ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 09-1936

DON B. KINCAID, JR.
Plaintiff-Appellee

-vs-

ERIE INSURANCE COMPANY
Defendant –Appellant.

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ON APPEAL FROM THE CUYAHOGA COUNTY COURT OF APPEALS CASE NO. 92101

MERIT BRIEF OF PLAINTIFF-APPELLEE, DON B. KINCAID, JR.

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INTRODUCTION

Plaintiff-Appellee, Don B. Kincaid, Jr., has brought this action seeking reimbursement for certain expenses he incurred while defending a personal injury lawsuit which had been brought against him. Defendant-Appellant, Erie Insurance Company, denied in an Answer and First Amended Answer that anything at all was owed to him. A Motion to Dismiss pursuant to Civ. R. 12(C) followed arguing primarily that the terms of the policies directed that "the insured is obligated to make a claim for reimbursement and then wait 30 days before suing." *Motion of Defendant Erie Insurance Company for Judgment on the Pleadings, p6, . (Defendant's Motion").* The issue of "standing" also received brief mention. *Id., pp. 6-7.*

In overturning the trial judge's dismissal of Plaintiff's claims for relief, the Eighth District observed simply that the policy language did not actually require any pre-suit notice or submission of proof before litigation was commenced. *Kincaid v. Erie Ins. Co.*, 183 Ohio App. 3d 748, 754, 2009-Ohio-4372, 918 N.E. 2d 1036, 1041 ¶ 20. Essentially the same result had been reached in *Gallo v. Westfield Natl. Ins. Co.*, 8th Dist. No. 91893, 2009-Ohio-1094, 2009 W.L. 625522, and in *Kavouras v. Allstate Ins. Co.* (December 1, 2008), U.S. Dist. Ct., N.D. Ohio, Case No. 1:08CV571,[1] and in *Johnson v. Geico Gen. Ins. Co.* (November 3, 2008), U.S. Dist. Ct., S.D. Fla., Case No. 08-80740-CIV-MARRA, 2008 W.L. 4793616.

Defendant is now before this Court arguing that even though no requirement for pre-suit notice and proof of covered expenses was ever included in Plaintiff's policy, such a condition should be implied under the general doctrine of standing, vague

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[1] A copy of the *Kavouras* decision is attached as Exhibit A to Reply Brief that Plaintiff

concepts of fundamental fairness, and its own notions of public policy. Although Ohio's judiciary has been issuing decisions for the last two centuries, none have been cited imposing such an unwritten restriction upon a policyholder. No explanation has been offered, moreover, for why this objective cannot be accomplished through straightforward policy language. For the reasons to be developed herein, this Court should decline the invitation to be the first in Ohio to judicially engraft conditions for bringing suit into an otherwise clear and unambiguous policy of insurance.

(..continued)
submitted to the Court of Appeals on February 23, 2009.

STATEMENT OF CASE AND FACTS

The following facts were alleged in the Class Action Complaint of February 28, 2008. The Plaintiff-Appellee, Don B. Kincaid Jr., had purchased a motor vehicle insurance policy from Defendant-Appellant, Erie Insurance Company. On September 8, 2005, he was sued in a civil action for allegedly injuring Marlene C. Spilar ("Spilar") in an automobile accident. *Spilar v. Kincaid, Lake C.P. Case No. 03CV001576.* Plaintiff had timely notified Defendant of both the collision as well as the personal injury lawsuit and a defense was arranged for him by the carrier. Naturally, Plaintiff incurred expenses at the request of Defendant and/or the attorneys who had been hired to represent him, such as copy charges, postage, transportation costs, and parking fees. Defendant eventually settled the claim against Plaintiff and Spilar's lawsuit was dismissed with prejudice on October 28, 2004.

Under the "Additional Payments" provision of the "Liability Protection" section of the standard-form motor vehicle insurance policy, Defendant had agreed to reimburse certain litigation expenses incurred by the insureds. Plaintiff commenced the instant action on February 28, 2008 to enforce his rights under the policy. He sought to recover the expenses due to him not only in his own right, but also on behalf of all similarly situated policyholders. The Complaint specified that he had incurred the expenses at Defendant's request, Defendant knew that he had incurred the expenses, Defendant understood that the reimbursement was owed, but Defendant has yet to pay the amounts due.

Defendant submitted an Answer denying liability on April 4, 2008. A First

Amended Answer followed seven days later which again denied that anything was owed to Plaintiff.

On May 8, 2008, Defendant filed a Motion for Judgment upon the Pleadings arguing that the Complaint failed to allege any potentially valid claims for relief in accordance with Civ.R. 12(C). Defendant maintained *inter alia* that "the duty which is asserted under the Complaint and under [the Ohio Fair Claims Practices Act] applies only to 'first-party claims'" and could have no application to "reimbursement under a third-party liability policy *** ." *Id., pp. 2-3.* Citing a "LAWSUITS AGAINST US" clause, the insurer further maintained that:

> The policy requires as a condition precedent to coverage that the insured provide notice and that no lawsuit can be brought against Erie until thirty days after such notice has been received."

Id., p. 5 (emphasis added)

Plaintiff's timely Memorandum in Opposition was submitted on June 12, 2008 (hereinafter "Plaintiff's Memorandum"). Plaintiff noted that he had specifically alleged, and intended to establish beyond all dispute, that he had fully complied with all of the "proof of loss" and other conditions for liability coverage. *Id., pp. 6-7.* He further demonstrated that Defendant's "thirty day" notice requirement was limited to the Medical Payment, Comprehensive, and Collision coverage claims and did not extend to the Liability Protection portion of the policy. *Id., p. 8.* Defendant submitted a Reply Brief on June 23, 2008 which simply re-hashed the arguments which had already been raised.

Judge Brian J. Corrigan granted the Motion to Dismiss on September 5, 2008 without explanation. In the ensuing appeal, the unanimous Eighth District reversed

this decision. *Kincaid*, 183 Ohio App. 3d 748. The panel adhered to the precedent which had been established a few months earlier in *Gallo*, 2009-Ohio-1094, and concluded that a potentially viable breach of contract claim had been sufficiently alleged. *Id., ¶ 15.* In response to Defendant's argument that pre-suit notice of the expense reimbursement claim had to be submitted and rejected before litigation could be commenced, the panel reasoned that:

> *** Our review of the insurance policy, which was attached to [plaintiff's] complaint, shows no requirement that [he] notify Erie in any particular way or within a certain time frame to recover incurred 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, and we find no notice requirement in the insurance policy in regard to additional payments. Simply put, the terms of the contract are plain and unambiguous; there is no notice requirement for additional payments under the policy. *** [emphasis added, footnote omitted]

Id., ¶ 20. For largely the same reasons, the Court concluded that the allegations of breach of fiduciary duty and for declaratory relief were sufficient to allow the case to proceed to the discovery stage. *Id., ¶ 23-32.* The trial court was affirmed only with regard to the dismissal of the claim for unjust enrichment/*quantum meruit*, since there was no dispute that the parties' relationship is governed by contract. *Id.*

Defendant sought further review and submitted three Propositions of Law for consideration. This Court agreed to accept jurisdiction, but only over the interrelated issues of standing and the undesirability of advisory opinions. *Kincaid v. Erie Ins. Co.*, 124 Ohio St. 3d 1442, 2010-Ohio-188, 920 N.E. 2d 373. The third Proposition of Law dealing with whether an insured must first submit a claim to the insurer as a precondition for filing suit was not allowed. *Id.*

ARGUMENT

PROPOSITION OF LAW NO. I: 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 A 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 NO. II: 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.

