SURVEY OF ILLINOIS LAW: INSURANCE LAW

David J. Roe[*]

Contributing Authors: Nancy K. Caron,[**] Robert H. Hanaford,[***] Laura M. Kotelman,[****] Steven R. McMannon,[*****] Ronald Lee Ohren,[******] Ellen J. Zabinski,[*******] and Patricia A. Zimmer[********]

INTRODUCTION

This article is the result of the combined effort of the members of the Illinois State Bar Association Insurance Law Section. The contributing authors have devoted their time and efforts to creating a scholarly work for attorneys, judges and the public. These efforts are

---

* David J. Roe is a partner with Clausen Miller P.C. who practices in the area of business liability analysis, liability insurance coverage, casualty and commercial disputes. David's practice includes litigating liability coverage issues including environmental and toxic tort coverage litigation. He is currently Managing Editor of The Policy, the Illinois State Bar Association's publication on insurance law. David can be reached at (312) 606-7821.

** Nancy K. Caron is the Assistant Vice President of Claims-Legal for Fireman's Fund Insurance Company. She is a member of the Illinois State Bar Association where she was a past president for the Insurance Law Section Counsel. Nancy has been an editor since 1998 for the ISBA publication "The Policy." She is a past member of the Insurance Law Committee of the Chicago Bar Association. Nancy has spoken at numerous seminars and has written various articles on insurance related matters.

*** Robert H. Hanaford concentrates his practice in personal injury and wrongful death cases arising from construction, transportation, aviation, product and work place accidents. Robert also represents clients in commercial and insurance disputes and Federal Aviation Administration enforcement actions. He is a frequent author and speaker on civil trial practice. He can be reached at the Law Offices of Robert H. Hanaford, 312-899-9020.

**** Laura Kotelman is a Practice Specialist with Sidley Austin LLP in Chicago. Her responsibilities are limited to practice development and marketing primarily for the Insurance and Financial Services Practice Group at Sidley. She is a member of the ISBA Insurance Law Section Council. She can be reached at lkotelman@sidley.com or 312-456-4246.

***** Steven R. McMannon is a long time contributor and co-editor to the ISBA newsletter, The Policy.

****** Ron Ohren is a partner with Baker & McKenzie LLP. He represents and advises clients on myriad insurance issues and insurance industry practices.

******* Ellen Zabinski is an associate of Bates & Carey LLP who concentrates her practice in all areas of liability insurance coverage law, toxic tort coverage litigation, and other insurance matters. Ellen regularly assists insurers in drafting new policy forms and coverage litigation. Ellen has extensive experience in mediating complex matters prior to trial and litigating insurance matters. Ellen Zabinski can be reached at Bates & Carey LLP, (312)-(762)-(3187).

******** Patricia Zimmer is a partner at Ripplinger & Zimmer LLC who concentrates her practice in the area of personal injury and professional negligence litigation. Pat regularly assists clients with insurance disputes, including coverage and subrogation issues, as well as litigation against insurers. She has spoken at a number of seminars regarding insurance issues in litigation. She can be reached at Ripplinger & Zimmer, 618-234-2440.

greatly appreciated. This article analyzes significant Illinois opinions relating to insurance law issued from October 1, 2004 through September 30, 2005. Our goal 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.

I. CONSTRUCTION OF THE INSURANCE POLICY, APPLICATIONS, FORMATION AND MODIFICATION

A. Duties of the Insurer and Insured

Steadfast Insurance Co. v. Caremark RX Inc.[1]

Holding: When the insurance policy excludes coverage for intentional acts and the underlying complaint contains only theories of liability based on intentional acts, there is no duty on the insurer to defend.[2]

Caremark RX Inc., a provider of pharmacy benefit management services for various health plans, was sued in two separate actions on behalf of those plans.[3] The suits were based on a theory of breach of fiduciary duty under the Employee Retirement Income Security Act (ERISA).[4] Caremark's professional liability insurer, Steadfast, filed this declaratory judgment action, asking the court to find no duty on its part to defend or indemnify Caremark in regard to those suits.[5] The trial court, faced with summary judgment motions for both parties, granted summary judgment for Caremark and denied Steadfast; however, the appellate court reversed.[6] The appellate court noted that the policy at issue stated that it did not apply to any claim arising from any "dishonest, fraudulent, criminal, intentional or malicious act, error or omission, or those of a knowingly wrongful nature or the willful violation of any statute or ordinance committed by or at the direction

1. 359 Ill. App. 3d 749, 835 N.E.2d 890 (1st Dist. 2005).
2. *Id.*, 835 N.E.2d 890.
3. *Id.* at 750–52, 835 N.E.2d at 892–93.
4. *Id.* at 751, 835 N.E.2d at 893.
5. *Id.* at 753, 835 N.E.2d at 894.
6. *Id.*, 835 N.E.2d at 894, 901.

of or with the knowledge of any 'Insured.'"[7]

Turning to the underlying complaint, which included five counts, the court pointed out that all counts were predicated on earlier paragraphs, which were replete with allegations of Caremark's participation in a secret scheme by which it "diverted and converted" discounted prices, favored certain higher-priced drugs in exchange for kickbacks and circumvented rules set forth in the Omnibus Reconciliation Act.[8] When read as a whole, the alleged wrongful acts were intentional, not negligent.[9]

Nevertheless, Caremark cited *National Union Fire Insurance Co. v. Associates in Adolescent Psychiatry*[10] and argued that ERISA breach of fiduciary duty claims do not require proof of bad faith or an intent to defraud.[11] Therefore, the underlying claim was potentially within the policy coverage, and Steadfast's duty to defend was triggered.[12] The appellate court disagreed.[13] In *National Union* the underlying complaint contained state law claims, including a claim for negligent misrepresentation.[14] Here, no such negligence theories were propounded in the underlying complaint.[15] The court stated "we cannot simply ignore the absence of allegations of negligent conduct and inclusion of only intentional conduct in the complaints."[16]

Caremark also argued that the complaint implied negligence by alleging that Caremark failed to inform the plaintiffs that it committed the previously alleged acts, therefore this claim was potentially within the coverage afforded under the policy.[17] But the court held that this aspect of the complaint did not allege that these failures were a result of negligence.[18] Instead, the complaint as a whole makes clear that these failures were simply part of the alleged scheme to defraud, which would have necessarily included knowing action on Caremark's part.[19]

---

7. *Id.* at 756, 835 N.E.2d at 897.
8. *Id.* at 756–57, 835 N.E.2d at 897.
9. *Id.* at 757, 835 N.E.2d at 897.
10. 1987 WL 12661 (N.D. Ill. 1987).
11. *Steadfast Ins. Co.*, 359 Ill. App. 3d at 757–58, 835 N.E.2d at 897–98.
12. *Id.*, 835 N.E.2d at 897–98.
13. *Id.*, at 758, 835 N.E.2d at 898.
14. *Id.*, 835 N.E.2d at 898.
15. *Id.*, 835 N.E.2d at 898.
16. *Id.*, 835 N.E.2d at 898.
17. *Id.* at 760, 835 N.E.2d at 900.
18. *Id.* at 760–61, 835 N.E.2d at 900–01.
19. *Id.* at 761, 835 N.E.2d at 900–01.

The focus of the analysis is to be on the conduct alleged, rather than the characterization of the conduct.[20]

The court therefore reversed the summary judgment rulings, and entered judgment in favor of Steadfast.[21] Because there was no duty to defend, there was no duty to indemnify, and Steadfast was also granted judgment on that issue.[22]

American States Insurance Co. v. Capital Associates of Jackson County, Inc.[23]

Holding: If the advertising injury policy was not intended to cover sending junk facsimiles, the insurer has no duty to defend.[24]

The insured was sued in a class action for sending unsolicited advertisements to businesses via facsimile in violation of federal law.[25] The insurer undertook the defense of the suit pursuant to a reservation of rights, but then filed a declaratory judgment action seeking a declaration that it had no duty to defend or indemnify the insured pursuant to the advertising injury provision in the policy.[26] The district court held that the insurer had a duty to defend, based on the language of the advertising injury provision, which the district court held included the privacy invasions cited in the underlying suit.[27] The Court of Appeals reversed, holding that the actions alleged in the underlying lawsuit did not fall within the purview of the advertising injury provision.[28] Specifically, the policy provision defined "advertising injury" as "oral or written publication of material that violates a person's right of privacy."[29] The Court noted that the scope of privacy under an advertising injury provision was an issue of first impression in Illinois.[30] The Court ruled that the alleged conduct was not the type of behavior contemplated by the advertising injury clause because facsimile transmittals did not constitute a "publication."[31] Additionally, the advertising injury provision encompassed

20. *Id.*, 835 N.E.2d at 901.
21. *Id.* at 761–62, 835 N.E.2d at 901.
22. *Id.* at 762, 835 N.E.2d at 901.
23. 392 F.3d 939 (7th Cir. 2004).
24. *Id.* at 943.
25. *Id.* at 940.
26. *Id.*
27. *Id.*
28. *Id.* at 943.
29. *Id.* at 940.
30. *Id.* at 943.
31. *Id.* at 942–43.

informational content, while the statute banning junk facsimiles that was the basis for the class action, dealt with the manner of transmission as opposed to the content.[32]

32. *Id.* at 943.

B. Discovery and Evidentiary Issues

Western States Insurance Co. v. O'Hara[33]

Holding: Attorney/client privilege and work product privilege do not prevent discovery of coverage opinion documents due to the "common interest doctrine."[34]

Western States Insurance Company (Western States) issued an automobile liability policy to Richard and Mary Ann O'Hara with a $500,000 limit for all claims.[35] Jessica O'Hara, the O'Hara's daughter who was insured under the policy, was involved in an accident while driving her parents' vehicle.[36] As a result of the accident, a number of people were severely injured.[37] The most severely injured was Megan Lovelace, a passenger in Jessica's vehicle, who suffered a spinal fracture leaving her paralyzed from the waist down.[38] A number of individuals in the other vehicle driven by Robert Hilgenbrinck suffered injuries as well.[39]

A claims examiner with OneBeacon Insurance Company (OneBeacon), an affiliate of Western States, hired the law firm of Tressler, Soderstrom, Maloney & Priess (Tressler) to represent Western States in regard to its obligations to the O'Haras following the accident.[40] No one from the Tressler firm provided legal advice to the O'Haras regarding the accident.[41] Thereafter, Western States paid $10,101 to settle the property damage claim for Robert Hilgenbrinck's vehicle.[42] Western States also paid $480 to settle a claim for property damage to a tree at the site of the accident, and $489,419 to settle the claim based on Megan Lovelace's injuries.[43] This payment purportedly exhausted the $500,000 policy limit.[44] Before settling the Lovelace claim, Western States contacted counsel F. Donald Heck, Jr., who was

33. 357 Ill. App. 3d 509, 828 N.E.2d 842 (4th Dist. 2005).
34. *Id.* at 517, 828 N.E.2d at 848–49.
35. *Id.* at 511, 828 N.E.2d at 844.
36. *Id.*, 828 N.E.2d at 844.
37. *Id.*, 828 N.E.2d at 844.
38. *Id.* at 512, 828 N.E.2d at 844.
39. *Id.*, 828 N.E.2d at 844.
40. *Id.*, 828 N.E.2d at 844.
41. *Id.*, 828 N.E.2d at 844.
42. *Id.*, 828 N.E.2d at 844.
43. *Id.*, 828 N.E.2d at 844.
44. *Id.*, 828 N.E.2d at 844.

hired by Western States to represent Jessica in the criminal proceedings following the accident.[45] Western States confirmed Heck's agreement to settle the Lovelace claim.[46] Furthermore, the O'Haras did not object to the settlement.[47]

Approximately a year after the settlement of the Lovelace claim, the Hilgenbrincks filed suit against Jessica seeking damages for injuries allegedly sustained in the accident.[48] Upon notification of the lawsuit, Western States retained counsel to defend Jessica under a reservation of rights, and filed suit seeking a declaratory judgment that it had no obligation to defend or indemnify Jessica in the Hilgenbrinck action because the policy limits had been exhausted.[49] The O'Haras filed a counterclaim in the declaratory judgment action for breach of contract and bad faith refusal to settle, as well as affirmative defenses.[50]

After discovery was initiated, Western States asserted that certain materials were protected by the attorney/client and work product privileges and refused to produce documents related to its consideration of claims against the O'Haras and documents related to the settlement of the Lovelace claim.[51] The O'Haras moved to compel production or an in camera inspection of the withheld documents, asserting that Western States had waived any protection of privilege and work product by placing at issue in the declaratory action whether the settlement with Lovelace was reached in good faith.[52] The O'Haras further argued that the privilege did not protect discovery by them under the "common-interest doctrine."[53] "The Hilgenbrincks also moved to compel production of these documents."[54]

The trial court granted the O'Haras' motion to compel holding that there is a common interest, and that the common interest was at issue.[55] The court stated that "Tressler [and] Western States can[not] insulate themselves from the advice and coverage obligations by hiring the Tressler firm and hiring the separate firm to represent O'Hara."[56] As

45. *Id.* at 512, 828 N.E.2d at 845.
46. *Id.*, 828 N.E.2d at 845.
47. *Id.*, 828 N.E.2d at 845.
48. *Id.*, 828 N.E.2d at 845.
49. *Id.*, 828 N.E.2d at 845.
50. *Id.*, 828 N.E.2d at 845.
51. *Id.* at 513, 828 N.E.2d at 845.
52. *Id.*, 828 N.E.2d at 845.
53. *Id.*, 828 N.E.2d at 845.
54. *Id.*, 828 N.E.2d at 845.
55. *Id.*, 828 N.E.2d at 845.
56. *Id.*, 828 N.E.2d at 845.

to the Hilgenbrinck's, the trial court ordered that it would perform an in camera inspection of the disputed documents to determine if further disclosure was necessary.[57] Western States refused to comply with the orders, and the trial court held it in civil contempt and ordered it to pay $500 in fines, calling the order a "friendly contempt order" to "let the appellate court sort this out."[58]

The Fourth District Appellate Court, relying upon *Waste Management, Inc. v. International Surplus Lines Insurance Co.*,[59] found that the common interest doctrine applied.[60] The court rejected Western States' argument that because Jessica was represented by separate counsel, their interests were not "common."[61]

Western States further contended that the trial court's ruling to the contrary "annulled the basis of the adversarial system, leaving litigants in this state to wonder whether the advice given by their counsel will truly be protected from disclosure to their adversaries."[62] The court noted that the record established that attorney Heck was only representing Jessica with respect to the potential criminal charges against her, and not in regards to civil liability issues as well.[63] The court noted that "[l]ike the insureds and insurers in Waste Management, Western States and the O'Hara's shared a common interest in settling or defeating the Lovelace claim."[64] Although the Tressler firm was not representing the O'Haras, the court noted that it was asked to give advice on settling a claim in which the O'Hara's, as the insureds, had an interest.[65] The appellate court held that the trial court properly ordered the disputed documents produced to the O'Haras.[66] The court also rejected Western States objection based upon the work product doctrine finding that Waste Management offers no protection of the disputed documents from discovery by the O'Haras based upon the court's focus on the shared interests of the insured and the insurer, as well as the absence of an adversarial process at the time the materials were created.[67]

---

57. *Id.* at 514, 828 N.E.2d at 846.
58. *Id.*, 828 N.E.2d at 846.
59. 144 Ill. 2d 178, 579 N.E.2d 322 (1991).
60. *O'Hara*, 357 Ill. App. 3d at 517, 828 N.E.2d at 848.
61. *Id.* at 517, 828 N.E.2d at 848–49.
62. *Id.* at 516, 828 N.E.2d at 847.
63. *Id.* at 517, 828 N.E.2d at 848.
64. *Id.*, 828 N.E.2d at 848.
65. *Id.*, 828 N.E.2d at 848.
66. *Id.* at 517, 828 N.E.2d at 849.
67. *Id.* at 518, 828 N.E.2d at 849.

As to the Hilgenbrincks, the court first noted that the common interest doctrine did not apply because at no time did Western States or the Hilgenbrinck's share a common interest.[68] The court found that because Western States had named the Hilgenbrincks as defendants, they had standing to challenge the proposed declaratory judgment.[69] The issue then became whether Western States waived the attorney/client privilege by placing advice from the Tressler firm at issue.[70] The court held that by contending that the settlements had exhausted the policy limits in the declaratory judgment, Western States placed "good faith" at issue.[71] The court further found that the sought-after communications were also placed at issue.[72] By asking the court to find that it had exhausted the policy limits, Western States also asked the court to find good faith, which can only be fairly determined based upon the reasons and motives underlying the decision.[73] Thus, the court found that the trial court did not err and ordered the documents relating to the reasons and motives for the settlement decision, including those related to advice from the Tressler firm, disclosed.[74]

Dardeen v. Kuehling (State Farm Insurance Co., Appellant)[75]

Holding: Homeowner's insurer had no duty to instruct homeowner to preserve evidence which may be relevant to personal injury claim. [76]

Dardeen filed suit for injury sustained when he tripped and fell on Kuehling's property.[77] State Farm Insurance was named as an additional defendant based on a negligent spoliation of evidence theory.[78] State Farm's motion for summary judgment was successful at the trial court, but reversed by the appellate court.[79] The issue before the Supreme Court was the duty which a homeowner's insurer owes in

68. *Id.* at 518–19, 828 N.E.2d at 849.
69. *Id.* at 519, 828 N.E.2d at 850.
70. *Id.*, 828 N.E.2d at 850.
71. *Id.* at 520, 828 N.E.2d at 850.
72. *Id.*, 828 N.E.2d at 851.
73. *Id.* at 520–21, 828 N.E.2d at 851.
74. *Id.*, 828 N.E.2d at 851.
75. 213 Ill. 2d 329, 821 N.E.2d 227 (2004).
76. *Id.* at 339, 821 N.E.2d at 233.
77. *Id.* at 332, 821 N.E.2d at 228.
78. *Id.*, 821 N.E.2d at 229.
79. *Id.*, 821 N.E.2d at 229.

these circumstances.[80] Kuehling contacted her insurance agent on the day of the injury, to ask if she could repair the uneven sidewalk where the plaintiff had fallen, "before somebody else gets hurt on it."[81] The agent agreed.[82] The plaintiff returned to the site of his injury that night, to examine the area.[83] No one took any photographs.[84] Some days later, Kuehling went ahead with her plans to repair the site.[85]

The Supreme Court began its analysis by avowing its decision in *Boyd v. Travelers Insurance Co.*[86] In *Travelers Insurance*, the court announced that negligent spoliation of evidence claims would be available under the ordinary negligence principles of duty, breach and causation, without specifically recognizing it as an independent tort.[87] The duty element of such claims is two-pronged: first, does a duty arise in the case at bar by virtue of agreement, contract, special circumstances, or voluntary undertaking; second, if so, should a reasonable person faced with the particular circumstances at hand have foreseen that the evidence in question was material to a potential lawsuit.[88] Both prongs must be fulfilled before a duty to preserve evidence will be found in any particular situation.[89]

In the case at bar, the court rejected arguments that the plaintiff was a third party beneficiary in regard to any contractual obligation between Kuehling and State Farm, that any special relationship existed between the plaintiff and State Farm, and that State Farm had any sort of control over the evidence at any time.[90] The court specifically declined to find that a mere opportunity to control the evidence was sufficient to give rise to a duty, therefore, the first prong was absent.[91] The Supreme Court reversed the appellate court and affirmed the trial court's entry of summary judgment for State Farm.[92]

---

80. *Id.* at 335, 821 N.E.2d at 230–31.
81. *Id.* at 331, 821 N.E.2d at 228.
82. *Id.*, 821 N.E.2d at 228.
83. *Id.* at 331–32, 821 N.E.2d at 228.
84. *Id.* at 332, 821 N.E.2d at 228.
85. *Id.*, 821 N.E.2d at 228.
86. 166 Ill. 2d 188, 652 N.E.2d 267 (1995); *Dardeen*, 213 Ill. 2d at 335, 821 N.E.2d at 231.
87. *Dardeen*, 213 Ill. 2d at 335–36, 821 N.E.2d at 231.
88. *Id.* at 336, 821 N.E.2d at 231.
89. *Id.*, 821 N.E.2d at 231.
90. *Id.* at 337–40, 821 N.E.2d at 231–33.
91. *Id.* at 338–39, 821 N.E.2d at 232–33.
92. *Id.* at 340, 821 N.E.2d at 233.

C. The Insurer, Agent, and Insured Relationship

AYH Holdings, Inc. v. Avreco, Inc.[93]

Holding: A broker's status as subagent of insured was a question of fact;[94] a broker owed a duty to inform insured of insurer's financial condition;[95] factual issues regarding breach of broker's duty precluded summary judgment;[96] factual issues precluded summary judgment on statute of limitations.[97]

American Yacht Harbor Associates L.P. (AYH), an owner and operator of commercial property in St. Thomas, U.S. Virgin Islands, sustained severe property damage when Hurricane Marilyn struck on September 15, 1995.[98] AYH's excess insurance carrier, Geneva Assurance Syndicated, Inc. (Geneva), became insolvent and could not cover AYH's losses.[99] AYH filed suit against Avreco and Gremesco – insurance brokers involved in placing the policy with Geneva.[100] AYH alleged that the brokers breached their professional and fiduciary duties because they failed to monitor and discover the unsound financial condition of Geneva.[101] Gremesco filed a counterclaim against Avreco for contribution and indemnification.[102]

Following AYH's suit, Avreco filed a motion for summary judgment, arguing that AYH's claims were barred by the statute of limitations, the duties AYH alleged were breached did not exist in this relationship, and that no agency relationship existed.[103] Gremesco filed a summary judgment motion on the same grounds.[104] After a hearing with extensive evidence, the trial court granted Avreco's motion for summary judgment and dismissed AYH's complaint.[105] Following this ruling, Avreco filed a motion for summary judgment on Gremasco's

---

93. 357 Ill. App. 3d 17, 826 N.E.2d 1111 (1st Dist. 2005).
94. *Id.* at 34, 826 N.E.22. at 1127.
95. *Id.* at 40, 826 N.E.2d at 1131.
96. *Id.* at 42, 826 N.E.2d at 1133.
97. *Id.* at 43, 826 N.E.2d at 1134.
98. *Id.* at 19–20, 826 N.E.2d at 1115.
99. *Id.* at 20, 826 N.E.2d at 1115.
100. *Id.*, 826 N.E.2d at 1115.
101. *Id.* at 21, 826 N.E.2d at 1117.
102. *Id.* at 20, 826 N.E.2d at 1115.
103. *Id.* at 22, 826 N.E.2d at 1117.
104. *Id.*, 826 N.E.2d at 1117.
105. *Id.* at 30, 826 N.E.2d at 1123.

cross-claim, which the trial court granted.[106] Gremesco and AYH appealed the rulings of the trial court.[107]

The appellate court reversed and remanded the case.[108] The court noted the issues of a duty owed by a wholesale insurance broker and the scope of that duty were questions of first impression in Illinois.[109] The court first addressed whether Avreco was acting as an agent for AYH, because if it was not, there could be no fiduciary duty.[110] The court focused on the issue of subagency, and concluded a genuine issue of material fact existed as to whether Avreco was acting as a subagent when it procured the renewal insurance on AYH's behalf, thereby precluding summary judgment.[111] The court did not accept Avreco's argument that it simply performed a ministerial task because agents are empowered to delegate ministerial and mechanical tasks to subagents.[112] The court next addressed whether Avreco breached its duty of professional care.[113] The court looked at the facts and determined that, given its status as a broker and its involvement in a specialty insurance market, Avreco had a duty under the circumstances.[114] The court would not hold that all brokers (or all wholesale brokers) would owe such a duty but, under the facts of this case, the evidence was sufficient to create a duty on the part of Avreco to inform AYH of the information in its possession in connection with the financial condition of Geneva.[115] Therefore, the trial court erred in granting summary judgment on plaintiff's professional negligence claim.[116]

Next, the court addressed whether Avreco had a duty to monitor and assess the risk of Geneva and convey any material information to it.[117] Because the issue of a wholesale broker's duties was an issue of first impression in Illinois, the court looked to other jurisdictions, treatises and practice guides.[118] The court held that Avreco had adverse

