The Tyra Law Firm, P.C.

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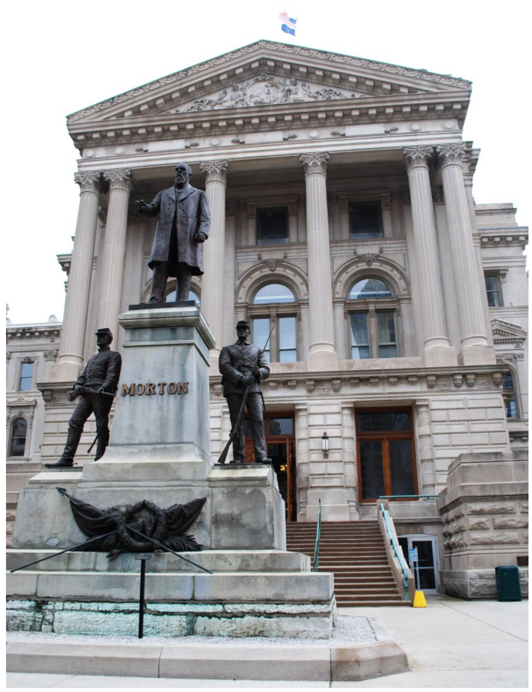
INSURANCE-RELATED LEGISLATION AT THE STATEHOUSE

Every legislative session presents issues of interest for the insurance industry, and 2013 has been no different. Two issues that garnered attention the past couple of years have been "loser pays" and the selection of appellate judges.



In particular with loser pays, conservative legislators have sought a way to reduce the filing of frivolous lawsuits. A worthy goal, many of the loser pays bills would ultimately have a negative impact on the insurance industry. The insurance industry frequently represents people against whom a judgment could be entered, so when legislation simply says the prevailing party will recover its attorneys' fees, it does not take into account that a jury could enter a small verdict against a defendant, but the defendant "wins" in the sense the judgment was well below plaintiff's last settlement demand. Still, the plaintiff would be the "prevailing party," and could therefore recover attorney fees. Therefore, it appears many of the legislators who have supported the concept have begun looking for other ways to curb lawsuit abuse without negatively impacting defendants. None of the bills introduced on loser pays are currently moving.

There has also been a lot of discussion on changing the selection of appellate judges in Indiana. Currently selected through a nominating process commonly referred to as the Missouri System, a commission comprised of the Chief Justice, three attorneys elected by their peers, and three non-attorneys appointed by the Governor, provide a list of three candidates from which the Governor may select. From our perspective, one problem with the current system is that the plaintiffs' bar has been a much more cohesive, forceful proponent of peer-elected candidates for the nominating commission than has been the defense bar and insurance industry, so that the membership of the nominating commission is tilted in favor of the plaintiffs' bar, and in turn may tend to nominate more judicial candidates to their liking.

Some legislators have proposed Indiana move towards a federal system in which the Governor appoints whomever he/she wants but that person is then confirmed by the Senate. Of all the bills introduced, only one has moved and is still alive. Instead of the Governor having the three outright appointments to the Commission, it requires the Governor to choose his appointments from a list provided by the caucus leader of the General Assembly.

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DEFAULT JUDGMENTS

Granite State Ins. Co. v. Robert Lodholtz, et al.
Indiana Court of Appeals, December 14, 2012

Lodholtz was injured on the premises of Pulliam Enterprises, which was insured by Granite State. On June 24, 2011, Lodholtz sued Pulliam, which contacted York Risk Services, which was the claims administrator for Granite State. York requested and received an extension of time from Lodholtz' counsel to respond to the Complaint, but York failed to do so. Lodholtz obtained a default judgment against Pulliam on August 23, 2011. On August 24, York sent a letter to Pulliam's private counsel urging Pulliam to "take immediate action to vacate the default judgment and defend itself in the matter."

Pulliam settled with Lodholtz on September 7, 2011, rather than moving to vacate the default judgment. The settlement included Lodholtz' agreement to collect his damages from Granite State and York rather than from Pulliam. On September 13, 2011, Granite State offered to represent Pulliam under a reservation of rights, which Pulliam rejected on September 14. The trial court denied Granite State's motion to intervene in the case, and awarded Lodholtz $3.9 Million at the damages hearing.

