

# SURVEY OF RECENT DEVELOPMENTS IN INSURANCE LAW

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For this Survey Period,<sup>1</sup> the appellate and federal courts continued a recent trend of addressing fewer insurance coverage cases. However, the courts did address important issues in automobile coverage cases as well as commercial general liability cases. This Article examines the most significant decisions affecting automobile, commercial general liability, homeowners, and property policies and their impact upon the field of insurance law.<sup>2</sup>

## I. AUTOMOBILE COVERAGE CASES

### *A. Supreme Court Determines that Prejudgment Interest Statute Applies to Underinsured Motorist Claims*

The case of *Inman v. State Farm Mutual Automobile Insurance Co.*<sup>3</sup> involved a determination by the Indiana Supreme Court on whether prejudgment interest under the Tort Prejudgment Interest Statute (“Interest Statute”)<sup>4</sup> was recoverable on an underinsured motorists (“UIM”) claim. The insured received personal injuries after being rear-ended by another motorist.<sup>5</sup> After the insured presented a personal injury claim, the motorist’s liability insurer offered his full liability policy limits of \$50,000.<sup>6</sup>

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1. The Survey Period for this Article is September 30, 2012 to October 1, 2013.

2. Selected cases decided during the survey period, but not addressed in this Article include: *Consolidated Insurance Co. v. National Water Services, LLC*, 994 N.E.2d 1192 (Ind. Ct. App.) (finding insured’s execution of release of claim eliminated insurer’s subrogation rights so that insurer was discharged for any coverage obligation), *trans. denied*, 999 N.E.2d 417 (Ind. 2013); *Everhart v. Founders Insurance Co.*, 993 N.E.2d 1170 (Ind. Ct. App. 2013) (concluding that bar patron was victim of battery by insured bar employee and liability coverage was excluded); *Holiday Hospital Franchising, Inc. v. AMCO Insurance Co.*, 983 N.E.2d 574 (Ind. 2013) (concluding that victim’s sexual abuse claim against insured hotel was subject to molestation exclusion); *State Auto Insurance Co. v. DMY Realty Co.*, 977 N.E.2d 411 (Ind. Ct. App. 2012) (finding absolute pollution exclusion in commercial general liability policy as ambiguous); *State Farm Fire & Casualty Co. v. Riddell National Bank*, 984 N.E.2d 655 (Ind. Ct. App.) (finding policy’s suit limitation provision violated Indiana statute such that ten year statute of limitations applied to insured’s suit against insurer), *trans. denied*, 989 N.E.2d 782 (Ind. 2013); *State Farm Insurance Co. v. Young*, 985 N.E.2d 764 (Ind. Ct. App. 2013) (ordering medical payments insurer’s lien to be reduced pursuant to IND. CODE § 34-51-2-19 (2013) as insured could not collect full value of its damages from tortfeasor).

3. 981 N.E.2d 1202 (Ind. 2012).

4. IND. CODE §§ 34-51-4-1 to -9 (2013).

5. 981 N.E.2d at 1203.

6. *Id.*

The insured possessed an auto policy with UIM limits of \$100,000.<sup>7</sup> The insured presented a UIM claim to her own insurer seeking to recover an additional \$50,000 of coverage, after setting off the \$50,000 received from the UIM.<sup>8</sup> The insurer disputed whether the insured was entitled to any UIM coverage, and the insured filed a lawsuit against the insurer.<sup>9</sup> The case proceeded to trial, and the jury returned a verdict for the insured in the amount of \$50,000.<sup>10</sup> The insured filed a motion to recover prejudgment interest pursuant to the Interest Statute.<sup>11</sup> The insurer argued that the Interest Statute did not apply to a contract action such as a UIM claim.<sup>12</sup> In the alternative, the insurer argued that even if the Interest Statute did apply, public policy prohibited the insured from being able to recover prejudgment interest in excess of the UIM policy limits in the absence of a breach of the duty of good faith claim against the insurer.<sup>13</sup>

The trial court denied the insured's motion without comment.<sup>14</sup> The court of appeals reversed the trial court, and ordered that the insured be awarded prejudgment interest.<sup>15</sup>

The Indiana Supreme Court granted transfer, and determined that prejudgment interest was recoverable in a UIM case under the Interest Statute.<sup>16</sup> The court noted that the Interest Statute "applies to any civil action arising out of tortious conduct," and that a UIM claim is a "prototypical example" of a case meeting that definition.<sup>17</sup> While the insured's lawsuit against her UIM insurer was a contractual action, the factual basis of the insured's action "arose out of" an automobile accident, a tort event.<sup>18</sup> Thus, the Indiana Supreme Court concluded prejudgment interest was recoverable in UIM claims.<sup>19</sup>

The court also rejected the insurer's argument that prejudgment interest could not be recovered by the insured because her UIM policy limits were exhausted by her claim.<sup>20</sup> The court further observed that the purpose of the Interest Statute was "to expedite the amicable settlement of litigation without trial, and to permit compensation to a party who is unreasonably deprived of proceeds as a result of

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7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. 938 N.E.2d 1276 (Ind. Ct. App. 2010), *trans. granted*, 981 N.E.2d 1202 (Ind. 2012). The court of appeals awarded a total amount of interest of \$3616.44 and an additional \$13.10 per day from the date of the plaintiff's motion.

