

SURVEY OF RECENT DEVELOPMENTS IN INSURANCE LAW

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During this survey period,¹ the Indiana appellate and federal courts addressed many cases in the fields of automobile, homeowners, and commercial insurance. A large number of decisions focused upon uninsured/underinsured motorist coverage. This Article examines the most significant decisions and discusses their impact on the field of insurance law.²

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1. The survey period for this Article is approximately November 1, 2007 to October 31, 2008.

2. For cases that were decided during the survey period but are not discussed in this Article, see *Nautilus Insurance Co. v. Reuter*, 537 F.3d 733 (7th Cir. 2008) (applying “most intimate contacts” test as Indiana’s choice of law principle, and concluding that commercial general liability insurer did not owe coverage for victims claims of negligent hiring and supervision of insured’s employees); *Carolina Casualty Insurance Co. v. Estate of Studer*, 555 F. Supp. 2d 972 (S.D. Ind. 2008) (finding that trucking liability insurer did not act in bad faith by interpleading policy limits for court to allocate among injured claimants); *Economy Premier Assurance Co. v. Wernke*, 521 F. Supp. 2d 852 (S.D. Ind. 2007) (applying intentional acts exclusion in liability policy to exclude coverage to insured for striking claimant in the face); *Old Republic Insurance Co. v. RLI Insurance Co.*, 887 N.E.2d 1003 (Ind. Ct. App. 2008) (determining priority of insurance coverages available to truck driver involved in accident), *trans. denied*, 2009 Ind. LEXIS 2391 (Ind. Mar. 5, 2009); *Allstate Insurance Co. v. Fields*, 885 N.E.2d 728 (Ind. Ct. App. 2008) (concluding that insurer did not breach its duty of good faith to insured when it refused to pay its policy limits when demanded by insured), *trans. denied*, 2009 Ind. LEXIS 31 (Ind. Jan. 15, 2009); *General Casualty Insurance Co. v. Bright*, 885 N.E.2d 56 (Ind. Ct. App. 2008) (holding that policy’s one-year limitation of action clause did not apply to prohibit insurer’s lawsuit against insured to void coverage); *Allianz Insurance Co. v. Guidant Corp.*, 884 N.E.2d 405 (Ind. Ct. App. 2008) (addressing a number of issues relating to the insurer’s duty to defend the insured, including a discussion of the duty when an insured possesses a policy deductible or a self-insured retention), *trans. denied*, 2009 Ind. LEXIS 19 (Ind. Jan. 8, 2009); *French v. State Farm Fire & Casualty Co.*, 881 N.E.2d 1031 (Ind. Ct. App. 2008) (concluding that insured may be entitled to difference in premium when insurance agent may have sold unnecessary insurance to insured); *Insuremax Insurance Co. v. Bice*, 879 N.E.2d 1187 (Ind. Ct. App.) (finding a question of fact existed on insurer’s ability to void policy because of insured’s alleged misrepresentation of accident details), *trans. denied*, 891 N.E.2d 50 (Ind. 2008); *Billboards “N” Motion, Inc. v. Saunders-Saunders & Assoc., Inc.*, 879 N.E.2d 1135 (Ind. Ct. App.) (concluding that insurance agent is not responsible for failing to advise insured on type or amount of insurance coverage to obtain absent a special relationship), *trans. denied*, 891 N.E.2d 51 (Ind. 2008); *American Family Mutual Insurance Co. v. Matusiak*, 878 N.E.2d 529 (Ind. Ct. App. 2007) (addressing whether homeowners insurance policy applied to hail damage claim to house that was in process of being sold), *trans. denied*, 898 N.E.2d 1218 (Ind. 2008); *McMurray v. Nationwide Mutual Insurance Co.*, 878 N.E.2d 488 (Ind. Ct. App. 2007) (prorating underinsured motorist coverage under two applicable insurance policies), *trans. denied*, 891 N.E.2d 50 (Ind. 2008); *Spacey v. State Farm Fire & Casualty Co.*, 878 N.E.2d 297 (Ind. Ct. App. 2007) (interpreting ten-day cancellation of policy period in IND. CODE § 27-7-12-13 (2004) referenced

I. AUTOMOBILE COVERAGE CASES

A. *Courts Address Whether Claims for Emotional Distress Damages Constitute "Bodily Injury" Under Automobile Insurance Policy*

The insurance coverage issue that received the most attention during this survey period was whether an insured's claim for emotional distress satisfied the definition of "bodily injury"³ to be entitled to coverage. Indiana's appellate courts addressed the issue on three occasions in the context of uninsured or underinsured motorist coverage, while another decision addressed it on a liability claim. A number of interesting outcomes followed from these decisions.

