

Insurance Law

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I. INTRODUCTION

In general, the year in insurance law was interesting even though there were a minimal number of published decisions. This Article examines several of those cases and attempts to keep the practitioner abreast of current trends in Indiana insurance case law as well as changes in Indiana statutes governing different aspects of insurance law.

One of the more notable decisions during the survey period reversed the long-standing principle in Indiana that an insurance broker was the agent of the proposed insured for insurance procurement purposes. This has been an area of constant litigation, and the decision in *Aetna Insurance Co. v. Rodriguez*¹ will be of interest to the insurance practitioner.

Other cases reported on in this Article examine such issues as the court's construction of the phrase "alighting from an automobile" for the purpose of uninsured motorist coverage, an insurer's burden of proof when relying on a "cooperation clause" as a defense, insurance coverage for second permittees, and intoxication as a defense to denying coverage when a policy excludes coverage for intentional acts. This Article also reviews some of the additions and amendments enacted by the 1987 General Assembly.

II. RELATIONSHIP BETWEEN BROKER AND COMPANY

During the survey period,² the Indiana Supreme Court decided a case that will have far-reaching consequences on the issue of insurance company liability for the acts or omissions of insurance brokers. In the case of *Aetna Insurance Co. v. Rodriguez*,³ the court made the blanket statement that "in Indiana when a broker makes application for insurance and the insurance policy is issued, the broker is the agent of the insurer and can bind it within the scope of his authority."⁴ The court's statement

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1. 517 N.E.2d 386 (Ind. 1988).
2. August 1, 1987, to July 1, 1988.
3. 517 N.E.2d 386 (Ind. 1988).
4. *Id.* at 388.

on this issue represents a reversal of the previously accepted rule that an insurance broker is the agent of the proposed insured for all purposes relating to the procurement of insurance.⁵

The case arose from a transaction in 1979 in which Mr. Rodriguez purchased a building from Shaver Motors, Inc. (Shaver). As a part of the transaction, Shaver obtained and recorded a mortgage on the property, and Rodriguez agreed to insure the premises for Shaver's benefit. Rodriguez contacted an insurance broker named Nick George to obtain the insurance. Ultimately, Aetna Insurance Company of the Midwest issued a policy to Rodriguez. The policy had a standard mortgage clause which protected any mortgagee named on the declarations page. However, Shaver was not named in the declarations. Instead, Shaver was erroneously listed on an endorsement as a contract seller.⁶

At a later date, the building burned. When Shaver made a claim under the standard mortgage clause, Aetna would not pay, and litigation ensued.⁷

Each party filed for summary judgment. In a lengthy written opinion, the trial court granted summary judgment in favor of Shaver for several reasons. First, the court excused Mr. Rodriguez for not knowing the specific manner in which Shaver should have been listed on the policy. In the same vein, the court held that the broker-agent and the company should bear the burden of asking the proposed insured enough facts to determine how the additional insured should be shown on the policy. Additionally, under the specific facts of the case, the court found that Nick George acted as an agent for the company and not as agent for the proposed insured. Therefore, Aetna Insurance was held liable for George's failure to list Shaver properly on the policy, and Aetna was estopped from denying coverage to Shaver.⁸

On appeal, one of Aetna's principle arguments was that an insurance broker in Indiana is always considered to be the insured's agent for purposes of procuring insurance.⁹ Relying upon the cases of *Stockberger v. Meridian Mutual Insurance Co.*¹⁰ and *Automobile Underwriters, Inc.*

5. *Monarch Ins. Co. v. Siegel*, 625 F. Supp. 693 (N.D. Ind. 1986); *Steward v. City of Mt. Vernon*, 497 N.E.2d 939 (Ind. Ct. App. 1986); *Stockberger v. Meridian Mut. Ins. Co.*, 182 Ind. App. 566, 395 N.E.2d 1272 (1979); *Bulla v. Donahue*, 174 Ind. App. 123, 366 N.E.2d 233 (1977); *Automobile Underwriters, Inc. v. Hitch*, 169 Ind. App. 453, 349 N.E.2d 271 (1976).

6. *Aetna Ins. Co. v. Rodriguez*, 496 N.E.2d 1321, 1322 (Ind. Ct. App. 1986), *vacated*, 504 N.E.2d 1030 (Ind. Ct. App. 1987), *rev'd*, 517 N.E.2d 386 (Ind. 1988).

7. *Id.*

8. *Id.* at 1322-24.

9. *Id.* at 1324.

10. 182 Ind. App. 566, 395 N.E.2d 1272 (1979).

v. Hitch,¹¹ Aetna argued that any mistakes of Nick George should be imputed to Rodriguez rather than to Aetna.¹²

The Indiana Court of Appeals disagreed, noting that at the time of the *Stockberger* and *Hitch* decisions there was an Indiana insurance statute which stated: "[A]n insurance broker is hereby declared to be the agent of the insured for all purposes in connection with such insurance."¹³ However, in 1977, the Indiana General Assembly repealed the earlier statute and replaced it with a new one.¹⁴ The new version of the statute did not contain the same agency language as the previous statute.

Because the 1977 legislation did not contain the provision concerning brokers' authority, the court noted that it appeared that "the Indiana common law has been restored to the state it was in before the [1971] statute was enacted."¹⁵ The court also noted that Indiana cases, decided before that statute, had held "that when a broker made application for insurance, and the insurance policy was issued, the broker was the agent of the insurer and could bind it within the scope of his authority."¹⁶

In spite of its holding, the court apparently found that the issue of the agent's authority to bind the insurance company is a question of fact. In reviewing the record of the lower court, the court of appeals held that, due to the lack of evidence concerning George's authority, a genuine issue of fact existed concerning such authority, and thus remanded the case to the trial court for further proceedings.¹⁷

On the issue of whether the policy covered Shaver even though its status was listed as contract seller rather than mortgagee, the court of appeals did not disagree with Shaver's contention that mere mislabeling of its status did not preclude coverage and noted that an Indiana Supreme Court decision greatly reduced the distinction between the two.¹⁸ However, the court determined that it was unnecessary to address the question because, "Shaver was not listed as either contract seller or mortgagee *in the declarations*,"¹⁹ and it, therefore, could not find "that coverage was provided as a matter of law."²⁰

11. 169 Ind. App. 453, 349 N.E.2d 271 (1976).