16. *Inman*, 981 N.E.2d at 1204.

17. *Id.*

18. *Id.*

19. *Id.* at 1205.

20. *Id.*

a settlement delay.”<sup>21</sup> With that purpose in mind, the Supreme Court concluded that prejudgment interest was recoverable in a UIM case as a collateral litigation expense, not subject to the policy limits.<sup>22</sup> However, the Indiana Supreme Court affirmed the trial court’s refusal to award prejudgment interest, as such a decision was within the trial court’s discretion.<sup>23</sup>

The Indiana Supreme Court’s decision appears to be a sound one and is significant to the insurance industry. Insureds may not only seek prejudgment interest in their UIM claims, but any interest award is recoverable as a litigation expense, even if the policy limits have been exhausted by payments for the UIM claim.

*B. Court of Appeals Concludes That Policy Arbitration Provision Became Mandatory if Either Party Requested It*

In *Pekin Insurance Co. v. Hanquier*,<sup>24</sup> an insured sustained personal injuries after being involved in an automobile accident. The insured filed a lawsuit against the other motorist and her UIM insurance company.<sup>25</sup> The policy contained the following arbitration provision:

ARBITRATION

If we and an “insured” do not agree:

1. whether that person is legally entitled to recover damages under this endorsement; or
2. as to the amount of damages

either party may make a written demand for arbitration. In this event, each party will select an arbitrator. The two arbitrators will select a third.<sup>26</sup>

The UIM carrier made a written demand for arbitration of the UIM claim, and also filed a Motion to Stay the lawsuit against the other motorist pending the conclusion of the arbitration.<sup>27</sup> The trial court denied the motion.<sup>28</sup> The insurance company filed a second motion asking the trial court to compel arbitration

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21. *Id.* at 1206.

22. *Id.* The court noted “[P]rejudgment interest is imposed on the insurer not by reason of its contract with the insured, but because the insurer has failed to make a qualifying settlement offer and the trial court believes such interest is warranted.” *Id.* at 1209 n.5.

23. *Id.* at 1208.

24. 984 N.E.2d 227 (Ind. Ct. App. 2013).

25. *Id.* at 229.

26. *Id.* at 230.

27. *Id.* at 229.

28. *Id.*

pursuant to Indiana Code section 34-57-2-3(a) (2013).<sup>29</sup> After the trial court denied the motion, an appeal was pursued.<sup>30</sup>

The insurer argued that the policy provision was mandatory if either party requested arbitration.<sup>31</sup> The insured contended that the policy's language that "either party may" request arbitration, made the provision a permissive, rather than mandatory, provision.<sup>32</sup>

The court of appeals concluded that the provision was unambiguous and mandated arbitration after a request was made by either party.<sup>33</sup> In explaining its decision, the court stated:

Under the policy, either [the insurer] or the insured "may" make a demand for arbitration, but neither is required to make such a written demand. However, once either party makes a written demand for arbitration, arbitration becomes mandatory. The policy provides that after either party submits a written request for arbitration, "each party *will* select an arbitrator. The two arbitrators *will* select a third. . . . Each party *will* . . . [b]ear the expenses of the third arbitrator equally. A decision agreed to by two of the arbitrators *will* be binding . . . ." (citation omitted). After written demand for arbitration is made, the language of the policy is no longer permissive.<sup>34</sup>

The decision is consistent with Indiana's public policy favoring enforcement of arbitration provisions.<sup>35</sup> While the court determined arbitration was required and ordered a stay of proceedings against the insurer, the court permitted the insured's claim against the motorist to proceed.<sup>36</sup>

### *C. Court of Appeals Determines That Assetless Estate May Still Assign Estate's Rights to Collect Excess Judgment*

The decision of *Pistalo v. Progressive Casualty Insurance Co.*<sup>37</sup> provides an interesting analysis by the court of appeals on the recovery of an excess judgment against an insured's estate. An insured was involved in an automobile accident with the plaintiff who sustained personal injuries.<sup>38</sup> The plaintiff filed a personal

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29. This statute provides in pertinent part: "[o]n application of a party showing a written agreement to submit to arbitration, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration." *Id.* at 230.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* (original emphasis).

35. *Koors v. Steffen*, 916 N.E.2d 212, 215 (Ind. Ct. App. 2009).

36. *Pekin Ins. Co.*, 984 N.E.2d at 231.

37. 983 N.E.2d 152 (Ind. Ct. App. 2012), *trans. denied*.

