Gallagher Sharp LLP

Insurance Newsletter

October 2016

Special Interest Areas:

Individual Highlights:

TORT PREJUDGMENT INTEREST

Once a defendant loses a tort action, a plaintiff may seek prejudgment interest ("PJI"), particularly if the verdict greatly exceeds the highest offer. This newsletter summarizes Ohio law regarding tort (as opposed to contractual) PJI and offers some practical guidelines.

A. Good Faith Effort to Settle a Tort Claim - R.C. 1343.03(C)

R.C. 1343.03(C) governs the award of PJI in a tort action and sets forth the requirements to support such an award. Specifically, the trial court must find (1) that the party required to pay the judgment "failed to make a good faith effort to settle," and (2) that the party to whom the judgment is to be paid "did not fail to make a good faith effort to settle the case." *See* R.C. 1343.03(C)(1); *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St. 3d 638, 658 (1994). In evaluating whether a party has engaged in good faith settlement negotiations, the Supreme Court of Ohio has held that the court must narrowly focus upon the facts as they were known by the parties from pretrial discovery prior to the commencement of the trial. *Moskovitz*, *supra* at 661.

Put to practice, "a party has not 'failed to make a good faith effort to settle' under R.C. 1343.03(C)" so long as "he has (1) fully cooperated in discovery proceedings, (2) rationally evaluated his risks and potential liability, (3) not attempted to unnecessarily delay any of the proceedings, and (4) made a good faith monetary settlement offer or responded in good faith to an offer from the other party." *Kalain v. Smith*, 25 Ohio St. 3d 157 (1986), at syllabus. Critically, "if a party has a good faith, objectively reasonable belief that he has no liability, he need not make a monetary settlement offer" at all. *Id.*

The plaintiff bears a "heavy burden" of proving that the defendant failed to make a good faith effort to settle the case. *Moskovitz, supra*, 69 Ohio St.3d at 659. A party, reasonably believing it is not liable, is not obligated to make or respond to a settlement offer. *Kalain v. Smith*, syllabus. Moreover, PJI may not be appropriate even though the verdict is far more than the defendant's offer. *Fischer v. Dairy Mart Convenience Stores, Inc.*, 77 Ohio App.3d 543, 560 (1991); *Evans v. Dayton Power & Light Co.*, 4th Dist. No. 05CA800, 2006-Ohio-319, at ¶47. *See also, Taylor v. Steinberg*, 8th Dist. Nos. 80280 & 80493, 2002-Ohio-2961, at ¶35 ("Just because the jury decided adversely to Steinberg is by no means dispositive of the reasonableness issue for purposes of prejudgment interest. The issue is what was objectively reasonable, not what the jury happened to find."); *Emerson v. Yurchak*, 1st Dist. No. C-060113, 2006-Ohio-6162, at ¶12 ("Progressive underestimated the jury award, but poor predictive ability does not necessarily establish a lack of good faith."). One

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Supreme Court of Ohio

No coverage for abuse claims.

The Supreme Court of Ohio unanimously held that an abuse or molestation exclusion in a commercial liability policy excludes coverage for an award of damages based on the insured's vicarious liability for a claim arising from its employee's physical abuse of a child in the insured's care and custody. The court also held that the policy does not provide coverage for a related award of attorney fees or post-judgment interest.

Michael and Lacey Faieta sued World Harvest Church and Harvest Preparatory School and its employee, Richard Vaughan, for claims arising from an incident wherein the Faietas' minor son was allegedly beaten by Vaughan with an object. Specifically, the Faietas asserted claims of assault and battery against Vaughan, claims of negligence, and intentional infliction of emotional distress against Vaughan and World Harvest, as well as claims of negligent hiring and supervision and respondeat superior against World Harvest. Grange, which insured World Harvest under a commercial general liability policy and umbrella policy, agreed to defend the suit under a reservation of rights.

At trial, the jury awarded the Faietas $764,235 in compensatory damages and $5 million in punitive damages against World Harvest and $134,865 in compensatory damages and $100,000 in punitive damages against Vaughan. Final judgment was entered against World Harvest for $2,871,431.87, which included $82,365 in damages awarded against Vaughan for which World Harvest was found secondarily liable. The verdict was upheld by the Tenth District Court of Appeals and then settled for $3,101,147.

