Gallagher Sharp ATTORNEYS

Insurance Newsletter

June 2015

Special Interest Areas:

Individual Highlights:

OUTLINE OF TIME PERIODS CONTAINED IN: OHIO UNFAIR CLAIMS ACTS

Here are the most pertinent generally applicable time periods specified in Ohio's Unfair Claims Acts. Although this is a helpful quick reference guide, all the relevant provisions should also be periodically reviewed. They can be found in Ohio Administrative Code ("OAC") Sections 3901-1-07 (Unfair Trade Practices) at http://codes.ohio.gov/oac/3901-1-07 and 3901-1-54 (Unfair Property & Casualty Claims Settlement Practices) at http://codes.ohio.gov/oac/3901-1-54. In case of conflict between these two code provisions, OAC 3901-1-54 controls (OAC 3901-1-54(K)).

***As to Insureds and Third-Party Claimants*:**

Acknowledgments and Updates

- Within **15 days** after notice of claim from an insured or third-party claimant: **acknowledge claim**—even if only to note receipt and note the need for additional time (OAC 3901-1-07(C)(2) & OAC 3901-1-54(F)(2))

- Within **15 days** after receiving any other communication from an insured or third-party claimant: **send a response** (OAC 3901-1-54(F)(3)) (this deadline does not apply if a complaint has been filed in court)

- Within **15 days** after notice of claim or other communication from insured or third-party claimant: **send all the necessary claim forms and complete instructions** which the insured or third-party claimant is required to submit for that type of claim, or pay the claim within 10 days (OAC 3901-1-54(F)(2))

- Within **21 days** after notice of any claim: claim file should be opened and **investigation should commence** (OAC 3901-1-07(C)(4))

- Within **21 days** after proof of loss submitted by an insured: **respond to proof of loss**—even if only to note receipt and note the need for additional time (OAC 3901-1-07(C)(12)(a) & OAC 3901-1-54(G)(1))

- Update response **every 45 days**, specifying reasons if additional time is needed. (OAC 3901-1-54(G)(1))

- **60 days before** any **limitations period expires** (either statutory or contractual): notify any insured or third-party claimant, if he/she is not represented by counsel (OAC 3901-1-54(G)(5))

(Continued on page 9)

Supreme Court of Ohio

An insurance provision that excludes coverage for acts committed with the deliberate intent to injure an employee precludes coverage for employer intentional torts.

Plaintiff was working on a ladder-jack scaffold on a construction project. He claimed that his job superintendent kept bolts used to secure the scaffold in his office because using them was too time consuming. The plaintiff's expert, a safety engineer, opined that the scaffold was not property secured. The plaintiff fell from the unsecured scaffold and filed suit against his employer alleging that the defendant acted with deliberate intent under R.C. 2745.01 to cause the plaintiff's injury and that the defendant's actions constituted or were equivalent to the "deliberate removal by an employer of an equipment safety guard" as set forth in R.C. 2745.01.

Cincinnati Insurance Company ("CIC") insured the employer under a commercial general liability policy. CIC intervened in the action, and filed a complaint for a declaratory judgment that CIC had no obligation to indemnify the employer for the injuries the plaintiff sustained in his fall. CIC did not dispute its obligation to defend the employee's bodily injury suit. The employer moved for summary judgment on the plaintiff's claim, arguing that he could not prove that his employer acted with intent to injure or that injury was substantially certain. The trial court found genuine issues of material fact as to whether the pins normally used to secure the ladder jacks constituted an equipment safety guard and whether the employer deliberately removed them.

CIC, however, maintained that even if the plaintiff prevailed on his employer intentional tort claim, any liability would be excluded from CIC's coverage because the insured's liability would be premised upon a deliberate intent to injure the employee. The plaintiff responded that an employer intentional tort proven with the rebuttable presumption of intent under R.C. 2745.01(C) did not involve deliberate intent to injure and was therefore not excluded from coverage. The Employers Liability Coverage Form in CIC's policy covered an "intentional act" (defined as "an act which is substantially certain to cause 'bodily injury'"), but excluded coverage for "liability for acts committed by or at the direction of an insured with the deliberate intent to injure." The trial court granted summary judgment in favor of CIC, and a divided court of appeals reversed the trial court.