106. *Id.*, 826 N.E.2d at 1123.
107. *Id.* at 30, 826 N.E.2d at 1124.
108. *Id.* at 44, 826 N.E.2d at 1134.
109. *Id.* at 31, 826 N.E.2d at 1124.
110. *Id.* at 32, 826 N.E.2d at 1125.
111. *Id.* at 37, 826 N.E.2d at 1129.
112. *Id.*, 826 N.E.2d at 1129.
113. *Id.* at 38, 826 N.E.2d at 1129.
114. *Id.* at 40, 826 N.E.2d at 1131.
115. *Id.*, 826 N.E.2d at 1131.
116. *Id.*, 826 N.E.2d at 1131.
117. *Id.*, 826 N.E.2d at 1131.
118. *Id.*, 826 N.E.2d at 1131.

information regarding Geneva that it imparted to another client.[119] Viewing the evidence most favorably to AYH, the court concluded that the evidence created a genuine issue of material fact as to whether Avreco knew when it placed the renewal policy of facts or circumstances putting it on notice that the insurance presented to AYH presented an unreasonable risk.[120]

After also determining that there was conflicting evidence as to whether the statute of limitations expired[121] and whether section 2201 of the Illinois Code of Civil Procedure[122] barred AYH's claims,[123] the court also addressed whether the trial court erred in granting summary judgment in favor of Avreco and against Gremesco on its cross-claim for contribution and indemnification because Avreco's knowledge was superior to Gremesco's knowledge.[124] The court also reversed this finding by the trial court, holding that Gremesco's claims against Avreco were dependent upon AYH's claims against Avreco.[125] Because the court determined that the trial court erred in granting summary judgment in favor of Avreco against AYH, the court concluded that it was error to grant summary judgment in favor of Avreco against Gremesco.[126]

II. COMMERCIAL GENERAL LIABILITY INSURANCE AND PROFESSIONAL LIABILITY COVERAGE

A. Trigger, Tender of Defense, Duty to Defend, Coverage

General Agents Insurance Co. of America v. Midwest Sporting Goods Co.[127]

Holding: A liability insurer is not entitled to reimbursement of defense costs incurred prior to a finding of no duty to defend.[128]

When Midwest Sporting Goods Company (Midwest) was sued by

119. *Id.* at 42, 826 N.E.2d at 1133.
120. *Id.*, 826 N.E.2d at 1133.
121. *Id.*, 826 N.E.2d at 1133.
122. 735 ILL. COMP. STAT. 5/2.201 (West 2002).
123. *AYH Holding, Inc.*, 357 Ill. App. 3d at 43, 826 N.E.2d at 1134.
124. *Id*. at 44, 826 N.E.2d at 1134.
125. *Id.*, 826 N.E.2d at 1134.
126. *Id.*, 826 N.E.2d at 1134.
127. 215 Ill. 2d 146, 828 N.E.2d 1092 (2005).
128. *Id.* at 166, 828 N.E.2d at 1104.

the City of Chicago and Cook County for creating a public nuisance, it tendered the defense of the suit to its liability insurer, General Agents Insurance Company of America (Gainsco).[129] Gainsco initially denied coverage, but when an amended complaint was filed against Midwest, Gainsco decided to defend the suit under a reservation of rights.[130] In a letter explaining its decision to Midwest, Gainsco wrote that it was not waiving any of its rights, "including the right to recoup any defense costs paid in the event that it is determined that the Company does not owe the Insured a defense in the matter, . . ."[131] Gainsco also filed a declaratory judgment action, requesting a determination of the parties' rights and obligations.[132] After the trial court granted summary judgment for Gainsco, Gainsco filed a motion for reimbursement of the defense costs incurred to date in the underlying suit.[133]

Midwest appealed the summary judgment ruling, and the trial court stayed the post-trial motion pending outcome of the appeal.[134] The appellate court affirmed judgment for Gainsco, and the trial court subsequently found in Gainsco's favor and awarded it the costs incurred in the underlying suit.[135] Midwest again appealed, and the trial court was again affirmed.[136]

On further appeal, the Supreme Court noted that the appellate court decision relied heavily on a 1903 decision, *City of Chicago v. McKenchney*.[137] In *McKenchney*, the parties to a dispute agreed to certain terms to be followed, until their dispute could be resolved in court.[138] The Supreme Court, however, found that such an "accommodation pending litigation" did not apply in the case of an insurance contract that did not contain such a provision.[139]

Considering the parties' arguments in its analysis, the court first examined *Grinnell Mutual Insurance Co. v. Shierk*,[140] wherein the district court, with no Illinois precedent to guide it, predicted that the Supreme Court would follow the majority rule on the issue, and order

---

129. *Id.* at 147, 828 N.E.2d at 1093.
130. *Id.*, 828 N.E.2d at 1094.
131. *Id.* at 148, 828 N.E.2d at 1094.
132. *Id.* at 149, 828 N.E.2d at 1094.
133. *Id.*, 828 N.E.2d at 1095.
134. *Id.* at 149–50, 828 N.E.2d at 1095.
135. *Id.* at 150, 828 N.E.2d at 1095.
136. *Id.*, 828 N.E.2d at 1095.
137. 205 Ill. 372, 68 N.E. 945 (1903).
138. *Id.*, 68 N.E. 945.
139. *Gen. Agents Ins. Co. of Am.*, 215 Ill. 2d at 153, 828 N.E.2d at 1097.
140. 996 F. Supp. 836 (S.D. Ill. 1998).

reimbursement.[141] Recovery in other jurisdictions is allowed based on implied contract or unjust enrichment.[142] The district court's prediction was erroneous.[143] Instead, the court decided to follow the minority view, based on public policy.[144] The court agreed with those jurisdictions that hold that such recovery would allow the insurer to unilaterally change the policy.[145] When an insurer determines to defend its insured under a reservation of rights, it does so to protect its own interest as much as its insured's.[146] Gainsco argued that, because there was no duty to defend, the rights and obligations of the parties are not to be determined from the policy.[147] The court, in rejecting this argument, pointed out that the duty to defend arises as soon as suit is filed against the insured, and continues until the point where it is judicially determined not to exist.[148] An insurer is free to include an agreement within the policy itself, calling for such reimbursement, but cannot do so after the fact by way of a reservation of rights letter.[149] Here, as there was no contractual obligation of reimbursement upon determination of no duty to defend, Gainsco had no right to such reimbursement.[150]

Cianci v. Safeco Insurance Co. of Illinois[151]

Holding: An evidentiary hearing was required to determine whether the settlement was entered into with good-faith so insurer and cleaning company were discharged from liability for contribution.[152]

Homeowners experienced water damage from their roof and claimed their home insurer, Safeco Insurance Company of Illinois (Safeco) negligently delayed removal of the water damage for two weeks.[153] Safeco hired American Cleaning Co. (American Cleaning) to repair the water damage, but American Cleaning failed to properly

141. *Id.* at 839.
142. *Id.*
143. *Gen. Agents Ins. Co. of Am.*, 215 Ill. 2d at 160–61, 828 N.E.2d at 1101.
144. *Id.* at 162–63, 828 N.E.2d at 1102.
145. *Id.* at 161, 828 N.E.2d at 1101.
146. *Id.* at 164, 828 N.E.2d at 1103.
147. *Id.*, 828 N.E.2d at 1103.
148. *Id.* at 165–66, 828 N.E.2d at 1104.
149. *Id.* at 164, 828 N.E.2d at 1103.
150. *Id.* at 165–66, 828 N.E.2d at 1104.
151. 356 Ill. App. 3d 767, 826 N.E.2d 548 (1st Dist. 2005).
152. *Id.* at 783, 826 N.E.2d at 562.
153. *Id.* at 770, 826 N.E.2d at 552.

clean and remove water-damaged carpeting and furniture.[154] As a result of the delay and improper repairs, toxic mold began to grow in the home.[155] Safeco did not agree to test for mold for more than nine months, but when the presence of mold was confirmed, Safeco told the homeowners to evacuate their home.[156] Homeowners retained one company–Brouwer Brothers Steamatic, Inc. (Brouwer Brothers)–to remove the mold, but they were unsuccessful.[157] Safeco ultimately resolved to tear down the home and build a new one.[158]

Homeowners filed suit against Safeco, American Cleaning, and Brouwer Brothers, seeking equitable and compensatory relief.[159] American Cleaning filed a motion to transfer venue based on forum non conveniens, which Brouwer Brothers joined.[160] Each defendant then filed motions to dismiss the complaints.[161] The trial court denied Safeco's motion to dismiss, but reserved ruling on the forum non conveniens motions.[162] Subsequently, homeowners notified the court that they had reached a settlement with Safeco and American Cleaning, and that American Cleaning would withdraw its forum non conveniens motion.[163] The court continued Brouwer Brothers' pending motions.[164] Safeco then filed a motion for good faith settlement, requesting that the court enter an order finding its settlement had been made in good faith so it would not be subject to any contribution liability.[165] American Cleaning also filed a motion seeking the court to find its settlement was made in good faith.[166] Brouwer Brothers objected to these motions.[167]

The court then heard Brouwer Brothers' motion, but indicated that it was waiting to see if the parties would settle.[168] The court found that Will County was a more appropriate forum, but Brouwer Brothers requested that the court wait to enter a ruling until a final order

154. *Id.*, 826 N.E.2d at 552.
155. *Id.* at 770–71, 826 N.E.2d at 552.
156. *Id.* at 771, 826 N.E.2d at 552.
157. *Id.*, 826 N.E.2d at 552.
158. *Id.*, 826 N.E.2d at 552.
159. *Id.*, 826 N.E.2d at 552.
160. *Id.* at 772, 826 N.E.2d at 553.
161. *Id.*, 826 N.E.2d at 553.
162. *Id.*, 826 N.E.2d at 553.
163. *Id.*, 826 N.E.2d at 553.
164. *Id.*, 826 N.E.2d at 553.
165. *Id.* at 772–73, 826 N.E.2d at 553.
166. *Id.* at 773, 826 N.E.2d at 554.
167. *Id.*, 826 N.E.2d at 554.
168. *Id.*, 826 N.E.2d at 554.

regarding the other settlements was entered.[169] The trial court then found the Safeco and American Cleaning settlements to be in good faith.[170] The court later entered its order granting Brouwer Brothers' motion for transfer of venue.[171]

Brouwer Brothers filed an appeal from the court's good-faith orders regarding the settlements between the homeowners and Safeco and American Cleaning.[172] Plaintiffs Safeco and American Cleaning filed a motion to dismiss the appeal, arguing that Brouwer Brothers lacked standing to appeal the trial court's ruling because Brouwer Brothers failed to file a contribution claim against either of the settling defendants.[173] The court disagreed, reasoning that Brouwer Brothers' time to file a counterclaim had not expired because its motion to dismiss was pending at the time Safeco and American Cleaning's settlements were presented to the court, and the time for filing a counterclaim had not arrived.[174] Plaintiffs alternatively sought dismissal of Brouwer Brothers' appeal because the issue of settlement allocation was not ripe for adjudication.[175] The court disagreed, holding that Brouwer Brothers could suffer hardship if the court did not address whether the allocation was sufficient.[176]

The court then addressed Brouwer Brothers' argument that the trial court erred in entering orders approving settlement before it considered the forum non conveniens motion.[177] The court held that the trial court did not abuse its discretion in waiting to rule on Brouwer Brothers' forum non conveniens motion, reasoning that Brouwer Brothers could not now argue that the court committed an error in waiting to rule on its motion when Brouwer Brothers specifically requested the court to delay its ruling.[178] Brouwer Brothers next argued on appeal that the good-faith orders were nullities because the forum non conveniens motion was pending in front of the court before the settling parties' good faith motions.[179] The court disagreed with this argument, holding that the trial court was not required to rule on the

169. *Id.* at 773–74, 826 N.E.2d at 554.
170. *Id.* at 774, 826 N.E.2d at 554.
171. *Id.*, 826 N.E.2d at 555.
172. *Id.*, 826 N.E.2d at 555.
173. *Id.* at 775–76, 826 N.E.2d at 555.
174. *Id.* at 777, 826 N.E.2d at 557.
175. *Id.*, 826 N.E.2d at 557.
176. *Id.*, 826 N.E.2d at 557.
177. *Id.*, 826 N.E.2d at 557.
178. *Id.* at 778, 826 N.E.2d at 558.
179. *Id.* at 779, 826 N.E.2d at 559.

forum non conveniens motion before making any other substantive rulings.[180]

Brouwer Brothers alternatively argued that the trial court erred in finding that the settlements between the other parties was entered in good-faith to discharge American Cleaning and Safeco from liability for contribution to Brouwer Brothers under the Illinois Joint Tortfeasor Contribution Act, 740 ILCS 100/2(c).[181] Brouwer Brothers argued that the court should have conducted an evidentiary hearing to evaluate the settlement and method of apportionment before entering the good-faith finding.[182] The settling parties claimed that the record was sufficient for the trial court to make its decision that the settlements were made in good faith and Brouwer Brothers failed to carry its burden of rebutting their prima facie showing of good-faith by a preponderance of the evidence, as required under the statute.[183] The appellate court relied upon *Muro v. Abel Freight Lines, Inc.*[184] in holding that the trial court's good-faith order was premature.[185] The appellate court noted that the settling parties did not adhere to the court's order to allocate the settlement amounts according to the plaintiffs' methods of recovery, but rather lumped the negligence claims (where contribution could be available) with intentional tort and vicarious liability claims (where contribution would not be available).[186] The appellate court also noted that the trial court did not conduct an evidentiary hearing and that there was an issue as to what impact Safeco's assignment would have on the parties' respective rights and liabilities relevant to the Illinois Contribution Act.[187] Thus, the appellate court reversed the trial court's holding and remanded the case to Will County for the court to conduct a limited evidentiary hearing to evaluate the fairness and reasonableness of the settlement amounts and allocations in light of the claims involved.[188]

Pekin Insurance Co. v. Dial[189]

---

180. *Id.* at 780, 826 N.E.2d at 559.
181. *Id.*, 826 N.E.2d at 559–60; 740 ILCS 100/2(c).
182. *Cianci*, 356 Ill. App. 3d at 781, 826 N.E.2d at 561.
183. *Id.* at 781–82, 826 N.E.2d at 561.
184. 283 Ill. App. 3d 416, 669 N.E.2d 1217 (1st Dist. 1996).
185. *Cianci*, 356 Ill. 3d at 782, 826 N.E.2d at 561.
186. *Id.*, 826 N.E.2d at 561.
187. *Id.* at 783, 826 N.E.2d at 562.
188. *Id.* at 784, 826 N.E.2d at 562.
189. 355 Ill. App. 3d 516, 823 N.E.2d 986 (5th Dist. 2005)

Holding: Insurer had no duty to defend insured in cause of action alleging sexual assault.[190]

Pekin Insurance Company issued a commercial general liability insurance policy to Dial Real Estate & Investments and David Dial (Dial) as the insured "with respect to the conduct of the business."[191] Cynthia Cain filed a sexual assault action against Dial, and Dial tendered the defense of Cain's action to Pekin.[192] Pekin filed an action seeking a declaration that it had no duty to defend Dial.[193] The trial court found that Pekin had a duty to defend Dial and that Pekin breached its duty to defend.[194] On appeal, Pekin argued that the trial court erred in finding that the sexual assault allegations were covered by the policy.[195]

The policy provided in pertinent part as follows:

> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. We will have the right and duty to defend any 'suit' seeking those damages. . . .
>
> b. This insurance applies to 'bodily injury' and 'property damage' only if: (1) The 'bodily injury' or 'property damage' is caused by an 'occurrence' that takes place in the 'coverage territory'. . . . [196]

The policy defined the term bodily injury as "bodily injury, sickness, or disease sustained by a person, including death resulting from any of these at any time" and defined the term "occurrence as "an accident including continuous or repeated exposure to substantially the same generally harmful conditions."[197] The policy excluded the following from coverage: "Expected or intended injury. 'Bodily injury' or 'property damage' expected or intended from the standpoint of the insured."[198]

Cain filed suit alleging that between May 20, 2000, and June 26, 2000, Dial negligently touched, fondled, and exposed himself to her with the misapprehension of her desires and wishes.[199] Cain also alleged that Dial repeatedly, willfully, and without provocation touched, fondled, and exposed

---

190. *Id.* at 522, 823 N.E.2d at 992.
191. *Id.* at 518, 823 N.E.2d at 988.
192. *Id.*, 823 N.E.2d at 989.
193. *Id.*, 823 N.E.2d at 989.
194. *Id.* at 517, 823 N.E.2d at 988.
195. *Id.* at 518, 823 N.E.2d at 988.
196. *Id.*, 823 N.E.2d at 988.
197. *Id.*, 823 N.E.2d at 988.
198. *Id.*, 823 N.E.2d at 989.
199. *Id.*, 823 N.E.2d at 989.

himself to her.[200] Cain alleged that as a result of Dial's conduct, she suffered an upset stomach, headaches, and a loss of a normal life.[201] After Dial tendered the defense of Cain's action to Pekin, Pekin refused the tender and filed a declaratory judgment action seeking a declaration that it had no duty to defend Dial because Dial's alleged conduct was intentional, because Dial's alleged conduct did not arise out of or within the course of his employment, and because Cain did not seek damages for "bodily injury" as contemplated by the insurance policy.[202] The trial court found that Cain's complaint pled a cause of action that was potentially covered by the insurance policy and that Pekin breached its duty to defend Dial.[203] The court denied Pekin's motion for a judgment on the pleadings and granted Cain's motion for summary judgment.[204]

On appeal the Fifth District noted that the policy provided coverage for bodily injury caused by an "occurrence," and that the policy defined occurrence as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."[205] The policy further excluded coverage for bodily injury "expected or intended from the standpoint of the insured."[206] To determine coverage, the court noted that it would construe the definition of "occurrence together with the policy's specific exclusion for expected or intended injury."[207]

In the present case, Cain alleged that Dial fondled and touched her and exposed himself to her with the misapprehension of her desires and wishes.[208] Citing, *West American Insurance Co. v. Vago*,[209] the court found that even though the complaint was couched in terms of negligence, the complaint alleged a course of conduct that was clearly intentional and not merely negligent or accidental.[210] The court explained that if Dial engaged in the conduct alleged in the complaint, he would have been consciously aware that he was practically certain to cause emotional injuries to Cain.[211] Cain's injuries were a natural and probable result of Dial's alleged conduct, whether

200. *Id.*, 823 N.E.2d at 989.
201. *Id.*, 823 N.E.2d at 989.
202. *Id.*, 823 N.E.2d at 989.
203. *Id.* at 519, 823 N.E.2d at 989.
204. *Id.*, 823 N.E.2d at 989.
205. *Id.* at 520, 823 N.E.2d at 990.
206. *Id.*, 823 N.E.2d at 990.
207. *Id.*, 823 N.E.2d at 990.
208. *Id.* at 522, 823 N.E.2d at 992.
209. 197 Ill. App. 3d 131, 553 N.E.2d 1181 (2d Dist. 1990).
210. *Pekin*, 355 Ill. App. 3d at 522, 823 N.E.2d at 992.
211. *Id.*, 823 N.E.2d at 992.

or not he anticipated the precise injury that Cain would suffer.[212] Similarly, the court found that Dial should have reasonably anticipated Cain's injuries, and therefore, Cain's injuries were "expected" and not covered under the policy.[213] The court expressly found that Cain's allegations of negligence were a transparent attempt to trigger insurance coverage.[214] The court concluded that Cain failed to allege facts to bring her cause of action within or potentially within the coverage of the policy.[215] Because the allegations of the tort complaint were clearly excluded from coverage under the policy, Pekin had no duty to defend Dial and therefore, it reversed the trial court's decision.[216]

AAA Disposal Systems, Inc. v. Aetna Casualty & Surety Co.[217]

Holding: An insured must reasonably comply with the notice of occurrence and notice of claim provisions contained in an insurance policy.[218]

This case involves the environmental clean up of a waste site; plaintiffs are waste haulers and the site operator.[219] Defendants include primary and excess insurers that provided coverage to plaintiffs from October 1973 through May 1988.[220] Intervenors were companies that cleaned up the site and then obtained a judgment for contribution against plaintiffs.[221]

All policies "required plaintiffs to provide written notice of an occurrence 'as soon as practicable,' or 'promptly.' The policies also required 'immediate' and 'prompt' notice of a claim or suit."[222]

The State of Illinois filed a complaint against plaintiffs in 1985 seeking cleanup of the landfill, however, plaintiffs' did not give notice of the claim until 1990 or 1991.[223] The court found that "plaintiffs' six- or seven-year delay in giving notice to the insurers constitutes late notice of an occurrence under any reasonable interpretation of the policy provisions."[224]

When sued by the intervenors for contribution, plaintiffs promptly notified

212. *Id.*, 823 N.E.2d at 992.
213. *Id.*, 823 N.E.2d at 992.
214. *Id.*, 823 N.E.2d at 992.
215. *Id.*, 823 N.E.2d at 992.
216. *Id.*, 823 N.E.2d at 992.
217. 355 Ill. App. 3d 275, 821 N.E.2d 1278 (2d Dist. 2005).
218. *Id.* at 283, 821 N.E.2d at 1286.
219. *Id.* at 278–79, 821 N.E.2d at 1282–83.
220. *Id.*, 821 N.E.2d at 1283.
221. *Id.* at 278, 821 N.E.2d at 1282.
222. *Id.* at 282–83, 821 N.E.2d at 1286.
223. *Id.* at 283, 821 N.E.2d at 1286.
224. *Id.*, 821 N.E.2d at 1286.

the insurers. But, this was too little too late. Even though notice of the lawsuit was timely, the plaintiffs' late notice of the occurrence prevented the insurers from making a timely investigation.[225] The court noted that "a delay of even a few months in giving notice has been held to be unreasonable and to constitute a breach of the notice provision of an insurance policy as a matter of law."[226]

Plaintiffs argued the insurers were not prejudiced; however, lack of prejudice is only a factor to be considered "where the insured has a good excuse for the late notice or where the delay was relatively brief."[227] In this case, "plaintiffs did not present a good excuse for the late notice, and their delay was not relatively brief; therefore, prejudice is not a factor to be considered."[228]

Notably, the court stated, "It is well settled that a notice provision is a valid condition precedent to coverage and not a mere technical requirement that an insured may overlook or ignore with impunity."[229] It is also "well settled that an insurer does not have to prove that it was prejudiced by an insured's breach of the notice clause in a policy to be relieved of its duty to pay."[230]

Illinois State Bar Ass'n v. Coregis Insurance Co.[231]

Holding: A material misrepresentation in an insurance application renders the policy voidable not void ab initio.[232] The right to rescind is waivable if the facts show that it would be unjust, inequitable, or unconscionable to allow the insurer to rescind the policy.[233]

In 1994, attorneys Brian Hubka and Thomas Nathan of the law firm Munday & Nathan entered into an agreement to jointly represent Cherry Maxwell in a personal injury lawsuit that arose out of an auto accident.[234] In April 1994, Hubka and Nathan agreed to a settlement on behalf of Ms. Maxwell in the amount of $225,000.[235] "Instead of dispersing the settlement proceeds to Ms. Maxwell, Hubka converted them for his own use. On

225. *Id.* at 284, 821 N.E.2d at 1287.
226. *Id.* at 283, 821 N.E.2d at 1286.
227. *Id.*, 821 N.E.2d at 1287.
228. *Id.*, 821 N.E.2d at 1287.
229. *Id.*, 821 N.E.2d at 1286.
230. *Id.*, 821 N.E.2d at 1286.
231. 355 Ill. App. 3d 156, 821 N.E.2d 706 (1st Dist. 2004).
232. *Id.* at 167, 821 N.E.2d at 715.
233. *Id.* at 170, 821 N.E.2d at 717.
234. *Id.* at 158, 821 N.E.2d at 708.
235. *Id.*, 821 N.E.2d at 708.

