

X. Insurance

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Four cases were decided during the survey period that are of particular interest to attorneys practicing insurance law. Of greatest significance is a decision in which a carrier, although not a party to an uninsured motorist suit, was bound by the judgment on an action brought by its insured. Secondly, the Indiana Court of Appeals added an additional dimension to the definition of who is an "insured" under uninsured motorist coverage. Thirdly, a federal court determined that punitive damages attributed to a corporation could be shifted to its insurer. Finally, policy provisions for group accidental death coverage were strictly construed in favor of the insurer.

A. Uninsured Motorist Coverage

1. *Right to Intervene.*—In *Vernon Fire & Casualty Insurance Co. v. Matney*,¹ the First District Court of Appeals, in affirming the summary judgment of a trial court against the insurance company, determined that (1) the insurance company did have a right and duty to intervene in an action between an insured and an uninsured motorist, (2) the insurance company was a proper party to a suit against an uninsured motorist, and (3) a judgment against an uninsured motorist was binding against the insurance company.

Jimmie D. Matney, an insured individual under the Family Protection Coverage in a policy issued by Vernon Fire & Casualty Company (Vernon), was a passenger on a motorcycle. Matney received serious injuries from a collision of the motorcycle and an automobile driven by an uninsured motorist, Ethel Thoms. Matney brought action against Thoms and gave notice to Vernon of the significant litigatory steps in the action against Thoms. Prior to the proceedings against Thoms, Matney also served notice upon Vernon of his intention to assert a first-party claim under his uninsured motorist coverage (UMC). A summary judgment against Thoms and an award of \$25,000 were granted. Matney then demanded payment from Vernon under the UMC provision of his policy and was refused. Matney sued Vernon for the policy limit and received summary

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¹351 N.E.2d 60 (Ind. Ct. App. 1976).

judgment for the \$10,000 policy limit. Vernon appealed, raising the issues of (1) the right or duty of Vernon to intervene in the action between Matney and Thoms, (2) the position of Vernon in the proceedings, and (3) the effect of the judgment against Thoms on Vernon.

Following the reasoning of *Indiana Insurance Co. v. Noble*,² the court held that the insurance company has the right to have all issues adjudicated at a single trial.³ In *Noble*, the court determined that an insurer could intervene in an action by its insured against an uninsured motorist because multiple litigation should be discouraged where possible. Although a later case, *Smith v. Midwest Mutual Insurance Co.*,⁴ indicated that an insurer could not be allowed to take part in a suit between the insured and an uninsured motorist, the court overruled the *Smith* approach and chose instead to follow the reasoning expressed in *Noble*.⁵ The court cited *Noble* for the four options available to an insured who seeks to recover for injuries resulting from a collision with an uninsured motorist.⁶ Focusing on the third alternative, which allows the insured party to judicially resolve the issues of damages and liability against the uninsured motorist without joining the insurer *when notice is given the insurer*, the court reasoned that the insurance company did have a

²148 Ind. App. 297, 265 N.E.2d 419 (1970), *transfer denied*, No. 569A84 (Ind. June 8, 1971).

³351 N.E.2d at 64.

⁴154 Ind. App. 259, 289 N.E.2d 788 (1972).

⁵351 N.E.2d at 65. The court expressed concern about the potential conflict of interest between the insurance carrier and its insured when the insurer intervenes. Noting that if intervention was prohibited two separate trials with two different verdicts based on the same factual situation would be possible, the court determined that "the cumulative effect of the spirit of the Indiana Trial Rules, the interests of justice, the avoidance of multiple litigation and the conservation of judicial time" called for insurer intervention.

⁶*Noble* outlined the insured's options for recovery as follows:

1. He may file an action directly against his insurance company without joining the uninsured motorist as a party defendant and litigate all of the issues of liability and damages in that one action.
2. He may file an action joining both the uninsured motorist and the insurance company as party defendants and litigate all of the issues of liability and damages in that action.
3. He may file an action against the uninsured motorist alone without joining the insurance company as a party defendant and litigate the issues of liability and damages. In such case he gives preliminary and adequate notice of the filing and pendency of such action to the insurance company so that they make [sic] take appropriate action including intervention.
4. He may file an action against the uninsured motorist and give no notice to the insurance company.

