

In the  
**Supreme Court of Ohio**

DON B. KINCAID, JR.,

Plaintiff-Appellee,

v.

ERIE INSURANCE COMPANY,

Defendant-Appellant.

Case No. 09-1936

On Appeal from the Cuyahoga County  
Court of Appeals, Case No. 92101

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**MERIT BRIEF OF AMICUS CURIAE OHIO INSURANCE INSTITUTE  
IN SUPPORT OF APPELLANT**

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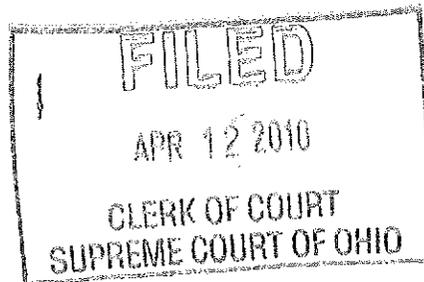
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## STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae Ohio Insurance Institute (“OII”) and its members are deeply concerned about the decision of the Court of Appeals, which held that an insured can maintain an action against an insurer for breach of contract and bad faith for failing to pay a claim even though the insurer never knew about the claim until the insured filed the lawsuit against it. The Court of Appeals admitted that its decision seems “illogical,” and this Court has recognized that it warrants review. OII supports appellant Erie Insurance Company in urging the Court to reverse the ruling below.

Insurance is one of the largest industries in Ohio and an important pillar of its economy. Many major insurance companies have chosen to domicile here, creating jobs and generating business activity that benefits all Ohio citizens and all levels of state and local government. OII is the professional trade association for property and casualty insurance companies throughout the State, including approximately 50 domestic insurers as well as reinsurers and foreign insurers. It closely monitors cases like the present appeal that raise important issues of insurance law, and it has participated as an amicus curiae in many significant insurance cases decided by this Court. OII is uniquely qualified to provide both a broad perspective on insurance law and practical insights into the specific issues raised by this appeal.

Insurance makes modern life possible for both businesses and individuals by spreading risks of loss that a single business or individual could not bear alone, but it cannot provide that protection unless insurers’ legal obligations are calculable and determinate. These legal obligations are defined by the provisions of insurance policies and by principles of Ohio insurance law; novel legal theories that enlarge insurers’

duties beyond those defined limits distort the underlying risk calculations and upset the settled expectations of insureds and insurers alike.

OII respectfully submits this amicus curiae brief because Ohio law has never previously recognized that a justiciable controversy about insurance coverage exists before the insured reports the loss and the insurer denies coverage. On the contrary, Ohio courts have always held that an insurer has no legally enforceable duty to indemnify an insured unless and until the insurer is informed about a covered loss and receives appropriate documentation. There is no justiciable dispute unless the insurer refuses to reimburse the insured. The decision of the Court of Appeals below would vastly expand the traditional legal obligations of Ohio insurers by conferring standing on insureds to file compensatory and punitive damages actions against their insurers for not reimbursing expenses that the insurers had no knowledge of and, thus, had no opportunity to pay.

The ruling below has to turn insurance law on its head in order to find that appellee Kincaid has standing to bring this action. Without the Court of Appeals' novel theory that Kincaid was improperly denied payment for a claim that he never made, Kincaid's legal "injury" – and, thus, his standing – is wholly conjectural, i.e., that, if a claim were made, it would be denied. No actual controversy presently exists between these parties.

If it is not reversed, the ruling by the Court of Appeals will be cited as legal authority for lawyer-generated class action lawsuits against insurers for individual reimbursements that the insurers didn't learn about until the lawsuits were filed. Insurers will have no practical way to avoid liability because they will have no possible

means of determining who to pay for undisclosed claims. The ruling below unsettles principles of Ohio law that have long been settled, undermining the calculations of risk, benefits, reserves, and premium rates on which millions of insurance policies are based. OII, its members, and all insured Ohio residents thus have a vital interest in the outcome of this appeal.

