SURVEY OF RECENT DEVELOPMENTS IN INSURANCE LAW

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During this survey period,[1] the appellate courts of Indiana addressed a number of cases involving automobile, general liability, homeowners, and commercial liability insurance questions. The most controversial cases focused upon whether insurance coverage existed for the diminished value of an automobile after it has been damaged from an accident and then repaired. This Article addresses the decisions of the past year, and analyzes their effect on the practice of insurance law.[2]

I. AUTOMOBILE CASES

A. Automobile Policy Covered Diminished Value of Vehicle After Repair from Accident

When an automobile has been involved in an accident, the insured and the insurer must decide whether it should be repaired or considered a total loss (i.e., whether the costs to repair are more than the car's fair market value). Most standard insurance policies generally provide that the insurer is responsible for the lesser amount needed to repair the automobile or its fair market value.[3] After an insured has repaired his or her vehicle, the insured often contends that the vehicle has sustained a diminished value from its pre-accident condition.[4] Until recently, no Indiana case had addressed whether a vehicle's diminished value is recoverable under an automobile insurance policy. During this survey period, the issue was addressed with three published decisions.

In *Allgood v. Meridian Security Insurance Co.*, the insured's vehicle was

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1. The survey period for this Article is approximately October 1, 2003, to September 30, 2004.

2. Other cases during the survey period, but not addressed in this Article include *Westfield Insurance Co. v. Yaste, Zent & Rye Agency*, 806 N.E.2d 25 (Ind. Ct. App. 2004) (involving action by insurer against broker for negligence and fraud) and *Dunaway v. Allstate Insurance Co.*, 813 N.E.2d 376 (Ind. Ct. App. 2004) (deciding whether an insurer waived a one-year policy limitation on actions against insurer).

3. One version provides:

A. Our Limit of liability for loss will be the lesser of the:

1. Actual cash value of the stolen or damaged property; or
2. Amount necessary to repair or replace the property with other property of like kind and quality.

Allgood v. Meridian Sec. Ins. Co., 807 N.E.2d 131, 132 (Ind. Ct. App.), *reh'g denied*, 812 N.E.2d 1065 (Ind. Ct. App. 2004).

4. *See* LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 175:47 (3d ed. 1998) ("A vehicle is not restored to substantially the same condition if repairs leave the market value of the vehicle substantially less than the value immediately before the collision."); *see also id.* § 175.54 (providing examples of policy limitations that do not allow depreciation to be deducted).

damaged in an automobile accident.[5] Her insurance company paid for the costs to repair the vehicle, but did not pay for any diminished value. The insured filed a class action lawsuit against her insurance company contending that diminished value of the vehicle was a recoverable element of loss under the policy.[6]

The insurer filed a motion to dismiss, and the insured countered with a motion for summary judgment. The trial court granted the insurer's motion, and an appeal ensued.[7] On appeal, the court observed that other jurisdictions were split on whether the diminished value of the vehicle was recoverable under an automobile policy.[8]

The court ultimately concluded that the policy language was ambiguous and that the vehicle's diminished value after repairs was a recoverable loss element.[9] The court construed the ambiguous policy to include an obligation of the insurer "to restore to the insured a vehicle similar in appearance, function *and* value" as it existed at the time of the loss.[10]

After the court's ruling, the insurer requested a rehearing, and was joined by various insurance trade organizations as amici curiae.[11] The insurer and amici curiae suggested that the appellate court's present ruling adversely raised public policy concerns.[12] These concerns included that the extent of the diminished value could not be adequately determined until the vehicle was sold. Thus, there was no reasonable manner to calculate an insured's damages.[13] However, the court rejected that argument by stating that personal property is valued in a number of situations without resorting to actual sale of the property.[14] Nevertheless, the court placed the burden of proving diminished value upon the insured.[15]

The court also rejected the notions that a flood of class action lawsuits against insurers would likely occur, and that all insureds' policy premiums would be increased.[16] However, the court did observe that insurers are free to include an exclusion for diminution in value of vehicles in their policies to avoid the risk.[17]

In *Dunn v. Meridian Mutual Insurance Co.*,[18] a different district of the Indiana Court of Appeals was also asked to interpret whether diminution in value

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5. *Allgood*, 807 N.E.2d at 132.
6. *Id*.
7. *Id*. at 133.
8. *See id.* at 134 n.1.
9. *Id*. at 136.
10. *Id*.
11. Allgood v. Meridian Sec. Ins. Co., 812 N.E.2d 1065, 1065 (Ind. Ct. App. 2004).
12. *Id.*
13. *Id*.
14. *Id*. at 1065-66.
15. *Id.* at 1066.
16. *Id.*
17. *Id.*
18. 810 N.E.2d 739 (Ind. Ct. App. 2004).

for repaired vehicles was a recoverable element of damages under the uninsured motorist coverage in a policy. The insured's vehicle was repaired after being involved in an accident with an uninsured motorist.[19] The insured alleged that the policy language, identical to the language of the policy in *Allgood*,[20] provided coverage for the diminished value of the vehicle following repairs.[21]

The *Dunn* court relied upon the ruling in *Allgood* to find that diminution in value was a recoverable loss under an uninsured motorist policy.[22] Consequently, the court reversed the trial court's dismissal of the insured's action.[23]

As a result of these cases, insureds may seek to recover for the diminished value of their vehicle following repairs. However, insurance companies will probably add an exclusion to the policy which will eliminate the coverage, or raise rates to reflect the increased risk of damages.

