OHIO STATE COURTS
Gallagher Sharp July 2018 Insurance Newsletter

A vehicle may be deemed a "temporary substitute vehicle" if the insured intends for the vehicle to substitute an out-of-service covered vehicle.

Kyle Conaway was the owner and CEO of Lee's Hydraulic & Pneumatic Services, LLC ("Lee's"). Kyle's father, Darrin, lived and worked with Kyle. Every day, Kyle drove Darrin to Lee's in Kyle's Ford F-450 truck. Cincinnati Insurance Company insured the truck through a business automobile policy. In January 2014, the truck broke down as a result of diesel fuel freezing due to extremely cold weather. Since the truck broke down, Kyle's employee, Mark, attempted to drive Kyle and Darrin to Lee's in Mark's minivan. An accident occurred en route and Kyle and Darrin were ejected from the minivan. Darrin was killed. Kyle and the administrator of Darrin's estate argued that Kyle and Darrin were insureds under Lee's business auto policy because the minivan was a "temporary substitute vehicle." The policy provided that a "temporary substitute vehicle" may be covered if the named vehicle is "out of service because of its breakdown, repair servicing, 'loss,' or destruction." The court found that Kyle intended to use the minivan as a temporary substitute for the truck and that it was a covered vehicle pursuant to Cincinnati's policy. *Conway, et al. v. Cincinnati Ins. Cos., et al.*, 3d Dist. No. 1-16-55, 2017-Ohio-8787.

Business-pursuit exclusion applies when the activity at issue is the type of work customarily performed and the purpose is to make a profit.

Jake Phillips worked for his father's company, Jim Phillips Excavating, and was hired to demolish a barn. Unfortunately, the customer's granary, home, and garage were damaged in a resulting fire. The customer's insurer paid for the loss and subrogated against the Phillipses, who sought coverage under Jim's farm/ranch policy with American Family. The trial court granted summary judgment based on the business pursuit exclusion, which stated in pertinent part that the policy would "not pay for damages due to… property damage arising out business pursuits except: (a) activities normally considered non-business; or (b) occasional or part-time business activities of any self-employed insured under 19 years of age." The Sixth District adopted the test used by the Eighth District in *Lenart v. Doversberger*, 8th Dist. Nos. 65372, 65373, 1994 WL 189433, *7 (May 12, 1994), finding that the elements necessary for an activity to constitute a business pursuit are (1) continuity, and (2) profit motive. In this case there was no coverage because Jake customarily performed demolition to earn a living with a purpose of making a profit on this job, and that it was not relevant whether he actually made a profit on this job. *American Family Ins. v. James Phillips, et al.*, 6th Dist. No. OT–17–004, 2017 WL 5626218 (Nov. 22, 2017).

Language excluding coverage where the insured is operating a vehicle in violation of his/her "driving privileges" is not ambiguous and excludes coverage where the insured violates the terms of his/her learner's permit.

Ran Gurung had a temporary driving permit which required him to be accompanied by a licensed driver when operating his vehicle. He was driving his car and had two passengers; neither passenger had a driver's license. He was insured by Founders Insurance Company. He struck a bus and injured someone. Founders denied coverage because its policy provided that "[n]o coverage is afforded under any Part of this policy if, at the time of the accident, your insured car or temporary substitute car is being operated by a person who . . . is in violation of any condition of their driving privileges[.]" Gurung claimed that the term "driving privileges" was ambiguous and "refers only to the permission to drive that is sometimes granted to a person whose driver's license has been revoked or suspended." The court disagreed and found that Founders had properly denied coverage because "the exclusion provides that no coverage is afforded if, at the time of the collision, the insured's car is being operated by a person who is in violation of any condition of their authorization to operate a motor vehicle upon the public highways." *Founders Ins. Co. v. Gurung*, 9th Dist. Nos. 28508, 28511, 2017-Ohio-8983.

Whether an insured should have been aware of rot and decay is a question of fact and an improper determination for summary judgment stage.

Intergroup International's building was insured by Cincinnati Insurance Companies and sustained roof damage. Cincinnati initially denied coverage because the damage was caused by rot and decay of a truss rather than wind/storm damage, and found a collapse coverage rider was inapplicable because it provided coverage for a "collapse" caused by decay that is hidden from view. About a year later, a large portion of the roof collapsed inward onto the interior floor of the building. Cincinnati denied coverage for this second incident because "Intergroup was put on notice of the decay" of the truss by the prior partial failure. The court found no coverage for the initial truss failure because (1) there was no admissible evidence showing that it was caused by excluded rot and decay, and (2) the roof hadn't actually collapsed, so the collapse rider didn't apply. However, the court found that coverage potentially existed for the second larger collapse of the roof because there was no evidence that Intergroup knew of the decay and whether Intergroup should have known is an issue of fact for the jury. *Intergroup Internatl. Ltd. v. Cincinnati Ins. Cos.*, 8th Dist. No. 105290, 2017-Ohio-8660.

A pollution exclusion unambiguously excludes coverage for personal injury actions based on localized exposure as well as large scale environmental contamination.

A group of 84 Alcoa employees were exposed to toxic coal-tar pitch contained in a product manufactured by GrafTech during the course of their jobs smelting aluminum. The employees sued GrafTech which demanded defense and indemnity from its insurer, ACE. ACE denied coverage based on the pollution exclusion in the policy. GrafTech filed suit seeking a declaration of coverage, asserting "that pollution exclusions apply only to contamination of the environment, not to personal injury lawsuits alleging localized exposure to allegedly dangerous products, even if such exposure happens somewhere in the 'environment.'" Both the trial court and the court of appeals disagreed holding that the pollution exclusion unambiguously applies because the employee lawsuits alleged: (1) "GrafTech's products released a toxic substance into

the plant"; (2) "GrafTech negligently failed to provide a safe product, the normal use of which resulted in a release of toxic chemicals that caused harm to exposed employees"; and (3) "GrafTech's products had the effect of making the environment impure, harmful, or dangerous." *GrafTech Internatl., Ltd. v. Pacific Emps. Ins. Co.*, 8th Dist. No. 105258, 2017-Ohio-9271.

Class certification proper for assessing multiple UM premiums for UM coverage, after a UM premium was paid on a first vehicle.

Without ruling on the merits, the trial court certified a class action against Farmers Insurance Company based on its practice of assessing multiple UM premiums for UM coverage, even after a UM premium was paid on a first vehicle. Specifically, the class action alleges that the Supreme Court of Ohio's decision in *Martin v. Midwestern Group Ins. Co*., 70 Ohio St.3d 478 (1994), invalidated the "other-owned vehicle" exclusion in UM coverage. Consequently, insurers should no longer charge a premium for UM coverage on multiple vehicles because the insured has UM coverage while in any of their owned vehicles due to the fact that a UM premium was paid on one vehicle. The court of appeals affirmed class certification on the class claims for breach of contract and fraud. The court did not rule on the merits of those claims. *Bowen v. Farmers Ins. Co.*, 8th Dist. No. 105643, 2018-Ohio-1638.