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I. THE IMPORTANCE OF DETERMINING SUBROGATED MEDICAL PAYMENT CLAIMS PRIOR TO SETTLING WITH AN INJURED PARTY

When an accident occurs, the insurer of a tortfeasor (i.e. the liable party) may wish to negotiate a settlement with the injured party and obtain a release for all claims arising from the incident. If the injured party has made a med pay claim with his or her own insurer, that insurer may have acquired a subrogated interest in the injured party's liability claim. A settlement between the tortfeasor and the injured party, in and of itself, may not extinguish a subrogated claim for medical payments held by the injured party's insurer where the tortfeasor had notice of the subrogated claim at the time of settlement. This article addresses the effect that notice of an insurer's subrogated claim for medical payments has on a settlement with an injured party, and offers suggestions on how insurers for both parties can avoid unnecessary expense and litigation when resolving potential claims.[1]

I. An Insurer's Subrogation Rights to Recover Medical Payments

When an insurer makes medical payments on behalf of an insured who is injured by the wrongful acts of another, and the insurance contract includes a subrogation clause, the insurer may seek to recover those payments from the liable party through its subrogation rights. *Cincinnati Ins. Co. v. Evans*, 6th Dist. No. WD-09-012, 2010-Ohio-2622, ¶37. "Subrogation is the right of the insurer to be put in the position of the insured in order to pursue recovery from the third party legally responsible to the insured for a loss paid by the insurer." *Nationwide Ins. Co. v. Russell*, 6th Dist. No. L-87-288, 1988 Ohio App. LEXIS 2164, *2-3; *Physicians Ins. Co. v. Univ. of Cincinnati Hosp. Aring Neurological Inst.*, 146 Ohio App.3d 685, 689, 767 N.E.2d 1215 (10th Dist. 2001). As a subrogee, the insurer then becomes the real party in interest for the full amount of the medical expenses paid, and may institute its own action against the tortfeasor to recover such payments. *Smith v. Travelers Ins. Co.*, 50 Ohio St.2d 43, 362 N.E.2d 264 (1977).

It is incumbent on the insurer, however, to inform the tortfeasor and the tortfeasor's insurance carrier of its subrogation interest. The insurer may not simply rely on its insured to inform the tortfeasor of an insurer's subrogated claim. While an insurer may protect its right of subrogation by including an appropriate clause in its policy, "such clause does not operate to place the entire burden of protection on the insured. An insurer must aid its insured in the preservation of its subrogation rights." *McDonald v. Republic-Franklin Ins. Co.*, 45 Ohio St.3d 27, 31, 543 N.E.2d 456 (1989).

II. How Knowledge of a Subrogation Claim Affects Ability to Settle with an Insured

Subrogation issues often arise when a tortfeasor's insurer negotiates a settlement with an injured party, and obtains a full and final release for all bodily injury claims related to the accident. The injured party's insurer, who has become subrogated for medical payments made on injured party's behalf, then seeks compensation from the tortfeasor. The tortfeasor denies liability based on the release obtained from the injured party. In such cases, the determinative issue is whether the injured party's insurer provided notice to the tortfeasor of the subrogated claim prior to the time of

[1] Accordingly, the scope of this article is limited to subrogated claims for medical payments, and does not address the varied issues that may arise from statutory liens, such as those involving Medicare or Workers' Compensation, or other types of subrogated interests.

settlement with the injured party. If so, the tortfeasor remains liable for the subrogated interest, and the tortfeasor's insurer may be liable for a second payout.

The general rule under Ohio law regarding notice of a subrogation claim was articulated by the court in *Hartford Acc. & Indem. Co. v. Elliott*, 32 Ohio App.2d 281, 290 N.E.2d 919 (1st Dist. 1972), as follows:

> A tortfeasor who settles the claim of a party injured by his act with full awareness of the fact that the claim has been subrogated is liable to the subrogee for the amount paid out by such subrogee.

Id. at syllabus; *Nationwide Ins. Co. v. Russell*, 6th Dist. No. L-87-288, 1988 Ohio App. LEXIS 2164, *9. This rule is intended to prevent wrongdoers from shirking their liability by settling with a claimant and thereby successfully avoiding known obligations to the claimant's insurer. *Wendy's Int'l v. Karsko*, 94 F.3d 1010, 1014 (6th Cir. 1996).

