



SMITH, ROLFES
& SKAVDAHL
COMPANY LPA

CINCINNATI

600 VINE STREET • SUITE 2600
CINCINNATI, OHIO 45202
TELEPHONE: (513) 579-0080
TELE-FAX: (513) 579-0222

COLUMBUS

50 W. BROAD STREET • SUITE 3400
COLUMBUS, OHIO 43215
TELEPHONE: (614) 469-7130
TELE-FAX: (614) 469-7146

DETROIT

39555 ORCHARD HILL PLACE • SUITE 600
NOVI, MICHIGAN 48375
TELEPHONE: (248) 374-5020
TELE-FAX: (248) 348-5760

www.smithrolfes.com

Dear Insurance Professional:

When we compiled last year's *Tort and Insurance Law Summary* we did not envision in 2007 we would expand our firm, however, in June, 2007, Smith, Rolfes & Skavdahl Company, L.P.A. opened our third office in Novi, Michigan. The addition of this new office in many ways exemplifies why our firm has been successful. We did not seek the opportunity to open an office in Michigan, but instead responded to a request and need from an insurance carrier client which has supported our law firm almost from our founding.

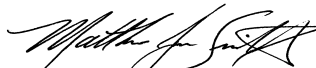
We pride ourselves on partnering with insurance carriers throughout the United States to address the full range of insurance law related matters. We consider it a privilege and honor to be part of the "team" providing our clients, and their insureds, with the highest quality of legal representation. In Michigan, our client had a need and by partnering together we are achieving success on many levels, first by meeting their needs while also improving and expanding our firm as we learn and enjoy our practice in this new venue.

This philosophy founded our firm in 1989 and continues to guide us as we approach our twentieth year of practice. As we discovered last year, we may never know exactly where the road ahead will lead us, but with the confidence and trust of our existing clients, and those new clients we will welcome in the year ahead, we look forward to continuing to be one of America's preeminent insurance service law firms.

Thank you from all of us at Smith, Rolfes & Skavdahl for the confidence you continue to demonstrate in our firm with each new assignment. We pledge to continue to provide you at all times with only the highest quality of legal representation. Nothing less should be acceptable to you and is certainly not acceptable to us.

Sincerely yours,

SMITH, ROLFES & SKAVDAHL COMPANY, L.P.A.



Matthew J. Smith



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I. ADMISSIBILITY AND IMPACT OF COLLATERAL SOURCE PAYMENTS IN TORT ACTIONS

An issue of increasing contention in injury lawsuits is what impact collateral source payments have on a plaintiff's ultimate recovery. This is significant not only for claims which go to trial, but also in settlement negotiations. The law in this area varies considerably from state to state, and this article will address the current state of the law in Ohio, Kentucky, Indiana, and Michigan.

Ohio

Traditionally, Ohio courts took the position not only was the existence of collateral sources and their payments inadmissible, but also it could have no bearing whatsoever on the amount of damages a plaintiff could present. In other words, a plaintiff could present the total amount billed by a medical provider, without regard to what amount the provider actually accepted for payment, and regardless of whether or not the collateral source had a right of subrogation.

Ohio law changed substantially on this issue with the decision of *Robinson v. Bates*, 112 Ohio St. 3d 117, 2006-Ohio-362. This decision did not directly address whether collateral source payments were admissible; it permits parties to present evidence of not only the actual amount billed by their medical provider, but also if a lesser amount was accepted as payment in full, that amount could be presented as evidence also. The difference in such instances is at times very compelling, as many medical providers have contracts with health insurers obligating them to accept a substantially reduced amount as payment in full. *Robinson v. Bates* left it for a jury to decide whether to award a plaintiff the total amount billed, the amount accepted in payment, or a figure somewhere in between. To date, the application of this decision has not been explored in detail in any appellate decisions.

Complicating the situation even further in Ohio, is the implementation of R.C. 2315.22. This statute is part of Senate Bill 80, and applies to claims which arose on or after April 7, 2005. Under this statute, in any tort action, a defendant may present evidence of any payment made to or on behalf of a plaintiff for injury or property damage by a collateral source, so long as the collateral source has no right of subrogation. The statute further provides if a defendant does present such evidence, plaintiff may in turn provide evidence of what they paid or contributed for the collateral source benefit in question.

A remaining unsettled issue is whether *Robinson v. Bates* applies to claims which arose on or after April 7, 2005. At this time no Ohio appellate court has yet addressed this issue, and it is certainly one which bears watching in 2008.

Kentucky

The law on this issue is more clear and settled in Kentucky. The governing authority is *Baptist Healthcare Systems, Inc. v. Miller*, 177 S.W. 3d. 676 (2005). The Supreme Court of Kentucky was presented with virtually the same issue Ohio faced in *Robinson v. Bates*, and reached a very different result. They determined evidence of payments by collateral sources was inadmissible and the only evidence regarding medical bills which could be presented to a jury was the actual amount billed by the provider, and the fact that the provider may have accepted a lesser amount in payment, was not relevant or admissible.

Indiana

In Indiana, this issue is addressed largely by statute. Indiana Code 34-44-1-2 and 3 directly addressed when collateral source evidence may and may not be considered. In order for evidence of a collateral source payment to be admissible, it may not fall under any of the following categories: life insurance payment; death benefit; insurance benefit directly paid for by plaintiff or a family member of plaintiff; or payments made by any governmental body, agency, or entity. Under this section of the code, evidence may also be presented of the amount a plaintiff is required to pay as a result of receiving the benefit. Evidence may also be presented as to the cost to plaintiff (or plaintiff's family) of the benefit in question.

Indiana Code 34-44-1-3 provides that proof of such payments can be considered by a court in reviewing verdicts which are alleged to be excessive.

Michigan

Michigan also addresses collateral source payments by way of statute. Pursuant to M.C.L.A. 600.6303, evidence of collateral source payments is admissible only after a verdict is rendered and before the matter goes to judgment. The trial court must then reduce the portion of the verdict which was for economic damages, by the corresponding amount of collateral source payments. The amount of the deduction though, will be reduced by the amount paid by plaintiff, plaintiff's family, or plaintiff's employer for premiums for the collateral source.



II. FORECLOSURE AND INSURABLE INTERESTS

2007 saw a substantial increase in foreclosure actions filed in Ohio, Kentucky, Indiana, and Michigan. With this rise in foreclosures, questions arose on a number of issues impacting insurers, including how a foreclosure affects insurable interests. This article addresses this issue as it relates to these four states.

A foreclosure is a lawsuit to obtain a judgment of foreclosure and the sale of the premises after default by the mortgagor. A foreclosure lawsuit consists of a number of steps, culminating in a judicial order of sale of the property, followed by confirmation of the sale, and the possible entry of a deficiency judgment. A foreclosure should be viewed as a process, and until the steps are completed, it cannot be said the property has been foreclosed. The mortgagor may redeem the property within a time specified by statute by paying the amount of the judgment, plus costs and interest.

“A person has an insurable interest in property whenever he would profit by or gain some advantage by its continued existence and suffer some loss or disadvantage by its destruction.” *CNH Capital v. Janson Excavating, Inc.*, 2007-Ohio-2127, citing *Phillips v. Cincinnati Ins. Co.* (1979), 60 Ohio St.2d 180, 181. Accordingly, an insurable interest can exist even in the absence of title or deed to the property.

Effect of foreclosure on insurable interest of mortgagor

Generally, a mortgagor retains an insurable interest even when in default of the mortgage loan, until the named insured’s right of redemption expires.

Ohio

R.C. 5721.25 governs rights of redemption in Ohio. An Ohio court would likely recognize the insurable interest of a named insured during the pendency of a foreclosure action until such time as the court issues an entry confirming the foreclosure sale. On rare occasions, a foreclosure sale may be vacated and the order of confirmation set aside keeping the insurable interest in the named insured as though no sale had been attempted. *Richland County Mut. Ins. Co. v. Sampson* (1883), 38 Ohio St. 672.

Therefore, under Ohio law, a named insured may recover proceeds pursuant to all policy terms and conditions to the extent of his or her interest until the court enters an order confirming the sale. An entry of confirmation of sale is not the same as an order directing a sheriff’s sale to occur at a later time.

Kentucky

A mortgagor has a twelve (12) month redemption period, during which time he has the right to redeem the property by paying the amount for which the property sold, plus interest. A mortgagor’s insurable interest may continue beyond the redemption period until the purchaser has fully complied with his bid or executed a bond for its payment. *Smith v. National Union Fire Ins. Co. of Pittsburgh*, 239 Ky. 106 (1931).

Indiana

A mortgagor may redeem the real estate prior to a sheriff's sale by issuing payment to the county clerk prior to the issuance of the judgment and decree to the sheriff, or by payment to the sheriff directly after such issuance. *I.C. § 32-29-7-7*.

Where a positive duty is imposed upon the mortgagor to insure for the benefit of the mortgagee and the mortgagor takes out such a policy, the mortgagee may acquire an equitable lien on the proceeds of any such policy in the event of a loss, whether or not the mortgagee is actually named as a loss payee. *Lakeshore Bank and Trust Co. v. United Farm Bureau Mut. Ins. Co., Inc.*, 474 N.E.2d 1024 (Ind. Ct. App. 1985).

Michigan

A mortgagor's redemption period is six (6) months from the time the complaint is filed. *Mich. R.J.A. § 600.3115*. Courts have held a mortgagor's valid assignment of a right to collect insurance proceeds to a third-party is of no value if the purchase price at foreclosure is equal to the full amount of the debt. *Emmons v. Lake States Ins. Co.*, 484 N.W. 2d 712 (Mich. App. 1992).

Effect of foreclosure upon mortgagee's insurable interest

Most insurance policies now contain what is known as a standard mortgage clause wherein a named mortgagee's right to recovery is not invalidated by act or default of the named insured, except under limited circumstances.

Ohio

Ohio courts recognize the named mortgagee as having a separate claim under the policy of insurance. *Pittsburgh National Bank v. Motorist Mutual Ins. Co.* (1993), 87 Ohio App.3d 82. A mortgagee's insurable interest will continue until the mortgage debt is fully satisfied by either recovery of insurance proceeds or foreclosure sale.

Therefore, when a property loss occurs prior to confirmation of the sheriff's sale, the mortgagee has the option to: (1) recover from the insurance proceeds the full amount of the mortgage obligation, or amount due under the policy (if less); or (2) foreclose on the mortgage real estate and, to the extent the foreclosure sale does not satisfy the mortgage loan, recover the balance from the insurance proceeds.

For example, if the mortgagee elects to foreclose on the property and receives the full unpaid principal balance of the mortgage loan in a sheriff's sale, we are of the opinion the court would find no insurance proceeds would be recoverable by the mortgagee. This should remain true even if the mortgagee bids on and purchases the real estate in the foreclosure sale.

If the proceeds from the foreclosure sale or mortgagee's bid on the property are less than the unpaid principal mortgage balance, the mortgagee may seek recovery of the remaining amounts due on the mortgage obligation from the available insurance proceeds.

Kentucky

Kentucky law provides for both an “open mortgage clause” and a “standard mortgage clause.” An “open mortgage clause” provides the policy shall be payable to the mortgagee as its interest may appear, and its rights will be defeated by a breach of the conditions of the policy by the mortgagor. *Rhode Island Ins. Co. v. Wurtman*, 98 S.W.2d 29, 31 (Ky. 1936). A “standard mortgage clause” provides in case of loss, the policy is payable to the mortgagee, and its interest as payee shall not be invalidated or affected by an act of the mortgagor. *Grange Mut. Cas. Co. v. Central Trust*, 774 S.W.2d 838, 839 (Ky.App 1989).

In a standard mortgage clause, the ability of the mortgagee to recover can hinge upon notification requirements. However, such requirements should be explicit as ambiguities are always resolved in favor of the insured. For example, in *Anderson v. Kentucky Growers Insurance Co. Inc.*, 105 S.W.3d 462 (Ky. App. 2003) the court of appeals determined that had the insurer desired to make a mortgagee's recovery under the policy contingent upon notifying it of the filing of foreclosure proceedings, it could have done so by explicit language. Merely requiring notification of a “substantial change in risk” was insufficient to exclude coverage of the mortgagee when the mortgagee failed to provide notice upon the filing of foreclosure proceedings.

Indiana

The well-established rule is that where insurance is made payable to the mortgagee “as his interest may appear,” the mortgagee is entitled to the proceeds of the policy to the extent of his mortgage debt, holding any surplus after the extinguishment of his debt, for the benefit of the mortgagor. *Pearson*, 408 N.E.2d 166. The mortgagee's interest is in the indebtedness, and not in the property. *Fifth Third Bank v. Indiana Ins. Co.*, 771 N.E.2d 1218 (Ind. Ct. Apps. 2002). Both the property pledged and the insurance proceeds constitute a bank's security for the debt, and a bank can proceed against either or both, e.g. through a foreclosure action and/or by asserting a claim to foreclosure proceeds. *Loving v. Ponderosa Systems, Inc.* 479 N.E.2d 531 (Ind. Ct. App. 1985). The rights of the mortgagee to the insurance proceeds are determined as of the time of loss, and as such, a foreclosure action brought after the loss does not necessarily affect the insurer's liability to the mortgagee. *Fifth Third*, 771 N.E.2d 1218.

A “standard mortgage clause” gives rise to an independent insurance contract between insurer and mortgagee. *Fed. Nat'l. Mortgage Assoc. v. Great American Ins. Co.*, 157 Ind. App. 347 (Ind. Ct. App. 1973). That contract may provide that if the mortgagee acquires title to the property at the foreclosure sale, effectively reducing or paying off the debt owed, the insurer is obligated to compensate the mortgagee as the new owner, for a loss occurring after the sale. *Id.* If a policy contains a “loss payable clause,” the interest of the mortgagee decreases upon its acquisition of title following foreclosure, to the extent that the mortgagee is compensated for the mortgagor's debt. *Id.*

Michigan

It is well settled under Michigan law that an insurance policy's standard mortgage clause constitutes a separate and distinct contract between a mortgagee and an insurance company for payment on the mortgage. *Marketos v. American Employers Ins. Co.*, 240 Mich. App. 684, 692-693 (2000).

Furthermore, the standard mortgage clause requires an insurer to provide coverage for the mortgagee's interest in the insured property even if the mortgagee has acquired the fee title to the property through a foreclosure, regardless of the period of redemption. This is due to the fact that foreclosure of a mortgage resulting in acquisition of title by a mortgagee is generally regarded as an increase of interest rather than a "change of ownership" and does not require notice to the insurer under a standard mortgage clause. *Cap Mort v. Mich. Basic Prop Ins.*, 111 Mich. App. 393 (1981).

One issue to note, however, is the foreclosure referenced in the agreement can only mean foreclosure by the mortgagee, since purchase of the property at foreclosure by anyone else would extinguish the mortgagee's insurable interest. *Id* at 398.

Conclusion

When a covered property loss occurs prior to confirmation of a foreclosure sale, both the mortgagor and the mortgagee retain an insurable interest in the property. After a court's entry of confirmation of the foreclosure sale (or expiration of the redemption period), only the mortgagee retains an insurable interest, up to the unpaid principal balance of the mortgage loan, and subject to all applicable policy terms, conditions and limitations.

If the mortgagee receives money from a sheriff's sale, or purchases the property for a specified bid amount in the sheriff's sale, amounts due to the mortgagee under the policy of insurance would be offset by the amount received/bid by the mortgagee in the foreclosure. If the foreclosure sale proceeds/bid equals the unpaid principal balance on the mortgage loan, the mortgagee is not entitled to recovery of additional insurance proceeds.

Reported decisions in these four states are relatively sparse, but as foreclosures continue to increase, courts will be forced to address these issues with increasing frequency. We recommend consulting legal counsel should you have any questions regarding the application of these general principles to the specific facts of any claim.

On property losses involving a foreclosure, we recommend you consider investigating the following to determine if the foreclosure has an effect upon any amounts which would be due and owing to either the mortgagor (insured) or a named mortgagee:

1. When was the foreclosure action filed?
2. Who are the parties to the foreclosure action?

3. Has a sheriff's sale been ordered and proper notice of the sale given?
4. Has the property been sold? For what amount? To whom?
5. What is the unpaid principal balance of the mortgage loan obligation (currently and on the loss date)?
6. Has a court of competent jurisdiction issued a final entry confirming the sheriff's sale, or has the mortgagor's statutory period of redemption otherwise expired?
7. Has the confirmation entry or sale been challenged, or is it likely to be challenged?
8. Is your company entitled to a setoff of amounts received/bid by the mortgagee after a sheriff's sale?



III. FREQUENTLY CITED OHIO STATUTES



A. General Considerations in Insurance Claims Management

Ohio Administrative Code § 3901-1-54

Unfair Claims Practices

This provision is not a statute, but is part of the state regulations governing insurers. It governs unfair settlement practices in the handling of property and casualty claims. Numerous minimum standards of conduct for claims representatives are set forth. It was substantially modified in November, 2004.

Although the code expressly provides violations of the code may result in disciplinary action being taken by the Department of Insurance, violations do not lead to civil liability, even on first-party claims.

R.C. § 4505.11

Salvage Titles

If it is economically impractical to repair a vehicle and the insurer has paid the owner an agreed sum for the purchase of the vehicle, the insurer shall obtain the title and within 30 days obtain a salvage title.

If the owner retains possession of the vehicle, the insurer cannot pay the owner to settle the claim until the owner first obtains a salvage title.

R.C. § 2111.18

Settlement of Minor's Claims

All settlements of personal injury claims of minors must be approved by the probate court of the county where the minor resides.

