Gallagher Sharp ATTORNEYS

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

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

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

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I. DECLARATORY JUDGMENT ACTIONS BY LIABILITY INSURERS

A declaratory judgment ("DJ") action may be instituted where the rights and obligations of the parties to a policy of insurance need to be adjudicated. Depending upon the circumstances, filing a DJ may be essential, prudent, or inappropriate. If a DJ action is brought, the proper parties must be named, and the appropriate venue–federal or state–should be determined.

This article addresses these issues and offers some practical advice.

1. Essential, Prudent, And Inappropriate DJ Practice.

The concept of filing a DJ in the insurance context was considered by the Supreme Court of Ohio in *Preferred Risk Ins. Co. v. Gill* (1987), 30 Ohio St.3d 108, where the court explained in paragraph one of its syllabus:

> An insurer may maintain a declaratory judgment action under R.C. Chapter 2721 for purposes of establishing its rights and obligations under a contract of insurance. The insurer, if proceeding in good faith, is entitled to bring such an action for purposes of adjudicating its duty to defend and/or indemnify its insured in a tort action brought by a third party, even where the underlying tort complaint alleges conduct within the insurance coverage of the contract of insurance.

It may be essential to file a DJ complaint or to intervene in a tort action to avoid the potential of an adverse, binding determination that may affect coverage. Thus, in *Howell v. Richardson* (1989), 45 Ohio St.3d 365, 367-68, the Supreme Court of Ohio stated that the insurer may "enter the action [against the policyholder/tortfeasor] and participate as a third-party defendant so as to defeat any liability on its part (*i.e.*, by demonstrating that the acts of the policyholder/tortfeasor were intentional)"; and that "[i]t is this opportunity that must be seized" because "whether seized or not, the opportunity to litigate in the original action will preclude relitigation of liability in the supplemental proceeding." Compare *Gehm v. Timberline Post & Frame*, 2007-Ohio-607 ("When a party has sought and been denied intervention, collateral estoppel will not prohibit future litigation of similar issues.")

Quite often, an insurance company chooses to file a declaratory judgment action simply because it is more prudent to file such an action than to issue a denial of coverage that *might* later be declared unjustifiable. In *Sanderson v. Ohio Edison Co.*, (1994), 69 Ohio St. 3d 582, the Supreme Court of Ohio held that an insurer that unjustifiably refuses to defend an action "foregoes the right to control the litigation and the insured in good faith may make a reasonable settlement without prejudice to the insured's rights under the insurance policy." Paragraph one of the syllabus.

Similarly, an insurer may choose to file a DJ where the policyholder may have breached the cooperation clause of the policy, relieving the insurer of any further obligation respecting a claim. *State Farm Mut. Auto. Ins. Co. v. Holcomb* (Summit Cty. 1983), 9 Ohio App.3d 79. By filing a DJ while defending the policyholder under a reservation of rights, the insurer can seek an adjudication of its obligations while retaining control over the underlying litigation**.**

A DJ action, however, may be inappropriate where there is no ripe or real case and controversy. For example, in *Mid-American Fire & Cas. Co. v. Heasley*, 2007-Ohio-1248, the Supreme Court of Ohio held that an insurer could not pursue a DJ action seeking an adjudication that its policyholder did not have a viable uninsured/underinsured motorist claim. Under controlling legal authority (*Westfield Ins. Co. v. Galatis,* 2003-Ohio-5849) the policyholder was barred from seeking coverage. Therefore, the high court reasoned, the DJ action was inappropriate because it would not have decided an actual controversy.

2. Proper Parties In A DJ Action.

R.C. 2721.12 provides that:

> (A) Subject to division (B) of this section, when declaratory relief is sought under this chapter in an action or proceeding, all persons who have or claim any interest that would be affected by the declaration shall be made parties to the action or proceeding. Except as provided in division (B) of this section, a declaration shall not prejudice the rights of persons who are not made parties to the action or proceeding. * * *
>
> (B) A declaratory judgment or decree that a court of record enters in an action or proceeding under this chapter between an insurer and a holder of a policy of liability insurance issued by the insurer and that resolves an issue as to whether the policy's coverage provisions extend to the injury, death, or loss to person or property that an insured under the policy allegedly tortiously caused shall be deemed to have the binding legal effect described in division (C)(2) of section 3929.06 of the Revised Code and to also have binding legal effect upon any person who seeks coverage as an assignee of the insured's rights under the policy in relation to the injury, death or loss involved. This division applies whether or not an assignee is made a party to the action or proceeding for declaratory relief and notwithstanding any contrary common law principles of res judicata or adjunct principles of collateral estoppel.

Division (A) essentially requires that everyone who has any claim or interest be named in a DJ action. Generally, the policyholder and the insurer are necessary parties, but there are exceptions. For example, a DJ action may be maintained between two insurers without the policyholder being named where neither company avers anything which could affect the policyholder's basic right under the policy. *United States Fid. and Guar. Co. v. Nationwide Mut. Ins. Co.* (Cuyahoga App. 1959), 110 Ohio App. 363. Also, an underlying insurer is not a necessary party to a DJ claim against an excess insurer if any determination of coverage under the excess policy has no legal bearing on a determination of coverage under the primary policy. *Weaver v. Continental Cas. Co.* (Tuscarawas App.), 2004-Ohio-1028.