Although two separate Propositions of Law have been fashioned, Defendant has lumped them together for purposes of argument. Plaintiff will thus proceed in similar fashion.

A. GENERAL STANDARDS FOR DISMISSAL.

This appeal arises from a Motion for Judgment on the Pleadings that had been brought under Civ.R. 12(C), which involves largely the same standard of review as motions to dismiss under Civ.R. 12(B)(6). *Vinicky v. Pristas* (8th Dist. 2005), 163 Ohio App.3d 508, 510-511 2005-Ohio-5196, 839 N.E.2d 88, 90; *Duff v. Coshocton County*, 5th Dist. No. 03-CA-019, 2004-Ohio-3713, 2004 W.L. 1563404 ¶ 15. The main difference simply is that a Civ.R. 12(C) application permits consideration of the defendant's answer. *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 1996-Ohio-459, 664 N.E.2d 931, 936. Only pure questions of law may be resolved. *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 165-166, 297 N.E.2d 113, 117; *Lin v. Gatehouse Constr. Co.* (8th Dist. 1992), 84 Ohio App.3d 96, 98-99, 616 N.E.2d

519, 521.

B. PLAINTIFF'S THEORIES OF RECOVERY.

None of the theories of recovery set forth in the Complaint require pre-suit notice and a submission of proof. Each will be addressed separately.

1. BREACH OF CONTRACT.

a. General Requirements

Plaintiff's primary claim for relief is for breach of contract, which requires nothing more than a demonstration of "(1) the terms of the contract, (2) the performance by the plaintiff of [his/her] obligations, (3) the breach by the Defendant, (4) damages, and (5) consideration." *American Sales, Inc. vs. Boffo* (1991), 71 Ohio App.3d 168, 175, 593 N.E.2d 316, 321; *Chou v. Chou* (October 3, 2002), 8th Dist. No. 80611, 2002 WL 31195424, *4. Upon a successful establishment of an unexcused breach, the aggrieved party is entitled to complete compensation for all of the damages and harm following therefrom. See *Kirshmarton v. William Bailey Constr., Inc.*, 93 Ohio St.3d 226, 229-230, 2001-Ohio-1334, 754 N.E.2d 785.

Attached as Exhibit A to the Class Action Complaint is the Named Plaintiff's applicable motor vehicle insurance policy. In addition to the promise of indemnity and a defense against accident claims, the "Liability Protection" section of the insuring agreement provides that:

> ADDITIONAL PAYMENTS
>
> **We** will make the following payments in addition to the limit of protection:
>
> ***
>
> 5. reasonable expenses **anyone we protect** may incur at **our** request to help **us** investigate or defend a claim or

> **suit**. This includes up to $100 a day for actual loss of earnings.
>
> ***

Id., pp. 5-6 (emphasis original). Noticeably absent from the policy is any requirement that an application for expenses must be submitted in a particular manner or within a certain timeframe. *Id.* There will be no dispute in this case that Plaintiff has yet to receive the reimbursement which is due to them pursuant to this clause. He is now seeking these payments through this lawsuit, which Defendant is vigorously contesting. Nothing further is needed to state a *prima facia* breach of contract claim under Ohio law.

b. The Policy Terms and Conditions

Presumably, the trial judge dismissed the case in reliance upon Defendant's representation that "The policy requires as a condition precedent to coverage that the insured provide notice and that <u>no lawsuit can be brought against Erie until thirty days after such notice has been received</u>." *Defendant's Motion, p. 5* [emphasis added]. The policy language which has been cited in support of this defense merely provided, in its entirety, that:

> RIGHTS AND DUTIES - GENERAL POLICY CONDITIONS
>
> We, you and anyone else protected by this policy must do certain things in order for the terms of this policy to apply:
>
> * * *
>
> 8. LAWSUITS AGAINST US
> You must comply with the terms of this policy before you may sue us. The legal liability of anyone we protect must be determined before we may be sued. This determination may be made by a court or law or by written agreement of all parties, including us. No one has the right to make us a party to a suit to determine the liability of anyone we

> protect. In the event of a Medical Payment claim or a Comprehensive or Collision loss, no suit may be brought against us until 30 days after proof of loss is filed. [emphasis added]

Class Action Complaint, Exhibit A, pp. 10-11. Obviously, no references to "notice" appear anywhere within the cited text. The "thirty days" requirement which was the lynch-pin of the Motion applies only to a "Medical Payment claim or a Comprehensive or Collision loss". *Id.* At the risk of overstating the obvious, the instant action is limited to claims for coverage under the Liability Protections of the policy.[2] *Class Action Complaint, ¶ 2, 12 & 23.*

The remainder of the "Lawsuit Against Us" clause cannot possibly serve as a barrier to the instant litigation, and the Motion did not suggest otherwise. *Class Action Complaint, Exhibit A, p. 11.* With respect to the first sentence, Defendant has not established that some other "terms of this policy" have been violated and the Class Action Complaint contains numerous allegations to the contrary. *Id., ¶ 13-15 &* 33. The "legal liability" language contained in the second sentence has plainly been satisfied, since the underlying personal injury/property damage lawsuits which were brought against Plaintiff was resolved. The third sentence does not impose any additional obligations upon the insureds, and merely confirms that "legal liability" may

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[2] It is difficult to believe that Defendant could seriously think for a moment that the "thirty days" requirement appearing at the end of the "Lawsuits Against Us" provision could possibly apply in this instance. Anyone with even a rudimentary knowledge of insurance law should appreciate that "liability" claims are wholly distinct from "medical payments" and "comprehensive or collision" claims. These basic forms of coverage have been set forth in separate sections of the insuring agreement. *Class Action Complaint, Exhibit A, pp. 5 (Liability Protection), 7 (Physical Damage Coverage), & 13 (Auto Medical Payments and Death Benefit Coverage Endorsement).* As was plainly explained in the pleading, Plaintiff had applied for, and been approved for, "liability" coverage after he was sued for damages. *Id, ¶ 2, 12 & 33.*

be established either through a court order or a settlement agreement. The fourth sentence has no application here, because the objective of this lawsuit is not "to determine the liability of anyone [Defendant] protect[s]." Defendant's own legal liability to pay covered expenses is the focus of the Class Action Complaint. As previously observed, the final sentence of the "Lawsuit Against Us" clause is limited strictly to "Medical Payment", "Comprehensive", and "Collision" claims, not requests for "additional payments" which have been brought under the Liability Protection provisions.

