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TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

I. EMPLOYEES AS INSUREDS – "COURSE AND SCOPE" ISSUES IN OHIO

Whether a worker is an "employee" may affect the disposition of a claim. The status of a worker may arise in various contexts, including coverage matters (a policy may extend coverage to an employee, but only if the employee is in the course and scope of employment), tort claims (a plaintiff may strive to affix liability on an alleged employer based on *respondeat superior*), and UM/UIM claims (a claimant may assert employee status to pursue a UM/UIM claim.)

Other examples may be offered, but in most instances, two questions emerge: 1) Was the individual an "employee" at the time of the loss?; and 2) If so, was he or she acting within the "course and scope" of that employment when the loss occurred?

This article reviews the definition of an "employee" under Ohio law, noting the "direction and control" test and distinguishing independent contractors, joint employment, and leased employees. Next, the article addresses the "course and scope" of employment, focusing on respondeat superior, the "coming and going rule", employees who are "always" on duty, and UM/UIM concept coverage. Finally, practical guidelines for analyzing these types of claims are offered, including the observation that the body of law the court relies upon often determines the outcome of the case.

A. Individual as Employee

1. "Direction and Control"

Absent a definition contained in a contract, courts usually revert to a common law definition of "employee." In *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm* (1995), 73 Ohio St.3d 107, 109, quoting Black's Law Dictionary (6th Ed., 1991) 362-63, the court defined an employee as "'[a] person in the service of another *** where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed." In eyes of the law, an individual acts within the employment context only when he or she acts for the employer and engages in the pursuit of the employer's business. *White Oak Coal Co. v. Rivoux* (1913), 88 Ohio St. 18, 102 N.E.302.

The right to "direction and control"also is the test applied under Ohio's workers' compensation statute. *Daniels v. MacGregor Co.* (1965), 2 Ohio St.2d 89 ("[t]here is nothing . . . to indicate that the question whether one is an employee within the meaning of the Workmen's Compensation Act should be any different from the question whether one is an employee for the purposes of applying the doctrine of *respondeat superior*"); See also *Republic-Franklin Ins. Co. v. Amherst* (1990), 50 Ohio St.3d 212, 215.

Even though this same test is applied in workers compensation cases, tort liability is not identical to workers' compensation exposure. In *Rogers v. Allis-Chalmers Mfg. Co.* (1950), 153 Ohio St. 513, the Supreme Court of Ohio observed that worker's compensation recovery "is based entirely on statute and has to do with questions aside from those relating to the doctrine of *respondeat superior...."* Indeed, R.C. 4123.95 directs that the Workers' Compensation Act is to be construed liberally in favor of employees. Thus, the cases in which an alleged employee seeks participation in the workers' compensation system often result in a determination that the worker was an employee, although on similar facts, the result may be the opposite in a tort context.

The burden of proof rests upon the party making the assertion, usually the plaintiff. "[T]he burden of

the plaintiff [is] to adduce evidence tending to show that the agent was acting within the scope of his employment and that the right to control the agent's conduct was in the defendant principal." *Senn v. Lackner* (1952), 157 Ohio St. 206, paragraph two of the syllabus.

2. Independent Contractor

Employees in Ohio are distinguished from non-employee independent contractors. By definition, independent contractors are retained only to effectuate a desired result, and there is no attempt on the part of the contractor to retain any control over the "mode or means" of obtaining the result. Independent contractors are not subject to liability under the *respondeat superior* doctrine. *Senn v. Lackner* (1952), 157 Ohio St. 206, 210.

Ohio Courts have recognized this distinction, and have set forth several principles which will distinguish an independent contractor from an employee:

> The relation of principal and agent or master and servant is distinguished from the relation of employer and independent contractor by the following test: did the employer retain control, or the right to control, the mode and manner of doing the work contracted for? If he did the relationship is that of principal and agent or master and servant, if he did not, but is interested merely in the ultimate result to be accomplished the relation is that of employer and independent contractor.

Councell v. Douglas (1955), 163 Ohio St. 292 at 295. "If the employer reserves the right to control the manner or means of doing the work, the relation created is that of master and servant, while if the manner or means of doing the work or job is left to one who is responsible to the employer only for the result, an independent contractor relationship is thereby created." *Hamilton v. State Employment Relations Board* (1994), 70 Ohio St. 3d 210, 213, quoting *Gillum v. Indus. Comm*. (1943), 141 Ohio St. 373, paragraph two of the syllabus. While an employer is liable for the negligent acts of an employee, an employer of an independent contractor is generally not liable for the negligent acts of the contractor or of his servants. *Pusey v. Bator*, 94 Ohio St.3d 275, 278-279 (2002).The mere fact that the employer reserves the right to supervise or inspect the work during performance does not make the contractor an employee. *Conasauga River Lumber Co. v. Wade*, 221 F.2d 312, 315 (6th Cir. 1955). The party who claims that a principal is responsible for the acts of an employee is obligated to prove the agency and scope of the authority. *Brown v. Christopher Inn.*, 45 Ohio App.2d 279, 283-284 (1975). Generally, the determination of whether a person is an employee or independent contractor is a matter of law to be decided by the court based upon the undisputed facts in the record. *Bostic v. Connor* (1987), 37 Ohio St.3d 144, 146.

In *Gillum v. Industrial Com*., supra, the Supreme Court of Ohio set forth the following key factors to be considered as to whether an individual is an employee or an independent contractor:

(a) the extent of control over the details of the work;
(b) whether or not the one employed is engaged in a distinct occupation or business;
(c) the kind of occupation (i.e., the work is usually done under the direction of an employer);
(d) the skill required in the particular occupation;
(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work
(f) the length of time for which the person is employed;
(g) the method of payment, whether by the time or by the job;
(h) whether the work is a part of the regular business of the employer; and

(I) whether or not the parties believe they are creating the relationship of master and servant.

