SURVEY OF RECENT DEVELOPMENTS IN INSURANCE LAW

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During this survey period,[1] Indiana courts addressed a number of interesting factual scenarios and coverage issues involving automobile insurance policies, homeowners insurance policies, and commercial general liability insurance policies. This Article examines the most significant decisions and their impact on the field of insurance law.[2]

I. AUTOMOBILE COVERAGE CASES

A. No Insurance Available to Grandmother for Her Liability Arising from Her Agreement to Be Legally Responsible for Minor's Driving Under the Financial Responsibility Statute

When a minor driver initially obtains his or her license, a parent or guardian of the minor, must sign a financial responsibility form. This form makes the parent or guardian responsible for any legal liability resulting from injuries or damages caused by the minor.[3] In *Motorists Mutual Insurance Co. v.*

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1. The survey period for this Article is approximately October 1, 2008 to September 30, 2009.

2. Selected cases which were decided during the survey period, but are not addressed in this Article include: *Harleysville Lake State Insurance Co. v. Granite Ridge Builders, Inc.*, Cause No. 1:06-CV-397-TS, 2009 WL 857412 (N.D. Ind. Mar. 31, 2009) (holding that equitable estoppel can bind an insurer to coverage if the insurer defends the insured without sending a reservation of rights notice to the insured); *Evanston Insurance Co. v. Deer-Bell, Inc.*, No. 1:07-cv-1160-SEB-JMS, 2009 WL 398969 (S.D. Ind. Feb. 13, 2009) (interpreting whether exclusion for acts or incidents involving battery applied for incident at bar); *Hastings Mutual Insurance Co. v. LaFollette*, No. 1:07-cv-1085-WTL-TAB, 2009 WL 348769 (S.D. Ind. Feb. 6, 2009) (interpreting whether a tenant qualified as a "voluntary worker" to be afforded insurance coverage under landlord's policy after swimming accident by third party); *American Family Mutual Insurance Co. v. Estate of Sloan*, No. 1:07-cv-0327-SEB-JMS, 2008 WL 5115245 (S.D. Ind. Dec. 3, 2008) (holding that purchaser of an automobile was not a "permissive user" to be afforded coverage under seller's insurance policy for accident when purchaser took possession and started to make installment payments); *Travelers Casualty & Surety Co. v. U.S. Filter Corp.*, 895 N.E.2d 1172 (Ind. 2008) (holding that consent of an insurance company is needed by an insured before insurance policy rights can be assigned by the insured unless the assignment happens after an identifiable loss occurs); *Sadler v. Auto-Owners Insurance Co.*, 904 N.E.2d 665 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 548 (Ind. 2009) (holding that insured was not precluded from seeking reimbursement for remediation costs from one of multiple insurance companies after receiving insurance benefits from other insurers.); *Schilling v. Huntington County Community School Corp.*, 898 N.E.2d 385 (Ind. Ct. App. 2008) (holding that a health plan's exclusion for injuries covered by workers compensation was valid even if employee lacked workers compensation insurance coverage), *trans. denied*, 915 N.E.2d 993 (Ind. 2009).

3. IND. CODE § 9-24-9-4(a) (2004) provides that "[a]n individual who signs an application for a permit or license under this chapter agrees to be responsible jointly and severally with the

Wroblewski,[4] the court addressed whether a grandmother who signed a financial responsibility form for her grandson was entitled to coverage under her personal insurance policy for a judgment entered against her.[5]

The grandson lived with his grandparents.[6] When the grandson turned sixteen years old, the grandparents purchased him a car, which they titled in his name, and purchased a liability insurance policy in his name.[7] The grandmother signed the financial responsibility form with the Bureau of Motor Vehicles when the grandson obtained his license.[8] The grandson had an automobile accident that resulted in personal injuries to his passenger, Alexis.[9] Alexis sued the grandson for negligence in his operation of the automobile, and the grandmother based upon her signing of the financial responsibility form.[10] The court entered judgment against the grandson and grandmother for $99,422.19.[11]

The grandmother possessed automobile liability insurance under a policy with Motorists that covered automobiles that she owned, but not the vehicle driven by the grandson at the time of the accident.[12] After the court entered the judgment, Alexis filed supplemental proceedings against Motorists, contending that it owed insurance coverage to the grandmother under her policy.[13] Motorists contended that no coverage was available because of a policy provision that excluded coverage for any vehicle other than a covered vehicle that was owned by or available for regular use of a family member.[14] The trial court granted summary judgment to Alexis after finding that Motorists owed coverage to the grandmother.[15] Motorists appealed.[16]

The court of appeals reversed the trial court.[17] Although the grandmother was legally responsible because she signed the financial responsibility form, the court applied the Motorists policy provision, and found that the policy excluded coverage for any liability of an insured based upon the use of another vehicle

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minor applicant for any injury or damage that the minor applicant causes by reason of the operation of a motor vehicle if the minor applicant is liable in damages."

4. 898 N.E.2d 1272 (Ind. Ct. App.), *trans. denied*, 915 N.E.2d 989 (Ind. 2009).
5. *Id.* at 1274.
6. *Id.* at 1273.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 1274.
12. *Id.*
13. *Id.*
14. *Id.* at 1276.
15. *Id.* at 1274. The trial court based its decision upon the policy language where Motorists agreed to "pay damages for bodily injury . . . for which any insured becomes legally responsible because of an auto accident." *Id.* at 1275.
16. *Id.*
17. *Id.* at 1277.

owned by a family member.[18] Because the grandmother's liability was based upon the grandson's use of his personal automobile, the exclusion applied.[19]

Any parent, guardian, or other individual who agrees to be responsible for a minor driver should be aware of both this decision and the statutory obligations Indiana imposes regarding a minor's operation of a vehicle. Those agreeing to be responsible for a minor driver must exercise care to make sure appropriate insurance coverage is in place to protect them.

