# X. Insurance

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This past survey year revealed an increasing number of cases arising out of disputes regarding the interpretation of insurance policy provisions. Selected for comment are those cases involving noteworthy variations on the common themes of policy exclusions for losses "intentionally caused by the insured," the effect of "other insurance" clauses, the "uninsured motorist coverage" endorsement, "omnibus" clauses, and exclusions for damages resulting from breach of warranty of fitness, as well as a single case construing subrogation rights.

## *A. Exclusions for Intentional Acts*

Most liability policies specifically exclude coverage for "damages caused by or at the direction of an insured."[1] In those policies which are silent on the subject, courts will generally read into them an implied exception that no coverage exists for a loss deliberately caused by an insured.[2] This exception recognizes the nature of insurance, which is intended to indemnify only those losses that are fortuitous.[3]

In *Indiana Lumbermens Mutual Insurance Co. v. Brandum*,[4] the insurer brought a declaratory judgment action to determine its liability for damages resulting from an automobile crash. In a fit of pique after seeing his fiancee riding with an acquaintance, the insured deliberately rammed the other vehicle several times causing it to veer off the road. The other automobile collided with a utility pole and came to rest upon a third vehicle that was parked along the roadside. The fiancee and the driver of the vehicle in which she was riding were both killed, and the occupants of the parked vehicle sustained bodily injuries. The trial court granted summary judgment in favor of the defendants on the theory that their injuries were not caused intentionally and therefore, did not fall within the scope of

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[1]*See* 7A J. Appleman, Insurance Law and Practice, § 4492.01 at 21 (Berdal ed. 1979) [hereinafter cited as Appleman]. *See also* Wigginton v. Lumbermans Mut. Cas. Co., 169 So. 2d, 70 (La. 1964).

[2]*See generally*, R. Keeton, Basic Text on Insurance Law 286-87 (1971) [hereinafter cited as Keeton].

[3]*Id.* at 288.

[4]419 N.E.2d 246 (Ind. Ct. App. 1981).

an exclusionary clause which provided: "Exclusions. This policy does not apply: . . . (b) to bodily injury or property damage caused intentionally by or at the direction of the insured."[5]

Lumbermens contended that it should not be responsible for its insured's defense nor liable for the resulting damages because (1) the exclusion applies to *all* damages caused by the insured's intentional acts or, in the alternative, the intent to cause the damages *should be inferred* from the circumstances;[6] (2) public policy precludes liability coverage for non-fortuitous losses;[7] and (3) the tort principle of transferred intent should apply to deny the insured liability coverage for damages caused by his intentional act even though there was no intent to injure that specific party.[8]

Relying principally upon *Home Insurance Co. v. Neilsen*,[9] the court of appeals rejected these arguments and held "that not only must an insured's acts have been intentional to preclude coverage, but the insured must also have intended to harm the party actually injured."[10] Additionally, the court stated that the insured's "actions were directed at individuals other than the appellees, and although . . . he should have been cognizant of danger to third parties, it is equally clear that the very nature of his acts was not such that harm to the appellees must have been intended."[11] The court's refusal to equate transferred intent with the contractual standard that permits the exclusion of coverage was tempered by its recognition that an exception exists when the insured's acts are so egregious that they raise the inference that the insured intended to harm anyone nearby.[12]

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[5]*Id.* at 247.

[6]*Id.*

[7]*Id.*

[8]*Id.* at 248.

[9]165 Ind. App. 445, 332 N.E.2d 240 (1975). Neilsen sought a declaration that Home Insurance was required to defend him against a suit seeking damages resulting from his striking a third party allegedly in self-defense. The court of appeals, in reversing the trial court's finding of a duty to defend, stated that the exclusionary clause was susceptible of several interpretations. It adopted the view that the proper interpretation is that the policy excludes coverage for an intentional act of the insured which was intended to cause injury. *Id.* at 450-51, 332 N.E.2d at 244. "The latter intent may be established either by showing an actual intent to injure, or by showing the nature and character of the act to be such that intent to cause harm to the other party must be inferred as a matter of law." *Id.*

[10]419 N.E.2d at 248.

[11]*Id.*

[12]*Id.* The court distinguished a federal district court decision, relied on by Lumbermens, which held that an automobile policy did not provide coverage where the insured set off a dynamite charge in his car intending to kill his wife and himself, but also injuring third parties. *Id.* (citing Kraus v. Allstate Ins. Co, 258 F. Supp. 407 (W.D. Pa. 1966), *aff'd*, 379 F.2d 443 (3d Cir. 1967)). "[S]etting off dynamite in a crowded urban

In *Heshelman v. Nationwide Mutual Fire Insurance Co.*,[13] a case factually similar to *Home Insurance Co.*,[14] an insured sued his homeowner's policy insurance carrier for failure to defend him in a third-party lawsuit seeking damages for assault and battery. The altercation arose when the insured attempted to cross a picket line manned by striking union employees, including the third party. When the insurer refused to defend, the insured provided his own defense[15] and initiated a declaratory judgment action to determine the insurer's duty to provide a defense. Nationwide responded that there was no coverage under the policy and, further, they did not have a duty to defend because of a clause in the policy that excluded: " 'Bodily injury, illness or death or property damages caused intentionally by or at the direction of an insured.' "[16] The court of appeals agreed, holding that where pleadings and an investigation of the facts fail to disclose a claim within the coverage of the policy, or when coverage is clearly excluded, no duty to defend exists even if the suit is otherwise false, groundless or fraudulent.[17]

A determination of the insurer's obligation to defend based solely on the allegations of the complaint is open to criticism. Under modern practice, the complaint merely serves a notice function and is framed before discovery proceedings crystallize the facts of the case.[18] The test to determine the duty to defend should therefore focus upon the facts underlying the lawsuit rather than the allegations in the complaint.[19] Even if the complaint is proven, it may not determine the obligation of the insurer to pay the resulting judgment. Further,

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area will of necessity injure bystanders raising the inference that the insured intended to harm anyone nearby." 419 N.E.2d at 248.

[13]412 N.E.2d 301 (Ind. Ct. App. 1981), *transfer denied*, March 24, 1981.

[14]For a brief discussion of this case see note 9 *supra*.

[15]Alleging self-defense, the insured counterclaimed against the third party and during the pendency of the declaratory judgment action prevailed on his counterclaim and the third party lost on his action. 412 N.E.2d at 302.

[16]*Id.*

[17]412 N.E.2d at 302 (citing 7C APPLEMAN, *supra* note 1, § 4685.01, at 124-27). *See generally* Annot., 2 A.L.R. 3d 1242 (1965).

[18]*See* Kepner v. Western Fire Ins. Co., 109 Ariz. 329, 331, 509 P.2d 222, 224 (1973). *See also* Texaco, Inc. v. Hartford Acc. & Indem. Co., 453 F. Supp. 1109 (E.D. Okla. 1978).

