The Tyra Law Firm, P.C.

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INSURANCE SPOTLIGHT: "OCCURRENCE" AND LATE NOTICE

Tri-Etch, Inc., et al. v. Cincinnati Ins. Co.
Indiana Supreme Court, July 21, 2009

This case has visited the Indiana appellate courts several times since the 1997 tragedy in which security service Tri-Etch failed to respond to a late-night alarm triggered when a robber abducted a liquor store employee and beat the employee to death. In the suit between the employee's Estate and Tri-Etch, a jury entered a $2.5 Million verdict against Tri-Etch.

Tri-Etch had $1 Million liability policies with Scottsdale Insurance Company and with Cincinnati Insurance Company, and a $2 Million umbrella policy with Cincinnati. Cincinnati contended that Tri-Etch did not notify it of the events surrounding the employee's murder until six years later. Scottsdale defended Tri-Etch; Cincinnati denied coverage and filed a Federal coverage dec action, which was later dismissed.

In the state-court coverage case the Estate and Tri-Etch then filed against Cincinnati, the trial court granted summary judgment to Cincinnati, holding that the Cincinnati policies provided coverage for this claim, but the notice Tri-Etch gave to Cincinnati "was unreasonably late as a matter of law," and therefore Cincinnati suffered prejudice by late notice.

The Court of Appeals reversed, focusing on Cincinnati's acknowledgement in the summary-judgment phase that even if it had received timely notice of the claim and the suit, it still would have denied coverage on the basis that the loss was not an "occurrence" under the policy. Cincinnati would not have done anything differently in response to the underlying claim and suit even with timely notice. Therefore, the Court held, as a matter of law Cincinnati did not suffer prejudice from the late notice.

The Court of Appeals also affirmed the trial court's holding that the Cincinnati policies provided coverage for this claim, because the events constituted an "occurrence." That is, the failure of Tri-Etch to respond to the alarm was an accident, rather than what Cincinnati characterized as a "business act." Therefore, Cincinnati had coverage for the claim and was obligated to pay the balance of the

Estate judgment that Scottsdale had not already paid, and to reimburse Scottsdale for one-half of the defense costs incurred since the date Cincinnati received notice of the claim and the suit.

The Indiana Supreme Court granted transfer, and affirmed the entry of summary judgment in favor of Cincinnati on two grounds: no "occurrence" and late notice.

First, the Supreme Court noted that the definition of "occurrence" required that the security company's failure to act was an "accident." The Court observed that the "lack of intentional wrongdoing does not convert very business error into an 'accident.'" Generally, business errors are covered by errors and omissions policies, not CGL policies. Because Tri-Etch's duty arose from its commercial conduct, its error was not an "accident," and therefore not an "occurrence" covered by the Cincinnati policy.

This analysis is not affected by the fact that the claim was brought by a third party (that is, the employee's Estate), rather than by a party to the Tri-Etch – liquor store contract, or that it is arguably a tort claim rather than a breach-of-contract claim. It is still a claim for a business error rather than an "accident," which would be covered by an E&O policy rather than a CGL policy.

The Court also agreed with Cincinnati that coverage is excluded by an exclusion for "any act, error or omission of the insured in rendering or failing to render telephone answering, alarm monitoring or similar services."

Second, the Court held that an insurer's denial of coverage on other grounds does not as a matter of law rebut the presumption of prejudice from late notice under *Miller v. Dilts* (Ind. 1984). "There is no reason why an insurer should be required to forego a notice requirement simply because it has other valid defenses to coverage." Even if an insurer consistently denies coverage, timely notice gives an insurer an opportunity to investigate while evidence is fresh, evaluate the claim, and participate in early settlement.

An insured bears the burden of demonstrating that the insurer's receipt of late notice created no prejudice, in order to rebut the presumption of prejudice that arises from the late notice. The Estate and Tri-Etch were unable to do that, so late notice is also a valid basis for summary judgment for Cincinnati.