B. Shared Use of "Farm Truck" by Farmers Did Not Trigger Exclusion for Unlisted Vehicles Available for Regular Use of Non-Insured Drivers

A case involving two farmers' shared use of a truck presented an interesting insurance coverage question in *Buckeye State Mutual Insurance Co. v. Carfield*.[20] A father and son owned separate farms, but shared equipment necessary to work each farm.[21] The father purchased a pickup truck, which they used as a "farm truck."[22] The father and son alternated use of the truck such that one of them would drive the truck when the other was using the heavy farm equipment for farming operations.[23]

While driving the truck, the son had an accident resulting in the death of another motorist.[24] The son's automobile insurer filed a declaratory judgment lawsuit to seek a judicial declaration that it did not owe the son liability insurance coverage based on a policy exclusion prohibiting coverage for the operation of uninsured vehicles available for the "regular use" of the son.[25] A bench trial occurred, and the trial court concluded that the evidence did not demonstrate that the truck was "available for [the son's] regular use," and thus the incident did not fall within the policy exclusion.[26]

On appeal, the court of appeals affirmed the trial court.[27] Although the court acknowledged the son had "periodic use" of the truck, the level of use did not show a "consistent, regular use" to fall within the exclusion.[28] The court observed that the evidence demonstrated that the truck was used sixty-two days of the year during the spring planting and fall harvesting seasons.[29] Absent a

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18. *Id.* at 1276.

19. *Id.* at 1277.

20. 914 N.E.2d 315, 317 (Ind. Ct. App. 2009).

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* The specific exclusionary language provided; "[The insurer does] not provide Liability Coverage for the ownership, maintenance or use of: . . . 2. Any vehicle, other than 'your covered auto,' which is . . . Furnished or available for [the insured's] regular use." *Id.*

26. *Id.*

27. *Id.* at 316.

28. *Id.* at 319.

29. *Id.*

recurring use of the truck throughout the year by the son, the court felt that the exclusion did not apply.[30]

The courts could have interpreted this case's facts and their application to the policy exclusion either way. Because the case was decided following a bench trial, the appellate court appeared reluctant to overturn the decision as it refused to reweigh the evidence. A different set of facts could lead to a different conclusion on the application of the "regular use" exclusion.

C. Parents Could Not Recover Uninsured Motorists Coverage Under Their Policy for Death of Adult Son Who Was Not an Insured Under the Policy

Bush v. State Farm Mutual Automobile Insurance Co.[31] addressed an attempt by the parents of an adult son to recover uninsured motorist coverage under their personal policy for their son's death.[32] Their son was killed in an accident while riding as an automobile passenger.[33] The driver of the car was uninsured, and neither the son nor the vehicle in which he was riding was insured for uninsured motorists coverage.[34] The parents sought uninsured motorist coverage under their personal insurance policy.[35] The insurer denied their claim because their son was not an "insured" as defined by the policy because he was a "relative" of the parents and did not reside in their home.[36]

The parents filed suit against their insurer to recover for the death of their adult son.[37] After both the parents and the insurer filed motions for summary judgment, the trial court granted the insurer's motion, finding that the adult son was not an "insured," and that the parents sustained no "bodily injury" to be afforded coverage.[38] The Indiana Court of Appeals reversed, concluding that the insurer's policy requirement that an insured sustain "bodily injury" in order for coverage to apply, violated Indiana's Uninsured Motorist Statute.[39]

The Indiana Supreme Court found that the insurer's policy language did not violate Indiana statutory requirements and affirmed the trial court's grant of summary judgment.[40] In addressing an issue of first impression, the court focused on whether the insurer's policy requirement that an insured must sustain "bodily injury" in order to obtain uninsured motorist coverage, violated Indiana's Uninsured Motorist Statute.[41] The court rejected the parents' argument that the

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30. *Id.*
31. 905 N.E.2d 1003 (Ind. 2009).
32. *Id.* at 1004.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. IND. CODE § 27-7-5-2 (Supp. 2009); *Bush*, 905 N.E.2d at 1004-05.
40. *Bush*, 905 N.E.2d at 1007-08.
41. *Id.* at 1005.

policy was ambiguous because it could be construed to include emotional distress damages sustained by an insured even absent a purely physical injury.[42] The court observed that it recently addressed this issue and held that the definition of "bodily injury" included claims for emotional distress if accompanied by a bodily touching.[43]

The court ultimately concluded that the insurer's policy restriction was valid.[44] Consequently, because the parents sustained no "bodily injury" from the accident that killed their son, they were not entitled to recover on their claims for uninsured motorist coverage.[45] The interpretation of the policy appears to support this decision. If the parents were successful with their argument, then the scope of uninsured motorist coverage would have been extended to cover individuals who could not successfully sue under Indiana's wrongful death statutes. In Indiana, the son's estate, not the parents individually, has the right to bring a tort lawsuit for the son's death.[46] In this case, the parents, not the son's estate, were seeking the uninsured motorist coverage.

D. An Insurer's Payment of Medical Bills Under Medical Payments Coverage Could Not Be Set Off Against Uninsured Motorist Exposure as an Advance Payment

The court in *Nealy v. American Family Mutual Insurance Co.*[47] addressed whether an uninsured motorist insurer was entitled to deduct amounts advanced to its insured under Indiana's advance payment statute.[48] A mother and daughter, who were insured with American Family, were involved in an accident with an uninsured motorist.[49] The mother and daughter plaintiffs filed a lawsuit against the uninsured driver and the owner of the vehicle who was also uninsured.[50] After the mother and daughter obtained default judgments against the driver and owner, American Family intervened to address its potential uninsured motorist coverage exposure.[51]

Before trial, American Family paid some of the medical bills incurred by the

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42. *Id.*

43. *Id. See* State Farm Mut. Auto. Ins. Co. v. Jakupko, 881 N.E.2d 654, 658 (Ind. 2008).

44. *Id.* at 1004.

