

# SURVEY OF RECENT DEVELOPMENTS IN INSURANCE LAW

RICHARD K. SHOULTZ\*  
LEWIS S. WOOTON\*\*

During this survey period,<sup>1</sup> the Indiana appellate courts addressed a number of cases in the fields of automobile, commercial, homeowners, life, and health insurance. There was a particular focus on uninsured/underinsured motorist coverage, with nearly half of the reported cases addressing it. This Article analyzes the most significant decisions in the past year and discusses their impact upon the practice of insurance law.<sup>2</sup>

---

\* Partner, Lewis Wagner, LLP. B.A., 1987, Hanover College; J.D., 1990, Indiana University School of Law—Indianapolis.

\*\* Associate, Lewis Wagner, LLP. B.A., 2002, Hanover College; J.D., 2006, Indiana University School of Law.

1. The survey period for this Article is approximately November 1, 2006, to October 31, 2007.

2. For cases not discussed in this Article for the survey period, see *Lummis v. State Farm Fire & Casualty Co.*, 469 F.3d 1098, 1100 (7th Cir. 2006) (holding insurer's refusal to pay claim for fire damages was not irrational where insurer reasonably suspected arson); *Reginald Martin Agency, Inc. v. Conseco Medical Insurance Co.*, 478 F. Supp. 2d 1076, 1088-89 (S.D. Ind. 2007) (finding that genuine issues of fact existed with respect to whether agent/broker was insurer's agent); *Nationwide Insurance Co. v. Heck*, 873 N.E.2d 190, 196-97 (Ind. Ct. App. 2007) (finding that summary judgment in favor of insured was appropriate where court found an enforceable written agreement to provide coverage even though there was no signed agreement); *Steve Silveus Insurance, Inc. v. Goshert*, 873 N.E.2d 165, 181 (Ind. Ct. App. 2007) (holding that substantial evidence existed for judgment that agents misappropriated trade secrets); *State Farm Mutual Automobile Insurance Co. v. Cox*, 873 N.E.2d 124, 129 (Ind. Ct. App. 2007) (holding that underinsured motorist insurer was not entitled to subrogation where insured was not "fully compensated" for his bodily injury and property damage); *Cinergy Corp. v. St. Paul Surplus Lines Insurance Co.*, 873 N.E.2d 105, 115 (Ind. Ct. App. 2007) (finding that excess liability insurers did not owe coverage for underlying claims against insured for alleged violation of Federal Clean Air Act), *trans. denied*, 2008 Ind. LEXIS 112 (Ind. Jan. 24, 2008); *Evan v. Poe & Associates, Inc.*, 873 N.E.2d 92, 101 (Ind. Ct. App. 2007) (holding that insureds who were denied benefits under homeowners policy because the application had been filled out improperly by insurance agent could not maintain an action against insurance agency because insured executed a release agreement which unambiguously released agency from liability); *Kempf v. St. Paul Reinsurance Co.*, 872 N.E.2d 162, 167 (Ind. Ct. App. 2007) (holding that vendor, who was selling commercial property under installment contract, was entitled to full value of the property after the property was destroyed by fire regardless of payments received by vendor from purchaser); *Newnam Manufacturing, Inc. v. Transcontinental Insurance Co.*, 871 N.E.2d 396, 402-03 (Ind. Ct. App.) (finding that Indiana Department of Environmental Management's order seeking to have insured install emission control equipment was not a covered loss under commercial general liability policy), *trans. denied*, *Great Northern Insurance v. Newnam Manufacturing, Inc.*, 878 N.E.2d 221 (Ind. 2007); *Liberty Mutual Fire Insurance Co. v. Beatty*, 870 N.E.2d 546, 551 (Ind. Ct. App. 2007) (holding that insured's purported rejection of uninsured motorist coverage was ineffective); *Hornberger v. Farm Bureau*

## I. AUTOMOBILE CASES

## A. “Other Insurance” Clauses Were Reconcilable and Not Mutually Repugnant

On many occasions, an insured involved in a motor vehicle accident possesses more than one applicable insurance coverage. When that occurs, each insurance policy’s “other insurance” clause must be compared to determine the

---

*Insurance*, 868 N.E.2d 1149, 1154 (Ind. Ct. App. 2007) (finding that underinsured motorist insurer was entitled to subrogation rights against alleged tortfeasor); *Safe Auto Insurance Co. v. Farm Bureau Insurance Co.*, 867 N.E.2d 221, 225 (Ind. Ct. App.) (finding that insured’s failure to notify insurer of move to different state or new marriage were material misrepresentations toward policy), *trans. denied*, 878 N.E.2d 210 (Ind. 2007); *Cinergy Corp. v. Associated Electric & Gas Insurance Services, Ltd.*, 865 N.E.2d 571, 583 (Ind. 2007) (finding that insureds’ costs to install equipment intended to reduce harmful emissions were not caused by an occurrence); *Arnett v. Cincinnati Insurance Co.*, 864 N.E.2d 366, 370 (Ind. Ct. App.) (holding that uninsured motorist coverage will not be read into insurance policy), *trans. denied*, 878 N.E.2d 205 (Ind. 2007); *Wells v. Auto Owners Insurance Co.*, 864 N.E.2d 356, 360 (Ind. Ct. App. 2007) (holding that arm insurance policy did not provide coverage for claims brought by injured motorcyclist for negligence and negligent entrustment due to motor vehicle exclusion); *Graves v. Johnson*, 862 N.E.2d 716, 721-22 (Ind. Ct. App. 2007) (holding that property insurer’s payment of insurance proceeds to landlord and tenant satisfied its obligation under the policy despite the fact that tenant forged landlord’s signature and failed to give landlord his share); *West American Insurance Co. v. Cates*, 865 N.E.2d 1016, 1021-22 (Ind. Ct. App.) (holding that underinsured motorist carrier is not entitled to a setoff if the carrier unreasonably delays payment after liability insurers denied coverage), *trans. denied*, 869 N.E.2d 460 (Ind. 2007); *McGuire v. Century Surety Co.*, 861 N.E.2d 357, 365 (Ind. Ct. App. 2007) (holding that no coverage was owed for collapse of building caused by faulty workmanship); *Moreton v. Auto-Owners Insurance*, 859 N.E.2d 1252, 1255 (Ind. Ct. App. 2007) (holding subrogation insurer was not sufficiently a party to small claims action by its insured to give res judicata effect to small claims judgment); *Briles v. Wausau Insurance Cos.*, 858 N.E.2d 208, 215-16 (Ind. Ct. App. 2006) (finding that hotel employee was not a permissive user of hotel shuttle van due to violation of express restrictions); *McCarty v. Walsko*, 857 N.E.2d 439, 447 (Ind. Ct. App. 2006) (holding patient could not proceed against Patients Compensation Fund because doctor’s underlying liability limits had not been exhausted); *Safe Auto Insurance Co. v. Farm Bureau Insurance Co.*, 856 N.E.2d 156, 162 (Ind. Ct. App. 2006) (holding insured’s failure to tell insurer about her husband did not void coverage and insured was vicariously liable for husband’s actions under Michigan law), *opinion superseded on reh’g*, 867 N.E.2d 221 (Ind. Ct. App.), *trans. granted*, 878 N.E.2d 210 (Ind. 2007); *Wineinger v. Ellis*, 855 N.E.2d 614, 618-19 (Ind. Ct. App. 2006) (finding that trial court properly barred reference to insurance or insurer in uninsured motorist case), *trans. denied*, 869 N.E.2d 448 (Ind. 2007); *State Farm Mutual Automobile Insurance Co. v. Noble*, 854 N.E.2d 925, 932 (Ind. Ct. App. 2006) (finding that issue of fact existed regarding whether husband had authority to bind his wife when he rejected underinsured motorist coverage), *trans. denied*, 869 N.E.2d 448 (Ind. 2007).

priority or sharing of these coverages.<sup>3</sup> Until recently, courts typically found the clauses irreconcilable and “mutually repugnant” such that each policy shared in coverage.<sup>4</sup>

The Indiana appellate courts addressed the applicability of competing “other insurance” clauses in two cases<sup>5</sup> during the survey period. In both instances, it was held that the clauses were reconcilable and not mutually repugnant.

