SURVEY OF RECENT DEVELOPMENTS IN INSURANCE LAW

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During this survey period,[1] the Indiana appellate courts decided a number of cases involving insurance questions in the automobile, general liability, and homeowners areas of coverage. An issue receiving a great deal of attention was the insurer's duty of good faith ("bad faith") owed to its insured and whether that duty was breached in different circumstances. This article addresses the decisions of the past year and analyzes their effect upon the practice of insurance law.[2]

I. AUTOMOBILE CASES

A. Automobile Policy's "Collision" Coverage Does Not Include Diminished Value of Vehicle After Repair, but May Provide Coverage Under Uninsured/Underinsured Motorist Coverage

In the last survey article on insurance law,[3] two court of appeals decisions[4] addressed for the first time a question of whether a vehicle's diminished value after repairs should be covered. When an automobile has been involved in an accident, the insured and the insurer must decide whether the damaged automobile must be repaired or considered a total loss (i.e., whether the costs to repair are more than the car's fair market value). Under most standard insurance policies, the insurer agrees to pay the lesser between the amount needed to repair

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1. The survey period for this Article is approximately October 1, 2004 to October 31, 2005.

2. Other cases during the survey period that are not addressed in this Article include *Woodring v. Culbertson*, 227 F.R.D. 290 (N.D. Ind. 2005) (holding underinsured motorist carrier has right to intervene in insured's lawsuit even if it destroys diversity); *Armstrong Cleaners, Inc. v. Erie Insurance Exchange*, 364 F. Supp. 2d 797 (S.D. Ind. 2005) (involving conflict of interest between insurer and holding insured entitled insured to selection of own defense counsel); *Safety National Casualty Co. v. Cinergy Corp.*, 829 N.E.2d 986 (Ind. Ct. App.) (holding excess insurer entitled to arbitrate coverage issues), *trans. denied*, 841 N.E.2d 986 (Ind. 2005); *Woodley v. Fields*, 819 N.E.2d 123 (Ind. Ct. App.) (holding insurer did not engage in bad faith by delaying settlement until insureds submitted documentation of claim), *reh'g denied* (Ind. Ct. App. 2004), *vacated sub nom. All State Insurance Co. v. Fields*, 842 N.E.2d 804 (Ind. 2006); *Amerisure, Inc. v. Wurster Construction Co.*, 818 N.E.2d 998 (Ind. Ct. App. 2004) (involving commercial liability insurer that did not insure for repair and replacement of faulty workmanship), *clarified on reh'g*, 822 N.E.2d 1115 (Ind. Ct. Ap. 2005); *Barclay v. State Auto Insurance Cos.*, 816 N.E.2d 973 (Ind. Ct. App. 2004) (finding wife to be insured under husband's policy, despite exclusion), *trans. denied sub nom. Newton v. State Auto Insurance Cos.*, 831 N.E.2d 745 (Ind. 2005).

3. Richard K. Shoultz, *Survey of Recent Developments in Insurance Law*, 38 IND. L. REV. 1163 (2005).

4. Dunn v. Meridian Mut. Ins. Co., 810 N.E.2d 739 (Ind. Ct. App. 2004), *vacated*, 836 N.E.2d 249 (Ind. 2005); Allgood v. Meridian Sec. Ins. Co., 807 N.E.2d 131 (Ind. Ct. App.), *aff'd on reh'g*, 812 N.E.2d 1065 (Ind. Ct. App. 2004), *vacated*, 836 N.E.2d 243 (Ind. 2005).

and the automobile's fair market value.[5] If the insurer agrees to pay for the repair of the automobile, an insured often contends that the vehicle's value is diminished from its pre-accident condition. These two decisions ruled that the diminished value was a loss covered under an automobile policy.[6] During this survey period, the Indiana Supreme Court reviewed each of these decisions and found that a vehicle's diminished value was not covered under a policy's "collision" coverage, but rather was covered under a policy's uninsured/undersinsured motorist coverage.[7]

In *Allgood v. Meridian Security Insurance Co.*,[8] the insured's vehicle was damaged in an automobile accident.[9] Her insurance company paid for the costs to repair the vehicle, but did not pay for any diminished value.[10] The insured filed a class action lawsuit against her insurer contending that diminished value of the vehicle was a recoverable element of loss under the "collision"[11] coverage in the policy. Although the court of appeals concluded that diminished value was covered under the policy, the Indiana Supreme Court disagreed.[12]

The court concluded that the determination of this issue rested on an interpretation of the policy.[13] The court concluded that under the "collision" coverage within the policy, the insurer "promised to repair the vehicle or to replace it with [a vehicle] of like kind and quality."[14] The insurer did not contractually agree "to restore the value of the vehicle" to its condition before the accident.[15] In arriving at such a conclusion, the court defined the insurer's agreement to "repair" to simply "restore [the vehicle] to its former condition, not necessarily to its former value."[16] Thus, the insurer was not obligated to pay under the "collision" coverage for diminished value of a repaired vehicle.

The same day it issued the *Allgood* decision, the Indiana Supreme Court

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5. An example of the policy language includes: "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 property of like kind and quality." *Allgood*, 807 N.E.2d at 132.

6. *Dunn*, 810 N.E.2d at 741; *Allgood*, 807 N.E.2d at 136.