38. *Id.* at 154.

injury lawsuit against the insured.<sup>39</sup> The insured was defended by her auto liability insurer under an insurance policy with liability limits of \$100,000.00.<sup>40</sup> Before trial, the insured passed away.<sup>41</sup> The plaintiff did not learn of the insured's death, until over two years after the motor vehicle accident.<sup>42</sup> As a result, the plaintiff opened an estate and named a representative for the insured's estate.<sup>43</sup>

The liability insurer continued to defend the estate's representative.<sup>44</sup> Before the trial, the liability insurer offered the insured's full policy limits to the plaintiff to settle, but the offer was refused.<sup>45</sup> The case eventually went to trial resulting in a verdict in favor of the plaintiff in the amount of \$309,000.00.<sup>46</sup> The liability insurer deposited the \$100,000.00 of the insured's policy limits into the court, but the plaintiff filed proceedings supplemental against the estate seeking to recover the full amount of the judgment from the insurer for the estate.<sup>47</sup>

The trial court issued an order that found that the plaintiff was entitled to \$1,000.00 in fees<sup>48</sup> and prejudgment interest of \$123,600.00.<sup>49</sup> However, the court further found that the estate's liability insurer was not a party to the case nor were there any allegations of bad faith asserted as part of the claim against the insurer.<sup>50</sup> Thus, the court ordered that the plaintiff was only entitled to \$100,000.00 policy limits deposited with the court.<sup>51</sup>

The plaintiff did not give up on collecting the judgment. The estate's representative assigned its rights against the insurer to the plaintiff in exchange for a covenant not to execute on collecting the excess judgment.<sup>52</sup> The plaintiff filed a direct action against the liability insurer seeking to recover the full amount of the judgment by alleging that the insurance company acted in bad faith in failing to settle the case within the policy limits.<sup>53</sup> Both parties filed a Motion for Summary Judgment, and the court ruled that the insurer was not responsible for any amount above its policy limits because the estate's assignment was invalid.<sup>54</sup>

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39. *Id.* at 155.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* Pursuant to IND. CODE § 34-50-1-6 (2012), the court found that the plaintiff was entitled to \$1000.00.

49. *Pistalo*, 983 N.E.2d at 155. This award was made pursuant to IND. CODE § 34-51-4-8 (2012).

50. *Pistalo*, 983 N.E.2d at 156.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

On appeal, the first issue that the court addressed was whether the plaintiff's action was barred because her claim against the estate was not filed within the nine month time limitation contained in the probate code.<sup>55</sup> The court of appeals rejected the argument that the plaintiff's claim against the estate was time barred.<sup>56</sup> Specifically, the court found that the only requirement to pursue a claim against the estate is that the claim be filed within the statute of limitations for the tort action.<sup>57</sup> In this particular case, because the plaintiff had filed his action against the insured within the applicable statute of limitations,<sup>58</sup> the plaintiff's action was not time barred.<sup>59</sup>

Furthermore, the court rejected the argument that because the estate had no assets, the plaintiff could not recover the excess judgment from the insurer.<sup>60</sup> The court found no public policy reason to condition the ability to pursue a breach of duty of good faith claim against an estate based upon its liquidity.<sup>61</sup> The court observed that if it conditioned the ability to pursue the bad faith claim upon whether an estate had assets, the court "would not serve the purpose of promoting good faith bargaining by liability carriers."<sup>62</sup> Furthermore, the court concluded that "[t]he fact that the estate had no assets goes to the *collectability* of the judgment, not the *right* to execute on the judgment against the estate."<sup>63</sup>

As a result, the court of appeals reversed the trial court's summary judgment entered in favor of the insurance company.<sup>64</sup> However, the court ruled as a matter of law that it could not determine whether the insurance company acted in bad faith, so it remanded the case back to the trial court for that determination.<sup>65</sup>

This case determined that the purpose behind finding a breach of duty of good faith is to make sure that insurance companies negotiate in good faith, which outweighed the fact that the estate had no collectible assets that were subject to execution by the plaintiff for the excess verdict.<sup>66</sup>

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55. *Id.* See IND. CODE § 29-1-7-7(e) (2013) provides, "[A] claim filed under Ind. Code 29-1-1-14-1(a) more than nine (9) months after the death of a decedent is barred."

56. *Pistalo*, 983 N.E.2d at 158.

57. *Id.*

58. IND. CODE § 34-11-2-4 (2013).

59. *Pistalo*, 983 N.E.2d at 158.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 160.

64. *Id.*

65. *Id.*

66. See *Economy Fire & Cas. Co. v. Collins*, 643 N.E.2d 382 (Ind. Ct. App. 1994) (adopting "judgment rule" that an insurer may be liable for the entire excess judgment entered against its insured, despite its insured's lack of ability to pay any of the excess judgment), *trans. denied* (Ind. 1995).

