IN THE SUPREME COURT OF OHIO

MOTORISTS MUTUAL INSURANCE COMPANY, Plaintiff/Appellant, v. IRONICS, INC. and OWENS-BROCKWAY GLASS CONTAINIER, INC., Defendants/Appellees.	:	CASE NO. 2020-0306 *On Appeal from the Wood County Court of Appeals, Sixth Appellate District,* *Court of Appeals* *Case No. 2019 WD 0018*

MERITS BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS IN SUPPORT OF APPELLEE IRONICS, INC.

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I. INTRODUCTION

United Policyholders submits this brief in support of the merit brief of Defendant-Appellee Ironics, Inc. ("Ironics"). The issues before this Court affect policyholders throughout the State of Ohio and impact the scope of coverage purchased by them.

The plain language of the Comprehensive General Liability policy (the "CGL Policy") and umbrella policy (the "Umbrella Policy") (collectively, the "Policies") that Plaintiff-Appellant Motorists Mutual Insurance Company ("Motorists") sold to Ironics requires Motorists to defend and indemnify Ironics against the underlying claim. Owens-Brockway Glass Container, Inc. ("Owens-Brockway") alleges that Ironics provided nonconforming tube scale, which upon incorporation into Owens-Brockway's glass products, damaged Owens-Brockway's glass bottles and rendered them unsafe and unusable. The CGL Policy provides coverage for claims seeking damages for "property damage" caused by an "occurrence." Both the majority opinion ("Majority") ***and*** the concurrence in part, dissent in part (the "Concurrence/Dissent") to the Sixth District Court of Appeals' Decision and Judgment (the "Decision") correctly determined that Owens-Brockway's claim for damage to its glass bottles satisfied the Policies' definition of "property damage" – "[p]hysical injury to tangible property" – and triggered Motorists' coverage obligations.[1]

The Sixth District's determination that proper construction of the Policies' definition of "property damage" obligates Motorists to defend and indemnify Ironics accords with the insurance industry's continuous representations to policyholders that CGL policies will cover physical property damage arising from a defective product that is integrated into a third party's property. To hold otherwise would absolve the insurance industry of longstanding promises of

[1] The Majority determined that there was "property damage" under the Umbrella Policy (Decision at ¶¶ 33, 45), and the Concurrence/Dissent found that there was "property damage" in the nearly identical definition under the CGL Policy (Decision at ¶ 69).

coverage made to policyholders. This Court should hold that Motorists' duty to defend and indemnify Ironics has been triggered under both the CGL Policy and the Umbrella Policy. At the very least, the Sixth District correctly found that coverage was triggered under the Umbrella Policy, and this decision should stand.

Secondly, the Court should disregard arguments raised by The Ohio Insurance Institute ("OII"), *amicus* for the insurance industry, seeking to re-write the Policies to unreasonably restrict coverage by inserting language not found in the four corners of the Policies. Interpreting the Policies in this matter would contradict longstanding Ohio law and set a dangerous new precedent allowing insurance companies to engage in post-loss underwriting restricting the coverage for which their policyholders had bargained and which they agreed to provide.

Finally, none of the exclusions cited by Motorists and OII apply to preclude coverage.

II. STATEMENT OF THE CASE AND FACTS

United Policyholders adopts the Statement of the Case contained in the brief of Defendant-Appellee Ironics, Inc.

III. STATEMENT OF INTEREST OF AMICUS CURIAE

Effectuating the purpose of insurance and interpreting insurance contracts requires special judicial handling. United Policyholders ("UP") respectfully seeks to assist this Court in fulfilling this important role. UP is a unique 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), to Preparedness (preparedness through insurance education), and Advocacy and Action (judicial, regulatory and legislative engagements to uphold the reasonable expectations of policyholders). 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, Jillian Froment, 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 and regularly appears as *amicus curiae* in courts nationwide to advance the policyholder's perspective on insurance cases likely to have widespread impact. UP has been advocating for policyholder's 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, 119 S.Ct. 710, 142 L.Ed.2d 753 (1999).

