SURVEY OF ILLINOIS LAW: INSURANCE LAW

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INTRODUCTION

This article analyzes Illinois opinions relating to insurance law that were issued between October 1, 2001 and October 1, 2002. This survey highlights the changes, modifications, or extensions of existing law. No attempt is made to present every decision announced during this period. The focus is on significant developments in recent case law in order to present to the practitioner the developing areas or the foreshadowing of potential changes in Illinois insurance law.

This article is divided into seven sections. Section I discusses the insurance policy as a contract, section II discusses construction of the contract, section III discusses commercial insurance issues, and section IV discusses vehicle insurance coverage. Section V reviews recent cases regarding breach of the duty to defend and bad faith. Directors and officer's insurance is reviewed in section VI and section VII concludes the survey of insurance law.

I. THE INSURANCE POLICY AS A CONTRACT

Styzinski v. United Sec. Life Ins. Co. of Illinois[1] arose from a dispute over a medical insurance policy issued by defendant United Security Life Insurance Company of Illinois (United) to plaintiff Roman Styzinski. Plaintiff filed a complaint against Defendant alleging breach of contract based on its failure to pay medical expenses he incurred after he was injured while driving a motorized two-wheel vehicle.[2]

United issued the medical insurance policy to Roman Styzinski. Mr. Styzinski was injured while driving a motorized two wheel vehicle and incurred

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1. 332 Ill. App. 3d 417, 772 N.E.2d 888 (1st Dist. 2002).
2. *Id.* at 418, 772 N.E.2d at 889.

approximately $100,000 of medical expenses.[3] At the time he applied for the insurance, he responded "no" to a question asking whether he had driven a motorcycle during the preceeding two years or contemplated driving one in the future.[4]

At the time he applied for his insurance, Mr. Styzinski operated a business that repaired small engines.[5] Within his application he answered "no" to the following question: "Does any person named above contemplate or has within the last two years been engaged in the following activities: . . . Motorcycle Driving or Racing . . .?"[6]

Mr. Styzinski stated that his insurance agent helped him complete the application and read the questions out loud to him "in a fast kind of motion, 'yes' or 'no.'"[7] Mr. Styzinski informed his agent that he occasionally test-drove dirt bikes. Mr. Styzinski stated that his agent told him that non-titled, non-highway vehicles do not qualify as motorcycles and advised him to answer the question "No."[8] The statements were acknowledged in an affidavit submitted by the plaintiff.[9] Following Mr. Styzinski's accident, United denied his claim for medical expenses based upon the alleged material misrepresentation.[10]

Plaintiff then brought a complaint alleging breach of contract.[11] United filed a motion for summary judgment attaching a copy of Mr. Styzinski's deposition wherein he testified that he had a license to drive a motorcycle and owned a 200 Honda Street bike as well as the off-road bike involved in the accident.[12] The plaintiff stated that he repaired approximately a dozen motorcycles or dirt bikes each year and test-drove all of them. He stated that he test drove these motorcycles within two years of his application, but he always did so off-road. A representative of United testified that if the plaintiff had answered "yes," an elimination endorsement excluding coverage for motorcycle injuries would have been issued.[13]

The court relied upon the insurance code, which provides that "no misrepresentation in a written insurance policy application 'shall defeat or

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3. *Id.*
4. *Id.*, 772 N.E.2d at 889)90.
5. *Styzinski*, 332 Ill. App.3d at 419, 772 N.E.2d at 890.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Styzinski*, 332 Ill. App.3d at 419, 772 N.E.2d at 891.
11. *Id.* at 420, 772 N.E.2d at 891.
12. *Id.*
13. *Id.* at 421, 772 N.E.2d at 892.

avoid the policy unless it shall have been made with actual intent to deceive or materially affect either the acceptance of the risk or the hazard assumed by the company.'"[14] An insurer does not need to prove that a misrepresentation was made with the intent to deceive as long as it was material to the assumed risk.[15] The court held that it did not need to determine whether the vehicle the plaintiff was operating at the time of the accident was a motorcycle as alleged by United or a dirt bike as alleged by the plaintiff. The plaintiff admitted during his deposition that he operated motorcycles during the two years preceeding his application.[16]

Therefore, there was no genuine issue of fact regarding whether the plaintiff's answer of "no" was a misrepresentation.[17] United would not have provided coverage for motorcycle injuries had the plaintiff revealed that he had test-driven motorcycles during the two years preceeding his application.[18] As a result, the plaintiff's response was material and was a misrepresentation. Rescission of the contract was a proper remedy for the plaintiff's material misrepresentation.

II. CONSTRUCTION OF THE INSURANCE CONTRACT

If a policy does not contain an "integration" clause, a court may consider extrinsic evidence to determine whether there are latent ambiguities in the insurance contract. The court in *Cincinnati Ins. Co. v. River City Construction Co.*[19] went beyond the four corners of the policy to consider objective extrinsic evidence to determine whether there were any latent ambiguities in the insurance contracts at issue. Cincinnati sought to offer extrinsic evidence to establish that an additional insured endorsement did not apply to the claim, namely depositions of third parties and affidavits from the insurance broker who procured the Cincinnati policy.[20] The trial court applied the "four corners" rule, but the appellate court found that it would apply the "provisional approach" to contract interpretation, allowing the court to consider parol evidence to determine if an agreement that appeared clear on its face was actually ambiguous.[21]

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14. *Id.* at 422, 772 N.E.2d at 893.
15. *Id.*
16. *Styzinski*, 332 Ill. App. 3d at 423, 772 N.E.2d 894.
17. *Id.*
18. *Id.* at 424, 772 N.E.2d at 894)95.
19. 325 Ill. App. 3d 267, 757 N.E.2d 676 (3d Dist. 2001).
20. *Id.* at 271, 757 N.E.2d at 680.
21. *Id.* at 272, 757 N.E.2d at 680.

The *Cincinnati* court found that because the contract at issue did not contain an "integration" clause, it could consider extrinsic evidence to determine whether there were latent ambiguities in the insurance contract.[22] The court cautioned, however, that such evidence must have an indicia of reliability, and it must be objective. However, the court ultimately found that the objective evidence presented did not demonstrate any latent ambiguity in the policy. [23]

III. COMMERCIAL INSURANCE COVERAGE

A. Emerging Issues in Commercial Coverage

A Commercial General Liability policy which contains an endorsement providing unlimited liability coverage for the use of an auto is a policy providing "motor vehicle" coverage, and the insurer is therefore required to offer UIM coverage to the insured.

In *Harrington v. American Family Mutual Insurance Co.*,[24] Green Acres Landscaping purchased a commercial general liability policy from American Family with liability limits of $1 million.[25] An endorsement to the policy provided coverage for hired auto and non-owned auto liability. Green Acres also purchased a separate group automobile liability policy for its vehicles used in connection with its business. This policy contained uninsured motorists coverage in the amount of $100,000 per person and $300,000 per occurrence.[26]

Green Acres Landscaping was a sole proprietorship owned by the plaintiff. The plaintiff was struck by an automobile while riding his bicycle. He settled with the insurer of the driver in the amount of $100,000.[27] He then submitted a claim for uninsured motorists coverage.[28]

American denied the claim, alleging that the amount paid by the driver's insurer was equal to the uninsured motorists coverage available under the group automobile policy.[29] The plaintiff alleged that the commercial general liability

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22. *Id.* at 273, 757 N.E.2d at 681.
23. *Id.*
24. 332 Ill. App. 3d 385, 773 N.E.2d 98 (1st Dist. 2002).
25. *Id.* at 386, 773 N.E.2d at 99.
26. *Id.*
27. *Id.*
28. Author's note: the court refers throughout this decision to uninsured coverage instead of underinsured coverage.
29. *Id.*

policy was subject to the Illinois Insurance Code.[30] The plaintiff alleged that the commercial general liability policy was a vehicle policy and, therefore, American was required to offer him uninsured motorists coverage in connection with his purchase of that policy.[31] American argued that the commercial general liability policy was a "liability only" policy which could not be held subject to the requirements of Section 143a–2. The court held that in order to determine whether or not the policy was subject to Section 143a–2, it must first determine "whether the direct benefit, albeit the financial benefit of the policy at hand, is received by the insured, the plaintiff in the case at bar, or by the individual who is physically injured himself."[32] The endorsement to the commercial general liability policy provided for bodily injury or property damage arising out of the maintenance or use of a "hired auto" or a "non-owned auto."[33]

The policy at issue provided plaintiff with liability coverage for bodily injury or property damage; however, the endorsement modified the commercial general liability policy to provide liability coverage for bodily injury or property damage arising out of the use of a "hired auto" or a "non-owned auto." The court found that the effect of this endorsement was to transform "the commercial general liability policy into a motor vehicle policy for purposes of Section 143a–2 of the insurance code."[34] Since the policy was subject to the insurance code, American was required to offer plaintiff uninsured motorists coverage. American failed to offer the uninsured motorists coverage as required by statute.

Therefore, the commercial general liability policy was reformed to contain uninsured motorists coverage in the amount of the liability limits. [35] Within the dissent, Justice Quinn opined that the endorsement applies to bodily injury or property damage arising out of the use of an auto only in connection with the business of the insured or their employee.[36] Since the insured was struck while riding a bicycle, the auto was not being used in the business nor operated by the insured or an employee. As a result, the issue of the application of Section 143a–2 should never be reached by the court[37]. Appeal was denied by the Illinois Supreme Court on October 2, 2002.[38]

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30. *Id.* at 386)87, 773 N.E.2d at 99 (relying on 215 ILL. COMP. STAT. 5/143a)2 (1997)).
31. *Harrington*, 332 Ill. App.3d at 387, 773 N.E.2d at 99.
32. *Id.* at 389, 773 N.E.2d at 101.
33. *Id.* at 391, 773 N.E.2d at 102.
34. *Id.*
35. *Id.* at 392–93, 773 N.E.2d at 104.
36. *Harrington*, 332 Ill. App.3d at 393, 773 N.E.2d at 105.
37. *Id.*
38. 2002 WL 31304319.

In *Dobbs v. State Farm Fire*,[39] Gail Hite was terminated from her employment with Southern Illinois Otolaryngology, Inc. (SIO). After her termination, she filed a complaint against SIO and another employee, Dr. Dobbs, alleging that she was fired on the basis of gender discrimination. She sought back wages and reinstatement to her job.[40] Ms. Hite became pregnant during her SIO employment and claimed that Dr. Dobbs was the child's father. She alleged that her employment termination was performed in a retaliatory way because of her pregnancy.[41]

Hite voluntarily dismissed her suit against Dr. Dobbs and SIO. SIO and Dr. Dobbs requested reimbursement of their defense costs from State Farm under an umbrella policy. State Farm denied coverage on the basis that there were no allegations in the complaint of bodily injury, property damage or personal injury as defined by the policy. Dr. Dobbs and SIO brought suit against State Farm seeking to recover defense costs and monetary penalties for State Farm's bad faith denial.[42]

On appeal, the court found that the policy defined personal injury to include racial or religious discrimination, which did not include gender discrimination.[43] The court held that even if gender discrimination did fall within the definition, the State Farm policy contained an endorsement which specifically stated that the policy did not apply to liability arising out of "discrimination, humiliation and mental anguish."[44]

The plaintiffs argued the policy contained a sexual molestation endorsement that provided coverage for damages arising out of any actual, alleged or threatened act of sexual misconduct. They argued that the personal injury exclusion for discrimination liability conflicted with the sexual molestation endorsement, resulting in an ambiguity, which should be construed against State Farm and in favor of coverage.[45] Plaintiffs argued the term "sexual misconduct" encompassed everything but rape, fondling and molestation, and therefore covered Hite's pregnancy. As such, pregnancy and gender discrimination could equate to sexual misconduct for the purposes of the interpretation of coverage under this endorsement. The court disagreed and held:[46]

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39. 332 Ill. App. 3d 885, 773 N.E.2d 1251 (5th Dist. 2002).
40. *Id.* at 886, 773 N.E.2d at 1252.
41. *Id.*
42. *Id.* at 887, 773 N.E.2d at 1252.
43. *Id.* at 888, 773 N.E.2d at 1253.
44. *Id.*
45. *Id.* at 889, 773 N.E.2d at 1253–54.
46. *Id.*

