

# SURVEY OF RECENT DEVELOPMENTS IN INSURANCE LAW

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During this survey period,<sup>1</sup> the Indiana appellate courts addressed fewer decisions than in past years. This Article examines the most significant decisions on coverage issues affecting automobile, homeowners, and commercial general liability insurance policies and their impact upon the field of insurance law.<sup>2</sup>

## I. AUTOMOBILE COVERAGE CASES

### *A. Emotional Distress Claim Did not Satisfy Definition of “Bodily Injury” to Permit Recovery for an Uninsured Motorist Claim*

The facts in the *Taele v. State Farm Mutual Automobile Insurance Co.*<sup>3</sup> decision are tragic. A husband and wife were traveling behind an automobile with their thirteen-year-old daughter riding as a passenger.<sup>4</sup> An uninsured motorist traveling in the opposite direction on the interstate, lost control of his vehicle, crossed the median, and struck the automobile that carried the daughter,

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1. The survey period for this Article is approximately September 30, 2010 through October 1, 2011.

2. Selected cases which were decided during the survey, but are not addressed in this Article include: *Trinity Homes, L.L.C. v. Ohio Casualty Insurance Co.*, 629 F.3d 653 (7th Cir. 2010) (deciding commercial general liability policy provided insurance coverage for faulty workmanship of subcontractor hired by insured); *Westfield Insurance Co. v. Hill*, 790 F. Supp. 2d 855 (N.D. Ind. 2011) (holding that insurer was entitled to summary judgment of no coverage for claim of mother of sexual abuse victim for emotional distress against insured); *State Farm Fire and Casualty Co. v. Nokes*, 776 F. Supp. 2d 845 (N.D. Ind. 2011) (finding insurance company was entitled to summary judgment of no coverage for foster child’s sexual abuse claim against foster parents); *Jackson v. Allstate Insurance Co.*, 780 F. Supp. 2d 781 (S.D. Ind. 2011); *American Family Mutual Insurance Co. v. Bower*, 752 F. Supp. 2d 957 (N.D. Ind. 2010) (holding that homeowners’ insurer was not entitled to summary judgment of no coverage for sexual abuse victim’s claim against parents/pastor of perpetrator); *Michel v. American Family Mutual Insurance Co.*, 2010 WL 3039506 (N.D. Ind. 2010) (holding that disagreement between insurer and insured on value of underinsured motorist claim, standing alone, did not demonstrate claim for breach of duty of good faith); *National Union Fire Insurance Co. v. Standard Fusee Corp.*, 940 N.E.2d 810 (Ind. 2010) (applying “uniform-contract-interpretation approach” in deciding choice of law for environmental coverage dispute), *reh’g denied*, 2011 Ind. LEXIS 410 (Ind. May 20, 2011); *Quiring v. GEICO General Insurance Co.*, 953 N.E.2d 119 (Ind. Ct. App. 2011) (deciding that injured driver was not a resident in mother’s home to be entitled to underinsured motorist coverage under mother’s automobile policy); *Auto-Owners Insurance Co. v. Hughes*, 943 N.E.2d 432 (Ind. Ct. App.) (requiring insurance company to supply insured with copy of insurance policy if asked), *trans. denied*, 962 N.E.2d 647 (Ind. 2011).

3. 936 N.E.2d 306 (Ind. Ct. App.), *trans. denied sub nom. Taele v. Figueroa*, 950 N.E.2d 1209 (Ind. 2011).

4. *Id.* at 307.

resulting in her death. The husband and wife witnessed the accident by looking in the rear view mirrors of their vehicle.

Although the husband and wife were not directly involved in the accident, it was alleged that a part of the uninsured motorist's automobile may have struck their windshield.<sup>5</sup> As a result of witnessing the accident, the husband suffered emotional distress, which included a diagnosis of high blood pressure and depression. The husband and wife presented an uninsured motorist claim under their automobile insurance policy to recover for their emotional distress injuries.<sup>6</sup>

The insurer denied their claim by contending that their emotional distress did not satisfy the definition of "bodily injury" in the policy, which was defined to include "bodily injury to a person and sickness, disease or death which results from it."<sup>7</sup> The trial court granted the insurer's summary judgment motion, and an appeal ensued.<sup>8</sup>

The court of appeals first analyzed Indiana law to determine whether the emotional distress claims stated recognizable claims for negligent infliction of emotional distress under Indiana law.<sup>9</sup> Indiana follows the "direct impact" test which requires a claimant to have a direct impact with the negligence of another before he or she may seek recovery under a negligence theory for emotional trauma.<sup>10</sup> A few years ago, the supreme court expanded the group of individuals who could pursue a claim for negligent infliction of emotional distress to include a bystander who witnessed or came upon the scene of the death of or serious injury to a loved one "with a relationship to the plaintiff analogous to a spouse, parent, child, grandparent, grandchild, or sibling."<sup>11</sup>

