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I. PROXIMATE CAUSE

Invariably the plaintiff must establish proximate cause as an element of a tort claim. This article will define proximate cause, discuss concurrent causes, remote and superseding causes, alternative liability, and proximate cause in legal malpractice actions. Finally, the article will offer guidelines for analyzing issues of proximate cause.

Definition

An act or failure to act is considered the proximate cause of injury if that act or omission directly produces the injury in a natural and continuous sequence and without which act or omission the injury would not have occurred. Proximate cause exists when an injury is the natural and foreseeable result of an act or failure to act. *Haas v. Kundtz* (1916), 94 Ohio St. 238.

Concurrent Causes

There can be more than one proximate cause. For example, when the negligent act of one party combines with the negligence of another to produce the damage, the negligence of each is a cause. It is not necessary that the negligence of each occur at the same time or place or that there be a common purpose or action. *Garbe v. Halloran* (1948), 150 Ohio St. 476.

If there are concurrent causes, in some cases the burden of proof as to apportionment may shift to the defendants. In *Pang v. Minch* (1990), 53 Ohio St.3d 186, the plaintiff sustained injuries in three successive motor vehicle accidents. As a result, the plaintiff's treating back physician diagnosed chronic lumbosacral myofascitis. The plaintiff alleged that he sustained one injury as a result of the negligence of all the defendants. Relying upon paragraph B(2) of Section 433 of the Restatement of the Law 2d, Torts (1965), the Supreme Court of Ohio held in two paragraphs of its syllabus:

> Where a plaintiff suffers a single injury as a result of the tortious acts of multiple defendants, the burden of proof is upon the plaintiff to demonstrate that the conduct of each defendant was a substantial factor in producing the harm.
>
> Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor.

Remote Cause And Superseding Cause

A person is not responsible for damage to another if his or her negligence is a remote, rather than a proximate, cause. A cause is remote when the injury could not have been foreseen or reasonably anticipated as the probable result of a negligent act. *Armour & Co. v. Ott* (1927), 117 Ohio St. 252.

A superseding cause may relieve a defendant of legal responsibility. Specifically, where two or more independent negligent acts combine to produce a single harmful result, and where each of the acts is a substantial factor in producing that result, the actors are jointly responsible unless the negligence of one or more actors breaks the causal connection of the other actor. A causal connection is broken when a new and independent subsequent act, or failure to act, intervenes and completely removes the effect of the first act of negligence. In such a case the subsequent act becomes the sole proximate cause of the injury. *Springsteel v. Jones & Laughlin Steel Corp.* (1963), 2 Ohio App.2d 353.

As an example, steel forgings may be negligently packed in pallet boxes by Defendant A and loaded onto a tractor-trailer rig by Defendant B. If the driver of Defendant B sees the forgings falling off the rig yet nonetheless continues to drive on, and if still more forgings fall off and crash through the windshield of the plaintiff's car causing serious injury, Defendant B's actions constitute a superseding cause. In this example, Defendant B was a responsible intervening agent which, after becoming conscious of the hazard, could have and should have eliminated it; by failing to do so, Defendant B broke the chain of causation between Defendant A's negligence and the injury. *Hurt v. Rogers Transp. Co.* (1955), 164 Ohio St. 323.

It is usually a jury question whether an intervening act, or just a concurrent cause, is involved. *Cascone v. Herb Kay Co.* (1983), 6 Ohio St.3d 155.

Alternative Liability

Where there is uncertainty as to which tortfeasor harmed the plaintiff, in some circumstances, alternative liability may apply. In *Minnich v. Ashland Oil Co.* (1984), 15 Ohio St.3d 396, the plaintiff was injured in an explosion while using a chemical purchased by his employer from one of two manufacturers. The plaintiff alleged that the chemical was unreasonably dangerous because the defendants negligently failed to warn him that the chemical was flammable. The plaintiff could not prove which defendant supplied the chemical that caused the explosion. The Supreme Court of Ohio commented on the injustice of permitting proved wrongdoers, who among them have inflicted injury upon an entirely innocent plaintiff, to escape liability merely because the nature of their conduct and the resulting harm has made it difficult or impossible to prove which of them caused the harm. Under these circumstances, the high court adopted the theory of so-called alternative liability:

> Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm. (2 Restatement of the Law 2d, Torts, Section 433[B][3], adopted.)

