Gallagher Sharp LLP

Insurance Newsletter

April 2016

Special Interest Areas:

Individual Highlights:

Prejudgment Interest on Contracts

A party who has lost a significant case understands that an adverse verdict may be only the beginning of that party's problems. For instance, the plaintiff may seek prejudgment interest (PJI) from a defendant. In Ohio, insurers may have PJI exposure on contract claims.

This newsletter summarizes the law governing contract, not tort, PJI. We cite the statute providing for contractual PJI, address when the obligation accrues, and note how to calculate PJI.

Contract PJI – R.C. 1343.03(A)

An award of prejudgment interest on a contractual 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.*, 73 Ohio St. 3d 110, 114 (1995). 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.*, 82 Ohio St. 3d 339, 341-342 (1998).

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. In an uninsured-underinsured motorist case 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.

(*Continued on page 8*)

Supreme Court of Ohio

Insurance company does not become a party to a "consumer transaction" under the Ohio Consumer Sales Practices Act when issuing a repair estimate.

In a 5-2 decision, the Supreme Court of Ohio held that an insurance company does not become a party to a "consumer transaction" under the Ohio Consumer Sales Practices Act ("CSPA"), R.C. Chapter 1345, when the insurance company issues a repair estimate in relation to its policyholder's claim for motor-vehicle damage. The court recognized that R.C. 1345.81(B) and (D) expressly require insurers to comply with their requirements for providing estimates that incorporate parts that are not manufactured by the original equipment manufacturer; however, R.C. 1345.81(E), the statute's remedial section, does not state that a violation of R.C. 1345.81 by an insurer constitutes an unfair and deceptive act or practice. Instead, R.C. 1345.81(E) expressly limits unfair and deceptive acts or practices to violations "of this section **in connection with a consumer transaction as defined in section 1345.01 of the Revised Code**." (Emphasis supplied by court.) "Consumer transactions" are defined in R.C. 1345.01 to not include transactions between insurance companies and their customers. The court concluded, "Thus, because an insurer cannot be a party to a consumer transaction, an insurer cannot commit an unfair or deceptive act or practice under R.C. 1345.81(E)." *Dillon v. Farmers Ins. of Columbus, Inc.*, 145 Ohio St.3d 133, 2015-Ohio-5407.

Ohio State Appellate Decisions

Listing a category of vehicles for a type of coverage by symbol creates an ambiguity resulting in coverage even if no premium is paid for that type of coverage.

Donald Dlesk died in a single-vehicle accident, and the State Highway Patrol called Westfall Towing to clear the accident scene and remove Dlesk's vehicle. Dlesk was insured by Ohio Mutual Insurance Group. Westfall Towing obtained a judgment of just under $10,000 against Dlesk's estate for towing and storage. Westfall Towing then filed a supplemental complaint against Ohio Mutual. There was no dispute that coverage would exist if "Physical Damage Collision" coverage was afforded under the insurance policy at issue. Ohio Mutual asserted that "in order for collision coverage to have been in effect, the '7' had to be present **and** there had to be a premium charge listed." (Emphasis added.) Here Symbol 7 was listed, but no premium was charged for "Physical Damage Collision" coverage. The court found an ambiguity because "[u]nder the insurer's interpretation of the policy, the 7 listed next to physical damage collision coverage would be meaningless" and "[u]nder [the claimant's] interpretation, the 7 would indicate collision coverage." The court interpreted the ambiguity against the insurer and found coverage was owed though no premium was charged for the coverage. *Westfall v. Estate of Donald Dlesk*, 7th Dist. No. 14 HA 17, 2015-Ohio-4313.

Even if there was lawful basis to deny the claim, bad faith may exist without an underlying breach of contract where the insurer intentionally failed to determine whether there was any lawful basis to deny the claim.

