

## Ohio

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### REGULATORY LIMITS ON CLAIMS HANDLING

#### Timing for Responses and Determinations

Ohio Administrative Code § 3901-1-07 defines unfair practices in the insurance context. It is an unfair practice for an insurance company to fail “to acknowledge pertinent communications with respect to claims arising under insurance policies in writing, or by other means so long as an appropriate notation is made in the claim file of the insurer, within **fifteen (15) days** of receiving the notice of claim in writing or otherwise.” Ohio Admin. Code § 3901-1-07(C)(2). Insurers must reply to all other pertinent communications and/or inquiries of the Department of Insurance respecting a claim within **twenty-one (21) days**. Ohio Admin. Code § 3901-7-07(C)(3). Furthermore, insurers must implement reasonable procedures to commence an investigation of any claim filed by either a first party or third-party claimant within **twenty-one (21) days** of receipt of notice of a claim. Ohio Admin. Code § 3901-7-07(C)(4). Regarding property or casualty policies specifically, Ohio Admin. Code § 3901-1-54(G)(1) provides:

An insurer shall **within twenty-one (21) days** of the receipt of properly executed proof(s) of loss decide whether to accept or deny such claim(s). If more time is needed to investigate the claim than the twenty-one days allow, the insurer shall notify the claimant within the **twenty-one (21) day period** and provide an explanation of the need for more time. If an extension of time is needed, the insurer has a continuing obligation to notify the claimant in writing, at least every **forty-five (45) days**, of the status of the investigation and the continued time for the investigation.

Moreover, an insurer shall tender payment to a first party claimant no later than **ten (10) days** after acceptance of a claim if the amount of the claim is determined and is not in dispute, unless the settlement involves a structured settlement, action by a probate court, or other extraordinary circumstances as documented in the claim file. Ohio Admin. Code § 3901-1-54(G)(6).

Regarding sickness and accident insurance policies specifically, the Ohio Revised Code requires that such a policy contain a provision that written notice of a claim must be given to the insurer within **twenty (20) days** after the occurrence or commencement of any loss covered by the policy or as soon thereafter as is reasonably possible. Ohio Rev. Code § 3923.04(E). Regarding credit life and accident and health insurance, all claims shall be promptly reported to the insurer or its designated claim representative, and the insurer shall maintain an adequate claim file. Ohio Rev. Code § 3918.10(A). All claims shall be settled as soon as possible in accordance with the terms of the insurance contract. *Id.*

Every policy of sickness and accident insurance delivered, issued for delivery, or used in Ohio must contain certain standard provisions. Ohio Rev. Code § 3923.04. Regarding

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## Ohio

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the timing for responses and determinations, the following provision is a standard provision required by Ohio law:

Time of payment of claims. Indemnities payable under this policy for any loss, other than loss for which this policy provides any periodic payment, will be paid immediately upon, or **within thirty (30) days after**, receipt of due written proof of such loss. Subject to due written proof of loss, all accrued indemnities for loss for which this policy provides periodic payment will be paid ..... and any balance remaining unpaid upon the termination of liability will be paid immediately upon receipt of due written proof.

Ohio Rev. Code § 3923.04(H).

### Standards for Determination and Settlements

Ohio statutes provide a procedure under which one can pursue an insurance claim. See Ohio Rev. Code §§ 3901.19-3901.221. However, “[n]owhere in the Ohio statutory or regulatory framework proscribing deceptive trade practices in insurance does it provide a civil remedy to a private party aggrieved by an insurer.” *Elwert v. Pilot Life Ins. Co.*, 77 Ohio App.3d 529, 542, 602 N.E.2d 1219 (1st Dist. 1991) (quoting *Strack v. Westfield Companies* (1986), 33 Ohio App.3d 336, 515 N.E.2d 1005).

However, Ohio Admin. Code § 3901-1-54 provides rules insurers must follow regarding property/casualty claims settlement practices. For example, Ohio Admin. Code § 3901-1-54(E) provides a great deal of regulations an insurer must follow with respect to misrepresentations of policy provisions, including concealment of benefits, denial of claims, and written notice. § 3901-1-54(G) provides even more standards for the settlement of claims, including, but not limited to, what information a denial must contain, submitting insureds to polygraph testing, and notice. Subsection (H) also provides regulations regarding standards for prompt, fair, and equitable settlements of automobile insurance claims.

Regarding life insurance, the Ohio Revised Code expressly prohibits the issuance of any life insurance policy containing a provision for any mode of settlement at maturity of less value than the amount insured on the face of the policy plus dividend additions, less any indebtedness to the insurer on the policy, and less any premium that may be by the terms of the policy deducted. Ohio Rev. Code § 3915.09(C).

The insurer’s liability under an accident or health insurance policy is limited by the terms of the policy. *State Auto. Mut. Ins. Co. v. Dolosich*, 135 Ohio App.3d 601, 735 N.E.2d 38 (8th Dist. 1999). Thus, the insurer’s liability will be determined on a case-by-case basis using the principles of contract interpretation described below.

As with other types of disputes, Ohio case law favors compromise or settlement of an insurance claim provided no fraud or deception is practiced. Accordingly, settlement agreements reached with insurers are enforceable notwithstanding subsequent change of heart by the insured regarding the terms of such an agreement. *Feathers v. Tasker*, 9th Dist. Summit No. 26318, 2012-Ohio-4917. Parties are bound by the terms of their settlement agreement as in any other contract where they have manifested intent to enter into the agreement. *Id.* Regular contract defenses apply to settlement agreements in the insurance contract, including mutual mistake, *Morgan v. State Farm Mut. Auto. Ins. Co.*, 8th Dist. Cuyahoga No. 47841, 1985 WL 6871, or fraud *Stoller v. Fid. & Guar. Ins. Underwriters, Inc.*, 6th Dist. Wood No. WD-87-64, 1988 WL 81809.

Once an insured cashes a check received by an insurer as settlement of a claim, the insured can no longer challenge the settlement. *Fralely v. Allstate Ins. Co.*, 5th Dist. Richland No. 03-CA-67, 2004-Ohio-2272, ¶ 21.

### Privacy Protections (In addition to Federal Gramm-Leach-Bliley Act)

On March 20, 2019, Ohio adopted cybersecurity legislation modeled after the National Association of Insurance

## Ohio

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Commissioners (NAIC) Insurance Data Security Model Law. The Ohio law, Senate Bill 273 (S.B. 273), which added Sections 3965.01-11 to the Ohio Revised Code, applies to insurers authorized to do business in Ohio. Companies were given one year to put the security measures into place.

Ohio's law requires insurance providers to take several steps to protect nonpublic personal information, including conducting risk assessments, including:

- Written information security program. A licensee must implement a comprehensive written information security program. As part of this program, each provider must include an incident response plan. Ohio Rev. Code § 3965.02.
- Risk assessment. A provider must conduct an annual review of the security program's key controls, systems, and procedures. Ohio Rev. Code § 3965.02(C).
- Annual certification. Insurers domiciled in Ohio must annually submit a written statement to the superintendent of insurance, certifying that the insurer is in compliance with the requirements set forth in the law. Ohio Rev. Code § 3965.02(I).
- Prompt investigation. If a provider learns that a "cybersecurity event" (defined by Ohio Rev. Code 3965.01(E)) has or may have occurred, the provider or an outside provider must conduct a prompt investigation and oversee measures to restore the security of the compromised information systems. Ohio Rev. Code § 3965.03.
- Oversight of third-party service providers. A provider must require its third-party service provider to implement appropriate security measures to secure the nonpublic information that is accessible or held by that provider. Furthermore, if a licensee learns that a cybersecurity event may have occurred in a third-party service provider's information system, the licensee must conduct an investigation or make reasonable efforts to confirm that the third-party provider conducted an investigation and restored security. Ohio Rev. Code § 3965.03(C).
- Cybersecurity event notification. Under certain circumstances, a licensee must notify the superintendent of insurance of a cybersecurity event no later than three business days after determination the event occurred. Ohio Rev. Code § 3965.04.

Under Ohio Rev. Code § 3958.08, satisfaction of the statutory requirements gives a provider an affirmative defense to any cause of action alleging that the failure to implement reasonable information security controls resulted in a data breach concerning nonpublic information.

In addition to Chapter 3958 of the Ohio Revised Code, the Ohio Administrative Code contains provisions that regulate the Department of Insurance with respect to employee access to confidential personal information that is kept by the Department. Ohio Admin. Code § 3901-1-02. The superintendent of the department must designate an employee of the department to serve as the data privacy point of contact. *Id.* at § 3901-1-02(D)(4). The data privacy point of contact shall work with the chief privacy officer within the office of information technology to assist the department with both the implementation of privacy protections for the confidential personal information that the department maintains and compliance with section 1347.15 of the Revised Code and the rules adopted pursuant to the authority provided by that chapter. *Id.*

## PRINCIPLES OF CONTRACT INTERPRETATION

Insurance policies are written contracts between the insurer and insured. Thus, the meaning of the contract terms must be determined according to the same rules as are applicable to other written contracts. *Chiquita Brands Internatl., Inc. v. Natl. Union Ins. Co.*, 1st Dist. No. C-120019, 2013-Ohio-759, 988 N.E.2d 897, ¶ 7; *Auto-Owners Ins. Co. v. Merillat*, 6th Dist. No. F-05-027, 167 Ohio App.3d 148, 2006-Ohio-2491, 854 N.E.2d 513, ¶ 34.

## Ohio

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When confronted with an issue of contract interpretation, courts must give effect to the intent of the parties in the agreement. Indeed, the fundamental goal in an insurance policy is to ascertain the intent of the parties from a reading of the contract in its entirety and to settle upon a reasonable interpretation of any disputed terms in a manner calculated to give the agreement its intended effect. *Med. Assur. Co. v. Dillaplain*, 2nd Dist. No. 2009 CA 6, 186 Ohio App.3d 635, 2010-Ohio-841, 929 N.E.2d 1084, ¶ 13.

Interpreting insurance policies requires a court to examine the intent of the parties and to give effect to that intent. Accordingly, in interpreting insurance policies, courts look to the terms of the policy. *Petrone v. Grange Mut. Cas. Co.*, 9th Dist. Summit No. 20909, 2002-Ohio-3746, ¶ 17. When the intent of the parties is evident from the clear and unambiguous language in an insurance provision, the plain language of the provision must be applied. *Cincinnati Ins. Co. v. CPS Holdings, Inc.*, 115 Ohio St.3d 306, 2007-Ohio-4917, 875 N.E.2d 31, ¶ 7 (2007); *Este Oils Co. v. Federated Ins. Co.*, 132 Ohio App.3d 194, 200, 724 N.E.2d 854, 858 (1st Dist.1999). Thus, where the plain and ordinary meaning of the language used in an insurance policy is clear and unambiguous, a court cannot resort to construction of that language; it must apply the plain and ordinary language. *Suder-Benore Co. v. Motorists Mut. Ins. Co.*, 6th Dist. No. L-12-1351, 2013-Ohio-3959, 995 N.E.2d 1279, ¶ 14.

Contract terms are to be given their plain and ordinary meaning. *Cincinnati Indemn. Co. v. Martin*, 85 Ohio St.3d 604, 1999-Ohio-322, 710 N.E.2d 677 (1999); *Gomolka v. State Auto. Mut. Ins. Co.*, 70 Ohio St.2d 166, 172, 436 N.E.2d 1347, 1351 (1982). A court may only deviate from the plain and ordinary meaning of the policy terms and construe a different meaning if the plain meaning would cause an absurd result. *Blohm v. Cincinnati Ins. Co.*, 39 Ohio St.3d 63, 529 N.E.2d 433 (1988). Thus, only in the rarest of circumstances may a court substitute a different meaning to provisions of a policy that are unambiguous. See *Herschell v. Rudolph*, 11th Dist. Lake No. 2001-L-069, 2002-Ohio-1688. However, in the absence of plain meaning, a term must be defined by reference to extrinsic evidence. *Aetna Cas. & Sur. Co. v. Roland*, 47 Ohio App.3d 93, 95, 547 N.E.2d 379, 382 (10th Dist.1988).

When a contract term is defined in the policy, that definition controls what the term means. *Watkins v. Brown*, 97 Ohio App.3d 160, 164, 646 N.E.2d 485, 487 (2nd Dist.1994). When a term is not defined in the policy, the court must look to their plain and ordinary meaning, and the fact that an insurance policy does not define a term does not necessarily mean it is ambiguous. *Fahlbush v. Crum-Jones*, 1st Dist. No. C-070285, 176 Ohio App.3d 328, 2008-Ohio-1953, 891 N.E.2d 1242, ¶ 16. Nor is it true that a term is ambiguous because the policy could have been more clearly drafted. *Milburn v. Allstate Ins. Co. Property & Cas.*, 10th Dist. No. 09AP-392, 185 Ohio App.3d 796, 2009-Ohio-5476, 925 N.E.2d 1018, ¶ 19. Terms or phrases that have a technical meaning in the business to which the contract refers will be interpreted according to such meaning unless a contrary intention is clearly expressed. *Govt. Emps. Ins. Co. v. Hughes*, 10th Dist. No. 08AP-1120, 184 Ohio App.3d 397, 2009-Ohio-5023, 921 N.E.2d 269, ¶ 20; *Mastellone v. Lightning Rod Mut. Ins. Co.*, 8th Dist. No. 88783, 175 Ohio App.3d 23, 2008-Ohio-311, 884 N.E.2d 1130, ¶ 61; *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.*, 78 Ohio St.3d 353, 1997-Ohio-202, 678 N.E.2d 519 (1997).

