No. 2023-0255

IN THE SUPREME COURT OF OHIO

Certain Underwriters at Lloyd's, London, et al.,	:	
	:	On Appeal from the Court of Appeals
Appellants,	:	Eight Appellate District,
v.	:	Cuyahoga County Court of Appeals
The Sherwin-Williams Company,	:	Case No. CA-20-110187
Appellee.	:	Decided September 1, 2022

BRIEF OF AMICI CURIAE AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, COMPLEX INSURANCE CLAIMS LITIGATION ASSOCIATION, AND NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES IN SUPPORT OF APPELLANTS AND REVERSAL

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IDENTITY AND INTEREST OF AMICI CURIAE

The Complex Insurance Claims Litigation Association ("CICLA"), American Property Casualty Insurance Association ("APCIA"), and National Association of Mutual Insurance Companies ("NAMIC") (collectively, "Amici") are trade associations of property and casualty insurance companies. Together, Amici represent the vast majority of commercial and personal lines insurance companies in the United States. All three Amici seek to assist courts in resolving important insurance cases, regularly appearing as *amicus curiae* in state and federal courts around the country, including this Court – as they recently did in *Acuity v. Masters Pharmaceutical, Inc.*, 169 Ohio St.3d 387, 2022-Ohio-3092, 205 N.E.3d 460 ("*Acuity*").[1]

APCIA is the primary national trade association for home, automobile, and business insurers. With a legacy dating back 150 years, APCIA promotes and protects the viability of private competition to benefit consumers and insurers. APCIA's member companies represent 63 percent of the U.S. property-casualty insurance market, including 73 percent of the commercial insurance market. On issues of importance to the insurance industry and marketplace, APCIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums at the federal and state levels and submits *amicus curiae* briefs in significant cases before federal and state courts.

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[1] Amici have participated as *amicus curiae* on the same or similar issues in cases across the country. *E.g., ACE Amer. Ins. Co. v. Rite Aid Corp.,* 270 A.3d 239 (Del. 2022); *Westfield Nat'l Ins. Co.* v. Q*uest Pharms., Inc. v.*, 57 F.4th 558 (6th Cir. 2023) (participation by CICLA and APCIA); *AIU Ins. Co. v. McKesson Corp.*, No. 22-16158 (9th Cir.) (decision pending).

CICLA is a trade association of major property and casualty insurance companies. Through *amicus curiae* briefs, CICLA seeks to assist courts in understanding and resolving the core coverage issues of greatest importance to insurers today. CICLA has participated as *amicus curiae* in numerous insurance cases in state and federal appellate courts across the United States.

NAMIC consists of more than 1,500 member companies, including seven of the top 10 property/casualty insurers in the United States. The association supports local and regional mutual insurance companies on main streets across America as well as many of the country's largest national insurers. NAMIC member companies write $357 billion in annual premiums and represent 69 percent of homeowners, 56 percent of automobile, and 31 percent of the business insurance markets. Through its advocacy programs NAMIC promotes public policy solutions that benefit member companies and the policyholders they serve and fosters greater understanding and recognition of the unique alignment of interests between management and policyholders of mutual companies.

This case raises important issues of contract interpretation, including application of this Court's ruling in *Acuity*. At issue again here is the application and interpretation of widely used insurance policy language that limits coverage to liability for damages *because of* bodily injury or property damage resulting from an occurrence. Similar or identical language to that used in the Policies at issue here is contained in hundreds of thousands of commercial liability policies across the United States. The decision here will thus affect Amici's members, their policyholders, and

the general commercial liability insurance marketplace as a whole. Amici's interest in this case is vital.