Id. In a workers' compensation context, similar factors concerning whether an individual is an independent contractor or employee are found in R.C. § 4123.01(A)(1)(c). Thus, if the employer is concerned only with the end result and does not control how the result is achieved, then the relationship is likely one of principal and independent contractor under Ohio law. Independent contractors are often identified by written agreement, but that written agreement cannot vest "direction and control" rights to the contractor.

3. Joint Employment

Joint employment also is possible under Ohio law. Joint employment exists where "one employer, while contracting in good faith with an otherwise independent company" obtains "sufficient control of the terms and conditions of employment of the employees who are employed by the other employer" to meet the test for an employee/employer relationship." *Morton v. Reliant Pharm., LLC* (Oct. 4, 2004), Stark App. No. 2003CA00443, 2004 Ohio App. LEXIS 5228, quoting *Swallows v. Barnes & Noble Book Stores, Inc*. (1997), 128 F.3d 990, 993, fn.4, citing *NLRB v. Browning-Ferris Ind. of Pennsylvania, Inc*. (3d Cir. 1982), 691 F.2d 1117, 1123. In joint employment situations, two employers "co-determine those matters governing the essential terms and conditions of employment." *Morton*, supra. In most cases of "joint employment," an independent contractor status was sought, but the employer/contractor retained (intentionally or unintentionally) "direction and control" over one or more parts of the task.

4. Leased Employees

The relationship of employee to employment agency is often that "the worker is authorizing the employment agency to offer to the agency's customers the worker's services as an employee of the customer. After acceptance by the customer of the offer, there is a contractual relationship among the three under which the agency is to make certain payments on behalf of the customer to and for the worker, the worker is to work as an employee for the customer, and the customer is to make payments to the agency." *Western World Ins. Co., Inc. v. Spevco* (1996), 109 Ohio App.3d 122, 126, discretionary appeal not allowed (1996), 76 Ohio St.3d 1423; *State ex rel. Newman v. Industrial Comm'n* (1977), 77 Ohio St.3d 271, 273; *Daniels v. MacGregor Co.* (1965), 2 Ohio St. 2d 89. Under the workers' compensation system, "leased" employees are treated as the employees of the leasing temporary agency for normal claims, but in claims alleging a violation of a specific safety requirement, the customer is to be deemed the employer. ICO Hearing Manual, Memo L8 (May 7, 2001).

B. Defining Course and Scope of Employment

A determination that a worker is an "employee," as opposed to an independent contractor, does not end the inquiry. Even if a worker is an "employee," he or she may not be acting within the "course and scope" of employment. Generally, the test for whether an employee is within the "course and scope" of employment is whether the employer controls the material details of the employee's activity. *Boch v. New York Life Ins. Co.* (1964), 175 Ohio St. 458, 463; *Flynn v. Westfield Ins. Co.*, Hamilton App. No. C-050909, 2006-Ohio-3719, ¶43. Where an employee is engaged in activities solely for his own benefit while he should be performing work for the employer (i.e., is engaged in a "frolic or detour"), the employee is generally found not to be acting within the scope of his employment. *Senn v. Lockner* (1952), 157 Ohio St. 206, 105 N.E.2d 49.

"[W]hen reasonable minds can come to but one conclusion," then "the issue regarding scope of employment becomes a question of law." *Osborne v. Lyles* (1992), 63 Ohio St. 3d 326, 330; accord *Patidar v. Tri-State Renovations, Inc.*, Franklin App. No. 06AP-212, 2006-Ohio-4631, ¶9; *Houston v. Liberty Mut. Fire Ins. Co.*, Lucas App. No. L-04-1161, 2005-Ohio-4177, ¶43; *Cincinnati Ins. Co. v. Lohri*, Franklin App. No. 05AP-94, 2005-Ohio-5167, ¶¶16-22; *Reese v. Fid. & Guar. Ins. Underwriter* (2004), 158 Ohio App. 3d 696, 702.

1. *Respondeat Superior*

Under the doctrine of *respondeat superior*, liability is imposed upon an employer "for the acts done by an employee in the course and scope of employment." *Amato v. Heinika, Ltd.*, 2005-Ohio-189, *4. The theory is that the employer, who directs and controls the employee, should have the employer's acts imputed to him. *Id*. In Ohio, in order to prevail against an employer under a *respondeat superior* theory, the employee's tort must be committed within the "scope of [his or her] employment" with the employer. *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 58; 565 N.E. 2d 584. An employer is not liable for the independent, self-serving acts of employees that in no way facilitate or promote the employer's business. *Groner v. de Levie*, Franklin Cty. App. No. 00 AP-1244, 2001 Ohio App. LEXIS 1928. Whether an employee is acting within the "scope of employment" is generally a question of fact to be determined by jury, and it only becomes a question of law when "reasonable minds can come to but one conclusion." *Davis v. The May Depart. Stores, Co.*, Summit Cty. App. No. 20396, 2001-Ohio-1362.

2. The "Coming and Going Rule"

Ohio courts, in addressing the issue of *respondeat superior*, have held that an employee "driving to work at a fixed place of employment" is not acting in the course of her employment. *Boch v. New York Life Ins. Co.* (1964), 175 Ohio St. 458, 196 N.E.2d 90.

