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PREJUDGMENT INTEREST

Anyone on the losing side of a significant case understands that an adverse verdict may be only the beginning of the defendant's problems. For example, the plaintiff may seek prejudgment interest (PJI). In Ohio, insurers may face PJI claims based upon a claim arising in contract for first-party claims or in tort for third-party claims.

This article summarizes the law of prejudgment interest for both contract and tort claims, specifies how interest is calculated, and offers eight practical guidelines for avoiding and defending PJI claims.

A. First-Party Contract Claims - R.C. 1343.03(A)

An award of prejudgment interest on a first-party insurance claim (such as an underinsured motorist, med pay, or property claim) is governed by R.C. 1343.03(A) which provides, in pertinent part:

> [W]hen money becomes due and payable upon * * * a contract * * *, the creditor is entitled to interest at the rate per annum determined pursuant to section 5703.47 of the Revised Code, unless a written contract provides a different rate of interest in relation to the money that becomes due and payable, in which case the creditor is entitled to interest at the rate provided in that contract.

Interest pursuant to R.C. 1343.03(A) is an item of compensatory damages. *Royal Elec. Constr. Corp. v. Ohio State Univ.* (1995), 73 Ohio St. 3d 110, 114. The purpose of awarding PJI is to make the aggrieved party whole; injustice can occur when an insurer denies contractually-owed benefits resulting in protracted litigation. *Landis v. Grange Mutual Ins. Co.* (1998), 82 Ohio St.3d 339, 341-342. A policyholder, however, is not automatically entitled to recover PJI even if the insurer has failed to settle in good faith. *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St.3d 552, 558. Thus, whether PJI is owed is a separate determination from whether an insurer has committed the tort of bad faith.

1. When Prejudgment Interest Begins to Accrue

In accordance with R.C. 1343.03(A), PJI begins to accrue "when money becomes due and payable." Determining when the money is "due and payable" often is hotly contested, in part because there is no bright-line rule. The Supreme Court of Ohio in *Landis, supra* suggested several alternatives:

> "[W]hether the prejudgment interest *** should be calculated from the date coverage was demanded or denied, from the date of the accident, from the date at which arbitration of damages would have ended if [the insurer] had not denied benefits, or some other time based on when [the insurer] should have paid [the insured] is for the trial court to determine."

Id. at 342.

Ohio courts have come to different conclusions as to when, and if, PJI is owed. Suffice it to say that a PJI ruling is invariably fact-driven, *i.e.*, the specifics of the case are of critical importance.

The decision regarding PJI is reposed in the sound discretion of the trial court, so the standard for review is an abuse of discretion. As a practical matter, therefore, whichever side loses in the trial court usually will have a difficult time reversing the PJI award on appeal.

One of the unsettled issues is whether PJI applies to future contractual damages and losses. The Supreme Court of Ohio on January 24, 2007 agreed to hear a case that will decide that issue. *Stoner v. Allstate Ins. Co.*, Morrow App. No. 05 CA 16, 2006-Ohio-3998, disc. appeal accepted, 112 Ohio St.3d 1440, 2007-Ohio-152.

B. Good Faith Effort To Settle A Tort Claim - R.C. 1343.03(C)

The inquiry in tort claims is on whether each side made a good faith effort to settle. Specifically, R.C. 1343.03 (C) provides:

> (C)(1) If, upon motion of any party to a civil action that is based on tortious conduct, that has not been settled by agreement of the parties, and in which the court has rendered a judgment, decree, or order for the payment of money, the court determines at a hearing held subsequent to the verdict or decision in the action that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case, interest on the judgment, decree, or order shall be computed as follows:
>
> > (a) In an action in which the party required to pay the money has admitted liability in a pleading, from the date the cause of action accrued to the date on which the order, judgment, or decree was rendered;
> >
> > (b) In an action in which the party required to pay the money engaged in the conduct resulting in liability with the deliberate purpose of causing harm to the party to whom the money is to be paid, from the date the cause of action accrued to the date on which the order, judgment, or decree was rendered;
> >
> > (c) In all other actions, for the longer of the following periods:
> >
> > > (I) From the date on which the party to whom the money is to be paid gave the first notice described in division (C)(1)(c)(I) of this section to the date on which the judgment, order, or decree was rendered. The period described in division (C)(1)(c)(I) of this section shall apply only if the party to whom the money is to be paid made a reasonable attempt to determine if the party required to pay had insurance coverage for liability for the tortious conduct and gave to the party required to pay and to any identified insurer, as nearly simultaneously as practicable, written notice in person or by certified mail that the cause of action had accrued.
> > >
> > > (ii) From the date on which the party to whom the money is to be paid filed the pleading on which the judgment, decree, or order was based to the date on which the judgment, decree, or order was rendered.

