

SURVEY OF RECENT DEVELOPMENTS IN INSURANCE LAW

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INTRODUCTION

The area of insurance law received a great deal of attention by the courts and lawmakers during this survey period.¹ This survey will address those decisions discussing new substantive law. Other cases that simply reiterated generally accepted principles of insurance law will not receive attention in this Article.²

The area of automobile insurance coverages, including uninsured/underinsured motorist coverages, received the most attention by the courts during this survey period. Other significant decisions discussing subrogation law, general liability, health insurance coverages and insurance agent liability will be addressed. Finally, recent legislative enactments will be discussed.

I. AUTOMOBILE DECISIONS

A. *Automobile Insurer's Liability for Hospital Lien*

Although not a true insurance decision, *Board of Trustees of Clark Memorial Hospital v. Collins*,³ will certainly affect many insurance companies and attorneys who represent their insureds. In *Collins*, the defendant Collins was injured in an automobile accident in Kentucky by another person who was insured by State Farm Fire & Casualty Company.⁴ Both Collins and the insured were residents of Kentucky.⁵ Collins received treatment from a hospital in Indiana resulting in medical expenses of approximately \$10,000.⁶

The Indiana hospital filed a "Sworn Statement and Notice of Intention to Hold Hospital Lien"⁷ with the Indiana Department of Insurance to recover the amount owed for Collins' medical treatment. The facts demonstrated that neither State

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1. The survey period for this Article is approximately September 1, 1995 to August 1, 1996.

2. Practitioners may wish to review the other decisions not discussed in this Article which include: *American National Fire Insurance Co. v. Rose Acre Farms, Inc.*, 107 F.3d 451 (7th Cir. 1997) (material misrepresentation on umbrella policy); *American Family Mutual Insurance Co. v. Welton*, 926 F. Supp. 811 (S.D. Ind. 1996) (mortgage interest holder's right to insurance proceeds); *Ticor Title Insurance Co. v. FFCA/IIP 1988 Property Co.*, 898 F. Supp. 633 (N.D. Ind. 1995) (title insurer had no duty to defend its insured from a recharacterization claim when insured intended to create a defect in the title); *Mutual Security Life Insurance Co. v. Fidelity & Deposit Co.*, 659 N.E.2d 1096 (Ind. Ct. App. 1995), *trans. denied*, (fidelity bond).

3. 665 N.E.2d 952 (Ind. Ct. App. 1996), *trans. denied*.

4. *Id.* at 953.

5. *Id.*

6. *Id.*

7. *Id.* See IND. CODE §§ 32-8-26-1 to -8 (1993).

Farm nor its insured received any actual notice of the lien by the hospital.⁸

Collins and State Farm negotiated a settlement which included the Indiana hospital bill.⁹ As part of the settlement, Collins agreed to satisfy any liens, but disappeared without paying the Indiana hospital bill.¹⁰ Subsequently, the hospital filed suit against State Farm and Collins.

The court determined that the trial court's entry of summary judgment for State Farm was erroneous and reversed.¹¹ The court found that State Farm possessed constructive notice of the hospital lien because it was authorized to do business in Indiana and the hospital had filed the lien with the Insurance Department.¹² The court concluded that the Indiana Hospital Lien Act¹³ actually creates a legal right¹⁴ that may be enforced against insurance companies doing business in Indiana.¹⁵

Insurance companies must now be cognizant of the locale where treatments are received by persons injured by their insureds. If an insurance company conducts business within the state in which the plaintiff has received treatment, the insurer may wish to check periodically with the state's Insurance Department for the status of any liens. Otherwise, insurers may find an enforceable right of action against them seeking the outstanding medical expenses when they have already made payment to the injured party.

B. Single Limit of Coverage Applies to Loss of Consortium Claim

In *Medley v. Frey*,¹⁶ a question of first impression in Indiana was whether damages for loss of consortium was included in the single limit coverage. The plaintiff's husband was seriously injured and permanently disabled in an automobile accident. The defendant's insurance policy limits were \$100,000 per person and \$300,000 per accident.¹⁷ The plaintiff had Parkinson's disease which required a great amount of care previously given by the husband.¹⁸ The defendant's insurer settled the husband's claim for \$100,000 and the wife asserted a separate loss of consortium claim "under the \$300,000 per accident limit of the

8. *Collins*, 665 N.E.2d at 953.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 954. Filing a claim with the Indiana Department of Insurance gives notice to all who "are insurance companies authorized to do business in Indiana under IC 27-1-3-20." IND. CODE § 32-8-26-4 (1993).

13. IND. CODE §§ 32-8-26-1 to -8 (1993).

14. *Collins*, 665 N.E.2d at 955. (In recognizing that the plaintiff possessed a legal "right," the court rejected State Farm's argument that the hospital only possessed a lien which could not be extended beyond Indiana's border.)

15. *Id.*

16. 660 N.E.2d 1079 (Ind. Ct. App. 1996), *trans. denied*.

17. *Id.* at 1079-80.

18. *Id.* at 1080.

policy.”¹⁹ The defendant’s insurer contended that the loss of consortium damages were included in the payment of the husband’s claim and could not be subject to a separate per person limit of coverage.²⁰

The only previous decision interpreting Indiana law on this issue was a federal decision where the court determined that the loss of consortium claim was subject to the same per person limit of liability coverage as the injured spouse’s claim.²¹ The *Medley* court concluded that the limit on bodily injury damages includes “loss of services, . . . sustained by any one person in an auto accident” based on the language of the policy. The *Medley* court also looked to the policy language which defined “bodily injury” to include “bodily harm, sickness or disease, including death that results.”²² Under this definition, a claim for loss of consortium was not included.²³

The court next looked at the “limitation of liability” provision of the policy which provided: “The limit of liability shown in the Declarations for each person for Bodily Injury Liability is our maximum limit of liability for all damages, including damages for care, loss of services or death, arising out of ‘bodily injury’ sustained by any one person in any one accident.”²⁴

Based upon the policy language, the court concluded that the loss of consortium claim was encompassed within the per person limit of coverage for bodily injury; therefore, the wife could not recover under a separate per person limit.²⁵

C. Interpretation of “Carrying Persons For a Fee” Exclusion

Most personal automobile liability policies contain an exclusion for carrying other persons for a fee.²⁶ During this survey period, two decisions addressed this exclusion and provided certain factors to assist courts in its analysis of this type of exclusion.

In *Meridian Mutual Insurance Co. v. Auto-Owners Insurance Co.*,²⁷ the insured charged co-workers a flat, weekly rate for driving them to work.²⁸ After a serious accident occurred in the insured’s van while driven with permission by

19. *Id.*

20. *Id.*

21. *Id.* (citing *Montgomery v. Farmer’s Ins. Group*, 585 F. Supp. 618, 619 (S.D. Ind. 1984)).

