

IN THE SUPREME COURT OF OHIO

Don B. Kincaid, Jr.,	:	
	:	Case No. 09-1936
Plaintiff-Appellee,	:	
	:	ON APPEAL FROM THE CUYAHOGA
v.	:	COUNTY COURT OF APPEALS, EIGHTH
	:	APPELLATE DISTRICT
Erie Insurance Company,	:	
	:	Court of Appeals Case No. 92101
Defendant-Appellant.	:	

MEMORANDUM OF AMICI CURIAE NATIONWIDE PROPERTY AND CASUALTY
INSURANCE COMPANY, NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,
NATIONWIDE MUTUAL INSURANCE COMPANY, NATIONWIDE INSURANCE
COMPANY OF AMERICA, NATIONWIDE ASSURANCE COMPANY, AND
NATIONWIDE GENERAL INSURANCE COMPANY IN SUPPORT OF APPELLANT ERIE
INSURANCE COMPANY

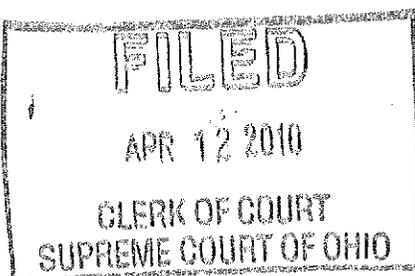
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I. STATEMENT OF THE FACTS.

A. Introduction.

Amici Curiae Nationwide Property and Casualty Insurance Company, Nationwide Mutual Fire Insurance Company, Nationwide Mutual Insurance Company, Nationwide Insurance Company of America, Nationwide Assurance Company, and Nationwide General Insurance Company (“the Nationwide amici”) file this brief to urge this Court to reverse the Eighth District Court of Appeals’ decision in Kincaid v. Erie.¹ That decision that, if left uncorrected, will throw Ohio’s insurance industry into a state of confusion and disarray, and open the courts to a flood of easily-avoided litigation on matters that are not ripe, about which there is no real dispute or justiciable controversy.

This case is one of eight similar putative class action suits, filed at or about the same time by the same lawyers, implicating the same basic issue of litigation-related expense reimbursement. They all involve automobile liability insurance policyholders who were sued in connection with auto accidents. These sued policyholders were defended by lawyers under the terms of their auto liability policies, and were indemnified by their insurance companies. The policies at issue entitle policyholders who have been sued to reimbursement of reasonable expenses incurred in connection with the defense of the auto liability lawsuits against them.

The policyholders in the instant lawsuits claim to have incurred litigation-related expenses—such as postage in mailing in a complaint, or parking at a courthouse—that have not been reimbursed to date by their insurance carriers. The policyholder plaintiffs do not claim that they ever asked to have their expenses reimbursed prior to filing the instant lawsuits. Instead, as

¹ Nationwide was formed in Ohio in 1925 as the Ohio Farm Bureau Federation, offering mutual automobile insurance to Ohio policyholders. Since that time, while still based in Columbus, Ohio, Nationwide has grown to become the sixth largest auto insurer in the United States. It employs some 13,000-14,000 Ohioans, and thousands more nationally, with many thousands of policyholders in Ohio and beyond.

a "first resort," they just sued their own insurance carriers as putative class action representatives, seeking money damages for alleged failure to reimburse expenses they never asked to have reimbursed.

Under the Eighth District Court of Appeals' holding in Kincaid v. Erie, 183 Ohio App.3d 748, 2009-Ohio-4372 (Cuyahoga), such a policyholder who believes she is entitled to be reimbursed 40 cents for mailing a complaint, or \$7 for parking at a deposition in connection with the auto liability lawsuit, is not required to tell her insurance company, or the lawyer who defended her, about her alleged incurred expense. She is not required to make any request for expense reimbursement. Instead, according to the Eighth District's ruling, she may file a class action complaint requesting reimbursement for the first time in the form of a lawsuit. In other words, she can keep silent about her alleged expenses, never request reimbursement, and then sue her insurance carrier for alleged breach of contract and alleged bad faith refusal to pay expense reimbursement that was never requested. The Eighth District conceded this was an "illogical" result. It was, especially so when insurance companies willingly and routinely reimburse reasonable litigation expenses pursuant to their policies—provided they have been made aware of such expenses as an initial matter.

This Court should correct this "illogical" result. A policyholder who believes she is entitled to expense reimbursement should not make the courthouse steps the first ones she takes in seeking that reimbursement. Before retaining a class action lawyer and filing a putative class action complaint accusing her insurer of breach of contract and bad faith, a policyholder who believes she is entitled to expense reimbursement should make her insurance company aware of the claimed expenses and give the insurer the opportunity to reimburse them. Such a duty is

hardly onerous. The potential availability of expense reimbursement is not concealed from policyholders such as Mr. Kincaid in the Erie case. After all:

- the policyholder has a written insurance policy spelling out the potential availability of expense reimbursement in plain language;
- each policyholder in these cases also had a defense lawyer representing his or her interests pursuant to the defense provisions of the auto policies;
- the policyholder is the person with unique and/or superior knowledge of what out-of-pocket expenses were allegedly incurred;
- a policyholder who hires capable counsel and files a lawsuit alleging failure to reimburse expenses pursuant to the insurance policy can hardly claim not to have been aware of expense reimbursement provisions in the policy. A policyholder—who knows enough about expense reimbursement policy provisions to sue under them—surely knows enough to make a request for reimbursement under them prior to filing suit.

Other courts that have considered this expense reimbursement issue have all concluded that a policyholder must make an expense reimbursement request as a prerequisite to suing for alleged failure to pay expense reimbursement. The Eighth District stands alone in imposing an "illogical" result. The Eighth District's legal error should be corrected.

Absent correction, the Eighth District's decision threatens to upend basic principles of ripeness and standing, which require an actual case or controversy for the courts' consideration, and which prohibit advisory opinions. Policyholders should not be permitted to sue for expenses that the insurance company may have been perfectly willing to pay had only it known of them. Only if the policyholder submitted the alleged expense, and the insurance company refused to reimburse it, would there be a case or controversy capable of judicial resolution. Until then, the

parties only have a hypothetical dispute about what the insurance carrier might have done if it had actually known of the expense reimbursement request. The courts have never been in the business of rendering advisory opinions on hypothetical conflicts.

The Eighth District's decision also threatens to upend the claims made/reported nature of the insurance industry. Instead of leaving the threshold burden with the policyholder to come forward to identify the alleged loss for which he or she wants reimbursement, the Eighth District would create a situation in which insurance companies would have to regularly canvass insureds to ask them if they have any losses—for fear of being sued for bad faith if there were some unknown, unreported loss lurking somewhere in the universe of its insureds. That is not how insurance has ever been expected to operate. The duty of notifying the insurance company of the claimed loss lies squarely with the insured. The Kincaid v. Erie decision should be corrected to leave that duty where it belongs. Left uncorrected, the decision threatens to undermine any certainty in Ohio's insurance industry regarding whether insurance is inherently a claims-made process (it is), or whether insurance companies should be in the business of regularly polling policyholders to determine if they have any claims they may wish to assert (they should not).

Moreover, in reaching its illogical result, the Eighth District in Kincaid v. Erie misconstrued the applicable canons of policy interpretation. The Eighth District wrongly held that unless there is express policy language to the contrary, it must uphold an “illogical” result in the name of generally construing insurance policies in favor of the insured. But this Court has consistently held that common sense must prevail to prevent an absurd or illogical result when it comes to the interpretation of an insurance policy. The Kincaid v. Erie decision runs contrary to this Court's directives with respect to policy interpretation and should be corrected.

