The Tyra Law Firm, P.C.

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ANNOUNCING THE TYRA LAW FIRM, P.C.

Kevin C. Tyra is pleased to announce the formation of The Tyra Law Firm, P.C., and his association with attorney Jerry Padgett and paralegal Amy Heustis.

The firm will continue Kevin's emphasis on insurance defense (including medical malpractice, worker's compensation, and product liability defense), insurance coverage, and insurance fraud investigation, along with general litigation. Kevin and his firm welcome the opportunity to continue serving many of the insurance carriers, corporations, and individuals they have been serving over the years.

The firm's offices are located in the 100-year-old Emelie Building in downtown Indianapolis.

Contact information for The Tyra Law Firm, P.C. is listed below.

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DTCI SPEAKING ENGAGEMENT

Kevin C. Tyra, along with co-speaker Dan Witte of State Farm Litigation Counsel, presented a "2006–07 Insurance Law Update" on November 15, 2007, at the Defense Trial Counsel of Indiana annual conference. Dan was the outgoing Chair of the Insurance Coverage section of DTCI. Kevin is the incoming Chair of that section.

Assignment of Insurance Bad-Faith Claim

State Farm v. Estep
Indiana Supreme Court, September 25, 2007

State Farm's insured, Perkins, while driving drunk, hit Estep's motorcycle, causing "devastating" injuries. In Estep's personal-injury suit against Perkins, State Farm assigned defense counsel, and tendered Perkins' $50,000 policy limits to Estep, which Estep refused. The jury trial resulted in a verdict of $650,000 in compensatory damages and $15,000 in punitive damages. State Farm immediately thereafter paid its policy limits to the plaintiff.

In the ensuing proceedings supplemental to collect the $615,000 balance of the judgment, Estep did not name State Farm as a party. However, Estep asked Perkins to assign to it his rights to any bad-faith claim against State Farm. Perkins refused because he and his personal counsel believed State Farm had not engaged in bad faith. Nevertheless, the trial court ordered the assignment of any claim Perkins had to Estep. Estep thereafter sued both State Farm (alleging fraud, constructive fraud, and breach of contract) and Perkins' personal attorney, Susong.

On transfer to the Supreme Court, the Court began by observing that "assignment should be permitted or prohibited based on the effect it will likely have on modern society, and the legal system in particular." Starting with the legal-malpractice claim Estep brought against Perkins' personal attorney, the Court held that such claims are not assignable, expressing a concern about preserving the sanctity of the client-lawyer relationship.

Regarding the assigned claim against State Farm, the Court started with review of the Direct Action Rule, which prohibits a third party or judgment creditor from directly suing a judgment debtor's insurance carrier to recover an excess judgment. Public policy concerns include unwarranted settlement demands, escalating insurance costs, and serious conflicts of interest between the insureds and their insurers. The Court held that allowing involuntary assignment of claims against carriers whose insureds do not believe they have been wronged by their insurance companies was against public policy, and therefore prohibited.

It is noteworthy that the vote on the bad-faith-assignment issue was 3-2, with Chief Justice Shepard (who generally is sympathetic with the interests of insurance carriers) rendering the majority opinion, and Justices Boehm and Dickson (who generally are not) dissenting.

Key Point: A court cannot assign a claim of bad faith over the objection of the insured/defendant in proceedings supplemental of a liability judgment. However, an insured/defendant can voluntarily assign such a claim. It is therefore important for the carrier to document, in the course of settlement decisions (particularly the decision not to settle on the plaintiff's terms), the concurrence of the insured with the carrier's decisions.

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Firearms Sale as Public Nuisance

Smith & Wesson Corp., et al. v. City of Gary
Indiana Court of Appeals, October 29, 2007

The city of Gary, Indiana ("the City") filed lawsuits against several gun manufacturers and dealers for public nuisance, negligence, and negligent design. In its complaint, the City alleged that gun dealers knowingly sold guns to illegal buyers through straw purchases (where someone would purchase a firearm on behalf of a second person who was legally prohibited from purchasing a firearm, all with the knowledge of the gun dealer). The complaint also alleged that the gun manufacturers knew of these illegal sales but did nothing to stop them from occurring.

Initially, the trial court dismissed the City's public nuisance claim. This issue was ultimately decided by the Indiana Supreme Court, which reversed the dismissal of the public nuisance claim and also permitted the City to proceed on its negligence and negligent design claims as well.

