SURVEY OF RECENT DEVELOPMENTS IN INSURANCE LAW

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During this survey period,[1] the Indiana appellate courts addressed a number of insurance issues in the fields of automobile, commercial, and homeowners coverage. This period focused upon unique coverage topics. This Article addresses the decisions in the past year and analyzes their effect upon the practice of insurance law.[2]

I. AUTOMOBILE CASES

A. Passenger in Automobile Was Not "Using" Vehicle to Be Afforded Liability Coverage

The decision of *Estate of Sullivan v. Allstate Insurance Co.*[3] addressed an interesting question of whether a passenger of an automobile should be afforded liability coverage under an automobile insurance policy. Two insurance agents,

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1. The survey period for this Article is approximately November 1, 2005 to October 31, 2006.

2. Other cases during the survey period that are not addressed in this Article include *Casey v. Phelan Insurance Agency*, 431 F. Supp. 2d 888 (N.D. Ind. 2006) (holding that agency did not violate Indiana's uninsured motorist statute by acquiring policy for insured that contained limits lower than liability limits); *Wolf Lake Terminals, Inc. v. Mutual Marine Insurance Co.*, 433 F. Supp. 2d 933 (N.D. Ind. 2005) (holding that environmental contamination claim satisfied definition of "personal injury" to support coverage under commercial general liability policy); *Lutz v. Erie Insurance Exchange*, 848 N.E.2d 675 (Ind. 2006) (finding that auto insurer has rights to pursue subrogation action in its own name); *Carter v. Property Owners Insurance Co.*, 846 N.E.2d 712 (Ind. Ct. App. 2006) (deciding that court could not rule as a matter of law that injured person was not an employee or independent contractor for application of "employee" exclusion under liability policy); *Perryman v. Motorist Mutual Insurance Co.*, 846 N.E.2d 683 (Ind. Ct. App. 2006) (holding that statute of limitations for insured's breach of contract lawsuit began when insured discovered injury from coverage denial); *Matteson v. Citizens Insurance Co. of America*, 844 N.E.2d 188 (Ind. Ct. App. 2006) (treating tortfeasor as insured under liability policy so that insurer's payment of proceeds to victim foreclosed victim's underinsured motorist claim); *Walton v. First American Title Insurance Co.*, 844 N.E.2d 143 (Ind. Ct. App. 2006) (finding that insurer who refuses to defend insured for lawsuit, does at its own peril); *American Family Mutual Insurance Co. v. Ginther*, 843 N.E.2d 575 (Ind. Ct. App. 2006) (holding that liability insurer must pay post-judgment interest as part of compensation compensatory damage award); *Mid-American Fire & Casualty Co. v. Shoney's, Inc.*, 843 N.E.2d 548 (Ind. Ct. App. 2006) (holding that insured landlord's ownership of gas station was a "business pursuit" which excluded environmental claim); *In re Estate of Highfill*, 839 N.E.2d 218 (Ind. Ct. App. 2005) (construing disclaimer of coverage under life insurance policy), *trans. denied*, 860 N.E.2d 584 (Ind. 2006); *S.C. Nestel, Inc. v. Future Construction Co.*, 836 N.E.2d 445 (Ind. Ct. App. 2005) (finding that insurance company may not pursue subrogation claim against parties insured under policy).

3. 841 N.E.2d 1220 (Ind. Ct. App. 2006).

Robert and Alan, were returning from a sales call to a prospective insured.[4] Robert was driving his personal automobile with Alan as a front seat passenger.[5] Allegedly, Robert traveled into the path of another automobile being driven by the decedent plaintiff, who lost control and collided with a semi-tractor trailer.[6] As a result of this collision, the decedent's estate brought a lawsuit against Robert, Alan, and others.[7]

Alan sought insurance coverage for the estate's lawsuit from his personal automobile insurer.[8] That insurer provided a defense to Alan under a reservation of rights, and filed a separate declaratory judgment action to determine whether it owed liability insurance coverage to Alan for the estate's lawsuit.[9] The policy provided coverage to Alan for "damages caused by his use of a 'non-owned auto,' which means 'an auto used by you.'"[10] Thus, the issue of the declaratory judgment action was whether Alan, as a passenger, was "using" the automobile involved in the accident to be afforded insurance coverage.

The trial court granted the insurer's motion for summary judgment, finding that no coverage was owed.[11] The appellate court analyzed many Indiana decisions which addressed the meaning of "use" within an automobile liability policy,[12] and affirmed the granting of summary judgment.[13] The court approved prior judicial decisions that interpreted "use" of an automobile for a liability policy as suggestive of "activity that assist[ed] in propelling or directing the vehicle to a place."[14] The court also recognized that activities other than the actual driving of a vehicle can still involve an insured's "use" of an automobile for purposes of providing liability coverage, if the insured has an "active relationship" to the vehicle other than merely being a passenger.[15]

The appellate court concluded that Alan's sole relationship as a passenger in the accident vehicle, was insufficient to demonstrate that he was "using" the vehicle to be afforded insurance coverage.[16] The court also rejected the insured's suggestion that evidence was designated that Alan provided directions to Robert

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4. *Id.* at 1222.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *See id.* at 1223-25 (discussing Monroe Guar. Ins. Co. v. Campos, 582 N.E.2d 865 (Ind. Ct. App. 1991); Am. Family Mut. Ins. Co. v. Nat'l Ins. Ass'n, 577 N.E.2d 969 (Ind. Ct. App. 1991); Miller v. Loman, 518 N.E.2d 486 (Ind. Ct. App. 1987); Protective Ins. Co. v. Coca-Cola Bottling Co.—Indianapolis, Inc., 467 N.E.2d 786 (Ind. Ct. App. 1984); Challis v. Commercial Standard Ins. Co., 69 N.E.2d 178 (Ind. App. 1946)).
13. *Id.* at 1226.
14. *Id.* at 1223 (quoting *Protective Ins. Co.*, 467 N.E.2d at 790-91).
15. *Id.* at 1224 (citing *Monroe*, 582 N.E.2d 865).
16. *Id.* at 1225.

to create an inference that Alan was "using" the vehicle.[17]

This case is helpful in clarifying what is necessary for a passenger to be considered "using" a vehicle to be afforded coverage. This decision makes abundantly clear that merely being an occupant of a vehicle will not be sufficient to demonstrate "use" of a vehicle to trigger liability coverage.