Division (B) of R.C. 2721.12 provides that mere claimants need not be named in a DJ action between a policyholder and its insurer, even though the claimants will be bound by the outcome. This provision was enacted to legislatively overrule *Broz v. Winland* (1994), 68 Ohio St. 3d 521, which held that a determination in a DJ action between and insurer and its policyholder does not bind persons injured by the policyholder's negligence who are not parties to the DJ action. The

statute, like all statutes, is presumed constitutional, although a claimant who may not even know about a coverage adjudication (especially one not contested by the policyholder) could argue that the statute is unconstitutional. To date, however, no court in any reported case has found the measure constitutionally infirm.

Even though claimants may not be necessary parties, courts typically will allow them to intervene because they are proper parties. Accordingly, in *Indiana Ins. Co. v. Murphy* (Allen App.), 2006-Ohio-1264, the court reversed a trial court's denial of a claimant's motion to intervene. The appellate court found that a tort claimant's interest in the tortfeasor's insurance coverage is sufficient to permit him to intervene in a DJ action under Civil Rule 24(A), and explained that "the clear and unambiguous language of both Sub. House Bill 58 and [R.C. 2721.02(B)[1]] preclude the injured party from *commencing* a declaratory-judgment action," but "[n]othing in either the Bill or in R.C. 2721.02(B) precludes an injured tort claimant from *participating* in a declaratory judgment action brought by the insurer against the alleged tortfeasor; *i.e.*, an action commenced by another party." *Id.* at ¶25 (Italics original). See, also, *Pfeiffer v. State Auto. Mut. Ins. Co.* (Hamilton App.), 2006-Ohio-5074 (allowing an injured claimant to intervene in an action brought by the insurer against a non-cooperative policyholder/tortfeasor.)

3. The Venue For A DJ Action.

Insurers often prefer adjudicating coverage issues in federal court, and indeed, there are many instances in which federal courts have decided DJ actions. There is some authority, however, allowing a federal judge to dismiss a DJ action where issues of state law predominate. In *Travelers Indem. Co. v. Bowling Green Professional Assoc., PLC* (6th Cir. 2007), 495 F.3d 266, 271, the United States Court of Appeals for the Sixth Circuit (which encompasses Ohio) recently dismissed an insurer's DJ action in federal court because the Federal Declaratory Judgment Act ("FDJA") provides discretion in determining whether and when to entertain an action, even when the suit otherwise satisfies subject matter jurisdictional prerequisites. Compare *Omaha Prop. & Cas. Ins. Co. v. Johnson* (6th Cir. 1991), 923 F.2d 446 (identifying five factors a court should evaluate in deciding whether to accept jurisdiction of a claim under the FDJA.)

In Ohio state courts, Civil Rule 3(B) sets forth multiple proper venues. A DJ action may be filed in the county where the policyholder resides, the policyholder maintains a principal place of business, the policyholder conducted activity that gave rise to the claim, or all or part of the claim for declaratory relief arose (e.g. where an accident or occurrence took place).

4. Practical Advice.

1. If there is a some question as to the rights and obligations of the parties to a contract of insurance, a DJ action may be considered. *Preferred Risk v. Gill.* Still, there must be an actual case or controversy. *Mid-American Fire & Cas. Co. v. Heasley.*

2. If the policyholder's culpable mental state, or some other coverage-

[1]R.C. 2721.01(B) prohibits direct actions by claimants who do not possess a judgment from suing the tortfeasor's insurer.

determinative issue, will be adjudicated in a pending action against the tortfeasor/policyholder, the insurer must intervene and seek declaratory relief. *Howell v. Richardson.*

3. If the policyholder arguably has breached the cooperation clause of the policy, a DJ action may be prudent. *State Farm Mut. Auto. Ins. Co. v. Holcomb.*

4. If the insurer wishes to maintain control over litigation brought by a claimant against the policyholder, the insurer should institute a DJ. If the insurer fails to do so and is later found to owe coverage, the insurer will be bound by any good faith settlement or adjudication. *Sanderson v. Ohio Edison.*

5. All persons who have or claim any interest that would be affected by a DJ action must be joined, although by statute claimants need not be named in a DJ action between an insurer and its policyholder. R.C. 2721.12.

6. Even though claimants are not necessary parties to a DJ action, they are proper parties and generally will be allowed to intervene in a pending DJ. *Indiana Ins. Co. v. Murphy; Pfeiffer v. State Auto. Mut. Ins. Co.*

7. There is authority for a federal court to decline to exercise jurisdiction in a DJ action where state law issues predominate. *Travelers Ind. Co. v. Bowling Green Professional Assoc.* In state court, proper venues include where the policyholder resides, maintains a principal place of business, or conducted relevant activity.