In order to be entitled to Liability Protection, and the Additional Payments allowed therein, one only needs to comply with the "What To Do When An Accident Or Loss Happens" clause set forth in the General Policy Conditions. That portion of the policy provided only, in pertinent part, that:

> 13. WHAT TO DO WHEN AN ACCIDENT OR LOSS HAPPENS
>
> When there is an accident or loss, **anyone we protect** will:
>
> a. notify **us** or **our** Agent in writing as soon as possible stating:
>
> 1) the name and policy number of **our** policyholder;
>
> 2) the time, place and circumstances of the accident or loss;
>
> 3) names and address of injured persons and witnesses.
>
> b. promptly notify the police in case of theft.
>
> c. give us:
>
> 1) promptly, any papers that relate to the accident or loss;

> 2) a signed statement containing all the facts about the claim;
> 3) proof of loss to damaged property.
>
> ***

Class Action Complaint, Exhibit A, p. 12. From the context of the policy, the phrase "accident or loss" plainly refers to the motor vehicle collision which generated the liability claim. *Id.* Defendant has never disputed that the Named Plaintiff and each of the proposed class members supplied the insurer, or its Agent, with all of the information and paperwork necessary with respect to the motor vehicle accident. *Class Action Complaint, ¶* 14. They would not have been furnished with both indemnity and a defense at the carrier's expense had they failed to do so. Compliance with the "What to do When an Accident or a loss Happens" requirement thus is not an issue, and certainly not one which may be resolved from the pleadings as a matter of law.

The "What to do When an Accident or a Loss Happens" provision actually places the onus of obtaining records upon Defendant. Section 13 states, in pertinent, part that:

> When there is an accident or loss, **anyone we protect** will:
>
> ***
>
> d. <u>at **our** request</u>:
>
> ***
>
> 9) sign papers to allow **us** to obtain medical reports, <u>earning statements and copies of records</u>: [bold original, **u**nderlining added]

Class Action Complaint, Exhibit A, p. 12. Defendant has yet to argue, let alone establish, that the Plaintiff refused to cooperate with the insurer's efforts to obtain "copies of records" and "earning statements" which were believed to be necessary to

justify the issuance of "Additional Payments." Given that the insureds had been required to incur these expenses at the request of either the insurer or the attorneys who had been retained to represent them, Defendant must not be allowed to feign ignorance that reimbursement was due. Despite Defendant's considerable urging to the contrary, there is nothing in the policy which precludes an insured from filing a claim of breach of contract until a formal demand for payment of expenses has been tendered and rejected.

c. Proof of Loss

Defendant has fretted that Plaintiff "has still not submitted a claim for a payment, provided any documentation of an alleged claim, or even a detailed description of any amounts he incurred." *Defendant's Brief, p. 8.* Plaintiff would have been more than happy to do so, but the filing of the Motion to Dismiss precluded any discovery from being conducted in this case. Much of the necessary proof is expected to be within Defendant's possession, such as documents and envelopes indicating that mailing and copying charges were incurred when materials were sent at Defendant's request. The insurer's files will also likely confirm that Plaintiff was directed to travel to a deposition and other proceedings, for which he is entitled to a mileage reimbursement at standard rates.[3] The policy also provides for "up to $100 a day for actual loss of earnings" sustained while attending such judicial proceedings. *Class Action Complaint, Exhibit A, p. 6.*

Discovery will also likely reveal that the attorney who was hired by Defendant to defend Plaintiff against Spilar's lawsuit was promptly reimbursed for the travel,

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3 For example, Ohio law has long provided that witnesses are entitled to ten (10)

mileage, and parking expenses he incurred attending depositions and other proceedings. Since Plaintiff would have been required to be present at the same sessions, the insurer must have appreciated that reimbursement was also due to him.

To the extent that any further proof is required, notice can be issued to each of the class members directing them to provide additional evidence of copying and mailing charges incurred while sending requested information to Defendant, earnings lost attending judicial proceedings, travel expenses necessitated by the litigation, and all other expenses covered under section 5 or the "Additional Payments" section of the Liability Protection provisions. *Class Action Complaint, Exhibit A, p. 6.* Such class-wide notices are, of course, commonplace in proceedings brought under Civ. R. 23.

d. Plaintiff's Performance

Citing *Thomas v. Matthews*, (1916), 94 Ohio St. 32, 113 N.E. 669, syllabus, Defendant has complained that Plaintiff must first show his own "substantial performance or tender performance of the conditions to be performed" in order to prevail upon his claim. *Defendant's Brief, pp. 8-9.* There is no need for any "tender," as Plaintiff has already fully performed all of the conditions and obligations which the policy imposes upon him. *Class Action Complaint, paragraphs 13-15 & 33.* He paid his premiums, submitted a timely proof of loss form, complied with all the insurer's requests, and fully cooperated in the defense of Spilar's lawsuit. *Id.* As previously noted, these allegations must be accepted as true at this early stage of the lawsuit. *Greeley v. Miami Valley Maint. Contractors* (1990), 49 Ohio St.3d, 228, 230-231, 551 N.E.2d 981; *Michael v. Whitehall* (10th Dist. 1999), 134 Ohio App.3d 719, 721, 732

(..continued)
cents a mile when responding to subpoenas. *R.C. §2335.06(A).*

N.E.2d 398, 399-400. It is certainly telling that Defendant has been unable to point to a single policy provision which Plaintiff has purportedly violated.

For this same reason, Defendant's criticism of Plaintiff for supposedly having "ignor[ed] his own obligation to read his insurance contract" are seriously misguided. *Defendant's Brief p. 17.* Three appellate judges have carefully reviewed the insuring agreement and were unable to find any language warning the insureds that some sort of notice and proof needed to be tendered and rejected before an action could be brought for covered expenses. *Kincaid,* 183 Ohio App. 3d 748 ¶ 20. A number of such conditions had been included in the aforementioned "LAWSUITS AGAINST US" clause, but none apply in this instance. *Class Action Complaint, Exhibit A, p. 11.* Perhaps Defendant should have spent more time "reading" the standard form policies before issuing them to the insureds.