Subsequently, World Harvest filed a breach of contract and bad faith lawsuit against Grange, alleging that Grange had improperly refused to indemnify World Harvest for any portion of the judgment. The trial court determined that Grange was obligated to indemnify World Harvest for $1,472,677 in compensatory damages, attorney fees, and post-judgment interest, but did not have to pay for punitive damages. On appeal, the Tenth District affirmed in part, ordering Grange to pay World Harvest only the $82,365 in compensatory damages for which it was secondarily liable, the full amount of attorney fees, and only a portion of post-judgment interest. In doing so, the appellate court held that the Grange policy only excluded coverage for damages arising from World Harvest's direct liability. On reconsideration, the appellate court ordered Grange to pay post-judgment interest on the full amount of the judgment.

The Supreme Court of Ohio reversed the court of appeals decision. First, the court considered whether the endorsed molestation or abuse exclusion in the Grange policies issued to World Harvest barred coverage for the amount awarded against World Harvest based on vicarious liability. In holding that it did, the court noted that the abuse exclusion was broad and expressly excluded coverage for "bodily injury" arising out of actual or threatened abuse by anyone so long as the victim was in the care, custody or control of the insured. The court further found that the exclusion was not limited only to sexual abuse or to an insured's direct liability. Having found no coverage for any of the Faietas' claims, the court also concluded that Grange was not obligated to pay any award of attorney fees or post-judgment interest. Accordingly, the court of appeals decision was reversed. *World Harvest Church v. Grange Mut. Cas. Co.*, Slip Op. No. 2016-Ohio-2913.

Ohio State Appellate Decisions

A list of scheduled drivers on the declarations page of a commercial auto policy does not make ambiguous a clear reference to a specific individual as the named insured.

Wetzel sought underinsured motorists coverage for a motor vehicle accident that occurred while he was driving his girlfriend's vehicle. The Auto-Owners policy specifically listed Wetzel's father as the named insured. However, Wetzel and five other drivers were listed as "scheduled drivers." The trial court granted summary judgment to Auto-Owners because Wetzel did not live with his father at the time of the accident, nor was he driving one of the five trucks identified in the policy. Wetzel's sole argument on appeal was that the word "you" in the Auto-Owners policy included him because of his inclusion as a "scheduled driver." However, in citing several cases from across the country, the appellate court held that the policy's definition of who is an insured for underinsured motorist coverage is unambiguous regardless of questions over the significance of the "schedule driver" designation. *Wetzel v. Auto-Owners Ins. Co.*, 2d Dist. No. 2015-CA-25, 2016-Ohio-5355.

Motorcycle passenger is "insured for uninsured motor vehicle coverage under another policy" even when she cannot actually recover under that other policy.

Ramsey, the decedent, was a passenger on a motorcycle involved in a collision. The other driver was at fault and his liability policy had coverage in the amount of $25,000. The decedent was insured by one policy with UIM coverage of $12,500, and another policy with UIM coverage of $25,000. The motorcycle driver's State Farm policy had UIM coverage of $100,000. The Second District Court of Appeals affirmed a trial court decision enforcing language in a State Farm motorcycle policy that limits the definition of "insured" to one that is not "insured for uninsured motor vehicle coverage under another policy." The court held that, even though decedent could not actually recover under the other two policies because their limits were less than or equal to the at-fault driver's policy limits, decedent was still an insured under those policies. Therefore, she was not an insured under the State Farm policy. *Ramsey v. State Farm Mut. Auto. Ins. Co.*, 2d Dist. No. 27050, 2016-Ohio-5871.

Trial court order denying motion to bifurcate bad-faith and punitive damages claim and to stay discovery in a case involving uninsured motorist coverage is not a final appealable order.

The First District Court of Appeals dismissed State Farm's appeal of an order denying its motion to bifurcate the bad-faith claim from a UIM claim and to stay discovery. In doing so, the court found that the court's order actually did not order the disclosure of privileged material but simply denied a stay of discovery. Thus, the order did not meet the requirements of R.C. 2505.02(B)(4), which establishes when the granting or denying of a provision remedy is a final and appealable order. *Loukinas v. State Farm Mut. Auto. Ins. Co.*, 1st Dist. No. C-160311, 2016 Ohio App. LEXIS 3636.

