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I. 2010 SUPREME COURT OF OHIO CASES

The Supreme Court of Ohio decided an array of cases in 2010. This newsletter summarizes some of those decisions, principally those concerning insurance coverage, and includes commentary on the practical effect of each case. We also observe that the Supreme Court last year was less predictable and more plaintiff-oriented than in prior years.

In *Kaminski v. Metal & Wire Products Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, and *Stetter v. R.J. Corman Derailment Services, L.L.C.*, 125 Ohio St.3d 280, 2010-Ohio-1029, the high court held that Ohio's employer intentional tort statute, R.C. 2745.01, was constitutional. These cases will result in Ohio employers winning more employer intentional tort cases on summary judgment.

In *Elevators Mut. Ins. Co. v. J. Patrick O'Flaherty's, Inc.*, 125 Ohio St.3d 362, 2010-Ohio-1043, the court held that a no contest plea by an insured is inadmissible in an action for declaratory judgment for insurance. Even though the insured pled no contest and was convicted of arson and insurance fraud, he was allowed to sue the insurer for his fire loss and for bad faith. This case will result in more bad faith cases being filed and going to the jury.

Neal-Pettit v. Lahman, 125 Ohio St.3d 327, 2010-Ohio-1829, held that a liability insurer is obligated to pay an award of attorney fees in a civil lawsuit when the award is incident to recovery of punitive damages, unless the policy language clearly excludes coverage for an attorney fees' award. In cases where an insurance policy is not explicit, insurers may be obligated to pay plaintiff's attorney fees based on a covered compensatory award against their insured.

In *Jaques v. Manton*, 125 Ohio St.3d 342, 2010-Ohio-1838, one of the few bright lights of last year, the Supreme Court held that R.C. 2315.20 allows evidence of write-offs so juries can determine the reasonable value of medical expenses. This case will bring down the value of personal injury claims.

In *Pennsylvania Gen. Ins. Co. v. Park-Ohio Industries*, 126 Ohio St.3d 98, 2010-Ohio-2745, the court held that lack of notification to a non-targeted insurer bars the targeted insurer's contribution claim against the non-targeted insurer only if the failure to notify the non-targeted insurer has resulted in prejudice to that insurer. The court explicitly found that the inability of non-targeted insurers to control the defense, defend their interests, investigate the claim, choose counsel, set litigation strategy, and control settlement, did not amount to prejudice. The court also reaffirmed the vitality of the "all-sums" method recognized in *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842. This case will make it difficult for insurers, especially excess insurers, to demonstrate prejudice.

In *Heintzelman v. Air Experts, Inc.*, 126 Ohio St.3d 138, 2010-Ohio-3264, the court found that if an insurer files a declaratory judgment action, the result of that action is not binding upon a claimant who obtained a judgment against the insured if the claimant was not a party to the insurer's declaratory judgment action. This case counsels that insurers commencing a declaratory judgment action should name any potential judgment creditors, i.e., claimants or plaintiffs, in order to bind them to any coverage determination.

In *Fed. Ins. Co. v. Executive Coach Luxury Travel, Inc.*, 2010-Ohio-6300, the high court found coverage for an independent contractor bus driver under a policy of insurance issued to the customer/university. The court held that a customer need not have possession or control of a transportation provider's vehicle for the transportation provider to be an insured pursuant to the omnibus clause of the customer's policy. As a result of this decision, transportation providers will seek liability coverage under their customers' business auto policies. (A comprehensive summary of this case is found in the next section of this newsletter.)

In *Allstate Ins. Co. v. Campbell*, 2010-Ohio-6312, the court held that the doctrine of inferred intent applies to actions other than murder or sexual molestation, but the act and harm must be inextricably tied so that the act necessarily results in the harm. The court denied summary judgment for several insurers who denied coverage in a case where a motorist and passenger were injured when several boys placed a Styrofoam target deer in the roadway. As a practical matter, this case will make it more difficult for insurers to prevail on summary judgment based on intentional act exclusions for harm "expected or intended." (A comprehensive summary of this case also is found in the next section of this newsletter.)