On further appeal, the Supreme Court recognized that it had to assume that the plaintiff could establish that the defendant deliberately removed an equipment safety guard and that the removal was a direct cause of his injury because the trial court had not yet determined whether the presumption applied or was rebutted. In either case, though, the high court concluded that intent to injure was an essential element of his employer intentional tort claim. Thus, the plaintiff could not recover without a finding that the defendant acted with the intent to injure, and there were no set of facts under which the defendant could be legally liable to the plaintiff that would fall within CIC's coverage. The Supreme Court, therefore, reversed the court of appeals. The Supreme Court found it unnecessary to address a public policy argument, and it declined to decide if coverage was illusory because that argument was not made in the courts below.

Justices Lanzinger and Kennedy concurred in syllabus and judgment only. Justices O'Neill and Pfeiffer dissented and complained that insurance agents are selling "worthless pieces of paper that will never pay a claim…" *Hoyle v. DTJ Enterprises, Inc.*, Slip. Op. No. 2015-Ohio-843.

Ohio State Appellate Decisions

Emotional distress claim does not constitute "personal injury" under CGL policy.

A dance studio was sued for accepting $500,000 in prepayment from a student, then abruptly closing without refunding the money. Owners, the insurer of the studio, denied coverage to the studio for the resulting lawsuit, and the trial court granted summary judgment to Owners in the subsequent declaratory judgment action. The studio appealed, arguing that the negligent infliction of emotional distress claim met the definition of "personal injury" in the policy, which included "the following offenses....Discrimination, humiliation, sexual harassment, and any violation of civil rights…." Specifically, the studio argued that the emotional distress claim included "humiliation," and therefore was covered. The court of appeals affirmed, citing the word "offenses" in the policy: "humiliation under the CGL is not a resulting harm….but a breach of conduct or infraction." Thus, the policy was unlike that in a case cited by the studio where the court found coverage where "humiliation" was used without the word "offense," suggesting that the resulting harm of humiliation was sufficient to constitute "personal injury." *G&K Mgmt. Servs. v. Owners Inc. Co.*, 5th Dist. No. 14-CA-33, 2014-Ohio-5497.

Expert medical testimony is required to prevail on a UM/UIM claim based solely on soft tissue injuries.

Davie had uninsured/underinsured motorist coverage under his personal auto insurance policy issued by Nationwide Insurance Company of America when he was injured by an uninsured motorist. Davie filed suit against the alleged tortfeasor and Nationwide seeking recovery solely for alleged soft tissue injuries. Davie, however, presented no expert testimony to support his claimed soft tissue injuries at trial. The trial court directed a verdict against Davie for that reason. The court of appeals affirmed, reasoning that because "[t]he injuries that Davie allegedly suffered were 'soft tissue' injuries to his neck, back, and shoulders 'the causal connection between such injuries and the automobile accident alleged to have caused them is beyond the scope of common knowledge, and . . . such causal connection must be established by expert testimony.'" The court of appeals found soft tissue injuries "are 'internal and elusive, and are not sufficiently observable, understandable, and comprehensible by the trier of fact.'" Because Davie had failed to present expert testimony supporting his claimed soft tissue injuries, the court of appeals found that the verdict was properly directed against Davie, as he could not prevail as a matter of law. *Davie v. Nationwide Mut. Ins. Co.*, 8th Dist. No. 101285, 2015-Ohio-104.

A liability insurance policy exclusion for injuries to an insured is valid and enforceable even if the injuries are caused by another insured and result in statutory wrongful death damages to the deceased's beneficiaries.