UP seeks to fulfill the classic role of *amicus curiae* by supplementing the efforts of counsel and drawing the court's attention to law 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 IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1

The incorporation doctrine was adopted long ago by the insurance industry to insure losses such as those suffered by Ironics.

The incorporation doctrine serves to "cover a policyholder's liability arising from incorporation of an allegedly defective product or work into property of third persons." Lorelie S. Masters et al., INSURANCE COVERAGE LITIGATION, § 14.06 (December 1, 2019).[2] The application of the incorporation doctrine traditionally has turned on the definition of "property damage." Here, the CGL Policy at issue defines "property damage" as "[p]hysical injury to tangible property, including all resulting loss of use of that property." *See* Decision at ¶ 67. The drafting history of the Insurance Services Office ("ISO") Form CGL policy (the "Standard Form"), on which the CGL Policy here is based, and the representations made by the insurance industry as it drafted that Standard Form, makes clear that Motorists intended to defend and indemnify policyholders for the very claim alleged against Ironics.

At an insurance industry conference prior to introducing the 1966 Standard Form policy, Liberty Mutual executive Richard Schmalz, who helped draft the 1966 Standard Form, affirmatively stated that insurance companies intended to insure damage to incorporated products. As Schmalz told the panel,

> All courts seem to say in the situation where the insured's product is incorporated in a building or somebody else's work product so that the value of the other work expended in utilizing the product has to be destroyed in order to remedy the situation, that everything except the cost of the product itself is payable under a standard policy. I think there has been no change in the intent in this particular area and that we can expect exactly the same type of result to obtain as under the old policy.

[2] Gene Anderson, a founding partner of Anderson Kill, P.C., was an original author of previous editions of this treatise. Mr. Anderson passed away in 2010.

INSURANCE COVERAGE LITIGATION, § 14.04[B] (quoting Richard Schmalz at the 1965 Mutual Insurance Technical Conference Proceedings, Casualty and Automotive Underwriting Conference). In addition to the language of the 1966 Standard Form, contemporaneous statements confirm that the insurance industry intended for the 1966 Standard Form to cover incorporated products.

The definition of "property damage" evolved between the 1966 Standard Form and the 1973 Standard Form, however the insurance industry's position did not. The 1973 Standard Form defines "property damage" as "physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom." INSURANCE COVERAGE LITIGATION, § 14.03. Robert Cook, who helped draft the 1973 Standard Form, explained that losses from incorporated products should remain covered under the new Standard Form: "I think it would under both the old and the new policies. I think that this is clearly covered. The courts have said so under the pre-1966 policy in several cases." INSURANCE COVERAGE LITIGATION, § 14.04[F] (quoting Robert Cook at the 1965 Mutual Insurance Technical Conference Proceedings, Casualty and Automotive Underwriting Conference). Again, the policy language and contemporaneous statements on behalf of the insurance industry confirmed the intent to cover claims alleging losses for liabilities from damage due to incorporated products such as those at issue in this case.

The 1986 Standard Form definition, functionally the same as the 1973 Standard Form, provides in relevant part that property damage is "[p]hysical injury to tangible property, including all resulting loss of use of that property." INSURANCE COVERAGE LITIGATION, § 14.03. Like the 1973 Standard Form, both physical injury and resulting loss of use constitute property damage.

