

SURVEY OF RECENT DEVELOPMENTS IN INSURANCE LAW

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INTRODUCTION

Over the past few years, the area of insurance law has been the subject of much attention by the courts and lawmakers. Likewise, for this past survey period¹ there were a number of decisions addressing issues affecting the insurance industry such as an insurer's duty to defend, insurance agent liability, and cancellation of insurance policies for misrepresentations by the insured. These decisions will be discussed in this Article.²

I. THE INSURER'S DUTY TO DEFEND

During this survey period, the Indiana Court of Appeals decided a controversial case which imposed a greater burden upon insurers before they can deny coverage for a claim. In *Monroe Guaranty Insurance Co. v. Monroe*,³ the Indiana Court of Appeals imposed a requirement upon an insurer to conduct a reasonable investigation of all claims before it could determine whether it has a duty to defend.⁴ At first glance, such a requirement would seem reasonable. However, the decision is contrary to existing Indiana Supreme Court precedent⁵ and imposes an unreasonable requirement upon insurers to investigate claims which clearly lack coverage. Nevertheless, this decision should be kept in mind on all questions involving the insurer's duty to defend.

In *Monroe*, an employee filed an action against his employer contending that the employer "intentionally" caused injury to the employee at the worksite by requiring him to perform difficult jobs when the employee could not use his right

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1. The survey period for this Article is approximately September 1, 1996, to August 1, 1997.

2. Practitioners may wish to review the other decisions not addressed in this Article which include: *Angleton v. Estate of Angleton*, 671 N.E.2d 921 (Ind. Ct. App. 1996) (denying life insurance proceeds to beneficiary who killed decedent); *Hightshue v. AIG Life Ins. Co.*, 939 F. Supp. 1350 (S.D. Ind. 1996), *aff'd*, 135 F.3d 1144 (7th Cir. 1998) (clarifying standard of review for challenge of denial of benefits under ERISA plan); *Ansert v. Adams*, 678 N.E.2d 839 (Ind. Ct. App. 1997) (denying insured's claim of bad faith by insurer for refusal to pay claim); *United Farm Bureau Mut. Ins. Co. v. Nationwide Mut. Fire Ins. Co.*, 678 N.E.2d 1165 (Ind. Ct. App. 1997) (discussing conflicts in "other insurance" provisions); *Erie Ins. Group v. Sear Corp.*, 102 F.3d 889 (7th Cir. 1996) (holding insured's defamatory statements did not trigger advertising injury coverage).

3. 677 N.E.2d 620 (Ind. Ct. App. 1997).

4. *Id.* at 624.

5. *Transamerica Ins. Servs. v. Kopko*, 570 N.E.2d 1283, 1285 (Ind. 1991) (holding that an insurance company has no duty to defend when the claim is obviously not covered by the policy).

arm.⁶ The employer submitted the employee's claim to its insurer. The insurer denied coverage based solely upon a review of the employee's Complaint.⁷ Specifically, the insurer contended that because the employee's claim clearly stated that the employer "intentionally" caused the employee's injuries, the Worker's Compensation and Employers Liability Policy did not provide coverage as there was no "accident."⁸

The employer denied that it intentionally caused injury to the employee.⁹ Instead, the employer contended that it did not know of the employee's limitation and that the job he was to perform did not require the use of his right arm.¹⁰ In essence, the employer's argument suggested that it could have "accidentally" but not "intentionally" caused the employee's injuries and that coverage was owed.¹¹

In a prior decision, the Indiana Supreme Court analyzed an insurer's duty to defend by stating that it was to be "determined *solely* by the nature of the complaint."¹² A number of appellate decisions following the *Kopko* decision have analyzed the duty by stating: "[t]he insurer's duty to defend is determined from the allegations of the complaint coupled with those facts known to or ascertainable by the insurer after reasonable investigation."¹³