> [N]otwithstanding the general rule that the duty of an insurer to defend an action brought against its insured is to be determined from the allegations of the complaint . . . , it is also a general rule "that the obligation . . . to defend its insured is determined by the actual facts brought to the [insurer's] attention . . . rather than pertinent allegations contained in the complaint or petition of a complainant against the insured which are not true."

*Id.* at 1112 (quoting American Motorists Ins. Co. v. Southwestern Greyhound Lines, Inc., 283 F.2d 648, 649 (10th Cir. 1960)).

[19]109 Ariz. at 331, 509 P.2d at 224.

in actions involving damages caused by the defendant's intentional acts, there is a possibility that any judgment obtained would be covered by the indemnity provisions of the policy. For example, the injured party could amend his complaint to allege negligent conduct allowing the insured to assert a claim of self-defense.[20] The insurer is placed in peril if it refuses to defend based on facts not in the pleadings. If it is ultimately determined that a defense was required, the company must reimburse its insured for his costs of defense.[21] Because the wrongful refusal constitutes a breach of contract, the insurer is liable for all damages reasonably flowing from such breach.[22]

During the survey period, the court of appeals decided a third case that presented the issue of an insurer's duty to defend under a policy with an exclusionary clause for intentionally inflicted injuries. In *Snodgrass v. Baize*,[23] the court examined and approved the procedures employed by an insurer to fulfill its contractual duty to provide a defense while preserving its position to assert a coverage defense after the determination of a third-party action.

*Snodgrass* involved a claim for personal injury arising out of a shooting which the plaintiff alleged, alternatively, was inflicted intentionally *or* negligently by the defendant's decedent. Prior to trial on the negligence action, counsel selected by the insurance company to represent its insured informed the insured's personal attorney that because of the potential conflict of interest,[24] he would seek authorization from the carrier to withdraw his appearance. The personal attorney would be allowed to conduct the defense for which the latter would be paid a reasonable fee by the insurance company.

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[20]St. Paul Fire & Marine Ins. Co. v. Hodor, 200 So. 2d 205 (Fla. Dist. Ct. App. 1967). *See also* United States Fidelity & Guar. Co. v. Baugh, 146 Ind. App. 583, 257 N.E.2d 699 (1970). The holding of *United States Fidelity* was rejected by a federal district court in All-Star Ins. Corp. v. Steel Bar, Inc., 324 F. Supp. 160 (N.D. Ind. 1971). "[T]he use of language by the Appellate Court in its lengthy opinion is so confusing that it is not possible to tell what the Court intended by its opinion." *Id.* at 163.

[21]*See* Arenson v. National Auto. & Cas. Ins. Co., 48 Cal. 2d 528, 310 P.2d 961 (1957). "Having defaulted such agreement the company is manifestly bound to reimburse its insured for the full amount of any obligation reasonably incurred by him." *Id.* at 539, 310 P.2d at 968. *See also* Keitham v. Massachusetts Bonding & Ins. Co., 159 Conn. 128, 267 A.2d 660 (1970).

[22]*See, e.g.*, Southwestern Bell Tel. Co. v. Western Cas. & Sur. Co., 269 F. Supp. 315 (E.D. Mo. 1967), *modified*, 396 F.2d 351 (8th Cir. 1968); Kepner v. Western Fire Ins. Co., 109 Ariz. 329, 509 P.2d 222 (1973); Beck v. Kelly, 323 So. 2d 667 (Fla. Dist. Ct. App. 1975).

[23]405 N.E.2d 48 (Ind. Ct. App. 1980).

[24]*Id.* at 52. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 5-17; *cf.* American Employers Ins. Co. v. Goble Aircraft Specialties, 205 Misc. 1066, 131 N.Y.S.2d 393 (Sup. Ct. 1954) (an attorney may not represent both the insurance carrier and the insured).

It was further understood and agreed to by the personal attorney that the carrier would be allowed to defend against any claim under proceedings supplemental or execution procedures, and that it would litigate the question of whether the plaintiff was injured as a result of intentional *or* negligent conduct. After the jury returned a verdict for the plaintiff on the negligence count, a motion for proceedings supplemental was filed against the judgment defendant and the insurer. The company argued that the injury was " 'expected or intended from the standpoint of the insured' " and was therefore excluded from coverage.[25] The trial court accepted the insurance company's argument.

On appeal, the judgment holder argued that in proceedings supplemental the carrier should be bound by the jury verdict under doctrines of res judicata, collateral estoppel, or equitable estoppel.[26] Noting that res judicata is divided into two parts, "claim preclusion" and "collateral estoppel,"[27] the court rejected the application of either doctrine.[28] With respect to "claim preclusion," the court stated that while the two proceedings involved the same facts, the respective claims were not the same.[29] The original civil action involved a claim seeking damages for the insured's tortious conduct and the instant proceeding was "a claim to obtain an asset in the hands of a third party to satisfy the judgment rendered upon the first claim."[30]

The court acknowledged that the doctrine of "collateral estoppel" was "facially applicable" because the insurer is deemed in privity with its insured.[31] Yet, because there was a partial conflict of interest between the indemnitee and indemnitor,[32] and because the insurer could not control the defense of its insured, "collateral estoppel" did not apply. As a New Jersey court stated in *Burd v. Sussex Mutual Insurance Co.*,[33]

> [w]henever the carrier's position so diverges from the insured's that the carrier cannot defend the action with com-

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[25]405 N.E.2d at 51.

[26]*Id.*

[27]*Id.* at 51. *See also* State v. Speidel, 392 N.E.2d 1172 (Ind. Ct. App. 1979).

[28]405 N.E.2d at 51-53.

[29]*Id.* at 51.

[30]*Id.*

[31]*Id. See, e.g.*, Cowan v. Ins. Co. of N. America, 22 Ill. App. 3d 883, 318 N.E.2d 315 (1974); Hoosier Cas. Co. v. Miers, 217 Ind. 400, 27 N.E.2d 342 (1940).

[32]"The insured would benefit, to the extent of policy limits, from a finding of negligence which arguably was within the coverage of the policy. The insurer would favor a finding of an intentional tort which the policy did not cover." 405 N.E.2d at 51. *See also* Farm Bureau Mut. Auto. Ins. Co. v. Hammer, 177 F.2d 793 (4th Cir. 1949), *cert. denied*, 339 U.S. 914 (1950).

[33]56 N.J. 383, 267 A.2d 7 (1970).

