

a vigorous dissent, Judge Buchanan reasoned that the *Ashton* case reflects a desire to limit the admissibility of a witness' prior crimes to those specifically enumerated by statute and those involving dishonesty or false statement.⁹⁹ Judge Buchanan would hold that the words "dishonesty or false statement" are to be narrowly construed so as to include "only those crimes involving such conduct as indicates lack of veracity or propensity to tell the truth;"¹⁰⁰ and, even though the crime of assault and battery with intent to commit robbery is a crime of violence, it does not necessarily indicate a lack of veracity.

Judge Buchanan's reluctance to allow cross-examination concerning the crime involved in *Mayes* appears to be more a product of his fear of prejudice to the defendant by "indiscriminate blackening of a witness' character"¹⁰¹ than of the logical classification of the crime of assault and battery with intent to commit robbery. His reliance on the dictionary definition of "dishonesty" is flawed. The definition "inclination to mislead, lie, cheat, or defraud" must also contemplate the more serious form of dishonesty—robbery.

XI. Insurance

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A. Punitive Damages

In *Vernon Fire & Insurance Co. v. Sharp*,¹ the insured sued two insurers who had rejected his proofs of loss. The parties stipulated at trial that (1) the insurers were liable under their

to *Ashton*, convictions for crimes involving dishonesty or false statement are admissible for impeachment purposes. *Ashton v. Anderson*, 258 Ind. 51, 62, 279 N.E.2d 210, 216-17 (1972), citing IND. CODE §§ 34-1-14-13, -14 (Burns 1973); *id.* § 35-1-31-6 (Burns 1975). *Ashton* was applied to the impeachment on cross-examination of a defendant in a criminal case. *Dexter v. State*, 260 Ind. 608, 279 N.E.2d 817 (1973), noted in 1974 *Survey of Indiana Law* 203.

⁹⁹318 N.E.2d 811, 824 (Ind. Ct. App. 1974) (Buchanan, J., dissenting).

¹⁰⁰*Id.* at 825.

¹⁰¹*Id.* at 826.

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¹316 N.E.2d 381 (Ind. Ct. App. 1974). For additional discussion of *Vernon* see Note, *The Expanding Availability of Punitive Damages in Contract Actions*, 8 IND. L. REV. 668, 681-86 (1975).

policies, (2) the policies were in effect at the time of the loss and covered the property destroyed, and (3) the insured's \$94,000 estimate of loss was acceptable. The insurers contended, though, that since each policy contained a pro rata clause,² their liability should be in proportion to the total amount of insurance in effect at the time of the loss. However, each insurer had assumed a risk of loss by fire to the extent of \$31,250; the total coverage on the destroyed property was therefore \$62,500. In view of the stipulation that the loss exceeded \$94,000, the pro rata clauses were inoperative, and each insurance carrier was liable for its policy limits.

The First District Court of Appeals affirmed a trial court award to the insured of \$34,000 in punitive damages. The court first noted that Indiana law permits recovery of punitive damages where the conduct of the wrongdoer indicates malice or a heedless disregard of the consequences.³ It then found that the insurers' obstinate refusal to settle the claim from the time of loss through trial, more than two years later, constituted a heedless disregard of the rights of the insured. The policy provisions were so clear that the companies could not in good faith dispute the amount of their liability. The jury's award of punitive damages in addition to an award of the policy limits thus was permissible.⁴ *Sharp* is significant in that it appears to be the first

²A pro rata clause, commonly used in the "other insurance" provisions of a policy, provides that when an insured has other insurance available, a company will be liable only for that proportion of loss represented by the ratio between its policy limits and the total limits of all available insurance. *Putnam v. New Amsterdam Cas. Co.*, 48 Ill. 2d 71, 76, 269 N.E.2d 97, 99 (1970).

³316 N.E.2d at 384. The court further noted that punitive damages are also permitted where the conduct of the wrongdoer constitutes heedless disregard of the consequences, malice, gross fraud, or oppressive conduct. *Id. See, e.g., True Temper Corp. v. Moore*, 299 N.E.2d 844 (Ind. Ct. App. 1973) (heedless disregard of the consequences); *Jerry Alderman Ford Sales, Inc. v. Bailey*, 291 N.E.2d 92 (Ind. Ct. App. 1972) (proof of malice and oppression allows award of punitive damages even where some elements of fraud are unproven). The elements of actionable fraud are stated in *Capitol Dodge, Inc. v. Haley*, 288 N.E.2d 766 (Ind. Ct. App. 1972).

