The Indiana Insurance Guaranty Association Act: More Problems than Protection

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I. Indiana Insurance Guaranty Association v. Kiner[1]

Although the Indiana Insurance Guaranty Association Law of 1971[2] has been in effect for 16 years, the first judicial decision construing the substantive provisions of the Act was not handed down until February 12, 1987. The lack of cases interpreting the Act is difficult to understand, considering the lack of clarity of many of its provisions.

In 1974, John L. Kiner, Jr., a minor, and his mother, Cassell Kiner, filed a lawsuit against the owners and operators of a taxicab company for injuries sustained by John Kiner, when he was struck by a cab. The Kiners obtained jury verdicts in their favor and, on March 24, 1982, the court entered judgment for $8,000.00 on the verdict in favor of John Kiner, and $2,000.00 on the verdict for his mother. The judgment defendant had liability insurance with Kenilworth Insurance Company in Chicago, Illinois. Several days after the Indiana trial court entered judgment in favor of the Kiners, an Illinois court declared Kenilworth Insurance Company insolvent and entered a liquidation order. Although the Kiners filed a claim in the liquidation proceeding pending in the state of Illinois, they did not receive any payments to satisfy their judgment. Thereafter, the Kiners applied to the Indiana Insurance Guaranty Association for payment of both judgments entered in their favor.[3]

The IIGA declined to pay the Kiners' $10,000.00 claim and argued that it was not obligated to pay the entire amount of both judgments. The IIGA asserted that its obligation was limited to the "reasonable medical and hospital expenses"[4] of John L. Kiner, Jr., as well as "any

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[1] 503 N.E.2d 923 (Ind. Ct. App. 1987).

[2] Ind. Code §§ 27-6-8-1 to -19 (1982 & Supp. 1987). Through the remainder of this article, the Indiana Insurance Guaranty Association will be referred to as the "IIGA," and the Indiana Insurance Guaranty Association Law of 1971 will be referred to as the "Act."

[3] *Kiner*, 503 N.E.2d 923.

[4] *Id.* at 924.

amounts actually lost by reason of his inability to work and earn wages."[5] The IIGA's position was based upon Indiana Code section 27-6-8-7(a)(i)(1) which states:

> In the case of claims arising from bodily injury, sickness, or disease, including death resulting therefrom, the amount for which the association shall be obligated shall not exceed the claimant's reasonable expenses incurred for necessary medical, surgical, X-ray and dental services, including prosthetic devices and necessary ambulance, hospital, professional nursing and funeral services, and any amounts actually lost by reason of claimant's inability to work and earn wages or salary or their equivalent that would otherwise have been earned in the normal course of such injured claimant's employment, to which may be added at the discretion of the association a sum not to exceed one thousand dollars [$1,000] for all other costs and expense incurred by the claimant prior to the insolvency.[6]

The IIGA filed a summary judgment motion asserting that its liability was limited by the provisions of Indiana Code section 27-6-8-7(a)(i)(1). In denying the IIGA's motion for summary judgment, the trial court interpreted the word "claims" in Indiana Code section 27-6-8-7(a)(i)(1) to mean only "unpaid claims" and decided that this section of the Act did not apply to a judgment. The court believed that the limitations on damages outlined in Indiana Code section 27-6-8-7(a)(i)(1) did not apply to the judgments which were previously entered by the trial court in the Kiners' tort action.[7] Thereafter, the court granted summary judgment on the Kiners' claims against the IIGA and found that the association was obligated to pay the full amount of the Kiners' two judgments totalling $10,000.00, plus costs.[8] The Indiana Court of Appeals reversed the trial court's grant of summary judgment in favor of the Kiners and against the IIGA, and held that a genuine issue of material fact existed concerning whether the Kiners "fall within the class of persons protected by the guaranty law."[9] In addition to holding

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[5] *Id.*

[6] Ind. Code § 27-6-8-7(a)(i)(1) (1982). It is not clear from the *Kiner* decision what evidence was presented at trial relating to John Kiner's medical and hospital expenses or lost wages. Additionally, it is uncertain what evidence was presented to support the jury's verdict of $2,000.00 in favor of John Kiner's mother. As a result, it is not possible from the decision to determine what amounts other than medical expenses and lost wages might have been included in the jury's verdict totaling $10,000.00.

[7] *Kiner*, 503 N.E.2d at 924-25.

[8] *Id.* at 925.

[9] *Id.*

that the Kiners failed to establish that they fall within the class of persons protected by the Act, the appellate court provided a substantial discussion clarifying the meaning and application of the limitations contained in Indiana Code section 27-6-8-7.[10]

A. The Kiners Failed to Establish Whether They Fall Within the Class of Persons Protected by the Act

The court of appeals reversed the trial court's judgment in favor of the Kiners, in part, upon a determination that a genuine issue of material fact existed concerning applicability of the Act to the Kiners. The court carefully pointed out that a claimant bears all responsibility for demonstrating that he falls within the class of persons intended to be afforded protection or coverage by an insurance guaranty act. A claimant must demonstrate both that he has met all requirements of the guaranty law and that he has complied with any conditions precedent to asserting a claim. As a prerequisite to claiming coverage under the Act, an individual must demonstrate that he has a "covered claim" within the meaning of Indiana Code section 27-6-8-4(4).[11]

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[10]*Id.*

[11]*Id.* A "covered claim" is defined as:

> (A)n unpaid claim or judgment which arises out of and is within the coverage and not in excess of the applicable limits of an insurance policy to which this chapter applies issued by an insurer, if the insurer becomes an insolvent insurer after the effective date (January 1, 1972) of this chapter and (a) the claimant or insured is a resident of this state at the time of the insured event or (b) the property from which the claim arises is permanently located in this state. "Covered claim" shall be limited as provided in section 7 [27-6-8-7] of this chapter, and shall not include (1) any amount due any reinsurer, insurer, insurance pool, or underwriting association, as subrogation recoveries or otherwise; provided, that a claim for any such amount, asserted against a person insured under a policy issued by an insurer which has become an insolvent insurer, which if it were not a claim by or for the benefit of a reinsurer, insurer, insurance pool or underwriting association, would be a "covered claim" may be filed directly with the receiver or liquidator of the insolvent insurer, but in no event may any such claim be asserted in any legal action against the insured of such insolvent insurer; nor (2) any supplementary obligation including but not limited to adjustment fees and expenses, attorney fees and expenses, court costs, interest and bond premiums, whether arising as a policy benefit or otherwise, prior to the appointment of a liquidator; nor (3) any unpaid claim or judgment not filed timely or properly in the liquidation proceedings in accordance with the provisions of IC 27-1-4 [repealed] if the insolvent insurer is a domestic insurer or in accordance with the applicable provisions of the law of the state of domicile if the insolvent insurer is not a domestic insurer. All covered claims filed timely and properly in the liquidation proceedings shall be referred immediately to the association by the liquidator for processing as provided in this chapter.

IND. CODE § 27-6-8-4(4) (1982).

The definition of "covered claim" contains mandatory requirements which must be established by the claimant as a prerequisite of the assertion of any such claim. Additionally, the definition contains exclusionary language which specifically eliminates certain claims which would otherwise be covered but for the exclusionary language contained in the definition.[12]

The court of appeals in *Kiner* held that the Kiners failed to establish that the judgment which they obtained against the cab company "was within the coverage and not in excess of the applicable limits of the Kenilworth insurance policy; that the Kenilworth insurance policy was one to which this chapter applies; nor that the claimant or the insured was a resident of Indiana at the time of the accident."[13] Moreover, Indiana Code section 27-6-8-11 requires a claimant to exhaust his rights against all other applicable guaranty associations or insurance policies before asserting his claims against the IIGA. Any recoveries from other applicable insurance policies or guaranty associations shall be applied as a setoff or reduction to any amounts ultimately recovered from the IIGA.[14] The court of appeals held that the Kiners failed to demonstrate that they had exhausted their rights to recover from other guaranty associations or applicable insurance policies as required by Indiana Code section 27-6-8-11.[15]

B. All Covered Claims Under the Act are Limited by All Provisions of Indiana Code Section 27-6-8-7

The court of appeals decision in *Kiner* clarifies the applicability of the limitations outlined in Indiana Code section 27-6-8-7. The IIGA

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[12]Ind. Code § 27-6-8-4(4) (1982).

[13]*Kiner*, 503 N.E.2d at 925 (footnote omitted from quotation).

[14]Ind. Code § 27-6-8-11 (1982) provides:

(a) Any person having a claim against an insurer under any provision in an insurance policy other than a policy of an insolvent insurer which is also a covered claim, shall be required to exhaust first his right under the policy. Any amount payable on a covered claim under this chapter shall be reduced by the amount of recovery under the insurance policy.

(b) Any person having a claim which may be recovered under more than one [1] insurance guaranty association or its equivalent shall seek recovery first from the association of the place of residence of the insured except that if it is a first party claim for damage to property with a permanent location, he shall seek recovery first from the association of the location of the property, and if it is a workmen's compensation claim, he shall seek recovery first from the association of the residence of the claimant. Any recovery under this chapter shall be reduced by the amount of recovery from any other insurance guaranty association or its equivalent. [IC 27-6-8-11, as added by Acts 1971, P.L. 390, § 1.]

[15]*Kiner*, 503 N.E.2d at 925-26.

claimed that regardless of the amount of the verdicts rendered by the jury in the trial court, the IIGA's liability to the Kiners was limited to John Kiner's reasonable medical and hospital expenses and lost income pursuant to Indiana Code section 27-6-8-7(a)(i)(1).[16] The trial court determined that the limitations outlined in Indiana Code section 27-6-8-7(a)(i)(1) applied only to "unpaid claims" asserted against the IIGA and were not applicable to the judgments entered in favor of Mrs. Kiner and her son, John. The court of appeals determined that Indiana Code section 27-6-8-7(a)(i)(1) applies equally to unpaid claims as well as judgments, and held that "[*a*]*ll* covered claims are limited by *all* of section 7."[17] The court reasoned that the definition of a "covered claim" specifically states that covered claims are limited as provided in Indiana Code section 27-6-8-7. The court held that "the plain meaning of this provision is that a covered claim is limited by *all* of section 7. The provision does *not* state that judgments are exempt from this limitation. Nor does any other provision of the Guaranty Law."[18]

The court emphasized that its holding on this issue is consistent with the insurance guaranty laws of other states and that other jurisdictions do not treat judgments any differently than they do unpaid claims.[19] Thus, the limitations outlined in Indiana Code section 27-6-8-7 apply equally to all claims which meet the definition of a "covered claim" as outlined by Indiana Code section 27-6-8-4(4), whether such claim arises through a judgment or otherwise. As the court held in *Kiner*:

> Even if the Kiners are able to show that they fall within the class of persons protected by the statute, their recovery from the Association is limited to John Kiner's reasonable medical and hospital expenses and any amounts actually lost by reason of his inability to work and earn wages.[20]

II. The IIGA—A General Overview

All fifty states and the District of Columbia have enacted some form of a property/casualty guaranty association act.[21] The majority

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[16]*Id.* at 928. *See supra* text accompanying note 6.

[17]503 N.E.2d at 927 (emphasis in original).

[18]*Id.* (emphasis in original).

[19]*Id.* The court discussed two cases from Illinois and one Florida decision relating to the guaranty laws of those states. *See* Florida Ins. Guar. Ass'n v. Dolan, 355 So.2d 141 (Fla. App. 1978); Nianick v. Edgewater Beach Hotel, 28 Ill. App. 3d 33, 328 N.E.2d 82 (1975); Lucas v. Illinois Guaranty Fund, 52 Ill. App. 3d 237, 10 Ill. Dec. 81, 367 N.E.2d 469 (1977).

[20]503 N.E.2d at 928.

[21]Ala. Code § 27-42-1 to -20 (1986); Alaska Stat. § 21.80.010 to .190 (1984 &

of guaranty associations laws were enacted during the early 1970's in response to growing concern over the financial failure of insurance companies, and their resulting inability to discharge defense[22] and indemnity[23] obligations to their policyholders.

The Indiana Insurance Guaranty Association Law was enacted in 1971.[24] The IIGA is comprised of all persons[25] who are duly authorized

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Supp. 1987); Ariz. Rev. Stat. Ann. § 20-661 to -680 (West 1975 & Supp. 1986); Ark. Code § 23-90-101 to -123 (1987); Cal. Ins. Code § 1063 to 1063.14 (West 1972 & Supp. 1987); Colo. Rev. Stat. § 10-4-501 to -502 (1973 & Supp. 1986); Conn. Gen. Stat. Ann. § 38-273 to -289 (West 1987); Del. Code Ann. tit. 18, § 4201 to 4221 (1974 & Supp. 1986); D.C. Code Ann. § 35-1901 to -1917 (1981); Fla. Stat. Ann. § 631.50 to .70 (West 1984 & Supp. 1987); Ga. Code Ann. § 33-36-1 to -18 (1982 & Supp. 1987); Haw. Rev. Stat. § 431D-1 to -18 (1985); Idaho Code § 41-3601 to -3621 (1977 & Supp. 1987); Ill. Ann. Stat. ch. 73, para. 1065.82 to .103 (Smith-Hurd Supp. 1987); Ind. Code § 27-6-8-1 to -19 (1982 & Supp. 1987); Iowa Code Ann. § 515B.1 to .18 (Supp. 1987); Kan. Stat. Ann.§ 40-2901 to -2919 (1981); Ky. Rev. Stat. Ann. § 304-36-010 to 170 (Michie Bobbs-Merrill 1981 & Supp. 1986); La. Rev. Stat. Ann. § 22:1375 to -94 (West 1978 & Supp. 1987); Me. Rev. Stat. Ann. 24-A, § 4431-51 (1964 & Supp. 1986); Md. Ins. Code Ann. 48A-501 to -519 (1986 & Supp. 1987); Mass. Gen. Laws Ann. Ch. 175D, § 1-16 (West 1987); Mich. Comp. Laws Ann. § 500.7901 to .7949 (West 1983 & Supp. 1987); Minn. Stat. Ann. § 60C.01 to .20 (West 1986); Miss. Code Ann. § 83-23-101 to -137 (1972 & Supp. 1987); Mo. Ann. Stat. § 375.785 (Vernon Supp. 1987); Mont. Code Ann. § 33-10-101 to -117 (1987); Neb. Rev. Stat. § 44-2401 to -2418 (1984); Nev. Rev. Stat. § 687A.010 to .160 (1985); N.H. Rev. Stat. Ann. § 404-B:1 to :18 (1983); N.J. Stat. Ann. § 17:30A-1 to -20 (West 1985); N.M. Stat. Ann. § 59A-43-1 to -18 (1984); N.Y. Ins. Law § 7601 to 764 (McKinney 1985 & Supp. 1987); N.C. Gen. Stat. § 58-155.41 to .60 (1982 & Supp. 1987); N.D. Cent. Code § 26.1-42-01 to -15 (Supp. 1987); Ohio Rev. Code Ann. § 3955.01 to .21 (Anderson 1971 & Supp. 1986); Okla. Stat. tit. 36, § 2001 to 2020 (Supp. 1987); Or. Rev. Stat. § 734.510 to .710 (1985); Pa. Stat. Ann. tit. 40. § 1701.101 to .605 (Purdon 1971 & Supp. 1987); R.I. Gen. Laws § 27-34-1 to -18 (1979 & Supp. 1987); S.C. Code Ann. § 38-19-10 to -180 (Law Co-op. 1976 & Supp. 1986); S.D. Codified Laws Ann. § 58-29A-1 to -53 (1978 & Supp. 1987); Tenn. Code Ann. § 56-12-101 to -119 (1980 & Supp. 1987); Tex. Ins. Code Ann. §§ 21.28-C to -22 (Vernon 1981 & Supp. 1987); Utah Code Ann. § 31A-28-201 to -220 (1986); Vt. Stat. Ann. tit. 8, § 3611 to 3626 (1984); Va. Code Ann. § 38.2-1600 to - 1623 (1986 & Supp. 1987); Wash. Rev. Code Ann. § 48.32.010 to .930 (1984); W. Va. Code § 33-26-1 to -18 (1982 & Supp. 1987); Wis. Stat. Ann. § 646.01 to .73 (West 1980 & Supp. 1987); Wyo. Stat. § 26-31-101 to -117 (1977).