In *State Farm Mutual Auto Insurance Co. v. Jakupko*,⁴ a father drove an automobile with his wife and two children as passengers.⁵ Unfortunately, the family was involved in an automobile accident with an underinsured motorist.⁶ The father was seriously injured in the accident, and the wife and one child suffered emotional distress as a result of being in the car and witnessing the father's injuries.⁷

The family possessed underinsured motorist insurance coverage with State Farm which had limits of \$100,000 for claims of "each person" and \$300,000 for "each accident."⁸ State Farm paid \$100,000 to the father to satisfy his claim.⁹ However, State Farm denied the remaining family members' claims seeking an additional \$200,000 for emotional distress by contending that their claims arose from the father's injuries, and were included in the amount paid to satisfy the father's claim.¹⁰

The trial court and Indiana Court of Appeals concluded that State Farm's interpretation that the family members' claims were included in the father's

calendar as opposed to business days); *Smith v. Auto-Owners Insurance Co.*, 877 N.E.2d 1220 (Ind. Ct. App. 2007) (applying a "discovery rule" for determining when an insured should have realized that a tortfeasor's insurer became insolvent in order to have an uninsured motorist claim to pursue), *trans. denied*, 891 N.E.2d 43 (Ind. 2008); *Vectren Energy Marketing & Service, Inc. v. Executive Risk Specialty Insurance Co.*, 875 N.E.2d 774 (Ind. Ct. App. 2007) (members of a limited liability corporation lacked standing to sue corporation's insurer for a coverage declaration).

3. Most standard insurance policies define "bodily injury" to mean "bodily injury to a person and sickness, disease or death which results from it." *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Jakupko*, 881 N.E.2d 654, 656 (Ind. 2008). Indiana's uninsured/underinsured motorist statute requires coverage to apply to "bodily injury, sickness or disease." IND. CODE § 27-7-5-2(a)(1) (2004).

4. 881 N.E.2d 656 (Ind. 2008).

5. *Id.* at 655.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

claim contravened Indiana's underinsured motorist statute.¹¹ The Indiana Supreme Court agreed with the lower courts.¹² That court first observed that it was undisputed that the family members sustained an "impact" from the accident such that they could seek to recover for their claims under Indiana law.¹³

The supreme court also determined that the family members' emotional distress claims satisfied the policy and statutory definition of "bodily injury."¹⁴ Because an emotional distress claim involves "mental anguish," the court concluded that this demonstrated a "sickness" under the definition of "bodily injury."¹⁵

The court also rejected State Farm's claim that the family members' emotional distress claim was included in its payment to the father of the "per person" limits.¹⁶ The court concluded that Indiana's underinsured motorist statute prevents State Farm from attempting to limit the family members' claims by lumping them together with the father's claim.¹⁷ Thus, the family members were entitled to assert separate per person claims of \$100,000 up to the per accident limit of \$300,000.¹⁸

On the same day that the Indiana Supreme Court decided the *Jakupko* case, it also decided *Elliott v. Allstate Insurance Co.*¹⁹ Factually, the *Elliott* case is very similar to *Jakupko* except *Elliott* involved a mother who was driving a car with her sister and daughter as passengers when they had an accident with an uninsured motorist.²⁰ The mother was insured with Allstate, who paid her the "each person" uninsured motorist limit of \$25,000.²¹ The sister and daughter sought the remaining \$25,000 of "each accident" uninsured motorist coverage limits for their emotional distress claims after witnessing the mother's injuries.²²

The trial court agreed with Allstate that the passengers' claims were included in the payment made to the mother for her claims.²³ The Indiana Court of Appeals reversed the trial court by concluding that the emotional distress claims of the passengers were entitled to their own separate limits of liability.²⁴

The Indiana Supreme Court agreed with the court of appeals.²⁵ Referencing

11. *Id.* at 661.

12. *Id.*

13. *Id.* at 656. For analysis of Indiana's law on ability to recover emotional distress damages, see *Shaumber v. Henderson*, 579 N.E.2d 452 (Ind. 1991).

14. *Jakupko*, 881 N.E.2d at 658.

15. *Id.*

16. *Id.* at 662.

17. *Id.*

18. *Id.*

19. 881 N.E.2d 662 (Ind. 2008).

