This was especially true of the offense in question, the "most fundamental element" of which was the sex of the defendant.

Even though the supreme court sanctioned judicial notice of a defendant's sex, it is still safer for the State to put a witness on the stand and elicit from the witness an opinion as to a defendant's sex. This would alleviate any defendant's contention that she did not know that the court had taken judicial notice of her sex and would prevent appeals over the procedural burden facing the defendant in such cases. In any event, if the trial court takes judicial notice of the defendant's sex, it should place such notice on the record. If the court does not do so on its own motion, the prosecuting attorney should request the court to put such notice on the record.

X. Insurance

*G. Kent Frandsen**

This Note reviews the most significant insurance cases decided by the Indiana courts within the past year. For the most part, the issues presented involved construction of policy language and legislative intent. It is sufficient to note that the courts were not ambivalent in exercising their judgment in this area of law. As the following cases indicate, the element of reasonableness was given a rather high priority when consumer expectations conflicted with prolix policy language.

A. Fraudulent Misrepresentation of Insuring Agreement

One interesting case decided this past year by the Indiana Court of Appeals should serve as a caveat to the insurance industry to deal in good faith with its insureds. In *Physicians Mutual Insurance Co. v. Savage*,[1] the court of appeals held that misrepresentations by an insurer's agent can support a specific finding of fraud. This finding justified an award of substantial exemplary damages in an action on the contract. In this case, the executor of the insured's estate notified the insurance company of the insured's death and requested claim and proof of death forms. The insured had been fatally injured while operating an automobile and a blood test taken

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The author wishes to express his appreciation for the able assistance of Robert L. Hartley, Jr.

[1]296 N.E.2d 165 (Ind. Ct. App. 1973).

shortly after the injury revealed that she had a .21 percent blood alcohol content at the time of the accident. The insurer had issued a hospital expense and accident policy to the decedent which contained a rider providing for a $10,000 accidental death benefit. The policy issued to the insured contained the following exclusion: "This policy does not cover any loss caused by or resulting from . . . (6) mental disorder, alcoholism or drug addiction."[2] After an exchange of correspondence between the insurer and the executor, one of the insurer's agents visited the executor and misrepresented that the rider to the policy contained an exclusion denying liability in the event the insured was intoxicated at the time of her death.[3] Although, at that time, the executor was unaware that the rider shown to him by the agent was substantially different from the one actually attached to the policy, he wisely rejected an offer to settle for $1,000. Thereafter, an action seeking the $10,000 face value of the rider and exemplary damages for the insurer's wrongful and willful denial of its contractual obligations was filed by the executor.

The trial court made a specific finding that the insurer had, through its agent, knowingly perpetrated a fraud on the plaintiff by substituting another contract of insurance for the contract of insurance entered into and by denying insurance coverage for accidental death. The court therefore awarded the executor $50,000 in exemplary damages in addition to a recovery of the face value of the rider. On appeal, Judge Robertson, speaking for a unanimous court, affirmed the judgment of the trial court and held that there was sufficient evidence of probative value to establish the common law elements of fraud.[4] The court held that the element of scienter was a question for the trier of fact and that it could be inferred from statements made recklessly.[5]

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[2]*Id.* at 167.

[3]The purported rider contained the following exclusion: "Injury sustained in consequence of the Insured's being intoxicated or under the influence of any narcotic unless administered on the advice of a physician." *Id.* The court noted the substantial distinction between being an alcoholic and being intoxicated.

[4]The court cited Capitol Dodge, Inc. v. Haley, 288 N.E.2d 766 (Ind. Ct. App. 1972), for the elements of fraud and said:

> For all practical purposes, the representation and the falsity . . . are admitted, . . . [and] the record reveals evidence from which the trier of fact could reasonably infer the existence of scienter, deception and injury.

296 N.E.2d at 169.

[5]*See* Capitol Dodge, Inc. v. Haley, 288 N.E.2d 766 (Ind. Ct. App. 1972); Jordanich v. Gerstbauer, 287 N.E.2d 784 (Ind. Ct. App. 1972). *See also* Automobile Underwriters, Inc. v. Smith, 131 Ind. App. 454, 166 N.E.2d 341 (1960).