22. *Id.*

23. *Id.*

24. *Id.* at 1080-81.

25. *Id.* at 1081. The court also stated that if the definition of “bodily injury” includes loss of consortium or services, then the claim may not be subject to a per person limit. *Id.* at 1081 n.1. See also *Giardino v. Fierke*, 513 N.E.2d 1168 (Ill. App. Ct. 1987); *Allstate Ins. Co. v. Handegard*, 688 P.2d 1387 (Or. Ct. App. 1984).

26. See, e.g., *infra* note 36 and accompanying text.

27. 659 N.E.2d 207, 209 (Ind. Ct. App. 1995), *trans. granted*, (Ind. May 22, 1996).

28. *Id.*

another, the insured's co-workers filed suit.²⁹ The excess insurer filed a declaratory judgment action asking to be relieved from any coverage obligation because the policy contained a "carrying person for a fee" exclusion.³⁰ After the trial court entered summary judgment in favor of the insurer, an appeal ensued.

In analyzing the exclusion, the court looked to four factors as significant in determining whether the exclusion should apply:

1. whether the amount charged is a definite amount;
2. whether it was proportionate to the actual expenses of the trip;
3. whether payment of the amount was voluntary or was paid as consideration to the driver; and
4. whether the driver and passengers were engaged in a common enterprise.³¹

In applying these factors, the *Meridian Mutual* court concluded that the exclusion applied and stated,

The use of a vehicle to shuttle passengers to and from the same destination on a daily basis for a fixed fee or charge falls within the exclusion. [The insured] charged a fee which was definite, arbitrary and involuntary. This was not a casual use but a regular, ongoing use of the vehicle to transport passengers for a consideration under what was, in effect, a contractual arrangement. We conclude that the van was carrying persons for a fee when the accident occurred, an activity excluded from coverage under the [insurer's] policy.³²

The court in *General Accident Insurance Co. of America v. Gonzales* addressed the same type of exclusion under similar facts.³³ In this case, the insured charged his co-workers five dollars a day for travel to their worksite.³⁴ After the insured and his co-workers were involved in an accident with an uninsured motorist, the passengers sought uninsured motorist claims under the insured's policy.³⁵ The insurer sought to exclude coverage because the policy contained a "carrying person for a fee" exclusion. It did, however, provide for a "share-the expense car pool" exception.³⁶

29. *Id.*

30. The exclusion stated, "This coverage does not apply to: 1. Bodily injury or property damage arising out of the ownership, maintenance or use of a vehicle when used to carry persons or property for a fee. This exclusion does not apply to: a. Shared-expense car pools . . ." *Id.* at 210.

31. *Id.* at 211 (citing *Johnson v. Allstate Ins. Co.*, 505 So. 2d 362, 367 (Ala. 1987)).

32. *Id.* at 212. The court also concluded the "shared-expense car pool" exception to the exclusion was inapplicable because the amount charged by the insured did not reflect a sharing of the expenses, but instead, a flat fee regardless of the expense incurred by the insured. *Id.* at 213.

33. 86 F.3d 673 (7th Cir. 1996).

34. *Id.* at 674.

35. *Id.*

36. The specific exclusion at issue provided that, "A. We do not provide Liability coverage

Although the *General Accident* court agreed with the factors suggested by *Meridian Mutual* as significant to the analysis,³⁷ the Seventh Circuit arrived at a different conclusion and found that the “share-the-expense car pool” exception to the exclusion applied despite the fact that the insured did not account for actual expenses when charging his passengers.³⁸

Despite the fact each case had similar facts, the outcomes of each were different. Practitioners must keep each of these cases in mind and apply the four factor test³⁹ to determine whether coverage exists.

At first glance, some practitioners may feel that the application of a “carrying person for a fee” exclusion to be contrary to public policies such as the promotion of car pools. However, the standard insurance policy does except true car pools where the expenses are shared by the parties. These cases demonstrate that a determination whether the exclusion applies will be very fact sensitive. Insureds who are able to establish that the amounts charged to their passengers go towards expenses as opposed to being an arbitrary figure, will most likely be entitled to insurance coverage.

D. *Trucking Insurance—“Bobtail” Policy Application*

Most truck drivers maintain what is known as “bobtail” insurance. This type of insurance indemnifies a trucker when he has an accident while operating the tractor unit without a trailer and outside the scope of employment.⁴⁰ Usually, this insurance will apply after the trucker has made a delivery for his client and is returning home.

In *Liberty Mutual Insurance Co. v. Connecticut Indemnity Co.*, a truck driver obtained a shipment for delivery.⁴¹ With the permission of the shipper, the truck driver was allowed to store, uncouple and park the trailer at a truck stop and go home for the weekend.⁴² While returning to the truck stop to retrieve the shipment, the truck driver was involved in an accident with another motorist.⁴³ The issue before the court was whether the shipper’s liability policy or the “bobtail” policy of the trucker was primary on a claim by the injured motorist.

The court determined that the shipper’s liability policy was primary. Because the driver was still within the control of the shipper,⁴⁴ the court reasoned that the trucker was still completing his dispatch orders. Thus, the shipper’s liability

for any person: . . . 5. For that person’s liability arising out of the ownership or operation of a vehicle while it is being used to carry persons or property for a fee. This exclusion (A.5.) does not apply to a share-the-expense car pool.” *Id.*

37. *Id.* at 675-76.

38. *Id.* at 679.

39. *See supra* note 31 and accompanying text.

40. *Liberty Mut. Ins. Co. v. Connecticut Indem. Co.*, 55 F.3d 1333, 1334 (7th Cir. 1995).

41. *Id.*

42. *Id.*

43. *Id.* at 1335.

44. *Id.* at 1338.

policy, rather than the bobtail policy, had primary responsibility.

