X. Insurance

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Indiana insurance law was enriched during the survey period by four cases from Indiana's appellate courts and one case from the federal district courts. Of particular interest is the court of appeals decision that a fire insurance carrier may not apply an across-the-board deduction to the replacement value of direct property loss from fire simply because the cost to the insurer to make the insured whole is greater at the time of the loss than when the policy was initially issued. The Indiana Supreme Court determined that when each of two liability insurance policies written by different carriers was applicable to the same claim and when policy language met specific standards, each insurer was liable for a prorated contribution to the settlement above the deductible amount in the primary policy. A result was reached by the court of appeals which expanded the concept of direct loss when an insured was forced to sell cattle prematurely because of a loss to farm property from a tornado. Another court of appeals case puts attorneys on guard to certain construction contract language which, if used, limits the recourse of the insured despite negligence by the other party to the agreement. Finally, the federal district court discussed the legal interrelationships among life insurance premium payments, cash value, dividends, and the automatic premium loan provision in the context of a common business situation.

A. *Replacement Value*

In *Travelers Indemnity Co. v. Armstrong*,[1] the court of appeals, in affirming the jury verdict and decision of a trial court against the insurance company, determined that the term "actual cash value," when used in a fire insurance policy, meant the insured was entitled to a sufficient settlement to allow repair, restoration, or replacement of the damaged property without a deduction for depreciation.[2] The court further determined that punitive damages were allowable by the jury in addition to compensatory damages when

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[1] 384 N.E.2d 607 (Ind. Ct. App. 1979).

[2] *Id.* at 615.

the insurance company improperly represented the provisions of the insurance policy to the insured.[3]

Orrie L. Armstrong was the owner of a farmhouse, approximately 100 years old, which was extensively damaged by fire. Mrs. Armstrong and her husband, while occupying the home, had made several improvements, and after her husband's death, Mrs. Armstrong continued to maintain and modernize the house.[4]

In 1971, Mrs. Armstrong renewed a fire insurance policy through the Travelers Indemnity Company for a three-year period. Prior to the renewal, her agent advised that the coverage on the farmhouse be increased because the cost of building materials had risen substantially since the original issuance of the policy. Mrs. Armstrong acted on this advice and increased the policy limits on the farmhouse at renewal to $15,000.

The day after the fire, which occurred in 1972, she notified her agent of the damage. A claims investigator for the insurance company and an independent repair contractor carefully examined the house to determine what would be necessary to restore the premises to their condition before the fire.

Within a week of this inspection, the insurance investigator telephoned Mrs. Armstrong and informed her that the cost of repair was $8,729.62. He then offered to pay the insured $4,200 in cash if she chose not to repair the house, or to pay $6,400 to a contractor if she wished to repair. When Mrs. Armstrong asked the investigator to explain the offer, he indicated that he did not understand it either, but that there "was something . . . in the policy that was percentage-wise,"[5] and that the insurance coverage would not pay for the full cost of repair.

Mrs. Armstrong declined both offers and contacted an attorney. A banker who had appraised property in the area an average of two or three times a week for twenty years was retained, along with another appraiser, to inspect the property, appraise its value, and arrive at an estimate of the cost necessary to restore the house to a livable condition. The banker estimated the value of the house before the fire, exclusive of the land, to be $15,000 and determined that the value of the house after the fire was $6,500. The banker's appraisal of the damage was $8,500, or in other words, he felt that the value of the farmhouse was decreased by the repair cost.

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[3]*Id.* at 618-19.

[4]In the 10 years before the fire, the Armstrong's had installed new aluminum siding, kitchen cabinets, and a new furnace. Then, in the 18 months preceding the fire, two closets were added; hardwood paneling and ceiling tile were installed in the living room, the dining room, and in four second floor bedrooms; and new floor tile was put in the dining room. The extensive nature and immediacy of the improvements were thus distinguishing features of this case.

[5]384 N.E.2d at 611.

Later, the insurance company admitted that the estimate of $8,769.62 obtained by its representative and the contractor was fair and reasonable; the investigator testified that he had mistakenly adjusted the claim through an inapplicable policy provision which, in his opinion, restricted his offer to the insured to no more than $4,288.58 because the condition of the house called for a fifty-percent depreciation deduction.[6]

The next reported communication from the insurer occurred more than seven months after the fire. In a letter from a supervisor of the insurance company to the insured's attorney, the supervisor enclosed a check for $6,497.22 and explained that the proposed settlement was determined by applying a twenty-five percent depreciation factor to all repair costs to avoid betterment of the 100-year-old house. The letter was the first written notification of a depreciation reduction percentage. The offer was refused and the check was returned.

Judgment was entered by the trial court following a jury verdict for the insured awarding compensatory damages of $8,769.62 and punitive damages of $25,000. Interest on the compensatory damage award was computed at $1,785.13 by the court, based on a stipulated annual percentage rate of eight percent. The insurer appealed, contesting error in each element of the judgment. Issues of the admission of testimony and of the court's instructions were also raised by the insurance company.