⁴316 N.E.2d at 384. Subsequent to the decision in *Sharp*, the First District Court of Appeals held in *Rex Ins. Co. v. Baldwin*, 323 N.E.2d 270 (Ind. Ct. App. 1975), that an insurer's obdurate refusal to pay death benefits notwithstanding the running of the incontestable period, during which it could have rescinded the policy for the alleged fraud in procuring the policy, would support an award of punitive damages. The court stated:

The record before us reveals evidence that the policy provisions were sufficiently clear that Rex could not dispute the amount of liability in good faith; we are of the further opinion that from such evidence the trial court could reasonably infer the existence of heedless dis-

Indiana case allowing punitive damages in a contract action without a finding of fraudulent conduct by the wrongdoer.⁵

B. Judicial Construction of Policy Provisions

1. Notice "As Soon as Practicable"

*Ohio Casualty Insurance Co. v. Rynearson*⁶ dealt with the construction of a liability policy clause relating to the duty of an insured to give notice to the insurer "as soon as practicable."⁷ The insurer's tenant was accidentally electrocuted during the policy period, but the lessor failed to give notice to his liability carrier until he was served 22 months later with a complaint for damages filed by the decedent's personal representative. The insured then made a claim against his insurer, which responded by bringing a declaratory judgment action for a determination of its liability to the insured. The United States District Court for the Southern District of Indiana granted summary judgment for the insurer.

On appeal to the Seventh Circuit Court of Appeals, the insured contended that the design of the policy misled him into the belief that the policy provided no coverage for his tenant's death. The court rejected this contention, primarily on the basis that the insured was a practicing attorney with several years of experience as a claim adjuster, claim supervisor, and claims manager for insurance companies. From these facts the court concluded that the insured possessed a special knowledge of insurance contracts and therefore should be held to a higher standard of care than the average person in complying with the notice provision of his insurance policy.⁸ Furthermore, the insured

regard of the consequences, malice, oppressive conduct and injury.
Id. at 274.

⁵*Compare* *Physicians Mut. Ins. Co. v. Savage*, 296 N.E.2d 165 (Ind. Ct. App. 1973) (punitive damages allowed for fraud), *with* *Standard Land Corp. v. Bogardus*, 289 N.E.2d 803 (Ind. Ct. App. 1972) (punitive damages refused when no fraud proved).

⁶507 F.2d 573 (7th Cir. 1974).

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A notice provision is not to be considered as a technical requirement included in policies merely for the convenience of the insurance company. Rather, it is a matter of substance imposing a valid prerequisite to coverage.

International Harvester Co. v. Continental Cas. Co., 33 Ill. App. 2d 467, 471, 179 N.E.2d 833, 835 (1962), *cited with approval in* *Greater Chicago Auction, Inc. v. Abram*, 25 Ill. App. 3d 667, 323 N.E. 2d 818 (1975).

⁸507 F.2d at 577. *But cf.* *Porter v. General Cas. Co.*, 42 Wis. 2d 740, 168 N.W.2d 101 (1969). The insured consulted his attorney immediately reporting the incident to his liability insurer. A jury was permitted to after an employee was injured on his farm but waited 19 months before find that the notice was given "as soon as practicable."

stated that he had failed to read his policy. Acknowledging that late notice has been excused where the insured was unaware of the existence of a policy,⁹ the court would not apply this exception where the insured alleged that he was unaware of the coverage simply because he had failed to read his policy.¹⁰

Although late notice has been excused upon a showing that the company was not prejudiced by the delay,¹¹ the court noted that a presumption of prejudice arises as a matter of law where a notice is unreasonably late.¹² The presumption arises because “[p]rompt notice of an accident is of great importance in preparing a defense while the facts may be more readily and accurately ascertainable.”¹³ Since the insured offered no evidence to rebut this presumption, the trial court was not required to include a finding of prejudice to support its order granting the company’s motion for summary judgment.¹⁴

2. *Pre-existing Conditions Clause*

Health and hospitalization policies typically contain a provision excluding coverage for benefits arising from an illness, injury, or physical condition which existed prior to the effective date of the policy. This pre-existing condition provision is included in policies ostensibly for the purpose of protecting insurers from applicants who would otherwise fraudulently seek coverage for a physical condition of which they are already aware.

