beyond a reasonable doubt to the satisfaction of the jury. While the determination on remand was made by the judge, the court affirmed the decision because it held defendant's evidence insufficient to dispute the presumption.

XI. Insurance

*G. Kent Frandsen**

During the survey period Indiana's appellate courts rendered several decisions of importance to attorneys practicing in the area of insurance law. Of most significant interest is the Indiana Supreme Court's decision affirming an award of punitive damages against an insurer. Decisions from the courts of appeals added a new dimension to the frequently litigated question of when coverage commences under a "conditional binding receipt" contained in an application for life insurance; clarified the scope of coverage of the "omnibus clause" in an automobile liability policy; and rejected the "legal interest" theory of insurable interest.

A. Punitive Damages

Vernon Fire & Casualty Insurance Co. v. Sharp,[1] one of the more provocative cases decided by the Indiana Supreme Court this year, affirmed a First District Court of Appeals decision[2] that punitive damages are recoverable in a breach of contract action when there is a "mingling" of "tortious conduct" with the breach of contract.[3] The obscure and disputed portion of the opinion, at least among the supreme court justices, revolves around the question of whether it is essential to find all of the elements of a

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The author wishes to extend his grateful appreciation to Kathryn Wunsch for her assistance in the preparation of this article.

[1]349 N.E.2d 173 (Ind. 1976), also discussed in Gray, *Consumer Law*, *supra* at 148, Bepko, *Contracts and Commercial Law*, *supra* at 161.

[2]Vernon Fire & Cas. Ins. Co. v. Sharp, 316 N.E.2d 381 (Ind. Ct. App. 1974), *discussed in* Frandsen, *Insurance, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 260 (1975) [hereinafter cited as Frandsen, *1975 Survey*]; Note, *The Expanding Availability of Punitive Damages in Contract Actions*, 8 IND. L. REV. 668, 681-86 (1975).

[3]349 N.E.2d at 180-81.

common law tort or merely a serious wrong, "tortious in nature," before an award of punitive damages may properly be assessed. Recognizing that Indiana follows the general rule that punitive damages are not recoverable in contract actions,[4] the court acknowledged that Indiana has allowed punitive damages to be awarded when an independent tort accompanies a breach of contract.[5] At this juncture, Justices Prentice and DeBruler disagreed with the majority on both the law and the facts of the case.[6]

The majority quoted Professor Corbin's language summarizing those situations in which a court may appropriately instruct a jury that an award of exemplary damages may be made even though the substandard conduct does not constitute an independent tort,[7] and then examined the record to find that the jury could have awarded punitive damages on two possible theories.[8] The jury might have found all of the elements of fraud in the inducement of the contract.[9] Alternatively, the jury might have failed

[4]*Id.* at 179, *citing* Hibschman Pontiac, Inc. v. Batchelor, 340 N.E.2d 377 (Ind. Ct. App. 1976), discussed in Bepko, *Contracts and Commercial Law*, *supra* at 163; Standard Land Corp. v. Bogardus, 154 Ind. App. 283, 289 N.E.2d 803 (1972); 11 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1340 (3d ed. 1968).

[5]349 N.E.2d at 180, *citing* Murphy Auto Sales, Inc. v. Coomer, 123 Ind. App. 709, 112 N.E.2d 589 (1953). *See* Physicians' Mut. Ins. Co. v. Savage, 296 N.E.2d 165 (Ind. Ct. App. 1973), *discussed in* Frandsen, *Insurance, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 217 (1974) [hereinafter cited as Frandsen, *1974 Survey*]; Jeffersonville R.R. v. Rogers, 38 Ind. 116 (1871).

[6]349 N.E.2d at 185 (Prentice, J., dissenting).

[7]

> It can be laid down as a general rule that punitive damages are not recoverable for breach of contract, although in certain classes of cases, there has been a tendency to instruct the jury that they may award damages in excess of compensation and by way of punishment. These cases, however, are cases that contain certain elements that enable the court to regard them as falling within the field of tort *or as closely analogous thereto.*

Id. at 180, *quoting from* 5 A. CORBIN, CORBIN ON CONTRACTS § 1077, at 438-39 (1964) (emphasis by the court).

