ORIGINAL

In The
SUPREME COURT OF OHIO

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

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STATEMENT OF AMICUS INTEREST

Amicus curiae Ohio Insurance Institute ("OII") and its members submit this brief in support of Travelers Casualty and Surety Company and St. Paul Fire and Marine Insurance Company. OII urges the Court to answer the certified question "no."

OII is the professional trade association for property and casualty insurance companies in the State of Ohio, and its members include dozens of domestic insurers as well as reinsurers and foreign insurers. OII's member companies represent over 83% of Ohio's private passenger auto insurance market, 84% of the homeowners market, and 43% of the commercial market (based on 2010 market share reports from the Ohio Department of Insurance). OII provides a wide range of services to its members and to the public, media, and government officials in three primary areas: education and research, legislative and regulatory affairs, and public information. In connection with these activities, OII closely monitors judicial decisions that address important issues of insurance law, and it has selectively participated as amicus curiae in several of this Court's landmark insurance cases. OII is uniquely qualified to provide the Court with a broad perspective on the basic principles of insurance law relevant to this appeal, as well as practical insight into how the answer to the certified question will impact insurers, insureds, and the citizens of Ohio.

STATEMENT OF THE CASE AND FACTS

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

OII urges the Court to answer the certified question "no."

ARGUMENT

I. To answer the certified question, the Court need only compare the method of exhaustion proposed in the question with the method of exhaustion required under the excess policies.

The outcome in this case should be controlled by the simple and true cornerstone of all insurance coverage disputes: "'[I]nsurance policies should be enforced in accordance with their terms as are other written contracts. Where the provisions of a 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.'" *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835, at ¶ 8 (citation omitted); *see also Shifrin v. Forest City Ents., Inc.*, 64 Ohio St.3d 635, 638, 597 N.E.2d 499 (1992) (stating "[w]hen the terms in a contract are unambiguous, courts will not in effect create a new contract by finding an intent not expressed in the clear language employed by the parties.") (Citation omitted). Here, the proponents of a "yes" answer to the certified question uniformly propose ignoring basic excess policy contract language, and thereby enlarging the excess carriers' obligations. The OII urges the Court to reject that approach and instead apply the policies' terms to the undisputed facts to reach a "no" answer to the certified question.

The policy provision at issue here is the exhaustion clause. An exhaustion clause is not some minor provision to be cast aside to serve the interests of one party or the other. It is a central premise of an excess insurer's economic and contractual bargain, and the main reason that a primary policy with a $2 million liability limit has a steep cost, whereas an excess policy with a $10 million liability limit costs substantially, if not exponentially, less.

The exhaustion clause examined in *Fulmer v. Insura Property & Cas. Co.*, 94 Ohio St.3d 85, 87 n. 1, 2002-Ohio-64, 760 N.E.2d 392 , provides a good example for a broad discussion because it states the essence of what many such clauses require: "We will pay under this coverage *only* if . . . [t]he *limits of liability* under any applicable bodily injury liability bonds or policies have been exhausted by payment of *judgments or settlements* . . .." (Emphasis added). To progress from commencement of suit to the point of paying a settlement or judgment, the expense incurred by the primary insurer can often exceed the primary limit of liability. Apart from defense attorney fees themselves, a primary insurer must hire personnel (and incur corresponding overhead for salary and benefits, office space, staff support, etc.) to manage the defense internally. For major litigation, that often means an in-house claim attorney with direct file responsibility, and a hierarchy of executive oversight to assure that successively larger exposures are consistently and soundly handled, evaluated, and resolved. In addition, among other tasks, primary insurers must retain experts, approve the substance of legal briefs, and oversee discovery. In the vast majority of cases, the primary insurer incurs most or all of these expenses before a liability exposure can be evaluated for settlement. The exhaustion-clause requirement that the underlying limits must be paid pursuant to a settlement or to satisfy a judgment takes these costs – and the timing of when they are almost always incurred – into account. The *availability* and *low cost* of a large excess limit of liability for Ohio businesses depends on the ability of excess insurers to enforce their exhaustion clauses.

