SURVEY OF ILLINOIS LAW: INSURANCE LAW

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INTRODUCTION

This article analyzes Illinois opinions relating to insurance law issued from October 1, 2003 through September 30, 2004. The purpose of this survey is to highlight the changes, modifications, or extensions of existing law, and not necessarily 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 emerging issues and foreshadow potential changes in insurance law. This articles is the result of the combined effort of the members of the Illinois State Bar Association Insurance Committee. The co-editors of this article include David Anderson, Nancy Caron, Laura Kotelman, Robert Hanaford, Steve McMannon, Ronald L. Ohren, Ellen Zabinski, and Patricia A. Zimmer. These members devote their time and effort to creating scholarly work for attorneys, judges and the public.

This article is divided into three sections, the Duty to Defend the Insured, Interpretation of Specific Policy Provisions, and Recent Legislation.

I. DUTIES OF THE INSURER AND INSURED: DUTY TO DEFEND

Insurer had no duty to defend lawsuit against sellers for negligent representation and failure to ascertain defects because the complaint failed to allege an "occurrence" resulting in "property damage."[1]

Pursuant to finalizing the sale of their house, Defendants John and Joan Lane ("Defendants") signed a disclosure report stating that they

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1. Allstate Ins. Co. v. Lane, 345 Ill. App. 3d 547, 803 N.E.2d 102 (1st Dist. 2003).

were not aware of any recurring leaks or material defects throughout the house.[2] After the buyers discovered defects in the property, they filed an action against the Defendants alleging rescission of the contract, or restitution under theories of mutual mistake, negligent and fraudulent misrepresentation. The Defendants tendered the defense of the action to Allstate Insurance Company ("Allstate"), with which they had a family liability insurance policy. Allstate refused to defend and filed a declaratory judgment action, claiming that the action did not allege "property damage" caused by an "occurrence" as defined in the policy. Allstate further contended that it owed no duty to defend or indemnify the Defendants because the underlying action arose from a contract, intentional acts, or third-party property damage claim, all of which were excluded under the policy. The trial court granted summary judgment in favor of Allstate, concluding that there was no "occurrence" resulting in "bodily injury" or "property damage." The Defendants appealed, arguing that Allstate had a duty to defend because the negligent misrepresentation allegation of the underlying complaint sufficiently alleged an "occurrence" under the Allstate policy.[3]

The appellate court affirmed the trial court's granting Allstate's summary judgment motion.[4] The court found that the underlying complaint did not allege property damages caused by the Defendants' failure to disclose leaks and material defects of the house. In the underlying complaint, the plaintiffs alleged that property damage was caused by faulty installation of the windows and the resulting water infiltration. The court held that the Defendant's failure to disclose the defects during a one-month period of time could not have caused the property damage which accrued over an approximately ten-year period prior to the sale of the house. Furthermore, the court determined that the underlying complaint did not allege an "occurrence" as that term is defined under the Allstate policy. In fact, the court found that the underlying complaint alleged the opposite; that the Defendants' failure to disclose the defects was intentional, not careless, negligent or even reckless. The complaint alleged that the Defendants knew for a fact that the home was damaged and deliberately failed to tell potential buyers.[5]

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2. *Id.* at 548, 803 N.E.2d at 104.
3. *Id.* at 548-50, 803 N.E.2d at 104-05.
4. *Id.* at 548, 803 N.E.2d at 104.
5. *Id.* at 551, 803 N.E.2d at 106.

The appellate court concluded that because the Defendants' alleged intentional concealment of the defects was not an occurrence, Allstate owed no duty to defend.[6] The court reasoned that the actual accident or occurrence at issue was the faulty installation of the windows, resulting in the damage to the house. The underlying claims pertained to the nondisclosure of this damage, not to the damage itself. Therefore, the underlying claim was outside the scope of coverage provided under the Allstate policy. The court noted that Allstate's position was further supported by the fact that the underlying complaint arose from a contract dispute and included allegations of intentional acts by the Defendants, both of which were excluded under the policy.[7]

Insurer has no duty to defend or indemnify insured in suit alleging insured's liability under the Drug Dealer Liability Act.[8]

The plaintiff in the underlying suit, Janice Aeschlimann (Janice), filed a first amended complaint against defendant Robert Long and others for acts that lead to the death of Sara Aeschlimann (Sara), Janice's daughter.[9] The complaint alleges in one of the counts that Long "knowingly participated in the chain of distribution of an illegal drug that was actually digested by the plaintiff's decedent Sara L. Aeschlimann."[10]

Long was insured under a homeowner's policy by Westfield National Insurance Company, and Westfield Insurance Company insured him under a personal umbrella policy.[11] Each policy contained the following exclusion: "We do not provide coverage for bodily injury . . . arising out of the use, sale, manufacture, delivery, transfer or possession by any person of a Controlled Substance(s) as defined by the Federal Food and Drug Law."[12] The insurers filed a declaratory judgment suit seeking a declaration that this exclusion relieved them from their duty to defend or indemnify Long. The trial court granted the insurers' motion for judgment on the pleadings on the basis of the

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6. *Id.*
7. *Id.*
8. Westfield Nat'l Ins. Co. v. Long, 348 Ill. App. 3d 987, 811 N.E.2d 776 (2d Dist. 2004).
9. *Id.* at 988, 811 N.E.2d at 778.
10. *Id.* at 989, 811 N.E.2d at 778.
11. *Id.*
12. *Id.*

drug exclusion, ruling that the allegations against Long in the Aeschlimann complaint "fall squarely" within the exclusion.[13]

On appeal, Long contended that the drug exclusion did not apply because the allegations contained in the Aeschlimann complaint do not directly link him to the act that caused Sara's death.[14] The Aeschlimann complaint alleged distribution and participation in distribution, activities the appellate court found clearly fell within the sale, delivery, transfer, or possession of methamphetamine, which is a controlled substance under the federal statute.[15] Although no Illinois court had considered a similar policy drug exclusion, the Second District Appellate Court held that "defendant's actions in our case are alleged to have been focused directly on the distribution of illegal drugs, which clearly falls within the language, sale, delivery, transfer, or possession found in the exclusion in plaintiff's policies."[16]

Long next contended that the phrase in the exclusion, "arising out of," is vague and ambiguous and should be construed in his favor.[17] The Second District noted that in *Allstate Insurance Co. v. Smiley*,[18] it previously held that the phrase "arising out of," when used in an exclusionary clause of an insurance policy, is not ambiguous as a matter of law, but should be given a limited interpretation in favor of the insured. In *Allstate*, the Court defined the phrase to mean "to spring up, originate . . . or to come into being, to come about: come up: take place."[19] Applying this definition, the Court held that "it is clear that Sara's death arose out of the sale, delivery, transfer, or possession of methamphetamine."[20] Accordingly, the court held that the trial court properly granted judgment on the pleadings.[21]

Duty To Defend: Intentional Act

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13. *Id.*
14. *Id.* at 990, 811 N.E.2d at 779.
15. *Id.*
16. *Id.* at 991, 811 N.E.2d at 780.
17. *Id.*
18. 276 Ill. App. 3d 971, 659 N.E.2d 1345 (2d Dist. 1995).
19. *Id.* at 978; 659 N.E.2d at 1351.
20. *Westfield*, 348 Ill. App. 3d at 992, 811 N.E.2d at 780.
21. *Id.*

No duty to defend homeowner-insured in connection with complaint that alleged sexual abuse by insured's husband when policy excluded coverage for intentional acts.[22]

Plaintiff Westfield National Insurance Company ("Westfield") brought a declaratory judgment against its insured, Jill Wood Valdez ("Valdez") on grounds that it was not obligated to defend or indemnify Valdez in a civil suit filed against her by Continental Community Bank and Trust Company ("Continental"), as next friend and guardian of the estates of J.S. and S.S., minors (collectively "minors").[23] Valdez is the aunt of the minors. The underlying suit arose from allegations that between 1995 and 1996, Valdez's husband sexually molested the minors during their visits to the Valdez home. Valdez's husband pleaded guilty and was convicted for the incidents.[24] The minors further alleged that their aunt owed "a duty to protect each child from harm and danger which she knew or should have known existed."[25] The minors also alleged, among other things, that their aunt was guilty of numerous wrongful acts and omissions. Valdez tendered her defense to Westfield under her homeowner's policies, which was in effect at all relevant times at issue. Westfield filed a declaratory judgment action claiming that it owed no duty to defend or indemnify Valdez because the underlying action alleged deliberate and intentional conduct, which was precluded from coverage under the "expected or intended" exclusion of the Westfield policies. The trial court granted Westfield's motion for summary judgment, and ruled that Westfield had no duty to defend or indemnify Valdez. The minors appealed.[26]