Id. at 63 (citing *Indiana Ins. Co. v. Noble*, 148 Ind. App. 297, 265 N.E.2d 419 (1970) (citations omitted)).

right and a duty to decide whether or not to become a party in the suit.⁷

Answering the second issue, the court determined that Vernon was a proper party to the action of Matney against Thoms.⁸ Matney, Thoms, and Vernon were all concerned with the same issues of fact. If Vernon had elected to defend its interests, Matney would have been spared the difficulty of an initial action against Thoms and a subsequent action against Vernon. Noting that the conflict of interest between the insurer and the insured would always be present, the court held that such a conflict was not sufficient to prevent Vernon from defending its interest in the first trial, had the insurer chosen to do so.⁹

Finally, the First District Court of Appeals held that the judgment against Thoms was binding on Vernon for the liability and damages issues because Vernon repeatedly denied coverage or liability to Matney after being notified of every significant act taken against Thoms.¹⁰ Furthermore, the uninsured motorist statutory language in conjunction with the policy provisions justified such a result.¹¹

⁷*Id.* at 64. The court noted that Indiana Trial Rule 24(A) controlled the insurer's intervention.

⁸*Id.* at 65.

⁹*Id.* See *Indiana Ins. Co. v. Noble*, 148 Ind. App. 297, 265 N.E.2d 419 (1970). Judge White, dissenting, called attention to the legal and ethical problems which arise when an insurance company participates in the defense of an uninsured motorist. *Id.* at 335-36, 265 N.E.2d at 443.

¹⁰351 N.E.2d at 65. Vernon had received and acknowledged repeated notice of the proceedings of Matney against Thoms. The court indicated that by not intervening in the original action, Vernon had waived any defenses to liability and damages.

¹¹Indiana uninsured motorists coverage is mandated in IND. CODE § 27-7-5-1 (1976): 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 with respect to any motor vehicle registered or principally garaged in this state, unless coverage is provided therein or supplemental thereto . . . for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom.

The policy issued by Vernon to Burton Matney, the father of the injured party, provided:

Coverage J—Family Protection (Damages for Bodily Injury): 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, sickness or disease, including death resulting therefrom, hereinafter called "bodily injury," sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured automobile; provided, for the purposes of this coverage, determina-

This decision answers a troublesome question that has plagued the Indiana insurance bar. When an insured gives adequate notice to his insurer, a judgment in favor of the insured against an uninsured motorist will apparently be binding on the insurer whether or not the carrier chooses to become a party to the original action by intervening.

2. *Definition of Insured.*—*Vernon Fire & Casualty Insurance Co. v. American Underwriters, Inc.*¹² presents the question of whether a carrier may restrict its UMC to exclude occupants of the insured vehicle. This issue had not previously come before the Indiana courts because it has been generally assumed that "coverage for persons who are occupying an insured vehicle when they are injured by an uninsured motorist operating another vehicle is unquestioned."¹³

Joe Lancaster was injured while riding as a passenger on a motorcycle operated and owned by Jack A. Davidson when the motorcycle collided with an automobile operated by Pete A. Hall, an uninsured motorist. American Underwriters, Inc. (AUI) had insured Davidson's motorcycle for liability and UMC. Joe Lancaster and his father, who had paid Joe's medical expenses, carried UMC with Vernon. Although Vernon was willing to pay its share of Lancaster's medical expenses, AUI denied any coverage to Lancaster. AUI claimed its policy did not provide uninsured motorist coverage to passengers of vehicles owned by its insureds.¹⁴

The trial court ruled that neither Joe Lancaster nor his father were entitled to recover from AUI, but the First District Court of Appeals reversed the trial court's decision and required AUI to contribute a pro rata share of Joe Lancaster's stipulated damages.¹⁵

Analyzing the language of the Indiana Uninsured Motorists

tion as to whether the insured or such representative is legally entitled to recover such damages, and if so the amount thereof, shall be made by agreement between the insured or such representative and the company or, if they fail to agree, by arbitration.

No judgment against any person or organization alleged to be legally responsible for the bodily injury shall be conclusive, as between the insured and the company, of the issues of liability of such person or organization or of the amount of damages to which the insured is legally entitled unless such judgment is entered pursuant to an action prosecuted by the insured with the written consent of the company.

351 N.E.2d at 66.

¹²356 N.E.2d 693 (Ind. Ct. App. 1976).

¹³A. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE § 2.10 (Supp. 1974).

¹⁴356 N.E.2d at 694. The parties stipulated that Hall was negligent and was the proximate cause of the accident.

