IN THE SUPREME COURT OF OHIO

CASE NO. 2023-0255

APPEAL FROM THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE NO. CA-20-110187

THE SHERWIN-WILLIAMS COMPANY,

Plaintiff-Appellee,

v.

CERTAIN UNDERWRITERS AT LLOYD'S LONDON, et al.,

Defendants-Appellants.

MERIT BRIEF OF *AMICI CURIAE* PRODUCT LIABILITY ADVISORY COUNCIL, INC. AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PLAINTIFF-APPELLEE, THE SHERWIN-WILLIAMS COMPANY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTRODUCTION AND INTEREST OF THE *AMICI CURIAE*

Commercial general liability ("CGL") insurance policies are intended to protect against the risks of harm to reduce financial uncertainty if an insured experiences a loss. For years, Ohio courts have construed insurance policies to cover manufacturers' losses that arise from tort claims alleging that manufacturers' products have caused harm, including payment for remediation costs. Nevertheless, Appellants ("the Insurers") attempt to shirk their coverage responsibility to The Sherwin-Williams Company (Sherwin-Williams or Policyholder) by taking the untenable position that: (1) their CGL policies' agreement to cover "damages" does not include payment to remediate dangerous conditions; (2) Sherwin-Williams is not entitled to coverage because the conduct for which it seeks coverage under the CGL policies was substantially certain to result in harm; and (3) their CGL policies do not insure against public nuisance claims. More is at stake in this case than just Sherwin-Williams' insurance claim. This case will determine whether manufacturers receive the tort liability coverage for which they paid substantial premiums and reasonably expect.

Product Liability Advisory Council, Inc. ("PLAC") is a non-profit professional association of corporate members representing a broad cross-section of American and international product manufacturers, including members based in Ohio. PLAC seeks to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products and those in the supply chain. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse range of industries in the manufacturing sector, including transportation, electronics, informational technology, and more. Since 1983, PLAC has filed over 1,200 briefs in both state and federal courts as *amicus curiae* on behalf of its members, while presenting a perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product risk management.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in all 50 states and in every industrial sector. Manufacturing employs nearly 13 million men and women, contributes $2.91 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. The NAM regularly submits amicus briefs in cases presenting issues of importance to the manufacturing community.

Amici have members who are incorporated in and/or conduct substantial business operations in Ohio. Those members rely on Ohio law to protects their insurance rights stemming from their insurance policies intended to provide coverage for various risks. *Amici* respectfully submit this brief to address important issues of Ohio insurance law impacting their membership. Rules of insurance interpretation have far-reaching impact on the many insurance products that manufacturers buy to protect themselves from risks in this and other states. Moreover, an essential assessment for any manufacturing company in deciding where to invest is the legal landscape and its consistency and predictability. The Insurer's arguments — including their restrictive interpretation of the general term "damages" and their argument that losses from the manufacture of products with knowledge of a risk of harm are uninsurable — would represent a sea change. It is essential that this Court reject those arguments and that contract construction under Ohio law result in the uniform and predictable interpretation of insurance policies.

SUMMARY OF ARGUMENT

The Insurers urge the Court to deviate from well-established principles of Ohio insurance law and effectively abrogate the broad liability insurance coverage upon which all manufacturers and product developers necessarily rely. The Insurers' arguments are untenable and must be rejected.

In the CGL policies they sold to Sherwin-Williams, the Insurers promised to pay "damages" (a word they failed to define in their policies), and the plain meaning of that word encompasses what a manufacturer must pay to remedy harm it allegedly caused. Indeed, for decades, Ohio courts have broadly interpreted the term "damages" as including a variety of remedies, including the costs of environmental clean-up. Insurers could have limited the meaning of "damages" if they so intended by defining the term or otherwise carving out exceptions; they failed to do so. As such, this Court should not deviate from well-settled principles by adopting the narrow interpretation the Insurers proffer here.