This case presents precisely the type of liability for damage for which the insurance industry consistently affirmed that coverage would apply. The property damage occurred to Owens-Brockway's glass products when Ironics' defective tube scale was incorporated into those glass products. Indeed, the Court of Appeals recognizes that property damage occurred. *See* Decision at ¶¶ 33, 45 ("the property damage related to Ironics' supply of nonconforming tube scale…"; "we find that physical injury to Owens-Brockway's glass product, whether such product is determined to be Ironics' property or other property, constitutes "property damage" as that term is defined under the umbrella policy"). This physical damage rendered the glass products unsafe and unusable. Therefore, according to the insurance industry itself, liability for the property damage to the glass products caused by Ironics' allegedly defective tube scale is covered under the Standard Form CGL Policy that Motorists sold to Ironics.[3] Courts, too, have interpreted coverage for liability for similar "property damage" under such policies in accord with the previous representations of coverage made by the insurance industry. Ohio Courts of Appeals have held that when a defective product cannot be separated from the product into which it is incorporated, it causes physical damage to the entire product. *Moraine Materials Co., Inc. v. The Ohio Cas. Ins. Co.*, 2nd Dist. Montgomery No. 6284, 1979 WL 208510, *3 (Dec. 12, 1979) ("Here, the rest of the wall, exclusive of the part containing the defective cement, was the property of Armco . . . we hold that there was 'physical' damage to the wall."). *Transamerica Ins. Co. v. S.A.I. Marketing. Corp*., 8th Dist. Cuyahoga No. 49256, 1985 WL 6860, *4 (June 13, 1985) ("the manufacturer seeks indemnity from the distributor for claims by its customers when

[3] Motorists knew Ironics' business when it issued the policies in that it listed the business as "metal dealers/distributors nonstructural". In fact, in Motorists' Complaint, it alleged that Ironics processed tube scale and sold it to various customers to be incorporated into other parts. If Motorists does not cover property damage to those incorporated systems, what liability arising out of Ironics' products for property damage would be covered?

its timing lights failed because the distributor's capacitors failed. Those claims seek payment for 'property damage' caused by an 'occurrence' . . .").

Further, Ohio courts find that the property damage occurs when a defective product is incorporated into a larger system. *Bundy Tubing Co. v. Royal Indemn. Co.*, 298 F.2d 151 (6th Cir. 1962). In *Bundy*, the policyholder manufactured copper tubing which was incorporated into concrete flooring as a part of a radiant heating system. The tubing was defective, causing the heating system to fail, and the entire floor into which it had been incorporated had to be removed. There, the Court stated: "In our opinion, property was damaged by the installation of defective tubing in a radiant heating system which caused the system to fail and become useless." *Bundy*, at 153; *see also Parker Hannifin Corp. v. Steadfast Ins. Co*., 445 F. Supp. 2d 827, 833 (N.D. Ohio 2006) (finding that "the disparity between the costs of actual damage to homes and furnishings and the (potentially miniscule) cost of actual gasket [policyholder's product] repair, renders it both fair and efficient to classify the repaired/replaced product as the Zenith televisions [incorporated product]").

Other courts also have taken this well-reasoned approach. For example, the United States Court of Appeals for the Eighth Circuit found physical injury to tangible property, including all resulting loss of use of that property, where a policyholder sold contaminated carbon dioxide which was incorporated into third parties' carbonated beverages. *Nat'l Union Fire Ins. Co. of Pittsburgh v. Terra Indus., Inc.*, 346 F.3d 1160, 1165 (8th Cir. 2003). Likewise, the United States Court of Appeals for the Seventh Circuit relied on the drafting history of the property damage provision to rule that "a loss that results from physical contact, physical linkage, as when a potentially dangerous product is incorporated into another and, because it is incorporated and not merely contained, … must be removed, at some cost, in order to prevent the danger from

materializing." *Eljer Mfg., Inc. v. Liberty Mut. Ins. Co.*, 972 F.2d 805, 810 (7th Cir. 1992); *Anthem Electronics, Inc. v. Pacific Employers Ins. Co.*, 302 F.3d 1049, 1052 (9th Cir. 2002) (finding that loss of use of scanners incorporating defective circuit boards constituted property damage); *Pittway Corp. v. American Motorist Ins. Co.*, 56 Ill App.3d 338, 342 (1977) ("A component is so intertwined with the entire mechanism that the defect necessarily results in damage to the complete product the component will be deemed to have caused property damage.").

