IN THE SUPREME COURT OF OHIO

CERTAIN UNDERWRITERS AT LLOYD'S LONDON, ET AL., Appellants, v. THE SHERWIN-WILLIAMS COMPANY, Appellee.	CASE NO. 2023-0255 On Appeal from the Eighth Appellate District, Cuyahoga County Court of Appeals, Case No. CA-20-110187

MERIT BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS IN SUPPORT OF APPELLEE THE SHERWIN-WILLIAMS COMPANY

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I. INTRODUCTION

United Policyholders ("UP") submits this amicus brief in support of the merit brief of Appellee The Sherwin-Williams Company ("Sherwin-Williams") because the issues on appeal under Appellants' Certain Underwriters at Lloyd's London ("Underwriters") Propositions of Law Nos. 1, 2 and 3 are all predicated on this Court misapplying or changing well-established rules of insurance policy construction. Namely, that an insurance policy must be broadly construed in favor of the policyholder and strictly against the insurer; that coverage grants in a policy are construed broadly in favor of the insured; that exclusions in a policy are construed strictly against the insurer; that exclusions only exclude what is clearly excluded.

These are fundamental rules of insurance policy construction. Yet Underwriters' position—without ever expressly challenging these principles—effectively argues for their change. Such a change would be a severe set-back for Ohio insureds.

The Court of Appeals, in reversing the trial court's grant of summary judgment, applied well-established rules of insurance policy construction. Specifically, the Court of Appeals looked at the ordinary meaning of words and construed insuring clauses broadly and limitations on coverage narrowly, and then applied the plain words of the policies to the facts established in the underlying trial. The insurers, including their amici, ask for a novel departure from the basic rules of insurance law and seek per se rules—rules divorced from the policy language—for claims involving public nuisance or where the insured is found to have knowledge of the mere risk of injury.

Although the underlying litigation played out over many years, the basic facts are relatively straightforward. In the underlying representative public nuisance action, Sherwin-Williams was found to have had actual knowledge of the risk of harm from lead paint used in homes and that its promotions of lead paint for that use was found to have contributed to the

creation of a "public nuisance." As a result of those findings, Sherwin-Williams was ordered to pay money into an "abatement" fund. That money would then be used by municipalities to repair pre-1951 built homes that were damaged by lead paint, and most particularly, pre-1951 homes where the deteriorating lead had caused bodily injury and would continue to cause injury to residents.

Under any reasonable construction of the insurance policies purchased by Sherwin-Williams, the cost of remediating homes that have unsafe conditions that have resulted in bodily injury constitutes a sum that Sherwin-Williams has become "legally obligated to pay as damages" "because of" "bodily injury" or "property damage." Further, Sherwin-William's knowledge of the risk of harm from the use of lead paint for interior use does not equate to Sherwin William's expecting or intending that harm, and thus the findings of the trial court in California do not fall within the scope of that exclusion.

Appellants' coverage arguments in this appeal suffer from three key flaws:

1. **Relating to Underwriters' Propositions of Law 3.** Contrary to Appellants' arguments, the phrase "damages because of bodily injury or property damage" when used in an insurance policy's grant of coverage must be construed broadly and in the way that a reasonable policyholder would understand. The money that Sherwin-Williams would have paid, but for the ultimate settlement, to remediate pre-1951 homes with injurious-lead conditions constitutes "damages" as that term is understood in insurance policies; the money is not for combatting generalized societal harms as claimed by Underwriters.
2. **Relating to Underwriters' Proposition of Law 1**. The damages Sherwin-Williams was ordered to pay were plainly "because of" or "on account of" bodily injury and property damage at the pre-1951 homes. Only those homes that had injurious lead conditions

were to be remediated, with injurious conditions assessed based on bodily injury that had been confirmed to have occurred in those homes.

3. **Relating to Underwriters' Proposition of Law 2.** Appellants seek to dramatically expand the scope of the meaning of the phrase "expected or intended" in commercial general liability ("CGL") insurance policies. It is well established that "expected or intended" exclusionary language precludes insurance coverage for losses resulting from conduct that is knowing, intentional, or inherently harmful. Acts committed by the insured with a specific intent to cause an injury (sometime *the* injury that resulted; sometimes *any* foreseeable injury) fall within the scope of an exclusion for an injury expected or intended by the insured. Acts committed intentionally by the insured, but with no expectation of injury or only a generalized knowledge that a risk of injury exists or is even substantially certain to exist, fall outside the scope of such an exclusion. The tort system in Ohio is based on the assumption that manufacturers can purchase insurance to mitigate liabilities for products that carry some risk, for few products are 100% safe. The ruling sought by Underwriters would call into doubt the availability of insurance for any number of beneficial products that carry some amount of known risk.