Many "course and scope" issues arise in worker's compensation motor vehicle accident suits where the employee is traveling to or from work. In *Ruckman v. Cubby Drilling* (1998), 81 Ohio St.3d 117, 120, the Supreme Court of Ohio ratified in a workers' compensation case the common law rule that the focus for determining whether an employee in transit from one location to another is within the course and scope of employment "is on whether the employee commences his substantial employment duties only after arriving at a specific and identifiable work place designated by his employer." The court adopted an expansive test for determining if the employee is in the course and scope of employment while coming or going to work. The court held that such an employee will be eligible for workers' compensation benefits, even while going to or coming from work, where the travel serves a function of the employer's business and creates a risk that is distinctive in nature from or quantitatively greater than risks common to the public.

The tendency of courts to find an employment relationship in the workers' compensation context also is illustrated by *Amstutz v. Prudential Ins. Co.*, 136 Ohio St. 404, 1940 Ohio LEXIS 563, where the Supreme Court of Ohio upheld a jury verdict finding that a worker was entitled to workers' compensation benefits. The high court held that an agent who drove to a plant to collect an insurance premium was in the course and scope of employment on his way home.

In a tort case, however, the Supreme Court came to the opposite conclusion. In *Bauman v. Sincavich* (1940), 137 Ohio St. 21, 23-24 the court reversed a jury verdict against an employer. The employee, a delivery

man, left his delivery route to give two friends a ride. An accident occurred while the driver was returning to his route. The court held that the driver was not in the course and scope of employment.

3. Employees Who are "Always" on Duty

Issues also arise in cases where employees claim they are "always" on duty. The classic example is a police officer, who may be bound by law to act in certain situations. However, even for employees who are "always" on duty, the test is normally whether "he is performing some obligation of that employment" at the time of the loss. *Madison v. Buckeye Union Ins. Co.*, Cuyahoga App. No. 86311, 2006-Ohio-449, ¶¶ 18-22, *Simerlink v. Young* (1961), 172 Ohio St. 427, syllabus; Accord *Kunze v. Columbus Police Dep't* (1991), 74 Ohio App. 3d 742, 746-747.

Employees sometimes are allegedly in the course and scope of employment after regular employment hours if they are "on duty" when the loss occurs. The facts of the case, and what the employee was doing, may be determinative. *J & C Drilling Co. v. Salaiz* (Tex. App. 1993), 866 S.W.2d 632, 637 (holding that being on 24 hour call does not equate to being within the course and scope of employment 24 hours per day); *Connell v. Carl's Air Conditioning* (Nev. 1981), 97 Nev. 436, 438-9 (holding the same); *Hallett v. United States* (D. Nev. 1995), 877 F. Supp. 1423, 1428-30 ("while technically correct that they were "on duty", merely being on duty does not bring every act of a United States military officer within the scope of employment * * * non-official, voluntary activities, were not done with an intention to perform as part of or incident to services on account of which the members of the military were employed.");

4. UM/UIM Coverage

The issue of whether an employee is within the "course and scope" of employment is particularly important in UM/UIM cases. This is because employees normally do not qualify as insureds, unless they are acting in the "course of employment." In *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, the Supreme Court found that while UM/UIM coverage afforded solely to a corporate named insured may be ambiguous (because a corporation cannot sustain bodily injury), the ambiguity can extend UM/UIM coverage only employees within the "course and scope of employment." *Id.* at ¶ 61. Therefore, where an employee is acting outside the "course and scope" of employment when he or she is injured, no UM/UIM coverage can be afforded under a commercial auto policy absent specific policy language affording such coverage.

C. Practical Guidelines

The following guidelines may prove useful in analyzing cases involving course and scope of employment issues:

1. If the worker is subject to the direction and control of another party, that party may be deemed the employer of the worker.

2. If the hiring party is only interested in the outcome and does not retain any right to control the hired worker and the manner and mode of doing the work, an independent contractor relationship may exist; the factors set forth in the *Gillum* case, supra, should be examined.

3. Where two employers exercise control over a worker, each may be deemed an employer.

4. The general test for determining if a employee is in the "course and scope" of employment turns on: (1) whether the employer has a right to control the employee, including any details of the employee's work; and (2) whether the employee was acting in furtherance of the employer's business;

5. Employers are liable for the acts of an employee in the course and scope of employment;

6. In tort cases, driving to a fixed place of employment is not within the course and scope of employment, but in workers' compensation cases, an employee can be in the course and scope of employment pursuant to the "coming and going rule" if the employee is serving a function of the employer's business and faces a distinctive or greater risk than that of the general public;

7. An employee such as a police officer or other employee who is "on call" may be considered to be in the course and scope of employment, if the employee is performing some obligation of that employment at the time of loss;

8. A UM/UIM claimant generally must establish that he or she was in the course and scope of employment to qualify as an insured; and

9. The outcome of an employment/course and scope issue may be affected by the body of law relied upon by the court: a narrower interpretation of who is an employee often is found in tort cases, while a broader approach (which favors finding that a worker is an employee) is the norm in workers' compensation cases.

II. SUPREME COURT OF OHIO CASE LAW

Trial Court's Prompt Entry of Judgment on Remand Gives *Scott-Pontzer* One Final Grasp

Sheaffer v. Westfield Ins. Co., 2006-Ohio 4476. The plaintiffs' decedent was killed in an automobile accident. Although the decedent was not in the course and scope of employment at the time of the accident, the plaintiffs sought underinsured motorists coverage under her employer's business auto policy, general liability policy, and umbrella liability policy. Westfield issued the business auto policy and settled with the plaintiffs. Argonaut Great Central Ins. Co. issued the general liability and umbrella liability policies and disputed coverage but agreed to stipulate to the amount of the plaintiffs' damages at $525,000. On August 15, 2002, the trial court entered a declaratory judgment against Argonaut, which appealed the trial court's decision. The court of appeals in a September 10, 2003 decision held that the trial court erred in finding coverage under the general liability policy, but affirmed the trial court's judgment that pursuant to *Scott-Pontzer* coverage was owed under the umbrella liability policy. The case was remanded to the trial court and the trial court promptly entered final judgment against Argonaut on October 15, 2003, consistent with the court of appeals' September 10, 2003 order.

