

ORIGINAL

IN THE SUPREME COURT OF OHIO

THE LINCOLN ELECTRIC COMPANY,	:	
	:	Case No. 2013-1088
Petitioner,	:	
	:	
v.	:	On Certified Question from
	:	the United States District Court
TRAVELERS CASUALTY AND	:	for the Northern District of Ohio
SURETY COMPANY, et al.,	:	Eastern Division
	:	Case No. 1:11-2253
Respondents.	:	

BRIEF OF AMICI CURIAE OF JOSEPH B. STULBERG, JD, Ph.D,
 MICHAEL E. MORITZ CHAIR IN ALTERNATIVE DISPUTE RESOLUTION,
 MICHAEL E. MORITZ COLLEGE OF LAW AND WILBUR C. LEATHERBERRY,
 PROFESSOR EMERITUS OF LAW AT CASE WESTERN RESERVE UNIVERSITY
 IN SUPPORT OF PETITIONER

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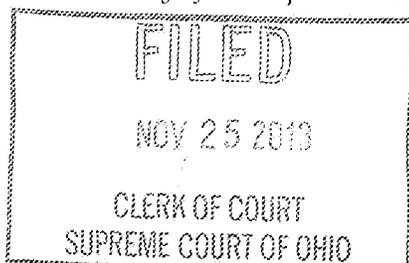
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TABLE OF CONTENTS

TABLE OF CONTENTS..... i-ii

TABLE OF AUTHORITIES.....iii-iv

INTEREST OF AMICI CURIAE.....1

STATEMENT OF THE CASE.....2

LAW AND ARGUMENT3

Proposition of Law No. 1:3

THE LAW AND PUBLIC POLICY STRONGLY FAVOR THE SETTLEMENT OF DISPUTES.....3

 A. This Court and the intermediate courts of appeals have demonstrated a staunch commitment to fostering rules of law that favor settlement.....3

 1. The Court’s commitment to the development of alternative dispute resolution mechanisms is evident from its actions to support ADR initiatives throughout Ohio.....5

 2. The Court has consistently supported rules of law that advance, rather than impede, the successful settlement of disputes8

 B. Ohio’s support of ADR policy initiatives and rules of law favoring settlement of disputes parallels federal law and policy12

Proposition of Law No. 2:15

A RULE OF LAW THAT IS PERCEIVED TO REQUIRE A PARTY TO FORFEIT A LEGAL RIGHT OR PAY A SETTLEMENT PENALTY IN ORDER TO CONTINUE NEGOTIATIONS WORKS AGAINST THE PUBLIC POLICY FAVORING SETTLEMENT.....15

A.	Good faith bargaining is a core value in law, theory and successful negotiation practice.....	16
B.	Flexibility is central to successful negotiation.....	18
C.	The incentives to settle must outweigh the perceived disadvantages.....	20
	CERTIFICATE OF SERVICE	23

TABLE OF AUTHORITIES

CASES

<i>Bogan v. Progressive Casualty Insurance Co.</i> , 36 Ohio St.3d 22, 521 N.E.2d 447 (1988).....	4, 9, 11
<i>Centennial Ins. Co. v. Liberty Mut. Ins. Co.</i> , 62 Ohio St.2d 221, 404 N.E.2d 759 (1980).....	3
<i>City of Akron v. SERB</i> , 9th Dist. Summit No. 26227, 2013-Ohio-1213.....	16
<i>Con Agra v. NLRB</i> , 117 F.3d 1435 (D.C. Cir. 1997)	16
<i>Continental W. Condominium Unit Owners Assn. v. Howard E. Ferguson, Inc.</i> , 74 Ohio St.3d 501, 660 N.E.2d 431 (1996).....	8
<i>Fidelholtz v. Peller</i> , 81 Ohio St.3d 197, 690 N.E.2d 502 (1998).....	20
<i>Fulmer v. Insura Prop. & Cas. Co.</i> , 94 Ohio St.3d 85, 760 N.E.2d 392 (2002)	10, 11
<i>Goodrich Corp. v. Commercial Union Ins. Co.</i> , 9th Dist. Summit Case Nos. 23585 & 23586, 2008-Ohio-3200	20
<i>Krischbaum v. Dillon</i> , 58 Ohio St.3d 58, 567 N.E.2d 1291 (1991)	3, 8
<i>Landis v. Grange Mut. Ins. Co.</i> , 82 Ohio St.3d 339, 695 N.E.2d 1140 (1998)	9
<i>NLRB v. GE</i> , 418 F.2d 736 (2nd Cir. 1969).....	16
<i>NLRB v. Katz</i> , 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed.2d 230 (1962)	16
<i>Ortiz v. United States Fid. & Guar. Co.</i> , 8th Dist. Cuyahoga No. 86966, 2005-Ohio-5982	4
<i>Seng v. Seng</i> , 12th Dist. Clermont No. CA2007-12-1201, 2008-Ohio-6758	4
<i>Shallenberger v. Motorist Mut. Ins. Co.</i> , 167 Ohio St. 494, 150 N.E.2d 295 (1958).....	3