Key Point: (1) A business omission is not an "occurrence." (2) The late-notice defense to third-party coverage may be asserted even if the carrier would have denied coverage on other grounds anyway.

Note: The Indiana Supreme Court also held on April 28, 2009 in *Dreaded, Inc. v. St. Paul Guardian Ins. Co.* that a liability carrier has no duty to defend an insured until it receives notice of the claim, and is not liable for retroactive defense costs.

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"EXCESSIVE ENTANGLEMENT" IN RELIGION

Rosalyn West v. Betty Wadlington, et al.
Indiana Court of Appeals, June 10, 2009

West, Wadlington, and Jeanette Larkins were active in the Mt. Olive Missionary Baptist Church. Wadlington sent an e-mail highly critical of West to Larkins and two other individuals, which included a copy of a memo that Wadlington had drafted and intended to provide to the church's Board of Deacons and Board of Trustees, which concluded by suggesting that West be removed from her positions within the church. Larkins forwarded this e-mail to 89 other church members. West filed a complaint for defamation and invasion of privacy / false light.

The Court of Appeals addressed the defense that West's claims could not be addressed by a civil court because it would require the court to determine questions of religious doctrine. In the seminal case of Lemon v. Kurtzman, 403 U.S. 602 (1970), the United States Supreme Court set forth a three part test for the regulation of a person's freedom to act in the context of their right to

freedom of religion under the First Amendment. Here, the Court addressed the third prong of the Lemon test, which says there cannot be excessive government entanglement with religion. Excessive entanglement results when courts begin to review and interpret a church's constitution, laws, and regulations, but a court can apply neutral principles of law to churches without violating the First Amendment.

In this case, the Court found there was no excessive entanglement. The Court distinguished this case from a prior Indiana Supreme Court decision, in which the Indiana Supreme Court upheld the dismissal of a defamation claim because a review of the claims in that case would have involved an impermissible scrutiny of religious doctrine. However, that case involved statements made by a church official in the firing of a church employee, whereas here, West, Wadlington, and Larkins were all co-equal church members.

Finally, the Court rejected the argument that even though some of Wadlington's statements were not purely religious, taken in context with those comments that were religious converted all of the statements to a purely religious issue. According to the Court, this argument's flawed premise is that anyone could make any number of defamatory statements by putting them in the context of a religious dispute. Therefore, the Court found the claims should not have been dismissed, and that a jury could decide whether Wadlington's e-mail was defamatory from a secular standpoint. As such, the Court reversed and remanded to the trial court.

Key Point: While a court cannot review a solely religious issue, a claim will not be automatically dismissed just because there is a religious-based defense.

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INCURRED RISK IN MEDICAL MALPRACTICE

Brenda Spar v. Jin S. Cha, M.D.
Indiana Supreme Court, June 16, 2009

Spar had a history of gynecological and abdominal problems which begin in 1986 when she was involved in a serious automobile accident. As a result of the accident, Spar underwent emergency surgery and spent two months in an intensive care unit. In the ensuing years, Spar underwent several subsequent abdominal procedures including gall bladder surgery and procedures to remove scar tissue in the abdomen. At least two of Spar's prior surgeons explained the risk of abdominal surgery, which includes bleeding, infection and injury to internal organs including the bowel and bile duct.

Spar consulted Dr. Cha because of difficulty in conceiving a child. Dr. Cha performed a laparoscopy on Spar in January of 2001 to determine if Spar's fallopian tubes were clogged. Spar first saw Dr. Cha the morning of the surgery when she was on a gurney hooked up to an I.V. outside the operating room. There, Dr. Cha explained how the surgery would be performed and told her that the procedure posed possible complications including bleeding, bowel injury, and infection.

Spar was discharged from the hospital after the surgery but continued to experience abdominal pain and nausea. Another surgeon performed an emergency surgery two days later and determined that Spar's bowel had been perforated during the laparoscopy, causing significant damage.