Legal Malpractice

In a legal malpractice case in order for a client to prove that the client's lawyer proximately caused damages, a "trial-within-a-trial" must be conducted to determine if the client would have been successful in the matter at issue. Thus, in *Environmental Network Corp. v. Goodman Weiss Miller, LLP*, 119 Ohio St.3d 209, 2008-Ohio-3833, the plaintiffs were clients who had been represented by the defendant law firm in a lawsuit concerning a landfill. The landfill suit was settled on the second day of trial. The plaintiffs then sued the defendant, alleging that the negligence of the defendant compelled the plaintiffs to settle, and that but for the negligence of the defendant, the plaintiffs would have obtained a better outcome had the case been tried to its conclusion. The trial court, interpreting a 1997 Supreme Court case, concluded that the plaintiffs satisfied their proximate causation burden because "some evidence" established a causal connection between the plaintiffs' damages and the defendant's actions. The Supreme Court reversed, and clarified what a plaintiff must prove to sustain a legal malpractice claim:

> When a plaintiff premises a legal-malpractice claim on the theory that he would have received a better outcome if his attorney had tried the underlying matter to conclusion rather than settled it, the plaintiff must establish that he would have prevailed in the underlying matter and that the outcome would have been better than the outcome provided by the settlement. *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 1977 Ohio 259, 674 N.E.2d 1164, clarified.

Practical Advice

When analyzing proximate cause, the following guidelines may be helpful:

1. An act or failure to act is considered the proximate cause of injury if that act or omission directly produces the injury in a natural and continuous sequence and without which act or omission it would not have occurred. The injury must be the natural and foreseeable result of the act or failure to act. *Haas v. Kundtz*.

2. If the negligent act of one party combines with the negligence of another to produce injury or damage, the negligence of each is a proximate cause. *Garbe v. Halloran*.

3. In the case of multiple defendants, if the conduct of each is a substantial factor in producing a single injury to the plaintiff, the burden of proof as to apportionment of harm is upon each defendant. *Pang v. Minch*.

4. A cause is remote if injury could not have been foreseen or reasonably anticipated as the probable result of a negligent act. A defendant is not liable if his negligence is a remote, rather than a proximate, cause. *Armour & Co. v. Ott*.

5. If two or more independent negligent acts combine to produce a single harmful result, and each of the acts is a substantial factor in producing that result, the actors are jointly responsible, unless the negligence of one or more actors breaks the causal connection of another actor. Such a connection is broken only where a new and independent subsequent act, or failure to act, intervenes and completely removes the effect of the first act of negligence. *Spring Steel v. Jones and Laughlin Steel Corp.*

6. Usually whether an intervening act, or just a concurrent cause, is involved presents a question of fact for a jury to decide. *Cascone v. Herb Kay Co.*

7. If a plaintiff has been harmed by one tortfeasor where two or more proven tortfeasors could have caused the harm, but there is uncertainty as to which one caused it, the burden of proof shifts to each tortfeasor to prove that the party did not cause the harm. *Minnich v. Ashland Oil.*

8. In a legal malpractice suit where the plaintiff alleges that a party would have had a better outcome had a matter been tried to its conclusion but for the negligence of the lawyer, the plaintiff must establish that the party would have prevailed in the underlying matter and the outcome would have been better than the settlement. *Environmental Network Corp. v. Goodman Weiss Miller, LLP.*

II. SUPREME COURT OF OHIO

Supreme Court Of Ohio Sets Forth An Insured's Obligation To Cooperate And An Insurer's Duty To Provide Notice After The Allocation Of Insurance Coverage.

Pennsylvania Gen. Ins. Co. v. Park-Ohio Industries, 126 Ohio St.3d 98, 2010-Ohio-2745

The Supreme Court of Ohio reaffirmed the "all-sums" allocation method for progressive-injury losses (such as asbestos claims) that the Court first recognized in *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842. Under the "all-sums" approach, the insured may select the policy or policies under which the insured is to be indemnified, and the insurer who issued that policy or policies must seek contribution from any other insurers who also would owe coverage for the progressive-injury.

The Supreme Court further held that the insured has a duty to cooperate with the selected insurer, which included identifying any other policies and insurers which might provide coverage for the loss.

Finally, the Court ruled that the failure to timely notify a nontargeted insurer of a pending claim was not necessarily a bar to contribution. The Court determined that failure to notify a nontargeted insurer would bar a claim for contribution only if the failure to notify the nontargeted insurer resulted in prejudice to that insurer. The Supreme Court ruled that denying a nontargeted insurers initial notice of the claim/litigation and the ability to control the defense, defend their interests, investigate the claim, choose counsel, set litigation strategy, and control settlement would not constitute prejudice because such consequences would be the natural results of an all-sums approach. The Court also held that in the case before it the nontargeted insurers were not prejudiced as a matter of law because the insured's underlying settlement with the claimant was reasonable.