7. Dunn v. Meridian Mut. Ins. Co., 836 N.E.2d 249 (Ind. 2005); Allgood v. Meridian Sec. Ins. Co., 836 N.E.2d 243 (Ind. 2005).

8. *Allgood*, 836 N.E.2d 243.

9. *Id*. at 245.

10. *Id*.

11. The specific policy language stated that the insurer would "pay for direct and accidental loss to 'your covered auto' or any 'non-owned auto,' including their equipment, minus any applicable deductible shown in the Declarations." *Id*. at 246. The insured argued that "direct and accidental loss" included diminished value of the vehicle. *Id*.

12. *Id*. at 247.

13. *Id.* at 246.

14. *Id*. at 247.

15. *Id*.

16. *Id*.

decided *Dunn v. Meridian Mutual Insurance Co.*[17] In a similar fact scenario, the court concluded that the diminished value of a vehicle was covered under uninsured/underinsured motorist coverage of an insurance policy.[18] After an auto accident with an uninsured motorist, the insured's vehicle was repaired.[19] The insured sought coverage under the uninsured motorist coverage under the policy, whereas the insurer paid for the repairs under the "collision" coverage.[20]

The Indiana Court of Appeals had concluded that the insured was entitled to the diminished value of the vehicle because the insurer's promise to "repair and replace the [vehicle]" included any diminished value of the vehicle.[21] However, the Indiana Supreme Court had rejected that conclusion when it reviewed the lower court decision in *Allgood*.[22]

In *Dunn*, the insured argued that his claim was compensable under the uninsured motorist protection rather than the "collision" coverage, which was the policy language reviewed by the supreme court in *Allgood*.[23] According to the insured, the uninsured motorist coverage lacked the limiting language which led the court to construe the policy as it did in *Allgood*.[24] Under the uninsured motorist coverage, the insurer promised to pay the insured all amounts for which the uninsured motorist may be liable to the insured.[25]

Although the court stated that it was not proper for the parties to suggest that one form of coverage applied instead of another, the court agreed with the insured.[26] The court observed that an insurer is responsible to its insured for all damages that the insured is legally entitled to recover from the uninsured motorist.[27] Under Indiana law, a tortfeasor is responsible for diminished value of a vehicle.[28] Consequently, an insurer is responsible for diminished value to an insured's vehicle that is damaged by the actions of an uninsured motorist.[29]

The distinction between the *Allgood* and *Dunn* cases focuses upon an interpretation of the policy language. In each case, the supreme court analyzed the policy language under the respective coverage at issue to see if diminished

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17. 836 N.E.2d 249 (Ind. 2005). Although the court noted that this case was decided under Tennessee law, the court observed that Tennessee law and Indiana law appeared the same. *Id.* at 252, 254.

18. *Id.* at 250.

19. *Id.* at 250-51.

20. *See id*. at 251-52.

21. *Id*. at 253.

22. *Id.*; Allgood v. Meridian Sec. Ins. Co., 836 N.E.2d 243, 247 (Ind. 2005).

23. *Dunn*, 836 N.E.2d at 252.

24. Specifically, the "Limit of Liability" language that restricts an insurer's obligation to the lesser of the costs of repair of the vehicle or actual cash value was not present in the uninsured motorist coverage. *Id*. at 253.

25. *Id*.

26. *Id.* at 253-54.

27. *Id*. at 254.

28. *Id.* at 253 (citing Wiese-GMC, Inc. v. Wells, 626 N.E.2d 595, 598 (Ind. Ct. App. 1993)).

29. *Id.* at 253-54.

value was recoverable. Insurance companies will most likely add an exclusion to the policy to eliminate this added damage element or raise rates to reflect the increased risk.

B. An Auto Insurer Was Not Collaterally Estopped to Argue Lack of Coverage for Permissive Use in Accident by Vehicle Operator

The case of *Kelly v. Hamilton*[30] presented a very common factual situation when rented vehicles are involved in accidents. While an insured's vehicle was taken to a shop for service, the insured rented another vehicle for temporary use.[31] The rental agreement between the insured and the rental agency contained a provision which expressly prohibited the rental vehicle's operation by anyone under twenty-one years of age. The insured allowed a nineteen-year-old friend to drive the car who was then involved in an accident resulting in personal injuries to another motorist.[32]

The injured motorist filed a lawsuit against the driver.[33] The injured motorist's attorney notified the vehicle's insurer of the lawsuit against the driver. However, the insurer denied owing coverage, including a duty to defend the driver, by contending that its policy only covered "non-owned" vehicles, such as the rental car, if "used by [the insured] or a resident relative with the owner's permission."[34] Because the rental agency, as owner of the rental vehicle prohibited drivers under twenty-one years old, the insurer contended that the nineteen-year-old driver lacked permission to drive the rented vehicle.[35]

Based upon the stipulation, the injured motorist received a judgment against the driver.[36] In proceedings supplemental, the injured motorist sought to acquire the insurance proceeds under the vehicle's liability policy and added the insurer as a garnishee-defendant.[37] When the insurer appeared and raised the defense that no coverage was available under its policy with the insured, the injured motorist argued that the insurer was collaterally estopped from raising the coverage defense because it had not appeared to defend its insured in the underlying action.[38]

The appellate court concluded that the insurer was not estopped from asserting the lack of permissive use defense.[39] The court observed that when a liability insurer is faced with a lawsuit against its insured and has a question on whether coverage exists for the lawsuit, the insurer may proceed as follows:

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30. 816 N.E.2d 1188 (Ind. Ct. App. 2004).
31. *Id*. at 1189.
32. *Id*. at 1190.
33. *Id*.
34. *Id.* at 1194.
35. *Id*. at 1190.
36. *Id*.
37. *Id.*
38. *Id.* at 1191.
39. *Id*.

