

# Survey of Recent Developments in Insurance Law

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## INTRODUCTION

For this Survey,<sup>1</sup> the area of insurance law received a great deal of attention. Although many areas of insurance law received consideration,<sup>2</sup> this Article will limit its focus to insurance law issues most likely to be confronted by the general practitioner.

The most notable decision within the survey period deals with the question of whether an insured's statement to his insurer is discoverable by opposing parties. The decision, *Richey v. Chappell*,<sup>3</sup> is not specifically an insurance law case, but it does significantly affect the handling of insured claims. The decision overturns prior Indiana law<sup>4</sup> (allowing the disclosure of an insured's statement) and creates a privilege making the statement nondiscoverable.<sup>5</sup>

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1. The survey period for this area of law is approximately Sept. 1, 1991, to Oct. 31, 1992.

2. Many cases addressed existing insurance law issues. Practitioners may want to review these cases to refresh their insurance law background: *State Farm Mut. Auto. Ins. Co. v. Latham*, 793 F. Supp. 183 (S.D. Ind. 1992) (addressing whether automobile liability coverage applied to passenger who drove automobile without owner's consent); *Allstate Ins. Co. v. Shockley*, 793 F. Supp. 852 (S.D. Ind. 1991) (addressing definition of "household resident" for purpose of homeowner's liability policy); *Property Owners Ins. Co. v. Cope*, 772 F. Supp. 1096 (N.D. Ind. 1991) (addressing whether entertaining client was part of "business conduct" by insured to entitle him to business liability coverage); *American Family Mut. Ins. Co. v. Lane*, 782 F. Supp. 415 (S.D. Ind. 1991) (employee who engaged in fight outside of employer's business was outside of business activity so that employer's liability coverage was inapplicable); *Troxell v. American States Ins. Co.*, 596 N.E.2d 921 (Ind. Ct. App. 1992) (policy time limitation to sue insurer enforceable); *Allstate Ins. Co. v. Kepchar*, 592 N.E.2d 694 (Ind. Ct. App. 1992) (insured's failure to give notice of an occurrence to insurer barred coverage for occurrence); *Koenig v. Bedell*, 601 N.E.2d 453 (Ind. Ct. App. 1992) (insured's failure to advise insurer of loss within reasonable time barred coverage to insured).

3. 594 N.E.2d 443 (Ind. 1992).

4. See, e.g., *DeMoss Rexall Drugs v. Dobson*, 540 N.E.2d 655, 657 (Ind. Ct. App. 1989); *Snodgrass v. Baize*, 405 N.E.2d 48, 54 (Ind. Ct. App. 1980).

5. *Richey*, 594 N.E.2d at 447.

This Article also will address other important decisions concerning insurance agent and insurance company liability, health and medical insurance issues, and automobile insurance issues. Additionally, several decisions concerning uninsured/underinsured motorist law will be addressed.

### I. DISCOVERABILITY OF AN INSURED'S STATEMENT

The *Richey v. Chappell* decision has had significant impact on both plaintiff and defense attorneys. The decision creates a privilege against disclosure of statements given by an insured to his insurer concerning an occurrence that may have been covered by liability insurance.<sup>6</sup> By creating this privilege, the Indiana Supreme Court has remedied many conflicts among insureds, insurers, and insurance defense attorneys.

Past readers of this Survey may recall the problems raised<sup>7</sup> when the Indiana Court of Appeals decided *DeMoss Rexall Drugs v. Dobson*.<sup>8</sup> Specifically, those problems consisted of increased trial court supervision of discovery,<sup>9</sup> the limitation of prelitigation investigation by an insurer to the detriment of its insured,<sup>10</sup> and the most significant problem, the detrimental effect upon the level of cooperation expected between an insured and his or her insurer.<sup>11</sup>

Practically all liability insurance policies include a cooperation clause requiring the insured to cooperate with his or her insurer in the investigation and defense of a claim.<sup>12</sup> These clauses meant, prior to *Richey*, that an insured risked invalidating the coverage if he or she failed to cooperate with the insurer.<sup>13</sup> At the same time, when a plaintiff also sought recovery against the insured for claims not covered by the insurance, the plaintiff could gain access to statements made by the insured

6. *Id.*

7. See John C. Trimble, *Survey of Recent Developments in Insurance Law*, 23 IND. L. REV. 431, 432-36 (1990).

8. 540 N.E.2d 655 (Ind. Ct. App. 1989).