The appellate court affirmed the trial court's grant of summary judgment in favor of Westfield.[27] The court determined that the intentional-acts exclusion of the policies applied and precluded Westfield from owing a duty to defend or indemnify Valdez for the injuries she allegedly inflicted upon the minors. The factual allegations reflected that Valdez invited and encouraged the minors to visit her home while her husband was present; directed the minors to

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22. Westfield Nat't Ins. Co. v. Cont'l Cmty. Bank & Trust Co., 346 Ill. App. 3d 113, 804 N.E.2d 601 (2d Dist. 2003).
23. *Id.* at 114-15, 804 N.E.2d at 602-03.
24. *Id.* at 115, 804 N.E.2d at 603.
25. *Id.*
26. *Id.* at 115-16, 804 N.E.2d at 603-04.
27. *Id.* at 115, 804 N.E.2d at 603.

sit on her husband's lap while he was "partially clad;" and promoted a "collective viewing of movies which involved naked actors and actresses."[28] In addition, the complaint alleged that Valdez encouraged the minors to wear "minimal and provocative clothing" when interacting with her husband, Valdez allegedly did nothing when her husband went to visit the minors in their bedrooms and did nothing when one of the minors locked herself in the bathroom crying.[29] The court found that these factual allegations reflected Valdez's awareness of her husband's prior criminal involvement with minors. The court held that Valdez should have been aware of her own conduct toward the minors, and thus, should have reasonably "expected" such injuries as a natural and probable result of her enabling actions.[30] The court determined that the underlying complaint did, in fact, allege intentional conduct on the part of Valdez and that these allegations were affirmative acts merely couched in terms of negligence. The court therefore concluded that the exclusion provision barring coverage for bodily injury that is "expected or intended" from the standpoint of the insured applies and Westfield had no duty to defend or indemnify Valdez in the underlying action.[31]

No duty to defend complaint alleging trespass that occurred after policy expired.[32]

Plaintiff (insurer) brought a declaratory judgment action alleging that it had no duty to defend or indemnify its insured under a CGL policy that expired in 1993.[33] The insured leased the premises at issue in the underlying suit until June 30, 2001. The underlying lawsuit alleged negligence and trespass against the insured. Specifically, the underlying complaint alleged that the insured discharged chemicals around and under the leased premises. The policy contained a pollution exclusion, which barred claims for property damage and bodily injury.[34] However, the insured argued that the personal injury coverage of the policy would apply to the underlying case, specifically

28. *Id.* at 121-22, 804 N.E.2d at 607-09.
29. *Id.* at 122, 804 N.E.2d at 609.
30. *Id.*
31. *Id.* at 122-24, 804 N.E.2d at 609-10.
32. Nat'l Fire and Indem. Exch. v. Ali & Sons Co., 346 Ill. App. 3d 107, 803 N.E.2d 636 (1st Dist. 2004).
33. *Id.* at 108, 803 N.E.2d at 636.
34. *Id.* at 108-09, 803 N.E.2d at 636-37.

the coverage for "wrongful entry".[35] The court first considered whether the trial court properly defined the word "around," used in the underlying complaint, as "immediately adjacent."[36] The policy defined "wrongful entry" to mean "entry into . . . premises that the [injured] person occupies."[37] The insurer contended that there could be no wrongful entry during the policy period because the insured lawfully possessed the property alleged to be damaged in the underlying complaint. Therefore, the underlying complaint, in using the term "around" did not make a claim for injury, during the policy period, to premises occupied by the injured person. The Appellate Court found this definition to be proper, and therefore summary judgment for the insurer was appropriate, as the underlying complaint alleged damage only at the leased premises, occupied by the insured itself.[38]

The court distinguished *Millers Mutual Insurance Ass'n of Illinois v. Graham Oil Co.*[39] In that case, the underlying complaint was found to come within the personal injury coverage of the policy at issue, because it alleged the "unauthorized seepage and migration of gasoline onto the property of an adjoining neighbor."[40] No such migration to other premises was alleged in the underlying suit here. Finally, the appellate court held that, even if the allegations in the underlying complaint could be interpreted to fall within the "wrongful entry" definition in the policy, there would still be no coverage, as any trespass could only occur after the termination of the insured's lease, in June 2001, eight years after the policy period. A trespass cannot occur on property which the alleged trespasser has lawful possession of. Insured's further argument that the underlying complaint could have alleged migration to other premises was also for naught, as it did not in fact allege such migration.[41]

Insurer has a duty to defend insured sued for trespass.[42]

Tony and Deena Rendleman filed a lawsuit against the insured Ronnie L. Lyons in the circuit court of Perry County alleging that

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35. *Id.* at 109, 803 N.E.2d at 637.
36. *Id.* at 110-11, 803 N.E.2d at 638.
37. *Id.* at 109, 803 N.E.2d at 637.
38. *Id.* at 109-11, 803 N.E.2d at 637-38.
39. 282 Ill. App. 3d 129 (1996).
40. *Ali & Sons*, 346 Ill. App.3d at 111, 803 N.E.2d at 639.
41. *Id.* at 112-13, 803 N.E.2d at 639-40.
42. Lyons v. State Farm Fire & Cas. Co., 349 Ill. App. 3d 404, 811 N.E.2d 718 (5th Dist. 2004).

Lyons had trespassed when he had built levees that protruded onto their property.[43] After Lyons tendered his defense to his homeowner's insurer, State Farm, State Farm refused to defend, raising policy defenses. Lyons thereafter filed a complaint for declaratory judgment in Williamson County and sought coverage and indemnification under the policy. State Farm and Lyons each filed a motion for judgment on the pleadings. The trial court granted Lyons' motion, and ordered State Farm to provide a defense in the underlying claim.[44] In considering the appeal brought by State Farm, the Fifth District Appellate Court noted that the trespass count included the following allegations: "Defendant has trespassed on Plaintiffs' Property in that Defendant has constructed levees that protrude onto Plaintiffs' Property," and "Defendant's actions constitute a wrongful interference with Plaintiffs' actual possessory rights in Plaintiffs' Property."[45] Lyons' homeowners' policy with State Farm provides coverage for "damages because of bodily injury or property damage to which this coverage applies, caused by an occurrence."[46] The policy excludes coverage for property damage that "is either expected or intended by the insured."[47] Additionally, the policy defines "occurrence" as "an accident, including exposure to conditions, which results in: a. bodily injury; or b. property damage."[48] The policy goes on to state, "property damage means physical damage to or destruction of tangible property, including loss of use of this property. Theft or conversion of property by an insured is not property damage."[49]

State Farm argued the act of constructing levees was intentional and therefore not an "occurrence" within the meaning of the policy, which defines "occurrence" as "an accident."[50] In addition, State Farm argued that the levees were the "natural and ordinary consequences" of the act of construction and not "an accident."[51]

In rejecting State Farm's argument, the Appellate Court noted that in the case of *Yates v. Bankers Life and Casualty Co*.[52], the Illinois

43. *Id.* at 405-06, 811 N.E.2d at 721.
44. *Id.* at 406, 811 N.E.2d at 721.
45. *Id.* at 407, 811 N.E.2d at 722.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* at 407-08, 811 N.E.2d at 722.
50. *Id.*
51. *Id.*
52. 415 Ill. 16, 111 N.E.2d 516 (1953).

Supreme Court summarized the interpretation of accident that it had previously adopted from the Supreme Court opinion *United States Mutual Accident Ass'n. Barry*.[53] In *Yates*, the Illinois Supreme Court noted:

> if an act is performed with the intention of accomplishing a certain result, and if, in the attempt to accomplish that result, another result, unintended and unexpected, and not the rational and probable consequence of the intended act, in fact, occurs, such unintended result is deemed to be caused by accidental means.[54]

The Appellate Court noted that the focus of the inquiry in determining whether an occurrence is not whether the acts performed were intentional, but is whether the injury is expected or intended by the insured. The Court found there was no doubt that Lyons intended to build levees surrounding his pond. However, the question determining policy coverage is whether he intended to build part of the levees on the Rendlemans' property. If he did not intend to build on the Rendleman's property, then the result is unintended or unexpected. After reviewing the complaint, the Court was unable to find any allegations suggesting that Lyons expected or intended to build the levees on the Rendleman's property.[55]

The Court also rejected State Farm's assertion that trespass cannot be based on negligent conduct, citing the Illinois Supreme Court case of *Dial v. City of O'Fallon*,[56] "one can be liable under present-day trespass for causing a thing or a third person to enter the land of another either through a negligent act or through an intentional act."[57] In construing the policy and complaint liberally and resolving all doubts in favor of the insured, the Appellate Court concluded that the allegations of the underlying complaint were potentially within the coverage under the policy. The Court also rejected State Farm's argument that the Moorman Doctrine prohibited recovery finding that the complaint sought consequential damages directly related to the damage caused by the trespass and therefore the Moorman Doctrine did not apply.[58]

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53. 131 U.S. 100 (1889).
54. *Yates*, 415 Ill. at 19, 111 N.E.2d at 517–18.
55. *Lyons*, 349 Ill. App. 3d at 409–10, 811 N.E.2d at 723-24.
56. 81 Ill. 2d 548, 411 N.E.2d 217 (1980).
57. *Id.* at 556–57, 411 N.E.2d at 222.
58. *Lyons*, 349 Ill. App. 3d at 410-12, 811 N.E.2d at 725-26.

