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## Anatomy of a Claim – Initial Pleadings and Discovery

This article is the second of Gallagher Sharp’s “Anatomy of a Claim” series, and will provide an overview of the discovery process – our first article outlined the initial steps in claim handling from first notice to suit, concluding with law pertaining to the duty to defend.

One of the first questions after an insurer appoints defense counsel should be whether the case can or should be removed. A case is removable if the claims asserted arise under federal law, or if there is complete diversity amongst the parties and the amount in controversy is at least \$75,000. 28 U.S.C. §1441(a); 28 U.S.C. §1331; 28 U.S.C. §1441(a); 28 U.S.C. §1332. Federal court may be more favorable to a defendant. In federal court a civil plaintiff’s verdict must be unanimous, while in Ohio a plaintiff’s verdict needs only three-quarters of the jurors. Fed. Civ.R. 48(b); Ohio Civ.R. 48. Further, federal judges often have smaller caseloads and may be able to devote more time and attention to dispositive motions and discovery issues.

The next step is preparation of the pleading responsive to the complaint. Counsel may file a motion to dismiss pursuant to Ohio Civ.R. 12(B)(6) if the complaint fails to state a claim upon which relief can be granted, meaning that even taking all of the allegations in the complaint as true the plaintiff is legally barred from recovery. *Wright v. MetroHealth Medical Center*, 58 F.3d 1130, 1138 (6th Cir. 1995); *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545 (1992). In most cases, though, the complaint will not be subject to a motion to dismiss.

If and when the time comes to file an answer the allegations in the complaint will be admitted, denied, or denied for want of information. Ohio Civ.R. 8(B). All potential legal defenses should be asserted to avoid waiving them. Ohio Civ.R. 12(B). The answer may include cross-claims against a co-defendant who may be liable for all or part of the alleged damages, although cross-claims are not compulsory. Ohio Civ.R. 13(G). The answer may also include a counterclaim against the plaintiff, which may be mandatory if “it arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim.” Ohio Civ.R. 13(A). An insured should be notified of the potential need to assert compulsory counterclaims, for instance a claim for personal injuries arising out of the same accident. This notice should be in writing for the sake of posterity. A defendant may also file a third-party complaint bringing in another party to the suit. Ohio Civ.R. 14(A).

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## Ohio State Appellate Decisions

*Prior judgment collaterally estopped passenger from establishing driver was insured.*



Danny Norman Sr. rented a 1997 Dodge Intrepid for his son, Danny Jr., to drive. The Intrepid was involved in a single-car accident. At the time of the accident, Roy Crackle was driving the Intrepid and Danny Jr. was riding as a passenger. James Hicks, also riding as a passenger, sustained serious injuries. Hicks filed suit against Norman Sr. and Crackle and claimed that Norman Sr. negligently entrusted the vehicle to Crackle. The trial court granted Norman Sr. summary judgment and found that he did not entrust the car to Crackle but only entrusted it to his son, Danny Jr.

Subsequently, Hicks filed a second suit seeking a declaratory judgment that Crackle was an insured under Norman Sr.'s State Farm automobile insurance policy. Under the State Farm policy, one who has the consent of the named insured may be considered an insured. The court held that this fact was already litigated in the first suit and Hicks was collaterally estopped from arguing it again. The court precluded any finding of coverage under the insurance policy. [\*Hicks v. State Farm Mut. Auto. Ins. Co.\*, 2017-Ohio-7095.](#)

*"Other Insurance" clause not an escape clause when individual not an "insured" under policy.*

Kulwinder Singh was driving a car owned by his brother, Bittu Multani. Singh possessed insurance coverage via a policy issued to him by 21st Century Insurance Company, while Multani was insured under an American Family policy. While driving Multani's vehicle, Singh caused a collision with a motorcyclist. Plaintiff filed suit against Singh, Multani, and their corporations alleging negligent entrustment against Multani and negligence against Singh. Singh and Multani both filed answers. A motion to dismiss the corporations was filed and granted by the court. Later, Singh filed a third-party complaint against American Family (Multani's insurer) seeking a declaratory judgment regarding coverage and defense under the policy issued by American Family.



