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Interpleader – What Are Your Options When The Tortfeasor's Insurer Tries to Beat You To The Courthouse?

by Brenda M. Johnson

In the landmark case of *State Farm Fire & Cas. Co. v. Tashire*,[1] the United States Supreme Court observed that interpleader should not be used to compel tort plaintiffs to litigate claims against an insured tortfeasor "in a single forum of the insurance company's choosing."[2] This has not, however, stopped liability insurers from turning to interpleader in cases where they anticipate that multiple claims against one of their insureds will exceed policy limits.

Some insurers may do it because they think it will protect them from bad faith claims.[3] Often, though, despite the Supreme Court's observation in *Tashire*, interpleader is an insurer's preemptive attempt to select the forum in situations where its insured would not have a right to do so. Either way, whenever there are multiple potential tort plaintiffs and a potential defendant with limited insurance, there is a possibility that the insurer will file an interpleader action with the eventual aim of forcing the tort plaintiffs to litigate their claims in the context of that action, as opposed to a forum chosen by the plaintiffs.

When this happens, you have options, but they depend on the forum in which the interpleader has been filed. If you are in federal court and the tort claims can be heard in a state court, your options are relatively favorable, since federal courts generally will abstain from exercising jurisdiction over the underlying tort claims in favor of the tort plaintiff's choice of forum. If the interpleader action has been filed in state court, however, the situation is less clear. There are, however, very good arguments for allowing tort plaintiffs to litigate their underlying claims in a forum of their choosing, as opposed to one selected by a tortfeasor's liability insurer, even when the interpleader action has been filed in an Ohio court.

At least two state supreme courts have embraced the United State Supreme Court's reasoning in *Tashire*, and have held that a trial court cannot enjoin tort plaintiffs from litigating their tort claims in a forum of their own choosing, which suggests that the jurisdictional priority rule is not an absolute barrier to allowing plaintiffs to file separate actions. Further support for this lies in the fact that the tort claims, if brought in the context of the interpleader action, would have to be alleged as cross-claims. Cross-claims are permissive rather than compulsory, and thus should not be subject to the jurisdictional priority rule.

I. Interpleader Was Not Designed To Solve The Problems That Arise When A Tortfeasor Is Subject To Multiple Claims

Interpleader, simply defined, "is where the plaintiff says 'I have a fund in my possession, in which I claim no personal interest, and to which you, the defendants, set up conflicting claims; pay me my costs, and I will bring the fund into court, and you shall contest it between yourselves.'"[4] Having arisen as an equitable remedy, a party seeking interpleader "must be free from blame

in causing the controversy, and where he stands as a wrongdoer with respect to the subject matter of the suit or any of the claimants, he cannot have relief by interpleader."[5] This means that under traditional principles, while a tortfeasor's insurer may be able to invoke the remedy, the tortfeasor cannot.[6]

In its modern form, interpleader involves two stages. In the first stage, the court determines whether the interpleader plaintiff, also referred to as the "stakeholder," has properly invoked interpleader (*i.e.*, whether the court has jurisdiction, whether there are conflicting claims to the fund at issue, and whether there are any equitable considerations that might prevent the use of interpleader).[7] If these requirements are met, the stakeholder will then deposit the fund with the court and be discharged from the action, retaining no further standing to direct the disposition of the funds.[8]

Once the funds are deposited and the stakeholder is discharged, the action then proceeds to the second stage, which involves determining the respective rights of the claimants to the fund. The question this poses when liability insurance is involved is whether the parties can be compelled to litigate their underlying tort claims in the context of the interpleader action. In *Tashire*, the United States Supreme Court indicated that they should not.

Tashire arose from a 1964 collision of a pickup truck and a Greyhound bus in which two people were killed and over thirty others were injured. When the first lawsuits arising from the crash were filed in state court, State Farm (which had issued a $20,000 liability policy to the pickup truck driver) filed a separate interpleader action in federal district court. In a motion that would later be joined by Greyhound, State Farm then sought to compel all potential tort plaintiffs to litigate their tort claims against the potential tort defendants, including the truck driver, Greyhound, and the bus driver, in the interpleader action.[9]

The district court granted the injunction, which the Supreme Court ultimately held was in error, as it concluded that the federal interpleader statute did not authorize the district court to do so.

