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DIBS ON DAMAGES

Trial lawyers say victims and their families should get the money from accident settlements. Insurance companies say they should continue to get first crack at it.

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As the Ohio Supreme Court dealt with a flurry of legal briefs in what would become a landmark insurance case, Kimberly Brown and her two children headed north on I-71 from their Lewis Center residence toward her parents' home in Cleveland.

On that morning in April 2004, a southbound driver clipped a tractor-trailer while attempting to pass, lost control of his Jeep Cherokee and hurtled across the median into the Browns' Pontiac Grand Prix.

The collision killed 11-year-old Kourtney Brown, seriously injured Kimberly and her 5-year-old son, Joshua, and left the car crumpled.

The accident also later revealed a serious flaw in the Ohio Supreme Court's eventual insurance decision, which rewrote the rules for how accident victims recover damages from the person responsible for their injuries, say Kimberly Brown and a bevy of lawyers who are calling on lawmakers to remedy the situation.

Brown and her husband, Tim, sued the driver of the Cherokee. But the \$270,000 settlement didn't end up in the family's pockets. Instead, it went to their insurance carrier, Nationwide, to cover what the other driver's policy didn't.

The Browns and their attorney, **Keith Karr**, say the family deserved at least a portion of the settlement. But the Supreme Court's ruling in September 2004 put Nationwide first in line for the money.

Some families, backed by the state's powerful trial-lawyers association, are pushing legislators to give priority to families in legal settlements from negligent drivers, doctors and others who cause injury.

"This affects almost anyone who has insurance," said Mark Kitrick, who represents the Ohio Academy of Trial Lawyers on a state panel studying the issue. "We're seeing a lot more

people who are injured having to go to bankruptcy court."

Insurance companies say cases like the Browns' are rare. And the Supreme Court's 2004 ruling didn't so much rewrite Ohio insurance law, they say, as reaffirm the notion -- already written into most insurance policies -- that insurance companies are entitled to at least part of settlements from negligent parties.

The insurance industry asserts that if the trial lawyers get their way, rates for policyholders across Ohio may increase because companies will lose out as attorneys and families line up for settlement dollars.

Kelly McGivern, president of the Ohio Association of Health Plans, said that despite the doom-and-gloom predictions of many trial lawyers, little has changed as a result of the high-court ruling. In that case, *Lawson vs. the Northern Buckeye Education Council*, the court ruled 4-3 that the language of an insurance contract guaranteeing the insurer first priority on settlements would take precedence over a family's claim to the money.

The family of Emily Lawson, a child from Defiance who was injured in a traffic accident, refused to turn over a \$250,000 settlement to its insurer, Northern Buckeye, a nonprofit. The family claimed that a provision in the contract granting the insurer first priority was illegal and unenforceable.

"What we view as happening is the Supreme Court simply upheld and reaffirmed Ohio's adoption of the default rule and the contract terms," McGivern said. "The court ruled that there was a specific agreement in the contract that should be followed.

"In the case of the Lawsons, it was a union-negotiated contract on behalf of the teachers. It's just like any other benefit -- they're provided as a term of employment. It's important that people understand what is included in their policy and what is not."

But Kitrick said the idea of "buyer beware" doesn't apply to insurance contracts because people don't get to negotiate their terms.

The legal term for the concept is subrogation. Anthem Blue Cross and Blue Shield spokeswoman Kim Ashley said the company hasn't changed its handling of such claims since the Lawson ruling.

Some families, including the Browns, say subrogation is abstract lawyer-speak that wasn't explained when they signed their insurance contracts and becomes real only after an accident.

To trial lawyers and insurance companies, the debate is more than academic. Both sides have active lobbies in Columbus and have contributed thousands of dollars to state politicians, including the six senators and representatives on the state panel studying the issue.

The Ohio Subrogation Rights Commission is scheduled to report by year's end on what changes, if any, should be made to state law governing insurance settlements.

Trial lawyers say they don't intend to freeze insurance companies out of settlement claims but rather to distribute the money more equitably between insurers and victims.

Insurance companies say they already reach fair agreements with more than 90 percent of policyholders and there's no need to rewrite the law to address exceptions such as the Lawson and Brown cases.

The commission's chairman, state Rep. Geoffrey C. Smith, R-Columbus, said he has yet to be convinced there's a problem.

Insurance companies and their political-action committees have been among Smith's most reliable contributors, giving more than \$5,000 into his candidate committee this year. Smith also received \$200 from the trial lawyers group.

Smith said the stakes are higher than lawyers' and insurers' own interests, although the two sides have been heard most loudly during the debate.

Smith said he and many Republican lawmakers agree with the Supreme Court's ruling that the Lawsons -- and the Browns and other families -- signed insurance contracts that clearly spelled out the insurance company's first-priority claim to damages.

If the court or lawmakers try to invalidate insurance contracts across Ohio, companies will have to raise rates to compensate for the transfer of settlements from insurers to lawyers and families, Smith said.

"It will drive up health insurance premiums, which already are skyrocketing 11 (percent) to 20 percent a year," said Smith, also chairman of the House's insurance committee. "What you'll get is people leaving the state of Ohio."

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Illustration: Photo, Graphic appeared in newspaper, not in the archive.

Photo caption: (1) ERIC ALBRECHT| DISPATCH

Kimberly and Tim Brown and their son, Josh, stand in their Lewis Center home near a picture of Kourtney, 11. She was killed in a 2004 traffic accident. The Browns sued but didn't get a penny of the \$270,000 settlement.

(2) Graphic

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