For example, in *Hartford* a driver was injured in an automobile accident caused by the defendant. The driver's medical bills were paid for by her insurer, who then put the defendant and his insurance carrier on notice of its subrogation claim. The defendant's insurer subsequently settled the claim directly with the driver. The driver's insurer then filed an action against the defendant to recover its subrogated interest. The court held that because the defendant was aware of the claimed subrogation interest, the defendant remained liable to the driver's insurer despite the previous settlement of the driver's claim. A similar result was reached in *United Healthcare of Ohio v. Percival*, 4th Dist Nos. 01CA2630, 01CA2635, 2002-Ohio-3163, ¶¶31-34.[2]

Even where a tortfeasor makes a good faith effort to protect a lienholder's interests, such as adding its name to a settlement check, the tortfeasor may remain responsible for the lien if the funds are never, in whole or in part, turned over to the lienholder.[3] *See Qualchoice, Inc. v. Paige-Thompson*, 8th Dist. No. 88233, 2007-Ohio-1712; *Econ. Fire & Casualty Co. v. Motorists Mut. Ins. Co.*, 5th Dist. Nos. 1995CA00101 and 1995CA00108, 1995 Ohio App. LEXIS 5994 (Nov. 27, 1995). Such a situation may be avoided by issuing separate checks to the injured party and the lienholder, or by securing and documenting the lienholder's acquiescence to the process of adding its name to a single settlement check.

Generally, notice will be effective if provided either to the tortfeasor or the tortfeasor's insurer prior to settlement. *Community Mut. Ins. Co. v. Taylor*, 61 Ohio Misc.2d 627, 628, 581 N.E.2d 1186 (1991); *Cincinnati Ins. Co. v. Rose*, 63 Ohio Misc.2d 1, 612 N.E.2d 819 (1992).[4] Ohio courts have

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[2] In this situation, the tortfeasor may attempt to pursue a third-party action against the injured party seeking indemnification. Any right to indemnification, however, should arise from the settlement with the injured party, not a separate agreement with the injured party's attorney. The Supreme Court of Ohio has indicated that Ohio ethical rules are violated when, as a condition of settlement, a tortfeasor's attorney proposes or requires a plaintiff's attorney to personally indemnify the tortfeasor for any claims made by third parties. *See* Ohio Sup.Ct., Bd Comm'rs on Grievances & Discipline Opinion 2011-1 (Feb. 11, 2011).

[3] It is not uncommon in such instances, where the lienholder is a participating insurance company, for the lienholder to submit the matter to inter-company arbitration, possibly resulting in a double payment.

[4] It does not appear that Ohio courts have addressed the issues that may arise from a situation in which a tortfeasor was provided notice of a medical payment subrogation claim but failed to pass such notice on to his or her insurer prior to settlement.

not clearly defined, however, what constitutes proper notice under the rule. At least one court has found that any notice must be specific as to the type of subrogation interest claimed:

> The notice of a subrogation claim must be specific in order to place the insurance company on notice of a specific claim; otherwise, a general, non-specific subrogation claim cannot place a carrier on notice for any specific type of subrogation claim, including property damages or medical payments.

Motorists Mut. Ins. Co. v. 7, 540 N.E.2d 765 (1988). The Court in *Community Mut. Ins. Co. v. Taylor*, however, indicated that even a general notice of subrogation could be sufficient to place the tortfeasor and his insurer on inquiry as to the type and amount of the claimed interest. *Id.* at 630.