II. SUPREME COURT OF OHIO

A. Umbrella Policy Only Provides Excess Coverage For Policies Listed Within Schedule Of The Umbrella Policy Or Unlisted Policies Applicable To Accidents Resulting In Bodily Injury Or Property Damage

Cincinnati Ins. Co. v. CPS Holdings, Inc., 2007-Ohio-4917. Cincinnati Insurance issued CPS Holdings, Inc. an umbrella policy. CPS Holdings, a third party administrator of a program to procure natural gas, was sued for mismanagement of state funds and failure to pay natural gas suppliers. Cincinnati sought a declaratory judgment that its umbrella policy did not afford any coverage for the suit. CPS Holdings asserted that Cincinnati's policy covered the suit because a Gulf E&O policy had provided liability coverage for the suit brought against CPS Holdings. CPS Holdings argued that the E&O policy fell within the Cincinnati policy's definition of "underlying insurance" and that Cincinnati had agreed to afford excess insurance for suits covered by "underlying insurance". The Supreme Court in an unanimous decision held that the E&O policy was not "underlying insurance" because the E&O policy was not listed in the Schedule of Underlying Insurance Policies and the E&O policy was not an unlisted insurance policy applicable to an "occurrence" that resulted in "bodily injury" or "property damage."

B. Insurer Has A Duty To Defend A Suit Alleging Sexual Harassment By A Supervisor Where The Supervisor's Intent In Committing The Alleged Acts Has Not Been Determined

Ohio Government Risk Mgmt. Plan v. Harrison, 2007-Ohio-4948. Ohio Government Risk Mgmt. Plan sought a declaratory judgment that it did not owe the City of Wapakoneta and its police chief defense or indemnity in a suit alleging that the police chief had used the police department's computer system to display and distribute offensive and pornographic photographs and e-mails, and had used hidden electronic devices owned by the department to audio record female employees in the police department restrooms. The Plan argued that the alleged conduct involving sexual harassment and sexually deviant behavior was outside the scope of employment and therefore not covered. The Supreme Court rejected the Plan's argument and held that a genuine issue of fact existed as to whether the police chief was acting within the scope of his employment, because the police chief's intent in committing the alleged acts was not determined. The Supreme Court found that whether the police chief acted in his official capacity or with purely private motives was a question that would not be resolved until evidence was submitted in the underlying action.

III. OHIO COURT OF APPEALS

A. Policy Language, Endorsements, And Exclusions

1. Water Damage Exclusion Unambiguously Applies To Both Man-Made And Natural Events.

Shanton v. United Ohio Ins. Co., 2007-Ohio-6379 (Fourth App. Dist.). The Shantons home was seriously damaged by a mudslide caused by a broken, county-owned water line. They filed a claim under their homeowner's policy issued by United Ohio Insurance Company. United Ohio denied their claim based upon a "water damage" exclusion in the policy. The Shantons filed suit alleging that the exclusion was ambiguous and could reasonably be construed to apply only to damages caused by natural forces. The court disagreed, finding that the policy unambiguously and expressly excludes coverage for water damage, regardless of whether it is caused by natural or man-made perils. The court reached its conclusion because the exclusion included water from backed up sewers, plumbing, and sump pumps that are not typically limited to natural forces.

2. An Insurance Policy Does Not Provide Liability Coverage To An Additional Insured For A "Borrowed Servant's" Negligence.

Cincinnati Ins. Co. v. Grange Mut. Cas. Co., et al., 2007-Ohio-6470 (Fifth App. Dist.). Drake Construction, the general contractor, was an additional insured on two liability policies issued to two of Drake's subcontractors, Frank Novak & Son and SJD Construction. Novak employed Randy Carrico, who died at the construction site when an employee of SJD, Alvin Newman, threw a piece of lumber out a window. Because it did not have enough labor on the day of the incident, Drake "borrowed" Newman to help Drake perform clean up of the site. The court held that Newman was a "borrowed servant" because Drake directed and controlled Newman's activities that led to Carrico's death. Because the liability policies issued to Novak and SJD only provide coverage to

an additional insured, Drake, for the negligence of Novak or SJD, the liability policies did not provide coverage for Drake's negligence.

3. Partial Collapse Of Insured Buildings Covered Under "Collapse" Specified Peril.

Zanesville, LLC v. Motorists Mutual Ins. Co., 2007-Ohio-6448 (Fifth App. Dist.). Zanesville, LLC owned a building insured by Ohio Limited Liability Company. A partner of Zanesville, LLC noticed pieces of mortar and brick on the sidewalk which had apparently fallen away from the building. The partner called a building inspector to the property who determined the building was in danger of collapsing and recommended demolishing the building. The partner hired a contractor to tear down the building and made a claim under the Ohio Limited policy. Ohio Limited's policy provided coverage for specified causes of loss including "collapse." The court determined that a partial collapse of the building was sufficient to provide coverage under the "collapse" cause of loss. The insured had provided evidence, the pieces of brick and mortar on the sidewalk, that the building had partially collapsed. Therefore, the Ohio Limited policy provided coverage for the insured's claim for damages to the building.

4. Prior Coverage Determination May Bind Insurer In Future Claims.

Cincinnati Ins. Co. v. ACE INA Holdings, Inc., 2007-Ohio-5576 (First App. Dist.). The Cincinnati Insurance Company, an excess insurer, sued the primary insurer, ACE INA Holdings seeking an additional $1.8 million to cover asbestos claims against their insured, Flexo Products, Inc. Cincinnati alleged that ACE owed the additional primary coverage based on three multi-year policies. The three successive multi-year policies each spanned three years, for nine years of total coverage. ACE's potential liability was $300,000 "aggregate." The $ 1.8-million question was whether the word "aggregate" meant that the $300,000 limit applied per year or per term. The policies did not specifically state whether the aggregate was "annual" or for each multi-year policy. The court of appeals held that extrinsic evidence was properly considered. Cincinnati submitted extrinsic evidence of ACE's prior claims handling including internal ACE memoranda indicating that ACE considered the aggregates annual. The court reasoned: "It was their original interpretation, it makes sense, and we think they should stick to it." The court found, however, that ACE had not acted in bad faith because "the available policies were at least susceptible to interpretation; and neither ACE's interpretation of aggregate nor its one-accident-or-occurrence argument, while bordering on feckless, lacked good faith."