[8]The court also implied that appellant had committed a breach of duty. *See* 349 N.E.2d at 185. Justice Prentice, dissenting, pointed out that the statute which the appellant may have violated, IND. CODE § 27-1-22-18 (Burns 1975), not only prohibits extraction of an unauthorized premium but also defines the prohibited act as a criminal offense. The rule in Indiana is that punitive damages are not permissible if an act is also subject to criminal punishment. 349 N.E.2d at 200 (Prentice, J., dissenting).

For other cases suggesting that punitive damages are proper in cases of statutory torts, see Jeffersonville R.R. v. Rogers, 38 Ind. 116 (1871); Rex Ins. Co. v. Baldwin, 323 N.E.2d 270, 274 (Ind. Ct. App. 1975).

[9]349 N.E.2d at 184. However, the majority opinion reiterated no facts from which the jury might have found all of the elements of actionable fraud. *Id.* at 193-94 (Prentice, J., dissenting).

to find all of the essential elements of a recognized tort but decided that the insurer committed a "serious intentional wrong" by refusing to pay proceeds for which it was admittedly liable[10] because of its "interested motive" of exacting "additional consideration" in the form of a release from a claim by one of the insured's employees.[11] The court characterized such action as "oppressive conduct"[12] and held it to be sufficient to support punitive damages for breach of contract unaccompanied by an independent tort.[13]

The rule of *Vernon* will clearly not apply when an insurer in good faith disputes the amount of liability to the insured.[14] All of the justices agreed that there was a bona fide dispute in *Vernon* and found error in the trial court's denial of a directed verdict on the part of the complaint alleging "bad faith." However, a good faith dispute may become oppressive when it is used as a subterfuge or accompanied by misconduct beyond the permissible limits of a disagreement over the terms of a contract, as in *Vernon.*

It seems to this writer that the majority of the court perceives a particular repugnance in situations in which parties subject to state licensing and regulations conduct their affairs and dealings with the public in an oppressive manner, wrongfully using their superior bargaining positions to their own advantage.[15] Thus, when such a party's breach of contract coalesces with substandard conduct, public policy reasons for limiting the remedy to compensatory and consequential damages should give way to

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[10]*Id.* at 184. The insurers had conceded, before trial, that they were liable for a portion of the proceeds, but disputed the amount. 316 N.E.2d at 383.

[11]349 N.E.2d at 184. Evidence revealed that the insurer had attempted to coerce the plaintiff into securing the release as a condition of settlement. *Id.* at 183.

[12]*Id.* at 184.

[13]*See also* Jones v. Abriani, 350 N.E.2d 635 (Ind. Ct. App. 1976), *discussed in* Gray, *Consumer Law, supra* at 149; Bepko, *Contracts and Commercial Law, supra* at 162 (punitive damages permissible when breach of sales warranty is accomplished by "fraudulent and oppressive conduct"); Jerry Alderman Ford Sales, Inc. v. Bailey, 154 Ind. App. 632, 291 N.E.2d 92 (1972) (a "fraudulent state of mind," without all elements of actionable fraud, will support an award of punitive damages).

[14]349 N.E.2d at 184. *Compare* Rex Ins. Co. v. Baldwin, 323 N.E.2d 270 (Ind. Ct. App. 1975), holding that an award of punitive damages is proper when an insurer refuses to pay a claim to which it has no valid defense. The court found that there was no actionable fraud but that the insurer's conduct was a "heedless disregard of the consequences." *Id.* at 273.

[15]*See* 349 N.E.2d at 184-85.

the public policy of deterring wrongful conduct. Exemplary damages in such cases are an appropriate vehicle for deterring the future conduct of the wrongdoers before the court and other persons in a similar situation.[16]

Although public policy is generally expressed by acts of the legislature,[17] the existence of statutory penalties for proscribed activities of insurers[18] should not be viewed as a limitation on the power of the appellate courts to impose monetary sanctions by way of punitive damages when the public's interest is paramount. In *Vernon*, the insured was "whipsawed" by two insurance companies, and such conduct is reprehensible, constitutes bad faith, and is the antithesis of the warranty of good faith implicit in all contracts of insurance.[19]

B. Insurable Interest

A principle basic to almost all types of insurance is that of indemnity, the concept that one who sustains loss from a risk against which he has insured himself should be entitled to compensation or reimbursement only to the extent of his loss. The rationale for the rule is, of course, that insurance for an amount greater than that needed for compensation is likely to induce the evils of wagering or willful destruction of insured lives or prop-

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[16] *Id.* at 180.