The court rejected the shipping company insurer's argument based on *Biel, Inc. v. Kirsch*⁴⁵ that Indiana law dictates a different result. In *Biel*, the Indiana Supreme Court concluded that an employee is not normally within the service of his employer while on his way to or from work.⁴⁶ The *Liberty Mutual* decision appears to contradict *Biel*. In *Liberty Mutual*, it appears that the truck driver was returning to his work site to begin his employment just as every other factory worker does on a daily basis. Nevertheless, the *Liberty Mutual* court found the control of the shipper over the truck driver as being the significant factor to find the shipper's liability policy as primary. -

E. Automobile Medical Payments Subrogation—Payment of Attorney Fees to Insured's Attorney

During this survey period, three cases were decided addressing the rights of an insured's attorney to seek attorney fees and pro rata costs from a lienholder for the recovery of the lien from a tortfeasor.⁴⁷

In *Erie Insurance Co. v. George*,⁴⁸ the insured retained counsel to pursue a lawsuit against a tortfeasor arising from an automobile accident.⁴⁹ After the insured's attorney sent medical bills to his client's insurer for payment pursuant to the medical payments coverage, the insurer submitted a check for the bills, but informed the insured's attorney of its right and intent to pursue subrogation against the tortfeasor.⁵⁰ The insurer then filed a subrogation suit against the tortfeasor.⁵¹ This action prompted the tortfeasor insurer to deposit a check with the court for the amount of the medical bills in order to interplead the insured.⁵²

The insured's attorney intervened in the insurer's subrogation action claiming that the insurer had no right to proceeds from the tortfeasor and sought attorney fees and pro rata costs.⁵³ The trial court entered summary judgment in favor of the insured's attorney, concluding that the insurer possessed no subrogation rights until the insured had settled with or obtained a judgment against the tortfeasor.⁵⁴

45. *Id.* at 1336 (citing *Biel, Inc. v. Kirsch*, 161 N.E.2d 617 (Ind. 1959)).

46. *Biel*, 161 N.E.2d at 618.

47. This author would expect continued interest by the court of appeals on the parties' rights in subrogation cases as well as the amounts owed to the insured's attorneys for fees and costs.

48. 658 N.E.2d 950 (Ind. Ct. App. 1995), *trans. granted*, (Ind. Oct. 7, 1996).

49. *Id.* at 952.

50. *Id.*

51. *Id.*

52. *Id.* See IND. TR. R. 22.

53. *George*, 658 N.E.2d at 952.

54. *Id.* The trial court's determination was based solely upon the belief that the purpose of subrogation was to prevent double recovery by the plaintiff. See *id.* at 953. However, the court of appeals also noted that an insurer's right to subrogation prevents a wrongdoer from shielding himself from liability by knowing that the insured has insurance. *Id.*

On appeal, the trial court was reversed.⁵⁵ At the time the insurer made its payment for the medical bills to the insured, the insurer obtained subrogation rights from which it could pursue the wrongdoer.⁵⁶ However, the court of appeals remanded the action for a factual determination of whether the insured's attorney was entitled to attorney fees and costs for the recovery of the medical payments coverage.⁵⁷ If the insurer was "unjustly enriched" by the work of the insured's attorney in presenting a claim, then the insured's attorney would be entitled to attorney fees and costs.⁵⁸

In other cases addressing subrogation, the decisions of *D'Archangel v. Allstate Insurance Co.*⁵⁹ and *Allstate Insurance Co. v. Smith*⁶⁰ were decided only seven days apart and address identical factual situations. In both cases, the insurers made medical payments to their insureds as a result of an auto accident.⁶¹ The insureds settled their claims against the tortfeasor without filing suit.⁶² As a result, the insurers sought full reimbursement of their medical payments while the insureds sought to recover attorney fees and pro rata costs for recovering the insurer's payments.⁶³

In support of their position, the insurers relied upon statutory language which provides that attorney fees and costs must be paid by the insurer when "claiming subrogation or reimbursement rights to the proceeds of a settlement or judgment *resulting from a legal proceeding* commenced by an insured against a third party legally responsible for personal injury for which payment is made by the insurer."⁶⁴ The insurers argued that because settlement occurred without the insureds filing a lawsuit, no reduction of the subrogation claim for attorney fees and costs was warranted. However, in each case, the court rejected the insurers' arguments.⁶⁵ The *Smith* court succinctly explained its decision by stating:

It is consistent with this policy to conclude that *any time* an insurance company is subrogated from proceeds gained through the insureds' effort and expenses, the insurance company should pay a portion of those expenses, regardless of whether a lawsuit was actually filed. To conclude otherwise would hinder legislative purpose.⁶⁶

These cases definitively establish that insurers must pay their fair share of costs and attorney fees for settlements which include any amount to which the

55. *Id.* at 952.

56. *Id.* at 953.

57. *Id.*

58. *See id.* at 954.

59. 656 N.E.2d 294 (Ind. Ct. App. 1995), *trans. denied*.

60. 656 N.E.2d 1156 (Ind. Ct. App. 1995).

61. *D'Archangel*, 656 N.E.2d at 295; *Smith*, 656 N.E.2d at 1157.

62. *D'Archangel*, 656 N.E.2d at 295; *Smith*, 656 N.E.2d at 1157.

63. *D'Archangel*, 656 N.E.2d at 295; *Smith*, 656 N.E.2d at 1157.

64. IND. CODE § 34-4-41-3 (1993) (emphasis added).

65. *D'Archangel*, 656 N.E.2d at 296-97; *Smith*, 656 N.E.2d at 1159.

66. *Smith*, 656 N.E.2d at 1159.

insurer is subrogated regardless of whether a lawsuit was filed. The only circumstance which allows the insurer to avoid paying the insured is if the insurer actively participates in settling the insured's lawsuit.

F. Uninsured/Underinsured Motorists Coverage

1. *Insured's Failure to Notify Carrier of Settlement with Tortfeasor.*—In every underinsured motorist case, a settlement occurs between the insured and the tortfeasor. The decision of *Commercial Union Insurance Co. v. Moore*⁶⁷ focused upon the effect of the insured's underinsured motorist claim after failing to notify the carrier of his settlement with the tortfeasor. In this case, the insured was a passenger on a motorcycle involved in an accident with another vehicle.⁶⁸ The insured settled his claim with the operator of the motorcycle for the limits of the operator's policy but never notified his carrier of the settlement nor did he obtain permission to settle.⁶⁹ The underinsured motorist coverage contained an exclusion from coverage if the insured failed to notify the insurer of the settlement with the tortfeasor.⁷⁰

Although the trial court denied the insurer's motion for summary judgment, the court of appeals reversed.⁷¹ In reaching this conclusion, the court found that the exclusion was plain and unambiguous and voided coverage because of the insured's failure to comply.⁷²

2. *Limitation on Time to Pursue UM/UIM Claim.*—In *Union Automobile Indemnity Ass'n v. Shields*,⁷³ an automobile accident occurred which resulted in the death of the insured.⁷⁴ The insured's representative notified the insurance agent of the insured's death shortly after it occurred and that an underinsured motorist claim would be pursued.⁷⁵ However, no formal suit or arbitration proceeding had been filed until two years after the insured's death.⁷⁶ Because of the delay in filing, the insurer contended that a policy provision barred the representative from seeking underinsured motorist coverage.⁷⁷ On appeal, the

67. 663 N.E.2d 179 (Ind. Ct. App. 1996), *trans. denied*.