<i>Spercel v. Sterling Industries, Inc.</i> , 31 Ohio St.2d 36, 285 N.E.2d 324 (1972).....	4, 8
<i>State ex rel. Wright v. Weyandt</i> , 50 Ohio St.2d 194, 363 N.E.2d 1387 (1977).....	3
<i>Triplett v. Rosen</i> , 10th Dist. Franklin Nos. 92AP-816, 92AP-817, 1992 Ohio App. LEXIS 6787 (Dec. 29, 1992).....	4, 11
<i>Twinsburg City Sch. Dist. Bd. v. SERB</i> , 172 Ohio App.3d 535, 2007-Ohio-957.....	16

STATE STATUES AND ADMINISTRATIVE REGULATIONS

Administrative Dispute Resolution Act, 5 U.S.C. § 571	13
Negotiated Rulemaking Act of 1996, 5 U.S.C. § 561	13, 14
28 U.S.C. § 651	14
R.C. 1343.02(A)	9
R.C. Chapter 2710.....	7
R.C. 2711.02-03.....	7
R.C. 2711.21-24.....	7
Ohio Rules of Evidence 408	5
Ohio Rules of Professional Conduct at Rule 4.1	18
Ohio Rules of Superintendence 15 & 16	6

INTEREST OF AMICI CURIAE

Professor Joseph B. Stulberg is the current Michael E. Moritz Chair in Alternative Dispute Resolution at The Ohio State University Michael E. Moritz College of Law. He teaches courses primarily in the area of alternative dispute resolution (“ADR”). A former vice president of the American Arbitration Association in charge of its Community Dispute Services program, Professor Stulberg has been active in the ADR field as a practitioner, scholar, and teacher since 1973. Professor Stulberg has trained more than 8,500 people in 45 states to serve in court, agency-based, or community-based dispute resolution programs. He developed and conducted the prototype 40-hour mediator training programs for the Supreme Courts of Florida and Michigan; designed and implemented the first peer-mediation program in New York City public schools; teamed with Partners for Democratic Change to deliver dispute resolution training to governmental and NGO leaders in Central and Eastern Europe; and has taught courses on mediation theory and practice at multiple U.S. law schools and for university students in Western, Central, and Eastern Europe.

Professor Wilbur C. Leatherberry is an emeritus professor of law at Case Western Reserve University. Professor Leatherberry taught insurance law for forty years. He also has been active in the field of Alternative Dispute Resolution and helped to design the ADR program for the United States District Court for the Northern District of Ohio. He has served frequently as a neutral in mediation and arbitration processes, both

private and court-annexed, and has conducted ADR training programs both for neutrals and advocates. Many of the mediations in which he has participated involved insurance issues.

Because of their scholarly and practical experience in ADR, Professors Stulberg and Leatherberry have a keen interest in advancing the development of rules of law that support ADR, adhere to the negotiation policies and practices that advance settlement efforts, and avoid rigid bargaining frameworks that undermine settlement efforts.

STATEMENT OF THE CASE

The United States District Court for the Northern District of Ohio, Eastern Division, has certified the following question to this Court:

May an insured who has accrued indemnity and defense costs arising from progressive injuries, and who settles resultant claims against primary insurer(s) on a pro rata allocation basis among various primary insurance policies, employ an all sums method to aggregate unreimbursed losses and thereby reach the attachment point(s) of one or more excess insurance policies?

Amici curiae submit that an overriding principle that should be considered in answering this question is the State's strong public policy favoring application of the rule of law in a way that encourages the out-of-court resolution of disputes. If, by virtue of reaching an out-of-court settlement with its primary insurers on a *pro rata* basis, a policyholder is required to give up its rights to pursue its excess insurers on a

more favorable all sums basis, a policyholder will be discouraged from reaching out-of-court resolutions of its coverage disputes.

LAW AND ARGUMENT

Proposition of Law No. 1:

THE LAW AND PUBLIC POLICY STRONGLY FAVOR THE SETTLEMENT OF DISPUTES.