Public Policy Does Not Preclude Coverage For An Award Of Attorney Fees Incidental To A Recovery Of Punitive Damage.

Neal-Pettit v. Lahman, 125 Ohio St.3d 327, 2010-Ohio-1829.

The Supreme Court of Ohio held that public policy does not prohibit an insurance policy from providing coverage for an award of attorney fees in a civil lawsuit when that award is incident to recovery of punitive damages. The Court said that unless the policy language clearly excludes coverage for an attorney fees award, an insurer is liable to pay for such an award.

The case arose out of an automobile accident caused by an intoxicated driver who had fled the scene of an earlier collision. The plaintiff was awarded compensatory damages, punitive damages, and attorney fees. The intoxicated driver's auto insurance company paid the compensatory damages award, interest and expenses, but denied any coverage under its policy for either the punitive damages or the attorney fees award. The trial court granted summary judgment in favor of plaintiff on the attorney fee portion of the jury verdict. The insurer appealed, arguing that it had no coverage for attorney fees where the fee award is based upon recovery of punitive damages, which public policy prevents an insurer from covering. The court of appeals affirmed the trial court's decision on the basis that attorney fees were conceptually distinct from punitive damages and that attorney fees were not expressly excluded from coverage by the language of the insurance policy. The Supreme Court of Ohio affirmed the court of appeals. The Supreme Court found that an exclusion of coverage in the policy for "punitive or exemplary damages, fines or penalties" did not apply because it did not refer in any way to attorney fees or litigation expenses, and that coverage for attorney fees, therefore, was not clearly and unambiguously excluded from coverage. The Court rejected the insurer's claim that it would be against public policy for it to pay attorney fees on behalf of a policyholder when those fees are awarded solely as a result of a punitive damages based upon a finding of malice. The Court observed that R.C. 3937.182(B) only prohibits insurance coverage of punitive damages.

Claimants Are Bound Only By Declaratory Judgment Actions Filed By The Insured Or Declaratory Judgment Actions In Which The Claimants Participate.

Estate of Heintzelman v. Air Experts, Inc., 126 Ohio St. 3d 138, 2010-Ohio-3264.

The Supreme Court of Ohio clarified under what circumstances plaintiffs are bound by a judgment in a declaratory judgment action between the insurer of the defendant and the defendant. The Court held that plaintiffs were bound by the outcome of the declaratory judgment action if either the declaratory judgment action was filed by the defendant/insured or the plaintiffs participated in the declaratory judgment action.

A wrongful death lawsuit was brought against a defendant company which had gone out of business . The defendant's liability insurer assumed the defendant's defense, but also filed a separate declaratory judgment action against only its insured, seeking a declaration that the insurer had no duty to indemnify the insured for any judgment against it. The insured did not answer the complaint for declaratory judgment, and a default judgment was entered in favor of the insurer. The default judgment apparently was rendered unbeknownst to the wrongful death plaintiffs, who had obtained a multi-million dollar verdict against the insured. Those wrongful death plaintiffs filed a supplemental complaint against the defendant's insurer pursuant to R.C. 3929.06, the supplemental complaint statute allowing suit against an insurer where a judgment against an insured is unsatisfied for thirty days. The trial court granted summary judgment in favor of the insurer, holding that pursuant to R.C. 3929.06, the plaintiffs were bound by the judgment even though they were not parties to the action. The court of appeals reversed the trial court's judgment because the insurance company had initiated the declaratory judgment action. R.C. 3929.06 states that when the holder

of the policy of insurance commences a declaratory judgment action against an insurer, any judgment in that action is binding on judgment creditors (including plaintiffs with a judgment against an insured). The statute does not speak to declaratory judgment actions commenced by the insurer, and thus does not state that when the insurer commences the declaratory judgment action, any judgment is binding on creditors. The Supreme Court affirmed the court of appeals. Analyzing the specific language found in R.C. 2721.12(B), 2721.02(C), and 3929.06(C)(2), the Supreme Court held that a judgment relating to insurance coverage is binding upon an insured's judgment creditor only if the insured initiated the declaratory judgment action or the judgment creditor participated in that action as a party.

III. OHIO COURT OF APPEALS

A. Policy Language, Endorsements, And Exclusions.

1. Business Income And Extra Expense Coverage Applies To Storm Sewer Endorsement.

Trautman v. Union Insurance Company, (Third App. Dist.), 2010-Ohio-1504. Trautman received property damage coverage under the Water Back-up and Sump Overflow endorsement to her Union Insurance Company policy after rain water caused area storm sewers to back up and damage Trautman's business property. Union denied business income and extra expense coverage, arguing that such coverage was only available if the loss or damage was "caused by or resulted from a Covered Cause of Loss." "Covered Cause of Loss" was defined as "risks of direct physical loss * * *[,]" and business income and extra expenses are not "direct physical loss." The court rejected this argument because the standard policy also defined "Covered Cause of Loss" as "risks of direct physical loss[,]" and interpreting the endorsement to exclude business income loss and extra expense coverage would require the policy to also exclude such coverage, rendering the business income and extra expense coverage in the policy illusory.