The contract of insurance did not contain a coinsurance or pro-rata clause;[7] nothing in the policy language indicated that any deduction should be taken for depreciation.[8] The term "actual cash value" was thus in question. The court of appeals, noting that an insurance contract was not subject to real bargaining and was therefore a contract of adhesion, indicated that questions of interpretation of ambiguous terms would be resolved against the insurer to the benefit of the insured.[9] Because a fire insurance contract is a contract of in-

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[6]*Id.* at 612.

[7]*Id.* at 613.

[8]The loss payable clause in the insurance contract read as follows:

> [T]his Company . . . to an amount not exceeding the amount(s) above specified, does insure the Insured . . . to the extent of the actual cash value of the property at the time of the loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss . . . against all DIRECT LOSS BY FIRE . . . .

Id. at 612. The phrase "actual cash value" was not defined in the policy. The insurance company claimed that its loss was limited to the actual cash value of the direct loss by fire incurred by the insured and that cash value as used in the above language meant an allowance for depreciation should be subtracted from the replacement cost.

[9]*Id.* at 613. *See* Freeman v. Commonwealth Life Ins. Co., 149 Ind. App. 211, 271 N.E.2d 177 (1971), *transfer denied*, 259 Ind. 237, 286 N.E.2d 396. The *Travelers* court

demnity in which the insurer "undertakes to make the insured whole for the loss of insured property caused by fire,"[10] the court reasoned that the principle of indemnity had to underlie the interpretation of the term "actual cash value."[11]

"Actual cash value" had not previously been defined by Indiana courts. The appellate court used cases from other jurisdictions to assist in its analysis, arriving at the conclusion that "the phrase actual cash value, within the context of the fire insurance policy in the case at bar, means an amount of money, within the policy limit, sufficient to restore, repair, or replace the property destroyed."[12]

Travelers Indemnity Company relied upon the Tennessee case of *Braddock v. Memphis Fire Insurance Corp.*[13] to support its subtraction of depreciation from the repair estimate. In the *Braddock* case, the court considered a casualty loss which totally destroyed the insured's fifteen-year-old roof. The replacement cost of the roof was $247. The claim was denied because the Tennessee Supreme Court felt the insured would realize a profit by having a new roof instead of the old roof.[14]

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cited O'Meara v. American States Ins. Co., 148 Ind. App. 563, 268 N.E.2d 109 (1971), for authority that an insurance contract term was ambiguous if reasonably intelligent men would honestly differ on the meaning after reading it. 384 N.E.2d at 613.

[10]384 N.E.2d at 613. *See* First Nat'l Bank v. Boston Ins. Co., 17 Ill. App. 2d 159, 149 N.E.2d 240 (1958); Butler v. Aetna Ins. Co., 64 N.D. 764, 256 N.W. 214 (1934). In support of the concept that a contract of indemnity required full restitution to the insured, the court also quoted from Washington Mills Mfg. Co. v. Weymouth Ins. Co., 135 Mass. 503, 506-07 (1883), as follows:

> The contract of the insurer is not that if the property is burned, he will pay its market value; but that he will indemnify the assured, that is, save him harmless, or put him in as good a condition, so far as practicable, as he would have been in if no fire had occurred.

384 N.E.2d at 613.

[11]384 N.E.2d at 613.

[12]*Id.* at 615 (citing Glens Falls Ins. Co. v. Gulf Breeze Cottages, 38 So. 2d 828 (Fla. 1949) (actual cash value is the amount of money required to put the roof of a building in as near as possible the same condition before the loss without allowance for depreciation); General Outdoor Advertising v. LaSalle Realty, 141 Ind. App. 247, 218 N.E.2d 141 (1966); Fedas v. Insurance Co. of State of Pa., 300 Pa. 555, 151 A. 285 (1930) (actual cash value means the cost to replace a building or chattel as of the date of a fire, considering the use and function of the property); Third Nat'l Bank v. American Equitable Ins. Co., 27 Tenn. App. 249, 178 S.W.2d 915 (1943) (depreciation may not be deducted from the cost of replacement because to do so would make the recovery fall short of the principle of indemnity)). The *LaSalle* court held that in the determination of damages for a partial tortious injury to a building with value separate from the real estate when the cost of restoration does not exceed the fair market value of the building before the damage, the proper measure is the cost of restoration. 141 Ind. App. at 267, 218 N.E.2d at 151. An analogy was drawn between this tort remedy of restitution and the principle of indemnity in the *Travelers* case. 384 N.E.2d at 615.

[13]493 S.W.2d 453 (Tenn. 1973).

