

IN THE SUPREME COURT OF OHIO

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| THOMAS BARBEE, ET AL.  | : | Case No.: 2010-1091  |
|                        | : |  |
| Plaintiffs             | : | On Appeal from the Lorain County Court<br>of Appeals, Ninth Appellate District |
|                        | : |  |
| v.                     | : | <b>Court of Appeals</b>  |
|                        | : | <b>Case No. 09CA009594</b>   |
| ALLSTATE INSURANCE CO. | : | <b>09CA009596</b>  |
|                        | : |  |
| Defendant              | : |  |

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**APPELLEES MEMORANDUM OPPOSING JURISDICTION**

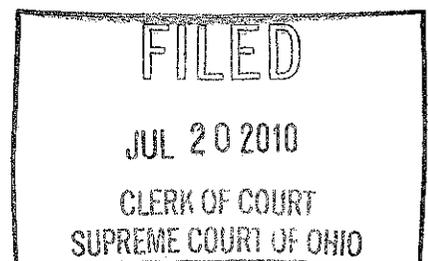
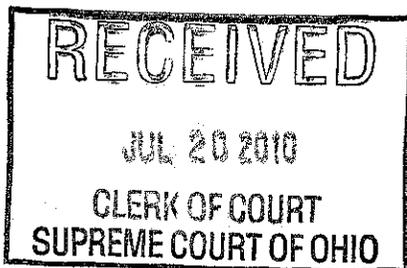
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## MEMORANDUM IN OPPOSITION

### I. EXPLANATION AS TO WHY THIS CASE DOES NOT INVOLVE THE PUBLIC OR GREAT GENERAL INTEREST

This is not a case of public or great general interest. Unfortunately, for Appellant, Nationwide, the policy language provisions cited in their jurisdictional memorandum, which are involved in this case, and others referenced, are not identical. The various courts of appeals that have commented upon the issue of contractual statutes of limitations regarding uninsured/underinsured claims are fact specific and policy language specific.

Subsequent to the filing of Appellant, Nationwide's Memorandum in Support of Jurisdiction, the Ninth District Court of Appeals in this matter certified a conflict between districts on June 28, 2010. In that opinion, a copy which is attached hereto as Exhibit "A", the Ninth District Court of Appeals notes:

"Although the Allstate and Nationwide policies at issue in this case have language that is different from the policy at issue in *D'Ambrosio*, the effect of their language is the same as the Erie policy." Page 3, attached as Exhibit "A".

It is respectfully submitted to this Honorable Court that the difference in the policy languages necessitates a fact specific, case specific review, which has been adequately done by the courts in this state. In the case at bar, the Allstate policy language states:

"Any legal action against Allstate must be brought within 3 years of the date of accident. No one may sue us under this coverage unless there is full compliance with all the policy terms and conditions."

"We are not obligated to make any payment for bodily injury under this coverage...until after the limits of liability for all liability protection in effect and applicable at the time of the accident have been fully and completely exhausted..."

The Nationwide policy language is different and states:

“No lawsuit may be filed against us...until said person has fully complied with all the terms and conditions of this policy...subject to the preceding...under the uninsured motorist coverage of this policy, any lawsuit must be filed against us: “A) within (3) years from the date of accident...”

Reading the policy language from both policies, it becomes apparent that the Nationwide policy language is different than the Allstate policy language. In fact, the Nationwide policy language is complete with the term, “subject to the preceding” that means that the provision, where no lawsuit may be filed against them, does not have a three (3) year contractual statute of limitations from the date of accident if the insured has not fully complied with all the terms and conditions of the policy. Nationwide’s policy also provides the following condition:

“No payment will be made until the limits of all other liability insurance and benefit apply have been exhausted by payments.”

Clearly, the insured has to exhaust those limits. As such, under the terms of the policy, it is an insured’s duty and responsibility to exhaust the payment limits of any other liability insurance carrier that applies before bringing a lawsuit.