Thereafter, Argonaut appealed the court of appeals' September 10, 2003 decision to the Supreme Court on October 24, 2003; *Westfield Ins. Co. v. Galatis*, 2003-Ohio 5849, overruled *Scott-Pontzer* on November 5, 2003; and Argonaut appealed the trial court's October 15, 2003 judgment to the court of appeals on

November 12, 2003. On January 21, 2004, the Supreme Court declined to accept discretionary jurisdiction of Argonaut's October 24, 2003 appeal. In a dissent written by Justice Stratton and concurred in by Justices O'Connor and O'Donnell, it is noted that when the court considered that appeal the plaintiffs represented that "[t]he first and foremost reason why this Court should reject Appellant's appeals is that this case is still pending in the Fifth District Court of Appeals," and "[t]here is no need for this Court to exercise its discretionary jurisdiction to consider a case which is still pending in a lower appellate court."

On December 3, 2004, the court of appeals decided that appeal. The court of appeals affirmed the trial court's October 15, 2003 finding that the doctrine of law of the case applied and the plaintiffs' vested right was not abrogated by the *Galatis* decision. Argonaut appealed the court of appeals' December 3, 2004 decision to the Supreme Court, which accepted jurisdiction. However, the Supreme Court then affirmed the court of appeals' December 3, 2004 decision on the ground that the legal issues that determined the case were terminated on January 21, 2004 when the Supreme Court denied jurisdiction of the earlier appeal. The Supreme Court did not re-visit the court of appeals' September 10, 2003 decision or its own January 21, 2004 decision declining Argonaut's discretionary appeal of that decision. The court simply noted that after the court denied jurisdiction of that appeal there was nothing for the plaintiffs to do but collect on their October 15, 2003 judgment.

In *Hopkins v. Dyer*, 2004-Ohio-6769, the Supreme Court held that Galatis had retroactive application which superseded the law of the case doctrine on remand. Justice Stratton in her dissenting opinion in *Sheaffer* argued that the majority opinion was inconsistent with the Supreme Court's recent decision in *Hopkins*. Indeed, at first blush, *Sheaffer* and *Dyer* may seem incompatible, but in *Dyer,* Gallagher Sharp, as amicus curiae counsel, pointed out that "multiple issues of coverage, coverage defenses including late notice, and damages were never determined and subject to adjudication on remand." The Supreme Court in *Dyer* noted in its opinion that the Court of Appeals "remanded the cause for the trial court to decide various defenses, including prejudice from the long delay in notifying Lumbermens of her UIM claim." The Supreme Court has always held that where remand is limited to entering judgment, a change in the law will not be applied on remand. *Phung v. Waste Management Inc*. (1994), 71 Ohio St.3d 408; *National Amusements v. Springdale* (1990), 53 Ohio St. 3d 60. The Supreme Court in *Sheaffer* carefully noted that "A valid judgment entry had been entered by the trial court; the court of appeals did not substantially change that judgment. The trial court, consistent with the instructions of the court of appeals, made a minor modification to its order. No new evidence was required. No new argument was heard. No briefs were submitted." The court in *Sheaffer* further noted that:

> Prior to the first round of appeals, a judgment had been entered against Argonaut for $525,000. It was found liable under both its general comprehensive liability policy and its umbrella policy. After the first round of appeals, Argonaut still had a judgment against it for $525,000. Pursuant to this judgment, Argonaut was liable only under the umbrella policy. Because both policies limited the insurers' liability to $1,000,000, the court of appeals' decision had no practical effect on the judgment. After this court denied jurisdiction, there was nothing for the Sheaffers to do but collect on their October 15 judgment.

Id. at ¶12. Since there was nothing left to be decided on remand, the Supreme Court reasoned that its decision to deny jurisdiction over Argonaut's first appeal "decided the issue and prevented any retroactive application of *Galatis* to this case." Id. at ¶13. Therefore, the *Hopkins* and *Sheaffer* cases actually may be considered to be in accord. In *Hopkins*, there were coverage issues to be addressed on remand and therefore the "law of the

case" had to yield to the intervening Supreme Court decision in *Galatis*. But in *Sheaffer*, there were no issues to be addressed on remand so there was a final binding judgment once the Supreme Court declined to exercise jurisdiction over the first appeal. The controversy and apparent inconsistency between these decisions could have been avoided had the Supreme Court stated that *res judicata* protection was afforded the judgment because there was nothing left to be done on remand.

III. LOWER COURT CASE LAW

A. Bad Faith

Bad Faith For Delaying Payment Of Insurance Proceeds - Insured Entitled To Obtain Claims File In Discovery For The Period Pre-Payment

Unklesbay v. Fenwick, 2006-Ohio-2630 (Second Appellate District). Unklesbay sued Preferred Mutual claiming bad faith for failing to timely pay insurance proceeds. The trial court ordered that Preferred Mutual's claim file be produced to Unklesbay. Preferred Mutual appealed, challenging the trial court's order requiring it to produce privileged and work product protected materials in its claims file. Preferred Mutual argued that *Boone v. Vanliner Ins. Co.* , 91 Ohio St.3d 209, was not applicable, because it had never denied coverage. Preferred Mutual asserted that nothing in its claims file could demonstrate a lack of good faith in denying coverage, because it had never denied coverage. The court found that "bad-faith 'refusal to pay' encompasses more than the outright denial of a claim," including "delaying the processing of [the] claim" and "the insurer's foot-dragging in the claims handling and evaluation process." The court affirmed the order requiring production of the claim file prior to benefit-payment date. The court, however, required the trial court to conduct an *in camera* review on remand to assure that irrelevant attorney-client or work-product documents created after Unklesbay's lawsuit was filed, but prior to payment of insurance benefits, are not produced.