¹⁵*Id.* at 696. Damages were \$23,998.43 in medical expenses.

Act,¹⁶ the "Persons Insured" clause of AUI's policy,¹⁷ the definition of an insured for liability purposes in the same policy,¹⁸ and the uninsured motorist provision of the AUI coverage,¹⁹ the court found that some internal conflict existed within the policy, which in turn conflicted with the language of the Indiana Uninsured Motorists Act. The uninsured motorist statute was held to provide the minimum

¹⁶IND. CODE § 27-7-5-1 (1976) provides:

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 with respect to any motor vehicle registered or principally garaged in this state, unless coverage is provided therein or supplemental thereto, in limits for bodily injury or death set forth in Acts 1947, chapter 159, sec. 14, as amended heretofore and hereafter, under policy provisions approved by the commissioner of insurance, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom.

Provided, That the named insured shall have the right to reject such coverage (in writing) and Provided further, That unless the named insured thereafter requests such coverage, in writing, such coverage need not be provided in or supplemental to a renewal policy where the named insured has rejected the coverage, in connection with a policy previously issued to him by the same insurer.

¹⁷The following clause was in the AUI policy:

Persons Insured: The following only are insured under the Uninsured Motorists Coverage: The named insured and the lawful spouse of such named insured if, and only if, such spouse is living with the named insured at the time of the accident.

356 N.E.2d at 695.

¹⁸An insured was defined in the liability section of the AUI policy as follows: (3) Definition of Insured (Coverages A and B): With respect to the insurance provided by this contract, the unqualified word "insured" means only the insured specified as the named insured on the application page of this policy and any other person using the insured motorcycle described in this policy to whom the named insured has given permission, provided the use is within the scope of such permission and provided such person is a licensed driver over 16 years of age.

Id.

¹⁹The uninsured motorist coverage of the AUI policy stated:

Coverage C—Protection Against Uninsured Motorists: To pay all sums which the insured or his legal representative shall be legally entitled to receive as damages from the owner or operator of an uninsured automobile because of bodily injury, including death resulting therefrom sustained by the insured, caused by accident and arising out of the use of such uninsured automobile provided for the purposes of this coverage, determination as to whether the insured or such representative is legally entitled to recover such damages, and if so the amount thereof, shall be made by agreement between the insured or such representative and the Underwriters, or if they fail to agree, by arbitration.

Id.

standard of protection to a passenger, regardless of the policy's language.²⁰

It was determined that AUI had attempted to define its uninsured motorist coverage more narrowly than that allowed by Indiana statute. Such a limiting could not be approved by the appellate court.²¹ Insurers, then, must be at least as liberal in the drafting of their uninsured motorist clauses as the statutory minimum.²² In light of this holding, it would follow that the term "insured" must include the vehicle owner and all others who legally use or operate the insured vehicle.

B. Punitive Damages

Indiana courts have previously held that punitive damages are recoverable when there is a statutory tort.²³ In *Norfolk & Western Railway v. Hartford Accident & Indemnity Co.*,²⁴ the United States District Court for the Northern District of Indiana considered a question of first impression as to whether an insured may shift the burden of a punitive damage award to its insurer. The court held

²⁰*Id.* at 696. The court cited *Taylor v. American Underwriters, Inc.*, 352 N.E.2d 86 (Ind. Ct. App. 1976), for the rule that a conflict within a policy does not require a holding of ambiguity. Indicating that the policy terms were clear and unambiguous in their meaning, it was determined that the provisions would not be construed against the insurer. *See generally* *United Farm Bureau Mut. Ins. Co. v. Pierce*, 152 Ind. App. 387, 283 N.E.2d 788 (1972).

The court followed the reasoning of *Cannon v. American Underwriters, Inc.*, 150 Ind. App. 21, 275 N.E.2d 567 (1971), as to the ineffectiveness of policy clauses which are narrower than the statutory standard. 356 N.E.2d at 696. In *Cannon*, the court stated:

[T]he legislative intent in requiring certain insurance policies to provide protection for policyholders injured by operators of "uninsured motor vehicles" should be liberally construed to the end that persons injured by uninsured motorists be protected to the limits of such policies to the same extent that they would have been protected if the tort-feasors had carried insurance.

150 Ind. App. at 28, 275 N.E.2d at 571 (quoting *Bowsher v. State Farm Fire & Cas. Co.*, 244 Or. 549, 419 P.2d 606 (1966)).