“A court will resort to extrinsic evidence in its effort to give effect to the parties’ intentions only where the language is unclear or ambiguous, or where the circumstances surrounding the agreement invest the language of the contract with special meaning.” *Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130, 509 N.E.2d 411, 413 (1987). Furthermore, where words in the policy have a special meaning within a particular trade or industry which is not reflected on the face of the agreement, courts may resort to extrinsic evidence to establish that meaning. *Roland*, 47 Ohio App.3d at 95.

Since the insurer generally is the party who drafts the policy language, a policy which is reasonably susceptible to more than one interpretation, i.e. it is ambiguous, is to be construed liberally in favor of the insured and strictly against the insurer. *Marusa v. Erie Ins. Co.*, 136 Ohio St.3d 118, 2013-Ohio-1957, 991 N.E.2d 232, ¶ 8 (2013); *Clark*

*v. Scarpelli*, 91 Ohio St.3d 271, 2001-Ohio-39, 744 N.E.2d 719 (2001); *Crabtree v. 21st Century Ins. Co.*, 4th Dist. No. 06CA2945, 176 Ohio App.3d 507, 2008-Ohio-3335, 892 N.E.2d 925, ¶ 10; *Cincinnati Ins. Co. v. ACE INA Holdings, Inc.*, 1st Dist. No. C-060384, 175 Ohio App.3d 266, 2007-Ohio-5576, 886 N.E.2d 876, ¶ 26. If a policy provision is ambiguous, any reasonable construction which results in coverage for the insured must be adopted by the trial court. *Columbiana Cty. Bd. of Commrs. v. Nationwide Ins. Co.*, 130 Ohio App.3d 8, 16, 719 N.E.2d 561, 566 (7th Dist.1998). As a limitation, the general rule of liberal construction of insurance policies in favor of the claimant who seeks coverage cannot be used to create an ambiguity where one does not exist. *Lager v. Miller-Gonzalez*, 120 Ohio St.3d 47, 2008-Ohio-4838, 896 N.E.2d 666, ¶ 16 (2008); *Auto-Owners Ins. Co. v. Merillat*, 6th Dist. No. F-05-027, 167 Ohio App.3d 148, 2006-Ohio-2491, 854 N.E.2d 513. Exclusions or exceptions from coverage must be expressly provided or must arise by necessary implication from the policy language. *Fulkerson v. UNUM Life Ins. Co. of Am.*, 36 F.4th 678, (6th Cir. 2022)(decedent’s mother was not entitled to the accidental death benefit under decedent’s policy because reckless driving falls within the unambiguous plain meaning of crime, and the policy excluded losses caused by, contributed to by, or resulting from the commission of a crime); (*Dublin Bldg. Sys. v. Selective Ins. Co. of S.C.*, 10th Dist. No. 06AP-213, 172 Ohio App.3d 196, 2007-Ohio-494, 874 N.E.2d 788, ¶ 26. Thus, provisions that provide for exclusions or exemptions from coverage must be narrowly construed in favor of the insured.

## CONTRACT INTERPRETATION

### Common Issues

1. **Faulty Workmanship as an “Occurrence” [What is the state of the common law in your state on this subject?]**

The Ohio Supreme Court consistently holds that faulty workmanship is not an occurrence under commercial general liability policies. “Claims of defective construction or workmanship brought by a property owner are not claims for property damage caused by an occurrence under a commercial general liability policy.” *Westfield Ins. Co. v. Custom Agri Sys.*, 133 Ohio St.3d 476, 2012-Ohio-4712, 979 N.E.2d 269, ¶ 19. The basis for the Ohio Supreme Court’s holding is that claims for faulty workmanship are not fortuitous in the context of commercial general liability policies and, therefore, are left uncovered. *Id.* at ¶ 14. *See also Ohio N. Univ. v. Charles Constr. Servs.*, 155 Ohio St.3d 197, 2018-Ohio-4057, 120 N.E.3d 762, ¶ 29 (“[Commercial General Liability] policies are not intended to protect owners from ordinary business risks that are normal, frequent or predictable consequences of doing business that the insured can manage.”).

2. **Does Your State Have an Anti-Indemnity Statute? [And if so, does it have any notable peculiarities?]**

Ohio’s anti-indemnity statute is limited to indemnity provisions contained within construction contracts. Ohio Rev. Code § 2305.31 renders void and against public policy indemnity provisions in construction contracts purporting to indemnify and hold a party harmless from property damage or personal injury caused by or resulting from the negligence of the promisee. Of note, Ohio courts have held that section 2305.31 does not void provisions in construction contracts that require the promisor to obtain liability insurance naming the promisee as an additional insured. *Brzeczek v. Std. Oil Co.*, 4 Ohio App.3d 209, 213, 447 N.E.2d 760 (6th Dist. 1982). *See also Toledo Edison Co. v. ABC Supply Co.*, 46 F.App’x 757, 764 (6th Cir. 2002) (while section 2305.31 prevents a promisor from agreeing to indemnify a promisee for the promisee’s negligence, “the *Brzeczek* court held that two parties to such a contract could allocate the risk of loss between themselves through insurance in any manner they wish”).

## CHOICE OF LAW

The Ohio Supreme Court has adopted Sections 187 and 188 of the Restatement of Conflicts of Law. *Ohayon v. Safeco Ins. Co. of Illinois*, 91 Ohio St.3d 474, 2001-Ohio-100, 747 N.E.2d 206 (2001). Section 187 of the Restatement generally provides that the law of the state chosen by the parties to a contract will govern their contractual rights and duties. Thus, Ohio courts will honor choice of law provisions in insurance policies. Where choice of law is not designated in the policy, Section 188 governs. Section 188 provides the “most significant relationship” test. The rights and duties of the parties must be determined by the law of the state which has the **most significant relationship** to the transaction and the parties. This also section also enumerates factors that courts should consider in the absence of such a choice.

In absence of an effective choice of law provision in the insurance policy, the contacts to be taken into account to determine the law applicable include:

- The place of contracting,
- The place of negotiation,
- The place of performance,
- The location of the subject matter, and
- The domicile, residence, nationality, place of incorporation, and place of business of the parties.

The above contacts are to be evaluated according to their relative importance with respect to the particular issue.

The focus on the various factors above will often correspond with the Restatement’s view that the rights created by an insurance contract should be determined “by the local law of the state which the parties understood was to be the *principal location of the insured risk during the term of the policy*, unless with respect to the particular issue, some other state has a more significant relationship...to the transaction and the parties.” *Ohayon*, 91 Ohio St.3d at 479 (emphasis in original).

A separate choice of law analysis applies to the underlying loss. Thus, the state law that applies to an insurance contract may not be the same law that applies to the underlying claim. If the underlying claim is a tort, the law of the state where the tort occurred controls, but if the underlying claim is contractual, the Restatement will determine the choice of law. *See Kurent v. Farmers Ins. of Columbus*, 62 Ohio St.3d 242, 246, 581 N.E.2d 533, 536 (1991)

## DUTIES IMPOSED BY STATE LAW

### Duty to Defend

#### 1. Standard for Determining Duty to Defend

Under Ohio law, an insurer has a duty to defend its insured, and the duty is broad. *Cincinnati Ins. Co. v. BCPS Holdings, Inc.*, 115 Ohio St.3d 306, 2007-Ohio-4919, 875 N.E.2d 31 (2007) (holding that the insurer’s duty to defend is both broader and distinct from the duty to indemnify). Thus, the issue is often whether the complaint is sufficiently pleaded to trigger the duty. Pursuant to the standard “pleading test” where the pleadings unequivocally bring an action within the

coverage afforded by the policy, the duty to defend will attach. *Willoughby Hills v. Cincinnati Ins. Co.*, 9 Ohio St.3d 177, 459 N.E.2d 555 (1984); *Sanderson v. Ohio Edison Co.*, 69 Ohio St.3d 582, 635 N.E.2d 19 (1994); *Lexington Ins. Co. v. DunnWell, LLC*, 9th Dist. Summit No. 27476, 2016-Ohio-5311, 69 N.E.3d 1066. However, where the insurer's duty to defend is not apparent from the pleadings in the case against the insured, but the allegations do 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 had been pleaded, the insurer must accept the defense of the claim." *Willoughby Hills*, 9 Ohio St.3d at 180, 459 N.E.2d 555 (emphasis added). Thus, the "scope of the allegations" may encompass matters well outside the four corners of the pleadings. *Id.*

The "duty to defend need not arise solely from the allegations in the complaint but may arise at a point subsequent to the filing of the complaint." *Id.* at 177; but see *Preferred Risk Ins. Co. v. Gill*, 30 Ohio St.3d 108, 113, 507 N.E.2d 1118 (1987)(distinguishing *Willoughby Hills* holding that "where the conduct which prompted the underlying...suit is so indisputably outside coverage, we discern no basis for requiring the insurance company to defend or indemnify its insured simply because the underlying complaint alleges conduct within coverage."); *Ward v. United Foundaries, Inc.*, 129 Ohio St.3d 292, 295, 2011-Ohio-3176, 951 N.E.2d 770 (2011)("if the claims are clearly and indisputably outside the contracted coverage, the insurer need not defend the insured.").

Thus, while the duty to defend is broad, it is not without limitation. In *Preferred Risk*, the Ohio Supreme Court held that the allegations in the complaint did not justify the application of the *Willoughby Hills* rule when the insurer sought a declaratory judgment that it had no duty to defend an insured against a tort claim brought by the parents of a child murdered by the insured. *Preferred Risk*, 30 Ohio St.3d at 112, 507 N.E.2d 1118; see also *Cincinnati Ins. Co. v. Anders*, 99 Ohio St.3d 156, 2003-Ohio-3048, 789 N.E.2d 1094 (2003) (holding that if the conduct alleged in a complaint is indisputably outside the scope of coverage, there is no duty to defend); compare *Great American Ins. Co. v. Hartford Ins. Co.*, 85 Ohio App.3d 815, 818, 621 N.E.2d 796 (11th Dist. 1993) (holding that "the insurer's obligation to defend will continue until the claim is confined to a theory of recovery that the policy does not cover."); *Cincinnati Indemn. Co. v. Martin*, 85 Ohio St.3d 604, 1999-Ohio-322, 710 N.E.2d 677 (1999) (holding that 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 the insured where the policy excludes liability coverage for claims based on bodily injury to the insured). The *Anders* court made clear that while *Preferred Risk* remains good law, the principles set forth in that case should be limited to cases which are substantially similar to *Preferred Risk*.

When an insurer is found to have breached its duty to defend, the insured may recover all damages "which could reasonably be considered as arising naturally from [the insurer's] breach of the duty to defend." *Roberts v. United States Fid. & Guar. Co.*, 75 Ohio St.3d 630, 1996-Ohio-101, 665 N.E.2d 664 (1996). However, an insurer may not recover damages that are too "remote, speculative, and not supported by evidence." *Id.*

## 2. Issues with Reserving Rights

Where the insurer is doubtful of its liability and wishes to retain its rights, it may give a "nonwaiver" notice to the insured or attempt to enter a "nonwaiver" agreement with the insured, reserving the rights to later assert the policy breach for noncoverage. A "reservation of rights" consists of a notice given by the insurer that it will defend the suit but reserved all rights it

has based on noncoverage under the policy. *Estate of Heintzelman v. Air Experts, Inc.*, 5th Dist. Delaware No. 11CAE050043, 2011-Ohio-5242, ¶ 55 (quoting *Motorists Mutual Ins. Co. v. Trainor*, 33 Ohio St.2d 41, 45, 294 N.E.2d 874 (1973)). By providing a reservation of rights, an insurer reserves the right to deny coverage at a later date based on the terms of the policy. *Id.*; *Nationwide Ins. Co. v. Alli*, 7th Dist. No. 07 MA 126, 178 Ohio App.3d 17, 2008-Ohio-4318, 896 N.E.2d 742, ¶ 40; *Mastellone v. Lightning Rod Mut. Ins. Co.*, 8th Dist. No. 88783, 175 Ohio App.3d 23, 2008-Ohio-311, 884 N.E.2d 1130, ¶ 39.