9. See Trimble, *supra* note 7, at 434-35.

10. *Id.* at 435.

11. *Id.*

12. Generally, cooperation clause language provides:

We have no duty to provide coverage under this policy unless there has been full compliance with the following duties:

...

B. A person seeking any coverage must:

1. Cooperate with us in the investigation, settlement or defense of any claim or suit.

1 SUSAN J. MILLER & PHILIP LEFEBVRE, *MILLER'S STANDARD INS. POLICIES ANN.* 10 (1988).

13. See *Miller v. Dilts*, 463 N.E.2d 257 (Ind. 1984).

to the insurer that could reveal evidence damaging to the insured's defense.

The Indiana Supreme Court recognized these problems in deciding *Richey*. By establishing a privilege for statements given to the insurer by the insured,<sup>14</sup> the court eliminated the potential conflict that existed if the statement was revealed to the plaintiff. In the future, the decision should reduce the increased burden placed upon trial courts due to their pre-*Richey* involvement in discovery disputes.

The *Richey* decision will significantly curtail the ability of plaintiffs' attorneys to discover statements of insured defendants. The decision establishes the same protection between insured and insurers as that between plaintiffs and their attorneys and, in doing so, eliminates the potential conflict between insured and insurer. The elimination of this conflict should pave the way for the free flow of communication and cooperation between insureds and insurers.

## II. INSURANCE AGENT/BROKER LIABILITY

During the Survey period, the courts addressed insurance agent liability in two different contexts. The first context focused on an agent's duty to advise a prospective insured regarding available uninsured/underinsured motorist policy limits. The second context addressed whether an insurance broker represents the insured or the insurer.

In *Craven v. State Farm Mutual Insurance Co.*,<sup>15</sup> Craven was involved in an accident with an uninsured motorist. After she submitted a claim to her insurer, she discovered her uninsured motorist limits were less than her bodily injury liability limits. Craven sued her insurer claiming the insurer and the agent violated Indiana law by providing uninsured motorist coverage in an amount less than her bodily injury liability coverage.<sup>16</sup> However, the court rejected the claim because the statute requiring the offering of identical limits had not become effective until after Craven's policy had been first issued.<sup>17</sup>

The most important aspect of this case concerned Craven's second theory of recovery. Craven claimed her agent was negligent in failing to advise her that the uninsured motorist coverage was less than her bodily injury policy limits and that additional coverage was available.

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14. *Richey v. Chappell*, 594 N.E.2d 443, 446 (Ind. 1992).

15. 588 N.E.2d 1294 (Ind. Ct. App. 1992).

16. IND. CODE § 27-7-5-2(a) (Supp. 1992) requires an insurer to offer uninsured/underinsured motorist coverage to its insured in an amount equal to the bodily injury liability limits.

17. *Craven*, 588 N.E.2d at 1296.

The court was faced with the issue of what duty an insurance agent or broker owed to an insured to advise of the amount of limits the insured could obtain for both coverages.

Unfortunately, the court's response lacked any guidance to practitioners representing insurance agents or brokers. The court found the agent was not liable to the insured for violating a duty.<sup>18</sup> However, the court stated an agent might possess a duty to advise an insured concerning insurance matters including the amount of available coverage limits "upon a showing of an intimate long term relationship between the parties or some other special circumstances."<sup>19</sup>

The court's decision gives no assistance as to what factors are needed to establish "an intimate long term relationship." Consequently, practitioners who advise or represent insurance agents and brokers face difficulty in advising their clients as to what duty is owed an insured. Until the courts elaborate the factors that may be used to determine whether the duty exists, this particular area of insurance law will continue to be ripe for litigation.