- A. This Court and the intermediate courts of appeals have demonstrated a staunch commitment to fostering rules of law that favor settlement.**

This Court has a long tradition of supporting rules of law and practices that favor the settlement of disputes. While its disposition to favor settlement extends far back into the Court's jurisprudence, the Court re-affirmed its importance in the modern era. In *Krischbaum v. Dillon*, 58 Ohio St.3d 58, 69-70, 567 N.E.2d 1291 (1991), the Court explained the rationale for supporting the settlement of litigation as follows:

"The law favors prevention of litigation by compromise and settlement." *State ex rel. Wright v. Weyandt* (1977), 50 Ohio St.2d 194, 4 O.O. 383, 363 N.E.2d 1387, syllabus; *Shallenberger v. Motorist Mut. Ins. Co.* (1958), 167 Ohio St. 494, 505, 5 O.O.2d 173, 180, 150 N.E.2d 295, 302. Given the explosion of litigation so characteristic of the modern era, it is essential that the settlement of litigation be facilitated, not impeded. So long as there is no evidence of collusion, in bad faith, to the detriment of other, non-settling parties, the settlement of litigation will be encouraged and upheld.

See also Wright v. Weyandt, 50 Ohio St.2d at 197 (noting that it is "common sense" for the law to favor settlement of disputes); *Centennial Ins. Co. v. Liberty Mut. Ins. Co.*, 62 Ohio

St.2d 221, 223, 404 N.E.2d 759 (1980) (recognizing that there are public *and* private interests in obtaining the prompt and just settlement of insurance claims).

The intermediate appellate courts have heeded and embraced this Court's commitment to fostering rules of law that support settlement. Citing this Court's opinion in *Bogan v. Progressive Casualty Insurance Co.*, 36 Ohio St.3d 22, 521 N.E.2d 447 (1988), the Tenth District expanded upon the rationale, stating:

It is uncontroverted that public policy favors settlement. When parties agree to settle cases, litigation is avoided, costs of litigation are contained, and the legal system is relieved of the burden of resolving the dispute with the resulting effect of alleviating an already overcrowded docket. When the amount of settlement is less than the policy limits, the unpaid amount may represent a significant savings costs since litigation was avoided or curtailed . . . Thus, separate from the contract of insurance, considerations of public policy generally favor settlements.

Triplett v. Rosen, 10th Dist. Franklin Nos. 92AP-816, 92AP-817, 1992 Ohio App. LEXIS 6787, *18 (Dec. 29, 1992). See also *Ortiz v. United States Fid. & Guar. Co.*, 8th Dist. Cuyahoga No. 86966, 2005-Ohio-5982, ¶ 21 (same); *Seng v. Seng*, 12th Dist. Clermont No. CA2007-12-1201, 2008-Ohio-6758, ¶ 8 ("The resolution of controversies * * * by means of compromise and settlement * * * results in a saving of time for the parties, the lawyers, and the courts, and it is thus advantageous to judicial administration, and, in turn, to government as a whole.") (citing *Spercel v. Sterling Industries, Inc.*, 31 Ohio St.2d 36, 38, 285 N.E.2d 324 (1972)).

Thus, there exists in Ohio jurisprudence a long and deep vein of support for the concept that the law should favor the out-of-court resolution of disputes.

- 1. The Court's commitment to the development of alternative dispute resolution mechanisms is evident from its actions to support ADR initiatives throughout Ohio.**

This Court's strong commitment to fostering the settlement of disputes in order to avoid the consequences, costs and uncertainty of litigation is evident not only in the Court's opinions, but also in its actions. For example, in 1980 the Court adopted Ohio Rule of Evidence 408, which renders settlement offers and conduct or statements made in compromise negotiations generally inadmissible to prove or disapprove a claim or its amount. By adopting this rule, the Court assured litigants of the freedom to pursue settlement discussions free of the fear that something they say or do to privately settle their dispute could be used against them, should their efforts not be successful.

