CLOSING THE DOOR ON *SCOTT-PONTZER,* ET AL.

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The Ohio Supreme Court has greatly expanded the scope of UM/UIM coverage with critical decisions that have caught the insurance industry, the insurance buyer, and especially the business consumer, by surprise.

The first of these decisions was in *Selander v. Erie Insurance Group*,[2] which at the time of its decision, was not fully appreciated for the impact it could, and did, have. The case involved a commercial general liability policy ("CGL"), not an automobile insurance policy. The provision in question was the hired and non-owned automobile coverage. The insured was injured and had sought UM/UIM coverage. The issue was whether the insurer issuing a CGL policy was required to provide an offer of UM/UIM coverage. The insurer argued that the CGL policy was not automobile coverage and, therefore, the requirements of O.R.C. § 3987.18 did not apply. The Court established and held that the label on the policy or the intentions of the insurer, i.e., general liability and other than auto coverage, was not important since an insurance policy is a contract of adhesion. If the policy provided *any*, even a diminimus amount, of auto coverage then the policy was in fact an auto policy.

Once the Court had determined that the CGL policy did provide some auto liability coverage, the insurer had the burden to show compliance.[3] Per *Abate*, the penalty for any insurer who ignores the requirement to offer and provide UM/UIM is severe. *Abate* holds that when an insurer does not offer UM/UIM, the coverage is imputed into the policy. According to *Selander*, the failure to offer UM/UIM coverage with a policy of auto liability reforms the policy to include UM/UIM at the same financial level as the liability coverage. This is pursuant to the requirement of O.R.C. § 3937.18, which states that no auto liability policy is to be delivered unless an offer of equivalent UM/UIM is included.

Selander sat brewing as a potential storm waiting to hit the mainland. The next case that pushed the storm closer to home was *Scott-Pontzer v. Liberty Mutual Fire Insurance Co.*[4] This case involved an off duty employee driving the family automobile. The vehicle was not listed in the schedule of vehicles on his employer's commercial auto policy, nor was the policy's hired and non-owned language intended to cover a personally used vehicle. The employer also carried an umbrella liability policy over the commercial auto coverage. In a novel and creative analysis, the plaintiff sought coverage from and under his employer's policies.

The Supreme Court, in one of many four-three decisions to come down adversely to the insurance industry, held in *Scott-Pontzer* that the language used in the commercial auto policy was ambiguous. The policy only listed the corporate employer as the named insured. The Court said that the policy language of "you" referring back to the named insured, which was the corporation, was confusing. They reasoned that a corporation could not occupy a vehicle and could not suffer an injury under the policy. Therefore, the intent of the policy must be to include its employees and natural persons in the coverage. Accordingly, employees were included within the definitions of "insured" under the employer's auto policy. The Court went further and held that since there were no qualifications on the condition of who constituted an insured for UM/UIM coverages, such as a requirement to be engaged in the business activity of the employer, the coverage was extended to the personal use and activity of the employee.

Once the hurdle was overcome in the underlying auto policy, the Court held that employees were covered by the umbrella policy as well. In this case, the umbrella policy followed the coverages of underlying form. However, the umbrella policy did have an "at work" requirement. The Court dealt with this provision by holding that since there was no UM/UIM coverage in the umbrella at the inception of the contract, the policy conditions and exclusions only applied to the coverages that were bargained for at the issuance of the policy (i.e. liability). Further, the conditions and exclusions did not apply to imputed coverage. Therefore having found coverage in the underlying policy and having determined that the umbrella did cover auto liability, the Court held there should have been UM/UIM coverage offered for the umbrella and, in the absence of the offer, UM/UIM was imputed into the umbrella. The shock waves from *Scott-Pontzer* meant that an employer is held to insure his employees non-stop, 24 hours a day. Following *Scott-Pontzer*, was the decision in *Ezawa v. Yasuda Fire and Marine Insurance Co. of Am.*[5] In *Ezawa*, the Court, without much discussion or analysis, held that based on *Scott-Pontzer*, dependents of employees are also covered by employer policies.