If the net amount of the settlement proceeds to the minor exceed \$10,000, a guardianship must be established until the minor turns 18 or the balance of funds no longer exceeds \$10,000.

B. Clarification of Facts and Legal Duties

R.C. § 2317.48

Action for Discovery

When information and facts surrounding a case are difficult to obtain, a person may bring an action for discovery. A discovery action allows a party to explore the strength of a case without subjecting the party to the potential penalties associated with frivolous lawsuits.

R.C. § 2721.01 et. seq.

Declaratory Judgment Actions

This section allows parties to file suit to have the court determine the validity of a contract and/or the rights of the parties under the contract. This is the most effective tool for resolving disputes on the availability or amount of insurance coverage available.

Effective September 24, 1999, a plaintiff who is not an insured under a policy cannot bring a declaratory judgment action against a third party's insurer to determine if coverage is available for a claim until or unless a final judgment has been placed of record awarding the plaintiff damages against the insured.

C. Uninsured Motorist Coverage

R.C. § 3937.18

UM/UIM Coverage

- (A) Effective October 31, 2001, an insurer no longer has a duty to offer UM/UIM coverage to its insured with the sale of a policy. As a result, there will no longer be any requirement that a rejection or reduction in coverage be in writing.
- (A) UIM coverage is not excess coverage.
- (G) Insurers may preclude both inter-family and intra-family stacking in their policies.
- (H) On wrongful death claims, any claim for a single death is subject to the per person limit on coverage.
- (H) An insured has a three year statute of limitations to assert a UM/UIM claim, assuming they did not destroy the insurer's right of subrogation.
- (K) A vehicle available for the regular use of the insured, a family member, or a fellow household member can be deemed an uninsured vehicle.
- (L) These requirements only apply to policies meeting the financial responsibility requirements or to umbrella policies.

R.C. § 3937.44

Per Person Limits

For both liability and UM/UIM coverages, only the person limit is available for recovery for each person suffering a bodily injury or for each decedent.

D. Statutory Subrogation Rights

R.C. § 2744.05

Immunity of Political Subdivisions to Subrogation Claims

Political subdivisions are immune to any subrogation claim brought by an insurer.

R.C. § 3937.18 (E)

UM/UIM Claims

In the event of payment to an insured for an uninsured/underinsured motorist claim, the insurer making such payment is entitled to the proceeds of any settlement or judgment resulting from the exercise of the insured's rights against a legally liable party. This right is limited by relevant insolvency proceedings.

R.C. § 3937.21

Subrogation

If an insurance company pays to, or on behalf of, its insured any amount later determined to be due from another insurer, it shall be subrogated to all rights of the insured against such insurer.

R.C. § 4123.93

Workers' Compensation Subrogation Rights

This statute became effective April 9, 2003, and therefore applies only to injuries occurring on or after that date. It restores subrogation rights of the Ohio Bureau of Workers' Compensation and self-insured employers. For claims where the injury occurred prior to April 9, 2003, there is no right of subrogation.

Employees now must notify the lienholder if there is a third-party who is responsible for their injuries so that there is a reasonable opportunity to assert their subrogation rights. Responsible parties include UM/UIM insurers.

If an employee is not made whole, then the statute prescribes a formula for *pro-rata* distribution of any recovery between the employee and lienholder.

If there is the potential for future payments by the lienholder, a portion of the recovery is to be put in an interest bearing trust account to protect any future lien.

E. Liability and Damages Considerations

R.C. § 2315.18

Caps on Compensatory Damages

This statute took effect in April, 2005.

There is no cap on economic damages. Non-economic damages are capped at \$250,000.00 or three times the amount of the economic damages, with an absolute maximum of \$350,000.00 per plaintiff or \$500,000.00 per occurrence. Exceptions are recognized for certain types of profound and catastrophic injuries. These caps do not pertain to claims against governmental entities, which are governed by Chapter 27.

R.C. § 2315.19

Comparative Fault

A plaintiff's recovery is reduced in proportion to their percentage of comparative fault. If a plaintiff is 51% or more at fault, they are barred from recovery.

For injuries occurring prior to April 8, 2003, there is joint and several liability among joint tortfeasors for economic damages. For non-economic damages there is only several liability among joint tortfeasors. If the injury occurred on or after April 8, 2003, R.C. 2307.22 is applicable instead.

R.C. § 2307.22

Allocation of Damages

This statute only applies to claims where the injury occurred on or after April 8, 2003. If there are multiple defendants at fault, any defendant who is more than 50% at fault is subject to joint and several liability for the plaintiff's economic damages. All other at-fault defendants are liable only to the proportionate extent of their liability. All at-fault defendants are only proportionally liable for non-economic damages.

If there are multiple defendants at fault, and no one defendant is more than 50% at fault, then the at fault defendants are liable only to the proportionate extent of their liability for both economic and non-economic damages. The only exception exists for intentional tortfeasors, who are still subject to joint and several liability for economic damages.

R.C. § 2307.32

Enforcement of Contribution

This statute only applies to claims where the injury occurred prior to April 8, 2003. If the injury occurred on or after that date, R.C. § 2307.25 is applicable instead.

A party has one year from the date of judgment against it to seek contribution from joint tortfeasors.

If the party settles a claim without a judgment, that party has one year from the date of settlement in which to seek contribution.

A party who enters into a good faith settlement with a plaintiff or claimant for only a portion of the plaintiff's damages is immune to claims for contribution from other tortfeasors. The release of claims bars any contribution claims of joint tortfeasors made either before or after the date of settlement.

R.C. § 2307.25

Right of Contribution

This statute only applies to claims where the injury occurred on or after April 8, 2003. A right of contribution will exist only if two or more tortfeasors are subject to joint and several liability.

R.C. § 2307.28

Set-offs for Damages

This statute only applies to claims where the injury occurred on or after April 8, 2003. A non-settling defendant is entitled to a set-off from any award of damages from what a plaintiff has already recovered from any settling party. This right exists even if the settling party is not found to be liable. This overrules *Fidleholtz v. Peller* (1998), 81 Ohio St. 3d 197, which required a finding the settling party was liable before a set-off could be imposed.

R.C. § 2307.711

Comparative Fault in Product Liability Actions

Assumption of risk is a defense in product liability claims. Depending upon the nature of the assumption of risk, it can be an absolute bar to a plaintiff's recovery, without any comparative fault analysis, or any service proportionate basis for reducing damages and liability. This statute took effect in April, 2005.

R.C. § 2125.01 et. seq.

Wrongful Death Actions

A wrongful death action can only be brought by the executor or administrator of the decedent's Estate.

The decedent's surviving spouse, parents, and children are rebuttably presumed to have been damaged by the death.

All other family members must prove their entitlement to damages.

R.C. § 2317.02

Waiver of Physician-Patient Privilege

By filing a tort action, a plaintiff waives any physician-patient privilege and the defendant is entitled to obtain the entirety of the plaintiff's medical records.

R.C. § 2745.11

Workplace Substantial Certainty Torts

This statute took effect April 7, 2005. It reflects the latest legislative effort to codify workplace substantial certainty torts. An employee making such a claim must now either prove the employer intended to injure them, or that the employer acted with the belief that injury was substantially certain to occur. Substantial certainty is considered a deliberate intent to cause injury, disease or death. The statute goes on to provide that the deliberate removal of a safety guard or any misrepresentation of a toxic or hazardous substance creates a rebuttable presumption of an intent to injure.

R.C. § 4123.741

Fellow Employee Tort Immunity

An employee may not bring suit against an employer or fellow employee for injuries sustained as a result of the negligence of the employer or fellow employee.

The injury must have occurred within the scope and course of employment and be compensable under Workers' Compensation laws.

The statutory immunity does not apply to intentional torts.

R.C. § 2315.21

Punitive or Exemplary Damages

Effective April, 2005, a defendant now has an absolute right to bifurcate a trial on a punitive damage claim.

Punitive damages are capped at one to two times the amount of any compensatory damage award. In the case of a small employer or private individual, punitive damages are capped at two (2) times the amount of damages or ten percent of their net worth.

R.C. § 4513.263

Seatbelt Defense

This statute became effective April, 2005. A defendant may now interject evidence the plaintiff failed to wear a seatbelt. This evidence is not admissible for the purposes of establishing liability, but can be utilized to establish a plaintiff's injuries would not have occurred or not have been as severe, had a seatbelt been worn.

F. Insurance Fraud

R.C. § 2913.47(B) (1)

Presenting Fraudulent Claims

A person commits insurance fraud if, while acting with purpose to defraud or knowing the person is facilitating a fraud, the person presents or causes to be presented any written or oral statement that is part or in support of an application for insurance or a claim for a benefit under a policy of insurance, knowing the statement, in whole or in part, is false or deceptive.

R.C. § 2913.47(B) (2)

Fraud in the Application or Claim for Insurance

It is illegal to assist, aid, abet, solicit, procure, or conspire with another to prepare or make any written or oral statement intended to be presented to an insurer as part or in support of an application for insurance or a claim for a benefit under a policy of insurance, knowing the statement, in whole or in part, is false or deceptive.

R.C. § 2913.47(C)

Penalties

First Degree Misdemeanor—Fraudulent claims in an amount less than \$500.00.

Fifth Degree Felony—Fraudulent claims between \$500.00 and \$4,999.99.

Fourth Degree Felony—Fraudulent claims between \$5,000.00 and \$99,999.99.

Third Degree Felony—Fraudulent claims of \$100,000.00 or more.

R.C. § 3904.13

Disclosure of Personal or Privileged Information by an Insurance Carrier

An insurer is prohibited from disclosing any personal or privileged information about an individual collected or received in connection with an insurance transaction, unless the disclosure is necessary for detecting or preventing criminal activity, fraud, material misrepresentation, or a material non-disclosure in connection with an insurance action.

Disclosed information must be limited to that which is reasonably necessary to detect or prevent criminal activity, fraud, material misrepresentation, or a material non-disclosure in connection with insurance transactions.

When the above conditions are met, disclosure may be made to law enforcement or other governmental agencies to protect the interest of the insurer in preventing and/or prosecuting fraudulent claims, or if the insurer reasonably believes illegal activities have already been conducted by the individual.

R.C. § 3904.01(T) and § 3904.03

Pretext Interviews

A “pretext interview,” as defined in R.C. §3904.01(T), is an interview whereby a person, in an attempt to obtain information about a natural person, performs one or more of the following:

- (1) Pretends to be someone else;
- (2) Pretends to represent another entity;
- (3) Misrepresents the true purpose of the interview;
- (4) Refuses to identify himself/herself.

An insurer is generally prohibited from using pretext interviews to obtain information in connection with an insurance transaction; however, a pretext interview may be undertaken to obtain information for the purpose of investigating suspected criminal activity, fraud, material misrepresentation, or a material non-disclosure in connection with an insurance claim.

R.C. § 3911.06

False Answer in Application for Insurance

An insurer is prohibited from denying recovery under a policy of insurance on the basis the applicant gave false answers in his application, unless it is proved the answer was willfully false, fraudulently made, material, and induced the company to issue the policy.

The agent or insurance company must have no prior knowledge of the application’s falsity or fraudulent nature prior to issuing the policy of insurance.

R.C. § 3937.42 and § 3937.99

Exchange of Information with Law Enforcement and Prosecuting Agencies

An insurer has a legal obligation to notify law enforcement authorities when it has reason to suspect its insured has submitted a fraudulent motor vehicle claim.

Failure to notify the proper authorities constitutes a fourth degree misdemeanor.

R.C. § 3999.21

Insurance Fraud Warnings

All application and claim forms issued by an insurer must contain the following warning: *Any person who, with intent to defraud or knowing he is facilitating a fraud against an insurer, submits an application or files a claim containing a false or deceptive statement is guilty of insurance fraud.*

Failure to include the warning is not a valid defense for insurance fraud.

R.C. § 3999.41

Anti-Fraud Programs

Every insurer is now required to adopt a written anti-fraud program. This program must include procedures for detecting insurance fraud.

Additionally, this program is to identify the person(s) responsible for the anti-fraud program.

Those not yet engaged in the business of insurance must submit a written plan within 90 days after beginning to engage in the business of selling insurance.

R.C. § 3999.42

Notice to Department of Insurance of Suspected Fraud

Requires an insurer to notify the Department of Insurance whenever it suspects insurance fraud (as established in the Theft Fraud Law under R.C. §3917.47) involving a claim of \$1,000 or more.

R.C. § 3905.49(A) (13) and § 3905.491

Insurance Agents and Solicitors Must Report Felony Convictions to the Superintendent

Requires licensed insurance agents or solicitors convicted of felonies to report the convictions to the Superintendent of Insurance within 30 days of the judgment or conviction entry date.



IV. FREQUENTLY CITED KENTUCKY STATUTES



K.R.S. § 44.072

Limited Waiver of Sovereign Immunity in Negligence Claims

It is the intent of the General Assembly to preserve the sovereign immunity of the Commonwealth, except in limited situations set forth in the statute. Except as specifically indicated otherwise, the Board of Claims shall have exclusive jurisdiction to hear claims for damages against the Commonwealth.

K.R.S. § 342.690

Exclusiveness of Workers' Compensation Remedy

If an employer secures payments of Workers' Compensation for his employees, the liability of the employer shall be limited to such Workers' Compensation payments and shall be exclusive and in place of all other liability.

K.R.S. § 304.20-020

Uninsured Vehicle Coverage

No automobile insurance policy shall be issued unless it provides coverage for injuries caused by the owners or operators of uninsured motor vehicles. An insured shall have the right to reject such coverage in writing. The term uninsured motor vehicle shall be deemed to include an insured motor vehicle where the liability insurer thereof is unable to make payment with respect to the legal liability of its insured due to insolvency.

K.R.S. 304.39-320

Underinsured Motorist Coverage

- A tortfeasor's liability insurance is the primary coverage and the underinsured motorist coverage insurance is the secondary or excess coverage. Therefore, UIM coverage is payable only to the extent that judgment exceeds the tortfeasor's liability coverage. *Kentucky Farm Bureau Mut. Ins. Co. v. Rogers*, 179 S.W.3d 815, 818 (Ky. 2005).
 - (1) Every insurer shall make available upon request to its insureds underinsured motorist coverage.
 - (2) If an injured person agrees to settle a claim with the liability insurer and the settlement would not fully satisfy the claim for personal injuries so as to create an underinsured motorist claim, then written notice of the proposed settlement must be submitted by certified or registered mail to all underinsured motorist insurers that provide coverage.
 - (3) The underinsured motorist insurer then has a period of 30 days to consent to the settlement or retention of subrogation rights.

- (4) The underinsured motorist insurer is entitled to a credit against total damages in the amounts of the limits of the underinsured motorist liability policies in all cases. Nothing however, including any payments or credit reduces or affects the total amount of underinsured motorist coverage available to the injured party.

K.R.S. 411.310

Statute of Repose

- (1) In any product liability action it shall be presumed that the subject product was not defective if the injury occurred more than five years after the date of sale to the first consumer, or more than eight years after the date of manufacture.
- (2) In any product liability action it shall be presumed that the product was not defective if the design, methods of manufacture and testing conform to the generally recognized and prevailing standards or the state-of-the-art in existence at the time the design was prepared and the product was manufactured.

K.R.S. 411.186

Assessment of Punitive Damages

In any civil action where claims for punitive damages are included, the jury, or judge if the jury trial has been waived, shall determine concurrently with all the other issues presented whether punitive damages may be assessed.

In determining the amount of punitive damages to be assessed, the trier of fact should consider the following factors:

- (a) the likelihood at the relevant time that serious harm would arise from the defendant's misconduct;
- (b) the degree of the defendant's awareness of that likelihood;
- (c) the profitability of the misconduct to the defendant;
- (d) the duration of the misconduct and any concealment of it by the defendant; and
- (e) actions by the defendant to remedy the misconduct once it became known to the defendant.

V. FREQUENTLY CITED INDIANA STATUTES



A. *Automobile Insurance*

I.C. § 9-25-2-3

Financial Responsibility

Requires insurance in the following amounts:

- (1) \$25,000 per person;
- (2) \$50,000 per accident; and
- (3) \$10,000 property coverage per accident.

I.C. § 27-7-5-2(a)

UM/UIM Coverage

Requires insurers to offer UM/UIM coverage with every bodily injury liability policy of insurance in an amount not less than \$50,000 or the limit of liability insurance, whichever is greater and can only be rejected in writing.

I.C. § 27-7-5-4(a)

Uninsured Motor Vehicles

An uninsured motor vehicle is one without liability insurance or not otherwise compliant with the financial responsibility requirements of such laws of this or another state or where the insurer is unable to make payments to the limit of liability due to insolvency.

I.C. § 27-7-5-4(b)

Underinsured Motor Vehicles

An underinsured motor vehicle is one where the limits of coverage available for payment to the insured under all bodily injury liability policies covering persons liable to the insured are less than the limits of the insured's underinsured motorist coverage.

B. *Negligence, Other Torts and Contribution*

I.C. § 34-51-2-2

Comparative Fault of Governmental Subdivisions

Contributory negligence remains a complete defense to claims under the Tort Claims Act.

I.C. § 34-51-2-5

Comparative Fault Set-off

Contributory fault of a claimant acts to proportionately reduce the total damages for an injury by the claimant's contributory fault.

I.C. § 34-51-2-6

Contributory Negligence as Complete Defense

Contributory negligence is a complete defense if a claimant's contributory fault is greater than the fault of all other persons whose fault proximately contributed to the claimant's damages.

I.C. § 34-51-2-10

Intentional Torts

A plaintiff may recover 100% of the compensatory damages in a civil action for an intentional tort from a defendant who was convicted after a prosecution based on the same evidence.