A one-year contractual limitation period on bringing suit is valid and runs from the date the insured first knew of any loss or damage regardless of its scope.

Mr. Leibowitz insured his home with State Farm. He noticed water stains on the walls of his home in 2005 and had them repaired. They reappeared in 2007 and Mr. Leibowitz again had them repaired but did not look into the underlying cause. He noticed additional water intrusion around a skylight in 2011. He consulted with one of the original architects of his home and, again, performed what he believed to be the necessary repairs. However, in 2012 the problems reappeared and grew worse. He then reported the issues to his State Farm agent resulting in a full investigation of the sources of the leaks and resulting hidden damage. The total cost of repairs exceeded $100,000. State Farm denied coverage because long-term water infiltration is not covered. State Farm also informed Mr. Leibowitz of the one-year contractual limitation period. Mr. Leibowitz claimed that the date of loss was June 30, 2012, and filed suit on June 26, 2013. However, State Farm then asserted the defense that Mr. Leibowitz's suit was barred by the one-year contractual limitation period reading: "[n]o action shall be brought unless there has been compliance with the policy provisions. The action must be started within one year after the date of loss or damage." Mr. Leibowitz argued estoppel based on claimed reliance on the June 30, 2012, date of loss recited in State Farm's coverage denial letter. The court disagreed reasoning that "[a]lthough the initial repairs to the house did not fix the problem, it does not change the fact that the problem existed from the summer of 2011" and, thus, "[b]y the time State Farm denied Mr. Leibowitz's claim in November 2012 and told him that he had one year from the date of loss to file suit, more than one year had **already** passed from when Mr. Leibowitz noticed the damage." (Emphasis added.) Therefore, there was no detrimental reliance by the insured and no estoppel. *Leibowitz v. State Farm Ins. Co.*, 9th Dist. No. 27863, 2016-Ohio-5690.

Limiting the definition of insured for UM/UIM coverage to occupants of the vehicle who are not insured for UM/UIM coverage under their own insurance is valid and enforceable.

Chapman was injured while traveling as a passenger in Farmer's vehicle. The accident was caused by the negligence of Sheibelhood, who had liability limits of $50,000 per person and $100,000 per occurrence with State Farm. Chapman had UM/UIM limits with Progressive which matched the tortfeasor's liability limits. Farmer, however, had UM/UIM limits of $100,000 per person and $300,000 per occurrence with American Family. Chapman therefore sought UM/UIM coverage under the American Family policy issued to Farmer. The American Family policy defined "insured person" as "anyone else occupying your insured car who is not" "a named insured for underinsured motorists coverage under another policy, a self-insurance program, or a liability bond[.]" Thus, the court found that Chapman was not an insured person for UM/UIM coverage under the American Family policy because he was a named insured for UM/UIM coverage under his own policy with Progressive. The court reasoned that "[i]f there is no 'insured person,' there is no underinsured motorist coverage and, in the absence of underinsured motorist coverage, the 'other insurance' provisions of the contract never come into play." Thus, there was no UM/UIM coverage available for Chapman under the American Family policy issued to Farmer. *Chapman v. Am. Family Ins. Co.*, 9th Dist. No. 27862, 2016-Ohio-5906.

U.S. Sixth Circuit Court Opinions

No coverage for sexual molestation claims.

The Sixth Circuit held that an insurer's policy excluded coverage for a pastor's sexual misconduct when the policy stated: "Exclusions. This insurance does not apply to: a. Any person who personally participated in any act of "sexual misconduct or sexual molestation." Further, the Sixth District held that the public policy of the state of Ohio prohibited liability coverage for sexual abuse of minors. Finally, the court stated there was no exception to the general rule against sexual misconduct insurance where a policy involved a religious institution. *Clifford v. Church Mut. Ins. Co.* 2016 U.S. App. LEXIS 12541 (6th Cir. July 5, 2016).