Although the court concluded that the insureds possessed a negligent infliction of emotional distress claim against the other motorist, it was still necessary for the insureds to satisfy the definition of "bodily injury" to pursue a claim under the policy.<sup>12</sup> The court engaged in an extensive review of recent supreme court decisions which addressed whether emotional distress claims met the definition of "bodily injury" within an insurance policy.<sup>13</sup> After reviewing these cases, the court concluded the husband and wife were not entitled to

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5. *Id.*

6. *Id.*

7. *Id.* (emphasis omitted). Interestingly, this definition replaced a more restrictive definition which provided "[b]odily injury—means physical bodily injury to a person and sickness, disease or death which results from it. A person does not sustain bodily injury if that person suffers emotional distress in the absence of physical bodily injury." *Id.* (emphasis omitted).

8. *Id.*

9. *Id.* at 308.

10. *Id.* (citing *Shuamber v. Henderson*, 579 N.E.2d 452, 456 (Ind. 1991)).

11. *Id.* (citing *Groves v. Taylor*, 729 N.E.2d 569, 573 (Ind. 2000)).

12. *See id.* at 310.

13. *See id.* at 308-10; *see also* *Bush v. State Farm Mut. Auto. Ins. Co.*, 905 N.E.2d 1003 (Ind. 2009); *State Farm Mut. Ins. Co. v. D.L.B.*, 881 N.E.2d 665 (Ind. 2008); *Elliott v. Allstate Ins. Co.*, 881 N.E.2d 662 (Ind. 2008); *State Farm Mut. Auto. Ins. Co. v. Jakupko*, 881 N.E.2d 654 (Ind. 2008).

uninsured motorist benefits, because they were not directly impacted and did not sustain a direct physical injury from the accident.<sup>14</sup> In order to establish “bodily injury” to permit the insureds to recover for their emotional trauma, it was necessary for them to sustain a physical impact of some sort.<sup>15</sup> The court rejected the suggestion that the piece of the other vehicle that collided with the insureds’ windshield demonstrated a “direct impact.”<sup>16</sup>

In this case, the court of appeals correctly followed precedent from the Indiana Supreme Court regarding the definition of “bodily injury” in an insurance policy. While the outcome is unfortunate for the family in this tragic case, this opinion provides a consistent line of decisions addressing the scope of “bodily injury” as it relates to emotional distress claims.

*B. Insured Who Received Medical Payments Benefits Could not Reduce Insurer Lien After Settlement with Tortfeasor*

The decision of *Wirth v. American Family Mutual Insurance Co.*<sup>17</sup> addresses the common question of whether an insurance company that issues medical payments coverage to its insured can demand full repayment when the insured settles with a tortfeasor. The insured was injured as a result of a motor vehicle accident, and his medical bills of \$1969.26 were paid by his automobile insurance company under the medical payments coverage.<sup>18</sup> The insured filed a negligence lawsuit against the other motorist, and settled his claim for \$3500.

The insured could not reach an agreement with the automobile insurance company on the amount to repay for the medical payments lien.<sup>19</sup> The insured filed a lawsuit against the insurance company seeking a declaration on whether the insurer possessed a subrogation right to demand repayment of its lien. After the trial court entered summary judgment in favor of the insurer, which required the insured to repay the full amount of the lien, an appeal ensued.

The insured contended that the automobile insurer lacked a right to seek repayment of the lien.<sup>20</sup> The insured presented an affidavit from a long time plaintiff’s attorney valuing the insured’s claim at approximately \$8000.<sup>21</sup> Because the insured did not collect the full value of his claim from the tortfeasor, he argued that the insurer’s right to subrogate to recover its lien did not exist.<sup>22</sup> The insured relied upon an Indiana case, which determined that a subrogation lienholder could not recover the amount paid to its insured until the insured was

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14. *Taele*, 936 N.E.2d at 310.

15. *Id.* at 311.

16. *Id.* at 310 n.3.

17. 950 N.E.2d 1214 (Ind. Ct. App. 2011).

18. *Id.* at 1215.

19. *Id.*

20. *Id.* at 1216.

21. *Id.* at 1215.