### **STATEMENT OF ALLEGED FACTS**

There is no dispute as to any fact that is relevant to appellant Erie Insurance Company's propositions of law. Appellee Don B. Kincaid, Jr. purchased an automobile liability insurance policy from Erie that included, inter alia, reimbursement for "reasonable expenses" he might incur "to help [Erie] investigate or defend a claim or suit" against him. Kincaid later struck a bicyclist with his automobile, and she filed a personal injury lawsuit against him. Erie retained attorneys for Kincaid who provided his defense and ultimately settled the bicyclist's lawsuit.

In his Complaint in the present action, Kincaid alleged that he "incurred travel related expenses, including mileage," when he attended his deposition in the personal injury lawsuit. (Complaint, at ¶ 18.) However, Kincaid did not allege that Erie knew about the alleged expenses, and it is undisputed that the filing of his Complaint – asserting breach of contract and bad faith claims against Erie for not paying these expenses – was the first time he told Erie that he had incurred them. Erie never refused to reimburse the expenses; it never had an opportunity to decide whether to reimburse them. Kincaid nevertheless maintains that Erie's failure to pay his undisclosed expenses constitutes a legal injury and presents a justiciable controversy.

Erie moved for judgment on the pleadings pursuant to Civil Rule 12(C). It pointed out that it could not have breached the terms of the insurance policy, and could not have done so in bad faith, because Kincaid never requested reimbursement for the expenses. Kincaid has no standing, and there is no justiciable controversy between the parties, in these circumstances.

The trial court granted Erie's motion and dismissed the case. (Journal Entry, Sept. 5, 2008.) Kincaid appealed to the Eighth District Court of Appeals, which held that judgment should not have been entered in Erie's favor on the breach of contract and bad faith causes of action because the terms of the parties' insurance policy did not require Kincaid to tell Erie about his alleged expenses:

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 . . . .

2009-Ohio-4372, at ¶ 20.

Amicus curiae OII supports Erie in urging this Court to reverse the Court of Appeals' ruling. OII respectfully submits that Kincaid has no standing, and that he has not presented a justiciable controversy, for the reasons set forth below.

## **ARGUMENT**

### Proposition of Law No. 1:

An insured lacks standing to file an action against the insurer for coverage of a loss under an insurance policy where the insured has not presented a claim for the loss and has not given notice of the loss to the insurer.

Kincaid cannot maintain his breach of contract and bad faith causes of action against Erie because he never told Erie about the existence or amount of his alleged

reimbursable expenses, and, thus, Erie never refused to pay them. The ruling below is not merely “illogical.” Kincaid lacks standing to maintain this lawsuit because his alleged injury is purely hypothetical until and unless Erie refuses to reimburse him. There is no way to predict at this time that Erie will “breach the insurance contract” or “act in bad faith” by refusing to reimburse him for the expenses and thereby cause an actual injury.

Before a court can consider the legal merits of a lawsuit, “the person seeking relief must first establish standing to sue.” *Modesty v. Scottsdale Surplus Lines* (8<sup>th</sup> App. Dist.), 2006-Ohio-4272, at ¶ 7, citing *Ohio Contractors Assn. v. Bicking*, 71 Ohio St.3d 318, 320, 1994-Ohio-183. Inasmuch as Kincaid never gave any information to Erie about the existence or amount of his alleged expenses before he sued it for breach of contract and bad faith, any supposition by Kincaid or this Court that Erie would have refused to pay the expenses – with or without bad faith – is speculative. Any legally cognizable injury that Kincaid might incur if Erie were to deny this claim is thus conjectural and contingent, and Kincaid lacks standing. See *Lujan v. Defenders of Wildlife* (1992), 504 U.S. 555, 560-61 (the “constitutional minimum of standing” requires, inter alia, that “the plaintiff must have suffered an ‘injury in fact’ . . . which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical”). Standing “requires demonstration of a concrete injury in fact, rather than an abstract or suspected injury.” *Master v. O’Malley*, (8<sup>th</sup> App. Dist.), No. 68895, 1996 WL 157340, appeal denied (1996), 77 Ohio St.3d 1422.

OII agrees with appellant Erie that Kincaid has no actual, non-hypothetical injury, and thus has no standing to maintain this action, unless and until he tells Erie about his

alleged expenses and submits appropriate documentation, and Erie refuses to reimburse him. Kincaid's Complaint alleges none of these essential facts and therefore fails on its face to establish that he has standing.