> plete fidelity to the insured, there must be a proceeding in which the carrier and the insured, represented by counsel of their own choice, may fight out their differences. That action may, as here, follow the trial of the third party's suit against the insured.[34]

The judgment holder also argued that because the carrier had not given him a notice of disclaimer or reservation of rights, it should have been equitably estopped from asserting a coverage defense.[35] The court held that Indiana only requires that such notice be given to the insured to preserve any coverage defenses.[36] Additionally, the court noted that estoppel arguments are generally raised in cases where the insurer has defended the insured. In the instant case the carrier, by paying the judgment debtor's personal attorney, fulfilled its duty to defend but did not control the defense of the civil action.[37]

### *B. Cumulative Coverage Clauses*

Virtually all insurance policies, other than those on life, contain "other insurance" clauses.[38] Historically these clauses were included in fire and personal property insurance policies to protect the insurer against the moral risks incident to over-insurance.[39] Their inclusion in modern automobile liability policies, however, has been solely to reduce or limit the liability of the insurer in the event of concurrent coverage of the same risk by another insurer.[40]

Courts throughout this country have been deluged with litigation arising over conflicting "other insurance" clauses. Most of these courts have adopted the so-called "majority rule," as enunciated in *Zurich General Accident & Liability Insurance Co. v. Clamor*.[41] This rule requires that a court reconcile this conflict by first determining which of the "other insurance" provisions is the more specific in its

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[34]*Id.* at 391, 267 A.2d at 11.

[35]405 N.E.2d at 53 (citing State Farm Mut. Auto. Ins. Co. v. Phillips, 210 Ind. 561, 2 N.E.2d 989 (1936)).

[36]405 N.E.2d at 53.

[37]*Id.*

[38]*See* Werley v. United Servs. Auto. Ass'n, 498 P.2d 112 (Alaska 1972). "[A]utomobile liability insurance policies [generally] contain 'other insurance' clauses providing that in the event of other *applicable* insurance, (1) this insurance shall not apply (an 'escape' clause), or (2) that this insurance shall be excess only (an 'excess' clause), or (3) there shall be a proration of the loss (a 'proration' clause)." *Id.* at 116 (emphasis in original); *See also* Note, *Concurrent Coverage in Automobile Liability Insurance*, 65 COLUM. L. REV. 319 (1965).

[39]*See* KEETON, *supra* note 2, at 168.

[40]*Id. See also* Note, *supra* note 38.

[41]124 F.2d 717, 720 (7th Cir. 1942). *See also* Annot., 76 A.L.R.2d 502 (1961).

restriction, and then give effect to the specific over the general clause.[42] Thus, a policy containing a general escape clause will yield to one containing a specific excess clause, and generally the former policy must bear all liability.[43]

The Indiana Supreme Court in *Indiana Insurance Co. v. American Underwriters, Inc.*,[44] rejected the "majority rule" and held that whenever these clauses conflict, they are to be disregarded "and each insurer is liable for a prorated amount of the resultant damage not to exceed his policy limits."[45] Notwithstanding this clear pronouncement, insurers have endeavored to persuade Indiana courts that the holding of *Indiana Insurance Co.* is inapplicable when carriers are disputing allocation *among themselves* of a loss incurred by an insured who had coverage afforded by two policies. They argue that the court should give effect to the express intent of the parties as contained in the respective policies when determining the apportionment of a loss among insurers.

*Indiana Insurance Co. v. Federated Mutual Insurance Co.*,[46] was a declaratory judgment action seeking a determination of each insurer's respective liability for a $100,000 settlement with a motorcyclist who was struck by a truck being test-driven by the defendant. The defendant had a comprehensive liability policy issued by Federated with $100,000/$300,000 bodily injury limits. The owner of the truck was insured under a comprehensive liability and garage insurance policy issued by Indiana Insurance with identical limits. Both policies contained "other insurance" clauses. Federated's coverage included non-owned vehicles and was available as excess insurance. The Indiana Insurance policy purported to escape liability if a garage customer had "other valid and collectible insurance, whether primary, excess or contingent, . . . [with] limits . . . sufficient to pay damages up to the amount of the applicable [statutory] financial responsibility limit . . . . "[47]

Indiana Insurance argued that it was not liable under its policy because the defendant was a garage customer, as defined in its

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[42]124 F.2d at 720.

[43]The basis for those jurisdictions using the "majority rule" to reconcile conflicting "other insurance" clauses by construing the policy language is the "general contract doctrine encouraging parties to contract freely without fear of judicial interference." Indiana Ins. Co. v. Federated Mut. Ins. Co., 415 N.E.2d 80, 84 (Ind. Ct. App. 1981). *See also* Watson, *The "Other Insurance" Dilemma*, 54 ILL. B.J. 486 (1966).

[44]261 Ind. 401, 304 N.E.2d 783 (1973), *discussed in* Frandsen, *Insurance, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 217, 224-26 (1974).

[45]261 Ind. at 407, 304 N.E.2d at 787.

[46]415 N.E.2d 80 (Ind. Ct. App. 1981).

[47]*Id.* at 82. In Indiana these limitations are $15,000 per person/$30,000 per occurrence. IND. CODE § 9-2-1-15 (1976).

escape clause, and that Federated's coverage was sufficient to pay damages up to the Indiana statutory limit.[48] Federated, however, contended that because the defendant was driving a non-owned vehicle, its coverage should be treated as "'excess insurance over any other valid and collectible insurance available to the insured.'"[49] Therefore Indiana Insurance was either primarily liable for the whole settlement or, if the clauses were mutually repugnant, each carrier bore primary liability and each should pay one-half of the $100,000 settlement.[50]

The trial court properly ruled that the two clauses were mutually repugnant and should be disregarded *in toto*, and held each insurer liable for one-half of the $100,000 settlement. The court of appeals, relying principally upon the earlier *Indiana Insurance Co.* decision, affirmed in an informed discussion of why the proration method should be used when apportioning a loss among concurrent carriers.[51] Indiana Insurance argued that although the clauses of two policies may be found mutually repugnant for liability purposes, "they can still be used to deduce the intent of the insurer to limit the amount or extent of its liability."[52] The court acknowledged that it would have addressed the issue of lower liability limits for garage customers had Indiana Insurance conspicuously inserted such a limit in its policy; "[i]nstead, its purported limitation is buried in and is an intricate part of its escape clause provision."[53] Regrettably, the court's suggestion is likely to encourage the continuing battle of draftsmanship.

The fervor with which insurers seek to avoid being designated as primary carrier is exceeded only by their opposition to judicial apportionment of the loss by disregarding policy language and rewriting the contract. "Generally the allocation of liability between insurers is determined by contract, and where such contractual provisions are not inconsistent with public policy, they will be enforced."[54]

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[48]415 N.E.2d at 83.

[49]*Id.* at 81.

[50]*Id.* at 82.

[51]*Id.* at 83-86 (citing Indiana Ins. Co. v. American Underwriters, Inc., 261 Ind. 401, 304 N.E.2d 783 (1973)).

[52]415 N.E.2d at 88.

