SURVEY OF RECENT DEVELOPMENTS IN INSURANCE LAW

RICHARD K. SHOULTZ*
SONIA C. DAS**

INTRODUCTION

During this survey period,[1] the courts decided significantly more automobile insurance than commercial liability cases. Many of the automobile decisions addressed the scope of coverage for a driver's alleged permissive use of an automobile and clarified the extent of coverage that may be available. However, one decision on declaratory judgment stands to significantly impact the insurance coverage field and deserves special attention. This Article addresses the past year's cases, and analyzes their effect on the practice of insurance law.[2]

I. DECLARATORY JUDGMENT INSURANCE CASES

A. Third Party Claimant May Pursue Declaratory Judgment Action

As most insurance practitioners know, a declaratory judgment action is the usual means to determine the scope of insurance coverage owed when a dispute exists. In most coverage lawsuits involving third party claims,[3] the insurance

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* Partner, Lewis & Wagner. B.A., 1987, Hanover College; J.D., 1990, Indiana University School of Law—Indianapolis.

** Associate, Lewis & Wagner. B.A., 1996, Indiana University; J.D., 2000, Indiana University School of Law.

1. The survey period for this Article is approximately October 1, 2002 to September 30, 2003.

2. Other cases during the survey period are not analyzed within this article. Bartlett v. State Farm Mut. Auto. Ins., 2002 WL 31741473 (S.D. Ind. 2002) (holding insurer entitled to summary judgment on claim for bad faith in handling underinsured motorist claim); Tunny v. Erie Ins. Co., 790 N.E.2d 1009 (Ind. Ct. App. 2003) (holding underinsured motorist carrier not entitled for set off of worker's compensation payments reflecting amounts paid to insured's attorney); Brady v. Allstate Indem. Co., 788 N.E.2d 916 (Ind. Ct. App. 2003) (holding underinsured motorist carrier did not commit bad faith on disputed value of claim); State Farm Mut. Auto. Ins. Co. v. Steury, 787 N.E.2d 465 (Ind. Ct. App. 2003) (holding insurer required to obtain written rejection of underinsured motorist coverage when policy was renewed after legislative amendment requiring offering of UIM coverage even though already rejected); Microvote Corp. v. GRE Ins. Group, 779 N.E.2d 94 (Ind. Ct. App. 2002) (holding CGL insurer owed no coverage for claim seeking replacement damages for insured's defective product); State Farm Mut. Auto. Ins. Co. v. Leybman, 777 N.E.2d 763 (Ind. Ct. App. 2002) (holding insured not entitled to uninsured motorist coverage when another liability insurance company offers policy limits, even if coverage is disputed); Am. Family Mut. Ins. Co. v. Federated Mut. Ins. Co., 775 N.E.2d 1198 (Ind. Ct. App. 2002) (holding insurer's failure to obtain written rejection of uninsured motorist coverage entitled insured to uninsured motorist benefits equal to liability coverage limits).

3. A "third party" claim is one for insurance coverage being presented by a party who is not the insured or insurer. In other words, that claimant is a "third party" to the insurance contract. A

company files the declaratory judgment action in a separate court from the underlying claim that is being presented against the insured. However, in *Wilson v. Continental Casualty Co.*,[4] the court addressed the propriety of the third party claimant bringing the declaratory judgment action.

The third party claimant was an alleged victim of legal malpractice, who brought a lawsuit against his former attorney.[5] The attorney submitted the complaint to his legal malpractice carrier, who provided a defense to him under a reservation of rights.[6] However, the claimant filed a separate declaratory judgment lawsuit against the malpractice carrier, contending that the insurer was obligated to defend the attorney without a reservation of rights and to pay any amounts owed by the attorney for the lawsuit.[7] The malpractice insurer sought to dismiss the action contending it was prohibited by Indiana's rule against third parties bringing a direct action against an insurance company.[8]

The Indiana Court of Appeals reaffirmed the prohibition of direct actions by third parties against insurers, but distinguished a declaratory judgment action by the third party to determine insurance coverage.[9] The court recognized obstacles that may be faced by a claimant when an insurer is defending its insured under a reservation of rights:

> A plaintiff is at a severe disadvantage when an insurance carrier chooses to defend an insured under a reservation of rights because at any time during the proceeding, even after the plaintiff has expended considerable time and resources, the insurance carrier can bring a declaratory action to establish that it does not have to indemnify the insured defendant.[10]

Allowing third parties to bring a declaratory judgment action to determine coverage when they have claims against an insured subject to a coverage question does not appear to significantly change the practical procedures for determining coverage. In order to have a judicial determination on coverage that is binding against all interested parties, most insurance companies already include the insured and the third party when a declaratory judgment action is filed.

However, a potential problem evolving from this decision is when third parties bring the declaratory judgment action in the same court as their existing claim against the insured. Such a practice presents a multitude of practical

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"first party" claim is one brought by the insured seeking coverage.

4. 778 N.E.2d 849 (Ind. Ct. App. 2002).

5. *Id.* at 850.

6. *Id.* An insurance company that provides a defense under a "reservation of rights," does so for the benefit of protecting itself from being collaterally estopped on issues that may be raised in the underlying tort action. *See* Liberty Mut. Ins. Co. v. Metzler, 586 N.E.2d 897 (Ind. Ct. App. 1992). It also prevents the insurer from potentially breaching the insurance policy or its duty of good faith owed to the insured. *See Wilson*, 778 N.E.2d at 852.

7. *Id.* at 850.

8. *See* Menefee v. Schurr, 751 N.E.2d 757 (Ind. Ct. App. 2001).

9. *Wilson*, 778 N.E.2d at 851-52.

10. *Id.* at 852.

problems, including making the litigation of declaratory judgment lawsuits more costly to insurance companies, as the company must now participate in all discovery even if irrelevant to the coverage issues.

