Gallagher Sharp ATTORNEYS

CLEVELAND OFFICE
Sixth Floor Bulkley Building
1501 Euclid Avenue
Cleveland, OH 44115
216.241.5310 PHONE
216.241.1608 FAX

TOLEDO OFFICE
420 Madison Avenue
Suite 1250
Toledo, OH 43604
419.241.4860 PHONE
419.241.4866 FAX

DETROIT OFFICE
39111 West Six Mile Rd.
Suite 141
Livonia, MI 48152
734.591.7468 PHONE
734.591.7467 FAX

January, 2009 Newsletter

TABLE OF CONTENTS

I. PRIMARY AND EXCESS INSURERS: RELATIONSHIPS, PROBLEMS, AND SOLUTIONS

A policyholder may have both a primary and an excess policy of insurance. Occasionally one of the insurers may find itself at loggerheads with the other. Common problems include the non-responsiveness of a carrier, disagreements over the handling of the file, and differences of opinion on the value of a claim.

This article describes the typical relationship between a primary and excess carrier. It then discusses, one-by-one, each of the above three problems, possible solutions to each problem, and the overriding consideration in nearly every case: protecting the interests of the insured.

Relationship Between Primary And Excess Insurer

The relationship between a primary and excess carrier is principally defined by the language in the insurance policies. Thus, the policies must be examined. The following is a description of the relationship between those two insurers based upon language commonly found in primary and excess policies.

The primary policy obligates the insurer to defend and indemnify the policyholder, consistent with the terms and conditions of the policy. The excess policy generally does not impose on the excess insurer a duty to defend, although the excess carrier typically, at its own discretion, can participate in the defense, investigation, and settlement of any occurrence. Further, excess policies usually are not triggered until there has been payment of the full amount of the underlying limits and any other insurance.

Excess policies usually state that the underlying insurance must remain valid and in full force and effect. Moreover, the underlying limits shall not be reduced or exhausted except by payment of judgments, settlements, or related costs or expenses (if such costs or expenses reduce the limits). Failure to comply with that condition does not invalidate the excess insurance, but the obligation of the excess carrier generally will not exceed that which would have applied absent any failure to comply with that condition, i.e. the excess policy usually will not "drop down."

Both primary and excess policies have prompt notice conditions. Notice to an excess insurer, however, may not be required until it becomes apparent that there may be a claim involving the excess policy. Thus, what constitutes late notice to a primary insurer may not amount to late notice to the excess insurer.

An excess insurer can rely upon the conditions of the primary policy in seeking information from the primary insurer. Because an insured often acts through agents or representatives, including the primary insurer and defense counsel, the excess insurer may seek information from them. When doing so, the excess insurer may cite the notice and cooperation conditions of the primary policy.

Problems And Solutions

Countless problems may arise between primary and excess insurers, but many of them center on three issues: non-responsiveness of an insurer, disagreements over the defense of the claim, and differences of opinion as to claim value.

Non-responsiveness is a common problem. After you have identified the appropriate person who has the information, usually a claims representative, an introductory email or letter followed by a phone call often is the best way to seek information. You will usually want to ask the person for help (as opposed to demanding information), in part because studies indicate that people are usually much more inclined to cooperate when they are asked to help someone else. Moreover, sometimes you can obtain information and insight over the phone that is not apparent from a review of documents. If the person is not responding, though, you will have to resort to written communication.

If there is no response to one or more follow-up letters, another letter - this time with a reasonable time frame for responding - may be indicated. Suggesting that the claims representative simply forward documents and reports (as opposed to requesting narrative responses) may yield a response. In some cases, the easier you make it, the better.

If repeated, non-confrontational requests for information are unavailing, a more aggressive approach can be considered. A manager of your company can communicate with his or her counterpart at the other company. Although doing so often will irritate the non-cooperative claims representative, such an approach often brings results.

Sometimes retaining counsel is helpful; a letter from a lawyer may get the attention of a non-cooperative insurer.

If information is still not forthcoming, you can consider, in appropriate circumstances, enlisting the assistance of the insured, directly or through the insured's broker or personal counsel. Two or three voices may be more difficult to ignore than one.