In accepting the defense of a claim, the insurer is free to reserve its rights to assert defenses, including defenses that later come to light. *Glidden Co. v. Lumbermens Mut. Cas. Co.*, 112 Ohio St.3d 470, 2006-Ohio-6553, 861 N.E.2d 109 (2006); *Westfield Cos. v. O.K.L. Can Line*, 1st Dist. No. C-030151, 155 Ohio App.3d 747, 2003-Ohio-7151, 804 N.E.2d 45, ¶ 8. The issuance of a reservation of rights is an essential predicate to defeating a waiver or estoppel claim. See *Amerisure Ins. Co. v. Mut. Fire, Marine & Inland Ins. Co.*, 8th Dist. Cuyahoga No. 58433, 1991 WL 76034, \*13; *Ins. Co. of N. Am. v. Travelers Ins. Co.*, 118 Ohio App. 3d 302, 322, 692 N.E.2d 1028 (1997).

A reservation of rights may be issued in response to a notice of occurrence, notice of claim or in response to a notice of the suit. Upon receipt of notice of occurrence, claim or suit, an insurer should issue a reservation of rights in order to preserve any coverage positions available to it at law or under the insurance policy. *Trainor*, 33 Ohio St.2d at 45, 294 N.E.2d 874. An insurer must give “reasonable notice” to the insured that it disclaims liability; otherwise, the insurer waives the right to avoid liability because of an exception under the policy. *Socony-Vacuum Oil Co. v. Continental Cas. Co.*, 45 Ohio Law Abs. 458, 67 N.E.2d 836 (8th Dist.1944), *aff'd*, 144 Ohio St. 382, 59 N.E.2d 199 (1945).

Ohio courts have not definitively determined what constitutes “reasonable notice.” If the reservation of rights comes so late that it prejudices the insured’s ability to defend the matter, a court may find the insurer has waived the reservation of rights. *Dietz-Britton v. Smythe, Cramer Co.*, 139 Ohio App.3d 337, 347, 743 N.E.2d 960, 968 (8th Dist.2000) (holding that a two-year lapse between the start of the defense and reservation of rights was too long). “Providing a defense for nearly one year without reserving rights may give rise to a claim of estoppel.” *Turner Liquidating Co. v. St. Paul Surplus Lines Ins. Co.*, 93 Ohio App.3d 292, 300, 638 N.E.2d 174, 179 (9th Dist.1994). In *Collins v. Grange Mut. Cas. Co.*, the Court of Appeals held that a sixteen-month period constituted a waiver of a reservation of rights. 124 Ohio App.3d 574, 579, 706 N.E.2d 856, 859 (12th Dist.1997). On the other hand, defending the insured for as long as two months was not sufficient to prejudice the insured. *Med. Protective Co. v. Fragatos*, 8th Dist. No. 93843, 190 Ohio App.3d 114, 2010-Ohio-4487, 940 N.E.2d 1011, ¶ 20. Similarly, the insured was not prejudiced when the insurer defended for a period of 16 days before issuing a reservation of rights. *GuideOne Mut. Ins. Co. v. Reno*, 2nd Dist. Greene No. 01-CA-68, 2002-Ohio-2057, *aff'd sub nom.* *Cincinnati Ins. Co. v. Anders*, 99 Ohio St.3d 156, 2003-Ohio-3048, 789 N.E.2d 1094 (2003). However, some courts have concluded that by providing a defense without a reservation of rights, it is conclusively established that the insured was prejudiced. See *Ins. Co. of N. America v. Travelers Ins. Co.*, 118 Ohio App.3d 302, 322, 692 N.E.2d 1028, 1041 (8th Dist.1997).

There are no specific requirements as to what information must be included in a reservation of rights letter and whether the letter is sufficient is to be determined on a case-by-case basis. *Efficient Lighting Sales Co. v. Neverman*, 8th Dist. Cuyahoga No. 91093, 2009-Ohio-627, ¶ 27



(holding that a reservation of rights letter that reserved the right to raise all defenses and preserve all terms and conditions of the policy was deemed sufficient). However, the letter should “fairly inform” the insured of the insurer’s position with regard to a claim. *Newby Intern., Inc. v. Nautilus Ins. Co.*, 112 Fed.Appx. 397, 405 (6th Cir.2004); see *Britton*, 139 Ohio App.3d at 350, 743 N.E.2d 960 (“When deciding to reserve rights, an insurer has the obligation to do so in good faith, without causing undue prejudice to plaintiff’s ability to make an informed decision to obtain independent counsel.”); *Fairfield Mach. Co. v. Aetna Cas. & Sur. Co.*, 7th Dist. Columbiana No. 2000 CO 14, 2001-Ohio-3407.

Conflicts of interest and ethical issues may arise when an insurer hires an attorney or law firm to defend a policyholder. Disputes can develop regarding the tripartite relationship between defense counsel, the insurer, and the insured. See *Swiss Reinsurance Am. Corp. v. Roetzel & Andress*, 9th Dist. No. 22523, 163 Ohio App.3d 336, 2005-Ohio-4799, 837 N.E.2d 1215. If the insurer has issued a reservation of rights, a potential conflict exists with respect to the conduct of the insured’s defense—the insurer and insured may have divergent views on how to handle the defense, views that may cause the judgment in the underlying case to be determinative of the coverage issue in one way or another.

The majority view in Ohio is that an insurer may select counsel to defend the insured under a reservation of rights. The insurer need only pay for the insured’s private counsel when the insurer’s stance with respect to coverage renders it “impossible” for it to “protect both its own interests and those of the insured.” *Red Head Brass, Inc. v. Buckeye Union Ins. Co.*, 135 Ohio App.3d 616, 626, 735 N.E.2d 48, 55 (9th Dist.1999). This is a difficult hurdle to jump for the insured who seeks to utilize private counsel. The interests must be “mutually exclusive,” or irreconcilable on an issue material to coverage, before the insurer must pay the costs of private counsel for the policyholder. *Id.* Where the insurer reserves its right to deny coverage, but the facts present “no conflict of interest,” the insurer need not pay for private counsel. *Lusk v. Imperial Cas. & Indemn. Co.*, 78 Ohio App.3d 11, 19, 603 N.E.2d 420, 425 (10th Dist.1992).

A reservation of rights is not necessary in the absence of a duty to defend. Thus, if a policy excludes coverage for certain types of circumstances or behavior, the reservation of rights is not necessary to maintain defenses to coverage. If an insurer has no duty to defend, it cannot later be estopped from raising coverage defenses, or said to have waived those defenses, if it fails to reserve rights when notified of a claim or suit potentially implicating its coverage. See *McGuffin v. Zaremba Contr.*, 166 Ohio App.3d 142, 147, 2006-Ohio-1734, 849 N.E.2d 315 (8th Dist. 2006).

Finally, if an insurer defends an insured, and it is later determined that there was no duty, the insurer may be able to recoup the money it spent on the defense. See *United National Insurance Co. v. SST Fitness Corp.*, 309 F.3d 914 (6th Cir. 2002) (“We agree that allowing an insurer to recover under an implied contract theory so long as the insurer timely and explicitly reserved its right to recoup the cost and provided adequate notice of the possibility of reimbursement promotes the policy of ensuring defenses are afforded even in questionable cases.”). Thus, if the reservation of rights letter contains a provision that allows the insurer to recoup legal fees, courts will enforce it, assuming there are no deficiencies in the reservation. When faced with a reservation of rights, an insured can choose to 1.) decline the offer, pay for the defenses and seek to recover on the policy, 2.) decline the offer and file a declaratory judgment action, or 3.) accept the offer subject to the reservation of rights. *Id.* at 921.

## State Privacy Laws; Insurance Regulatory Issues; Arbitration/Mediation

### 1. Criminal Sanctions

The Revised Code imposes penalties on insurance companies for violations of, or noncompliance with, insurance regulations, including violations of various regulatory provisions, such as those regarding insurance agents generally, crimes relating to insurance, foreign life insurance companies' failure to make an annual statement, sickness and accident insurance companies, and ratings bureaus.

Ohio Rev. Code § 3999.99 provides the penalties for committing insurance-related crimes. Some of the crimes and their associated penalties follow. No medical examiner for a life insurance company or for an applicant for insurance therein shall knowingly make a false statement or report to such company or to an officer thereof concerning the health or physical condition of an applicant for insurance, or other matter or thing affecting the granting of such insurance. Ohio Rev. Code § 3999.02. Whoever violates this section is guilty of a misdemeanor of the second degree. Ohio Rev. Code § 3999.99(A).

No trustee, officer, agent, or employee of a corporation, company, or association organized to transact the business of life or accident or life and accident insurance on the assessment plan shall knowingly insure a person, or permit him to be insured without that person's knowledge or consent, or insure a fictitious person, a person over sixty-five (65) or under fifteen (15) years of age, or a sickly or infirm person. Ohio Rev. Code § 3999.03. A person who violates this provision is guilty of a misdemeanor in the first degree. Ohio Rev. Code § 3999.99(B).

Insurers are required under the Revised Code to make a reasonable effort to notify every certified holder who is covered under an insurance policy whenever the person fails to make a premium payment or contribution that results in the termination of coverage. The notice must be in writing and must clearly state that the person failed to make the required premium payment, the reason for the failure, and the effect of the failure on the coverage of the certificate holder under the policy or contract. Ohio Rev. Code § 3999.32. A person who knowingly violates this section is guilty of a felony of the fourth degree. Ohio Rev. Code § 3999.99(F).

### 2. The Standards for Compensatory and Punitive Damages

If an insurer fails to act in good faith with respect to a settlement, the insurer becomes liable to respond in damages to the insured, including actual damages, compensatory damages, and on a showing of malice or aggravated or egregious fraud, punitive damages. *Dardinger v. Anthem Blue Cross & Blue Shield*, 98 Ohio St.3d 77, 2002-Ohio-7113, 781 N.E.2d 121 (2002).

Punitive damages may only be recovered against an insurer where there is both a breach of the duty of good faith in refusing to pay the insured's claim and also where there is proof of actual malice on the insurer's part or aggravated or egregious fraud on the part of the insurer. See *Jenkins v. State Farm Mut. Auto. Ins. Co.*, 10th Dist. Franklin No. 11AP-1074, 2013-Ohio-1142; *Stewart v. Siciliano*, 11th Dist. No. 2011-A-0042, 2012-Ohio-6123, 985 N.E.2d 226; *Florists' Mut. Ins. Co. v. Ludy Greenhouse Mfg. Corp.*, 521 F.Supp.2d 661 (S.D. Ohio 2007).

An insured's request for "any and all relief Court deems just and proper" is insufficient to state a claim for compensatory damages where the entire crux of the insured's claim is that the insured had a duty to defend; a blanket prayer for relief in no way afforded the insurer notice of a claim for damages stemming from a refusal to defend. *Cincinnati Ins. Co. v. Colelli & Assoc., Inc.*, 9th Dist. Wayne No. 04CA0008, 2004-Ohio-4726.

### 3. Insurance Regulations to Watch

The Ohio Department of Insurance proposed changes to the insurance regulations, including the following: 3901-3-02 exempt from filing the annual group capital calculation for the ultimate controlling person of certain insurance holding company systems, and 3901-3-03 to expand the prior notice filing requirements governing agreements for cost sharing services and management services including defining certain data as the property of the insurer.

Below is a Legislative Update on notable proposed insurance legislation:

- H.B. No. 99: To amend the regulations regarding the practice of reducing benefits related to emergency services if a condition is determined, after the fact, to not be an emergency. Health insurers would be prohibited from reducing or denying a claim for reimbursement for emergency services based solely on a diagnosis code, impression ICD code, or select procedure code relating to the enrollee's condition. Enrollees would not be required to self-diagnose and reimbursement for emergency services claims could not be reduced or denied based on the absence of an emergency medical condition if a prudent layperson with an average knowledge of health and medicine would have reasonably expected the presence of an emergency situation. Insurers would be required to perform an emergency services utilization review, conducted by an eligible board-certified emergency medicine physician, prior to reducing or denying such a claim.
- H.B. No. 130: To establish an exemption to prior authorization requirements. Health insurers would be required to provide publicly available data regarding prior authorization requests, including whether the prior authorization request is for a service, medical device or drug; the specialty of the provider requesting the authorization, indication for use of the subject of the request, rate of denial, reasons for denial, rate of appeal of decisions with regard to a particular service, device, or drug, and the amount of time between submission of requests and responses from the insurer. If an insurer approves at least eighty percent of requests submitted by a provider for a particular service, device, or drug, the provider will be exempted from complying with the insurer's prior authorization requirement for not less than twelve months. Health care providers that do not receive such exemptions would have the right to request that the insurer provide evidence to the provider supporting its decision to not grant an exemption, as well as a right to appeal such a decision.

S.B. No. 115: To amend the regulations regarding limitations imposed by health insurers on services not covered by benefits. Currently applicable only to vision care, insurers would be required to provide conspicuous disclaimers utilizing specific language to all enrollees prior to the provision of out-of-pocket dental services. A pattern of violations of this new section would constitute an unfair and deceptive act or practice in the business of insurance under sections 3901.19 to 3901.26 of the Ohio Rev. Code.