[22]Most liability policies contain a provision obligating the insurance company to provide a defense to the insured for any claim or suit covered by the policy. *See, e.g.*, Cincinnati Insurance Co. v. Mallon, 409 N.E.2d 1100 (Ind. Ct. App. 1980).

[23]The duty to indemnify can arise in either the first-party or third-party context. In the first-party context (*i.e.*, fire insurance, uninsured motorist), the insurer agrees to indemnify the insured for any injury or damage suffered by the insured. In the third-party context (*i.e.*, automobile liability coverage), the insurer agrees to indemnify the insured for any sums which the insured is legally obligated to pay another person (the third-party claimant) as a result of the insured's conduct or lack thereof.

[24]Ind. Code § 27-6-8-1 to -19 (1982 & Supp. 1987).

[25]Ind. Code § 27-6-8-4(8) (1982) defines "person" to mean "an individual, cor-

to transact certain types of insurance[26] in Indiana. Upon the insolvency of any member insurer, the IIGA stands in the shoes of the insolvent insurer, subject to all rights, duties and obligations of the insolvent insurer's policy as modified by certain terms and conditions of the Act.[27] Any costs incurred by the IIGA in defending any insured under a liability policy, all payment of "covered claims" by IIGA to any insured or third-party claimant, together with all administration costs are reimbursed by the remaining solvent member insurers through a periodic assessment.[28]

The purpose of the Act was expressed by the legislature as follows:

> The purpose of this chapter is to provide a mechanism for the payment of claims under certain insurance policies to avoid excessive delay in payment and to avoid excessive financial loss to claimants or policyholders because of the insolvency of an insurer, to assist in the detection and prevention of insurer insolvencies, and to provide an association to assess the cost of this protection among insurers.[29]

Despite this stated purpose, the Indiana Legislature has enacted one of the most restrictive guaranty association acts in the country, both from the standpoint of policyholder and third-party claimant protection.

A. IIGA's Limit of Liability

Indiana and Colorado stand alone as having the most restrictive liability limit provisions in their respective guaranty association laws. Both statutes provide that the guaranty association's maximum liability per claim is the lesser of: (1) the policy limits of the insolvent insurer; or (2) the sum of $50,000.00 less $100.00 statutory deductible.[30]

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poration, partnership, reciprocal or inter-insurance exchange, association or voluntary organization."

[26]Ind. Code § 27-6-8-3 (1982) restricts the scope of the Act "to all kinds of direct insurance except life, title, surety, disability, accident and sickness, health care, credit, mortgage guaranty, and ocean marine insurance." Ind. Code § 27-6-8-4(6) (1982) further excludes from the Act "farmers mutual insurance companies organized and operating pursuant to I.C. § 27-5 other than I.C. § 27-5-3 and I.C. § 27-5-4-2." "Direct insurance" has been defined by one court as "an insurance contract between the insured and the insurer which has accepted the risk of a designated loss to such insured, which relationship is direct and uninterrupted by the presence of another insurer." Zinke-Smith, Inc. v. Florida Ins. Guar. Ass'n, Inc., 304 So.2d 507, 508 (Fla. App. 1974).

[27]Ind. Code § 27-6-8-7(a)(iii) (1982).

[28]Ind. Code § 27-6-8-7(a)(ii) (1982).

[29]Ind. Code § 27-6-8-2 (1982).

[30]Colo. Rev. Stat. § 10-4-508(1)(a) (1973); Ind. Code § 27-6-8-7(a)(i) (1982).

A review of the limits of liability language contained in other jurisdictions' property/casualty guaranty association acts reveals that one jurisdiction has limits of $1,000,000.00 per claim;[31] one jurisdiction has limits of $500,000.00 per claim;[32] thirty-two jurisdictions have limits of $300,000.00 per claim;[33] four jurisdictions have limits of $150,000.00 per claim;[34] seven jurisdictions have limits of $100,000.00 per claim;[35] and two jurisdictions limit the association's liability solely to the limits contained in the policy of the insolvent insurance company.[36]

In addition to this low "per claim" limit of liability, the Indiana Act expressly provides that the association's liability is limited to $100,000.00 for all claims arising out of a single occurrence.[37] Thus, Indiana's "per occurrence" limit of liability is substantially less than the majority of other jurisdictions' "per claim" limits of liability. This

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[31]R.I. Gen. Laws § 27-34-6 (1979 & Supp. 1987).

[32]Cal. Ins. Code § 1063.1(c)(6) (West 1972 & Supp. 1987).

[33]Alaska Stat. § 21.80.060(a)(1) (1987); Ark. Code § 23-90-101 to -123 (1987); Conn. Gen. Stat. Ann. § 38-278(1)(a)(ii) (West 1987); Del. Code Ann. tit. 18, § 4208(a)(1) (1975); D.C. Code Ann. § 35-1906(a)(1) (1981); Fla. Stat. Ann. § 631.57(1)(a)(3) (West 1984); Hawaii Rev. Stat. § 431D-8(a)(1) (1985); Idaho Code § 41-3608(1)(a) (1977 & Supp. 1987); Iowa Code Ann. § 515B.5(1)(a) (Supp. 1987); Kan. Stat. Ann. § 40-2906(a)(1) (1981); Me. Rev. Stat. Ann. tit. 24-A, § 4438(1)(a) (1964 & Supp. 1986); Md. Ann. Code art. 48A, § 508(a)(1) (1986 & Supp. 1987); Mass. Gen. Laws Ann. ch. 175D, § 5(1)(a) (West 1987); Minn. Stat. Ann. § 60C.09(2) (West 1986); Miss. Code Ann. § 83-23-115(1)(a) (1973); Mo. Ann. Stat. § 375.785(4)(a) (Vernon Supp. 1987); Mont. Code Ann. § 33-10-105(1)(a) (1987); Neb. Rev. Stat. § 44-2406(1) (1984); Nev. Rev. Stat. § 687A.060(1)(a) (1985); N.H. Rev. Stat. Ann. § 404-B:8(1)(a) (1983); N.D. Cent. Code § 26.1-42-05(1)(a) (1960 & Supp. 1987); Ohio Rev. Code Ann. § 3955.01(B)(1) (Anderson 1971 & Supp. 1986); Or. Rev. Stat. § 734.570(1) (1977); Pa. Stat. Ann. tit. 40, § 1701.201(b)(1)(i) (1971); S.C. Code Ann. § 38-19-60(1)(a) (Law. Co-op. 1985); S.D. Codified Laws Ann. § 58-29A-16 (1978); Utah Code Ann. § 31A-28-207(1)(a) (1974); Vt. Stat. Ann. tit. 8 § 3615(a)(1) (1984); Va. Code Ann. § 38.2-1606(A)(1)(ii) (1986 & Supp. 1987); Wash. Rev. Code Ann. § 48.32.060(1)(a) (1984); W. Va. Code § 33-26-8(1)(a) (1982 & Supp. 1987); Wis. Stat. Ann. § 646.31(4) (West 1980 & Supp. 1987).

[34]Ala. Code § 27-42-8(a)(1) (1986); Ill. Ann. Stat. ch. 73, § 1065.87-2 (Smith-Hurd 1965 & Supp. 1987); La. Rev. Stat. Ann. § 22:1382(1)(a) (West 1978 & Supp. 1987); Okla Stat. Ann. tit. 36, § 2007(A)(1)(c) (West 1976 & Supp. 1987).

[35]Ariz. Rev. Stat. Ann. § 20-664(A)(1) (1975); Ga. Code Ann. § 33-36-3(2)(E); Ky. Rev. Stat. Ann. § 304.36-080(1)(a) (Michie/Bobbs-Merrill 1981 & Supp. 1986); N.M. Stat. Ann. § 59A-43-4(C) (1984); Tenn. Code Ann. § 56-12-107(a)(1) (1980); Tex. Ins. Code Ann. § 21.28-C(5)(2) (West Supp. 1987); Wyo. Stat. § 26-31-106(a)(i) (1983).

[36]Mich. Comp. Laws Ann. § 500.7925(c)(4) (West 1983); N.Y. Ins. Law § 7608(c) (McKinney 1985 & Supp. 1987).

[37]Ind. Code § 27-6-8-7(a)(1) (1982) provides that "in no event shall the association be obligated to a policy holder or claimant in an amount in excess of the applicable limits provided in the policy from which the claim arises; nor shall the association be obligated in an amount in excess of One Hundred Thousand Dollars [$100,000] for all claims arising out of a single occurrence . . . ."

disparity raises numerous questions concerning Indiana's commitment to providing fair and reasonable compensation to policyholders and third-party claimants upon the insolvency of an insurance company.

1. Property Damage Claims.—Property damage claims under the Act can arise in both first and third party contexts.[38] In the third-party context, the per claim and per occurrence limits of liability should not raise significant concern over the adequacy of compensation to property damage victims. On those occasions where the IIGA's limits are insufficient to fully compensate the property damage suffered, the injured party should have access to additional coverage under his own policy of insurance.[39] In fact, the property damage victim in most instances will have an affirmative duty under the Act to initially exhaust the coverage available under his own policy of insurance as a condition precedent to his right to pursue a claim against the IIGA.[40]

A more immediate concern over the IIGA's ability to fully compensate insured policyholders arises in the first party context, particularly in claims involving the destruction of residences and businesses by accidental fire or other means. Homeowner's and multi-peril commercial insurance would fall within the category of direct insurance subject to the Act.[41] If a homeowner's fire insurer was insolvent at the time that an accidental fire destroys the home, the $49,900.00 limit of liability under the Indiana Act may be insufficient to repay the equity in the home. This could be particularly ruinous to the typical class of homeowners (the elderly and retired) who have built up the most equity in their homes.

Of equal concern would be the potential financial impact upon the mortgage company who will be named in most instances as an additional insured in the homeowner's policy under the standard mortgage clause. Under Indiana law, the standard mortgage clause contained in the homeowner's policy would be construed to create a separate policy of

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[38]In the first-party context, the IIGA would take the place of the injured party's insolvent carrier for purposes of compensating the injured party's property damage. In the third-party context, the IIGA would take the place of the third-party tortfeasor's insolvent carrier for purposes of defending and indemnifying the tortfeasor for liability arising out of damage to the injured party's property.

[39]For example, in those rare automobile property damage cases exceeding $49,900.00, the automobile owner should have available to him collision or comprehensive coverage in his own automobile insurance policy. Additionally, in those cases involving property damage to homes, businesses, and inventory or contents, the property owner should have his own homeowner's or multi-peril business insurance policy to provide additional coverage.

[40]*See infra* text accompanying notes 140-81.

[41]IND. CODE § 27-6-8-3 (1982). In *Hardester v. Eubanks*, 731 S.W.2d 780 (Ark. 1987), a fire insurance policy was considered a "covered claim" under language similar to Indiana's act.

insurance for the benefit of the mortgage company.[42] Thus, the mortgage company should have a separate claim under the Act, with protection to a maximum of $49,900.00. Unless the mortgage company has also insured its interest in the property under another policy, the money recovered from the IIGA could be insufficient to cover the existing mortgage debt. Under these circumstances, the homeowner could be faced with a foreclosure action initiated by the mortgage company, as well as the possibility of a deficiency judgment.

This prospect is even more alarming in the context of an accidental fire destroying a business whose insurance company becomes insolvent. Most businesses purchase comprehensive insurance covering the building, the contents, and also insuring against business interruption or lost profits. If it is assumed that property damage to the building, contents and lost profits constitute three separate claims under the Act,[43] the $100,000.00 per occurrence limitation would be applicable.[44] Even in the "mom and pop" operation, it is not hard to imagine the situation where the IIGA's $100,000.00 limit would not cover the equity in the business' structure, contents, and any profits which were necessarily lost during reconstruction.

This problem of inadequate compensation would be equally applicable to a financial institution holding a mortgage on the business' building. To the extent that the mortgage holder has not insured its interest under another policy, its maximum recovery of $49,900.00 from the IIGA could be insufficient to satisfy the outstanding mortgage debt. Once again, it is not hard to imagine the scenario of the business owner facing a foreclosure action by the mortgage company, along with the prospects of a deficiency judgment.

2. Bodily Injury Claims.—Under Indiana law, recoverable damages in a personal injury action include: (1) the reasonable expense of necessary past and future medical care, treatment and services;[45] (2) the permanency of the injuries suffered;[46] (3) past and future physical pain and suffering;[47] (4) past and future mental pain, suffering and

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[42]Federal Nat. Mtg. Ass'n v. Great American Ins. Co., 300 N.E.2d 117, 119 (Ind. App. 1973).

[43]In this, and many other contexts, an issue will arise as to how many "claims" are being presented against the IIGA. Under the assumed facts, the insured has purchased three separate coverages, and has paid a premium for each separate coverage applicable to the building, contents, and lost profits. Thus, the assumption is made that three separate claims arose out of the same fire, thereby triggering the per occurrence limits of the Act.

[44]Ind. Code § 27-6-8-7(a)(i) (1982).

[45]Kavanagh v. Butorac, 140 Ind. App. 139, 144, 221 N.E.2d 824, 828 (1966).

[46]Town of Elkhart v. Ritter, 66 Ind. 136, 141 (1879); Giles v. Fortune, 156 Ind. App. 664, 667-68, 298 N.E.2d 34, 36 (1973).

[47]City of Evansville v. Rinehart, 142 Ind. App. 164, 170, 233 N.E.2d 495, 499 (1968); *Giles* 156 Ind. App. at 667-8, 298 N.E.2d at 36.

anguish;[48] (5) the aggravation of a previous injury, disease or condition;[49] (6) disfigurement and/or deformity resulting from the injuries;[50] (7) the value of lost wages or earnings;[51] and (8) loss of future earning capacity.[52] Indiana is one of only four states which preclude an injured party from recovering a majority of the damages identified above.[53]

Only Missouri,[54] Nebraska,[55] and Tennessee[56] contain similar restrictions in their respective guaranty association acts. These states'

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[48]Posey County v. Chamness, 438 N.E.2d 1041, 1050 (Ind. Ct. App. 1982).

[49]Dunkelbarger Const. Co. v. Watts, 488 N.E.2d 355, 358 (Ind. Ct. App. 1986); Johnson v. Bender, 174 Ind. App. 638, 644-45, 369 N.E.2d 936, 940 (1977).

[50]New York, C. & St. L. R.R. v. Henderson, 237 Ind. 456, 477, 146 N.E.2d 531, 543-44 (1957); Harrod v. Bisson, 48 Ind. App. 549, 560-61, 93 N.E. 1093, 1097 (1911).

[51]Reith-Riley Const. Co. v. McCarrell, 163 Ind. App. 613, 618, 325 N.E.2d 844, 848 (1975).

[52]State v. Totty, 423 N.E.2d 637, 646 (Ind. Ct. App. 1981); Duchane v. Johnson, 400 N.E.2d 193, 196 (Ind. Ct. App. 1980); *Reith-Riley*, 103 Ind. App. at 618, 325 N.E.2d at 848.

[53]*See infra* notes 54-57 and accompanying text.