The general rule that exemplary damages are not recoverable in contract actions[6] was not applicable because the trial court made a specific finding of fraud. Therefore, the court of appeals was justified in upholding the award of exemplary damages.[7] In response to the insurer's contention that $50,000 was excessive, the court recognized that the purpose of such an award is not merely to compensate the injured party, but rather is to deter similar wrongful conduct.[8] In light of the substantial net worth of the insurer,[9] the court concluded the award was not an abuse of discretion.[10]

B. Uninsured Motorist Coverage

1. Exclusion Void as Against Public Policy

In 1955, as a means of forestalling compulsory liability insurance and unsatisfied judgment funds, the automobile insurance industry instituted a campaign of expanding the coverage of the standard automobile policy to include uninsured motorist coverage (UMC).[11] Indiana requires UMC under a statute enacted in 1965 which provides in part:

> No automobile liability or motor vehicle liability policy or insurance insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall be delivered or issued for delivery in this state . . . unless coverage is provided therein or supplemental thereto . . . for the protection of persons insured thereunder who are legally entitled to recover dam-

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[6]Standard Land Corp. v. Bogardus, 289 N.E.2d 803 (Ind. Ct. App. 1972); Hedworth v. Chapman, 135 Ind. App. 129, 192 N.E.2d 649 (1963).

[7]Voelkel v. Berry, 139 Ind. App. 267, 218 N.E.2d 924 (1966); Hedworth v. Chapman, 135 Ind. App. 129, 192 N.E.2d 649 (1963); Murphy Auto Sales, Inc. v. Coomer, 123 Ind. App. 709, 112 N.E.2d 589 (1953); *cf.* Jerry Alderman Ford Sales, Inc. v. Bailey, 291 N.E.2d 92 (Ind. Ct. App. 1972).

[8]296 N.E.2d at 169. *See* Capitol Dodge, Inc. v. Haley, 288 N.E.2d 766 (Ind. Ct. App. 1972).

[9]The insurer's Statement of Condition disclosed total assets in excess of $37,000,000 and total liabilities in excess of $28,000,000.

[10]*But cf.* Bangert v. Hubbard, 127 Ind. App. 579, 126 N.E.2d 778 (1955) (punitive damages in a malicious prosecution action were held excessive because they were not reasonably proportioned to the amount of compensatory damages).

[11]A. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE (1969) is a comprehensive treatise concerning the uninsured motorist protection endorsement. Chapter 1 of this treatise describes in detail the origins of the coverage. Also, see Laufer, *Insurance Against Lack of Insurance? A Dissent from the Uninsured Motorist Endorsement*, 1969 DUKE L.J. 227, for a brief but well written description of the endorsement.

> ages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom.[12]

A further provision of the statute allows any insured to reject UMC, but only if the rejection is in writing.[13] Few insureds are aware of this option, if, in fact, they are even aware of the scope of their UMC. In essence, it is a quasi-form of mandatory first party insurance.[14] Proponents of mandatory first party insurance such as modified-fault plans, more commonly known as no-fault automobile liability insurance, may well reserve their enthusiasm upon reviewing the cases involving UMC. The suggestions that, under first party coverage, the insurers are conscious of the importance of accommodating their insureds through prompt settlements and are inclined to resolve differences in favor of their insureds, appear illusory after reviewing some recent decisions involving UMC.

In *State Farm Mutual Insurance Co. v. Robertson*,[15] the court of appeals reaffirmed its posture of rejecting policy language which conflicts with and is more restrictive than statutes enacted for the protection of persons insured. The underlying purpose of UMC was the basis for the court's holding that a policy exclusion which restricted UMC protection was void as contrary to public policy. In *Robertson*, the insured's son, a member of the insured's household, was fatally injured as a result of being struck by an uninsured vehicle. At the time of the accident, the son was operating a motorcycle owned by the insured, but which was not listed as an insured vehicle in the policy issued by State Farm. The father brought a wrongful death action against the driver of the uninsured automobile and obtained a judgment. This judgment was not satisfied and Robertson's subsequent claim under the UMC provision was denied by State Farm based on the following exclusion contained in its policy:

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[12]IND. CODE § 27-7-5-1 (IND. ANN. STAT. § 39-4310, Burns 1965).