Granite State appealed the denial of its motion to intervene. The Court of Appeals affirmed the trial court's denial on the basis that because Granite State only offered to defend Pulliam under a reservation of rights, its interest in the litigation "is not cognizable but rather contingent upon the acceptance of coverage," and therefore is an insufficient basis to intervene in the litigation.

Storm Damage Specialists of America v.
Melissa A. Johnson, et ux.
Indiana Court of Appeals, February 27, 2013

Storm Damage solicited a roof-repair job with the Johnsons, whose homeowner's carrier issued Storm Damage a check for the repair. Storm Damage kept the check but didn't perform the work. The Johnsons sued Storm Damage, issuing a summons and complaint to the address of Storm Damage's registered agent as listed on the Indiana Secretary of State's website. Storm Damage's liability carriers also received a courtesy copy of the summons and complaint. No one appeared for Storm Damage, which was defaulted. Storm Damage later moved to correct error, explaining that its corporate accountant had filed the wrong address with the Secretary of State.

The trial court denied the motion to correct error, and the Court of Appeals affirmed, noting that the incorrect address had existed on the website for over two years, but Storm Damage made no attempt to correct it. The Johnsons, who had no reason to expect the information was inaccurate, had followed the rules regarding obtaining service of process.

<u>KeyPoints</u>: The specific holding in *Lodholtz* concerns a narrow procedural issue about a carrier intervening in its insured's litigation, but the facts in these two cases provide a reminder about four important points for claim professionals. First, not paying attention at the outset of a suit against your insured can be catastrophic in Indiana. Default judgments are not easily set aside in Indiana, unlike some other jurisdictions. Second, in the *Lodholtz* situation, issuing a reservation of rights letter when you already put the insured behind the eight ball is not the way to go. Third, a default judgment brought on by a third party such as a TPA or an accountant may still be something you can't remedy. Fourth, if Storm Damage's carriers had acted on the courtesy copies they had received, that default judgment could have been avoided.

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IS THE MED MAL CAP CONSTITUTIONAL? (PART TWO)

Timothy Plank v. Community Hospitals of Indiana, Inc.
Indiana Supreme Court, January 15, 2013

Plank filed a complaint against Community Hospital alleging medical malpractice causing his wife's death. The jury awarded Plank $8.5 million in damages. Community Hospital moved to reduce the verdict to conform with the statutory cap of $1.25 million under the Indiana Medical Malpractice Act ("the MMA"). Eight days later, Plank filed a written objection and requested the trial court conduct an evidentiary hearing as to whether the MMA's cap on damages is unconstitutional. Community Hospital argued Plank waived his objection to the reduction of the damages amount because he did not state his objection at the time Community Hospital moved for the reduction shortly after the verdict was delivered. The State also intervened for the purpose of defending the constitutionality of the cap.

The trial court ultimately overruled Plank's request for the hearing, and entered judgment in the amount of $1.25 million. On appeal, the Court of Appeals reversed the denial of Plank's request for an evidentiary hearing (the Court of Appeals decision was discussed in the Fall 2011 Newsletter). Both Community Hospital and the State sought transfer.

Essentially, the State relied on a 30 year old appellate decision that found the MMA damages cap was constitutional, and argued that any change in circumstances during the past 30 years was evidence the cap had succeeded in accomplishing its intended purpose. However, the Supreme Court pointed out that a party may still argue that a change in circumstances requires a reversal of existing law. Nonetheless, the question upon which the Supreme Court focused was whether Plank should be entitled to an evidentiary hearing to develop his constitutional argument.

Community again argued Plank waived his ability to challenge constitutionality at the trial court level. Plank responded that the constitutionality of a statute may be raised at any stage of a proceeding. While the Court acknowledged it may review a constitutional claim regardless of waiver, it pointed out this was not actually a waiver question. Instead, the issue is whether Plank forfeited his opportunity to conduct an evidentiary hearing to develop his constitutionality argument.

Forfeiture is the failure to make a timely assertion of a right. This case proceeded at the trial court level for nearly six years, as well as a two week jury trial, and at no point did Plank notify the trial court he took exception to the MMA damages cap. Not only did Plank fail to file a pre-trial motion challenging the cap, but also failed to make any claim prior to the jury's verdict at the end of the two week trial. Instead, Plank waited eight days to submit a written objection to the reduction of the verdict, which the Supreme Court said was too late.

