

# SURVEY OF RECENT DEVELOPMENTS IN INSURANCE LAW

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## INTRODUCTION

During this survey period,<sup>1</sup> the Indiana Supreme Court acted to “giveth and taketh away” substantive rights in the insurance industry. The court ushered in the survey period with *Miller Brewing Co. v. Best Beers*,<sup>2</sup> by refusing to permit a party<sup>3</sup> to seek punitive damages from a defendant<sup>4</sup> who breached a contract.<sup>5</sup> Only a few months later, with its decision in *Erie Insurance Co. v. Hickman*,<sup>6</sup> the Indiana high court showed that it also could “taketh away” substantive rights.

Although Indiana courts rendered many other insurance decisions during the survey period,<sup>7</sup> this Article’s main focus is the probable effect of the Indiana Supreme Court’s ruling in *Hickman*. This Article will also address notable decisions in the following areas: “intentional acts” exclusions; health and life insurance; automobile coverage; and uninsured/underinsured motorist coverage.

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1. The survey period for this issue is approximately September 1, 1992 to October 31, 1993.

2. 608 N.E.2d 975 (Ind. 1993).

3. In this context, “party” also refers to the insured in an insurance contract.

4. “Defendant” includes an insurance company.

5. See Judy L. Woods & Brad A. Galbraith, *Recent Developments in Contract and Commercial Law*, 27 IND. L. REV. 769 (1994).

6. 622 N.E.2d 515 (Ind. 1993).

7. Practitioners may wish to review many of the other notable insurance law decisions from the survey period. See, e.g., *Sullivan v. American Casualty Co.*, 605 N.E.2d 134 (Ind. 1992) (defensive use of collateral estoppel in uninsured motorist litigation); *West Am. Ins. Co. v. Mid-American Fire & Casualty Co.*, 611 N.E.2d 646 (Ind. Ct. App. 1993) (whether an auto policy covered a newly purchased automobile); *Bailey v. Shelter Mut. Ins. Co.*, 615 N.E.2d 508 (Ind. Ct. App. 1993) (whether wife who was listed as an insured was entitled to fire insurance proceeds when court eliminated wife’s interest in property by divorce); *Frankenmugh Mut. Ins. Co. v. Williams*, 615 N.E.2d 462 (Ind. Ct. App. 1993) (insurer not responsible for insured’s judgment absent notice); *Daniels v. Cincinnati Ins. Co.*, 800 F. Supp. 753 (S.D. Ind. 1992) (addressing whether liability policy covered insured CEO for personal liability on hazardous chemical claim); *Lift-A-Loft Corp. v. Rodes-Roper-Love Ins. Agency, Inc.*, 975 F.2d 1305 (7th Cir. 1992) (statute of limitations on breach of contract claim against insurance agency); *Baylor Heating & Air Conditioning, Inc. v. Federated Mut. Ins. Co.*, 987 F.2d 415 (7th Cir. 1993) (definition of “occurrence” under comprehensive general liability policy); *United Farm Bureau Mut. Ins. Co. v. Schult*, 602 N.E.2d 173 (Ind. Ct. App. 1992) (addressing liability interests in partnership); *American Economy Ins. Co. v. Motorists Mut. Ins. Co.*, 605 N.E.2d 162 (Ind. 1992) (addressing policy language for the reduction of underinsured motorist benefits based on amounts received from underinsured motorist).

## I. ACTION FOR INSURER'S TORTIOUS BREACH OF A DUTY OF GOOD FAITH

Although not a case specifically dealing with insurance, the Indiana Supreme Court's decision in *Miller Brewing Co. v. Best Beers*<sup>8</sup> made a significant contribution to the field of insurance law. In *Miller*, a beer distributor sought consequential and punitive damages from a beer brewer for the brewer's alleged breach of a distributorship agreement.<sup>9</sup> One of the issues raised in the appeal was whether the distributor was entitled to seek punitive damages for the brewer's breach of the contract.

The Indiana Supreme Court first reiterated Indiana's general rule that a plaintiff cannot recover punitive damages in a breach of contract action.<sup>10</sup> It also observed that Indiana courts seemed to suggest that there were exceptions to this general rule,<sup>11</sup> referring to *Vernon Fire & Casualty v. Sharp*.<sup>12</sup> In *Sharp*, an insured sought punitive damages from two insurers after they failed to indemnify the insured for a covered fire loss.<sup>13</sup> The insurers refused to pay for losses that the policy unquestionably covered until the parties resolved a separate disputed coverage claim.<sup>14</sup> Although the *Sharp* court recognized Indiana's rule against the recovery of punitive damages in a breach of contract case, it found that the insured successfully had established that the insurers engaged in "intentional and wanton" tortious conduct.<sup>15</sup> Consequently, the court upheld the insured's judgment for punitive damages.<sup>16</sup>

Although the *Sharp* court ruled that the insured was entitled to punitive damages by showing that the insurers committed an independent tort, the court also mentioned that a plaintiff may recover punitive damages in a breach of contract case without establishing that the defendant committed an independent tort:

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8. 608 N.E.2d 975 (Ind. 1993).

9. *Id.* at 978.

10. *Id.* at 981 (citing *inter alia* *Lawyers Title Ins. Corp. v. Pokvaka*, 595 N.E.2d 244, 250 (Ind. 1992)); *Bud Wolf Chevrolet, Inc. v. Robertson*, 519 N.E.2d 135, 136 (Ind. 1988); *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349, 362 (Ind. 1982)).

11. *Id.*

12. 349 N.E.2d 173 (Ind. 1976).

13. The specific paragraphs from the insured's complaint for punitive damages provided:  
[2.] That said defendants have wrongfully breached said contracts of insurance and refuse to pay for the loss sustained by the plaintiff, and that said defendants have been guilty of bad faith in dealing with their insured, this plaintiff.  
[3.] That the said defendants have acted in an intentional and wanton manner in dealing with their insured, this plaintiff, and as a result thereof they have refused to pay this plaintiff the proceeds of said insurance.

*Id.* at 179.

14. *Id.* at 181-83.

15. *Id.* at 184.

16. *Id.* at 185.