12. *Rodriguez*, at 1324.

13. *Id.* (quoting IND. CODE § 27-1-15-1(d) (1982)).

14. *Id.* (citing IND. CODE § 27-1-15.5-1 to -20 (1982)).

15. *Id.*

16. *Id.* (citing *Johnson, Ins. Comm'r v. Schrepferman*, 67 Ind. App. 606, 119 N.E. 494 (1918); *Indiana Ins. Co. v. Hartwell*, 123 Ind. 177, 24 N.E. 100 (1889); 16 J. APPLEMAN, INSURANCE LAW AND PRACTICE § 8731, at 375 (1981)).

17. *Rodriguez*, 496 N.E.2d at 1324-25.

18. *Id.* at 1324.

19. *Id.* (emphasis in original).

20. *Id.*

On Petition for Rehearing by Shaver Motors, the Indiana Court of Appeals reversed itself.²¹ The court held that under the law enunciated in the landmark decision of *Skendzel v. Marshall*²² a contract seller and a mortgagee are substantially the same.²³ Therefore, the court refused to allow Aetna to distinguish between the two. Because Shaver was listed in the policy as a contract seller, the court found that was sufficient for Shaver to have rights under the policy.²⁴

After this turn of events, Aetna petitioned to transfer the case to the Indiana Supreme Court. On transfer, the supreme court reversed both of the earlier court of appeals opinions and affirmed the original trial court decision.²⁵ In doing so, the court ignored the factual issues that were raised by the court of appeals in its first opinion and ruled as a matter of law "that in Indiana when a broker makes application for insurance and the insurance policy is issued, the broker is the agent of the insurer and can bind it in the scope of his authority."²⁶

The supreme court may have erred in relying upon the reasoning of the court of appeals' first decision. At the time of the original appeal, the court of appeals refused to acknowledge the law of *Stockberger v. Meridian Mutual Insurance Co.*²⁷ and *Automobile Underwriters, Inc. v. Hitch*²⁸ because it felt that those cases were predicated upon the earlier Indiana Code section which made an insurance broker an agent of the insured for all purposes connected with the procurement of insurance.²⁹ However, in rejecting *Stockberger* and *Hitch* the court of appeals misread *Hitch*.

In *Hitch*, the court had stated that an agent who represents several insurance companies or works on behalf of more than one agent is considered an insurance "broker."³⁰ The court went on to state the "general rule" that "an insurance broker can be considered an agent

21. *Aetna Ins. Co. v. Rodriguez*, 504 N.E.2d 1030 (Ind. Ct. App. 1987), *rev'd*, 517 N.E.2d 386 (Ind. 1988).

22. 261 Ind. 226, 301 N.E.2d 641 (1973), *cert. denied*, 415 U.S. 921 (1974).

23. 504 N.E.2d at 1034.

24. *Id.* The Court's ruling flies in the face of the traditional reasons raised by insurance companies for distinguishing between land contract sellers and mortgagees. *See, e.g., Lakeshore Bank & Trust Co. v. United Farm Bureau Mut. Ins. Co.*, 474 N.E.2d 1024 (Ind. Ct. App. 1985); *Insurance Co. of N. Am. v. Nicholas*, 259 Ark. 390, 533 S.W.2d 204 (1976).

25. *Aetna Ins. Co. v. Rodriguez*, 517 N.E.2d 386 (Ind. 1988).

26. *Id.* at 388 (citing *Indiana Ins. Co. v. Hartwell*, 123 Ind. 177, 24 N.E. 100 (1890)).

27. 182 Ind. App. 566, 395 N.E.2d 1272 (1979).

28. 169 Ind. App. 453, 349 N.E.2d 271 (1976).

29. *Rodriguez*, 496 N.E.2d at 1324 (citing IND. CODE § 27-1-15-1(d) (1982)).

30. 169 Ind. App. at 459, 349 N.E.2d at 276 (citing 16 J. APPLEMAN, INSURANCE LAW AND PRACTICE § 8732 (1968)).

only for the purposes of delivering policies and collecting premiums thereon. The insurer would not be bound, ordinarily, by the mistakes or negligence of a broker."³¹ After adopting the "general rule," the *Hitch* court stated "moreover" that an existing Indiana statute made an insurance broker the agent of the insured.³² In using the term "moreover," the court clearly implied that it was adopting the general rule and that it was simply referring to the statute as *additional* support for adopting the general rule.

When the court of appeals ruled in the first *Aetna* case that *Hitch* and *Stockberger* were based upon the earlier Indiana statute,³³ the court overlooked the fact that *Stockberger* had also adopted general common law when it held that an insurance broker was the agent of the insured for all purposes related to the procurement of coverage.³⁴ The court did not have to go back to the 1880's to discover the common law in Indiana in this area.

Even if the court of appeals erred in its first opinion, it at least left open the possibility that there could be a question of fact in each particular case as to the broker's authority and whether he is an agent of the company or an agent of the insured. However, when the Indiana Supreme Court ruled as it did, the court, in essence, established as a *rule of law* that an insurance broker will always be the agent of the insurance company for purposes of procuring insurance for a proposed insured.³⁵

This recent ruling by the Indiana Supreme Court takes Indiana out of the mainstream of American law on this particular issue.³⁶ The prevailing rule across the country is based upon the well-understood fact that ordinarily a person is the agent of the first person who hires him.³⁷ Furthermore, Indiana and most other states have long held that when a broker works with a proposed insured to assist him in procuring insurance, a fiduciary relationship arises wherein the agent has a duty to use reasonable care and due diligence to procure adequate insurance

31. *Hitch*, 169 Ind. App. at 460, 349 N.E.2d at 276 (citing Metropolitan Inter-Ins. Exch. v. Anthony, 1 Ill. App. 3d 612, 275 N.E.2d 296 (1971)); Kenilworth Ins. Co. v. Chamberlain, 131 Ill. App. 2d 975, 269 N.E.2d 317 (1971); Taylor v. Crowe, 444 Pa. 471, 282 A.2d 682 (1971); 16 J. APPLEMAN, INSURANCE LAW AND PRACTICE § 8730 (1968).