For these reasons, Amici respectfully submit this *amicus curiae* brief.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from an underlying action brought by a group of California municipalities in which Sherwin-Williams and other lead-paint companies were found liable for creating a public nuisance by intentionally promoting lead paint for interior residential use, knowing of the public health hazards. *Cty. of Santa Clara v. Atl. Richfield Co.,* 137 Cal. App. 4th 292, 40 Cal.Rptr.3d 313 (2006) ("*Santa Clara I*"); *People v. ConAgra Grocery Prods. Co.,* 17 Cal. App. 5th 51, 227 Cal.Rptr.3d 499 (2017) ("*Santa Clara II*"). Sherwin-Williams was found liable to the government entities solely on their "representative public nuisance claim" and ordered to fund an abatement plan. In approving the plan, the California trial court explained:

> The Plan targets [ ] homes in the Jurisdictions that pose the greatest risk of lead poisoning to children, requires outreach and education to homeowners, requires trained individuals to inspect homes for lead paint, it utilizes abatement techniques that have been used for decades and have been proven to be safe, and it takes appropriate measures to protect the safety of residents and community members.

People v. Atl. Richfield Co., Cal.Super. No. 100CV788657, 2014 WL 1385823, at *49 (Mar. 26, 2014), *aff'd in part*, *rev'd in part* by *Santa Clara II,* 17 Cal.App. 5th at 106 (upholding trial court's finding that defendants' pre-1951 promotions increased the use of lead paint on residential interiors).

On appeal, the California Court of Appeal affirmed the trial court's finding that Sherwin-Williams was liable because the company affirmatively promoted the use of

lead paint for interior residential use while it had *actual knowledge* that interior residential lead paint would harm children. *Santa Clara II*, 17 Cal. App. 5th at 85, 101. The appellate court also affirmed the trial court's abatement fund order specifically because it provided "*no compensation* to a plaintiff for prior harm." *Id.* at 132 (emphasis added). This is because under the representative public nuisance claim, the government plaintiffs cannot seek "damages" for compensation; they must seek "solely to pay for the prospective removal of the hazards [Sherwin-Williams] had created." *Id.* ("The abatement fund was not a 'thinly-disguised' damages award.… None of these funds were permitted to be utilized to reimburse plaintiff, any of the 10 jurisdictions, or any homeowners for already-incurred costs."); s*ee also Santa Clara I*, 137 Cal.App.4th at 309-310 (distinguishing representative public nuisance claim from products liability action). Following remand, the case ultimately settled for a total of $305 million to be paid into the abatement fund. Sherwin-Williams seeks insurance coverage for its portion of that settlement.

The insurers in this case provided Sherwin-Williams with third-party bodily injury and property damage liability insurance. The policies contain standard CGL language, providing coverage for "damages" "because of," "on account of," or "for" "property damage" or "bodily injury" caused by an "accident" or an "occurrence," where the harm is neither "expected [n]or intended." *Sherwin-Williams Co. v. Certain Underwriters at Lloyd's London*, 8th Dist. Cuyahoga No. 110187, 2022-Ohio-3031 ¶ 88; *see also* Merit Brief of Appellants Certain Underwriters at Lloyd's, London ("Ins. Merits Br.") at 6-7, fn.3 & Supp. 103-113.

This appeal raises three issues: (1) whether, under this Court's decision in *Acuity*, CGL coverage for "damages" "*because of*" "bodily injury" or "property damage" applies to an insured's liability to abate societal harm and prevent future injuries, untethered to "bodily injury" or "property damage" to particular individuals or properties; (2) whether an order requiring the insured to contribute to an abatement fund to cease a public nuisance prospectively and *not to compensate* anyone for past loss or injury constitutes "damages" for purposes of CGL coverage; and (3) whether CGL coverage applies to an insured's liability for a public nuisance where that liability is premised on a finding that the insured had *actual knowledge* of the public hazard created by its conduct.[2]

The trial court granted summary judgment for the insurers on the "damages" issue, holding that the abatement fund did not constitute "damages" as defined in the policies, but rejected the insurers' arguments on fortuity/knowledge issues and did not address the "because of bodily injury or property damage" requirement. On appeal, the Ohio Court of Appeals, Eighth District, reversed summary judgment for the insurers, finding in Sherwin-Williams' favor on all three issues. In its September 1, 2022 decision, the Eighth District held that the abatement fund qualified as "damages" under Ohio law because it had a "compensatory effect," rejected insurers' arguments that Sherwin-Williams' "actual knowledge" of the harm for which it was