[14]The Tennessee Supreme Court stated: "A fire insurance contract is a contract of indemnity. Its purpose is to reimburse the insured; to restore him as nearly as

The Indiana Court of Appeals indicated that the *Braddock* case did not accomplish the necessary indemnification required by the insurance contract.[15] In *Braddock*, the "insurance company arbitrarily reduced the estimated cost of replacement by a depreciation factor" and then subtracted the $50 deductible amount required by the policy, leaving the insured with a net settlement of only $11 in exchange for his fifteen-year-old roof.[16] According to the *Travelers* court, even with the $50 deductible added back, $61 was not enough to give the insured the functional efficiency of the old roof.[17]

The Indiana decision requires that the purpose and function of the property be considered to preserve its intrinsic value.[18] Referring to the Pennsylvania case of *Farber v. Perkiomen Mutual Insurance Co.*,[19] the court concluded:

> [T]he risk is necessarily affected by changing economic conditions, such as, the increasing costs of labor and materials. Because it is the insurer's undertaking to make the insured whole within the policy limits, the augmented damage resulting from increased costs of labor and materials is the liability of the insurer up to the stated limit of the insurance.[20]

Although Travelers alleged several errors in the jury verdict on compensatory damages, the court of appeals quickly dismissed the charges. The court determined that the jury could ignore depreciation because the fire damage was largely confined to the interior of

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possible to the position he was in before the loss. The replacement-less-depreciation rule and the broad evidence rule operate to accomplish indemnity." *Id.* at 459-60. The Tennessee Supreme Court further stated:

> "While replacement cost is a dominant factor in fixing the amount of recovery for total loss of a building, it plays an even greater part in fixing the amount of recovery for a partial loss to a building. It would seem that the only practical way to measure the extent of partial damage to a building would be to inventory its damaged parts, and the only way to express such damage in terms of money would be to count the cost of replacing such parts, so as to restore the building to the same condition it was in just before the fire. And the view which we think supported by the better reason and the greater weight of authority is that depreciation may not be deducted from such cost because that would make the sum insufficient to complete the repairs and would leave the building unfinished; and this would fall short of the indemnity contracted for in the policy."

Id. at 457 (quoting Third Nat'l Bank v. American Equitable Ins. Co., 27 Tenn. App. 249, 272-73, 178 S.W.2d 915, 925 (1943)).

[15]384 N.E.2d at 614.

[16]*Id.*

[17]*Id.*

[18]*Id.*

[19]370 Pa. 480, 88 A.2d 776 (1952). *See* Metz v. Travelers Fire Ins. Co., 355 Pa. 342, 49 A.2d 711 (1946).

[20]384 N.E.2d at 615.

the house which had been renovated within ten years of the fire, and the majority of the work having been done within eighteen months of the loss.[21] Further, the court stated that the admission of the bank official's testimony as an expert was properly the decision of the trial court and would not be disturbed unless there was a manifest abuse of discretion.[22] Also, the trial court's instruction to the jury was held to be a correct statement of the law.[23]

In addition to full compensatory damages, the trial court jury awarded Mrs. Armstrong $25,000 in punitive damages. Punitive damages have been an important part of Indiana insurance law for several years and may properly be granted to an insured when the insurer engages in "fraud, malice, gross negligence, or oppression."[24] After making both oral and written statements to the insured over a period of several months that the policy required a deduction for depreciation, the insurer admitted both by written interrogatories that became part of the record and by direct testimony that no such policy provisions existed.[25] The court reasoned that, even assuming that the property had diminished in value, no flat depreciation

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[21] *Id.*

[22] *Id.* at 616-17 (citing Isenhour v. State, 157 Ind. 517, 528, 62 N.E. 40, 44 (1901)).

[23] 384 N.E.2d at 616, 619. The court noted that Travelers had failed to provide an alternative instruction on the matter and chose instead to simply object to the plaintiff's tendered instruction. *Id.* at 616-17. The trial court gave the following instruction to the jury:

> If you find from a preponderance of the evidence and under the court's instructions that the defendant was guilty of willfully injuring the plaintiff by false representations to the plaintiff concerning the legal effect of the provisions in the insurance policy, and that this conduct was willful, oppressive, malicious, or the statements were made with heedless disregard of their consequences, and that as a result thereof, Mrs. Armstrong was damaged, and if you further find that Mrs. Armstrong is entitled to recover compensatory or actual damages, then you may, also, allow to her exemplary or punitive damages as well.
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> Exemplary damages are damages allowed as punishment by way of example and to deter others from committing a like act. If you allow exemplary damages, they may be in such amount as you find sufficient to punish the defendant for its conduct and to act so as to be a deterrent to others.

Id. at 619.

[24] Hibschman Pontiac, Inc. v. Batchelor, 266 Ind. 310, 314, 362 N.E.2d 845, 847 (1977) (quoting Vernon Fire & Cas. Ins. Co. v. Sharp, 264 Ind. 599, 349 N.E.2d 173 (1976)). *See Vernon*, 264 Ind. at 609, 349 N.E.2d at 180, *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, 163 Ind. App. 308, 313, 323 N.E.2d 270, 274 (1975). *See also* Norfolk & Western Ry. Co. v. Hartford Accident & Indem. Co., 420 F. Supp. 92 (N.D. Ind. 1976), *discussed in* Mortensen, *Insurance, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 187, 192 (1978).