It is also evident that notifying Defendant of a desire to be reimbursed for the Additional Benefits and submitting even infallible proof would have been pointless. As revealed in the insurer's pleadings, Defendant's position is that the distinction between "first party" and "third party" claims precludes any such recovery. *First Amended Answer, paragraphs 31 & 37.* Even though this contention is seriously flawed, a lawsuit is needed to conclusively dispel the defense. A pre-suit demand undoubtedly would have been rejected on this basis. The law never requires the performance of a vain act. *House v. Moomaw* (2nd Dist. 1964), 120 Ohio App. 23, 40, 201 N.E.2d 66, 78; *Pearl Street Sav. & Trust Co. v. Smolensky* (9th Dist. 1933), 16 Ohio Law Abs. 33, 1933 W.L. 1585.

e. The Available Case of Law

One of the cases which Defendant has openly acknowledged is "identical" to the case at bar is *Kavouras, supra*, which remains pending in the U.S. District Court for the Northern District of Ohio. *Defendant's Brief, p. 3 fn. 1 on December 1, 2008.* District Judge Donald C. Nugent has rejected the insurer's attempts to imply "notice" provisions in that instance which would defeat the claims for reimbursement which had been brought. Just like the Eighth District below, the federal court concluded in a decision which was rendered on December 1, 2008 that the insureds' allegations that they had satisfied all conditions precedent to coverage were sufficient to overcome the motion to dismiss that had been brought.[4]

Another compelling decision reaching the same sensible result was rendered by a Florida federal court in *Johnson*, 2008 W.L. 4793616. An identical class action proceeding had been filed which also sought unreimbursed expenses from a motorist insurer. The carrier filed a motion to dismiss which was strikingly similar to that which was granted in the trial court proceedings below. Notably, the insurer in *Johnson* relied heavily upon *Edwards v. Prudential Prop. & Cas. Co.* (2003), 357 N.J. Super. 196, 814 A. 2d 1115, which is also the focus of Defendant's Brief. But the District Judge was unimpressed and denied the motion with respect to the claims for breach of contract, declaratory relief, and equitable remedies.

Unable to locate any Ohio authorities which advocate an implied pre-suit notice and proof requirement, Defendant has implored this Court to follow the logic of *Edwards*, 357 N.J. Super. 196. *Defendant's Brief, pp. 10, 18 & 20.* The only support

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4 A copy of that decision is attached as Exhibit A to the Reply Brief that Plaintiff

which the New Jersey court offered for the unwritten duty that was imposed was the following statement from 8 CORBIN ON CONTRACTS, §37.11 (1999):

> *** if only the promisee possesses information necessary for performance of a contract term, "notice to the promisor is, by construction of law, a condition of the promisor's duty to perform".

CORBIN actually requires the rejection of Defendant's Motion, as was recognized in *Hardy v. Minnesota Life Ins. Co.*, (June 25, 2009), U.S. Dist. Ct., N.D., Ohio Case No. 1:08CV2714, 2009 W.L. 1850998. The plaintiff had brought a class action lawsuit in which she maintained that her life insurer had "unlawfully failed to refund the unearned premiums on credit insurance policies ***." *Id., *1.* Just as in the instant action, the insurer demanded an immediate dismissal on the grounds that "it is obligated to provide a refund once it receives notice of the right to a refund." *Id.* The carrier continued "that because it received no notice that [the plaintiff] had paid off her loan, it had no way of knowing that a refund was due." *Id.*

The plaintiff responded that while the policy did contain a notice requirement and thirty-day deadline, "the insurance contract [was] silent as to the person or entity responsible for notification, thereby placing no duty on [her] to notify Minnesota Life of the loan pay-off." *Id., at *3.* Interestingly, she successfully used the aforementioned section of Corbin to her advantage:

> Citing 8 Corbin on Contracts §37.11 (1999), [plaintiff] asserts that Minnesota Life had access to notice of the early loan termination and, that where the facts of notice can be discovered by either party to the contract, notice is not a condition precedent to performance. Further, [plaintiff] maintains that Ohio Administrative Code § 3901 requires insurance companies to communicate with creditors and

(..continued)
submitted to the Court of Appeals on February 29, 2009.

> that Minnesota Life is statutorily required to obtain "notice" of terminated loans and refunds owed. Ms. Hardy asserts that Ohio Revised Code §§ 3918.05 and 3918.08, governing refunds of unearned premiums, are incorporated into the insurance contract and that no conditions precedent, whether express or implied, are permissible because the duty to refund is unconditional.

Id., at *3. District Judge Nugent agreed and reasoned that:

> In her First Amended Complaint, [plaintiff] claims to have satisfied all conditions precedent to a refund of unearned premiums and that Minnesota Life failed to provide said refund. <u>While the applicable Group Policy states that Minnesota Life will provide a refund, when due, within 30 days of being notified that a refund is due, the contract is silent as to who is required to provide notice and by what means.</u> Therefore, the Court finds the insurance contract to be ambiguous. <u>If [plaintiff] complied with the conditions precedent to a refund, as alleged in the First Amended Complaint, and Minnesota Life failed to provide the refund, she could prevail on her breach of contract claim.</u> *Hrnyak v. Mid-West National Life Insurance Co.,* Case No. 1:08 CV 2642, unreported, 2009 U.S. Dist. LEXIS 23377 at *12-13, 2009 WL 735851 (N.D. Ohio March 20, 2009.) Accepting the allegations in the First Amended Complaint relative to [Plaintiff's] breach of contract claim as true, [plaintiff] has stated claims sufficient to withstand dismissal. [emphasis added]

Id., at *4.

The same sound result is warranted in the instant case. Here, there is no pre-suit notice requirement in the policy at all which could even arguable apply. As in *Hardy*, "the contract is silent as to who is required to provide notice and by what means." *Id., at* *4. Only Defendant is privy to that critical information. Dutifully reading the policy cover-to-cover will <u>not</u> reveal whether it is the insurer or the insured which is to initiate the process. It is certainly reasonably to assume that the initial responsibility falls upon Defendant, as Section 13(d)(9) of the General Policy

Conditions directed that that the insurer had to be allowed "at our request" to obtain "copies of records" from the insured. *Class Action Complaint, Exhibit A, p. 12.* A policyholder who decides to nevertheless take the initiative will be unable to determine, moreover, what needs to be submitted and where the materials have to be sent. Defendant is thus in no position to berate Plaintiff for supposedly having failed to follow the "proper" procedure for securing the Additional Benefits.

