

VIII. Insurance

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The Indiana courts and legislature addressed a number of significant issues during this survey period which have long confused and frustrated the processing and settlement of insurance claims.¹ The most significant of these cases was *Travelers Indemnity Co. v. Armstrong*² which resolved three important questions: (1) the burden of proof required to sustain a punitive damage award against an insurance company, (2) the interpretation of "actual cash value" (ACV), and (3) the evidentiary vehicle for proving ACV. Additionally, the Indiana legislature adopted a fourteen-point plan designed to define and sanction an insurance company's unfair claim settlement practices³ and enacted a comparative negligence act⁴ which will undoubtedly alter traditional settlement mechanisms available to a claimant.

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¹There were other insurance cases decided during this survey period which are not discussed in this article. See, e.g., *Metropolitan Life Ins. Co. v. Tallent*, 445 N.E.2d 990 (Ind. 1983) (group term life insurance policy with no cash surrender value is not property for purposes of determining marital assets; restraining order enjoining disposition of property did not prohibit changing beneficiary of group policy); *Indiana Ins. Co. v. Ivetch*, 445 N.E.2d 110 (Ind. Ct. App. 1983) (insurer held liable to bailee for loss to bailor's property); *First United Life Ins. Co. v. Northern Indiana Bank & Trust Co.*, 444 N.E.2d 1241 (Ind. Ct. App. 1983) (determining the duty of an insurer to notify assignee of a life insurance policy of the policy's termination for nonpayment of premiums); *Integrity Ins. Co. v. Lindsey*, 444 N.E.2d 345 (Ind. Ct. App. 1983) (insurer's conduct constituted waiver of policy provisions for written notice, formal proof of loss and right to appraisal); *Lee v. Lincoln Nat. Bank & Trust Co.*, 442 N.E.2d 1147 (Ind. Ct. App. 1982) (Michigan No-Fault Insurance Act held extraterritorial and not a bar to Michigan residents' action against Indiana residents for automobile accident occurring in Indiana); *Asbury v. Indiana Union Mut. Ins. Co.*, 441 N.E.2d 232 (Ind. Ct. App. 1982) (liability of homeowner insurer for damage to animal pelts collected as part of insured's hobby of hunting animals); *Paul Revere Life Ins. Co. v. Gardner*, 438 N.E.2d 317 (Ind. Ct. App. 1982) (action under Massachusetts law requiring insurer to give notice of conversion rights under employer group life policy upon termination of insured's employment); *Bituminous Fire & Marine Ins. Co. v. Culligan Fyrprotexion, Inc.*, 437 N.E.2d 1360 (Ind. Ct. App. 1982) (determining the extent of insurer's subrogation rights in action against subcontractor); *Allstate Ins. Co. v. Neumann*, 435 N.E.2d 591 (Ind. Ct. App. 1982) (defining the term "resident" within the context of an uninsured motorist provision).

²442 N.E.2d 349 (Ind. 1982).

³Act of Apr. 19, 1983, Pub. L. No. 259-1983, § 2, 1983 Ind. Acts 1669, 1675-76 (codified at IND. CODE § 27-4-1-4.5 (Supp. 1983)).

⁴Act of Apr. 21, 1983, Pub. L. No. 317-1983, § 1, 1983 Ind. Acts 1930, 1930-33 (codified at IND. CODE §§ 34-4-33-1 to -8 (Supp. 1983)).

A. General Insurance Principles

1. *Punitive Damages Against an Insurer.*—Indiana courts traditionally have held that punitive damages are not permitted in contract cases.⁵ Yet, punitive damages have been authorized against an insurer when: (1) the breach of an insurance contract is accompanied by an independent common law tort such as fraud or deceit, or (2) wrongful conduct, not arising to an independent tort, is mingled with elements of fraud, malice, gross negligence, bad faith or oppression; and the public interest would be served by the deterrent effect of punitive damages upon future wrongdoers.⁶

These “tortious conduct” exceptions have radically altered adherence to the general rule and resulted in frequent punitive damage claims by insureds in actions to enforce their rights under insurance contracts.⁷ Additionally, plaintiffs’ attorneys have often demonstrated a propensity to seek large punitive damage awards for an insurer’s breach of contract even though the breach arose out of a marginal good faith claim dispute or resulted from an insurer’s negligent preparation or settlement of the insured’s claim.⁸ This propensity has been reinforced by the application of a “preponderance of evidence” standard in proving punitive damage claims. The result of these factors has been frequently to place insurance companies in the untenable position of either paying questionable claims or denying such claims and, if proven wrong, suffering adverse punitive damage awards.⁹

Faced with this influx of punitive damage claims, the Indiana courts, during this survey period, substantially limited the substantive bases upon which a punitive damage award will be affirmed. In *American Family Insurance Group v. Blake*,¹⁰ an insured sought payment of certain medical benefits and imposition of punitive damages against an insurer alleging

⁵See *Vernon Fire & Cas. Ins. Co. v. Sharp*, 264 Ind. 599, 349 N.E.2d 173 (1976).

⁶*Vernon Fire & Cas. Ins. Co. v. Sharp*, 264 Ind. 599, 349 N.E.2d 173 (1976); see *Hoosier Ins. Co. v. Mangino*, 419 N.E.2d 978 (Ind. Ct. App. 1981); *Travelers Indem. Co. v. Armstrong*, 384 N.E.2d 607, 618 (Ind. Ct. App. 1979) (citing *Vernon Fire & Cas. Ins. Co. v. Sharp*, 264 Ind. 599, 349 N.E.2d 173 (1976)), *aff’d in part, rev’d in part*, 442 N.E.2d 349 (Ind. 1982); *Jos. Schlitz Brewing Co. v. Central Beverage Co.*, 172 Ind. App. 81, 359 N.E.2d 566 (1977); *Jones v. Abriani*, 169 Ind. App. 556, 350 N.E.2d 635 (1976); *Jerry Alderman Ford Sales, Inc. v. Bailey*, 154 Ind. App. 632, 291 N.E.2d 92 (1972); see also Note, *Indiana’s Allowance of Punitive Damages in Contract Actions Against Insurance Companies: How New Is It?*, 55 IND. L.J. 563 (1980); Note, *The Expanding Availability of Punitive Damages in Contract Actions*, 8 IND. L. REV. 668 (1975).

⁷See Bourhis, *Recognition and Recovery for Bad Faith Torts*, 18 TRIAL 47 (Dec. 1982).

⁸See Albright, *Punitive Damages Litigation—Where Is Indiana Headed?*, in DAMAGES, THEIR NATURE AND PREVENTION 1983 VII-1 (Indiana Continuing Legal Education Forum 1983).

⁹*Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349, 363 (Ind. 1982) (citing *Vernon Fire & Cas. Ins. Co. v. Sharp*, 264 Ind. 599, 609-10, 349 N.E.2d 173, 181 (1976)).