20. *Id.* at 663.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 665.

its newly issued decision in *Jakupko*, the court found that Allstate's attempt to restrict the passengers' claims for uninsured motorist coverage violated Indiana's uninsured motorist statute.²⁶

The decision of *State Farm Mutual Automobile Insurance Co. v. D'Angelo*²⁷ was the third uninsured/underinsured motorist case addressing emotional distress claims. A child bicyclist was seriously injured and eventually died when he was struck by an underinsured motorist.²⁸ The child's mother did not witness the crash, but came upon the scene shortly after it happened.²⁹ The mother attempted to lift the vehicle off of the child, and she also observed the emergency personnel treating the child.³⁰ As a result, she suffered from emotional distress.³¹

The underinsured motorist's liability insurer paid its limits of \$25,000 for the child's wrongful death claim and an additional \$25,000 for the mother's claim for negligent infliction of emotional distress.³² The mother then presented an underinsured motorist claim to her insurance carrier, State Farm, seeking redress for the child's wrongful death and the mother's emotional distress.³³ State Farm paid an additional \$75,000 for the wrongful death claim to satisfy the \$100,000 policy limit.³⁴ However, State Farm denied that the mother possessed an underinsured motorist claim under the policy because it believed that she did not sustain a separate bodily injury independent of any injury sustained by the child.³⁵

The trial court granted summary judgment to the mother on her claim by finding that State Farm's interpretation of the policy violated Indiana's underinsured motorist statute.³⁶ The Indiana Court of Appeals reversed the trial court.³⁷ The court concluded that the mother's claims for emotional distress arose because she witnessed the child's *injuries*, not the child's *accident*.³⁸ Thus, her claim arose from the child's bodily injury, and was limited in recovery of underinsured motorist benefits to the amount paid to the child for his injury and death.³⁹

Additionally, such a finding limited the mother's ability to seek any coverage pursuant to the policy's "Each Accident" limit.⁴⁰ Because such additional

26. *Id.* at 664; *see also* IND. CODE § 27-7-5-2(a)(1) (2004).

27. 875 N.E.2d 789 (Ind. Ct. App. 2007), *trans. denied*, 891 N.E.2d 42 (Ind. 2008).

28. *Id.* at 791.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 792.

34. *Id.*

35. *Id.*

36. *Id.* at 794-95; *see* IND. CODE § 27-7-5-2 (2004) (Indiana's underinsured motorist statute).

37. *D'Angelo*, 875 N.E.2d at 800.

38. *Id.* at 798.

39. *Id.*

40. *See id.*

coverage limits applied to a person sustaining a bodily injury while “actually involved in the accident,” the mother clearly did not qualify as she witnessed the post-accident events.⁴¹ The court also concluded that Indiana’s underinsured motorist statute was not violated by State Farm’s policy language.⁴²

The final emotional distress claim involved a third party liability claim, as opposed to a first party uninsured/underinsured motorist claim, but it was issued on the same date as the *Jakupko* and *Elliott* decisions. In *State Farm Mutual Automobile Insurance Co. v. D.L.B. ex rel. Brake*,⁴³ a young child witnessed his cousin being struck and killed by a motorist while they rode their bikes.⁴⁴ The child sustained no personal injury, but did suffer from traumatic stress.⁴⁵

At the time of the accident, State Farm insured the motorist.⁴⁶ State Farm paid its limits to the deceased cousin’s parents to settle their claims against the motorist.⁴⁷ However, State Farm denied the child witness’ liability claim for emotional distress because he did not sustain “bodily injury” as required by the policy.⁴⁸

Both the trial court and Indiana Court of Appeals found that the child was entitled to pursue a liability claim against the motorist as his claim for emotional distress satisfied the definition of “bodily injury” in the motorist’s policy.⁴⁹ The Indiana Supreme Court reversed the two lower courts and concluded that no coverage was available for the emotional distress claim.⁵⁰ Relying upon its decision in *Jakupko*, the court concluded that because the child sustained no impact from the accident, his emotional distress damages did not satisfy the definition of “bodily injury,” which required some “bodily touching” or impact.⁵¹

These cases are very instructive in dealing with emotional distress claims and whether they satisfy the definition of “bodily injury” in an insurance policy. The cases indicate that emotional distress claims do satisfy the definition if they include an impact; however, a bystander who witnesses the accident or comes upon the accident shortly after it happens, will not satisfy the definition.

41. *Id.*

42. *Id.* at 800. It is interesting to observe that the Indiana Supreme Court denied transfer on the *D’Angelo* decision after it decided *Jakupko* and *Elliott*. Thus, it can be argued that the supreme court probably recognized a clear distinction in the cases which supports the court of appeals decision.

43. 881 N.E.2d 665 (Ind. 2008).

44. *Id.* at 665.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 666.

49. *Id.*

50. *Id.*

51. *Id.*; see also *State Farm Mut. Auto. Ins. Co. v. Jakupko*, 881 N.E.2d 654, 659 (Ind. 2008); *Wayne Twp. Bd. of Sch. Comm’rs v. Ind. Ins. Co.*, 650 N.E.2d 1205, 1210 (Ind. Ct. App. 1995).

