

# SURVEY OF RECENT DEVELOPMENTS IN INSURANCE LAW

RICHARD K. SHOULTZ\*

The Indiana appellate courts continue to address a number of fact scenarios and coverage issues affecting automobile, homeowners', and commercial general liability insurance policies. This Article examines the most significant decisions that were addressed during this survey period<sup>1</sup> and their impact upon the field of insurance law.<sup>2</sup>

## I. AUTOMOBILE COVERAGE CASES

### *A. Insured's Uninsured Motorist Claim Was Not Barred by Limitation of Action Clause in Policy When Coverage for Defendant Motorist Was Withdrawn*

When an insured is involved in a motor vehicle accident with another motorist and sustains personal injuries, the insured often files a lawsuit against the other motorist and the insured's own automobile insurer. If the motorist lacks liability insurance, the insured will seek to recover uninsured motorist coverage from the automobile insurer. However, many times, when the motorist has liability insurance, the insured includes the automobile insurer as a defendant to recover underinsured motorist coverage, even when it has not been demonstrated that the motorist is an underinsured motorist. In *Bradshaw v. Chandler*,<sup>3</sup> the Indiana Supreme Court was asked to address whether an uninsured motorist claim was time-barred by a policy provision when the insured learned late that the uninsured motorist claim existed.

After being involved in an accident with another motorist, the injured plaintiff in *Bradshaw* filed suit against the other motorist and Affirmative, his

---

\* Partner, Lewis Wagner, LLP; J.D., 1990, Indiana University School of Law—Indianapolis; B.A., 1987, Hanover College.

1. The survey period for this Article is approximately October 1, 2009 through September 30, 2010.

2. Selected cases which were decided during the survey period, but are not addressed in this Article, include *American Family Mutual Insurance Co. v. C.M.A. Mortgage, Inc.*, 682 F. Supp. 2d 879 (S.D. Ind. 2010) (holding that commercial general liability insurance company's supply of a defense under reservation of rights and separate filing of declaratory judgment action preserved rights to prevent insured from entering into consent judgment); *Wilson v. American Family Mutual Auto Insurance Co.*, 683 F. Supp. 2d 886 (S.D. Ind. 2010) (determining that in case involving uninsured motorist, insurance company did not breach its duty to deal with insured in good faith on soft tissue claim); *Buckeye State Mutual Insurance Co. v. Carfield*, 914 N.E.2d 315 (Ind. Ct. App. 2009) (determining that based upon factual evidence presented, automobile was not regularly available for insured's use to be excluded under automobile liability policy), *trans. denied*, 929 N.E.2d 783 (Ind. 2010); *Cincinnati Insurance Co. v. Trosky*, 918 N.E.2d 1 (Ind. Ct. App. 2009) (finding that excess insurer was obligated to provide uninsured motorist coverage despite the fact that underlying underinsured motorist insurers did not issue payment because of self-insured status of tortfeasor), *trans. denied*, 929 N.E.2d 789 (Ind. 2010).

3. 916 N.E.2d 163 (Ind. 2009).

own insurance company.<sup>4</sup> In his complaint, the plaintiff alleged that Affirmative owed him underinsured motorist coverage because of the accident.<sup>5</sup> The other motorist initially received liability insurance coverage through a policy issued to the vehicle's owner.<sup>6</sup> However, that insurer eventually notified the injured plaintiff that this motorist was an excluded driver under the policy such that no liability coverage was available to the motorist for the injured plaintiff's lawsuit.<sup>7</sup>

At this point, the plaintiff amended his complaint to allege that Affirmative owed uninsured rather than underinsured motorist coverage.<sup>8</sup> The insurer contended that the plaintiff's new claim for uninsured motorist coverage was barred by a two year policy limitation of action clause that required the insured to bring suit against the insurer within two years of the accident.<sup>9</sup> The insurer argued that because the plaintiff's suit to recover uninsured motorist coverage was not brought within two years of the accident (even though the insurer was a defendant because of the underinsured motorist claim), the action was time-barred.<sup>10</sup> The trial court granted the insurer's motion for summary judgment,<sup>11</sup> and the court of appeals affirmed.<sup>12</sup>

However, the Indiana Supreme Court reversed.<sup>13</sup> While observing that contractual limitations that reduce the time to file a lawsuit were not favored, the court recognized that they do offer insurers protection from delays by insureds that could potentially prejudice an insurer's ability to investigate a claim.<sup>14</sup> However, in this case, because the insurance company was already a defendant, the purpose behind enforcement of the contractual limitation was lacking.<sup>15</sup> Furthermore, it was impractical to expect an insured to identify at the beginning of the lawsuit filing whether the claim was for uninsured or underinsured motorist coverage when the insured could not have known which policy coverage applied.<sup>16</sup>

---

4. *Id.* at 165.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 166. The court of appeals decision is an unpublished table disposition located at 900 N.E.2d 510 (Ind. Ct. App. 2008).

13. *Bradshaw*, 916 N.E.2d at 168.

14. *Id.* at 167. By prompting insureds to give timely notice, insurers obtain the necessary information to form "business judgments concerning claim reserves and premium rates." See *Summers v. Auto-Owners Ins. Co.*, 719 N.E.2d 412, 414 (Ind. Ct. App. 1999).

15. *Bradshaw*, 916 N.E.2d at 167.

16. *Id.*

*B. Court Addressed Choice of Law Question and Concluded That Employee Was "Using" Covered Auto to Be Entitled to Uninsured Motorist Coverage Despite Lack of Physical Contact*

The decision in *Stonington Insurance Co. v. Williams*<sup>17</sup> offered analysis by the Indiana Court of Appeals on the choice of law for insurance policy questions as well as the application of the uninsured motorist statute. *Stonington* involved a Wisconsin moving company that acquired an automobile insurance policy from a Colorado broker and California insurance company.<sup>18</sup> In seeking the automobile policy, the insured executed an application where it selected uninsured/underinsured motorist insurance limits that equaled the liability limits.<sup>19</sup> However, the policy issued by the insurer provided for liability insurance coverage of \$1 million, but only offered uninsured motorist coverage of \$100,000.<sup>20</sup>

After the policy was issued, the moving company requested that the insurer include an Indiana company as an additional insured to the policy.<sup>21</sup> The insurance company subsequently amended the policy to add the Indiana company as an additional insured.<sup>22</sup> The problem in this case arose when an employee of the Indiana company loaded a trailer in Indiana for a trip to New York.<sup>23</sup> The employee had completed his pre-trip inspection and had his hand near the door of the tractor to begin to get inside when an uninsured motorist lost control and collided with the tractor.<sup>24</sup> As a result of this accident, the employee sustained significant personal injuries.<sup>25</sup>

The employee filed a complaint against the insurer contending that he was entitled to recover uninsured motorist benefits under the policy.<sup>26</sup> The insurer denied the employee's claim and filed a motion for summary judgment, contending that the employee did not qualify as an insured under the policy at the time of the accident.<sup>27</sup> The trial court granted partial summary judgment in favor of the employee and concluded that Indiana law—not Wisconsin law—applied.<sup>28</sup> Furthermore, the trial court found that based upon the requirements of Indiana's uninsured motorist statute,<sup>29</sup> the policy was to be reformed to provide for one million dollars of insurance coverage for the employee's uninsured motorist

---

17. 922 N.E.2d 660 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 818 (Ind. 2010).