[25] 384 N.E.2d at 617.

deduction would be appropriate for such items as labor, overhead, and taxes.[26] The court of appeals indicated that an across-the-board depreciation deduction was not appropriate and that the offers of the insurer to Mrs. Armstrong were "oppressive and indicative of a heedless disregard of the consequences."[27] Noting that fraud need not be proved to support a punitive damage award, the appellate court upheld the trial court's jury instruction.[28]

Finally, because the interest granted by the trial court was computed on a stipulated annual rate of eight percent, according to an agreement by the parties, the insurer did not have a valid objection to its imposition by the trial court. Although the insurer also objected to the amount, no demonstration of the mathematical inaccuracy of the interest charge was offered; therefore, no error was shown.[29]

B. Prorata Contribution

The Indiana Supreme Court, in *Ryder Truck Lines, Inc. v. Carolina Casualty Insurance Co.*,[30] determined that each of two insurers was liable prorata for the settlement amount above the policy deductible floor when the policies contained conflicting provisions.[31] The decision reversed the holding of the court of appeals[32] and the trial court and thus clarified Indiana law.

The claim arose when the driver of a truck leased by Ryder Truck Lines collided with an automobile, injuring the occupants of the auto. On the day of the accident, Ryder entered into a one-way lease of a tractor-trailer for the purpose of transporting foods from Gary, Indiana, to Nashville, Tennessee. The lease called for Corkren & Company, owner of the tractor-trailer, to receive seventy-three percent of the fee Ryder earned for the transportation service. In addition to the tractor-trailer, Corkren provided a driver at its expense and agreed to maintain the vehicle, including payment of all

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[26]*Id.* at 618.

[27]*Id.* at 618-19. The court characterized the insurance company's written offer which included a uniform 25% reduction in replacement value to avoid betterment of the house as "a ludicrous notion." *Id.* at 618.

[28]*Id.* at 619. The trial court instructed the jury as follows: "You are instructed that you may draw reasonable inferences from the evidence, and fraud need not in every case be proved by positive evidence if facts and circumstances are present from which fraud is inferred." *Id. See* Jones v. Abriani, 350 N.E.2d 635 (Ind. Ct. App. 1976).

[29]384 N.E.2d at 620.

[30]385 N.E.2d 449 (Ind. 1979).

[31]*Id.* at 452.

[32]372 N.E.2d 504 (Ind. Ct. App. 1978). Both the trial and appellate court had held that Liberty Mutual Insurance Company was the primary carrier and should bear the total loss, less the deductible paid by Ryder.

repairs, gas, and oil. The driver of the tractor-trailer, however, was operating the vehicle under the authority of Interstate Commerce Commission (ICC) permits and Public Service Commission of Indiana permits issued to Ryder.

The driver collided with the automobile en route to Nashville, Tennessee. The injured parties settled the claim for $46,000. Ryder paid the $25,000 deductible amount according to the liability insurance policy it held with Liberty Mutual Insurance Company. Liberty Mutual paid the additional $21,000 and then sought indemnity from Corkren's carrier, Carolina Casualty Insurance Company. The two carriers could not agree on the question of indemnification and suit was brought by Ryder and Liberty against Carolina. After unsuccessful attempts in the trial court and court of appeals, the Indiana Supreme Court held that Liberty Mutual and Carolina Casualty were liable prorata for the $21,000 amount.[33]

The Liberty Mutual policy and the Carolina Casualty policy both contained clauses which restricted the liability of the insurer if "other insurance" was available to cover the loss.[34] Further, the Liberty Mutual policy contained a required ICC clause which was promulgated to assure compensation to injured parties and to promote highway safety.[35] The interplay of the "other insurance" provisions in both policies with the ICC endorsement in the Liberty Mutual policy created the central question resolved by the supreme court.

Citing with approval an earlier opinion in *Indiana Insurance Co. v. American Underwriters, Inc.*,[36] the *Ryder* opinion indicated that the reconciliation of "other insurance" provisions and the ICC clause had been achieved in Indiana by recognizing "*dual* primary liability" and apportioning liability between the insurers.[37] Further buttress-

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[33]385 N.E.2d at 452.

[34]*Id.* at 450.

[35]The Liberty Mutual ICC endorsement stated in pertinent part:

> Within the limits of liability hereinafter provided it is further understood and agreed that no condition, provision, stipulation, or limitation contained in the policy, or any other endorsement thereon or violation thereof, or of this endorsement, by the insured, shall relieve the Company from liability hereunder or from the payment of any such final judgment, irrespective of the financial responsibility or lack thereof or insolvency or bankruptcy of the insured.