Finally, because State Farm had a duty to defend Lyons in the underlying action, the Court further found that State Farm breached that duty by failing to seek a declaratory judgment or defend under reservation of rights. Therefore, the Court concluded that the estoppel doctrine applied to the case and State Farm is barred from asserting policy defenses. The Court did, however, reverse the trial court's final judgment which included a duty to indemnify, finding that such a duty to indemnify was premature.[59]

II. INTERPRETATION OF SPECIFIC POLICY PROVISIONS

Property Damage: Asbestos

An insurer is obligated to reimburse school district for asbestos remediation costs due to policies' "ordinary deficiency clause" when asbestos-related losses resulted from replacement of material required to meet state or municipal laws, codes or ordinances.[60]

In *Board of Education v. International Insurance Co*., International Insurance Company ("International") issued seven policies to the Board of Education of Maine Township High School District No. 207 ("the school district") for the years 1985 through 1991.[61] In 1992 or 1993, the school district discovered that the majority of its floor and ceiling tiles contained asbestos and decided to abate the asbestos dangers by demolishing, repairing and replacing the asbestos-containing building materials. The school district sought coverage for the asbestos-related costs incurred pursuant to the Illinois Asbestos Abatement Act, 105 ILCS § 105/1 (West 1992) and its regulations. The school district subsequently filed a declaratory judgment action against International seeking a determination of coverage. Both parties moved for summary judgment.[62]

The circuit court determined that the "latent defect" exclusion for asbestos-related losses in the policies precluded the school district's claims. The court further concluded that the asbestos-related costs incurred by the school district were not a covered loss under the

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59. *Id.* at 415, 811 N.E.2d at 728.
60. Bd. of Educ. of Me. Twp. High Sch. Dist. No. 207 v. Int'l Ins. Co., 344 Ill. App. 3d 106, 799 N.E.2d 817 (1st Dist. 2003).
61. *Id.* at 107, 799 N.E.2d at 819.
62. *Id.*

policies' "ordinary deficiency clause." Therefore, the court granted International's motion for summary judgment. The school district appealed the court's summary judgment with regard to the 1986, 1987, 1988 and 1989 policies ("the policies") on the basis that (1) the policies' ordinance deficiency clause extended coverage over the school district's claims, and (2) supplemental coverage applied to the claims pursuant to the "all-risk" clause contained in the policies.[63]

The appellate court reversed the summary judgment in favor of International. The appellate court determined the ordinance deficiency clause in the policies provides coverage for such asbestos-related damages and losses resulting from the replacement of material required to meet state or municipal laws, codes or ordinances. The court interpreted the clause as negating the asbestos exclusion if the claimed losses were incurred as a result of compliance with a statute-mandated requirement. The court concluded that the ordinance deficiency clause trumped all exclusions, including "wear and tear" and contamination exclusions.[64]

Policy Exclusions

Operation of owner's aircraft by lessee company was "commercial activity" within the meaning of exclusion in owner's policy.[65]

On October 30, 1996, a plane owned by Alberto-Culver Company and being used by Aon Corporation and Aon Aviation crashed upon take off, killing all four people aboard.[66] Aon Aviation and Alberto each maintained flight departments at Palwaukee Airport and each operated their own twin engine jet plane. The flight in question was conducted pursuant to an Interchange Agreement entered into by Alberto and Aon, which permitted Aon and Alberto to utilize each other's jets as needed. The agreement contained a hold harmless clause and required each party to have an aircraft insurance policy with limits of a minimum $150 million to provide coverage when piloting each other's airplanes.[67]

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63. *Id.* at 107-08, 799 N.E.2d at 819-20.
64. *Id.* at 113, 799 N.E.2d at 824.
65. Alberto-Culver Co. v. Aon Corp., 351 Ill. App. 3d 123, 812 N.E.2d 369 (1st Dist. 2004).
66. *Id.* at 125, 812 N.E.2d at 372.
67. *Id.* at 125-26, 812 N.E.2d at 372.

In accordance with the Interchange Agreement, Aon Aviation purchased a $300 million liability policy from USAU covering Aon Aviation for any liability relating to its operation of its owned and non-owned aircraft.[68] Similarly, Alberto purchased aviation insurance from AAU providing liability and property damage coverage in connection with its owned and non-owned aircraft. Neither the USAU policy nor the AAU referenced the Interchange Agreement, nor was any evidence produced making the Interchange Agreement a part of the respective policies of insurance by rider, endorsement or otherwise.[69]

This dispute over the insurance coverage arose subsequent to the liability litigation which found the pilot for Aon Aviation at fault. Thereafter, AAU, Alberto's insurer, filed a declaratory judgment action seeking a declaration that Aon Aviation and Aon Corporation were not insured under the AAU policy issued to Alberto. The insurers of Aon Aviation, USAU, intervened and successfully moved for cross-motions for summary judgment against AAU and Alberto. The circuit court found that Aon Aviation and Aon Corporation were entitled to coverage under Alberto's policy with AAU, and that AAU had a duty to defend and indemnify Aon Aviation because AAU's policy was deemed primary coverage, while USAU's coverage was found to be excess coverage. Alberto then appealed from this judgment.[70]

The AAU insurance policy obtained by Alberto provided coverage for insureds, which was defined as "any person while using the aircraft with the permission of the [n]amed [i]nsured provided the actual use is within the scope of such permission."[71] The definition further provided that the insurance afforded to these permissive users did not apply to "any person or organization or agent or employee thereof (other than employees of the [n]amed [i]nsured) engaged in the operation of any flying service, or aircraft or piloting service, with respect to any occurrence arising out of such activity."[72] The policy did not contain a definition of what is meant by "flying service, or aircraft or piloting service." The AAU policy also contained an other insurance clause which stated that the coverage afforded to Alberto should be excess of all other insurance. The Aon Aviation policy issued by USAU also provided non-owned aircraft coverage via

68. *Id.* at 126, 812 N.E.2d at 373.
69. *Id.*
70. *Id.* at 125-26, 812 N.E.2d at 372.
71. *Id.* at 127, 812 N.E.2d at 373.
72. *Id.*

endorsement. The USAU policy's non-owned coverage endorsement contained an excess other insurance clause.[73]

On appeal, AAU/Alberto primarily contended that Aon Aviation waived its right to assert coverage by virtue of its execution of the Interchange Agreement. The court disagreed that the Interchange Agreement had any application in this matter. The court found that Aon Aviation did not waive its right to seek coverage under the AAU policy through its execution of the Interchange Agreement due to the fact that the General Condition Seven of the AAU policy stated that no terms of the policy shall be waived or changed except by endorsement issued as part of the policy signed by AAU. The court noted that the Interchange Agreement was not made an endorsement to the AAU policy, as a result, cannot operate to waive Aon Aviation's ability to seek coverage thereunder.[74]

The court then looked at whether exclusion (i) of AAU policy, which denied coverage to any person or organization engaged in the operation of any flight service or aircraft or piloting service, applied to preclude coverage for Aon Aviation. Alberto argued that at the time of the accident, Aon Aviation was operating such a service, thus triggering the application of exclusion (i).[75]

In response, USAU/Aon Aviation argued that "service" must be construed to exclude only those entities engaged in "commercial" aircraft operations, not in-house aircraft transportation. USAU further argued the exclusion runs afoul of the stated purpose of the AAU policy, which covered Alberto's aircraft for "all operations of the [n]amed [i]nsured," including the exchange of private aircraft with Aon Aviation.[76]

In finding the exclusion inapplicable, the circuit court constructed the AAU policy in conjunction with the Interchange Agreement. The appellate court declined to adopt this interpretation, looking solely at the exclusion in interpreting coverage.[77]

The appellate court first looked at whether the language of the exclusion was ambiguous. The court the language was not ambiguous, noting that if AAU intended to deny coverage only to those engaged in commercial activities, it could have easily chosen the same language

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73. *Id.* at 127-28, 812 N.E.2d at 373-74.
74. *Id.* at 130-31, 812 N.E.2d at 376-77.
75. *Id.* at 133-34, 812 N.E.2d at 378-79.
76. *Id.*
77. *Id.*

that USAU used in its policy, which denied coverage to those operating "commercial flying service or flying school or any person engaged in commercial aviation." Unlike USAU, AAU excluded any flight service for permissive user coverage, not solely commercial flights. The court therefore held that the exclusion must be enforced as written.[78]