[2] While this brief addresses only the first two issues, amici support the amicus brief filed by the Ohio Insurance Institute ("OII"), which addresses the third issue in further detail, including its discussion of the public policy reasons why insurance policies do not provide coverage for non-fortuitous conduct from which harm is substantially certain to result. *See also infra* at 9.

held liable established that it "expected or intended" that harm for purposes of CGL coverage, and applied a "remote-causal-connection theory," requiring a mere connection between the "bodily injury" sustained by children residing in buildings containing lead paints that were promoted by Sherwin-Williams and "property damage" to those buildings. 2022-Ohio-3031, ¶¶ 67-71, 80-82, 90.

Following this Court's decision in *Acuity*, which expressly rejected the Eighth District's remote-causation connection theory, Insurers moved for reconsideration. The Eighth District promptly denied that motion, stating that the insurers' reliance on *Acuity* was "misplaced" because "both the policies and facts" in the case are different. It stated: "The Insurers fail to demonstrate that their policies contain the language that [sic] *Acuity* which required that damages be tied to a particular bodily injury." *Sherwin-Williams Co. v. Certain Underwriters at Lloyd's London*, 8th Dist. Cuyahoga No. 110187, at 2 (Sept. 30, 2022) ("Denial of Rehr'g."). Focusing on the definite article "the" in relation to the term "bodily injury," the Eighth District rejected the insurers' arguments that the structure of the policies and the context of the policy language as a whole independently supported this Court's holding in *Acuity*.

ARGUMENT

Amici submit that the Eighth District's rulings are wrong. ***First***, the plain language and structure of the CGL policies at issue, like those in *Acuity*, make manifest that the nexus required by the terms "because of," "on account of," and "for" is not met by a mere causal nexus. Public nuisance claims that do not seek recovery to compensate specific individuals who suffered bodily injury or to compensate for specific property damage for which the insured is held liable do not establish causality. Further, the fact that the abatement plan includes removal of lead paint from pre-1951 homes does not satisfy *Acuity's* "particular injury" test any more than administering naloxone to particular individuals suffering from opioid addiction did.

Under the Eighth District's ruling, coverage would apply if there is even a remote connection to some bodily injury or property damage, even if the insured's loss bears no direct relationship to the cost of redressing any particular bodily injury or property damage. Such an approach is untenable and would create a multiplier effect on the risks assumed by insurers, unfairly burdening them with claims never intended to be covered, harming policyholders by dissipating available insurance resources for actual bodily injury and property damage claims, and upending the insurance marketplace generally. CGL policies do not—and were never intended to—respond to suits to fund public services unrestricted by any measurable goal of compensating a particular injury. This Court rejected that invitation in *Acuity* and should do so again here.

Second, the Eighth District wrongly concluded that the abatement fund order in the *Santa Clara* action constituted "damages" for purposes of CGL coverage,

deeming the order as having a "compensatory effect" because it effectively reimbursed the government entities for costs they incurred in responding to the lead paint hazard. 2022-Ohio-3031, ¶67. There is no support in the record for that conclusion. Moreover, that rationale misreads the policy language by detaching the term "damages" from the basis of the insured's liability. CGL policies provide coverage for sums the insured is "legally obligated" to pay "as damages." In the *Santa Clara* action, the basis of Sherwin-Williams' liability was defined by the statute governing "representative" public nuisance claims, which expressly prohibited compensatory relief. Indeed, the California Court of Appeal upheld the abatement order in *Santa Clara* precisely because the remedy would not, and could not, be used "to recompense anyone for accrued harm[.]" *Santa Clara II,* 17 Cal.App.5th at 133); Cal. Code Civ. Proc. § 731. Sherwin-Williams was not held liable for property damage to pre-1951 homes (where abatement would have had a "compensatory effect"). Sherwin-Williams was held liable for creating a public health hazard, the remedy for which was solely to eliminate the hazard to avoid *prospective harm*.