²¹356 N.E.2d at 696 (citing *Ely v. State Farm Ins. Co.*, 148 Ind. App. 586, 268 N.E.2d 316 (1971)). *See also* *Taylor v. American Underwriters, Inc.*, 352 N.E.2d 86 (Ind. Ct. App. 1976); *Patton v. Safeco Ins. Co. of America*, 148 Ind. App. 548, 267 N.E.2d 859 (1971); *Cannon v. American Underwriters, Inc.*, 150 Ind. App. 21, 275 N.E.2d 567 (1971).

See *Indiana Ins. Co. v. Noble*, 148 Ind. App. 297, 307, 265 N.E.2d 419, 426 (1970), *transfer denied*, No. 569A84 (Ind. June 8, 1971), for cases which indicate that uninsured motorist legislation should be liberally construed.

²²356 N.E.2d at 696.

²³*See* *Vernon Fire & Cas. Ins. Co. v. Sharp*, 349 N.E.2d 173 (Ind. 1976), *discussed in* Frandsen, *Insurance, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 243, 243 (1976); *Jeffersonville R.R. Co. v. Rogers*, 38 Ind. 116 (1871); *Rex Ins. Co. v. Baldwin*, 323 N.E.2d 270, 274 (Ind. Ct. App. 1975).

²⁴420 F. Supp. 92 (N.D. Ind. 1976).

that "it would not be inconsistent with public policy to allow the corporation to shift to an insurer the punitive damage award when that award is placed upon the corporation solely as a matter of vicarious liability."²⁵

The court distinguished between liability for punitive damages that is imposed directly and liability for punitive damages that is imposed through respondeat superior.²⁶ Generally, where punitive damages are awarded as a deterrent or punishment for the insured's behavior, the award may not be shifted to the insurer.²⁷ However, where the corporation as employer is held liable for a punitive damage award where an employee acts within the scope of his employment, an exception to this rule is created.²⁸ When met, this exception allows the corporation to hold the insurer liable for the punitive damage award, provided the policy provisions do not exclude such coverage.²⁹

In *Norfolk & Western Railway*, Hartford Accident and Indemnity provided an insurance policy to Norfolk.³⁰ A truck owned by Norfolk and driven by an employee was involved in an automobile accident with another vehicle. The jury awarded the injured party \$67,000 in compensatory damages and \$200,000 in punitive damages. Hartford paid the compensatory damage amount. Hartford and Norfolk negotiated the punitive damages down to \$187,500 and divided the burden of payment equally between them, subject to judicial determination of rights to coverage. Norfolk then sued Hartford to

²⁵*Id.* at 97.

²⁶*Id.* at 96. Direct liability for punitive damages is imposed when the corporation has acted in a malicious or oppressive manner. See *Jeffersonville R.R. Co. v. Rogers*, 38 Ind. 116, 126 (1871). Vicarious liability through respondeat superior is created when the corporation, without a wrong of its own, is held responsible for the tortious act of its agent.

²⁷"To the extent, then, that the law imposes punitive damages upon an insured in order to shape or deter the insured's conduct, the insured may not avoid the penalty by means of insurance." 420 F. Supp. at 95.

²⁸See *Morford v. Woodworth*, 7 Ind. 83 (1855); *Taber v. Hutson*, 5 Ind. 322 (1854).

²⁹420 F. Supp. at 95.

³⁰The insurance policy issued by Hartford to Norfolk included "all sums which the insured shall become legally obligated to pay as damages because of . . . bodily injury or . . . property damage to which this insurance applies, caused by an occurrence and arising out of the ownership, maintenance or use . . . of any automobile." 420 F. Supp. at 93.

Employees of Norfolk were included as insureds under the contract, and damages were defined as "damages for death and for care and for loss of services resulting from bodily injury and damages for loss of use of property resulting from property damage." *Id.*

Thus, the policy provisions were quite liberal in coverage of the insured. The court noted that the insurance contract covered punitive damages because Hartford could have chosen to specifically exclude such damages in its broad definition of coverage.

recover the \$93,750 it paid; Hartford counterclaimed for its \$93,750 payment. Applying Indiana law,³¹ Judge Eschbach determined that the insured was only vicariously liable; and, thus, it was not contrary to public policy for Norfolk to receive full payment of the punitive damage award from Hartford.³²

Although the particular policy issued by Hartford was of a standard form used throughout the country,³³ it appears that an insurer can take steps to protect itself from punitive damage awards based on vicarious liability by expressly excluding exemplary or punitive damages in the policy. Given the competitive nature of the property and casualty lines, profitability problems, and the relatively low premium per vehicle when a group policy is used, changes in coverage clauses are likely to occur.