¹⁰439 N.E.2d 1170 (Ind. Ct. App. 1982).

an unreasonable, willful and wanton refusal to pay the claim. The trial court entered summary judgment upon the medical benefits claim but denied the insured's claim for punitive damages. Affirming that adverse judgment, the Indiana Court of Appeals found no evidence of tortious conduct by the insurer.¹¹ The court determined that punitive damages are not appropriate when there is an "honest dispute," even when the insurer ultimately is determined to be in breach of the insurance contract.¹²

Similarly, *Nationwide Mutual Insurance Co. v. Neville*¹³ involved an action arising out of a claim dispute under a group insurance contract which provided, in part, for accidental death benefits to members of a local volunteer fire department. The policy also provided generally for payment of death benefits if the "injury or a heart or circulatory malfunction" caused the insured's death.¹⁴ An exclusion under the policy, however, provided for denial of benefits following death due to heart or circulatory malfunction if the insured experienced a heart or circulatory condition prior to accepting coverage under the policy. The insured, a volunteer fireman, suffered smoke inhalation and a heart attack during his performance of firefighting duties. Approximately one month later, while still being treated for those injuries, the insured died as a result of a massive heart attack. The insured's surviving spouse filed a claim for death benefits under the group policy, but the insurer denied that claim based upon evidence that the insured had been treated for hypertension prior to coverage, which the insurer argued was a circulatory condition excludable under the policy. The surviving widow then filed an action against the insurance company seeking compensatory damages for breach of the insurance contract and punitive damages. The jury awarded compensatory damages in the amount of \$30,000 and punitive damages in the amount of \$145,000.¹⁵

The Indiana Court of Appeals affirmed the compensatory verdict based on breach of contract but reversed the punitive damage award.¹⁶ The court rejected arguments that the insurer's conduct constituted fraud, a "heedless disregard of the consequences," or a "bad faith" state of mind.¹⁷ Stating that negligence will not support a claim for punitive

¹¹*Id.* at 1175.

¹²*Id.* The court stated that punitive damages are unfounded when the insurer's denial is based upon a good faith defense. *Id.* (citing *Hoosier Ins. Co. v. Mangino*, 419 N.E.2d 978 (Ind. Ct. App. 1981)).

¹³434 N.E.2d 585 (Ind. Ct. App. 1982).

¹⁴*Id.* at 586.

¹⁵*Id.* at 587-88.

¹⁶*Id.* at 589, 596.

¹⁷*Id.* at 595. The court stated that a claim denial "so ludicrous and outside the bounds of reason as to be tainted by fraud, oppression, bad faith, or gross negligence" would constitute bad faith. *Id.* The court further stressed that "'even a breach indicating substandard business conduct does not entitle the promisee to . . . punitive damages.'" *Id.* (quoting *Peterson v. Culver Educ. Found.*, 402 N.E.2d 448, 457 (Ind. Ct. App. 1980) (citing *Vernon*

damages, the court gave examples of conduct which would not support an award of punitive damages: (1) insurer's good faith and reasonable dispute of coverage which results in a breach of contract; (2) insurer's negligent investigation of a coverage claim; or (3) insurer's settlement practice which negligently falls below insurance industry standards.¹⁸ As such, the court rejected the widow's attempt to characterize Nationwide's denial of benefits as conduct so unreasonable as to constitute bad faith, malice or oppressive conduct.¹⁹

Again, in *Continental Casualty Corp. v. Novy*,²⁰ an action to enforce a physician's disability claim, the trial court granted the physician's disability claim but rejected the punitive damage count. On appeal, the insured contended that the claim was denied in bad faith because the insurer failed to physically examine him or ascertain the nature of his subsequent employment. Thus, the insured argued, the failure to diligently investigate the claim, when evidence favorable to that claim was readily available, constituted oppressive and bad faith conduct.²¹ The court rejected this contention and concluded that lack of diligent investigation into an insured's claim, standing alone, is insufficient to support a punitive damage award.²²

Finally, in *D & T Sanitation, Inc. v. State Farm Mutual Automobile Insurance Co.*,²³ the insured was denied punitive damages and the trial court entered a specific finding that the insurer's conduct was not " 'malicious or willful or obstreperous misconduct which would support punitive damages.' " ²⁴ Affirming that adverse judgment, the Indiana Court of Appeals rejected the insured's assertion that an insurer's negligent selection of an appraiser or repair facility constituted bad faith conduct.²⁵

The imposition of more stringent substantive limitations was further augmented by the adoption of a higher evidentiary standard in *Travelers*

Fire & Cas. Ins. Co. v. Sharp, 264 Ind. 599, 349 N.E.2d 173 (1976)). Finally, a "heedless or reckless disregard of consequences" or "tortious conduct," as contemplated by *Vernon Fire & Cas. Ins. Co. v. Sharp*, 264 Ind. 599, 349 N.E.2d 173 (1976), involves a conscious and intentional wrongdoing which by nature is oppressive or malicious. 434 N.E.2d at 594; see *Prudential Ins. Co. v. Executive Estates, Inc.*, 174 Ind. App. 674, 369 N.E.2d 1117 (1977); *Bob Anderson Pontiac, Inc. v. Davidson*, 155 Ind. App. 395, 293 N.E.2d 232 (1973); *Capitol Dodge, Inc. v. Haley*, 154 Ind. App. 1, 288 N.E.2d 766 (1972).

¹⁸*Id.* at 595-96.

¹⁹*Id.* at 595.

²⁰437 N.E.2d 1338 (Ind. Ct. App. 1982).

²¹*Id.* at 1355.

²²*Id.* at 1356. The court concluded that a negligent failure to investigate a claim cannot be the basis for awarding punitive damages. Rather, the insured has the burden of showing that the preconditions to the insurer's obligation to pay a claim have been met. *Id.* (citing *Craft v. Economy Fire & Cas. Co.*, 572 F.2d 565, 571-72 (7th Cir. 1978)).

²³443 N.E.2d 1207 (Ind. Ct. App. 1983).

²⁴*Id.* at 1209 (quoting the lower court opinion of Judge Dalton C. McAlister of the Allen Superior Court in this case).

²⁵443 N.E.2d at 1209-10.

*Indemnity Co. v. Armstrong.*²⁶ In a clear effort to limit punitive damage awards in insurance disputes, the Indiana Supreme Court rejected the “preponderance” standard for one of “clear and convincing” evidence.²⁷ Noting that an insured has no inherent right to punitive damages and that these awards are merely a windfall to the lucky insured,²⁸ the court concluded that the public interest would best be served by encouraging litigation of “good faith” claim disputes.²⁹ The court stated that to allow an award of punitive damages, upon evidence of no greater persuasive value than that needed to support the underlying breach of contract, would impose such a risk on the insurer as to make questionable claims “nondisputable.”³⁰ Thus, an insurer would be coerced into paying all such claims in order to avoid the risk of an adverse punitive damage award.³¹

In support of the new evidentiary standard, the court stated:

In fact, it is incongruous to permit a recovery of that to which there is no entitlement upon evidence that barely warrants a recovery of that which is the plaintiff’s absolute right. Yet, that is precisely what may occur when the inference of obduracy, from which punitive damages may flow, is permissible, but not compelled, from the same conduct from which compensatory damages flow, as a matter of right. To avoid such occurrences, punitive damages should not be allowable upon evidence that is merely consistent with the hypothesis of malice, fraud, gross negligence or oppressiveness. Rather some evidence should be required that is inconsistent with the hypothesis that the tortious conduct was the result of a mistake of law or fact, honest error of judgment, overzealousness, mere negligence or other such noniniquitous human failing. . . . And, just as the requirement of proof beyond a reasonable doubt furthers the public interest with respect to criminal cases, a requirement of proof by clear and convincing

²⁶442 N.E.2d 349 (Ind. 1982).