> Connotation of the word 'sexual,' when used as an adjective to the word 'misconduct,' is different than when that same word is used as an adjective to the word 'discrimination.' 'Sexual' as in 'sexual misconduct' refers to prurient conduct of some nature. 'Sexual' as in 'sexual discrimination' refers to a human's gender.[47]

The court further found that Hite sought only economic damages as a result of her alleged gender discrimination. Accordingly, coverage for Hite's claim was clearly excluded under the commercial umbrella policy. Consequently, State Farm had no duty to defend the plaintiffs.[48]

C. Duty to Defend the Insured

In *West American Insurance Co. v. J.R. Construction Co.*[49], J.R. Construction was hired by Fuchs Lubricants as the general contractor for a building project. J.R. Construction subcontracted with Altra Steel (Altra) to supply and install the steel components of the building, and Altra hired All Estimating to assist with some of the ironwork on the project. Charles Masunas, an employee of All Estimating, was injured on the job site and sued J.R. Construction. J.R. Construction tendered the lawsuit to the liability insurers of Altra and All Estimating.[50]

Altra had its general liability insurance with West American. An oral agreement between J.R. Construction and Altra required Altra to add J.R. Construction as an additional insured on the West American policy.[51] West American's agent had issued a certificate of insurance listing J.R. Construction as an additional insured on Altra's policy. After it received the tender from J.R. Construction, West American sent a letter confirming that J.R. Construction was listed as an additional insured on Altra's policy, but stating that any insurance under the West American policy was excess over any other valid and collectable insurance available to J.R. Construction.[52]

There were also notes in West American's claim file indicating that West American considered J.R. Construction an additional insured under its policy. However, West American later notified J.R. Construction that it was denying coverage because there was no written contract requiring Altra to list J.R. Construction as an additional insured and the underlying complaint did not allege

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47. *Id.*
48. *Id.* at 890, 773 N.E.2d at 1254.
49. 334 Ill. App. 3d 75, 777 N.E.2d 610 (1st Dist. 2002).
50. *Id.* at 79, 777 N.E.2d at 613.
51. *Id.* at 77, 773 N.E.2d at 612–13.
52. *Id.* at 78, 773 N.E.2d at 613.

liability arising out of Altra's work.[53] Almost twenty-two months after first receiving the tender from J.R. Construction, West American filed a declaratory action.[54]

West American had a blanket endorsement adding to the policy "any person or organization who [the named insured] is required to name as an additional insured on this policy under a *written contract or agreement*."[55] This decision is particularly troubling in that the court side-stepped the written contract requirement by finding that West American had acknowledged that J.R. Construction was an additional insured under its policy and that this was consistent with the intent of Altra and J.R. Construction as evidenced by the parties' affidavits and the certificate of insurance.[56] The court further held it was not required to determine whether the underlying complaint alleged liability arising out of Altra's work, as required by the blanket endorsement, because coverage existed as a result of West American's conduct and not by virtue of the blanket endorsement. In fact, the court held that J.R. Construction had the same coverage as the policyholder.[57] Finally, the court held that West American was estopped from relying on any of its coverage defenses and remanded the case for further proceedings on J.R. Construction's request for damages under section 155 of the Illinois Insurance Code.[58]

This decision is based upon exceptional facts that may not likely reoccur. The practitioner would be well advised to limit his or her reliance upon this decision due to the exceptional facts that ultimately resulted in estoppel on the part of the insurer. In *State Farm Fire & Casualty v. Tillerson*,[59] the contractor, Tillerson, was issued a contractor's liability policy by State Farm. Tillerson entered into a contract with the Gauses to build an addition to their home and convert an existing carport into a garage.[60] After the completion of the project, the Gauses filed suit against Tillerson alleging they were injured as a result of Tillerson's breach of an express warranty of workmanship, breach of an implied warranty of habitability, and breach of an implied warranty of fitness for ordinary and particular purpose due to Tillerson building over a cistern and failing to take the necessary precautions to prevent the uneven settling of soil beneath the addition. Tillerson tendered his defense to State

53. *Id.* at 79, 773 N.E.2d at 614.
54. *Id.*
55. *Id.* at 80, 777 N.E.2d at 614 (emphasis added).
56. *Id.* at 81, 777 N.E.2d at 615.
57. *Id.* at 85, 777 N.E.2d at 618.
58. *Id.* at 89, 777 N.E.2d at 622 (citing 215 ILL. COMP. STAT. 155 (2000)).
59. 334 Ill. App. 3d 404, 777 N.E.2d 986 (5th Dist. 2002).
60. *Id.* at 406, 777 N.E.2d at 988.

Farm under the commercial general liability policy.[61] The Illinois court of appeals reviewed several issues including (1) whether the claims of breach of an express warranty of workmanship, breach of an implied warranty of habitability, and breach of an implied warranty of fitness for ordinary and particular purpose alleged an "occurrence" as defined under the liability policy, and (2) whether the claims alleged "property damage" as defined by the policy.[62]

The policy applied "only to bodily injury or property damage caused by an occurrence . . . The policy define[d] 'occurrence' as 'an accident, including continuous or repeated exposure to substantially the same general harmful conditions which result in bodily injury or property damage'."[63] Although the use of the word "occurrence" in insurance policies broadens coverage and eliminates the need to find an exact cause of damages, as long as they are neither intended nor expected by the insured, the occurrence must still be accidental.[64]

The Gauses' complaint alleged that Tillerson's work was "'defective in design, material[,] and workmanship because [Tillerson] built the addition over a cistern without taking necessary precautions and failed to take precautions to prevent the damage caused by the settling of ground underneath the room addition.'"[65] The court held that where the defect is no more than the natural and ordinary consequences of faulty workmanship, it is not caused by an accident. The construction defects set forth in the Gauses' complaint were the natural and ordinary consequences of improper construction techniques, failing to properly compact the soil and failing to fill or remove a cistern under the ground prior to construction.[66]

> Comprehensive general liability policies are intended to protect the insured from liability for injury or damage to the persons or property of others; they are not intended to pay the costs associated with repairing or replacing the insured's defective work and products, which are purely economic losses. Finding coverage for the cost of replacing or repairing defective work would transform the policy into something akin to a performance bond.[67]

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61. *Id.*
62. *Id.* at 406–7, 777 N.E.2d at 989.
63. *Id.* at 408, 777 N.E.2d at 990.
64. *Id.* (citing Bituminous Gas. Corp. v. Newburg Const. Co., 218 Ill. App. 3d 956, 965, 578 N.E.2d 1003, 1009 (1991)).
65. *Id.* at 409, 777 N.E.2d at 991.
66. *Id.*
67. *Id.* at 410, 777 N.E.2d at 991(citing Traveler's Ins. Co. v. Eljer Mfg., Inc., 197 Ill. 2d 278, 314, 757 N.E.2d 481, 503 (2001), quoting Qualls v. Country Mut. Ins. Co., 123 Ill. App. 3d 831, 833–34, 462 N.E.2d 1288, 1291 (4th Dist. 1984)).

The court held that the Gause complaint alleged "no more than the natural and ordinary consequences of faulty workmanship," which is not an accident or "occurrence" as defined in the contractor liability policies.[68] The court further held the Gause complaint did not allege "property damage."[69] It merely sought the repair or the replacement of defective work or the diminishing value of the home. This represented only an economic loss, not physical injury to tangible property. While noting that the only alleged damage was to the single structure upon which Tillerson worked, the court stated "[c]overage under contractor general liability policies is for tort liability for damage to other property, not for the insured's contractual liability for economic loss."[70] Consequently, State Farm had no duty to defend Tillerson.[71]

In *General Agents Insurance Co. v. Midwest Sporting Goods Co.*,[72] the insurer filed suit against an insured gun distributor seeking a declaration that it owed no duty to defend or indemnify with respect to underlying claims against the insured for negligently entrusting guns to inappropriate purchasers, thereby creating a public nuisance.[73] The insurer argued the underlying complaint did not allege an "occurrence" within the meaning of the subject policy and that the "expected or intended injury exclusion" precluded coverage.[74] The trial court granted summary judgment in favor of the insurer.[75]

The First District affirmed the judgment of the trial court in favor of the insurer, finding the underlying complaint did not allege a covered "occurrence."[76] The policy restricted coverage to "accidents," and while that term was not expressly defined, the court applied the Eighth Circuit's interpretation of the word "accident" as stated in *City of Carter Lake v. Aetna Casualty & Surety Co.*[77] Namely, courts should consider an accident as a matter of probability. If an insured knew or should have known that there was a substantial probability that certain results would follow his acts or omissions, then there had not been an accident or occurrence.[78]

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68. *Id.* at 409, 777 N.E.2d at 991.
69. *Id.* at 410, 777 N.E.2d at 991.
70. *Id.*, 777 N.E.2d at 992 (citing Home Indem. Co. v. Wil-Freds, Inc., 235 Ill.App.3d 971, 977, 601 N.E.2d 281, 285 (1992)**).**
71. *Id.*, 777 N.E.2d at 991.
72. 328 Ill. App. 3d 482, 765 N.E.2d 1152 (1st Dist. 2002).
73. *Id.* at 484, 765 N.E.2d at 1154.
74. *Id.* at 486, 765 N.E.2d at 1155.
75. *Id.*
76. *Id.* at 491, 765 N.E.2d at 1160.
77. *Id.* at 487, 765 N.E.2d at 1157 (citing City of Carter Lake v. Aetna Cas. & Sur. Co.604 F.2d 1052, 1058–1059 (8th Cir. 1979)).
78. *Id.*

The court determined the policy did not provide coverage for the negligent entrustment or public nuisance claim.[79] The evidence in the record indicated Midwest's pattern and practice of entrusting guns to persons in a group with known propensity to introduce the guns to an illegal secondary market that would reach persons who would use the guns. The court also noted that this market involves a known, great, and very unreasonable risk of harm to others. The sales pattern and practices alleged could not qualify as accidental either under a claim of negligent entrustment or public nuisance. As such, the insurer had no duty to defend or indemnify the insured in the underlying suit.[80]

In *National Union Fire Insurance Co. of Pittsburgh, PA v. R. Olson Construction Contractors, Inc.*,[81] Olson was named as an additional insured in a commercial general liability policy issued to Meyer Material Company. A Meyer employee suffered injury on the job and brought suit against Olson.[82] Olson filed a third party complaint against Meyer for contribution in that case. Olson also sought defense and indemnification for the suit from Meyer's insurer under the additional insured endorsement.[83] The court first examined the language of the endorsement and noted that it excluded coverage for any liability resulting from Olson's own negligence. This language was clear and unambiguous.[84]

In this case, the underlying complaint alleged negligence on the part of Olson, which is clearly excluded from coverage under the policy.[85] That being the case, the court should not go on to consider any allegations in a third-party action brought by Olson because to do so would interfere with the adjudication of liability questions in the underlying complaint. In addition, a third-party action for contribution presumes that both the third-party plaintiff and the third-party defendant are negligent. The court also rejected Olson's contention that the policy as written provided illusory coverage because the policy would cover situations where the allegations against the additional insured were based on vicarious liability.[86]

In *American Standard Insurance Co. v. Basbagill*,[87] American Standard issued an automobile liability insurance policy to Randy Bresnahan covering his 1990 Ford Bronco for up to $40,000 per incident. On April 19, 1997, Bresnahan

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79. *Id.* at 490–1, 765 N.E.2d at 1159–60.
80. *Id.* at 491, 765 N.E.2d at 1160.
81. 329 Ill. App. 3d 228, 769 N.E.2d 977 (2d Dist. 2002).
82. *Id.* at 230, 769 N.E.2d at 978.
83. *Id.* at 231, 769 N.E.2d at 979.
84. *Id.* at 238, 769 N.E.2d at 984.
85. *Id.* at 235, 769 N.E.2d at 982.
86. *Id.* at 235–36, 238, 769 N.E.2d at 982, 984–5.
87. 333 Ill. App. 3d 11, 775 N.E.2d 255 (2d Dist. 2002).

