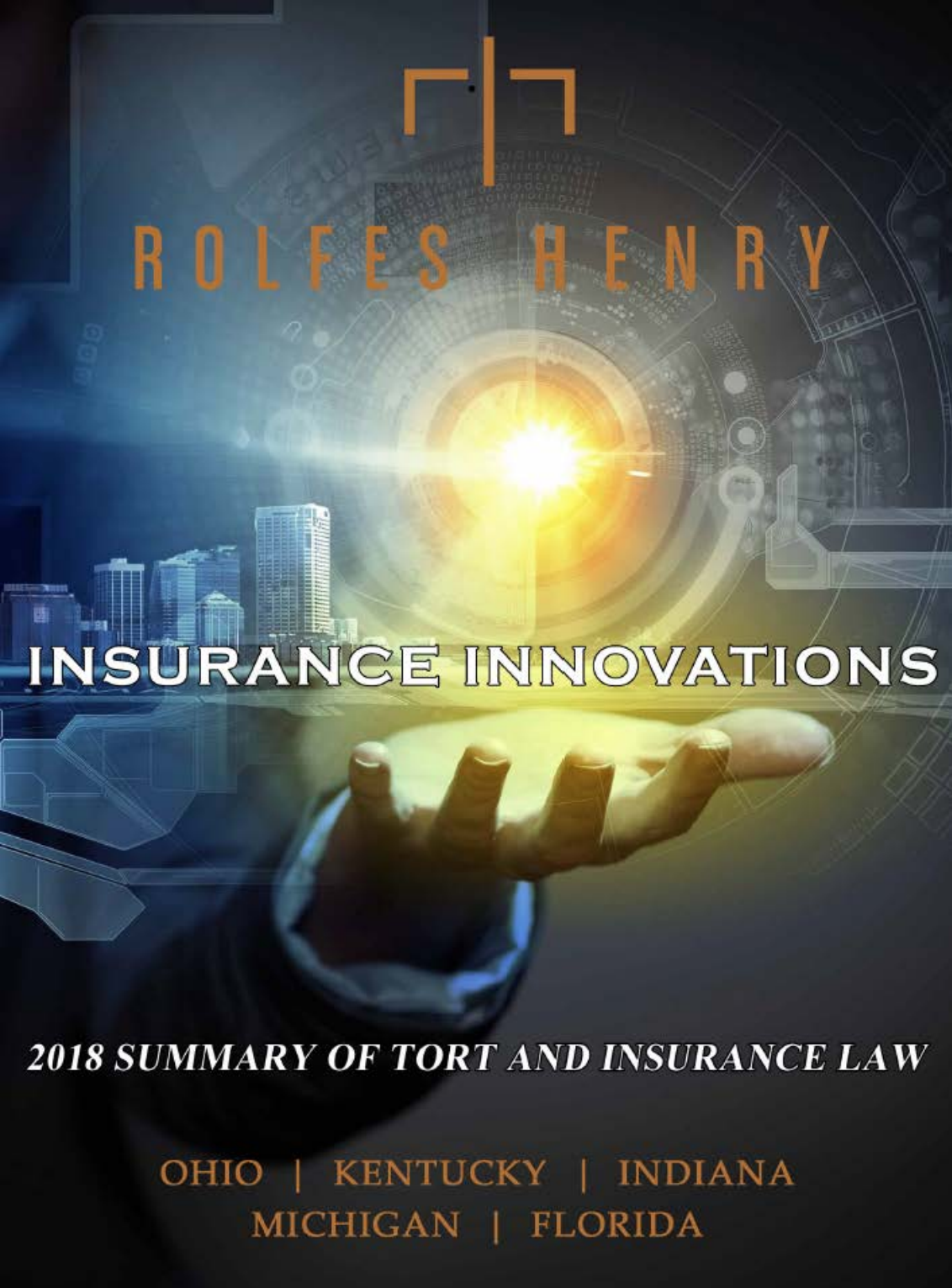

ROLFES HENRY
INSURANCE INNOVATIONS
2018 SUMMARY OF TORT AND INSURANCE LAW
OHIO | KENTUCKY | INDIANA
MICHIGAN | FLORIDA

ROLFES HENRY

"Innovation is the Only Way to Win"

-- Steve Jobs

Dear Insurance Professional:

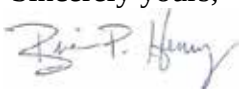
We are constantly affected by innovation. Whether it comes in the form of the newest Smartphone or computer screens on our refrigerators, we are all presented with countless opportunities to expand beyond our "original programming" and innovate ourselves, our lives, and yes, our profession. We accept some of those opportunities and reject others, but as the adage goes, there is no standing still – you're either moving forward or you're moving backwards. The world of innovation allows us to move forward.

For nearly thirty years, Smith, Rolfes & Skavdahl has served the legal community on a local, statewide, and national platform. We have moved from a solo practice in a two-room office to three dozen attorneys strategically placed from Detroit to Ft. Lauderdale. We have literally handled cases and claims from coast to coast, and even internationally, on behalf of our business partners. We have embraced changes in our industry full-force, innovating our procedures and systems to improve the services we provide, and hopefully you all have benefitted from our willingness to grow and innovate with you. And today, as evidenced by the front cover of this Law Summary, our Firm is continuing its efforts to innovate and move forward.

Our Firm is more diverse, more experienced, and more innovative than ever before. We make it our mission to see likely changes in the insurance field before they ever happen, and to partner with you all for those eventual outcomes. We are proactive, responsive partners who act with integrity and cater to our clients' unique needs – delivering elevated expertise, efficient results, and seamless service. We will not forget our origins or what made us what we are today, but now we move forward to a new phase in the "SRS" history book. We are honoring our past, broadening our present, and strengthening our future. We will accomplish this with a new name, a new look, and a renewed commitment to serving our clients to the very best of our abilities, through hard work, commitment to task, and innovation.

Moving forward, Rolfes Henry will continue to be professionals in action. Moving forward, Rolfes Henry will continue to be partners in service. Moving forward, we will continue to innovate . . . together. And we look forward to that journey with all of you.

Sincerely yours,



Brian P. Henry
President

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I. STATUTES OF LIMITATIONS TABLE – STATE BY STATE COMPARISON

Claim Type	Ohio	Kentucky	Indiana	Michigan	Florida
Assault & Battery	1 year R.C. §2305.111	1 year K.R.S. §413.140	2 years I.C. §34-11-2-4 (1)	2 years M.C.L.A. §600.5805 (2)–(4)	4 years Fla. Stat. §95.11(3)(o)
Bodily Injury Due to Negligence	2 years R.C. §2305.10	Auto Acc. – 2 yrs. K.R.S. §304.39-230 BI Claims/other than auto accs.– 1 yr K.R.S. §413.140	2 years I.C. §34-11-2-4 (1)	3 years M.C.L.A. §600.5805(10)	4 years Fla. Stat. §95.11(3)(a)
Personal Property Damage Due to Negligence	2 years R.C. §2305.10	2 years K.R.S. §413.125	2 years I.C. §34-11-2-4 (2)	3 years M.C.L.A. §600.5805(10)	4 years Fla. Stat. §95.11(3)(a)
Wrongful Death	2 years R.C. §2125.02	1 year (from appt.) K.R.S. §413.180	2 years I.C. §34-23-1-1	3 years M.C.L.A. §600.5805(10)	2 years Fla. Stat. §95.11(4)(d)
Libel, Slander, Defamation	1 year R.C. §2305.11	1 year K.R.S. §413.140	2 years I.C. §34-11-2-4	1 year M.C.L.A. §600.5805(9)	2 years Fla. Stat. §95.11(4)(g)
Bad Faith	4 years R.C. §2305.09(D)	5 years K.R.S. §413.120	2 years I.C. §34-11-2-4(2)	N/A	5 years Fla. Stat. §95.11(2)(b) (breach of contract action)
Contract in Writing	8 years R.C. §2305.06	15 years K.R.S. §413.090(2)	10 years I.C. §34-11-2-11	6 years M.C.L.A. §600.5807(8)	5 years Fla. Stat. §95.11(2)(b)
Contract not in Writing	6 years R.C. §2305.07	5 years K.R.S. §413.120(1)	6 years I.C. §34-11-2-7(1)	6 years M.C.L.A. §600.5807(8)	4 years Fla. Stat. §95.11(3)(k)
Fraud	4 years R.C. §2305.01(C) Identity Fraud 5 years R.C. §2305.09(C)	5 years K.R.S. §413.120(12)	6 years I.C. §34-11-2-7(4)	6 years M.C.L.A. §600.5813	4 years Fla. Stat. §95.11(3)(j)

II. THE STATE OF OHIO

A. FREQUENTLY CITED OHIO STATUTES

1. 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. § 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.

Amended by 2009 Ohio SB 106 to change the amount of net settlement from $10,000.00 or less to $25,000.00 or less after payment of fees and expenses. Additional language added includes: "In the settlement, if the ward is a minor, the parent or parents of the minor may waive all claim for damages on account of loss of service of the minor, and that claim may be included in the settlement."

R.C. § 3737.16
Release of, or Request For, Information Relating to Fire Loss by Insurance Company

Civil authorities investigating property fire losses (including the fire marshal, a fire department chief, local law enforcement, or the county prosecutor) may request an insurance company investigating a property fire loss to release any information in its possession concerning the loss.

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 thirty (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. § 4509.51
Automobile Minimum Liability Limits

The statute requires minimum automobile liability coverage limits (per accident) of: (1) $25,000.00 for bodily injury or death of any one person in any accident; (2) $50,000.00 for bodily injury to or death of two or more persons in any one accident; and (3) $25,000.00 for injury to property of others in any one accident.

R.C. § 4509.53(D)
Motor Vehicle Insurance Policy Applications

The written application of insurance is part of a motor vehicle liability policy.

2. 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 claiming to have a cause of action, or a person against whom a cause of action has been filed, may bring an action for discovery. A discovery action allows such party to explore the strengths of the complaint or defense without subjecting the party to the potential penalties associated with frivolous lawsuits.

R.C. §§ 2721.01 *et. seq.*
Declaratory Judgment Actions

This chapter 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.

R.C. § 4123.01(A)(1)(c)
"Employee" Under Construction Contract

The statute sets out specific factors to determine whether a person is an "employee" under a construction contract.

3. 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 per person limit is available for recovery for each person suffering a bodily injury or for each decedent.

4. 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.

5. Liability and Damages Considerations

R.C. § 1533.181
Immunity – Recreational User Claims

The statute provides where a premises owner may be immune from claims by a recreational user of the premises.

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. § 2305.402
Pending Changes to Trespass Liability Statute

Pending 2012 Ohio Senate Bill 202 would specify the responsibility of a possessor of real property to a trespasser and the circumstances in which the possessor may be liable in a tort action for the death or injury of a trespasser. The amendment seeks to clarify that it is the intent of the General Assembly to declare that the American Law Institute's finalized "Restatement Third of Torts: Liability for Physical and Emotional Harm" does not constitute the public policy of the state of Ohio. If passed, Senate Bill 202 would codify the longstanding common law rule that a land possessor owes no duty of care to a trespasser except to refrain from willful, wanton, or reckless conduct that is likely to injure the trespasser. This change would also keep in place Ohio's current exceptions to this rule where a land possessor owes a trespasser a duty of reasonable care.

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 fifty percent 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 fifty percent 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. § 2307.25
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 *Fildelholtz 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. § 2307.32
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. § 2307.711
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 serves as a proportionate basis for reducing damages and liability. This statute took effect in April 2005.

R.C. § 2315.18
Caps on Compensatory Damages

There are no caps on economic damages. There are no caps on non-economic damages for "catastrophic" injuries, which are defined as "permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system, or permanent physical functional injury that permanently prevents the injured person from being able to independently care for and perform life-sustaining activities." With respect to "non-catastrophic" injuries, non-economic damages are capped at the greater of $250,000.00 or three (3) times the amount of economic damages, with an absolute maximum of $350,000.00 per plaintiff or $500,000.00 per occurrence. Thus, if an individual plaintiff incurs more than $83,333.00 in economic loss damages, the cap for non-economic damages increases from $250,000.00 to $350,000.00.

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. § 2315.20
Collateral Benefits

A defendant in a tort action may introduce evidence of certain collateral benefits for the plaintiff, with stated exceptions. One such exception is if the source of collateral benefits has a federal, contractual or statutory right of subrogation.

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 times the amount of damages or ten percent of their net worth.

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. § 2323.44
Rights of Subrogee

Notwithstanding any contractual or statutory provision to the contrary, the rights of a subrogee asserting a subrogation claim against a third party will be diminished in the same manner as the injured party's interests are diminished. Either party may file a suit under Chapter 2721 to resolve any disputes that may arise from the distribution of the recovery in the tort action.

R.C. § 2745.01
Employer Intentional Torts

This statute took effect April 7, 2005. It reflects the latest legislative effort to codify employer intentional 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. § 3109.09 and § 3109.10
Parental Liability

Liability of the parents is limited to $10,000.00 where their child willfully damages property or commits a theft offense (R.C. § 3109.09) and where their child has assaulted someone (R.C. § 3109.10).

R.C. § 3929.06
Insurance Money Applied to Judgment

Once a final judgment is entered in favor of a plaintiff against a person insured against such liability, after thirty (30) days the judgment creditor may file a supplemental complaint directly against the insurer to pay the amount of the unpaid judgment against the insured.

R.C. § 3929.25
Extent of Liability Under Policy (Valued Policy Statute)

The valued policy statute applies to any structure insured against loss by fire or lightning. In case of a total loss the insurer shall pay the amount of the policy; however, if the policy requires actual repair or replacement of the structure, then the amount paid shall be as prescribed by the policy.

R.C. § 3929.86
Fire Loss Claim – Payment of Property Taxes

Where fire damage to a structure exceeds $5,000.00, the statute sets forth procedures for payment of delinquent property taxes from the insurance proceeds.

R.C. § 3937.182
No Insurance for Punitive Damages

Motor vehicle policies cannot insure against punitive damages.

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. § 4319.18
Liquor Liability Claims

This statute limits the scope of claims against a tavern due to actions of an intoxicated person resulting in injury to a third party.

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.

6. 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. § 3904.01(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; and/or

(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. § 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. § 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. § 3929.87
Time for Determination in Arson Investigation

The Fire Marshall has ninety (90) days after a fire loss in excess of $5,000.00 to determine whether the loss was caused by arson.

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. § 3999.31

Immunity for Providing or Receiving Information Relating to Suspected Fraudulent Insurance Acts

No person is subject to liability for libel or slander by furnishing information to the Superintendent of Insurance relating to suspected fraudulent insurance acts. This immunity extends to any such information provided to any law enforcement official and any other person involved in the detection or prevention of fraudulent insurance acts.

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 ninety (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 Ohio Department of Insurance whenever it suspects insurance fraud (as established in the Theft Fraud Law under R.C. § 3917.47) involving a claim of $1,000.00 or more.

B. OHIO STATUTES OF LIMITATIONS

ONE YEAR

Claim Type/Section	**Statute Period**
Assault and Battery R.C. § 2305.111	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. § 2305.113	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.
Libel, Slander, Defamation R.C. § 2305.11	One year from the publication of the defamatory act.

TWO YEARS

Claim Type/Section	**Statute Period**
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.

THREE YEARS

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.

FOUR YEARS

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 from the date the damage occurred.
Fraud R.C. § 2305.09	Four years from the alleged act of fraud.
Breach of Covenant to Provide Adequate Insurance R.C. § 2305.09	Four years from the date inadequate insurance is discovered.
Tort of Bad Faith R.C. § 2305.09	Four years from the alleged act of bad faith.
Torts, Rights not Otherwise Enumerated R.C. § 2305.09	Four years after the cause thereof accrued.

Claim Type/Section	Statute Period
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. § 2305.06	Amended by 2012 Ohio Senate Bill 224 to reduce the statute of limitations period for actions based upon a breach of a written contract to eight (8) years. The new law shortens the period within which a lawsuit may be brought for breach of contract actions accruing both before and after the effective date of September 28, 2012. For claims that accrued prior to September 28, 2012, the limitations period is the earlier of: eight years from September 28, 2012; or the expiration of the limitations period in effect prior to the enacted of 2012 SB 224, which is 15 years from the date of the breach.
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.

C. SIGNIFICANT OHIO COURT DECISIONS

1. Supreme Court Decisions

a. Governmental Immunity Decisions

Agrabrite v. Neer et al., Slip Opinion No. 2016-Ohio-8374
https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2016/2016-Ohio-8374.pdf

Where a Third Person Is Accidentally Injured As a Result of Police Action, Ohio Rev. Code 2744.03(A)(6)(b) Applies

Plaintiff was injured in a motor vehicle accident allegedly caused by a high-speed police chase while pursuing a suspect. The suspect's vehicle struck Plaintiff's vehicle. Plaintiff was injured, and sued the police for negligence. The trial court granted summary judgment in favor of the officers, concluding, as a matter of law: (1) A police officer who pursues a suspect is not the proximate cause of injuries to a third party unless the officer's conduct is extreme and outrageous; and (2) Under this standard, no reasonable juror could conclude that the officers' actions were the proximate cause of the accident. The Court of Appeals affirmed. The Supreme Court also affirmed, albeit on different grounds, holding: (1) The no-proximate-cause standard applied by the court of appeals in this case is contrary to Ohio Rev. Code 2744.03(A)(6)(b), which provides that law enforcement officers are immune from liability unless they act maliciously, in bad faith, or in a wanton or reckless manner; and (2) applying the correct standard set forth in section 2744.03(A)(6)(b), the officers could not be held liable for damages as a result of their actions.

b. Other Significant Decisions

Gyugo v. Franklin Cty. Bd. Of Dev. Disabilities, Slip Opinion No. 2017-Ohio-6953
(July 27, 2017)
http://www.supremecourt.ohio.gov/rod/docs/pdf/0/2017/2017-Ohio-6953.pdf

Employee Not Excused From Disclosing Sealed Conviction on Application When Question Requires Disclosure of Sealed Convictions

Plaintiff, defendant's employee, was terminated from his position after he failed to disclose his sealed criminal conviction on his application for employment, as well as on applications to renew his registration as an adult service worker. At issue in this case is whether the registration applications that explicitly required disclosure of sealed convictions were in violation of R.C. 2953.33(B). The Supreme Court determined plaintiff was not excused from "honestly" answering those questions because the questions bore a direct and substantial relationship to plaintiff's position and to his qualifications for registration. Plaintiff's termination was upheld because his denial of a sealed criminal conviction on four registration applications constituted dishonesty.

Johnson v. Montgomery, Slip Opinion No. 2017-Ohio-7445 (September 6, 2017)
http://www.supremecourt.ohio.gov/rod/docs/pdf/0/2017/2017-Ohio-7445.pdf

Under Dram Shop Act, "Intoxicated Person" Includes Workers, Not Just Permit Holder's Patrons

Plaintiff was injured in an automobile accident while riding as a passenger. The other vehicle was driven by defendant d, a strip club dancer. Dancer was intoxicated due to drinking during her shift. Under Ohio's Dram Shop Act, someone injured by an "intoxicated person" may sue a liquor-permit holder for an off-premises injury only when the permit holder or its employee served the person knowing them to be intoxicated. At issue in this case is whether dancer qualifies as an "intoxicated person" under the statute or whether the term only encompassed the permit holder's patrons. The Supreme Court held that an "intoxicated person," under the Dram Shop Act, includes *any* person, not just a permit holder's patrons. Therefore, the Dram Shop Act applies to a permit holder who sold intoxicating beverages to a worker whose intoxication causes an injury.

2. Appellate Court Decisions

a. Insurance Coverage Decisions

Harris v. Transamerica Advisors Life Ins. Co., 2017-Ohio-341(6th Dist.)
http://www.supremecourt.ohio.gov/rod/docs/pdf/6/2017/2017-Ohio-341.pdf

There is No Breach of Contract or Bad Faith When an Insurer Calculates a Death Benefit According to the Last Quarterly Statement and the Policy Language Makes this Procedure Clear

Plaintiff children filed suit against their deceased mother's life insurance company for breach of contract and bad faith. Insurer paid the death benefit equally to plaintiffs by calculating the death benefit as listed on the last quarterly statement. Plaintiffs argue the insurer should have paid a substantially higher premium based on the percentage calculation of the benefit at the time of death, rather than from the last quarterly statement. The language in the policy unambiguously stated the death benefit would be recalculated each quarter, and may change daily. Therefore, the trial court granted summary judgment. The court of appeals affirmed, finding no breach of contract or insurer bad faith when the insurer follows the unambiguous language to calculate a death benefit.