[13]*Id.*

[14]First party insurance is a term used extensively within the industry to distinguish coverage, such as collision, comprehensive, medical payments and uninsured motorist protection, from public liability coverage which is commonly referred to as third party insurance. In first party insurance, if there is a loss, the insured deals with his insurer for purposes of indemnification. In third party insurance, the injured person looks to the tortfeasor's insurer for compensation of the alleged injuries or loss.

[15]295 N.E.2d 626 (Ind. Ct. App. 1973). For other recent Indiana cases involving UMC, see Vantine v. Aetna Cas. & Sur. Co., 335 F. Supp. 1296 (N.D. Ind. 1971); Cannon v. American Underwriters, Inc., 275 N.E.2d 567 (Ind. Ct. App. 1971); Ely v. State Farm Mut. Auto. Ins. Co., 148 Ind. App. 586, 268 N.E.2d 316 (1971); Patton v. Safeco Ins. Co. of America, 148 Ind. App. 548, 267 N.E.2d 859 (1971); Indiana Ins. Co. v. Noble, 148 Ind. App. 297, 265 N.E.2d 419 (1970).

> Insuring Agreement III (uninsured motorist coverage) does not apply: . . . b) to bodily injury to an insured while occupying or through being struck by a land motor vehicle owned by the named insured or resident of the same household, if such vehicle is not an "insured vehicle."[16]

Citing case authority that announced the following principles, the court stated that the provisions of the statute must be considered a part of every automobile liability policy whether written specifically therein or not,[17] that uninsured motorist legislation is remedial in nature and should be liberally construed,[18] and further, that the statute is for the protection of *persons* insured, irrespective of the insured's proprietary or insurance interest in the vehicle he happens to be occupying, and is not limited to *persons injured while operating or occupying an insured automobile.*[19] In light of these principles, the court held that the policy exclusion limiting the coverage afforded by the statute was invalid.[20]

2. UMC Set-Off Provision Void

In *Leist v. Auto Owners Insurance Co.*,[21] the Second District Court of Appeals considered a policy provision reducing any loss payable under UMC by amounts paid or payable under any workmen's compensation law.[22] Leist was injured while operating his employer's vehicle and was paid $11,976.12 under the employer's workmen's compensation policy. Auto Owners insured the employer

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[16]295 N.E.2d at 628.

[17]Indiana Ins. Co. v. Noble, 148 Ind. App. 297, 265 N.E.2d 419 (1970).

[18]Cannon v. American Underwriters, Inc., 275 N.E.2d 567 (Ind. Ct. App. 1971); Indiana Ins. Co. v. Noble, 148 Ind. App. 297, 265 N.E.2d 419 (1970). *See also* Riehl v. National Mut. Ins. Co., 374 F.2d 739 (7th Cir. 1967); State Farm Mut. Auto. Ins. Co. v. American Underwriters, Inc., 371 F.2d 999 (7th Cir. 1967); Simpson v. State Farm Mut. Auto. Ins. Co., 318 F. Supp. 1152 (S.D. Ind. 1970).

[19]Vantine v. Aetna Cas. & Sur. Co., 335 F. Supp. 1296 (N.D. Ind. 1971); Cannon v. American Underwriters, Inc., 275 N.E.2d 567 (Ind. Ct. App. 1971); Patton v. Safeco Ins. Co. of America, 148 Ind. App. 548, 267 N.E.2d 859 (1971).

[20]295 N.E.2d at 629. *Accord, e.g.*, Vantine v. Aetna Cas. & Sur. Co., 335 F. Supp. 1296 (N.D. Ind. 1971); Doxater v. State Farm Mut. Auto. Ins. Co., 8 Ill. App. 3d 547, 290 N.E.2d 284 (1972); Shipley v. American Standard Ins. Co., 183 Neb. 109, 158 N.W.2d 238 (1968).

[21]311 N.E.2d 828 (Ind. Ct. App. 1974).

[22]

> Any loss payable . . . to or for any person shall be reduced by (c) the amount paid and the present value of all amounts payable to him under any workmen's compensation law . . . .