18. *Id.* at 663.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 664.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. IND. CODE § 27-7-5-2 (2011).

claim.<sup>30</sup>

On appeal, the first issue that the court addressed was whether Wisconsin or Indiana law applied. The court concluded that there was a conflict between the laws of the State of Indiana and the State of Wisconsin such that the court needed to determine which state's substantive law applied.<sup>31</sup> In addressing the choice of law question, the court observed that Indiana followed "the most significant relationship" test, which requires the court to take into account the following factors in deciding which state's law would apply: "(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicil[e], residence, nationality, place of incorporation, place of business of the parties."<sup>32</sup> However, the court also observed that if an insurance issue is involved in a choice of law question, greater preference will be given to the state where "the parties understood was to be the principal location of the insured risk during the term of the policy, unless . . . some other state has a more significant relationship."<sup>33</sup>

The court of appeals found that because the issue before it involved a question of the extent of applicable insurance available under the policy, the principal location of the insured risk provided the greater weight in deciding the conflict of law issue. After applying the facts and the other "significant contacts," the court found that no state had any more significance over the others.<sup>34</sup> The court then determined that based upon the fact that the accident happened in Indiana, its law applied.<sup>35</sup>

The next question addressed by the court was whether under Indiana's uninsured motorist statute,<sup>36</sup> the employee met the definition of "insured" for purposes of being able to obtain underinsured motorist coverage. The court observed that a policy provision is contrary to the underinsured motorist statute if it "limits uninsured motorist protection as to persons who would otherwise qualify as insureds for liability purposes."<sup>37</sup> The policy provided that the definition of "insured" for liability coverage would include a person who was "using" a covered auto.<sup>38</sup> However, the uninsured motorist policy provision limited coverage for an "insured" who was "occupying" a covered auto.<sup>39</sup> The court found that because the definition under the underinsured motorist coverage differed from the definition and application of coverage provided under the liability section, the limiting distinction of the underinsured motorist coverage

---

30. *Stonington Ins. Co.*, 922 N.E.2d at 664.

31. *Id.* at 665.

32. *Id.* (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(2) (1971)).

33. *Id.* (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 193 (1971)).

34. *Id.* at 667.

35. *Id.*

36. IND. CODE §§ 27-7-5-2 to -6 (2011).

37. *Stonington Ins. Co.*, 922 N.E.2d at 669 (quoting *Harden v. Monroe Guar. Ins. Co.*, 626 N.E.2d 814, 819 (Ind. Ct. App. 1993)).

38. *Id.* at 670.

39. *Id.*

violated Indiana's uninsured motorist statute.<sup>40</sup>

In this specific case, the court concluded that because the employee was in the process of getting into the truck at the time the accident occurred, he met the definition of "using" the vehicle and qualified as an insured. Previously, the Indiana Court of Appeals had determined that an individual can be "using" a vehicle even if the person is not actually inside the vehicle.<sup>41</sup> As a consequence, the employee in this case was entitled to seek uninsured motorist coverage with limits of \$1 million.<sup>42</sup>

This case offers a thorough assessment on determining the choice of law and the determination of the availability of uninsured motorist coverage. Practitioners may wish to review this decision if a question on either issue may arise.

*C. Insured Could Not Recover Underinsured Motorist Coverage Under Umbrella Policy When Required Coverage from Underlying Policies Was Absent*

On many occasions, insureds sustain catastrophic injuries, and there is insufficient liability coverage available from the tortfeasor to provide an appropriate remedy. Thus, many insureds acquire excess or umbrella liability coverage and look to that coverage to provide uninsured or underinsured motorist coverage. In the case of *Adkins v. Vigilant Insurance Co.*,<sup>43</sup> the court of appeals provided an excellent analysis of the purpose behind umbrella insurance coverage and the requirements that underlying insurance policies be in effect before coverage will exist.

In *Adkins*, a groundskeeper was seriously injured while operating a tractor on a roadway, as part of his employment, when he was struck by another vehicle which was insured by State Farm Insurance Company.<sup>44</sup> State Farm offered the full liability policy limits available for its insured driver to the groundskeeper in settlement of all claims to be asserted against State Farm's insured.<sup>45</sup> Because the limits offered by State Farm were not sufficient to address the groundskeeper's injuries, he next looked to his employer's insurance policies for underinsured motorist coverage.<sup>46</sup> The employer possessed a number of different policies, including an automobile liability policy with underinsured motorist coverage, a homeowners' policy with no underinsured motorist coverage, and an

---

40. *Id.*

41. *See* *Monroe Guar. Ins. Co. v. Campos*, 582 N.E.2d 865, 871 (Ind. Ct. App. 1991) (finding that tow truck operator was "using" vehicle while performing part of activities relating to towing business).

42. *Stonington Ins. Co.*, 922 N.E.2d at 671.

43. 927 N.E.2d 385 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 828 (Ind. 2010).

44. *Id.* at 387.

45. *Id.*

46. *Id.*

excess umbrella policy with underinsured motorist coverage.<sup>47</sup>

In assessing the applicability of the policies, the trial court determined that no underinsured motorist coverage was available under the automobile policy because the tractor, being operated by the groundskeeper, was not an “insured vehicle” within that policy.<sup>48</sup> It was also determined that the homeowners’ policy did not provide underinsured motorist coverage because of exclusion for claims arising from use of an automobile.<sup>49</sup> However, the groundskeeper contended that he was entitled to pursue underinsured motorist coverage under the excess umbrella policy.<sup>50</sup> The terms of the excess umbrella policy required that the named insured maintain underlying insurance coverage before the excess umbrella policy applied. Specifically, the policy provided that the excess insurer “cover[ed] these damages in excess of the underlying insurance or the Required Primary Underlying Insurance, whichever is greater, if they are caused by an occurrence during the policy period, unless otherwise stated.”<sup>51</sup>