In other words, an excess insurer's bargain is more than just not paying the primary insurer's limit of liability (which in this case appears to be $2 million). It is also to not incur claim expenses (like defense attorney fees) *and* internal overhead costs that are necessary during the work-up stage of litigation. Despite these facts, the "yes" proponents argue that avoiding payment of the underlying liability limit is the only purpose undergirding an exhaustion clause. One group of amici, for example, argues that if the Court answers "yes," the excess insurers in this case would "not pay a dollar *more* or a moment *sooner* than its policy limits and *attachment point* require." (Ohio Manufacturers' Ass'n et al. amicus curiae brief at 17) (emphasis added)

("OMA amicus brief"). In fact, however, the opposite is true. To understand why, the Court would benefit by first noting that the "yes" proponents substitute the made-up term "attachment point" for what instead should be "satisfy the requirements of the exhaustion clause." The certified question itself does the same thing. But the term "attachment point" means nothing more than a dollar amount, in this case $2 million. To *satisfy the requirements of the exhaustion clause*, however, the "attachment point" must be reached in a particular way, so as to give the excess insurer the benefit of its bargain for providing to the policyholder a large excess liability limit at low cost. In this case, the "yes" proponents want the Court to rule that reaching the "attachment point" is something of an accounting procedure that should be of no legal concern to the excess insurer. As such, none of the "yes" proponents argue that the exhaustion clauses themselves are actually satisfied. Instead, they argue that the "attachment point" can be reached with a mythical accounting shift, thereby making the excess carriers liable *sooner* and for millions of dollars *more* than would be the case if the insured satisfied what the exhaustion clauses actually require. The Court should reject this approach and instead examine precisely what exhaustion clauses require – that excess carriers pay after primary carriers are done paying and not before – and rule accordingly. This approach requires a "no" answer to the certified question.

In addition to using a made-up term as a substitute for satisfaction of the policies' actual exhaustion requirements, the "yes" proponents ground their arguments on a pervasive red herring – that this case presents a question of allocation, when in fact it presents a question of exhaustion. Allocation has occurred, and it is never going to change. Under this Court's *Goodyear* decision, the law "permits the policyholder to seek coverage from any policy in effect during the time period of injury or damage . . . up to that policy's coverage limits." 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835, at ¶ 6. The Referral Order states that Lincoln

Electric selected an allocation method for the policies underlying the targeted excess insurers, and that the primary insurers have paid completed settlements in accordance with Lincoln Electric's choice. (Order at 4). But Lincoln Electric has not shown that the underlying limits have been exhausted by those payments. To the contrary, the primary policies continue to be obligated to pay indemnity for Lincoln Electric's pending and future welding liability. In these circumstances, to permit Lincoln Electric to declare the underlying liability limits exhausted is to prematurely require the excess carriers to pay for defense costs and incur internal overhead costs that are necessary during the work-up stage of pending and future litigation. This would result in excess insurer liability *before* the primary carriers' payment of an underlying judgment or settlement that exhausts the final dollar of their underlying liability limits. This contradicts what the exhaustion clauses require. A declaration that the underlying policy limits are exhausted at a time when the underlying insurers undisputedly remain legally obligated to pay defense and indemnity for pending and future welding claims is a mythical declaration unsupported by the excess insurers' exhaustion clauses. A "yes" answer would greatly enlarge the excess carriers' obligations despite unambiguous contract language proscribing that outcome.