> In the case of claims arising from bodily injury, sickness, or disease, including death resulting therefrom, the amount for which the association shall be obligated shall not exceed the claimant's reasonable expenses incurred for necessary medical, surgical, X-ray and dental services, including prosthetic devices and necessary ambulance, hospital, professional nursing and funeral services, and any amounts actually lost by reason of claimant's inability to work and earn wages or salary or their equivalent that would otherwise have been earned in the normal course of such injured claimant's employment, to which may be added at the discretion of the association a sum not to exceed one thousand dollars [$1,000] for all other costs and expense incurred by the claimant prior to the insolvency. In the case of a claim for wrongful death, the foregoing obligation of the association shall be subject to the limitations provided by the wrongful death statutes of the state of Indiana. Such amounts which are legally payable because of the death of a claimant shall be paid to his estate, or father or mother or guardian or to the surviving spouse or children or next of kin as set out in IC 34-1-1-2 and IC 34-1-1-8. The amount for which the association shall be obligated may also include payments in fact made to others, not members of claimant's household, which were reasonably incurred to obtain from such other persons ordinary and necessary services for the production of income in lieu of those services the claimant would have performed for himself had he not been injured.

IND. CODE § 27-6-8-7(a)(i)(1) (1982).

[54]MO. ANN. STAT. § 375.785(4)(1)(a)b (1972) provides:

> In the case of claims arising from bodily injury, sickness or disease, the amount of any such award shall not exceed the claimant's reasonable expenses incurred for necessary medical, surgical, x-ray, dental services and comparable services for individuals who, in the exercise of their constitutional rights, rely on spiritual means alone for healing in accordance with the tenets and practice of a recognized church or religious denomination by a duly accredited practitioner thereof, including prosthetic devices and necessary ambulance, hospital, professional nursing, and any amounts lost or to be lost by reason of claimant's inability to

guaranty association acts, however, provide for a much higher limit of liability[57] than does Indiana's Act.

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work and earn wages or salary or their equivalent, except that the association shall pay the full amount of any covered claim arising out of a workers' compensation policy. Such award may also include payments in fact made to others, not members of claimant's household, which were reasonably incurred to obtain from such other persons ordinary and necessary services for the production of income in lieu of those services the claimant would have performed for himself had he not been injured. Verdicts as respects only those civil actions as may be brought to recover damages as provided in this subsection shall specifically set out the sums applicable to each item in this subsection for which an award may be made.

[55]Neb. Rev. Stat. § 44-2406(3) (Supp. 1986) provides:

In the case of claims arising from bodily injury, sickness or disease, including death resulting therefrom, the amount of any such award shall not exceed the claimant's reasonable expenses incurred for necessary medical, surgical, X-ray, and dental services, including prosthetic devices and necessary ambulance, hospital, professional nursing, and funeral services, and any amounts actually lost by reason of claimant's inability to work and earn wages or salary or their equivalent, but not other income, that would otherwise have been earned in the normal course of such injured claimant's employment. Such award may also include payments in fact made to others, not members of claimant's household, which were reasonably incurred to obtain from such other persons ordinary and necessary services for the production of income in lieu of those services the claimant would have performed for himself or herself had he or she not been injured. The amount of any such award under this subsection shall be reduced by the amount the claimant is entitled to receive as the beneficiary under any health, accident, or disability insurance, or under any salary or wage continuation program under which he or she is entitled to benefits, or from his or her employer in the form of workers' compensation benefits, or any other such benefits to which the claimant is legally entitled, and any claimant who intentionally fails to correctly disclose his or her rights to any such benefits shall forfeit all rights which he or she may have by the provisions of the Nebraska Property and Liability Insurance Guaranty Association Act.

[56]Tenn. Code Ann. § 56-12-107(a)(1) (1980) provides:

In the case of claims other than workmen's compensation arising from bodily injury, sickness or disease, including death resulting therefrom, the amount for which the association shall be obligated shall not exceed the claimant's reasonable expenses incurred for necessary medical, surgical, X-ray and dental services, including prosthetic devices and necessary ambulance, hospital, professional nursing and funeral services, and any amounts actually lost by reason of claimant's inability to work and earn wages or salary or their equivalent that would otherwise have been earned in the normal course of such injured claimant's employment, to which may be added at the discretion of the association an additional sum as compensation for permanent physical impairment if said payment can be made within the policy limits.

[57]Missouri's act provides coverage of $300,000.00, less a $200.00 deductible. Mo. Ann. Stat. § 375.785(4)(1)(a) (1982). Nebraska's act provides coverage of $300,000.00. Neb. Rev. Stat. § 44-2406(1) (Supp. 1986). Tennessee's act provides coverage of $100,000.00, less a $100.00 deductible. Tenn. Code Ann. § 56-12-107(a)(1) (1980).

Even a cursory review of Indiana's Act reveals that the Act provides no coverage for some of the most devastating damages associated with personal injury. While under appropriate circumstances the Act would pay for a surgeon's medical bill to repair severe lacerations, the Act does not permit recovery of damages for the permanent scarring that the injured party will be required to live with for the rest of his life. While the Act may pay for a surgeon's bill to set a badly broken leg, it in no way provides any compensation for the fact that the injured party will walk with a limp for the rest of his life, and can no longer participate in physical activities from which he or she derived enjoyment prior to the accident. While the Act may pay for the services of a rehabilitative therapist, it in no way compensates the injured person for the severe agony and pain which was suffered during the accident, during rehabilitation, or which will be suffered in the future.

Of equal concern is the Indiana Act's $49,900.00 limit of liability, particularly in light of rising medical costs. Any type of serious personal injury can quickly result in the injured party incurring more than $49,900.00 in medical expenses. To the extent that the injured party does not have health insurance or any other type of collateral insurance, the IIGA's maximum liability of $49,900.00 may not satisfy the injured party's medical obligations, which could have been otherwise satisfied if the tortfeasor had higher bodily injury limits.

B. The IIGA's Limit of Liability is Applicable to Workmen's Compensation Claims

Indiana's Act joins the majority of other jurisdictions to provide coverage for claims against a workmen's compensation carrier which has become insolvent.[58] Of the forty-four jurisdictions whose guaranty association acts cover workmen's compensation insurance, thirty-seven of the jurisdictions include language in their statutes to the effect that the limitation of liability does not apply to workmen's compensation claims or that the guaranty association is required to pay the full amount of any covered claim arising out of a workmen's compensation policy.[59] Indiana is one of only seven jurisdictions whose limits of

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[58]The only states which exclude workmen's compensation claims from their property/casualty guaranty association acts are Arizona, Massachusetts, New Jersey, North Carolina, Pennsylvania, Washington, and West Virginia. Ariz. Rev. Stat. Ann. § 20-661(6) (West 1975); Mass. Gen. Laws Ann. ch. 175D § 2 (West 1987); N.J. Rev. Stat. Ann. § 17:30A-2(b) (West 1985); N.C. Gen. Stat. § 58-155.43 (1982); Pa. Stat. Ann. tit. 40 § 1701.103(3)(vii) (Purdon 1971); Wash. Rev. Code Ann. § 48.32.020 (West 1984); W. Va. Code § 33-26-3 (1982).

[59]Jurisdictions which specify that the full amount of any workmen's compensation

liability are applicable to any claim under a workmen's compensation policy.[60] Indiana's limit of liability of $49,900.00, however, is substantially lower than the limits of liability which would be applicable to workmen's compensation claims in the six other jurisdictions. Five jurisdictions provide coverage up to $300,000.00 for workmen's compensation claims,[61] while one jurisdiction provides that workmen's compensation payments cannot exceed policy limits.[62]

As previously noted, Indiana's Guaranty Association Act restricts recovery thereunder to medical expenses and lost income.[63] This re-

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claim shall be paid include Alabama, ALA. CODE § 27-42-8(1) (1986); Alaska, ALASKA STAT. § 21.80.060 (1984); California, CAL. INS. CODE § 1063.1(6) (West 1987); Colorado, COLO. REV. STAT. § 10-4-508(1)(a) (Supp. 1986); Connecticut, CONN. GEN. STAT. ANN. § 38-278(1)(a)(ii) (West 1987); Delaware, DEL. CODE ANN. tit. 18 § 4208(a)(1) (1975); the District of Columbia, D.C. CODE ANN. § 35-1906(a)(1) (1981); Florida, FLA. STAT. ANN. § 631.57(1)(a)(3) (West 1984); Georgia, GA. CODE ANN. § 33-36-3(2)(E) (Supp. 1987); Hawaii, HAW. REV. STAT. § 431D-8(a)(1) (1985); Idaho, IDAHO CODE § 41-3608(a) (Supp. 1987); Illinois, ILL. ANN. STAT. Ch. 73 § 1065-87-2 (Smith-Hurd Supp. 1987); Iowa, IOWA CODE ANN., 515 B.5(1)(a) (Supp. 1987); Kansas, KAN. STAT. ANN. § 40-2906(a)(1) (1981); Kentucky, KY. REV. STAT. ANN. § 304.36-080(1)(a) (Michie/Bobbs-Merrill 1981); Louisiana, LA. STAT. ANN. § 22:1382(1)(a) (Supp. 1987); Maine, ME. REV. STAT. ANN. tit. 24-A § 4438(1)(A) (Supp. 1987); Maryland, MD. INS. CODE ANN. art. 48A § 501-19; Michigan, MICH. COMP. LAWS ANN. § 500.7901-7949 (1983 & Supp. 1987); Minnesota, MINN. STAT. ANN. (1983 Supp. 1987) § 60C.09(2) (West 1986); Mississippi, MISS. CODE ANN. § 83-23-115(1)(a) (1972); Missouri, VERNON ANN. 375.785(4)(a) (Vernon Supp. 1987); Montana, MONT. CODE ANN. § 33-10-105(1)(a) (1987); Nebraska, NEB. REV. STAT. § 44-2406(1) (1984); New Hampshire, N.H. REV. STAT. ANN. § 404-B:8(1)(a) (1983); New Mexico, N.M. STAT ANN. § 21.28-C(5)(2) (West Supp. 1987); Oklahoma, OKLA. STAT. ANN. tit. 36 § 2007(A)(1)(a) (Supp. 1987); Oregon, OR. REV. STAT. § 734.570(1) (1985); Rhode Island, R.I. GEN. LAWS § 27-34-6 (Supp. 1987); South Carolina, S.C. CODE ANN. § 38-19-60(1)(a) (Law. Co-op. 1985); South Dakota, S.D. CODIFIED LAWS § 58-29A-16 (1978); Tennessee, TENN. CODE ANN. § 56-12-107(1) (Michie 1980); Texas, TEX. INS. CODE ANN. § 21.28-C(5)(2) (West Supp. 1987); Utah, UTAH CODE ANN. § 31A-28-207(1)(a) (1986); Vermont, VT. STAT. ANN. tit. 8 § 3615(a)(1) (1984); Virginia, VA. CODE ANN. § 38.2-1606(1)(i) (Supp. 1987); and Wyoming, WYO. STAT. § 26-31-106(a)(i)(A) (1977).

[60]Arkansas, ARK. CODE § 23-90-103 (1987); Indiana, IND. CODE § 27-6-8-3 (1982); Nevada, NEV. REV. STAT. § 687 A.033 (1985); New York, N.Y. INS. LAW § 7603(D) (McKinney 1985); North Dakota, N.D. CENT. CODE § 26.1-42-01 (Supp. 1987); Ohio, OHIO REV. CODE ANN. § 3955.01 (Anderson Supp. 1986); Wisconsin, WIS. STAT. ANN. § 646.01(1) (West Supp. 1987) are the only states whose limits of liability are applicable to any claims under a workmen's compensation policy.

[61]Arkansas, ARK. CODE § 23-90-103(2) (1987); Nevada, NEV. REV. STAT. § 687 A.060(1)(a) (1985); North Dakota, N.D. CENT. CODE § 26.1-42-05(1)(a) (Supp. 1987); Wisconsin, WIS. STAT. ANN. § 646.31(4) (West Supp. 1987) have a $300,000.00 limit of liability.

[62]New York, N.Y. INS. LAW § 7608(a) (McKinney 1985) and Ohio, OHIO REV. CODE ANN. 3955.08(A)(1) (Anderson Supp. 1986) provide that any payment for workmen's compensation cannot exceed the policy limits of the insolvent insurer.

[63]*See supra* note 45.

striction, together with the $49,900.00 limitation of liability applicable to workmen's compensation claims may create an irreconcilable conflict between the IIGA Act and the Indiana Workmen's Compensation Act.

The Indiana Workmen's Compensation Act was enacted in order to afford an expeditious remedy for work-induced injury or death which the worker or his dependents could pursue with a minimum of legal procedure.[64] In lieu of requiring the employee to successfully maintain a suit against the employer, the Act merely requires that the employee or his dependents demonstrate "personal injury or death by accident arising out of and in the course of employment."[65] In order to balance the effects of this "no-fault" legislation, the rights and remedies of the employee and dependents under the Workmen's Compensation Act constitute the exclusive remedy available against the employer.[66]

The Indiana Workmen's Compensation Act provides for certain mandatory benefits which must be awarded for a claim subject to the Act. These benefits include the payment of medical, surgical, hospital and nurse services,[67] temporary partial disability,[68] temporary total disability,[69] permanent impairment and/or disfigurement,[70] death benefits,[71] and burial expenses.[72] A comparison of the benefits available under the Indiana Workmen's Compensation Act and the IIGA Act reveals several inconsistencies that would arise in the event of a claim against the IIGA by virtue of a workmen's compensation insurer's insolvency.

First, as long as medical expenses are incurred within two years from the last day for which compensation was paid under an original award,[73] there is no limitation on the amount of medical expenses which an injured employee may be paid under the Workmen's Compensation Act.[74] By contrast, the IIGA Act precludes the recovery of medical expenses beyond the limit of liability of $49,900.00.[75]

Second, an award for "impairment" under the Indiana Workmen's Compensation Act strictly refers to the partial or total loss of function

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[64]*Thompson v. A.J. Thompson Stone Co.*, 81 Ind. App. 442, 144 N.E. 150 (1924).
[65]Ind. Code § 22-3-2-5 (Supp. 1987).
[66]Ind. Code § 22-3-2-6 (1982).
[67]*Id.* § 22-3-3-4.
[68]*Id.* § 22-3-3-9.
[69]*Id.* § 22-3-3-8.
[70]Ind. Code § 22-3-3-10 (Supp. 1987).
[71]Ind. Code §§ 22-3-3-16, -17 (1982 & Supp. 1987).
[72]Ind. Code § 22-3-3-21 (Supp. 1987).
[73]*Id.* § 22-3-3-27(c).
[74]*Id.* § 22-3-3-4.
[75]*Id.* § 27-6-8-7(a)(1) (1982).

of a part of the body or of the body as a whole, and not an impairment of wage earning powers.[76] By restricting recovery to medical expenses and lost income, the Act appears to preclude an injured employee's recovery of damages for impairment if the workmen's compensation carrier has become insolvent.[77]

As previously noted, an overwhelming majority of other jurisdictions, noting the restrictive nature of the Workmen's Compensation Act, have expressly provided that any limits of liability language in the Guaranty Association Act would not be applicable to a claim arising under a workmen's compensation act, and that the association would be required to satisfy in full any workmen's compensation claim.[78] It remains to be seen whether Indiana courts will permit the rights and remedies mandated under the Workmen's Compensation Act to be removed from coverage under the IIGA Act.

Of additional concern is the fact that the $49,900.00 limit of liability under the IIGA Act may in some circumstances be less than the amount which could be awarded under a workmen's compensation claim. Once again, the Indiana courts will presumably be required to determine whether the legislature can use the IIGA Act to place a lower limit of liability than that mandated by the Indiana Workmen's Compensation Act.

C. IIGA's Treatment of Subrogation Claims

The Act expressly requires any person having a claim against the IIGA to first exhaust his right under any other insurance policy providing coverage for a "covered claim."[79] In most instances, this ex-

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[76]White v. Woolery Stone Co., 181 Ind. App. 532, 396 N.E.2d 137 (1979); Perez v. United States Steel Corp., 172 Ind. App. 242, 359 N.E.2d 925 (1977); Runion v. Indiana Glass Co., 98 Ind. App. 453, 16 N.E.2d 961 (1938); Sumpter v. Colvin, 98 Ind. App. 453, 190 N.E. 66 (1934).