[53]*Id.*

[54]8A APPLEMAN, *supra* note 1, § 4907.65 at 365, 367. *See* Pacific Indem. Co. v. Liberty Mut. Ins. Co., 269 Cal. App. 2d 793, 799, 75 Cal. Rptr. 559, 565 (1969) (the intention of the principals is the critical factor in allocating primacy of coverage between duplicate insurers); *but see* Miller v. National Farmers Union Property & Cas. Co., 470 F.2d 700, 706 (8th Cir. 1972) (Minnesota cases declaring that equitable principles govern in solving conflicting, overlapping insurance escape or excess clauses are inapplicable where both policies are primary and there are no conflicting escape or excess clauses). *See also* Rossmoor Sanitation, Inc. v. Pylon, Inc., 40 Cal. App. 3d 417, 115 Cal.

*United Services Automobile Association v. American Interinsurance Exchange*[55] involved another dispute among two liability carriers regarding the proper interpretation of their respective "other insurance" clauses. *A*, while operating an automobile owned by *B*, collided with a vehicle owned and operated by *C*. *C* brought suit against both *A* and *B* for personal injuries sustained in the collision. *A* was insured under a family automobile policy issued by United Services Automobile Association (United Services) with liability limits of $100,000 per person. *B* was insured under a policy issued by American Interinsurance Exchange (Interinsurance) with policy liability limits of $15,000 per person. Under the terms of the Interinsurance policy, *A* was insured as a non-owner driver. Prior to trial, *C* settled his personal injury action for $7,500. Each insurer's share of the settlement was determined by prorating the loss in accordance with the respective policy limits. United Services and Interinsurance reserved the right to contest their respective liability based upon the terms of the policies. United Services brought the instant action against Interinsurance seeking a declaratory judgment of its liability on the underlying claim. The trial court found against United Services on the basis that the "other insurance" clauses were conflicting and mutually repugnant, thus the loss was to be prorated according to each insurer's liability limits.

Based on *Federated Mutual Insurance Co.*,[56] the court of appeals affirmed. Rejecting United Services' argument that to impose a pro-rata contribution would make it liable for a greater share of the loss " 'solely by reason of [its] higher policy limits,' "[57] the court held "that proration of the loss . . . is the correct method for apportioning the loss in this State."[58]

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Rptr. 91 (1974), *vacated*, 13 Cal.3d 622, 532 P.2d 97, 119 Cal. Rptr. 449 (1975). In *Rossmoor Sanitation*, the court of appeals stated that "[w]here dual coverage is provided [by two insurers] for the same risk, public policy plays a minor role in the determination of which coverage is primary, for to the public it makes little difference which of two insurers is ultimately held responsible for a particular loss." 115 Cal. Rptr. at 97.

[55]416 N.E.2d 875 (Ind. Ct. App. 1981), *transfer denied*, July 14, 1981.

[56]*See* notes 46-54 *supra* and accompanying text.

[57]416 N.E.2d at 879.

[58]*Id.* The supreme court adopted the proration rule in Indiana Ins. Co. v. American Underwriters, Inc., 261 Ind. 401, 304 N.E.2d 783 (1973).

> " 'It [proration] does not arbitrarily pick one of the conflicting clauses and give effect to it; it does not deprive the insured of any coverage; it is not prejudicial in giving a windfall to one insurer at the expense of another; it does not encourage litigation between insurers; it does not delay settlements. On the other hand, it does enable underwriters to predict the losses of the insurers more accurately; it does preclude the use of illogical rules developed by the courts (e.g., first in time, specific v. general and primary tort-feasor doctrines); and it does give a basis for uniformity of result. In addition, pro-

*Midwest Mutual Insurance Co. v. Indiana Insurance Co.*,[59] also concerned "other insurance" clauses, and suggests that insurers are routinely suing each other in order to either require or disclaim participation in the risk-taking process. Midwest issued a motorcycle policy which afforded uninsured motorist coverage (UMC) for the named insured and her relatives. Midewest paid $3,000 in full satisfaction of a claim arising out of a collision with a hit and run motorist, and brought a declaratory judgment action to compel contribution from Indiana Insurance who had issued a policy, also including UMC, covering another vehicle owned by the named insured.

It is generally stated that "[w]here two or more companies fully insure the same risk and one company is compelled to pay the total loss, it is entitled to contribution from the others for the amount of their proportionate shares."[60] In its attempt to avoid this liability, Indiana Insurance argued first that its policy, containing uninsured motorist coverage, was not available to the insured because of an exclusion in the UMC that provided:

> Exclusion. This policy does not apply under Part IV;
> (a) to bodily injury to an insured while occupying an automobile (other than an insured automobile) owned by the named insured or a relative, or through being struck by such automobile.

In disposing of this argument, the court noted that words in an insurance policy should be given their popular and ordinary meaning.[61] The son was riding a motorcycle; he was not occupying an automobile. "Had Indiana intended to exclude motorcycles owned by the insured but not insured with the company, it could have and should have chosen to use the words 'motor vehicle' in the exclusion."[62]

Indiana Insurance also argued that even if its policy covered the accident, the coverage was to be "excess" insurance to that available under Midwest Mutual's policy and because the claim was set-

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> rating the loss among all insurers is a rule that can be applied regardless of the number of insurers involved and regardless of the type of conflicts that are created by the "other insurance" clauses.' "

*Id.* at 408-09, 304 N.E.2d at 788 (quoting Werley v. United Servs. Auto Ass'n, 498 P.2d 112, 119 (Alaska 1972)).

[59]412 N.E.2d 84 (Ind. Ct. App. 1980).

[60]8A APPLEMAN, *supra* note 1, § 4921, at 513. *See, e.g.*, Commercial Cas. Ins. Co. v. Hartford Acc. & Indem. Co., 190 Minn. 528, 253 N.W. 888 (1934) (per curiam); Continental Cas. Co. v. St. Paul Mercury Fire & Marine Ins. Co., 163 F. Supp. 325 (S.D. Fla. 1958), wherein the court held that even though neither policy contains a proration clause, an insurer may compel contribution where both cover the same risk. *Id.* at 327.

[61]412 N.E.2d at 87. *See, e.g.*, Spears v. Jackson, 398 N.E.2d 718, 719 (Ind. Ct. App. 1980); Thompson v. Genis Building Corp., 394 N.E.2d 242, 244 (Ind. Ct. App. 1979); Physicians Mut. Ins. Co. v. Savage, 156 Ind. App. 283, 286, 296 N.E.2d 165, 167 (1973).