The court also found that the placement of "flight service" within the list of other activities did not justify reading "commercial" into the language. In addition, the court found USAU/Aon Aviation's reliance on the AAU policy provision which covers "all operations of the named insured" to be without merit. The court held that this general policy provision was overridden by the specific policy exclusion (I).[79]

Because AAU was not a party to the Interchange Agreement, the policy did not endorse the Interchange Agreement and AAU received no additional premiums for Aon Aviation's coverage. Therefore, AAU was entitled to implement its policy exclusions without regards to the Interchange Agreement. The appellate court therefore reversed the circuit court's grant of summary judgment, finding that Aon Aviation was excluded from coverage under the AAU policy as a matter of law.[80]

Assuming arguendo that the language of the endorsement was ambiguous, the court then went on to consider the extrinsic evidence presented to the court. The court found that it would still reach the same conclusion due to the nature of the collateral evidence presented. In particular, the court focused on the affidavit of a former executive vice-president of AAU describing the history of exclusion (i).[81]

The vice-president stated in the affidavit that the AAU policy language was modified from "charter service" to "flying service" in response to an accident involving another company. Thereafter, AAU issued an endorsement that modified the policy language to make it clear that no flying or piloting service by those other than the named insured were entitled to coverage. The court found this change was deliberately made with the intent of encompassing persons or entitles engaged in the operation of a flight service, regardless of whether or not the operation was commercial in nature.[82]

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78. *Id.* at 134-36, 812 N.E.2d at 379-80.
79. *Id.* at 135-36, 812 N.E.2d at 380.
80. *Id.* at 136, 812 N.E.2d at 380.
81. *Id.* at 136-37, 812 N.E.2d at 380-81.
82. *Id.*

Lastly, the court noted that even if the court were to read the term "commercial" into the existing language of the exclusion, the exclusion would still apply. The court noted that USAU/Alberto's position rested on the flawed premise that using an aircraft for private, in-house corporate purposes, was not "commercial" in nature. The court disagreed, finding that since the flight was conducted under the Interchange Agreement, which was by definition a lease, Aon Aviation engaged in the operation of a commercial aircraft at the time of the accident, thus placing it squarely within the scope of exclusion (i).[83]

In its opinion, the court also looked at whether the USAU non-owned aircraft coverage was excess or primary. The USAU policy endorsement for non-owned aircraft provided that it was primary coverage subject to a condition precedent that all other valid and collectible insurance covering the loss must be exhausted. The court found that there was no other valid and collectible coverage, making USAU the primary carrier for this loss. For the reasons set forth above, the judgment of the Circuit Court of Cook County was reversed.[84]

Automobile Insurance: Mandatory Coverage

Insurer for auto dealership was not required to provide coverage for damage to dealer-owned vehicle which occurred when customer test the vehicle.[85]

Farmers provided automobile coverage to three insureds who were driving an auto dealer's cars with permission.[86] In each case, the driver caused collision damage to the dealer's autos. Universal paid these collision claims as the insurer for the dealer and then sought subrogation from the three drivers. In response, Farmers filed a complaint for declaratory judgment contending Farmers was not liable because its policies provided collision coverage only on an excess basis when its insureds damaged non-owned autos they were driving.[87]

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83. *Id.* at 138, 812 N.E.2d at 382.
84. *Id.* at 137-38, 812 N.E.2d at 381-82.
85. Farmers Automobile Ins. Ass'n v. Universal Underwriters Ins. Co., 348 Ill. App. 3d 418, 810 N.E.2d 562 (1st Dist. 2004).
86. *Id.* at 419, 810 N.E.2d at 563.
87. *Id.*

Universal filed a motion to dismiss and Farmers filed a motion for judgment on the pleadings. The trial court granted Farmers' motion for judgment on the pleadings. Universal filed a motion for rehearing contending that the trial court erred by treating permissive users as "insureds" under the Universal policy and by inserting a collision coverage requirement into the Mandatory Insurance Act. On October 31, 2002, the trial court, agreeing with Universal, reversed its prior order and granted Universal's motion to dismiss. The trial court found that Farmers' insureds were not covered as permissive users on the Universal policy, and that the mandatory insurance statute, even though it did require vehicle owners to provide "liability" insurance, did not require that collision coverage be provided. Farmers then filed this appeal.[88]

The appellate court noted that the question of whether an auto owner/dealer owes collision coverage to a permitted user was an issue of first impression when the appeal was filed. However, during the pendency of the appeal, the First District decided the case of *Universal Underwriters Group v. Pierson*.[89] *Universal Underwriters Group* involved the same Universal "Auto Inventory Coverage Part 300" at issue here, as well as a similar factual situation.[90]

The court in *Pierson* held, based on the court's review of Part 300 of the Universal insurance policy, that Universal owed no collision coverage to the permitted user of the auto dealer. Part 300, while providing collision coverage, lacked the same expansive definition of "who is an insured" which was specifically listed in other parts of the policy. Therefore, the policy did not provide coverage for the permitted user for damages to the dealer's car.[91]

The *Pierson* court also addressed the Mandatory Insurance statute, holding public policy does not require an auto owner/dealer to provide collision coverage for permitted users of its auto. Rather, the Mandatory Insurance statute requires vehicle owners only to provide "liability" insurance. The court reasoned that the legislature, by leaving out terms to the contrary, enacted a provision requiring insurance coverage only for claims advanced by third parties injured by a driver, not for the losses of the driver or the vehicle. This conclusion was confirmed by the courts' interpretation of the public

88. *Id.* at 419-20, 810 N.E.2d at 563-64.
89. 337 Ill. App. 3d 893, 787 N.E.2d 296 (1st Dist. 2003).
90. *Farmers*, 348 Ill. App. 3d at 420, 810 N.E.2d at 564.
91. *Id.* at 420-21, 810 N.E.2d at 564-65.

policy underlying the Mandatory Insurance law which was to protect the public by securing payment of their damages. Therefore, the *Pierson* court concluded that there was no indication that the statute extends to require coverage for damages to the insured vehicle while in control of a permissive user. The appellate court chose to follow the Pierson rationale for this matter.[92]

The appellate court disagreed with Farmers' contention that primary coverage must be provided by the insurer of the vehicle rather than the insurer of the driver, regardless of whether the permissive user is insured under a separate personal liability policy. Farmers failed to recognize a crucial element of the Mandatory Insurance statue as the statute only requires liability insurance, not primary insurance. As such, Farmers' next argument that permissive users cannot be excluded under certain sections of the owner's liability policy also failed because the coverage at issue in this case was primary, not liability insurance.[93]

The court also noted Farmers' attempts to extend the public policy in Illinois from one that simply mandates coverage for injuries to third parties to a broader policy that requires coverage for damage to the vehicle driven by the insured's permitted user. The court found that there was no indication that the legislature or the courts were willing to provide such extensive coverage. Finally, the court held that the trial court did not commit reversible error in granting Universal's motion for rehearing in this matter. Therefore, the decision of the trial court was affirmed.[94]

Definitions: Newly Acquired Automobile

Automatic insurance clause extends coverage to newly-acquired vehicle for accident occurring during grace period despite lack of notice to insurer that insured automobile has been replaced.[95]

Corey Smith purchased a 1986 Chevrolet Caprice on October 12, 1999 and was involved in an accident in the vehicle the following

92. *Id.* at 421, 810 N.E.2d at 565.
93. *Id.*
94. *Id.* at 422-23, 810 N.E.2d at 565-66.
95. Am. Freedom Ins. Co. v. Smith, 347 Ill. App. 3d 1, 806 N.E.2d 1136 (1st Dist. 2004).

day.[96] Although he was planning to sell a 1995 Chevrolet Monte Carlo covered by an automobile insurance policy issued by American Freedom Insurance Company ("AFIC"), he still owned the first car at the time of the purchase of the Caprice, and the first car was still operable. Following the accident, Smith made a claim under the uninsured motorist provision of the policy he had obtained for his first car.[97]

AFIC filed a declaratory judgment action against Smith and his passenger, seeking a determination that the accident was not covered by the policy. The policy offered coverage for an "insured automobile" and its passengers for losses incurred as a result of accidents with uninsured motorists, and contained two provisions that were reviewed by the court. The first covered an automobile "acquired by the named insured during the policy period, provided it replaces an insured automobile." The second provision applied if AFIC insured all vehicles owned by the insured on the date of his acquisition and, if "the named insured notifies the company in writing within 30 days after the date of such acquisition of his election to make the liability and uninsured motorist coverages under this and no other policy issued by the company applicable to such automobile."[98]

First, the trial court found that Smith's Caprice was an insured automobile as defined by either the replacement vehicle provision or the additional vehicle provision. The court noted that Smith certified in his deposition that he planned to sell the Monte Carlo within days of the purchase of the Caprice. Additionally, the trial court found nothing in the policy language defining "replacement" that would indicate a requirement the first auto be disposed of before coverage could be applied to the later-purchased car. As to the additional vehicle provision, the court noted that had the Caprice not been a total loss, Smith's claim notice to AFIC would have resulted in the vehicle being scheduled on the policy.[99]

The First District Appellate Court noted that the policy language did not specifically define "replacement" or limit the term to those vehicles acquired following the disposal or disability of the first car. The Appellate Court found that the Illinois Supreme Court in *United*

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96. *Id.* at 3, 806 N.E.2d at 1137.
97. *Id.*
98. *Id.*
99. *Id.* at 5, 806 N.E.2d at 1139.