[77]The Missouri Court of Appeals creatively side-stepped this issue in the decision of Hankins Const. v. Missouri Ins. Guar. Ass'n., 724 S.W.2d 583 (Mo. App. 1986). The MIGA argued that an award for "permanent partial disability" was not a covered claim since the award was not directly traceable to either medical expenses or lost wages as required by the Missouri Act. The *Hankins* court, while recognizing that an award for permanent partial disability could be made even though an injury would have no affect upon the employee's earning capacity, nonetheless found that an award of permanent partial disability constituted "lost income" under the Missouri Act. The *Hankins* court further rejected the MIGA's suggestion that a separate hearing or judicial determination should be required in order to determine what amount of the permanent partial disability award was attributable to lost earnings. *Id.* at 588.

[78]*See supra* note 60.

[79]Ind. Code § 27-6-8-11(a) (1982) provides:

Any person having a claim against an insurer under any provision in an insurance

haustion requirement will result in the injured party pursuing a first-party claim against his uninsured motorist coverage.[80] The majority of uninsured motorist provisions contain express contractual language permitting the carrier, to the extent of payment, to become subrogated to the rights of the injured party against a third-party tortfeasor.[81]

The IIGA Act expressly provides that "any amount due any reinsurer, insurer, insurance pool, or underwriting association, as subrogation recoveries or otherwise" is not a "covered claim" under the Act.[82] Rather, the insurance company's only avenue through which to enforce its subrogation rights is to assert a claim as a creditor directly with the receiver or liquidator of the insolvent insurer.[83] Furthermore, the Indiana Act expressly precludes a solvent insurer from pursuing its subrogation rights against the insured of an insolvent insurer.[84]

1. Constitutionality.—Only five jurisdictions permit a subrogated insurance carrier to recover some, or all, of its subrogation claim against the guaranty association.[85] The remaining jurisdictions, similar

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> policy other than a policy of an insolvent insurer which is also a covered claim, shall be required to exhaust first his right under the policy. Any amount payable on a covered claim under this chapter shall be reduced by the amount of recovery under the insurance policy.

[80] *See infra* text accompanying notes 153-70.

[81] The policy or endorsement affording the coverage specified in this chapter may also provide that payment to any person of sums as damages under such coverage shall operate to subrogate the insurer to any cause of action in tort which such person may have against any other person or organization legally responsible for the bodily injury or death, or property damage, because of which such payment is made, and the insurer shall be subrogated to the extent of such payment, to the proceeds of any settlement or judgment that may later result from the exercise of any rights of recovery of such person against any person or organization legally responsible for said bodily injury or death, or property damage, for which payment is made by the insurer. Such insurer may enforce such rights in its own name or in the name of the person to whom payment has been made, as in their interest may appear, by proper action in any court of competent jurisdiction.

IND. CODE § 27-7-5-6 (Supp. 1987).

[82] IND. CODE § 27-6-8-4(4) (1982).

[83] [A] claim for any such amount [subrogation recovery or otherwise], asserted against a person insured under a policy issued by an insurer which has become an insolvent insurer, which if it were not a claim by or for the benefit of a reinsurer, insurer, insurance pool or underwriting association, would be a 'covered claim' may be filed directly with the receiver or liquidator of the insolvent insurer . . . .

Id.

[84] The Act states: "[I]n no event may any such claim [subrogation recovery or otherwise] be asserted in any legal action against the insured of such insolvent insurer . . . ." *Id.*

[85] California's Act provides that:

to Indiana, expressly exclude subrogation claims from the definition of "covered claims" under the guaranty association statute.

The constitutionality of such an exclusion was recently challenged in the decision of *California Union Insurance Co. v. Central National Insurance Co. of Omaha.*[86] In concluding that such an exclusion was constitutional, the California Court of Appeals noted:

> The Legislature chose to provide a limited form of protection for the public, not a fund for the protection of other insurance companies from the insolvencies of fellow members. In comments upon a similar provision, excluding from coverage the claims of other insurers by subrogation or otherwise, the drafters of the National Association of Insurance Commissioners Insurance Guaranty Association Model Bill stated, "the subcommittee does not feel that coverage should be extended to elements of the insurance industry which know or reasonably can be expected to know the financial condition of various companies." The Legislature's choice to provide coverage only to the original claimant under the policy is rational and constitutional.[87]

2. *Other Subrogation Rights or Liens.*—The Act carefully restricted the subrogation exclusion to "any reinsurer, insurer, insurance pool, or underwriting association."[88] Thus, other subrogation and lien provisions in federal[89] and state[90] statutes and regulations apparently

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> A member insurer may recover in subrogation from the association only one-half of any amount paid by such insurer under uninsured motorist coverage for bodily injury or wrongful death (and nothing for a payment for anything else), in those cases where the injured person insured by such an insurer has proceeded under his or her uninsured motorist coverage on the ground that the tortfeasor is uninsured as a result of the insolvency of his or her liability insurer . . . provided that such member insurer shall waive all rights of subrogation against such tortfeasor.

CAL. INS. CODE § 1063.2(c)(1) (West Supp. 1987). Georgia allows subrogation if the subrogation insurer has net worth of less than $3,000,000.00. GA. CODE ANN. § 3-36-3(2)(F) (Supp. 1987). Michigan permits subrogation if the net worth of the member insurer is less than 1/10 of 1 percent of aggregate premiums written by member insurers during the preceding calendar year. MICH. COMP. LAWS ANN. § 500.7925(3) (West 1983). Both New York and Wisconsin contain no language in their statutes prohibiting subrogation.

[86]117 Cal. App. 3d 729, 172 Cal. Rptr. 35 (1981).

[87]*Id.* at 734.

[88]IND. CODE § 27-6-8-4(4) (1982).

[89]*See, e.g.*, 42 U.S.C. § 1395(y)(b)(1) (1983) (subrogating the United States to the extent of any payments made under Medicare to the recipient's cause of action against any liable third party); 38 U.S.C. § 629 (1983) (subrogating the United States to the extent of any payment made to a veteran to the extent of the veteran's rights against a third-party tortfeasor); 5 U.S.C. § 8131 (1983) (subrogating the United States to the extent

were not intended to be included within the exclusion. Once again, it will be up to the Indiana courts to determine whether the federal government, state government and other private individuals may pursue subrogation claims under the IIGA for medical-related and wage benefits provided to injured parties.

3. *Subrogation Rights Against the Insured of the Insolvent Insurer.*—Finally, Indiana's Act expressly precludes an insurer from enforcing its subrogation rights directly against an insured of an insolvent insurance company.[91] Other jurisdictions have reached a similar conclusion, either through express statutory language in the Guaranty Association Act[92] or by judicial fiat.[93] The statutes and judicial decisions are problematic because they provide a negligent tortfeasor with additional protection which was not present under his original insurance policy.

In choosing the bodily injury and property damage limits in a liability policy, the insured determines the dollar value of risk for which he will carry insurance, as well as the dollar value of risk which he will self insure. Unless the insured can demonstrate that the insurer

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of any medical benefits paid to an injured employee to the employee's rights against a third-party tortfeasor); 42 U.S.C. § 2651 (1983) (creating subrogation rights in the United States to cover all instances in which the United States is authorized or required by law to furnish hospital, medical, surgical or dental care and treatment to a person who is injured or suffers a disease under circumstances creating a tort liability upon some third person).

[90]*See, e.g.*, IND. CODE § 12-1-7-24.6 (1982) (providing the Indiana State Department of Public Welfare with a lien, to the extent of Medicaid benefits paid, on any recovery from a third-party tortfeasor or insurance company); IND. CODE § 32-8-26-3 (Supp. 1987) providing that any private or state-owned hospital has a lien for all reasonable and necessary charges for hospital care, treatment, or maintenance of a patient upon any cause of action, suit, or claim accruing to the patient, that necessitated the hospital care, treatment or maintenance; IND. CODE § 32-8-38-2 (Supp. 1987) (creating in an emergency ambulance service a lien for all reasonable and necessary charges upon any action, suit or claim accruing to the patient because of illness or injuries that gave rise to the cause of action, and necessitated the provisions of emergency ambulance services); IND. CODE § 12-5-6-9 (Supp. 1987) (creating subrogation rights in the State Department of Public Welfare for any hospital care afforded to indigents against any other person who is liable for the illness or injury for which assistance was granted); IND. CODE § 16-7-3.6-8(c) (1984) (subrogating the State of Indiana to the extent of any payment made under the Compensation for Victims of Violent Crimes Fund to the rights of the victim against the perpetrator of the crime or any person liable for the pecuniary loss resulting from the crime).

[91]IND. CODE § 27-6-8-4(4) (1982).

[92]*See, e.g.*, FLA. STAT. ANN. § 631.54(3) (West 1984) (providing that "Member insurers shall have no right of subrogation against the insured of any insolvent member."); OHIO REV. CODE ANN. § 3955.01(B)(2) (Supp. 1986).

[93]Sandson's Bakery v. Glover, 162 N.J. Super. 225, 392 A.2d 640 (1978).

was guilty of negligence or bad faith in its settlement attempts,[94] any judgment in excess of the insurer's policy limits will be the financial responsibility of the insured. This personal financial responsibility extends to both original claims by injured persons, as well as the subrogation claims of insurance companies who have been forced to provide coverage to the injured parties due to the tortfeasor's conduct.

The Indiana Act's preclusion of subrogation actions against an insured of an insolvent carrier insulates the insured from personal liability vis-a-vis subrogated insurance companies. This, in turn, affords the insured much greater protection than was afforded, or even contemplated under his insurance policy.

A logical alternative to Indiana's approach could be to permit subrogation actions against the insured to the extent that the claim is outside of the coverage limits afforded by the policy issued by the insolvent insurer. This type of approach has been embraced within the Iowa Guaranty Association Act.[95] This would protect the tortfeasor to the same extent as the insurance policy which he purchased, and would also protect subrogated insurance companies from bearing the brunt of another carrier's insolvency.

D. *The Medical Malpractice Act*

IIGA's limit of liability and restriction of recoverable damages also raises serious questions concerning a medical malpractice claim against a qualified health care provider whose insurance carrier has become insolvent. The Indiana Medical Malpractice Act[96] provides that a health care provider can become qualified under the Act by paying the applicable surcharge and by filing proof of financial responsibility with the Commissioner of Insurance, which can include proof that the health care provider is insured by a policy of malpractice liability insurance in the minimum amount of $100,000.00 per occurrence, and an annual aggregate which is dependent upon the function performed by the health care provider.[97] A qualified health care provider's liability for

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[94]Under Indiana law, "a liability insurer, having assumed control of the right of settlement of claims against the insured, may become liable in excess of its policy limit if it fails to exercise due care in representing its insured." Bennett v. Slater, 154 Ind. App. 67, 70, 289 N.E.2d 144, 146 (1972).

[95]The Iowa Act provides that there can be no subrogation actions against the insured "except to the extent that the claim is outside the coverage of the policy issued by the insolvent insurer." Iowa Code Ann. § 515(B).3 (Supp. 1987).

[96]Ind. Code § 16-9.5-1-1 to -10-4 (1982 & Supp. 1987).

[97]Ind. Code § 16-9.5-2-1, 16-9.5-2-6(a)(1) (1982 & Supp. 1986).

an occurrence of malpractice is limited to $100,000.00.[98] Any judgment or settlement, which is in excess of the health care provider's liability of $100,000.00, is then recoverable from the patient's compensation fund.[99] The patient's compensation statute, in turn, provides that no damages can be recovered thereunder until the health care provider or its insurer has paid its policy limits of $100,000.00,[100] or its annual aggregate has been exhausted.[101]

Neither the Medical Malpractice Act nor the IIGA Act offer any guidance whatsoever concerning how a claim should be handled against a qualified health care provider where that provider's medical malpractice carrier becomes insolvent. Technically, a health care provider is deemed qualified upon providing proof of malpractice insurance in the minimum amount of $100,000.00 per claim.[102] Does that health care provider remain qualified under the Act and subject to maximum liability of $100,000.00 if his medical malpractice insurer becomes insolvent? Alternatively, does the carrier's insolvency remove the health care provider from "qualified" status, thereby subjecting him to unlimited liability?

Given the Act's stated purpose of avoiding excessive financial loss to policyholders because of the insolvency of an insurer, a persuasive argument could be made that the health care provider should remain qualified under the Indiana Act. If this is the correct interpretation, does the Act's limit of liability of $49,900.00 preclude an injured party from ever gaining access to the patient's compensation fund, which under certain circumstances could involve a potential recovery of an additional $400,000.00?[103] After all, access to the patient's compensation fund is strictly limited to those situations where a qualified health care provider has paid $100,000.00, or the annual aggregate limit has been exhausted.[104]

Completely blocking an injured patient's access to the patient's compensation fund would appear contrary to the stated purpose of the IIGA Act to avoid excessive financial loss to claimants because of the insolvency of an insurer. If the courts determine that the $49,900.00

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[98]Ind. Code § 16-9.5-2-2(b) (1982). The Act further provides, however, that in the event that the annual aggregate has been paid by or on behalf of the qualified health care providers, all sums which may thereafter become due and payable to a claimant arising out of an act of malpractice shall be paid during that year from the Patients Compensation Fund. Ind. Code § 16-9.5-2-7 (1982).

[99]Ind. Code § 16-9.5-2-2(c) (1982).

[100]Ind. Code § 16-9.5-4-3 (1982).

[101]Ind. Code § 16-9.5-2-7 (1982).

[102]Ind. Code § 16-9.5-2-6 (Supp. 1987).

[103]*See* Ind. Code § 16-9.5-2-2 (1982).

[104]*See supra* notes 98-101 and accompanying text.

limit under the Act does not preclude an injured patient's access to the patient's compensation fund, at what dollar level does the compensation fund become operable? Subject to the $500,000.00 limitation,[105] does the patient's compensation fund become operable upon the IIGA's payment of $49,900.00 to the injured patient? The resolution of these issues will likewise require Indiana courts to carefully scrutinize the stated goal and purpose behind both the IIGA Act and the Medical Malpractice Act.

III. Presentation of Covered Claim Under the Act

To determine whether the Act will afford protection to a particular claimant, it is necessary to determine whether the asserted claim falls within the definition of a "covered claim" outlined in Indiana Code section 27-6-8-4(4). The claimant should also review the exclusionary language of that definition which eliminates certain claims from coverage under the Act even though they otherwise fall within the definition of a "covered claim."[106] Once it is determined that a particular claim is covered by the Act, it is extremely important to assure that the claim is properly filed in the liquidation proceeding of the insolvent insurer. The Act states that a "covered claim" within the meaning of the Act shall not include:

> [A]ny unpaid claim or judgment not filed timely or properly in the liquidation proceedings in accordance with the provisions of IC 27-1-4 [repealed][107] if the insolvent insurer is a domestic insurer or in accordance with the applicable provisions of the law of the state of domicile if the insolvent insurer is not a domestic insurer.[108]

As a result, the Act specifically excludes from the definition of a "covered claim" any claims which are not properly filed. Therefore, it is important to comply with any and all requirements for the filing of claims relating to insolvent insurers. Every practitioner should carefully review and assure compliance with all current statutory requirements which might relate to the filing of such claims. It is necessary not only to comply with Indiana's statutes concerning the filing of

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[105] Ind. Code § 16-9.5-2-2 (1982).

[106] Ind. Code § 27-6-8-4(4) (1982).

[107] This chapter, concerning rehabilitation, liquidation and conservation, was repealed by Acts 1979, P.L. 255, § 3. For present provisions, see Ind. Code § 27-9-1-1 to 27-9-4-10 (1982 & Supp. 1986).