Finally, Kincaid v. Erie should be reversed because it would encourage a flood of needless litigation that could be easily avoided. The Kincaid v. Erie decision allows policyholders to bring suit for expense reimbursement that the insurance carrier may very well have paid, if only it had known about it. Allowing a case to proceed (much less a putative class action) where the parties may not actually be in dispute and could have easily resolved the situation with notice by the insured of his or her claim is not an efficient use of judicial resources.

B. The Facts Of Kincaid v. Erie.

The Nationwide amici incorporate by reference herein the statement of facts contained in the appellant's brief of Erie Insurance Company. Briefly summarized, the salient facts are as follows.

Donald Kincaid was an Erie policyholder involved in a motor vehicle accident. He was sued in connection with that accident. Erie, pursuant to its policy with him, engaged a defense lawyer to represent Mr. Kincaid. The liability lawsuit against Mr. Kincaid was resolved with Erie paying funds on Mr. Kincaid's behalf. During the course of his claim under his auto liability policy, Mr. Kincaid never made Erie aware that he had incurred expenses for which he would like to be reimbursed. It is undisputed that Mr. Kincaid never requested expense reimbursement prior to filing suit against Erie.

On February 28, 2008, Mr. Kincaid filed a lawsuit in Cuyahoga Common Pleas Court, alleging Erie had breached its contract and acted in bad faith in failing to reimburse expenses for which it was never notified. See Case No. 08-CV-652374, Cuyahoga County Common Pleas Court. Thereafter, the Erie defendants filed an answer and amended answer that specifically denied that plaintiff had ever tendered to them a request for expense reimbursement.

C. Similar Suits Were Filed Against Many Of Ohio's Leading Insurers At The Same Time; None Of Those Lawsuits Alleged Any Request For Expense Reimbursement Was Made By The Policyholder Prior To Suing His Or Her Insurer.

At or about the same time of the Kincaid v. Erie complaint filing, multiple similar lawsuits were filed against other insurance carriers, including against the Nationwide amici, by policyholders of those companies. Those lawsuits are as follows:

- Negron v. Nationwide Property And Casualty Insurance Co. et al., No. CV-08-650310 (Cuyahoga C.P.) (filed February 7, 2008);
- Cika v. Progressive Preferred Ins. Co., No. CV-08-653115 (Cuyahoga C.P.) (filed March 6, 2008);
- Gallo v. Westfield Nat. Ins. Co., No. CV-08-652376 (Cuyahoga C.P.) (filed February 28, 2008);
- Johnson v. GEICO Gen. Ins. Co., No. 08-80740-CIV-MARRA (S.D. Fla.) (filed July 8, 2008);
- Kavouras v. Allstate Ins. Co., No. CV-08-649018 (Cuyahoga C.P.) (filed January 28, 2008) (The Kavouras v. Allstate case was subsequently removed to federal court, Case No. 08-571 (N.D. Ohio).);
- Hosey v. State Farm Mut. Auto., No. CV-08-656919 (Cuyahoga C.P.) (filed April 15, 2008);
- Lycan v. Lumbermens Mutual Cas. Co., No. CV-07-644127 (Cuyahoga C.P.) (filed December 10, 2007).

Notably, while each of the lawsuits alleged breach of contract and bad faith for alleged failure to provide expense reimbursement, none alleged that there had been a request for expense reimbursement by the policyholder that had been refused by the insurance carrier. That is, these are not lawsuits about the denial of an expense reimbursement request being made by the policyholder. Rather, these lawsuits involve policyholders who are suing for expense reimbursement without ever having requested expense reimbursement as a threshold matter.

As a result, the complaints' sufficiency under Civil Rule 12(B)(6) was tested in several of the cases. Several motions to dismiss by defendants argued that the respective complaint did not satisfy Rule 12(B)(6) because the plaintiff failed to allege that any request for expense reimbursement had been made prior to filing suit. In opposition to the various motions to dismiss, the respective plaintiffs argued, *inter alia*, that for purposes of notice pleading sufficiency under Civil Rule 8, it was enough for the plaintiff to have alleged "compliance with conditions precedent" in order to survive a motion to dismiss.

The results of the motions to dismiss were mixed. The Negron v. Nationwide motion to dismiss was denied without written opinion. The same occurred in Hosey v. State Farm.

In Kavouras v. Allstate, the federal court, applying Ohio law and federal procedural requirements, ruled in a written decision that it was sufficient for the plaintiff to have alleged compliance with conditions precedent. See Kavouras v. Allstate, No. 1:08 CV 571, 2008 U.S. Dist. LEXIS 108404, *11 (N.D. Ohio Dec. 3, 2008). The same result obtained in Johnson v. GEICO, in which the federal court held "that by pleading 'all conditions precedent' have been met, the Complaint adequately alleges a breach of contract claim." Johnson v. GEICO, No. 08-80740-CIV-MARRA, 2008 U.S. Dist. LEXIS 108487, *6 (S.D. Fla. Nov. 3, 2008).²

In contrast, in Gallo v. Westfield, No. CV-08-652376, 2009-Ohio-1094 (Cuyahoga), the trial court granted the Rule 12(B)(6) motion to dismiss. That outcome was appealed by the plaintiff to the Eighth District Court of Appeals. In a written decision dated March 12, 2009, the Eighth District in Gallo held that plaintiff's assertion that she had complied with all conditions precedent was sufficient to satisfy "the liberal notice pleading requirements set forth in Civ. R. 8[.]" Id. at ¶14 (citing Kavouras v. Allstate).

² The Johnson v. GEICO complaint did not assert a claim for bad faith.

Neither Kavouras v. Allstate, Johnson v. GEICO, nor Gallo v. Westfield held, suggested, or intimated that a policyholder has no duty to request expense reimbursement prior to suing for expense reimbursement. Rather, each held that a generalized allegation of compliance with conditions precedent was sufficient to satisfy the applicable pleading requirements under Rule 12(B)(6).

D. The Eighth District Court Of Appeals In *Kincaid v. Erie* Ruled The Lawsuit Could Proceed, Despite Recognizing This Created An “Illogical Result.”

In Kincaid v. Erie, the defendants did not file a motion to dismiss. Instead, they filed an answer and an amended answer, and then moved for judgment on the pleadings pursuant to Civil Rule 12(C). The amended answer specifically denied that plaintiff had ever made a request for expense reimbursement prior to filing his complaint. The trial court dismissed the complaint. The plaintiff appealed to the Eighth District Court of Appeals. The Kincaid court, on appeal, held differently than the courts that had preceded it. While the prior written decisions all said it was enough to plead compliance with conditions precedent when faced with the argument that the complaints failed to allege any demand for expense reimbursement, the Eighth District in Kincaid went a critical additional step. It specifically held, in what it described as an admittedly “illogical” result, that the policyholder had no duty or condition precedent whatsoever to ask for expense reimbursement before suing for expense reimbursement. It held:

While it may seem illogical that an insurer is required to pay for expenses that the insured never notified the company about, we are required to interpret the contract as written, and we find no notice requirement in the insurance policy in regard to additional [expense reimbursement] payments. Simply put, the terms of the contract are plain and unambiguous; there is no notice requirement for additional payments under the policy.

Kincaid v. Erie, 2009-Ohio-4372 at ¶20 (emphasis added). At the same time it held that an insured has no duty to request expense reimbursement before filing suit, the Eighth District also

held, without explanation, that it would be “premature” to decide if the insurance carrier had an affirmative duty to actively canvass its insureds and solicit requests for expense reimbursement. See Kincaid v. Erie at ¶20, fn. 1.