> (2) No court shall award interest under division (C)(1) of this section on future damages, as defined in section 2323.56 of the Revised Code, that are found by the trier of fact.

The foregoing law applies to all PJI proceedings conducted after its enactment on June 2, 2004, even if the lawsuit was filed before the effective date of the statute. *Barnes v. Univ. Hosps. of Cleveland*, Cuyahoga App. Nos. 87247, 87285, 87710, 87903 & 87946, 2006-Ohio-6266, at ¶75.

A PJI motion pursuant to the statute must be filed no later than fourteen days after the entry of the judgment by the trial court. If it is not, the court lacks jurisdiction to award PJI. *Cotterman v. Cleveland Elec. Illum. Co.* (1987), 34 Ohio St.3d 48, paragraph one of the syllabus.

1. The Standard Of "Good Faith"

The statute requires the trial judge to assess whether there was a "good faith effort" to settle. The Supreme Court of Ohio in two cases has explained what does NOT amount to a "good faith effort" to settle.

In *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, the high court explained that a failure to make a good faith effort to settle does not mean "bad faith." Even so, parties and even courts sometimes refer to PJI being awarded because a party negotiated in "bad faith."

In the syllabus of *Kalain v. Smith* (1986), 25 Ohio St. 3d 157, the Supreme Court of Ohio explored the contours of the issue as follows:

> A party has not 'failed to make a good faith effort to settle' under R.C. 1343.03(C) if he has: (1) fully cooperated in discovery proceedings, (2) rationally evaluated his risks and potential liability, (3) not attempted to unnecessarily delay any of the proceedings, and (4) made a good faith monetary settlement offer or responded in good faith to an offer from the other party. If the party has a good faith, objectively reasonable belief that he has no liability, he need not make a monetary settlement offer.

The plaintiff bears a "heavy burden" of proving that the defendant failed to make a good faith effort to settle the case. *Moskovitz*, supra, 69 Ohio St.3d at 659. A party, reasonably believing it is not liable, is not obligated to make or respond to a settlement offer. *Kalain v. Smith*, syllabus. Moreover, PJI may not be appropriate even though the verdict is far more than the defendant's offer. *Fischer v. Dairy Mart Convenience Stores, Inc.* (1991), 77 Ohio App.3d 543, 560; *Evans v. Dayton Power & Light Co.*, Adams App. No. 05CA800, 2006-Ohio-319, at ¶47. See also, *Taylor v. Steinberg*, Cuyahoga App. Nos. 80280 & 80493, 2002-Ohio-2961, at ¶35 ("Just because the jury decided adversely to Steinberg is by no means dispositive of the reasonableness issue for purposes of prejudgment interest. The issue is what was objectively reasonable, not what the jury happened to find."); *Emerson v. Yurchak*, Hamilton App. No. C-060113, 2006-Ohio-6162, at ¶12 ("Progressive underestimated the jury award, but poor predictive ability does not necessarily establish a lack of good faith."). One court has even found constitutional implications. In *Avondent v. Blankstein* (1997), 118 Ohio App.3d 357, 370 the court stated: "*** It would be unconstitutional to penalize a party for exercising his right to a trial."

Although the focus at a PJI hearing usually is on the alleged lack of good faith of the defendant, R.C. 1343.03 provides that a plaintiff cannot recover PJI unless the plaintiff "did not fail to make a good faith effort to settle." The defendant should strive to establish that the plaintiff did fail to do so.

As a practical matter, though, trial judges seem to be influenced by a large plaintiff's verdict. Stated another way, a significant disparity between the jury verdict and the last offer may suggest to some jurists that the defendant did not rationally evaluate the risks or liability or did not make a good faith offer.

2. Discovery And Hearing

A post-trial proceeding for PJI is subject to the general discovery process and the Civil Rules. Therefore, upon the filing of a PJI motion, the plaintiff may gain access through discovery to those non-privileged portions of the insurer's claim file. *Peyko v. Frederick* (1986) 25 Ohio St.3d 164, paragraph one of the syllabus. In a PJI proceeding, privileged matters in the insurer's claim file are those that "go directly to the theory of defense of the underlying case" in which the decision or verdict has been rendered. *Moskovitz, supra*, 69 Ohio St.3d at 662-663. On occasion, discovery of parts of the defense attorney's file also may be sought.