⁹507 F.2d at 577, *citing* Metropolitan Life Ins. Co. v. Peoples Trust Co., 177 Ind. 578, 584, 98 N.E. 513, 515 (1912).

¹⁰507 F.2d at 577, *citing* General Accident Fire & Life Assurance Corp. v. Prosser, 239 F. Supp. 735 (D. Alas. 1965).

¹¹*See, e.g.*, Glade v. General Mut. Ins. Ass’n, 216 Iowa 622, 246 N.W. 794 (1933). For an extensive review of cases excusing compliance with a policy’s notice provision see Annot., 39 A.L.R.3d 593 (1971).

¹²507 F.2d at 579, *citing* Hartford Accident & Indem. Co. v. Lochmandy Buick Sales, 302 F.2d 565 (7th Cir. 1962).

¹³507 F.2d at 579.

¹⁴*Id.* The insured also contended that he justifiably believed on the basis of statements in the official coroner’s certificate that no claim for damages would result. The court held that this would not justify the delay in notification since the notice requirement related to any occurrence resulting in bodily injury, regardless of the insured’s belief as to whether or not a claim would arise. The court was construing the following clause:

In the event of an occurrence, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the insured to the company or any of its authorized agents as soon as practicable.

507 F.2d at 576.

At issue in *Mutual Hospital Insurance, Inc. v. Klapper*,¹⁵ however, was not the insured's awareness of the condition but the pre-existence of the condition. The Klappers obtained a family health policy with a 270-day waiting period before coverage became effective for a pre-existing condition. One month later a routine eye examination of the insured's child revealed an eye defect for which the child subsequently underwent surgery. The insured submitted a claim for benefits, which the insurer denied on the ground that the disease existed prior to the effective date of the policy and therefore was not covered because of the policy's exclusionary clause.

The insured filed suit and moved for summary judgment. The trial court granted the insured's motion. On appeal, the First District Court of Appeals reversed the summary judgment and remanded to the trial court for a determination of whether the eye defect was capable of diagnosis by a physician prior to the effective date of the policy.¹⁶ The appellate court adopted the majority rule that a disease or condition exists for the purpose of a health insurance policy when it "first becomes manifest or active or when there is a distinct symptom or condition where one learned in medicine can with reasonable accuracy diagnose the disease."¹⁷

On petition to transfer to the Indiana Supreme Court,¹⁸ Justices Givan and Prentice agreed with the first district's interpretation of the test for determining the time of origin of a disease and therefore voted to deny transfer.¹⁹ Justices Arterburn and Prentice, however, voted to allow transfer because of their disagreement with first district's test. They advanced the less restrictive rule that a disease should be deemed to originate when the insured knows or reasonably should have known of the disease rather than when the disease is capable of diagnosis by a physician.²⁰ Since Justice DeBruler did not participate in the supreme court's decision, the court was evenly divided. The court therefore denied transfer in accordance with Appellate Rule 11(B) (5). The test adopted by the first district thus remains the Indiana law regarding the construction of pre-existing conditions clauses.

¹⁵288 N.E.2d 279 (Ind. Ct. App. 1972).

¹⁶*Id.* at 284.

¹⁷288 N.E.2d at 281-82, quoting from *Southards v. Central Plains Ins. Co.*, 201 Kan. 499, 502, 441 P.2d 808, 811 (1968).

¹⁸312 N.E.2d 482 (Ind. 1974).

¹⁹*Id.* at 485.

²⁰*Id.* at 484.