#### 4. State Arbitration and Mediation Procedures

Except as otherwise provided by statute, a provision in any written contract to settle by arbitration a controversy that subsequently arises out of the contract, or out of the refusal to perform the whole or any part of the contract, or any agreement in writing between two or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit, or arising after the agreement to submit, from a relationship then existing between them or that they simultaneously create, is valid, irrevocable, and enforceable except upon grounds that exist at law or in equity for the revocation of any contract. Ohio Rev. Code § 2711.01(A).

Although the provisions of the statute are applicable to insurance contracts, application of the statute requires that the procedure required by the policy be arbitration, which requires that the dispute be submitted to a neutral and independent arbitrator for a decision which is final and binding regardless of the outcome. Where the procedure lacks the binding nature and finality required to constitute it an arbitration, the statute does not compel the parties to the policy to submit to it. *Schaefer v. Allstate Ins. Co.*, 63 Ohio St.3d 708, 590 N.E.2d 1242 (1992); *Travelers Cas. & Sur. Co. v. Aeroquip-Vickers, Inc.*, 6th Dist. Lucas No. L-06-1201, 2007-Ohio-5305.

The general rule that persons selected as arbitrators should be impartial and nonpartisan applies to appraisers selected in pursuance of the provisions of an insurance policy. An arbitration award may be set aside on a showing that there was evident partiality or corruption on the part of the arbitrator. However, only relationships from which one could reasonably infer bias, and not those which are peripheral, superficial, or insignificant, will require vacating the award. *Staff v. State Farm Mut. Ins. Co.*, 87 Ohio App.3d 440, 622 N.E.2d 434 (8th Dist. 1993); *Cousino v. Stewart*, 6th Dist. Fulton No. F-05-011, F-05-004, 2005-Ohio-6245.

#### 5. State Administrative Entity Rule-Making Authority

The Department of Insurance has all powers and must perform all duties formerly vested in and imposed upon the Department of Commerce and Superintendent of Insurance. Ohio Rev. Code § 121.081. The Revised Code provides for the creation of the Department of Insurance, which is administered by the Superintendent of Insurance as director and designated deputies, assistants, and employees. Ohio Rev. Code § 121.02(M). The Superintendent is appointed by the Governor with advice and consent of the Senate, holds office during the term of the appointing governor and is subject to removal at the pleasure of the Governor. Ohio Rev. Code § 121.03(H).

The Superintendent has the authority and duty to make sure that the laws relating to insurance are enforced. Ohio Rev. Code § 3901.011. The Superintendent also has the duty to adopt, amend, and rescind rules and make adjudications, necessary to discharge the Superintendent's duties and exercise the Superintendent's powers. Ohio Rev. Code §§ 3901.041, 3901.042. The Superintendent may adopt rules in accordance with the Revised Code that the Superintendent considers necessary and advisable for the purpose of implementing the Health Insurance Portability and Accountability Act of 1996. Ohio Rev. Code § 3901.044. Additionally, the Superintendent may adopt rules in accordance with statute to establish reasonable fees for any service or transaction performed by the Department of Insurance pursuant to certain provisions, if no fee is otherwise provided for such service or transaction. Ohio Rev. Code § 3901.043.

Among the other functions authorized for the Superintendent of Insurance are the powers:

- to require reports, administer oaths, summon witnesses, request declaratory judgment action, and initiate criminal proceedings. Ohio Rev. Code § 3901.04.
- to examine the financial affairs of any insurer. Ohio Rev. Code § 3901.07.
- to make written requisitions upon the officers or directors of any bank, trust company, clearing corporation, direct participant, or member bank, for information relating to the financial transactions with any insurance company, fraternal beneficiary association, or assessment association. Ohio Rev. Code § 3901.08.
- to conduct hearings in the case of a suspected violation by insurance companies of the regulations as to the acquisition of stock of other insurers and interlocking directorates. Ohio Rev. Code § 3901.13.
- to conduct hearings in the case of a suspected violation by insurance companies of the regulations as to unfair or deceptive practices. Ohio Rev. Code § 3901.22(A).
- to approve mergers and other acquisitions of control in relation to domestic insurers. Ohio Rev. Code § 3901.321(F)(1).
- to examine rating bureau and determine whether to grant a license to a rating bureau. Ohio Rev. Code § 3935.06.
- to examine a managing general agent as if it were the insurer under the provision regarding examination of insurance companies. Ohio Rev. Code § 3905.75(B).

## EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

### Bad Faith Claim Handling/Bad Faith Failure to Settle Within Limits

#### 3. First Party

An insurer has a duty under Ohio law to act in good faith in the processing and payment of the claims of its insured. *Zoppo v. Homestead Insurance Company*, 71 Ohio St.3d 552, 554, 644 N.E.2d 397, 1994-Ohio-461 (1994); *Staff Builders, Inc. v. Armstrong*, 37 Ohio St.3d 298, 525 N.E.2d 783 (Ohio 1988). The liability arises from the breach of the positive legal duty imposed by law due to the relationship between the insurer and the insured. *Staff Builders*, at 302. The duty of good faith operates to ensure that an insurer's performance or refusal to perform under the contract does not impair the insured's right to receive benefits that he might reasonably expect to flow from the contract. See *Buckeye Union Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 1st Dist. Hamilton No. C-960282, 1997 WL 180278.

However, it still remains unclear whether, under Ohio law, a bad faith plaintiff must be able to point to a specific contract provision or duty in order to prevail as a matter of law. The *Staff Builders* court and the *Zoppo* court both stated that an insurer has a duty of good faith in the *processing* and *payment* of the claim. *Staff Builders*, 37 Ohio St.3d at 302; *Zoppo*, 71 Ohio St.3d at 554-55. Thus, it seems that a bad faith claim must, as a matter of law, be premised on the insurer's failure to "process" or "pay" a covered claim. The process or payment language in both cases suggest that the bad faith claim must be tied to some contractual duty.

Some courts will require an underlying breach of contract claim. See, e.g., *Bob Schmitt Homes, Inc. v. The Cincinnati Ins. Co.*, 8th Dist. Cuyahoga No. 75263, 2000 WL 218379, \*4 (holding that

the “initial factual prerequisite” for a bad faith claim was an allegation that the insured was denied some contractual coverage to which the insured was entitled); *Pasco v. State Auto. Mut. Ins. Co.*, 10th Dist. Franklin No. 04AP-696, 2005-Ohio-2387, ¶ 14 (there can be no bad faith claim without an insurer having an “obligation to pay or settle a claim” covered by the policy); *Toledo-Lucas County Port Auth. v. Axa Marine & Aviation Ins. (UK) Ltd.*, 220 F.Supp. 2d 868, 873 (N.D. Ohio 2002) (“[A]n insured may not maintain a claim of bad faith in the absence of coverage under the policy.”); *Hahn’s Elec. Co. v. Cochran*, 10th Dist. Franklin No. 01AP-1391, 2002-Ohio-5009, ¶ 20 (allowing the trial court to stay the bad faith claim pending the outcome of the underlying contract claim); *Emerson v. Med. Mut. of Ohio*, 1st Dist. Hamilton No. C-030074, 2004-Ohio-3892, ¶ 35 (holding that because the plaintiff was not covered under the policy, he could not maintain a claim for bad faith based on the refusal to pay).

On the other hand, some Ohio courts have held that a breach of the duty of good faith will give rise to a cause of action in tort irrespective of any liability arising from breach of contract. See, e.g., *Staff Builders*, 37 Ohio St.3d at 302; *Bullet Trucking, Inc. v. Glen Falls Ins. Co.*, 84 Ohio App.3d 327, 616 N.E.2d 1123 (2nd Dist.1992) (“the tort of bad faith is an independent claim which does not necessarily rely on a breach of contract claim for its existence.”); *Wagner v. Midwestern Indem. Co.*, 83 Ohio St.3d 287, 1998-Ohio-111, 699 N.E.2d 507 (1998) (holding that jury issue on coverage does not prove absence of bad faith); *Essad v. Cincinnati Cas. Co.*, 7th Dist. Mahoning No. 00 CA 207, 2002-Ohio-1947 (Apr. 16, 2002) (Bad faith claim based on “failure to investigate” without reasonable justification could be asserted without proving coverage); *Simpson v. Permanent General Ins. Co.*, 8th Dist. Cuyahoga No. 81216, 2003-Ohio-1157 (holding that the duty of good faith is independent from any contractual duties and bad faith can exist in the absence of coverage).

“An insurer fails to exercise good faith in the processing of a claim of its insured where its refusal to pay the claim is not predicated upon circumstances that furnish a **reasonable justification** thereof.” *Staff Builders*, 37 Ohio St.3d at 303, 525 N.E.2d 783; followed by *Zoppo v. Homestead Insurance Company*, 71 Ohio St.3d 552, 554, 644 N.E.2d 397, 1994-Ohio-461 (1994); *Buckeye Union Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, *Bosley v. Associated Paper Stock, Inc.*, 7th Dist. Mahoning No. 21 MA 0012, 2022-Ohio-2649. This is known as the “reasonable justification” standard. An insurer lacks a reasonable justification when it acts arbitrarily or capriciously. *Hoskins v. Aetna Life Ins. Co.*, 6 Ohio St.3d 272, 277 (1983).

The reasonable justification standard is not new. See *Hart v. Republic Mutual Insurance Company*, 152 Ohio St. 185 (1949); *Slater v. Motorists Mutual Insurance Company*, 174 Ohio St. 148 (1962); *Hoskins v. Aetna Life Insurance Company*, 6 Ohio St.3d 272 (1983). Even though the “reasonable justification” standard has been around since 1949, the Ohio Supreme Court modified it in 1992 when it required plaintiffs to show that a bad faith tort arises when an insurer **intentionally** refuses to satisfy a claim where there is either (1) no lawful basis for the refusal, and (2) an **intentional** failure to determine whether there was any lawful basis for such a refusal. *Motorists Mutual Insurance Company v. Said*, 63 Ohio St.3d 690 (1992). The 1994 *Zoppo* decision, however, overruled the *Said* decision and the “reasonable justification” standard returned. *Zoppo*, 71 Ohio St.3d at 554, 525 N.E.2d 397. Now, proof of actual intent is no longer required. *Wagner v. Midwestern Indemnity Company*, 83 Ohio St.3d 287, 290, 699 N.E.2d 507 (1998) (acknowledging that the *Zoppo* decision sets forth a lower standard of proof for a bad faith action).

The burden of proof is on the insured to establish bad faith on the part of the insurer; it is not the

insurer's burden to prove it acted in good faith. *McCurdy v. Hanover Fire & Cas. Ins. Co.*, 964 F.Supp.2d 863 (N.D. Ohio 2013). However, the mere refusal to pay an insurance claim is not, in itself, conclusive of the insurer's bad faith. *Maxey v. State Farm Fire & Cas. Co.*, 689 F. Supp.2d 946 (S.D. Ohio 2010); *Helmick v. Republic-Franklin Ins. Co.*, 39 Ohio St.3d 71, 529 N.E.2d 464 (1988).

#### 4. Third-Party

Ohio law does not recognize third-party bad faith claims brought against an insured's carrier. *See, e.g., Intercity Auto Sales, Inc. v. Evans*, 8th Dist. Cuyahoga No. 95778, 2011-Ohio-1378; *Gillette v. Estate of Gillette*, 10th Dist. No. 05AP-171, 163 Ohio App.3d 426, 2005-Ohio-5247, 837 N.E.2d 1283. A third-party tort claimant has no right to assert a bad faith claim against a tortfeasor's liability insurer. *Murrell v. Williamsburg School District*, 92 Ohio App.3d 92, 95, 634 N.E.2d 263 (12th Dist. 1993) ("Ohio's law is clear that an insurer's duty to act in good faith runs only from the insurer to the insured and a third party has no cause of action for bad faith against the tortfeasor's insurance company."); *see also Medical Assur. Co. v. Martinez*, N.D. Ohio No. 1:06 CV 1248, 2008 WL 2227345, report and recommendation adopted, N.D. Ohio No. 1:06 CV 12482008 WL 2227340 ("Ohio law clearly and unequivocally provides that a claim of bad faith cannot be brought against an insurer by a third-party claimant."); *Anthony v. Chicago Title Ins. Co.*, S.D. Ohio No. 2:06-CV-00719, 2007 WL 1144802; *Pasipanki v. Morton*, 61 Ohio App.3d 184, 185, 572 N.E.2d 234 (9th Dist. 1990) ("An insurance company has a duty to act in good faith in settling claims and a breach of that duty will give rise to a cause of action by the insured. However, this duty runs only from the insurer to the insured, not to third parties.").

In *Whitacre v. Nationwide Ins., Co.*, 7th Dist. Belmont No. 11 BE 5, 2012-Ohio-4557, ¶ 8, the court held that the bar to a bad faith action by an injured party against a tortfeasor's liability insurer did not apply to a plaintiff nonpolicy holder's suit against tortfeasor's liability insurer directly under verbal contract the plaintiff claimed to have obtained with the insurer to pay the plaintiff's medical expenses and not for payment of damages pursuant to the tortfeasor's insurance policy.