Furthermore, except in very limited circumstances that clearly do not apply here (*e.g.*, murder and sexual molestation of a minor), Ohio courts do not presume an intent to harm. In this case, there has been no finding that Sherwin-Williams ever intended to injure anyone or damage anything. Yet insurers argue that the *consequences* (i.e., bodily injury or property damage) of Sherwin-Williams' *intentional act* (manufacturing and promoting an otherwise lawful product) are also intentional; the argument is insupportable. Under Ohio precedent, Insurers cannot avoid liability by stretching the application of the "inferred intent" doctrine beyond its rational parameters.

Finally, Insurers ignore facts and law in arguing that CGL insurance does not cover Sherwin-Williams' public nuisance claim. The policies broadly cover liability "because of" and "on account of" "bodily injury" and "property damage." In this case, there would be no basis for

the underlying action had there not been bodily injury or property damage. Under the abatement plan, Sherwin-Williams was required to fund the remediation of lead from pre-1951 residences through a fund held "in the name of the People." A court-appointed master would have identified specific residences that met qualifying criteria, and money from the fund would remediate those damages; the funds would not be used to compensate governmental entities. This is precisely the liability that manufacturers reasonably expect to be covered under standard CGL policies and for which these Insurers contractually agreed to cover. They should be held to account.

STATEMENT OF THE CASE AND FACTS

Amici adopt the Statement of the case contained in the brief of Appellee Sherwin-Williams.

ARGUMENT

I. PROPOSITION OF LAW NOS. 1 AND 3

Manufacturers pay substantial premiums for, and rely upon, broad CGL insurance policies to cover their risks. *See* Oh. Ins. Coverage § 1:1 (Aug. 2023 update) (the purpose of insurance is "to provide coverage for liability claims"); 1 Couch on Ins. § 1:7 (June 2023 update) (courts interpret insurance policies so the insured "will be protected to the full extent that any fair interpretation will allow"). Manufacturers that engage in product research and development, in particular, rely on CGL insurance to cover their risks because products, particularly innovative products, can give rise to accidents for many reasons – *e.g.*, variations in how products are used or misused, changes in the environment in which the products are used, scientific studies that discover risks previously unknown, and more.[1] Thus, manufacturers and product developers prudently purchase insurance and rely upon their insurers to protect them.

[1] *See* Marisa Manley, *Product Liability: You're More Exposed Than You Think*, HARVARD BUS. REV. (Sept. 1987), https://hbr.org/1987/09/product-liability-youre-more-exposed-than-you-think.

A. OHIO RENDERS INSURERS LIABLE UNDER CGL POLICIES FOR THE "DAMAGES" THE POLICYHOLDER PAID IN THE UNDERLYING ACTION.

Ohio courts have created an environment in which manufacturers expect their liabilities will be covered by insurance, particularly where insurers promised to pay "all sums" that the insured is legally obligated to pay as or for "damages," without defining the word "damages." Under those circumstances, Ohio law requires the term to be interpreted consistent with its plain meaning. *See Laboy v. Grange Indem. Ins. Co.*, 144 Ohio St. 3d 234, 2015-Ohio-3308, 41 N.E.3d 1224, ¶¶ 8-9 ("Words and phrases must be given their 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.") (internal citation omitted). "Damages" is defined as "the estimated money equivalent for detriment or injury sustained." Webster's New Universal Unabridged Dictionary 504 (2003). In other words, the term "damages" includes all amounts a manufacturer is ordered to pay to remedy harm for bodily injury or property damage.

Notably, Ohio courts consistently have ruled that the ordinary dictionary definition of "damages" encompasses both monetary and equitable relief, which includes the cost of expenditures for environmental cleanup. *See Kipin Industries, Inc. v. Am. Universal Ins. Co.*, 41 Ohio App. 3d 228, 230-231, 535 N.E.2d 334 (1st Dist. 1987) ("when the environment has been adversely affected by pollution to the extent of requiring governmental action or expenditure or both for the safety of the public, there is 'property damage' whether or not the pollution affects any tangible property owned or possessed exclusively by the government"); *Stychno v. Ohio Edison Co.*, 806 F. Supp. 663, 674-76 (N.D. Ohio 1992) ("damages" included payments "to remove and remedy the effects of improper hazardous [substances]" present on property); *Sanborn Plastics Corp. v. St. Paul Fire & Marine Ins. Co.*, 84 Ohio App. 3d 302, 316, 616 N.E.2d 988, 998 (1993) ("costs for environmental clean-up constituted 'damages'" under the insurance policies).

