

IN THE SUPREME COURT OF OHIO

WEST BROAD CHIROPRACTIC, : Case No. 2008-1396 consolidated with
: Case No. 2008-1489
Appellant, :
: On Appeal from the Franklin County Court of
v. : Appeals, Tenth Appellate District
: AMERICAN FAMILY INSURANCE, :
: Appellee. :

MERIT REPLY BRIEF OF AMICUS CURIAE, OHIO STATE CHIROPRACTIC
ASSOCIATION AND OHIO OSTEOPATHIC ASSOCIATION, ON BEHALF OF
APPELLANT WEST BROAD CHIROPRACTIC

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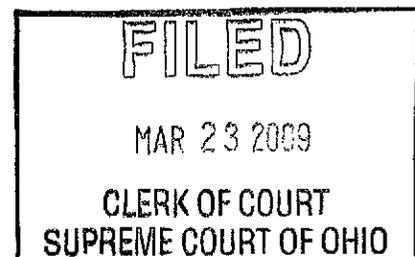


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I. ARGUMENT

Proposition of Law No. II: R.C. 3929.06 does not preclude an assignee of settlement proceeds from bringing a direct action against a third party insurer, who had prior notice of such assignment, after the insurer had settled with the assignor and distributed settlement proceeds in disregard of that written assignment.

CERTIFIED CONFLICT QUESTION NO. 1

Does R.C. 3929.06 preclude an assignee of prospective settlement proceeds from bringing a direct action against a third party insurer, who had prior notice of such assignment, after the insurer had settled with the assignor and distributed settlement proceeds in disregard of that written assignment.

- A. Contingent proceeds to be paid in the future can be assigned before they exist, including tort claim proceeds to be paid out by an insurer.

Amicus Curiae, Ohio Association Of Civil Trial Attorneys (“OACTA”) argues that an injured party “at the time of the assignment” has no present right to obtain settlement proceeds from an insurer, and for this reason, the injured party cannot assign the right. (OACTA Brief, p. 2). However, it is well-established at common law that a fund or sum of money expected to be paid in the future can be assigned, even if the fund or sum of money is subject to a contingency that might affect future payment. “In equity, the assignee of an expectancy, possibility, or contingency acquires a present equitable right, which becomes an equitable property right over the proceeds of such expectancy, possibility or contingency as soon as they come into existence as an interest in possession.” 3 POMEROY, EQUITY JURISPRUDENCE (1941), Section 1271. Equity does not hold that an assignment of such an expectancy or contingent interest operates as a present transfer, but construes it as operating by way of a present contract to give a title which, as between the parties, takes effect and attaches to the subject as an equitable title or lien, which equity will enforce, as soon as it comes into existence and possession, without the necessity of any new act. 6A CORPUS JURIS SECONDUM, Assignments, Section 16. *Bernstein v. Allstate Insurance Company* (NY Civ. 1968), 56 Misc.2d 341, 288 N.Y. S.2d 646 illustrates its operation

in an existing tort claim:

... when the negligence action was settled, and the settlement fund came into existence, the equitable assignment became a legal assignment. It effectuated a transfer of title to that portion of the fund assigned to the doctor and Allstate was obligated to immediately turn over that portion to him.

56 Misc.2d at 342, 288 N.Y.S.2d at 648.

Beyond Ohio, even the United States Supreme Court has acknowledged the historical validity of equitable assignments: "... an order to pay out of a specified fund has always been held to be a valid assignment in equity and to fulfill all of the requirements of the law."

Christmas v. Russell (1871), 81 U.S. 69, 20 L.Ed. 762.

"An equitable assignment creates, on the property, a present equitable charge which equity recognizes as vested, but which the law does not recognize as vested or valid, and which, when the right become existent, ripens into a preferred and enforceable right." *Gintel v. Green* (Ca. App. 1958), 165 Cal.App.2d 723, 332 P.2d 298. See, also, *Pennsylvania Co. v. Thatcher* (1908), 78 Ohio St. 175, 85 N.E. 55 ("equitable assignment to attorney of an interest in the proceeds of [future] compromise, not enforceable in suit at law, his remedy being in equity"), citing *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co. v. Volkert* (1898), 58 Ohio St. 362, 50 N.E. 924.

Assignment of future contingent funds in other factual contexts is not uncommon. It has long been established that an employee has power to assign his right to future wages, even though they become due only after performance of services not yet rendered; and this is true even though there is no enforceable contract binding him to render the service or binding the employer to keep him employed. 4 CORBIN ON CONTRACTS (1951), Section 874.