After dinner with a friend, husband and wife, Brian and Shirley Sterling, returned home. Shirley was driving but neglected to turn the vehicle off after parking it in the couple's garage. The next day, Brian and Shirley were found dead in their home due to carbon monoxide poisoning. At the time of this incident, Brian and Shirley were insured under homeowner's and automobile liability insurance policies issued by American National Property & Casualty Company. Brian's estate sued Shirley's estate for, among other things, wrongful death. Shirley's estate sought coverage and a defense from American National. American National filed a declaratory judgment action asserting that coverage was barred for injuries sustained by an insured. Shirley's estate countered by asserting that the statutory wrongful death damages "belong to the decedent's children" who are not insureds. The court of appeals disagreed and enforced the exclusion of coverage for injuries to an insured in both the American National policies, concluding as follows: "An insurer has no duty to defend or indemnify its insured in a wrongful death lawsuit brought by a noninsured based on the death of an insured where the policy excludes liability coverage for claims based on bodily injury to an insured." *Am. Nat'l Prop. & Cas. Co. v. Sterling*, 7th Dist. No. 13 MA 139, 2014-Ohio-5674.

An insured's plea of guilty to a criminal act which includes the element of "knowingly" causing harm raises a rebuttable presumption that liability coverage is excluded by the intentional acts exclusion; self-serving testimony by the insured to the contrary is insufficient to rebut that presumption.

Cummings was injured when Lyles allegedly intentionally hit him while he was riding his bicycle. Lyles believed that the bicycle Cummings was riding was stolen from Cummings. Lyles later plead guilty to felonious assault relating to the incident. Cummins sued Lyles for his injuries. GEICO Indemnity Company insured Lyles for automobile liability at the time of the incident. GEICO intervened seeking a declaration that it owed no duty to defend or indemnify Lyles relative to the incident with Cummings. The trial court found GEICO had no duty to defend or indemnify Lyles based on the intentional acts exclusion in the GEICO Policy. The court of appeals agreed, reasoning that: 1) "although admissible, a felonious assault conviction does not conclusively establish an intent to harm, because felonious assault involves a mental state of 'knowingly' rather than 'purposely'"; 2) therefore, "a guilty plea to a 'knowing' criminal offense create[s] a strong, rebuttable presumption that the injury was 'expected and intended' so as to fall within the intentional acts exclusion; " 3) because it is always in the interest of the insured to establish coverage, an insured's self-serving statement is of negligible value; and therefore 4) an insured's affidavit or deposition testimony claiming lack of intent to injure is insufficient to rebut the presumption that the injury was "expected and intended." Because Lyles failed to rebut the presumption of intent to injure with third-party testimony, coverage was excluded by the intentional acts exclusion and GEICO had no duty to defend or indemnify Lyles. *Cummings v. Lyles*, 8th Dist. No. 101446, 2015-Ohio-316.

An insurer may not rely upon discovery served by a co-defendant or informal discovery requests in seeking to compel production of documents/medical records from its insured.

Miller was insured by State Farm Mutual Automobile Insurance Company for uninsured/underinsured motorists coverage. Miller was involved in an accident. He sued the tortfeasor for damages and State Farm for uninsured/underinsured motorists coverage. State Farm admitted coverage and cross-claimed against the tortfeasor for indemnification. The tortfeasor served discovery on Miller but State Farm did not. Relying on the tortfeasor's discovery requests, State Farm moved to compel Miller to produce his medical records. The trial court granted State Farm's motion to compel and Miller appealed. State Farm argued that "because the other driver's attorney served interrogatories and a request for production of documents on Mr. Miller, State Farm was authorized to ensure Mr. Miller's compliance with those discovery requests." The court of appeals disagreed and reversed the order compelling production, holding that "where a party has not propounded any requests for discovery [even if an informal request has been made], it reasonably has no basis on which to seek an order compelling disclosure of information from an opponent." *Miller v. State Farm Mut.*, 9th Dist. No. 27236, 2015-Ohio-280.

