

OHIO CASE SUMMARIES
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Ohio case summaries are brief descriptions of cases decided in the past week by the Ohio Supreme Court and lower appellate courts on issues related to insurance law. Except for holidays, these summaries will be provided Wednesday and Friday of each week. To discontinue receiving this service, please call Jared Wagner at 937-224-3333 or email Jared at jawagner@green-law.com.

Court of Appeals: Sixth District

Case Name: *TOL Aviation, Inc. v. Intercargo Ins. Co.*, 2006-Ohio-6061

Decided: November 17, 2006 (posted November 17, 2006)

Issue(s): Duty of Good Faith / Negotiation of Settlements / Attorney Fees

Summary of Opinion: This case involves two litigations. The first occurred when a TOL Aviation ("TOL") employee damaged a customer's plane during a maintenance inspection, but lied to the customer concerning the source of the damage. TOL's insurer, Intercargo, hired separate counsel to represent TOL and each of the individual employee/defendants. Intercargo also retained counsel to represent its interests in this matter. During the pendency of the litigation, it became clear that Intercargo owed \$15,796.85 to the customer for the repairs of his plane under the terms of TOL's insurance agreement, yet Intercargo did not pay the customer this amount for almost a year. Thereafter, a global release settlement was reached, whereby the customer received \$50,000 in exchange for dismissal of the action. The \$15,796.85 Intercargo had already paid was credited against the \$50,000, with the balance of the settlement amount to be paid by TOL and its employees.

The second litigation was initiated by TOL and its employees against Intercargo, alleging that Intercargo had acted in bad faith. Intercargo moved for summary judgment, alleging that it could not be liable for bad faith due to the fact that it paid out the entire amount of the covered portion of the customer's claim. The trial court denied Intercargo's motion and allowed in camera inspection of correspondence between Intercargo and the attorneys it had hired. A review of the correspondence revealed that Intercargo had been trying to negotiate a separate settlement with the customer behind the scenes and without the knowledge of either TOL or TOL's employees. Furthermore, the correspondence revealed that the customer initially offered to settle the case for \$34,500, but Intercargo failed to

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inform TOL and TOL's employees of this offer. The correspondence also demonstrated that there was no basis for Intercargo's delayed refusal to pay the customer's claim. After a bench trial, TOL and its employees were awarded the amounts they had spent in settling the case, including attorney fees, minus the deductible and the diminished value of the plane caused by TOL. The trial court also awarded TOL and its employees attorney fees for the second litigation.

On appeal, the Sixth District affirmed the decision of the trial court finding that Intercargo had acted in bad faith. Specifically, the court held that an insurer's duty extends beyond paying a claim and includes the handling of a claim. Foot-dragging and poor evaluation of the viability of claims can constitute bad faith where the insurance companies actions are not justified. The court found that Intercargo had acted in bad faith by undercutting its insureds in the interest of settling the actions against it. As to the issue of attorney fees, the Sixth District affirmed the trial court's decision as to attorney fees incurred in the initial litigation because such fees are considered compensatory damages in a bad faith action. However, the appellate court found that the award for attorney fees related to the second litigation was not proper because such fees are not compensatory in nature and the trial court made no finding that punitive damages were proper.

Court of Appeals: Ninth District

Case Name: *Turner v. Nationwide Ins. Co.*, 2006-Ohio-6063

Decided: November 20, 2006 (posted November 20, 2006)

Issue(s): Damages

Summary of Opinion: Plaintiff was injured in an automobile accident, and negligence was admitted. A trial was held on the issue of damages, at which Plaintiff introduced medical bills and testimony of treating physicians. Defendants introduced rebuttal testimony of physicians who stated that Plaintiff's medical problems were the result of pre existing injuries and not the accident. After deliberating, the jury awarded Plaintiff \$0. Plaintiff then moved for a new trial, arguing that the finding of \$0 damages was inadequate and had been influenced by passion or prejudice. The trial court denied the motion. On appeal, the Ninth District recognized that medical bills give rise to a presumption that the amount billed for the medical services is reasonable. However, such bills do not give rise to a presumption that the services are necessary. A plaintiff has the burden of proving that medical services are both reasonable and necessitated by the actions of the tortfeasor. Because there was conflicting testimony from the various expert doctors concerning whether the medial services had been necessitated by the accident, the appellate court affirmed the decision of the trial court.

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Court of Appeals: Twelfth District

Case Name: *Myers v. Encompass Indemn. Co.*, 2006-Ohio-6076

Decided: November 20, 2006 (posted November 20, 2006)

Issue(s): Definition of "surface water"

Summary of Opinion: Plaintiff's home was flooded by water that escaped from his neighbor's drain pipe and resulted in his storm drain backing up. Plaintiff sought coverage under his homeowner's insurance agreement, but the claim was denied. Plaintiff then brought suit for coverage and bad faith. The trial court granted Plaintiff summary judgment. On appeal, the insurer, Encompass, argued that coverage was excluded under Plaintiff's policy for any losses caused by surface water. In the alternative, Encompass argued that losses caused by backed up sewers or drains were subject to an addendum to Plaintiff's policy that had a \$15,000 coverage limit. In response, the Plaintiff argued that the water became "sewer water" once it had entered a man made channel (his neighbor's pipe). Thus, Plaintiff argued that the water was no longer "surface water" at the time it caused damage to his home. The Twelfth District rejected this argument, holding that there is no legal distinction between surface water that is above the ground and surface water that is temporarily channeled through underground pipes. Thus, the appellate court held that the loss was excluded from Plaintiff's insurance policy. However, the Ninth District reviewed the language of the addendum to the policy and found that it provided coverage to Plaintiff for this loss, albeit with a \$15,000 limit.

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