American Family filed a motion for summary judgment and argued that Singh was not an insured under the policy. American Family defined an insured as "a. [Y]ou or a relative and b. [A]ny person using your car who is not an insured for vehicle liability covered by any other insurance policy, a self insurance program or a liability bond while using such a car." It further defined a relative as "a person living in your household related to you by blood, marriage or adoption." At the time of the accident, Singh had his own insurance policy and had not lived in the same household as Multani for several years. Singh argued that the American Family policy was an invalid escape clause based upon a claimed conflict with an "other insurance" clause in Singh's 21<sup>st</sup> Century policy. The trial court granted summary judgment, finding that the American Family policy was not an escape clause and Singh did not meet the definition of an insured person. The trial court found that the clauses were not in conflict.

A consent judgment in the amount of \$150,000 was obtained against Singh. 21st Century remitted policy limits of \$50,000.00, leaving an unsatisfied judgment in the

amount of \$100,000. In the consent judgment, any rights that Singh had against American Family for its denial of coverage were assigned to the plaintiff. Singh appealed the trial court's granting of summary judgment in favor of American Family.

The court of appeals affirmed the win for American Family, citing *Engler v. Stafford*, 6th Dist. No. L-06-1257, 2007-Ohio-2256 as support. The sixth district found that the record clearly shows that Singh possessed an applicable insurance policy and he lived in a separate household from Multani at the time of the accident. Singh was not an insured and because the case did not involve an escape clause, the other insurance clause was never triggered. [\*Egert v. Singh Bros., LLC\*, 2017-Ohio-4017.](#)

*Order on motion to stay discovery not necessarily a final appealable order.*

The Jones home burned down. Nationwide believed Jones intentionally set fire to the home and committed fraud, so Nationwide filed suit seeking a declaratory judgment on coverage. Jones counterclaimed for breach of contract and bad faith. Nationwide filed a motion to bifurcate and stay discovery regarding the bad faith claim until the contractual dispute was resolved. Nationwide asserted that Jones requested privileged information, because he sought to take a deposition of its trial counsel which would breach attorney-client privilege and disclose attorney work product. The trial court granted the motion to bifurcate, ruling the bad faith claim would be tried immediately after the contractual claim with the same jury. The court also denied the motion to stay discovery. Nationwide appealed. The fourth district held that a ruling on a motion to stay discovery was not a final appealable order. The appellate court found that it is not until a court compels a party to produce specific purportedly privileged documents or communications that a final and appealable order exists. [\*Nationwide Mut. Fire Ins. v. Jones\*, 2017-Ohio-4244.](#)



*Insurer who pays a third-party claimant with knowledge of the claimants' former counsel's lien and without protecting that lien may incur duplicate liability.*

Progressive insured Thornton who negligently caused an accident with Thomas. Thomas retained Kisling, Nestico & Redick, aka KNR, as his attorneys. Thomas became dissatisfied and discharged KNR. KNR advised Progressive of its prior fee agreement and asserted a charging lien based on work performed against any amounts paid in settlement of the claim. Progressive then settled directly with Thomas, without paying KNR. KNR sued Progressive for failing to protect its lien. The court found that "KNR's charging lien is enforceable against Progressive" because "Progressive had knowledge of KNR's charging lien before it settled Thomas's claim and, despite this knowledge, distributed the settlement proceeds to Thomas solely." Thus, Progressive incurred duplicate liability. [\*Kisling, Nestico & Redick, L.L.C. v. Progressive Max Ins. Co.\*, 2017-Ohio-8064.](#)

*A three-year contractual limitation period on suit by the insured is valid and enforceable under current Ohio law.*



Leon was involved in a motorcycle accident with a phantom vehicle while insured by State Farm for uninsured/underinsured motorist coverage. The State Farm policy contained a three-year contractual limitation period for bringing suit against State Farm for coverage. State Farm informed Leon of the three-year limitation period and stated that Leon could not sue the unknown tortfeasor but had to sue State Farm within the three-year contractual limitation period. Leon failed to do so. The court found the three-year contractual limitation period clear, unambiguous, and fully enforceable under Ohio statutory law, and affirmed summary judgment in favor of State Farm. [\*Leon v. State Farm Fire & Cas. Co., 2017-Ohio-8168.\*](#)

*Plaintiff must be "insured's" employee for coverage to be excluded pursuant to employment/employer exclusion clauses.*

Brian Goodell suffered injuries when struck by a truck he was servicing for his employer, Wylie & Sons. The truck had been put into gear by Shawn Pasquale, a friend of Thomas Wylie who would often work in the garage. Goodell sued Pasquale for negligence, obtained a default judgment, and filed a supplemental complaint against Motorists claiming his loss was covered under policies issued to Wylie & Sons. The trial court found that the claim was covered under a business auto policy, and Motorists appealed.