Such is the case here. Ironics' product, when incorporated into the final product of Owens-Brockway, caused physical injury and resulting loss of use of that final, non-policyholder product. Decision at ¶¶ 33, 45, 69. This constitutes property damage under the CGL Policy (and the Umbrella Policy), and Motorists owes Ironics coverage for the claim at issue asserting liability for such damage.

Further, the Court of Appeals' interpretation of "other property" (*See* Decision at ¶ 28) when applying the economic loss concept is inconsistent with the intent of the insurance industry in drafting the ISO Standard Form Policy. "[T]he drafting history of the property-damage clause, and the probable understanding of the parties to liability insurance contracts, persuade us that the incorporation of a defective product into another product inflicts physical injury in the relevant sense on the latter at the moment of incorporation[.]" *Eljer*, 972 F.2d at 814. Here, the "other property" at issue is Owens-Brockway's glass products, which were damaged and rendered unusable by Ironics' defective tube scale. *See, e.g., Chubb Ins. Co. of New Jersey v. Hartford Fire Ins. Co.*, 229 F.3d 1135 (2d Cir. 2000) ("a breach of contract or warranty can be an 'occurrence' if, as a result of the breach, property sold by the insured to a third party, which was then incorporated into other property belonging to the third party, caused damage to

this other property") (citations omitted.) Indeed, the Court of Appeals (in both the Majority and Concurrence/Dissent opinions) agreed that Ironics' allegedly defective tube scale caused property damage. *See* Decision at ¶ 33. This property damage triggers coverage under the CGL Policy.

As the Concurrence/Dissent notes, the Decision bases its findings on case law involving purchases of already-integrated products. *See* Decision at ¶ 82; *see also, HDM Flugservice GmbH v. Parker Hannifin Corp.*, 332 F.3d 1025 (6th Cir. 2003); *Nationwide Agribusiness Ins. Co. v. CNH Am. LLC*, N.D. Ohio No. 1:12-cv-01430, 2014 WL 2520502 (June 4, 2014). That did not happen here. Owens-Brockway purchased "allegedly-defective raw material (tube scale) for use as a component ingredient in the manufacture of glass containers, which caused physical damage to Owens-Brockway's other property when it was used to manufacture those glass containers." Decision at ¶ 82. Therefore, the economic loss concept has no application here, and the claim triggered Motorists' liability coverage obligations under the CGL Policy.[4]

Finally, the CGL Policy's plain language supports coverage here. Property damage means "[p]hysical injury to tangible property, including all resulting loss of use of that property." Decision at ¶ 13. Under Ohio law, "[t]he words and phrases in an insurance policy must be given their plain and ordinary meaning, unless manifest absurdity results or some other meaning is clearly evinced from the contract." *Acuity, A Mut. Ins. Co. v. Siding & Insulation Co.*, 8th Dist.

[4] Even if the only claim was a contractual claim, that would not preclude coverage because Owens-Brockway seeks damages to non-insured's property. *Funk v. Rent-All Mart, Inc.*, 91 Ohio St. 3d 78, 80, 2001-Ohio-270, 742 N.E.2d 127 (2001) (holding that it is the substance of the complaint, not the caption, that determines the nature of the action); "[T]he issue examined by the Ohio courts to determine insurance coverage is not whether the cause of action is one for contract or tort but whether the damages may be characterized as contractual in nature or whether they are consequential property damage." *The Burlington Ins. Co v. PMI Am., Inc.*, 862 F. Supp. 2d 719, 728-729 (S.D. Ohio 2012) ("complaint should not be construed to encompass only breach of contract.").

Cuyahoga 2016-Ohio-1381, 62 N.E.3d 937, ¶ 9. Here, at the moment of incorporation, Ironics' tube scale caused physical injury to tangible property, the glass products. Based on the plain language of the CGL Policy, the definition of property damage has been met, and Motorists' liability insurance coverage obligations have been triggered.