2. "Public Or Livery Conveyance" Exclusion Bars Coverage For Driver Under His Personal Umbrella Liability Policy.

Niemeyer v. Western Reserve Mutual Casualty Company, (Third App. Dist.), 2010-Ohio-1710. Niemeyer was the driver of a chartered bus taking 33 members and coaches of a college baseball team to Florida. The bus crashed and five players, Niemeyer, and his wife died in the accident. Niemeyer's estate sought coverage from Niemeyer's umbrella liability policy issued by Western Reserve. The appellate court affirmed the trial court's denial of coverage because the bus was being used as a "livery conveyance" at the time of the accident. The court recognized that many cases interpreting "public or livery conveyance" were from the 1950's and even the 1930's, but recent out-of-state courts have updated the terminology and interpreted it more broadly. The court held that the policy's "public or livery conveyance" exclusion applied because the charted bus was a livery conveyance, which is a vehicle that "has been hired or rented for temporary use from a livery, (i.e., a business that rents vehicles)."

3. Court Upheld Intra-Family UM Exclusion And Denial Of Bodily Injury Claim By Wife Against Husband.

Dunson v. Home-Owners Ins. Co., (Third App. Dist.), 2010-Ohio-1928. Jeanette Dunson was severely injured while riding as a passenger in a car driven by her husband. They were insured under an auto policy issued by Home-Owners Insurance Company ("HOIC"). Mr. Dunson was excluded from liability coverage ("liability coverage does not apply to bodily injury to you or any relative."), so Mrs. Dunson filed an uninsured motorists claim under the HOIC policy. HOIC argued that its policy did not provide intra-family UM coverage due to an exclusion stating that UM coverage does not apply "to bodily injury caused by an automobile operated by a person excluded from coverage for bodily injury liability under the policy." The trial court held that Mrs. Dunson was entitled to coverage because although the clause "was not necessarily ambiguous or misleading" on its face, it was ambiguous when "considered in proper historical context" of the intra-family exclusion in Ohio. The appellate court reversed, holding that the exclusionary clause was clear and unambiguous within the four corners of the policy, and it was improper to consider extrinsic evidence to create an ambiguity. Further, an ambiguity is not created simply because the UM exclusion failed to cross-reference, by number, the bodily-injury liability exclusion.

4. Providing Coverage Generally "Everywhere In The World" But Only As To Certain Enumerated Covered Perils Does Not Create A Policy Ambiguity.

Eiben v. Grange Mut. Cas. Co., (Eighth App. Dist.), 2010-Ohio-1673. Eiben was insured under a homeowner's insurance policy issued by Grange Mutual Casualty Company and sought coverage for tools stolen at a residential construction site that was not Eiben's primary residence. Eiben claimed that the Grange policy was ambiguous and afforded coverage because it generally stated that it provided coverage for "personal property owned or used by an insured person anywhere in the world" but then excluded coverage for theft "from a dwelling under construction or of construction material and supplies until completed and occupied" or "away from the residence premises" if the insured is not "temporarily residing there." The court disagreed, holding that the Grange policy unambiguously stated that "coverage is provided for personal property 'anywhere in the world,' but only for the perils insured by the policy" and "the perils Eiben requested coverage for were excluded by the plain, unambiguous contract language." The court also held that the trial court order appealed by Eiben was final even though it failed to declare the rights of the parties because no party had requested a declaration of rights in the pleadings and the "the trial court's grant

of declaratory judgment in favor of Grange [was] harmless error." (GALLAGHER SHARP was counsel for Grange in this matter.)

5. Insurance Policy's Anti-Assignment Clause Invalidated An Insured's Assignment Of Insurance Proceeds To An Auto Body Shop.

Mercedes-Benz of W. Chester v. Am. Family Ins., (Twelfth App. Dist.), 2010-Ohio-2307. Three American Family insureds had their vehicles repaired at the plaintiff's auto body shop and executed assignments of proceeds. The repair charges exceeded the amount American Family had agreed to pay. Plaintiff filed suit against American Family for the amount it claims was owed to them for the repairs. The trial court granted American Family's motion for summary judgment based upon the anti-assignment clause in the insurance policy. The appellate court affirmed the granting of summary judgment and held that the anti-assignment clause invalidated the insureds' assignments to the plaintiff.