If all efforts are unsuccessful, a "letter of last resort" may be indicated. The letter should set forth the following: the right to the requested information, citing appropriate policy provisions; detail the efforts to obtain the information; describe the insurer's non-responsiveness; indicate the potential adverse consequences to the insured, the insurer, and perhaps even the non-responding insurer; and demand the information by a certain date.

The final or "nuclear" option is to file suit, but rarely will an insurer choose to do so, especially while a claim is pending. But if the foregoing course of action is followed, an insurer can lay the ground work for a successful later suit. Indeed, in many states, including Ohio, insurers owe certain duties to other insurers. See, e.g. *Centennial Ins. Co. v. Liberty Mut. Ins. Co.* (1980), 62 Ohio St.2d 221, syllabus ("An excess insurer is subrogated to the insured's rights against the primary insurer and may maintain an action for breach of the primary carrier's good faith duty to settle and defend.")

If the problem is a disagreement over the handling of a file, the solution will depend upon the nature of the disagreement and the duties of each insurer. Invariably, the primary insurer has the right

and duty to control the defense. Thus, an excess insurer typically can only monitor the case and make suggestions. But if the primary insurer, for example, is not conducting needed discovery or retaining appropriate experts, the excess carrier should urge the primary carrier to do what is indicated. As suggested above, it is usually advisable to begin with gentle requests and if they are unheeded move to forceful demands. Also retaining counsel and enlisting the help of the insured/broker/personal counsel may be appropriate. Further, the excess insurer can invoke any language in its policy that allows it to "participate" in the defense, investigation, and settlement of the case. In some cases, the excess insurer may even assume the control of the case, with the permission of the primary carrier, if it is clear that the excess insurer has the true exposure, e.g. in cases where the primary insurer has tendered its limits.

The excess insurer, however, should take pains to avoid any claim of waiver or estoppel if it does not intend to take control of the case. (Waiver is the voluntary relinquishment of a known right; estoppel typically is defined as a promise which the promisor should reasonably expect to induce action or forbearance on the part of another person, who justifiably relies upon the promise to his or her damage, such that justice demands that the promise be enforced.) If the excess carrier does not wish to take control of the case, therefore, it should explicitly state that and remind the primary carrier that it cannot pass its obligation along to the excess carrier, and quote any applicable language in the excess policy (such as the excess carrier having no duty to defend.

Finally, if there is a dispute as to the value of a claim, the carriers should attempt to identify the reasons for the disagreement. For example, the carriers may have divergent views of liability, causation, damages, or some combination thereof. If the basis for any disagreement can be identified, the carriers may be able to make some progress in narrowing their differences. Many carriers do a claims review in a roundtable setting, use jury verdict research, seek the opinions of experienced counsel, or under appropriate circumstances and at the right juncture, engage in mediation to settle the case. If the carriers end up "agreeing to disagree" their rights and obligations, of course, will be dictated by the policy language as interpreted by the courts.

If the carriers cannot come to terms, it may be possible for one insurer to settle the case and then proceed against the other insurer. In some cases, the suit against the insured may proceed to trial; if there is a bad result, additional litigation may ensue. Sometimes, the insured may assign any claim, including any tort claims for bad faith, to the plaintiff in exchange for a full and final release from the plaintiff. In other instances, the excess carrier may sue the primary insurer.

Although each case obviously must be judged on its own merits, courts often focus on whether a carrier has been diligent in protecting the interests of the insured. If one carrier has done so while the other has not, the courts may side with the carrier most concerned about the insured. Accordingly, in dealing with any of the forgoing problems, every insurer should be sensitive to the interests of its insured.

II. SUPREME COURT OF OHIO

Other-Owned-Auto Exclusion Clearly And Unambiguously Applies To UM Claims Arising Out Of Insured-Relative's Wrongful Death Although Exclusion States That Coverage Does Not Apply "*For* Bodily Injury" Rather Than "*Because* Of Bodily Injury."