Likewise, in other commercial contexts, future rents which have not yet been paid, and which might not *ever* be paid, are commonly assigned. For example, in *In re Jason Realty, L.P.*

(C.A.3 1995), 59 F.3d 423, the Court held that future rents presently assigned over to a bank were not the property of a commercial debtor's bankruptcy estate, but were instead the property of the assignee-bank. The Court held that the fact that the rents which were to be paid in the future were conditional did not prevent their assignment.

When American settled with Ms. Norregard, it knew that part of these settlement proceeds were assigned to West Broad Chiropractic, and, like any other obligor of a creditor, with notice of the assignment of those proceeds to the creditor, it was not entitled to disregard the assignment. In this context, American is no different than any other obligor who is on notice of the assignment of future proceeds which it will be required to distribute after satisfaction of a pending contingency. And, in spite of Appellee's arguments proposing the application of R.C. 3929.06, that statute does not, and cannot be made to permanently shield an insurer from the ordinary duties owed by any obligor, with prior notice of an assignment, who holds or will hold assigned funds.

The *West Broad* Court ignored the plain language of R.C. 3929.06 and the accompanying unambiguous interpretation by the courts. The *West Broad* Court's specific error is its belief that R.C. 3929.06 implicitly (rather than expressly) rendered the proceeds assignment invalid, by incorrectly concluding that if R.C. 3929.06 prevented Ms. Norregard from suing American Family for a finite amount of settlement proceeds on the date she made the proceeds assignment over to West Broad, then the assignment must therefore be void at inception.

Instead, R.C. 3929.06 is inapplicable to the assignment, and the rights thereunder, at the moment of execution. At the time of making a valid assignment of future funds subject to a contingency, no assignor, contemporaneously, has a direct right of action to obtain the expected fund. The contingency must first occur.

A person who does not have a present right to obtain proceeds or a fund from an existing payment source, but who may have that right in the future, can assign the prospective fund or a portion of it to another. *General Excavator Co. v. Judkins* (1934), 128 Ohio St. 160, 190 N.E. 389. In *General Excavator*, an excavating contractor assigned to his bank future proceeds from an executory excavation contract. The contractor did not assign his contract itself over to his lender, but only the future proceeds that he expected would result from his future performance of it. No money was owed to the contractor at the time of assignment, and, as payment was conditional on the assignor-contractor's subsequent performance of the work, payment might never have become due. Nonetheless, this Court held this assignment was valid as it met the requirements of an "equitable assignment":

The consent of a debtor, i.e., the one obligated to an assignor, is not required to an assignment, even though it be for only part of an entire debt or claim. Such assignment will be enforced against the debtor in equity. *Pittsburgh, C.C. & St. L. Ry. Co. v. Volkert*, 58 Ohio St. 362, 50 N.E. 924; 80 A.L.R., note beginning at page 414. *** An equitable assignment needs no particular form and may even be oral. So long as there is an intention on one side to assign and an intention on the other side to accept, supported by sufficient consideration and disclosing a present purpose to make an appropriation of a debt or fund, it is enough. 2 *Ruling Case Law*, 614; 5 *Corpus Juris*, 910.

Id at 165.

Similarly, in *Moore v. Foresman* (1962), 172 Ohio St. 559, 179 N.E.2d 349, the trust which was presently in existence provided the source necessary for assignment by contingent beneficiaries of assets that they did not own at the time of assignment, but which they would own upon satisfaction of a future condition. In *Hite v. Hite* (1929), 120 Ohio St. 253, 166 N.E. 193, the will of the decedent was the existing source of the assignor's future inheritance, which this Court held could be validly assigned before such inheritance rights ever vested in the potential beneficiaries.

Hsu v. Parker (1996), 116 Ohio App.3d 629, 688 N.E.2d 1099, a case extensively discussed in Appellant’s brief, also illustrates a person’s right to assign contingent proceeds to another before they arrive, and before the contingency has been satisfied. At the *moment* Elaine Parker, the patient, assigned over to Dr. Hsu, her orthopedic surgeon, a portion of her expected proceeds from a future tort claim settlement, she *also* had “no direct right of action”¹ against her attorney (who would receive and distribute them if they were ever paid), and she had no “right to settlement proceeds”² from him. It is also true that at the time of assignment, Dr. Hsu had no “contractual or other legally cognizable relationship”³ with Ms. Parker’s attorney, the assignment obligor. In the same way, the insurer for a tort claim that has already occurred will be distributing money in the future, either in settlement, or after a judgment is rendered after trial, subject to the contingency that the claim is dropped or nothing paid to the plaintiff at the conclusion of trial. Properly viewed, an insurer is no different from any other obligor who waits for the contingency to occur or not, to distribute the previously assigned contingent proceeds, that have now “come into existence.”⁴