The Court of Appeals essentially manufactured standing by finding that Kincaid sustained a legal injury – Erie's failure to reimburse Kincaid for his alleged expenses – even though Erie was never advised of the expenses and never refused to reimburse him. This effectively imposes an affirmative duty on Erie and other insurers to reimburse insureds for unreported expenses, when it is impossible for them to know who (or how much) to pay.

Insurers are obligated to pay covered claims and thus may be liable in contract if they improperly refuse to pay and may be liable in tort if they improperly refuse to pay in bad faith. In this case, Erie never refused to reimburse Kincaid for the alleged expenses. See, e.g., *Sprenulli's American Service v. Cincinnati Ins. Co.* (8<sup>th</sup> App. Dist. 1992), 91 Ohio App.3d 317, 322, appeal dismissed, 68 Ohio St.3d 1223, 1994-Ohio-311 (“[t]o prevail on a claim of bad faith, the insured must prove the insurer's refusal to pay a claim was totally arbitrary and capricious”) (emphasis added).

Not surprisingly, no Ohio court has ever before concluded that an insured has standing to sue an insurer for failing to reimburse expenses that the insurer was not reasonably advised of by the insured. The primary legal authorities that Kincaid relied upon below – *Gallo v. Westfield Nat. Ins. Co.* (8<sup>th</sup> App. Dist.), 2009-Ohio-1094, *Kavouras v. Allstate Ins. Co.* (N.D. Ohio 2008), No. 1:08-CV-571, and *Johnson v. Geico Gen. Ins. Co.* (S.D. Fla. 2008), No. 08-80740-CIV, 2008 WL 4793616 – never addressed that issue. However, in *McGinn v. State Farm Mut. Auto. Ins.* (2004), 268

Neb. 843, 689 N.W.2d 802, the Nebraska Supreme Court squarely rejected breach of contract and bad faith claims brought by an insured who had not submitted a claim for reimbursement under the defendant-insurer's policy:

If McGinn would submit a claim, we do not know if he would be afforded coverage, denied coverage, or denied coverage in part . . . . [I]t cannot yet be said that State Farm has breached the contract of insurance or failed to do the thing agreed to.

689 N.W.2d at 806.

The pendency of the bicyclist's personal injury lawsuit against Kincaid did not automatically mean that he would incur expenses that were covered by the Additional Payments provision. No payment is due under that provision unless the insured incurs an actual wage loss or other out-of-pocket expenses; even if an insurer requested that an insured attend a deposition or hearing, it would not know whether the insured incurred any transportation expenses or lost any pay. All this information – which is known only to insureds – must be communicated to the insurer before it can decide to pay or to deny coverage for the expenses. See, e.g., *13 Couch on Insurance 3d*, § 186.1, at pp. 186-7, 186-13 (2007) (“the insurer must rely on the insured or other interested party to provide all details that affect the insurance relationship . . . [including] [s]ufficient and accurate proof of the amount of the loss”).

In *Cochran v. State Farm Mut. Auto. Ins. Co.* (Ga. Super. 2003), No. 2002-CV-54540, 2003 WL 25485811, the Court granted judgment to the defendant insurer on nearly identical claims for the same reason:

[I]t is conceivable that an insured testifying at trial would not be entitled to reimbursement because he or she is retired, unemployed, a student, or salaried without loss. Defendant would have no way of knowing whether or not an insured was entitled to wage reimbursement . . . . [I]t necessarily

follows that Plaintiff had to actually make a claim for reimbursement in order for Defendant to perform.

(Emphasis added.)

Ohio jurisprudence has always recognized that there can be no breach of contract or bad faith denial of a claim – and thus no legal injury – unless the insured makes the claim and the insurer denies it. See, e.g., *Heller v. Standard Accident Ins. Co.* (1928), 118 Ohio St. 237, where the Court held that the insured’s failure to tell his automobile insurer that a negligence lawsuit had been filed against him precluded coverage under the insurance policy, even though the insured had told the insurer about his automobile accident when it occurred.

Kincaid argued below that he sustained a legal injury, even though no claim was made or denied, because Erie breached an affirmative duty that is purportedly imposed on all insurers by an Ohio Department of Insurance rule. The regulation, OAC 3901-1-54(E)(1), provides in relevant part:

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.

