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I. PRIORITY OF COVERAGE ANALYSIS[1]

Priority of coverage can be complex, and no insurer wishes to be placed in a position of paying more than it owes or, indeed, has contracted to provide. However, an insurer should not generally refuse defense or indemnity ***solely*** on the basis of being "excess" of other insurance. *See* OAC 3901-1-07. Where there is ***no*** dispute that coverage is available and a dispute between insurers arises solely as to priority of coverage, generally the insurers should cover the loss in equal shares. *Id*. The insurers involved should then resolve priority of coverage between themselves through negotiation, intercompany arbitration, or a declaratory judgment action. *Id*. An insurer which pays more than its share because other insurers have refused to pay their respective shares has not, generally, acted as a volunteer. *CNH Capital v. Janson Excavating, Inc*., 171 Ohio App. 3d 694, 2007-Ohio-2127.

Ohio statutory law does not regulate priority of coverage; it is governed solely by policy language and court decisions. Insurers may craft priority of coverage language to reflect the intent of the parties. There is no truly "standard" language. Determining priority of coverage, therefore, requires careful review of the specific language in the various policies covering the loss. However, following are some rules of general application which can assist in determining the priority of coverage.

Step 1: Determine Whether Coverage Is Available Under Multiple Policies.

Generally, this initial determination is governed by the type of loss, the type of coverage afforded under the various policies at issue, and the exclusions contained in those policies. This initial focus is on whether there is coverage under multiple policies, not the priority of coverage. (Of course, if coverage is not available under multiple policies, then there is no issue of priority of coverage.)

Although a complete analysis of coverage is beyond the scope of this article, it is noteworthy that some insurers have limited the initial grant of coverage, under certain circumstances, to persons who are "not insured" for this "coverage under another" insurance policy. Ohio appellate courts typically have found such provisions valid. *See, e.g., W. Am. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 1st Dist No. C-100012, 2010-Ohio-6311, ¶18, holding that "where an injured passenger having his own UM policy does not qualify as an insured under the car owner's insurance policy, a court need not compare the effects of the other insurance clauses in the respective insurance contracts." There is, however, continuing debate as to whether such clauses will ultimately be found effective by the Supreme Court of Ohio.

In *State Farm Mut. Auto. Ins. Co. v. Home Indemn. Ins. Co.*, 23 Ohio St.2d 45, 46 (1970), the Supreme Court of Ohio found that an "escape clause" which states that coverage is provided "but only if no other valid and collectible . . . insurance, either primary or excess . . . is available to such person" renders that policy primary to excess insurance. The court reasoned that, because excess insurance is not "collectible" until primary insurance is exhausted, there is no "other valid and collectible insurance" at the primary level and the "escape clause" does not apply. The policy with the "escape clause" was thus found primary to excess insurance.

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[1] This material has been prepared by professionals for general information ***only*** based on generic policy language and should not be utilized as a substitute for legal guidance. Readers should not act upon the information contained in these materials without professional advice.

It is unclear whether the Supreme Court of Ohio would apply similar analysis if faced with a conflict between: 1) an excess insurance provision; and 2) a clause limiting the definition of "Who Is An Insured" based on the existence of "coverage under another" insurance policy. While language limiting the definition of "Who Is An Insured" to instances where coverage is not available under other insurance has generally been found effective by Ohio appellate courts, a definitive determination has yet to be made by the Supreme Court of Ohio.

Step 2: Determine The Types Of "Other Insurance" Clauses At Issue.

After concluding that more than one policy provides coverage for the loss, the next step is to determine the types of "Other Insurance" clauses at issue. In general, there are six basic types of "Other Insurance" clauses, described as follows:

1) Pro Rata:

   If there is any other applicable liability insurance or bond, we will pay ***only our share of the damages***. ***Our share is the proportion that our limit of liability bears to the total of all applicable limits***. (Emphasis added.) *Motorists Mut. Ins. Co. v. Lumbermens Mut. Ins. Co.*, 1 Ohio St.2d 105, 106, 205 N.E.2d 67 (1965).