32. 169 Ind. App. at 460, 349 N.E.2d at 277 (citing IND. CODE § 27-1-15-1(d) (1982)).

33. 496 N.E.2d 1321 (Ind. Ct. App. 1986), *vacated*, 504 N.E.2d 1030 (Ind. Ct. App. 1987), *rev'd*, 517 N.E.2d 356 (Ind. 1988).

34. 182 Ind. App. 566, 576, 395 N.E.2d 1272, 1278-79 (1979).

35. *Aetna Ins. Co. v. Rogriguez*, 517 N.E.2d 386 (Ind. 1988).

36. *See generally* 3 R. RHODES, COUCH ON INSURANCE 2d § 25:95 (1984).

37. *Id.*

to meet the needs of the proposed insured.³⁸ In this day and age when major insurance brokers can select from dozens of insurance companies when placing coverage for a proposed insured, it no longer makes sense that the acts or omissions of the broker should be imputed to a particular company based upon a rule such as the one recently enunciated by the Indiana Supreme Court.

After *Hitch* and *Stockberger*, there had been a degree of certainty in cases involving acts or omissions of brokers because attorneys could rely upon the rule that a broker was the agent of the insured for purposes of procuring coverage. As a result of *Rodriguez*,³⁹ this author predicts that litigation in this area will take on sizeable proportions because cases will now be more fact-sensitive than ever before. There will be a great deal more attention devoted to the past relationship between the broker and the company. Attorneys and judges will no longer be able to look to the relatively easy question of whether a particular insurance agency was a captive agency of a company or whether the agency was in a position to write insurance through several companies.

III. UNINSURED MOTORIST COVERAGE—DEFINITION OF “ALIGHTING FROM” AN AUTOMOBILE

One of the bright spots in insurance law during the survey period was the case of *Miller v. Loman*.⁴⁰ In *Miller*, the Indiana Court of Appeals provided excellent guidelines on how to determine when a person is “alighting from” an automobile for purposes of uninsured motorist coverage.⁴¹ While other Indiana cases have touched upon the meaning of “alighting from” an automobile, no court has previously provided such helpful advice on how to approach this problematic subject.⁴²

The *Miller* case arose from an accident which occurred on December 20, 1983. The injured party, Steve Miller, and his wife were being driven to the airport by John and Laura Perkinson. As they were driving toward the airport, their truck struck a chuckhole, causing the truck’s muffler to break loose and fall into the street. Mr. Perkinson continued driving until he was able to turn around to retrieve the muffler. When the truck

38. *Id.* §§ 25.93-25.99.

39. 517 N.E.2d 386 (Ind. 1988).

40. 518 N.E.2d 486 (Ind. Ct. App. 1987).

41. The court also addressed the meanings of “loading or unloading” a vehicle and “maintenance or use” of a vehicle. *Id.* at 492-93. However, the court’s rulings on these topics were not significant enough to warrant discussion in this Article.

42. For earlier treatment of the subject in Indiana, see, e.g., *State Farm Mut. Auto. Ins. Co. v. Barton*, 509 N.E.2d 244 (Ind. Ct. App. 1987); *Michigan Mut. Ins. Co. v. Combs*, 446 N.E.2d 1001 (Ind. Ct. App. 1983); *United Farm Bureau Mut. Ins. Co. v. Pierce*, 152 Ind. App. 387, 283 N.E.2d 788 (1972).

stopped near the muffler, Miller offered to retrieve the muffler. Perkinson warned Miller that the muffler might be hot and that he should kick it off to the side of the road so that Perkinson could find it on the trip back from the airport.⁴³

After exiting the truck, Miller crossed two lanes of the street and reached the muffler at a location about thirty feet away from the truck. The muffler was one to two feet from the berm of the road. As Miller was kicking the muffler off the road, he was struck and seriously injured by a car that was being driven by an uninsured motorist.⁴⁴

Subsequently, Miller made an uninsured motorist claim against Perkinson's automobile liability insurance carrier, Allstate Insurance Company. The case found its way to the Indiana Court of Appeals after the trial court entered summary judgment for Allstate reasoning that Miller was not "getting into or out of an automobile" when the accident happened and was, therefore, not covered by the insurance policy.⁴⁵

In the court of appeals, Allstate argued that the court should apply a time and distance analysis that would limit coverage to those accidents occurring within the area in which a person normally subjects himself to the risks resulting from exiting an automobile.⁴⁶ Because Miller was approximately thirty feet away from the truck when the accident happened, Allstate argued that Miller was past the point where he was subject to the usual risks arising from exiting an automobile.⁴⁷

Miller agreed that time and distance are factors which may be considered by a court in deciding whether to extend coverage in a given situation. However, he also argued that time and distance should not be the only factors in determining an injured party's relationship with the automobile.⁴⁸

To analyze the issue, the court looked to cases from other states. In doing so, the court found three approaches to determining whether a person is "alighting from" an automobile when an accident occurs.⁴⁹

The first line of cases is in accord with Allstate's position. Several cases held that the proper analysis focuses on the relationship between the injured person and the vehicle, with specific reference to two factors: the amount of time lapsing between exit and injury and the *distance* from the vehicle to the location of the accident.⁵⁰

43. 518 N.E.2d at 487.

44. *Id.*

45. *Id.* at 487-88.

46. *Id.* at 488.

47. *Id.*

48. *Id.*

49. *Id.* at 488-91.