Sherwin-Williams' arguments to the contrary are analogous to those rejected by this Court in *Acuity*. Here, the counties' theories of relief were not that specific injuries occurred to specific children or properties because of the insured's conduct. Rather, their claim was that Sherwin-William's alleged promotion of lead paint for interior use was a direct and proximate cause of the lead paint hazards, and the "damages" sought were based on that public-health crisis. That the relief ordered to abate the public nuisance includes removal of lead paint from homes does not

render the relief "compensatory."

Third, that Sherwin-Williams was found to have "actual knowledge" of the public hazard for which it was held liable forecloses coverage based on the fundamental concept of fortuity, the plain language of the policies, and Ohio public policy. Amici support the arguments made by Insurers and amicus the Ohio Insurance Institute ("OII") on this issue. *See* Ins. Merits Br. at 25-38; OII Amicus Br. at 5-11. Both established law and public policy make clear that the conduct for which Sherwin-Williams was held liable in the *Santa Clara* action is neither a covered occurrence nor even an insurable risk. Commercial liability insurance exists to transfer risks presented by an accident or other unforeseeable event. It is not designed to immunize policyholders from the natural consequences of calculated business choices such as the affirmative promotion of a product for use in a particular setting, knowing that such use will harm children. Indeed, to hold otherwise would be to create incentives for companies to engage in knowing or reckless misconduct in pursuit of profits, while also impairing the availability and affordability of insurance for the marketplace at large.

I. CGL POLICIES COVER AN INSURED'S LIABILITY FOR DAMAGES "BECAUSE OF" BODILY INJURY OR PROPERTY DAMAGE TO PARTICULAR INDIVIDUALS OR PROPERTIES, NOT TO ABATE SOCIETAL HARMS OR PREVENT FUTURE INJURIES.

As in *Acuity*, the Plain Language of the Policies Requires a Direct Connection Between the Damages Sought and Bodily Injury or Property Damage to Particular Individuals or Properties.

The Sherwin-Williams Policies contain the key causation language at issue in *Acuity*, where the Court made clear that an insured's liability for corporate conduct

untethered to particularized harm is outside the scope of the insuring agreement. As in *Acuity*, the Policies here provide CGL coverage for "damages" "because of," "on account of," or "for" "property damage" or "bodily injury" caused by an "accident" or an "occurrence." Such terms establish important boundaries on the risks assumed, fundamentally conferring insurance only for damages "because of" or "for" "bodily injury" to a specific, identifiable person or "property damage" to a particular property.

In *Acuity*, applying the ordinary meaning of the term "because of" to mean "by reason of" or "on account of," the Court rejected the 8th District's ""remote-causal-connection theory," holding that more than a tenuous connection between the damages sought and bodily injury was required. Reading the policy as a whole supports the plain language, the Court explained, citing the use of the definite article "the" in referring to "the bodily injury," the loss-in-progress provisions, and emphasizing the central concept of "bodily injury" in the insuring agreements of the policies. *Acuity* at ¶¶ 30-35. Further, had the intent behind CGL coverage been to afford coverage for any suit seeking losses that tangentially relate to bodily injury sustained by a person, the Court reasoned, different language (such as "arising out of") would have been used. *Id.* at ¶ 35. Accordingly, the Court held that it is not enough to establish coverage where the damages sought "merely relate to bodily injury, regardless of whether the claims are in fact tied to any particular bodily injury sustained by a person." *Id.* at ¶ 27.

Acuity applies equally here. All of the Policies contain causative limiting language in the insuring agreements, and the fact that they only cover suits in which

specific bodily injury or property damage must be proven is further supported by other policy provisions. For example, Ultimate Net Loss is defined in the excess policies at issue to mean "the total sum which the Assured, or any company as his insurer, or both, become obligated to pay by reason of personal injury, property damage, or advertising liability claims." *See* Ins. Merits Br. at 7 fn.3 & Supp. 103-113. Consistent with the causative limitation in the primary CGL policies, public nuisance claims do not fall within the definition of Ultimate Net Loss and are likewise outside the scope of coverage under the excess policies.