The authoritative test for determining the existence of a pre-existing condition is in the alternative: that is, whether (1) the condition has become manifest to the insured, or (2) whether a physician could accurately diagnosis it. The test is open to strong criticism. Obviously, many persons appear to be and believe themselves to be in good health; yet they may have a latent disease which will not manifest itself to them for several years. It would constitute an intolerable trap for purchasers of health and hospitalization insurance if coverage for a pre-existing condition could be denied because a physician, after the policy's effective date, could establish that he could have diagnosed the condition before the effective date had the insured consulted him. Unqualified terms in an insurance policy should not be technically construed; rather, like the words in any contract, they should be read in their common and usual meaning.²¹ Exclusionary clauses, therefore, should not be construed so as to exclude undetected pre-existing conditions.

C. Stacking of Benefits

In the 1974 case of *Jeffries v. Stewart*,²² the First District Court of Appeals dealt with a situation in which a single policy of insurance covered several cars. The policy had a limit of liability clause and a separability clause,²³ both of which were applicable to the uninsured motorist coverage (UMC).²⁴ The court found an ambiguity as to whether the limits of liability clause applied to each car or to the insurance contract as a whole and resolved the ambiguity against the insurer, thereby permitting the insured to stack the liability limits of the coverage.²⁵ The

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In construing a contract it is the duty of the court to ascertain the intention of the parties, and to give effect to such intent. In so doing words are to be understood in their plain, ordinary and popular sense, unless there is something in the contract to indicate a different meaning. This rule applies to insurance as well as to other contracts.

Mutual Life Ins. Co. v. Geller, 68 Ind. App. 544, 549, 119 N.E. 173, 174 (1918).

²²309 N.E.2d 448 (Ind. Ct. App. 1974), *discussed in* Frandsen, *Insurance, 1974 Survey of Indiana Law*, 8 IND. L. REV. 217, 223-24 (1974).

²³A separability clause generally contains language to the following effect: "When two or more automobile are insured hereunder, the terms of this policy shall apply separately to each." R. KEETON, *BASIC TEXT ON INSURANCE LAW* 664 (1971).

²⁴IND. CODE § 27-7-5-1 (Burns 1975) requires all policies insuring against bodily injury or death resulting from automobile accidents to provide coverage when the death or bodily injury is caused by an uninsured motorist. *See* Frandsen, *supra* note 22, at 219-21.

²⁵309 N.E.2d at 453.

defective draftsmanship of the policy therefore was instrumental in allowing the insured to recover an amount equal to the sum allowable for all cars covered by the policy even though only one car had been damaged.²⁶

Miller v. Hartford Accident & Indemnity Co.,²⁷ decided in 1974 by the United States District Court for the Northern District of Indiana and affirmed by the Seventh Circuit Court of Appeals, demonstrates that proper draftsmanship of policies can prevent stacking of benefits. *Miller* was an action brought by the widow of the insured, suing in her own right and as administratrix of her husband's estate, seeking a recovery of \$60,000 UMC benefits and \$2,000 accidental death benefits. The decedent-insured had purchased one policy covering three vehicles, with limits of liability of \$1,000 for the accidental death of each named insured and \$20,000 for each accident under UMC. The court found that, unlike the policy in *Jeffries*, the *Miller* policy contained no separability clause and the UMC clause unambiguously declared the limits of liability to be applicable to each accident regardless of the number of automobiles covered by the policy.²⁸ The court therefore refused to permit stacking of either the accidental death or the UMC benefits.

In *Miller*, the plaintiff also contended that stacking was permitted under the authority of *Simpson v. State Farm Mutual Auto Insurance Co.*²⁹ *Simpson* concerned an insurer's attempt to limit UMC benefits through the use of an "excess" clause contained in two separate policies issued to the the insured, each covering a separate automobile owned by him. Since UMC benefits attach to the named insured as well as to the insured vehicles, the court held that an insurer collecting two separate premiums for the UMC takes the accompanying gamble of having to respond with benefits payable under each policy.³⁰ The court also concluded that UMC reflects a legislative intent to establish at least a minimum recovery for injuries caused by uninsured motorists rather than an intent to fix maximum levels of recovery under this type of insurance. Hence, any attempt to limit the statutorily required coverage through policy limitations would be in derogation of the statute.³¹ The *Miller* court distinguished *Simpson* on the basis that *Miller* involved only one insurance policy and showed

²⁶Frandsen, *supra* note 22, at 224.