As set forth below, UP respectfully submits that Appellants' positions in this appeal run afoul of well-established Ohio rules of insurance policy construction and well-settled case law throughout the country, violate the insurance doctrines designed to protect policyholders from vague or uncertain policy language, and also run counter to a policyholder's reasonable expectations. The Eighth Appellate District's opinion and order should be affirmed by this Court.

II. STATEMENT OF THE CASE AND FACTS

UP adopts the Statement of the case contained in the brief of Appellee Sherwin-Williams.

III. STATEMENT OF INTEREST OF AMICUS CURIAE

UP is a non-profit, tax-exempt, charitable organization founded in 1991 that provides valuable information and assistance to the public concerning insurers' duties and policyholders' rights. UP monitors legal developments in the insurance marketplace and serves as a voice for policyholders in legislative and regulatory forums. UP helps preserve the integrity of the insurance system by educating consumers and advocating for fairness in policy sales and claim handling. Grants, donations, and volunteers support the organization's work. UP does not accept funding from insurance companies.

UP assists Ohio businesses and residents through three programs: Roadmap to Recovery™ (disaster recovery and claim help), Roadmap to Preparedness (preparedness through insurance education), and Advocacy and Action (judicial, regulatory, and legislative engagements to uphold the reasonable expectations of insureds). UP hosts a library of informational publications and videos related to personal and commercial insurance products, coverage, and the claims process at www.uphelp.org. UP communicates with the Director of the Ohio Department of Insurance, Judith French, on a regular basis during meetings of the National Association of Insurance Commissioners where UP's Executive Director Amy Bach, Esq. serves as an official consumer representative.

In furtherance of its mission, UP cautiously chooses cases in which it will appear as amicus curiae on behalf of policyholders, limiting its participation to insurance cases likely to have widespread impact. UP has been advocating for insureds' rights in the courts for decades. For instance, UP's amicus brief was cited in the U.S. Supreme Court's opinion in *Humana Inc. v. Forsyth*, 525 U.S. 299 (1999). UP recently submitted an amicus curiae brief to this Court in *Motorists Mutual Insurance Company v. Ironics, Inc., et al*., Case No. 2020-0306, *The Cincinnati Insurance Company v. Discount Drug Mart*, Case No. 2022-0318*, Neuro-*

Communication Services, Inc. v. The Cincinnati Insurance Co. et. al., Case No. 2021-0130, and *EMOI Services Inc. v. Owners Insurance Co.*, Case No. 2021-1529.

UP seeks to fulfill the classic role of amicus curiae by supplementing the efforts of counsel and drawing the court's attention to the broader ramifications of the ruling being sought by the parties that may have escaped consideration. As commentators have stressed, an amicus is often in a superior position to focus the court's attention on the broad implications of various possible rulings. R. Stern, E. Greggman & S. Shapiro, Supreme Court Practice, 570-71 (1986) (quoting Ennis, Effective Amicus Briefs, 33 Cath. U.L. Rev. 603, 608 (1984)).

IV. ARGUMENT

A. Propositions of Law Nos. 1 & 3

Commercial general liability ("CGL") insurance, as the name implies, is bought by business entities to broadly protect them from liabilities that arise from their commercial activities. Every year, companies pay substantial premiums for CGL coverage and in return receive a promise of protection, which is made in the form of specific contractual language—in this case, Sherwin-Williams received insurance coverage for "all sums" the insured pays "as damages" (or "for damages") "because of bodily injury or property damage."

This broad grant of coverage contains precisely the sort of language that a reasonable insured would expect to apply to the money that Sherwin-Williams was ordered to pay in the underlying California lead paint litigation. But in their arguments relating to propositions of law numbers 1 and 3, Underwriters and The Ohio Insurance Institute ("OII"), *amicus* for the insurance industry, seek to disclaim coverage on the grounds that the money paid by Sherwin-Williams was not "because of" "bodily injury" or "property damage" and that it did not constitute "damages." In making these arguments, Underwriters and OII seek new legal rules

that would dramatically narrow the scope of coverage contained in typical CGL policies sold throughout Ohio and the country.