The Court took another major step forward to making ADR truly a meaningful option in 1989 when it created an Advisory Committee on Dispute Resolution and again in 1992 when it established the Dispute Resolution Section within the Court. The Section's mission – to provide technical assistance and training to courts interested in providing ADR programs and to promote statewide rules and uniform standards for such programs – greatly enhances the availability and effectiveness of ADR, particularly mediation, throughout the judicial system. The work of the Advisory Committee and the Section dovetailed with the work of the Ohio Commission on Dispute Resolution and Conflict Management, which was created by the Ohio General Assembly in 1989 to support the development of ADR programs in Ohio schools, communities, government

and the courts. The Court again assumed a critical leadership role and re-energized its support for ADR in 2012 when it elevated the Advisory Committee to commission status. As the Chief Justice noted in her comments announcing the adoption of Ohio Rules of Superintendence 16.01 through 16.14 to create the new Commission on Dispute Resolution: "Elevating the status of the dispute resolution advisory body reflects the importance of this work throughout Ohio courts." See *Supreme Court Creates New Dispute Resolution Commission* (Jan. 5, 2012)¹

The new Commission can be expected to carry forward and build upon the many ADR initiatives implemented by the Court and the General Assembly over the past two decades. These initiatives include, among other things, the adoption of ADR programs as part of the local courts' comprehensive case-management programs and the adoption of Rules of Superintendence to establish the qualifications of mediators in certain court-administered programs. See Sup.R. 15 & 16. Although the Court has not required local courts to implement mediation programs or services, Sup.R. 16(A) requires local courts to consider a local rule providing for mediation. And, "there has been a steady increase in the both the numbers and types of courts that offer quality mediation services in Ohio." See *Court Connected Mediation in Ohio*.²

¹ Available at: www.supremecourt.ohio.gov/PIO/news/2012/disputeResComm_010512.asp (accessed Nov. 6, 2013).

² Available at: www.sconet.state.oh.us/JCS/disputeResolution/resources/mediation/asp (accessed Nov. 6, 2013).

Another key initiative, put in place at the Court's urging, was the adoption of the Uniform Mediation Act in 2005. That Act governs the practice of mediation in this State and also provides mediation participants and the mediator with a privilege regarding communications made during a mediation. *See* R.C. Chapter 2710. In 2001 and 2003, respectively, the General Assembly amended the laws governing arbitration in Ohio to further promote the expeditious resolution of commercial construction disputes and medical malpractice disputes – two areas in which there is frequent, costly and complex litigation involving multiple parties and insurance companies. *See* R.C. 2711.02-.03; R.C. 2711.21-24. Most recently, the Court exercised its leadership to address, together with the legislative and executive branches of government, the foreclosure crisis. The Court's 2008 Foreclosure Mediation Program Model was a key component of the "Save the Dream" initiative, helping Ohioans facing foreclosure stay in their homes and ameliorating effects of the foreclosure crisis on the broader economy.

As these examples illustrate, Ohio's public policy in support of the compromise and settlement of disputes has been implemented by the Court and the General Assembly in both word and deed. The commitment to ADR initiatives has grown stronger over the years. Experience demonstrates that ADR is highly beneficial to litigants and the courts and should be supported by rules of law and procedure that foster its use and do not needlessly impede on the litigants' ability to achieve their objectives in a fair and timely fashion.

2. The Court has consistently supported rules of law that advance, rather than impede, the successful settlement of disputes.

While the Court's leadership in making ADR a meaningful component of the system of judicial administration in Ohio is one way in which it has demonstrated its commitment to the settlement of disputes, an equally important role has been to articulate rules of law that favor the successful settlement of disputes. Examples of such rules of law are prevalent. For example, in *Spercel v. Sterling Industries, Inc.*, the Court held that where parties voluntarily enter into an oral settlement agreement in the presence of the court, "such agreement constitutes a binding contract" that may not be unilaterally repudiated and may be rescinded only by means of a motion to set aside the agreement. *Id.*, 31 Ohio St.2d 36, paragraphs one and two of the syllabus. Yet, in *Continental W. Condominium Unit Owners Assn. v. Howard E. Ferguson, Inc.*, 74 Ohio St.3d 501, 660 N.E.2d 431 (1996), the Court held that a party to a settlement agreement can avoid performance by the other party by filing a satisfaction of judgment. While the two cases may seem inconsistent, they are reconciled by the fact that the law favors settlements as a means to terminate the litigation. In both cases, the Court chose as its rule of law the principle that would best protect the conclusive resolution of the dispute and terminate the litigation. *See also Krischbaum v. Dillon*, 58 Ohio St.3d at 69 (holding it is not against public policy for legatees to settle a will contest with one of several beneficiaries named in the will).

The Court has noted the strong public policy favoring the settlement of disputes

in a number of cases involving insurance coverage disputes. For example, in *Landis v. Grange Mut. Ins. Co.*, 82 Ohio St.3d 339, 695 N.E.2d 1140 (1998), the Court held that claims based upon an insurance policy are contract claims for purposes of R.C. 1343.02(A), even when they arise out of tortious conduct, such that prejudgment interest is available to the policyholder even if the insurer denies benefits in good faith. *Id.* at 341. The rule of law announced in *Landis* favors the settlement of coverage disputes because it minimizes the insurer's motivation to use delay in settling to its advantage, and thereby may increase the likelihood of a quicker settlement.