<u>KeyPoint</u>: What is primarily important to note from this decision is the circumvention of the issue of whether the MMA damages cap is constitutional. Instead, this decision effectively provides a road map for the plaintiff's bar to challenge the constitutionality of this cap; that is, in order to challenge the constitutionality, you must file a pre-trial motion with the trial court asking for an evidentiary hearing. Therefore, it remains to be seen how the constitutionality challenge will eventually play out, but it is virtually guaranteed that the Supreme Court will be deciding that issue within the next few years.

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LIMITATIONS CLAUSE IN POLICY

State Farm v. Riddell Nat'l Bank
Indiana Court of Appeals, February 20, 2013

Riddell National Bank's mortgagor filed bankruptcy, and Riddell obtained a deed in lieu of foreclosure. When it took possession of the property, it discovered damage, and filed a claim with the mortgagor's homeowner's carrier, State Farm, which denied the claim.

Riddell filed suit against State Farm more than two years after the date of loss. State Farm moved to dismiss on the basis of the one-year limitations clause in the policy. The trial court denied the motion to dismiss, and the Court of Appeals affirmed.

Indiana Code 27-1-13-17 provides, essentially, that a limitations clause of less than two years after date of loss in a homeowner's policy in Indiana is unenforceable. State Farm argued that the statute means that when the clause is for less than two years, the statute automatically extends the limitation to two years, so State Farm would still have a basis to dismiss Riddell's suit.

The Court agreed with Riddell, however, that the application of the statute simply voids the one-year limitation, and Indiana's ten-year statute of limitation for written contracts instead applies to Riddell's insurance claim.

<u>KeyPoint</u>: This holding is pretty straightforward, but it does point out a relatively little-known statutory prohibition in Indiana against policy limitations clauses of less than two years.

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MEDIATION COMMUNICATIONS

Dennis Horner v. Marcia Carter
Indiana Supreme Court, February 12, 2013

The trial court approved a divorce settlement agreement reached by Horner and Carter following mediation. Horner later sought to modify a provision in that agreement that required him to pay monthly housing payments to Carter even after she remarried. At issue were statements that Horner claimed to have made about this issue during the mediation. The trial court excluded this evidence, and denied Horner's request for modification of the housing payment obligation. The Court of Appeals found the exclusion of the testimony had been in error, although it was harmless error.

The Supreme Court addressed Rule 2.11 of the Indiana ADR Rules, which discusses the confidentiality of matters that occur during mediation. This Rule incorporates Rule 408 of the Indiana Rules of Evidence regarding the inadmissibility of settlement offers. Rule 2.11 states that any matter discussed during the mediation shall be considered confidential and privileged.

In *Vernon v. Acton*, the Indiana Supreme Court had held the mediation confidentiality provisions of the ADR Rules include oral settlement agreements reached in mediation, and that mediation settlement agreements must be considered compromise settlement negotiations until reduced to writing.

Horner's objective in presenting the disputed evidence was to show it was neither his intent nor his oral agreement during mediation to continue making these payments. However, the Supreme Court disagreed that Horner's statements could be admitted as extrinsic evidence to aid in the construction of an ambiguous agreement. It cited Indiana's judicial policy of strongly urging the resolution of disputes, which embraces the confidentiality of conduct and statements made during settlement negotiations at mediation. As such, the Supreme Court said Horner's statements fell within the express inadmissibility of mediation evidence.

KeyPoint: Discussions during the course of mediation will not be admissible in a subsequent legal proceeding.

However, in several past appellate decisions not mentioned in *Horner*, communications and observations from mediation were found to be admissible even though what happens at mediation is supposed to be confidential. Therefore, the issue of whether something may be admissible simply because it is confidential as a result of it happening at mediation may not be as clear cut as the *Horner* decision appears to make it.

This is a two-edged sword for the defense in mediation. On the one hand, it is helpful that comments in mediation are not later admissible in court, for example if the defense concedes liability for negotiation purposes. On the other hand, the defense may acquire useful information from the plaintiff in mediation that this decision may make more difficult to use later in the case if it does not settle at mediation.

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PREJUDGMENT INTEREST

Margaret Kosarko v. William A. Padula
Jacqueline Wisner, M.D., et al. v. Archie L. Laney
Hassan Alsheik v. Alice Guerrero
Kathy Inman v. State Farm
Indiana Supreme Court, December 12, 2012

On December 12, 2012, the Indiana Supreme Court issued four opinions regarding the application of the Indiana Tort Prejudgment Interest Statute ("TPIS").