## Fraud

In Ohio, fraudulent conduct that is intended to induce a person to enter into a contract is a cause of action. *See Stecz et al. v. Travelers Insurance Co.*, 159 Ohio Misc.2d 1, 2009-Ohio-7196, 934 N.E.2d 430 (Ohio Com.Pl.). In order to prove fraudulent inducement, a plaintiff must show that a defendant made a knowing, material misrepresentation, or where there is a duty to disclose, concealment of a material fact, with the intent of inducing the plaintiff's reliance and that the plaintiff relied upon that misrepresentation or omission to his or her detriment. *ABM Farms, Inc. v. Woods*, 81 Ohio St.3d 498, 502, 692 N.E.2d 574 (1998). Stated differently, a claim of fraud consists of six elements: a representation of fact, which is material, made falsely—either with knowledge of its falsity or utter disregard and recklessness as to falsity—with the intent to mislead, with justifiable reliance thereupon, and a resulting injury. *Tokles & Son, Inc. v. Midwestern Indem. Co.*, 65 Ohio St.3d 621,632, 605 N.E.2d 936 (1993).

Like the duty of good faith, the tort of fraud in the inducement is separate and distinct from the insurance contract. *Stecz* at ¶ 21. Thus, any contractual statutes of limitations or limitations enforceable pursuant to a policy are not applicable to fraud claims.

## Intentional or Negligent Infliction of Emotional Distress

A claim for intentional infliction of emotional distress requires plaintiff to show that (1) defendant intended to cause emotional distress or knew or should have known that actions taken would result in serious emotional distress; (2) defendant's conduct was extreme and outrageous; (3) defendant's actions proximately caused plaintiff's psychic injury; and (4) the mental anguish plaintiff suffered was serious. *Pyle v. Pyle*, 11 Ohio App.3d 31, 34, 463 N.E.2d 98 (8th Dist. 1983). Defendant's conduct must be so extreme and outrageous "as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Hanly v. Riverside Methodist Hosp.*, 78 Ohio App.3d 73, 82, 603 N.E.2d 1126 (10th Dist. 1991). A defendant can avoid liability for plaintiff's emotional distress "if defendant does no more than insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress." *Id.*; see *Griffith v. Buckeye Union Ins. Co.*, 10th Dist. Franklin No. 86AP-1063, 1987 Ohio App. LEXIS 8971; *William Hammann, Inc. v. Continental Cas. Co.*, 1st Dist. Hamilton No. C-850803, 1987 Ohio App. LEXIS 9051, \*10 (holding that an action for intentional infliction of emotional distress is a purely independent tort and not derivative of a contract claim).

## State Consumer Protection Laws, Rules and Regulations

The Ohio Consumer Sales Practices Act is Ohio's most encompassing consumer protection law. The CSPA generally **has no application to controversies concerning insurance policies**. *Johnson v. Lincoln Nat'l Life Ins. Co.*, 69 Ohio App.3d 249, 590 N.E.2d 761 (2d Dist. 1990); see also *Schaller v. Nat'l Alliance Ins. Co.*, 496 F. Supp. 2d 890 (S.D. Ohio 2007) (granting summary judgment to an insurer on a claim brought by the owners of a motor home who claimed their damaged motor home should have been declared a total loss by the insurer).

However, the insurance company exception to the OCSA does not provide a blanket exemption for all activities conducted by an insurance company; rather, a court must make a practical inquiry into whether the insurer was actually operating as an insurance company in the transaction at issue. *Thornton v. State Farm Mut. Auto Ins. Co.*, N.D. Ohio No. 1:06-CV-00018, 2006 WL 3359448; see also *Hofstetter v. Fletcher*, 905 F.2d 897 (6th Cir. 1988) (holding that defendant's acts of selling life insurance by fraudulently advising the investor to set up a home-based business in order to avoid paying tax fall within the statutory definition of "consumer transactions" contained in Ohio Rev. Code § 1345.01(A)).

Furthermore, Ohio Rev. Code §§ 3901.19-3901.221 prohibit unfair and deceptive acts regarding insurance and provide the procedure under which one can pursue a claim. Ohio Rev. Code § 3901.22 provides for both an administrative hearing process and penalties for committing an unfair or deceptive act. The Superintendent of the Department of Insurance may revoke an offender's license to engage in the business of insurance, prohibit the company or agency from employing the person who committed the act, order the person to return any payments received as a result of the violation and pay statutory interest on such payments. Ohio Rev. Code § 3901.22(D). The Superintendent may also request that the Ohio Attorney General prosecute the person who committed the act, and this may be commenced as a class action. Ohio Rev. Code § 3901.22(E). The Superintendent may also impose monetary damages. Ohio Rev. Code § 3901.22(F).

## State Class Actions

Pursuant to Ohio Rule of Civil Procedure 23(A), "One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."



## Ohio

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Ohio Rule of Civil Procedure 23(B)(3) provides that an action may be maintained as a class action if, in addition to the prerequisites of subdivision (A), "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to the findings include: (a) the class members' interests in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already begun by or against class members; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (d) the likely difficulties in managing a class action."

It is now well established that "a claim will meet the predominance requirement when there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individual position." *Cope v. Metro. Life Ins. Co.*, 82 Ohio St. 3d 426, 429-30, 696 N.E.2d 1001 (1998).

As explained in the 1966 Advisory Committee Notes to Rule 23(b)(3) of the Federal Rules of Civil Procedure:

Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results. \* \* \*

The court is required to find, as a condition of holding that a class action may be maintained under this subdivision, that the questions common to the class predominate over the questions affecting individual members. It is only where this predominance exists that economies can be achieved by means of the class-action device. In this view, a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action. \* \* \* On the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed.

"Courts generally find that the existence of common misrepresentations obviates the need to elicit individual testimony as to each element of a fraud or misrepresentation claim, especially where written misrepresentations or omissions are involved." *Cope*, 82 Ohio St.3d at 430. "They recognize that when a common fraud is perpetrated on a class of persons, those persons should be able to pursue an avenue of proof that does not focus on questions affecting only individual members." *Id.* "If a fraud was accomplished on a common basis, there is no valid reason why those affected should be foreclosed from proving it on that basis." *Id.*

"Courts also generally find that a wide variety of claims may be established by common proof in cases involving similar form documents or the use of standardized procedures and practices." *Id.*, citing *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 77 (1998). Also, claims based on an underlying scheme are particularly subject to common proof. *Id.*, citing *Murray v. Sevier*, 156 F.R.D. 235, 248-249 (D. Kan. 1994).

In *Cope*, the Court found that the insureds satisfied the requirements of predominance and superiority for a class action. The insureds alleged that the life insurer's agents targeted existing policyholders, sold them replacement insurance as new insurance, and intentionally omitted mandatory disclosure warnings. Each insured's written statement on replacement of existing policies could establish intent, proving on a class-wide basis that agents knew or should have known need for written disclosure warnings. Further, an inference of inducement and reliance could arise as to the entire class.

## DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS

### Discoverability of Claims Files Generally

As a general rule, Ohio courts find claims files to be discoverable and not subject to the protections afforded by the attorney work-product doctrine. *See, e.g., Roggelin v. Auto-Owners Ins.*, 6th Dist. Lucas No. L-02-1038, 2002-Ohio-7310, ¶ 15.

Under Rule 26(B)(3) of the Ohio Rules of Civil Procedure, “a party may obtain discovery of documents and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing of good cause therefor. \*\*\*.” The attorney work-product doctrine protects only documents “prepared in anticipation of litigation” and not merely in the ordinary course of business. *Roggelin.*, 2002-Ohio-7310 at ¶ 15.

Ohio courts hold that claims files are generally prepared in the ordinary course of business and, as such, are discoverable. “[A]n insurance company has a routine duty to investigate accidents and, thus, such materials generated are not prepared in anticipation of litigation but prepared in the ordinary course of business.” *Id.*

However, that is not to say that an insurance company’s claims file can never be protected under the work-product doctrine. “In determining whether the material are prepared in the ordinary course of business or are work product prepared in anticipation of litigation, the facts of each case must be carefully reviewed because at a certain point an insurance company’s activity shifts from the ordinary course of business to anticipation of litigation.” *DeMarco v. Allstate Ins. Co.*, 2014-Ohio-933, P23, 2014 Ohio App. LEXIS 910, \*9, 2014 WL 1327846.

Likewise, as discussed more fully below, communications involving an attorney that are documented within a claim file may be protected from disclosure by the attorney/client privilege.

### Discoverability of Reserves

Federal Courts are divided on whether to allow the discovery of reserve information. *N.T. by & through Nelson v. Children’s Hosp. Med. Ctr.*, S.D. Ohio No. 1:13CV230, 2017 WL 5953432, \*4. Some Federal Courts have allowed the discovery of reserve information in bad-faith cases. In *Park-Ohio Holdings Corp. v. Liberty Mut. Fire Ins. Co.*, No. 1:15-CV-943, 2015 WL 5055947, at \*4 (N.D. Ohio Aug. 25, 2015) (applying Ohio law) the court held that “[i]nformation about the levels of reserve . . . is relevant as information about [the] [d]efendant’s valuation of the claims and could demonstrate a lack of good faith regarding settling the claim.” (footnote omitted); *see also Gen. Elec. Credit Union v. Natl. Fire Ins. Co. of Hartford*, S.D. Ohio No. 1:09-CV-143, 2009 WL 10679471 (citations omitted) (“The reserve information is not only potentially relevant to coverage, but it is particularly relevant regarding whether Defendant has acted in bad faith.”).

However, courts regularly prohibit the discovery of case reserves based on work-product immunity or lack of relevance. *See e.g., Decker v. Chubb Nat’l Ins. Co.*, Case No. 1:15-cv-88, 2015 WL 5954584, at \*5-6 (S.D. Ohio Oct. 14, 2015) (involving a first-party bad faith claim arising out of the insurer’s denial of coverage for a fire loss); *Bondex Intern., Inc. v. Hartford Acc. & Indem. Co.*, N.D. Ohio No. 1:03CV1322, 2006 WL 355289, \*2, found that (“Where the reserves have been established based on legal input, the results and supporting papers most likely will be work-product and may also reflect attorney-client privilege communications.”); *but see, Retail Ventures, Inc. v. Natl. Union Fire Ins. Co. of Pittsburgh, PA*, S.D. Ohio No. CIV.A. 2:06-CV-443, 2007 WL 3376831, \*5 (court granted plaintiffs’ request for production of information regarding reserves as to plaintiffs’ specific claims, acknowledging that defendant’s waived privilege as to counsel).

In *S Soc. Corp. v. Am. Cas. Co. of Reading, PA.*, N.D. Ohio No. 1:91CV0327, 1991 WL 346302, Society sought

## Ohio

reimbursement from its American D&O policy for funds paid in settlement of claims brought against a predecessor company and its officers and directors for violations of securities law. Society served discovery requests for reserve information, and American responded by producing some documents and withholding others on the basis of relevance and privilege, supporting its privilege and work product doctrine objections with a privilege log. American argued that the reserve information was irrelevant because it is "maintained by an insurer based upon a myriad of factors wholly unrelated to an insurer's evaluation of potential coverage under the policy." The court disagreed, stating that the information would be relevant to show American's valuation of the underlying litigation. However, American's privilege log effectively prevented production of those documents pertinent to reserves that were protected by attorney-client privilege and work product doctrine.

Similarly, in an action brought by an insurer, seeking reformation of an insurance policy based on mistake, the court in *Cigna Ins. Co. v. Cooper Tire & Rubber, Inc.*, 180 F. Supp. 2d 933 (N.D. Ohio 2001), overruled the insurer's opposition to the production of reinsurance and reserve information. After previously rejecting the insurer's claim that the policy at issue, which provided liability coverage to a tire manufacturer, provided coverage only for tires that were sold outside of the United States, the court addressed the insurer's claim for reformation of the policy on the ground that coverage for domestic tire sales was the result of mistake. Finding that information regarding whether the insurer had obtained reinsurance to cover potential loss under the policy, as well as the amount of such reinsurance, might indicate whether the insurer had interpreted the policy as providing coverage for all tires sold or whether it believed that coverage was limited only to foreign tire sales. Reasoning that there would have been less need for reinsurance if the insurer's perceived risk was low while exposure to a greater risk made it more likely that reinsurance would be necessary, the court used similar reasoning to hold that information regarding any reserves set by the insurer was relevant, reasoning that the amount of any reserves set by the insurer may indicate the extent of the risk to which the insurer believed itself to be exposed. In light of the nature of the claim at issue, the court recognized that the reserve and reinsurance information was more discoverable than in a case in which a party did not seek to change the terms of the contract. Rejecting the insurer's contention that the documents were not relevant, the court ordered the documents to be produced forthwith.