As the Court observed in *Tashire*, the classic problem interpleader arose to address was one "where a stakeholder, faced with rival claims to the fund itself, acknowledges – or denies – his liability to one or the other of the claimants."[10] It is a remedy that in many ways was designed to aid insurance companies – but not by allowing liability insurers to select the forum for litigating tort claims against their insureds.

Among other things, the Court noted that a liability insurer's interest in an interpleader action, which is no greater than its coverage limits, should not be allowed to determine where tort plaintiffs bring their underlying claims.[11] In so doing, the Court observed that the insurance problem interpleader was intended to remedy "was that of an insurer faced with conflicting but mutually exclusive claims to a policy, rather than an insurer confronted with the problem of allocating a fund among various claimants whose independent claims may exceed the amount of the fund."[12] The Court also observed that the insurer's interest, which was confined to the limits of its liability coverage, did not require the underlying tort claims to be litigated in a single forum, since it would "receive[] full vindication when the court restrains claimants from seeking to enforce against the insurance company any judgment obtained against its insured, except in the interpleader proceeding itself."[13]

II. Federal Courts Generally Defer To State Court Proceedings To Decide The Underlying Tort Claims

Tashire establishes that federal courts cannot enjoin the litigation tort claims outside of the confines of an interpleader action.[14] At some point in an interpleader action, however, the court must determine the respective rights of the claimants to the fund at issue. If the tort claims are pending in other courts, this poses a problem that *Tashire* does not address – namely, whether a district court should refrain from determining the rights of the parties to the fund at issue until their tort claims have been adjudicated in a forum of the tort plaintiffs' choosing.

The Supreme Court has not addressed this issue; however, in the spirit of *Tashire*, lower federal courts have recognized that issues of judicial economy, as well as issues of comity and deference to the authority of state courts to address state law issues, weigh heavily in favor of postponing the second phase of interpleader when the underlying tort claims are being litigated in state court. Thus, federal courts will generally invoke one of two doctrines under which a federal court can decline to exercise its jurisdiction in deference to a concurrent state court proceedings as a basis for staying the interpleader action until the underlying tort actions have been fully litigated.

In *Brillhart v. Excess Ins. Co. of America*,[15] and later in *Wilton v. Seven Falls Co.*,[16] the Supreme Court held that federal courts have discretion to decline to hear a declaratory judgment action when there is another suit between the same parties pending in state court that presents the same issues of state law, and a number of federal courts have applied this standard by analogy to interpleader actions.[17] Others have applied the more

rigorous "exceptional circumstances" abstention doctrine adopted by the Supreme Court in *Colorado River Water Conservation Dist. v. United States* [18] to interpleader actions, which can lead to a similar result.[19]

III. Ohio Law Is Less Clear, But It Should Not Preclude Filing Separate Tort Actions

Under Ohio law, interpleader is governed by Ohio's Civil Rule 22, which is similar to the federal rule on which it is modeled, but there is very little guidance in Ohio case law with respect to its application in cases involving tort actions. That said, there are certain legal principles that supply some guidance as to how, and when, an Ohio court in which a interpleader action has been filed should address the underlying tort claims.

The first question to address is whether the jurisdictional priority rule plays a role. This rule provides that "[a]s between courts of concurrent jurisdiction, the tribunal whose power is first invoked by the institution of proper proceedings acquires jurisdiction, to the exclusion of all other tribunals, to adjudicate upon the whole issue and to settle the rights of the parties."[20] Since the rule can apply even when the causes of action are not exactly the same, so long as "the suits present part of the same 'whole issue,'"[21] it raises a question as to whether another Ohio trial court would have authority to consider the underlying tort claims in a separate action if an interpleader action has already been filed.

Ohio courts have not addressed this issue directly. There are good arguments, however, that the jurisdictional priority rule should not prevent a tort plaintiff from litigating his or her claims in an action filed separately from the interpleader action.

First, at least two states that follow the jurisdictional priority rule have adopted the rationale in *Tashire*, in which the U.S. Supreme Court held that interpleader does not authorize a court to enjoin potential claimants from filing separate tort actions.

