

Survey of Recent Developments in Insurance Law

JOHN C. TRIMBLE*

INTRODUCTION

The area of insurance law received a considerable amount of attention during the survey period.¹ In fact, there were probably twice as many insurance law cases reported in the last year as in any other year in recent memory. Although there were many interesting cases,² this Article

* Member of the firm of Robert F. Wagner, P.C., practicing in association with the law offices of Lewis, Bowman, St. Clair & Wagner. B.A., 1977, Hanover College; J.D., 1981, Indiana University School of Law-Indianapolis.

1. The survey period for this issue is approximately January 1, 1991, to December 31, 1991. The survey period for this Article last year was approximately June, 1989 to August 1, 1990. Cases that were reported between August 1, 1990, and January 1, 1991, will also be mentioned in this Article.

2. Many cases during the survey period addressed or explained existing insurance law. Each of the cases mentioned in this footnote is worthy of review. *See Transamerica Ins. Servs. v. Kopco*, 570 N.E.2d 1283 (Ind. 1991) (addressing the interpretation under Indiana law of an alienation exclusion in a liability policy); *Egnatz v. Medical Protective Co.*, 581 N.E.2d 438 (Ind. Ct. App. 1991) (addressing an insurer's duty to renew medical malpractice insurance); *Meridian Mut. Ins. Co. v. Trueblood & Graham*, 577 N.E.2d 606 (Ind. Ct. App. 1991) (dealing with the right of a medical insurer to recover payments for medical expenses to its insured out of any recovery the insured received from the third party tort-feasor); *Weger v. Lawrence*, 575 N.E.2d 659 (Ind. Ct. App. 1991) (addressing the question of whether an automobile dealer has a duty to ascertain whether the buyer of an automobile has insurance prior to giving the buyer an interim registration plate); *American States Ins. Co. v. Adair Indus., Inc.*, 576 N.E.2d 1272 (Ind. Ct. App. 1991) (dealing with the question of whether a "family member" needed to have permission to use an automobile within the definition of the omnibus clause in the policy); *Richey v. Chappell*, 572 N.E.2d 1338 (Ind. Ct. App. 1991) (addressing the discoverability of an insurance company claim investigative file); *Schierenberg v. Howell-Baldwin*, 571 N.E.2d 335 (Ind. Ct. App. 1991) (addressing the discoverability of an insurance company claim investigative file); *Wedzeb Enter., Inc. v. Aetna Life & Casualty Co.*, 570 N.E.2d 60 (Ind. Ct. App. 1991) (dealing with the question of whether an insurance company has a duty of good faith to explain to its insured the full ramifications and consequences of signing a release that absolves the company from any further performance under the insurance contract); *Cincinnati Ins. Co. v. Compton*, 569 N.E.2d 728 (Ind. Ct. App. 1991) (reviewing the elements and burden of proof in a civil case to avoid insurance coverage arising from the insured's arson); *Fitzgerald v. Travelers Ins. Co.*, 567 N.E.2d 159 (Ind. Ct. App. 1991) (dealing with the effect of a change of beneficiary in a life insurance policy when the change is in violation of a provisional order in a dissolution action and one party to the action dies); *Watson v. Golden Rule Ins. Co.*, 564 N.E.2d 302 (Ind. Ct. App. 1990) (addressing the elements that must be proven by an insurance carrier to rescind a policy of insurance because of material misrepresentations of the insured on the application); *State Farm Auto. Ins. Co. v. James*, 562 N.E.2d 777 (Ind. Ct. App. 1990) (this case is noteworthy because it touched upon the procedure that a judgment creditor of an insured must follow in order to pursue proceedings supplemental to judgment against an insurer).

will focus only upon those issues that are most likely to be confronted by an attorney in general practice. The cases reported in this Article will deal with the continuing evolution of Indiana law concerning the "intentional act" exclusion, automobile liability policy exclusions and conditions, selected miscellaneous cases, and a brief discussion of some of the practical statutory changes enacted by the 1991 Indiana General Assembly.

I. THE EXPECTED OR INTENDED INJURY EXCLUSION

The standard liability insurance policy available on the market today provides coverage to an insured for damages arising from an accident or occurrence. However, most policies exclude liability coverage if the injury or damage was "expected or intended" by the insured.³

The word "intended" was defined by an Indiana court in 1975 in *Home Insurance Co. v. Neilsen*.⁴ In *Neilsen*, the court found that intent to cause injury could be proved by demonstrating that the insured actually meant to cause the injury.⁵ The court also held that intent to cause injury could be proved circumstantially by showing that the nature and character of the insured's conduct was such that the insured's intent to cause injury could be inferred as a matter of law.⁶

The meaning of the word "expected" was not defined by an Indiana court until 1989 in *Indiana Farmers Mutual Insurance Co. v. Graham*.⁷ In *Graham*, the court held that an expected injury "means that the insured acted although he was consciously aware that the harm caused by his actions was practically certain to occur."⁸

During the survey period, there were at least seven cases that dealt with the subject of whether an injury caused by an insured's act was expected or intended. Two of the cases were ones in which the average person would not be surprised to see an insurance company raise the intentional act exclusion because the injuries were caused by guns.⁹ The remaining cases involved situations in which the average practitioner might not readily recognize that the intentional acts exclusion could be applicable.¹⁰

3. 1 MILLER'S STANDARD INSURANCE POLICIES ANN., 2, 214, 261 (ver. 3 1991).