If the attorney-client privilege is raised with regard to portions of the claims file, the trial court must conduct an in camera (in chambers) inspection to determine which portions of the file, if any, are privileged. After that determination, plaintiff's counsel is granted access to the nonprivileged portions of the file. *Sarka v. Love*, Cuyahoga App. No. 85960, 2005-Ohio-6362, at ¶40. Should the trial court order production of portions of the claim file believed to be privileged, an immediate interlocutory appeal may be filed in order to preserve the asserted privilege. *Radovanic v. Cossler* (2000), 140 Ohio App.3d 208, 213.

It may be necessary for the insurer's defense counsel to testify as a witness at the PJI hearing. Defense counsel can address how pretrial settlement negotiations were conducted, discovery problems which may have arisen, any issues of delay, and counsel's evaluation. If the defense counsel becomes a witness, that lawyer and his or her firm may need to withdraw as trial counsel at depositions or the hearing. *155 North High v. Cincinnati Ins. Co.* (1995), 72 Ohio St.3d 423, 427.

While the statute mandates a "hearing" before awarding PJI, a trial court may deny PJI without a hearing if it appears from the written motion and briefs that no award is likely. *Ready v. Barfield*, Cuyahoga App. No. 86929, 2006-Ohio-2590, at ¶9; *Foreman v. Wright*, Cuyahoga App. No. 82067, 2003-Ohio-5819, at ¶¶14, 21. The goal should be to defeat a PJI claim on the briefs alone and thus avoid the time, expense, and problems associated with discovery of the insurer's claim file and depositions of claims personnel. See, *Werner v. McAbier*, (Jan. 13, 2000), Cuyahoga App. Nos. 75197 & 75233, 2000 Ohio App. LEXIS 73 (trial court did not abuse its discretion by granting a protective order and preventing the deposition of the insurance adjuster and production of the claim file on the grounds that the discovery was unnecessary and unduly burdensome); *Goudy v. Stockton*, Greene App. No. 2001-CA-46, 2001-Ohio-1459 (trial court "did not abuse its discretion by ruling on a prejudgment interest motion without first allowing the movant discovery concerning the respondent's lack of good faith, because the movant had failed to make any showing that she had made a good-faith effort to settle").

C. How Interest Is Calculated

R.C. 1343.03, effective on June 2, 2004, provides for the PJI rate to be determined according to the annual variable interest rate determined annually by the Ohio Department of Taxation, which is based upon the federal short-term rate pursuant to R.C. 5703.47. Prior to June 2, 2004, the PJI rate was fixed at ten percent per annum.

The variable interest rate prescribed by R.C. 1343.03(A) applies to all actions pending on June 2, 2004 and to any actions filed after that date, regardless of when the cause of action accrued. *Jones v. Progressive Preferred Ins. Co.*, supra, at ¶20. In the calculation of PJI pursuant to R.C. 1343.03(C) in those actions pending on June 2, 2004 involving claims arising before that date, the ten percent interest rate will apply for the time-period until June 2, 2004. For the time-period thereafter, the courts are obligated to apply the rate determined by the Ohio Department of Taxation pursuant to R.C. 5703.47 for each year in which PJI has accrued. The following rates, which can be found at the Ohio Department of Taxation's website at http://tax.ohio.gov/divisions/ohio_individual/individual/interest_rates.stm, are:

Time Period	Interest Rate
Post-January 1, 2007	8%
January 1 to December 31, 2006	6%
January 1 to December 31, 2005	5%
June 2 to December 31, 2004	4%
June 1, 2004 and before	10%

D. Practical Guidelines

The following guidelines may assist in avoiding and, when necessary, defending PJI claims:

1. As a claim is investigated, the claims file should document liability, causation, and damages, and any other basis for evaluating the claim;

2. The rationale for any offer (or lack of an offer) should be set forth in the claims file;

3. Every entry and document in the claims file–including communications with defense counsel–should be crafted with an awareness that the entire file may be examined by plaintiff's counsel and the trial judge post-verdict;

4. Because the defense attorney also may find at least portions of his or her file are discoverable, counsel should exercise caution in how the defense file is documented;

5. A defendant should take pains to "fully cooperate in discovery proceedings" and not "unnecessarily delay any of the proceedings", as those factors will be examined by the court;

6. When a PJI motion is made, the insurer should consider retaining counsel other than defense trial counsel to evaluate the prospects of PJI and to oppose the motion;

7. Consideration also should be given to taking depositions of the plaintiff and plaintiff's counsel, and seeking non-privileged portions of opposing counsel's file; although not routinely sought, the rationale for allowing discovery of the defendant applies with equal force to the plaintiff; and

8. Every effort should be made to win the PJI issue in the trial court, because it usually will be difficult to obtain a reversal on appeal.