Neither of [the reasons for the requirement of a plaintiff establishing an independent tort by the defendant] is very compelling when it appears from the evidence as a whole that a serious wrong, tortious in nature, has been committed, but the wrong does not conveniently fit the confines of a pre-determined tort. . . .<sup>17</sup>

In subsequent decisions, courts have referred to this language when permitting a plaintiff to recover punitive damages in breach of contract cases without having first established an independent tort.<sup>18</sup>

The *Miller* court, finding that the above-cited language in *Sharp* was *dicta*,<sup>19</sup> instead held:

[i]n order to recover punitive damages in a lawsuit founded upon a breach of contract, the plaintiff must plead and prove the existence of an independent tort of the kind for which Indiana law recognizes that punitive damages may be awarded.<sup>20</sup>

With the *Miller* decision, the court reaffirmed part of the *Sharp* language, which recognized that Indiana law requires an insured to plead and prove an independent tort before the insured may seek punitive damages for alleged bad faith.<sup>21</sup> Additionally, the *Miller* court established that there are no exceptions to this rule by eliminating the confusing *dicta* of *Sharp*, in which the court stated that a plaintiff does not always need to establish an independent tort before he or she may recover punitive damages in a breach of contract case.<sup>22</sup> However, *Miller's* significance to the insurance industry was short-lived.

Later in the year, the Indiana Supreme Court judicially created the first exception to the general rule pronounced in *Miller*. The *Erie Insurance Co. v. Hickman*<sup>23</sup> decision will significantly impact attorneys representing both insureds and insurance companies. In *Hickman*, the Indiana Supreme Court recognized "a cause of action for the tortious breach of an insurer's duty to deal

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17. *Id.* at 180.

18. *Miller*, 608 N.E.2d at 982.

19. Specifically, the *Miller* court stated:

[W]e conclude that the language in *Vernon Fire* was *dicta* when it suggested that punitive damages are available in contract actions even if the plaintiff does not also establish each element of a recognized tort for which Indiana law would permit the recovery of punitive damages.

*Id.* at 983.

20. *Id.* at 984.

21. *Id.*

22. *See supra* notes 17-19.

23. 622 N.E.2d 515 (Ind. 1993).

with its insured in good faith."<sup>24</sup> The court's recognition of this cause of action, created a new tort in the state of Indiana.<sup>25</sup>

In *Hickman*, the insured obtained only liability and uninsured motorist coverages from the insurer.<sup>26</sup> The insured was involved in an automobile accident with another driver,<sup>27</sup> and then reported the accident to the insurer for uninsured motorist coverage. The insurer investigated the accident and concluded that the other driver was insured.<sup>28</sup>

Early in the investigation, the insurer advised its insured to pursue her recovery against the other driver.<sup>29</sup> However, the insured later discovered that the other driver was uninsured and made a claim for uninsured motorist coverage with her insurer.<sup>30</sup> The insurer allowed a year to pass before confirming that the other driver was in fact uninsured.<sup>31</sup> Finally, when the insurer finished its investigation, it determined that the insured was not entitled to uninsured motorist benefits because her comparative fault was greater than fifty percent.<sup>32</sup>

In response to the insurer's refusal to proceed further,<sup>33</sup> the insured filed a lawsuit against the insurer and the other driver.<sup>34</sup> The insured sought to recover from the other driver for personal injuries and property damage.<sup>35</sup> The insured also sued the insurer for breach of the insurance contract, bad faith and punitive damages for failing to pay uninsured motorist benefits.<sup>36</sup>

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24. *Id.* at 519.

25. Although the beginning of the *Hickman* decision appears to assert that such a tort remedy already existed in Indiana ("We grant transfer to reaffirm the existence of a duty that an insurer deal in good faith with its insured, . . .") *Id.* at 517, the court actually recognized this tort for the first time. *Id.* at 519.

26. *Id.* at 521.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 522. The insurance policy provided that the insurer agreed to pay only the amount of damages that the insured would be entitled to recover from the uninsured motorist. *Id.* at 521. Therefore, if the insured's comparative fault was greater than fifty percent, the insured would not be entitled to recover from the insurer under the uninsured motorist coverage. *Id.* See also IND. CODE. ANN. §§ 34-4-33-1 to -12 (West Supp. 1993).

33. *Id.* at 522. The insured demanded arbitration under the policy and named an arbitrator. However, the insurer failed to name its arbitrator. *Id.*

34. *Id.*

35. *Id.* The insured obtained a default judgment against the other driver. *Id.*

36. *Id.*

At trial, the jury returned a verdict for the insured, awarding both compensatory and punitive damages.<sup>37</sup> The insurer appealed the punitive damage award after the Indiana Supreme Court granted transfer and remanded the case on another issue.<sup>38</sup>

Although acknowledging the impact of *Miller*, the *Hickman* court ruled that an exception should exist in the relationship between the insured and the insurer.<sup>39</sup> In creating an exception, the court recognized an implied legal duty on the part of the insurer to deal in good faith with its insured in every insurance contract.<sup>40</sup> The "special relationship" between the insured and the insurer justifies recognizing a cause of action violating that duty.<sup>41</sup>

The *Hickman* court also discussed the application of punitive damages in situations where the insured possesses a tort action for "bad faith" by the insurer. The court noted that even if the insured succeeds in establishing that the insurer breached his duty of good faith, the insured is not automatically entitled to punitive damages.<sup>42</sup> Instead, the existing standard for recovery of punitive damages remains.<sup>43</sup> Punitive damages are recoverable only if an insured demonstrates, by clear and convincing evidence, that the insurer

acted with malice, fraud, gross negligence, or oppressiveness which was not the result of a mistake of fact or law, honest error or judgment, overzealousness, mere negligence, or other human failing, in the sum [that the jury believes] will serve to punish the defendant and to deter it and others from like conduct in the future.<sup>44</sup>

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37. *Id.* The court summarized the verdict as follows:

[The driver of the insured's car] was awarded compensatory damages in the amount of \$85.75 and punitive damages in the amount of \$1,000. [The insured] was awarded compensatory damages in the amount of \$2046.97 for the damages to her vehicle, the towing charge, the cost of temporary transportation, and interest she incurred on a loan she obtained to have her car repaired at her own expense, and punitive damages in the amount of \$10,000.