Spar submitted a complaint against Dr. Cha to a medical review panel in accordance with the Indiana Medical Malpractice. The panel unanimously found that Dr. Cha had failed to meet the standard of care, and the case proceeded to trial under two theories: (1) negligence in failing to employ alternative diagnostic procedures in lieu of surgery, and (2) failure to obtain Spar's informed consent to the chosen course of treatment.

Dr. Cha introduced expert testimony that he had complied with the applicable standard of care in treating Spar and obtaining her informed consent. Evidence of Spar's informed consent to the surgeries by previous doctors was admitted over Spar's objection. The jury returned a verdict in favor of Dr. Cha. Spar appealed, arguing that the trial court erred by submitting incurred risk to the jury and by admitting evidence of Spar's consent to prior surgeries.

The Court of Appeals reversed and remanded. The Indiana Supreme Court accepted transfer of the matter and agreed with the Court of Appeals that incurred risk is not a defense to claims of lack of informed consent or negligent performance of a medical procedure.

The Supreme Court reasoned that because a patient cannot consent to less than ordinary care, the defense of incurred risk has little legitimate application in the medical malpractice context. The patient is entitled to expect that the services will be rendered in accordance with the standard of care, however risky the procedure may be. The Supreme Court ruled that Spar's motion for judgment on the evidence should have been granted.

The Supreme Court did not agree however, that evidence of Spar's consent to the prior surgeries was inadmissible. Because a physician need not advise concerning risks of which the patient already has actual knowledge, any evidence showing or tending showing the patient's knowledge as to the surgical risks was relevant and admissible; this presumably would include any knowledge, information or disclosures made by her other surgeons.

Keypoint: A patient cannot agree, either implicitly or explicitly, to waive a doctor's responsibility to exercise the requisite standard of care.

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MEDICAL-EXPENSE REDUCTIONS

Brandon Stanley v. Danny Walker
Indiana Supreme Court, March 17, 2009

Stanley and Walker were involved in an automobile accident in which Walker sustained injuries. Walker filed a complaint against Stanley.

During the trial, Walker, introduced redacted medical bills totaling $11,570 showing the amounts medical service providers originally billed him in order to prove "the reasonable value" of the medical expenses he incurred. However, Walker's medical providers accepted payment from his health insurance company of $6,820 (a discount of $4,750) in full satisfaction of the medical bills.

Stanley asked the trial court to admit Walker's discounted medical bills into evidence. Walker objected on grounds that evidence of the discounted bills violated Indiana's collateral source statute, which in part prohibits the introduction of evidence of "insurance benefits" in personal injury cases. The trial court determined that the discounts constituted "insurance benefits" paid for by the plaintiff, and therefore could not be placed into evidence.

The jury returned a verdict in favor of Walker. Stanley appealed, asserting that the trial court erred when it barred introduction of Walker's discounted medical bills into evidence. The Court of Appeals affirmed the trial court's ruling. The Indiana Supreme Court granted transfer.

The Supreme Court held that the collateral source statute does not bar evidence of discounted amounts introduced into evidence in order to determine the reasonable value of medical services. To the extent the adjustment or accepted charges for medical services may be introduced into evidence without referencing insurance, they are allowed.

Walker's redacted medical bills should have been admitted as they were offered without reference to insurance or for the purpose of showing who paid for the bills, but rather to show the

"reasonable" value of the medical services as evidenced by the actual amount paid for them. "Reasonable value" is not exclusively based on the actual amount paid or the amount originally billed. The Court stated there where the reasonable value of medical services is disputed, the opposing party may produce contradictory evidence to challenge the reasonableness of the proffered medical bills.

The Court further opined that given the current state of the health care pricing system, where authorities suggest that a medical provider's billed charges do not equate to cost, the jury may well need the amount of the payments, amounts billed by the medical service providers, and other relevant evidence to determine the amount of reasonable medical expenses.

Keypoint: Defendants are allowed to offer "discounted" bills as evidence of the true value of the medical expenses claimed by the Plaintiff, even if such amounts were subsequently paid by a third party.