Legal Trends

Driving While *Intexticated* – New Spate of Claims, Some Alleging Punitive Damages

We have noticed a growing trend in the amount of motor vehicle accident related litigation being filed alleging that the other driver was distracted by a cell phone and seeking punitive damages. If you have not begun seeing these cases yet, chances are you will soon.

According to the Ohio State Highway Patrol[1], in 2015, 13,261 drivers in Ohio crashed while being distracted by something within their vehicles. Thirty-nine of these drivers were in fatal crashes which resulted in 43 deaths. Another 4,593 drivers were in injury crashes resulting in 6,916 injuries. The number of reported distracted drivers rose 11% from 2014 to 2015. The biggest distraction category reported in 2015 was "Other Inside the Vehicle" (e.g., passengers, food and/or drinks) which comprised 59% of all distracted drivers and 44% of distracted drivers in fatal crashes (down from 56% in 2014). "Phone" and "Texting/Emailing" were the distractions for 24% of all distracted drivers, but 41% of distracted drivers in fatal crashes (up from 31% in 2014).

In recognition of these claims, investigators should inquire about cell phone usage by all drivers and seek to preserve all relevant evidence, in part to avoid a spoliation claim. Some plaintiffs' attorneys seem to be routinely alleging that a defendant driver is distracted, without any factual support. Moreover, more and more plaintiffs are alleging punitive damages, again many times without any appropriate basis.

The court in *Hunter v. Riggle*, 2014 Ohio Misc. LEXIS 10673 (May 7, 2014) addressed cell phone usage and a punitive damage claim. That court found that a question of fact remained as to whether a driver could be liable for punitive damages for a motor vehicle accident where there was evidence that the driver was speeding, following traffic too closely, under the influence of Adderall and Prozac, and talking

[1] http://statepatrol.ohio.gov/doc/Distracted_Driving_Bulletin_2016.pdf

on her cellular phone. Similarly, in *Lux v. Hickman*, Franklin Ct. Common Pleas No. 14CVC08-8466,2015 Ohio Misc. LEXIS 13452, * 6 (July 6, 2015), the court stated that if there was evidence that the driver had been looking at his cell phone at the time of the accident, it was to be a jury question as to whether his actions constituted actual malice. However, the court ultimately granted summary judgment as to the punitive damage claim because there was no evidence that the defendant was talking or texting on his phone at the time of the accident, finding that "mere speculations" were not sufficient. *Id*. at *7-8.

Punitive awards in Ohio are rare, partly because a plaintiff must prove by clear and convincing evidence that a defendant acted with malice. R.C. 2315.21(C)(1) and (D)(4). In *Preston v. Murray*, 32 Ohio St.3d 334, 336 (1987) the Supreme Court of Ohio defined the required malice as "(1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm." Drunk driving will expose a driver to a punitive award. *See, e.g., Cade v. Lunich*, 70 Ohio St.3d, 640 N.E.2d 159 (1994). However, even in cases in which a driver is intoxicated courts have been reluctant to award punitive damages. *See, Cleland-Blinn v. Diegel*, 6th Dist. No. L-93-113, 1994 Ohio App. LEXIS 1903, *6 (May 6, 1994) (finding that evidence that defendant driver admitted to drinking and was seen weaving in and out of traffic prior to accident did not warrant finding that driver acted with actual malice in causing accident). In all cases punitive awards must be stayed and bifurcated from the rest of the case. R.C. 2315.21(B)(1).

More distracted driving and punitive claims are sure to come. Policyholders will face uninsured exposure and as a result may hire personal counsel. Insurers will reserve their rights and be sensitive to the issues raised by any punitive claim. Additional motion practice probably will be necessary. Insurers who are forewarned are forearmed in dealing with this emerging trend.

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court has even found constitutional implications. In *Avondent v. Blankstein*, 118 Ohio App.3d 357, 370, (1997), the court stated: "*** It would be unconstitutional to penalize a party for exercising his right to a trial."

As a practical matter, though, trial judges seem to be influenced by a large plaintiff's verdict. Stated another way, a significant disparity between the jury verdict and the last offer may suggest to some jurists that the defendant did not rationally evaluate the risks or liability or did not make a good faith offer.