*Id.* at 522.

38. The Indiana Court of Appeals originally reversed the award of punitive damages. *Erie Ins. Co. v. Hickman*, 580 N.E.2d 320 (Ind. Ct. App. 1991). The Indiana Supreme Court then reversed the Court of Appeals' decision in *Erie Ins. Co. v. Hickman*, 605 N.E.2d 161 (Ind. 1992). Following remand, the Court of Appeals once again reversed the trial court's award of punitive damages because punitive damages are not recoverable in a breach of contract case. *Erie Ins. Co. v. Hickman*, 610 N.E.2d 283 (Ind. Ct. App. 1993).

39. 622 N.E.2d at 518.

40. *Id.*

41. *Id.* Although the court recognized the right of an insured to pursue a tort remedy for violation of bad faith by an insurer, the court also determined that the evidence presented at trial did not support the imposition of punitive damages against the insured. *Id.* at 520.

42. *Id.* at 520.

43. *Id.*

44. *Id.* (quoting *Bud Wolf Chevrolet, Inc. v. Robertson*, 519 N.E.2d 135, 137-38 (Ind.

The immediate impact of the *Hickman* decision is unclear without a definable standard for those actions by an insurer that will constitute "bad faith." The *Hickman* court readily admitted that no uniform definition existed in other jurisdictions that had recognized such an action.<sup>45</sup>

An examination of the cases from other states reveals that the elements necessary to establish an insured's action for "bad faith" differ. In Alabama, one court stated "that an actionable tort arises for an insurer's intentional refusal to settle a direct claim where there is either (1) no lawful basis for the refusal coupled with actual knowledge of that fact or (2) intentional failure to determine whether or not there was any lawful basis for such refusal."<sup>46</sup> In Arizona, a court noted:

We recently clarified that tort recovery for bad faith is allowed if an insurer intentionally breaches the implied covenant of good faith and fair dealing in the insurance contract by denying the insured the security and protection from calamity that is the object of the insurance relationship. (citation omitted) To establish a prima facie case of bad faith, [the insured] had to prove that [the insurer] acted intentionally, not inadvertently or mistakenly, and that [the insurer] dealt unfairly or dishonestly with [the insured's] claim or failed to give fair and equal consideration to the [insured's] interests.<sup>47</sup>

A California court described the standard by stating:

It is the obligation, deemed to be imposed by the law, under which the insurer must act *fairly and in good faith* in discharging its contractual responsibilities. Where in so doing, it fails to deal fairly and in good faith with its insured by refusing, without proper cause, to compensate its insured for a loss covered by the policy, such conduct may give rise to a cause of action in tort for breach of an implied covenant of good faith and fair dealing.<sup>48</sup>

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1988)).

45. The *Hickman* opinion states:

Although the majority of states recognize a cause of action in tort in the context of third-party claims and a lesser number for first party claims, . . . there is no uniform approach among individual states. Given the variety of ways in which tort claims for the failure of the insurer to exercise good faith may arise, (citation omitted), it is neither necessary nor prudent for us to fully define the parameters of the tort in this opinion.

*Id.* at 519, n.2.

46. *Chavers v. National Sec. Fire & Casualty Co.*, 405 So.2d 1, 7 (Ala. 1981).

47. *Hawkins v. Allstate Ins. Co.*, 733 P.2d 1073, 1079 (Ariz. 1987) *cert. denied* 484 U.S. 972 (1987).

48. *Gruenberg v. Aetna Ins. Co.*, 510 P.2d 1032, 1037 (Cal. 1973).

In addition to the possible uncertainty that the *Hickman* decision may bring, the necessity for this new tort seems questionable. The *Hickman* court failed to cite any perceived problem concerning "bad faith" by insurers; in fact, there are relatively few instances in which an insurer actively engages in "bad faith."<sup>49</sup>

Indiana currently has statutory law intended to deter those actions by an insurer that might be considered "bad faith." Indiana's Unfair Claim Settlement Practices Act<sup>50</sup> ("the Act") addresses those actions in which an insurer may not deal in good faith with its insured. The purpose of the Act was to regulate the business of insurance by: "[D]efining, or providing for the determination of, all such practices which constitute in this state unfair methods of competition and unfair or deceptive acts or practices and by prohibiting the trade practices so defined and determined."<sup>51</sup> The Act also lists specific actions by an insurance company handling a claim that would be considered "unfair claim settlement practices."<sup>52</sup>

In *Hickman*, the Indiana Supreme Court dismissed the Act's applicability to the creation of a tort remedy for "bad faith" because the Act provided no private cause of action.<sup>53</sup> Although the Act does not provide a private remedy to the insured, the insurer faces the prospect of being assessed penalties by the commissioner of the Indiana Department of Insurance should its representatives engage in unfair claim settlement practices.<sup>54</sup> These penalties may also include monetary fines against the insurer.<sup>55</sup>

One of the effects of creating a tort remedy for a breach of the duty of good faith is that now an insured is permitted to seek punitive damages.<sup>56</sup> One of the well documented purposes of assessing punitive damages is to punish the defendants and to deter similar conduct in the future.<sup>57</sup> By permitting an insured to seek punitive damages for alleged acts of "bad faith," the insurer is now subject to a double penalty if the insured obtains punitive damages and if the insurer is assessed penalties by the Insurance Commissioner for its actions.

The *Hickman* decision will likely create a plethora of litigation for practitioners on both sides of insurance law cases. Without a clear definition of

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49. *Sharp* illustrates an example of what these authors would consider bad faith. In *Sharp*, an insurer refused to make payment for covered losses until the insurer settled with the insured for a disputed loss. See *supra* notes 12-14 and accompanying text.

50. IND. CODE ANN. § 27-4-1-4 to -19 (West 1993 & Supp. 1993).

51. IND. CODE ANN. § 27-4-1-1 (West 1993).

52. For a list of the "unfair claim settlement practices," practitioners should refer to IND. CODE ANN. § 27-4-1-4.5 (West 1993).

53. *Hickman*, 622 N.E.2d at 519, n.1. See also IND. CODE ANN. § 27-4-1-18 (West 1993).