C. *Accidental Death*

In *Equitable Life Assurance Society v. Crowe*,³⁴ a group accidental death policy was literally interpreted, resulting in a judgment in favor of the insurer. Barbara Phillips was employed by General Tire and Rubber Company and was covered under the employees' group accidental death policy issued by Equitable. Phillips was laid off her job on February 15, 1974, and was accidentally killed on February 27, 1974. Mildred Crowe, as Phillips' beneficiary, won summary judgment from the trial court for the insurance proceeds of \$9,500.³⁵ The First District Court of Appeals reversed the lower court decision after finding that although the premium for Phillips' coverage had been paid in February, the policy provisions requiring both notice of termination of employment and payment of premium had not been met.³⁶

³¹*Id.* at 97.

³²*Id.* at 98.

³³*Id.* at 94. The court indicated that the identical policy was issued throughout the country and was litigated in *Price v. Hartford Accident & Indem. Co.*, 108 Ariz. 485, 502 P.2d 522 (1972).

³⁴354 N.E.2d 772 (Ind. Ct. App. 1976).

³⁵*Id.* at 775.

³⁶The insurance policy issued by Equitable to General Tire provided the following: [I]nsurance hereunder of any employee shall cease automatically upon the occurrence of any of the following events: . . . *the termination of his employment in the classes of employees insured hereunder. Cessation of active work by an employee shall be deemed to constitute the termination of his employment except that under the circumstances stated below the Employer may, for the purposes of the insurance hereunder, by filing written notice with the Society and continuing the payment of premiums for the insurance hereunder, regard employees as still in the employment of the Employer for the respective periods stated:*

. . . .

Noting the clear and unambiguous language of the policy, Judge Lowdermilk stated: "We cannot treat any part of a contract as surplusage if it can be given a meaning reasonably consistent with other parts of the contract."³⁷ Since Phillips came under the lay-off provision of the insurance contract and had not worked for several days before her death, the court determined that she was not insured because the notice provision of the insurance contract had not been met.³⁸

This case indicates the reluctance of the Indiana courts to substitute any terms of coverage in a contract issued by an insurer and accepted by an insured. When termination is defined as including lay-offs unless certain conditions are met, partial satisfaction of the required provisions will not extend coverage, even though premiums are paid.³⁹

(b) *where the employee is given leave of absence or temporarily laid off: for the full period of such leave of absence or lay-off, but not exceeding a maximum period of ninety days. After such ninety day period the employee may continue his insurance hereunder by payment of the premium for such insurance.*

At the expiration of the respective periods above mentioned, unless the employee shall then return or shall have theretofore returned to active work, his insurance hereunder shall terminate automatically.

Id. at 774-75 (emphasis by the court). The present policy specifically provided that lay-off coverage to an employee was available only upon the performance of two conditions by General Tire: (1) the continued payment of premiums to Equitable and (2) notification to Equitable that the coverage of the terminated employee should be continued.

³⁷*Id.* at 778 (citing *Oard v. Rechter*, 322 N.E.2d 392 (Ind. Ct. App. 1975)).

³⁸Crowe argued that the February 1974 report from General Tire to Equitable listed Phillips as an employee and should have therefore served as adequate written notice to the insurer that Phillips' coverage should continue through February. The court noted that the report covered January events only and could not notify Equitable of the February lay-off. Furthermore, the contract had a specific notice requirement in the employer's report provision which stated the following:

Failure on the part of the Employer to record the insurance of any employee who has qualified for coverage hereunder, or failure on the part of the Employer to include such insurance in the reports furnished to the Society, shall not deprive the employee of his insurance; *nor shall* failure to record the termination of insurance of any employee, or *failure to include such termination in the reports furnished to the Society, be construed as involving or permitting the continuation of his insurance beyond the date of termination as determined by the provisions of this policy.*

354 N.E.2d at 779 (emphasis by the court).

³⁹*Id.* Some may feel that the court's decision is regrettable because the employee may not have known of the notice requirement, and therefore the result would be inconsistent with the employee's reasonable expectations. Assuming that the employee was not aware of the policy's notice provision, an action in negligence may have been available against the employer.