45. *Id.* at 1005.

46. The Indiana Supreme Court commented upon this issue in dicta. Specifically, the parents were not "persons 'legally entitled to recover damages'" for the son's death. *Id.* at 1008 (citing Estate of Sears *ex rel.* Sears v. Griffin, 771 N.E.2d 1136, 1138 (Ind. 2002)). Under Indiana's Child Wrongful Death Act, IND. CODE § 34-23-2-1(d) (Supp. 2009), and the Adult Wrongful Death Act, IND. CODE § 34-23-1-2(b) (2008), only the estate could bring a lawsuit to recover damages for the son's death.

47. 910 N.E.2d 842 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 559 (Ind. 2009).

48. *Id.* at 845; IND. CODE § 34-44-2-3 (2008).

49. *Nealy*, 910 N.E.2d at 845.

50. *Id.*

51. *Id.*

mother and daughter.[52] An American Family representative sent a letter to the mother and daughter explaining that American Family paid the bills under the policy's medical payments coverage rather than the uninsured motorist coverage.[53] At trial, the mother and daughter obtained verdicts against American Family for uninsured motorist coverage.[54] Relying upon the advance payment statute,[55] American Family tendered checks that deducted the amounts previously paid for the family's medical bills from the verdict award.[56] The mother and daughter filed a motion with the court asking that it reject American Family's claim that it was entitled to set off its payments for medical bills from the verdict for uninsured motorist coverage.[57] The trial court granted American Family's motion to permit the setoff, and an appeal ensued.[58]

The advance payment statute provides:

> If it is determined that the plaintiff is entitled to recover in an action [for personal injury, wrongful death, or property damage]:
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> (1) the defendant may introduce evidence of any advance payment made; and
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> (2) the court shall reduce the award to the plaintiff to the extent that the award includes an amount paid by the advance payment.[59]

The appellate court focused on the wording of this statute, and concluded that American Family's payments to the mother and daughter were not "advance payments" under the statute.[60] The court acknowledged that the purpose of the statute was to prevent double recovery by a personal injury plaintiff if an insurance company made an advance payment for medical bills.[61] But the court determined that American Family was not a "defendant" as required by the advance payment statute and thus was not allowed to utilize the setoff.[62] American Family was not an entity who was liable to the mother/daughter from a personal injury accident but owed contractual liability as a medical payments insurer.[63]

The court also looked at whether the American Family insurance policy language permitted a setoff.[64] Although the policy explicitly authorized American Family to deduct the medical bills paid from the limits of medical

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52. *Id.*
53. *Id.*
54. *Id.*
55. IND. CODE § 34-44-2-3 (2008).
56. *Nealy*, 910 N.E.2d at 845.
57. *Id.*
58. *Id.*
59. *Id.* (quoting IND. CODE § 34-44-2-3 (2008)).
60. *Id.*
61. *Id.*
62. *Id*. at 846.
63. *Id.*
64. *Id.* at 847.

payments coverage, the policy did not allow American Family to deduct payments made under the medical payments portion of the policy from the uninsured motorist coverage.[65] Because American Family said that the payment of the medical bills was made under the medical payments coverage rather than the uninsured motorist coverage, setoff was not permitted.[66] As a result, the court reversed the trial court order.[67]

Chief Judge Baker, concurring in part and dissenting in part, believed that the advance payment statute applied to allow American Family's setoff.[68] Although acknowledging that the facts and party designations did not strictly follow the advance payments statute, Chief Judge Baker argued that not allowing a setoff would result in an unjust, double recovery in damages by the mother and daughter.[69] The purpose of the statute is to avoid double recovery by a party for the same element of damages.[70] Chief Judge Baker believed that the purpose was not achieved in this case without a setoff or reimbursement of the medical payments to the insurer.[71]

E. Insurance Company Prevented from Denying Coverage After It Failed to Provide Sufficient Notice of Coverage Defense to Insured

The case of *Founders Insurance Co. v. Olivares*[72] provides a glimpse of how an insurer will be prevented from asserting a policy defense if proper notice is not given to the insured.[73] Founders insured an automobile owned by a mother and son.[74] The Founders' insurance policy listed the mother as a named insured, and listed her husband as an additional insured.[75] The policy listed the son as an excluded driver.[76] Although the policy listed the mother as residing in Indiana, she actually lived in New Jersey.[77] The vehicle remained and the son resided in Indiana.[78]

A motorist was injured in an accident with a person driving the automobile owned by the mother and son.[79] The driver fled the scene of the accident, and

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65. *Id.* at 847-48.
66. *Id.* at 848.
67. *Id.* at 850.
68. *Id.* (Baker, C.J., dissenting in part and concurring in part).
69. *Id.*
70. *Id.*
71. *Id.*
72. 894 N.E.2d 586 (Ind. Ct. App. 2008).
73. *Id.* at 592-93.
74. *Id.* at 588.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*

was never identified.[80] After the accident, the son told the police that someone stole the vehicle.[81] The injured motorist notified Founders that she intended to allege in a lawsuit that the son was driving the vehicle at the time of the accident.[82] Founders responded by indicating to the injured motorist that it reserved its rights to deny coverage based upon the lack of permission of the driver to use the vehicle at the time of the accident.[83]

The injured motorist sued the mother and son.[84] Founders was advised of the lawsuit, and retained counsel to represent the mother and son.[85] Later, Founders was added as a defendant, and the injured motorist and Founders sought a declaratory judgment to establish whether they owed coverage to the son.[86] During the trial, Founders presented evidence that it prepared a letter to the mother and son[87] that said that if the son was driving the automobile at the time of the accident, no coverage would be available.[88] But no evidence was presented at trial that confirmed that Founders sent the letter or that the mother or son received the letter.[89]

At a bench trial, the trial court determined that the son was an insured driver under Founders' insurance policy.[90] The trial court also found that because Founders had not issued a reservation of rights to its insureds advising of the son's exclusion from the policy, the court prevented Founders from asserting that as a coverage defense.[91]

The court of appeals affirmed the trial court.[92] The court of appeals acknowledged the general rule that the doctrine of estoppel cannot be used to create coverage under an insurance policy.[93] But the court noted that an exception exists if the insurer assumes the defense of an insured, and fails to reserve its own rights to contest coverage by giving proper notice to the insured.[94]

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80. *Id.*

81. *Id.* There was no sign of damage to the steering column to suggest that someone had started the vehicle without the keys. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 589.