However, courts have been persuaded that an insurer's reserves are not relevant discoverable information. For example, in *Bondex Int'l, Inc. v. Hartford Accident & Indem. Co.*, No. 1:03CV1322, 2006 U.S. Dist. LEXIS 6044, the court held that certain information relating to the reserves was not relevant. The court explained that "evidence of the amount of reserves is not relevant because it is not necessarily based on a full knowledge of the facts and the law of the case" and that it "most often reflects a business decision, and a business decision, while perhaps of interest to plaintiffs, is not relevant to the litigation." *Id.*

### Discoverability of Existence of Reinsurance and Communications with Reinsurers

There is no categorical privilege that applies to the existence of reinsurance or communications with reinsurers "given that reinsurers have a third-party relationship with the insurers. See *Bondex Int'l, Inc. v. Hartford Accident & Indem. Co.*, No. 1:03CV1322, 2006 U.S. Dist. LEXIS 6044, at \*12 (N.D. Ohio Feb. 14, 2006) (compelling production of reinsurance agreements); *Ins. Co. v. Cooper Tire & Rubber, Inc.*, 180 F. Supp. 2d 933, 936 (N.D. Ohio 2001) (compelling production of reinsurance communications); *Soc 'y Corp. v. Am. Cas. Co.*, No. 1:91CV0327, 1991 U.S. Dist. LEXIS 21180, 1991 WL 346302, at \*1-2 (N.D. Ohio July 24, 1991) (denying insurer's motion for protective order that would have allowed it to withhold documents regarding reinsurance).

### Attorney/Client Communications

As a general rule, communications between an insurer and an attorney are protected from disclosure by the attorney-client privilege. See Ohio Rev. Code § 2317.02(A). The Court in *Jackson v. Greger*, 110 Ohio St. 3d 488 (2006) concluded that § 2317.02(A) applies to both testimony and written discovery. The court explained that a testimonial privilege applies not only to prohibit testimony at trial, but also to protect the sought-after

## Ohio

communications during the discovery process. The purpose of discovery is to acquire information for trial. Because a litigant's ultimate goal in the discovery process is to elicit pertinent information that might be used as testimony at trial, the discovery of attorney-client communications necessarily jeopardizes the testimonial privilege. Such privileges would be of little import were they not applicable during the discovery process. *Id.*

However, it is established Ohio law that an insurer may not rely on the attorney-client privilege or the work-product doctrine in withholding documents and other information from their claims file showing lack of good faith in settling a claim or denying coverage. *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St. 3d 638, 635 N.E.2d 331; *Boone v. Vanliner Ins. Co.*, 91 Ohio St.3d 209, 2001-Ohio-27, 744 N.E.2d 154 (2001); *Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp.*, 127 Ohio St.3d 161, 2010-Ohio-4469, 937 N.E.2d 533, at ¶ 31. In *Moskovitz*, the Supreme Court extended the *Peyko* decision and concluded that the attorney-client privilege does not protect the insurer's claims files from discovery in a prejudgment interest proceeding. *Moskovitz*, 69 Ohio St.3d at 638. In *Boone*, the Court expanded *Moskovitz* to allow a plaintiff in a bad faith claim against an insurer to discover privileged information in the insurer's claims files that existed prior to the denial of coverage.

The Ohio legislature attempted to rein in the scope of the *Boone*, *Moskovitz*, and *Peyko* decisions when it enacted Ohio Rev. Code § 2317.02(A)(2):

An attorney, concerning a communication made to the attorney by a client in that relationship or the attorney's advice to a client, except that if the client is an insurance company, the attorney may be compelled to testify, subject to an in camera inspection by a court, about communications made by the client to the attorney or by the attorney to the client that are related to the attorney's aiding or furthering an ongoing or future commission of bad faith by the client, if the party seeking disclosure of the communications has made a prima-facie showing of bad faith, fraud, or criminal misconduct by the client.

(emphasis added).

Under § 2317.02(A)(2), in determining any discovery dispute involving disclosure of the claims file, the trial court must conduct an in-camera inspection of all documentation withheld from production, including the insurer's claims file materials, before ordering disclosure. See, e.g., *Stewart v. Sicilano*, 11th Dist. No. 2011-A-0042, 2012-Ohio-6123, 985 N.E.2d 226. The *in-camera* review is an important part of the process. In *Unklesbay v. Fenwick*, 2nd Dist. No. 2005-CA-108, 167 Ohio App.3d 408, 2006-Ohio-2630, 855 N.E.2d 516, the court of appeals held that the trial court abused its discretion in failing to conduct an *in-camera* review of the claims file "because a bad faith claim does not entitle disclosure of everything in a claims file." *Id.*

## DEFENSES IN ACTIONS AGAINST INSURERS

### Misrepresentations/Omissions: During Underwriting or During Claim

Under Ohio insurance law, a "representation" is a verbal or written statement by the insured to the insurer, prior to the completion of the contract, as to the existence of some fact or state of facts, made for the purpose of inducing, and tending to induce, the insurer more readily to assume the risk. *Allstate Ins. Co. v. Boggs*, 27 Ohio St.2d 216, 271 N.E.2d 855 (1971). A "misrepresentation" is a statement, as a fact, of something which is untrue and which the insured states with the knowledge that it is untrue and with an intent to deceive, or which the insured states positively as true without knowing it to be true, and which has a tendency to mislead, where such fact in either case is material to the risk. A half-truth or failure to speak when necessary to qualify an insurance applicant's misleading prior statements also amounts to a misrepresentation.

A claim or defense based on an alleged material representation by the insured in an insurance application begins

## Ohio

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with Ohio Rev. Code § 3911.06, which states:

No answer to any interrogatory made by an applicant in his application for a policy shall bar the right to recovery upon any policy issued thereon, or be used in evidence at any trial to recover upon such a policy, unless it is clearly proved that such answer is willfully false, that it was fraudulently made, that it is material, and that it induced the company to issue the policy, that but for such answer the policy would not have been issued, and that the agent or company had no knowledge of the falsity or fraud of such an answer.

Ohio Rev. Code § 3911.06. Ohio courts have explicitly recognized that the “clearly prove” language imposes a “clear and convincing” burden of proof on the insurer. *Bratten v. Grange Mut. Life Ins. Co.*, 7th Dist. Mahoning No. 90 C.A. 60, 1991 WL 285715).

Courts routinely find that nothing more completely vitiates a contract of insurance than false answers to material questions in an insurance application. An insurer can avoid coverage if an insured knowingly gives false answers to material questions on the application. Further, Ohio courts do not recognize a distinction between misrepresentation in the application (or underwriting) and misrepresentation in a claim. Both may be grounds for voiding the policy. If the insured, upon issuance of the policy, notes false answers and conceals such falsity from the insurer, then the insurer can similarly void the policy. *Redden v. Constitutional Life Ins. Co.*, 172 Ohio St. 20, 24, 173 N.E.2d 365 (1961).

As a general rule, the mere fact that a misrepresentation is false does not in and by itself void the policy. In order to relieve the insurer of liability, the untrue representation must relate to a material matter. *James v. Safeco Ins. Co. of Illinois*, 195 Ohio App.3d 265, 2011-Ohio-4241, 959 N.E.2d 599 (8th Dist. 2011). A fact may be “material” in relation to an insurance contract if the fact, communicated to the insurer, would either induce it to decline insurance altogether or not to accept it unless at a higher premium; any fact is material if knowledge or ignorance of it would naturally influence the insurer in making the contract at all or in estimating the degree and character of the risk or in fixing the rate of the insurance. *American Continental Ins. Co. v. Estate of Gerkins*, 69 Ohio App.3d 697, 591 N.E.2d 774 (3d Dist. 1990).

“[A] misrepresentation will be considered material if a reasonable insurance company, in determining its course of action, would attach importance to the fact misrepresented.” *Abon, Ltd. V. Transcon. Ins. Co.*, 5th Dist. Richland No. 2004-CA-0029, 2005-Ohio-3052, 2005 Ohio App. LEXIS 2847. False sworn answers by an insured are material if they might have affected the attitude and action of an insurer. They are equally material if they may be said to have been calculated either to discourage, mislead or deflect the company's investigation in any area that might seem to the company, at that time, a relevant or productive area to investigate. *Id.*

Example: A lawyer’s failure to disclose affiliations with business entities in an application for professional malpractice insurance was not a material misrepresentation that voided coverage. *Ross v. Ohio Bar Liab. Ins. Co.*, 124 Ohio App.3d 591, 706 N.E.2d 867 (5th Dist. 1998).

Under Ohio’s statutory framework, a false statement in the application for sickness or accident insurance does not bar recovery unless the insurer clearly proves five elements: 1.) the statement was willfully false, 2.) the statement was fraudulently made, 3.) that it materially affects the acceptance of risk or the hazard assumed by the insurer, 4.) that it induced the insurer to issue the policy, and 5.) but for the false statement the policy would not have been issued. Ohio Rev. Code § 3923.14.

If the misrepresentation or misstatement is a warranty, the policy is void *ab initio*. The *Boggs* case established a two-part test for deciding if a misrepresentation or misstatement qualifies as a warranty. “The first prong requires

that the misrepresentation appear on the policy's face or be plainly incorporated into the policy. Under the second prong, the policy must plainly warn that a misstatement or misrepresentation renders the policy void from its inception." *Care Risk Retention Group v. Martin*, 191 Ohio App.3d 797, 947 N.E.2d 1214 (2d Dist. 2010). Thus, in order for a misstatement to render an insurance policy void *ab initio*, that fact must appear clearly and unambiguously from the terms of the policy, rendering the misstatement a warranty.

## Failure to Comply with Conditions

Ohio law recognizes the enforceability of conditions within insurance policies for obtaining coverage, including conditions excluding coverage losses for concealing or misrepresenting material facts or circumstances. See *Gibney v. State Farm Fire & Cas. Co.*, 897 F.Supp.2d 618 (S.D. Ohio 2012). A condition precedent is an act or event, other than a lapse of time, which must exist or occur before a duty of immediate performance of a promise arises. *Ohio Natl. Life Assur. Co. v. Satterfield*, 194 Ohio App.3d 405, 2011-Ohio-2116, 956 N.E.2d 866 (9th Dist. 2011). On the other hand, a condition subsequent provides that a policy will become void, or the insurer relieved from performance, upon the happening of some act.

Insurance contracts usually contain conditions that, if satisfied, will relieve the insurer of performance. Under common law principles, the happening of a condition or misrepresentation will lead to harsh results for the insured. Thus, Ohio has enacted statutes that relieve the rigorous consequences of the common-law rules on conditions for life insurance policies. Ohio Rev. Code § 3911.06. However, this statute does not apply to automobile liability or collision policies. See *Pioneer Mut. Cas. Co. of Ohio v. Qualls*, 103 Ohio App. 14, 146 N.E.2d 612 (2d Dist. 1957); *Republic Mut. Ins. Co. v. Wilson*, 66 Ohio App. 522, 35 N.E.2d 467 (4th Dist. 1940); *Burpo v. Resolute Fire Ins. Co.*, 90 Ohio App. 492, 107 N.E.2d 227 (8th Dist. 1951). Thus, the issue of fulfillment of conditions precedent is highly litigated in the State of Ohio.

A condition requiring the insured to bring an uninsured/underinsured motorist claim within three years of the date of the accident is valid and enforceable. See *Chalker v. Steiner*, 7th Dist. Mahoning No. 08 MA 137, 2009-Ohio-6533, 2009 Ohio App. LEXIS 5455 (Dec. 8, 2009) ("the limitations provision in this case is unambiguous and enforceable and the exhaustion provision [of the tortfeasor's policy] is a condition precedent to payment rather than the right to file an action for UM/UIM benefits."). However, an insurer has a duty of good faith to inform its insured of a policy's time limitation condition precedent if the insurer becomes aware of a potential claim prior to the clause's expiration. *Wilson v. Ohio Cas. Ins.*, 185 Ohio App.3d 276, 279, 2009-Ohio-6798, 923 N.E.2d 1187 (1st Dist. 2009) ("An insurer owes an insured a duty of good faith, and if the insurer simply remains silent about a limitations period in the face of a potential claim, it violates that duty.").

On the other hand, courts will enforce notice provisions requiring insureds to inform the insurer of a potential claim as a condition precedent. See, e.g., *Heiney v. The Hartford*, 10th Dist. Franklin No. 01AP-1100, 2002-Ohio-3718. More generally, if an insurance policy specifies general conditions precedent that must be satisfied before an insured is entitled to coverage, an insured's failure to comply with those conditions precedent precludes recovery under UM or UIM coverage by operation of law. *Duriak v. Globe American Cas. Co.*, 28 Ohio St.3d 70, 502 N.E.2d 620 (1986), overruled on other grounds *Miller v. Progressive Cas. Ins. Co.*, 69 Ohio St.3d 619, 1994-Ohio-160, 635 N.E.2d 317 (1994), at syllabus (holding that a provision for uninsured or underinsured motorist coverage which precludes the insured from commencing any action or proceeding against the insurance carrier for payment of uninsured or underinsured motorist benefits, unless the insured has demanded arbitration and/or commenced suit within one year from the date of the accident, is void as against public policy).