68. *Id.* at 180.

69. *Id.*

70. The exclusion provided: "We do not provide coverage under this endorsement for property damage or bodily injury sustained by any person: . . . 2. If that person or the legal representative settles the bodily injury or property damage claim without our consent." *Id.* at 181. Although not stated in the *Commercial Union* decision, the insurance company's reason for requiring consent is to preserve subrogation rights against the tortfeasor.

71. *Id.*

72. *Id.*

73. 79 F.3d 39 (7th Cir. 1996).

74. *Id.* at 40.

75. *Id.*

76. *Id.*

77. The provision provided:

No suit, action or arbitration proceeding for the recovery of any claim under this

Seventh Circuit affirmed the trial court's grant of summary judgment in favor of the insurer,⁷⁸ although Indiana law had previously determined that a one-year limitation period was unreasonable.⁷⁹ However, *Shields* allows insurers to enforce two-year limitation periods.⁸⁰

This decision also focused upon the ability of insurance companies to waive reliance upon the limitation provision based upon their conduct in dealing with the insured.⁸¹ However, mere silence by the insurer is not sufficient to demonstrate waiver of the time limitation.⁸² If the individual seeking coverage is a party to the contract, the insurer is not required to give notice of the time limitation in the policy because the insured is expected to have read the policy.⁸³ If the individual is not a party to the contract, then the insurance company must give notice of the time limitation to be able to enforce it.⁸⁴

3. *Different Limits for UM/UIM and Bodily Injury Coverages.*—Some insureds possess insurance policies with lower uninsured/underinsured motorist coverages than the limits provided under their bodily injury coverages. In *Hupp v. Canal Insurance Co.*,⁸⁵ an injured insured sought to increase the amount of uninsured motorist coverage to equal the higher limits existing under his bodily injury coverages.⁸⁶ The insured was involved in an automobile accident with an uninsured motorist while the insured was operating his employer's vehicle.⁸⁷ In 1986, the employer first obtained the insurance policy from the insurer⁸⁸ with minimum uninsured motorist coverage limits and did not raise them on any of its successive renewals of the policy.⁸⁹

In seeking the higher limits, the insured relied upon policy language that specified the uninsured motorist coverage was provided "in accordance with

endorsement shall be sustainable in any court of law or equity unless a COVERED PERSON shall have complied with all the terms of this endorsement, nor unless commenced within two (2) years after the occurrence of the loss.

Id.

78. *Id.*

79. *See generally* Scalf v. Globe Am. Cas. Co., 442 N.E.2d 8 (Ind. Ct. App. 1982).

80. *Shields*, 79 F.3d at 41.

81. *Id.*

82. The court distinguished *Stewart v. Walker*, 597 N.E.2d 368 (Ind. Ct. App. 1992), because the party seeking the benefits was a party to the contract.

83. *See Shields*, 79 F.3d at 42.

84. *Id.*

85. 654 N.E.2d 901 (Ind. Ct. App. 1995), *trans. denied*.

86. *Id.*

87. *Id.* at 902.

88. This date is important. Now, insurers must offer their insureds UM/UIM coverage equal to the limits for bodily injury coverages when the insurance coverage is first sought. *See* IND. CODE § 27-5-5-2(a) (Supp. 1996). In 1986, insurers were only required to offer UM/UIM coverage with minimum limits regardless of the limits for bodily injury coverage. *See id.* § 27-7-5-5(a) (1982) (amended 1993).

89. *Hupp*, 654 N.E.2d at 902.

Indiana Statute.”⁹⁰ The insured argued that this provision required the limits of the uninsured motorist coverage to equal the bodily injury limits as required to presently be offered by statute.⁹¹ The court rejected the insured’s argument.⁹² Because the employer was charged a premium for lower limits which complied with the statutory requirements in 1986, the court found that it would be unreasonable to expect the insured to be entitled to higher limits than assessed in the premium.⁹³

4. *Lack of Availability of UM/UIM Coverage for Operation of Moped.*—A question that frequently arises concerns whether UM/UIM coverages are available to injured insureds occupying vehicles other than automobiles. That question was recently addressed in *IDS Property Casualty Insurance Co. v. Kalberer*.⁹⁴ In *Kalberer*, the insured’s son was operating a moped when he was involved in an accident with an underinsured motorist.⁹⁵ The parents, as guardians of the son, sought underinsured motorist coverage for their son after settling for policy limits with the underinsured motorist.⁹⁶ After a declaratory judgment action was filed, the trial court granted summary judgment in favor of the parents finding that underinsured motorist coverage existed.⁹⁷

On appeal, the court of appeals reversed the entry of summary judgment in favor of the parents and remanded for summary judgment to be entered in favor of the insurer.⁹⁸ No underinsured motorist coverage was found to exist because the moped was not an “insured” vehicle.⁹⁹ The court of appeals believed that the Indiana legislature intended to permit an insurer the right to limit their uninsured/underinsured motorist coverage to those owned vehicles from which the insurer has charged a premium for coverage.¹⁰⁰ Because the moped was not a vehicle for which a premium had been charged, no underinsured motorist coverage was available.

5. *Lack of UM/UIM Coverage for Accident with Pony-Drawn Cart.*—The

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 904.

94. 661 N.E.2d 881 (Ind. Ct. App. 1996), *trans. denied*.

95. *Id.* at 882-83.

96. *Id.*

97. *Id.*

98. *Id.* at 885.

99. *Id.*

100. *Id.* at 884-85.

When [uninsured/underinsured motorist coverage] is written to apply to one (1) or more motor vehicles under a single automobile liability policy, such coverage applies only to the operation of those motor vehicles for which a specific (uninsured or underinsured motorist) premium charge has been made and does not apply to the operation of any motor vehicles . . . owned by the named insured for which a premium charge has not been made.