In *Citizens Insurance Co. v. Ganschow*,<sup>6</sup> Cletus Ganschow was injured when the vehicle in which he was a passenger collided with an uninsured driver.<sup>7</sup> Ganschow filed a lawsuit to recover uninsured motorist benefits from his parents’ automobile insurer, Citizens Insurance Company (“Citizens”), and from the insurer for the vehicle’s owner, Standard Mutual Insurance Company (“Standard”). Standard filed a counterclaim and cross-claim for declaratory judgment asking the court to determine that both policies provided primary insurance coverage and should be prorated.<sup>8</sup> Citizens argued that its coverage was excess, such that its coverage only applied after Standard’s limits were exhausted.<sup>9</sup> The trial court entered summary judgment for Standard, and ordered that Ganschow’s damages be prorated between Standard’s and Citizens’s policies.<sup>10</sup> Citizens appealed the trial court’s decision.<sup>11</sup>

On appeal, there was no dispute that Ganschow qualified as an insured under both policies, and the sole issue to be determined was the share of damages that each insurer should be required to pay.<sup>12</sup> The policy issued by Standard contained the following “other insurance” provision:

---

3. For sample language of an “other insurance” clause, see *General Accident Insurance Co. of America v. Hughes*, 706 N.E.2d 208, 209 (Ind. Ct. App. 1999) (“If there is other applicable liability insurance we will pay only our share. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide for a vehicle you do not own shall be excess over any other collectible insurance and the insurance on such a vehicle and any other collectible insurance shall be primary.”).

4. See *Ind. Ins. Co. v. Am. Underwriters, Inc.*, 304 N.E.2d 783, 787 (Ind. 1973) (finding the compared “other insurance” clauses to be “mutually repugnant” which required a pro rata allocation); *but see Am. Econ. Ins. Co. v. Motorists Mut. Ins. Co.*, 605 N.E.2d 162, 164-65 (Ind. 1992) (approving court of appeals’s decision determining priority of insurance coverages, but reversing on other grounds).

5. *Citizens Ins. Co. v. Ganschow*, 859 N.E.2d 786 (Ind. Ct. App.), *trans. denied*, 869 N.E.2d 458 (Ind. 2007); see also *Cincinnati Ins. Co. v. Am. Alternative Ins. Corp.*, 866 N.E.2d 326 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 205 (Ind. 2007). *Cincinnati Insurance Co.* will not be analyzed in detail because the reasoning employed is substantially similar to that of *Citizens Insurance Co.*

6. 859 N.E.2d 786.

7. *Id.* at 788.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

With respect to bodily injury to an insured while occupying an automobile not owned by the named insured, *the insurance under part IV shall apply only as excess insurance over any other similar insurance available to such insured and applicable to such automobile as primary insurance, and this insurance shall then apply only in the amount by which the limit of liability for this coverage exceeds the applicable limit of liability of such other insurance.*

Except as provided in the foregoing paragraph, if the insured has other similar insurance available to him and applicable to the accident, the damages shall be deemed not to exceed the higher of the applicable limits of liability of this insurance and such other insurance and the company shall not be liable for a greater proportion of any loss to which this Coverage applies than the limit of liability hereunder bears to the sum of the applicable limits of liability of this insurance and such other insurance.<sup>13</sup>

The policy issued by Citizens contained an “other insurance” provision which read as follows:

1. Any recovery for damages for “bodily injury” or “property damage” sustained by an “insured” may equal but not exceed the higher of the applicable limit for any one vehicle under this insurance or any other insurance.
2. Any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance.
3. We will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits.<sup>14</sup>

Standard argued that pursuant to existing case law, where two potentially applicable insurance policies both contain “other insurance” clauses, the clauses are “mutually repugnant” to each other and should be disregarded, making both insurers liable for damages on a prorated basis.<sup>15</sup> Conversely, Citizens argued that the existence of “other insurance” clauses in two potentially applicable insurance policies did not require the clauses to be disregarded if the clauses could be reconciled.<sup>16</sup> Citizens asserted that the two “other insurance” clauses at issue were reconcilable because under its policy, the insurance provided was clearly excess if Ganschow’s injuries arose while riding in a vehicle that he did not own, and Standard’s insurance coverage was only excess if other “similar

---

13. *Id.* at 788.

14. *Id.*

15. *Id.* at 790 (citing *Ind. Ins. Co. v. Am. Underwriters, Inc.*, 304 N.E.2d 783 (Ind. 1973)).

16. *Id.* at 791 (citing *Am. Econ. Ins. Co. v. Motorists Mut. Ins. Co.*, 593 N.E.2d 1242 (Ind. Ct. App.), *aff'd in part, vacated in part*, 605 N.E.2d 162 (Ind. 1992)).

insurance” was applicable to cover the loss.<sup>17</sup>

The court of appeals agreed with Citizens’s position, and reversed the trial court’s entry of summary judgment.<sup>18</sup> The court held that there was no blanket rule under Indiana law that all competing “other insurance” clauses must be found unenforceable.<sup>19</sup> The court stated that because it could harmonize the two “other insurance” clauses at issue, it was free to give effect to the parties’ intent.<sup>20</sup> Accordingly, the court gave instructions for the trial court to enter judgment that Citizens’s policy was excess with respect to Ganschow’s claims.<sup>21</sup>

This decision is important to the practice of insurance law because it clarifies that not all competing “other insurance” clauses will be ignored as some practitioners have urged. If the clauses can be reconciled, then they will be given their intended effect.

### *B. Claimant’s Recovery of Benefits from Tortfeasor’s Insurer Eliminated Underinsured Motorist Carrier’s Liability*

The decision of *Kinslow v. Geico Insurance Co.*<sup>22</sup> provides a good analysis of the proper method for calculating a set-off in an underinsured motorist case. In *Kinslow*, a wife sustained serious injuries and her husband died after being involved in an accident while riding their motorcycles.<sup>23</sup> The wife filed suit against the negligent tortfeasor and her own underinsured motorist carrier.<sup>24</sup> The tortfeasor’s insurer paid its policy limits of \$100,000 to the wife for her injuries and another payment of \$100,000 for the death of her husband.<sup>25</sup>

The wife’s underinsured motorist coverage provided limits of \$100,000 per person and \$300,000 per accident.<sup>26</sup> Her insurer filed a motion for summary judgment on the basis that after setting off the amounts received by the wife from the tortfeasor’s insurer, the underinsurance limits were exhausted.<sup>27</sup> The trial court granted the insurer’s motion for summary judgment, and the wife appealed.<sup>28</sup>

For purposes of appeal, it was assumed that the wife’s damages totaled at

---

17. *Id.*

18. *Id.*

19. *Id.*; see *Am. Econ. Ins. Co.*, 593 N.E.2d at 1242.

20. *Id.* at 793.