II. SUPREME COURT OF OHIO

Case Law

A. Denial Of An Insurer's Motion To Intervene Is Not A Final Appealable Order

Gehm v. Tinmberline Post & Frame, 2007-Ohio-607. The Supreme Court held that a denial of a liability insurer's motion to intervene is not a final appealable order where collateral estoppel will not prohibit future litigation of similar issues. The insurer argued that the trial court's denial of its motion to intervene in the underlying property damage suit against its insured was a final appealable order under R.C. 2505.02(B)(1) because the denial of the insurer's motion "in effect determine[d] the [insurer's] action and prevent[ed] a [declaratory] judgment." The insurer had based its assertion upon the Supreme Court's decision in *Howell v. Richardson* (1989), 45 Ohio St.3d 365. There, the court imposed collateral estoppel against a liability insurer which could have intervened in the prior bodily injury action against its insured. The Supreme Court in *Gehm* explained, however, that "[w]hen a party has sought and been denied intervention, collateral estoppel will not prohibit litigation of similar issues." The court stated that collateral estoppel applied in *Howell*, because the insurer had not sought intervention in the underlying action.

Significant Pending Cases

A. Certified Conflict To Resolve Whether S.B. 97 Amendments To R.C. 3937.18 May Be Incorporated Into Insurance Policy Commenced Prior To Effective Date Of Amendment

Advent v. Allstate Ins. Co., 2006-Ohio-6791 (Tenth Appellate District). The following question was certified as being in conflict with the 8th District Court of Appeals in *Storer v. Sharp*, 2006-Ohio-1577:

> Can the S.B. No. 97 amendments to R.C. 3937.18 be incorporated into an insurance policy during a two-year guarantee period that commenced subsequent to the S.B. No. 267 amendments to R.C. 3937.18 and R.C. 3937.31, but prior to the S.B. No. 97 amendments?

S.B. 97, among other things, changed the law by providing that UM/UIM coverage is optional, not mandatory.

B. Constitutionality Of Tort Reform Challenged

1) The Ohio Supreme Court accepted questions certified by the United States District Court challenging the tort reform law, S.B. 80, effective April 7, 2005. *Arbino v. Johnson & Johnson*, 2006-Ohio-4288.

The high court will answer questions regarding:

R.C. 2315.18 (limits on recovery of non-economic damages);
R.C. 2315.20 (introduction of collateral sources); and
R.C. 2315.21 (punitive damage caps, and mandatory bifurcation).

2) The Ohio Supreme Court also accepted questions of state law certified by the United States District Court pertaining to the constitutionality of S.B. 80's statute of repose and subrogated workers' compensation benefits. *Groch v. GM*, 112 Ohio St.3d 1416, 2006-Ohio-6712. The court will answer the following questions:

> Do R.C. 2305.10(C) and (F) (the statute of repose) violate the open courts provision of the Ohio Constitution, Article I, Section 16? Do R.C. 2305.10(C) and (F) violate the takings clause, Article I, Section 19, of the Ohio Constitution? Do R.C. 2305.10(C) and (F) violate the due process and remedies clause, Article I, Section 16, of the Ohio Constitution? Do R.C. 2305.10(C) and (F) violate the equal protection clause, Article 1, Section 2, of the Ohio Constitution? Do R.C. 2305.10(C) and (F) violate the ban on retroactive laws, Article II, Section 28, of the Ohio Constitution? Does Senate Bill 80 violate the one-subject rule, Article II, Section 15, of the Ohio Constitution?
>
> Do the statutes allowing subrogation of workers' compensation benefits, R.C. 4123.93 and 4123.931, violate the takings clause, Article 1, Section 19, of the Ohio Constitution?

Do R.C. 4123.93 and 4123.931 violate the due process and remedies clause, Article I, Section 16, of the Ohio Constitution? Do R.C. 4123.93 and 41.23.931 violate the equal protection clause, Article I, Section 2, of the Ohio Constitution?

C. Prejudgment Interest - Is A Hearing Required To Deny Prejudgment Interest

Pruszynski v. Reeves, Geauga App. No. 2005-G-2612, 2006-Ohio-5190. The issue was whether a court of appeals can hold that a party failed to make a good faith settlement effort and base that finding only on a motion for prejudgment interest when the trial court did not conduct a hearing on the prejudgment interest motion. The 11th District ordered the trial court to award prejudgment interest, not simply remand for a hearing.