2) Equal Shares:

   If all of the other insurance permits ***contribution by equal shares***, we will follow this method also. Under this approach each insurer ***contributes equal amounts*** until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first. (Emphasis added.) *Western World Ins. Co. v. Erie Ins. Co.*, 2nd Dist. No. 10550, 1988 Ohio App. LEXIS 1775 (May 6, 1988).

3) Escape:

   Provides coverage for the insured "***but only if no other valid and collectible*** . . . ***insurance***, either primary or excess . . . ***is available*** to such person." (Emphasis added.) *State Farm Mut. Auto. Ins. Co. v. Home Indem. Ins. Co.*, 23 Ohio St.2d 45, 46 (1970).

4) Excess:

   Any insurance we provide will be excess over any other collectible insurance, self-insurance, or bond. Any insurance we provide for use of a covered auto by any person other than you will be ***excess over any other collectible insurance***, self-insurance, or bond. (Emphasis added.) *Aetna Cas. & Sur. Co. v. Buckeye Union Cas. Co.*, 157 Ohio St. 385, 390, 105 N.E.2d 568 (1952).

5) Excess Over Excess:

> Any insurance we provide shall be excess over any other collectible insurance. Any insurance we provide for use of your covered auto by any person other than you or any family member will be ***excess over*** any other collectible insurance, self-insurance or bond stated to be primary, contributing, ***excess or contingent***. (Emphasis added.) *Progressive Direct Ins. Co. v. Motorists Mut. Ins. Co.*, 191 Ohio App.3d 686, 2011-Ohio-315.

6) Super Excess:

> Under a "super excess clause," coverage is available only "***after exhaustion*** of all . . . insurance . . . whether primary, excess or contingent . . . ." (Emphasis added.) *Ohio Cas. Ins. Co. v. Chugach Support Servs.*, No. C10-5244 RBL, 2011 U.S. Dist. LEXIS 105187 (W.D. Wash. Sept. 16, 2011); *Maryland Cas. Co. v. Horace Mann Ins. Co.*, 551 F.Supp. 907, 910 (W.D. Pa. 1982). Generally, true "super excess" clauses are found only in high level (multi-million dollar) excess policies which also specify the underlying limits which must be exhausted.

The generic categories of "Other Insurance" language identified above can be useful in determining the type of clauses at issue as well as ascertaining if the language at issue is non-standard. In all instances, though, the precise language in the policies must be examined in light of the applicable case law.

Step 3: Determine Priority Of Coverage.

Once the types of clauses involved have been identified, the next step is to determine whether the "Other Insurance" provisions conflict. If there is no conflict between the "Other Insurance" provisions at issue, then they should be applied as written. For instance, if one insurer states that it is *pro rata* with other "applicable" insurance and the second policy states that it is "excess" over other "collectible insurance," then the *pro rata* policy is primary because the excess policy is not "applicable" until primary coverage is exhausted. *Trinity Universal Ins. Co. v. General Accident Fire & Life Assur. Corp., Ltd.*, 138 Ohio St. 488, 489, 35 N.E.2d 836 (1941); *Nationwide Mut. Ins. Co. v. Personal Serv. Ins. Co*, 8th Dist. No. 39987, 1980 Ohio App. LEXIS 13699 (Jan. 10, 1980); *United States Fidelity & Guaranty Co. v. Nationwide Mut. Ins. Co.*, 110 Ohio App. 363, 369, 163 N.E.2d 46 (8th Dist. 1959).

If the "Other Insurance" provisions are in conflict, i.e., two policies state that they are excess, then generally the following guidelines apply:

- If two policies both provide coverage on the same basis, they are *pro rata*, i.e., excess vs. excess = *pro rata*. *Buckeye Union Ins. Co. v. State Auto. Mut. Ins. Co.*, 49 Ohio St.2d 213, syllabus (1977).