B. <u>Coverage For Intentional/Criminal Acts</u>.

1. Severability Of Insurance Clause: Negligence Claims Against Separate Insureds Are Covered When Stemming From The Intentional Or Criminal Act Of Another Insured.

Safeco Ins. Co. of America v. Federal Ins. Co., 2007-Ohio-7068 (First App. Dist.). Safeco issued both a homeowners policy and an excess policy to the parents. Chubb also issued a homeowners policy and an excess/umbrella policy to the parents providing similar coverage for the

same period. The parents' son committed an allegedly intentional and criminal act on a third party. The parents were sued for negligent supervision and related negligence claims by the injured third party. Safeco denied the parents claims for coverage or a defense. Safeco asserted that because the parents' son was: 1) an insured; and 2) had committed an intentional or criminal act, coverage was excluded for all insureds, i.e., including his parents. Chubb disagreed and, although the Chubb policies had similar language, provided the parents with coverage and a defense. Eventually, the parents assigned their rights under the Safeco Policies to Chubb, which pursued its defense and indemnity costs against Safeco. Chubb, represented by GALLAGHER SHARP, asserted that the "Severability of Insurance" condition providing that "[t]his insurance applies separately to each insured" meant that negligent insureds were afforded coverage even if one insured committed an intentional or criminal act. The court of appeals agreed that: 1) the negligence claims qualified as an "occurrence"; and 2) reading the severability condition in conjunction with the exclusions in the Safeco policies, the exclusions are ambiguous. The court found that the exclusions for intentional conduct do not apply to insureds who have been merely negligent, when the policies contain language indicating that coverage applies "separately to each insured." Accordingly, the court ruled in favor of Chubb and found coverage.

The court further found its decision to be in conflict with: 1) the Fifth Appellate District on the issue of whether negligence claims stemming from allegedly intentional conduct of another insured qualify as an "occurrence"; and 2) the Third Appellate District on the issue of whether a severability condition mandates coverage for negligent insureds where another insured has committed an intentional act. The court certified these issues to the Ohio Supreme Court for final resolution.

2. Intentional Acts Of Insured Preclude Liability Coverage For Any Other Insureds Under The Policy.

Allstate v. Dolman, et al., 2007-Ohio-6361 (Sixth App. Dist.). The parents of a minor child sued Mr. and Mrs. Dolman claiming the minor child was sexually assaulted by Mr. Dolman. The parents alleged Mr. Dolman intentionally caused the child's injuries. Additionally, the parents alleged Mrs. Dolman negligently supervised interaction between the minor child and Mr. Dolman because Mr. Dolman had previously been convicted of sexual assault on a minor. Allstate sought a declaration from the court that the homeowners policy issued to the Dolmans did not provide a duty to defend or indemnify the Dolmans. The court held that Allstate's "Criminal and Intentional Act Exclusion" precluded coverage to both Dolmans. The policy's exclusion provided that the policy does not provide coverage for acts "intended by, or which may reasonably be expected to result from the intentional or criminal acts or omissions of, any insured person." The court concluded that the Allstate policy excluded coverage for all alleged causes of action against any insureds for Mr. Dolman's intentional act.

3. The Intentional Act Exclusion Applies When An Insured Claims Self-Defense.

Hastings Mut. Ins. Co. v. McCoy, 2007-Ohio-2447 (Fifth App. Dist.). Plaintiff sued an insured for injuries arising from an assault by the insured. The insurer, Hastings Mutual, filed summary judgment, arguing the policy excluded coverage for liabilities arising from the intentional

acts of the insured. The insured argued the intentional act exclusion did not apply because the insured acted in self-defense. The court determined that while self-defense may absolve the insured in a criminal proceeding, "the underlying intentionality of those acts does not change." Therefore, the intentional act exclusion applied to preclude coverage.

4. Intentional Acts Preclude Liability Coverage For Any Other Insureds Under The Policy.

Allstate Indemnity Co. v. Collister, 2007-Ohio-5201 (Eleventh App. Dist.). Allstate sought a declaratory judgment that it did not owe a duty to defend or indemnify its insureds under a homeowner's policy arising out of the adult son's sexual assaults on minors in the insured's residence. The Allstate policy defined "insured" as including any relatives who are residents of the household.

The policy contained an intentional acts exclusion as well as a "joint obligations" clause, which "exclude coverage for the intentional acts of an 'insured person' and impute the acts of any 'insured person' under the policy to other insured persons." Because the adult son was an "insured," his intentional conduct was imputed to his parents. The adult son's intentional conduct was not covered under the policy, and the insured parents' alleged negligent supervision of their adult son also was not covered. Allstate did not have a duty to defend or indemnify the insureds.