Plaintiffs were involved in an automobile accident while insured by Nationwide. The Nationwide policy provided $5,000 in no fault medical payments coverage. Nationwide refused coverage and plaintiff sued for breach of the medical payments coverage provisions and bad faith. Because plaintiffs had received full reimbursement in a settlement with the tortfeasor, the trial court entered summary judgment in favor of Nationwide, finding no damages relating to plaintiffs' breach of contract claim, but plaintiffs' bad faith claim remained pending. The Seventh District Court of Appeals affirmed the entry of summary judgment in favor of Nationwide based on the absence of breach of contract damages. As to bad faith, the court reasoned that "[t]here are two types of bad faith claims: (1) when an insurer breaches its duty of good faith by intentionally refusing to pay an insured's claim where there is no lawful basis for the refusal coupled with actual knowledge of that fact; and (2) when an insurer breaches its duty of good faith by intentionally refusing to pay an insured's claim where the insurer intentionally failed to determine whether there was any lawful basis for such refusal." The first type requires plaintiffs to succeed on a breach of contract theory, "the second type of bad faith claim is not as dependent on the contract claim." "In the second type of claim, the insured need only establish that the insurer had no reasonable justification to fail to determine whether its refusal had a lawful basis." The court found an issue of fact presented because Nationwide initially made payment, retracted payment, delayed making contact with one insured until more than three months after the claim was made, and then only had intermittent contact with the insured, for instance, an eight month hiatus and a ten month hiatus. The court concluded that "it is possible that the insured would be unable to prove the insurance company's refusal to pay on the claim was unlawful, but still be able to prove that insurer failed to determine whether the refusal had a lawful basis" and remanded the matter to the trial court for trial on the bad faith claim. One judge dissented and believed that because the claim was "fairly debatable" there could be no bad faith**.** *Ballard v. Nationwide Ins. Co.*, 7th Dist. No. 14 MA 85, 2015-Ohio-4474.

Equitable relief constitutes "damages" under policy.

Joseph McNabb was sued for unjust enrichment after his wife embezzled money from her employer. Wayne Mutual denied Mr. McNabb a defense and indemnity under a farm-owners insurance policy. In a declaratory judgment action the trial court granted summary judgment in favor of Wayne Mutual. The Fourth District Court of Appeals reversed. Wayne Mutual argued on appeal that the policy did not cover the unjust enrichment claim because it sought equitable relief, which Wayne Mutual argued did not constitute "damages." The policy provided that Wayne Mutual had "duty to defend any suits seeking….damages." The court cited Black's Law Dictionary in finding that the meaning of damages was broad enough to include restitution of money because "restitution damages" are defined as "damages awarded to a plaintiff when the defendant has been unjustly enriched at the plaintiff's expense." The court cited testimony by Wayne Mutual's vice president of claims stating that it was "pretty clear (Mr. McNabb) was being sued for damages." *Wayne Mut. Ins. Co v. McNabb*, 4th Dist. No. 15CA1, 2016-Ohio-153.

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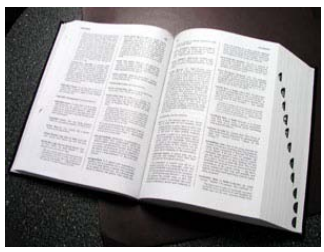

After a judicial determination that there is no duty to defend, an insurer that defends an insured under a reservation of rights is entitled to recover its defense costs under a theory of restitution.

In *Chiquita Brands Int'l, Inc. v. Nat'l Union Fire Ins. Co.*, the First District Court of Appeals affirmed a judgment in favor of National Union, holding that it was entitled to recover its defense costs. The underlying claims against Chiquita alleged that the claimants had been injured by Chiquita's financing of terrorist groups in Columbia from 1989 to 2004. National Union initially refused to defend Chiquita against those claims. However, the trial court ruled that it must do so, and National Union started to provide a defense under a reservation of rights, including the right to seek reimbursement of the defense payments.