Insurer that intervenes has standing to contest any substantive issues on appeal.

Various property owners brought claims against a subcontractor arising from the partial collapse of a construction site building framework. Acuity insured the subcontractor and intervened into the lawsuit. Without actually determining whether there was coverage, the trial court, after a bench trial, determined that the subcontractor was not legally liable to the property owners pursuant to the economic loss doctrine. On appeal, the insured subcontractor did not file a brief, and the property owners claimed that Acuity lacked standing to contest the property owners' appeal. However, the Second District Court of Appeals affirmed the trial court's decision and held that while one who was not a party to an action generally has no right of direct appeal, a well-settled exception to the rule is that one who has attempted to intervene as a party does have requisite standing. *Fed. Ins. Co. v. Fredericks, Inc.*, 2d Dist. No. 26230, 2015-Ohio-694.

Bicyclist is not a "pedestrian" for purposes of med pay.

Dye was riding his bicycle in a public street and was hit by a pickup truck. Dye had an auto policy through Nationwide with med pay coverage that included treatment of accidental bodily injury suffered by insureds "as pedestrians if hit by any motor vehicle or trailer." The trial court found the word "pedestrians" was ambiguous because it was not defined in the policy, therefore Dye was entitled to med pay. The Fifth District reversed, citing the definition of "pedestrian" in Black's Law Dictionary as well as R.C. 4511.01, which defines the terms as "any natural person afoot." Dye was not "afoot," and was not entitled to med pay. *Dye v. Grose*, 5th Dist. No. 14CA58, 2015-Ohio-1001.

A denial of a motion to intervene is not a final appealable order.

Plaintiff was injured on the job and brought an employer intentional tort claim alleging purposeful removal of a safety switch. Appellant Motorist Mutual Insurance Company sought to intervene to determine its obligations to defend and indemnify the defendant employer. The trial court denied the motion to intervene and the court of appeals dismissed the appeal for lack of a final appealable order. In so doing the appellate court stated that, pursuant to *Gehm v. Timberline Post & Frame*, 112 Ohio St.3d 514, 2007-Ohio-607, a party is not collaterally estopped from litigating similar issues in the future when it has sought and been denied intervention in a pending litigation. *Jackson v. Proto Machine & Mfg., Inc.*, 11th Dist. No. 2013-P-0078, 2015-Ohio-1205.

Federal District Court Opinions

Court applies Federal Rule 54(b) standard in determining that an interlocutory appeal is permissible.

Howard Industries brought claims of: 1) breach of fiduciary duty; 2) breach of contract; 3) bad faith; and 4) punitive damages against ACE insurance from a fire loss that occurred on its property. The total damages alleged were in excess of $890,000.00. Plaintiff filed a motion for declaratory judgment, requesting that the court adopt its interpretation of two provisions in the policy – the coinsurance clause and the pollution clean-up provision. The coinsurance provision was the lynchpin of plaintiff's claim, worth approximately $800,000.00. In response, defendant filed for partial summary judgment regarding the interpretation of the same two provisions. The court ultimately adopted plaintiff's interpretation of the pollution clean-up provision, and ACE's interpretation of the coinsurance provision. Plaintiff then moved for a certificate of appealability under Fed. R. Civ. P. 54(b) which requires a two-step analysis to determine whether an interlocutory appeal is permissible. First, a court must conclude that the judgment is final, which means the judgment is a decision on a cognizable claim for relief and there was the ultimate disposition of an individual claim. Second, a court must decide if there is no just reason for delay. In addressing this issue, the court interpreted the Sixth Circuit case of *Akers v. Alvey*, 338 F.3d 491 (6th Cir. 2003), which set forth the five factors required to determine if there was no just reason for delay: 1) the relationship between the adjudicated and the unadjudicated claims; 2) the possibility that the need for review might or might not be mooted by future developments in the district court; 3) the possibility that the reviewing court might be obligated to consider the same issue a second time; 4) the presence or absence of a claim or counterclaim which could result in set-off against the judgment sought to be made final; and 5) miscellaneous factors such as delay, economic and solvency considerations, shortening of time at trial, frivolity of competing claims, expense, and the like.