On balance, 2010 was not a good year for defendants and insurers. The court seemed to shift direction, in part because Chief Justice Thomas Moyer died on April 2, 2010. He was replaced by Democrat Eric Brown, who was appointed to fill Moyer's unexpired term. The change in personnel affected the court dynamics. As a result, insurers and defendants probably lost cases they would have won under Chief Justice Moyer. The court became less predictable and more plaintiff-oriented.

Last fall, though, the make-up of the court changed again. Maureen O'Connor was elected Chief Justice and Yvette McGee Brown (a Democrat) won a slot as an Associate Justice. It is too early to characterize this newly constituted court, but with each case decided, the predilections and character of the Supreme Court of Ohio will take shape.

II. SUPREME COURT OF OHIO

Inferred Intent Doctrine Extended To Cases Other Than Sexual Molestation And Murder.

Allstate Ins. Co. v. Campbell, 2010-Ohio-6312. The Supreme Court of Ohio held that when an insurance policy excludes coverage for intentional acts, "the doctrine of inferred intent is not limited to cases involving acts of sexual molestation or homicide." The court added, however, that "the doctrine of inferred intent applies only in cases in which the insured's intentional act and the harm caused are intrinsically tied so that the act has necessarily resulted in the harm."

The case resulted from a teenage prank. After dark, a group of boys placed a lightweight Styrofoam target deer just below the crest of a hill on a hilly and curvy two-lane rural road with a 55 m.p.h. posted speed limit. They chose the location because approaching drivers would be unable to see the deer until they were 15 to 30 yards away. The boys then watched the reactions of motorists when they saw the target deer in the middle of the road. About five minutes after the boys placed the target on the road, Robert Roby drove over the hill and, upon seeing the target deer, lost control of his vehicle, left the road, and overturned the vehicle. Roby and his passenger sustained serious injuries in the accident, and filed lawsuits against the boys, their parents, and their insurance companies.

The insurers sought a declaratory judgment that, based on the intentional acts exclusions in their respective policies, they were under no duty to defend or indemnify the teenagers and their parents against the lawsuits. Summary judgment was entered in favor of the insurers. The trial court declared that none of the insurers had a duty to defend or indemnify its insureds. Although there was no proof that the boys intended to cause harm, the trial court inferred the boys' intent, finding that as a matter of law their conduct was substantially certain to result in harm. The court of appeals reversed the trial court, however, and remanded the case for trial. The court of appeals concluded that the boys' actions did not support an objective inference of intent to injure as a matter of law.

The Supreme Court affirmed the court of appeals' decision. Justice Judith Ann Lanzinger in the court's lead opinion wrote: "We cannot say as a matter of law that the act of placing a target deer in a road in the manner done here necessarily results in harm." She noted that "other cars had passed by and avoided the target," and concluded: "While the boys' act was ill-conceived and irresponsible and resulted in serious injuries, the action and the harm are not intrinsically tied the way they are in murder and sexual molestation." She held "that while the doctrine of inferred intent may apply to actions other than murder or sexual molestation, it does not apply in this case." She then "clarif[ied] that the doctrine of inferred intent applies only in cases in which the insured's intentional act and the harm caused are intrinsically tied so that the act has necessarily resulted in the harm," and instructed "that courts are to examine whether the act has necessarily resulted in the harm -- rather than whether the act is substantially certain to result in harm." She explained that "this test provides a clearer method for determining when intent to harm should be inferred as a matter of law."

Justice Lanzinger found, though, that the language of one of the policies, an American Southern policy, excluded coverage for bodily injury or property damage "which results directly or indirectly from ... an intentional act of any insured." "Because the broad language of that exclusion was not limited to harm or injury 'expected or intended' by an insured," Justice Lanzinger wrote, "we must

conclude that as a matter of law, American Southern is under no duty to defend or indemnify Dailyn Campbell or his family for any liability resulting from his intentional acts in participating in the events at issue in this case."

Justice Lanzinger's opinion was joined in its entirety by Justice (and Chief Justice-elect) Maureen O'Connor.

In Justice Paul Pfeifer's separate opinion, joined by Chief Justice Eric Brown, he concurred in the court's syllabus holdings and in all of the judgment except the portion differentiating the American Southern policy from the three other companies' policies.