Canfield Motor Sports, Inc. v. Motorist Mut. Ins. Co., 2017-Ohio-735 (7th Dist.)
http://www.supremecourt.ohio.gov/rod/docs/pdf/7/2017/2017-Ohio-735.pdf

Circumstantial Evidence Was Sufficient to Entitle Insured Merchant to Coverage for Loss Due to Trick, Scheme, or False Pretense

Motorcycle merchant's commercial general liability policy contained a "false pretense clause" which provided coverage where a person caused the merchant to voluntarily part with a motorcycle by trick, scheme, or under false pretenses. Merchant contracted with an auction house to sell motorcycles at a public auction, and the bikes were sold. However, the auction house did not remit payment to the merchant. Rather, the auction house filed bankruptcy protection, and the merchant sought reimbursement for the sold bikes under the policy. Merchant filed a declaratory judgment action, and prevailed. On appeal, the court determined that generally

a trick or scheme must exist at the time of the transfer of the bikes. However, the court also concluded that, in this case, the chain of events that took place prior to the bankruptcy was sufficient to infer fraudulent intent, thereby triggering coverage.

b. UM/UIM Decisions

Koepke v. Metro. Property & Cas. Ins. Co., 2017-Ohio-4084 (10th Dist.)
http://www.supremecourt.ohio.gov/rod/docs/pdf/10/2017/2017-Ohio-4084.pdf

Anonymous Hit-and-Run Driver may be Liable for Negligence if the Trier of Fact Determines Driver Was Proceeding Unlawfully At the Time of Accident

Insured pedestrian was injured by a hit-and-run driver while trying to cross the road. Insured filed suit against her insurer for breach of contract based on her belief that her policy provided uninsured motorist coverage. The policy provided coverage for bodily injury caused by uninsured motorists, but only if insured was legally entitled to collect those damages from the uninsured motorist. Because plaintiff could not prove the hit-and-run driver was negligent, summary judgment was granted in favor of the insurer. The court of appeals reversed and remanded to the trial court, holding a question of fact existed regarding whether the hit-and-run driver violated R.C. 4511.33(A) (requiring a driver to drive entirely within a single lane of traffic), and concluded that if the hit-and-run driver was proceeding unlawfully when he hit plaintiff, then the driver may be liable for negligence.

Sherer v. Progressive, 2017-Ohio-7278 (6th Dist.)
http://www.supremecourt.ohio.gov/rod/docs/pdf/6/2017/2017-Ohio-7278.pdf

Insured Bicyclist Attempting to Cross the Road Is Not Entitled to Uninsured Motorist Coverage Under Policy in Absence of Evidence Establishing a Duty Owed By a Hit-And-Run Motorcyclist to the Insured

Bicyclist was injured by a hit-and-run motorcyclist while attempting to cross a heavily traveled intersection. Bicyclist brought an action against his insurer based on a denial of coverage. The trial court granted summary judgment in favor of the insurer, holding that although the motorcyclist was speeding, the collision would have nonetheless occurred because of the bicyclist bolting into oncoming traffic while the motorcycle was two car lengths away from the intersection. The court of appeals upheld the decision because there was no record of evidence presented in which anyone could be deemed to have breached a duty to the bicyclist such that proximate cause and liability could potentially be attributed.

Collins v. Auto-Owners Ins. Co., 2017-Ohio-880 (12th Dist.)
http://www.supremecourt.ohio.gov/rod/docs/pdf/12/2017/2017-Ohio-880.pdf

Son of Decedent is not "Relative" Under Policy and, Consequently, Not Entitled to UIM Benefits

Plaintiff was injured in an automobile accident in which he was not at fault. Plaintiff settled his claim with tortfeasor's insurer, but plaintiff's damages exceeded the tortfeasor's policy limits. Plaintiff then filed a declaratory judgment action seeking a declaration the policy provided UIM

coverage. The trial court concluded plaintiff was a "relative" under the policy, and concluded plaintiff was entitled to UIM benefits. The appellate court disagreed, and concluded the plaintiff was not entitled to UIM benefits, because plaintiff did not reside with his father at the time of the accident, because his father had passed away two years earlier. Thus, plaintiff was not an "insured" for UIM purposes under the policy.

c. Employment Decisions

Dunn v. GOJO Industries, 2017-Ohio-7230 (9th Dist.)
http://www.supremecourt.ohio.gov/rod/docs/pdf/9/2017/2017-Ohio-7230.pdf

Employer Did Not Discriminate against Employee Discharged for Sleeping on The Job

Plaintiff was hired for her position when she was 56 years old in 2008. In 2015, several co-workers observed plaintiff sleeping at her desk. Co-workers took pictures and a video of plaintiff sleeping. Plaintiff was observed snoring in the video. Plaintiff alleged that she was resting her eyes to cope with a migraine. Co-workers reported this incident to plaintiff's supervisor. Supervisor reported the incident to HR, and plaintiff's employment was terminated. Plaintiff's former officemate, who was in her late twenties, was assigned plaintiff's previous duties. Plaintiff sued employer, alleging disability and age discrimination in violation of R.C. 4112.02. At trial, defendant was awarded summary judgment. The court of appeals held that plaintiff failed to show that employer's reason for discharge, her sleeping on the job, was pretext for disability discrimination; employer did not have a duty to accommodate employee's alleged disability; and employee failed to show that employer's reason for discharge was pretext for age discrimination.

d. Premises Liability Decisions

Vaughn v. Firehouse Grill, L.L.C., 2017-Ohio-6967 (1st Dist.)
http://www.supremecourt.ohio.gov/rod/docs/pdf/1/2017/2017-Ohio-6967.pdf

Testimony That the Color of a Ramp and the Abutting Parking Line Hid the Change in Elevation Between Ramp and Parking Lot Does Not By Itself Create A Genuine Issue of Material Fact to Preclude Summary Judgment

Customer filed a negligence claim against restaurant when she tripped on a handicap ramp while exiting restaurant. Customer had traversed the ramp three times prior to falling. She sued restaurant as property owner, and the company which painted the ramp. The trial court granted summary judgment in favor of the restaurant based on the "known peril" doctrine and the "open and obvious" doctrine. Trial court granted summary judgment in favor of the painters because they had subcontracted the work out, and did not direct or supervise the work. On appeal, the court affirmed summary judgment in favor of both restaurant and painting company, based upon the trial court's reasoning.

Kronjak v. New Plaza Mg. L.L.C., 2017-Ohio-1184 (9th Dist.)
http://www.supremecourt.ohio.gov/rod/docs/pdf/9/2017/2017-Ohio-1184.pdf

Hole Underneath Plaintiff's Own Vehicle was Open and Obvious Hazzard Because of Plaintiff's Observation that Other Areas of Parking Lot Also Needed Repair

After leaving a restaurant, plaintiff stepped into a hole that was partly under her own car in plaza parking lot causing injury. The trial court awarded summary judgment to defendant concluding that the hole was an open and obvious danger, obviating defendant's duty to warn invitees of latent or hidden hazardous conditions. The court of appeals affirmed, noting plaintiff's husband testified that the parking lot needed repair before entering the restaurant. The fact that hole was located partly under plaintiff's car did not constitute an attendant circumstance sufficient to impose liability, because the vehicle was under their own control. An attendant circumstance must be created by the property owner, and must be beyond the control of the injured party.

Burke v. Giant Eagle, Inc., 2017-Ohio-4305 (8th Dist.)
http://www.supremecourt.ohio.gov/rod/docs/pdf/8/2017/2017-Ohio-4305.pdf

Grocery Store Entitled to Summary Judgment Where Plaintiff Failed to Present Evidence The Store Had Constructive Notice of Liquid on Floor

Plaintiff entered grocery store to obtain a flu shot. While walking past the customer service desk, she slipped on a brown substance on the floor and fell. Plaintiff brought an action in negligence against defendant grocery store. Following discovery, defendant moved for summary judgment, which was granted. The court of appeals upheld the decision, holding that plaintiff did not present any evidence that grocery store had constructive notice of the liquid. Plaintiff slipped and fell moments after entering the store, she could provide no evidence for the duration of time the liquid remained on the floor, and no security footage existed.

Reeves v. St. Leonard, 2017-Ohio-7433, (2nd Dist.)
http://www.supremecourt.ohio.gov/rod/docs/pdf/2/2017/2017-Ohio-7433.pdf

The Presence of Wet Floor Signs Is Relevant Regarding the Issue of Whether Business Complied with Duty of Care

Plaintiff was injured after slipped and fell on a recently mopped floor inside fitness center. Plaintiff brought a personal injury action against defendant fitness center. Defendant filed a motion for summary judgment, which was granted on the basis the wet floor was an open and obvious hazard. On appeal, the court determined that the wetness of the floor was not readily discernible. Consequently, the open and obvious doctrine did not apply. However, the court found that the presence of wet floor signs located five to ten feet from the accident site was sufficient to satisfy the duty to warn business invitees of latent defects. Plaintiff also argued that he was distracted by an "attendant circumstance," but in the absence of an open and obvious hazard, the attendant circumstances doctrine is inapplicable.

Parker v. Red Roof Inn, 2017-Ohio-7595 (9th Dist.)
http://www.supremecourt.ohio.gov/rod/docs/pdf/9/2017/2017-Ohio-7595.pdf

Photos of Embankment Where Plaintiff Fell are Insufficient to Establish the Hazard was Open and Obvious

Plaintiff checked into a hotel, proceeded to back his truck into parking space abutting a steep embankment, and entered his hotel room. Plaintiff then left his room to check the tools in the back of his truck. While walking to the back of the vehicle, he felt the ground slip from under him, and fell down an embankment into a separate parking lot, several feet below. Plaintiff filed his complaint for personal injuries under principles of Ohio premises liability law. The trial court granted the hotel's motion for summary judgment on the basis the embankment was "open and obvious." Plaintiff appealed, and the court reversed, holding the trial court's decision was not supported by the evidence. On remand, the hotel filed the same motion supported, this time, by photographs of the embankment. The trial court, again, granted summary judgment in favor of defendant. On appeal, the court determined that the photos were not dispositive of the issue regarding whether the steepness of the embankment was "open and obvious." The case was remanded for trial.

May v. Kroger Co., 2017-Ohio-7696 (5th Dist.)
http://www.supremecourt.ohio.gov/rod/docs/pdf/5/2017/2017-Ohio-7696.pdf

Evidence of Stained Ceiling Tiles in Other Areas of Store is Not Evidence Water Puddles on the Floor Were Caused by a Leaking Ceiling.

Plaintiff was pushing her cart toward the grocery store deli when she slipped on a puddle. Plaintiff noticed that the ceiling of grocery store had a leak that caused the puddle, with drips falling every three to five seconds. The manager of the grocery store was not aware of the puddle prior to customer's fall. Plaintiff noticed stained ceiling tiles in other areas of the store. The trial court granted defendant's motion for summary judgment. The court of appeals held that plaintiff failed to present any evidence that defendant's officers or employees placed the water on the floor or that any officer or employee had actual knowledge of the water on the floor. Evidence of stained tiles and/or repaired tiles located in other areas of the store, not where plaintiff fell, is not direct evidence of a leaking roof.

e. Governmental Immunity Decisions

Caudill v. Columbus, 2017-Ohio-7617 (10th Dist.)
http://www.supremecourt.ohio.gov/rod/docs/pdf/10/2017/2017-Ohio-7617.pdf

In Claim for Excessive Force for Police Shooting Death of Plaintiff's Wife, Officer is Entitled To Immunity Where Conduct Does Not Rise to Recklessness

A Columbus police officer shot and killed plaintiff's wife after responding to a 911 call in which it was reported that she was cutting herself, in possession of a gun, and suicidal. The trial court granted officer's motion for summary judgment on the basis that reasonable minds could only conclude that his conduct did not rise to the level of recklessness, and was therefore entitled to immunity. Plaintiff appealed, arguing that there was a genuine issue of material fact in dispute as to whether the officer acted recklessly and wantonly. The appellate court held that defendant was

entitled to immunity because when the officer was responding to the call he knew the plaintiff's wife was suicidal and had access to a gun. The officer's actions were only negligent at best, considering the wife was pointing a gun at the officer prior to the shooting.

O.G. v. Middleburg Heights, 2017-Ohio-7604 (8th Dist.)
http://www.supremecourt.ohio.gov/rod/docs/pdf/8/2017/2017-Ohio-7604.pdf

City Entitled to R.C. 2744 Immunity While Operation of Gymnasium Where Plaintiff Did Not Demonstrate the Injury Was Caused by Physical Defects On or Within Those Grounds or Buildings

Minor was injured when he reached out to touch a gym divider curtain machine as it raised the curtain. The minor became entangled in the machine, and was not dislodged until a gym attendant lowered the screen. Minor sustained permanent damage to his arm. Minor's parents brought an action against the city for negligence and loss of consortium. The trial court granted summary judgment to defendants, holding they were entitled to political subdivision immunity. The appellate court held that although a political subdivision can be held liable for injury caused by the negligence of its employees, there must be a physical defect that caused the injury. Based on maintenance and repair records for the machine, there was no evidence that the gym divider constituted or contained a physical defect. The judgment of the trial court was affirmed.

Westport Ins. Corp. v. Stark Cty. Sanit. Eng. Dept., 2007-Ohio-7573 (5th Dist.)
http://www.supremecourt.ohio.gov/rod/docs/pdf/5/2017/2017-Ohio-7573.pdf

Political Subdivision is Entitled to Immunity When Backed Up Sewer System Flooded Apartment Building

Flooding occurred in an apartment building following 2.49 inches of rain in a short period of time. Insurer compensated the building owners for their property damages. As subrogee, insurer filed a complaint against defendant county sanitary sewer department for negligent maintenance of its sanitary sewer system. Defendant moved for summary judgment, claiming as a political subdivision, it was entitled to immunity under R.C. Chapter 2744. Defendant argued the sewer backup was caused by a torrential downpour and was not a maintenance issue. The court denied summary judgment, finding a genuine issue of material fact as to whether the sewer system was properly maintained. The court of appeals determined that the trial court erred based upon the weather reports, upkeep reports, and inspection records that were attached to the motion that showed no issue with maintenance. Once defendant met its burden, plaintiff presented an expert's report. The expert's conclusions were based on speculation, according to the appellate court, and held the trial court erred by overruling defendant's motion for summary judgment.

David v. Matter, 2017-Ohio-7351 (6th Dist.)
http://www.supremecourt.ohio.gov/rod/docs/pdf/6/2017/2017-Ohio-7351.pdf

Allegations of Recklessness In Complaint Was Sufficient to Support Negligent Infliction of Emotional Distress Claim

Administrator of decedent's estate and decedent's wife brought a wrongful death action against two city police officers who shot and killed decedent while responding to a call regarding a man with a gun. Decedent's wife also brought a claim for negligent infliction of emotional distress

regarding alleged reckless conduct of the officers. The lower court denied officers' motion for partial judgment on the pleadings regarding the claim for negligent infliction of emotional distress. On appeal, the court held that wife sufficiently alleged throughout her complaint that officers' conduct was reckless. Therefore, her claim fell within exception to statutory immunity, and the trial court's decision was affirmed.

f. Other Significant Decisions

Hoeflinger v. AM Mart, L.L.C., 2017-Ohio-7530 (6th Dist.)
http://www.supremecourt.ohio.gov/rod/docs/pdf/6/2017/2017-Ohio-7530.pdf

Liquor Store Owner Had No Liability Under Dram Shop Act, and Social Host Owed No Duty To Protect Motorist from Motorist's Own Negligence

Parents brought an action against liquor store and party host on behalf of their deceased son. Deceased was killed in a single car accident, after consuming alcohol at a party. Deceased was under the drinking age, but was legally an adult. At trial, the court granted defendants' motion for judgment on the pleadings because deceased was an adult whose injury was self-inflicted. Therefore, the complaint did not state a cause of action under the Dram Shop Act against defendant liquor store. On appeal, the court reasoned that because deceased was legally an adult, and defendant liquor store did not sell the consumed liquor to deceased, the Dram Shop Act was inapplicable. Regarding the social hosts, the court determined that no cause of action exists against social hosts who provide intoxicating beverages to an underage adult who suffered a self-inflicted injury or death due to intoxication. The judgment was therefore affirmed.

3. Federal Court Decision

Barbara Jackson v. Professional Radiology, No. 16-4171 (April 27, 2017)
http://www.opn.ca6.uscourts.gov/opinions.pdf/17a0160p-06.pdf

Collection of Medical Bills Directly From Insured Was Improper

Following an automobile accident, plaintiff was taken to the hospital. Plaintiff informed hospital that she had insurance. While at hospital, plaintiff received treatment from defendant health care provider. Defendant billing service did not submit treatment charges to plaintiff's insurer. Instead, defendant sent a letter to plaintiff seeking payment of the balance. When plaintiff did not make a payment, her account was transferred to defendant debt collector. The collector sent a letter to plaintiff requesting payment. Plaintiff advised the collector that she was represented by counsel. Plaintiff's attorney eventually negotiated a payment settlement, and obtained a release for the defendant health care providers' bills for services. However, plaintiff was again contacted for an outstanding balance. Plaintiff paid the balance and then brought a class action against all three defendants for violation of ORC 1751.60(A). At trial, defendant debt collector moved for judgment on the pleadings, and the other two defendants moved to dismiss for failure to state a claim. Both motions were granted. On appeal, the court held that debt collector was not subject to the Ohio statutory provision, and the decision was affirmed. However, the court determined that defendants healthcare provider and billing service sought payment directly from plaintiff. Therefore, both defendants were in violation of the statute, and the motion to dismiss for failure to state a claim should not have been granted.

D. SIGNIFICANT CASES PENDING BEFORE THE OHIO SUPREME COURT

Pelletier v. City of Campbell et al., 2016-Ohio-8097

Is a City Liable for An Accident When Foliage Impairs Ability to See a Stop Sign?

Plaintiff was involved in an automobile accident when she ran a stop sign and collided with another driver. Plaintiff claimed she did not see the stop sign because her view as blocked by foliage. Supreme Court will decide whether government immunity under R.C. 2744.02(B)(3) is applicable. Specifically, the court will address whether there has been a negligent failure to keep a public road "in repair," and possibly provide an operative meaning for what "in repair" means.

National Collegiate Athletic Association, et al. v. Steven Schmitz, et al., 2016-Ohio-8041

Can an Individual Experience an Injury, and Wait 40 Years to Ascertain the Full Severity of Injury Before Bringing Suit?

Decedent was a former college football player in the mid-1970s. Plaintiffs, deceased's wife and estate, allege that football program, where deceased played, incentivized deceased to make head injuries on himself and others—through helmet to helmet hits – as well as ignore concussion symptoms—by continuing to play and practice after experiencing symptoms of concussions. Plaintiffs' allege that, over time, deceased developed memory loss, cognitive decline, Alzheimer's, traumatic encephalopathy, and dementia, all caused by repetitive concussive blows, and sub-concussive blows to the head while playing football. Despite awareness of concussive effects at the time of injury, and worsening condition over time, Plaintiffs allege decedent was not required to bring his claim at any point prior to 2012. Supreme Court will decide whether the discovery rule permits the tolling of statues of limitations until plaintiffs learn the full severity of their injuries.

These cases were pending at the time this summary was printed. To confirm whether the Supreme Court has issued a decision in any of these cases, we invite you to visit our website at http://www.smithrolfes.com.

III. THE COMMONWEALTH OF KENTUCKY

A. FREQUENTLY CITED KENTUCKY STATUTES

1. Automobile Insurance

K.R.S. § 304.9-503
Types of Insurance That Rental Vehicle Agent May Handle at Company Office - Coverage is Primary Over Other Coverage

A rental vehicle agent may sell, solicit, or negotiate insurance at the rental vehicle company office for insurance that covers the risk of travel, including accident and health insurance, liability insurance, personal property insurance, roadside assistance, emergency sickness protection programs, and any other insurance incidental to the rental of a motor vehicle and approved by the executive director. The rental vehicle insurance will be the primary coverage over any other coverage which may be available to the renter or authorized driver covering the loss.

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 § 304.39-010 - K.R.S. § 304.39-220
Personal Injury Protection / No-Fault Coverage

Unless specifically waived by the purchaser of automobile insurance, every purchaser in Kentucky is entitled to basic reparation payments to be paid without proof of fault for automobile accident injuries. The maximum amount of benefits to be paid out under the coverage is $10,000.00 per accident. The amount will be allocated to cover economic losses that are attributable to: medical expenses, work loss, replacement service loss, survivor's economic loss, and survivor's replacement service loss.

Once the limits of the no-fault coverage have been met, an injured party may pursue a third-party claim against the tortfeasor. The threshold requirements in order to pursue such a claim are that the damages either exceed $1,000.00, or that the injury sustained is a permanent disfigurement, a fracture to the bone, a compound, comminuted, displaced or compressed fracture, loss of a body member, permanent loss of bodily function, or death.

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 uninsured 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 thirty (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 credits, reduces or affects the total amount of underinsured motorist coverage available to the injured party.

2. Negligence, Other Torts and Contribution

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. § 186.590
Minor's Negligence Imputed to Person Signing Application or Allowing Him to Drive

Any negligence of a minor under the age of eighteen (18), who has been licensed upon an application as provided by K.R.S. 186.470, will be imputed to the person who signs the application and they will be held jointly and severally liable for any damages caused by the minor's negligence. Motor vehicle owners who cause or knowingly permit a minor under age eighteen (18) to drive the vehicle on the highway, or who furnish a vehicle to the minor, will be jointly and severally liable for the damage caused by the minor.

K.R.S. § 405.025
Parent or Guardian Liable for Willful Damage to Property Caused by Minor

The parent or guardian of any minor, in his care and custody, against whom judgment has been rendered for the willful marking upon, defacing or damaging of any property, shall be liable for the payment of that judgment up to an amount not to exceed $2,500.00 and not to exceed $10,000.00 in a cumulative amount.

K.R.S. § 411.182
Comparative Negligence

Under an action brought for negligence, Kentucky apportions liability for a sustained injury in relation to each party's degree of fault. As between the parties, the jury is required determine how much at fault each party was, and then apportion damages accordingly (i.e. pure

comparative negligence). Comparative negligence will not bar an entire recovery by the plaintiff, but will reduce the total amount of the plaintiff's award in proportion to their degree of fault.

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:

(1) The likelihood at the relevant time that serious harm would arise from the defendant's misconduct;

(2) The degree of the defendant's awareness of that likelihood;

(3) The profitability of the misconduct to the defendant;

(4) The duration of the misconduct and any concealment of it by the defendant; and

(5) Actions by the defendant to remedy the misconduct once it became known to the defendant.