B. Policy Exclusion for Use of Rental Vehicle Upheld Despite Indiana Statute Defining Primary Coverage Responsibility

An insurance coverage issue that frequently arises focuses upon the primary insurance responsibility for vehicle renters involved in accidents. In *Safe Auto Insurance Co. v. Enterprise Leasing Co.*,⁵² the insured rented a truck from a rental company for an out-of-state trip because the insured believed his vehicle was unreliable, and he wanted to transport his motorcycle in a more reliable rental truck.⁵³ In executing the rental contract, the insured declined to purchase the rental company's liability protection for the truck.⁵⁴

While the insured was using the truck in a state other than Indiana, he was involved in an accident that produced personal injuries to another motorist.⁵⁵ At the time of the rental, the insured possessed a liability insurance policy with Safe Auto.⁵⁶ The injured motorist filed a complaint against the insured, and Safe Auto hired counsel to defend the insured under a reservation of rights.⁵⁷ The case eventually settled for an amount equal to the insured's policy limits with Safe Auto.⁵⁸

Safe Auto filed a declaratory judgment action, contending that it did not owe liability coverage to the insured because of an exclusion which stated:

[Safe Auto] will provide liability coverage for any auto [an insured rents] from a car rental agency or garage, ONLY while your covered auto is being serviced or repaired, or it if [sic] has been stolen or destroyed. PLEASE NOTE THAT NO COVERAGE IS AFFORDED TO VEHICLES RENTED FOR REASONS OTHER THAN THOSE STATED ABOVE.⁵⁹

Because the insured's personal automobile was not being repaired and was not stolen, Safe Auto argued that its insurance coverage was excluded, and therefore, the rental company possessed the insurance coverage obligation.

The rental company contended that Safe Auto's policy exclusion was contrary to an Indiana statute that defined the primary insurance obligation on leased vehicles.⁶⁰ The statute in question provides:

When a claim arises from the operation of a motor vehicle leased under a written lease agreement, if under the agreement the lessee agrees to provide coverage for damage resulting from his operation of the vehicle, then the motor vehicle insurance coverage of the lessee is primary. No

52. 889 N.E.2d 392 (Ind. Ct. App. 2008), *reh'g denied*.

53. *Id.* at 394.

54. *Id.*

55. *Id.* at 395.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

claim may be made against any coverage available for the vehicle by the lessor until the limits of the motor vehicle insurance coverage provided by the lessee for the vehicle are exhausted.⁶¹

The trial court granted the rental company's motion for summary judgment.⁶² On appeal, the Indiana Court of Appeals reversed.⁶³ The court found that there was no agreement between the insured and the rental company for the insured to provide insurance coverage which was necessary for application of the statute.⁶⁴ In fact, the insured testified that he did not expect Safe Auto's policy to cover the rented truck even though he declined to purchase the rental company's supplemental insurance.⁶⁵

The court also commented in dicta that even if the primary insurance statute was applicable, it would not invalidate Safe Auto's policy exclusion.⁶⁶ Instead, the statute clarifies the primary insurance obligation when two applicable policies conflict.⁶⁷ The court suggested that Indiana's General Assembly, rather than the judicial system, was the proper forum for public policy arguments to prevail on the validity of Safe Auto's exclusion for coverage of rented vehicles.⁶⁸

The court's analysis that the statute did not apply appears correct because the Safe Auto policy excluded coverage for this particular situation. This decision properly enforced the terms of the insurance policy.

C. Court Refuses to Permit Forced Assignment by Insured of Breach of Duty of Good Faith Claim Against Insurer

When an insured has insufficient insurance coverage to address an injured plaintiff's damages, the insured usually is agreeable to assigning to the plaintiff any potential claim for breach of duty of good faith by the insurer, in exchange for the plaintiff's agreement not to attempt to collect the excess judgment from the insured. However, in *State Farm Mutual Automobile Insurance Co. v. Estep*,⁶⁹ the insured refused to agree to the assignment.⁷⁰ The interesting questions addressed in that case focused upon whether the plaintiff could force the insured to assign the claim and whether the insurer had a right to intervene in the supplemental stage of the lawsuit against the insured.

The facts revealed that the insured was intoxicated when he struck the plaintiff who was riding on a motorcycle.⁷¹ As a result of the impact, plaintiff

61. IND. CODE § 27-8-9-9 (2003).

62. *Enter. Leasing Co.*, 889 N.E.2d at 395.

63. *Id.* at 398.

64. *Id.* at 397.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. 873 N.E.2d 1021 (Ind. 2007).

70. *Id.* at 1023.