B. Advanced Medical Payments by Liability Insurer Permitted to Be Setoff from Judgment Against Driver

The decision of *Crabtree v. Estate of Crabtree*,[18] provides excellent analysis of the effect of a defendant driver's liability insurer making advanced medical payments to the defendant's vehicle occupants. Two children were passengers inside an automobile driven by their father that was involved in an accident.[19] The father's blood alcohol level was above the legal liability limit when the accident happened.[20] As a result of the accident, the children sustained personal injuries.[21]

Approximately a year after the accident, the father "died of causes unrelated to the accident."[22] The children brought a lawsuit against their father's estate to recover "compensatory and punitive damages."[23] Apparently, the children's lawsuit alleged that their father's conduct was "willful and wanton" in order to prevent the bar against the lawsuit by Indiana's guest statute.[24] The estate successfully sought dismissal of the punitive damages claim, but the compensatory damage claim went to trial.[25] An award of $11,500 was entered in favor of each child.[26] Upon the motion of the estate, the trial court reduced the children's judgments by the amount that they received in medical payments coverage from their father's insurer.[27]

The children appealed both the trial court's dismissal of the claim for punitive damages, as well as the trial court's decision to reduce the judgment by the payment of medical expenses.[28] The court of appeals reversed both decisions.[29] This Article will not address the Indiana Supreme Court's ruling on the trial court's dismissal of the punitive damage claim, except to state that the supreme court ruled that "Indiana law does not permit recovery of punitive

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17. *Id.* at 1226.
18. 837 N.E.2d 135 (Ind. 2005).
19. *Id.* at 136.
20. *Id.*
21. *Id.*
22. *Id.* at 137.
23. *Id.*
24. IND. CODE § 34-30-11-1 (2004).
25. *Crabtree*, 837 N.E.2d at 137.
26. *Id.*
27. *Id.*
28. *Id.*
29. A.C. v. Estate of Crabtree, 809 N.E.2d 433 (Ind. Ct. App.), *vacated*, Crabtree v. Crabtree, 822 N.E.2d 977 (Ind. 2004).

damages from the estate of a deceased tortfeasor."[30] The court concluded that the primary purpose of punitive damages is to punish a wrongdoer and deter that wrongdoer from engaging in future misconduct.[31] In the case of a deceased torfeasor, the primary purpose of imposing punitive damages no longer existed.[32]

The children argued that the trial court's decision to allow a credit to the estate for medical payment benefits advanced by the vehicle's insurer, was improper.[33] Specifically, the children contended that the insurer who advanced the medical payments was required to seek repayment of those benefits pursuant to Indiana's subrogation statute.[34] The estate countered that the applicable statute was Indiana's "advanced payment" statute:[35]

> If it is determined that the plaintiff is entitled to recover in an action described in section 1 of this chapter:
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> 1. the defendant may introduce evidence of any advanced payment made; and
>
> 2. the court shall reduce the reward to the plaintiff to the extent that the award includes an amount paid by the advanced payment.[36]

The court defined "advanced payments" to "include a payment made to the plaintiff by the defendant or the defendant's insurance company."[37] The court also observed that the purpose of the advanced payment statute was to prevent double recovery by the plaintiff if an advanced payment had been made.[38]

The supreme court rejected the estate's contention that the subrogation statute applied.[39] Because the subrogation statute required the subrogated insurer to pay a share of attorney fees and collection costs, the supreme court concluded that the legislature did not intend to compel an insurer to have to pay this proportionate share of its attorney fees while also insuring the defendant.[40] Because the insurer was both the medical payments insurer and the estate's liability insurer, the insurance company would have to take a reduction pursuant to the subrogation act for payments it is making to itself.[41] Instead, the supreme court concluded that the advanced payment statute properly addressed the issue.[42]

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30. *Crabtree*, 837 N.E.2d at 139.
31. *Id.*
32. *Id.*
33. *Id.* at 140.
34. *Id.* at 142 (citing IND. CODE § 34-53-1-2 (2004)).
35. *Id.* at 140 (citing IND. CODE § 34-44-2-3 (2004)).
36. *Id.*
37. *Id.* (quoting IND. CODE § 34-6-2-3 (2004)).
38. *Id.* (citing Monroe v. Strecker, 355 N.E.2d 418, 420 (Ind. App. 1976)).
39. *Id.* at 142.
40. *Id.*
41. *Id.*
42. *Id.*

This opinion is judicially sound in addressing a common occurrence where advanced medical payments have been made. An insurer should provide medical payments insurance to injured passengers, and maintain the ability to obtain a setoff for liability payments paid to the same passengers in resolution of a liability claim.

C. Self-Insured Employer Responsible to Indemnify and Defend Employee's Permissive Use of Vehicle Supplied by Employer

During the survey period, the Indiana Supreme Court delivered a very interesting decision addressing the obligations of self-insured entities providing vehicles to their employees in *Northern Indiana Public Service Co. v. Bloom*.[43] An electric utility supplied one of its employees with a truck to drive to and from work.[44] Under Indiana's Financial Responsibility Act,[45] the utility deposited sums totaling $1 million to be considered a self-insured entity.[46]

The employee was involved in an automobile accident while driving the truck causing his death and injuries to the other vehicle's driver.[47] The injured driver filed a personal injury lawsuit against the employee's estate and the utility.[48] The utility filed a counterclaim against the injured driver to recover property damage to its truck.[49] Additionally, the utility filed a cross-claim against the employee's estate seeking indemnification for any liability imposed on the utility because of the employee's driving of the utility's truck.[50] The estate cross-claimed against the utility, seeking an order requiring the utility to defend and indemnify the employee's estate for the claims of the injured driver.[51]

A number of summary judgment motions were eventually filed concerning these various claims. The more significant rulings focused upon the trial court granting summary judgment to the estate on its request for costs of defense and indemnity from the utility, and the denial of the utility's summary judgment motion seeking indemnification from the estate.[52] The trial court further ordered the utility to pay for the estate's legal defense costs and to indemnify it for any judgment that could be entered against the estate up to the full extent of any excess liability insurance possessed by the utility.[53]

The court of appeals affirmed the trial court's order requiring the utility to defend and indemnify the estate, but reversed the trial court's order, establishing the maximum liability of the utility at $1 million, the amount made in deposits

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43. 847 N.E.2d 175 (Ind. 2006).
44. *Id.* at 179.
45. IND. CODE §§ 9-25-1-1 to -9-7 (2004).
46. *N. Ind. Pub. Serv. Co.*, 847 N.E.2d at 179.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at 179-80.
53. *Id.* at 180.

to the Bureau of Motor Vehicles.[54] On appeal to the Indiana Supreme Court, the utility conceded that it was responsible for the deceased employee's liability to the other driver, but contended that its liability was limited to the minimum amounts required under the Financial Responsibility Act, $60,000.[55]

The supreme court recognized that "[t]he purpose of the Financial Responsibility Act is to assure a source of compensation for victims harmed by the negligent operation of motor vehicles."[56] The court also observed that a party's election to be a self-insured entity only requires the party to afford the same amount of compensation to injured victims as what an entity with minimum limits under a liability policy possesses.[57] As a consequence, the supreme court concluded that self-insurers, such as the utility, must provide the minimum amount of security for potential liability as required of an entity who possesses a liability insurance policy.[58]