B. <u>UM/UIM</u>.

1. An Insured Need Not Produce Third-Party Eyewitness Testimony To Receive UM Coverage When The Identity Of The Tortfeasor Is Unknown.

Ingram v. State Farm, (Sixth App. Dist.), 2010-Ohio-1599. A driver and his passenger were struck by an SUV that fled the scene of the accident. The driver submitted uninsured motorist claims under both his Safe Auto policy and the passenger's State Farm policy. The claims were denied, and the driver filed suit against both companies. The trial court granted summary judgment for the insurers on the grounds that there was insufficient "independent corroborative evidence" that the accident was caused by an unidentified driver, as required by both policies and R.C. 3937.18(B)(3).

The trial court cited *Girgis v. State Farm Mut. Auto. Ins. Co.* (1996), 75 Ohio St.3d 302, which held that the insured's testimony alone was not sufficient to constitute "independent corroborative evidence," and interpreted that decision to mean that such evidence "must come from the testimony of an independent third party." The court of appeals reversed and remanded, finding that "there is no requirement in appellees' policies, R.C. 3937.18, or *Girgis* that the 'additional evidence' needed to support the insured's testimony be eyewitness testimony." Because the testimony of both the driver and the passenger – as reflected in their depositions as well as statements made to police and medical personnel – gave nearly identical accounts of the accident, there was sufficient "independent corroborative evidence" to go to a jury.

2. A Medical Provider's Lien Does Not Reduce The Amount Available To An Insured Under A UIM Policy.

Gilliland v. Nationwide Prop. & Cas. Ins. Co., (Fourth App. Dist.) 2010-Ohio-2512. Plaintiff was involved in an auto accident and filed suit against his insurer for UIM benefits. Plaintiff's medical provider imposed a lien on any recovery. The insured's UIM limit was the same as the tortfeasor's policy limits; thus, absent some liability that reduced the amount available for payment, the insurer would not be liable because the limits were equal. The insured argued that the medical provider lien reduced the amount available for payment under R.C. 3937.18(C), and therefore the insured was underinsured to the extent of the lien. The Fourth Appellate District previously held in another case that "a medical lien placed on a recovery decreased the amount available for payment and so could not be used to setoff the amount owed under the underinsured motorist policies." The insured moved for partial summary judgment seeking UIM benefits for the amount of the lien which the trial court granted. The insurer appealed, arguing that the medical provider's lien was an expense of the insured. The court of appeals agreed with the insurer and overruled *its prior decision,* reasoning that the Fourth District was the only court of appeals that found a medical lien placed on a judgment, based on services provided to the plaintiff, decreased the amount available for payment under R.C. 3937.18(C).

C. <u>Coverage For Intentional Acts</u>.

1. A Clear Exclusion For 'Intentional' Acts Of A Person Who Lacks Capacity May Be Valid.

Imhoff v. Encompass Ins., (Fifth App. Dist.), 2010-Ohio-2760. Two nurses at a deceased's nursing home sued his estate based on an assault. The insured suffered from dementia. The estate sought coverage under the deceased's homeowner's policy. The company denied coverage based on a clause excluding "intentional acts or omissions." The exclusion applied even if such "covered person lacks the metal [sic] capacity to govern his or her conduct." The estate sued for coverage, citing *Nationwide Ins. Co. v. Estate of Kollstedt*, 71 Ohio St.3d, 1995-Ohio-245, which held a policy excluding coverage where "the insured expected or intended to cause bodily injury...does not apply under circumstances where the insured was mentally incapable of committing an intentional act." The Fifth District found that the clause in the case at bar went beyond that in *Kollstedt*, and because the Supreme Court did not reach its ruling on public policy grounds, the clause was valid and there was no coverage.

2. Guilty Plea To A Crime With A Required Mental State Of "Knowingly," Is Sufficient To Trigger An Intentional Acts Exclusion.

*Black v. Richards***,** (Fifth App. Dist.), 2010-Ohio-2938. The friend of an insured minor set fire to curtains in a vacant home. The insurer filed a declaratory judgment action, arguing it had no duty to defend the civil suit against the insured minor based on the "Intentional Acts" exclusion in the applicable homeowner's policy. The insured argued that while the setting of the fire was intentional on the part of the friend, the insured's action in failing to prevent the fire could be seen as negligence. The insurer argued that the insured pled guilty to the crime of conspiracy to commit arson -- which encompasses a mental state of "knowingly" -- and thus conclusively established his actions were "intentional." The court of appeals affirmed summary judgment for the insurer, finding that because the crime "encompasses the mental state of knowingly...[the] admission, therefore, is sufficient to trigger the intentional acts exclusion."