The law of assignment of contingent proceeds requires *not* that the assigned funds exist or be able to be sued upon at the moment of assignment, but rather that the source of the contingent proceeds exist at the time of assignment. The contingency affecting the future proceeds must arise out of an existing right or source. The excavating contractor in *General Excavator* validly assigned expected proceeds from an existing but unperformed contract to a third party creditor otherwise unconnected to that contract. Expectancies or “possibilities” such

¹ OACTA Brief, p. 2.

² OACTA Brief, p. 3.

³ OACTA Brief, p. 1.

⁴ 3 POMEROY, EQUITY JURISPRUDENCE (1941), Section 1271.

as this are sufficiently definite and are thus valid. Likewise, an assignment of contingent proceeds from an existing tort claim is another expectancy or possibility that is valid, but an assignment of prospective proceeds from a tort claim or loss event which has not yet occurred is the invalid “possibility on a possibility” or “naked expectancy”:

The purported assignment in this case was not of an expected settlement fund from an expected tort claim. It was an assignment of a right to monies from an expected settlement of an existing tort claim. The ‘specific thing’ which was intended to be assigned was a sum of money from an identifiable fund arising at a future time as a result of the fulfillment of a condition (a settlement of the tort claim). The right to the proceeds of the expected settlement is therefore assignable.

Costanzo v. Costanzo (N.J. Super. 1991), 590 A.2d 268 (emphasis added).

Surprisingly, even with the ample law before it, including all or most of the above, the *West Broad* Court failed to recognize that an equitable assignment is not void simply because the assignor, by assigning prospective proceeds, is, by necessity, assigning the attendant right to sue to obtain the settlement proceeds when they “come into existence.” The lesson of this Court’s decisions in *General Excavator*, *Moore*, *Hite*, and the abundant other historical authority, is that one can assign the right to future proceeds, so long as it is based on the assignor’s contract, inheritance status, tort claim, or other right existing at the moment of assignment. This is not the naked possibility – the “mere chance or expectation that a person will acquire future property,” Black’s Law Dictionary (8 Ed. Rev. 1999), 1203-1204 – that courts deem void.

B. The claimant can directly enforce payment of the settlement amount against the insurer upon providing a release.

In addition to its erroneous position at page 3 of its brief that the assignment failed because Ms. Norregard did not have the right to obtain settlement funds from American at the *moment* of the assignment, its argument in Section B asserts a more sweeping misapplication of R.C. 3929.06. OACTA submits that Ms. Norregard could never have sued American directly,

even if American had failed or refused to pay her the settlement after she released American and its insured.⁵

While OACTA acknowledges that “payment of the ‘settlement proceeds’ may ultimately be the obligation of the tortfeasor’s insurer,” OACTA then argues that “the injured party does not have any direct right of action against an insurer or indemnitor of the tortfeasor.” (OACTA Brief, p. 3). However, if payment of settlement proceeds is “the obligation of the tortfeasor’s insurer,” then a claimant will have the right to sue the insurer to perform the settlement if the settlement is not paid after delivery of the release. The claimant’s right to enforce settlement terms against an insurer exists completely apart from R.C. 3929.06. *Fletcher v. Nationwide Mutual Ins. Co.*, Montgomery App. No. 02CA1599, 2003-Ohio-3038, at ¶23:

Nationwide argues that, as a third party beneficiary to an insurance contract, Fletcher has no right of action to enforce coverage. That may be correct with respect to Fletcher's negligence claim against Knop, but that is not the nature of Fletcher's declaratory judgment claim against Knop and Nationwide. Nationwide is not a third party, but a principal, to the bi-lateral contract of settlement with Fletcher. The unrelated constraints against third parties seeking coverage from insurers have no application.

See, *Builders & Manufacturers Mut. Casualty Co. v. Hummon* (N.D. Ohio 1939), 26 F.Supp. 929 (applying predecessor statute to R.C. 3929.06, that section has no application when plaintiff in tort action has been paid and release has been procured in advance of judgment); affirmed in *Builders & Mfrs. Mut. Casualty Co. v. Preferred Automobile Ins. Co.* (C.A.6 1941) 118 F.2d 118, 121:

Section 9510-4 requires the application of the proceeds of the insurance to the satisfaction of an existing judgment, and is available only when a final judgment has been entered against the

⁵ American paid Norregard “a cash settlement in exchange for a signed release discharging any and all claims . . . Norregard may have against American . . . and/or its insured.” (Supp.10).

insured. *Canen v. Kraft*, 41 Ohio App. 120, 180 N.E. 277; *State Automobile Mutual Ins. Co. v. Columbus Motor Express Co.*, 15 O.L.A. 747; *Fire Ass'n of Philadelphia v. State Automobile Mutual Ins. Co.*, 29 O.L.A. 135.