22. *Id.* at 1216.

fully satisfied for the amount of its judgment against a tortfeasor.<sup>23</sup> However, based upon the insured's complete settlement with and release of the tortfeasor, in contrast to an unsatisfied judgment, the court distinguished the case relied upon by the insured.<sup>24</sup>

The insured also argued that if the insurance company could pursue its subrogation right, then the trial court erred by not determining the full value of the insured's lawsuit against the tortfeasor—regardless of the settlement amount.<sup>25</sup> Relying upon an Indiana Supreme Court decision,<sup>26</sup> the insured contended that the trial court should have considered factors such as the risk to the insured of the allocation of comparative fault or inadequate insurance coverage to compensate for the loss to determine whether the settlement was reasonable.<sup>27</sup> However, the court of appeals concluded that the insured did not present any evidence to suggest that the insurance company's lienholder interest should be reduced because of comparative fault or lack of insurance.<sup>28</sup>

This case offers guidance to attorneys representing plaintiffs/insureds with medical payments liens, that they should attempt to compromise and settle the lien, if possible, before settling with a tortfeasor. Otherwise, the insured will have the burden to demonstrate that the lienholder's interest should be reduced for other reasons.

*C. Court Concluded that Boyfriend of Unmarried Couple Living Together May Be Entitled to Liability Insurance Coverage under Girlfriend's Policy*

In today's society, a common living arrangement involves two individuals residing as an unmarried couple. In *Estate of Kinser v. Indiana Insurance Co.*,<sup>29</sup> the court of appeals addressed the availability of automobile insurance for an unmarried couple living together with their children from other relationships.<sup>30</sup> Each member of the couple possessed their own automobile which was insured with different insurance companies. Because both worked at the same company, they often rode together in the girlfriend's car with each taking turns as the driver. Normally, the boyfriend would use his automobile for most errands, but occasionally, would use the girlfriend's vehicle for long drives because of its fuel efficiency.<sup>31</sup> Both had keys to the other's vehicle in case the other accidentally was locked out of the vehicle. The boyfriend did not drive the girlfriend's automobile without asking for permission, and the evidence showed that he only

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23. *Id.* at 1217 (citing *Capps v. Klebs*, 382 N.E.2d 947 (1978)).

24. *Id.* This concept of a lienholder not being permitted to collect its interest if the insured has an unsatisfied claim, is also codified at IND. CODE § 34-51-2-19 (2011).

25. *Wirth*, 950 N.E.2d at 1217.

26. *Dep't of Pub. Welfare v. Couch*, 605 N.E.2d 165 (Ind. 1992).

27. *Wirth*, 950 N.E.2d at 1217.

28. *Id.*

29. 950 N.E.2d 23 (Ind. Ct. App. 2011).

30. *Id.* at 25.

31. *Id.*

asked for permission to drive the girlfriend's car on one previous occasion.<sup>32</sup>

On a day when both the boyfriend and girlfriend were not working, they decided to take their children to a museum in the girlfriend's vehicle.<sup>33</sup> As the boyfriend was driving, they were involved in a terrible accident that resulted in his death and injuries to his family members and another motorist. The other motorist pursued a liability claim against the boyfriend's estate, seeking insurance coverage under the boyfriend's liability insurance policy for the girlfriend's car.<sup>34</sup> The insurer of the girlfriend's automobile filed a declaratory judgment action, arguing that coverage was excluded for the estate because the girlfriend's car was available for the boyfriend's regular use<sup>35</sup>: "We do not provide [l]iability [c]overage for the ownership, maintenance, or use of: . . . 2. Any vehicle, other than 'your covered auto,' which is: a. Owned by you; or b. Furnished or available for your regular use."<sup>36</sup> Because of the living situation and the frequent use of the girlfriend's vehicle by the boyfriend, the insurer contended that no coverage was available to the boyfriend's estate.<sup>37</sup>

The trial court granted summary judgment to the boyfriend's insurance company.<sup>38</sup> On appeal, the court first observed that the exclusion served a vital purpose in protecting insurers from having to insure vehicles that are regularly used by an insured, but which the insured pays no premium for the insurance coverage.<sup>39</sup> In determining whether the exclusion applied, the court focused upon a "concept of mutual understanding" between the driver and the vehicle owner on the right of the driver to regularly use the automobile.<sup>40</sup> In making this determination, the court looked to the meaning of whether the vehicle was "furnished" or "available" to the driver to regularly use.<sup>41</sup> The court concluded that "furnished" meant that the driver "is given keys to access and permission to use a given vehicle for a purpose as general or specific as both the furnisher and recipient mutually understand."<sup>42</sup> The court determined that "availability" referred to whether the vehicle was "readily obtainable" by the driver.<sup>43</sup>

The court of appeals ultimately determined that an issue of fact existed on whether the girlfriend's automobile was "furnished" or "available" for use to the boyfriend.<sup>44</sup> As a result, the court reversed the summary judgment to the

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32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 27 (alteration in original).

37. *Id.*

38. *Id.* at 25.

39. *Id.* at 27.

40. *Id.* at 28.

41. *Id.* at 28-29.

42. *Id.* at 28.

43. *Id.* at 29.

44. *Id.* at 30.

insurer.<sup>45</sup> Typically, these cases will be very fact sensitive based upon the driver's ability to use the vehicle.