D. <u>Policy Conditions Of Coverage</u>.

1. An Insurer Does Not Waive The Right To Cancel Coverage By Accepting Late Payments.

Akbik v. Erie Ins. Group, (Seventh App. Dist.), 2010-Ohio-1535. Akbik, while a pedestrian, was struck by an automobile operated by Cole. Akbik was seriously injured and obtained a default judgment against Cole for $1,000,000. Cole was insured by Erie Insurance Company and when Akbik's judgment against Cole went unpaid, Akbik sued Erie directly. Prior to the accident, Cole had made partial payment of her insurance premium to Erie which Erie had accepted to extend coverage for the time covered by the partial payment but Cole remained delinquent for the full payment. Erie notified Cole that the policy would cancel if full payment was not timely received, and thus complied with the policy provision requiring 30 days advance notice of cancellation. The court found that Erie "had the right to cancel Cole's policy even though it accepted her late payments" because "the policy expressly stated that [Erie] does not waive its right to cancel the policy merely because it has accepted late payments."

2. The Exhaustion Clause And The Three-Year Contractual Limitations Period Create A Policy Ambiguity Which Results In The Three-Year Contractual Limitation Period Beginning To Run Upon Exhaustion Of The Tortfeasor's Liability Coverage Limits.

Barbee v. Allstate Ins. Co., (Ninth App. Dist.), 2010-Ohio-2016. The Barbees were injured in an automobile accident caused by an underinsured motorist. The Barbees brought an underinsured motorist claim against UM/UIM insurers, Allstate Insurance Company and Nationwide Mutual Fire

Insurance Company. Allstate and Nationwide moved for summary judgment, arguing that the Barbees' claims were barred under the policies' three-year contractual limitations period. Allstate's policy provided that "[a]ny legal action against Allstate must be brought within three years of the date of the accident. No one may sue us under this coverage unless there is full compliance with all the policy terms and conditions." Nationwide's policy provided that "[n]o lawsuit may be filed against us . . . until the said person has fully complied with all the terms and conditions of this policy . . . . Subject to the preceding . . . , under the Uninsured Motorists coverage of this policy, any lawsuit must be filed against us: a) within three (3) years from the date of the accident . . . ." The court found that one "of the conditions precedent for payment for underinsurance is exhaustion of all other liability coverage" and, therefore, the Barbees "did not have a right to coverage or a mature claim against Allstate and Nationwide until the liability insurance of the [tortfeasors] was exhausted." The court held that because "there is a conflict between a policy's exhaustion clause and limitations clause, there is an ambiguity in the contract" which must be construed in favor of coverage. The court concluded that because the Barbees had brought their claims against Allstate and Nationwide within three years of exhausting the tortfeasors' liability coverage, they had complied with the contractual three-year limitation period.

3. Two-Year Limitation Period In Insurance Policy Was Reasonable And Unambiguous.

D'Ambrosia v. Hensinger, (Tenth App. Dist.), 2010-Ohio-1767. Plaintiff was a passenger in a vehicle involved in an accident and filed suit against the defendant-driver. She eventually dismissed the suit without prejudice and then timely refiled. Approximately 16 months after refiling, and over six years after the accident, the Plaintiff amended her complaint to add a UIM claim against Erie Insurance. The trial court granted Erie Insurance's motion for summary judgment based upon the two year limitation period in the insurance policy. The appellate court affirmed the trial court's ruling. The appellate court indicated that plaintiff failed to provide any relevant facts or circumstances supporting her claim that the limitation period was unreasonable or ambiguous.

4. Limitation Period In Policy Was Ambiguous.

Dominish v. Nationwide Ins. Co., (Eleventh App. Dist.), 2010-Ohio-3048. Plaintiff's house was damaged when a tree fell on it during a thunderstorm on July 26, 2006. Plaintiff made a claim with Nationwide Insurance Company, his homeowners' insurer. Defendant issued a partial denial of coverage and issued payment for the interior damage. Plaintiff returned the check to defendant and disputed the denial for the roof damage. Plaintiff filed suit on July 25, 2008. The defendant's policy contained the following language: "Any action must be started within one year after the date of loss or damage." The appellate court determined that this policy language was ambiguous inasmuch as the insured could reasonably believe that submitting the claim to the defendant was "starting" a claim. Further, although the claim representative indicated in a letter to the plaintiff that

if he wished to file suit, he must do so within one year, the appellate court held that the policy language controls regardless of the claim representative's interpretation made after the contract was issued.