Id. at 830.

for both workmen's compensation and automobile liability. Auto Owners sought and obtained a declaratory judgment and injunction restraining Leist from seeking, by arbitration, damages under the automobile liability policy's UMC provision. The maximum amount payable under UMC was $10,000. The trial court held that Auto Owners could set off the workmen's compensation recovery against any UMC recovery, and since the workmen's compensation recovery exceeded any possible UMC recovery, arbitration would be useless. The court also held that under Indiana's workmen's compensation statute [23] Auto Owners was subrogated to Leist's UMC recovery to the extent of $11,976.12, and for this additional reason arbitration would be useless.

The Indiana Court of Appeals reversed. The court decided that since the Indiana UMC statute [24] sets minimum limits below which coverage may not go,[25] the policy provision for set-off of workmen's compensation benefits was in derogation of the UMC statute and therefore void. With regard to Auto Owners' right of subrogation under Indiana's workmen's compensation statute, the court noted that the statutory right of subrogation does not ripen until there is a judgment, settlement or a refusal by the insured to assert his right of recovery.[26] Since this action arose prior to Leist's obtaining a judgment under UMC, the court held that any right of subrogation in Auto Owners had not ripened.[27]

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[23] IND. CODE § 22-3-2-13 (Burns 1974).

[24] *Id.* § 27-7-5-1. (IND. ANN. STAT. § 39-4310, Burns Supp. 1974).

[25] Simpson v. State Farm Mut. Auto. Ins. Co., 318 F. Supp. 1152 (S.D. Ind. 1970); Cannon v. American Underwriters, Inc., 275 N.E.2d 567 (Ind. Ct. App. 1971); Patton v. Safeco Ins. Co. of America, 148 Ind. App. 548, 267 N.E.2d 859 (1971); Indiana Ins. Co. v. Noble, 148 Ind App. 297, 265 N.E.2d 419 (1970).

[26]

> [I]f the action against such other person is brought by the injured employee or his dependents and judgment is obtained and paid, and accepted or settlement is made . . . then from the amount received . . . there shall be paid to the employer, or such employer's compensation insurance carrier, the amount of compensation paid to such employee . . . .

IND. CODE § 22-3-2-13 (Burns 1974).

[27] In so holding, the court avoided the interesting issue of whether the workmen's compensation insurer's right of subrogation extends to all amounts recovered by an injured employee regardless of their source, or whether the right of subrogation only extends to amounts recovered in tort. However, the implication of the court's holding is that, after Leist obtains a judgment entitling him to UMC recovery, Auto Owners will be subrogated to his recovery despite the fact that the recovery results from a contract action rather than a tort action.

3. "Stacking" Benefits

In 1970, the United States District Court for the Southern District of Indiana allowed an insured to recover the full policy limits under the UMC provisions of two separate policies, each of which covered a separate vehicle owned by the insured.[28] The question of "stacking" of benefits had not previously been presented to the Indiana courts. In *Jeffries v. Stewart*,[29] the Indiana Court of Appeals permitted "stacking" of UMC benefits and medical payments under a *single* policy which insured three separate vehicles. The insured obtained a $30,000 judgment against his uninsured tortfeasor. The insured joined his own insurer in the action and the trial court held that the insurer's liability was limited to $10,000 under UMC and $500 in medical payments. The insured appealed. Rejecting the holdings of courts in several other jurisdictions[30] which denied the "stacking" of benefits when the insured had multiple coverage under a single policy, the appellate court reversed. It held that since the policy covered three separate vehicles, the benefits could be "stacked" and the insured could recover up to $30,000 under UMC and $1500 in medical payments. The appellate court expressly did not base its decision on Indiana's uninsured motorist statute.[31] Rather, the court rested its decision on an ambiguity resulting from conflicting policy provisions and, of course, resolved the ambiguity in favor of the insured.[32] The policy provisions in conflict were the separability condition providing that "[w]hen two or more automobiles are insured hereunder, the terms of this policy shall apply

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[28]Simpson v. State Farm Mut. Auto. Ins. Co., 318 F. Supp. 1152 (S.D. Ind. 1970). Judge Dillin reasoned that if the question were presented to the Indiana courts they would adopt the majority view permitting aggregation of benefits since the UMC statute fixed minimum, not maximum, requirements of coverage, since any attempt of an insurer to limit the effect of the statute would be in derogation of the statute, and since it would be unconscionable to permit the insurers to collect a premium for coverage they are required to provide and then to avoid payment of a loss because of limiting language in their policies.

