

SURVEY OF RECENT DEVELOPMENTS IN INSURANCE LAW

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For this Survey Period,¹ the Indiana appellate and federal courts continued a recent trend of addressing fewer insurance coverage cases.² For the cases that were addressed, most were automobile decisions, with the primary focus being uninsured and underinsured motorist situations. Most of the cases addressed recurring insurance issues that should be of interest to the general insurance and tort practitioner. This Article examines the most significant decisions on coverage issues affecting automobile and homeowners policies and their impact upon the field of insurance law.³

I. AUTOMOBILE COVERAGE CASES

A. Court Determines Appropriate Limits of Underinsured Motorist Coverage to Address Multiple Claims

The case of *Lakes v. Grange Mutual Casualty Co.*⁴ involved a frequently occurring situation where multiple individuals are injured from an automobile accident but have limited ability to recover money from the responsible party. Hannah Lakes, a twelve-year-old child, was riding with her mother and sister when they were involved in a motor vehicle accident with another driver, Isaacs, who also had a passenger in his automobile.⁵ The occupants of each vehicle sustained serious injuries from the accident.⁶

Hannah and the other occupants⁷ of her automobile filed a lawsuit against Isaacs and their underinsured motorist insurance company, Grange.⁸ Isaacs had

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1. The Survey Period for this Article is September 30, 2011 through October 1, 2012.

2. See, e.g., Richard K. Shultz, *Survey of Recent Developments in Insurance Law*, 45 IND. L. REV. 1227 (2012).

3. Selected cases decided during the Survey Period, but not addressed in this Article, include the following: *Ohio Cas. Ins. Co. v. Herring-Jenkins*, 830 F. Supp. 2d 566 (N.D. Ind. 2011) (deciding that employee filling potholes for asphalt company was not “occupying” truck to be entitled to uninsured motorist coverage); *Haag v. Castro*, 959 N.E.2d 819 (Ind. 2012) (deciding that youth soccer organization’s automobile liability policy did not cover soccer members involved in accident while traveling to a rafting trip); *State Auto. Mut. Ins. Co. v. Flexdar, Inc.*, 964 N.E.2d 845 (Ind. 2012) (deciding that insurance company’s “pollution” exclusion was ambiguous); *City of Evansville v. U.S. Fid. & Guar. Co.*, 965 N.E.2d 92 (Ind. Ct. App.), *trans. denied*, 971 N.E.2d 1215 (Ind. 2012) (holding that claim to recover costs to prevent future environmental harm was not covered as “occurrence” under policy).

4. 964 N.E.2d 796 (Ind. 2012).

5. *Id.* at 797.

6. *Id.* at 797-98.

7. Hannah’s father also pursued a loss of consortium claim. *Id.* at 798 n.1.

8. *Id.* at 798.

liability insurance with limits of \$25,000 per person and \$50,000 per accident.⁹ Isaacs's insurer settled, and the policy limits were divided among the injured claimants, with Hannah receiving \$5100.¹⁰

The Grange policy included underinsured motorists coverage of \$50,000 per person and \$50,000 per accident.¹¹ Grange denied that it owed coverage to Hannah and the others because its per accident limits of underinsured motorist coverage were equal to the liability limits of Isaacs's coverage.¹² Hannah's family members dismissed their claim, leaving Hannah as the only plaintiff seeking underinsured motorist coverage.¹³ The trial court granted Grange's motion for summary judgment based upon the per accident limits comparison in coverages.¹⁴ The court of appeals reversed the trial court and concluded that Isaacs was an underinsured motorist, which allowed Hannah to recover up to \$44,900 in underinsured motorist coverage after deducting the amount she received from Isaacs's insurer.¹⁵

The Indiana Supreme Court recognized that a number of Indiana appellate decisions supported Grange's argument that if identical per accident policy limits existed between the tortfeasor's coverage and the underinsured motorist coverage, then no additional underinsured motorist coverage was available.¹⁶ However, the supreme court felt that earlier court of appeals' decisions failed to achieve the purpose of underinsured motorist coverage to provide "individuals indemnification in the event negligent motorists are not adequately insured for damages that result from motor vehicle accidents."¹⁷

As a result, the Indiana Supreme Court concluded that when multiple claimants are seeking underinsured motorist coverage, the courts

should examine each claim individually and compare each with the per-person limits of the applicable [underinsured motorist] coverage. The per-accident limits have no bearing on whether a vehicle is underinsured. Rather, the per-accident limits come into play only to limit the insurer's liability to the claimants.¹⁸

This case is significant in that it offers guidance on how to handle underinsured

9. *Id.*

10. *Id.*

11. *Id.* at 798-99.