More important is the potential for conflict that exists for the attorney hired by the insurance company to represent the insured. If the underlying lawsuit and declaratory judgment actions are combined, that defense attorney faces irreconcilable conflicts. Specifically, that attorney is being paid by the insurer to defend the insured, while the same insurance company is attempting to eliminate the insurance coverage being provided. The resolution of this potential conflict is to keep the declaratory judgment and underlying actions separate and distinct.

B. Third Party Claimant's Rights to Insurance Proceeds Are Limited to the Insured's Rights

The decision in *Wolverine Mutual Insurance v. Vance*,[11] presented a very interesting case concerning the rights of a third party claimant to insurance proceeds in a declaratory judgment proceeding. The named insured shot the third party claimant after an altercation. The shooting victim filed a lawsuit against the insured. The insured was also prosecuted and convicted of attempted murder.[12] Because the jury's determination of the insured's guilt included a requisite finding that the insured possessed the specific intent to injure the victim, the insured's homeowners insurance company filed a declaratory judgment action contending that it did not owe insurance coverage because the insured's actions were intentional and excluded under the policy.[13]

The insurance company filed a Motion for Summary Judgment that no liability coverage was available to the insured, relying in support upon the attempted murder conviction. The district court granted summary judgment to the insurance company, and the claimants appealed.[14] The appellate court agreed with the victim that it was not collaterally estopped to litigate the insured's intent because of the guilty plea verdict.[15] Although the insured was collaterally estopped to challenge the criminal court's funding of intent,[16] the victim was not a party to the criminal proceedings, and could still litigate the issue.[17]

However, the court expanded upon this principle in a very interesting way, upholding the district court's grant of summary judgment. The court determined that because Indiana is not a "direct action state," so that the shooting victim could not bring a direct civil lawsuit against the liability insurance company for damages, the shooting victim may only "stand in the legal shoes" of the insured

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11. 325 F.3d 939 (7th Cir. 2003).
12. *Id.* at 941-42.
13. *Id.* at 942.
14. *Id.* at 941.
15. *Id.* at 943.
16. *See* Meridian Ins. Co. v. Zepeda, 734 N.E.2d 1126 (Ind. Ct. App. 2000).
17. *Wolverine Mut. Ins.*, 325 F.3d at 943.

to seek indemnification from the insurer.[18] Consequently, because the insurance company's contractual duty flows only to the insured concerning the obligation of providing insurance coverage, the victim's rights to receive those proceeds was limited to the rights of the insured. Thus, if collateral estoppel applied to the insured where the criminal conviction collaterally estopped him from re-litigating the issue, summary judgment in favor of the insurer was still warranted because the victim had no greater rights than the insured.[19]

This decision appears to give little or no ability to the claimant to actually litigate the insured's intent. Even though the court says that the insured has the right to do so and is not collaterally estopped, the court then stated that because the victim had no greater rights than the insured who was collaterally estopped, the victim could not recover even if liability was established. It will be interesting to see how Indiana courts treat this ruling in declaratory judgment actions. If the Seventh Circuit's analysis is accepted, then insurers should be able to argue that collateral estoppel of the insured will also affect and limit the third party claimant's right as well.

II. AUTOMOBILE CASES

A. Permissive Use of Vehicle

The scope of insurance coverage available to a driver who is allegedly using a vehicle with permission was addressed in a number of decisions during the survey period. The question of the driver's operation of the vehicle and entitlement to coverage is a popular topic of litigation because of the unusual situations where drivers obtain the opportunity to drive automobiles.

In *American Family Insurance Co. v. Globe American Casualty Co.*,[20] the court addressed whether an intoxicated driver was entitled to coverage and whether the insurance company's issuance of an SR-22 form certifying proof of financial responsibility for the automobile,[21] overrode the policy provisions which limited the coverage. The owner of the vehicle granted permission to King's wife to use the owner's car, while King's wife's car was being repaired.[22] The owner did not grant permission to King to use the vehicle.[23]

On the day of the accident, King, while intoxicated, drove the vehicle, and collided with another motorist resulting in the motorist's death.[24] When

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18. *Id.* at 944.

19. *Id.*

20. 774 N.E.2d 932 (Ind. Ct. App. 2002).

21. The SR-22 form was created by Indiana's General Assembly for persons whose driving privileges have been suspended to demonstrate proof of financial responsibility under Indiana's Financial Responsibility Act, IND. CODE § 9-30-10-13 (2003), in order to obtain a driver's license. *Am. Family Ins. Co.*, 774 N.E.2d at 937.

22. *Id.* at 936.

23. *Id.*

24. *Id.* at 934.

insurance coverage was sought by King from the owner's policy for the lawsuit brought by the decedent, the owner's insurer filed a declaratory judgment contending that King was not an "insured" under the policy as he did not have permission to operate the automobile.[25]

The trial court granted summary judgment to the owner's insurance company determining that no insurance coverage was available, and the Indiana Court of Appeals affirmed.[26] While the court recognized that "implied permission" to use the automobile may exist by mere silence of the vehicle owner when initially supplying the vehicle to another,[27] the policy language at issue required the "express permission" of the owner in order for coverage to apply.[28] Because the vehicle owner never gave King express permission to operate the vehicle, he was not an "insured" under the policy to be afforded insurance coverage.[29]

The other interesting issue addressed by the appellate court focused upon the effect of the SR-22 form. One of the parties to the declaratory judgment proceedings argued that coverage existed for King, even if he did not qualify as an "insured," because the SR-22 form created a policy ambiguity.[30] Because the SR-22 form established the operator's proof of financial responsibility, the argument was made that it created "unconditional nonowned insurance coverage" for the operation of the vehicle.[31]

The appellate court rejected the argument that "unconditional" coverage was created or that an ambiguity existed within the policy.[32] The court observed that if such an argument was accepted, then insureds who received the SR-22 form possessed coverage greater than those under the policy who did not receive the form with the payment of no additional premium.[33] The purpose of the SR-22 form is merely "'to inform the recipient . . . that insurance has been obtained; the certificate itself, however, is not the equivalent of an insurance policy.'"[34]

Another interesting permissive use decision focused upon whether the

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25. *Id.*

26. *Id.* at 941.

