

### 3 Significant Ohio Insurance Updates From 2023

By **Jenna Pletcher and William Peseski** (January 16, 2024)

The past year saw some significant changes and developments in Ohio's insurance coverage landscape, from the perspective of both policyholders and insurance carriers. From new bad faith discovery mechanisms relating to out-of-state property to the Ohio Supreme Court's interpretation of what constitutes an assault or battery for coverage purposes, Ohio's insurance coverage landscape continues to evolve.

#### **1. The Ohio Supreme Court has opined that bad faith claims sound in tort.**

In November 2023, the Ohio Supreme Court in *The Scott Fetzer Co. v. American Home Assurance Co.* again addressed the topic of insurance bad faith, this time within the context of a discovery privilege dispute, opining and issuing guidance as to choice-of-law questions.[1]

Significantly, the court began its opinion by stating, "Insurer bad-faith claims sound in tort and are not rooted in any particular text of a contract and instead arise by operation of law." This opinion directly affects a court's choice-of-law analysis as to a particular issue when concerning bad faith claims.

In *Scott Fetzer*, the choice of Ohio law allowed a policyholder to compel the production of documents from an insurance company that otherwise would have been protected by attorney-client privilege, even though the insured property was located in Michigan and the policy was purchased in Indiana.

The court reaffirmed that a claim against an insurance company for bad faith sounds in tort, and, thus, tort choice-of-law rules apply. In issuing guidance, the court opined that the law of the state with the "most significant relationship" to the controversy controls.

By way of background, after purchasing a company from its prior Indiana-based operator, *The Scott Fetzer Co.* was responsible for environmental cleanup and remediation work at two manufacturing sites in Michigan. *Scott Fetzer* argued that several insurance policies issued to its predecessor-operator in the 1960s provided coverage for the cleanup and sued the insurance companies, including *Travelers Casualty and Surety Co.*, in Ohio courts for coverage.

In the course of discovery, *Scott Fetzer* moved to compel *Travelers* to produce documents related to claims-handling procedures and communications regarding *Scott Fetzer's* claim, which documents *Travelers* argued were protected by attorney-client privilege.

However, in Ohio, attorney-client privilege does not shield from discovery documents that reveal a defendant's bad faith. In contrast, Michigan does not recognize a cause of action for bad faith, and Indiana does not allow for discovery of attorney-client privileged materials in a bad faith claim.



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The Ohio Supreme Court reasoned that because a bad faith claim arises from tort, not contract, choice-of-law provisions for tort actions apply to bad faith claims. The court then ruled that Ohio law would apply under the "most significant relationship" test of the Restatement of Conflict of Laws, Section 145. Thus, even though the insured property was located in Michigan and the insured had been an Indiana company, Ohio law applied to the bad faith claim, because Ohio had the most significant relationship to the administration and denial of the coverage claim.

After this decision, it is important to be aware that a claim for bad faith claims handling is a tort claim that may be subject to different state laws than a breach-of-contract claim in the same case.

In Ohio specifically, because of the ability to compel production of otherwise privileged documents in a bad faith case, it is crucial to determine whether the bad faith claim is substantially related to Ohio to potentially open the door to compel production of privileged documents and communications from insurance companies.

## **2. Marijuana and alcohol DUIs may no longer be treated differently in light of recent recreational legalization.**

At least one Ohio appellate court has interpreted marijuana possession in connection with a coverage determination for an automobile accident, applying a policy exclusion for operating a vehicle while under the influence of marijuana.[2]

However, in light of Ohio's Nov. 7, 2023, ballot initiative legalizing recreational marijuana, this issue may well again be before the courts.

Jaylah Cleveland arrived for her shift at Starbucks one day "acting strangely." She admitted to "smoking weed." Her manager, saying Cleveland could not work while high, asked her to leave. Cleveland then got in her car and drove it through the front window of the Starbucks, hitting a customer, and then backed up and injured another customer.