With respect to the trial court's order requiring the utility to defend and indemnify its employee, the supreme court concluded that the Financial Responsibility Act does not transform a self-insured entity into a "quasi-insurance carrier and require it to indemnify a permissive user[,]" such as its employee.[59] Instead, the purpose of the Act is to require the self-insured entity to provide protection to other drivers for injuries or damages arising from the use of the self-insured entity's vehicles.[60] As a result, its purpose was not to provide security to the permissive user for his potential liability, such that no duty to indemnify existed under the Financial Responsibility Act.[61]

However, the supreme court also created a duty for the self-insured entity to disclose to the permissive user that the self-insured utility's indemnity exposure was limited. The supreme court concluded that because the utility supplied the vehicle to the employee for use in employment and for personal use, the utility possessed a duty to disclose its limited indemnification obligation under the

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54. *Id.* (citing 816 N.E.2d 887 (Ind. Ct. App. 2004), *trans. granted*, 831 N.E.2d 746 (Ind. 2005)).

55. *Id.* at 181. Indiana Code section 9-25-4-5 provides as follows:

> [T]he minimum amounts of financial responsibility are as follows:
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> (1) Subject to the limits set forth in subdivision (2), twenty-five thousand dollars ($25,000) for bodily injury to or the death of one (1) individual.
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> (2) Fifty thousand dollars ($50,000) for bodily injury to or the death of two (2) or more individuals in any one (1) accident.
>
> (3) Ten thousand dollars ($10,000) for damage to or destruction of property in one (1) accident.

IND. CODE § 9-25-4-5 (2004).

56. *N. Ind. Pub. Serv. Co.*, 847 N.E.2d at 182 (citing Fed. Kemper Ins. Co. v. Brown, 674 N.E.2d 1030, 1035 (Ind. Ct. App. 1997)).

57. *Id.*

58. *Id.* at 182-83.

59. *Id.* at 184.

60. *Id.*

61. *Id.* at 185.

Financial Responsibility Act.[62] The court found that the utility should have made the employee aware of the significant risk exposure that existed, so that the employee could take necessary steps to try to secure appropriate insurance coverage.[63] If the utility failed to do so, the utility was barred from bringing any claims to seek reimbursement from the employee's estate for any obligation that the utility had above and beyond the self-insured limits.[64]

This case presented some extremely interesting legal issues for the court to address. While the self-insured entity who complies with the mandates of the Indiana Financial Responsibility Act has limited financial obligations to the public, the court also wanted to insure that a permissive user of that self-insured entity's vehicle has the opportunity to acquire sufficient protection from other sources.

D. Insured's Failure to Give Examination Under Oath at Request of Insurer Constituted Breach of Policy as a Matter of Law

The decision in *Morris v. Economy Fire & Casualty Co.*[65] addressed the refusal of insured homeowners to provide examinations under oath as required under their policy.[66] The insureds refused to provide the examination under oath, until they received transcribed recorded statements that they gave to the insurer.[67] When the insurer refused to supply those transcribed statements, the insureds filed a complaint against the insurer alleging breach of the insurance contract and seeking damages for the insurer's alleged failure to deal with the insured in good faith.[68]

The trial court granted the insurer's motion for summary judgment, finding that the insureds' failure to provide the examination under oath constituted a breach of the contract and excused the insurer from having to provide any coverage.[69] The court of appeals reversed the trial court.[70]

The Indiana Supreme Court granted transfer, and affirmed the trial court's grant of summary judgment to the insurer.[71] The supreme court rejected the insureds' contention that they were entitled to receive the transcribed statements before having to give the examination under oath.[72] Instead, the supreme court

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62. *Id.* at 188.

63. *Id.*

64. *Id.*

65. 848 N.E.2d 663 (Ind. 2006).

66. In a section titled "Your Duties After Loss," the policy provided: "[i]n case of a loss to covered property, you must see that the following are done: . . . (f) as often as we reasonably require: . . . (3) submit to examination under oath, while not in the presence of any other insured, and sign the same." *Id.* at 666.

67. *Id.* at 665.

68. *Id.*

69. *Id.*

70. *Id.* (citing Morris v. Econ. Fire & Cas. Co., 850 N.E.2d 129 (Ind. Ct. App. 2004)).

71. *Id.*

72. *Id.* at 666.

found that the policy required the insureds to give the examinations at the request of the insurer, and there were no policy provisions which allowed the insureds to refuse to do so until they received documents from the insurer.[73] By refusing to submit to the examination, the court found, as a matter of law, that the insureds breached the policy.[74] Consequently, the insurer did not have to provide insurance coverage under the homeowners policy.[75]

This decision firmly establishes that the policy requirement that an insured submit to an examination under oath at the request of the insurer is a policy condition that must be satisfied in order for the insured to be entitled to coverage. Furthermore, because the examination under oath affords the insurer a valuable tool in detecting and addressing potential insurance fraud, the court's refusal to require the insurer to supply the insured's transcribed statements benefits the insurer in addressing potential insurance fraud claims.[76]

E. In Addressing Claims of Multiple Passengers to Underinsured Motorist Benefits to Determine if Tortfeasor Was an "Underinsured Motorist," Insurer Should Compare Policy Limits Between Tortfeasor's Liability Policy and Underinsured Motorist Coverage Policy

The decision of *Grange Insurance Co. v. Graham*[77] addresses a commonly occurring situation. Graham was driving a vehicle that was insured by an automobile policy with underinsured motorist coverage limits of $100,000 per person and $300,000 per accident.[78] Inside Grange's vehicle were four other passengers.[79] Graham collided with a vehicle being driven by Hildenbrandt, who was insured by an automobile policy that had liability limits of $100,000 per person and $300,000 per accident.[80]

The accident resulted in serious injuries to Graham and the other occupants of her automobile.[81] Because their damages appeared to exceed the per accident policy limits of Hildenbrandt's policy, the liability limits were divided among the occupants of Graham's vehicle, with each of them receiving less damages than what they believed their claims were worth, and also less than the per person limits of the policy ($100,000).[82] Each occupant of Graham's vehicle sought to recover underinsured motorist coverage under the policy covering the vehicle in

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73. *Id.*

74. *Id.* at 666-67.

75. *Id.*

76. The insurer obviously does not wish to supply an insured with previously recorded statements because of the insured's description or "story" of the incident changes, this is significant evidence of potential fraud by the insured.

77. 843 N.E.2d 597 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 589 (Ind. 2006).