Lager v. Miller-Gonzalez, 2008-Ohio-838. The plaintiff's decedent was killed in a motor vehicle accident caused by the negligence of an uninsured motorist. The decedent was a passenger in her own car insured by Nationwide (UM limits of $50,000/$100,000). The decedent's parents also had a policy with Nationwide (UM limits of $300,000/$300,000). The decedent was a resident of her parents' household and, therefore, an insured (a "family member"), but Nationwide denied that the parents' policy afforded any UM coverage for the accident because the policy contained an other-owned-auto exclusion. The plaintiff asserted that the exclusion was ambiguous because it stated that coverage did not apply "*for* bodily injury" rather than "*because* of bodily injury." The trial court and court of appeals agreed. The Ohio Supreme Court in a 5-to-2 decision (Justice Moyer and Pfeiffer dissenting separately) reversed; stated that the plaintiff's argument was "a semantic distinction"; and concluded that "[to] permit coverage in circumstances like those presented here would improperly allow 'a person who owns more than one motor vehicle [to] choose not to insure one vehicle and bear no financial risk for the decision because he will be deemed to have in effect purchased liability coverage for the vehicle he decided not to insure if he is struck by another uninsured motorist.'" Id. at P31, quoting *Martin v. Midwestern Group Ins. Co.*, 1994 Ohio 407 (Moyer, C.J., dissenting).

III. OHIO COURT OF APPEALS

A. Policy Language, Endorsements, And Exclusions

1. The Business Risk Exclusion For Damage To Real Property Does Not Exclude An Insured's Right To A Defense, If The Damage Is To Real Property Owned By A Third Party Who Is Not Involved In The Project Or Agreement

Beaverdam Contracting, Inc. v. Erie Insurance Company, et al., 2008-Ohio-4953 (Third App. Dist.). The insured, Beaverdam Contracting, was hired to clear certain land, but it unknowingly cleared land owned by a third party adjacent to the land that Beaverdam was hired to clear. Erie Insurance Company filed a declaratory judgment action seeking an order that it is not required to provide a defense and indemnification to Beaverdam under its CGL policy. The CGL policy did not apply to property damage to "that particular part of real property in which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the 'property damage' arises out of those operations or [] that particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it." The court affirmed the trial court's decision that there was a duty to defend, stating that "general liability policies are . . . intended to provide protection from certain unexpected and unintended business accidents, especially when the harm befalls a third party who was not involved in the project or agreement." Erie also claimed that the "work in progress" exclusion and the "poor workmanship" exclusions also precluded the coverage, but the court disagreed, again stating that

the mistake in this case was not a part of the assigned work in progress or the operations that Beaverdam should have been performing. Rather, the damage was to property owned by a third party, who was not involved in the underlying project.

2. A Homeowner's Policy Exclusion For Damages "Arising Out Of" The Operation Of A Motor Vehicle Excludes Coverage, Even If The Accident Is Caused, In Part, By Negligent Maintenance Of The Insured's Home

Kallaus v. Allen, 2008-Ohio-5081 (Fifth App. Dist.). Allen negligently backed his pickup truck out of his driveway into the path of oncoming motorcyclist Kallaus. Allen was insured under a homeowner's policy issued by Grange and sought coverage for his negligence under that policy. Allen claimed that the dangerous condition of his property, i.e., negligence in failing to trim trees and shrubbery abutting the driveway, was a concurrent cause of the accident, thus affording him coverage. The Grange policy excluded coverage for "Bodily injury or property damage arising out of the ownership, maintenance, use . . . .of: . . . motor vehicles." The court found no duty to defend or indemnify Allen by Grange because "arises out of" excludes a claim when the injury originates via the operation of a motor vehicle. The court rejected Allen's argument that negligence in maintaining his property was a concurrent cause of the accident covered by his homeowner's policy.

3. Where Multiple Insurance Policies Issued By The Same Insurer To Different Insureds Provide Liability Coverage, Anti-Stacking Language Will Be Enforced To Limit Coverage To The Single Policy With The Highest Limit

Nationwide Mut. Fire Ins. Co. v. Wood, 2008-Ohio-4335 (Ninth App. Dist.). Wood was involved in an accident while operating a vehicle owned by Barnes. Nationwide insured Barnes' pickup truck with bodily injury liability limits of $50,000 per person and $100,000 per occurrence. Nationwide also insured Wood under an automobile policy providing bodily injury liability limits of $25,000 per person and $50,000 per occurrence. Nationwide paid its $100,000 limit under the Barnes policy and filed suit seeking a declaratory judgment that it had no further obligations under the insurance policy it issued to Wood.