## II. HOMEOWNERS COVERAGE CASES

*A. Insurer Was Entitled to Rescind Policy for Material Misrepresentation Despite Its Failure to Return the Policy Premiums to Insured*

In providing insurance coverage to insureds, the insurance companies rely upon receiving accurate information from the insureds when the coverage is sought. In *Dodd v. American Family Mutual Insurance Co.*,<sup>67</sup> the Indiana Supreme Court found that an insurance company could rescind an insurance policy based upon an insured's material misrepresentation despite the insurer's failure to refund the policy premium to the insured.<sup>68</sup>

At the time of the acquisition of his policy, the named insured, Michael, was living in a home with his girlfriend, Katherine.<sup>69</sup> In the policy application, Michael listed Katherine as "an unrelated person in the household."<sup>70</sup> The application also asked if Michael "or any member of [the] household" had any past or current losses at any other location.<sup>71</sup> Michael answered this question in the negative.<sup>72</sup> However, while Michael and Katherine were previously living together in a home owned by Katherine, their home was destroyed by a fire resulting in a claim to another insurance company.<sup>73</sup> Relying upon Michael's application for a policy with the omission of the earlier fire loss, a new policy was issued by a new insurance company.<sup>74</sup>

Michael and Katherine sustained another fire loss which destroyed their garage.<sup>75</sup> They filed a claim with their new insurance company, and during its investigation into the cause and origin of the fire, Michael disclosed for the first time the earlier home fire to the insurance company.<sup>76</sup> Upon learning of the prior fire, the new insurance company treated the insured as making a material misrepresentation in the acquisition of coverage, and voided the insurance policy from its inception.<sup>77</sup> However, the insurer did not return the policy premiums.<sup>78</sup> The insurer also denied Michael and Katherine's garage fire loss claim.<sup>79</sup>

Michael and Katherine filed a lawsuit against the insurance company for breach of contract and intentional infliction of emotional distress.<sup>80</sup> The

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67. 983 N.E.2d 568 (Ind. 2013).

68. *Id.* at 570-71.

69. *Id.* at 569.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

insurance company sought and the trial court granted summary judgment to the insurer due to Michael's misrepresentation in the acquisition of the insurance coverage.<sup>81</sup> Michael and Katherine pursued an appeal to the court of appeals, which affirmed the trial court in part, but also reversed the decision in part.<sup>82</sup>

The Indiana Supreme Court granted transfer of the court of appeals' decision.<sup>83</sup> The crux of Michael and Katherine's appeal was that the insurance company could not rescind the policy based upon the fact that the insurer did not refund the premiums paid by them for the coverage.<sup>84</sup> There was no dispute that the insurance company did not refund the premiums to the insureds.<sup>85</sup> However, after summary judgment was granted to it, the insurance company interpled all of the premiums that it had collected to the trial court which held the funds pending the outcome of the appeal.<sup>86</sup> The Indiana Supreme Court mentioned the longstanding general rule that an insurance company that attempts to rescind a policy, must offer to return the premiums it has collected from the insured "within a reasonable time after the discovery of the alleged [misrepresentation]."<sup>87</sup> The court observed that if the insurance company failed to return the premiums, such omission constituted a waiver of any misrepresentation defense.<sup>88</sup>

However, the Indiana Supreme Court also observed that there is an exception to the general rule requiring the insurance company to return the premiums.<sup>89</sup> Specifically, a tender of the premiums was unnecessary if "the insurer has paid a claim . . . which is greater in amount than the premiums paid."<sup>90</sup> The evidence demonstrated that the insurance company had previously paid a hail damage claim presented by Michael and Katherine which exceeded the amounts that they had paid in premiums.<sup>91</sup> Consequently, the court affirmed the trial court in finding that a material misrepresentation had occurred, and due to the exception involving a separate claim presented by the insureds, found that the insurance company was not required to tender the premiums before it could rescind the insurance policy.<sup>92</sup>

This decision is a sound one concerning material misrepresentation by insureds. The insured received the benefit of coverage for the earlier claim.

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81. *Id.*

82. *Dodd v. Am. Family Mut. Ins. Co.*, 956 N.E.2d 769, 770 (Ind. Ct. App. 2011), *trans. granted*, 983 N.E.2d 568 (Ind. 2013).

83. *Dodd*, 983 N.E.2d at 570.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* (citing *Grand Lodge of Bhd. of R.R. Trainmen v. Clark*, 127 N.E. 280, 282 (Ind. 1920)).

88. *Id.*

89. *Id.*

90. *Id.* (quoting *Am. Standard Ins. Co. v. Durham*, 403 N.E.2d 879, 881 (Ind. Ct. App. 1980)).

91. *Id.* at 571.

92. *Id.*



Consequently, the justification for requiring a return of the premiums to the insured when the insurance company wished to rescind the policy, was not present.