See, also, *Rommel v. West Am. Ins. Co.* (C.A.D.C. 1960), 158 A.2d 683. *Howton v. State Farm Mut. Ins. Co.* (Ala. 1987), 507 So.2d 448, 451: “[A]n insurance carrier is no less liable under the law for the breach of its own contract obligations or for its own tortious conduct than is any other party.” Not surprisingly, insurers are permitted to bring claims against plaintiffs to enforce the terms of the settlement agreement. See, *Med. Assurance Co. of Miss. v. Jackson* (S.D. Miss. 1994), 864 F. Supp. 576.

This Court has made clear that “at the point of settlement, a settlement debt is created, and the plaintiff becomes a creditor entitled to the settlement proceeds.” *Hartmann v. Duffey*, 95 Ohio St. 3d 456, 459, 2002-Ohio-2486, 768 N.E. 2d 1170. OACTA accordingly concedes that the tortfeasor’s insurer has the separate and distinct obligation to pay those settlement proceeds, so it makes no sense for OACTA to assert that no claimant can ever sue an insurer to perform that admitted obligation subsequent to receiving a release. R.C. 3929.06 certainly has nothing to do with a claimant’s right to enforce the payment of settlement directly against a defaulting insurer. Once there is an agreement – a contract to settle – it is as enforceable as any other contract. Should the insurer fail to honor its obligation to pay, it is susceptible to direct suit, notwithstanding the statute.

1. *R.C. 3929.06 only precludes suit against an insurer for its insured’s tort liability.*

Even without an entry of judgment against its insured and the passage of thirty days thereafter, R.C. 3929.06 does not preclude every action whatsoever against an insurer, by anyone other than its insured. Ohio law prevents victims from asserting tort claims directly against the tortfeasor’s insurer, because the insurer typically does not owe any duty to the claimant for those

tort claims. See, *Chitlik v. Allstate Insurance Co.* (1973), 34 Ohio App.2d 193, 299 N.E.2d 295 (“[P]ersonal injury actions must be first brought by the injured party against the alleged tortfeasor. He is the one whose wrongdoing is alleged to have caused the injury, and if the facts are found as alleged, he will be primarily liable.”). Later Ohio decisions have been consistent with *Chitlik’s* focus on correctly applying the direct action rule to an attempt by a tort victim to sue the insurer for its insured’s own tort. See, e.g., *Lawreszuk v. Nationwide Insurance Co.* (1977), 59 Ohio App.2d 111, 114, 392 N.E.2d 1094; *Braswell v. Duncan* (Nov. 26, 1997), 8th Dist. App. No. 72038, 1997 Ohio App. LEXIS 5310, * 7-8 (“[A]n injured party does not acquire an independent or direct cause of action for damages [for the tortfeasor’s acts and omissions] against an alleged tortfeasor’s insurer simply by reason of the alleged tortfeasor’s acts and omissions.”).

These cases correctly construe R.C. 3929.06 consistently with the limitations set forth in its plain language. R.C. 3929.06 prevents direct actions against an insurer by a plaintiff “for injury, death, or loss to the personal property of the plaintiff”, until thirty days has elapsed from the entry of judgment in that “distinct civil action for damages between the plaintiff and insured tortfeasor.” The additional cases cited by OACTA at page 3 and 4 of its brief do nothing more than restate this correct but irrelevant proposition.

However, the insurer does owe a duty to a claimant for payment of the settlement when the claim is over and is a liquidated sum of money. The direct action brought by West Broad against American in this case was not the “distinct civil action for damages between the plaintiff and an insured tortfeasor.” It was a direct action, brought under the common law of equitable assignments of prospective proceeds, against an obligor of such an assignment, and such an action was brought against the obligor after creation of the settlement proceeds. American was

the holder of previously assigned proceeds, and therefore was an obligor, no different than any other obligor of an equitable assignment.

- C. The five appellate cases which comprise Ohio's majority view upholding the assignment of contingent tort claim proceeds against insurers are clearly not premised on the UCC or surety law.