[17] "The power of courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt." American Underwriters, Inc. v. Turpin, 149 Ind. App. 473, 477, 273 N.E.2d 761, 764 (1971), *quoting from* Richmond v. Dubuque R.R., 26 Iowa 191, 202 (1868).

[18] IND. CODE § 27-4-4-5 (Burns 1975) provides for an award of attorneys' fees against unauthorized insurance companies that delay or refuse to make payment vexatiously or without reasonable cause. Other jurisdictions have statutory provisions for the assessment of civil penalties, including attorneys' fees, against insurance companies for failure to timely pay a claim without a just and reasonable ground. *See, e.g.*, FLA. STAT. ANN. § 626.911 (West 1972); KAN. STAT. ANN. § 40-908 (1973); LA. REV. STAT. ANN. § 22:657 (West Supp. 1976); MASS. ANN. LAWS ch. 175B, § 4 (Michie/Law. Co-op 1972).

[19] "An insurer owes to its insured an implied-in-law duty of good faith and fair dealing that it will do nothing to deprive the insured of the benefits of the policy." Fletcher v. Western Nat'l Life Ins. Co., 10 Cal. App. 3d 376, 401, 89 Cal. Rptr. 78, 93 (1970).

In 1970, New York enacted an "unfair claim settlement practices by insurers" act. N.Y. INS. LAW § 40d (McKinney Supp. 1975-76). One of the practices condemned is "not attempting in good faith to effectuate prompt, fair and equitable settlements of claims submitted in which liability has become reasonably clear."

erty. Thus, the requirement has developed, by judicial decision in most states, that the insured must have an insurable interest in the life or property that is the subject of his insurance.[20] The development of the test of what is and who has an insurable interest has been long and arduous. Historically, an insurable interest existed when the interest or right was of such a nature as to be enforceable in the courts of law or equity. Generally, the insured was required to have title, a possessory interest, or a contract right in the property to be able to recover under a policy initially obtained to protect against the risk of loss. However, a competing doctrine, called the "factual expectation" theory, emerged in the early nineteenth century.[21] Although this doctrine was widely favored by text writers, it did not receive much judicial acceptance until the middle of the twentieth century.[22] The doctrine is attributed to statements in Judge Lawrence's opinion in *Lucena v. Crauford*,[23] wherein he concluded that the contract of insurance "is applicable to protect men against uncertain events which may in any wise be of disadvantage to them."[24] Lawrence's rationale was farsighted and, indeed, compatible with the realities of risk transference in today's industrial society.

It appears that the First District Court of Appeals has adopted the "factual expectation" theory. In *All Phase Construction Corp. v. Federated Mutual Insurance Co.*[25] the insurer rejected a subcontractor's claim for materials destroyed by fire at a construction site, contending that the subcontractor had no insurable interest in the materials. This contention was based on terms of the construction contract whereby the subcontractor relinquished title to the materials upon delivery to the project and agreed to waive all lien rights he might have in the project. Judge Robertson, author of the opinion, reasoned that although the existence or nonexistence of title and lien rights are helpful in determining whether an insurable interest exists, such evidence is not dis-

[20]"Usually, American courts have turned to English precedents on insurable interest questions without explicit reference to the fact that the English cases were interpretations and applications of English statutes . . . ." R. KEETON, INSURANCE LAW, BASIC TEXT 97 (1971). For examples of state insurable interest statutes, see CAL. INS. CODE §§ 280-287, 300-305 (West 1972); N.Y. INS. LAW §§ 146-148 (McKinney 1966); TEX. REV. CIV. STAT. ANN. art. 3.49-1 (Vernon 1963).

[21]Harnett & Thornton, *Insurable Interest In Property: A Socio-Economic Reevaluation Of A Legal Concept*, 48 COLUM. L. REV. 1162, 1172 (1948).

[22]*Id.* at 1173-74.

[23]2 Bos. & P.N.R. 269, 127 Eng. Rep. 630 (H.L. 1805).

[24]*Id.* at 301, 127 Eng. Rep. at 642.