> An insurer may avoid the effects of collateral estoppel by: (1) defending the insured under a reservation of rights in the underlying tort action, or (2) filing a declaratory judgment action for a judicial determination of its obligations under the policy. Either of these actions will preserve an insurer's right to later challenge a determination made in the prior action.
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> An insurer may also elect not to defend an insured party in a lawsuit if, after investigation of the complaint, the insurer concludes that the claim is "patently outside the risks covered by the policy." Such a course is taken at the insurer's peril because the insurer will be "bound *at least* to the matters *necessarily determined* in the lawsuit."[40]

In *Kelly*, the issue of the driver's permissive use was not necessarily decided in the tort lawsuit where judgment was entered against the driver.[41] Consequently, the insurer was free to raise the lack of permission as a coverage defense.[42]

As to the permissive use issue, the court concluded that the insurer was correct that no coverage was owed to the driver.[43] The rental agency, as owner of the vehicle, expressly prohibited anyone under twenty-one years of age to drive.[44] The insured's granting of permission to the nineteen-year-old driver was outside the scope of permission that he possessed under the rental agreement.[45] Consequently, the insurer did not owe liability coverage to the driver.[46]

C. A Plaintiff's Claim for Emotional Distress Damages Arising from Injury to Spouse Is Subject to "Per Person" Limit of Liability Coverage

In *Allstate Insurance Co. v. Tozer*,[47] the insured was driving a car with a friend and two of the friend's siblings.[48] After the driver lost control of the car, it struck a telephone pole, killing the friend and causing the siblings minor personal injuries.[49] The estate of the friend settled a liability claim against the

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40. *Id*. (quoting State Farm Fire & Cas. Co. v. T.B. *ex rel.* Bruce, 762 N.E.2d 1227, 1230-31 (Ind. 2002)). An excellent case describing the peril risked by the insured is *Liberty Mutual Insurance Co. v. Metzler*, 586 N.E.2d 897 (Ind. Ct. App. 1992) (finding that the insurer was collaterally estopped to argue intentional conduct of insured who drove truck into restaurant when insurer refused to defend under reservation of rights or file declaratory judgment, and default judgment based on negligence was entered against insured).

41. *Kelly*, 816 N.E.2d at 1191.

42. *Id.*

43. *Id*. at 1197.

44. *Id*. at 1195.

45. *Id*. at 1197.

46. *Id.*

47. 392 F.3d 950 (7th Cir. 2004).

48. *Id*. at 951.

49. *Id*.

driver which included payment by the insured's underlying carrier of $100,000 which was the limits of coverage available for injury to a single person.[50] The underlying policy provided coverage of $100,000 for claims by "each person" and $300,000 for all claims arising from "each accident."[51]

The siblings filed a separate lawsuit against the insured seeking damages for emotional distress after observing the death of their brother.[52] The lawsuit did not seek to recover damages for the minor physical injuries of the siblings.[53] The insurer supplied counsel to defend the insured in the siblings' lawsuit and filed a separate declaratory judgment lawsuit contending that it had exhausted the extent of its coverage exposure by paying the "each person" limits of coverage.[54] The insurer argued that the siblings' emotional distress claims were subject to the "each person" limit of coverage that was exhausted by payment of the estate's claim, and that no further coverage was owed.[55]

The district court rejected the insurer's argument and found that because the emotional distress claims satisfied the definition of bodily injury claims,[56] the siblings' claims were subject to separate limits for "each person."[57] On appeal, the Seventh Circuit reversed.[58]

The Seventh Circuit concluded that the siblings' emotional distress claims were subject to the "each person" limit which was paid to satisfy the claim of the brother's estate.[59] The court observed that the siblings' emotional distress claims were alleged to have arisen "as a result of" the death of the brother, not because of their own personal injuries.[60] The policy language explicitly stated that "each person" limits included "all damages sustained by anyone else as a result of" bodily injury to one person.[61]

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50. The total settlement was for $1.1 million. One hundred thousand dollars came from the "each person" limits of the underlying policy; the remaining $1 million came from an umbrella policy. *Id*.

51. *Id*.

52. *Id*.

53. *Id*.

54. *Id.* at 952.

55. *Id*.

56. The policy stated:

> The limits shown on the Policy Declarations are the maximum we will pay for any single accident involving an insured auto. *The limit stated for each person for bodily injury is our total limit of liability for all damages because of bodily injury sustained by one person, including all damages sustained by anyone else as a result of that bodily injury.* Subject to the limit for each person, the limit stated for each accident is our total limit of liability for all damages for bodily injury.

Id. at 953 (emphasis added).

57. *Id*. at 952.

58. *Id*. at 956.

59. *Id*. at 953.

60. *Id*.

61. *Id*.