- An "escape" provision "is innately obligatory" and construed to read "that its policy would insure the loss *'**but only if either no other valid and collectible primary automobile insurance*** or no other valid and collectible excess automobile insurance is available to the insured.'" *State Farm Mut. Auto. Ins. Co. v. Home Indemn. Ins. Co.*, 23 Ohio St.2d 45, 47-48 (1970). Thus, where one policy states that it is "excess" and the other policy contains an "escape clause," the policy with the "escape clause" is primary. *Id*. This is so because there is no other collectible "primary" insurance; there is only other "excess" insurance. *Id*.

- "Excess over excess" language is read to be "excess" insurance which prorates with other excess insurance. *Progressive Direct Ins. Co. v. Motorists Mut. Ins. Co.*, 191 Ohio App. 3d 686, 2011-Ohio-315.

The following chart provides examples of how these general principles may apply to the generic priority of coverage language addressed above. Again, though, this chart is no substitute for a detailed analysis of the particular language in the subject jurisdiction.

TYPE OF CLAUSE IN FIRST POLICY BEING ANALYZED							
TYPE OF CLAUSE IN SECOND POLICY BEING ANALYZED	**CLAUSE TYPE**	*pro rata*	escape	not insured if covered under other insurance	excess	excess over excess	super excess
	pro rata	*pro rata*	*pro rata* policy is primary	*pro rata* policy is primary	*pro rata* policy is primary	*pro rata* policy is primary	*pro rata* policy is primary
	escape	*pro rata* policy is primary	both policies primary *pro rata*	escape policy is primary	escape policy is primary	escape policy is primary	escape policy is primary
	not insured if covered under other insurance	*pro rata* policy is primary	escape policy is primary	both policies primary *pro rata*	excess is primary	excess over excess is primary	super excess is primary
	excess	*pro rata* policy is primary	escape policy is primary	excess is primary	both policies primary *pro rata*	both policies primary *pro rata*	excess is primary
	excess over excess	*pro rata* policy is primary	escape policy is primary	excess over excess is primary	both policies primary *pro rata*	both policies primary *pro rata*	excess over excess is primary
	super excess	*pro rata* policy is primary	escape policy is primary	super excess is primary	excess is primary	excess over excess is primary	both policies primary *pro rata*

Contribution by equal shares applies only if all insurance policies agree on that method and, therefore, it is not included in this chart, which is limited to conflicting "Other Insurance" clauses.

II. OHIO COURT OF APPEALS

A. Policy Language and Exclusions

1. An Employer Who Reimburses An Employee For Use Of His Own Vehicle Within The Course And Scope Of Employment Does Not "Hire" The Employee's Vehicle Under The Employer's Auto Liability Insurance.

21st Century Ins. Co. v. Estate of Doubrava, 8th App. Dist. No. 97903, 2012-Ohio-3374. Brenton, an employee of K. Roberts Construction, Ltd., was driving his pickup truck while towing a Roberts equipment trailer when he rear-ended a car, killing Ms. Doubrava who was a passenger in that vehicle. K. Roberts Construction was insured under an auto liability policy issued by 21st Century Insurance Company. 21st Century filed a declaratory judgment action against Ms. Doubrava's Estate asserting that no liability coverage existed because: 1) the definition of "insured" "does not include * * * Your employee if the vehicle is owned by that employee, that employee's family member, or a member of the employee's household"; 2) Brenton was not listed as an "operator" on the declarations page of the policy; 3) Brenton's truck was not listed as a "covered vehicle" in the declarations and did not qualify as "[a] newly acquired vehicle"; and 4) Brenton's truck was not a "temporary substitute vehicle" because it was not a temporary substitute for a disabled covered vehicle. The estate asserted in response that Brenton's truck qualified for coverage under the "hired vehicle liability only coverage endorsement" because Roberts paid Brenton $300 monthly, in addition to gasoline reimbursement, for use of his truck. The court disagreed, holding that because Brenton's "truck remained under his possession and control at all times" "it was not leased or hired for purposes of the insurance endorsement."

2. An Insured's Contractual Duty To Indemnify Another For Defense Of Liquor Liability Claims Arises Out Of Contract, Not The Sale Of Liquor, And Is Therefore Not Covered Under Liquor Liability Coverage.