I.C. § 34-51-2-12

Contribution and Indemnity

In an action under this chapter, there is no right of contribution among tortfeasors. The right of indemnity is unaffected by this section.

I.C. § 34-51-2-14

Nonparty Defense

In an action based on fault, a defendant may assert that the damages of the claimant were caused in full or in part by a nonparty.

I.C. § 34-51-2-15

Nonparty Defense

The burden of proving a nonparty defense is upon the defendant who must affirmatively plead the defense.

I.C. § 34-51-2-16

Nonparty Defense

A nonparty defense must be pled if known. Nonparty defenses which become known after the filing of the answer must be raised with reasonable promptness. If the summons and complaint was served more than 150 days prior to the expiration of the claimant's statute of limitations, nonparty defenses must be pled no later than 45 days prior to the expiration of that limitation of action; however, the trial court may alter these time limits to allow defendants a reasonable opportunity to discover the existence of a nonparty defense and allow the claimant a reasonable opportunity to add the nonparty as an additional defendant prior to the expiration of the period of limitations applicable to the claim.

I.C. § 34-20-1-1

Products Liability Actions

The article governs all actions that are brought by a user or consumer against a manufacturer or seller for physical harm caused by a product regardless of the substantive legal theory or theories upon which the action is brought.

I.C. § 34-20-2-1

Product Liability

Liability exists for an unreasonably dangerous or defective product if seller should reasonably foresee the consumer or class of persons being exposed to the harm caused by the defective condition, the seller is engaged in the business of selling the product and it reaches the user or consumer without substantial alteration.

I.C. § 34-20-2-2

Products Liability

An action can be maintained even though reasonable care was used in the manufacture and preparation of the product and there is no privity of contract. However, reasonable care is a defense to design defect claims and those for failure to provide adequate warnings.

I.C. § 34-20-2-3

Strict Product Liability

An action for strict product liability for an unreasonably dangerous defective condition may only be brought against the manufacturer.

I.C. § 34-20-2-4

Product Manufacturers

If a court cannot gain jurisdiction over a manufacturer, then the manufacturer's principal distributor or seller, who the court can gain jurisdiction, will be deemed the manufacturer of the product.

I.C. § 34-20-9-1

Indemnity in Product Liability Actions

A party held liable may seek indemnity from other persons whose actual fault caused the product to be defective.

I.C. § 34-23-1-1

Wrongful Death

Requires an action in wrongful death to be maintained by the personal representative of the decedent and to have been able to have been prosecuted by the decedent had the decedent lived.

I.C. § 34-23-1-2(d)

Limitation of Certain Wrongful Death Damages

The type of damages in subsection (c)(3)(A) (reasonable medical, hospital, funeral and burial expenses) are limited to \$300,000.

C. Subrogation

I.C. § 34-51-2-19

Lien Reduction

Subrogation claims or other liens or claims arising out of the payment of medical expenses or other benefits as the result of personal injuries or death shall be diminished by the claimant's comparative fault or the uncollectibility of the full value of the claim resulting from limited liability insurance or any other cause in the same proportion as the claimant's recovery is reduced. The lien or claim shall also bear a *pro rata* share of the claimant's attorney fees and litigation expenses.

I.C. § 27-7-5-6(a)

Subrogation for UM/UIM Payments

Provides that payment of UM/UIM coverage for damages operates to subrogate the insurer to any cause of action in tort which payee may have.

I.C. § 27-7-5-6(b)

Exception to the Right of Subrogation for UIM Payments

The insurer providing underinsured motorist coverage does not have the right of subrogation if it is informed of a bona fide offer of settlement which includes a certification of the liability coverage limits of the underinsured motorist and the insurer fails to advance payment in at least the amount of the offer within 30 days.

D. Insurance Fraud

I.C. § 27-2-13-2

Arson Reporting

When requested by an authorized agency charged with the responsibility of investigating a fire loss, an insurer shall furnish information to the agency consisting of any and all relevant information or evidence considered important to the authorized agency. This includes but is not limited to any and all policy information, policy premium payment records, history of prior claims made by the insured, any material relating to the investigation of the loss including statements, proof of loss, or other relevant evidence.

I.C. § 27-2-13-3

Arson Reporting

When an insurer has reason to believe a fire loss in which it has an interest is caused by a means that was not accidental, then the company shall notify an authorized agency in writing and provide that agency with all materials developed from the insurer's investigation of the fire loss. The insurer shall also provide the office of the state fire marshal a copy of any information provided under this section.

I.C. § 27-2-13-4

Arson Reporting

When an authorized agency receives information under this chapter, it may release or provide the same information to any other authorized agency to further its investigation. In addition, an insurer who provides information under this chapter has the reciprocal right to request and receive relevant information from that agency. Finally, an insurer or authorized agency who releases or provides evidence or information under this chapter is immune from any civil or criminal liability for providing the evidence or information.

I.C. § 27-2-13-5

Arson Reporting

When an authorized agency is investigating a fire that it believes to have been caused by arson it may, in writing, order an insurer to withhold payment of any policy proceeds on the damaged or destroyed property for up to thirty (30) days from the date of the order. The insurer may not make a payment during that time, except as follows:

1. Emergency living expenses;
2. Emergency action necessary to secure the premises;
3. To prevent further damage to the premises; or,
4. To a mortgagee who is not the target of the investigation of the authorized agency.

I.C. § 27-2-14-2

Vehicle Theft Reporting

If an insurer has reason to believe that a vehicle theft claim made by an insured is fraudulent, the insurer shall notify, in writing, an authorized agency of the suspected fraudulent claim and provide the agency with all materials developed from the insurer's investigation.

I.C. § 27-2-14-3

Vehicle Theft Reporting

An authorized agency investigating a vehicle theft may, in writing, require an insurer investigating the loss to release any and all relevant information or evidence considered important to the authorized agency, including:

1. Pertinent policy information (including a policy application);
2. Policy premium payment records;
3. History of prior claims made by the insured;
4. Material relating to the investigation, including:
 - A. Statements;
 - B. Proofs of Loss;
 - C. Other relevant evidence.

I.C. § 27-2-14-4

Vehicle Theft Reporting

An authorized agency provided with information under this chapter may release or provide the same information to any other authorized agency to further its investigation. In addition, an insurer who provides information under this section has the reciprocal right to request and receive relevant information from that agency. When requested, the agency shall provide the requested information within a reasonable time, not exceeding thirty (30) days. Finally, an insurer or authorized agency that releases or provides evidence or other information under this chapter is immune from civil or criminal liability for providing that information.

I.C. § 27-2-16-3

Claim Forms

All preprinted claim forms required by an insurer as a condition of payment of a claim must contain a statement which clearly states the following: “*A person who knowingly and with intent to defraud an insurer files a statement of claim containing any false, incomplete, or misleading information commits a felony.*”

E. Misc. Statutes

I.C. § 34-14-1-1

Declaratory Judgment

A court may declare rights, status and other legal relations whether or not further relief is or could be claimed.

I.C. § 34-14-1-2

Declaratory Judgment

A person interested under a deed, will, written contract or other writings or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract or franchise may have questions of construction or validity determined or obtain a declaration of rights, status or legal relations thereunder.

I.C. § 34-50-1-4

Qualified Settlement Offer

This is essentially a codification of the Trial Rule 68 Offer of Judgment. When a qualified settlement offer is made pursuant to this statute, and not accepted, then the party rejecting the offer must ultimately obtain a more favorable judgment. If the rejecting party fails to obtain a more favorable judgment, the offering party is entitled to attorney’s fees, costs, and expenses in an amount not to exceed \$1,000.00. To be valid, a qualified settlement offer must:

1. Be in writing;
2. Be signed by the offeror or the offeror’s attorney;
3. Be designated on its face as a “qualified settlement offer;”

4. Be delivered to each recipient or the recipient's attorney by:
 - A. Registered or certified mail; or
 - B. Any other method that verifies the date of receipt.
5. Set forth the complete terms of the settlement proposal in sufficient detail to allow the recipient to decide whether to accept or reject it;
6. Include the name and address of the offeror and the offeror's attorney; and,
7. Expressly revoke all prior qualified settlement offers made by the offeror to the recipient.



VI. FREQUENTLY CITED MICHIGAN STATUTES

General Considerations in Insurance Claims Management

M.C.L.A. § 500.4503

Fraudulent Insurance Acts

A person commits insurance fraud if they present or prepare any oral or written statement supporting an application or claim for insurance while knowing the statement is false either in whole, or in part.

M.C.L.A. § 500.4507

Release of Information to Authorized Agency or Insurer

Upon written request by an authorized agency, an insurer may release to the authorized agency, at the authorized agency's expense, any or all information that is considered important relating to any suspected insurance fraud. An authorized agency may release information on suspected insurance fraud to an insurer upon a showing of good cause. This information may include, but is not limited to, the following:

- (a) Insurance policy information relevant to an investigation, including any application for a policy.
- (b) Policy premium payment records that are available.
- (c) History of previous claims made by the insured.
- (d) Information relating to the investigation of the suspected insurance fraud, including statements of any person, proofs of loss, and notice of loss.

M.C.L.A. § 500.4509

Report of Information Concerning Insurance Fraud

In the absence of malice in a prosecution for insurance fraud, any person who cooperates with an authorized agency or complies with a court order to provide evidence or testimony is not subject to civil liability with respect to any act concerning the suspected insurance fraud, unless that person knows that the evidence, information, testimony, or matter contains false information pertaining to any material fact or thing.

M.C.L.A. § 500.4511

Violations, Penalties

A person who commits insurance fraud is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than \$50,000.00, or both, and restitution. A person who enters into an agreement or conspiracy to commit insurance fraud is guilty of a felony, punishable by imprisonment for not more than 10 years or by a fine of not more than \$50,000.00, or both, and shall be ordered to pay restitution.

M.C.L.A. § 500.2845

Insured Real Property Fire Proceeds

If a claim is filed for a loss to insured real property due to fire or explosion and a final settlement is reached on the loss to the insured real property, an insurer shall withhold from payment 25% of the actual cash value of the insured real property at the time of the loss or 25% of the final settlement, whichever is less. For residential property, the 25% settlement or judgment withheld shall not exceed \$6,000.00 adjusted annually beginning June 1, 1999 in accordance with the Consumer Price Index.

M.C.L.A. § 29.4

Reporting of Fires; Release of Information by Insurance Companies

Fire investigators and fire prevention officials may request an insurer investigating a fire loss of real or personal property release all information in possession of the agent relative to the loss.

If an insurer has reason to suspect a fire loss was caused by incendiary means, the insurer must notify the fire investigating agency and furnish them with all relevant material acquired during its investigation of the fire loss.

M.C.L.A. § 500.2026

Unfair Claims Practices

- (1) Unfair or deceptive acts or practices in the business of insurance include but are not limited to:
 - (a) Misrepresenting pertinent facts or insurance policy provisions relating to coverage at issue.
 - (b) Failing to acknowledge promptly or to act reasonably and promptly upon communications with respect to claims arising under insurance policies.
 - (c) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies.
 - (d) Refusing to pay claims without conducting a reasonable investigation based upon the available information.
 - (e) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed.
 - (f) Failing to attempt in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear, and;
- (2) The failure of a person to maintain a complete record of all the complaints of its insureds which it has received since the date of the last examination is an unfair method of competition and unfair or deceptive act or practice in the business of insurance.

M.C.L.A. § 500.2006

Timely Payment of Claims or Interest; Proof of Loss; Calculation of Interest; Exemptions

A person must pay on a timely basis to its insured the benefits provided under the terms of its policy, or, in the alternative, the person must pay to its insured 12% interest on claims not paid on a timely basis. Failure to pay claims on a timely basis or to pay interest on claims is an unfair trade practice unless the claim is reasonably in dispute.

An insurer shall specify in writing the materials that constitute a satisfactory proof of loss not later than 30 days after receipt of a claim unless the claim is settled within the 30 days. If proof of loss is not supplied as to the entire claim, the amount supported by proof of loss shall be considered paid on a timely basis if paid within 60 days after receipt of proof of loss by the insurer.

Automobile Insurance

M.C.L.A. § 500.3009

Minimum Auto Insurance Limits

An automobile liability policy insuring against loss resulting from liability imposed by law for property damage, bodily injury, or death suffered by any person arising out of the ownership, operation, maintenance, or use of a motor vehicle shall not be issued to any motor vehicle unless the liability coverage is subject to a limit, exclusive of interest and costs of:

- (a) not less than \$20,000.00 because of bodily injury to or death of 1 person in any 1 accident, and subject to that limit for 1 person,
- (b) to a limit of not less than \$40,000.00 because of bodily injury to or death of 2 or more persons in any one accident, and
- (c) to a limit of not less than \$10,000.00 because of injury to or destruction of property of others in any accident.

M.C.L.A. § 500.3105

Personal Protection Benefits; Accidental Bodily Injury

- (1) Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle.
- (2) Personal protection insurance benefits are due without regard to fault.
- (3) Bodily injury includes death resulting therefrom and damage to or loss of a person's prosthetic devices in connection with the injury.
- (4) Bodily injury is accidental as to a person claiming personal protection insurance benefits unless suffered intentionally by the injured person or caused intentionally by the claimant. Even though a person knows that bodily injury is substantially certain to be caused by his act or omission, he does not cause or suffer injury intentionally if he acts or refrains from acting for the purpose of averting injury to property or to any person including himself.

M.C.L.A. § 500.3107

Allowable Medical Expenses and Accommodations

Personal protection insurance benefits are payable for the following:

- (a) Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation;
- (b) Work loss consisting of loss of income from work an injured person would have performed during the first 3 years after the date of the accident if he or she had not been injured. The statutory maximum is based upon a schedule which is periodically adjusted for inflation; and
- (c) Replacement services or expenses not exceeding \$20.00 per day, reasonably incurred in obtaining ordinary and necessary services in lieu of those that, if he or she had not been injured, an injured person would have performed during the first 3 years after the date of the accident, not for income but for the benefit of himself or herself or of his or her dependent.

M.C.L.A. § 500.3010

Loss or Damage Caused by Fire or Explosion to Motor Vehicle

An automobile insurer shall not pay a claim of \$2,000.00 or more for loss or damage caused by fire or explosion to an insured motor vehicle until a report has been submitted to the fire or law enforcement authority designated and the insurer has received from the insured a copy of the report.

This section does not apply to accidental fires or explosions. If the insurer or the fire or law enforcement authority designated determines that the fire or explosion may not be accidental, the insurer shall notify the insured of the requirement for a report under this section by no later than 30 days after the determination.

M.C.L.A. § 500.3112

Payees of Personal Protection Benefits; Payments as Discharge of Liability

Personal protection insurance benefits are payable to or for the benefit of an injured person or, in case of his death, to or for the benefit of his dependents. Payment by an insurer of personal protection insurance benefits discharges the insurer's liability to the extent of the payments unless the insurer has been notified in writing of the claim of some other person. If there is doubt about the proper person to receive the benefits or the proper apportionment, the insurer and the claimant may apply to the circuit court for an appropriate order. In the absence of a court order the insurer may pay:

- (a) To the dependents of the injured person, the personal protection insurance benefits accrued before his death without appointment of an administrator or executor.
- (b) To the surviving spouse, the personal protection insurance benefits due any dependent children living with the spouse.

M.C.L.A. § 500.3113

Persons not Entitled to Personal Protection Benefits

A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident:

- (a) The person was using a motor vehicle or motorcycle which he or she had taken unlawfully, unless the person reasonably believed that he or she was entitled to take and use the vehicle.
- (b) The person was the owner or registrant of a motor vehicle involved in the accident and failed to maintain the security for payment of benefits under personal and property protection insurance.
- (c) The person was not a resident of Michigan, was an occupant of a motor vehicle not registered in Michigan, and was not insured by an insurer which has filed a certification for nonresidents.

M.C.L.A. § 257.1106

Death, Injury or Damages Caused by Uninsured Motorist; Application for Payment from Fund

Where the death of or personal injury or property damage to any person or property is occasioned by an uninsured motor vehicle, any person who would have a cause of action against the owner or driver of the uninsured motor vehicle in respect to the death or personal injury, or property may make application for payment out of the Motor Vehicle Accident Claims Act fund for all damages in respect to the death or personal injury and for damages in excess of \$200.00 in respect to property damage.

M.C.L.A. § 257.1123

Maximum Payments for Death, Injury or Property Damage

In respect to applications under the Motor Vehicle Accident Claims Act for payment of damages arising out of motor vehicle accidents, the secretary shall not pay out of the fund, (a) more than \$20,000.00, exclusive of costs, on account of injury to or the death of 1 person, and, subject to such limit for any one person so injured or killed, not more than \$40,000.00, exclusive of costs, on account of injury to or the death of 2 or more persons in any one accident; and (b) more than \$10,000.00, exclusive of costs, for loss of or damage to property resulting from any one accident.

General Liability Considerations

M.C.L.A. § 600.2959

Comparative Fault

In a tort action, the court shall reduce the damages by the percentage of comparative fault of the person upon whose injury or death the damages are based. If the plaintiff's percentage of fault is greater than the aggregate fault of the other person or persons, whether or not parties to the action, the court shall reduce economic damages by the percentage of comparative fault of the person upon whose injury or death the damages are based, and non-economic damages shall not be awarded.

M.C.L.A. 600.6304

Joint and Several Liability

The trier of fact must allocate liability among nonparties, even in medical malpractice cases where the plaintiff is not at fault, before joint and several liability is imposed on each defendant. Once joint and several liability is determined to apply, joint and several liability prohibits the limitation of damages to each defendant's respective percentage of fault.