[25]340 N.E.2d 835 (Ind. Ct. App. 1976).

positive of the question. Distinguishing between an insurable interest and a legally enforceable property interest, the court quoted language from the Third District Court of Appeals decision in *Ebert v. Grain Dealers Mutual Insurance Co.*:[26]

> Anyone has an insurable interest in property who derives a benefit from its existence or would suffer a loss from its destruction whether or not he has title or a secured interest in the property. A right of property is not essential. *Any limited or qualified interest or any expectancy of advantage is sufficient.*[27]

If the foregoing analysis of *All Phase* is correct, it follows that when an insured has made a full disclosure of his interest in the property to be protected under the policy, he may recover for loss even though he has no title, lien, or contract right in the property. His reasonable expectation of benefit from preservation of the property or loss from its damage will support recovery under the policy in the event of loss.[28]

C. Casualty Insurance

1. The Omnibus Clause

The term "omnibus clause" is ordinarily used to signify a provision of a liability insurance policy designating additional insureds by an expansive class description in terms of some relationship to the insured.[29] Although the term "omnibus" is seldom found in a policy, the clause typically appears under the caption "persons insured" or "definition of insured."[30] Indiana Code sec-

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[26]303 N.E.2d 693 (Ind. Ct. App. 1973).

[27]*Id.* at 697 (emphasis added).

[28]"The usual rule customarily followed is that an interest exists when the insured derives pecuniary benefit or advantage by the preservation or continued existence of the property or will sustain pecuniary loss from its destruction." J. APPLEMAN, INSURANCE LAW AND PRACTICE § 2123, at 35-37 (1969).

[29]R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM 583-84 (1965).

[30]The typical family automobile policy contains a provision similar to the following:

> Persons Insured
> Under the Liability and Medical Expense coverages, the following are insured:
> (a) with respect to an owned automobile,
> (1) the named insured,
> (2) *any other person using such automobile with the permission of the named insured, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission, and . . . .*

tion 27-1-13-7 requires the inclusion of the clause in all automobile liability policies issued or delivered in the state.[31] The statutory purpose is to extend coverage to those driving the insured vehicle with the permission of the named insured or additional insureds. The omnibus clause has been a source of frequent litigation, generally involving the questions of whether the use of the insured vehicle was with the express or implied permission of the insured or within the scope of the permission granted.

In the case of *Winkler v. Royal Insurance Co.*,[32] Alice Wolfe rented an automobile from Hertz Corporation in her name for the sole use of her husband's half brother, Dennis, who was not a member of her household. During Dennis' use of the rented vehicle, he was involved in a fatal collision which resulted in a wrongful death action against him by the decedent's personal representative. After a default judgment was entered against Dennis, the administratrix sued the insurer for the proceeds of the policy it had issued to Hertz Corporation on the leased vehicle.

The insurer refused to concede liability and, in support of its motion for summary judgment, asserted that the policy did not extend coverage to one outside the policy's definition of additional insureds;[33] and that the policy specifically excluded, *inter*

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[31] IND. CODE § 27-1-13-7 (Burns 1975) provides in part:

No such policy shall be issued or delivered in this state to the owner of a motor vehicle, by any domestic or foreign corporation . . . unless there shall be contained within such policy a provision insuring such owner against liability for damages for death or injury to persons or property resulting from negligence in the operation of such motor vehicle, in the business of such motor vehicle, in the business of such owner or otherwise, by any person legally using or operating the same with the permission, expressed or implied of such owner. A policy issued in violation of this section shall, nevertheless, be held valid but be deemed to include the provisions required by this section, and when any provision in such policy or rider is in conflict with the provision required to be contained by this section, the rights, duties and obligations of the insurer, the policyholder and the injured person or persons shall be governed by the provisions of this section.

[32] 337 N.E.2d 499 (Ind. Ct. App. 1975).

[33] The pertinent part of the insurance policy defining the insured read as follows:

The unqualified word 'insured' includes the named insured and also includes (1) Any person, firm, association, partnership or corporation to whom an automobile has been rented without a chauffeur by the named insured (herein referred to as the 'renter'); (2) Any employee of said renter (herein referred to as the 'driver'); (3) Any employer of said renter; (4) . . . (5) If the named insured is an individual, resident of the household of the named insured, . . .

alia, those persons who had not signed the rental agreement, were not regularly employed by lessee, or were not members of lessee's immediate family. There also was a novel tie-in between the liability policy and the rental agreement. The rental agreement provided that the leased vehicle was to be used only by certain designated persons including the lessee and the lessee's permittee, provided the permittee was a member of the lessee's immediate family, his employer or employee. The trial court found that since the driver did not fall within any of these categories he was not within the coverage afforded under the policy. Therefore, the insurer's motion for summary judgment was granted.