K.R.S. § 411.190
Obligations of Owner to Persons Using Land for Recreation

An owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on the premises to persons entering for such purposes.

Nothing in this section limits in any way any liability which otherwise exists for willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity.

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 (5) years after the date of sale to the first consumer or more than eight (8) 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. § 411.310
Presumptions in Product Liability Actions

(1) In any product liability action, it shall be presumed, until rebutted by a preponderance of the evidence to the contrary, that the subject product was not defective if the injury, death or property damage occurred either more than five

(5) years after the date of sale to the first consumer or more than eight (8) years after the date of manufacture.

(2) State of the Art Defense.

K.R.S. § 413.241
Limitiation on liability of licensed sellers or servers of intoxicating beverages -- Liability of intoxicated person

(1) The General Assembly finds and declares that the consumption of intoxicating beverages, rather than the serving, furnishing, or sale of such beverages, is the proximate cause of any injury, including death and property damage, inflicted by an intoxicated person upon himself or another person.

(2) Any other law to the contrary notwithstanding, no person holding a permit under KRS Chapters 241 to 244, nor any agent, servant, or employee of the person, who sells or serves intoxicating beverages to a person over the age for the lawful purchase thereof, shall be liable to that person or to any other person or to the estate, successors, or survivors of either for any injury suffered off the premises including but not limited to wrongful death and property damage, because of the intoxication of the person to whom the intoxicating beverages were sold or served, unless a reasonable person under the same or similar circumstances should know that the person served is already intoxicated at the time of serving.

(3) The intoxicated person shall be primarily liable with respect to injuries suffered by third persons.

(4) The limitation of liability provided by this section shall not apply to any person who causes or contributes to the consumption of alcoholic beverages by force or by falsely representing that a beverage contains no alcohol.

(5) This section shall not apply to civil actions filed prior to July 15, 1988.

3. Insurance Fraud

K.R.S. § 227.220
Duties of State Fire Marshal and Chief State Building Official Relating to Fire Loss

Details actions the State Fire Marshal shall or may take in the event of a fire loss.

K.R.S. § 227.250
Duty of Insurers to Report Losses from Fire, Lightning, Hazardous Materials, Flammable Liquids or Explosions

Insurers must report to the State Fire Marshal loss or damage caused by fire, lightning, hazardous materials, and flammable liquids or explosions that occur in or on property insured by the insurer in a manner prescribed by the State Fire Marshal. The State Fire Marshal may waive the reporting if, in his discretion, the losses are unimportant due to the small amount involved and to save time and expense.

K.R.S. § 227.260
Records of Fire Inspections, Investigations and Losses

State Fire Marshal shall keep a record of all fire inspections, investigations and fire losses occurring in this state and of facts concerning them. The records shall be public except for

K.R.S. § 304.12-230
Unfair Claims Practices Act

This statute imposes duties on insurers on both first-party and third-party insurance claims. Under the statute, claims are to be paid within thirty (30) days upon notice and proof of claim unless the insurer is able to demonstrate why the claim cannot or should not be paid. The statute imposes interest at an annual rate of twelve percent (12%) after the expiration of the thirty (30) day period. The statute also allows an insured to recover attorneys' fees for violations of this statute.

K.R.S. § 304.14-100
Application as Evidence

If the insurer does not furnish a copy of the insurance application to the insured within thirty (30) days after the insurer has received written demand from the insured, then the application of insurance is not admissible in evidence in any action between the insured and the insurer that arises out of the policy.

K.R.S. § 304.14-110
Representations in Applications

All statements and descriptions in any application for an insurance policy will be deemed representations and not warranties. Misrepresentations, omissions, and incorrect statements will not prevent a recovery under the policy unless they are fraudulent, material to the acceptance of the risk or to the hazard assumed by the insurer, or if the insurer in good faith would not have issued the policy, issued it at a different premium rate, not have issued a policy in as a large amount, or would not have provided coverage for the hazard resulting in the loss if insurer had been informed of the true facts.

K.R.S. § 304.14-270
Forms for Proof of Loss Furnished

Upon written request by any person claiming to have a loss under any insurance contract, the insurer must provide forms of proof of loss to the insured. The insurer has no responsibility or liability for the completion of the proof of loss forms.

K.R.S. § 304.14-280
Claims Administration Not Waiver

Acknowledgment of the receipt of notice of loss or claim under the insurance policy, furnishing forms for reporting a loss or claim and receiving any such forms or proofs completed or uncompleted, investigating any loss or claim or engaging in negotiations for a possible settlement of a loss or claim, and making advance or partial payments under insurance policies, does not constitute a waiver of any provision of a policy or of any defense the insurer may assert.

K.R.S. § 304.20-160
Power of Authorized Agency to Require Insurer to Furnish Information Concerning Fire Loss

An authorized agency may require an insurer to release information or evidence in the insurer's possession deemed important to the investigation of a fire loss of suspicious origin. Such information may include, but is not limited to:

(1) Pertinent insurance policy information pertaining to such fire loss and any application for such a policy;

(2) Policy premium payment records;

(3) History of previous claims made by the insured;

(4) Material relating to such loss or potential loss.

Furthermore, when an insurer has reason to believe a fire loss may be of other than accidental cause, the insurer shall notify, in writing, an authorized agency.

Any insurer, or person acting in its behalf, or authorized agency who in good faith releases information in compliance with this section, shall not be held civilly or criminally liable.

K.R.S. § 304.47-060
Immunity for Cooperation With Law Enforcement

Under this statute an insurer is immune from civil liability if it notifies law enforcement authorities of suspected insurance fraud.

K.R.S. § 304.47-080
Special Investigative Units

All insurers licensed in Kentucky must have a special investigative unit to investigate possible insurance fraud. The unit may be staffed either by employees of the insurer or individuals specifically contracted by the insurer to investigate.

4. Miscellaneous Statutes

K.R.S. § 304.1-090
"Principal Office" Defined

This statute defines "principal office" as the office from which the general affairs of the insurer are directed or managed.

K.R.S. § 304.14-060
Insurable Interest, Property

"Insurable interest" means any actual, lawful, and substantial economic interest in the safety or preservation of the subject of the insurance free from loss, destruction, or pecuniary damage or impairment. Contracts of insurance of property or of any interest in or arising from property are only enforceable for the benefit of those who have an insurable interest in the things insured at the time of the loss.

K.R.S. § 304.14-360
Construction of Policies

Every insurance contract will be construed according to the entirety of its terms and conditions as set forth in the policy, and as amplified, extended, or modified by any rider, endorsement, or application attached to and made a part of the policy.

K.R.S. § 304.14-380
Venue of Suits Against Insurers

Suits based on causes of action against an insurer upon an insurance contract must be brought in the county where the cause of action arose or in the county where the policy holder resides.

K.R.S. § 304.20-050
Arbitration Provision Not Binding

A provision agreeing to arbitrate any or all disputes contained in an automobile liability or motor vehicle liability insurance policy delivered, issued for delivery or renewed in Kentucky, is not binding upon the named insured or person claiming under him.

K.R.S. § 329A.070
Adjuster Licenses

The provisions of KRS 329A.010 to 329A.090 do not apply to:

(5) An insurance company, licensed insurance agent, staff or independent adjuster if authorized to do business in Kentucky, or an individual employed by an insurance company or licensed insurance agent to investigate suspected fraudulent insurance claims, but who does not adjust losses or determine claims payments, performing investigative duties limited to matters strictly pertaining to an insurance transaction; [referencing insurance adjusters].

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. § 405.025
Parent or Guardian Liable for Willful Damage to Property Caused by Minor

The parent or guardian of any minor, in his care and custody, against whom judgment has been rendered for the willful marking upon, defacing or damaging of any property, shall be liable for the payment of that judgment up to an amount not to exceed $2,500.00 and not to exceed $10,000.00 in a cumulative amount.

K.R.S. § 411.182
Allocation of Fault in Tort Actions - Award of Damages - Effect of Release

In tort actions when more than one party is at fault, the court will instruct the jury to answer interrogatories, and if no jury, will make findings indicating the amount of damages each claimant would be entitled if contributory fault is disregarded, and the percentage of total fault of all parties. In determining the percentage of fault, the trier of fact will consider the nature of the

conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed and the court will also determine the award of damages to each claimant in accordance with the findings and determine and state in the judgment each party's equitable share of the obligation to each claimant. A release, covenant not to sue, or other agreement between the claimant and a liable person, will discharge the liable person from all liability for contribution but will not discharge the liability of other liable persons unless it so provides and the claim of the releasing person against other persons will be reduced by the released persons' equitable share of the obligation.

K.R.S. § 411.184

Definitions - Punitive Damages - Proof of Punitive Damages

Punitive damages include exemplary damages and are damages other than compensatory and nominal damage. They are awarded to punish and to discourage the defendant and others from similar conduct in the future. The plaintiff must prove by clear and convincing evidence that the defendant acted toward the plaintiff with oppression, fraud, and malice. Punitive damages will not be assessed against a principal or employer for the act of an agent or employee unless they authorized, ratified, or should have anticipated the conduct. Punitive damages are not available for a breach of contract.

K.R.S. § 413.120

Actions to be Brought Within Five (5) Years

The following actions shall be commenced within five (5) years after the cause of action accrued:

(1) An action upon a contract not in writing, express or implied.

(2) An action for personal injuries suffered by any person against the builder of a home or other improvements. This cause of action shall be deemed to accrue at the time of original occupancy of the improvements which the builder caused to be erected.

B. KENTUCKY STATUTES OF LIMITATIONS

Claim Type/Section	**Statute Period**
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.

ONE YEAR

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.

TWO YEARS

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.

FOUR YEARS

FIVE YEARS

Claim Type/Section	Statute Period
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 perpetrated.
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.
Bad Faith K.R.S. § 413.120(7)	Five years from the alleged act of bad faith.

OTHER

Claim Type/Section	Statute Period
Breach of Written Contracts K.R.S. § 413.090	Ten years from the date of the breach.
Actions Upon Written Contract K.R.S. §413.160	Ten years from cause of action accruing
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.

C. SIGNIFICANT KENTUCKY COURT DECISIONS

1. Supreme Court Decisions

a. Insurance Coverage Decisions

State Farm Mut. Auto. Ins. Co. v. Adams, No. 2015-SC-000366-DG, 2017 Ky. LEXIS 361 (Aug. 24, 2017)
http://opinions.kycourts.net/sc/2015-SC-000366-DG.pdf

Coverage – Examination Under Oath

Insurer can take Examination Under Oath (EUO) of no-fault/basic reparations benefit claimant as a valid provision of the insurance contract. The court put a limitation on the EUO to include only "accident-related" questions but still allows insurers to query further regarding medical-related questions through the state's Motor Vehicle Reparations Act (MVRA). The Court acknowledged that in the investigation of the claims medical and accident related questions may be intermingled.

Thiele, et al. v. Rockcastle Kentucky Growers Ins., No. 2015-SC-00158-DG (June 15, 2017)
http://opinions.kycourts.net/sc/2015-SC-000158-DG.pdf

Homeowner's Insurance – Collapse

Insured made a claim under her homeowner's policy following the discovery of damage from termite infestation. The claim was denied as insured made a claim under the policy provision concerning collapse due to insects. Collapse has a specific meaning in connection with a structure; to break down or to go to pieces suddenly, especially by falling in of sides; to cave in. The Court determined damage to insured property could not be classified as "collapse" based on the definition above, despite being substantial. The Court found the damage was not covered under the language of the insurance policy.

Indiana Ins. Co. v. Demetre, No. 2015-SC-000107-DG (Aug. 24, 2017)
http://opinions.kycourts.net/sc/2015-SC-000107-DG.pdf

Bad Faith – Damages for Emotional Distress

Insurer issued a policy to insured for a vacant property (formerly a gas station) which allegedly caused harm to the adjacent neighbor. The insurer handled a settlement with the neighbors. The insured filed a bad faith action against the insurer. The Court held there was sufficient evidence for a jury to conclude insurer acted unreasonably in various aspects of the claims process. There was evidence to show the insurer prohibited the insured from receiving adequate representation, and that insurer had the specific intent to deny coverage.

b. Employment Decision

Commonwealth of Kentucky, Uninsured Employers' Fund v. Sidebottom, et al.
No. 2016-SC-000249-WC, 2017 Ky. LEXIS 2 (Feb. 16, 2017)
http://opinions.kycourts.net/sc/2016-SC-000249-WC.pdf

Workers Compensation- Average Weekly Wage

Employee was a waitress who was originally paid an hourly salary plus tips until she retained additional job responsibilities then her pay structure became a weekly rate plus tips. Despite the employee reporting her tips to the employer, the employer failed to report her income from tips to the Internal Revenue Service (IRS). After a major work-related injury, when attempting to determine the appropriate compensation, it was determined she was a variable wage employee paid a salary plus unreported tips as a waitress. The Supreme Court held that the average weekly wage of a claimant receiving weekly salary plus tips not reported to IRS was to be calculated as if claimant were a variable, rather than fixed, wage employee.

Commonwealth v. Brock, No. 2016-SC-000111-WC, 2017 Ky. LEXIS 1 (Feb. 16, 2017)
http://opinions.kycourts.net/sc/2016-SC-000111-WC.pdf

Workers Compensation: Up-The-Ladder Liability

Neither property owners nor their companies qualified as contractors with up-the-ladder liability for injuries sustained by a construction worker because they were not up-the-ladder contractors subject to liability for injuries workers sustained on construction project. To be adjudged as liable, an entity must fit the statutes' descriptions of a "contractor" and for that to occur the companies must be regularly engaged in the same or similar type of work as the work the subcontractor was hired to perform. The Supreme Court held that neither property owners nor their companies met the relevant statutory criteria to qualify as "contractors" laden with up-the-ladder liability for injuries sustained by worker hired by general contractor on a construction project.

c. Governmental Immunity Decision

Univ. of Louisville v. Rothstein, No. 2016-SC-000220-DG, 2017 Ky. LEXIS 449 (Nov. 2, 2017)
http://opinions.kycourts.net/sc/2016-SC-000220-DG.pdf

Waiver of Immunity by State University

A professor of medicine brought an action against a state university, alleging that the university breached the professor's contract granting tenure and appointing him as a distinguished university scholar. The Court held Ky. Rev. Stat. Ann. §45A.245, codified within the Kentucky Model Procurement Code (KMPC), that waives governmental immunity for actions on contract, waived immunity of the university as to all claims arising from lawfully authorized written contracts with the Commonwealth and its agencies. This waiver of immunity included written employment contracts.

2. Appellate Court Decisions

a. Insurance Coverage Decisions

Homestretch Logistical Solutions, Inc. v. Johnson Lawrence Walker Ins. Co., No. 2014-CA-01255-MR (Ky. Ct. App. Feb. 24, 2017)
http://opinions.kycourts.net/coa/2014-CA-001255.pdf

Coverage and Agency Actions

Insured obtained insurance for its semi-truck fleet through the agency. An error was made, removing the incorrect truck from the policy. Insured's truck which was incorrectly removed got into an accident. When insured sought coverage under the policy it was denied. Insured claims agency was negligent. The only duty the agency had to the insured was to ensure insured's insurance needs were satisfied. Since it was the actions of the insured which caused the subject truck to be removed from the policy there is no negligence on the part of the agency.

Khazai Rug Gallery, LLC. v. State Auto Casualty & Property Ins. Co., No. 2016-CA-00129-MR (Ky. Ct. App. March 10, 2017)
http://opinions.kycourts.net/coa/2016-CA-000129.pdf

Inventory Computation Exclusion

Insured rug seller sued its insurer after the denial of rug seller's insurance claims for losses resulting from alleged employee thefts pursuant to the policy's exclusion of employee theft claims proven only by inventory or profit-and-loss computations. The Court found the rug seller failed to produce *prima facie* evidence, other than inventory computations, establishing that employees stole seventy-nine rugs and cash. The Court also determined the insurer could not be held liable for misrepresentation arising out of its alleged failure to inform rug seller of the inventory computation exclusion.

Robertson v. Westfield National Ins. Co. No. 2016-CA-00477-MR (Ky. Ct. App. May 12, 2017)
http://opinions.kycourts.net/coa/2016-CA-000477.pdf

All-Terrain Vehicle as "Motor Vehicle"

Injured was operating an all-terrain vehicle (ATV) on a public road when he collided with an insured vehicle. Injured was not insured but made a basic reparation benefits claim against the insurer as injured claims he was a pedestrian at the time of the accident. The Court found that injured's ATV was not a motor vehicle under Kentucky's Motor Vehicle Reparations Act (MVRA) therefore; his claim for basic reparation benefits need be reconsidered.

Romans v. Kentucky Farm Bureau Mut. Ins. Co., No. 2015-CA-001253-MR
(Ky. Ct. App. May 19, 2017)
http://opinions.kycourts.net/coa/2015-CA-001253.pdf

One-Year Contractual Provision – Valid

Homeowner's policy did not cover vandalism and insured's claim was brought after the one-year contractual limitation period. Insured claims he was not made aware of the limitation provision which should render it invalid. The Court found the limitation provision to be clear and unambiguous and that other similar contractual provisions have previously been upheld. There was no interference on the part of the insurer and the opportunity to conduct discovery would likely not have provided additional relevant facts in connection with the claim. Therefore, the claim by insured is invalid as untimely filed.

b. UM/UIM Decisions

Hettler v. State Farm Mutual Auto. Ins. Co., No. 2015-CA-001207-MR
(Ky. Ct. App. Feb. 24, 2017)
http://opinions.kycourts.net/coa/2015-CA-001207.pdf

UIM - Loss of Consortium Claims

Claimant's mother brought claims on behalf of her minor daughter for UIM benefits under grandmother's policy. The claims arose from death of the girl's father as a result of a motorcycle accident. The deceased father was insured by a different carrier, did not live with the grandmother, did not live with the girl, and was not operating a vehicle listed on the grandmother's insurance policy. The Court found there is no reasonable expectation that an insured may bring claims against its insurer arising from the death of someone who is not an insured under any interpretation of the policy.

Weird v. State Farm Mutual Auto. Ins. Co., No. 2012-CA-000326-MR
(Ky. Ct. App. Feb. 10, 2017)
http://opinions.kycourts.net/coa/2012-CA-000326.pdf

UIM: Two-year Contractual Statute of Limitation Valid

A drunk driver hit the insured. The insured had UIM coverage through his insurer and the drunk driver's insurer paid out its policy limits. Insured then added own insurer to the lawsuit for UIM coverage. The insurer complains its addition was untimely and it should not be a party based on the contractual two-year statute of limitations. In defense, the insured claimed the two-year statute of limitations for UIM claims was unreasonable. The Court found the two-year contractual limit period is valid, and insured should have added his insurer to the suit within the two-year period following the final basic reparation benefits payment.

c. Employment Decisions

Memorial Hospital v. Morgan, No. 2015-CA-001596 (Ky. Ct. App. Jan. 13, 2017)
http://opinions.kycourts.net/coa/2015-CA-001596.pdf

Workers Comp- Past-Due Benefits & Attorney Fees

The employee in this case settled with the employer for a lump sum amount of past-due benefits, and the employee's attorney was awarded fees. When the employer mailed a check to the attorney he deducted litigation expenses, and forwarded the remainder to the client employee since the stub on the check noted "past due benefits." Two years later the attorney sued the employer for not paying the attorney fees. The employer presented clear evidence that contrary to the attorney's belief, the check sent indicating "past due benefits" actually included the attorney fees.

Ford Motor Company (LAP) v. Curtsinger, No. 2016-CA-001423 (Ky. Ct. App. Feb. 02, 2017)
http://opinions.kycourts.net/coa/2016-CA-001423.pdf

Workers' Compensation

An Administrative Law Judge (ALJ) dismissed a worker's claim for benefits due to an alleged work-related injury to the left shoulder. In doing so, the ALJ explained that the worker's alleged injury was, at most, an exacerbation of a pre-existing condition. The Court needed to determine whether the worker did indeed sustain an exacerbation of a pre-existing injury and, if so, whether the exacerbation was work related. The Court explained that a work-related exacerbation of a pre-existing condition qualifies as a new and separate "injury" within the meaning of KRS 342.0011(1), even if it does not warrant an impairment rating. The work-related exacerbation supplies a basis for an award of medical benefits, per KRS 342.020(1), at least until the date the worker returns to his or her pre-exacerbation baseline state of health.

Powers v. Keeneland Association, Inc., No. 2015-CA-001868 (Ky. Ct. App. March 31, 2017)
http://opinions.kycourts.net/coa/2015-CA-001868.pdf

Employment – Independent Contractor or Employee

Injured was found to be not an employee, but rather an independent contractor. Therefore, he was unable to invoke the protections of the Kentucky's Civil Rights Act (KCRA). The Court noted the definition of an employee simply as "an individual employed by an employer." KRS 344.030(5). The Court then considered the common-law agency test to determine whether an individual was an agent or an independent contractor under the KCRA. After considering all of the factors the court agreed that injured was an independent contractor. While injured may have received some benefits traditionally associated with being an employee, the freedom he enjoyed over his schedule, duties, and general work life was more typical of an independent contractor.

Teno v. Ford Motor Co., No. 2015-CA-001903 (Ky. Ct. App. April 28, 2017)
http://opinions.kycourts.net/coa/2015-CA-001903.pdf

Workers' Compensation

An Administrative Law Judge (ALJ) found the employee failed to prove a work-related injury. The Court held the ALJ had misconstrued the evidence of one of the physicians and reversed. The Court found the ALJ had "flagrantly erred in her discounted assessment" of one doctor's opinion that employee had not been experiencing active impairment at the time of her work injury and that her work activities caused her to experience pain. The Court further noted that "universally recognized" to be caused by repetitive work is not enough to create a causal connection between the diagnosis and the work injury before it can be found to be work-related.