54. IND. CODE ANN. §§ 27-4-1-5.6, -6 (West 1993).

55. *Id.*

56. *Hickman*, 622 N.E.2d at 520.

57. *Miller*, 608 N.E.2d at 983.

those acts that constitute "bad faith," insureds will be able to hold their right to pursue an action for "bad faith" for "ransom" against insurers to force insurers to settle cases.

Additionally, an insurer's right "to disagree" with an insured may be in jeopardy. As the *Hickman* court mentioned, an insurer has long possessed the ability to disagree with an insured about the insured's right to recover:

It is evident that the exercise of [the right to disagree as to the amount of recovery] may directly result in the intentional infliction of temporal damage, including the damage of interference with an insured's business (which an insured will undoubtedly consider to be oppressive). The infliction of this damage has generally been regarded as privileged, and not compensable, for the simple reason that it is worth more to society than it costs, i.e., the insurer is permitted to dispute its liability in good faith because of the prohibitive social costs of a rule which would make claims nondisputable.<sup>58</sup>

As a practical matter, how long will the insurer's right to disagree exist? The insured now possesses an additional weapon as leverage against the insurer to settle a claim. Without any standard to define what action may constitute "bad faith," insurers must now, in asserting their right "to disagree," risk being assessed punitive damages for failing to settle a questionable claim.

The precedent created by the *Miller* decision would have best served those practitioners of insurance law. By requiring plaintiffs to establish independent torts like fraud or gross negligence, insureds damaged by such tortious conduct possessed the right to be compensated and to assess punitive damages against the insurer. However, insurance law after *Hickman* is now clouded. After *Hickman*, the cost of insurance will likely increase in light of the anticipated litigation. With no definition of "bad faith," insureds will no doubt attempt to define "bad faith" in any circumstance in which the insurer asserts his or her purported "right to disagree." Likewise, insurers will be tentative to respond to claims based upon this generalized, undefinable fear of acting in "bad faith." Litigation and appeals likely will abound as the court will be asked to focus upon insurers' actions and to define whether they constitute "bad faith."

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58. *Hickman*, 622 N.E.2d at 520 (quoting *Vernon Fire & Casualty Ins. Co. v. Sharp*, 349 N.E.2d 173, 181 (Ind. 1976)).

## II. INTENTIONAL ACTS EXCLUSION

### A. Shooting Incidents

Over the last several years, many Indiana cases have addressed the "intentional acts" exclusion.<sup>59</sup> In most situations, the cases involve shootings by the insured.<sup>60</sup> During the survey period, Indiana courts issued three decisions involving such shootings. Two of the cases, *State Farm Casualty Co. v. Sanders*<sup>61</sup> and *Allstate Insurance Co. v. Barnett*,<sup>62</sup> contain a thorough discussion of the criteria relied upon by the courts in determining whether the intentional act exclusion applies. Although not included in this survey, practitioners within this area should review these cases.

Another shooting case is also worthy of attention. In *Hawkins v. Auto-Owners Mutual Insurance Co.*,<sup>63</sup> an insured who shot another person was convicted of attempted murder.<sup>64</sup> His insurer sought a declaratory judgment that no liability insurance coverage was available to the insured after the shooting victim's estate filed a lawsuit against the insured.<sup>65</sup> The trial court granted the insurer's motion after considering the criminal trial transcript as evidence in the declaratory judgment action.<sup>66</sup>

On appeal, the Indiana Court of Appeals reversed the summary judgment entry, and held that a criminal conviction was not admissible in a subsequent civil case pursuant to existing precedent.<sup>67</sup> Although the court recognized that Indiana's General Assembly had enacted a statute that permitted the admission of a criminal judgment as evidence in a civil case,<sup>68</sup> it determined that any

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59. The exclusion's language is usually very similar to the following:

1. Coverage L and Coverage M do not apply to:

a. bodily injury or property damage:

(1) which is either expected or intended by an insured.

*State Farm and Casualty Co. v. Sanders*, 805 F. Supp. 1453, 1455 (S.D. Ind. 1992).

60. Some previous Indiana cases include *Allstate Ins. Co. v. Herman*, 551 N.E.2d 844 (Ind. 1990); *Auto-Owners Mut. Ins. Co. v. Stroud*, 565 N.E.2d 1093 (Ind. Ct. App. 1991); and *Bolin v. State Farm Fire and Casualty Co.*, 557 N.E.2d 1084 (Ind. Ct. App. 1990).

61. 805 F. Supp. 1453 (S.D. Ind. 1992).

62. 816 F. Supp. 492 (S.D. Ind. 1993).

63. 608 N.E.2d 1358 (Ind. 1993).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* The Indiana Court of Appeals relied upon *Brooks v. State*, 291 N.E.2d 559 (Ind. Ct. App. 1973).

68. IND. CODE ANN. § 34-3-18-1.

statute conflicting with trial procedure rules enacted by the Supreme Court was null and void.<sup>69</sup>

The Indiana Supreme Court, however, observed that federal courts have long permitted the admissibility of criminal convictions in a subsequent civil case.<sup>70</sup> Furthermore, the majority of jurisdictions in the United States also permit the introduction of criminal convictions in subsequent civil cases.<sup>71</sup> Consequently, the court accepted Indiana's statute<sup>72</sup> permitting the introduction of a criminal conviction in a subsequent civil case and affirmed the trial court's entry of summary judgment.<sup>73</sup>

The importance of the *Hawkins* decision is that it will be easier for insurers to introduce evidence of an insured's intentional conduct if the insured was convicted of an intentional crime for the same conduct. However, practitioners should be wary of not producing other evidence of an insured's intentional conduct. Although the *Hawkins* court concluded that the criminal conviction conclusively established that coverage was excluded under the facts presented, such evidence will not always be conclusive. Instead, the criminal conviction is only one indicia necessary to satisfy the exclusion.

### B. Non-shooting Incidents

The case of *Progressive Casualty Insurance Co. v. Morris*<sup>74</sup> involved a motorcycle accident in which an insurer sought to disclaim coverage by contending that the insured motorcycle rider acted intentionally in crossing a center line and striking another vehicle.<sup>75</sup> Although it involves the intentional act exclusion, this case best serves as a reminder about the steps an insurer must take to disclaim coverage properly.