The First District, in a prior appeal, ruled that National Union did not have a duty to defend Chiquita. On remand, the trial court determined that National Union was entitled to recoup $11,744,014.87 in defense costs plus $1,247,042.79 in prejudgment interest on the ground that an implied-in-fact contract was created through the letters that had accompanied National Union's defense-cost payments. The appellate court rejected that theory because the subject policies were silent as to reimbursement of defense costs. However, the court of appeals held that National Union was entitled to recover those defense costs under a restitution theory. Specifically, the court held, "where (1) an insurer does not provide a defense until after a court has entered judgment declaring that the insurer has a duty to defend, (2) the insured demands that the insurer provide a defense, (3) the insurer provides the defense under a reservation-of-rights stating that it may seek to be reimbursed, and later (4) an appellate court determines that a duty-to-defend never existed, then (5) the insurer is entitled to be reimbursed for its defense-cost expenditures under a theory of restitution." (*Id*. at ¶24.) The court did note that its holding is "narrow" and based on the "particular facts of this case." *Id*.

In his dissent, Judge Stautberg stated that the duty to defend is broader than the duty to indemnify, but National Union has "asked the court to narrow its broad obligation to defend, so that the duty to defend is coterminous with the duty to indemnify." *Id*. at ¶38. Judge Stautberg also noted that no Ohio state court has weighed in on the issue, and there is a split of authority among other jurisdictions. Specifically, he observed that cases that do not allow for reimbursement of defense costs generally turn on the fact that the policy at issue does not provide for reimbursement. Finally, Judge Stautberg stated that because this was a declaratory judgment action and there was no monetary judgment issued against National Union, the theory of restitution did not apply because National Union made the defense payments voluntarily. *Chiquita Brands Int'l, Inc. v. Nat'l Union Fire Ins. Co.*, 1st Dist. No. C-140492, 2015-Ohio-5477.

Genuine issues of fact preclude summary judgment in favor of insurer on liability under an auto policy where heavily intoxicated insured drove his truck into a bar resulting in bodily injury to patrons.

The Second District Court of Appeals reversed a trial court's grant of summary judgment, which held that there was no coverage under a State Farm auto policy for claims made by patrons who were injured when a heavily intoxicated Marvin Schalk drove his truck into a bar. Just prior to doing so, Schalk had had been asked

to leave the bar because of inappropriate conduct arising from encountering his estranged wife there and being upset over comments made to her by another man. Schalk texted his wife that he wanted to talk, he was "gonna crash through the front door," and felt he had "nothing to lose." Schalk pled guilty to two counts of felonious assault. State Farm filed a declaratory judgment action seeking a declaration that there was no coverage under the auto policy issued to Schalk because the bodily injury did not arise from an "accident" and/or was excluded from coverage by an intentional acts exclusion. The trial court granted State Farm's motion for summary judgment, applying the inferred intent doctrine, and finding that the extensive nature of the property damage caused by Schalk's actions necessarily resulted in bodily injury to the patrons. The court of appeals reversed the trial court, holding that the trial court erred as a matter of law that the scope of the damage permitted the inference of an intent to cause bodily injury. In doing so, the court noted that Schalk stated he did not intend to hurt anyone and the evidence suggested he drove into the bar through a window that would have been hard to see into from his truck.

In his dissent, Judge Hall noted that Schalk had expressed his intent by stating he was "gonna crash through the front door," he had driven at an estimated speed of 43 mph into the bar, and had shifted in reverse to try to back out after doing so. Thus, the event was no accident and should be excluded as an intentional act. Judge Hall asserted that this case is identical to *State Farm Mut. Ins. Co. v. Gourley*, 10th Dist. No. 12AP-200, 2012-Ohio-4909, wherein the tenth district held that there was no coverage under an auto policy for bodily injuries caused when an insured intentionally rammed her vehicle into another, resulting in bodily injury to the occupants, because there was no "accident." Judge Hall stated that "only a dolt" would not be able to realize that driving through a small occupied bar would result in injury to its occupants, and that Schalk's uncorroborated subjective self-serving statements that he did not intend to cause the injuries were insufficient to create a genuine issue of fact under these circumstances. *State Farm Mut. Auto. Ins. Co. v. Schalk*, 2nd Dist. No. 26573, 2016-Ohio-732.