The court of appeals first rejected Motorists' argument that Pasquale was co-employee because the record did not establish that Pasquale was actually an employee. The court thus found that the co-employee exclusion did not apply. Motorists also argued that two exclusions barred coverage: (1) a workers' compensation exclusion barring coverage for "Any obligation for which the 'insured' or the 'insured's' insurer may be held liable under any workers' compensation...law.;" and (2) an employer's liability exclusion barring coverage for "Bodily injury" to "An 'employee' of the 'insured'" arising out of the scope of the employee's job. The court of appeals found that neither exclusion applied. The court cited the severability clause and found that Pasquale was also an insured under the policy and that: "Each insured is considered individually as to whether the exclusion applies and the language clearly applies the exclusions to Wylie & Sons but not Pasquale because he is not Goodell's employer." [\*Goodell v. Motorists Mut. Ins. Co., 2017-Ohio-8425.\*](#)

## U.S. Sixth Circuit Court Opinions

*Excess insurer may recover defense costs.*



In an appeal from the Northern District of Ohio, the Sixth Circuit affirmed the trial court's decision to grant partial summary judgment to the excess insurer, awarding \$8 million in defense costs from the primary insured. The court held that the excess insurer was entitled to equitable indemnification under Ohio law. By the terms of its policy, the primary insurer was obligated to defend the insured and pay all defense costs (without limit) for any lawsuit where any part of the damages owed by the insured would fall within the CGL policy limits. When the primary insurer failed to do

so, and the excess insurer fulfilled the obligation, the excess insurer could recover under equitable indemnification under Ohio law. As the primary insurer derived a benefit from the excess insurer providing defense costs, all the elements of equitable indemnification were met. *IMG Worldwide, Inc. v. Great Divide Ins. Co.*, 2017 U.S. App. LEXIS 16311 (6<sup>th</sup> Cir. Aug. 23, 2017)

*Sixth Circuit reverses summary judgment on negligent misrepresentation claim.*

Plaintiff had purchased an automobile policy and an umbrella policy from Liberty Mutual. Based on the plaintiff's conversations with several Liberty Mutual sales employees, he believed that the umbrella policy provided excess underinsured/uninsured coverage. Following an automobile accident caused by a third party, Liberty Mutual informed the insured that the umbrella policy did not provide UM/UIM coverage. The plaintiff sued, alleging negligent misrepresentation, breach of contract, negligent hiring, and breach of fiduciary duty. The district court granted summary judgment on the plaintiff's negligent misrepresentation claim, holding that the plain language of the policy did not include UM/UIM coverage.

The Sixth Circuit reversed, holding that there was a genuine issue of material fact as to plaintiff's claims. The UM/UIM language in the umbrella policy was unambiguous, as it excluded UM/UIM coverage except as "specifically listed on your policy declarations." Even so, the policy declarations page specifically listed the automobile policy and included UM/UIM coverage. As such, the Sixth Circuit reversed the district court's decision to grant summary judgment in favor of Liberty Mutual. *Abboud v. Liberty Mut. Ins. Group, Inc.*, 2017 WL 4511488 (6<sup>th</sup> Cir. Oct. 10, 2017)



## Federal District Court Decisions

*Insurer does not owe coverage in invasion of privacy case.*

Liberty Mutual filed a declaratory action seeking the court to hold it was not required to provide coverage for the alleged acts of its insured, James Anderson. Anderson was sued in state court by his ex-wife, who alleged that he sent her harassing e-mails and leaked sexually explicit images and videos of her online. The court held that the claims made against Anderson were not an "occurrence" under the policy. The plain language of the policy was clear and unambiguous. As the claims Anderson were premised on intentional acts, Liberty was not required to provide a defense or indemnify Anderson against claims of invasion of privacy, false light, public disclosure of private acts, intentional infliction of emotional distress, defamation per se, and punitive damages. *Liberty Ins. Corp. v. Anderson*, 2017 U.S. Dist. LEXIS 107899 (N.D. Ohio Jul. 12, 2017).