Farm Bureau Mutual Insurance Co. v. Elder[100] previously addressed this issue and held that

> [a] vehicle cannot be a 'replacement' vehicle under a policy of automobile insurance if the insured retains ownership of the 'replaced' vehicle and if it remains operable. Although the insured may have intended to replace his insured vehicle here, he had not done so by the time of the accident. The second vehicle was therefore an additional vehicle within the meaning of the policy.[101]

In light of this statement by the Supreme Court, the First District concluded that Smith's newly acquired Caprice could not be covered under his insurance policy as a replacement vehicle.[102]

The court next considered the trial court's finding of coverage under the policy's "additional vehicle" provision. The Appellate Court initially noted that a majority of jurisdictions hold that insurance policy provisions providing coverage for newly acquired vehicles if the insured provides notice within a specified period after the acquisition, generally referred to as "automatic insurance" clauses, have been interpreted to provide a 30-day interim protection regardless of the issuance of notice. The court observed that the First District follows the weight of authority from other jurisdictions holding that in standard insurance policies, the automatic insurance clause extends coverage to a newly acquired vehicle during the grace period even if the insured did not notify the insurer of the replacement or addition. The court concluded that an accident involving an additional vehicle within the notice period was covered despite a lack of notice to the insurer and held that the trial court's finding of coverage for the insured's accident was appropriate.[103]

Uninsured Motorist Coverage: Other Insurance

Self-insured municipalities pool was not an insurer for purposes of triggering excess other insurance provision in UIM coverage of other insurer's auto policy.[104]

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100. 86 Ill. 2d 339, 427 N.E.2d 127 (Ill. 1981).
101. *Id.* at 340, 427 N.E.2d at 128.
102. *Smith*, 347 Ill. App. 3d at 6, 806 N.E.2d at 1139-40.
103. *Id.* at 6-10, 806 N.E.2d at 1140-43.
104. Yaccino v. State Farm Mut. Automobile Ins. Co., 346 Ill. App. 3d 431, 804 N.E.2d 677 (2d Dist. 2004).

On December 18, 1999, Yaccino was an occupant in a police car which was insured by IRMA.[105] The police car was struck by a car driven by Alba resulting in personal injuries to Yaccino. State Farm insured Yaccino under a personal automobile policy. The vehicle driven by Alba was uninsured. The State Farm policy issued to Yaccino provided that it applied on an excess basis if there was UIM coverage available to an insured under more than one policy and if the insured sustained bodily injury while occupying a vehicle not owned by or leased to a named insured. The coverage provided by IRMA was under a pool of self-insured municipalities. IRMA issued to West Chicago a coverage document which provided that the self-insurance pool would not cover a loss which was insured by a commercial insurer except on an excess basis.[106]

Yaccino sought a declaratory judgment specifying whether State Farm or IRMA's policy was excess for UIM coverage. State Farm filed a cross-claim against IRMA seeking a declaration that IRMA's UIM coverage was primary. On cross-motions for summary judgment, the trial court found that State Farm's coverage was primary and IRMA's was excess. State Farm appealed.[107]

On appeal, the court first examined the other insurance provisions of the two policies. State Farm argued that regardless of whether IRMA's coverage was insurance or not, State Farm's "other coverage" provision in its UIM coverage provided that State Farm was excess with regards to Yaccino's claim. The court disagreed, finding that the excess provision operated only if the other UIM coverage was provided by a policy issued by an insurer. Therefore, the court found that it must first determine if IRMA was an insurer.[108]

In making this determination, the appellate court looked at *Antiporek v. Village of Hillside*,[109] which held that membership in IRMA constitutes pooled self-insurance of governmental entities that share the risks and costs of civil liabilities and does not operate as a waiver of municipal tort immunity. The court also looked at *Aetna Casualty & Surety Co. of Illinois v. James J. Benes & Associates, Inc.*,[110] in which the court found that IRMA was not a private insurance carrier for purposes

105. *Id.* at 432, 804 N.E.2d at 679.
106. *Id.* at 432-35, 804 N.E.2d at 679-81.
107. *Id.* at 432, 804 N.E.2d at 679.
108. *Id.* at 436-37, 804 N.E.2d at 682-83.
109. 114 Ill. 2d 246, 499 N.E.2d 1307 (1986).
110. 229 Ill. App. 3d 413, 593 N.E.2d 1087 (2d Dist. 1992).

of equitable contribution. State Farm argued that *Aetna* and *Antiporek* were limited to the issues of tort immunity and equitable contribution, but the court disagreed.[111]

State Farm also argued the case of *Chicago Hospital Risk Pooling Program v. Illinois State Medical Inter-insurance Exchange*.[112] State Farm maintained that, as in *Chicago Hospital*, because the IRMA coverage documents resemble an insurance contract, the court should hold that IRMA must be treated like a commercial carrier. The court disagreed, holding that the public policy considerations discussed in the *Antiporek* and *Aetna* cases were determinative and such considerations were not present in the *Chicago Hospital* case because the hospitals, although non-profit institutions, were not public entities. Therefore, the court determined there was no risk that public funds would be expended to pay claims. The court found that IRMA should not be treated as an insurer for purposes of giving effect to the "other coverage" clause in the State Farm policy.[113] The court next looked at the State Farm and IRMA policy provisions to determine which was primary. The State Farm policy provided that it would not pay damages that an insured is entitled to collect from an owner or operator of an uninsured vehicle. Therefore, when the "other coverage" clause in the State Farm policy is not triggered, State Farm provides primary coverage. The IRMA documents provide that IRMA's coverage shall always be excess over other commercial insurance. The court found that since the State Farm coverage was primary commercial insurance, the IRMA policy was excess.[114]

The court also addressed the second appeal on the issue of whether Officer Bemis was a necessary party. The court concluded that whether Officer Bemis was a necessary party was moot for purposes of this appeal. Therefore, it dismissed the second appeal. For the foregoing reasons, the judgment of the circuit court was affirmed in the first appeal and the second appeal was dismissed.[115]

Underinsured Motorist Coverage: Time Limitation

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111. Yaccino v. State Farm Mut. Automobile Ins. Co., 346 Ill. App. 3d 431, 437–39, 804 N.E.2d 677, 683–84 (2d Dist. 2004).
112. 325 Ill. App. 3d 970, 758 N.E.2d 353 (1st Dist. 2001).
113. *Yaccino*, 325 Ill. App. 3d at 439–40, 804 N.E.2d at 684–86.
114. *Id.* at 440-41, 804 N.E.2d at 686.
115. *Id.* at 441-42, 804 N.E.2d at 686-87.

Insurance policy providing two-year limitations period for asserting underinsured motorist claim is valid even if the insured is unaware of the extent of her injuries within the two year period.[116]

Plaintiff, Debra Parish, was involved in a car accident March 16, 1999.[117] She was insured by defendant, Country Mutual Insurance Company. Country Mutual paid $1,842.10 for Debra's medical treatment under the med-pay provision of her policy. In September 2001, Debra had surgery for injuries from the accident.[118]

The other driver was insured by Geico Direct Insurance (Geico). Prior to December 27, 2002, Debra settled with Geico for its policy limit of $20,000. On December 27, 2002 she notified Country Mutual of that she intended to pursue an underinsured motorist claim. Country Mutual denied underinsured coverage because the claim was not presented within two years of the accident date.[119]

Plaintiffs, Debra Parish and Troy Parish, filed a complaint seeking declaratory relief. The complaint was dismissed because the underinsured claim was not asserted within the two-year limitations period contained in the Country Mutual policy. The dismissal was affirmed on appeal. On appeal, plaintiff conceded the two year limitation period was not ambiguous, but argued that it was against public policy. She also argued that she did not appreciate the extent of her injuries until after two years.[120]

The relevant policy language provided that "any suit, action, or arbitration will be barred unless commenced within two years after the accident. Arbitration proceedings will not commence until we receive your written demand for arbitration."[121]

The court found that the policy provision was unambiguous. "Under the plain meaning of the . . . policy provision, the policy required Troy and Debra to commence any legal action for underinsured benefits against Country Mutual within two years of the date of Debra's accident."[122] Plaintiffs could cite no case law finding the limitation period against public policy. However, they argued that