78. *Id.* at 598.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

which they were riding.[83] The underinsured motorist carrier contended that because the tortfeasor's policy had identical per person and per accident limits as the underinsured motorist policy, no additional coverage was available.[84]

A declaratory judgment lawsuit was filed.[85] The trial court denied the insurer's motion for summary judgment, and granted summary judgment in favor of the claimants.[86] The court concluded that because the claimants had received less than the per person limits for underinsured motorist coverage, they were entitled to seek additional amounts up to the per person limits of the underinsured motorist coverage.[87]

On appeal, the court observed that each party presented a previous Indiana appellate decision which supported their respective positions.[88] While the court found each of these cases instructive, they did not directly address the issue before the court.[89] Instead, the court looked to the guiding purpose of uninsured/underinsured motorist coverage, to place "the insured in the position he would have occupied if the tortfeasor had liability coverage equal to [the insured's] underinsured motorist limits."[90] The court found that a comparison of the limits of coverage available under the tortfeasor's policy and the underinsured motorist policy ($300,000 per occurrence) were identical because the goal was to provide the claimants with the same coverage as if their own underinsured motorist policy applied.[91] Consequently, the court concluded that the tortfeasor was not an "underinsured motorist"; therefore, the claimants could not obtain additional recovery.[92]

At first glance, it appears that the *Grange* decision is a departure from the Indiana Supreme Court's decision in *Corr v. American Family Insurance*.[93] In

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83. *Id.* at 599.

84. *Id.* Surprisingly, the court did not appear to provide the definition of "underinsured motorist" within the policy. The policy included language of what the insurer owed as follows:

> [t]he maximum we will pay under this coverage is the lesser of: (1) the difference between; (a) the amount paid in damages to the insured by or for any person or organization who may be liable for the insured's bodily injury; and (b) the per person limit of coverage provided in this policy; or (2) the difference between; (a) the total amount of damages incurred by the insured; and (b) the amount paid by or for any person or organization for the uninsured's bodily injury.

Id. at 598-99.

85. *Id.* at 599.

86. *Id.*

87. *Id.* at 599.

88. *Id.* at 600. The insurer cited *Allstate Insurance Co. v. Sanders*, 644 N.E.2d 884 (Ind. Ct. App. 1994), while the claimants referred to *Corr v. American Family Insurance*, 767 N.E.2d 535 (Ind. 2002).

89. *Grange*, 843 N.E.2d at 600.

90. *Id.* at 601 (quoting *Allstate*, 644 N.E.2d at 887).

91. *Id.* at 602.

92. *Id.*

93. 767 N.E.2d 535, 537 (Ind. 2002).

Corr, several parties were injured by a tortfeasor which resulted in a division of that tortfeasor's limits to the multiple injured victims; however, the underinsured motorist claim at issue was presented by only one of the claimants and that claimant was seeking coverage under his own policy. The supreme court ultimately "determined that the tortfeasor's vehicle *was* underinsured because the insureds' policies provided underinsured limits that exceeded the amount paid [to the claimant] by the tortfeasor."[94] Thus, because the claimant in *Corr* received less than the per person limit and was the only claimant to the underinsured motorist policy, the supreme court found that the claimant could seek the difference between what was paid and the per person limit of his policy.[95]

Another decision on this issue decided during this survey period is *Progressive Insurance Co. v. Bullock*.[96] *Bullock* involved a situation where multiple claimants received a distribution from a tortfeasor's policy, and sought coverage under their underinsured motorist policy. The *Bullock* case, decided before the *Graham* decision, is factually complicated; however, one of the conclusions in *Bullock* is a rejection of the *Graham* court's determination that a comparison of the per person limits between the liability and underinsured motorist policies should be used to define an underinsured motorist.[97] Instead, the *Bullock* decision followed the analysis of an earlier court decision on this issue.[98]

If the goal is to provide an insured with compensation of at least what that insured could recover from the tortfeasor, then the *Corr* analysis is more appropriate. In other words, if the insured does not receive the per person limits from the tortfeasor, then the insured should be able to recover that figure from any applicable underinsured motorist policy. The court in *Grange* rejected that approach, and suggests a comparison of the per person limits, while the *Bullock* case appears to hold the opposite conclusion.

F. Policy That Required Suit Against Insurer for Underinsured Motorist Benefits Within Personal Injury Statute of Limitations Ruled Ambiguous

The analysis in *Clevenger v. Progressive Northwestern Insurance Co.*[99] focused on whether an insured's lawsuit against his insurer for underinsured motorist coverage was barred. The insured sustained personal injuries as a result of an automobile accident with another driver.[100] The insured's counsel submitted a claim on behalf of the insured for medical benefits coverage for medical expenses incurred by the insured, and the insurer paid the medical

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94. *Grange*, 843 N.E.2d at 600.
95. *Id.* at 601 (citing Corr v. Shultz, 767 N.E.2d 541 (Ind. 2002)).
96. 841 N.E.2d 238 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 589 (Ind. 2006).
97. *Id.* at 243-44.
98. *Id.*
99. 838 N.E.2d 1111 (Ind. Ct. App. 2005).
100. *Id.* at 1113.

bills.[101]

The insurer informed its insured and the other driver's counsel of its subrogation rights for payment of the medical bills.[102] The insured completed her treatment, and her litigation against the other driver continued;[103] however, approximately one month before the expiration of the two-year statute of limitations for personal injury claims,[104] the insured resumed treatment, which eventually required a surgery greatly increasing her medical expenses.[105]

As a result of this new medical treatment, the other driver's insurer agreed to exchange its full policy limits in settlement of the case.[106] The insured notified her underinsured motorist insurer that she intended to pursue a claim for coverage under the underinsured motorist section of the policy.[107] After more than two years had passed from the date of the accident, the insurer filed a declaratory judgment action claiming that the insured's claim for underinsured motorist benefits was untimely because it was after the expiration of what would be the two-year bodily injury statute of limitations.[108] The insurer contended that because no action was filed against it for underinsured motorist coverage within the two-year bodily injury statute of limitations, the insured's claim was time-barred.[109]

In response, the insured argued that other policy provisions prevented her from filing a lawsuit against the insurer.[110] Specifically, the insured argued that until she received the full policy limits of the other driver, she had no underinsured motorist claim to pursue, and could not file a lawsuit against the insurer.[111]

The court found that the provision relied upon by the insurer was ambiguous.[112] The court first observed that there was no reference within the policy to a specific time when the statute of limitations would be triggered.[113] Reading together the insurer's policy language that restricted the insured's ability to bring suit against the insurer and the language requiring that the insured exhaust all coverage with any potential tortfeasors before presenting a claim, the

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101. *Id.*

102. *Id.*

103. *Id.*

104. IND. CODE § 34-11-2-4 (2004).

105. *Clevenger*, 838 N.E.2d at 1113.

106. *Id.* at 1113-14.

107. *Id.* at 1114.

108. The applicable insurance policy language provided: "We may not be sued unless there is full compliance with all terms of this policy. Any lawsuit against us by you . . . must be commenced within the time period set forth as the bodily injury statute of limitations in the laws of the state listed in our records as your principal address." *Id.* at 1115.