[62]412 N.E.2d at 87.

tled within that policy's limits, Indiana Insurance was not liable. Examining the "other insurance" provision in Indiana Insurance's policy, the court observed that it classified "other insurance" into two categories:

> While the insured is occupying an *automobile* not owned by the named insured, any Indiana insurance is deemed excess. In all other circumstances, Indiana shall be liable pro rata. In the situation at bar, the vehicle was not an automobile. Therefore, the very language of the policy dictates pro rata coverage.[63]

Finally, Indiana Insurance argued that by paying $3,000 in full satisfaction of the loss, Midwest Mutual became a volunteer and was not therefore entitled to contribution.[64] The court of appeals properly allowed Midwest to obtain a prorated contribution from Indiana, and on policy considerations held that payment by an insurer which performs its contractual obligations does not render it a volunteer.[65]

### *C. Uninsured Motorist Coverage*

In *Indiana Farmers Mutual Insurance Co. v. Speer*,[66] the wife of the named insured under an Indiana Farmers' policy was killed in a collision with an allegedly uninsured motorist while she was driving a vehicle owned by her son who resided at home. The son's car was not insured by Indiana Farmers. Unlike in most automobile policies,[67]

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[63]*Id.* (emphasis in original).

[64]8A APPLEMAN, *supra* note 1, § 4921, at 534.

> If an insurer voluntarily pays more than its share of the loss . . . some decisions had held it to be unable to demand contribution. Thus, if a policy contains a coinsurance clause limiting the insurer's liability to its pro rata share of the loss, an insurer paying the full amount of a loss has been held in early cases to be a mere volunteer as to the excess, and not entitled to contribution from the insurer which denied liability.

*Id. See, e.g.*, Employers Cas. Co. v. Transport Ins. Co., 444 S.W.2d 606 (Tex. 1969); Farm Bureau Mut. Auto. Ins. Co. v. Buckeye Union Cas. Co., 147 Ohio St. 79, 67 N.E.2d 906 (1946).

[65]412 N.E.2d at 89. These policy considerations included encouraging quick claim settlements by insurers and preventing unnecessary litigation that would result if the insured covered under two policies were forced to institute legal action to determine the liability of the two insurers. *Id.* (citing St. Paul Fire & Marine Ins. Co. v. All-State Ins. Co., 25 Ariz. App. 309, 312, 543 P.2d 147, 150 (1975)).

[66]407 N.E.2d 255 (Ind. Ct. App. 1980), *transfer denied*, Mar. 27, 1981.

[67]Typically, "Persons Insured" under the liability coverage of an automobile policy include: "(a) with respect to the owned automobile, (1) the named insured and any resident of the same household, . . ." KEETON, *supra* note 2, at 662. Under the definitions section of such policies a " 'named insured' means the individual named in Item I of the declarations and also includes his spouse, if a resident of the same household." *Id.*

the wife was not defined as a "named" or "additional" insured under the liability coverage provisions of Indiana Farmers' policy issued to the husband on another vehicle.[68] The husband contended that the wife was entitled to the benefits of that policy's uninsured motorist coverage (UMC) provisions.[69] The insurer responded that the Indiana UMC statute[70] does not require it to provide coverage in this situation and that its policy did not in fact provide such coverage.[71]

It is clear that the UMC statute sets the minimum standard of protection which the legislature deemed acceptable, and any attempt by an insurer to dilute or diminish UMC is contrary to public policy.[72] For example, a provision in a policy limiting the application of UMC coverage to accidents which directly involve an automobile insured under the principal policy, is contrary to the public policy expressed in the statute and is therefore void.[73]

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[68]For purposes of liability coverage Indiana Farmers' policy, Section A, defined "Persons Insured" to include, among others: "(a) The named insured. . . ." 407 N.E.2d at 257.

[69]For purposes of uninsured motorist coverage, Indiana Farmers' policy, Section C, "Persons Insured" includes:

> (a) The *named insured* and any *designated insured* and, while residents of the same household, the spouse and relatives of either;
> (b) any other person while *occupying* an *insured highway vehicle*;
> (c) any person, with respect to damages he is entitled to recover because of *bodily injury* to which this insurance applies sustained by an *insured* under (a) or (b) above.

*Id.* (emphasis in original).

[70]IND. CODE § 27-7-5-1 (1976). In pertinent part, that section states:

> 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 [9-2-1-15] . . . , 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.

*Id.*

[71]Section C of the Indiana Farmers policy contained an exclusion reading in part: Exclusions: This insurance does not apply:

> . . .
> "(b) to *bodily injury* to an insured while *occupying a highway vehicle* (other than an *insured highway vehicle*) owned by . . . any relative resident in the same household as the *named or designated insured* . . . but this exclusion does not apply to the named insured or his relatives while *occupying* . . . a highway vehicle owned by a designated insured or his relatives; . . ."

407 N.E.2d at 257 (emphasis in original).

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

[73]Cannon v. American Underwriters, Inc., 150 Ind. App. 21, 275 N.E.2d 567 (1971). *Cannon* quoted with approval the following language from Motorists Mut. Ins. Co. v.

The issue in *Indiana Farmers Mutual* was whether an insurance company could permissibly limit uninsured motorist coverage to only those persons who are insured under the liability coverage afforded by the policy. The court of appeals quoted one of its earlier opinions which stated that " '[w]hile the statute does not specifically define "insured" for the purposes of determining who is allowed to recover under the uninsured provision, it is our interpretation that the legislature intended persons insured under the liability policy to be those who would recover under the uninsured motorist coverage.' "[74] Additionally, this court recognized that the few courts which have decided this specific issue are divided as to which definition should prevail.[75] The court proceeded to hold that "the most reasonable interpretation of [Indiana's] uninsured motorist statute is one which results in coverage when the person is listed as a person insured under the liability portion of the policy."[76]

This result is eminently correct. Given Indiana's public policy of not mandating liability coverage, there are sound policy reasons for tying the requirement of UMC to liability coverage. Because the legislature is not likely to mandate liability coverage, uninsured motorists will continue to be a problem. It was sound public policy for the legislature to attack this problem by requiring that UMC be extended to those persons who are insured for liability. However, those persons who are uninsured for liability should not be protected by the public policy of this state from their own kind. By tying UMC to liability coverage, the legislature was saying that if a driver has liability coverage to protect the other person whom he injures

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Bittler, 14 Ohio Misc. 23, 235 N.E.2d 745 (1968): "It is not necessary for an injured insured to be occupying any automobile to be entitled to the protection of this [UMC] endorsement. If he is injured, by accident while a pedestrian as the result of the operation of an uninsured automobile, he is covered." *Id.* at 31, 235 N.E.2d at 750, *quoted in* 150 Ind. App. at 29, 275 N.E.2d at 571.

[74]407 N.E.2d at 258 (quoting Vernon Fire & Cas. Co. v. American Underwriters, Inc., 171 Ind. App. 309, 313, 356 N.E.2d 693, 696 (1976)).