116. Parish v. Country Mut. Ins. Co., 351 Ill. App. 3d 693, 814 N.E.2d 166 (4th Dist. 2004).
117. *Id.* at 694, 814 N.E.2d at 167.
118. *Id.*
119. *Id.* at 694-95, 814 N.E.2d at 168.
120. *Id.* at 695, 814 N.E.2d at 168.
121. *Id.* at 695-96, 814 N.E.2d at 168.
122. *Id.* at 696, 814 N.E.2d at 169.

the present case was an exception because Debra did not appreciate the value of her damages within the two year limitation period.[123]

Relying on *Vansickle v. Country Mutual Insurance Co.*,[124] the court noted that "insurance companies are entitled to reasonably limit their exposure from an insurance contract."[125] The court noted that the problems created when a legal action against the tortfeasor extends beyond two years may be dealt with by giving the underinsured carrier notice of the claim. As noted in Vansickle, "[i]nsurance companies that utilize suit limitation provisions must expect to be subjected to lawsuits which allege the likelihood of liability under the UM-UIM coverage."[126] However, "the insurance company can avoid the lawsuit by agreeing with the insured to put the UM-UIM issue on hold until resolution of the action against the tortfeasor."[127]

The court noted that even if Debra was not aware of the extent of her injuries within two years, she should have been aware of the other driver's limited coverage "and the possibility their damages could exceed the tortfeasor's limited coverage over the period of months or years necessary to resolve their claim."[128]

The court also discussed what constitutes sufficient notice of an underinsured motorist claim. In *Hale v. Country Mutual Insurance Co.*,[129] the court noted that "an insured need not formally demand arbitration to preserve his or her right to make a claim . . . for underinsured benefits so long as the insured notifies [the insurer] of the insured's belief he or she has an underinsured claim." In *Hale*, the insured's attorney wrote a letter to Country Mutual noting the possibility of a claim and requesting the underinsured policy limits. However, in the present case there was no notice to Country Mutual of an underinsured motorist claim.[130]

Homeowner Coverage, Suit Limitation Period

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123. *Id.* at 696-97, 814 N.E.2d at 169.
124. 272 Ill. App. 3d 841, 651 N.E.2d 706 (4th Dist. 1995), Parish v. Country Mut. Ins. Co., 351 Ill. App. 3d 693, 814 N.E.2d 166 (4th Dist. 2004).
125. *Parish*, 351 Ill. App. 3d at 697, 814 N.E.2d at 169.
126. *Id.* at 697, 814 N.E.2d at 170.
127. *Id.*
128. *Id.*
129. 334 Ill. App. 3d 751, 778 N.E.2d 721 (5th Dist. 2002).
130. *Parish*, 351 Ill. App. 3d at 698, 814 N.E.2d at 170.

Suit limitation period tolled prior to filing of proof of loss.[131]

On November 11, 1999, plaintiffs Bruce and Deborah Mitchell ("plaintiffs") incurred substantial damage when their house burned down. State Farm Fire and Casualty Company ("State Farm") had previously issued a fire insurance policy to the plaintiffs.[132] On November 23, 1999, State Farm issued a letter to the plaintiffs, detailing the various steps the policy required them to take and the documentation they were required to provide. On May 8, 2000, State Farm sent a letter to the plaintiffs denying payment of the claim based on the plaintiffs' failure to provide documentation and submit to an examination under oath. The letter further informed the plaintiffs that if they decided to proceed with litigation, the policy required suit to be commenced within one year after the loss. The period of limitations to file suit tolled from the date on which proof of loss was filed until the date the claim is denied in whole or in part. On May 16, 2000 and November 3, 2000, the plaintiffs delivered more documentation to State Farm. On November 11, 2000, the plaintiffs filed a sworn proof of loss. On November 16, 2000, State Farm notified the plaintiffs that their claim had been denied on May 8, 2000, and that the plaintiffs had failed to file suit with the one-year statute of limitations period. On October 24, 2001, the plaintiffs filed suit against State Farm to compel coverage. State Farm moved to dismiss on the basis that the suit was barred by the statute of limitations. The trial court granted State Farm's motion to dismiss and the plaintiffs appealed.[133]

The appellate court reversed the trial court's order dismissing the case. Although the court conceded that the plaintiffs did, in fact, fail to bring suit within one year of the date of loss, the court determined that State Farm's May 8, 2000 letter did not constitute a final denial of the claim. State Farm had an obligation to consider and respond to any information presented to it during the one-year period. The running of the one-year period tolled from the date the proof of loss was filed until the date the claim was denied in whole or in part. Therefore, the court found that State Farm could not have issued an absolute denial of the

131. Mitchell v. State Farm Fire & Cas. Co., 343 Ill. App. 3d 281, 796 N.E.2d 617 (4th Dist. 2004)..

132. *Id.* at 282, 796 N.E.2d at 618.

133. *Id.* at 282-84, 796 N.E.2d at 618-19.

claim before the proof of loss was filed. State Farm was obligated to respond to the proof of loss only after it was filed.[134]

The court concluded that the plaintiffs filed the proof of loss within the one-year period. When State Farm responded to the proof of loss on November 16, 2000, it told the plaintiffs that it was already too late to file suit. The court determined that State Farm's actions may have persuaded the plaintiffs into believing that State Farm was still interested in negotiating a settlement beyond the one-year limitations period. This created a genuine issue of material fact that precluded dismissal of the action.[135]

Dissenting, Justice McCullough found that State Farm clearly informed the plaintiffs of the limitation period and what they need to do within that period of time. He believed that the plaintiffs failed to cooperate, therefore, the trial court's order of dismissal should have been affirmed.[136]

Estoppel

Insurer not estopped to deny coverage when insured was not prejudiced by reservation of rights letter issued one month prior to trial and insurer continued to defend insured.[137]

Since 1994, Kiszkan was covered by a State Farm personal liability umbrella policy ("PLUP").[138] In fact, Kiszkan had obtained several State Farm policies over the years through Agent Andrew Oberc's office. In May 1998, Kiszkan brought Matricard to Oberc's office so that Matricard could apply for an automobile liability insurance policy. In the course of completing the application, it was represented to Oberc's office manager that Matricard was Kiszkan's grandson and lived with her. This relationship was noted on Matricard's automobile policy application that was sent to State Farm's underwriting department.[139]

In September 1998, Matricard was involved in an automobile accident in which Matricard and Taylor died. Matricard was driving

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134. *Id.* at 284-86, 796 N.E.2d at 619-21.
135. *Id.*
136. *Id.* at 286-88, 796 N.E.2d at 621-23.
137. State Farm Fire & Cas. Co. v. Kiszkan, 346 Ill. App. 3d 292, 805 N.E.2d 292 (1st Dist. 2004).
138. *Id.* at 293, 805 N.E.2d at 294.
139. *Id.*

his own car and was covered by his State Farm automobile policy at the time of the accident. After Kiszkan provided a death certificate, a medical authorization for Matricard's medical records and verbal confirmation from Kiszkan that she was Matricard's grandmother, State Farm paid Kiszkan $20,000 in death benefits and $2,000 in medical payment benefits under Matricard's automobile policy.[140]

In April 1999, the attorney for Taylor's estate sent State Farm a notice of petition to open Matricard's estate, and included an "Affidavit of Heirship" completed by Kiszkan referring to herself as a "friend" of Matricard. The service list, attached to the petition listed Kiszkan as "Catherine Kiszkan, grandmother, closest known next-of-kin."[141]

In May 1999, Taylor's estate filed an action for wrongful death and survival against Matricard's estate. As required under the policy, State Farm assumed Matricard's defense. In December 1999, the attorneys for Taylor's estate made a settlement demand on State Farm for the entire $1.1 million in coverage under Matricard's automobile policy and Kiszkan's personal umbrella liability policy.[142]

In March 2000, Kiszkan informed the attorney for Matricard's estate that although Matricard had lived with her, he was not related. Within days, State Farm reserved its right to deny coverage to Matricard's estate under Kiszkan's PLUP based on Matricard not being related to Kiszkan. In May 2000, State Farm filed a declaratory judgment action seeking a determination that it had no obligation to indemnify Matricard under the PLUP. In June 2000, a jury awarded Taylor's estate a $6.3 million judgment against Matricard's estate arising from the auto accident. Matricard was indemnified by State Farm the $100,000 limit under his personal automobile policy.[143]

State Farm subsequently moved for summary judgment based upon the fact that Matricard was not a relative of Kiszkan and therefore not an insured under the Kiszkan's PLUP. In support of its motion, State Farm attached Kiszkan's deposition transcript wherein she stated that she was not related to Matricard.[144]

Defendants filed a cross-motion for summary judgment. Defendants did not dispute the lack of relationship, but instead raised

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140. *Id.* at 293-94, 805 N.E.2d at 294.
141. *Id.* at 294, 805 N.E.2d at 294.
142. *Id.* at 294, 805 N.E.2d at 294-95.
143. *Id.* at 294-95, 805 N.E.2d at 295.
144. *Id.* at 295, 805 N.E.2d at 295.