Voith Industrial Services, Inc. v. Gray, No. 2016-CA-001083 (Ky. Ct. App. March 24, 2017)
http://opinions.kycourts.net/coa/2016-CA-001083.pdf

Workers' Compensation

Janitor assigned to clean the paint shop facility at an auto manufacturing plant was injured after inhaling fumes of a chemical solvent. An Administrative Law Judge (ALJ) awarded permanent partial disability benefits based on a finding that he sustained occupational asthma, RADS, and sleep apnea as a result of the injury. The ALJ also found that the employee was entitled to an enhanced benefit pursuant to a multiplier. The Board affirmed the ALJ's findings regarding the application of the multiplier and the work-related sleep apnea. The Court held that the board properly concluded that the lay and medical evidence supported an award of enhanced benefits. The Court also held that the board properly determined that substantial evidence supported the ALJ's finding that the employee sustained work-related sleep apnea.

d. Premises Liability Decisions

McCoy v. Fam. Dollar Store of Ky., Ltd., No. 2015-CA-000926-MR, 2017 Ky. App. LEXIS 2 (Ct. App. Jan. 6, 2017)
http://opinions.kycourts.net/coa/2015-CA-000926.pdf

Premises Liability: Parking Lot Wheel Stops

Injured fell on a wheel stop in a store parking lot after stepping off a sidewalk onto the wheel stop while loading her purchases into her vehicle. Injured's expert engineer opined the wheel stop was an unsafe trip hazard placed in front of the store and injured would not have been harmed had the hazard not been present. The Court refused to consider the engineer's opinion because the expert report was not properly presented. Therefore, the court found the store had not breached its duty of care by the existence of the wheel stop in the parking lot. Since the wheel stop was not defective, damaged, it did not create an unreasonably dangerous condition requiring a warning to invitees nor did it require correction. Similarly, since there was no properly presented evidence to the contrary the wheel stops were not considered unreasonably dangerous.

Brooks v. Seaton Place Homeowners Assoc., No 2016-CA-001112-MR
(Ky. Ct. App. June 16, 2017)
http://opinions.kycourts.net/coa/2016-CA-001112.pdf

Premises Liability - Homeowners Association

A personal injury allegedly arose from negligence of homeowners in maintaining the sidewalk in front of their home during a community-wide garage sale. Injured fell then sued two homeowners and the homeowners association alleging that all three owed injured a duty of care to maintain the sidewalk in good repair. The Court found no liability on the part of the homeowners association as the covenants concerning "common areas" did not include the sidewalk. The Court found, regarding the homeowners, that the mere fact they were participating in a yard sale did not create a duty of care which extended to the injured.

Hayes v. DCI Properties- DKY, LLC., No. 2016-CA-001189-MR (Ky. Ct. App. June 16, 2017)
http://opinions.kycourts.net/coa/2016-CA-001189.pdf

Premises Liability – Construction

An intoxicated minor was injured when he attempted to operate heavy equipment at a nearby residential construction site. During the operation, he overturned the piece of equipment onto his leg. His parents claimed the equipment was an attractive nuisance and therefore the construction company was liable. The Court reasoned that since the injured boy was over the age of fourteen he could not be afforded the tender-years element of the attractive nuisance doctrine. Since he was a licensed driver and could appreciate that the equipment on the construction site posed an unreasonable risk, there is no liability on the part of the construction company.

e. Governmental Immunity Decisions

Nelson County Board of Ed v. Newton, No. 2015-CA-001292 (Ky. Ct. App. Jan. 13, 2017)
http://opinions.kycourts.net/coa/2015-CA-001292.pdf

Qualified Immunity – Childcare Providers

Claims were asserted against two childcare facility administrators and two care providers who were employees of the county board of education. The Court concluded the duties of the care providers were not discretionary therefore they were not entitled to qualified official immunity from the negligence claims asserted against them. Discretionary acts include "those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment." Claims arose that the care providers were negligent in supervising and caring for claimant's son following the application of sunscreen during an outdoor event. Sun block had been applied to the boy previously but not under his shirt. From this lack of sun protection he suffered serious burns on his back and shoulders. Otherwise, the Court found the two administrators involved were entitled to qualified official immunity from the negligence claims asserted.

Richardson v. Queen, No. 2015-CA-001585 (Ky. Ct. App. Jan. 20, 2017)
http://opinions.kycourts.net/coa/2015-CA-001585.pdf

Qualified Immunity-Claim for Child's Death During Physical Fitness Class at School

A mother, individually and as next friend to her son, filed a complaint against the principal, superintendent, substitute gym teacher and others after her son fell while playing basketball in physical education class and sustained a traumatic brain injury. All defendants were dismissed on summary judgement excluding the substitute teacher. The Court held that substitute gym teacher's act of supervising students playing basketball during physical education class constituted a ministerial function; therefore she was not entitled to qualified immunity.

City of Brooksville v. Warner, No. 2015-CA-000975 (Ky. Ct. App. March 17, 2017)
http://opinions.kycourts.net/coa/2015-CA-000975.pdf

Qualified Immunity – Police Chief

The city and chief of police alleged that negligent driving during a police pursuit entitled the chief to qualified official immunity. The Court concluded the safe operation of a police vehicle is a ministerial act and noted that the city's general policies and procedures required officers to operate official vehicles in a careful and prudent manner and to obey all laws and all departmental orders pertaining to such operation. Those procedures also warned officers that despite being able to drive at emergency speeds the law is still enforceable against those who may be criminally or civilly responsible for his or her actions. The Court concluded that officers have discretion to decide the circumstances surrounding an emergency pursuit, but officers do not have discretion for the manner of operating the police vehicle during the emergency pursuit. Driving is a matter of duty and training; it is not subject to deliberation or judgment. Therefore, the chief was not entitled to qualified official immunity.

f. Other Significant Decisions

Cales v. Baptist Healthcare Sys., No. 2015-CA-001103-MR, 2017 Ky. App. LEXIS 10 (Ct. App. Jan. 13, 2017)
http://opinions.kycourts.net/coa/2015-CA-001103.pdf

Medical Products Liability & Federal Preemption

A patient brought claims for negligence and product liability against a hospital and manufacturer. Patient alleged improper *off-label use* of an implantable device, and failure to warn the patient of the *off-label use*. *Off-label use* is when a medical device is used for a purpose unapproved by the FDA. The Court found the FDA approval of devices pre-empted product liability claims, but did not pre-empt medical negligence claims, did not establish the hospital's standard of care as to failure to inform, and noted the claim against the manufacturer did not preclude the alternative claim against the hospital.

Bryant v. Allstate Indemnity Co., No. 15-CA-001451-MR (Ky. Ct. App. Feb. 24, 2017)
http://opinions.kycourts.net/coa/2015-CA-001451.pdf

Pre-litigation Depositions – Not Allowed

To allow for pre-litigation testimony, the testimony or information must be at risk of loss and consequently have a valid reason for preservation. Insurer filed an unverified petition, though verification is required, concerning proceedings to perpetuate testimony. The insurer also did not serve the petition on injured parties; there was no notice, nor hearing for the parties to respond. The Court concluded the insurer did not provide the proper notice and response time of the petition, nor did it have standing to bring the petition to force the deposition testimony.

3. Federal Court Decision

Chiropractors United for Research & Educ., LLC v. Conway et al., No. 3:15-CV-00556-GNS, 2015 U.S. Dist. LEXIS 133559 (W.D. Ky. Oct. 1, 2015)
https://law.justia.com/cases/federal/district-courts/kentucky/kywdce/3:2015cv00556/95067/32/

Prior Solicitation Statute - Valid

The Commonwealth of Kentucky enacted an updated prior solicitation statute after its original was found unconstitutional. The new solicitation statute was constitutionally challenged by Chiropractors United as a regulation of commercial speech, equal protection violation under the U.S. Constitution and the Kentucky Constitution, and an unconstitutional prior restraint on speech. The Court found that the speech was uncontestably protected under the First Amendment, that there was a substantial government interest in regulating licensed healthcare providers, ensuring they do not overreach or abuse the PIP system, and in protecting the privacy of motor vehicle accident victims from inappropriate solicitation. The Court then found that the new solicitation statute is not a prior restraint but instead as a subsequent punishment, because it later "punishes those who engage in a particular form of speech at a particular time."

D. SIGNIFICANT CASE PENDING BEFORE THE KENTUCKY SUPREME COURT

American Mining Ins. Co. v. Peter Farms, LLC., No. 2017-SC-000066-DG

Interpretation of "Occurrence" and Measure of Damages

The issue present on appeal deals with the proper interpretation of the word "occurrence" in an insurance policy in relation to coverage for mistaken mining. A second issue in this case is the correct measure of damages; reasonable royalty rate or market rate minus cost.

Travelers Indemnity Company v. Armstrong, No. 2017-SC-41-DG

Transfer of Automobile and Subsequent Liability

The issues present on appeal include: (1) whether a car dealership complied with statutory requirements to transfer a vehicle so the dealer was no longer the owner at the time of a later accident; (2) whether there is a bona fide sale despite not receiving a valid transfer of title; (3) whether a prior auto dealer is absolved from liability when the subsequent dealer complies with the statutory transfer requirements.

Cales v. Baptist Healthcare System, Inc., No. 2017-SC-57-DG

Medical Product Liability & Federal Pre-emption

There are two issues pending before the Court in this case. First is a matter of first impression in Kentucky regarding dismissal of a state product liability claim due to federal pre-emption involving *off-label use* of medical devices. Second is the applicable standard of care of the hospital when a medical device is used off-label.

Baker v. Fields, No. 2017-SC-144-DG

Qualified Immunity – School Administrators

There are three issues pending before the Court. First, whether an act or omission regarding sexual abuse of a student by a teacher is discretionary, warranting qualified immunity. Second, whether potential bad faith by the administration abrogated the claim for qualified immunity, even if the act or omission is discretionary. Finally, whether the duty to report child abuse is discretionary, if so, then should administrators be immune even if being convicted of violating the duty to report statute.

American General Life Ins. Co. v. DRB Capital, LLC, No. 2017-SC-329-DG

Anti-assignment Provisions in Settlement Agreements. KRS 454.430

The sole issue here is whether one can prohibit the assignment of annuity payments from a settlement agreement to a third-party, based on an anti-assignment provision in the settlement agreement.

These cases were pending at the time this summary was printed. To confirm whether the Supreme Court has issued a decision in this case, we invite you to visit our website at http://www.smithrolfes.com.

IV. THE STATE OF INDIANA

A. FREQUENTLY CITED INDIANA STATUTES

1. Automobile Insurance

I.C. § 9-25-2-3
Financial Responsibility

Requires insurance in the following amounts:

(1) $25,000.00 per person;

(2) $50,000.00 per accident; and

(3) $10,000.00 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 $50,000.00 or the limit of liability insurance, whichever is greater and which 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.

I.C. § 27-7-6-2
Definitions

This statute contains the definitions for "automobile insurance policy", and "automobile liability coverage".

2. Negligence, Other Torts and Contribution

I.C. § 7.1-5-10-15.5
Civil Liability for Furnishing Alcohol

A person who furnishes alcohol is not liable for civil action for damages caused by the intoxicated person, unless they actually knew the person was visibly intoxicated, and the intoxication of the person was the proximate cause of the injury or damage.

If a person, who is 21, suffers an injury or death, caused by voluntary intoxication, the person, the person's heirs, dependents or representative may not make a claim against the person who furnished the alcohol.

I.C. § 12-15-29-4.5
Medicaid Claim

Insurer must accept a Medicaid claim for a Medicaid recipient for three (3) years from the date of service. An insurer cannot deny a Medicaid claim solely based on the date of submission, type or format of the claim, method of submission or failure to provide proper documentation.

Insurer cannot deny a Medicaid claim solely due to lack of prior authorization. Insurer will conduct the prior authorization retrospectively when prior authorization is necessary. Insurer must adjudicate such claim as if it received prior authorization.

I.C. § 14-22-10-2.5
Entry Onto Premises of Another

A person, who enters a premise, without permission or monetary compensation, for the purposes of hunting or fishing, does not have an assurance that the premise is safe.

The owner of a premise does not assume responsibility or incur liability for damage or injury caused by others persons using the premises.

I.C. § 22-3-10-1
Ban on Employer Waiver of Liability

Any contracts between an employer and an employee, or any contracts between an employee and any third-party, which purport to release the employer or third-party from any liability for damages arising out of the negligence of the employer or third-party are against public policy and declared null and void.

I.C. § 34-18-8-4
Medical Malpractice – Prerequisite to Commencement of Action

Prior to commencing a medical malpractice action in Indiana, the claimant's proposed complaint must be presented to a "medical review panel" for review, and the panel must provide an opinion regarding whether or not the evidence supports the alleged conclusions.

I.C. § 34-20-1-1
Product 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 the 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 the product reaches the user or consumer without substantial alteration.

I.C. § 34-20-2-2
Product 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 over whom the court can gain jurisdiction will be deemed the manufacturer of the product.

I.C. § 34-20-3-1
Product Liability

A product liability action in negligence or strict liability must be commenced within two (2) years from the cause of action or within ten (10) years after the delivery to the initial user or customer. If the cause of action happens after eight (8) years but before ten (10) years of the date of delivery, the action may be commenced within two (2) years after the cause of action.

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 $300,000.00.

I.C. § 34-31-4-1
Parental Liability

A parent is liable for no more than $5,000.00 in actual damages from damage caused by their child, if the parent has custody and the child is living with the parent.

I.C. § 34-44-1-3
Payments of Awards

Proof of payments may be considered by trier of fact for determining the amount of any award and for any court review of awards considered excessive.

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 one-hundred percent 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 were served more than one hundred fifty (150) days prior to the expiration of the claimant's statute of limitations, nonparty defenses must be pled no later than forty-five (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. § 34-51-3-2
Punitive Damages – Clear and Convincing Evidence

Any claim for punitive damages must be established by clear and convincing evidence to support an award.

I.C. § 34-51-3-4
Punitive Damages – Maximum Award

Any punitive damage award may not be more than the greater of:

(1) Three times the amount of compensatory damages; or

(2) Fifty Thousand Dollars ($50,000.00).

I.C. § 34-51-3-5
Punitive Damages – Mandatory Reduction

If a trier of fact awards punitive damages that exceed the maximum allowable award, the court shall reduce the punitive damage award to an amount no more than the greater of:

(1) Three times the amount of compensatory damages; or

(2) Fifty Thousand Dollars ($50,000.00).

3. Subrogation

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 thirty (30) days.

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 un-collectability 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.

4. Insurance Fraud

I.C. § 27-2-13-2
Release of Information by Insurer

Insurer must furnish policy information relevant to fire loss, history of claims of claimant, and materials relating to fire investigation, if requested by an authorized agency investigating a fire loss.

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; and

(4) Material relating to the investigation, including:

a) Statements;

b) Proofs of Loss; and/or

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."*

I.C. § 27-2-19-7
Immunity for Exchange of Information

An insurer, attorney, or investigative agency that receives and provides information pursuant to the requirements of the Indiana Code in good faith is immune from liability arising from the act of receiving, or the act of providing the information.

I.C. § 36-8-17-7
Fire Investigation

A fire department must investigate and determine the cause of fire in their territory. If the fire chief believes a crime was committed, he must notify the division and submit a report. The report must include: (1) a statement of facts; (2) the extent of damage; (3) the amount of insurance; and (4) other information required in the commission's rules. To carry out this section, the fire department may: (1) enter and inspect property; (2) cooperate with prosecuting attorney; (3)

subpoena witnesses and documents; (4) give oaths; (5) take depositions and conduct hearings; and (6) separate witnesses and regulate the course of proceedings.

5. Miscellaneous Statutes

I.C. § 22-3-2-6
Workers' Compensation – Exclusive Remedy

The Indiana Workers' Compensation Administration provides the exclusive rights and remedies granted to an employee by account of personal injury or death, by accident, while that employee is within the course and scope of his employment.

I.C. § 25-10-1-15
Admissibility of Chiropractor Testimony

A chiropractor's testimony relating to records or reports of a licensed medical physician may be admissible as evidence at trial if:

(1) The chiropractor is properly qualified as an expert; and

(2) The court is satisfied the information which the chiropractor testifies about is of the type reasonably relied on by other chiropractors.

I.C. § 27-4-1-4.5
Unfair Claim Settlement Practices

The statute sets forth certain actions/inactions which may constitute unfair claim settlement practices under Indiana law.

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; and

(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.

I.C. § 34-51-4-8

Prejudgment Interest

If a court awards prejudgment interest, the court must determine the period during which prejudgment interest accrues, which may not exceed forty-eight (48) months. Generally, prejudgment interest will begin to accrue on the latest of the following dates:

(1) Fifteen months after the cause of action accrued; and

(2) Six months after a medical malpractice claim is filed (if, I.C. § 34-18-8 and I.C. § 34-19-9 do not apply) or one hundred eighty (180) days after a medical review panel is formed to review a medical malpractice complaint.

(3) In all cases, however, the court shall exclude any period of delay that the court determines is caused by the party requesting prejudgment interest.

B. INDIANA STATUTES OF LIMITATIONS

TWO YEARS

Claim Type/Section	Statute Period
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.
Bad Faith I.C. § 34-11-2-4(2)	Two years from alleged act of bad faith.
Workers' Compensation I.C. § 22-3-9-8	Within two years from the date the cause of action accrues.

C. SIGNIFICANT INDIANA COURT DECISIONS

1. Supreme Court Decisions

a. Insurance Coverage Decisions

Estate of Curtis by Brade v. Geico General Insurance Co., No. 71A05-1610-PL-2438 (2017)
http://www.leagle.com/decision/In%20INCO%2020170310248/ESTATE%20OF%20CURTIS%20v.%20GEICO%20GENERAL%20INSURANCE%20COMPANY

Fist Fights are not Covered by Auto Insurance

Two drivers had a minor collision in a store parking lot which resulted in some harsh words and fists being thrown. After the physical altercation, one of the drivers died allegedly as a result of the altercation. Auto insurer paid for extant driver's legal defense in decedent driver's wrongful death suit but reserved the right to later deny coverage. Upon summary judgment from insurer, the trial court held that the coverage only applied to incidents directly from the "use" of his vehicle, of which a fist fight after a minor collision was not. Extant driver appealed that decision, but the appellate court affirmed, noting that extant driver's vehicle had no integral role in the fight.

b. Other Significant Decisions

Goodwin v. Yeakle's Sports Bar & Grill, Inc., No. 27S02-1510-CT-627 (2016)
http://www.in.gov/judiciary/opinions/pdf/10261601rdr.pdf

Foreseeability in Negligence

Appellants were injured at a neighborhood bar after a shooting. Appellants sued the bar for negligence. The trial court granted summary judgment in favor of the bar, and the court of appeals reversed and remanded. The Supreme Court of Indiana affirmed the trial court's judgment. The Court stated that foreseeability is not only a component of the proximate cause element of negligence, but foreseeability is also a component of the duty element of negligence as well. For the purposes of determining whether an act is foreseeable in the context of duty, the court determines whether or not there is some probability or likelihood of harm that is serious enough to induce a reasonable person to take precautions to avoid the harm. There should be no consideration of the actual facts involved, only a broad type of analysis of the type of victim and the harm involved. The Court concluded that a shooting inside a neighborhood bar is not foreseeable as a matter of law.

Sedam v. 2JR Pizza Enterprises, LLC, Nos. 39S05-1703-CT-171 (Oct. 31, 2017)
http://www.in.gov/judiciary/opinions/pdf/10311701mm.pdf

Negligent Hiring and Respondeat Superior

A pizza delivery driver collided with a scooter, resulting in the death of the scooter operator. The estate of the scooter operator brought suit against the delivery driver's employer, claiming negligence under respondeat superior and negligent hiring. The employer filed for summary judgment on both claims. The Supreme Court of Indiana granted partial summary judgment to the employer, allowing only the negligence claim by the estate under the doctrine of respondeat superior because the employer admitted the employee was acting within the course and scope of her employment at the time of the accident. The Court granted summary judgment on the claim of negligent hiring claim because the claim is based on the employee's negligence, and the estate could not recover twice for the same damage.

2. Appellate Court Decisions

a. Insurance Coverage Decisions

Bokori v. Martinoski, No. 45A03-1603-SC-519 (2017)
https://www.in.gov/judiciary/opinions/pdf/02151701lmb.pdf

Fair Market Value of Leased Vehicle Includes Remaining Balance of Lease

Two drivers had a motor vehicle collision which resulted in non-fault driver's vehicle being totaled. After a small claims court lawsuit, in which non-fault driver prevailed, the magistrate awarded the fair market value of non-fault driver's vehicle, which included the remaining value of her lease, as damages to her. Fault-driver appealed this determination, but the appeals court affirmed that the remaining value of the lease is included in the fair market value of the vehicle.

Walsh Construction Co. v. Zurich American Insurance Co. et al., No. 45A04-1606-PL-1284
http://caselaw.findlaw.com/in-court-of-appeals/1854703.html

Self-Insured Retention Endorsements Must be Satisfied Prior to Commercial Policy Enforcement

General contractor hired a subcontractor for road work. The contract required subcontractor to indemnify contractor for failures and negligence in its work. Subcontractor's commercial general liability insurance policy named general contractor as an additional insured on a primary and non-contributory basis. A motorist was later injured while travelling through the work zone's traffic pattern, causing him to file a negligence action against general contractor, who then filed a third-party complaint against subcontractor for failing to indemnify general contractor. The trial court found on summary judgment that insurer had no contractual obligation to cover general contractor as an additional insured, and thus insurer need not pay out on behalf of subcontractor. The appellate court affirmed the decision, noting that the plain language of the retention endorsement does not require that insurer defend or indemnify general contractor until subcontractor satisfies its self-insured retention.