²⁷*Id.* at 358-63.

²⁸*Id.* at 362 (citing *Indianapolis Bleaching Co. v. McMillan*, 64 Ind. App. 268, 113 N.E. 1019 (1916)).

²⁹442 N.E.2d at 363.

³⁰*Id.*

³¹The court stated that

[t]he public interest cannot be served by any policy that deters resort to the courts for the determination of bona fide commercial disputes. “The infliction of this damage has generally been regarded as privileged, and not compensable, for the simple reason that it is worth more to society than it costs, i.e., the insurer is permitted to dispute its liability in good faith because of the prohibitive social costs of a rule which would make claims nondisputable.”

Id. (quoting *Vernon Fire & Cas. Ins. Co. v. Sharp*, 264 Ind. 599, 609-10, 349 N.E.2d 173, 181 (1976)).

evidence furthers the public interest when punitive damages are sought.³²

Thus, at a minimum, the court has adopted a preference for an evidentiary standard which will not deter the judicial resolution of bona fide insurance claim disputes. Further, the court has left unsettled the scope of its holding and whether the "clear and convincing" evidentiary standard will be applied to all punitive damage claims, whether contractual or tortious in nature.

2. *Construction of Insurance Contracts.*—*Aetna Insurance Co. v. Monteith Tire Co.*³³ involved an injury sustained by the employee of a truck owner when a recapped tire, mounted by Monteith, exploded causing the rim assembly to strike the employee. Both Aetna and Midland Insurance Company tendered a defense to Monteith under full reservation of rights letters. Aetna then instituted an action against Midland seeking a declaration that Midland had exclusive coverage responsibility. Judgment was entered for Midland but the appellate court reversed.

The Indiana Court of Appeals determined that language in the insurance policy³⁴ must be given its plain meaning and that Aetna's policy excluded coverage for injuries resulting from any recapping service.³⁵ In fact, Monteith had received a premium reduction for an endorsement containing that exclusion. The court concluded that although "service" was not specifically defined in the policy, the mounting of recapped tires is a "service" within the ordinary meaning of that word.³⁶ Therefore, the policy was not ambiguous and Aetna was within its contractual rights to deny coverage.³⁷

B. Property Insurance

1. *Indemnity Contracts—Interpretation of Actual Cash Value.*—Indemnity contracts are designed to reimburse an insured without allowing the insured to profit from his loss.³⁸ As such, these contracts are generally construed to avoid placing the insured in a better position than

³²*Id.* at 362-63.

³³443 N.E.2d 880 (Ind. Ct. App. 1983).

³⁴Aetna's "Products Limitation Endorsement" provided:

"In consideration of a premium reduction, it is agreed that such insurance as is afforded by the Bodily Injury Liability Coverage and Property Damage Liability Coverage does not apply to Bodily Injury or Property Damage included within the completed operations hazard or products hazard for any tire retreading, recapping operations or the sales or service of same. ACCEPTED /s/ Ray W. Monteith"

Id. at 881 (quoting Record at 153).

³⁵443 N.E.2d at 881.

³⁶*Id.*

³⁷*Id.*

³⁸Travelers Indem. Co. v. Armstrong, 442 N.E.2d 349, 352 (Ind. 1982).

if no loss had occurred.³⁹ This principle is intended to discourage wagering or destruction of an insured's property in order to collect insurance proceeds.⁴⁰

Two primary loss reimbursement mechanisms have been created with respect to property insurance: (1) actual cash value coverage (ACV) and (2) replacement cost coverage without a deduction for depreciation.⁴¹ ACV is a pure indemnity contract designed only to put the insured in the same position as before the loss.⁴² Although an ACV adjustment for new property will often be the cost of repair, this method of valuation is seldom used for an older building unless the damage is very minor. Where an older building is seriously damaged but not destroyed, the repair cost will typically be discounted to reflect depreciation "so that the insured will not receive the equivalent of a new building for a loss of the old one."⁴³ This method of computation is generally imposed to deny an insured the opportunity to profit from his loss, a result inconsistent with an indemnity contract.⁴⁴

Replacement cost coverage, on the other hand, provides greater coverage than the standard ACV policy and therefore is not a strict indemnity contract.⁴⁵ In return for a higher premium, the insured will receive the cost of returning the damaged property to its original condition even if that cost exceeds the property's fair market value prior to the loss.⁴⁶ Thus, replacement cost coverage will often result in an enhancement of the dwelling's pre-loss value.⁴⁷

*Travelers Indemnity Co. v. Armstrong*⁴⁸ compared these two loss reimbursement mechanisms and determined an insurer's liability under an ACV policy. Travelers issued a farmowner's policy that provided a \$15,000 liability limit on a dwelling. That policy provided coverage: "to the extent of the actual cash value of the property at the time of loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality, . . . against all direct loss by fire."⁴⁹ The home was substantially damaged by fire and Travelers determined the cost of repair to be \$8,729.62. Travelers then offered the

³⁹*Id.* (citing 6 J. APPLEMAN, *INSURANCE LAW AND PRACTICE* § 3823, at 218-19 (1972)); *Brand Distrib., Inc. v. Insurance Co. of N. America*, 532 F.2d 352 (4th Cir. 1976)).

⁴⁰See generally Note, *Valuation and Measure of Recovery Under Fire Insurance Policies*, 49 COLUM. L. REV. 818 (1949).

⁴¹*Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349, 352 (Ind. 1982).

⁴²*Id.*

⁴³*Id.* at 353 (quoting Note, *supra* note 40, at 823).

⁴⁴*Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349, 353 (Ind. 1982).

⁴⁵*Id.*

⁴⁶*Id.*

⁴⁷*Id.*

⁴⁸442 N.E.2d 349 (Ind. 1982).

⁴⁹*Id.* at 354 (emphasis added by the court). Travelers issued the "Actual Cash Value Form" approved for use in Indiana in 1955. *Id.* at 351.

insured \$6,497.22, an amount representing the actual cost of restoration depreciated by twenty-five percent.

Plaintiff rejected that offer and sued Travelers for breach of contract and tortious conduct. The trial court instructed the jury that Armstrong should receive the full loss to his dwelling, not to exceed the policy limits.⁵⁰ Travelers objected to this instruction alleging that the policy's language compelled a depreciation deduction so that the insured would not be unjustly enriched.⁵¹ The jury returned a verdict of \$8,729.62 actual and \$25,000 punitive damages.