12. *Id.* at 802.

13. *Id.* at 798.

14. *Id.*

15. *Id.* This figure is the net result after deducting Isaacs share of liability coverage (\$5100) from the per person limits of \$50,000. *Id.*

16. *Id.* at 799, 802 (citing *Progressive Halcyon Ins. Co. v. Petty*, 883 N.E.2d 854 (Ind. Ct. App. 2008); *Auto-Owners Ins. Co. v. Eakle*, 869 N.E.2d 1244 (Ind. Ct. App. 2007); *Grange Ins. Co. v. Graham*, 843 N.E.2d 597 (Ind. Ct. App. 2006); *Allstate Ins. Co. v. Sanders*, 644 N.E.2d 884 (Ind. Ct. App. 1994)).

17. *Id.* at 803 (quoting *United Nat'l Ins. Co. v. DePrizio*, 705 N.E.2d 455, 459 (Ind. 1999)).

18. *Id.* at 805.

motorist claims when multiple claimants exist, but a tortfeasor's limits are insufficient to address the claims. Because a number of cases have ruled differently on this issue, the Indiana Supreme Court's analysis will be helpful in addressing additional cases.

B. An Insured's Claim for Uninsured Motorist Coverage Did Not Satisfy the Definition of "Temporary Substitute" Vehicle

The case of *Gasser v. Downing*¹⁹ offers an analysis of an interesting factual question of what constitutes a "temporary substitute" vehicle under an uninsured motorist policy. The insured, Gasser, planned to golf with some friends.²⁰ However, he could not start his car because of a dead battery.²¹ Because he had no other available automobile and he could not reach his girlfriend to use her car, he called one of his fellow golfers to take him to the golf course.²² As his friend was driving, their car was involved in an accident, and Gasser was injured.²³

Gasser sought to recover uninsured motorist coverage²⁴ from his employer's automobile policy by contending that the vehicle in which he was riding was a "temporary substitute" vehicle.²⁵ Under the employer's policy, coverage applied for a "temporary substitute" vehicle, if the insured did not own the vehicle, and it was "temporarily used as a substitute for [the insured's] automobile [which was] out of use because of breakdown, repair, servicing, loss or destruction."²⁶ The insurer, Auto-Owners Insurance, filed a motion for summary judgment which was granted by the trial court.²⁷ On appeal, the court noted that the purpose behind the "temporary vehicle" clause of a policy was "not to narrow the coverage of an insurance policy, but to provide the insured with continuous coverage for one operating vehicle on one policy."²⁸ In attempting to define what was considered a "temporary substitute" vehicle, the court concluded that the use of the replacement vehicle must be undertaken to "fulfill a previous legal or contractual obligation" of the insured.²⁹ The court also noted that when the replacement vehicle was merely used as a "friendly or brotherly accommodation" for the insured, it was not considered a "temporary substitute" vehicle.³⁰

19. 967 N.E.2d 1085 (Ind. Ct. App. 2012).

20. *Id.* at 1087-88.

21. *Id.* at 1087.

22. *Id.*

23. *Id.*

24. *Id.* at 1086. The decision is silent on whether the insured sought coverage because the vehicle in which he was riding or another vehicle involved in the collision was uninsured.

25. *Id.*

26. *Id.* at 1087.

27. *Id.* at 1086.

28. *Id.* at 1088 (quoting *Deadwiler v. Chi. Motor Club Ins. Co.*, 603 N.E.2d 1365, 1367 (Ind. Ct. App. 1992)).