That conclusion makes sense. How a governmental entity chooses to address broad social harms is both inherently speculative and discretionary; it is untethered to a compensation award for any individual's bodily injury or specific property damage and, therefore, outside the scope of the insurance contract. Given the increasing line of precedent finding (as this Court did in *Acuity*) that insurers do not owe even a duty to defend when the plaintiffs do not have to plead or prove any specific damages "because of" or "for" bodily injury,[3] as well as the national scope of the widely used CGL policy provisions at issue here, this Court should reverse the Eighth District's misreading of the policy language and reiterate its holding in *Acuity*.

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[3] *See Quest Pharm., Inc.*, 57 F.4th at 563 (holding that because the governmental entities in the underlying suits against opioid distributor did not need to plead or prove that their citizens or patients experienced any bodily injury, they did not seek damages "because of" bodily injury); *Rite Aid Corp.*, 270 A.3d at 253-254 (insurer owed no duty to defend the insured drugstore company against lawsuits filed by Ohio counties seeking "economic damages" for losses incurred as a "direct and proximate result" of the company's failure to effectively prevent the diversion of prescription opioids into the illicit market, because damages did not depend on proof of bodily injuries).

Sherwin-Williams Was Not Held Liable to Contribute to the Abatement Fund "Because of" Bodily Injury to Any Particular Person or Damage to Particular Property.

Also analogous to *Acuity*, the governmental plaintiffs in the *Santa Clara* action did not seek "damages because of bodily injury." They did not seek compensation for property damage for specific citizens, and their claim is not derivative of a particular citizen's bodily injury or property damage. Nor could they have done so, as Insurers lay out in their Merits Brief. Ins. Merits Br. at 7-9. Neither "bodily injury" nor "property damage" was an element of the representative public nuisance claim for which Sherwin-Williams was held liable, and the California Court of Appeal expressly held that the governmental plaintiffs were prohibited under the public nuisance statute from using the abatement fund to compensate anyone for past harm. *Id*. at 12-13 (*citing Santa Clara I*, 137 Cal.App.4th at 309; *Cty. of San Luis Obispo v. Abalone All.* 178 Cal.App.3d 848, 860, 223 Cal.Rptr. 846 (1986). The purpose of the abatement fund is to prevent future harm.

In the decision below, the Eighth District nonetheless ruled that the Santa Clara action satisfied the "particular injury" requirement set forth in *Acuity* because "the California government sought to recover the cost of remediating specific pre-1951 homes with lead hazards – not its economic losses." Denial of Rehrg. at 2. But as the Insurers note, the government *did not seek to recover* any remediation costs – it never conducted any remediation and it could not have recovered such costs if it had. Ins. Merits Br. at 23. In any event, the issue is not whether specific individuals or properties will be affected by resolution of the *Santa Clara* action, any more than individuals suffering from opioid addiction would be affected by the damages sought

in *Acuity*. Establishing the existence of lead paint in particular pre-1951 houses was not an element of the public nuisance claim; removing lead paint from those houses is simply part of the effort to prospectively abate the health hazard Sherwin-Williams created. One would hope that the sums collected either through judgments or settlements in the opioid cases at issue in *Acuity* would result in the general public being less affected by the scourge of opioids much the way the abatement fund in California should lessen the general public's exposure to lead paint. But as *Acuity* made clear, a generalized societal benefit is not what CGL policies are intended to cover. *Acuity* at ¶ 39.

Imposing a New Extra-Contractual Risk on Insurance Carriers Would Harm Ohio's Insurance Marketplace.

No public policy reason exists to deviate from the plain application of CGL policy terms limiting coverage to damages "because of" or "for" "bodily injury." To underwrite CGL policies such as the Policies at issue, insurers calculate and pool the risk of damages payable for third-party bodily injury and property damage, which impact different policyholders in different locations at different times. But insurers are not, and cannot be, guarantors against the consequences of all unfortunate events that impact society at large. They are instead risk spreaders, functioning to equalize the known but unpredictably distributed risks defined in their policies' express terms. Premiums are calculated by actuaries based on prior losses for bodily injury and property damage as those terms are understood at the time of underwriting.