February 22, 1995, the Illinois Attorney Registration and Disciplinary Commission (ARDC) filed a complaint against Hubka alleging . . . that he converted client funds."[236] On May 4, 1995, Hubka admitted in his answer to the ARDC complaint that he had not dispersed the settlement funds to Maxwell.[237]

Five months after answering the ARDC complaint, Hubka submitted an application to renew his lawyer's professional liability insurance policy with Coregis, with whom he had been continuously insured since 1993.[238] In his application, he stated that he was not aware of any "circumstance, act, error, omission or personal injury which may result in a claim" against him.[239] Coregis subsequently renewed the policy for the period of November 7, 1995, to November 7, 1996.[240]

"On January 20, 1996, Maxwell filed suit against Hubka, Nathan and Munday for conversion, legal malpractice, breach of fiduciary duty and breach of contract."[241] Nathan and Munday's defense was provided by the Illinois State Bar Association Mutual Insurance Company, its professional liability insurer.[242]

Hubka's was suspended from the practice of law by the Illinois Supreme Court on August 8, 1996.[243] After learning of his suspension, on September 4, "Coregis informed Hubka that it would not renew the policy which was to expire on November 7, 1996."[244] "Hubka tendered the defense of the Maxwell lawsuit to Coregis" on September 30, 1996.[245] Three days later, Coregis issued a reservation of rights letter to Hubka assigning him counsel and highlighting various exclusions of the policy including the exclusion for claims arising out of conversion, misappropriation, or improper commingling of client funds, the dishonest acts exclusion and the exclusion for claims arising out of acts, errors, omissions, or personal injury occurring prior to the effective date of the policy if the insured knew or could reasonably foreseen that such act, error or omission may be expected to be the basis for a claim or suit.[246] Coregis further stated that by agreeing to

236. *Id.*, 821 N.E.2d at 708.
237. *Id.*, 821 N.E.2d at 708.
238. *Id.*, 821 N.E.2d at 708.
239. *Id.*, 821 N.E.2d at 708.
240. *Id.*, 821 N.E.2d at 708.
241. *Id.*, 821 N.E.2d at 708.
242. *Id.*, 821 N.E.2d at 708.
243. *Id.* at 158–59, 821 N.E.2d at 708.
244. *Id.* at 159, 821 N.E.2d at 708.
245. *Id.*, 821 N.E.2d at 708.
246. *Id.* at 159–60, 821 N.E.2d at 708–09.

defend Hubka under the reservation of rights, the company did not waive any rights or defenses, nor did it waive its right to deny coverage at a later date.[247] Coregis also reserved its right to withdraw from the defense.[248]

The counsel hired by Coregis subsequently drafted a letter to Hubka explaining there was a potential conflict of interest which allowed Hubka the right to choose independent counsel.[249] Hubka also had the option of waiving any potential conflict in consenting to the continuation of the attorney as his representative.[250] The attorney testified by affidavit that he specifically discussed with Hubka the potential conflict of interest and that Hubka understood the issues and agreed to waive any potential conflict.[251] Hubka disagreed, stating in his own affidavit that he never received this letter, discussed any potential conflict with Bruck, or waived any potential conflict.[252]

On August 14, 1997, "Coregis filed a complaint for declaratory judgment against Hubka and Maxwell" seeking a declaration that it owed no duty to defend Hubka in Maxwell's lawsuit based on the exclusions for conversion of client funds and for claims that the insured knew or could have reasonably could have foreseen would be the basis of a claim or lawsuit.[253] Neither Nathan or Munday was named as a defendant in the declaratory judgment action.[254]

The day after Coregis filed its action, the trial court granted Maxwell's motion for summary judgment and entered judgment against Hubka for more than $200,000.[255] Subsequently, Maxwell filed a motion for "summary judgment against Nathan and Munday based on a theory of joint venture liability."[256] On June 30, 1998, "the trial court granted Maxwell's motion for summary judgment against Nathan and Munday." ISBA Insurance paid Maxwell's judgment in its entirety.[257] Coregis subsequently filed a motion for summary judgment on its complaint for declaratory judgment, which was granted in June or July

247. *Id.* at 160, 821 N.E.2d at 709–10.
248. *Id.*, 821 N.E.2d at 710.
249. *Id.*, 821 N.E.2d at 710.
250. *Id.* at 160–61, 821 N.E.2d at 710.
251. *Id.* at 161, 821 N.E.2d at 710.
252. *Id.*, 821 N.E.2d at 710.
253. *Id.*, 821 N.E.2d at 710.
254. *Id.*, 821 N.E.2d at 710.
255. *Id.*, 821 N.E.2d at 710.
256. *Id.*, 821 N.E.2d at 710.
257. *Id.*, 821 N.E.2d at 710.

of 2000, against Hubka, Maxwell and numerous other claimants.[258] "In September 2000, the circuit court denied Nathan and Munday's attempt to intervene in Coregis' declaratory judgment action."[259]

On October 31, 2000, ISBA Mutual and Munday "filed a complaint for declaratory judgment against Coregis" arguing that "Coregis waived its right to rescind Hubka's policy" and that Coregis was "estopped from raising any policy defenses because it failed to inform Hubka that a conflict of interest existed in its representation of Hubka during Maxwell's lawsuit."[260] They further alleged that "Coregis had a duty to indemnify Hubka for Ms. Maxwell's judgment."[261] Both parties "filed cross motions for summary judgment."[262] The circuit court granted Coregis' motion, "finding that, because Hubka had made a material misstatement on his application for renewal in October 1995, the policy was void *ab initio*."[263] The plaintiffs appealed.[264]

The first question addressed by the court was whether Hubka's misrepresentation on the insurance application rendered the insurance void ab initio or merely voidable.[265] The court first defined the difference between a contract that is void ab initio and one that is merely voidable.[266] "A contract that is void *ab initio* is treated as though it never existed," thus "neither party can choose to ratify the contract by simply waiving its right to assert the defect."[267] "If a contract is . . . voidable, a party can either opt to void the contract based upon that defect or . . . choose to waive that defect and ratify the contract despite it."[268] The court determined that a material misrepresentation on an insurance application makes the policy voidable, not void ab initio.[269] The court cited the Illinois Supreme Court's explanation of the misrepresentation statute, section 154 of the Illinois Complied Statutes[270] in *Golden Rule Insurance Co. v. Schawartz*.[271] In *Golden Rule*, the court stated that the statute establishes a two-prong test to be used

258. *Id.* at 161–62, 821 N.E.2d at 711.
259. *Id.* at 162, 821 N.E.2d at 711.
260. *Id.*, 821 N.E.2d at 711.
261. *Id.*, 821 N.E.2d at 711.
262. *Id.*, 821 N.E.2d at 711.
263. *Id.*, 821 N.E.2d at 711.
264. *Id.*, 821 N.E.2d at 711.
265. *Id.* at 163, 821 N.E.2d at 712.
266. *Id.* at 164, 821 N.E.2d at 713.
267. *Id.*, 821 N.E.2d at 713.
268. *Id.*, 821 N.E.2d at 713.
269. *Id.* at 167, 821 N.E.2d at.715.
270. 215 ILL. COMP. STAT 5/154 (2000).
271. 203 Ill. 2d 456, 464, 786 N.E.2d 1010 (2003).

in situations where the insurance policy "may be voided."[272] The court relied upon this statement to find that material misrepresentation under Section 154 renders the policy voidable, not void ab initio.[273]

Because the policy was voidable, the court next looked at whether Coregis had waived its right to rescission.[274] The court noted that a party seeking to rescind a transaction on the ground of fraud or misrepresentation must elect to do so promptly after learning of the fraud or misrepresentation.[275] "An unreasonable delay in taking the necessary steps to set aside a fraudulent contract will have the effect of affirming it."[276] The court concluded that in common law, a contracting party's right to rescind the contract was waivable if not exercised promptly.[277]

The court then examined the question of whether by enacting Section 154, the legislature limited the grounds for rescission as well as changed the common law on whether that right was waivable.[278] The court found that the statute did not effect the common law with regard to rescission, and an insurer can waive its right to rescission if it does not invoke it promptly.[279]

Finally, the court addressed the issue of whether Coregis waived its right to rescind the policy.[280] To find waiver, facts must establish that it would be unjust, inequitable, or unconscionable to allow the insurer to assert the defense.[281] The court found none of Coregis actions could have reasonably led Hubka, or anyone else, to believe that Coregis was waiving its right to rescind the policy.[282] The facts showed that "less than a month after Hubka was suspended from the practice of law, Coregis informed him that it would no longer renew the policy."[283] Three days after Hubka notified Coregis of Maxwell's lawsuit, Coregis sent a reservation of rights letter to Hubka stating that it would defend but would withdraw its defense if it was later determined there was no

---

272. *Id.* at 464, 786 N.E.2d at 1015.
273. *Coregis*, 355 Ill. App. 3d at 167, 821 N.E.2d at 715.
274. *Id.* at 169, 821 N.E.2d at 717.
275. *Id.*, 821 N.E.2d at 717.
276. *Id.* at 169–70, 821 N.E.2d at 717.
277. *Id.*, 821 N.E.2d at 717.
278. *Id.* at 167, 821 N.E.2d at 715.
279. *Id.*, 821 N.E.2d at 715.
280. *Id.* at 170, 821 N.E.2d at 717.
281. *Id.*, 821 N.E.2d at 717.
282. *Id.*, 821 N.E.2d at 717.
283. *Id.*, 821 N.E.2d at 717.

coverage.[284] In that letter, Coregis highlighted the exclusion which denies coverage for claims of which the insured knew or could have reasonably have foreseen might be expected to be the basis of a claim or suit.[285] The court also noted that Coregis' reservation of rights letter specifically stated that Coregis was not waiving its rights on this matter.[286]

The court also found that Coregis promptly filed this complaint for declaratory judgment and several months after filing, amended its complaint seeking to rescind the policy.[287] By these actions in defending under a reservation of rights and promptly seeking a declaration that it owed no duty to defend, "Coregis did exactly what the courts have said insurers must do if they want to preserve their right to deny coverage, refuse to defend or decline to indemnify."[288] The court noted that, although Coregis could have filed its declaratory judgment earlier, the circuit court was certainly under no obligation and possibly could not have ruled until the underlying lawsuit involving the insured was resolved.[289] Based upon these facts, the court held that Coregis did not waive its right to rescind the policy based upon Hubka's material misrepresentation.[290]

Klaiber v. Dytec Central, Inc.[291]

Holding: The California Insurance Guarantee Association (CIGA) statute excludes from the definition of "covered claim" any claim to the extent that it was covered by any other insurance available to the claimant or insured.[292] John Klaiber sued to recover damages for personal injuries he sustained from radio waves while painting an antenna located on a radio tower on top of the Sears Tower.[293] WBBM-FM Radio (WBBM), one of the stations broadcasting from the antenna that Klaiber was working on when the accident occurred, and Trizechahn Office Properties, Inc. (Trizechahn), the manager of the Sears Tower, were the only two defendants that did not settle prior to

284. *Id.*, 821 N.E.2d at 717.
285. *Id.* at 170–71, 821 N.E.2d at 717–18.
286. *Id.* at 171, 821 N.E.2d at 718.
287. *Id.*, 821 N.E.2d at 718.
288. *Id.*, 821 N.E.2d at 718.
289. *Id.*, 821 N.E.2d at 718.
290. *Id.* at 172, 821 N.E.2d at 719.
291. 361 Ill. App. 3d 166, 836 N.E.2d 171 (1st Dist. 2005).
292. *Id.* at 171, 836 N.E.2d at 175.
293. *Id.* at 167, 836 N.E.2d at 172.

trial.[294] At the time of the accident, Liberty Mutual Fire Insurance (Liberty) insured WBBM, and Reliance Insurance Company (Reliance) insured Trizechahn.[295] Before the trial began, "Reliance went into liquidation."[296] "CIGA assumed Reliance's insurance obligations since Reliance was insolvent and Trizechahn is a California corporation."[297]

During trial, WBBM, Liberty, Trizechahn, and CIGA agreed that the parties would be bound by the fault percentages relating to the accident determined by the jury.[298] All parties also agreed that CIGA would have the option to litigate whether CIGA was obligated to pay the claim based on the "insurer of last resort" provisions described in the California Insurance Code.[299]

After the trial, the jury found in favor of Klaiber and against WBBM and Trizechahn, and found both parties jointly and severally liable.[300] The jury determined the fault at 40% for Trizechahn and 25% for WBBM.[301] The remaining 35% fault was allocated to defendants that had settled prior to trial.[302] Based upon the jury-determined fault proportion, and the modified judgment after applying setoff for previous settlements, Trizechahn was liable for 40/65ths of the judgment amount, or $383,295.42.[303] WBBM was liable for 25/65ths of the judgment amount, equivalent to $239,559.64, subject to CIGA's statutory position that it was not obligated to pay as an "insurer of last resort." [304]

As the insurer of WBBM, Liberty paid the full judgment amount to Klaiber.[305] Afterwards, CIGA and Liberty filed cross-motions for declaratory relief on CIGA's obligation to pay the judgment.[306] The trial court ruled that CIGA's obligation to pay did not arise because the

294. *Id.*, 836 N.E.2d at 172.
295. *Id.*, 836 N.E.2d at 172.
296. *Id.*, 836 N.E.2d at 172.
297. *Id.*, 836 N.E.2d at 172.
298. *Id.*, 836 N.E.2d at 172.
299. CAL. INS. CODE § 1063.1 (West 2005).
300. *Klaiber*, 361 Ill. App. 3d at 167, 836 N.E.2d at 172.
301. *Id.*, 836 N.E.2d at 172.
302. *Id.*, 836 N.E.2d at 172.
303. *Id.*, 836 N.E.2d at 172.
304. *Id.*, 836 N.E.2d at 172.
305. *Id.*, 836 N.E.2d at 172.
306. *Id.*, 836 N.E.2d at 172.

exhaustion of Liberty's policy would fully satisfy the judgment.[307]

The issue on appeal was "whether a solvent insurer's policy must be exhausted before CIGA is obligated to pay on behalf of a joint tortfeasor whose insurance carrier became insolvent."[308] Liberty contended that the trial court erred in ruling that CIGA was not obligated to pay the portion of the judgment representing Trizechahn's liability because Liberty did not insure Trizechahn, regardless of whether Liberty's policy was sufficient to pay the entire judgment.[309] Liberty argued that although "its policy may cover the 'occurrence' because it insured one of the tortfeasors, the policy does not cover the 'covered claim' because it does not insure Trizechahn.[310] It further argued that the CIGA statute at issue does not refer to "occurrences," but instead "covered claims" which is statutorily defined as the "obligations of an insolvent insurer."[311]

CIGA responded that "the plain language of the 'covered claims' statutory language and the intent underlying the purpose of that statute support the trial court's ruling that the Liberty policy must be exhausted before CIGA is obligated to pay a portion of the judgment awarded to Klaiber."[312] CIGA further stated that the California legislature's intent was to create CIGA to serve as a "fund of last resort" to pay under a policy only after all of the other insurance from solvent insurers had been extinguished.[313] They also asserted the entry of joint and several liability as to WBBM and Trizechahn for the total judgment award allowed Klaiber to exercise his right to collect the whole amount from Liberty.[314] This entry resulted in other insurance available to the claimant or insured regardless of whether Liberty insured Trizechahn.[315] The First District Appellate Court agreed with CIGA, and found that the relevant case law revealed that CIGA was created as an insurer of last resort and is "responsible for paying claims only when no other insurance was available."[316] The Court explained that for it to order CIGA to pay a proportionate amount of the judgment would defeat the purpose

307. *Id.* at 167, 836 N.E.2d at 172–73.
308. *Id.* at 168, 836 N.E.2d at 173.
309. *Id.*, 836 N.E.2d at 173.
310. *Id.*, 836 N.E.2d at 173.
311. *Id.*, 836 N.E.2d at 173.
312. *Id.* at 169, 836 N.E.2d at 173.
313. *Id.*, 836 N.E.2d at 173.
314. *Id.*, 836 N.E.2d at 174.
315. *Id.*, 836 N.E.2d at 174.
316. *Id.*, 836 N.E.2d at 174.

of CIGA, and the legislative intent regarding the creation of CIGA.[317] It noted that CIGA was not an insurer and did not stand in the shoes of an insurer, but rather, was only an insurer of last resort.[318] The Court held that it "did not consider it necessary to call upon CIGA to provide coverage as an insurer of last resort when other sufficient insurance was available,"[319] and it concluded that Liberty's policy must be exhausted before CIGA is required to pay the portion of the judgment attributable to Trizechahn.[320]

Taco Bell Corp. v. Continental Casualty Co.[321]

Holding: Declaratory judgment against the insurers was affirmed in all respects except for a reduction in the amount of defense costs that insurer was required to pay as reimbursement.[322]

This action arose out of protracted litigation in Michigan (Michigan Suit) between Taco Bell Corporation (Taco Bell) and Wrench, a design agency.[323] Wrench alleged that a Taco Bell national advertising campaign, which featured a Chihuahua obsessed with Taco Bell food, misappropriated Wrench's marketing plan previously presented to Taco Bell.[324]

Zurich American Insurance Company (Zurich) and Continental Casualty Company (Continental) issued policies that provided advertising injury coverage to Taco Bell.[325] Taco Bell sued the insurers in federal court in Illinois, seeking a declaration that the insurers had a duty to pay for Taco Bell's defense of the Michigan Suit.[326] Taco Bell subsequently reached a settlement with Continental.[327] Despite the settlement with Continental, the district court granted Taco Bell summary judgment.[328] The court ordered Zurich to pay defense costs already incurred in the Michigan Suit, plus the costs of the declaratory judgment action.[329] Finally, the court ordered Zurich to pay Continental for half of the defense costs that Continental had already

317. *Id.* at 170, 836 N.E.2d at 174.
318. *Id.*, 836 N.E.2d at 174.
319. *Id.* at 170, 836 N.E.2d at 175
320. *Id.* at 171, 836 N.E.2d at 175.
321. 388 F. 3d 1069 (7th Cir. 2004).
322. *Id.* at 1079.
323. *Id.* at 1071.
324. *Id.* at 1072.
325. *Id.*
326. *Id.* at 1071.
327. *Id.*
328. *Id.*
329. *Id.*

paid on Taco Bell's behalf.[330] The insurers appealed. [331]

Continental's policy ran from January 1, 1997, through October 6, 1997, and Zurich's ran from October 7, 1997, through December 31, 1998.[332] The policies contained identical definitions of "advertising injury."[333] Zurich claimed a policy exclusion for advertising injury "arising out of oral or written publication of material whose first publication took place before the beginning of the policy period."[334] Zurich argued the first of the offending Taco Bell advertisements was aired prior to the inception of the Zurich policy.[335] Zurich argued this exclusion was a complete defense to coverage, despite the fact that most of the advertising campaign ran after the Zurich policy was in force.[336]

The court held that the prior publication exclusion did not bar coverage.[337] In part, the court's finding in this regard was attributable to its conclusion that later incarnations of Taco Bell's advertising campaign alleged new, infringing matter, and therefore alleged "fresh wrongs."[338] The court seemed reluctant, particularly in the context of the duty to defend, to rule that the exclusion barred coverage where it was alleged that the basic idea for the advertising campaign was stolen prior to the inception of Zurich's policy, but it was also alleged not only that Taco Bell "stole additional, subordinate but still protected, ideas" after Zurich's policy incepted, but also that Taco Bell incorporated those ideas into subsequent commercials.[339]

Zurich also argued that coverage was barred by Taco Bell's failure to provide prompt notice of the Michigan Suit.[340] The court held that, under Illinois law, prejudice to the insurer is a factor that must be weighed, and that harmless delay is not sufficient to support a late notice defense.[341] Because the delay was only a few months, and because the court found no evidence that Zurich would have taken steps to prevent Taco Bell from continuing to run the commercials had Zurich been notified earlier, the court rejected the late notice defense.[342]

In addition, Zurich challenged the amount of reimbursable defense costs

---

330. *Id.*
331. *Id.*
332. *Id.* at 1072.
333. *Id.*
334. *Id.*
335. *Id.*
336. *Id.*
337. *Id.* at 1073.
338. *Id.*
339. *Id.* at 1073–74.
340. *Id.* at 1074.
341. *Id.*
342. *Id.* at 1074–75.

awarded to Continental and Taco Bell.[343] Zurich first argued that its policy had a self-insured retention providing that Zurich's duty to pay defense costs was not triggered until Taco Bell paid $2 million in defense costs.[344] Continental did not have a self-insured retention under its policy.[345] Taco Bell's defense costs were $5.8 million, and Continental paid $3.5 million.[346] The district court had ordered Zurich to reimburse Continental for one-half of the defense costs exceeding the $2 million self-insured retention ($1.8 million).[347] Zurich argued that the court should have divided the defense costs in half, then subtracted the $2 million retention from the amount that Zurich would have owed.[348] The court sided with Zurich's method of calculating its defense costs obligation, and therefore reduced the amount that Zurich was required to pay Continental to $1 million.[349]

The court held that Zurich did not have the right to challenge Taco Bell's defense costs, both because Taco Bell had presented a lengthy, detailed, and credible affidavit as to its defense costs, and because Zurich could have defended under a reservation of rights and then supervised the defense, which it opted not to do.[350] Therefore, the court found that Zurich had a presumed confidence in Taco Bell's management of its defense.[351]

Zurich also argued that it was not responsible for reimbursing the expenses that Taco Bell incurred in connection with its prosecution of its declaratory judgment.[352] The court noted that Illinois law formerly was divided on this issue, but concluded that it is now clear that the "American Rule" should apply in these cases, and that there is no duty of reimbursement so long as the insurer has "non-frivolous" defenses to the declaratory judgment.[353] The court thus ordered that Zurich was not responsible for reimbursing Taco Bell for the cost of prosecuting the declaratory judgment action.[354]

Finally, Continental argued that Zurich should be responsible for the majority of the defense costs, as the majority of the offending commercials were broadcast during Zurich's policy term.[355] The court rejected this

343. *Id.* at 1075.
344. *Id.*
345. *Id.*
346. *Id.*
347. *Id.*
348. *Id.*
349. *Id.*
350. *Id.* at 1076.
351. *Id.* at 1076–77.
352. *Id.* at 1077.
353. *Id.*
354. *Id.*
355. *Id.* at 1078.

argument as arbitrary.[356] However, the court also addressed another argument that was not raised by Continental–that the district court's grounds for dividing the defense costs equally between the insurers was "highly questionable."[357] In so holding, the district court relied on the "other insurance" clauses in the insurers' policies.[358] While the court recognized that, in general, where insurers' policies are triggered, and where those policies cover the same risk and have identical "other insurance" clauses, the liability will be apportioned equally between the insurers.[359] However, in this instance, the policies insured the same kind of risk, but not the same risk itself, because the policies were successive.[360] On these facts, the court held that to apply "other insurance" clauses would make insurers liable—at least in part—for occurrences outside the policy term.[361] However, as the court reasoned that Continental's proposed method of allocation was just as arbitrary as the district court's, the district court's method of allocation was affirmed.[362]

Burmac Metal Finishing Co. v. West Bend Mutual Insurance Co.[363]

Holding: Jury determination that insured did not comply with condition precedent to coverage under the policy was not against the manifest weight of the evidence.[364]

Burmac sued its commercial carrier after it denied coverage for a fire loss that occurred in March, 1997.[365] The trial court initially granted summary judgment to the insurer, but the appellate court held that the issue of Burmac's substantial compliance with a condition precedent under the policy was a question of fact, and remanded the case for a jury determination.[366] The policy in question contained a protective safeguards endorsement (PSE) that required Burmac to maintain an automatic sprinkler system in the building.[367] Evidence at trial showed that a number of the sprinkler heads had been disabled at some point.[368] The question for the jury was whether Burmac had substantially

356. *Id.*
357. *Id.*
358. *Id.*
359. *Id.*
360. *Id.* at 1079.
361. *Id.*
362. *Id.*
363. Burmac Metal Finishing Co. v. W. Bend Mut. Ins. Co., 356 Ill. App. 3d 471, 825 N.E.2d 1246 (2d Dist. 2005).
364. *Id.* at 481–83, 825 N.E.2d at 1256–57.
365. *Id.* at 474, 825 N.E.2d at at 1250.
366. *Id.* at 474–75, 825 N.E.2d at 1251.
367. *Id.* at 480, 825 N.E.2d at 1255.
368. *Id.* at 475–77, 825 N.E.2d at 1251–52.

complied with the PSE in the policy.[369] On special interrogatory, the jury decided that it had not, and returned a verdict for the insurer.[370]

In its appeal, Burmac argued that any removal or capping of sprinkler heads was done before the most recent renewal of the policy prior to the fire, in December 1996, and therefore it was entitled to judgment as a matter of law, because no changes had been made to the system after the renewal.[371] Therefore, Burmac argued, the insurer must be imputed with the knowledge that the sprinkler heads were inoperational, or estopped from denying the claim on that basis.[372] First noting that the jury could have found that some capping or removal of sprinkler heads did occur after the renewal date, the court continued by stating that renewal policies are generally made under the same terms and conditions of the original policy.[373] In this case, the PSE requirement had been in the policy since at least 1992.[374] By operation of law, the insurer was entitled to assume that the sprinkler system in place on the property remained the same as it had been at that time.[375] The jury determined that the system was not the same.[376] The court was critical of Burmac on this point, stating that "[w]e find it patently ridiculous to assume defendant would have renewed the policy without modifying the terms if it had known about the capping or if it at least had had a chance to determine whether the insured met its underwriting guidelines."[377] The duty of good faith would require Burmac, rather than the insurer, to act affirmatively in its dealings and provide such information.[378]

The court also considered Burmac's arguments in regard to expert qualifications and proper jury instructions, and found no error.[379]

B. Policy Exclusions

369. *Id.* at 475, 825 N.E.2d at 1251.
370. *Id.* at 477, 825 N.E.2d at 1253.
371. *Id.* at 479, 825 N.E.2d at 1254.
372. *Id.*, 825 N.E.2d at 1254–55.
373. *Id.* at 480, 825 N.E.2d at 1255.
374. *Id.*, 825 N.E.2d at 1255.
375. *Id.*, 825 N.E.2d at 1255.
376. *Id.*, 825 N.E.2d at 1255.
377. *Id.*, 825 N.E.2d at 1255.
378. *Id.*, 825 N.E.2d at 1255.
379. *Id.* at 481–85, 825 N.E.2d at 1256–59.