The Indiana Court of Appeals affirmed that judgment and concluded that so long as the dwelling could be repaired with "material of like kind and quality," Travelers must pay that cost up to the policy limit.⁵² The appeals court found that a depreciation deduction would deny the insured the ability to restore the dwelling to its pre-loss functional efficiency, a result which did not comport with the underlying basis of the policy.⁵³ That decision sent immediate tremors throughout the insurance industry as the fundamental distinction between ACV and replacement cost coverage was eliminated. Thus, by rejecting traditional notions of indemnity, the court opened the door for ACV policyholders to obtain replacement cost coverage without paying the higher premiums normally associated with that coverage.

The Indiana Supreme Court reversed the court of appeals and determined that ACV is limited by three factors: (1) the policy limit, (2) the actual cash value of the lost property, and (3) the cost of repair or

⁵⁰*Id.* at 357-58. The trial court gave the following instruction:

You are instructed that insurance policy in question bound and required the defendant to pay the full direct loss resulting from a fire to the house in question within the stated limits of the policy, namely \$15,000. There are no provisions in the policy applicable to the tenant house that was damaged which either required or authorized the insurance company to reduce the amount payable under the contract below such an amount.

Id.

⁵¹*Id.* at 358. *See also* Travelers Indem. Co. v. Armstrong, 384 N.E.2d 607, 616 (Ind. Ct. App. 1979), *aff'd in part, rev'd in part*, 442 N.E.2d 349 (Ind. 1982).

⁵²384 N.E.2d 607, 617 (Ind. Ct. App. 1979). The court of appeals posited the following rationale in support of its holding:

The insurance policy serves to insure against loss not exceeding the amount stated in the policy limit, and the payment of an amount less than the limit, which is not sufficient to restore or replace the functional efficiency provided by the property before the loss, does not comply with the policy.

. . . Because it is the insurer's undertaking to make the insured whole within the policy limits, the augmented damage resulting from increased costs of labor and materials is the liability of the insurer up to the stated limit of the insurance.

Id. at 615 (citations omitted).

⁵³*Id.* at 615 (citing Fedas v. Insurance Co. of Pennsylvania, 300 Pa. 555, 151 A. 285 (1930)).

replacement.⁵⁴ The court noted that failure to account for depreciable components would result in the dwelling being restored to a value exceeding its pre-loss value,⁵⁵ a result inconsistent with the purpose of an indemnity contract.⁵⁶

A similar outcome was reached in *Ohio Casualty Insurance Co. v. Ramsey*,⁵⁷ wherein insured property was totally destroyed by fire. The trial court interpreted an ACV policy, similar to the one analyzed in *Travelers*, to mean replacement cost without a depreciation deduction.⁵⁸ The appellate court rejected that approach and determined that replacement of a dwelling's functional efficiency is unfounded in a total loss case because the property will not be generally subject to restoration.⁵⁹ Therefore, "pure replacement cost" would permit an ACV policyholder, under the facts presented in *Ramsey*, to receive a new home of enhanced value, a result inconsistent with indemnity principles normally associated with an ACV insurance contract.⁶⁰

Thus, these decisions have limited what the insurance industry feared would be a blanket application of "replacement cost" in ACV determinations and have preserved the fundamental distinction between ACV and replacement cost coverage. Further, this distinction appears equally applicable to both partial and total property loss cases. As such, policyholders must pay the higher premiums associated with replacement cost coverage before they will be able to reap the benefits of that type of coverage. Therefore, ACV policyholders should carefully re-examine their policies

⁵⁴442 N.E.2d at 354. The court stated:

The difference between factors No. 2 and No. 3, is that No. 2, according to the weight of authority, permits a reduction in liability in view of the very real consideration that following complete restoration of an extensively damaged building, the building will often be worth more than it was before the loss occurred. The degree to which this comes into play obviously varies with the physical condition and degree of obsolescence [sic] of the building, prior to the loss, and the extent of the damage insured against. The determination is further complicated by reasons of factors, other than mere age or physical deterioration, that also affect values.

Id.

⁵⁵*Id.*

⁵⁶*Id.* at 353.

⁵⁷439 N.E.2d 1162 (Ind. Ct. App. 1982).

⁵⁸*Id.* at 1164. In entering its judgment, the trial court ruled in part:

[T]he Court . . . finds that the subject property herein was destroyed by fire that the evidence herein showed that said dwelling cannot be repaired at a cost of less than face value of the insurance herein and that the replacement cost would far exceed the limits of the policy herein and that the plaintiff is entitled to replacement of said property or in the alternative the limits of the policy herein

Id.

⁵⁹*Id.* at 1166.

⁶⁰*Id.* at 1169.

to determine if indemnity coverage is sufficient to protect their property interests.

2. *Broad Evidence Rule—Method for Proving Actual Cash Value of Loss.*—*Travelers* further analyzed the proper evidentiary vehicle for proving ACV and adopted the broad evidence rule.⁶¹ That rule, characterized by the court as the majority rule of other jurisdictions, provides flexibility in determining the value of a loss and permits the trier of fact to consider every fact and circumstance which would logically contribute to a correct estimate, such as depreciation; replacement cost; fair market value; amount of loss; effect of over- or under-insurance; original cost versus cost of reproduction; and declarations against interest made by the insured.⁶² The court noted that the broad evidence rule is more flexible than other evidentiary methods of computing ACV losses.⁶³ It concluded that a consideration of all relevant factors would foster the underlying goal of an indemnity contract, namely, to make the measure of recovery correspond to the actual loss sustained by the insured.⁶⁴

3. *Innocent Co-owner's Right to Recover Insurance Proceeds.*—The Indiana Court of Appeals addressed the rights of an innocent spouse to receive insurance proceeds under a homeowner's policy for loss to a home which had been deliberately destroyed by that spouse's husband. In *Fuston v. National Mutual Insurance Co.*,⁶⁵ the innocent spouse was denied recovery in a jury trial following an instruction that, because of tenancy by the entirety, one spouse's act justifying the denial of recovery barred recovery for the innocent spouse.⁶⁶ The insurance policy excluded coverage

⁶¹442 N.E.2d at 352-57; see also *Atlas Constr. Co. v. Indiana Ins. Co.*, 160 Ind. App. 33, 39-40, 309 N.E.2d 810, 814 (1974) (giving tacit approval to the broad evidence rule); *McAnarney v. New York Fire Ins. Co.*, 247 N.Y. 176, 159 N.E. 902, 905 (1928) (landmark decision originating the broad evidence rule). The court analyzed four methods utilized in other jurisdictions to make ACV determinations: (1) replacement cost without depreciation, (2) market value, (3) replacement cost with depreciation deduction, and (4) broad evidence rule. 442 N.E.2d at 354-56.

⁶²442 N.E.2d at 356.

⁶³*Id.* at 357.