4. 332 N.E.2d 240 (Ind. Ct. App. 1975).

5. *Id.* at 244.

6. *Id.*

7. 537 N.E.2d 510 (Ind. Ct. App. 1989).

8. *Id.* at 512.

9. See *Auto-Owners Ins. Co. v. Stroud*, 565 N.E.2d 1093 (Ind. Ct. App. 1991); *Bolin v. State Farm Fire & Casualty Co.*, 557 N.E.2d 1084 (Ind. Ct. App. 1990).

10. See *Red Ball Leasing, Inc. v. Hartford Accident & Indem. Co.*, 915 F.2d 306

The cases involving guns, *Bolin v. State Farm Fire & Casualty Co.*¹¹ and *Auto-Owners Insurance Co. v. Stroud*,¹² are noteworthy only because they demonstrate that it is not always easy for an insurance company to convince a court that an insured expected or intended to cause injury. The *Bolin* case involved a young man shooting a pellet gun from a car at a passing motorist, while *Stroud* dealt with a young man who fired a shotgun at point blank range through a door in order to thwart a burglar's efforts to break into a store. In each case, the court made it clear that an insurer must prove a high expectation of injury or very clear intent to cause injury before the insurer's duty to defend and indemnify will be relieved.¹³ In particular, the *Bolin* case demonstrates that mere reckless conduct will not suffice to exclude coverage.¹⁴ Even though the insurers in *Bolin* and *Stroud* were unsuccessful, anyone reading the cases would not be surprised that the insurers attempted to avoid coverage. The same cannot necessarily be said for the remaining cases that were decided last year.

One very interesting case was *Red Ball Leasing, Inc. v. Hartford Accident & Indemnity Co.*¹⁵ The named insured, Red Ball Leasing, was a company that leased and sold commercial trucks through one of its subsidiaries. The company had entered into an agreement to lease several of its trucks to Red Star Moving Company. The financing for the leasing included a security interest in the trucks provided to Red Ball.

During the course of the leases, a mistake occurred in Red Ball's accounting system which caused Red Ball to believe that Red Star had defaulted in its monthly payments on the trucks. Consequently, Red Ball repossessed four of the trucks. Although the error was later discovered and remedied, Red Star sued Red Ball for breach of contract, intentional interference with business, and conspiracy to interfere with business. When Red Ball was sued, it sought a defense from its liability insurer, Hartford Accident and Indemnity Company.

Hartford declined to defend Red Ball for the reason that the repossession of the trucks was intentional, and not an "occurrence" or accident as required by the policy.¹⁶ Although the court and the parties

(7th Cir. 1990); *Trisler v. Indiana Ins. Co.*, 575 N.E.2d 1021 (Ind. Ct. App. 1991); *Wiseman v. Leming*, 574 N.E.2d 327 (Ind. Ct. App. 1991); *Davidson v. Cincinnati Ins. Co.*, 572 N.E.2d 502 (Ind. Ct. App. 1991); *City of Muncie v. United Nat'l Ins. Co.*, 564 N.E.2d 979 (Ind. Ct. App. 1990).

11. 557 N.E.2d 1084 (Ind. Ct. App. 1990).

12. 565 N.E.2d 1093 (Ind. Ct. App. 1991).

13. *Id.* at 1096; *Bolin*, 557 N.E.2d at 1090.

14. *Bolin*, 557 N.E.2d at 1088. (The insured had pled guilty to criminal recklessness, but that plea was not sufficient to exclude coverage.).

15. 915 F.2d 306 (7th Cir. 1990).

16. *Id.* at 308-09.

seemingly conceded that Red Ball may have acted on the good faith mistaken belief that it had the right to repossess the trucks, the actual act of repossession was an intentional act.¹⁷ The court held:

A volitional act does not become an accident simply because the insured's negligence prompted the act. Injury that is caused directly by negligence must be distinguished from injury that is caused by the deliberate and contemplated act initiated at least in part by the actor's negligence at some earlier point.¹⁸

At first blush, the denial of coverage in this case appears to be unjust. After all, the parties did not seriously dispute that Red Ball had acted negligently in its bookkeeping procedures. Nevertheless, the court's opinion is supported by numerous decisions from other jurisdictions that have held that there can never be an accident or occurrence when the actual damage has been caused by an intentional act.¹⁹

A similar case decided during the survey period was *City of Muncie v. United National Insurance Co.*²⁰ In this case, the City of Muncie was sued for various civil rights violations after the new mayor fired eleven city employees based upon their political affiliations. Subsequently, the city sued its liability insurance carrier for failure to defend and indemnify the city in the lawsuit.

United National denied coverage on the basis that the city's actions were intentional. The city's policy would have provided coverage for discrimination had it been committed as a result of some negligent act of the city. However, in the civil rights law suit, the federal district court found that the mayor's decision to terminate the employees was intentional.²¹ The Indiana Court of Appeals relied upon the definition of "intentional" found in *Home Insurance Co. v. Neilsen*²² to hold that the city was not entitled to insurance coverage.²³

This case is interesting because the facts indicate that the new mayor consulted with city attorneys before he discharged the employees. Therefore, the mayor arguably could have been acting in good faith. Nevertheless, the intentional and volitional act of firing the employees resulted in injuries or damages that were intended, and thus, there was no coverage.