B. "Willful Conduct" Is Not Automatically "Intentional" Conduct for Insurance Policy Construction

The case of *Integon v. Singleton*[24] presented an interesting question of whether an insurer must defend its insured against allegations of willful and wanton misconduct. The wife of an insured sustained personal injuries after an accident while she was a passenger on a motorcycle being operated by the insured.[25] The wife filed a lawsuit against her husband, and alleged that his conduct was willful and wanton, as opposed to negligent, in causing the accident. She made this allegation to avoid the lawsuit's prohibition under Indiana's Guest Statute.[26]

The sole basis of the wife's complaint against her husband was for "willful and wanton" conduct. Consequently, the liability insurer for the husband contended that no coverage was owed because the husband's conduct was "intentional" rather than "accidental."[27] The insurer argued that "intentional" conduct did not trigger coverage under the insuring agreement,[28] and was also

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19. *Id*. at 740.

20. *Compare id. with* Allgood v. Meridian Ins. Co., 807 N.E.2d 131, 132 (Ind. Ct. App. 2004).

21. *Dunn*, 810 N.E.2d at 740.

22. *Id*. at 741.

23. *Id*.

24. 795 N.E.2d 511 (Ind. Ct. App. 2003).

25. *Id*. at 512.

26. *Id*. at 515. Indiana's Guest Statute establishes that operators of motor vehicles are not liable for their operation of the vehicle that results in injuries to certain, specified classes including spouses. IND. CODE § 34-30-11-1 (2004).

27. *Integon*, 795 N.E.2d at 514.

28. *Id.* The policy indicated the insurer would provide coverage as follows: "**We will pay damages**, except punitive or exemplary damages, for **bodily injury** or **property damage** for which any **insured** becomes legally responsible because of an **auto accident**." *Id*. at 512. It defined "accident" to mean "a sudden, unexpected, and unintended occurrence." *Id.*

excluded under a different provision.[29] The insurer brought a declaratory judgment lawsuit, and eventually asked the court to grant it summary judgment. The trial court denied the summary judgment request, prompting an appeal by the insurer.[30]

The court of appeals rejected the insurer's contention that willful and wanton misconduct was the same as intentional conduct.[31] While the court did not foreclose the possibility that willful and wanton misconduct may also be intentional, the court refused to find, as a matter of law, that the two types of conduct were synonymous.[32] Instead, the insurer must present evidence showing the intentions of the insured to cause the damage in order to disclaim coverage.

This decision appears to be a sound one concerning intentional conduct of an insured. Many policies also exclude coverage for damages "expected" by the insured, which has a lesser standard.[33] An insurer may be more successful in arguing that willful and wanton misconduct is synonymous with expected conduct. This decision did not address those standards.

C. A Driver with a Suspended License Did Not Have Permissive Use to Drive Even Though He Was Attempting to Escape a Knife-Wielding Attacker

The facts of *Mroz v. Indiana Insurance Co.*[34] present an interesting coverage question. The named insured allowed his teenage son to drive a van to and from school and work.[35] However, due to excessive school absences, the son's license was suspended by the Bureau of Motor Vehicles. Nevertheless, the father still allowed the son to drive, but required the son to obtain permission from the father on each occasion. The father and son knew that it was illegal for the son to drive on the suspended license.[36]

One evening the father gave a family friend permission to drive the van to take the son bowling. The father told the son that he did not have permission to drive that evening. As the group attempted to depart the bowling alley, the family friend engaged in a violent confrontation with another person who threw a baseball bat at the van. The family friend stopped the van, and exited the van

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29. The exclusion stated that no coverage was provided for "**[b]odily injury** or **property damage** caused intentionally by or at the direction of an **insured**." *Id.*

30. *Id*. at 513.

31. *Id.* at 516. *See also* Nat'l Mut. Ins. Co. v. Eward, 517 N.E.2d 95, 101 (Ind. Ct. App. 1987) (intoxicated driver's actions may have been "willful and wanton," but were not established by the evidence as "intentional").

32. *Id.*

33. "Expected" injury which is excluded under a liability policy focuses upon when the insured is consciously aware that injury is practically certain to occur. *See* Bolin v. State Farm Fire and Cas. Co., 557 N.E.2d 1084, 1086 (Ind. Ct. App. 1990).

34. 796 N.E.2d 830 (Ind. Ct. App. 2003).

35. *Id.* at 831.