Each Nationwide policy provided that it was excess relative to the accident at issue. Both policies further contained language in their "other insurance" clauses to prevent the "stacking" of coverage "[i]f more than one policy issued by us or a company affiliated with us applies on an excess basis to the same loss, we will pay only up to the highest limit of any one of them." Wood argued that 1) the excess insurance clauses are mutually repugnant and have no legal effect; and therefore 2) the anti-stacking provision is inapplicable because it required that more than one Nationwide policy apply on an excess basis. The court disagreed finding that there is no need to find the clauses mutually repugnant where only one insurance company issued both policies. Accordingly, the court concluded that the anti-stacking language also applied and that Nationwide owned only $100,000.

4. An Automobile Liability Policy Is Not Required to Cover Permissive Users under Ohio's Financial Responsibility Act Unless the Owner Previously Violated the Act and Uses a Certified Policy as Proof of Financial Responsibility

GEICO General Insur. Co. v. State Farm Mut. Automobile Insur. Co., 2008-Ohio-4117, (First App. Dist.). Thornton was driving a car owned by Browning when Thorton ran into the back of another vehicle. Browning was insured by State Farm, and Thornton was insured by GEICO. State Farm denied coverage for Browning, arguing that Browning's policy excluded permissive users who were insured under another policy. The State Farm policy defined an insured, in part, as "any other person who is not insured for vehicle liability coverage by any other insurance policy . . . ." GEICO claimed that this definition violated R.C. 4509.51 of Ohio's Financial Responsibility Act, which requires an "owner's policy" to cover all permissive users. The court held that an owner's liability insurance is not required to cover all permissive users as stated under R.C. 4509.51 because this pertains only to owners who have previously failed to verify proof of financial responsibility as required under R.C. 4509.101(A)(3)(a-c). If such an individual chooses to use liability insurance as proof of financial responsibility, then the policy must be certified as required under R.C. 4509.51, and this type of policy requires coverage for all permissive users. In contrast, the "typical owner" is not required to meet the mandates of R.C. 4509.51 because a R.C. 4509.101(G)(2) contains a "catch all" provision that allows a court or the BMV to accept other evidence to verify proof of financial responsibility, and there is no other mandate in the Act that requires coverage for all permissive users. The court described this as a "two-tier system" for proof of financial responsibility.

5. Once The Insured Has Established The Sudden And Accidental Exception To The Pollution Exclusion Applies To Some Damages, The Insurer Must Prove Which Damages Were Caused By Gradual Seepage To Avoid Liability For All The Pollution At Issue

Goodrich Corp. v. Commercial Union Ins. Co., 2008-Ohio-3200 (Ninth App. Dist.). Goodrich sought coverage from numerous insurers for environmental cleanup costs expended at one of its facilities. The policy pollution exclusion provided that there would be no insurance coverage for property damage caused by the discharge or release of pollutants into the environment unless the release or discharge was sudden and accidental. Goodrich presented evidence that there had been several sudden and accidental releases of pollutants. However, there was also slow seepage. The damages resulting from each cause could not be separated. The court found that Ohio courts follow a "concurrent cause" theory of insurance recovery: "Where property damage results from more than one contributing cause, and the insurance policy 'expressly insures against direct loss and damage by one element but excludes loss or damage by another element, the coverage extends to the loss even though the excluded element is a contributory cause." The court concluded that once the insured has established facts to trigger the sudden and accidental exception, the burden shifts back to the insurer to prove that the excluded, gradual release of pollution was the overriding cause of the insured's damages.