⁶⁴*Id.* at 356-57. *Travelers'* language may be construed as adopting the broad evidence rule for all property loss cases. When so construed, it is consistent with *Ohio Cas. Ins. Co. v. Ramsey*, 439 N.E.2d 1162 (Ind. Ct. App. 1982), which applied the rule in a total loss property case. The court of appeals in *Ohio Casualty*, however, referred by footnote to a suggestion that "replacement cost less depreciation" should be the touchstone in the ordinary property loss case, thus limiting the broad evidence rule to those unusual fact situations wherein greater flexibility is needed to make an ACV determination. 439 N.E.2d at 1169 n.4.

⁶⁵440 N.E.2d 751 (Ind. Ct. App. 1982).

⁶⁶The trial court rejected *Fuston's* tendered instruction which stated:

If you find that one of the defendants committed an act which would void the terms of the insurance policy but that the other defendant was innocent of any such act, you should return a verdict against the one defendant and a verdict for the other defendant.

Id. at 752.

with respect to “an insured” who was guilty of failure to protect the property.⁶⁷ The Indiana Court of Appeals, citing the equitable principle that a party will not be permitted to profit from his wrongdoing, concluded that a culpable spouse’s conduct dissolves the tenancy by the entirety and permits an innocent spouse to recover one-half of the insurance proceeds.⁶⁸ The court acknowledged that in some cases such a division of benefits might permit the wrongful spouse to enjoy part of the proceeds but stated that trial courts are competent to fashion remedies that would avoid that result.⁶⁹

Fuston clearly expanded the holding of *American Economy Insurance Co. v. Liggett*,⁷⁰ which permitted full recovery of the insurance proceeds by an innocent spouse where the wrongful spouse had perished during the destruction of the insured property. Yet, *Fuston* left unanswered what “other remedies” are authorized to limit the culpable surviving spouse from receiving part of the insurance proceeds. The court did not directly address whether its holding will affirm the right of an innocent non-related co-insured to insurance proceeds on property destroyed by a culpable co-insured, but it noted the Delaware Supreme Court’s dictum that in such circumstances recovery would be allowed.⁷¹ *Fuston* did, however, send a significant signal to the insurance industry that policy modifications which explicitly exclude an innocent co-insured from any recovery under a homeowner’s policy might be upheld under court challenge.⁷² Finally, the court in *Fuston* stated that the innocent co-insured must be totally free of collusion with the guilty spouse or be precluded from recovering any part of the insurance proceeds.⁷³

4. *Pro Rata Contributions Between Property Insurers.*—In *Indiana Insurance Co. v. Sentry Insurance Co.*,⁷⁴ both insurers issued policies on property that had been sold on contract. Sentry insured the vendee and Indiana insured the vendor to that contract. Each policy provided that its insurer would be pro rata liable with all other insurers of the property. After the property was destroyed by fire, Indiana denied coverage liability and refused to pay its pro rata share of the loss. Affirming an adverse judgment for Indiana Insurance, the Indiana Court of Appeals stated that before a pro rata contribution will be required, each policy must insure (1) the same parties, (2) the same casualty, (3) the same property, and (4) the same insured interest.⁷⁵ Concluding that the

⁶⁷*Id.* at 751-52 n.l.

⁶⁸*Id.* at 753-54.

⁶⁹*Id.* at 754.

⁷⁰426 N.E.2d 136 (Ind. Ct. App. 1981).

⁷¹440 N.E.2d at 754 (citing *Steigler v. Insurance Co. of N. America*, 384 A.2d 398 (Del. 1978)).

⁷²440 N.E.2d at 754.

⁷³*Id.*

⁷⁴437 N.E.2d 1381 (Ind. Ct. App. 1982).

⁷⁵*Id.* at 1388 (citing *Granite State Ins. Co. v. Employers Mut. Ins. Co.*, 125 Ariz.

first three elements could not be disputed, the court addressed Indiana's argument that only the vendee's interest had been destroyed and therefore the risk of loss must be borne solely by the vendee in possession.⁷⁶ Rejecting this position, the court stated:

Although it is true that in an action between the vendee and the vendor the vendee would usually bear the risk of loss, this legal principle is irrelevant in the instant case. To hold otherwise would state that when the vendee bears the risk of loss (which is usually the case), the insurer of the vendor's interest would never pay for a loss even though it accepted the premiums from the vendor; the vendee would then become the insurer and the insurance company would be relieved of its role as insurer and allowed to reap the windfall of the premiums it collected from the vendor.⁷⁷

Additionally, the court acknowledged the right of a co-insurer to bring an action to enforce a pro rata contribution.⁷⁸ The court stated that the non-participating insurer would be required to pay its pro rata share even though it did not participate in the claim adjustment⁷⁹ and would further be barred from challenging the adjustment.⁸⁰

5. *Mortgagor-Mortgagee Rights to Proceeds Resulting from Losses to Mortgaged Premises.*—Two cases addressed the right of a mortgagor to have insurance proceeds applied to restoration and repair of the mortgaged premises as opposed to the mortgage debt. In *Hoosier Plastics v. Westfield Savings & Loan Association*,⁸¹ American Color (mortgagor)

275, 609 P.2d 90 (Ariz. Ct. App. 1980); *Emmco Ins. Co. v. Indiana Farmers Mut. Ins. Co.*, 152 Ind. App. 212, 283 N.E.2d 404 (1972)).

⁷⁶437 N.E.2d at 1388.

⁷⁷*Id.* (footnote omitted).

⁷⁸*Id.* at 1390 (citing *Ohio Cas. Group of Ins. Cos. v. Royal-Globe Ins. Cos.*, 413 N.E.2d 678 (Ind. Ct. App. 1980)).

⁷⁹437 N.E.2d at 1390.

⁸⁰*Id.* The court cited with approval the language of *Massachusetts Bonding & Ins. Co. v. Car & Gen. Ins. Corp.*, 152 F. Supp. 477 (E.D. Pa. 1957) which stated:

"The protection which law and equity afford a co-insurer is available only to a co-insurer which recognizes its liability and participates in assuming charge of the matters relating to the claim involving its insured and its co-insurer. If the defendant had performed its obligation, it would have joined in the negotiations for settlement or, disapproving settlement, would have joined in the defense of any suit against Johnson; it would not have thrust sole responsibility upon the plaintiff. When the defendant falsely disclaimed, and refused to undertake or perform its obligations it lost its rights to complain that the plaintiff [the other insurer] undertook the obligations of both in the common, as well as its own, interest."

437 N.E.2d at 1390 (quoting *Massachusetts Bonding & Ins. Co. v. Car & Gen. Ins. Corp.*, 152 F. Supp. 477, 480-81 (E.D. Pa. 1957)).