III. LOWER COURT CASE LAW

A. Bad Faith

1. An excess judgment against an insured gives rise to a claim against the insurer despite the fact that the judgment was satisfied by a third party.

Whittaker v. Allstate Ins. Co., 2006-Ohio-6431 (Tenth Appellate District). Jeffries sued Tyler for injuries sustained in an automobile accident. Tyler was insured by Allstate with liability limits of $12,500 per person and $25,000 per accident. In response to Jeffries' settlement demand of $6,000, Allstate offered $2,500. A jury awarded Jeffries $40,000 and his wife $9,000 for loss of consortium. Allstate partially satisfied the judgment by paying the policy limits of $12,500, and defense counsel suggested to Tyler to consult a bankruptcy attorney. Tyler filed for Chapter 7 bankruptcy protection. The bankruptcy trustee filed suit against Allstate seeking to recover the amount of the judgment in excess of the policy limits. Jeffries' underinsured motorist carrier, State Farm, paid the remainder of the judgment and did not pursue its subrogation rights against Tyler. The trial court granted Allstate's summary judgment motion, which argued that Tyler did not suffer any damages as a result of the alleged wrongful failure to settle within policy limits prior to trial.

The issue before the appellate court was "whether the existence of an unpaid excess judgment against the insured is a prerequisite to the bringing of this bad faith claim." The court answered the question in the negative and reversed the trial court decision, holding that the claim for relief accrues as soon as an excess judgment exists.

B. Insurance Agent Liability

1. Non-Competition Clause In Insurer/Agency Agreement Enforceable

Ralston Ins. Agency, Inc. v. Nationwide Mut. Ins. Co., 2007-Ohio-507 (Ninth Appellate District). The insurer and the agent entered into a contract whereby the agent was entitled to certain earned credits and payments (essentially commissions for policy renewals) if the agent cancelled the contract with the insurer. The contract, however, provided that the insurer would not have to pay these amounts if (1) the

agent engaged in the insurance business in competition with the insurer within one year after cancellation and within a 25 mile radius of the agent's business location at the time of cancellation, and (2) if the agent attempted to induce or assist any of the insurer's policyholders in cancelling or replacing their policies. Agreeing with the case of *Plazzo v. Nationwide Mut. Ins. Co.* (1996), 9th App. No. 17022, 1996 Ohio App. LEXIS 476, the court upheld the non-competition clause as a valid and reasonable condition which protected the insurer's business interests without causing the agent undue hardship.

C. Uninsured/Underinsured Motorists

1. An Insurer Can Validly Limit UM/UIM Coverage To Those Occupying Covered Autos

Rosely v. Wells, 2006-Ohio-6313 (Second Appellate District). Rosely was in an automobile accident while operating her own vehicle within the course and scope of her employment by Antioch University. Antioch had UM/UIM coverage under insurance policies issues by Twin City Fire Insurance Company (commercial auto) and Hartford Casualty Company (umbrella). The court of appeals held that Rosely was not insured under the Twin City Policy because UM/UIM coverage was only afforded for vehicles "you" own and "you" unambiguously referred to the named insured, Antioch. The court found that an insurer could validly limit UM/UIM coverage to occupants of covered autos (i.e., those owned by Antioch in this case). The court also held that no UM/UIM coverage was afforded under the terms of the Hartford umbrella, and that none could be imposed by law (post-S.B. 97).

2. An Insurer Who Pays A Claim With Knowledge Of Other "Potential" Coverage (But Without Knowledge Of The Other "Potential" Insurer's Identity Or Policy Terms) Does Not Act As A Volunteer And May Later Seek Contribution From The Other Insurer.