During the survey period, a most interesting case addressed the problem area of whether an agent/broker is the agent of the insured or the insurer.<sup>20</sup> Readers of this Survey may recall a past article<sup>21</sup> addressing the case of *Aetna Insurance Co. v. Rodriguez*.<sup>22</sup> The *Rodriguez* decision caused great consternation to attorneys and insurance agents/brokers based on the Indiana Supreme Court's blanket statement, "in Indiana when a broker makes application for insurance and the insurance policy is issued, the broker is the agent of the insurer and can bind it within the scope of his authority."<sup>23</sup> This blanket statement took Indiana out of the mainstream of American law on this issue,<sup>24</sup> which has held a broker is the agent of the insured, not the insurer.<sup>25</sup>

However, in *Callis v. State Automobile Insurance Co.*,<sup>26</sup> the court of appeals revisited this issue. Callis had purchased a truck from Ar-

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18. *Id.* at 1298.

19. *Id.* at 1297.

20. *Callis v. State Auto. Ins. Co.*, 579 N.E.2d 129 (Ind. Ct. App. 1991).

21. John C. Trimble, *Insurance Law*, 22 IND. L. REV. 229, 229-34 (1989) [hereinafter *Insurance*].

22. 517 N.E.2d 386 (Ind. 1988).

23. *Id.* at 388.

24. *Insurance*, *supra* note 21, at 233.

25. *See Automobile Underwriters, Inc. v. Hitch*, 349 N.E.2d 271, 276 (1976) (The court quoted the general rule to be "[a]n insurance broker can be considered an agent [of the insurer] only for the purposes of delivering policies and collecting premiums thereon. The insurer would not be bound, ordinarily by the mistakes or negligence of a broker." (citing 16 APPLEMAN, INSURANCE LAW AND PRACTICE § 8730 (1968))).

26. 579 N.E.2d 129 (Ind. Ct. App. 1991).

chitectural Brick. Under the purchase agreement, Architectural Brick was to deduct from Callis' earnings the cost of the truck and premiums for insurance. The premiums were to be forwarded on to Wren, an insurance agent.

Wren knew that Callis had an interest in the truck. However, the insurance policy omitted Callis as an owner. After a fire to the truck, Callis discovered that the policy had expired and that Wren was "pocketing" the premiums without purchasing insurance for the truck. After being included as a defendant in a lawsuit against the insurance company by Architectural Brick, Callis cross-claimed against the insurer for the negligent or wilful actions of Wren, the agent.<sup>27</sup>

Although the court reversed the trial court's summary judgment in favor of the insurer,<sup>28</sup> the court opened the door for the argument that in some cases, the negligent actions of an insurance broker should not be imputed to the insurer.<sup>29</sup> This case may be the first step to the courts' realization that in the broker situation, the insurer should not be responsible for the broker's actions. Such a realization would put Indiana back in the mainstream of American law on this issue.

### III. ACTIONS AGAINST INSURERS

The case of *Indiana Insurance Co. v. Plummer Power Mower & Tool Rental, Inc.*<sup>30</sup> should prove interesting to all practitioners who either sue or defend insurance companies. The case addresses the issue of whether an insured can recover consequential damages for breach of contract from the insurer in excess of the policy limits.<sup>31</sup>

In *Plummer*, an insurer denied payment to its insured for an explosion and fire that occurred in a commercial building owned by the Plummers. The insurer denied payment based on the Plummers failure to document losses and the insurer's contention the Plummers intentionally set the fire.<sup>32</sup> After a jury trial, the Plummers were awarded compensatory and punitive damages as well as attorney fees.<sup>33</sup>

The *Plummer* case represents the first time the compensatory damages issue has been addressed by an Indiana court since the issue was clouded by *Burleson v. Illinois Farmers Insurance Co.*<sup>34</sup> In *Burleson*, the United States District Court for the Southern District of Indiana found an

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27. *Id.* at 131.

28. *Id.* at 132.

29. *Id.* at 131.

30. 590 N.E.2d 1085 (Ind. Ct. App. 1992).

31. *Id.* at 1089-92.

32. *Id.*

33. *Id.* at 1087-88.