By evaluating and distributing risks in this fashion, insurance allows businesses and individuals to pool their risks of specified categories of loss, enabling

them to engage in activities impossible to undertake if they each had to bear the associated risks alone. *See* Robert E. Keeton & Alan I. Widiss, *Insurance Law* 12-13 (1988). This important economic and societal function is accomplished through an actuarially estimated risks-for-premium exchange essential to the integrity of the underwriting process.

Insurers' indemnity obligations are limited to "damages" imposed on the policyholder "because of," "on account of," or "for" "bodily injury," but there is no duty to indemnify the insured for liabilities that do not impose damages for "bodily injury," such as funding the governmental abatement plan to address the public health crisis at issue here. The policy terms limit the risks assumed by the insurer in exchange for a premium. What the government entities might spend responding to social issues is an entirely discretionary matter that may be based on political or other considerations, rather than the economic reasonableness standard that is the touchstone of insurance risk assessment. Because such discretionary expenditures do not in any way constitute a measure of damages for any individual's bodily injury, they fall outside the coverage specific to such injuries.

If this Court failed to enforce this policy language and found coverage for what are essentially expenditures for public services which the government would otherwise be funding itself, it would create excessive uncertainty about the effect of widely used policy language that insurers rely on as fixed and limiting. Both courts and scholars have cautioned that this uncertainty "would have a decidedly detrimental effect on the affordability of insurance coverage." *Koenig v. Progressive*

Ins. Co., 410 Pa.Super. 232, 245, 599 A.2d 690 (1991); *see* Andreas Richter & Thomas C. Wilson, *Covid-19: Implications for Insurer Risk Management and the Insurability of Pandemic Risk*, Geneva Risk Ins. Rev. 45, 171, 174, 179 (2020) (discussing uncertainty of outcomes even in cases with clear contractual language).

The public nuisance for which Sherwin-Williams and other paint companies were held liable imposed a high cost on society, but retroactively imposing the extra-contractual risk of public programs on insurance carriers, instead of on the policyholder whose affirmative corporate conduct created the public health hazard would impair the industry's ability to pay actually insured claims and undermine the insurance mechanism as a whole. Such a result would have the further effect of allowing a corporate entity to insure a knowingly created public health hazard. The CGL policy provides liability coverage for claims against a policyholder by specific individuals for their own bodily injuries or property damage, not to fund a governmental response to address societal harms.

II. UNDER THE PLAIN LANGUAGE OF THE INSURANCE POLICIES AND LONG-ESTABLISHED LAW, INSURANCE CONTRACTS COVERING SUITS FOR "DAMAGES" DO NOT AFFORD COVERAGE FOR NON-COMPENSATORY RELIEF.

"Damages" is a Form of Legal Relief Providing Compensation for Past Harms.

In interpreting insurance contracts, Ohio courts seek to determine the intent of the parties from a reading of the policy in its entirety, and to determine a "reasonable interpretation of any disputed terms in a manner designed to give the contract its intended effect." *E.g., Laboy v. Grange Indem. Ins. Co.*, 144 Ohio St.3d

234, 2015-Ohio-3308, 41 N.E.3d 1224, ¶ 8. The policy language is given its "plain and ordinary meaning" "unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument." (Citation omitted.) *Id.* A policy term is not ambiguous unless it is "reasonably susceptible of more than one interpretation," and an unreasonable interpretation does not create ambiguity. *Maher v. United Ohio Ins. Co.*, 2022-Ohio-1015, 188 N.E. 3d 212, ¶ 22 (Ohio App., 4th Dist.). Nor is ambiguity created by assertions outside the record purporting to contradict the policy's plain meaning. *Laboy* at ¶¶11, 15 (rejecting policyholder's interpretations as inconsistent with the facts, stating "that is not the reality of this case.").