50. 518 N.E.2d at 488-89 (citing *Menchaca v. Hiatt*, 59 Cal. App. 3d 117, 130

The second line of cases reviewed by the court involved jurisdictions which had taken a time and distance approach but had additionally examined the intent of the injured person, specifically any overt acts indicative of an intent to "undertake a new direction or activity."⁵¹ Illustrative of this approach is a statement made by the Florida District Court of Appeals in the case of *Fidelity & Casualty Co. v. Garcia*⁵² where the court stated: "We think that a rational limit to the activity that may be said to be encompassed within the term 'alighting from' is the time and place at which the insured shows an intention, evidenced by an overt act based on that intention, to undertake a new direction or activity."⁵³

Finally, the court noted a third line of jurisdictions which place reliance upon whether, prior to an accident, a person "alighting from" a vehicle has reached a zone or location of safety from the risks of exiting a vehicle.⁵⁴ For example, if a passenger in an automobile exits from the passenger side of the car, crosses in front of the insured vehicle to reach the opposite curb and is struck by an uninsured vehicle prior to reaching the opposite curb, jurisdictions which follow the "zone of safety" approach would find coverage under the "alighting from" policy language. The rationale of such a finding is based on the premise that crossing a street to reach a position of safety is a natural and reasonably foreseeable activity when one alights from a car.⁵⁵

After reviewing the three approaches taken by other jurisdictions, the court noted that a very recent Second District Court of Appeals case addressed the issue.⁵⁶ In *State Farm Mutual Automobile Insurance Co. v. Barton*⁵⁷, the injured plaintiff was riding with a friend who intentionally fishtailed the car and crashed into a utility pole. The accident caused live wires to fall at the passenger side of the car. The plaintiff

Cal. Rptr. 607 (1976); *Crear v. Nat'l. Fire & Marine Ins. Co.*, 469 So. 2d 329 (La. Ct. App. 1985); *Day v. Coca Cola Bottling Corp.*, 420 So. 2d 518 (La. Ct. App. 1982); *Breard v. Haynes*, 394 So. 2d 1282 (La. Ct. App. 1981)).

51. 518 N.E.2d at 489 (citing *Government Employees Ins. Co. v. Keystone Ins. Co.*, 442 F. Supp. 1130 (E.D. Pa. 1977); *State Farm Mut. Auto Ins. Co. v. Yanes*, 447 So. 2d 945 (Fla. Dist. Ct. App. 1984); *Fidelity & Casualty Co. of N.Y. v. Garcia*, 368 So. 2d 1313 (Fla. Dist. Ct. App. 1979)).

52. 368 So. 2d 1313 (Fla. Dist. Ct. App. 1979).

53. *Id.* at 1315.

54. 518 N.E.2d at 489-90 (citing *State Farm Mut. Ins. Co. v. Holmes*, 175 Ga. App. 655, 333 S.E.2d 917 (1985); *Joins v. Bonner*, 28 Ohio St. 3d 398, 504 N.E.2d 61 (1986)).

55. *See, e.g.*, *Joins v. Bonner*, 28 Ohio St. 3d 398, 504 N.E.2d 61 (1986).

56. 518 N.E.2d at 490 (citing *State Farm Mut. Auto. Ins. Co. v. Barton*, 509 N.E.2d 244 (Ind. Ct. App. 1987)).

57. 509 N.E.2d 244 (Ind. Ct. App. 1987).

had exited the car from the driver's door and had made it safely to the roadway. Shortly thereafter, the plaintiff returned to the car to help push it free. After unsuccessful attempts to push the car, the plaintiff started to walk away but was injured when he accidentally touched one of the downed lines about three feet from the car.⁵⁸

Judge Shields applied what appears to be a time, distance, and zone of safety approach in finding that there was no coverage.⁵⁹ She found that when the occupants of the vehicle had gotten out of the car and safely away from it after the initial impact with the pole, they had completed the process of "alighting from" the vehicle. Therefore, when the injury occurred, the plaintiff was embarking upon a new and distinct course of conduct.⁶⁰

After reviewing the various approaches taken by other states and after giving consideration to the *Barton* case, the *Miller* court decided to incorporate all of the factors that had been used in other jurisdictions. The court stated:

We believe the proper determination of whether an individual is "alighting from" or "getting out of" an automobile requires the examination of several factors which may establish the existence of a relationship between the individual and the insured automobile. These factors include: the distance between the accident and the automobile; the time separating the accident and the exit from the automobile; the individual's opportunity to reach a zone of safety; and the individual's intentions in relation to the automobile. These factors will, of course, have greater or lesser weight depending upon the circumstances of each individual case. There may be instances in which one of the factors may be determinative, such as where the accident occurs at such a great distance from the automobile as to render it unreasonable to assume the process of alighting had not been completed.⁶¹

Based upon the cited factors, the court ruled that Miller was not "alighting from" the vehicle when the accident occurred. Because he was thirty feet away from the truck and kicking a muffler when the automobile struck him, and because he evidenced no intention to reach a location of safety, the court found that he was engaging in conduct that was distinct from any acts necessary to exit a vehicle.⁶²

58. *Id.* at 245-46.

59. *Id.* at 247-48.

60. *Id.* at 248.

61. 518 N.E.2d at 491-92.

62. 518 N.E.2d at 492 (citing *Carta v. Providence Wash. Indem. Co.*, 143 Conn. 372, 122 A.2d 734 (1956)).

Some may criticize *Miller v. Loman*⁶³ because the court has outlined an approach which will make every case fact-sensitive. However, any review of the cases that have come before will demonstrate that each was fact-sensitive anyway. Now, judges and practitioners have reasonably clear guidelines with which to analyze the facts of each case. Furthermore, the court, by sustaining the trial court's summary judgment, has made it clear that such factors as the reasonableness of time and distance, intent, and zone of safety can be determined by the judge as a matter of law.