21. *Id.* at 795.

22. 858 N.E.2d 109 (Ind. Ct. App. 2006).

23. *Id.* at 110.

24. *Id.*

25. *Id.*

26. *Id.* The applicable policy language provided that “any amounts otherwise payable for damages under this coverage shall be reduced by: All sums paid because of the bodily injury by or on behalf of persons or organizations who may be legally responsible.” *Id.* at 111.

27. *Id.* at 110.

28. *Id.* at 111.

least \$400,000.<sup>29</sup> The wife argued that the proper method of applying a set-off was to subtract the amounts paid by the underlying tortfeasor from the amount of total damages incurred, and thus, she was entitled to recover \$200,000 from her underinsured motorist carrier.<sup>30</sup> The underinsured motorist carrier countered that the amounts paid by the underlying tortfeasor should be subtracted from the limits of the underinsured motorist policy.<sup>31</sup>

The court acknowledged that Indiana case law was split with regard to the proper calculation of a set-off.<sup>32</sup> However, the court held that it was compelled to find in favor of the underinsured motorist carrier because of Indiana Code section 27-7-5-5(c),<sup>33</sup> which was to be read into every underinsured motorist policy and unambiguously demonstrated that all amounts received from the tortfeasor's insurer should be set off from the applicable underinsured motorist limits.<sup>34</sup>

This opinion reiterates the proper method of calculating a setoff under Indiana law.<sup>35</sup> Although other cases have provided a similar analysis in recent years, this case is important because it focuses on the statutory mandate regarding set-offs as opposed to the somewhat conflicted and confusing existing caselaw.

---

29. *Id.* at 114.

30. *Id.* at 111.

31. *Id.*

32. *Id.* at 113-14. The wife contended that the Indiana Supreme Court's decision in *Beam v. Wausau Insurance Co.*, 765 N.E.2d 524 (Ind. 2002) supported her position. *Kinslow*, 858 N.E.2d at 113. The insurers contended that the supreme court's decision in *American Economy Insurance Co. v. Motorists Mutual Insurance Co.*, 605 N.E.2d 162 (Ind. 1992) applied. *Kinslow*, 858 N.E.2d at 113.

33. *Kinslow*, 858 N.E.2d at 114. Pursuant to Indiana Code section 27-7-5-5(c): 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) (2004).

34. *Kinslow*, 858 N.E.2d at 114.

35. *See Am. Econ. Ins. Co.*, 605 N.E.2d 164-65.

*C. Liability Insurer Satisfied Its Duty to Insured by Interpleading  
Its Liability Limits*

The case of *Mahan v. American Standard Insurance Co.*<sup>36</sup> is an important case with potentially broad application regarding an insurance company's duty to its insureds when the insured faces multiple claims that will likely exceed his or her policy limits. In a liability insurance policy, an insurer possesses a duty to defend its insured against any lawsuits filed because of a covered occurrence, as well as a duty to indemnify its insured for any settlements or judgments reached up to the policy limits.

Mahan, who had been drinking alcohol, negligently operated his vehicle, colliding with another vehicle causing injuries to six passengers.<sup>37</sup> At the time of the accident, Mahan was insured under an automobile policy with American Standard Insurance Company ("American Standard") with liability limits of \$50,000 per person and \$100,000 per accident.<sup>38</sup> The policy also contained the following provision: "We will defend any suit or settle any claim for damages payable under this policy as we think proper. HOWEVER, WE WILL NOT DEFEND ANY SUIT AFTER OUR LIMIT OF LIABILITY HAS BEEN PAID."<sup>39</sup>

Because of the perceived likelihood that the injured parties' damages would exceed the per accident limit in its policy, American Standard notified Mahan that he should consider hiring personal counsel to defend against his exposure for a judgment in excess of his insurance coverage.<sup>40</sup> American Standard filed an interpleader action and tendered its full liability policy limits with the court to be distributed to Mahan and the injured parties as the court decided each party was entitled.<sup>41</sup> The interpleader complaint also sought a judicial determination that American Standard was relieved of its obligation to defend Mahan in the passengers' lawsuits.<sup>42</sup> Mahan filed an answer to the interpleader complaint and asserted that American Standard had a duty to defend him in the matter despite the complaint in interpleader and that American Standard's refusal to defend him amounted to a breach of the insurer's duty of good faith.<sup>43</sup>

Over Mahan's objection, the trial court issued an order distributing the funds to the injured parties and enjoining all of the injured parties from commencing any further action against American Standard or Mahan.<sup>44</sup> Subsequently, Mahan and American Standard filed cross-motions for summary judgment on the issue

---

36. 862 N.E.2d 669 (Ind. Ct. App.), *trans. denied*, 869 N.E.2d 456 (Ind. 2007).

37. *Id.* at 671.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 671-72.

42. *Id.* at 672.

43. *Id.*

44. *Id.* at 673.

of American Standard's duty to defend Mahan and the alleged bad faith claim.<sup>45</sup> The trial court entered summary judgment for American Standard, and Mahan appealed.<sup>46</sup>

On appeal, the court determined that because there had not been a lawsuit filed against Mahan, American Standard had no duty to defend him.<sup>47</sup> Additionally, the court rejected Mahan's argument that American Standard acted in bad faith because it never attempted to obtain a release agreement for the benefit of Mahan before it interpleaded the policy limits.<sup>48</sup> The court concluded that an insurer only commits bad faith if it: (1) makes an "unfounded refusal" in making payment; (2) "caus[es] an unfounded delay in making payment; (3) deceiv[es] the insured"; or (4) "exercis[es] any unfair advantage to pressure an insured into settlement of a claim."<sup>49</sup> Finding that American Standard had not done any of the above, the court ruled that American Standard had a rational basis for filing the interpleader and did not breach its duty of good faith.<sup>50</sup>

This decision is important because it is the first reported case in Indiana that holds that an insurer does not have a duty to defend its insured if no lawsuit is filed by the alleged victims, and an insurer can satisfy its duty to indemnify before any lawsuit is filed by interpleading its liability limits. An insurer should be able to interplead its policy limits on serious cases without fear of breaching its duty of good faith owed to the insured.

#### *D. Insured Could Not Recover Underinsured Motorist Benefits for Injury Caused by "Miss and Run" Driver*

The decision of *Von Hor v. Doe*<sup>51</sup> addressed the significance of the "physical contact" requirement that is commonly found in the definition of an underinsured motorist.<sup>52</sup> As the insured, Von Hor drove his motorcycle, and an unidentified automobile driver suddenly swerved into his lane.<sup>53</sup> Von Hor swerved to the right to avoid a collision, but his motorcycle struck a curb, causing him to crash and sustain serious injuries.<sup>54</sup>

At the time of the accident, Von Hor was insured by State Farm under a policy that provided uninsured motorist coverage.<sup>55</sup> The policy defined an "uninsured motor vehicle" as "a 'hit-and-run' land motor vehicle whose owner or driver remains unknown and which **strikes** . . . the *insured*; or . . . the vehicle

---

45. *Id.* at 673-74.

46. *Id.* at 675.

47. *Id.* at 676.

48. *Id.* at 677.

49. *Id.* (citing *Erie Ins. Co. v. Hickman ex rel. Smith*, 622 N.E.2d 515, 519 (Ind. 1993)).

50. *Id.*

51. 867 N.E.2d 276 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 212 (Ind. 2007).

52. *Id.* at 277.