OACTA argues that the leading cases in Ohio supporting the validity of assignments of proceeds “rests on the fundamental misapplication of Uniform Commercial Code (“UCC”) provisions and the law of suretyship.” (OACTA Brief, p. 6). This assertion, at best, significantly misreads the case law.

OACTA incorrectly frames the adherence to a principle or general proposition of law as reliance on the particular facts of a single case. In each of *Mt. Lookout Chiropractic Center v. Motley* (Dec. 1, 1999), 1st Dist. App. No. C-980987, 1999 WL 1488971, *Akron Square Chiropractic v. Creps*, Summit App. No. 21710, 2004-Ohio-1988, *Roselawn Chiropractic Cntr., Inc. v. Allstate Ins. Co.*, 160 Ohio App.3d 297, 2005-Ohio-1327, 827 N.E.2d 331, *Gloekler v. Allstate Ins. Co.*, Ashtabula App. No. 2007-A-0040, 2007-Ohio-6163 and *Cartwright v. Allstate Ins. Co.*, Butler App. No. CA2007-06-143, 2008-Ohio-2623, the courts first looked to *First Bank of Marietta v. Roslovic & Partners, Inc.*, 86 Ohio St.3d 116, 1999-Ohio-89, merely to borrow on the common law principle that an account debtor had become obligated to pay the assignee once the account debtor had received proper notice of the assignment. *First Bank of Marietta* at ¶10. The fact is that the court in *First Bank of Marietta* was required to employ UCC provisions for its reasoning because one party was a bank and, consequently, it involved a secured transaction. That is not the case here.

In fact, to avoid any confusion about the implication of their decisions, both the *Roselawn* and *Cartwright* courts used identical language to note exactly what it was that the courts intended to embrace: “the same principle [as in *First Bank of Marietta*] is applicable here.”

Roselawn at ¶19; *Cartwright* at ¶21, (emphasis added). Not one of those courts analyzed UCC provisions or explicitly applied the UCC to the issues now before this Court. Furthermore, OACTA's own brief underscores the relative weakness of its UCC argument. As an example, OACTA, rather disingenuously, would have this Court believe that the *Cartwright* court was referring to the UCC when it wrote of preserving "the goals of commercial reliability and stability," but a review of that citation shows no such connection. *Cartwright* at ¶13. As this Court well knows, the UCC is not the sole source for preserving goals of commercial reliability and stability.

Still, even if the UCC provisions had been the basis for the courts decisions in *Mt. Lookout Chiropractic*, *Akron Square*, *Roselawn*, *Gloeckler* and *Cartwright*, the court in *Zenfa Labs, Inc. v. Big Lots Stores, Inc.*, Franklin App. No. 05AP-343, 2006-Ohio-2069, made it abundantly clear that the issue of the assignments of proceeds, and the accompanying notice, could be resolved just as readily under common law. *Zenfa Labs* at ¶36.

Specifically, the court in *Zenfa Labs* declared that "[a]t least one Ohio court has followed this general common law rule that liability flows from a debtor to an assignee after a debtor has been notified of an assignment." *Id.* at ¶38 (emphasis added). Ironically, the Ohio court cited by *Zenfa Labs* as following the general common law rule on assignments was the court in *Roselawn*. *Id.* Ultimately, any reliance on UCC provisions is unnecessary.

- D. After an insurer has negotiated a claimant's tort claim to a liquidated settlement amount, it is an assignment obligor with prior notice of assignment of those funds. An assignment obligor is merely obliged to apply the funds in its hands in accord with the assignor's instructions. It is not a 'surety' or 'guarantor' for anyone.

OACTA argues at page 7 of its brief, that an insurer with prior notice of the assignment of prospective proceeds is deprived of the ability to dispute expenses claimed by the claimant, and instead is turned into a guarantor of payment for the expenses. Nothing about a proceeds

assignment stops an insurer from dealing with its claimant in the usual way, including disputing the extent and value of services provided to the claimant by medical providers, and challenging the injury's relationship to, or aggravation by the accident. The Eleventh District agreed that the adjustment function is untouched by a medical provider's use of a proceeds assignment:

Starcher specifically instructed Allstate to pay Gloekler pursuant to the assignment agreement. At that time, Allstate had a duty to pay Gloekler directly prior to paying any additional proceeds to Starcher. Simply stated, Gloekler was entitled to the first \$2,050 that Allstate determined Starcher was entitled to In addition, if a dispute developed between Starcher and Gloekler, such as whether or not the chiropractor was legally required to submit the bills to Starcher's medical insurance or claims of overcharging, Allstate could simply tender the settlement check with both Starcher and Gloekler listed as payees.