Patchett v. Lee, No. 29S04-1610-CT-549
http://www.in.gov/judiciary/opinions/pdf/10211601ggs.pdf

Collateral Source Doctrine and Government Payors

Defendant's negligence causing a motor vehicle collision, injures plaintiff. Negligence was conceded, but issue arose as to whether the plaintiff's Health Indiana Plan healthcare reductions are prohibited by the collateral source rule. The trial court held that these rate reductions in medical bills were prohibited by the collateral source rule, and the court of appeals affirmed. The Supreme Court of Indiana reversed this decision. The Court reasoned that payments were probative of reasonable value of medical expenses and were admissible under *Stanley v. Walker*, stating that the trial court abused its discretion in excluding payments as evidence.

b. Employment Decisions

Vinup v. Joe's Construction, LLC., No. 58A04–1602–CT–502 (2016)
http://www.in.gov/judiciary/opinions/pdf/11301603jsk.pdf

Employee vs. Independent Contractor Decision

A laborer, who was injured on the job while working for a limited liability construction company, filed a lawsuit against the company seeking damage for his personal injuries. The construction company's commercial general liability insurer and the construction company itself filed declaratory actions denoting the laborer as an employee and not an independent contractor, thus eliminating insurance coverage for laborer's injury via a specific policy provision. The trial court agreed with the construction company and insurer on summary judgment. Laborer appealed the decision, but the appellate court affirmed the summary judgment.

Ryan v. TCI Architects/Engineers/Contractors, Inc., No. 49S02-1704-CT-253 (Apr. 26, 2017)
http://www.in.gov/judiciary/opinions/pdf/04261701shd.pdf

Exception to the Duty of Care Owed by a General Contractor to a Subcontractor's Employees

A subcontractor's employee brings a negligence action against a general contractor for a retail construction project, alleging that the general contractor had a duty to provide him with a safe workplace and that duty was breached when the employee fell off of a ladder that was too short for removing ductwork. The Supreme Court of Indiana rules that a general contractor assumes a non-delegable duty of care related to worksite safety for all subcontractor employees when the general contractor enters into a contract assigning such a duty to itself. Typically, in Indiana, a general contractor owes no duty of care to employees of an independent contractor. However, one exception to this rule is when a general contractor enters into an agreement that imposes a specific duty of care to all workers on the worksite.

Walsh Construction Company v. Zurich American Insurance Company, No. 45A04-1606-PL-1284 (Mar. 28, 2017)
http://www.in.gov/judiciary/opinions/pdf/03281701en.pdf

Duty to Defend and Indemnify Pursuant to a Self-Insured Retention Endorsement

A general contractor brings an action against a subcontractor's commercial general liability insurer for declaratory judgment that insured owes a duty to defend and indemnify the general contractor as an additional insured under a policy with a self-insured retention endorsement. The court of appeals holds that the insurer had no obligation to defend or indemnify the general contractor as an additional insured until the subcontractor satisfied the $500,000.00 self-insured retention amount contracted for in the policy.

c. Other Significant Decisions

Watts Water Technologies, Inc. v. State Farm Fire & Casualty Co., No. 45A04–1604–CT–831 (2016)
https://www.in.gov/judiciary/opinions/pdf/12271602ebb.pdf

Compelling Arbitration in Product Liability Actions

Property insurer brought a subrogation action against water heater manufacturer for an allegedly defective connector which caused water damage to insured's home. Manufacturer moved to compel arbitration of the issue, but the trial court disagreed that arbitration was compulsory citing the insurance policy's non-requirement of arbitration regarding products liability issues. The appellate court affirmed the trial court's decision.

Dermatology Associates, P.C., v. White, No. 49A02-1512-PL-2189
https://www.in.gov/judiciary/opinions/pdf/01191701mgr.pdf

180-Day Extension Requirements on Statute of Limitations in Medical Malpractice Actions

Patient received laser hair removal from dermatologist on her face which reacted to makeup she was wearing, causing a discoloration of her face at the location of that makeup and resulting in her filing a medical negligence action of less than $15,000.00 in damages at the department of insurance. After learning that the discoloration was permanent, patient voluntarily dismissed the action at the department in order to increase her damages sought in litigation. Dermatologist moved to permanently dismiss the action for missing the statute of limitations, but the trial court denied that motion. At appeal over that motion, the court held that the action did induce the 180-day extension and thus reversed the trial court and granted dermatologist's motion to dismiss, noting that learning the discoloration was permanent did not fulfil the requirement of learning new knowledge of bodily harm which would cause greater damages than $15,000.00.

Smith v. Dunn Hospitality Group Manager, Inc., No. 82A05-1509-CT-1635
http://www.in.gov/judiciary/opinions/pdf/10121601par.pdf

Premises Liability: Hotel Liability for Third Party Theft

Hotel guests brought negligence action against a hotel for allowing third-parties to access their room and remove their personal belongings. The lower court entered summary judgment in favor of the hotel, and the guests appealed. The Court of Appeals affirmed the decision, holding that the statutory liability of the hotel for loss or damage to any person property brought into the hotel by guests was capped at $200.00, pursuant to the innkeeper's statute (IC 32-33-7-3). There was nothing in the record to indicate that the hotel conspired with the third-parties to commit the theft in the hotel room.

Polet v. ESG Security, Inc., No. 49A02-1510-CT-1631
http://www.in.gov/judiciary/opinions/pdf/12271601ebb.pdf

Premises Liability: Contractual Duties

After a stage collapse at a state fair, injured patrons and the estates of deceased patrons brought suit against the security company hired by the state fair. The lower court entered summary judgment in favor of the security company. Plaintiffs appealed and the court of appeals affirmed this decision. The Court reasoned that the security company did not have a duty relating to the stage collapse due to high winds at the time of the collapse. The security company was merely hired to provide security personnel at various times and locations. The agreement between the security company and the state fair did not include any provision which could place protecting patrons from a stage collapse cause by wind within the company's scope of work.

Rogers v. Martin, No. 02S05-1603-CT-114
http://www.in.gov/judiciary/opinions/pdf/10261601lhr.pdf

Foreseeability in Negligence

The estate of the deceased brought a negligence action against appellee after a fist fight between the deceased and appellee's co-host led to the death of the deceased in the appellee's home. The Court stated that when foreseeability is a part of the duty analysis in a negligence action, such as in landowner-invitee cases, it is evaluated in a different manner than foreseeability in the context of proximate cause. When courts use this analysis, a duty will be found where, in general, reasonable persons would recognize the harm and agree that it exists. No consideration is given to the specific facts of the case. Applying this analysis, the court inquired as to whether a duty should be imposed on appellee, as a homeowner, to take precautions to prevent a co-host from fighting with and injuring a houseguest. The Court held that it is not reasonably foreseeable for a homeowner to take precautions to avoid this unpredictable situation, and appellee had no duty to take reasonable precautions to protect the houseguest from a co-host's conduct.

3. Federal Court Decisions

a. Insurance Coverage Decisions

Frye v. Auto-Owners Insurance Co., No. 16-1677
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2017/D01-03/C:16-1677:J:Flaum:aut:T:fnOp:N:1888735:S:0

Capping UIM Liability Under Umbrella Policy

Insured filed suit against his employer's insurer to recover UIM benefits under his employer's commercial automobile and commercial umbrella policies. The U. S. District Court for the Northern District of Indiana entered summary judgment in favor of the insurer, and insured appealed. The Court of Appeals held that, according to IC 27-7-5-2, a statutory provision allowing insurers to omit UIM coverage from commercial umbrella policies did not exempt insurers from a statutory provision requiring UIM liability limit equal to policy's general per-incident limit if UIM coverage was included. Thus, commercial umbrella policy could not cap insurer's UIM liability at $1 million when the policy's general per-incident limit was $5 million.

Atlantic Casualty Insurance Company v. Garcia, No. 2:15-CV-66-JEM (Jan. 5, 2017)
https://www.leagle.com/decision/infdco20170109709

Claims-in-Process Exclusion

An insurer brings an action against an insured commercial property owner seeking a declaratory judgment that the insured's commercial general liability policy does not provide coverage for investigation and remediation of environmental contamination that predated the purchase of the property. The Northern District Court holds that the policy's claims-in-process exclusion barred coverage. This exclusion applies to both known and unknown property damage. Therefore, even though the insureds did not become aware of the pollution until after the policy's inception, the exclusion applies. Appeal pending in the 7th Circuit Court of Appeals.

b. Other Decision

Couvillion v. Speedway LLC, No. 16-1202
https://www.gpo.gov/fdsys/pkg/USCOURTS-ca7-16-01202/pdf/USCOURTS-ca7-16-01202-0.pdf

Premises Liability: Reasonable Anticipation of Harm

Gas station patron brought suit against a gas station after she fell over a pallet of salt bags on the gas station premises. The U. S. District Court for the Southern District of Indiana granted summary judgment in favor of the gas station, and the patron appealed. The Court of Appeals affirmed the decision of the lower court. The Court reasoned that the gas station owner could not have reasonably anticipated that a patron would fall over the salt bags when the salt bags are easy to see, with nothing obstructing the view of the salt bags.

These cases were pending at the time this summary was printed. To confirm whether the Supreme Court has issued a decision in any of these cases, we invite you to visit our website at http://www.smithrolfes.com.

V. THE STATE OF MICHIGAN

A. FREQUENTLY CITED MICHIGAN STATUTES

1. General Considerations in Insurance Claims Management

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. § 29.6
Fire Marshal Investigative Authority

State fire marshal may investigate and inquire into fire cause and origin that results in death or property damage, and without restraint or trespass liability.

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:

(1) More than $20,000.00, exclusive of costs, on account of injury to or the death of one 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 two or more persons in any one accident; and

(2) More than $10,000.00, exclusive of costs, for loss of or damage to property resulting from any one accident.

M.C.L.A. § 436.1801(3)
Liquor Liability

Right of action of person killed, injured, or damaged by unlawful sale or providing of alcohol to minor or visibly intoxicated person, if the unlawful sale is proven to be a proximate cause of the damage, injury or death.

M.C.L.A. § 500.2006

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

An insurer must pay on a timely basis to its insured the benefits provided under the terms of its policy, or, in the alternative, the insurer must pay to its insured twelve percent 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 thirty (30) days after receipt of a claim, unless the claim is settled within the thirty (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 sixty (60) days after receipt of proof of loss by the insurer.

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; and

f) Failing to attempt in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear.

(2) The failure of an insurer 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. § 500.2845

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 twenty-five (25) percent of the actual cash value of the insured real property at the time of the loss or twenty-five (25) percent of the final settlement, whichever is less. For residential property, the twenty-five (25) percent 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. § 500.4503

Fraudulent Insurance Acts

In general, 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:

(1) Insurance policy information relevant to an investigation, including any application for a policy;

(2) Policy premium payment records that are available;

(3) History of previous claims made by the insured; and/or

(4) 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 four (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 ten (10) years or by a fine of not more than $50,000.00, or both, and shall be ordered to pay restitution.

2. 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:

(1) Not less than $20,000.00 because of bodily injury to or death of one person in any one accident, and subject to that limit for one person;

(2) To a limit of not less than $40,000.00 because of bodily injury to or death of two or more persons in any one accident; and

(3) 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. § 500.3010
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 thirty (30) days after the determination.

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:

(1) Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services, and accommodations for an injured person's care, recovery, or rehabilitation;

(2) Work loss consisting of loss of income from work an injured person would have performed during the first three (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

(3) 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 three (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. § 500.3112

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:

(1) To the dependents of the injured person, the personal protection insurance benefits accrued before his death without appointment of an administrator or executor; and

(2) 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:

(1) 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;

(2) 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; and/or

(3) 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.

3. General Liability Considerations

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. § 600.1483
Medical Malpractice Damages Cap

In a medical liability action, total noneconomic damages recoverable by all plaintiffs against all defendants are limited to $280,000.00, adjusted annually for inflation, except in cases where the plaintiff is hemiplegic, paraplegic, or quadriplegic due to an injury to the brain or spinal cord, or where the plaintiff had permanently impaired cognitive capacity, or the plaintiff has had a permanent loss of or damage to a reproductive organ, then noneconomic damages shall not exceed $500,000.00.

M.C.L.A. § 600.2913
Parental Liability for Minor Child's Willful Injury or Damage

Person can recover damages for maximum of $2,500.00 from parents of resident minor child of parents when the minor has willfully or maliciously caused injury or damaged property.

M.C.L.A. § 600.2922
Wrongful Death Actions

Whenever the death of a person 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 decedent's spouse, parents, children, descendants, grandchildren, brothers and sisters, grandparents, the children of the decedent's spouse, and those who are devisees under the will of the deceased, and those entitled to share in the state under the laws of intestate succession.

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 his own *pro rata* share of the entire liability.

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, 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 noneconomic damages shall not exceed $280,000.00, adjusted annually for inflation, 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. § 600.2959
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 noneconomic 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. § 691.1407
Governmental Immunity from Tort Liability

A governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function.

An officer, employee, member, or volunteer of the governmental agency is immune from tort liability caused while acting on behalf of the government agency if the following three conditions are met:

(1) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority;

(2) The governmental agency is engaged in the exercise or discharge of a governmental function; and

(3) The officer's, employee's, member's, or volunteer's conduct does not amount to negligence that is the proximate cause of the injury or damage.

4. Miscellaneous Statutes

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.

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. § 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 joined after a verdict for the plaintiff is rendered 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 ten (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 lienholder does not exercise the lienholder's right of subrogation within twenty (20) days after receipt of the notice of the verdict, the lienholder shall lose the right of subrogation.

B. MICHIGAN STATUTES OF LIMITATIONS

ONE YEAR

Claim Type/Section	Statute Period
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	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. An action for recovery of property protection insurance benefits shall not be commenced later than one year after the accident.

TWO YEARS

Claim Type/Section	Statute Period
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 six 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.

THREE YEARS

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.

FOUR YEARS

Claim Type/Section	Statute Period
Breach of Contract for 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.

SIX YEARS

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.
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.

FIFTEEN YEARS

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.

C. SIGNIFICANT MICHIGAN COURT DECISIONS

1. Supreme Court Decisions

a. Government Immunity

Estate of George Nickola v. MIC General Insurance Company, 500 Mich. 115, 894 N.W.2d 552 (2017)
http://publicdocs.courts.mi.gov/opinions/final/sct/152535_61_01.pdf

Insurer's Untimely Payment of UIM Benefits is Subject to Penalty Interest Under the Uniform Trade Practices Act

Plaintiffs brought declaratory judgment action against automobile insurer to compel arbitration of claim for UIM benefits. After a six-year dispute regarding the third arbiter, arbiters issued award to insureds. Representative of insured's estate filed motion for entry of judgment on the arbitration award. Plaintiff also asked the court to assess penalty interest under the Uniform Trade Practices Act (UTPA). The Circuit Court affirmed the arbitration awards but declined to award penalty interest, finding that penalty interest did not apply because the UIM claim was "reasonably in dispute" for purposes of MCL 500.2006(4). The Court of Appeals affirmed. The Supreme Court held that insureds were directly entitled to UIM benefits, and were not "third-party tort claimants." Therefore, insureds could recover penalty interest under the UTPA without showing that insurer's liability was not reasonably in dispute.

Daniel Kemp v. Farm Bureau General Insurance Company of Michigan, 500 Mich. 245 (2017)
http://publicdocs.courts.mi.gov/opinions/final/sct/151719_66_01.pdf

Individual Entitled to PIP Benefits Under the No-Fault Act For Injuries Sustained While Unloading Personal Belongings From His Parked Vehicle

Plaintiff was injured while lifting his personal belongings out of his parked vehicle. Plaintiff filed suit against defendant insurer seeking no-fault benefits under MCL 500.3106(1)(b). Defendant moved for summary disposition, arguing that plaintiff's injury did not arise out of the ownership, operation, maintenance, or use of the parked motor vehicle as a motor vehicle, his injury did not meet the parked motor vehicle exception under the statute, and his injury did not have a causal relationship to the parked motor vehicle that was more than incidental. The trial court granted defendant's motion. The Court of Appeals concluded that plaintiff's "injury had nothing to do with 'the transportational function' of his truck," and affirmed the motion. The Supreme Court held that plaintiff created an issue of fact regarding whether he satisfied the parked motor vehicle exception under the statute and the corresponding causation requirement. The Supreme Court also held as a matter of law that plaintiff satisfied the transportational function requirement. The Supreme Court reversed the court of appeals decision and remanded the case to the trial court for further proceedings not inconsistent with their opinion.

b. No-Fault/PIP Decision

Covenant Medical Center Inc. v. State Farm Mutual Automobile Ins. Co., 895 N.W.2d 490 (2017)
http://publicdocs.courts.mi.gov:81/OPINIONS/FINAL/SCT/152758_73_01.pdf

Healthcare Providers Do Not Have a Direct Cause of Action Against No-Fault Insurers For Services Rendered to Patients

Healthcare provider brought an action against patient's automobile insurer to recover personal protection insurance (PIP) benefits, after patient settled his suit against insurer, releasing insurer from liability. The Circuit Court granted insurer's motion for summary judgment, but the court of appeals reversed in favor of healthcare provider. The Supreme Court, in a landmark decision, held that after a plain reading review of the no-fault act, there is no support for plaintiff's argument that a healthcare provider possesses a statutory cause of action against a no-fault insurer for recover of PIP benefits. Plaintiff therefore has no statutory right to proceed against defendant. In drafting the opinion, the majority noted that this does not leave healthcare providers without recourse, because they can still seek payment directly from an injured person for the reasonable costs of medical services.

2. Appellate Court Decisions

a. Insurance Coverage Decisions

DC Mex Holdings LLC v. Affordable Land LLC, No. 332439 (Mich. Ct. App. July 25, 2017)
http://publicdocs.courts.mi.gov/opinions/final/coa/20170725_c332439_38_332439.opn.pdf

Cash Value of Life Insurance Policy Exempt From Garnishment To Any Creditor of Insured

Plaintiff issued a writ of garnishment regarding any property or money insurer held belonging to individual defendant. Insurer filed a disclosure indicating that individual defendant owned an individual life insurance policy with a cash value. The disclosure also indicated the life insurance may be exempt from garnishment under MCL 500.2207. The Court of Appeals analyzed the statute to determine whether the life insurance policy was exempt from garnishment. The statutory language was designed to protect life insurance policies for the beneficiary spouse and children.

Home-Owners Insurance Company v. Dominic F. Andriacchi, No. 331260; 332457; 333695 (Mich. Ct. App. June 8, 2017)
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20170608_C331260(35)_RPTR_58o-331260-FINAL-I.PDF

Earth Movement Exclusion Unambiguously Precludes Coverage For Any Earth Movement

Defendant sought coverage under his policy for damages to his building that occurred after a major street repair had taken place. A licensed structural engineer, retained by plaintiff, determined that the damage was due to earth movement beneath the interior concrete floor slab. The claim was denied pursuant to an exclusion for "any earth movement." Defendant maintained

that the earth movement exclusion in the policy only applied to natural earth movement, not to "man-made" earth movement. The Court of Appeals held the plain language of an insurance contract excluding damage caused by "any earth movement" was unambiguous, and therefore the exclusion applied.

Bartlett Investments Inc. v. Certain Underwriters at Lloyd's London, No. 328922
(Mich. Ct. App. March 2, 2017)
http://publicdocs.courts.mi.gov/opinions/final/coa/20170302_c328922(54)_rptr_18o-328922-final-i.pdf

Waiver Doctrine Does Not Apply to Risks Not Agreed Upon by the Parties

Plaintiff is the owner of a vacant building for which it purchased a commercial property insurance policy. Because vacant buildings carry a greater risk for vandalism and damage than do occupied buildings, plaintiff was required to obtain a policy with special certificates for vacant buildings. The policy called for any loss or damage caused by vandalism to be reported within ten days. The policy also required, as a condition of coverage, that plaintiff keep the building fully secured at all times and regularly inspected. Plaintiff's owner discovered extensive damage to the building due to vandalism, and submitted a claim. Following defendant's rejection of claim by letter, plaintiff filed suit. The trial court granted defendant's motion, dismissing the case. On appeal, the court held that certain defenses are waived if they are not stated in the initial denial letter; however, requiring defendant to insure plaintiff for vandalism that occurred as a result of plaintiff's failure to secure and inspect the property would greatly expand the risk undertaken by the defendant in contract. Although defendant did not raise the defense that plaintiff failed to secure and inspect the building in its initial denial letter, the waiver doctrine was inapplicable.

b. UM/UIM Decisions

Michelle Wagner v. Farm Bureau Mutual Insurance Co. of Michigan, No. 332400
(Mich. Ct. App. Sep. 12, 2017)
http://publicdocs.courts.mi.gov/opinions/final/coa/20170912_c332400_50_332400.opn.pdf

Under Ambiguous Policy, Vehicle Becomes Uninsured Only Upon a Court's Ruling of No Coverage

Plaintiff was involved in an accident with pizza delivery driver. Delivery driver was insured by defendant insurer. Plaintiff brought a third-party automobile liability claim against pizza delivery driver. Defendant insurer provided a defense under a reservation of rights, citing language that insurer does not provide coverage for liability arising from operation of a vehicle used to carry property for a fee. Defendant later filed a declaratory action that it had no duty to defend pizza delivery driver from plaintiff's third-party claim. The trial court granted defendant insurer's motion. Plaintiff notified defendant insurer, and her own insurer, of her potential UM claim. Insurer sent a letter asserting that notice was not timely met pursuant to the policy. Plaintiff sued. At trial, defendant insurer moved for summary disposition that under the policy the UM claims were time barred. The trial court and court of appeals disagreed, finding that the policy was ambiguous given that notice must be given within three years, but also required proof of uninsured status of the vehicle. Here, there was no proof of the uninsured status of the vehicle

until the declaratory judgment action - which occurred past the policy time limit regarding notice. Therefore, summary disposition was denied.

c. No-Fault/PIP Decisions

Tyann Shelton v. Auto-Owners Insurance Company, No. 328473 (Mich. Ct. App. Feb 14, 2017)
http://publicdocs.courts.mi.gov/opinions/final/coa/20170214_c328473(59)_rptr_12o-328473-final-i.pdf

A Question of Fact Prevents Summary Disposition on a PIP Claim Based on an Insurer's Fraud Exclusion

Plaintiff alleged that she was injured while riding as a passenger in a single-car collision. As a result, plaintiff sought PIP benefits because she did not own a vehicle and did not reside with a relative who did. Defendant denied the claim and plaintiff sued. The trial court granted summary disposition as to replacement services, but denied the motion as to payment of medical services. On appeal, the court determined that a question of fact existed regarding whether plaintiff made material misrepresentations and, if so, whether they were made to defraud defendant. Reliance on an exclusionary clause in an insurance policy is an affirmative defense and so defendant has the burden of proof. Thus, to obtain summary disposition, defendant insurer must show there is no question of fact as to any of the elements of its affirmative defense. The judgment was affirmed.