29. *Id.* at 1089 (quoting *Deadwiler*, 603 N.E.2d at 1369).

30. *Id.* at 1088 (quoting *Tanner v. Penn. Thresherman & F.M.C. Ins. Co.*, 226 F.2d 498 (6th

In addressing the facts, the court concluded that the friend's vehicle "was being used as a favor or friendly accommodation, not to fulfill a legal or contractual obligation [that the insured] had."³¹ Consequently, the insured was not entitled to uninsured motorist coverage from his business's auto policy.³²

At first glance, one may view the court's ruling as too limited. However, the court focused upon the purpose of the "temporary substitute" vehicle clause, and concluded that more than allowing a car to be used as a "favor" was needed to meet the definition.³³

C. Court Concluded that Liability Coverage Was Not Excluded for Insured's Use of Prohibited Drugs

In *Keckler v. Meridian Security Insurance Co.*,³⁴ the court of appeals was asked to address whether insurance coverage was excluded for a driver's use of marijuana before an accident.³⁵ A young insured was traveling with three passengers inside his car.³⁶ The insured attempted to pass to the left of a stopped vehicle ahead of him which was yielding to oncoming traffic before making a left turn.³⁷ The insured crossed the center line and collided head-on with an oncoming truck, resulting in the death of two passengers and serious injuries to the third passenger in the insured's car and the truck driver.³⁸ The police investigated the crash and found a bag of marijuana in the insured's vehicle.³⁹ The insured tested positive for marijuana in his blood system and pled guilty to the charge of operating a vehicle with a controlled substance in his body resulting in serious bodily injury.⁴⁰

The decedents' estates and the other seriously injured passengers filed separate lawsuits against the insured.⁴¹ The insured possessed a primary insurance policy with one insurer and an umbrella insurance policy with a different insurance company.⁴² The umbrella insurer filed a declaratory judgment action and asserted it did not owe liability insurance coverage to the insured because of the following exclusion from the insured's policy:

The coverages provided by this policy do not apply to . . . "Bodily injury" . . . arising out of . . . [t]he use, sale, manufacture, delivery,

Cir. 1955)).

31. *Id.*

32. *Id.*

33. *Id.* at 1088-89.

34. 967 N.E.2d 18 (Ind. Ct. App.), *trans. denied*, 974 N.E.2d 475 (Ind. 2012).

35. *Id.* at 19-20.

36. *Id.* at 20.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*; see IND. CODE § 9-30-5-4(a)(2) (2013).

41. *Keckler*, 967 N.E.2d at 20.

42. *Id.*

transfer or possession by any person of a Controlled Substance(s) as defined by the Federal Food and Drug Law at 11 USCA Sections 811 and 812. Controlled substances include but are not limited to cocaine, LSD, marijuana and all narcotic drugs. However, this exclusion does not apply to the legitimate use of prescription drugs by a person following the orders of a licensed physician.⁴³

In the declaratory judgment action, one of the claimants filed a motion for summary judgment, which was joined by the other claimants, on the basis that the exclusion was not applicable.⁴⁴ The umbrella insurer filed a cross-motion and included an affidavit from a toxicologist.⁴⁵ The toxicologist offered the opinion that the hospital test results demonstrated that marijuana was in the insured's blood system, but the results could not reveal when the driver ingested the marijuana, or if the psychoactive effects from its use were present at the time of the accident.⁴⁶ The insurer argued that this testimony, along with the insured's guilty plea, satisfied the conditions of the exclusion by showing that the driver used marijuana at or near the time of the accident.⁴⁷

The trial court granted summary judgment to the insurer despite finding that the possession of marijuana by the driver was not shown to be the "efficient and predominating cause of the accident."⁴⁸ Instead, the trial court concluded that the public policy of Indiana did not require an insurer to cover "illicit drug use" by a driver involved in an accident.⁴⁹

On appeal, the entry of summary judgment was reversed as the court determined that the designated evidence did not establish, as a matter of law, that the driver's use of marijuana was "the efficient and predominating cause of" the injuries to the claimants.⁵⁰ The court noted that the toxicologist's testimony did not conclusively establish the driver's actions were caused by the impairing effects of marijuana.⁵¹ Likewise, the court found the insured's plea agreement to operating the vehicle while under the influence of a controlled substance was not conclusive because impairment to the driver is not required to meet the elements of the crime.⁵²

At first glance, it may appear that the court has rewritten the exclusionary clause's language by inserting a requirement that the insured be "impaired" from

43. *Id.* (first, third, and fourth alterations in original).

