Supreme Court of Ohio Clerk of Court - Filed September 08, 2020 - Case No. 2020-0405

IN THE OHIO SUPREME COURT

CASE NO. 2020-0405

AKC, INC.

Appellee,

v.

UNITED SPECIALTY INS. CO.,

Appellant.

APPEAL FROM THE SUMMIT COUNTY COURT OF APPEALS,

NINTH APPELLATE DISTRICT

COURT OF APPEALS CASE NO: 2019-CA-29197

MERIT BRIEF OF AMICUS CURIAE OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS IN SUPPORT OF APPELLANT UNITED SPECIALTY INSURANCE COMPANY

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I. STATEMENT OF INTEREST OF AMICUS CURIAE

The Ohio Association of Civil Trial Attorneys ("OACTA") promotes fairness, excellence, and integrity in the civil justice system by providing resources and education to attorneys and others dedicated to the defense of civil actions. OACTA is an association of Ohio attorneys who represent the interests of defendants in tort litigation and other parties in civil disputes who are paid for their services other than principally out of the recovery they obtain. OACTA's members also include personnel from corporations, government bodies and insurance companies responsible for managing such matters. OACTA was formed to allow these similarly interested lawyers to act together to advocate in the courts, to educate the bar on common problems, and to serve the public by promoting and improving the administration of justice.

The issue presented by this appeal is of great interest to OACTA, its members, and their clients and employers. As Appellant and Appellee agree, the proposition of law accepted for review is one of first impression and presents "one of the most litigated environmental coverage issues in the country—the entry of raw sewage into private property from municipal sanitary sewer lines or similar sources" (Appellant's memorandum in support of jurisdiction, p. 1; see also, Appellee's memorandum opposing jurisdiction, p. 1, concurring that insurance coverage "for entry of raw sewage into private property from municipal sewer lines is one of the most litigated environmental coverage issues in the country").

OACTA members are frequently involved in both the underlying claims for damage to private property caused by such intrusions and the insurance coverage litigation that so often ensues. With respect to the resolution of insurance coverage issues generally, OACTA and its members believe that it is in the best interest of both insurers and insureds alike that the rules and procedures for resolving them should be clear, easily understood and predictable. The process of

resolving disputed insurance coverage issues should also be efficient. Indeed, the necessity of "speedy relief" to preserve the parties' rights is one of the elements of an action under Ohio's Declaratory Judgment Act. See, *Aust v. Ohio State Dental Bd.*, 136 Ohio App.3d 677, 681, 737 N.E.2d 605 (10th Dist., 2000) (elements of an action for declaratory relief are: (1) a real controversy; (2) that is justiciable in character; and (3) speedy relief is necessary to preserve the parties' rights).

With regard to the resolution of coverage issues related to the interpretation of the absolute pollution exclusion to the first party commercial property coverage of a standard ISO form policy, predictability, transparency and efficiency are best achieved by adhering to the traditional rules of contract interpretation that this Court and Ohio's intermediate courts of appeals have followed for generations. Because the Ninth District Court of Appeals broke with that practice by side-stepping the central issue presented on appeal and reversing the trial court's entry of summary judgment, and because the Appellee has advocated throughout this litigation for an unwarranted extension of this Court's controversial 2001 opinion in *Andersen v. Highland House Co.*, 93 Ohio St.3d 547, 757 N.E.2d 329, 2001-Ohio-1607, OACTA urges the Court to reverse the court of appeals and to reinstate the original judgment.

In *Andersen*, this Court introduced the inappropriately subjective exercise of attempting to discern whether a particular loss could/should be characterized as "traditional environmental contamination" as a pre-condition to enforcing the otherwise clear and unambiguous absolute pollution exclusion. *Andersen*, supra., at, 2001-Ohio-1607, 93 Ohio St. 3d 547, 551–52, 757 N.E.2d 329, 334, citing, *Weaver v. Royal Ins. Co. of Am.* (1996)], 140 N.H. [780] at 783, 674 A.2d [975] at 977, quoting *Vantage Development *552 Corp. v. American Environment Technologies Corp.,* 251 N.J.Super. 516, 525, 598 A.2d 948, 953 (1991) ("We would be remiss * * * if we were

to simply look to the bare words of the exclusion, ignore its *raison d'etre,* and apply it to situations which do not remotely resemble traditional environmental contamination").