In this case, both Nationwide and Allstate lost their motions for summary judgment at the trial level, and at the appellate level. The applicable law and rationale under the specific facts of this case was appropriately applied by The Lorain County Court of Common Pleas judge as well as the Ninth District Court of Appeals. Appellant, Nationwide, now respectfully requests this Honorable Court to engage in a fact specific analysis and not a topic that is of public or great general interest. Each of the cases cited in appellant’s brief for jurisdiction, *D’Ambrosio v. Hensinger, et al.*, Ohio 1767, *Lynch v. Hawkins*, 2008 Ohio 1300, and *Chalker v. Steiner*, 2009 Ohio 6533, are distinguishable from the facts and policy language of the instant matter. As such, this Court should

reject jurisdiction.

## II. BRIEF IN OPPOSITION TO PROPOSITION OF LAW NO.1 AS PROPOSED BY APPELLANT

In this matter, Appellant submits the following question for review by this Honorable Court:

“A policy provision that requires uninsured/underinsured actions to be brought against the insurer within three years from the date of the accident is unambiguous and enforceable even when read in conjunction with the exhaustion provision and the provision requiring that the insured fully comply with the terms of the policy before filing suit.”<sup>1</sup>

By agreeing to decide this issue, the Court will in effect establish what statute of limitations applies to an underinsured motorist claim. Essentially, Nationwide wants this Honorable Court to decide whether or not it is the duty and responsibility of insureds in Ohio to sue their own insurance carrier for underinsured motorist coverage despite whether or not their claim has actually accrued, or the contractual limitations and obligations under the policy have been met. As this Court is aware, in *Angel v. Reed*, 2008 Ohio 3193, this issue was addressed in the context of an *uninsured* motorist claim. However, the rationale in the *Angel* decision was not extended to the *underinsured* motorist coverage. In fact, this Honorable Court deliberately avoided applying the rationale of the *Angel* decision to the *underinsured* motorist situation even though the issue was briefed and argued. This Honorable Court is acutely aware that an underinsured motorist claim is not readily apparent or obvious at the time of a collision. That is why courts have followed an accrual date rationale and looked to see if any prejudice has occurred to the carrier for the application of a statute of limitations for underinsured claims.

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<sup>1</sup> At the outset, it is interesting to note that Appellant, Nationwide's Motion for Jurisdiction and Motion to Certify Conflict, has not been supported by any briefs or arguments by co-appellant, Allstate Insurance Company. Allstate has not prevailed on this legal argument at the trial court level nor the court

In the Ninth District, it was argued and maintained that the Court should adopt an accrual date rationale for underinsured motorist claims. Instead of deciding this issue, the Appellate Court focused on the clear ambiguity of the Appellants' policy language. However, in this Court, Appellant, Nationwide, now argues to set a contractual statute of limitations for underinsured motorist cases. An accrual date statute of limitations is the most consistent with the actual policy language of the **Appellants** herein. Both policies require exhaustion of all applicable liability insurance coverage "through settlement or judgment" before a lawsuit can be instituted. When an insured meets all their duties and responsibilities under the contract, then, the cause of action for an underinsured motorist claim accrues.

Under the specific facts of this case, the Barbees had no right to bring a claim against Allstate and/or Nationwide because they had not exhausted the tortfeasor's liability insurance coverage when the three (3) year contractual statute of limitations expired. In fact, the tortfeasor's liability insurance coverage was not exhausted until December, 2005. The date of collision was October 12, 2002. Although the Barbees knew of their potential underinsured claims, those claims did not accrue until December, 2005 when the liability amongst the tortfeasors was determined and, subsequently, amounts awarded to the particular Barbees, by the Federal Court judge in Madison, Wisconsin.