IV. COOPERATION CLAUSE

One of the more startling cases during the survey period struck a blow to the traditional insurance company defense of failure to cooperate.⁶⁴ In the case of *Smithers v. Mettert*,⁶⁵ the Indiana Court of Appeals made it clear that an automobile liability insurance carrier may not deny liability coverage to an insured for failure to cooperate unless the insurer has done everything humanly possible to make the insured cooperate.

The *Smithers* case arose from an automobile accident which occurred on April 25, 1979, when James C. Mettert's car swerved off the road and overturned. One of the passengers in the car, Roger Smithers, was injured. At the time of the accident, Mettert carried automobile liability insurance through Milwaukee Insurance Company. The policy was a standard automobile liability contract which contained a standard cooperation clause.⁶⁶

Some time after the accident, Smithers retained an attorney, and a claim was submitted to Milwaukee for Smithers' injuries. Milwaukee, in turn, retained an independent adjuster to investigate the claim. In January and February of 1980, the adjuster sent two letters to Mettert at his Indiana address, but there was no immediate response.⁶⁷ In March, Mettert answered the adjuster's letters and gave a statement about the accident.⁶⁸ During that conversation, Mettert stated that he was leaving for California and did not have the time to discuss the accident.⁶⁹

A year later in February 1981, Smithers filed suit against Mettert. Milwaukee retained counsel who entered an appearance and answered the lawsuit on behalf of Mettert in May 1981. Thereafter, the defense

63. 518 N.E.2d 486 (Ind. Ct. App. 1987).

64. *Smithers v. Mettert*, 513 N.E.2d 660 (Ind. Ct. App. 1987).

65. *Id.*

66. *Id.* at 661-62.

67. *Id.* at 661.

68. *Id.*

69. *Id.* at 665.

counsel attempted to reach Mettert by sending letters by regular mail and certified mail to out-of-state addresses. Neither letter was returned, and counsel did not receive a response from Mettert.⁷⁰ Thereafter, defense counsel unsuccessfully attempted to contact Mettert through Mettert's mother.

When counsel had not heard from Mettert by September of 1981, he requested investigative assistance from Milwaukee Insurance. At that point, Milwaukee hired an investigative agency to locate Mettert. In November, defense counsel received an investigative report indicating that Mettert was temporarily living with his brother and sister-in-law in Florida. The report included Mettert's address as well as a phone number.⁷¹

Defense counsel continued to attempt to contact Mettert by sending a certified letter to the Florida address. The letter came back unclaimed. Defense counsel also attempted to call Mettert in Florida without success. A second certified letter was sent in November of 1982 to the Florida address. Duplicate letters were also sent to another Florida address and to Mettert's mother in Indiana. Finally, when no response had been received from Mettert, defense counsel petitioned the court to withdraw his appearance on behalf of Mettert because of his lack of success in contacting Mettert.⁷²

After defense counsel was granted leave to withdraw, the court entered a default judgment for Smithers and against Mettert. Smithers subsequently filed a Motion for Proceedings Supplemental and initiated a garnishment action against Milwaukee Insurance. Nothing became of the garnishment motion until November 1986 when the trial court denied Smithers' motion for payment of insurance proceeds from Milwaukee.⁷³ Smithers appealed this decision.

To support its denial of payment, Milwaukee relied upon the co-operation clause in the policy which stated in pertinent part that "[t]he insured shall cooperate with the company and upon the company's request, assist in making settlements, in the conduct of suits . . . and the insured shall attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses."⁷⁴

The court of appeals held that in order for Milwaukee to prevail on its defense of failure to cooperate, it had to prove three elements. First, the company has to establish that the insured breached the co-operation clause by an intentional and willful failure to cooperate and

70. *Id.* at 661.

71. *Id.*

72. *Id.*

73. *Id.* at 661-62.

74. *Id.* at 662.

attend trial.⁷⁵ Second, the company has to prove that it used good faith efforts and due diligence in attempting to gain the insured's cooperation.⁷⁶ Third, the company was obligated to prove that the insured's failure to cooperate prejudiced the company in defending the insured.⁷⁷

In spite of all of Milwaukee's efforts, the court found that it had failed to meet its burden of establishing intentional and willful failure to cooperate. Although the court stated that there may have been sufficient evidence of Milwaukee's good faith efforts to gain cooperation from Mettert and sufficient evidence of prejudice to Milwaukee, the court found that there was no proof that Mettert had refused to respond to the company after being contacted by them.⁷⁸ Specifically, the court stated that "[a]bsence of a response alone does not indicate a refusal to cooperate."⁷⁹ The court also stated that "Mettert's absence from trial also does not establish an intentional and willful failure to cooperate," especially since the action was filed subsequent to Mettert's "disappearance."⁸⁰ In a footnote, the court pointed out that Milwaukee had not attempted to subpoena or depose their insured. Furthermore, Milwaukee had not made any effort to contact Mettert in person.⁸¹ Relying on these factors, the majority found that the cooperation clause did not support the trial court's order denying Smithers' garnishment of the insurance proceeds and reversed the trial court's finding.

This case should stand as a strong example for the insurance industry of the extent to which a company must go in attempting to obtain an insured's cooperation. Because the absence of a response is not enough to indicate a refusal to cooperate, a company is going to have to resort to attempting personal contact with a recalcitrant insured. Furthermore, if a company knows the whereabouts of its insured, this case suggests that the company may have to subpoena or attempt to depose the insured.

Although the *Smithers* case may seem extreme, it is not without support in Indiana law. At least one earlier case has pointed out that

75. *Id.* (citing *Newport v. MFA Ins. Co.*, 448 N.E.2d 1223, 1227 (Ind. Ct. App. 1983); 8 J. APPLEMAN, *INSURANCE LAW & PRACTICE* § 4784 (1981)).

76. 513 N.E.2d at 662 (citing *Mutual Automobile Ins. Co. v. Walker*, 382 F.2d 548, 551 (7th Cir. 1967); *Potomac Ins. Co. v. Stanley*, 281 F.2d 775, 781 (7th Cir. 1950)); *Newport v. MFA Ins. Co.*, 448 N.E.2d 1223, 1227 (Ind. Ct. App. 1983).