was involved in an accident resulting in the death of Peter Sawczuk, his wife and their two daughters.[88] Bresnahan was later sued by the Sawczuk estate. A factual question arose as to whether Bresnahan was driving the Bronco at the time of the accident.[89]

American Standard attempted to deposit its policy limits with the underlying court and to seek a declaration that, by doing so, it satisfied its duty to defend Bresnahan. The policy at issue stated that the company would not defend any suit after the limit of liability was "offered or paid." The policy did not define "offered" or "paid."[90]

The appellate court held that American Standard could not fulfill its duty to defend by tendering its policy limits to the court. An insurer cannot be considered to have "paid" money under a policy until the insurer surrenders any claim to the money and, in the process, fulfills an obligation to the recipient.[91] Although American Standard delivered a check to the court, it merely deposited the money there; it did not "pay" anything. The court explained that its holding was in accord with not only a reasonable reading of the policy language, but also with the reasonable expectations of a typical policyholder who purchases an insurance policy and expects to receive indemnification for damages owed and a defense of any suit brought against him.[92] Thus, American Standard had not "paid" its policy limit merely by remitting the sum to the Circuit Court by interpleader without surrendering any claim to the funds or delivering them to a party who is legally entitled to them.[93]

D. Advertising Injury Coverage

In *Konami (America) Inc. v. Hartford Insurance Co. of Illinois*,[94] Konami was in the business of designing, advertising, and selling video games that were used in bars and arcades.[95] Konami was sued by a business competitor for patent infringement relating to digital circuitry for television gaming apparatuses. Konami allegedly incorporated the patented device in its coin operated video games. Konami sought coverage under the advertising

88. *Id.* at 12–13, 775 N.E.2d at 257.
89. *Id.* at 13, 775 N.E.2d at 257.
90. *Id.*
91. *Id.* at 15–16, 775 N.E.2d at 259.
92. *Id.* at 18, 775 N.E.2d at 261.
93. *Id.* at 19, 775 N.E.2d at 262.
94. 326 Ill. App. 3d 874, 761 N.E.2d 1277 (2d Dist. 2002).
95. *Id.* at 875, 761 N.E.2d at 1279.

injury provisions of a commercial general liability policy issued by Hartford Insurance Company.[96]

Hartford denied coverage and Konami bought a breach of contract action against Hartford.[97] The appellate court found there was no nexus between any enumerated offense and Konami's advertising activities. Hartford's definition of "advertising injury" included "piracy" as an enumerated offense. Konami asserted that patent infringement is a form of piracy and that it committed patent infringement in the course of its advertising.[98] The appellate court took notice that some dictionaries define "piracy" to encompass patent infringement. However, whether such piracy constituted an "advertising injury" required the court to examine whether such piracy was committed in the course of advertising.[99]

To determine whether piracy was committed "in the course of advertising," the court turned to the allegations of the underlying complaint.[100] The complaint simply did not allege an injury arising out of any type of advertising. Rather, the complaint merely alleged the infringement of a patented device.[101] The court explained that the gravamen of a patent infringement case is the making, using, or selling of a patented invention, not the advertising of it. Thus, patent infringement usually does not occur within the course of one's advertising. Without such a connection to advertising activities, the court held that Konami was not entitled to coverage under the advertising injury provision of the Hartford policy.[102]

E. Policy Clauses and Exclusions

In *The Atchison, Topeka & Santa Fe Railway Company v. St. Paul Surplus Lines Insurance Company*,[103] Santa Fe railroad company filed a declaratory action against a liability insurer (St. Paul) to determine whether St. Paul had an obligation to defend and indemnify Santa Fe in four underlying personal injury lawsuits brought pursuant to FELA.[104] Santa Fe previously entered into a written agreement with an independent contractor (ITS) to load

96. *Id.*
97. *Id.*
98. *Id.* at 878, 761 N.E.2d at 1282.
99. *Id.* at 878–89, 761 N.E.2d at 1282.
100. *Id.* at 878, 761 N.E.2d at 1281–82.
101. *Id.*
102. *Id.* 880, 761 N.E.2d at 1283.
103. 328 Ill. App. 3d 711, 767 N.E.2d 827 (1st Dist. 2002).
104. *Id.* at 712, 767 N.E.2d at 878.

and unload trailers and containers from railroad flatcars. ITS and/or an affiliated company purchased commercial general liability coverage from St. Paul, adding Santa Fe by endorsement as an "Additional Protected Person." The commercial general liability policies at issue contained an employer's liability exclusion and had previously contained an employer's liability exclusion for persons employed in work subject to FELA which was deleted from the policy.[105] The commercial general liability policies also stated that they applied "to each protected person named in the Introduction as if that protected person was the only one named there; and separately to each other protected person. However, the limits of coverage shown in the Coverage Summary are shared by protected persons."[106]

The appellate court affirmed the trial court's granting of summary judgment in favor of St. Paul as to suits involving Santa Fe employees, given that the employer's liability exclusion precluded coverage for bodily injury to an employee arising out of employment by a "protected person."[107] Although Santa Fe contended that its employees were covered under the policy in light of the deletion of a FELA exclusion (because the deletion of the FELA exclusion was an explicit recognition of coverage for FELA claims), the court disagreed. The court noted that unlike the FELA exclusion, the employer's liability exclusion was never modified or removed from the policies, thereby precluding coverage.[108] With respect to underlying suits involving individuals who were employees of ITS, the appellate court reversed the trial court's granting of summary judgment in favor of St. Paul and remanded the underlying claims to the trial court. The appellate court determined that the "separation clause" contained in the policy provided separate coverage for Santa Fe and for ITS as if each was separately insured with a distinct policy. Thus, the employer's exclusionary clause did not preclude the claims brought against Santa Fe by ITS employees.[109]

In *Board of Managers of the Townhomes of Woodland Hills Condominium Ass'n v. State Farm Fire and Casualty Co.*,[110] coverage was sought under a homeowners insurance policy and a personal liability umbrella policy for the actions of the owner as property developers. However, the homeowner policy expressly excluded liability coverage for "bodily injury or property damage arising out of business pursuits of any insured or the rental or

105. *Id.* at 715, 767 N.E.2d at 830.
106. *Id.* at 713, 767 N.E.2d at 828.
107. *Id.* at 715, 767 N.E.2d at 830.
108. *Id.*
109. *Id.* at 717, 767 N.E.2d at 831.
110. 329 Ill. App. 3d 531, 768 N.E.2d 874 (2d Dist. 2002).

holding for rental or any part of any premises by any insured."[111] The State Farm umbrella policy provides coverage for a "loss" but expressly excludes liability coverage for "any loss caused by your business operations or arising out of business property."[112] Both policies define business as "trade, profession or occupation."[113]

The owners' only connection with the property came from their business interest in the property.[114] An insurer may justifiably refuse to defend an action against its insured if it is clear from the face of the underlying complaint that the allegations fail to state facts that bring the case within, or potentially within, the policy's coverage.[115] In the present case, the allegations of the underlying complaint failed to state facts that either actually or potentially brought the case within the policies' coverage. The policies excluded injuries arising from business pursuits, business property, and business operations. Allegations that the owners were liable because they were directors or managers were nothing more than rephrasings of the fact that the alleged damages arose from the owners' status as owners and developers.[116]

In *Northern Ill. Gas Co. v. Home Insurance Co.*,[117] Nicor Gas (Nicor), sued its liability insurers to recover the costs it incurred investigating and remediating environmental contamination at six manufactured gas plant (MGP) sites.[118] The MGPs were in operation as early as the mid 1800s. One of the by-products of the gas manufacturing process was tar, which was either sold or stored underground at the MGPs. In the 1900s, the introduction of natural gas made manufactured gas production obsolete. By the early 1950s, the facilities were no longer operational.[119] Although the owners made efforts to extract some of the tar from the underground containers, some tar remained when the MGPs were closed. The underground tanks were then emptied of usable material and filled with building debris and other materials to bring them to ground level.[120] Eventually, coal tar and coal tar water was released from the containers into the surrounding soil and groundwater. The release of these

111. *Id.* at 534, 768 N.E.2d at 877.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* (citing Northbrook Property & Casualty Co. v. Transportation Joint Agreement, 194 Ill. 2d 96, 98 741 N.E.2d 253, 254 (2000)).
116. *Id.*
117. 334 Ill. App. 3d 38, 777 N.E.2d 417 (1st Dist. 2002).
118. *Id.* at 40, 777 N.E.2d at 418.
119. *Id.*, 777 N.E.2d at 419.
120. *Id.*

substances contaminated the groundwater, soil, and the surrounding environment.[121]

In 1987, the Illinois Environmental Protection Agency (IEPA) informed Illinois utility companies that the companies "may want to investigate" potential environmental problems at MGPs under their control.[122] This request was voluntary as compared to action taken by the IEPA under 415 ILCS 5/4(q) wherein the IEPA provides notice of a potential adversarial action.[123] In 1992, Nicor began to enroll its sites into the IEPA's voluntary cleanup program. Within its suit, Nicor sought reimbursement from its insurers for the costs incurred during the remediation and cleanup of its MGPs.[124] All of the policies issued to Nicor contained language similar to the following:

> Underwriters hereby agree to indemnify the Assured for all sums which the Assured shall be obligated to pay by reason of the liability imposed upon by law for damages on account of property damage caused by or growing out of each occurrence.[125]

"Occurrence" was defined as "one happening or series of happenings, arising out of or due to one event taking place during the term of this policy."[126] None of the policies in question were in effect during the time Nicor's MGPs were operational.[127]

Some of the insurers moved for summary judgment on the ground that Nicor was not "legally obligated to pay" for the investigation and remediation of these sites, as its commercial general liability policies required.[128] Nicor argued that it was legally obligated to pay the cleanup costs by reason of liability imposed by law or, alternatively, because the cleanup was conducted in consultation with the IEPA.[129]

After conducting an extensive review of law from various jurisdictions, the court followed the holding of *Certain Underwriters at Lloyd's of London v. Superior Court*,[130] wherein the Supreme Court of California determined that "an insurer's duty to indemnify the insured under a standard comprehensive general liability insurance policy for 'all sums that the insured becomes legally

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121. *Id.* at 41, 777 N.E.2d at 419.
122. *Id.*
123. *Id.*
124. *Northern*, 334 Ill. App. 3d at 40, 777 N.E.2d at 419.
125. *Id.* at 42, 777 N.E.2d at 420.
126. *Id.*
127. *Id.* at 43, 777 N.E.2d at 420.
128. *Id.*
129. *Id.*, 777 N.E.2d at 421.
130. *Id.* (citing 24 Cal.4th 945, 950, 16 P.3d 94, 97, 103 Cal.Rptr. 2d 672, 675 (2001)).

obligated to pay as damages' is limited to money ordered by a court."[131] The California court held that "while the immediate cleanup of environmental contamination should be encouraged, the polluter should not be allowed to shift to the insurer some or all of the costs that might be imposed on the insured at the end of a proceeding conducted by an administrative agency pursuant to an environmental statute."[132]

Noting that Illinois courts have held that one does not become legally obligated to pay damages until a judgment or settlement is reached, the appellate court concluded that the cost of the voluntary cleanup did not constitute damages Nicor was "legally obligated to pay."[133] Nicor voluntarily undertook the cleanup efforts, and the involvement of the IEPA was non-adversarial and did not amount to a court judgment against Nicor. As a result, the insurers were not required to indemnify Nicor for its voluntary actions.[134]

F. Estoppel

In *RLI Ins. Co. v. Illinois National Insurance Co.*,[135] an employee of a garbage company was loading garbage into the back of the truck when he was struck from behind. He was pinned in between the two vehicles and suffered serious injuries. He sought recovery from the driver of the car, the owner of the garbage truck and parent company of the owner of the garbage truck.[136]