27. *See* Am. Employers' Ins. Co. v. Cornell, 76 N.E.2d 562 (Ind. 1948).

28. The policy defined "insured person" to include: "With respect to a car not owned by you, to be an insured person you must be using the car with the express permission of the owner and within the scope of such permission." *Am. Family Ins. Co.*, 774 N.E.2d at 936 (emphasis omitted).

29. *Id.*

30. Generally, the rules of insurance policy construction require an ambiguous insurance policy to be construed against the drafter of the policy, which is usually the insurance company, and in favor of the insured. *See* Bosecker v. Westfield Ins. Co, 724 N.E.2d 241, 244 (Ind. 2000). However, in this case, the declaratory judgment action was between two insurance companies, instead of an insurance company and its insured, such that the court viewed the policy from a neutral stance. *Am. Family Ins. Co.*, 774 N.E.2d at 936.

31. *Id.* at 939.

32. *Id.*

33. *Id.*

34. *Id.* (quoting Postlewait Constr. Co. v. Great Am. Ins. Co., 720 P.2d 805, 807 (Wash. 1986)).

vehicle owner's level of intoxication bears on his ability to give permission to another to operate a vehicle. In *Smith v. Cincinnati Insurance Co.*,[35] a vehicle owner's extreme intoxication was clearly evident to all who observed her. Allegedly, the vehicle owner gave permission to a fifteen year old driver who possessed only a learner's permit, and could not lawfully operate the vehicle without a guardian or relative accompanying her.[36] The young operator of the vehicle drove off the roadway and caused personal injuries to both the driver and the owner of the vehicle.

When the owner filed a complaint for personal injuries, the operator sought insurance coverage under the owner's policy.[37] The trial court and Indiana Court of Appeals found that coverage was excluded for the driver under the policy language as the young driver did not have a reasonable belief that she had permission to drive.[38] The Indiana Supreme Court agreed that the driver was not entitled to coverage.[39] The supreme court, quoting from the lower court's decision, determined a five part test should be used to determine whether a driver has a reasonable belief that she is entitled to driver another person's car:

> (1) [W]hether the driver has the express permission to use the vehicle;
> (2) [W]hether the driver's use of the vehicle exceeded the permission granted;
> (3) [W]hether the driver was legally entitled to drive under the laws of the applicable state;
> (4) [W]hether the driver had any ownership or possessory right to the vehicle; and
> (5) [W]hether there was some form of relationship between the driver and the insured, or one authorized to act on behalf of the insured, that would have caused the driver to believe that she was entitled to drive.[40]

Because the driver only possessed a learner's permit, the court concluded that she did not have a reasonable belief that she would be entitled to drive the owner's car.[41]

However, the court disagreed with a second ground cited by the Indiana Court of Appeals in its finding that no coverage existed. The court of appeals indicated that because the owner was extremely intoxicated when the permission was allegedly given, no reasonable person would have believed that the owner could have given permission.[42] Recognizing the strong public interest in

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35. 790 N.E.2d 460 (Ind. 2003).

36. *Id.* at 460; *see* IND. CODE § 9-24-7-4(2) (2003).

37. *Smith*, 790 N.E.2d at 461.

38. The policy excluded coverage for any person "[u]sing a vehicle without a reasonable belief that that person is entitled to do so." *Id.*

39. *Id.* at 462.

40. *Id.* at 461.

41. *Id.*

42. *Id.*

preventing intoxicated drivers from operating motor vehicles, the court found that an owner's level of intoxication should not be relevant in determining whether that owner may give permission to another to operate the vehicle:

> Given the strong state and national interest of keeping persons who are intoxicated from operating motor vehicles, we think it sound policy to encourage sober drivers to get behind the wheel and not let their friends drive while drunk. It is true that a person may be so intoxicated that she may be unable to give her consent in other contexts. However, in the case of an intoxicated would-be driver, the level of sobriety should not prohibit another person from relying on the driver's request to operate her car. In essence, the fact that a would-be driver is extremely intoxicated has no bearing on whether she can nonetheless give her permission for a sober designated driver to drive her car.[43]

The supreme court clearly felt it necessary to recognize the strong public interest against intoxicated drivers operating motor vehicles.

In another case addressing permissive use of a vehicle, the U.S. Court of Appeals for the Seventh Circuit determined that no permission existed to a driver who was unlicensed in violation of a written agreement. In *Vanliner Insurance Co. v. Sampat*,[44] the named insured was a storage company. The storage company entered into an operating agreement with a truck driver where the driver provided the transportation to pull the storage company's trailers.[45] The agreement authorized the driver to use other individuals to drive the vehicle if they were "properly licensed."[46] When the driver became ill, he asked another individual accompanying him on a trip as a loader to operate the tractor, even though the individual was not licensed.[47] The substitute driver caused an automobile accident resulting in serious personal injuries.[48]

A declaratory judgment action was brought to determine the obligation of the storage company's insurer to provide coverage to the substitute driver for the personal injury lawsuit brought against him.[49] The focus of the action was whether the unlicensed driver of the vehicle had the permission of the named insured, the storage company, to be entitled to coverage.[50]

While noting that Indiana follows the "liberal" rule in determining implied permission,[51] the court concluded that the unlicensed driver did not have permission to be afforded coverage. Because the contractor agreement expressly required drivers to be properly licensed, the court could not imply permission for

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43. *Id.* at 462.
44. 320 F.3d 709 (7th Cir. 2003).
45. *Id.* at 710.
46. *Id.* at 713.
47. *Id.*
48. *Id.* at 710.
49. *Id.*
50. *Id.* at 712.
51. *Id.* at 713.

the unlicensed driver to use the vehicle in satisfaction of the liberal rule.[52] Consequently, there was no coverage available under the storage company's policy for the unlicensed driver.[53]

Each of these "permissive use" cases demonstrate that the court will apply the "liberal" rule concerning permission, but will not deviate from express restrictions placed upon the permission of using the vehicle. Thus, in addressing these types of cases, special focus needs to be given to the initial granting of permission to see if there are any restrictions that prevent application of the "liberal" rule.