And the insurer does indeed bear a responsibility to ensure that a claimant who has been approved for liability coverage (as Plaintiff indisputably was in this case) is apprised of all available benefits:

> (1) 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.
>
> ***

Ohio Admin Code §3901-1-54(E).

Because they are parties to the insurance contracts and "asserting a right to payment under an insurance policy," the Plaintiff qualifies as a "first party claimant." *Ohio Admin. Code §3901-1-54(C)(8).* There will be no dispute in this case that he submitted a timely and proper claim under the "Liability Protection" section of the motorist insurance policy which was approved by Defendant. *Class Action Complaint, ¶ 11-15.* A legal defense would not have been furnished to him against Spilar's lawsuit, and the settlement certainly never would have been paid, had his claim for coverage been unacceptable for any reason. Since a valid "claim" was "presented" to the carrier, Ohio Admin. Code §3901-1-54(E)(1) <u>mandated</u> that Plaintiff was to be affirmatively advised of <u>all</u> the benefits available. Included within the "Liability Protection" coverage

is where the "Additional Expenses" provision, which lies at the heart of this action. *Class Action Complaint, Exhibit A, p. 6.* Just as in *Hardy*, 2009 W.L. 1850998, there was no reasonable to believe that initiating the reimbursement process rested solely upon the policyholder.

f. The Plain and Ordinary Terms

While courts in New Jersey may be receptive to adding new terms to insurance agreements which had been omitted by the contracting parties, that has never been the practice in Ohio. Largely at the urging of the insurance industry, Ohio's judiciary has steadfastly refused to glean new terms and provisions from unambiguous insurance contracts. *Atwood v. State Farm Mut. Ins. Co.* (4th Dist. 1990), 68 Ohio App.3d 179, 182, 587 N.E.2d 936, 937 (*** insurance policies are to be given their ordinary meaning and are not to be expanded by judicial fiat ***.)

The Eighth District should be applauded for scrupulously adhering to these principles of judicial restraint. The panel noted that Defendant's failure to include a pre-suit notice and proof requirement in the policy appeared to be "illogical," but nevertheless refused to imply terms where none existed. *Kincaid*, 183 Ohio App. 3d 748 ¶ 20. Regardless of the practical implications for the parties, the courts of Ohio have never been in the business of judicially re-writing insurance policies which appear to have been drafted improvidently. *McNally v. American States Ins. Co.* (6th Cir. 1962), 308 F.2d 438, 445; *Schwartz v. Stewart Title Guar. Co.* (8th Dist. 1999), 134 Ohio App.3d 601, 607, 731 N.E.2d 1159, 1163.

Other examples of Ohio courts refusing to imply new terms in insurance contracts are legion. In *Travelers Indem. Co. v. Reddick* (1974), 37 Ohio St.2d 119,

308 N.E.2d 454, the insureds urged this Court to construe a purportedly ambiguous "physical contact" requirement in a hit-and-run motor vehicle clause to permit uninsured motorist coverage even though the tortfeasor's vehicle had never struck their automobile. The unanimous opinion concluded that there was "nothing uncertain" about the terms appearing in the policy and refused to stray beyond the actual language employed. *Id.,* 37 Ohio St.2d at 122. Likewise, the insureds argued in *Cincinnati Indemn. Co. v. Martin,* 85 Ohio St.3d 604, 1999-Ohio-322, 710 N.E.2d 677, that a "bodily injury to an insured" clause should be read to permit coverage even for non-insureds. In affirming the entry of summary judgment in favor of the insurer, the majority specifically observed that:

> It is well established that when the language in an insurance policy is clear and unambiguous, we must enforce the contract as written and give the words their plan and ordinary meaning. *Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd.* (1992), 64 Ohio St.3d 657, 665, 597 N.E.2d 1096, 1102.

Id., 85 Ohio St.3d at 607. This principle has been upheld again and again during the course of Ohio jurisprudence. *Rhoades v. Equitable Life Assur. Soc. Of U.S.* (1978), 54 Ohio St.2d 45, 47, 374 N.E.2d 643, 644 ("Where the provisions of the policy are clear and unambiguous, courts cannot enlarge the contract by implication so as to embrace an object distinct from that originally contemplated by the parties."); *Cincinnati Ins. Co. v. Kramer* (1st Dist. 1993), 91 Ohio App.3d 528, 531, 632 N.E.2d 1333, 1334 ("When the provisions of an insurance contract are clear and unambiguous, courts cannot enlarge the coverage by implying terms that are not in the agreement."); *Progressive Ins. Co. v. Tarpeh* (8th Dist. 1996), 116 Ohio App.3d 634, 637, 688 N.E.2d 1102, 1104 (refusing to "liberally" construe policy in favor of insured since language

was "clear and unambiguous"); *Mueller v. Taylor Rental Cntr.* (8th Dist. 1995), 106 Ohio App.3d 806, 809, 667 N.E.2d 427, 429 (affirming grant of summary judgment in favor of insurer because unambiguous policy language "must be applied as written, without judicial interpretation."); *White v. Ogle* (8th Dist. 1979), 67 Ohio App.2d 35, 39, 425 N.E.2d 926, 929 ("An insurance company is only liable according to the terms and provisions of its contract, and not otherwise.")

The great irony is, of course, that Defendant is now imploring this Court to imply conditions precedent into the Additional Payment provision of the Liability Protection coverage which will deny reimbursement to every insured, save for those few who are somehow privy to this unwritten rule of law. The insurer plainly is in no position to suggest that some sort of "ambiguity" exists, given that a small army of attorneys and insurance experts undoubtedly had been retained for the purpose of ensuring that Defendant's rights and interests were fully protected under the standard form policies. There is simply no dancing around the fact that the plain and ordinary terms of the insuring agreement do <u>not</u> impose any "conditions precedent" for expense reimbursements which Plaintiff could have conceivably violated, as a matter of law. The Motion for Judgment on the Pleadings was thus properly denied with respect to the claim of breach of contract.

2. BREACH OF FIDUCIARY DUTY.

Count II of the Complaint alleges a claim of breach of fiduciary duties. *Class Action Complaint, pp. 15-16.* As a result of the special trust that is created in Ohio by the relationship between the insurer and insured, such responsibilities are owed. *Buemi v. Mutual of Omaha Ins. Co.* (8th Dist. 1987), 37 Ohio App.3d 113, 116, 524

N.E.2d 183, 186; *Heekin v. Mutual of Omaha Ins. Co.* (8th Dist. 1989), 1989 W.L. 4157 *3. It has thus been recognized that:

> In Ohio, an insurance company has a fiduciary responsibility toward its insureds to act in good faith toward its insureds in carrying out its duties under the contract. [citations omitted]

Red Head Brass, Inc. v. Buckeye Union Ins. Co. (9th Dist. 1999), 135 Ohio App.3d 616, 632, 735 N.E.2d 48, 59; see also *Jokic v. State Auto. Mut. Ins. Co.*, 11th Dist. No. 2004-L-135, 2005-Ohio-7044, 2005 W.L. 3610428 ¶ 34.