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NO DUTY TO UNREASONABLE DRIVERS

Witmat Development Corp. v. Randall Dickison
Indiana Court of Appeals, June 4, 2009

Randall Dickison veered off a county road, struck a small tree, and eventually landed in a water-filled strip pit located on Witmat's property. Dickison drowned. Dickison's Estate sued Witmat, alleging Witmat negligently failed to warn of the water-filled strip pit next to the roadway. The trial court denied Witmat's motion for summary judgment. On appeal, the Court of Appeals reversed.

Witmat argued that it owed no duty to Dickison, or, alternatively, that Dickison's own negligence caused the accident. Witmat designated evidence that according to the autopsy, Dickison had been operating his vehicle with a blood alcohol content of more than twice the legal limit, that Dickison drove his vehicle off a relatively flat and straight roadway, and that he traveled more than 230 feet before his vehicle entered the water-filled strip pit. In response, the Estate designated the affidavit of an accident reconstructionist, who stated that an overcorrection could have resulted in Dickison's vehicle leaving the roadway and ending up in the strip pit.

However, the Court noted the Estate failed to designate any evidence that the accident occurred because Dickison overcorrected his vehicle or that any other factor may have caused the accident. This, combined with Dickison's BAC level, led the Court to conclude Witmat owed no duty to Dickison. Rather, the sole proximate cause was Dickison's own negligence. As such, the Court found the trial court erred in denying Witmat's motion for summary judgment.

Key Point: The courts will not likely find a duty exists for owners of land adjacent to a road when an injured driver is found to have clearly failed to exercise reasonable care.

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PARENT'S CLAIM FOR EMOTIONAL DISTRESS

Indiana Patient's Compensation Fund v. Gary Patrick
Indiana Court of Appeals, May 18, 2009

Gary Patrick's adult son, Christopher Patrick, sustained abdominal trauma in an automobile accident. Christopher was discharged from St. Mary's Medical Center the next day. That evening, Christopher started vomiting blood. By the time the EMT's arrived, Christopher had lost consciousness. He was pronounced dead upon arrival at the hospital. The cause of death was an untreated ruptured colon from seatbelt trauma. At the time of death, Christopher was 31 years of age, had no dependents, and lived with his father.

Gary, individually and as personal representative of Christopher's Estate, brought a medical malpractice action against the physician who treated Christopher and against St. Mary's Medical Center. In addition to claiming damages for his son's death, Gary asserted a claim for his own emotional distress. Gary settled his claims against the health care providers, who agreed to pay $250,000, the maximum amount allowed under the Indiana Medical Malpractice Act ("MMA"). After the settlement, Gary individually and as personal representative of Christopher's estate, filed his petition for payment of excess damages against the Patient's Compensation Fund (the "Fund").

The Fund moved for summary judgment on Gary's individual claim for emotional distress damages, arguing that damages for negligent infliction of emotional distress are not recoverable under the Adult Wrongful Death Statute ("AWDS") and that Gary had not satisfied Indiana's requirements of the modified impact rule. The trial court concluded that Gary's claim for emotional distress ("ED") was independent of his claim for damages under the AWDS and awarded him $600,000 on his ED claim. The Fund appealed the award on Gary's ED claim.

The Indiana Court of Appeals affirmed. The Court held that Gary's ED claim arose from the negligence of the medical personnel in treating his son. His claim therefore arose in the context of medical malpractice and was not derivative of the AWDS claim. The fact that Christopher died subsequently, causing the matter to be pursued under the AWDS, did not change the existence or the nature of the claims. Gary's ED claim was therefore independent of and in addition to the AWDS claim.

The Court also held that though Gary was not present when the medical malpractice occurred, he did deal with the aftermath, as he was present during his son's subsequent relapse and death. He therefore met the requirements of the "bystander" rule, which states that a bystander may establish direct involvement by proving that the plaintiff actually witnessed or came on the scene soon after the death or severe injury of a loved one. The Court also noted while the ED claim was not derivative of the AWDS claim, it would be considered a derivative claim under the MMA.