53. *Id.*

54. *Id.*

55. *Id.*

the *insured* is occupying and causes *bodily injury* to the *insured*.”<sup>56</sup> Von Hor brought a lawsuit against State Farm seeking uninsured motorist coverage.<sup>57</sup>

State Farm filed a motion for summary judgment alleging that it owed no coverage because the tortfeasor’s vehicle did not meet the definition of an uninsured vehicle because the unidentified vehicle did not “strike” Von Hor or his motorcycle.<sup>58</sup> The court granted summary judgment for State Farm, and Von Hor appealed.<sup>59</sup>

On appeal, Von Hor admitted that the tortfeasor’s vehicle did not strike him, but urged the court to adopt the “corroborative evidence test” which places liability on an uninsured motorist insurer for miss-and-run accidents if a third party can corroborate the insured’s allegations that the negligence of an unidentified vehicle proximately caused the accident.<sup>60</sup> Von Hor argued that public policy considerations supported adoption of the corroborative evidence test for “miss and run” uninsured motorist cases.<sup>61</sup> However, the court refused to adopt the corroborative evidence rule and found that actual physical contact was required for there to be uninsured motorist coverage available.<sup>62</sup> The court relied substantially on existing case law which clearly indicated that “miss and run” drivers were not uninsured motorists.<sup>63</sup>

Because Indiana courts have continually enforced insurance policy requirements of physical contact with unidentified drivers, Von Hor faced a difficult challenge to convince the court to change the law. In this case the court enforced the plain terms of the policy which required physical contact to satisfy the definition of uninsured motorist.

#### *E. Insureds Could Not Recover Under Their Underinsured Motorist Coverage Because Tortfeasor’s Vehicle Was Not Underinsured*

During the survey period, the Indiana Court of Appeals had an opportunity to provide further explanation of the definition of an underinsured motorist in *Auto-Owners Insurance Co. v. Eakle*.<sup>64</sup> In *Eakle*, the plaintiff driver and his two passengers were seriously injured when they were involved in an automobile

---

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 278.

60. *Id.* at 279 (citing *Girgis v. State Farm Mut. Auto. Ins. Co.*, 662 N.E.2d 280, 282 (Ohio 1996)).

61. *Id.*

62. *Id.*

63. *Id.* at 278-79 (citing *Rice v. Meridian Ins. Co.*, 751 N.E.2d 685 (Ind. Ct. App. 2001)).

64. 869 N.E.2d 1244 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 218 (Ind. 2007); *see also* *Clark v. State Farm Mut. Auto Ins. Co.*, 473 F.3d 708, 714 (7th Cir. 2007) (applying Indiana law and holding that where multiple claimants make a claim for benefits under a single underinsured motorist policy, the court should compare the per accident limits of the underinsurance policy with the liability limits of the tortfeasor).

accident after a third-party tortfeasor ran a red light.<sup>65</sup> The plaintiff driver and his passengers brought a claim against the tortfeasor's insurer, and the plaintiff driver's wife also brought a claim for loss of consortium.<sup>66</sup> The tortfeasor's insurer agreed to pay the four claimants its per accident policy limit of \$500,000, and the claimants accepted.<sup>67</sup> The claimants sued their underinsured motorist carrier, which possessed limits of \$500,000 per person and \$500,000 per accident, to recover additional damages.<sup>68</sup> The underinsured motorist carrier defended on the basis that the tortfeasor's vehicle was not underinsured.<sup>69</sup> On cross-motions for summary judgment, the court entered summary judgment in favor of the plaintiffs, finding that the tortfeasor's vehicle was underinsured.<sup>70</sup>

On appeal, the underinsured motorist insurer contended that the tortfeasor was not "underinsured" because a comparison of the "per accident" policy limits of the tortfeasor and underinsured motorist insurer were equal (\$500,000).<sup>71</sup> The claimants argued that because the actual per person payments from the tortfeasor's insurer were less than the per person limit of \$500,000 under the underinsured motorist coverage, the tortfeasor's vehicle was underinsured.<sup>72</sup>

The court reviewed existing case law and determined that the tortfeasor's vehicle was not underinsured.<sup>73</sup> According to the court, the goal of underinsured motorist coverage "is to give the insured *at least the same* coverage as if his or her own underinsurance policy was the only one that applied."<sup>74</sup> Consequently, the court compared the per accident limits of the tortfeasor's policy and the claimant's underinsurance policy.<sup>75</sup> The court determined that because both policies had \$500,000 per accident limits, the tortfeasor's automobile was not underinsured.<sup>76</sup>

#### *F. Forum Selection Clause in Underinsured Motorist Policy Held Unenforceable*

In *Farm Bureau General Insurance Co. of Michigan v. Sloman*,<sup>77</sup> the court was confronted with the issue of the enforceability of a forum selection clause.<sup>78</sup>

---

65. *Auto-Owners Ins. Co.*, 869 N.E.2d at 1245.

66. *Id.*

67. *Id.*

68. *Id.* at 1247.

69. *Id.*

70. *Id.*

71. *Id.* at 1248.

72. *Id.*

73. *Id.* at 1253.

74. *Id.* (quoting *Grange Ins. Co. v. Graham*, 843 N.E.2d 597, 602 (Ind. Ct. App. 2006) (emphasis added)).

75. *Id.*

76. *Id.*

77. 871 N.E.2d 324 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 219 (Ind. 2007).

78. *Id.* at 326.

The insured, Sloman, purchased an insurance policy with uninsured motorist coverage in Michigan.<sup>79</sup> Sloman was injured in a motor vehicle accident with a negligent uninsured motorist in Indiana.<sup>80</sup> As a result, Sloman filed a lawsuit against his uninsured motorist carrier, Farm Bureau General Insurance Co. ("Farm Bureau") in Elkhart County, Indiana.<sup>81</sup> Sloman's insurance policy with Farm Bureau contained a forum selection clause which required any suit brought against Farm Bureau to be brought in Michigan, where the policy was purchased.<sup>82</sup>

Farm Bureau moved for summary judgment on the basis that Elkhart County, Indiana was not a proper forum.<sup>83</sup> The trial court denied the motion because it found that the forum selection clause was unenforceable as contrary to Indiana law. Farm Bureau appealed.<sup>84</sup>

The appellate court held that to determine the validity of a forum selection clause, the court must determine whether the clause was "freely negotiated" and whether it was "just and reasonable."<sup>85</sup> After reviewing the record, the court did not find any evidence that the forum selection clause was not freely negotiated between the parties to the policy.<sup>86</sup> With respect to whether the forum selection clause was just and reasonable, the court employed a four-part test to determine whether the clause: (1) limited the fora in which the insurer could be subject to suit; (2) conserved judicial resources; (3) passed on economic benefits to the consumer; and (4) caused problems with multiple litigation.<sup>87</sup>

The court held that the forum selection clause was unenforceable for several reasons.<sup>88</sup> First, the court found that the forum selection clause did not limit the fora in which the insurer could be sued because the insured was free to sue the tortfeasor in Indiana, and the insurer would be forced to intervene as a necessary party to avoid being bound by the trial court judgment.<sup>89</sup> Second, the court found that the sound public policies of preventing multiple litigation and conserving

---

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 327. The policy language provided: "Any court action for any dispute regarding coverage . . . or any dispute regarding whether a person is entitled to recover compensatory damages . . . must take place in the venue of the county and state in which the policy was purchased." *Id.* at 327.

83. *Id.* Farm Bureau also defended on the basis that Sloman did not bring his action within one year as required by the policy, but the court found that there was a question of fact regarding whether Sloman complied with the policy's requirements. *Id.* at 327-28.