⁸¹433 N.E.2d 24 (Ind. Ct. App. 1982).

mortgaged property to Westfield (mortgagee). A building on the mortgaged premises was destroyed by fire and a dispute arose as to the proper application of insurance proceeds payable under a policy obtained by the mortgagee pursuant to the mortgage agreement. The mortgage agreement required that the mortgagor obtain an insurance policy on the mortgaged property which contained a clause making any loss payable to the mortgagee as its "interest may appear." The agreement further provided that insurance proceeds should first be applied to restoration or repair of the premises so long as such repair was economically feasible and the mortgagee's security interest was not impaired.⁸²

The court stated that the policy language, as its "interest may appear," generally entitles the mortgagee to apply policy proceeds to the mortgage debt.⁸³ The insurance proceeds therefore substitute for the property as security and act as an equitable conversion of the property.⁸⁴ Thus, the mortgagee will normally prevail over a mortgagor who desires to apply the proceeds to repair and restoration of the property.⁸⁵ The parties to a mortgage agreement however can change that result by contracting to apply the proceeds to restoration rather than the mortgage debt.⁸⁶ Thus, the court upheld the right of the mortgagor to apply the proceeds towards restoration where the mortgage provides for such application.⁸⁷

The Indiana courts also addressed this issue in *Loving v. Ponderosa Systems, Inc.*⁸⁸ In that case, the mortgage agreement provided that insurance proceeds be applied to the mortgage debt or alternatively, at the mortgagee's election, to restoration of the damaged premises. The court stated that the mortgagee's interest is in the debt only.⁸⁹ Further, although the court agreed with *Hoosier Plastics* that the mortgagee may, by agreement, require the application of the proceeds to restoration, the court found no language in the agreement mandating such application.⁹⁰ Thus, the mortgagor's lessee was held responsible for the full cost of repair to the extent insurance proceeds were not made available by the mortgagee.⁹¹

These cases therefore illustrate the flexibility the parties have to alter traditional risk of loss principles with respect to mortgaged properties and the importance of specifying the manner of insurance proceed disbursement in the event that property is destroyed.

⁸²*Id.* at 26-27.

⁸³*Id.* at 27.

⁸⁴*Id.*

⁸⁵*Id.*

⁸⁶*Id.*

⁸⁷*Id.* at 28.

⁸⁸444 N.E.2d 896 (Ind. Ct. App. 1983).

⁸⁹*Id.* at 906 (citing *Pearson v. First Nat'l Bank*, 408 N.E.2d 166 (Ind. Ct. App. 1980)).

⁹⁰444 N.E.2d at 907.

⁹¹*Id.*

C. Life, Accident and Health Insurance

1. *Rights of an Insured Under a Conversion Policy.*—In *Sur v. Glidden-Durkee*,⁹² a former employee of Glidden-Durkee was covered by a group health insurance policy provided by Prudential during the term of his employment. Prior to Sur's voluntary termination of employment, he discussed with an employer representative his right to convert the group policy to an individual policy, as permitted by Prudential's employee benefit booklet. Sur was informed that he could convert to an individual health plan within a specified number of days following the termination of his employment. Subsequent to terminating that employment, Sur's wife gave birth to a severely deformed child who required extensive surgery and medical care. Upon examining the conversion policies available, Sur discovered that none provided for major medical coverage as he had been provided under the group policy. Faced with assuming the great bulk of his son's medical expenses, Sur brought an action against his employer and Prudential for benefits available under the major medical plan. He alleged that he had been misled into believing major medical would be provided in one of the conversion policies primarily because he had not been informed that such coverage was not available under the conversion plans. Sur admitted that he had failed to inquire about major medical benefits and that the defendants had not affirmatively misrepresented that major medical could be obtained upon conversion. The district court granted summary judgment for both Glidden-Durkee and Prudential. The Seventh Circuit Court of Appeals reversed, holding that a material issue of fact existed as to whether Sur had been misled by Glidden-Durkee's agent or Prudential's booklet.

The Seventh Circuit stated that an employer is not an agent for an insurer and representations made by that employer will not be imputed to the insurer.⁹³ Rather, the employer who negotiates a group insurance contract acts as the employees' agent⁹⁴ and therefore owes a duty of good faith and diligence in both obtaining adequate insurance for its employees and informing those employees of conversion rights under the group policy.⁹⁵ This duty to inform includes a duty to avoid misleading an employee with respect to his conversion rights.⁹⁶ The court concluded that failure to notify an employee of *substantial* dissimilarities between the group plan and the conversion policy might result in a breach of the duty to inform.⁹⁷ Noting that major medical constituted approximately ninety percent of the benefits paid under the group plan,⁹⁸ the court determined

⁹²681 F.2d 490 (7th Cir. 1982).

⁹³*Id.* at 493.

⁹⁴*Id.*

⁹⁵*Id.* at 494 (citing *Sheller-Globe Corp. v. Sheller*, 413 N.E.2d 318 (Ind. Ct. App. 1980)).

⁹⁶681 F.2d at 494.

⁹⁷*Id.* at 495.

⁹⁸*Id.* at 499.

that a trier of fact might find a breach of the employer's fiduciary duties as agent for the insured.⁹⁹ Therefore, summary judgment was improper as to Glidden-Durkee.

The court next stated that an insurer will be estopped to deny coverage when the employee has reasonably relied upon the insurer's act or omission.¹⁰⁰ The court determined that Prudential's benefit booklet failed to state affirmatively that major medical would not be provided with the conversion policies.¹⁰¹ Therefore, it reversed the award of summary judgment concluding that reasonable men might differ on whether the booklet misled Sur and thus, whether Prudential should be estopped to deny major medical benefits.¹⁰²

In *Commonwealth Life Insurance Co. v. Jackson*,¹⁰³ a family protection rider was added to a life insurance policy which insured the wife and children for \$1,000 each and permitted the children to convert that policy into individual policies at age twenty-five with additional evidence of insurability. The family protection policy contained a suicide clause denying death benefits for suicides committed within two years from the date of issue. One of the children exercised the conversion privilege and a converted policy was issued. The converted policy also contained a clause denying benefits for suicides committed within two years from the "date of issue."¹⁰⁴ The insured child committed suicide more than two years after the original family protection policy was issued but less than two years from the time of conversion. Benefits were denied because of the suicide clause. The insured claimed the two-year time period mentioned in the converted policy should be computed from the time when the family protection rider was issued, not from the date the converted policy was issued. An action was initiated to enforce payment of the death benefit. The trial court granted summary judgment for the insured and the judgment was affirmed on appeal.

⁹⁹*Id.* at 495.

¹⁰⁰*Id.* The court stated that detrimental reliance could be supported by Sur's failure to seek health insurance elsewhere. *Id.* at 495 n.12.

¹⁰¹*Id.* at 499. The court further stated:

The most significant feature of the conversion provision, however, is that nowhere does its state that Major Medical coverage is not available upon conversion. . . . [W]e think a rational jury could readily conclude that, in informing employees that a conversion policy is "available," while neglecting to inform them that the conversion policy covers only a small percentage of the group policy's maximum coverage, the booklet is materially misleading. This is particularly true in light of the Indiana courts' insistence that an insurance company articulate with utmost clarity those risks that it does not intend to insure against in the policies it holds out for sale.

Id. (citations omitted).

¹⁰²*Id.*

¹⁰³432 N.E.2d 1382 (Ind. Ct. App. 1982).

¹⁰⁴*Id.* at 1384.