B. As a Matter of Law, Court Refuses to Find Lack of Uninsured Motorist Coverage for Insured's Collision with "Debris" in Roadway

The *Will v. Meridian Insurance Group., Inc.*[54] decision is a case addressing the existence of uninsured motorist coverage for an insured's accident with an unknown driver and object. The insured was driving her automobile and collided with a pile of roofing materials.[55] In attempting to avoid the debris pile, the insured sustained injury as a result of the rollover of her vehicle.[56]

In order for uninsured motorist coverage to apply, the insured must have collided with a "hit-and-run vehicle."[57] The court recognized the purpose of such a policy provision is to prevent fraudulent claims by insureds from alleged accidents with unknown hit and run drivers.[58] However, the court observed that "indirect contact" with a vehicle may satisfy the "hit and run" requirements.[59] The court indicated that "indirect contact" occurs when a "'continued transmission of force indirectly and contemporaneously [causes contact] through an intermediate object.'"[60]

The trial court granted the uninsured motorist insurer's summary judgment motion which asked the court to rule as a matter of law that the insured's collision with the debris did not satisfy the policy definition for "hit and run vehicle."[61] However, the appellate court reversed the trial court.[62] The court simply found that the designated evidence for the summary judgment motion did not establish an absence of genuine issues of material fact on the continuous sequence and chain of events concerning the origin of the debris.[63] While

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52. *Id.*
53. *Id.*
54. 776 N.E.2d 1233 (Ind. Ct. App. 2002).
55. The opinion describes the pile as "four to five f[eet]" high. *Id.* at 1234.
56. *Id.*
57. *Id.*
58. *Id.* at 1236; *see also* Allied Fid. Ins. Co. v. Lamb, 361 N.E.2d 174 (Ind. App. 1977).
59. *Will*, 776 N.E.2d at 1236.
60. *Id.* at 1235 (quoting *Lamb*, 361 N.E.2d at 177).
61. *Id.*
62. *Id.* at 1239.
63. *Id.*

summary judgment for the insurer was reversed, the court observed that the insured will have a heavy burden to show an entitlement of coverage.[64]

The conclusion of the court is unusual. While generally insureds who seek coverage must establish an entitlement as part of their burden of proof to recover for a claim under the policy, it seems that the court has placed an almost impossible burden upon the underinsured motorist insurer to be entitled to summary judgment. Because the policy required a "hit and run vehicle," the insurer in this case clearly established that the undisputed facts demonstrated that there was no collision with a "hit and run vehicle" even under the "indirect physical contact" rule to establish coverage. Once the insurer demonstrated the policy terms were not satisfied, the burden should have shifted to the insured to present some evidence to create a genuine issue of material fact that there was "indirect physical contact" with a "hit and run vehicle" to demonstrate coverage.[65] This decision will limit an insurer's ability to seek summary judgment when the insured cannot show an entitlement to coverage.

In a similar case, the United States District Court for the Northern District of Indiana ruled for an insurer concerning a lack of uninsured motorist coverage for the insured's vehicle collision with abandoned semi truck tires along the side of the road. In *Northland Insurance Co. v. Gray*,[66] the insureds sought uninsured motorist coverage from their carrier when their vehicle's tire sustained a blow out, and the vehicle veered off the side of the road and struck the abandoned semi truck tires.[67] The uninsured motorist carrier filed a declaratory judgment action to contend that no coverage was available because the insureds did not have an accident with a "hit and run vehicle."[68] The insured moved to dismiss the declaratory judgment action by contending that it was improperly brought by the insurer without an "actual controversy,"[69] and that the insurer was depriving the insureds of their ability to choose the forum to seek relief.[70]

The district court rejected the insureds' arguments seeking dismissal.[71] Additionally, the court determined, as a matter of law, that no uninsured motorist coverage was available to the insureds because their accident did not involve a

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64. *Id.*

65. The court defined "indirect physical conduct" as "'when an unidentified vehicle strikes an object impelling it to strike the insured automobile and a substantial nexus between the unidentified vehicle and the intermediate object is established.'" *Id.* at 1236 (quoting *Lamb*, 361 N.E.2d at 179).

66. 240 F. Supp. 2d 846 (N.D. Ind. 2003).

67. *Id.*

68. The specific policy provision at issue stated: "'Uninsured motorist vehicle' means a land motor vehicle or trailer . . . [w]hich is a hit-and-run vehicle and neither the driver nor the owner can be identified. A hit-and-run vehicle is one that causes 'bodily injury' to an 'insured' by hitting the 'insured,' a covered 'auto' or vehicle and 'insured' is 'occupying.'" *Id.* at 849.

69. The Federal Declaratory Judgment Act, 28 U.S.C. § 2201 (2003), requires an "actual controversy" exist between the parties to the litigation.

70. *Gray*, 240 F. Supp. 2d at 848.

71. *Id.* at 850.

"hit-and-run vehicle" which was necessary to satisfy the definition of "uninsured motor vehicle."[72] This decision appears to be a correct analysis, although it is surprising that the court ruled as a matter of law when the insureds had filed a motion to dismiss the action.