the affirmative defenses of waiver, equitable estoppel and judicial estoppel. The court granted summary judgment to State Farm, finding that State Farm was not liable to Matricard's estate under Kiszkan's PLUP because he did not qualify as an insured under the policy. The circuit court declined to apply either the doctrine of estoppel or waiver.[145]

On appeal, the defendants first argued summary judgment was not proper because the defendants' claim was based on the misrepresentation that Matricard and Kiszkan were related. Defendants argued there was a material question of fact regarding the party responsible for the misrepresentation which needed to be resolved by a trier of fact. They further argued that if State Farm was found to be responsible for the misrepresentation, then the policy exclusion which would otherwise apply to Matricard had either been waived or State Farm should be estopped from denying coverage. The court disagreed, finding that the question of coverage should not turn on which side has the more credible explanation for the misrepresentation, but rather on the terms of the policy itself.[146]

The court then addressed the application of waiver and estoppel. The court held that State Farm had not waived its right to reserve its rights by representing the estate of Matricard in the Taylor suit because State Farm had acted reasonably in not asserting its reservation of rights until March 2000. Prior to that point, State Farm was proceeding under the mistaken and justifiable impression that Matricard and Kiszkan were related.[147]

Defendants' estoppel claim also failed because the defendants had failed to demonstrate how Matricard's estate was prejudiced by State Farm issuing a reservation of rights a month before the jury verdict against the estate. State Farm continued to represent Matricard's estate under the Matricard automobile policy. Additionally, there was nothing in the record to support a finding of prejudice other than defendants' assertion that Matricard's estate was prejudiced by the surrendering of its defense to State Farm. Furthermore, no claim was made that State Farm's representation of Matricard was defective in any way. State Farm's reservation of rights only involved the issue of Matricard's coverage under Kiszkan's PLUP. State Farm did not

145. *Id.* at 295-96, 805 N.E.2d at 295-96.
146. *Id.* at 296-97, 805 N.E.2d at 296-97.
147. *Id.* at 297-99, 805 N.E.2d at 297-98.

contest its duty to defend Matricard's estate under his own automobile policy, and promptly filed an action for declaratory judgment when it learned that Matricard and Kiszkan were not related. Therefore, State Farm was not estopped from denying coverage under the PLUP.[148]

Lastly, the court found that there was no coverage for Matricard under the PLUP because Matricard was not a relative of Kiszkan and, therefore, not an insured under the PLUP. The opinion of the circuit court was affirmed.[149]

Exclusions: Faulty Construction

Insurer properly denied coverage for damages to property from construction on adjacent property because term "construction" in exclusion was unambiguous and encompassed excavation activities.[150]

Plaintiff El Rincon Supportive Services Organization, Inc. ("El Rincon"), an Illinois not-for-profit corporation, procured a multiple-peril insurance policy from defendant First Nonprofit Mutual Insurance Company ("FNMIC"), which provided coverage on El Rincon's property in Chicago.[151] On or around September 1, 2001, El Rincon's property was physically damaged by construction and excavation being performed to an adjacent property. El Rincon notified FNMIC of the claim for property damage.[152] FNMIC first issued a reservation of rights letter and later denied coverage for the claim based on an exclusion in the policy that precluded coverage for loss or damage caused by or resulting from "faulty, inadequate, defective or negligent . . . construction, renovation, remodeling . . . of part or all of any property on or off the described premises."[153] El Rincon filed a declaratory judgment action, claiming that FNMIC wrongfully denied coverage to El Rincon. FNMIC filed a motion for summary judgment on grounds that the exclusion applied to this loss. El Rincon cross-moved for summary judgment, arguing that the terms "property," "construction" and "excavation" were ambiguous under the exclusion. The trial court denied FNMIC's summary judgment motion and

148. *Id.* at 299-00, 805 N.E.2d at 298-99.
149. *Id.* at 300, 805 N.E.2d at 299.
150. El Rincon Supportive Serv. Org., Inc. v. First Nonprofit Mut. Ins. Co., 346 Ill. App. 3d 96, 803 N.E.2d 532 (1st Dist. 2004).
151. *Id.* at 98, 803 N.E.2d at 533.
152. *Id.* at 98, 803 N.E.2d at 534.
153. *Id.* at 99, 803 N.E.2d at 534.

granted El Rincon's motion for summary judgment, agreeing that the exclusion was ambiguous. FNMIC appealed.[154]

The appellate court reversed the trial court's decision and granted FNMIC's summary judgment motion. On appeal, the court noted that parties disagreed regarding the definition of the term "construction" and whether excavation activities are part of construction activities. FNMIC contended that El Rincon's use of the term "construction" amounts to a judicial admission that the property damage resulted from "construction" activities and that the plain definition of the term "construction" encompasses all activities relating to the construction process and that the insurance policy is not ambiguous.[155]

The appellate court first concluded that El Rincon's use of the term "construction" did not amount to a judicial admission that the property damage resulted from "construction" activities. The court held that the exclusion barred coverage for damages resulting from the faulty, inadequate, defective or negligent construction of part of or all of any property on or off the described premises. The court determined that based on the plain, ordinary meaning of the terms "construction" and "excavation," a reasonable person would consider the construction process to encompass excavation activities. Since the term "construction" includes excavation activities, the court concluded that the property damage resulting from the construction excavation operations on the adjacent property was excluded under the policy.[156]

El Rincon also argued that FNMIC's interpretation of the policy rendered the policy useless because it covered almost nothing. The court, however, refused to conclude that an insured purchasing a multiple-peril insurance policy whose operation consisted of providing professional social services would expect coverage for damages resulting form construction excavation activities on an adjacent property by a contractor it did not hire. Coverage relating to property damage was merely one portion of the total coverage under FNMIC's multiple-peril policy.[157]

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154. *Id.* at 99, 803 N.E.2d at 535.
155. *Id.* at 100-07, 803 N.E.2d at 535-41.
156. *Id.*
157. *Id.*

Fire Insurance: Innocent Insured

Innocent insured is entitled to recover for losses sustained due to fire intentionally started by co-insured.[158]

Plaintiff's garage was torched by his adult stepson.[159] Defendant, Allstate Insurance Company, denied plaintiff's claim for fire damage because the stepson (William Fort) was considered a co-insured and, therefore, his intentional act was imputed to plaintiff.[160]

Plaintiff (Martin Wasik) filed a lawsuit claiming Allsate's denial of the claim under his homeowners' insurance policy was a breach of contract. Defendant defended on the basis that plaintiff's stepson intentionally started the fire. Both parties filed motions for summary judgment. The trial court denied plaintiff's motion and granted defendant's motion The trial court found that William Fort was an insured under the policy and that there was no evidence that he did not start the fire. Further, while the court found plaintiff was an innocent insured, the insurance policy clearly and unambiguously precluded liability.[161] The homeowners' policy contained a "joint obligations" clause in the general policy declarations that states, "the terms of this policy impose joint obligations on persons defined as an insured person. This means that the responsibilities, acts and failures to act of a person defined as an insured person will be binding upon another person defined as an insured person."[162] The general policy declarations section also provided that "we do not cover any loss or occurrence in which any insured person has concealed or misrepresented any material fact or circumstance."[163] Specifically excluded from coverage were intentional or criminal acts of an insured person. On appeal, plaintiff argued that since he was an innocent insured, the acts of his stepson cannot be imputed to him to deny coverage.[164]

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158. Wasik v. Allstate Ins. Co., 351 Ill. App. 3d 260, 813 N.E.2d 1152 (2d Dist. 2004).
159. *Id.* at 261, 813 N.E.2d at 1153.
160. *Id.*
161. *Id.* at 261-64, 813 N.E.2d at 1153-55.
162. *Id.* at 264-65, 813 N.E.2d at 1156.
163. *Id.* at 265, 813 N.E.2d at 1156.
164. *Id.* at 264, 813 N.E.2d at 1155.