The issue before the appellate court was whether the subsequent conversion policy was a separate and independent contract or a continuation of the original policy. The court quoted a Georgia case for the general rule:

“It is generally held that when a policy of life insurance is canceled or surrendered and replaced by a new agreement, the new policy does not create a new contract of insurance, but effects a continuance of the original contract so that the liability of the insurer for death by suicide is not affected by the fact that death occurred within the period specified in the new policy’s suicide clause. If the new policy is so different as to constitute an entirely new agreement the original suicide clause is inapplicable; but where the latter is identical or at least substantially similar to the old policy, it is usually held that the policies should be considered as one agreement.”¹⁰⁵

The court noted that the conversion policy depended strictly upon the original policy for its existence and that the insured applied for the conversion policy on a form provided for that purpose.¹⁰⁶ Further, the court stated that enforcement of a two-year suicide clause in a converted policy would not foster the anti-fraud bases for suicide clauses.¹⁰⁷ Since the benefits accruing under the conversion policy were clearly fixed by the original policy, the court concluded that both policies must be construed as one agreement and the suicide clause must fail.¹⁰⁸

2. *Definition of “Child” as Beneficiary Under a Life Insurance Policy.*—In *Aetna Life & Casualty Insurance Co. v. Stapleton*.¹⁰⁹ a decedent had designated his surviving “children” as beneficiaries under a group life insurance policy and several illegitimate children claimed a right to the proceeds. Because an insurance policy is a contract, the court determined that contract and not probate principles should govern the interpretation of “child” under the policy.¹¹⁰ The court concluded that the

¹⁰⁵*Id.* at 1388 (citations omitted) (quoting *Founders Life Assurance Co. v. Poe*, 242 Ga. 748, 750, 251 S.E.2d 247, 249 (1978)).

¹⁰⁶*Id.* at 1391. The court additionally noted that the application contained no questions relating to insurability or physical examination and that Commonwealth backdated the date of issue in order to provide continuous coverage under the old policy. *Id.*

¹⁰⁷The court stated that

[i]f the function of the short term suicide clause is merely to serve as an anti-fraud provision . . . where evidence of insurability is waived and where a party is led to believe he is effecting a conversion . . . rather than purchasing an entirely new policy the suicide clause of the second policy would not be given effect.

Id.

¹⁰⁸432 N.E.2d 1382. See *Occidental Life Ins. Co. v. Hurley*, 513 S.W.2d 897 (Tex. Civ. App. 1974); *Western & S. Life Ins. Co. v. Shelby*, 101 Ind. App. 1, 194 N.E. 197 (1935).

¹⁰⁹556 F. Supp 228 (S.D. Ind. 1982).

¹¹⁰*Id.* at 230.

plain meaning of "child" includes all offspring, both legitimate and illegitimate.¹¹¹ Therefore, the illegitimate children were held to fall within the class of beneficiaries contemplated by the insured decedent when he contracted for the life insurance.¹¹²

*D. Casualty Insurance: Statute of Limitations
in Uninsured Motorist Cases*

In this survey period, the Indiana courts finally addressed the issue of whether the two-year statute of limitations for tort actions or a shorter limitation period specified in an insurance contract is applicable in uninsured motorist cases. In *Scalf v. Globe American Casualty Co.*,¹¹³ the insured failed to file his claim within one year of loss as required by the uninsured motorist portion of his policy.¹¹⁴ The insured's claim was denied and judgment was entered for the insurer on the insured's action to enforce that claim. Reversing that judgment, the appellate court determined that the legislature intended the uninsured motorist statute to afford an insured the same protection against loss as he would have enjoyed had the offending motorist been insured.¹¹⁵ Since an insured has two years to bring an action against an insured offender, the one-year contractual limitation diminished the rights intended by statute and therefore was contrary to public policy.¹¹⁶ The court in *Scalf* clearly endorsed the two-year tort statute of limitations as a minimum coverage period in uninsured motorist cases.¹¹⁷

¹¹¹*Id.*

¹¹²*Id.*

¹¹³442 N.E.2d 8 (Ind. Ct. App. 1982).

¹¹⁴The policy provided:

Action Against the Company: No suit or action whatsoever or any proceeding instituted or processed in arbitration shall be brought against the company for the recovery of any claim under this coverage unless as a condition precedent thereto, the insured or his legal representative has fully complied with all of the terms of the policy and unless same is commenced within twelve months next after the date of the accident.

Id. at 9 n.3.

¹¹⁵*Id.* at 10.

¹¹⁶*Id.*

¹¹⁷The court stated:

Thus to provide *Scalf* with the same financial protection he would have had if he were injured by an insured motorist, he must be able to pursue his remedy against his insurance carrier for the same time period he would be able to pursue his claim against an insured tortfeasor's insurance carrier. Enforcement of the contractual one-year limit in the uninsured motorist provision would place *Scalf* in a substantially different position than he would have been if the tortfeasor had carried the required coverage.

Id. at 11. See *Bocek v. Inter-Insurance Exch. of Chicago Motor Club*, 175 Ind. App. 69, 369 N.E.2d 1093 (1977).

E. Statutory Developments

The General Assembly passed a number of laws impacting on the insurance industry during the survey period.¹¹⁸

1. *Indiana Public Adjuster Statute.*—A new Indiana Public Adjuster statute¹¹⁹ was enacted to address the constitutional infirmities cited by the Indiana Supreme Court in *Professional Adjusters, Inc. v. Tandon*.¹²⁰ Under the old legislation, the public adjuster was authorized to *represent* an insured in the adjustment of claims for loss under any policy of insurance covering real or personal property except an auto policy.¹²¹ This authorization included the power to negotiate and effect settlement of the insured's claim.¹²² The court concluded that the public adjuster's conduct of interpreting contracts, assessing damage, and assisting the insured in negotiation and settlement of claims, constituted the unauthorized practice of law.¹²³

¹¹⁸Legislation enacted which impacted upon the insurance industry included the following: Act of Apr. 4, 1983, Pub. L. No. 261-1983, §§ 1-5, 1983 Ind. Acts 1695, 1695-96 (codified at IND. CODE §§ 27-8-9-5 to -9 (Supp. 1983)) (repealing IND. CODE §§ 27-8-9-1 to -4 (1982)) (owner's policy will be considered primary, unless damage occurs when the vehicle is left with a business that stores, repairs, tests, sells or parks automobiles, or under a car rental agreement, the lessee agrees to insure his liability while operating the vehicle in determining which motor vehicle liability policy must be exhausted first when two or more collectible policies apply to the insured loss); Act of Apr. 11, 1983, Pub. L. No. 256-1983, § 1, 1983 Ind. Acts 1656, 1656 (codified at IND. CODE § 27-1-13-14 (Supp. 1983)) (permitting insurer to sell group casualty and liability insurance to two or more qualified public transportation agencies for the purpose of insuring their public transportation functions); Act of Apr. 13, 1983, Pub. L. No. 260-1983, §§ 1, 3, 1983 Ind. Acts 1679, 1679-83 (codified in part at IND. CODE §§ 27-1-9-12, 27-6-1.1-1 to -6 (Supp. 1983)) (repealing IND. CODE §§ 27-1-7-18, 27-1-9-7, 27-6-1 (1982)) (addressing regulation of reinsurance risks by domestic insurance companies and revises references to reinsurance); Act of Apr. 5, 1983, Pub. L. No. 258-1983, § 1, 1983 Ind. Acts 1665, 1665-69 (codified at IND. CODE § 27-2-9-3 (Supp. 1983)) (expanding power of Indiana domestic insurance companies to form subsidiaries and giving the Insurance Commissioner additional regulatory power over these subsidiaries).