The owner of the truck and its parent company were insured under three policies. Illinois National issued a commercial general liability policy with liability limits of $1 million and an automobile liability policy with limits of $1 million.[137] The business auto policy contained an uninsured motorists coverage limit in the amount of $1 million.[138] The RLI umbrella policy provided liability coverage in the amount of $5 million. The RLI policy scheduled the two underlying policies from Illinois National and provided that it did not apply to the "ownership, maintenance or use of a vehicle except as insofar as such coverage was provided by the underlying policies."[139]

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131. *Northern*, 334 Ill. App. 3d at 43, 777 N.E.2d at 421.
132. *Id.*
133. *Id.*
134. *Id.*
135. 335 Ill. App. 3d 633, 781 N.E.2d 321 (1st Dist. 2002).
136. *Id.* at 636, 781 N.E.2d at 324.
137. *Id.* at 636–37, 781 N.E.2d at 324–5.
138. *Id.* at 637, 781 N.E.2d at 325.
139. *Id.*

The insured was informed by Illinois National that it had coverage of $1 million and assigned attorneys for the defense of the insured. A letter referenced the commercial general liability policy but did not mention the business automobile policy. RLI issued a reservation of rights based upon an automobile liability exclusion within its policy.[140] The Illinois National representative completed an internal coverage analysis which found that the action was covered under the commercial general liability policy and that the automobile exception would not apply because the vehicle was not operated by the insured. Further, the representative found that an excess judgment was possible. RLI, the umbrella insurer, contacted Illinois National and questioned the determination that the business auto policy would not apply.[141] RLI took the position that both policies were potentially triggered.[142]

In a subsequent letter, Illinois National took the position that the commercial general liability policy did not apply because of the exclusion for liability "arising out of the ownership, maintenance, use or entrustment to others of any *** 'autos' *** owned or operated by or rented *** to any insured."[143] Although Illinois National sent this change in position to RLI, it did not inform the insured of its change in position. The underlying litigation was settled for approximately $3 million, and Illinois National paid $1 million under the business automobile policy.[144] RLI then funded $1.6 million of the settlement and filed a declaratory judgment action against Illinois National on the grounds that RLI paid amounts due and owing under Illinois National's commercial general liability policy, business automobile policy and UIM coverage.[145] Illinois National argued that the commercial general liability's automobile liability exclusion and the business automobile policies anti-stacking provisions entitled Illinois National to summary judgment in its favor.[146] The court followed the rule that where an insurer's assumption of a defense has induced the insured to surrender their right to control their own defense, the insured has suffered a prejudice which will support a finding that the insurer is estopped to deny policy coverage.[147]

In the present case, Illinois National agreed to defend the insured under one of its policies, but subsequently switched its coverage without notifying the insured of its decision to do so. The insured was defended under a commercial general liability policy and never received any correspondence from Illinois

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140. *Id.* at 638, 781 N.E.2d at 326.
141. *RLI Ins.*, 335 Ill. App. 3d at 638, 781 N.E.2d at 326.
142. *Id.*
143. *Id.* at 640, 781 N.E.2d at 327.
144. *Id.* at 641, 781 N.E.2d at 328.
145. *Id.*
146. *Id.*
147. *RLI Ins.*, 335 Ill. App. 3d at 645, 781 N.E.2d at 331.

National reserving any of its rights under either of the policies or notifying the insured of any coverage problems. Only after the settlement was reached did Illinois National decide to change its coverage from the commercial general liability policy to the business automobile policy.[148] With the switch from the commercial general liability policy to the business automobile policy, the anti-stacking clause (which prevented the insureds from further coverage other than the $1 million limit under that policy), was potentially applicable. This action was in the interest of the insurer and not in the best interest of the insured. As a result, Illinois National was estopped from asserting any policy exclusions under the commercial general liability or business automobile liability policies.[149]

This decision is interesting not so much for its application of estoppel when an insurer does not reserve rights, but instead, this is one of the few published decisions where an insurer has brought an equitable contribution claim in its own name against another insurer and successfully asserted estoppel against the insurer.

In *Employer's Reinsurance Corp. v. E. Miller Insurance Agency, Inc.*,[150] Employer's Reinsurance Corp. ("ERC") issued a claims made errors and omission policy to the Miller Agency. The Miller Agency issued several certificates of insurance on behalf of an insured to Power Construction and A.J. Maggio as additional insureds under two general liability insurance policies.[151] When Power Construction and A.J. Maggio were sued, the insurers denied coverage claiming that the parties were never added as additional insureds under the policies.[152] One insurer alleged that the Miller Agency was not an authorized agency and had no authority to buy coverage. The second insurer claimed that no policy existed for the dates alleged, and therefore, there could be no additional insured coverage under the policy.[153] As a result, Northbrook Property, the general liability insurer of Power Construction and A.J. Maggio, provided the defense and indemnification to those insureds. Northbrook Property along with Power Construction and A.J. Maggio then brought suit against the Miller Agency alleging fraud, breach of fiduciary duty and breach of contract.[154]

The Miller Agency was served with a complaint; however, the Miller Agency never forwarded a copy of the summons or complaint to ERC, its

148. *Id.* at 647, 781 N.E.2d at 332.
149. *Id.*
150. 332 Ill. App. 3d 326, 773 N.E.2d 707 (1st Dist. 2002).
151. *Id.* at 329, 773 N.E.2d at 709.
152. *Id.*
153. *Id.*
154. *Id.* at 329–30, 773 N.E.2d at 709.

errors and omissions insurer. Approximately two months after service, ERC did receive a copy of the complaint from the plaintiffs in the underlying litigation.[155] ERC then opened a complaint file and began its own investigation. ERC contacted the insureds several times regarding the defense of the Miller Agency. No response was made to those inquiries.[156] ERC then phoned the agency and was informed that documentation would be forthcoming. Four months after service, ERC informed the Miller Agency that it had not assumed its defense and that a default judgment could be sought. ERC stated that if it was not contacted within one week it would deny coverage for breach of the cooperation provision within its policy. No response was made by the Miller Agency. Approximately three weeks after its warning, ERC denied coverage to the Miller Agency based upon its failure to cooperate with the investigation. Approximately one year later, ERC was notified that a default had been entered against the defendants.[157]

The defendants contacted ERC following the receipt of the default orders. ERC responded by informing the defendants that coverage was denied based upon breach of the late notice and cooperation provisions within the policy.[158] ERC then filed the present declaratory judgment action. The action was based upon late notice and breach of the duty to cooperate. ERC's complaint did not contain an allegation that its policy contains a duty to pay for defense costs but not a duty to defend.[159] On this last issue, the court ruled that it was possible that ERC never explicitly contracted to have a duty to defend its insureds; however, ERC failed to raise this issue in the pleadings of its declaratory judgment action. As a result, the court would not consider this component of ERC's argument.[160] The court reviewed only the late notice and breach of the duty to cooperate arguments. While citing *Northern Insurance Co. of New York v. City of Chicago*,[161] the court held that "[W]hen such a contract includes a provision requiring the insured to notify the insurer of a suit against it, this provision is not just a technical requirement but a 'condition precedent to the triggering of the insurer's contractual duties'."[162]

When a provision requires "prompt notice" and contains a cooperation clause, these conditions must be fulfilled before an insured can benefit from the

155. *Id.* at 330, 773 N.E.2d at 709.
156. *E.R.C.*, 332 Ill. App. 3d at 330, 773 N.E.2d at 709.
157. *Id.* at 331, 773 N.E.2d at 710.
158. *Id.*
159. *Id.* at 331–32, 773 N.E.2d at 710–11.
160. *Id.* at 336, 773 N.E.2d at 714.
161. 325 Ill. App. 3d 1086, 759 N.E.2d 144 (1st Dist. 2001).
162. *E.R.C.*, 332 Ill. App. 3d at 336–37, 773 N.E.2d at 715 (citing *Northern Ins.*, 325 Ill. App. 3d at 1086, 759 N.E.2d at 144).

insurer's duty to defend and indemnify it. The court clearly identifies a notice requirement as a "condition precedent" to the duty to defend an insured based upon the holding in *Northern Insurance*.[163] Based upon the facts, the insured failed to give notice of the suit for almost fourteen (14) months. However, the insurer did receive actual notice from the suit from the plaintiffs in the underlying litigation. The actual notice provided to the insurer satisfied the notice requirement within the policy.[164] However, the insured was still under an obligation to comply with the cooperation clause. The cooperation clause imposes a broad duty of cooperation and is without limitation or qualification. Based upon the insured's failure to cooperate, the court held that ERC was excused from its duties because the defendants breached their duty to cooperate. As a result, ERC should not have been estopped from ascertaining coverage defenses "where, ultimately, it would have been discharged from its duties."[165]

Northbrook then alleged that ERC should be estopped from denying policy defenses due to its failure to defend the insured under a reservation of rights or timely file a declaratory judgment action.[166] The court again turned to the decision in *Northern Insurance* and recognized that the estoppel doctrine applies only when an insurer has breached its duty to defend. If the insurer had no duty to defend or its duty to defend was not properly triggered, estoppel cannot be applied against the insurer.[167] In the present case, the insured never gave ERC an opportunity to participate in the underlying suit. Further, ERC continued to attempt to contact the insured and retrieve information. As a result, the estoppel doctrine is not applicable to the present facts.[168] Even if estoppel were potentially applicable, ERC fulfilled one of the two options expressed by the court in *Northern Insurance*.[169] At the time ERC filed the declaratory judgment action, the underlying litigation was unresolved by final judgment or settlement. In addition, ERC filed a declaratory judgment action less than three months after it reaffirmed its denial of coverage to the insured.

Therefore, because ERC was released of its duty to defend and indemnify the Miller Agency due to the breach of the agency's duty to cooperate, ERC

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163. *Id.* at 338, 773 N.E.2d at 716.
164. *Id.* at 339, 773 N.E.2d at 717.
165. *Id.* at 340, 773 N.E.2d at 718.
166. *Id.* at 332, 773 N.E.2d at 711.
167. *E.R.C.*, 332 Ill. App. 3d at 332, 773 N.E.2d at 711 (citing *Northern Ins.*, 325 Ill. App. 3d at 1094, 759 N.E.2d 144).
168. *Id.*
169. *Id.* at 341, 773 N.E.2d at 718–19.

was not estopped from ascertaining coverage defenses and was under no obligation to provide a defense or indemnification to the insured.[170]

IV. VEHICLE INSURANCE COVERAGE

A. Application for Coverage

In *State Farm Co. v. American Service Insurance Co.*,[171] American Service Ins. Co. issued an automobile insurance policy which listed the applicant as the principal driver and two additional regular drivers. The policy did not list the applicants unlicenced minor son as a driver of the vehicle.[172] A pedestrian was struck and injured by the insured vehicle, and the pedestrian brought suit against the applicant and the applicants minor son. American Service Insurance investigated the matter and found that the 14-year-old minor son was operating the vehicle and sent a letter to the insured stating that the insured made a material misrepresentation by failing to declare the son as a resident driver on the application. Therefore, American stated it was rescinding the insurance policy.[173] American sent a draft to the insured representing the premiums paid which was cashed by the insured. American did not defend the insured in the suit brought by the pedestrian.[174]

The suit brought by the pedestrian proceeded to arbitration wherein an award in an amount of $20,000 was entered in favor of the pedestrian. The pedestrian recovered $20,000 from State Farm under their UM coverage.[175] State Farm then brought a declaratory judgment action against American Service alleging that American Service breached its duty to defend its insured and failed to file a reservation of rights or a declaratory judgment action. State Farm claimed that American was now estopped from denying coverage under its policy.[176]

American had asserted that it had a right to declare the policy "null and void from its inception" due to a material misrepresentation by the applicant.[177] The court reviewed estoppel law and held that the application of the estoppel doctrine is not appropriate if the insurer had no duty to defend or if the insurer's

