IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BONDEX INTERNATIONAL, INC., et al., Plaintiffs-Appellants/Cross-Appellees v. CENTURY INDEMNITY COMPANY, et al., Defendants-Appellees/Cross Appellants	Case Nos. 08-4735 09-3091 09-3092 09-3304 09-3307

PETITION FOR PANEL REHEARING

The Court should reconsider its holding in this matter because the Court has misconstrued the insurance policies in this case creating confusion and unintended consequences relating to a fundamental concept of insurance law, to wit: Who is an insured under a policy of insurance? By defining "company" so broadly as to include non-business entities prior to the inception of the policy, the Court has created unintended coverage under myriad commercial policies for everything from new employees' actions prior to being hired to unorganized "subsidiaries" corporations do not even know they have. Injecting this confusion into the law will result in unnecessary costs and litigation for both insureds and insurers and will have profound impact on commercial insurance coverage far beyond this case.

In the Court's November 28, 2011 Opinion the Court finds that the term "company" as used in the definition of "Named Insured" means "an association of persons for carrying on a commercial enterprise" and is not restricted in any way to formally organized business entities like corporations, partnerships, etc. (Opinion at 11.) The Court also recognizes that the first clause of the Named Insured definition contains a "temporal limitation." The Court's Opinion states: "By focusing on the 'inception date of the policy' the term takes a snapshot of companies under the Named Insured's control and active management at the time the policies took effect." (Opinion at 13, emphasis added.)

The Court then analyzes whether the Reardon Division (post 1966) qualifies as a "company" under the control and active management of the Named Insured. (Opinion at 12.) This analysis of the Reardon Division, however, is entirely misplaced because no one has ever argued that the Reardon Division was not a Named Insured. A division of a corporate Named Insured has no separate legal existence and is insured because it is the Named Insured. There is no need to determine whether that corporate division constitutes a "company" under control and active management of the Named Insured.[1]

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[1] Plaintiffs did advance counts against Mt. McKinley only relating to the Reardon and Republic Division claims but those counts were based on a distinct contractual liability argument and in no way questioned the Reardon Division's insured status. (Opening Brief at 71-73.)

The Court's analysis of this non-issue is also irrelevant to the primary issue in the case; whether Old Reardon is a Named Insured under the plain meaning of the definition. What is really problematic, however, is that the Court uses its misplaced analysis of the Reardon Division as a spring board to its conclusion regarding Old Reardon.

Accepting the Court's conclusion with respect to the term "company" and the Court's recognition of the policies' temporal limitation, the question, as it relates to Old Reardon, is what "association of persons for carrying on a commercial enterprise" from the 1966 transaction existed, selling these same products, in the same manner, at the same places and was under the Insureds' management and control as of each of the Policies' inception dates.

The inception dates of the Policies at issue are the following:

September 15, 1972 – Century

September 15, 1975 – Century

September 15, 1972 – Continental

September 15, 1975 – Continental

June 7, 1976 – Allstate

June 7, 1977 – Allstate

June 7, 1978 – Allstate

May 18, 1979 – Allstate

June 7, 1976 – Columbia

June 7, 1977 – Columbia

May 1, 1978 – Columbia

May 28, 1979 – Columbia

October 13, 1974 – McKinley

May 31, 1980 – McKinley

May 31, 1981 – McKinley

May 31, 1982 – McKinley

May 31, 1983 – McKinley

The Defendant insurers, who have the burden on summary judgment, did not even attempt to answer the essential question for each of the inception dates. (*See*, McKinley Brief pp. 40-42, Century Brief pp. 47-49.)

This Court, on the record before it, also cannot answer the question. The Court merely says that "the Reardon Division continued Old Reardon's business – making many of the same paint and drywall products, at the same plants, with the same employees, and then selling these products under the same brand names." (Opinion at 13.) But, as the Court noted, the Reardon Division ceased to exist at least one year before the inception date of the first of the policies. Even if the sale in 1971 of the Reardon Division's assets and liabilities to another corporate entity, Bondex International, Inc. ("Bondex") did not significantly change the business or

product lines—and there are numerous facts in dispute regarding the change in business and product lines from 1966 to 1973[2]—there is no evidence of record that the same employees who worked for Old Reardon before the 1966 sale (the "same association of persons carrying on a commercial enterprise," Opinion at 13) were still working, in association, selling the same products at the same locations as of any of the foregoing inception dates.[3] Counsel for Mt. McKinley conceded at oral argument that in order for the definition to apply Old Reardon and the "other company" under active management and control must be the same.