84. *Id.* at 328.

85. *Id.* at 329-30.

86. *Id.*

87. *Id.* at 331-34.

88. *Id.*

89. *Id.* at 331; *see* *Stewart v. Walker*, 597 N.E.2d 368, 376 (Ind. Ct. App. 1992) (holding that in order to assert defenses available to tortfeasor, uninsured motorist insurer must intervene in lawsuit filed by insured against tortfeasor).

judicial resources were not furthered by the forum selection clause because the insured would be forced to file suit against the uninsured motorist in Indiana while being forced to litigate against his uninsured motorist carrier in Michigan.<sup>90</sup> Finally, the court found that there was no legitimate argument that economic benefits would be passed onto the consumer due to the forum selection clause because it was unlikely that Farm Bureau would recognize any economic benefit from the forum selection clause.<sup>91</sup>

*G. Court Ordered Assignment of Potential Claim for Breach of Duty of Good Faith Was Invalid*

In *State Farm Mutual Automobile Insurance Co. v. Estep*,<sup>92</sup> the Indiana Supreme Court was confronted with the interesting issue of whether a court could order an insured to assign the insured's claim for breach of the duty of good faith ("bad faith claim") owed by the insurer to another.<sup>93</sup> A creditor, who possessed a judgment against the insured, brought a proceeding supplemental to collect on the judgment.<sup>94</sup> The creditor requested that the trial court order the insured to assign any potential "bad faith claims" against the insured's insurance company to the creditor.<sup>95</sup> The trial court granted the creditor's request, even though the insured did not believe the insurer breached the duty of good faith.<sup>96</sup>

The insurer moved to intervene in the proceedings supplemental and asked the court to vacate the assignment order.<sup>97</sup> The trial court denied the insurer's motion to intervene, and the insurer appealed.<sup>98</sup> The court of appeals reversed in part and affirmed in part the trial court's decision.<sup>99</sup> The court of appeals found that the insurer should have been afforded an opportunity to intervene, but also ruled that the forced "bad faith" claim assignment could occur if a viable claim existed.<sup>100</sup>

The Indiana Supreme Court granted transfer<sup>101</sup> and found that the order assigning the debtor's potential bad faith claim was invalid for a number of reasons.<sup>102</sup> First, the proposed assignment was inconsistent with the "Direct Action Rule" which prohibits a plaintiff from pursuing a lawsuit directly against

---

90. *Farm Bureau Gen. Ins. Co. of Mich.*, 871 N.E.2d at 331-34.

91. *Id.* at 332-33.

92. 873 N.E.2d 1021 (Ind. 2007).

93. *Id.* at 1023.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 1024.

98. *Id.*

99. *State Farm Mut. Auto. Ins. Co. v. Estep*, 818 N.E.2d 114, 126 (Ind. Ct. App. 2004), *vacated*, 873 N.E.2d 1021 (Ind. 2007).

100. *Id.*

101. *State Farm Mut. Auto Ins. Co. v. Estep*, 831 N.E.2d 748 (Ind. 2005).

102. *State Farm Mut. Auto Ins. Co.*, 873 N.E.2d at 1024.

a tortfeasor's insurer based on the actions of the insured tortfeasor.<sup>103</sup> Second, allowing forced assignments of bad faith claims would result in increased litigation because judgment creditors would begin to sue the insurance companies as a matter of course.<sup>104</sup> Third, allowing the assignments would negatively affect settlement negotiations due to the possibility of an excess coverage claim and the cost of litigating it.<sup>105</sup> Finally, all insureds would suffer from increased costs due to the added expenses associated with insurance companies' litigation against assigned "bad faith claims."<sup>106</sup>

## II. HOMEOWNERS CASES

### A. *Trampoline Exclusion in Homeowners Policy Held Unenforceable Due to Structural Ambiguity*

In *National Mutual Insurance Co. v. Curtis*,<sup>107</sup> the Indiana Court of Appeals was asked to determine whether a trampoline exclusion in a homeowners insurance policy was enforceable.<sup>108</sup> While attending a party at the insured's home, the plaintiff was injured after using a trampoline.<sup>109</sup> As a result, the plaintiff filed a lawsuit against the insurance company for the insured seeking a declaratory judgment on whether the insurer owed coverage to the insured for the accident.<sup>110</sup> The insurer argued that by endorsement to the policy, coverage was excluded for bodily injury "[a]rising out of the ownership, maintenance or use of a trampoline."<sup>111</sup> At the trial court, the plaintiff and insurer filed cross-motions for summary judgment on the coverage question, and the court found as a matter of law that coverage existed.<sup>112</sup> The insurer appealed the trial court's decision.<sup>113</sup>

The trampoline exclusion was contained in a portion of the policy titled "Supplemental Exclusions."<sup>114</sup> The issue facing the appellate court was whether

---

103. *Id.* at 1026. The supreme court stated that Direct Action Rule was "well settled" in Indiana with only one limited exception where the plaintiff brings a declaratory judgment lawsuit against the insurer to determine whether the insured possesses liability coverage. *Id.* at 1026 n.10; *see also* *City of South Bend v. Century Indem. Co.*, 821 N.E.2d 5, 10 (Ind. Ct. App. 2005).

104. *State Farm Mut. Auto. Ins. Co.*, 873 N.E.2d at 1027.

105. *Id.* The supreme court observed that potential conflicts of interest between insureds and insurers would be exacerbated because of the insurer's duty to protect its insured from a judgment in excess of the policy limits. *Id.*

106. *Id.*

107. 867 N.E.2d 631 (Ind. Ct. App. 2007).

108. *Id.* at 632.

109. *Id.* at 633.

110. *Id.*

111. *Id.*

112. *Id.* at 633-34.

113. *Id.* at 634.

114. *Id.* at 635.

the exclusion, which appeared to exclude coverage on its face, was appropriately placed within the policy to inform the insured or whether it created an ambiguity such that it could not be enforced.<sup>115</sup> The court defined its task as an attempt “to reconcile the seemingly contradictory duty of an insurance company to provide an unambiguous and clear policy with the duty of an insured to read his insurance policy.”<sup>116</sup>

The court carefully reviewed the relevant insurance policy and found that the homeowners policy at issue was eighteen pages long and was modified by the fourteen page “Supplemental Extension” document.<sup>117</sup> The insuring agreement in the main portion of the policy indicated coverage for personal liability “[i]f a claim is made or a suit is brought against an ‘insured’ for damages because of ‘bodily injury’ or ‘property damage’ caused by an ‘occurrence’ to which this coverage applies.”<sup>118</sup> The trampoline exclusion was located approximately fourteen pages from the location of the other exclusions within the policy.<sup>119</sup>

The appellate court held that the policy was ambiguous because of its confusing structure and the placement of the exclusion in an area separated from the other exclusions.<sup>120</sup> Therefore, the court refused to enforce the exclusion and held that the insurer owed coverage.<sup>121</sup>

Insurance practitioners should be aware of the significance of this case. While the *Curtis* court recognized that the insurer is free to limit coverage, it must do so in a manner that does not confuse the insured.<sup>122</sup> As this court concluded, merely placing the limiting language in an unusual location can render the policy ambiguous.<sup>123</sup>

#### *B. Alleged Child Molestation Was Not a Covered Loss Due to Child Care Exclusion*

In *T.B. ex rel. Bruce v. Dobson*,<sup>124</sup> the court was asked to determine whether a minor’s lawsuit against the insured homeowners for alleged molestation was covered under the homeowners insurance policy.<sup>125</sup> T.B. brought a lawsuit against the insured husband and wife after the child was molested by the husband while at their home for child care services.<sup>126</sup> T.B. also notified the insureds’

---

115. *Id.*

116. *Id.*

117. *Id.* at 636.