*Northern District of Ohio grants summary judgment to insurer in fire loss case.*



On January 1, 2015, there was an arson fire at the insureds' residence. State Farm conducted an examination under oath of the insureds. Following the examinations under oath, State Farm requested certain financial documents and other evidence of the insureds' whereabouts at the time of the arson fire. After repeated attempts to obtain the requested information from the insureds for months following the fire, State Farm denied the claim based on the insureds' failure to cooperate as required by the terms of the policy. The insureds filed suit, alleging that State Farm had breached its policy and committed bad faith.

The Northern District of Ohio granted summary judgment in State Farm's favor, holding that the plaintiffs' failure to produce the requested documentation resulted in substantial and material prejudice to State Farm. As such, the court held there was no genuine issue of material fact on plaintiffs' breach of contract claim. Plaintiffs' bad faith claim was also dismissed on summary judgment because the court held that State Farm did not breach the insurance contract. *Bolton v. State Farm Fire & Cas. Co.*, 2017 WL 5132732 (N.D. Ohio Nov. 6, 2017).

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Once an answer is filed the parties will start formal discovery. This may include the exchange of written discovery such as interrogatories, requests for production of documents, and requests for admission, as well as depositions, or an independent medical examination. Which discovery tools defense counsel chooses to utilize should depend on the case, and factors may include:

- The overall plan of action;
- The seriousness of the injuries or damages;
- Whether there is a liability defense;
- Whether opposing counsel is competent or cooperative; and
- Viability of a dispositive motion.

Most case management schedules include a dispositive motion deadline after the discovery deadline. Dispositive motions are those that will resolve a case in whole or in part; the most common type<sup>1</sup> is a Civ.R. 56 motion for summary judgment, which may be granted if the evidence shows no genuine issue of material fact when the evidence is construed in a light most favorable to the plaintiff. Ohio Civ.R. 56(C); *Temple v. Wean United, Inc.*, 50 Ohio St. 2d 317, 327 (1977). As a practical matter, the success of a motion for summary judgment may depend on the assigned judge. Defense counsel should be able to provide information on prior rulings of the judge, which may give some insight into what ruling might be expected.

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Most courts will schedule a final pretrial or settlement conference after discovery and before trial, which someone with full and final settlement authority is often required to attend. Just how productive this is depends on the venue and judge – some judges and court mediators devote significant time and effort to settlement negotiations and some do not.

The parties may also wish to explore private mediation, which may be more productive than mediation through the court because (1) the parties can choose the mediator, (2) the mediator may have more time to devote to the case, and (3) the parties can decide when the case is ready to mediate.

In all cases, the pleadings and discovery should reflect the plan of action agreed to by the client and attorney.

<sup>1</sup>A party may also file a motion for judgment on the pleadings after “the pleadings are closed but within such time as not to delay the trial,” which relies on the complaint and answer, including any materials that a party attaches to the answer. Ohio Civ.R. 12(C). In theory this could dispense of claims before costly discovery by providing the court with some information not included in the complaint. However, in practice courts rarely grant such motions and often will simply deem them early motions for summary judgment.

## Gallagher Sharp is Now Open in Columbus

Gallagher Sharp is pleased to announce that it opened an office in Columbus, Ohio, in addition to our offices in Cleveland, Toledo, and Detroit, Michigan. The new office allows Gallagher Sharp to better serve our clients in central and southern Ohio, and handles all practice areas including insurance coverage and litigation. For questions please contact, Steven Strang at [SStrang@Gallaghersharp.com](mailto:SStrang@Gallaghersharp.com), the partner in charge of the Columbus office.

### *About Gallagher Sharp*

*For over 100 years Gallagher Sharp LLP has provided aggressive and cost-efficient representation in a wide variety of civil litigation. Our registered service mark -- “Solutions, Not Surprises” -- embodies Gallagher Sharp’s core philosophies and illustrates our commitment to partnering with clients by providing prompt and accurate reporting, case evaluations focused on early resolution strategies, thorough knowledge of your industry, client-oriented seminars, publications, and news advisories, rapid and on-site response to accidents, and nurse paralegals to assist in injury and wrongful death issues. We believe our client team structure gives clients the benefits of small firm responsiveness and accountability as well as large firm stability, experience, and resources.*



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