In *Morris*, the injured motorist brought a lawsuit for personal injuries and property damage against the motorcycle driver.<sup>76</sup> After receiving notice of the lawsuit, the motorcyclist's insurer failed to take any action to represent the rider or to seek a declaratory judgment that no coverage existed.<sup>77</sup> The injured motorist obtained a default judgment and initiated garnishment proceedings against the insurer.<sup>78</sup> The insurer then appeared and attempted to claim that the

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69. 608 N.E.2d at 1359.

70. *Id.* See FED. R. EVID. 803(22).

71. *Id.*

72. IND. CODE ANN. § 34-3-18-1 (West 1983).

73. 608 N.E.2d at 1359.

74. 603 N.E.2d 1380 (Ind. Ct. App. 1992).

75. *Id.* at 1382.

76. *Id.*

77. *Id.*

78. *Id.*

motorcyclist's actions were intentional and excluded from coverage.<sup>79</sup> Relying on *Liberty Mutual Insurance Co. v. Metzler*,<sup>80</sup> the Indiana Court of Appeals affirmed the trial court's grant of summary judgment to the injured motorist.<sup>81</sup> Specifically, the court determined that the insurer was collaterally estopped from litigating this issue when it failed to intervene in the other driver's action against the insured.<sup>82</sup>

The *Morris* decision is important as a reminder to insurers about protecting their rights to disclaim coverage. As stated in the *Metzler* decision:

An insurer, after making an independent determination that it has no duty to defend, must protect its interest by either filing a declaratory judgment action for a judicial determination of its obligations under the policy or hire independent counsel and defend its insured under a reservation of rights. (citations omitted). As we have indicated, '[An insurer] can refuse to defend or clarify its obligation by means of a declaratory judgment action. If it refuses to defend, it does so at its peril. (citations omitted) . . .' An insurer, having knowledge its insured has been sued, may not close its eyes to the underlying litigation, force the insured to face the risk of litigation without the benefit of knowing whether the insurer intends to defend or to deny coverage, and then raise policy defenses for the first time after judgment has been entered against the insured.<sup>83</sup>

### III. PROPERTY AND NON-AUTO LIABILITY CASES

#### A. Definition of "Occurrence"

In *City of Jasper v. Employers Insurance*,<sup>84</sup> the Seventh Circuit was asked to address when an "occurrence" arises to initiate coverage under a comprehensive general liability policy.<sup>85</sup> In *Jasper*, a city issued two building permits to a commercial developer.<sup>86</sup> After the developer began construction, neighbors filed a zoning complaint. From the proceedings of the zoning complaint, it was

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79. *Id.*

80. 586 N.E.2d 897 (Ind. Ct. App. 1992).

81. 603 N.E.2d at 1382.

82. 603 N.E.2d at 1383.

83. *Metzler*, 586 N.E.2d at 902.

84. 987 F.2d 453 (7th Cir. 1993).

85. *Id.* at 454.

86. *Id.* at 455.

determined that the building permits were issued in violation of local ordinances. The developer then demolished the newly constructed building.<sup>87</sup>

In an underlying lawsuit, the developer sued the city for negligence in issuing the building permits.<sup>88</sup> The city requested that its insurer defend the lawsuit, but the insurer refused on the basis that the “occurrence” as defined by the policy,<sup>89</sup> took place outside the policy period.<sup>90</sup>

In interpreting this policy language, the Seventh Circuit concluded that the “occurrence” did not arise until the property damage actually resulted.<sup>91</sup> Thus, the date that the developer was ordered to demolish the building became the date of the “occurrence” of the property damage.<sup>92</sup> This date occurred after the policy period expired and no coverage was found to exist.<sup>93</sup> Although the city’s negligence may have occurred during the policy period, the “occurrence” happened after the policy period expired.

The Seventh Circuit also recognized that the type of loss resulting from the city’s negligence was not the type of loss for which the parties to the insurance contract would contemplate to be insured.<sup>94</sup> In a departure from the ruling of the district court, the Seventh Circuit found that there was no “accident” in this case.<sup>95</sup> Instead, the city engaged in an “action” that resulted in damage to the developer.<sup>96</sup> The court distinguished between “actions” and “accidents,” and determined that the city could not obtain insurance coverage for an “action” under this policy.<sup>97</sup>

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87. *Id.*

88. *Id.*

89. The policy language provided as follows:

‘[O]ccurrence’ means an accident, including continuous or repeated exposure to conditions, which results in *bodily injury or property damage* neither expected nor intended from the standpoint of the *insured*.

*Id.* at 454 (emphasis in original).

90. *Id.* at 455.

91. *Id.* at 457.

92. *Id.*

93. *Id.*

94. Specifically, the court stated:

We think no realistic insured city could rationally believe it was covered for the consequences of judgmental decisions it might make in the course of performing its municipal duties — even though these decisions might ultimately be reversed by the state court. The conduct of the insured was not an accident; rather, it was part of the normal and expected consequences of government. There may be some language or some insurance coverage to protect a governmental entity from this type of result, but the policy in question does not.

*Id.* at 457.

95. *Id.*

96. *Id.*

97. *Id.*

*B. Interpretation of One-Year Provision to Bring Suit*

During the survey period, two decisions addressed and interpreted the one-year limitation provision found in most insurance policies, which require an insured to bring suit against an insurer within one year from the date of loss if an insured believes the company improperly refused to pay a claim.<sup>98</sup>

In *Brunner v. Economy Preferred Insurance Co.*,<sup>99</sup> the insured suffered hail damage to the roof of a commercial property.<sup>100</sup> However, the insured did not discover the hail damage until nearly eighteen months after the damage occurred.<sup>101</sup> Upon discovery, the insured notified the insurer of the damage, but the insurer immediately denied the claim because it had not been timely asserted.<sup>102</sup>

When the insured sued the insurer for breach of contract, the insurer moved for summary judgment, contending that the one-year limitation barred the action. In response, the insured argued that a "discovery" rule should apply in interpreting the one-year limitation period.<sup>103</sup>