Essentially, TPIS provides for an award of prejudgment interest in tort cases under certain circumstances. First, the statute requires the plaintiff to make a qualified written settlement demand within one year of filing a claim. To be "qualified," it must give the defendant 60 days to pay the settlement, and it must not exceed one and one-third of the judgment eventually awarded. Second, the statute empowers the defendant to avoid prejudgment interest by making a qualified offer of settlement within nine months of the filing of the claim. For the defendant's offer to be "qualified," it must provide for payment within 60 days of plaintiff's acceptance of the offer, and it must be at least two-thirds of the judgment eventually awarded. The interest rate is 8%.

In *Kosarko*, the trial court had rejected Kosarko's petition for prejudgment interest after she recovered a $210,000 judgment. She had made a timely qualified demand for $100,000. The trial court had applied the "common law *Roper* standard," which required that damages had to be "complete and ascertainable " as of the time the demand had been made. The Supreme Court, however, held that TPIS abrogated the common law *Roper* standard, so that whether the damages were "complete and ascertainable" when the plaintiff made her demand is irrelevant to a later award of prejudgment interest under the statute. The Court remanded to the trial court to exercise its discretion under the TPIS.

In *Wisner*, a medical malpractice case, the Court first discussed at length the sniping, unprofessional conduct of both counsel at trial, which is fascinating/appalling all on its own. The Court then turned to the trial court's denial of plaintiff's petition for prejudgment interest on his $1.75 Million jury verdict, which decision the Court affirmed.

Laney's counsel had made a demand for $250,000 under the Medical Malpractice Act, but specified a 30-day time limit rather than 60 days, and did not cite TPIS. The Court held that in future cases, the demand should cite TPIS and specify the 60-day limit. The Court did find that Laney's waiting more than two years after filing suit to send the demand justified the denial of prejudgment interest to Laney.

In *Alsheik*, plaintiff's counsel had included a 15-day time limit in his demand, which the Supreme Court held met the minimum requirements of TPIS by having a time limit, even though it was the wrong time limit. The wrinkle in *Alsheik* was that plaintiff had filed suit, voluntarily dismissed without prejudice, sent the qualified demand letter two months after dismissal, then refiled the suit, which the Court found to be acceptable procedure.

Inman applied TPIS to an underinsured motorist ("UIM") claim, which the Supreme Court held is applicable, despite State Farm's argument that UIM is a contractual claim rather than a tort claim, and therefore TPIS should not apply. The Court also held that prejudgment interest is a "collateral litigation expense," and therefore can be awarded in excess of the insured's UIM policy limits.

In *Inman*, the Court discussed in more detail the trial judge's discretion in whether to award prejudgment interest, an issue mentioned only in passing in the other three decisions. Inman had UIM limits $50,000 over the liability limits of the tortfeasor, who settled with her for those limits. Inman made a demand for those limits, which State Farm rejected without making a counteroffer. The jury verdict against State Farm was in the amount of $50,000. The trial judge denied Inman's petition for prejudgment interest without explanation.

The Court emphasized that TPIS permits the trial court to award prejudgment interest, but does not require it. It is committed solely to the discretion of the trial court, based on the statute's "function as a tool for the trial court to encourage settlement and incentivize expeditious resolution of disputes." The Court affirmed the trial court's exercise of its discretion to deny prejudgment interest despite any explanation by the trial court, because the trial court has that discretion so long as it does not deny the petition for a legally-incorrect reason, such as the sufficiency or timeliness of plaintiff's settlement demand when the plaintiff had in fact met those requirements.

KeyPoints: When the plaintiff has made a qualified settlement demand under TPIS, defense counsel and the claim professional should consider the cost of prejudgment interest when evaluating exposure and how to respond to the settlement demand, especially if it appears the litigation may be protracted and the potential verdict may be high. The opportunities to insulate the defense from prejudgment interest may be limited, since the deadline to serve a qualified offer to the plaintiff is three months shorter than the deadline for the plaintiff to serve its qualified demand, so if prejudgment interest may be a significant factor and the defense anticipates a likely plaintiff's verdict, the defense may need to consider a qualified offer before it ever receives a qualified demand.

