

Survey of Recent Developments in Insurance Law

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I. INTRODUCTION

The past year could be labeled the "practical" year in the area of insurance law. There were no particularly momentous decisions changing any long-standing principles of insurance. However, there were numerous opinions dealing with some of the practical, every-day problems that practitioners face in interpreting insurance contract situations. Although there were a number of interesting opinions,¹ this Article will focus upon the cases that are likely to arise most frequently in the general practice of law.

The cases reported in this Article will deal with: (1) the continuing development of Indiana law with respect to the "intentional act" exclusion; (2) selected statute of limitations issues; (3) automobile liability policy exclusions; (4) a new area of insurance agent liability; and (5) a discussion of some practical statutory changes enacted by the 1990 Indiana General Assembly.

II. INTENTIONAL ACTS EXCLUSION

During the survey period,² the Indiana Court of Appeals again dealt with the interpretation and effect of the standard "intentional act"

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1. There were a number of interesting cases that discussed or reaffirmed existing insurance law. See *State Farm Fire & Cas. Co. v. Miles*, 730 F. Supp. 1462 (S.D. Ind. 1990) (an insured's guilty plea to a criminal act is admissible, but not conclusive, on the issue of whether an insured acted intentionally); *Burleson v. Illinois Farmers Ins. Co.*, 725 F. Supp. 1489 (S.D. Ind. 1989) (an insurer should not be liable for consequential damages arising from a breach of the insurance contract if the insurer acted in good faith when it originally denied payment to its insured); *Westers v. Auto-Owners Ins. Co.*, 711 F. Supp. 946 (S.D. Ind. 1989) (insurer granted summary judgment on the issue of punitive damages only in a case in which coverage was denied because arson was suspected); *Aetna Cas. & Sur. Co. v. Crafton*, 551 N.E.2d 893 (Ind. Ct. App. 1990) and *Johnson v. Payne*, 549 N.E.2d 48 (Ind. Ct. App. 1990) (reaffirming that a "resident" of a household is determined by more than just the person's subjective statements of intent); *LeMaster Steel Erectors, Inc. v. Reliance Ins. Co.*, 546 N.E.2d 313 (Ind. Ct. App. 1989) (reaffirming that an insurer may not subrogate against another person who is an insured under the policy); *Martin v. Rivera*, 545 N.E.2d 32 (Ind. Ct. App. 1989), *trans. denied* (discussing the "passenger for hire" exclusion in an automobile policy).

2. Approximately June 1989 to Aug. 1, 1990.

exclusion. The case of *Allstate Insurance Co. v. Herman*³ is interesting because it shows just how difficult it can be in Indiana for an insurance company to prove that its insured acted intentionally when injuring another person. Although the facts of the case appear to indicate that the insured clearly acted intentionally, the Indiana Court of Appeals⁴ and the Indiana Supreme Court⁵ reached different conclusions about how to apply the intentional acts exclusion.

In *Herman*, the insured, Steven Heroy, and his wife got into a fight with a gang of twenty to thirty people in front of the Heroys' house.⁶ During the fight, Heroy suffered a head injury and dislocated his shoulder. When he noticed a member of the group striking Mrs. Heroy in the head with a baseball bat, he went into the house and procured his wife's .32 caliber revolver. Upon returning, he fired a shot into the air from his front porch, causing the group to begin running. He then chased the group and fired the four remaining shots in the direction of the fleeing people.⁷ One of the shots struck Charles Herman in the back. Herman and his father filed a civil liability action against Heroy. Allstate Insurance Company subsequently intervened in the lawsuit seeking a declaratory judgment on the question of whether Heroy's actions were intentional.⁸ The Allstate homeowner's insurance policy covering Heroy contained an intentional act exclusion which read: "We do not cover bodily injury or property damage intentionally caused by an insured person."⁹

The trial judge denied a motion for summary judgment filed by Allstate. Allstate then brought an interlocutory appeal to the Indiana Court of Appeals.¹⁰ The court of appeals first noted that the standard for interpreting the intentional act exclusion was established in the 1975 case of *Home Insurance Co. v. Neilsen*.¹¹ In *Neilsen*, the court held that a policy excluded coverage for any act of the insured in which the insured "intended to cause injury."¹² The intent could be proven by showing that the insured actually intended the injury or by showing that the nature and character of the insured's act was such that intent to harm the other party must be inferred as a matter of law.¹³

3. 551 N.E.2d 844 (Ind. 1990).