Although the First District Court of Appeals disposed of the case on procedural grounds, it is noteworthy that the policy apparently did not comply with statutory requirements for coverage of additional insureds.[34] The appellate courts have held that an insurer's use of policy language in derogation of a legislative mandate will be given no effect.[35] Also, under the most conservative of tests, both the insurance policy and the rental agreement were adhesion contracts.[36] Unless the prolix language of such agreements has been brought to the attention of and explained to

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> (6) Any partner or executive officer of the renter; (7) If qualified licensed operators, members of the immediate family of the renter or of any partner or executive officer of the renter; (8) Any employee of the named insured while acting within the scope of his employment . . . .

337 N.E.2d at 501.

[34]*See* note 31 *supra*.

[35]McNutt v. State Farm Mut. Auto. Ins. Co., 369 F. Supp. 381, 385 (W.D. Ky. 1973); Tulley v. State Farm Mut. Auto. Ins. Co., 345 F. Supp. 1123, 1128 (S.D. W. Va. 1972); Simpson v. State Farm Mut. Auto. Ins. Co., 318 F. Supp. 1152 (S.D. Ind. 1970), *discussed in* Frandsen, *1975 Survey*, *supra* note 2, at 266; Patton v. Safeco Ins. Co., 148 Ind. App. 548, 267 N.E.2d 859 (1971).

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> A "contract of adhesion" is a standardized contract prepared entirely by one party, and which, due to the disparity in bargaining power between the draftsman and the second party, must be accepted or rejected by the second party on a "take it or leave it" basis without opportunity for bargaining and, under such conditions that the second party or "adherer" cannot obtain the desired product and service save by acquiescing in form of the agreement.

Star Finance Corp. v. McGee, 27 Ill. App. 3d 421, 426, 326 N.E.2d 518, 522, (1975).

See Prudential Ins. Co. v. Lamme, 83 Nev. 146, 147, 425 P.2d 346, 347 (1967), in which the court recognized "an insurance policy is not an ordinary contract. It is a complex instrument, unilaterally prepared, and seldom understood by the assured." *See Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

the purchaser, neither the exclusions nor the forfeiting language of either should be binding on the insured[37] or on those to whom he has entrusted the vehicle.[38]

The issue in *State Farm Fire & Casualty Co. v. White*[39] was whether an automobile insurance carrier could avoid liability under the policy's omnibus clause when the insured vehicle was involved in a collision while being operated by a subpermittee of the named insured outside the scope of permission given to the initial permittee. The Third District Court of Appeals recognized that "permission of the named insured contemplates express or implied permission" and held the insurer liable.[40] Stating that Indiana applies the liberal rule in construing omnibus clause permission provisions,[41] the court further buttressed its decision by approving language from *Home Mutual Insurance Co. v. Automobile Underwriters, Inc.*[42] suggesting that coverage might be implied to the second, or subpermittee, when the owner has not expressly forbidden such delegation.

The insurer argued that the case at bar was clearly distinguishable from those cases interpreting typical omnibus clause provisions since the present policy's provisions specified that the permittee's use not only be with the named insured's permission, but also within the scope of such permission. The court simply noted that the phrase "within the scope of such permission" is dependent upon the question of "permission." Thus, a separate deliberative process to ascertain scope of permission is unnecessary once the trier of fact determines whether or not "permission, express or implied" has been given.[43]

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[37]Weaver v. American Oil Co., 257 Ind. 458, 276 N.E.2d 144 (1971).

[38]For a thorough analysis of circumstances which permit the inference that the driver had permission to use the vehicle, see Hays v. Country Mut. Ins. Co., 28 Ill. 2d 601, 192 N.E.2d 855 (1963). However, in 1973 the Supreme Court of Illinois rejected the tenuous factual distinctions recognized in *Hays* and adopted the "initial permission" test as enunciated in Odolecki v. Hartford Acc. & Indem. Co., 55 N.J. 542, 264 A.2d 38 (1970), "once the initial permission has been given by the named insured, coverage is fixed, barring theft or the like." *Id.* at 550, 264 A.2d at 42.

[39]341 N.E.2d 782 (Ind. Ct. App. 1976).

[40]*Id.* at 784, *citing* American Employers' Ins. Co. v. Cornell, 225 Ind. 559, 76 N.E.2d 562 (1948).

[41]341 N.E.2d at 784.

[42]261 F. Supp. 402 (S.D. Ind. 1966).