CNA Casualty of California v. E.C. Fackler, Inc.[380]

E.C. Fackler, Incorporated (Fackler), administered trusts for employers who wanted to self-insure against workers' compensation claims.[381] In the early 1990s, Fackler solicited employers to participate in three trusts (Trusts).[382] In 1998, the acting Director of the Illinois Department of Financial and Professional Regulation (Director) began examining Fackler and found Fackler negligently managed the Trusts, which jeopardized the Trusts' financial status.[383] On November 4, 1999, the Director revoked Fackler's license to administer and manage trusts and orders of liquidation of the Trusts were entered in 2000-2001.[384] The circuit court appointed the Director as the Trusts' liquidator.[385] In this capacity, the Director filed two suits against Fackler, the trustees and Fackler's major insurance producer on behalf of the Trusts alleging that Fackler breached its fiduciary duty to the Trusts, negligently misrepresented and aided and abetted the breach of fiduciary duty.[386]

CNA Casualty of California (CNA) issued a professional liability policy to Fackler and defended it in these underlying lawsuits, but also filed suit against Fackler, seeking a declaration that it was not required to pay claims asserted by the Director.[387] On CNA's motion for judgment on the pleadings, the trial court determined that none of the policy's exclusions barred the Director's recovery.[388] Specifically, the court held that the "insolvency," "governmental intervention," and "actuarial acts" exclusions did not apply and entered a final judgment against CNA and in favor of the Director.[389] CNA appealed.[390]

The appellate court reversed and remanded the case to the trial court to enter a judgment in favor of CNA.[391] The court held that the "insolvency" exclusion would bar coverage if Fackler (1) placed or obtained insurance coverage in the insolvent Trusts, or (2) placed client

380. 361 Ill. App. 3d 619, 836 N.E.2d 732 (1st Dist. 2005).
381. *Id.* at 621, 836 N.E.2d at 734.
382. *Id.* at 622, 836 N.E.2d at 734.
383. *Id.* at 623, 836 N.E.2d at 735.
384. *Id.*, 836 N.E.2d at 735.
385. *Id.*, 836 N.E.2d at 735.
386. *Id.*, 836 N.E.2d at 735.
387. *Id.*, 836 N.E.2d at 735.
388. *Id.*, 836 N.E.2d at 735.
389. *Id.*, 836 N.E.2d at 735.
390. *Id.*, 836 N.E.2d at 735.
391. *Id.* at 633–34, 836 N.E.2d at 743.

funds into the insolvent Trusts.[392] Based on the trust and pooling agreements, the Trusts were the functional equivalent of insurance for the employers, thus, Fackler secured coverage from CNA to cover its administration of the Trusts, and CNA added the exclusions to limit its risk exposure under a possible circumstance of insolvency of the Trusts.[393] Turning to the second prong of the "insolvency" exclusion analysis, the appellate court concluded that the employers Fackler solicited in participating in the Trusts were Fackler's "clients" and that Fackler placed the employers' funds into the Trusts.[394] Thus, the insolvency exclusion applied "whether or not forming self-insurance trusts is tantamount to 'placing or obtaining insurance coverage.'"[395]

With respect to the "governmental intervention" exclusion, the court agreed with CNA's argument that the exclusion applied to preclude coverage for the Director's underlying suits, in that the Director was authorized and empowered by the Insurance Code to intervene in any insurer entity for the purpose of wrapping up its business, paying its outstanding claims and recovering against those responsible for the financial failure of the insurer.[396] The Court noted that the Insurance Code contains a statutory scheme that allows the Director to intervene in self-insured pools.[397] Therefore, the liquidation proceedings brought under the authority of the Insurance Code were appropriately classified as a "governmental intervention."[398] The appellate court reversed the lower court's holding that the phrase "arising out of or in connection with a governmental intervention" was ambiguous.[399] Rather, the court held that the language of the exclusion provides for either "arising out of" or "in connection with."[400] The court determined that the words "in connection with" indicate that the "timing of the claims is not controlling."[401] As the claims made in the underlying litigation were in connection with the "governmental intervention," the court concluded that both parts of the exclusion applied to this matter.[402]

---

392. *Id.* at 624–25, 836 N.E.2d at 736.
393. *Id.* at 627, 836 N.E.2d at 739.
394. *Id.* at 629, 836 N.E.2d at 740.
395. *Id.* at 630, 836 N.E.2d at 740.
396. *Id.* at 631, 836 N.E.2d at 741.
397. *Id.* at 630, 836 N.E.2d at 741.
398. *Id.* at 630–31, 836 N.E.2d at 741.
399. *Id.* at 633, 836 N.E.2d at 743.
400. *Id.* at 632, 836 N.E.2d at 742.
401. *Id.*, 836 N.E.2d at 742.
402. *Id.*, 836 N.E.2d at 742.

Finally, the appellate court agreed with the trial court that the "actuarial" exclusion did not apply to the underlying claims.[403] The court reasoned that Fackler was acting as an administrator and not as an actuary.[404] In fact, the Director alleged that Fackler hired an actuarial consulting firm separate and apart from its responsibilities, which did not make Fackler an "actuarial."[405]

Valley Forge Insurance Co. v. Swiderski Electronics, Inc.[406]

Holding: A lawsuit claiming damages for unsolicited fax advertisements fell within insured's policy provision for personal and advertising injury coverage.[407]

Private investigator "Ernie Rizzo, d/b/a Illinois Special Investigations (Rizzo), brought a class action lawsuit under the [Telephone Consumer Protection Act (Act)[408]] against Swiderski Electronics, Inc. (Swiderski)" for sending unsolicited fax advertisements.[409] The Act provides that "[i]t shall be unlawful for any person within the United States . . . to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine."[410] Rizzo sought damages for Swiderski's alleged "sending [of] unsolicited faxes throughout Illinois without obtaining prior consent . . . improperly and unlawfully convert[ing] . . . fax machine toner and paper" and for attorney fees.[411]

Valley Forge Insurance Company and Continental Casualty Corporation (Insurers) "disclaimed coverage and filed a complaint for a declaratory judgment [on the basis that] they had no duty to defend or indemnify Swiderski" under the policy.[412] Swiderski counterclaimed "arguing that the complaint alleged claims for 'property damage' and 'personal and advertising injury'."[413] A provision in the policy provided a "duty to defend any suit . . . seeking damages caused by

403. *Id.* at 633, 836 N.E.2d at 743.
404. *Id.*, 836 N.E.2d at 743.
405. *Id.*, 836 N.E.2d at 743.
406. 359 Ill. App. 3d 872, 834 N.E.2d 562 (2d Dist. 2005).
407. *Id.* at 899, 834 N.E.2d at 576.
408. 47 U.S.C. § 227 (2000).
409. *Valley Forge Ins. Co.*, 359 Ill. App. 3d at 875, 834 N.E.2d at 565.
410. *Id.* (citing 47 U.S.C. §§ 227(b)(1), (c) (2000)).
411. *Valley Forge Ins. Co.*, 359 Ill. App. 3d at 875, 834 N.E.2d at 565.
412. *Id.* at 875–76, 834 N.E.2d at 565–66.
413. *Id.* at 876, 834 N.E.2d at 566.

'personal and advertising injury'" arising from "oral or written publication, in any manner, of material that violates a person's right of privacy."[414] The trial court entered a declaratory judgment that the insurers "had a duty to defend Swiderski" and must pay defense costs incurred in the underlying suit.[415]

The primary issue on appeal was whether the phrase "written publication" as used in the insurance policy could reasonably be interpreted as including the transmittal of material without transmittal to a third party.[416] The insurer's position is that "publication" means the transmission of offending material about the plaintiff to a third party; therefore, merely sending unsolicited faxes does not constitute a written publication.[417]

No Illinois court had addressed the issue raised; however, the issue has been litigated in federal court with a resulting division among the federal courts.[418] The insurers relied on *American States Insurance Co. v. Capital Associates of Jackson County, Inc.*,[419] "which held that sending unsolicited fax advertisements was not covered under the advertising [injury provisions]."[420] The insurance policy in *American States Insurance*, as in this case, "defined 'advertising injury' to include '[o]ral or written publication of material that violates a person's right of privacy'."[421] The district court found a duty to defend.[422] On appeal "the Seventh Circuit then reversed finding that 'privacy' is a word with many connotations, [primarily] secrecy and seclusion."[423] The court concluded that the policy covered the tort of "invasion of privacy," which requires "an oral or written statement revealing an embarrassing fact" or which "casts someone in a false light."[424] In other words, the Act prohibits the particular method of advertisement, not the content, "while the advertising injury provision dealt with informational content."[425]

---

414. *Id.*, 834 N.E.2d at 566.
415. *Id.* at 877, 834 N.E.2d at 566.
416. *Id.* at 879, 834 N.E.2d at 568.
417. *Id.*, 834 N.E.2d at 568.
418. *Id.* at 879, 834 N.E.2d at 568–69.
419. 392 F. 3d 939, 943 (7th Cir. 2004).
420. *Valley Forge Ins. Co.*, 359 Ill. App. 3d at 880, 834 N.E.2d at 569 (quoting Am. States Ins. Co. v. Capital Assoc. of Jackson Co., Inc., 392 F.3d 939, 940 (7th Cir. 2004)).
421. *Valley Forge Ins. Co.*, 359 Ill. App. 3d at 880, 834 N.E.2d at 569.
422. *Id.*, 834 N.E.2d at 569.
423. *Id.*, 834 N.E.2d at 569.
424. *Id.*, 834 N.E.2d at 569.
425. *Id.* at 880–81, 834 N.E.2d at 569.

Relying on opposite authority, the court found that "the plain and ordinary meaning of 'publication'" as used in the policy is not limited to the publication of material that wrongfully discloses private facts to third parties.[426] "Stated simply, the word 'publication' would not convey to the average, ordinary, normal, reasonable person an intention to include only communications sent to a third party."[427]

The court further noted that interpreting "publication" "to mean communication to a third party" results in an ambiguity because an equally reasonable construction is "that no third party is required."[428] "Where competing reasonable interpretations of a policy exist," the court is "not permitted to choose which interpretation . . .[it] will follow."[429]

The court also rejected the "insurers' argument that the advertising injury provision does not provide coverage for violations of a person's seclusion," but only for violations of one's right to privacy.[430] The court noted that "the term 'right of privacy' is open to numerous interpretations."[431] Therefore, "[b]ecause a reasonable person would understand 'privacy' to mean the right to be left alone . . . the sending of unsolicited fax advertising falls potentially within the scope of coverage under the terms of the advertising injury provision."[432]

A.M.I. Diamonds Co. v. Hanover Insurance Co.[433]

Holding: The insurer's denial of coverage for theft of diamonds under jewelers' block policy was appropriate where the jeweler's employee had not acted with the requisite amount of care; thus the exclusion for jewelry stolen while being transported in a vehicle was properly applied.[434]

This case arose out of a jewel heist in which $100,000 worth of diamonds were stolen from an employee of the insured jeweler while

426. *Id.* at 882, 834 N.E.2d at 570–71 (citing Park Univ. Enter., Inc. v. Am. Cas. Co., 314 F. Supp. 2d at 1094 (D. Kan. 2004); TIG Ins. Co. v. Dallas Basketball, Ltd., 129 S.W.3d at 232 (Tex. App. 2004)).
427. *Valley Forge Ins. Co.*, 359 Ill. App. 3d at 886, 834 N.E.2d at 573–74.
428. *Id.* at 886, 834 N.E.2d at 574.
429. *Id.*, 834 N.E.2d at 574.
430. *Id.*, 834 N.E.2d at 574.
431. *Valley Forge Ins. Co.*, 359 Ill. App. 3d at 887, 834 N.E.2d at 575 (citing *Park Univ. Enter., Inc.*, 314 F. Supp. 2d at 1109).
432. *Id.*, 834 N.E.2d at 575.
433. 397 F.3d 528 (7th Cir. 2005).
434. *Id.*

he was at a gas station.[435] The employee temporarily left the car to use the telephone, but claimed to keep the car in sight at all times.[436] While he was out of the car, a woman acting as a decoy distracted him by asking directions.[437] Although the employee stopped to answer her question, he kept the car in sight; however, when the woman dropped a map, he picked it up.[438] During that time, her accomplice stole the diamonds from the car.[439]

The jeweler sought coverage for the loss under a jewelers' block policy, which excluded coverage for losses sustained "while [the jewelry is] in or upon any vehicle," unless the employee driving the vehicle was "actually in or upon such vehicle" and had the diamonds in "close personal custody and under direct control."[440] Citing this exclusion, the insurer declined custody and the jeweler sued.[441] The district court granted summary judgment to the insurer, finding that the insurer had properly declined coverage.[442] The jeweler appealed.[443]

In interpreting the policy, the Court of Appeals first looked to the purpose of the relied-upon exclusion.[444] The Court held that the purpose of the exclusion was two-fold: to prevent a "moral hazard," and to limit coverage in high-risk situations.[445] "Moral hazard" was defined as the effect of an insured who relaxes his duty of care knowing that an insurance company will bear the risk of loss.[446] The Court found that the salesman had negligently failed to lock his car door, thereby creating risk of loss.[447]

The Court next interpreted the text of the exclusion in light of its underlying purposes.[448] Because the salesman was no longer "actually in" the car, and therefore the diamonds were no longer in his "close personal custody" or under his "direct control," his carelessness

435. *Id.* at 529.
436. *Id.*
437. *Id.*
438. *Id.*
439. *Id.*
440. *Id.*
441. *Id.*
442. *Id.*
443. *Id.* at 528.
444. *Id.* at 529–30.
445. *Id.*
446. *Id.* at 530.
447. *Id.*
448. *Id.*

triggered the exclusion.[449]

III. EXCESS AND UMBRELLA LIABILITY INSURANCE

Home Insurance Co. v. Cincinnati Insurance Co.[450]

Holding: Liability insurer for general contractor as additional insured on subcontractor policy could not recover on equitable contribution theory because it was an excess insurer and the policies insured different risks.[451] Liability insurer for general contractor as additional insured on subcontractor's policy was entitled to recover equitable contribution from subcontractor's carrier but waived a portion due to the fact that it failed to assert it was an excess insurer prior to settlement.[452]

Allied Asphalt Paving Company (Allied) was a general contractor for a renovation project on the Kennedy Expressway, which subcontracted work on the project to Aldridge Electric Company, Inc. (Aldridge) and Western Industries, Inc. (Western).[453] Matthew Fisher, an employee of Aldridge who was injured while installing lights in an underpass on the project, sued numerous parties, including Allied and Western.[454] It was alleged that Allied and Western "had agreed to assume responsibility for all safety aspects of the project and had breached their duties" in this regard.[455]

At the time of the accident, Allied was named as an additional insured under an insurance policy issued to Western by Cincinnati and also on a policy issued to Aldridge by Home.[456] Each policy contained an endorsement indicating that Allied was named as an insured but only with respect to liability arising out of "your work" for that "insured by or for you."[457] The term "your work" was defined in each policy as including "work or operations performed by you or on your behalf, and materials, parts or equipment furnished in connection with

449. *Id.* at 531.
450. 213 Ill. 2d 307, 821 N.E.2d 269 (2004).
451. *Id.* at 321, 821 N.E.2d at 279.
452. *Id.* at 328, 821 N.E.2d at 283.
453. *Id.* at 309–10, 821 N.E.2d at 272.
454. *Id.*, 821 N.E.2d at 273.
455. *Id.*, 821 N.E.2d at 273.
456. *Id.*, 821 N.E.2d at 273.
457. *Id.*, 821 N.E.2d at 273.

such work or operations."[458] It is undisputed the Home policy was an excess policy while the Cincinnati policy was a primary policy.[459]

After Allied tendered to both carriers, Cincinnati accepted the defense of Allied but reserved its rights to deny coverage with respect to any work or contract that was not performed by Western on behalf of Allied.[460] Home accepted the defense of Allied, indicating that it would agree to share the cost of Allied's defense and indemnity with the insurance carrier for Western on a 50/50 basis subject to review of both policies and a reservation of rights.[461] The claim against Western was subsequently settled for $40,000.[462] The claim against Allied was settled for $600,000, with Home paying $500,000 and Cincinnati paying $100,000.[463] Subsequently, Home filed a declaratory judgment action against Cincinnati asserting theories of equitable subrogation and equitable contribution.[464] Cross motions for summary judgment were filed.[465] The court granted Cincinnati's motion for summary judgment and denied Home's cross motion for summary judgment, finding that Home was not entitled to equitable contribution from Cincinnati because the Home policy was excess, and "excess and primary insurers do not insure the same risk."[466] The court also denied the equitable subrogation claim, finding that Home waived it by not promptly asserting that it was an excess insurer and, therefore, had no duty to defend Allied.[467]

The appellate court affirmed the circuit court's findings but did not address the circuit court's waiver ruling.[468] In so holding, the appellate court cited to the case of *Schal Bovis, Inc. v. Casualty Insurance Co.*,[469] noting that in *Schal Bovis*, "a necessary element to maintain an equitable contribution claim" was that the policies must insure the same risk.[470] In this instance, each insurer insured different risks as each covered "the additional insured only to the extent that liability arose out of the

458. *Id.*, 821 N.E.2d at 273.
459. *Id.*, 821 N.E.2d at 273.
460. *Id.* at 310–11, 821 N.E.2d at 273.
461. *Id.* at 311, 821 N.E.2d at 273.
462. *Id.*, 821 N.E.2d at 273.
463. *Id.*, 821 N.E.2d at 273.
464. *Id.*, 821 N.E.2d at 273.
465. *See id.* at 313, 821 N.E.2d at 274.
466. *Id.* at 313, 821 N.E.2d at 274–75.
467. *Id.* at 313–14, 821 N.E.2d at 275.
468. *Id.* at 314, 821 N.E.2d at 275.
469. 315 Ill. App. 3d 353, 732 N.E.2d 1179 (1st Dist.2000).
470. *Home Ins. Co.*, 213 Ill. 2d at 314, 821 N.E.2d at 275.

work of the respective underlying named insureds."[471] Accordingly, it found that Home was not entitled to equitable subrogation as a matter of law. [472]

The appellate court also held that Home was not entitled to equitable contribution because the policies did not insure the same risk due to the respective "arising out of your work" endorsements.[473] In so holding, the appellate court refused to adopt the reasoning of the appellate court in *Cincinnati Insurance Co. v. River City Construction Co.*,[474] a case which declined to follow *Schal Bovis*.[475] As an alternative basis for its ruling, the appellate court noted that the policies did not insure the same risk because one was an excess policy and the other was a primary policy.[476]

The Supreme Court first addressed the equitable contribution arguments.[477] The court defined contribution as "an equitable principal arising among coinsurers which permits one insurer who has paid the entire loss, or greater than its share of the loss, to be reimbursed from other insurers who are also liable for the same loss."[478] The court further noted that contribution applies to multiple, concurrent insurance situations and is only available where the concurrent policies insured the same entities, the same interests and the same risks.[479] Subrogation and indemnification were defined by the court as devices for placing the entire burden for a loss on the party ultimately liable or responsible for it and by whom it should have been discharged.[480] The court noted that indemnity arises in a situation where the entity seeking indemnification does so in its own right, while in subrogation, the subrogee succeeds to another's right to payment.[481]

The court found that "it is well settled that the doctrine of equitable contribution is not applicable to primary/excess insurer issues because, by definition, the policies do not cover the same risks, i.e., the protections under the excess policy do not begin until those of the

471. *Id.*, 821 N.E.2d at 275.
472. *Id.*, 821 N.E.2d at 275.
473. *Id.*, 821 N.E.2d at 275.
474. 325 Ill. App. 3d 267, 757 N.E.2d 676 (3d Dist. 2001).
475. *Home Ins. Co.*, 213 Ill. 2d at 314–15, 821 N.E.2d at 275.
476. *Id.* at 315, 821 N.E.2d at 275.
477. *Id.*, 821 N.E.2d at 276.
478. *Id.* at 316, 821 N.E.2d at 276.
479. *Id.*, 821 N.E.2d at 276.
480. *Id.*, 821 N.E.2d at 276.
481. *Id.*, 821 N.E.2d at 276.

primary policy cease."[482] It was undisputed in this case that the Home policy was an excess policy and the Cincinnati policy was a primary policy.[483] Therefore, Home could not recover on its equitable contribution claim.[484]

The court then addressed Home's argument that the appellate court should not have relied upon *Schal Bovis* to find a lack of identity of the risks insured but should have instead relied upon *River City* to hold that the two policies insured the same risks.[485] In *Schal Bovis*, the court found that the risk that the plaintiff might be injured in connection with one contractor's work was a different risk than that the plaintiff might be injured in connection with another contractor's work.[486] The court held that "because each insurer insured substantially different risks, each was precluded from seeking equitable contribution from the others."[487] The *River City* appellate court declined to follow the *Schal Bovis* court, ruling that there was a sufficient identity of insurable interests to support an equitable contribution claim.[488]

In the instant case, the Cincinnati policy covered Allied only for liability arising out of Western's work while the Home policy covered Allied only for liability arising out of Aldridge's work.[489] Although it is possible that both policies will one day be triggered because Allied's liability for an accident arose out of the work of both entities, the court distinguished this from the question of whether both policies set out to cover the same risk.[490] The court found that under the terms of either policy, Allied would have been 100% covered if liability arose at all out of the work of the named insured, no matter how slight.[491] The court found that *Schal Bovis* was the better reasoned case and overruled *River City* to the extent that it was inconsistent with its findings.[492]

The court next turned to the equitable subrogation issue.[493] The court first identified the elements of an equitable subrogation claim as follows:

---

482. *Id.* at 317, 821 N.E.2d at 276.
483. *Id.*, 821 N.E.2d at 277.
484. *Id.*, 821 N.E.2d at 277.
485. *Id.* at 318, 821 N.E.2d at 277.
486. *Id.*, 821 N.E.2d at 277.
487. *Id.* at 319, 821 N.E.2d at 278.
488. *Id.* at 320, 821 N.E.2d at 278.
489. *Id.* at 322, 821 N.E.2d at 279.
490. *Id.*, 821 N.E.2d at 279.
491. *Id.*, 821 N.E.2d at 279.
492. *Id.* at 319, 821 N.E.2d at 280.
493. *Id.* at 322–23, 821 N.E.2d at 280.

> (1) the defendant carrier must be primarily liable to the insured for a loss under a policy of insurance; (2) the plaintiff carrier must be secondarily liable to the insured for the same loss under its policy; and (3) the plaintiff carrier must have discharged its liability to the insured and at the same time extinguished the liability of the defendant carrier.[494]

The court noted that the appellate court, in analyzing this issue, found that "because the Home and Cincinnati policies did not insure the "same risk," they did not cover the "same loss" for purposes of equitable subrogation."[495] The court found that the appellate court erred in equating the "identity of the risk" element of a contribution claim with the "same loss" requirement of a subrogation claim.[496]

It also noted that the appellate court either overlooked or ignored the holding in *Schal Bovis* holding that the excess insurer, who would be in the same position as Home, was entitled to equitable subrogation.[497] The court noted that *Schal Bovis* expressed a correct view, holding that a subrogation action brought by an excess carrier against a primary carrier is completely distinct from a contribution action.[498] A subrogation claim only requires that the secondary insurer insure the "same loss" as the primary insurer.[499] In determining whether the same loss was insured, the requirement looks retrospectively at the loss suffered.[500] The court found that Allied suffered only one loss and that if Allied's liability arose at all out of Western's works then Cincinnati was wholly liable for that loss as the primary insurer and Home was only secondarily liable for that loss as the excess insurer.[501] The court, therefore, held that Home was entitled to summary judgment on its equitable contribution claim as a matter of law.[502]

The court noted that Home would only be allowed to recover if it could be shown that Cincinnati owed coverage to Allied because Allied's liability arose, at least in part, out of Western's work.[503]

---

494. *Id.* at 323, 821 N.E.2d at 280.
495. *Id.*, 821 N.E.2d at 280.
496. *Id.*, 821 N.E.2d at 280.
497. *Id.* at 324, 821 N.E.2d at 280.
498. *Id.*, 821 N.E.2d at 281.
499. *Id.*, 821 N.E.2d at 281.
500. *Id.*, 821 N.E.2d at 281.
501. *Id.* at 324–25, 821 N.E.2d at 281.
502. *Id.* at 325, 821 N.E.2d at 281.
503. *Id.*, 821 N.E.2d at 281.

