<u>The Five Most Important Insurance Cases of 2001</u>

By
Glen R. Pritchard, Esq.
Clark, Perdue, Roberts & Scott
471 East Broad Street
Suite 1400
Columbus, OH 43215
gpritchard@cprslaw.com

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I. Linko v. Indemn. Ins. Co. of N. Am. (2000), 90 Ohio St.3d 445

A. Pre-HB 261

Two pre-H.B. 261 Ohio Supreme Court cases invalidated nearly every attempt to reject or reduce UDM coverage in Ohio: *Gyori v. Johnston Coca-Cola Bottling Group* (1996), 76 Ohio St.3d 565, and *Linko v. Indemn. Ins. Co. of N. Am.* (2000), 90 Ohio St.3d 445. *Linko* and *Gyori* imposed the following requirements for rejecting/reducing UDM coverage:

- UDM coverage must be offered in writing and cannot be rejected until it is offered; therefore, UDM coverage arose by operation of law under the umbrella policy.
- A written rejection of UDM coverage must be executed and returned to the insurer **before** the beginning of the policy period; accordingly UDM coverage arose by operation of law under the business auto policy.
- The insured must provide a description of the coverage;
- The premium for the UDM coverage must be disclosed;
- The UDM coverage limit must be disclosed;
- An offer of UDM coverage to a separately incorporated "parent" corporation does not constitute an offer to an insured "subsidiary" corporation.
- A "parent" corporation does not have implied authority to reject UDM coverage on behalf of a separately incorporated subsidiary corporation.

- An insurer must show a valid offer and rejection of UDM coverage on the four corners of the contract, and may not rely upon extrinsic evidence to show compliance with its statutory duty to offer the coverage.

Practically no insurer followed all of these rules.

B. Post H.B. 261

HB 261, effective September 3, 1997, changed the requirements for rejecting or reducing uninsured motorist coverage by 1) allowing an applicant, in addition to the named insured, to sign the rejection; 2) making the rejection by one named insured or applicant effective as to all other insureds under the policy; and 3) creating a presumption that uninsured motorist coverage was validly offered if the coverage was properly rejected. Relying upon *Hindall v Winterhur* (March 29, 2001), 2001 WL 339459 (N.D.Ohio), insurers argue that H.B. 261 completely overruled *Linko* and *Gyori*. The defense especially emphasizes that H.B. 261 creates a presumption that a written rejection of coverage creates a presumption that UDM coverage was validly offered.

However, the Fifth District Court of Appeals very recently rejected the argument that H.B. 261 superceded the *Linko/Gyori* requirements. Even after H.B. 261, insurers must state the premium of the coverage, provide a description of UDM coverage, and indicate the amount of coverage that is available to be purchased. See *Pillo v. Stricklin* (Dec. 31, 2001), Stark App. No. 2001CA00204, unreported.

II. Littrell v. Wigglesworth (2001), 91 Ohio St.3d 425

Interpreted R.C. 3937.18(A)(2), which provides for a set-off of underinsured motorist coverage, as follows:

> Underinsured motorist coverage, which shall be in an amount of coverage equivalent to the automobile liability or motor vehicle liability coverage * * * where the limits of coverage **available for payment** to the insured under all bodily injury liability bonds and insurance policies covering persons liable to the insured are less than the limits for the insured's uninsured motorist coverage. Underinsured motorist coverage is not and shall not be excess insurance to other applicable liability coverages, and shall be provided only to afford the insured an amount of protection not greater than that which would be available under the insured's uninsured motorist coverage if the person or persons liable were uninsured at the time of the accident. **The policy limits of the underinsured motorist coverage shall be reduced by those amounts available for payment under all applicable bodily injury liability bonds and insurance**

> **policies covering persons liable to the insured.** (Emphasis added.)

The Court held that an insurer is entitled to reduce (set-off) UDM limits by the amount "available for payment" from the tortfeasor's insurer to **all insureds** under the policy (regardless of whether the amount available to a particular insured is reduced as a result of payment to other insured claimants.)

III. Davidson v. Motorists Mut. Ins. Co. (2001), 91 Ohio St.3d 262

The Ohio Supreme Court held that a homeowner's insurance policy which provides limited liability coverage for the operation of unregistered recreational motor vehicles is not a motor vehicle policy of insurance which is subject to the mandatory offer of UM coverage. Accordingly, the Court declined to find that UDM coverage arose by operation of law under the policy. The Court reasoned that coverage for vehicles which are not subject to motor vehicle registration and not designed for use on public roads is merely incidental coverage and does not trigger R.C. 3937.18.

However, in footnote 2 of the decision, the Court specifically refused to consider whether the policy was subject to R.C. 3937.18 as a result of the policy's extension of coverage for motor vehicle accidents involving injury to residents employees. However, the Court accepted jurisdiction in *Lemm v. Hartford* (Oct. 4, 2001), Franklin App. No. 01AP-251, unreported, in which the issue is squarely before the Court.