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170. *Id.*
171. 332 Ill. App. 3d 31, 773 N.E.2d 666, (1st Dist. 2002).
172. *Id.* at 35, 773 N.E.2d at 669.
173. *Id.*
174. *Id.*, 773 N.E.2d at 670.
175. *Id.*
176. *Id.*
177. *Id.*

duty to defend was not properly triggered. Where there is no insurance policy in existence, there is no duty to defend the insured.[178] Despite State Farm's argument that American Service Ins. Co. was relying on a provision allowing the voiding of a policy, this is not a policy of defense. American's rescission argument does not involve a question of coverage, but instead, it raises an issue of whether an insurance policy was in existence at the time of the loss. As a result, application of the estoppel doctrine was not appropriate to this case.[179] American Service relied upon the following clause when it voided the policy: "Fraud Misrepresentation . . . [i]n the event that any representation contained in the application is false, misleading or materially effects the acceptance . . . of this risk. . . . this policy shall be null and void and of no benefit whatsoever from its inception."[180]

Although the policy contains a misrepresentation clause, the Illinois Insurance Code contains an applicable section as well.[181] That section provides in part that no misrepresentation will void a policy unless the misrepresentation was stated in the policy or endorsement or in the written application for the policy period. The statute further provides that "no such misrepresentation or false warranty shall defeat or avoid the policy unless it shall have been made with actual intent to deceive or materially effects either the acceptance of the risk or the hazard assumed by the company."[182] The court held that this statutory provision superceded the contractual language. As a result, American did not have the power to void the policy as stated within its misrepresentation clause.[183]

Pursuant to Section 154, American could only void the policy if a misrepresentation or false warranty was made in a written application and was made with the actual intent to deceive American or materially effected American's acceptance of the risk or the hazard assumed. Upon reviewing the record, the court found that it was undisputed that the applicant failed to disclose the minor as a "resident driver" or "regular operator" of the insured auto.[184] However, numerous other factual questions remained, including whether the failure to disclose the minor was a "misrepresentation" or "false warranty."[185] It was also unclear whether the applicant intended to deceive

178. *American Service*, 332 Ill. App. 3d at 38, 773 N.E.2d at 672 (citing Employers Ins. Co. of Wausau v. Ehlco Liquidating Trust, 187 Ill.2d 127, 150–51, 708 N.E.2d 1122 (1999)).
179. *Id.*
180. *Id.*
181. 215 ILL. COMP. STAT. 5/154 (2000).
182. 215 ILL. COMP. STAT. 5/154 (2000).
183. *American Service*, 332 Ill. App. 3d at 39, 773 N.E.2d at 673.
184. *Id.*
185. *Id.*

American or whether it effected the acceptance of the risk or the hazard assumed. The intent of the insured in cashing the premium refund check was also unclear. As a result, the court found an issue of material fact regarding whether American could void the policy as defined under Section 154 of the Insurance Code.[186]

B. Offer of Uninsured Motorist Coverage

In *Norris v. National Union Fire Ins. Co. of Pittsburgh, PA*,[187] Tommy Norris was killed in a traffic accident while driving a truck owned by Jones Truck Lines. The driver of the other vehicle was uninsured. At the time of the accident, Norris owned an automobile insured through Allstate Insurance Company with $20,000 limits. Allstate paid these limits to the family of the decedent.[188]

The truck owned by Jones Truck Lines was insured under a policy issued by National Union Fire Insurance Company of Pittsburgh, PA ("National Union") with limits of $2 million per accident. This policy contained no Uninsured Motorist (UM) coverage whatsoever.[189] A declaratory action was brought by Norris' survivors alleging the National Union policy should be reformed to include UM coverage in the amount of $2 million. National Union argued that if the policy was to be reformed, it should be reformed to the statutory minimum of $20,000 per person and $40,000 per occurrence.[190]

The plaintiffs argued that where there has been an insufficient offer of UM coverage, the court should impose a level equal to the higher limits. The plaintiffs also alleged that the purported rejection by the truck owner of the excess UM coverage was invalid because the policy did not comply with Illinois law.[191] National Union argued that it offered UM coverage up to the $2 million limit of the policy but that the owner made a knowing and intelligent rejection of that offer.[192]

The Illinois UM statute provides that no policy of liability coverage for an automobile may be issued unless UM coverage is offered in an amount up to the insured's bodily injury liability limits.[193] In order to satisfy the requirements of this section, an offer of UM coverage must meet a four part test described

186. *Id.*
187. 326 Ill. App. 3d 314, 760 N.E.2d 141 (1st Dist. 2001).
188. *Id.* at 317, 760 N.E.2d at 144.
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*

in *Cloninger v. National Gen. Ins. Co.*[194] Under *Colinger*, an offer must (1) notify the insured in a commercially reasonable manner if the offer is not made in face-to-face negotiations; (2) specify the limits of the optional coverage without using general terms; (3) intelligibly advise the insured of the nature of the offer; (4) advise the insured that the optional coverage is available for a relatively modest premium increase.[195] Here, the form offered by National Union indicated that the basic limits in Illinois were $30,000. The form also failed to identify the additional cost of the coverage.[196] These errors created a situation as if no offer was made at all. Any purported rejection of this offer was not effective. Since the purported rejection was ineffective, the National Union policy was reformed by the court to reflect a higher UM limit equal to the $2 million liability limit of the policy.[197]

Pursuant to *Norris*, where an offer of UM coverage failed to accurately convey the limits and cost of available coverage, the rejection of UM coverage was ineffective, and the policy was reformed to include UM coverage with limits equal to the liability limits.[198]

In *Cope v. State Farm Fire & Casualty Co.*,[199] Kenneth, Sheila and Kendra Cope ("plaintiffs") were insured under a personal liability umbrella policy with a liability limit of $1 million.[200] Kendra Cope was standing near a telephone booth next to the street when she was struck by an uninsured motor vehicle. At the time of the accident, the plaintiffs had an automobile liability policy issued by State Farm with $100,000 in UM coverage. Although the umbrella policy contained liability coverage, it did not include any excess coverage for injuries caused by an uninsured or underinsured motor vehicle.[201] State Farm tendered the $100,000 policy limits under the UM coverage in its policy.[202]

Plaintiffs filed suit against State Farm seeking reformation of the umbrella policy to reflect $1 million in excess UM coverage. Plaintiffs alleged State Farm failed to make a meaningful offer informing them of the availability of UM coverage as an option under the umbrella coverage. The plaintiffs alleged that if an insurer voluntarily chooses to make excess UM coverage available,

194. 109 Ill.2d 419, 488 N.E.2d 548 (1985).
195. *Id.* at 426, 488 N.E.2d at 550.
196. *Id.*
197. *Id.*
198. *Id.*
199. 326 Ill. App. 3d 468, 760 N.E.2d 1020 (5th Dist. 2001).
200. *Id.* at 470, 760 N.E.2d at 1021.
201. *Id.*, 760 N.E.2d at 1021–22.
202. *Id.*

it has a duty to provide a meaningful offer as required by the Illinois Insurance Code.[203]

The court held the clear language of the statute requires that insurers who provide liability coverage on an excess or an umbrella basis are not required to provide nor are prohibited from offering excess UM coverage.[204] Under the Illinois Insurance Code, an insurer who provides bodily injury liability coverage must offer UM coverage in an amount equal to the bodily injury liability limits. There is no comparable requirement in the statute governing UM coverage under an umbrella policy.[205] In the present case, there was no legal duty upon the umbrella carrier to offer UM coverage, and, therefore, the policy was not reformed.[206]

In *Wood v. National Liability & Fire Insurance Co.*,[207] Wood applied for automobile liability coverage and failed to fill out any UM/UIM rejection form.[208] National Liability and Fire Insurance Company issued a policy and then notified the agent that the form was incomplete. The agent then filled the form out on behalf of the insured.[209] Several months later the insured was involved in an automobile accident. The insured sought UM/UIM benefits equal to his liability limit of $350,000. National maintained that the agent completed the rejection form on behalf of Mr. Wood which reduced the limits to $20,000/$40,000.[210]

The court held that the statute clearly requires that the "applicant" fill out the rejection form. The only logical interpretation that can be provided to the statute is that the rejection form must be completed at the time the insured applies for insurance.[211] National argued that the insured filled out the rejection form which modified the policy. The court would have accepted this position if an amended policy had been issued; however, no amended policy was issued, and, as a result, the insured was entitled to UM/UIM coverage equal to the liability limits of $350,000.[212]

The court also reviewed whether the rejection of UM/UIM coverage must be made on the "application" or whether it can be completed on a separate

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203. *Id.*
204. *Cope*, 326 Ill. App. 3d at 471, 760 N.E.2d at 1023 (citing 215 ILL. COMP. STAT. 5/143a-2(5) (1997)).
205. *Id.*
206. *Id.*
207. 324 Ill. App. 583, 755 N.E.2d 1044 (2d Dist. 2001).
208. *Id.* at 584, 755 N.E.2d at 1046.
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*

document. The court held that a separate UM/UIM rejection form can accompany the application for insurance.[213]

C. Uninsured/Underinsured Coverage Limits

In *Thurman v. Grinnell Mut. Reinsurance Co.*,[214] Rebecca Thurman was a passenger in a car that was owned and operated by Clarence Huffman. She was involved in an accident with another vehicle that was insured by State Farm Insurance Company.[215] The driver of that vehicle had liability limits of $50,000 per person and $100,000 per accident. Ms. Thurman received approximately $9,000 of the State Farm limits.[216]

The driver of the vehicle occupied by Ms. Thurman had underinsured motorists coverage in the amount of $25,000 per person and $50,000 per occurrence.[217] Ms. Thurman sought $25,000 less a $9,000 off-set received from State Farm. Grinnell refused and claimed that the Illinois Insurance Code stated that the amount payable by Grinnell to Mr. Thurman for underinsured motorists benefits was zero because the UIM coverage limits provided for, and the Grinnell policy did not exceed, the liability limits of the State Farm policy.[218] Section 143a–2(4) provides in pertinent part as follows:

> [T]he maximum amount payable by the underinsured motorists coverage carrier shall not exceed the amounts by which the limits of the underinsured motorists coverage exceeds the limits of the bodily injury liability insurance of the owner or operator of the uninsured motor vehicle.[219]

The Court reviewed the earlier Supreme Court decision in *Cummins v. Country Mutual Insurance Co.*,[220] in which the Supreme Court held that a determination as to whether a vehicle is underinsured must be made by comparing the amount of the underinsured motorists coverage to the amount of the liability coverage *actually* recovered from the at–fault driver.[221] The Court then compared that holding with the amendment to the statute cited above and held that the legislatures intent was clearly indicated and restricted under underinsured motorists coverage where the limits of the liability insurance

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213. *Id.*
214. 327 Ill. App. 3d 920, 764 N.E.2d 130 (5th Dist. 2002).
215. *Id.* at 921, 764 N.E.2d at 131.
216. *Id.*
217. *Id.*
218. *Id.* at 921–22, 764 N.E.2d at 132 (citing 215 ILL. COMP. STAT. 5/143a–2(4) (1997)).
219. 215 ILL. COMP. STAT. 5/143a–2(4) (1997).
220. 178 Ill.2d 474, 687 N.E.2d 1021 (1997)).
221. *Id.* at 485–86, 687 N.E.2d at 1027.

of the owner or operator of the underinsured motor vehicle exceed the limits of the underinsured motorists coverage.[222] Rather than comparing the amounts actually recovered by the party claiming underinsured motorists benefits, the Court held that the statute required a comparison of the actual dollar limits stated within the policy. If the underinsured motorists coverage limits do not exceed the stated liability limits of the at-fault driver, no recovery is possible.[223] The Court then applied the mathematical formula laid out in the statute to the policy limits at hand and, in an apparent misunderstanding of the statute, compared the per person UIM limits with the per occurrence liability limits. The Court held that the UIM limits of $25,000 (State Farm UIM limits of $25,000 per person/$50,000 per occurrence) did not exceed the $100,000 liability limits (Grinnell, $50,000 per person/$100,000 per occurrence).[224] Because $25,000 does not exceed $100,000, or because it can be said to exceed $100,000 by zero, under the clear language of the statute, the maximum amount payable by defendant under the statute is $0."[225]

In *Roth v. Illinois Farmers Insurance Company*,[226] the issue in dispute was whether the $100,000 per-person limit or the $300,000 per-occurrence limit of the underinsured-motorist coverage applied to the plaintiff's claim. The appellate court affirmed the trial court's granting of summary judgment in favor of the plaintiff. Angela Roth died as a result of injuries sustained in an automobile accident in which she was a passenger and as a result of an apparent drag race instigated by the driver of the other vehicle, Darin Diesen, who was an underinsured motorist. The defendant had issued an automobile insurance policy to Angela's parents that provided coverage for Angela's injuries and subsequent death. The limits of liability clauses were the source of contention between the parties. The court reasoned that in examining the defendant's policy as a whole and the relation of its provisions to each other, it found it significant that the per-occurrence clause in the policy did not expressly make its underinsured-motorist coverage subject to the per-person limit, although in the bodily injury liability portion of the policy, the per-occurrence clause was subject to the per-person limit.[227] The court found that the presence of such language in one provision and the absence in another provision within the same policy was significant in that it suggested an intention

222. *Id.*
223. *Id.*
224. *Id.*
225. *Id.*
226. 324 Ill. App. 3d 293, 754 N.E.2d 439 (5th Dist. 2001).
227. *Id.* at 298, 754 N.E.2d at 443.

by the drafter to provide broader coverage in those situations where the language is absent.