Bergman v. Cotanche and Boyne USA, Inc., No. 330438 (Mich. Ct. App. Feb 23, 2017)
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20170223_C330438(36)_RPTR_16o-330438-FINAL-I.PDF

Front-End Loader Exempt From Registration Requirements Under No-Fault Act

Defendant finished plowing a driveway with a front-end loader. Defendant proceeded to drive the front-end loader on the street to the next driveway for plowing, about a quarter of a mile away. Plaintiff was driving in the opposite direction on the street when the two vehicles collided. At trial, the court ruled against defendant's motion for summary disposition. On appeal, the court determined that a front-end loader that has to travel about a quarter of a mile along a public road between work sites is exempt from the no-fault acts registration and insurance requirements. The front-end loader falls into a statutory exemption for "special mobile equipment." The transportation function must be incidental to meet the exemption.

Grace Transportation Inc. v. Farm Bureau General Insurance Company, No. 329276
(Mich. Ct. App. Jan 31, 2017)
http://publicdocs.courts.mi.gov/opinions/final/coa/20170131_c329276_45_329276.opn.pdf

Health Care Provider's Ability to Recover an Injured Party's Medical Expenses Under the No-Fault Act is Dependent on the Injured Party's Eligibility for No-Fault Benefits

Plaintiff provided health care to the injured insured. After the claim was denied, plaintiff sought recovery for services rendered. The court determined that a healthcare provider's eligibility to recover medical expenses is dependent on the injured party's eligibility for no-fault benefits under the insurance policy. Here, injured insured was barred from recovering PIP benefits, and her case was dismissed. Because the plaintiff's claims are derivative and because underlying

claim was barred, plaintiff's claims against defendant are likewise barred, and the trial court properly granted defendant's motion for summary disposition.

Hastings Mutual Insurance Company v. Grange Insurance Company of Michigan, No. 33193 (Mich. Ct. App. May 16, 2017)
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20170516_C331612(33)_RPTR_48o-331612-FINAL-I.PDF

Businesses That Peripherally Participate in Repair Service for Motor Vehicles are Not Excluded From Coverage Under MCL 500.3101(1)

Farm employee was repairing his sister's car in a barn when a fire occurred. The fire destroyed the barn, and its contents. The barn was owned by a farm that is an LLC. The farm's primary purpose was to grow crops, but the barn was regularly used for auto repair and maintenance. The farm's insurer paid farm in insurance benefits to cover the loss. The insurer filed a claim as subrogee for property protection benefits against the no-fault insurer of the vehicle lost in the fire. Both parties filed motions for summary disposition. The trial court granted summary disposition in favor of the farm's insurer. Court of Appeals upheld the decision of the trial court, finding that the no-fault act did not relieve auto insurer of liability given that the farm was in the business of farming rather than in the business of auto repair or maintenance.

David Gurski v. Motorists Mutual Insurance Company, No. 332118
(Mich. Ct. App. Oct. 17, 2017)
http://publicdocs.courts.mi.gov/opinions/final/coa/20171017_c332118_54_332118.opn.pdf

Car's Insurer that Provided Liability Coverage was Not an "Insurer" for the Purposes of No-Fault Law

Plaintiff was working outside the vehicle when the vehicle slipped into gear and injured him. Plaintiff attempted to recover PIP benefits under his own business policy, the policy of car's owner, and Michigan Automobile Insurance Placement Facility, but was denied by all three. Plaintiff filed suit. At trial, plaintiff was awarded partial summary disposition. The court found that the insurer of the car's owner of was obligated to cover plaintiff's PIP benefits. On appeal, the court determined that the trial court erred when it ruled that insurer was liable for PIP benefits because the insurer did not provide any PIP coverage to the insured, and therefore was not an "insurer" for the purposes of MCL 500.3115.

d. Employment Decision

Timothy Matouk v. Michigan Municipal League Liability & Prop Pool, No. 332482
(Mich. Ct. App. July 11, 2017)
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20170711_C332482(41)_RPTR_74o-332482-FINAL-I.PDF

An Insurer is Not Obligated to Defend a Lawsuit Against a Police Officer that Alleges Misconduct Outside the Scope of Employment.

An individual disappeared. Her body was discovered months later. The victim's family alleged that it was a murder, and that two different police departments conspired to conceal the crime. They further alleged that plaintiff police officer, the victim's cousin, was either the murderer or participated in the cover up. The victim's family, on behalf of the estate, brought an action against both police departments, plaintiff, and 19 individual officers. Defendant insurer refused to defend plaintiff, claiming his conduct fell outside of coverage. Plaintiff brought a complaint for declaratory judgment seeking to compel defendant to pay for his defense. Defendant filed a motion for summary disposition, arguing coverage under the policy only extends to employees for damages arising from conduct within the scope of their employment. The trial court denied defendant's motion as premature. Less than a month later, plaintiff brought a motion for partial summary disposition, limited to the subject of defendant's duty to defend. The trial court granted the motion, concluding defendant has a contractual obligation to defend. The decision was reversed on appeal. The court determined that plaintiff was asked to not participate in the investigation in any way, so any involvement alleged in the complaint was outside the scope of his employment. Therefore, the insurance company had not duty to provide a defense for the officer.

Linda Escott v. Public School Employees' Retirement Board, No. 333264
(Mich. Ct. App. July 18, 2017)
http://publicdocs.courts.mi.gov/opinions/final/coa/20170718_c333264_35_333264.opn.pdf

Public School Employees Required to Be Deemed Totally and Permanently Disabled By Independent Medical Advisor to Receive Disability Benefits

Teacher accepted a voluntary layoff, and then applied for non-duty disability benefits based upon her vision deficit. After filing for non-duty disability benefits, retirement board designated an independent medical advisor. Medical advisor examined teacher, but determined that there were no limitations to prevent teacher from being able to perform job duties. Teacher requested a hearing, but was again denied benefits. On appeal, the court determined that the retirement board has no authority to grant non-duty disability retirement benefits to a public school employee unless an independent medical advisor determined the employee totally and permanently disabled.

e. Premises Liability Decisions

Shirley Metzler v. GSM America Inc., No. 328778 (Mich. Ct. App. Feb 2, 2017)
http://publicdocs.courts.mi.gov/opinions/final/coa/20170202_c328778_39_328778.opn.pdf

In a Premises Liability Case, the Inquiry is Whether a Reasonable Person Would Have Noticed an Open and Obvious Hazard

Plaintiff was injured when she tripped and fell on an elevated sidewalk at defendant's store. At trial, summary disposition was ordered in favor of the defendant because the hazard was to be open and obvious. On appeal, plaintiff argued that the trial court erred in concluding there was no genuine issue of fact. Plaintiff argued that she should not have been expected to notice the elevated sidewalk when the property owner stated in his deposition that he had never noticed the elevated sidewalk, despite working there for ten years. The court decided that the question is not

whether the property owner saw the hazard, but whether a reasonable person in the plaintiff's position would have seen the hazard upon casual inspection. The court determined that the trial court did not err in determining that a reasonable person would have noticed the elevated sidewalk. The judgment was affirmed.

Susan Blackwell v. Dean Franchi, No. 328929 (Mich. Ct. App. Jan. 31, 2017)
http://publicdocs.courts.mi.gov/opinions/final/coa/20170131_c328929(21)_rptr_8o-328929-final-i.pdf

An 8-Inch Drop-Off Inside a Residence Was Not Discoverable Upon Casual Inspection By Guests of Dinner Party

Plaintiff attended a dinner party at defendants' home. After entering the residence of defendant, plaintiff walked down a hallway, and did not observe a step with an eight-inch drop. Trial Court granted summary disposition based on the argument that drop-off was open and obvious. Court of Appeals reversed the decision based upon the testimony of other dinner party guests that said that a lack of lighting did not make the step readily observable upon casual inspection, as well as pictures of the step itself. The Court determined that a genuine issue as to whether defendants' owed plaintiff a duty to warn of the drop-off remained. The decision will have to be determined by a jury's interpretation of conflicting testimony regarding whether the drop-off was open and obvious.

f. Governmental Immunity Decision

Carrie S. Flanagin v. Kalkaska County Road Commission, No. 330887 (Mich. Ct. App. May 23, 2017)
http://publicdocs.courts.mi.gov/opinions/final/coa/20170523_c330887(35)_rptr_50o-330887-final-i.pdf

Snowplow Drivers Are Not Shielded by Governmental Immunity From Negligence Claims While Plowing

At trial, snowplow driver's motion for summary disposition was denied because there was a genuine issue of material fact as to whether the snowplow was four to six feet over the centerline at the time of accident. The Court of Appeals determined that while a driver can travel over the centerline without committing a moving violation, the statutory exemptions do not relieve the driver of performing his work in a non-negligent manner. The degree to which the driver traveled over the centerline and whether doing so was proper under variables like weather, could allow a reasonable jury to conclude that that the snowplow was negligently operated at the time of the accident. Therefore, denial of summary disposition was appropriate.

Genesee County Drain Commissioner v. Genesee County, No. 331023 (Mich. Ct. App. Aug. 22, 2017)
http://publicdocs.courts.mi.gov/opinions/final/coa/20170822_c331023_38_331023.opn.pdf

Unjust Enrichment Claim Not Barred By Doctrine of Governmental Immunity

Plaintiff participated in a county health plan through insurer. Based on an estimate of the amount that the claims and administrative costs would be each year, participants and county paid premiums. Unbeknownst to participants, any excess by which the premiums exceeded the amount necessary to pay claims and administrative costs was refunded to county at the end of each year. Participants filed suit for their share of the refund of premiums paid. The court of appeals held that a claim for unjust enrichment is not a tort claim, and thus not barred by the governmental tort liability act. The court concluded that a claim under the equitable doctrine of unjust enrichment ultimately involves contract liability and not tort liability. The case was remanded for further proceedings in accordance with this opinion.

3. Federal Court Decisions

Vitamin Health v. Hartford Casualty Ins., 6th Cir. No. 16-1724 (April 11, 2017)
http://www.opn.ca6.uscourts.gov/opinions.pdf/17a0213n-06.pdf

Insurer Has No Duty to Defend Where Underlying False Advertising Action Against Insured Does Not Fall Within Coverage of "Personal and Advertising Injury" Provision

Insured manufacturer of eye health supplements brought action against insurer, asserting a contract claim and seeking declaration that the underlying action by competitor—for false advertising and patent infringement—fell within the policy coverage of "personal and advertising injury." District Court granted defendant's motion for summary judgment, stating that insurer had no duty to defend or indemnify. On appeal, the court stated that under the policy there was no coverage because there was no disparagement. Disparagement cannot occur when policy holder is alleged to have misrepresented the content of its *own* product, and not its competitor's. Judgment was affirmed in favor of insurer.

Orchard, Hiltz & McCliment v. Phoenix Insurance, 6th Cir. No. 16-1176 (Jan. 20, 2017)
http://www.opn.ca6.uscourts.gov/opinions.pdf/17a0047n-06.pdf

Policies' Professional Services Exclusions Barred Coverage of Project Engineer That Designed Plans for Every Facet of Wastewater Project

Owner hired contractor for construction for a wastewater treatment plant. Through contract, owner required contractor to maintain liability insurance under which owner's project engineer was protected from claims arising out of contractor's work. After injured workers on the project brought claims against engineer for unsafe conditions, engineer sought protection under contractor's policy. Insurer denied coverage based on the professional services exclusion. In a suit to determine coverage, the court found that even though workers' acts involved unskilled construction, the exclusion still precluded coverage because those non-professional acts - unskilled construction - were reasonably related to engineer's overall provision of professional services - engineering. Therefore, the professional services exclusion applied.

Indian Harbor Ins. v. Clifford Zucker, 6th Cir. No. 16-1695/1697/1698 (March 8, 2017)

http://www.opn.ca6.uscourts.gov/opinions.pdf/17a0128p-06.pdf

Trust's Action Against Officers of Company Excluded From Company's Policy Under "Insured-Versus-Insured" Exclusion

Holding company owned community banks in 17 states. Following the financial crisis, after taking large losses, holding company and subsidiary filed Chapter 11 bankruptcy. To gain creditors support of the bankruptcy plan, holding company assigned all of the company's causes of action to a liquidating trust, which could pursue those claims on behalf of creditors. The liquidating trust agreed not to pursue the officers' personal assets but instead would limit its recover to the company's insurance policy. The liquidation plan also required the officers to sue plaintiff insurer if it denied coverage under the management liability policy. However, the policy contained an insured-versus-insured exclusion. The liquidation trustee brought an action for breach of fiduciary duties against officers. Plaintiff insurer sough a declaratory judgment that it had no obligation to cover any damages from the lawsuit because the trust's claims fell within the insured-versus-insured exclusion. The court held that there was a direct connection between the debtors/insured and the liquidation trust. Therefore, the trust's action against officers was excluded from company's policy under the insured-versus insured exclusion.

D. SIGNIFICANT CASES PENDING BEFORE THE MICHIGAN SUPREME COURT

Bertin v. Mann, (155266)

What is The Applicable Standard of Care for Being Struck by a Golf Cart?

Plaintiff was injured when he was struck by a golf cart driven by defendant. The trial court determined the standard of care was "reckless misconduct," as parties were co-participants in a recreational activity. The jury entered a verdict in defendant's favor. On appeal, the court determined the standard as ordinary negligence, and reversed. Supreme Court will determine whether the reckless misconduct standard of care or the ordinary negligence standard of care applies to an injury resulting from the operation of a golf cart while playing golf recreationally.

Blackwell v. Franchi, (155413)

Does A Homeowner Owe a Duty to Warn a Guest of a Step in a Dark Room?

Plaintiff was injured, while attending a dinner party at defendant's home, when she went to put her purse in a darkened room and fell off an eight-inch step. Plaintiff did not turn on the light. The trial court granted summary disposition in favor of defendant based on the step being an open and obvious hazard, and that the light switch would have illuminated the hazard. On appeal, the court reversed, holding the open and obvious doctrine does not require guests to turn the lights on to illuminate an impending hazard.

These cases were pending at the time this summary was printed. To confirm whether the Supreme Court has issued a decision in this case, we invite you to visit our website at http://www.smithrolfes.com.

VI. THE STATE OF FLORIDA

A. FREQUENTLY CITED FLORIDA STATUTES

1. General Considerations in Insurance Claim Management

Fla. Stat. § 86.011
Declaratory Judgments

This statute gives the circuit and county courts of Florida the authority to declare rights, status, and other equitable or legal relations whether or not further relief is or could be claimed.

Fla. Stat. § 95.03
Contract Provision Shortening Limitations Period

This statute prohibits contract provisions which mandate an action based on the contract be brought in a shorter time period than prescribed in Florida's statute of limitations.

Fla. Stat. § 95.10
Cause of Action Arising in Another State

This statute prohibits a cause of action being brought in Florida if the cause of action arose in another state and the applicable statute of limitations of that state has lapsed.

Fla. Stat. § 626.854
Public Adjuster Prohibitions

Statute enacted to regulate public insurance adjusters and to prevent the unauthorized practice of law. The statute prohibits public adjusters from soliciting or entering into a contract with an insured or claimant within forty-eight (48) hours of a potential claim. The statute allows an insured to cancel a contract with a public adjuster within three (3) days of its signing or three (3) days following notification of the claim to an insurer without penalty to the claimant. The statute also contains provisions restricting the activities and fees allowable by public adjusters.

Fla. Stat. § 626.9521
Unfair Claims Practices; Penalties

The statute pertains to penalties imposed for an unfair or deceptive practice in the insurance business. The statute includes punitive fines for persons and insurers who commit an unfair claim practice.

Fla. Stat. § 626.9744
Settlement Practices Relating to Property Insurance

When a homeowner's insurance policy provides for the adjustment and settlement of first-party losses based on repair or replacement cost, physical damage incurred in making a repair or replacement which is covered shall be included in the loss. When a loss requires replacement of items and the replaced items do not match in quality, color, or size, the insurer shall make reasonable repairs or replacement of items in adjoining areas, subject to consideration of relevant factors.

Fla. Stat. § 627.405
Insurable Interest Requirement for Property

No insurance contract of property shall be enforceable except for the benefit of persons having an insurable interest in the things insured at the time of the loss. The statute defines "insurable interest" as "any actual, lawful, and substantial economic interest in the safety or preservation of the subject of the insurance free from loss, destruction, or pecuniary damage or impairment."

Fla. Stat. § 627.4136
Non-joinder of Insurers

The statute requires for a person who is not an insured to obtain a settlement or verdict against a person who is an insured before a cause of action against a liability insurer can be maintained. An insurer has the right to insert a contractual provision into a liability insurance policy which precludes persons not designated as an insured from joining a liability insurer as a defendant.

Fla. Stat. § 627.4137
Disclosure of Certain Information Required

The statute requires insurers who provide liability coverage to disclose particular information upon written request of a claimant within thirty (30) days. This disclosure must be signed by a corporate officer, the insurer's claims manager, or superintendent, and must contain the following information: the insurer's name, the insured's name (or insureds' names), the limits of the liability coverage, a statement of any policy or coverage defense which it reasonably believes applies to the situation, and a copy of the policy. An insurer has a continuing duty to update this information to the claimant immediately upon discovering new facts relevant to the statement.

Fla. Stat. § 627.4143
Outline of Coverage

No private passenger automobile or basic homeowner's policy shall be delivered or issued for delivery unless an outline has been delivered prior to issuance or accompanies the policy. The statute lists what an effective outline of coverage for a private passenger motor vehicle insurance policy contains. The statute also requires that a basic homeowner's policy may not be delivered or issued unless a comprehensive checklist of coverage is delivered prior to issuance. The statute lists what the comprehensive checklist of coverage must include.

Fla. Stat. § 627.701
Liability of Insureds, Coinsurance, and Deductibles

If an insurance policy or contract contains provisions requiring the insured to be liable as a coinsurer with the insurer issuing the policy, the statute lists the requirements the policy must meet to do so. The statute also contains restrictions on insurers and disclosure requirements for insurers for hurricane damage deductibles.

Fla. Stat. § 627.70121
Payment of Claims for Dual Interest Property

Effective for policies issued or renewed on or after Oct. 1, 2006, a property insurer shall transmit claims payments directly to the primary policyholder, payable to the primary policyholder only, without requiring a dual endorsement from any mortgage holder or lienholder, for amounts payable for personal property and contents, additional living expenses, and other covered items that are not subject to a recorded security interest.

Fla. Stat. § 627.70131
Insurer's Duty to Acknowledge Communications Regarding Claims; Investigation

An insurer shall review and acknowledge receipt of a communication with respect to a claim within fourteen (14) calendar days, unless payment is made within that time period or the failure to respond is caused by factors beyond the insurer's control. The acknowledgement requirement shall not apply to claimants represented by counsel beyond communications necessary to provide forms and instructions.

Within ten (10) working days after an insurer receives proof of loss, the insurer shall begin an investigation as is reasonably necessary.

Within ninety (90) days after an insurer receives notice of a property insurance claim, the insurer shall pay or deny such claim or a portion of the claim unless failure to pay is caused by factors outside the insurer's control.

Fla. Stat. § 627.7015
Alternative Procedure for Resolution of Disputed Property Insurance Claims

This statute sets forth a non-adversarial procedure for a mediated claim resolution conference as an effective, fair, and timely alternative to the traditional adversarial appraisal process.

Fla. Stat. § 627.7016
Insurer Contracts With Building Contractors

An insurer who offers residential coverage may contract with a building contractor skilled in techniques that mitigate hurricane damage. The insurer must guarantee the building contractor's work if the insurer offers policyholders the option to select the services of such building contractors. The insurance company is not liable for the actions of the building contractor.

Fla. Stat. § 627.702
Valued Policy Law

This statute fixes the measure of damages payable to the insured in the amount of a total loss as the amount of money specified in the policy for which premiums were charged and paid. This statute does not deprive an insurer of any proper defense, and the insurer is never liable for more than the amount necessary to repair, rebuild, or replace the structure. An insurer is not prohibited from repairing or replacing damaged property at its own expense, without contribution on the part of the insured, except when an insured has elected to purchase stated value coverage. Any insurer may provide insurance indemnifying the insured for the difference between the value of the insured property at the time of loss and the amount expended to repair, rebuild, or replace it.