In *Oak Cas. Ins. Co. v. Lechliter*,[22] West Virginia's highest court held that "in an interpleader action filed by an insurance company seeking the orderly contest of insurance proceeds arising from automobile liability coverage, which proceeds are insufficient to cover all claims resulting from an accident involving its insured, the [trial court] may not restrict an interpleader defendant's right to file a lawsuit against the insured tortfeasor to determine the liability of that person or entity for the underlying accident."[23] In *Club Exchange Corp. v. Searing*,[24] the Kansas Supreme Court reached a similar conclusion, albeit while acknowledging that, "[a]s a practical matter . . . where the principal target of the claimants, and the only apparent source from which their claims may be satisfied, is the stake, all claims will no doubt be resolved in the interpleader action."[25]

This suggests that the jurisdictional priority rule should not operate as a barrier to the subsequent filing of such actions. If the filing of separate tort actions cannot be restricted by an interpleader court, it follows that jurisdictional priority rule should not bar filing them either.

Second, an argument can be made that the jurisdictional priority rule has no application in these cases, at least as far as the underlying tort claims are concerned. As courts in other states have noted, the jurisdictional priority rule serves the same purpose as res judicata, and thus the same rules should apply in determining the applicability of each.[26] For the tort claims to be adjudicated in the interpleader action, they would have to be brought as cross-claims between the parties named as interpleader defendants (presuming, of course, that the liability insurer has named its insured as a defendant). Cross- claims are permissive, not compulsory, which means the failure to bring such a claim in one action does not normally preclude bringing it in a separate action later.[27] By the same reasoning, the tort claims could also be brought in a separate action while the interpleader action is still pending.

Either way, applying the jurisdictional priority rule in cases where a liability insurer has filed an interpleader action in one venue, when the tort plaintiffs wish to litigate in another, would serve none of the legitimate purposes on which the rule is based. The purpose of the jurisdictional priority rule is to prevent a second court from interfering with the resolution of issues that are already pending before the court that first obtained jurisdiction.[28] However, as the U.S. Supreme Court noted in *Tashire*, it is fundamentally unreasonable to allow a liability insurer whose interest is confined to its policy limits to "wag the dog" as far as forum selection is concerned, and compel tort plaintiffs to bring their underlying claims "in a single forum of the insurance company's choosing."[29]

In light of these principles, the jurisdictional priority rule should not automatically prevent bringing such claims in a separate action, nor would its application serve any of the purposes to which the jurisdictional priority rule is directed. As federal commentators have noted, in most interpleader cases of the type addressed in *Tashire*, "the stakeholder will be an insurance company that is simply seeking to discharge its liability under a policy; as a result, a cross-claim, which may be attempting to establish the tortfeasor's liability above and beyond the fund,

typically will not be very closely related to the interpleader claim."[30]

Finally, there is no procedural or jurisdictional rule that would preclude an Ohio court from staying the second stage of an interpleader action in order to allow the underlying tort claims to be tried in a forum of the tort plaintiffs' choosing. This approach would satisfy the legitimate concerns of all parties, as well as equally important issues of judicial efficiency and comity. ■