4. *Allstate Ins. Co. v. Herman*, 542 N.E.2d 576 (Ind. Ct. App. 1989), *vacated*, 551 N.E.2d 844 (Ind. 1990).

5. *Herman*, 551 N.E.2d 844 (Ind. 1990).

6. *Id.* at 844.

7. *Id.*

8. *Id.* at 844-45.

9. *Herman*, 542 N.E.2d at 577.

10. *Id.* at 576.

11. 165 Ind. App. 445, 332 N.E.2d 240 (1975).

12. *Id.* at 451, 332 N.E.2d at 244.

13. *Id.*

Following this interpretation, the Indiana Court of Appeals in *Herman* held that the trial judge was correct in denying the summary judgment.¹⁴ The court noted that Heroy had testified that he was confused and that he was "just aiming in the general direction of where they was at."¹⁵ The intermediate court did not believe that pointing a gun and firing it in the general direction of a crowd was sufficient proof, as a matter of law, to hold that Heroy acted intentionally.¹⁶

Upon transfer to the Indiana Supreme Court, the result was different. The court examined the evidence, and concluded that there was no question that Heroy deliberately emptied a revolver into a crowd of fleeing people.¹⁷ On that basis, the court held as a matter of law that Heroy acted intentionally when he fired into a crowd, and the court remanded the case for entry of summary judgment in favor of Allstate.¹⁸

The disagreement in this case between the court of appeals and the supreme court is somewhat troubling. Although the court of appeals correctly held that summary judgment should be denied when there is any genuine issue of material fact,¹⁹ its ruling appears to totally overlook the basic purpose of liability insurance. Liability insurance is designed to protect the insured from liability arising from accidents and other unforeseen occurrences. It was never designed to protect an insured who, in a fit of anger, fires a pistol in the direction of a fleeing crowd. Had the trial court and court of appeals properly considered this factor, the case never would have reached the Indiana Supreme Court.

III. STATUTE OF LIMITATIONS ISSUES

One of the more significant cases dealing with statute of limitations issues in the insurance context was *Sprowl v. Eddy*.²⁰ This case dealt with the very common situation in which a plaintiff's attorney is trying to settle with the tortfeasor's insurance carrier prior to filing suit. In such cases, it is not unusual for the negotiations to take place right up to the two-year statute of limitations for tort actions.²¹ *Sprowl* answers the question of what can happen when the plaintiff's attorney and the insurance carrier voluntarily agree to waive the statute of limitations so they can continue to negotiate a settlement without having filed suit.

14. 542 N.E.2d at 578.

15. *Id.*

16. *Id.*

17. *Herman*, 551 N.E.2d at 845.

18. *Id.* at 846.

19. *Herman*, 542 N.E.2d 576, 577.

20. 547 N.E.2d 865 (Ind. Ct. App. 1989).

21. IND. CODE § 34-1-2-2 (1981).

In *Sprowl*, the plaintiff, Mr. Eddy, allegedly suffered injuries in an automobile accident with Sprowl.²² Following the accident, Eddy's attorney began to negotiate settlement with Sprowl's insurer, Indiana Farmers Mutual.²³ Although communications were exchanged over several months, the case was not settled as the two-year statute of limitations deadline approached. Approximately one week before the deadline, Farmers wrote Eddy's attorney and agreed to waive the statute of limitations for approximately two months so the parties could discuss settlement.²⁴ Shortly before the two-month extension expired, Farmers again agreed to extend the statute of limitations a few extra days.²⁵