Such a holding leaves the insurance industry in a state of confusion and uncertainty as to expense reimbursement. On the one hand, the policyholder has no duty, according to the Eighth District, to request expense reimbursement. On the other hand, the insurance carrier has no legal duty to take special extra steps to notify the policyholder of the expense reimbursement provisions in the policy. Despite neither party having any applicable legal duty under its analysis, the Eighth District held that such litigation could proceed, even absent any announced legal framework as to which party had the relevant duty. As a practical matter, the Eighth District effectively held that unless an insurance company guesses or divines that its policyholder may have unannounced out-of-pocket expenses and makes an unsolicited offer to reimburse such possible expenses, it can be sued for breach of contract and bad faith.

E. The Facts Of The *Negron v. Nationwide* Lawsuit.

The Nationwide amici, like Erie, were also sued in Cuyahoga County Common Pleas Court on or about February 7, 2008, by a policyholder represented by the same law firm who represents the Erie plaintiff. The lawsuit is a putative class action of Nationwide Ohio policyholders for a 15-year period who allegedly incurred unreimbursed postage expenses, and/or alleged unreimbursed mileage and parking expenses, in connection with an auto liability suit defended by Nationwide.

The named plaintiff in the Nationwide suit is a Nationwide policyholder named Emma Negron. She was sued in Cleveland Municipal Court in 2005 in connection with a 2004 minor auto accident. Pursuant to her Nationwide liability policy, she was provided with an attorney by

Nationwide to defend her interests in that suit. The Cleveland Municipal Court lawsuit was voluntarily dismissed in 2006, and was refiled in Cuyahoga County Common Pleas Court.

In the refiled action, Ms. Negron was once again defended by her Nationwide-assigned attorney. The lawsuit was settled well short of trial, with Nationwide paying \$1000 to the adverse party in full settlement and release of the claims against Ms. Negron.

At the same time that the Municipal Court and refiled Common Pleas Court lawsuits were proceeding, Ms. Negron had two privately-retained lawyers who were advising her of her rights, who wrote letters to Nationwide, and who filed a bodily injury lawsuit on her behalf against the driver of the other vehicle in the accident. For a period of time, Ms. Negron's own bodily injury lawsuit in which she was a plaintiff was consolidated in Cuyahoga County Common Pleas Court with the other lawsuit in which she was a defendant represented by a Nationwide-assigned lawyer. The Nationwide-defended lawsuit was settled before Ms. Negron's bodily injury lawsuit as plaintiff. Both suits were settled by late 2007.

When the subsequent putative class action lawsuit was filed by Ms. Negron against Nationwide in early 2008, Ms. Negron claimed that she had incurred \$1.80 in unreimbursed expenses in mailing either the Municipal Court or Common Pleas Court auto liability complaint to Nationwide for handling. She also claimed that on four occasions, she incurred unreimbursed expenses in driving to a law firm that was a couple miles from her house, and spending \$7 to park there. She attested to these alleged facts in verified interrogatory responses.

In actuality, Ms. Negron never incurred any expenses in mailing materials to Nationwide. Nationwide obtained the Municipal Court and Common Pleas Court complaints that named her as a defendant when plaintiff's counsel in those cases mailed it a courtesy copy of the complaints back in 2005 and 2006. In fact, it was Nationwide that notified Ms. Negron of the filings, not

vice versa. Thereafter, Nationwide provided Ms. Negron with self-addressed stamped envelopes when it asked her to mail information. Ms. Negron eventually recanted her claim that she incurred postage expenses. She amended her prior interrogatory answers to admit she incurred no postage expenses whatsoever.

As for her four claimed trips to a law firm, it turns out that the law firm in question was the one that represented her in her bodily injury lawsuit as plaintiff. Ms. Negron has now admitted that at least three of the four trips for which she was originally seeking reimbursement were for travel in connection with her plaintiff's bodily injury lawsuit—not for travel in connection with the lawsuit that Nationwide was defending. Ms. Negron's sole remaining claim is that on the day she was deposed, she drove to the office of her own bodily injury lawyer (not her Nationwide-appointed defense counsel), and wants to be reimbursed for the approximately 2 miles she drove each way, and \$7 she allegedly incurred in parking. Her claim now is for \$9.85.

Ms. Negron does not claim that she ever asked Nationwide to be reimbursed for the \$9.85. She does not allege that she ever told Nationwide about her alleged incurred expenses. She does not allege that any one of the three lawyers that were representing her at the time ever informed Nationwide about her alleged incurred expenses, and/or her desire to be reimbursed. Instead, Nationwide's first notice that Ms. Negron contends she is owed \$9.85 in expense reimbursement was in the form of her class action lawsuit. Nationwide, for its part, routinely reimburses requests for reimbursement of reasonable expenses, pursuant to its policy language, provided that it is made aware of the expense reimbursement requests.

The Negron v. Nationwide case is currently stayed pending this Court's resolution of the Kincaid v. Erie appeal. That stay has had the effect of postponing a costly scheduled evidentiary hearing on class certification. Nationwide opposed plaintiff's motion for class certification. The

inherently individualized factual issues of whether a given insured incurred any reasonable expenses at Nationwide's request, what they were told regarding expense reimbursement, and whether they received expense reimbursement, make the case unsuitable for class treatment irrespective of the outcome of the legal duty question in Kincaid v. Erie. Nonetheless, the importance of the legal issues in Kincaid v. Erie causes the Nationwide amici to file this brief, without prejudice to their position regarding class certification.

II. LAW AND ARGUMENT.

Proposition of Law 1: An Insured Lacks Standing To File An Action Against His Insurer For Coverage Under An Insurance Policy Where The Claimant Has Not Presented A Claim For Loss Potentially Covered By Such Policy And Where The Claimant Has Failed To Even Present Notice To The Insurer Of The Alleged Loss.

Proposition of Law 2: Courts Will Not Issue Advisory Opinions On Whether An Insured Is Entitled To Coverage Under An Insurance Policy Where No Loss Has Been Set Forth And Where No Claim Was Made To The Insurer For Payment.

In effect, both Propositions of Law set forth by Erie and accepted for review by this Court focus on the same basic question: does a policyholder who seeks expense reimbursement have a threshold duty to request reimbursement from his or her carrier before suing for alleged failure to reimburse expenses? As a matter of Ohio law, sound public policy, and common sense, this Court should answer that question in the affirmative, for the reasons set forth herein.

A. **No Dispute, And No Justiciable Controversy, Exists Unless And Until The Policyholder Makes A Request For Expense Reimbursement.**

1. **Plaintiff's Claim Is Not Ripe Absent A Request For Reimbursement.**

The Eighth District's ruling runs afoul of basic principles of ripeness and standing. Unless a request for reimbursement has been made and refused, there is no actual case or controversy between the parties. Until the policyholder makes a request, no one knows if there will be a dispute, or if the expense reimbursement will be paid. If it is paid, there is no

controversy, and nothing for a lawsuit to adjudicate. If it is not paid, only then do the parties have a controversy. The problem with the Eighth District's approach is that it allows a lawsuit to proceed where there is only a hypothetical, contingent, and inchoate controversy—not a justiciable one. Cf. Ohio Constitution Art. IV § 4(B) (“The courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters”) (emphasis added); State ex rel. Keller v. City of Columbus, 164 Ohio App.3d 648, 2005-Ohio-6500, ¶19 (Franklin) (“Courts of common pleas and divisions thereof have original jurisdiction over all justiciable matters.”).

To be justiciable, there “must exist a real controversy presenting issues which are ripe for judicial resolution and which will have a direct and immediate impact on the parties.” Id. (emphasis added; internal quotations omitted). See also Keller v. City of Columbus, 100 Ohio St.3d 192, 2003-Ohio-5599, ¶26 (“In order to be justiciable, a controversy must be ripe for review.”). Under this Court's precedent, however, a legal claim is not ripe before the parties are in actual disagreement:

The basic principle of ripeness may be derived from the conclusion that “judicial machinery should be conserved for problems which are real or present and imminent, not squandered on problems which are abstract or hypothetical or remote.”