"The fiduciary owes a duty of the most perfect and scrupulous good faith ('*uberrima fides*') to his principal." *Myer v. Preferred Credit, Inc.* (Harrison C.P. 2001), 117 Ohio Misc.2d 8, 22, 2001-Ohio-4190, 766 N.E.2d 612, 622 ¶ 15. The rule thus follows that:

> The creation of a fiduciary duty may arise out of contract or out of an informal relationship where both parties understand that a special trust or confidence has been reposed. *Stone v. Davis* (1981), 66 Ohio St.2d 74, 20 O.O.3d 64, 66-67, 419 N.E.2d 1094, 1097-1098; *Umbaugh Pole Bldg. Co. v. Scott* (1979), 58 Ohio St.2d 282, 12 O.O.3d 279, 390 N.E.2d 320. "'A "fiduciary relationship" is one in which a special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust.'" *Stone, supra,* quoting *In re Termination of Emp.* (1974), 40 Ohio St.2d 107, 115, 69 O.O.2d 512, 517, 321 N.E.2d 603, 609. A person who occupies a fiduciary relationship to another acts as an agent to that person and owes the utmost loyalty and honesty to the principal. *Testa v. Roberts* (1988), 44 Ohio App.3d 161, 165, 542 N.E.2d 654, 659.

Thompson v. Cent. Ohio Cellular, Inc. (8th Dist. 1994), 93 Ohio App.3d 530, 540, 639 N.E.2d 462, 468; see also *Spalding v. Coulson* (8th Dist. 1995), 104 Ohio App.3d 62, 80, 661 N.E.2d 197, 209. One of the hallmarks of this special relationship is the

fiduciary's obligation of full and complete disclosure. *Nagy v. Jackson* (8th Dist. 1930), 8 Ohio Law Abs. 670, 1930 W.L. 2226; *Foust v. Valleybrook Realty Co.* (6th Dist. 1981), 4 Ohio App.3d 164, 165, 466 N.E.2d 1122, 1125. Once an insurer has induced the trust of the insured with comforting policy language or soothing promotional advertising, the "assumed duty doctrine" will impose a burden to affirmatively dispel any misunderstandings which may develop. *Baughman v. State Farm Mut. Auto. Ins. Co.*, 9th Dist. No. 22204, 2005-Ohio-6980, 2005 W.L. 3556406, ¶ 41-48; *Thomas v. Nationwide Mut. Ins. Co.*, (8th Dist. 2008), 117 Ohio App. 3d 502, 520-522, 2008-Ohio-3662, 895, N.E. 2d 217..

As with the claim for Breach of Contract, the Class Action Complaint satisfactorily alleges all the essential elements of a claim of Breach of Fiduciary Duties in full compliance with Civ.R. 8(A). *Class Action Complaint, ¶ 36-43.* Once the time has come for the merits of this theory of recovery to be presented, there will be no serious dispute that Defendant has steadfastly and systematically refused to alert their insureds to the availability of reimbursement for the expenses they know have been incurred during the course of the covered lawsuits. Purposefully remaining silent about the funds which are owed is decidedly contrary to the fiduciary obligations of full disclosure.

As previously observed, the Ohio Department of Insurance requires all carriers doing business in this State to "fully disclose to first party claimants all pertinent benefits, coverages, or other provisions of an insurance contract under which a claim is presented." *Ohio Admin. Code §3901-01-54(E)(1).* Plaintiff dutifully "presented" a claim for "Liability Protection" coverage which was accepted and approved by

Defendant. *Class Action Complaint, ¶ 12-15 & 33.* There is thus no truth to Defendant's insinuations that the insured failed to perfect his "claim" with "properly executed proof[s] of loss" as required to trigger this duty of disclosure. *Defendant's Brief, p. 19.* The insurer seems to be arguing that benefits need not be disclosed under Ohio Admin. Code §3901-1-54(E)(1) until the insured first submits a claim to them, which makes no sense at all. *Id.* One does not need to be informed of that which has already been sought. The substantially more logical interpretation of the regulation is that a general claim for Liability Protection must be submitted, and the Proof of Loss required by the policy presented (*i.e.*, the details of the accident and the nature of the damages/injuries sustained) before the insurer is obligated to ensure that the claimant is aware of all potentially available benefits.

There also can be no merit to the notion that the regulation can be satisfied simply by expecting the insureds to "read their own policies." Under that tortured construction Ohio Admin. Code §3901-1-54(E)(1) would no longer serve any discernable purpose. Given that <u>all</u> insurance benefits and coverages are explicitly set forth in the written agreements, and such policies are required to be furnished to every insured, it is evident that the regulation requires an affirmative effort beyond that. Otherwise, there would have been no reason to promulgate the directive.

Plaintiff is mindful that these Department of Insurance regulations do not establish independent causes of action upon which damages may be recovered. *Furr v. State Farm Mut. Auto. Ins. Co.* (6th Dist. 1998), 128 Ohio App.3d 607, 616-617, 716 N.E.2d 250, 257. In recognition of this, he has predicated his demands for relief against Defendant instead upon the well-recognized theories of breach of contract

(Count I), Bad Faith/Breach of the Covenant of Good Faith and Fair Dealing (Count II), and Declaratory Judgment (Count IV). Even though they do not create private rights of recovery, Defendant remains obligated to abide by the mandates of the Department of Insurance and evidence of noncompliance will be admissible in these proceedings. See generally, *Chambers v. St. Mary's Sch.*, 82 Ohio St.3d 563, 1998-Ohio-184, 697 N.E.2d 198, syllabus ("The violation of an administrative rule does not constitute negligence *per se*; however, such a violation may be admissible as evidence of negligence."); *Rak v. Safeco Ins. Co. of Am.*, 8th Dist. No. 84318, 2004-Ohio-6284, 2004 W.L. 2676740 ¶ 27 (citing Ohio Admin. Code §3901-1-54(G)(2) in justifying reversal of summary judgment upon breach of insurance contract claim); *Banks v. Nationwide Mut. Fire Ins. Co.* (Nov. 28, 2000), 10th Dist. No. 99 AP-1413, 2000 W.L. 1742064 *3 (overturning trial judge's dismissal of breach of contract claim based, in part, upon Ohio Admin. Code §3901-1-54); *Piersoll v. Keaton* (Oct. 31, 2000), 10th Dist. No. 00 AP-392, 2000 W.L. 1617780 *1 (motorist insurer cites Ohio Admin. Code §3901-1-54(G)(5) in support of its motion for summary judgment); *Laibson v. CNA Ins. Cos.* (May 14, 1999), 1st Dist. No. C-980736, 1999 W.L. 299899 *2 (Ohio Admin. Code §3901-1-54(G)(5) is cited in support of affirming summary judgment entered in favor of motorist insurer).

