

## Indiana

### REGULATORY LIMITS ON CLAIMS HANDLING

#### Timing for Responses and Determinations

Limits are expressed in terms of “reasonableness” in Ind. Code § 27-4-1-4.5, which is entitled “Enumeration of Unfair Claim Settlement Practices.” Under the Unfair Claim Settlement Practices Act, failing to acknowledge and act reasonably upon communications with respect to claims arising under insurance policies, failing to affirm or deny coverage of claims within a reasonable time, or failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed, all *may* subject an insurer to liability for unfair claims practices under the statute.

For accident and sickness insurance policies, Ind. Code § 27-8-5.7 *et seq.*, governs the payment of such claims. A “clean claim” must be paid or denied within thirty (30) days after an electronically filed claim is received by the insurer, or within forty-five (45) days after receipt of a claim filed on paper. An insurer must otherwise notify a provider of any deficiencies in a submitted claim within the same respective time periods. An insurer who fails to notify a provider of any deficiencies in the claim within the proscribed time period establishes the claim as a “clean claim.” An insurer who fails to pay or deny a clean claim within the required time and who subsequently pays the claim must pay the provider interest on the allowable amount of the claim paid. *Id.* at §§ 27-8-5.7-5 & 27-8-5.7-6.

#### Standards for Determination and Settlements

Indiana’s Unfair Claim Settlement Practices Act (Ind. Code § 27-4-1 *et. seq.*) incorporates Indiana’s common law principles for evaluating an insurer’s conduct. The obligation of good faith and fair dealing with respect to the discharge of the insurer’s contractual obligation includes the obligation to refrain from: (1) making an unfounded refusal to pay policy proceeds; (2) causing an unfounded delay in making payment; (3) deceiving the insured; and (4) exercising any unfair advantage to pressure an insured into a settlement of his claim. *White v. State Farm Mutual Auto Ins. Co.*, 709 N.E.2d 1079 (Ind. Ct. App. 1999); *Allstate Ins. Co. v. Hennings*, 827 N.E.2d 1244 (Ind. Ct. App. 2005); *Knowledge A-Z, Inc. v. Sentry Ins.*, 857 N.E.2d 411 (Ind. Ct. App. 2006), *Maple Creek Commons Homeowners Ass’n v. State Farm Fire & Cas. Co.*, 1:08-CV-00475-TWP, 2012 WL 14022 (S.D. Ind. Jan. 4, 2012).

### PRINCIPLES OF CONTRACT INTERPRETATION

Insurance policies are contracts “subject to the same rules of judicial construction as other contracts.” *Erie Indem. Co. for Subscribers at Erie Ins. Exch. v. Estate of Harris by Harris*, 99 N.E.3d 625, 630 (Ind. 2018). The court will interpret an insurance policy with the goal of ascertaining and enforcing the parties’ intent as revealed by the insurance contract. *Westfield Cos. v. Knapp*, 804 N.E.2d 1270 (Ind. Ct. App. 2004).

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If the language in an insurance contract is clear and ambiguous, it should be given its plain and ordinary meaning. *Erie*, 99 N.E.2d at 630. Courts may construe ambiguous policy terms only. *Id.* An insurance policy provision is ambiguous only if it is susceptible to more than one reasonable interpretation. *Holiday Hospitality Franchising, Inc. v. AMBO Ins. Co.*, 983 N.E.2d 574, 578 (Ind. 2013). Ambiguity does not arise from mere disagreement over a policy term's meaning or by simply offering different policy interpretations. *Erie*, 99 N.E.2d at 630.

When evaluating alleged ambiguities—whether there exist two reasonable interpretations for one policy term—courts read insurance policies “from the perspective of ... ordinary policyholder[s] of average intelligence.” *Allgood v. Meridian Sec. Ins. Co.*, 836 N.E.2d 243, 246–47 (Ind. 2005). If reasonably intelligent policyholders would honestly disagree on the policy language's meaning, then the term is ambiguous and subject to judicial construction. *Id.* at 247. Conversely, if reasonably intelligent policyholders could not legitimately disagree as to what the policy language means, the court will apply its plain ordinary meaning. *Erie*, 99 N.E.3d at 630.