State ex rel. Elyria Foundry Co. v. Industrial Comm. of Ohio (1998), 82 Ohio St.3d 88, 89 (quoting Comment, Mootness and Ripeness: The Postman Always Rings Twice (1965), 65 Colum. L. Rev. 867, 876). In this respect, “a claim that rests upon future events that may not occur at all, or may not occur as anticipated, is not considered ripe for review.” State ex rel. Keller, 2005-Ohio-6500 at ¶20. Indeed:

It has been long and well established that it is the duty of every judicial tribunal to decide actual controversies between parties legitimately affected by specific facts and to render judgments which can be carried into effect. It has become settled

judicial responsibility for courts to refrain from giving opinions on abstract propositions and to avoid the imposition by judgment of premature declarations or advice upon potential controversies.

Fortner v. Thomas (1970), 22 Ohio St.2d 13, 14. Where a party seeks a judicial ruling on what is only a “potential controversy” that has not ripened into an actual dispute, this Court has recognized that “[a]ttempts to procure such rulings are not only unfair to other litigants who are engaged in legitimate controversies but to the judicial system itself, whose vitality depends, in part, upon the resolution of actual cases and controversies.” Cleveland Trust Co. v. Eaton (1970), 21 Ohio St.2d 129, 146 (Schneider, J., concurring). A plaintiff who asserts a claim that is not ripe lacks standing. See State ex rel. Ohio Acad. of Trial Lawyers v. Sheward (1999), 86 Ohio St.3d 451, 524-25 (“The concept of legal standing is based on the principle that courts decide only cases or controversies between litigants whose interests are adverse to each other, and do not issue advisory opinions.”).

The problem of allowing a lawsuit before there is an actual, ripe dispute undermines the legal sufficiency of each of the causes of action asserted in the Erie case. The Erie plaintiff asserted a claim for declaratory judgment, for example. But this Court recognizes that a declaratory judgment is premature when it is not yet known whether the parties are in dispute:

Most significantly, in keeping with the long-standing tradition that a court does not render advisory opinions, [the declaratory judgment statutes] allow the filing of a declaratory judgment only to decide an actual controversy, the resolution of which will confer certain rights or status upon the litigants. . . . [I]n order for a justiciable question to exist, the danger or dilemma of the plaintiff must be present, not contingent on the happening of hypothetical future events and the threat to his position must be actual and genuine and not merely possible or remote.

Mid-American Fire & Cas. Co. v. Heasley, 113 Ohio St.3d 133, 2007-Ohio-1248, ¶9 (internal quotations and citations omitted). Here, the Eighth District ruled that a plaintiff can sue without first asking for expense reimbursement, apparently on the theory that if a request had been made,

it may have been refused. That is a hypothetical, advisory lawsuit, based on future contingencies that may not occur. Id. Such a claim should have been dismissed—whether declaratory in nature or not.³

As for the claim against Eric for breach of contract, a party that wants to collect under a contract does not get to make the courthouse the first step in the process. First, there must be a request for performance by the other side. See, e.g., Café Miami v. Domestic Uniform Rental, No. 87789, 2006-Ohio-6596, ¶12 (Cuyahoga) (“[F]or the plaintiff to place the defendant in breach, the plaintiff must tender performance of his obligation and demand performance by the defendant of the reciprocal obligation.”).⁴ Plaintiffs should not be allowed to sue for breach of contract regarding expense reimbursement without making a threshold demand for performance.

As for the bad faith claim that the Eighth District allowed to proceed, under Ohio law:

“An insurer fails to exercise good faith in the processing of a claim of its insured where its refusal to pay the claim is not predicated upon circumstances that furnish reasonable justification therefor.” Zoppo v. Homestead Ins. Co. (1994), 71 Ohio St.3d 552. To prevail on a claim of bad faith, the insured “must prove that the insurer’s refusal to pay a claim was totally arbitrary and capricious.” Spremulli’s Am. Serv. v. Cincinnati Ins. Co. (1992), 91 Ohio App.3d 317, 322.

³ While Mid-American Fire & Cas. Co. v. Heasley was a declaratory judgment case, this Court has applied it and its ripeness/standing analysis outside the context of declaratory judgment actions. See, e.g., Allen v. Totes/Isotoner Corp., 123 Ohio St.3d 216, 2009-Ohio-4231, ¶17.

⁴ See also Diem v. Koblitz (1892), 49 Ohio St. 41, 55 (“The holding that, to entitle the seller to sue, he must offer to perform and request performance by the purchaser, is in accordance with the now generally recognized rule on the subject.”); Telxon Corp. v. Smart Media of Delaware, Inc., C. A. Nos. 22098 & 22099, 2005-Ohio-4931, ¶54 (Summit) (“From a reasonableness standpoint, this may be the most troubling aspect of this whole case - that [plaintiff] never demanded that [defendant] perform this alleged promise. Therefore, [plaintiff’s] claim is legally insufficient[.]”); Thomas v. Matthews (1916), 94 Ohio St. 32, 51 (“It is not the duty of the defendant in a suit for damages for breach of contract to demand performance on the part of the plaintiff or to notify him of his readiness and willingness to perform. That duty is upon the party to the contract who seeks to recover for its breach.”); MTH Real Estate, LLC v. Hotel Innovations, Inc., No. 21729, 2007-Ohio-5183, ¶26 (Montgomery) (“With this in mind, Innovations’ argument that MTH is now in breach of the contract, where...no evidence of some type of repudiation has been presented, is premature.”).

Johnson v. American General Life Ins. Co., No. E-06-004, 2006-Ohio-5771, ¶23 (Erie). At its most basic level, a bad-faith claim is predicated on an insurer's "bad-faith refusal to pay a claim[".]” Helmick v. Republic-Franklin Ins. Co. (1988), 39 Ohio St.3d 71, 75 (emphasis added).

Here, there is no alleged refusal to pay a claim among any of the related cases. The plaintiffs do not allege they ever asked to be reimbursed for alleged postage and parking/mileage expenses. Defendants were not presented with the opportunity to pay or refuse to pay a claim for expense reimbursement before being sued for bad faith. Without a refusal to pay a claim, there is no bad faith claim stated.

In sum, all of plaintiff's claims suffered from the same basic deficiency: plaintiff never tendered a request for expense reimbursement. Without such a request, plaintiff lacked standing and his claims were not ripe. They were correctly dismissed at the pleadings stage by the trial court, and wrongly reinstated by the Eighth District Court of Appeals. See, e.g., Wash. Mut. Bank v. Beatley, No. 06AP-1189, 2008-Ohio-1679, ¶10 (Franklin) (“[D]ismissal for lack of standing is a dismissal pursuant to Civ. R. 12(B)(6).”) (citing cases); Smolak v. City of Columbus, No. 07AP-373, 2007-Ohio-4671, ¶5 (Franklin) (affirming grant of motion to dismiss under Rule 12(B)(6) for “lack of a justiciable matter ripe for review, a lack of standing as to Phillip L. Harmon, and a lack of an actual justiciable controversy”); Whaley v. Franklin County Bd. of Comm’rs (2001), 92 Ohio St.3d 574, 581 (“A Civ.R. 12(C) motion for judgment on the pleadings has been characterized as a belated Civ.R. 12(B)(6) motion for failure to state a claim upon which relief can be granted.”). This Court should reverse the Eighth District, and confirm that a complaint that fails to allege a demand for expense reimbursement prior to the lawsuit for expense reimbursement, in turn fails to state a claim as a matter of law.