The excess umbrella insurer contended that because none of the “underlying policies”—the auto or homeowners’ policy—offered coverage in this matter, there was no underinsured motorist coverage available through the excess umbrella policy.<sup>52</sup> However, the insured argued that because the policy language utilized a disjunctive “or” in specifying what it may require as “underlying insurance,” State Farm’s liability limits were sufficient to satisfy the “underlying insurance” requirement of the excess umbrella policy.<sup>53</sup>

The court noted that with respect to excess or umbrella insurance coverage, such policies are written with an insurance company assessing its risk based on the assumption “that the insureds have or will procure and maintain the agreed upon primary policy [of insurance].”<sup>54</sup> In interpreting the language at issue, the court found that the “underlying insurance” provision was intended to require that the named insured have that underlying insurance in place.<sup>55</sup> In this particular case, because neither the automobile nor homeowners’ policies of the named insured applied, the requirement of an applicable underlying policy was absent such that the groundskeeper could not recover underinsured motorist coverage from the umbrella policy.<sup>56</sup>

This case provided an excellent assessment of the purpose behind excess or umbrella insurance coverage in that it is intended to be a cost-effective means for individuals to protect themselves. Because the risk that was to be covered by the excess or umbrella insurance anticipated that the insured possessed primary

---

47. *Id.* at 387-88.

48. *Id.* at 388.

49. *Id.*

50. *Id.*

51. *Id.* at 391 (citation omitted).

52. *See id.*

53. *Id.* at 391-92.

54. *Id.* at 390.

55. *See id.* at 392-93.

56. *See id.*

policies, and none were present, the court concluded that no coverage existed under the umbrella policy.

*D. Underinsured Motorist Insurer Could Not Remove Itself as Defendant in Lawsuit and Substitute Dismissed Underinsured Motorist as the Only Defendant for Trial*

In personal injury lawsuits, defendants are able to exclude from evidence that a party defendant may possess liability insurance to pay for any judgment.<sup>57</sup> In *Howard v. American Family Mutual Insurance Co.*,<sup>58</sup> the court of appeals addressed whether an uninsured motorist insurer could remove itself completely from the caption of the case and have a dismissed tortfeasor substituted as the only defendant in the case for presentation before a jury.<sup>59</sup> In this case, the insured was involved in a motor vehicle accident with an underinsured driver in Kentucky.<sup>60</sup> At the time of the accident, the insured possessed underinsured motorist coverage with American Family Mutual Insurance Company (“American Family”).<sup>61</sup> The tortfeasor possessed limited liability coverage, and after a lawsuit was filed in Kentucky against both the tortfeasor and the underinsured motorist company, the insurer for the tortfeasor offered its policy limits to the insured in exchange for a release.<sup>62</sup> American Family agreed to let the insured accept the underinsured motorist’s policy limits, and the tortfeasor was dismissed as a defendant.<sup>63</sup> The case against American Family was also dismissed but then refiled in an Indiana court.<sup>64</sup>

In responding to the insured’s complaint, American Family admitted that its policy provided underinsured motorist coverage.<sup>65</sup> Shortly before the case was to proceed to trial, American Family filed a motion to substitute the dismissed underinsured driver as the proper party defendant; it also filed a simultaneous motion in limine seeking to exclude all reference to American Family as a defendant.<sup>66</sup> The trial court granted American Family’s motions, which prompted an interlocutory appeal.<sup>67</sup>

The Indiana Court of Appeals reversed the trial court’s decision to allow American Family to substitute the dismissed underinsured motorist as the only

---

57. See IND. R. EVID. 411.

58. 928 N.E.2d 281 (Ind. Ct. App. 2010).

59. *Id.* at 282.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* Apparently, there was a question whether the Kentucky court would have jurisdiction over American Family. *Id.* at 282 n.1.

65. *Id.* at 282.

66. *Id.*

67. *Id.* at 282-83.

party defendant.<sup>68</sup> The court concluded that an insured has the right to proceed to trial against his underinsured motorist carrier and that there can be no substitution of a dismissed underinsured motorist as a proper party defendant.<sup>69</sup> Specifically, the court held that “Indiana law provides no authority for substitution of a non-party tortfeasor as a nominal defendant in place of an insurer in a contract case, where the plaintiff seeks recovery of underinsured motorist benefits.”<sup>70</sup>

It remains uncertain whether the *Howard* decision will have a universal impact in prohibiting efforts by an insurer to substitute an uninsured or underinsured motorist as a party defendant.<sup>71</sup> The key to the court’s ruling appeared to be that the underinsured motorist was no longer a party to the proceedings and was therefore considered a “non-party.” To the extent that a lawsuit includes both the underinsured motorist and the underinsured motorist insurer, the insurer may be able to remove itself from being a party to the case if it agrees to be bound by the outcome of the lawsuit up to the extent of its underinsured motorist coverage.

## II. COMMERCIAL GENERAL AND FARM LIABILITY CASES

### *A. Indiana Supreme Court Concludes That Insured Contractors Are Entitled to Coverage Under General Liability Insurance Policy for Faulty Workmanship Claims*

The Indiana Supreme Court addressed an important insurance coverage question on whether insured builders have liability insurance coverage for alleged faulty workmanship when it decided *Sheehan Construction Co. v. Continental Casualty Co.*<sup>72</sup> In deciding this case, the supreme court rejected a number of Indiana Court of Appeals decisions that had concluded that no coverage was available under a general liability policy for claims to repair or replace an insured’s faulty workmanship.<sup>73</sup> After this decision, builders have liability coverage under existing commercial general liability insurance policies

---

68. *Id.* at 284.

69. *See id.* at 284-85.

70. *Id.* at 284 (citing *Brown-Day v. Allstate Ins. Co.*, 915 N.E.2d 548, 552-53 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 791 (Ind. 2010)).

71. For a decision where substitution was permitted, see *Wineinger v. Ellis*, 855 N.E.2d 614, 616 (Ind. Ct. App. 2006), *trans. denied*, 869 N.E.2d 448 (Ind. 2007) (permitting an uninsured motorist insurer to substitute the uninsured motorist as the sole named defendant when the insurer admitted liability and represented that it would pay the insured’s judgment up to the limits of coverage).

72. 935 N.E.2d 160, 161 (Ind.), *modified and aff’d on reh’g*, 938 N.E.2d 685 (Ind. 2010).

73. Specifically, *Sheehan* abrogated *Amerisure, Inc. v. Wurster Construction Co.*, 818 N.E.2d 998 (Ind. Ct. App. 2004), *clarified on reh’g*, 822 N.E.2d 1115 (Ind. Ct. App. 2005), and *R.N. Thompson & Assocs., Inc. v. Monroe Guarantee Insurance Co.*, 686 N.E.2d 160 (Ind. Ct. App. 1997).



for faulty workmanship claims unless current standard policy language is changed.