Gloekler, 2007-Ohio-6163, at ¶26.

OACTA has it backwards when it argues, "Allowing the provider to directly pursue the insurer while at the same time depriving the insurer of defenses against the provider's claim has the same effect as making the insurer an unwilling guarantor of payment to the provider." (OACTA Brief, p. 7). By the time a settlement amount has been agreed between the claimant and the insurer, the insurer is obviously satisfied that it has made its case to the claimant regarding all the reasons that it is not willing to pay the claimant's original demand, including the expenses incurred by the claimant. *Gloekler* makes the obvious point that the insurer still decides the claim's total value, and can settle within that amount, or go to trial, with or without the existence of a medical provider's proceeds assignment. Likewise, after an accident, the claimant remains free to pay what he or she chooses, to attempt to restore a vehicle to pre-accident condition, or obtain medical care to attempt to return to his or her state of health before the accident. When the claimant makes these purchasing decisions after the accident, he or she cannot be expected to know the amount that the tortfeasor's insurer will be willing to pay for

those expenses, nor will, for example, the auto body repairman be willing to take whatever the insurer decides he should be paid for his completed work. The same is true for a medical provider who is providing services to a claimant after an accident. In particular, when a medical provider agrees to treat a patient who presents himself as being injured in a specific accident, neither the patient nor the provider can predict then with legal precision which symptoms and complaints will later be deemed “proximately” caused by the accident. The patient still wants the treatment for his complaints, regardless of the later legal allocation. The insurer also will be offering less for a variety of other reasons, also unconnected to the price of the repairman’s or medical provider’s services, such as the claimant’s relative negligence, his or her perceived ability to testify, past accident history, and credibility in general.

Obviously the tension between what the claimant has spent or incurred, and what the insurer wants to pay for those expenses exists in every settlement negotiation, with or without the presence of a proceeds assignment. It is clearly present if the claimant had paid for his property repair and medical expenses prior to settlement. If there was a gap between the amount that the claimant had already paid a medical provider or a repairman, and the amount offered for those expenses by the insurer, surely, no insurer could insist on making those providers give the claimants a refund. The insurer’s objections might provide some basis for the claimant to later discuss or even dispute the costs with either provider, but the insurer’s offer alone would not be conclusive on the amount that the claimant was required to pay either provider.

If the claimant receives *all* the settlement money, on a check which lists the assignee medical provider as a payee, (as was the procedure reasonably required by the West Broad assignment), the insurer has paid nothing more than the settlement amount it has agreed to pay, *and* the claimant/patient can easily investigate any disparity between the cost of services and the

amount reimbursed for them by the insurer.⁶ By paying in this manner, the medical provider is also protected from a patient who has no legitimate questions or dispute with the cost of services, but instead is willing to abscond with *all* of the settlement money, and pay none of his bill to his medical provider. In each of the seven appellate cases⁷, each claimant/patient absconded with *all* of the settlement money.

OACTA's argument that it is being made into a guarantor by this payment mechanism transparently reveals its desire for the assignment to be so misinterpreted that it is remade into a surety, for then its consent is required. It firmly desires for insurers to be able to determine, after services have been rendered, the amount any medical provider receives. It desires the leverage possible when the provider has no protection from a patient's default.

OACTA attempts to recast *Hsu v. Parker* as a surety case, to apparently illustrate the benefits to all concerned if insurers could choose whether or not to comply with proceeds assignments on settlement. Instead, it grievously misstates a clear case describing an obligor's straightforward duty to comply with an assignment of future proceeds. The attorney obligor in *Hsu v. Parker* was held liable as an obligor of a document which was held by the Appellate Court to be an assignment of proceeds, for which the attorney had notice in advance:

As shown by appellee's signature on this document, appellee had knowledge of the assignment. Consequently, appellee was obligated to pay appellant for medical services appellant provided to Parker from any settlement reached in the personal injury action.

Hsu at 633 (emphasis added).

⁶ Like any person buying services under contract, the patient has all the other usual means for later disputing the cost and quality of services, including reporting a medical provider to the respective state licensing board.

⁷ *Roselawn; Akron Square; Mt. Lookout; Gloekler; Cartwright; West Broad Chiropractic v. American Family Insurance*, Franklin App. No. 07AP-721, 2008-Ohio-2647; and *Knop Chiropractic, Inc. v. State Farm Ins. Co.*, Stark App. No. 2003CA00148, 2003-Ohio-5021.