The defendant argued that because the per-person clause defines the coverage, there is no ambiguity.[228] However, the court disagreed and found that because *both* the per-person and per-occurrence clause defined coverage applicable to the claims asserted by the plaintiff, the policy was ambiguous. The court further held that because neither clause provided that the application of one excluded the application of the other, the result was confusion to an insured whose claims fell within both. Since ambiguous terms in an insurance policy generally are construed against the drafter of the policy and in favor of coverage because the insurer is the drafter of the policy and could have drafted the ambiguous provision clearly and specifically, the court found in favor of the plaintiff.[229]

Based upon a faulty affidavit in the notice of appeal, the Illinois Supreme Court found that leave to appeal in this matter was improvidently granted. The appeal was dismissed December 5, 2002.[230]

In *Domin v. Shelby Ins. Co.*,[231] Shelby Insurance Company issued a single policy of insurance for two vehicles owned by Terrence and Marie Domin ("the Domins"). Terrence Domin was involved in an automobile accident with an uninsured driver. The Domins then sought UM benefits from Shelby. The Shelby policy provided UM benefits for "bodily injury" which was defined as "sickness or disease, including death that results."[232] The Shelby policy contained a limit of liability provision which provided that the limit of liability "shown in the Schedule or in the Declarations for each person for UM Coverage is our maximum limit of liability for all damages . . . arising out of bodily injury sustained by any one person in any one accident."[233]

The Domins argued that although the "limit of liability" provision was unambiguous, an ambiguity arose when it was read with the Declarations page. The Domins argued that the liability limits of $100,000 could then be stacked for a maximum coverage of $200,000.[234]

The court reviewed first whether the "limit of liability" provision was unambiguous and second, whether any ambiguity was created by the manner in which the vehicle's limits were identified on the Declarations page[235]. The

228. *Id.*
229. *Id.* at 299, 754 N.E.2d at 444.
230. 202 Ill. 2d 490, 782 N.E.2d 212.
231. 326 Ill. App. 3d 688, 761 N.E.2d 746 (1st Dist. 2001).
232. *Id.* at 690, 761 N.E.2d at 748.
233. *Id.*
234. *Id.* at 692, 761 N.E.2d at 749.
235. *Id.* at 694, 761 N.E.2d at 750.

court held that the anti-stacking provision was clear and unambiguous, and Shelby agreed to pay only up to the limit of insurance which was $100,000 for each person who suffered bodily injury. Only Terrence Domin suffered bodily injury.

The court then reviewed whether there was ambiguity created by the arrangement or manner in which the limits were displayed on the Declarations page.[236] The Domin's two vehicles were listed separately on the Declarations page, and there was one liability limit listed for both vehicles. As a result, the liability "limits" language on the declarations page was not inconsistent with the policy anti-stacking provision.

D. Stacking of Policy Limits

In *Hall v. General Casualty Company of Illinois, et al.*,[237] the Halls filed a declaratory judgment action against General Casualty, the insurer of Davis, a driver who hit the Halls with his automobile. The automobile policy issued by General Casualty contained an anti-stacking clause that stated its limit of liability shown in the Declarations page for "each accident" would be General Casualty's maximum limit of liability for all damages resulting from any one automobile accident. The Halls argued that the insurance policy was ambiguous regarding stacking because the declaration page stated, "Insurance is provided where a premium is shown."[238] Plaintiffs argued that since both vehicles insured under the policy showed a premium, the policy could reasonably be construed to provide a $500,000 limit of liability per accident twice, for each vehicle. General Casualty argued that the anti-stacking provision unambiguously limits its maximum liability to $500,000, regardless of the number of vehicles or premiums shown in the Declarations page. The trial court granted the Halls' motion for summary judgment, and General Casualty appealed.[239]

The court of appeals affirmed the trial court's holding, determining that the General Casualty insurance policy provided liability coverage in the amount of $500,000 per person and $1 million per accident.[240] After acknowledging that anti-stacking provisions will be enforced as written if the provision is unambiguous and does not violate public policy, the court looked to the policy

236. *Id.* at 695, 761 N.E.2d at 751.
237. 328 Ill. App. 3d 655, 766 N.E.2d 680 (5th Dist. 2002).
238. *Id.* at 658, 766 N.E.2d at 682.
239. *Id.*
240. *Id.* at 661, 766 N.E.2d at 684.

to determine whether the language was ambiguous. The court found inconsistent and contradictory provisions in the policy. The court concluded that the inclusion of the language, "Insurance is provided where a premium is shown," together with the layout of the declarations page, created the ambiguity in this particular case.[241]

In *Kost v. The Farmer's Automobile Insurance Ass'n.*,[242] Robert Kost was an insured under an automobile insurance policy issued by Farmers Automobile Insurance Association ("Farmers"), which provided underinsured motorist coverage. Robert Kost was fatally injured in an automobile accident. The insurer of the driver paid its liability limits to the administrators of Kost's estate. The estate then claimed underinsured motorist coverage from Farmers. The Farmers' policy provided for arbitration in the event the UIM claim could not be settled. The arbitration provision within the policy stated that if the arbitration amount exceeded the liability specified by the Illinois Responsibility Law, either party could demand a right to a trial.[243] The matter was submitted to arbitration, which resulted in a calculation of damages in the amount of $300,000 with 50% negligence attributable to the decedent. The recoverable damages were assessed at $150,000. [244]

The estate sought a trial *de novo* and filed an action to vacate the arbitration award and grant a trial *de novo*.[245] The insurer took the unique position that the *de novo* trial clause within its own policy was unenforceable as a matter of public policy. The court was then faced with the issue of whether an insured may use a trial *de novo* provision to seek a trial after arbitration, despite the fact that Illinois law establishes that insurers may not enforce unfairly drafted trial *de novo* provisions. The court reviewed prior decisions holding trial *de novo* clauses within UIM provisions to be unenforceable and stated that the concern in Illinois was for a fairness to the insured. The court further took the position that "allowing an insurer who has placed a biased trial *de novo* provision in a policy to then claim that the provision is void as against public policy when an insured attempts to enforce the provision should not be sanctioned by the courts."[246] As a result, the court held that when the trial *de novo* clause is attempted to be exercised by the insurer, it is unenforceable, but when the insured exercises the same provision, it is permissible. As a result, a trial *de novo* clause within a UIM provision will

241. *Id.* at 660–61, 766 N.E.2d at 684.
242. 328 Ill. App. 3d 649, 766 N.E.2d 676 (5th Dist. 2002).
243. *Id.* at 651, 766 N.E.2d at 677.
244. *Id.*
245. *Id.*
246. *Id.* at 654, 766 N.E.2d at 679.

be unenforceable on the part of the insurer but may still be exercised by the insured.

This decision represents a departure by the Fifth District from prior UIM *de novo* trial decisions. Prior decisions had held that a trial *de novo* provision within a UM clause is enforceable, but a trial *de novo* provision within a UIM clause is not enforceable by the insurer. Within this decision, the 5th District has held that the UIM trial *de novo* clause is an enforceable provision but only when exercised by the insured. The court fails to provide any citation to prior decisions which allows it to take this unusual step of selective enforcement. The Illinois Supreme Court previously reviewed a *de novo* trial provision within a UM policy and found the provision to be valid. The Court of Appeals then found a UIM *de novo* trial decision invalid, and the Supreme Court instructed the Court of Appeals to review its decision again in light of the Supreme Court's prior decision holding a UM *de novo* trial provision valid. Although the Supreme Court expressed no opinion regarding the validity of the UIM *de novo* trial provisions, the instruction to the Court of Appeals to review its decision suggests that the Supreme Court would find an arbitration provision containing a *de novo* trial clause within a UIM provision to be valid.

In *Maka v. Illinois Farmers Ins. Co.*,[247] Illinois Farmer's Ins. Co. ("Farmers") issued two insurance policies to Jozef Maka for two separate automobiles. The underinsured motorist coverage contained limits of $100,000 in one policy and $50,000 in the other.[248] The insured's daughter was killed in an automobile accident while she was a passenger. The driver settled the tort claim for policy limits of $20,000. The insured then made a demand to Farmer's for underinsured motorist benefits under both policies. In response, Farmer's paid Maka $80,000, representing the $100,000 underinsured motorist limits minus the $20,000 payments received from the tortfeasor.

The insured filed a declaratory judgment action seeking the additional $50,000 of underinsured motorist coverage. The policy provided that the "limits provided by this policy may not be stacked or combined by the limits provided by any other policy issued to you or a family member by any member company of the Farmer's Insurance Group of Companies."[249] Maka argued that the explicit anti-stacking clause was contained only in the uninsured portion of the policy, but no such clause was contained within the underinsured endorsement to the policy. Second, Maka asserted that Illinois law requires that Farmer's explicitly set forth every limitation on coverage in each portion of the policy which Farmer's intended to limit. Maka did not argue that the anti-stacking

247. 332 Ill. App. 3d 447, 772 N.E.2d 895 (1st Dist. 2002).

248. *Id.* at 449, 772 N.E.2d at 896.

249. *Id.* at 449, 772 N.E.2d at 897.

clause was ambiguous. The court found that the underinsured coverage endorsement affirmatively set forth that all of the terms and conditions of the uninsured coverage would apply to the underinsured coverage.[250] From this, it was clear that any limitation of coverage within the uninsured section would apply to the underinsured coverage.

Maka argued that this provision should have been set forth explicitly within the underinsured motorist provision. The court held that the reference within the underinsured motorist provision to the terms and conditions within the uninsured provision was sufficient to set forth the limits within the uninsured provision, including the anti-stacking provision.[251] The court held that the anti-stacking provision was not ambiguous and that it was not ambiguous in its incorporation of the endorsement of underinsured coverage. As a result, Maka was not entitled to receive the $50,000 sought under the second policy.

In *Janes v. Western States Insurance Co.*,[252] the plaintiff and her husband were named insureds under two separate insurance policies issued by Western States Insurance Company and Trends America Indemnity Company ("TIG"). They were involved in an automobile accident with another vehicle that had liability limits of $50,000. The insurer of the other vehicle paid the policy limits of $50,000 to the plaintiff. The plaintiff sought UIM benefits and sought to stack all of the coverage available under a TIG policy for a total of $300,000 in coverage.[253]

The TIG policy contained a "limit of liability" provision that stated "the limit of liability shown in the Schedule or in the Declarations for each person for Underinsured Motorists Coverage is our maximum limit of liability for all damages . . . arising out of 'bodily injury' sustained by any one person in any one accident."[254] The Schedule did not list any limit of liability. The Declarations page contained a section entitled "coverages and limits." There were three vehicles listed on the Declarations with a corresponding premium payment as well as a corresponding limit of liability of 50/100. The plaintiff alleged that the per person/per accident limit resulted in $150,000 of coverage for her and $150,000 for her husband, for a maximum coverage of $300,000. The court held that the arrangement on the Declarations page could lead to confusion and appeared to state that the policy limits were cumulative.[255] Although the~~y~~ "limits of liability" provision may have been unambiguous, the

250. *Id.* at 453, 772 N.E.2d at 900.
251. *Id.* at 455, 772 N.E.2d at 901.
252. 335 Ill. App. 3d 1109, 783 N.E.2d 37 (5th Dist. 2001).
253. *Id.* at 1109, 783 N.E.2d at 40.
254. *Id.*, 783 N.E.2d at 39.
255. *Id.* at 1112, 783 N.E.2d at 42.

arrangement of the policy limits within the Declarations page created an ambiguity that was resolved in favor of the insured. Therefore, the plaintiff was entitled to stack the policy limits for a total of $300,000 in UIM coverage.