*Hastings Mutual Insurance Co. v. Webb*¹⁰¹ decision provides an interesting factual question and excellent reasoning concerning the rules for construing provisions in insurance policies. In this case, the insured sought uninsured motorist coverage after sustaining injuries from an accident with an uninsured Amish defendant operating a pony-drawn cart.¹⁰² The policy stated that some terms would be defined to apply throughout the policy while special definitions existed for terms contained within quotation marks.¹⁰³ The policy gave a specific definition for the word "trailer,"¹⁰⁴ but it also referred to the word *trailer* without the use of quotation marks within the UM/UIM endorsement.¹⁰⁵ The insured argued that coverage was owed because the policy was ambiguous and did not exclude a pony-drawn cart from coverage.¹⁰⁶ Additionally, the insured argued that if the insurance policy was not ambiguous, coverage was still owed due to the public policy behind Indiana's Uninsured Motorist Statute.¹⁰⁷

The Indiana Court of Appeals determined that no ambiguity existed in the policy.¹⁰⁸ The court focused upon the fact that the insured was seeking uninsured *motorist* coverage which dispelled any notion that the operator of a pony-drawn cart was a *motorist*.¹⁰⁹ Similarly, the court found no violation of Indiana's Uninsured Motorist Statute.¹¹⁰ Because the policy was intended to apply to *motor vehicles*¹¹¹ and not pony-drawn vehicles, no coverage was available to the insured.¹¹²

7. *Material Misrepresentation in Acquisition of Liability Coverage and Effect on Uninsured Motorist Coverage.*—During the survey period, an interesting coverage question regarding material misrepresentation in the acquisition of liability insurance coverage was decided by two different courts resulting in different outcomes. Each of these cases merit discussion and considerable scrutiny

101. 659 N.E.2d 1049 (Ind. Ct. App. 1995).

102. *Id.* at 1050.

103. *Id.* at 1051.

104. The definition provided: "I. "Trailer" means a vehicle designed to be pulled by a: 1. Private passenger auto; or 2. Pickup or van. It also means a farm wagon or farm implement while towed by a vehicle listed in 1. or 2. above." *Id.*

105. The key portion defined "uninsured motor vehicle" to include "a land motor vehicle or . . . trailer of any type." *Id.* (emphasis added).

106. *Id.*

107. IND. CODE § 27-7-5-2 (Supp. 1996).

108. *Hastings*, 659 N.E.2d at 1052.

109. *Id.*

110. IND. CODE § 27-7-5-2.

111. *Hastings*, 659 N.E.2d at 1053. Indiana's legislative purpose behind the Uninsured Motorist Statute is to place the insured in a position as if the uninsured "motorist" had complied with Indiana's Financial Responsibility Statute [IND. CODE § 9-23-4-1 (1993)]. See *City of Gary v. Allstate Ins. Co.*, 612 N.E.2d 115, 117 (Ind. 1993). Because the Financial Responsibility Statute only requires those operating motor vehicles to be insured, there was no violation of the Uninsured Motorist Statute by the determination that a pony-drawn vehicle was not a motor vehicle.

112. See *Hastings*, 659 N.E.2d at 1054.

by practitioners if a similar factual question presents itself.

In *Motorists Mutual Insurance Company v. Morris*,¹¹³ a tortfeasor had acquired liability insurance from an insurance company (“liability insurer”) by providing material misrepresentations concerning his driving record.¹¹⁴ After the tortfeasor was involved in an accident, the injured plaintiff submitted a claim to the liability insurer which was denied based upon the material misrepresentations of the tortfeasor.¹¹⁵ The injured plaintiff sought and received payments from his uninsured motorist carrier (“UM carrier”).¹¹⁶ The liability insurer filed a declaratory judgment to completely rescind the liability insurance coverage based upon the insured’s material misrepresentations.¹¹⁷ The UM carrier who was added as a defendant filed a subrogation cross-claim against the tortfeasor to recover the amounts paid to the injured plaintiff.¹¹⁸

After the trial court determined that the liability insurer could not rescind the policy, an appeal ensued.¹¹⁹ The court of appeals reversed the trial court and concluded that the liability insurer could rescind the policy based upon the material misrepresentations of the tortfeasor.¹²⁰ In arriving at its conclusion, the court of appeals based its decision upon three determinations:

- “[T]he legislature’s policy of compensating accident victims has been upheld”¹²¹
- “[T]he real dispute here is between insurance companies who are not entitled to protection under [Indiana’s Financial Responsibility Act]”¹²²
- the fact that the [UM carrier] accepted and was compensated for the risk of injury to its insured by an uninsured motorist when it issued its uninsured motorist policy.¹²³

Based upon these considerations, the UM carrier was not entitled to subrogate against the liability insurer because the liability policy was rescinded.¹²⁴

The District Court for the Southern District of Indiana faced a similar factual scenario, but arrived at a different conclusion from the *Morris* court.¹²⁵ In *Pekin*,

113. 654 N.E.2d 861 (Ind. Ct. App. 1995).

114. *Id.*

115. *Id.*

116. *Id.* at 862.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 863.

121. *Id.*

122. *Id.*; see IND. CODE § 9-25-4-1 (Supp. 1996).

123. See *Morris*, 654 N.E.2d at 863.

124. *Id.*

125. *Pekin Ins. Co. v. Super*, 912 F. Supp. 409 (S.D. Ind. 1995).

the insured purchased liability coverage from an agent, and on the date that the agent forwarded the insurance application to the insurance company, the insured had an accident.¹²⁶ Two days later, the insurance company reviewed the insured's driving records and discovered that the insured's driver's license was suspended at the time the application was received.¹²⁷

Although the insurance company initially filed a declaratory judgment to void coverage because of misrepresentations, it settled with the insured by agreeing to pay only the minimum insurance requirements under the Indiana Financial Responsibility Act.¹²⁸ However, the injured plaintiff argued that the insurance company was responsible for the excess amount irrespective of the material misrepresentations.¹²⁹ The federal district court disagreed.¹³⁰

The district court concluded that the Indiana Supreme Court would not follow *Morris* because Indiana is a compulsory state requiring drivers to be financially responsible.¹³¹ As a compulsory state, the insurance company was liable only for the minimum amount of insurance coverage under the financial responsibility statute and could avoid any excess liability due to the material misrepresentations.¹³²

Practitioners faced with this type of factual scenario must carefully review both the decisions. The analysis of *Morris* seemingly does not apply to cases involving injured third parties because it involved a dispute between insurance companies. As demonstrated by the *Pekin* decision, the overriding concern is to protect the injured third party plaintiff. Thus, the *Pekin* analysis should be considered the guiding principle on this issue of law.

II. PERSONAL AND COMMERCIAL GENERAL LIABILITY INSURANCE POLICY ISSUES

A. *Effect of Release Language in Lease on Subrogation Rights*

*United Farm Bureau Mutual Insurance Co. v. Owen*¹³³ is a "must read" decision for all attorneys, insurance representatives, and parties involved in lease arrangements. In *Owen*, a group of individuals rented premises from a landlord by executing a lease agreement.¹³⁴ After a fire occurred on the premises, the

126. *Id.* at 410.

127. *Id.*

128. *Id.* (citing IND. CODE § 9-25-4-5 (1993)).