Where the case was settled prior to trial, "there is a presumption that the injured worker in the underlying case would have prevailed on all of his theories of liability."[504] Here, there was nothing in the deposition testimony or the affidavits on file to create a genuine issue of fact to overcome the presumption that Allied's liability arose, at least in part, out of the work of Western.[505] Therefore, the court found that Home was entitled to summary judgment as a matter of law on its subrogation claim.[506]

The court next addressed the circuit court's holding that Home waived its subrogation claim.[507] The court noted that "the failure of a paying insurer to reserve its rights against a non-paying insurer may constitute a waiver of the right to equitable remedies."[508] An insurer seeking to reserve its rights against a second insurer must make this point clear in its correspondence with the second insurer.[509] The court also noted that it is a good practice to include such reservation language in any settlement agreement or order and then provide a copy of it to the non-settling insurer.[510]

The court found that the "totality of Home's conduct was inconsistent with any claim that it would seek full reimbursement for the Fisher settlement from Cincinnati," noting that Home accepted Allied's defense without a specific reservation of rights and without asserting that it was an excess insurer.[511] Home only asserted that it would share in the cost of Allied's defense and indemnity with Western on a 50/50 basis and only sought $300,000 of the total amount paid from Cincinnati at the time of the settlement.[512] Also, Home never asserted it was an excess insurer at the time of settlement.[513] The court found that these actions by Home waived a portion of its reimbursement claim.[514] Therefore, Home was entitled to recover only $200,000 from Cincinnati.[515]

For the foregoing reasons, the court affirmed the summary

504. *Id.*, 821 N.E.2d at 281.
505. *Id.*, 821 N.E.2d at 281.
506. *Id.* at 326, 821 N.E.2d at 282.
507. *Id.*, 821 N.E.2d at 282.
508. *Id.* at 326–27, 821 N.E.2d at 282.
509. *Id.* at 327, 821 N.E.2d at 282.
510. *Id.*, 821 N.E.2d at 282.
511. *Id.*, 821 N.E.2d at 282–83.
512. *Id.* at 327–28, 821 N.E.2d at 283.
513. *Id.* at 328, 821 N.E.2d at 283.
514. *Id.*, 821 N.E.2d at 283.
515. *Id.*, 821 N.E.2d at 283.

judgment for Cincinnati on the equitable contribution claim but reversed the appellate court on the equitable subrogation claim.[516]

Standard Mutual Insurance Co. v. Mudron[517]

Holding: Claims against an insured for breach of employment contract fell within the "business pursuits" exclusion contained in the insured's personal umbrella liability policy.[518]

Standard Mutual Insurance Company (Standard Mutual) "filed a complaint for declaratory judgment seeking a determination that it had no duty to defend" its insured, Patrick Mudron (Mudron), for breach of an employment agreement under the homeowner's liability policy and a personal umbrella liability policy issued by Standard Mutual.[519] The trial court granted State Mutual's motion for summary judgment finding it had no duty to defend Mudron.[520]

Mudron was an insurance broker for Brown & Brown, Inc.[521] He was fired and then allegedly convinced a former Brown employee to join him in another insurance agency where Brown clients were solicited in violation of an employment agreement.[522] A lawsuit was filed to enjoin Mudron and to recover damages.[523] He tendered the lawsuit to Standard Mutual who denied coverage under the business pursuit exclusion of the policy.[524]

The appellate court affirmed and in doing so noted the general rule pertaining to questions of insurance coverage:

> In determining whether an insurer is obligated to defend its insured, a court examines the allegations in the underlying complaint and compares those allegations to the relevant provisions of the insurance policy. If the facts as alleged fall within, or potentially within, the language of the policy, the duty to defend arises. An insurer's duty to defend is much broader than its duty to indemnify, and the allegations in the underlying complaint must be liberally construed in favor of the insured.[525]

---

516. *Id.*, 821 N.E.2d at 283.
517. 358 Ill. App. 3d 535, 832 N.E.2d 269 (3d Dist. 2005).
518. *Id.* at 539, 832 N.E.2d at 273.
519. *Id.* at 536, 832 N.E.2d at 270.
520. *Id.*, 832 N.E.2d at 270.
521. *Id.*, 832 N.E.2d at 270.
522. *Id.* at 536, 832 N.E.2d at 271.
523. *Id.*, 832 N.E.2d at 270–71.
524. *Id.*, 832 N.E.2d at 271.
525. *Id.* at 537, 832 N.E.2d at 271.

The personal umbrella policy in this case provided that Standard Mutual "promised to pay any 'damages' incurred by the insured, subject to the exclusions and liability limits of the policy.[526] Damages were defined as sums the insured must pay "because of personal injury or property damage . . . caused by an occurrence."[527]

The court found that the claims in the lawsuit against Mudron fell within the "business pursuits" exclusion contained in Standard Mutual's umbrella policy.[528]

> The insurance policy excludes coverage for, among other things, the 'business pursuits of an insured.' 'Business' is defined under the policy as 'employment, trade, profession or occupation.' When this exclusion is considered in the context of the allegations of the Brown complaint, it is clear that the Brown lawsuit is predicated entirely on Mudron's business pursuits.[529]

The court noted that "each count of the Brown complaint arises from Mudron's employment relationship with Brown. Nothing in the complaint alleges damages or seeks relief from events independent of the employment agreement."[530]

Central Illinois Light Co. v. Home Insurance Co.[531]

Holding: Insurers' duty to indemnify under excess liability policies providing for indemnity for "all sums" the insured became "liable to pay" as damages to property was triggered by IEPA's assertion that it intended to enforce strict liability statute regarding cleanup against insured as this constituted a claim for damages under the policy.[532] Excess/Umbrella Insurance: Funds expended by insured, in response to claim of strict liability asserted by IEPA, to investigate and remediate environmental contamination constituted "damages" within meaning of excess liability policies.[533]

CILCO is the owner of several properties in Illinois that formerly

526. *Id.*, 832 N.E.2d at 272.
527. *Id.*, 832 N.E.2d at 272.
528. *Id.* at 538, 832 N.E.2d at 272.
529. *Id.*, 832 N.E.2d at 272.
530. *Id.* at 539, 832 N.E.2d at 273.
531. 213 Ill. 2d 141, 821 N.E.2d 206 (2004).
532. *Id.* at 177, 821 N.E.2d at 226.
533. *Id.*, 821 N.E.2d at 226.

housed manufactured gas plants (MGPs).[534] "Gas was manufactured at these facilities from the 1850s through the 1930s, using processes that created coal tar as a by-product."[535] The tar was collected, placed in underground containment structures and sold.[536] This technology ultimately was rendered obsolete.[537] CILCO dismantled various of the sites from the late 1920s through the early 1950s.[538] "At each site, the cover of the containment structure was removed and most of the remaining coal tar was extracted for sale."[539] The containers were then filled with materials such as construction debris, even though large amounts of tar remained within the structures.[540]

"In 1985, CILCO received a report prepared by the Radian Corporation in conjunction with the United States Environmental Protection Agency . . . which described the potential for environmental contamination at former MGP sites."[541] Shortly thereafter, CILCO examined its properties and acknowledged ownership of three former MGP sites.[542] In 1986, discolored and odorous soil was discovered at one of the sites. "CILCO investigated and eventually determined that tar constituents were present in the soil."[543]

Shortly thereafter, the Illinois EPA held a meeting in which CILCO was informed that it was strictly liable under state and federal law for environmental contamination at MGP sites.[544] The Illinois EPA informed them that they could bring suit to compel investigation and remediation at the sites or CILCO could act voluntarily under the supervision of the agency.[545] The IEPA officials further informed CILCO that they could deal with its liability "the easy way or the hard way."[546]

In 1987, CILCO entered into a voluntary agreement with the IEPA pursuant to the Pre-Notice Site Cleanup Program (Pre-Notice Program).[547] Under this Pre-Notice Program,"the IEPA upon the

534. *Id.*, 821 N.E.2d at 226.
535. *Id.* at 146, 821 N.E.2d at 209.
536. *Id.*, 821 N.E.2d at 209.
537. *Id.*, 821 N.E.2d at 209.
538. *Id.*, 821 N.E.2d at 209.
539. *Id.*, 821 N.E.2d at 209.
540. *Id.*, 821 N.E.2d at 209.
541. *Id.*, 821 N.E.2d at 209.
542. *Id.*, 821 N.E.2d at 209.
543. *Id.*, 821 N.E.2d at 210.
544. *Id.*, 821 N.E.2d at 210.
545. *Id.* at 147, 821 N.E.2d at 210.
546. *Id.*, 821 N.E.2d at 210.
547. *Id.*, 821 N.E.2d at 210.

request of the owner or operator . . . [would] provide review and evaluation services at a site where hazardous substance[s] might be present and supervise the voluntary cleanup of the site.[548] After the sites were cleaned up, the IEPA sent "No Further Action" letters to CILCO informing it that it was released from further responsibilities under the Act.[549]

"CILCO sought indemnification from its excess insurers for its expenditures related to investigation and remediation of the sites."[550] These excess liability policies were issued to CILCO between 1948 and 1985.[551] The policies contained somewhat different language, although none contained a duty to defend.[552] From 1957 to 1971, CILCO was insured by policies issued by Certain London Market Insurers (CLMI).[553] The CLMI policies provided that the insurer would indemnify the insured for "any and all sums which the insured shall become liable to pay and shall pay or by final judgment be adjudicated to pay or by which agreement between the insurers and the underwriters of the representative shall be paid to any person, firm . . . as damages . . . to property."[554] After 1979, "lower layer" excess policies required CLMI to indemnify CILCO for "all sums which the insured shall be obligated to pay by reason of the liability: (a) imposed upon the Assured by law, or (b) assumed under contract or agreement with the named Assured for damages . . . ."[555]

CILCO "filed suit against its excess liability insurers for indemnification of funds expended to investigate and remediate environmental contamination at several sites that formerly housed manufactured gas plants . . . ."[556] In response, the insurers filed nine motions for summary judgment or partial summary judgment.[557] The Circuit Court of Peoria County granted five of these motions and denied four. Several of these orders were appealed to the appellate court.[558] The appellate court reversed the circuit court's order granting summary judgment in favor of the defendants on the issue of

548. *Id.*, 821 N.E.2d at 210.
549. *Id.* at 147–48, 821 N.E.2d at 210.
550. *Id.* at 148, 821 N.E.2d at 210.
551. *Id.*, 821 N.E.2d at 210.
552. *Id.* at 148–50, 821 N.E.2d at 210–11.
553. *Id.* at 148, 821 N.E.2d at 210.
554. *Id.*, 821 N.E.2d at 210.
555. *Id.*, 821 N.E.2d at 210–11.
556. *Id.* at 144, 821 N.E.2d at 208.
557. *Id.*, 821 N.E.2d at 208.
558. *Id.*, 821 N.E.2d at 209.

indemnity.[559]

On appeal, the Supreme Court first addressed the issue of whether the policy language or the case law construing similar language clearly require a lawsuit or other adversarial proceeding such as an administrative complaint before a duty to indemnify arises under the policies.[560] The court noted that under the 1957-1971 policy language, indemnification is provided under three circumstances: (1) the insured becoming liable to pay and, in fact, paying damages; (2) a final judgment awarding damages; or (3) an agreement between the insured and the underwriters to pay damages.[561] In this case, options two and three do not apply.[562] At issue is whether the insured became liable to pay and, in fact, did pay damages so as to trigger coverage under the policy.[563] After examining some dictionary definitions of "liable," "obligation" and "damages," the court concluded that the policy language, standing alone, does not require the insured to have been served as a defendant or respondent in an adversarial proceeding before a duty to indemnify arises.[564] Noting that both parties were sophisticated business entities that can be assumed to have specialized knowledge of the contractual terms, the court then turned to a body of case law from Illinois and other jurisdictions construing similar policy language to aid in the construction of the policy.[565] After a lengthy discussion of the cases, the court concluded that the language of the policies did not expressly require the insured's liability for damages to be fixed by the resolution of a lawsuit, either by settlement or judgment.[566] Therefore, the policy language did not require the filing of a lawsuit or administrative complaint as a precondition to CLMI's duty to indemnify.[567]

The court then turned to question of whether CILCO was legally obligated to undertake cleanup of its MGP sites and, if so, whether the expenditures were properly characterized as "damages."[568] The court noted that CILCO's legal obligation to make the cleanup expenditures, if any, did not attach as a result of a final judgment in a lawsuit or even

559. *Id.* at 145, 821 N.E.2d at 209.
560. *Id.* at 153, 821 N.E.2d at 213.
561. *Id.* at 154, 821 N.E.2d at 214.
562. *Id.*, 821 N.E.2d at 214.
563. *Id.*, 821 N.E.2d at 214.
564. *Id.* at 156, 821 N.E.2d at 214.
565. *Id.*, 821 N.E.2d at 214.
566. *Id.* at 161, 821 N.E.2d at 218.
567. *Id.* at 162, 821 N.E.2d at 218.
568. *Id.*, 821 N.E.2d at 218.

a ruling by the state administration agency.[569] Rather, CILCO was informed by the EPA of its strict liability for coal tar contamination.[570] CILCO was aware of soil contamination at one of the sites and aware that it owned at least two other sites with buried coal tar in containment structures that posed a threat of release.[571] Based upon these facts, CILCO elected to participate in a voluntary cleanup program.[572] The alternative, as described by the EPA, was to "do it the hard way" by ignoring the problem until the IEPA initiated an enforcement proceeding.[573]

The court then went into a lengthy discussion of several cases dealing with this issue.[574] The court was persuaded by *Vogue Tyre & Rubber Company v. CIGNA*[575] in which the Northern District found that under Illinois law, mandatory environmental regulations imposed a legal obligation without a requirement of a third-party action.[576] Thus, that court found that Vogue Tyre was legally obligated to remediate the site, not only in the absence of a lawsuit, but in the absence of any action by the IEPA or other party triggering a claim for damages.[577] The court also noted that although it agreed with Vogue Tyre, it also agreed with CLMI that insureds ought not to be able to act entirely unilaterally to undertake environmental cleanup and then to obtain indemnification on the basis that they were legally obligated to do so.[578] The court found that if no third party asserts a right to damages, the payment is merely gratuitous.[579] The court concluded, therefore, that the mere existence of regulations and the insured's decision to voluntarily undertake environmental cleanup was not sufficient to invoke the insurer's duty to indemnify.[580] The insured must, at a minimum, be acting in response to a claim.[581]

In the present case, the affidavit of one of CILCO's employees revealed that CILCO was confronted with a claim in the form of an

---

569. *Id.*, 821 N.E.2d at 218.
570. *Id.*, 821 N.E.2d at 218.
571. *Id.*, 821 N.E.2d at 218.
572. *Id.* at 163, 821 N.E.2d at 219.
573. *Id.*, 821 N.E.2d at 219.
574. *Id.*, 821 N.E.2d at 219.
575. 1998 WL 801786 (N.D. Ill. Nov. 13, 1998), reconsideration granted and summary judgment denied, No. 96 C 4864, 1999 WL 33117273 (N.D. Ill. Feb. 11, 1999).
576. *Cent. Ill. Light*, 213 Ill. 2d at 166, 821 N.E.2d at 221.
577. *Id.* at 168, 821 N.E.2d at 222.
578. *Id.*, 821 N.E.2d at 222.
579. *Id.* at 174, 821 N.E.2d at 225.
580. *Id.*, 821 N.E.2d at 225.
581. *Id.*, 821 N.E.2d at 225.

assertion by the Illinois EPA that the agency intended to enforce the strict liability provision against owners or operators of former MGP sites.[582] Therefore, the court found that CILCO was operating under a legal obligation when it agreed to participate in a voluntary cleanup program.[583]

The court then addressed the question of whether the cost incurred by CILCO for a statutory mandated environmental cleanup and response to the IEPA's claim may be considered "damages" under the policies.[584] The court noted that damages may be distinguished from some other sorts of payments by their remedial purpose.[585] The language of the Environmental Protection Act makes the remedial purpose of the cleanup expenditures clear.[586] The act imposes liability for "all costs of removal or remedial action"[587] and refers to "costs and damages" provided for in this section.[588] Based upon these facts, the court concluded that the expenditures made in response to a claim of strict liability asserted by the IEPA against CILCO were made for remedial purposes and, as such, constituted damages within the plain meaning of the policy.[589]

Lastly, the court addressed CLMI's and CILCO's argument that the court should take public policy concerns into account when construing the language of the CLMI policies.[590] The court found that the questions presented in this case, while complex, were merely ones of construction of the language of an insurance policy and that any effect of its Holdings on either CLMI or the insurance industry as a whole could be remedied by the drafting of more specific policy language.[591] Thus, the court declined to consider public policy in making its determination.[592]

Therefore, the court affirmed the judgment of the appellate court, reversing the circuit court, and remanding for further proceedings.[593]

---

582. *Id.*, 821 N.E.2d at 225.
583. *Id.* at 175, 821 N.E.2d at 225.
584. *Id.*, 821 N.E.2d at 225.
585. *Id.*, 821 N.E.2d at 225.
586. *Id.* at 176, 821 N.E.2d at 226.
587. 415 ILCS 5/22.2(f) (West 2002).
588. 415 ILCS 5/22.2(i) (West 2002).
589. *Cent. Ill. Light*, 213 Ill. 2d. at 176, 821 N.E.2d at 226.
590. *Id.*, 821 N.E.2d at 226.
591. *Id.* at 177, 821 N.E.2d at 226.
592. *Id.*, 821 N.E.2d at 226.
593. *Id.*, 821 N.E.2d at 226.

IV. AUTOMOBILE INSURANCE

A. Policy Terms, Conditions, and Exclusions

Bohner v. Ace American Insurance Co.[594]

Holding: DUI was a criminal act within meaning of exclusion in "auto gap" policy for loss arising directly or indirectly out of any criminal act of the insured; Criminal act exclusion in "auto gap" policy did not violate public policy where used to deny coverage to insured involved in single car accident while driving drunk.[595]

On August 24, 2002, Jeremy Bohner, the plaintiff, purchased a GMC Sonoma.[596] On that same date, he purchased a "auto gap" insurance policy from Ace American Insurance Company, the defendant.[597] On February 8, 2004, Bohner was involved in an automobile accident that resulted in the total loss of his vehicle.[598] He was charged with driving under the influence of alcohol at the time of the accident and plead guilty to the DUI charge.[599]

Ace subsequently refused to cover the loss of the plaintiff's vehicle due to an exclusion in the "auto gap" policy for criminal or illegal acts.[600] Bohner then filed a breach of contract action against Ace.[601] On December 9, 2004, the trial court ruled on the parties' cross-motions for summary judgment, granting the plaintiff's motion for summary judgment and denying defendant's motion for summary judgment.[602] The defendant then filed this appeal.[603]

On appeal, Ace argued that, because the language of the exclusion is clear and should be applied as written, the trial court erred in granting the plaintiff's motion for summary judgment.[604] The court agreed, finding that the terms of the insurance policy were clear and

---

594. 359 Ill. App. 3d 621, 834 N.E.2d 635 (2d Dist. 2005).
595. *Id.*, 834 N.E.2d 635.
596. *Id.* at 622, 834 N.E.2d at 637.
597. *Id.*, 834 N.E.2d at 637.
598. *Id.*, 834 N.E.2d at 637.
599. *Id.*, 834 N.E.2d at 638.
600. *Id.*, 834 N.E.2d at 638.
601. *Id.*, 834 N.E.2d at 638.
602. *Id.*, 834 N.E.2d at 638.
603. *Id.*, 834 N.E.2d at 638.
604. *Id.*, 834 N.E.2d at 638.

unambiguous.[605] The plaintiff's policy excludes from coverage losses due to dishonest, fraudulent, criminal, or illegal acts.[606] The court noted that driving under the influence is a criminal act in the State of Illinois.[607] Accordingly, the court found that losses due to driving under the influence by the plaintiff were not covered under the insurance policy.[608]

The plaintiff cited the case of *Lincoln Logan Mutual Insurance Co. v. Fornshell*,[609] for the proposition that the exclusion at issue here contravenes public policy.[610] The court found that the plaintiff's reliance on Lincoln Logan was misplaced.[611] In *Lincoln Logan*, Fornshell became involved in a physical altercation during which Sturgeon stabbed Fornshell in the chest and abdomen with a pocketknife.[612] Fornshell died and Sturgeon was convicted of first-degree murder. Fornshell's parents then sued Sturgeon for wrongful death.[613]

Logan Mutual Insurance and Grinnell Mutual Reinsurance defended Sturgeon under a reservation of rights under the personal liability coverage in his homeowner's policy.[614] The carriers brought an action for declaratory judgment alleging that Sturgeon's policy did not cover him for intentional acts.[615] Following a bench trial, the court found in favor of the insurance companies.[616]

On appeal, the Illinois Appellate Court for the Fourth District upheld the ruling of the trial court, noting that the intentional acts exclusion was problematic in that it could render the insurance policy illusory if it excluded coverage for intentional acts as well as negligent and innocent acts.[617] The court noted that the exclusion should not be read in isolation, but with reference to the facts of the case at hand and that the provisions should be reasonably interpreted so as not to render an absurd result.[618] Reading the exclusion in conjunction with the

605. *Id.* at 623, 834 N.E.2d at 639.
606. *Id.*, 834 N.E.2d at 639.
607. *Id.*, 834 N.E.2d at 639.
608. *Id.* at 623–24, 834 N.E.2d at 639.
609. 309 Ill. App. 3d 479, 722 N.E.2d 239 (4th Dist. 1999).
610. *Bohner*, 359 Ill. App. 3d at 624, 834 N.E.2d at 639.
611. *Lincoln Logan*, 309 Ill. App. 3d at 480, 722 N.E.2d at 240.
612. *Id.*, 722 N.E.2d at 240.
613. *Id.*, 722 N.E.2d at 240.
614. *Id.* at 480–81, 722 N.E.2d at 240.
615. *Id.* at 481, 722 N.E.2d at 240.
616. *Id.* at 482–83, 722 N.E.2d at 242.
617. *Id.* at 483–85, 722 N.E.2d at 242–43.
618. *Id.* at 484–85, 722 N.E.2d at 242–43.

relevant facts, the court found that the parties did not intend to insure for the intentional act of murder.[619]

The appellate court here found that although Lincoln Logan was somewhat analogous to the facts of the present case, it did not support the plaintiff's belief that the criminal acts exclusion was contrary to public policy.[620] The court found that the Lincoln Logan case supported its conclusion that public policy is not offended by the instant provision.[621] As noted in Lincoln Logan, the court found that exclusion should not be read in isolation, but should be read in conjunction with the facts at hand.[622] The court found that whether an insurance policy violates public policy depends on the facts and circumstances of the case as well as the language of the insurance policy.[623]

A literal interpretation of this exclusion would effectively deny coverage for acts as minimal as infractions of the statutory rules of the road.[624] Policyholders and insurance companies normally do not expect instances of speeding, running a stop sign, etc. to be excluded from insurance coverage.[625] Although in this instance driving under the influence was a criminal offense, the parties here clearly did not intend that coverage would be provided for criminal acts such as drunk driving.[626] The court also found that the exclusion for a criminal act such as drunk driving is reasonable in this case because the insurance policy in question was an "auto gap" policy and did not impose undue hardship on innocent third parties who may have been involved in the accident.[627]

The court noted that courts in other jurisdictions have been reluctant to apply criminal act exclusions contained in automobile liability policies.[628] In those cases, applying the criminal act exclusion would deny insurance coverage to innocent victims of criminal acts which would run afoul of the mandatory automobile liability insurance statutory provisions.[629] In the present case, the court is not construing

---

619. *Id.* at 483, 722 N.E.2d at 242.
620. *Bohner*, 359 Ill. App. 3d at 624, 834 N.E.2d at 639.
621. *Id.*, 834 N.E.2d at 639.
622. *Id* at 625, 834 N.E.2d at 640.
623. *Id.*, 834 N.E.2d at 640.
624. *Id*, 834 N.E.2d at 640.
625. *Id*, 834 N.E.2d at 640.
626. *Id*, 834 N.E.2d at 640.
627. *Id* at 626, 834 N.E.2d at 641.
628. *Id*, 834 N.E.2d at 641.
629. *Id*, 834 N.E.2d at 641.

an automobile liability policy but rather construing an auto gap policy.[630] Thus, in this instance, there is no public policy concern of innocent victims being left without coverage.[631] The court of appeals reversed the judgment of the Circuit Court of Lake County.[632]

Progressive Universal Insurance Co. of Illinois v. Liberty Mutual Fire Insurance Co.[633]

Holding: Commercial exclusion not ambiguous or against public policy. Section 7–317(b)(2) of the Illinois Safety and Family Responsibility Law is "intended to insure that . . . of entrusting one's vehicle to someone else does not foreclose an injured party from obtaining payment for otherwise covered losses resulting from operation of the vehicle."[634]

In *Progressive*, the defendant insured, Shirley Abbinate, owned a mini van that her son, Ronald Abbinate, was using for a pizza delivery job with Casale Pizza.[635] He hit a pedestrian while delivering a pizza.[636] The Plaintiff insurer, Progressive, denied coverage on the basis that commercial use of the vehicle was excluded.[637] Defendant, Liberty Mutual Insurance Company, paid the pedestrian under his uninsured motorist coverage with Liberty.[638]

The policy excluded coverage for bodily injury or property damage arising out of "the ownership, maintenance, or use of a vehicle while being used to carry persons or property for compensation or a fee, including, but not limited to, delivery of . . . food, or any other products."[639] Cross motions for summary judgment were filed on Progressive's declaratory judgment action.[640] Liberty argued that the exclusion did not apply because it was ambiguous and against public policy.[641] The trial court granted Progressive's motion.[642]

---

630. *Id*, 834 N.E.2d at 641.
631. *Id*, 834 N.E.2d at 641.
632. *Id* at 627, 834 N.E.2d at 642.
633. 215 Ill. 2d 121, 828 N.E.2d 1175 (2005).
634. *Id.* at 137, 828 N.E.2d at 1184.
635. *Id.* at 124, 828 N.E.2d at 1177.
636. *Id.*, 828 N.E.2d at 1177.
637. *Id.* at 125, 828 N.E.2d at 1178.
638. *Id.* at 124, 828 N.E.2d at 1177.
639. *Id.* at 125, 828 N.E.2d at 1178.
640. *Id.*, 828 N.E.2d at 1178.
641. *Id.*, 828 N.E.2d at 1178.
642. *Id.*, 828 N.E.2d at 1178.