34. 725 F. Supp. 1489 (S.D. Ind. 1989).

insurer could not be liable for consequential damages caused by the insurer's breach of the contract if the insurer acted in good faith in denying the insured's claim.<sup>35</sup>

The *Plummer* court refused to follow the *Burleson* decision that good faith of the insured could prevent the insured from recovering consequential damages from the insurer.<sup>36</sup> Instead, the court concluded that foreseeable consequential damages are recoverable for an insurer's breach of the contract regardless of the insurer's good faith:

Simply, put, the insurer cannot look at an insured's loss of livelihood and loss of home, shrug its shoulders, and hide behind the fact it made an "honest mistake." Delay, whether in good or bad faith, has clearly foreseeable consequences.<sup>37</sup>

Furthermore, if the consequential damages exceed the limits of the policy, the insured may still recover them from the insurer if the damage was reasonably foreseeable at the time the parties entered into the contract.<sup>38</sup>

This case is also enlightening on the issue of what damages are recoverable from an insurer for breach of contract. No longer will an insurer's good faith be a defense to a claim for consequential damages. Instead, if the consequential damages were reasonably foreseeable at the time of the breach of the contract, then they will be recoverable regardless of the insurer's intent.<sup>39</sup>

Another case that should prove interesting to practitioners who handle workers compensation cases is *Stump v. Commercial Union*.<sup>40</sup> In *Stump*, the Indiana Supreme Court decided a certification question from the United States District Court for the Northern District of Indiana. The precise question certified was whether "Indiana law permit[ted] a cause of action by an injured employee against an employer's worker's compensation carrier for that carrier's actions during its processing and handling of the worker's compensation claim."<sup>41</sup>

The Indiana Supreme Court expressly recognized an employee's right to pursue an action directly against the worker's compensation carrier for tortious conduct such as gross negligence, intentional infliction of

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35. *Id.* at 1490-95.

36. *Plummer*, 590 N.E.2d at 1092.

37. *Id.* at 1092 n.6.

38. *Id.* at 1092.

39. *Id.*

40. 601 N.E.2d 327 (Ind. 1992).

41. *Id.* at 329. The specific actions by the insurer which were being challenged included gross negligence, intentional infliction of emotional distress, constructive fraud, breach of duty to act in good faith, breach of a fiduciary duty, and intentional deprivation of worker's rights under the Worker's Compensation Act, IND. CODE. § 22-3-2-6 (1982), amended by *Id.* § 22-3-2-6 (Supp. 1992).

emotional distress, or constructive fraud.<sup>42</sup> However, the supreme court determined that an employee does not possess a right to sue the carrier for breach of a duty to act in good faith<sup>43</sup> and breach of fiduciary duty between an insured and an insurer.<sup>44</sup>

This case carries importance in that carriers must deal in good faith in handling worker's compensation claims by employees. In *Stump*, the court has created a direct cause of action by the employee against the carrier by recognizing that the exclusive remedies of the Indiana Worker's Compensation Act<sup>45</sup> do not bar such direct actions.

#### IV. HEALTH/MEDICAL INSURANCE CASES

##### A. Representations in Product Brochures

The decision in *Palsce v. Guarantee Trust Life Insurance Co.*<sup>46</sup> should be reviewed by any health insurance law practitioner. In *Palsce*, the insureds purchased health insurance after their son brought home the insurer's brochure from school. The brochure contained the representation among others, that the policy provided maximum benefits of \$25,000 for each accident. Later, the insureds presented a claim to the insurer for nearly \$12,000 after their son suffered an injury to his right eye resulting in permanent blindness. The insurer informed the insureds that the insurance policy, a master copy of which was available at the school but never provided to the insurers, provided maximum limits of only \$1,000 for loss of an eye. This limitation was contained on the master policy but was not mentioned on the brochure even though some exclusions under the coverage were mentioned.

The *Palsce* court reviewed decisions from other jurisdictions to hold the insurer was liable for the greater policy amount pursuant to the broader representations in the brochure rather than the policy.<sup>47</sup> The court found a conflict between the representations of coverage in the brochure and the master policy and applied the broader coverage.<sup>48</sup>

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42. *Stump*, 601 N.E.2d at 332-33.

43. *Id.* at 333. Although the supreme court recognized that the carrier has this duty, the exclusive right to pursue the carrier for a breach belongs to the Indiana Industrial Board. *Id.*

44. *Id.* at 334. The supreme court recognized that no fiduciary duty existed between the employee and the carrier.

45. IND. CODE. § 22-3-2-6 (1982), amended by *Id.* § 22-3-2-6 (Supp. 1992).

46. 588 N.E.2d 525 (Ind. Ct. App. 1992).