36. *Id.*

to chase the perpetrator.[37]

As the son waited in the van, another individual approached the son with a knife raised above his head in a threatening gesture. Fearing the attacker, the son jumped into the driver's seat, and drove the van to get away. However, the van's brakes failed, and the son struck and injured a pedestrian.[38]

The insurer for the van filed a complaint for declaratory judgment, arguing that no liability insurance coverage existed because of an exclusion for any insured "[u]sing a vehicle without a reasonable belief that that 'insured' is entitled to do so."[39] In response, the son argued that he had a reasonable belief he was entitled to use the van under the circumstances where he was attempting to escape his attacker.[40]

The trial court granted summary judgment to the insurer.[41] This decision was affirmed on appeal.[42] The court acknowledged supreme court precedent outlining a five part test to determine a driver's "reasonable belief" of entitlement to operate an automobile:

> (1) whether the driver has the express permission to use the vehicle; (2) whether the driver's use of the vehicle exceeded the permission granted; (3) whether the driver was legally entitled to drive under the laws of the applicable state; (4) whether the driver had any ownership or possessory right to the vehicle; and (5) whether there was some form of relationship between the driver and the insured, or one authorized to act on behalf of the insured, that would have caused the driver to believe that she was entitled to drive.[43]

The appellate court concluded that the son did not have a reasonable belief to operate the car because his license was suspended, and he was not entitled to drive under the laws of Indiana.[44] The court also rejected an "extreme emergency" defense[45] offered by the son in his effort to escape the attacker.[46]

The courts appear to be strictly construing the facts to determine whether a driver has a reasonable belief to operate the car. In assessing these situations, the courts rejected self-defense and intoxication of the owner as justifiable excuses

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37. *Id.*

38. *Id.* at 831-32.

39. *Id*. at 832 (alteration in original).

40. *Id.*

41. *Id*.

42. *Id.*

43. *Id.* at 833 (quoting Smith v. Cincinnati Ins. Co., 790 N.E.2d 460, 461 (Ind. 2003)). The *Smith* court indicated that a driver with only a learner's permit, who drove a car because of the owner's intoxication, did not have a reasonable belief to operate the car. *Smith*, 790 N.E.2d at 462.

44. *Mroz*, 796 N.E.2d at 833.

45. *Id.* The son relied upon Indiana Code section 9-30-10-18, which suggests that *in a criminal action*, a driver's actions may be excused if done to save life or limb in an emergency. IND. CODE § 9-30-10-18 (2004).

46. *Mroz*, 796 N.E.2d at 834.

for drivers without licenses to drive and expect to be afforded insurance coverage.[47]

D. Uninsured Motorist Coverage Is Not Available, Even if Driver Is Uninsured, if There Is Insurance Coverage for the Vehicle

The case of *Greenfield v. Allstate Personal Property and Casualty*[48] presented an interesting policy interpretation on the availability of uninsured motorist coverage. In supplying her daughter with an automobile, a mother gave clear instructions that no one, other than the daughter, was to drive the vehicle.[49] The daughter allowed another individual to drive the vehicle, and an accident occurred resulting in the death of the daughter. The driver was uninsured at the time of the accident.[50]

The daughter's estate sought uninsured motorist coverage from the mother's policy. The insurer argued that no coverage was available because the vehicle involved was not an "uninsured auto."[51] While the driver was uninsured, the vehicle in which the daughter was riding, was insured.[52]

Both the trial court and the court of appeals agreed with the interpretation offered by the insurer and affirmed the summary judgment in favor of the insurer.[53] The court relied upon earlier decisions where an insured sought to assert a claim for incidents involving his own vehicle and uninsured drivers.[54]

The court also rejected the suggestion that the insurer's policy violated the public policy of Indiana's Uninsured Motorist Statute.[55] However, the court observed that Indiana's legislature had not addressed the earlier court decisions on this issue.[56] Because the statute had been amended a number of times, without any provisions which disapproved the earlier court decisions, the court concluded

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47. *Smith*, 790 N.E.2d at 462; *Mroz*, 796 N.E.2d at 834.

48. 806 N.E.2d 856 (Ind. Ct. App. 2004).

49. *Id*. at 857.

50. *Id.*

51. *See id.* at 857-58. The policy noted that coverage was owed for damages that the insured is "entitled to recover from the owner or operator of an *uninsured auto*." *Id*. at 858 (emphasis added). It further defined "uninsured auto" as "a motor vehicle which has no bodily injury or property damage liability bond or insurance policy in effect at the time of the accident." *Id*. The policy further stated that an uninsured auto is not "a motor vehicle which is insured under . . . this policy." *Id.*

52. *Id*.

53. *Id.* at 861.

54. *See* Jones v. State Farm Mut. Auto. Ins. Co., 635 N.E.2d 200 (Ind. Ct. App. 1994) (insured was passenger of own vehicle that was operated by underinsured motorist); Whitledge v. Jordan, 586 N.E.2d 884 (Ind. Ct. App. 1992) (uninsured thief who was stealing a car injured the insured who was trying to prevent theft).