*D. Court Determines that Garage's Automobile Policy Does not Apply to Accident Involving Vehicle Using Garage's Temporary License Plate*

The case of *Cotton v. Auto-Owners Insurance Co.*<sup>46</sup> presented an interesting question as to the extent of coverage available under an automobile dealership's garage liability policy. A passenger was injured in an automobile accident after the driver lost control and struck a bridge.<sup>47</sup> The driver had recently purchased the automobile but had not registered it with Indiana Bureau of Motor Vehicles. Before the accident, the driver obtained a temporary license plate from his grandfather who owned a motor vehicle dealership, but whose dealership was not the seller of the vehicle. Additionally, the driver was not an employee of the dealership.<sup>48</sup> The dealership was insured under a garage liability policy from Auto-Owners.

After the accident, the passenger sued the driver, the grandfather, the dealership and Auto-Owners seeking recovery for personal injuries and a declaratory judgment finding that the garage policy with Auto-Owners provided coverage to the driver for the accident.<sup>49</sup> The trial court granted summary judgment to Auto-Owners finding that there was no coverage available under the garage policy.<sup>50</sup>

The garage policy specified that insurance coverage was afforded to the dealership for expected maintenance and operation of automobiles by employees of the dealership, and included those uses that were "incidental thereto" and "in connection with" the purpose of the garage or dealership.<sup>51</sup> The court was asked to determine whether the driver's use of the automobile in this case was "incidental to" and "in connection with" a business purpose of the dealership.<sup>52</sup>

The passenger contended that the dealership's ability to distribute temporary license plates, even if it did not sell the vehicle on which the plate was placed, was an act "incidental to" the garage business.<sup>53</sup> Relying upon an earlier decision from the Indiana Court of Appeals, the court interpreted the policy language, stating:

Generally speaking, to provide a temporary license plate may well be incidental to a licensed auto dealer's business, but Auto-Owners' garage policy provides coverage only if the plate is used "in connection with"

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45. *Id.*

46. 937 N.E.2d 414 (Ind. Ct. App. 2010), *trans. denied*, 950 N.E.2d 1204 (Ind. 2011).

47. *Id.* at 415.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 416.

52. *Id.* at 416-17.

53. *Id.* at 417.

the business operations. In other words, the use of the plate must be “directly incidental to the garage business.”<sup>54</sup>

No evidence was produced to suggest that the automobile was being used “incidental to” or “in connection with” the dealership.<sup>55</sup> The court concluded that the garage policy did not apply to provide coverage to the driver.<sup>56</sup> This case provides an excellent example of how a court may interpret and apply insurance policy language. Because the driver had no connection with the garage, a finding of coverage would be well beyond the intent of the garage policy’s language.<sup>57</sup>

## II. COMMERCIAL GENERAL LIABILITY CASES

### A. Court Addresses Triggering Date of Multiple Liability Insurance Policies

The decision in *Grange Mutual Casualty Co. v. West Bend Mutual Insurance Co.*<sup>58</sup> presented an interesting analysis on the application of multiple liability insurance policies in a situation where damages were not readily apparent. A contractor was hired to construct a school, and subcontracted the sewer installation and plumbing work.<sup>59</sup> After construction was completed, the school experienced a flood resulting in significant water damage. The flooding was caused by a fractured storm drain pipe that was negligently installed by the subcontractor.<sup>60</sup>

The contractor’s insurance company settled with the school on its claim for the water damage.<sup>61</sup> The insurer pursued a subrogation and declaratory judgment action against the subcontractor and its insurers to recover the amounts paid to the school. During the time the subcontractor performed the work for the school, it was insured by West Bend, but at the time the flooding occurred, the subcontractor was insured by Grange.<sup>62</sup> West Bend and Grange settled the subrogation claim of the contractor’s insurer, and filed declaratory judgment actions against each other to determine which policy was triggered to provide coverage to the subcontractor.<sup>63</sup>

Each insurer also filed cross-motions for summary judgment, contending that

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54. *Id.* at 417-18 (quoting *Auto. Underwriters, Inc. v. Hitch*, 349 N.E.2d 271, 274 (Ind. Ct. App. 1976)).

55. *Id.*

56. *Id.* at 418.

57. *See id.*

58. 946 N.E.2d 593 (Ind. Ct. App. 2011).