In *Skidmore v. Throgmorton*,[256] Greg Skidmore and Susan Throgmorton were involved in a car accident in which the vehicle that Throgmorton was operating was owned by her father, William Spencer, and insured by Safeco Insurance Company ("Safeco") under a policy paid for by Spencer. The Safeco liability policy also provided coverage for an additional car owned by Spencer. Additionally, Throgmorton had Safeco insurance on two vehicles that she owned, plus excess liability coverage. Each of the four cars had Safeco liability coverage of $100,000 per accident per person.

Skidmore filed suit for his bodily injuries and damages against Throgmorton. Prior to trial, Safeco analyzed its own policies and made a determination that $200,000 in coverage was applicable to Skidmore's claim.[257] The $100,000 per accident per person limits of the Spencer policy, which was limited to the one vehicle by application of that policy's anti-stacking clause, was added to $100,000 from the Throgmorton liability policy, which was also limited to one vehicle by the application of the policy's anti-stacking clause. Skidmore filed a motion with the trial court and sought to have the trial court determine that $400,000 in coverage was actually available arguing that the anti-stacking clause of each applicable policy should be disregarded. The trial court entered an order concluding that only $200,000 in insurance coverage was available for the accident, and Skidmore filed a motion to reconsider. The trial court later reversed its previous order and found that latent ambiguities existed in the insurance policy language and concluded that $400,000 in insurance coverage was available. Safeco appealed this order.[258]

The court of appeals reviewed the anti-stacking clause of the policy and the declaration sheet that was incorporated into the anti-stacking clause. The declarations page was divided into five separate columns. There were columns designated for the available coverages, one column for the applicable coverages for each vehicle and one column for the premium associated with the insured-elected coverage for each vehicle. The Throgmorton and Spencer policies each had liability bodily injury limits of $100,000 for each person and $300,000 for each occurrence. For each of the four cars involved, there was a separate premium listed for that liability bodily injury coverage. The court pointed to three recent cases involving virtually identical provisions and declarations page setups, which all concluded that the anti-stacking clause at

256. 323 Ill. App. 3d 417, 751 N.E.2d 637 (5th Dist. 2001).
257. *Id.* at 419, 751 N.E.2d at 638.
258. *Id.*, 751 N.E.2d at 639.

issue was ambiguous, and thus, that the stacking of the bodily injury coverage for each vehicle was allowable.[259] The court chose to follow the reasoning of these cases in concluding that the anti-stacking clause, coupled with the declarations page, was ambiguous and that stacking was allowable. The court held that the ambiguity was that it was not clear to what the "limit of liability" in the anti-stacking clause referred in the declarations page and affirmed the trial court's decision.[260]

E. Extent of Coverage

In *Ramirez v. State Farm Mutual Auto Insurance Co.*,[261] the plaintiff brought suit as parent and next friend of the estate of her deceased son seeking a declaratory judgment action that the uninsured motorists provision within a State Farm policy covered the damages related to the decedents injuries and death. The deceased minor, Jamaliel Ramirez, was driving his parents car. He had a passenger in the car at the time. Another vehicle containing three individuals began following the decedent's car. Jamaliel attempted to get away from the car, but the other vehicle pursued him. Eventually, the second car pulled along side Jamaliel's vehicle, and one of the passengers in the second car fired approximately ten (10) gun shots into the decedent's car. One of the shots hit the decedent in the chest. The second car then sped away. The driver then passed out and the car left the road striking a light pole. Jamaliel died at the hospital and his cause of death was established as a gun shot wound to the chest. Two individuals in the second car eventually plead guilty to a charge of murder.[262] On behalf of her son, Jamaliel, the plaintiff sought uninsured motorists coverage from State Farm. The uninsured motorists provision within the State Farm policy provided in pertinent part:

> We will pay damages for bodily injury an insured is legally entitled to collect from the owner or driver of an uninsured motor vehicle. The bodily injury must be sustained by an insured and caused by accident arising out of the operation, maintenance or use of an uninsured motor vehicle.[263]

Based upon this provision, State Farm claimed that the damages did not arise out of an accident and denied the plaintiff's claim. The trial court determined that the incident was an "accident" and that the incident "arose out

259. *Id.* at 424, 751 N.E.2d at 643.
260. *Id.* at 426, 751 N.E.2d at 644.
261. 331 Ill. App. 3d 77, 771 N.E.2d 619 (2d Dist. 2002).
262. *Id.* at 79, 771 N.E.2d at 621.
263. *Id.* at 80, 771 N.E.2d at 621.

of" the use and operation of an uninsured vehicle.[264] Based upon these findings, the trial court held that State Farm was required to provide uninsured motorist coverage. On appeal, State Farm argued that the injuries did not "arise from" the accident. State Farm did concede that Jamaliel's injuries arose by "accident' and, therefore, the court expressed no opinion on this issue. The only issue reviewed by the court was whether the accident "arose out of" the operation of an uninsured vehicle. The term "arising out of" has been construed broadly to mean originating from, incident to, or having a causal connection with the ownership, maintenance or use of the vehicle."[265] The court in *Aryainejed*[266] reviewed various tests construing "arising out of" and established that an activity that is "within the risk reasonably contemplated by the parties" should determine coverage. The court in the present case applied this "reasonable contemplation" test and held that "the appropriate analysis for construing "arising out of" language in the context of uninsured motorists provisions of an automobile insurance policy is the reasonable contemplation test."[267]

As applied in the present case, the instrumentality of Jamaliel's injuries and death was the gun shot fired from another vehicle. The operation of an uninsured vehicle was not the instrumentality that caused the injuries and death of Jamaliel. As a result, the plain language of the policy precluded coverage for the injuries that were the result of a gun shot. Therefore, the court found that it was not within the reasonable contemplation of the parties to the insurance policy that the "arising out of" language would apply and provide uninsured motorist coverage for these injuries.[268]

In *State Farm Mut. Auto. Ins. Co. v. George*,[269] James George and Erin Hitch had a minor child named Taylor Hitch. The parents were never married and the minor child lived with her father at all times. The minor's mother was killed in a single car accident while riding as a passenger. The driver of the vehicle had no liability insurance.

James, the father, had an automobile insurance policy with State Farm. The minor was insured under the State Farm policy because she lived with her father. The mother was not an insured under the State Farm policy. Following the accident, the father made an uninsured motorist claim on behalf of the

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264. *Id.*
265. Aryainejed v. Economy Fire & Cas. *Co*., 278 Ill. App. 3d 1049, 663 N.E.2d 1107 (3d Dist. 1996)
266. *Id.*
267. *Ramirez*, 331 Ill. App. 3d at 85, 771 N.E.2d at 626.
268. *Id.* at 86, 771, N.E.2d at 626.
269. 326 Ill. App. 3d 1065, 762 N.E.2d 1163, (3d Dist. 2002).

minor daughter for the loss of society she suffered because of her mother's death. The father alleges that the Illinois Insurance Code[270] requires "that an insured be covered for loss of society caused by the death of an individual who is not insured under the policy."[271]

The court reviewed whether the Illinois Insurance Code (the "Act") mandated coverage for loss of society when the actual bodily injury is sustained by any person, or solely by an insured person. No Illinois court had yet reached this issue. The majority of other jurisdictions have held that insurance policies do not compensate for damages for loss of society.[272] (Citations Omitted)

The Act applies to "insured person[s] . . . entitled to recover damages . . . because of bodily injury."[273] The court held that this language is ambiguous and can be read to mandate coverage for loss of society or to allow for its exclusion. The court then looked to the purpose behind the law in order to resolve the ambiguity. The public policy underlying the Act is to place insured parties injured by an uninsured driver in substantially the same position they would have been in if the driver would have been insured. [274] Collateral claims based on physical injury to another are derived only from the underlying claim of the physically injured person. As a result, loss of society cannot be recovered under a policy where the injured party could not recover.

If the mother had lived, she could not have made a claim for her injuries under the liability provisions of State Farm's policy. Her claim or any wrongful death claim would have been made under her own insurance policy. The father also alleged that the minor's loss of society is a "bodily injury" to the minor and, therefore, compensable. The Court held that loss of society, like loss of consortium, consists of conceptual damages rather than actual physical injury contemplated by the policy definition of bodily injury. Loss of society is a personal rather than a bodily injury, and, therefore, not covered under the express language of the policy.[275]

In *General Casualty Insurance Co. v. Lacy*,[276] after settling his claim for injuries with the at-fault driver's insurer for a total of $42,500, Lacey sought underinsured coverage from his own insurance company. The insurer denied coverage because the at-fault driver's policy limits had not been exhausted by the settlement. The circuit court granted the insurer summary judgment, which

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270. 215 ILL. COMP. STAT. 5/143a (1997).
271. *George*, 326 Ill. App. 3d at 1067, 762 N.E.2d at 1165.
272. *Id.*
273. 215 ILL. COMP. STAT. 5/143a (1997).
274. *George*, 326 Ill. App. 3d at 1068, 762 N.E.2d at 1165.
275. *Id.* at 1069, 762 N.E.2d at 1167.
276. 199 Ill.2d 281, 769 N.E.2d 18 (2002).

was affirmed by the appellate court. In the supreme court, Lacey argued that the current statute, section 143a–2(7) of the Insurance Code, which states that "settlement of the bodily injury claim in an amount less than the limits of liability of the bodily injury coverages applicable to the claim shall not preclude the claimant from making an underinsured motorist claim against the underinsured motorist coverage" indicated a legislative intent of public policy, and as it was in effect at the time of the settlement, should govern the rights of the parties in this case.[277] The supreme court noted that it is well settled that "statutes in force at the time an insurance policy was issued are controlling," and, as the statute on this issue specifically authorized the insurer to include such an exhaustion provision in the policy at the time it was issued, the insurer was entitled to enforce that provision. [278]

F. Additional Vehicle Policy Issues

In *Nichols v. Certain Underwriters at Lloyd's London*,[279] the plaintiff was insured under a cargo insurance policy issued by Lloyd's. The certificate of insurance identified the insured goods as "motor truck cargo." While transporting a trailer from Illinois to Florida, an employee of the insured detached the trailer and parked it on a lot at a truck stop in San Antonio, Florida. There was no fencing, guards or security provided on the lot. Three days later, the driver returned and found that the trailer with its cargo had been stolen. The plaintiff submitted a claim under the Lloyd's policy for approximately $45,000.[280]

Lloyd's denied the claim and asserted that the detached trailer did not satisfy the definition of "truck" under policy. The policy covered "all risks of physical loss or damage from an external cause to lawful cargo in and/or on a truck whilst in [the insured's] care, custody or control in the ordinary course of transit."[281] Under the policy, the term "truck" was defined as "a truck or truck-trailer designed for travel on public roads . . . but only (i) whilst attached to a covered truck or trailer or (ii) whilst temporarily detached for a period not exceeding 72 consecutive hours (Sundays and holidays excluded) from a covered truck or tractor."[282] The definition of "truck" required that the separate trailer be garaged in a building, parked in a fully enclosed yard, or

277. *Id.* at 284, 769 N.E.2d at 20.
278. Id. at 285, 769 N.E.2d at 20.
279. 331 Ill. App. 3d 555, 771 N.E.2d 595 (4th Dist. 2002).
280. *Id.* at 556, 771 N.E.2d at 596.
281. *Id.* at 556, 771 N.E.2d at 597.
282. *Id.*

under constant surveillance. The policy defined the term "unattached" as a truck which has been left without a responsible person to drive, guard or attend the truck.