Westfield National Insurance Co. v. Farmers Insurance Exchange, 2006-Ohio-6849 (Third Appellate District). Westfield provided UM/UIM coverage to the plaintiff in the underlying action. The plaintiff settled with the tortfeasor-defendant for his coverage limits and then filed suit against Westfield for additional UIM coverage. In discovery, plaintiff disclosed the existence of an "unidentified" insurer which insured his business and might also provide UM/UIM coverage. Westfield requested that "unidentified" policy in discovery and moved to compel its production. The motion to compel was granted but, on the same date, the UM/UIM claim by plaintiff was mediated and a settlement was reached. Westfield paid $225,000 and received a full release and assignment of rights against the "unidentified" business auto insurer. Westfield did not know the identity or policy terms of the "unidentified" insurer. Westfield later learned that the initially "unidentified" insurer was Farmers and filed suit seeking contribution. Farmers asserted that Westfield had acted as a volunteer in paying the full UM/UIM claim. The court of appeals found that knowledge of "the *potential* existence of another insurance policy which *may* or *may not* provide additional insurance coverage does not constitute 'knowledge' sufficient to waive an insurance company's right to contribution against another insurance company whose coverage and liability is not fully demonstrated until after a settlement has been executed." (Emphasis original.) The court reasoned that holding otherwise would "discourage prompt settlement of insurance claims."

3. A Self Insured Municipality Is Uninsured For Purposes of UM/UIM Coverage

Rogers v. City of Dayton, 2007-Ohio-673 (Second Appellate District). Rogers was injured in an automobile accident caused by an employee of the city of Dayton acting within the course and scope of employment. Rogers had UM/UIM coverage with State Farm. State Farm asserted that the city was not uninsured and, accordingly, should pay Rogers damages. The court found that the city was required to obtain a certificate of self-insurance under Ohio's financial responsibility law, R.C. 4509.72(A), because it owned more than 25 vehicles. Because the city failed to do so, it qualified as uninsured under Ohio's UM/UIM statute. Consequently, Rogers' injury was within the scope of State Farm's uninsured motor vehicle coverage.

4. No Liability Or UM Coverage Where Spouse Claims Injuries Caused By Husband

GEICO General Ins. Co. v. Cook, 2007 Ohio 1023 (Fourth Appellate District). Mrs. Cook sustained injuries due to her husband's negligence in operating a vehicle insured by GEICO. GEICO's policy excluded liability coverage for Mr. Cook based on a liability exclusion for "bodily injury to any insured or any family member of an insured residing in his household." The court determined the policy clearly and unambiguously excluded liability coverage for Mr. Cook for Mrs. Cook's injury claim against him. Mrs. Cook then argued she was entitled to UM coverage under the GEICO policy because Mr. Cook did not have insurance. However, the GEICO policy stated, "The term 'uninsured motor vehicle' does not include: (a) an insured auto; . . . (f) a motor vehicle owned by, furnished to, or available for the regular use of you, a spouse, or a resident relative of you." Because the vehicle was an insured vehicle on the policy and regularly available to both Mr. and Mrs. Cook, the vehicle did not meet the definition of an uninsured auto.

5. A UIM Carrier Is Not Entitled To Set Off A Settlement From Medical Malpractice Defendants

Gray v. Grange Mut. Cas. Co., 2006-Ohio-6370 (Tenth Appellate District). Gray was involved in an accident caused by the negligence of Craig Jackson, who was insured under a policy with $12,500 limits. As a result of the accident, Gray was transported to Shelby General Hospital, where it is claimed he received negligent medical care. Thereafter, Gray died. His estate settled with Jackson for his policy limits of $12,500 and settled the medical malpractice claim for $510,000 out of a $1 million professional liability policy. The estate sought undersinured motorist coverage under a Grange policy issued to Gray's parent, and another Grange policy issued to Gray's surviving sister.

On appeal, the primary issue was whether Grange is entitled to set off the amount available from the medical malpractice defendants' professional liability policy under R.C. 3937.18 as amended by HB 261. This issue is one of first impression in Ohio. The *Gray* Court held that Grange was not entitled to set off the medical malpractice settlement from its UM/UIM limits under either R.C. 3937.18(A)(2), or the Grange policy language.

6. Ambiguous Definition of "Insured" Did Not Exclude Permissive Driver's UIM Claim

Wohl v. Swinney, 2007-Ohio-592 (Twelfth Appellate District). Wohl and Slattery sued Swinney for injuries they sustained in a motor vehicle accident. The claims against Swinney were settled for his liability policy limits. Slattery then pursued a UIM claim against Motorist, which issued a policy to Wohl. Motorists argued that Slattery was not an "insured" under the UM/UIM coverage parts because Slattery was insured under his own policy with American States. Therefore, Slattery was not "[a]ny other person occupying your covered auto who is not a named insured or an insured family member for uninsured motorist coverage under another policy." The *Wohl* Court found the above-referenced definition of an insured ambiguous and, therefore, held that Slattery was not excluded from UIM coverage under the Motorists policy.