This decision appears consistent with earlier Indiana appellate decisions which concluded that a consortium claim by a spouse for injuries sustained by the other spouse, are subject to the "per person" limits of a liability policy.[62] The policy language appeared to clearly address this situation, and the Seventh Circuit applied that language as written.

D. Under a Conditional Sales Contract, Court Concludes that Buyer Is Owner for Purposes of Insurance Coverage Despite Remaining Conditions to the Sale

The facts in *Great West Casualty Co. v. National Casualty Co.*[63] depict a common occurrence following the sale of a vehicle. A seller of a semi-tractor entered into a conditional sales contract with the buyer that included a number of favorable terms for the seller.[64] Before the contract was completed, the buyer's driver was involved in an accident that produced personal injuries to another motorist while hauling a load not owned by the seller.[65] A dispute arose between the seller's and buyer's insurance companies as to which of their policies was primary to address the injured motorist's claim arising from the accident.[66]

The seller's insurer filed a declaratory judgment action contending that the buyer was the "owner" of the semi-tractor such that the buyer's insurance was primarily responsible to address the claims arising from the accident.[67] The buyer's insurer argued that the seller remained the "owner" and that the driver was considered a "permissive user" of the semi-tractor to be entitled to coverage under the seller's policy.[68]

In resolving this question, the Seventh Circuit relied upon an Indiana statute[69] that vested ownership of a vehicle purchased under a conditional sales agreement to the buyer.[70] The court rejected attempts by the buyer to suggest that the court

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62. *Id.* at 955; *see, e.g.*, Medley v. Frey, 660 N.E.2d 1079, 1080-81 (Ind. Ct. App. 1996); *cf.* Armstrong v. Federated Mut. Ins. Co., 785 N.E.2d 284 (Ind. Ct. App. 2003) (finding that loss of love and companionship of child killed in accident was not a separate "bodily injury" under the policy when neither parent suffered a physical impact in the accident).

63. 385 F.3d 1094 (7th Cir. 2004).

64. For instance, the buyer agreed to permit the seller to determine which of the buyer's drivers could operate the semi-tractor until completion of the sales contract. *Id.* at 1095.

65. *Id.*

66. *Id*.

67. *Id*.

68. *Id*. at 1095-96.

69. IND. CODE § 9-13-2-121 (2005) provides:

> If a motor vehicle is the subject of an agreement for the conditional sale or lease . . . with the right of purchase upon the performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee or lessee . . . the conditional vendee or lessee . . . is considered to be the owner.

70. *Id*. at 1096.

must look at the degree of control maintained by the seller to suggest that the seller was the owner of the semi-tractor.[71]

The Seventh Circuit's conclusion created a rare "bright-line" test for ownership and provides excellent guidance to buyers and sellers. Even though terms of the conditional sales agreement placed some degree of control with the seller, for the purpose of assessing the risk for insurance, the buyer was considered the owner.

E. Motor Carrier Policy Endorsement Provides Liability Coverage to Trucker Involved in Accident Despite Other Policy Limitations

A semi-tractor involved in a motor vehicle accident will usually involve tragic consequences. Thus, the federal government requires that semi-tractor operators and owners engaged in interstate commerce provide protection to the public by insuring that the operator has the financial responsibility to protect the public for damages caused by the operator's negligence.[72] Thus, operators are required to have an MCS-90 insurance endorsement in their liability policies to provide the necessary protections to the public.[73] This endorsement provides that the insurer will pay, within the limits of coverage, for losses sustained by the public, and that "[N]o condition . . . in the policy . . . shall relieve the [insurer] from liability or from the payment of any final judgment, within the limits of liability . . . , irrespective of financial condition, insolvency or bankruptcy of the insured."[74]

In *Carolina Casualty Insurance Co. v. E.C. Trucking*,[75] a truck operator was involved in an accident that resulted in the death of another driver. The truck driver was operating a truck that was owned by one company, but leased to another.[76] The lessor of the truck also had an operating agreement with the owner company to allow the truck to be driven under the lessor company's Interstate Common Carrier ("ICC") authority.[77] The lessor did not have its own ICC authority. The decedent's widow brought a wrongful death suit against the driver and the various entities that either owned or leased the tractor.[78]

An insurer for one of the companies who had an operating agreement with the lessor, intervened in the lawsuit to contend that its insurance coverage was

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71. *Id.* at 1097-98.

72. Travelers Ins. Co. v. Transport Ins. Co., 787 F.2d 1133, 1140 (7th Cir. 1986) ("The purpose of the [Interstate Common Carrier ("ICC")] regulations is to ensure that an ICC carrier has independent financial responsibility to pay for losses sustained by the general public arising out of its trucking operations.").

73. *See* 49 C.F.R. §§ 387.7(a), 387.9, 387.15 (2005).

74. Carolina Cas. Ins. Co. v. E.C. Trucking, 396 F.3d 837, 841 (7th Cir. 2005).

75. *Id.* at 837.

76. *Id*. at 840.

77. *Id*.

78. *Id*.

inapplicable.[79] However, both the district court and Seventh Circuit concluded that the MCS-90 endorsement, contained in the insurer's policy, voided any restrictions on coverage that may exist within the policy.[80] Because the broad intent of the MCS-90 endorsement was to compensate the public, it superseded any limitation on coverage contained in the policy.[81]

This case is helpful in analyzing the interaction between the broad intent behind the MCS-90 endorsement and limitations in the insurance policy that afford coverage to trucking companies. If a policy contains that endorsement, it appears that its coverage defenses are not applicable, at least to the detriment of the public.