¹¹⁹Act of Apr. 4, 1983, Pub. L. No. 257-1983, § 1, 1983 Ind. Acts 1657, 1657-64 (codified at IND. CODE §§ 27-1-27-1 to -11 (Supp. 1983)). (repealing IND. CODE §§ 27-1-24-1 to -9 (1982)).

¹²⁰433 N.E.2d 779 (Ind. 1982).

¹²¹See *id.* at 782 (interpreting IND. CODE §§ 27-1-24-1 to -9 (1982)).

¹²²IND. CODE § 27-1-24-1(a) (1982). The statute authorized the public adjuster to act "on behalf of" or aid "in any manner" an insured in negotiating or settling a claim. *Id.*

¹²³433 N.E.2d at 783. The court implied that the statute might withstand a constitutional attack if it limited an adjuster's authority to appraise the loss and report back to the insured the fair value of the claim, provided that the adjuster refrained from negotiating or settling the insured's claim. *Id.* at 782.

A strong dissent, written by Justice Hunter, challenged the majority's distinction between private and public adjusters. *Id.* at 784 (Hunter, J., dissenting). The dissent noted that public adjusters perform identical functions to those performed by insurance adjusters and as such, if public adjusters engage in the unauthorized practice of law, so do private insurance adjusters. *Id.* at 784-85. It further cited statutory language limiting the conduct of an adjuster in recommending legal courses of action to an insured, representing an insured who is represented by an attorney, or referring an insured to a particular legal counsel. *Id.* at 786. Finally, the dissent concluded that public policy favors giving an insured the

The new legislation is thus an obvious legislative attempt to salvage the remnants of the public adjuster concept. It only authorizes the public adjuster to *render advice or assistance* in the adjustment of claims.¹²⁴ Further, it specifically prohibits a public adjuster from engaging in the “practice of law.”¹²⁵ Finally, the statute expands the powers of the Insurance Commissioner to monitor and punish wrongful conduct by a public adjuster.¹²⁶

The amended legislation therefore significantly limits the public adjuster’s authority to assist in any negotiation or claim settlement on behalf of an insured. Whether these limitations will be sufficient to withstand further constitutional attack is uncertain for the Act still fails to define what actions constitute the “practice of law” or the scope of the adjuster’s authority to “advise or assist” in the adjustment of claims.

2. *Unfair Claim Settlement Practices.*—The legislature further added a new fourteen-point section to the insurance code dealing with unfair claim settlement practices.¹²⁷ That section enumerates numerous unauthorized practices which might result in penalties against an insurance company. It provides minimum standards for the insurance industry in its dealings with an insured to include standards for disclosure of coverage provisions, the appropriate procedure for responding to an insured’s claim, and the proper standard for investigation, evaluation, and settlement of an insured’s claim.¹²⁸

same right to non-legal assistance in the settlement of insurance claims as presently enjoyed by the insurance industry. *Id.* at 787.

¹²⁴IND. CODE § 27-1-27-1(a) (Supp. 1983).

¹²⁵*Id.* § 27-1-27-9.

¹²⁶*Id.* § 27-1-27-7.

¹²⁷Act of Apr. 19, 1983, Pub. L. No. 259-1983, § 2, 1983 Ind. Acts 1669, 1675-76 (codified at IND. CODE § 27-4-1-4.5 (Supp. 1983)).

¹²⁸Those unauthorized practices are as follows:

- (1) Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue.
- (2) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies.
- (3) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies.
- (4) Refusing to pay claims without conducting a reasonable investigation based upon all available information.
- (5) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed.
- (6) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear.
- (7) Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds.
- (8) Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application.
- (9) Attempting to settle claims on the basis of an application which was altered

Significantly, the legislation crosses over all areas of insurance law.¹²⁹ It vests the Insurance Commissioner with new authority for enforcement of the code and establishes stringent monetary penalties for unfair claim settlement practices.¹³⁰ Unfortunately, the act is vague, ambiguous and lacks sufficient specificity to put an insurer on notice of the exact conduct prohibited. Terms such as "promptly settle," "provide reasonable explanation," and "reasonable standards" provide little if any standard upon which the insurance industry can structure its course of dealings with an insured.

Further, the Act opens the door for new challenges to the substantive and evidentiary restrictions imposed by the Indiana courts for punitive damage awards. The new section provides that a failure to properly communicate, investigate, or settle claims constitutes an unfair settlement practice. This language will undoubtedly result in a re-examination of recent court decisions reversing punitive damage awards for similar "unintentional" conduct by the insurer. On the other hand, the commissioner's authority to impose monetary penalties upon carriers who violate the unfair settlement practices prohibitions might operate to bar punitive damages entirely if the courts apply the general rule that punitive damages are improper when other monetary sanctions might be imposed.

3. *Comparative Fault Act.*—Finally, the legislature enacted a comparative fault act¹³¹ during this survey period. The Act provides, in part, that a percentage of fault must be assigned to the plaintiff when comparative fault is at issue.¹³² Fault greater than fifty percent will bar the plaintiff's recovery as did the defense of contributory negligence.¹³³

without notice to, or knowledge or consent of, the insured.

(10) Making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which the payments are being made.

(11) Making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration.

(12) Delaying the investigation or payment of claims by requiring an insured, claimant, or the physician of either to submit a preliminary claim report and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information.

(13) Failing to promptly settle claims, where liability has become reasonably clear, under one (1) portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.

(14) Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

IND. CODE § 27-4-1-4.5 (Supp. 1983).

¹²⁹*Id.* § 27-4-1-4.

¹³⁰*Id.* §§ 27-4-1-6, -12.

¹³¹Act of Apr. 21, 1983, Pub. L. No. 317-1983, § 1, 1983 Ind. Acts 1930, 1930-33 (codified at IND. CODE § 34-4-33-1 to -8 (Supp. 1983)).

¹³²IND. CODE § 34-4-33-5(1) (Supp. 1983).

¹³³*Id.* § 34-4-33-5(2).

The Act is mentioned here because of the tremendous impact it will ultimately have on the adjustment and settlement of insurance claims.¹³⁴ No longer faced with the devastating contributory negligence defense, settlement opportunities for plaintiffs should increase since the likelihood of plaintiffs recovering some part of their claim at trial will be substantially greater.

¹³⁴For a more in depth discussion of the Comparative Fault Act, see *Symposium on Indiana's Comparative Fault Act*, 17 IND. L. REV. NO. 3 (1984).