The *Monroe* court radically departed from the *Kopko* precedent by requiring an insurer to conduct a "reasonable investigation into the facts underlying the complaint" before making a decision on the duty to defend.¹⁴ The troubling aspect of the *Monroe* decision is that no investigation by the insurer could possibly lead to a finding of coverage based upon the allegations of the Complaint. The theory against the insured was for "intentional" conduct, as clearly identified in the Complaint, which could not be covered under the insured's policy.¹⁵ Thus, the insured's claim that his conduct was not "intentional" was irrelevant to the coverage obligation. If the insured's actions were merely negligent, the claim against the insured would be barred by Indiana's Worker's Compensation Act,¹⁶ which prohibits negligence claims by

6. *Monroe*, 677 N.E.2d at 621. One of the allegations of the employee's Complaint stated: "Because [the employer] either intended to injure Plaintiff or knew injury was certain to occur, Plaintiff's second injury was not 'by accident' and thus is not included under Indiana's Workers Compensation Statute, I.C. §22-3-2-6." *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Transamerica Ins. Servs. v. Kopko*, 570 N.E.2d 1283, 1285 (Ind. 1991) (emphasis added).

13. *See Trisler v. Indiana Ins. Co.*, 575 N.E.2d 1021, 1023 (Ind. Ct. App. 1991); *see also Wayne Township Bd. of Sch. Comm'rs v. Indiana Ins. Co.*, 650 N.E.2d 1205, 1208 (Ind. Ct. App. 1995).

14. *Monroe*, 677 N.E.2d at 624.

15. *Id.* at 621.

16. *See* IND. CODE § 22-3-2-6 (1993).

employees against employers unless the claim falls outside the exclusivity provision of the Act.

The impact of the *Monroe* decision now imposes an obligation upon insurers to conduct a reasonable investigation even if the allegations of the Complaint facially demonstrate a lack of coverage. The *Monroe* decision will likely spawn a new round of litigation to decide what is a "reasonable" investigation by an insurer. Insurers facing a factual situation such as what existed in *Monroe* now must be aware of this significant burden and maintain accurate and complete records of their investigation even though it may be clear that no coverage would be owed for the claim.

Another case which addressed the duty to defend owed by an insurer is *Indiana Farmers Mutual Insurance Co. v. Ellison*.¹⁷ In this case of first impression, a grandchild was sexually molested by her grandfather in the presence of the grandmother.¹⁸ These molestations occurred over a number of visits even after observation by the grandmother.¹⁹ The grandchild eventually sued the grandmother for negligence and the grandmother tendered the claim to her homeowners insurance company for coverage.²⁰

The insurance company refused to defend or indemnify claiming that coverage was excluded for bodily injuries "expected or intended" by the grandmother.²¹ After a declaratory judgment action was filed, the matter proceeded to trial and a judgment was entered finding the existence of a duty of the insurance company to defend the suit for the grandmother.²² On appeal, the court focused upon the insurer's duty to defend by weighing the evidence.²³ Because the grandmother observed the molestations and still permitted the grandchild to be exposed to the grandfather for additional molestations, the court concluded that the evidence demonstrated that the grandmother was "consciously aware" of the molestations.²⁴ Thus, the court determined that coverage was excluded and the insurer owed no duty to defend.²⁵

II. INSURER'S LIABILITY FOR AGENT ACTIONS

During the survey period, two significant decisions addressed an insurance company's liability for actions of the agent and deserve attention. In *Fidelity &*

17. 679 N.E.2d 1378 (Ind. Ct. App. 1997).

18. *Id.* at 1380.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 1381.

23. *Id.* at 1382.

24. *Id.* The Indiana Court of Appeals has defined the term "expected" in an insurance policy as being when an insured is "consciously aware that the injury was practically certain in result." *Indiana Farmers Mut. Ins. Co. v. Graham*, 537 N.E.2d 510, 512 (Ind. Ct. App. 1989).

25. *Ellison*, 679 N.E.2d at 1382.

