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The Phoenix

The Best Defense is a Good Offense When it Comes to Insurance Coverage Disputes

Which is it; the best offense is a good defense or the best defense is a good offense? For insurance carriers faced with an insurance coverage dispute, the best defense is a good offense. Taking an offensive approach is the best strategy for an insurance carrier who receives a new lawsuit or a claim which may or may not be covered under its policy. Although initially more costly, the insurance carrier's best approach when facing an issue of whether a lawsuit or a claim is covered or excluded under its policy, is to defend the underlying lawsuit under a reservation of rights and then take an offensive approach by filing a declaratory judgment action to determine its duties and obligations under the policy.

By not defending the underlying lawsuit, the insurance carrier loses its right to control the underlying litigation, faces a possible bad faith claim and perhaps may even find itself bound to a judgment by a claimant who sued to recover under the insurance policy.

When the insurance carrier makes the determination to litigate the coverage dispute through a declaratory judgment action, it should and potentially must include a tort claimant as a party to the litigation. The Ohio Supreme Court in *Estate of Heintzelman v. Air Experts, Inc.* (2009), 120 Ohio St. 3d 1524, is now considering whether the tort claimant must be included as a party in a declaratory judgment action filed by the insurance carrier. In *Heintzelman*, the insurance carrier (American Family Insurance Co.) took the proper approach by defending its insured under a reservation of rights and filing a separate declaratory judgment action to determine its coverage obligations. However, the insurance carrier failed to include the tort claimant in its declaratory judgment action. The insured failed to answer the declaratory judgment action, and the trial court granted a default judgment against the insured, finding that the insurance carrier had no duty to defend and indemnify the insured in the underlying lawsuit. A verdict in excess of $2.5 Million was then taken against the insured in the underlying lawsuit.

The tort claimant then, pursuant to O.R.C. Section 3929.06, filed a supplemental complaint against the insurance carrier directly in an attempt to satisfy the judgment. The trial court

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Cleveland Heart Walk

BSMPH's participation in the Cleveland Heart Walk was a huge success. Over 25 BSMPH employees, friends and family all participated in the event showing overwhelming support for this worth while cause.

Supreme Court's Opinion Will Impact the Future of Medical Malpractice Claims in Ohio

This summer, the Ohio Supreme Court issued an Opinion in a legal malpractice case that will have a direct impact on the future of medical malpractice claims in Ohio. In *National Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, Slip Opinion No. 2009-Ohio-3601, the Ohio Supreme Court held that a law firm as an entity does not engage in the practice of law and, therefore, cannot commit legal practice. A law firm, however, may be vicariously liable for the negligence of its attorneys but only when one or more of its individual attorneys have been named as defendants and are found liable.

In reaching its determination, the Ohio Supreme Court relied upon its own precedent in medical malpractice claims that only individuals practice medicine and, therefore, only individuals can commit medical malpractice. The court reasoned that the term malpractice refers to the failure of one rendering services in the practice of a profession to exercise the de-

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The Best Defense is a Good Offense When it Comes to Insurance Coverage Disputes cont.

hearing the supplemental complaint agreed with the insurance company and dismissed the tort claimant's supplemental complaint on the grounds of res judicata and collateral estoppel. The Court of Appeals reversed the trial court's ruling and held that because the tort claimant was not a party to the declaratory judgment action, it was not bound by the court's determination of no coverage or indemnity for the insured.

Thus, until the Ohio Supreme Court decides *Heintzelman*, insurance companies must include any tort claimants as a party to any declaratory judgment actions. Failure to do so may leave the insurance carrier with a ruling on its declaratory judgment action which is not binding on a tort claimant.

In taking an offensive approach by filing a declaratory judgment action and specifically naming any potential tort claimants, the insurer avoids the pitfall of finding itself bound to a judgment by a tort claimant who sues to recover under the insurance policy. Insurance carriers should instruct their defense counsel to join all parties to the declaratory judgment action, including any potential tort claimants.

By Andrew M. Wargo, Esq.

Supreme Court's Opinion Will Impact the Future of Medical Malpractice Claims in Ohio cont.

gree of skill and learning normally applied by members of that profession in similar circumstances. The court reiterated that Ohio common law has traditionally limited malpractice to the professional misconduct of physicians and attorneys.

In *Nat'l Union*, the Ohio Supreme Court also held that a law firm may only be found vicariously liable when one or more of its individual attorneys are liable. Again, the court applied established precedent with regards to the doctrine of respondeat superior and vicarious liability traditionally seen in medical malpractice cases. The court reasoned that the liability for tortious conduct flows through the agent by virtue of the agency relationship to the principle. Where there is no liability assigned to the agent, it logically follows that no liability can be imposed on the principle for the agent's actions. Thus, a law firm can only be liable if one or more of its attorneys is held to be liable. Likewise, a hospital, medical practice or a nursing home can be liable only if one or more of its physicians or nurses is held to be negligent.