17. *Id.* at 309-11.

18. *Id.* at 311.

19. *See id.* at 309 n.1.

20. 564 N.E.2d 979 (Ind. Ct. App. 1991).

21. *Id.* at 983.

22. 332 N.E.2d 240, 244 (Ind. Ct. App. 1975).

23. *City of Muncie*, 564 N.E.2d at 982.

*Davidson v. Cincinnati Insurance Co.*²⁴ and *Trisler v. Indiana Insurance Co.*²⁵ similarly dealt with coverage for intentional acts. In each of these cases, the insured had what is known as "personal injury" liability coverage. Some examples of the types of claims that were covered under the personal injury liability portions of the two policies in these cases were false arrest, false detention or imprisonment, malicious prosecution, wrongful entry or eviction, humiliation, libel, slander, defamation of character, and invasion of privacy.²⁶ The problem faced by the courts in each case was to decide whether the expected or intended acts exclusion should apply to exclude coverage to insureds who have coverage in their policy for liability arising from acts that are sometimes intentional in nature.²⁷ Each court resolved the apparent conflict in a different manner.

In *Davidson*, the insured was sued for violation of civil rights, malicious prosecution, abuse of process, conspiracy, fraud, bribery, and deceit. He was also accused of slander. As a result of the patently intentional allegations in the complaint, Cincinnati Insurance Company did not want to defend or indemnify Mr. Davidson. However, Mr. Davidson cogently made the point that his personal injury coverage, by its very definition, was designed to indemnify him for intentional acts such as malicious prosecution and slander.²⁸ He argued that if the intentional acts exclusion was applied to these acts, the coverage would be illusory.²⁹ The court agreed and held that there was a conflict between the intentional acts exclusion and the coverage provided under the personal injury section.³⁰ The court, therefore, was compelled to "satisfy the reasonable expectations of the insured."³¹ It held that there was coverage and Cincinnati Insurance should defend Davidson.³²

In *Trisler*, the court did not go as far as the court in *Davidson*. The dispute was over the question of whether the insurance company had wrongfully refused to defend Trisler in two actions.³³ In reviewing the situation the court did not discuss whether Trisler's personal injury coverage was illusory. By its analysis, the court appeared to acknowledge

24. 572 N.E.2d 502 (Ind. Ct. App. 1991).

25. 575 N.E.2d 1021 (Ind. Ct. App. 1991).

26. See *id.* at 1023; *Davidson*, 572 N.E.2d at 506.

27. *Trisler*, 575 N.E.2d at 1023-24; *Davidson*, 572 N.E.2d at 507.

28. *Davidson*, 572 N.E.2d at 507.

29. *Id.*

30. *Id.* at 508.

31. *Id.*

32. *Id.*

33. The court did not have to deal with the indemnity issue because the underlying lawsuits against Trisler were resolved by dismissal or summary judgment in his favor.

that the types of torts covered under the personal liability portion of the policy were sometimes "intentional" in nature. The court specifically noted, however, that there are times when the insurer's duty to defend is broader than its duty to indemnify.³⁴ Thus, the court held that Indiana Insurance should have at least defended Mr. Trisler against the claims of libel and slander under his personal injury coverage even though it might not have had to pay any judgments that were rendered against him.³⁵

One additional intentional acts case from the survey period was *Wiseman v. Leming*,³⁶ a case of first impression, in which the Indiana Court of Appeals was called upon to decide the duty to defend an insured under a homeowner's policy for allegations arising from sexual molestation of a child. In *Wiseman*, Timothy T. Leming pled guilty to molesting a child in his home. State Farm sought to avoid coverage under a homeowner's liability policy because Mr. Leming's acts were intentional. In an attempt to circumvent the exclusion, Mr. Leming called a psychologist to trial who testified that Leming's acts of molestation were not consciously intended to harm the victim. Based upon that testimony, Leming argued that he did not have the subjective intent to harm and that his claim should not be barred.

The court noted that this same issue had been decided in other jurisdictions,³⁷ and those courts had held that in sexual molestation cases, intent to harm could be inferred as a matter of law.³⁸ The court also noted that under Indiana law, our criminal statutes make child molesting a heinous criminal act that is inherently harmful.³⁹ Therefore, the court held that the insured's subjective intent was irrelevant.⁴⁰

In a further attempt to elude the intentional acts exclusion, Mr. Leming argued that he was mentally ill and that his illness should negate his intent to commit the harm.⁴¹ He relied on *West American Insurance Co. v. McGhee*.⁴² In *McGhee*, the Indiana Court of Appeals held that a person who is legally insane cannot commit an intentional act because he lacks the mental capacity to intend to cause harm.⁴³ The court, however, placed a high burden on the person claiming insanity to prove

34. Trisler v. Indiana Ins. Co., 575 N.E.2d 1021, 1022-23 (Ind. Ct. App. 1991).

35. *Id.* at 1025.

36. 574 N.E.2d 327 (Ind. Ct. App. 1991).

37. *Id.* at 329.

38. *Id.* (citing Allstate Ins. Co. v. Troelstrup, 789 P.2d 415 (Colo. 1990)).

39. *Id.*

40. *Id.*

41. *Id.*

42. 530 N.E.2d 110 (Ind. Ct. App. 1988).