In this matter, the Court of Appeals properly noted that "under Ohio law, 'damages' in its plain and ordinary meaning is necessarily broad enough to encompass a variety of remedies, including compensatory damages, injunctive relief, restitution, and other equitable relief." *Sherwin-Williams Co.*, No. 110187, 2022 WL 3971731, at *16 (Ohio Ct. App. Sept. 1, 2022) (*citing Wayne Mut. Ins. Co. v. McNabb*, 2016-Ohio-153, 45 N.E.3d 1081, ¶ 36 (4th Dist. 2016) (finding that the undefined term "damages" is ambiguous and concluding that the equitable remedy of restitution is included in the definition of damages); *Jackson v. Ohio Civ. Rights Comm.*, 50 Ohio App. 3d 13, 16, 552 N.E.2d 237 (8th Dist. 1989) (finding that "[r]estitution and compensatory damages are synonymous")).

The Insurers incorrectly suggest that this Court should effectively abandon the above-described, established principles of Ohio insurance law in favor of their view that the term "damages" in Sherwin-Williams' CGL polices does not include payment to remediate harmful conditions. The Insurers did not define the term "damages" in that manner in their CGL policies. Had the Insurers intended to exclude coverage sought by Sherwin-Williams in this case, they could (and should) have narrowly defined the term "damages" to make this intent clear to their policyholders. A manufacturer presented with such a restriction then could have made an informed choice whether to accept it or buy a different insurer's policy. Having failed to include this limitation on the word "damages," the Insurers should not have the benefit of courts reading into the CGL policies terms that are not there.[2] *See Buckeye Union Ins. Co. v. Consol. Store Corp.*, 68 Ohio App. 3d 19, 25, 587 N.E.2d 391 (10th Dist. 1990) ("absence of a provision from a written

[2] At best, for the Insurers, the term "damages" is ambiguous as to whether it includes money paid to an abatement fund; where there is ambiguity, the policy is interpreted in favor of coverage. *Westfield Ins. Co. v. Hunter*, 128 Ohio St. 3d 540, 2011-Ohio-1818, 948 N.E.2d 931, ¶ 11.

contract is evidence of an intention of the parties to exclude it rather than of an intention to include it.").

Sherwin-Williams paid "damages" by paying money to a fund held in California for the harmed "People" of the state of California. That money was to be used to fix and remedy the existing, hazardous conditions Sherwin-Williams allegedly had assisted in creating years earlier. For these reasons, the Insurers' suggestion that they should not indemnify Sherwin-Williams for amounts paid in settling the underlying *Santa Clara* action should be rejected.

B. CGL POLICIES INSURE AGAINST PUBLIC NUISANCE CLAIMS.

Public nuisance litigation has been used in recent times to achieve massive verdicts and settlements, but the cause of action in most jurisdictions remains a common law tort. *See Leslie Salt Co. v. San Francisco Bay Conservation*, 53 Cal. App. 3d 605, 619, 200 Cal. Rptr. 575 (Cal. Ct. App. 1984) ("All that is required to establish that particular conduct constitutes the tort … of public nuisance is that it interferes with a right common to the general public."). CGL insurance policies cover tort liability. *See* 20-129 Appleman on Insurance Law & Practice Archive § 129.1 (2d 2011) ("Commercial general liability (CGL) insurance usually does cover liabilities arising out of torts").

