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Insurance Newsletter

July 2014

Special Interest Areas:

Individual Highlights:

SIGNIFICANT SUPREME COURT OF OHIO CASES

There are coverage cases, and then, there are coverage cases. In other words, some cases are more important than others. This article details some of those cases, including ones addressing bad faith. Some decisions are of recent vintage, others are "oldies but goodies." Of course, this summary is not all-inclusive and is not intended to apply to specific matters, but these cases may offer some guidance and help focus a coverage analysis.

I. THE DUTY TO DEFEND

A. Insurers Have to Accept Defense of Their Insureds Where the Allegations Against Their Insureds State a Claim Which Is Potentially or Arguably Within Their Policy Coverage

The scope of the allegations against an insured may encompass matters well outside the four corners of the pleadings, and an insurer's duty to defend may attach at some later stage of the litigation. An insurer must accept defense of an insured where the allegations against the insured state a claim which is potentially or arguably within the policy coverage, or there is some doubt as to whether a theory of recovery within the policy coverage has been pleaded. *Willoughby Hills v. Cincinnati Ins. Co.*, 9 Ohio St. 3d 177 (1984).

B. Insurers May Have a Broader Duty to Defend Where They Have Agreed to Defend "Groundless, False or Fraudulent Claims"

Under Public Officials Wrongful Act liability coverage, the insurer has a duty to defend the city and its officers in suits alleging, inter alia, sex discrimination because the policy affords coverage for groundless, false, or fraudulent claims, the policy covers any matter claimed against an insured solely by reason of their having served or acted in an official capacity, and a genuine issue of material fact exists as to whether the city's chief of police acted within the scope of employment. *Ohio Government Risk Mgt. Plan v. Harrison*, 115 Ohio St. 3d 241, 2007-Ohio-4948.

C. Insurers Do Not Owe Defense and Indemnity of Claims Alleging Only Defective Construction

Claims of defective construction or workmanship brought by a property owner are not covered claims for "property damage" caused by an "occurrence" under a CGL policy. *Westfield Ins. Co. v. Custom Agri Systems, Inc.*, 133 Ohio St. 3d 476, 2012-Ohio-4712.

Significant Supreme Court of Ohio Cases is continued on page 10.

Ohio State Appellate Decisions

A stop gap coverage endorsement which incorporates the terms of the general liability policy to which it is endorsed, does not broaden coverage to automobile accidents which are generally excluded from coverage.

Ameritemps was insured under Commercial General Liability ("CGL") and umbrella policies issued by National Union. One of Ameritemps employees caused an automobile accident while acting within the course and scope of his employment. The trial court found coverage excluded under the CGL Policy by the "Aircraft, Auto or Watercraft" exclusion that provides that the insurance does not apply to: "Bodily injury or property damage arising out of the ownership, maintenance, use or entrustment to others of any * * * auto * * * owned or operated by * * * any insured." The court of appeals agreed. Ameritemps next argued that coverage was afforded under the "Employer's Liability Coverage Stop Gap Endorsement" to the CGL Policy. But both the trial court and court of appeals disagreed because "the endorsement clearly states that it 'forms a part of the general liability policy' itself and further states in bold capital letters: ALL OTHER TERMS, CONDITIONS, AND EXCLUSIONS SHALL REMAIN UNCHANGED." Both courts held that an "endorsement is read as though it is within the policy." Thus, the same exclusion applied to bar coverage: "The 'Aircraft, Auto or Watercraft' exclusion remains unchanged by the stop gap endorsement and applies to bar coverage under the entire policy, including the stop gap endorsement." Finally, both the trial court and court of appeals held that the umbrella policy did not provide coverage because it followed form to underlying insurance. *Crum & Forster Indem. Co. v. Ameritemps, Inc.*, 8th Dist. No. 99610, 2013-Ohio-5419.

Access to a fleet of vehicles for use during part-time work is sufficient to trigger the "regular use" exclusion while operating a fleet vehicle.