[108] Ind. Code § 27-6-8-4(4) (1982).

such claims,[109] but it is also necessary to comply with all applicable provisions of the law of the state of domicile of the insolvent insurer if the insolvent insurer is not a domestic insurer.[110]

Upon entry of an order of liquidation of a domestic insurer,[111] the liquidator appointed by the court, unless otherwise directed, is required to give notice by first class mail as soon as possible to all persons known or reasonably expected to have claims against the insurer, at their last known address as indicated by the records of the insurer.[112] The liquidator is also required to provide notice of the liquidation as soon as possible by "publication in a newspaper of general circulation in the county in which the insurer has its principal place of business and all other locations the liquidator considers appropriate."[113] The notice to potential claimants shall require the claimants to file, along with proper proof, their claims and shall state a deadline for the filing of such claims.[114] Proof of all claims must be filed with the liquidator on or before the last date for filing specified in the notice.[115] Claims which are filed after the deadline set by the liquidator and identified in the notice are assigned a lower priority for the distribution of assets from the insurer's estate than are claims which are filed on time.[116]

Any third party alleging a cause of action against the insured of an insurer in liquidation may file a claim with the liquidator.[117] However, whether the third party files such a claim, the insured against whom such claims are asserted may file a claim on his own behalf in the liquidation proceedings.[118]

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[109] *See supra* note 108 and accompanying text. *See also* IND. CODE § 27-6-8-7(a)(i)(2) (1982). For Indiana's statutory requirements relating to the assertion of such a claim, see IND. CODE §§ 27-9-3-10, 27-9-3-33, and 27-9-3-34 (1982).

[110] IND. CODE § 27-6-8-4(4) (1982). *See also* IND. CODE §§ 27-9-4-3(c), 27-9-4-7 (1982).

[111] *See* IND. CODE § 27-9-3-6, to -7 (1982). An order to liquidate the business of a domestic insurer must appoint the Commissioner of Insurance (and his successors in office) as liquidator. IND. CODE § 27-9-3-7(a)(1) (1982).

[112] IND. CODE § 27-9-3-10(a)(4) (1982).

[113] *Id.* § 27-9-3-10(a)(6) (1982). *See also* §§ 27-6-8-9(b)(i), 27-6-8-7(a)(v) (1982).

[114] *Id.* § 27-9-3-10(b).

[115] *Id.* § 27-9-3-33(a). *See also* Middleton v. Imperial Insurance Co., 34 Cal. 3d 134, 193 Cal. Rptr. 144, 666 P.2d 1 (1983), holding that a liquidator who failed to give notice of the time for filing claims, as required by statute, is estopped from asserting the time limitation contained in the notice against late filers who did not receive the required notice.

[116] *See* IND. CODE §§ 27-9-3-40(3) (timely filed claims), § 27-9-3-40(6) (1982) (claims filed late).

[117] *Id.* § 27-9-3-36(a).

[118] *Id.* § 27-9-3-36(b).

A proper proof of claim must contain certain specific information and must be signed by the claimant.[119] At a minimum, the proof of claim must include the following information:

1. The particulars of the claim including the consideration given for it.
2. The identity and amount of the security on the claim.
3. The payments made on the debt, if any.
4. That the sum claimed is justly owed and that there is no setoff, counterclaim, or defense to the claim.
5. Any right of priority of payment or other specific right asserted by the claimants.
6. A copy of written instrument that is the foundation of the claim.
7. The name and address of the claimant and the attorney who represents him, if any.[120]

The liquidator may require that additional information or documents be provided by the claimant.[121] In addition, the liquidator may require that claims be asserted on a prescribed form.[122] After receiving a properly filed claim from a third party having a covered claim against any insured of the insolvent insurer, the liquidator must immediately forward the claim to the IIGA for processing in accordance with the provisions of the Act.[123]

In the event of the insolvency of an insurer who is not domiciled in the state of Indiana, the Commissioner of Insurance may file a petition requesting his appointment as an ancillary liquidator[124] if the Commissioner finds that "there are sufficient assets of the insurer located in Indiana to justify the appointment of an ancillary liquidator and the protection of the creditors or policyholders in Indiana requires such appointment."[125] In the event of the appointment of an ancillary receiver within the state of Indiana, Indiana claimants may file their claims either with the ancillary receiver in Indiana or with the appointed

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[119]*Id.* § 27-9-3-34.
[120]*Id.* § 27-9-3-34(a)(1)-(7).
[121]*Id.* § 27-9-3-34(b).
[122]*Id.*
[123]Ind. Code § 27-6-8-7(a)(i)(2) (1982).
[124]*See* Ind. Code § 27-9-1-2(a) and (o) (1982).
[125]*Id.* § 27-9-4-4(a).

liquidator in the liquidation proceeding in the reciprocal state.[126] Such claims must be filed on or before the last date fixed for the filing of such claims in the liquidation proceedings of the domiciliary state.[127] If no ancillary receiver has been appointed within the state of Indiana relative to the liquidation of an insurer not domiciled in the state of Indiana, it would appear necessary to assert claims pursuant to the laws of the state of domicile of the insolvent insurer or the laws of the state where any liquidation proceeding is pending.

The Act requires a claimant to exhaust his rights under applicable policies of insurance other than the insolvent insurer.[128] Any amounts payable as a covered claim pursuant to the Act shall be reduced by the amount of recovery from such other insurance policies.[129] For this reason, it is important for a claimant to carefully examine the possible existence of any other applicable insurance coverage and assert timely claims against that coverage.[130] The Act also requires that under certain situations a claimant must first assert claims against the guaranty associations of other states.[131] If a claimant fails to timely assert his claims against other applicable guaranty associations or insurance policies, he runs the risk of voiding any applicable coverage which might be afforded by the Act.

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[126]*Id.* § 27-9-4-7(a). A reciprocal state is defined by IND. CODE § 27-9-1-2(p) (1982) as:

> any state other than Indiana in which:
> (1) in substance and effect IC 27-9-3-7(a), IC 27-9-4-3, IC 27-9-4-4, and IC 27-9-4-6 through IC 27-9-4-8 are in force;
> (2) provisions are in force requiring that the commissioner (or equivalent official) be the receiver of a delinquent insurer; and
> (3) some provision exists for the avoidance of fraudulent conveyances and preferential transfers.

[127]*Id.* § 27-9-4-7(a). Domiciliary state is defined as "the state in which an insurer is incorporated or organized, or, in the case of an alien insurer, its state of entry." *Id.* § 27-9-1-2(f).

[128]IND. CODE § 27-6-8-11(a) (1982).

[129]*Id.*

[130]*See supra* text accompanying notes 39-40, and *infra* text accompanying notes 140-170.

> [131]Any person having a claim which may be recovered under more than one (1) insurance guaranty association or its equivalent shall seek recovery first from the association of the place of residence of the insured except that if it is a first party claim for damage to property with a permanent location, he shall seek recovery first from the association of the location of the property, and if it is a workmen's compensation claim, he shall seek recovery first from the association of the residence of the claimant. Any recovery under this chapter shall be reduced by the amount of recovery from any other insurance guaranty association or its equivalent.

IND. CODE § 27-6-8-11(b) (1982).

The Act allows for a stay of any action pending in a court of the state of Indiana in all proceedings in which the insolvent insurer is a party or is obligated to defend a party.[132] The language of this statute allowing for a stay is mandatory and provides an automatic right to a stay of at least six months. The Act defines an insolvent insurer as:

> a member insurer holding a valid certificate of authority to transact insurance in this state either at the time the policy was issued or when the insured event occurred and (b) *against whom a final order of liquidation*, with a finding of insolvency, to which there is no further right of appeal, *has been entered by a court of competent jurisdiction in the company's state of domicile.*[133]

Based upon this definition of an "insolvent insurer," the automatic stay is available in all actions pending in Indiana courts regardless of whether the liquidation proceeding against the insolvent insurer is pending within the state of Indiana or some other state.

In addition to the automatic stay, the Act specifically authorizes the IIGA to petition the court to set aside "any decision, verdict or finding based on the default of the insolvent insurer or its failure to defend an insured . . . ."[134] The Act states that upon the filing of a petition by the IIGA to set aside such a default judgment, the association "*shall* be permitted to defend against the claim on the merits."[135] Similarly, the statute relating to the filing of a proof of claim in the liquidation proceeding states that "[a] judgment or order against an insured or the insurer entered at any time by default or by collusion"[136] need not "be considered as evidence of liability or the measure of damages."[137] The same statute mandates that "[a] judgment or order against an insured or the insurer entered not more than four [4] months before the filing of the petition [for liquidation]"[138] need not be con-

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> [132]All proceedings in which the insolvent insurer is a party or is obligated to defend a party in court in this state *shall be stayed* for up to six [6] months and such additional time thereafter as may be determined by the court from the date the insolvency is determined or an ancillary proceeding is instituted in the state whichever is later to permit proper defense by the association of all pending causes of action.

Id. § 27-6-8-17 (emphasis added). *See also* IND. CODE § 27-9-4-4 (1982) (relating to the institution of ancillary proceedings for insolvent insurers which are not domiciled in Indiana).

[133]IND. CODE § 27-6-8-4(5) (1982) (emphasis added).

[134]IND. CODE § 27-6-8-17 (1982).

[135]*Id.* (emphasis added).

[136]IND. CODE § 27-9-3-34(d)(2) (1982).

[137]*Id.* § 27-9-3-34(d).

[138]*Id.* § 27-9-3-34(d)(3).

sidered as evidence of liability or the measure of damages. As a result, any judgment against the insolvent insurer or its insured is of little value if the judgment was obtained by default or within four months prior to the filing of the liquidation petition.

IV. A Closer Look at Specific Problems Under the Act

As noted by the *Kiner* court, due to substantial similarities between Indiana's Act and the guaranty association acts of other jurisdictions, the Indiana courts will look to the case law of other jurisdictions for guidance in construing the Indiana Act.[139] Numerous decisions from other jurisdictions will lend helpful guidance to the Indiana courts in addressing various issues which will arise under the Indiana Act.

A. *Exhaustion of Remedies Under Other Insurance Policies*

The *Kiner* court noted that "[t]he Insurance Guaranty Law also requires that a claimant or policyholder first exhaust his rights against any other applicable insurance policies or guaranty associations . . . ."[140] The exhaustion of remedies provisions of the Indiana Act provide as follows:

> Any person having a claim against an insurer under any provision in an insurance policy other than a policy of an insolvent insurer which is also a covered claim, shall be required to exhaust first his right under the policy. Any amount payable on a covered claim under this chapter shall be reduced by the amount of recovery under the insurance policy.[141]

Two concepts arise out of this provision. First, the exhaustion requirements are limited to claims arising under a provision in an insurance policy. As will become apparent, this limitation will have important ramifications, from the standpoint of both first-party and third-party claims. Second, the exhaustion requirements are expressly restricted to the notion of a "covered claim." A "covered claim" must arise out of an insurance policy to which the Act applies. Thus, the exhaustion of remedies requirements will not be applicable to those kinds of insurance which are excluded from the Act: "life, title, surety, disability, accident and sickness, health care, credit, mortgage guaranty, and ocean marine insurance."[142]

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[139] Indiana Ins. Guar. Ass'n v. Kiner, 503 N.E.2d 923, 925 n.4 (Ind. Ct. App. 1987).
[140] *Id.* at 925.
[141] Ind. Code § 27-6-8-11(a) (1982).
[142] *Id.* § 27-6-8-3.

In addressing questions concerning the exhaustion of remedies requirement of the Act, it is recommended that a three-step approach be utilized:

> (1) First, identify the parties involved and the nature of their claims against the IIGA. In the third-party context, the tortfeasor/insured will be making a claim against the IIGA to satisfy his insolvent carrier's duty to defend and indemnify; the injured third party will be making a claim against the tortfeasor/insured, in an attempt to invoke the IIGA's indemnity obligations on behalf of the tortfeasor. In the first-party context, the injured insured will be making a claim against the IIGA to satisfy the indemnity obligations that the insolvent carrier owed directly to the insured;
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> (2) Second, identify whether the party would be making a claim against a collateral source in his capacity as a named or additional insured under another policy of insurance. If this is the case, then the other policy of insurance would be subject to the exhaustion requirement. If, on the other hand, the party is a stranger to the collateral insurance policy and would be pursuing a claim against a third party who is an insured under the collateral insurance, then the exhaustion requirement would not be applicable;[143] and
>
> (3) Third, if a claim under an insurance policy is involved, is the type of insurance involved subject to the purview of the Act? If the collateral insurance involves life, title, surety, disability, accident and sickness, health care, credit, mortgage guaranty, or ocean marine insurance, the exhaustion requirements would not be applicable.[144]

1. Third-Party Claim—Tortfeasor's Exhaustion Requirements.—As previously noted, in the third-party context, the tortfeasor/insured's claim against the IIGA is to enforce the insolvent carrier's defense and indemnity obligations under his policy of insurance. The IIGA is required to step into the shoes of the insolvent insurer and to defend and indemnify the tortfeasor/insured for the "covered claim" of the injured third-party.[145]

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[143] *See id.* § 27-6-8-11(a).

[144] *See id.* §§ 27-6-8-3, -11(a).

[145] Ind. Code § 27-6-8-7(a)(ii) (1982), provides that the IIGA shall:

> Be deemed the insurer to the extent of its obligation on the covered claims as limited by this chapter and to this extent shall have all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent, including those relating to reinsurance contracts and treaties entered into by the

Thus, the only collateral insurance which the tortfeasor/insured would be required to exhaust under the Act would be under any secondary insurance which would provide defense and indemnification to the tortfeasor for purposes of the covered claim of the injured third-party.

This scenario will not arise in the context of a true "excess" or "umbrella" policy, since those policies specifically exclude any liability below a specified retained limit. The situations will arise, however, where the tortfeasor is concurrently covered by two or more different insurance policies, and one of the carriers becomes insolvent.

The decision of *Ross v. Canadian Indemnity Insurance Co.*[146] addresses this type of situation. In *Ross*, the plaintiff suffered personal injuries when he was loading drums of acid onto a truck. The plaintiff sued the property owner. At the time of the accident, the property owner's premises were insured through Signal/Imperial Insurance. The property owner was also named as an additional insured in the truck-owner's policy with Canadian Indemnity for "injuries occurring during the loading and unloading of the vehicle."[147]

Pursuant to the California Insurance Code, the premises insurer provided primary coverage, while the truck-owner's insurer provided excess coverage. Before the resolution of the underlying action, the premises insurer became insolvent. The tortfeasor then requested that the truck-owner's insurer tender a defense to it, arguing that that policy became primary upon the insolvency of the premises insurer. When the truck-owner's insurer refused to tender a defense, the California Guaranty Association undertook the defense, and entered into a stipulated judgment in favor of the plaintiff in the amount of $50,000.00. The tortfeasor and the California Guaranty Association then assigned to the plaintiff their rights against the truck-owner's insurer. The plaintiff then initiated suit against the truck-owner's insurer, claiming third-party beneficiary status as a result of the agreement.[148]

The *Ross* court concluded:

> [W]hen a secondary insurer is available in the event of an insolvent primary insurer, the secondary insurer should be responsible in the absence of specific language to the contrary.

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insolvent insurer. However, the association's obligation to defend any insured of the insolvent insurer or to indemnify against the costs of such defense terminates as soon as the claimant or claimants have been paid all benefits that they are entitled to under this chapter.

[146]142 Cal. App. 3d 396, 191 Cal. Rptr. 89 (1983).

[147]*Id.* at 399, 191 Cal. Rptr. at 100.

[148]*Id.* at 399-400, 191 Cal. Rptr. at 100-01.