The drafters of the Standard Form Policies at issue here repeatedly and affirmatively stated that ISO Standard Form policies were intended to cover property damage resulting from incorporated products such as those at issue here. The Concurrence/Dissent properly applies the law to the facts of this case in reaching a result that matches the expectation of the insurance industry and policyholders throughout the State of Ohio. At a minimum, the interpretation supported by the drafters and relied upon by Ironics is reasonable. And 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); *Hartman v. Erie Ins. Co.*, 6th Dist. Wood 2017-Ohio-668, 85 N.E.3d 454, ¶ 49. 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." (citation omitted.) *Andersen v Highland House Co*., 93 Ohio St. 3d 547, 549, 757 N.E.2d 329 (2001). Accordingly, this Court should find that Motorists' liability insurance coverage obligations under the CGL Policy have been triggered. At the very least, for all the reasons stated above, this Court should affirm the Court of Appeals' Decision that Motorists' coverage obligations under the Umbrella Policy have been triggered.

Given that insurance companies and policyholders understood that there would be coverage for "everything except the cost of the product itself" when it is incorporated into a

larger product, a holding otherwise, would eliminate the bargained-for coverage and have wide-reaching implications for all suppliers and manufacturers of component parts, food, pharmaceuticals, etc. Rather, as the Decision notes, if the insurance companies, as drafters, wanted to exclude all integrated systems from coverage, they could have. Decision at ¶ 43. They did not, and should not be able to assert an interpretation contrary to their plain language, own understanding of the plain language, and the parties' expectations.

Proposition of Law No. 2

***Amicus* for the insurance industry's improper attempt to re-write the policy to narrow the definition of "occurrence" should be disregarded.**

The Ohio Insurance Institute ("OII"), *amicus* for the insurance industry, asks this Court re-write the Umbrella Policy unreasonably to restrict the coverage for which Ironics long paid premiums to Motorists. This contradicts both longstanding rules of policy interpretation and common sense. In its Merit Brief in Support of Motorists (the "OII Brief"), OII asserts that the Court of Appeals "read the critical term 'accident' and the concept of 'fortuity' entirely out of the definition of 'occurrence' in the umbrella policy." OII Brief at p. 15. The Court of Appeals did no such thing. First, the Decision states that "property damage related to Ironics' supply of nonconforming tube scale was unintended and unexpected from Ironics' standpoint, thus constituting an 'occurrence' as contemplated by the policy language." Decision at ¶ 33. Thus, even if this Court were to impose a "fortuity" requirement not contained in the policy, the requirement is met here. At the very least, the consequential damages to the glass product (which is not Ironics' product) constitute an "occurrence" as defined by the policies. This Court has held that such consequential damages are covered. *Westfield Ins. Co. v. Custom Agri Sys., Inc.*, 133 Ohio St. 3d 476, 2012-Ohio-4712, 979 N.E.2d 269, ¶ 13 ("If the damages are consequential and derive from the work the insured performed, coverage generally will lie.").

This reasoning has been consistently applied by courts applying Ohio law. *Heile v. Herrmann*, 1st Dist. Hamilton 136 Ohio App. 3d 351, 353, 736 N.E.2d 566. ("In other words, the policies do not insure an insured's work itself; rather, the policies generally insure consequential risks that stem from the insured's work."); *Burlington*, 862 F. Supp. 2d at 728 (citing cases that "readily found coverage when there is collateral damage to property other than the insured's work product."); *Ferro Corp. v. Blaw Knox Food & Chem. Equip. Co*., 8th Dist. Cuyahoga No. 80804, 2002-Ohio-5472, ¶ 41. ("The better rule is that when an insured's defective work/product has injured some other property, there *is* an occurrence.").