A fax blast is not a covered "occurrence" because the resulting property damage is intended from the standpoint of the insured.

Beachwood Hair Clinic sent a blast fax in violation of the federal Telephone Consumer Protection Act ("TCPA") and sustained a $4 million adverse judgment in the class action lawsuit that followed. Beachwood Hair Clinic had CGL coverage with Acuity. Acuity paid the $2 million limits under the invasion of privacy coverage, which did not require an occurrence or exclude expected or intended harm. Acuity was sued under another part of the policy which did require an occurrence and had an expected or intended harm exclusion. The remaining limits were $2 million. Beachwood Hair Clinic claimed that it had no intent to violate the TCPA because the Clinic had hired a third-party vendor who represented (falsely) that it had consent to send the faxes. The court concluded "that the property damage was not caused by an 'occurrence'; it was expected or intended by the insured, and the exclusion clause applies to preclude coverage under the property-damage provisions of the insurance agreement." The court stated "'property damage' was 'inherent' in the very nature of sending a junk fax" because it necessarily resulted in the expenditure of paper and ink. *Acuity, A Mut. Ins. Co. v. Siding & Insulation Co.*, 8th Dist. No. 103180, 2016-Ohio-1381.

Federal District Court Opinions

A. Northern District

Policy does not cover damages resulting from employee theft.

The court concluded that an insured was not entitled to coverage under a policy of insurance following the theft of over $1 million through a check fraud and wire transfer fraud scheme perpetrated by one of the insured's employees. Construction Contractors Employer Group had a policy of insurance from Federal Insurance Company that contained a "Crime Coverage" provision, but the policy expressly excluded coverage for any loss that an insured was aware of prior to the inception date of the policy. The policy was for the time period of March 22, 2013 through July 1, 2013. The plaintiff policyholder became aware of the theft by its employee in July of 2012, and completed a forensic accounting investigation to determine the complete scope of the theft in May of 2013. The court held that because there was undisputed evidence demonstrating that the policyholder was aware of the thefts prior to the March 22, 2013 inception date of the policy, Federal Insurance Company was entitled to judgment as a matter of law. *Constr. Contrs. Emplr. Grp., LLC v. Fed. Ins. Co.*, 2015 U.S. Dist. LEXIS 152388 (N.D. Ohio Nov. 10, 2015).

Contractual liability provision precludes coverage.

The Contractual Liability Provision in a Liberty Mutual policy, the court held, barred coverage for property damages resulting from the insured's sale of faulty cap screws. Plaintiff, Supply Technologies, LCC, incorporated faulty components into its cap screws, which caused significant damages to third parties. Liberty Mutual had issued a CGL policy that included a "contractual liability exclusion" precluding coverage for losses stemming from the loss of use caused by the defective cap screws. The CGL policy did not cover "property damage" for which the insured is obligated to pay damages by reason of assumption of liability in a contract or agreement. The court held that the subject losses were business risks inherent in supplying parts. The court held that Liberty Mutual was justified in denying coverage under the policy and granted its motion for summary judgment. *Park-Ohio Holdings Corp. v. Liberty Mut. Fire Ins. Co.*, 2015 U.S. Dist. LEXIS 147602 (N.D. Ohio Oct. 30, 2015).

B. Southern District

Policy does not cover damages resulting from sexual molestation.

The court held that coverage under a policy of insurance was not available to compensate an injury caused by the sexual misconduct of a clergyman because the clergyman's actions were intentional and not committed within the scope of his employment. In a separate action, plaintiffs, who were minors at the time of the incident, recovered $4,350,000 in damages against an associate pastor of the church for sexual assaults. The Ohio courts held that the associate pastor was not acting in his

official capacity at the time of the assaults, and plaintiffs' judgment was awarded solely against the associate pastor and not the church. Plaintiffs sought to collect their judgment from Church Mutual Insurance Company, which had insured the church at the time of the incident. Specifically, plaintiffs sought recovery under the general liability and sexual molestation liability coverages in the Church's policy.