*B. Court of Appeals Determines That Mortgage Company Was Entitled to Equitable Lien on Insurance Proceeds Despite Its Failure to Be Listed as Payee Under the Policy*

The decision of *Marling Family Trust v. Allstate Insurance Co.*<sup>93</sup> addressed an interesting fact scenario. A homeowner obtained a second mortgage from a trust.<sup>94</sup> The second mortgage agreement required the homeowner to insure the residence for the benefit of the trust.<sup>95</sup> The homeowners obtained an insurance policy from Allstate but failed to list the trust as a mortgagee on the homeowners policy.<sup>96</sup>

The homeowner lost the property due to foreclosure.<sup>97</sup> At the sheriff's sale, the trust purchased the home and took physical possession of the property.<sup>98</sup> At that time, the trust learned that there was significant interior water damage to the home that occurred during the applicable policy period of the Allstate homeowners policy.<sup>99</sup> The trust notified Allstate that it was submitting a claim for coverage under the policy.<sup>100</sup>

Allstate denied the trust's claim for proceeds under the homeowners policy.<sup>101</sup> The trust brought a lawsuit against Allstate, contending that the trust possessed an equitable lien upon policy proceeds due to its position as a mortgage holder.<sup>102</sup> The trial court granted Allstate's summary judgment motion and concluded that no coverage was available.<sup>103</sup>

The court of appeals reversed the trial court's decision.<sup>104</sup> The court applied the equitable doctrine that the court "will treat as done that which should have been done."<sup>105</sup> Relying upon an earlier court of appeals' decision,<sup>106</sup> the court concluded that because the mortgage agreement placed a duty upon the

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93. 981 N.E.2d 85 (Ind. Ct. App. 2012).

94. *Id.* at 87.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* Even though the trust was a second mortgage holder, when it purchased the home through the foreclosure sale, it bought out the interest of the first mortgagee.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 89 (quoting *Lakeshore Bank & Trust Co. v. United Farm Bureau Mut. Ins. Co., Inc.*, 474 N.E.2d 1024 (Ind. Ct. App. 1985)).

106. *See Lakeshore*, 474 N.E.2d 1024.

homeowner to acquire insurance for the benefit of the trust, an equitable lien existed on behalf of the trust to the insurance proceeds from the policy.<sup>107</sup> The court found that “the mere existence of the duty” upon the homeowner to insure the property for the benefit of the mortgage company, was sufficient to create the lien.<sup>108</sup>

However, the court also required that the trust give proper notice of its interest in the property to the insurance company before the insurance company distributes the policy proceeds.<sup>109</sup> This requirement was to avoid the possibility of the insurer having to make double payments, one payment to the original homeowner, and another payment to an unknown mortgage holder.<sup>110</sup> In this case, because the trust gave notice to Allstate of its interest before Allstate distributed the proceeds, it could still recover the insurance proceeds.<sup>111</sup>

This decision clearly contemplates addressing the interest of a party that should have been protected. While the mortgage holder was not listed as an insured party, it should have been protected under the policy by the homeowner.

### III. COMMERCIAL GENERAL LIABILITY CASES

#### *A. Court of Appeals Determines That Release Between Insured and Insurance Company Unambiguously Applied to Any Claims Pursued Under Excess Policies*

The decision of *United States Fidelity and Guaranty Co. v. Warsaw Chemical Co.*<sup>112</sup> provides an interesting analysis of the extent of a release and whether it applies to both primary and excess insurance policies possessed by an insured. The insured, a chemical company, possessed both primary and excess commercial general liability policies with the same insurer.<sup>113</sup> The insured was advised of a need to remediate a chemical spill existing on its premises.<sup>114</sup> The chemical company notified the insurance company of the remediation order, and requested reimbursement for defense and remediation costs from the insurer.<sup>115</sup> The insurer initially denied coverage for a number of reasons.<sup>116</sup> However, the insured and the insurance company entered into a settlement agreement where the chemical company released the insurer of all claims or demands related to the remediation in exchange for \$25,000.00.<sup>117</sup>

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107. *Marling*, 981 N.E.2d at 89.

108. *Id.* (quoting *Lakeshore*, 474 N.E.2d at 1026).

109. *Id.*

110. *Id.*

111. *Id.*

112. 990 N.E.2d 18 (Ind. Ct. App.), *trans. denied*, 994 N.E.2d 732 (Ind. 2013).

113. *Id.* at 19.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

Approximately fifteen years after the execution of the release agreement, the chemical company sued the insurer, contending that the release that was executed only applied to the insurer's obligations under the primary liability policies.<sup>118</sup> The chemical company sought coverage under the excess policies for additional remediation and defense costs.<sup>119</sup> The trial court concluded that the release only applied to the primary policies, and not the excess policies.<sup>120</sup>

On appeal, the court engaged in an analysis of the specific language of the release. The release contained a number of "recital" paragraphs which identified only the primary policies issued by the insurer.<sup>121</sup> However, the operational agreement portion of the release provided in pertinent part that:

1. In consideration for the payment of \$25,000.00, receipt of which is hereby acknowledged, [the chemical company] releases, acquit[s], and forever discharges [the insurer] and its agents, representatives, parent organizations, subsidiaries, and all other persons, firms or corporations in privity with [the insurer] from any further claims, demands, causes of action, damages, clean-up costs, expert fees, consulting fees, attorney fees, costs or losses of any kind and nature. . . related to, the pollution and contamination of the soil and groundwater in, upon or adjacent to the [premises].<sup>122</sup>