Barnes was a part-time police officer. As part of his employment, the police department furnished him with a vehicle out of a fleet of available vehicles. While operating one of those fleet vehicles, he was hit and injured by an intoxicated motorist he was pursuing within the scope of his employment as a part-time police officer. The intoxicated motorist had no insurance coverage. Barnes had personal uninsured/underinsured motorist coverage under his own auto insurance policy issued by State Farm. The State Farm policy excluded UM/UIM coverage while Barnes was operating any vehicle made available for his "regular use." Nonetheless, Barnes sued State Farm seeking UM/UIM coverage claiming that because he only worked two or three shifts per month he was not furnished the "regular use" of any vehicle. The trial court and court of appeals found coverage excluded, however, reasoning that "Barnes worked part-time as a patrolman, during which time he always had access to the fleet of police vehicles" which "constitutes regular use as a matter of law." Both courts found the exclusion valid and controlling to bar coverage. *Barnes v. Thompson*, 7th Dist. No. 12 CO 26, 2013-Ohio-5886.

Communications between an insured and insurer relative to coverage made during the pendency of a declaratory judgment action are adversarial and not attorney-client privileged.

The K&D Group and Stonebridge Condominiums ("K&D") were insured under a Commercial General Liability policy issued by Cincinnati Insurance Company. K&D was sued by The Condominiums at Stonebridge Owners' Association, Inc. for negligence, among other things, based on water damage/infiltration into the condominiums. Cincinnati provided a defense under a reservation of rights. Cincinnati also filed a declaratory judgment action against K&D and the Owners' Association seeking a declaration as to its coverage obligations. That suit was consolidated with the negligence suit. In the declaratory judgment action, the Owners' Association sought discovery of Cincinnati's entire claims file, including all communications between Cincinnati and its insured. In response, Cincinnati produced a letter in which K&D's personal counsel "discussed concerns [K&D] had about the defense provided by Cincinnati in the Owners' Association action." K&D moved for a protective order asserting the attorney-client privilege and demanding that the letter be returned. The trial court found the letter not to be privileged because: "The letter is adversarial: K&D demands that Cincinnati do more to provide a defense in this case. In support of the demand, K&D's counsel describes some deficiencies that he perceives in the defense provided to date * * *; It is simply not a communication from K&D to its attorney." The court of appeals agreed, holding that: (1) the letter "is a communication between adversaries in active litigation" and (2) the "common interest" doctrine does not apply because the "letter was not sent to advance the common interest of defending against claims brought by the Owners' Association." Rather, it was sent to assert Cincinnati's failure to meet its contractual obligation to defend and request that Cincinnati employ additional resources in [K&D's] defense." *Condos. at Stonebridge Owners' Ass'n v. K&D Group, Inc.*, 8th. Dist. No. 100261, 2014-Ohio-503.

There is no ambiguity created by defining "insured" for liability coverage differently and more broadly then the "Named Insured" for property damage coverage under the same policy of insurance.

State Farm insured MPDS Memphis—an apartment complex—for liability and property damage coverage. Priore was a 50% owner, a managing member and guarantor on a $17 million loan to MPDS Memphis. A portion of the apartment complex collapsed due to ice and snow accumulation on the roof, resulting in property damage and lost rental income. Priore sued State Farm for coverage and, in the alternative, his insurance agent for not obtaining coverage. Priore asserted that the State Farm policy is ambiguous because one "plausible interpretation is that any individual or entity that is listed as an insured" also qualified as a "Named Insured." The court disagreed and found that the State Farm policy was unambiguous in limiting the definition of "Named Insured" to MPDS Memphis in the declarations despite the more expansive definition of "insured" for liability coverage. Reformation was not available because Priore never read the policy. Similarly, Priore's claim against his agent failed because he had not requested coverage, had not made the agent aware of his exposure/personal stake in the business, and because "Priore failed to read the policy and make the relevant inquiries" as to coverage. *Priore v. State Farm Fire & Cas. Co.*, 8th Dist. No. 99692, 2014-Ohio-696.