Justice Terrence O'Donnell entered a separate opinion, joined by Justice Evelyn Lundberg Stratton, in which he concurred in only paragraph one of the syllabus that the inferred intent doctrine is not limited to cases involving sexual molestation or homicide. He dissented from the lead opinion's creation of a new test for inferred intent. Justice O'Donnell would have adhered to the court's existing precedent as enunciated in *Gearing v. Nationwide Ins. Co.* (1996), 76 Ohio St.3d 34, that "inferred intent applies when an insured's intentional act was "substantially certain to result in injury."

Justice Robert R. Cupp also wrote separately. In his opinion, Justice Cupp concurred with the court's syllabus holding that the inferred intent doctrine is applicable to cases other than those involving homicide or sexual molestation. He also agreed with the lead opinion's decision that American Southern was entitled to summary judgment based on the different wording of the intentional acts exclusion in their policies. However, Justice Cupp found that the language of an Allstate policy exclusion for injury or property damage "which may reasonably be expected to result from the intentional or criminal acts or omissions of" an insured was sufficiently similar to the American Southern policy language to support summary judgment in favor of Allstate.

Commercial Auto Policy's Omnibus Clause Affords Liability Coverage To Charter Bus Company Driver.

Fed. Ins. Co. v. Executive Coach Luxury Travel, Inc., 2010-Ohio-6300. The Supreme Court of Ohio held that commercial auto insurance policies issued to a university can extend liability coverage to a driver employed by a charter bus company for an accident which occurred while the bus was transporting members of the university's baseball team to a game in Florida. The court determined that the driver was an insured based upon policy language providing coverage for anyone "while using with [the university's] permission" a covered vehicle that the university "owned, hired or borrowed."

The case arose out of a March 2007 accident that killed five baseball players from Bluffton University, the bus driver and the bus driver's wife, and injured several other players and coaches while the chartered bus was traveling on a highway in Atlanta, Georgia. The university's baseball coach had made arrangements to charter the bus from Executive Coach Luxury Travel, Inc. and had agreed to Executive Coach's suggestion that one of its drivers who was familiar to the coach be assigned as the driver for the trip. At the time of the crash, the university was covered by a primary auto insurance policy, an umbrella policy, and an additional excess liability policy. The umbrella

and excess liability policies followed the terms and conditions of Bluffton's primary auto insurance policy, which included the definition of an insured person.

The trial court and court of appeals had both held that neither the driver nor Executive Coach qualified as an "insured" because the university did not own and had not "hired" or "borrowed" the bus involved in the accident, but rather had contracted with Executive Coach to provide transportation services in a vehicle leased by Executive Coach and driven by one of its employees. In reversing the lower courts, the Supreme Court concluded that the driver was an "insured" pursuant to the "omnibus clause" in the Hartford policy. Rejecting several cases cited by the insurers interpreting the word "hire" as requiring control and possession of the vehicle, the majority said: "We are not persuaded that these cases should be the law of Ohio."

Justice Paul Pfeifer authored the majority opinion which was joined by Chief Justice Eric Brown, Justice Maureen O'Connor, and Judge Timothy P. Cannon of the 11th District Court of Appeals, who sat in place of Justice Robert R. Cupp. Justice Judith Ann Lanzinger concurred in judgment only.

Justice Evelyn Lundberg Stratton, who wrote a dissenting opinion that was joined by Justice Terrence O'Donnell, noted: "The majority's narrow interpretation expands the scope of coverage beyond what the parties to the insurance policy intended. ...Today's opinion unreasonably extends coverage to a third party and effectively opens the door for similar claims under other scenarios because the omnibus clause is standard in many insurance policies."

III. OHIO COURT OF APPEALS

A. Policy Language, Endorsements & Exclusions.

1. History Of Abuse Sufficient To Qualify As "Expected" Act And Preclude Coverage For Negligent Hiring Claim.

Cincinnati Ins. Co. v. Oblates of St. Francis de Sales, Inc., 2010-Ohio-4382 (Sixth App. Dist.). A minor victim and his parents sued a priest for sexual abuse, as well as the priest's church for negligent supervision. The church's insurer denied coverage for the negligence claim against the church on the grounds that the incident was not an "occurrence" covered by the policy, which defined the word as "an accident, or a happening or event...which unexpectedly or unintentionally results in personal injury." The insurer argued that the injuries were "expected" by the church, citing the priest's long history of abuse of which the church had some knowledge. The trial court granted summary judgment for the insurer. The court of appeals affirmed, citing *Physicians Ins. Co. of Ohio v. Swanson* (1991), 58 Ohio St.3d 189, for the proposition that an act is "expected or intended" if it is "substantially certain to occur," and finding that the priest's history made the incident substantially certain to occur.