2. Plaintiff's Contention He Complied With "Conditions Precedent" Does Not Create A Justiciable Controversy, But It Is An Admission He Had A Duty To Request Expense Reimbursement.

In his statement in opposition to jurisdiction, filed with this Court, plaintiff in many ways concedes that he had an obligation to request expense reimbursement as a precondition to filing the instant lawsuit. For example, on pages 7 and 8 of his jurisdictional brief, plaintiff argues that it is sufficient for him to have generally alleged compliance with "conditions precedent" in order to survive a motion to dismiss. In support of his argument, he cites to the Kavouras v. Allstate and Johnson v. GEICO decisions, in which the two federal courts so held. But Kavouras v. Allstate and Johnson v. GEICO were decided under Federal Rule 12(b)(6). The instant case arises under Ohio Rule of Civil Procedure 12(C), in which the question is not simply one of the complaint's sufficiency under Rule 12(B)(6), but of the pleadings sufficiency—that is, the complaint, and the answer. See Whaley, 92 Ohio St.3d at 581. Faced with an amended answer by Erie that specifically states that no request for expense reimbursement was ever made by plaintiff, plaintiff cannot rely on a generalized allegation of "compliance with conditions precedent" (and no further supporting detail) to say that it was. If plaintiff in Kincaid v. Erie really believed that he had indeed made a request for expense reimbursement prior to filing suit, he would have offered to so allege in an amended complaint. None of the plaintiffs in the related cases has made such an offer, because none ever requested expense reimbursement prior to filing putative class action lawsuits.

The very fact that plaintiff would even make the argument that "alleging compliance with conditions precedent is enough" is telling, however. It operates as an admission by plaintiff that he recognizes the need to have made a request for expense reimbursement as a precondition to filing his lawsuit. Likewise, the Kavouras v. Allstate and Johnson v. GEICO decisions stand as

recognition that the respective plaintiffs had a duty to request expense reimbursement prior to filing suit. This Court should clarify that alleging—and ultimately proving—a pre-suit request for expense reimbursement is a necessary requirement, mandated by principles of standing and ripeness, to stating a claim for expense reimbursement, according to Civil Rules 8, 12(B)(6), and 12(C).

Plaintiff's mistake, in part, is that he frames the issue as one of compliance with contractual conditions precedent. See Complaint ¶33 (“All conditions precedent to Defendant’s payment obligations under its standard form motor vehicle liability insurance policies have been performed by the named Plaintiffs and the Classes”) (emphasis added). But the lack of ripeness of his claims goes beyond the question of contractual conditions precedent; it goes to the more fundamental question of whether there is a ripe, justiciable controversy for which plaintiff possesses the requisite standing. A complaint is properly dismissed pursuant to Rule 12(B)(6) where the claim is not ripe, and/or the plaintiff lacks standing. See, e.g., Smolak v. City of Columbus, No. 07AP-373, 2007-Ohio-4671, ¶5 (Franklin) (affirming grant of motion to dismiss for “lack of a justiciable matter ripe for review, a lack of standing as to Phillip L. Harmon, and a lack of an actual justiciable controversy” where “[t]he suggestion that the City of Columbus might some day decide it can disregard the clear requirements of the Ohio Revised Code [is] speculative at best.”); State ex rel. Atrium Pers. & Consulting Serv. v. Indus. Comm’n, No. 07AP-681, 2007-Ohio-6604, ¶4 (Franklin) (“We also agree with the magistrate’s decision that because the action fails to present a question that is ripe for review, this court must grant respondents’ motions to dismiss.”); Wash. Mut. Bank v. Beatley, No. 06AP-1189, 2008-Ohio-1679, ¶10 (Franklin) (“[D]ismissal for lack of standing is a dismissal pursuant to Civ. R. 12(B)(6).”) (citing cases). There is no case law in Ohio that in any way suggests that a

deficiency as basic as lack of justiciable controversy, lack of ripeness, and/or lack of standing can be “cured” by simply alleging compliance with contractual conditions precedent.

Plaintiff also argues that the act of filing a lawsuit constitutes his “request” for expense reimbursement. Aside from representing bad public policy by encouraging avoidable litigation, this argument by plaintiff is a further indication that plaintiff admits he had a duty to request expense reimbursement, even if the parties disagree on how such a request should be effected. It is also a further indication that plaintiff admits he made no request for expense reimbursement prior to filing the complaint. But filing a putative class action lawsuit does not constitute a mere “request” for expense reimbursement. It is instead a demand for money damages and attorney fees. Here, it is also a public accusation of breach of contract and bad faith. Plaintiff argued to this Court that the fact that defendants would defend themselves against legal claims of breach of contract and bad faith must mean that they have “refused” a “request” for expense reimbursement.

The filing of a lawsuit and an answer thereto is not what creates a ripe, justiciable controversy, however: the ripe, justiciable controversy must exist before the lawsuit as a prerequisite to bringing it. See, e.g., Columbia Oldsmobile, Inc. v. Montgomery, No. C-890382, 1991 Ohio App. LEXIS 5536, *4 (Hamilton Nov. 20, 1991) (“Only when an actual controversy is shown to exist can jurisdiction be invoked and the issue of the constitutionality of the ordinance be held ripe for determination.”); Haig v. Ohio State Bd. Of Edu. (1992), 62 Ohio St.3d 507, 511 (existence of “justiciable controversy” is a “prerequisite” to suit) (emphasis added). Defendants are entitled to show that they did not breach a contract, that they did not act in bad faith, and that plaintiff did not make any threshold request for expense reimbursement so as to create a ripe controversy, without being deemed to have “refused” a “request” (actually, a

putative class action demand for money damages and attorney fees) for expense reimbursement.

Emma Negron, the plaintiff in the Nationwide v. Negron case, provides an example. Had she made a pre-suit request for expense reimbursement, Nationwide could have explained to her that she incurred no postage expense (as initially claimed by her in the lawsuit), and could have pointed out that three of the four times she claims to have incurred parking expenses, it was to drive to her own plaintiff's personal injury lawyer's office, not at the request of Nationwide or pursuant to the auto liability suit in which she was sued. Nationwide then could have tendered her, if appropriate,⁵ the \$9.85 in alleged unreimbursed expenses she now claims to have incurred. But Ms. Negron skipped all of that, preferring instead to file a putative class action lawsuit accusing Nationwide of breach and bad faith for not having reimbursed alleged out-of-pocket expenses that were never tendered to it for reimbursement (many of which alleged expenses did not actually arise from the auto liability suit for which she had insurance coverage). That premature lawsuit does not create a justiciable controversy. Defendants' willingness to point out the inappropriate procedural posture of plaintiffs' claims does not mean "Defendant is refusing to tender," as plaintiff wrongly contends in his jurisdictional memorandum to this Court. See Pl. Memo. Opp. Juris. at 7. The fact that defendants are "vigorously contesting," in plaintiff's words, id., the plaintiffs' attempts to obtain an improper advisory opinion on claims that are not ripe does not create a ripe, justiciable controversy, either. This Court should reject out of hand plaintiff's circular argument that defending oneself against a claim that is not ripe itself creates an actual, justiciable controversy that would satisfy the ripeness prerequisite. In order for Kincaid v. Erie's plaintiff to create an actual, justiciable controversy, he needed to make a pre-suit request for expense reimbursement. Having failed to do so, his complaint should be

⁵ It would need to determine whether her defense lawyer already reimbursed her, for example.

dismissed pursuant to Civil Rule 12(B)(6) and/or 12(C).

B. The Legal Duty Should Reside With The Policyholder To Identify And Request Reimbursement For His Or Her Alleged Out-Of-Pocket Expenses.