The ordinary meaning of "damages" is compensation for injury or loss. *E.g., Wayne Mut. Ins. Co. v. McNabb*, 2016-Ohio-153, 45 N.E.3d 1081, ¶36 (Ohio App., 4th Dist.) (quoting *Black's Law Dictionary* 416 (8th Ed. 2004) (defining "damages" as "[m]oney claimed by, or ordered to be paid to, a person as compensation for loss or injury") and *Webster's New Universal Unabridged Dictionary* 504 (2003) (defining "damages" as "the estimated money equivalent for detriment or injury sustained"). That meaning is reinforced in the context of liability insurance coverage, where it refers to a compensatory award to a third party for past injuries or wrongs.[4]

[4] Here, the Sherwin-Williams policies insure against "damages" for which the insured is "liable" – making clear in context of the policies that what is insured against is third-party liability for "damages" in the legal sense of the term. The use of the term "damages" in the context of the policies thus reflects the plain meaning. If the terms in an insurance contract were not to be interpreted in their accepted, ordinary sense, consistent with the policy as a whole, then neither insurers nor insureds could reliably determine their respective rights and duties.

"Damages" is "the compensation for which the law will award for an injury done,… [i]n its common usage," it is "the estimated money equivalent for detriment or injury sustained." 25 C.J.S. *Damages* § 1 (1966 & Supp. 2001). Put differently, "damages" are a compensatory amount awarded to substitute for bodily injury or property damage that a third party sustained.

If a suit does not seek compensatory damages for actual bodily injury or property damage, there is no coverage under traditional liability insurance policies. For example, in *Preau v. St. Paul Fire & Marine Insurance Co.*, 645 F.3d 293, 296 (5th Cir. 2011), an insured was held liable for failing to disclose an anesthesiologist's history of drug abuse in a letter of recommendation to a medical center. While under the influence, the anesthesiologist failed to properly administer anesthesia to a patient of the medical center, leaving the patient in a permanent vegetative state. *Id.* at 294. The medical center sued the insured for misrepresentation, and a jury awarded it damages in the amount paid to settle the bodily injury claim, plus attorneys' fees. *Id.* at 294-295. The insured then sought coverage for that judgment from its CGL insurer. *Id.* In the coverage action, the United States Court of Appeals for the Fifth Circuit, applying Louisiana law, held that the amounts the insured was required to pay in the misrepresentation lawsuit were economic losses and not "damages" he was "legally required" to pay "for covered bodily injury." *Id.* at 296. The Court explained:

> The economic damages [the medical center] sought for [the insured's] tortious misrepresentation are distinct from the damages [the patient] or any other party might seek for her bodily injuries. The fact that *the amount* of the damages that [the medical center] sought was directly

> related to the amount it paid to defend and settle the [patient's bodily injury lawsuit] does not mean that [the insured] became legally required to pay for [the patient's] bodily injury.

Id.

The Fifth Circuit affirmed this analysis just last week in *Discover Property & Casualty Insurance Co. v. Blue Bell Creameries USA*, Inc., 5th Cir. No. 22-50842, --- F.4th ---, 2023 WL 4443246 (July 11, 2023). There, a shareholder derivative lawsuit was filed against insured corporate directors and officers for allegedly continuing to manufacture ice cream products with knowledge that the company's manufacturing plants had repeatedly and consistently tested positive for Listeria contamination. Applying Texas law, the Court held that the suit sought economic loss, not damages on behalf of customers who may have suffered "bodily injury" from the Lysteria outbreak. *Id.* at *8. *See also Nationwide Mut. Ins. Co. v. A.H. ex rel. Hunter*, 444 F. App'x 753 (5th Cir. 2011) (Mississippi law); *Everest Indem. Ins. Co. v. Valley Forge, Inc.*, 140 F. Supp. 3d 421, 428 (E.D. Pa. 2015) (no duty to defend a recycling center under a general liability policy for public nuisance suit by a township because "[n]o specific property owner has brought a claim of special harm"); *Mass. Bay Ins. Co. v. Faber Brothers, Inc.,* N.D.Ill. No. 04 C 5160, 2007 WL 1029366, at *3 (Mar. 30, 2007) (insurer owed no duty to defend public nuisance caused by insured's marketing and distribution of firearms because "the bodily injuries and property damage mentioned in the underlying complaint are only evidence of the problems caused by [the insured's] activities" and are not "damages for bodily injury").