118. *Id.* at 632-33.

119. *Id.* at 635.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. 868 N.E.2d 831 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 220 (Ind. 2007).

125. *Id.* at 833.

126. *Id.*

homeowner's insurer, State Farm, of the lawsuit.<sup>127</sup> Upon receiving notice of the claim, State Farm investigated the claim and denied coverage because of a child care exclusion in the policy.<sup>128</sup>

T.B. settled her claim with the insureds, but agreed to only enforce the judgment against State Farm.<sup>129</sup> T.B. filed a motion for proceedings supplemental against State Farm to collect the settlement from State Farm's policy.<sup>130</sup> State Farm responded by asserting that no coverage was available because of the child care exclusion.<sup>131</sup> On cross motions for summary judgment, the court ruled in favor of T.B., and State Farm appealed.<sup>132</sup>

On appeal, the issue before the court was whether the child care exclusion applied.<sup>133</sup> The exclusion stated:

1. Coverage L . . . [does] not apply to:

. . . .

i. any claim made or suit brought against any insured by:

(1) any person who is in the care of any insured because of child care services provided by or at the direction of:

(a) any insured;

(b) any employee of any insured; or

(c) any other person actually or apparently acting on behalf of any insured; or

(2) any person who makes a claim because of bodily injury to any person who is in the care of any insured because of child care services provided by or at the direction of:

(a) any insured;

(b) any employee of any insured; or

(c) any other person actually or apparently acting on behalf of any insured.

*This exclusion does not apply to the occasional child care services*

---

127. *Id.*

128. *Id.* at 833-34.

129. *Id.* at 834.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

*provided by any insured, or to the part-time child care services provided by any insured who is under 19 years of age[.]*<sup>134</sup>

T.B. argued that the exclusion was ambiguous because the term “occasional” found within the exclusion was not defined.<sup>135</sup> Alternatively, T.B. contended that while the wife admittedly provided more than occasional child services, the husband only provided child care services sporadically and that T.B.’s loss arose out of the husband’s supervision.<sup>136</sup>

The evidence revealed that his wife operated the day care in her home five days a week for approximately twenty-five years.<sup>137</sup> Additionally, the wife provided day care services to T.B. for nearly ten years.<sup>138</sup> On one particular day, the wife left T.B. with the husband for a short time, and the husband molested T.B.<sup>139</sup>

Based on this evidence, the court held that the child care exclusion applied to exclude coverage.<sup>140</sup> First, the court found that the term “occasional” was not ambiguous.<sup>141</sup> Next, with respect to determining whether child care services were rendered “occasionally,” the court held that the relevant question was not whether the husband’s child care services were occasional, but rather whether T.B.’s care was occasional.<sup>142</sup> Because the court held that T.B.’s care was more than occasional, the exclusion eliminated any coverage obligation of State Farm.<sup>143</sup>

### *C. Insurer Did Not Have a Duty to Defend Insureds Due to Business Exclusion*

In *Kessel v. State Automobile Mutual Insurance Co.*,<sup>144</sup> the court was asked to interpret a business exclusion found within a homeowners insurance policy. The insured homeowners leased a barn on their property to a horse boarding and riding business.<sup>145</sup> The homeowners owned a dog which ran free on the property.<sup>146</sup> The owner of the horse boarding business had encouraged the homeowners to allow the dog to run loose because she felt more secure with the dog present.<sup>147</sup> On one particular day, a customer of the horse boarding business,

---

134. *Id.* at 835-36 (emphasis added).

135. *Id.* at 837.

136. *Id.*

137. *Id.* at 833.

138. *Id.*

139. *Id.*

140. *Id.* at 837.

141. *Id.*

142. *Id.* at 838.

143. *Id.*

144. 871 N.E.2d 335 (Ind. Ct. App. 2007).

145. *Id.* at 336.

146. *Id.*

147. *Id.*

Jessica Howell, came to the property to ride her horse.<sup>148</sup> As Howell was leaving, she noticed the homeowners' dog appeared to be shaking from cold.<sup>149</sup> As Howell attempted to cover the dog with a towel, the dog bit her.<sup>150</sup>

Howell filed suit against the owner of the horse boarding business and the homeowners to recover for her personal injuries.<sup>151</sup> The liability insurer for the homeowners filed a declaratory judgment lawsuit to determine whether coverage was owed for Howell's lawsuit.<sup>152</sup> The homeowners' insurer moved the trial court for summary judgment on the coverage issue by contending the policy excluded coverage for bodily injury incidents "arising out of or in connection with a 'business.'"<sup>153</sup> The trial court granted the insurer's motion for summary judgment, and Howell appealed.<sup>154</sup>

On appeal, the court noted that the policy phrase "in connection with" is interpreted broadly under Indiana law and determined that Howell's alleged loss was unambiguously excluded under the policy.<sup>155</sup> In doing so, the court cited approvingly the holding of the court in the North Carolina case of *Nationwide Mutual Fire Insurance Co. v. Nunn*,<sup>156</sup> which concluded that where an injured party is on the premises in connection with a business then "all of the possible proximate causes" of the injured person's injuries are "in connection with" the business.<sup>157</sup> Given this broad interpretation, the loss was clearly excluded.<sup>158</sup>

This case demonstrates the broad reading that courts give to the phrase "in connection with" found within an insurance policy.<sup>159</sup> This is a common phrase found in numerous contexts in many types of insurance policies, and thus the holding in this case has potentially broad application.<sup>160</sup>

#### *D. Homeowners Policy Did Not Apply To Workplace Assault and Battery That Produced No Bodily Injury*

The case of *Knight v. Indiana Insurance Co.*<sup>161</sup> involved the interpretation of a business exclusion and the phrase "bodily injury" within a homeowners

---

148. *Id.*

149. *Id.* at 336-37.

150. *Id.*

151. *Id.* at 337.

152. *Id.*

153. *Id.* at 338.

154. *Id.*

155. *Id.* at 339.

156. 442 S.E.2d 340 (N.C. Ct. App. 1994).

157. *Kessel*, 871 N.E.2d at 339-40 (citing *Nationwide Mut. Fire Ins. Co.*, 442 S.E.2d at 344).

158. *Id.*

159. *Id.*

160. *See Hartford Cas. Ins. Co. v. Evansville Vanderburgh Public Library*, 860 N.E.2d 636 (Ind. Ct. App.), *trans. denied*, 869 N.E.2d 459 (Ind. 2007).