F. In Uninsured Motorist Coverage Case, Absent Claim of Bad Faith, Insured Cannot Recover More Than Policy Limits

In *Allstate Insurance Co. v. Hennings*,[82] a school teacher was involved in an automobile accident with an uninsured motorist and sustained personal injury. The teacher filed a lawsuit and obtained a default judgment against the uninsured motorist.[83] The teacher then amended her complaint to add her uninsured motorist insurer, Allstate, as a defendant.[84]

Allstate defended against the complaint challenging both the liability of the uninsured motorist and the damages of the teacher.[85] At trial, the uninsured motorist was found fully responsible, and the teacher was awarded $115,000 in damages against Allstate, even though her uninsured motorist limits were $100,000.[86] Allstate filed a motion to correct error seeking, in part, that the trial court reduce the verdict to its policy limits of $100,000. The trial court denied Allstate's motion, and an appeal ensued.[87]

The Indiana Court of Appeals reversed the trial court, and determined that the verdict should have been reduced to the policy limits.[88] While the court criticized Allstate's behavior in handling the teacher's claim, it determined that the insurer's behavior did not equate with bad faith.[89] The court also observed that the teacher did not present a claim for bad faith against the insurer.[90] The court held that because the claim was solely for uninsured motorist coverage the

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79. *Id*. The actual coverage issue was not specifically identified within the court's opinion.
80. *Id*. at 840-41.
81. *Id*. at 841.
82. 827 N.E.2d 1244 (Ind. Ct. App. 2005).
83. *Id*. at 1247.
84. *Id*.
85. *Id*.
86. *Id.* at 1249.
87. *Id*.
88. *Id*. at 1250.
89. *Id*. at 1251.
90. *Id*.

policy limits of the coverage prevented an award beyond the policy limits.[91] Therefore, the trial court abused its discretion when it allowed the jury verdict in excess of the policy limits to stand.[92]

G. Worker's Compensation Insurer Was Not Entitled to Lien on Employee's Recovery of Uninsured Motorist Benefits from Employee's Personal Policy

In *Pinkerton's Inc. v. Ferguson*,[93] an employee in the scope of her employment sustained serious personal injuries from an accident with an uninsured motorist.[94] As a result of the accident, the employee received more than $300,000 in workers' compensation benefits from her employer.[95] When the employee settled for the full limits of $50,000 in uninsured motorist coverage from a personal insurance policy issued to her husband, the employer asserted a lien on the settlement because of the workers' compensation payments.[96] The employee filed a declaratory judgment action contending that the employer was not entitled to a lien against the settlement pursuant to the uninsured motorist coverage.[97]

In addressing this question, the court focused upon an Indiana statute that allowed an employer or workers' compensation insurer to assert a lien against proceeds the employee may receive due to liability of "some other person."[98] Relying upon the decision of *Ansert Mechanical Contractors, Inc. v. Ansert*,[99] the employer argued that the statute gave it a lien on the employee's uninsured motorist proceeds.[100]

However, the appellate court distinguished *Pinkerton's* from *Ansert* by noting that the uninsured motorist coverage was not paid for by the employer.[101] Because the uninsured motorist proceeds at issue were not purchased by the employer,[102] the employer was not entitled to a lien.[103] To allow the employer to obtain a lien on the proceeds would thwart the public policy of workers' compensation, which shifts the risk of employee injury to the employer, and

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91. *Id.*; *see also* Allstate Ins. Co. v. Hammond, 759 N.E.2d 1162, 1167 (Ind. Ct. App. 2001).

92. *Hennings*, 827 N.E.2d at 1250-51. The court also abused its discretion in failing to instruct the jury that it could only award a verdict up to the limits of the policy. *Id.* at 1252.

93. 824 N.E.2d 789 (Ind. Ct. App.), *reh'g denied*, *trans. denied*, 841 N.E.2d 185 (Ind. 2005).

94. *Id*. at 790.

95. *Id*.

96. *Id*. at 790-91.

97. *Id*. at 791.

98. *See id.*; *see also* IND. CODE § 22-3-2-13 (2005).

99. 690 N.E.2d 305 (Ind. Ct. App. 1997).

100. *Pinkerton*, 824 N.E.2d at 792.

101. *See id.*

102. Pinkerton's attempted to challenge the employee's ownership of the policy because it was issued to her husband, but because Pinkerton's had not responded to the employee's ownership arguments in post-trail briefing, the issue was waived on appeal. *See id*. at 793 n.2.