43. *Id.*

his insanity.⁴⁴ In this case, because Mr. Leming made no showing that his mental disorder was of such a level to have overcome his capacity to act rationally, his insanity defense was rejected, and coverage was again denied.⁴⁵

II. AUTOMOBILE LIABILITY INSURANCE CASES

A. Compulsory Insurance

During the survey period, there was one case that may prove to be a landmark decision in Indiana insurance law. The case of *Transamerica Insurance Co. v. Henry*⁴⁶ began in the federal court system.⁴⁷ Because the case involved a significant interpretation of Indiana law, the Seventh Circuit Court of Appeals certified the question to the Indiana Supreme Court for adjudication.⁴⁸

The factual background of the *Transamerica* case is not particularly important. The case basically involved the interpretation of what is commonly known as a "household exclusion" in an automobile liability policy. Generally speaking, a household exclusion denies liability coverage to an insured arising from claims for injury to a fellow member of the same household.⁴⁹ In this case, the household exclusion read as follows: "We do not provide liability coverage . . . for bodily injury to any person who is related by blood, marriage or adoption to you, if that person resides in your household at the time of the loss."⁵⁰

The legitimacy of the household exclusion had previously been passed upon by the Indiana Supreme Court in the seminal 1985 case of *Allstate Insurance Co. v. Boles*.⁵¹ In *Boles*, the Indiana Supreme Court held that Allstate's household exclusion was binding and that it did not contravene public policy.⁵² The decision at that time appeared to turn on the question of whether Indiana's financial responsibility statute was compulsory.⁵³

Since *Boles* was decided, the Indiana statutes dealing with financial responsibility have changed. Under the earlier statute,⁵⁴ a person was required to provide proof of financial responsibility only *after* an accident

44. *Id.* at 112.

45. *Wiseman v. Leming*, 574 N.E.2d 327, 329 (Ind. Ct. App. 1991).

46. 563 N.E.2d 1265 (Ind. 1990).

47. *See Transamerica Ins. Co. v. Henry*, 904 F.2d 133 (7th Cir. 1990).

48. *See Transamerica Ins. Co. v. Henry*, 904 F.2d 387 (7th Cir. 1990).

49. *Transamerica*, 563 N.E.2d at 1266.

50. *Id.*

51. 481 N.E.2d 1096 (Ind. 1985).

52. *Id.* at 1101.

53. *Id.*

54. IND. CODE § 9-2-1-4 (1981).

had occurred.⁵⁵ However, under the newer financial responsibility statute, a person is now required to provide proof of financial responsibility in order to register a vehicle.⁵⁶ Therefore, the Indiana Supreme Court held in *Transamerica* that the new form of the statute is compulsory in nature.⁵⁷ Because the statute was found to be compulsory, the court was then required to look at the question of whether the household exclusion was contrary to Indiana public policy.

In reviewing the issue, the court noted that the purpose of the current financial responsibility law is to protect automobile owners and their families, friends, and guests from injury or damage caused by *other* cars on the road.⁵⁸ The statute does not mandate that automobile owners protect themselves for damages caused by their own families, friends, and guests.⁵⁹ The court, therefore, again found the household exclusion to be a valid and enforceable exclusion.⁶⁰

The importance of this case is that it sets the stage for litigation in the future. There have been numerous automobile insurance cases that have been decided on the question of whether our financial responsibility laws are compulsory. Now that the Indiana Supreme Court has finally held that the financial responsibility statutes are compulsory, the door is again open for litigants to argue that conditions and exclusions within automobile liability policies are against public policy.

B. The Meaning of "In, Upon, Entering, or Alighting From" an Automobile

Over the last several years there has been a succession of cases dealing with the issue of whether a person is "in, upon, entering, or alighting from" a vehicle for purposes of automobile uninsured or underinsured motorist coverage.⁶¹ In *Auto-Owners Insurance Co. v. Powell*,⁶² the issue arose again. The case does not change or add much to Indiana law. It remains interesting, however, because it demonstrates in

55. *Transamerica Ins. Co. v. Henry*, 563 N.E.2d 1265, 1267 (Ind. 1990) (citing IND. CODE § 9-2-1-4 (1981)).

56. IND. CODE § 9-1-4-3.5 (1988).

57. *Transamerica*, 563 N.E.2d at 1268.

58. *Id.*

59. *Id.*

60. *Id.* at 1269.

61. See, e.g., *Miller v. Loman*, 518 N.E.2d 486 (Ind. Ct. App. 1987); *State Farm Mut. Auto. Ins. Co. v. Barton*, 509 N.E.2d 244 (Ind. Ct. App. 1987); *Michigan Mut. Ins. Co. v. Combs*, 446 N.E.2d 1001 (Ind. Ct. App. 1983); *United Farm Bureau Mut. Ins. Co. v. Pierce*, 283 N.E.2d 788 (Ind. Ct. App. 1972).

62. 757 F. Supp. 965 (S.D. Ind. 1991).

detail the factual analysis that a court must make in determining whether a person should be entitled to the benefits of insurance coverage on the vehicle.

In this particular case, Mr. Powell was operating his employer's van along Interstate I-465 in Indianapolis. Powell lost control of the van, struck a median wall, and ended up facing perpendicular to the highway with a portion of the van extending into the traveled portion of the interstate. Following the accident, Mr. Powell exited from the van to "walk off" momentary disorientation caused by the accident. Another motorist stopped on the other side of the interstate to help Powell, and at some point, Mr. Powell crossed the interstate to the other vehicle. Thereafter, Powell returned across the interstate to his van and was struck down when an uninsured vehicle collided with the van and forced the van into him. There was a dispute as to how long Mr. Powell was out of his van before the second accident occurred, but it was probably a period of two to five minutes.