85. *Id.*

86. *Id.*

87. Founders admitted there was a typographical error regarding the first name of its insured in this letter. Founders referred to the individual as "David" when his actual first name was "Daniel."

88. *Id.*

89. *Id.*

90. *Id.* at 591.

91. *Id.*

92. *Id.* at 594.

93. *Id.* at 592. The rationale behind this rule is that an insurer should not be compelled to insure a risk where the insured had not paid a premium to cover the risk. *Id.* (citing Employers Ins. of Wausau v. Recticel Foam Corp., 716 N.E.2d 1015, 1028 (Ind. Ct. App. 1999)).

94. *Id.* at 592-93.

Because Founders failed to factually establish that it had provided a proper reservation of rights to the mother and son, the court estopped Founders from asserting this coverage defense.[95]

This case is another example of how an insurer can be prevented from asserting policy defenses if the insurer fails to properly reserve its rights to contest coverage or file a declaratory judgment action to determine its coverage obligations. Insurers must follow one of these procedures to avoid being estopped from asserting its coverage defenses.[96]

II. HOMEOWNERS INSURANCE COVERAGE CASE

As more homeowners acquire all-terrain vehicles ("ATVs") and accidents from their use occur, questions arise regarding whether various types of insurance policies provide coverage. In *McCoy v. American Family Mutual Insurance Co.*,[97] the plaintiffs sought liability insurance coverage under a homeowners policy after an accident resulted in personal injuries to a guest using an ATV.[98] Shoemaker, who was living with McCoy and her children, owned the ATV.[99] The children invited one of their friends to visit and to operate the ATV.[100] Although McCoy was present when the children started to ride the ATV, she left before the guest drove it.[101] Shoemaker remained with the children, and the guest was injured while using the ATV in his presence.[102]

The guest's representatives sued McCoy seeking recovery for the guest's injuries.[103] The representatives obtained a default judgment against McCoy when she did not answer the complaint.[104] At the time of the accident, McCoy possessed a homeowners insurance policy with American Family.[105] American Family filed a declaratory judgment action and contended that the homeowners policy excluded coverage for McCoy.[106] The exclusion provided that personal

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95. *Id.* at 593. The court also determined that the son was prejudiced as a matter of law by Founders's assumption of his defense without reserving its rights. *Id.* at 594.

96. For a good example of the ramifications of an insurer failing to proceed under these options, see *Liberty Mutual Insurance Co. v. Metzler*, 586 N.E.2d 897 (Ind. Ct. App. 1992).

97. 898 N.E.2d 1237 (Ind. Ct. App. 2008), *trans. denied*, 915 N.E.2d 984 (Ind. 2009).

98. *Id.* at 1238.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* McCoy had a conversation with her insurance agent who apparently informed her there would be no coverage under the American Family policy for the visitor's lawsuit. *Id.* Believing that no coverage existed, McCoy did not notify American Family of the lawsuit. *Id.* While American Family asserted this alleged "late notice" issue as a coverage defense, the court did not address it.

liability coverage did not exist for "'bodily injury or property damage arising out of the ownership, supervision, entrustment, maintenance, operation, use, loading or unloading of any type of motor vehicle, motorized land conveyance or trailer.'"[107]

In the declaratory judgment proceeding, the guest argued that an exception to this exclusion applied as coverage was afforded for vehicles "owned or operated or rented or loaned to any **insured**."[108] Specifically, the visitor argued that the ATV was "loaned" to McCoy by Shoemaker; therefore, coverage under the homeowners policy applied.[109]

The trial court granted summary judgment to American Family, finding the exclusion applied.[110] The Indiana Court of Appeals affirmed.[111] The court rejected the suggestion that the ATV was loaned to McCoy.[112] At the time of the accident, Shoemaker, the owner of the ATV, was present and directing its use.[113] The court noted that if the ATV was loaned to anyone, it was loaned to the child visitor, not McCoy.[114]

This case presented an excellent analysis of application of a policy exclusion. The risk of use of any vehicle, including ATVs, is not one that a homeowners insurer would agree to assume. Instead, a separate policy is generally needed to provide the appropriate coverage for the ATV use.

III. COMMERCIAL AND PROPERTY COVERAGE CASES

A. Court Waived an Insurance Policy Condition Because of Insurance Company's Delay in Paying Undisputed Portion of Claim

The decision of *Rockford Mutual Insurance Co. v. Pirtle*[115] demonstrates the risk to an insurance company when it delays making payments to its insured for a property claim.[116] The facts reveal that an insured sustained damage to a historic building from a fire.[117] At the time of the fire, the insured rented the building to tenants while the building was being restored.[118] After the fire, the insured submitted a claim for replacement cost coverage under its insurance

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107. *Id.* at 1239.

108. *Id.*

109. *Id.*

110. *Id.* at 1238.

111. *Id.* at 1239.

112. *Id.*

113. *Id.*

114. *Id.*

115. 911 N.E.2d 60 (Ind. Ct. App. 2009), *reh'g denied*, 2009 Ind. App. LEXIS 2397 (Ind. Ct. App. Oct. 28, 2009).

116. *Id.* at 69-69.

117. *Id.* at 63.