Id. See 49 C.F.R. § 1043.1 (1970). The endorsement is required by § 215 of the Interstate Commerce Commission Act, 49 U.S.C. § 315 (1976). This endorsement is known as Form B.M.C. 90. *See* 49 C.F.R. § 1003.2 (1970).

[36]261 Ind. 401, 304 N.E.2d 783 (1973), *cited in* 385 N.E.2d at 450.

[37]385 N.E.2d at 450-51. The relevant portion of Indiana Ins. Co. v. American Underwriters, Inc. reads as follows:

> Both policies, when read separately, appear to afford coverage to the insured. Yet each "other insurance" provision forces an examination of its

ing the conclusion that a prorata indemnification between the insurers was the proper result, the court noted that the driver of the leased vehicle, in circumstances of this nature, is a joint employee of the vehicle owner and the lessee.[38]

The court stated that "once the basic goal of compensating the injured third party is achieved, the liabilities of the two insurers covering the same loss should turn on the terms of their respective policies,"[39] and thus the court indicated that its reasoning in *Indiana Insurance* should be followed rather than the approach used by the court of appeals.[40] *Transport Indemnity Co. v. Rollins Leasing Corp.*[41] was discussed by the court as further authority for the concept that express policy provisions may still be honored while complying with the requirements of the ICC endorsement by the two insurers sharing liability.[42]

Ryder and Liberty Mutual also argued that Carolina Casualty should reimburse Ryder for the $25,000 paid by Ryder because of the deductible provision in Liberty Mutual's policy. Carolina Casualty's policy contained an "excess insurance" clause which the court held did not apply to the deductible amount.[43] Agreeing on this

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> opponent. This "circular riddle" can be resolved by (1) attempting to give effect to one policy provision over the other, or (2) applying mechanical or arbitrary rules . . . , or (3) holding both clauses to be conflicting and mutually repugnant and, therefore, disregarding them. We find the last mentioned alternative to be the most reasonable. This method not only provides indemnification for the insured, but also, through the process of proration, gives effect to the general intent of the insurers.
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> In such a case [as this] there exists *dual* primary liability.

Id. at 451 (citing 261 Ind. at 407, 304 N.E.2d at 787).

[38]*See* Transport Motor Express, Inc. v. Smith, 262 Ind. 41, 311 N.E.2d 424 (1974); Jones v. Furlong, 121 Ind. App. 279, 97 N.E.2d 369 (1951).

[39]385 N.E.2d at 451.

[40]*Id.* at 451-52. The principal case relied upon by the court of appeals, Argonaut Ins. Co. v. National Indem. Co., 435 F.2d 718 (10th Cir. 1971), interpreted the ICC endorsement to mean that the lessee's insurer is primarily liable, regardless of any other policy provisions or private agreements. 385 N.E.2d at 451. *See also* Indiana Ins. Co. v. Parr Trucking Serv. Ins., 510 F.2d 490 (6th Cir. 1975).

[41]14 Wash. App. 360, 541 P.2d 1226 (1975), *discussed in* 385 N.E.2d at 451.

[42]The court noted that the "excess" insurance clauses of the two automobile policies involved in *Rollins* were very similar to the "other insurance" clauses in the present case. 385 N.E.2d at 451. The *Rollins* court stated that although the one insurer had agreed to be unconditionally bound to indemnify its insured, it did not agree to bypass its opportunity for contribution from another insurer. 14 Wash. App. at 363-64, 541 P.2d at 1229. *See also* National Mut. Ins. Co. v. Liberty Mut. Ins. Co., 90 U.S. App. D.C. 362, 196 F.2d 597 (1952); Argonaut Ins. v. Transport Indem., 6 Cal. 3d 496, 492 P.2d 673, 99 Cal. Rptr. 617 (1973).

[43]385 N.E.2d at 452. The excess insurance clause in Carolina Casualty's policy read:

> With respect to any automobile of the commercial type while leased or

issue with the court of appeals, the Indiana Supreme Court reiterated the rule that excess coverage is applicable only when the limits of the primary policy have been exhausted.[44]

C. *Direct Loss*

A loss resembling consequential damage was determined to be a direct loss from a tornado by the court of appeals in *Farmers Mutual Aid Association v. Williams*.[45] Affirming the decision of the trial court, the appellate court held that the term "direct loss" was ambiguous and sustained recovery of the insured for loss caused by a premature sale of seventeen steers.[46]

Charles Williams was a cattle breeder with forty years of experience operating a farm and feedlot in which he had a barn, a confinement area for cattle fattenings, and grain supplies for feeding twenty head of steers. He was insured against damages by a tornado with Farmers Mutual Aid Association. In 1974 a tornado totally destroyed the barn and the confinement area, substantially damaged the feed supplies, and killed three steers that were being prepared for future sale. Because there was no barn or corral, the remaining seventeen steers were put on range pasture instead of the more advantageous special grain fattening ration. The change in diet and location caused the cattle to rapidly lose weight. Williams felt that the circumstances brought about by the tornado damage dictated immediate sale of the remaining seventeen steers, even though they had not yet reached their maximum weight. The sale resulted in a loss of profit. Farmers Mutual paid the claim for the barn, the confinement area, the damaged grain, and the three dead steers but contested Williams' claim for the loss caused by early sale of the remaining seventeen head of cattle, contending that the insurance policy indemnified against direct loss only. The stipulated damages of $2,400 were awarded Williams by the trial court, and the judgment was affirmed by the court of appeals.