Casualty Co. v. Tillman Corp.,²⁶ a corporation was having difficulty obtaining worker's compensation insurance. The corporation used an individual named Layden to attempt to acquire coverage under Indiana's Assigned-Risk Pool through the Indiana Compensation Rating Bureau.²⁷ The Bureau assigned the coverage to an insurer who issued a binder for a thirty day policy pending an audit to determine the amount of premium.²⁸ The corporation then sent a large sum of money to Layden for the premium which he embezzled.²⁹

The question addressed by the Seventh Circuit was whether Layden was an agent of the corporation or the insurer which would determine who would bear the loss.³⁰ The magistrate decided that Layden was the agent of the corporation and entered summary judgment in favor of the insurer³¹ relying upon prior Indiana precedent which established that "[a]n intermediary in the insurance business is the agent of the insured while shopping for a policy, and the agent of the insurer after a policy issues."³²

While the corporation had submitted the premium money to Layden after the binder had been submitted, the Seventh Circuit concluded that Layden was still the agent of the corporation and not the insurer.³³ Applying the facts of the case, the court found that the corporation rather than the insurer should bear the loss in this case because the insurer had no control or influence over Layden.³⁴

While *Tillman* may be on its face a departure from Indiana's "brightline" test concerning insurance agency liability, the case applies a well-established factual analysis to determine agency. Because there was little control by the insurer over the agent, the corporation had the better opportunity to prevent the loss.

Another case involving actions of an agent is *Wiggam v. Associates Financial Services of Indiana, Inc.*,³⁵ where the question addressed was whether an agent's representations may override the express language of an insurance policy application.³⁶ In 1986, the insured acquired life and disability insurance in connection with a loan.³⁷ In his loan application, there were two separate boxes which contained the amount of premium for each form of coverage.³⁸ After the insured signed the application, the loan was approved and the insured

26. 112 F.3d 302 (7th Cir. 1997).

27. *Id.* at 303.

28. *Id.*

29. *Id.*

30. *Id.* at 303-04.

31. *Id.* at 304.

32. *Id.* at 304 (citing *Benante v. United Pac. Life Ins. Co.*, 659 N.E.2d 545, 547 (Ind. 1995); *Aetna Ins. Co. v. Rodriguez*, 517 N.E.2d 386 (Ind. 1988)).

33. *Id.* at 306.

34. *Id.* at 305.

35. 677 N.E.2d 87 (Ind. Ct. App. 1997).

36. *Id.* at 90.

37. *Id.* at 88.

38. *Id.*

received both forms of coverage.³⁹

In 1988, the insured acquired another loan from the same company.⁴⁰ The exact same application form was used and the insured signed the box to acquire life but not disability insurance associated with this loan.⁴¹ After the insured became disabled, he sought disability coverage under both loans but discovered that he only had it for the 1986 loan.⁴² The insured contended that his agent had assured him that he had both forms of coverages for the 1988 loan as he had for the 1986 loan.⁴³ The agent denied making any such representations.⁴⁴

After suit was filed to recover the insurance proceeds, the insurer filed a summary judgment motion contending that the application demonstrated lack of coverage.⁴⁵ The insured contended that a factual dispute existed to prevent the entry of summary judgment due to the agent's representations.⁴⁶

In affirming the trial court's grant of summary judgment, the Indiana Court of Appeals determined that the loan application was not complex and clearly demonstrated a lack of coverage.⁴⁷ Because the loan application was short and easily understood, the court distinguished the *Wiggam* facts from another Indiana case that determined that an agent's alleged misrepresentations could override the express terms of a complex insurance policy.⁴⁸

Wiggam reaffirms an insurance company's ability to require its insureds to read and be bound by noncomplex policy terms. With most policies having multiple endorsements, riders and provisions, an agent's representations about the policy are significant and should be limited unless absolutely necessary.

III. CANCELLATION AND REVOCATION OF POLICIES

During the survey period, two cases were decided addressing the cancellation and revocation of policies which may be of interest to insurance practitioners. In *Federal Kemper Insurance Co. v. Brown*,⁴⁹ a father sought to obtain automobile insurance for his stepson to replace the existing coverage which was about to be canceled.⁵⁰ After the father informed the agent that the stepson had received a number of speeding tickets, the agent told the father that coverage for

39. *Id.*

40. *Id.*

41. *Id.* at 88-89.