During the pendency of this case, Congress passed the Protection of Lawful Commerce in Arms Act (the "PLCAA"), which excluded all firearm manufacturers, distributors, and dealers from civil liability for harm caused by criminal or unlawful misuse of their firearms or firearm products. The PLCAA also ordered that any pending qualified civil liability action was to be immediately dismissed. Subsequent to the passage of the PLCAA, the defendants filed a motion to dismiss, or in the alternative, for judgment on the pleadings. However, the trial court denied both of these motions.

The main issue addressed by the Court of Appeals was whether Indiana's public nuisance statute was applicable to the sale or marketing of firearms for the purposes of the PLCAA. While the PLCAA requires that all qualified civil liability actions were to be dismissed, it also contains an exception which states that a qualified civil liability action does not include "an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product." As such, the Court of Appeals acknowledged that the case would turn on the interpretation of "applicable" in this exception.

As the Court determined that the use of "applicable" within the PLCAA was not ambiguous, it found that Indiana's public nuisance law did apply to the sale or marketing of firearms. The Court of Appeals stated that even if the PLCAA required a violation of a statute that was facially applicable to the sale or marketing of a firearm, this is exactly what the City alleged in its complaint. Therefore, the Court of Appeals found that because the City's complaint, as well as the previous Indiana Supreme Court decision, indicated that the City did allege that the defendants violated state or federal statutes applicable to the sale or marketing of firearms, the City's action fell under the exception to the PLCAA and was not barred.

Key Point: As long as you sufficiently allege a violation of a federal or state statute that is applicable to the sale or marketing of a firearm, the claim will likely survive a challenge under the PLCAA.

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Insurance Coverage: "In Connection With"

Kessel v. State Automobile Mut. Ins. Co.
Indiana Court of Appeals, August 6, 2007

The Kessels rented a barn on their residential property to Lapham to use as a horse boarding and riding business. Lapham allowed the Kessels' dog to run loose in the vicinity of the barn. The Kessels' dog bit Howell, one of Lapham's horse-boarding customers. Howell sued Lapham and the Kessels for her injuries, and the Kessels presented the claim to State Auto, their homeowners insurance carrier.

State Auto filed a declaratory-judgment action, asserting the policy exclusion that the dog-bite incident "arose out of and in connection with a business conducted from an insured location." The Kessels argued that the exclusion was ambiguous, and that (1) the dog bite was not related to the boarding business, and in any event, (2) the boarding business was Lapham's, not the Kessels'. The trial court granted summary judgment to State Auto based on the exclusion, and the Court of Appeals affirmed.

The Court emphasized the broader meaning of "in connection with" than "arising out of." That is,

"arising out of" requires more of a causal connection between the injury and the business. "In connection with" merely requires that the injured party was on the premises because of the business. The Court concluded, "Although State Auto may have been required to defend and indemnify the Kessels if their dog bit someone under different circumstances, State Auto did not agree to insure the Kessels against injuries connected with a business conducted from an insured location or engaged in by an insured."

Key Point: A claim that has any connection with a coverage-excluded activity should be scrutinized to consider whether it is sufficient to deny coverage.

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Insurance Fraud Investigation

Precht v. Franklin Co. Farmers Mut. Ins. Co.
Indiana Court of Appeals, August 22, 2007

Carolyn Precht and Harold Precht owned a house which burned to the ground. The Prechts were separated, and a divorce was pending. Their property carrier, Franklin County Farmers Mutual, paid the property claim to Harold, then brought suit against Carolyn to recover that payment, based on its conclusion she was involved in the loss. The trial court entered judgment in favor of the carrier, and Carolyn appealed. The case therefore addresses the question of what constitutes sufficient evidence of insurance fraud.

It was undisputed that Carolyn was not living in the house when it burned; in fact, she was in her home in Ohio when the fire started. When she was notified of the fire and arrived at the scene, her first comment was that she didn't do it. She also commented to investigators that it looked like the fire resulted from an electrical problem (the arsonist had used a propane torch on the breaker panel in an apparent attempt to make it look like a breaker malfunction).

The doors to the house had been locked when the fire started. Of the four people who owned keys to the house, only Carolyn had a motive to destroy the house; supposedly because she did not want to move back into the house, as a result of the divorce. Also, the only family member who did not cooperate in the arson investigation was Carolyn's adult son. The carrier's theory, therefore, was that Carolyn conspired to have her son set the fire.

The Court of Appeals acknowledged that proof of an insured's involvement in a loss must be by direct or circumstantial evidence, rather than relying simply on speculation. The Court acknowledged that the trial court never determined who actually set the fire, though it was supposed to be Carolyn's son. The Court also acknowledged the disputed issue whether Carolyn was opposed to moving back to Indiana, and that this alleged motive for arson was not as strong as the motives usually proven, such as financial distress or malice toward a property owner.