An insured breaches the conditions precedent to liability coverage by entering a consent judgment with the plaintiff before providing the insurer notice of the claim and suit. *Novak v. State Farm Ins. Co.*, 9th Dist. Medina No. 09CA0029-M, 2009-Ohio-6952, 2009 Ohio App. LEXIS 5860 (Dec. 31, 2009), at ¶ 13 ("where an insurer does

## Ohio

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not refuse to defend an insured, the insured is not at liberty, and is in fact barred from, entering into a settlement agreement without the insurer's consent.").

Notice and subrogation provisions contained in the general "Conditions" section of a policy create a condition precedent, with which failure to comply precludes recovery of UIM coverage. See *Knox v. Travelers Ins. Co.*, 10th Dist. Franklin No. 02AP-28, 2002-Ohio-6958, 2002 Ohio App. LEXIS 6773 (Dec. 17, 2002). To determine whether a notice provision has been breached, the court first asks whether the insured provided notice within a "reasonable time" in light of the circumstances. *Burlington Ins. Co. v. PMI Am., Inc.*, 862 F.Supp.2d 719, 735 (S.D. Ohio 2012) (quotation omitted). If the delay was reasonable, then the insured did not breach the notice provision. But, if the delay was unreasonable, then the court presumes prejudice, which the insured must then rebut. *Id.*

Finally, Ohio joins the majority of states and holds that when an insurer's denial of underinsured or uninsured motorist (UIM) coverage is premised on the insured's breach of a consent-to-settle or other subrogation-related provision in a policy of insurance, the insurer is relieved of the obligation to provide coverage if it is prejudiced by the failure to protect its subrogation rights. An insured's breach of such a provision is presumed prejudicial to the insurer absent evidence to the contrary. *Ferrando v. Auto-Owners Mut. Ins. Co.*, 98 Ohio St.3d 186, 207, 2002-Ohio-7217, 781 N.E.2d 927 (2002).

### Challenging Stipulated Judgments: Consent and/or No-Action Clause

In *Dominish v. Nationwide Ins. Co.*, the Ohio Supreme Court held that an insured's limitation of action clause was enforceable. The policy provided:

Suit Against Us. No action can be brought against us unless there has been full compliance with the policy provisions. Any action must be started within one year after the date of loss or damage.

*Dominish v. Nationwide Ins. Co.*, 129 Ohio St.3d 466, 2011-Ohio-4102, 953 N.E.2d 820 (2011). The Supreme Court reversed the Eleventh District and held that Nationwide could enforce its limitation-of-action clause because there was no ambiguity in the clause and Nationwide did not waive its rights by its actions. Moreover, the Supreme Court held that under Ohio law, for an insurance company to waive such a right, it must have either: (1) "recognized liability," or (2) "held out a reasonable hope of adjustment and by doing so, induced the insured to delay filing a lawsuit until after the contractual period of limitation had expired." *Id.* at ¶ 10.

In terms of consent clauses, an insurer providing underinsured motorist coverage is not required to give its consent to a proposed settlement, the terms of which would destroy its right of subrogation provided within the policy. *Bogan v. Progressive Cas. Ins. Co.*, 36 Ohio St.3d 22, 521 N.E.2d 447 (1988). The *Bogan* court held that where a provider of underinsured motorist coverage has reasonably refused to give advanced consent, particularly in the context of a settlement, then the insured is bound by the policy's advance consent requirement. The issue then becomes whether the insurer has unreasonably refused to grant consent for the insured to settle with the tortfeasor's carrier. *Id.* An insured can proceed to bring an action against the tortfeasor without obtaining a consent to sue from his own underinsurance carrier, such proceeding not affecting the insurance coverage. However, there may remain a contractual duty of the insured not to settle with the tortfeasor without obtaining the consent of the insurer, where such settlement entails a complete release of the tortfeasor from all liability and, accordingly, destroys the insurer's right of subrogation. *Id.* at 30.

In cases involving the alleged breach of a consent-to-settle or other subrogation-related clause, the first step is to determine whether the provision actually was breached. *Ferrando v. Auto-Owners Mut. Ins. Co.*, 98 Ohio St.3d 186, 208, 2002-Ohio-7217, 781 N.E.2d 927 (2002). If it was not, the inquiry is at an end, and UIM coverage must be provided. Also, if the insurer failed to respond within a reasonable time to a request for consent to the

## Ohio

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settlement offer, or unjustifiably withheld consent, the release will not preclude recovery under the UIM policy, and the subrogation clause will be disregarded. *Id.* If the consent-to-settle or another subrogation provision-related clause was breached, the second step is to determine whether the UIM insurer was prejudiced. If a breach occurred, a presumption of prejudice to the insurer arises, which the insured party bears the burden of presenting evidence to rebut. *Id.*

Insurers have tried to use a subrogation provision of its policy to deny uninsured motorist coverage when it refused to consent to a settlement with the tortfeasor. This forced the Supreme Court to revisit its decision in *Bogan*. See *Fulmer v. Insura Prop. & Cas. Co.*, 94 Ohio St.3d 85, 93, 2002-Ohio-64, 760 N.E.2d 392 (2002) (holding that when an insured has given her underinsurance carrier notice of a tentative settlement prior to release, and the insurer has had a reasonable opportunity to protect its subrogation rights by paying its insured the amount of the settlement offer but does not do so, the release will not preclude recovery of underinsurance benefits).

Because the purpose of a consent-to-settlement provision is essentially similar to that of a notice of claim provision, the prejudice standard should apply to both. That is, the insurer must suffer prejudice, such as the loss of subrogation rights, from the breach of a consent-to-settlement clause in order to deny coverage. See *Ferrando*, 2002-Ohio-7217 at ¶ 86.

### Preexisting Illness or Disease Clauses

Under Ohio statutory law, individual policies for sickness and accident insurance are subject to preexisting conditions provisions. Ohio Rev. Code § 3923.57. Preexisting conditions provisions cannot exclude or limit coverage for a period beyond twelve months following the policyholder's effective date of coverage and may only relate to conditions during six months immediately preceding the effective date of coverage. Ohio Rev. Code § 3923.57(A).

In determining whether a pre-existing conditions provision applies to a policyholder or dependent, each policy shall credit the time the policyholder or dependent was covered under a previous policy, contract, or plan if the previous coverage was continuous to a date not more than thirty days prior to the effective date of the new coverage, exclusive of any applicable service waiting period under the policy. Ohio Rev. Code § 3923.57(B).

The Affordable Care Act, however, contains a provision that requires health plans to offer coverage to people even if they have a preexisting condition. Under this provision, health plans cannot deny coverage for a preexisting condition. The provision took effect on January 1, 2014 for all health plans. This reform provision does not apply to grandfathered individual health insurance policies.

### Statutes of Limitations and Repose

Effective June 16, 2021, the statute of limitations for a written contract is **six (6) years**. Ohio Rev. Code § 2305.06. Prior to June 16, 2021, the statute of limitations for a written contract was **eight (8) years**. *Id.*

Insurance policies usually contain a clause limiting the time within which suit must be brought under the policy. Parties may limit the statute of limitations time period on a contract "to a period that is shorter than the general statute of limitations for a written contract, as long as the shorter period is a reasonable one." *Sarmiento v. Grange Mut. Ins. Co.*, 106 Ohio St.3d 403, 2005-Ohio-5410, 835 N.E.2d 692, ¶ 11. If the insurance contract does reduce the time provided in the statute of limitations, it must be "in words that are clear and unambiguous to the policyholder." *Id.*; *Lane v. Grange Mut. Companies*, 45 Ohio St.3d 63, 543 N.E.2d 488 (1989). The Ohio Supreme Court held that a two-year limitation period would be a "reasonable and appropriate" period of time in which to require an insured who has suffered a bodily injury to commence an action under the uninsured/underinsured motorist provision of an insurance policy. *Miller v. Progressive Ins. Co.*, 69 Ohio St.3d 619, 624, 635 N.E.2d 317



## Ohio

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(1994). It also held in *Miller*, however, that a one-year period to commence such a lawsuit would be unenforceable as against public policy. *Id.* Under Ohio Rev. Code § 3937.18(H), a policy for uninsured/underinsured motorist coverage may shorten the limitations period to as little as three years.

“It is incumbent upon an insurer to establish the enforceability of a limitations clause and it cannot enforce such a clause where the insured had not been provided with notice that the clause was part of the policy. It would be unconscionable to permit an insurance company to enforce a limitation clause contained in the standard form of their policy against an insured who did not specifically bargain for the clause and who never had an opportunity to become aware of the clause until after the limitation period had expired.” *Wilson v. Ohio Cas. Ins.*, 185 Ohio App.3d 276, 279, 2009-Ohio-6798, 923 N.E.2d 1187 (1st Dist. 2009). *Id.*

Actions on an insurance contract not in writing, or upon a liability created by statute other than a forfeiture or penalty, must be brought within six years. Ohio Rev. Code § 2305.07. Actions for fraud growing out of a contract for insurance must be brought within four years, and the period of limitation in such regard runs from the time of discovery of the fraud. Ohio Rev. Code § 2305.09.

## TRIGGER AND ALLOCATION ISSUES FOR LONG-TAIL CLAIMS

### Trigger of Coverage

There are various theories as to which policies are triggered to provide coverage for a continuing loss. Several courts apply the “continuous trigger” theory. Under a continuous trigger, all policies from first exposure to the end of the loss provide coverage. *See Westfield Ins. Co. v. Milwaukee Ins. Co.*, 12th Dist. Butler No. CA2004-12-298, 2005-Ohio-4746, 2005 Ohio App. LEXIS 4255 (Sep. 12, 2005). The Ohio Supreme Court has not expressly determined Ohio law on trigger theories in the context of long-tail claims. *Gencorp, Inc. v. AIU Ins. Co.*, 104 F. Supp. 2d 740, 745 (N.D. Ohio 2000). The decision most commonly relied upon by policyholder is a Lucas County (Toledo) trial court opinion applying a continuous trigger to asbestos bodily injury claims. *Owens-Corning Corp. v. American Continental Ins. Co.*, 74 Ohio Misc.2d 183, 213, 660 N.E.2d 770 (Lucas C.P. 1995) (stating that the “continuous injury” rule has been adopted as consistent with and recognized by Ohio law).

Since the Supreme Court has not ruled on the issue, there is no uniform consensus in Ohio on which theory applies. However, other Ohio district courts have used the “continuous trigger” theory. *Plum v. W. Am. Ins. Co.*, 1st Dist. Hamilton No. C-050115, 2006-Ohio-452, 2006 Ohio App. LEXIS 387 (Feb. 3, 2006) (applying continuous trigger theory to defective construction litigation). Indeed, it is the theory used quite often by courts in other jurisdictions.

Generally, parties tend to avoid the triggering issue. *See Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 515, 2002-Ohio-2842, 769 N.E.2d 835 (2002) (“The parties are in agreement as to which primary insurance policies have been called into play, and there is no dispute that there was continuous pollution across multiple policy periods that give rise to occurrences and claims to which these policies apply.”). Thus, the parties in *Goodyear*, assumed a continuous trigger. The trigger issue was not discussed, analyzed, or decided.

### Allocation Among Insurers

Allocation deals with the apportionment of a covered loss across multiple triggered insurance policies. *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 515, 2002-Ohio-2842, 769 N.E.2d 835 (2002). The issue of allocation arises in situations involving long-term injury or damage, such as environmental cleanup claims where it is difficult to determine which insurer must bear the loss. *Id.*

## Ohio

Where the policy promises to provide coverage for “all sums” the insured becomes liable to pay during the coverage period, Ohio has adopted the “all sums” pick-and-choose method of allocation. *Id.*; *Pa. Gen. Ins. Co. v. Park-Ohio Indus.*, 126 Ohio St.3d 98 (2010). Under this theory, the insured can allocate the entire loss to any one primary policy (the targeted policy) unless there is a contrary statute, a clause prohibiting other insurance, or a clause providing apportionment of payments between insurers. See *Encore Receivable Management, Inc. v. Ace Property and Cas. Ins. Co.*, S.D. Ohio No. 1:12-CV-297, 2013 WL 3354571, \*4, vacated (May 19, 2014); *Goodyear*, 95 Ohio St.3d 512, 796 N.E.2d 835. The insured therefor has the ability to allocate the entire loss to any one primary policy. If that policy is exhausted, then coverage flows upward through the umbrella policy. The Ohio Revised Code provides:

When there are two or more insurance policies upon the same property, each policy shall contribute to the payment of the whole or of the partial loss in proportion to the amount of insurance mentioned in each policy. In no case shall the insurer be required to pay more than the amount mentioned in its policy.

Ohio Rev. Code § 3929.26. If an insured chooses a target policy, that insurer may seek contribution from the other policies that have not been triggered but who have not been requested to respond to the loss by the insured. See *Pa. Gen.*, 126 Ohio St.3d 98, paragraph one of the syllabus. Thus, the lynchpin for establishing liability among coinsurers is a showing that the respective coverages apply to the same property, insure against the same risk, and protect the same interest of the same insured. *Arkwright Mut. Ins. Co. v. Lexington Ins. Co.*, 1st Dist. Hamilton No. C-990347, 2000 WL 1434164.