161. 871 N.E.2d 357 (Ind. Ct. App. 2007).

policy.<sup>162</sup> In December 1999, former Indiana University Basketball Coach Bob Knight overheard assistant basketball coach, Ronald Felling, criticize him and call him a derogatory name.<sup>163</sup> As a result, Knight confronted Felling over the statements.<sup>164</sup> As Felling attempted to leave the room, Knight bumped Felling, causing Felling to fall backward into a television set.<sup>165</sup> Felling was not injured in the incident.<sup>166</sup> Felling, however, filed a federal lawsuit against Knight seeking monetary damages because Knight had allegedly violated his constitutional right to be free of assault.<sup>167</sup>

Knight reported the lawsuit to his homeowners insurer, and the insurer denied coverage for the suit.<sup>168</sup> The insurer denied coverage on the basis that there was no "bodily injury"<sup>169</sup> as required under the policy and that the loss was excluded under the "business"<sup>170</sup> and "expected or intended" exclusions.<sup>171</sup> After settling the lawsuit with Felling, Knight filed a lawsuit against his homeowners insurer for indemnification.<sup>172</sup> On cross-motions for summary judgment, the court entered judgment for the insurer, and Knight appealed.<sup>173</sup>

On appeal, Knight asserted that he was entitled to indemnity for the settlement of Felling's lawsuit, and even if he was not, the insurer breached its contract by failing to reasonably investigate and defend Knight.<sup>174</sup> The court, however, rejected Knight's arguments and found that there was clearly no "bodily injury" to trigger coverage and that coverage was excluded under the unambiguous language of the business exclusion.<sup>175</sup>

The court also focused on whether the insured properly refused to defend Knight in the Felling lawsuit.<sup>176</sup> While the court acknowledged that an insurer's duty to defend is broader than its duty to indemnify, it held that the refusal to defend in this case was proper.<sup>177</sup> According to the court:

As a matter of course, when the insured is charged a premium, he or

---

162. *Id.* at 358.

163. *Id.*

164. *Id.*

165. *Id.* at 359.

166. *Id.*

167. *Id.*

168. *Id.* at 359-60.

169. "Bodily injury" was defined as "[b]odily harm, sickness or disease, including required care, loss of services, and death that results." *Id.* at 361.

170. The policy language for this exclusion provided that no coverage existed for bodily injury "arising out of or in connection with a business engaged in by an insured." *Id.* at 362.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 362.

175. *Id.*

176. *Id.*

177. *Id.* at 362-63.

she has an expectation of a defense in the face of a lawsuit for a contemplated risk. However, in the continuum of potential claims, one may arise which is so far removed from the focus of the parties' contract that there is no question a reasonable claims manager could deny coverage and refuse to defend against it, although the refusal is at the Insurer's peril with regard to collateral estoppel.<sup>178</sup>

When an insurer denies an insured's request for a defense to a lawsuit, the insurer faces being collaterally estopped from re-litigating matters decided in the litigation.<sup>179</sup> The *Knight* case demonstrates that when insurers are absolutely convinced that no coverage is owed, it may successfully refuse to defend its insured.

### III. COMMERCIAL CASES

#### A. *Insured Breached Policy by Refusing to Submit to Examination Under Oath*

The decision of *Knowledge A-Z, Inc. v. Sentry Insurance*,<sup>180</sup> is an interesting decision that discusses an insured's obligations under a commercial general liability policy. Knowledge A-2, Inc. ("Knowledge") possessed an insurance policy with Sentry Insurance ("Sentry") which contained the following provisions outlining the insured's duties under the policy:

#### 3. DUTIES IN THE EVENT OF LOSS OR DAMAGE

a. You must see that the following are done in the event of loss or damage to Covered Property:

\* \* \* \* \*

(6) As often as may be reasonably required, permit [Sentry] to inspect the property proving the loss or damage and examine [the insured's] books and records.

\* \* \* \* \*

(8) Cooperate with us in the investigation or settlement of the claim

\* \* \* \* \*

b. We may examine any insured under oath while not in the presence of

---

178. *Id.* at 362 (citing *State Farm Fire & Cas. Co. v. T.B. ex rel. Bruce*, 762 N.E.2d 1227, 1230 (Ind. 2002)).

179. *State Farm Fire & Cas. Co.*, 762 N.E.2d at 1230.

180. 857 N.E.2d 411 (Ind. Ct. App. 2006), *trans. denied*, 869 N.E.2d 457 (Ind. 2007).

any other insured and at such times as may be reasonably required, about any matter relating to this insurance or the claim including an insured's books and records. In the event of an examination, an insured's answers must be signed.<sup>181</sup>

In December 2002, Knowledge made a claim with Sentry alleging that it had sustained a loss of \$1,337,012 as a result of an employee's theft of computer equipment.<sup>182</sup> Over the next year and a half, Sentry contended that Knowledge failed to provide it with documents supporting its claim and to permit its employee to submit to an examination under oath.<sup>183</sup> On June 21, 2004, Sentry filed a declaratory judgment asserting that it did not owe coverage because Knowledge did not comply with the provisions under the policy outlining its duties.<sup>184</sup> The trial court granted Sentry's motion for summary judgment on the complaint, and Knowledge appealed.<sup>185</sup>

Relying heavily on the recent Indiana Supreme Court case of *Morris v. Economy Fire & Casualty Co.*,<sup>186</sup> the court affirmed the trial court's ruling.<sup>187</sup> According to the court, the duties imposed on the insured by the policy were not from "cooperation clauses" that may necessitate the insurer to show some prejudice to be enforceable.<sup>188</sup> Instead, the insurer's requests for documents and an examination under oath of Knowledge's employee were mandatory and subject only to a reasonableness standard.<sup>189</sup> The insured's refusal to submit to an examination under oath was a sufficient reason for the insurer to deny coverage based upon the violation of conditions outlined in the policy.<sup>190</sup>

#### *B. Damages to Building Caused by Negligence of a Third Party Was Not a Covered Loss*

The court in *Hartford Casualty Insurance Co. v. Evansville Vanderburgh Public Library*<sup>191</sup> was asked to analyze a "general exclusion" and an "ensuing loss" provision within an insurance policy. An insured library purchased a nearby historic building for purposes of expanding the library and also purchased an adjacent lot in order to construct an underground parking area for the new building.<sup>192</sup> As the excavation team hired by the library was installing sheet piling around the edge of the historic building with a pile driving hammer, the

---

181. *Id.* at 415.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. 848 N.E.2d 663 (Ind. 2006).

187. *Knowledge A-Z, Inc.*, 857 N.E.2d at 420 (citing *Morris*, 848 N.E.2d at 666).

188. *Id.*

189. *Id.*

190. *Id.*

191. 860 N.E.2d 636 (Ind. Ct. App.), *trans. denied*, 869 N.E.2d 459 (Ind. 2007).

192. *Id.* at 638.

building was damaged.<sup>193</sup> When the dirt behind the sheet wall was excavated, the building suffered structural damage and had to be demolished.<sup>194</sup> The library's investigation concluded that the design and use of the pile driving hammer and earth retention system caused the damage of the building.<sup>195</sup>

As a result of the damage to the building, the library submitted a claim to its property insurance company for reimbursement, and the insurer denied coverage.<sup>196</sup> The insurer relied on the "general exclusion" in its policy, which read:

We will not pay for loss or damage caused by, resulting from, or arising out of any acts, errors, or omissions by you or others in any of the following activities, regardless of any other cause or event that contributes concurrently, or in any sequence to the loss or damage:

1. Planning, zoning, developing, surveying, testing or siting property;

\* \* \*

3. *Any of the following performed to or for any part of land, buildings, roads, water or gas mains, sewers, drainage ditches, levees, dams, other structures or facilities, or any Covered Property;*

a. *Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction; or*

b. *Furnishing of work, materials, parts or equipment in connection with the design, specifications, workmanship, repair, construction, renovation, remodeling, grading or compaction[.]*<sup>197</sup>

The library argued that although the general exclusion excepted coverage for construction losses (e.g., the cost to repair defective construction work), the "ensuing loss" provision in the policy permitted coverage for loss that ensues or results from construction activities.<sup>198</sup> The ensuing loss provision, which was an exception to the general exclusion, read as follows: "*If physical loss or damage by a Covered Cause of Loss ensues, we will pay only for such ensuing loss or damage.*"<sup>199</sup> On cross motions for summary judgment, the trial court ruled for the library, and the insurer appealed.<sup>200</sup>

On appeal, the court analyzed the relevant policy language and reversed the

---

193. *Id.* at 638-39.