5. Repeated Requests For Documentation May Waive A Contractual Statute Of Limitations.

Arp v. Am. Family Ins. Co., (Sixth App. Dist.), 2010-Ohio-2250. The insured suffered a fire loss and made a claim with his GL insurer. Over the course of the next year the insurer made several requests for documentation regarding the loss, conducted an oral examination of the insured, and made several payments under the policy, including providing housing expenses for sixteen months. The insured filed suit twenty months after the accident. The insurer moved for summary judgment based on the one-year contractual limitations period set out in the policy, which the trial court granted. The court of appeals reversed. The court cited *Hounshell v. Am. States In. Co.* (1981), 67 Ohio St.2d 427, 429, for the proposition that an insurer may waive a contractual time limitation by "acts or declarations which evince a recognition of liability, or acts or declarations which hold out a reasonable hope for adjustment and which acts or declarations occasion the delay by the insured in filing an action on the insurance contract until after the period of limitations has expired." The court found an issue of fact regarding whether the repeated requests for documents (as well as other actions) over the course of the year led the insured to hold out a "reasonable hope for adjustment," despite the insurer's repeated assertions it was not waving any rights under the policy.

6. Continued Investigation Of A Claim May Waive A Contractual Statute Of Limitations.

Am. Family Ins. Co. v. Taylor, (Fifth App. Dist.), 2010-Ohio-2756. On May 20, 2003, the insureds filed a claim based on storm damage. The insurer initially denied the claim but then reopened the investigation after the insureds signed a non-waiver agreement which provided that the insurer was not waiving any rights under the policy. The adjuster later sent the insureds a letter stating, amongst other things, that the company was not waiving the requirement that the insured file any suit within a year of the damage. On July 11, 2005, the insurer filed a declaratory judgment action, and the insureds counterclaimed for breach of contract. The trial court granted the insurers motion for summary judgment on the counterclaim, citing the one-year limitations period in the contract. The court of appeals reversed, finding the continued investigation waived the clause: "Placing no time limit upon the insurer's *investigation*, yet requiring the claimant to file suit within a specified period, in effect penalizes the insured for working with the insurance company...."

E. <u>Misrepresentation</u>.

1. Negligent Misrepresentation Claims Against An Insurance Agent Are Not Barred By The Economic Loss Doctrine.

Potts v. Safeco Ins. Co., (Fifth App. Dist.), 2010-Ohio-2042. Plaintiffs bought homeowners insurance through Safeco Insurance Company from an agent at Welker & Oyster. The policy initially provided coverage for sump-pump related losses, but later was amended to exclude damages from sump-pumps. Welker advised the insureds that while the policy was amended, coverage for sump-pump related losses remained. Plaintiffs then suffered damage from a sump-pump malfunction and Safeco denied coverage. Plaintiffs brought suit against both the insurer for coverage and the agency for "negligence." The trial court granted both defendants' motions for summary judgment, the agency's based on the fact that the economic loss rule barred recovery. The court of appeals affirmed. The court noted, however, the general rule that "while negligence claims by insureds against their insurance brokers for failing ***to procure coverage*** were barred by the economic loss doctrine, ***negligent misrepresentation*** claims were not." However, because plaintiffs only pled simple negligence and not negligent misrepresentation, they waived their right to assert the argument on appeal.

2. An Insurance Policy Cannot Be Voided *Ab Initio* Based On Material Misrepresentations Or Omissions In The Application Unless The Application Is Expressly Incorporated In The Policy And The Policy States That It Will Be Void *Ab Initio* Rather Than Merely Voidable.

Am. Family Ins. Co. v. Johnson, (Eighth App. Dist.), 2010-Ohio-1855. The Johnsons insured their home under a homeowner's policy issued by American Family Insurance Company. The Johnsons' home was damaged by fire and American Family filed a declaratory judgment action against the Johnsons seeking a declaration that, because the Johnsons made misrepresentations or omissions on their application for insurance, the insurance policy was void *ab initio*. The court found that the American Family policy failed to expressly incorporate the application into the policy. The court found that "the policy merely mentions the application; it does not state that the application is part of the policy" and "does not specifically state that a misrepresentation as to prior claims would render the policy void *ab initio*." Rather, the application states that the false statements on it "may void the policy." Therefore, the court found that even if misrepresentations or omissions were made in the application, such did not operate to void the policy *ab initio* and preclude coverage for the fire loss at issue.

F. Subrogation.

1. Subrogated Health Insurers May Not Directly Sue Comprehensive General Liability Insurers For No Fault Medical Payments Coverage.