5. An Assault And Battery Exclusion Bars Coverage For Derivative Claims Such As Negligent Supervision.

Carter v. Scottsdale Surplus Lines Ins. Co., 2007-Ohio-4322 (First App. Dist.). Carter was shot several times by another patron while at a bar. Carter and his family sued the bar's owner, Wilbar Enterprises, LLC, which was insured by Scottsdale. Scottsdale refused to defend against Carter's action. Wilbar then filed a third-party complaint against Scottsdale for declaratory judgment, bad faith, and breach of contract.

The court found that the assault and battery exclusion unambiguously included a shooting, as well as a physical altercation. Further, the court found that the Policy language unambiguously excluded coverage for Carters' negligent hiring, supervision and security claims because coverage for derivative claims of negligence stemming from and assault or battery were also excluded. The court concluded that Scottsdale had no duty to defend or indemnify.

C. UM/UIM

1. A UM/UIM Insurer Is Entitled To Setoff Only The Amounts Paid Under The Tortfeasor's Liability Policy, Not The Full Limits Available.

Kuchmar v. Nationwide Mut. Ins. Co., 2007-Ohio-6336 (First App. Dist.). Kuchmar was a passenger in a vehicle being driven by Peters. Peters negligently drove the vehicle into high water and Kuchmar drowned. Peters was insured by USAA with limits of $1.3 million. Kuchmar had $1.3 in UM/UIM coverage under a policy issued Nationwide. Kuchmar's estate sued Peters and the

action settled for $1.25 million. Kuchmar's estate then claimed that each beneficiary was entitled to recover up to the $1.3 UM/UIM limit of the Nationwide policy (effectively raising the Nationwide UM/UIM per-occurrence limit to $5.2 million). The court disagreed and enforced the per-occurrence limit. The court reasoned that the argument presented by Kuchmar's estate would convert the Nationwide policy into excess coverage, would convert the per-occurrence limit to a per-person limit, and would clearly place the estate's beneficiaries in a better position than if Peters had been uninsured. The court next determined the issue of setoff. The court found that the Supreme Court's recent decision in *Webb v. McCarty*, 2007-Ohio-4162, requires a setoff in the amount actually paid, not available for payment as had previously been the law. The court concluded that Nationwide's exposure was $150,000.

2. UIM Coverage Does Not Provide Coverage For Insureds' Claims For Loss Of Consortium.

Kudla, et al. v. Wendt, et al., 2007-Ohio-6637 (Eighth App. Dist.). Thomas Kudla, a passenger in a vehicle driven by his daughter Jean Kudla died as a result of an auto accident caused by Margaret Wendt. The decedent lived with his wife, Mary Kudla, and his daughter, Jean Kudla, at the time of the accident. State Farm issued two insurance policies that included UIM coverage to Jean Kudla. Wendt's liability carrier paid its limits of $50,000 to the decedent's estate. Jean Kudla and Mary Kudla then made a UIM claim with State Farm for their loss of consortium due to the death of the decedent. State Farm's UIM insurance agreement provided coverage for "bodily injury" to an insured. Finding that Jean Kudla's and Mary Kudla's claims of loss of consortium were not "bodily injury," the court determined the State Farm policy did not provide UIM coverage for the Kudlas' claims.

3. An Insured Can Only Have One Residence For Purposes Of UM/UIM Coverage When The Policy Defines A "Relative" As A Relative That Lives "Primarily" With You.

Wallace, et al. v. State Farm Mut. Auto. Ins. Co., 2007-Ohio-6373 (Sixth App. Dist.). A daughter of divorced parents died in an auto accident. The tortfeasor's carrier paid its policy limits of $47,500 to the decedent's estate. State Farm issued two separate automobile policies to the parents of the decedent. Both policies provided $100,000 of underinsured motorist coverage for a relative of the named insured that "resides primarily with [the named insured.]" The court held that only one of the policies provided underinsured motorists coverage because the decedent could only "primarily" reside at one residence. The court determined that the decedent "primarily" lived with the father because the decedent used her father's address on 1) school records; 2) her driver's license; and 3) applications for employment.

4. An Insurer May Exclude UM/UIM Coverage Where The At Fault Vehicle Is Also Insured For Liability Coverage Under The Same Policy.

Calhoun v. Harner, 2007-Ohio-6025 (Third App. Dist.). The Harner family was involved in an automobile accident. Mr. Harner was at fault and his children were injured. The Harner children then sought UM/UIM coverage under the auto policy issued by American Select Insurance

Company. The American Select policy provided UM/UIM coverage but contained the following exclusion: "[U]ninsured motor vehicle does not include any vehicle or equipment * * * that is a covered automobile for which [liability] coverage is provided under * * * this policy." The vehicle in which the Harner children were injured was insured for liability coverage under the American Select Policy. The court reasoned that a UM policy may include "terms and conditions that preclude [UM] coverage for bodily injury or death suffered by an insured under specified circumstances, including but not limited to" any of the circumstances specified in the UM statute. Therefore, the court found the exclusion valid and UM/UIM coverage barred.

5. "Regular Use" Exclusion Bars Uninsured Motorist Coverage To An Employee Driving One Of His Employer's Fleet Vehicles.