7. An "Other Owned Auto" Exclusion With The Term "Operating Occupying" Was Not Ambiguous And, Therefore, Was Enforceable Under R.C. 3937.18 (S.B. 97)

Burgess v. Erie Ins. Co., 2*007*-Ohio-934 (Tenth Appellate District). Plaintiff was involved in an accident with an uninsured motorist while operating his father's motorcycle. At the time of the accident, plaintiff maintained a policy with Erie Insurance Company with uninsured motorist coverage limits of $100,000 per person/$300,000 per accident. The plaintiff's father's motorcycle was not a listed vehicle on the Erie policy. Erie denied coverage under the "other owned auto" exclusion, which stated in pertinent part that coverage does not apply to "bodily injury to anyone we protect while operating occupying...a motor vehicle... furnished to, or available for the regular use of you...if the motor vehicle is not specifically identified in the policy" for UM/UIM coverage.

Pursuant to R.C. 3937.18(I)(1) as amended by S.B. 97, an insurer may limit UM/UIM coverage through an "other owned auto" exclusion. Plaintiff argued that the term "operating occupying" was ambiguous and rendered the exclusion unenforceable. The appellate court agreed with the trial court that "the only reasonable construction of the phrase is to read the term as two separate actions, despite the lack of a comma between them." Therefore, no ambiguity existed and the exclusion was enforceable.

D. Prejudgment Interest

1. No Prejudgment Interest Where Insurer Fully Investigates And Evaluates, But Wrongly Predicts Case Value

Emerson v. Yurchak, 2006-Ohio-6162 (First Appellate District). Yurchak, insured by Progressive, was involved in a traffic accident with Emerson. Emerson sued Yurchak and was awarded over $70,000 in damages. Progressive's final settlement offer was less than half that amount. Emerson sought prejudgment interest (PJI) on the judgment claiming that Progressive had failed to make a good faith settlement offer. The court of appeals found that because the evidence of liability, causation, and the extent of Emerson's damages were fully evaluated by Progressive but represented "a close call," the trial court did not abuse its discretion in refusing to award PJI. Specifically, the court of appeals held that "poor predictive ability does not necessarily establish a lack of good faith" and that Progressive "simply got it wrong."

2. Trial Court Abused Its Discretion When It Denied Plaintiff's Motion For Prejudgment Interest

Lopez v. Dorkoff, 2007 Ohio 642 (Fifth Appellate District). Prior to trial, the insurer offered $25,000 and the plaintiff demanded $50,000. The jury returned a verdict in favor of the plaintiff for $55,100. The trial court denied plaintiff's motion for pre-judgment interest after a hearing on the matter. The Fifth District Court of Appeals determined the trial court abused its discretion in finding the insurer negotiated in good faith. The appellate court used the following facts in making its determination: 1) the insurer did not hire an expert to review plaintiff's medical records or exam the plaintiff but decided on its own experience that only $6000 of the claimed $21,000 in medical bills related to the accident; 2) the insurer paid an accident reconstructionist $4600 to establish comparative negligence on a claim the company "believed involved nominal damages;" and 3) the insurer did not make an offer equaling the plaintiff's claimed medical bills until two weeks prior to trial.

E. Subrogation

1. A Subrogated Insurer's Rights Are Limited As A Third-Party Beneficiary

Qualchoice, Inc. v. Brotherhood Ins. Co., 2007 Ohio 226 (Fifth Appellate District). Cunningham was injured when he fell at a church insured by Brotherhood Insurance. Qualchoice, the health carrier for Cunningham, pursued a subrogation claim under Brotherhood's medical payments coverage. Under Brotherhood's medical payments coverage, the claimant must bring the claim within one year of the injury. The appellate court held Qualchoice's claim must also be brought within one year of the injury, because it sought subrogation rights through Cunningham, a third-party beneficiary of Brotherhood's policy. The court relied on *Nationwide v. Rice*, 5th App. No. CT2001-0017 (Oct. 15, 2001), where the court previously held a third party beneficiary under the insurance policy must take the limitations of the policy when it accepts the benefits.