B. UM/UIM

1. An Insured's Failure To "Subjectively Understand" The Policy Terms Does Not Entitle The Insured To UM/UIM Coverage If Coverage Is Clearly And Unambiguously Excluded

Geico General Insurance Company v. Van Meter, 2008-Ohio-5110 (Fourth App. Dist.). The driver of a vehicle and his passenger, who was his father, were involved in a fatal accident. The father survived, but the son did not. The father was a named insured under the Geico policy, which insured the vehicle. The liability portion of the policy excluded coverage for "bodily injury to any insured or any family member of an insured residing in his household." The UM/UIM provision excluded coverage for "a motor vehicle owned by, furnished to, or available for the regular use of you, spouse, or a resident relative of you." The court held that these "household exclusions" are valid and enforceable under Revised Code 3937.18(I), even if the insured did not understand that the policy excluded coverage for injuries involving members of his family.

2. Personal Umbrella Coverage Did Not Provide UM/UIM Coverage Because "Loss" Is Limited To Those Sums That The Insured Must Pay

Seifke, Jr. v. Bond, 2008-Ohio-4146, (Second App. Dist.). Seifke was injured in an automobile accident. He had a $100,000 liability policy from State Farm, and the tortfeasor had a $100,000 liability policy from Grange. Seifke was also an insured under the personal umbrella portion of a policy issued by Universal Underwriters Insurance Company ("UUIC"). Seifke settled with the tortfeasor for the Grange policy limits. Seifke sought underinsured motorist coverage under the UUIC policy, but the court held that he was not entitled to UM/UIM coverage because the policy defined "loss" as sums that Seifke "*must pay* as damages because of injury." Seifke was not required to pay anything, so there was no coverage. Thus, the UUIC policy only provided excess liability coverage, not UM/UIM coverage.

C. Declaratory Judgment Actions

1. A Declaratory Judgment Action Filed By An Insurer Is Not Binding On The Judgment Creditor Of The Insured Tortfeasor

Estate of Heintzelman v. Air Experts Inc., 2008-Ohio-4883 (Fifth App. Dist.). American Family insured Martel who was sued by Heintzelman. Heintzelman obtained a substantial judgment against Martel. In the meantime, American Family filed a declaratory judgment action against only Martel seeking a declaration that it provided Martel no coverage. American Family obtained a default judgment in its favor. Heintzelman then sued American Family directly for coverage. Heintzelman argued that because he was not a party to the action between American Family and Martel he was not bound by the no coverage determination. American Family asserted that under R.C. 2721.12(B) and R.C. 3929.06(C)(1), enacted in 1999, the judgment it obtained against Martel was binding on Heintzelman even though he was not a party to that action. The court analyzed the two statutes at issue and concluded that in a declaratory judgment action involving a determination of coverage between an insurer and its insured, a final judgment will have binding legal effect on the judgment creditor ***if the holder of the insurance***

policy commences the action against its insurer before the judgment creditor commences its action against the insurer. But because the insurer, American Family, filed the declaratory judgment action against its insured ***before*** Heintzelman commenced his action against American Family, the judgement obtained by American Family against its insured was not binding on Heintzelman.

2. A Declaratory Judgment Is Not A Final Appealable Order Where It Merely Grants The Insured's Motion For Summary Judgment Without Declaring The Insured's Rights Under The Policy

Flight Servs. & Sys. v. Lloyd's Policy Signing Office, 2008-Ohio-5118 (Eighth Dist. App.). Flight Services & Systems, Inc. was insured by Certain London Market Insurance Companies. Flight Services was sued by Kovach for injuries sustained while boarding an airplane. Flight Services filed a declaratory judgment action against London Market Insurers seeking a declaration that London Market Insurers were required to defend and indemnify Flight Services with respect to the underlying wrongful death tort action. Both sides moved for summary judgment. The trial court: 1) denied London Market Insurers' motion for summary judgment finding that genuine issues of material fact exist for trial; 2) granted Flight Services' cross-motion based on a policy ambiguity; and 3) entered Civ.R. 54(B) "no just reason for delay" language. The court of appeals dismissed for want of a final appealable order because the trial court did not declare the rights of the parties, but rather, merely stated that Flight Services' motion for summary judgment is granted.