Insurer had duty to fully disclose need for an allocated verdict in a personal injury case involving covered and non-covered claims.

A lawsuit was filed against World Harvest Church ("WHC") and Richard Vaughn, who was an employee in the WHC preparatory school, by a student and his parents alleging battery, intentional infliction of emotional distress and negligent supervision. A verdict was entered in favor of the parents and student. After WHC settled with the parents and student, it filed suit against Grange seeking indemnification and a declaration that WHC is entitled to payment from Grange for some or all of the amount it paid the parents to settle the claims against it. The trial court separated out the verdict into compensatory damages, punitive damages, attorney fees and prejudgment interest and entered judgment. Grange and WHC appealed. The primary issue on appeal is whether Grange had the burden to have the general verdict allocated into covered and non-covered claims or to advise WHC of the need for special interrogatories to allocate damages. The general rule is that "an insured has the burden to prove entitlement to coverage, including the burden of allocating a general award into covered and non-covered claims, but that where an insurer has a duty to defend the insured and fails to seek an allocated verdict or advise the insured of the need for one, the burden shifts to the insurer."

In this case, Grange argued that, although it retained a law firm to defend WHC, it sent WHC a reservation of rights letter informing it that there were questions as to whether the claims were covered by their policy and that WHC may seek to consult with their private attorney. WHC did, in fact, retain a private attorney who entered into a joint defense agreement with the Grange-retained attorney. The court held that Grange's reservation of rights and the presence of WHC's independent counsel did not change Grange's duty to "fully disclose the precise situation concerning the necessity of seeking an allocated verdict in the personal-injury case." *World Harvest Church v. Grange Mut. Cas. Co.*, 10th Dist. No. 13 AP-290, 2013-Ohio-5707.

The intentional "pushing" of another person may qualify as an accidental "occurrence" under a homeowner's policy where the resulting injury is not the result reasonably expected by the insured.

Schaefer was injured in an altercation with Musil. Musil attempted to turn Schaefer toward him during an argument by pushing Schaefer's shoulder. Schaefer fell and was injured. Schaefer filed suit against Musil to recover for his injuries. Musil was insured under a homeowner's policy issued by Allstate Insurance Co. Allstate intervened in the suit between Schaefer and Musil seeking a declaratory judgment that no coverage is available for the altercation because the altercation does not qualify as an "occurrence," i.e., an accident defined as an unintended and unforeseen injury, under the Allstate homeowner's policy. The trial court found no coverage to exist but the court of appeals reversed, reasoning that "[b]ecause there is no evidence that Musil intended to cause Schaefer injury when he pushed Schaefer, the focus falls on the unexpected prong." Because there was no testimony as to the force used by Musil, the court of appeals concluded "that there is a genuine issue of fact as to whether Musil's push to Schaefer's shoulder could reasonably be expected to result in Schaefer falling over and sustaining injury." The court of appeals remanded the matter to the trial court for further discovery; the court expressed no opinion as to whether the intentional acts exclusion may apply. *Schaefer v. Musil*, 9th Dist. No. 27109, 2014-Ohio-1504.

Trial court's decision to direct a verdict on the issue of negligence between the plaintiff and defendant did not preclude the intervening plaintiff/insurer from submitting interrogatories to the jury since the court and all parties acknowledged and agreed that the two cases were being tried together.

Plaintiff DeWitt sued Defendant Jensen for injuries sustained during a college party after Jensen became upset that DeWitt was dancing with Jensen's ex-girlfriend. DeWitt testified that he followed Jensen into another room to speak with him and Jensen struck him in the face five to eight times, resulting in two black eyes, a broken nose and two chipped teeth. Jensen testified that he flailed his arm and accidentally punched DeWitt in the face only once in reaction to being grabbed by the shoulder. As a result of the lawsuit, Jensen sought insurance coverage from State Farm under liability policies issued to his parents. State Farm filed an intervening complaint seeking a declaration that its policies do not provide coverage for the altercation between DeWitt and Jensen because Jensen's conduct was not an "occurrence" but rather intentional and malicious misconduct, and therefore excluded by the policies. State Farm and Jensen filed cross-summary judgment motions on coverage, which were both overruled.