End Notes

1. 386 U.S. 523 (1967).
2. 386 U.S. at 534.
3. *See* Jonathan M. Stern, *Multiple Claims and Insufficient Limits*, For The Defense 19 (Sept. 2009) (discussing use of interpleader as a strategy to avoid bad faith liability).
4. *Aetna Ins. Co. v. Evans*, 57 Fla. 311, 335, 49 So. 57 (1909) (quoting *Hoggart v. Cutts*, 1 Craig & P. 204).
5. *Farmers Irrigating Ditch & Reservoir Co. v. Kane*, 845 F.2d 229, 232 (10th Cir.1988) ("Our attention has not been directed to any case where a tortfeasor in a multi-claim tort can admit liability, tender into court a minimal amount of money with the representation that such is all he has, force the claimants to prorate the amount deposited, and then obtain an order discharging him from any further liability for his tort.").
6. *See Pan American Fire & Casualty Co. v. Revere*, 188 F. Supp. 474, 481-82 (E.D. La. 1960).
7. *United States v. High Tech. Prods.*, 497 F.3d 637, 639 (6th Cir. 2007).
8. *Id.* Once an insurer interpleads the policy limits, it relinquishes any standing to direct the eventual disposition of the funds. *See Mahoney v. Westfield Ins. Co.*, 124 Ohio App.3d 639, 643, 707 N.E.2d 26 (10th Dist. 1997) (citing *Atkinson v. Metropolitan Life Ins. Co.*, 114 Ohio St. 109, 150 N.E. 748 (1926)).
9. *See Tashire* at 526.
10. *Tashire*, 386 U.S. at 534.
11. *Id.* at 535.
12. *Tashire* at 533, n. 15.
13. *Id.* at 535.
14. Under federal law, there are two types of interpleader – statutory interpleader and rule interpleader – but the differences are mainly jurisdictional in nature. Statutory interpleader under 28 U.S.C. § 1335 only requires what is known as minimal diversity, *i.e*, diverse citizenship between at least two adverse claimants, and the amount at issue can be as little as $500. The citizenship of the stakeholder – the entity with the funds in question – is not relevant. Rule interpleader, which is governed by Rule 22 of the Federal Rules of Civil Procedure, requires a separate basis for jurisdiction, such as federal question jurisdiction or conventional diversity jurisdiction. *See Metropolitan Life Ins. Co. v. Marsh*, 119 F.3d 415 (6th Cir. 1997). There is a split of authority as to whether the stakeholder's citizenship is relevant in determining whether diversity jurisdiction exists in rule interpleader cases. *See UBS Fin Servs. v. Kaufman*, No. 3:15-CV-00887-CRS, 2016 U.S. Dist. LEXIS 74408 (W.D. Ky. June 8, 2016) (discussing split). Also, for purposes of diversity jurisdiction, the amount in controversy requirement is determined by the value of the interpleader stake, as opposed to the value of the claims against it. *See Brotherhood Mut. Ins. Co. v. United Apostolic Lighthouse, Inc.*, 200 F. Supp.2d 689 (E.D. Ky. 2002).
15. 316 U.S. 491 (1942).
16. 515 U.S. 277 (1995).
17. *See, e.g., Arnold v. KJD Real Estate, LLC*, 752 F.3d 700 (7th Cir. 2014) (*Wilton-Brillhart* abstention is applicable to interpleader actions involving claims that are the subject of parallel state court actions); *National Union Fire Ins. Co. v. Karp*, 108 F.3d 17 (2d Cir. 1997) (court may dismiss or stay action under *Brillhart* standards); *NYLife Distributors, Inc. v. Adherence Group, Inc.*, 72 F.3d 371 (3d Cir. 1995) (*Brillhart-Wilton* standards apply to determine whether to dismiss or stay statutory interpleader action in favor of parallel state court action); *Great W. Cas. Co. v. Frederics*, No. 1:10cv267, 2011 U.S. Dist. LEXIS 128211, 2011 WL 5326236 (W.D.N.C. Nov. 4, 2011) (same).
18. 424 U.S. 800 (1976).
19. *See, e.g., EMCASCO Ins. Co. v. Dairyland Ins. Co.*, No. 03-4174-SAC, 2004 U.S. Dist. LEXIS 6550, 2004 WL 838060 (D. Kan. March 4, 2004) (staying interpleader action on *Colorado River* grounds); *Crider v. Taylor,* No. 89-0001-R, 1989 U.S. Dist. LEXIS 18104 (W. D. Va. Nov. 13, 1989) (same); *but see Chaffe McCall, LLP v. World Trade Ctr. of New Orleans*, No. 08-4432, 2009 U.S. Dist. LEXIS 14353 (E.D. La. Feb. 6, 2009) (denying abstention under *Colorado River* standard); *W. Side Transp. v. APAC Miss.*, 237 F. Supp.2d 707 (S.D. Miss. 2002) (same).
20. *State ex rel. Phillips v. Polcar*, 50 Ohio St.2d 279, 364 N.E.2d 33 (1977), syllabus. Notably, this rule applies only to actions pending in different Ohio courts with concurrent jurisdiction, and does not apply when an action is pending in another state. *See, e.g., Newman v. Martinez*, 4th Dist. Pike No. 15CA857, 2016-Ohio-647.
21. *State ex rel. Otten v. Henderson,* 129 Ohio St.3d 453, 2011-Ohio-4082, ¶ 29, 953 N.E.2d 809.
22. 206 W. Va. 349, 524 S.E.2d 704 (1999) (following *Tashire*).
23. *Id.* at 356.
24. 222 Kan. 659, 567 P.2d 1353 (1977) (following *Tashire*).
25. *Id.* at 665.
26. *Cruz v. FTS Construction, Inc,.* 140 N.M. 284, 2006-NMCA-109, ¶ 15, 142 P.3d 365 (N.M. App. 2006).
27. *See, e.g., SunTrust Bank v. Wagshul,* 2d Dist. Montgomery No. 25567, 2013-Ohio-3931, ¶ 10 (cross-claims are permissive, and failure to raise them does not have preclusive effect).
28. *Michaels Bldg. Co. v. Cardinal Fed. Savings & Loan Bank*, 54 Ohio App.3d 180, 182 (8th Dist. 1988).
29. *Tashire*, 386 U.S. at 535.
30. Wright, Miller & Kane, 7 FEDERAL PRACTICE & PROCEDURE Civil 3d § 1715, p. 644-645 (2001).