Characterizing the case as one of first impression, the Indiana Court of Appeals rejected the insured's argument.<sup>104</sup> The court concluded that the failure to discover the damage did not toll the policy provision which limited the period in which the insured could bring suit.<sup>105</sup> The court based its decision upon the fact that an insurance company requires prompt notice of a loss so that it will have the opportunity to make a timely and adequate investigation of the circumstances surrounding the loss.<sup>106</sup> The passage of time can frustrate the insurer's ability to prepare an adequate defense.<sup>107</sup> Thus, a policy provision containing a strict deadline for notifying the carrier of claims and bringing suit on those claims within the deadline is valid in Indiana.<sup>108</sup>

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98. This one-year limitation clause is similar to the following:

D. LEGAL ACTION AGAINST US

No one may bring a legal action against us under this Coverage Part unless:

1. There has been full compliance with all the terms of this Coverage Part; and
2. The action is brought within one year after the date on which direct physical loss or damage occurred.

*Brunner v. Economy Preferred Ins. Co.*, 597 N.E.2d 1317, 1318 (Ind. Ct. App. 1992).

99. *Id.* at 1317.

100. *Id.* at 1318.

101. *Id.*

102. *Id.*

103. *Brunner*, 597 N.E.2d at 1318.

104. *Id.* at 1319-20.

105. *Id.* at 1319.

106. *Id.* See also *Miller v. Dilts*, 463 N.E.2d 257 (Ind. 1984).

107. *Brunner*, 597 N.E.2d at 1319.

108. *Id.* at 1319-20.

The second case addressing the one-year limitation issue was *Wood v. Allstate Insurance Co.*<sup>109</sup> An insured suffered a loss from a fire that started late in the evening but was not extinguished until the early morning hours of the next day.<sup>110</sup> A year passed as the insurer investigated the claim after apparently suspecting the insured of arson.<sup>111</sup>

On the anniversary of the date the fire was extinguished, the insured filed suit against the insurer for breach of contract.<sup>112</sup> After the insurer filed a summary judgment motion, the court determined that the date the fire began was the time the one-year limitation began to run.<sup>113</sup> Consequently, the insured's suit was untimely pursuant to the one-year limitation.<sup>114</sup>

### C. Interpretation of Liability Deductible on Multiple Claims

In rare circumstances, certain insurance policies are written with liability insurance deductibles to apply to certain type of claims. In particular, painting companies and car washes have deductibles in their liability policies because of the possibility that multiple units will be damaged in the event of one negligent act.

In *General Casualty v. Diversified Painting Service, Inc.*,<sup>115</sup> the court was asked to interpret a policy's deductible provision after a liability claim was made against an insured paint company. The insured's actions damaged sixty to eighty cars after failing to control the overspray at a project.<sup>116</sup> The insured's policy contained a "per claim" deductible of \$250.<sup>117</sup> The insured attempted to argue that its policy was ambiguous in that the deductible should apply to the "occurrence" of the overspray rather than to each claim presented.<sup>118</sup> The argument before the court concerned whether the generalized act of overspraying

109. 815 F. Supp. 1185 (N.D. Ind. 1993).

110. *Id.* at 1189-90.

111. *Id.*

112. *Id.* at 1188.

113. *Id.* at 1191.

114. *Id.*

115. 603 N.E.2d 1389 (Ind. Ct. App. 1992).

116. *Id.* at 1390.

117. *Id.*

118. *Id.* The insured relied upon the following policy language:

[The insured's] obligation to pay damages because of 'property damage' applies only in excess of any deductible amount stated in the Declarations. The limits of insurance applicable to each 'occurrence' shall be reduced by the amount of such insurance.

....

The deductible amount applies to all damages because of 'property damages' sustained by one person or organization as a result of any one occurrence.

The insurer relied upon language in the declaration page which stated that a "PROPERTY DAMAGE PER CLAIM DEDUCTIBLE" of \$250 applied. *Id.* at 1390-91.

was a single occurrence that required the application of a single deductible, or whether the deductible must be applied to each damaged vehicle.<sup>119</sup>

Based upon the policy's language, the court held that each damaged vehicle was subject to a separate liability deductible.<sup>120</sup> Specifically, the court determined that the policy language indicated that the parties intended for the insurer to apply a separate deductible to each individual property claim.<sup>121</sup>

The case is worthy reading for those attorneys representing an insured who has the type of business where a single generalized activity can result in multiple injuries or damages.

#### IV. HEALTH AND LIFE INSURANCE

##### A. Avoidance of Coverage—Insured's Material Misrepresentation

*Curtis v. American Community Mutual Insurance Co.*<sup>122</sup> contains an excellent analysis of the elements of a material misrepresentation by an insured in a health insurance application. All practitioners dealing with a material misrepresentation case may wish to review this decision.

In *Curtis*, the insurer accused the insured of improperly answering questions on her application for health insurance.<sup>123</sup> Had the insured answered the application properly, the responses most likely would have revealed that the insured was suffering from the early symptoms of cervical cancer.<sup>124</sup> After the insurer issued the policy, the insured received a hysterectomy for which the insurer refused to pay.<sup>125</sup> The insurer argued that had it known about the insured's earlier problems revealed in a pap smear, the insurer would have issued the policy with an endorsement excluding coverage for disorders of the genital organs.<sup>126</sup>

The *Curtis* court noted that a misrepresentation on an insurance application is "material" if the omitted fact or statement, if truly stated, might have influenced the insurer's decision to issue the policy or charge a higher premium.<sup>127</sup> A false representation in an insurance policy concerning a

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119. *Id.* at 1390.

120. *Id.*

121. *Id.*

122. 610 N.E.2d 871 (Ind. Ct. App. 1993).

123. *Id.* at 873.

124. *Id.* at 874.

125. *Id.* at 873.

126. *Id.* at 874.