44. *Id.* at 21.

45. *Id.*

46. *Id.* The toxicologist explained that two types of THC exist in a person's blood stream after using marijuana. Carboxy THC is the metabolic form of THC that is not psychoactive, while THC is the ingredient that provides the psychoactive effects to the user. *Id.*

47. *Id.* at 23.

48. *Id.* at 22.

49. *Id.*

50. *Id.* at 23 (internal quotation marks omitted).

51. *Id.*

52. *Id.* at 24.

the use of the marijuana. However, because the exclusionary clause specifically states that coverage is excluded for the “personal injur[ies]” of the claimants “arising out of . . . [t]he use,” the court’s analysis correctly requires that the insurer demonstrate the insured’s impairment from the marijuana caused the claimants’ injuries.

D. Court Refused to Require Insured to File a Complaint Against Insurer Within Indiana’s Statute of Limitations for Personal Injury Actions

The case of *Auto-Owners Insurance Co. v. Benko*⁵³ addressed the applicability of a limitation of action clause within an insurance policy for an underinsured motorist claim.⁵⁴ The insured was involved in an accident with another motorist.⁵⁵ Shortly before the expiration of the two-year statute of limitations for a personal injury lawsuit,⁵⁶ the insured filed a lawsuit against the negligent driver involved in the accident.⁵⁷ After the expiration of the statute of limitations, the insurer for the negligent driver offered its policy limit to the insured.⁵⁸ The insured notified her own underinsured motorist insurance company of the offer and the insured’s intent to pursue an underinsured motorist claim.⁵⁹

The underinsured motorist insurance company filed a motion to intervene in the insured’s lawsuit and asserted a declaratory judgment complaint.⁶⁰ The insurer contended that no coverage was available because of the following policy provision, which required the insured to file a lawsuit against the insurance company within the applicable statute of limitations for personal injury lawsuits:

a. TIME LIMITATION FOR ACTIONS AGAINST US

Any person seeking Uninsured or Underinsured Motorist Coverage must:

- (1) present a claim for compensatory damages according to the terms and conditions of the policy; and
- (2) conform with any applicable statute of limitations applying to **bodily injury** claims in the state in which the accident occurred.⁶¹

The insurer contended that because the insured had not filed a lawsuit against the insurance company within Indiana’s two-year statute of limitations for personal injury actions, the insured’s claim was time-barred.⁶²

53. 964 N.E.2d 886 (Ind. Ct. App.), *trans. denied*, *Auto-Owners Ins. Co. v. Ewing*, 970 N.E.2d 665 (Ind. 2012).

54. *Id.* at 888.

55. *Id.* at 887-88.

56. IND. CODE § 27-7-5-4 (2013).

57. *Benko*, 964 N.E.2d at 888.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

The insured filed a motion for summary judgment, contending that the policy provision was unenforceable because it was vague and ambiguous as to whom an insured must bring a lawsuit against—the underinsured motorist or the insurance company.⁶³ The trial court granted the plaintiff’s motion, and an appeal ensued.⁶⁴

On appeal, summary judgment for the plaintiff was affirmed.⁶⁵ The court of appeals concluded the policy provision was ambiguous because “an ordinary policyholder” would interpret the provision to require the insured to bring a lawsuit against the tortfeasor, and not the insurer, within the statute of limitations.⁶⁶ The court noted that if it accepted the insurance company’s interpretation, then an insured would have to bring suit against the insurer on every personal injury claim within the two-year statute of limitations.⁶⁷

The court’s rejection of the insurance company’s interpretation of the provision is sound. An underinsured motorist insurer has no obligation to afford coverage to the insured until the tortfeasor’s policy limits have been tendered or awarded by a legal judgment. Thus, an insured should not be required to bring a lawsuit against the underinsured motorist insurer in every personal injury case to preserve his or her claim.