Immediately prior to trial, DeWitt voluntarily dismissed his claims for battery and intentional infliction of emotional distress, proceeding solely on his claim for negligence. Additionally, DeWitt and Jensen entered into a stipulation that Jensen's act of striking DeWitt in the face was negligent. State Farm was not a party to the stipulation. The case proceeded to trial, with the court advising the jury that there were in fact two distinct cases being tried together. At the close of evidence, DeWitt moved for a directed verdict on his negligence claim as well as the issue regarding Jensen's lack of intent in striking DeWitt as respects State Farm's coverage claim. The trial court granted the directed verdict with respect to the negligence claim, but allowed State Farm to submit interrogatories to the jury regarding whether Jensen's act of striking DeWitt was intentional or merely accidental. Ultimately, the jury found that Jensen's act of striking DeWitt was intentional and malicious, thereby precluding coverage under the State Farm insurance policies. The jury's verdict was affirmed by the trial court. The court of appeals, in upholding the jury's verdict, stated that because State Farm was not a party to the stipulation and did not waive its right to proceed to judgment on the claims advanced in its intervening complaint, the directed verdict granted by the trial court was not a final judgment as contemplated by R.C. 2505.02, and only served to dispose of the negligence claim in the "first case" and not State Farm's declaratory judgment action. Therefore the court of appeals held that the jury's ultimate finding that Jensen acted intentionally was neither inconsistent with a final judgment nor precluded by the directed verdict on stipulated negligence in the "first case." *Dewitt v. Jensen*, 2d Dist No. 25768, 2014-Ohio-529.

Taking contradictory positions in litigation may result in the claim file, including attorney-client communications, being discoverable.

Allstate Insurance Company insured DeMarco under an automobile liability insurance policy which included uninsured/underinsured motorist coverage. DeMarco was involved in an accident with Chavez while Chavez was driving a vehicle owned by Schmidt. Both Chavez and Schmidt were uninsured. Allstate denied coverage on the basis that: 1) DeMarco was neither an insured, nor operating an insured vehicle relative to the accident; and 2) Chavez and Schmidt were not uninsured. DeMarco sued both Chavez and Schmidt for negligence and Allstate for UM/UIM coverage. DeMarco further alleged that Allstate failed to act in "good faith." In discovery, DeMarco sought Allstate's claim file. Allstate filed motions to: 1) bifurcate and stay discovery on the bad faith claim; and 2) for a protective order based on attorney-client privilege and the work product doctrine. At the same time, Allstate maintained that DeMarco's allegation of lack of "good faith" did not amount to a "bad faith" claim. The trial court denied Allstate's motion to bifurcate stating that "because Allstate had maintained that there was no bad faith claim, there was nothing in that regard to bifurcate." The trial court also denied Allstate's request for a protective order. Allstate only appealed the denial of the protective order. The court of appeals affirmed holding that: 1) DeMarco's lack of "good faith" claim is a bad faith claim; 2) because DeMarco pleaded a bad faith claim, he is entitled to discover attorney-client communications relating to the coverage denial; and 3) work-product protection did not apply because Allstate opens a claim file "in the ordinary course of business" and there was no evidence that Allstate anticipated litigation pre-suit. *Demarco v. Allstate Ins. Co.*, 8th Dist. No. 100192, 2014-Ohio-933.

Claims for post-traumatic stress disorder and related physical symptoms arising out of witnessing a motor vehicle accident do not state claims for "bodily injury" so as to trigger coverage under automobile policy.

