

## Davis & Young Opens Office in Warren on January 1, 2005

by  
 Thom Wright

**W**hat do Cleveland, Akron, Youngstown and Warren all have in common? No, besides cold winters and crappy weather.

Yes. Each is the home of a Davis & Young local office.

On January 1, 2005 we opened our newest office in Warren, Ohio.

The Managing Partner in Warren is **Jack Meola**. Davis & Young is fortunate to have an attorney of Jack's stature running the Warren Office. Along with his own thriving practice, Jack brings more than twenty years of litigation experience to the firm.

After graduating from Case Western Reserve University School of Law in 1984, Jack moved to Warren and began his insurance defense practice. Today he practices primarily in Trumbull, Mahoning, Ashtabula and Columbiana Counties.

In 1998, Jack opened his own firm in Warren and continued his practice, concentrating on civil and insurance defense litigation, including serious personal injury, wrongful death, employer intentional tort cases, medical malpractice defense and UM/UIM claims. Jack also has significant experience advising insurers regarding coverage issues and claims.

While the face of "insurance defense" continues to morph, Davis & Young strives to meet the ever changing needs of its clients. Providing high caliber legal services and local representation is not a slogan, but a commitment we take seriously to insure that both your needs and the needs of your insureds are being met. Jack's trial experience throughout the Mahoning Valley gives Davis & Young added depth and gives our clients the comfort and security that they are both entitled to and expect from Davis & Young.

Davis & Young is not the only challenge Jack took on beginning in January. Jack and his wife, Margo, had their first child, a baby boy, Carter Samuel, on January 4, 2005. Call me with any questions you have regarding the Warren Office. Or, contact Jack directly (to offer him congratulations and wish him luck!) at (330) 395-0600; e-mail: [jmeola@dywarren.com](mailto:jmeola@dywarren.com); 155 South Park Avenue, Suite 130 - Park Place Building, Warren, Ohio 44481-1055 (until February 28, 2005); or 108 Main Street, S. W., Tenth Floor, Warren, Ohio 44481 (as of March 1, 2005). ■



## Larry Wilkes and Rich Garner Become D&Y Partners

In addition to Jack Meola, Davis & Young welcomes **Larry Wilkes** and **Rich Garner** as its newest partners. Since 1999, Larry has worked in the firm's Youngstown Office.

Larry graduated from Youngstown State University in 1981 with a B.A. in Political Science, and he received his J.D. from Ohio Northern University in 1984.

Larry joined the firm with 15 years of experience in practicing law. Previously, he was a partner in the law firm of Wilkes, Wilkes, and Welsh where he concentrated on insurance defense litigation. As the managing partner of the Youngstown Office, Larry oversees many of the office's operations and he counsel's clients in evaluating and negotiating injury cases. He has also presented seminars on UM/UIM coverage for the Mahoning County Bar Association.

Since 2000, Rich has worked in the firm's Cleveland Office. Rich received his B.A. (1990) and J.D. (1993) from Ohio State University. Rich was previously a prosecutor, and then a magistrate, in Delaware County.

After joining D&Y in Cleveland, Rich began advising clients on insurance coverage issues, and bad faith and related litigation, with a focus on UM/UIM coverage. Rich's tireless work against **Scott-Pontzer** led to him being recognized as Ohio Lawyers Weekly's "Lawyer of the Year" in 2003. In addition to his excellent insurance coverage work, Rich has expanded his practice to include commercial clientele. ■



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# Tort Reform Redux



by

*Richard M. Garner*

In 1996, the Ohio General Assembly passed sweeping tort reform legislation only to see it struck down by the Supreme Court of Ohio as unconstitutional in 1999. Over the last two years, Ohio's legislators have once again been hard at work enacting tort reform legislation that could reshape Ohio law for decades to come.

In 2003, SB 120 reshaped comparative negligence and reintroduced statutory distinctions between economic and non-economic damages.

In 2004, the pace of reform accelerated.