E. Court Could Not Rule, as a Matter of Law, on Son’s Residency to Determine Whether Son was Insured Under Mother’s Policy

A frequently litigated insurance issue focuses upon the residency of a potential insured, and whether coverage applies. *Omni Insurance Group v. Poage*⁶⁸ addresses this question with a son of divorced parents. The son was involved in an accident while driving his mother’s car with her permission.⁶⁹ The mother’s automobile insurance policy provided coverage to those persons operating her vehicle with permission, but expressly excluded coverage for any claims resulting from the use of a vehicle by “any resident, including a **family member**, of [the mother’s] household who is not listed in the Declarations page” of the policy.⁷⁰

When the mother filled out the policy application, she indicated there were no drivers greater than fourteen years of age living within her household.⁷¹ At the time of the accident, the mother and father shared joint custody of the son.⁷² The son believed that he had a residence at each parent’s home.⁷³ On the day of the

63. *Id.* at 888-89.

64. *Id.* at 889.

65. *Id.* at 891.

66. *Id.*

67. *Id.*

68. 966 N.E.2d 750 (Ind. Ct. App.), *trans. denied*, 974 N.E.2d 475 (Ind. 2012).

69. *Id.* at 752-53.

70. *Id.* at 752.

71. *Id.* at 753.

72. *Id.*

73. *Id.* at 752-53.

accident, the son had spent the night at his mother's residence.⁷⁴

The mother's automobile insurer denied the claim of liability insurance for the son, contending that coverage was excluded as the son was a resident of his mother's home, and he was not disclosed to the insurer before the accident.⁷⁵ The insurer filed a summary judgment action against mother, son, and the accident victims to determine that no coverage was owed.⁷⁶ The trial court granted summary judgment to the accident victims, concluding that the son was not a resident of the mother's home and was entitled to liability coverage under the mother's policy for the victims' personal injury lawsuit.⁷⁷

The issue presented to the appellate court was simple. If the son was a resident of the mother's house, then the insurer was entitled to summary judgment because it had not been advised of his residency, nor was it able to charge a premium for the risk associated with his driving.⁷⁸ If the son was not a resident of the mother's home, then he was entitled to insurance coverage as a "permissive" user of the mother's automobile.⁷⁹

The court looked at an earlier case addressing "residency" for the purpose of determining whether an individual qualified as an insured under a policy.⁸⁰ While recognizing that an individual could have "dual residency" for purposes of determining the applicability of insurance coverage, the court found a number of contested facts concerning the son's residency.⁸¹ Specifically, the court noted the joint custody arrangement of the parents and that the son had a bedroom at each parent's home.⁸² Additionally, the son's subjective intent was to have a home at both locations.⁸³ In contrast, the son also listed his father's address on his driver's license and received mail at his father's home.⁸⁴ As a result, the court found that questions of fact existed on the son's residency that prevented summary judgment from being granted to either party.⁸⁵

This case provides an excellent example of the fact-sensitive nature of insurance coverage cases. Here, there was a factual dispute about the residency of the son, such that the court could not determine, as a matter of law, where the son resided, or whether he had dual residency at both his mother's and father's homes.⁸⁶

74. *Id.*

75. *Id.* at 753.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 755-56 (citing *Ind. Farmers Mut. Ins. Co. v. Imel*, 817 N.E.2d 299, 304-05 (Ind. Ct. App. 2004)).

81. *Id.* at 756-57.

82. *Id.*

83. *Id.*

84. *Id.* at 752.

85. *Id.* at 757.