C. Uninsured Motorist Coverage Not Available for Accidental Discharge of Paintball Gun Inside Vehicle

An interesting factual case ending in unfortunate results occurred in *Sizemore v. Erie Insurance Exchange*,[73] where the claimant sustained a serious eye injury as a result of the discharge of a paint gun. On the date of the accident, some young men were riding in a car with two paintball guns.[74] They met a friend, and stopped the car to talk.[75] The friend stuck his head inside the front passenger window, and as he did so, one of the paintball guns fired.[76] The friend was struck in the eye, resulting in its removal and replacement with a prosthetic eye.[77] The occupants of the car believe that the safety of the gun was activated, but it apparently discharged when they placed the gun on top of the right front passenger seat of the car.[78]

The driver of the vehicle when the accident happened was uninsured.[79] Consequently, the friend presented an uninsured motorist claim to his own insurance company seeking coverage for his injuries.[80]

The insurer denied that it owed any uninsured motorist coverage because there was no causal connection between the incident and the user's operation of a motor vehicle. Specifically, before coverage existed, there must have been a "motor vehicle accident."[81] The trial court and court of appeals both agreed with the insurer that no coverage existed.[82] In order for coverage to apply, the court felt that the use of the vehicle must be the "the efficient and predominating cause

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72. *Id.*
73. 789 N.E.2d 1037 (Ind. Ct. App. 2003).
74. *Id.* at 1038.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. The policy's language provided:

> We will pay for damages for bodily injury and property damage that the law entitles you or your legal representative to recover from the owner or operator of an uninsured motor vehicle or underinsured motor vehicle. Damages must result from a motor vehicle accident arising out of the ownership or use of the uninsured motor vehicle or underinsured motor vehicle as a motor vehicle.

Id. at 1039.
82. *Id.*

of the accident."[83] Because the undisputed facts demonstrated that the only connection of the uninsured vehicle was that the paintball gun happened to rest against the passenger's seat, the court concluded that the automobile only "remotely contributed" to causing the friend's injuries.[84] Likewise, the court found that the applicable policy language clearly required "motor vehicle accident," and because no motor vehicle accident occurred, an additional ground existed to deny coverage.[85]

This case enforces earlier Indiana decisions addressing unusual circumstances in attempts to seek application of uninsured motorist coverage in automobile policies. The courts require that the automobile accident be the "efficient and predominating cause" of the claimant's injuries before the automobile policy will apply. If the use of an automobile only remotely contributes to the cause, then the automobile policy is not the proper policy to respond.

E. Underinsured Motorist Coverage Not Available for Loss of Consortium Claim for Death of Adult Child

In *Armstrong v. Federated Mutual Insurance Co.*,[86] the insureds were parents of a daughter killed in an automobile accident. As a result of her death, the daughter's estate received the full policy limits available to the tortfeasor that caused her death.[87] The parents of the daughter sought damages for the "loss of love and companionship" of their daughter from their underinsured motorist coverage.[88] The major issue addressed by the court was whether damages for "loss of love and companionship" met the definition of "bodily injury"[89] to afford coverage.

The court initially concluded that the policy's definition of "bodily injury" did not include the emotional-type damages presented in a claim for "loss of love and companionship."[90] The court also distinguished other Indiana cases which may have suggested that emotional damages may satisfy the definition of "bodily injury" in a policy with an identical policy definition.[91] In this particular case,

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83. *Id.* at 1040 (citing Ind. Lumberman's Mut. Ins. Co. v. Stateman Ins. Co., 291 N.E.2d 897 (Ind. 1973)).

84. *Id.*

85. *Id.*

86. 785 N.E.2d 284 (Ind. Ct. App. 2003).

87. *Id.* at 286.

88. *Id.* at 292.

89. The policy defined "bodily injury" to mean "bodily harm, sickness or disease, including death that results." *Id.*

90. *Id.*

91. In *Wayne Township Board of School Commissioners v. Indiana Insurance Co.*, 650 N.E.2d 1205 (Ind. Ct. App. 1995), the court determined that the "bodily injury" included the emotional trauma suffered by a child molestation victim because the victim sustained a physical impact which was inherent in the crime of child molestation. *Armstrong*, 785 N.E.2d at 293.

the parents who lost their adult daughter did not sustain a "bodily injury" as defined by the policy to be entitled to damages for the "loss of love and companionship" under the policy.[92] Their claim for damages did not involve any bodily impact necessary to satisfy the definition of "bodily injury."[93]

This case is important in demonstrating that claims devoted strictly to loss of love and companionship will not be proper to recover under uninsured/underinsured motorist policies. Until this case was decided, there existed some uncertainty concerning an insured's right to pursue such a claim.[94]

F. Listed Driver on Policy Is Not Same as "Insured" to Be Entitled to Uninsured Motorist Coverage

An individual who was identified as a "listed driver" under a policy was not considered an "insured" as that term was defined within the policy to be afforded uninsured motorist coverage in the case of *Puryear v. Progressive Northern Insurance Co.*[95] A roommate purchased an automobile policy and was the only named insured.[96] However, the named insured's "roommate" was identified as a "listed driver" on the policy.[97] The roommate was seriously injured as a pedestrian by a hit and run driver and sought uninsured motorist coverage from the roommate's policy.[98]

The roommate contended that his status as a "listed driver" made him entitled to receive uninsured motorist coverage under the policy.[99] However, the court rejected that argument by reviewing the definition of "insured person,"[100] and concluded the roommate was not entitled to uninsured motorist coverage. The court also rejected the roommate's argument that the policy was ambiguous from its inclusion of "listed drivers" and "insureds."[101]

A similar conclusion was decided in *Little v. Progressive Insurance.*[102] The named insured acquired an automobile policy and completed the necessary forms

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92. *Id.*

93. *Id.*

94. The case also has a very instructional discussion on when jury instructions may be used to define insurance policy terms that will be decided by the jury. For instance, the court determined that the term "resident" as used within the insurance policy, did not require a jury instruction as it was "neither legal nor technical in nature, and is widely used and understood by the average juror." *Id.* at 288.

95. 790 N.E.2d 138 (Ind. Ct. App. 2003).

96. *Id.* at 139.

97. *Id.* The purpose of having "listed drivers" is to remove any uncertainty of whether such a person has permission to use the vehicle.