55. IND. CODE § 27-7-5-2 (2003).

56. *Greenfield*, 806 N.E.2d at 860.

that the legislature tacitly approved the court's earlier rulings.[57]

E. Newly Acquired Vehicle Qualified for Coverage Under Personal Auto Policy Even Though Vehicle Was Purchased for Unstarted Business

The case of *American Family Mutual Insurance Co. v. Ginther*[58] contains a number of interesting issues applicable to insurance practitioners. The insured purchased a truck which he intended to eventually use for a construction business that he had not yet started. On his way home after completing the purchase, the insured was involved in an automobile accident with other motorists who sustained personal injuries.[59] At the time of the accident, the insured possessed a personal automobile policy with American Family on his only other operable vehicle.[60]

Two days later, the insured's wife visited their insurance agency requesting insurance coverage on the new truck. The insured advised that the new truck was to be used in his commercial business that had not been started. With respect to the accident, the agent notified the insured that because the new truck was to be used for a commercial business, there was no coverage to the insured under the personal liability policy.[61]

The insured filed a declaratory judgment action against American Family, but not against the injured motorists, to determine whether the new truck satisfied the "newly acquired vehicle" portion of the policy.[62] However, after the insured's counsel withdrew, the insured and American Family executed a stipulation of dismissal, with prejudice, of the declaratory judgment action.

The injured motorists submitted claims to their uninsured motorist carrier, Safeco. Eventually, Safeco and the injured motorists settled the uninsured motorists claims. A second lawsuit was filed by the injured motorists on behalf of Safeco to recover from the insured for the amounts paid by Safeco.[63] A default judgment was obtained against the insured, and proceedings supplemental

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57. *Id*. at 861.

58. 803 N.E.2d 224 (Ind. Ct. App. 2004).

59. *Id*. at 226.

60. *Id*.

61. *Id*.

62. The policy provided that "your insured car" meant

> [a]ny additional private passenger car or utility car of which you acquire ownership during the policy period, provided:
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> (1) If it is a private passenger car, we insure all of your other private passenger cars; or
>
> (2) If it is a utility car, we insure all of your other private passenger cars and utility cars.
>
> You must tell us within 30 days of its acquisition that you want us to insure the additional car.

Id. at 232.

63. *Id.* at 228.

to collect on the judgment were pursued against American Family.[64]

American Family pursued a number of legal attacks on the action, by filing multiple dispositive motions which were denied; appellate proceedings were also pursued. First, American Family argued that the injured motorists were collaterally estopped from bringing the action because of the earlier litigation between the insured and American Family.[65] American Family suggested that the injured motorists failed to intervene in the proceedings, and were therefore bound by the outcome. However, the appellate court rejected that argument by noting that because the injured motorists were not parties to the earlier declaratory judgment action, they were not bound by the ruling.[66] The court further observed that the party bringing the declaratory judgment action must include all affected parties in order to have a binding effect.[67]

The court also affirmed the trial court's conclusion that coverage for the new truck existed under the American Family policy because it was a newly acquired vehicle. American Family argued that because the new truck was purchased for the insured to use in a commercial business, no coverage existed. The court rejected this contention as well by observing that because the business was not in operation at the time of the accident, the truck was a personal auto that satisfied the definition of a newly acquired vehicle.[68]

The final legal issue focused upon whether the injured motorists were judicially estopped from arguing that American Family owed coverage because they sought and received uninsured motorist coverage.[69] The court rejected this argument as well for a number of reasons. The most significant reason was based upon the fact that when American Family denied coverage to the insured, the injured motorists qualified to seek uninsured motorist coverage under the Safeco policy.[70]

F. An Insured's Accident with Uninsured and Underinsured Motorists Did Not Permit a Claim for the Policy Limits of Each Coverage

In *Imre v. Lake States Insurance Co.*,[71] the insured was a passenger on an all-terrain vehicle ("ATV"). As the operator of the ATV suddenly turned left, the ATV was struck by a car that was attempting to pass in a no-passing zone. As

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64. *Id*. at 229.

65. *Id.* at 230.

66. *Id*. at 230-31.

67. *Id*. The court specifically looked to Indiana Code section 34-14-1-11 which provides in pertinent part, that for declaratory judgment actions, "all persons shall be made parties who have or claim any interest that will be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." IND. CODE § 34-14-1-11 (2004).

68. *Ginther*, 803 N.E.2d at 233.

69. *Id* at 235.

70. *Id*.

71. 803 N.E.2d 1126 (Ind. Ct. App. 2004).

a result of the accident, the insured sustained serious personal injuries.[72]

The insured possessed a policy that provided uninsured and underinsured motorist coverage of $100,000.[73] The operator of the ATV was uninsured. The driver of the car possessed liability limits of $50,000, which were paid to the insured. The insured made an unusual request to its insurer contending that, because there was both an uninsured and underinsured motorist, $100,000 of policy limits applied to each claim for a total of $200,000.[74]

The insurer countered that only $100,000 of coverage was available for all claims, and that it was entitled to a setoff for the $50,000 paid by the underinsured motorist.[75] The trial court agreed, and granted summary judgment to the insurer. On appeal, the court agreed with the insurer and found that no reasonable policyholder would expect to have coverage of $200,000, instead of $100,000.[76] Furthermore, the court concluded that the insurer was entitled to a setoff for the $50,000 paid by the driver of the vehicle.[77]

G. Uninsured Motorist Coverage Under Personal Policy Was Not Available to Police Officer Injured While Riding Motorcycle

The facts and ultimate conclusion in *Jackson v. Jones*[78] provide an excellent reminder of why insureds may wish to periodically review the extent of coverages available to them. The insured was a motorcycle police officer who was involved in an accident with an uninsured motorist. The municipality that employed the police officer did not offer uninsured motorist coverage on the motorcycle involved in the accident, and the police officer sought coverage from his own personal insurance policy.[79] The personal insurer denied coverage by relying upon policy language that excluded uninsured motorist coverage for incidents involving the use of vehicles, not identified in the policy, which were available for the regular use of the insured.[80] The parties agreed that the motorcycle involved in the accident was provided for the regular use of the police

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72. *Id*. at 1128.