Sheehan was a general contractor hired by a number of homeowners to construct their homes in a residential subdivision.<sup>74</sup> As a general contractor, Sheehan utilized subcontractors who actually performed the work in constructing the homes.<sup>75</sup> One homeowner experienced water intrusion to his home that was caused by the faulty workmanship of the subcontractors.<sup>76</sup> As a result, the homeowner filed a lawsuit against Sheehan seeking damages for the costs to repair the faulty workmanship.<sup>77</sup>

During the relevant time period, Sheehan possessed a commercial general liability (CGL) policy from Continental Insurance Company.<sup>78</sup> Most CGL policies provide coverage for “occurrences” that produce injury or property damage.<sup>79</sup> The term “occurrence” is generally defined as an “accident.”<sup>80</sup> The CGL policy also included a “your work” exclusion, which provided that coverage was not available for “[p]roperty damage” to “your work” arising out of it or any part of it and included in the “products-completed operations hazard;” it also did not apply “if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.”<sup>81</sup>

After the filing of the homeowners’ lawsuit, Continental agreed to provide a defense to Sheehan under a reservation of rights.<sup>82</sup> Other homeowners who were also experiencing water intrusion pursued lawsuits against Sheehan that resulted in the conversion of the homeowners’ lawsuits into a class action.<sup>83</sup> Eventually, a settlement was reached where Sheehan agreed to pay a monetary figure and assigned its rights to proceeds from the CGL policy to the homeowners; in exchange, the homeowners agreed not to pursue their claims against Sheehan.<sup>84</sup>

Continental filed a declaratory judgment lawsuit in which it sought a judicial ruling that Continental did not owe a duty to indemnify Sheehan for the homeowners’ claims pursuant to the CGL policy.<sup>85</sup> Relying upon *R.N. Thompson* and *Amerisure*, Continental contended that the homeowners’ claims to recover

---

74. *Sheehan Constr. Co.*, 935 N.E.2d at 163.

75. *Id.*

76. *Id.*

77. *Id.* at 163-64.

78. *Id.* at 164.

79. The CGL policy language provided coverage for “sums that the insured becomes legally obligated to pay as damages because of ‘bodily injury’ or ‘property damage’ . . . caused by an ‘occurrence’ that takes place . . . during the policy period.” *Id.* (citation omitted).

80. *Id.*

81. *Id.* (citation omitted).

82. *Id.*

83. *Id.*

84. *Id.* Sheehan also assigned to the homeowners any claims it had against the subcontractors.

85. *Id.*

the costs to repair or replace the faulty workmanship did not demonstrate an “occurrence” or “property damage” to trigger the CGL coverage.<sup>86</sup> The trial court granted Continental’s motion for summary judgment, which was affirmed on appeal.<sup>87</sup>

The Indiana Supreme Court observed that there was a split in authority around the country on whether claims for the repair of an insured’s faulty workmanship were covered under a CGL insurance policy.<sup>88</sup> In addressing this question, the Indiana Supreme Court rejected the earlier court of appeals decisions finding that no coverage existed.<sup>89</sup> Instead, the court concluded that unless the insured clearly intended to cause the faulty workmanship, any property damage that resulted from the insured’s construction activities would satisfy the definition of “occurrence” to trigger the insuring agreement of the CGL policy.<sup>90</sup>

The court next turned its attention to whether the “your work” exclusion in the CGL policy applied to bar coverage. The first section of the exclusion eliminated coverage for the portion of Sheehan’s work that consisted of the construction of the home.<sup>91</sup> However, the court observed that the specific exclusion in Sheehan’s policy contained an “exception” for work performed on Sheehan’s behalf by subcontractors that it hired.<sup>92</sup> This “exception” reinstated coverage that the exclusion initially removed from the policy.<sup>93</sup> Consequently, based on the language of the CGL policy issued by Continental, Sheehan was entitled to coverage for the homeowners’ faulty workmanship claims.<sup>94</sup>

Two justices dissented from the majority’s determination that Sheehan was entitled to coverage. Chief Justice Shepard concluded that a CGL policy was neither designed nor priced to cover the “warranty claims” asserted by the homeowners for a faulty workmanship claim.<sup>95</sup> Justice Sullivan believed that the costs to repair an insured’s faulty workmanship did not satisfy the definition of an “occurrence” to trigger a coverage obligation under a CGL policy.<sup>96</sup>

This decision will significantly impact insureds and insurers in assessing faulty workmanship claims. CGL policies issued to builders will become performance bonds that provide insurance coverage whenever an insured constructs a defective building. Almost certainly, the insurance industry will respond by eliminating the “subcontractor exception” to the “your work”

---

86. *Id.* at 165.

87. *Sheehan Constr. Co. v. Cont’l Cas. Co.*, 908 N.E.2d 305 (Ind. Ct. App. 2009), *trans. granted, opinion vacated*, 929 N.E.2d 782 (Ind. 2010).

88. *Sheehan Constr. Co.*, 935 N.E.2d at 167-68. See *id.* n.4 & n.5 for examples of such cases.

89. *See id.*

90. *Id.* at 170.

91. *Id.* at 171.

92. *Id.*

93. *Id.*

94. *Id.* at 171-72.

95. *See id.* at 172 (Shepard, C.J., dissenting).

96. *Id.* (Sullivan, J., dissenting).

exclusion so that coverage will be excluded. Alternatively, insurance companies may respond to the increased risk of having to pay “warranty claims” of an insured by substantially increasing the premium paid by the builder to purchase a CGL policy.

*B. Injured Contractor Employee’s Lawsuit Seeking Worker’s Compensation Benefits Was Covered Under Farm Liability Insurance Policy*

In *Everett Cash Mutual Insurance Co. v. Taylor*,<sup>97</sup> the Indiana Supreme Court addressed a matter of first impression in determining whether insureds under a farm personal liability policy were entitled to liability insurance coverage from an injured contractor’s claim for worker’s compensation benefits. In acquiring insurance coverage, the insureds contacted their insurance agent and specifically asked for “all risk coverage” to cover any contractors who came onto their property.<sup>98</sup> Everett Cash Mutual Insurance Company (“Everett Cash”) provided a farm personal liability insurance policy.<sup>99</sup> The insureds contracted with a painting contractor whose employee sustained a shock injury after contacting an electrical wire.<sup>100</sup>

The injured employee filed a lawsuit against the insureds seeking only to recover worker’s compensation benefits.<sup>101</sup> His employer did not possess a worker’s compensation policy to cover injured employees.<sup>102</sup> Indiana has a specific statute that permits employees of contractors to seek worker’s compensation benefits directly from entities that hire the contractor under certain circumstances:

The state, any political division thereof, any municipal corporation, any corporation, limited liability company, partnership, or person, contracting for the performance of any work exceeding one thousand dollars (\$1,000) in value by a contractor subject to the compensation provisions of . . . [Indiana Code section] 22-3-2 through . . . 22-3-6, without exacting from such contractor a certificate from the worker’s compensation board showing that such contractor has complied with section 5 of this chapter . . . shall be liable to the same extent as the contractor for compensation, physician’s fees, hospital fees, nurse’s charges, and burial expenses on account of the injury or death of any employee of such contractor, due to an accident arising out of and in the course of the performance of the work covered by such contract.<sup>103</sup>

---

97. 926 N.E.2d 1008 (Ind. 2010).