The linchpin was the attorney obligor's prior knowledge of a proceeds assignment, not his consent to be a surety.

OACTA's reference to *Shiepis Clinic of Chiropractic, Inc. v. Stephenson* (July 8, 1996) 5th Dist. No. 1995CA00343, 1996 Ohio App. LEXIS 3707, again reflects only its preference to be a surety, because *Shiepis* is not an assignment case, and therefore not relevant. In *Shiepis*, the court enforced a written instrument styled as a doctor's lien against an attorney representing the doctor's patient. In that case the attorney *signed* the instrument, and specifically *agreed*:

The undersigned, being attorney of record for the above patient does hereby agree to observe all the terms of the above and agrees to withhold such sums from any settlement, judgment or verdict as may be necessary adequately to protect the said doctors named above.

Id. at *1 (emphasis added).

The trial court held that since the attorney signed the instrument containing this language, he had made himself into a surety for the funds that he had failed to withhold from settlement. This case did not hold that a lien or assignment of settlement proceeds must obtain the obligor's consent before it binds him. The law of assignments does not require this.

Amicus Curiae for Appellant respectfully submits that this is not the place for OACTA to advocate for new ways to protect these various interests. If American had not disregarded it, the assignment in this case would have more than adequately protected all interests- the insurer's interest in not paying over the agreed upon amount of settlement; the patient's interest in having possession of the settlement funds pending any cost dispute; and the medical provider's interest in being protected from a complete default in payment, after services were rendered.

- E. OACTA offers a false choice – eliminating the payment protection that a proceeds assignment affords a medical provider after settlement only affects an insurer’s the ability to settle claims with claimants who would otherwise not pay the expenses they claim to owe.

OACTA again makes a policy argument that flatly ignores the well-known chronology of the adjustment and settlement of a tort claim. OACTA argues, “If an injured party is permitted to assign a direct cause of action that an assignee can directly enforce against a tortfeasor’s insurer, numerous unintended consequences will complicate the ability to compromise and settle claims.” (OACTA Brief, p. 8). However, the proceeds assignment is only “directly enforceable” against the insurer *after* the entire claim is reduced to a finite sum of money, and the insurer thereafter chooses to ignore the assignor’s instructions in the assignment. OACTA continues: “Since the assignee medical provider asserts a vested right to a fixed amount of settlement proceeds without regard to the overall value of the injured party’s claim, the provider has no incentive to negotiate or compromise the claimed value of his services.” (OACTA Brief, p. 9). OACTA presupposes that every medical provider, in the absence of an assignment, is eager to take the always-lower amount offered from the insurer. Regardless of whether his payment is secured against patient default by an assignment or not, a provider would “assert” or expect to get paid for his services, unless his patient, not the insurer, provides him with a reason to compromise them:

Plaintiff owes the clinic for the service rendered regardless of whether he brings a suit to collect against the tortfeasor. At trial the defendant's attorney may well point to the proceeds assignment as an indication that Dr. Sazdanoff has an interest in the outcome of the case at which time the doctor will say to the attorney yes, I expect to get paid just like you expect to get paid for the work you are doing.

Williams v. Taylor (September 27, 2002), Richland C.P. No. 02-CV-824H (unreported).

The presence of the proceeds assignment means that the medical provider is not

compelled to cut his bill for services to his patient, for the insurer's reasons , such as, "defenses to liability (including the injured party's contributory negligence), the preexisting nature of any injuries ... and evidentiary issues." *Id.* By themselves, these are not reasons that compel the provider to receive less, although the provider is free to, and most often does, accommodate the patient when the claim value is lowered for these reasons. The insurer does not "lose the ability to negotiate and compromise the claim based on these factors", but it loses the ability to insert itself between the patient and a medical provider, and dictate what the medical provider will be paid, for reasons it admits have to do with the strength or weakness of the claimant's case against its insured, not the work done by the provider for the claimant.

The assignment gives the medical provider some assurance against complete default by his patient. The provider is the one "who loses the ability to negotiate and compromise" if this straightforward payment method didn't exist. His willingness to compromise with his patient means nothing when the provider learns from a call to the adjuster that a claimant was paid six months ago, and discovers that his or her current location is unknown. This is not an unfounded concern, as noted at page 15, *infra*, as every single appellate assignment default case brought against an insurer involved an assignor patient who had completely absconded with all the settlement money, paid nothing to the provider, and had no legitimate dispute with the provider about his or her bill once the settlement was in hand.⁸

The amount a patient owes his or her medical provider for services is primarily between them. As stated in detail above, the insurer need only determine the total amount it will pay for the claim or litigate it. The proceeds assignment here only required American to pay the total settlement to the claimant with a check that included the medical provider as a payee. The

⁸ See footnote 7.

claimant is then in a position, when warranted, to discuss a compromise amount with his or her medical provider based on any factors that reduced the value of the claimant's case, but *not* based on his or her potential uncollectability.