The appellate court agreed the provision was unambiguous, but found it was void and unenforceable because against public policy.[643] The court relied upon *State Farm Mutual Automobile Insurance Co. v. Smith*,[644] in finding the exclusion against public policy because contrary to section 7–317(b)(2) of the Illinois Safety and Family Responsibility Law.[645] The Act provides that an owner's auto insurance policy "shall insure the person named therein and any other person using or responsible for the use of such motor vehicle . . . with the express or implied permission of the insured."[646] The appellate court concluded that because Ronald was using the vehicle with his mother's express permission, Progressive was required to defend and indemnify Ronald in the lawsuit by the pedestrian.[647]

On review the court balanced the state's mandatory liability insurance requirement to protect the public against the principles of freedom of contract.[648] "The power to declare a private contract void as against public policy is . . . exercised sparingly."[649] The court noted that "an agreement will not be invalidated on public policy grounds unless it is clearly contrary to what the constitution, the statutes or the decisions of the courts have declared to be the public policy or unless it is manifestly injurious to the public welfare."[650] The decision whether an agreement is contrary to public policy is scrutinized on case by case analysis.[651]

Liberty Mutual relied primarily on the court's decision in *Smith*.[652] In that case, an individual insured by State Farm drove to a casino with a companion and left the vehicle with a parking valet employed by the casino.[653] When the valet later retrieved the vehicle it rolled backwards while the insured's companion was entering the car "striking her and knocking her to the ground."[654]

Following the accident, the companion filed a negligence action

---

643. *Id.* at 126, 828 N.E.2d at 1178.
644. 197 Ill. 2d 369, 757 N.E.2d 881 (2001).
645. *Progressive*, 215 Ill. 2d at 126–27, 828 N.E.2d at 1178–79 (citing Mutual Auto. Ins. Co. v. Smith, 197 Ill. 2d 369, 757 N.E.2d 881 (2001)).
646. 625 ILCS 5/7–317(b)(2) (2006).
647. *Progressive*, 215 Ill. 2d at 127, 828 N.E.2d at 1179.
648. *Id.* at 128–30, 828 N.E.2d at 1179–80.
649. *Id.* at 129, 828 N.E.2d at 1180.
650. *Id.* at 129–30, 828 N.E.2d at 1180.
651. *Id.* at 130, 828 N.E.2d at 1180.
652. *Id.*, 828 N.E.2d at 1180.
653. *Id.*, 828 N.E.2d at 1180.
654. *Id.*, 828 N.E.2d 1180.

against the insured, valet, and the casino.[655] State Farm was contacted by the valet and casino with requests for State Farm to tender their defense.[656] State Farm argued it owed no duty to defend or indemnify either party, and as a result, brought an action to obtain a declaratory judgment.[657] In its action, State Farm relied on a provision in the policy, "which specified that no coverage would be provided when the subject vehicle was 'being repaired, serviced or used by any person employed or engaged in any way in a car business.'"[658]

Holding that the policy exclusion applied, the circuit court ruled State Farm had no duty to defend or indemnify the valet or casino.[659] The appellate court subsequently reversed the trial court's decision based on two reasons.[660] "First, it held that the exclusion was unenforceable because it conflicted with the mandatory language of the omnibus clause provision set forth in section 7– 317(b)(2) of the Illinois Safety and Family Financial Responsibility Law and the policy of [Illinois'] mandatory automobile insurance legislation.[661] Second, it ruled that the exclusion was inapplicable because the valet parking service furnished by the casino did not constitute a 'car business' within the meaning of the policy."[662]

The Illinois Supreme Court relied only on the first of these grounds because a vehicle owner must give express or implied permission to those in the car business to use the vehicle.[663] Therefore, the court concluded that "because the policy excluded persons using the vehicle with the insured's permission, it violated section 7–317(b)(2) and was void."[664] However, the court went to state that "the permissibility of other possible policy exclusions is not before us today and we express no opinion as to any other exclusion."[665]

In this case, the court found a significant factual distinction between the car business exclusion at issue in *Smith* and the food

---

655. *Id.* at 130, 828 N.E.2d at 1181.
656. *Id.*, 828 N.E.2d at 1181.
657. *Id.*, 828 N.E.2d 1175, 1181.
658. *Id.*, 828 N.E.2d 1175, 1181.
659. *Id.* at 130–31, 828 N.E.2d at 1181.
660. *Id.* at 131, 828 N.E.2d at 1181.
661. *Id.*, 828 N.E.2d 1175, 1181.
662. *Id.*, 828 N.E.2d at 1181.
663. *Id.*, 828 N.E.2d at 1181.
664. *Id.* at 132, 828 N.E.2d at 1181.
665. *Id.*, 828 N.E.2d at 1182 (quoting State Farm Mutual v. Smith, 197 Ill. 2d 369, 379, 757 N.E.2d 881, 886 (2001)).

delivery exclusion in Ronald's mother's policy.[666] Permissive users where the only users in which the car business exclusion found in Smith would apply.[667] "Unlike the exclusion in this case, it was inapplicable to the named insured or his spouse, or any agent, employee or partner of the insured, his spouse and certain others.[668] The named insured, his spouse, and the others were expressly exempted from the exclusion."[669] As a result, conduct undertaken by someone using the vehicle with the insured's permission would not be covered although it would have been had the conduct been undertaken by the insured.[670]

The court stated no one was exempt from the food delivery exclusion in this case because of the "clear and unambiguous terms of the policy," and as a result, the exclusion would apply to the named insured as well as anyone using the van with permission.[671] Liability insurance coverage was found to extend to permissive users of the vehicle because Progressive's policy did not differentiate between the insured and permissive drivers as was the case in *Smith*.[672] "As a result, the food delivery exclusion [did] not conflict with the statute and [could not] be said to be void as against public policy."[673]

The court reasoned "[i]f section 7–317(b)(2) operated to invalidate the food delivery exclusion with respect to permissive users such as Ronald, . . . Progressive would be obliged to defend and indemnify permissive users for conduct that would clearly not be covered if undertaken by the actual named insured."[674]

"Liberty Mutual contends that Illinois' mandatory liability insurance requirement nullifies virtually any exclusion that would allow an insurer to avoid providing less than the minimum liability coverage required by law."[675] The court found that this requirement did not run to the insurance carriers, but rather to the owners and operators of motor vehicles.[676] Furthermore, insurance carriers are not required

666. *Id.* at 132–34, 828 N.E.2d at 1182–83.
667. *Id.* at 133, 828 N.E.2d at 1182.
668. *Id.*, 828 N.E.2d at 1182.
669. *Id.*, 828 N.E.2d at 1182.
670. *Id.* at 133, 828 N.E.2d at 1182.
671. *Id.* at 134, 828 N.E.2d at 1182–83.
672. *Id.*, 828 N.E.2d at 1183.
673. *Id.*, 828 N.E.2d at 1183.
674. *Id.* at 135, 828 N.E.2d at 1183.
675. *Id.* at 136, 828 N.E.2d at 1184.
676. *Id.*, 828 N.E.2d at 1184.

to cover, without exclusion, every loss operators and owners sustain.[677]

Restrictions on the insurance required to comply with the law must be statutorily derived because the liability insurance requirement is statutory in origin.[678] However, the law does not expressly forbid parties from excluding certain risks from liability coverage in an insurance contract.[679] "Inclusion of permissive users goes to the issue of who must be covered.[680] It says nothing of what risks must be covered."[681] "To hold that requiring coverage for permissive users means that insurers are forbidden from excluding certain types of risks from coverage requires a leap in reasoning that neither the language of the statute nor the rules of statutory construction will support."[682]

Accordingly, the court held that section 7–317(b)(2) of the Illinois Safety and Family Responsibility Law is simply "intended to insure that the common and often unavoidable practice of entrusting one's vehicle to someone else does not foreclose an injured party from obtaining payment for otherwise covered losses resulting from operation of the vehicle."[683]

Canal Insurance v. A&R Transportation & Warehouse, LLC[684]

Holding: Injured driver was statutory employee within the meaning of MCS–90 endorsement which did not provide liability coverage for insured's employees while engaged in the course of their employment.[685]

Canal Insurance (Canal) issued an automobile liability insurance policy to A&R Transportation and Warehouse LLC (A&R) with effective dates of December 26, 1998, to December 26, 1999.[686] On the declarations page, the description of owned automobiles stated "See Endorsement E69L attached."[687] Endorsement E69L listed a number

677. *Id.*, 828 N.E.2d at 1184.
678. *Id.*, 828 N.E.2d at 1184.
679. *Id.*, 828 N.E.2d at 1184.
680. *Id.* at 137, 828 N.E.2d at 1184.
681. *Id.*, 828 N.E.2d at 1184.
682. *Id.*, 828 N.E.2d at 1184.
683. *Id.*, 828 N.E.2d at 1184.
684. Canal Ins. v. A&R Transp. & Warehouse, LLC, 357 Ill. App. 3d 305, 827 N.E.2d 942 (1st Dist. 2005).
685. *Id.* at 306, 827 N.E.2d at 943.
686. *Id.* at 307, 827 N.E.2d at 944.
687. *Id.*, 827 N.E.2d at 944.

of tractors. However, there were no individual trailers listed.[688] In the space provided for a description of scheduled vehicles, the endorsement stated "any trailer while singularly attached to a scheduled tractor."[689]

The policy also contained endorsement MCS–90 entitled "Endorsement For Motor Carrier Policies of Insurance for Public Liability Under Sections 29 and 30 of the Motor Carrier Act of 1980."[690] This endorsement provided that the insurer agreed to pay, "within the limits of liability. . . , any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles subject to the financial responsibility requirements of Sections 29 and 30 of the Motor Carrier Act of 1980, regardless of whether . . . each motor vehicle was specifically described in the policy."[691] The endorsement further provided that this insurance did not apply to injury to the insured's employees, while the employees were engaged in the course of their employment.[692]

On October 5, 2000, Kenneth Boyd (Boyd) filed an action in the Circuit Court of Cook County against Vickie O'Neal, A&R Transportation Trucking, Inc., and A&R Transport, seeking damages for injuries he received on April 21, 1999, when he lost control of a vehicle he was operating.[693] In his complaint, Boyd alleged that prior to April 21, 1999, he contracted to haul refrigerated freight owned by A&R Transportation Trucking, Inc. and/or A&R Transport using a trailer provided by them.[694] He rented a tractor from O'Neal.[695] Boyd was injured when the brakes on the tractor and/or trailer failed as he applied them while descending a hill, causing him to lose control of the tractor/trailer.[696]

A&R requested that Canal defend and indemnify it in the Boyd action. Canal, acting under a reservation of rights, undertook A&R's defense and filed this action for declaratory judgment seeking a declaration that it had no duty to defend or indemnify A&R.[697] Canal

688. *Id.*, 827 N.E.2d at 944.
689. *Id.*, 827 N.E.2d at 944.
690. *Id.*, 827 N.E.2d at 944.
691. *Id.*, 827 N.E.2d at 944.
692. *Id.* at 308, 827 N.E.2d at 944.
693. *Id.*, 827 N.E.2d at 945.
694. *Id.*, 827 N.E.2d at 945.
695. *Id.*, 827 N.E.2d at 945.
696. *Id.*, 827 N.E.2d at 945.
697. *Id.* at 308, 309, 827 N.E.2d at 945.

asserted that, because neither the tractor nor the trailer was described in the policy's declarations or scheduled on the policy, no coverage was afforded to A&R under the policy.[698] Boyd asserted in response that under the provisions of MCS–90 endorsement, Canal was required to pay any judgment that might be rendered against A&R, regardless of whether the tractor or the trailer was specifically described in the policy.[699]

Boyd and Canal filed cross-motions for summary judgment.[700] The trial court denied Boyd's motion and granted Canal's cross-motion, finding that Canal owed no duty to defend or indemnify A&R.[701] Boyd's motion for reconsideration was denied and this appeal followed.[702]

On appeal, Canal argued that the policy affords no coverage for the claims asserted against A&R in the underlying action as neither the tractor nor the trailer fall within the definition of an "owned automobile."[703] Boyd admitted that this is true but asserted that the provisions of the MCS-90 endorsement negated the limiting definition of an "owned automobile" contained within the policy and obligated Canal to indemnify A&R for any damages that might be awarded against it in the underlying action.[704] In response, Canal argued that the MCS-90 endorsement provided that the coverage afforded thereunder did not apply to injuries sustained by an employee of A&R while acting in the course of his employment.[705] Canal argued that, for purposes of the application of the endorsement, Boyd was an employee of A&R and, as a consequence, the endorsement affords A&R no coverage for the occurrence alleged.[706]

The appellate court agreed. In so holding, the court noted that MCS-90 is a federally mandated endorsement whose terms are specified by federal regulation.[707] Therefore, federal law governs its operation and effect.[708] The endorsement specifically excludes from coverage "the insured's employees while engaged in the course of their

698. *Id.* at 309, 827 N.E.2d at 945.
699. *Id.*, 827 N.E.2d at 945.
700. *Id.*, 827 N.E.2d at 945.
701. *Id.*, 827 N.E.2d at 945.
702. *Id.*, 827 N.E.2d at 945.
703. *Id.* at 310, 827 N.E.2d at 946.
704. *Id.*, 827 N.E.2d at 946.
705. *Id.*, 827 N.E.2d at 946.
706. *Id.*, 827 N.E.2d at 946.
707. *Id.* at 311, 827 N.E.2d at 947.
708. *Id.*, 827 N.E.2d at 947.

employment."[709]

In *Perry v. Harco National Insurance Co.*,[710] the Ninth Circuit addressed the meaning of the term "employee" as used in the MCS-90 endorsement.[711] The court noted that the term "employee" is defined in 49 C.F.R. § 390.5 as "a driver of a commercial motor vehicle (including an independent contractor while in the course of operating a commercial motor vehicle)" and concluded that this definition of "employee" would be applied when interpreting an MCS-90 endorsement.[712]

Boyd argued that adopting this definition of "employee" would be in direct conflict with the express provisions of the Motor Carrier Act of 1980 and the express language of the statute's liability insurance requirement.[713] The court disagreed, finding that this argument was previously rejected in *Consumers County Mutual Insurance Co. v. P.W. & Sons Trucking, Inc.*,[714] which held that the purpose of the insurance requirement in the MCS-90 endorsement was to compensate members of the public.[715] The court found that the MCS-90 endorsement did not require motor carriers to obtain coverage for injury to or death of their employees while engaged in the course of their employment.[716]

At the time of the accident, Boyd was hauling a load of refrigerated freight in furtherance of his contract with A&R.[717] He was driving a tractor he had leased from O'Neal and was pulling A&R's trailer.[718] Because Boyd was a statutory employee of A&R at the time of the occurrence, the coverage afforded to A&R by reason of the MCS-90 endorsement does not apply.[719]

Boyd further contended that a finding that he was an employee of A&R in the context of this declaratory judgment action was inappropriate, as it would be binding upon him in the underlying action.[720] The court disagreed, holding that its finding was applicable only to a determination of coverage under the MCS-90 endorsement

---

709. *Id.*, 827 N.E.2d at 947.
710. 129 F.3d 1072 (9th Cir. 1997).
711. *Canal Ins.*, 357 Ill. App. 3d at 311, 827 N.E.2d at 947.
712. *Id.*, 827 N.E.2d at 947.
713. *Id.*, 827 N.E.2d at 947.
714. 307 F.3d 362 (5th Cir. 2002).
715. *Canal Ins.*, 357 Ill. App. 3d at 311, 827 N.E.2d at 947.
716. *Id.*, 827 N.E.2d at 947.
717. *Id.* at 312, 827 N.E.2d at 947.
718. *Id.*, 827 N.E.2d at 947.
719. *Id.* at 312, 827 N.E.2d at 948.
720. *Id.*, 827 N.E.2d at 948.

and had no implication for the underlying action.[721]

Boyd also argued that the Illinois Commercial Transportation Law required that all motor carriers maintain insurance coverage and that all motor vehicles operated by or under the authority of the carrier be covered.[722] The court found that the Illinois Commercial Transportation Law argued by Boyd applied only to intrastate commerce.[723] At the time of the accident, Boyd was hauling a load of refrigerated freight for A&R from Illinois to Pennsylvania.[724] As a consequence, Boyd was engaged in interstate commerce.[725] Therefore, the provisions of the Transportation Act upon which he relied had no application.[726]

Based upon the above analysis, the court found that the occurrence alleged in the underlying action did not fall within the coverage afforded to A&R under the policy.[727] The court therefore affirmed the Circuit Court's order denying Boyd's motion for summary judgment and granted summary judgment in favor of Canal.[728]

American Family Insurance Group v. Cleveland[729]

Holding: Right of subrogation within the policy was enforceable against injured passenger in insured's vehicle.[730]

Plaintiff American Family filed a three count complaint against Cleveland, a passenger in its insured's vehicle whose medical expenses plaintiff had paid under it medical payment portion of the policy.[731] The trial court dismissed the counts based on contractual subrogation and third party beneficiary, and held a bench trial on the theory of equitable subrogation, ruling in favor of defendant.[732] In reversing the trial court, the appellate court noted that life, accident, medical, and health insurers traditionally do not have an equitable or an implied right

721. *Id.*, 827 N.E.2d at 948.
722. *Id.*, 827 N.E.2d at 948.
723. *Id.*, 827 N.E.2d at 948.
724. *Id.* at 313, 827 N.E.2d at 948.
725. *Id.*, 827 N.E.2d at 948.
726. *Id.*, 827 N.E.2d at 948.
727. *Id.*, 827 N.E.2d at 948.
728. *Id.*, 827 N.E.2d at 948.
729. 356 Ill. App. 3d 945, 827 N.E.2d 490 (4th Dist. 2005).
730. *Id.* at 950, 827 N.E.2d at 494–95
731. *Id.* at 946–47, 827 N.E.2d at 492.
732. *Id.* at 947, 827 N.E.2d at 492.

of subrogation in Illinois.[733] When such policies contain clear, unambiguous subrogation clauses, however, they will be enforced.[734] In this case, the American Family policy contained such a clause.[735] Despite the fact that Cleveland was not a named insured or a signatory to the policy, she was an insured under the policy, she had accepted the benefits of the policy, and was therefore subject to the subrogation clause.[736] The court remanded the case for entry of order by the trial court in accordance with its decision.[737]

B. Liability Limits and Stacking of Coverage

Hobbs v. Hartford Insurance Co. of the Midwest[738]

Holding: Where anti-stacking clause contained in underinsured motorist policy is unambiguous as to the extent of coverage, the clause will be applied as written.[739]

At issue in these consolidated appeals was whether an insured may "stack," i.e., aggregate, the limits of liability for underinsured-motorist coverage where multiple vehicles are covered under one policy.[740] Hobbs carried underinsured motorist coverage for two vehicles under a single policy issued by Hartford in the amount of $100,000 per person, $300,000 per occurrence.[741] After Hobbs was involved in a motor vehicle accident in which she allegedly sustained injuries and damages in excess of $200,000, she settled the claims against the driver of the other vehicle for the driver's policy limits of $50,000.[742] Pursuant to the underinsured motorist coverage, Hartford tendered to Hobbs a check in the amount of $50,000 representing the difference between the $100,000 per person underinsured motorist coverage afforded under Hobbs' policy and the $50,000 that Hobbs received from the other driver's insurer.[743] Hobbs filed a declaratory judgment

733. *Id.* at 950, 827 N.E.2d at 494.
734. *Id.*, 827 N.E.2d at 494.
735. *Id.* at 951, 827 N.E.2d at 495.
736. *Id.* at 950–51, 827 N.E.2d at 494–95.
737. *Id.* at 951, 827 N.E.2d at 493.
738. 214 Ill. 2d 11, 823 N.E.2d 561 (2005).
739. *Id.* at 31–32, 823 N.E.2d at 572.
740. *Id.* at 14, 823 N.E.2d at 562.
741. *Id.* at 15, 823 N.E.2d at 562–63.
742. *Id.* at 14–15, 823 N.E.2d at 562.
743. *Id.* at 15, 823 N.E.2d at 563.

action maintaining that the Hartford policy was ambiguous as to the limits of the underinsured motorist coverage and that she should be allowed to stack the underinsured motorist coverage for the two vehicles, thus producing a per person limit of $200,000.[744] The trial court rejected Hartford's argument that the policy contained unambiguous anti-stacking language and that the underinsured motorist bodily injury limit was $100,000 per person.[745] The trial court found that the declaration page of the policy contained language inconsistent with and contradictory to the anti-stacking provisions, creating an ambiguity that it resolved in favor of Hobbs to permit stacking.[746] The Appellate Court affirmed and the Supreme Court allowed Hartford's petition for leave to appeal.[747]

In *Anheuser v. Prudential Property & Casualty Insurance*,[748] Leanne Anheuser was involved in a motor vehicle accident while driving a car owned by her parents who carried underinsured motorist coverage with Prudential containing limits of $100,000 per person.[749] Anheuser settled claims against the driver of the other vehicle for the driver's policy limits of $100,000.[750] The Prudential policy covered three vehicles including the one involved in the accident.[751] Prudential took the position that the other driver's bodily injury limits of $100,000 per person were equal to the underinsured motorist.[752] Prudential also maintained that the policy prohibited stacking of underinsured motorist coverage.[753] Anheuser argued that the Prudential policy was ambiguous as to the limits of underinsured motorist coverage and that stacking should be permitted to determine whether the other driver was underinsured.[754] The trial court ruled that the delcarations page of the policy contained language creating an ambiguity that the anti-stacking clause in the policy cannot cure.[755] The trial court ruled in favor of Anheuser and declared that the underinsured motorist bodily injury