98. *Id.* at 1010.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. IND. CODE § 22-3-2-14(b) (2011). It is important to note that this obligation does not apply to “an owner who contracts for performance of work on the owner’s owner occupied residential property.” *Id.* § 22-3-2-14(a)(1).

In filing the lawsuit against the insureds, the injured employee apparently sought the worker's compensation benefits afforded under the statute—rather than pursuing a premises liability cause of action against the insureds—in order to avoid having to prove that the owner was negligent.

The insureds submitted the injured employee's lawsuit to their insurance agent for coverage under the Everett Cash farm liability policy.<sup>104</sup> However, Everett Cash denied coverage, contending that the injured employee's lawsuit was for worker's compensation benefits that did not present an "occurrence" necessary to trigger liability coverage and was also excluded under the farm liability. Everett Cash relied upon the following exclusion, which stated:

Coverage L [liability coverage] does not apply to . . . bodily injury to a person, including a domestic employee, if the insured has a . . . [worker's] compensation policy covering the injury or if benefits are payable or are required to be provided by an insured under a . . . [worker's] compensation, non[-]occupational disability, occupational disease or like law.<sup>105</sup>

As a result of the coverage denial, the insureds filed a lawsuit against Everett Cash for breach of contract.<sup>106</sup> Everett Cash moved for summary judgment at the trial court level, but the motion was denied.<sup>107</sup> An interlocutory appeal was pursued, and the court of appeals reversed the trial court.<sup>108</sup> The Indiana Supreme Court granted transfer of the case for consideration.<sup>109</sup>

The supreme court initially rejected Everett Cash's argument that the injured employee's claim did not present an "occurrence" to trigger coverage.<sup>110</sup> Because the injured employee's claim occurred as a result of an accident that produced bodily injury, the court found that this satisfied the definition to trigger a coverage obligation.<sup>111</sup>

Next, the court found that the "worker's compensation" exclusion upon which Everett Cash relied was ambiguous and unenforceable.<sup>112</sup> Specifically, the court found that reasonable interpretations of the exclusionary language led to multiple conclusions and that it was ambiguous as applied to this insured.<sup>113</sup> Because the insureds were farmers who did not operate a business, the court found it significant that they could not purchase worker's compensation insurance coverage to protect themselves from claims similar to that presented

---

104. *Taylor*, 926 N.E.2d at 1010.

105. *Id.* at 1012 (citation omitted).

106. *Id.* at 1010.

107. *Id.* at 1010-11.

108. *Id.* at 1011.

109. *Id.*

110. *Id.* at 1012.

111. *Id.*

112. *See id.* at 1013.

113. *Id.* at 1013-14.

by the injured subcontractor. The court noted,

Given that the . . . [insureds] could not have even purchased worker's compensation insurance to protect themselves from claims by . . . [the contractor's] employees, it is hard to imagine them thinking that an exclusion regarding worker's compensation could preclude them from having protection from a lawsuit by someone injured in an accident on their property.<sup>114</sup>

Consequently, the court determined that Everett Cash's policy language was ambiguous and construed the language against the insurer.<sup>115</sup> Furthermore, the court commented that to the extent that Everett Cash wished to exclude claims seeking worker's compensation benefits from its liability coverage, it needed to refine the language so that it was clearer.<sup>116</sup>

This particular case provides good insight concerning an issue that many practitioners are probably unaware of: the possible requirement that in certain circumstances, an insured may be forced to supply worker's compensation benefits to injured employees of contractors coming upon their property. Thus, having the opportunity to provide that coverage through a liability policy is an extra benefit that insureds have gained through the *Taylor* decision.

### *C. Court Found That Insured Was Bound by Change in Insurance Policy Language Despite Lack of Notice*

On many occasions, an insured never reads—or never has the opportunity to read—an insurance policy until after a loss occurs. On some occasions, policy language changes at a policy's removal from the time the policy was first acquired by the insured. In *Wurster Construction Co. v. Essex Insurance Co.*,<sup>117</sup> the changes to a policy significantly affected an insured's entitlement to coverage following a construction accident.

Wurster Construction Company was a contractor on a construction project.<sup>118</sup> Wurster subcontracted a portion of the construction work to an entity known as Kane Construction.<sup>119</sup> Pursuant to Kane's subcontract with Wurster, Kane agreed to procure liability insurance coverage that would name Wurster as an additional insured and provide primary coverage over Wurster's own liability coverage.<sup>120</sup> Kane then subcontracted its work to Main Street Construction, but did not include any provision within its subcontract requiring Main Street to obtain liability insurance coverage for Kane or Wurster.<sup>121</sup> A Main Street employee

---

114. *Id.* at 1014 (internal footnote omitted).

115. *Id.*

116. *Id.*

117. 918 N.E.2d 666 (Ind. Ct. App. 2009).

118. *Id.* at 669.

119. *Id.*

120. *Id.*

121. *Id.*

sustained fatal injuries after a fall during the construction project.<sup>122</sup> As a result, the estate of the deceased worker filed a personal injury lawsuit against Wurster.<sup>123</sup>

After the initial lawsuit was filed, Wurster and Kane presented a number of insurance claims (by various insurance policies) arising from the incident.<sup>124</sup> The pertinent part of the case for purposes of this survey Article<sup>125</sup> focused upon the appeal by Essex, Kane's insurance company, who argued in a declaratory judgment proceeding that it owed no liability insurance coverage to Kane for the estate's lawsuit.<sup>126</sup> Specifically, Essex contended that a policy provision excluded coverage for personal injury claims sustained by any employees of independent contractors utilized by Kane.<sup>127</sup> However, in addressing that issue, it was significant to see the history of the exclusion in the Essex policy.