118. *Id.*

policy with Rockford.[119]

Rockford hired an independent adjuster to assist in estimating the damage to the building.[120] After the adjuster arrived at an estimate, Rockford gave the adjuster settlement authority to try to reach a settlement with the insured.[121] But the settlement offer was less than the mortgage that existed on the property and the estimates that the insured had obtained to repair the building.[122] The insured rejected the adjuster's settlement offer and submitted a repair estimate to Rockford that exceeded the limits of the policy.[123] Rockford granted the adjuster additional settlement authority up to the policy limits.[124] Despite Rockford's authorization of a settlement of the claim up to the dwelling policy limits, the adjuster made an offer for a lesser figure, which it contended was the "actual cash value" of the building at the time of the fire.[125]

Rockford retained another independent adjuster who submitted a slightly higher offer as actual cash value for the damaged building.[126] The insured did not respond to the offer.[127] Instead, the insured filed a lawsuit against Rockford for breach of contract and breach of the duty of good faith that Rockford owed to its insured.[128] The court dismissed the claim for breach of the duty of good faith when Rockford tendered the actual cash value figure suggested by the second adjuster.[129] Upon receipt of these funds, the insured paid the mortgage on the property rather than using the payment to rebuild.[130]

Rockford filed a motion for summary judgment contending that the insured's recovery was limited to the actual cash value of the building because the insured had not repaired the building.[131] The insured disputed the amount assigned as actual cash value, and claimed he was entitled to compensatory damages because he struggled to satisfy the mortgage obligations from the loss of rental income due to the fire.[132]

The court denied the insurance company's summary judgment motion.[133]

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119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* The dwelling policy limits were $193,000. *Id.* The offer made was $69,874.62. *Id.*

125. *Id.*

126. *Id.* The second adjuster arrived at a figure of $86,146.66. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* Although the decision does not include the actual date of payment, it was paid almost a year after the date of the fire.

130. *Id.* at 65.

131. *Id.* at 63. The pertinent part of the policy coverage provided that the insured was entitled to replacement costs for the damaged building, subject to the insurer not paying "more than the actual cash value of the damage until actual repair or replacement is completed." *Id.* at 64.

132. *Id.* at 64-65.

133. *Id.* at 63.

The case proceeded to trial, and the insured was awarded a judgment for insurance policy proceeds and consequential damages.[134] On appeal, the court focused on whether the insured could be excused from complying with a policy condition requiring him to rebuild in order to obtain replacement cost coverage.[135] In this case, because Rockford did not make an actual cash value offer to the insured until six months after the fire, the court found that the insured faced a dire predicament in addressing the outstanding mortgage because of the lack of rental income.[136]

The court concluded that "equitable principles" compelled it to excuse the policy condition that the insured rebuild in order to acquire the full dwelling policy limits that exceeded actual cash value of the building.[137] Because the insurer delayed paying the actual cash value to the insured, the court found that the insurer waived the policy condition and affirmed the trial court's verdict.[138]

The other interesting aspect of this case focused upon the court's affirmation of the consequential damage award.[139] The court observed that because of Rockford's failure to pay the actual cash value, the insured continued to incur damages including "repairs, utilities, and property taxes" which arose from the insurer's alleged breach of the policy.[140]

B. Alarm Company's Failure to Notify Store Owner of Alarm Not Being Activated Was Not an "Occurrence" to Trigger Coverage Under General Liability Policy

An unfortunate set of facts brought about the resolution of a number of interesting insurance coverage questions in *Tri-Etch, Inc. v. Cincinnati Insurance Co.*[141] Around midnight, when a liquor store was about to close, a clerk was abducted by a robber, and was tied to a tree at a local park.[142] The robber beat the clerk, and the clerk was not found until early the next morning.[143] Although found alive, the clerk eventually died because of his injuries.[144]

The store possessed a contract with an alarm company, which required the alarm company to notify the store's owner within thirty minutes if the alarm was not activated at the closing of the store.[145] The clerk's estate filed a lawsuit

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134. *Id.* at 64. The actual award was $124,149.55 for breach of the insurance policy, and $406,136.58 in consequential damages. *Id.*

135. *Id.* at 65.

136. *Id.* at 66.

137. *Id.* at 66-67.

138. *Id.*

139. *Id.* at 67-68.

140. *Id.* at 68-69.

141. 909 N.E.2d 997 (Ind. 2009), *reh'g denied*, 2009 Ind. LEXIS 1508 (Ind. Oct. 13, 2009).

142. *Id.* at 999.

143. *Id.*

144. *Id.*

145. *Id.*

against the alarm company by contending that it was negligent when it failed to notify the store's owner that the alarm was not activated.[146] The alarm company possessed a commercial general liability and umbrella policy with Cincinnati Insurance Company.[147] The alarm company also was insured with Scottsdale Insurance Company through an alarm company dealers association policy that included errors and omissions coverage.[148] Scottsdale provided a defense to the alarm company for the estate's lawsuit.[149]

The evidence demonstrated that Cincinnati was not notified of the lawsuit until March of 2004, approximately seven years after the incident.[150] Cincinnati denied coverage by contending that the clerk did not die of an "occurrence" as required by both of its policies, and that the alarm company did not provide timely notice to Cincinnati of the event and lawsuit as required by the policy.[151] Cincinnati also filed a counterclaim for declaratory judgment to assert its defenses.[152]

The litigation addressed a number of issues.[153] Eventually, a trial resulted in a verdict of $2.5 million in favor of the Estate.[154] Scottsdale tendered its policy limits to the Estate, and the alarm company assigned its rights to coverage under the Cincinnati policies to the Estate.[155] Both the Estate and Cincinnati filed summary judgment motions.[156] The trial court ultimately granted summary judgment to Cincinnati, finding that Cincinnati received late notice of the incident and lawsuit, and that the late notice caused prejudice.[157]

On appeal, the court of appeals reversed, and remanded with instructions that the trial court should enter judgment in favor of the estate.[158] The court of appeals concluded that the incident demonstrated an "occurrence" under the

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146. *Id.*

147. *Id.*

148. *Id.* The Cincinnati policy did not include errors and omissions coverage. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 1000. Cincinnati also claimed that the umbrella policy excluded coverage for claims based upon the insured's providing of alarm services. *Id.* The Indiana Supreme Court ultimately determined that no coverage existed under the umbrella policy as the clerk's death was due to the alleged failure of the alarm company to provide an alarm service. *Id.* at 1004.