IV. *Ohayon v. Safeco Ins. Co.* (2001), 91 Ohio St.3d 474

In *Ohayon*, the insureds lived, garaged their automobiles, and purchased their insurance in Ohio. They were involved in a crash caused by an uninsured motorist in Pennsylvania. In making their UM claims, they sought to apply the law of Pennsylvania which permitted stacking of coverage. In rejecting the insureds' argument, the Ohio Supreme Court held that the law of the state most closely connected to the insurance contract would control the rights of the parties.

Ohayon arises as a defense in *Scott-Pontzer* litigation in one of two situations. First, the plaintiff may be an employee in an Ohio branch office of an out-of-state corporation. The named insured on the corporate policy is the out-of-state corporation, and the policy itself was negotiated and issued in the state of the home office.

In the second situation, the plaintiff is an employee of an Ohio corporation which is a wholly owned subsidiary of a larger out-of-state corporation. The parent corporation is the named insured on an insurance policy which covers, usually by endorsement, all of the subsidiary corporations.

In either case, the policy is often an extensive "national policy" with separate endorsements tailored to the unique insurance requirements of all 50 states.

Somewhere in the pile of forms and endorsements is an Ohio Uninsured Motorist Coverage endorsement which contains the ambiguous *Scott-Pontzer* language.

When the named insured under the policy is an out-of-state corporation, the defense argument goes as follows:

> Ohio insurance law, i.e. *Scott-Pontzer*, should not be used to interpret the coverage afforded under the policy. Instead, the Ohio Supreme Court's decision in *Ohayon v Safeco Ins.* (2001), 91 Ohio St.3d 474, demands application of the law of the state with the most significant contacts with the insurance contract, i.e., the state where the policy was negotiated, issued, etc. Since the policy was negotiated and issued outside Ohio, and the foreign state has not recognized any *Scott-Pontzer* ambiguity, no coverage is available to corporate employees while not working in the scope of employment.

Plaintiff's Response

Henderson v. Lincoln Natl. Specialty Ins. Co. (1994), 68 Ohio St.3d 303: R.C. 3937.18 applies to motor vehicle liability insurance policy covering vehicles registered and principally garaged in Ohio, even when policy was not delivered or issued for delivery in Ohio by insurer.

Devore v Richmond (July 27, 2001), Wood C.P. No. 99CV527, unreported: The named insured had Indiana address and insurance company was also located in Indiana. However, the insured's principle place of business was in Ohio, and the covered vehicles were principally garaged in Ohio. Therefore, Ohio law applies.

Cincinnati Ins v Simpson (March 23, 2001), Wood C.P. No. 99 CV 302, unreported: The employer was a Michigan corporation. The plaintiff was the minor child of an employee. The corporate auto policy was negotiated, purchased, and issued in Michigan. However, the policy included an Ohio uninsured motorist endorsement. Further, the accident that gave rise to the claim occurred in Ohio. Held: In applying the choice of law test for contracts, Ohio law applies.

Caylor v Pacific Employers (August 3, 2001), Miami C.P. No. 99-400, unreported, Entry on Motion for Summary Judgment with respect to CIGNA: Plaintiff worked in the Ohio office of an out-of-state corporation. The policy was a national policy intending to cover vehicles in Ohio. The insurer attempted to obtain a rejection of Ohio UDM coverage. Held: Ohio law applies. The insurer implicitly choose Ohio law by covering Ohio vehicles and attempting to get a rejection under Ohio law.

V. Kormanik v. St. Paul Fire & Marine Ins. Co. (Oct. 22, 2001), ND Ohio ED Case No. 5:01CV02122, unreported.

Where an Ohio resident brings a declaratory judgment action and UDM claim against an out of state insurer in state court, there is no diversity jurisdiction allowing the insurer to remove the action to federal court. 28 USC 1332(c)(1) (the "diversity limiting provision" or "diversity stripping statute") provides as follows:

> [I]n any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principle place of business.

Hence, when a corporation is an insurer, citizenship may be predicated upon citizenship of the insured, thus destroying diversity jurisdiction if the insurer and the insured are both citizens of Ohio. The Court noted:

> Much like the "direct action" statutes enacted by the legislatures in Wisconsin and Louisiana and Michigan's no-fault insurance statute, the *Scott-Pontzer* line of cases has resulted in a burgeoning number of cases that would not otherwise have fallen within the diversity jurisdiction of the federal courts. Thus, the same policy reasons that prompted the addition of the diversity restricting provision to § 1332(c) in the first place apply with equal force to *Scott-Pontzer* actions. Furthermore, the unsettled nature of the law surrounding such actions frequently leaves district courts in the difficult position of attempting to guess how the Ohio Supreme Court would rule given a particular set of circumstances. It makes far more sense for state court (sic) to address these unsettled issues because then the Ohio Supreme Court would have an opportunity to correct any errors that might be made.