If notice is not provided, an insurer's subrogation claim may be destroyed by the injured party's settlement. An illustrative case is *QualChoice, Inc. v. Doe*, 8th Dist. No. 88048, 2007-Ohio-1586, in which an insured was injured in a car accident, and his insurer paid various medical expenses on his behalf. The tortfeasor and his insurance carrier subsequently entered into a settlement and release with the insured for all claims arising from the accident. At the time of the settlement, the tortfeasor had no knowledge of the insurer's subrogation claim. The insurer then filed an action against the tortfeasor to recover its medical expenses. The court reaffirmed the general rule that a tortfeasor who settles with an insured despite an awareness of an insurer's subrogated interest remains liable to the insurer for any amounts paid. As the tortfeasor was unaware of the insurer's subrogation claim, however, the general rule did not apply. The court therefore held that the insured had destroyed the insurer's right of subrogation against the tortfeasor when the insured executed the full and final settlement. [5]

III. Guidelines for Evaluating Med Pay Subrogation Issues

1. When an insurer pays an insured's medical expenses arising from the wrongful acts of another, in order to protect its subrogation rights, the insurer must ensure that the liable party and its insurance carrier are informed of the subrogated claim. *Hartford Acc. & Indem. Co. v. Elliott*, 32 Ohio App.2d 281, 290 N.E.2d 919 (1st Dist. 1972); *McDonald v. Republic-Franklin Ins. Co.*, 45 Ohio St.3d 27, 31, 543 N.E.2d 456 (1989).

2. When settling the claim of an injured party, any release and/or indemnification agreement must be executed by the injured party. It violates Ohio ethics rules for a plaintiff's attorney to offer, or for a defendant's attorney to require, that the plaintiff's attorney personally agree to indemnify the tortfeasor for subsequent third-party claims. Ohio Sup.Ct., Bd Comm'rs on Grievances & Discipline Opinion 2011-1 (Feb. 11, 2011).

3. If a tortfeasor and its insurer obtain a settlement and release from an injured party with knowledge of a subrogation claim for medical payments made on that party's behalf, the tortfeasor will remain liable for the subrogated amount. *Hartford Acc. & Indem. Co. v.*

[5] Note that in such an instance, the subrogated insurer may have a right of reimbursement against its insured for the medical expenses it paid. *Auto-Owners Ins. Co. v. Engelman*, 6th Dist. No. OT-96-028, 1996 Ohio App. LEXIS 5490, *9 (Dec. 6, 1996). To enforce that right, however, the insurer may have to sue its own insured.

Elliott, 32 Ohio App.2d 281, 290 N.E.2d 919 (1st Dist. 1972); *United Healthcare of Ohio v. Percival*, 4th Dist Nos. 01CA2630, 01CA2635, 2002-Ohio-3163, ¶¶31-34.

4. Notice of a subrogation claim should be specific as to the type of subrogation interest being asserted – i.e., a claim for medical payments. Even a general notice of subrogation, however, may be sufficient to preserve the subrogation claim. *Motorists Mut. Ins. Co. v. Yates*,44 Ohio Misc.2d 5, 7, 540 N.E.2d 765 (1988); *Community Mut. Ins. Co. v. Taylor*, 61 Ohio Misc.2d 627, 630, 581 N.E.2d 1186 (1991).

5. If neither the tortfeasor nor its insurer has been put on notice of an insurer's subrogated medical payments claim prior to entering into a settlement with an insured injured party, the settlement agreement will destroy the insurer's right to recover the subrogated amount from the tortfeasor. *QualChoice, Inc. v. Doe*, 8th Dist. No. 88048, 2007-Ohio-1586.

6. Naming the subrogated insurer along with the injured party on a settlement check has long been an accepted practice and will often suffice to adequately fulfill a tortfeasor's obligation to protect a lien interest. However, in instances of fraud or where a settlement draft is otherwise negotiated without the proceeds being remitted to the lie holder, the tortfeasor may remain responsible for the lien. *See Qualchoice, Inc. v. Paige-Thompson*, 8th Dist. No. 88233, 2007-Ohio-1712; *Econ. Fire & Casualty Co. v. Motorists Mut. Ins. Co.*, 5th Dist. Nos. 1995CA00101 and 1995CA00108, 1995 Ohio App. LEXIS 5994 (Nov. 27, 1995).

II. SUPREME COURT OF OHIO

Three-Year Statute Of Limitations For Uninsured/Underinsured Motorist Claim

On September 29, 2011, the Supreme Court of Ohio upheld a provision requiring a policyholder to sue an insurer for underinsured motorist coverage within three years of an accident, even where the insufficiency of the tortfeasors' insurance is not determined within that three-year period.