In early September, HB 342 and HB 292 took effect with the aim to curb the asbestos and silica claims which have ravaged Ohio's manufacturing sector and their insurers. Among other things, the bills generally provide:

- minimum medical requirements for such claims.
- the filing of a written report and supporting test results constituting prima-facie evidence of an exposed person's physical impairment that meets the minimum requirements for the particular claim; the procedures by which a defendant may challenge such evidence; and procedures for administrative dismissal and reinstatement of such cases.
- rules governing the statute of limitations for such claims.
- certain immunities and protections for premises owners subject to such claims.
- that the plaintiff prove that the plaintiff's exposure was a result of the defendant's tortious act, and requires the plaintiff to prove that that particular defendant's conduct and the exposure to silica or mixed dust was a substantial factor in causing the injury or loss.

In December, HB 498 and SB 80 were passed and sent to the Governor for his signature. Governor Taft is expected to sign both bills which will become effective 90 days thereafter. These bills will have a significant impact on many tort cases.

HB 498, the smaller of the two bills, reforms Ohio's employer intentional tort liability law. It enacts R. C. 2745.01 which provides, in pertinent part:

- (A) In an action brought against an employer by an employee, or by the dependent survivors of a deceased employee, for damages resulting from an intentional tort committed by the employer during the course of employment, the employer shall not be liable unless the plaintiff proves that the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur.
- (B) As used in this section, "substantially certain" means that the employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.

*A full copy of the bill can be obtained at [www.legislature.state.oh.us/bills.cfm?ID=125\\_HB\\_498](http://www.legislature.state.oh.us/bills.cfm?ID=125_HB_498).*

SB 80 is a sweeping overhaul of many provisions of Ohio tort law. Among other things, it:

- provides a variety of regulations pertaining to punitive damages, including graduated punitive damages caps and a prohibition on prejudgment interest on punitive damages.
- prohibits the trier of fact from using certain evidence in determining the amount of non-economic damages; limits non-economic damages in non-catastrophic cases to the greater of \$250,000.00 or three times the amount of economic damages up to \$350,000.00 per plaintiff and \$500,000.00 per occurrence.
- permits defendants to introduce certain evidence of benefits that have been paid to the plaintiff as a result of damages that resulted from the injury or loss that is the subject of the pending claim.
- eliminates the consumer expectation test as stand-alone test for design defect causes of action in products liability cases and integrates the test into the list of factors to be considered in the risk-utility test for design defect causes of action; strengthens the "no feasible alternative design or formulation" defense for design defect cases by eliminating the "unreasonableness" exception; abrogates all common law product liability causes of action by superseding the holding of **Carrel v. Allied Products Corp.** (1997), 78 Ohio St.3d 284;
- establishes a 10-year statute of repose for product liability claims and construction-related claims.
- allows evidence of non-use of a seatbelt to be introduced in tort actions for the purpose of reducing non-economic damage awards.
- provides immunity from civil damages for food manufacturers, sellers and trade associations for claims resulting from a person's obesity, weight gain or cumulative consumption.
- provides limitations on the successor asbestos-related liabilities of certain corporations.
- modifies civil immunity for health care professionals and health care workers.

*A full copy of the bill can be obtained at [www.legislature.state.oh.us/bills.cfm?ID=125\\_SB\\_80](http://www.legislature.state.oh.us/bills.cfm?ID=125_SB_80).*

Hopefully, these legislative enactments will result in the broad long-term societal and economic benefits trumpeted by their sponsors, but this remains to be seen. It also is unclear whether the legislation will pass constitutional muster. Court challenges to such legislation seem inevitable. However, since 2002, the high court has taken a conservative turn which suggests any court challenges could receive a chilly reception.

The short-term effects of the legislation may be more pronounced. If the past is any predictor of the future, there will likely be a spike in the number of tort cases filed in the near future—just as there was with the 1996 tort reform legislation—as plaintiffs' lawyers file their cases prior to the effective date of the reforms to avoid the new legislation. Likewise, appellate activity will likely increase over the next year as various provisions of the legislation are challenged (in part due to SB 80's modifications to Ohio's final appeal order statute designed to expedite such appeals). All of which suggests that 2005-2006 could be a very busy two years for litigants, their lawyers, insurers and the courts.