The court noted that the term "direct" was not defined within the policy language.[47] The holding that "direct" was an ambiguous

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loaned to any person or organization, other than the name insured, engaged in the business of transporting property by automobile for others, or any hired private passenger automobile insured on the "cost of hire" basis, or any non-owned automobile, the insurance shall be excess insurance over any other valid and collectible insurance.

372 N.E.2d at 510.

[44]385 N.E.2d at 452. *See generally* J. APPELMAN, 8 INSURANCE LAW & PRACTICE § 4914 (rev. ed. 1962). Ryder was, in effect, a self-insurer for the deductible amount.

[45]386 N.E.2d 950 (Ind. Ct. App. 1979).

[46]*Id.* at 952.

[47]*Id.*

term was reinforced by the testimony of the president of Farmers Mutual Aid Association that the term "direct" could not be precisely defined.[48] The balance then tipped in favor of the insured as the court concluded that if an expert could not define the term "direct," it was reasonable to expect a layman to have an understanding different from that of the insurer.[49] The court felt it was required to interpret the ambiguous term in favor of the insured and reasoned that Williams' reasonable expectation was of coverage for the loss.[50]

Williams felt it would take from two to four weeks to reverse the declining condition of the cattle; another expert offered the same conclusion.[51] The decision made by the insured to sell the cattle was brought about by their immediate weight loss and by other conditions caused by the tornado. Thus, the analysis of Williams' monetary loss followed the traditional "but for" reasoning of tort law, resulting in an insurance payment for property damage as well as for additional consequential loss. The result reflects the growing trend of courts to favor the insured when disputes over policy language arise and broadens the potential recovery in similar future occurrences.

D. *Construction Agreements*

In *Morsches Lumber, Inc. v. Probst*,[52] it was held that an agreement to provide insurance is also an agreement to limit the recourse of the policy owner to its proceeds only, even though the loss may be caused by negligence of the other party.[53] The result should encourage caution when an insurance allocation agreement is part of a construction contract.

Morsches Lumber, Inc. built a cattle pole barn for Walter F. Probst. The construction agreement entered into by the two parties required Probst to insure for fire and windstorm damage and Morsches to purchase liability and workmen's compensation insurance. The barn, partially completed, was destroyed in a windstorm, and

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[48]*Id.* The appellate court was required to view the evidence in a manner most favorable to the insured and could not reweigh the evidence or the credibility of witnesses. *Id. See* Long v. Johnson, 381 N.E.2d 93 (Ind. Ct. App. 1978). Also, "direct" was an ambiguous term because reasonably intelligent men could honestly differ as to its meaning. 386 N.E.2d at 952 (citing Utica Mut. Ins. Co. v. Ueding, 370 N.E.2d 373 (Ind. Ct. App. 1977)).

[49]386 N.E.2d at 952.

[50]*Id.*

[51]*Id.* Both the insured and a veterinarian familiar with Williams' marbling operation also testified that the usual means for caring for the cattle were no longer available and that the cattle suffered rapid weight loss because their diet changed to range roughage in lieu of the fattening feeds.

[52]388 N.E.2d 284 (Ind. Ct. App. 1979).

[53]*Id.* at 287.

Probst's claim settlement from his insurance only covered approximately seventy-five percent of the loss. The trial court determined that Morsches had been negligent in the construction of the barn, that the negligence was the proximate cause of the destruction, and that Probst was entitled to reimbursement from Morsches of the portion of the loss not covered by insurance. The question of Morsches' negligence was not considered on appeal; instead, the appellate court considered the question "whether an agreement to provide insurance constitutes an agreement to limit the recourse of the party acquiring the policy solely to its proceeds even though the loss may be caused by the negligence of the other party to the agreement."[54]

Several decisions from other jurisdictions were cited by the court to illustrate the principle that agreements to insure limit compensation to insurance proceeds.[55] The references by the court to two cases are particularly noteworthy. A Maryland court stated:

> [W]here parties to a business transaction mutually agree that insurance will be provided as a part of the bargain, such agreement must be construed as providing mutual exculpation to the bargaining parties who must be deemed to have agreed to look solely to the insurance in the event of loss and not to liability on the part of the opposing party.[56]

A similar holding was reached by a Pennsylvania court which held that "in commercial agreements between two business concerns a provision that one will maintain insurance against certain risks indicates an intention to grant immunity to the other from liability, even though loss is caused by the negligence of the other."[57]

The court then reasoned that the cases referred to dealt with a fire loss which was more likely to be the result of negligence than a windstorm; that many of the cases were complex transactions of which a fire risk was a fully anticipated risk, unlike the instant case in which the transaction was so simple that no plans or specifica-

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[54]*Id.* at 285. The specific language of the insurance allocation agreement was not stated; thus, the wording chosen by the court to frame the issue is illustrative of the type of agreement involved.