42. *Id.* at 89.

43. *Id.* at 90.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 91.

48. *Id.* In *Medtech Corp. v. Indiana Insurance Co.*, the court determined that an agent's representations which contradicted policy terms excused an insured's failure to read the policy provisions because of the policy's complexity. 555 N.E.2d 844 (Ind. Ct. App. 1990).

49. 674 N.E.2d 1030 (Ind. Ct. App. 1997).

50. *Id.* at 1032.

the son would cost in excess of \$1000 per year.⁵¹ The agent, in order to save the father money, completed an application misrepresenting that the father's spouse was the only other driver in the household.⁵² The father signed the application and a policy was issued.⁵³

Later, the stepson was involved in an accident resulting in serious injuries to two individuals.⁵⁴ The injured parties had uninsured/underinsured motorist coverage which paid for treatment of their injuries and the insurer retained subrogation rights to pursue the stepson.⁵⁵ The father's auto insurer filed suit to rescind the policy covering the stepson.⁵⁶

On appeal, the court rejected the father's argument that the misrepresentations were made by the agent.⁵⁷ Because the father knew the facts to be incorrect, but nevertheless signed the application, the father was deemed to have made the misrepresentations.⁵⁸

The more significant issue addressed by the court focused upon the uninsured/underinsured motorist carrier's argument that Indiana public policy prevented cancellation of the policy because of the harm which resulted to injured third parties.⁵⁹ However, the court determined that public policy was not violated because the injured persons had purchased uninsured/underinsured motorist coverage.⁶⁰ While the uninsured/underinsured motorist coverage may not have been sufficient to cover the extent of the injured party's loss, the statutory minimum coverage⁶¹ available satisfied Indiana's policy.⁶² Consequently, the stepson's automobile carrier could rescind the policy based upon the father's misrepresentations without violating public policy.⁶³

IV. INTERPRETATION OF POLICY DEFINITIONS AND TERMS

A number of cases were decided by the Indiana appellate courts which interpreted the definitions of various policy terms. The cases define such terms as "household," "land motor vehicle," and "ownership, maintenance and use" as

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 1033.

58. *Id.* at 1035.

59. *Id.* (citing *American Underwriters Group, Inc. v. Williamson*, 496 N.E.2d 807, 810-11 (Ind. Ct. App. 1986)). As stated by the court, "we have held that an insurance company may not rescind a policy of insurance on the ground of fraud or misrepresentation in procuring the insurance policy so as to escape liability to third persons." *Id.*

60. *Id.* at 1036.

61. See IND. CODE § 27-7-5-2 (Supp. 1997); IND. CODE § 9-25-4-5 (1993).

62. *Federal Kemper Ins. Co.*, 674 N.E.2d at 1036.

63. *Id.* at 1037.

they are used in insurance policies. The implications of the court's holding as it pertains to each term are addressed in the following sections.

A. Definition of "Household"

An interesting factual scenario existed in *Erie Insurance Exchange v. Stephenson*⁶⁴ which has broad implications for insurers. A grandmother became sick and moved to her daughter's home.⁶⁵ Her grandson stayed at the grandmother's home paying the utility bills but no rent.⁶⁶ The grandmother maintained the homeowner's insurance and the real estate taxes.⁶⁷

The grandson was entertaining some friends when a bottle rocket struck one of the friends in the eye.⁶⁸ Almost four years later the friend filed a lawsuit against the grandson to recover for the eye injury.⁶⁹

One of the issues addressed by the court was whether the grandson was entitled to liability coverage as a resident of the grandmother's "household."⁷⁰ The insurer argued that because the grandmother had moved from the home, the grandson was no longer part of her "household" and, therefore, was not entitled to coverage.⁷¹