To decide whether Mr. Powell was "in, upon, entering, or alighting from" the van for purposes of uninsured motorist coverage, the court relied on *Miller v. Loman*.⁶³ In *Miller*, the court indicated a four-step analysis that should be evaluated in determining whether a person has completed the act of "alighting from" a vehicle.⁶⁴ The factors are: (1) the physical distance between the disabled automobile and the injury-producing accident; (2) the time lapse between the exit from the automobile and the injury-producing accident, (3) the opportunity for the individual to reach a zone of safety; and (4) the individual's intention with relation to re-entering the automobile.⁶⁵ The *Powell* court applied these factors and found that Powell had completed all acts necessary to "alight from" the van and that Powell was thus not entitled to coverage under the uninsured motorist provision of the auto-owners policy.⁶⁶ The court's analysis in *Powell* demonstrates the utility of the four step analysis.⁶⁷ The analysis is extremely helpful in enabling attorneys, judges, and insurance companies to evaluate situations so that litigation can be avoided.

Late in the survey period, there was another case dealing with a similar issue. In *Monroe Guaranty Insurance Co. v. Campos*,⁶⁸ the Indiana Court of Appeals was called upon to decide whether a wrecker

63. 518 N.E.2d 486 (Ind. Ct. App. 1987).

64. Powell did not contend that he was "in or upon" the van. Thus, the issue that the court addressed was the subject of "alighting from."

65. *Miller*, 518 N.E.2d at 491.

66. *Powell*, 757 F. Supp. at 971-72.

67. *Miller*, 518 N.E.2d at 491.

68. 582 N.E.2d 865 (Ind. Ct. App. 1991).

driver was "using" his tow truck when he was struck and injured by an uninsured driver. In this case the driver, Mr. Campos, had been summoned in his company's tow truck to an intersection in Fort Wayne, Indiana, where police officers had stopped a semi-tractor/trailer driver under suspicion of driving while intoxicated. When Mr. Campos arrived, he was told to wait while the tractor/trailer driver was given a breathalyzer test. The officer invited Mr. Campos to wait in the back seat of the police officer's car.

While he was waiting, Mr. Campos returned briefly to his tow truck to answer a page. Thereafter, he learned from the officer that the tractor/trailer driver was going to be arrested and that it would be necessary for Campos to remove the tractor/trailer from the street. As Mr. Campos was exiting the police vehicle to inspect the tractor/trailer for purposes of hitching his tow, he was struck and badly injured by a vehicle operated by an uninsured motorist.

The controversy in this case arose from the question of whether the tow truck was being "used" by Mr. Campos at the time of the accident. Previously, in *Miller v. Loman*, the court held that the "use" of an automobile means "propelling or directing a vehicle to a place where it ceases to be employed."⁶⁹ An earlier Indiana Court of Appeals case, *American Family Mutual v. National Insurance*,⁷⁰ also held that the term "use" means to "drive" or "operate" a vehicle.⁷¹

Despite its earlier definitions of the term "use," the Indiana Court of Appeals in *Campos* found that it was necessary to study the nature of the use contemplated by the particular vehicle that was insured.⁷² Because the insured vehicle was a tow truck, the court observed that it was reasonable to expect that a tow truck driver would have to engage in activities other than simply *driving* the truck.⁷³ Those activities attendant to "using" the truck might include evaluating the scene, securing the disabled vehicle, attaching the tow equipment to the vehicle, and consulting with law enforcement officials concerning the situation.⁷⁴

Before reaching its conclusion, the court noted that other jurisdictions have grappled with the meaning of the word "use" in the context of garbage trucks, fire trucks, and tow trucks.⁷⁵ In each such instance, the

69. *Miller v. Loman*, 518 N.E.2d 486, 492 (Ind. Ct. App. 1987).

70. 577 N.E.2d 969 (Ind. Ct. App. 1991).

71. *Campos*, 582 N.E.2d at 870.

72. *Id.*

73. *Id.* at 971.

74. *Id.*

75. *Id.* (citing *Hartford Accident & Indem. Co. v. Booker*, 230 S.E.2d 70 (Ga. Ct. App. 1976)); *Stevens v. USF&G Co.*, 345 So. 2d 1041 (Miss. 1977); *Great Am. Ins. Co. v. Cassel*, 389 S.E.2d 476 (Va. 1990).

other jurisdictions acknowledged that it is sometimes necessary to do certain things outside of the vehicle when "using" it.⁷⁶ Thus, the court found in this instance that the "use" of a tow truck is more than just driving it, and the court held that Mr. Campos was "using" the tow truck when he was struck by the uninsured motorist.⁷⁷

Although this opinion would seem to extend coverage beyond the parameters previously contemplated by other Indiana cases, it is probably a well-reasoned opinion. Using the four measuring sticks provided by the *Miller v. Loman* case, there is no question that Mr. Campos was close in time and space to his departure from the tow truck. Furthermore, his intent was to re-enter the tow truck, and he had not reached a zone of safety when he was struck by the uninsured motorist. Thus, he was certainly "using" the tow truck insofar as the *Miller v. Loman* tests are concerned.