> The secondary insurer has received a premium for the risk and thus the secondary insurer, and not CIGA [California Insurance Guaranty Association], should be responsible for the coverage of the loss.[149]

A similar situation which is also ripe for controversy in this context will involve commercial vehicles subject to a leasing agreement, where the lessee and lessor each carry liability insurance providing coverage to the leased vehicle.[150] One would expect this to be a recurring problem, especially in light of the increased use of trip-lease agreements in the commercial community.[151]

2. Third-Party Liability—Injured Party's Exhaustion Requirements.—In this context, the injured party is pursuing a third-party claim against a tortfeasor/insured whose liability insurance company has become insolvent. There is apparently widespread confusion concerning what other insurance, if any, the injured party must initially exhaust as a condition precedent to gaining access to the IIGA's duty to indemnify the tortfeasor/insured of the insolvent carrier.

a. Uninsured Motorist Coverage

Numerous decisions from other jurisdictions have concluded that an injured party must first exhaust the coverage available under the uninsured motorist provisions of his own insurance policy, prior to proceeding against the guaranty association.[152] In *Kentucky Insurance Guaranty Association Mutual v. State Farm Automobile Insurance Co.*,[153] plaintiffs who suffered injuries in an automobile accident filed suit against the driver of the other vehicle. The other driver's insurance company was adjudged to be insolvent by an Illinois court. The Kentucky Guaranty Association demanded that the plaintiffs initially exhaust the limits of the uninsured motorist coverage provided by their own policy before they could pursue any claim under the Kentucky

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[149]*Id.* at 404, 191 Cal. Rptr. at 104.

[150]For a discussion concerning which insurance carrier provides primary coverage to the leased vehicle, see Ryder Truck Lines v. Carolina Cas. Ins. Co., 270 Ind. 315, 385 N.E.2d 449 (1979); American Underwriters, Inc. v. Auto-Owners Mut. Ins. Co., 454 N.E.2d 876 (Ind. Ct. App. 1983); Ind. Code §§ 27-8-9-7 to -9 (Supp. 1987).

[151]*See* Redieks Exp., Inc. v. Maple, 491 N.E.2d 1006, 1010-11 (Ind. Ct. App. 1986).

[152]*See, e.g.*, King v. Jordan, 601 P.2d 273 (Alaska 1979); Spearman v. State Sec. Ins. Co., 57 Ill. App. 3d 393, 372 N.E.2d 1008 (1978); Kentucky Ins. Guar. Ass'n v. State Farm Auto Ins. Co., 689 S.W.2d 32 (Ky. Ct. App. 1985); Vokey v. Massachusetts Insurers Insolvency Fund, 381 Mass. 386, 409 N.E.2d 783 (1980); Henninger v. Riley, 317 Pa. Super. 570, 464 A.2d 469 (1983); Sands v. Pennsylvania Ins. Guar. Ass'n, 283 Pa. Super 217, 423 A.2d 1224 (1980); Prutzman v. Armstrong, 90 Wash. 2d 118, 579 P.2d 359 (1978).

[153]689 S.W.2d 32 (Ky. Ct. App. 1985).

Insurance Guaranty Association Act. The plaintiffs' insurance company denied that it was liable to provide plaintiffs uninsured motorist coverage.[154]

The court initially noted that the plaintiffs' policy of insurance defined an uninsured motor vehicle to include "[a] land motor vehicle . . . with respect to which there is a bodily injury liability bond or insurance policy applicable at the time of the accident but the company writing the same . . . is or becomes insolvent."[155] This policy language was substantially identical to the Kentucky uninsured motorist statute which provided that "an 'uninsured motor vehicle' shall be deemed to include any insured motor vehicle the liability insurer of which cannot pay a legal liability due to insolvency."[156]

The court then considered the exhaustion of remedies language in the Kentucky Insurance Guaranty Association Act which provided that "[a]ny person having a claim against his insurer under any provision in his insurance policy which is also a covered claim shall be required to exhaust first his right under such policy."[157] The court concluded that such language was intended to require insureds to exhaust their right to recover sums due under the uninsured motorist coverage portion of their own liability insurance policy as a condition precedent to pursuing a "covered claim" against the association.[158]

A similar result was reached by the Superior Court of Pennsylvania in the decision of *Henninger v. Riley*.[159] The *Henninger* court construed an "exhaustion of remedies" provision in the Pennsylvania Insurance Guaranty Association Act which is identical to the exhaustion of remedies provision in Indiana's Act. Construing this provision, the *Henninger* court concluded that the Pennsylvania Guaranty Association Act required the plaintiffs to first exhaust their rights under the uninsured motorist coverage afforded by their policy before proceeding against the guaranty association. The *Henninger* court further stressed that the exhaustion of benefits under the uninsured motorist coverage precedes the creation of any obligation on the part of the guaranty association to step into the shoes of the insolvent insurer.[160]

It is also important to note that the entire limits of the uninsured motorist coverage must be exhausted as a condition precedent to pursuing a claim under the Guaranty Association Act. In *Prutzman v.*

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[154] *Id.* at 33-34.
[155] *Id.* at 34.
[156] *Id.*
[157] *Id.* at 35.
[158] *Id.*
[159] 317 Pa. Super. 570, 464 A.2d 469 (1983).
[160] *Id.* at 675-77, 464 A.2d at 472-73.

Armstrong,[161] the plaintiff was injured in an automobile accident. She initiated suit against the other driver, such suit resulting in a settlement for the other driver's bodily injury limits of $15,000.00. After receiving notice of the insolvency of the other driver's carrier, the plaintiff and other driver nonetheless proceeded to submit a stipulated judgment for $15,000.00 which was approved by the court.[162]

Thereafter, the plaintiff instituted a declaratory judgment action against her insurance company, which had issued uninsured motorist coverage with a $15,000.00 limit, and the Washington Insurance Guaranty Association.[163] The trial court determined that the plaintiff could accept $12,600.00 from her insurance carrier and recover the $2,400.00 difference (less the $100.00 deductible) from the Washington Insurance Guaranty Association.[164] On appeal, the *Prutzman* court determined that plaintiff's settlement for less than the policy limits of her uninsured motorist coverage was inadequate to constitute exhaustion under the Insurance Guaranty Association Act.[165]

Louisiana stands alone as the only jurisdiction which does not require an exhaustion of uninsured motorist benefits before an injured party can proceed against the guaranty association. In *Hickerson v. Protective National Insurance Co.*,[166] the Louisiana Supreme Court determined that since the Louisiana Guaranty Association Law provided coverage in lieu of the insolvent insurer, the insured could not be considered "uninsured" for purposes of the plaintiff's uninsured motorist coverage.[167] The *Hickerson* court stated that this conclusion was necessary in order to afford some protection to the insured of the insolvent carrier, who otherwise would have been subject to liability for the subrogation claims of the solvent insurer which had paid the uninsured motorist claim.[168]

It is anticipated that Indiana will likely align itself with the majority of other jurisdictions requiring an injured party to initially exhaust his uninsured motorist coverage prior to proceeding against the IIGA. Indiana's uninsured motorist statute specifically provides that an "'uninsured motor vehicle' . . . includes an insured motor vehicle where the liability insurer of the vehicle is unable to make payment with respect to the legal liability of its insured within the limits specified

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[161] 90 Wash. 2d 118, 579 P.2d 359 (1978).
[162] *Id.* at 119-20, 579 P.2d at 361.
[163] *Id.*
[164] *Id.* at 120, 579 P.2d at 361.
[165] *Id.* at 122, 579 P.2d at 362.
[166] 383 So. 2d 377 (La. 1980).
[167] *Id.* at 379-80.
[168] *Id.* at 379.

in IC 9-2-1-15 because of insolvency."[169] Furthermore, the concerns expressed by the *Hickerson* court would not be present in Indiana, since the IIGA Act specifically precludes an insurer from enforcing a subrogation claim directly against the insured of the insolvent carrier.[170]

b. Workmen's Compensation Claim

The Indiana Workmen's Compensation Act permits an injured employee to bring an action against a third-party, subject to the subrogation rights or lien of an employer who has paid benefits.[171] If the third-party tortfeasor's carrier becomes insolvent, will the injured employee be required to exhaust the full extent of workmen's compensation benefits from his employer?

Resolution of this issue requires an analysis of the second prong of the three-part test previously enumerated.[172] Would the employee be making a claim against the workmen's compensation carrier in his capacity as a named or additional insured under the workmen's compensation policy?

A workmen's compensation policy is issued to the employer as the named insured. By the terms of a workmen's compensation policy, the carrier agrees, *inter alia*, to pay on the employer's behalf any benefits which the employer is required to pay employees under the workmen's compensation law. The employee is neither a named nor additional insured under the workmen's compensation policy.[173]

Indiana law has consistently recognized that a third-party stranger to an insurance policy, who is neither a named nor additional insured thereunder, possesses no rights under the insurance policy and cannot maintain a direct action against the insurance company.[174] This type of rationale has been expressly extended to the context of an employee, vis-a-vis a workmen's compensation policy.[175] Thus, the injured em-

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[169] IND. CODE § 27-7-5-4(a) (1982 & Supp. 1987) (1987 supplement version effective Jan. 1, 1988).

[170] IND. CODE § 27-6-8-4(4) (1982) (providing that "in no event may any such claim [subrogation claim of insurer] be asserted in any legal action against the insured of such insolvent insurer").

[171] IND. CODE § 22-3-2-13 (1982).

[172] *See supra* discussion in text p. 231.

[173] *See* Baker v. American States Ins. Co., 428 N.E.2d 1342 (Ind. Ct. App. 1981). In *Baker*, the court noted that an employee was not a third-party beneficiary of an insurance policy issued by a workmen's compensation carrier to the employer. *Id.* at 1347.

[174] Eichler v. Scott Pools, Inc., 513 N.E.2d 665 (Ind. Ct. App. 1987); Winchell v. Aetna Life & Casualty Insurance Co., 182 Ind. App. 261, 394 N.E.2d 1114 (1979); Bennett v. Slater, 154 Ind. App. 62, 289 N.E.2d 144 (1972); Spicklemeir v. T.H. Mastin & Co., 107 Ind. App. 350, 24 N.E.2d 797 (1940).

[175] *Baker*, 428 N.E.2d 1342 (Ind. Ct. App. 1981).

ployee would not have a claim as an insured under the employer's workmen's compensation policy. Rather, the injured employee would have a third-party claim against the employer under the Workmen's Compensation Act. Accordingly, the injured employee would not be required under the IIGA Act to exhaust his remedies under his employer's workmen's compensation coverage precedent to pursuing his claim against the negligent tortfeasor under the IIGA Act.

c. Injured Party's Claim Against Two or More Defendants, One of Whose Liability Insurance Carrier Becomes Insolvent

The situation often arises where an injured party has a cause of action against two or more joint tortfeasors. If the carrier of the first joint tortfeasor becomes insolvent, will the injured party be required to exhaust the policy limits of the second tortfeasor with the solvent carrier prior to proceeding under the Act?

Applying the second prong of the three-part test previously denominated, this question must be answered in the negative.[176] The injured party is not a named or additional insured under the policy of insurance issued to the second tortfeasor by the solvent insurance carrier. Since the injured party has no right to assert a direct action against that insurance company, he should not be required to exhaust the limits of that policy prior to gaining access to the guaranty association fund vis-a-vis the first tortfeasor's insolvent insurer.

This conclusion is supported by the opinion of the Pennsylvania Superior Court in the decision of *Sands v. Pennsylvania Insurance Guaranty Association*.[177] In *Sands*, a passenger suffered personal injury as a result of an automobile collision. The injured party filed an uninsured motorist claim with the carrier providing coverage to the driver of his vehicle, and was paid the full amount of uninsured motorist benefits. The insured passenger also filed an uninsured motorist claim under his own policy and obtained a judgment for the full amount of that coverage. Thereafter, the passenger's insurer became insolvent. The passenger then applied to the Pennsylvania Insurance Guaranty Association for the payment of the amount of his judgment against his insurance company. The guaranty association refused payment, claiming that the passenger had failed to exhaust the insurance coverage available to him vis-a-vis the liability coverage carried by the driver of the vehicle in which the injured party was a passenger at the time of the accident.[178]

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[176]*See supra* discussion in text p. 231.

[177]283 Pa. Super. 217, 423 A.2d 1224 (1980).

[178]*Id.* at 221, 423 A.2d at 1225.

The *Sands* court rejected this argument, noting that while the injured party may have had a claim against the driver, the injured party was not a person having a claim against the driver's insurance company. The court further noted that any claim that the injured party might have had against his driver's insurer under the liability policy would not have been a covered claim, because the claim would not have resulted from the insolvency of the carrier, but from the negligence of the driver.[179]

d. Injured Party's Health Care Coverage

The typical injured third-party will have some form of health care coverage which could pay for medical expenses and hospital costs associated with injuries caused by the tortfeasor/insured of the insolvent insurance company. Under these circumstances, will the injured third-party be required to exhaust the coverage that is available under this health care policy as a condition precedent to gaining access to the IIGA?

The second prong of the three-part analysis previously enumerated would be satisfied,[180] since the injured party would be making a claim as a named or additional insured under his own health care policy. The third prong, however, would not be satisfied because a claim against a health care policy is not a "covered claim" under the Act.[181] As such, the injured third-party would not be required to exhaust the coverage available under his health care policy as a condition precedent to gaining access to the IIGA.

3. First-Party Context.—In the first-party context, the injured insured will be making a direct claim for benefits under his own insurance policy. If the injured insured's insurance company becomes insolvent, the IIGA steps into the shoes of the insolvent carrier to the extent of obligations under the insurance policy, subject to the restrictions of the Act.[182]

a. Identical Secondary Coverage

Exhaustion requirements may be applicable in the first-party context where the injured insured had a second policy of insurance available to him as a named or additional insured. For example, a passenger who suffers injuries in an automobile accident between a vehicle being operated by the host driver, and a vehicle being operated by an un-

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[179] *Id.* at 224, 423 A.2d at 1227.

[180] *See supra* discussion in text p. 231.

[181] IND. CODE § 27-6-8-3 (1982) (excepts from coverage health care insurance).

[182] IND. CODE § 27-6-8-7(a)(2)(ii) (1982).

insured tortfeasor, would most likely have an uninsured motorist claim under his own policy of insurance,[183] as well as the host driver's insurance policy.[184] If the passenger's insurance company becomes insolvent, will he be required to exhaust the uninsured motorist coverage available under the host driver's policy as a condition precedent to gaining access to the IIGA?

Resolution of this issue will involve the second and third prongs of the three-part test previously enumerated.[185] The passenger would be making a claim as an "additional insured" under the host driver's policy of insurance. Furthermore, an uninsured motorist claim under the host driver's insurance policy would be a "covered claim" under the Act. Thus, the injured passenger would be required to initially exhaust the host driver's uninsured motorist coverage prior to gaining access to the IIGA.[186]

A similar situation would be presented by a mortgage company which carried its own insurance on the mortgaged property, and which was also denominated as an additional insured under a standard mortgage clause in the homeowner's policy. If the mortgage company's insurer became insolvent, would the mortgage company be required to exhaust its rights under the homeowner's policy prior to gaining access to the IIGA? Such a claim would be presented by the mortgage company as an insured under the homeowner's policy to the extent of the mortgage debt.[187] Additionally, the claim under the homeowner's

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[183]The normal insuring agreement in an uninsured motorist coverage provides that:

> We will pay damages which a covered person is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of bodily injury:
> 1. sustained by a covered person; and
> 2. caused by an accident.
>
> The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the uninsured motor vehicle. ISU Personal Auto Policy, Form PP-00-1 (Ed. 6/80).

[184]*See* notes 128-29. The term "covered person" is normally defined to include "any other person occupying your covered auto," and would thus qualify the passenger as a "covered person" for purposes of the host driver's uninsured motorists coverage. *See* ISO Personal Auto Policy, Form PP-OO-1 (Ed. 6/80).

[185]*See supra* discussion in text p. 231.

[186] This conclusion seems to have been implicitly reached by the Pennsylvania Superior Court in the decision of Sands v. Pennsylvania Ins. Guar. Ass'n, 283 Pa. Super. 217, 423 A.2d 1224 (1980), on facts identical with the hypothetical presented in the text. The *Sands* court noted that the passenger was a "person having a claim against [the host driver's solvent insurance company], so far as [the host driver's insurance company], provided uninsured motorist coverage." *Id.* at 223, 423 A.2d at 1227. The *Sands* court concluded that the passenger did "exhaust his rights under such policy" as a result of the host driver's insurer's payment of the uninsured motorist limits of $10,000.00. *Id.* at 223, 423 A.2d at 1227.