152. *Id.* at 1000.

153. The Indiana Supreme Court addressed the application of a contractual one-year limitation on actions. Young v. Tri-Etch, Inc., 790 N.E.2d 456 (Ind. 2003). The Indiana Court of Appeals also addressed Cincinnati's attempt to intervene in the underlying lawsuit. Cincinnati Ins. Co. v. Young, 852 N.E.2d 8 (Ind. Ct. App. 2006).

154. *Tri-Etch, Inc.*, 909 N.E.2d at 999.

155. *Id.* Scottsdale also countersued against Cincinnati to recover a portion of its defense costs. *Id.* at 1000.

156. *Id.*

157. *Id.*

158. *Id.* The Indiana Court of Appeals also remanded that summary judgment be entered in favor of Scottsdale on its claim. *Id.*

policy, and that even if Cincinnati received late notice of the incident and lawsuit, it was not prejudiced because it denied coverage to the alarm company on other coverage grounds.[159] The Indiana Supreme Court granted transfer.[160]

In addressing the "occurrence"[161] issue, the supreme court determined that the alarm company's failure was not an "accident," but represented a professional "error" which was not covered under a general liability policy.[162] In supporting its decision, the court observed:

> [The alarm company's] failure was just such an "error or omission," not an "accident," and for that reason it is not an "occurrence" covered by Cincinnati's [commercial general liability] and umbrella policies. The [commercial general liability] policy does not guarantee the quality of work or products of its insureds. To the extent [the alarm company] had a duty to [the clerk], it arose from its contract with [the clerk's] employer. This may give rise to tort liability. . . . But it does not convert a failure to meet a standard of care under a contractually assumed duty into an "accident."[163]

With respect to the late notice defense, the supreme court reversed the court of appeals' decision, which had determined that Cincinnati waived the late notice defense when it denied coverage by asserting the lack of "occurrence" defense.[164] The supreme court specifically found that an insurer may deny coverage on other grounds while retaining its ability to assert a late notice defense:

> We do not agree that an insurer's denial of coverage on other grounds as a matter of law rebuts the presumption of prejudice from late notice existing under [*Miller v. Dilts*, 463 N.E.2d 257 (Ind. Ct. App. 1984)]. There is no reason why an insurer should be required to forego a notice requirement simply because it has other valid defenses to coverage. If there is no prejudice to the insurer from lack of notice, the absence of prejudice does not arise from the insurer's taking the position that it also has other valid defenses to coverage.[165]

Tri-Etch helped firmly establish the scope of coverage for a commercial general liability policy for professional activities. *Tri-Etch* also established that an insurer may raise multiple coverage defenses rather than being required to choose one defense and abandon all others.

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159. *Id.*

160. *Id.* at 1001.

161. "Occurrence" was defined to be "'an accident, including continuous or repeated exposure to substantially the same general harmful conditions.'" *Id.*

162. *Id.*

163. *Id.* (internal citation omitted).

164. *Id.* at 1005.

165. *Id.*

C. Contractor May Be Entitled to Commercial General Liability Insurance for Faulty Workmanship if It Causes Damage to Portions of Building Not Part of a Contractor's Scope of Work

Indiana has decided a number of cases where the question focuses on whether a commercial general liability insurance policy provides coverage to a contractor for claims of faulty workmanship.[166] These cases have established a general rule that a commercial general liability policy "does not cover an accident of faulty workmanship but rather faulty workmanship which causes an accident."[167] In *T.R. Bulger, Inc. v. Indiana Insurance Co.*,[168] the court addressed a slight factual variation that clarified the scope of coverage for a faulty workmanship claim.[169]

As a home was being built, the owners hired a contractor to install a heating and air conditioning system.[170] As part of the installation, a large amount of piping was spread throughout the home.[171] Near the end of construction of the home, a dispute arose between the homeowners and the contractor, which prompted the contractor to leave the home before construction was complete.[172] When the homeowners activated the heating system, leaks existing in the piping resulted in water damage to other parts of the constructed home.[173] As a result, the homeowners sued the contractor who filed a counterclaim to recover payment for services rendered.[174]

The contractor sought coverage under his commercial general liability insurance policy for the homeowner's lawsuit.[175] The insurance company contended that no coverage existed for the alleged faulty workmanship of the contractor based upon policy definitions and exclusions.[176] Both the insurer and contractor filed declaratory judgment actions.[177] The trial court granted the insurer's motion for summary judgment by finding that the insured's faulty workmanship was "the efficient and predominant cause" of the homeowner's

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166. *See* Amerisure, Inc. v. Wurster Constr. Co., 818 N.E.2d 998, 1004 (Ind. Ct. App. 2004); Jim Barna Log Sys. Midwest, Inc. v. General Cas. Ins. Co., 791 N.E.2d 816, 824 (Ind. Ct. App. 2003); R.N. Thompson & Assocs., Inc. v. Monroe Guar. Ins. Co. 686 N.E.2d 160, 165 (Ind. Ct. App. 1997).

167. Ind. Ins. Co. v. DeZutti, 408 N.E.2d 1275, 1279 (Ind. 1980) (citing Weedo v. Stone-E-Brick, Inc., 405 A.2d 788, 796 (N.J. 1979)).

168. 901 N.E.2d 1110 (Ind. Ct. App. 2009).

169. *Id.* at 1114-15.

170. *Id.* at 1112.

171. *Id.*

172. *Id.*

173. *Id.* at 1116.

174. *Id.* at 1112.

175. *Id.* at 1112-13.