²⁷506 F.2d 11 (7th Cir. 1974).

²⁸*Id.* at 15.

²⁹318 F. Supp. 1152 (S.D. Ind. 1970).

³⁰*Id.* at 1156.

³¹*Id.*

no evidence of an attempt to limit liability in derogation of the Indiana UMC statute.³²

Contemporaneous with the decision in *Miller*, the Seventh Circuit Court of Appeals handed down a consolidated decision, *Trinity Universal Insurance Co. v. Capps*,³³ regarding two similar cases concerning attempts by insureds to stack benefits. In the first case, the insurer had issued one policy insuring two separate vehicles. The policy contained a limits of liability clause applicable to both UMC and medical expenses. It also contained a separability clause applicable to the medical expenses coverage but explicitly inapplicable to UMC. Under the authority of *Jeffries* and *Miller*, the court denied stacking of UMC but allowed the insured to stack benefits under the medical services coverage.³⁴ In the companion case, the policy in question contained a clear limitation on the liability of the insurer, and the separability clause was made explicitly inapplicable to the UMC.³⁵ The insured was not permitted to stack the UMC benefits.

On the basis of all these decisions, one may reasonably conclude that stacking of benefits under a policy's UMC and medical expenses coverage will be refused unless specifically permitted by the policy or unless an ambiguity is created in the policy. The ambiguity will be created in two situations: (1) When the separability clause is made applicable to either coverage, or (2) when the limits of liability section of the policy is made inapplicable to one or more of the coverages.

D. Statutory Developments

Among several statutory amendments concerning insurance adopted this year by the Indiana General Assembly, two amendments are of particular significance. In 1974 the General Assembly gave governmental entities authority to purchase liability insurance covering themselves and their employees³⁶ and provided that the attorney general "shall advise the governor concerning the desirability of compromising or settling a claim or suit brought

³²506 F.2d at 14-15.

³³506 F.2d 16 (7th Cir. 1974). The report of the lower court opinion of *Trinity* is found at 387 F. Supp. 106 (N.D. Ind. 1974). The second case was *Schelfo v. Government Employees Ins. Co.*, reported below at 387 F. Supp. 108 (N.D. Ind. 1974). The cases were separately briefed and argued although consolidated for the reported opinion.

³⁴506 F.2d at 18, *aff'g in part and rev'g in part* 387 F. Supp. 106 (N.D. Ind. 1974).

³⁵506 F.2d at 17, *aff'g* 387 F. Supp. 108 (N.D. Ind. 1974).

³⁶IND. CODE § 34-4-16.5-18 (Burns Supp. 1974), *as amended*, *id.* § 34-4-16.5-18 (Burns Supp. 1975).

against the state"³⁷ and shall defend such suits.³⁸ The insurance industry questioned this intrusion of the attorney general into the sacrosanct area of the insurer's contractual privilege to compromise and settle claims made against its insureds.³⁹ The 1975 legislature, in an attempt to resolve this conflict, amended the 1974 statute to subordinate the historic duties of the attorney general⁴⁰ to the contract rights of the insurer.

The pertinent section of the amendment provides that the terms of the policy govern the rights and obligations of both the governmental entity and the insurer with respect to the settlement and the defense of claims or suits brought against the insured, but that the insurer may not enter into a settlement for an amount exceeding the insurance coverage without the approval of the insured's chief executive or governing board.⁴¹ The restriction on the insurer's authority to settle for an amount in excess of policy limits is nothing more than an illusory concession, since any attempt to bind an insured to an amount in excess of policy limits without the insured's approval has no effect.⁴²

The 1975 General Assembly also amended the existing statutes concerning life, accident, and health insurance by adding a

³⁷*Id.* § 34-4-16.5-14(a) (Burns Supp. 1974), *as amended, id.* § 34-4-16.5-14(a) (Burns Supp. 1975).

³⁸*Id.* § 34-4-16.5-14(d) (Burns Supp. 1974), *as amended, id.* § 34-4-16.5-14(d) (Burns Supp. 1975).