OACTA also expresses hypothetical concern that an “insurer has no reliable way of ensuring that it timely discovers any assignments that have been made.” (OACTA Brief, p. 9). In this case, notice was sent to American from West Broad well in advance of settlement. The notice comprised a cover letter to American, which identified the name of the claimant, the date of loss, the claim number, and the name of the insured. (Supp. 8). A copy of the proceeds assignment was attached to this cover letter. *Id.* Both documents were sent by certified mail, which was signed for by an American representative. (Supp. 17). American has never claimed in this case that it did not receive notice, or was surprised to learn of the assignment. In all of the Ohio appellate decisions, the insurer consciously disregarded the assignment: “Allstate received proper notice of the assignment between Creps and Akron Square, and (4) Allstate knowingly and intentionally refused to honor the assignment.” *Akron Square* at ¶13; “It is undisputed that Allstate received notification from Roselawn that Tate had assigned to Roselawn the proceeds from any claim against Stanton and Allstate.” *Roselawn* at ¶8.

The claims handling procedures of insurers require them to routinely receive and retain significant amounts of important documentation, including medical authorizations from claimants, medical records, police reports, accident reports, photographs, reports from myriad medical professionals, correspondence and supporting documentation from claimant's counsel, as well as to watch for subrogation notices. It can be expected to be sophisticated enough to retain a notice of assignment that identifies the claimant, date of loss, claim number and name of it's insured, particularly when it will be sent by certified mail.

Not only are OACTA's purely hypothetical concerns not borne out by actual experience, but they are also legally unfounded, since assignment case law makes it clear that if an obligor can demonstrate that it did not have advance notice of a proceeds assignment, then it is not liable for failing to pay the assignee: "... the fund holder is bound from the time of notice." *Christmas v. Russell* (1871), 81 U.S. 69, 84, 20 L. Ed. 762; *Hsu v. Parker* (1996), 116 Ohio App. 3d 629, 633, 688 N.E.2d 1099.

OACTA's purported policy concerns have received no support in the majority position expressed by the five leading appellate decisions,⁹ and also receive no mention even in the two minority cases.¹⁰ All the insurer is required to do after it receives notice of a proceeds assignment is add the assignee's name to the settlement check. Permitting an insurer to disregard this simple task at the end of a case will only ease settlements with claimants who will not otherwise pay the provider themselves, and it is hard to imagine that insurers are not mostly concerned with wanting to possess this leverage approaching settlement time.

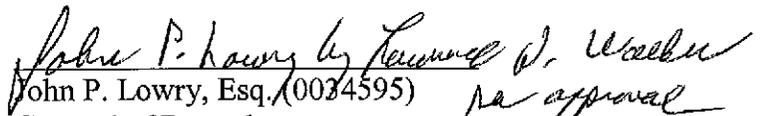
II. CONCLUSION

With this case, the Court of Appeals has adopted a rule that will foster litigation across many counties in Ohio, deters timely medical treatment to uninsured Ohioans, creates unexplainable disparity in the common law and misreads the Ohio Revised Code. To correct this significant misinterpretation of the law, the Court must reverse the decision of the Court of Appeals and hold that the proceeds assignment at issue in this case is valid and binding on the Appellee.

⁹ *Roselawn; Akron Square; Mt. Lookout; Gloekler; and Cartwright.*

¹⁰ *West Broad Chiropractic v. American Family Insurance*, Franklin App. No. 07AP-721, 2008-Ohio-2647, and *Knop Chiropractic, Inc. v. State Farm Ins. Co.*, Stark App. No. 2003CA00148, 2003-Ohio-5021.

Respectfully submitted,

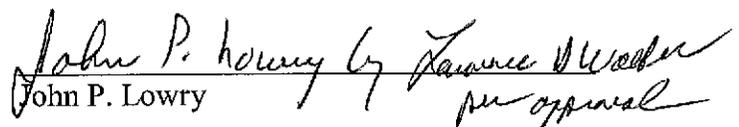

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via U.S. Mail this 23rd day of
March, 2009 upon all counsel of record.


John P. Lowry *per approval*

KTBH: 4841-5949-2099, v. 3