This principle was confirmed in *Cope v. Metropolitan Life Ins. Co.*, 82 Ohio St.3d 426, 1998-Ohio-405, 696 N.E.2d 1001. A life insurer had been charged with neglecting, among other things, to furnish notifications required by Ohio Admin. Code §3901-1-36. *Id.*, 82 Ohio St.3d at 427. "The gravamen of [plaintiffs'] complaint is that MetLife engaged in a scheme to collect larger commissions and front-end load charges

by intentionally omitting the state-mandated written disclosure warning when issuing replacement life insurance." *Id.* at 433. In permitting the plaintiffs to proceed with the class action lawsuit, the unanimous Court explained that:

> In light of all the foregoing, we conclude that the trial court abused its discretion in denying class certification. Indeed, we cannot imagine a case more suited for class action treatment than this one. This case involves the use of form documents, standardized practices and procedures, common omissions spelled out in written contracts, and allegations of a widespread scheme to circumvent statutory and regulatory disclosure requirements, any one of which has been held to warrant class action treatment. [emphasis added]

Id., at 438. The instant Defendant's indifference to Ohio Admin. Code §3901-1-54(E)(1) should be treated no differently.

In support of the position that none of the insureds needed to be advised of the "Additional Payments" which were available once their Liability Protection claims were approved, Defendant had previously cited *Nickschinski v. Sentry Ins. Co.* (8th Dist. 1993), 88 Ohio App. 3d 185, 623 N.E. 2d 660. *Defendant's Motion, pp. 3-4.* That Court had recognized the general rule that "an insured is charged with knowledge of the contents of his insurance contract." *Id,* 88 Ohio App. 3d at 195 (citations omitted). The circumstances of that case did not implicate, and the panel was not called upon to consider, the affirmative obligation of disclosure which is imposed by Ohio Admin. Code §3901-1-54(E)(1). The Department of Insurance has determined that once a claim has been "presented", the insurers is obligated to "fully disclose *** all pertinent benefits, coverages or other provisions of an insurance contract". *Id.* The general rule has thus been superseded by the agency and, at least where the regulation applies, insurers are no longer entitled to expect that the insureds will comb through the fine

print of their policies on their own to determine all the benefits which are due.

Defendant's own authorities recognize that exceptions exist to the general rule that insurers are not obliged to advise insureds of the contents of their policies. The carrier had prominently cited *Baughman*, 2005-Ohio-6980, and *Martin v. Grange Mut. Ins. Co.* (11th Dist. 2001), 143 Ohio App. 3d 332, 757 N.E. 2d 1251, for the proposition that "Ohio courts have held that there was no such duty as a matter of law." *Defendant's Motion, p. 4.* Actually, in *Baughman* the Ninth District concluded that a jury issue existed as to whether the motorist insurer's fiduciary obligations did indeed require changes in the policyholder's legal rights to be affirmatively disclosed to them. *Id,* 2005-Ohio-6980 ¶ 21. In similar fashion, the *Martin* court had held that summary judgment had been improperly granted where there was evidence that the insurer had voluntarily assumed the duty to apprise the insureds of developments in the law. *Id,* 143 Ohio App. 3d at 349-340.

Recently, the Eighth District had occasion to confirm an exception to this general rule in, 177 Ohio App. 3d 502. The dispute between the motorist insurer and policyholder was whether timely "written proof" of the claim had been submitted in compliance with the explicit terms of coverage. *Id,* 177 Ohio App. 3d at 519-520. The majority observed that such notice requirements can be waived, and insurers estopped from enforcing them, by words and conduct. *Id,* at 520-521. Significantly in that instance, "at no time did [the agent] advise [plaintiff] that she needed to submit written proof of her claim to [the insurer]." *Id,* at 522. This and additional factors led this Court to conclude that the plaintiff "presented sufficient evidence, *if believed,* that would permit reasonable minds to reach different conclusions on the issue of whether

[the insurer], by its words, actions, and conduct, waived the strict compliance of requiring [the insured] to submit written proof of her claim." *Id*, at 522 (italics original).

Of course, the fact remains that even a careful scrutiny of the standardized policies will never disclose when and how a claim for Additional Benefits is supposed to be made. Undoubtedly in an effort to discourage such applications, that vital information was never openly shared. The Eighth District thus properly determined that the claim for breach of fiduciary duties was not susceptible to an immediate dismissal under Rule 12(C).

3. DECLARATORY RELIEF.

With respect to Count IV, the three elements necessary for securing a declaratory judgment are (1) a real controversy between adverse parties, (2) which is justicable in character, and (3) requires speedy relief to preserve rights which may be otherwise impaired or lost. *Fairview Gen. Hosp. v. Fletcher* (1992), 63 Ohio St.3d 146, 148-149, 586 N.E.2d 80, 82; *Grange Mut. Cas. Co. v. Smith* (4th Dist. 1992), 80 Ohio App.3d 426, 430, 609 N.E.2d 585, 587. The "actual controversy" requirement of R.C. §2721.02 is not as strict as Defendant has maintained. The Cuyahoga County Court of Appeals has explained that:

> A "controversy" exists for purposes of a declaratory judgment when there is a genuine dispute between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. [citation omitted]

Wagner v. City of Cleveland (8th Dist. 1988), 62 Ohio App.3d 8, 13, 574 N.E.2d 533, 536; *see also Halley v. Ohio Co.* (8th Dist. 1995), 107 Ohio App.3d 518, 524-525, 669

N.E.2d 70, 74-75.