However, all regulation of the matters described in OAC 3901-1-54(E)(1) is expressly reserved to the Superintendent of Insurance:

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) (emphasis added). “Instead of applying to a private cause of action, [OAC 3901-1-54] is relevant . . . in an action between the State of Ohio, Department of Insurance, and the insurance provider.” *Price v. Dillon* (7<sup>th</sup> App. Dist.), No. 07-MA-75, 2008-Ohio-1178, at ¶ 36, appeal denied, 119 Ohio St.3d 1411, 2008-Ohio-3880. See *Furr v. State Farm Mut. Auto. Ins. Co.* (6<sup>th</sup> App. Dist. 1998), 128 Ohio App.3d 607, 616,

holding that OAC 3901-1-54 "does not create a private cause of action for violation of its rules and, therefore, should not be considered as evidence of bad faith" in an action by an insured against his insurer. In any event, the Superintendent of Insurance has not charged a violation of the regulation in these circumstances.

Ohio courts have always recognized that "an insured has a duty to examine the coverage provided him and is charged with knowledge of his own insurance policies." *Fry v. Walters & Peck Agency, Inc.* (6<sup>th</sup> App. Dist. 2001), 141 Ohio App.3d 303, 312, appeal denied (2001), 92 Ohio St.3d 1418. "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." *Ohio Farmers' Ins. Co. v. Todino* (1924), 111 Ohio St. 274, 278. See also *Heights Driving School, Inc. v. Motorists Ins. Co.* (8<sup>th</sup> App. Dist.), 2003-Ohio-1737 at ¶ 38, appeal denied, 99 Ohio St.3d 1514, 2003-Ohio-3957 (same).

Other courts have granted judgment on the pleadings to insurers facing identical allegations. In *Edwards v. Prudential Property & Cas. Co.* (N.J. App. 2003), 357 N.J. Super. 196, 814 A.2d 1115, certification denied (2003), 176 N.J. 278, 822 A.2d 608, the plaintiff-insured was sued for damages in a personal injury suit; he filed a putative class action against his automobile liability insurer for failing to inform him that he might be entitled to reimbursement of expenses that he incurred when he attended the trial of the personal injury suit. The Court held that the insurer had no such affirmative duty:

[The insurer's] duty to "pay" under the [policy] provisions clearly presupposes a request or demand for payment and the presentation of facts supporting the claim before the insurers have a duty to reimburse. The insured's obligation to make such a claim is both logical and necessary to trigger the insurer's duty to reimburse.

357 N.J. Super. at 204, 205, 814 A.2d at 1120 (emphasis added). Significantly, the Court reached that result even though New Jersey Administrative Code Section 11:2-17.5 contains the same disclosure requirement as OAC 3901-1-54(E)(1), discussed supra.

Ohio law has never authorized an award of compensatory or punitive damages against an insurer for failing to reimburse expenses that it was never told about. An insured has no legal injury – and therefore has no standing – unless the insurer improperly denies coverage of the expenses. The decision of the Court of Appeals accordingly should be reversed, and the Court should reinstate the trial court’s judgment dismissing this action.

Proposition of Law No. 2:

Courts will not issue advisory opinions as to whether an insured is entitled to coverage of a loss under an insurance policy where the insured made no claim to the insurer for the loss.

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As set forth above, Kincaid has no standing to maintain this action in the absence of any refusal by Erie to reimburse him for his alleged expenses. In addition, because Kincaid failed to plead that he told Erie about his alleged expenses and that Erie refused to pay them, his Complaint presents no case or controversy within the jurisdiction of Ohio courts.

Citing “the liberal notice pleading requirements” of the Civil Rules, the Court of Appeals relied upon Kincaid’s conclusory allegation that “[a]ll conditions precedent to Defendant’s payment obligations under its standard form motor vehicle liability insurance policies have been performed by the named Plaintiff . . . .” 2009-Ohio-4372,

at ¶¶ 13, 16; Complaint, at ¶ 33. This is not a factual allegation; it is a legal conclusion, and, thus, it is not entitled to deference even at the pleadings stage of these proceedings. The Complaint contains no affirmative factual averments that Kincaid told Erie about his alleged expenses and that Erie refused to reimburse them, i.e., that an actual controversy exists between the parties. See *Mid-American Fire & Cas. Co. v. Heasley*, 113 Ohio St.3d 133, 136, 2007-Ohio-1248, at ¶ 9 (“[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”).