The insurer argued that the unambiguous language of the release clearly contemplated that the chemical company released the insurer for *all* claims and was not limited to only the listed insurance policies.<sup>123</sup> The chemical company contended that because the "recitals" had only referenced the primary insurance policies, the agreement only extended to release the insurer for any coverage obligation under those policies.<sup>124</sup>

The court noted that the language at issue was clear and unambiguous.<sup>125</sup> The court concluded that the clear language covered any and all policies that the insurer issued to the chemical company, and that the trial court erred in denying the insurance company's summary judgment motion.<sup>126</sup>

This case involves an interpretation of unambiguous provisions of a release. Because the broad nature of the release applied to any and all claims, as opposed to only listed policies, it encompassed all claims pursued under both the primary and excess policies.

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118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 20.

123. *Id.* at 19.

124. *Id.*

125. *Id.* at 24.

126. *Id.*

*B. Seventh Circuit Affirms Summary Judgment to Insurer Where Insured Voluntarily Settled with Claimant Without Receiving Consent of Insurance Co.*

The decision in *West Bend Mutual Insurance Co. v. Arbor Homes, LLC*<sup>127</sup> discussed the application of a “voluntary payment” provision of an insurance policy. The insured was a home builder that had contracted with buyers for the construction of a residential home.<sup>128</sup> The builder subcontracted the plumbing work to a plumber.<sup>129</sup> Pursuant to the subcontract, the plumber was to obtain liability insurance that named the builder as an additional insured.<sup>130</sup> The plumber purchased a liability insurance policy from West Bend.<sup>131</sup>

Unfortunately for the home buyers, the plumber failed to connect the home’s plumbing to the main sewer lines such that raw sewage was discharged into the home’s crawl space.<sup>132</sup> Soon after taking possession of the home, the buyers smelled an odor and complained of feeling ill.<sup>133</sup> After notifying the builder of the situation, the builder discovered the incorrect plumbing installation.<sup>134</sup> The builder had the plumber connect the sewer line and engaged in environmental remediation of the home to address the sewage contamination.<sup>135</sup> In the end, the builder ended up spending more than \$65,000.00 to repair and clean the home.<sup>136</sup>

The home buyers were unwilling to accept the home after its remediation.<sup>137</sup> Instead, they demanded that the builder buy the home, and construct a new one.<sup>138</sup> The builder told the subcontractor to notify West Bend regarding the buyers’ claims.<sup>139</sup> The builder sent a letter to the plumber which discussed a tentative settlement that was reached with the buyers, and requested that the plumber send the letter to West Bend.<sup>140</sup>

After not hearing from the plumber or West Bend, the builder assumed that West Bend had no objections to the settlement and entered into a final settlement agreement with the buyers.<sup>141</sup> The builder agreed to buy the home, build another home for the buyers, pay all closing costs and moving expenses of the buyers as well as compensate the buyers for any increase in their mortgage rate.<sup>142</sup>

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127. 703 F.3d 1092 (7th Cir. 2013), *reh ’g denied*.

128. *Id.* at 1093.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 1094.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

The builder eventually filed suit against the plumber alleging a number of legal theories to seek reimbursement for its settlement with the buyers.<sup>143</sup> The builder's attorney also sent a copy of the complaint to West Bend, requesting that West Bend become involved in resolving the dispute.<sup>144</sup> West Bend denied any liability and filed a declaratory judgment lawsuit.<sup>145</sup> In addition to asserting other coverage defenses,<sup>146</sup> West Bend contended that the "voluntary payment" policy provision was violated.<sup>147</sup> That provision provided: "No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our [the insurer's] consent."<sup>148</sup>

The district court granted summary judgment to West Bend by finding that there was no coverage available to the builder.<sup>149</sup> The builder appealed contending that the insurer sustained no prejudice from the builder's settlement such that the voluntary payment provision could not apply to disclaim coverage.<sup>150</sup>

The Seventh Circuit rejected this argument.<sup>151</sup> The court observed that the purpose of the "voluntary payment" provision is to give the insurer "the opportunity to protect itself and its insured by investigating any incident that may lead to a claim under the policy, and by participating in any resulting litigation or settlement discussions."<sup>152</sup> Although the court found that the builder "behaved admirably" by resolving the buyers' claim, the builder failed to protect West Bend's interest when the builder did not obtain West Bend's consent to the settlement.<sup>153</sup> The court observed that the "voluntary payment" provision "is not a notice provision *per se*, but a consent provision."<sup>154</sup> Because the undisputed evidence established that the builder did not obtain the West Bend's consent, no coverage was owed.<sup>155</sup>

This case is an excellent example of the purpose and application of the "voluntary payment" provision. An insurer must be afforded the opportunity to participate in its insured's defense and to be involved in any potential settlement negotiations. Failure to obtain the insurance company's consent will be fatal to any claim for coverage.

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143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* (The insurer contended that the builder was not an "additional insured," that a "fungi and bacteria" exclusion applied, and that no coverage was afforded for completed-operations of the insured.)