The third case in this troika pulling the coverage out of employers' policies is *Linko v. Indemnity Insurance Co. of North America*.[6] As the impact of *Scott-Pontzer* was being felt by employers, the first reaction of the employer was to respond that even if an employee was an insured, that there was still no coverage because UM/UIM coverages were rejected. In *Linko*, an employee on personal time was injured by an under-insured driver. The employer was a small subsidiary of a larger group of American companies comprising the North American branch of a French corporate organization. The corporate entity at the head of the American subsidiaries purchased the insurance for itself and all of the American subsidiaries. Accordingly, the risk manager, on behalf of all of the American subsidiaries, had declined all UM/UIM coverage in states where such coverage could be rejected, such as Ohio. The Supreme Court held that the rejection was invalid. The reasons given by the Supreme Court were twofold. First, the subsidiary, as a separate corporate entity, did not evidence its own decision to reject the coverage. In other words, the risk manager, who was not an officer or employee of the subsidiary, could not reject the UM/UIM coverage unless the appropriate specific authority was given by the subsidiary to the risk manager. Second, the Court created three criteria against which any rejection must be measured. The Court stated that an insured could not give a knowing waiver and rejection of UM/UIM coverage unless the offer was appropriate. Without a proper offer, there cannot be a proper rejection. The offer, in order to be proper, must be in writing and must contain the following three items: 1) a brief description of the UM/UIM coverage, 2) the listing of premium for the described UM/UIM coverage, and 3) an express statement of policy limitations. All of these items are expected to be in a single document that evidences the offer. These three criteria were heretofore unannounced and practically every form of rejection used by the insurance industry was defective under this test, especially rejections used with commercial auto coverages. The most frequently omitted item was the premium since it most often was provided in a separate document, or shown as a rate per vehicle. In *Linko*, the insurer provided a quote without an offer of UM/UIM which was in response to bid specifications prepared by the corporate risk manager. The risk manager intended to reject Ohio UM/UIM and did not seek any price for that coverage.

The cumulative effect of these three cases expanded the scope of coverage to off-duty employees' activity. The cases also expanded the types of policies that have to respond to a UM/UIM event. Finally, these cases invalidated any rational rejection of UM/UIM coverage.

Add to this analysis the case law regarding the nature of the UM/UIM claim. In *Ohayon* v. *SAFECO Insurance Co. of Illinois*,[7] the Supreme Court summarized a line of cases that finally established that a UM/UIM claim is a claim for benefits under an insurance policy by an insured. Although the event that gives rise to a UM/UIM claim is a tort, the claim for UM/UIM benefits is a first party contractual matter, not a tort claim. The significance of this holding cannot be underestimated. Because of this line of reasoning, UM/UIM claims are subject to the statute of limitations for written contract per O.R.C. Section 2305.06 which is of 15 years, not the shorter four-year statute of limitations for actions in tort. A cottage industry has been created to reopen claims that are in the time period starting with these decisions and going back 15 years. When the Supreme Court interprets a matter under an insurance policy, they are merely determining what the contract has always meant, hence their decisions are retroactive. The Court did not hold that any of these cases were to be limited to the facts of the case, nor were they only to be applied prospectively.

The immediate outrage in the business community produced a coalition that brought reform to the UM/UIM coverage with the passing of S.B. 97, effective October 31, 2001. This reform package became a top priority for the legislation and it was enacted in record time. Unfortunately, legislation is almost never retroactive, while a Supreme Court decision almost always is.

Even with the legislative reform, there is an enormous backlog of cases from prior years that brings exposure to the insurance industry. There has been no one theory to cut off the past liability. It has taken a number of theories and cases to minimize this prior exposure. The following indicate some headway in bringing closure to segments of the retroactive liabilities. Other theories and lines of cases are available but not presented in this article.

The most promising avenue to minimize the retroactive effect of *Scott-Pontzer* is the theory being advanced in a line of cases that require the plaintiff to preserve the right of subrogation and to give timely notice. In many of the demands for *Scott-Pontzer* coverage, the plaintiffs, in early cases within the 15-year period, are very likely to have settled with the tort-feasor. Such settlement also releases the tort-feasor from further liability and an insurer providing UM/UIM coverage cannot exercise any subrogation activity. Along with this right of subrogation is the contractual requirement of prompt notice to the UM/UIM insurer. The plaintiff often breaches that provision. This

principle follows the holding in *Bogan v. Progressive Casualty Ins.*[8] Although parts of *Bogan* have been overturned on other issues, the obligation to preserve subrogation is still effective. The issue is squarely before the Ohio Supreme Court in the case of *Burkhart v.CNA Insurance Co*.[9] and a decision is expected before the end of the year.

In *Burkhart* the employers' policies were a commercial auto policy, general liability policy and an umbrella policy. In addition to the issue of whether the insured has the obligation to protect the insurer's right of subrogation, there are questions whether the injured party is an insured under the policies and whether the UM/UIM coverage has been properly imputed into the policies. This case highlights the subrogation issue for imputed coverage.