In the underlying case, claimants Sandra and Michael Dieringer filed suit against a minor driver and his parents after Sandra witnessed the driver strike and kill her sister with his truck. Sandra was not physically injured, but claimed to have suffered from post-traumatic stress disorder ("PTSD") as a result of witnessing the accident. Grange insured the driver through his mother's automobile policy. Grange filed this declaratory judgment action after the trial court in the underlying case granted summary judgment in favor of the Dieringers' automobile insurer, finding that Sandra's claims for PTSD did not state claims for "bodily injury" as defined by her automobile policy.

The trial court granted summary judgment in favor of Grange despite an affidavit from Sandra's doctor opining that Sandra suffered "bodily injury" because PTSD causes brain cell damage and physical injury to the human brain, shortens life expectancy, causes atrophy of memory circuits and is associated with the development of a number of other physical problems such as the premature development of coronary artery disease. The court of appeals affirmed, noting that the majority of appellate courts in Ohio have concluded that identical or similar definitions of "bodily injury" do not include PTSD-related injuries. *Grange Ins. Co. v. Sawmiller*, 3d Dist. No. 2-13-19, 2014-Ohio-1482.

An insurer's promise to pay medical expenses at "any negotiated reduced rate accepted by a medical provider" may be ambiguous as applied because it is not limited to geographic area or who negotiated the reduced rate.

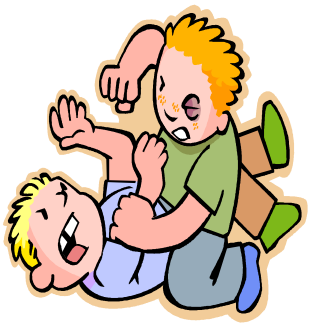
The Laboys were insured under a personal auto policy issued by Grange Mutual Casualty Company which included no-fault medical payments coverage. The Laboys were injured in an auto accident and sought medical payments coverage under the Grange policy. The Grange policy provided that "Grange would pay the lesser of reasonable medical expenses or 'any negotiated reduced rate accepted by a medical provider.'" The Laboys' medical insurance had a lower negotiated rate with the medical providers from whom the Laboys received treatment than did Grange. Grange reimbursed the medical providers at its higher negotiated rate and the Laboys claimed that unfairly reduced the amount of coverage available to them. The Laboys sued for breach of contract to force Grange to pay the lower rates negotiated by their own medical insurer. The court of appeals found the Grange Policy ambiguous when applied because "any negotiated reduced rate accepted by a medical provider" is not limited to who negotiated the rate or the geographic location of the provider. While the court found that interpreting the language "to mean any negotiated reduced rate anywhere in the world would be an absurd interpretation," the court also found that factual development of the negotiated reduced rates available was required at the trial court level to determine the reasonable meaning of the relevant language. The court of appeals remanded the dispute to the trial court to allow further discovery to be conducted as to the reduced rates available. *Laboy v. Grange Indem. Ins. Co.*, 8th Dist. No. 100116, 2014-Ohio-1516.

An intentional acts exclusion which defines "criminal act" as an "intentional act" will allow the finder of fact to consider a delinquency adjudication in juvenile court as probative of whether the exclusion applies to bar coverage.

Sanders' home was insured under a homeowner's policy issued by Nationwide Mutual Insurance Company, which denied coverage for a fire loss based on it being a deliberate act by Sanders' minor son. Sanders' minor son pleaded guilty to setting the arson fire in juvenile court. Sanders sued Nationwide for coverage and alleged bad faith. The trial court granted Nationwide summary judgment on bad faith, and the issue of whether the fire was deliberately set within the meaning of the intentional acts exclusion was determined by the jury at trial in Nationwide's favor. Sanders appealed and the court of appeals affirmed, reasoning as follows: 1) Sanders' minor son was an insured based on being a resident relative; 2) the voluntary intoxication of Sanders' minor son at the time he set the arson fire was irrelevant because "an insured cannot be heard to argue that he did not intend to do an otherwise intentional act on the basis that he was voluntarily intoxicated and thereby claim coverage under an insurance policy that excludes coverage for intentional acts"; 3) because the Nationwide policy exclusion defines "intentional act" to include a "criminal act," not "conviction of a crime," Sanders' minor son's delinquency adjudication in juvenile court was properly considered by the jury; and 4) the trial court properly admitted testimony by Nationwide's expert on fire causation over Sanders' objection even though the expert's opinion that the cause of the fire was arson was based solely on ruling out all other possible origins of the fire. The trial court's entry of summary judgment in favor of Nationwide on Sanders' bad faith claim was affirmed because coverage was excluded based on the jury verdict. *Sanders v. Nationwide Mut. Ins. Co.*, 8th Dist. No. 99954, 2014-Ohio-2386.