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# D&Y Lawyers In The News

On the first Saturday in December since 1997, **Pat Roche, Sr.** has been the lead-off presenter at the Legal Eagles Seminar, a program sponsored by the Cuyahoga County Bar Association and St. Edward High School which provides continuing legal education to lawyers. On December 4, 2005, he made a presentation on the developments in civil justice 2004. Pat's fellow presenters and attendees at the seminar included Ohio Supreme Court Justice Terrence O'Donnell, Court of Appeals Judge Sean Gallagher, Cuyahoga County Court of Common Pleas Judge Timothy McGinty, Juvenile Court Judge Patrick Corrigan, Lakewood Municipal Judge Patrick Carroll, and J. Matthew Cain of the Offices of the United States Attorney for the Northern District of Ohio. Pat's presentation has been consistently evaluated as "excellent" by the seminars' attendees. *Pat's seminar materials are available to all D&Y clients by contacting Pat at (216) 348-1700.*

**Dave Fagnilli** was a guest speaker at the combined Cuyahoga and Akron Bar Associations' UM/UIIM seminar held on December 17, 2004. The event's chairman was D&Y's **Rich Garner**. **Hank**

**Hentemann** started this popular program in 1998 and presented again this year. David's topic was "Trial of the UM/UIIM Case." He discussed techniques he has used to neutralize jury bias and other factors unique to cases where the named defendant is an insurance company.

In addition to hosting the Cuyahoga and Akron Bar Association's UM/UIIM seminar in December 2004, **Rich Garner** presented the "Savvy Practitioner's Guide to Insurance Settlements in Ohio." In November 2004, **Shawn Cormier** presented at Westfield regarding potential fraudulent medical claims arising from minor impact cases.

In January 2005, **Shelley Wharton** and **Shannon Donze** spoke at the Insurance Board of Northern Ohio. Their presentation concerned document retention policies for insurance claims. In September 2004, Shelley also presented the "Handling Automobile Liability Case in Ohio" seminar.

**Shelley Wharton** recently joined the "Insurance Women of Akron," and was appointed to the Chippewa Lake Zoning and Planning Commission by the Chippewa Lake Mayor. ■

## D&Y TRIALS

**Jan Roller** received a defense verdict in Medina County, after a five-day trial in front of Judge Collier. The case concerned the duty one independent contractor owes a second independent contractor at a construction site. The Plaintiff, a painter, fell from a second floor balcony after placing his weight on a temporary stair railing. The railing gave way and the Plaintiff fell to the first floor, severely injuring his left foot, ankle and leg. At the time, both the Plaintiff and the defendant, a carpenter, were working as independent contractors for the co-defendant, the general contractor.

The court granted a directed verdict to the general contractor, finding that it owed no duty to the Plaintiff (as an independent contractor). The Plaintiff argued that Jan's client, the carpenter, owed a duty of ordinary care to the painter and that he had created a "latent defect" for which the carpenter owed a duty to advise others, including the painter, of the condition. Judge Collier rejected this theory and instructed the jury that the house under construction was an inherently dangerous setting and that the carpenter, as an independent contractor, was not liable

to the Plaintiff unless he actively participated in the Plaintiff's work.

Considerable pre-trial time was spent on the issue of the application of OSHA regulations to the case. Judge Collier ruled that the regulations could not be admitted into evidence and that the Plaintiff's expert could not offer an opinion that the carpenter violated specific OSHA regu-

*The jury found the Plaintiff  
90% negligent, the tort  
feasor 10% negligent,  
and the D&Y-represented  
defendant 0% negligent.*

lations because the painter was not the carpenter's employee.

Ultimately, the jury found that the painter was negligent and the carpenter was not negligent in causing the painter's injury. The temporary railing had only been in place for five minutes while the carpenter went outside to cut another part of the railing system. These facts were the most important to the jury. However, significant debate remained among the attorneys after the verdict regarding the

legal duty, if any, owed by the carpenter to the painter.

**Shawn Cormier** recently received a defense verdict in Mahoning County. The case concerned an alleged assault following a wedding reception. The jury found the Plaintiff 90% negligent, the tortfeasor 10% negligent, and the D&Y-represented defendant 0% negligent.

**Pat Roche, Sr.** received a defense verdict under the "sudden medical emergency" defense in Cuyahoga County. The defendant's vehicle crossed the center line and struck a vehicle occupied by two women. The defendant was a 79-year-old diabetic. According to the physicians, the defendant had low blood-sugar prior to the accident, causing him to "black out." The jury believed that the defendant suffered a sudden medical emergency and entered a defense verdict.