109. *Id.*

110. *Id.* at 1115-16.

111. *Id.* at 1116.

112. *Id.*

113. *Id.* at 1117.

court found the policy ambiguous.[114] As a consequence, the court refused to grant summary judgment to the insurer.[115]

Although the policy language appeared to be clear in requiring that claims against the underinsured motorist carrier be instituted within the two-year statute limitations period for personal injury, this decision is sound because the insured was not aware of her right to pursue an underinsured motorist claim until after that two-year period of time had expired. To prevent the insured from asserting an underinsured motorist claim in this instance would be a harsh result.

G. Court Finds Ambiguity in Uninsured Motorist Policy's Requirement That Uninsured Motorist Be "Identified"

If an insurance policy requires that the other driver of an accident be "identified," how specific in the identity does the insured need to be? That was the issue addressed in *Gillespie v. Geico General Insurance Co.*[116] The insured was driving along the highway when a "white Honda" automobile being driven by a Caucasian woman spun and came to rest in the middle of the highway.[117] In an effort to avoid the white Honda, the insured also lost control, and collided with a median wall along the highway.[118] The driver of the white Honda left the accident scene, and no one was able to identify her by name.[119] The insured sought uninsured motorist coverage from his carrier; however, the carrier denied the claim by contending that the white Honda was not an "uninsured auto" as required under the policy.[120] The policy restricted the definition of "uninsured auto" to exclude "a vehicle whose owner or operator cannot be identified."[121]

The trial court granted the insurer's motion for summary judgment by finding that the language of the policy was unambiguous.[122] On appeal, the court noted that the insurer did not define "identified."[123] When the court looked at dictionary definitions of "identify," it found that the insured's ability to describe the other car as a white Honda, and the driver as a Caucasian woman, was sufficient to satisfy the meaning of "identify."[124] Consequently, the court construed the policy against the insurer and noted that the insurer could have drafted the policy to require certain information to meet its definition of "identify."[125]

Certainly, it was the intent of the insurer to be able to learn the name of the

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114. *Id.* at 1117-18.
115. *Id.* at 1118.
116. 850 N.E.2d 913 (Ind. Ct. App. 2006).
117. *Id.* at 915-17.
118. *Id.* at 915.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* at 916.
123. *Id.* at 918.
124. *Id.*
125. *Id.*

other driver in order to seek recovery for any benefits paid to its insured.[126] However, because it did not define "identify" to require the name of the other driver, the court found the policy ambiguous.

H. Unidentified Driver's Projection of Gravel from Roadway into Insured's Tractor Trailer Was Sufficient to Demonstrate "Hit and Run" Accident

The facts in *Walker v. Employers Insurance of Wausau*[127] involve a common attempt to define a "hit and run accident" for purposes of uninsured motorist coverage. A tractor-trailer operator was traveling along the highway, when a pick-up truck swerved into the tractor-trailer driver's lane.[128] While "the pick-up truck passed within inches" of the tractor-trailer, there was no impact between the vehicles. However, the pick-up truck traveled into the shoulder of the roadway, where it projected gravel onto the grill and fender of the tractor-trailer, causing the driver to lose control and become injured in a serious accident.[129]

The policy at issue defined an "uninsured auto," in part, as a "hit-and-run auto."[130] The parties agreed that there was no direct contact between the tractor-trailer and the pick-up truck; however, the insured argued that the spray of gravel from the pick-up truck onto the tractor-trailer, was sufficient to show "indirect" physical contact[131] to support a finding of coverage.[132] As a result, the court found that an issue of fact existed on whether physical contact between the pick-up truck and the tractor-trailer occurred.[133] Consequently, the court reversed the trial court's granting of summary judgment to the uninsured motorist carrier.[134]

I. Liability Insurer Denied Right of Intervention in Underlying Litigation to Contest Coverage Issues

The decision of *Allstate Insurance Co. v. Keltner*[135] addressed an effort by an automobile liability insurer to intervene in underlying litigation to protect its interest because of coverage matters. An automobile accident occurred when the

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126. Insurers wish to have the tortfeasor's name in order to assert a possible subrogation action to recover any amounts paid to the insured.

127. 846 N.E.2d 1098 (Ind. Ct. App. 2006).

128. *Id.* at 1100.

129. *Id.*

130. *Id.* at 1103-04.

131. The decision in *Allied Fidelity Insurance Co. v. Lamb*, 361 N.E.2d 174, 179 (Ind. Ct. App. 1977), determined that "indirect contact" was sufficient to establish a "hit and run" as required under an insurance policy. *See also* Will v. Meridian Ins. Group, Inc., 776 N.E.2d 1233, 1237 (Ind. Ct. App. 2002) (finding that insured driver's collision with a "pile of debris" in the roadway which came from another vehicle would be sufficient to show "indirect contact" for purposes of uninsured motorist coverage).

132. *Walker*, 846 N.E.2d at 1103.

133. *Id.* at 1105.

134. *Id.*

135. 842 N.E.2d 879 (Ind. Ct. App. 2006).

insured driver lost control and crashed her vehicle into a telephone pole.[136] As a result, one of three siblings riding as passengers inside the car was killed, while the other two sustained personal injuries.[137] The driver's liability insurer settled with the estate of the decedent passenger for the full amount of policy limits available.[138] The settlement that was achieved reserved the rights of the other two passengers to pursue their own lawsuits as a result of the accident.[139]

The two other passengers filed a lawsuit against the driver seeking to recover for their own personal injuries as well as seeking emotional distress damages from observing the death of their brother inside the vehicle.[140] As a result of the emotional distress claims, the insurer for the tortfeasor driver filed a declaratory judgment action in federal court claiming that it possessed no obligation to indemnify the two passengers for the emotional distress claims because it had already compensated the decedent's estate to the full extent of insurance coverage available.[141]

The appellate court ruled that the liability insurance carrier was not responsible to pay for any emotional distress damages related to the two passengers observing their sibling's death.[142] As a result of the federal court decision, the insurer sought to intervene in the passengers' lawsuit against the driver.[143] It argued that if it did not intervene, there would be no way to differentiate any jury award to the passengers for personal injury damages as opposed to emotional distress damages.[144] In essence, the insurer contended that it possessed a significant interest in the litigation which could not be adequately protected if it was not granted permission to intervene.[145]

The Indiana Court of Appeals refused to grant the insurer the right to intervene because it failed to establish that its interest would not be protected by the current action.[146] The court found that if a judgment was entered against the driver in a lump sum figure, a supplemental hearing would allow for the inclusion of evidence to determine an appropriate division of the damages between the personal injuries and emotional distress of the passengers.[147]

Additionally, the court cited Indiana's policy to prevent the interjection of

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136. *Id.* at 880.