1. Insurance policies are construed liberally in favor of coverage.

Before turning to the specific arguments relating to Propositions of Law 1 and 3, this Court should bear in mind the well-established and special features of insurance policy interpretation and the insurance marketplace in Ohio.

An insurance policy is a contract, and therefore must be interpreted in accordance with the plain and ordinary meaning of the words and phrases contained within it. *Gomolka v. State Auto. Mut. Ins. Co.*, 70 Ohio St.2d 166, 167-168, 436 N.E.2d 1347 (1982). But as anyone who has ever read an insurance policy knows, they are complicated contracts with often technical and confusing terms, sold to large and small businesses and private citizens alike as contracts of adhesion in a marketplace characterized by inequality between seller and purchaser. At the same time, insurance policies are aleatory contracts, with one party (the insurer) receiving the full benefit of its bargain at the outset (i.e., upon receipt of the premium payment) and the other party (the insured) only receiving any tangible benefit in the unlikely event of a covered loss. In this system, judicial enforcement of the insurer's promise of indemnity for losses is essential for maintaining day-to-day business operations and personal activities.

Ohio courts accordingly adhere to the rule of liberal construction in construing insurance contracts. *Wagner v. Nationwide Mut. Ins. Co.*, 235 N.E.2d 741, 743 (Ohio Com. Pl. 1968). If an insurance provision is reasonably susceptible to more than one interpretation, it must be construed strictly against the insurance company, and liberally in favor of coverage. *Lane v. Grange Mut. Cos.*, 45 Ohio St. 3d 63, 65, 543 N.E.2d 488 (1989); *Buckeye Union Ins. Co. v. Price*, 39 Ohio St.2d 95, 311 N.E.2d 844 (1974). Moreover, the test to be applied in determining whether there is an ambiguity in a policy is not what the insurer intended it to mean, but what a

reasonably prudent layperson applying for insurance would have understood. *Bluemile, Inc. v. Atlas Indus. Contractors, Ltd.*, 102 N.E.3d 579 (10th District 2017), appeal not allowed, 97 N.E.3d 502 (Ohio 2018).

In other words, under Ohio law, an insurance company seeking to avoid its coverage obligations "must establish not merely that the policy is capable of the construction it favors, but rather that such an interpretation is the only one that can fairly be placed on the language in question." *Andersen v Highland House Co.*, 93 Ohio St. 3d 547, 549, 757 N.E.2d 329 (2001) (citation omitted).

2. The California lawsuit's characterization of the remedy as an equitable one does not control the meaning of the word "Damages" for the purposes of Ohio insurance coverage.

The policies do not define the word "damages," so "damages" must be given a broad definition consistent with the rule of liberal construction in favor of the insured. *Sylvania Township Board of Trustees v. Twin City Fire Ins. Co.*, 2004 -Ohio-483,¶1 (6th District, Judge Lanzinger)("Because we must construe the broad definition of "damages" as set forth in the policy in the insured's favor, an award of attorney fees is covered under the policy.")

Ohio courts have construed the term "damages":

- *Allied Moulded Prod., Inc. v. Keegan*, 81 Ohio App. 3d 424, 428, 611 N.E.2d 377, 379 (1992)(""Damages," in the plural, is defined as "compensation in money imposed by law for loss * * *," Webster's New Collegiate Dictionary (9 Ed.1990) 323, and "[m]onetary compensation that may be recovered in court by someone who has suffered injury * * * through an unlawful act or omission of another." Statsky, West's Legal Thesaurus and Dictionary (1985) 206.");

- *Wayne Mutual Ins. Co. v. McNabb*, 2016-Ohio-153, 45 N.E.2d 1081 (4th District)(accepting dictionary definition of "damages" as "the estimated money equivalent for detriment or injury sustained" and holding that equitable remedy of restitution constituted "damages" under policy).

Underwriters' and OII's arguments regarding whether the abatement order in the underlying California litigation constitutes "damages" within the meaning of a CGL insurance policy run directly afoul of the above-discussed rules of insurance policy interpretation that require words to be given their plain and ordinary meaning and that if a word is found to be ambiguous, then the meaning favoring the insured prevails. Here, the plain meaning of the word "damages" clearly applies to the order requiring Sherwin-Williams to pay money into the abatement fund for remediating lead paint in pre-1951 homes.