Genuine issues of material fact as to whether an insured acted in self-defense preclude summary judgment in favor of an insurer, even where a "self-defense" exception to intentional acts exclusion is expressly removed by an endorsement.

Michael Hawk sued B. J. Stocklin and Harry Larschied for damages after Hawk and Stocklin were involved in a physical altercation inside a bar owned by Larschied. Stocklin was a security officer at the bar, but was not on the clock at the time of the incident. Larschied's insurer, Cincinnati Specialty Underwriters Insurance Company ("Cincinnati") filed a declaratory judgment action seeking a determination as to coverage, and the cases were consolidated. The trial court granted summary judgment in favor of Cincinnati, finding that coverage for Hawk's injuries was excluded by the policy's assault and battery exclusion. The court noted that the policy's "expected or intended injury exclusion," which provided an exception for self-defense, was specifically deleted, by endorsement, and replaced with an "assault and battery" exclusion, which contained no such exception.



The court of appeals reversed and found that, based on the evidence that had been submitted, genuine issues of material fact existed as to whether Stocklin had acted in self-defense under *Preferred Mutual Ins. Co. v. Thompson*, 23 Ohio St.3d 78, 491 N.E.2d 688 (1986) even in the absence of the self-defense exception. The court also noted that there was a material issue of fact as to whether Stocklin was an insured under the policy since he was not on the clock at the time of the altercation. Notably, in its discussion the court harshly criticized Cincinnati's use of 40 pages of endorsements:

> Clearly, if [Cincinnati] wanted to delete a significant provision of coverage from the original Policy, it could have simply removed that language from the original Policy prior to selling it to this bar owner. Instead, [Cincinnati] chose to leave intact the original exception to the exclusion and add on an endorsement, among forty pages of other endorsements, which in a rather complicated and cumbersome way, added language, modified language, and deleted language in order to eliminate the coverage provision (the exception to the exclusion) still set forth in the original Policy. As such, we have some concern as to whether this manner of "deleting" a category of coverage involving the reasonable use of force in self-defense, which might clearly be significant to a bar owner purchasing such insurance, does not itself create unnecessary confusion, if not inherent ambiguity in this Policy, at least when sold to a new customer in this form. *Hawk* at ¶24.

Hawk v. Stocklin, 3rd Dist. No. 1-13-56, 2014-Ohio-2335.

Subrogated insurers can obtain a maximum $10,000 recovery against the parent of a minor who willfully and intentionally caused the damage no matter how many parties'/insureds' property was damaged in the uninterrupted course of conduct of the minor.

State Farm and Grange insured two vehicles damaged by a minor who first stole a dump truck and then fled from the police, intentionally hitting other vehicles along his path of flight. After paying their insureds' vehicle damages claims, State Farm and Grange brought a subrogated liability claim against the minor's father based on his statutory liability for the willful and intentional conduct of his minor son. The court found the father's liability capped by statute at $10,000 for all the "willfully damaged" "property of multiple parties during an uninterrupted course of conduct," "rather than $10,000 for each party whose property was damaged." Because the father had already settled with the dump truck owner for payment of the full $10,000 available, the court of appeals ruled that State Farm and Grange could obtain no recovery. *State Farm Mut. Auto. Ins. Co. v. Jiles*, 9th Dist. No. 26841, 2014-Ohio-2512.