137. *Id.*

138. *Id.* at 881.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* (citing Allstate Ins. Co. v. Tozer, 392 F.3d 950 (7th Cir. 2004)).

143. *Id.*

144. *Id.*

145. *Id.* at 882-83. Such a basis was necessary in order to comply with Indiana Trial Rule 24(a). The insurer contended that the defense counsel for the driver would not work to differentiate between the personal injury damages and the emotional distress damages because the driver would not have coverage for the emotional distress damages.

146. *Id.* at 883.

147. *Id.*

the fact that a defendant may possess liability insurance.[148] The court recognized the prejudicial effect upon the defendant if the jury is aware that the defendant may have insurance.[149] Consequently, the court refused to allow the insurer to intervene in the matter.[150]

The court's decision is unusual, but appropriate. As best demonstrated by this case, the driver stands to be potentially prejudiced in having a fair and impartial allocation of damages if the jury is aware of the fact that insurance may indemnify him for any liability. This decision is unusual because support for such rationale has been eroding over the last few years.[151]

II. HOMEOWNERS CASES

A. Indiana Supreme Court Interprets Whether Liability Coverage Is Available for Intentional Actions of Insured

The decision of *Auto-Owners Insurance Co. v. Harvey*[152] involved an unfortunate set of facts, but led to an interesting appellate decision. Harvey, a sixteen-year-old girl, engaged in sexual relations with Gearheart, a nineteen year old, at a boat ramp near the Wabash River.[153] Harvey eventually told Gearheart to stop, and a dispute between them developed where Harvey apparently pushed Gearheart on two occasions.[154] When Harvey approached him a third time, Gearheart put his hands on her shoulders and pushed Harvey, causing her to lose her balance, fall off the edge of the boat ramp, down a rocky embankment, and into the river, resulting in her drowning.[155] Gearheart eventually pled guilty to involuntary manslaughter.[156] Harvey's parents brought a negligence lawsuit against Gearheart and also sought declaratory relief on whether Gearheart's liability insurer was liable for his actions.[157]

The liability insurer contended that it owed no coverage to Gearheart because: (1) there was no "occurrence" which was necessary to trigger a coverage obligation; and (2) Gearheart's conduct satisfied the "intended or expected harm" exclusion[158] in the policy. The trial court denied the liability

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148. *Id.* at 884.

149. *Id.*

150. *Id.*

151. *See* Stone v. Stakes, 749 N.E.2d 1277 (Ind. Ct. App. 2001) (reference by plaintiff's attorney to defendant's attorney employment with insurance company during voire dire questioning was permitted).

152. 842 N.E.2d 1279 (Ind. 2006).

153. *Id.* at 1280.

154. *Id.*

155. *Id.*

156. *Id.* at 1281-82. Involuntary manslaughter is enacted under Indiana Code section 35-42-1-4(c) (2004).

157. *Harvey*, 842 N.E.2d at 1282.

158. The policy provision stated that no liability coverage applied "to bodily injury or property damage *reasonably expected or intended by the insured.* This exclusion applies even if the bodily

insurer's summary judgment motion by finding that there was an issue of material fact.[159] On an interlocutory appeal, the court of appeals reversed, finding that there was no coverage because there was no "occurrence" under the policy.[160]

The Indiana Supreme Court addressed both contentions by the insurer. First, on the question of whether there was an "occurrence," the policy defined an "occurrence" as "an accident that results in bodily injury or property damage and includes, as one occurrence, all continuous or repeated exposure to substantially the same generally harmful conditions."[161] The insurer contended that Gearheart's testimony established that Harvey's death was the natural and probable result of Gearheart's intentional acts of pushing her, not because of an "accident."[162]

The supreme court agreed that implicit within the meaning of "accident" to establish an "occurrence" in an insurance policy, is the lack of intentional conduct on the part of the insured.[163] Nevertheless, the court concluded that the definition of "occurrence" was ambiguous:

> The policy language does not require that the "occurrence" or "accident" be limited to the actions of the insured. The claimed damages clearly arise out of [Harvey's] death, and the coverage ambiguity thus is whether the death should be considered to have been caused by the event of Gearheart's pushing or by the event of [Harvey's] drowning. If the required "accident" refers to Gearheart's push, then it is undisputed that it did not occur unexpectedly or unintentionally. If it applies to [Harvey's] slip, fall, and drowning, however, it is not clear that the drowning was clearly unexpected and unintentional. It was obviously unexpected and unintentional from [Harvey's] perspective, and possibly so from Gearheart's point of view.[164]

The supreme court ultimately rejected the liability insurer's suggestion that Harvey's drowning death, even though resulting from the intentional pushing of Gearheart, was not an "occurrence."[165] The court also rejected federal court rulings interpreting Indiana law, that claims for damages arising from a volitional

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injury or property damage is of a different kind or degree, or is sustained by a different person or property, than that reasonably expected or intended." *Id.* at 1288 (emphasis in original).

159. *Id.* at 1282.

160. *Id.* at 1281.

161. *Id.* at 1283.

162. *Id.*

163. *Id.* at 1283; *see also* Red Ball Leasing v. Hartford Accident and Indem. Co., 915 F.2d 306, 311-12 (7th Cir. 1990) (finding that insured's intentional repossession of trucks was not an "occurrence" and not covered); Allstate Ins. Co. v. Davis, 6 F. Supp. 2d 992, 996 (S.D. Ind. 1998) (finding that the death of child resulting from insured intentionally bouncing child on knee, was not an occurrence).

164. *Id.* at 1284-85.

165. *Id.* at 1285.

act of an insured did not establish an "occurrence" under a liability policy.[166]

Likewise, the court also refused to find, as a matter of law, that because the insured plead guilty to involuntary manslaughter, that conviction established that there was no "occurrence" to trigger coverage.[167] By rejecting this argument, the court stated:

> At most, the guilty plea shows only that Gearheart intended the battery (improper touching by pushing [Harvey]), and that her death resulted. But it does not establish that he intended [Harvey's] slip, fall, and drowning, and thus does not preclude the assertion that her death was accidental, and thus an "occurrence." . . . The push was not accidental, but a genuine issue exists whether the drowning and resulting death were.[168]

The liability insurer additionally argued that it owed no liability coverage to Gearheart because his actions "intended" to harm Harvey, and were subject to the intentional acts exclusion.[169] The supreme court rejected that argument by indicating that it could not find as a matter of law that Gearheart intended to harm Harvey.[170] Quite simply, the court found that there were conflicting facts as to whether Gearheart intended to harm Harvey, and summary judgment was properly denied.[171]

This decision is a significant attempt by the court to clarify policy language that is very difficult to apply in real world situations. Quite simply, the court found that even though the insured engaged in intentional conduct by pushing the drowning victim, there was a question of fact as to whether he intended to harm her. To the extent the evidence presented to the trier of fact would show that the insured engaged in intentional conduct to harm Harvey, the coverage could be determined not to exist.