[55]*Id.* at 285-86. *See* Newport News Shipbuilding & Dry Dock Co. v. United States, 34 F.2d 100 (4th Cir. 1929) (indirect payment of insurance premiums was part of the construction costs and could have been assumed by either party); Rock Springs Realty, Inc. v. Waid, 392 S.W.2d 270 (Mo. 1965) (rent payments are indirect insurance premiums when insurance is to be paid for by the lessor).

[56]General Cigar Co. v. Lancaster Leaf Tobacco Co., 323 F. Supp. 931, 941 (D. Md. 1971), *quoted in* 388 N.E.2d at 286.

[57]Hearst Magazines v. Cuneo E. Press Inc., 293 F. Supp. 824, 829 (E.D. Pa. 1968), *quoted in* 388 N.E.2d at 286.

tions were made; and that in Indiana an express stipulation must be made for a party to be exonerated from his own negligence.[58]

The case was ultimately decided by the use of the reasonable expectations of the parties standard, based upon the understanding of the individuals concerned.[59] The court reasoned that the parties, through their agreement, intended that each would provide particular insurance to protect both individuals no matter what the cause of the loss and that Probst's recovery was therefore limited to the proceeds of the insurance policy he purchased.[60] Based on the holding, it would seem advisable for clients involved in construction agreements to personally procure sufficient coverage for any risks they do not personally wish to bear.

E. *Life Insurance Policy Provisions*

The district court granted summary judgment to the insurer in *Great Horizons Development Corp. v. Massachusetts Mutual Life Insurance Co.*[61] The court held that the life insurance policy issued by Massachusetts Mutual Life Insurance Company on the life of an executive of Great Horizons Development Corporation lapsed for nonpayment of premiums,[62] that the insurer was not required to give a thirty-one day advance notice to the policyowner or any other party prior to termination of the policy by the insurer[63] and finally, that the insurer did not have a duty, implied or otherwise, to keep the insured informed of the existing loan value of the policy for purposes of the payment of premiums.[64]

Life insurance policy terms often do not have the precise meaning to the public that they do to those more intimately involved in the life insurance industry. Further, the area of life insurance is specialized and quite distinct from that of casualty insurance or fire and marine protection. The problem of thoroughly understanding the implications of life insurance terminology is further compounded by the long-term nature of permanent or cash value life insurance when compared with the more immediate and relatively short period of coverage provided by other forms of insurance. Permanent or cash value life insurance is an intangible product designed to serve

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[58]388 N.E.2d at 286.

[59]*Id.* at 286-87.

[60]*Id.* at 287. The court chose to follow the line of cases which indicated that "an agreement to insure is an agreement to provide both parties with the benefits of insurance."

[61]457 F. Supp. 1066 (N.D. Ind. 1978).

[62]*Id.* at 1082.

[63]*Id.*

[64]*Id.*

the insured for a lifetime, often during unexpected, changing circumstances. *Great Horizons* provides a legal framework to aid the Indiana attorney in correct interpretation and application of common policy provisions.

The controversy decided by the federal court arose in a fairly common business context. A $250,000 key executive life insurance policy was acquired in 1973 by Great Horizons on the life of its deceased president.[65] By 1974, Great Horizons was experiencing cash flow problems, and thus some of the premiums on the policy were paid through the policy's automatic premium loan provision. When the 1975 premium became due, the cash value in the policy was insufficient to cover the premium through the automatic premium loan feature, so Great Horizons arranged to pay the difference by check. After this premium had been paid through the combination of separate check and automatic premium loan, the total indebtedness on the policy, including interest from past invasions of the cash value, equalled the value of the policy. Massachusetts Mutual did not notify Great Horizons that it would terminate the policy, although it had the right to discontinue coverage at its option through the policy language. The next premium was not paid, the thirty-one-day grace period expired, and no further premiums were paid on the policy.[66] When the insured died in 1975, Great Horizons submitted proof of death and a claim for benefits. Massachusetts Mutual refused to pay the claim and suit was brought by Great Horizons. The trial court found that there were no genuine issues about any material facts and granted summary judgment.