47. *Id.* at 527.

48. *Id.*

### B. Representations by Agents

The case of *Plohg v. NN Investors Life Insurance Co.*<sup>49</sup> is similar to the previously mentioned *Palsce* decision. In *Plohg*, the insurer denied a health insurance claim by its insured pursuant to an exclusion for losses due to the insured's use of intoxicants.

However, the insured argued he was shown all of the exclusions when he sought insurance and the intoxication exclusion was not included or shown to him. He sought to preclude the exclusion because of the constructive fraud of the agent.

The court found the insured had relied upon the agent's representations and had canceled his existing insurance coverage in order to purchase the insurer's coverage.<sup>50</sup> As a result, the agent's representations governed the agreement rather than the actual policy language.<sup>51</sup>

## V. AUTOMOBILE CASES

### A. Definition of "Using" an Automobile

The question of "using an automobile" as defined in an insurance policy has been the subject of frequent litigation over the years. In this survey period, the subject was once again addressed in *American Family Mutual Insurance Co. v. National Insurance Ass'n.*<sup>52</sup>

In *American Family*, an automobile mechanic was driving a van owned by Brown to a body shop for repairs when he had an accident. After the other driver recovered a judgment against the mechanic, the other driver sought a determination as to whether Brown's wife's insurance covered the mechanic's operation of the vehicle.<sup>53</sup>

National Insurance claimed that coverage was excluded under the policy because the vehicle was "being used" by a person employed or engaged in the business of repairing automobiles.<sup>54</sup> After reviewing case

49. 583 N.E.2d 1233 (Ind. Ct. App. 1992).

50. *Id.* at 1236-37.

51. *Id.* at 1237.

52. 577 N.E.2d 969 (Ind. Ct. App. 1991).

53. *Id.* at 969-70.

54. *Id.* at 970. The exclusion stated:  
This policy does not apply under Part 1:

. . . .

(g) to an owned automobile while *used* by any person while such person is employed or otherwise engaged in the automobile business. . . .

. . . .

"automobile business" means the business or occupation of selling, repairing, servicing, storing or parking automobiles.

law from other jurisdictions, the court determined the mechanic's act of operating the van to perform repairs was "using" the van within the exclusion.<sup>55</sup> Consequently, no coverage was found.<sup>56</sup>

### B. Duty to Defend

The case of *Liberty Mutual Insurance Co. v Metzler*,<sup>57</sup> is absolutely "must" reading for all insurance law practitioners. *Metzler* illustrates what can happen to an insurance company if it refuses to defend an insured under a reservation of rights or file a separate declaratory judgment action to determine its obligations when coverage for an insured in a tort lawsuit is in question.

In *Metzler*, the carrier insured a trucking company and its driver. The driver deviated from his route and stopped at a pub to meet his girlfriend.<sup>58</sup> After getting into an argument with his girlfriend, the driver proceeded to drive his semi-truck into the pub, killing one person and injuring many others including the Powells.

The Powells filed suit against the truck driver and trucking company for the intentional and negligent acts of the driver. Based on the driver's conviction for numerous intentional crimes, the carrier did not defend the insured because the carrier argued the intentional acts were excluded under the policy.<sup>59</sup> Later, after the carrier refused to defend, the Powells amended their complaint to seek recovery only for the driver's negligence and recovered a large monetary default judgment.<sup>60</sup>

The Powells then attempted to recover the judgment from the carrier by adding the carrier to the lawsuit as a garnishee defendant.<sup>61</sup> The carrier responded to the Powells' actions by asserting a counterclaim for declaratory judgment the policy did not cover the driver's actions because of the intentional act exclusion.<sup>62</sup>

Unfortunately for the carrier, the court of appeals concluded the carrier was collaterally estopped from arguing the applicability of the intentional act exclusion based on the trial court's judgment in the Powells' favor under theories of negligence.<sup>63</sup> The court noted the carrier could have protected its interest in either of two ways: by filing a

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55. *Id.* at 971-72.

56. *Id.* at 972.

57. 586 N.E.2d 897 (Ind. Ct. App. 1992)

58. *Id.* at 899.