127. *Id.*

material fact will void the policy even if the representation was made innocently.<sup>128</sup>

The insured argued that the insurer acted unreasonably in failing to investigate because the name and location of the insured's doctor were on the application.<sup>129</sup> The Court recognized that an insurer may rely on the insured's answers on an insurance application without conducting any investigation, if the insurer has no reason to doubt the validity of the answers.<sup>130</sup> In this situation, the insurer was not placed on "inquiry notice" of a sufficient nature to prompt it to conduct additional investigation.<sup>131</sup>

### B. Life Insured Proceeds—Murder By Beneficiary

In *Estate of Chiesi v. First Citizens Bank*,<sup>132</sup> a wife, who was a beneficiary of two life insurance policies on her husband, murdered her husband.<sup>133</sup> Because she was convicted of murder, the proceeds of the policies were transferred to the estate of the deceased.<sup>134</sup>

The *Estate of Chiesi* court was faced with the question of whether the proceeds should flow to the children of the decedent, or whether the creditors of the father's estate should be entitled to share the proceeds.<sup>135</sup> The Indiana Court of Appeals previously had held that claims against the proceeds of life insurance policies are normally exempt from a creditor's claims when the policy names a spouse as a beneficiary and the proceeds are for the benefit of the spouse.<sup>136</sup> However, the Indiana Supreme Court held that the proceeds were not exempt from attachment by creditors of the estate.<sup>137</sup> Consequently, the children of the insured decedent were required to share the proceeds from the life insurance policies with their father's creditors.

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128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 874-75.

132. 613 N.E.2d 14 (Ind. 1993).

133. *Id.*

134. IND. CODE ANN. § 29-1-2-12.1(a) (West Supp. 1992).

135. *Estate of Chiesi*, 613 N.E.2d at 14.

136. See *Estate of Chiesi v. First Citizens Bank*, 604 N.E.2d 3 (Ind. Ct. App. 1992), *aff'd*, 613 N.E.2d 14 (Ind. 1993). See also IND. CODE ANN. § 27-1-12-14(c) (West Supp. 1992).

137. *Estate of Chiesi*, 613 N.E.2d at 15.

## V. AUTOMOBILE CASES

A. *General Principles*

1. *Permissive Use of An Automobile.*—The issue of permission to use an automobile is one that arises frequently to insurance practitioners. The *Manor v. Statesman Insurance Co.*<sup>138</sup> decision includes a good description of the circumstances under which a permissive user of an automobile will have insurance coverage.

In this case, an employee of the named insured was using the insured's dump truck.<sup>139</sup> The employer previously had instructed the employee that he had permission only to drive the dump truck to and from a job site and his home,<sup>140</sup> and had expressly instructed the employee not to use the dump truck for personal use.<sup>141</sup> The employee sought the employer's permission to use the truck for his personal use.<sup>142</sup> He was unable to reach the employer, but used the dump truck anyway.<sup>143</sup> During this use, he was involved in an accident and was sued for damages by the injured parties.<sup>144</sup>

The insurer sought declaratory relief from defending or indemnifying the employee because of the employee's failure to obtain permission as required by the policy.<sup>145</sup> The court acknowledged that in determining whether an individual had the permission of the insured, Indiana had always followed the "liberal rule."<sup>146</sup>

However, the court concluded that the employer's express instructions restricting the employee's personal use of the vehicle overrode any implied permission that the employee may have thought he possessed.<sup>147</sup> In fact, the court recognized the employee's failure to reach the employer as a realization that he did not have permission to use the truck.<sup>148</sup>

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138. 612 N.E.2d 1109 (Ind. Ct. App. 1993).

139. *Id.* at 1111-12.

140. *Id.* at 1111.

141. *Id.*

142. *Id.* at 1112.

143. *Id.* The employee argued at trial that he had implied permission because the employer never called back to tell him not to use the truck.

144. *Id.* at 1112.

145. *Id.*

146. *Id.* at 1113. The "liberal rule" was been defined as a situation in which "one who has permission of an insured owner to use his automobile continues as such a permittee while the car remains in his possession, even though that use may later prove to be for a purpose not contemplated by the insured owner when he entrusted the automobile to the use of such permittee." *Arnold v. State Farm Mut. Auto. Ins. Co.*, 260 F.2d 161, 165 (7th Cir. 1958).

147. *Id.* at 1115.

148. *Id.* at 1114.

This case demonstrates how Indiana courts will review the facts in every case carefully. Furthermore, even though an employer has a policy that prohibits personal use of a company vehicle, there may be implied permission if the employer has allowed employees to routinely disregard company policy.<sup>149</sup>

2. *Temporary Substitute Vehicle*.—In *Deadwiler v. Chicago Motor Club Insurance Co.*,<sup>150</sup> the court addressed an issue of first impression in Indiana. The specific question was whether an insured's daughter had coverage under the insured's policy if the insured had a "temporary substitute vehicle."<sup>151</sup> The court held that, under Indiana law, a "temporary substitute vehicle" is "a car which was in the possession or under the control of the insured to the same extent and effect as the disabled car of the insured would have been except for its disablement."<sup>152</sup> In this particular case, the court found coverage did not exist for the insured's daughter because the insured did not have possession or control over the vehicle.<sup>153</sup>

3. *Definition of "Maintenance or Use" of a Vehicle*.—Practitioners may wish to review *Shelter Mutual Insurance Co. v. Barron*<sup>154</sup> for an example of an interesting factual situation and its application to a homeowner's policy. In *Barron*, the plaintiff was sitting on the hood of the insured's truck when a disagreement erupted between the two.<sup>155</sup> The plaintiff was injured when the insured grabbed her and pulled her from the hood of the truck.<sup>156</sup> After the plaintiff sued the insured, the insured's insurance company sought to avoid coverage under a policy exclusion in the insured's homeowner's policy for any injury that arose out of the "ownership, maintenance or use" of a motor vehicle.<sup>157</sup> However, the court rejected this argument, finding that the involvement of the truck was merely incidental to the injury.<sup>158</sup> As a result, coverage existed under the homeowner policy.

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149. *Id.* at 1113-14.

150. 603 N.E.2d 1365 (Ind. Ct. App. 1992).

151. *Id.* at 1366-67. The policy defined "temporary substitute vehicle" to mean:

4. Any auto or trailer you do not own while used as a temporary substitute for any other vehicle described in this definition which is out of normal use because of its:
  - a. breakdown;
  - b. repair.

*Id.* at 1367.