[43]*See, e.g.*, Hays v. Country Mut. Ins. Co., 28 Ill. 2d 601, 192 N.E.2d 855 (1963).

2. *Actions for Loss of Consortium Under UMC*

In the case of *Spainhower v. Willis*,[44] the United States District Court for the Southern District of Indiana was presented with the issue of whether a wife may maintain an action under uninsured motorist coverage (UMC) of the family automobile policy for loss of consortium arising from her husband's injuries sustained in an automobile collision with an uninsured motorist. In support of a motion to dismiss the wife's action, the insurer contended that since she had not herself sustained bodily injuries, her claim for recovery under the UMC could not be maintained. Denying the motion, Judge Noland interpreted the applicable UMC provisions[45] to permit recovery when loss of consortium arises out of an injury which is itself compensable under UMC. The court relied upon a Florida case[46] which had construed a similar UMC provision to allow recovery on the theory that the purpose of UMC[47] is to substitute the insured's own carrier for the negligent and uninsured motorist. Further, in view of previous cases in which Indiana courts have consistently held that UMC is

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[44]Cause No. EV 75-123-C (S.D. Ind. Feb. 9, 1976).

[45]The provision provided, in part, as follows:

> UNINSURED MOTORISTS COVERAGE
>
> . . . .
>
> To pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured automobile . . . .

Complaint Appendix at 3, Spainhower v. Willis, Cause No. EV 75-123-C (S.D. Ind. Feb. 9, 1976).

> The policy went on to define an "insured" under UMC as including:
>
> a. The named insured and any relative . . . .
>
> . . . .
>
> c. any person with respect to damages he is entitled to recover for care or loss of services because of bodily injury to which this coverage applies.

Id.

The policy designated the husband as the "named insured" and provided further that his wife was included as an insured if she was a resident of the same household. *Id.*

[46]Mobley v. Allstate Ins. Co., 276 So. 2d 495 (Fla. Ct. App. 1973).

[47]For a general discussion of the purpose of UMC see 7 AM. JUR. 2d *Automobile Ins.* § 135, at 461 (1961) wherein it is stated:

> The purpose of the statute making UMC compulsory, it has been said, is to give the same protection to a person injured by an uninsured motorist as he would have had if he had been injured in an accident caused by an automobile covered by a standard liability insurance policy.

See also Frandsen, *Insurance, 1974 Survey, supra* note 5, at 219-21.

remedial in nature,[48] damages for loss of consortium should be as fully compensable under UMC as damages for other types of personal injuries.[49]

3. *Duty to Discover Errors in Application*

It is clear that an insurer may rescind a policy procured by an applicant through misrepresentations or the concealment of facts that are material to the risk.[50] However, an insurer may be estopped from asserting the grounds necessary to effect a rescission if its own wrongful or negligent conduct would make rescission inequitable.[51] This latter principle was at issue in *State Automobile Mutual Insurance Co. v. Spray*,[52] a declaratory judgment action brought in the United States District Court for the Southern District of Indiana. State Auto sought a declaration that its automobile policy issued to Spray was void because of the insured's false representations of material facts on the policy application and, therefore, that the company had no duty to defend or to assume any liability for the insured in a state court action for injuries arising out of an automobile accident.

On the policy application, the insured had stated that during the past three years he had not been a resident of Indiana and had not been convicted of a moving traffic violation or involved in an automobile accident. He further stated that during the three years his driver's license had not been revoked, suspended, or restricted. The court found that all of these representations were false.

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[48]*See, e.g.*, State Farm Mut. Auto Ins. Co. v. Robertson, 295 N.E.2d 626, 628-29 (Ind. Ct. App. 1973); Cannon v. American Underwriters, Inc., 150 Ind. App. 21, 22, 275 N.E.2d 567, 568 (1971). *See also* Frandsen, *Insurance, 1974 Survey*, *supra* note 5, at 221 & n.18.

[49]For somewhat analogous cases recognizing that parents may maintain an action against their UMC carrier for damages arising out of the wrongful death of their children resulting from the negligence of an uninsured motorist, see State Farm Mut. Auto Ins. Co. v. Selders, 187 Neb. 342, 190 N.W.2d 789 (1971); Brummett v. Grange Ins. Ass'n, 4 Wash. App. 979, 485 P.2d 88 (1971); *see also* Annot., 26 A.L.R.3d 935, 938 (1969).