In *Barbee v. Nationwide Mut. Ins. Co.*, 130 Ohio St.3d 96, 2011-Ohio-4914, the Barbees were involved in a chain-collision motor vehicle accident in Wisconsin on October 12, 2002. Nationwide insured their vehicle, which included UM/UIM coverage. The Nationwide policy required any lawsuit for UIM coverage be filed within three years of the date of the accident. The policy also contained an exhaustion provision stating that no payment will be made until the limits of all other liability insurance and bonds that apply have been exhausted by payments. The Barbees put Nationwide on notice of a potential UIM claim within one year of the accident, and timely sued the tortfeasors in Wisconsin. That Wisconsin litigation, which was not concluded until more than three years after the accident, apportioned liability and fixed damages. There was insufficient insurance to cover the damages awarded to the Barbees, so they sued Nationwide, but not until more than four years after the accident.

Nationwide raised the three-year limitation period as a defense. The Barbees argued that the Wisconsin litigation against the tortfeasors was not adjudicated until more than three years after the accident, so they did not know if there was a viable UIM claim within the three-year period. Moreover, they asserted that the Nationwide policy was ambiguous because there was a

conflict between the three-year limitation provision and the exhaustion provision. The Barbees won in the trial court and court of appeals, but the Supreme Court reversed.

Justice Cupp, writing for the five-person majority, stated that the policy provisions, when read together, plainly require an insured to fully comply with the terms and conditions of the policy, which include but are not limited to protecting Nationwide's subrogation rights, and filing suit within three years of the date of the accident. The high court found no ambiguity in the policy and concluded that Nationwide was entitled to summary judgment.

Bifurcation Of Punitive Damages

On February 15, 2012, in a 5 to 2 decision, the Supreme Court of Ohio upheld the constitutionality of R.C. 2315.21(B), a tort reform amendment to the punitive damages statute making bifurcation (i.e., separate trials) in tort actions involving both compensatory and punitive damages claims mandatory upon request.

In *Havel v. Villa St. Joseph*, Slip Op. 2012-Ohio-552, the Supreme Court of Ohio held that R.C. 2315.21(B) creates, defines, and regulates a substantive, enforceable right to separate stages of trial relating to the presentation of evidence for compensatory and punitive damages in tort actions. The Court explained that because it is a substantive statute, it takes precedence over Civ.R. 42(B) which gives a trial court discretion to bifurcate claims for trial purposes, as compared to R.C. 2315.21(B) which requires bifurcation when a motion requesting it is filed. The Court determined that because R.C. 2315.21(B) is a substantive law, it prevails over the procedural bifurcation rule promulgated by the Ohio Supreme Court in Civ.R. 42(B), and thus, does not violate the separate of powers required by Article IV, Section 5(B) of the Ohio Constitution.

III. OHIO COURT OF APPEALS

A. Policy Language, Endorsements, and Exclusions

1. Auto-Body Shops Not Intended Third-Party Beneficiaries Under Automobile Insurance Policies.

Blue Ash Auto Body, Inc. v. Progressive Cas. Ins. Co., 2011-Ohio-5785 (First App. Dist.). A group of auto-body shops filed a class action against Progressive for various claims, including breach of contract. The shops contended that they were intended third-party beneficiaries under Progressive's policies with its insured, and that Progressive had breached its contractual requirement to have insured vehicles restored to pre-loss conditions by failing to pay the shops the reasonable cost of repair. The trial court granted summary judgment to Progressive based on a "no benefit to bailee" provision within the policies. The appellate court affirmed, but on the basis that the shops were not intended beneficiaries under the policies. In applying the "intent to benefit test," the court found that the policies did not demonstrate an intention by either Progressive or its insureds to benefit the shops. As the policies were unambiguous in their lack of intent to benefit third parties, the court refused to consider extrinsic evidence.

2. Knowledge That There Were Problems With Equipment Before Policy Period Sufficient to Invoke Loss in Progress Exclusion.