In its summary judgment briefing to the trial court, its briefing to the Ninth District Court of Appeals, and its jurisdictional memoranda filed in this Court, Appellee has repeatedly and consistently cited *Andersen*, and urged every court that has had opportunity to consider the issue presented to expand the holding of that case beyond its narrow facts (i.e., release of carbon monoxide gas from a malfunctioning heater in a multi-unit residential apartment complex) to the much broader and more regularly litigated facts of this case (discharge of sewage from a municipal system into the basement level of private premises). Appellee is anticipated to advance the same argument in this Court.

OACTA respectfully suggests that, to the extent that it introduced the wholly subjective notion of "traditional environmental contamination" into Ohio's coverage calculus under the absolute pollution exclusion (and to the further extent that it invited the proverbial "camel's nose" of the "reasonable expectations" doctrine under the "tent" of Ohio's insurance coverage jurisprudence), the *Andersen* opinion was ill-advised. This Court should use this appeal to contain and limit the confusion, delay and expense that has resulted from *Andersen*, by limiting its holding to its facts ("Carbon monoxide emitted from a residential heater is not a 'pollutant' under a pollution exclusion of a commercial general liability insurance policy unless specifically enumerated as such").

Such a resolution of this appeal will free lower courts to return to traditional insurance coverage analysis when tasked with determining whether a particular claim is subject to the absolute pollution exclusion. This in turn will streamline the resolution of coverage disputes for all litigants when claims arise that implicate the absolute pollution exclusion under an ISO

commercial property form. More importantly, it will restore objectivity, predictability, and efficiency to the task of resolving these recurring insurance coverage disputes. In order to achieve these laudable goals, the Court should adopt the Appellant's proposition of law, reverse the judgment of the Ninth District Court of Appeals and reinstate the summary judgment for United Specialty Insurance Company.

II. STATEMENT OF THE FACTS AND CASE

OACTA adopts the recitation of the facts and the procedural history of the case set forth in the Appellant's Brief.

III. ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law:

> **The standard water backup and pollution exclusions in a first-party property insurance policy bar loss caused by or resulting from raw sewage.**

Amicus Curiae, the Ohio Association of Civil Trial Attorneys, requests the Court to adopt Appellant United Specialty Insurance Company's foregoing Proposition of Law for the following reasons.

1. OHIO'S TRADITIONAL RULES OF INSURANCE POLICY INTERPRETATION ARE WELL SUITED FOR THE RESOLUTION OF POLLUTION EXCLUSION COVERAGE ISSUES.

When confronted with an issue of contractual interpretation, the role of a court is to give effect to the intent of the parties to the agreement. *Hamilton Ins. Serv., Inc. v. Nationwide Ins. Cos.* (1999), 86 Ohio St.3d 270, 273, 714 N.E.2d 898, citing *Employers' Liab. Assur. Corp. v. Roehm* (1919), 99 Ohio St. 343, 124 N.E. 223, syllabus. See, also, Section 28, Article II, Ohio Constitution. Courts examine the insurance contract as a whole and presume that the intent of the parties is reflected in the language used in the policy. *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130, 31 OBR 289, 509 N.E.2d 411, paragraph one of the syllabus. The parties' intent is

understood to be expressed in "the plain and ordinary meaning of the language used in the policy unless another meaning is clearly apparent from the contents of the policy." *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, 7 O.O.3d 403, 374 N.E.2d 146, paragraph two of the syllabus. When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties. *Id.* As a matter of law, a contract is unambiguous if it can be given a definite legal meaning. *Westfield Ins. Co. v. Galatis*, 2003-Ohio-5849, 100 Ohio St. 3d 216, 797 N.E.2d 1256, citing, *Gulf Ins. Co. v. Burns Motors, Inc.* (Tex.2000), 22 S.W.3d 417, 423.