M.C.L.A. § 600.2925a

Contribution Between Tortfeasors

When two or more persons become jointly or severally liable in tort for the same injury to a person or property, there is a right of contribution among them even if a judgment has not been recovered against all or any of them.

The right of contribution exists only in favor of a tortfeasor who has paid more than his *pro rata* share of the common liability and his total recovery is limited to the amount paid by him in excess of his *pro rata* share. A tortfeasor against whom contribution is sought shall not be compelled to make contribution beyond their own *pro rata* share of the entire liability.

M.C.L.A. § 418.131

Employer-Employee Recovery, Remedies

The right to the recovery of workers' compensation benefits shall be the employee's exclusive remedy against the employer for a personal injury or medical condition resulting from the employment. An employer can be held liable for an intentional tort where an employee is injured as a result of a deliberate act of the employer and the employer specifically intended the injury. An employer is presumed to have intended to injure the employee if the employer had knowledge that an injury was certain to occur and willfully disregarded that knowledge.

M.C.L.A. § 691.1407

Governmental Immunity from Tort Liability

A governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, member, or volunteer of the governmental agency so long as the governmental agency is engaged in the exercise or discharge of a governmental function. To be acting on behalf of a government agency:

- (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
- (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
- (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

M.C.L.A. § 600.2946

Product Liability Actions

A manufacturer or seller is not liable unless a plaintiff establishes that the product was not reasonably safe at the time the specific unit of the product left the control of the manufacturer or seller and that, according to generally accepted production practices at the time, a practical and technically feasible alternative production practice was available that would have prevented the harm without significantly impairing the usefulness or desirability of the product to users and without creating equal or greater risk of harm to others.

There is a rebuttable presumption that the manufacturer or seller is not liable if the aspect of the product allegedly causing the harm was in compliance with federal or state standards, or was in compliance with regulations or standards relevant to the event causing the death or injury promulgated by a federal or state agency responsible for reviewing the safety of the product.

M.C.L.A. § 600.2946a

Product Liability Actions; Caps on Damages

In an action for product liability, the total amount of damages for noneconomic loss shall not exceed \$280,000.00, unless the defect in the product caused either the person's death or permanent loss of a vital bodily function, in which case the total amount of damages for noneconomic loss shall not exceed \$500,000.00.

In awarding damages in a product liability action, the trier of fact shall itemize damages into economic and noneconomic losses. Neither the court nor counsel for a party shall inform the jury of the limitations. The court shall adjust an award of noneconomic loss to conform to the limitations.

M.C.L.A. § 600.2922

Wrongful Death Actions

Whenever the death of a person, injuries resulting in death, or death is caused by a wrongful act, neglect, or fault of another, and the act would have entitled the party injured to maintain an action and recover damages if death had not ensued, the party that would have been liable, shall be liable to an action for damages. Every action under this section shall be brought by, and in the name of, the personal representative of the estate of the deceased. The people entitled to damages by being damaged by the death only include the decedant's spouse, parents, children,

descendants, grandchildren, brothers and sisters, grandparents and their spouse's children, as well as those who are devisees under the will of the deceased.

Miscellaneous Statutes

M.C.L.A. § 600.6303

Collateral Source Benefits; Subrogation

In a personal injury action in which the plaintiff seeks to recover expenses, evidence that the expense or loss was paid or is payable by collateral source is admissible. The collateral source provider is brought in after a verdict for the plaintiff and before a judgment is entered on the verdict. If the court determines that all or part of the plaintiff's economic damages are payable by a collateral source, the court will reduce the part of the judgment which represents damages paid or payable. This reduction shall not exceed the amount of the judgment for economic loss or that portion of the verdict which represents damages paid or payable by a collateral source.

Within 10 days after a verdict for the plaintiff, plaintiff's attorney shall send notice of the verdict to all persons entitled by contract to a lien against the proceeds of plaintiff's recovery. If a contractual lien holder does not exercise the lien holder's right of subrogation within 20 days after receipt of the notice of the verdict, the lien holder shall lose the right of subrogation.

M.C.L.A. § 600.2157

Waiver of Physician-Patient Privilege

In any personal injury suit, if the plaintiff produces a physician as a witness who has treated the patient for the injury or for any disease or condition for which the malpractice is alleged, that patient is considered to have waived the privilege provided in this section as to another physician who has treated the patient for the injuries, disease, or condition.

M.C.L.A. § 24.264

Declaratory Judgment Actions

Unless an exclusive procedure or remedy is provided by a statute governing the agency, the validity or applicability of a rule may be determined in an action for declaratory judgment when the court finds that the rule or its threatened application interferes with or impairs, or imminently threatens to interfere with or impair, the legal rights or privileges of the plaintiff.



VII. OHIO STATUTE OF LIMITATIONS

<u>Claim Type/Section</u>	<u>Statute Period</u>
Assault and Battery R.C. § 2305.11.1	One year from the date of assault or battery. If the identity of the person committing the assault or battery is unknown, the statute of limitations begins on the date plaintiff either learns the identity of the person or should have learned the identity of the person, whichever comes first.
Medical Malpractice R.C. § 2305.11	One year from the date of the malpractice incident. If the act of medical malpractice is not discoverable within one year, the plaintiff has one year from the date plaintiff knew or should have known of the malpractice, not to exceed four years from the date of malpractice.

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<u>Claim Type/Section</u>	<u>Statute Period</u>
Bodily Injury Due to Negligence R.C. § 2305.10	Two years from the date of incident.
Wrongful Death R.C. § 2125.02	Two years from the date of death.
Personal Property Damage Due to Negligence R.C. § 2305.10	Two years from the date of incident.
Product Liability Claims R.C. § 2305.10	Two years from the date of injury.

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Claim Type/Section

Statute Period

UM/UIM Claims
R.C. § 3937.18

Three years from the date of the accident. If the wrongdoer's insurer becomes insolvent, then the plaintiff has one year from the date of insolvency to make the UM/UIM claim, even if it is more than three years after the accident.

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Claim Type/Section

Statute Period

Intentional Infliction of
Emotional Distress
R.C. § 2305.09

Four years from the date of incident.

Damage to Real Estate
R.C. § 2305.09

Four years after the cause.

Fraud
R.C. § 2305.09

Four years from the occurrence of the alleged act of bad faith.

Breach of Covenant to
Provide Adequate
Insurance
R.C. § 2305.09

Four years from the date inadequate insurance is discovered.

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<u><i>Claim Type/Section</i></u>	<u><i>Statute Period</i></u>
Appeals R.C. § 2305.10	Unless otherwise provided by law, 30 days after the entry of the judgment or appealable order, whichever comes last. In a civil case, 30 days after service of notice of judgment and its entry.
Statutorily Created Actions R.C. § 2305.07	A liability created by statute, other than forfeiture or penalty, must be brought within six years of the date the claim arose.
Breach of Contracts Not in Writing R.C. § 2305.07	Six years from the date plaintiff's claim first arose.
Breach of Contracts in Writing R.C. § 2305.07	Fifteen years from the date of the breach, unless there is a specific provision in the contract allowing for a shorter period.
Minor's Claims - Claims of Incompetent Persons R.C. § 2305.16	The limitation period for any minor's claim does not begin until the minor reaches age 18. If a plaintiff is incompetent when injured, the limitation period does not begin until plaintiff is found competent.

VIII. KENTUCKY STATUTE OF LIMITATIONS

<u><i>Claim Type/Section</i></u>	<u><i>Statute Period</i></u>
Assault and Battery K.R.S. § 413.140	One year from the date of assault and battery.
Bodily Injury Claims Other than from Automobile Accidents K.R.S. § 413.140	One year from the date of injury. This statute applies to injuries caused by acts of negligence as well as those caused by intentional acts. This statute does not apply to bodily injuries stemming from automobile accidents.
Loss of Consortium K.R.S. § 413.140	One year from the date of the incident.
Medical Malpractice K.R.S. § 413.140	One year from the time the injury is first discovered or in the exercise of reasonable care should have been discovered. Any action must still be commenced within five years from the date the alleged act of negligence occurred.
Malicious Prosecution K.R.S. § 413.140	One year from the date of the incident.
Libel, Defamation, or Slander K.R.S. § 413.140	One year from the date of the incident.
Wrongful Death K.R.S. § 413.180	If a person dies before the expiration of the applicable statute of limitations, the action may still be brought by their personal representative so long as it is commenced within one year of the appointment of the representative.
Product Liability K.R.S. § 413.140	One year from the date of the bodily injury.

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Claim Type/Section

Statute Period

Bodily Injuries from
Automobile Accident
K.R.S. § 304.39-230

Two years from the date of the accident or two years from the date of the last no-fault payment. Survivors and beneficiaries of a decedent have two years to make a claim for wrongful death.

Damage to Personal
Property
K.R.S. § 413.125

Two years from the date of injury or damage.

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Claim Type/Section

Statute Period

Product Liability
K.R.S. §355.2-725

Four years from when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach if brought under a theory of breach of warranty.

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<u><i>Claim Type/Section</i></u>	<u><i>Statute Period</i></u>
Breach of Contracts Not in Writing K.R.S. § 2305.10	Five years from the date the contract was breached.
Trespass on Real or Personal Property K.R.S. § 413.120	Five years from the date of injury or damage.
Fraud K.R.S. § 413.120	Five years from the date the fraud was discovered, but per K.R.S. § 413.130 no more than ten years after the date the fraud was perpetuated.
Intentional Infliction of Emotional Distress K.R.S. § 413.120	Five years from the date of the incident.
Bodily Injury Claims Against the Builder of a Home or a Person Making Improvements to a Home K.R.S. § 413.120	This cause of action accrues at the time of original occupancy of the home, or occupancy after the improvements in question were made.
Statutory Claims K.R.S. § 413.120	This applies to all claims for liability based upon a statute where no statute of limitations is provided by statute.

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Claim Type/Section

Statute Period

Breach of Written
Contracts
K.R.S. § 413.090

Fifteen years from the date of the breach.

Claims of Minors and
Incompetents
K.R.S. § 413.170

The statute of limitations does not begin to run until the minor reaches the age of majority or the incompetent plaintiff becomes competent.

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IX. INDIANA STATUTE OF LIMITATIONS

<u>Claim Type/Section</u>	<u>Statute Period</u>
Employment I.C. § 34-11-2-1	Except those based upon a written contract, within two years of the date of the act or omission complained of.
Medical Malpractice I.C. § 34-11-2-3	Within two years from the date of the act, omission or neglect complained of.
Personal Injury, Injury to Character and Injury to Property I.C. § 34-11-2-4(2)	Within two years after the cause of action arises.
Product Liability I.C. § 34-20-3-1(b)	Within two years after the cause of action accrues; or not more than ten years after the delivery of the product to the initial user or consumer. However, if the cause of action accrues at least eight years but less than ten years after that initial delivery, the action may be commenced at any time within two years after the cause of action accrues.
Wrongful Death I.C. § 34-23-1-1	Within two years after the death of the decedent.

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X. MICHIGAN STATUTE OF LIMITATIONS

<u>Claim Type/Section</u>	<u>Statute Period</u>
Libel, Defamation, or Slander M.C.L.A. § 600.5805(9)	One year for an action charging libel or slander.
Disability of Infancy or Insanity at Accrual of Claim M.C.L.A. § 600.5851	If the person entitled to bring an action is under eighteen years of age or not mentally competent at the time the claim accrues, the person shall have one year after the disability is removed through death or otherwise, to make the entry or bring the action.
Actions for Personal or Property Protection Benefits; Notice of Injury M.C.L.A. § 500.3145	<p>An action for recovery of personal protection insurance benefits for accidental bodily injury may not be commenced later than one year after the date of the automobile accident causing the injury unless written notice of injury has been given to the insurer within one year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury.</p> <p>An action for recovery of property protection insurance benefits shall not be commenced later than one year after the accident.</p>

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<u>Claim Type/Section</u>	<u>Statute Period</u>
Assault, Battery, or False Imprisonment M.C.L.A. § 600.5805(2)-(4)	Two years for a person charging assault, battery, or false imprisonment. Five years for a person charging assault or battery against: his or her spouse or former spouse, an individual with whom he or she has a child in common, an individual with whom he or she has had a dating relationship, or a person with whom he or she resides or formerly resided.
Malicious Prosecution M.C.L.A. § 600.5805(5)	Two years from the date of the underlying criminal action being terminated in favor of the accused.
Medical Malpractice M.C.L.A. § 600.5805(6), § 600.5838(a)	Two years for an action charging malpractice, or within 6 months after the plaintiff discovers, or should have discovered, the existence of the claim, whichever is later. However, except as otherwise provided in section 600.5851 (7) or (8) regarding minors, the claim shall not be commenced later than six years after the date of the act or omission that is the basis of the claim.
Fraudulent Concealment of Claim or Identity of Person Liable, Discovery M.C.L.A. § 600.5856	If a person who is or may be liable for any claim fraudulently conceals the existence of the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within two years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim, although the action would otherwise be barred by the period of limitations.

Claim Type/Section

Statute Period

Bodily Injuries for Claims
Not Otherwise Specified
by Statute
M.C.L.A. § 600.5805(10)

Actions to recover damages for injuries to person or property must be brought within three years from the time of accrual.

Wrongful Death
M.C.L.A. § 600.5805(10)

Three years after the time of the death for all actions to recover damages for the death of a person.

Product Liability Claims
M.C.L.A. § 600.5805(13)

Three years from when the cause of action accrues. The cause of action accrues when a plaintiff by exercise of reasonable diligence discovers, or should have discovered, that he or she has a possible cause of action. However, in the case of a product that has been in use for not less than ten years, the plaintiff, in proving a *prima facie* case, shall be required to do so without benefit of any presumption.

Claim Type/Section

Statute Period

Breach of Contract of
Written or Oral Sale
M.C.L.A. § 440.2725

Four years from when the cause of action has accrued. A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. By the original agreement the parties may reduce the period of limitation to not less than one year, but may not extend it.

Claim Type/Section

Statute Period

Damages for Breach of Contract
M.C.L.A. § 600.5807(8)

Six years for actions to recover damages or sums due for breach of contract, starting from the date that the claim accrued.

Damage to Property by Engineers, Contractors, Architects
M.C.L.A. § 600.5839(1)

Six years for actions against architects, professional engineers, or contractors arising from improvements to real property, actions against land surveyors; limitation of actions; definitions; application of amendments.

Death or Injury Arising from Improvements to Real Property
M.C.L.A. § 600.5839

Six years after the time of occupancy of the completed improvement, use, or acceptance of the improvement, or one year after the defect is discovered, or should have been discovered, provided the defect constitutes the proximate cause of the injury or damage and is the result of gross negligence. No such action shall be maintained for more than ten years after the time of occupancy of the completed improvement, use or acceptance of the improvement.

Uninsured/
Underinsured Motorist Coverage
M.C.L.A. § 600.5807 (8)

In the absence of a contractual limitations provision, suit for UM/UIM benefits is governed by the six-year statute of limitations applicable to contract actions, not the three-year period applicable to claims for injury to person or property.

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Claim Type/Section

Statute Period

Foreclosure of
Mortgages
M.C.L.A. § 600.5803

No person shall bring or maintain any action or proceeding to foreclose a mortgage on real estate unless he commences the action or proceeding within fifteen years after the mortgage becomes due or within fifteen years after the last payment was made on the mortgage.

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XI. SIGNIFICANT OHIO COURT DECISIONS

A. Insurance Coverage Decisions

Mid-American Fire & Cas. Co. v. Heasley, 113 Ohio St. 3d. 133, 2007-Ohio-1248.

When Can a Declaratory Judgment Action Be Brought?

Heasley asserted a *Scott-Pontzer* claim against Mid-American. After the *Galatis* decision was released, Heasley voluntarily dismissed his action, without prejudice. Mid-American then filed a new action against Heasley, seeking a declaratory judgment that there was no UM/UIM coverage available for him. Heasley sought the dismissal of the declaratory judgment action on the basis that there was no claim being made against the policies, and at the current time he had no legal basis to bring a claim based upon *Galatis*.

The Supreme Court upheld the dismissal of the declaratory judgment action, holding an insurer may not bring a declaratory judgment action against another party if that party is barred from seeking coverage under the current state of the law. The court rejected Mid-American's argument that a potential claim or controversy still existed since Heasley retained the right to refile his suit.

This decision may well make it more difficult for insurers to have disputed claims resolved with finality. The obvious concern of the insurer was a potential for the suit being refiled, and this decision prevents insurers from attempting to take proactive action like this. This creates an uneven playing field as this decision really only pertains to insurers and not insureds.

Cincinnati Ins. Co. v. CPS Holdings, Inc., 115 Ohio St. 3d. 306, 2007-Ohio-4917.

Duty to Defend Under Umbrella Policy

CPS was an insured under both a common policy and an umbrella policy issued by Cincinnati Insurance. CPS sought a defense under both policies on a lawsuit filed against it. Cincinnati Insurance declined coverage under both policies and filed a declaratory judgment action. CPS ultimately opted not to pursue any claim under the common policy, but continued to argue there was a duty to defend under the umbrella policy.

There was a specific requirement under the umbrella policy for underlying insurance to be in place before there could be coverage under the umbrella. The Supreme Court determined none of the coverage available to CPS qualified as underlying insurance as defined by the Cincinnati umbrella policy. The Supreme Court held Cincinnati Insurance owed no duty to defend under the umbrella policy because the requirement of underlying insurance was not met.