B. Subrogation

Insurer Entitled To Subrogation For Medical Payments

Steele v. Towne Air Freight, 2006-Ohio-2187 (Fifth Appellate District). The driver's insurer, American Family, made medical payments to the passenger, Steele. Steele settled with the other parties and American Family sought to recover its medical payments from the settlement. The appellate court held that under the policy's medical expense coverage Steele was an insured person and an intended third-party beneficiary of the policy. The policy's language specifically provided that the insurer had the right to recover payments from a tortfeasor. Because American Family paid part of Steele's medical expenses, it was entitled to be reimbursed for those payments when Steele settled the case with other parties.

Equitable Subrogation Claim May Be Established Without Introducing Policy

State Farm Mut. Auto. Ins. Co. v. Swartz, 2006-Ohio-2096 (Fifth Appellate District). State Farm paid its insured's claim for personal injuries and filed suit against the tortfeasor under a claim of subrogation. Swartz argued that State Farm failed to produce sufficient evidence to entitle it to right of subrogation, because it failed to produce the actual policy. On appeal, the court held the equitable subrogation claim was shown by testimony that the insured had a policy with the insurer, that he filed a claim for injuries sustained in the accident, and that the insurer paid the claim.

C. Late Notice

Late Notice Bars Supplemental Action Against Insurer To Collect Default Judgment

Sesko v. Hutchins Caw, Inc., 2006-Ohio-5434 (Eighth Appellate District). In *Sesko*, the plaintiff obtained a default judgment against the defendant before the defendant's carrier was put on notice of the claim. The plaintiff/judgment creditor appealed a grant of summary judgment to the disability insurance carrier in the supplemental action, arguing that late notice of the plaintiff's claim to the carrier was not prejudicial because the trial court (without opinion) had denied the carrier's motion for relief from default judgment in the underlying case. Plaintiff argued that the denial of the motion meant that the defendant/judgment debtor had no defenses to plaintiff's claim in the underlying action, thus the carrier had no defenses to plaintiff's claim in the supplemental action. Finding the late notice to the carrier was prejudicial, the court of appeals held "[The Defendant] is judgment-proof, and [the Plaintiff] predictably looks to Vigilant and its deep pockets. But the depth of a party's pockets has no bearing on the legal duty to indemnify. The relationship between the parties is defined purely by contract, and no court can impose legal duties that the parties did not specifically agree to. The contract here provides for notice as soon as practicable, and we conclude that no reasonable person could find that Vigilant received such notice, when it did not learn of this action until after a default judgment had been entered."

D. Insurance Agent Liability

An Agent Is Liable To The Insurer For Improperly Backdating A Policy Amendment.

Progressive Preferred Ins. Co. v. Hammerlein Helton Ins., 2006-Ohio-4601 (First Appellate District). The Hammerlein insurance agency obtained an insurance policy for the insured from Progressive. The insured called the agency office after hours on a Friday and left a message on the answering machine, requesting that the coverage limit be increased. The next day, a driver for the insured's business was involved in a vehicle collision. On Monday morning, the insured reported the accident. His earlier message for increased coverage was received and processed on Monday as well, and the coverage limit was raised with an effective date of Friday. Progressive was obligated to pay the insured an amount in excess of the original coverage limit. Progressive then sued the agent for the difference between the original coverage limit and the amount Progressive was required to pay the insured. The court found that there was no meeting of the minds between the insured and the agency regarding the request for increased coverage on Friday. Therefore, the agency had improperly backdated the request, beached its agreement with Progressive, and was liable to pay the difference in coverage.

E. Endorsements/Exclusions/Policy Language

Coverage For "Misappropriation Of Advertising Ideas Or Style Of Doing Business" Is Ambiguous And Therefore Includes Trade-Dress And Trademark Infringement Claims

Westfield Ins. Co. v. Factfinder Mktg. Research, Inc., 2006-Ohio-4380 (First Appellate District). Westfield insured McGinnis who was sued by MFI for, among other things, misappropriation of trade dress,

trademarks, and proprietary methods. McGinnis sought a defense under his insurance policy issued by Westfield. The policy covered "advertising injury" defined as an injury arising out of one or more of the following offenses: "a. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; b. Oral or written publication of material that violates a person's right of privacy; c. Misappropriation of advertising ideas or style of doing business; or d. Infringement of copyright, title or slogan." The court found subsection "c" of the definition ambiguous, holding that the common meaning of misappropriation incorporates the idea of trade-dress and trademark infringement. Accordingly, the court found that Westfield owed McGinnis a defense.