73. *Id*.

74. *Id*.

75. *Id.* at 1129.

76. *Id*. at 1131.

77. *Id*. Specifically, the applicable language provided that the insurer would "not make a duplicate payment under this coverage for any element of loss for which payment has been made by or on behalf of persons or organizations who may be legally responsible." *Id.*

78. 804 N.E.2d 155 (Ind. Ct. App. 2004).

79. *Id*.

80. The exact language provided:

> It is agreed that the following exclusion is added to the Exclusions under part II of your policy. *Uninsured Motorist coverage . . . does not apply to damages arising out of the* ownership, maintenance, or *use of any vehicle other than your insured car* . . . , which is *owned by or furnished or available for the regular use by you* or a family member.

Id. at 159.

officer. The police officer argued that such an exclusion violated Indiana's public policy as outlined under the Uninsured Motorist Statute.[81]

The trial court and appellate court rejected the police officer's contention. The appellate court concluded that as long as the liability coverage afforded under the policy includes the same exclusion at issue in the uninsured motorist coverage section, then public policy is not violated.[82]

As many insureds utilize vehicles supplied by their employers, they should check the available coverages under the employer's and their personal policies. As existed in this case, the police officer lacked any uninsured motorist coverage to compensate for his personal injuries when he was using an employer's motorcycle. To avoid this uninsured risk, insureds should perform a comparison of the available coverages.

H. An Uninsured Motorist Claim Is a Breach of Contract Action Where Damages Are Determined upon Tort Principles

In *Malott v. State Farm Mutual Automobile Insurance Co.*,[83] the insured and insurer disagreed on the value of the insured's uninsured motorist claim. The insurer paid the medical bills submitted by the insured, but contended that the insured was entitled to no additional compensation.[84] The case proceeded to trial where the jury was instructed that, in order to find in favor of the insured, it must conclude the insurer breached the policy and that damages were limited to the limits of coverage available under the policy.[85] The jury also was instructed on the manner of calculating the insured's damages that would be available under a tort theory. The jury concluded that the insurer was only entitled to an additional $14,000 in damages, and the insured appealed, contending that the jury was improperly instructed.[86]

On appeal, the jury's verdict was affirmed.[87] The court enunciated the manner in which a uninsured motorist claim is to be assessed by the trier of fact as follows:

> Thus, as with all [uninsured motorist] insurance recovery cases, this case was a hybrid between a contract case and a tort case. Technically, it was an action to recover for a breach of contract, but in order to do so, [the insured] was required to demonstrate [the uninsured motorist's] negligence and a causal link from the accident to her claimed damages and that those damages exceeded the amount [the insurer] had already paid. . . . In other words, in the present case the jury was required first to assess the damages [the insured] suffered in the accident in

81. IND. CODE § 27-7-5-2 (2003).

82. *Jackson*, 804 N.E.2d at 161.

83. 798 N.E.2d 924 (Ind. Ct. App. 2004).

84. *Id*. at 925.

85. *Id*. The policy limits were $100,000.

86. *Id*. at 926.

87. *Id*. at 927.

> accordance with tort law principles, and then it was required to compare this amount with the amount [the insurer] had actually paid and determine, under contract law principles, whether [the insurer] breached its contractual obligation to pay [uninsured motorist] benefits.[88]

The court also concluded that the jury was properly instructed that the damages for the breach of contact claim could not exceed the insured's policy limits.[89] Because no claim for bad faith was filed by the insured, the extent of damages available was the policy limits.[90]

I. Chiropractor Entitled to Enforce Assignment of Proceeds Against Negligent Driver's Liability Insurer

In *Midtown Chiropractic v. Illinois Farmers Insurance Co.*,[91] a decision of first impression in Indiana, the Indiana Court of Appeals recognized as valid an assignment by a patient to a chiropractor of proceeds for any recovery from negligent parties arising from an auto accident. The court also allowed the chiropractor to enforce the assignment by bringing an action directly against the negligent party's insurer.[92]

The patient was injured in an auto accident and sought chiropractic treatment.[93] In obtaining the chiropractic treatment, the patient executed an assignment of benefits or proceeds he may receive from a settlement or verdict from any responsible party for the accident. The patient and the insurer for the other party involved in the accident reached a settlement, but the settlement draft did not include the chiropractor, and the patient did not pay the chiropractor. After the patient executed a release of all claims against the other driver, the chiropractor brought a lawsuit against the driver's insurer, but not the driver, to recover for providing services rendered.[94]

The insurer initially contended that the assignment was improper as an attempt to assign the patient's personal injury claim.[95] The appellate court agreed that personal injury claims remain unassignable,[96] but the court determined that the patient's assignment was confined to proceeds and not the patient's entire cause of action.[97] The court stated that allowing a patient to assign proceeds to the chiropractor relieved the patient from having a financial burden before a settlement is reached.[98]

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88. *Id*. at 926 (internal citations omitted).
89. *Id*. at 927.
90. *Id*.
91. 812 N.E.2d 851 (Ind. Ct. App. 2004), *petition for trans. pending*.
92. *Id*. at 857.
93. *Id*. at 853.
94. *Id*.
95. *Id*.
96. *See* Allstate Ins. Co. v. Axsom, 696 N.E.2d 482 (Ind. Ct. App. 1998).
97. *Midtown Chiropractic*, 812 N.E.2d at 854.
98. *Id*. at 854-55.