147. *Id.* at 1095.

148. *Id.*

149. *Id.* at 1094.

150. *Id.*

151. *Id.*

152. *Id.* at 1095.

153. *Id.* at 1096.

154. *Id.*

155. *Id.*

*C. Court of Appeals Refuses to Allow Insurer to Intervene in Lawsuit Against Insured After Insurer Offered to Defend Insured Under Reservation of Rights*

The decision in *Granite State Insurance Co. v. Lodholtz*<sup>156</sup> provides guidance to insurance companies of unfortunate results that can occur if an insured is not afforded a defense even when coverage is in question. A contractor sustained serious personal injuries while working at the insured's facilities.<sup>157</sup> The injured contractor sued the insured who notified the claims administrator of its liability insurer about the lawsuit.<sup>158</sup> The administrator sought and obtained an extension of time to answer the complaint for the insured, but did not file an answer within the extended deadline.<sup>159</sup> As a result, a default judgment was entered against the insured.<sup>160</sup> After the default judgment was entered and before a damages award was assessed, the insured, on its own, agreed to a settlement with the injured contractor where he would not attempt to collect any damages directly from the insured but only seek the damages from any insurance coverage available to the insured.<sup>161</sup>

Approximately a week after the settlement between the contractor and insured, the insurance company advised the insured that it would represent the insured in the lawsuit under a reservation of rights.<sup>162</sup> The trial court entered a default judgment in favor of the contractor and awarded damages of \$3,866,462.00.<sup>163</sup> The insurer attempted to intervene in the lawsuit pursuant to Indiana Rule of Trial Procedure 24(a)(2) to assert its coverage defenses, and to request the court to vacate the default judgment.<sup>164</sup> The trial court refused to allow the insurer to intervene.<sup>165</sup>

On appeal, the insurer contended the trial court abused its discretion in denying the Motion to Intervene.<sup>166</sup> The insurer explained that its interests in the litigation were in danger of being impeded and were not protected.<sup>167</sup> However, the contractor contended that the insurer's interests were only "contingent," because the insurer reserved its rights to deny coverage and did not offer coverage to the insured.<sup>168</sup> The contractor relied upon the decision of *Cincinnati Insurance Co. v. Young*<sup>169</sup> where the test for intervention as of right required proposed

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156. 981 N.E.2d 563 (Ind. Ct. App. 2012), *trans. denied*.

157. *Id.* at 565.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 566.

167. *Id.*

168. *Id.*

169. 852 N.E.2d 8, 13 (Ind. Ct. App. 2006), *trans. denied*.

intervenors to show “(1) an interest in the subject of the action, (2) disposition of the action may as a practical matter impede the protection of that interest, and (3) representation of the interest by existing parties is inadequate.”<sup>170</sup>

The court of appeals affirmed the trial court’s denial of the insurer’s request for intervention.<sup>171</sup> The court concluded that because the insurance company reserved its rights to deny coverage, it did not have a “direct interest” as required under Trial Rule 24 to justify intervention as of right.<sup>172</sup>

This decision seems to completely ignore the interests of the insurance company in challenging the coverage issues. As Judge Baker observed in the dissent, intervention appeared to be the only way the insurer could challenge the contractor’s claim after default judgment was entered.<sup>173</sup> Furthermore, the insurer had not denied coverage to the insured, but rather defended under a reservation of rights, which previous court rulings have addressed is the proper way for an insurance company to avoid the effects of collateral estoppel when it has coverage issues that it wishes to still address.<sup>174</sup>

*D. Court of Appeals Concludes That Umbrella Policy was Ambiguous with Respect to Whether It Provided “Completed Operations” Coverage to Insured*

The case of *Hammerstone v. Indiana Insurance Co.*<sup>175</sup> provides an interesting analysis by the court in addressing an alleged insurance policy’s ambiguity. The insured was the manufacturer of a vacuum machine that was utilized to mulch leaves and other yard debris.<sup>176</sup> An operator was injured while using the machine, and filed a product liability action against the insured manufacturer and others.<sup>177</sup> The insured submitted the claim to its primary insurer which agreed to provide a defense to the insured for the injured customer’s claim.<sup>178</sup> However, the umbrella insurer issued a reservation of rights letter to the insured and also filed a declaratory judgment action to present coverage defenses.<sup>179</sup> The umbrella insurer contended that insurance coverage under the umbrella policy was excluded by a policy endorsement that specifically provided that “products-completed operations” coverage did not apply to bodily injury claims.<sup>180</sup> The umbrella insurer filed and was granted summary judgment finding that no coverage was available.<sup>181</sup>

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170. *Granite*, 981 N.E.2d at 566 (quoting *Cincinnati Ins.*, 852 N.E.2d at 13).

171. *Id.*

172. *Id.* at 567.

173. *Id.* at 568 (Baker, J., dissenting).

174. *See Liberty Mut. Ins. Co. v. Metzler*, 586 N.E.2d 897 (1992).