**David Fagnilli** tried a clear liability/disputed damages auto accident in Lake County in December 2004. The Plaintiff was the driver of a small pick-up truck that was stopped in heavy traffic when the distracted defendant slammed into her. Damage to both vehicles was extensive, and the passenger in the defendant's vehicle shattered the windshield with her

*continued on next page*

head. The Plaintiff was taken by ambulance from the scene, and followed up with treatment at the Cleveland Clinic and with a local chiropractor. An independent chiropractor reviewed the Plaintiff's chiropractic treatment, and opined that although the Plaintiff still had symptoms, her passive chiropractic treatment was excessive and went on for too long. The

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*The jury awarded a defense verdict to Pat, as it found no proximate cause between the accident and the alleged injuries.*

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Plaintiff's attorney rejected the insurer's last offer, stated that he would get prejudgment interest for bad faith, and filed suit. David utilized the independent chiropractor at trial, and the jury verdict was within a few hundred dollars of the last offer.

**Pat Roche, Jr.** successfully defended two cases in Cuyahoga County in October and November 2004. The first matter concerned an admitted negligence rear-end UIM claim, where the Plaintiff incurred \$8,000 in medical bills. The Plaintiff alleged a herniated disc with possible future surgery, relying upon the opinion of Dr. Leizman of Beachwood Orthopedic. The tortfeasor settled for the policy limits, and then the Plaintiff pursued the UIM insurance coverage. The Plaintiff made a demand of \$15,000 and the carrier offered \$10,000. The jury awarded a defense verdict to Pat, as it found no proximate cause between the accident and the alleged injuries.

Pat's second trial concerned a disputed liability motor vehicle accident. The Plaintiff was pulling out of a gas station when the defendant allegedly went left-of-center to maneuver into a turning lane. The Plaintiff had \$4,000 in medical specials. The last demand was \$10,000 and the last offer was \$6,000. The jury determined that the Plaintiff was 60% at fault for the accident, while the defendant was

40% liable. Therefore, the Plaintiff recovered nothing and Pat received his second defense verdict in as many months.

**Tom Connick** recently received a defense verdict at trial in Cuyahoga County after a week long trial. The case concerned a non-traditional slip and fall accident. Tom represented a residential apartment building that caters to mobility-disabled residents. The Plaintiff was wheelchair-bound (she had MS), and was a resident of defendant's for seven years. However, for a year prior to the accident, the Plaintiff was able to walk with the assistance of a cane.

On the day of the accident, the Plaintiff went to retrieve her mail. The mailboxes were built into the wall and were located near the common living area. The Plaintiff alleged that she slipped and fell on water and/or ice tracked into the building from the outside from other wheelchair-bound residents. The Plaintiff incurred medical specials of \$70,000, alleging a torn rotator cuff, disc herniation at C4-5 and C5-6, a sprained wrist and lumbar disc injury. The Plaintiff underwent four separate surgeries, including a Cloward procedure and neck fusion to repair the herniated discs.

At trial, the Plaintiff argued that the defendant owed her a special duty of care (due to her disability) and that the defendant was statutorily and contractu-

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*However, Tom convinced the jury that the defendant merely owed the Plaintiff the ordinary standard of care...*

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ally obligated to maintain the premises in a safe condition. The Plaintiff's safety expert testified that the defendant failed to maintain the premises in a safe condition, especially in light of its disabled residents. The Plaintiff asked for \$350,000 in damages. However, Tom convinced the jury that the defendant merely owed the Plaintiff the ordinary standard of care, and

that it did not breach its duty owed to her (even taking into account her disability). The jury returned a defense verdict.

**Bill Vance** received a defense verdict in September 2004 in front of Judge McCafferty in Cuyahoga County. The case involved a two car accident at the intersection of Brookpark and Broadview. Each party claimed that they had a green light. Bill discovered that the Plaintiffs had been drinking earlier at two strip clubs and were on their way to a third at the time

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*Bill discovered that the Plaintiffs had been drinking earlier at two strip clubs and were on their way to a third at the time of the accident...*

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of the accident; the defendant, meanwhile, was on her way home from her boyfriend's house. The Plaintiff-driver was not cited for a DUI (nor was he tested for alcohol consumption). Judge McCafferty granted the Plaintiffs' motion in limine to strike all evidence regarding alcohol consumption, the earlier whereabouts, and destination of Plaintiffs at the time of the accident.