59. *Id.*

60. Mrs. Powell received a judgment in the amount of \$1,600,000 and Mr. Powell's judgment was for \$150,000. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 901-02.

declaratory judgment action to determine its obligations under the policy or by defending the driver under a reservation of rights.<sup>64</sup> Because the carrier did neither, it was collaterally estopped from arguing the intentional act exclusion:

[a]n insurer, having knowledge its insured has been sued, may not close its eyes to the underlying litigation, force the insured to face the risk of that litigation without the benefit of knowing whether the insurer intends to defend or to deny coverage, and then raise policy defenses for the first time after judgment has been entered against the insured.<sup>65</sup>

This case stresses the importance to carriers to take action to protect their interests.<sup>66</sup> Failure to do so may preclude the carrier from later asserting available coverage defenses.

### C. *Uninsured/Underinsured Motorists Coverage*

During the survey period, a number of significant decisions were handed down regarding uninsured/underinsured motorists coverage in a number of different areas. Although not all cases are mentioned in this survey, the more noteworthy ones are included.

1. *Duty to intervene.*—The case of *Stewart v. Walker*<sup>67</sup> should prove interesting reading to all practitioners. Stewart was a passenger in a car involved in an accident with an uninsured motorist. Shortly after filing a complaint against the uninsured driver, Stewart informed her own uninsured motorist carrier and the carrier for her car's driver that she had filed suit but had not perfected service against the uninsured motorist.<sup>68</sup>

Neither uninsured motorist insurance carrier intervened in the lawsuit.<sup>69</sup> Stewart recovered a judgment against the uninsured motorist in the amount of \$80,000.<sup>70</sup> In seeking satisfaction of her judgment, Stewart

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64. *Id.* at 902.

65. *Id.*

66. Although the carrier was unsuccessful in reversing the large judgment based on the intentional act exclusion, the court reversed the judgment based on the fact the carrier was not collaterally estopped to litigate whether the driver's actions were within the scope of his employment. *Id.* at 905.

67. 597 N.E.2d 368 (Ind. Ct. App. 1992)

68. *Id.* at 370, 373-74.

69. In such a situation, a carrier must intervene in the insured's lawsuit to protect its interest or else be bound by the outcome of the insured's lawsuit. See *Vernon Fire and Cas. Ins. Co. v. Matney*, 351 N.E.2d 60, 65 (1976).

70. *Stewart*, 597 N.E.2d at 370.

filed a declaratory judgment action against both insurers to determine their obligations.<sup>71</sup>

Stewart's personal carrier argued it should not be bound by the judgment because it was not afforded an opportunity to intervene. Although the carrier admitted the insured notified the carrier of the lawsuit, it argued the insured did not advise them she was successful in obtaining service against the uninsured motorist before she obtained the default judgment. The court of appeals rejected this argument, concluding the carrier's receipt of the complaint was sufficient notice to allow the carrier to intervene and protect its interests.<sup>72</sup>

The carrier for the driver of Stewart's car argued no coverage existed under its policy because the insured failed to comply with three conditions under the policy.<sup>73</sup> However, the court concluded the carrier waived these policy conditions by failing to notify Stewart of their existence or that they intended to rely upon them.<sup>74</sup>

With respect to policy conditions, insurers must notify insureds of their existence, especially if asked by the insured:<sup>75</sup>

We cannot but conclude that a duty of good faith dealing certainly must include an obligation to inform such a claimant of conditions precedent in the insurance contract, the more so when the nonparty claimant has asked whether the insurer requires any additional information in order to process the claim.<sup>76</sup>

This requirement should be repeated by all carriers when they expect policy conditions to be followed. Insurers should not sit back, fail to advise an insured of a policy condition, and then attempt to bar coverage pursuant to the policy condition. Insurers have an affirmative duty to notify insureds before they can attempt to enforce a policy condition.<sup>77</sup>

2. *Self-Insurers*.—Recently, in *City of Gary v. Allstate Insurance Co.*,<sup>78</sup> the court decided a case of first impression in Indiana: whether self-insured entities must provide uninsured motorist coverage to the

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71. *Id.*

72. *Id.* at 372-73.