Cleveland then pulled into oncoming traffic, where she hit a vehicle before driving away and striking another vehicle. All told, Cleveland injured four separate people, who were insured by four different insurance companies.

Cleveland's insurance company, Grange Insurance Co., argued that it had no duty to defend Cleveland, because her conduct fell within the policy exclusions for criminal conduct and for use of a controlled substance.

In December 2022, the Ohio Court of Appeals, Sixth Appellate District, sided with Grange, reasoning that although auto insurance policy exclusions for alcohol use are not enforced due to being against public policy, exclusions for marijuana use are permissible because marijuana is a controlled substance under federal law and was, at the time, only legalized for medical use in Ohio.

According to the court, these were "clear reasons to treat marijuana use differently than alcohol use." However, since *Grange Insurance Co. v. Cleveland*, Ohio has legalized recreational marijuana use, although marijuana still remains a federally controlled substance.

This is an area to watch, as we expect additional developments in the law. Ohio courts normally do not allow insurance carriers to avoid coverage for alcohol-related operating a

vehicle while impaired injuries, as doing so would be against public policy and would harm victims who are not negligent or otherwise at fault.

While the Sixth District was inclined to treat driving under the influence of marijuana differently, it is unclear how Ohio's recent legalization of recreational marijuana affects that decision, as legalization would seem to undermine the court's reasoning that marijuana is patently different than alcohol.

It is likely that this issue will continue to appear before the courts, and marijuana may soon be treated similarly to alcohol for insurance coverage purposes due to the changes in state law.

### **3. The criminal law subjective intent requirement may not apply in civil policy "assault or battery" exclusions.**

In July 2023, the Ohio Supreme Court ruled that criminal law definitions of "assault" and "battery" do not necessarily apply for purposes of exclusions in a commercial general liability insurance policy and that subjective criminal intent is not required for these exclusions to apply.[3]

In *Krewina v. United Specialty Insurance Co.*, a resident at an adult care facility attacked another resident with a knife. The attacker was charged with felonious assault but found not guilty by reason of insanity.

The Ohio Supreme Court, interpreting the language of the adult care facility's CGL insurance policy, held that the policy's assault-or-battery exclusion applied to preclude coverage. The policy excluded "bodily injury ... arising out of or resulting from ... any actual, threatened or alleged assault or battery," but it did not define the terms "assault" or "battery."

The court, in order to give the terms "their plain and ordinary meaning," determined that because the policy was a CGL insurance contract — in other words, a civil policy — the "plain and ordinary civil-law definitions" of the terms would apply.

Notably, the civil law definitions of "assault" and "battery" require only a willful act, as opposed to the mens rea or subjective intent required by the criminal definitions of the terms — thus, under the civil law definitions, the attacker's actions fell within an exclusion to the policy.

It is important to be cautious regarding undefined terms, because even commonly understood criminal terms such as "assault" and "battery" may not require criminal intent to trigger policy exclusions. What this means for policyholders is that policy exclusions for acts such as assault or battery may be broader than they seem at first glance and that more conduct may be excluded under the policy than expected.

### **Conclusion**

As these cases demonstrate, it is essential for policyholders, carriers and counsel to keep up to date on developments in Ohio coverage insurance law. Even some of the cases discussed above may soon become obsolete. It will be interesting, for instance, to watch how Ohio courts handle coverage for marijuana-related DUI accidents, to see if the law begins to treat marijuana similarly to alcohol for insurance coverage purposes following Ohio's recent legalization of recreational marijuana.

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***Disclosure: Brouse McDowell represented The Scott Fetzer Co. in Scott Fetzer Co. v. Travelers.***

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[1] Scott Fetzer Co. v. Am. Home Assur. Co. Inc., Slip Opinion No. 2023-Ohio-3921.

[2] Grange Insurance Company v. Farmers Insurance, 2022-Ohio-4303, 203 N.E.3d 6 (6th Dist.).

[3] Krewina v. United Specialty Insurance Company, 172 Ohio St.3d 29, 2023-Ohio-2343, 221 N.E.3d 819.