86. *Id.*

II. HOMEOWNERS INSURANCE CASES

A. Court Concluded That Insurer Was Bound by Appraisal Award, After Insurer Waived Requirements That Insured Follow Policy Conditions

In *Westfield National Insurance Co. v. Nako*,⁸⁷ an insured sustained a fire loss at a second home that she inherited from her mother.⁸⁸ The insured contended that she owned the house jointly with her brothers, but she was the only one who lived at the house and was the only named insured on the homeowners insurance policy.⁸⁹ After the insured submitted a claim, her homeowners insurance company investigated the loss.⁹⁰ The insurer estimated the fair market value of the damaged home, while the insured submitted a much higher replacement cost figure based on the cost to rebuild the home.⁹¹

Because the insured and insurer could not agree upon the appropriate figure owed to the insured for the damaged home, the insurance company filed a complaint for interpleader, alleging that because of the joint ownership of the home, the insurer was concerned that it might be subject to multiple claims.⁹² The insurer sought relief to deposit the proceeds for the fair market value of the home with the court,⁹³ which they never did.⁹⁴ The insured counterclaimed for breach of contract and breach of the duty of good faith by the insurance company.⁹⁵

The insured also filed a motion with the court to submit the dispute to the appraisal process.⁹⁶ Each side agreed to have the loss appraised and the court ordered the appraisal to occur.⁹⁷ One appraiser submitted his figure of the insured's damages on a fair market value basis, while the other appraiser submitted a replacement cost figure.⁹⁸ The umpire agreed to the replacement cost

87. 963 N.E.2d 1126 (Ind. Ct. App.) *trans. denied*, 968 N.E.2d 232 (Ind. 2012).

88. *Id.* at 1129.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 1130-31. The insurer later amended the complaint which sought to interplead a lesser figure as the fair market value. *Id.* at 1130.

94. *Id.*

95. *Id.*

96. *Id.* Under the appraisal process of a homeowners insurance policy, each side chooses an appraiser, and the appraisers will attempt to select an umpire by agreement. The appraisers and umpire will attempt to arrive at a figure representing the insured's loss. If at least two of the three individuals agree upon the loss figure, that figure will represent the insured's actual loss for purpose of the insurance claim. *Id.*

97. *Id.*

98. *Id.*

figure as the extent of the insured's loss.⁹⁹ As a result, the insured requested the trial court to enter a judgment for the replacement cost figure as the extent of the loss.¹⁰⁰

The insurance company opposed the insured's request and claimed that the court should enter judgment for the one appraiser's fair market value determination (even though it was not agreed upon by the umpire).¹⁰¹ The company argued that the insured failed to comply with policy conditions requiring notice to the insurer of an intent to rebuild the home and that the insured had not rebuilt the home as required by the policy to obtain replacement cost coverage.¹⁰² The trial court entered judgment for the insured for the replacement cost figure and concluded that the insurer had waived its ability to insist that the insured comply with the policy conditions in order to obtain the replacement cost coverage.¹⁰³

The insurance company appealed, and the appellate court affirmed the trial court.¹⁰⁴ The court concluded that the insurer waived its ability to enforce the policy conditions against the insured.¹⁰⁵ The court was very critical of the insurer for not paying the undisputed amount of loss (the fair market value) to the insured so that she could begin reconstruction of the home.¹⁰⁶

This case is informative in two ways. First, the insurance company should have paid the undisputed fair market value of the loss to the insured or to the court pursuant to the interpleader action. Its failure to do so may have led the court to conclude that it waived its policy provisions on the insured's claim for replacement cost coverage. Second, the insurance company apparently did not remind the insured that it was insisting upon compliance with, and not waiving, its policy requirements before the insured could recover the replacement cost coverage.

B. Court Concludes That Insureds Breached Policy's Cooperation Clause by Placing "Reasonableness" Limitations on Insurer's Investigation of Loss

The case of *Foster v. State Farm Fire & Casualty Co.*¹⁰⁷ provides an excellent example of the ability of an insurance company to require an insured to produce documentation and submit to an examination under oath as part of the insurance

99. *Id.* at 1130-31.

100. *Id.* at 1131.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 1133-34.

105. *Id.* at 1133.

106. *Id.* The court's criticism of the insurer may have been misplaced based upon the insurer's concerns of multiple claimants which prompted the insured to file the interpleader as opposed to paying the insured.