The Court determined that despite the somewhat equivocal nature of the evidence against Carolyn, there was sufficient evidence on which the trial court could rule that Carolyn was involved in the fire.

Key Point: This case is an illustration of what an Indiana court may consider to be sufficient circumstantial evidence of a claimant's involvement in a property loss. Keep in mind, however, that this is not a guarantee of how a court may rule in a similar case. If the trial court had held there was insufficient evidence of Carolyn Precht's involvement in the fire, the Court of Appeals would have almost certainly affirmed that judgment, too.

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Medical Malpractice: Doctor's Counterclaim for Violation of Act

Kho v. Pennington
Indiana Supreme Court, September 19, 2007

Plaintiff's attorney Pennington had filed suit on behalf of her client, Miller, alleging medical malpractice against Dr. Kho. Pennington "double-filed" under the Indiana Medical Malpractice Act (the "Act"); that is, she filed a proposed complaint with the Department of Insurance for a medical review panel, and she also filed a complaint for malpractice in circuit court.

Under the Act, Ind. Code 34-18-1-1, et seq., a plaintiff may not proceed in circuit or superior court against a "qualified health care provider" (that is, a medical provider whose insurance carrier has paid a surcharge into the state Patient Compensation Fund) until a medical review panel has rendered an opinion on the claim. The plaintiff may file a complaint in circuit or superior court, but the plaintiff may not identify the medical provider by name in any of his pleadings, and the circuit/superior court case is stayed until the panel has rendered its opinion.

Pennington, however, identified Dr. Kho by name in the suit she filed in circuit court before the medical review panel rendered its opinion. Eventually, Pennington/Miller dismissed Dr. Kho from the suit as evidence developed that Dr. Kho did not actually treat Miller's decedent.

Thereafter, Dr. Kho filed suit against Pennington and Miller, essentially alleging defamation, malicious prosecution, and abuse of process. One of Dr. Kho's theories was that Pennington violated his rights to confidentiality while the medical review panel process was underway by publishing his name in the circuit court complaint. That issue was presented in the appeal to the Supreme Court.

The Supreme Court held that Dr. Kho stated a valid claim for Pennington's violation of the statutory prohibition against identifying him by name before the panel rendered its opinion. The Court discussed the statutory provision's purpose to "disfavor subjecting a health care provider to public accusations of medical malpractice until after such claim is presented to a medical review panel." The Court rejected Pennington's argument that regardless of identifying Dr. Kho in the circuit court complaint, the allegations were public information because Department of Insurance filings are public information.

The Court concluded, "the doctor's claim against the malpractice claimant and her attorneys for violation of the statutory defendant identity confidentiality provision presents a cognizable negligence action for violation of an express statutory duty."

Key Point: A medical provider is entitled to be protected from public embarrassment by a malpractice allegation until a panel has rendered its opinion. It remains to be seen whether the appellate courts may use other Act provisions as grounds for private causes of action by doctors and nurses.

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Product Liability: "Wood" You Believe It?

Dorman v. Osmose, Inc.
Indiana Court of Appeals, September 25, 2007

Dorman's complaint alleged negligence and strict liability for an injury he suffered during the construction of a wood deck. While building the deck, Dorman wore shorts, and at some point struck his leg against a freshly cut piece of wood. The wood used by Dorman had been treated with a pesticide manufactured by Osmose, Inc. The wound soon became infected, and Dorman was diagnosed with cellulitis (inflammation of connective

tissue) and ascending lymphadenitis (inflammation of lymph nodes).

This case ultimately went to jury trial, where the jury returned a verdict in favor of Osmose. Dorman appealed several issues after the trial court denied his motion to correct error. His first issue involved a member of the jury, who after the jury had been selected, made it known to the court that he was upset after finding out that he was going to lose income from his job from serving on the jury. The juror then informed the court that he had already decided who should win. The court passed this information on to the attorneys for both sides, and Dorman's attorney suggested releasing the juror. However, the court decided to talk to the juror the next day to see if he had calmed down. Upon talking to the juror the following day, the court learned that the juror had calmed down and had backed off his statements from the day before. After deciding to keep the juror on the panel, Dorman's attorney never renewed his objection to the retention of this juror. The Court of Appeals found that Dorman's attorney's failure to object to the continued use of this juror waived the issue for review on appeal.

Another issue that arose during trial was the trial court's denial of Dorman's request to admit language from Osmose's appellate brief from a previous issue in this case. Plaintiff's attorney argued that the language in the brief was a statement against their interest and should be admissible. However, the Court of Appeals found that the language that Dorman wanted to admit were not factual assertions, and therefore were not admissible under the hearsay exceptions.