One additional case during the last year dealt with the meaning of the word "use." In *American Family Mutual Insurance Co. v. National Insurance Association*,⁷⁸ an individual by the name of Russell Isaac was involved in an automobile collision while driving a van that was owned by a Michael Brown. Mr. Isaac was a professional mechanic and had agreed to perform body repair on the van for Mr. Brown. The accident happened while Isaac was taking the van to a body shop to do the repair work.

As a result of the accident, the other driver was paid by his own uninsured motorist carrier, and the carrier, American Family, obtained a judgment against Isaac for more than \$24,000. Mr. Isaac did not have sufficient resources to satisfy the judgment, so American Family brought proceedings supplemental against National Insurance Association, the automobile liability carrier for Michael Brown's wife.

National moved for summary judgment on the basis that Mr. Isaac's operation of the van was excluded under a provision in the policy which excluded coverage if a vehicle was being "used" by any person "engaged in the automobile business." The term "automobile business" was defined as "the business or occupation of selling, repairing, servicing, storing, or parking automobiles."⁷⁹

The dispute in this case over the meaning of the word "use" was whether "use" meant "employing an item in one's own service," or whether it meant "to drive" or "operate." In this instance, the court held that the word "use" meant to *operate* the vehicle and that it was being operated by a person who was in the automobile business and

76. *Monroe Guar. Ins. Co. v. Campos*, 582 N.E.2d 865, 870 (Ind. Ct. App. 1991).

77. *Id.* at 871.

78. 577 N.E.2d 969 (Ind. Ct. App. 1991).

79. *Id.* at 971.

who was using it as a part of the effort to effectuate repairs.⁸⁰ Therefore, the court held that the personal automobile policy of Mrs. Brown excluded coverage for Mr. Isaac.⁸¹

Although the ruling in this case may make sense, it is not helpful to the general body of law dealing with the meaning of the word "use" in Indiana. Unfortunately, the definition of the word "use" has been changed from one case to another depending upon the context. It will continue to be difficult for lawyers and judges to be guided by this and other cases. The definition of "use" is probably an area in which we will continue to see litigation in the future.

III. MISCELLANEOUS CASES

A. Subrogation

In *Associated Insurance Co., Inc. v. Burns*,⁸² the Indiana Court of Appeals decided a matter of first impression with respect to Indiana subrogation law. In this case, William Burns was an employee of Cardinal Service Management, and in the course of his employment, Mr. Burns was injured on the job. When Mr. Burns made a workers' compensation claim, Cardinal's workers' compensation carrier, Commercial Union Insurance, denied that the injury occurred in the course of employment and refused payment. Mr. Burns was then required to submit his bills for medical and hospital expenses to his group health carrier, Associated.

Mr. Burns subsequently filed a complaint against Cardinal and its insurer before the Industrial Board to have a determination made on the question of whether his injuries were compensable under the Workers' Compensation Act. Associated then requested permission of the Board to intervene in the litigation to determine whether it should be entitled to subrogation for the health care benefits it had paid. The issue presented was whether intervention should be allowed.

In analyzing the situation, the Indiana Court of Appeals noted that the Workers' Compensation Act was designed to transfer the economic loss caused by an industrial accident from the employee to the employer.⁸³ In this instance, the court acknowledged that it was beneficial to the employee to be able to receive necessary treatment while awaiting an award of workers' compensation.⁸⁴ Because the Industrial Board had full authority by statute to determine all matters related to reimbursements

80. *Id.*

81. *Id.*

82. 562 N.E.2d 430 (Ind. Ct. App. 1990).

83. *Id.* (citing *Goins v. Lott*, 435 N.E.2d 1002, 1010 (Ind. Ct. App. 1982)).

84. *Burns*, 562 N.E.2d at 434.

for compensation, the court allowed Associated to intervene for reimbursement of the bills it had paid.⁸⁵

This is a sensible case because it was Commercial Union's decision to deny benefits that prompted payment by Associated. If Associated were not allowed some form of reimbursement, it would provide workers' compensation carriers a much greater incentive to deny benefits and later escape having to pay medical bills if the injury is adjudicated to have been work related.

B. Health Insurance — Are Medical Providers Third Party Beneficiaries?

In the case of *N N Investors Life Insurance Co., Inc. v. Crossley*,⁸⁶ the Indiana Court of Appeals dealt with the issue of whether a medical provider is a third party beneficiary to a medical insurance policy between an insurer and an insured. In this case, the court held that the medical provider was not a third party beneficiary.⁸⁷

The case arose from a policy providing medical insurance to one Lucille Crossley and her husband, Donald Lee Finch. Mrs. Crossley shot Mr. Finch and rendered him a quadriplegic. He subsequently received treatment at several health care facilities, including the Methodist Hospital of Gary, Indiana.

At some point in time after Mr. Finch was injured, N N Investors Life Insurance Company discovered that Mrs. Crossley had made material misrepresentations with respect to the medical information she provided on her insurance application. N N Investors, therefore, filed a lawsuit to rescind the policy, and it named Crossley, Finch, and the medical providers as defendants.