Near the end of the extension period, Eddy tendered a demand for settlement that exceeded Sprowl's insurance limits. When the demand was rejected, Eddy filed suit.²⁶ Thereafter, counsel was employed for Sprowl, and an answer was filed in which the statute of limitations was asserted as an affirmative defense. Eddy moved to strike the defense and Sprowl moved for summary judgment on the defense. After a hearing, the trial court denied Sprowl's motion for summary judgment and sustained Eddy's motion to strike. The issue presented on appeal was whether the trial court had ruled correctly.²⁷

There was no question before the court of appeals that the personal injury action had been filed after the two-year statute of limitations.²⁸ The main question, therefore, was whether Eddy had a right to believe that Farmers Mutual had the authority to waive the statute of limitations for its insured, Sprowl.²⁹ The court held that Eddy had the right to rely on Farmers's representation, and that Eddy did, in fact, rely to his detriment.³⁰ Therefore, the court agreed that there was a genuine issue of material fact, and that the trial court correctly denied Sprowl's motion for summary judgment.³¹ However, the court also found that the trial court had erred in granting Eddy's motion to strike because a question of fact also existed on the issue of estoppel.³²

The case is interesting not because of the appellate court's ruling, but because the court of appeals acknowledged that Eddy's settlement

22. 547 N.E.2d at 865.

23. *Id.*

24. *Id.*

25. *Id.* at 865-66.

26. *Id.* at 866.

27. *Id.*

28. *Id.*

29. *Id.* at 868.

30. *Id.*

31. *Id.*

32. *Id.*

demand exceeded Sprowl's insurance policy limits.³³ The court then addressed the question of whether Eddy could properly rely on Farmers's authority to extend the statute of limitations as to any exposure that Sprowl could have to Eddy in excess of Sprowl's insurance limits.³⁴ The court noted that Eddy should not have expected Farmers to be responsible for any more than Sprowl's policy limit and, therefore, Farmers's extension of the statute of limitations was only to the extent of Farmers's policy limit.³⁵ Sprowl could not be held to pay anything from his personal resources for any judgment in excess of the policy limit.³⁶

This case is important because it contains a fact scenario that is very common. For many reasons, plaintiffs' attorneys and insurers like to try to settle cases before suit. After *Sprowl*, plaintiffs' attorneys must now file suit to preserve the statute of limitations. Because plaintiffs' attorneys will not often know the tortfeasor's policy limit, and because they will usually not have much information about the tortfeasor's personal assets, they cannot risk limiting their recovery to the amount of the tortfeasor's liability limits. Instead of agreeing to extend the statute of limitations, counsel will now have to file suit and simply agree to extend the time period that the insurance company has to hire counsel to appear and defend the insured.

Two additional cases during the survey period addressed a statute of limitations question. In *Panos v. Perchez*³⁷ and *Lumpkins v. Grange Mutual Companies*,³⁸ the Indiana Court of Appeals addressed the question of how long an insured has to bring an action against his own insurer for uninsured motorist benefits. In each case, the insurer argued that the two-year period of limitations for personal injury actions should apply.³⁹ However, in both cases the court held that the ten-year statute of limitations for contract actions would govern.⁴⁰ The court reasoned that the insurance company's liability to the insured arose out of a right created by contract; therefore, the contract statute of limitations should apply.⁴¹ Although the court ruled that the longer statute of limitations is applicable, *Lumpkins* demonstrated that there is a trap for the unwary with respect to this issue. In *Lumpkins*, the Grange Mutual policy contained a provision in the uninsured motorist section that required

33. *Id.*

34. *Id.* at 868-69.

35. *Id.* at 868.

36. *Id.* at 869.

37. 546 N.E.2d 1253 (Ind. Ct. App. 1989).

38. 553 N.E.2d 871 (Ind. Ct. App. 1990).

39. *See Panos*, 546 N.E.2d at 1255; *Lumpkins*, 553 N.E.2d at 872.

40. *See Panos*, 546 N.E.2d at 1255; *Lumpkins*, 553 N.E.2d at 873.