Thus, there is simply no record evidence that an association of persons related to Old Reardon was carrying on a commercial enterprise and being managed and controlled by the Insureds as of the inception dates of the policies. At best the record reveals that in the mid-1980's when the later policies incepted only two employees who had worked at Old Reardon were connected to Bondex. (R.612, Fleming 61-65, Appx.4346.) One of those was a purchasing agent and the other had been a sales employee for Old Reardon but was a commissioned sales

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[2] Plaintiffs demonstrated at some length in their Opening Brief (pp. 56-60) that there were significant changes to the product lines, locations and employees. Moreover, the alleged adopting of Old Reardon's incorporation date was specifically disputed. *Id.*

[3] This assumes that a continuation of factory workers equates with the persons actually carrying on the business because it is undisputed that those actually managing the Old Reardon business did not go on to work for RPM at any time after the 1966 transaction.

representative for Bondex because of the changes in the structure of the entity. (*Id.*) At a minimum there are material questions of fact for each policy's inception date.

Furthermore, if the Court's Opinion is intended to mean that because an "association of persons" formerly employed by Old Reardon was at some point under the management and control of RPM after the 1966 sale and therefore can be deemed to remain so without actual proof for the periods 1973-1985 (and presumably forever) bizarre results would follow.

For example, if Company A purchased a division of Company B in 1966 and then Company A purchased an insurance policy in 1973, the division would be a Named Insured under the policy, entitled to coverage, for the division's products and conduct prior to 1966. Indeed, if a group of employees left Company B to join Company A in 1966 and Company A purchased insurance in 1980, the group of employees (an association of persons carrying on a commercial enterprise) would be a Named Insured under the 1980 policy for conduct before 1966 without even a showing that the employees were still employed in 1980.

Another example: Company A purchased a factory from Company B in 1966 that manufactured asbestos products from 1930 to 1966 and certain of the factory workers came over and worked for Company A after the purchase. In 1979 Company A sold the factory. In 1980 Company A purchased insurance policies.

Under the Court's analysis, because the factory and employees had at one time been under the control and active employment of Company A, the factory would be a Named Insured for decades of asbestos sales prior to 1966.

These scenarios are exactly what the Ohio Supreme Court warned against in *Pilkington North America, Inc. v. Travelers Casualty & Surety Company*, 861 N.E.2d 121 (Ohio 2006). That is, multiple insureds making claims to an insurance policy. *Id*. at 130-31.

Note that the scenarios discussed above are completely distinct from why the Plaintiffs here have coverage for Old Reardon claims. As noted in Plaintiffs' Opening Brief (p. 24), Plaintiffs have coverage for claims alleging exposure to Old Reardon products because the claims are brought against Plaintiffs and Plaintiffs are "legally obligated to pay as damages" for these "personal injuries," not because Old Reardon itself is a Named Insured. Thus, the coverage for these claims is in no way a windfall to Plaintiffs and no stranger to the policies is making claims thereunder.[4]

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[4] It is also for this reason that the Court was incorrect in stating that the Plaintiffs are trying to create a "loophole" in the Named Insured definition to obtain "unlimited coverage (for Old Reardon) unlike every other entity on Named Insured's policy." (Opinion at 15.) Plaintiffs' position has always been that Old Reardon has no coverage at all under the Policies because it is not a "Named Insured" like every other entity on the Policies. The Court eschews a non-existent loophole in favor of a mammoth extension of coverage to strangers to the policies.

Importantly, the consequences of the Panel's Opinion here are easily avoided if one reexamines the term "company" in the context of the definition of "Named Insured," taking into account a range of sources. The phrase at issue is "subsidiary company (including subsidiaries thereof) and any other company under their control with active management at the inception date of this policy…." It is apparent in context that the word "company" encompasses those business entities over which the signatory to the policy has control and actively manages but where the entity is not, strictly speaking, a "subsidiary." This would include, for example, a joint venture over which the signatory has board control but only 50% or less actual ownership.[5] It could also include a similar situation involving a partnership, LLC, or other state-created entity that is not a subsidiary. The insurance companies simply wanted to make it clear in the policy that they were insuring risks over which the signatory had control as opposed to those ventures where the signatory might be a passive investor only.