59. *Id.* at 594.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

there was no “occurrence”<sup>64</sup> as required in their policy to establish coverage.<sup>65</sup> The trial court concluded that an “occurrence” existed at the time the flooding occurred.<sup>66</sup> Thus, the trial court granted summary judgment to West Bend, and denied summary judgment to Grange.<sup>67</sup>

On appeal, the court observed that each insurer incorrectly focused upon the timing of when the work was performed in determining whether there was an “occurrence.”<sup>68</sup> Instead, the proper focus should have been on “the timing of the property damage,” which was what the policy required in order trigger a coverage obligation.<sup>69</sup>

The court concluded that both companies’ policies were triggered.<sup>70</sup> The Grange policy was found to apply because the water damage clearly occurred during its policy period.<sup>71</sup> The court also concluded that the West Bend policy was implicated because it covered the subcontractor at the time it negligently installed the storm drain.<sup>72</sup> Additionally, because the West Bend policy also provided coverage for “any continuation, change or resumption of that . . . ‘property damage’ after the end of the policy period,” the court determined the policy encompassed the water damage resulting from the damaged drain pipe, even though the damage manifested after the end of the West Bend policy period.<sup>73</sup>

*B. Court Determines that Liability Policy Provides no Coverage for Prospective Damages from a Loss*

In *Continental Casualty Co. v. Sycamore Springs Homeowners Ass’n, Inc.*,<sup>74</sup> the Seventh Circuit addressed whether an assignee of an insured’s rights under a commercial general liability policy could recover for prospective damages. A residential developer built a subdivision in a low-lying area which was subject to flooding.<sup>75</sup> The developer used a builder who was insured with Continental Casualty Company. During construction, the builder filled a retention pond, and also built along other areas which resulted in a reduction of the subdivision’s ability to absorb rainwater. After a significant amount of rain, the subdivision

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64. The policies defined an occurrence as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” *Id.* at 595 n.3.

65. *Id.* at 595.

66. *Id.* at 595-96.

67. *Id.*

68. *Id.* at 595.

69. *Id.*

70. *Id.* at 597.

71. *Id.*

72. *Id.*

73. *Id.* (alteration in original).

74. 652 F.3d 804 (7th Cir. 2011).

75. *Id.* at 804.



flooded, and a number of homes were damaged.<sup>76</sup>

The homeowners association sued the builder.<sup>77</sup> In its complaint, the association asked that the builder pay damages and undertake efforts to reduce *future* flooding.<sup>78</sup> The builder passed the lawsuit on to Continental, which filed a declaratory judgment action, contending insurance coverage was not owed. The association settled its lawsuit with the builder, where the builder paid only a portion of the settlement, and the association retained an assignment to pursue the remainder of the settlement under the builder's insurance policy with Continental.<sup>79</sup>

The district court concluded that no coverage was available to the builder because the association's complaint only sought compensation for improvements made to the property as a means of preventing future flooding rather than for damages caused by the flooding.<sup>80</sup> On appeal, the Seventh Circuit affirmed the district court.<sup>81</sup> The court rejected the association's argument that its complaint did not seek prospective relief because it sought monetary damages.<sup>82</sup> Instead, the court observed that a commercial general liability policy is not intended to provide monetary damages to cover improvements made to property to address an insured's potential negligence, but only to address damages that had already occurred because of the insured's negligence.<sup>83</sup>

This case provides guidance to practitioners to closely scrutinize the types damages sought under an insurance policy in determining whether coverage is owed. Damages arising from improvements made to property, rather than damages relating to a past loss, are not covered.<sup>84</sup>

### III. HOMEOWNERS INSURANCE CASES

#### *A. Insured Was not Entitled to Insurance Coverage for Use of Golf Cart Away from His Home*

Frequently, many homeowners acquire golf carts or other motorized vehicles to drive on their property or within their neighborhood. The court's determination in *Wicker v. McIntosh*<sup>85</sup> provides guidance on whether liability insurance coverage extends to accidents involving the use of a golf cart.

In this case, the plaintiff filed a negligence lawsuit for injuries he sustained

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76. *Id.*

77. *Id.*

78. *Id.* at 805.

79. *Id.*

80. *Id.*

81. *Id.* at 806.

82. *Id.*

83. *Id.*

84. *See id.*

85. 938 N.E.2d 25 (Ind. Ct. App. 2010).

as a passenger in a golf cart accident.<sup>86</sup> The owner of the golf cart, who was driving at the time, was insured under his father's homeowner's insurance policy for liability coverage. The homeowner's insurance company intervened in the lawsuit, and asserted a complaint for declaratory judgment, arguing its policy only covered the golf cart to the extent of its use on the owner's property.<sup>87</sup> The insurance company filed a motion for summary judgment, and the injured passenger filed a cross-motion. The trial court granted the insurer's motion, and an appeal ensued.