71. *Id.* at 1022 n.1.

suffered devastating injuries which ultimately led to the plaintiff's untimely death.⁷² Before his death, the plaintiff filed a lawsuit against the insured.⁷³ The insured possessed an insurance policy with bodily injury liability limits of \$50,000 with State Farm.⁷⁴ State Farm hired defense counsel for the insured, and the insured also retained his own personal counsel.⁷⁵ State Farm repeatedly offered the insured's full bodily injury limits to the plaintiff in exchange for a release of all claims, but the plaintiff refused all offers.⁷⁶

The case proceeded to trial, and a jury awarded the plaintiff \$650,000 in compensatory damages and \$15,000 in punitive damages.⁷⁷ State Farm paid the plaintiff the \$50,000 of bodily injury limits, and the defense counsel it hired to defend the insured withdrew from representing the insured.⁷⁸ The plaintiff instituted supplemental proceedings against the insured seeking the remaining \$615,000 of the jury's award.⁷⁹ The plaintiff requested that the insured voluntarily assign to him any potential bad faith claim against State Farm, but the insured refused by contending that there was no justifiable basis to claim that State Farm committed a breach of its duty of good faith.⁸⁰

The plaintiff requested that the court issue an order requiring the insured to assign any claim he had against State Farm to the plaintiff.⁸¹ When this request was made, State Farm was not a party to the proceedings supplemental.⁸² Despite the insured's objection, the court ordered the insured to assign any potential claim it possessed against State Farm to the plaintiff.⁸³

After receiving the forced assignment, the plaintiff filed a separate lawsuit against State Farm and the insured's personal counsel in Illinois in an attempt to recover the outstanding jury award.⁸⁴ Upon receiving notice of the lawsuit and assignment, State Farm moved to intervene in the Indiana litigation and challenge the assignment.⁸⁵ When the trial court denied both of State Farm's motions, State Farm appealed.⁸⁶

On appeal, the Indiana Court of Appeals reversed the trial court, and concluded that State Farm should have been granted the right to intervene.⁸⁷ The

72. *Id.* at 1022-23.

73. *Id.* at 1023.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 1023-24.

85. *Id.* at 1024.

86. *Id.*

87. *Id.*

court of appeals also found that a forced assignment of a potential bad faith claim could be made, but only if the court first determined that a viable claim existed.⁸⁸

The supreme court granted transfer.⁸⁹ That court agreed with the court of appeals that State Farm should have been permitted to intervene to challenge the assignment.⁹⁰ The court also concluded that the forced assignment was improper under Indiana law.⁹¹ The court observed that forced assignments of potential bad faith claims were contrary to Indiana's Direct Action Rule, which prohibits a third party to the insurance contract from bringing a lawsuit directly against an insurance company for bad faith or to recover an excess judgment.⁹² The court also found that allowing such an action would detrimentally change the "'special relationship'"⁹³ that exists between an insured and insurer when a plaintiff sues the insured by creating more potential conflicts of interest.⁹⁴ Finally, the court found that to permit such a forced action would increase insurance costs to all insureds, which includes insureds who found the defense provided by their insurance company satisfactory.⁹⁵

The court also commented upon the fact that State Farm's exposure risk was significantly increased beyond any premium paid by the insured if a forced assignment was permitted.⁹⁶ As demonstrated by this case, State Farm received premiums for \$50,000 of liability insurance coverage which it provided to its insured.⁹⁷ To permit a forced assignment, State Farm's potential exposure was for the full amount of the judgment against the insured, even though State Farm offered its policy limits repeatedly to attempt to settle the case.⁹⁸

In this case, it appears appropriate that a forced assignment against State Farm was not permitted after it repeatedly attempted to settle the case by offering its policy limits. However, a potential bad faith claim is an asset⁹⁹ of the insured that a creditor, such as the plaintiff, should be able to seek in proceedings supplemental, even if by forced assignment. If forced assignments are allowed,

88. *Id.*

89. *Id.* at 1028.

90. *Id.* at 1024 n.6. The Indiana Supreme Court determined, however, that State Farm should have been permitted to intervene pursuant to Indiana Trial Rule 24(B) ("permissive intervention") as opposed to the court of appeals' conclusion that intervention was as a matter of right under Indiana Trial Rule 24(A). *Estep*, 873 N.E.2d at 1024 n.6 (citing IND. TRIAL R. 24).

91. *Estep*, 873 N.E.2d at 1027.

92. *Id.*; *see also* *Menefee v. Schurr*, 751 N.E.2d 757, 760-61 (Ind. Ct. App. 2001) (discussing the Direct Action Rule).

93. *Estep*, 873 N.E.2d at 1026 (quoting *Menefee*, 751 N.E.2d at 760).

94. *Id.* at 1027.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 1027-28.

99. *Id.* at 1025 ("The common law in most states today, including Indiana, teaches that any choice in action that survives the death of the assignor may be assigned.").

they could lead to the practical problems that the court outlined.¹⁰⁰ It will be interesting to see if this issue is revisited at some point in the future.