B. Discovery and Hearing

A post-trial proceeding for PJI is subject to the general discovery process and the Civil Rules. Therefore, upon the filing of a PJI motion, the plaintiff may gain access through discovery to those non-privileged portions of the insurer's claim file. *Peyko*

v. Frederick, 25 Ohio St.3d 164 (1986), paragraph one of the syllabus. In a PJI proceeding, privileged matters in the insurer's claim file are those that "go directly to the theory of defense of the underlying case" in which the decision or verdict has been rendered. *Moskovitz, supra*, 69 Ohio St.3d at 662-663. On occasion, discovery of parts of the defense attorney's file also may be sought.

If the attorney-client privilege is raised with regard to portions of the claims file, the trial court must conduct an in camera (in chambers) inspection to determine which portions of the file, if any, are privileged. After that determination, plaintiff's counsel is granted access to the non-privileged portions of the file. *Sarka v. Love*, 8th Dist. No. 85960, 2005-Ohio-6362, at ¶40. Should the trial court order production of portions of the claim file believed to be privileged, an immediate interlocutory appeal may be filed in order to preserve the asserted privilege. *Radovanic v. Cossler*, 140 Ohio App.3d 208, 213 (2000).

It may be necessary for the insurer's defense counsel to testify as a witness at the PJI hearing. Defense counsel can address how pretrial settlement negotiations were conducted, discovery problems which may have arisen, any issues of delay, and counsel's evaluation. If the defense counsel becomes a witness, that lawyer and his or her firm invariably must withdraw as trial counsel at depositions or the hearing. *155 North High v. Cincinnati Ins. Co.*, 72 Ohio St.3d 423, 427 (1995). Indeed, subject to a few exceptions, an attorney may not ethically act as an advocate and be a witness. Rule 3.7, Ohio Rules of Professional Conduct.

While the statute mandates a "hearing" before awarding PJI, a trial court may deny PJI without a hearing if it appears from the written motion and briefs that no award is likely. *Ready v. Barfield*, 8th Dist. No. 86929, 2006-Ohio-2590, at ¶9; *Foreman v. Wright*, 8th Dist. No. 82067, 2003-Ohio-5819, at ¶¶14, 21. The goal should be to defeat a PJI claim on the briefs alone and thus avoid the time, expense, and problems associated with discovery of the insurer's claim file and depositions of claims personnel. *See*, *Werner v. McAbier*, 8th Dist. Nos. 75197 & 75233, 2000 Ohio App. LEXIS 73 (Jan. 13, 2000), (trial court did not abuse its discretion by granting a protective order and preventing the deposition of the insurance adjuster and production of the claim file on the grounds that the discovery was unnecessary and unduly burdensome); *Goudy v. Stockton*, 2nd Dist. No. 2001-CA-46, 2001-Ohio-1459 (trial court "did not abuse its discretion by ruling on a prejudgment interest motion without first allowing the movant discovery concerning the respondent's lack of good faith, because the movant had failed to make any showing that she had made a good-faith effort to settle").

C. Practical Guidelines

The following guidelines may assist in avoiding, and when necessary defending, PJI claims:

1. As a claim is investigated, the claims file should document liability, causation, and damages, and any other basis for evaluating the claim.

2. The rationale for any offer (or lack of an offer) should be set forth in the claims file.

3. Every entry and document in the claims file–including communications with defense counsel–should be crafted with an awareness that the entire file may be examined by plaintiff's counsel and the trial judge post-verdict.

4. Because the defense attorney also may find at least portions of his or her files are discoverable, counsel should exercise caution in how the defense file is documented.

5. A defendant should take pains to "fully cooperate in discovery proceedings" and not "unnecessarily delay any of the proceedings," as those factors will be examined by the court.

6. When a PJI motion is made, insurers often retain counsel other than defense trial counsel to evaluate the prospects of PJI and to oppose the motion; other counsel must be retained if defense counsel will be a witness.

7. Consideration also should be given to taking depositions of the plaintiff and plaintiff's counsel, as well as seeking non-privileged portions of opposing counsel's file; although not routinely sought, the rationale for allowing discovery of the defendant applies with equal force to the plaintiff.

8. Every effort should be made to win the PJI issue in the trial court, because it often is a difficult to obtain a reversal on appeal.

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