Keypoint: Emotional Distress claims by family members, which are allowable in medical malpractice cases, must be based upon the plaintiff's involvement in the suffering of the injured party not merely because an injury or death occurred.

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PROTECTING CUSTOMERS

The Kroger Co. v. Lu Ann Plonski
Indiana Court of Appeals, April 28, 2009

After Plonski bought her groceries at Kroger, she placed her purse in her shopping cart and began loading her groceries in her car, which she had parked near the store entrance. A man grabbed her and threw her in the trunk of her car. Eventually Plonski got out and escaped.

After Plonski filed a negligence complaint against Kroger, Kroger moved for summary judgment, arguing it had no duty to protect Plonski from the criminal act of a third party who was not a guest of the store. In support, Kroger designated evidence that the area had a low crime rate. However, in response to discovery requests from Plonski, Kroger provided police reports that indicated there were more than 30 police runs to that location over a two year time period, including a reported carjacking. The trial court denied Kroger's motion for summary judgment. The Court of Appeals affirmed this decision.

In *Paragon Family Restaurant v. Bartolini*, (Ind. 2003) the Indiana Supreme Court had held that landowners have "a duty to take reasonable precautions to protect their invitees from foreseeable criminal attacks," including in the store parking lot. A key element of that duty is the foreseeability of the kind of criminal attack in which the plaintiff was involved, considering the totality of circumstances, including the nature of the property

and the history of similar criminal activity in that location. The fact that a carjacking had occurred on the premises one year earlier was sufficient to establish a factual issue about the foreseeability of the attack on Plonski, thereby precluding summary judgment for Kroger.

Key Point: When a crime happens in a store's parking lot, the courts will likely find that the store had a duty to protect the customer from this crime.

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UNINSURED MOTORIST COVERAGE: EMOTIONAL DISTRESS

Maggie Bush, et ux. v. State Farm Mut. Auto. Ins. Co.
Indiana Supreme Court, May 13, 2009

Leonard Bush, Jr., the adult son of Maggie Bush and Leonard Bush, Sr., died in a single-vehicle auto accident in which he was a passenger. The driver was uninsured. Leonard, Jr. did not reside with his parents, and he had no auto insurance coverage of his own. Nevertheless, Maggie and Leonard, Sr., made an uninsured-motorist claim against their auto carrier, State Farm, on the theory that their emotional distress was "bodily injury" contemplated by the Indiana Uninsured Motorist Statute, Ind. Code 27-7-5-2, and sued State Farm on that basis.

State Farm denied the claim on the basis that their emotional distress was not "bodily injury" under the policy or the statute. The trial court granted summary judgment to State Farm. The Court of Appeals reversed, holding that State Farm's exclusion of coverage for damages arising from Leonard, Jr.'s death violated the Uninsured Motorist Statute.

The issues before the Supreme Court were (1) whether the State Farm policy excluded emotional distress claims by the parents, and (2) whether such an exclusion violates the Uninsured Motorist Statute.

On the first issue, the Court held that the definition of "bodily injury" in the policy was unambiguous and that it includes emotional distress only if it arises from a bodily touching, citing *State Farm v. Jakupko* (Ind. 2008).

On the second issue, the Court noted that prior appellate decisions had held that emotional distress unaccompanied by an impact was not a "bodily injury" under uninsured or underinsured motorist coverage, and the legislature has never responded, implying these decisions correctly interpreted the original legislative intent.

The Court also noted that the only claim for damages relating to Leonard, Jr.'s death would be through the Adult Wrongful Death Act, which provides a cause of action through the decedent's estate only. Therefore, the Bushes cannot individually claim damages for their adult son's death.

Key Point: The Supreme Court continues to construe the scope of uninsured and underinsured motorist coverage relatively narrowly, consistent with the plain language of the statute.

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WELCOME TO CANDACE ARNOLD

The Tyra Law Firm has hired Candace Arnold as a file clerk and for general staff support. Candace is currently a student at IUPUI pursuing her Bachelor's degree in social work. Upon receiving her BSW she will continue her education through the Masters program in social work.

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