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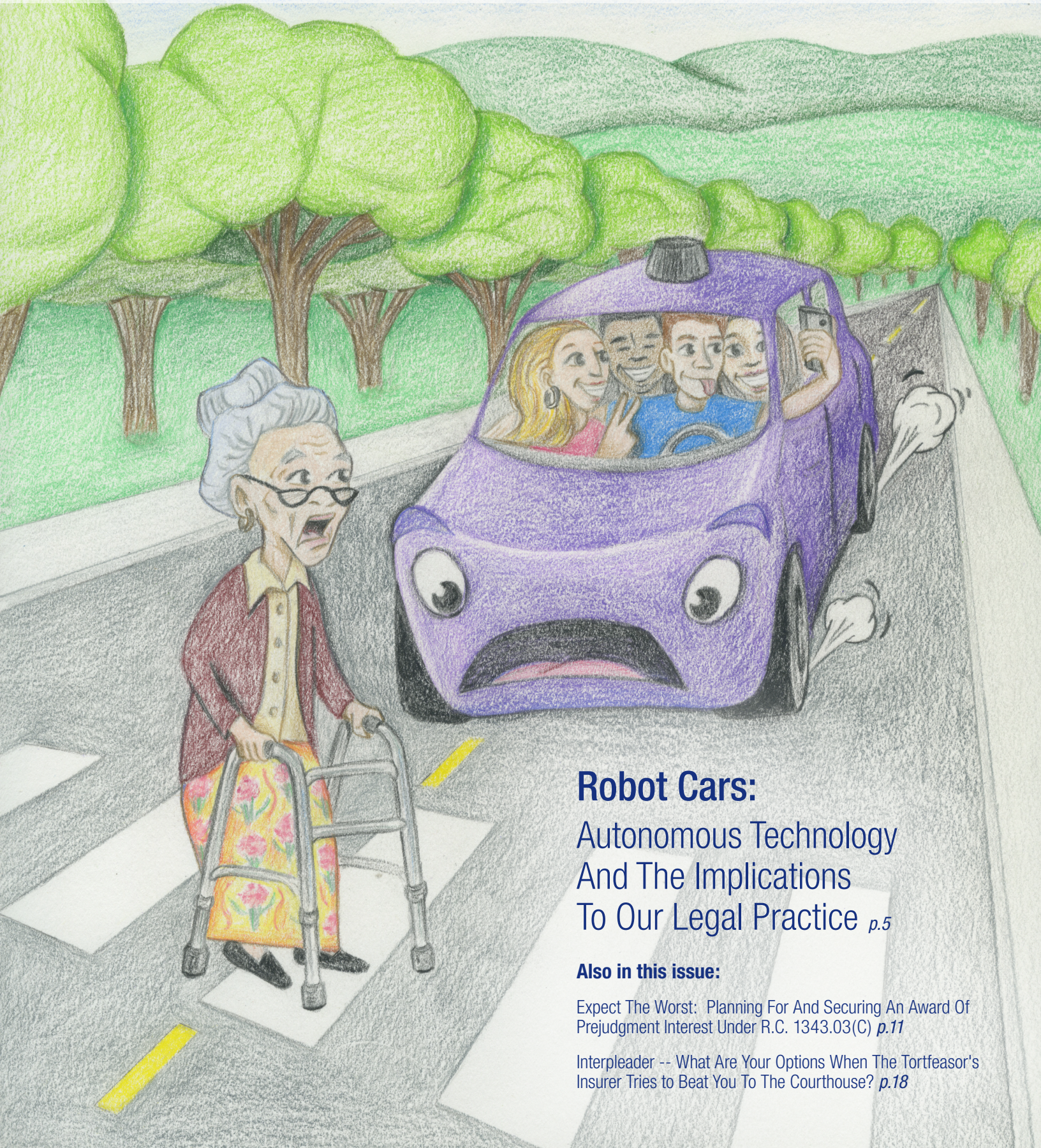

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