129. *Id.*

130. *Id.* at 412.

131. See *American Underwriters Group Inc. v. Williamson*, 496 N.E.2d 807, 810-11 (Ind. Ct. App. 1986) ("[A]n insurer cannot on the ground of fraud or misrepresentation retrospectively avoid coverage under a *compulsory* or financially responsibility law so as to escape liability to a third party.") (emphasis added).

132. *Pekin*, 912 F. Supp. at 412.

133. 660 N.E.2d 616 (Ind. Ct. App. 1996).

134. *Id.* at 617.

landlord recovered proceeds from his insurance company.¹³⁵ The insurance company thereafter commenced a subrogation suit against the tenants who started the fire.¹³⁶

One of the tenants filed a summary judgment motion relying upon the lease language which released the tenant from any liability for casualty losses. The lease stated:

Landlord and Tenant do each hereby release the other from all liability for any accident, damage or injury caused to person or property, provided, this release shall be effective only to the extent that the injured or damaged party is insured against such injury or damage and only if this release shall not adversely affect the right of the injured or damaged party to recover under such insurance policy.¹³⁷

Based upon this language, the trial court granted the tenant's request for summary judgment.¹³⁸

The Indiana Court of Appeals affirmed this finding.¹³⁹ Because the insurance company stood "in the shoes of its insured" by initiating the subrogation action, the release barred a subrogation action.¹⁴⁰ Whenever a casualty loss is presented in the context of a landlord/tenant dispute, the lease should be reviewed carefully for language which may bar any attempts to collect.

B. Professional Liability Exclusions in a Commercial General Liability Policy

In *Erie Insurance Group v. Alliance Environmental, Inc.*,¹⁴¹ an environmental consulting service prepared an evaluation report for asbestos removal project that was critical of a competitor. The competitor filed a lawsuit alleging defamation and tortious interference with contract. The defendant environmental firm sought coverage under its general liability policy,¹⁴² which was denied the claim because coverage did not include the insured's rendering of a professional service.¹⁴³

The insurer filed a declaratory judgment to determine that no coverage was owed to the insured for the competitor's claim.¹⁴⁴ The court granted summary

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 619.

140. *Id.*

141. 921 F. Supp. 537 (S.D. Ind. 1996), *aff'd*, 102 F.3d 889 (7th Cir. 1996).

142. *Id.* at 538-39. It is important to note that the insured's policy was not a professional liability policy.

143. The "professional services" exclusion provided that the policy did not cover "personal injury" damages "due to . . . any service of professional nature, including but not limited to (1) the preparation or approval of maps, plans, opinions, reports, surveys, designs, or specifications and (2) supervisory, inspection or engineering services." *Id.* at 541.

144. *Id.* at 540.

judgment for the insurance company by determining that all of the insured's actions were done in the course of rendering a professional opinion. Thus, they were subject to the exclusion.¹⁴⁵

Another issue addressed by the court focused upon the claims that the insured's actions were covered by an "advertising injury"¹⁴⁶ clause which did not contain a "professional services" exclusion.¹⁴⁷ However, the court rejected this argument because the statements were clearly made in the course of rendering a professional service rather than in an attempt to "advertise" to acquire new business.¹⁴⁸

C. Application of "Your Product" Exclusion to General Liability Policy

*United Capitol Insurance Co. v. Special Trucks, Inc.*¹⁴⁹ is complex which makes a summary of the facts and analysis difficult. However, the decision is beneficial in discussing the applicability of "your work"¹⁵⁰ and "your product"¹⁵¹ exclusions existing in commercial general liability policies. These exclusions are intended to prevent general liability coverage for the repair or replacement of poor workmanship of the insured.¹⁵² Instead, general liability policies are intended to cover consequential damages (other than the work of the insured) arising from the insured's work.¹⁵³ This decision should be reviewed if the practitioner is facing a coverage question involving a claim for the insured's work performed or any product made.

D. Analysis of Insurance Company's Duty to Defend Insured

During the survey period, the Indiana court of appeals decided a number of cases addressing an insurance company's "duty to defend" its insured. Any practitioner in the insurance coverage area will want to review these cases as the "duty to defend" continually evolves in Indiana.

145. *Id.* at 547.

146. "Advertising injury" was defined as an injury arising out of "oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products, or services." *Id.* at 548.

147. *Id.* at 547.

148. *Id.* at 548.

149. 918 F. Supp. 1250 (N.D. Ind. 1996).

150. Most general liability policies define "your work" to mean "[w]ork or operations performed by you or on your behalf; and materials, parts or equipment furnished in connection with such work or operations." *Id.* at 1254.

151. "Your product" is defined to mean "[a]ny goods or products, other than real property, manufactured, sold handled, distributed or disposed of by you . . ." *Id.*

152. *Id.* at 1257.

153. For example, a general liability policy would cover damages to a computer from a leaking roof constructed by the insured but would not cover the cost to repair or replace the poor workmanship of the roof.

In *Indiana Insurance Co. v. North Vermillion Community School Corp.*,¹⁵⁴ a school teacher sued the insured school corporation alleging that he was fired in violation of his constitutional rights.¹⁵⁵ The school submitted a claim for the lawsuit under its general liability policy. The insurer denied the request contending that it had no “duty to defend” because the firing was an intentional act.¹⁵⁶

The school sought to recover its defense costs after it obtained summary judgment on the fired teacher’s claim.¹⁵⁷ Although the court determined that no coverage was available under a “bodily injury” clause,¹⁵⁸ coverage for the school existed under the “personal injury”¹⁵⁹ clause. One of the covered offenses under the “personal injury” protection was a claim for defamation.¹⁶⁰ Because the teacher’s complaint against the school contained allegations of defamation,¹⁶¹ the court found that the insurer owed a “duty to defend” and was responsible for the school’s defense costs.¹⁶²

In *United Services Automobile Ass’n v. Caplin*,¹⁶³ the insureds sold their home to another family and were sued based upon fraudulent statements allegedly made concerning the home.¹⁶⁴ Even though the insurance company issued a reservation of rights letter, it initially acquiesced in paying the insured’s defense costs of an attorney chosen by the insureds.¹⁶⁵ However, when the court of appeals reversed the insureds’ summary judgment by finding evidence of fraud, the insurance company refused to provide a further defense.¹⁶⁶

A declaratory judgment action was commenced and each party sought summary judgment.¹⁶⁷ After the trial court found a “duty to defend,” the insurance

154. 665 N.E.2d 630 (Ind. Ct. App. 1996), *trans. denied*.

155. *Id.* at 631.