The Plaintiff-driver suffered two broken legs, with one requiring surgery with the installation of hardware. Another surgery will be required in the future to remove the hardware. Past medical bills were more than \$50,000, and he claimed \$50,000 in lost wages. The Plaintiff-passenger had soft tissue neck and back injuries with \$7,000 in medical bills. There was no lost wage claim.

At trial, both parties called eye witnesses who contradicted each other, and contradicted their own statements made to the police, the insurance adjusters, and at deposition. The Plaintiff-driver asked the jury for \$425,000, while the Plaintiff-passenger asked for \$35,000. However, Bill convinced the jury that his client had the green light. The jury returned a defense verdict against the Plaintiff-driver, and returned a verdict

for the Plaintiff-passenger of \$7,500, but only against the Plaintiff-driver. The jury did not find the defendant liable for any of the damages.

## D&Y APPEALS

**Rich Garner** was amicus curiae counsel for the prevailing insurer in two separate cases in front of the Supreme Court of Ohio. In the first case, **Hollon v. Clary**, 104 Ohio St. 3d 526, 2004 Ohio 6772, the Supreme Court reversed judgment for a UM/UIM claimant on the basis that the UM/UIM insurer made a valid offer of UM/UIM coverage and obtained a valid rejection. Although the offer was not strictly Linko-compliant, the offer was valid because the written rejection of UM/UIM coverage created an unrebuttable presumption that there was a valid offer and the insurer presented an affidavit from the corporate named insured that it was generally apprized of the premiums for UM/UIM coverage. Although this case does not overrule Linko, the case suggests a shift from strict compliance with Link under policies governed by the post-HB261 version of R.C. 3937.18.

In the second case, **Hopkins v. Dyer**, 104 Ohio St. 3d 461, 2004 Ohio 6769, the Supreme Court of Ohio reversed judgment for a UM/UIM claimant on the basis that neither the law of the case doctrine, nor res judicata, barred application of **Westfield v. Galatis**, 100 Ohio St. 3d 216, 2003 Ohio 5849, where pending **Scott-Pontzer** litigation had not been fully and finally resolved of all issues, including damages. The litigation was on its second round of appeals when Galatis was decided, and the question arose as to whether Galatis could be applied to the case (due to its procedural status). The Supreme Court held that Galatis could be, and should be, applied to the present case. The Supreme Court also made clear that Galatis is expressly applicable to cases where UM/UIM coverage arises “by operation of law.” This case indicates that it should be applied to all pending **Scott-**

**Pontzer** cases.

**Rich Garner** and **Christopher Vlasich** successfully argued to the Eighth District Court of Appeals that Galatis should be applied retroactively, in **McNair v.**

*The Supreme Court also made clear that Galatis is expressly applicable to cases where UM/UIM coverage rises “by operation of law.”*

**Hartford**, 8th Dist. No. 84550, 2005 Ohio 29. McNair is of importance due to the procedural aspects of the case. D&Y filed a motion to dismiss the claim pursuant to Galatis, as the Plaintiff did not allege that he was in the course and scope of employment at the time of the accident. The Eighth District affirmed the trial court’s decision to dismiss the claim solely based on the pleadings.

**Tom Connick** successfully argued to the Ninth District Court of Appeals in **Westfield v. Cramer**, 9th Dist. No. 04CA008443, 2004 Ohio 6084, that although the claimant was in the course and scope of employment at the time of the accident, that he was not entitled to UM/UIM coverage, as the claimant was not “occupying” a covered auto at the time of the accident. The Court agreed with Tom’s argument that the language of the “Who is an Insured” section of the policy required that an employee of the

*Tom is currently defending this matter at the Supreme Court of Ohio.*

named insured “occupy” a covered auto before he qualified as an insured. The Ninth District held that the claimant was not “occupying” a covered auto, and that even as an employee of the named insured he was not entitled to UM/UIM coverage. Tom is currently defending this matter at the Supreme Court of Ohio. ■

## The Latest D&Y Additions

**Jack Meola** has joined our Warren office as managing partner. (See cover story for complete details.)

**Susan Weber** has joined D&Y’s Youngstown Office as an associate. Susan is a native of Brooklyn, New York, and was raised in Youngstown. She graduated from Youngstown State University in 1975, and received her nursing degree from the University of Maryland in 1986. Susan received her J.D. from the Dickinson School of Law in 1989. Susan brings with her a wealth of experience representing both Plaintiffs and defendants in products liability and personal injury litigation.