Ohio Government Risk Mgmt. Plan v. Harrison, 115 Ohio St. 3d. 241, 2007-Ohio-4948.
Duty to Defend on Sexual Harassment Claims

The City of Wapakoneta and its former police chief were sued by an employee who alleged, among other things, she was subject to sexual harassment while she worked for the police department. The department's insurer brought a declaratory judgment action against the Chief, contending the allegations against him, if true, were beyond the scope of his employment, and not carried out in the furtherance of his duties as Chief. They relied on language defining an insured as any employee "while acting on behalf of or in the interest of the employer." The Supreme Court rejected this argument, holding whether or not the Chief was acting in the course and scope of his employment, or in furtherance of the department's interests, was an issue of fact to be decided by a jury. They rejected the argument that sexual harassment was inherently beyond the course and scope of the Chief's employment.

Westfield National Ins. Co. v. Safe Auto Ins. Co., 2007 -Ohio-2469.
Unlicensed Driver Exclusion

Safe Auto's insured was involved in an at-fault accident while driving a vehicle owned by Westfield's insured. Although the driver was unlicensed, he had permission of the owner to drive the vehicle. Westfield paid all claims stemming from the accident and then brought a subrogation suit against the at-fault driver, who in turn joined Safe Auto. Safe Auto argued it owed no coverage on the claim as there was a specific provision in its policy that there would be no coverage if the vehicle was being operated by a person who did not have a valid driver's license. The court upheld this exclusion and found there was no coverage under the Safe Auto policy.

ABBO v. Perkins, 2007-Ohio-1520.
Michigan PIP and Ohio Residents

This case involved an accident occurring in Michigan. The drivers and occupants of both vehicles involved were all Ohio residents with Ohio insurance policies. Following the accident, they asserted a number of claims, including claims for PIP benefits under Michigan law. They contended since the accident occurred in Michigan that the provision under their policies, stating the policy would conform with the law in the state where the accident occurred, required PIP coverage to be made available. The court of appeals rejected this argument and found there was no no-fault coverage available. They based their decision on the fact that since all of the claimants and the alleged tortfeasor were Ohio residents, that superseded any presumption that Michigan law would apply. Additionally since all of the insurance policies in question were Ohio policies, the court declined to find any coverage available under Michigan law.

Welfle, Inc. v. Motorists Ins. Co., 2007-Ohio-1899.

Contractor's Liability

Motorists' insured allegedly damaged a bridge while removing asphalt from it. They made a claim under their CGL policy with Motorists. The court held there was no coverage under the CGL policy for repairs to the bridge, as the bridge had been damaged by the insured incorrectly performing its work on it.

Keith v. State Farm Ins. Co., 2007-Ohio-1878.

Residential Exclusion

A minor child was injured in a cooking accident in her father's home. The parents were divorced, and the mother asserted a claim against the father under his homeowner's policy with State Farm. The State Farm policy contained a residential exclusion. The mother contended that since she was the residential parent under the divorce decree that the exclusion did not apply. The court of appeals disagreed, noting that the daughter had been living with her father for an established period of time. The exclusion was enforced and there was no coverage under the State Farm policy.

Pierson v. Farmers Ins. Of Columbus, Inc., 2007-Ohio-1188.

Homeowner's Policies and Rental Property

This declaratory judgment action involved a homeowner's policy Farmers issued for their insured's principal residence. The insured also owned a separate piece of rental property, and plaintiff's child was killed in an accident involving the rental property. There was no specific policy in place for the rental property, and the parents of the child brought a claim under the Farmers' policy. The appellate court had to determine whether the insured premises were used "in connection with" the rental property. The appellate court ruled in favor of Farmers, noting the properties were located in different cities and the only connection between the two properties were several items of property from the principal residence were being stored on the rental property.

QualChoice v. BHD Ins. Co., 2007-Ohio-226.

Statute of Limitations

A health insurer brought a subrogation suit against a liability insurer, seeking to recoup payments it made from the liability insurer's medical payment coverage. The medical payment insurer had a one year statute of limitations in its policy for the coverage and asserted the subrogation claim time barred. The court of appeals agreed and enforced the one year limitations, even though the health insurer was not aware of it. The court determined the health insurer was an intended third-party beneficiary under the policy and therefore was bound by the policy's provisions.

Associated Visual Communications v. Erie Ins. Group, 2007-Ohio-708.

Fire Loss, Multiple Locations

Plaintiff temporarily moved property for storage from its insured warehouse to another building on another piece of property. While the property was being stored at the second location, a fire loss resulted and the claim was made under the owner's policy. The only location listed on the policy was the original warehouse. The other location and the buildings on it were not listed in the policy, and the court of appeals held there was no coverage for the fire loss as the loss happened on property which clearly was not insured under the policy.

Choby v. Aylsworth, 2007-Ohio-3375.

Vicious Dog Exclusion

Plaintiff was bitten by defendant's dog while making a delivery to the defendant's home. The defendant's homeowner's policy contained an exclusion for injuries caused by a dangerous or vicious dog. The appellate court held the exclusion was applicable and enforceable as the evidence showed the dog was not restrained and had bitten people before.

Hastings Mut. Ins. Co. v. McCoy, 2007-Ohio-2447.

Intentional Acts and Self Defense

Hastings Mutual insured a farmer who was involved in a fight with an alleged trespasser. The insured was sued by the alleged trespasser and sought a defense under his policy. The insured contended he acted in self defense. The appellate court upheld the policy's intentional act exclusion as, even though self defense was alleged, the insured nevertheless admitted he intentionally used force, thereby triggering the exclusion.

Torres v. Gentry, 2007-Ohio-4781.

Negligent Supervision and Intentional Acts

The plaintiff was shot and injured by the defendants' child. The plaintiff's lawsuit alleged the parents negligently supervised the child, and coverage was sought under the parents' homeowner's policy. The homeowner's insurer intervened arguing there was no coverage under their policy's intentional act exclusion. The child-shooter had been convicted of felonious assault. The insurer argued the felonious assault itself was an intentional act and not an occurrence as defined under the policy. The insurer also contended the parents' alleged negligent supervision was not an occurrence under the policy and was not separate from the alleged intentional act. The appellate court agreed and found there was no coverage under the homeowner's policy.

Carter v. Adams, 2007-Ohio-4322.
Assault and Battery Exclusion

The plaintiff was shot and injured on the premises of the defendant's bar. The defendant sought coverage under their liability insurance. The policy contained an exclusion for assault and battery. The appellate court held the exclusion barred coverage for all claims stemming from the shooting, including allegations that the bar owner was negligent in preventing the shooting from occurring.

B. UM/UIM Decisions

State Auto Ins. Co. v. Pasquale, 113 Ohio St. 3d. 11, 2007-Ohio-970
Off-Road Vehicles Exclusion

State Auto's insureds brought a UIM claim after their son was injured by a person operating a dirt bike. State Auto's policy excluded from its definition of "uninsured motor vehicle" any vehicle "designed mainly for use off public roads while not on public roads." The issue the Supreme Court chose to consider was whether the dirt bike was a "motor vehicle" as contemplated by R.C. § 3937.18 as amended by House Bill 261 in 1997. That legislation did not define "motor vehicle." In enforcing State Auto's exclusion, the Supreme Court noted elsewhere in the revised code "off-road motorcycles" were defined separately from "motor vehicles", and thus the court felt it was the intent of the legislature to treat them separately under the law. The Supreme Court concluded such an interpretation was consistent with the intent of the legislature, limiting UM/UIM coverage to people using the roads and not off-road events.

Webb v. McCatry, 114 Ohio St. 3d. 292, 2007-Ohio-4162
Amount Available for Payment

Mrs. Webb was killed, and her husband injured, in an accident caused by Mr. McCatry. Mr. McCatry had automobile liability insurance with a single limit of \$300,000.00 per accident. Mr. Webb settled his individual BI claim for \$25,000.00. His wife's estate settled its wrongful death claim for \$269,836.08. The Webbs' had UIM coverage under their own policy with limits of \$100,000.00/\$300,000.00. The Webbs' insurer contended since their total policy limits equaled what was available under the McCatry policy, there was no coverage. The Supreme Court rejected this argument noting that analysis should be based upon the amounts available for payment, and not a comparison of policy limits to policy limits. The court determined the amount available for payment under the McCatry policy was what was actually paid, and not the total policy limit. The Supreme Court held the claimants were uninsured to the extent their UIM policy limits exceeded the amount available per payment. The Supreme Court noted though that the claims were still subject to the policy's per person limit of \$100,000.00.

Snyder v. American Family Ins. Co., 114 Ohio St. 3d 239, 2007-Ohio-4004
Effect of Statutory Immunity

Plaintiff was a police officer who was injured when struck by a police car driven by a fellow officer. The fellow officer and the police department were statutorily immune from liability. As a result, plaintiff brought a UM claim under her policy with American Family. American Family argued the immunity precluded coverage due to a requirement in the policy that an insured is “legally entitled to recover” from any tortfeasor. The Supreme Court ruled in favor of American Family noting R.C. § 3937.18(I) did not prohibit such an exclusion.

Acuff v. Motorists Mut. Ins. Co., 2007-Ohio-938
Failure to Protect Subrogation

Plaintiff sued both his UM insurer (Motorists) and the at-fault driver following an auto accident. Motorists asserted a subrogation claim against the at-fault driver for both its medical payment and UM/UIM obligations. Plaintiff settled with the at-fault driver and agreed to assume any obligations the at-fault driver owed to Motorists. Motorists argued this conduct breached the policy and served as a further bar to coverage. Plaintiff contended because of the assignment, Motorists could still pursue its subrogation claim against him. The appellate court ruled in favor of Motorists based upon their insured’s interference with the company’s subrogation rights.

Baxter v. USAA Cas. Ins. Co., 2007-Ohio-2102
Prior Rejection of Coverage

In 1993 plaintiff rejected UM coverage under their umbrella policy. The rejection form stated the basic cost of such coverage, but did not quote an exact premium. Plaintiff was subsequently injured in an auto accident and argued the rejection form did not comply with the requirements of *Linko*. The appellate court rejected this argument finding the offer of coverage, even if not precise, nevertheless met the requirement of being a meaningful offer.

Howard v. Howard, 2007-Ohio-3940
Household Exclusions

A wife sued her husband for injuries she suffered in an accident while he was driving. Their policy’s liability coverage contained a household exclusion. As a result the wife also brought a UM claim. The insurer contested coverage as the policy’s UM coverage also contained a household exclusion. The appellate court upheld the household exclusion, noting it was harmonious with the requirements of R.C. § 3937.18.

Yoder v. Thorpe, 2007-Ohio-5866

Regular Use Exclusion

Plaintiff was a police officer injured within the course and scope of her employment, while operating a police vehicle. She tried to make a UM claim under her personal policy. The policy contained an exclusion barring coverage for injuries sustained while operating the vehicle available for regular use. The appellate court upheld the exclusion and rejected plaintiff's argument that the exclusion was contrary to public policy.

Hostottle v. Nationwide Mutual Ins. Co., 2007-Ohio-5857

Regular Use Exclusion

Plaintiff was a police officer who was injured within the course and scope of his employment, while operating a police vehicle. He tried to make a UM claim under his personal policy. The policy had a regular use exclusion. Plaintiff argued the vehicle he was operating at the time of the accident was not available for his regular use as that particular vehicle was not assigned to him on a regular basis and that his use of police vehicles depended upon what was available in the motor pool. The appellate court rejected this argument and held all vehicles within the department's motor pool were available for the officer's regular use, and accordingly the exclusion was applicable.

C. Employment Decisions

State ex rel. Gross v. Industrial Commission of Ohio, 115 Ohio St.3d 249, 2007-Ohio-4916

Effect of Violation of Workplace Safety Rules on Benefits

One of the Ohio Supreme Court's most controversial decisions in many years in Workers' Compensation was *State ex rel. Gross v. Industrial Commission*, 112 Ohio St. 3d. 65, 2006-Ohio-6500. That decision, in late 2006, involved a teenage employee who suffered severe burns while cleaning a pressure cooker at a KFC restaurant. The employee's methods were contrary to the employer's expressed practices which were spelled out in the employee handbook, and were also contrary to safety warnings attached to the machine. The employer contended the employee's failure to follow the safety instructions constituted a voluntary abandonment of his employment, and the employee was discharged, effective the date of the accident, for failing to follow the instructions.

In the 2006 decision, the Supreme Court held his ignoring of the warnings and instructions did constitute a voluntary abandonment of employment and precluded his recovery of further benefits. In a rare development, in 2007 the Supreme Court agreed to reconsider its earlier decision and substantially revised it. Upon further review, the Supreme Court determined the voluntary abandonment doctrine had never been applied before to conduct occurring prior to or at the time of injury. The Supreme Court decided it was more appropriate for the legislature to address whether the doctrine would apply in instances like this. In explaining its decision, the Supreme Court also tried to explain in no way were they trying to interject fault as an element of any Workers' Compensation claim.

Bickers v. W. & S. Life Ins. Co., 2006-Ohio-572

Retaliatory Termination

Plaintiff sued her employer, alleging she was terminated in retaliation for filing a Workers' Compensation claim. Ohio law recognizes a statutory claim under R.C. 4123.90 for such a claim, but instead plaintiff chose only to file a common law claim for wrongful discharge in violation of public policy. Western and Southern took the position that R.C. 4123.90 was plaintiff's only remedy, and that she could not pursue a common law public policy claim. The Supreme Court ruled in favor of the employer, holding the statutory claim was the employee's sole remedy against the employer.

American Interstate Ins. Co. v. G&H Service Center, Inc., 112 Ohio St.3d 521, 2007-Ohio-608

Out-of-State Workers' Compensation Subrogation

A Louisiana resident was injured in Ohio, while acting in the course and scope of his employment with a Louisiana company. He subsequently made a Workers' Compensation claim in Louisiana and received benefits. His employer's insurer then filed a subrogation suit in Ohio against the alleged tortfeasor. The tortfeasor alleged the subrogation claim was not valid under Ohio law as Louisiana's subrogation statute was substantially similar to an Ohio statute which had previously been ruled unconstitutional. The Supreme Court disagreed. The Supreme Court engaged in a conflict of laws analysis and determined that Louisiana law and not Ohio law should be applied. Because this involved a claim between a Louisiana employee and a Louisiana employer, with benefits being paid in Louisiana, Louisiana had the closest relationship to the claim and therefore their law should be applied.

Leininger v. Pioneer National Latex, 115 Ohio St.3d 311, 2007-Ohio-4921

Age Discrimination Claims

In this decision the Supreme Court held there is no non-statutory common law cause of action in Ohio for wrongful discharge based upon age discrimination. The Supreme Court determined that Ohio provided sufficient statutory rights to employees protecting them from age based discrimination, and therefore a common law claim was not necessary.

Seiler v. Donald Martens & Sons Ambulance Service, 2007-Ohio-1603

Borrowed Servant

A hospital nurse was injured while helping an ambulance services' employee move a patient from a stationary chair to a wheelchair. She sued the ambulance service for her injuries. The ambulance service argued it was immune from liability as the nurse was a borrowed servant. The appellate court determined the nurse was not a borrowed servant, and therefore could pursue a claim against the ambulance service. In particular, the court noted the hospital did not direct the ambulance service on how to move the patient and the employee most likely would not have been able to move the patient without the nurse's assistance.

Moore v. Ohio Valley Coal Co., 2007-Ohio-1123

Failure to Follow Safety Rules

An employee filed a substantial certainty tort claim against the employer after losing consciousness in a coal mine due to low oxygen levels. The appellate court upheld summary judgment in favor of the employer noting, in particular, the employee failed to use their safety equipment and did not follow the employer's safety rules. Additionally, there were no prior accidents or safety issues in the area in question.

Kastner v. Southside Lincoln-Mercury Sales, Inc., 2007-Ohio-874

Negligent Hiring

A car dealership was sued by a customer after the salesman had borrowed money from the customer and also allegedly defrauded both the customer and the dealership in a vehicle sale. The appellate court upheld summary judgment in favor of the dealership noting the salesman had acted outside the scope of his employment and engaged in misconduct.

Carter v. Lapp Roofing and Sheet Metal Co., Inc., 169 Ohio App. 3d 255, 2006-Ohio-5391

Substantial Certainty Claim

An employee brought a substantial certainty tort claim against his employer after falling while trying to untangle his shirt from a power line. The appellate court rejected a prior summary judgment granted to the employer, noting the fact employees were required to work forty to fifty feet above the ground without a safety harness, which could be found by a jury to constitute substantial certainty of a fall accompanying bodily injury. The court also noted there had been at least one prior similar fall.

Deal v. C.J. Kraft Ent., 2007-Ohio-666

Substantial Certainty Claim

An employer was sued following a job site elevator accident. The evidence at trial showed ten years earlier there had been a similar accident. The evidence also demonstrated the elevator was used thirty to forty times each week without incident. The appellate court determined the combination of the gap in time between the earlier accident and the frequency of use, precluded any finding of substantial certainty.

Durbin v. Kokosing Construction Co., Inc., 2007-Ohio-554

Substantial Certainty Claim

An employee was killed as a result of a cave-in while repairing a drainage pipe in a trench. The employee was digging at a depth greater than five feet without proper assistance being provided. The appellate court upheld summary judgment in favor of the employer noting this was an emergency repair and the employee's supervisors were not aware the employee was deepening the trench.

Wilcox v. Paygro Co., Inc., 2007-Ohio-315
Substantial Certainty Claim

Plaintiff was injured by a machine where the employer had previously disabled an audible warning device. The appellate court determined whether this exposed the employee to an injury which was substantially certain to occur was a question for a jury to decide, and summary judgment in favor of the employer was improper.