The "yes" proponents also try to equate the circumstances in this case with those in an underinsured-motorist case, like *Fulmer*. (*E.g.*, OMA amicus brief pp. 16-19). But the circumstances are not the same. In cases like *Fulmer*, the *injured claimant* agrees to forego collecting damages for the difference between the settlement amount and the tortfeasor's per-person liability limit. After the settlement, the case *proceeds* as a UIM claim because the injured claimant contends that he or she is still undercompensated even if the forgone damages are taken into account. Here, no claimant contends that he or she is entitled to more than the alleged tortfeasor – Lincoln Electric – and its primary insurers agreed to pay. Instead, every claimant that has agreed to settle his or her case has received the full settlement amount. There is no "gap" for the claimants to forego. In addition, unlike the situation in *Fulmer*, *the settled cases are over*. There is nothing more to do to protect Lincoln Electric from additional liability exposure in those cases. Nevertheless, Lincoln Electric asks to have the underlying limit mythically declared "exhausted," not because there is even a single case that has been litigated to a *Fulmer*-type settlement that will still go forward, but so that *later-filed* cases and *pending* cases (in addition to past cases) can be tendered to the excess carriers *immediately* for defense, *before* the total of the settlements or judgments paid by the underlying policies for all cases is equal to the underlying limit. This would require the excess carriers to incur defense attorney costs, and internal overhead costs, *before* consummation of the settlement, or entry of the judgment, that results in the exhaustion of the underlying policy limit. This in fact would result in the excess insurer's liability a "moment sooner" and for "a dollar more" than if the Court simply enforces what the exhaustion clauses' plain language requires. In addition to the fact that individual auto risks are fundamentally different from multi-claimant long-term-exposure risks, the rationale underlying *Fulmer* does not justify expanding the excess carriers' obligations in the manner the "yes" proponents suggest.

In sum, the exhaustion clause is a central premise of an excess insurer's contractual bargain. Based on what they know actuarially – that the vast majority of cases do not reach the settlement or judgment phase until most of the costs are incurred by the primary insurer – excess insurers can offer Ohio businesses a large limit of commercial excess liability coverage for a relatively modest cost. This is important not only to business and industry in this state, but to its citizenry as well. Business needs insurance to protect its operations; the citizenry expects adequate insurance even when a catastrophic injury occurs. If the Court answers "yes" to the certified question, however, both the cost and the availability of excess coverage would be jeopardized in Ohio, which would become an outlier state in recognizing a policyholder's right to use accounting shifts in lieu of what an excess policy's exhaustion clause actually requires. *See, e.g.*, *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.*, 85 Ohio St.3d 660, 1999-Ohio-292, 710 N.E.2d 116, *reversed,* Westfield *Ins. Co. v. Galatis,* 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256. By answering "no," the Court not only will reinforce the most fundamental of rules governing insurance – that unambiguous policy terms must be enforced as they are written – it will leave the adjustment of risk in the hands of the bargaining parties.

II. The enforcement of the excess insurers' bargained-for contract rights would neither work a forfeiture of policyholder rights nor cast a chill over primary insurance settlements.

The terms "forfeit" and "forfeiture" appear often in the opening briefs, as does the notion that answering "no" to the certified question would doom primary insurance settlements. Neither is apt.

The "yes" proponents' pervasive red herring is perhaps best seen in this contention from one of Lincoln Electric's supporting amici: "Lincoln Electric's settlement with its primary insurer has absolutely no bearing on the applicability of *the 'all sums' language* in the excess policies." (OMA amicus brief at 12) (emphasis added). This case, however, is actually about the *exhaustion* language in the excess policies, and the primary settlement has a direct bearing on whether *those* provisions – which state a condition precedent to the policies' obligation to pay – have been met. This is true because the primary settlement reflects not only Lincoln Electric's choice as to how it wished to allocate indemnity payments, but also *in fact* how indemnity payments have been allocated. As the certification order describes it, "The Primary Policy Agreement provides that, *for purposes of exhausting St. Paul's primary policy limits*, St. Paul's indemnity payments under the Agreement are spread equally (allocated on a 'pro rata' basis) across all primary policies." (Order at 4) (emphasis added). Lincoln Electric does not deny that it elected to allocate indemnity payments in this manner; it does not deny that all past indemnity payments in fact have been allocated in this manner; it does not deny that this allocation regime is never going to change; and it does not deny that the excess policies' exhaustion requirements have yet to be met. When Lincoln Electric negotiated its choice of allocation, it knew what the excess policies required for exhaustion. It did not forfeit its excess coverage; instead, it carefully balanced the risks it foresaw with its primary insurance program against what the terms of its excess policies required.