**Shannon Donze** has joined D&Y’s Cleveland Office as an associate. Shannon is a native of Strongsville, receiving her B.A. from Bowling Green State University in 2001. Shannon graduated from Case Western Reserve University School of Law in 2004, where she was a member of the Jonathon M. Ault Mock Trial Team and the Phi Delta Phi national Legal Ethics Society. Prior to joining D&Y as an associate, she was a law clerk in D&Y’s Cleveland Office.

**John Sherrod** has joined D&Y’s Akron Office. John received his B.A. in economics from Allegheny College in 1999, and his J.D. from the University of Akron School of Law in 2004. John has prior experience in general insurance defense matters, including trucking and representation of athletes. ■



# The Lawson Case: Subrogation Made Easy



by  
**Dennis R. Fogarty**

In September of last year, the Ohio Supreme Court gave health insurers a powerful new weapon in pursuing subrogation rights in personal injury claims throughout the State. In **Northern Buckeye Educational Council Group Health Benefits Plan v. Lawson**, 103 Ohio 3d 188, 2004-Ohio-4886, the Ohio Supreme Court clarified the law with respect to a subrogated healthcare providers right to reimbursement out of personal injury proceeds under the terms and condition of the health plan contract. Previously, Ohio state and federal courts applied inconsistent rules as to the priority rights of a subrogated healthcare insurer. These Ohio courts often grappled with the “made whole doctrine” which stood for the proposition that a healthcare insurer is entitled to reimbursement only after the Plaintiff had been fully compensated through verdict or settlement.

In the wake of Lawson, however, Ohio courts must apply the terms and conditions of subrogation provisions contained in various health insurance contracts. The Lawson court did not abrogate the “made whole doctrine” but instead, subjugated the doctrine to the terms of the health insurance contract. The Lawson court held at syllabus:

*A provider of health insurance benefits and an insured who has been injured by an act of a third party may agree prior to the payment of medical benefits that the insured will reimburse the insurer for any amounts later recovered from that third party, third party's insurer, or any other person through settlement or satisfaction of judgment upon any claims arising from*

*the third party's act. A clear and unambiguous agreement so providing is not unenforceable as against public policy, irrespective of whether the settlement or judgment provides full compensation for the insured's total damages.*

The “made whole doctrine” may be disregarded where the health insurance contract unambiguously states: (1) that the insurer has a right to full or partial recovery of amounts paid by it on the insured's behalf; and (2) that the insurer will be accorded priority over the insureds as to any funds recovered.

Typically, and for many years, health insurers have included subrogation provisions in their contracts which arguably satisfy Lawson. A determination of the health insurer's right to subrogation must be made by an examination of these provisions. As a practical matter, it is not common to request the health insurance contract as part of the discovery process of a personal injury action. However, now, in the wake of Lawson, it is a good idea to request the policy provisions at the earliest possible date.

Common subrogation terms in such contract include as follows:

- A. “Part E - Duties After an Accident or Loss.”
- B. General Duty.
- C. We must be notified promptly of how, when and where the accident or loss happened. Notice should also include the names and addresses of any injured persons and of any witnesses. A person seeking any coverage must:...
- D. Cooperate with us in the investigation, settlement or defense of any claim, or suit;...
- E. Submit a proof of loss when required by us.
- F. “Our right to recover payment”:  
If we make a payment under this policy and the person to or for whom payment was made has a right to recover dam-

ages from another we shall be subrogated to that right. That person shall do whatever is necessary to enable us to exercise our rights; and nothing after the loss to prejudice them...If we make a payment under this policy and the person to or for whom payment is made recovers damages from another, that person shall hold in trust for us the proceeds of recovery; and reimburse us to the full extent of our payment.

The foregoing appears to comply with Lawson insofar as the language grants the insurer the right to full recovery of amounts paid on the insured's behalf and further requires the insured to hold any proceeds from a recovery in trust and “reimburse us to the full extent of our payment.”