Smith v. Carnegie Auto Parts, Inc., 2007-Ohio-992
Scope of Employment

Plaintiff made a workers' compensation claim after being injured in an auto accident. She had worked for her employer at home, and the accident occurred after she had finished mailing envelopes as part of that project. The appellate court determined the accident was part of her commuting to and from work and not a special mission for the employer. They noted she was a fixed situs employee who ordinarily did not work from her home, and therefore there was no entitlement to workers' compensation.

D. Premises Liability Decisions

Harting v. Dayton Dragons Professional Baseball Club, LLC, 2007-Ohio-2100
Assumption of Risk

Plaintiff sued a baseball team after being struck by a foul ball. The appellate court upheld summary judgment on the basis of primary assumption of risk. Plaintiff tried to argue they were distracted by the team mascot, but the court also noted the team posted notices warning of dangers imposed by foul balls, made announcements during the game about such warnings, and there was a warning on the plaintiff's ticket.

Rezac v. Cuyahoa Falls Concerts, Inc., 2007-Ohio-703
Open and Obvious Defense

While leaving a concert facility, plaintiff walked off a paved trail into a wooded area and fell into a ravine. The appellate court upheld summary judgment in favor of the defendant based upon the open and obvious defense. The path itself was clear and lit, and once the plaintiff chose to go off the path into the woods, she knowingly entered an area where visibility was limited.

Adkins v. Chief Supermarket, 2007-Ohio-772
Open and Obvious Defense

Plaintiff sued the supermarket after slipping and falling on a rug in the store's entryway. The appellate court upheld summary judgment for the defendant based not only on the open and obvious defense, but also on the fact plaintiff had already walked over the rug when entering the store, and her fall occurred when she was leaving. The court noted the condition of the rug had not changed at all between her entering and leaving.

Lang v. Holly Hill Motel, 2007-Ohio-3898

Open and Obvious Defense

Plaintiff sued a motel after slipping and falling on a single step. Summary judgment for the motel was upheld on the basis the condition of the steps was open and obvious. Specifically, the fact that the steps had a high rise and no handrail was clear. The appellate court rejected an argument that the height of the step was in violation of the Ohio Building Code, as they noted any such violation was not negligence *per se*.

E. Governmental Immunity

Elston v. Howland Local Schools, 113 Ohio St.3d 314, 2007-Ohio-2070

Immunity for Discretionary Activity

This appeal involved a certified conflict among Ohio appellate districts. The question was whether a political subdivision could be immune from liability pursuant to R.C. 2744.03(A)(5) as a result of an employee's decision on how to use equipment or facilities, unless the employee acted with a malicious purpose, in bad faith, or in a wanton or reckless manner. This appeal stemmed from an injury suffered by a high school baseball player while pitching batting practice. The player and his parents contended the coach was negligent in how he conducted the practice, and also with regard to the safety equipment he made available for use. The Supreme Court determined this discretionary conduct of the employee was subject to statutory immunity.

Kramer v. Auglaize Acres, 113 Ohio St.3d 266, 2007-Ohio-1946

County Nursing Home Immunity

Plaintiff's decedent was injured at a county nursing home when she was dropped by nurses. The patient ultimately died from her injuries. The Supreme Court held R.C. 3721.10 (Nursing Homes' Patients' Bill of Rights) superceded any statutory immunity to the county nursing home under R.C. 2744, and accordingly the nursing home was not immune from liability. The individual employees of the nursing home were found to have retained their immunity, notwithstanding the competing statutes. The Supreme Court also noted the nursing home could regain immunity if the jury determined the nursing home procedure in question was a discretionary act.

Sobczak v. Sylvania, 2007-Ohio-1045

Immunity and Road Design

Plaintiff sued the city of Sylvania after being injured in an auto accident. He alleged the city was negligent for not having guardrails in place and for improperly designing an entrance ramp. The appellate court held the city was immune from liability as the design and control of the highways were governmental functions and therefore protected pursuant to R.C. 2744.02.

Svette v. Caplinger, 2007-Ohio-664
Immunity for 911 Calls

A police sub-division, its dispatcher, and sheriff were sued by an injured motorist for allegedly not adequately responding to 911 calls of erratic driving of another motorist. The appellate court held the defendants were immune from liability as 911 services were considered to be emergency medical, ambulance and rescue services and therefore protected under R.C. 2744.01.

F. Miscellaneous Decisions

Arbino v. Johnson & Johnson, 2007-Ohio-6948
Constitutionality of Damages Caps

This appeal involved a certified question of law from the United States District Court for the Northern District of Ohio. The certified questions involved a challenge to the constitutionality of R.C. 2315.18 which imposes a cap on non-economic damages and R.C. 2315.21 which imposes a cap on punitive damage awards. This decision was the first time the Ohio Supreme Court directly addressed the comprehensive tort reform statutes which were part of Senate Bill 80, going into effect in April of 2005.

In a five to two decision, the Supreme Court held both statutes were constitutional and valid. R.C. 2315.18 limits non-economic damages to no more than the greater of \$250,000.00 or three times the amount of economic damages, with an absolute maximum of \$350,000.00. The statute includes an exception for serious injuries meeting a specific criteria. R.C. 2315.21 limits punitive damage awards to no more than two times the amount of compensatory damages.

Fehrenbach v. O'Malley, 113 Ohio St.3d 18, 2007-Ohio-971
Statute of Limitations for Parental Loss of Consortium Claims

This appeal involved a determination of what the triggering date is for a parent's loss of consortium claim when their minor child is injured. Plaintiffs argued since their claim was derivative of their child's injury, their claim should be tolled until the child reached the age of 18. The defendant argued the statute of limitations for the parents' claim began to run as of the time of the injury. The Supreme Court ruled the statute of limitations on the parents' derivative claims were tolled and did not begin running until the child reached the age of 18.

Bellman v. American International Group, 113 Ohio St.3d 323, 2007-Ohio-2071
Post-Settlement Interest

This suit was a class action alleging various insurers entered into oral agreements to settle claims with plaintiffs, then delayed paying the settlements to accumulate additional interest on the funds in question. The plaintiffs argued they were entitled to statutory interest as of the date of the verbal agreement. The Supreme Court reached a compromised solution, holding that the date of any written settlement agreement between the parties becomes the date post-settlement interest

begins to accrue. The only exception to this is the parties otherwise negotiate a separate agreement or understanding as it relates to interest.

Welling v. Weinfeld, 113 Ohio St.3d 464, 2007-Ohio-2451

Privacy Claims

This decision expanded the ability of a plaintiff to sue for having their right of privacy invaded or violated. Specifically, based upon this decision, a plaintiff has such a claim when there is publicity portraying them in a false light. This particular case stemmed from a dispute between neighbors which escalated to the point where one neighbor videotaped the other in their yard, aimed floodlights on their neighbors' yard, aimed surveillance cameras at the neighbors' yard, and put up posters insinuating the neighbors had damaged their property. Invasion of privacy claims were expanded to include statements portraying someone in a false light, as the court felt it was necessary for people to have the ability to control statements being made about them. In order for such a claim to arise, the false light in which the person has been portrayed must be highly offensive to a reasonable person, and the defendant must have either had knowledge of or acted in reckless disregard as to the falseness of the matter in question.

Miller v. First International Fidelity and Trust Bldg., Ltd., 113 Ohio St.3d 474, 2007-Ohio-2457

Pre-Judgment Interest and Appeals

This procedural based decision dealt with when a final judgment on a jury verdict is final and appealable, in conjunction with a post-trial motion for pre-judgment interest. The Supreme Court held that so long as a motion for pre-judgment interest was pending, the final judgment was not a final appealable order, and it could only be appealed once the pre-judgment interest issues were decided. This decision could very well put insurers in a perilous position, as in the event of an adverse verdict, before they would have the opportunity to challenge the verdict on appeal, they would be faced with the situation where they would have to produce their claim file, upon request, during the pre-judgment interest phase. Depending upon how broad the scope of post-trial discovery will be, this could very well have a chilling effect on insurers who wish to challenge excessive verdicts, as even if they are successful on appeal, the production of their claim file could very well divulge key strategic information to the plaintiff and their attorney.

Culbreath v. Golding Enterprises, LLC, 114 Ohio St.3d 357, 2007-Ohio-4278

Consumer Sales Practices Act

This decision clarified who is entitled to assert a claim under Ohio Consumer Sales Practices Act. The Supreme Court limited the Act's protection to individuals, and not to business entities.

Olynyk v. Scoles, 114 Ohio St.3d 56, 2007-Ohio-2878

Voluntary Dismissals

This decision clarified what effect multiple dismissals of a plaintiff's suit has on their right to continue to pursue their claims. In the case in question, the plaintiff's suit was initially dismissed without prejudice, by agreement of the parties. The plaintiff filed a second suit, and then opted

to dismiss that suit voluntarily, without prejudice. The defendants argued the second dismissal, even though it was designated a dismissal without prejudice, should bar the claims in their entirety as it was a second dismissal. The Supreme Court disagreed, noting that since the first dismissal was by order of the court, as opposed to a voluntary dismissal, the double dismissal rule did not apply. As a result, the plaintiff was given the opportunity to file yet a third suit involving the same claims.

Gliozzo v. University Urologists of Cleveland, Inc., 114 Ohio St.3d 141, 2007-Ohio-3762
Failure of Service

Plaintiff filed suit against the defendants, but failed to obtain proper service of summons on them. Nevertheless, the defendants appeared in the suit through counsel, and answered the complaint. Among the defenses asserted in the answer was a failure of service. The defendants participated fully in the litigation and shortly before trial, filed a motion to dismiss the suit because service had never been perfected. The Supreme Court held since failure of service was timely raised as a defense, the defendants' participation in the lawsuit did not waive that defense, and the complaint was subject to dismissal for not properly serving the defendants.

Terry v. Caputo, 115 Ohio St.3d 351, 2007-Ohio-5023
Admissibility of Expert Testimony

This decision refined the standard for the admissibility of medical expert testimony in claims of toxic exposure. The Supreme Court held plaintiffs had to establish two elements to prove a medical condition resulted from the exposure. First they had to prove the toxic substance in question was capable of causing the medical condition in question. Second, the plaintiff had to specifically prove that their particular condition was caused by exposure to the toxic substance.

Peters v. Columbus Steel Castings Co., 115 Ohio St.3d 134, 2007-Ohio-4787.
Arbitration Agreements

Plaintiff's decedent signed an agreement with his employer which included a condition where he agreed that any claims of dispute he had against the employer were to be resolved by arbitration. There was specific language in the agreement that it applied not only to the employee, but also to his heirs and beneficiaries. The employee subsequently died in a workplace accident and his estate brought suit against the employer. The employer argued the litigation was improper, and that arbitration, per the agreement, was the estate's sole and exclusive remedy. The Supreme Court disagreed. The Supreme Court held a wrongful death suit was an independent action belonging to the decedent's next of kin, and the next of kin were not bound by the contract as signed by the decedent as they themselves were not parties to the contract.

Lasley v. Nguyen, 2007-Ohio-4086
Requirement of Expert Testimony at Trial

Plaintiff claimed to have suffered soft tissue injuries in a minor impact auto accident with the defendant. The plaintiff had a documented history of prior injuries and claims involving the same body parts, including a prior finding of permanency on a Workers' Compensation claim. At trial, plaintiff chose to present her claims without expert testimony, arguing she was qualified to establish that she was injured following the accident and incurred medical expenses. Plaintiff further argued that in "small" cases, it was unduly burdensome to force a plaintiff to incur the expense of medical expert testimony. The trial court granted the defendant's motion for directed verdict since plaintiff failed to present expert testimony causally relating her injuries to the accident. The court of appeals upheld this ruling, noting that in minor impact cases, with a prior injury pattern, it was all the more necessary for a plaintiff to present expert testimony to differentiate between the multiple possible causes of injury.

Rakich v. Anthem Blue Cross & Blue Shield, 2007-Ohio-3739
Diminution and Value of Cars on Third-Party Claims

In this suit, plaintiffs argued they were entitled not only to recover damages for the repair of their vehicle and their loss of use, but also for its reduced value, even following the satisfactory completion of repairs. The court of appeals recognized a claim for residual diminution of value. Specifically, plaintiffs were allowed to recover, in addition to their repair costs and loss of use expenses, the difference between the market value of their vehicle immediately before the accident and the market value of the vehicle immediately after the repair. It is important to note this was a third-party claim, and this decision is only applicable to third-party claims. It is our opinion it has no applicability to first-party claims, as the scope of recovery on first-party claims is governed by the contract of insurance between the parties.

Abbott v. Marshalls, 2007-Ohio-1146
Spoliation of Evidence

Plaintiff was arrested and charged with shoplifting at the defendant's store. The day after the alleged incident, the store destroyed the videotape of the incident. Plaintiff was subsequently acquitted in the criminal trial and sued the store for both false arrest and spoliation of evidence. The appellate court allowed the spoliation claim to be presented to the jury as the evidence at trial demonstrated the tape was destroyed despite the store's explicit policies and procedures regarding the preservation of tapes, and it could be surmised the store acted intentionally to thwart the plaintiff's suit.

Saylor v. Wilde, 2007-Ohio-4631
Settlement Authority

Plaintiff tried to enforce a settlement based upon an offer which had been made by the defendant's attorney. The defendant's attorney did not have settlement authority for the amount he had offered. The court of appeals held the attorney did not have authority to settle the claim for the amount in question, and therefore there could be no meeting of the minds between the parties and there was no settlement to enforce. They specifically ruled the attorney's role as defense counsel by itself did not give him complete authority to settle the case.

Hundemer v. Partin, 2007-Ohio-5631
Negligent Entrustment Claims

The appellate court upheld summary judgment in favor of a vehicle owner on a negligent entrustment claim. The vehicle owner had no knowledge of the alleged negligent driver's supposed incompetence, and the court further held the owner had no duty to investigate the driver's driving record or whether the driver was insured.



XII. SIGNIFICANT KENTUCKY COURT DECISIONS

Pile v. City of Brandenburg, Ky., 215 S.W. 3d 36 (2006)

Negligence and Causation

Plaintiff's decedent was killed when her vehicle was struck head on by a stolen police cruiser owned by the City of Brandenburg, and driven by a hand-cuffed prisoner. The estate brought a wrongful death action against the city and police officer to whom the cruiser was assigned.

The Supreme Court determined the act of safely controlling a police cruiser is a ministerial function, stripping the officer's immunity. The officer violated §189.430(3) by failing to turn off the engine and take out the keys of his unattended police cruiser. The Supreme Court noted the "special relationship" doctrine has no application to the issue of whether the officer violated a traffic law and the issue of whether the officer was negligent is reserved for a jury. Lastly, the Supreme Court pointed out an intervening act must be capable of bringing about the injury, and must have been reasonably foreseeable by the original actor. The court held the prisoner's actions were not an intervening cause of the collision since leaving the key in the vehicle was a negligent act which created the opportunity for the prisoner to escape and cause the accident.

Autry v. Western Kentucky University, Ky., 219 S.W. 3d 713 (2007)

Immunity/Negligence

Plaintiff's decedent, a student of Western Kentucky University (WKU), was assaulted, raped and set on fire in her dormitory. The student's estate brought a wrongful death action against WKU and several of its employees.

The Supreme Court decided whether any of the defendants were entitled to be dismissed from this action because they have sovereign immunity from suit in negligence due to being an officer, agency or employee of the state. The Supreme Court held the University was entitled to immunity for non-proprietary functions. The Court held running the residence hall was for the benefit of the students and part of the University's duties and was not a proprietary function. The University was immune, and therefore, the University employees in their official capacities were also entitled to immunity. The Student Life Foundation (SLF), which ran the dorm, was serving the University's needs and by managing the dorms was carrying out its required statutory duty. Since SLF was an incorporated entity, it derived qualified immunity through the University when it was sued directly.

Steel Technologies, Inc. v. Congleton, Ky., _____S.W. 3d _____ (2007)

Pre Impact Fear Damages

This case arose from a tractor-trailer accident that resulted in the death of plaintiff's decedent. Two chains holding a steel coil broke off the tractor-trailer and the coil fell directly in the path of her vehicle, causing her car to strike a stone wall before coming to a stop.

The Supreme Court noted the pre-impact rule, which allows recovery for emotional disturbances resulting from conduct which causes bodily harm, is in conflict with the impact rule which currently stands in Kentucky. The impact rule states it is not enough that the emotional distress be accompanied by contact, it must be caused by the contact and therefore contact must precede the emotional distress. Evidence indicated the decedent was rendered unconscious by the impact, and the Supreme Court overruled the pre-impact damages that were awarded. Lastly, the Supreme Court held the \$1 million dollar award of punitive damages was not a violation of due process and the ratio of punitive to compensatory damages was not outrageously disparate.

Smith, et al v. Carbide and Chemicals Corporation, et al., Ky., 226 S.W. 3d 52 (2007)
Trespass/Measure of Damages

One hundred twenty-eight individuals who owned eighty parcels of property within ten miles of the Paducah Gaseous Diffusion Plant (PGDP) brought an intentional trespass action against several contractors. The owners alleged there was a diminution of property values due to groundwater contamination over a decade.

The first issue the Supreme Court decided was whether proof of actual harm was required to state a claim for intentional trespass. The Supreme Court held proof of actual harm is not required since every unauthorized entry upon the land of another person results in at least nominal damages. Second, the Supreme Court decided whether the plaintiffs have a right of recovery under Kentucky law if they can prove a diminution in their property values due to an intentional trespass. The Supreme Court held the diminution in property's value would be a recognized measure of damages after an actual injury has been found. The Supreme Court noted an actual injury may be found when an intrusion which is an unreasonable interference with the property owner's possessory use of his or her property and when the groundwater was contaminated to the extent it could not be used for consumption by humans, animals or crops.