176. *Id.* at 1113. Specifically, the insurer contended that there was no "property damage" as defined by the policy, and that exclusions for damage to the insured's work applied. *Id.*

177. *Id.*

damages such that no coverage existed under the commercial general liability policy.[178]

The court of appeals reversed the summary judgment granted to the insurer, finding that disputed factual questions existed.[179] The court distinguished the present case from earlier "faulty workmanship" cases by observing that, in this case, there was evidence that the contractor's alleged faulty workmanship had produced damages other than damages to the contractor's work.[180] Specifically, the alleged faulty installation of the piping had caused damage to the other portions of the house that were not part of the contractor's work.[181] As a result, the insurer was not entitled to a judgment as a matter of law that no coverage existed.[182]

Insurance law practitioners should note the factual distinction that exists in *Bulger* that separates it from earlier "faulty workmanship" cases. In the earlier cases, the insured was the builder of or general contractor in charge of building the entire home.[183] In *Bulger*, the insured contractor's work was only the installation of the heating and air conditioning system. Thus, the contractor's alleged faulty workmanship affected other parts of the home outside the scope of the contractor's work, which constituted "property damage" under the policy. This distinction is important in determining whether coverage under a commercial general liability policy exists for a faulty workmanship claim.

D. Insured's Failure to Give Timely Notice of Covered Incident Excused the Insurer from Paying for Insured's Defense Costs Incurred Before Notice Was Given to Insurer

In *Dreaded, Inc. v. St. Paul Guardian Insurance Co.*,[184] the Indiana Supreme Court addressed a situation where an insured sought about three years' worth of attorney defense and investigation costs on an environmental claim before notice was given to the insurer.[185] The insured received a letter from the Indiana Department of Environmental Management concerning a possible soil contamination at the insured's former business location.[186] The insured hired its own attorney and engaged its own experts to address the alleged soil

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178. *Id.* at 1114.

179. *Id.* at 1116.

180. *Id.* at 1115-16.

181. *Id.*

182. *Id.* at 1116.

183. *See supra* note 166. During this survey period, the case of *Sheehan Construction Co. v. Continental Casualty Co.*, 908 N.E.2d 305 (Ind. Ct. App. 2009), *trans. granted, opinion vacated*, 2010 LEXIS 57 (Ind. Jan. 14, 2010), addressed a similar fact situation and confirmed the general rule that claims to repair or replace faulty workmanship of an insured are not covered under a commercial general liability insurance policy.

184. 904 N.E.2d 1267 (Ind. 2009).

185. *Id.* at 1268.

186. *Id.* at 1268-69.

contamination.[187] Three years later, it notified its commercial general liability insurer of the letter from the governmental agency, and requested that the insurer pay costs associated with its investigation and defense.[188]

The insurer agreed to assume the defense of the insured from the point of receiving notice of the matter.[189] But the insurer refused to reimburse the insured for the defense and investigation costs incurred before notice was given to the insurer.[190] The insurer relied on policy provisions that required the insured to give notice of a covered incident and not to assume any financial obligations in the investigation or defense without the insurer's consent.[191]

The insured filed a breach of contract action against the insurer.[192] Both the insurer and the insured sought summary judgment.[193] The trial court granted the insurer's motion, concluding that the policy required the insured to give notice, and that the insured gave unreasonably late notice to the insurer of the incident.[194] Furthermore, the trial court rejected the insured's argument that even notice was late, the insurer was required to show prejudice because of the delay before denying coverage.[195] The court of appeals reversed the trial court, concluding that even though the insured supplied late notice, a question of fact existed whether the insurer was prejudiced.[196]

The Indiana Supreme Court reversed the court of appeals, and affirmed the trial court's grant of summary judgment to the insurer.[197] In so doing, the court explained important principals to address the late notice defense on insurance coverage matters. First, the court determined that the "notice" provision of an insurance policy is a condition precedent that the insured must satisfy before any insurance coverage obligation exists for the insurance company.[198] The court explained the importance of the notice provision:

> [A]n insurer cannot defend a claim of which it has no knowledge. The function of a notice requirement is to supply basic information to permit an insurer to defend a claim. The insurer's duty to defend simply does not arise until it receives the foundational information designated in the notice requirement. Until an insurer receives such enabling information, it cannot be held accountable for breaching this duty.[199]

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187. *Id.* at 1269.
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.* at 1271.
192. *Id.* at 1269.
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.* at 1273.
198. *Id.* at 1271 (citing Miller v. Dilts, 463 N.E.2d 257, 266 (Ind. 1984)).
199. *Id.* at 1273.

Additionally, when addressing a failure by an insured to supply timely notice, it is irrelevant to determine if the insurer sustained prejudice from the late notice.[200] Instead, in addressing the late notice question, courts should only focus upon whether the insurer received the proper notice.[201] Whether an insurer was prejudiced simply does not matter.[202]

Dreaded provides excellent assistance to insurance coverage practitioners in determining how to address the late notice provision of a policy. The focus has been narrowed to when proper notice was received and whether the timing of that notice was reasonable.[203]

E. Court Concludes That Claimant's Multiple Injuries Were Continuing Such That No New "Occurrence" Existed to Trigger Coverage Under Multiple Policies

Quanta Indemnity Co. v. Davis Homes, LLC[204] offers an interesting situation involving a claim for a continuing personal injury and the applicability of multiple insurance policies.[205] In 2002, a homeowner contended that he sustained a brain stem injury from an electric shock when he used a dryer in his home.[206] As a result, he brought a personal injury lawsuit against the builder of the home and other contractors.[207] At the time of the incident, North American Specialty Insurance Company insured the builder, and the builder tendered the lawsuit to North American for coverage.[208] North American subsequently provided the builder with a defense for the lawsuit.[209]

Approximately three years later, while the homeowner's lawsuit against the builder was ongoing, the homeowner committed suicide, allegedly because of the depression sustained from the shock injury.[210] The homeowner's wife amended the complaint against the builder to allege a claim for wrongful death.[211] At this time, the builder had liability coverage with a different insurance company, Quanta Indemnity Company, and submitted a request for insurance coverage

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200. *Id.*

201. *Id.*

202. *Id.*

203. The decision of *Miller v. Dilts*, 463 N.E.2d 257 (Ind. 1984), provides an excellent analysis of the late notice defense: in this case, the court found that a delay of six months was unreasonable and demonstrated "presumed prejudice" to the insurer.