156. *Id.* at 632-33. Two types of coverages provided by the policy were analyzed. “Bodily injury” coverage was defined as “bodily injury, sickness or disease sustained by any person” The second type of coverage available to the school was “personal injury” coverage which was limited to coverage of specific offenses committed by the insured.

157. *Id.* at 632.

158. *Id.* at 635. The court agreed that the school’s intentional conduct would not be covered under the “bodily injury” coverage.

159. *Id.*

160. *Id.*

161. *Id.* Judge Staton, in a dissenting opinion, concluded that the teacher’s complaint did not contain a claim for defamation. *Id.* at 636. (Staton, J., dissenting). Specifically, the court found a defamation claim under allegations such as: “18. That the Defendants . . . conspired to deprive [the teacher] of his employment and sought to further damage him by impugning his good reputation in the community.” *Id.* at 634.

162. *Id.*

163. 656 N.E.2d 1159 (Ind. Ct. App. 1995), *trans. denied*.

164. *Id.* at 1160-61.

165. *Id.* at 1161.

166. *Id.*

167. *Id.*

company appealed.¹⁶⁸ Relying on *Transamerica Insurance Services v. Kopko*,¹⁶⁹ the court of appeals determined the fraudulent and intentional conduct of the insureds fell outside the coverage provided under the homeowners insurance policy. Therefore, no “duty to defend” was owed by the insurance company.¹⁷⁰ Further, an estoppel argument raised by the insureds was rejected because the insurance company had issued a reservation of rights letter.¹⁷¹ If the court had accepted the insureds’ argument, bad policy would have been created because an insurance company would have to deny coverage to an insured in every situation where a coverage question existed.¹⁷²

Two other very significant “duty to defend” cases, *American States Insurance Co. v. Kiger*¹⁷³ and *Seymour Manufacturing Co. v. Commercial Insurance Co.*,¹⁷⁴ addressing environmental coverage issues were also decided during this survey period. Although the facts¹⁷⁵ were slightly different, their outcomes were the same.¹⁷⁶

In *Kiger*, the insured was sued by the Indiana Department of Environmental Management (IDEM) for leakage from an underground storage tank.¹⁷⁷ After the insurer denied coverage for the leakage claim, the insured added the insurer to the lawsuit as a third party defendant.¹⁷⁸ The issue was whether a “pollution exclusion” clause applied even though it required the discharge to be “sudden and accidental.”¹⁷⁹ The court found the exclusion to be ambiguous, and therefore found in favor of the insured.¹⁸⁰ Specifically, the court determined that “sudden” was used to clarify that coverage existed for “unexpected” discharge of pollutants.¹⁸¹

168. *Id.*

169. 570 N.E.2d 1283 (Ind. 1991).

170. *Caplin*, 656 N.E.2d at 1162.

171. *Id.*

172. *Id.* at 1163.

173. 662 N.E.2d 945 (Ind. 1996).

174. 665 N.E.2d 891 (Ind. 1996).

175. *Kiger* involved a claim for leakage of gasoline from an underground storage tank while *Seymour*’s facts concerned a claim for leakage of chemicals from drums.

176. Based upon the fact that both *Kiger* and *Seymour* came to the same conclusion, the focus of this Article will be upon the *Kiger* decision.

177. *Kiger*, 662 N.E.2d at 947.

178. *Id.* at 946.

179. The exact language of the exclusion provided: “This insurance does not apply to: 8. Bodily injury or property damage caused by the dumping, discharge or escape of irritants, pollutants or contaminants. This exclusion does not apply if the discharge is sudden and accidental.” *Id.* at 947. The insurance company argued that the pollution in this case was a gradual development as opposed to “sudden.”

180. *Id.* at 948.

181. *Id.* Clearly, this ruling means that the only way the pollution exclusion may apply is if the leakage is intentional or expected by the insured.

III. LIFE, HEALTH AND DISABILITY INSURANCE ISSUES

A. *Need for COBRA Notice by Group Medical Provider*

The facts in *Lim v. White*¹⁸² demonstrate what may occur to insureds when their employers completely close operations. The insured worked at a hotel and was covered under the hotel's group medical insurance plan.¹⁸³ After the hotel sold its operations, it terminated its group medical plan.¹⁸⁴

The insured continued to work for the new owner of the hotel, but could not obtain insurance benefits from the new hotel owner until the expiration of a waiting period.¹⁸⁵ Prior to the sale date, the insured became pregnant but was without insurance coverage because of the waiting period for coverage under the new hotel owner's plan.¹⁸⁶

The insured filed suit claiming coverage might be continued pursuant to the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) which amended the Employee Retirement Income Security Act (ERISA).¹⁸⁷ Specifically, the insured claimed that upon the occurrence of a "qualifying event" such as termination,¹⁸⁸ the group medical plan must notify the insured of the right to continuation coverage.¹⁸⁹

However, both the trial court and the court of appeals concluded that the insured was not entitled to notification of continued coverage.¹⁹⁰ The plan administrator was not required to notify the plaintiff¹⁹¹ because the right to continued coverage terminated when the group health plan was discontinued.¹⁹² In this case, the insured simply had no coverage available.

B. *ERISA Subrogation for Medical Payments*

Another subrogation case decided by the District Court for the Northern District of Indiana, should be reviewed by all personal injury practitioners who face ERISA liens. In *Murzyn v. Amoco Co. Metropolitan*,¹⁹³ a group health plan paid medical benefits on behalf of two insureds injured in an automobile accident in the amounts of \$39,000 and \$87,000, respectively.¹⁹⁴ The trial court determined that the insureds' damages from the automobile accident were

182. 661 N.E.2d 566 (Ind. Ct. App. 1996).

183. *Id.* at 568.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* (citing 29 U.S.C. §§ 1161-1168 (1994)).

188. *Id.* (citing 29 U.S.C. §§ 1161, 1163(2)).

189. *Id.* at 568-69 (citing 29 U.S.C. § 1166(9)(4)).

190. *Id.* at 568.

191. *Id.*

192. *Id.* (citing 29 U.S.C. § 1162(2)(B)).

193. 925 F. Supp. 594 (N.D. Ind. 1995).

194. *Id.* at 596.