In *Bogan v. Progressive Casualty Ins. Co.*, the Court was called upon to address the effect of an "exhaustion clause," which required the policyholder to exhaust the limits of the tortfeasor's insurance policy before seeking coverage under his underinsured motorist policy, in the context of a less-than-limits settlement. The Court held that the exhaustion requirement is satisfied even though the policyholder settles with the tortfeasor's insurer for less than its policy limits, provided that the policyholder fills the gap by crediting the underinsured motorist the difference between the settlement amount and the underlying insurer's policy limits. *Id.*, 36 Ohio St.3d 22, paragraph two of the syllabus. The Court noted that this result read the exhaustion clause "as it was intended, *i.e.*, a threshold requirement and not a barrier to underinsured motorist insurance coverage." *Id.* at 28. But, it also noted, *id.* at 25-26, that the result was consistent with the strong public policy favoring settlement of disputes, saying:

There are of course a number of considerations which militate in favor of settlement between the underinsured tortfeasor's insurer and the injured party. Obviously, settlement avoids litigation with its attendant expenses and resultant burden upon the legal system. Where the amount of settlement is less than the policy limits, the unpaid amount may well represent the savings in litigation costs for both sides. More importantly, settlement hastens the payment to the injured party who obviously needs compensation soon after the injuries when the medical expenses begin to amass and when the anxiety level is probably quite high. Additionally, there are many situations where litigation would not be a preferred course of action because, while the injuries are certain, there may remain other problems of proof. Thus, the public policy considerations, apart from the contract of the parties, generally favor settlements.

Because of conflicting courts of appeals' decisions interpreting *Bogan*, the Court subsequently clarified and re-affirmed its holding in *Fulmer v. Insura Prop. & Cas. Co.*, 94 Ohio St.3d 85, 760 N.E.2d 392 (2002). In *Fulmer*, the Court declined to read *Bogan* and hold that in order to satisfy the exhaustion requirement the insured must show that the difference between the policy limit and the settlement was approximately equal to the litigation expense saved by the settlement. The Court instead held that an insured satisfies an exhaustion requirement in her underinsured motorist policy when she receives any amount in settlement with the injured party and agrees to limit her right to proceed against her insurer for only those amounts in excess of the tortfeasor's available policy limits. *Fulmer*, Syllabus 2. The Court again spoke to how its ruling furthered the public interest in settling disputes and avoiding litigation:

For the foregoing reasons, we reject the court of appeals' interpretation of *Bogan*, which takes the complex decision that an injured insured must make and boils it down to an equation that does not, and cannot, take into account all of the factors important in the decision.

Fulmer's interpretation, on the other hand, accurately reflects the *Bogan* court's posture on the issue. That is, Fulmer's interpretation permits an injured insured to take into account all of the factors important to her in determining how much she is willing to accept to settle her claim against the tortfeasor, and at the same time protects her underinsurer from paying more than it bargained for by giving it credit for the full amount of the tortfeasor's available policy limit.

Id., 94 Ohio St.3d at 95.

While *Bogan* and *Fulmer* involved underinsured motorists policies, the same rationale and result was extended to interpret an exhaustion clause in a commercial liability excess insurance policy in *Triplett v. Rosen*, 10th Dist. Franklin No. 92AP-816, 92AP-817, 1992 Ohio App. LEXIS 6787 (Dec. 29, 1992). The court of appeals followed *Bogan* and held that the underlying primary policy could be exhausted by a less-than-limits settlement, provided that the insured absorbed the difference between the settlement amount and the primary policy limits. *Triplett's* holding relied on the strong public policy favoring settlements, so long as the outcome is not foreclosed by policy language. *Id.* at 18.

As these examples illustrate, the Court has compiled a notable record for considering how a particular rule of law will advance or hinder the strong public interest in favoring the settlement and compromise of disputes. The Court should stay its course in deciding this case. In a complex dispute such as that presented here, where there are multiple parties and multiple interests, the Court should seek out and apply

the rule of law that will best support the parties' ability to timely settle such suits, without requiring any party to forfeit its rights or pay a settlement penalty.

B. Ohio's support of ADR policy initiatives and rules of law favoring settlement of disputes parallels federal law and policy.

The State of Ohio is certainly not alone in developing a robust public policy in favor of ADR. Ohio's pro-ADR policy has grown in tandem with corresponding developments at the federal level, implicating both administrative agencies and courts.