It is generally the role of the finder of fact to resolve ambiguity. See, e.g., *Davis v. Loopco Industries, Inc.* (1993), 66 Ohio St.3d 64, 609 N.E.2d 144. However, where the written contract is standardized and between parties of unequal bargaining power, an ambiguity in the writing will be interpreted strictly against the drafter and in favor of the non-drafting party. *Cent. Realty Co. v. Clutter* (1980), 62 Ohio St.2d 411, 413, 16 O.O.3d 441, 406 N.E.2d 515. In the insurance context, the insurer customarily drafts the contract. Thus, an ambiguity in an insurance contract is ordinarily interpreted against the insurer and in favor of the insured. *King v. Nationwide Ins. Co.* (1988), 35 Ohio St.3d 208, 519 N.E.2d 1380, syllabus.

The foregoing rules of policy interpretation have been cited and relied upon by this Court, Ohio's inferior courts, and this state's bar for decades. In all other contexts, they have served well to resolve insurance coverage issues without the unnecessary addition of confusing and amorphous standards nowhere found in the parties' contract. To the extent that *Andersen* requires an additional, wholly subjective layer of analysis (i.e., the inquiry into whether the facts of a particular insurance claim constitute "traditional environmental contamination"), it is unnecessary,

inefficient, and at odds with these traditional, long accepted rules. This Court should use this appeal as an opportunity to correct that imbalance.

2. THE ABSOLUTE POLLUTION EXCLUSION IS CLEAR AND UNAMBIGUOUS.

The absolute pollution exclusion (i.e., no coverage for "bodily injury" or "property damage" due to "the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants"), and the definition of the policy term, "pollutants" (i.e., "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste"), have been held by this Court, Ohio's intermediate Courts of Appeals, and federal courts applying Ohio law to be clear and unambiguous in precluding coverage for claims arising from pollution. See, e.g., *Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd.* (1992), 64 Ohio St.3d 657, 665, 597 N.E.2d 1096, 1102*; Selm v. Am. States Ins. Co.*, No. C-010057, 2001 WL 1103509, (Ohio Ct. App. Sept. 21, 2001); *Zell v. Aetna Casualty & Surety Ins.* (1996), 114 Ohio App.3d 677; 683 N.E.2d 1154; *Owners Ins. Co. v. Singh* (Sept. 21, 1999), Richland App. No. 98-CA-108, unreported; *W. Am. Ins. Co. v. Hopkins* (Oct. 14, 1994), Clark App. No. CA 3108, unreported; *U.S. Fire Ins. Co. v. City of Warren*, 87 F. App'x 485, 489 (6th Cir. 2003); *Longaberger Co. v. United States Fidelity & Guaranty Co.* (S.D. Ohio 1998), 31 F.Supp.2d 595.

The same is true of courts in jurisdictions outside of Ohio. See, e.g., *McKusick v. Travelers Indemnity Co.* (June 8, 2001), Mich. Ct. App. No. 221171, unreported; *Great Northern Ins. Co. v. Benjamin Franklin Fed. Savings & Loan Assn.* (D. Oregon 1990), 793 F.Supp. 259; *Morrow Corp. v. Harleysville Mut. Ins. Co.* (E.D.Va.2000), 101 F.Supp.2d 422; *Auto Owners Ins. Co. v. Tampa Housing Auth.* (C.A.11, 2000), 231 F.3d 1298; *Tippett v. Padre Refining Co.* (La.2000), 771 So.2d 300; *South Dakota State Cement Plant Comm. v. Wausau Underwriters Ins. Co.* (2000),

2000 S.D. 116, 616 N.W.2d 397; *McGuirk Sand and Gravel, Inc. v. Meridian Mut. Ins. Co.,* 220 Mich.App. 347, 559 N.W.2d 93 (Mich.Ct.App.1996).

Given the general acceptance of the absolute pollution exclusion as a clear and unambiguous expression of the contracting parties' intent, *Andersen*'s introduction of terms not expressed in the their agreement as a basis for determining coverage is contrary to Ohio's longstanding rules of policy interpretation, disruptive of the efficient resolution of disputes, confusing and unhelpful. This Court should use this appeal to remedy these shortfalls.