In this case, the trial court aptly articulated the issue of whether or not there are "damages" when "a party is required to pay multi-millions of dollars as a result of a final judgment or settlement," noting the relevance of the cliché, "if it looks like a duck, walks like a duck, and sounds like a duck, it is a duck." *Sherwin-Williams, et al., v. Certain Underwriters at Lloyd's London, et al.*, Cuyahoga C.P. No. C-05-585786, at 6 (Dec. 4, 2020). Of course, the trial court ultimately ruled against Sherwin-Williams due to the incorrect holding that an Ohio court is bound by a California court's determination that a given remedy is equitable rather than legal in nature, even when such a determination is "counterintuitive and illogical." *Id.* at 7. But the Eighth Appellate District, with the advantage of the publication of New York's two cases *Certain Underwriters at Lloyd's London v. NL Industries, Inc.*, N.Y. App.No. 650103/2014, 2020 N.Y. Misc. LEXIS 10905 (Dec. 29, 2020) and *Certain Underwriters at Lloyd's, London v. NL Industries, Inc.*, 164 N.Y.S.sd 607, 203 A.D. 3d 595 (2022), correctly reversed the trial court

on this issue. In so doing, the Eighth Appellate District upheld the independence of Ohio courts—just as the New York Appellate Division did for courts in New York—to make their own determinations of the meaning of specific words in contracts.

Moreover, Ohio insurance law is settled that the word "damages" applies to compensatory damages as well as injunctive relief, restitution, and forms of equitable relief. In the environmental remediation context specifically, it is common for county, state, or federal governmental entities to seek money from businesses in a way not considered "legal damages" within the narrow meaning of that term of art, but that does constitute "damages" as the word is used in insurance policies and as the word is reasonably understood by average insureds. *See The Sherwin-Williams Co. v. Certain Underwriters at Lloyd's London*, 2022 Ohio 3031, 32-33, 35 ¶¶ 59, 61, 66 (Ohio Ct. App. 2022) (quoting *Black's Law Dictionary* and collecting cases supporting proposition that "damages" encompasses equitable relief including the cost of government expenditures for environmental cleanup).

Underwriters' policies do not distinguish between sums the insured becomes legally obligated to pay in legal actions versus sums the insured becomes legally obligated to pay in equitable actions. Nor do they contain an exclusion for sums the insured becomes legally obligated to pay that are solely equitable in nature. However, Underwriters asks the Court to read such a distinction into its policy, and insert words into the policy that are not there. At the very least, Underwriters asks the Court to narrowly construe the insurance coverage grant in contravention to ordinary rules of insurance policy construction.

Any reasonable insured would believe, like Sherwin-Willliams believed, that an order to pay money to remediate unsafe properties would constitute "damages." Even if the term

"damages" has multiple meanings, the meaning proffered by Sherwin-Williams is at the very least a reasonable interpretation and therefore should prevail.

3. The insurance industry's appeal to *Acuity* Is misplaced.

The Court should reject the insurance industry's attempt to establish this Court's ruling in *Acuity v. Masters Pharm., Inc.,* 169 Ohio St.3d 387, 2022-Ohio-3092, 205 N.E.3d 460 as a beachhead for coverage denials across a wide range of insurance lawsuits.

There are crucial differences between the language in *Acuity* and Sherwin-William's policies. *Acuity* involved the interpretation of a single ISO form that repeatedly used the phrase "*the* bodily injury" and contained a "loss-in-progress" exclusion, the combination of which led this Court to conclude that "[t]he bodily injury alleged in the underlying suit therefore must be a particularized injury." *Acuity v. Masters Pharm.*, 2022-Ohio-3092, 18 (Ohio 2022). But the policy language stipulated to in the present case does not include the article before "bodily injury" or "property damage" and does not contain a loss-in-progress exclusion. Underwriters and OII make no serious attempt to show how the policy language here requires Sherwin-Williams to demonstrate particularized bodily injury during the policy period. The Court should not import requirements from a case that involved narrower policy language to the present matter—doing so would be tantamount to creating a *per se* rule requiring a showing of particularized injury untethered to policy language.