The insurance policies in this case are no different. The insurance policies in question cover "damages" "because of" or "on account of" "bodily injury" or "property damage." The Insurers ignore settled rules of insurance policy interpretation by arguing for a narrow interpretation of the words "because of" and "on account of."[3] However, "there would be no basis for the claim [in *Santa Clara*] if neither bodily injury nor property damage were at issue." *Sherwin-Williams Co. v. Certain Underwriters at Lloyd's London*, No. CV-06-685786, 2020 WL 13582323, at *3

[3] Insurance policies are to be given a "liberal construction in favor of the insured." *Gibbons v. Metro. Life Ins. Co.*, 135 Ohio St. 481, 486, 21 N.E.2d 588 (1939).

(Cuyahoga Cnty. Dec. 3, 2020). As such, this is the type of loss these policies were designed to insure. *See Sherwin-Williams Co. v. Certain Underwriters at Lloyds London*, 813 F. Supp. 576, 587 (N.D. Ohio 1993) (observing that "most courts applying Ohio law have held that the term 'property damage' encompasses harm to land or buildings necessitating abatement costs.").

Under the abatement plan, Sherwin-Williams was required to fund the remediation of lead from identified pre-1951 residences through a fund held "in the name of the People [and] dedicated to abating the public nuisance." Joint Ex. 14 at 2 (Am. Judgment). The funds were *not* used to compensate the governmental entities that sued in a representative capacity on behalf of the People. Joint Ex. 13 at 8 (Am. Stmt. Of Decision). The money was paid to resolve the damages of people and their property. *Id.* at 104 (individual property owners "screened to see if they own a property" meeting various criteria).[4] To this end, the creation of an abatement fund affects the mechanism through which damages paid are distributed, not the underlying damages that the policyholder had to pay on account of such a claim. As such, the Insurers' argument that CGL policies do not afford coverage in this instance must be rejected.

II. PROPOSITION OF LAW NO. 2

TORT-BASED CLAIMS ARE UNINSURABLE UNDER CGL INSURANCE POLICIES ONLY WHERE A MANUFACTURER HAD AN INTENT TO CAUSE HARM, WHICH CANNOT BE IMPLIED IN THIS MANUFACTURING SETTING.

The Insurers, contrary to Ohio law, urge the Court that coverage is precluded by the "expected or intended" exclusion in Sherwin-Williams' CGL policies because injuries or damages

[4] This situation is distinguishable from *Acuity v. Masters Pharm., Inc.*, 169 Ohio St. 3d 387, 2022-Ohio-3092, 205 N.E.3d 460, ¶ 3, where this Court concluded that coverage was not warranted. Acuity was a non-representative action in which governments sought recovery for economic losses resulting from the opioid epidemic, including "increased law-enforcement expenses, judicial expenditures, prison and public-works costs," etc. *Id.*

occurring after an intentional *act* (e.g., to manufacture, sell, and promote an otherwise lawful product) also must have been intentional. That is not the law of Ohio. Instead, Ohio courts have found an expected and intended exclusion to apply only when an insured intends for the resulting harm or injury. *See Buckeye Union Ins. Co. v. New Eng. Ins. Co.*, 87 Ohio St. 3d 280, 283, 720 N.E.2d 495, 499 (1999) ("an intent to injure, not merely an intentional act, is a necessary element to uninsurability"). While there are very limited circumstances in which courts can infer intent as a matter of law (*e.g.*, murder, sexual molestation of a minor), none apply here.

In *Allstate Ins. Co. v. Campbell*, 128 Ohio St. 3d 186, 2010-Ohio-6312, 942 N.E.2d 1090, ¶ 7, the insurers argued an intent to harm should be inferred as a matter of law where an insured's act is "substantially certain" to cause harm. That case concerned whether insurance companies had a duty to indemnify children and their parents for a motor vehicle accident resulting from a "misguided teenage prank" in which the children placed a Styrofoam deer on a curvy two-lane road after dark. *Id.*, ¶ 2. There, the insurance companies argued the doctrine of "inferred intent" should be extended – beyond the limited instances in which courts previously applied it – to circumstances "where undisputed facts establish that harm was substantially certain to occur as a result of the insured's conduct." *Id.*, ¶¶ 33-34. The Court disagreed, finding the doctrine of inferred intent applied "only in cases in which the insured's intentional act and the harm caused are *intrinsically tied* so that the act has necessarily resulted in the harm." *Id.*, ¶ 48, 56. The Court further cautioned that the doctrine is inapplicable where, as here, an intentional act will not *necessarily* result in the harm caused by that act. *Id. See also Granger v. Auto-Owners Ins.*, 144 Ohio St. 3d 57, 65, 2015-Ohio-3279, 40 N.E.3d 1110 (Under *Campbell*, "the harm must be the inherent result of an intentional act.").