Hostottle v. Nationwide Mut. Ins. Co., 2007-Ohio-5857 (Eighth App. Dist.). Hostottle, a police officer for the City of Cleveland Division of Public Utilities, sought uninsured motorist coverage under his personal auto policy through Nationwide. Hostottle was driving one of the City's fleet vehicles in the course and scope of Hostottle's employment when an uninsured motorist collided with Hostottle. Nationwide argued its policy excluded coverage for the accident because Hostottle was driving a vehicle that was provided for Hostottle's regular use. The court, reasoning that the exclusion did not require one particular vehicle to be driven by the insured, determined that Nationwide's "regular use" exclusion barred coverage for Hostottle's uninsured motorist claim.

6. Medical Bills Paid To Satisfy A Lien Do Not Reduce The "Amounts Available For Payment" Under Ohio's Uninsured/Underinsured Motorist Statute.

Boila v. Nationwide Mut. Ins. Co., 2007-Ohio-6071 (Seventh App. Dist.). Medicare paid medical bills of $42,139.78 incurred by Boila, a passenger in a vehicle insured by Nationwide. The tortfeasor's carrier had liability limits of $100,000 which equaled Boila's limit of underinsured motorist coverage. Boila argued that R.C. 3937.18 required Nationwide to pay the amount of the Medicare lien of $42,139.78 in addition to the Nationwide $100,000 limit. Boila argued that the "amounts available for payment" from the tortfeasor were reduced by the Medicare lien, yielding a payment of only $57,860.22 from the tortfeasor. Boila argued he was entitled to $42,139.78 from his underinsured motorist coverage, Nationwide. The court determined that payment of Boila's Medicare lien was made for his benefit and, therefore, payment of the lien did not reduce the "amounts available for payment." Reasoning that R.C. 3937.18 was written to remove a disparity between a person getting hit by an uninsured motorist versus an underinsured motorist, the court determined Nationwide did not owe $42,139.78.

7. "Regular Use" Exclusion Does Not Apply To An Insured Occupying A Company Vehicle Issued By The Employer To A Co-Worker.

Gainer v. State Farm Ins. Co., 2007-Ohio-5324 (Eighth App. Dist.). Plaintiff, a passenger in a vehicle owned by his employer, was hit by an uninsured motorist. Plaintiff's employer's insurer for the vehicle did not provide uninsured motorist coverage. Plaintiff, therefore, sought uninsured

motorist coverage under his personal auto policy through State Farm. State Farm argued the policy excludes coverage for a vehicle that is not listed on the policy but provided to plaintiff for his "regular use." Plaintiff's employer issued the vehicle to plaintiff's co-worker for the co-worker's business and personal use. The trial court, relying on *Thompson v. Preferred Risk Mut. Ins. Co.* (1987), 32 Ohio St. 3d 340, determined plaintiff did not have control of the vehicle and, therefore, the "regular use" exclusion did not apply. Additionally, the court reasoned that the plaintiff's use of the vehicle while off duty precluded application of the "regular use" exclusion because the employer did not provide plaintiff a vehicle for his personal use.

8. Insured Not Entitled To Uninsured Motorist Coverage Under The "Regular Use" Exclusion.

McCall v. State Farm Mut. Auto. Ins. Co., 2007-Ohio-5109 (Ninth App. Dist.). Plaintiff was struck by an uninsured motorist while he was standing in the back of a sanitation truck while in the course and scope of employment with the City of Akron. Because the plaintiff's employer was self-insured and did not provide uninsured motorist coverage, the plaintiff sought uninsured motorist coverage under his father's State Farm policy. State Farm denied the plaintiff's claim under the "regular use" exclusion. Plaintiff argued unsuccessfully that his use was not "regular" and that the activity that he performed on the truck was not "use." The appellate court held that plaintiff's use was "regular" since he worked on one of the trucks nearly every day. The appellate court also rejected plaintiff's argument that his use was not "regular" because he was a "randomly assigned passenger."

9. Court Upholds UM/UIM Endorsement Limiting The Definition Of Insured To Those Not Insured For Such Coverage Under Another Policy.

Watkins v. Grange Mutual Cas. Co., 2007-Ohio-4366 (Third App. Dist.). Watkins was injured while a passenger in a vehicle driven by Hoffman when a vehicle driven by Bowersock struck Hoffman's vehicle. Hoffman's vehicle was covered under a policy issued by Grange. Watkins was an insured under a policy issued by American Family. Watkins settled with Bowersock for his policy limits of $ 100,000. Watkins had $100,000 UM/UIM limits under her policy with American Family and UM/UIM coverage was completely offset. The Grange Policy, however, had a UM/UIM limit of $250,000, and defined insured for UM/UIM coverage as "[a]ny other person while occupying your covered auto with a reasonable belief that that person is entitled to do so, if that person is not insured for Uninsured Motorist Coverage under another policy." Grange denied UM/UIM coverage to Watkins because she was a UM/UIM insured under the American Family Policy. Watkins claimed that she was not insured under the American Family Policy because she was not entitled to any recovery. The court disagreed because "Watkins still ha[d] underinsured motorists coverage even though the policy limits have been completely offset by the recovery from Bowersock." Thus, Watkins was not an insured under the Grange Policy and not entitled to UM/UIM coverage.