[50]Prentiss v. Mutual Benefit Health & Acc. Ass'n, 109 F.2d 1 (7th Cir.), *cert. denied*, 310 U.S. 636 (1940). Brunnemer v. Metropolitan Life Ins. Co., 213 Ind. 650, 14 N.E.2d 97 (1938); Automobile Underwriters, Inc. v. Stover, 148 Ind. App. 555, 268 N.E.2d 114 (1971); Indiana Ins. Co. v. Knoll, 142 Ind. App. 506, 236 N.E.2d 63 (1968).

[51]*See, e.g.*, Hoosier Ins. Co. v. Ogle, 150 Ind. App. 590, 276 N.E.2d 876 (1971); West v. Indiana Ins. Co., 148 Ind. App. 176, 264 N.E.2d 335 (1970); Metropolitan Life Ins. Co. v. Head, 86 Ind. App. 326, 157 N.E. 448 (1927).

[52]Cause No. NA 75-55-C (S.D. Ind. Feb. 3, 1976), *appeal docketed* No. 75-1338 (7th Cir. Feb. 23, 1976).

It is indisputable that such representations are material to the risk to be assumed by the insurer and, generally speaking, the insured's falsehoods would have permitted State Auto to rescind the policy.[53] However, in accordance with its standard practice, State Auto had conducted a routine investigation to obtain additional personal and financial information concerning the applicant. The investigation had revealed that the insured had not been a resident at the Florida address listed on the application and, apparently, had never resided in Florida. Although this information was discovered by State Auto representatives less than one month after the policy had been issued and more than four months prior to the accident in question, State Auto failed to make any further investigation concerning the insured.

It is generally held that if an insurer possesses evidence of false representations sufficient to place a prudent man on notice and cause him to begin an inquiry which might disclose the truth, the insurer is bound by what a reasonable inquiry would have revealed and is estopped from asserting the defense of false representations of material facts.[54] The court applied this principle, concluding that an insured's recent place of residence is an important link in the inquiry of whether he may be an acceptable risk. Had State Auto investigated the false statement of the insured's residence, it could have discovered the other misrepresentations contained in the application and taken steps to rescind the policy before the occurrence of the accident.

State Auto is a significant decision because the court recognized that the "public interest" requires automobile liability insurers to inquire into apparent misstatements in applications for coverage so that the public may be protected from irresponsible

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[53]Before the insurer may rescind an automobile liability policy because of a representation made by the insured in his application, the representation must be one which might reasonably influence the insurer in deciding whether to accept the risk. *See* Auto. Underwriters, Inc. v. Stover, 148 Ind. App. 555, 268 N.E.2d 114 (1971). The test of materiality in Indiana "is not that the company was influenced, but that the facts if truly stated might reasonably have influenced the company in deciding whether it should accept or reject the risk." New York Life Ins. Co. v. Kuhlenschmidt, 218 Ind. 404, 420, 33 N.E.2d 340, 347 (1941).

[54]Adamson v. Home Life Ins. Co., 508 F.2d 766 (5th Cir. 1975); *see* Union Ins. Exchange, Inc. v. Gaul, 393 F.2d 151 (7th Cir. 1968), in which the court cited and applied Indiana law in refusing to allow an automobile liability insurer to rescind its policy under facts somewhat similar to those in *State Auto.*

drivers to the greatest possible extent.[55] Although insurers generally are not required to make independent investigations of the applicant's representations,[56] if an investigation is made and material misrepresentations come to light the insurer is obligated to conduct a further inquiry and will be charged with notice of what the subsequent inquiry would have disclosed.[57]

D. Life Insurance Conditional Receipt

In a case likely to accelerate the use of "COD" insurance[58] in Indiana, the First District Court of Appeals ruled that when consideration supports the issuance of a conditional receipt for life insurance, death of the applicant prior to notification of rejection imposes liability on the insurer for the amount of the proceeds stated in the application. In *Kaiser v. National Farmers Union Life Insurance Co.*,[59] the plaintiff's decedent applied for a whole life policy and paid the first year's premium on June 30, and was given a conditional receipt providing that insurance coverage under the policy would be effective if on a specified date the company deemed him to be an insurable risk. On July 11, the applicant submitted to the required medical examination. On July 20, he was killed in an automobile accident, prior to the insurer's formal acceptance or rejection of his application. The trial court strictly interpreted the language of the receipt[60] and held that

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[55]When an automobile liability insurer issues a policy, it assumes an obligation to investigate the insurability of its insured. The insurer may not postpone an investigation until the insured injures another nor may it employ a second investigation, prompted by imminence of claim, to avoid its policy. Public policy militates against such a proposition. Travelers Ins. Co. v. Wilhelm, [1973] INSUR. L. REP. (CCH) 7757 (D. Mont. 1973).