The insurer also argued that even if the assignment was valid, the chiropractor could not bring an action against the other driver's insurance company to recover the amounts.[99] The appellate court concluded that if a liability insurer for a negligent driver fails to pay the chiropractor holding the assignment, the chiropractor then may bring a direct action against the insurer to enforce the assignment.[100] The court's recognition of a chiropractor's right to bring a direct action against the insurer of an alleged tortfeasor appears to be in direct conflict with law that prohibits such actions.[101] Furthermore, this case could lead plaintiffs of personal injury claims to assign their right to proceeds to any creditor, with the result that the creditor may enforce the assignment against an insurer, even if the insurer lacks any knowledge of the creditor's rights when a settlement is reached with the injured plaintiff.

II. COMMERCIAL POLICIES

A. If Policy Requires a Party to Have a Written Contract to Be an Additional Insured, Then an Oral Contract Is Insufficient

In construction projects, the allocation of risks for injuries to persons working at the site is often litigated. The decision of *Liberty Insurance Corp. v. Ferguson Steel Co.*[102] focused on efforts to include a party as an additional insured to another's policy. Pursuant to an informal, oral agreement between the subcontactor and the general contractor to perform work and to name the general contractor as an insured on the subcontractor's policy, the subcontractor started working at the construction site.[103] One of the subcontractor's employees sustained injuries from an accident and brought a lawsuit against the general contractor.[104]

Shortly after the accident, the general contractor and the subcontractor entered into a written contract which included a provision requiring the subcontractor to purchase and maintain liability insurance that included the general contractor as an additional insured. The contract also incorporated all prior negotiations between the parties.[105]

As a result of the injured employee's lawsuit, the general contractor sought insurance under the subcontractor's policy. The insurer denied coverage because the additional insured endorsement required that the named insured and the proposed additional insured must have "agreed in writing in a contract or agreement that such person or organization [will] be added as an additional

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99. *Id*. at 856.
100. *Id*. at 857.
101. *See* Winchell v. Aetna Life and Cas. Ins. Co., 394 N.E.2d 1114 (Ind. App. 1979).
102. 812 N.E.2d 228 (Ind. Ct. App. 2004).
103. *See id*. at 229-30.
104. *Id*.
105. *Id*. at 230.

insured on your policy."[106] Because there was no written contract calling for the general contractor to be included as an additional insured on the subcontractor's policy, the insurer argued that no coverage was owed.[107]

The court of appeals agreed with the insurer, and reversed the trial court's grant of summary judgment to the general contractor. The court rejected the general contractor's arguments that the endorsement did not require the written contract to exist before the work began or the accident occurred, and that the execution of the contract after the work began was a common course of dealing between the parties.[108] The court found that the insurer was only bound to insure parties based on the written contracts in existence at the time of the accident, and that because the insurer was not part of the "course of dealing" between the contractor and subcontractor, it lacked knowledge of those dealings to be bound by them.[109]

B. With Respect to a Lost Policy, the Insured Bears the Burden to Demonstrate the Coverage Available

The decision of *PSI Energy, Inc. v. Home Insurance Co.*[110] focused upon a number of issues in a complex environmental lawsuit. However, the court addressed one matter of first impression: what an insured is required to demonstrate to obtain coverage when the insurance policy cannot be located.

The insured was a utility company that operated a number of gas manufacturing facilities from the mid-1800s to 1950.[111] As a result of the manufacturing process during the utility's ownership, groundwater was contaminated from by-products resulting in a need for costly remediation. The utility sought insurance coverage for environmental claims from various insurers who provided policies to the utility during that time frame.[112] Unfortunately, neither the utility nor the insurers could locate actual or exemplar copies of certain excess policies that were in place at the time of loss to determine the scope of coverage that may be available.[113]

After a declaratory judgment action was brought to establish coverage, the

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106. *Id.* at 229. The exact language identified an insured as

> [a]ny person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability arising out of your ongoing operations performed for that insured.

Id. at 229.

107. *Id.* at 230.

108. *Id*. at 231.

109. *Id*.

110. 801 N.E.2d 705 (Ind. Ct. App.), *trans. denied*, 812 N.E.2d 85 (Ind. 2004).

111. *Id*. at 710-11.

112. *Id*. at 711.