Ohio Cas. Ins. Co. v. Mansfield Plumbing Products LLC, 2011-Ohio-4523 (Fifth App. Dist.). Mansfield Plumbing experienced problems with cracked hush tubes beginning in 2002 and continuing to 2005. From 2003 to 2004 they paid third party property damage claims of over $3 million. The company sought coverage under several excess policies, which contained a "loss in progress" exclusion that excludes "bodily injury or property damage that is a…continuation or resumption of any bodily injury or property damage known…prior to the beginning of the policy period, to have occurred." Ohio Casualty successfully argued to the magistrate that Mansfield Plumbing knew its toilets malfunctioned in 2002; therefore even if the damage fell within the policy period that began in 2003 the loss was excluded. Mansfield Plumbing appealed, arguing that while it did know of several problems with the tubes in 2002, it had no way of knowing if any future damage claims might arise or how extensive they would be. The court of appeals affirmed, finding that the "failing of the hush tubes is a continuation of the property damage and is excluded by the loss in progress provision."

3. Policyholder Not Entitled To Coverage Where Negligence Occurred During Policy Period But Bodily Injury Occurred Outside Of Coverage Period.

Estate of Heintzelman v. Air Experts, Inc., 2011-Ohio-5242 (Fifth App. Dist.). In August of 1999, Tom Martel installed an air conditioner and left a power outlet unprotected. He was covered by a policy of insurance effective on May 18, 1999 to May 18, 2000. On July 15, 2002 the homeowner died when electrocuted by the unprotected outlet. Mr. Martel's insurer moved for summary judgment in the resulting declaratory judgment action, arguing the harm occurred outside of the policy period. The trial court granted summary judgment, finding no coverage. On appeal the appellant argued that because the insurance policy reads, "This insurance applies to 'bodily injury' and 'property damage'" and then speaks of "'bodily injury' or 'property damage'," Mr. Martel was covered for bodily injury because the property damage occurred within the policy period. In other words, appellant argued that the case involved both bodily injury and property damage because of the faulty installation, and the policy provides coverage if either the bodily injury or property damage was caused by an occurrence within the policy period. The court of appeals disagreed, finding the plain meaning of the word "or" leads to a conclusion that the bodily injury had to occur during the policy period for Mr. Martel to be entitled to coverage for the claim. The court found it significant that there was no real property damage claim alleged.

4. A Child Subject To Shared Custody May Not Qualify As An "Insured Resident" Of Both Parents' Households Where The Child Does Not Reside In Both Parents' Households With Sufficient Duration And Regularity.

Grange Mut. Cas. Co. v. Norton, 2011-Ohio-6195 (Ninth App. Dist.). Norton's parents divorced and shared custody. Norton visited her father in the summer and, on the first day of her visit, was

injured while operating an ATV on property owned by her father. Grange insured Norton's father under a homeowner's policy. Norton made a claim under the medical payments provisions of the Grange policy. Grange denied coverage based on "a policy exclusion applicable to insured persons operating a motor vehicle." Norton sued and the trial court found that, because Norton was not "an insured" under the Grange policy, the exclusion did not apply and coverage existed. The court of appeals agreed because, although custody was shared, Norton did not reside with her father for a sufficient "duration and [with sufficient] regularity" to qualify as a resident of his household and, therefore, did not qualify as an insured. Specifically, for the first sixth months after her parents' divorce, Norton visited her father only "every Wednesday and every other weekend" and after that period, Norton "did not visit her father at his home for almost a year" until the visit when she was injured. The court therefore found the exclusion not to apply because Norton was not an insured.

5. A Specific Exclusion Unambiguously Controls And Limits A General Grant Of Coverage.

Michaels v. Michaels, 2012-Ohio-118 (Ninth App. Dist.). Mr. Michaels drove his motorcycle off the road, injuring Mrs. Michaels, his wife and passenger. Mrs. Michaels then sued Mr. Michaels for negligence and his insurer, Markel American Insurance Company, seeking a declaration that liability coverage for her claim against her husband was available. Specifically, she claimed that because a separate premium was paid for "Passenger Liability," which was not defined anywhere in the insurance policy, the exclusions listed under the liability coverage section of the insurance policy did not apply to passengers. But the Markel policy separately excluded liability coverage for "Bodily Injury or Property Damage sustained by any Insured Person" and Mrs. Michaels qualified as an insured person under the Markel policy as Mr. Michaels' resident spouse. The court found liability coverage unambiguously excluded, reasoning that "when injuries to a specific person as a passenger have been unambiguously excluded by another, independent provision, addition of guest passenger liability coverage will not bring such specifically excluded injuries back within coverage." The court further found that the specific exclusion applied to bar coverage unless the policy stated that "the passenger liability coverage negated or voided the spousal exclusion so as to bring a 'specifically excluded injur[y] back within coverage'."