[56]Mutual Life Ins. Co. v. Moriarity, 178 F.2d 470 (9th Cir. 1949). *See also* Chamberlain v. Fuller, 59 Vt. 247, 9 A. 832 (1887), wherein the court recognized, "No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool." *Id.* at 256, 9 A. at 836.

[57]In Knights of Pythias v. Kalinski, 163 U.S. 289 (1895), the Court held that an insurance company may be charged with knowledge of facts which it ought to have known and that knowledge which is sufficient to lead a person to inquire further constitutes notice of whatever the inquiry would have disclosed and will be regarded as knowledge of the facts. *See* Columbia Nat'l Life Ins. Co. v. Rodgers, 116 F.2d 705 (10th Cir. 1941).

[58]Absent a contrary agreement (the conditional receipt, for example) payment of the initial premium and delivery of the policy are usually concurrent acts. Therefore, during the period between the signing of the application and the delivery of the policy, no money has been advanced to the insurance company, and no insurance is in effect. This is called "COD", or "cash on delivery" insurance.

[59]339 N.E.2d 599 (Ind. Ct. App. 1976).

[60]*See* Prudential Ins. Co. v. Lamme, 83 Nev. 146, 425 P.2d 346 (1967) for a discussion of the two types of conditional receipts in common usage,

there was no coverage at the time of decedent's death; the insurer had not approved the application since it was attempting to obtain additional information on the applicant's "insurability."[61] Reversing the trial court's decision, the court of appeals ruled that the conditional receipt has the effect of creating temporary or interim insurance until the company makes a final decision to accept or reject the application. In a persuasive opinion, Judge Lybrook reasoned that to construe the terms of the receipt to create no obligation until after the insurer's approval would be to overlook the patent ambiguity of the language contained in the receipt;[62] deprive the applicant of his reasonable expectations;[63] and, if the policy is ultimately issued, extract a premium for coverage not received,[64] between payment of premium and issuance of the policy. Thus, when a conditional receipt supported by consideration is issued by a life insurer, any conditions contained in the receipt are to be treated as conditions subsequent. Therefore, the insurer must act on the application and cannot terminate the risk until the insured is notified during his lifetime. Since the insurer did not reject Kaiser's application prior to his death, it was liable for the amount of the proceeds stated in the application.

It is imperative that courts understand, as did the court of appeals in *Kaiser*, that "freedom to contract" must not be used as a shibboleth permitting an insurer to bargain with instruments of confusion, technically adequate to meet the requirements of precision recognized in ordinary contracts among parties of equal bargaining power,[65] when, in fact, the applicant for insurance does not have equality of bargaining power.[66]

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the "approval type" and the "insurability type." The receipt in *Kaiser* was an "insurability type." 339 N.E.2d at 600.

[61]The courts have recognized that "insurability" includes elements other than health. *See* Rosenbloom v. New York Life Ins. Co., 65 F. Supp. 692, 696 (W.D. Mo. 1946), wherein the court stated, "Insurability as a term of art signifies all those physical and moral factors reasonably taken into consideration by life insurance companies in determining coverage or matters affecting the risk"; Kallman v. Equitable Life Assur. Soc'y, 248 App. Div. 146, 288 N.Y.S. 1032 (1936). Note the strong dissent in Casey v. Transamerica Life Ins. & Ann. Co., 511 F.2d 577, 580 (7th Cir. 1975) (Pell, J., dissenting).

[62]Allen v. Metropolitan Life Ins. Co., 44 N.J. 294, 208 A.2d 638 (1965).

[63]Prudential Life Ins. Co. v. Lamme, 83 Nev. 146, 425 P.2d 346 (1967).

[64]Stonsz v. Equitable Life Assur. Soc'y., 324 Pa. 97, 187 A. 403 (1936).

[65]Gaunt v. John Hancock Mut. Life Ins. Co., 160 F.2d 599, 601 (2d Cir. 1947).

[66]The Third District Court of Appeals reached the same decision as the *Kaiser* court in Monumental Life Ins. Co. v. Hakey, 354 N.E.2d 333 (Ind. Ct. App. 1976).