In *Ferrando v Auto Owners Mutual Insurance Co*.,[10] the claim for UM/UIM coverage is being made by an employee injured in the course and scope of his job. In this case the employee was covered for UM/UIM by the employer, but he was unaware of the coverage and no claim was made with the employer's insurer. The injured employee settled and released the tort-feasor. More than three years later the employee seeks UM/UIM coverage from his insurer who brings in the employer's insurer for contribution. The previous release bars the UM/UIM insurer's subrogation claim. The employee asserts the tort-feasor was uncollectible at the time of settlement, so the UM/UIM insurer has lost nothing. The employee asserts that the UM/UIM insurer has an obligation to prove actual prejudice as a result of the settlement in order to deny the UM/UIM claim. The Supreme Court has recently heard oral argument and a decision is due before the end of the year.

Next, a recent case dealing with employees of school boards has been decided in the U. S. District Court.[11] In *Nationwide*, the Court held that school boards are specifically required to operate within their statutory limits. Such statutes do not authorize a school board to buy insurance coverage for employees' off-duty activity. This case contradicts Ohio appellate decisions in *Mizen v. Utica National Insurance Group*[12] and *Roberts v. Wausau Business Insurance*.[13]

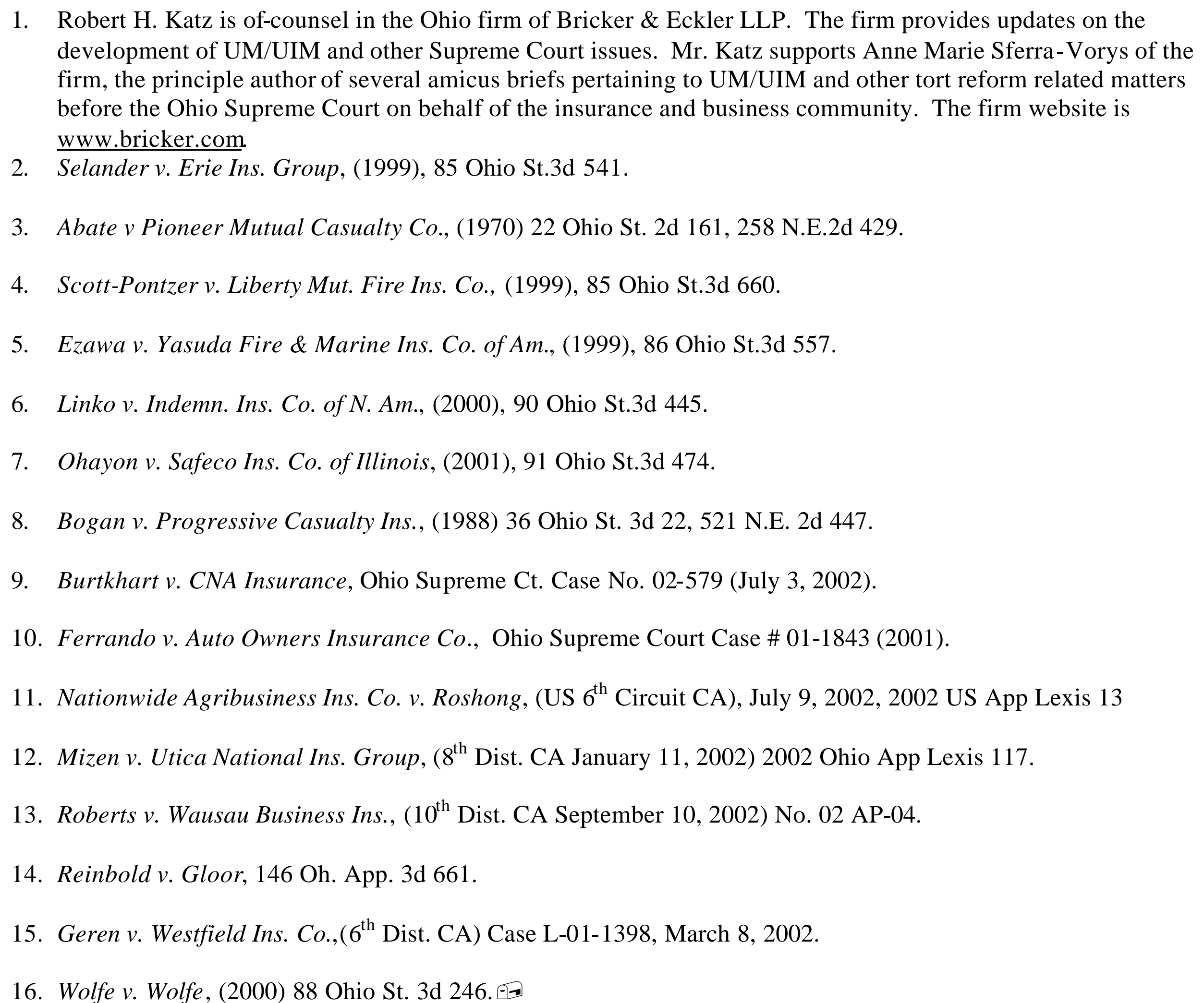
Another segment of the *Scott-Pontzer* exposure being closed deals with the character of the employer. In *Scott-Pontzer*, the Court held that a corporation could not occupy a vehicle and, therefore, when the named insured is a corporation it must include the employees. In the case of *Reinbold v. Gloor*[14] the named insurer was a proprietorship. Since the policy in question actually named an individual, the ambiguity of *Scott-Pontzer* disappeared. In *Geren v. Westfield Insurance Co.*[15] the insured was a partnership. Since a partnership is not a separate entity but is the association of two or more named individuals the ambiguity likewise disappears. *Geren* has been accepted for review by the Supreme Court for decision this year.