10. Trial Court Properly Refused To Identify The Defendant Underinsured Motorist Carrier At Trial.

Mounts v. Malek, 2007-Ohio-5112 (Ninth App. Dist.). The plaintiffs were riding on a motorcycle when they were struck by a tortfeasor. Plaintiffs filed suit against the tortfeasor, and their own underinsured motorist carrier, Allstate. The trial court granted the tortfeasor's motion in limine to exclude any mention of Allstate in front of the jury. The appellate court affirmed, and found that the plaintiffs suffered no prejudice from the prohibition to identify Allstate as a party at trial. Further, the naming of Allstate as a party had no bearing on the jury's decision as to the proximate cause and damages issues.

D. Coverage For Additional Insured At Construction Site

1. Promisor To A Hold Harmless And Indemnification Agreement Must Pay Promisee's Litigation Costs If The Promisee Is Not Negligent.

Kovach v. Warren Roofing & Illuminating Co., 2007-Ohio-2514 (Eighth App. Dist.). Defendant CEI filed a cross-claim against defendant Tremco claiming it must indemnify CEI for any judgment plaintiff obtains against CEI for plaintiff's personal injuries. Pursuant to a contract between Tremco and CEI, Tremco agreed to hold harmless and indemnify CEI for any injuries caused by Tremco's negligence. Tremco refused to hold harmless and indemnify CEI because plaintiff alleged that CEI was a negligent party causing plaintiff's injuries, and R.C. 2305.31 prohibits indemnity agreements for construction-related accidents which indemnify a party for his own negligence. After the trial court determined that CEI was not negligent as a matter of law, CEI demanded indemnification for the litigation expenses it incurred in defending itself against plaintiff's claims of negligence. The Eighth Appellate District determined that Tremco was required to pay CEI's past litigation costs because CEI was found not negligent even though the plaintiff alleged CEI's negligence caused plaintiff's injuries. The court stated, "A mere assertion of a negligence claim is not sufficient to defeat a contractual indemnification provision."

2. Additional Insured Is Not Entitled To Defense And Indemnity For Negligent Acts By The Additional Insured.

Tingler v. C.J. Mahan Construction Co., 2007-Ohio-5463 (Fifth App. Dist.). A general contractor, C.J. Mahan, required its subcontractor to name C.J. Mahan as an additional insured on the subcontractor's general liability policy. Two employees of the subcontractor filed suit against C.J. Mahan alleging its negligence caused the employees' injuries. C.J. Mahan requested indemnity and defense from the subcontractor's insurer, Cincinnati Insurance, because C.J. Mahan was listed as an additional insured under the policy. The court held that the language of the policy did not require Cincinnati Insurance to provide coverage for C.J. Mahan's negligence, but only to provide indemnity and defense to C.J. Mahan for the subcontractor's alleged negligence.

E. Set-Off

1. Inter-Company Arbitration Award For Med Pay Set-Off From Jury Verdict.

Fickes v. Kirk, 2007-Ohio-6011 (Eleventh App. Dist.). Plaintiff sued defendant for personal injuries she claims she sustained as a result of an accident caused by the defendant's negligence. Plaintiff received medical payments coverage benefits from her personal insurer, Nationwide. Nationwide filed for inter-company arbitration and received an award for the medical payments paid to the plaintiff. Defendant's liability insurer, State Farm, paid the arbitration award. The plaintiff's claims then proceeded to trial and resulted in a verdict in plaintiff's favor. The trial court granted defendant's motion to set off the arbitration award from the verdict and entered judgment, which was affirmed on appeal.

F. Permissive User

1. Insured Can Have A Reasonable Belief That He Or She Is Entitled To Use A Vehicle Even If The Insured Does Not Have A Driver's Licence.

Rose v. Phinney, 2007-Ohio-5494 (Third App. Dist.). Phinney, who did not have a driver's license, borrowed Cross's vehicle to perform a single specific errand. Rather than returning the vehicle after the errand, Phinney took the vehicle on a road trip to pick up several friends. During that trip, she caused an accident for which she admitted liability. Hastings Mutual Insurance Company insured Cross's vehicle and admitted that Phinney was an insured. Nonetheless, Hastings asserted that coverage for Phinney was excluded because of an exclusion: "any 'insured' * * * Using a vehicle without a reasonable belief that that 'insured' is entitled to do so." Hastings asserted that Indiana law applied because under Indiana law one cannot have a reasonable belief that one is entitled to use a vehicle without a valid driver's license. The court applied Ohio law and found that under Ohio law Phinney could have had a reasonable belief that she was entitled to operate the vehicle despite the fact that she did not have a valid driver's license. The court concluded that the exclusion applied because Phinney had exceeded the scope of the permission given to her.

G. Arbitration

1. No Waiver Of Arbitration Clause.

Travelers Sur. & Cas. Co. v. Aeroquip-Vickers, 2007-Ohio-5305 (Sixth App. Dist.). Safety National invoked its right to arbitration and filed a motion to stay the proceedings against it. The trial court determined Safety National had waived its policy condition to invoke its right to arbitration. In reversing the trial court's decision, the Sixth Appellate District determined the court must weigh four factors to determine whether a party to a contract waives the arbitration clause in an insurance policy: 1) whether arbitration was implicitly waived by filing a complaint, counter-claim, or cross-claim in the litigation; 2) whether the party seeking arbitration delayed in its request to invoke the arbitration clause; 3) the amount of participation in the litigation by the party seeking arbitration; and 4) whether the non-moving party will suffer prejudice due to the delay in seeking arbitration.