Compex International Company v. Stephen C. Taylor, Ky., 209 S.W. 3d 462 (2007)
Product Liability

Plaintiff was injured when a chair he was sitting in, which was owned by his parents, collapsed. He brought a products liability action against the chair manufacturer, Compex International Company, alleging negligence, strict liability and breach of implied warranty. The trial court dismissed the claims, specifically stating Taylor's warranty claim was dismissed due to the parties' lack of privity.

The Supreme Court chose to adopt the theory of strict liability as set out in §402 of the Restatement (Second) of Torts. The Court held privity remains a prerequisite for products liability claims based on a warranty. In addition, the Supreme Court held §355.2-318, which gives an exception to privity of contract, is inapplicable to this case since there was no underlying contractual buyer-seller relationship between Mr. Taylor's parents and the chair manufacturer, Compex International Company, Ltd.

General Electric Company v. Cain, et al., Ky., 236 S.W. 3d 579, (2007)

Workers' Compensation, Exclusive Remedy Immunity

This case arose when the plaintiffs allegedly contracted an occupational disease from exposure to asbestos while performing work for the defendants. The Jefferson Circuit Court awarded summary judgment to the defendant owners, holding they were "contractors" immune from tort liability, the exclusive remedy provision in Kentucky Revised Statute (KRS) 342.690(1) immunizing them from tort liability was not unconstitutional and each owner had sufficiently proven it had secured payment of compensation as required by KRS 342.340. The court of appeals reversed holding General Electric Company (G.E.) was not a "contractor" as defined by KRS 342.610(2)(b).

The Supreme Court first decided whether the defendants are statutory employers entitled to an exclusive remedy immunity under KRS 342.690(1). The Supreme Court held for the exclusive remedy to be applicable, the worker must have been injured while performing work that was of a kind which is a regular or recurrent part of the owner's business. Specifically for G.E., the Court held summary judgment was improper because the available evidence was insufficient to support the finding that the plaintiffs performed work of a kind that was a regular part of the work of G.E.'s business. Secondly, the Supreme Court held the documented evidence of workers' compensation coverage was sufficient proof of workers' compensation coverage for the purpose of summary judgment. Lastly, the Supreme Court held the exclusive remedy exclusion did not violate the workers' constitutional rights, since workers are provided an opportunity to reject coverage under KRS 342.690.

Cumberland Valley Contractors, Inc. v. Bell Company Coal Corporation, ___ S.W. 3d ___, Ky., (2007)

Contract/Exculpatory Clauses

Cumberland Valley Contractors and Del Rio contracted to operate a mine Bell County Coal Corporation owned, who was also responsible for all mining maps. The contract had an exculpatory clause relating to the performance of the mapping duties. Cumberland Valley and Del Rio sued Bell County Coal after a series of flooding incidents, asserting the areas were inaccurately mapped, for misrepresentation, negligence, gross negligence, and breach of contract.

The Supreme Court held the exculpatory clause was clearly worded and specific and not against public policy. They stated Kentucky has long upheld exculpatory clauses in arm's length transactions between sophisticated parties with equal bargaining power. Also, they pointed to K.R.S. §352.450 and recognized both parties to the contract shared the duty of providing accurate mining projections.

Kentucky Employers Mutual Insurance v. Tackett, Ky., 236 S.W. 3d 9, (2007)

Bad Faith

Plaintiff was injured at work when a truck he was repairing fell on him. He filed a workers compensation claim which resulted in Kentucky Employers Mutual Insurance (KEMI) paying all reasonable and necessary medical expenses incurred. He later re-opened his claim to compel KEMI to pay for medical care since they had refused to pay for some treatment and delayed payments. He then filed suit alleging bad faith in refusing to pay and delaying payments. The

trial court denied KEMI's motion to dismiss for lack of jurisdiction. The court of appeals denied a writ of prohibition claiming the trial court acted outside its jurisdiction.

The Kentucky Supreme Court considered whether the writ of prohibition was properly denied by examining the Workers' Compensation Act, 342.690(1). The Act provides an exclusive remedy for work-related injuries and grants immunity for liability arising from common law and statutory claims to the employer's workers' compensation insurance carrier. The Kentucky Supreme Court held the exclusive remedy provision of the Workers' Compensation Act precluded the tort claims and the circuit court had no jurisdiction.

Bituminous Casualty Corporation v. Kenway Contracting, Incorporated, Ky., --- S.W. 3d ---, (2007)

Coverage Exclusions

Homeowners contracted with Kenway Contracting to remove an attached carport. A Kenway employee brought the carport and over half the residential structure to the ground. Kenway had a CGL policy through Bituminous Casualty Corporation (BCC). BCC took the position there was no coverage under the policy arguing several exclusions applied to the incident. Kenway filed a declaratory judgment action.

The Supreme Court ruled the damage that resulted to the property was neither expected nor intended, and could be considered an accident and therefore met the definition of occurrence under the CGL policy. The Supreme Court also held the business risk exclusion did not operate to preclude coverage. Lastly, the Supreme Court held the policy exclusion for damage to a particular part of real property on which the insurer performed operations if damage arose from those operations, and the exclusion for property damage to a part of property that must be restored, repaired or replaced because of incorrectly performed work, had multiple interpretations and were therefore ambiguous. An ambiguous policy is to be construed against the drafter and the Supreme Court concluded neither exclusion operated to preclude coverage.

Dowell v. Safe Auto Insurance Company, Ky., 208 S.W. 3d 872, (2006)

Uninsured Motorist Coverage

Plaintiff was rear ended by a vehicle that fled the scene of the collision. She made a claim for UM benefits under her policy with State Auto for injuries sustained in the accident. Safe Auto denied coverage stating plaintiff could not identify the hit and run driver or the vehicle he was driving.

The Supreme Court had to decide whether the hit and run vehicle was considered an uninsured motor vehicle under the Safe Auto policy. The court noted Safe Auto's policy identified fifteen exclusions applicable to uninsured and underinsured motorist coverage, none of which disclosed injury inflicted by a hit and run vehicle is not covered. The Supreme Court held since the hit and run driver cannot be located, no insurance policy "applied" to him at the time of the accident and concluded a hit and run vehicle was not excluded from the UM coverage of the Safe Auto policy.

Reece v. Nationwide Mutual Insurance, Ky., 217 S.W. 3d 226, (2007)

Underinsured Motorist Coverage

Plaintiff was injured in an accident as a passenger in a vehicle insured by GEICO. GEICO paid her PIP benefits, as well as \$25,000. The carrier for her father, Nationwide Mutual Insurance, provided underinsured motorist coverage. She filed suit against Nationwide to collect UIM benefits.

The primary issue the Supreme Court decided was whether plaintiff was required to present specific evidence of how her earning power was permanently impaired in order to submit the issue of permanent impairment to the jury. The Supreme Court held specific evidence was not required. Evidence of permanent injury alone is sufficient for an instruction on permanent impairment of earning power, and the jury can make the determination if there has been a permanent impairment, the extent of such impairment and the amount of damages for such impairment. Plaintiff had sufficiently shown her injuries were permanent with the testimony of herself and two treating physicians.

Moore v. Globe American Casualty Company, Ky., 208 S.W. 3d 868, (2006)

Uninsured Motorist Coverage

Plaintiff sought UM benefits from Globe American, who denied coverage because plaintiff rejected UM coverage in her insurance application.

The Supreme Court decided whether Globe American's insurance policy followed the requirements of Kentucky law as it applies to UM coverage. The Supreme Court referred to K.R.S. 304.20-020(1), which requires insurers to provide coverage for insured persons entitled to recover damages against uninsured motor vehicles, but also states the named insured shall have a right to reject UM coverage in writing. The Supreme Court held plaintiff rejected the UM coverage when she specifically checked the box on the application that stated, "I hereby reject both of the above coverages," denoting UM coverages.

Schmidt v. Leppert, Ky., 214 S.W. 3d 309 (2007)

PIP Subrogation

An Indiana resident, negligently caused an automobile accident in Kentucky and injured plaintiff. Nationwide paid PIP benefits to plaintiff. Nationwide conceded the tortfeasor's insurance carrier was not responsible since their policy did not provide PIP coverage, so Nationwide sued the tortfeasor directly for subrogation.

The Supreme Court held K.R.S. §304.39-070 requiring an insured's policy to include PIP in order to have "security" on a motor vehicle. The tortfeasor therefore did not have "security," his vehicle was not a "secured motor vehicle," which means the tortfeasor was not a "secured person." The Kentucky Supreme Court held Nationwide could sue the tortfeasor directly to recover the BRB it had paid to Leppert. Importantly, the court overruled *State Farm Mutual Automobile Insurance Company v. Harris, 850 S.W. 2d 49 (Ky. App. 1992)*, to the extent that it held anyone operating a vehicle in Kentucky had "security" if the operator had a valid out of state insurance policy.

XIII. SIGNIFICANT INDIANA COURT DECISIONS

State Farm Mutual Auto Insurance Co. v. Gutierrez, 866 N.E.2d 747 (2007)
Bifurcation of Bad Faith Claims

This case arose after a passenger in a pickup truck was injured in a non-automobile accident that still involved the truck. While transporting a dollhouse along the highway, the passenger exited the stopped vehicle on the side of the highway to re-secure the dollhouse. The driver put the vehicle in reverse, causing the truck door to swing open and strike the passenger in the back, causing injury that required surgery and subsequent care. The passenger sued both the driver for negligence and State Farm for breach of contract, bad faith failure to pay claims, and punitive damages. State Farm filed a motion to bifurcate the bad faith claim from the underlying claims. The Supreme Court held bifurcation of bad faith claims from underlying tort claims is not automatic based on a showing of mere speculation of potential prejudice. The decision is within the discretion of the trial court and a showing of actual prejudice is a prerequisite to establishing the trial court erred in denying a motion for bifurcation.

Indiana Ins. Guaranty Assoc. v. Bedford Reg. Medical Center, 863 N.E.2d 308 (2007)
Claims Against an Insolvent Insurer

The estate of a patient who had been treated at Bedford Regional Medical Center brought wrongful death and malpractice claims against the hospital for the inadequate treatment he received ultimately leading to his death. As a result of Bedford Medical's insolvency, the hospital sued Indiana Insurance Guaranty Association ("IIGA") seeking reimbursement for the cost of settling the malpractice action. At issue was whether IIGA was required to pay the lost wages of the deceased patient. The Supreme Court held that, under Indiana Code § 27-6-8-7(a)(i)(1) IIGA is required to pay the readily calculable lost wages of a worthy claimant.

Meyers v. Meyers, 861 N.E.2d 704 (2007)
Retaliatory Discharge Claims

An employee brought a retaliatory discharge claim against his corporate employer and the corporate shareholders. The plaintiff was terminated from his job after complaining about his employer's failure to pay him overtime wages, overtime pay, and un-deposited payroll tax deductions. The issue was whether an employee could maintain a claim for retaliatory discharge allegedly resulting from these complaints. The employee argued his right to overtime pay fell within a "public policy" exception to Indiana's general employment at will doctrine. The Supreme Court refused to recognize such an exception to the employment at will doctrine holding the employee could not maintain such a claim under Indiana law.

Ford Motor Co. v. Rushford, 868 N.E.2d 806 (2007)

Product Liability

This claim arose as a products liability action against Ford Motor Company and its local car dealership after the purchased vehicle's airbag deployed in a car accident and injured the plaintiff. The plaintiff claimed neither Ford Motor Company nor the Ford dealership provided her with adequate warning concerning the potential danger to an adult passenger of front-seat airbags. The Court recognized Indiana law requires the seller of a product to give adequate warnings to customers of known potential dangers, but where the manufacturer provides such warnings and the seller passes those warnings along to the consumer, the seller has no additional obligation to warn. In this case, warnings were part of the vehicle's owner's manual. Accordingly, the Supreme Court held the dealer owed no duty to warn an adult passenger of the potential hazard of front-seat airbags where the owner's manual provided by Ford Motor Company contained adequate airbag warnings.

Row v. Holt, 864 N.E.2d 1011 (2007)

Qualified Immunity of Law Enforcement Officers

This claim arose after a complex series of events ultimately culminated in the plaintiff being arrested at his home for striking a police officer and resisting arrest. The plaintiff brought claims of false arrest and false imprisonment as a result of this incident. At issue was whether law enforcement officials are entitled to qualified immunity on such claims. Generally, an arrest by a law enforcement officer without probable cause can give rise to civil liability for false arrest. The Supreme Court held that where a reasonable officer, under the facts and circumstances encountered by the arresting officer, would believe the suspect had committed or was committing a criminal offense, that officer is entitled to qualified immunity on false arrest and false imprisonment claims.

Cinergy Corp., et al. v. Associated Electric and Gas Ins. Services Ltd., et al., __ N.E.2d__ (2007)

Duty to Defend

As a result of incurring enormous defense costs in a federal environmental lawsuit, several power companies sought payment of their defense costs, as they were incurred, under the terms of their various liability insurance policies. The insurance companies argued the defense costs were not covered under the policy and brought an action for declaratory judgment. The power companies sought partial summary judgment to compel payment of all past and future defense costs incurred in responding to the federal environmental lawsuit, which was denied. Ultimately, the Supreme Court based its decision on the distinction between "remedial" costs v. "prophylactic" costs. Remedial costs, which are those costs associated with preventing further environmental damage were determined to be covered, while prophylactic costs, those expenses incurred to pay for measures taken in advance of the release of hazardous waste, are generally not covered. Accordingly, the Supreme Court upheld the denial of the power companies' motion for partial summary judgment seeking reimbursement for defense costs associated with those claims seeking to compel the power companies to install equipment to reduce future emissions of pollutants.

Harris Madison School Corp. v. Howard, 861 N.E.2d 1190 (2007)

Comparative Fault

This case arose as a result of injuries sustained by a high school student when a theatrical apparatus designed to allow the “Peter Pan” character to fly above the audience failed. In defense of plaintiff’s claims, the school district alleged the defense of contributory negligence, despite the fact the Indiana legislature abolished the doctrine of contributory negligence nearly two decades ago. Although the general defense of contributory negligence was abolished, the Indiana Supreme Court held the defense of contributory negligence does remain available as a complete bar to liability to governmental agencies such as public schools.

State Farm Mutual Auto Ins. Co. v. Estep, 873 N.E.2d 1021 (2007)

Assignment of Bad Faith Claims

This case arose as the result of a judgment creditor seeking satisfaction of an unpaid judgment from a non-paying debtor. The trial court ordered the debtor to assign his potential bad faith claim against his automobile insurance carrier to the judgment creditor in partial satisfaction of the unpaid judgment. Subsequently, the judgment creditor commenced a bad faith lawsuit against the automobile insurance company. The insurance company moved to vacate the trial court’s order directing assignment of the bad faith claims to the creditor. While Indiana law does allow an insured to directly assert a claim against his insurer for breach of the duty of good faith, the duty of good faith arises purely out of the insurance contract between the insured and the insurer. Accordingly, the Indiana Supreme Court held the order forcing the debtor to assign the potential bad faith claims is not permissible noting Indiana follows the “direct action rule,” which prohibits a third-party from taking assignment of this type of claim.



XIV. SIGNIFICANT MICHIGAN COURT DECISIONS

Rowland v. Washtenaw County Road Com'n., 477 Mich. 197; 731 N.W.2d 41, (2007).
Governmental Immunity

Plaintiff was injured as a result of a fall sustained while crossing a potholed county road. Plaintiff sued the county but failed to provide the county with notice within 120 days of the injury as required by the notice provision of the defective highway exception to governmental immunity under MCL 691.1404(1). The defendant, Washtenaw County Road Commission, raised the notice requirement as an affirmative defense and moved for summary disposition of the claim. The Supreme Court held the lack of timely notice was sufficient to bar the suit, and it was not necessary for the commission to prove it was prejudiced by the late notice.

Renny v. Dept. of Transp., 478 Mich. 490; 734 N.W.2d 518, (2007).
Tort Liability – Governmental Immunity

Plaintiff was injured when she slipped on a patch of snow and ice on the sidewalk in front of the doorway of a rest area. She brought suit against the Michigan Department of Transportation (MDOT), claiming that melted snow and ice accumulated in front of the entranceway and created a hazardous, slippery surface.

The Supreme Court found for the defendant and held a design defect is not sufficient to impose liability on governmental agencies under MCL 691.1406. Liability under the public building exception to governmental immunity may be based on the defendant's failure to repair and maintain the public building and not for a defective design. The case was remanded to the trial court for a determination as to whether or not the plaintiff's suit may proceed on the basis of a failure to repair or maintain.

Perry v. Golling Chrysler Plymouth Jeep, Inc., 477 Mich. 62; 729 N.W.2d 500, (2007).
Automobile Accident Liability – Transfer of Title

This case arose out of an automobile accident involving a newly purchased automobile driven shortly after its purchase. After sustaining injuries as a result of the accident, plaintiff sued the car dealership from which the automobile was purchased. Plaintiff claimed that the dealership was still the owner of the car and thus liable for the acts of its permissive user, because, although the application for title had been signed, the title was not effectively transferred until the application was delivered to the Secretary of State.

The Supreme Court reinstated the trial court's grant of summary disposition for the defendant after concluding that transfer of title was effective at the moment of signing. The dealership was not required to send the application to the Secretary of State in order to complete the transfer.

Trentadue v. Buckler Lawn Sprinkler., 479 Mich. 378; 738 N.W.2d 664, (2007).