The language of the insurance policy excluded personal liability coverage for:

- (1) The ownership, maintenance, use, loading or unloading of motor vehicles or all other motorized land conveyances, including trailers, owned or operated by or rented or loaned to an "insured";
- (2) The entrustment by an "insured" of a motor vehicle or any other motorized land conveyance to any person; or
- (3) Vicarious liability, whether or not statutorily imposed, for the actions of a child or minor using a conveyance excluded in paragraph (1) and (2) above.<sup>88</sup>

However, the policy exclusion did not apply to: "A motorized land conveyance designated for recreational use off public roads, not subject to motor vehicle registration and . . . [o]wned by an 'insured' and on an 'insured location[.]'"<sup>89</sup>

The court concluded that the policy excluded coverage because the accident did not occur at the "insured location," which was the insured's home.<sup>90</sup> In this case, the accident occurred away from the insured's home, and the exception to the exclusion, therefore, did not apply.<sup>91</sup>

Owners of small motorized vehicles, such as golf carts, should be aware of this decision and its guidance on the extent of liability coverage that may be available. If the accident would have happened on the premises designated in the policy, the exception to the exclusion would have applied and coverage would have existed.<sup>92</sup> For accidents that occur away from the insured's home, such as driving through a residential neighborhood, a policy with similar language would exclude coverage.

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86. *Id.* at 26.

87. *Id.*

88. *Id.* at 27 (citation omitted).

89. *Id.* at 27-28 (third alteration in original) (citation omitted).

90. *Id.* at 29.

91. *Id.*

92. *See id.*

*B. Insured Lacked Insurance Coverage for Liability Claim After Guest Consumed Controlled Substance Prescribed for Insured*

In *Forman v. Penn*,<sup>93</sup> the court interpreted the language of an insurance policy to determine whether a personal liability exclusion applied to a sad fact situation. Here, the insured lived with his girlfriend and her teenage son.<sup>94</sup> The son invited two other teenage boys to spend the night at the insured's home. The girlfriend kept physician-prescribed methadone in the home.<sup>95</sup> During the overnight stay, one of the guests ingested the methadone, resulting in serious injury. The parties disputed whether the son supplied the guest with the methadone or whether the guest consumed it without the son's knowledge.<sup>96</sup>

The injured guest filed suit against the named insured, his girlfriend, and her son.<sup>97</sup> The insured and the son contended that they were entitled to liability coverage under the homeowners policy.<sup>98</sup> The insurer intervened in the lawsuit and sought a declaratory judgment, arguing that the policy excluded coverage for bodily injury

[a]rising out of the use, sale, manufacture, delivery, transfer, or possession by any person of a Controlled Substance(s) as defined by the Federal Food and Drug Law at 21 U.S.C.A. Sections 811 and 812. Controlled Substances include but are not limited to cocaine, LSD, marijuana and all narcotic drugs. However, this exclusion does not apply to the legitimate use of prescription drugs by a person following the orders of a licensed physician.<sup>99</sup>

The insurer contended that the exclusion applied because the methadone was a "controlled substance."<sup>100</sup> The trial court agreed, and granted summary judgment to the insurance provider on the insured's and son's requests for insurance coverage.<sup>101</sup>

The insured and son contended that the exception to the exclusion applied, because the girlfriend had a valid prescription for the methadone.<sup>102</sup> However, the court found that the exception did not apply because the guest was not involved in a "legitimate use of" a prescribed drug, and he was not "following the orders of a licensed physician."<sup>103</sup> The court determined that the clear and unambiguous

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93. 945 N.E.2d 717 (Ind. Ct. App.), *trans. denied sub nom.* Penn v. W. Reserve Mut. Cas. Co., 962 N.E.2d 639 (Ind. 2011).

94. *Id.* at 719.

95. *Id.*

96. *Id.*

97. *Id.* The injured teenager also sued the other guest. *Id.*

98. *Id.*

99. *Id.* at 720 (alteration in original) (citation omitted).

100. *Id.*

101. *Id.* at 719.

102. *Id.* at 721.

103. *Id.* at 720.

language in the policy excluded liability coverage for the insured or the girlfriend's son.<sup>104</sup> This case presents an unfortunate situation for the named insured and his girlfriend's son who claimed they were not involved in the guest's ingestion of the methadone.<sup>105</sup> However, the policy exclusion was clear that no coverage was available in this instance, and the court correctly applied the language to the facts of the case.<sup>106</sup>

*C. Court Interprets Extent of Coverage Available to Insured  
for a Fire Loss to Rebuild Home*

*French v. State Farm Fire & Casualty Co.*<sup>107</sup> addressed an interesting dispute between an insured and insurance company regarding the benefits available under a homeowners policy after a fire. The insured purchased a manufactured home, and after the purchase, the insured contacted an independent insurance agent to acquire coverage.<sup>108</sup> The agent asked the insured a number of questions about the home, but did not ask the insured about the home's price or if it was a manufactured home. The insured believed that he had told the agent about owning a manufactured home, but the agent denied being so told, and further claimed that the insured said it was "under construction," which suggested that it was a "stick-built"<sup>109</sup> home.<sup>110</sup>

An insurance policy was issued on the home with a provision that the insurance company would pay "the reasonable and necessary cost to repair or replace [the home] with similar construction."<sup>111</sup> A fire eventually destroyed the home, and the insured submitted a claim. An adjuster for the insurer visited the home, and discovered that the home was a manufactured home and not a stick-built home.<sup>112</sup> The insurance company offered to cover the cost of replacing the home with another manufactured home, but the insured wanted to start over with a stick-built home.<sup>113</sup> The insured eventually accepted the amount offered, "but reserved the right to seek additional coverage" up to the limits of the policy for a stick-built home.<sup>114</sup> The insured also filed suit against the insurance company for breach of the insurance policy and the agent for negligence in procuring the

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104. *Id.* at 721.