The court's ruling has potential consequences in medical malpractice claims presently pending. For instance, medical malpractice lawsuits which were filed solely against a medical entity such as a hospital, practice group or nursing home are susceptible to dismissal under *Nat'l Union* for failure to name individual medical providers as defendants. The inability to establish liability against individual doctors or nurses prevents plaintiffs in such cases from recovering against hospitals and nursing homes. In situations where the statute of limitations has run on a claim, the dismissal may be permanent. Motions to dismiss have been filed in courts all across Ohio since the court's decision which could lead result to varying interpretations of the proper application of the law set forth in *Nat'l Union*.

The biggest impact of *Nat'l Union* may be seen in future malpractice claims filed against nursing homes. Under Ohio statutory law, medical claims include civil actions filed against nursing homes and residential facilities as well as nurses, physical therapists, physician assistants and emergency medical technicians. One reasonable interpretation of *Nat'l Union* is that a nursing home, like a law firm or hospital, is a business entity through which nurses provide treatment and care to residents. The Ohio Supreme Court specifically identified lawyers and physicians in its application of malpractice and subsequent interpretations may limit this ruling as such. Furthermore, the Ohio Revised Code provides for a statutory cause of action against nursing homes under the Nursing Home Bill of Rights which differentiates such claims from their medical negligence brethren.

Nonetheless, it is not farfetched to anticipate the Supreme Court's decision leading to plaintiffs naming nurses and other medical providers individually in these lawsuits. If a nursing home may only be held vicariously liable for the negligence of its nurses, plaintiffs will need to establish the liability of the individual nurses who provided the treatment and care in order to recover damages against the nursing home case.

There are other possible implications arising from this decision. One is an increase in presuit discovery. Since plaintiffs will need to identify individual medical providers to file a viable lawsuit, potential defendants will be required to cooperate in the disclosure of the identities of doctors, nurses or other medical providers who delivered medical care to the injured party. It may no longer be acceptable to object to such inquiries or to direct plaintiffs to the medical records to identify the caregivers on their own.

Finally, *Nat'l Union* may undermine the usefulness of 180-letter which has been traditionally used to extend the statute of limitations by up to 6 months in order to complete a more thorough investigation of the claim before filing suit. This will be especially true when the identities of the treating medical providers are unknown. Since the 180-day letter may only extend the statute of limitations on defendants who are properly served with the letter prior the expiration of the stat-

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Supreme Court's Opinion Will Impact the Future of Medical Malpractice Claims in Ohio cont.

ute of limitations, the 180-day letter will not preserve a claim against defendants who are later identified or named as John Does in the case.

As with higher court decisions, *Nat'l Union* has created many questions that will only be answered as lower courts begin applying the Supreme Court's ruling to current and future cases. While the full impact of *Nat'l Union* is yet to be determined, medical providers should anticipate a significant change in the complexion of cases brought against them.

By Donald J. Richardson, Esq.

A Short History of the Asbestos Bubble

If I were to ask you the question, "What is the highest paying search term on the Internet?" You might be surprised to learn the answer. The highest paying search term is the dollar value a word or phrase that an Internet search engine, such as Google, will charge the customer for each click the customer's advertisement receives that brings that visitor to its website. Everyday common words and phrases have a market value, which is paid by the highest bidder.

The Number One most expensive search term on Google is "mesothelioma" at a cost per click of $69.10. In fact, asbestos lawyers' ads constitute 20 of the 30 most expensive search terms on Google, the world's most used search engine. If you type in the term mesothelioma on Google, you will see that it generated about 7,840,000 hits. At 69 dollars a click, the investment a plaintiff's attorney makes in soliciting clients on the Internet is significant. A mesothelioma case can be worth up to approximately a million dollars in settlement.

Mesothelioma is big business. If you watch TV, you have undoubtedly seen an advertisement soliciting families of mesothelioma "victims." Plaintiff's attorneys also use mass mailings and radio advertisements to find clients. Mesothelioma is one of the rarest forms of cancer in the USA. There are approximately 3,000 cases diagnosed each year in this country. When one contemplates the number of lawyers in this country that is a very small universe of potential clients to be divided. Yet, for such a rare cancer why does the term mesothelioma take it to the top of the bidding war for Internet advertising? It all started in 1977 with *Bates v. State Bar of Arizona,* 433 U.S. 350, wherein the United States Supreme Court ruled that attorney advertising was commercially speech protected by the First Amendment to the U.S. Constitution. In one fell swoop, age-old professional barriers against trial-lawyer solicitation were effectively eviscerated. The ability to solicit clients led to asbestos lawyers using radiological screening ventures that collected mass quantities of claimants for asbestos related disease. By the mid-1980s the mass health screenings sponsored by plaintiff's attorney and labor unions identified hundreds of thousands of plaintiffs nationwide. The courts of America were flooded with asbestos cases. Cleveland, Ohio was one of them.