103. *Id*. at 793.

would instead shift that risk back to the employee who paid for the uninsured motorist coverage.[104]

II. COMMERCIAL CASES

A. Good Faith Dispute on Coverage Issue Does Not Automatically Prevent Claim for Bad Faith Against Insurer

The decision of *Monroe Guaranty Insurance Co. v. Magwerks Corp.*[105] presented an interesting analysis of the standards to support a claim for bad faith[106] against an insurer who questions the existence of a covered claim. The insured sustained a loss to its building when sections of its roof fell to the floor following a period of heavy rain and snow.[107] The insured submitted a claim to its insurer, who conducted an investigation.[108] During the course of the investigation, the insurer's adjusters made references that the roof damage was from a "collapse" of the roof.[109] However, despite the fact that a building's "collapse" was covered,[110] the insurer denied the claim by raising various exclusions.[111]

The insured filed a lawsuit against the insurer for breach of contract and bad faith.[112] Both the insured and insurer filed summary judgment motions as to whether the loss resulted from a collapse.[113] The insured argued that the modern view of "collapse" involved a change in the structural integrity, and that coverage existed.[114] The insurer argued the "traditional view" of "collapse," required that the building be "reduced to flattened form or rubble."[115] Indiana had no decisions adopting either viewpoint.[116]

The trial court granted the insured's motion for summary judgment, determining that coverage existed for the loss, and the case proceeded to trial on the amount of damages and whether the insurer engaged in bad faith.[117] The jury

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104. *Id*. at 792-93.

105. 829 N.E.2d 968 (Ind. 2005).

106. It also called a breach of the duty of good faith.

107. *Monroe Guar. Ins.*, 829 N.E.2d at 971.

108. *Id*.

109. *Id.* Specifically, one of the adjusters issued a report describing the loss as "[r]oof damage and collapsed interior ceiling panels." *Id.*

110. The policy provided that the insurer would "pay for loss or damage caused by or resulting from risks or direct physical loss *involving collapse of a building or any part of a building* caused only by one or more of the following: . . . Weight of rain that collects on a roof." *Id.*

111. *See id.*

112. *Id*.

113. *Id*.

114. *See id*. at 972-73 & n.2.

115. *Id*. at 972 & n.1.

116. *See id*.

117. *Id*. at 971.

awarded the insured over $1 million in compensatory damages under the policy and $4 million in punitive damages for breach of the insurer's duty of good faith to the insured.[118]

The Indiana Court of Appeals reversed the verdict, concluding that the modern definition of "collapse" applied to the case, but that there was a genuine issue of material fact as to whether collapse occurred.[119] The Indiana Supreme Court affirmed the appellate court's adoption of the modern definition of "collapse" as a "substantial impairment of the structural integrity" of a building.[120] The supreme court summarily affirmed the court of appeals's reversal of the trial court's grant of summary judgment of the insured.[121]

Despite finding that summary judgment was not warranted on the issue of collapse, the supreme court affirmed the jury's finding that the insurer breached its duty of good faith.[122] The supreme court reaffirmed that a good faith dispute by an insurer of a question of coverage will not support a claim of bad faith.[123] Thus, if the sole dispute between the parties was whether coverage existed because of the definition of collapse, then the insured could not recover on a bad faith claim.[124] However, the court observed that the insured's contention that the insurer engaged in bad faith was not based on the insurer's position on coverage, but was based upon the manner in which the insurer handled the claim.[125] The supreme court noted that evidence existed to support the insured's claim that the insurer knew a collapse existed, but "manufactured" an excuse to avoid paying the claim.[126] Thus, despite the fact that a good faith dispute existed as to coverage, the jury's finding of bad faith was supported by other evidence of the manner in which the insurer handled the claim.[127]

B. When Insured Failed to Give Timely Notice of Lawsuit, Insurer Was Not Responsible for Defense Costs Incurred by Insured Before Date of Notice

The case of *Liberty Mutual Insurance Co. v. OSI Industries, Inc.*[128] involved a complex set of facts, but contains good analysis by the appellate court, reiterating a few basic principles of insurance law. The insured developed an oven used in the fast food industry.[129] Another company claimed that the oven utilized its trade secret for a component that was stolen by a former employee

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118. *Id*.
119. *Id.* at 972.
120. *See id.* at 973.
121. *Id.* at 975.
122. *Id*. at 977.
123. *Id.* at 975 (citing Freidline v. Shelby Ins. Co., 774 N.E.2d 37, 40 (Ind. 2002)).
124. *Id*.
125. *Id*.
126. *Id*. at 976-77.
127. *See id.* at 977.
128. 831 N.E.2d 192 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 190 (Ind. 2005).
129. *Id*. at 196.

subsequently hired by the insured.[130] As a result, the company brought a lawsuit against the insured alleging a number of legal theories.[131]

The insured requested that its insurer provide a defense for the lawsuit, and filed a declaratory judgment action when the insurer denied the request.[132] The insurer subsequently denied coverage.[133] On cross motions, the trial court granted summary judgment for the insured's claim for coverage under the policy, and also determined that the insurer was responsible for a portion of the insured's defense costs.[134] The insurer appealed, in part, on grounds that the trial court held the insurer responsible for defense costs incurred before notice of the suit was given to the insurer.[135]

On appeal, the court reversed the trial court's award to the insured of defense costs incurred before notice was given to the insurer.[136] Because the policy required notice of suit "as soon as practicable" and the insured did not provide notice until at least fourteen months after the suit was commenced, the insurer argued that any costs incurred before such notice were outside the policy's coverage.[137] The appellate court rejected the insured's argument that the insurer was collaterally estopped from asserting its defenses because of its wrongful coverage denial.[138] Instead, in addressing the notice issue, the court reiterated a two part test: (1) whether notice was provided within a reasonable time; and (2) whether the insurer sustained prejudice from the late notice.[139] If the notice was unreasonably delayed then prejudice is presumed, and it must be rebutted by the insured.[140] The insurer can also present evidence of actual prejudice.[141]

The appellate court determined that the insured failed to rebut the presumption of prejudice.[142] The court found that the insurer was prejudiced because it "(1) was denied the opportunity to offer settlement or guide the course of the litigation; (2) was not given the opportunity to select [defense counsel];

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130. *Id*.