105. *Id.*

106. *See id.*

107. 950 N.E.2d 303 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 650 (Ind. 2011).

108. *Id.*

109. *See generally Stick Construction v. Pre-Manufactured Construction*, PRIDE BUILDERS, [http://www.pride-home.com/about/stick\\_v\\_engineered](http://www.pride-home.com/about/stick_v_engineered) (last visited June 18, 2012) ("The traditional way to build a home has long been described as 'stick built homes.' That is, assembling the building, on site, out of lumber . . .").

110. *French*, 950 N.E.2d at 306-07.

111. *Id.* at 307 (citation omitted).

112. *Id.*

113. *Id.*

114. *Id.*

insurance policy.<sup>115</sup>

The relevant portion of the insurance policy provided that it would “pay up to the applicable limit of liability . . . the reasonable and necessary cost to repair or replace with similar construction and for the same use on the premises . . . the damaged part of the property.”<sup>116</sup> While the insured argued that a stick-built replacement home was of “similar construction” to the manufactured home, the insurer disagreed, contending that its cost was not “reasonable and necessary” as required by the policy.<sup>117</sup> The trial court denied the summary judgment motions of both parties.<sup>118</sup>

The appellate court examined the disputed policy terms, and found they were ambiguous in meaning.<sup>119</sup> Despite finding the policy language ambiguous, the court of appeals determined that the trial court was correct in denying summary judgment to either party.<sup>120</sup>

The appellate court also rejected the insurer’s argument that the insured concealed facts in the acquisition of coverage which permitted the insurer to rescind the policy.<sup>121</sup> Specifically, the insurance company contended that the insured’s statement that the home was “under construction” at the time the policy was acquired, constituted a concealment of the fact that the house was a manufactured home.<sup>122</sup> The court concluded that a manufactured home also must be “constructed” such that there was no concealment or misrepresentation by the insured to allow the policy to be rescinded.<sup>123</sup>

This case provides an example of the fact sensitive nature of insurance coverage disputes. Clearly, neither party was entitled to a summary resolution of the case, based upon each having a plausible construction of the policy terms based upon the disputed facts.<sup>124</sup>

#### *D. Court Enforces Insurance Policy Limitation of Action Clause*

The decision of *Trzeciak v. State Farm Fire & Casualty Co.*<sup>125</sup> offers important guidance regarding the enforceability of insurance policy time limitations and the applicable statute of limitations for a breach of good faith claim by an insurer. An insured filed a lawsuit against his homeowner’s

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115. *Id.*

116. *Id.* at 309 (alterations in original) (citation omitted).

117. *Id.*

118. *Id.* at 307.

119. *Id.* at 309-10.

120. *Id.* at 310. Typically, ambiguous insurance policy language is construed against the insurance company as drafter of the policy. *Id.* at 309 (citing *Meridian Mut. Ins. Co. v. Auto-Owners Ins. Co.*, 698 N.E.2d 770, 773 (Ind. 1998)).

121. *Id.* at 314.

122. *Id.* at 311-12.

123. *Id.* at 312.

124. *See id.* at 310.

125. 809 F. Supp. 2d 900 (N.D. Ind. 2011).

insurance company to recover for a loss allegedly sustained when the insured was arrested by the police and for breach of the insurer's duty of good faith.<sup>126</sup> His complaint was filed over six years after the date of loss.

The insurer filed for summary judgment, contending the suit was prohibited by a one-year policy limitation on suits against the insurer.<sup>127</sup> The district court granted the insurer's motion, and determined that Indiana has long enforced insurance policy limitation of action clauses.<sup>128</sup> The court found no justification for not enforcing the policy limitation.<sup>129</sup>

Additionally, the insurer contended that the insured's claim for breach of duty of good faith was also time-barred.<sup>130</sup> The district court agreed and concluded that the claim for breach of duty of good faith, was a tort remedy.<sup>131</sup> Consequently, it was subject to Indiana's two-year personal property statute of limitations.<sup>132</sup> The court also applied the "discovery rule," which requires the running of the statute of limitations "when the [insured] knew or, in the exercise of ordinary diligence, could have discovered that an injury had been sustained as a result of the tortious act of another."<sup>133</sup> The court concluded that the insured did not bring the action against the insurer within two years of the date of accrual.<sup>134</sup>