"Damages" thus consist solely of those sums awarded to compensate third

parties for actual injuries caused by the policyholder. Other courts have recognized that this compensatory aspect of damages is reflected in the term's common usage in insurance policies. *See, e.g.*, *Aetna Cas. & Sur. Co. v. Hanna*, 224 F.2d 499, 503 (5th Cir.1955) ("Damages" are "only payments to third persons when those persons have a legal claim for damages[.]"); *Hayes v. Md. Cas. Co.*, 688 F. Supp. 1513, 1515 (N.D.Fla.1988) ("[T]he word 'damages' as used in an insurance agreement of this kind is meant in its ordinary legal sense — compensation in money imposed by law for loss or injury."); *Md. Cas. Co. v. Armco, Inc.*, 822 F.2d 1348, 1353 (4th Cir. 1987) ("Damages is a form of substitutional redress which seeks to replace the loss in value with a sum of money.").

Recognizing that coverage for liability in "damages" due to third-party injury means an award to compensate a third party for harm comports with the policy provisions as a whole. The policies do not broadly agree to pay all amounts the policyholder must pay to comply with a court order or law, but rather limit the insurer's agreement to pay "damages" because of "bodily injury" or "property damage."

The Abatement Fund for Which Sherwin-Williams Was Held Liable Does Not Constitute Covered "Damages."

One of the most fundamental principles of liability insurance law is that an insurer's duty to indemnify – to pay a judgment against its insured or a reasonable settlement – is based on the facts having been established which show that coverage applies. *Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.*, 112 Ohio St.3d 482, 2006-Ohio-6551, 861 N.E.2d 121, ¶ 33 ("The duty to indemnify arises from the

conclusive facts and resulting judgment.") *See generally* 16A Couch on Ins., Practice and Procedure in Insurance Litigation § 227:27 (3d eEd.).

Here, the abatement order holding Sherwin-Williams liable to contribute monies to fund the government plaintiffs' abatement plan was – by statute – not compensatory. The *Santa Clara* plaintiffs did not seek, and in fact were prohibited from seeking, compensation for past loss on their own behalves or on behalf of their citizens. *See* Ins. Merits Br. at 12-13; *Santa Clara II*, 17 Cal. App. 5th at 132. There is simply no basis for the Eighth District's assertion that the abatement fund was nevertheless compensatory. As in *Laboy*, "that is not the reality of this case." *Laboy* at ¶ 11, 15.

Enforcing the "Damages" Limitation is Important to the Insurance System.

The specification of coverage for *damages* because of "bodily injury" or "property damage" is the crux of commercial general liability insurance: it protects insureds from traditional tort liability awards compensating third parties for their injuries. The abatement plan Sherwin-Williams was required to fund did not, and could not, compensate anyone for past injuries; it was, by statute, not money awarded to children suffering from lead paint exposure, or to homeowners as a form of compensation for past harm. Nor could it compensate any such injury for the public entities or derivatively for their citizens. Rather, the abatement fund was designed to prevent future harm. This type of relief is not covered by the Sherwin-Williams policies.

Under Ohio principles of contract interpretation, common usage, and the policy

terms, "damages" means the award of monetary compensation for a third party's "bodily injury" or "property damage." Insurers agreed to protect Sherwin-Williams from traditional tort liability awards – awards that compensate third parties for their injuries – not to fund programs for the prevention of future bodily injuries or property damage. And here – the underlying action is dispositive. Sherwin-Williams was liable to pay monies to fund an abatement order in the *Santa Clara* action, but it was not liable for "damages" to compensate bodily injury or property damage, as required by the plain and ordinary meaning of the policy language for coverage to exist.

CONCLUSION

For all of the foregoing reasons, Amici respectfully request that this Court reverse the court below and order summary judgment for the Insurer on all grounds.

Respectfully submitted,

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