The court determined that the insurer owed coverage to the grandson.⁷² In applying the facts of the case to its interpretation of "household," the court held that a person could be a resident of more than one household.⁷³ Thus, despite the fact that the grandmother no longer lived in the home, it still was her home for insurance coverage purposes.⁷⁴ This decision supported the insured's intent to provide insurance coverage for the premises even though she may not have resided at the home.⁷⁵

B. Definition of "Land Motor Vehicle"

The definition of a "land motor vehicle" has significance to many potential factual scenarios within insurance law. For example, a construction of the

64. 674 N.E.2d 607 (Ind. Ct. App. 1996).

65. *Id.* at 609.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 610. The policy language permitted coverage for "certain residents of the homeowner's 'household.'" *Id.*

71. *Id.*

72. *Id.*

73. *Id.* ("[W]e conclude that there is no requirement that members of a household live under the same roof. (citation omitted). Thus, it is possible to maintain two households or to live as a member of one household and still be the 'domestic head' of a separate household."). *Id.*

74. *Id.*

75. *Id.* The decision also contained an excellent discussion of an insured's obligation to give timely notice of an accident to the insurer and the effects of a failure to do so. *Id.* at 610-13.

definition may determine whether coverage is available to an insured under either an automobile or homeowner policy for a particular factual scenario. The decision of *Erie Insurance Co. v. Adams*⁷⁶ is beneficial in construing the meaning of this term.

In *Adams*, a friend of the insured grandson severed a thumb while working on a dismantled El Camino at the insured's home.⁷⁷ After the friend filed suit, the insured sought coverage under her homeowner's policy and the insurer contended that no coverage was owed because of an exclusion for claims of bodily injury arising out of the "ownership, maintenance or use of . . . any land motor vehicle" ⁷⁸

The court entered into a factual analysis of whether the dismantled El Camino was a "land motor vehicle." The El Camino had been driveable when first purchased but had not been driven for almost a year.⁷⁹ The El Camino did not have a body, seats, brakes or engine and was described by the insured as "wheels and a frame."⁸⁰ Based upon the clearly inoperable condition of the El Camino (most notably the absence of a motor), the court determined as a matter of law that it was not a motor vehicle as that term was intended to trigger the exclusion.⁸¹

C. Interpretation of "Ownership, Maintenance, or Use" of a Motor Vehicle

Another decision interpreting a different section of the "motor vehicle" exclusion is *Westfield Insurance Co. v. Herbert*.⁸² A sixteen year old son of the insured discovered oil was leaking through a valve cover in his car's engine, so he decided to replace the cover.⁸³ After removing the old cover, the son decided to clean and sell it.⁸⁴ After soaking the cover in gasoline, the son decided to burn the cover to remove the gasket which resulted in an explosion injuring a young girl.⁸⁵ After the young girl filed suit, the homeowner's insurer claimed that coverage was excluded because the son was involved in "maintaining" the motor vehicle.⁸⁶

76. 674 N.E.2d 1039 (Ind. Ct. App. 1997).

77. *Id.* at 1040.

78. *Id.*

79. *Id.* at 1040, 1043.

80. *Id.* at 1040.

81. *Id.* at 1043.

82. 110 F.3d 24 (7th Cir. 1997).

83. *Id.* at 26.

84. *Id.*

85. *Id.*

86. The actual exclusion provided that coverage was excluded for bodily injury arising out of "the ownership, maintenance, use, loading or unloading of motor vehicles or other motorized land conveyances, including trailers, owned or operated by or rented or loaned to an insured." *Id.* at 26.