The Panel essentially rejects this view by placing dispositive weight on the fact that the policies use "company" rather than "corporation." (Opinion at 11.) According to the Panel, the word "company" refers to "an association of persons

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[5] It would not be uncommon, for example, for two or more business entities to form a venture where one entity invests most of the capital and the others bring other assets (a patent, for example). In that scenario, one of the entities might maintain actual governing control under the terms of the formation agreements.

for carrying on a commercial or industrial enterprise." From that definition, the Court concludes that there is no requirement under the policy that the entity "under the control and active management" of the Insured be a formal business entity. (*Id.*) But unmooring the word "company" from any requirement that some formal entity be involved leads to the consequences outlined above.[6]

Here, the Panel reads too much into the definition that it quotes. The Panel says that nothing in the definition suggests that the term "company" here extends only to formal business entities—that is not true. The dictionary definition cited by the Court refers to a "commercial or industrial enterprise." Under one of the sources quoted by the Panel, an "enterprise," in the relevant context, is "a unit of economic organization or activity; especially: a business organization." *Webster's New Collegiate Dictionary*, 380 (1975 ed.); *Webster's Third New International Dictionary of the English Language Unabridged* 757 (1976 & 1981 eds.); *see also* Merriam-Webster Online, http://www.merriam-webster.com/dictionary/enterprise,

[6] At argument, counsel conceded that the word "company" had been used in the policies and not "corporation." But that limited concession did not go to the Panel's point here. Instead, acknowledging that the use of the word "company" and not "corporation" might have significance means only that things like partnerships, LLCs or other entities and not statutory "corporations" would also be covered, not that there is no requirement that any formal business entity be involved.

definition 3(a) (last visited Dec. 8, 2011). A "business organization" connotes far more than a loose, informal group of persons or group of assets.[7]

In addition, *Black's Law Dictionary* from 1979, defines "company" as "Union or association of persons for carrying on a commercial or industrial enterprise; a partnership, corporation, association, joint stock company." *Id.* at 255 (5th ed. 1979).[8] To be sure, that definition is very similar to the one that the Panel quotes but the examples that follow are telling. By listing corporation, partnership etc., the definition can certainly be read to limit the term to formal business entities. (*Contrast* Opinion at 11, saying that there is nothing in the definition that appears to limit the term "company" to formal business entities like "corporations" and "partnerships.") And in this particular context, that limitation makes sense.

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[7] In relevant part, an "organization" is "an administrative and functional structure (as a business or a political party)." *See Webster's New Collegiate Dictionary*, 809 (1975 ed.); *see also* Merriam-Webster Online, http://www.merriam-webster.com/dictionary/organization, definition 2(b) (last visited Dec. 8, 2011.) In *American Automobile Assoc. v. Bureau of Revenue*, 541 P.2d 967, 970 (N.M. 1975), the court found that a group was a "business organization in the common understanding of that term" where it was a "group of people that has a more or less constant membership, a body of officers, a purpose, and a set of regulations." The latter, at the very least, connotes a formal organization.

[8] Ohio courts commonly look to *Black's Law Dictionary* in ascertaining the meaning of terms in insurance policies. *See, e.g., Federal Ins. Co. v. Executive Coach Luxury Travel*, 944 N.E.2d 215, 219 (Ohio 2010); *Grange Ins. Co. v. Stubbs*, 2011-Ohio-5620, 2011 WL 5185572, at *3 (Ohio 10th Dist. Ct. App. Nov. 1, 2011).

But even putting aside these considerations, a limitless definition of "company" does not make common sense in the specific context of this particular provision. This part of the "Named Insured" definition refers to "any subsidiary company" and "any other company under their control and active management." The second reference to "company" (the one subject to this debate) is clearly tied to the first reference to "company" by the phrase "any other" (and it is the exact same word in any event). Importantly, it would make no sense to refer to a "subsidiary company" and not mean some formal business entity. Otherwise, a loose association of persons or group of assets would somehow constitute a "subsidiary." This would mean that large corporations could potentially have thousands of otherwise unorganized "subsidiaries."

Not only does the Plaintiffs' reading of "company" comport with the plain language of the provision and the context in which it is found, it is the only reading that avoids consequences that simply make no sense and that insurance companies generally would, in any other case, be trying desperately to avoid. There is nothing in the Ohio jurisprudence of insurance law to suggest the Ohio Supreme Court would create the kind of unlimited coverage for strangers to insurance policies this Court's opinion creates.

Even if the Panel were to disagree with Plaintiffs' reading of the term "other company," however, under the Court's own reading of the term, there is just no

record upon which to conclude "an association of persons . . . carrying on a commercial and industrial enterprise" with any relationship to Old Reardon was under the control and active management at the inception dates of the Policies. It should be noted that there is also no evidence that during the course of their contentious dealings with each other, the insurers ever asserted this "other company" could apply to Old Reardon and no evidence Plaintiffs ever agreed to it. This argument was raised for the first time in this litigation and then only as an alternative argument to the now discredited *de facto* merger claim among others. Given this history and the fact this issue was never addressed by the lower court and only argued briefly as an alternative ground on appeal and, more importantly, given the potential for serious disruption in insurance law relating to all manner of business transactions, the prudent course, would be to remand this issue to the district court for full factual development and briefing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The below signed attorney hereby certifies that on December 12, 2011, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

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