Reversing the trial court, the appellate court noted that the innocent insured doctrine must be considered in light of the general rule of contract construction that provides "when construing an insurance policy, the court must ascertain the parties' intent. [citation omitted]. If the policy terms are unambiguous, the court will afford them their plain, ordinary and popular meaning."[165] However, if "the terms are susceptible to more than one interpretation, they are ambiguous and will be construed in favor of the insured and against the insurer that drafted the policy."[166]

The appellate court found that the exclusionary language contained in the Allstate policy was ambiguous. As the court stated,

> [a]lthough the clauses could be read as entirely prohibiting coverage for a loss caused by the act or failure to act of 'any' insured, they do not clearly state that the policy will be void or coverage will be excluded as to all insureds in the event of some improper behavior by 'any' insured.[167]

The court also found that "joint obligations" clause in the policy was ambiguous. This clause provided that "the responsibilities, acts and failures to act of a person defined as an insured person will be binding upon another person defined as an insured person.[168]The court concluded that "the joint obligations clause is, at best, ambiguous. Therefore, we will not interpret it broadly enough to exclude coverage for an innocent insured when another insured has intentionally or criminally caused a loss."[169]

Medical Payments Coverage: Subrogation

Insured cannot maintain an action against his insurer for unjust enrichment based upon policy requirement that insured reimburseinsurer for medical payments by insurer which were later recovered from another person.[170]

The plaintiff, Nesby, had an automobile insurance policy with Country Mutual which provided medical payments coverage for the

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165. *Id.* at 265-66, 813 N.E.2d at 1156-57.
166. *Id.* at 265, 813 N.E.2d at 1156.
167. *Id.* at 266, 813 N.E.2d at 1157.
168. *Id.* at 267, 813 N.E.2d at 1157.
169. *Id.* at 267, 813 N.E.2d at 1158.
170. Nesby v. Country Mut. Ins. Co., 346 Ill. App. 3d 564, 805 N.E.2d 241 (5th Dist. 2004).

payment of medical bills incurred as a result of injuries sustained while he was a passenger in a covered automobile.[171] Under the terms of the policy, Country Mutual had a "right to recover payment" provision allowing Country Mutual to obtain the insured's right to recover against third parties after Country Mutual paid the medical bills. The provision also provided Country Mutual the right to reimbursement if the insured recovered damages directly.[172]

Nesby was involved in an automobile accident in 2000 and collected $4,793 in medical expenses under the med pay coverage of the Country Mutual policy. Nesby then pursued recovery directly from the responsible party for his injuries. Country Mutual asserted an interest in any recovery by Nesby, and on December 11, 2000, Nesby paid $4,793 less attorney's fees to Country Mutual, for a net reimbursement of $3,195.33.[173]

Nesby subsequently filed a complaint alleging Country Mutual was unjustly enriched by the reimbursement. Country Mutual filed a motion to dismiss, which was granted by the trial court. The trial court granted the plaintiff 28 days to amend his complaint, but an amended complaint was never filed. The trial court dismissed plaintiff's complaint with prejudice on March 21, 2003, and the plaintiff appealed.[174]

On appeal, the plaintiff argued there was no right to recover payments for medical expenses because the policy language was ambiguous. Relying on the alleged ambiguity, plaintiff argued that his complaint sufficiently stated a cause of action for unjust enrichment.[175]

The court affirmed the judgment of the circuit court, holding that the theory of unjust enrichment is an equitable remedy based upon a contract implied in law. Since unjust enrichment is an equitable remedy, it is only available when there is no adequate remedy at law.[176]

Here, the automobile insurance policy governed the relationship of the parties, and the language of the policy clearly stated that if Nesby recovers from another, Country Mutual has a right to reimbursement. In this situation, the unambiguous contract language controls, not

171. *Id.* at 565, 805 N.E.2d at 242.
172. *Id.*
173. *Id.* at 566, 805 N.E.2d at 242.
174. *Id.*
175. *Id.* at 566-67, 805 N.E.2d at 242-43.
176. *Id.* at 567, 805 N.E.2d at 243.

equitable considerations such as unjust enrichment. Since the plaintiff was contractually obligated under the policy to reimburse Country Mutual, there are no facts he can allege upon which relief can be granted. Therefore, the trial court's dismissal of the complaint was proper, and the appellate court affirmed the judgment of the circuit court of Williamson County.[177]

Reinsurance: Agent/Broker

Reinsurer was entitled to summary judgment when broker lacked actual or apparent authority to bind reinsurer to reinsurance contract.[178]

In this case, which arises out of a complex reinsurance dispute, plaintiff Sphere Drake sought a judgment that its broker, Euro International Underwriting ("EIU"), lacked authority to bind Sphere Drake to a reinsurance contract (the "retrocession") with defendant American General ("All American").[179] Sphere Drake argued that EIU had a monetary limitation on its authority to represent Sphere Drake, and that EIU exceeded this limitation when it entered into the reinsurance agreement with All American. The district court ruled in favor of Sphere Drake, holding that EIU lacked actual and apparent authority to bind Sphere Drake, and rejecting All American's proffered defenses of ratification, waiver and estoppel. Thus, the retrocession was held to be void ab initio. All American appealed.[180]

The appellate court first found that no genuine issue of material fact existed as to whether EIU was Sphere Drake's agent at the time it signed the retrocession. The court held that EIU lacked actual authority because the amount contracted for clearly exceeded EIU's monetary limitation on its authority. The court also held that EIU lacked apparent authority, because Sphere Drake did not knowingly acquiesce in EIU's exercise of authority, and because Sphere Drake did not know that EIU had exceeded its monetary cap until after the retrocession was signed. Moreover, it was not reasonable for All American to have concluded that EIU had the authority to bind Sphere Drake because All American had the means to determine the extent of

177. *Id.*
178. Sphere Drake Ins. Ltd. v. Am. Gen. Life Ins. Co., 376 F.3d 664 (7th Cir. 2004).
179. *Id.* at 667.
180. *Id.* at 667–71.

EIU's authority, and a reasonable broker, standing in the shoes of All American's broker, would have investigated the dollar limit on EIU's authority.[181]

The court also rejected All American's affirmative defenses of ratification, estoppel, and waiver. First, the court held that Sphere Drake did not ratify the retrocession by waiting seven months after learning that the premium limit had been exceeded to rescind, because Sphere Drake's investigation was still in progress for several months after the first indication that EIU had exceeded its authority. Second, the court held that All American could not assert estoppel as an affirmative defense because it could not establish that it was misled into believing that Sphere Drake would not attempt to rescind. Third, the defense of waiver was held to be similarly unavailing, as All American did not establish that Sphere Drake had evinced a clear and unequivocal intent not to repudiate the contract.[182]

III. RECENT LEGISLATION

During the past year, there have been a number of bills enacted regarding insurance. These bills include the following:

S-2122 Proof of Insurance
SUMMARY: S-2122 was approved on July 13, 2004, and becomes effective January 1, 2005. This law amends Section 3-415 of the Illinois Vehicle Code, to require applications for motor vehicle registration renewal to include information relating to the insurance policy for the motor vehicle, including the name of the insurer that issued the policy, the policy number and the expiration date of the policy.

H-5175 Proof of Insurance
SUMMARY: H-5175 was approved on July 13, 2004, and becomes effective January 1, 2005. This law amends Section 7-602 of the Illinois Vehicle Code, authorizing the Illinois Secretary to adopt rules requiring that reasonable measures be taken to prevent the fraudulent production of insurance cards.

S-2238 Rejection of UM Insurance Coverage

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181. *Id.* at 671–74.
182. *Id.* at 677–78.

SUMMARY: S-2238 was approved on July 16, 2004 and became effective immediately. This law amends Section143a-2 of the Illinois Insurance Code by removing the provision requiring every application for motor vehicle coverage to contain a space for indicating the rejection of additional uninsured motorist coverage and requiring the applicant to sign the indication rejection in order to effectuate the rejection of coverage.

S-1207, Alternative Dispute Resolution, UM/UIM
SUMMARY: S-1207 was approved on August 8, 2003 and becomes effective January 1, 2004. This legislation authorizes a court to award attorneys' fees in addition to certain monetary amounts for "vexatious and unreasonable" for settling claims. The legislation also amends provisions regarding uninsured motorist disputes.

S-1150, Agents, Brokers & Producers-Licensing
SUMMARY: S-1150 was approved on July 22, 2003 and becomes effective January 1, 2004. This legislation requires a "self-service storage facility" to obtain an insurance producer's license or obtain a self-service storage facility limited line license before offering or selling insurance.

H-3522, Fraud
SUMMARY: H-3522 was approved on July 22, 2003 and becomes effective January 1, 2004. This legislation prohibits an applicant for automobile liability insurance from providing a false address.

H-3661, Cancellation and Nonrenewal, Credit Reports, Underwriting/Rating
SUMMARY: H-3661 was approved on August 8, 2003 with multiple effective dates. This legislation enacts specified provisions of the National Conference of Insurance Legislators (NCOIL) Model Act on the Use of Credit Information in Personal Insurance and implements technical and conforming changes. These amendments were contingent upon the enactment of Illinois House Bill 1640, which became effective October 1, 2003. These provisions do not apply to commercial insurance. Furthermore, this legislation amends provisions of the Illinois Insurance Code regarding nonrenewal of insurance policies.

H-1640 - Credit Reports, Underwriting/Rating

SUMMARY: H-1640 was approved on July 9, 2003, and becomes effective Oct. 1, 2003. This legislation enacts the National Conference of Insurance Legislators Model Act on the use of credit information in personal lines insurance. The law does not apply to commercial insurance.