98. *Id.*

99. *Id.* at 140.

100. Policy defined "insured person" to mean the named insured, a relative of the named insured, and any person occupying a covered vehicle. *Id.*

101. *Id.* at 141.

102. 783 N.E.2d 307 (Ind. Ct. App. 2003).

to properly reject uninsured and underinsured motorist coverages in accordance with the Indiana statute.[103] After the policy was issued, the named insured requested that the insurance company add another individual as a "driver" on the policy.[104] When the insurance company received the request, it sent a form for the rejection of uninsured and underinsured motorist coverage to the named insured.[105] Neither the named insured nor the listed driver signed or returned the rejection form.[106] Later, the listed driver was involved in an automobile accident with an uninsured motorist, and sought uninsured motorist benefits under the policy, and the insurance company denied the claim.[107]

After the listed driver filed a complaint against the uninsured motorist carrier, the carrier responded with a Motion for Summary Judgment which was granted by the trial court.[108] The court discussed extensively that an individual identified as a "listed driver" is not the same as a "named insured" under the policy.[109] The court found that the only individuals entitled to uninsured motorist coverage were those who met the definition of "insured" under the policy.[110] Because the new "listed driver" did not satisfy that definition, no uninsured motorist coverage was available.[111]

Furthermore, the court found that the failure of either the named insured or the listed driver to complete and return the rejection form was not significant.[112] Specifically, the court found that the named insured was the only individual entitled to accept or reject the uninsured/underinsured motorist coverage.[113] The court also refused to find that the insurance company's submission of the second form after the named insured added the listed driver to the policy created any type of equitable estoppel for the insurance company to deny coverage.[114] This decision reinforces the policy language that affords coverage only to "insureds." Although others may be identified as "listed drivers" for purposes of the insurance company to establish permission to operate the automobile, those individuals do not automatically become "insureds" entitled to the benefits of the coverage, unless they are specifically identified as "insureds" and premium is

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103. *Id.* at 300; IND. CODE § 27-7-5-2(a) (2003) (providing that the "named insured" possesses a right to reject either or both uninsured and underinsured motorist coverage).

104. 783 N.E.2d at 309.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 309-10.

109. *Id.* at 311. The court observed that one legal treatise provided that "one listed in the policy, but only in the status of driver of the vehicle, is not a named insured despite the fact that such person's name was physically in the policy." *Id.* (quoting LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 110:1 (3d ed. 1997)).

110. *Id.* at 312.

111. *Id.* at 313.

112. *Id.*

113. *Id.*

114. *Id.* at 315.

paid for their inclusion.

G. Husband's Rejection of Uninsured Motorist Coverage Did Not Apply to Wife

In *State Farm Fire & Casualty Co. v. Garrett*,[115] a husband acquired a personal umbrella policy for him and his wife.[116] At the time of acquisition, the husband completed a form rejecting uninsured motorist coverage, but no form was completed by his wife.[117] The wife was fatally injured in an automobile accident, and her estate, with her husband as personal representative, sought uninsured motorist coverage.[118]

The uninsured motorist insurer made three arguments to suggest that no uninsured motorist coverage was available to the wife's estate. The insurer argued that because any uninsured motorist coverage would directly benefit the husband, the husband's rejection of uninsured motorist coverage should apply to the estate's claim.[119] Second, the insurer argued that because of their husband and wife status, an agency relationship existed such that the husband's execution of the rejection also applied to any claim by the wife or her estate.[120] Lastly, the insurance company argued that the legislature amended the statute to allow any named insured's rejection to encompass all insureds.[121]

The trial court and court of appeals rejected each of these arguments. The court engaged in a lengthy review and analysis of Indiana's uninsured motorist statute[122] to interpret whether the various arguments raised by the insurer were correct. Finding that the husband's rejection could not be binding upon the claim presented by the wife's estate, the court determined that uninsured motorist coverage was available for the wife's death.[123]

This case contained a very good analysis by the court on the procedures required for rejection of the uninsured motorist coverage. With Indiana's legislative change allowing one named insured to reject coverage for all others,[124] this decision may have only a limited impact on cases. However, it does appear to correctly interpret the facts of this case that the husband's rejection could not

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115. 783 N.E.2d 329 (Ind. Ct. App. 2003).

116. *Id.* at 331.

117. *Id.*

118. *Id.*

119. *Id.* at 333-34.

120. *Id.* at 334.

121. Specifically, in 1999, the legislature amended Indiana Code section 27-7-5-2(b) to state "'any named insured of an automobile or motor vehicle liability policy has the right, *on behalf of all other named insureds and all other insureds*, in writing, to: (1) reject both the uninsured motorist coverage and the underinsured motorist coverage provided for in this section. . . .'" *Id.* at 337 (citing IND. CODE § 27-7-5-2(b) (1982) (amended 1999)).

122. IND. CODE § 27-7-5-2 (1982) (amended 1999).

123. *State Farm Fire & Cas. Co.*, 783 N.E.2d at 338.

124. IND. CODE § 27-7-5-2(b).

encompass the claim of the wife or her estate.