3. A Declaration That There Exists A Duty To Defend Is Not A Final Appealable Order If Other Claims Remain Pending

Midwestern Indem. Co. v. Nierlich, 2008-Ohio-3537 (Eighth App. Dist.). The court held that the entry of a declaratory judgment on the duty to defend: 1) as to fewer than all putative insureds; 2) while leaving the duty to defend undetermined as to all remaining putative insureds; and 3) with no determination as to the duty to indemnify, was not a final appealable order without Civ.R. 54(B) certification.

D. Policy Conditions Of Coverages

1. Since Insured Failed To Comply With Condition Precedent To Coverage, Insurer Was Not Obligated To Provide Coverage

Savage v. American Family Ins. Co., 2008-Ohio-4460 (Tenth App. Dist.). Plaintiffs submitted a property loss claim in excess of $50,000 after their home was burglarized. Based on a large discrepancy between the amount of property loss claimed and the amount of personal property declared on a bankruptcy petition filed five years earlier, AFI sought to take the examination under oath of both Plaintiffs and requested their tax returns, which Plaintiffs refused to provide. After one examination was conducted and before the second could be scheduled, Plaintiffs filed suit claiming that AFI breached the contact in bad faith. The court affirmed the granting of summary judgment in favor of AFI reasoning that since the Plaintiffs had not complied with the conditions precedent to coverage, AFI had no contractual obligation to provide coverage.

2. Insured Failed To Submit To An Examination Under Oath But Insurer Failed To Provide Policy And Transcriptions Of Oral Statement. Question Of Fact As To Whether Insured Or Insurer Breached The Contract First

Goins v. Stewart, 2008-Ohio-4206 (Fifth App. Dist.). Plaintiff made a claim under his homeowners' policy with AFI after Plaintiff's house was destroyed by a fire. AFI took two oral statements from the Plaintiff and then requested an examination under oath. Plaintiff requested a copy of the oral statements, which AFI refused to provide. Plaintiff filed suit for breach of contract and bad faith. The court reversed the granting of summary judgment in favor of AFI and rejected AFI's argument that the Plaintiff had breached a condition of the policy. The appellate court held that there was a genuine issue of fact as to who first breached the contract.

3. A Consent To Settle Provision Applies Only To Claims Against The Insured, Not An Action Brought By An Injured Third Party Directly Against The Insurer

Duncan v. Hopkins, 2008-Ohio-3772 (Ninth App. Dist.). The Cincinnati Insurance Company provided "wrongful acts" insurance coverage to Flagship. Flagship sold securities. The Duncans purchased securities from Flagship and then sued it alleging fraud. Cincinnati filed a declaratory judgment action against Flagship on the issue of coverage. The Duncans intervened. Cincinnati and the Duncans entered into a settlement of the Duncans' intervenor complaint. They asked the trial court to enter judgment indicating that the settlement would not affect Cincinnati's coverage action against Flagship. Flagship opposed claiming that the settlement violated the policy provision which required approval before Cincinnati could settle any claim. The settlement provision stated: "with the consent of the 'policy insureds' named in connection with the 'claim', [Cincinnati may] make any settlement of any 'claim' we deem expedient." Claim was defined as seeking damages from an insured. The court found this language unambiguously applied to obtaining an insured's consent before settling proceedings initiated against the insureds, but not directly against Cincinnati. Therefore, the court found the consent provision inapplicable.

4. One Year Contractual Limitation Period Not Waived By Investigation Of Claim Or Issuance Of Checks

Vogias v. Ohio Farmers Ins. Co., 2008-Ohio-3605 (Eleventh App. Dist.). Plaintiff filed a claim for jewelry stolen from her Florida home, approximately 18 months after the theft. After Plaintiff signed a Non-Waiver Agreement, Ohio Farmers began its investigation and issued several checks to Plaintiff. When it was discovered that the theft occurred outside of her policy period, Ohio Farmers stopped payment on the checks and continued their investigation. Plaintiff filed suit for breach of contract. The appellate court affirmed the granting of summary judgment in favor of Ohio Farmers holding that Ohio Farmers did not waive and should not be estopped from asserting the one-year contractual period for filing a claim since the plaintiff's own inaction delayed her making a claim. The appellate court also rejected the plaintiff's argument that the issuance of the checks waived the limitation of action clause.