An Automobile Liability Insurance Policy That Failed To Define The Terms "Accident" And "Occurrence" Was Ambiguous, And Therefore, Allowed The Injured Parties To Each Recover Under A Separate Occurrence Policy Limit

Nationwide Mut. Ins. Co. v. Godwin, 2006-Ohio-4167 (Eleventh Appellate District). Mr. and Mrs. Godwin were each operating a motorcycle when they were struck sequentially by a vehicle operated by Mr. William Chepla. Mr. Chepla was insured under a Nationwide Mutual Insurance Company policy. The Nationwide policy provided bodily injury liability limits of $100,000 per person/$100,000 per occurrence. The Nationwide policy did not define the terms "accident" and "occurrence." The Godwins argued that since the terms were undefined and they were each entitled to recover $100,000 for each accident. Nationwide disagreed and argued that "the courts of Ohio clearly adhere to the 'causation view,' which holds that policy limits clauses refer to the cause of the insured event, when construing the terms 'accident' or 'occurrence.' *Banner v. Raisin Valley, Inc.* (N.D. Ohio 1998), 31 F.Supp. 2d 591, 593. The rationale for this theory is that these terms should be defined by determining whether there is but one proximate cause for a series of injuries. *Progressive Preferred Ins. Co. v. Derby* (June 15, 2001), 6th Dist. No. F-01-002, 2001 Ohio App. LEXIS 2649, at *8-9." The court of appeals declined to follow the"causation view" and held that since the Nationwide policy failed to define the terms "accident" and "occurrence" in the liability policy at issue, the policy was ambiguous and such language must be construed against Nationwide, such that each plaintiff was entitled to collect under a separate occurrence amount up to $100,000.

Contractor's Excavation Damage To Adjoining Property Excluded Under CGL Policy

Interstate Props. v. Prasanna, Inc., 2006-Ohio-2686 (Ninth Appellate District). A subcontractor went onto the land of an adjoining property owner and damaged the property by removing some of the land's surface area. The insurer brought a declaratory judgment action seeking a declaration that it had no duty to defend or indemnify the contractor and others under its commercial general liability policies. The court of appeals upheld summary judgment to the insurer based on the "work in progress" exclusion in the policy, that excluded coverage for property damage to "[t]hat particular part of real property on which you or any contractor or subcontractor working directly or indirectly on your behalf is performing operations, if the property damage arises out of those operations." After recognizing that CGL policies "are not intended to insure against a breach of contract or poor workmanship," the court rejected the argument that the removed land was "collateral damage," holding "[c]ollateral damage is not the actual poor work product; rather, it consequentially flows from it. Examples of collateral damage include the additional property damage that results from a subsequent rain or other external factors, such as damage to the interior of a home or surrounding landscape caused by a leaky roof or a poorly installed drainage system."

F. Uninsured/Underinsured Motorists

1. Policy Interpretation

Broadened Coverage And Covered Auto Defenses Found Inapplicable To Eliminate Ambiguity For UM/UIM Coverage

Flynn v. Westfield Ins. Co., 2006-Ohio-3719 (First Appellate District). Flynn was seriously injured in an automobile accident. At the time of the accident he was: 1) a partner at a law firm; 2) employed by a title company; and 3) a volunteer for the Catholic Church. When the accident occurred he was traveling to a volunteer event for the Catholic Church and taking real estate closing documents to a bank near the volunteer event. Flynn recovered under his personal auto policy and against the tortfeasor. He then sought further recovery under the policies issued to his two employers and the Catholic Church.

Westfield insured the law firm and title company. The court found coverage under both of these policies, which contained a UM/UIM endorsement substantively identical to that at issue in *Scott-Pontzer*. Flynn was covered by the Westfield policy issued to the law firm because it was a partnership, and hence, provided coverage to the individual partners including Flynn. It thus did not matter whether Flynn was acting within the scope of his employment for the law firm–which he was not. Flynn was also covered under the Westfield policy issued to the title company. Even though the title company was a corporation, UM/UIM coverage was afforded for "you" and Flynn was acting within the scope of his employment.

Westfield asserted that the Broadened-Coverage endorsement present in both policies eliminated the ambiguity. The endorsement named a specific single individual as covered under each policy. The court found that naming an individual did not remove the ambiguity. The court followed *Galatis* to hold that the endorsement expands coverage and cannot be interpreted to implicitly limit coverage which would otherwise be provided. Westfield further asserted that UM/UIM coverage was limited to those in covered autos. The court disagreed holding that: 1) the definition of insured for UM/UIM was not limited to those in covered autos; and 2) if UM/UIM coverage was limited to those in covered autos, then the other owned auto exclusion would be surplusage.

The court found no UM/UIM coverage under the policies issued to the Catholic Church because of the "coming and going rule" which provides that traveling to and from employment is generally not considered within the scope of employment. The court found that the same rule applies to volunteer activities.

Ambiguity Found In "New" Ohio UM/UIM Form

Hasenfratz v. Warnement, 2006-Ohio-2797 (Third Appellate District). Hasenfratz was involved in an accident while operating a truck owned by her employer Brennan. The alleged tortfeasor was uninsured. Hasenfratz sought UM/UIM coverage under her employer's business auto policy and umbrella policy issued by Empire Fire and Marine Insurance. The court found coverage based on the ambiguity identified in *Scott-Pontzer v. Liberty Mutual Fire Ins. Co.*, 85 Ohio St. 3d 660. The court recognized that *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, limited the holding in *Scott-Pontzer* to cases where the employee is acting within the scope of his employment. Nonetheless, the court found that *Scott-Pontzer's* rationale was applicable beyond the definition of insured analyzed (Form CA 2133). The court looked to the definition of insured in the Empire Policy at issue:

a. The "Insured" named in the Declarations;
b. A partner of yours, but not for any "auto" owned by him or her or a member of his or her household;
c. An officer if you are a corporation, but not for any "auto" owned by such officer or by a member of his or her household;
d. The spouse of a, b, or c above, but not for any "auto" owned by such spouse or by a member of his or her household;
e. [other specified individuals].