77. 513 N.E.2d at 662 (citing *Miller v. Dilts*, 463 N.E.2d 257, 261 (Ind. 1984); *Motorists Mut. Ins. Co. v. Johnson*, 139 Ind. App. 622, 628, 218 N.E.2d 712, 715 (1966)).

78. 513 N.E.2d at 663. The court noted that when Mettert had, in fact, received notification, he responded and was cooperative. The court determined that the evidence established only that Milwaukee attempted to contact Mettert, *not* that Mettert had refused to cooperate. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* n.1.

liability insurance is now mandatory in many states. Such insurance is meant not only to protect the insured, but is also intended to protect members of the public who may suffer injuries through another's negligence. Thus, unless the courts require insurance companies to provide complete proof of diligent efforts to locate insureds, the practical usefulness of insurance policies would be diluted because without such "strict" requirements a company could walk away from coverage simply by showing the disappearance or nonresponsiveness of its insured.⁸²

V. MISCELLANEOUS CASES

A. *Permissive Use of Automobile*

In the case of *National Mutual Insurance Co. v. Eward*,⁸³ the Indiana Court of Appeals gave broad meaning to an omnibus clause in an automobile insurance policy. The court held that the first permissive user of a vehicle has implied permission to loan the vehicle to a second permissive user unless the vehicle owner has expressly prohibited the first user from loaning the vehicle.⁸⁴

The *Eward* case arose from a very interesting factual situation. The vehicle in question, a van, was owned by Jack A. McClees Painting and was insured by National Mutual Insurance Company. McClees had a painting foreman by the name of Darrell Jones. In 1984, Jones voiced the possibility that he would leave the company for a better-paying job. To induce Jones to stay, McClees provided Jones with a company van that Jones could use virtually as his own. McClees placed no restrictions on how and when Jones could use the van, and Jones obligated himself to take care of minor repairs. For a period of time prior to the accident, Jones drove the van to work, used it on personal business and dates, and paid for fuel, a new tire, and radiator repairs.⁸⁵

At some later date, McClees instructed Jones that he did not want anyone drinking alcohol and then driving the van. However, after placing that restriction on Jones, McClees took all of his work crew out for food and alcoholic beverages. McClees also knew that Jones and a friend from work would sometimes stop for beer after work. He also knew that the van was Jones' only means of transportation.⁸⁶

82. See *Newport v. MFA Ins. Co.*, 448 N.E.2d 1223 (Ind. Ct. App. 1983) (citing *Pennsylvania Thresherman & Farmer's Mut. Casualty Ins. Co. v. Owens*, 238 F.2d 549 (4th Cir. 1956)).

83. 517 N.E.2d 95 (Ind. Ct. App. 1987).

84. *Id.* at 99.

85. *Id.* at 97.

86. *Id.*

One evening a couple of months after McClees imposed the alcohol and driving restriction, Jones went drinking with Jack Eward, the brother of Steven Eward. At some point during the evening, Steven Eward joined the two of them and, when the three of them prepared to leave, Jones asked Steven to drive the van because he was the least intoxicated. As they left, Steven drove away in the van and then realized that he had left Jones back on the sidewalk. As he was backing the van to get Jones, he struck and injured Jones.⁸⁷

Based upon these facts, the trial court found that Steven Eward had the implied permission of Jack McClees to drive the van and, therefore, was insured under McClees' policy. Eward and the trial court relied on the Seventh Circuit Court of Appeals' findings in *Arnold v. State Farm Mutual Automobile Insurance Co.*,⁸⁸ where it was noted that:

[U]nder Indiana law, a policy that contains an omnibus clause extends coverage to a permittee of the owner [C]overage [is] properly extended to a second permittee under an omnibus clause in a case which there was implied consent by the owner to a friend of the original permittee.⁸⁹

The trial court found that since McClees did not expressly or impliedly forbid Jones from allowing another to drive, consent could be implied.⁹⁰

National argued that for Eward to be covered under the policy, he had to be using the van for Jones' benefit *and* within the scope of McClees' permission to Jones. Relying on this assertion, National claimed that since Eward was as drunk as Jones and since McClees had restricted Jones' use of the van while drinking, Eward's use of the van was outside the scope of the permission originally given to Jones and, therefore, coverage was precluded.⁹¹ The court disagreed and stated:

[T]he fact that a permittee used the vehicle for a purpose not contemplated by the owner when he gave permission does not exclude the permittee from coverage, and the extent of the deviation from the original purpose is not material.⁹²

The trial court also concluded that McClees had waived any restriction concerning use of the van and alcohol consumption because of his conduct in taking Jones and others for drinks, and because McClees knew that

87. *Id.* at 97-98.

88. 260 F.2d 161 (7th Cir. 1958).

89. 517 N.E.2d at 99 (citing *Arnold State Farm Mut. Auto. Ins. Co.*, 260 F.2d 161 (7th Cir. 1958)).

90. 517 N.E.2d at 99.

91. *Id.*

92. *Id.*

Jones had no other transportation besides the van.⁹³ The court of appeals agreed, holding: "[H]ere, McClees initially placed no restrictions on how Jones could use the van. Therefore, under Indiana law, the trial court could properly conclude Eward had implied permission, and that he came under the protection of the policy."⁹⁴ The court also found that the trial court had the discretion to conclude that, on the basis of his conduct, McClees had waived any restriction concerning drinking and driving.⁹⁵

The broad ruling by the court in this case suggests that the courts are going to find implied permission for the second permittee of a vehicle anytime that the owner of a vehicle loans it without placing restrictions on who may use it. Although the relevant Indiana statute⁹⁶ does not require such a broad reading,⁹⁷ the *Eward* case is another example of the fact that courts are recognizing a public policy in favor of extending liability coverage for the protection of injured third parties.⁹⁸

B. Denial of Liability Coverage for Insured's Intentional Acts

In *National Mutual Insurance Co. v. Eward*,⁹⁹ discussed above, the insurance company unsuccessfully argued that coverage should be denied to Steven Eward because Eward was intoxicated at the time of the accident.¹⁰⁰ Although the company's argument was unsuccessful, the novel approach taken by the company deserves mention.