2. Owning A Clinic Where Medical Services Are Rendered Sufficient To Invoke "Professional Service" Exclusion.

Eastley v. Volkman, 2010-Ohio-4771 (Fourth App. Dist.). A woman's estate sued the owner of a pain management clinic and a doctor at the clinic for wrongful death stemming from a bad reaction to drugs. A jury found the doctor's malpractice and the owner's negligence caused the death. The owner's insurer denied coverage for the claim under its business policy, claiming that the professional services exclusion applied. That provision precluded coverage for bodily injury due to the rendering of any "professional services or treatments." The trial court found there was coverage because the claim was grounded in the owner's "commercial activities," not professional services. The court of appeals reversed, finding that the owner was "indisputably engaged in the business of providing medical services to patients at her clinic" through doctors like the one previously found to have caused the death.

3. Complaint Alleging Publication Of True Statements Does Not Require A Defense Under A Policy Covering Slander Or Libel.

Westfield Ins. Co. v. Trent, 2010-Ohio-5897 (Sixth App. Dist.). A commercial liability insurance policy covered civil claims arising out of "oral or written publication, in any manner, of material that slanders or libels a person or organization…." The insured was sued by a business competitor, who claimed that the insured showed a video wherein the plaintiff admitted to poaching perch to potential purchasers, and as a result the plaintiff was unable to sell any fish. The complaint alleged that the insured conspired to tortiously interfere with plaintiff's business relationships and found an illegal group boycott against the plaintiff's business. The insurer denied coverage on the grounds that the complaint did not potentially or arguably present libel, slander, or disparagement claims because there were no contentions that the insured published false statements, an essential element of those claims. The trial court granted summary judgment for the insurer in the resulting declaratory judgment action. The court of appeals affirmed, reasoning that the complaint did not state a claim that potentially would be entitled to coverage.

4. An Insurance Policy Exclusion Barring Coverage For Property Owned, Rented, Or Occupied By The Insured Is Unambiguous and Enforceable.

Co. Wrench v. Andy's Empire Constr., Inc., 2010-Ohio-5790 (Eighth App. Dist.). Andy's Empire Construction, Inc. was insured by Owners Insurance Company. Andy's rented a backhoe for a construction job and while it was being transported to the job site, it collided with a bridge on the interstate, causing substantial damage to the backhoe. The firm from which Andy's had rented the backhoe sued for the damages sustained. Andy's, in turn, sued Owners for defense and indemnity. Owners asserted that the policy exclusion for property damage to "[p]roperty you own, rent or occupy" barred coverage. The trial court agreed and entered summary judgment in Owners' favor. The court of appeals affirmed, holding that the exclusion was unambiguous and applied to bar coverage because the backhoe was rented by Andy's.

5. Intrafamily Exclusion Not Against Public Policy.

Fratilla v. Auto Owners, 2011-Ohio-970 (Sixth App. Dist.). A woman injured in an auto accident brought suit against her husband's insurer for UM coverage. The insurer denied coverage based on an intrafamily exclusion in the policy. The trial court granted summary judgment for the insurer. On appeal, the woman argued that the exclusion was against public policy because "it is the clear legislative intent of [the Ohio Financial Responsibility Act] that a motor vehicle should not be operated on Ohio highways unless proof of financial responsibility is maintained in the type and amount mandated. Because a household exclusion…negates a facet of that coverage…it is contrary to public policy." The court of appeals affirmed, holding that the insured was at liberty to purchase whatever policy he desired, and such clauses are not against public policy.