F. Endorsements/Exclusions/Policy Language

1. A CGL Policy Which Excludes Coverage For Bodily Injury Or Property Damage That Arises Out Of The Use Of An Auto Also Excludes Coverage For Negligent Hiring, Retention, And Supervision Relative To The Use Of An Auto

Lehrner v. Safeco Insurance/American States Ins. Co., 2007-Ohio-795 (Second Appellate District). Jock, an employee of Lavello's Pizza, experienced a seizure while driving to make a pizza delivery and struck two pedestrians. Utica First Insurance Company insured Lavello's under a business-owners' liability policy which excluded coverage "for bodily injury or property damage that arises out of the ownership, operation, maintenance, use, occupancy, renting, loaning, entrusting, supervision, loading or unloading of an auto." The pedestrians filed suit against Lavello's and its owners alleging, among other things, negligent hiring, retention, and supervision of Jock. The court held that the Utica policy excluded coverage. The court stated that the bodily injury to the pedestrians arose out of Jock's operation of an automobile, because he hit them with his car. The court concluded that "even if it might

be argued that the bodily injury to the Lehrners arose out of the Herberts' negligence in supervising Jock's use of a car to deliver pizza, the policy would deny coverage for the claim against the Herberts."

2. Insurer Estopped From Asserting Late Notice Defense In Refiled Case Due To Claims Professional's Previous Denial Of Defense/Indemnity

Stiggers v. The Erie Ins. Group, 2006-Ohio-5920 (Eighth Appellate District). The plaintiff filed a suit against a contractor for defective construction. The plaintiff's attorney notified the insurer, which had issued a commercial general liability policy to the contractor. The insurer issued a reservation of rights letter that accepted the defense while the insurer investigated the matter. A month later, the insurer issued a letter denying defense and indemnity, and the plaintiff voluntarily dismissed her claim against the contractor without prejudice. The plaintiff obtained new counsel, who contacted the insurer, indicating that he would refile the claim against the contractor and proceed with a supplemental complaint against the insurer, unless he could negotiate a settlement with the insurer. The claims professional stated that the claim had already been investigated and the insurer had decided not to defend or indemnify, and that the insurer was not likely to reverse that decision. Further, the claims professional sent the reservation of rights and coverage denial letter to new counsel. The plaintiff did not provide the insurer notice of the refiled case. Plaintiff obtained a default judgment against the contractor. The court held the claims professional's discussion with plaintiff's counsel resulted in a waiver/estoppel of the insurer's notice defense.

3. Insurer Found To Have Breached Watercraft Policy Where It Made A "Betterment" Deduction On Claim

Peterson v. Progressive Corp., 2006-Ohio-6175 (Eighth Appellate District). In *Peterson*, the policyholder submitted a claim on his watercraft policy resulting from damage to his boat motor from an underwater hazard. The insurer elected to repair the damage to the motor and restore it to its pre-loss condition. The insurer was unable to find a used motor and parts comparable to the insured's motor, so the insurer provided a remanufactured motor, but reduced the claim payment for "betterment" – the difference between the fair market value of the property at the time of the loss and the increased value of the property once the repairs were completed. Finding that the policy made no provision for this type of adjustment, the court found the insurer in breach of the contract and reversed the trial court's denial of a nationwide class action for all policyholders who submitted a similar claim and had a betterment adjustment made to their claim.

4. Property Damage Resulting From Faulty Workmanship By A Subcontractor Constituted An "Occurrence" Under The CGL Policy

Dublin Building Systems v. Selective Ins. Co. of Am., 2007-Ohio-494 (Tenth Appellate District). The plaintiff was a general contractor for the construction of several office buildings. Subcontractor Reiter Wall Systems installed stucco and cultured stone to the exterior walls but apparently failed to seal the exterior joints of the building, resulting in mold growth inside the exterior walls. The plaintiff was insured under a CGL policy issued by Selective Insurance, which denied coverage based on a "business

risk" exclusion. The appellate court held that the property damage from faulty workmanship by a subcontractor was an insurable "occurrence" under the CGL policy.

The CGL policy had contained a "business risk" exclusion for "'property damage' to 'your product.'" The policy defined "product" as [a]ny goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by you. The appellate court reasoned that the building was not a "product" and was considered part of the real property, so the exclusion was inapplicable.

G. Mediation

1. Claims Representative Found In Contempt And Jailed For Failing To Attend Mediation

Scarnecchia v. Rebhan, 2006-Ohio-7053 (Seventh Appellate District). The Mahoning County Common Pleas Court ordered a mediation between the parties and specifically required the attendance of clients and insurance representatives. The claims professional assigned to the claim was part of the catastrophe team dealing with Hurricane Katrina, and as a result, could not attend the mediation and did not arrange for a substitute, although she was aware of the court order. The court held a show cause hearing for the failure to appear, and found the non-party claims professional guilty of contempt, imposed a $500 fine, and imposed a two day jail sentence (although she was released later in the day). The court upheld the contempt finding, reasoning that the claims professional chose to ignore the court order although she could have asked to reschedule the mediation.

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