[75]Two recent Michigan cases have held that in interpreting the language of the UMC regarding "persons insured thereunder," the Michigan legislature was referring to persons insured under the liability coverage portion of the policy. *See* Pappas v. Central National Ins. Group of Omaha, 400 Mich. 475, 255 N.W.2d 629 (1977); Washington v. Travelers Ins. Co., 92 Mich. App. 151, 284 N.W.2d 754 (1979). Alabama courts have generally held that in order to come within the UMC, the insurer must be required to be legally liable for bodily injury under its policy. *See* United States Fidelity & Guar. Co. v. Perry, 361 So. 2d 594 (Ala. Ct. App. 1978); State Farm Auto. Ins. Co. v. Reaves, 292 Ala. 218, 292 So. 2d 95 (1974). However, in interpreting their uninsured motorist statute that an insured, as used in the statute, mans insured as defined in the policy's uninsured motorist coverage. *See* Forrester v. State Mut. Auto. Ins. Co., 213 Kan. 442, 517 P.2d 173 (1973).

*See generally* 2 I. SCHERMER, AUTOMOBILE LIABILITY INSURANCE § 21 (1981); A. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE § 12.13 (1969 & Supp. 1981).

[76]407 N.E.2d at 259.

and, if the first driver is also injured in the collision, the public policy of this state will give him some minimal protection if that other person is uninsured.

### *D. Omnibus Clause*

The term "omnibus clause" refers to a liability policy provision which designates additional insureds by an expansive class description expressed in terms of some relationship to the insured. Omnibus clauses have been a prolific source of litigation. Many of the cases involve disputes about "permission express or implied"—whether a person who was using the car at the time of the accident had been allowed by the named insured to use it only for a limited time or purpose.[77]

Two objectives are generally given in support of the development of omnibus clauses. First, it serves the interests of the named insured by providing coverage to persons who are the "natural objects of his concern."[78] Second, it serves the interests of innocent victims of incidents to which the insurance coverage applies.[79] This latter consideration has been a major influence upon legislation that mandates or encourages the inclusion of omnibus clauses in liability insurance coverage.[80]

Regrettably, rather than expand the class of insured persons to reflect these two objectives, Indiana Code section 27-1-13-7[81] mandates only that the policy *insure such owner* against liability for damages caused by any person legally operating the insured vehicle with the permission of the owner.[82] Fortunately, the Indiana insurance industry has not designed their omnibus clauses to merely serve this limited risk of protecting the owner of a vehicle from the tort of negligent entrustment[83] or from the application of the doctrine of respondeat superior.[84]

Jurisdictions called on to decide whether a permittee deviated from the owner's scope of permission have adopted one of three views. The liberal view or "initial permission" rule allows coverage if a person has permission to use the automobile irrespective of any

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[77]KEETON, *supra* note 39, at 223.

[78]*Id.* at 222.

[79]*Id.* at 223.

[80]*Id.*

[81]IND. CODE § 27-1-13-7 (1976).

[82]*Id.*

[83]*See, e.g.*, Alspach v. McLaughlin, 144 Ind. App. 592, 247 N.E.2d 840 (1969) (intoxicated person); Smith v. Thomas, 126 Ind. App. 59, 130 N.E.2d 85 (1955).

[84]*See, e.g.*, Trinity Universal Ins. Co. v. Farmers Mut. Auto. Ins. Co., 309 F.2d 283 (7th Cir. 1962); Challis v. Commercial Standard Ins. Co., 117 Ind. App. 180, 69 N.E.2d 178 (1946).

deviations, as long as the car remains in his possession.[85] The moderate or "minor deviation" rule allows coverage only where the deviation does not constitute a gross violation of the scope of permission.[86] The strict or "conversion" rule denies coverage for any deviation from the time, place, or purpose specified.[87] In all but the first view, the question of coverage is dependent upon petty factual distinctions—of what was or was not said and done—that bear on the scope of permission granted. The result is unending litigation.

A deficiency of the standard omnibus clause is apparent when the named insured gives permission to a second person to use the car, and that person gives permission to a third person, called the sub-permittee or permittee's permittee.[88] Typically, when the automobile is turned over to the original permittee, the named insured neither expressly authorizes nor prohibits its use by the third party. The courts generally allow coverage to the sub-permittee in this situation, holding that his use of the car was for the benefit of the original permittee.[89] If the named insured expressly prohibits the use of the vehicle by third persons, the sub-permittee is generally not covered when using the car for his own purposes.[90]

This latter situation was present in *Riverside Insurance Company of America v. Smith*.[91] Willetta Heath was given the use of her mother's car for the express purpose of commuting to and from Willetta's place of employment. One evening a friend of Willetta's, Kathy Arnold, asked to use the insured vehicle. Without calling her mother, Willetta allowed Kathy to take possesion of the car. Kathy was involved in a collision with another vehicle in which she lost her life as did the appellant's decedent who was in the other car. An action was instituted in federal district court by the insurer of the car being driven by the sub-permittee. The district court directed a verdict for the insurer.[92] During the trial, Willetta's mother testified that she had specifically prohibited Willetta from allowing other persons to operate the car. Further testimony revealed that there was

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[85]*See, e.g.*, Matits v. Nationwide Mut. Ins. Co., 33 N.J. 488, 166 A.2d 345 (1960); Arnold v. State Farm Mut. Auto. Ins. Co., 158 F. Supp. 1 (S.D. Ind.), *aff'd*, 260 F.2d 161 (7th Cir. 1958).

[86]*See, e.g.*, Employers Mut. Cas. Co. v. Mosqueda, 317 F.2d 609 (5th Cir. 1963); Allied Mut. Cas. Co. v. Nelson, 274 Minn. 297, 143 N.W.2d 635 (1966).

[87]*See, e.g.*, Eagle Fire Co. v. Mullins, 238 S.C. 272, 120 S.E.2d 1 (1961).

[88]KEETON, *supra* note 2, at 226-28.

[89]*See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Automobile Underwriters, Inc., 371 F.2d 999 (7th Cir. 1967).

[90]*See, e.g.*, Horn v. Allied Mut. Cas. Co., 272 F.2d 76 (10th Cir. 1959); Hays v. Country Mut. Ins. Co., 28 Ill. 2d 601, 192 N.E.2d 855 (1963); *but see* Maryland Cas. Co. v. Iowa Nat'l Mut. Ins. Co., 54 Ill. 2d 333, 297 N.E.2d 163 (1973).

[91]628 F.2d 1002 (7th Cir. 1980).