D. Comparison of Underinsured Motorist Coverage Limits to Tortfeasor's Bodily Injury Liability Limits Results in Finding of No Coverage

The decision in *Progressive Halcyon Insurance Co. v. Petty*¹⁰¹ offers a good analysis of how courts compare limits of a tortfeasor's liability coverage with an insured's policy to determine if underinsured motorist (UIM) coverage applies. Autumn Petty (Autumn) was driving a vehicle along the interstate with her brother, Michael Petty (Michael), as a passenger.¹⁰² Another motorist, Sears, crossed the median of the interstate, and collided with Autumn's vehicle, causing personal injuries to both Autumn and Michael.¹⁰³ Autumn filed a lawsuit against Sears and her UIM insurer, Progressive, to recover for personal injuries from the accident.¹⁰⁴ Michael, also a party to the lawsuit, similarly made a claim against Sears and Progressive.¹⁰⁵

Sears possessed a liability insurance policy that provided limits of \$50,000 per person and \$50,000 per accident.¹⁰⁶ The Progressive policy contained UIM limits of \$50,000 per person and \$50,000 per accident.¹⁰⁷ Sears' insurer interpleaded its full limits of \$50,000 into the court in exchange for release of all claims against Sears.¹⁰⁸ Autumn and Michael agreed to divide Sears' limits, with Autumn receiving \$15,000 and Michael receiving \$35,000.¹⁰⁹

In response to Autumn's and Michael's UIM claim, Progressive contended that no coverage was available.¹¹⁰ Relying upon a number of recent appellate decisions,¹¹¹ Progressive argued that because the UIM "per accident" limits of Autumn's policy were identical to Sears' bodily injury liability limits, Sears was not a UIM under its policy.¹¹²

100. *See id.* at 1027-28.

101. 883 N.E.2d 854 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1217 (Ind. 2008).

102. *Id.* at 855.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 856.

111. For the cases Progressive relied on, see *Auto-Owners Insurance Co. v. Eakle*, 869 N.E.2d 1244 (Ind. Ct. App. 2007), *trans. denied*, 878 N.E.2d 218 (Ind. 2008); *Grange Insurance Co. v. Graham*, 843 N.E.2d 597 (Ind. Ct. App. 2006); *Allstate Insurance Co. v. Sanders*, 644 N.E.2d 884 (Ind. Ct. App. 1994).

112. *Petty*, 883 N.E.2d at 855; see IND. CODE § 27-7-5-4(b) (2004) (defining "underinsured motor vehicle" as including "an insured motor vehicle where the limits of coverage available for payment to the insured under all bodily injury liability policies covering persons liable to the

The trial court granted Autumn's and Michael's Motions for Summary Judgment, and denied Progressive's Motion for Summary Judgment.¹¹³ However, on appeal, the appellate court reversed, holding that summary judgment should be granted to Progressive.¹¹⁴

In concluding that no UIM coverage was available, the court compared the per accident limits of Sears' liability policy with the Progressive UIM limits.¹¹⁵ Because Autumn and Michael recovered the same total amount as they would recover if Sears was uninsured—\$50,000—Sears did not meet the definition of UIM.¹¹⁶ According to the court, if the per accident limits are identical, then no UIM exposure remains.¹¹⁷

The court also rejected Michael's argument that because he and Autumn individually received less than \$50,000 per person, they received less than the minimum per person limits of the UIM coverage as required by Indiana law,¹¹⁸ and thus, Sears should be considered an UIM.¹¹⁹ The court found that the statute's reference to \$50,000 was a "*per accident*," rather than a "*per person*" minimum coverage requirement.¹²⁰ The court also determined that insureds may not trigger UIM coverage by agreeing to accept a figure from the tortfeasor that may be less than the per person or per accident limits.¹²¹

II. COMMERCIAL CASES

A. Court Allows Insurance Company to Take Multiple Examinations Under Oath of Insured

In *National Athletic Sportswear, Inc. v. Westfield Insurance Co.*,¹²² the insured sustained a loss when an intruder broke into its building and stole business equipment.¹²³ The insured submitted a claim to its insurer, Westfield Insurance Company (Westfield), who sought to examine an insured's representative about the loss.¹²⁴

insured are less than the limits for the insured's underinsured motorist coverage at the time of the accident").

113. *Petty*, 883 N.E.2d at 856.

114. *Id.* at 865.

115. *Id.* at 863.

116. *Id.*

117. *Id.* at 858-59.

118. *See* IND. CODE § 27-7-5-2(a) (2004).

119. *Petty*, 883 N.E.2d at 863-65 (rejecting Michael's argument). Michael's brief cited Indiana Code section 27-7-5-2(a) in support of his assertion. *See id.* at 863.

120. *Id.* at 864.

121. *Id.*

122. 528 F.3d 508 (7th Cir. 2008).

123. *Id.* at 513.