Academics and practitioners who focus on ADR often identify the Roscoe Pound Conference of 1976 as the genesis for transformative growth in federal efforts to encourage ADR as a matter of national policy. At that conference, which was sponsored by the American Bar Association, the Conference of Chief Justices, and the Judicial Conference of the United States, former U.S. Supreme Court Chief Justice Warren Burger invited Frank Sander, then a Professor of Law at Harvard, to present an academic paper in which Professor Sander noted the explosion in civil litigation, described its inevitable and costly drain on the resources of the courts, and challenged the prevailing assumption that courts must always be "the natural and obvious dispute resolvers." Frank E.A. Sander, *Varieties of Dispute Processing*, in *The Pound Conference: Perspectives on Justice in the Future* 65, 67 (A. Leo Levin & Russell R. Wheeler eds., 1979). Professor Sander then examined various forms of ADR and the key criteria that determine how particular disputes might best be resolved extrajudicially. *Id.* at 68-79.

He concluded by advocating a "flexible and diverse panoply of dispute resolution processes," with case assignments to be made based upon those criteria. *Id.* at 83.

Since Professor Sander presented his watershed paper at the Pound Conference, Congress has noted the ever-increasing demands placed upon administrative agencies and federal courts and has acted to codify specific federal policies implementing and favoring ADR. In 1990 and 1996, for example, Congress enacted and amended the Administrative Dispute Resolution Act, 5 U.S.C. § 571 *et seq.*, upon its finding that "the availability of a wide range of dispute resolution procedures, and an increased understanding of the most effective use of such procedures, will enhance the operation of the Government and better serve the public." *See* Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320 (amending Pub. L. No. 101-552 and Pub. L. No. 102-354); *see also* 5 U.S.C. § 571 *et seq.* Also within the sphere of administrative law, Congress enacted the Negotiated Rulemaking Act of 1996, 5 U.S.C. § 561 *et seq.*, after finding that adversarial rulemaking "deprives the affected parties and the public of the benefits of face-to-face negotiations and cooperation in developing and reaching agreement on a rule." Pub. L. No. 101-648, Section 2, *amended by* Pub. L. No. 104-320.

Next, in the Alternative Dispute Resolution Act of 1998, Congress expressly incorporated pro-ADR policies into the federal judiciary and Title 28 of the U.S. Code, authorizing the use of ADR processes in "all civil actions" and the designation and training of employees or judicial officers "knowledgeable in [ADR] practices and

processes to implement, administer, oversee, and evaluate the court's [ADR] program." 28 U.S.C. § 651(b) & (d). In the same Act, Congress authorized the Federal Judicial Center and the Administrative Office of the United States Courts to "assist the district courts in the establishment and improvement of alternative dispute resolution programs by identifying particular practices employed in successful programs and providing additional assistance as needed and appropriate." 28 U.S.C. § 651(f).

The Executive Branch, too, has made ADR a key aspect of federal policy. In 1991, for example, President George Bush signed Executive Order 12778, which he intended to address "the tremendous growth in civil litigation" that has "burdened the American court system" and "imposed high costs on American individuals, small businesses, industry, professionals, and government at all levels." 56 Fed. Reg. 55195. President Bush noted that the harmful consequences of "current litigation practices" could be ameliorated by "encouraging voluntary dispute resolution" and he ordered the administration's litigation counsel to make "reasonable attempts to resolve a dispute expeditiously and properly before proceeding to trial." *Id.*

As the foregoing brief chronology reveals, Ohio's strong public policy in favor of ADR has much in common with similar policies advanced at the federal level over the last few decades. The existence of (and compelling practical need for) these pro-ADR policies is no longer subject to reasonable debate. Now that the policies themselves are in place at both the state and federal levels, it is critical to identify the specific practices

and judicial norms that will foster and encourage implementation of those policies, instead of undermining them. As the following discussion will show, this certified-question case presents this Court with an opportunity to support and advance the state and national public policies in favor of settlement by answering the question certified in a manner that will preserve negotiator flexibility, encourage multi-party engagement in settlement discussions, and preserve the settlement incentives that are necessary to bring willing parties to the bargaining table for productive discussion and resolution of complex insurance coverage claims.

Proposition of Law No. 2:

A RULE OF LAW THAT IS PERCEIVED TO REQUIRE A PARTY TO FORFEIT A LEGAL RIGHT OR PAY A SETTLEMENT PENALTY IN ORDER TO CONTINUE NEGOTIATIONS WORKS AGAINST THE PUBLIC POLICY FAVORING SETTLEMENT.