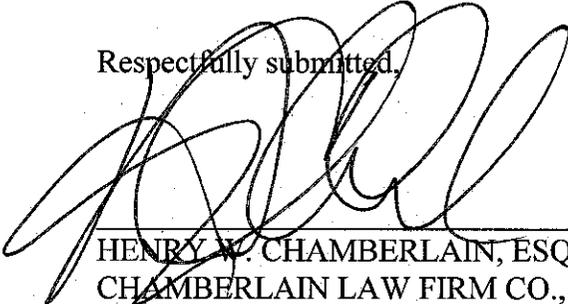
There was no dilatory action on behalf of the Barbees in this matter. In fact, the Appellant herein was put on notice of a potential underinsured claim and was aware of the litigation being prosecuted in Madison, Wisconsin. There is no prejudice that ever occurred to the Appellant herein. In fact, had a claim been brought against Appellant in the Lorain County Court of Common Pleas within their contractual three (3) year statute of limitations, that cause of action would have been

stayed. No discovery, no preparation for trial, no further pretrials would have occurred in the context of the potential underinsured case until the litigation in Madison, Wisconsin had concluded.

Essentially, Appellant, Nationwide wants this Honorable Court to decide that it must be sued within three (3) calendar years from the date of the collision, even if they have notice of a potential claim, they know that an underinsured claim has not accrued, they know no action would have been taken in that lawsuit until the liability claim concluded; and that failure of Appellee to take such unnecessary litigation steps, precludes them from bringing an underinsured claim against a policy for which they duly and timely paid their premiums.

It is respectfully submitted that this Honorable Court reject jurisdiction in this case. In the alternative, should this Court accept jurisdiction, it is urged by Appellees that the Court find the policy language inconsistent and ambiguous, and adopt an accrual date rule for underinsured motorist cases.

Respectfully submitted,



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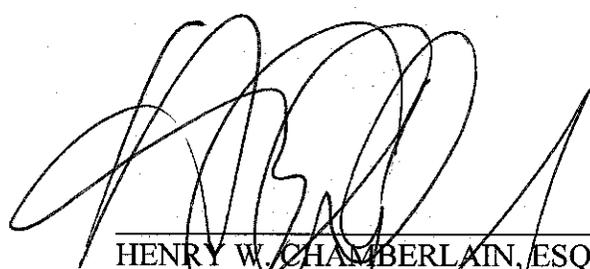
**CERTIFICATE OF SERVICE**

A copy of the foregoing has been served via regular U.S. Mail this 19<sup>th</sup> day of July 2010 upon the following:

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STATE OF OHIO

) FILED  
LORAIN COUNTY  
) ss.

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

COUNTY OF LORAIN )

2010 JUN 28 A 10:19

THOMAS BARBEE, et al. )  
CLERK OF COMMON PLEAS  
RON KADAKOWSKI

C.A. Nos. 09CA009594  
09CA009596

Appellees

v.

JOURNAL ENTRY

ALLSTATE INSURANCE COMPANY

Appellant

Appellee Nationwide Insurance Company has moved this Court to certify a conflict between its judgment in this case and the judgment of the Tenth District Court of Appeals in *D'Ambrosio v. Hensinger*, 10th Dist. No. 09AP-496, 2010-Ohio-1767. The motion is granted because the two cases conflict on the same question of law.

Article IV Section 3(B)(4) of the Ohio Constitution provides that, whenever the judges of a court of appeals determine that a judgment upon which they have agreed conflicts with a judgment of another court of appeals, they shall certify that conflict to the Ohio Supreme Court. In *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St. 3d 594, 596 (1993), the Ohio Supreme Court held that, for certification under Article IV Section 3(B)(4) to be appropriate, three conditions must be satisfied:

First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict *must* be "upon the same question." Second, the alleged conflict must be on a rule of law—not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals.



The “question of law” that Nationwide has suggested for certification is: “Is a policy provision that requires uninsured/underinsured actions to be brought against the insurer within three years from the accident ambiguous when read in conjunction with the exhaustion provision and the provision requiring the insured to fully comply with the terms of the policy before filing suit.”

In *D’Ambrosio v. Hensinger*, 10th Dist. No. 09AP-496, 2010-Ohio-1767, Ruth D’Ambrosio was injured when the car in which she was riding collided with a car operated by David Hensinger. The collision occurred in September 2001. In August 2003, Ms. D’Ambrosio sued Mr. Hensinger for negligence. In March 2006, she voluntarily dismissed her complaint, but re-filed it in February 2007. In June 2008, she amended her complaint to assert a claim for underinsured motorist coverage against Erie Insurance Company after she learned the limits of Mr. Hensinger’s liability coverage.