41. *See Panos*, 546 N.E.2d at 1255; *Lumpkins*, 553 N.E.2d at 873.

the insured to bring any action against the company within the time period allotted by the applicable statute of limitations for bodily injury or death.⁴² In Indiana, that period of limitations is two years.⁴³

Lumpkins argued that the two-year limiting provision should not be followed unless the insurer could show that it had been prejudiced by the insured's failure to bring his action within the two-year statute of limitations period.⁴⁴ Lumpkins correctly pointed out that under Indiana law, policy provisions dealing with issues such as notice and cooperation do not bar recovery unless the insurer has been prejudiced as a result of delay or problems with cooperation.⁴⁵ The court of appeals disagreed.⁴⁶ It held that the purpose of a provision limiting the time to bring an action against the company was "to promote certainty and hasten the resolution of claims."⁴⁷ Therefore, the court stated that prejudice need not be shown.⁴⁸ The court concluded by stating that the time limitation can be waived by the insurer, but that the insurer did not have to show prejudice.⁴⁹ Therefore, the two-year provision in the policy was binding.⁵⁰

Lumpkins demonstrates very clearly that an attorney representing a client against an insurer *must read the policy*. Although most automobile policies are fairly standard, *Lumpkins* dealt with a policy provision that was not standard. Because his action was not commenced within two years after the date of the accident, Lumpkins was barred from recovery under his uninsured motorist coverage. Every attorney must learn from this case that the policy must be obtained from the insured and reviewed as the first step in proper representation.

IV. AUTOMOBILE LIABILITY POLICY EXCLUSIONS

Another noteworthy case from the survey period was *Safeco Insurance Co. of America v. State Farm Mutual Automobile Insurance Co.*⁵¹ In *Safeco*, the Indiana Court of Appeals determined the validity of a provision in an automobile liability policy excluding coverage to "any person under the age of twenty-five who is not a member of the named insured's family."⁵²

42. 553 N.E.2d at 873.

43. IND. CODE § 34-1-2-2(1) (1981).

44. *Lumpkins*, 553 N.E.2d at 874.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. 555 N.E.2d 523 (Ind. Ct. App. 1990).

52. *Id.* at 523.

The case arose when three young men were returning from a camping trip in an automobile owned by the father of one of them. The owner's son had entrusted the vehicle to one of his companions. Subsequently, the friend who was driving was involved in an accident, and was sued by the parties he injured. The issue was whether the friend driving the vehicle should be entitled to liability coverage under the owner's policy.⁵³

State Farm Mutual commenced the lawsuit in the form of a declaratory judgment action.⁵⁴ State Farm was the personal auto insurer of the young man who was driving,⁵⁵ and it contended that the owner's policy with Safeco Insurance should also defend the young man in the lawsuit arising from the accident.⁵⁶ However, Safeco contended that it did not owe him a defense because of the exclusion.⁵⁷

The trial judge determined that the exclusion in the Safeco policy was void as contrary to public policy.⁵⁸ Specifically, the judge found that the endorsement was in conflict with Indiana's compulsory insurance law.⁵⁹ That finding was challenged on appeal.

The Indiana Court of Appeals first discussed the nature of Indiana's financial responsibility law. The court noted that Indiana's law is not technically a compulsory insurance statute.⁶⁰ In reviewing Indiana Code section 27-1-13-7, the court noted that all Indiana casualty insurers must provide a policy containing a provision insuring the *owner* against liability for damages caused by death or injury to other persons resulting from the negligent operation of the owner's motor vehicle.⁶¹ However, the statute did not expressly require that a non-owner operator be covered by the policy. Instead, a separate financial responsibility statute⁶² permits non-owner operators to procure coverage through their own operator's policy.⁶³

Under the circumstances, the court found that Safeco technically had complied with the spirit of the statute because it was not required to provide coverage any broader than necessary to protect the *owner* of the vehicle.⁶⁴ Because the non-owner operator had the prerogative

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 524 (citing *American Underwriters Group v. Williamson*, 496 N.E.2d 807 (Ind. Ct. App. 1986)).