744. *Id.*, 823 N.E.2d at 563.
745. *Id.*, 823 N.E.2d at 563.
746. *Id.*, 823 N.E.2d at 563.
747. *Id.*, 823 N.E.2d at 563.
748. *Id.* at 15–16, 823 N.E.2d at 563. Anheuser v. Prudential Prop. & Cas. Ins. was consolidated with *Hobbs* for review by the Illinois Supreme Court. *Id.* at 16, 823 N.E.2d at 563–64.
749. *Id.*, 823 N.E.2d at 563–64.
750. *Id.* at 16, 823 N.E.2d at 563.
751. *Id.*, 823 N.E.2d at 563.
752. *Id.*, 823 N.E.2d at 563.
753. *Id.*, 823 N.E.2d at 563.
754. *Id.*, 823 N.E.2d at 563.
755. *Id.*, 823 N.E.2d at 563.

limits were $300,000 per person.[756] Therefore, the Supreme Court allowed Prudential's motion for direct appeal and consolidated the case with the Hobbs appeal for review.[757]

The only issue presented to the Supreme Court was whether the Hartford and Prudential policies properly construed, prohibited, or permitted stacking of underinsured motorist coverage.[758] The Supreme Court noted that the Illinois Insurance Code expressly authorizes the use of anti-stacking provisions in motor vehicle policies and therefore if the anti-stacking clauses at issue are unambiguous, they will be given effect.[759] As to Hobbs' policy, Hartford principally relied on *Bruder v. Country Mutual Insurance Co.*,[760] and argued that the "limit of liability" provision, when read in conjunction with the declaration page of the policy, unambiguously prohibited stacking and limited underinsured motorist bodily injury coverage to $100,000 per person.[761] Citing, *Bruder* and *Domin v. Shelby Insurance Co.*,[762] with approval, the Supreme Court held that the anti-stacking clause in the Hartford policy unambiguously limits coverage to $100,000 per person, regardless of the number of vehicles or premiums shown on the declarations, and that the statement "Coverage is provided only where a premium is shown for the auto and coverage," does not create an ambiguity as to Hartford's limit of liability.[763] The anti-stacking clause, the court held, will be enforced as written.[764] Accordingly, the court reversed the judgment of the appellate court and the trial court permitted stacking of underinsured motorist coverage.[765]

As to the Prudential policy, the court noted that although the question was whether the other driver was "underinsured," the analysis regarding the Prudential policy was the same as that related to the Hartford policy.[766] That is, if the anti-stacking clause in the Prudential policy is enforced, the limits under the other driver's policy and Anheuser's policy will be equal and underinsured motorist coverage

---

756. *Id.*, 823 N.E.2d at 563.
757. *Id.* at 16, 823 N.E.2d at 563–64.
758. *Id.* at 17, 823 N.E.2d at 564.
759. *Id.* at 18, 823 N.E.2d at 564.
760. Bruder v. Country Mut. Ins. Co., 156 Ill. 2d 179, 620 N.E.2d 355 (1993)
761. *Hobbs*, 214 Ill. 2d at 19, 823 N.E.2d at 565.
762. Domin v. Shelby Ins. Co., 326 Ill. App. 3d 688, 761 N.E.2d 746 (1st Dist. 2001)
763. *Hobbs*, 214 Ill. 2d at 27, 823 N.E.2d at 570.
764. *Id.*, 823 N.E.2d at 570.
765. *Id.*, 823 N.E.2d at 570.
766. *Id.* at 27–28, 823 N.E.2d at 570–71.

will not be available.[767] The trial court had relied on *Hall v. General Casualty Co. of Illinois*,[768] in ruling that the declaration page was ambiguous and would be construed to permit stacking.[769] The Supreme Court expressly overruled Hall finding that the statement "insurance is provided where a premium is shown" does not address the issue of stacking, and cannot reasonably be read as "directly contradictory" to the anti-stacking clause.[770] The court further explained that under any reasonable reading, the statement "if a premium charge does not appear, that coverage is not provided" does not suggest how to answer the question of whether coverage may be stacked.[771] The answer, however, was found in the unambiguous anti-stacking clause which provided "coverage on other cars insured by us cannot be added to or stacked on the coverage of the particular car in favor of the insured," the court further explained that it would not, however, "torture ordinary words until they confessed to ambiguity."[772] As with the Hartford policy, the Supreme Court also held that the Prudential policy anti-stacking clause will be enforced as written, and reversed the judgment of the Appellate and Circuit Court.[773]

C. Uninsured Motorists and Underinsured Motorist Coverage

Illinois Farmers Insurance Co. v. Marchwiany[774]

Holding: Automobile policy only had per-person UIM coverage limit, as opposed to per-occurrence UIM coverage limit, that applied to survivor of decedent's claims.[775]

Boguslaw Marchwiany sustained fatal injuries in an automobile accident.[776] The vehicle Mr. Marchwiany operated at the time of the accident was insured under a policy issued by American Family Insurance Company (American Family), with UIM coverage limits of

767. *Id.*, 823 N.E.2d at 570–71.
768. Hall v. Gen. Cas. Co. of Ill., 328 Ill. App. 3d 655, 766 N.E.2d 680 (5th Dist. 2002)
769. *Hobbs*, 214 Ill. 2d at 29, 823 N.E.2d at 570–71.
770. *Id.* at 27, 823 N.E.2d 569.
771. *Id.* at 29, 823 N.E.2d 571.
772. *Id.*, 823 N.E.2d 571.
773. *Id.* at 30–31, 823 N.E.2d at 572.
774. 361 Ill. App. 3d 916, 838 N.E.2d 172 (5th Dist. 2005).
775. *Id.* at 923, 838 N.E.2d at 178–79.
776. *Id.* at 917, 838 N.E.2d at 174.

$100,000 per person and $300,000 per occurrence.[777] Additionally, Mr. Marchwiany had an automobile insurance policy issued by Farmers Insurance Company (Farmers), with UIM coverage limits of $100,000 per person and $300,000 per occurrence. Mr. Marchwiany's survivors (survivors) filed legal action against the other drivers involved in the accident.[778] In settling the claims, the other drivers paid the majority of their liability limits, totaling $119,000.[779] The survivors then made UIM claims against Farmers for Mr. Marchwiany's personal injuries and for wrongful death.[780] Farmers responded that these claims were not applicable for UIM coverage.[781] American Family paid the survivors $80,000 in UIM coverage, and the survivors released American Family of any future liability.[782]

Farmers then filed a declaratory judgment action alleging that Mr. Marchwiany "was the only person to sustain bodily injuries," the survivors sought "UIM benefits due to their consequential damages" and the survivors' claims were "subject to the UIM per-person limit of $100,000."[783] Farmers also argued, inter alia, that the American Family policy provided the same amount of coverage as the Farmers policy, the Farmers policy was "excess to the American Family policy" and Farmers was "only required to pay UIM coverage to the extent its limits exceeded those of the American Family policy, but the limits of the Farmers and American Family policies were the same."[784] Farmers sought a declaration that the per-person $100,000 limit applied to the survivors' claims and that it had no obligation to provide UIM coverage to the survivors.[785] The survivors' counterclaimed for declaratory relief, alleging that the $300,000 per-occurrence limit applied to this case for each of the uninsured tortfeasors (totaling $600,000) because more than one claimant existed,[786] citing *Roth v. Illinois Farmers Insurance Co.*[787] Both sides filed summary judgment motions, and the trial court granted Farmers' motion, determining that

777. *Id.*, 838 N.E.2d at 174.
778. *Id.*, 838 N.E.2d at 174.
779. *Id.*, 838 N.E.2d at 174.
780. *Id.*, 838 N.E.2d at 174.
781. *Id.*, 838 N.E.2d at 174.
782. *Id.*, 838 N.E.2d at 174.
783. *Id.*, 838 N.E.2d at 174.
784. *Id.* at 917–18, 838 N.E.2d at 174.
785. *Id.* at 918, 838 N.E.2d at 174.
786. *Id.*, 838 N.E.2d at 174.
787. 324 Ill. App. 3d 293, 754 N.E.2d 439 (5th Dist. 2001).

the per-person limit applied to the survivors' claims.[788] The survivors appealed that decision.[789]

The appellate court affirmed the lower court's ruling in favor of Farmers, applying a per-person limit of $100,000.[790] The court framed this issue as whether *Roth* or *Martin v. Illinois Farmers Insurance*,[791] applied.[792] In *Martin*, the court determined that a derivative claim for UIM coverage for loss of society was subject to the per-person limit.[793] Specifically, the court held that "the driver's vehicle did not satisfy the definition of an underinsured motor vehicle because there was no gap in coverage between the plaintiff's UIM coverage and the amount of the tortfeasor's policy."[794] The court concluded that the policy language (similar to the Farmers' policy here) clearly stated that the per-person limit of liability applied to all damages and that the limit included all the consequential damages sustained by other persons, such as loss of society.[795] The court found this holding consistent with other Illinois cases that held "loss of consortium is a derivative claim to the direct injury that causes it and such claim is generally included and subject to the policy limitations for bodily injury to one person."[796]

Conversely, in *Roth*, the court held that the policy language regarding the per-person limitation of coverage was ambiguous and, therefore, construed the language against the insurer.[797] The court in this case determined that *Martin* controlled.[798] Because the Farmers policy language at issue here was identical to that in *Martin*, the language was unambiguous.[799] The court also noted that, while there were factual similarities with *Roth*, there were also factual similarities with *Martin*.[800] Further, the court noted that while *Roth* was decided after *Martin*, *Roth* did not directly address *Martin*, and that the court was not bound to follow *Roth*.[801] The court reasoned, "[f]ollowing the holding in *Martin*¸ the per-person UIM coverage limit applie[d] here as

788. *Marchwiany*, 361 Ill. App. 3d at 918–19, 838 N.E.2d at 175.
789. *Id.* at 919, 838 N.E.2d at 175.
790. *Id.*, 838 N.E.2d at 175.
791. 318 Ill. App. 3d 751, 742 N.E.2d 848 (2000).
792. *Marchwiany*, 361 Ill. App. 3d at 919, 838 N.E.2d at 175.
793. *Id.* at 920, 838 N.E.2d at 176 (citing *Martin*, 318 Ill. App. 3d at 763, 742 N.E.2d 848).
794. *Id.*, 838 N.E.2d at 176 (citing *Martin*, 318 Ill. App. 3d at 759, 742 N.E.2d 848).
795. *Id.* (citing *Martin*, 318 Ill. App. 3d at 763, 742 N.E.2d 848).
796. *Id.* at 921, 838 N.E.2d at 177.
797. *Id.* (citing *Roth*, 324 Ill. App. 3d at 297–98, 754 N.E.2d 439).
798. *Id.* at 921, 838 N.E.2d at 177.
799. *Id.*, 838 N.E.2d at 177.
800. *Id.* at 922, 838 N.E.2d at 178.
801. *Id.*, 838 N.E.2d at 178.

well: [the survivors'] claims for consequential damages are, therefore, not separate claims, but are included in the $100,000 per-person limit."[802] The court also concluded that the Illinois Supreme Court has previously held that, "where one person received bodily injuries, in one motor vehicle accident, claims for wrongful death fell within the ambit of the policy's UIM coverage limits of $100,000."[803]

Prudential Property & Casualty Insurance Co. v. Kelly[804]

Holding: A declarations page which contains a premium for UIM coverage for multiple vehicles does not permit stacking unless the policy contains a phrase creating an ambiguity.[805]

Prudential Property & Casualty Insurance Company (Prudential) issued an automobile policy to Patricia and Edward Kelly (the Kellys).[806] The policy provided under insured motorist (UIM) coverage for four vehicles.[807] Patricia Kelly was injured in an automobile accident and claimed that the Prudential policy allowed her to aggregate or "stack" the UIM coverage for the four vehicles.[808] The underlying lawsuit was settled for the tortfeasor's policy limits of $100,000.[809]

Prudential took the position that its policy provided UIM coverage only when the bodily injury liability limits of the tortfeasor's policy were lower than the limits of the UIM coverage.[810] The UIM limits on each car in the Prudential policy were $100,000.[811] Prudential denied the Kelly's claim for UIM coverage.[812] The Kelly's asserted that the declarations page of the policy created an ambiguity with regard to whether the UIM coverage limits on the four vehicles could be stacked.[813] Prudential claimed that the policy limits were clear and unambiguous and that the policy contained an anti-stacking

802. *Id.*, 838 N.E.2d at 178 (citing *Martin*, 318 Ill. App. 3d at 763, 742 N.E.2d 848).
803. *Id.*, 838 N.E.2d at 178.
804. 352 Ill. App. 3d 873, 817 N.E.2d 1226 (3d Dist. 2004).
805. *Id.* at 874, 817 N.E.2d at 1227.
806. *Id.*, 817 N.E.2d at 1228.
807. *Id.*, 817 N.E.2d at 1228.
808. *Id.*, 817 N.E.2d at 1228.
809. *Id.*, 817 N.E.2d at 1228.
810. *Id.*, 817 N.E.2d at 1228.
811. *Id.*, 817 N.E.2d at 1228.
812. *Id.*, 817 N.E.2d at 1228.
813. *Id.*, 817 N.E.2d at 1228.

provision.[814]

"The declarations page of the Prudential policy state[d] 'if a premium charge does not appear, that coverage is not provided.'"[815] The UIM liability limits of $100,000 per person was listed once on the declarations page.[816] "A separate premium [was] listed for each of the four vehicles for [the UIM] coverage."[817] The policy also contained an anti-stacking clause which stated that the "limit of coverage applies regardless of the number of policies, insureds, insured cars . . . . Coverages on other cars insured by us cannot be added to or stacked on the coverage of the particular car involved."[818] The court held that the listing of a separate premium for each of the four vehicles did not created any ambiguity with regard to whether the coverages may be stacked.[819] The critical issue before the court was whether the language "[i]f a premium charge does not appear, that charge is not provided" created an ambiguity concerning whether stacking was permitted.[820]

The court in *Hall v. Gentle Casualty of Illinois*[821] reviewed a policy that stated "insurance is provided where a premium is shown."[822] The court held that the language in Hall in conjunction with the separate premiums for each vehicle created an ambiguity and permitted stacking of the UIM limits.[823]

In the present case, there was a distinct difference between the language reviewed by the court in *Hall* stating "insurance is provided where a premium is shown" and the present policy stating if "a premium charge does not appear, that charge is not provided."[824] The court held that the language in the present policy meant only what it stated, which was, "that coverage is not provided when a premium for the coverage does not appear on the declarations page."[825] The language did "not explicitly state or imply that the UIM coverage on all four vehicles may be stacked if one of the vehicles [was] involved in

814. *Id.*, 817 N.E.2d at 1228.
815. *Id.* at 875, 817 N.E.2d at 1229.
816. *Id.*, 817 N.E.2d at 1229.
817. *Id.*, 817 N.E.2d at 1229.
818. *Id.* at 876, 817 N.E.2d at 1229.
819. *Id.*, 817 N.E.2d at 1229.
820. *Id.*, 817 N.E.2d at 1229.
821. 320 Ill. App. 3d 655, 766 N.E.2d 680 (2002).
822. *Prudential Prop.*, 352 Ill. App. 3d at 876, 817 N.E.2d at 1229.
823. *Id.*, 817 N.E.2d at 1229.
824. *Id.* at 876, 817 N.E.2d at 1229–30.
825. *Id.* at 876–77, 817 N.E.2d at 1230.

an accident."[826] "The language only inform[ed] the insured that coverage [was] not provided if a premium [did] not appear on the declarations page."[827]

Any potential confusion with regard to whether stacking was permitted under the policy was clarified by the anti-stacking provision in the policy.[828] That provision clearly stated that stacking would not be permitted.[829] Consequently, the insured was not entitled to stack the UIM benefits under the policy.[830]

V. MEDICAL, HEALTH INSURANCE AND WORKERS' COMPENSATION INSURANCE

Sheppard v. Rebidas[831]

Holding: Workers' compensation lien on second accident did not include $50,000 carrier paid to settle workers' compensation claim for first accident as separate settlements took place and therefore the settlements were not unified so as to allow recovery of the lien on the first accident from the proceeds of employee's settlement of his personal injury claim on the second accident.[832]

Sentry Insurance Company, the subrogee of Maytag, appealed the circuit court's finding that Sentry "did not have a lien, pursuant to Section 5(b) of the Illinois Workers' Compensation Act, against the proceeds of a settlement between the plaintiff, Bernard Sheppard, and the defendant, Bozena Rebidas."[833] This case arose from three work-related accidents in which Sheppard was involved while employed by Maytag.[834] "The first accident occurred on October 17, 2000, the second on December 21, 2000, and the third on June 26, 2002."[835] Shepard filed three claims under the Illinois Workers' Compensation

826. *Id.* at 877, 817 N.E.2d at 1230.
827. *Id.*, 817 N.E.2d at 1230.
828. *Id.*, 817 N.E.2d at 1230.
829. *Id.*, 817 N.E.2d at 1230.
830. *Id.*, 817 N.E.2d at 1230.
831. 354 III. App. 3d 330, 820 N.E.2d 1089 (1st Dist. 2004).
832. *Id.* at 334, 820 N.E.2d at 1093.
833. *Id.* at 330, 820 N.E.2d at 1090.
834. *Id.*, 820 N.E.2d at 1090.
835. *Id.* at 331, 820 N.E.2d at 1090.

Act, one for each claim.[836] For all three claims, Maytag's insurance carrier was Sentry.[837]

"Sentry settled all three of Sheppard's workers' compensation claims."[838] For the October 17, 2000 accident, Sheppard agreed to pay a lump sum of $50,000.[839] This agreement was prepared by Sheppard's attorney, signed by Sentry's claims representative on July 31, 2002, and later approved by the Illinois Industrial Commission.[840] The December 21, 2000 accident was settled by a $1 lump sum payment which was signed on October 8, 2002, by Sentry's representative and approved by the Industrial Commission.[841] A $1 lump sum payment was also made for the June 26, 2002 accident.[842] This agreement was signed by the representative for Sentry on August 20, 2002 and approved by the Industrial Commission on January 10, 2003.[843]

Prior to the settlement of the workers' compensation claims, Sheppard filed a personal injury lawsuit against Rebidas, a third party involved in the December 21 accident.[844] A default judgment was awarded in that action in the amount of $560,000.[845] "While proceedings to vacate the default judgment were pending, Sentry filed a petition to intervene in the suit" asserting that as a result of the December 21accident, it had paid Sheppard over $90,000 and retained a lien in that amount pursuant to Section 5(b) of the Illinois Workers' Compensation Act.[846] The court permitted Sentry's intervention in the action and the Rebidas suit was settled on July 2, 2003 for the sum of $400,000.[847] After the settlement, Sheppard moved that the court enter an order adjudicating Sentry's recoverable workers' compensation lien as amounting only to $19,523.37.[848] Sheppard contended that these medical expenses were the only amount properly included in the lien as the separate settlement for the December 21 accident indicated that Sentry paid only a lump sum of $1 for

836. *Id.* at 330–31, 820 N.E.2d at 1090.
837. *Id.* at 331, 820 N.E.2d at 1090.
838. *Id.*, 820 N.E.2d at 1090.
839. *Id.*, 820 N.E.2d at 1090.
840. *Id.* at 331, 820 N.E.2d at 1091.
841. *Id.*, 820 N.E.2d at 1091.
842. *Id.*, 820 N.E.2d at 1091.
843. *Id.*, 820 N.E.2d at 1091.
844. *Id.*, 820 N.E.2d at 1091.
845. *Id.*, 820 N.E.2d at 1091.
846. *Id.*, 820 N.E.2d at 1091.
847. *Id.*, 820 N.E.2d at 1091.
848. *Id.*, 820 N.E.2d at 1091.

permanent or partial disability.[849] In addition, there was no payment for temporary total disability for the December 21 accident.[850]

Sentry argued, in response, that the settlement contracts it "entered into with Sheppard were negotiated and resolved in unity" and that the $50,000 paid, "though allocated in the settlement agreement to the October 17th accident, gave rise to a lien with regards to the December 21st accident."[851] The parties subsequently settled the medical expenses issued but left open the dispute as to whether Sentry retained a $50,000 lien with regards to the settlement for the December accident.[852]

The claims analyst for Sentry testified that she authorized Sheppard's claims to be settled together for $50,000 but admitted that she signed separate contracts for each settlement at separate dates and times.[853] The attorney who represented Sheppard in the workers' compensation case denied that the claims for the October 17 accident and the December 21 accident were settled together for $50,001.[854] He testified that the different dates appearing next to the signatures on each settlement indicated to him that the contracts were negotiated at separate times and that the claims were never consolidated before the Illinois Industrial Commission.[855] The trial court determined that Sentry did not have a lien on the settlement of the third party action and denied Sentry's request for relief.[856]

On appeal, Sentry contended that it was entitled to the $50,000 lien for permanent partial disability.[857] The appellate court disagreed, finding that Sentry's claim was not supported by the record because the settlement contract for the December 21 accident explicitly stated that there was no lost time or temporary total disability paid.[858] The court also noted that Sentry only agreed to pay Sheppard a lump sum of $1 for permanent partial disability stemming from the December 21 accident.[859]

Sentry argued that the testimony of Sentry's agent showed the

---

849. *Id.*, 820 N.E.2d at 1091.
850. *Id.*, 820 N.E.2d at 1091.
851. *Id.* at 332, 820 N.E.2d at 1091.
852. *Id.*, 820 N.E.2d at 1091.
853. *Id.* at 332, 820 N.E.2d at 1091–92.
854. *Id.*, 820 N.E.2d at 1091–92.
855. *Id.* at 332–33, 820 N.E.2d at 1092.
856. *Id.* at 333, 820 N.E.2d at 1092.
857. *Id.*, 820 N.E.2d at 1093.
858. *Id.* at 334, 820 N.E.2d at 1093.
859. *Id.*, 820 N.E.2d at 1093.

parties' intent to settle Sheppard's claims in unison.[860] The court disagreed, finding that it would not substitute its "judgment for that of the trial court regarding conflicts in testimony and the credibility of witnesses."[861] Accordingly, the court found that the trial court did not err in determining that Sentry's $50,000 payment made in settlement of the claim for the October 17 accident did not give rise to a lien with regards to the claim for the December 21 accident.[862] Therefore, the court affirmed the judgment of the trial court.[863]

Crichton v. Golden Rule Insurance Co.[864]

Holding: Not for profit consumer organization that provided group health insurance as a benefit to members was not liable under the Consumer Fraud and Deceptive Business Practices Act for alleged conduct of the health insurer, nor was it liable for breach of fiduciary duty.[865]

A member of a non-profit consumer organization brought a class action against Golden Rule Insurance Company (Golden Rule) and the consumer group, Federation of American Consumers and Travelers (FACT), alleging violations of the Consumer Fraud and Deceptive Business Practices Act (Act) and for breach of fiduciary duty. The Circuit Court entered summary judgment for FACT.[866]

The complaint against Golden Rule alleged Golden Rule violated the Act because it engaged in a practice called "closing a block" of insurance whereby it periodically discontinued marketing and enrollment of eligible individuals.[867] The practice has the effect of increasing insurance renewal premiums because there are no longer new members enrolled in which to spread the overall cost of insurance.[868]

Plaintiff alleged FACT violated the Act and breached its fiduciary

860. *Id.*, 820 N.E.2d at 1093.
861. *Id.*, 820 N.E.2d at 1093.
862. *Id.*, 820 N.E.2d at 1093.
863. *Id.* at 335, 820 N.E.2d at 1094.
864. 358 Ill. App. 3d 1137, 832 N.E.2d 843 (5th Dist. 2005).
865. *Id.*, 832 N.E.2d 843.
866. *Id.* at 1139, 832 N.E.2d at 846.
867. *Id.* at 1139, 832 N.E.2d at 847.
868. *Id.*, 832 N.E.2d at 847.

duty in connection with the marketing and sale of Golden Rule's health insurance.[869] Plaintiff alleged "Golden Rule and FACT falsely marketed the health insurance as group insurance despite Golden Rule's practice of closing blocks of insurance and causing the insurance to become increasingly expensive."[870] Plaintiff "alleged Golden Rule and FACT concealed from the plaintiff and members of the class the rate consequences of Golden Rule's routine practice of closing blocks of insurance and replacing low, new-issue premium rates with much higher, permanent premium rates."[871] Plaintiff "also alleged that FACT owed a fiduciary duty to its members who purchased Golden Rule health insurance pursuant to the master insurance policies issued to FACT by Golden Rule and that FACT breached its fiduciary duty by participating in the deceptive marketing practices."[872]