107. 674 F.3d 663 (7th Cir. 2012).

company's investigation of an insured's claim.¹⁰⁸ In that case, the insureds sustained a fire loss that severely damaged their home.¹⁰⁹ They submitted a claim to their insurance company, and the insurer began investigating the loss by requesting that the insureds provide documents and agree to interviews.¹¹⁰ During the initial interviews of the insureds, the insurer learned that the insureds were engaged in a number of businesses, had multiple bank accounts, and were involved in a number of different lawsuits.¹¹¹ After learning this information, the insurance company requested more information from the insureds, including bills and receipts associated with their business activities.¹¹²

The insurance company eventually determined that the fire was intentionally set and referred the case to its "Special Investigative Unit" for further investigation.¹¹³ The insurance company also reminded the insureds that its policy required them to submit a proof of loss which documented their damages.¹¹⁴ The insureds sought and received an extension of time to submit their proof of loss and to provide documentation.¹¹⁵ After the insureds sent in some of the required information, the insurance company requested that the insureds sit for "examination[s] under oath."¹¹⁶ The insureds engaged in multiple examinations which had to be continued, by agreement, based upon the fact that the insurance company had not received all of its requested information from the insureds.¹¹⁷

The insurance company sent multiple letters to the insureds requesting that they provide various documents concerning the financial condition of their businesses.¹¹⁸ The insureds placed a date limitation upon the insurance company to complete its investigation and to conduct the examinations under oath, based upon the fact that the insureds believed that they had a one-year policy limitation to bring suit against the insurance company.¹¹⁹ However, the insurance company rejected the limitations placed by the insureds and advised that the insureds had an additional year to bring their lawsuit against the insurance company based upon a newly enacted statute.¹²⁰ Just before the one-year anniversary of the fire

108. *Id.* at 664-65.

109. *Id.* at 664.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 665.

114. *Id.*

115. *Id.*

116. *Id.* An "examination under oath" is similar to a deposition but occurs before litigation is involved. The examination is authorized by the insurance policy.

117. *Id.* at 665-66.

118. *Id.* at 665.

119. *Id.* at 666, 670.

120. *Id.*; *see also* IND. CODE § 27-1-13-17(b) (2013) (stating that the minimum period an insurance company can provide for a limitation of action to bring suit against an insurer on a claim under a policy is two years).

loss, the insureds filed a lawsuit against the insurance company for breach of contract and a claim for breach of the duty of good faith.¹²¹

After removal of the action from state to federal court, the insurance company eventually moved for and received summary judgment.¹²² On appeal, the court concluded that the trial court properly granted summary judgment to the insurance company based upon the failure of the insureds to comply with policy conditions requiring certain documentation and examinations under oath.¹²³ Relying upon previous Indiana decisions,¹²⁴ the court concluded that the insureds could not impose “reasonableness” restrictions upon the insurance company in conducting its investigation.¹²⁵ The court found the insureds had failed to comply with the requirements of the insurance policy, and the insurance company had acted properly in insisting that the insureds produce the documents that were requested.¹²⁶

This case provides an excellent example of an insurance company’s ability to insist upon the cooperation of an insured in supplying of documents and sitting for examinations under oath when the insurance company is conducting an investigation of a loss. Failure of the insured to do so constitutes a breach of the policy conditions.

121. *Foster*, 674 F.3d at 666.

122. *Foster v. State Farm Fire & Cas. Co.*, No. 1:10-CV-20-TLS, 2011 WL 3610425, *19 (N.D. Ind. Aug. 17, 2011), *aff’d*, 674 F.3d 663 (7th Cir. 2012).

123. *Foster*, 674 F.3d at 671.

124. *Id.* at 668 (citing *Nat’l Athletic Sportswear, Inc. v. Westfield Ins. Co.*, 528 F.3d 508 (7th Cir. 2008); *Morris v. Econ. Fire & Cas. Co.*, 848 N.E.2d 663 (Ind. 2006)).

125. *Id.*

126. *Id.* at 670.