The policy excluded coverage from unattended trucks unless they were parked within a fully enclosed yard, building, or secured lot. While applying standard rules of policy language interpretation, the court held that the trailer did not meet the definition of "truck" because it was not within a "secured lot." Although the coverage was excluded under the main body of the policy, an additional endorsement was attached to the policy and was paid for with an additional premium. The endorsement was entitled unattended truck endorsement, and, provided that irrespective of the exclusion for losses from unattended trucks, the policy was extended to include losses "to cargo directly resulting from forcible and/or violent entry into unattended trucks, subject to such trucks having all their openings closed, securely locked [,] and all keys removed . . ."[283] The court held that this provision extended coverage by modifying the exclusion for unattended trucks as well as the definition of "truck". This modification extended coverage to unattended detached trailers which were closed and locked. The requirement for a secure parking area was not included within the endorsement, and, as a result, coverage was provided to the insured under the cargo policy.

In *St. Paul and Marine Insurance Co. v. Guthrie*,[284] defendant DeMay rented a car from Enterprise car rental in Moline, Illinois. Vershaw was listed as an additional driver on the rental agreement, which provided that other drivers were not permitted without Enterprise's approval. The defendants intended to use the rental car to travel to Florida. An accident occurred during the trip in which Vershaw and DeMay were allegedly injured. Vershaw filed a claim with plaintiff, asserting that Guthrie had been driving the rental car at the time of the accident. After plaintiff filed its motion for declaratory judgment, Liberty Mutual Fire Insurance Company intervened. Liberty insured DeMay's parents, providing potential uninsured motorist coverage to DeMay if Guthrie was found to be uninsured. The policy provided in part as follows:

EXCLUSIONS

A. We do not provide Bodily Injury Liability or Property Damage Liability Coverage for any person:

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283. *Id.* at 557, 771 N.E.2d at 598.

284. 332 Ill. App. 3d 486, 773 N.E.2d 763 (3d Dist. 2002).

> 8. using or occupying your covered auto without your permission or using or occupying any vehicle other than your covered auto without the permission of the owner."[285]

The court held that the initial permission rule provided that once the named insured of an insurance policy containing a clause extending liability coverage to persons who use the named insured's vehicle with the insured's permission (an omnibus clause) has given permission to another to use the car, any person subsequently given permission to drive the car by that first permittee is covered under the policy.[286] The court held that the same public policy supported application of the rule to "driver's coverage" of non-owned vehicles.

V. BREACH OF DUTY AND BAD FAITH

In *O'Neill v. Gallant Insurance Co.*,[287] after Marguerite O'Neill was seriously injured due to Gallant's insured's negligence, her attorney sent a demand letter to Gallant for the policy limits of $20,000.00 to be paid within 30 days. Gallant made no response to this letter, even though the Gallant claims adjuster who reviewed the file recommended, before the demand was even made, that policy limits be paid on the claim, and the claims manager concurred in that recommendation. John Moss, executive vice president of Gallant's parent company, was the only one other than the chief executive officer who could authorize such a settlement. Moss chose to ignore the recommendations of his adjusters, and also disregarded the advice of the lawyers hired by Gallant to represent its insured, who had urged Moss to tender policy limits in response to the demand and who predicted that a jury verdict for Mrs. O'Neill was likely to be 15 to 30 times the amount of coverage. A jury in fact awarded $731,063.00 in damages to Mrs. O'Neill in her trial against Gallant's insured.[288]

The insured then assigned her bad faith claim against Gallant to Mrs. O'Neill. When the jury in that case awarded $3,010,063.00, Gallant appealed. Gallant's argument was that the verdict was against the manifest weight of the evidence.[289] In analyzing this issue, the appellate court first set out the standard for a finding of bad faith on the part of an insurance company. "Bad faith" exists when "an insurer fail[s] to give at least equal consideration to the

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285. *Id.* at 488, 773 N.E.2d at 765.

286. State Farm Mut. Automobile Ins. Co. v. Universal Underwriters Group, 182 Ill. 2d 240, 695 N.E.2d 848 (1998).

287. 329 Ill. App. 3d 1166, 769 N.E.2d 100 (5th Dist. 2002).

288. *Id.* at 1171, 769 N.E.2d at 105.

289. *Id.* at 1172, 769 N.E.2d at 106.

insured's interest when the insurer arrives at a decision on whether to settle the claim."[290] In this case, when Gallant's claims manager recommended to John Moss that he meet Mrs. O'Neill's demand, she wrote that it was necessary to do so "in order to make sure that the policyholder's interests were treated with equal weight as the company's interest."[291] The court held that this admission, standing alone, was sufficient to support the jury's verdict.

Even so, analyzing this case with the seven factors applicable to the issue of bad faith yields the same result. Those factors are: The advice of the insurance company's adjusters; a refusal to negotiate; the advice of defense counsel; communication with the insured, to keep the insured apprised of the claimant's willingness to settle, an inadequate investigation and defense of the claim; a substantial prospect of and adverse verdict; and the potential for damages that exceeds the policy limits.[292] Finding each of these factors weighing in favor of the verdict in this case, the court found no reason to disturb the jury's award of compensatory damages.

Gallant also argued that the award of punitive damages was contrary to law and the evidence. The court held that where an insurer's conduct amounts to an "utter indifference and reckless disregard for its policyholder's financial welfare" punitive damages could be awarded. [293] Such conduct was shown in this case. The insurer's complete control over the claim and defense of the underlying case created a fiduciary duty on its part. The evidence clearly proved a breach of that duty such that punitive damages were warranted.

The court rejected Gallant's argument that section 155 of the Insurance Code preempts such damages, noting that the Illinois Supreme Court, in *Cramer v. Insurance Exchange Agency*,[294] held that the section preempts punitive damages in first party benefit denial cases but was silent as to refusal to settle third party claims.[295] Gallant also argued that the amount of the punitive damages award, $2,300,000.00, was excessive. The court analyzed this argument under the constitutional standards set forth in *BMW of North America, Inc. v. Gore*,[296] and found that the award was appropriate. [297]

In a final note, the court rejected Gallant's argument that, because its insured had been ordered by the court to assign her claim to Mrs. O'Neill, the assignment was invalid. Gallant relied on the Fifth District's decision in

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290. *Id.*
291. *Id.*
292. *O'Neill*, 329 Ill. App. 3d at 1172–76, 769 N.E.2d at 105–06.
293. *Id.* at 1176, 769 N.E.2d at 109.
294. 174 Ill. 2d 513,675 N.E.2d 897 (1996).
295. *O'Neill*, 329 Ill. App. 3d at 1178, 769 N.E.2d at 111.
296. 517 U.S. 559 (1996).
297. *O'Neill*, 329 Ill. App. 3d at 1181, 769 N.E.2d at 113.

Roundtree v. Barringer[298] as support for this argument. Noting that the prohibition was based on public policy concerns that had since proved groundless, the court reversed its holding in *Roundtree* and held that compulsory assignments as authorized by statute may be obtained in all cases, including bad-faith settlement claims.[299]

In the unpublished decision of *Berryman v. American Family Mut. Ins. Co*,[300] Mikel Berryman was a passenger in an automobile which was being driven by Tina Johnston. Ms. Johnston was insured under an American Family Mutual Ins. Co. policy with bodily injury limits of $50,000. Prior to trial, plaintiff's counsel made a settlement demand of $50,000, which was to remain open for only one month. The demand was rejected, and the matter went to trial with a jury verdict against Johnston in the amount of $3.25 million.[301] American Family paid the policy limits. Ms. Johnston assigned her rights under the American Family policy to the plaintiff to forego execution of the judgment. The plaintiff brought a complaint against American Family alleging that American Family was negligent and alleging bad faith for failure to settle within the policy limits. The court succinctly stated the test in Illinois for a bad faith suit, stating that the plaintiff must show, at the time of the settlement offer, the following: (1) the probability of an adverse finding on liability was great, and (2) the amount of damages would likely have exceeded the policy limit.[302]

Although Berryman alleged that Johnston was the driver of the vehicle, the insured denied that she was the driver, which was corroborated by two independent State police reports and unchallenged by other objective evidence. The other evidence included injuries to Berryman's scalp, neck and chest consistent with someone in the driver's position striking the windshield and steering wheel. The injuries to Johnston were consistent with someone in the passenger seat striking the mirror, console and gear shift. Berryman's medical records contained a statement he made to a healthcare provider that he was the "unrestrained driver" of the vehicle. Based upon this evidence, the court held that no "rational trier of fact could reasonably conclude that American Family acted negligently and in bad faith for failing to settle the case for the policy limit at the time that the offer was made."[303] The court held that there was overwhelming evidence that Berryman was the driver of the vehicle at the time of the accident.

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298. 92 Ill. App. 3d 903, 416 N.E.2d 675 (5th Dist. 1981).
299. *O'Neill*, 329 Ill. App. 3d at 1186, 769 N.E.2d at 116.
300. 24 Fed. Appx. 603, 2001 WL1563916, (7th Cir. Ill. 2001).
301. 24 Fed. Appx. 604, 2001 WL1563916, (7th Cir. Ill. 2001).
302. *Id.*
303. *Id.*

This case can be compared to *Haddick v. Valor Insurance*,[304] wherein the court found a material question of fact as to the driver of the vehicle and allowed the plaintiff to bring a cause of action for failure to settle within the policy limits against Valor.

VI. DIRECTORS AND OFFICERS INSURANCE

In the unpublished decision of *Bernstein v. Genesis Ins. Co.*,[305] the D&O insurer, Genesis Insurance Company, sought a declaration that it was entitled to advance defense costs with regard to an underlying suit. The underlying action settled just before the declaratory judgment action came to be heard on oral argument. The Seventh Circuit remanded the action to the district court to determine the impact of the settlement on the action. The district court held that the "insured versus insured" exclusion in the policy did not exclude coverage for all of the insureds, and the Seventh Circuit affirmed.[306] Thus, Genesis was held responsible for advancing some of the defense costs. The insureds apparently alleged that Genesis' failure to advance defense costs was done in bad faith.

The Court affirmed the district court's holding that Genesis was not obligated to pay defense costs on behalf of the directors, since one former director was a defendant in the underlying suit, and his involvement gave rise to a reasonable question as to whether the "insured versus insured" exclusion in the policy was applicable.[307] (In other words, while not discussed in any detail in this opinion, there was a reasonable question as to whether the underlying suit was brought "at the behest of" the former director.) The Court also rejected the assertion that Genesis had acted in bad faith, apparently finding that it had a *bona fide* coverage defense. The Court remanded the action back to the district court for an assessment of damages, but only as to the breach of contract, and not as to any bad faith.

VII. CONCLUSION

Illinois courts have chosen this past year as the year of the vehicle policy. In particular, numerous decision were announced regarding uninsured and underinsured motorist coverage. Several trends have continued to develop in

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304. 198 Ill.2d 409, 763 N.E.2d 299 (2001).
305. 28 Fed.Appx. 560, 2002 WL 214969 (7th Cir. 2002).
306. 28 Fed.Appx. at 562, 2002 WL 214969 (7th Cir. 2002).
307. *Id.* at 562.

Illinois uninsured and under insured motorist coverage. In general, Illinois courts have enforced policies consistent with prior court opinions. There has been a refinement of Illinois law in regards to applications for UM and UIM coverage. Generally, courts have begun increasing the importance of specific rejection or election of UM coverage and have started to increase the distinction between UM and UIM coverage. The application for UM coverage has come under increasing attention while UIM coverage has been recognized as requiring less stringent formality under the UM statute.

Courts have expanded coverage where insurers issue polices that cover "vehicles" and have required that the insurer offer UIM coverage under general liability policies. But, the lack of distinction between UM and UIM coverage by some courts has left an unclear picture of the future treatment of these coverages. Lastly, although courts have continued to apply estoppel to insurers who fail to defend their insureds, the facts supporting estoppel in recent decisions seem to be more egregious than in past decisions. It is too early to tell but, courts may be approaching a balance between the duties of the insured to provide notice and cooperate with the insurer and the insurer's duty to defend the insured and to resolve coverage disputes through declaratory judgement actions.