61. *Id.* (citing IND. CODE § 27-1-13-7 (1981)).

62. IND. CODE §§ 9-2-1-1 to -41 (1988).

63. *Safeco*, 555 N.E.2d at 524 (citing IND. CODE §§ 9-2-1-1 to -41 (1988)).

64. *Id.* at 524-25.

and the ability to obtain coverage through a separate source, Safeco's policy was not in contravention of Indiana law.⁶⁵ This case again demonstrates the fact that not every automobile policy in Indiana is standard. Companies have found that they can include limiting provisions in their policies to reduce their exposure. The exclusion in Safeco's policy is not one that an attorney would expect to see in a standard automobile policy. It simply underscores the need to study the policy language in every case because no two policies are exactly the same.

V. INSURANCE AGENT LIABILITY

In *Medtech Corp. v. Indiana Insurance Co.*,⁶⁶ the Indiana Court of Appeals decided a unique issue of insurance agent liability. The issue was whether an agent could be liable to an insured for mishandling the submission of a claim when the duty for claim processing was not specifically a part of the agent's responsibility to the company or to the insured.

In this case, Joe Ferree Agency, Inc. had procured a commercial insurance policy for Medtech and Biotechnic that covered the companies' inventory, equipment, and supplies, and also provided liability coverage.⁶⁷ Shortly after the coverage was procured, a building leased by the insured was undergoing roof repairs when rain came through the roof and caused substantial damage to the company's inventory, equipment, and supplies.⁶⁸

Initially, the insured's insurance agent prepared a property loss notice, and forwarded it to Indiana Insurance Company. The insurance agent promised the insureds that he had done everything necessary to preserve any claims that they might have under the policy.⁶⁹ However, the insureds originally did not want their own insurer to pay the claim because they believed that the roofing company's insurer would settle their losses.⁷⁰ Later, after negotiations with the roofer failed, the insureds turned to Indiana Insurance Company.⁷¹

Indiana Insurance Company denied the claim because the insureds did not file a sworn statement in proof of loss within sixty days of the incident, and did not bring their suit against Indiana Insurance Company within one year of the date of loss as required by the policy provisions.⁷²

65. *Id.*

66. 555 N.E.2d 844 (Ind. Ct. App. 1990).

67. *Id.* at 846.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

After being turned down by Indiana Insurance Company, the insureds turned to their agent for compensation. In their suit against the agency, they brought claims based upon promissory estoppel, actual or constructive fraud, and principles of agency.⁷³ The constructive fraud issue proved to be the most potent in favor of the insureds.

The court noted that the elements of constructive fraud are: "(1) a duty existing by virtue of the relationship between the parties; (2) representations or omissions made in violation of that duty; and (3) reliance on that representation or omission by the individuals to whom the duty is owed and to the detriment of that individual."⁷⁴ In addressing these issues, the court initially considered whether the agency had any legal or contractual duty to assist the insureds in processing the claim. The court also noted that even when taking on a duty gratuitously, the obligation arises to use reasonable skill, care, and diligence in carrying out the duty.⁷⁵

To counter the constructive fraud allegation, the insurance agency argued that the insureds had their own duty to learn the contents of their insurance policy, including the provisions relied upon by the insurer to deny coverage.⁷⁶ Interestingly, the court of appeals noted that "reasonable reliance upon an agent's representation can override an insured's duty to read his insurance policy."⁷⁷

Attorneys who represent insurance agents should take this case to heart. Attorneys should advise their clients to be very careful when counseling insurance customers in situations in which the customer wishes to make a claim against someone else's coverage, as opposed to presenting a claim under the customer's own coverage. This case illustrates that an insured can lose precious rights under an insurance policy by not complying with policy time limitations. An agent must emphasize to his or her insurance customer that these limitations must be remembered if the insured decides to delay making a claim with the insured's own carrier.

VI. STATUTORY DEVELOPMENTS

A. *Unfair Claim Settlement Practices*

In 1990, the Unfair Claim Settlement Practices Act⁷⁸ was considerably overhauled. Although there is still no common law cause of action based

73. *Id.*

74. *Id.* at 848-49.