Prior to the spate of putative class action lawsuits filed at or about the time of the Kincaid v. Erie lawsuit, there were only two reported decisions that addressed the question of whether a policyholder must request expense reimbursement before suing for expense reimbursement. In both of those cases, the courts unequivocally held that as a matter of law and logic, the policyholder must demand expense reimbursement before suing for it.

In Edwards v. Allstate Ins. Co., 814 A.2d 1115, 1120 (N.J. App. Div. 2003), the New Jersey appeals court held that “[t]he insured’s obligation to make such a claim is both logical and necessary to trigger the insurer’s duty to reimburse.” That same year, the courts in Georgia likewise decided that a policyholder must make a request or demand for expense reimbursement before the insurance carrier has any duty to provide it. See Cochran v. State Farm Mut. Ins. Co., No. 2002-CV-54540, 2003 WL 25485811 (Ga. Super. Aug. 13, 2003) (“[T]he Court concludes that, as a matter of law, Defendant’s duty to reimburse Plaintiff for lost salary and/or wages presupposes a request or demand for payment by Plaintiff and the presentation of the facts supporting his claim before Defendant had a duty to reimburse.”).

The Edwards and Cochran cases were correctly decided. It is eminently reasonable that a person who wants to be reimbursed for out-of-pocket expenses should, as an initial matter, request reimbursement.

The plaintiff in Kincaid v. Erie, however, like the plaintiffs in the similar putative class actions, has variously argued that it is unfair to place the duty on the policyholder to come forward with a request for expense reimbursement, and that a policyholder cannot be expected to know enough to come forward with such a request. The plaintiffs would put the duty on the

insurance carriers to find out whether any expenses were incurred by the policyholder because the policyholder allegedly does not know enough to request reimbursement. These arguments defy common sense.

The person who can be expected to have superior knowledge as to what alleged out-of-pocket expenses were incurred by the policyholder is the policyholder herself, for she is the one who actually incurred those expenses. See, e.g., 13 Couch on Insurance 3d, § 186.1, at pp. 186-7, 186-13 (noting “the insurer must rely on the insured or other interested party to provide all details that affect the insurance relationship” such as “sufficient and accurate proof of the amount of loss”). As between the policyholder and the insurance carrier, the policyholder is in the better position to know whether she paid to park at the courthouse, thereby incurring expenses—or instead used a monthly bus pass, or walked over from work, or found a free meter, or was dropped off by a friend, thereby incurring no out-of-pocket expenses related to the lawsuit. The law has always held that where a party to a contract has superior knowledge in this fashion, the party has to come forward to notify the other side of this information before triggering any duty to perform. See, e.g., 8 Corbin on Contracts, § 37.11 (1999) (where other party needs information to be able to perform, “notice to the promisor is, by construction of law, a condition of the promisor’s duty to perform.”); 15 Williston on Contracts § 48:7 (party with “peculiar knowledge” must give notice to the other side to trigger duty to perform).⁶ Indeed, it is only

⁶ See also Lewis & Michael Moving and Storage, Inc. v. Stofchuk Ambulance Service, Inc., No. 05AP-662, 2006-Ohio-3810, ¶22 (Franklin) (before being sued for breach, other party must be “allowed a period of time—even if only a short one—to cure the breach if it can.”) (quoting Farnsworth, Contracts (3d Ed. 2004) 525, Section 8.18).

logical that a person who desires expense reimbursement should be expected to request it before filing a lawsuit.⁷

In the various pending expense reimbursement cases, the plaintiffs' argument seems to be that they could not be expected to know that they might be eligible for expense reimbursement without the insurance carrier specially notifying them of that fact and inviting them to request expense reimbursement. This argument fails on many levels.

1. First and foremost, the policyholders are all presented with an insurance policy containing expense reimbursement provisions in black and white. As a matter of Ohio law, the policyholder is presumed to have knowledge of the contents of his or her policy. See, e.g., Ohio Farmers' Ins. Co. v. Todino (1924), 111 Ohio St. 274, 278 ("Plaintiff under the law was required to know the contents of her policy. If in doubt as to its scope and extent, it was her duty to consult someone who could advise her.") (overruled on other grounds, Commercial Credit Co. v. Schreyer (1929), 120 Ohio St. 568); Michigan Auto. Ins. Co. v. Van Buskirk (1927), 115 Ohio St. 598, 606 ("The insured had the policy in his possession and is presumed to know its provisions."); Ohio Farmers' Ins. Co. v. Titus (1910), 82 Ohio St. 161, 171 (same); Mumaw v. Western & Southern Life Ins. Co. (1917), 97 Ohio St. 1, 7 ("It is urged that the insured will be presumed to have read and understood the terms of his policy; and, in the absence of fraud or circumstances legally shown to the contrary, this is true."); Nickschinski v. Sentry Ins. Co., 88 Ohio App.3d 185, 195 (Cuyahoga 1993) ("[A]n insured is charged with knowledge of the contents of his insurance contract.").

⁷ Cf. Heller v. Standard Accident Ins. Co. (1928), 118 Ohio St. 237, 243–44 (holding insured who wants to excuse himself from giving notice to insurance company of claim would have to allege and demonstrate that it was "impossible" for him in the exercise of "due diligence" to have known of the claim). Here, it is not "impossible" for policyholders to know what out-of-pocket expenses they themselves incurred. On the contrary, that information is squarely and uniquely in their own personal knowledge.

2. Second, the policyholders at issue in this lawsuit all specifically had lawyers representing them for purposes of the litigation in which their alleged expenses were incurred. In the Negron v. Nationwide case, for example, the policyholder, Emma Negron, in addition to her own defense lawyer, also had two personal lawyers at the same time, who were representing her in connection with her own claim for bodily injury against the other driver in the same underlying auto accident. (Ms. Negron had been sued by her passenger in the lawsuit defended by her defense counsel; simultaneously, she filed her own lawsuit against the driver of the other vehicle in the accident, and was represented by two lawyers in that related, consolidated case). With the presence of one or more lawyers to represent the policyholder in all of the underlying lawsuits, the policyholder cannot be heard to argue that she did not know what her policy rights were or did not have the opportunity to understand them. This is especially so where, as with Ms. Negron, the policyholder asserts the attorney-client privilege as to all of her expense-related communications with her lawyers, when she later sues her insurance carrier for expense reimbursement that was never requested.

3. Third, and perhaps equally important, plaintiffs' argument that they should be excused from requesting expense reimbursement because they could not know of the possibility of expense reimbursement flies in the face of the very lawsuits that they filed. The lawsuits, after all, allege breach of the expense reimbursement provisions of the insurance policies at issue. The complaints quote from the plain language of the policies as it relates to expense reimbursement. A party that knew enough to bring a lawsuit for expense reimbursement had sufficient knowledge and information to take the lesser step of making a request for expense reimbursement. Nothing was "concealed" from plaintiffs, and they should be required to make a request for expense reimbursement before filing suit for it.

Given the fact that policyholders are armed with all of the knowledge and information they need to make a request for expense reimbursement, plaintiff's argument to the lower courts that the insurance carrier should have done more to apprise them of the availability of expense reimbursement rings hollow. In support of his novel duty-shifting argument, which would allow a policyholder to sue for expense reimbursement that was never requested, plaintiff has attempted to invoke OAC § 3901-1-54(E)(1). Indeed, the various plaintiffs have cited in their lower court briefing OAC § 3901-1-54(E)(1), which states:

An insurer shall fully disclose to first party claimants all pertinent benefits, coverages or other provisions of an insurance contract under which a claim is presented.