113. *See id*.

insurers sought summary judgment by contending that the utility failed to present evidence of the coverages provided to them because the policies were unavailable.[114] The utility presented various records to show the existence of the policies, and also a report and deposition testimony of an insurance expert who attempted to establish the terms of coverage by reference to other policies. While the expert was able to offer testimony of what he believed the scope of coverage to be under the missing policies, he also admitted an inability to describe the coverages with any degree of certainty.[115]

The trial court granted summary judgment to the insurers, and determined that the evidence was insufficient for the trier of fact to determine what coverage existed.[116] The court of appeals reversed the trial court, and concluded that a question of fact existed.[117] The court found it most significant that the polices at issue were excess policies, and the terms and conditions of the excess policies were most likely the same as the primary policies, which were part of the appellate record. The court placed the burden to prove the substance of coverage on the utility company, such that the trier of fact could still determine that the utility company did not present sufficient evidence.[118]

III. HOMEOWNER'S LIABILITY POLICY

A. Coverage Under a Farmer's Liability Policy Was Not Available for Claims of Injured Farm Worker, Struck by a Truck While on the Farm

In most circumstances, a homeowner's policy will explicitly exclude liability coverage for claims arising from motor vehicle accidents. In *Westfield Cos. v. Knapp*,[119] the exclusion was addressed in the context of a farm liability policy when a farm worker was struck by a truck while employed at the farm. The liability insurer filed a declaratory judgment claiming, in part,[120] that no liability coverage was available to the farm because of application of the "motor vehicle" exclusion.[121]

The injured worker apparently conceded that he was struck by a "motor vehicle," which made the exclusion applicable, but contended that an exception

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114. *Id*.

115. *Id*. at 721.

116. *Id*. at 710.

117. *Id*. at 722.

118. *Id*. Another important holding from this decision was that a continual release of contaminants into the ground water during each policy period triggered each policy that was affected. *Id.* at 738.

119. 804 N.E.2d 1270 (Ind. Ct. App. 2004).

120. Another issue addressed was whether medical payments coverage was available to the injured worker. *Id.* at 1272.

121. *Id.* That policy provision excluded coverage for any bodily injury arising out of the "maintenance, use, operation, or 'loading or unloading' of any 'motor vehicle' . . . by any 'insured.'" *Id*. at 1274.

to the definition of "motor vehicle" applied to afford coverage.[122] Specifically, the exception applied to "mobile equipment," which included "vehicles while used on premises [the insured] own[ed] or rent[ed]."[123] Thus, the injured worker contended that because he was struck by a "vehicle" which was undefined within the policy, it satisfied the definition of "mobile equipment" and should be excepted from the policy exclusion.[124]

The trial court agreed with the injured worker and granted summary judgment finding coverage.[125] However, the court of appeals reversed the trial court, finding the evidence designated showed that the truck was a "motor vehicle."[126] The court observed that the truck was "registered, insured, designed for and licensed for use on public roads" such that it satisfied the exclusion, but not the exception.[127]

A similar question was also addressed in *Illinois Farmers Insurance Co. v. Wiegand.*[128] A young girl visiting the insured's daughter was severely injured when involved in an accident while operating the insured's ATV.[129] The injured girl filed a lawsuit against the daughter's parents alleging that they were liable for negligently entrusting the ATV to the girl.[130] The parents sought liability coverage under their homeowners policy. That insurer argued that coverage was excluded because the injuries to the girl occurred from the use and entrustment[131] of a "motor vehicle."[132] The parents argued that coverage existed because the ATV fit within an exception to the definition of "motor vehicle" as a

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122. *Id*. at 1274-75.

123. *Id*. at 1275.

124. *Id*.

125. *Id*. at 1273.

126. *Id*. at 1276.

127. *Id*.

128. 808 N.E.2d 180 (Ind. Ct. App. 2004).

129. *Id*. at 182.

130. *Id*.

131. The exclusions provided that no coverage was available when the claim

> 7. results from the ownership, maintenance, use, loading or unloading of: . . .
>
> b. **motor vehicles**.
>
> 8. results from the entrustment of . . . **motor vehicles**. . . . Entrustment means the permission you give to any **person** other than you to use any . . . motor vehicles . . . owned or controlled by you.

Id. at 183.

132. "Motor vehicle" was defined, in pertinent part, as:

> a. a motorized land vehicle, including a trailer, semi-trailer or motorized bicycle, designed for travel on public roads. . . .
>
> c. Any other motorized land vehicle designed for recreational use off public roads.
>
> None of the following is [sic] a **motor vehicle**. . . .
>
> b. A motorized land vehicle, not subject to **motor vehicle** registration, used only on an **insured location**.

Id.

nonregistered vehicle used only on the named insured's premises.[133]

The trial court granted summary judgment to the insurer in finding that the ATV was a "motor vehicle" as defined by the policy, and that it was not excepted from the definition.[134] The court denied the insurer's request for summary judgment concerning coverage for the negligent entrustment claim.[135]

On appeal, the court of appeals addressed each of the trial court's conclusions. As to the determination that the ATV was a "motor vehicle," the court observed that this question was one of first impression in Indiana.[136] Relying upon decisions from other jurisdictions that addressed this issue,[137] the court concluded that the ATV was a recreational vehicle designed for use off of public roads.[138] The court also found that the exception to the definition of "motor vehicle" did not apply, because the ATV was used at the time of the accident and on other occasions away from the "insured location."[139] As a result, the homeowner's policy did not apply.