[92]*Id.* at 1004-05.

an exception to this express prohibition; if there was an emergency and Willetta was unable to drive, she could allow someone else to drive the car.[93]

On appeal, appellant argued that Willetta's decision not to return home was within this exception contemplated by her mother. Rejecting this argument, a majority of the court of appeals concluded that the " 'emergency exception' envisioned only the situation where her own children would be incapable of driving themselves home and not a situation where, as here, a third party, confronted with her own difficulties, needed to borrow the . . . car."[94]

Appellants further argued that there was sufficient evidence in the record for the jury to infer that Willetta was impliedly authorized to lend her mother's car to a third person. Applying the test for implied authorization as set forth in *Home Mutual Insurance Co. v. Automobile Underwriters, Inc.*,[95] the majority concluded that Kathy was not acting with implied authorization because her use of the car was not within the scope of the original permission—to use the car for commuting to and from Willetta's place of employment.[96]

The appellants additionally argued that Indiana public policy requires a liberal interpretation of omnibus clauses.[97] The omnibus clause of the Riverside policy referred not only to express or implied authority to permit others to use the car, but to apparent authority to do so. Appellants argued that the court erred in directing a verdict because there was sufficient evidence in the record to create an issue of fact for the jury concerning Willetta's apparent authority to lend her mother's car.[98] Again, the majority rejected these contentions and pointed out that the Indiana statute does not require insurance policies to cover the liability of *permissive users*.[99]

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[93]*Id.* at 1005-07.

[94]*Id.* at 1007.

[95]261 F. Supp. 402 (S.D. Ind. 1966). "'[C]onsent of the owner to the use by a second permittee of an automobile loaned to a first permittee will be implied in Indiana, if such use is for the benefit of the first permittee, and within the scope of his original permission.' " *Id.* at 405, *quoted in* 628 F.2d at 1007.

[96]628 F.2d at 1007.

[97]*Id.* at 1008.

[98]*Id.*

[99]*Id.* In reference to insureds, the policy provides:

> "Definition of Insured. Except as provided under Insuring Agreement V and Coverage C—Section (2), the unqualified word "Insured" includes the Named Insured and, if the Named Insured is an individual, his spouse, and also includes any other person while using the automobile or any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the Named Insured or spouse or with the permission of either or with the permission of an adult member of the Named Insured's

However, the opinion makes no mention of an earlier decision of the Seventh Circuit Court of Appeals which stated that "the law of Indiana is here governing, and Indiana follows a liberal or broad approach in the construction of omnibus clauses in automobile insurance policies."[100] The majority of the court noted that although the term "authorized" appeared in the policy's omnibus clause,[101] the words of limitation contained in the statute mean only that Willetta was "empowered" to act as agent for her mother. Thus, since there was a lack of evidence to establish an agency relationship between Willetta and her mother, the court concluded that "apparent authority" concepts were not applicable.[102]

Judge Swygert based his dissenting opinion on this issue. Referring to the majority's conclusion that "although the insurance company itself selected the word 'authorized' for its policy, the company really intended to use the word 'empowered' and thereby to exclude apparent authority as a basis for coverage," as a legerdemain,[103] the dissent stated that "Indiana's law has for nearly a century recognized 'apparent' authority."[104] The dissent concluded that the majority's decision denied the appellants their day in court and gave the insurer an undeserved windfall because there was sufficient evidence in the record to support a jury finding that Willetta had apparent authority to lend the car to Kathy.[105]

From the viewpoint of a permissive user of an insured vehicle, it would be a misplaced belief that the Indiana statute requires the insurer to provide him with liability coverage. It is unfortunate that this so-called "requirement" of coverage is viewed as representative of Indiana's public policy concerning who should have the protection of or access to any liability coverage on insured vehicles. It is more unfortunate that the majority of the court in *Riverside* was able to refer to this statute as support for their decision to read the policy's omnibus clause more restrictively than, perhaps, was intended by the drafters.[106]

One of the trial court's findings in *Riverside* states that "under

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household, other than a chauffeur or domestic servant, provided that such adult member of said household is *authorized* by the Named Insured or spouse to grant such permission."

*Id.* at 1004 (emphasis added).

[100]Riehl v. National Mut. Ins. Co., 374 F.2d 739, 744 (7th Cir. 1967).

[101]628 F.2d at 1008.

[102]*Id.*

[103]*Id.* at 1010. (Swygert, J., dissenting).

[104]*Id.* (citing Over v. Schiffling, 102 Ind. 191, 196, 26 N.E. 91, 93 (1885)).

[105]628 F.2d at 1010-11.

[106]*See* notes 97-102 *supra* and accompanying text.

Indiana law, where there has been an express prohibition to a permittee against allowing others to operate the automobile, the insurance company has no duty to defend or pay any judgment obtained against such operator."[107] In fact, no Indiana appellate court has decided a case involving this issue. The case cited by the district court actually holds that since the car was used by the sub-permittee to accomplish the purpose for which permission was given initially, the first permittee has, in the absence of restrictions imposed by the insured, *implied* permission to lend the car.[108]

### *E. Insurer's Subrogation Rights Prejudiced*

In *Hockelberg v. Farm Bureau Insurance Co.*,[109] the court of appeals decided whether the trial court erred in rendering summary judgment against Hockelberg because her release of the defendants in her personal injury lawsuit prejudiced the subrogation rights of Farm Bureau.[110] After filing suit for bodily injuries sustained in an automobile collison, the plaintiff settled her personal injury lawsuit for $15,000, gave the defendants a release discharging them from all liability, and dismissed the cause with prejudice. Prior to dismissal, Hockelberg submitted a claim against Farm Bureau for $2,000 of medical expenses. Farm Bureau denied the claim because the plaintiff refused to sign a medical subrogation receipt.

An insurer's rights of subrogation derive from those of its insured, and it "takes no rights other than those which the insured had."[111] Based on this principle, the court of appeals affirmed the trial court's decision holding that when an insured, prior to settlement with her insurer, gives the tortfeasors a complete release of claims and dismisses her suit with prejudice, the insurer's subrogation rights are destroyed and with them go, by operation of law, any right of action that the insured may have had on the policy.[112] The

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[107]628 F.2d at 1005 (citing State Farm Mut. Auto. Ins. Co. v. Automobile Underwriters, Inc., 371 F.2d 999 (7th Cir. 1967)).

[108]628 F.2d at 1002.

[109]407 N.E.2d 1160 (Ind. Ct. App. 1980).

[110]The subrogation clause in Farm Bureau's policy provided:

"12. SUBROGATION.

In the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery therefor against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. *The insured shall do nothing after loss to prejudice such rights.*"

*Id.* at 1161 (emphasis in original).

[111]*Id.* at 1162 (quoting American States Ins. Co. v. Williams, 151 Ind. App. 99, 106, 278 N.E.2d 295, 300 (1972)).