In this instance, a declaratory judgment may be necessary to establish issues of law which are common to all the class members. For example, such a remedy may be appropriate with respect to Defendant's misguided argument that a policyholder who is known to have incurred covered expenses must still issue some sort of "proof of loss" and await an actual "refusal" from the carrier before legal action may be commenced. There is, of course, no such requirement in the "Liability Protection" policy language. Likewise, a declaratory judgment would be a suitable means of extinguishing the notion that the "notice" of the request for reimbursement must be furnished within a defined period of time. The insuring agreement which Defendant drafted and issued contains no such deadlines for "Additional Payments." Finally, a judicial declaration appears to be warranted with regard to Defendant's contention that the distinction between "first party" and "third party" benefits somehow precludes Additional Payments from being recovered at all. *First Amended Answer, paragraphs 31 & 37.*

The availability of declaratory relief to resolve insurance-related disputes is well-recognized. *Travelers Indem. Co. v. Cochrane* (1951), 155 Ohio St. 305, 312, 98 N.E.2d 840, 844 ("The courts have frequently rendered declaratory judgments as to the validity and construction of various kinds of insurance contracts and as to the rights of parties arising therefrom."); *Motorists Mut. Ins. Co. v. Brandenburg*, 72 Ohio St.3d 157, 159, 1995-Ohio-281, 648 N.E.2d 488, 490 ("It is beyond dispute that questions concerning insurance policies are within the preview of R.C. Chapter 2721."); *Preferred Risk Ins. Co. v. Gill* (1987), 30 Ohio St.3d 108, 112-113, 507 N.E.2d 1118, 1122 ("We hold, therefore, that an insurer may maintain a declaratory judgment action

under R.C. Chapter 2721 for purposes of establishing its rights and obligations under a contract of insurance.").

Defendant's repeated citations to *Mid-American Fire and Cas. Co. v. Heasley,* 113 Ohio St.3d 133, 2007-Ohio-1248, 863 N.E.2d 142, are puzzling. The insurer had sued its policyholder seeking a judicial declaration that no *Scott-Pontzer* benefits were available following the issuance of the *Galatis* decision. *Id.,* 113 Ohio St.3d at 135 ¶5-6. The insurer appeared to be unconcerned that the insured was not actually seeking such coverage. *Id.* This Court observed that "such a claim would be frivolous" and any entitlement to "UM/UIM payments as a result of *Scott-Pontzer* were extinguished by *Galatis.*" *Id.*, at 136-137.

Since Defendant has yet to identify any Supreme Court authority which also "extinguishes" the instant Plaintiff's claim for unreimbursed expenses, *Mid-American Fire* has no conceivable application. The question of whether such "Additional Benefits" are available to a first-party claimant is still legitimately in dispute. Dismissal of Count IV is thus unwarranted.

C. PLAINTIFF'S STANDING TO PURSUE HIS CLAIMS FOR RELIEF.

Since there is no avoiding the verity that the policy at issue does not impose any requirements of pre-suit notice or proof for expense reimbursement claims, Defendant has sought to salvage the missing policy provision through the doctrine of standing. *Defendant's Brief, pp. 4-11.* That rudimentary requirement is not particularly difficult to satisfy, as this Court has explained that:

> "Standing" is defined at its most basic as "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right." Black's Law Dictionary (8th Ed. 2004) 1442. Before an Ohio court can consider the merits of a legal

> claim, the person or entity seeking relief must establish standing to sue. *Ohio Contrs. Assn. v. Bickling* (1994), 71 Ohio St.3d 318, 320, 643 N.E.2d 1088. "'[T]he question of standing depends upon whether the party has alleged such a "personal stake in the outcome of the controversy ***" as to ensure that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution."'" *State ex rel. Dallman v. Franklin Cty. Court of Common Pleas* (1973), 35 Ohio St.2d 176, 178-179, 64 O.O.2d 103, 298 N.E.2d 515, quoting *Sierra Club v. Morton* (1972), 405 U.S. 727, 732, 92 S.Ct. 1361, 31 L.Ed.2d 636, quoting *Baker v. Carr* (1962), 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663, and *Flast v. Cohen* (1968), 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947.

Ohio Pyro, Inc. v. Ohio Dept. of Comm., 115 Ohio St.3d 375, 381, 2007-Ohio-5024, 875 N.E.2d 550, 557. In the case *sub judice*, the pleadings establish that the Plaintiff is entitled to funds which – the two Answers and Motion to Dismiss attest – Defendant has yet to tender. He thus possesses a real and immediate stake in the controversy.

Defendant has cited a number of authorities equating standing with an "injury in fact." *Defendant's Brief, pp. 4-7.* Plaintiff has no quarrel with this fundamental principle. But not a single case has been identified even remotely suggesting that a rejection of pre-suit notice and proof is necessary for such an injury to exist. *Id.*

In Defendant's peculiar view, no "controversy" is "ripe" and litigation is impermissible as long as the prospect exists that the defendant will accede to the plaintiff's pre-suit demand. The implications of Defendant's nonsensical position are truly staggering. A lawsuit could not be brought immediately to enjoin illegal dumping activities and recover clean-up costs until the polluter had disclaimed any intention of doing so voluntarily. In order to possess standing to sue for a debt due upon a note, a creditor would first have to present notice and proof to the debtor and wait for a

rejection before the dispute was "ripe." A potential defendant in a personal injury action could delay the filing of the claim indefinitely simply by ignoring the plaintiff's pre-suit notice and proof. It is undoubtedly for these reasons that no Court has apparently adopted the revolutionary view that an actionable controversy does not exist until the moment putative defendant explicitly rejects the claim.

The more sensible view is that standing concerns only whether the party bringing the action will be directly benefitted or injured by a judgment. *State ex rel. Toledo v. Lucas Cty. Bd. Of Elec.*, 95 Ohio St.3d 73, 75, 2002-Ohio-1383, 765 N.E.2d 854, 857; *State ex rel. Sinay v. Sodders*, 80 Ohio St.3d 224, 226, 1997-Ohio-344, 685 N.E.2d 754, 757; *Broadview Hts. v. Baron* (8th Dist. 2000), 139 Ohio App.3d 729, 748, 745 N.E.2d 516, 531; *Midland Funding L.L.C. v. Stowe*, 7th Dist. No. 08 CO 32, 2009-Ohio-7084, 2009 W.L. 5258458 ¶18. It should go without saying that Plaintiff will realize a benefit if he prevails upon any of his three remaining causes of action since he will receive the reimbursement which is due to him under his policy. Pre-suit demands and rejections have never been a requirement of standing, and this Court should decline the invitation to revamp the venerable doctrine now.

CONCLUSION

Because the Eighth District justifiably determined that the Class Action Complaint alleges potentially viable claims for relief for purposes of Civ. R. 12(C), the eminently sensible ruling should be affirmed in all respects.

Respectfully submitted,

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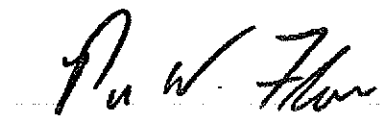

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CERTIFICATE OF SERVICE

I hereby certify that the forgoing **Brief** was served via regular U.S. Mail on this 28th day of May, 2010 upon:

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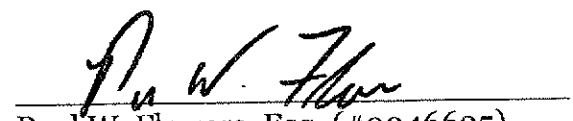

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