³⁹A standard liability insurance policy typically contains a provision such as the following:

The insured agrees that the company shall defend any suit alleging such bodily injury and property damage and seeking damages which are payable under the terms of this policy, even if any of the allegations of the suit are groundless, false, or fraudulent; but the company may make such investigation and settlement of any claim or suit as it deems expedient.

⁴⁰IND. CODE § 4-6-2-1 (Burns 1973) (originally enacted as Act of March 5, 1889, ch. 71, § 4, [1889] Ind. Acts 125).

⁴¹IND. CODE § 34-4-16.5-18 (Burns Supp. 1975), *amending id.* § 34-4-16.5-18 (Burns Supp. 1974).

In a letter to the Governor dated April 16, 1975, the attorney general stated that it was his opinion that the amendment was unconstitutional since it delegated a portion of the executive and administrative power of governmental entities to privately owned insurance companies.

⁴²*See Birkholz v. Cheese Makers Mut. Cas. Co.*, 274 Wis. 190, 192, 79 N.W.2d 665, 666 (1956), wherein the court noted:

Insurance policies, and particularly the one in the instant case, habitually state that the insurer's functions are limited to the terms and conditions of the policy. The authority of the insurer to make settlements is limited to the insurer's own resources and it is not empowered by the policy, without the insured's knowledge and consent, to contribute toward the settlement either cash or other property, such as causes of actions, belonging to the assured.

new chapter expanding coverage for the insured's family.⁴³ The new chapter mandates that insurance benefits be payable to a newly-born child from the moment of birth for the care and treatment of congenital defects and birth abnormalities.⁴⁴ Unfortunately, the amendment applies only to those policies delivered after October 1, 1975.⁴⁵ The original bill had provided that its requirements also would apply to all accident and sickness insurance policies in effect at the date of passage of the act.⁴⁶ However, on second reading in the senate, the bill's sponsor successfully moved to amend the original version by deleting any reference to these policies.⁴⁷

The amendment also contains an emergency clause making the statute's provisions effective on passage.⁴⁸ Thus, the question of whether or not coverage exists under a policy issued after April 21, 1975, the date on which the Governor signed the bill, and before October 2, 1975, the expressed date of application of the statute, may be the subject of litigation. It is highly irregular to include conflicting effective dates in a bill, although one may conclude that the emergency clause merely served as notice to the insurers to prepare for the issuance after October 1, 1975, of policies containing the expanded coverage.⁴⁹ The preferable legislative action would have been to impose the required coverage on all policies delivered, issued for delivery, or renewed after the effective date.

⁴³IND CODE §§ 27-8-5.6-1 *et seq.* (Burns Supp. 1975).

⁴⁴*Id.* § 27-8-5.6-2.

⁴⁵Ind. Pub. L. No. 282, § 2 (Apr. 21, 1975) provides, "The requirements of this act shall apply to accident and sickness insurance policies and contracts delivered or issued for delivery in this state after October 1, 1975."

⁴⁶Ind. S. 169, 99th Gen. Assembly, 1st Sess. (1975) provided in part: The requirements of this act shall apply to all accident and sickness insurance policies delivered or issued for delivery in this state after October 1, 1975. All accident and sickness insurance policies in effect on the passage of this act shall be amended to provide the newly born coverage required by this act not later than September 30, 1975.

⁴⁷Presumably, the sponsor was apprised of the doubtful validity of a provision which would alter retroactively the contractual obligations of the parties. *See* [1944] OPS. ATTY GEN. IND. No. 32, at 132, in which it was stated that "statutes and ordinances should be given a construction which will not give them a retroactive effect, especially where such a construction will either destroy or impair vested property or contractual rights." *See also* Connecticut Mut. Life Ins. Co. v. Talbot, 113 Ind. 373, 14 N.E. 586 (1887).

⁴⁸Ind. Pub. L. No. 282, § 3 (Apr. 21, 1975).

⁴⁹The purpose of a future effective date is to inform persons of the provisions of a statute before it becomes effective in order that they may take steps to protect their rights and discharge their obligations. *Cf.* McLead v. Commercial Nat'l Bank, 206 Ark. 1086, 178 S.W.2d 496 (1944).