Plaintiff argued that the court's order constituted a final judgment with respect to the declaratory judgment claims. Defendant asserted that declaratory judgment claims are not cognizable claims for relief; therefore, the court's order is not the "ultimate disposition" of any claim because issues of liability and damages remain in dispute. The court held that ACE's arguments were without merit, and ruled that the judgment was final. The court then considered whether there was any just reason for delay. The court agreed with plaintiff that the five *Akers* factors favor immediate appeal on the declaratory judgment ruling. The court's determination regarding the interpretation of the coinsurance and pollution clean-up clauses was a pivotal issue affecting the remainder of plaintiff's claims. In addition, a ruling from the appellate court could moot or drastically alter plaintiff's ability to obtain relief. The pivotal fact for the court's determination was that plaintiff's ability to recover a majority of the claim submitted under the policy depended on the correct interpretation of the coinsurance and pollution clean-up clauses. As such, the court found there was no just reason to delay the appeal. *Howard Indus. v. ACE Am. Ins. Co.*, U.S. Dist Ct. S.D. Ohio No. 2:13-cv-0677; 2015 U.S. Dist. LEXIS 7275 (January 22, 2015).

Homeowner's policy does not cover a fire loss caused by the intentional act of a co-insured.

Nationwide brought a declaratory judgment action against its insured, McDermott. Ms. McDermott's husband accidently started a fire while manufacturing and smoking marijuana in their basement. The defendant's husband was a licensed medical marijuana patient and caregiver under M.C.L. § 333.26241 et seq. In addition to growing marijuana, McDermott's husband was extracting THC from butane in the basement of the home. He started the fire while performing butane extractions when a flame he had lit to smoke some of the honey oil ignited the butane and consumed the house. McDermott did not know her husband was performing the butane extractions or that butane was flammable.

Nationwide initially paid McDermott $160,209.50 under the policy, and was seeking a judgment to reclaim its payment. The policy included a Michigan Amendatory Endorsement that stated McDermott had "a duty to notify [Nationwide] as soon as possible of any change which may affect the premium risk under the policy," including "changes in occupancy or use of the residence premises." Based on this clause, the court held that McDermott did not fulfill her duty under the policy, as the marijuana manufacturing operation was an "unacceptable risk" to Nationwide. As such, McDermott was not entitled to coverage. *Nationwide Mut. Fire. Ins. Co. v. McDermont*, 2015 U.S. App. LEXIS 3012 (6th Cir. February 24, 2015).

Insureds misrepresented location of accelerant in premises.

Allstate's motion for partial summary judgment was granted regarding an insured's claim for bad faith and punitive damages. The insureds suffered a fire loss and were denied coverage by Allstate on the grounds that the insured had misrepresented or concealed material information regarding the facts and circumstances surrounding the fire. At issue was conflicting testimony from the insureds regarding whether cigarette lighter fluid was in the home, and if so, the location of the lighter fluid at the time of the fire.

Regarding the bad faith claim, the court held that Allstate had a reasonable justification to deny the claim, as it conducted a thorough investigation which revealed two key facts: 1) the EUO testimony of the insureds was inconsistent regarding the location of cigarette lighter fluid in the home; and 2) the conclusions of Allstate's cause and origin expert, Mark Schockman, that the accelerant was used to start the fire. Accordingly, the court ruled that the fire cause was fairly debatable, and therefore, Allstate was entitled to summary judgment on the bad faith claim only. *Blevins v. Allstate Prop. & Cas. Ins. Co.*, 2015 U.S. Dist. LEXIS 17979 (S. D. Ohio 2015).

Plaintiff did not have an insurable interest in premises.