Fla. Stat. § 627.712
Residential Windstorm Coverage Required

This statute requires an insurer issuing a residential property insurance policy to provide windstorm coverage. An insurer must make an exclusion of windstorm coverage and an exclusion of coverage of contents, available at the option of the policyholder. The statute lists criteria which must be met for such exclusions.

Fla. Stat. § 744.387
Settlement of Minor's Claims

A settlement agreement of a minor's claim reached after an action has been commenced must be approved by the court having jurisdiction over the action. If a settlement agreement is reached before an action is commenced, the court may authorize the settlement if it will be for the best interest of the minor. If the net settlement exceeds $15,000.00, the court shall appoint a guardian on the minor's behalf.

2. Insurance Fraud

Fla. Stat. § 627.409
Representations in Applications and Warranties

Any statement or description made by an insured in an application for insurance is a representation. A misrepresentation, omission, or concealment of fact may prevent recovery if it is material to either acceptance of the risk or to the hazard assumed by the insurer or if the insurer, in good faith, would not have issued the policy, the same coverage, the same premium rate, or insured in as large an amount had the true facts been known.

Fla. Stat. § 627.425
Forms for Proof of Loss Furnished

On request of any person claiming to have a loss under an insurance contract, an insurer shall furnish forms of proof of loss. This statutory requirement does not include a responsibility for the completion of such proof by the insurer.

Fla. Stat. § 627.426
Claims Administration

Acknowledgement of the receipt of notice of loss or claim under a policy, furnishing forms for reporting a loss or claim, for giving information relative to a loss or claim, for making proof of loss, or investigating any loss or claim under any policy or engaging in settlement negotiations does not constitute a waiver of any provision of a policy or any defense.

A liability insurer shall not be permitted to deny coverage based on a particular coverage defense unless: (a) written notice of reservation of rights to assert a coverage defense is given to the insured within thirty (30) days after the insurer knew of the coverage defense, and (b) at least thirty (30) days before trial, the insurer gives notice of its refusal to defend the insured, obtains from the insured a non-waiver agreement setting out the specific facts and policy provisions upon which the coverage defense is asserted, and retains independent counsel.

Fla. Stat. § 633.03
Investigation of Fire; Reports

The state fire marshal shall investigate the cause, origin, and circumstances of every fire occurring in Florida where property has been damaged or destroyed where there is probable cause to believe that the fire was the result of carelessness or design.

Fla. Stat. § 633.818
False Statements to Insurers

This statute deems false statements or representations by a firefighter employer to an insurer of Workers' Compensation insurance a second degree misdemeanor.

3. Automobile Insurance

Fla. Stat. § 324.021
Minimum Insurance Required

This statute requires motor vehicle insurance in the amounts of:

1. $10,000.00 in case of bodily injury to, or death of, one person in any one crash;
2. $20,000.00 in case of bodily injury to, or death of, two or more persons in any one crash;
3. $10,000.00 in case of injury to, or destruction of, property of others in any one crash.

Fla. Stat. § 626.9743
Settlement Practices Relating to Motor Vehicle Insurance

The statute specifies prohibited conduct in settling motor vehicle insurance claims and applies to both personal and commercial claims. When liability and damages owed are reasonably clear, an insurer may not recommend that a third-party claimant make a claim on his or her own policy solely to avoid paying the claim under the policy issued by that insurer. Methods for adjustment and settlement of a motor vehicle total loss are provided and include a cash settlement, a replacement motor vehicle, or another method agreed to by the claimant.

Fla. Stat. § 627.4132
Stacking of Coverages

The statute prohibits stacking of insurance policies when an insured is protected by any type of motor vehicle insurance policy. The insured is only covered to the extent provided on the vehicle involved in the accident. The stacking prohibition does not apply to uninsured motorist coverage.

Fla. Stat. § 627.7263
Rental and Leasing Driver's Insurance to be Primary

The valid insurance providing coverage for the lessor of a motor vehicle for rent or lease is primary unless otherwise stated. If the lessee's coverage is to be primary, the statute sets out the specific language which the lease agreement must contain in order for such coverage to be effective.

Fla. Stat. § 627.727
Uninsured and Underinsured Motor Vehicle Coverage

No motor vehicle liability insurance policy shall be issued unless uninsured motor vehicle (UMV) coverage is provided therein. An insured may make a written rejection of the coverage on behalf of all insureds under the policy. If the motor vehicle is leased, the lessee has the sole privilege to reject uninsured motorist coverage. The insurer shall notify the insured at least annually of the insured's options as to UMV coverage.

The term "uninsured motor vehicle" includes an insured motor vehicle when the liability insurer thereof: (a) is unable to make payment with respect to the liability of its insured due to its

insolvency, (b) has provided limits of bodily injury liability for its insured which are less than the total damages sustained by the person entitled to recover damages, or (c) excludes liability to a nonfamily member whose operation of an insured vehicle results in injury to the named insured.

Fla. Stat. § 627.7275
Motor Vehicle Liability

A motor vehicle insurance policy providing personal injury protection must also provide coverage for property damage liability. Insurers shall make coverage available for bodily injury, death, and property damage arising out of ownership, use, or maintenance of a motor vehicle in an amount not less than $10,000.00 for injury or death of one person in any one crash, $20,000.00 for injury or death of two or more persons in any one crash, and coverage available for property damage in an amount not less than $10,000.00 for the injury or destruction of another's property.

Fla. Stat. § 627.730
Florida Motor Vehicle No-Fault Law

Florida statutes within the range of section 627.730 to section 627.7405 may be cited and known as the "Florida Motor Vehicle No-Fault Law."

Fla. Stat. § 627.736
Required Personal Injury Protection Benefits, Exclusions, Priority, and Claims

This statute provides required insurance policy benefits, including, to a limit of $10,000.00, eighty (80) percent of all reasonable expenses for necessary medical services, sixty (60) percent of any loss of gross income and loss of earning capacity per individual from inability to work, and death benefits equal to the lesser of $5,000.00 or the remainder of unused personal injury protection benefits per individual.

This statute also authorizes exclusions of benefits for injuries sustained while occupying another motor vehicle owned by the insured and not insured under the policy, for injury sustained by any person operating the insured motor vehicle without consent, for injury caused to one's self intentionally or for injury sustained while committing a felony.

Fla. Stat. § 627.737
Tort Exemptions; Limitation on Right to Damages; Punitive Damages

This statute exempts owners and operators of motor vehicles from tort liability to the extent that the benefits required for personal injury protection under Fla. Stat. §627.736 are applicable. In any tort action brought against the owner or operator of a motor vehicle, a plaintiff may recover damages in tort for pain, suffering, mental anguish, and inconvenience because of bodily injury or disease only in the event that the injury or disease consists in whole or in part of:

(a) Significant and permanent loss of an important bodily function.

(b) Permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement.

(c) Significant and permanent scarring or disfigurement.

(d) Death.

Fla. Stat. § 627.7407
Application of the Florida Motor Vehicle No-Fault Law

This statute revives the Florida Motor Vehicle No-Fault Law, effective January 1, 2008, after the law was repealed on October 1, 2007. This statute requires personal injury protection coverage for motor vehicle owners. The statute recognizes that vehicle owners were not required to maintain personal injury protection coverage from October 1, 2007 to January 1, 2008.

4. Negligence, Other Torts and Contribution

Fla. Stat. § 624.155
Bad Faith

This statute provides a civil remedy in the event an insurer does not attempt, in good faith, to settle claims toward its insured.

5. Miscellaneous Statutes

Fla. Stat. § 627.4145
Readable Language in Insurance Policies

Effective for policies written on or after Oct. 1, 1983, this statute requires that every insurance policy written in Florida pass a readability test and lists the criteria a policy must meet to be deemed "readable." The statute also lists types of policies to which the readability requirement does not apply.

Fla. Stat. § 627.4265
Payment of Settlement

In a case in which a settlement between a person and insurer has been reached, the insurer shall tender payment no later than twenty (20) days after such settlement is reached. If the payment is not tendered within twenty (20) days or another date agreed to by the parties, it shall bear interest at the rate of twelve (12) percent per year from the date of the settlement agreement.

Fla. Stat. § 627.7142
Homeowner Claims Bill of Rights

After 90 days, insurers may not deny a claim based on undisclosed credit issues or cancel an insurance policy for insured's personal credit information which was "publicly available." The law also adds some provisions regarding the qualifications of neutral evaluators and umpires for appraisals.

B. FLORIDA STATUTES OF LIMITATIONS

ONE YEAR

Claim Type/Section	**Statute Period**
Specific Performance of a Contract Fla. Stat. § 95.11(5)(a)	One year for an action for specific performance of a contract.

TWO YEARS

Claim Type/Section	**Statute Period**
Medical Malpractice Fla. Stat § 95.11(4)(b)	Two years from the time the incident giving rise to the action occurred, or two years from the time the incident should have been discovered with due diligence. In no event shall the action be commenced later than four years from the date of the incident or occurrence out of which the cause of action occurred.
Wrongful Death Fla. Stat. § 95.11(4)(d)	Two years for an action for wrongful death.
Libel or Slander Fla. Stat. § 95.11(4)(g)	Two years for an action for libel or slander.

FOUR YEARS

Claim Type/Section	Statute Period
Bodily Injury due to Negligence Fla. Stat. § 95.11(3)(a)	Four years for an action founded on negligence.
Personal Property damage due to Negligence Fla. Stat. § 95.11(3)(a)	Four years for an action founded on negligence.
Trespass to Property Fla. Stat. § 95.11(3)(g)	Four years for an action for trespass on real property.
Fraud Fla. Stat. § 95.031(2)(a)	For an action founded on fraud, four years, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence. In any event, an action for fraud must be begun within twelve years after the date of the commission of the alleged fraud.
Breach of Contract not in Writing Fla. Stat. § 95.11(3)(k)	Four years for an action on a contract not founded on a written instrument.
Assault and Battery Fla. Stat. § 95.11(3)(o)	Four years for an action for assault and battery.
Malicious Prosecution Fla. Stat. § 95.11(3)(o)	Four years for an action for malicious prosecution.
Statutorily Created Liability Fla. Stat. § 95.11(3)(f)	Four years for an action founded on a statutory liability.
Rights not Otherwise Provided for Fla. Stat. § 95.11(3)(p)	Four years for any action not specifically provided for.

Products Liability Fla. Stat. § 95.11(3)(e), Fla. Stat. § 95.031(2)(b)	Four years for an action founded on the design, manufacture, distribution or sale of personal property not permanently incorporated into real property. Under no circumstances may a claimant commence an action for products liability to recover for harm allegedly caused by a product with an expected useful life of ten years or less, if the harm was caused by exposure to or use of the product more than twelve years after delivery of the product to its first purchaser or lessee who was not engaged in the business of selling or leasing the product or of using the product as a component in the manufacture of another product.

FIVE YEARS

Claim Type/Section	**Statute Period**
Contract in Writing Fla. Stat. § 95.11(2)(b)	Five years for an action on a contract founded on a written instrument.
Foreclosure of Mortgage Fla. Stat. § 95.11(2)(c)	Five years for an action to foreclose a mortgage.

Claim Type/Section	Statute Period
Bad Faith Fla. Stat. § 624.155	As a condition precedent to bringing an action of bad faith, an insurer must have been given sixty (60) days written notice of the violation. No action shall lie if, within sixty (60) days after filing notice, the damages are paid or the circumstances giving rise to the violation are corrected.
Minor's Claims Fla. Stat. § 95.051(1)(h)	Except as to claims of medical malpractice, the statute of limitations does not begin to run until the minor reaches the age of majority. In any case, the action must be begun within seven years after the act or event giving rise to the cause of action.

C. SIGNIFICANT FLORIDA COURT DECISIONS

1. Supreme Court Decisions

a. Insurance Coverage Decisions

State Farm Mutual Auto Insurance Co. v. Shands Jacksonville Medical Center, Inc., SC-15-1257 (Feb. 26, 2017)
http://www.floridasupremecourt.org/decisions/2017/sc15-1257.pdf

Fla. Stat. 627.736(6) and Scope of Discovery

Hospital provided medical care to insureds who were injured in motor vehicle accidents. After paying the hospital, the insurer asked for documents relating to the "reasonableness of the charges" pursuant to Fla. Stat. 627.736(6), which requires healthcare providers to provide PIP insurance companies documents relating to the treatment of injured persons and the associated costs. Hospital provided the insurer with various documents but refused to supply copies of third-party contracts containing negotiated discount rates between the hospital and other insurers and payers, contending the information was not covered by Fla. Stat. 627.736(6)(b). The insurer filed a petition pursuant to Fla. Stat. 627.736(6)(c) asking the trial court to compel discovery of the withheld information. The trial court ordered the hospital to produce the requested documents but the court of appeals reversed, finding the trial court's order exceeded the scope of discovery allowable under Fla. Stat. 627.736(6)(b) and (c). The Supreme Court of Florida affirmed the decision of the court of appeals, holding that the scope of discovery under Fla. Stat. 627.736(6)(c) is limited to the production of documents contained within Fla. Stat. 627.736(6)(b).

Altman Contrs., Inc. V. Crum & Forster Specialty Ins. Co., No. SC16-1420 2017 Fla. LEXIS 2492 (Dec. 14, 2017)
http://www.floridasupremecourt.org/decisions/2017/sc16-1420.pdf

Florida Supreme Court Holds Pre-Suit Notice of Claim Triggers Insurer's Duty to Defend

Property owner declared bankruptcy during condominium construction project. Property owner subsequently served general contractor with several Chapter 558 Notices of Claims, alleging over 800 unique construction defects. General contractor possessed a CGL policy with insurer. On appeal, the Florida Supreme Court held insurer's duty to defend was triggered when property owner served general contractor with the Chapter 558 Notices of Claims, notwithstanding that no suit had been filed by property owner.

b. Other Significant Decisions

In Re: Amendments to the Florida Evidence Code, SC16-181 (Feb. 16, 2017)
http://www.floridasupremecourt.org/decisions/2017/sc16-181.pdf

Expert Witness Testimony: Daubert versus Frye

In 2013, the Florida Legislature amended sections 90.702 and 90.704 of the Florida Statutes, replacing the Frye standard for the admissibility of expert evidence with the Daubert standard. The Frye standard employs a "general acceptance" standard in which expert testimony, relying on novel scientific processes or techniques, is subject to a standard of review that questions whether the technique is generally accepted in the scientific community. The Daubert standard, which governs all federal courts and has been adopted in whole or in part in 36 states, provides that the court must determine whether the expert testimony is both relevant and reliable. The Florida Supreme Court, however, rejected the rule change to the extent it is procedural, citing "grave constitutional concerns" regarding the right to a jury trial and access to the courts.

Worley v. Young Men's Christian Ass'n, Inc., No. SC150-1086, 2017WL 1366126
(Fla. S. Ct.., April 13, 2017)
http://www.floridasupremecourt.org/decisions/2017/sc15-1086.pdf

Attorney Referrals to Physicians Protected by Attorney-Client Privilege

Pedestrian brought suit against non-profit organization for her trip and fall in organization's parking lot. Pedestrian claimed various injuries, which a referred physician's office documented. In response, the organization alleged that the pedestrian's legal counsel had a "cozy agreement" with the treating physician's office, and sought to compel documents related to the relationship between her law firm and her treating physicians. The trial court ruled that the information was discoverable, as did the district court. Reversing the lower courts, the Florida Supreme Court held the financial relationship between a law firm and a treating physician is not discoverable, and the question of whether an attorney referred a client to a particular physician was protected by the attorney-client privilege.

North Broward Hospital District v. Kalitan, 219 So.3d 49 (Fla. S. Ct., June 8, 2017).
http://www.floridasupremecourt.org/decisions/2017/sc15-1858.pdf

Caps on Non-Economic Damages in Medical Malpractice Cases Ruled Unconstitutional

Patient brought action against hospital for medical malpractice due to complications from carpal tunnel surgery. A jury returned a verdict in favor of patient for over $4.7 million. The appeals court reduced the non-economic damages—including pain and suffering—by $3.3 million. Both parties were unsatisfied with this result, and appealed the matter to the Florida Supreme Court. The Supreme Court held that statutory caps on personal injury non-economic damages in medical malpractice suits violated Florida Constitution's equal protection clause, reinstating the initial award of $4.7 million.

Holmes Regional Medical Center, Inc. v. Allstate Ins. Co., 225 So.3d 780
(Fla. S. Ct., July 13 2017)
http://www.floridasupremecourt.org/decisions/2017/sc15-1555_CORRECTED.pdf

Insurer Barred from Seeking Equitable Subrogation due to Insured's Non-Payment of Judgment

A motor vehicle struck pedestrian while he was riding a scooter. Pedestrian suffered significant injuries, which driver claimed were "exacerbated by medical negligence." The trial court refused to allow driver to present evidence of medical negligence. The jury returned judgment against driver and driver's insurer for over $11 million. Driver's insurer paid out its policy limit of $1.1 million. Driver had yet to pay the remainder of the judgment. Pedestrian subsequently sued his medical providers claiming malpractice, and driver and driver's insurer intervened to file equitable subrogation complaint against medical providers. The trial court dismissed the complaint because the parties had not paid the entirety of the judgment debt. The District Court of Appeals reversed. On appeal, the Florida Supreme Court held that driver and driver's insurer were not entitled to seek equitable subrogation from medical providers until previous judgment debt had been fully satisfied.

2. Appellate Court Decisions

a. Insurance Coverage Decisions

Progressive American Insurance Company v. Eduardo J. Garrido D.C.P.A., etc., 3D15-1067 (Fla. Dist. Ct. App. Feb. 15, 2017)
http://www.3dca.flcourts.org/Opinions/3D15-1067.pdf

Fla. Stat. 627.736(1) and the Meaning of "Authorized Physician"

Insured suffered personal injuries as result of a car accident and sought treatment with a chiropractor. Insured assigned his PIP benefits to chiropractor under insured's insurance policy. Chiropractor submitted invoices totaling $6,075.12 to insurer for treatment of insured. Insurer paid $2,500.00 in PIP benefits. Insurer, however, refused to pay any further PIP benefits because there had not been a determination made by an authorized physician pursuant to Fla. Stat. 627.736(1)(a)3 that insured had suffered an emergency medical condition (EMC). Disputing the fact he was not qualified as an authorized physician, chiropractor filed a declaratory action which sought the full $10,000.00 PIP benefit limit. The trial court ruled the statute unconstitutional as applied to chiropractors on both equal protection and due process grounds. The trial court also determined that, in the absence of an EMC diagnosis, the statute allows an insured to recover up to $10,000.00 in PIP benefits. The court of appeals reversed the decision of the trial court, holding that the statute's requirements as applied to chiropractors was not unconstitutional and that, in the absence of an EMC diagnosis, an insured could only recover up to $2,500.00.

State Farm Florida Insurance Company v. Jose R. Fernandez and Sandra Fernandez, 3D16-1441 (Fla. Dist. Ct. App. Feb. 15, 2017)
http://www.3dca.flcourts.org/Opinions/3D16-1441.pdf

Post-Loss Obligations and Request for Appraisal

Insureds filed a claim with insurer in October 2005 for damage that occurred to insureds' home as a result of Hurricane Wilma. After investigating the claim in November 2005, insurer informed insureds some of the claimed damages were covered under the policy but the damages were less than the insureds' policy deductible. In April 2010, the insureds' public adjuster sent insurer a demand for appraisal, claiming Hurricane Wilma caused $142,733.81 in damages. Insurer sent a letter to insureds requesting "any and all documentation relating to repairs made to your property … which will serve to validate the date of loss, the cause of loss, and the scope of claimed damages." In response, insureds submitted a sworn proof of loss but did not attach any documents to support claim. Insurer denied claim after insureds failed to provide documents upon numerous requests. Insureds filed suit for breach of contract and moved to compel appraisal. The trial court granted insureds' motion. The court of appeals, however, reversed, finding the insureds failed to comply with all post-loss obligations required by insurance policy. The court of appeals pointed out that insureds did not provide notice of additional damage, protect property from further damage, keep an accurate record of expenses, provide requested documents to support claim, and submit a POL within sixty days of loss.

Orlando Noa v. Florida Insurance Guaranty Association, No. 3D16-1367 (Fla. Dist. Ct. App. March 22, 2017)
http://www.3dca.flcourts.org/Opinions/3D16-1367.pdf

Appraisal Determinations for Repairs Must Consider Costs of Legal Compliance

Insured filed a claim with insurer for windstorm damage caused by Hurricane Wilma. In December 2005, insurer assigned an adjuster to evaluate damage to the insured's roof. The adjuster determined damages did not exceed the policy deductible. Over three years later, insured submitted a second, identical claim for $71,687.97. The insurer rejected the second claim and invoked the appraisal clause in the insurance policy. In April 2010, two of the appraisers agreed the claim valued $17,602.10 (replacing only 3% of the tiles on the 3,200 square foot roof) which insurer remunerated to insured, minus the deductible. The appraisal explicitly disclaimed consideration of any effects of "law and ordinances" in computing the total cost of repair. One month later, insured submitted a permit application to have 30% of the roof replaced at a price of $8,700.00. The permit application was rejected by the building and zoning authority, as Miami-Dade County building code required that "not more than 25%" of a roof could be replaced unless the entire roof complies with "current code". The total cost of the proposed repair was now evaluated at $26,000.00, which insured accepted, and then sought further reimbursement from insurer in consideration of the "law and ordinances" effect on value. Third District Court of Appeals held that the appraisers must consider the requirements of building codes when computing cost of repair, and is not an area where courts will "re-appraise" for the parties. Here, two of the appraisers agreed that only 3% of the roof needed to be replaced, and insured and his hired roofers unilaterally determined that 30% of the roof warranted replacement. The court refused to the allow insured to appoint a "super-umpire" who could essentially overrule the

initial appraisal panel and force a re-evaluation of the property due to newly created legal obstacles, and denied insured any additional compensation or reconsideration of the appraisal.