Now Lincoln Electric apparently regrets that it assumed these negotiated risks and so tries to shift them to third parties, its excess carriers. One of its supporting amicus briefs describes this perfectly: "Lincoln Electric's settlement with its primary insurer has left it with unreimbursed costs for defense and indemnity. This, also, is typical, in that primary insurers, *like all other settling parties*, are motivated to settle only if the settlement will provide some benefit to them." (OMA amicus at 4) (emphasis added). It seems that Lincoln Electric has forgotten to include itself in this universal truth. Lincoln Electric's primary settlement provided it with an enormous benefit. It removed all uncertainty from Lincoln Electric's primary insurance program for a liability exposure that had the potential to do to Lincoln Electric what asbestos liability did to Johns-Manville. If Lincoln Electric had faced no uncertainty – *i.e.,* if it had not faced the potential that some or all of its primary insurers would prevail in the now-settled coverage litigation – it would have had no need to compromise. But it did face such uncertainty, so of course Lincoln Electric had to give the primary insurers something in return. What Lincoln Electric gave up to stabilize the risks to its primary insurance program it now wants to shift to third parties – the excess carriers. And it wants to do so even though (1) the undisputed facts show that the excess policies' exhaustion clauses have not been satisfied; and (2) it proceeded with a course of conduct – the primary settlement – that it knew would impact the manner in which the terms of its excess policy would be met. This is not a forfeiture; it is the application of facts *created by a party's own conduct* to the requirements of a contract.

Nor will the sky fall on primary settlements if the Court answers the certified question "no." This is the same as saying that every case with complicating settlement considerations should have a special substantive rule of law for each complication. Or that settlements that turn out to be less beneficial than perceived at inception should have a special substantive rule of law. Settlements are reached when each party balances its risks against the benefits it perceives. That happened here. Lincoln Electric knew what its excess policies required, and it settled in a way that created facts impacting those requirements. Settlements are not "discouraged" when they operate just as the contracting parties intended.

If anything has the potential to discourage settlement, it would be a "yes" answer to the certified question. This is so because a company facing long-term exposure risks is very likely to have the same insurer as both a primary insurer and an excess insurer, either in the same year or in different years along the triggered horizontal continuum. In that circumstance, a primary insurer would have no reason to settle if the benefit it receives in settlement is immediately lost to an excess policy that it also issued. As Lincoln Electric's supporting amicus aptly points out, parties "are motivated to settle only if the settlement will provide some benefit to them." (OMA amicus at 4). In truth, any risk to primary settlements lies in a "yes" answer to the certified question.

III. Regardless of the Court's answer to the certified question, a targeted insurer must retain a right of contribution from other insurers that provide coverage to the same insured for the same loss paid or expense incurred.

As explained above, OII believes that the certified question should be answered by comparing the method of exhaustion proposed in the question with the method of exhaustion required under the excess policies. As such, Ohio's all-sums allocation rule is not implicated in this appeal. Nevertheless, the certified question presupposes its involvement, and the "yes" proponents argue at length about it. What is concerning to OII is the potential for dictum on the subject to carry over into aspects of all-sums law that are important to insurers, in particular the right of contribution. For that reason, OII has devoted these few paragraphs to that topic.

When it applies, an all-sums allocation rule requires triggered and targeted policies to pay, up to the policy limit, for injury or damage that occurred during one or more other insurer's policy period(s). All sides in this dispute agree that fundamental fairness under such a rule requires a liberal right of a targeted insurer to obtain contribution from other insurers. The Court's decision in *Pennsylvania Gen'l Ins. Co. v. Park-Ohio Indus.*, 126 Ohio St.3d 98, 2010-Ohio-2745, 930 N.E.2d 800, is but one example of how matters beyond the targeted insurer's control could affect its contribution rights. Although this case presents no such issues to the Court, questions such as who must respond if a targeted insurer loses its right of contribution due to the policyholder's actions, or how deductibles, self-insured retentions, and retroactive premiums affect contribution claims, are important to the fairness of Ohio's all-sums rule. Regardless of the answer to the certified question, OII urges the Court to be mindful of the central role contribution plays in the all-sums context.

CONCLUSION

For the reasons detailed above, the Ohio Insurance Institute respectfully urges the Court to answer the certified question "no."

Respectfully submitted,

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