152. *Id.* at 1369 (quoting *Tanner v. Pennsylvania Thresherman and Farmers Mut. Casualty Ins. Co.*, 226 F.2d 498, 500 (6th Cir. 1955)).

153. *Deadwiler*, 603 N.E.2d at 1369.

154. 615 N.E.2d 503 (Ind. Ct. App. 1993).

155. *Id.* at 505.

156. *Id.*

157. *Id.* at 506.

158. *Id.*

4. *Resident of Household.*—*Alexander v. Erie Insurance Exchange*<sup>159</sup> addressed whether a young man was a resident of his father's or mother's household<sup>160</sup> for purposes of utilizing liability coverage.<sup>161</sup> If the young man could establish that he was a resident of his mother's household, then he would have liability coverage for an automobile accident under his mother's liability policy.<sup>162</sup> The court discussed several factors regarding the issue of residency in automobile insurance policies.<sup>163</sup> The factors include "(1) physical presence (intending to have a fixed abode for the time being, to dwell under the same roof and compose a family); (2) the unrestricted access to the insured's home and its contents; (3) the intent of the contracting parties to provide coverage; and (4) the totality of the evidence."<sup>164</sup>

In this case, the young man left his mother's home five months before the accident and was residing in another state with his father.<sup>165</sup> The young man also obtained a driver's license and engaged in full-time employment in the other state.<sup>166</sup> Additionally, after the young man left his mother's home, his mother contacted the insurer and removed him as a named driver on her policy in an effort to reduce her premiums.<sup>167</sup> The court concluded that the young man was not a resident of his mother's home and was not entitled to liability coverage under her policy.<sup>168</sup>

#### B. *Uninsured and Underinsured Motorist Coverage*

1. *Consent to Settle with the Underinsured Motorist.*—*Losiniecki v. American States Insurance Co.*<sup>169</sup> analyzes a situation in which an insured settles a personal injury claim and releases an underinsured motorist without first obtaining the consent to settle from the insured's own underinsured motorist carrier. In *Losiniecki*, the insured was injured as he was riding as a passenger on a motorcycle.<sup>170</sup> He settled his claim against the motorcycle driver without

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159. 982 F.2d 1153 (7th Cir. 1993).

160. *Id.*

161. The mother's insurance policy in this case provided coverage for the "named-insured," "relatives" (while they were driving an insured car) and non-owned vehicles when driven by "relatives." *Id.* at 1155.

162. *Id.*

163. *Id.* at 1156.

164. *Id.*

165. *Id.* at 1155.

166. *Id.*

167. *Id.* at 1156.

168. *Id.* at 1160.

169. 610 N.E.2d 878 (Ind. Ct. App. 1993).

170. *Id.* at 879.

obtaining his own insurer's consent.<sup>171</sup> Later, when the insured sought underinsured motorist benefits, his insurer denied coverage because the insured had already released the underinsured motorist.<sup>172</sup>

The court strictly enforced the policy provision that required the insurer's consent to the insured's settlement with the underinsured motorist,<sup>173</sup> stating that "[c]ourts cannot ignore the plain wording of an insurance contract."<sup>174</sup> Rather than requiring the insurer to demonstrate prejudice by the release of the underinsured motorist, the court simply construed the contract.

2. *Coverage for Shooting from an Uninsured Vehicle.*—In *State Farm Mutual Automobile Insurance Co. v. Spotten*,<sup>175</sup> a plaintiff was shot by a passenger in a passing uninsured motor vehicle.<sup>176</sup> The plaintiff sought uninsured motorist benefits for his injuries.<sup>177</sup>

Although this particular argument may sound specious, the Indiana Court of Appeals noted a long history of cases from other jurisdictions which had determined that a shooting from an uninsured motor vehicle created an uninsured motorist claim.<sup>178</sup> Likewise, the court referred to another line of cases in which courts have determined that the use of a vehicle in a shooting case is merely "incidental" to the shooting.<sup>179</sup> After reviewing both lines of cases, the court decided to follow the more conservative line, stating that the shooting was a random act of violence that was not a considered risk by the parties to the insurance contract.<sup>180</sup> Therefore, no uninsured motorist coverage was available.<sup>181</sup>

3. *Self-insured entities.*—The *City of Gary v. Allstate Insurance Co.*<sup>182</sup> addresses whether self-insured entities must provide uninsured motorist coverage for injuries sustained by persons operating the self-insured's vehicles. The Indiana Court of Appeals determined that self-insured entities were required to provide the same coverage as if they were insured.<sup>183</sup> The court also deter-

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171. The decision does not cite the policy language requiring consent of the underinsured carrier but states the policy provided "that coverage is not provided where the insured person settles a bodily injury or property damage claim without the consent of [the insurer]." *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. 610 N.E.2d 299 (Ind. Ct. App. 1993).

176. *Id.* at 300.

177. *Id.*

178. *Id.* at 301.

179. *Id.*

180. *Id.* at 302.

181. *Id.*

182. 612 N.E.2d 115 (Ind. 1993).

183. *City of Gary v. Allstate Ins. Co.*, 598 N.E.2d 625, 628-29 (Ind. Ct. App. 1992), *rev'd*, 612 N.E.2d 115 (Ind. 1993).

mined that the self-insured entity, the city of Gary, was not required to carry uninsured motorist coverage because the city was immune from liability arising from the negligence of persons other than city employees.<sup>184</sup> The Indiana Supreme Court disagreed, holding that self-insured entities were not required to provide uninsured motorist benefits.<sup>185</sup> In view of the fact that self-insured entities do not have “insurance policies,”<sup>186</sup> they are not required to offer the same coverage as required under Indiana’s financial responsibility statute.<sup>187</sup>

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184. *Id.* at 630.

185. *City of Gary*, 612 N.E.2d at 118-19.

186. *Id.* at 119. The rationale behind the Indiana Supreme Court’s ruling was that the Financial Responsibility Act requires certain types of coverage in policies “issued” by insurance companies. Self-insured entities do not have insurance policies. *Id.*

187. *Id.* Indiana’s financial responsibility act is located at IND. CODE ANN. § 27-7-5-2 (West Supp. 1992).