6. Unlicensed Driver Exclusion May Apply To An Accident Caused By A Parked Vehicle.

Gregory Dickenson v. Paula M. Pate, et al., 2011-Ohio-1085 (Tenth App. Dist.). Plaintiff was struck by a pickup truck that rolled into him as plaintiff was loading groceries into his vehicle in a parking lot. The truck was owned by Paula Pate and had been parked by her husband, William Pate, who was an unlicensed driver. Pate was insured by Safe Auto, which had a policy that contained an exclusion "if the covered auto is being operated by a person who is not a qualified, licensed driver, or is without a valid driver license...." The application of the exclusion turned on whether the truck was being operated by William Pate at the time of the accident. The appellate court determined that parking is related to the operation of a vehicle but that there was insufficient evidence as to whether Mr. Pate properly parked/secured the truck before the accident. As such there was a genuine issue of material fact.

7. If Not Defined In Policy, Term "Resides" Is Ambiguous and Can Create Issue Of Fact For Summary Judgment.

Hicks v. Mennonite Mut. Ins. Co., 2011-Ohio-499 (Second App. Dist.). Plaintiff's ill mother transferred ownership of her home to plaintiff, who moved in to take care of her. A homeowner's policy was issued in plaintiff's name. The policy defined the insured premises as the residence shown on the declarations page if the insured owned and resided in that residence. The policy did not define the term "reside." Plaintiff eventually moved out but maintained a daily presence at the home, often staying the night. After a fire broke out, the insurer denied coverage claiming plaintiff was not a resident of the home. The trial court granted summary judgment to the insurer, and plaintiff appealed. The appellate court reversed, finding the term "reside" to be ambiguous and noted that individuals may have more than one residence. Furthermore, the insurer could have defined "reside" but failed to do so.

8. Resident Relative Exclusion Bars Coverage To Tortfeasor When Victim Is A Resident Relative Of Co-Insured Party.

Allstate Insurance Co., v. Eyster, 2010-Ohio-3673 (Third App. Dist.). A driver caused an automobile accident injuring her sister, a passenger. The sister sued the driver, who sought indemnity under a policy listing herself and her parents as the insureds. The insurer denied coverage under a resident relative exclusion, which excluded liability for bodily injury to "any person related to an insured person by blood . . . and residing in that person's household." The trial court granted summary judgment for the driver, finding that the sister resided with the parents, not the driver, and holding that the resident relative exclusion applied only to those living with the tortfeasor. The appellate court reversed, finding that the language of the exclusion applied to anyone living with an "insured person." Both the driver and the parents were insured under the policy. There was no language in the exclusion implying that it only applied to the tortfeasor. As such, the plaintiff's claim was excluded from coverage under the resident relative exclusion.

B. <u>Additional Insured Coverage</u>.

1. Additional Insured Endorsement Does Not Cover Independent Acts Of Negligence.

Boatwright v. Penn-Ohio Logistics, 2011-Ohio-1006 (Seventh App. Dist.). Erie Insurance Exchange issued a policy of insurance to Penn-Ohio Logistics which included American Steel as an additional insured. Boatwright was employed by Penn-Ohio and, while working at a warehouse which Penn-Ohio rented from American Steel, was injured when the floor of the warehouse collapsed. Boatwright sued American Steel, among others, asserting that it had failed to warn of the inadequate support under the warehouse floor. Boatwright alleged only independent acts of negligence on the part of American Steel. Erie intervened and filed a motion for summary judgment against American Steel seeking a declaration that the Erie policy provided no coverage for American Steel's independent acts of negligence.

The Erie policy provided coverage for American Steel as an additional insured "but only with respect to liability arising out of [Penn-Ohio's] operations or premises owned by or rented to [Penn-Ohio]." The court found that American Steel "is included as an insured but only with respect to the liability arising out of Penn-Ohio's operations or premises owned by or rented by Penn-Ohio." The court reasoned that: 1) an "additional insured" provision is intended to protect the additional party from vicarious (secondary) liability for the acts or omissions of the primary insured; 2) the term "arising out of" modifies both the premises and operations; and 3) the nominal amount Erie charged to add American Steel as an additional insured indicates that the parties did not intend to insure American Steel for independent acts of negligence. The court concluded that the Erie policy "language indicates that liability is based on the relationship of the parties and thus, American [Steel], the additional insured, can only be liable if Penn-Ohio, the insured, is." The court accordingly found no coverage for American Steel under the additional insured endorsement.