124. *Id.*

The examination of the insured's owner lasted seven to eight hours.¹²⁵ After the examination, Westfield's attorney sent a letter to the insured's attorney requesting copies of certain documents and indicating that a second examination would need to be scheduled after receipt of the documentation.¹²⁶ The insured supplied a large number of documents to satisfy Westfield's document request.¹²⁷

The insured obtained new counsel who notified Westfield's attorney that the owner of the insured would not be made available for a second examination by Westfield's attorney.¹²⁸ The insured claimed that it had cooperated with Westfield by giving the long first examination and supplying the documents that Westfield requested.¹²⁹ Westfield's attorney responded by referencing the policy, which authorized Westfield to undertake the examinations.¹³⁰ The insured filed a lawsuit against Westfield, and the parties continued to dispute whether Westfield was permitted to conduct a second examination of the insured's owner.¹³¹

The district court concluded that the insured's refusal to be available for a second examination constituted a breach of the insurance policy.¹³² As a result, the district court granted Westfield's Motion for Summary Judgment.¹³³ While the court agreed with the insured's argument that, as a matter of contract, a "reasonableness" element existed in determining the length and number of examinations that an insurer could conduct, the court held that a second examination following the initial lengthy examination was not unreasonable.¹³⁴ While the court observed that an insurer cannot harass an insured by use of the examination, the court also observed that the policy granted a great amount of latitude to an insurer in the scope and length of the examinations.¹³⁵

The Seventh Circuit Court of Appeals completely adopted the district court's opinion.¹³⁶ This decision is very helpful to practitioners who conduct examinations under oath. The decision offers support to insurers to extensively question insureds on suspicious claims.¹³⁷ Insureds may face long and multiple

125. *Id.* at 514.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* The policy language provided that Westfield "may examine any insured under oath, while not in the presence of 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." *Id.* at 513.

131. *Id.* at 511.

132. *Id.* at 522.

133. *Id.* at 524. The court also granted Westfield summary judgment on the insured's claim for breach of duty of good faith. *Id.*

134. *Id.* at 519-21.

135. *Id.* at 522.

136. *Id.* at 510.

137. *See id.* at 522.

exams in complicated cases, and this case permits insurers to proceed pursuant to the insurance policy.¹³⁸

B. Court Narrowly Interprets Lease Clause Requiring Tenant to Insured/Landlord for Personal Injury Events

*Liberty Mutual Insurance Co. v. Michigan Mutual Insurance Co.*¹³⁹ addressed a common occurrence in landlord/tenant lease agreements. Duke Realty Corporation (Duke) was a landlord at a commercial business complex, renting space to its tenant, Trilithic, Inc. (Trilithic).¹⁴⁰ Pursuant to the lease agreement, Duke retained responsibility for snow and ice removal from common areas, including a pathway from Trilithic's employee parking lot.¹⁴¹ A Trilithic employee sustained personal injuries when she slipped on snow and ice while walking along this pathway on her way to work at Trilithic.¹⁴²

The employee sued Duke to recover for her personal injuries.¹⁴³ Under the lease, Trilithic was required to obtain liability insurance to cover both it and Duke from public liability and property damage.¹⁴⁴ Trilithic purchased a liability policy from Michigan Mutual Insurance Company (Michigan), which included an additional insured endorsement naming Duke as an additional insured with the following pertinent language: "WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule but only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to you and shown in the Schedule."¹⁴⁵

Pursuant to this provision, Duke tendered the defense and indemnity obligation for the employee's lawsuit to Michigan, who rejected the tender.¹⁴⁶ Duke's own liability insurer, Liberty Mutual Insurance Company (Liberty), provided a defense, and eventually settled the employee's lawsuit.¹⁴⁷ Liberty brought a lawsuit against Michigan to recover its cost for the defense and indemnity afforded to Duke, and Michigan counterclaimed to establish that no coverage was owed.¹⁴⁸ Eventually, Michigan received summary judgment from the trial court, which established that no coverage was owed to Duke, and an

138. *See id.* at 522-24.

139. 891 N.E.2d 99 (Ind. Ct. App. 2008)

140. *Id.* at 100.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 100-01.

148. *Id.* at 101. Specifically, Duke brought an action against Mutual, but Michigan requested that the trial court substitute Liberty for Duke as the real party in interest. *Id.* Duke's counsel acknowledged that Liberty was the proper subrogee of Duke. *Id.* Therefore, the trial court granted Michigan's request to substitute liberty for Duke. *Id.*

appeal ensued.¹⁴⁹

Liberty argued that although the fall occurred outside of the premises leased to Trilithic, Duke's liability still arose out of Trilithic's use of the leased premises as the injured employee was reporting to work when the accident happened.¹⁵⁰ The Indiana Court of Appeals disagreed with this broad interpretation of the "arising out of" language of the additional insured endorsement.¹⁵¹ Instead, the court held that in order for coverage to be triggered under the additional insured endorsement, "more than an incidental connection with the leased premises" was necessary.¹⁵² Because the employee's fall did not happen on a part of the leased premises, the court found that the connection between the accident and the leased premises was insufficient to support a finding of coverage.¹⁵³