B. Homeowners Insurance Policy Applied to Accident Involving Automobile Despite "Motorized Vehicle" Exclusion

Although homeowners insurance policies are intended to apply to risks associated with a home and not an automobile, many unique circumstances arise where the question presented is whether the homeowners policy may apply to accidents involving motor vehicles. In *Allstate Insurance Co. v. Burns*,[172] the insurer supplied a homeowners policy to the named insureds, including their son.[173] The son purchased a pick-up truck from a used car dealership, and

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166. *Id.* at 1286.
167. *Id.* at 1287.
168. *Id.*
169. *Id.* at 1288.
170. *Id.* at 1291.
171. *Id.*
172. 837 N.E.2d 645 (Ind. Ct. App. 2005).
173. *Id.* at 647.

acquired automobile insurance and a vehicle license registration for the truck.[174] Eventually, "the truck's transmission failed, and the [truck] would no longer run."[175] The son decided to try to fix the truck with the help of his friend.[176]

The son kept the truck parked behind his parents' home.[177] In the meantime, he canceled the automobile insurance on the truck.[178] The son acquired replacement parts, and with the help of the friend, planned to manually move the truck from behind the garage to a barn also located on his parents' property.[179] In order to move the truck, the son planned to start the truck so he could use the power steering and brakes.[180]

The son opened the hood of the truck and poured gasoline into the carburetor to prime the truck.[181] The truck would not start, and the friend poured more gasoline into the carburetor.[182] When the son attempted to start the engine, the gasoline fumes ignited and burned the friend.[183] As a result of the accident, the friend brought a lawsuit against the son, and the son sought liability insurance coverage under his parents' homeowner's policy.[184]

There was no question about the son's status as an insured under the parents' homeowners' policy; however, the insurer relied upon an exclusion to deny coverage which provided:

> *Exclusions—Losses We Do Not Cover*
>
> . . .
>
> 5) We do not cover bodily injury or property damage arising out of the ownership, operation, maintenance, use, occupancy, renting, loaning, entrusting, loading or unloading of any motorized land vehicle or trailer.[185]

However, the exclusion also had an exception such that it did not apply to: "a) a motorized land vehicle in dead storage or used exclusively on the residence premises."[186] The policy did not define "dead storage."[187]

The homeowners' insurer eventually sought summary judgment in a declaratory judgment action by relying upon the exclusion.[188] In response, the

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174. *Id.*
175. *Id.* at 648.
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.* at 649.
186. *Id.*
187. *Id.*
188. *Id.*

friend also sought summary judgment by contending that the exception to the "motor vehicle" exclusion applied because the truck was in "dead storage."[189] The trial court denied the insurer's summary judgment motion and entered summary judgment in favor of the son finding that he was entitled to coverage.[190] Specifically, the court found that the facts were undisputed that the truck was in "dead storage" such that the exception to the exclusion applied.[191]

The court attempted to determine the meaning of "dead storage" for purposes of the exception by relying upon decisions from other jurisdictions.[192] Based upon the fact that the son undertook steps to refrain from using the vehicle on the roadways by canceling his insurance and registration, and that the truck remained on the son's premises with movement only on the property, the court concluded that the truck was in "dead storage" within the meaning of the exception to the exclusion.[193]

It is unusual for homeowners' insurance policies to apply to incidents involving automobiles.[194] However, because the truck was never removed from the property, the court seemed convinced that the homeowners' policy was appropriate to respond to this fact situation.

III. COMMERCIAL CASES

A. Property Insurer Required to Pay for Insured's Attorney Fees Resulting from Third Party Litigation of the Insured

In *Masonic Temple Ass'n of Crawfordsville v. Indiana Farmers Mutual Insurance Co.*,[195] a fraternal organization brought a declaratory judgment action for coverage against its own property insurer, who denied its property claim for cracks in the wall and ceiling resulting from construction of an adjoining building.[196] The fraternal organization also pursued a lawsuit against the contractors involved on the construction project to seek recovery for their alleged

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189. *Id.*

190. *Id.* at 649-50.

191. *Id.* at 650.

192. *Id.* at 651-53. The court relied upon the following court decisions: *Allstate Insurance Co. v. Geiwitz*, 587 A.2d 1185 (Md. Ct. Spec. App. 1991); *Hogan v. O'Brien*, 206 N.Y.S. 831 (App. Div. 1924), *Nationwide Mutual Fire Insurance Co. v. Allen*, 314 S.E.2d 552 (N.C. Ct. App. 1984), which determined that vehicles staying on an insured's premises and not upon public roadways were generally considered to be in "dead storage" for purposes of the policy exclusion.

193. *Allstate Ins. Co.*, 837 N.E.2d at 653-54.

194. *See* Franz v. State Farm Fire & Cas. Co., 754 N.E.2d 978, 981 (Ind. Ct. App. 2001) (stating that if use of vehicle was "efficient and predominating cause" of accident, then motor vehicle exclusions under general liability policy will apply).

195. 837 N.E.2d 1032 (Ind. Ct. App. 2005).

196. *Id.* at 1034. The insurer denied the claim by contending there was an "earth movement" exclusion and that there was not a "collapse" as necessary to trigger coverage. *Id.* Those issues were addressed in another appellate proceeding in *Masonic Temple Ass'n of Crawfordsville v. Indiana Farmers Mutual Insurance Co.*, 779 N.E.2d 21 (Ind. Ct. App. 2002).

negligence.[197] Eventually, a settlement was reached between all parties to both lawsuits, but the fraternal organization excepted from the settlement its claim against the insurer to recover attorney fees relating to the pursuit of litigation against the contractors.[198]

The property insurer filed a summary judgment motion, contending that Indiana follows the general rule that each party to a litigation pays its own attorney fees.[199] The fraternal organization asked the court to adopt an exception to the general rule to permit recovery of attorney fees that are incurred in actions with third parties, brought about by a defendant's breach of contract.[200] In other words, "because the litigation expenses are merely a form of damages caused by the defendant's misconduct," they should be recoverable damages as part of the breach of contract action.[201]

The court agreed with the fraternal organization and adopted a "third-party litigation" exception to the general rule.[202] The court stated:

> When the defendant's breach of contract caused the plaintiff to engage in litigation with a third party to protect its interests and such action would not have been necessary but for defendant's breach, attorney fees and litigation expenses incurred in litigation with a third party may be recovered as an element of plaintiff's damages from defendant's breach of contract.[203]

While the court permitted the insured to recover its expenses for third party litigation, the American Rule still applies to prevent the insured from recovering its attorney fees in litigation on coverage matters with its insurer.