Undisputed affidavits filed in support of FACTS motion for summary judgment stated that FACT was a not for profit organization that offered members benefits ranging from travel discounts to health insurance.[873] While membership in FACT was a prerequisite to obtaining health insurance, FACT had no relation or control over Golden Rule and the health insurance policies were issued directly from Golden Rule to the members of FACT and all premiums were paid directly to Golden Rule.[874]

The court found that FACT did not violate the Consumer Fraud and Deceptive Business Practices Act or breach a fiduciary duty.[875] First, regarding the Act, the court noted that the elements to prove a claim are: (1) a deceptive act or practice; (2) intent that the plaintiff rely on the deception; and (3) the occurrence of the deception during a course of conduct involving trade or commerce.[876] "A plaintiff may recover for unfair as well as deceptive conduct."[877] To determine whether a given course of conduct or act is unfair, courts consider "(1) whether the practice offends public policy; (2) whether it is immoral, unethical, oppressive, or unscrupulous; and (3) whether it causes substantial

869. *Id.*, 832 N.E.2d at 847.
870. *Id.* at 1140, 832 N.E.2d 847.
871. *Id.*, 832 N.E.2d at 847.
872. *Id.*, 832 N.E.2d at 847.
873. *Id.* at 1141–42, 832 N.E.2d 848–49.
874. *Id.* at 1143, 832 N.E.2d 849.
875. *Crichton*, 358 Ill. App. 3d 1137, 832 N.E.2d 843.
876. *Id.* at 1145, 832 N.E.2d at 851.
877. *Id.* at 1146, 832 N.E.2d at 852.

injury to consumers."[878]

Plaintiff's claim that FACT engaged in the deceptive marketing and sale of health insurance by falsely marketing health insurance as group insurance despite Golden Rule's practice of closing blocks of insurance and causing the insurance to become increasingly expensive was not supported by any evidence of a representation by FACT that the health insurance Golden Rule issued was group health insurance.[879] At most, FACT directed potential members to Golden Rule's website.[880] "The information Golden Rule provided to its insureds regarding its health insurance does not support the plaintiff's claim against FACT."[881]

In conclusion, Plaintiff's "allegations do not describe deceptive or unfair conduct. FACT offered various buying benefits to the consumer, including travel services, continuing education . . . and health insurance. Although Golden Rule allegedly improperly increased its premiums, FACT's characterization of Golden Rule's health insurance as a [member] benefit is not unfair or deceptive."[882]

Summary judgment was properly granted on the breach of fiduciary duty claim against FACT.[883] Plaintiff alleged that FACT acted in a fiduciary capacity because it stated in its material to members that it will act on behalf of all members in all matters pertaining to the Golden Rule policy and promoted its insurance advisory board.[884] The court noted that "to recover for breach of a fiduciary duty, a plaintiff must prove that a fiduciary duty exists, that the fiduciary duty was breached, and that the breach proximately caused the injury of which the plaintiff complains.[885] A fiduciary duty arises either as a matter of law or by meeting a 'special circumstances' test."[886]

The court concluded that "plaintiff failed to allege and failed to demonstrate during the summary judgment proceedings that special circumstances between the plaintiff and FACT created a fiduciary relationship between them."[887] Plaintiff "did not allege a degree of kinship or a disparity in age, health, mental condition, education, or business experience between the parties that would support a finding

878. *Id.*, 832 N.E.2d at 852.
879. *Id.*, 832 N.E.2d at 852.
880. *Id.*, 832 N.E.2d at 852.
881. *Id.*, 832 N.E.2d at 852.
882. *Id.* at 1147, 832 N.E.2d at 853.
883. *Id.* at 1150, 832 N.E.2d at 855.
884. *Id.* at 1148–49, 832 N.E.2d at 854.
885. *Id.* at 1149, 832 N.E.2d at 854.
886. *Id.*, 832 N.E.2d at 854.
887. *Id.* at 1149, 832 N.E.2d at 854–55.

of a fiduciary relationship."[888]

Lenny Szarek, Inc. v. Maryland Casualty Co.[889]

Holding: Choice of law provision in workers compensation policy did not limit its applicability to claims filed in the specified state, but rather, restricted benefits payable under the policy to the extent payable under the named state.[890]

Lenny Szarek, Inc., an Illinois corporation doing business in Illinois and Wisconsin, obtained a workers compensation insurance policy from Maryland Casualty, and also belonged to an employer's liability pool agreement for the same coverage period.[891] The Maryland Casualty policy contained a provision defining "workers compensation law" as "the workers or workmen's compensation law and occupational disease law of each state or territory named in item 3.A. of the Information Page."[892] That item listed only Wisconsin.[893] The liability pool agreement defined "workers compensation law" as "the workers or workmen's compensation law and occupational disease law of Illinois."[894] Szarek's employee, Cholewinski, sustained a work-related injury.[895] The injury occurred in Wisconsin but Cholewinski, an Illinois resident, filed his workers compensation claim in Illinois.[896]

Maryland Casualty denied any liability for the claim, which was eventually settled for a total payment by Szarek, through its contributions to the pool, of $69,316.01 for benefits and defense.[897] Szarek brought suit against Maryland Casualty in Illinois state court, chancery division, alleging that the Cholewinski claim was covered under the Maryland policy, and that Maryland had wrongfully failed to defend and indemnify Szarek on the claim.[898] Maryland counterclaimed for a declaration that it had not duty to defend or indemnify under its policy. Cross motions for summary judgment

888. *Id.*, 832 N.E.2d at 855.
889. 357 Ill. App. 3d 584, 829 N.E.2d 871 (1st Dist. 2005).
890. *Id.* at 588–93, 829 N.E.2d at 875–79.
891. *Id.* at 585, 829 N.E.2d at 872–73.
892. *Id.*, 829 N.E.2d at 872–73.
893. *Id.* at 585, 829 N.E.2d at 873.
894. *Id.*, 829 N.E.2d at 873.
895. *Id.*, 829 N.E.2d at 873.
896. *Id.*, 829 N.E.2d at 873.
897. *Id.* at 586, 829 N.E.2d at 873.
898. *Id.*, 829 N.E.2d at 874.

resulted in a decision for Maryland.[899]

The issue on appeal was interpretation of the language of the policy provision.[900] Maryland argued that it was only obligated to defend and indemnify claims filed in Wisconsin.[901] Szarek maintained that proper interpretation of the provision obligated Maryland defend and indemnify a claim in accordance with Wisconsin law, regardless of where the claim was filed.[902] This is a case of first impression in Illinois, and the court analyzed two lines of decisions that have evolved over this issue, throughout the country.[903]

Courts in Washington, Michigan, New Hampshire, New Jersey, Maryland, and Pennsylvania have held that these clauses are choice of law provisions, restricting only benefits eligibility and not dependent upon the forum where claims may be brought.[904] On the other hand, California, Georgia, Oklahoma, New York, Louisiana, Mississippi, and Connecticut cases find that coverage applies under the policy only for claims filed in the state named by the policy.[905] The court agreed with the cases providing coverage pursuant to the law of the named state, regardless of the forum state chosen by the employee, finding this to be the "more enlightened view."[906] In addition, this finding follows the general rule that a policy provision susceptible to more than one reasonable interpretation is construed in favor of the insured. Maryland Casualty could have written the policy to explicitly exclude a risk inherent in the business of its insured, but did not do so.[907]

Maryland called the court's attention to *Ohio Casualty Co. v. Southwell*.[908] However, the court found that case inapplicable.[909] The Southwell court's issue was regarding Illinois' internal choice of law doctrine.[910] Under those principles, the court held that California law governed its decision, and applied the law accordingly.[911] That case, however, does not prevent an Illinois court from determining for itself,

899. *Id.* at 586–87, 829 N.E.2d at 874.
900. *Id.* at 587, 829 N.E.2d. at 874.
901. *Id.*, 829 N.E.2d. at 874.
902. *Id.*, 829 N.E.2d. at 874.
903. *Id.* at 588, 829 N.E.2d at 875.
904. *Id.*, 829 N.E.2d. at 874.
905. *Id.*, 829 N.E.2d. at 874.
906. *Id.* at 588–89, 829 N.E.2d at 875.
907. *Id.* at 589–91, 829 N.E.2d at 877.
908. 284 Ill. App. 3d 1019 (1996).
909. *Szarek*, 357 Ill. App. 3d at 591, 829 N.E.2d at 877.
910. *Id.*, 829 N.E.2d at 877.
911. *Id.*, 829 N.E.2d at 877

in the first instance, how such insurance policies are to be construed.[912]

Therefore, the circuit court's judgment was reversed, and the case was remanded for a determination of damages to be awarded to Szarek, based on the benefits schedule of Wisconsin's workers compensation act.[913] The court also instructed the trial court to determine whether equitable contribution principles would apply to divide the damages between Maryland and the administrator of the employer's pool.[914]

Metropolitan Property & Casualty Insurance Co. v. Pittington[915]

Holding: Summary judgment was improperly granted where there was conflicting evidence in the insured's criminal trial for attempted murder as to whether his conduct was intentional.[916] Further, insured's plea to reckless conduct was not collateral estoppel on the issue of intentional conduct because proof of reckless conduct is different than that for intentional conduct; namely, a "'conscious disregard' of a substantial and unjustifiable risk."[917]

Plaintiff, Metropolitan Property and Casualty Insurance Company (Metropolitan), insured James Pittington.[918] On May 7, 2000, while at Pittington's home, Pittington shot Harrison.[919] Pittington stated that he was only trying to scare Harrison when his shot gun accidentally discharged.[920] Pittington was prosecuted for attempted murder.[921] During the course of the criminal trial he pled guilty to reckless conduct.[922]

A wrongful death action against Pittington was filed by Harrison's estate.[923] Metropolitan filed a declaratory judgment action claiming any damages arising from Pittington's conduct were excluded from coverage.[924] The trial court granted summary judgment in favor of

912. *Id.* at 592, 829 N.E.2d at 878.
913. *Id.* at 592–93, 829 N.E.2d at 878.
914. *Id.* at 593, 829 N.E.2d at 879.
915. 362 Ill. App. 3d 220, 841 N.E.2d 413 (3d Dist. 2005).
916. *Id.* at 229, 841 N.E.2d at 420.
917. *Id.* at 227, 841 N.E.2d at 418.
918. *Id.* at 222, 841 N.E.2d at 414.
919. *Id.*, 841 N.E.2d at 420.
920. *Id.* at 223, 841 N.E.2d at 415.
921. *Id.* at 222, 841 N.E.2d at 414.
922. *Id.*, 841 N.E.2d at 415.
923. *Id.*, 841 N.E.2d at 414.
924. *Id.*, 841 N.E.2d at 414.

Metropolitan on the basis that Pittington "expected, anticipated or intended to shoot Harrison . . . .."[925]

The policy excluded coverage for bodily harm to others "which may reasonably be expected to result from . . . criminal acts of an insured person, or which are in fact expected, anticipated or intended by an insured person."[926]

In reversing the entry of summary judgment, the appellate court found that reasonable persons could draw divergent conclusions from the facts.[927] In addition to evidence supporting intentional conduct, there was contrary evidence that Pittington accidentally shot Harrison.[928] For instance, testimony at the criminal trial indicated that Harrison told a nurse, while receiving treatment, that the shooting was accidental.[929] Also, "Harrison's sister testified that she immediately went to her brother to render first aid after the shooting and he stated, it was an accident."[930]

The court also noted that any ruling as to the intentional nature of this shooting prior to the resolution of the underlying tort case would be premature under the Peppers doctrine.[931] The Supreme Court in Peppers stated: "Under the principle of collateral estoppel the finding in the declaratory judgment action that the injury was intentionally inflicted could possibly establish the allegations of the assault count in the complaint and might preclude [the victim's] right to recover under the other theories alleged."[932]

Finally, the court noted that Pittington's guilty plea for reckless conduct was not an admission that he "expected, anticipated or intended" to cause bodily harm to Harrison.[933] Rather, reckless conduct admits to an act which caused the harm or endangered the safety of Harrison with "conscious disregard" of a substantial and unjustifiable risk.[934]

VI. BAD FAITH

925. *Id.* at 223, 841 N.E.2d at 415.
926. *Id.* at 224, 841 N.E.2d at 416.
927. *Id.*, 841 N.E.2d at 416.
928. *Id.* at 225, 841 N.E.2d at 416.
929. *Id.*, 841 N.E.2d at 416.
930. *Id.*, 841 N.E.2d at 417.
931. *Id.* at 228–29, 841 N.E.2d at 419 (citing *Maryland Casualty Co. v. Peppers*, 64 Ill. 2d 187, 355 N.E.2d 24 (1976))
932. *Peppers*, 64 Ill. 2d at 197, 355 N.E.2d at 30.
933. *Metro. Prop. & Cas. Ins. Co.*, 362 Ill. App. 3d at 227, 841 N.E.2d at 417-18.
934. *Id.*, 841 N.E.2d at 418.

Williams v. American Country Insurance Co.[935]

Holding: Conflict of interest existed for insurer of both cab company and driver, where insurer could not choose a defense strategy without harming either the driver or the cab company for which he was driving and the record supported trial court's finding that insurer's conduct had been vexatious and unreasonable.[936]

Williams, a driver for Yellow Cab, and Yellow Cab were sued on May 12, 1998, by police officer William Davila for injuries.[937] Davila's complaint alleged negligence on William's part, as an agent or servant of Yellow Cab, in a car owned by Yellow Cab.[938] An amendment to the complaint added a count for negligent entrustment against Yellow Cab.[939] Williams had previously been convicted of misdemeanor battery regarding the same incident.[940] American Country insured both Williams and Yellow Cab, and Yellow Cab and American Country were both owned by Great Dane Holdings at the time of the occurrence.[941] American Country retained separate law firms to represent Williams and Yellow Cab.[942] It also sent Williams a letter, advising him that it was defending the case under a reservation of rights, citing the "Expected of Intended Injury" exclusion in the policy.[943] The answer to Davila's Complaint filed by the attorney retained by American Country to represent Williams denied that Williams was an agent of Yellow Cab, and asserted the affirmative defense of comparative fault.[944]

Approximately eighteen months after Davila's suit was filed Williams filed, a declaratory judgment action against American Country.[945] Williams alleged that American Country failed to warn him of an actual or potential conflict of interest in defending the Davila action, that there was a conflict of interest in that proof of intentional

935. 359 Ill. App. 3d 128, 833 N.E.2d 971 (1st Dist. 2005).
936. *Id.*, 833 N.E.2d 971.
937. *Id.* at 131, 833 N.E.2d at 974.
938. *Id.*, 833 N.E.2d at 974.
939. *Id.*, 833 N.E.2d at 974.
940. *Id.*, 833 N.E.2d at 974.
941. *Id.*, 833 N.E.2d at 974.
942. *Id.*, 833 N.E.2d at 974.
943. *Id.* at 131–32, 833 N.E.2d at 974.
944. *Id.* at 132, 833 N.E.2d at 974.
945. *Id.*, 833 N.E.2d at 974.

conduct by Williams would relieve American Country of responsibility, and that American Country breached its duty to defend him through numerous failures in the conduct of his defense in the Davila action.[946] Davila intervened in the declaratory judgment suit.[947] Cross motions for summary judgment were filed.[948] However, in light of the Supreme Court's decision in *American Family Mutual Insurance Co. v. Savickas*,[949] the trial court requested the parties brief the issue of duty to defend prior to its ruling.[950] American Country then filed a counterclaim, asserting that William's battery conviction established that his conduct was intentional and that he was therefore excluded from coverage by virtue of the intentional act exclusion of the policy.[951] On January 23, 2001, the attorney that American Country had retained to represent Williams in the Davila action withdrew, and Williams retained Michael Radzilowsky to represent him.[952] American Country sent Radzilowsky a letter two days later, offering to retain him on William's behalf, conditioned, among other things, on Williams dropping the declaratory judgment action with prejudice.[953] Radzilowsky did not agree to the offer, due to the amount of control that American Country insisted on retaining over the representation.[954] American Country then filed a second motion for summary judgment in the declaratory judgment action, based on its counterclaim, and a motion to dismiss, arguing that the suit was moot, as American Country had agreed to relinquish control of the Davila suit by its letter of January 25, 2001.[955]

The trial court granted American Country's motions, relying on *Savickas*. Davila appealed that decision.[956] Meanwhile, in the underlying suit, the trial court granted Yellow Cab's motion for summary judgment, and Davila also appealed that ruling.[957] The appellate court reversed and remanded that judgment, holding that material issues of fact remained regarding whether Williams had acted

946. *Id.*, 833 N.E.2d at 974–75.
947. *Id.*, 833 N.E.2d at 975.
948. *Id.*, 833 N.E.2d at 975.
949. 193 Ill. 2d 378, 739 N.E.2d 445 (2000).
950. *Williams*, 359 Ill. App. 3d at 133, 833 N.E.2d at 975.
951. *Id.*, 833 N.E.2d at 975.
952. *Id.*, 833 N.E.2d at 975.
953. *Id.*, 833 N.E.2d at 975.
954. *Id.* at 133, 833 N.E.2d at 975–76.
955. *Id.*, 833 N.E.2d at 976.
956. *Id.* at 133–34, 833 N.E.2d at 976.
957. *Id.* at 134, 833 N.E.2d at 976.

within the scope of his employment, regardless of whether it was intentional or negligent.[958] Ruling on Davila's appeal in the declaratory judgment action, the appellate court agreed that, pursuant to *Savickas*, Williams' criminal conviction was res judicata to both Williams and Davila.[959] However, the summary judgment was vacated and remanded, to allow a determination by the trial court on the issue of conflict of interest and any prejudice that may have resulted to Williams.[960] On remand, American Country was granted leave to file an amended counterclaim on September 23, 2002.[961] That was filed on September 25, 2003, and alleged no coverage under Williams' policy, for a variety of reasons.[962] On October 24, 2003, Williams and Davila filed motions for summary judgment, based on conflict of interest and resultant prejudice to Williams.[963] These motions were granted, and American Country appealed.[964]

Meanwhile, the underlying suit settled, and Williams then filed a motion for attorney fees and costs under section 155 of the Illinois Insurance Code.[965] Williams requested fees for the defense of the underlying suit as well as fees and costs in the declaratory judgment action, plus statutory penalties and prejudgment interest.[966] The petition was granted by the trial court. American Country appealed that decision as well, and the two appeals were consolidated.[967]

The appellate court first took up the issue of the existence of a conflict of interest.[968] In its analysis, the court noted that, when an insurer is faced with a question of whether it must decline to defend and pay the cost of independent counsel for the insured, the test is "if, in comparing the allegations of the complaint to the terms of the policy, the insurer's interests would be furthered by providing a less than vigorous defense to the allegations."[969] In this case, the court agreed with Williams, that a conflict of interest existed, because the interests of Yellow Cab and Williams were "diametrically opposed" in

958. *Id.*, 833 N.E.2d at 976.
959. *Id.*, 833 N.E.2d at 976.
960. *Id.*, 833 N.E.2d at 976.
961. *Id.*, 833 N.E.2d at 976.
962. *Id.* at 134–35, 833 N.E.2d at 976–77.
963. *Id.* at 135, 833 N.E.2d at 977.
964. *Id.*, 833 N.E.2d at 977.
965. 215 ILL. COMP. STAT. 5/155 (2002).
966. *Williams*, 359 Ill. App. 3d at 136, 833 N.E.2d at 977–78.
967. *Id.*, 833 N.E.2d at 978.
968. *Id.* at 137–39, 833 N.E.2d at 978–80.
969. *Id.* at 138, 833 N.E.2d at 979.

the underlying suit.[970] Although the policy required American Country to provide a vigorous defense for Williams and Yellow Cab, Yellow Cab's interests were served by denying the existence of an agency relationship, while it was in Williams' best interest to defend as an agent of Yellow Cab.[971] Held to the determination that his actions were intentional, Williams' best strategy in the civil suit was to prove the agency relationship, to hold Yellow Cab liable by virtue of respondeat superior.[972] American Country's ethical conflict resulted, in that it could not choose a defense strategy that would not harm one or the other of its insureds.[973]

American Country argued that no conflict existed where the policy language would exclude coverage for both insureds.[974] However, the court found that, in this case, although Williams, as insured, was estopped from arguing that his actions were not intentional, this was not a problem for Yellow Cab.[975] The exclusionary clause in the policy addressed the intention "from the standpoint of the insured."[976] Unless Yellow Cab intended injury to Davila, American Country could be liable under the policy as the insurer for Yellow Cab, if Williams was found to be its agent.[977]

The court went on to find that sufficient evidence in the case showed that American Country did not provide full disclosure regarding the conflict to Williams, and did not obtain Williams' consent to representation in the face of the conflict.[978] Therefore, Williams was entitled to assume control of his defense in the underlying case and to have American Country pay for it.[979] In addition, several facts established prejudice to Williams: (1) the denial of agency by the attorney retained by American Country to defend Williams in the underlying action, (2) that attorney's drafting of discovery responses to indicate that Williams was an independent contractor, and (3) American Country's failure to offer to retain independent counsel for Williams until nearly three years after the

970. *Id.*, 833 N.E.2d at 979.
971. *Id.* at 138–39, 833 N.E.2d at 980.
972. *Id.* at 139, 833 N.E.2d at 980.
973. *Id.*, 833 N.E.2d at 980.
974. *Id.*, 833 N.E.2d at 980.
975. *Id.*, 833 N.E.2d at 980.
976. *Id.*, 833 N.E.2d at 980.
977. *Id.* at 139–40, 833 N.E.2d at 980–81.
978. *Id.* at 140, 833 N.E.2d at 981.
979. *Id.*, 833 N.E.2d at 981.

initial filing of Davila's complaint.[980] Lastly, the appellate court determined that American Country's conduct was vexatious and unreasonable and that Williams was therefore entitled to attorney's fees and costs pursuant to Section 155 of the Illinois Insurance Code.[981] The court noted that the trial court's finding was supported by the record where American Country failed to notify him regarding the conflict of interest and controlled his defense in the underlying tort case for nearly three years despite the existence of a conflict and despite Williams' efforts to obtain new counsel.[982]

Jump v. Schaeffer & Associates Insurance Brokerage, Inc.[983]

Holding: The district court's dismissal of the insureds' claim for lack of subject matter jurisdiction was improper as the insureds had alleged injury above the $75,000 statutory minimum and had adequately pled a bad faith claim against the insurer.[984]

Insureds brought suit against their insurance company when the insurer denied coverage for the insureds' stolen boat.[985] Initially, the district court dismissed their diversity action for lack of subject matter jurisdiction, because their complaint's prayer for relief sought only $68,000 in compensatory damages, below the $75,000 jurisdictional amount.[986] The Court of Appeals reversed, noting that in subsequent pleadings regarding the jurisdictional issue, the insureds alleged a good faith, minimally reasonable belief that their losses, including improvements to the boat, totaled more than $75,000.[987]

The Court also held that the insureds were entitled to seek damages of up to $25,000,[988] because they adequately alleged bad faith against the insurer.[989] The Court noted, in this regard, that punitive damages under the bad faith statute may be used to satisfy the jurisdictional amount where such damages are recoverable as a matter of state law, and the claim for punitive damages is not a frivolous claim asserted

980. *Id.* at 140–41, 833 N.E.2d at 981.
981. *Id.*, 833 N.E.2d at 982.
982. *Id.*, 833 N.E.2d at 982.
983. 123 F. App'x 717 (2005).
984. *Id.*
985. *Id.* at 718.
986. *Id.*
987. *Id.* at 719.
988. Pursuant to 215 ILL. STAT. COMP. STAT. ANN. 5/155.
989. *Jump*, 123 F. App'x at 720.

solely for the purpose of obtaining jurisdiction.[990] The insureds alleged that they were deliberately misled and promised coverage that was illusory, and therefore may have stated a claim for fraud.[991] The Court therefore vacated the district court's dismissal and remanded the case for further proceedings.[992]

VII. CONCLUSION

Illinois courts have continued to refine insurance law and continued the trend to enforcing policy language as written. An insurance policy is a contract between two parties that are at slightly different bargaining levels. While balancing the rights of the parties, courts have enforced the duty to perform under the contract while providing remedies to the insured for the failure of the insurer to perform.

Illinois courts announced varied decisions this year with no clear preference for the expansion of any particular area. As with prior years, there has been a continued refinement of Illinois law in regards to applications for UM and UIM coverage and the defining of the insurer and insured relationship. This process will certainly continue as the courts address the expanding scores of issues arising under Illinois insurance law.

990. *Id.* at 719.
991. *Id.* at 720.
992. *Id.* at 721.