A miniscule percentage of the mass filings had an asbestos related lung cancer or mesothelioma. The strategy of the plaintiff's attorneys nationwide was to overwhelm a local court with hundreds or thousands of asbestos filings. To clear the clogged dockets, mass settlements in which a plaintiff's attorney would leverage one mesothelioma case in conjunction with hundreds of non-malignancy cases became the "solution" to the mass tort docket. This created an asbestos litigation bubble in the 1990s.

To put these numbers in perspective, nationwide approximately 110,000 new asbestos claims were filed in 2003 alone. This number was the peak of the asbestos litigation in Amer-

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Medicare Reimbursement Rules

BSMPH recently presented The New Medicare Reimbursement Rules at Cleveland Crowne Center. Presenters Donald J. Richardson, Esq. of BSMPH, Kim Robson, Sr. Vice President of LTC Claims and Susan Ferrante, Quality Improvement Project Coordinator of Ohio KePRO addressed issues relating to the new reimbursement rules. If you'd like a copy of the materials related to this event, please visit our News & Resources page at www.bsmph.com.

A Short History of the Asbestos Bubble cont.

ica and brought the nationwide total number of claimants to over 700,000. The Manhattan Institute, a think tank that researches public policy and follows U.S. legislation, reported in 2003 that the cost of this docket to defendants and insurers was predicted to be $250 billion. Only $180 billion of that amount had been reserved by insurers and businesses. Meanwhile, expert analysis of the nationwide docket indicated 80-90% of asbestos claimants had, not only no lung function impairment, but also, no asbestos related illness as recognized by medical science. In the 2000s, federal and state courts and state legislatures addressed the asbestos litigation crisis. See *The Asbestos Litigation Crisis*: *The Tide Appears To Be Turning*, 12 Conn. Ins. L.J. 477 (2006).

The best example of how the asbestos litigation bubble burst is found right here in the Cuyahoga County Court of Common Pleas. In Cuyahoga County, Ohio, there were about 13,000 pending asbestos cases in 1999. It was one of, if not the largest docket, of asbestos cases in the U.S. By October 2003 there were 40,000 cases being managed by two judges. Ohio legislators realized a crisis was at hand. In response, they passed asbestos tort reform (HB 292) on September 2, 2004. The legislation was designed to eliminate all unimpaired (no physical symptoms of disease or disability) plaintiffs' cases, which were screened and diagnosed *en mass* by dubious doctors, and leave behind only those cases involving impaired individuals with mesothelioma and non-smokers with lung cancer. The reform was challenged as unconstitutional by the plaintiffs' bar. However, the Ohio Supreme Court in *Ackison v. Anchor Packing Co.* upheld the tort reform and which held that asymptomatic radiological findings such as pleural abnormalities were compensable injuries. Almost immediately after this decision the asbestos judges in Cuyahoga County administratively dismissed almost 30,000 cases. As a result, the character of asbestos litigation in Ohio changed dramatically. Almost overnight, the Cuyahoga County asbestos docket became essentially a mesothelioma and lung cancer case docket. The Ohio legislation successfully accomplished what the U.S. Congress was unable to do – it diminished the plaintiffs' attorneys massive inventory of viable plaintiffs and has forced them to investigate and prosecute their cases one at time, the old fashioned way. This has reduced the active asbestos docket in Cuyahoga County to a manageable number of cases. It has resulted in our county becoming one of the most attractive asbestos dockets in the country. We have three full time judges dedicated to resolving the cases. They do so in an expedient and reasonable manner. Our success in Ohio is a model to the rest of the country.

By Kevin O. Kadlec, Esq.

News & Resources

Be sure to check out the new News & Resources page at www.bsmph.com for the latest information on firm events and speaking engagements.

Attorneys At Law
BONEZZI SWITZER MURPHY POLITO & HUPP CO. L.P.A.

1300 East 9th Street, Suite 1950
Cleveland, Ohio 44114-1501

Phone: (216) 875-2767
Fax: (216) 875-1570
E-mail: info@bsmph.com

Be sure to visit us on the web at
WWW.BSMPH.COM

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