## CONTRIBUTION ACTIONS

### Claim in Equity vs. Statutory

Ohio law gives rise to two rights of contribution for an insurer: (1) from a joint tortfeasor, pursuant to Ohio Rev. Code § 2307.25; and (2) from a coinsurer or concurrent insurer who provides coverage for the same loss. The right to contribution from a coinsurer or concurrent insurer is recognized in both statute and equity. Ohio Rev. Code § 3929.26 states that: “[w]hen there are two or more insurance policies upon the same property, each policy shall contribute to the payment of the whole or of the partial loss in proportion to the amount of insurance mentioned in each policy. In no case shall the insurer be required to pay more than the amount mentioned in its policy.”

Ohio Rev. Code § 2307.34 provides for a cause of action for contribution in favor of a primary insurer against a secondary insurer. A cause of action for contribution in favor of a primary insurer against a secondary insurer exists if all of the following apply:

The primary insurer issues a policy of motor vehicle liability insurance to a motor carrier to pay any final judgment recovered against the motor carrier for the death of any person or an injury to or loss to person or property of any person resulting from the negligent operation, maintenance, or use of motor vehicles displaying the identification placards of the motor carrier, as required by the interstate commerce commission or the public utilities commission;

The motor carrier enters into a lease agreement with the owner of a motor vehicle not owned by the motor carrier, that provides that an operator not employed by the motor carrier will, during the duration of the lease, operate the motor vehicle in service to the motor carrier and will display on the motor vehicle the required identification placards;

Due to the negligent operation by the operator of the leased motor vehicle an accident involving the leased motor vehicle occurs while the operator is engaged in a non-trucking activity, resulting in the

death of any person or in an injury to or loss to person or property of any person, and the operator is not an employee of the motor carrier;

The primary insurer pays a final judgment to compensate a party for the death of any person as the result of the accident or for an injury or loss to person or property of the party as the result of the accident;

At the time of the accident, a secondary insurer had issued to the owner of the motor vehicle a policy of motor vehicle liability insurance to pay any final judgment recovered against the owner for the death of any person or an injury to or loss to person or property of any person resulting from the negligent operation, maintenance, or use of the motor vehicle while it is being operated during a non-trucking activity.

Ohio Rev. Code § 2307.34(B)(1)-(5).

In terms of long-tail coverage disputes among co-insurers, the all-sums insurance coverage approach allows an insured to seek full coverage for its claims from any single policy, up to that policy's coverage limits, out of the group of policies that has been triggered. The insured selects one insurer, the "targeted insurer," from which it is able to obtain a defense to the action and full coverage for any eventual judgment. The targeted insurer is then able to file a later action against any other insurers, the "nontargeted insurers," to obtain contribution. *Pa. Gen. Ins. Co. v. Park-Ohio Indus.*, 126 Ohio St.3d 98, 2010-Ohio-2745, 930 N.E.2d 800.

## Elements

As stated above, the lynchpin for establishing liability among coinsurers is a showing that the respective coverages apply to the same property, insure against the same risk, and protect the same interest of the same insured. *Arkwright Mut. Ins. Co. v. Lexington Ins. Co.*, 1st Dist. Hamilton No. C-990347, 2000 WL 1434164. If two policies insure the same risk, concurrent coverage will exist even where each policy purports to provide only excess coverage. *Id.*

## DUTY TO SETTLE

An insurer's lack of good faith in the handling and settlement of insurance claims is the equivalent to bad faith. *Wasserman v. Buckeye Union Ins. Co.*, 32 Ohio St.2d 69, 290 N.E.2d 837 (1972). *Slater v. Motorists Mut. Ins. Co.*, 174 Ohio St. 148, 187 N.E.2d 45 (1962)(overruled on other grounds by, *Zoppo v. Homestead Ins. Co.*, 71 Ohio St. 3d 552, 1994-Ohio-461, 644 N.E.2d 397 (1994)); *Miller v. Kronk*, 35 Ohio App.3d 103, 519 N.E.2d 856 (10th Dist. 1987).

There is a distinction between an insurer's duty to defend and duty to settle within policy limits, which is appropriate because the duty to defend is usually absolute while the duty to settle is generally more discretionary. *Romstadt v. Allstate Ins. Co.*, 59 F.3d 608 (6th Cir. 1995); *City of Willoughby Hills v. Cincinnati Ins. Co.*, 9 Ohio St.3d 177, 459 N.E.2d 555 (1984) ("where the insurer's duty to defend is not apparent from the pleadings in the case against the insured, but the allegations do 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 had been pleaded, the insurer must accept the defense of the claim."); compare *Netzley v. Nationwide Mut. Ins. Co.*, 34 Ohio App.2d 65, 296 N.E.2d 550 (2d Dist. 1971) (there is a duty to settle where "there is reason to believe that the claim against the insured is a meritorious one, and where the reasonable expectation of successfully defending the action is negligible."); see also *Fireman's Fund Ins. Co. v. Mitchell-Peterson, Inc.*, 63 Ohio App.3d 319, 578 N.E.2d 851 (12th Dist. 1989) ("Evidence of facts indicating that an insurer refuses to settle within policy limits is not, in itself, conclusive of the insurer's bad faith").

### LH&D BENEFICIARY ISSUES

#### Change of Beneficiary

In Ohio, the “substantial compliance” rule applies when an insured seeks to change the beneficiary of a life insurance policy. “The weight of authority in this country requires the insured, who wishes to exercise his contractual right to change beneficiaries of his life insurance policies, to proceed substantially in accordance with the requirements of such policies.” *Stone v. Stephens*, 155 Ohio St. 595, 600, 99 N.E.2d 766 (1951); *see also Rindlaub v. Travelers Ins. Co.*, 119 Ohio App. 77, 81, 196 N.E.2d 602 (10th Dist. Franklin 1962) (holding that strict compliance is not required when seeking to effectuate a change in the beneficiary).

Every policy of sickness and accident insurance delivered, issued for delivery, or used in Ohio is required to contain a standard provision to the effect that unless the insured makes an irrevocable designation of beneficiary, the right to change the beneficiary is reserved to the insured, and the consent of the beneficiary or beneficiaries is not required to surrender or assignment of the policy or to any change of beneficiary or beneficiaries or to any other changes in the policy. Ohio Rev. Code § 3923.04(L).

#### Effect of Divorce on Beneficiary Designation

Under Ohio common law, “[w]hen a married woman is named as a beneficiary in a policy of insurance on the life of her husband she is entitled to the proceeds of the policy, notwithstanding a divorce obtained by her before his death.” *Cannon v. Hamilton*, 174 Ohio St. 268, 272, 189 N.E.2d 152 (1963). The right of a spouse to recover the proceeds of a life policy naming him or her as a beneficiary does not hinge on the existence of a relationship of husband and wife but rather the well-established principles of contract law. *Id.* However, in the case of a separation agreement incorporated into a decree of dissolution where the parties “express their intent to release all rights which each may have as a beneficiary under the policies of the other, such language is sufficient to eliminate each party as beneficiary of the other notwithstanding the fact that no specific change of beneficiary is made.” *Phillips v. Pelton*, 10 Ohio St.3d 52, 52, 461 N.E.2d 305 (1984).

Under Ohio Rev. Code § 5815.33(B)(1), unless the designation of beneficiary or the judgment or decree granting the divorce, dissolution, or annulment specifically provides otherwise,

If a spouse designates the other spouse as a beneficiary or if another person having the right to designate a beneficiary on behalf of the spouse designated the other spouse as a beneficiary, and if, after either type of designation, the spouse who made the designation or on whose behalf the designation was made, is divorced from the other spouse, obtains a dissolution of marriage, or has the marriage to the other spouse annulled, then the other spouse shall be deemed to have predeceased the spouse who made the designation or on whose behalf the designation was made, and the designation of the other spouse as a beneficiary is revoked as a result of the divorce, dissolution of marriage, or annulment.

Thus, if two people are married, and one spouse designates the other as the beneficiary on a life insurance policy, and the spouses divorce, the spouse who is the beneficiary is treated as if he or she predeceased the deceased spouse. However, this provision does not apply to insurance contracts entered into prior to the statute’s effective date of May 31, 1990, irrespective of the date of the divorce, dissolution, or annulment. *Aetna Life Ins. Co. v. Schilling*, 67 Ohio St.3d 164, 168, 616 N.E.2d 893 (1993). However, if the spouses remarry, the other spouse shall not be deemed to have predeceased the spouse who made the designation and the designation is not revoked. Ohio Rev. Code § 5815.33.

## INTERPLEADER ACTIONS

Interpleader is the process used when two parties have antagonistic claims to the proceeds of a life insurance policy, and the insurance company is unable to determine which claim is and which claim is not well founded. Ohio Civ. R. 22; *Mahoney v. Westfield Ins. Co.*, 124 Ohio App.3d 639, 643, 707 N.E.2d 26 (10th Dist. 1997). After the insurer interpleads the claimants and deposits the money in court, the insurer waives any interest in the outcome of the action and the case proceeds between the respective claimants. *Kabbaz v. Prudential Ins. Co.*, 27 Ohio App.3d 254, 257, 501 N.E.2d 43 (3d Dist. 1985).

For life insurance, “rights which become vested on the death of the insured and thus fixed by law cannot thereafter be affected” by interpleader of the insurer and the deposit of the disputed funds in court. *Stone v. Stephens*, 155 Ohio St. 595, 99 N.E.2d 766 (1951).

### Availability of Fee Recovery

Courts in Ohio are reluctant to award attorney’s fees for an insurance company filing an interpleader action. “Ohio law has long followed the American rule as to attorney fees not being included as part of the award of costs to the prevailing party in litigation, and there is no distinction in interpleader, either for the so-called innocent stakeholder or for any other party.” *Raack v. Bohinc*, 17 Ohio App.3d 15, 17, 477 N.E.2d 1155 (10th Dist. 1983) (quoting *Sorin v. Bd. Of Edn.*, 46 Ohio St.2d 177, 181 (1976) (“the Supreme Court reaffirmed application of the American rule precluding recovery of attorney fees in the absence of statutory authorization...except where ‘the losing party has acted in bad faith, vexatiously, wantonly, obdurately, or for oppressive reasons.’”)).

Insurers in Ohio that have filed interpleader actions in federal court have had some limited success in moving for an award of attorney’s fees. See, e.g., *Minn. Life Ins. Co. v. Birney*, No. 2:15-cv-2693, 2017 U.S. Dist. LEXIS 4128 (S.D. Ohio Jan. 11, 2017); See, e.g., *Columbus Life Ins. Co. v. Walker-Macklin*, No. 1:15-cv-535, 2016 U.S. Dist. LEXIS 96917 at \*10-15 (S.D. Ohio July 25, 2016); *Ameritrust Co. v. Derakhshan*, Case No. 1:92CV0931, 1992 U.S. Dist. LEXIS 8933, at \*3 (N.D. Ohio June 1, 1992) (permitting interpleader plaintiff to file a petition to recover attorney’s fees).

Neither Rule 22 of the Federal Rules of Civil Procedure nor 28 U.S.C. § 1335 expressly refer to attorney fees or costs. See *Holmes v. Artists Rights Enft Corp.*, 148 F. App’x 252, 259 (6th Cir. 2005). However, 28 U.S.C. § 2361 permits courts to “make all appropriate orders to enforce its judgement” in an interpleader action, including awarding attorney’s fees and costs. See also *Life Ins. Co. of N. Am. v. Bond*, No. 1:11-cv-146, 2013 WL 12178133, at \*7 (S.D. Ohio Feb. 5, 2013). In order to recover attorney’s fees, an interpleader plaintiff must show it is “(1) a disinterested stakeholder, (2) who has conceded liability, (3) has deposited the disputed funds into court, and (4) has sought discharge from liability.” *Holmes*, 148 F. App’x at 259 (citations omitted). Generally, “[t]he only limiting principle is reasonableness, and it is at the discretion of the Court to determine what award is appropriate.” *Id.*

However, federal courts in Ohio have shown reluctance to award fees in cases where the claims are of the type that arise in the ordinary course of the stakeholder’s business. See *Life Ins. Co. of N. Am. v. Bond*, No. 1:11-cv-146, 2013 WL 12178133 (S.D. Ohio Feb. 5, 2013). In *Bond*, the Southern District of Ohio held that an insurer did not have an interest in becoming immunized from further liability under a contested policy and denied a motion for attorney’s fees.

### Differences in State vs. Federal

Like the Federal Rule, Rule 22 of the Ohio Rules of Civil Procedure governs interpleader actions. However, the language of the federal rule is slightly different than Ohio Civil Rule 22. The Ohio rule states:

Persons having claims against the plaintiff may be joined as defendants and required to interplead when

their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

In such an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party may deposit all or any part of such sum or thing with the court upon notice to every other party and leave of court. The court may make an order for the safekeeping, payment or disposition of such sum or thing.