The court also reviewed the trial court's decision that coverage was afforded for the negligent entrustment claim against the parents. The court concluded that because the girl's injuries were caused from the "immediate and efficient" use of the ATV, no coverage was afforded.[140] The court summarized its position by stating "a negligent supervision claim, like the one here, is excluded from coverage where the injury would not have resulted but for the use of the motor vehicle."[141] Because the policy at issue was a homeowner's policy, no coverage was afforded for an accident that arose solely out of the use of a motor vehicle, even for a negligent entrustment claim.

B. Accident Occurring on Public Road, Was Not Within Insured "Premises" to be Afforded Liability Coverage

In *Indiana Insurance Co. v. Dreiman,*[142] two brothers owned adjoining farms that were separated by a public road. One of the brothers had a farm liability policy for his farm, and also identified the other brother as an additional insured and his farm as a "designated premises."[143] The grandson of the named insured was operating a motor bike with a passenger for recreation. As the grandson was driving on the public road separating the properties, he was involved in an

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133. *Id*. at 182.

134. *Id*. at 183.

135. *Id.* at 184.

136. *Id*. at 187.

137. Farm Family Mut. Ins. Co. v. Whelpley, 767 N.E.2d 1101 (Mass. App. Ct. 2002); DeWitt v. Nationwide Mut. Fire Ins. Co., 672 N.E.2d 1104 (Ohio Ct. App. 1996).

138. *Wiegand*, 808 N.E.2d at 187.

139. *Id*.

140. *Id*. at 190.

141. *Id.* at 191.

142. 804 N.E.2d 815 (Ind. Ct. App. 2004).

143. *Id*. at 817.

accident that injured the passenger. The passenger brought a lawsuit against the named insureds and the grandson for negligence.[144]

The named insureds sought coverage under the liability policy. While the policy generally excluded coverage for accidents involving a "motor vehicle," it did provide coverage for injuries involving a motor vehicle if "use[d] exclusively at the 'insured location.'"[145] The named insureds contended, and the trial court agreed, that the county road was a part of the "insured location"[146] under the policy because it divided the two insured property locations and was used by the named and additional insureds for their farming operations.[147]

The court of appeals disagreed with the trial court and reversed the summary judgment order that found the existence of coverage.[148] The court focused upon the meaning of "premises."[149] The court found this term to be unambiguous and that it did not include a public roadway.[150] Even though use of the road may have been part of the farming operations, the court found that because the insureds lacked any control over the county road, the road cannot be considered part of the insured's property for coverage purposes.[151]

C. A Minor's Sexual Molestation of Another Did Present an "Occurrence" to Trigger Coverage Under a Homeowner's Policy

Indiana law has clearly established that no insurance coverage is available to an adult sexual molester.[152] In *State Farm Fire and Casualty Co. v. C.F.*,[153] the court addressed and concluded that liability insurance coverage is also unavailable when the molester is a minor.

A twelve-year-old insured molested a six-year-old victim. The insured admitted in juvenile criminal proceedings to committing the acts.[154] The victim and her parents filed a lawsuit against the perpetrator and his parents.[155] The homeowner's insurer for the parents and perpetrator provided a defense under a reservation of rights. The victim filed a declaratory judgment contending that the victim's alleged injuries did not arise from an "occurrence" as the actions were

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144. *Id*.

145. *Id*. at 818.

146. The "insured location" was defined in the policy as "(a) The farm premises (including grounds and private approaches) and 'residence premises' shown in the Declarations. . . . [and] (c) Premises used by you *in conjunction with* the [farm and residence] premises." *Id*. at 819.

147. *Id*.

148. *Id*. at 816.

149. *Id*. at 820.

150. *Id*. at 821.

151. *Id*.

152. Wiseman v. Leming, 574 N.E.2d 327 (Ind. Ct. App. 1991).

153. 812 N.E.2d 181 (Ind. Ct. App. 2004).

154. *Id*.

155. *Id*. at 183.

intentional rather than accidental.[156] The victim argued that her injuries arose from an "occurrence" because the perpetrator was not able to form the necessary intent for his actions to be considered anything other an accidental.[157] In other words, the victim argued that intent could not be inferred from the molester's admissions, because a juvenile could not form the mens rea or necessary mental element of a crime.

The appellate court concluded that no "occurrence" existed, and reversed the trial court's denial of summary judgment to the insurer.[158] The court found that a juvenile is treated differently in juvenile court proceedings, because of the juvenile's lack of maturity and unique circumstances.[159] The court rejected the argument that minors cannot form the necessary mental element of a crime by observing that, if that was true, no minor could ever commit a crime because the mental element is part of the crime.[160] Thus, the perpetrator's admissions established that his conduct was not accidental and therefore did not constitute an "occurrence," and that no liability coverage was available.[161]

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156. *Id*. "Occurrence" was defined by the policy as "**an accident, including exposure** to **conditions**, which results in: a. **bodily injury**; or b. **property damage**; during the policy period." *Id.*

157. *Id*. at 184.

158. *Id*.

159. *Id*. at 184-85.

160. *Id*. at 185.

161. *Id*.