The court found the definition ambiguous because coverage was afforded to the named insured corporation which could never suffer injury. The court quoted *Galatis*: "Absent specific language to the contrary, a policy of insurance that names a corporation as an insured for uninsured or underinsured motorist coverage covers a loss sustained by an employee of the corporation only if the loss occurs within the course and scope of employment." Accordingly, the court followed *Scott-Pontzer* and *Galatis* to afford coverage to all employees, including Hasenfratz, within the course and scope of their employment.

"Covered Auto" Defense Bars UM/UIM Claim

Musser v. Luckey Farmers, Inc., 2006-Ohio-3392 (Sixth Appellate District). While in the course and scope of his employment, the employee was injured in an automobile accident. The accident occurred while the employee was driving his own car. The court found that the policy in question clearly and unambiguously limited UM coverage to those employees who were both acting within the scope of employment and occupying a "covered auto" at the time of an accident. The term "covered auto" referred only to the vehicles owned by the employer and specifically listed in the policy declarations. Because the policy defined an "insured" as an individual occupying a "covered auto," the employee did not qualify as an "insured."

"Other Owned Auto" Exclusion Bars UM/UIM Claim

Atterholt v. Preferred Mut. Ins. Co., 2006-Ohio-4139 (Fifth Appellate District). Atterholt was injured while riding his motorcycle. Atterholt owned two other motor vehicles that were insured with Preferred Mutual, but the motorcycle he was driving was not an insured under that policy. The trial court granted summary judgment to Preferred Mutual, finding that the policy excluded UIM coverage for injuries sustained while occupying a motor vehicle that was owned by the insured but not listed on the policy. On appeal, the court found that the trial court's ruling was proper under §3937.18. The court noted judicial precedent that held

that the "other owned auto" exclusions were enforceable to preclude coverage, and that the changes to § 3937.18 made by H.B. 261 supported such exclusions and limited the *Martin v. Midwestern Grp. Ins. Co.* (1994), 70 Ohio St.3d 478 holding.

"Total Driver Exclusion Endorsement" Is Valid Under Current And Previous Version Of Revised Code §3937.18

Fruit v. State Farm Mut. Auto. Ins. Co., 2006-Ohio-4121 (Eighth Appellate District). The insured had three UM/UIM policies which excluded a particular individual from coverage and denied coverage to all insureds if bodily injury, loss, or damage occurred while that excluded individual was operating the insured vehicle. The court of appeals held that under current Revised Code 3937.18, as amended by S.B. 97, or the prior version of statute as amended by H.B. 261, the "Total Driver Exclusion Endorsement" was valid; it excluded coverage for the individual named in the Endorsement and the insureds riding as passengers in the car with her. In reaching its holding the court found, "Because current R.C. 3937.18 no longer requires that policies offer uninsured and/or underinsured motorist coverage, driver exclusion provisions would not be contrary to statutory law. Furthermore, R.C. 3937.18 expressly allows a party to limit uninsured and/or underinsured motorist coverage by executing driver exclusion provisions. Finally, the General Assembly, in enacting the current version of R.C. 3937.18, expressly stated its intent: to eliminate any requirement of offering uninsured motorist coverage, to eliminate the possibility of uninsured motorist coverages being applied as a matter of law, to provide statutory authority for the inclusion of exclusionary or limiting provisions of uninsured motorist coverage, to eliminate any requirement of a written offer, selection or rejection form for uninsured motorist coverage, and to supersede the holdings, on which the [plaintiffs] rely, of *Linko v. Indemn. Ins. Co. of N. Am.,* 90 Ohio St.3d 445, 2000 Ohio 92, 739 N.E.2d 338, and *Sexton v. State Farm Mutl. Automobile Ins. Co.* (1982), 69 Ohio St.2d 431, 433 N.E.2d 555."

No UM Coverage Where Vehicle Owned By Or Furnished For The Regular Use Of The Insured Or Family Member

Green v. Westfield Insurance Company, 2006-Ohio-5057 (Ninth Appellate District). Janice Green was injured in an accident that was caused by the negligence of her husband. The Greens were insured under a policy of insurance which provided $1 million in liability coverage, and $1 million in UM/UIM coverage. The policy specifically excluded liability coverage for bodily injury to family members. Ms. Green made a claim under the UM/UIM coverage. Westfield denied UM coverage on the basis that the vehicle involved in the accident was owned by and available for the regular use of Mr. Green despite the vehicle being specifically identified as a covered vehicle in the policy. The court upheld the finding of no UM coverage under the policy, stating that the plain language of R.C. §3937.18(I)(1), effective October 31, 2001, supported the insurer's preclusion of vehicles owned by, or furnished, or available for the regular use of the insured or a family member from its definition of uninsured motor vehicle. The court stated that insurance companies and their customers are free to contract in any manner that they see fit and insurers were not required by law to offer UM/UIM coverage. If insurers opt to offer UM/UIM coverage, they are free to include exclusions or limitations on that coverage.

2. General UM/UIM Cases

General Knowledge Of UM/UIM Coverage By Insurance Agent Insufficient To Support A Valid Rejection Of UM/UIM Coverage Under *Linko* And *Hollon*

Evans v. Wallen, 2006-Ohio-3193 (Second Appellate District). Jessica Evans was injured in a single car accident. She was insured under her mother's insurance policy with Cincinnati Insurance Company (CIC). Jessica's mother, Carol Evans, had rejected UM/UIM coverage under that policy. Carol was a licenced CIC insurance agent. CIC's offer of UM/UIM coverage did not comply with the requirements of *Linko* because it failed to set forth the applicable premiums, available coverage limits, or describe UM/UIM coverage. The court found that the extrinsic evidence presented by CIC pursuant to *Hollon* was insufficient to support a valid offer and rejection by Carol because she testified that: 1) she did not understand the purpose of UM/UIM coverage, 2) she did not know the available coverage limits, and 3) she did not know the premiums for the various UM/UIM coverage limits available. Both Carol and her co-worker testified that all the necessary information was available in Carol's office. This spawned a vehement dissent by Judge Donovan who expressed the view that Carol's testimony "strains credulity."