At the outset, the trial court granted a summary judgment for N N Investors on the issue of Mrs. Crossley's material misrepresentations and declared that the policy was voidable. The question then arose as to whether the medical providers who had provided medical services to Mr. Finch should be independently entitled to recover under the contract.⁸⁸

The first issue was whether Methodist Hospital could recover as an assignee of benefits. That issue was quickly dispatched based upon the general rule that an "assignee acquires no greater rights than the assignor."⁸⁹ Consequently, Methodist next argued that it should be entitled

85. *Id.*

86. 580 N.E.2d 307 (Ind. Ct. App. 1991).

87. *Id.* at 309.

88. *Id.*

89. *Id.*

to benefits as a third party beneficiary to the insurance contract.

In evaluating the law with respect to third party beneficiaries, the court considered the case of *Mogenson v. Martz*,⁹⁰ in which the Indiana Court of Appeals held:

Third-party beneficiaries may directly enforce a contract in Indiana. A third-party beneficiary contract requires first, that the intent to benefit the third party be clear, second, that the contract impose a duty on one of the contracting parties in favor of the third party, and third, that the performance of the terms necessarily render to the third party a direct benefit intended by the parties to the contract.⁹¹

In applying the requirements to the present case, the Indiana Court of Appeals held that Methodist was not a third party beneficiary.⁹² The court noted that the insurance contract stated that "all benefits are payable to the Insured Individual."⁹³ Thus, there was no apparent intent in the policy for Methodist to benefit directly from the insurance contract other than by assignment.⁹⁴

Finally, as the third party beneficiary issue was decided, the question next arose as to whether the insurance company should be estopped from providing coverage. Unfortunately, the court did not get the opportunity to address this issue because it was not properly before the court.⁹⁵

The court's analysis of the third party beneficiary portion of the policy will probably withstand further analysis under Indiana law. The only way that a health care provider may be able recover is under a theory of estoppel. If the health care provider can prove that it relied to its detriment upon the insurer's assurances of coverage *before* services were provided, then the provider may have a reasonable opportunity to force the insurer to pay the bills.

C. *Installment Contract Seller's Right of Payment*

During the last year, there was an extremely important case dealing with another issue of first impression in Indiana. In *Property Owners Insurance Co. v. Hack*,⁹⁶ the court was asked to address the relative

90. 441 N.E.2d 34 (Ind. Ct. App. 1982).

91. *Id.* at 35.

92. *Investors Life Ins. Co., Inc. v. Crossley*, 580 N.E.2d 307, 309 (Ind. Ct. App. 1991).

93. *Id.*

94. *Id.*

95. *Id.*

96. 559 N.E.2d 396 (Ind. Ct. App. 1990).

rights of persons interested in the proceeds of a fire insurance policy.

In this case, Mr. and Mrs. Hack owned a restaurant and tavern that had been mortgaged with a local bank. The Hacks subsequently sold the business along with all of its equipment and fixtures, including a retail liquor permit, to a Mr. Lacey. The sale was transacted pursuant to the provisions of an installment contract. Under the contract, Mr. Lacey was obligated to procure fire, casualty, and extended insurance coverage on the property for his benefit and for the benefit of the Hacks.

Some two years after the sale, the insurance carrier obtained by Mr. Lacey sent notice to the Hacks that Mr. Lacey had permitted the coverages to lapse by reason of his failure to pay premiums. After learning of the lapse, Mr. Hack contacted an insurance agent for Property Owners Insurance and explained the situation in detail. He told the agent that there were three interested parties in the real estate, namely, the original mortgage holder (the bank), the Hacks as contract sellers, and Mr. Lacey as the contract buyer. Taking the information from Mr. Hack, the insurance agent, through Property Owners, issued a policy which listed Lacey as the insured, and on a section of the policy entitled "Additional Interest Schedule," the Hacks were listed as "contract holders," and the bank was listed as a mortgagee under a standard mortgage clause.

Approximately a year later, the business was destroyed by a fire, and Mr. Lacey was convicted of arson. Following the fire, Property Owners paid the mortgage balance to the bank, but refused to pay the Hacks for any of their losses sustained beyond the mortgage balance. When Property Owners refused to pay the Hacks for their fixtures and loss of income, they filed a lawsuit.

The issue was discreetly identified by the Indiana Court of Appeals as follows:

The case is one of first impression, and calls on us to rule on the nature and extent of a real estate installment contract seller's interest in fire insurance proceeds. The specific issue before us is whether a contract seller that requests insurance from an insurance company is entitled to recover the value of its interests under the contract in the event of a loss, notwithstanding the insurer's payment of the seller's mortgage to the seller's mortgagee.⁹⁷

The court recognized that there were certain basic legal concepts in conflict in this case. In general, an individual who is listed as a "loss

97. *Id.* at 398.

payee'' in an insurance policy does not have a direct contract with the insurer.⁹⁸ The loss payee's rights are considered to be derivative of the named insured's rights.⁹⁹ Thus, if the named insured commits an act such as arson that results in a denial of coverage, the loss payee loses his rights as well.¹⁰⁰

An exception to this rule is the New York Standard Mortgage Clause. Under a standard mortgage clause, courts have recognized that a mortgagee is entitled to direct contract rights against the insurer and is also entitled to direct payment *even if* the named insured committed an act that permits the policy to be avoided.¹⁰¹ In this case, Property Owners argued that the Hacks were no greater than mortgagees.¹⁰² Thus, Property Owners argued that it had satisfied its obligation by paying off the mortgage.¹⁰³

The court noted that contract sellers such as the Hacks can be protected in a policy by being named in what is called a "contract of sale clause."¹⁰⁴ Such a clause was not issued in this case even though the insurance agent had been given adequate information to enable him to realize that such a clause should be used.