6. Regular Use Exclusion Applied When There Was Frequent, Steady, Constant, Or Systematic Use Over Some Period Of Time.

Sullivan v. Williams, 2011-Ohio-6131 (Tenth App. Dist.). Plaintiff was driving her employer's car when she was involved in an accident with the defendant. Plaintiff settled her claim with the tortfeasor and brought a UIM claim against her personal policy with State Farm. The issue was whether the 'regular use exclusion' applied. Plaintiff argued that she was a dispatcher and only used her employer's car four times before the accident. The court noted that the plaintiff had only worked for her employer for five days and that driving customers to their appointments was part of her job duties. The appellate court determined that the regular use exclusion applied despite the short duration because there was frequent, steady, constant, or systematic use.

B. Coverage For Intentional Acts

1. Coverage Is Barred By The Intentional Acts Exclusion Where One Deliberately Sets One's Home On Fire With The Intent To Extinguish The Fire Before Damage Results Because The Act Is "Intrinsically Tied [With The Resulting Harm] So That The Act Has Necessarily Resulted In The Harm."

Lachman v. Farmers Ins. of Columbus, 2012-Ohio-85 (Eighth App. Dist.). Mrs. Lachman deliberately set fire to the comforter located in the master bedroom of the home in which she and her husband resided. The fire spread resulting in the home's complete destruction. The home was insured by Farmers. Farmers denied coverage because "the fire was intentionally set by Barbara Lachman, an insured under the policy." Mrs. Lachman claimed that she had intentionally started the fire so that her husband would put it out and feel like a hero rather than with the intent that the house be destroyed. Nonetheless, Mrs. Lachman pleaded guilty to two counts of arson defined as to "knowingly" "creating a substantial risk of physical harm to any property of another without the other person's consent." Mrs. Lachman asserted that under the test applied in *Allstate Ins. Co. v. Campbell*, 128 Ohio St. 3d 186, 2010-Ohio-6312, she had only intended to start a small fire which her husband would extinguish before it caused damage to their home. Thus, she claimed that her actions and the resulting fire damage were not "intrinsically tied so that the act has necessarily resulted in the harm." The court disagreed, finding that as a matter of law "failing to take the proper precautions to prevent the fire from spreading is intrinsically tied with resulting fire damage."

C. Workmanship/Construction Claims

1. Faulty Construction Work Not An "Occurrence" Under A General Liability Policy.

Myers v. United Ohio Ins. Co., 2012-Ohio-340 (Fifth App. Dist.). The Myers hired a contractor to perform work on their home, including construction of basement walls and the roof. After a season of inclement weather, the walls began to bow and the roof began to leak, causing damage to the structure itself and to interior property. The Myers filed suit against the contractor and his insurer based on a CGL policy, which defined an occurrence as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The trial court found that the policy did "not provide coverage for defective or faulty workmanship, but did provide coverage for consequential damages relating to repairs for mold and water damage caused by repeated exposure to the elements." The insurer conceded liability coverage for repair to water-damaged drywall. The court then found the insurer liable for all damage, including reconstruction of the roof and ceiling and basement wall, because "the repeated exposure to the elements has resulted in consequential damages and this property damage is caused by an 'occurrence' which is not excluded in the policy."

The court of appeals reversed, noting that "defective workmanship does not constitute an accident or occurrence under a CGL policy….Such policies are intended to insure the risks of an insured causing damage to other persons and their property, but are not intended to insure the risks of an

insured causing damage to the insured's own work." The evidence showed that the roof and wall were not properly constructed, so the damages awarded for the roof and wall itself "were not damages for consequential or collateral damage caused to the interior of the home, but rather were for damage to the work product itself and thus did not qualify as an occurrence…." The court also found that a fungus exclusion applied.