[187]The standard mortgage clause operates to create a separate and independent insurance

policy would be a "covered claim" under the Act.[188] As such, the mortgage company would be required to first exhaust its rights under the homeowner's standard mortgage clause as a condition precedent to gaining access to the IIGA.

b. Tortfeasor's Liability Coverage

Assume that a third-party operated his vehicle negligently, lost control of the same and caused extensive property damage to a homeowner's residence. The homeowner submits a claim under his homeowner's policy and that insurance company becomes insolvent. Will the homeowner be required to exhaust his rights against the negligent tortfeasor's automobile property damage coverage as a condition precedent to gaining access to the IIGA?

Once again, this question must be answered in the negative. The homeowner's claim would be against the negligent tortfeasor, and not as a named or additional insured under the tortfeasor's policy. Thus, the exhaustion requirements would not be applicable.

c. Health Care Coverage

Assume the situation where an injured passenger is making a claim under his uninsured motorist coverage. If the passenger's automobile insurer becomes insolvent, will the passenger be required to exhaust his rights under his health care policy as a condition precedent to gaining access to the IIGA?

Again, the answer is "no". The claim of the passenger would be presented in his capacity as an "insured" or "additional insured" under his health care policy. However, the claim under the health care policy falls outside the scope of a "covered claim" under the Act.[189] Accordingly, the injured passenger would not be required to exhaust coverage available under his health care policy as a condition precedent to gaining access to the IIGA.

B. *Setoff*

As a corollary to its "exhaustion of remedies" provisions, the Act also provides that "any amount payable on a covered claim under this chapter shall be reduced by the amount of recovery under the insurance policy."[190] The term "insurance policy" is modified by the "exhaustion

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policy between the mortgagee and the insurance company of the homeowner. Federal Nat. Mtg. Ass'n v. Great American Ins. Co., 157 Ind. App. 347, 300 N.E.2d 117 (1973).

[188] *See* Hardester v. Eugands, 731 S.W.2d 780 (Ark. 1987), where the Arkansas Property and Casualty Insurance Guaranty Act was applied to a claim under a fire insurance policy.

[189] IND. CODE § 27-6-8-3 (1982).

[190] IND. CODE § 27-6-8-11(a) (1982).

of remedies" language and is thereby subject to the three-part analysis previously adduced.[191] In order for the setoff provisions to be applicable, the IIGA must demonstrate as follows: first, that the recovery resulted from a direct claim by an insured against the insured's policy, either from the standpoint of a direct payment to the insured in the first-party setting, or in the form of a tender of defense and indemnification in the third-party setting; and second, that the payment was made under an insurance policy subject to the Act, and thus arose out of a "covered claim."[192]

1. Third-Party Context—Tortfeasor.—In this context, the tortfeasor's carrier has become insolvent and is, thus, unable to tender a defense or indemnify the tortfeasor for any sums for which he may become liable to the injured party. Thus, the tortfeasor's claim against the guaranty association would in essence request that the IIGA stand in the shoes of the insolvent insurer, tender a defense to the tortfeasor and indemnify the tortfeasor up to the extent of the policy limits, or $49,900.00, whichever is less.[193]

Under the express setoff language in Indiana's Act, setoff vis-a-vis the tortfeasor would be limited to those situations where the tortfeasor has additional insurance which would be considered secondary insurance upon the insolvency of his primary carrier.[194] If, for example, the tortfeasor was identified as an additional insured on another policy of insurance, any defense and indemnification rights that the tortfeasor would have under that policy could be set off against the defense and indemnity obligation owed under the Act.[195]

By contrast, if a co-defendant is indemnified by a separate insurance policy which does not inure to the benefit of the tortfeasor of the insolvent carrier, any payment made on the co-defendant's behalf should not be set off against the defense and indemnity obligation that the IIGA owes to the tortfeasor of the insolvent insurer. Such a payment would inure exclusively to the benefit of the co-defendant, and would in no way discharge either the duty to defend or duty to indemnify the tortfeasor of the insolvent insurance company.

Additionally, any true excess insurance coverage which the tortfeasor of the insolvent insurer may have would not operate as a setoff against IIGA's obligations under the Act. In the situation of a true "excess" or "umbrella" policy, the insurer's duty to defend and in-

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[191]*See supra* discussion in text p. 231.

[192]Ind. Code § 27-6-8-3 (1982).

[193]*Id.* § 27-6-8-7(a)(i)-(ii).

[194]*Id.* § 27-6-8-11(a).

[195]*See, e.g.*, Ross v. Canadian Indem. Ins. Co., 142 Cal. App. 3d 396, 191 Cal. Rptr. 99 (1983).

demnify would become operative only upon the exhaustion of the underlying insurance's retained limits. Upon the insolvency of the underlying coverage, such limits would not be exhausted and an express precondition of the policy would not be met.

2. Third-Party Context—Injured Party.—This appears to be the most frequent area where questions arise concerning the application of the setoff clause. In this situation, an injured party is bringing a suit against a tortfeasor whose carrier has become insolvent. If a collateral source has paid part or all of the injured party's medical expenses and/or loss of income, to what extent can such payments be set off against the obligations of the IIGA under the Act?

Once again, a three-part analysis is suggested.[196] The first prong has already been answered, since we know that the injured party is pursuing a third-party claim against a tortfeasor whose liability carrier has become insolvent. Thus, in order to avail itself of the setoff provisions, the IIGA must establish initially that the payment resulted from a direct claim by the injured party as an insured under a policy of insurance.[197] Second, the IIGA must establish that the payment arose under an insurance policy which is subject to the Act, and thus was a "covered claim."[198]

Thus, any payment received by an injured party from a workmen's compensation carrier would not be available to the IIGA for purposes of setoff. Any such payment would result from the employee's claim against the employer and not as a result of any direct claim under the workmen's compensation policy.[199]

The same result, but different considerations, attach to the situation where the injured party has had part or all of his medical expenses paid by his health care provider. Any such payment would result from the injured party's status as an insured under his health care policy, and would thus satisfy the first condition of the setoff requirement. However, any such payment would arise under the injured party's health care policy, a type of direct insurance expressly excluded from coverage under the Act.[200] As such, any such payment would not be

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[196]*See supra* discussion in text p. 231.

[197]*See supra* discussion in text p. 231.

[198]IND. CODE § 27-6-8-3 (1982).

[199]*Cf. See* cases cited *supra* note 152. Senac v. Sandefer, 418 So. 2d 543 (La. 1982), in which the court used a different analysis to reach a similar conclusion. The *Senac* court concluded that a party who had received workers' compensation disability benefits would not receive a double recovery if he were permitted to recover general damages which did not include lost wages or medical expenses from the guaranty association.

[200]IND. CODE § 27-6-8-3 (1982).

a "covered claim" within the parameters of the Act, and therefore, would not be available to the IIGA for purposes of setoff.[201]

Finally, a different result is reached with respect to any payments which the injured party has received in the form of uninsured motorist benefits from his own carrier. Any such payment would result from a direct claim by the injured party against the uninsured motorist provisions in his own policy, and would thus satisfy the first part of the setoff requirement. Second, the claim would be presented under an automobile liability policy, a form of direct insurance which is not excluded from the operation of the Act. Thus, any payment received under uninsured motorist coverage would appear to be available for purposes of the Act's setoff provisions.[202]

3. *First-Party Context.*—In the first-party context, the injured party will be seeking to recover benefits which are due him as an insured under his insurance policy. Typical claims will involve uninsured motorist coverage and claims under fire policies. To the extent that the insured's carrier has become insolvent, questions of setoff may arise with respect to payments which the insured has received from collateral sources. Once again, a two-part analysis should be followed: first, whether the payment resulted from the injured party's claim as an insured under an insurance policy; and second, whether the payment resulted from a "covered claim" under the Act.

In most instances, setoff probably will not be available in the first-party context. For example, any funds which the injured party has received from the tortfeasor's carrier are not claims under a policy of direct insurance and, thus, would not be subject to the setoff provisions. Similarly, any recovery which the injured party made under his health care policy would not constitute a recovery as a result of a "covered claim" since health care policies are specifically excluded from the Act.[203]

Setoff, however, would be available in the first-party context where the injured party had secondary insurance available to him as a named

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[201]*See, e.g.*, Pritchett v. Clifton, 687 F. Supp. 644 (W.D. Mo. 1984), *aff'd*, 738 F.2d 319 (8th Cir. 1984); Harris v. Lee, 387 So. 2d 1145 (La. 1980); Bullock v. Pariser, 311 Pa. Super. 487, 457 A.2d 1287 (1983). All of these cases recognize that where a certain type of insurance is specifically excluded from the insurance guaranty association law, the setoff provisions would not be applicable to payments by such excluded insurers.

[202]For cases holding that uninsured motorist benefits received by the injured party are available to the guaranty association under similar setoff provisions, see King v. Jordan, 601 P.2d 273 (Alaska 1979); Lucas v. Illinois Guaranty Association, 52 Ill. App. 3d 237, 367 N.E.2d 469 (1977); Vokey v. Massachusetts Insurers Etc., 409 N.E.2d 783 (Mass. 1980); Prutzman v. Armstrong, 90 Wash. 2d 89, 579 P.2d 359 (1978).

[203]Ind. Code § 27-6-8-3 (1982).

or additional insured.[204] Thus, where the injured party has two separate policies under which he qualifies as an insured for purposes of uninsured motorist coverage, the IIGA should be able to set off any uninsured motorist benefits which the injured party received from the solvent insurer from the IIGA's uninsured motorist obligations on behalf of the insolvent insurer.

A similar conclusion would be reached in the context of a mortgage company which carries its own insurance on the mortgaged property, and that was also denominated as an additional insured in the standard mortgage clause under the homeowner's policy. If either the homeowner's or mortgage company's insurer became insolvent, the mortgage company would be required to exhaust its rights under the solvent carrier's policy prior to proceeding against the guaranty association. Additionally, the IIGA should be able to set off any recovery from the solvent carrier against the obligations which it owes under the Act on behalf of the insolvent insurer.[205]

4. *Setoff of Uninsured Motorist Benefits—How Much?*—A complicated issue that the Indiana courts will be required to address is what portion of a payment received under an uninsured motorist coverage will be considered a "covered claim," subject to the setoff provisions of the Act. This issue arises since uninsured motorist benefits include all elements of bodily injury damages which an injured party can recover, while Indiana's Act restricts a "covered claim" to medical expenses and lost income.[206] Theoretically, only that portion of an uninsured motorist payment which can be directly attributed to medical expenses and lost income would constitute a "covered claim" under the Act, available for setoff.

One can imagine a number of perplexing problems which the Indiana courts will be required to address in attempting to allocate a portion of an uninsured motorist payment to medical expenses and lost income (and thus a "covered claim" subject to the setoff provision) and to other elements of damage such as pain and suffering, impairment, etc. (not a "covered claim," and thus not subject to the setoff provision).[207] It is not hard to imagine the injured party taking the position that the majority of benefits paid under the uninsured motorist provisions are allocable to pain and suffering, impairment, disfigurement, etc., and the IIGA taking the position that the uninsured motorists benefits should be allocated to medical expenses and lost income.[208]

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[204]*See supra* discussion in text p. 231.

[205]*Id.*

[206]IND. CODE § 27-6-8-7(a)(i)(1) (1982).

[207]*Id.* § 27-6-8-4(4).

[208]*See supra* notes 45-52. In Rodgers v. Missouri Ins. Guar. Ass'n, 656 F. Supp. 902

Under *Kiner*, the injured party, as a precondition to recovery, will be required to demonstrate the exhaustion of remedies under other applicable insurance.[209] As such, it would appear consistent with the exhaustion of remedies provisions to allocate to the injured party the burden of proving what amount of any uninsured motorist payment is attributable to medical expenses and lost income, and what amount is attributable to such damages as pain and suffering, impairment, and disfigurement, and thus not subject to the setoff provisions.[210]

C. *"Covered Claim"*

The IIGA Act defines a "covered claim" as follows:

> The term "covered claim" means an unpaid claim or judgment which arises out of and is within the coverage and not in excess of the applicable limits of an insurance policy to which this chapter applies issued by an insurer, if the insurer becomes an insolvent insurer after the effective date (January 1, 1972) of this chapter and (a) the claimant or insured is a resident of this state at the time of the insured event or (b) the property from which the claim arises is permanently located in this state.

(E.D. Mo. 1987), the court addressed an analogous problem. The plaintiffs brought a civil rights action against a sheriff alleging a violation of the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution, and 42 U.S.C. § 1983, as a result of the alleged wrongful repossession of two automobiles belonging to the plaintiffs. At the time of the incident, the defendant sheriff was insured under a liability policy issued by Ideal Mutual Insurance Company. The plaintiffs requested compensatory damages in the amount of $200,000.00, and punitive damages in the amount of $100,000.00. Following the insolvency of Ideal, the court entered a summary judgment in favor of the plaintiffs in the amount of $100,000.00. The court, however, did not specify what portion of the damages, if any, were for punitive damages. Thereafter, the plaintiffs filed proofs of claim with the Missouri Insurance Guaranty Association. The *Rodgers* court noted that the judgment represented a "covered claim" only to the extent it assessed actual damages, and that the court was thus required to segregate the judgment between actual damages and punitive damages. The court noted: "[l]acking more specific guidance, the Court will construe the judgment of the Western District to award plaintiffs actual and punitive damages in the same proportions as plaintiffs requested [in their Complaint] or in a ratio of 2:1." *Id.* at 905.

[209]Indiana Insurance Guaranty Association v. Kiner, 503 N.E.2d 923 (Ind. Ct. App. 1982).

[210]The Indiana Legislature may also wish to consider including a provision in the Act similar to that provided for in Missouri's Act. Missouri's Act contains a similar restriction to the amount of recoverable damages under a "covered claim." *See supra* note 55. The Missouri Act further provides that "verdicts as respects only those civil actions as may be brought to recover damages as provided in this subsection shall specifically set out the sums applicable to each item in this subsection for which an award may be made." Mo. Ann. Stat. § 375.785(4)(1)(a)(b) (Vernon Supp. 1987).

> "Covered claim" shall be limited as provided in section 7 [27-6-8-7] of this chapter, and shall not include (1) any amount due any reinsurer, insurer, insurance pool, or underwriting association, as subrogation recoveries or otherwise; . . . nor (2) any supplementary obligation including but not limited to adjustment fees and expenses, attorney fees and expenses, court costs, interest and bond premiums, whether arising as a policy benefit or otherwise, prior to the appointment of a liquidator; nor (3) any unpaid claim or judgment not filed timely or properly in the liquidation proceedings in accordance with the provisions of IC 27-1-4 [repealed] if the insolvent insurer is a domestic insurer or in accordance with the applicable provisions of the law of the state of domicile if the insolvent insurer is not a domestic insurer. All covered claims filed timely and properly in the liquidation proceedings shall be referred immediately to the association by the liquidator for processing as provided in this chapter.[211]

Apparently recognizing the limited applicability of the setoff provisions to payments received by an injured party from a collateral source, the courts of other jurisdictions have found creative ways to accomplish a "setoff" under statutes similar to Indiana's Act by construction of the term "unpaid claim," as well as the term "insurer subrogation."

1. Unpaid Claim or Judgment.—The IIGA Act specifically provides that a covered claim must be an "unpaid claim or judgment."[212] In construing this language, the Indiana court will likely be called upon to determine when a "claim" or "judgment" is deemed paid under the Act.