Third Wing, Inc. v. Columbia Cas. Co., 8th App. Dist. No. 97622, 2012-Ohio-2393. Third Wing had a contractual indemnity provision in its franchise contract with Buffalo Wild Wings. Both Third Wing and Buffalo Wild Wings were sued for violating the Dram Shop Act. Third Wing paid Buffalo Wild Wings' attorney fees under the indemnification clause of their franchise agreement and then sued Columbia Casualty Company "claiming that those attorney fees were 'damages' that Columbia, its liquor liability insurer, was legally obligated to pay." The court disagreed, holding that "the 'injury' claimed by Third Wing arose because of the indemnity clause in the franchise agreement, not from selling, serving, or furnishing alcoholic beverages."

3. When Policy Defined "Insured" As Someone Related By Blood To Policy Holder, Remoteness Of Such Relationship Does Not Preclude Coverage.

United Ohio Ins. Co. v. Brooks, 3rd App. Dist. No. 12-11-04, 2012-Ohio-1469. The plaintiff was hit and injured by a child driving an ATV. The plaintiff brought suit against the child, his mother, and his mother's boyfriend, alleging that the latter two owned the ATV and negligently entrusted it to the child. At the time, the child and mother lived with the mother's boyfriend, who maintained a homeowner's policy with an insurer. The insurer filed a declaratory judgment action seeking a ruling that it owed neither indemnity nor defense to any defendant because the policy only covered the boyfriend and his family members, which were defined as "a person related to you by blood, marriage, or adoption who is a resident of your household." In response, the defendants submitted a genealogy report showing that the mother and boyfriend had the same great-great-great grandparents. Therefore the child and boyfriend were blood relatives with eleven degrees of separation. The trial court granted judgment to the insurer, deeming the kinship too remote. The appellate court reversed, finding that the term "related" was not defined in the policy, and should be given its ordinary meaning of "connected by common ancestry or sometimes marriage." The insurer argued that this would lead to an absurd result, as some remote relationship might be found to exist among any two people in a community. The court, however, found that the insurer failed to provide any other reasonable interpretation of the contract language, and therefore refused to draw "an arbitrary line in the genealogical sand."

4. A Named Driver Exclusion Added Midterm Or During A Policy Renewal Within The R.C. 3937.31(A) Two-Year Guarantee Period Is Statutorily Invalid And Not Supported By Consideration Unless The Insurer Can Show A Valid Statutory Basis For Cancelling The Policy.

Cincinnati Ins. Co. v. Song, 8th App. Dist. No. 97379, 2012-Ohio-1062. Latona was the named insured under an auto liability insurance policy issued by Cincinnati Insurance effective October 27, 2005 through October 27, 2006. In October 2005, Song was involved in a motor vehicle accident while operating Latona's car. Cincinnati requested information from Latona as to Song's driving record and warned: "If we do not hear back from you or receive this Cincinnati Insurance may take further action due to the increased risk[.]" Six months later, Latona executed a named driver exclusion which excluded coverage for any accident involving a vehicle operated by Song. In 2006, Song was involved in an accident caused by an uninsured motorist while operating Latona's vehicle. Cincinnati initially agreed to pay the claim and, in fact, began making payments. But six months later, Cincinnati reversed its position and demanded reimbursement from Song. Cincinnati then filed suit seeking a declaration of no coverage and reimbursement of the amounts it had paid. Cincinnati claimed "that the named driver exclusion was supported by consideration because the company did not cancel the policy due to Song's driving record." The trial court agreed and entered summary judgment in favor of Cincinnati. On appeal, Song claimed that Cincinnati was estopped from denying coverage after beginning to make payments. The court of appeals disagreed and

concluded that coverage cannot be created by waiver or estoppel. Song next argued that the named driver exclusion was not supported by consideration and was in violation of the two-year auto liability policy guarantee period in R.C. 3937.31(A). The court of appeals agreed because there was no evidence that Cincinnati had a statutory basis to cancel the policy mid-two year term when it issued the October 2005 letter warning of "further action due to the increased risk" which resulted in Latona executing the named driver exclusion which modified the policy midterm. Therefore, the court of appeals decided there was a question of fact as to whether the named driver exclusion was supported by consideration or violated the two-year policy guarantee period. The matter was remanded for further factual development at the trial court level.