D. Representations Or Warranties On A Policy Application

1. Misrepresentations In An Application For Insurance Will Render The Policy Voidable, Rather Than *Void Ab Initio,* Unless The Application Is Clearly Incorporated In The Policy And The Policy Specifies That It Is Rendered *Void Ab Initio* By Material Misrepresentations In The Application.

James v. Safeco Ins. Co., 2011-Ohio-4241(Eighth App. Dist.). James leased a Ford Mustang, insured it with Safeco, and gave the vehicle to his daughter, Easton, to use. Easton and James resided separately, and the Mustang was garaged at Easton's home. James then took the Mustang back because Easton did not contribute to the lease payments. The Mustang was being stored in the driveway of James' residence when it was stolen. James made a claim for theft coverage under the Safeco policy. Safeco denied coverage on the basis that James' "representations and non-disclosures rendered the insurance policy void." James filed suit against Safeco. The trial court held the Safeco policy *void ab initio* (void at the outset) because James had misstated, or failed to update, the identity and residence of the Mustang's driver as well as the location where the vehicle was garaged. The court of appeals reversed, stating that: 1) the policy was issued "in reliance upon the statements in the application" but there was no language incorporating the application into the policy; and 2) policy language which provided that Safeco "may void this policy" based on a misrepresentation in the application "is a general statement" that a "'contract induced by fraud is not void, but it is voidable at the election of the one defrauded.'" Because Ohio law requires clear language indicating both that the application containing the misstatements is incorporated into the insurance policy and that misrepresentations render the policy void–not voidable–the court of appeals held that James' misstatements/non-disclosures were representations (rather than warranties) which render the policy only voidable and not *void ab initio*.

E. UM/UIM

1. The "Regular Use" Exclusion Bars UM/UIM Coverage Under A Personal Auto Policy While The Insured Is Operating A Vehicle Regularly Furnished For The Insured's Use By The Insured's Employer.

Liggins v. White, 2011-Ohio-4417 (Eighth App. Dist.). Liggins insured her personal auto under an insurance policy issued by State Farm which provided UM/UIM coverage. Liggins was injured in an accident while using an employer-provided vehicle in the course and scope of her employment. State Farm denied Liggins' claim for UM/UIM coverage under her personal auto policy based on

the "regular use" exclusion in the UM/UIM endorsement. Liggins sued State Farm, arguing that because she was only allowed to use her employer's vehicle during work hours, the vehicle was not available for her regular use. The trial court granted summary judgment to State Farm, finding UM/UIM coverage excluded. The court of appeals affirmed, holding that "even though an employer restricts the use of the vehicle to working hours and functions, the vehicle is still considered to be available for the employee's regular use" because "[s]ystematic and continuous use of a vehicle during work hours is sufficient." There was no issue of fact presented because Liggins' use of "the same truck [supplied by her employer] for the two years preceding the accident" established her "systematic and continuous" use of her employer's vehicle.

2. A UM/UIM Claimant May Not Proceed To Trial Solely Against Their UM/UIM Insurer After Entering Into A Partial Settlement With The Tortfeasor, Over The UM/UIM Insurer's Objection, For Less Than The Tortfeasor's Liability Coverage Limits.

Jesenovec v. Marcy, 2011-Ohio-4820 (Eighth App. Dist.). Jesenovec was injured in an automobile accident caused by Marcy. Jesenovec was insured for UM/UIM coverage by Grange. Jesenovec sued both Marcy for damages and Grange for UM/UIM coverage. Jesenovec and Marcy reached a partial settlement for less than Marcy's liability coverage limits. Grange did not consent and fronted payment in the amount of the settlement to Jesenovec. The trial court stayed the action against Marcy based on the settlement and allowed the case to be tried solely against Grange. After the verdict, the trial court entered judgment solely against Grange. Grange then sought to enforce its subrogation rights against Marcy, but the trial court dismissed Grange's claim. Grange appealed and the court of appeals reversed, holding that: 1) "the record clearly reflects that Grange retained enforceable subrogation rights when it objected to the settlement and advanced the settlement funds to Marcy"; and 2) "a substantial injustice occurred" in trying the case solely against Grange. The matter was remanded for new trial.

3. UM/UIM Insured May Not Recover For Emotional Distress Resulting In Physical Illness Due To The Death Of An Adult Child While Operating A Non-Covered Auto Due To The Negligence Of An Uninsured Motorist.