75. *Id.* at 849.

76. *Id.* at 849-50.

77. *Id.* at 851.

78. IND. CODE §§ 27-4-1-1 to -18 (1988).

upon violation of the Act, the legislature put a great deal more teeth into the Act by substantially increasing the civil penalties against insurers for violation of the Act.⁷⁹ By the terms of the Act, all insurers are obligated to notify existing insureds of the remedies available to them under the Act.⁸⁰ Furthermore, the Act obligates the Insurance Commissioner of Indiana to publish figures annually indicating the ratio of valid consumer complaints lodged against each company in proportion to the direct premiums earned in Indiana by each company.⁸¹

B. Cancellation of Policies

During 1990, Indiana Code section 27-7-6-12 was added.⁸² The new section prohibits any insurer after June 30, 1990 from failing to renew, refusing to issue an automobile policy, or canceling a policy on the basis that a person is "disabled" as defined by 42 U.S.C. § 416.⁸³ Furthermore, no company may issue an automobile insurance policy to a disabled person under conditions less favorable than those offered to non-disabled persons.⁸⁴

C. Subrogation

There were two important amendments to subrogation statutes during 1990. The first amendment dealt with the handling of underinsured motorist subrogation. Under Indiana Code section 27-7-5-6, the legislature provided a solution to the frequently troubling question of how a person can settle for the underlying limit of a third party's insurance policy without waiving his own right to recover against his own insurer for underinsured motorist coverage.

The statute now provides that an insured may notify his underinsured motorist carrier that he has received a bona fide offer of settlement from an underinsured motorist for the underinsured motorist's limits.⁸⁵ The underinsured carrier is then obligated to advance to its insured an amount equal to the amount provided for in the settlement offer within thirty days after the underinsured carrier receives the notice.⁸⁶ If the carrier does not do so, the insured may settle with the underlying policy

79. *Id.* § 27-4-1-6(1) (Supp. 1990).

80. *Id.* § 27-4-1-5.5(d).

81. *Id.* § 27-4-1-19.

82. Act of Mar. 16, 1990, Pub. L. No. 121-1990, § 9, 1990 Ind. Acts 1956; Act of Mar. 20, 1990, Pub. L. No. 149-1990, § 4, 1990 Ind. Acts 2092.

83. IND. CODE § 27-7-6-12(a) (Supp. 1990).

84. *Id.* § 27-7-6-12(b).

85. *Id.* § 27-7-5-6(b).

86. *Id.*

holder, and all subrogation rights by the underinsured carrier are waived.⁸⁷ If, however, the underinsured carrier advances the payment, the underinsured carrier has full rights of subrogation, and literally steps into the shoes of its insured in pursuing the claim against the underinsured motorist.⁸⁸

Indiana Code section 27-7-5-6 also addressed the question of subrogation when an insurer pays uninsured motorist coverage or underinsured motorist coverage because of the insolvency of an insolvent insurer.⁸⁹ The statute indicates that the paying insurer has no right of subrogation against the insured of the insolvent insurer or against the Indiana Insurance Guaranty Association, except that the paying insurer may subrogate against the insolvent insurer's insured that portion of its payment that exceeds the liability limits of the insolvent insurer's policy.⁹⁰

Indiana Code section 34-4-33-12 was also amended in 1990. This section provides that a subrogation claim, or other lien or claim arising out of the payment of medical expenses or other insurance benefits, is diminished by the comparative fault of the insured or the uncollectibility of the full value of the insured's claim.⁹¹ The statute now has an additional section that requires the party holding the lien or claim to bear a pro rata share of the claimant's attorney's fees and litigation expenses.⁹² In other words, the insurer can no longer refuse to pay the plaintiff's attorney's fees for recovering the lien amount.

87. *Id.*

88. *Id.*

89. *Id.* § 27-7-5-6(c).

90. *Id.*

91. *Id.* § 34-4-33-12.

92. *Id.*