#### IV. MISCELLANEOUS CASE LAW

In *Ashby v. Bar Plan Mutual Insurance Co.*,<sup>135</sup> the court interpreted an insurance policy's condition requiring notice to the insurance company of a malpractice lawsuit against its insured, and whether the doctrine of estoppel could result in the condition not being enforced. An insured attorney abandoned his legal practice and disappeared.<sup>136</sup> Before his disappearance, two clients hired the attorney to pursue personal injury actions on their behalf. The attorney had filed a lawsuit for one of the clients, which was dismissed because of the attorney's failure to comply with court orders.<sup>137</sup> The other client's action was time-barred by the statute of limitations due to the attorney's failure to file a lawsuit against the tortfeasor.

The attorney purchased malpractice insurance coverage, but had not disclosed

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126. *Id.* at 904.

127. *Id.* Indiana has a statute which requires that residential homeowner's policy limitations on suits against the insurer must be two years or more. IND. CODE § 27-1-13-17 (2011).

128. *Trzeciak*, 809 F. Supp. 2d at 909-10 (citing *New Welton Homes v. Eckman*, 830 N.E.2d 32, 34-35 (Ind. 2005)).

129. *Id.*

130. *See id.* at 913.

131. *Id.*

132. *Id.* (citing IND. CODE § 34-11-2-4(2) (2011)).

133. *Id.* (quoting *Wehling v. Citizens Nat'l Bank*, 586 N.E.2d 840, 843 (Ind. 1992)).

134. *Id.* at 913-14.

135. 949 N.E.2d 307 (Ind. 2011), *reh'g denied*, 2011 Ind. LEXIS 995 (Ind. Nov. 1, 2011).

136. *Id.* at 309.

137. *Id.*

the possible claims asserted by the two clients.<sup>138</sup> The clients filed a malpractice action against the attorney, but never actually notified the attorney of their action because his whereabouts were unknown. However, the clients did notify the malpractice insurance company for the attorney of their claims, who responded that it was investigating the claims against the attorney.<sup>139</sup> The insurer eventually moved to intervene in the malpractice lawsuit and contended that there was no coverage available to the missing attorney for the malpractice claims.<sup>140</sup>

The insurer filed for summary judgment, arguing that the attorney failed to satisfy the insurance policy's notice condition.<sup>141</sup> Specifically, the policy required the insured to provide notice to the insurer within twenty days of when a claim was first made against the attorney.<sup>142</sup> Because notice to the insurer of the clients' malpractice claim came from the clients and not the attorney, the insurer argued that the policy condition was not satisfied and no coverage was owed.<sup>143</sup>

The trial court granted summary judgment to the insurer.<sup>144</sup> However, the court of appeals reversed the judgment, by determining that the clients' notice to the insurer satisfied the policy notice condition.<sup>145</sup> The supreme court granted transfer, and concluded that the policy's notice condition was not satisfied because the attorney did not supply the insurer with notice of the clients' lawsuit.<sup>146</sup>

However, even if the policy condition was not satisfied because the attorney did not supply notice to the insurer, the supreme court found a question of fact existed on whether estoppel applied.<sup>147</sup> Specifically, the court concluded that the insurer failed to mention in its acknowledgement letter to the clients that a potential coverage question existed on the failure of the insured attorney to supply notice to the insurer.<sup>148</sup> Consequently, the court found that a question of fact existed as to whether the clients could have located the attorney, if the insurer had disclosed the notice provision, such that the twenty-day requirement would have been satisfied.<sup>149</sup>

This decision appears to create a duty upon the insurer to inform a third party to an insurance contract of coverage issues, even though there is no relationship

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138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 310.

142. *Id.*

143. *Id.* at 310, 312.

144. *Id.* at 310.

145. *Id.*

146. *Id.* at 312.

147. *Id.* at 312-13. The court defined "estoppel" to refer to a situation where "one's own acts or conduct prevents the claiming of a right to the detriment of another party who was entitled to and did rely on the conduct." *Id.* at 313 (quoting *Brown v. Branch*, 758 N.E.2d 48, 51-52 (Ind. 2011)).

148. *Id.*

149. *Id.*

between the third party and the insurer.<sup>150</sup> If the policy and its conditions are part of a contract between the insured and the insurer, then an insured's failure to comply with a condition, should bar coverage. This case appears to permit a stranger to the insurance contract to become involved in seeing that the policy conditions are complied with by the insured, by placing an additional notification duty upon the insurer.

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150. A third party beneficiary to an insurance policy cannot sue the insurance company for breach of duty of good faith because there is no "special relationship" to justify the imposition of a duty. *Cain v. Griffin*, 849 N.E.2d 507, 515 (Ind. 2006).