The court determined that Safety National had not implicitly waived its right to arbitration. First, Safety National had not filed a counter-claim or cross-claim, and had raised its right to arbitration as an affirmative defense. Second, the court determined that Safety National's delay of nineteen months before requesting a stay of the judicial proceedings was not sufficient to find waiver. Third, the court determined that Safety National's minimal participation in pre-trial hearings and depositions was not sufficient to find waiver. Finally, because Safety National only sought a stay of the proceedings against it and not the other twenty-seven parties involved, the court determined the other parties would not suffer any prejudice.

H. Subrogation/Assignment

1. Liability Insurer Had A Duty To Pay The Medical Provider Prior To Paying The Claimant, As A Result Of An Assignment Agreement.

Gloeckler v. Allstate Ins. Co., 2007-Ohio-6163 (Eleventh App. Dist.). Plaintiff chiropractor treated a claimant for injuries related to an auto accident after the claimant signed an assignment agreement. Plaintiff sent a copy of the assignment agreement to Allstate, which insured the alleged tortfeasor, and then submitted the claimant's medical bill. Allstate settled with the claimant without including the plaintiff on the check. Plaintiff filed suit for the amount of the medical bills plus interest. On appeal, the appellate court followed the decision of the First Appellate District in *Hsu v. Parker* (1996), 116 Ohio App.3d 629, and held that Allstate had a duty to pay Plaintiff directly, and prior to paying the claimant.

I. Insurance Agents

1. Insurance Agent Has No Fiduciary Duty To An Insured Absent Evidence Of Special Trust Or Confidence Placed In The Agent.

Nichols v. Schwendeman, 2007-Ohio-6602 (Tenth App. Dist.). Plaintiff was operating a motorcycle when he was involved in an accident. Plaintiff settled with the tortfeasor and then sought UIM coverage with State Auto, who denied coverage as the policy in effect at the time of the accident did not contain UIM coverage. Plaintiff sued his insurance agency claiming a breach of fiduciary duty and negligence. The court recognized that an insured's reliance on an insurance agent is insufficient to establish a fiduciary relationship absent evidence of a special trust or confidence placed in the agent. The court stated that "[a]n insurance agent owes no duty to seek replacement coverage for an insured in the absence of a request by the insured to do so."

J. Reservation Of Rights

1. Insured Must Demonstrate Actual Prejudice From Insurer's Withdrawal Of Defense After Providing A Defense For Five Months Without A Reservation Of Rights.

Roark v. Medmarc Casualty Ins. Co., 2007-Ohio-7049 (Ninth App. Dist.). Attorney Kochis was sued by a former client for legal malpractice arising out of his handling of an auto accident. Kochis' professional liability insurer, Medmarc, initially provided a defense without a reservation of rights, but then withdrew its defense five (5) months later. Judgment was entered against Kochis for stipulated damages and a supplemental action was filed against Medmarc. The court recognized that "waiver and estoppel cannot be employed to expand the coverage provided by a policy of insurance...an exception to this rule applies when an insurer induces reliance on the part of the insured by providing a defense without a reservation of rights." The court held that actual prejudice by the insured must be demonstrated "considering factors such as lost settlement opportunity, inability to produce testimony and witnesses in support of the defense, loss of the benefit of any defense by relying on the insurer, and withdrawal of the defense within such a close proximity to trial that preparation for trial is hindered." Since the trial court failed to review the record for evidence of actual prejudice by Kochis, the appellate court reversed the trial court's granting of plaintiff's dispositive motion and remanded the case.

K. The Volunteer Defense

1. Insurers Do Not Waive Their Right To Seek Contribution By Voluntarily Contributing Towards The Settlement Of The Underlying Case.

The Medical Protective Co., et al., v. Pro Assurance Corp., 2007-Ohio-4625 (Ninth App. Dist.). A medical malpractice lawsuit was filed against Dr. Nangureddi Krishnan for failure to diagnose a patient's glaucoma, which progressively worsened over a period of 12 years. Dr. Krishnan was covered under medical malpractice coverages from Physician's Insurance Company of Ohio ("PICO") from 1988 to 1996, from ProAssurance from 1996 to 1999 and from Medical Protective Co. ("MedPro") from 1999 through the date of diagnosis in 2000 and beyond. All three insurers hired separate counsel to defend Dr. Krishnan. MedPro filed a separate declaratory judgment action seeking a judgment that it owed no liability coverage for the medical malpractice claim. The underlying medical malpractice case settled with each carrier contributing $100,000 towards the settlement. ProAssurance argued that the settlement resolved the declaratory judgment action and that the other insurers' voluntary payments towards the settlement precluded them from seeking contribution. The court found that MedPro and PICO preserved their right to seek contribution in the absence of any written agreement to dismiss the declaratory judgment action. The appellate court recognized that "[a] payment is not voluntary where multiple insurers are liable for the same portions of the insured's loss." Therefore, MedPro, and PICO were not volunteers when they contributed towards the settlement of the medical malpractice case.

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