Federal District Court Opinions

An insurer does not act in bad faith in handling a suspicious fire loss claim where the insurer's positions were supported by reasonable justification and the timing of the insured's proof of loss statement cut off the possibility of further informal settlement negotiations.

Paragon brought suit against Safeco alleging breach of contract and bad faith in connection with Safeco's handling of an insurance claim that followed a fire that destroyed a portion of Paragon's premises and much of its inventory. Paragon sought coverage for: (a) emergency expenses and repairs; (b) damage to the building; (c) loss of business personal property; and (d) business interruption. After the parties resolved all coverage matters, the court granted Safeco's motion for summary judgment on the following grounds:

- Payment of Emergency Repairs: The court found that Safeco's four month delay in payment for emergency expenses was justified. The fire was caused by a human act and it was reasonable for Safeco to refuse to pay these expenses while the cause of the fire was still under investigation. Moreover, an adjuster's oversight in adding an incorrect payee on a check was not evidence of bad faith.
- Building Damage Claim: Despite Paragon's requests, Safeco was not required to provide anything more than a square foot repair estimate for its proposed repair of the building damage. This was customary in the industry and, in any event, the adjuster made a concerted effort to comply with Paragon's request for additional information.
- Business Personal Property/Business Interruption Claims: It was not bad faith for Safeco to initially omit 1,200 – 1,400 items of personal property from the claim on the grounds that the items were not located in a room damaged by fire. It was also not bad faith to not make a timely counteroffer to Paragon's demand for business interruption damages under the circumstances. Paragon cut off any further attempt at informal settlement negotiations on both claims by submitting a formal proof of loss within 2-3 weeks of its claim for personal property and business interruption damages. This caused Safeco to properly invoke the policy's appraisal provisions; as such, there was no bad faith.

Paragon Molding, Ltd. v. Safeco Ins. Co., No. 3:05-cv-422, 2013 U.S. Dist. LEXIS 163137 (S.D. Ohio Nov. 15, 2013).

Significant Supreme Court of Ohio Cases Cont'd.

II. COVERED CLAIMS AND DAMAGES

A. Insureds Sued for Negligent Supervision of Another Insured May Be Entitled to Coverage Although the Other Insured Committed an Intentional Act

Insured parents, sued for negligent supervision, are entitled to coverage even though their son (also an insured) committed an intentional act (stabbing the plaintiff). *Safeco Ins. Co. of America v. White*, 122 Ohio St. 3d 562, 2009-Ohio-3718.

B. The Doctrine of Waiver Cannot be Employed to Expand the Coverage of a Policy

As a general proposition, the doctrine of waiver cannot be employed to expand the coverage of a policy. However, the doctrines of waiver and estoppel may be applied to the rights of the insurer set forth in the policy. For example, if an insured has materially breached the prompt notice requirement of the policy and the insurance company does not deny or reserve its right to deny coverage based upon the breach, the doctrines of waiver and estoppel may be applied and the insurance company may be precluded from later denying coverage based upon the breach. *Hybud Equipment Corp. v. Sphere Drake Insurance Co.*, 64 Ohio St. 3d 657 (1992).

III. EXCLUSIONS

A. Intentional-Act Exclusion May Preclude Coverage Where the Insured's Intentional Act and the Harm Caused Are Intrinsically Tied

The inferred intent doctrine applies not only to cases involving murder or sexual molestation. The doctrine also applies where the act and the harm are inextricably tied so that the act necessarily results in the harm. *Allstate Ins. Co. v. Campbell*, 128 Ohio St. 3d 186, 2010-Ohio-6312 .

B. A Pollution Exclusion with a "Sudden and Accidental" Exception Is Clear and Unambiguous

A pollution exclusion with a "sudden and accidental" exception is clear and unambiguous. It limits coverage to pollution-related damages caused by sudden pollution incidents, for example, incidents involving equipment malfunctions, explosions and the like. *Hybud Equipment Corp. v. Sphere Drake Insurance Co.*, 64 Ohio St. 3d 657 (1992).