In *Florida Insurance Guaranty Association v. Dolan*,[213] a plaintiff suffered personal injuries while on the premises of the Gatlinburg Ski Corporation (GSC). Thereafter, the plaintiff sued GSC, which was defended by GSC's liability carrier. Following a $70,000.00 judgment in favor of the plaintiff, GSC's carrier was declared insolvent. In order to induce the plaintiff not to levy execution on the premises of GSC, one of GSC's operators entered into an agreement which provided for absolute, unconditional payment of the $70,000.00, being secured by a cashier's check under an escrow agreement. Thereafter, the plaintiff filed a claim against the Florida Insurance Guaranty Association.[214]

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[211] IND. CODE § 27-6-8-4(4) (1982).
[212] *Id.*
[213] 355 So. 2d 141 (Fla. Dist. Ct. App.), *cert. denied*, 361 So. 2d 831 (Fla. 1978).
[214] *Id.* at 141-42.

The Florida Act defined "covered claim" as an "unpaid claim." The *Dolan* court concluded that the plaintiff's claim was not a covered claim because the claim had been paid as a result of the unconditional guaranty of the insured's operator to satisfy the judgment, secured by a cashier's check under an escrow agreement.[215]

2. *Insurer's Subrogation Claim.*—Of equal importance is the Massachusetts Court of Appeals decision of *Ferrari v. Toto.*[216] In *Ferrari*, the plaintiff, while in the course of his employment was struck by an automobile negligently driven by the third-party tortfeasor, and suffered injuries. The plaintiff received over $35,000.00 in workmen's compensation benefits, and then filed suit against the tortfeasor for damages arising out of the accident. At the time of the accident, the tortfeasor carried liability insurance with per claim limits of $20,000.00. Subsequent to the filing of suit, the tortfeasor's carrier was adjudged insolvent. The Massachusetts Guaranty Association denied liability for the reason that the plaintiff had already recovered workmen's compensation benefits in excess of the limits of the tortfeasor's liability policy.[217]

The *Ferrari* court advanced two separate reasons in support of its conclusion that the plaintiff's claim was not a "covered claim" under the Massachusetts Guaranty Association Act. First, since the full extent of the Association's obligation under the Act (the $20,000.00 policy limits) had been provided by the workmen's compensation carrier, the claim had been "paid" under the Guaranty Association's Act.[218] Second, the Massachusetts Worker's Compensation Act contained a provision providing that any sum recovered by the employee in an action against a third party would be for the benefit of the workmen's compensation insurer.[219] Thus, the *Ferrari* court reasoned that the employee's claim was in reality a subrogation claim of an insurance company, which was precluded under subrogation provisions that were identical to Indiana's Act.[220]

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[215] *Id.* at 142.

[216] 9 Mass. App. Ct. 483, 402 N.E.2d 107 (1980), *aff'd*, 383 Mass. 36, 417 N.E.2d 427 (1981).

[217] *Id.* at 484-5, 402 N.E.2d at 108.

[218] *Id.* at 487, 402 N.E.2d at 109.

[219] *Id.* at 488, 402 N.E.2d at 110.

[220] Prior to the passage of the Indiana Comparative Fault Act, Ind. Code §§ 34-4-33-1 to -14 (West Supp. 1987), this type of argument could have been attacked on the basis that the insurance company's right of subrogation did not exist until the insured had been fully compensated, and that the tortfeasor's carrier's insolvency prevented complete compensation. *See, e.g.*, Willard v. Auto. Underwriters, Inc., 407 N.E.2d 1192 (Ind. Ct. App. 1980); Capps v. Klebs, 178 Ind. App. 293, 382 N.E.2d 947 (1979). The continuing validity of the rule against "pro tanto subrogation" may be brought into question under

A different conclusion was reached by the New Jersey Superior Court under similar circumstances in the decision of *Arnone v. Murphy.*[221] In *Arnone*, the insured had received workmen's compensation benefits, and subsequently sued the tortfeasor. When the tortfeasor's insurer became insolvent, a claim was filed with the New Jersey Guaranty Association.[222]

The court concluded that the guaranty association was liable to the claimant even though the insurance proceeds were subject to the lien of a workmen's compensation carrier. The *Arnone* court reasoned that the claim was that of the injured party, not that of the insurer. Although the term "covered claim" in the New Jersey statute excluded any claim of an insurer, the court reasoned that the workmen's compensation carrier's interest was a "lien," rather than a "claim." The court further noted that since workmen's compensation was expressly exempted from the New Jersey Guaranty Association Act, the payment to the employee would not "result in the shuffling of funds among member insurers."[223]

To the extent that the distinction between the principles advanced in *Ferrari* and *Arnone* is a logical one vis-a-vis the capacity in which the injured party is pursuing recovery of a claim against the guaranty association, considerable problems arise in applying the rationale advanced to a claimant under the Indiana Act who has received workmen's compensation benefits. On one hand, if the claimant has received

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the provisions of Indiana Code sections 34-4-33-12, and -14. Indiana Code section 34-4-33-12 (Supp. 1987) provides:

> If a subrogation claim or other lien or claim, other than a lien under I.C. 22-3-2-13 or I.C. 22-3-7-36, that arose out of the payment of medical expenses or other benefits exists in respect to a claim for personal injuries or death and the claimant's recovery is diminished:
>
> (1) by comparative fault; or
>
> (2) by reason of the uncollectability of the full value of the claim for personal injuries or death resulting from limited liability insurance or from any other cause
>
> the lien or claim shall be diminished in the same proportion as the claimant's recovery is diminished.

IND. CODE § 34-4-33-12 (Supp. 1987). IND. CODE § 34-4-33-14 (Supp. 1987), on the other hand, provides:

> In any action tried under this chapter, any subrogation or lien for collateral benefits received by the prevailing party shall be reduced by the ratio of the lower of the prevailing party's judgment or collected judgment to the amount of damages the trier of fact found the prevailing party to have sustained.

Id.

[221] 153 N.J. Super. 584, 380 A.2d 734 (1977).

[222] *Id.* at 588-89, 380 A.2d at 736-37.

[223] *Id.* at 594, 380 A.2d at 739.

workmen's compensation benefits and then obtains a settlement or judgment against the tortfeasor, Indiana Code section 22-3-2-13 provides that "from the amount received by the employee . . . there shall be paid to the employer or the employer's compensation insurance carrier, . . . the amount of compensation paid to the employee . . . plus medical, surgical, hospital . . . ." Since workmen's compensation insurance is covered by the Act, this would result in the shuffling of funds among "member insurers."[224]

The same provision of the Indiana Workmen's Compensation Act also provides that "the employer's compensation insurance carrier shall have a lien upon any settlement award, judgment, or fund out of which the employee might be compensated from the third party."[225] It will be left to the Indiana courts to address these provisions of the Indiana Workmen's Compensation Act, vis-a-vis the subrogation provisions of the IIGA Act and the rationale of *Ferrari* and *Arnone*.

The same type of issue may arise with respect to language in many health care policies, providing that to the extent of payment under the policy, the insurer is subrogated to all rights of recovery against the alleged tortfeasor.[226] If the Indiana courts adopt the reasoning of *Ferrari* that the "real party" pursing the claim is the insurance company, any recovery could be precluded under the Act's prohibition against insurer recovery from the guaranty fund.[227] If, on the other hand, the Indiana courts adopt the reasoning of *Arnone*, recovery under the Act would

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[224]IND. CODE § 22-3-2-13 (1981). Both the insolvent liability carrier of the tortfeasor and the workmen's compensation carrier would be member insurers under the Act. IND. CODE § 27-6-8-4(6) (1982).

[225]IND. CODE § 22-3-2-13 (1982).

[226]For example, in Mutual Hosp. Ins., Inc. v. MacGregor, 174 Ind. App. 550, 368 N.E.2d 1376 (1977), the following provision of a Blue Cross-Blue Shield policy was at issue:

> In the event of any payment for services under this Policy, Blue Cross-Blue Shield shall, to the extent of such payment, be subrogated to all the rights of recovery of the Member or Dependent arising out of any claim or cause of action which may accrue because of the alleged negligent conduct of a third party. Any such Member or Dependent hereby agrees to reimburse Blue Cross-Blue Shield, for any benefits so paid hereunder, out of any monies recovered from such third party as the result of judgment, settlement or otherwise; and such Member or Dependent hereby agrees to take such action, to furnish such information and assistance, and to execute and deliver all necessary instruments as Blue Cross-Blue Shield may require to facilitate the enforcement of their rights. This provision shall not apply, however, to a recovery obtained by a Member or Dependent from any insurance company on a policy under which said Member or Dependent is entitled to indemnity as a named insured person.

Id. at 1377.

[227]IND. CODE § 27-6-8-4(4) (1982).

not be precluded, since any payment to the injured party would not inure to the benefit of a member insurer.

D. *Subrogation of IIGA*

One important point must be made with respect to a first-party claim against the IIGA as a result of the insured's carrier becoming insolvent. In this context, the insured is pursuing a direct claim against the IIGA, who is standing in the shoes of the insured's insolvent carrier. The insured is bound by all terms and conditions of the original insurance policy,[228] including the duty to cooperate, and the subrogation and "hold in trust" provisions of the policy. In fact, the Indiana Act expressly provides that any party receiving payment shall be deemed to have assigned his rights under the policy to IIGA, to the extent of payment by the IIGA.[229]

As such, special care should be given to any settlement with a tortfeasor or his insurance carrier so as not to impair IIGA's subrogation rights. There is a substantial body of case law in Indiana indicating that the insured's general release of a tortfeasor will destroy the insurance company's subrogation rights and preclude the insured from making any claim under the insurance policy.[230] This type of reasoning could be equally applicable to deny an injured party access to the IIGA if he has destroyed IIGA's subrogation rights via a general release of the tortfeasor.[231]

E. *IIGA's Duty to Defend*

Some interesting case law has developed in other jurisdictions in the third-party context concerning IIGA's duty to defend the tortfeasor of the insolvent insurer.

1. Pre-Insolvency Attorney Fees.—The Act specifically provides that a "covered claim" does not include "attorney's fees and expenses, court costs, interest, bond premiums, whether arising as a policy benefit

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[228]*See* Pannell v. Missouri Ins. Guar. Ass'n, 595 S.W.2d 339 (Mo. Ct. App. 1980) (insured is required to comply with conditions of policy of insolvent insurer).

[229]Ind. Code § 27-6-8-10(a) (1982).

[230]*See, e.g.*, Allstate Ins. Co. v. Meek, 489 N.E.2d 530 (Ind. Ct. App. 1986); Dravet v. Vernon Fire & Casualty Ins. Co., 454 N.E.2d 440 (Ind. Ct. App. 1983); Hockelberg v. Farm Bureau Ins. Co., 407 N.E.2d 1160 (Ind. Ct. App. 1980). *But see* National Mut. Ins. Co., 454 N.E.2d 1386 (Ind. Ct. App. 1981).

[231]*See, e.g.*, Hemisphere Nat. Bank v. District of Columbia, 412 A.2d 31 (D.C. App. 1980) (if the claimant takes actions which prejudice subrogation rights to which the guaranty association would be entitled, the claimant is barred to the extent that the guaranty association rights were prejudiced).

or otherwise, prior to the appointment of a liquidator."[232] Similar provisions have been construed by the courts of other jurisdictions to indicate that a guaranty association was not obligated to pay attorney fees incurred by the insurer in tendering a defense to the insured tortfeasor before the carrier became insolvent.[233] Thus, a law firm which has undertaken the defense of an insured at the request of a carrier who becomes insolvent cannot recover pre-insolvency attorney fees from the guaranty association. Rather, its sole remedy is to file a claim with the liquidator.[234]

2. *Bad Faith.*—Numerous decisions from other jurisdictions have addressed the issue of whether a guaranty association can be held liable for the insolvent insurer's bad faith refusal to settle a claim within policy limits prior to insolvency. The courts have uniformly concluded that the guaranty association was not vicariously liable for its members' torts.[235]

Additionally, cases have also addressed the issue of whether the guaranty association can be held liable on a bad faith basis for itself refusing to accept an offer to settle a personal injury claim within the limits of the policy of an insolvent insurer. The courts have likewise concluded that no bad faith action can be maintained against the guaranty association for a failure to settle within policy limits.[236]

3. *Breach of Duty to Defend.*—One additional decision merits review concerning the guaranty association's duty to defend. In *Carrousel Concessions, Inc. v. Florida Insurance Guaranty Association*,[237] the insured tortfeasor brought an action against the guaranty association claiming that an inadequate defense had been provided. The Florida Court of Appeals agreed with the insured's contentions, and determined that the guaranty association was obligated to provide an "adequate defense." The court further held that if an inadequate defense was provided, the guaranty association could be sued for a breach of the

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[232]Ind. Code § 27-6-8-4(4) (1982).

[233]*See, e.g.*, Maguire, Ward, Maguire & Eldredge v. Idaho Ins. Guar. Ass'n, 112 Idaho 166, 730 P.2d 1086 (Idaho Ct. App. 1986); Metry, Metry, Sanom and Ashare v. Michigan Prop. & Cas. Guar. Ass'n, 403 Mich. 117, 267 N.W.2d 695 (1978); Ohio Ins. Guar. Ass'n v. Simpson, 1 Ohio App. 3d. 112, 439 N.E.2d 1257 (1981); Greenfield v. Pennsylvania Ins. Guar. Ass'n, 256 Pa. Super. 136, 389 A.2d 638 (1978).

[234]*See* Ind. Code § 27-9-1-1 to -4-10 (1982).

[235]*See, e.g.*, Rivera v. South Am. Fire Ins. Co., 361 So. 2d 193, (Fla. Ct. App. 1978), *cert. denied*, 368 So. 2d 1372 (Fla. 1979); Vaughn v. Vaughn, 23 Wash. App. 527, 597 P.2d 932 (1979).

[236]*See, e.g.*, Interstate Fire & Cas. Ins. Co. v. California Ins. Guar. Ass'n, 125 Cal. App. 3d 904, 178 Cal. Rptr. 673 (1981); Fernandez v. Florida Ins. Guar. Ass'n, 383 So. 2d 974 (Fla. Ct. App.), 389 So. 2d. 1109 (Fla. 1980).

[237]483 So. 2d 513 (Fla. App. 1986).

duty to defend the insured. Under such circumstances, the injured insured may be entitled to recover attorney fees and costs if he can establish that the defense supplied by the guaranty association was inadequate, and that it was reasonable for the insured to engage his own attorney in order to provide a defense to the action.[238]

V. Conclusion

The stated purpose of the Indiana Guaranty Association Act is, *inter alia*, "to avoid excessive financial loss to claimants or policyholders because of the insolvency of an insurer."[239] Despite the stated purpose, the Indiana Legislature has enacted one of the most restrictive property/casualty guaranty association acts in the country, joining Colorado as the only two jurisdictions limiting per claim liability to $49,400.00.[240] Additionally, Indiana is one of only four jurisdictions which limit an injured party's recovery under the Guaranty Association Act to essentially medical expenses and lost wages, thereby precluding, by legislative fiat, an injured party's ability to recover common law damages for pain and suffering, disfigurement and/or deformity, etc.[241]

The Indiana Guaranty Association Act has remained relatively unchanged since its passage in 1971. During the recent sunset audit of the Indiana Department of Insurance, the legislature addressed, *inter alia*, the current state of affairs of the Indiana Guaranty Association.[242] It is hoped that the Indiana Legislature will follow the lead of other jurisdictions which have recognized that soaring medical costs will require a reassessment of the per claim/per occurrence limits of liability currently provided for in the Indiana Act. It is further hoped that the Indiana Legislature will consider and address the inherent conflicts which currently exist between the Indiana Guaranty Association Act, and other acts which are subject to its jurisdiction, such as the Indiana Workmen's Compensation Act, and the Indiana Medical Malpractice Act.

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[238] *Id.* at 517.
[239] Ind. Code § 27-6-8-2 (1982).
[240] *See supra* note 30.
[241] *See supra* notes 53-56 and accompanying text.
[242] Indiana Underwriter (October 1987), p.1.