[29]309 N.E.2d 448 (Ind. Ct. App. 1974).

[30]Allstate Ins. Co. v. Shmitka, 12 Cal. App. 3d 59, 90 Cal. Rptr. 399 (1970); Otto v. Allstate Ins. Co., 2 Ill. App. 3d 58, 275 N.E.2d 766 (1971); Allstate Ins. Co. v. McHugh, 124 N.J. Super. 105, 304 A.2d 777 (1973). In Allstate Ins. Co. v. Mole, 414 F.2d 204 (5th Cir. 1969), and Polland v. Allstate Ins. Co., 25 App. Div. 2d 16, 266 N.Y.S.2d 286 (1966), aggregation of benefits was denied with respect to liability coverage.

[31]IND. CODE § 27-7-5-1 (IND. ANN. STAT. § 39-4310, Burns Supp. 1974).

[32]*See* O'Meara v. American States Ins. Co., 148 Ind. App. 563, 268 N.E.2d 109 (1971); United States Fidel. & Guar. Co. v. Baugh, 146 Ind. App. 583, 257 N.E.2d 699 (1970). The test is whether reasonably intelligent men, upon reading the contract, would honestly differ as to its meaning.

separately to each . . . ."[33] and the limits of liability provision limiting liability to $10,000 for each person and $20,000 for each accident.[34] The court stated:

> We cannot determine whether the limit of liability clause is a part of each of the three policies effectuated by the separability clause, or whether it is meant to apply to the single contract of insurance issued to Jeffries.[35]

The court also supported its decision by the fact that Jeffries paid three separate premiums for UMC and medical coverage. Of greatest interest to the insurance industry is the fact that the court in *Jeffries* apparently recognized that proper draftsmanship might avoid the problem altogether, either by having the separability clause by its express terms not apply to UMC,[36] or by making it clear that the limits of liability are absolute irrespective of the number of vehicles insured under the policy.[37]

C. "Other Insurance" Clauses

Cumulative coverage in automobile liability insurance policies has produced its own Alphonse and Gaston act.[38] Not infrequently, claims arise when "A" while driving "B's" automobile negligently causes injury to "C". Both "A" and "B" have public liability coverage under policies issued by different carriers. On the surface, it appears that the injured person should have access through the tortfeasor to two separate resources which could compensate him for his injuries. However, insurance companies have attempted to limit their liability when their insureds have access to other collectible insurance by the use of "other insurance" provisions which

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[33]309 N.E.2d at 450.

[34]*Id.* at 451.

[35]*Id.* at 453.

[36]Morrison Assurance Co., Inc. v. Polak, 230 So. 2d 6 (Fla. 1969); Dhane v. Trinity Universal Ins. Co., 497 S.W.2d 323 (Tex. Civ. App. 1973). *But see* Sturdy v. Allied Mut. Ins. Co., 203 Kan. 783, 457 P.2d 34 (1969); Lipscombe v. Security Ins. Co., 213 Va. 81, 189 S.E.2d 320 (1972).

[37]Hilton v. Citizens Ins. Co., 201 So. 2d 904 (Fla. App. 1967).

[38]In Fireman's Ins. Co. v. St. Paul Fire & Marine Ins. Co., 411 P.2d 271 (Ore. 1966), the court stated:

> This court believes it is good public policy not to put an injured plaintiff, or a defendant who is fortunate enough to have duplicate coverage, in a position where there is any possibility one insurer can say, "After you my dear Alphonse!" while the other says, "Oh, no, after you, my dear Gaston." They must walk arm in arm through the door of responsibility.

Id. at 274.

may contain either pro-rata clauses,[39] excess coverage clauses,[40] or escape clauses.[41] In the area of "other insurance" clauses, the attempt to achieve standardization and uniformity of policy language has fallen short of expectations.[42]

An issue of first impression for the Supreme Court of Indiana was presented in the case of *Indiana Insurance Co. v. American Underwriters, Inc.*[43] The question raised was whether the automobile owner's insurer or the driver's insurer should bear primary liability when both insureds had a policy covering the accident. The owner's policy contained an escape clause and the driver's contained an excess coverage clause.