The court narrowly construed the exclusion to find it inapplicable.⁸⁷ Because the accident did not occur while the son was working on his car but when he was cleaning an automobile part for later resale, the son was not engaged in maintenance upon the car to trigger the exclusion.⁸⁸ The key to this decision appears to be that the automobile part that the son was cleaning would not be used again within the automobile so that no maintenance was being performed upon the vehicle.⁸⁹

D. Interpretation of "Use" of a Motor Vehicle

Another decision addressing the meaning of "use" under an insurance policy but for a different purpose is *Allstate Insurance Company v. Cincinnati Insurance*.⁹⁰ The insured asked a fellow employee, a mechanic, to inspect her vehicle for a gasoline problem.⁹¹ When the employee raised the car on a hoist, some gasoline leaked and caught fire causing extensive property damage.⁹² In an attempt to collect for the property damage, a lawsuit was filed against the employee⁹³ which ultimately required an insurance coverage determination of whether the mechanic was "using" the vehicle in order to be an additional insured under the auto insurance.⁹⁴

The court of appeals concluded that the mechanic was not "using" the automobile to trigger a coverage obligation.⁹⁵ In making this determination, the court distinguished cases where the policy terms "arising out of the ownership, maintenance or use" of an automobile was construed differently by other courts.⁹⁶ The court clarified that the terms "maintenance" and "use" were not synonymous.⁹⁷ Consequently, the mechanic's work upon the car did not constitute "use" as required to establish coverage.⁹⁸

The meaning of "using" a vehicle for an occupation was addressed in *Alderfer v. State Farm Mutual Automobile Insurance Co.*⁹⁹ A volunteer

87. *Id.* at 27.

88. *Id.*

89. *Id.*

90. 670 N.E.2d 119 (Ind. Ct. App. 1996).

91. *Id.* at 120.

92. *Id.*

93. After a default judgment was entered against the employee, the plaintiff attempted to collect insurance proceeds from the vehicle owner's insurer by claiming the employee was covered. *Id.*

94. *Id.* In order for the mechanic to qualify as an insured under the policy, he must have been "using" the automobile. *Id.*

95. *Id.* at 122.

96. *Id.* at 121. *See, e.g.,* *Indiana Lumbermens Mut. Ins. Co. v. Statesman Ins. Co.*, 291 N.E.2d 897 (Ind. 1973).

97. *Allstate Ins. Co.*, 670 N.E.2d at 121.

98. *Id.* at 122.

99. 670 N.E.2d 111 (Ind. Ct. App. 1996).

firefighter was seriously injured when another firefighter pinned him with a fire truck.¹⁰⁰ The second firefighter had a personal liability policy which excluded coverage for non-owned vehicles “used in any other business or occupation.”¹⁰¹ The insurer relied upon the exclusion to avoid a coverage obligation.¹⁰²

The court ruled that the exclusion unambiguously applied because the term “any other business or occupation” was “all inclusive” and did not just apply to the principal business or occupation.¹⁰³ The firefighter was engaged in a “business or occupation” which was excluded under the policy even though he worked on a volunteer basis.¹⁰⁴

E. Interpretation of “Occurrence” in Claim for Negligent Hiring

An interesting factual coverage question was presented in the decision of *Erie Insurance Co. v. American Painting Co.*¹⁰⁵ The insured, a painting contractor, was sued by a customer for negligent hiring and retention of an employee who allegedly burglarized and set fire to the customer’s home.¹⁰⁶ The insurance company claimed that no coverage was owed because there was no “occurrence” to trigger coverage for the hiring and retention of the employee.¹⁰⁷ The insurance contract defined the term “occurrence” as “an accident, including continuous or repeated exposure to the same general, harmful conditions.”¹⁰⁸

The court, in a very short opinion without much analysis, agreed with the insurer and found that no coverage existed.¹⁰⁹ The court found that the insured’s action in hiring and retaining the employee was “intentional” and not “accidental” as required to show an “occurrence” and activate a coverage obligation.¹¹⁰

V. MISCELLANEOUS DECISIONS

A. Interpretation of Assault and Battery Exclusion

The decision of *Sans v. Monticello Insurance Co.*¹¹¹ is one of many decisions addressing whether insurance coverage is available to an individual who discharges a gun resulting in personal injuries to another. In *Sans*, a bartender

100. *Id.* at 111-12.

101. *Id.* at 112.