204. 606 F. Supp. 2d 941 (S.D. Ind. 2009).

205. *Id.* at 942.

206. *Id.* at 943.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* The homeowner utilized testimony from a physician who opined that the electrical shock produced various psychological conditions that caused the homeowner to commit suicide. *Id.*

211. *Id.*

under the Quanta policy.[212]

There was no dispute that the homeowner's suicide happened during the Quanta policy period.[213] But Quanta's policy had a number of policy definitions and exclusions which generally provided that any "'continuation, change, or resumption' of 'bodily injury'" within Quanta's policy period that the builder knew about before the period began was excluded from coverage.[214] Because the builder knew of the homeowner's injuries from the earlier shock incident, Quanta denied coverage, contending that the homeowner's suicide was a continuation of the initial shock injury and not a new event to trigger coverage under the Quanta policy.[215]

North American and the homebuilder attempted to argue that the suicide represented a new "occurrence" that happened within Quanta's policy period to trigger coverage.[216] Alternatively, North American argued for the application of a "continuous trigger" approach such that if a claimant's injuries arose over different insurers' policy periods, then each policy would apply.[217] The district court rejected each of these arguments, finding that Quanta's policy unambiguously excluded any coverage for the builder.[218] The court found that the builder knew the homeowner sustained injuries from the shock even if it did not know that the homeowner would eventually commit suicide.[219] As a result, under the Quanta policy, no coverage existed.[220]

Quanta presented an interesting coverage question because of the separate events affecting the homeowner and the existence of multiple insurers. In this case, Quanta's policy possessed precise language that permitted the exclusion of coverage for a "known claim."[221]

IV. INSURANCE AGENT LIABILITY

The case of *Brennan v. Hall*[222] focused on whether an insurance broker may be liable for providing false answers on an insurance application that the insured

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212. *Id.*

213. *Id.*

214. *Id.* at 949. There were a number of policy provisions that Quanta relied upon which also established that any "known claim" before the Quanta policy's period of coverage would not be covered. *See, e.g.*, *id.* at 944.

215. *Id.* at 944-45.

216. *Id.*

217. *Id.* at 947 n.5. The "continuous trigger" theory was best discussed in *Indiana Gas Co. v. Aetna Casualty & Surety Co.*, 951 F. Supp. 767, 770-71 (N.D. Ind. 1996), *vacated on other grounds*, 141 F.3d 314 (7th Cir. 1998).

218. *Quanta Indem. Co.*, 606 F. Supp. at 949 & n.6.

219. *Id.* at 948-49.

220. *Id.* at 949.

221. *Id.* at 946-47.

222. 904 N.E.2d 383 (Ind. Ct. App. 2009).

reviewed and signed.[223] A potential insured came to an insurance broker[224] seeking homeowners insurance coverage.[225] During a meeting with the broker, the broker asked the potential insured questions while the broker completed the insurance policy application.[226] One of the application questions asked if the potential insured had any animals or exotic pets.[227] The potential insured told the broker that she had dogs, and the broker asked if they were "vicious."[228] The potential insured said "no," and the broker marked "no" to the question about whether the insured had animals.[229] After reviewing the application, Buckeye State Mutual Insurance Company issued her an insurance policy.[230]

After the policy was issued, one of the insured's dogs bit a child, which prompted the child to bring a lawsuit against the insured.[231] Buckeye denied liability coverage for the child's lawsuit, claiming that the insurance policy was void based upon the insured's material misrepresentation on the application.[232] Buckeye also contended that it never would have issued a policy to the insured if it had known that the owned a Doberman Pinscher.[233]

The insured filed suit against the broker for negligence in acquiring insurance for her.[234] The lawsuit against the broker proceeded to trial, and a jury found that the broker was negligent for failing to properly acquire a policy for the insured.[235] On appeal, the broker contended that he could not have breached a duty to the insured because the insured had the opportunity to review the application for accuracy, and because the insured signed the application with the faulty information.[236]

The appellate court refused to reverse the jury's verdict.[237] In its finding, the court held:

> We hold that if [a broker] is negligent in assisting a client complete an insurance application, and such negligence leads to a basis for the

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223. *Id.* at 387.

224. A "broker" is retained by a client to obtain policies from various insurance companies on behalf of the client. *Id.* at 386 & n.2. An "agent" is affiliated with one insurance company and can only acquire coverage for the client from that single insurer. *See id.*

225. *Id.* at 385.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.* at 385-86.

232. *Id.* at 385.

233. *Id.* at 385-86.

234. *Id.* at 386.

235. *Id.* No damages were awarded to the insured as the underlying child's lawsuit was apparently stayed until the broker negligence suit was decided. *Id.*

236. *Id.* at 387.

237. *Id.* at 389.

> insurance company to deny coverage to the applicant and/or revoke the policy, the applicant may seek damages from the [broker], even if the applicant signed or ratified the application after having a chance to review it.[238]

The court also observed that the jury was free to assess comparative fault to the insured, if the evidence warranted, for signing the application with false information.[239]

CONCLUSION

Indiana courts decided a number of significant cases during the survey period important for practitioners to understand. Courts continue to look closely at the language of insurance contracts,[240] but did not shy away from using their equitable powers to excuse policy conditions.[241]

238. *Id.* at 388.

239. *Id.* at 389.

240. *See supra* Part I.D.

241. *See supra* Part III.A.