5. Coverage Excluded For Bar Fight Under Assault Or Battery Exclusion.

Williams v. United States Liab. Ins. Group, 5th App. Dist. No. 2011 CA 00252, 2012-Ohio-1288. Plaintiff was a patron at Smitty's Pub. She exchanged words with security personnel and decided to leave. However, the nearest exit was blocked by disc jockey equipment and she had to exit through another door. While on her way out, she was struck by several people involved in an altercation. The trial court granted summary judgment for the defendant insurance company of Smitty's based on an assault or battery exclusion, which denied coverage for any suit "based on assault or battery…whether caused by or at the instigation or direction of an insured…or any other person." Appellant argued that the accident was "based on" the D.J. blocking the exit, not the assault by third parties. The court rejected that claim, finding injuries were "based on" the chain of events stemming from the physical altercation between other persons in the pub, as well as the alleged omissions by Smitty's employees in connection with suppression of the assault or battery.

6. Exclusion For Injuries "Arising Out Of Sexual Molestation" Sufficient To Preclude Coverage For Negligence Claims Against Mother Of Rapist For Failing To Prevent Son's Actions.

Crow v. Dooley, 3rd App. Dist. No. 1-11-59, 2012-Ohio-2565. While attending home daycare at the defendant's residence, the minor plaintiff was sexually assaulted by the defendant's son. Plaintiff filed a civil action against defendant and her son, claiming in pertinent part that the defendant's negligence allowed or contributed to her son's actions. The defendant's insurer intervened, seeking a declaratory judgment that no coverage existed under the applicable homeowner's policy. The policy contained an exclusion for "bodily injury or property damage arising out of sexual molestation, corporal punishment or mental abuse." The trial court found that the exclusion did not apply to the negligence claims against the defendant, so the insurer owed coverage. The appellate court reversed, holding that because the molestation exclusion encompassed all injuries arising from molestation, it precluded coverage "without regard to the specific causal connection to the molester or the requisite mental state of the alleged tortfeasor." The court distinguished this policy language from policy exclusions in other cases that contained requirements of intent, consent, knowledge, or acts and omissions with a foreseeable result.

B. Uninsured/Underinsured Motorist Coverage

1. No UM/UIM Coverage Based On Self-Insured Exclusion Where Defendant Was Municipality.

Thom v. Perkins Twp., 6th App. Dist. No. E-10-069, 2012-Ohio-1568. An officer pulled into a woman's driveway and exited the cruiser without turning the vehicle off. The police cruiser went forward, striking and pinning Ms. Thom between the rear of her vehicle and the front of the police cruiser. Defendant Perkins Township claimed immunity, and Ms. Thom asserted UM/UIM claims against Western Reserve under her auto policy. The trial court granted summary judgment for Western Reserve, citing the Supreme Court of Ohio's decision in *Snyder v. Am. Family Ins. Co.*, 114 Ohio St.3d 239, 2007-Ohio-4004, which held that insurers are not prohibited from excluding UM/UIM claims when the tortfeasor is statutorily immune from liability. The court also considered the effect of a policy provision limiting the agreement to pay UM/UIM benefits to compensatory damages an insured is "legally entitled to recover." The court held that such language "unambiguously denies coverage for injuries caused by an insured motorist who are immune from liability…." Thom appealed arguing that the decision in *Snyder* does not apply because the Western Reserve policy includes other policy language that conflicts with the blanket denial of UM/UIM coverage where there is immunity. Specifically, the policy provided that an "'uninsured/underinsured motor vehicle' does not include any vehicle or equipment….Owned by a governmental unit or agency, unless the owner or operator of the 'uninsured/underinsured motor vehicle' has….an immunity under the Ohio Political Subdivision Tort Liability Law…." The Sixth District cited conflicting Twelfth District and Eighth District decisions interpreting the same clause, but ultimately agreed with the Twelfth District that a conflict in policy provisions distinguishes the case from *Snyder* and found UM/UIM coverage was not barred. However, the court reversed the trial court and entered judgment in favor of Western Reserve because Perkins Township was a self insurer at the time of the accident, and the policy excluded UM/UIM claims for vehicles "owned or operated by a self insurer under any applicable motor vehicle law…."