With respect to the policy Essex initially wrote, Kane received coverage for injuries sustained by employees of independent contractors if "the [n]amed [i]nsured's [Kane's] actions or inactions . . . [were] the direct cause of the injury."<sup>128</sup> However, upon renewal of the policy, the policy language was amended to exclude from coverage all claims for bodily injury by employees of the independent contractors utilized by Kane.<sup>129</sup> The trial court denied Essex's motion for summary judgment and found that it owed coverage to Kane.<sup>130</sup>

On appeal, the court analyzed the current Essex policy language, which did not appear to provide coverage to Kane.<sup>131</sup> Kane argued that coverage existed, claiming to be unaware of the policy language changes Essex made at renewal. Further, Kane claimed that it never would have agreed to those changes if it was aware of their inclusion in the policy.<sup>132</sup> The court focused upon the fact that Kane's insurance broker<sup>133</sup> was aware of changes to the policy such that the broker's knowledge was imputed to Kane.<sup>134</sup> As a result, the court of appeals reversed the trial court's denial of summary judgment to Essex and found that Essex did not owe liability coverage to Kane for the estate's lawsuit.<sup>135</sup>

---

122. *Id.*

123. *Id.*

124. *Id.*

125. There was also a significant discussion by the court concerning the timeliness of appeals pursued in the matter.

126. *Wurster Constr. Co.*, 918 N.E.2d at 678.

127. *Id.* at 679.

128. *Id.* at 678 (citation omitted).

129. *Id.* at 678-79.

130. *Id.* at 679.

131. *Id.*

132. *Id.* at 680-81.

133. For a recent discussion by the Indiana Supreme Court on the meaning of an "insurance agent" or "insurance broker," see *Estate of Mintz v. Connecticut General Life Insurance Co.*, 905 N.E.2d 994, 1000-01 (Ind. 2009).

134. *Wurster Constr. Co.*, 918 N.E.2d at 681.

135. *Id.* at 681-82.

This case demonstrates the situation where insurance companies may issue policies that do not accurately reflect the intent of their insureds when they seek additional insured status for another party. Practitioners who represent named insureds as well as additional insureds may want to insist upon receiving and reviewing the actual insurance policy language to determine the extent of coverage provided to the additional insured. Moreover, they should verify if policy language is consistent with the requirements imposed in the contract between the named and additional insureds.

### III. HOMEOWNERS' COVERAGE CASES

#### *A. Insurance Company Could Not Assert a Cause of Action Against Public Adjuster Used by Insureds to Resolve Homeowners' Insurance Claim*

When a homeowner sustains a fire, he may retain the services of a public adjuster<sup>136</sup> to assist in dealing with the insurance company on the adjustment of the claim. On many occasions, disputes between the public adjuster and the insurance company arise, which cause problems in resolving the insured's claim. In *Meridian Security Insurance Co. v. Hoffman Adjustment Co.*,<sup>137</sup> negotiations between a public adjuster and insurance company turned sour, which prompted the filing of lawsuits against each other.<sup>138</sup> These suits resulted in an appellate decision regarding whether any causes of action could be pursued by either party against the other.<sup>139</sup>

A fire occurred at the home of the insureds, who had a homeowners' insurance policy with Meridian.<sup>140</sup> While the claim for damage to real property was being resolved between the insureds and their insurer, a dispute arose concerning the salvageability and value of the insured's personal property items.<sup>141</sup> The homeowners eventually entered into a contract with a public adjuster to assist them in handling the claim for personal property damage.<sup>142</sup> When the insurer sent a cleaning crew to transport and clean the insured's personal property, the cleaning crew was told not to take the property.<sup>143</sup> The

---

136. The Indiana Code defines a "public adjuster" as

every individual or corporation who, or which, for compensation or reward, renders advice or assistance to the insured in the adjustment of a claim or claims for loss or damages under any policy of insurance covering real or personal property and any person or corporation who, or which, advertises, solicits business, or holds itself out to the public as an adjuster of such claims.

IND. CODE § 27-1-27-1 (2011).

137. 933 N.E.2d 7 (Ind. Ct. App. 2010).

138. *Id.* at 9-10.

139. *Id.* at 11.

140. *Id.* at 9.

141. *Id.*

142. *Id.*

143. *Id.*

homeowners submitted an inventory of the damaged property, but Meridian contended that the inventory was missing required information.<sup>144</sup> The public adjuster responded to Meridian's request for more details about the inventory by indicating that the homeowners' submission complied with Meridian's insurance policy requirements.<sup>145</sup>

After the insureds rejected Meridian's settlement proposal for the personal property items, they requested an appraisal as to the value of the damaged personal property items.<sup>146</sup> Meridian refused to proceed to the appraisal process and stopped paying storage fees for the personal property items.<sup>147</sup> Because the homeowners could no longer pay the storage fees to retain the property, they subsequently destroyed those items.<sup>148</sup>

Next, the homeowners filed a petition with the court for the appointment of an umpire.<sup>149</sup> Meridian responded by filing a counterclaim for declaratory judgment, contending that the insureds breached the policy by refusing to cooperate.<sup>150</sup> The homeowners amended their complaint to assert claims for breach of contract, failure to exercise good faith, adjuster negligence, and misrepresentation with respect to Meridian's handling of their claim.<sup>151</sup> Meridian amended its counterclaim and contended that the insureds engaged in fraudulent behavior and that Meridian owed no further obligations to them.<sup>152</sup> Additionally, Meridian added a third party complaint to argue that the public adjuster had breached the terms of the policy, failed to exercise good faith, and engaged in spoliation of evidence, fraud, and tortious interference with Meridian's contractual relationship with its insureds.<sup>153</sup> The public adjuster filed a motion for summary judgment as to each of the theories Meridian raised against him, contending that they were not valid under Indiana law.<sup>154</sup> The trial court granted the public adjuster's motion for summary judgment by specifically finding that the public adjuster was the agent of the insureds.<sup>155</sup> Because there was no contractual relationship between Meridian and the public adjuster, Meridian had

---

144. *Id.*

145. *Id.*

146. *Id.* Under many insurance policies, the parties can resolve their disputes about the value of a claim by seeking an appraisal. In such a case, the insured and insurer each select an appraiser, and those appraisers will attempt to agree upon a "neutral" umpire. If they cannot mutually select an umpire, either side may petition the court to select an umpire. The appraisers and the umpire will then determine the value of the claim, which is usually binding upon the parties.

147. *Id.* at 9-10.

148. *Id.* at 10 n.1.

149. *Id.* at 10.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 10-11.