C. Insurer's Pollution Exclusion May Not Preclude Coverage, Though, for Alleged Carbon Monoxide Poisoning

Carbon monoxide emitted from a residential heater is not a "pollutant" under the pollution exclusion of a CGL policy unless specifically enumerated as such. *Andersen v. Highland House*, 93 Ohio St. 3d 547, 2001-Ohio-1607 .

Significant Supreme Court of Ohio Cases Cont'd.

IV. DECLARATORY JUDGMENT ACTIONS

A. Liability Insurer May Have to Intervene in the Suit Against Its Insured

Where a determination is made in an initial action against a tortfeasor as to the tortfeasor's culpable mental state, the doctrine of collateral estoppel precludes relitigation of the determination in a supplemental proceeding brought against the tortfeasor's liability insurer pursuant to R.C. 3929.06. *Howell v. Richardson*, 45 Ohio St. 3d 365 (1989), syllabus corrected in *Grange v. Uhrin*, 49 Ohio St. 3d 162 (1990).

B. If an Insurer Is Denied Intervention, All Is Not Lost

When a party has sought and been denied intervention, the doctrine of collateral estoppel does not prohibit future litigation of similar issues. *Gehm v. Timberline*, 112 Ohio St. 3d 514, 2007-Ohio-607.

C. The Claimant May Not Be Bound, Though, by a Declaratory Judgment Action Obtained by an Insurer

A judgment in a declaratory judgment coverage action is binding on plaintiffs only if the action was initiated by the insured or the plaintiffs participated in the action. R.C. 3929.06 applied. *Estate of Heintzelman v. Air Experts, Inc.*, 126 Ohio St. 3d 138, 2010-Ohio-3264.

D. An Insurer May Not Rest a Declaratory Judgment Action on an Insured's No Contest Plea

Convictions based on a no contest plea are not admissible in a declaratory judgment coverage action. *Elevators Mutual Ins. Co. v. I. Patrick O'Flaherty's, Inc.*, 125 Ohio St. 3d 362, 2010-Ohio-1043.

V. BAD FAITH

A. An Insurer Has a Duty of Good Faith in Handling First-Party Claims, and Punitive Damages May Be Owed upon Proof of Actual Malice, Fraud or Insult

An insurer has a duty to act in good faith in the handling and payment of the first-party claims of its insured. A breach of the duty will give rise to a cause of action in tort, and punitive damages may be recovered from an insurer who breaches the duty of good faith in refusing to pay a claim of its insured upon proof of actual malice, fraud or insult on the part of the insurer. *Hoskins v. Aetna Life Ins. Co.*, 6 Ohio St. 3d 272 (1983).

B. An Insurer Must Have Reasonable Justification for Its Actions

An insurer fails to exercise good faith where its refusal to pay a claim is not predicated upon circumstances that furnish reasonable justification for its action. *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 1994-Ohio-461.

Significant Supreme Court of Ohio Cases Cont'd.

VI. MISCELLENANEOUS

A. The Insured May Make a Reasonable Settlement without Prejudice to Its Rights under the Policy.

If an insurer unjustifiably denies coverage, it foregoes the right to control the litigation and the insured may make a reasonable settlement without prejudice to the insured's rights under the policy. *Sanderson v. Ohio Edison Co.*, 69 Ohio St. 3d 582, 1994-Ohio-379.

B. Contribution Claim May Be Made Against Other Insurers

A claim for contribution may be made by a targeted insurer against a non-targeted insurer when loss or damage occurs over time and involves multiple insurers. Therefore, when a targeted insurer requests policy information from the insured regarding other policies, the insured must cooperate. However, a failure to cooperate does not automatically bar a claim against a non-targeted insurer, and a lack of notice to a non-targeted insurer only bars a contribution claim where prejudice has been suffered by the non-targeted insurer. *Pennsylvania Gen. Ins. Co. v. Park-Ohio Industries*, 126 Ohio St. 3d 98, 2010-Ohio-2745.

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