In addition to the difference in policy language, there are also important differences in the bodily injury and property damage alleged in the underlying litigations between *Acuity* and the present case. First, unlike what local governments sought to show in the opioid litigation, under the lead paint abatement plan, in many cases specific bodily injuries would need to be proved in order for a building to qualify for remediation. Second, each building is a particularized case of property damage and therefore would easily satisfy *Acuity's* particularized injury test even if

such a test were to apply. Third, the issues caused by lead paint found in particular homes are not generalized societal harms akin to a drug epidemic. Underwriters attempt to characterize lead paint in homes as "generalized societal harm" (Brief at 17) and a "generalized public health crisis" (Brief at 18) and characterize the California government plaintiffs as representing "only the generalized interest of the 'community' at large" (Brief at 19). But when one looks at the facts, the damages relevant to the bodily injuries, property damages, and purpose of the abatement fund are not in any way "generalized." They are rather, quite simply, the deteriorated lead paint itself in specific homes that need to be remediated by California governmental entities.

B. Proposition of Law No. 2

4. The insurance industry seeks a per se rule against coverage for all cases in which there is an awareness of risk of harm.

Sherwin-Williams' knowledge of the risk of harm presented by the use of lead paint in homes does not mean that Sherwin-Williams "expected and intended" any specific injury to result.

The gist of Underwriters' argument—and a point that UP takes particular issue with—is Underwriters' unspoken request that the Court *broadly* construe the "expected or intended" exclusion. This request turns the law of insurance policy construction on its head since Ohio, and every other state, requires exclusions to be *narrowly* construed. Ohio has long held that exclusions are strictly construed against the insurer. In order to apply, exclusions must be clear and exact. *Moorman v. Prudential Ins. Co.*, 4 Ohio St.3d 20, 445 N.E.2d 1122 (1983). "An exclusion in an insurance policy will be interpreted as applying only to that which is *clearly* intended to be excluded." *Hybud Equip. Corp. v. Sphere Drake Ins. Co.*, 64 Ohio St.3d 657, 597 N.E.2d 1096 (1992).

Selling a beneficial but risky product, with knowledge that it could injure some users, amounts at most to reckless conduct. But under Ohio law, recklessness does not establish that an insured "expected or intended" harm for the purpose of an insurance policies exclusion for knowing and intentional conduct. *Physicians Ins. Co. of Ohio v. Swanson*, 58 Ohio St.sd 189,569 N.E.2d 906 (1991).

The Ohio tort system is based on the assumption that manufacturers in most cases can shift some of the cost of their products liability to their insurers. To take a prominent example, no Ohio court has held that marketing asbestos products triggers the "expected or intended" exclusion even for asbestos products sold after *Borel v. Fibreboard Paper Products Corp.* 493 F.2d 1076 (5th Cir. 1973), which was the leading appellate decision imposing asbestos-related liabilities on asbestos producers and was issued at a point in time beyond which all asbestos producers and sellers were fully aware of the serious risk of asbestos-related disease. But under the ruling urged by the insurance industry here, the promotion or sale of any risky product in Ohio would theoretically trigger the "expected or intended" exclusion.

Such a ruling is unwise and would invite a host of problems and lawsuits relating to insurance coverage for all manner of products, from pharmaceuticals to appliances to any product with a potentially harmful chemical component, for few products are completely safe. This would lead to an unprecedented degree of uncertainty in how manufacturers can mitigate risks associated with their products. Longstanding Ohio public policy that allows courts to impose liability on product manufacturers and then permits the manufacturers to shift apportion of the cost of that liability to their insurer. *INA v. Forty-Eight Insulations*, 633 F.2d 1212, 1219 (6th Cir. 1980) (noting that comprehensive general liability policies are designed to insure the manufacturer against products liability suits).

A finding in a tort lawsuit that a business in some way "must have been aware" of the risks of its products is a far cry from the level of willfulness required to implicate an "expected/intended" limitation in an insurance policy. As the Eighth Appellate District pointed out, the trial court found that while Sherwin-Williams had "actual knowledge of the potential deleterious effects of lead" it "promoted its product with no expectation or intent to injure" (Trial Court's Judgment Entry, Dec. 4, 2020, p. 5, 7.)

V. CONCLUSION

For the reasons set forth above, this Court should affirm the Decision of the Eighth Appellate District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of September, 2023, the foregoing was electronically filed with the Court. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated in the electronic filing receipt. Further, copies were serviced upon all counsel of record pursuant to Civ. R. 5(B)(2)(f) by email:

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