Francis v. Tower Hill Prime Insurance Company, No. 3D16–2114 2017 WL 2960690 (Fla. Dist. Ct. App., July 12, 2017)
http://www.3dca.flcourts.org/Opinions/3D16-2114.pdf

Competing Appraisal Values Creates "Genuine Issue of Material Fact"; A Claim Must be Denied before Breach of Policy Action

Insurer paid out pursuant to policy for home interior repairs caused by roof leaks. This amount reflected actual cash value, less deductible and depreciation. Insured used the funds to repair roof leaks rather than the damaged interior of the home. Unsatisfied with the amount received from insurer, insured sued and claimed the insurer's payments did not reflect "actual cash value" of the interior damage, and furthermore, insured was in breach of contract for not paying for the roof repairs. The trial court granted summary judgement in favor of insurer, holding that the appraisal on the interior repairs was accurate, and any additional claims by insured for damage to the roof itself would be barred by the policy exclusion for "wear and tear". On appeal, the court of appeals held there was an issue of material fact caused by differing appraisal values for the interior damage, and further that the insured had yet to make any actual claim for damage to the roof, and it was premature to assert breach of contract against the insurer.

Castro v. Homeowners Choice Property & Casualty Insurance Company, Case No. 2D15–5456, 2017 WL 3614102 (Fla. Dist. Ct. App., August 23, 2017)
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2017/August/August%2023,%202017/2D15-5456.pdf

Previous Denial of Claim Bars Insurer's Attempt to Assert Breach of Condition

Insureds disputed coverage with insurer regarding policy coverage for alleged sinkhole activity. Insurer hired an expert who determined the insured's home had not been damaged by sinkhole damage, but rather it was caused by "earth movement", which was excluded under the policy. With this information, insurer denied coverage. Some four years later, insureds hired their own expert who determined that the damage to the home was, in fact, related to sinkhole activity. Insureds informed insurer of this information, to which insurer replied by formally requesting Examinations Under Oath (EUO) from all relevant parties. Insureds immediately filed suit. In response, insurer moved to dismiss due to insureds' failure to submit to the requested EUOs - allegedly a material breach of contract. The trial court agreed, granting summary judgement in favor of insurer. On appeal, the court of appeals reversed, holding that insured's previous denial of the claim foreclosed its rights to assert failure of policy conditions.

GEICO General Insurance Company v. Mukamal, No. 3D15–2750 2017 WL 3611593 (Fla. Dist. Ct. App., August 23, 2017)
http://www.3dca.flcourts.org/Opinions/3D15-2750.pdf

Insurer Liable for Verdict for Failing to Deny Coverage Properly

Insurer appealed adverse jury verdict in excess of $15 million. On appeal, the court of appeals affirmed, ruling that insurer failed to comply with Florida's "Claims Administration Statute". The case involved the death of plaintiffs' son in an automobile accident. Insurer asserted its basis of denial was the insured's failing to be a listed driver under its policy. At trial, a jury returned a verdict of $15,350,000.00 in favor of plaintiffs. On appeal, the court of appeals held that insurer had failed to comply with Florida's claims administration statute, and thus its coverage defense was invalid. Specifically, the statute mandates that insurers may only deny coverage in one of three delineated fashions: written notice to the named insured stating a refusal to defend, obtaining a non-waiver agreement from insured, or retaining independent counsel "mutually agreeable" to both parties. Here, insurer defended insured throughout the entirety of the trial, but failed to comply with the statute.

Omega Insurance Company v. Wallace, Case No. 2D16–449 2017 WL 3495211 (Fla. Dist. Ct. App. August 16, 2017)
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2017/August/August%2016,%202017/2D16-449.pdf

Sinkhole coverage

Homeowner sued insurer after dispute regarding proper method of subsurface repair for sinkhole damage under an insurance policy. The parties hired experts who could not agree on whether "underpinning" was necessary, in addition to "compaction grouting". The trial court - without hearing insurer's expert testimony - ruled in favor homeowner, and directed a verdict of over $200,000.00. On appeal, court of appeals reversed, holding the determination of the proper method of subservice repair is a matter for a jury to resolve.

Thornton v. American Family Life Assur., Co. 225 So. 3d 1012 (Fla Dist. App., 2017)
https://edca.1dca.org/DCADocs/2016/1472/161472_DC13_09132017_090511_i.pdf

Appeals Court Clarifies Definition of "Dependent Child" Under Policy

Insured parents brought action against health insurer to compel payment. The insured's 23-year-old daughter sustained significant injuries in a high-speed motorcycle accident. The parties disputed whether the injured daughter was a "dependent child" under the policy. The trial court concluded that the daughter was not covered, and ruled that no benefits were payable by insurer. Parents appealed. Court of Appeals reversed, finding that "dependent child" encompassed the daughter. Appellate court found the insurer's argument that the relevant clause's "under 25" age requirement was limited by a reference to the tax code (under which the daughter would not have qualified) to be against the a "plain reading" of the agreement, and would amount to a "slight-of-hand withdrawal of coverage."

Ifergane v. Citizens Property Ins. Co., 2017 Fla. App. LEXIS 14745 * (Fla. Dist. App., 2017)
http://www.3dca.flcourts.org/Opinions/3D16-1142.pdf

Typo in Insurance Letter Could Waive Contract Defense

Husband and wife had a wind-only dwelling policy with insurer. After Hurricane Wilma damaged the insured's home, insureds made a claim on their policy. While the claim was pending, the insureds divorced, and subsequently entered a settlement agreement where wife assigned her into interest in the home to husband. Insurer and husband could not agree to payment amount, and insurer requested sworn proof of loss and Examinations Under Oath (EUO) from husband and wife (now divorced). Husband complied, while wife did not. A lawsuit commenced where the trial court awarded husband $475,000.00 for damages to his home under policy. Insurer appealed, arguing that wife's refusal to submit to an EUO precluded. However, the appellate court also held that insurer may have waived the EUO requirement in a letter sent to insured that read "by stating the above reason or denial."

b. UM/UIM Decision

Schoeck v. Allstate Ins. Co.,2017 Fla. App. LEXIS 14447, *1 (Fla. Dist. App., 2017)
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2017/October/October%2013,%202017/2D16-3161.pdf

Applying Multiple Uninsured Motorist Policies

Father and daughter were involved in an automobile accident, resulting in injuries to daughter. Daughter alleged that the responsible driver lacked liability coverage sufficient to fully satisfy her damage claims. At the time of the accident, daughter was covered by two separate uninsured motorist provisions in two separate policies. On appeal, the court of appeals held that under the express terms of the first policy, daughter had to exhaust all collectible insurance from the second insurer's policy before any recovery from the first insurer. Nevertheless, the court held that the first insurer had waived this contractual defense. Specifically, the court held that the insurer's affirmative defense was "not plead with sufficient specificity," and the plain reading of the defense only disclaimed insurance coverage from the tortfeasor, not other sources available to the daughter.

c. Other Significant Decisions

Boutin v. St. Augustine Regional Vet. Emerg. Ctr., No. 5D16-1421, (Fla. 5th DCA Oct. 3, 2017)
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Veterinary Malpractice – Limitation on Damages

Court of Appeals affirmed the decision of the trial court, which held that non-economic damages are not recoverable in a veterinary malpractice action based solely on negligence. Plaintiff alleged that although her dog had no fair market value, because it was an older, mixed-breed dog, the animal did have great value as a companion to the plaintiff. The trial court ruled the plaintiff could not recover damages based on a subjective, emotional, or "intrinsic" value that

would be based on a non-economic valuation. On appeal, the court rejected plaintiff's argument to extend recoverable damages so as to include such non-economic damages.

Carmen Encarncion v. Lifemark Hospitals of Florida, etc., et al., 3D15-0834
(Fla. Dist. Ct. App. Feb. 1, 2017)
http://www.3dca.flcourts.org/Opinions/3D15-0834.pdf

Fla. Stat. 768.0755 and Premises Liability

Visitor and her mother were waiting in the emergency room for her mother to be admitted to hospital. After waiting five hours, visitor left waiting area to seek out a nurse to determine status of wait. As visitor left waiting area, she noticed a man, who she thought was a paramedic with a spray bottle, cleaning a stretcher in the hallway. In an attempt to walk around the area where the man was cleaning, visitor slipped and fell on what she guessed was the spray liquid on floor. Visitor sued the hospital for her injuries, contending there were no signs indicating the floor was wet. Visitor asserted the substance on the floor was oily, dirty, dark, and smelled like a cleaning product. Trial court granted hospital's motion for summary judgment. On appeal, the court affirmed the decision of the trial court, noting pursuant to Fla. Stat. 768.0755, which concerns premises liability for transitory foreign substances for businesses, an injured person who slips and falls on a transitory foreign substance must show the business knew or should have known of the dangerous condition and should have taken action to remedy the dangerous condition. The court of appeals found nothing to suggest the hospital knew the foreign substance was on the floor, and visitor could not establish how long the substance had been on the floor.

Geico General Insurance Company v. James M. Harvey, 4D15-4724
(Fla. Dist. Ct. App. Jan. 4, 2017)
https://edca.4dca.org/DCADocs/2015/4724/154724_DC13_01042017_083817_i.pdf

Negligence Alone Does not Establish Bad Faith

Insured was involved in car accident which resulted in death of motorcycle rider. The estate of motorcycle rider brought wrongful death lawsuit against the insured. The estate received an $8.47 million judgment against the insured following a jury trial. Thereafter, insured sued insurer to recover for bad faith in handling wrongful death lawsuit that resulted in excess judgment. The trial court denied insurer's motion for a directed verdict and entered judgment on jury verdict for insured. On appeal, the court held the insurer had not engaged in bad faith despite its failure to immediately inform insured of a request by motorcycle rider's estate for a statement regarding insured's assets. The court of appeals found that the insured had fulfilled the seven obligations an insurer owes to an insured, and that insurer's negligence alone is insufficient to sustain a bad faith claim. *Boston Old Colony Insurance Co. v. Gutierrez*, 386 So. 2d 783, 785 (Fla. 1980). The court of appeals further held that any deficiency in handling the claim did not cause the excess judgment.

Bryant v. Mezo, No. 4D16-386 2017 WL 2131495 (Fla. Dist. Ct. App., May 17, 2017)
https://edca.4dca.org/DCADocs/2016/0386/160386_DC05_05172017_090229_i.pdf

Personal Injury Case Dismissed After Injured Motorist Conceals Her Previous Injuries

Injured motorist sued the other driver, alleging the collision caused severe neck and back injuries. Responding to several formal requests for information, the injured motorist claimed she did not recall ever experiencing any injury to her neck or back. Subsequently, it was discovered she had filed two separate worker's compensation claims for a cervical spine injury, and had received treatments for neck and back pain on more than 70 occasions over a fifteen-year period. Upon this information coming to light, the trial court dismissed her suit for perpetuating a "fraud upon the court." The court of appeals affirmed the decision of the lower court, and admonished the injured motorist for "deny[ing] reality even when confronted with the evidence."

Kendall South Medical Center, Inc. v. Consolidated Insurance Nation, Inc., 219 So.3d 185 (Fla. Dist. Ct. App., May 10, 2017)
http://www.3dca.flcourts.org/Opinions/3D16-0926.pdf

Insurance Agent Advice

Medical center brought action for negligent procurement of an insurance policy. The insured alleged that it sought a commercial property insurance policy that would fully cover its leased property. Insured claimed the insurance agent who sold the policy advised the agreement included such coverage, but failed to mention the existence of a 90% coinsurance clause. When the sprinkler system leaked and caused $260,000.00 in damages, insured only received a payout of roughly $16,000.00. The trial court dismissed insured's claim. On appeal, the court of appeals reversed the lower court, finding that the insured had sufficiently pled a cause of action and could proceed with suit. The court held that the agent was required to "exercise due care in correctly advising the insured of the existence and availability of particular insurance", and there was an unresolved question of whether the insurance provider's agent failed to observe this standard.

Duarte v. Snap-On, Inc., 216 So.3d 771 (Fla. Dist. Ct. App., March 15, 2017)
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2017/March/March%2015,%202017/2D15-1952.pdf

Injured Driver Nearly Has Case Dismissed After Telling Inconsistent Stories in Separate Lawsuit

Driver was injured when his idle vehicle was struck from behind by another motorist. Four years later, driver filed suit. The other driver (and his employer) accepted fault, but disputed the extent of driver's claimed injuries to his back and arm. Two months later, driver was involved in another vehicle accident, allegedly exacerbating his arm and back pain. During two separate depositions, driver described the incident as so minor that "[driver] doesn't even know it would be considered an accident." While being deposed about the more recent crash, driver described the event as a "hard impact" and "very fast", and that his injuries were "severely aggravated". Upon learning of this deposition testimony, defendant moved to dismiss plaintiff's claims for perpetuating a "fraud upon the Court". The trial court granted the motion and dismissed driver's case with prejudice. Court of Appeals - with some reluctance - reversed the trial court, finding

dismissal too harsh a remedy. Instead, the court opined that "impeach[ment] at trial or imposing some lesser sanction" was more appropriate.

Deauville Hotel Management, LLC. v. Ward, 219 So.3d 949 (Fla. Dist. Ct. App., May 31, 2017)
http://www.3dca.flcourts.org/Opinions/3D15-2114.pdf

Wedding Ruined by Hotel Not Grounds for Intentional Infliction of Emotional Distress

Couple alleged several claims against a hotel for a scheduling kerfuffle, which resulted in their wedding reception being moved from a private ballroom to the hotel's lobby. The "distressing" events included "bikini-clad" hotel guests walking through the reception area, the hired disc jockey being told repeatedly to turn the music down, and the 190+ wedding guests being crammed into a space that could not comfortably accommodate a group of its size. At trial, the jury awarded the couple $5,000.00 for intentional infliction of emotional distress. On appeal, the court of appeals reversed the damage award, emphasizing that to impose liability for intentional infliction of emotional distress a defendant's behavior must be "truly outrageous". By way of example, the court offered a case where an insurance provider intentionally delayed payments to a terminally-ill insured in an effort to expedite her death. In the court's view, the hotel's behavior here was a far-cry from the extreme behavior necessary to support a similar verdict.

Office of Insurance Regulation v. State Farm Florida Insurance Company, 213 So.3d 1104 (Fla. Dist. Ct. App., March 20, 2017)
https://edca.1dca.org/DCADocs/2016/2301/162301_DC05_03202017_090535_i.pdf

QUASR Data is a Trade Secret Exempt from Florida's Public Records Act

Property insurer brought action against Florida Office of Insurance Regulation to have its "QUASR" data declared a trade secret, and thus exempt from Florida's Public Records Act. QUASR data is information insurers are statutorily obligated to produce quarterly to state government officials, and contains information not available to the general public. The reports contain insurer information regarding the amount of policies in effect, the total dollar value of structure exposure for policies providing wind coverage, and the number of policies canceled due to hurricane risk. Here, the insurer sought an injunction to keep the office from releasing any of its QUASR data to the public. The trial court entered judgment in favor of insurer on both issues. The office appealed. Court of Appeals affirmed, holding that the data was trade secret exempt from disclosure under Public Records Act, and the office was prohibited from releasing it to the public.

Hagertysmith, LLC, v. Timothy Gerlander, et al., 2017 Fla. App. LEXIS 14894 (Fla. Dist. App., 2017)
http://www.5dca.org/Opinions/Opin2017/101617/5D16-3655.op.pdf

Neighbors Can Proceed with Suit Over Ruined Lake View

Purchaser of a lakefront home sued neighbors for diminished home value caused by neighbor's construction of a dock and walkway which obscured view of lake. The trial court held that the purchaser had no cause-of-action, and could not recover any damages because they had no legal right to have an unobstructed view of the lake. On appeal, the court of appeals held that

purchaser did have a cause-of-action for invasion of "littoral rights", and remanded for further proceedings.

D. SIGNIFICANT CASES PENDING BEFORE THE FLORIDA SUPREME COURT

Delisle v. Crane Co., et al., Case No. SC16-2182 (Fla. 2016).
http://jweb.flcourts.org/pls/docket/ds_docket?p_caseyear=2016&p_casenumber=2182

Expert testimony

Doctor was diagnosed with mesothelioma. He sued several parties, including cigarette companies, on a theory that asbestos in the cigarettes he smoked contributed to his illness. Court awarded doctor over $8 million in damages, with a 44 percent liability imposed on the cigarette companies. Cigarette companies appealed, and the court of appeals vacated and remanded, finding doctor's expert to be an unreliable witness. Supreme Court of Florida has agreed to review to the case.

Harvey v. Geico General Ins. Co., Case No. SC17-85 (Fla. 2017).
http://jweb.flcourts.org/pls/docket/ds_docket?p_caseyear=2017&p_casenumber=85

Bad-Faith Insurance Claim

Insured sought to collect under a policy with insurer after automobile accident caused decedent's wrongful death. The trial court returned a verdict for upwards of $8 million against insured. Later, decedent attached insurer as a defendant. Subsequently, insured attempted to file a cross-claim against the insurer for bad-faith coverage denial. Court of Appeals barred the cross-claim, holding that the bad-faith coverage issue arose from a distinct set of factual circumstances. Florida Supreme Court granted review of this issue.

These cases were pending at the time this summary was printed. To confirm whether the Supreme Court has issued a decision in any of these cases, we invite you to visit our website at http://www.smithrolfes.com.

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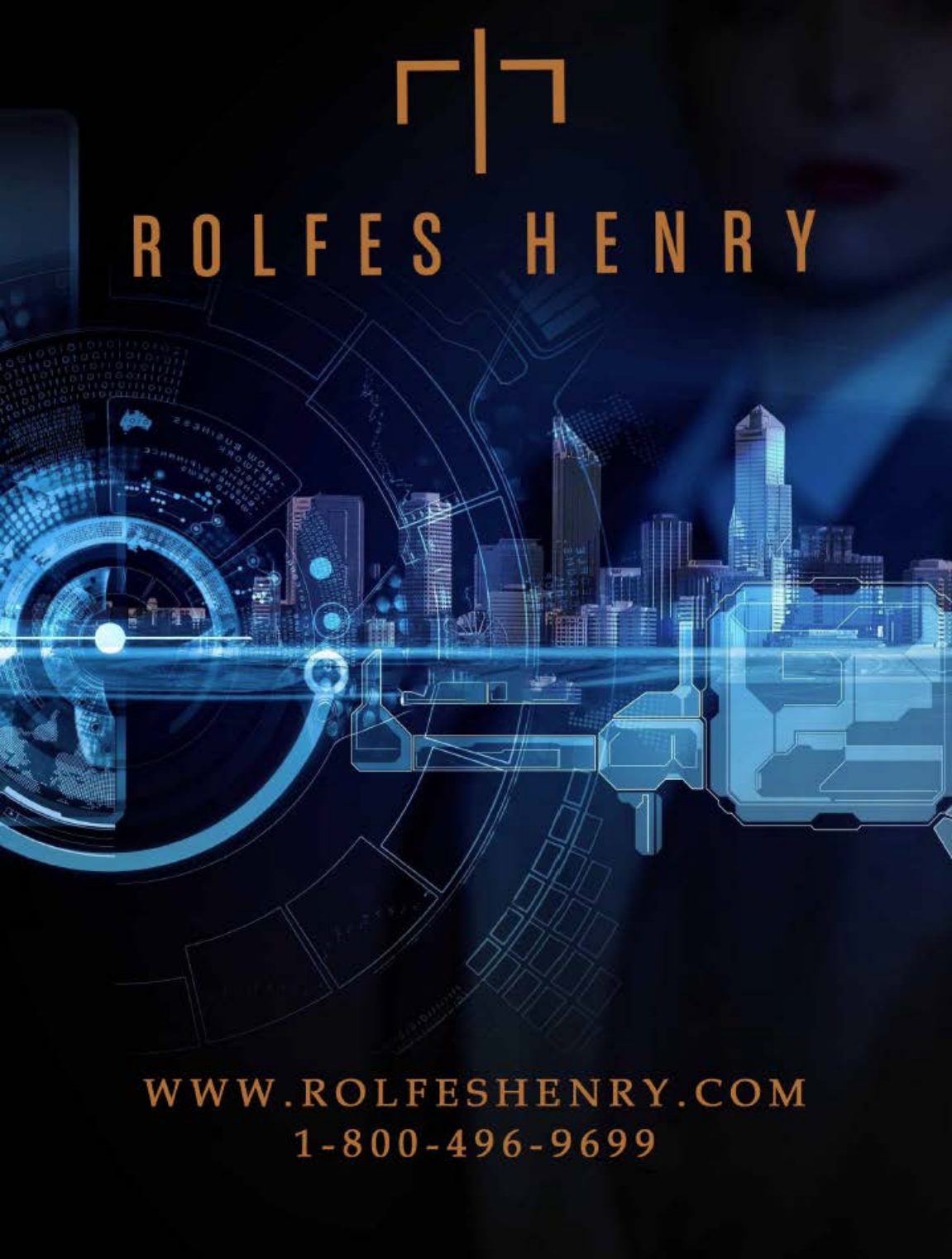
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