A Civ. R. 12(C) motion resembles “a belated Civ. R. 12(B)(6) motion” in that the court accepts as true all factual allegations in the pleadings. *Id.*, at ¶¶ 9, 17-18. See, e.g., *Whaley v. Franklin Cty. Bd. of Commrs.*, 92 Ohio St.3d 574, 2001-Ohio-1287. Here, Kincaid’s Complaint does not contain factual allegations contradicting the averment in Erie’s Answer that it was never told about the alleged expenses. The Court of Appeals improperly allowed Kincaid to substitute a general legal conclusion – that he had satisfied all applicable legal requirements – for factual allegations describing what he actually did. See *Clemens v. Katz* (6<sup>th</sup> App. Dist.), 2009-Ohio-1461, at ¶ 10, appeal denied, 122 Ohio St.3d 1481, 2009-Ohio-3625:

Under the notice pleading requirements . . . the plaintiff only needs to plead sufficient operative facts to support recovery under his claims . . . . Nevertheless, to constitute fair notice, the complaint must still allege sufficient underlying facts that relate to and support the alleged claim, and may not simply state legal conclusions.

The *Clemens* Court entered judgment for the defendant pursuant to Civ. R. 12(C) because the plaintiff’s complaint – like Kincaid’s Complaint in the present case – asserted “naked legal conclusions, without operative facts.” (*Id.*) See also *Mitchell v.*

*Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192-93 (“[t]aking the facts of the complaint as true and construing them in appellant’s favor, those facts fail to establish a claim”; “[u]nsupported conclusions . . . are not taken as admitted by a motion to dismiss and are not sufficient to withstand such a motion”) (original emphasis); *Copeland v. Summit Cty. Probate Court* (9<sup>th</sup> App. Dist.), 2009-Ohio-4860, at ¶ 10 (“[a]t the very least, facts as to when and where the allegations took place are essential to provide the fair notice required by the Civil Rules”).

This Court has previously considered judicial analyses of Fed. R. 12(C) in construing the correlative Ohio rule. See, e.g., *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 174-75. Kincaid’s pleadings in this case suffer from the same infirmities that the United States Supreme Court identified in *Ashcroft v. Iqbal* (2009), -- U.S.--, 129 S.Ct. 1937, and *Bell Atlantic Corp. v. Twombly* (2007), 550 U.S. 544. “A pleading that offers ‘labels and conclusions’ or a formulaic recitation of the elements of a cause of action will not do. . . . Nor does a complaint suffice if it tenders ‘naked assertions’ devoid of further factual enhancement.” *Ashcroft*, 129 S.Ct. at 1949, quoting *Twombly*, 550 U.S. at 555. The *Ashcroft* Court explained:

[T]he tenet that a court must accept as true all the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.

\* \* \* \*

Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.

129 S.Ct. at 1949. “[L]egal conclusions . . . must be supported by factual allegations.”

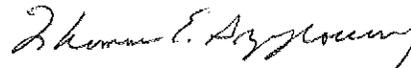
Id. (emphasis added).

In the present case, Kincaid's Complaint does not aver that Erie knew about the existence or amount of his alleged expenses and refused to reimburse them, and therefore does not allege facts showing that an actual controversy exists between the parties. The Complaint was properly dismissed by the trial court, and the decision of the Court of Appeals should be reversed.

### CONCLUSION

Amicus Curiae Ohio Insurance Institute agrees with appellant Erie Insurance Company that appellee Kincaid lacks standing to maintain this action and that there is no justiciable controversy between the parties. This Court should reverse the decision of the Court of Appeals and reinstate the trial court's judgment dismissing all claims in this action.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Merit Brief of Amicus Curiae Ohio Insurance Institute in Support of Appellant was served via regular United States mail on this 12<sup>th</sup> day of April, 2010, on the following:

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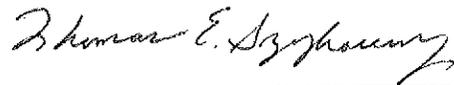
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