Relying upon simple rules of contract interpretation, the court found that Mr. and Mrs. Hack should have been compensated for the losses that they sustained beyond the mortgage balance.¹⁰⁵ The court noted that it was the fault of the insurance agent and the company that a contract of sale clause had not been issued.¹⁰⁶ The court also stated that it was certainly the reasonable expectation of the Hacks that they would be covered for all of their losses when they were the ones that had procured the coverage.¹⁰⁷ Thus, the court refused to let the insurance company treat the Hacks as mortgagees in a manner that would have limited their coverage to the mortgage proceeds.

This case is worth reading because it contains a large number of citations to general principles of insurance contract interpretation in the real estate and mortgage context. It is an excellent example of the application of the "reasonable expectation of the insured" rule to avoid

98. *Id.* at 400.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 399.

103. *Id.*

104. *Id.* at 402-03.

105. *Id.* at 402.

106. *Id.*

107. *Id.*

an injustice that would be caused by literal interpretation of an insurance contract.

D. Are Punitive Damages Recoverable Under Underinsured Motorist Coverage?

Another recent case of first impression is *Shuamber v. Henderson*.¹⁰⁸ In this case, the court was asked to decide whether a person could recover punitive damages from her own underinsured motorist coverage for grievous injuries caused by a third party.

In *Shuamber*, a mother and daughter were injured in an automobile accident in which the mother's son was killed. The other driver had only \$50,000 in insurance coverage and that amount was tendered into the court. The plaintiffs, Gail and Katherine Shuamber, then pursued an underinsured motorist claim against their own carrier, American Employer's Insurance Company. As a part of their underinsured motorist claim, the Shuambers believed that they should have been entitled to punitive damages against the other driver.

In analyzing the situation, the court acknowledged that Indiana Code section 27-7-5-2(a) requires insurers to make underinsured motorist coverage available in the same amounts and subject to the same limits as the insured's liability policy.¹⁰⁹ The court noted that the purpose of underinsured motorist coverage is to put injured motorists in the same position they would have been in if the offending party had the same limits of insurance as the insured.¹¹⁰

The issue of whether punitive damages should be recovered from one's own underinsured motorist coverage had been addressed in other jurisdictions, and the Indiana Court of Appeals decided to follow the view that recovery should not be allowed.¹¹¹ Quoting the Supreme Court of Rhode Island, the court in *Shuamber* observed:

Those courts that have [denied recovery] emphasize that coverage would defeat the purpose of punitive damages, which is to punish and deter others from acting similarly; and allowing coverage serves no useful purpose since, supposedly, the plaintiff had been made whole by the award of compensatory damages. Again, to allow coverage, it has been said, passes on to the other premium payers, the punishment intended for the defendant and creates (1) a conflict of interest between the insurer and the

108. 563 N.E.2d 1314 (Ind. Ct. App. 1990).

109. IND. CODE § 27-7-5-2(a) (Supp. 1991).

110. *Shuamber*, 563 N.E.2d at 1317.

111. *Id.*

insured and (2) a conflict between the rule permitting the jury to consider a defendant's financial standing in fixing the amount of punitive damages and the principle that the insurance coverage would not be revealed to the jury.¹¹²

This is certainly a sound ruling. Because the purpose of the underinsured motorist statute is to provide *compensation* to a person who is involved in an accident with an underinsured driver, it would not make sense to allow recovery of damages that are not compensatory in nature.

IV. STATUTORY DEVELOPMENTS

Although there were numerous amendments to general insurance laws during the 1991 General Assembly, the one amendment of significance to general practitioners was to the Unfair Claim Settlement Practices Act.¹¹³ The new section of the Act is known as the "Auto Repair Claims Settlement" section. The statute applies to policies written or received after June.

Briefly summarized, this new section of the Act obligates an insurance carrier to offer an insured the opportunity to choose among new body parts, after-market parts, or used parts when repairing a damaged vehicle that is within the first six model years since the year the vehicle was introduced.¹¹⁴ Under the statutory amendments, the company must not only offer the insured the opportunity to choose, but the company must also allow the insured to indicate *in writing* which body parts the insured chooses.¹¹⁵ If an insurer fails to follow these steps, that failure is considered to be an unfair claim settlement practice¹¹⁶ and is subject to the penalties to be imposed by the Department of Insurance as set forth in separate parts of the Act.¹¹⁷

This new statute has caused a great deal of consternation and turmoil in the automobile insurance industry. Already insurers are raising numerous questions concerning the interpretation of the Act. A reading of the Act demonstrates that it is vague, ambiguous, and sometimes difficult to interpret. There is no question that attorneys representing insureds and insurers will remain busy as claims are administered under

112. *Id.* at 543 (quoting *Allen v. Simmons*, 533 A.2d 541 (R.I. 1987)).

113. IND. CODE § 27-4-1-4.5(1)-(16) (Supp. 1991).

114. *Id.* § 27-4-1.5-8(d).

115. *Id.* § 27-4-1.5-8(c).

116. *Id.* § 27-4-1.5-12(1).

117. *Id.* § 27-4-1-5.6(a)-(d).

the new statute. The statute applies to policies written or renewed after June 30, 1991.