What these samples of cases present is that there is no one answer to limit the *Scott-Pontzer* exposure. In addition to the various lines of cases that go to a specific segment of the *Scott-Pontzer* exposure, there has been additional legislation to address other critical developments in Ohio's UM/UIM statutes. Therefore, it is important to determine what law actually applies to the facts of the case.

As an example, the *Linko* decision arose prior to H.B. 261, which amended the UM/UIM statutes to clarify that any insured or applicant could execute a rejection of coverage. So the issue in *Linko*, whether the risk manager could reject UM/UIM coverage as an applicant, may be handled differently than if the case had occurred after the legislation. The Court in dealing with the applicable law has ruled in *Wolfe v. Wolfe*[16] that the law that applies is the version of the statute in effect on the date of the inception or renewal of the policy. Thus there could be amendments to the statute that become effective after the inception of the policy, but before the date of loss, where such amendments do not apply to the loss. In *Wolfe* the Court also looked to Ohio's two-year non-cancellation provision for auto in O.R.C. 3937.31 which established a two-year renewal cycle. Subsequent to this case the UM/UIM statute was amended by S.B.267 effective September 21, 2000, to effectively remove the two-year cycle. With these decisions, and the resulting amendatory legislation, the roll-on effect of the statutory amendments becomes important to watch.

In summary, settlement of UM/UIM cases requires full inquiry into the facts, the timing, and the applicable law. Since not all issues have reached the Supreme Court, there are differences in the circuit courts and even the location of the accident in Ohio makes a difference. Progress is being made to close out blocks of retroactive liability as each issue reaches the Supreme Court.

Endnotes



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2. *Selander v. Erie Ins. Group*, (1999), 85 Ohio St.3d 541.
3. *Abate v Pioneer Mutual Casualty Co.*, (1970) 22 Ohio St. 2d 161, 258 N.E.2d 429.
4. *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.,* (1999), 85 Ohio St.3d 660.
5. *Ezawa v. Yasuda Fire & Marine Ins. Co. of Am.*, (1999), 86 Ohio St.3d 557.
6. *Linko v. Indemn. Ins. Co. of N. Am.*, (2000), 90 Ohio St.3d 445.
7. *Ohayon v. Safeco Ins. Co. of Illinois*, (2001), 91 Ohio St.3d 474.
8. *Bogan v. Progressive Casualty Ins.*, (1988) 36 Ohio St. 3d 22, 521 N.E. 2d 447.
9. *Burtkhart v. CNA Insurance*, Ohio Supreme Ct. Case No. 02-579 (July 3, 2002).
10. *Ferrando v. Auto Owners Insurance Co.*, Ohio Supreme Court Case # 01-1843 (2001).
11. *Nationwide Agribusiness Ins. Co. v. Roshong*, (US 6th Circuit CA), July 9, 2002, 2002 US App Lexis 13
12. *Mizen v. Utica National Ins. Group*, (8th Dist. CA January 11, 2002) 2002 Ohio App Lexis 117.
13. *Roberts v. Wausau Business Ins.*, (10th Dist. CA September 10, 2002) No. 02 AP-04.
14. *Reinbold v. Gloor*, 146 Oh. App. 3d 661.
15. *Geren v. Westfield Ins. Co.*,(6th Dist. CA) Case L-01-1398, March 8, 2002.
16. *Wolfe v. Wolfe*, (2000) 88 Ohio St. 3d 246.