Univ. Hosp. Health Sys. v. Total Tech. Servs., (Eighth App. Dist.), 2010-Ohio-2606. QualChoice, Inc., a health insurer, sued as subrogee of its insured seeking to recover no-fault medical payments coverage under a Federal Insurance Company policy insuring the lessor of the premises in which QualChoice's insured was injured. QualChoice claimed to be entitled to medical payments coverage without regard to fault as a third-party beneficiary, under the medical payments coverage provisions of the Federal CGL policy. The court disagreed holding that reading "the policy in its entirety as we are required to do, it is clear that the policy's no fault coverage applies when a judgment against Federal's insured is obtained, or when the insured has entered into a settlement agreement." The court reasoned that the "no fault provision [is intended to allow] the insured to settle the case and have Federal pay medical expenses without regard to fault." It does not make all those who enter the premises third-party beneficiaries of the CGL policy because "Ohio does not permit an injured party to sue an insurance company, of which it is not an insured, directly without first obtaining a judgment against the tortfeasor."

G. Arbitration.

1. The Arbitration Provision In A Homeowner's Policy Is Ambiguous So As To Allow Arbitration Of Coverage Disputes As Well As The Amount Of The Loss.

Frazier v. Am. Family Ins. Co., (Eighth App. Dist.), 2010-Ohio-3733. Frazier filed a complaint for declaratory judgment against American Family Insurance Company seeking coverage for a fire loss to her home. American Family had denied her claim for coverage on the grounds of intentional concealment and material misrepresentations which void the policy. Frazier moved to stay the suit and compel arbitration under the American Family policy, which contained an arbitration provision providing that "[i]n making a claim under the property coverages, if you or we cannot agree as to the amount of liability the controversy may be settled by arbitration. * * *." The trial court stayed the case and referred the matter to arbitration. American Family appealed, asserting "that disputes involving false or fraudulent representations are not subject to the arbitration provision." The court of appeals disagreed and affirmed the trial court's decision, reasoning that by "determining that Frazier was not entitled to coverage under the policy, American Family effectively determined that it had no liability under the policy, i.e., its 'amount of liability.'" The court of appeals found the arbitration provision ambiguous: "American Family did not draft the arbitration clause to clearly limit its scope to disputes as to the amount of property loss * * * the policy can be read to permit arbitration of disputes over coverage and damages." The court found

that coverage was arbitratable based on "the policy favoring arbitration and construing contract language against the drafter." The court further concluded that "whether Frazier complied with the contractual time limits and whether such requirements may have been extended or excused are all questions bearing on the substantive performance of the contract that should be determined by the arbitrator."

H. Miscellaneous.

1. Failure To File Insurance Policy Forms With The Ohio Department Of Insurance Does Not Render The Forms Invalid And Unenforceable As Between The Insurer And Insured.

Siegfried v. Farmers Ins. of Columbus, Inc., (Ninth App. Dist.), 2010-Ohio-1173. The Siegfrieds were injured in an accident caused by an underinsured motorist and had UM/UIM coverage from Farmers Insurance The Siegfrieds elected arbitration under the general arbitration provisions of the policy and followed the proper procedure to do so. However, Farmers invoked an endorsement to the policy which allows for arbitration but further provides that "[e]ither the insured person or we can refuse to agree to arbitration." The trial court invalidated the endorsement because it was not filed with the Ohio Department of Insurance, and stayed the matter pending arbitration in accordance with the original policy language. In doing so, the trial court relied upon R.C. 3937.03(H), which provides that "[n]o insurer shall make or issue a contract or policy except in accordance with filings which are in effect for said insurer" with the Ohio Department of Insurance. The court of appeals disagreed and reversed, holding that because "the purpose behind the regulatory filing requirement is not to allow insurance purchasers to evaluate the extent or character of coverage, the Siegfrieds cannot have relied on the filings in purchasing the policy in question and there is no reason to invalidate the language not filed with the Department of Insurance."

2. A Declaration That An Insurer Has The Duty To Defend Is Not Immediately Appealable Where The Duty To Indemnify Remains Unresolved.

Grange Mut. Cas. Co. v. Norton, (Ninth App. Dist.), 2010-Ohio-3660. Grange Mutual Casualty Company appealed the trial court's decision that it had a duty to defend certain claims against its insureds. The court of appeals dismissed Grange's appeal, however, holding that a declaration that an insurer has the duty to defend is not a final, appealable order where the insurer's duty to indemnify remains unresolved unless the trial court certifies that there is no just reason to delay an appeal. Because the trial court made no such certification, which is discretionary, the court of appeals was deprived of jurisdiction, and the appeal dismissed.