Parties settle litigation by negotiating in good faith to achieve their objectives through a give-and-take compromise of their respective litigation positions. When parties negotiate, each develops and advances proposals to resolve multiple issues; their counterpart assesses whether those proposals, or possible counter-proposals, reflect an outcome that is preferable to pursuing non-negotiation. If each concludes that the final proposals are more desirable than non-negotiating alternatives, then they settle; if either party assesses that the non-negotiating alternatives are more desirable, then that party will not – and should not – settle. In negotiating parlance made famous by the late Harvard Law Professor Roger Fisher, negotiating parties say – and should

say – “yes” to proposed settlement terms when they reflect an outcome more desirable than each party’s Best Alternative to a Negotiated Agreement (“BATNA”). Fisher et al., *Getting To Yes: Negotiating Agreement Without Giving In*, at 102 (3d Ed. 2011). And, they should say “no” when the alternative is more desirable than the final negotiating proposal. (*Id.*)

Negotiators employ multiple, credible negotiating tactics and styles. Whatever theoretical approach anchors a negotiator’s strategy – principled bargaining (*Getting to Yes*), competitive or distributive bargaining (Korobkin, *Negotiation Theory and Strategy* at 25-191 (2d Ed. 2009), or some blend (Mnookin et al., *Beyond Winning: Negotiating to Create Value in Deals and Disputes*, at 11-92 (2000)) – there are certain values that lace any approach and have been recognized in legal doctrine. Three are central to this case.

A. Good faith bargaining is a core value in law, theory and successful negotiation practice.

Good faith bargaining does not require making concessions, nor does it forbid hard bargaining. Good faith bargaining, however, does prohibit two bargaining tactics: advancing proposals on a take-it-or-leave-it basis, *NLRB v. GE*, 418 F.2d 736 (2nd Cir. 1969) and engaging in so-called “surface bargaining,” where a party hints at being willing to consider proposals, but in fact is simply stonewalling. See *NLRB v. Katz*, 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed.2d 230 (1962); *Con Agra v. NLRB*, 117 F.3d 1435, 1444 (D.C. Cir. 1997). See also *City of Akron v. SERB*, 9th Dist. Summit No. 26227, 2013-Ohio-1213, ¶ 7-10; *Twinsburg City Sch. Dist. Bd. v. SERB*, 172 Ohio App.3d 535, 2007-Ohio-957, ¶ 18.

Bargaining in good faith requires that parties be open to considering their counterpart's proposal and assessing whether bargaining options reflect a more desirable option than non-negotiated options.

Legal constructs (particularly judicial decisions binding statewide) that limit the positions a negotiating party may take, or limit a party's ability to respond to its counterpart's proposal, may impinge upon good-faith bargaining to the detriment of both parties. For example, as the Petitioner suggests here, if a policyholder in an all sums jurisdiction (like Ohio) believes that it must forfeit a right it otherwise would have or incur a settlement penalty by settling on a *pro rata* basis with its primary insurer, then the policyholder understandably will be resistant when its primary insurer proposes a *pro rata* settlement framework. The policyholder may feel that it has no choice but to insist upon a full coverage settlement on a take-it-or-leave-it basis in order to accept a *pro rata* settlement so that it does not forfeit its all sums rights against other non-settling insurers. Yet, the insurer may be equally sure that it will never agree to settle just one of several triggered policies and will insist upon a *pro rata* settlement at significantly less than full coverage. While neither party may have the conscious intent to engage in a form of surface bargaining, the effect may be the same because the external rule of law has forced the parties to an early impasse. Negotiation will have little chance of success in this scenario, even though both parties otherwise would be eager to have good-faith negotiations continue.

B. Flexibility is central to successful negotiation.

Flexibility is central to negotiation at both the substantive and process level. Bargaining conduct presumes flexibility in a party's bargaining position on at least some issues. Harvard Business Professor Howard Raiffa's classic statement from a game-theoretic perspective, *The Art and Science of Negotiation*, at 44-46 (1982), states it simply: a party's opening position – its *initial proposal* – is not identical to its *reservation price* (Raiffa's term for "bottom line"). In colloquial terms, each party develops bargaining proposals to resolve a particular issue that allows them bargaining space to compromise. This concept of bargaining space is recognized in the Ohio Rules of Professional Conduct at Rule 4.1. In providing guidance regarding a lawyer's duty to provide factual information to other parties, Comment 2 to Rule 4.1 states: "Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category...[.]" In other words, when a lawyer conveys a party's opening position in settlement negotiations, it need not be evidence-based and may differ from what the lawyer expects to show at trial, in order to leave room to bargain toward the bottom-line. At the substance level, negotiators conduct their bargaining with the goal and skill-set to move effectively through the bargaining space and assess

whether there exists a *zone of agreement* in which the reservation prices of the parties overlap. If there is such a zone, then agreement is possible.