73. These conditions included (1) legal action against carrier had to be commenced within the time limit for bodily injury actions, (2) judgment against a responsible party would be binding only if the carrier consented to it, and (3) the insured had to provide a copy of the complaint and summons to the carrier if suit was brought against the responsible party. *Id.* at 374.

74. *Id.* at 376.

75. *Id.* at 375-76.

76. *Id.*

77. *Id.*

78. 598 N.E.2d 625 (Ind. Ct. App. 1992).

vehicle drivers.<sup>79</sup> Although the court found supporting authority from other jurisdictions for both sides of the issue, the court ultimately ruled that when the legislature passed Indiana's Uninsured Motorist Statute,<sup>80</sup> it intended for self-insured entities to provide uninsured motorist coverage.<sup>81</sup>

3. *Rejection of uninsured motorist coverage/limits.*—The case of *Pafco General Insurance Co. v. Providence Washington Insurance Co.*<sup>82</sup> should prove to be interesting reading for any attorney who has a client injured by an uninsured motorist while driving a rental car. In *Pafco*, Baker leased an automobile from Ugly Duckling, which had a commercial automobile insurance policy for leased cars and had policy limits of \$60,000.00. When Baker leased the automobile, he represented to Ugly Duckling that he had full insurance coverage under his personal policy. Under the terms of the lease, Baker was forced to reject the uninsured motorist coverage offered from Ugly Duckling's carrier.

When Baker was involved in an accident with an uninsured motorist, he sought coverage under his personal policy with limits of \$25,000 and also pursuant to the policy covering Ugly Duckling. The court quickly concluded the forced rejection of the uninsured motorist coverage under Ugly Duckling's policy was contrary to Indiana's Uninsured Motorist Statute<sup>83</sup> and, therefore, invalid.<sup>84</sup> As a result, the court off-set the \$25,000 received from Baker's personal carrier and permitted Baker to recover an additional \$35,000 from Ugly Duckling's carrier.<sup>85</sup>

Three other cases decided during this survey period, *Craven v. State Farm Mutual Automobile Insurance Co.*,<sup>86</sup> *Inman v. Farm Bureau Insurance*,<sup>87</sup> and *United Farm Bureau Mutual Insurance Co. v. Lowe*,<sup>88</sup> addressed whether a carrier must offer uninsured/underinsured coverage in the same amounts as an insured's liability limits when the insured's policy is renewed.

In 1987, the Indiana General Assembly amended the Indiana Uninsured Motorist Statute<sup>89</sup> to require insurers to make available to insureds the same amount of uninsured/underinsured motorist coverage as the

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79. *Id.* at 626-29.

80. IND. CODE § 27-7-5-2 to -6.

81. *Allstate*, 598 N.E.2d at 629.

82. 587 N.E.2d 728 (Ind. Ct. App. 1992).

83. IND. CODE § 27-7-5-2 (Supp. 1992).

84. *Pafco*, 587 N.E.2d at 731.

85. *Id.* at 732.

86. 588 N.E.2d 1294 (Ind. Ct. App. 1992).

87. 584 N.E.2d 567 (Ind. Ct. App. 1992).

88. 583 N.E.2d 164 (Ind. Ct. App. 1991).

89. IND. CODE § 27-7-5-2 (Supp. 1992).

insured's liability limits.<sup>90</sup> The amendment to the statute took effect January 1, 1988.<sup>91</sup> However, the statute was intended to apply to policies that were "first issued" after December 31, 1987.<sup>92</sup>

These three cases addressed the question of whether, on a policy first written before December 31, 1987, but renewed after December 31, 1987, the insurer was required to make the higher liability limits available to an insured for uninsured/underinsured motorist coverage.

The overall conclusion from these three cases was that a policy renewed repeatedly with the same policy number is a "renewal" policy rather than a "first issued" policy and no compliance with the uninsured motorist statute is required.<sup>93</sup> If, however, the policy replaces an older policy or is a new policy, then the insurer must offer limits equal to the amount of the insured's liability limits.<sup>94</sup>

These decisions may be helpful to practitioners based on the fact that many insureds possess existing policies first issued prior to 1987 and continually renewed by the insureds. Such policies may have lower uninsured motorist limits than liability limits, and the practitioner must look to the time the policy was first created, as well as the times of renewal, to determine what limits are available to the insured for uninsured/underinsured coverage.