There are methods that a defendant or an insurer may undertake to avoid complications caused by a strengthened health insurer's medical lien. First, a defendant should obtain a copy of the Plaintiff's health insurance contract to determine the priority of rights in recovery of medical benefits paid on behalf of the Plaintiff. Secondly, in some circumstances, the health insurer should be made a party to the action and be required to assert

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*Typically, and for many years, health insurers have included subrogation provisions in their contracts which arguably satisfy Lawson.*

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its rights, if any, during a phase in the litigation when the subrogated lien may be taken into consideration in properly valuing the injury. Third, obtain all medical insurance “explanation of benefits” or similar forms detailing the amounts actually paid by the subrogated health insurer as opposed to the amounts charged by the provider. Most often, health insurers enter

*continued on next page*

into service contracts with providers for significantly reduced payment for medical care received by a Plaintiff.

Fourth and finally, any settlement agreement or release between a Plaintiff and insured defendant should include a medical subrogation indemnity and hold harmless provision which commits the Plaintiff to address any outstanding medical liens (known or unknown) and to defend and indemnify the defendant and his insurer against any subsequent claims.

Two additional concerns:

(1) To what extent is a subrogated healthcare insurer required to timely assert its rights in a pending personal injury action?

(2) To what extent is a subrogated healthcare insurer entitled to the proceeds of first party personal injury benefits (i.e. uninsured/underinsured motorist coverage)?

The first question is difficult to answer. Neither Lawson nor subsequent case law have addressed a health insurer's duty to timely assert its rights at a time when its lien can be taken into consideration. In certain circumstances, where a personal injury Plaintiff promptly notifies its health insurer of the existence of a claim or pending litigation and where the health insurer takes no steps to protect its rights under the contract *during* the litigation, the insurer may be precluded under an estoppel theory from later seeking reimbursement. Obviously, if such an estoppel argument were to succeed, the injured Plaintiff insured would have to strictly comply with the notice and cooperation provisions of the health insurer's contract.

A medical health insurer's rights to first

party payment under a contract for uninsured/underinsured motorist benefits may be governed by the subrogation provisions of the health insurance contract. Note that the subrogation provisions referenced above require a health contract insured to reimburse where the insured "recovers damages from another." Can those provisions be interpreted to apply equally to a first party benefits payment?

It is likely the courts will perceive Lawson to have granted broad and powerful rights to health insurers to recover

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benefits paid in the personal injury context and will therefore seek to strictly construe the terms and conditions of the health insurance contract to limit the scope of the rights conferred on the health insurer to those unambiguously stated in the language of the contract. Indeed, Lawson specifically and repeatedly refers to "clear and unambiguous agreements" and thus, any uncertainty as to whether a health insurer's rights apply to first party benefits will enure to the side of the health contract insured.

*For questions or comments with respect to the interpretation and enforceability of health insurance contract subrogation provisions, please contact the attorneys at Davis & Young.* ■

## New D&Y Website, New Features



On February 14, D&Y launched its **new and improved** website, which reflects yet another example of D&Y's continuing efforts to meet the needs of its clients. In addition to the helpful information our original website provided, the new site introduces the Firm's newly formed Practice Groups, both by area of law as well as by attorney. The new site offers instant access to current legal and firm news, and provides our clients with the ability to download D&Y's current and past newsletters, and articles of interest authored by D&Y attorneys.

As an added benefit, the new site offers the ability to download screen savers reflecting the architectural beauty of different courthouses from all over America. *Please be sure to stop by our new website at [www.davisyoung.com](http://www.davisyoung.com).* ■

Tort Reform Redux • continued from page 2

*For more information on Ohio tort reform, please feel free to contact any of Davis & Young's attorneys at their offices in Cleveland, Akron, Youngstown or Warren. Contact information is available at our website: [www.davisyoung.com](http://www.davisyoung.com).* ■

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*Save  
the Date*

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**UPCOMING D&Y EVENTS**

- ✓ **FRIDAY, APRIL 29, 2005**  
**D&Y Annual Law Seminar**  
Landmark Conference Center  
9th Floor - Midland Building  
Cleveland, Ohio
  
- ✓ **FRIDAY, JUNE 17, 2005**  
**D&Y Annual Golf Outing**  
Pine Ridge Country Club  
Wickliffe, Ohio