The significance of *Great Horizons* is in the discussion by the court of the policy terminology. Indiana courts have had little opportunity to provide a thorough definition of terms such as premiums, premium notices, nonforfeiture provisions, policy loans, automatic

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[65]The policy was first issued in 1969 on the deceased when he was president of another corporation and was transferred in 1973 to Great Horizons. The insured was charged an extra premium or rating because of the medical history discovered at the time of underwriting, and the policy also had a provision allowing for lower premiums during the first three policy years. In the first year of the policy, premiums were paid by a pre-authorized monthly check. The premiums were then paid on an annual basis for the next four years, using a combination of corporate checks and policy loans. As is customary with this type of financed premium, separate policy loan request forms were completed; these policy loans were not in any way affected by the automatic premium loan provision of the policy.

[66]On approximately May 28, 1975, Massachusetts Mutual erroneously mailed a dividend check to Great Horizons for $1,555. The check should not have been sent because at that time the policy was not in force. Although Massachusetts Mutual requested the return of the dividend check, Great Horizons refused their demand.

premium loans, and dividends, or to examine the relationship between dividends and cash or loan value.[67]

The court discussed several cases in which policy indebtedness equalled or exceeded the policy value when the policy automatically terminated without additional notice to the insured, thus illustrating the relationship between premiums, loan values, and termination provisions.[68] These decisions also clearly illustrated the conclusion that "a premium lapse provision is separate and distinct from a provision requiring notice prior to voiding a policy in which total indebtedness equals or exceeds the value of the policy."[69]

Policy provisions similar to those in *Great Horizons* were construed by the Missouri Supreme Court in *Robb v. Metropolitan Life Insurance Co.*,[70] and were discussed by the federal court.[71] In *Robb*, the plaintiff asserted that the provisions for policy lapse upon nonpayment of premiums must be interpreted together with other requirements, including a one-month notice. The *Robb* court held:

> The two provisions are separate and distinct, not inconsistent, and both should be given effect. Under the policy, upon

[67]A distinction is properly made between cash value and loan value. The cash value of the policy, in general terms, is the amount for which the policy may be surrendered to the issuing insurance company. The loan value is always less than the cash value and is usually less than the cash value by an amount equal to the annual percentage rate charged on the loan. This rate ranges from four percent simple interest in older policies to eight percent in more recent policies.

[68]457 F. Supp. at 1075-77. *See* Bauge v. Crown Life Ins. Co., 473 F.2d 787 (9th Cir. 1972) (policy provision requiring a 30-day notice prior to policy lapse was not applicable when previous automatic premium loans had exhausted the cash value); Pacific Mut. Life Ins. Co. v. Davin, 5 F.2d 481 (4th Cir. 1925) (policy lapsed for nonpayment of premium without notice to the insured when total indebtedness exceeded the cash surrender value of the policy); Loss v. Mutual Life Ins. Co., 230 F. Supp. 329 (S.D.N.Y. 1963) (no notice prior to forfeiture when policy lapsed for failure to pay premiums and automatic premium loan provision was inapplicable because of previous policy loans); Rick v. John Hancock Mut. Life Ins. Co., 230 Mo. App. 1084, 93 S.W.2d 1126 (1936) (nonforfeiture provision that required extended term insurance could not operate because insured had previously borrowed the maximum amount; policy lapsed for nonpayment of premiums without notice required); Heuring v. Central States Life Ins. Co., 230 Mo. App. 42, 87 S.W.2d 661 (1935) (insurer utilized the automatic premium loan provision of the policy to pay premiums until indebtedness exceeded the value of the policy; policy terminated for nonpayment of premiums without notice to the insured irrespective of 30-day notice provision in the policy); Columbus Mut. Life Ins. Co. v. Hines, 129 Ohio St. 472, 196 N.E. 158 (1935) (policy provision requiring notice to the insured before termination would not prevent an automatic termination of coverage when there was a default in premiums); Presentation Sisters Inc. v. Mutual Benefit Life Ins. Co., 85 S.D. 678, 189 N.W.2d 452 (1971) (policy lapsed because premium was not paid and not because loan was not paid).

[69]457 F. Supp. at 1077.

[70]351 Mo. 1037, 174 S.W.2d 832 (1943).

[71]457 F. Supp. at 1077-78.

> default in the payment of the premium and the expiration of the ensuing period of grace, the policy lapsed without any notice to the insured, and that was true regardless of whether or not there was an existing policy loan.[72]

The federal court restated the concept that the loan value is the property of the insurance company and not the insured unless there is a clear agreement to the contrary.[73] The court indicated that dividends, when declared, may be used to pay premiums at the insured's discretion but that loan values may only be used through the automatic premium loan provision by the insurance company when a premium was not paid by the end of the grace period.[74]

In addition to the discussion of terminology, the case indicates that insurance companies can continue to rely on established legal meanings for existing policy language. The current trend to simplify insurance contract language, meritorious as it may be, may perhaps lead to protracted future litigation on much the same questions of interpretation that have been so laboriously decided by earlier courts.

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[72]351 Mo. at 1042, 174 S.W.2d at 838, *quoted in* 457 F. Supp. at 1078.

[73]457 F. Supp. at 1079.

[74]*Id.*