This case may be in conflict with the Ninth Appellate District's decision in *Wilson v. Murch*, 2006-Ohio-1491. In *Murch*, which was successfully defended by Gallagher Sharp, the insured's risk manger testified to general knowledge of the existence, purpose, and availability of UM/UIM coverage as well as the "magnitude" of the cost of UM/UIM coverage. That court found such testimony sufficient extrinsic evidence to support a valid rejection under *Linko*.

Payments To Insureds Reduce Amount Of Underinsured Motorist Coverage Available

Wickerham v. Progressive Ins. Cos., 2006-Ohio-964 (Sixth Appellate District). Wickerham was insured by Progressive, providing a total of $50,000 in UM/UIM coverage. His son, who lived with him and also was an insured under the Progressive policy, was killed in a motor vehicle accident. The son's estate recovered $50,000 from the tortfeasor. However, $25,000 of this recovery went to the son's mother, who was not insured with Progressive. When Wickerham sought to recover under his Progressive policy for UIM coverage, Progressive denied the claim because it claimed the payment from the tortfeasor entirely offset the $50,000 UIM coverage available. On appeal, the court of appeals affirmed the granting of summary judgment to Progressive, and held that the entire amount of UIM coverage owed by Progressive was offset by the $50,000 received from the tortfeasor. The court reasoned that Wickerham was not entitled to any UIM coverage because the full amount available under the policies had already been offset by payments to the decedent, Wickerham's son, who was an insured under the Progressive policy. The court recognized that, in general, pursuant to *Littrell v. Wigglesworth* (2001), 91 Ohio St.3d 425, payments recovered by persons who are not insureds under an underinsured motorist policy cannot be used to offset the limits of underinsured motorist coverage available to the insureds. However, payments to *other insureds* under a policy do reduce the total amount of underinsured motorist coverage available to an insured.

Prejudgment Interest Awarded On Future Pain And Suffering Damages

Stoner v. Allstate Ins. Co., 2006-Ohio-3998 (Fifth Appellate District). Stoner filed suit against the tortfeasor and amended the complaint to add a claim against her own auto carrier, Allstate. During the course of the litigation, Stoner received settlement proceeds from another insurer, Westfield. The jury returned a verdict in Stoner's favor for past and future pain and suffering, medical expenses, and loss of ability to perform usual activities for life. Stoner's motion for prejudgment interest resulted in an award on only a portion of the verdict, because the trial court subtracted 1) the amount received from Westfield, 2) the amount awarded for future pain and suffering, and 3) the amount of medical expenses already paid by Allstate. Stoner appealed. The appellate court found that the trial court abused its discretion in denying prejudgment interest for future pain and suffering and for medical expenses. The court held that R.C. §1343.03(A) provides for prejudgment interest on "all judgments" and that the statute "references no predicate determinations which need to be made before a creditor will be entitled to interest. Thus, once a party has a judgment for an underlying contract claim, * * * we find that he [or she] is entitled to interest as a matter of law." The court concluded that interest was to be awarded as a matter of law on the future pain and suffering damages.

Forklift Is "Motor Vehicle" Under UM/UIM Policy

Gibboney v. Johnson, 2006-Ohio-5240 (Eighth Appellate District). In *Gibboney*, the Court of Appeals found that under a prior version of Ohio's uninsured/underinsured motorist statute in effect during May 2001, a forklift qualified as a "motor vehicle," and the carrier was precluded from limiting its definition of "motor vehicle" to a more restrictive meaning. The court reasoned that in *Delli-Bovi v. Pacific Indemnity Co.* (1999), 85 Ohio St.3d 343, the Supreme Court of Ohio "limited the definition of motor vehicles to land vehicles, specifically, vehicles that '**can be used** for transportation on the highway." Therefore, "while not designed for highway use, a forklift nonetheless **can** be driven on a highway. In a multiple warehouse complex, a forklift can be driven from one warehouse to another on the same road cars and trucks travel."

Personal Auto Carrier Entitled To Equitable Contribution From Employer Carrier For Pro Rata UM/UIM Benefits

Foremost Ins. Co. v. Motorists Mut. Ins. Co., 2006-Ohio-3022 (Eighth Appellate District). In *Foremost*, Krueger was injured while riding his motorcycle, allegedly in the course and scope his employment. Krueger sued the tortfeasor, his personal carrier, and his employer's carrier for coverage. Krueger's personal carrier paid its policy limits (minus the tortfeasor setoff) of $487,500 to Krueger. The personal carrier brought an action for equitable contribution against the employer's carrier, seeking a pro-rata share of the $487,500 it paid to Krueger. The court of appeals held that the personal carrier was entitled to equitable contribution because, UM/UIM coverage was owed to Krueger under the terms of both the personal and the employer's policies. The court rejected the employer carrier's argument that the personal carrier made payments as a "volunteer" and thus was not entitled to contribution: "Believing that it was the only company legally liable to Krueger, [the personal carrier] paid his claim. Accordingly, since there was a legal obligation on behalf of [the personal carrier] to pay Krueger's claim, [the personal carrier] did not act as a volunteer when it compensated Krueger for his damages."

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