C. Priority Of Coverage.

1. When Two Policies Cover The Same Risk, Insurer Cannot Escape Coverage By Claiming Its Policy Was Excess Over Other Excess Coverage.

Progressive Direct Ins. Co. v. Motorists Mut. Ins. Co., 2011-Ohio-315 (First App. Dist.). Three cases involving similar facts were consolidated for decision. In each case, a driver insured by Progressive caused an accident while driving a vehicle owned by an individual insured by Motorists. Thus, Progressive insured the driver while Motorists insured the vehicle. Progressive paid the damages claims and filed a declaratory judgment against Motorist for pro-rata coverage. All policies involved contained "other insurance" clauses stating that coverage was "excess over any other collectible insurance." Summary judgment was granted to Progressive based on *Buckeye Union Ins. Co. v. State Auto. Mut. Ins. Co.* (1977), 49 Ohio St.2d 213, holding that two policies purporting to be excess insurance are each liable in proportion to the insurance provided by each policy. On appeal, Motorist claimed the competing policies did not cover the same risk because its policy language claimed to be excess over other insurance "stated to be primary, excess or contingent." The appellate court disagreed, finding that the additional language "does not change the fact that the two clauses are 'mutually repugnant' excess clauses." Judgment for Progressive was therefore affirmed. The Sixth Appellate District arrived at the same conclusion in *Cincinnati Ins. Co. v. Motorists Mut. Ins. Co.*, 2010-Ohio-5176.

D. Policy Ambiguity.

1. Policy Was Ambiguous Due To Confusing Declaration Page.

Safe Auto Ins. Co. v. Semenov, 2011-Ohio-163 (Twelfth App. Dist.). Mr. Semenov was driving a vehicle that he owned when he was involved in an accident. At the time of the accident, he had a Safe Auto policy in effect. The issue was whether the Safe Auto policy was a Named Operator Non-Owned Vehicle policy, which would exclude coverage for the accident since Mr. Semenov was driving a vehicle that he owned. The court looked to the declaration page, which lists "1" next to "VEH#," lists the year of a vehicle and provides a premium amount for "VEH1." The Safe Auto policy also lists two excluded drivers. The court found the policy ambiguous and, therefore, found a question of fact as to the type of policy that was issued to Mr. Semenov.

E. UM/UIM.

1. An Automobile Insurance Policy May Define "Insured" To Exclude Individuals Covered Under Another UM Policy.

W. Am. Ins. Co. v. State Farm Mut. Auto. Ins. Co., 2010-Ohio-6311 (First App. Dist.). A driver and passenger were involved in a car accident caused by an uninsured motorist. The passenger asserted a UM claim against both her own insurer, West American, as well as the driver's insurer, State Farm. State Farm denied the claim, asserting that the passenger was not an "insured" under the driver's policy. West American settled its UM claim with the passenger and obtained summary judgment

against State Farm in its subrogation claim for reimbursement. The appellate court reversed. The court noted that Ohio law unequivocally allows an insurer to define the class of persons who qualify as insureds under an automobile policy. In addition to the driver, the UM portion of the driver's policy defined an "insured" as "any other person who is not insured for uninsured motorist coverage under another vehicle policy while occupying your car." The court held this definition to be permissible and unambiguous. As the passenger was not covered under State Farm's policy, there was no need to compare policies to determine if one was excess coverage.

2. Where The Tortfeasor Is Immune From Liability Due To Co-Employee Tort Immunity, UM/UIM Coverage Is Also Unavailable To The Injured Parties Because They Are Not "Legally Entitled To Recover" From The Tortfeasor.

Kobak v. Sobhani, 2011-Ohio-13 (Eighth App. Dist.). The Kobaks had uninsured motorist coverage under a policy issued by Nationwide Mutual Insurance Company. Mrs. Kobak was insured by Sobhani's negligent operation of his motor vehicle. Sobhani was uninsured. Both Mrs. Kobak and Sobhani were employees of Parma Hospital and the accident occurred in the parking lot provided for hospital employees' exclusive use. The Kobaks sued Sobhani for negligence and Nationwide for uninsured motorist coverage. Sobhani defended on the grounds of co-employee tort immunity and Nationwide moved for summary judgment arguing that the Kobaks were not "legally entitled to recover" from Sobhani due to his immunity and, therefore, not entitled to uninsured motorist coverage. The trial court and court of appeals agreed, holding that Nationwide afforded no uninsured motorist coverage to the Kobaks because "it is well settled that where the plaintiff cannot maintain a claim against the driver due to the application of the co-employee rule, R.C. 4123.741, the plaintiff is not 'legally entitled to recover' under the uninsured motorist provision."