The trial court granted summary judgment to Erie because Ms. D’Ambrosio had not brought her claim within her policy’s contractual limitation period. The policy provided that Erie did not have to pay her “until all other forms of insurance . . . have been exhausted by payment of their limits.” *D’Ambrosio v. Hensinger*, 10th Dist. No. 09AP-496, 2010-Ohio-1767, at ¶7. It also provided that Ms. D’Ambrosio had to comply with the terms of the policy before she could sue Erie. It further provided that “[l]egal action to recover

under Uninsured/Underinsured Motorists Coverage must be initiated within two years from the date of the [collision].” *Id.*

On appeal, Ms. D’Ambrosio argued that the limitations provision was “ambiguous when read in conjunction with the exhaustion provision and the provision requiring her to fully comply with the terms of the policy before filing suit.” *D’Ambrosio v. Hensinger*, 10th Dist. No 09AP-496, 2010-Ohio-1767, at ¶14. She argued that those provisions created an ambiguity in the policy because they “required her to raise her UM/UIM claim before she could prove it.” *Id.* at ¶8. The Tenth District rejected her argument, however, concluding that “[n]othing prevented [Ms. D’Ambrosio] from filing suit within two years from the date of the accident.” *Id.* at ¶16.

The Tenth District cited *Chalker v. Steiner*, 7th Dist. No. 08 MA 137, 2009-Ohio-6522, in support of its decision. In *Chalker*, the Seventh District noted that it had previously held that an exhaustion provision did not make an underinsured motorist policy ambiguous because “exhaustion is a condition precedent to payment by the insurer rather than a condition precedent to legal action by the insured.” *Id.* at ¶51 (citing *Regula v. Paradise*, 7th Dist. No. 07-MA-40, 2008-Ohio-7141, at ¶49).

Although the Allstate and Nationwide policies at issue in this case have language that is different from the policy at issue in *D’Ambrosio*, the effect of their language is the same as the Erie policy. Under each, the insurer does not have to pay benefits until all other insurance has been exhausted. The insured

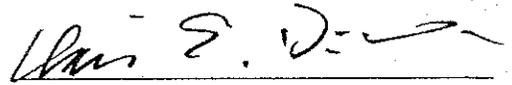
has no right to sue the insurer until all of the terms and conditions of the policy have been met. The insured, however, may not file an action against the insurer more than three years after the date of the collision.

In their decisions, the Seventh and Tenth District ignored the fact that the entire premise of an insurance contract is that, in exchange for the insured's premiums, the insurer promises to pay benefits if the insured suffers a loss. Payment from the insurer is the benefit bargained for by the insured. While the insurer may condition its obligation to pay benefits on things such as the exhaustion of other insurance, until it is required to pay under the policy and does not pay, the insured does not have a cause of action against it.

The Supreme Court has held that an insurance policy may limit the time for bringing an action on a contract to a period that is shorter than the general statute of limitations for a written contract, as long as the shorter period is reasonable and the provision reducing the period is "clear and unambiguous." *Angel v. Reed*, 119 Ohio St. 3d 73, 2008-Ohio-3193, at ¶11 (quoting *Sarmiento v. Grange Mut. Cas. Co.*, 106 Ohio St. 3d 403, 2005-Ohio-5410, at ¶11). We concluded that the Allstate and Nationwide policies were ambiguous because the limitations clauses could bar the Barbees from filing an action against the insurance companies before their right to benefits accrued. Because our conclusion conflicts with the Tenth District's decision in *D'Ambrosio v. Hensinger*, 10th Dist. No 09AP-496, 2010-Ohio-1767, however, we certify the following question to the Ohio Supreme Court: "Whether a limitations clause in

an underinsured motorist policy is enforceable if it forecloses the insured's right to sue the insurer before the insurer has a duty to pay under the policy."

Nationwide's motion to certify a conflict is granted.



Clair E. Dickinson, Presiding Judge

Concur:

Whitmore, J.

Moore, J.