Ross brought claims of breach of contract and bad faith against State Farm following a fire. At the time of the fire, however, he did not own the residence, having transferred title to his sister via a quit claim deed. Ross alleged that he transferred the title because he planned to deed the property to an LLC, which he owned. In addition, Ross had moved out of the property roughly seven months prior to the fire and his whereabouts at the time of the fire was inconsistent with surveillance footage. As a result of its investigation, State Farm denied his claim, voided the policy, and refunded the premiums to him.

State Farm moved for summary judgment on the grounds that the policy should be voided because plaintiff misrepresented material information and did not have an insurable interest in the premises at the time of the fire. The court ruled that as Ross had transferred his interest to his sister and was not the sole owner of the LLC (by which he ultimately intended to transfer title to the property), he did not have an insurable interest. The court also held that Ross misrepresented material facts in the investigation of his claim, namely his whereabouts at the time of the fire. Contrary to his EUO testimony and confirmed by the surveillance video, it was possible that Ross could have set the fire in this case. Therefore, State Farm was entitled to summary judgment. In addition, the court held there was no genuine issue of material fact to sustain plaintiff's bad faith claim. *Ross v. State Farm Fire & Cas. Co.*, 2015 U.S. Dist. LEXIS 18707 (S. D. Ohio 2015).

Ohio Unfair Claims Practices Settlement Act, *continued from page 1*

Payments

- Third-party claimants: if an agreed settlement is reached on all or part of a claim, forward payment within **5 days** of receipt of the fully executed settlement agreement and/or release (unless otherwise agreed to in the settlement contract) (OAC 3901-1-07(C)(16))

- First-party insureds: tender payment within **10 days** after acceptance of a claim if the amount of the claim is determined and is not in dispute, unless otherwise agreed or required by law (OAC 3901-1-54(G)(6))

Calendaring

- When the last day of any time period falls on a Saturday, Sunday, or holiday, the time limit is extended to the next business day (OAC 3901-1-07(C)(17)(d); OAC 3901-1-54(C)(5))

Auto Claims Additional Time Sensitive Provisions:

- If insured or third-party claimant purchases replacement vehicle **within 30 days** after payment for a total loss, then the insurer owes sales tax, but only if the insurer is provided with documentation of that purchase **within 33 days** after receipt of the cash settlement (OAC 3901-1-54(H)(7)(f) & (H)(7)(g)) (must notify of right to reimbursement of sales tax)

- Insured is entitled to notice of the right to renegotiate the cash settlement of a total loss if a comparable replacement vehicle is not available **within 35 days** of payment (OAC 3901-1-54(H)(7)(f))

As to the Ohio Department of Insurance:

- **21 days** after communications from the Ohio Department of Insurance—**respond** (OAC 3901-1-07(C)(3) & OAC 3901-1-54(F)(4))

- **Within 60 days** of the receipt of the proof of loss, if insurer reasonably believes fraud has been committed, **report fraud** to the Ohio Department of Insurance Fraud Division (OAC 3901-1-54(G)(1))

As to Record Retention Generally:

Maintain closed claim files for **three years** or until the completion of the next financial examination conducted by the state of domicile, whichever is greater. (OAC 3901-1-54(D)(1))

(Continued on page 10)

(Continued from Page 9)

States Other Than Ohio:

While this is a quick reference guide under Ohio law, many states have adopted similar Acts based on the Uniform Settlement Practices Act modeled on the Uniform Unfair Claims Settlement Practices Act promulgated by the National Association of Insurance Commissioners. We recommend that you check any state in which you are adjusting claims for similar provisions.

No Private Right of Action but Violation May be Evidence of Bad Faith:

While there is no private right of action for a violation of Ohio's Unfair Claims Settlement Practices Act, a limited number of Ohio courts have found a violation of the Act may be admissible in a bad faith claim. Note: Ohio's no private right of action rule is not necessarily true in other states; if you adjust claims in other states, please check with your local counsel in those states.

About Gallagher Sharp

For over 100 years Gallagher Sharp 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.

Gallagher Sharp ATTORNEYS

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