Second, "fortuity" does not appear in the policy. OII attempts to shoehorn an additional extra-contractual requirement into the plain meaning of the Umbrella Policy to reach an unsubstantiated, conclusion. OII is seeking relief which amounts to policy reformation, though there is no basis to re-write the policy to add a "fortuity" requirement.

As the Concurrence/Dissent notes, undefined words in an insurance policy must be given their plain and ordinary meaning. *See*, Decision at ¶ 70; *Nationwide Mut. Fire Ins. Co. v. Gunman Bros. Farm*, 73 Ohio St. 3d 107, 108-109, 1995-Ohio-214, 652 N.E.2d 684. Accident, undefined in the CGL Policy, means "an unforeseen and unplanned event or circumstance." *See*, https://www.merriam-webster.com/dictionary/accident. Where the language of an insurance policy is unambiguous, courts "have no authority to rewrite or otherwise construe the language the parties have adopted." *Nationwide Ins. Co. v. Alli*, 7th Dist. Mahoning 178 Ohio App. 3d 17, 2008-Ohio-4318, 896 N.E.2d 742, ¶ 22.

Construing the plain and ordinary meaning of the Umbrella Policy, the reasoning of the Court of Appeals in favor of coverage comports with the facts of this case. Ironics neither foresaw nor intended to sell defective tube scale to Owens-Brockway. Indeed, the parties even

stipulated as much and Motorists declaratory judgment complaint states that "Ironics was not aware that the subject tube scale had been contaminated with the chromite sand." Decision at ¶ 70.

The plain language of the Umbrella Policy, and the well-reasoned analysis of the Decision, makes clear that the loss constitutes an "occurrence." OII's misreading of the Decision presents no basis for which the Court may re-write the definition of "occurrence" to add extra-contractual requirements not present in the Umbrella Policy. Accordingly, this Court should disregard OII's attempt to expand the definition of occurrence, and instead interpret the policy language as written.

Proposition of Law No. 3

No exclusions preclude coverage.

Exclusions and other limiting language are subject to heightened scrutiny and must be clear and exact in order to apply. Any language in a policy that is asserted by an insurance company to bar or limit coverage is to be construed as an exclusion. *See, e.g., Physicians Ins Co of Ohio v Swanson*, 58 Ohio St. 3d 189, 191, 569 N.E.2d 906 (1991). "[W]here exceptions, qualifications or exemptions are introduced into an insurance contract, a general presumption arises to the effect that that which is not clearly excluded from the operation of such contract is included in the operation thereof." *Home Indem. Co. of New York v. Plymouth*, 146 Ohio St. 96, 64 N.E.2d 248 (1945), paragraph two of the syllabus. "[A]n exclusion from liability must be clear and exact in order to be given effect." *Lane*, 45 Ohio St. 3d at 65. Stated conversely, an insurance policy provision will not operate to limit coverage under Ohio law unless it "clearly, specifically, and unambiguously" does so. *Andersen v. Highland House Co.*, 93 Ohio St. 3d 547, 548, 2001-Ohio-1607, 757 N.E.2d 329 (2001).

The contractual liability exclusion does not apply because Owens-Brockway is not seeking to be indemnified by Ironics – a liability assumed by Ironics in a contract. "[T]he contractual liability exclusion reaches only a particular type of contract—a hold harmless or indemnification agreement….The phrase 'liability assumed by the insured under any contract or agreement' does not refer to the type of liability incurred as a result of the breach of every contract." *Burlington*¸ 862 F.Supp. 2d at 738-739. This phrase refers to a narrower class of contract liability:

> Liability insurance policies not infrequently contain provisions specifically excluding from coverage liability assumed by the insured under a contract not defined in the policy. Such provisions, which may be referred to as "contractual exclusion clauses," deny the coverage generally assumed by a liability policy in cases in which the insured in a contract with a third party agrees to save harmless or indemnify such third party.