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RESCISSION AND TENDER OF PREMIUMS

Michael Dodd et ux. v. American Family Ins. Co.
Indiana Supreme Court, March 5, 2013

Plaintiffs Michael and Katherine Dodd filed a claim in March, 1998 with Farm Bureau when Katherine's home was destroyed by a fire. At the time, Katherine and Michael were not married. Katherine, who owned the property, maintained the insurance policy with Farm Bureau. Farm Bureau paid a settlement for the loss but disputed certain aspects of the claim. Still unmarried, Michael filed an application with American Family in December, 1998 for homeowners coverage while in the process of trying to rebuild the home. The application asked if the applicant or any member of the household had any past or current losses at any locations. Michael answered in the negative.

Michael and Katherine were subsequently married. In 2003, the Dodds' garage was destroyed in a fire and they filed a claim with American Family. American Family learned of the prior nondisclosure of the Farm Bureau claim and voided the policy due to misrepresentation. The Dodds filed suit. The trial court granted summary judgment to American Family on both counts. After the Dodds filed their notice of appeal, American Family filed a motion to interplead all of the premiums it had collected from the Dodds, which totaled $2,079.90.

The Supreme Court accepted the case on transfer, and upheld the ruling of the trial court. The Dodds argued that American Family failed to tender premiums the Dodds paid for coverage and that failure to do so was a prerequisite for voiding coverage. The Court noted that the Dodds did not assert these issues before the trial court, and even if they did, Indiana law is clear that such a tender is not necessary where the insurer has paid a claim under the policy which is greater than the premiums paid under the policy. In this instance, American Family had already paid a hail damage claim for $5,500 under the policy, which was greater than the $2,079.80 in premiums paid by the Dodds. Therefore, no tender of premiums was required.

KeyPoint: Insurers are not required to tender premiums paid under a policy as a prerequisite to cancel a policy and deny a claim due to misrepresentation when a claim(s) has already been paid under the policy in an amount greater than the premiums that have been collected under the policy.

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YOU CAN'T CHARGE ME THAT MUCH (PART TWO)

Abby Allen v. Clarian Health Partners, Inc.
Indiana Supreme Court, February 12, 2013

Allen treated at Clarian North Hospital. Allen was uninsured and was not covered by Medicaid or Medicare. Allen had signed a Clarian contract agreeing to pay all charges for her treatment. This contract did not specify a dollar amount for the services rendered. Clarian billed Allen $15,641.64 according to its chargemaster rates. Allen filed suit, alleging breach of contract and seeking a declaratory judgment that the rates the hospital bills its uninsured patients are unreasonable and unenforceable. Allen argued in her complaint that Clarian would have accepted $7,308.78 for the same services and supplies if she had insurance. The trial court granted Clarian's motion to dismiss.

The Court of Appeals, however, reversed the trial court's decision and remanded for further proceedings (The Court of Appeals decision was discussed in the Fall 2011 Newsletter). The Supreme Court affirmed the trial court's decision.

Allen's breach of contract claim asserted that the lack of a specific price in Clarian's contract means it lacks a material term of price. Allen argued that Indiana law implies a reasonable price when a contract does not specify a price for services. However, the Court held that while a reasonable price can be imputed if a contract is uncertain as to price, absolute certainty is not required for all terms of the contract. A contract does not need to specify a dollar amount for goods or services in order to be enforceable. The Supreme Court also observed that nobody knows exactly what treatments the patient will need and how much it may ultimately cost.

The Supreme Court also disagreed with Allen's argument that her promise to pay the account for treatment is indefinite and cannot constitute a price term for Clarian's services.

Allen also relied on *Stanley v. Walker* for the proposition that the courts should assess the reasonableness of hospital charges. However, *Stanley* dealt with evaluating the reasonableness of a plaintiff's medical charges in the context of litigation, and whether the amount billed or the amount discounted by the health care provider actually constitutes the plaintiff's reasonable medical expenses. Here, the Supreme Court declined to extend *Stanley* to breach of contract claims. The Court then declined to address the declaratory judgment issue.

KeyPoint: Simply because a health care provider's contract to provide services to an uninsured patient does not specify an exact price for those services does not mean the contract is unenforceable. Providers in Indiana may continue to charge higher rates to uninsured patients.

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The Canal in downtown Indianapolis dyed green for St. Patrick's Day

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