Plaintiffs would apparently have this Court believe that providing a policy with plain language regarding the availability of litigation expense reimbursement, and providing a defense lawyer who has an independent duty to represent the policyholder's interests with respect to defending litigation pursuant to the same policy, is insufficient to discharge whatever obligations may exist under OAC § 3901-1-54(E)(1). The law has never so held, as set forth above, for the policyholder is presumed to have knowledge of the contents of his or her policy.

Notably, however, neither Mr. Kincaid in Eric, nor any of the other plaintiffs, have alleged in their complaints a cause of action for alleged breach of OAC § 3901-1-54(E)(1). The reason for that is simple: OAC § 3901-1-54(E)(1) is part of the Administrative Code, under the exclusive regulatory purview of the Ohio Department of Insurance ("ODI"). The ODI's further regulatory provisions in that same section expressly state in plain language that there is no private right of action for alleged violations of OAC § 3901-1-54:

Nothing in this rule shall be construed to create or imply a private cause of action for violation of this rule.

OAC § 3901-1-54(B).

Accordingly, Ohio courts have never recognized a private right of action under OAC § 3901-1-54(E)(1). They have also never permitted OAC § 3901-1-54 to be used as an element or a purported basis for another private right of action, such as a claim for bad faith. For example, in Furr v. State Farm, the Sixth District Court of Appeals found that OAC § 3901-1-54 does not create a private cause of action, and it cannot be used to establish the standard for bad faith. See Furr v. State Farm Mut. Automobile Ins. Co., 128 Ohio App.3d 607, 616 (Lucas 1998) (“[Defendant] argues that the Ohio Administrative Code does not create a private cause of action for violation of its rules and, therefore, should not be considered as evidence of bad faith. We agree.”); see also Griffith v. Buckeye Union Ins. Co., No. 86AP-1063, 1987 Ohio App. LEXIS 8971, *16–17 (Franklin Sept. 29, 1987) (“The Ohio Department of Insurance rules, however, do not create a private cause of action, but are regulatory in nature. Thus, the rules cannot be considered evidence of the applicable standard of bad faith.”). The administrative rule cited by plaintiff is relevant only in investigations and actions by the ODI.⁸ The General Assembly has vested the Superintendent of Insurance—not the policyholder plaintiffs nor any other private individual—with the power and duty to enforce the administrative rules relating to insurance.⁹ Plaintiff has no standing to assert a claim for a violation of OAC § 3901-1-54.

Knowing full well that he has no standing to assert a cause of action under OAC § 3901-1-54(E)(1), Mr. Kincaid in Erie, like the other plaintiffs, has nonetheless tried to use OAC

⁸ See Price v. Dillon, Nos. 07-MA-75, 07-MA-76, 2008-Ohio-1178, ¶36 (Mahoning) (“Instead of applying to a private cause of action, the Administrative Rule [OAC § 3901-1-54] is relevant in determining whether an insurance provider is guilty of an unfair claims practice [only] in an action between the State of Ohio, Department of Insurance and the insurance provider.”).

⁹ See R.C. § 3901.011 (“The superintendent of insurance shall see that the laws relating to insurance are executed and enforced.”); see also Strack v. Westfield Cos., 33 Ohio App.3d 336, 338 (Summit 1986) (“[T]he superintendent is granted wide latitude and authority in overseeing insurance companies. It is his mandatory duty to execute and enforce the laws relating to insurance.”).

§ 3901-1-54(E)(1) to prevent dismissal of his other causes of action for breach of contract, bad faith, and declaratory judgment. Plaintiff cannot do indirectly that which he cannot do directly. An Administrative Code provision that cannot stand as a cause of action fares no better when used to argue against dismissal of other causes of action. See, e.g., Furr and Griffith, supra. The un-pled OAC regulation cited by plaintiff does not serve as a basis to save his pled causes of action, which should be dismissed. This Court should decline plaintiff's invitation to upset the balance of power created by the Ohio General Assembly when it vested the Ohio Department of Insurance with the responsibility to promulgate and enforce administrative regulations like OAC § 3901-1-54(E)(1).¹⁰ If there is to be a private right of action, it should be the General Assembly that creates it, not the Eighth District Court of Appeals. Likewise, it is not for the courts to write rules for a state agency like the Ohio Department of Insurance. See, e.g., Appeal of Buckeye Power, Inc. (1975), 42 Ohio St.2d 508, 509 (holding with respect to administrative agencies, "a court may not take part in their rulemaking enactment or promulgation."). This Court should reject plaintiff's invitation to engage in executive agency rule-making, by rejecting plaintiff's request to create a private right of action under OAC § 3901-1-54 that does not exist in the law.

C. The Courts Must Not Abide A Policy Interpretation That Reaches An "Illogical" Result By Allowing Parties To Sue For Expenses They Never Requested.

This Court should not permit to stand what the Eighth District admits is an "illogical" interpretation of an insurance policy provision. "Illogical" interpretations or construction of any legal instrument, be it a statute or a contract, should be rejected in favor of a logical one. This

¹⁰ The Court should also decline any explicit or implicit request by plaintiffs for the courts to rewrite verbiage in insurance policies. The responsibility for approving policy forms in Ohio lies with the Ohio Department of Insurance. See, e.g., R.C. § 3937.03(A) ("Every insurer shall file with the superintendent of insurance every form of a policy... which it proposes to use.").

Court does not embrace “illogical or absurd result[s.]” In re T.R., 120 Ohio St.3d 136, 2008-Ohio-5219, ¶16. This Court also recognizes that “[w]hen possible, courts should also avoid interpretations that create confusion or uncertainty.” State v. Cabrales, 118 Ohio St.3d 54, 2008-Ohio-1625, ¶20. See also State ex rel. United Foundries v. Indus. Comm’n, 101 Ohio St.3d 207, 2004-Ohio-704, ¶15 (“[A] corollary forbids an interpretation that ‘gives rise to a patently illogical result.’”) (rejecting interpretation that is “vague, unworkable, and illogical.”).

This Court specifically has applied these principles to the insurance realm in holding no court is obligated to impose an admittedly “illogical” result in interpreting an insurance policy. See Westfield Ins. Co. v. Galatis, 100 Ohio St.3d 216, 2003-Ohio-5849, ¶14 (“Although, as a rule, a policy of insurance that is reasonably open to different interpretations will be construed most favorably for the insured, that rule will not be applied so as to provide an unreasonable interpretation of the words of the policy.”) (overturning Scott-Pontzer v. Liberty Mut. Fire Ins. Co. (1999), 85 Ohio St.3d 660).¹¹

Other Ohio appellate courts have duly recognized that the interpretation of an insurance policy should be constrained by common sense.

While the rule of strict interpretation is a fundamental principle in insurance law, it is tempered by other canons of construction that seek to bring balance and reason to the analysis. For instance, the Ohio Supreme Court stated the rule of strict construction “will not be applied so as to provide an unreasonable interpretation of the words of the policy.” In addition, courts have held that a contract “should be construed reasonably, so as not to arrive at absurd results.”

¹¹ See also Doe v. Shaffer (2000), 90 Ohio St.3d 388, 393 (“Accordingly, concluding that the Diocese or Griffin, the actual insureds, expected or intended the injuries that Doe sustained would not only be a tortured interpretation of the facts of this case, but an inherently illogical interpretation as well.”); Andersen v. Highland House Co. (2001), 93 Ohio St.3d 547, 551–52 (“As the final authority on Ohio law, we must take the opportunity to prevent an absurd and unreasonable result—one that was never clearly intended by Highland House or RMI and one that was never clearly communicated by Indiana Insurance.”).