Campbell is consistent with earlier Ohio precedent. In *Physicians Insurance Co. of Ohio v. Swanson*, 58 Ohio St. 3d 189, 193, 569 N.E.2d 906 (1991), the Court held that "to avoid coverage on the basis of an exclusion for expected or intentional injuries, the insurer must demonstrate that the injury itself was expended or intended." The Court observed that many unintended injuries result from intentional acts, and remain covered. *Id. See also Cincinnati Ins. Co. v. Mosley*, 41 Ohio App. 2d 113, 117, 322 N.E.2d 693 (4th Dist. 1974) (intentional acts exclusion did not apply to exclude liability for unintentional injuries resulting from deliberate acts); *Riverside Ins. Co. v. Wiland*, 16 Ohio App. 3d 23, 25-26, 474 N.E.2d 371 (11th Dist. 1984) (distinguishing intentional act from an intent to cause injury).

As noted here by the Appellate Court, a New York trial court applied this logic in a similar action and required insurance coverage for the abatement plan issued in *Certain Underwriters at Lloyd's London v. NL Indus., Inc.*, 2020 WL 7711918, at *13 (N.Y. Sup. Ct. Dec. 29, 2020 ("*NL Indus. I"*), *aff'd* 203 A.D.3d 595 (App. Div. 2022 ("*NL Indus. II"*). There, the trial court determined that knowledge of a risk of harm was not equivalent to having an expectation or intention to cause property damage or bodily injury. The court explained that "there is a distinction between knowledge of the risk of hazardous consequences of one's actions, and the intention to cause harm." *NL Indus. I*, 2020 WL 7711918, at *13.

In this case, there has been no finding that Sherman-Williams had knowledge that damages or injuries would flow directly from its actions. Rather, it lawfully sold a product that was, at the time, state-of-the-art. Indeed, in the first half of the 20th Century, lead paint was widely used because it was durable and water resistant. *See* Joint Ex. 13 at 67 (Am. Stmt. Of Decision). Moreover, even where an insured continues to act after it begins to develop an understanding of the *potential* consequences of its actions, that does not and should not somehow void coverage.

Hindsight may be "twenty-twenty," but that is not the standard to be applied when determining whether an insured intended the consequences of its acts, at the time of its acts. *See Burlington Ins. Co. v. PMI America, Inc.*, 862 F. Supp. 2d 719, 734 (S.D. Ohio 2012) (awareness that an act "might someday result in damages is not equivalent to knowledge of damages;" hindsight is 20/20). For these reasons, the Insurers' disparaging references to their policyholders' lead paint (or any product) as "poisonous" based on information developed decades after its manufacture and sale are misleading, prejudicial, unfair and irrelevant in the insurance context, and should be ignored.

At bottom, the "expected or intended" exclusionary language in Sherwin-Williams' insurance policies is commonplace in CGL insurance policies. Insurers' interpretation of the exclusionary language would eviscerate coverage for tort liabilities in other cases. This is so because manufacturers are frequently innovating to create products that consumers want and need. With that innovation comes the risk of harm that products could cause and that manufacturers insure against. Manufacturers, however, would be barred from coverage if the standard were that coverage is unavailable any time a manufacturer has knowledge that a product *might* cause harm. Such a standard is not sound as a matter of law or policy as it could chill innovation.

CONCLUSION

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

Respectfully submitted,

Dated: September 5, 2023

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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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