This decision involves a very narrow interpretation of the "arising out of" language in many insurance policies. The court clearly believed that the fact the employee was on her way to work at the time of the accident was only an "isolated connection" and insufficient to find coverage.¹⁵⁴

C. Supreme Court Determines that Statute of Limitations for Alleged Insurance Agent Negligence Occurs When Insured Could Have Discovered Omission in Coverage Through Ordinary Diligence

In *Filip v. Block*,¹⁵⁵ the Indiana Supreme Court offered very instructive guidance on the accrual date for the running of the statute of limitations on negligence claims against insurance agents. The insureds purchased an apartment building in 1998.¹⁵⁶ In 1999, they met with an insurance agent who had served as agent for the previous owner.¹⁵⁷ The insureds requested that the agent provide "the same coverage" as the previous owner possessed, and the agent arranged a commercial general liability policy with similar coverage as possessed by the previous owner.¹⁵⁸

The insureds moved into one of the apartment units and rented out the others.¹⁵⁹ The agent apparently knew that the insureds were living in the apartment building; however, the agent did not provide coverage for the insureds' personal property, nor did she acquire a separate tenant's policy for the

149. *Id.*

150. *Id.* at 103.

151. *Id.* at 103-05.

152. *Id.* at 104.

153. *Id.* at 105.

154. *Id.*

155. 879 N.E.2d 1076 (Ind. 2008), *reh'g denied*.

156. *Id.* at 1078-79.

157. *Id.* at 1079.

158. *Id.*

159. *Id.*

insureds.¹⁶⁰ The insureds contended that the agent told them that they would “be covered” for losses.¹⁶¹ The insureds also made a number of changes to the policy after its inception due to change in circumstances.¹⁶²

In 2003, a fire destroyed the apartment building and the insured’s personal property.¹⁶³ At that point, the insureds contended that they first discovered their uninsured exposure for their personal property when the insurance company denied coverage.¹⁶⁴ The insureds filed suit against the agent.¹⁶⁵ The agent responded to the complaint and filed a motion for summary judgment, which the trial court granted on the basis that the two year statute of limitations barred the complaint.¹⁶⁶

The supreme court observed four possible dates that the statute of limitations period could begin—“the date of coverage, the date of the loss, the date of the [insurance company’s] denial of the claim, [or] the date the insured learn[ed] or should in the exercise of reasonable care have learned of the coverage problems.”¹⁶⁷ The court concluded that the insureds’ claim for the agent’s alleged negligent procurement of the wrong insurance coverage accrued at the time the policy was issued as the failure to provide correct insurance was discoverable through the exercise of ordinary diligence.¹⁶⁸

The court rejected the insureds’ argument that they were unaware of the lack of insurance until the actual loss occurred.¹⁶⁹ The court succinctly observed:

[I]nsurance is about the shifting of risk. The [insureds] bore the risk of loss from the date the policy was issued, so their injury from the alleged negligence occurred at this point. Although the extent of damages was unknown within the statute of limitations, the full extent of damages need not be known to give rise to a cause of action Presumably, no litigation would have been necessary to correct their policy and pay the adjusted premium for the desired coverage before the fire, but if for any reason the coverage was no longer available the [insureds] could have asserted their negligence claim if they felt that necessary. Further, if we accept the [insureds’] argument, then insureds become free riders, paying lower premiums, perhaps for many years, and then retaining the ability

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* Interestingly, the opinion is silent on the exact date the lawsuit was filed. It appears it was filed within two years of the date of loss, but over two years from the date of the policy’s inception.

166. *Id.*; see IND. CODE § 34-11-2-4 (2008) (providing the requisite two-year limitation period).

167. *Filip*, 879 N.E.2d at 1082.

168. *Id.*

169. *Id.* at 1083-84

to claim the benefit of higher coverage if a loss is incurred.¹⁷⁰

Because the agent's alleged failure to insure could have been discovered by the insured from a review of the policy, the court concluded that the statute of limitations began to accrue when the policy was issued.¹⁷¹ As a result, the agent was entitled to summary judgment as the insureds' claim was time-barred.¹⁷² This decision is helpful to practitioners in providing a clearer understanding of the date for the beginning of the running of a statute of limitations for alleged insurance agent negligence claims.

170. *Id.* (citation omitted).

171. *Id.* at 1084.

172. *Id.* The court also addressed the appropriate manner for parties to provide evidence designation in briefing motions for summary judgment. *Id.* at 1080. Specifically, the court held that a party is free to designate evidence in the party's motion, memorandum of law, a separate filing or by appendix so long as it is done consistently. *Id.* at 1081.