In the decision below,[44] the appellate court applied what it termed the majority rule that, all else being equal, primary liability should fall on the automobile owner's insurer rather than on the operator's insurer.[45] This rule apparently resulted from a misinterpretation of the view enunciated in *Zurich General Accident & Liability Insurance Co. v. Clamor*,[46] which the appellate court recognized as the majority view.[47] The *Zurich* approach assigns primary liability by applying rules of construction to the insurance contracts and determining which policy more specifically assumes or excludes the risk of loss. A proper application of the *Zurich* approach clearly would not result in a hard and fast rule such as the one applied by the appellate court.[48] The appellate court's rule may be preferable, however, since the *Zurich* approach could lead to unending litigation to interpret newly drafted or revised "other insurance" provisions.

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[39]A pro-rata clause restricts the liability of concurrent insurers to an apportionment basis.

[40]An excess coverage clause restricts the insurer's coverage to the amount due the insured over and above another insurer's policy limits.

[41]An escape clause avoids all liability in the event of other insurance.

[42]For a good discussion of "other insurance" clauses and the conflicts which may arise between them, see 46 IND. L.J. 270 (1971).

[43]304 N.E.2d 783 (Ind. 1973).

[44]Indiana Ins. Co. v. American Underwriters, Inc., 290 N.E.2d 784 (Ind. Ct. App. 1972).

[45]The trial court applied the rule that the driver's insurer was primarily liable. *Id.* at 785.

[46]124 F.2d 717 (7th Cir. 1942).

[47]Indiana Ins. Co. v. American Underwriters, Inc., 290 N.E.2d 784, 786 (Ind. Ct. App. 1972).

[48]In *Zurich*, the court found that an excess clause was more specific than an escape clause. Thus, under the *Zurich* approach, the owner's insurer would be primarily liable only if the owner's policy contained an escape clause. However, if the driver's policy contained the escape clause, *Zurich* would hold the driver's insurer primarily liable.

The Indiana Supreme Court reversed, rejecting the rule applied by the trial court,[49] the rule applied by the appellate court,[50] and the *Zurich* approach. As Judge Beamer predicted,[51] the court adopted the minority view and held that whenever "other insurance" clauses conflict they are to be disregarded. The insurers share dual primary liability, prorated according to the limits of each policy. The court noted that the original purpose for "other insurance" clauses was to discourage overinsurance and the resultant temptation for self-injury. This purpose has little relevance today in the field of public automobile liability coverage. Further, the dual concerns of seeing that insureds receive a *quid pro quo* for the payment of premiums and that injuries are redressed are more important than giving judicial sanction to the artistry of the policy draftsman.

D. Mortgage Clauses

In *Federal National Mortgage Association v. Great American Insurance Co.*,[52] the appellate court was faced with the distinction between an "open or loss payable" clause[53] and a "union or standard mortgage" clause[54] in a fire insurance policy. The clause in question provided:

> Loss . . . shall be payable to the mortgagee . . . and this insurance as to the interest of the mortgagee (or trustee) only therein, *shall not be invalidated by any act or neglect of the mortgagor or owner . . . nor by any foreclosure* or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property . . . .[55]

Reversing the trial court, the appellate court followed well estab-

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[49]See note 45 *supra.*

[50]See text accompanying note 45 *supra.*

[51]In Allstate Ins. Co. v. American Underwriters, Inc., 312 F. Supp. 1386 (N.D. Ind. 1970), Judge Beamer was faced with a conflict between "other insurance" clauses and, in the absense of any Indiana case law on the subject, ignored the clauses and prorated liability between the insurers.

[52]300 N.E.2d 117 (Ind. Ct. App. 1973).

[53]

> Under a simple loss-payable or open-mortgage clause, the mortgagee is simply an appointee to receive the insurance fund recoverable in case of loss to the extent of his interest, and his right of recovery is no greater than the right of the mortgagor.

11 G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 42:660 (2d ed. R. Anderson 1963).

[54]These terms are used interchangeably to denote a clause which purports to protect the mortgagee by creating a separate contract between the insurer and mortgagee. *Id.* § 42:649.

[55]300 N.E.2d at 118 (emphasis added).

lished authority[56] and held that the language emphasized above was that of a "union or standard mortgage" clause, thereby creating a separate contract of insurance between the insurer and the mortgagee.