Johnson v. Progressive Preferred Ins. Co., 2011-Ohio-6448 (Eighth App. Dist.). Johnson was insured under an automobile insurance policy issued by Progressive. Johnson's son, Lavelle Randall, was specifically excluded from coverage in the policy declarations. Randall was killed in an automobile accident caused by an uninsured motorist while operating a vehicle that was not covered under the Progressive policy. Johnson sued Progressive for UM/UIM coverage claiming that Randall was a UM/UIM insured under the Progressive policy and that Johnson was also entitled to UM/UIM coverage because she "suffered sickness and disease and other bodily harm, and severe emotional distress." The court disagreed, holding that: 1) "under the plain language of the contract, Randall was not an insured entitled to coverage" because he was specifically listed as an excluded driver; and 2) as to Johnson's own injuries, they were not covered because "Johnson was not present at the time of the accident or otherwise involved in the accident" and therefore could not suffer

"bodily injury * * * caused by [the] accident[,] and arising out of the ownership, maintenance, or use of a motor vehicle by [the tortfeasor,]" as the Progressive policy required.

4. UM/UIM Coverage Unavailable Where The Tortfeasor Is Statutorily Immune From Liability.

Marusa v. Erie Ins. Co., 2011-Ohio-6276 (Eighth App. Dist.). The Marusas were injured when their automobile was struck by a North Royalton police officer who was responding to an emergency call and therefore immune from liability. The Marusas were insured by Erie Insurance Company, which denied their UM/UIM claim because the Marusas are not legally entitled to recover against the tortfeasor because of his immunity. The court agreed, holding that "[t]he Marusas were not legally entitled to recover from Officer Canda because of his immunity. Thus, when the definition and promise sections of the policy are read together, the Marusas were not entitled to coverage under the policy." One Judge dissented because she believed that coverage was intended by the insured when purchasing UM/UIM coverage. In her dissent, she stated: "This is an intolerable state of the law and one I hope is quickly rectified."

F. Policy Ambiguity

1. Failure To Define "Accident" In Policy Created An Ambiguity.

Miller v. Motorist Mut. Ins. Co., 2011-Ohio-6099, (Eleventh App. Dist.). An accident occurred when an SUV driven by Daniel Masterson veered into oncoming traffic and struck a group of motorcycles, including a motorcycle driven by David Perrine. The motorcycle immediately behind Mr. Perrine was driven by Michael Reese. Mr. Reese took evasive action but still collided with the Perrine motorcycle. Within 0.3 seconds, the Masterson SUV struck a motorcycle driven by Geoffrey Davis. Mr. Masterson was insured by Motorists Mutual Insurance Company ("MMIC") with a bodily injury liability limit of $100,000 for "each person" and $300,000 for "each accident." The only issue was whether the accident with the Davis motorcycle should be considered a separate accident. The appellate court noted that the MMIC policy failed to define "accident " and "does not specifically contemplate and limit MMIC's liability in a sequence of events as presented in this case ..." Therefore, the appellate court construed the ambiguity in favor of the claimants and reversed the granting of MMIC's summary judgment by the trial court.

G. Subrogation/Assignment/Liens And Med Pay

1. Insurer Need Not Introduce An Insurance Policy To Obtain An Equitable Subrogation Claim Against Tortfeasor.

Warmack v. Arnold, 2011-Ohio-5463 (First App. Dist.). A third party struck the insured's parked vehicle. The third party went to the home of the insured with $250 in cash, which the insured accepted as a full release of any claims he could bring against the tortfeasor. The insured then accepted a check for $4,075 from his insurer, which represented the value of the totaled automobile. The insurer then filed a subrogation action against the third party tortfeasor and recovered at trial. The tortfeasor appealed. The court of appeals found that the insurer need not have introduced the

actual policy of insurance at trial to establish its subrogation rights because of the doctrine of equitable subrogation, which requires only proof of payment as opposed to the formal subrogation needed for conventional subrogation. However, the court of appeals reversed the trial court because it found the insured unconditionally released any claims he had against the tortfeasor. Because a subrogation action the insurer has no more rights than the insured, the insurer could not recover against the tortfeasor.