National's policy required it to pay any sums the insured became legally obligated to pay "caused by an *accident*."¹⁰¹ Under the terms of the policy, an accident is defined as "continuous or repeated exposure to the same conditions resulting in bodily injury or property damage the insured neither expected nor intended."¹⁰² National argued that because Eward was driving while intoxicated when he injured Jones, his conduct was willful and wanton under Indiana law.¹⁰³ National's argument

93. *Id.* at 97-99.

94. *Id.* at 99 (citing *Arnold v. State Farm Mut. Auto. Ins. Co.*, 260 F.2d 161 (7th Cir. 1958); *American Employers' Ins. Co. v. Cornell*, 225 Ind. 559, 76 N.E.2d 562 (1948)).

95. 517 N.E.2d at 99.

96. IND. CODE § 27-1-13-7 (1988).

97. 517 N.E.2d at 98 (citing *Standard Mut. Ins. Co. v. Pavelka*, 580 F. Supp. 224 (S.D. Ind. 1983)).

98. *See, e.g.*, *Newport v. MFA Ins. Co.*, 448 N.E.2d 1223, 1229 (Ind. Ct. App. 1983).

99. 517 N.E.2d 95 (Ind. Ct. App. 1987).

100. *Id.* at 99-100.

101. *Id.* at 100 (emphasis in original).

102. *Id.* (emphasis omitted).

103. *Id.*

was based upon the case of *Williams v. Crist*¹⁰⁴ in which the Indiana Supreme Court held that if a driver was intoxicated at the time of the accident, the intoxication was sufficient to show willful or wanton misconduct under the Indiana Guest Statute.¹⁰⁵ National argued that the legal definition of willful was the same as the definition of the words "intended or expected" as used in the policy definition of an accident.¹⁰⁶

The Indiana Court of Appeals ignored National's argument entirely. Rather, the court employed an analysis that reviewed the nature of an insurance contract, the reasonable expectations of the parties about the coverage afforded, and the ordinary meaning of the word "accident."¹⁰⁷ Paradoxically, after reciting the accepted definition of the term "accident," the court found that National's policy covered "only acts which are *not* motivated by an intent and purpose to injure,"¹⁰⁸ but then emphasized the fact that National's policy did not mention the word "negligence."¹⁰⁹

The court's analysis of the meaning of the word "accident" offered no guidance. Because the word "negligence" was not contained in the policy, the court reasoned that there was no contractual limitation as to what type of accident would be afforded coverage.¹¹⁰ The court concluded:

[T]he contract does not expressly exclude damages from an accident in which the owner or driver is under the influence of alcohol. If there was to be an exception or limitation in this respect, the policy should contain the language to put the holder on notice of such limitation.¹¹¹

As a matter of public policy, the court probably was correct in holding that a standard automobile liability policy should cover accidents caused by intoxication unless the policies contain specific exclusions. However, the court's approach in reaching its conclusion was contrived. If anything, the court's analysis in this case is indicative of the corner that the courts have backed themselves into by their holdings that driving

104. 484 N.E.2d 576 (Ind. 1985).

105. *National Mut. Ins. Co. v. Eward*, 517 N.E.2d 95, 100 (citing *Williams v. Crist*, 484 N.E.2d 576 (Ind. 1985); IND. CODE § 9-3-3-1 (1982)).

106. *Id.*

107. *Id.* (citing *Protective Life Ins. Co. v. Coca-Cola Bottling-Indianapolis-Inc.*, 467 N.E.2d 786 (Ind. Ct. App. 1984); *Northland Ins. Co. v. Crites*, 419 N.E.2d 164 (Ind. Ct. App. 1981)).

108. 517 N.E.2d at 100-01.

109. *Id.* at 101.

110. *Id.*

111. *Id.* (citing *Rothman v. Metropolitan Casualty Ins. Co.*, 134 Ohio St. 241, 16 N.E.2d 417 (1938)).

while intoxicated is willful and wanton conduct as a matter of law.¹¹²

C. Liability of Insured for the Insured's Company's Claim Handling Practices

During the survey period, the Indiana Court of Appeals had the opportunity to decide whether an insured should be held accountable for the acts or omissions of his liability insurance carrier during the claim handling process. In *Eichler v. Scott Pools, Inc.*,¹¹³ one of Scott Pools' company vehicles was damaged when Thomas Eichler (a customer) backed into the vehicle in the company parking lot. Scott Pools made claim against Eichler but was unable to reach a satisfactory settlement with Eichler's insurance company, State Farm.¹¹⁴ Subsequently, Scott Pools filed suit in small claims court against Eichler but did not name State Farm as a party. Scott Pools sought compensatory damages and attorney fees.¹¹⁵

After a trial, the court entered a judgment in which it awarded compensatory damages; found that Eichler, through State Farm, had dealt with Scott Pools in bad faith; found that State Farm's conduct warranted punitive damages; and that Scott Pools was not entitled to attorney fees. The judgment was for \$546.42 in compensatory damages and \$2,453.58 in punitive damages.¹¹⁶ The award of punitive damages appeared to be based on the theory that State Farm's failure to settle with Scott Pools "was imputable to the Eichlers because State Farm was the Eichlers' agent."¹¹⁷

The Indiana Court of Appeals wasted no time in finding that the trial court had erred. The court cited the long-standing rule that "[a] claimant has no standing to sue a defendant's insurer for handling a claim negligently or in bad faith."¹¹⁸ Furthermore, the court noted that there is no duty on the part of an insurer to settle a third-party claim, nor is any duty owed to a claimant on a third-party beneficiary theory.¹¹⁹

Since State Farm had not been named as a party, the foregoing considerations were not directly in issue. However, the court noted that

112. See, e.g., *Obremski v. Henderson*, 497 N.E.2d 909 (Ind. 1986) (drunk driver was willful and wanton for purposes of treble damages statute); *Williams v. Crist*, 484 N.E.2d 576 (Ind. 1985) (drunk driver was willful and wanton for purpose of guest statute).