102. *Id.*

103. *Id.* at 113.

104. *Id.*

105. 678 N.E.2d 844 (Ind. Ct. App. 1997).

106. *Id.* at 845.

107. *Id.*

108. *Id.* at 846.

109. *Id.*

110. *Id.*

111. 676 N.E.2d 1099 (Ind. Ct. App. 1997).

ordered the plaintiff to leave the bar.¹¹² When the plaintiff reentered the bar, the bartender produced a gun that discharged and injured the plaintiff.¹¹³ After the plaintiff brought suit, the insurance company for the bar sought to exclude coverage for the incident by claiming that an exclusion for assault and battery applied.¹¹⁴

The bar produced an affidavit in response to the insurer's summary judgment motion that the bartender did not intend to fire the gun or shoot the plaintiff.¹¹⁵ The court held that it could not infer as a matter of law that the bartender intended to shoot the gun.¹¹⁶ Instead, the court found the existence of a material issue of fact, namely "intent," prevented the granting of summary judgment.¹¹⁷

The insurance cases dealing with claims for coverage for gunshots require a close look at the facts when being applied to other factual scenarios. The *Sans* case should not be interpreted to prevent the granting of a summary judgment denying coverage in situations where the facts demonstrate that an insured either intended or was consciously aware that harm would occur from the shooting of a gun.¹¹⁸ It is anticipated that individuals representing insureds and injured victims will cite *Sans* in an attempt to defeat an insurer's summary judgment motion to exclude coverage for incidents involving the discharge of a gun. A close look at the facts of each case may demonstrate significant differences and lead to a varied outcome.

B. Insurer's Independent Subrogation for Medical Payments

In *Erie Insurance Co. v. George*,¹¹⁹ an insured received payments for medical expenses from his own insurance company under the Medical Payments coverage.¹²⁰ Erie advised the insured that it possessed subrogation rights under the policy and intended to pursue its own claim against the tortfeasor to recover

112. *Id.* at 1100.

113. *Id.*

114. *Id.* at 1100-01. The exclusion provided:

It is agreed that the insurance does not apply to bodily injury or property damage arising out of assault and battery or out of any act or omission in connection with the prevention or suppression of such acts, whether caused by or at the instigation or direction of the insured, his employees, patrons or any other person.

Id. at 1101.

115. *Id.* at 1100.

116. *Id.* at 1103.

117. *Id.* at 1104.

118. For example, the facts of the following cases demonstrated that coverage was excluded because of the insured's conduct. *Home Ins. Co. v. Nielson*, 332 N.E.2d 240 (Ind. App. 1975) (insured's admission that he struck plaintiff but did not intend to injure); *Allstate Ins. Co. v. Herman*, 551 N.E.2d 844 (Ind. 1990) (shooting gun into crowd of people with intent to injure somebody).

119. 681 N.E.2d 183 (Ind. 1997).

120. *Id.* at 185.

the amounts.¹²¹ The insured retained his own counsel to pursue a personal injury claim and objected to the insurer's attempt to pursue an independent subrogation lawsuit.¹²²

The trial court concluded that the insurer did not have a separate right to pursue subrogation until the insured reached a settlement with or obtained a judgment against the tortfeasor.¹²³ The court of appeals reversed.¹²⁴ The supreme court reversed the court of appeals and determined that the insurance company could not pursue a separate action for subrogation without the consent of the insured.¹²⁵ A number of reasons were given for this decision including the prohibition against claim splitting, duplicative litigation, and prevention of the insurer from avoiding expense sharing.¹²⁶ The supreme court also acknowledged that the insured possesses the right to control the litigation while the insurer's interest is only secondary.¹²⁷ The insurer may acquire control of the litigation by entering into an express agreement with the insured granting that right.¹²⁸ The policy of insurance, alone, is insufficient to permit the insurer to proceed.¹²⁹

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 184.

126. *Id.* at 192-93.

127. *Id.* at 193-94.

128. *Id.*

129. *Id.* at 194.