H. Cancellation of Auto Policy Was Effective Despite Providing of Earlier Notice to Agent

During this survey period, two cases addressed cancellation of automobile policies for non-payment of premium. In each, the cancellation was challenged because notice of the cancellation was not previously provided to the insurance agent in accordance with the requirements of an Indiana statute.[125] In *Krueger v. Hogan*,[126] an insured stopped making premium payments on his automobile policy. The insurance company mailed notification to the named insured of its intent to cancel the policy if the premium was not received.[127] However, the carrier failed to mail the notice to the insurance agent as required by the statute.[128] The undisputed evidence had disclosed that the insured was aware that the insurance company would cancel the policy if premium payment was not provided.[129]

The injured was involved in an automobile accident resulting in the wrongful death of another motorist. When the named insured's liability insurer contended that the policy was canceled and refused to provide coverage for the motorist's lawsuit against the insured, a declaratory judgment action proceeded between the insurance company and the decedent's estate.[130]

The trial court and appellate court agreed that no coverage was available and that the insurance company properly canceled the policy despite its failure to strictly comply with the statute when it failed to provide notice to the agent.[131] The court observed that the primary purpose for the legislature to require notice to the agent is to make sure that sufficient notice of the cancellation is given to the insured.[132] The facts in this case reveal that the insured had actual notice that

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125. Indiana Code section 27-7-6-5 states in relevant part:

> No notice of cancellation of a policy to which section 4 (Ind. Code 27-7-6-4) of this chapter applies shall be effective unless mailed or delivered by the insurer to the named insured at least twenty (20) days prior to the effective date of cancellation; provided, however, that where cancellation is for nonpayment of premium at least ten (10) days notice accompanied by the reason therefore shall be given. *In the event such policy was procured by an insurance producer duly licensed by the state of Indiana, notice of intent to cancel shall be mailed or delivered to such insurance producer at least ten (10) days prior to such mailing or delivery to the named insured unless such notice of intent is or has been waived in writing by the insurance producer.*

IND. CODE § 27-7-6-5 (2003) (emphasis added).

126. 780 N.E.2d 1199 (Ind. Ct. App. 2003).

127. *Id.*

128. *Id.* at 1200.

129. *Id.* at 1202.

130. *Id.* at 1200.

131. *Id.*

132. *Id.*

the policy would be canceled, such that the additional requirement that notice be given to the insurance agent was unneeded.[133] Thus, even though the insurer failed to strictly follow the statute, it was not a bar to the policy still being canceled.[134]

A similar decision was reached in *American Standard Insurance Co. v. Rogers*,[135] where a permissive user was involved in a automobile accident while driving the named insured's automobile. A personal injury claim arose as a result of that accident against the permissive user. However, the insurance company for the car owner denied coverage to the permissive user by contending that the policy had been canceled approximately two months before the accident for the named insured's failure to provide a premium payment.[136]

The issue before the court was whether the insurance company properly canceled the policy and whether it was estopped from relying upon the cancellation of the policy based upon its prior conduct in accepting partial payments from the named insured. The facts demonstrated that the named insured had made partial payments a number of times when premium was due, resulting in the policy being extended.[137]

However, in the weeks shortly before the policy cancellation, the insured was provided notice by the insurer that a significant past due balance was owed, and that the policy would be canceled on a certain date if the full amount was not received.[138] Less than two weeks before the policy's effective cancellation date, the insurance company sent cancellation letters to the insured and the agent.[139] This letter did not explicitly comply with the Indiana statute on cancellation, as notice of at least ten days was not provided to the insurance agent.[140]

The court first determined that the insurance company did not waive its ability to cancel the policy by accepting previous partial payments from the insured.[141] The court found that the insurance company sufficiently advised the insured by its notice of cancellation that full payment by the insured was needed in order for the policy to continue.[142] The court found that there was no conduct on the part of the insurance company that misled the insured to believe that its policy would have been extended to cover the date of this accident without the insured paying a premium.[143]

Furthermore, the court found that the insurance company's lack of strict compliance with the cancellation statute by failing to give the insurance agent

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133. *Id.*
134. *Id.*
135. 788 N.E.2d 873 (Ind. Ct. App. 2003).
136. *Id.* at 875.
137. *Id.* at 877.
138. *Id.*
139. *Id.*
140. *Id.*; *see* IND. CODE § 27-7-6-5 (2003).
141. *Am. Standard Ins. Co.*, 788 N.E.2d at 878.
142. *Id.*
143. *Id.* at 879.

notice of the cancellation ten days before delivery to the named insured did not foreclose the insurer from canceling the policy.[144] As in *Kruger v. Hogan*,[145] the court found that strict compliance with the statute would not serve the intent and purpose of the statute.[146] The court found that the named insured was well aware that his policy was canceled and that additional notice being given to his insurance agent would not have served any purpose in extending the coverage.[147]

III. COMMERCIAL AND HOMEOWNER CASES

A. Homeowners' Policy Did Not Cover Liability for Boat Dislodged from Trailer

Vann v. United Farm Family Mutual Insurance Co.,[148] addressed the application of a motor vehicle exclusion in a homeowner's policy. While on the interstate, the insured was pulling a trailer that carried a boat behind his truck. The trailer became detached, crossed the interstate, and smashed into an oncoming vehicle. Upon impact with the other vehicle, the boat dislodged from the trailer and rammed into the cab of the oncoming vehicle resulting in serious injuries to the occupant.[149] The injured victim filed a personal injury lawsuit against the driver of the truck that pulled the trailer, and the driver sought liability insurance coverage under his homeowners' policy.[150]

The homeowner's insurance carrier filed a motion for summary judgment in the declaratory judgment proceedings asking the court to construe the policy's automobile exclusion[151] to preclude coverage. The trial court granted summary judgment in favor of the insurer, finding that there was no coverage.[152] On appeal, the court agreed that no coverage existed.[153] The appellate court determined that the driver's truck and trailer each satisfied the definition of "motor vehicle" within the policy and, thus, came within the applicable

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144. *Id.* at 880.

145. 780 N.E.2d 1199 (Ind. Ct. App. 2003).

146. *Am. Standard Ins. Co.*, 788 N.E.2d at 880.

147. *Id.*

148. 790 N.E.2d 497 (Ind. Ct. App. 2003).

149. *Id.* at 499-500.

150. *Id.*

151. *Id.* at 500. The lengthy exclusion at issue provided, in relevant part, that policy coverage did not apply to claims seeking recovery for bodily injury or property damage arising out of "the ownership, maintenance, use, loading, unloading or entrustment of (1) a motor vehicle . . . or (2) a watercraft . . . ." *Id.*

152. *Id.* at 501.