194. *Id.* at 639.

195. *Id.*

196. *Id.*

197. *Id.* at 641.

198. *Id.* at 644.

199. *Id.* at 641.

200. *Id.* at 638.

trial court's ruling.<sup>201</sup> According to the court, "[a]n exception to an exclusion cannot create coverage where none exists."<sup>202</sup> In order to determine whether coverage existed, the court had to determine what the "efficient proximate cause" of the loss was.<sup>203</sup> The efficient proximate cause rule is a rule used in many other jurisdictions in insurance coverage cases and provides that "where a peril specifically insured against sets other causes into motion which, in an unbroken sequence, produce the result for which recovery is sought, the loss is covered, even though other events with the chain of causation are excluded from coverage."<sup>204</sup> Using the "efficient proximate cause" rule, the court held that the cause of the loss was the third party's negligent construction and was excluded from coverage.<sup>205</sup>

This case is important because it marks the first time that an Indiana court has shown strong support for the "efficient proximate cause" rule. According to the court, "[w]e are persuaded by the analysis and reasoning of the efficient proximate cause rule in the interpretation and construction in policy language and believe that it serves the end of understandable and predictable coverage in the policy at issue here and all-risk policies in general."<sup>206</sup>

### *C. Insurer Satisfied Its Duty to Defend Insured by Interpleading Coverage Limits*

In *Abstract & Title Guaranty Co. v. Chicago Insurance Co.*,<sup>207</sup> the Seventh Circuit Court of Appeals was asked to determine whether an insurer had satisfied its duty to its insureds by interpleading coverage limits and refusing to defend insured. Abstract & Title Guaranty Co. ("Abstract") provided services in connection with real estate transactions.<sup>208</sup> One of its employees defrauded customers and caused millions of dollars worth of deals to turn sour.<sup>209</sup> When a customer contacted Abstract about the fraud, it notified its insurer of the claim, and before long it was apparent that more claims would be forthcoming.<sup>210</sup> According to the court, the insurance company "began to sense that claimants were circling [Abstract] much like stick-wielding children around a piñata."<sup>211</sup>

When Abstract started getting served with complaints, the insurer opted to

---

201. *Id.*

202. *Id.* at 646 (quoting *Amerisure Inc. v. Wurster Constr. Co.*, 818 N.E.2d 998, 1005 (Ind. Ct. App. 2004)).

203. *Id.*

204. *Id.* at 646 (citing *McDonald v. State Farm Fire & Cas. Co.*, 837 P.2d 1000, 1004 (Wash. 1992)).

205. *Id.*

206. *Id.* at 647.

207. 489 F.3d 808 (7th Cir. 2007).

208. *Id.* at 809.

209. *Id.* at 810.

210. *Id.*

211. *Id.*

interplead its liability limits in the federal district court in lieu of defending Abstract.<sup>212</sup> The insurer instructed Abstract to hire counsel of their own choosing and seek payment for the counsel from the interpleaded funds.<sup>213</sup> After the funds were dispersed to the defrauded victims, Abstract filed a breach of contract action against its insurer alleging bad faith by the insurer in failing to defend it in the lawsuits filed.<sup>214</sup> On cross motions for summary judgment, the court found in favor of the insurer.<sup>215</sup>

On appeal, the Seventh Circuit Court of Appeals had the benefit of the recently decided Indiana decision of *Mahan v. American Standard Insurance Co.*<sup>216</sup> to aid it in determining how an Indiana court would rule on an insurer interpleading its policy coverage limits. As the court noted, the facts of *Mahan* were substantially similar to the facts in the present case with one important difference. In *Mahan*, the court allowed the insurer to interplead its limits without defending its insured because no lawsuits were filed against the insured.<sup>217</sup> In the case at hand, there were pending lawsuits against Abstract when the insurer declined to defend.<sup>218</sup> The court, however, found that the existence of lawsuits pending against the insured was not a significant reason to deter it from making a decision in *Mahan*, and found that the insurer had satisfied its duty.<sup>219</sup>

This case is significant because it extends *Mahan* to allow insurers to interplead funds and refuse to defend their insureds even if there are pending lawsuits against the insureds. Indiana appellate courts will likely approve this decision because the policy reasons apply to both situations.

#### IV. LIFE INSURANCE CASE : A BENEFICIARY COULD NOT RECOVER UNDER LIFE INSURANCE POLICY DUE TO SUICIDE EXCLUSION

The decision of *Officer v. Chase Insurance Life & Annuity Co.*<sup>220</sup> is an interesting decision with potentially broad application. Officer, a beneficiary of his wife's life insurance policy, sought to recover \$1,000,000 in benefits after his wife committed suicide.<sup>221</sup> The relevant insurance policy contained a provision which limited coverage for a suicide that occurred within two years of the date of issue to the amount of all premiums paid under the policy.<sup>222</sup> Officer's wife

---

212. *Id.*

213. *Id.* (stating that when the funds were eventually distributed, Abstract & Title Guaranty did receive a significant portion in defense costs).

214. *Id.*

215. *Id.*

216. 862 N.E.2d 669 (Ind. Ct. App.), *trans. denied*, 869 N.E.2d 456 (Ind. 2007).

217. *Abstract & Title Guar. Co.*, 489 N.E.2d at 811.

218. *Id.* at 810.

219. *Id.* at 813.

220. 478 F. Supp. 2d 1069 (N.D. Ind.), *cert. denied*, 500 F. Supp. 2d 1083 (N.D. Ind. 2007).

221. *Id.* at 1071.

222. *Id.*

committed suicide thirty-eight days short of the two-year anniversary of the policy's date of issue.<sup>223</sup> The life insurance company concluded that the suicide provision applied and paid the benefits due, which amounted to \$540 in premiums that had been paid.<sup>224</sup>

Officer rejected the \$540 and demanded full payment under the policy.<sup>225</sup> When the insurer refused to pay more than the premiums paid pursuant to the suicide provision, Officer filed suit against the insurer.<sup>226</sup> The insurer moved for summary judgment on Officer's complaint, and the court granted the motion.<sup>227</sup> Officer appealed the trial court's ruling.<sup>228</sup>

On appeal, Officer argued that the insurer breached the life insurance policy due to the fact that the suicide provision in the policy did not apply because his wife had substantially performed her obligations under the policy at the time of her suicide.<sup>229</sup> The court noted that "the doctrine of substantial performance applies 'where performance of a nonessential condition is lacking, so that the benefits received by a party are far greater than the injury done to him by the breach of the other party.'"<sup>230</sup> The court, however, refused to apply the doctrine of substantial performance to the insurance policy and found that the suicide provision was applicable.<sup>231</sup> Therefore, the insurer's liability was limited to \$540.

This case is important because it holds that the doctrine of substantial performance will not be applied to rewrite the terms of an insurance policy.<sup>232</sup> Given the prevalence of time limitations in various insurance policies, this case could have wide application.

---

223. *Id.* at 1076.

224. *Id.* at 1072.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.* Officer also argued that the suicide provision was ambiguous and invalid as a forfeiture clause. *Id.* The court rejected both of these arguments. *Id.*

230. *Id.* at 1076 (quoting *Dove v. Rose Acre Farms, Inc.*, 434 N.E.2d 931, 935 (Ind. Ct. App. 1982)).

231. *Id.*

232. *Id.*