4. *Stacking*.—During the survey period, two decisions, *American Economy Insurance Co. v. Motorists Mutual Insurance Co.*<sup>95</sup> and *State Farm Mutual Automobile Insurance Co. v. Conway*,<sup>96</sup> addressed an insured's ability to stack the policy limits of two or more uninsured motorist coverages. Each case came to the same conclusion: if policies contained an anti-stacking clause,<sup>97</sup> such a clause was enforceable, and policy limits from each policy would not be added together or stacked.<sup>98</sup>

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90. *Id.*

91. *Id.* (Historical and Statutory Notes).

92. *Id.*

93. *Craven v. State Farm Auto. Ins. Co.*, 588 N.E.2d 1294, 1296 (Ind. Ct. App. 1992); *Inman v. Farm Bureau Ins.*, 584 N.E.2d 567, 568-69 (Ind. Ct. App. 1992); *United Farm Bureau Mut. Ins. Co. v. Lowe*, 583 N.E.2d 164, 168-70 (Ind. Ct. App. 1992).

94. *Craven*, 588 N.E.2d at 1296; *Inman*, 584 N.E.2d at 568-69; *Lowe*, 583 N.E.2d at 168-70.

95. 593 N.E.2d 1242 (Ind. Ct. App. 1992)

96. 779 F. Supp. 963 (S.D. Ind. 1991).

97. In *American Economy*, one of the policies contained an antistacking clause, which stated:

If this policy and any other policy providing similar insurance apply to the same *accident*, the maximum limit of liability under all the policies shall be the highest applicable limit under any one policy.

593 N.E.2d at 1244.

98. *American Economy*, 593 N.E.2d at 1245; *Conway*, 779 F. Supp. at 968.

Instead, the highest available limit from *one* policy would be the total limit available to the insured.<sup>99</sup>

In *American Economy*, another issue that might benefit some practitioners was addressed in dicta. The issue concerned whether a tortfeasor's liability limits may be offset against the insured's underinsured motorist coverage.<sup>100</sup> Without much discussion, the court concluded the carrier could not deduct the tortfeasor's payment and cited the case of *Tate v. Secura Insurance*<sup>101</sup> in support. However, it is likely the court intended the set-off prohibition would apply only to policies issued prior to January 1, 1988. For policies issued after January 1, 1988, the set-off of the payments received by insureds should be permitted.<sup>102</sup>

5. *Set-Off*.—Another case discussing an insurer's ability to set-off payments to an insured was *Hardiman v. Governmental Interinsurance Exchange*.<sup>103</sup> In *Hardiman*, the court discussed whether a carrier could set-off worker's compensation payments made to the insured from the total of uninsured/underinsured motorists coverage.<sup>104</sup>

After reviewing the issue in some detail, the court ultimately concluded the insurer could set-off from the underinsured motorists benefits available the total worker's compensation payments received by the insured.<sup>105</sup> Because the intent of the uninsured/underinsured statute was to provide a minimum amount of compensation to injured insureds, the purpose of the statute would be fulfilled when the insured received worker's compensation payments. Consequently, because the insured stood to be compensated by the minimum amount, the statute was satisfied, whether the payments came from worker's compensation or uninsured motorist insurance.

99. *American Economy*, 593 N.E.2d at 1245; Conway, 779 F. Supp. at 968.

100. *American Economy*, 593 N.E.2d at 1246-47.

101. 587 N.E.2d 665 (Ind. 1992).

102. State law clearly permits the set-off:

The maximum amount payable for bodily injury under uninsured or underinsured motorist coverage is the lesser of:

(1) the difference between:

(A) the amount paid in damages to the insured by or for any person or organization who may be liable for the insured's bodily injury; and

(B) the per person limit of uninsured or underinsured motorist coverage provided in the insured's policy; or

(2) the difference between:

(A) the total amount of damages incurred by the insured; and

(B) the amount paid by or for any person or organization liable for the insured's bodily injury.

IND. CODE § 27-7-5-5(c) (Supp. 1992).

103. 588 N.E.2d 1331 (Ind. Ct. App. 1992).

104. *Id.* at 1332-34.

105. *Id.* at 1334-35.