E. Coverage For Intentional Acts

1. A Plea Of Guilty To Criminal Assault Charges Bars Coverage And Cannot Be Relitigated

State Farm Fire & Cas. Co. v. Harpster, 2008-Ohio-3357 (Eighth App. Dist.). In an apparent fit of road rage, Harpster followed another motorist and, when the other motorist stopped and exited his vehicle, beat the motorist severely. Harpster pleaded guilty to aggravated assault. Hapster's insurer, State Farm, filed a complaint for declaratory judgment seeking a declaration that it did not have a duty to defend or indemnify Harpster relative to the civil action against him stemming from the assault. The court found that the criminal conviction of aggravated assault collaterally estopped Harpster from relitigating the issue of intent. The mere fact that he submitted an affidavit that essentially recanted his earlier admissions of wrongdoing did not give rise to a triable issue of fact. Therefore, the intentional acts exclusion applied and there was no covered occurrence under the State Farm Policy.

2. The Self Defense Exception To The Expected Or Intended Injury Exclusion Requires Proof Of Withdrawal From The Fray And A Clearly Expressed Intention For Peace

United Ohio Insurance Company v. Mantle, 2008-Ohio-3494. Mantle was sued for injuries he inflicted on the plaintiff during a fight between the two men. Mantle concedes that he started the fight, but claims that he withdrew from the fight and then the plaintiff started a second fight when he was injured. United Ohio sought a declaration that Mantle was not entitled to coverage under the policy's exclusion for causing injury that is expected or intended by the insured. Mantle argued that the exclusion did not apply because although he started the fight, plaintiff was injured while Mantle was defending himself in the second fight. The court held that Mantle is not entitled to coverage because even if Mantle withdrew from the fight in good faith, he did not "clearly and fairly" announce his desire for peace when he withdrew, and thus he failed to establish that he was acting in self-defense under the exception to the exclusion. The court reasoned that withdrawing from the fight is not enough to prove self-defense.

F. Workmanship/Construction Claims

1. Subsequent Damage To Household Fixtures Caused By Constructing A House Out Of Plumb Qualifies As An Occurrence And Is Not Barred By The "Your Work" Exclusion In A CGL Policy

Ohio Cas. Ins. Co. v. Hanna, 2008-Ohio-3203 (Ninth App. Dist.). Quality Home Construction Inc. constructed the frame of a house out of plumb and out of square, leading to problems with the roof, doors, drywall, wood trim, and windows. Quality was insured under policies issued by Ohio Casualty while it was performing the work and afterwards by Motorists Mutual Insurance Co. The court found that even though the defective construction did not cause "damage," it did cause "loss of use" of the affected windows, doors, etc. and therefore could be covered.

The court found an "occurrence" because Quality's improper work caused the house to have walls that were out of plumb and out of square and that the resulting defective supporting frame system constituted

an "occurrence" because it was caused by "an accident, including continuous . . . exposure to substantially the same general harmful conditions," namely, Quality's faulty work.

The court found the "your work" exclusions inapplicable because although the damage to the windows' cranks and gears arose out of Quality's out-of-plumb installation of the windows, it did not occur while Quality was installing them, and did not occur until after Quality finished its work on the house.

Finally, the court found that because the house's defective supporting frame system which resulted in continuing damage to windows, doors, etc., continued into the time period Motorists Mutual insured Quality, that its policy was also triggered.

G. Miscellaneous

1. Purchaser Of Home At Foreclosure Sale Is Not Covered Under Former Homeowner's Property Insurance Policy

Nationwide Mut. Ins. Co. v. Peters, 2008-Ohio-2957 (Ninth App. Dist.). Nationwide issued a homeowner's policy to Peters which identified ABN AMRO Mortgage Group, Inc. as first mortgagee. The insured property was foreclosed upon and sold at auction to Federal National Mortgage Association (FNMA). The property burned. The court held that because FNMA did not prove that it was the first mortgagee, there was no privity of contract between Nationwide and FNMA, and FNMA had no interest under the policy. Further, the Nationwide policy provided that: "This policy may be transferred to another only with our written consent." FNMA never obtained such consent. Therefore, FNMA could obtain no coverage under the Nationwide policy.

#1024373