155. *Id.* at 11.



no right to present a cause of action against the public adjuster.<sup>156</sup>

The court of appeals affirmed the trial court's summary judgment in favor of the public adjuster.<sup>157</sup> Specifically, the court determined that the public adjuster acted solely as the agent of the insureds.<sup>158</sup> Because the insureds were already engaged in a contractual relationship with Meridian, any actions by the public adjuster could not be considered a "tortious interference" of the contract between the insureds and Meridian to establish a separate cause of action by Meridian against the public adjuster.<sup>159</sup> Likewise, the court found that any suggestion that the public adjuster committed fraud or breached a duty of good faith could not support independent causes of action in favor of Meridian, as no recognizable relationship existed between the public adjuster and Meridian.<sup>160</sup>

The court also observed that because the public adjuster was the agent of the insureds, to the extent that his actions demonstrated a breach of the insurance policy, Meridian could assert the public adjuster's actions as defenses to any coverage obligation owed to the insureds.<sup>161</sup> Similarly, with respect to Meridian's claims that the public adjuster may have spoliated evidence, the court found that Meridian's remedy was to assert a coverage defense against the insureds (as the principal to the public adjuster), not to assert an independent cause of action against the public adjuster.<sup>162</sup>

*B. Court Refused to Enforce an Unoccupied Dwelling Exclusion  
When Elderly Widow Became Ill and Vacated Home*

In *Estate of Luster v. Allstate Insurance Co.*,<sup>163</sup> an interesting discussion occurred regarding the applicability of a homeowners' policy exclusion when the insured is not occupying the dwelling and a loss occurs. In this matter, an elderly widow (who lived alone) sustained an injury from a fall.<sup>164</sup> After her hospitalization, she moved into an extended care facility.<sup>165</sup> She executed a power of attorney with her personal lawyer, who notified her homeowners' insurance company to bill his office for her homeowners' insurance premium payments.<sup>166</sup> The widow never returned to her house and eventually passed away at the extended care facility.<sup>167</sup>

Approximately three months after her death (while the house was still

---

156. *Id.*

157. *Id.* at 16.

158. *Id.*

159. *Id.* at 12-13.

160. *Id.* at 14.

161. *Id.* at 13.

162. *Id.* at 15-16.

163. 598 F.3d 903 (7th Cir. 2010).

164. *Id.* at 905.

165. *Id.*

166. *Id.*

167. *Id.*

unoccupied), a fire occurred at the widow's former home, resulting in extensive damages.<sup>168</sup> The cause of the fire was never determined.<sup>169</sup> When the attorney asserted a homeowners' claim on behalf of the estate, the widow's insurer investigated and learned that the home had been unoccupied for approximately four and a half years before the widow's death.<sup>170</sup> As a result, the insurer denied coverage, relying upon a number of exclusions in the policy.<sup>171</sup> Specifically, the insurer relied upon exclusions that required that the insurance company be notified of changes in the occupancy of the home and excluded coverage if a loss occurred to the property from occupancy changes increasing the risk of hazard. Moreover, the policy excluded coverage if an insured did not occupy the home for a period of more than thirty consecutive days.<sup>172</sup> The estate filed a lawsuit against the insurance company for breach of the policy.<sup>173</sup> The trial court granted summary judgment to the homeowners' insurance company, which sought to enforce the policy exclusions.<sup>174</sup>

On appeal, the Seventh Circuit Court of Appeals, applying Indiana law, determined that the fact that the house was unoccupied for four and a half years called into question the application of the policy exclusion for an unoccupied dwelling.<sup>175</sup> Although the court would not rule as a matter of law that coverage was excluded, it concluded that the evidence submitted showed that the insurance policy exclusions might apply.<sup>176</sup>

Nevertheless, the court also determined that certain questions of fact prevented the entry of summary judgment—notably, whether the insurance company waived its reliance upon the “non-occupied dwelling” exclusion because it continued to collect premiums from the widow's attorney.<sup>177</sup> Specifically, the appellate record demonstrated that the homeowners' insurance company continued to collect premiums during most of the time the house was unoccupied.<sup>178</sup> Although the insurance company returned these premiums when it attempted to exclude coverage, the court ruled that the insurance company's actions created an issue of fact on whether it had waived its right to enforce the exclusion and cancel the policy.<sup>179</sup> As a result, the case was remanded back to the trial court for consideration and resolution of the disputed facts.<sup>180</sup>

This case provided an excellent analysis of a situation where an insured's

---

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 905-06.

172. *Id.* at 906.

173. *Id.* at 905.

174. *See id.* at 907.

175. *Id.*

176. *Id.* at 912 (remanding for hearings on various exceptions).

177. *Id.* at 909-10.

178. *Id.* at 909.

179. *Id.* at 912.

180. *Id.*

property is not occupied by the actual insured. In *Estate of Luster*, the court refused to find as a matter of law that when an insured does not occupy a home for a period of more than thirty consecutive days (such as when insureds travel to a winter home), the insurance company has a right to exclude insurance coverage if a loss occurs on the thirty-first day.<sup>181</sup> However, if the insurer can establish that the risk of hazard may have increased because of non-occupancy, coverage could potentially be excluded.<sup>182</sup> The court also provided an excellent discussion of how an insurance company must act when it knows that a home is unoccupied and wishes to enforce the policy exclusion.<sup>183</sup>

*C. Court Refused to Find That Insurance Agency Owed Its Clients a Duty to Advise of the Amount of Homeowners' Insurance Coverage for Total Loss of Home*

The decision in *Myers v. Yoder*<sup>184</sup> presents an interesting analysis of whether an insurance agent owed a duty to its insured in acquiring sufficient insurance coverage limits to replace a damaged home. The insureds contacted an insurance agent during the construction of their home, and the agent secured for the insureds a builders' risk insurance policy through an insurance company.<sup>185</sup> The amount of coverage was based upon what the insureds advised the agent would be the cost of the house after construction was completed.<sup>186</sup>

After the house was complete, the agent performed a "replacement cost estimator" on the new home, which calculated what it would cost to replace their residence. A new homeowners' insurance policy was issued to the insureds for the estimated replacement amount.<sup>187</sup> Over the years, the policy was renewed by the insureds with only slight increases in the amount of the replacement coverage limits.<sup>188</sup>

Later, the insureds' original agent left the insurance industry, and his former assistant became their insurance agent with a different agency.<sup>189</sup> The new agent arranged for replacement of their insurance policy with a different insurer, with only a slight increase in the policy limits.<sup>190</sup> In writing the new insurance policy, this agent did not perform a "replacement cost estimator" on the insureds' home.<sup>191</sup> The insureds recalled having only one conversation with the new agent in the solicitation of their business and claimed that they requested "full

---

181. *Id.* at 908-09.

182. *Id.* at 909.

183. *See id.* at 907-08.

184. 921 N.E.2d 880 (Ind. Ct. App. 2010).