C. Policy Cancellation

1. An Insurer Is Not Required To Send Written Notice Of Cancellation To All Insureds, Only The Named Policyholder.

Black v. Ryan, 11th App. Dist. No. 2011-L-030, 2012-Ohio-866. On July 4, 2008, Plaintiff Misty Black was a passenger on a motorcycle when it was struck by a vehicle operated by defendant Ryan. Plaintiff's claims against Nationwide included a UM/UIM claim. On May 14, 2008, Nationwide sent Plaintiff a notice of cancellation for nonpayment of premium. The policy was cancelled on May 26, 2008. Plaintiff argued and the trial court agreed that Nationwide was required to also send the written notice to plaintiff's daughter, who was an insured driver under the policy. The appellate court reversed and held that written notice was only required to be sent to the policyholder. Therefore, the Nationwide policy was properly cancelled.

D. Med Pay/Class Action

1. Class Action Against Insurer Related To Med Pay Review Process.

Wolfe v. Grange Indemn. Ins. Co., 5th App. Dist. No. 2010CA00339, 2012-Ohio-598. Grange had a med pay benefit under its policy that paid for "reasonable and necessary" medical expenses. It had a process wherein it forwarded medical bills to an unaffiliated third party, which would often reduce the allowed medical bills and print out a recommendation to Grange. The plaintiff filed a complaint for class action status, alleging a companywide policy of systematically underpaying med pay coverage claims. The court of appeals found that the class action was maintainable for policyholders who "made a payment that was reduced pursuant to the terms of the medical payments provision," but not for the class who "made medical payments claims on policies" and did not necessarily have a payment reduced. The second class would include people who have not suffered any damages, which would not meet the typicality requirement for class action suits.

E. Workmanship/Construction Claim

1. No Defense Obligation Pursuant To "Your Work" Exclusion.

Motorists Mut. Ins. Co. v. Gene Patton, Inc., 6th App. Dist. No. L-11-1180, 2012-Ohio-3112. Motorists' insured purchased a home from Patton, who was insured by Owners. Patton built the home, which began to leak through the windows and caused a crack to form on an interior wall. The complaint alleged Patton "negligently performed construction services in such a manner to cause water damage to plaintiff's real property…." The court of appeals affirmed the trial court's grant of summary judgment to Owners, finding it had no defense obligations. The court cited an exclusion for damages to property that "must be restored, repaired or replaced because 'your work' was incorrectly performed on it." "Your work" was defined to include "work or operations performed by you or on your behalf." The policy also excluded damages from materials furnished in connection with "your work," such as the windows. The court found this exclusion unambiguously barred coverage for the claims in the complaint. The court did not address the issue of consequential damages.

F. Prejudgment Interest

1. Contractual Prejudgment Interest Accrues From Date When Money Becomes Due and Payable Under The Policy Terms, Not From Date of Loss.

Stuckman v. Westfield Ins. Co., 3rd App. Dist. No. 3-11-18, 2012-Ohio-986. The plaintiffs suffered damages as a result of a house fire. The plaintiffs and their insurer could not agree on the amount

of loss, and an appraisal was subsequently performed pursuant to policy terms. After an amount was awarded and journalized by the court, the trial court further awarded the plaintiffs prejudgment interest from the date of the house fire. The insurer appealed, and the appellate court reversed. The court noted that prejudgment interest is governed by R.C. 1343.03(A), which provides that interest on written instruments such as insurance contracts begins to run "when money becomes due and payable." Under the terms of the insurance policy, loss was payable "60 days after we receive your proof of loss and * * * there is a filing of an appraisal award with us." The court therefore held that under the policy terms, money did not become "due and payable" until 60 days after the appraisal was filed with the insurer. Accordingly, the insured was only entitled to prejudgment interest from that date, not the date of loss.