113. 513 N.E.2d 665 (Ind. Ct. App. 1987).

114. *Id.* at 666.

115. *Id.*

116. *Id.*

117. *Id.* at 667 (footnote omitted).

118. *Id.* (citing *Bennett v. Slater*, 154 Ind. App. 67, 289 N.E.2d 144 (1972)).

119. 513 N.E.2d at 667 (citing *Martin v. Levinson*, 409 N.E.2d 1239 (Ind. Ct. App. 1980); *Winchell v. Aetna Life & Casualty Ins. Co.*, 182 Ind. App. 261, 394 N.E.2d 1114 (1979)).

when an insurer investigates and defends a claim on behalf of its insured, the insurer retains complete control over the defense of the claim and settlement.¹²⁰ Therefore, the court held that the existence of insurance coverage does not make the insurance representative an agent for the insured when the insurer is handling settlement discussions or defense matters.¹²¹ Rather, the insurer acts similarly to an independent contractor.¹²² Decisions of this nature continue to protect insureds from liability for their insurer's actions in situations such as settlement negotiations in which the insured does not participate nor have control over the insurer.

VI. STATUTORY AMENDMENTS

A. *Underinsured Motorist Coverage*

During 1987, the Indiana State Legislature amended the existing statutes concerning uninsured motorist coverage¹²³ by adding mandatory coverage for "underinsured motorists."¹²⁴ The term "underinsured motor vehicle" is defined as

[a]n insured motor vehicle where the limits of coverage available for payment to the insured under all bodily injury liability policies covering persons liable to the insured are less than the limits for the insured's underinsured motorist coverage at the time of the accident, but does not include an uninsured motor vehicle as defined in subsection (a).¹²⁵

Prior to the enactment of the statute, some companies had already been providing underinsured motorist coverage in Indiana. However, disputes arose concerning interpretation of policy limits and the correct definition of an underinsured motorist.¹²⁶ For that reason, the legislature expressly provided that underinsured motorist coverage must be afforded with limits of liability identical to those contained in the bodily injury liability portions of an insured's policy.¹²⁷ Further, the statutes provide a specific definition of how to determine whether a person is in fact "underinsured" in a given situation.¹²⁸

120. 513 N.E.2d at 668 (citing 44 AM. JUR. 2D *Insurance* § 1393, at 326 (1982)).

121. 513 N.E.2d at 668 (citing *Martin v. Levinson*, 409 N.E.2d 1239, 1245 (Ind. Ct. App. 1980)).

122. 513 N.E.2d at 668.

123. IND. CODE §§ 27-7-5-2 to -6 (1988).

124. *Id.* § 27-7-5-2.

125. *Id.* § 27-7-5-4(b).

126. *See, e.g., Meridian Mut. Ins. Co. v. Richie*, 517 N.E.2d 1265 (Ind. Ct. App. 1988).

127. IND. CODE § 27-7-5-2 (1988).

128. *Id.* § 27-7-5-4(b).

The advent of underinsured motorist coverage should be a good thing for those persons who have always carried limits substantially higher than the legal minimum of \$25,000/\$50,000.¹²⁹ Under the prior law, a seriously injured person who carried high uninsured motorist coverage limits was better off to get involved in an accident with an uninsured motorist than with a person who simply carried the minimum limits. That problem should no longer arise because mandatory underinsured motorist coverage will be carried in the same limits as a person's bodily injury liability coverage limits.

B. Unfair Claim Settlement Practices

During the 1987 legislature, the statute defining unfair claims settlement practices¹³⁰ was amended to prohibit insurance companies, in negotiating insurance liability claims, from "ascribing a percentage of fault to a person seeking to recover from an insured party, in spite of an obvious absence of fault on the part of that person."¹³¹ Although this author has not seen companies that have blatantly tried to apportion fault to persons who are free of fault, rumors abound in the industry that some companies were ascribing ten to fifteen percent fault to a motorist simply for being on the street. Apparently, the same rumors or examples found their way to the legislature and this amendment was the result.

C. Cancellation or Nonrenewal of Commercial Property and Casualty Insurance

One additional amendment in 1987 which is noteworthy concerns a new chapter concerning Cancellation and Nonrenewal of Commercial Property and Casualty Insurance policies.¹³² The new chapter requires an insurer to meet certain notice requirements prior to cancelling or refusing to renew a commercial liability insurance policy.¹³³ The time limitations relating to cancellation of a policy vary depending upon the circumstances. If the cancellation is caused by the insured's failure to pay a premium, the insurer must provide at least ten days notice.¹³⁴ When there has been a substantial change in the level of risk covered under the policy or the insured has failed to comply with reasonable safety recommendations or reinsurance of the insurance risk associated

129. *Id.* § 9-2-1-15.

130. IND. CODE § 27-4-1-4.5 (1988).

131. *Id.* § 27-4-1-4.5(15).

132. IND. CODE §§ 27-1-31-1 to 27-1-31-3 (1988).

133. *Id.* §§ 27-1-31-2(b), -3.

134. *Id.* § 27-1-31-2(b)(3).

with the policy has been cancelled, the insurer is required to give at least forty-five days notice.¹³⁵ A minimum of twenty days notice must be given by the insurer if he plans to cancel the policy because the insured committed fraudulent or material misrepresentations.¹³⁶

This amendment is believed to have been brought about as a result of certain insurance company underwriting practices which occurred during the recent "liability insurance crisis." There is no question that the notice provisions will offer greater fairness to companies in a day and age when certain types of commercial liability insurance are hard to find.

135. *Id.* § 27-1-31-2(b)(1).

136. *Id.* § 27-1-31-2(b)(2).