Courts should accept an interpretation of language in an insurance contract that harmonizes the provisions rather than one that supports a conflicting version of the provisions. *Westfield Cos. v. Knapp*, 804 N.E.2d 1270 (Ind. Ct. App. 2004). See also, *Wright v. Am. States Ins. Co.*, 765 N.E.2d 690 (Ind. Ct. App. 2002); *Meridian Mut. Ins. Co. v. Auto-Owners Ins. Co.*, 698 N.E.2d 770 (Ind. 1998). An insurance policy must be reasonably construed, and the court may not find coverage unless the language of the policy admits liability. *Gallant Ins. Co. v. Allstate Ins. Co.*, 723 N.E.2d 452 (Ind. Ct. App. 2000). That is, courts may not interpret a policy to mean something that it clearly does not or was not intended to mean, even if the failure to interpret the term limits the insurer's liability. *Rice v. Meridian Ins. Co.*, 751 N.E.2d 685 (Ind. Ct. App. 2001).

## CONTRACT INTERPRETATION

### Common Issues

#### 1. Faulty Workmanship as an “Occurrence”

In *Sheehan Constr. Co. v. Continental Cas. Co.*, 935 N.E.2d 160 (Ind. 2010), Indiana's Supreme Court observed that the definition of “occurrence” requires an “accident.” The Court then concluded that a claim for faulty workmanship that is “unexpected” and “without intention or design” is considered an unforeseeable accident on the part of the insured and satisfies the definition of “occurrence” within the meaning of a commercial general liability policy.

#### 2. Does Your State Have an Anti-Indemnity Statute?

Yes. I.C. 26-2-5-1 provides:

(a) As used in this section, “construction or design contract” includes a design-build contract under which all of the following for the same project are included:

(1) Architectural, engineering, and related design services.

(2) Labor, materials, and other construction services.

(b) All provisions, clauses, covenants, or agreements contained in, collateral to, or affecting any construction or design contract, except those pertaining to highway contracts, which purport to indemnify the promisee against liability for:

(1) death or bodily injury to persons;

(2) injury to property;

(3) design defects; or

(4) any other loss, damage, or expense arising under subdivision (1), (2), or (3): from sole negligence or willful misconduct of the promisee are against public policy and are void and unenforceable. Sole negligence does not include vicarious liability, imputed negligence, or assumption of a nondelegable duty.

## CHOICE OF LAW

Indiana follows the approach formulated by the Restatement (Second) of Conflict of Laws section 188 when deciding which law to apply when there is a conflict. *National Union Fire Ins. Co. of Pittsburgh, PA v. Standard Fusee Corp.*, 940 N.E.2d 810 (Ind. 2010). If the parties have not made an effective choice of law, the court will consider the different contacts the parties have with the forums at issue. *Id.* Indiana's choice of law rule for contract actions calls for applying the law of the forum with the most intimate contacts. *Id.* When applying principles in the insurance realm this means that [r]ights created by an insurance contract are determined by the law of the state where the risk or subject matter is located. *Id.* Where the "insured risk" spans multiple states, the Indiana courts have afforded this contact less weight, and looked then to the "place of performance of the contract, or 'the locations where the insurance funds will be put to use.'" *Standard Fusee*, 940 N.E.2d at 816-817 (quoting *Hartford Acc. & Indem. Co. v. Dana Corp.*, 690 N.E.2d 285 (Ind. Ct. App. 1997)).

Accordingly, in insurance contract cases, courts first attempt to determine the principal location of the insured risk; if the principal location of the insured risk can be determined, it is given more weight than other factors, but if no such location exists, the court continues its analysis of the most intimate contacts, such that the law of the state in most intimate contact is then to be applied to the entire dispute. *Id.* The following are representative of the factors to consider in applying Indiana's "most intimate contacts" test as choice-of-law rule for contract actions: (1) the place of contracting; (2) the place of negotiation; (3) the place of performance; (4) the location of the subject matter of the contract, and (5) the domicile, residence, nationality, place of incorporation and place of business of the parties. *Kentucky Nat. Ins. Co. v. Empire Fire & Marine Ins. Co.*, 919 N.E.2d 565 (Ind. Ct. App. 2010).