The parties moved for summary judgment. Defendant argued that public policy of the State of Ohio set out by the Supreme Court of Ohio in *Gearing v. Nationwide Ins. Co*., 76 Ohio St. 3d 34, precludes liability insurance coverage for injuries resulting from sexual molestation of a minor. The court agreed, as the definition of "occurrence" was the same in this policy as it was in *Gearing*. Further, when an individual commits an act of sexual misconduct, intent is inferred, and his acts cannot be an accident. Thus, there was no coverage under any section of the policy requiring an "occurrence."

Although the sexual molestation liability coverage did not require an "occurrence" to trigger coverage, the court held that the sexual misconduct and sexual molestation liability coverage did not apply in this case. The policy stated that it will not apply to "any person who personally participated in any act of sexual misconduct or sexual molestation." As plaintiffs' judgment was solely against the associate pastor, who participated in the sexual molestation, there was no coverage for his actions under the policy. *Clifford v. Church Mut. Ins. Co.*, 2015 U.S. Dist. LEXIS 138271 (S.D. Ohio Sept. 30, 2015).

Insurer is entitled to summary judgment as the owner of a residential property was not an insured under a landlord policy.

This case involved a "Dwelling Fire Three Policy Landlord" policy purchased by The Gerson Company from Foremost Insurance Company. Gerson sold a residential property to a tortfeasor in August of 2008, and issued the tortfeasor a general warranty deed. The tortfeasors gave Gerson a mortgage to secure the purchase price of the property, but failed to make any mortgage payments. Gerson did not take any steps to foreclose on the mortgage. On September 22, 2012, plaintiff Virginia Whitman was severely injured in a dog attack on the property. She obtained a default judgment against the tortfeasor and sought to recover her damages from the Foremost insurance policy issued to Gerson.

The court held that the Foremost policy did not cover the tortfeasors in this matter. The issue before the court was whether the tortfeasors were "employees" or "residence employees" under the policy, and there was no evidence in the record that Gerson had the right to control the tortfeasors' activities in maintaining the property. Further, Gerson did not pay the tortfeasors a salary or wages. Therefore, the tortfeasors were not employed by Gerson at the time of this incident and could not be considered named insureds under the policy. The court also held that the fact that the tortfeasors were in default of their mortgage at the time of the incident was inconsequential. Foremost Insurance was granted summary judgment. *Whitman v. Foremost. Ins. Co.*, 2015 U.S. Dist. LEXIS 148190 (S.D. Ohio Nov. 2, 2015).

Gallagher Sharp LLP

CLEVELAND
Sixth Floor. Bulkley Bldg.
1501 Euclid Avenue
Cleveland, Ohio 44115
216.241.5310 PHONE
216.241.1608 FAX

TOLEDO
420 Madison Avenue
Suite 1250
Toledo, Ohio 43604
419.241.4860 PHONE
419.241.4866 FAX

DETROIT
211 West Fort Street
Suite 660
Detroit, MI 48226
313.962.9160 PHONE
313.962.9167 FAX

Contact the Insurance Group:
http://www.gallaghersharp.com

(Prejudgment Interest continued from page 1)

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.

2. Calculating PJI

R.C. 1343.03, effective 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.

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.*, 169 Ohio App. 3d 291 (9th Dist. 2006). 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 Ohio Department of Taxation's website sets forth the following rates:

Calendar Year	Annual Rate	Monthly Accrual
2016	3.0%	0.25%
2015	3.0%	0.25%
2014	3.0%	0.25%
2013	3.0%	0.25%
2012	3.0%	0.25%
2011	4.0%	0.33%
2010	4.0%	0.33%
2009	5.0%	0.42%
2008	8.0%	0.67%
2007	8.0%	0.67%
2006	6.0%	0.50%

http://www.tax.ohio.gov/ohio_individual/individual/interest_rates.aspx

PJI often is not even considered until after an adverse verdict. A total risk assessment, however, should consider the potential for PJI well before trial.

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