Process flexibility is as important as substantive flexibility, particularly in multi-party negotiations. Negotiating conduct is not regulated or shaped by the equivalent of a jurisdiction's rules of civil procedure or its trial practice protocols. Parties engage in settlement discussions by either using tactics and strategies that are presumed shared and acceptable or negotiating explicitly some aspects of the process. Harvard Law Professor Robert H. Mnookin writes that a lawyer should prepare for and negotiate process, including matters beyond mere logistics, such as what topics should be addressed and in what sequence, and the like. *Beyond Winning, supra*, at 209. Multiple factors properly influence decisions regarding meeting sequences, information sharing, and bargaining tempos. Artificial parameters imposed on such dynamics, whether derived from power disparities or structural settlement incentives, can license substantive bargaining rigidity by a party. And such bargaining rigidity predictably leads to unnecessary, but significant, settlement penalties for those parties committed to conducting negotiations in good faith.

A rule of law that limits negotiation flexibility at either the substance level or the process level works against the public policy of favoring settlement over continued litigation. For example, in this case, if a policyholder perceives that *pro rata* settlement with its primary insurer will work a forfeiture of an important right or cause it to incur

a settlement penalty and the primary insurer is equally convinced that a *pro rata* settlement framework is essential to assure it of a final resolution, it is difficult to see how the parties can effectively negotiate. The law will hinder the parties from moving the settlement process along to see if there is that zone of agreement as to their dispute. This result will negatively impact policyholders and insurers because settlement will be much more difficult, more costly or, in the worst-case scenario, impossible.

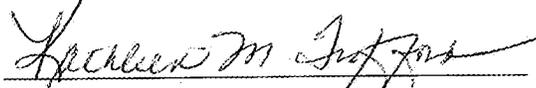
C. The incentives to settle must outweigh the perceived disadvantages.

Parties settle lawsuits because the proposed settlement terms reflect what is important to them. Settlement is possible because each party's priorities differ, so it is possible to "dove-tail" settlement terms that advance or secure each party's priorities. Ohio law recognizes this crucial settlement dimension. In *Fidelholtz v. Peller*, 81 Ohio St.3d 197, 201, 690 N.E.2d 502 (1998), the Ohio Supreme Court noted that a party can find settlement in its interest on such grounds as avoiding adverse publicity or maintaining commercial relationships. And such insights guided the Court of Appeals in *Goodrich Corp. v. Commercial Union Ins. Co.*, 9th Dist. Summit Case Nos. 23585 & 23586, 2008-Ohio-3200, ¶ 42-44, to recognize in a similar vein that defendant insurance companies, in settling insurance coverage disputes over environmental liability issues, might agree to dollar amounts that reflect interests beyond projected past clean-up costs, such as the value of releases from future claims or projected trial costs.

All of these varying incentives may well be present in negotiations between a commercial liability policyholder and its primary insurer(s), yet they could be completely overshadowed by the policyholder's perception that it will suffer a forfeiture of its right to proceed against an excess insurer on an all sums basis if it acquiesces to a *pro rata* settlement framework at the primary layer. If the policyholder is unlikely to settle with the primary layer on a *pro rata* basis for less than full coverage, while a *pro rata* settlement for less than full coverage is critically important to the primary insurers, then settlement of significant long-tail liabilities such as those at issue in this case likely will be significantly delayed, if not impossible. The policyholder and the primary insurer(s) will be forced to continue litigating their dispute, even though (but for the perceived forfeiture) they might have found that highly-prized zone of agreement and reap the benefits of settlement on a timely basis.

In sum, the stark consequence of a rule of law that gives rise to a perceived forfeiture is that it undermines each party's attempt to engage in a settlement process in good faith, with flexibility, and with the freedom to consider broad-based interests within the settlement formula. It freezes parties in their bargaining postures, enhances the likelihood that parties will squander scarce resources while engaging in surface bargaining, and undercuts the State's strong policy to promote settlement negotiations.

Respectfully submitted,



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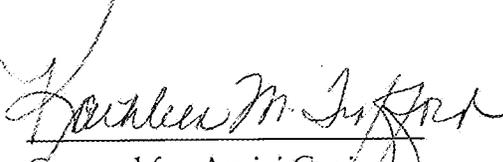
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