The last issue in this case revolved around a jury instruction on contributory negligence. Dorman argued that there was no evidence to support the giving of this instruction. The Court of Appeals found that because there was evidence in the record that any type of wood splinter could cause Dorman's injuries, that he knew to wear long pants to avoid splinters, and that Dorman failed to wear long pants, there was sufficient evidence to give this instruction.

Key Point: Always make a continuing objection when you disagree with a repeated occurrence at trial in order to preserve your record for appeal. Also, be sure to tender instructions for contributory negligence when there is any plausible basis for doing so.

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Proximate Cause – Speeding Alone is Not Enough

Florio v. Tilley
Indiana Court of Appeals, October 22, 2007

On a snowy morning, Florio pulled over to the side of a highway, just north of the northbound exit ramp on to the highway, to wait until weather conditions improved before trying to drive any further. Shortly afterwards, another car began to merge on to the highway from the exit ramp at the same time that a semi-tractor driven by Tilley was northbound on the highway. Upon entering the highway, the car hit a patch of ice, slid and hit Tilley, and then spun again and ultimately struck Florio's car, causing injury to Florio.

After Florio filed a lawsuit against Tilley (and Tilley's employer under *respondeat superior*) for negligence, the trial court granted summary judgment in favor of Tilley. The Court of Appeals affirmed the entry of summary judgment.

Florio argued two issues on appeal. First, he stated that had Tilley avoided driving altogether until the road conditions had improved, there would not have been an accident. However, the Court of Appeals stated that this was insufficient to establish proximate cause. Florio's second argument was that had Tilley been driving at a crawl, he would have had time to avoid the collision. The Court found that there was no evidence to support

this, and that even if Tilley's speed was excessive for the road conditions, speed was only a remote cause, and not a proximate cause, of Florio's injuries. In deciding this issue, the Court looked to a Washington Court of Appeals decision, in which that court found that speed can be used to establish cause in fact, but speed alone is insufficient to establish proximate cause.

In affirming the entry of summary judgment, the Court of Appeals stated that Florio presented no evidence that Tilley had any time to react to the loss of control by the other car. Therefore, the Court stated that a reasonable jury could not infer that Tilley was negligent in failing to avoid the accident.

Key Point: This decision continues a recent trend of the Indiana appellate courts to scrutinize the proximate cause between the alleged negligence and the accident. The claims professional should similarly consider whether the claimant's allegations demonstrate a sufficient case of proximate cause. A claim for negligence will not be successful when the only evidence is that excessive speed brought two drivers to the same location at the same time.

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Settlement Authority

Bay v. Pulliam et al.
Indiana Court of Appeals, August 28, 2007

After filing a lawsuit against Pulliam for injuries suffered in a vehicle accident, settlement negotiations were initiated between Pulliam's insurer and Bay's law firm. Various settlement demands were exchanged between both sides. The claims manager for Bay's law firm, who served as the main contact in the negotiations, ultimately informed the insurer that the Bays had accepted the most recent offer proposed by the insurer. However, one of the plaintiff's attorneys stated that upon telling the Bays about the offer, the Bays said that they wanted to settle the case but wanted to discuss it further. A few weeks later, the Bays rejected the offer from the insurer in writing.

Pulliam contended, and the trial court agreed, that Bay's attorney had actual authority to enter into the settlement agreement. However, the Court of Appeals disagreed, stating that there was no evidence that the plaintiffs had told their attorney to accept the settlement offer.

Furthermore, the Court of Appeals disagreed with the other defense argument that Bay's attorney had apparent authority to settle the case even if no actual authority existed. The Court stated that the existence of apparent authority must be manifested to a third party by the principal, and not the agent. As such, an attorney cannot gain apparent authority to settle a case just by representing that he has such authority. The Court stated that the mere fact that the Bays had authorized their attorney to enter into settlement negotiations and knew that the negotiations were being conducted does not mean that they had given authority to their attorney to approve the settlement. Therefore, the Court found that the acceptance of the settlement offer by the claim manager at Bay's attorney's law firm was not binding on the plaintiffs.

Key Point: Before agreeing to settle a lawsuit or a claim not yet in suit, always make sure that the client has given consent to settle for the amount of the settlement offer. This is best accomplished by insisting on a written communication signed or countersigned by the claimant/plaintiff approving the settlement.

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HOLIDAY GREETINGS FROM ALL OF US AT THE TYRA LAW FIRM

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