131. *See id.* The counts included "I) Illinois Consumer Fraud and Deceptive Business Practices Act . . . ; II) Illinois Trade Secret Act . . . ; III) Unfair Competition; IV) Breach of Confidence; V) Interference with Contractual Relations; VI) Breach of Fiduciary Duty; VII) Breach of Contract; and VIII) Conspiracy." *Id*.

132. *Id*. at 196-97. A second insurance company was involved in earlier stages of litigation but was dismissed on all claims and not a party to the appeal. *Id.* at 197 n.5.

133. *Id.* at 197.

134. *Id.*

135. *See id*. at 197, 199.

136. *Id*. at 204.

137. *Id.* at 200-01.

138. *Id*. at 201-02.

139. *Id.* at 202 (citing Milwaukee Guardian Ins., Inc. v. Reichart, 479 N.E.2d 1340 (Ind. Ct. App. 1985)).

140. *Id*.

141. *Id*. at 203.

142. *Id.* at 203-04.

and (3) was unable to negotiate the amount of attorney's fees."[143] Consequently, the insurer was not responsible for defense costs incurred by the insured before receiving notice of the lawsuit.[144]

The court also rejected the trial court's creation of an exception to the "American Rule" on the recovery of attorney fees in an insurance coverage lawsuit.[145] The trial court awarded the insured its attorney fees plus interest in pursuing the declaratory judgment.[146] The appellate court observed that the Indiana Supreme Court had adopted the American Rule, and it stated that it was bound to follow precedent.[147] Thus, an insured cannot recover its attorney fees in a declaratory judgment action involving a resolution on the issue of insurance coverage.

C. Claim for Breach of Duty of Good Faith Does Not Fit Within Language of Arbitration Clause

In *Hemocleanse, Inc. v. Philadelphia Indemnity Insurance Co.*,[148] the court affirmed the trail court's grant of a motion to compel arbitration of a breach of contract claim against the insurer and also affirmed the trail court's denial of the insurer's motion to compel arbitration of a claim for breach of the duty of good faith.[149] The insured contended that the insurer breached the insurance policy in failing to reimburse the insured for certain defense costs and committed bad faith by its refusal.[150] The insurer argued that both claims were subject to arbitration under the policy.[151]

The policy contained a provision that stated "[a]ny coverage dispute which cannot be resolved through negotiations between any insured and the insurer shall be submitted to binding arbitration."[152] The appellate court found that the parties were involved in a "coverage dispute" regarding the costs of the defense and that under the plain language of the policy such dispute was to be arbitrated.[153]

However, the most interesting aspect of this case focused on the insurer's request that the claim for breach of duty of good faith (the bad faith claim) must also be submitted to arbitration. The insurer argued that the facts of the bad faith

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143. *Id*. at 204.

144. *Id*.

145. The American Rule provides that a party's attorney fees cannot be recovered as damages in a lawsuit unless a statute, contract, or stipulation permits their recovery. *Id*. at 205; *see also* Kikkert v. Krumm, 474 N.E.2d 503, 504-05 (Ind. 1985).

146. *Liberty Mutual*, 831 N.E.2d at 205.

147. *Id*.

148. 831 N.E.2d 259 (Ind. Ct. App. 2005), *reh'g denied* (Ind. Ct. App. 2006).

149. *Id.* at 260-61.

150. *Id*. at 261.

151. *Id*.

152. *Id*.

153. *Id*. at 262-63.

claim and the coverage claim were so intertwined that they must be decided together.[154] The appellate court rejected the insurer's argument and concluded that, although the bad faith claim "requir[ed] that a 'coverage dispute' under the Policy be resolved," the bad faith claim was not itself a "coverage dispute" requiring arbitration under the policy.[155]

III. HOMEOWNERS CASES

A. Visiting Grandchild Was Not a "Resident Relative" of Insured to Apply Exclusion Under Homeowners Policy

The decision in *Illinois Farmers Mutual Insurance Co. v. Imel*[156] presented an interesting application of an insurance policy exclusion for claims involving injuries to relatives. The named insured grandparents had an agreement with the mother of their grandchild, that the grandchild would visit their farm two times per month.[157] On one visit, the grandchild was injured when a cow unexpectedly trampled him.[158]

The grandparents were insured under a homeowners liability policy that contained the following exclusion: "Coverage L does not apply to: a. bodily injury to you, and if residents of your household, your relatives and persons in your care or in the care of your resident relatives."[159]

The insurer contended that no liability coverage was available to the grandparents for the bodily injury claim of the grandchild because the grandchild was in the care of the grandparents.[160] The insurer argued that the construction of the exclusion did not require the grandchild to be a "resident" under all of the scenarios, but only that the grandchild be in the care and custody of an insured.[161]

The appellate court rejected the insurer's interpretation.[162] The court found that the absence of a comma in the policy exclusion demonstrated that the grandchild needed to be a resident of the grandparents' home in order for the exclusionary effect to take place.[163]