F. <u>Release</u>.

1. Indemnification Clause Did Not Require Payment For Subsequent Intercompany Arbitration Award.

Nationwide Mut. Fire Ins. Co. v. Delacruz, 2010-Ohio-6068 (Third App. Dist.). A driver was injured in an automobile accident with an individual insured by Nationwide. The driver's insurer paid $5,000 in medical expenses and submitted a subrogation claim to Nationwide through intercompany arbitration. The driver also sued Nationwide's insured. The arbitration was stayed pending the suit's resolution. Nationwide settled the driver's suit, and the driver signed a waiver releasing Nationwide from all future claims and agreed to indemnify Nationwide against actions in law that "may hereafter be made or brought * * * by anyone asserting a third party claim for subrogation." The subrogation arbitration then resumed and resolved with Nationwide owing $5,000. Nationwide brought an indemnification claim against the driver, but the driver was granted summary judgment. On appeal, the court affirmed. By filing for intercompany arbitration, the driver's insurer did not "commence an action" for purposes of tolling the statute of limitations, which had expired. Therefore, the claim against Nationwide did not constitute a subrogation claim that "may hereafter be made or brought" under the terms of the release.

G. Representations Or Warranties On A Policy Application.

1. Insured's Statements On A Malpractice Insurance Application Expressing Personal Belief Or Opinion Are Representations, Not Warranties.

Care Risk Retention Group v. Martin, 2010-Ohio-6091 (Second App. Dist.). In applying for a medical malpractice insurance policy, a doctor stated he was unaware of any incidents that he believed could give rise to a malpractice claim. While the doctor had received a letter from an attorney about a patient who died subsequent to surgery, it did not threaten litigation and the doctor believed the death was unrelated to the surgery. After obtaining the policy, the doctor was sued by the deceased patient's family. The insurer filed a declaratory judgment action claiming the doctor's statements regarding potential existing claims constituted warranties that made the policy void *ab initio*. Judgment was entered in favor of the insurer. The patient's family, who had intervened, appealed, and the appellate court reversed. The court found the statements were representations, not warranties, and could only render the policy voidable if the statements were made fraudulently. The policy application requested expressions of personal belief or opinion rather than statements of fact. The court found that such statements could not constitute a warranty that could render the policy void *ab initio*. The case was therefore remanded for further proceedings.

2. An Insurer Who Assumes The Defense Of An Insured Without A Reservation Of Rights Does Not Waive Its Ability To Void The Policy *Ab Initio* Absent Proof Of Actual Prejudice To The Insured Due To The Insurer's Control Of The Defense.

Medical Protective Co. v. Fragatos, 2010-Ohio-4487 (Eighth App. Dist.). Medical Protective Company of Fort Wayne, Indiana, insured Dr. Fragatos under a medical malpractice policy. After three medical malpractice actions were filed against Dr. Fragatos, Medical Protective Company filed a complaint seeking to void its policy *ab initio* due to material misrepresentations in the application. Dr. Fragatos responded that Medical Protective Company had waived its right to rescind the policy by defending the three suits against him without a reservation of rights. The trial court agreed, entered judgement against Medical Protective Company, and found coverage accordingly. The court of appeals reversed. The appellate court found no prejudice to be presumed by law and no evidence of prejudice because "[a]side from a bald assertion that such delay constitutes prejudice, there is no evidence that the insured, Fragatos, suffered any actual prejudice." The court of appeals went on to find the Medical Protective Company policy void *ab initio* because: 1) Fragatos lied about the number of past claims filed against him when he applied for insurance; 2) the application was expressly incorporated in the policy; and 3) the application's warning that any material misrepresentation would render the policy 'null and without effect' is equivalent to warning that the policy is void *ab initio*.