Wrongful Death – Statute of Limitations

This case arose out of a 1986 rape and murder which went unsolved until 2002 when DNA evidence determined who had committed the crime. Plaintiff, the daughter and personal representative of the estate of the deceased brought this suit in 2002 for wrongful death against several parties. The defendants argued the suit was barred by the three year statute of limitations for wrongful death actions. Plaintiff asserted that the common law discovery rule applied to toll the statute of limitations.

The Supreme Court held the statutory scheme for tolling the period of limitations precluded the common law discovery rule. Therefore, under MCL 600.5827, plaintiff's claims accrued at the time of the deceased's death and were barred if not brought within three years of that time. Because the plaintiff brought the claims sixteen years after the claim accrued, the Court ruled that the claims were barred by the statute of limitations.

Brown v. Brown., 478 Mich. 545; 739 N.W.2d 313, (2007).

Vicarious Liability

Plaintiff, an employee of the defendant, was raped by another of the defendant's employees, and sued the employer for negligence and vicarious liability stemming from the employee's assault and battery. Plaintiff claimed that the employee's crude and highly offensive comments were sufficient to establish the foreseeability of the rape and create a duty owed by the employer to the victim.

The Supreme Court held that absent a criminal record or past history of violence, employers are able to assume that their employees will obey criminal laws. Therefore, in circumstances where the employee has no prior criminal record or history of violent behavior indicating a propensity to rape, an employer is not liable for an employee's conduct, where the comments failed to convey an unmistakable, particularized threat of rape.

Muci v. State Farm Mut. Auto. Ins. Co., 478 Mich. 178; 732 N.W.2d 88, (2007).

Independent Medical Examinations

Plaintiff, an insured of State Farm was injured in an automobile accident and filed a claim for personal protection insurance benefits. Plaintiff's request for benefits was declined, leading the plaintiff to file suit. State Farm requested an unconditional medical examination. Plaintiff refused to submit to the examination, claiming that the conduct of the medical examination was governed by MCR 2.311(A), the more general rule applying to all independent medical examinations in litigation of any kind. MCR 2.311(A) limits the unqualified right to an independent medical examination by requiring that good cause for the examination be shown and by allowing court-created conditions on the examination.

The Supreme Court held MCR 2.311(A), controls matters on which the no-fault act is silent and does not control matters specifically addressed by the act. Under the no-fault act a court cannot impose conditions on an examination unless it can be shown that the examination will cause the claimant annoyance, embarrassment, or oppression. Plaintiff produced evidence showing that one of State Farm's physicians had previously inquired into matters protected by the attorney-client privilege. The Court found this evidence sufficient to show that the examination would cause annoyance, embarrassment or oppression and thus was an adequate basis to justify the imposition of conditions on the examination. The Court held that such conditions must be fashioned in a manner appropriate to protect against annoyance, embarrassment or oppression and ordered the trial court to reconsider the conditions proposed by the plaintiff and determine which conditions, if any, ought to be imposed in light of the evidence offered by the plaintiff.

Karaczewski v. Farbman Stein & Co., 478 Mich. 28; 732 N.W.2d 56, (2007).
Workers' Compensation

Plaintiff was injured in Florida while working for a Michigan employer under an employment contract made in Michigan. The plaintiff-employee filed an application for medical and wage loss benefits under Michigan law. An issue arose on whether Michigan had jurisdiction to decide the claim.

The Supreme Court held that the Workers' Compensation Bureau has jurisdiction over out-of-state injuries only where the plaintiff was a resident of Michigan at the time of the injury and the employment contract was made in Michigan.

Griswold Properties, L.L.C. v. Lexington Ins. Co., 741 N.W.2d 549, (Mich. App. 2007).
Insurance – Penalty interest

This decision was intended to resolve a conflict concerning the payment of penalty interest to first party insureds under MCL 500.2006(4). The conflict settled by this case concerns whether a first party insured is entitled to penalty interest when the insurer fails to pay a claim within the applicable statutory period, regardless of whether the amount of the claim is reasonably in dispute. The court of appeals found that the need to show that the amount of the claim is reasonably in dispute is required only when the claim involves third-party tort claimants. When the claimant is the insured or the party entitled to benefits under the insured's contract of insurance, and the benefits are not paid on a timely basis, the claimant is entitled to twelve percent (12%) interest, irrespective of whether the claim is reasonably in dispute.



**XV. SIGNIFICANT CASES PENDING BEFORE THE OHIO
SUPREME COURT**

Young v. Cincinnati Insurance Company
Changes to an Insurance Policy

This appeal asks the Supreme Court to consider whether an insurer has the right to change provisions within an insurance policy during the policy's two year guaranteed renewal period.

Lorince v. Universal Underwriters
Coverage for Loaner Cars

This appeal asks the Supreme Court to consider whether a customer driving a car dealer's loaner vehicle is insured under the dealer's liability coverage.

Anderson v. Nationwide Mutual Fire Ins. Co.
Rejection of UM/UIM Coverage

The issue presented by this appeal is whether extrinsic evidence is admissible to prove a proper offer and informed rejection of UM/UIM coverage for policies written prior to the effect of House Bill 261 in 1997.

Maynard v. Eaton Corp.
Statutory Interest

This appeal involves a question of what is the proper rate of statutory interest to impose on a judgment where the statutory rate changes while the judgment remains pending.

Burnett v. Motorists Mutual Insurance Co.
UM Intra-Family Exclusions

Mrs. Burnett was injured in an auto accident caused by the negligence of her husband. Her insurance policy contained an exclusion that precluded UM/UIM coverage for vehicles owned by a named insured or a family member. The Supreme Court will decide whether an "intra-family" exclusion that precludes such coverage violates the Equal Protection Clause.

Rogers v. Dayton
Effect of Self-Insurance on UM Coverage

Rogers was injured in an auto accident by another driver who was acting in the course of his employment with the City of Dayton. Dayton was self-insured, but never applied for a Certificate of Self-Insurance. The Supreme Court is deciding whether a municipality that chooses to self-insure for the liability of its employees is considered insured for the purposes of UM/UIM coverage.

Flynn v. Westfield Insurance Company

UM Coverage

While driving his own car within the scope of his employment, plaintiff was paralyzed from the waist down after he was injured in an automobile accident. The Supreme Court is considering whether an employee's personal automobile is covered by his employer's UM/UIM coverage, where the employer has only paid premiums for the company's "owned autos".

Angel v. Reed

UM/UIM Statute of Limitations

Plaintiff was injured in an auto accident. Almost two years later (23 months), she filed suit against Reed, but shortly thereafter voluntarily dismissed it. A year after, she made a claim for UM/UIM coverage. She filed this suit against the tortfeasor and Allstate after her UM/UIM claim was denied. The Supreme Court is deciding when the statutory limitations period begins to run on a UM/UIM claim: at the date of the accident, or at the time of "discovery" of the tortfeasor's true insurance status.

Howard v. Miami Township Fire Division

Governmental Immunity for Road Conditions

The Miami Township Fire Department conducted a training exercise resulting in water on a public road in freezing conditions. To prevent the formation of ice, they put salt on the road, but this was not effective. Plaintiff crashed his car when he encountered the slush buildup left behind by the firefighters. The trial court granted immunity to Miami Township stating plaintiff's estate filed a wrongful death action against the city. The Supreme Court will decide whether leaving water on a freezing road is a "negligent failure to remove obstructions from public roads" and therefore an exception to governmental immunity.

Allstate Insurance Co. v. Cleveland Electrical Illuminating Co.

Subrogation Against Utilities

In 2003, a tree limb fell onto electrical wires running into the home of the insured. The electrical company did not arrive for several hours, and before anyone arrived, the wire pulled away from the home and caused a fire. Allstate filed a subrogation action against Cleveland Electrical Illuminating Co. (CEI) and was awarded the full amount they paid to the insured. CEI appealed and the decision was overruled on grounds that the trial court lacked jurisdiction. The issue before the Supreme Court is whether the Public Utilities Commission of Ohio has exclusive jurisdiction over service-related claims and whether this case fits into that category.

Ahmed v. AK Steel Corp.

Premises Liability

Plaintiff's decedent was working as a security guard for Johnson Controls at AK Steel Corp. when she twisted her ankle on the steps and fell. Two weeks later, she died as a result of a pulmonary embolism, allegedly caused by a blood clot that formed because of the broken ankle. It was alleged that the lack of a handrail on the steps, in violation of Ohio Building Code and OSHA regulations, was the reason she fell and eventually died. The issue here is whether there is liability for negligence when a business invitee is injured by a danger that is open and obvious.

Hutchings v. Childress

Loss of Consortium Damages

As a result of an accident, plaintiff-husband has had to devote much of his time to caring for his wife and has lost income from the investment business that he and his wife operated together. The Supreme Court is going to decide whether the lost earnings of a non-injured spouse are recoverable under a loss of consortium claim.

Hilmer v. White

Occurrences and Intentional Acts

This appeal asks the Supreme Court to determine on claims of negligent supervision and/or entrustment, whether an occurrence includes injuries resulting from an intentional act, when the persons seeking coverage are only alleged to have acted negligently.



XVI. SIGNIFICANT CASES PENDING BEFORE THE KENTUCKY SUPREME COURT

Humana, Inc. v. Blöse
Employment Discrimination

This appeal asks whether a release agreement signed by an employee upon termination constitutes a complete defense to the employee's civil rights action, or if it can provide a breach of contract counterclaim by the employer.

DeVasier v. James
Medical Negligence

This appeal asks whether jury instructions regarding a psychiatrist's duty to warn of a patient's threat of violence was proper and whether Kentucky Revised Statute 202A.400 provides such a duty if the threat is not directly communicated to the psychiatrist.

Kugland v. Encompass Insurance Company
UIM Coverage – Civil Procedure

This appeal asks whether UIM coverage for three automobiles under the policy may be stacked.

Richardson v. Louisville/Jefferson County Metro Government
Civil Rights

This appeal asks whether the Jefferson County Metro Government was required to provide a defense under the Claims Against Local Government Act to a former police officer employee in a civil rights action.

Neurodiagnostics/Lexington Diagnostic Center v. Kentucky Farm Bureau Mutual Insurance Company
Basic Reparations Benefits

This appeal asks whether assignments of basic reparations benefits for the assertion of claims by medical providers are valid according to Kentucky Revised Statute 304.39-241.

Williams v. State Farm Mutual Automobile Insurance Company
Underinsured Motorist Coverage

This appeal asks whether an insurance policy excluded underinsured motorist coverage to a member of the insured's household when the vehicle was purchased by that member of the household, but titled not only in the purchaser's name, but the insured's name as well.

Commonwealth Transportation Cabinet, Department of Highways v. Sexton
Negligence

This appeal asks the Kentucky Supreme Court whether the Department of Highways has a duty to prevent dead or diseased trees from falling onto adjoining properties.

Scott v. Moore Pontiac, Buick, GMC, Inc.
Auto Dealer Liability

This appeal asks questions regarding motor vehicle dealership duties, causation and apportionment of damages.

Gilbert v. Prime, Inc., et al
Insurance/Statute of Limitations

This appeal raises issues regarding if suit has not been filed against an offending tortfeasor within two years of an accident, whether an insured is barred from making a claim against their own insurer for payment under collision coverage.

General Electric Co. v. Cain
Rehm v. Navistar International Corp.
Workers' Compensation

This appeal ask the Supreme Court to decide the proof required to show workers' compensation insurance was obtained to cover employees of a contractor and whether the work performed by the contractor was a "regular or recurrent" part of the employer's business.

Schmidt v. Leppert
Motor Vehicle Reparations Act (MVRA)

This appeal asks the Supreme Court for the proper interpretation of various statutory provisions of the insurance code relating to subrogation claims for payment of basic reparation benefits (BRB) asserted against out-of-state tortfeasors with no BRB coverage.

Mitchell v. Allstate Insurance Co.
Extent of Insurance Coverage

This appeal asks the Supreme Court to decide the extent of coverage to be given to a permissive user of an automobile when the use exceeds or varies from the permission given.

Kemper v. Gordon
Medical Malpractice

This appeal stems from an action alleging negligence in a physician's failure to diagnose cancer timely (Loss-of-Chance). Issue relates to appellate court recognizing the cause of action for lost chance of survival in instances where chance of survival or recovery is 50% or less at time of alleged act.

XVII. SIGNIFICANT CASES PENDING BEFORE THE INDIANA SUPREME COURT

Querry & Harrow, Ltd. v. Transcontinental Ins. Co.,
Subrogation

The Supreme Court is reviewing whether an excess insurer carrier is entitled to bring a legal malpractice action against the attorney who represented the insured in the underlying action under the doctrine of equitable subrogation.

Travelers Casualty and Surety Co., et al. v. United States Filter Corp., et al.
Insurance Coverage

In this case the Supreme Court is reviewing whether companies who acquire liabilities through corporate mergers or acquisitions have the right to then seek coverage under the acquired companies' general liability insurance policy.

Christopher R. Brown, DDS, Inc. v. Decatur County Memorial Hosp.
Pre-Judgment Interest

The Supreme Court is reviewing whether prejudgment interest is available for belated payments to healthcare providers for services rendered under the Workers' Compensation Act.

Speedway SuperAmerica, LLC v. Holmes
Post Judgment Motions for Relief

In this case the Supreme Court is reviewing the issue of post judgment relief based on the discovery of new evidence which was not available for testing prior to trial.

Cooper Industries, LLC v. City of South Bend
Statute of Limitations

In this case the Supreme Court is reviewing the use of the common law discovery rule to determine the applicable statute of limitations for a claim brought by the plaintiff under the Environmental Legal Action Statute.

Butler v. Indiana Department of Insurance
Proof of Damages – Wrongful Death

The Supreme Court is reviewing whether, under the Indiana Wrongful Death Act, evidence of the amount of medical bills or the amount actually paid for medical bills should be admitted in the calculation of damages.

American Fire and Casualty Co. v. Roller
Duty to Defend

The Supreme Court is reviewing an insurance coverage dispute regarding the issue of coverage for faulty workmanship under a general insurance policy.

XVIII. SIGNIFICANT CASES PENDING BEFORE THE MICHIGAN SUPREME COURT

Ross v. Auto Club Group

No Fault Benefits

Plaintiff sought to recover personal protection insurance benefits from the defendant insurer. The insurer claimed that the plaintiff, the sole owner of a subchapter S corporation, was self-employed and therefore not entitled to benefits. The court is deciding whether denying a claim based on the insurer's belief that the insured is self-employed is unreasonable, and therefore, requiring payment of the insured's attorneys fees under MCL 500.3148(1).

Miller v. Progressive Corporation

No Fault Benefits

Plaintiff was injured in an auto accident in Michigan. Even though she lived in Maryland, her parents kept her on their Michigan policy as an "occasional" driver. Plaintiff filed suit after her parent's insurer denied her request for no-fault benefits. The court is deciding whether an "occasional driver" is a "person named in the policy".

McDonald v. Farm Bureau

UIM Claim

The plaintiff's no-fault insurance policy requires any suit for UIM benefits be brought within one year of the accident. The plaintiff timely presented a claim, but the insurer did not deny the claim until more than one year after the accident. The court is deciding whether a one-year statute of limitation in the policy is tolled from the time a claim is made until the time the insurer denies the claim.

Drake v. Citizens Insurance Co.

No Fault Benefits

This no-fault case involves a parked delivery truck pumping grain into a silo using a three-auger device permanently connected to the truck. Plaintiff was injured while clearing an obstruction from one of the augers while the truck was parked but running. The court is deciding whether the plaintiff's injury arose out of the use of a motor vehicle as a "motor vehicle" under MCL 500.3105(1), entitling the plaintiff to no-fault benefits.

Vega v. Lakeland Hospital at Niles

Statute of Limitations

The mother of an 11-year-old boy brought a medical malpractice claim on his behalf, claiming that a doctor's 1999 misdiagnosis caused her son to suffer permanent mental impairment. The trial court dismissed the case, finding that the suit was filed after the two-year statute of limitations expired. The court is deciding whether a statutory savings provision for incompetent persons applies to medical malpractice claims, allowing the lawsuit to go forward.

Farmers Insurance Exchange v. Farm Bureau
Assigned Claims

Farmers Insurance is the assigned claims carrier paying benefits to a motorcyclist injured in an accident with a motor vehicle. Farm Bureau's insured was a co-owner of the vehicle involved in the accident, but the vehicle was not listed in the Farm Bureau policy. The court is deciding whether Farm Bureau is responsible for the motorcyclist's no-fault benefits because it insured the motor vehicle's owner, even though the vehicle was not listed in Farm Bureau's policy.

Citizens Insurance Company v. Pro-Seal Service Group
Duty to Defend

Plaintiff sought to compel its insurance company to defend it in a trademark infringement case. The policy provision required the insurance company to "pay those sums that the insured becomes legally obligated to pay as damages because of 'personal and advertising' injury to which this insurance applies." The court is deciding whether this "advertising injury" provision applies.

Liss v. Lewiston-Richards, Inc.
Michigan Consumer Protection Act

The Michigan Consumer Protection Act (MCPA), which prohibits deceptive practices in trade or commerce, does not apply to "[a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority," MCL 445.904(1)(a). The court is deciding whether the MCPA applies to residential builders or their corporate officers.

Auto Club v. Buerkel
Permissive Use

A woman unsuccessfully tried to stop her angry, drunken boyfriend from driving her car, which he drove regularly on other occasions with her consent. Several minutes later, her boyfriend struck another vehicle and injured the plaintiff, who then sued the car owner, her insurance company, and her boyfriend. The court is deciding, under these facts, whether the car was driven with the owner's "express or implied consent or knowledge", and also whether the vehicle owner and her insurance company are liable for the injuries the boyfriend caused.