The court then examined whether the grandchild had dual residency with his mother and the grandparents such that coverage was excluded.[164] Although the court acknowledged that insureds could have dual residency in some insurance

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154. *Id*. at 264.
155. *Id*. at 264-65.
156. 817 N.E.2d 299 (Ind. Ct. App. 2004).
157. *Id*. at 300.
158. *Id*.
159. *Id*. at 301 (internal quotation marks omitted).
160. *Id*.
161. *Id*.
162. *Id*. at 303-04.
163. *Id*.
164. *Id*. at 304.

disputes,[165] the evidence demonstrated that the grandchild was not a resident of the grandparents' home.[166]

This case demonstrates how important punctuation of a policy provision can be when the policy is interpreted. Here, the absence of one comma, resulted in two equally plausible constructions of an insurance policy.[167]

B. In Dispute with Agent, Insured's Cause of Action Accrued When Insurer Allegedly Breached Policy

In *Strauser v. Westfield Insurance Co.*,[168] a motorist sustained personal injuries after colliding with an insured's escaped horses that had wandered into the roadway. The motorist brought a lawsuit against the insured seeking insurance coverage from the insured's homeowners insurance carrier.[169] Initially, the insurer supplied counsel to defend the insured under a reservation of rights while it continued to investigate whether coverage existed for the lawsuit. The insurer ultimately concluded that no coverage existed, denied the claim, and withdrew the defense counsel.[170]

The motorist's lawsuit against the insured continued, and three years later the insured's attorney executed an agreement assigning the insured's rights to pursue a cause of action against his insurance agent for failing to acquire appropriate insurance coverage to the motorist.[171] Five years later, a monetary judgment was entered in favor of the motorist and against the insured.[172] A year and a half later, the motorist, as assignee of the insured, sued the agent for breach of contract and negligence in failing to secure proper insurance coverage.[173]

The insurance agent filed a motion for summary judgment and contended that the motorist's claim was barred by the applicable two-year tort statute of limitations for injury to property.[174] The motorist countered that the appropriate statute of limitations was a ten-year limitation for actions based on a written contract.[175] The court granted the agent's summary judgment motion.[176]

On appeal, the court concluded that more than ten years had passed since the

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165. *Id.* at 305; *see* Jones v. W. Reserve Group, 699 N.E.2d 711, 716 (Ind. Ct. App. 1998) (holding that whether a child was considered a resident of a household for purposes of uninsured motorist coverage was a question of fact for factfinder).

166. *See Imel*, 817 N.E.2d at 305. The court considered the age of the child, where the child attended school, and even whether the child brought toys to his grandparents' home. *Id.*

167. *See id.* at 303-04.

168. 827 N.E.2d 1181 (Ind. Ct. App. 2005).

169. *Id*. at 1182.

170. *Id*.

171. *Id*.

172. *Id*.

173. *Id*. at 1182-83.

174. *Id*. at 1183-84; *see* IND. CODE § 34-11-2-4 (2005).

175. *Strauser*, 827 N.E.2d at 1183-84; *see* IND. CODE § 34-11-2-11.

176. *Strauser*, 827 N.E.2d at 1183.

cause of action accrued, so the motorist's claim was barred by either the two- or the ten-year statute.[177] The court observed that Indiana applies the "discovery rule" to determine when a cause of action accrues, such that the statute "begins to run when a party knows, or in the exercise of ordinary diligence could discover, that the contract has been breached or that an injury had been sustained as a result of the tortious act of another."[178] In *Strauser*, the action against the agent accrued when the insurer denied the claim.[179] Because the lawsuit was not filed until after ten years from the coverage denial, the case was time-barred under either statute.[180]

The court also observed that it is the nature of the lawsuit that determines the applicable limitation period rather than the manner in which a plaintiff labels the complaint.[181] Although the court did not clarify whether the action against the agent was for breach of contract or negligence, the court referred to an earlier case to suggest that such an action is probably a negligence claim, rather breach of contract.[182]

IV. STATUTORY CHANGES

During the survey period, one significant statute was enacted that relieves insurance companies from the requirement that they must offer uninsured and underinsured motorist coverages within commercial automobile policies.[183] Formerly, whenever an insurer issued an auto liability policy, it also had to offer uninsured and underinsured motorist coverages to the insured and obtain a written waiver of those coverages to avoid those coverages from being included as a matter of law.[184] With this new statute, the insurer does not need to offer this coverage or obtain the rejection by the insured of a commercial vehicle.[185]

Practitioners may want to inform their clients who operate commercial vehicles of this change. Many employees assume that because they operate a company vehicle, that there will be uninsured and underinsured motorist coverages available. With this statute, most employers who have commercial fleets will probably not carry the coverages, and the employee must make sure that his or her personal coverage will apply to the operation of a company vehicle.

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177. *Id.* at 1185.
178. *Id*.
179. *Id*.
180. *Id*. at 1186.
181. *Id.* at 1185.
182. *Id*. (citing Butler v. Williams, 527 N.E.2d 231 (Ind. Ct. App. 1988)).
183. *See* IND. CODE § 27-7-5-1.5 (2005).
184. *Id.* § 27-7-5-2.
185. *Id.* § 27-7-5-1.5.