H. Declaratory Judgment Actions.

1. Where Declaratory Judgment Is Sought As To The Existence Of Coverage For Multiple Claims, No Final, Appealable Order Is Entered (Absent No Just Reason To Delay An Appeal Certification) Until The Trial Court Enters A Declaration As To All Coverage Issues Presented In The Complaint.

Nationwide Mut. Ins. Co. v. Pragotrade, Inc., 2010-Ohio-5603 (Eighth App. Dist.). Pragotrade, Inc. was insured by Nationwide Mutual Insurance Company. Pragotrade was sued in Pennsylvania for defective work. Nationwide filed a declaratory judgment action in Ohio seeking a declaration that it had no duty to defend or indemnify Pragotrade as to the liability claims for defective work and punitive damages claim pending against it in Pennsylvania. The trial court ruled that Nationwide had a duty to defend and indemnify Pragotrade as to the liability claims. However, the trial court also held the issue of coverage for punitive damages "has not been addressed by the parties either by testimony or in briefs" and "will not be determined." Nationwide appealed. The court of appeals dismissed Nationwide's appeal, holding that "[b]ecause the trial court failed to declare whether Nationwide has any obligation to indemnify Pragotrade for punitive damages as requested in its complaint" the trial court failed to resolve all claims. Because the trial court had declined to enter "no just reason to delay an appeal" certification there was no final, appealable order and the court of appeals lacked jurisdiction over the appeal.

2. A Declaratory Judgment Which Finds Certain Coverage Unavailable To The Plaintiff-Insured While Not Determining The Availability Of All Coverage(s) Sought In The Complaint Is Not A Final, Appealable Order.

Michaels v. Michaels, 2010-Ohio-6052 (Ninth App. Dist.). William Michaels drove his motorcycle off the road, injuring his wife and passenger, Debbie Michaels. Mr. Michaels was insured under a personal auto policy issued by Markel American Insurance Company. Mrs. Michaels sued her husband for negligence and his insurer seeking a declaration that coverage exists for: 1) Mrs. Michaels' liability claim against her husband; 2) her claim for medical payment coverage under the Markel policy; and 3) her uninsured motorist claim under the Markel policy. Apparently due to an intra-family exclusion, the trial court granted summary judgment to Markel, finding that no coverage existed for Mrs. Michaels' liability claim against her husband or her uninsured motorist claim under the Markel policy. But the trial court did not rule as to the availability of medical payment coverage under the Markel policy. Mrs. Michaels appealed. The court of appeals dismissed the case for want of jurisdiction, holding that: 1) the trial court did not declare all of the parties' rights and obligations because it failed to rule on the availability of medical payments coverage; 2) the trial court's ruling that Mr. Michaels was not entitled to liability coverage does not affect a substantial right because "[t]here is nothing about that determination that suggests that Ms. Michaels will be unable to obtain appropriate relief unless she is able to appeal it immediately"; and 3) the trial court did not find there to be no just reason to delay an appeal pursuant to Civ.R. 54(B).

I. Policy Conditions Of Coverage.

1. The Contractual Three-Year Limitation Period On UM/UIM Claims Runs From The Date Of The Accident, Not The Date One Of The Defendants Is Found To Be Immune By A Court.

Longley v. Thailing, 2010-Ohio-5012 (Eighth App. Dist.). The Longleys were struck by a City of Cleveland police officer while he was attempting to reenter the highway after assisting a stranded motorist on December 30, 2005. The Longleys sued the police officer and the city for negligence. In response, both asserted sovereign immunity. The trial court found the Longleys' claims barred by sovereign immunity, which decision was affirmed on appeal in 2009. In response, the Longleys amended their complaint to bring an uninsured motorist claim against their insurer, State Farm Insurance Company, in June of 2009. State Farm filed a motion for summary judgment based on the three-year post-accident limitation period on claims for uninsured motorist coverage under the terms of the State Farm Policy. The Longleys asserted that the three-year limitation period ran from the date that immunity was found by a court. The court of appeals disagreed and enforced the three-year limitation period from the date of the accident to bar the Longleys' claim reasoning that the city "was always immune under the facts of this case; the city did not become immune by virtue of our opinion."