Id, quoting 12 Couch on Insurance § 44A:35 at p. 55 (2nd Ed.1981). "At a very minimum, this analysis provides support for [the policyholder's] interpretation of the contractual liability exclusion, which prevents [the insurance company] from establishing that its interpretation is the only one that can fairly be placed on the language in question." *Burlington*, 862 F. Supp. 2d 739.

Even if Owens-Brockway was attempting to enforce an indemnity provision, the exception to the exclusion applies because Ironics would be liable to Owens-Brockway even in the absence of any agreement in a contract. "In other words, where the express contract actually adds nothing to the insured's liability, the contractual liability clause is not applicable…" *Serv. Masters of Akron, Inc. v. Hamilton Mut. Ins. Co.,* 9th Dist. Summit No. 10639, 1982 WL 2685, at *1-2 (Aug. 4, 1982) (holding that coverage was not precluded under contractual liability exclusion even where contract required one party to assume all the liability for collisions for another in contract, because the contract did not expand policyholder's obligation). When the

contractual obligations "mirror [the policyholder's] duty under general law principles" then it "did not assume liability for damages…sufficient to trigger the…contractual liability exclusion." *Ewing Constr. Co., Inc. v. Amerisure Ins. Co.*, 420 S.W.3d 30, 35 (Tex. 2014).

Contrary to the OII Brief, the "your product" exclusion does not apply because Ironics is not seeking coverage for damage to its own product, the raw materials, but for damage to Owens-Brockway's part, the glass product. "[O]n its face, the 'damage to your product' provision only excludes coverage for the property damage to the *insured's product . . . arising out of the insured's product*. The exclusion does not preclude coverage for property damage to the property of a third party . . . *arising out of the insured's product*." (Emphasis sic.) *Hartzell Industries, Inc. v. Fed. Ins. Co.*, 168 F. Supp. 2d 789, 798 (S.D. Ohio 2001). "Under Ohio law, an 'own product' exclusion from commercial umbrella liability coverage did not exclude coverage for the cost of replacing the insured's defective gaskets in the third-party manufacturer's projection screen television sets as the repair and replacement program represented the cost of eliminating property damage to a product that was not the insured's product. . ." 9A Couch on Ins. § 130.8, citing *Parker*, 445 F. Supp. 2d 827.

Likewise, the "your work" exclusion does not apply because Ironics is not seeking coverage for damage to its work, rather, for damage to other's property. "[W]here all of the damage that is being claimed is damage to the work of the insured which is caused by the work of the insured, the 'your work' exclusion will apply to preclude coverage." 9A Couch on Ins. § 129:18. Again, that is not the case here. At no time has Owens-Brockway even alleged that Ironics' work was defective – it did not allege that Ironics performed any work. Instead, it alleged that Ironics' product caused property damage to its property. *See, Ohio Cas. Ins. Co. v. Hanna*, 9th Dist. Summit Nos. 07CA0016-M, 07CA0017-M, 2008-Ohio-3203, ¶ 29 (finding that

the exclusion did not apply because "Quality's out-of-plumb installation of the windows did not cause property damage to other work performed by Quality. Rather, it caused damage to third-party property, specifically, the Hannas' prefabricated windows' cranks and gears").

The impaired property exclusion also does not preclude coverage because Owens-Brockway's glass products could not be restored to use by repair, replacement or removal of Ironics' product. *Burlington,* 862 F. Supp. 2d 719 (holding the insurance company failed to meet burden demonstrating that kiln could be restored to use by repair, replacement, or removal of policyholder's work).

V. CONCLUSION

For the reasons set forth above, this Court should find that Motorists' duty to defend and indemnify Ironics has been triggered under the CGL Policy or, at a minimum, affirm the Sixth District's Decision that coverage has been triggered under the Umbrella Policy. Further, the Court should disregard OII's arguments regarding the definition of occurrence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this Merits Brief of *Amicus Curiae* United Policyholders in Support of Appellee Ironics, Inc., was sent via email and/or ordinary U.S. mail this 15th day of September, 2020 to:

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