\$680,000 and \$990,000, respectively.¹⁹⁵ However, the tortfeasor's limits of coverage were \$100,000 for each of the claimants.¹⁹⁶

The insurance provider sought reimbursement of the settlement proceeds paid to its insureds.¹⁹⁷ The insurer argued that ERISA preempted any state law which attempted to diminish the insurer lien.¹⁹⁸ However, the insureds contended that they were not fully compensated for the amount of the judgment.¹⁹⁹

Finding no guidance or prohibition from the Seventh Circuit, the district court adopted a "make whole" doctrine which prohibited the group plan from recovering any of its payments until the insureds have been fully compensated for their injuries.²⁰⁰ This decision will be persuasive authority in ERISA claims that group plan subrogation liens will not be honored until the insured is made whole.²⁰¹

C. Designation of Beneficiaries on Life Insurance Policies

In the case, *In re Koors*,²⁰² the father of a family purchased a life insurance policy naming his sole child, a daughter, as the beneficiary.²⁰³ The father then adopted his wife's son from a previous marriage and had another child but never changed the beneficiary designation on the policy.²⁰⁴ After the husband and wife were killed, the children's guardian sought an equitable distribution of the life insurance proceeds despite the sole designation of the daughter as beneficiary.²⁰⁵

The court of appeals reversed the trial court's equitable division of the proceeds.²⁰⁶ The court concluded that the beneficiary designation must be observed and could not be ignored under the facts of this case.²⁰⁷

IV. RELATIONSHIP BETWEEN INSURANCE AGENTS, INSURED AND INSURANCE COMPANIES

A number of decisions during this period addressed the relationship between the insured, insurance agents and insurers. Many of the decisions simply repeated

195. *Id.*

196. *Id.* at 596, 601.

197. *Id.* at 596-97.

198. *Id.* at 597.

199. *Id.*

200. *Id.* at 601. Indiana would apply a pro rata sharing of expenses and attorney fees on a non-ERISA claim. *See* IND. CODE § 34-4-33-12 (1993).

201. If no judgment has been entered to determine the extent of the insured's damages, an interpleader action between the insured and the group health plan may need to be initiated to make that determination.

202. 656 N.E.2d 530 (Ind. Ct. App. 1995).

203. *Id.* at 531.

204. *Id.*

205. *Id.* at 530.

206. *Id.* at 531-32.

207. *Id.*

prior Indiana law and will not be recited within this article.²⁰⁸ However, other decisions are worth referencing for their conclusions.

In *Rollins Burdick Hunter, Inc. v. Board of Trustees*,²⁰⁹ Ball State University contracted with a sports promoter to play a football game in Ireland.²¹⁰ Before executing the contract, Ball State sought assurances from the promoter's insurance agent that insurance included coverage for non-appearance, non-performance.²¹¹ After receiving assurances from the promoter, Ball State executed the contract with the promoter.²¹² When the game was canceled, Ball State discovered that the coverage was never written into the insurance policy and sued the promoter's insurance agent to seek reimbursement for expenses incurred.²¹³

The court of appeals affirmed a jury verdict in favor of Ball State.²¹⁴ In support, the court found that Ball State established itself as a third party beneficiary and was entitled to reimbursement for expenses associated with the game.²¹⁵

Another factual scenario that frequently arose within this survey period focuses upon the liability of the insurance company for the negligence or dishonesty of the agent. In *Benante v. United Pacific Life Insurance Co.*,²¹⁶ an individual identifying himself as an agent for the insurance company received money from a prospective insured for the purchase of an annuity.²¹⁷ When the insured discovered that the agent did not apply her payments toward the purchase of the annuity, she demanded return of her money from the agent and the insurance company.²¹⁸ When the full amount was not returned, she brought suit against each of them.²¹⁹

The main issue before the court was whether the insurance company could be responsible for the agent's actions.²²⁰ The Indiana Supreme Court disagreed with the Indiana Court of Appeals and affirmed the trial court's denial of summary judgment for the insurance company.²²¹ Specifically, the supreme court found that

208. See *Wyrick v. Hartfield*, 654 N.E.2d 913 (Ind. Ct. App. 1995); *Trupiano v. Cincinnati Ins. Co.*, 654 N.E.2d 886 (Ind. Ct. App. 1995), *trans. denied*. The general principle upon which each of these cases stands is that the agent owes no duty to an insured for failing to provide adequate insurance coverage or failing to advise about insurance matters unless a close and long standing relationship existed and the agent is paid a separate fee for advice given.

209. 665 N.E.2d 914, 918 (Ind. Ct. App. 1996).

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* at 919.

214. *Id.* at 918-19.

215. *Id.*

216. 659 N.E.2d 545 (Ind. 1995).

217. *Id.* at 546.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.* at 547-48.

a question of fact existed as to whether the insurance salesman was an agent of the insurance company and whether the insurance company was liable to the prospective insured.²²²

Another decision came to a similar conclusion. The decision of *Plumlee v. Monroe Guaranty Insurance Co.*,²²³ involves a complex factual situation which will not be addressed within this article. However, the decision of the court is similar to the *Benante*²²⁴ conclusion. If faced with this scenario, practitioners should review each of these cases.

III. STATUTORY DEVELOPMENTS

Every year, statutes are amended concerning the insurance industry. However, most of these amendments are not applicable to the general practitioner. This past survey period encompassed three amendments which have wide-spread application.

Recent legislation²²⁵ permits insurance companies, law enforcement agencies, and other governmental agencies to freely exchange information concerning insurance fraud. The statute also contains requirements for protecting private information such as medical records.²²⁶ This statute should provide a defense from any civil claim for wrongful disclosure of such information by insurance companies during an arson investigation.

Other legislation addressing post partum hospital stays²²⁷ specifies the minimum coverage requirements under a health insurance policy for maternity patients. This statute was enacted to address many health plans that deny mothers and babies a reasonable time at a hospital following birth.

Finally, recent legislation²²⁸ also prohibits insurance companies from discriminating in issuing health and accident policies to persons suffering problems from abuse.²²⁹ Any insurance company that discriminates commits an unfair claims practice prohibited by statute.²³⁰

222. *Id.* at 548. Generally, the insurance company is only liable for the actions of its agent if an application for insurance has been accepted and a policy has been issued. *See Aetna Ins. Co. v. Rodriguez*, 517 N.E.2d 386, 388 (Ind. 1988).

223. 655 N.E.2d 350 (Ind. Ct. App. 1995), *trans. denied*.

224. 659 N.E.2d 545 (Ind. 1995).

225. IND. CODE § 27-2-19-6 (Supp. 1996).

226. *Id.* § 27-2-19-6(c).

227. *Id.* § 27-8-24-1 to -5.

228. *Id.* § 27-4-1-4; *Id.* §§ 27-8-24.3-6 to -9.

229. *Id.* § 27-8-24.3-6. "Abuse" is generally defined to include sexual assault, physical injury, reasonable fear of injury, false imprisonment or damage to property to control the behavior of another as exerted between family members. *Id.* § 27-8-24.3-2.

230. *Id.* § 27-8-24.3-9.