153. *Id.* at 504. Interestingly, the court of appeals had reversed the trial court in an earlier decision that was subsequently reversed by the Indiana Supreme Court. *See* Vann v. United Farm Bureau Mut. Ins. Co., 778 N.E.2d 869 (Ind. Ct. App. 2002), *trans. granted*, 792 N.E.2d 41 (Ind. 2003).

exclusion.[154]

The court appears to have correctly determined that no homeowners insurance coverage should apply for this event which clearly did not involve the operation of the boat nor have any connection with the risk intended to be covered by a homeowners' policy. Clearly, the insured's motor vehicle insurance is the proper policy to respond to any liability for the trailer.

B. As Long as Insurer Had "Rational Basis" to Decline Claim, Insurer Did Not Commit Bad Faith

Indiana law has firmly established that insurance companies owe a legal duty to their insureds to deal in good faith with any claims presented by the insured.[155] However, simply because the insurance company denies the insured's claim does not automatically show that the insurance company committed bad faith.[156] Instead, to demonstrate bad faith, the insured must establish, by clear and convincing evidence, that the insurance company had knowledge that there was no legitimate basis for denying liability.[157]

The decision of *Masonic Temple Ass'n v. Indiana Farmers Mutual Insurance Co.*[158] provides an excellent analysis by the court showing that a good faith disagreement between the insured and the insurance company concerning the extent of liability does not translate into a claim for the insurance company's breach of the duty of good faith.[159] Instead, so long as the insurance company presented a "rational basis" to support its position, no breach of the duty of good faith existed.[160]

In *Masonic Temple*, the insured sustained damage to one of its buildings. The insured contended that the damage to the building was caused by faulty construction excavation and therefore constituted a covered loss.[161] The insurer contended that coverage was excluded under of an "earth movement" exclusion and that coverage would only be allowed if there was a total collapse of the building.[162]

The insured brought a breach of contract action against the insurance company and also asserted a claim for bad faith denial of claim and sought to recover punitive damages.[163] Even though the determination of the coverage question was not resolved, the insurance company filed a motion for partial

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154. *Vann*, 790 N.E.2d at 503.
155. Erie Ins. Co. v. Hickman, 622 N.E.2d 515 (Ind. 1993).
156. *Id.* at 520.
157. Freidline v. Shelby Ins. Co., 774 N.E.2d 37, 40 (Ind. 2002).
158. 779 N.E.2d 21 (Ind. Ct. App. 2002).
159. *Id.* at 26.
160. *Id.* at 27.
161. *Id.* at 25.
162. *Id.*
163. *Id.*

summary judgment on the insured's bad faith and punitive damages claims.[164] Following the trial court's granting of partial summary judgment to the insurance company, an appeal ensued.[165]

The court found that the insurance company presented a rational basis to support its position.[166] Specifically, the court observed that no Indiana cases addressed the exact policy language at issue in the case.[167] The court rejected the insured's contention that the absence of controlling authority to support the insurance company's position presented a basis to find bad faith on the part of the insurance company.[168] The court specifically found that even if the insurance company was wrong in its position on the denial of the coverage, the insured could not seek punitive damages or prove bad faith without a showing that the insurance company lacked any rational basis to take the position it did.[169]

This decision provides support for an insurance company's ability to challenge a claim for coverage without having the fear of a breach of duty of good faith lawsuit being asserted against it. As long as the insurance company presents a "rational basis" for its position, no bad faith action will be permitted.

C. CGL Policy Did Not Cover Claims of Faulty Workmanship in Construction of Home Center

In *Jim Barna Log Systems Midwest, Inc. v. General Casualty Insurance Co.*,[170] the buyer of a log package sued the seller for negligent hiring of the home builder, negligent misrepresentation of the competency of the builder and conversion. The seller sought coverage under a commercial general liability (CGL) policy that it possessed.[171] The CGL insurance company denied coverage, contending that there was no triggering occurrence[172] within the meaning of the policy.

The trial court granted summary judgment in favor of the insurance company, and the appellate court affirmed.[173] Although the allegations made against the seller suggested the seller was negligent, the court observed that "an allegation of negligence is not necessarily an allegation of accidental conduct as defined in the context of a commercial general liability insurance policy."[174]

The court examined each of the counts asserted against the seller and

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164. *Id.*

165. *Id.*

166. *Id.* at 28-29.

167. *Id.* at 29.

168. *Id.*

169. *Id.* at 30.

170. 791 N.E.2d 816 (Ind. Ct. App. 2003).

171. *Id.* at 821.

172. *Id.* An "occurrence" was defined to mean "an accident including continuous or repeated exposure to substantially the same general harmful conditions." *Id.* at 822.

173. *Id.* at 819-20.

174. *Id.* at 825.

concluded that there was no accidental conduct to demonstrate an "occurrence" that would establish liability coverage.[175] Furthermore, the court found that no coverage existed because of multiple exclusions.[176] The most pertinent exclusion focused upon the "damage to your product" exclusion.[177] The allegations set forth in the buyer's complaint fell under this exclusion because the complaint sought damages for inadequate construction of the log home.[178]

The *Jim Barna* decision is another case that reinforces the limitations on the scope of coverage provided by a CGL policy for a claim of faulty workmanship. As the courts have repeatedly stated: "CGL policies cover the possibility that the goods, products, or work of the insured, once relinquished or completed, will cause bodily injury or damage to property *other than* to the product or completed work itself, and for which injury or damage the insured might be exposed to liability."[179]

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175. *Id.* at 829.

176. *Id.*

177. *Id.* at 827. This exclusion provides that insurance coverage does not apply to "'property damage' to 'your product' arising out of it or any party of it." *Id.*

178. *Id.* at 828.

179. R.N. Thompson & Assocs., Inc. v. Monroe Guar. Ins. Co., 686 N.E.2d 160, 162 (Ind. Ct. App. 1997) (emphasis in original).