Having decided this issue, the court was then faced with the question of how much coverage was extended to the mortgagee when the loss occurred after he purchased the property at the foreclosure sale. The insurer contended its liability was limited to any deficiency remaining after the foreclosure sale. The mortgagee contended that it should recover the entire value of its interest in the property, limited only by the face amount of the policy and the preforeclosure debt. Again reversing the trial court, the court decided this question in favor of the mortgagee.[57] This result would appear to be a proper application of the policy language.

E. Statutory Developments

In addition to several statutory amendments, primarily of a technical nature pertaining to the business of insurance, the 1974 General Assembly adopted two noteworthy amendments. This year, the legislature deleted the limitation on the extent of group life insurance that may be taken out on the life of any person by an employer, labor union or voluntary trade association.[58] Also of particular significance was a change affecting benefits payable under group hospital, medical or surgical expense policies. No such policy issued or renewed on or after January 1, 1975, may contain any provision reducing or coordinating benefits payable under the policy solely because similar benefits are payable under an *individual* policy of accident or sickness insurance.[59] Further, should the insured have other *group-type* accident and sickness insurance poli-

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[56]Northwestern Nat'l Ins. Co. v. Mildenberger, 359 S.W.2d 380 (Mo. App. 1962); Prudential Ins. Co. v. German Mut. Fire Ins. Ass'n, 231 Mo. App. 699, 105 S.W.2d 1001 (1937); Haskin v. Greene, 205 Ore. 140, 286 P.2d 128 (1955).

[57]The mortgagee purchased the property at the foreclosure sale for $13,900, which left $213.01 of the foreclosure debt unsatisfied. The face value of the fire policy was $10,000. Thus the question was not presented of whether the mortgagee could recover in excess of the foreclosure judgment had the face of the policy exceeded that amount.

[58]IND. CODE § 27-1-12-27 (IND. ANN. STAT. § 39-4221, Burns Supp. 1974), *as amended by* Ind. Pub. L. No. 122 (Feb. 14, 1974). This section had limited death benefits under a group life policy or combination of policies issued through an employer, labor union or voluntary trade association to $25,000 unless 200 percent of the annual compensation of the insured exceeded $25,000. In no event could benefits exceed the lesser of $75,000 or 200 percent of the insured's annual compensation.

[59]IND. CODE § 27-8-5-10 (IND. ANN. STAT. § 39-4260, Burns Supp. 1974), *as amended by* Ind. Pub. L. No. 125 (Feb. 20, 1974).

cies, the insurers may not reduce benefits payable under their policies below an amount equal to one hundred percent of total allowable expenses.[60]

F. Conclusion

Certainly the courts' refusals to allow policy restrictions which defeat laymen's expectations of coverage will result in a return to the drawing boards by the policy draftsmen. Further, it is likely that the industry will intensify its lobbying efforts for more favorable legislation. However, it occurs to this writer that until there is a major effort on the part of the insurance industry to strengthen its public image, litigation concerning the business of insurance will increase. A giant step forward would be achieved should the industry devote as much attention to the supervision of policy marketing as it has employed in drafting intricate insurance contracts. In this era of consumer protection, the judiciary should and will respond with equal solicitude for those unjustly denied benefits afforded them under their insurance policies as they do for persons injured through the use of defective products.

XI. Property

*Ronald W. Polston**

This was not an active year for the Indiana courts in the area of real property law.[1] There are a few cases worthy of note, however, not because they represent any significant advances in the law, but because they represent failures to bring the law up to date in areas in which there was a need to do so. This was particularly true of *Booher v. Richmond Square, Inc.*,[2] in the landlord-tenant area, and to a lesser extent of *Pulos v. James*,[3] which dealt with land use controls. Two other cases, *Continental Enterprises, Inc. v.*

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[60]During the transition period, litigation is almost certain to arise to determine which insurer is primarily liable when one policy is subject to the amending provision and another is exempt because its renewal date has not yet been reached.

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[1]Many cases which, in the broadest sense, relate to real property are treated in other parts of this survey; for example, Skendzel v. Marshall, 301 N.E.2d 641 (Ind. 1973), is treated in the section on Secured Transactions.

[2]310 N.E.2d 89 (Ind. 1974).

[3]302 N.E.2d 768 (Ind. 1973).