3. THIS COURT SHOULD LIMIT ITS HOLDING IN *ANDERSEN* TO ITS FACTS.

To the extent that this Court's *Andersen* decision introduced the notion that lower courts were required to determine whether a particular claim constituted "traditional environmental contamination" as a precondition to applying the pollution exclusion, it increased the cost (in terms of time, money, and judicial resources) associated with resolving such claims. The idea of "traditional environmental contamination" is by definition a subjective one. What traditions are implicated in the phrase? How does one measure the extent to which any particular incident of alleged environmental pollution is "traditional" or not?

The Court's support for this subjective evaluation only invites extreme positions, which in turn results in more---and more protracted---litigation any time it is potentially implicated. See, e.g., *Pure Tech Sys., Inc. v. Mt. Hawley Ins. Co.*, 95 F. App'x 132, 136 (6th Cir. 2004) ("Pure Tech raises a bevy of additional arguments, most of which ignore the language at issue and none of which are convincing," including "extensive reliance" on *Anderson*); *Rybacki v. Allstate Ins. Co.*, 2004-Ohio-2116 (Ninth District) (insureds' argument that *Andersen* invalidated the pollution exclusion in their homeowners' policy for claim seeking recovery of clean-up costs resulting from the leak of a pollutant, "lacks merit"); *Southside River-Rail Terminal v. Crum & Forster*

Underwriters of Ohio, 2004-Ohio-2723, 157 Ohio App. 3d 325, 811 N.E.2d 150 (argument that "sudden escape of 990,000 gallons of liquid Uran 28 from a collapsed storage tank on an industrial site" did not equate to a "traditional release of a pollutant into the environment" not successful); *Bosserman Aviation Equip., Inc. v. U.S. Liab. Ins. Co.*, 2009-Ohio-2526, 183 Ohio App. 3d 29, 915 N.E.2d 687 (3rd Dist.) (even though aircraft fuel clearly qualified as a "pollutant," plaintiff's exposure to the fuel while conducting his job duties was outside the "reasonable expectation" of the exclusion, and not "traditional environmental contamination"); *Citizens Ins. v. Lanly Co.*, No. 1:07 CV 241, 2007 WL 3129783, (N.D. Ohio Oct. 23, 2007) ("sweeping language in the *Andersen* court's majority opinion, to decide a fairly narrow question, has proved problematic"); *JTO, Inc. v. Travelers Indem. Co. of Am.*, 242 F. Supp. 3d 599, 607 (N.D. Ohio 2017) (*Andersen's* "traditional environmental contamination" standard did not forestall enforcement of the pollution exclusion in suit alleging that insured, over the course of several years, dredged and filled protected wetlands without a permit to do so).

Reliance on the traditional means and methods of resolving contract interpretation issues in general, and insurance policy interpretation issues in particular---i.e., applying the plain meaning of commonly understood words and phrases chosen by the parties to express their intent---instead of esoteric excursions into the rabbit hole of what is and isn't "traditional environmental contamination" would have almost certainly better served the courts and litigants in most, if not all, of the above cases.

Litigating pollution related insurance coverage issues without the subjective baggage of *Andersen* will be easier, faster, more predictable, and fairer than with it. This Court should declare *Andersen* a failed experiment and limit it solely to the facts of that case. This and future claims involving the pollution exclusion should be judged like all other contract---and insurance policy--

-interpretation cases, on the terms of the agreement that establishes the parties' respective rights and obligations. The Court should adopt Appellant's proposition of law, reverse the Ninth District Court of Appeals and reinstate the summary judgment for United Specialty Insurance Company.

IV. CONCLUSION

For all of the foregoing reasons, Amicus Curiae, Ohio Association of Civil Trial Attorneys urges the Court to reverse the judgment of the Ninth District Court of Appeals, reinstate the judgment of the Summit County Court of Common Pleas, and adopt Appellant United Specialty Insurance Company's proposition of law.

Respectfully submitted,

/s/ Gregory E. O'Brien

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of Amicus Curiae Ohio Association of Civil Trial Attorneys has been electronically filed with the Supreme Court of Ohio this 8th day of September 2020 and separately served by email to:

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