185. *Id.* at 882.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* at 883.

coverage” on their house.<sup>192</sup> The policy was later renewed with the new insurance company, with only a slight increase in the policy limits.<sup>193</sup>

At some later point, the insureds hired a contractor to dig a trench on their property.<sup>194</sup> The contractor accidentally struck a propane line, which caused gas to leak into the insureds’ home.<sup>195</sup> Unfortunately, the insureds’ property was destroyed when the gas exploded.<sup>196</sup> The insureds submitted a claim to their insurance company for the replacement value of their home.<sup>197</sup> At that time, they learned that the cost to replace their home exceeded the extent of the policy’s replacement costs limits by almost \$100,000.<sup>198</sup> As a result, the insureds filed a complaint against the insurance agency and insurance agent for negligence.<sup>199</sup>

At the trial court level, the insurance agency defendants filed a motion for summary judgment, contending that as a matter of law, they did not owe the insureds a “duty to advise them as to the amount [of insurance coverage] for which they should insure their house.”<sup>200</sup> They contended that only a “standard relationship” of agent and insured existed, but not a “special relationship” needed to impute a duty to the insurers to advise the insureds of the appropriate amount of coverage.<sup>201</sup> The trial court granted summary judgment for the insurance agency, finding specifically that there was “not an intimate, long-term relationship that would be required to create a duty to advise . . . [the insureds] in regards to the amount of insurance” they ought to maintain.<sup>202</sup>

On appeal, the court first observed that an insurance agent who agrees to acquire insurance for another owes that individual “a general duty to exercise reasonable care, skill and good faith diligence in obtaining the insurance.”<sup>203</sup> However, Indiana law provides that the agent’s duty “does not extend to providing advice to the insured unless the insured can establish the existence of an intimate, long-term relationship with the agent or some other special circumstance.”<sup>204</sup> The court identified certain factors that could demonstrate the existence of this “special relationship” between the agent and insured, which included whether the agent: “(1) exercised broad discretion in servicing the insured’s needs; (2) counseled the insured concerning specialized insurance coverage; (3) held himself out as a highly-skilled insurance expert; or (4)

---

192. *Id.* at 882.

193. *Id.*

194. *Id.* at 883.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* The insureds also sued the contractor who dug the ditch for negligently causing the gas explosion.

200. *Id.*

201. *Id.*

202. *Id.* at 884.

203. *Id.* at 885 (citations omitted).

204. *Id.* (citation omitted).

received compensation for the expert advice provided above the customary premium paid.”<sup>205</sup>

In this particular case, the appellate court determined that “no intimate, long-term relationship . . . existed” that could justify imposing the higher duty on the insurance agency.<sup>206</sup> The court also rejected the insureds’ expectation of receiving “full coverage” as sufficient to impose a duty on an agent to advise concerning the proper amount of insurance coverage.<sup>207</sup> As a result, the court determined that the insurance agency lacked any duty upon which the insureds could seek to recover against the insurance agency for their uninsured exposure.<sup>208</sup>

This case provides an excellent example of how insureds must pay attention to the declaration pages and premium notices for their policies to determine whether they are sufficiently insured. To the extent that there are any questions regarding that coverage, an insured must take steps to make sure that sufficient coverage is in place by establishing a “special relationship” with the insurer or agent or following up to make sure sufficient coverage exists.

#### IV. ENVIRONMENTAL COVERAGE CASES

During this survey period, the courts addressed a number of complex environmental coverage decisions. Because of the specialized nature of environmental insurance coverage practice and the fact-sensitive nature of each of these cases, this Article will not address those cases in great detail. However, the specific cases and a brief summary of the issues contained within them are mentioned below:

##### A. *Cinergy Corp. v. St. Paul Surplus Lines Insurance Co.*<sup>209</sup>

- An insured power company’s surrender of emission rights under the Clean Air Act<sup>210</sup> did not constitute an “occurrence” to trigger a coverage obligation.<sup>211</sup>
- Costs—including attorney fees and civil penalties—imposed by the federal government against the insured power company did not demonstrate an “occurrence” to trigger coverage under liability policies.<sup>212</sup>

205. *Id.* (citing *Court View Centre, LLC v. Witt*, 753 N.E.2d 75, 87 (Ind. Ct. App. 2001)).

206. *Id.*

207. *Id.* at 889 (citing *Barnes v. McCarty*, 893 N.E.2d 325, 329 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1231 (Ind. 2008) (refusing to find that an insured’s request for “full [insurance] coverage” was sufficient to create an insurance agent duty upon which a negligence action could be pursued)).

208. *Id.* at 887.

209. 915 N.E.2d 524 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 797 (Ind. 2010).

210. 42 U.S.C. §§ 7401-7671 (2006 & Supp. 2009).

211. *Cinergy Corp.*, 915 N.E.2d at 534.

212. *Id.* at 534-35.

B. *Indiana Farmers Mutual Insurance Co. v. North Vernon Drop Forge, Inc.*<sup>213</sup>

- A complaint filed by a recipient of contaminated fill dirt from an insured presented sufficient allegations to demonstrate an “occurrence” under the insured’s liability policy, implicating the insurance company’s duty to defend.<sup>214</sup>
- The insurance policy’s intentional acts exclusion did not exclude coverage for the insured’s dumping of contaminated dirt.<sup>215</sup>
- The fact that the insured supplied late notice of the claim to the insurance company did not result in prejudice to the insurer.<sup>216</sup>

C. *Pulse Engineering, Inc. v. Travelers Indemnity Co.*<sup>217</sup>

- This case presented an analysis of the appropriate choice of law question in determining which state’s law would apply to coverage for an environmental contamination claim.<sup>218</sup>

D. *P.R. Mallory & Co. v. American Casualty Co.*<sup>219</sup>

- Insureds who possessed knowledge of facts demonstrating an “occurrence” but delayed notifying their insurers of the occurrence were found to have provided unreasonably late notice.<sup>220</sup>
- The insureds’ unreasonable delay in notifying their insurance companies of environmental claims resulted in presumed prejudice to the insurers.<sup>221</sup>

E. *West Bend Mutual Insurance Co. v. United States Fidelity & Guaranty Co.*<sup>222</sup>

- A dispute between multiple insurance companies as to obligations to defend a mutual insured resulted in the court determining that one insurer’s “pollution exclusion” was sufficient to exclude coverage for a gasoline spill at insured’s premises under Indiana law.<sup>223</sup>

---

213. 917 N.E.2d 1258 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 796 (Ind. 2010).

214. *Id.* at 1263.

215. *Id.* at 1273.

216. *Id.* at 1276.

217. 679 F. Supp. 2d 969 (S.D. Ind. 2009).

218. *Id.* at 972-74.

219. 920 N.E.2d 736 (Ind. Ct. App.), *trans. denied*, 929 N.E.2d 795 (Ind. 2010).

220. *Id.* at 753.

221. *Id.* at 746.

222. 598 F.3d 918 (7th Cir. 2010).

223. *Id.* at 926.