B. The Court Concludes That a Claimant Seeking Medical Payments Coverage Can Sue Insurer Directly for Coverage, but Cannot Recover Under Theory of Breach of Duty of Good Faith

In *Cain v. Griffin*,[204] a restaurant patron slipped and fell while visiting the restaurant.[205] Under the restaurant's liability insurance policy, it provided medical bill payment coverage for medical expenses of the patron irrespective of fault.[206] The patron's lawyer apparently sent medical bills to the restaurant owners, but no evidence existed that the restaurant's liability insurer had received

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197. *Masonic Temple Ass'n of Crawfordsville*, 837 N.E.2d at 1035.

198. *Id.*

199. *Id.* at 1037; *see* Ind. Glass Co. v. Ind. Mich. Power Co., 692 N.E.2d 886, 887 (Ind. Ct. App. 1998) (stating the general rule that in the absence of a statute, contract, or rule to the contrary, a party cannot recover its attorney fees in litigation).

200. *Masonic Temple Ass'n of Crawfordsville*, 837 N.E.2d at 1038.

201. *Id.*

202. *Id.* at 1039.

203. *Id.*

204. 849 N.E.2d 507 (Ind. 2006).

205. *Id.* at 508.

206. *Id.* at 514.

the medical bills.[207] When the insurer failed to pay the medical bills, the patron filed a negligence claim against the restaurant owners, and added their liability insurer as a defendant for breach of contract and breach of the duty of good faith.[208]

Eventually, the insurer tendered a check to the patron for the medical bills, but did not include interest.[209] The patron "refused to cash the check."[210] The liability insurer moved for pretrial summary judgment, arguing that the patron was a third party claimant and that the insurer did not owe the patron any duty of good faith.[211]

The trial court granted the insurer's summary judgment motion on the patron's complaint.[212] The court of appeals affirmed the trial court's ruling.[213]

The Indiana Supreme Court observed a duty of good faith owed by an insurer to its insured.[214] Consequently, the supreme court analyzed the status of the patrons to the restaurant's insurer.[215] The court concluded that the patron was a third party beneficiary to the medical payments coverage that the restaurant possessed with its liability insurer.[216] As a third party beneficiary, the patron could bring a direct action against the restaurant's insurer to recover medical payment benefits despite Indiana's prohibition[217] against direct lawsuits against insurers.[218]

However, the supreme court refused to recognize that the patron could bring an action against the insurer for alleged breach of duty of good faith.[219] The court specifically found that third party beneficiaries do not possess the "special relationship" that the court determined was the basis to create a duty of good faith between an insurer and the insured.[220] Consequently, the court affirmed the grant of summary judgment to the insurer on the claim for breach of the duty of good faith.[221]

This decision appears very sound in its application. The patron should be afforded the right to directly sue to obtain medical payments coverage. However, because the patron also is a third party litigant against the restaurant, she has no "special relationship" to support a claim for breach of the duty of good faith.

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207. *Id.* at 509.
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*
213. 826 N.E.2d 41 (Ind. Ct. App. 2005), *vacated*, 849 N.E.2d 507 (Ind. 2006).
214. *Cain*, 849 N.E.2d at 510.
215. *Id.* at 514.
216. *Id.*
217. *See* Menefee v. Schurr, 751 N.E.2d 757, 760 (Ind. Ct. App. 2001).
218. *Cain*, 849 N.E.2d at 515.
219. *Id.*
220. *Id.*
221. *Id.*

Instead, the insurer's loyalty and duty should be to its insured: the restaurant.

C. The Court Interprets "Product Liability" Exclusion in Favor of Insured

The court in *Eli Lilly and Co. v. Zurich American Insurance Co.*[222] addressed an interesting set of facts requiring interpretation of a "product liability" exclusion under a commercial general liability policy. The insured was a drug maker that manufactured a chemotherapy drug.[223] The drug maker supplied the drug in a powdered format to an oncological pharmacist, who custom formulated prescriptions utilizing the drug with a saline solution.[224] The pharmacist improperly diluted the drug when filling prescriptions, resulting in personal injury lawsuits by the unknowing victims.[225] The pharmacist was criminally indicted for product tampering and other charges.[226] The victims' lawsuits contended that the drug maker "either should have known or did know" of the pharmacist's actions, and should have warned the patients to prevent their injuries.[227]

The drug maker notified its insurers of the victims' lawsuits.[228] The drug maker eventually settled the victims' lawsuits and sought reimbursement from the various insurers providing liability coverage.[229] One of the insurers claimed that its policy contained a "products liability" endorsement to avoid coverage for lawsuits involving the drug maker's products.[230] The policy defined "product liability hazard" by stating:

> [Product Liability Hazard] mean[s] Personal Injuries and/or Property Damage arising out of the Insured's Products or reliance upon a representation or warranty made at any time with respect thereto, but only if the Personal Injuries or Property Damage occurs away from the premises owned by or rented to the Named Insured and after physical possession of such products has been relinquished to others.[231]

The question presented to the court was whether this "product liability" exclusion applied. The insurer contended that because the lawsuit related to a product manufactured by Lilly, the exclusion applied.[232] However, the insured contended that the allegations asserted against the drug maker focused upon

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222. 405 F. Supp. 2d 948 (S.D. Ind. 2005).

223. *Id.* at 952.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.* at 952-53. The particular language of this exclusion stated: "This Policy is amended in that notwithstanding anything contained herein to the contrary, it shall not apply to—i) the Products Liability Hazard; . . . ." *Id.* at 952.

231. *Id.* at 953.

232. *Id.*

matters other than whether the harm was caused by the product, such that coverage was applicable.[233]

In addressing the situation, the court focused upon an insured's reasonable interpretation of the phrase "arising out of."[234] In addressing that issue, the court stated:

> We conclude on that basis that an ordinary policyholder, reading a product liability exclusionary clause which contains language excluding from coverage any claim for damages "arising out of the Insured's Products," would consider himself without coverage for a claim asserting that his product had caused some harm. We do not believe an ordinary policyholder would read this language to bar coverage of a claim that he failed to alert someone to the activities of another who was wrongfully dispensing the product.[235]

Consequently, the court concluded that the drug maker was entitled to coverage as the allegations asserted against the drug maker focused upon actions other than for injuries caused by the product itself.[236]

This decision has a very interesting analysis of how to address the interpretation of a policy from an "ordinary policyholder" perspective. The court's focus on the fact that the product did not cause the victims' harms, but instead another person's dispensing of the product caused the harm, appears to be a sound application of the exclusion.[237]

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233. *Id.*

234. *Id.* at 954.

235. *Id.*

236. *Id.*

237. The court also addressed and granted summary judgment to the insurer on the drug maker's bad faith claim. *Id.* at 957-58. The court's decision contains an excellent analysis re-emphasizing that an insurer does not breach the duty of good faith owed to its insured for "an inadequate investigation or flawed interpretation of Indiana law." *Id.* at 958.