175. 986 N.E.2d 841 (Ind. Ct. App. 2013).

176. *Id.* at 842.

177. *Id.*

178. *Id.* at 843.

179. *Id.* at 845.

180. *Id.* at 844.

181. *Id.* at 845.

The insured appealed and argued that the umbrella policy was inherently ambiguous.<sup>182</sup> While acknowledging the exclusion for “completed operations” within the policy, the insured argued that an ambiguity existed because the declarations page specifically stated that \$2,000,000 of policy limits applied for claims involving “products-completed operations.”<sup>183</sup>

The court of appeals reversed the trial court, and concluded that the policy was ambiguous.<sup>184</sup> In its finding, the court stated: “Thus, the Umbrella Policy states that it both provides \$2,000,000 of coverage for products-completed operations and that the insurance does not apply to products-completed operations hazard injuries. As a result, the Umbrella Policy is inherently ambiguous.”<sup>185</sup>

From the description of the case, it appears that an ambiguity existed within the policy. The insurer could not offer an explanation as to why limits for completed operations coverage were listed on the declarations page, but also excluded by the policy language. As a result, an ambiguity in the policy existed.

IV. PROPERTY INSURANCE CASE: *COURT OF APPEALS AFFIRMS TRIAL COURT’S ORDERS COMPELLING INSURANCE COMPANY TO PRODUCE PAST HAIL CLAIM HISTORY AND RESERVE INFORMATION*

The decision of *Auto-Owners Insurance Co. v. C & J Real Estate, Inc.*<sup>186</sup> is a troubling decision that will likely adversely affect insurers. The insured was the owner of a commercial building that was insured under a property policy.<sup>187</sup> After a hail storm, the insured filed a claim seeking coverage for damage to the roof of the insured’s building.<sup>188</sup> The insurance company investigated, but ultimately denied the claim, finding that the roof was not damaged due to hail.<sup>189</sup>

The insured filed a lawsuit against the insurer alleging breach of contract and breach of the duty of good faith and fair dealings owed by the insurer to the insured.<sup>190</sup> During the discovery stage of the litigation, the insured requested that the insurance company answer discovery requests relating to “every hail damage claim that [the insurer] received from an insured residing in Indiana with a commercial property insurance policy from the period of 2009 to the present date.”<sup>191</sup> The insurer objected to producing this information by claiming that such evidence was irrelevant and unlikely to lead to the discovery of admissible evidence.<sup>192</sup> The insurer relied upon the case of *Ramirez v. American Family*

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182. *Id.*

183. *Id.* at 844.

184. *Id.*

185. *Id.* at 846.

186. 996 N.E.2d 803 (Ind. Ct. App. 2013).

187. *Id.* at 804.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* at 805.

192. *Id.*



*Mutual Insurance Co.*<sup>193</sup> where in a lawsuit relating to a first party coverage claim, the court determined that “[i]nformation regarding other claims made by other insureds under other contracts was not relevant to the coverage afforded under the [present insured’s] insurance policy.”<sup>194</sup>

Additionally, the insured sought to obtain the amount of reserves<sup>195</sup> that the insurance company placed on the insured’s claim.<sup>196</sup> The insurance company objected to producing this information by contending the reserves were prepared by the insurer in anticipation of litigation.<sup>197</sup>

The trial court ordered the insurance company to produce information relating to its hail claims history and the reserve information.<sup>198</sup> The court of appeals affirmed the trial court’s ruling relating to the discovery of both discovery matters.<sup>199</sup> Because the insured had presented claims for both breach of contract and breach of duty of good faith, the court concluded that discovery of those matters was warranted as each was relevant to the claim for breach of duty of good faith.<sup>200</sup> The court reiterated that under the standard for discovery, information is discoverable, even if not admissible at trial, so long as it may lead to the discovery of admissible evidence.<sup>201</sup>

The key to this case appears to be that because the breach of contract and breach of duty of good faith claims had not been bifurcated, the court felt obligated to allow discovery of this information, even if it was prejudicial to the insurance company on the breach of contract claim.<sup>202</sup> In cases where claims for both breach of contract and breach of duty of good faith are alleged, insurers will need to immediately seek a bifurcation of the breach of duty of good faith claim from the breach of contract claim, in order to prevent the disclosure of this prejudicial evidence. The court hinted that its ruling may have been different if discovery of those claims had been bifurcated.

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193. 652 N.E.2d 511 (Ind. Ct. App. 1995).

194. *Id.* at 517.

195. IND. CODE § 27-1-13-8(c) (2014) requires an insurance company to set aside a “reserve for outstanding losses at least equal to the aggregate estimated amounts due or to become due on account of all losses or claims of which the company has received notice.”

196. *Id.*

197. *Id.* at 807.

198. *Id.*

199. *Id.* at 808.

200. *Id.* at 806.

201. *Id.* (see IND. R. TR. PROC. 26).

202. Because reserves are based upon an insurer’s estimate of its risk for a loss, disclosure of such information is prejudicial to the insurer on the breach of contract claim.