Burgess v. Erie Ins. Group, No. 06AP-896, 2007-Ohio-934, ¶16 (Franklin) (internal citations omitted). The Ninth District has recognized this limitation as well:

While the rule of strict interpretation is a fundamental principle in insurance law, it is tempered by other canons of construction that seek to bring balance and reason to the analysis. For instance, this court has held that a contract “should be construed reasonably, so as not to arrive at absurd results.”

Felton v. Nationwide Mut. Fire Ins. Co., 163 Ohio App.3d 436, 2005-Ohio-4792, ¶18 (Summit).¹²

This Court, for its part, has never embraced an “illogical” result, in the name of strict construction or otherwise. For example, workers’ compensation is another area in which there is a general rule of “strict construction” that favors coverage. Nonetheless, this Court has often recognized that this general rule cannot be used to justify an illogical result. It has held “[t]he application of the strict-construction rule cannot, however, justify an illogical result or one that is contrary to the clear intention of the code.” State ex rel Bumpers, Inc. v. Industrial Commission, 98 Ohio St.3d 134, 2002-Ohio-7089, ¶47. It has further held “where the application of those rules to a unique factual situation gives rise to a patently illogical result, common sense should prevail.” Id.¹³ Indeed, this Court and others in this state have consistently recognized the importance of avoiding “illogical results” in the insurance realm.

¹² See also, e.g., Cincinnati Ins. Co. v. Lohri, No. 05AP94, 2005-Ohio-5167, ¶27 (Franklin) (“However, to avoid illogical results... we find that pursuant to the language of the endorsement relied upon by appellant, when construed in favor of the policyholder, Ms. Trick is not an insured under the policy, and is therefore not entitled to uninsured motorists coverage.”); Kentucky Medical Ins. Co. v. Ohio Ins. Guaranty Assoc., No. 02AP817, 03-LW-2471, 2003-Ohio-3301, ¶26 (Franklin) (“A policy is not to be read as to extend coverage to absurd lengths or to be inconsistent with logic or the law.”).

¹³ See also, e.g., State ex rel. United Foundries v. Indus. Comm’n, 101 Ohio St.3d 207, 2004-Ohio-704, ¶15 (“While strict construction requires that all reasonable doubts in interpreting a specific safety requirement be resolved in the employer’s favor, a corollary forbids an interpretation that gives rise to a patently illogical result.”) (internal citations omitted) (rejecting interpretation that is “vague, unworkable, and illogical.”); State ex rel. DeVore Roofing &

The Eighth District, in reaching what it admits is an “illogical” result, has defied common sense on the issue of expense reimbursement. To justify its “illogical” result, the Eighth District states there is no express policy language that would mandate a different result. This Court should clarify that the duty to avoid illogical results in policy interpretation is present regardless of whether one is dealing with express policy language, or the absence of express policy language. The law of Ohio for the lower courts to apply cannot be “I am constrained to reach an illogical result unless there is express policy language to the contrary.” To allow such a result to stand threatens to throw all insurance policy interpretation into disarray, with a parade of other “illogical” results to surely follow.

D. This Court Should Not Embrace A Result That Leads To A Flood Of Litigation That Could Be Easily Avoided Through A Simple Pre-Suit Request For Expense Reimbursement.

“It is common sense that the law favors ‘the prevention of litigation, by the compromise and settlement of controversies.’” State ex rel. Wright v. Weyandt (1977), 50 Ohio St.2d 194, 197 (citations omitted).

Allowing lawsuits where there is no ripe controversy between the parties threatens to flood the courts with needless litigation, and defies common sense. If a simple pre-suit request could have yielded everything the plaintiff is seeking, then what is the point of a lawsuit? A plaintiff like Emma Negron, who currently believes she is entitled to \$9.85 in expense reimbursement, is better served to first request payment from Nationwide of \$9.85. Instead, she

Painting v. Indus. Comm’n, 101 Ohio St.3d 66, 2004-Ohio-23, ¶22 (“In State ex rel. Harris v. Indus. Comm. (1984), 12 Ohio St.3d 152, 153, 12 OBR 223, 465 N.E.2d 1286, we explained that ‘the commission has the discretion to interpret its own rules; however, where the application of those rules to a unique factual situation gives rise to a patently illogical result, common sense should prevail.’ By the same token, we must defer to the commission’s interpretation when it relies upon its own common sense to avoid an illogical result.”).

bypassed any request for reimbursement, and immediately filed a putative class action lawsuit.

That does not serve anyone's interests:

- The insured incurs the time and expense associated with litigation in order to receive what the insurance carrier may well have been willing to pay through a simple request.
- The insurance carrier faces the enormous time and expense inherent in the defense of any class action lawsuit, despite the obvious presence of myriad individualized factual issues.
- The courts are faced with all the time and resources consumed by adjudicating a (non-ripe) class action lawsuit.
- Other parties involved in legitimate disputes face diminished available judicial resources.

All of this when, in many instances, the parties may not actually be in disagreement, and the insurance carrier may be perfectly willing to provide reasonable expense reimbursement once informed of and asked about the alleged expenses.

This Court and the state and federal judicial systems in Ohio have engaged in a variety of measures to assist parties in resolving their disputes short of a full blown trial. This Court is on the record as favoring alternative dispute resolution, like mediation and arbitration.¹⁴ To allow lawsuits to proceed where there is no actual controversy between the parties, and where the defendant may well be willing to pay the expense reimbursement, is contrary to this state's public policy in favor of avoiding litigation where there exist streamlined means for providing full and fair recovery to a plaintiff. In a judicial system in which the courts have the power to order the parties to mediation, then surely the courts have the power to say to an insured "ask for

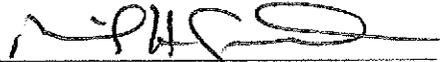
¹⁴ See, e.g., Derolph v. State (2001), 93 Ohio St.3d 628, 629 (stating that "[t]his court has supported and promoted mediation since at least 1989, when the court formed the Committee on Dispute Resolution," and noting that Ohio is a national leader in promoting alternative dispute resolution); ABM Farms, Inc. v. Woods (1998), 81 Ohio St.3d 498, 500 ("Ohio and federal courts encourage arbitration to settle disputes."); Mahoning County Bd. of MRDD v. Mahoning County TMR Ed. Ass'n (1986), 22 Ohio St.3d 80, 83 ("[Arbitration] provides the parties with a relatively speedy and inexpensive method of conflict resolution and has the additional advantage of unburdening crowded court dockets.").

expense reimbursement before suing for expense reimbursement.” That is the result the New Jersey and Georgia courts reached seven years ago in the Edwards and Cochran cases. And that is the result that is consonant with long-held Ohio precedent, and common sense.

III. CONCLUSION.

The Nationwide amici respectfully ask that this Court dispel the uncertainty in Ohio’s insurance industry created by Kincaid v. Erie, by reversing that decision, affirming that insurance in Ohio remains a claims-made process, and clearing the courts of inchoate controversies on matters that have not ripened into a justiciable case or controversy. A party that seeks expense reimbursement should request it before suing his or her insurance carrier for alleged breach of contract and bad faith. This Court should hold that a complaint for expense reimbursement that fails to allege a request for expense reimbursement by the policyholder, and a refusal to pay expense reimbursement on the part of the insurance carrier, fails to state a claim as a matter of law, and is subject to dismissal under Civil Rules 12(B)(6) and 12(C).

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Of Amici Curiae Nationwide Property And Casualty Insurance Company, Nationwide Mutual Fire Insurance Company, Nationwide Mutual Insurance Company, Nationwide Insurance Company Of America, Nationwide Assurance Company, And Nationwide General Insurance Company In Support Of Appellant Erie Insurance Company has been served upon the following via ordinary U.S. mail, postage prepaid, this 12th day of April, 2010:

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