[112]407 N.E.2d at 1162.

court distinguished *American Automobile Insurance Co. v. Spieker*,[113] which stated that " '[i]f the tort-feasor, with knowledge *that the insurer has already made payment to the insured*, makes settlement with him and thus obtains a release, it will not be a defense as against the insurer in enforcing its rights as subrogee.' "[114] *Spieker* was inapplicable because the insurer paid Hockelberg *after* she had settled with the tortfeasors.[115]

### *F. Limitations of Coverage of Comprehensive General Liability Policy*

*Indiana Insurance Co. v. DeZutti*,[116] a case in which the supreme court reversed both the court of appeals and the trial court, illustrates that if courts encounter difficulty in interpreting insurance policies, it is little wonder that laymen experience the same problems. Gilson, a general contractor, was sued for damages which were caused by faulty construction on a house which he had built for the DeZuttis. The DeZuttis contended that their house's brick and mortar were cracking because the house was settling as a result of defectively constructed footings. Gilson called upon Indiana Insurance to provide his defense pursuant to the terms of a comprehensive general liability policy. Indiana Insurance maintained that the alleged loss was not covered by the policy. Gilson instituted a declaratory judgment action in which the trial court found that the policy covered the alleged loss and that Indiana was obligated to defend its insured against the action for breach of warranty of fitness. The trial court determined that when certain exclusions were read in conjunction with another exclusion,[117] the policy was ambiguous and that such ambiguity should be resolved in favor of the insured. The

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[113]97 Ind. App. 533, 187 N.E. 355 (1933).

[114]*Id.* at 536, 187 N.E. at 356, *quoted in* 407 N.E.2d at 1161 (emphasis added).

[115]407 N.E.2d at 1161.

[116]408 N.E.2d 1275 (Ind. 1980).

[117]The policy contained the following pertinent exclusions:

"Exclusions

This insurance does not apply:

(a) to liability assumed by the insured under any contract or agreement except an incidental contract; but, this exclusion does not apply to a warranty of fitness or quality of the named insured's products or a warranty that work performed by or on behalf of the named insured will be done in a workmanlike manner . . .

(n) to property damage to the named insured's products arising out of such products or any part of such products;

(o) to property damage to work performed by or on behalf of the named insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith. . . ."

*Id.* at 1277.

court of appeals affirmed this determination,[118] but the supreme court reversed with instructions to vacate the trial court judgment and enter judgment in favor of Indiana.[119]

The policy provided coverage for property damage resulting from, *inter alia*, "completed operations hazard" and "products hazard."[120] It was undisputed that the property damage arose after construction was completed and possession of the house had been relinquished to the DeZuttis.[121] The supreme court therefore concluded that the damage came within the definitions of these two terms and that "there was coverage liability for breach of warranty of fitness unless it was properly excluded in some manner. The question is whether the damage to the insured's work was properly excluded . . . . "[122] Holding that the language of exclusion (o) was broad, unambiguous, and all-inclusive, the supreme court concluded that the risk assumed by the insurer was that of personal injury or damage to property *other* than the insured's own work or product.[123]

The insured had argued that the express exception for breach of warranty of fitness contained in exclusion (a) had the effect of granting or extending coverage to breach of contract damages for negligent work. Thus, this extension of coverage was repugnant to exclusions (n) and (o) and, because reasonable men would differ as to the meaning of these exclusions, the resulting ambiguity should be resolved in favor of the insured.[124] The court rejected this argument

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[118]396 N.E.2d 699 (Ind. Ct. App. 1979).

[119]408 N.E.2d at 1281.

[120]*Id.* at 1277. The policy's Definitions section contained the following pertinent definitions:

> " 'Property damage' means (1) physical injury to or destruction of tangible property which occurs during the policy period. . . .
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> . . . .
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> " 'Completed operations hazard' includes bodily injury and property damage arising out of operations or reliance upon a representation or warranty made at any time with respect thereto, but only if the bodily injury or property damage occurs after such operations have been completed or abandoned and occurs away from premises owned by or rented to the named insured. . . .
>
> . . . .
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> " 'Products hazard' includes bodily injury and property damage arising out of the named insured's products or reliance upon a representation or warranty made at any time with respect thereto, but only if the bodily injury or property damage occurs away from premises owned by or rented to the named insured and after physical possession of such products has been relinquished to others. . . ."

*Id.*

[121]*Id.* at 1277-78.

[122]*Id.* at 1278.

[123]*Id.*

[124]*Id.*

and stated that "[t]his reasoning ignores the basic principle that exclusion clauses do not grant or enlarge coverage. They are limitations or restrictions on the insuring clause."[125] In support of this proposition, the court adopted the holding of a New Jersey Supreme Court case, *Weedo v. Stone-E-Brick, Inc.*,[126] which reversed the only case authority cited by the court of appeals in its decision to affirm.[127] The Indiana Supreme Court reasoned that to adopt the insured's theory of the risk assumed by Indiana "would effectively convert the policy into a performance bond or guarantee of contractual performance and result in coverage for repair and replacement of the insured's own faulty workmanship."[128] Actually, that risk is a business risk and expense not intended to be covered under the policy, and was excluded by exceptions (n) and (o).

The court of appeals, after it determined that an ambiguity existed when reading the exclusions in concert, did not address the issue of whether the trial court erred when it found that exclusion (n) did not apply to the DeZutti claim and that exclusion (o) was applicable only to the damage to the footing but not damage to the remainder of the house caused by the defective footing. The supreme court proceeded to address these questions. It determined that exclusions (n) and (o) "clearly exclude coverage for damages to the insured's product or work when such damages are confined *to* the product or work and caused *by* the product or work, or *any part thereof*."[129] It further reasoned that exclusion (o) rather than (n) was more applicable because the property damage was attributable to work performed by or on behalf of the named insured.[130] Gilson, the named insured, was the general contractor and his product or work was the entire house, including the footings, which he built and sold. The footing was a component part of Gilson's product or work done on his behalf.[131]

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[125] *Id.*

[126] 81 N.J. 233, 405 A.2d 788 (1979).

[127] Weedo v. Stone-E-Brick, Inc., 155 N.J. Super. 474, 382 A.2d 1152 (1977), *quoted in* 396 N.E.2d at 701.

[128] 408 N.E.2d at 1279. *See generally* Henderson, *Insurance Protection for Products Liability and Completed Operations—What Every Lawyer Should Know*, 50 NEB. L. REV. 415 (1971).

[129] *Id.* at 1280 (emphasis in original). The court noted that Gilson had relied on older cases which had construed a currently nonexistent standard insurance clause containing the "ambiguous phrase 'out of which the occurrence arises.'" *Id.* at 1281. These earlier cases had construed this clause to only exclude damages caused by a defective part and not by the insured's entire product. When this clause was removed in 1966, and this single exclusion was divided into separate clauses as represented by (n) and (o), there was no longer a basis for this distinction. *Id.*

[130] *Id.*

[131] *Id.*

Thus, it appears that if the subcontractor responsible for the construction of the defective footing, had an insurance policy similar to that owned by Gilson, it would be available to indemnify Gilson for the damage to the remainder of the house, but not that damage to the defective footing.[132]

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[132] *Id.* at 1280.