## DUTIES IMPOSED BY STATE LAW

### Duty to Defend

#### 1. Standard for Determining Duty to Defend

An insurer's duty to defend is broader than its coverage for liability or its duty to indemnify. *Indiana Farmers Mut. Ins. Co. v. Ellison*, 679 N.E.2d 1378, 1381-82 (Ind. Ct. App. 1997), *trans. denied* (citing *Trisler v. Indiana Ins. Co.*, 575 N.E.2d 1021 (Ind. Ct. App. 1991)). The duty to defend is determined from the allegations of the complaint and "from the facts known or ascertainable by the insurer **after an investigation has been made.**" *Id.* at 1382 (emphasis added); *Mahan v. Am. Standard Ins. Co.*, 862 N.E.2d 669, 676 (Ind. Ct. App. 2007). If the pleadings fail to disclose a claim within the coverage limits, or one that is clearly excluded under the policy, *and* investigation reveals that the claim is outside the coverage of the policy, no defense is required. *Monroe Guar. Ins. Co. v. Monroe*, 677 N.E.2d 620 (Ind. Ct. App. 1997). However, the insurer has a duty to conduct a reasonable investigation into the facts underlying the complaint before it may refuse to defend the complaint. *Id.*; *Walton v. First Am. Title Co.*, 844 N.E.2d 143 (Ind. Ct. App. 2006), *Cincinnati Specialty, Underwriters Ins. Co. v. DMH Holdings, LLC*, No. 3:11-CV-357, 2013 WL 683493 (N.D. Ind. Feb. 22, 2013).

## 2. Issues with Reserving Rights

In Indiana, an insurer's duty to defend is broader than the duty to indemnify. *Seymour Mfg. Co. v. Commercial Union Ins. Co.*, 665 N.E.2d 891, 892 (Ind. 1996). It is the nature of the claim, not its merit, that establishes an insurer's duty to defend. *Trisler v. Ind. Ins. Co.*, 575 N.E.2d 1021, 1023 (Ind. Ct. App. 1991). To determine whether an insurer has a duty to defend, the underlying factual allegations of the complaint with the relevant provisions of the insurance policy need to be compared. *Ind. Farmers Mut. Ins. Co. v. N. Vernon Drop Forge, Inc.*, 917 N.E.2d 1258, 1271-72 (Ind. Ct. App. 2009). The duty to defend is triggered when the complaint alleges facts that might fall within the coverage of the policy. *Fed. Ins. Co. v. Stroh Brewing Co.*, 127 F.3d 563 (7th Cir. 1997). "Only if there is no possible factual or legal basis on which the insurer might be obligated to indemnify will the insurer be excused from defending its insured." *City of Gary v. Auto-Owners Ins. Co.*, 116 N.E.3d 1116, 1121 (Ind. Ct. App. 2018).

However, Indiana courts are quick to admonish an insurer who "sit[s] down and hold[s] its hands and purse...after fair notice," and "that an insurer may refuse to defend its insured, but at its own peril." *Liberty Mut. Ins. Co. v. Metzler*, 586 N.E.2d 897, 901 (Ind. Ct. App. 1992) (citing, *Cincinnati Ins. Co. v. Mallon*, 409 N.E.2d 1100 (Ind. Ct. App. 1980)); *National Mut. Ins. Co. v. Fincher*, 428 N.E.2d 1386, 1390 (Ind. Ct. App. 1980). When an insurer questions whether an injured party's claim falls within the scope of policy coverage or raises a defense that its insured has breached a policy condition, the insurer has two options: (1) file a declaratory judgment action for a judicial determination of its obligations under the policy; or (2) hire independent counsel and defend its insured under a reservation of rights. *Gallant Ins. Co. v. Wilkerson*, 720 N.E.2d 1223, 1227 (Ind. Ct. App. 1999) (citing *Metzler*, 586 N.E.2d at 902). Even if recovery in the underlying suit is premised upon several theories of liability, some of which are excluded from policy coverage, the insurer still is obligated to defend if even only one theory falls within the policy's coverage.

## State Privacy Laws; Insurance Regulatory Issues; Arbitration/Mediation

### 1. Criminal Sanctions

The only criminal sanction imposed by Indiana's Insurance Code concerns fraudulent representations in an application for life, health, or accident insurance. (Ind. Code § 27-8-3-21):

27-8-3-21 Fraudulent representations; offenses

Sec. 21. A person who knowingly makes a false or fraudulent statement or representation in or with reference to any application for insurance, or for the purpose of obtaining any money or benefit in or to any corporation, association, or society transacting business under this chapter, commits a Class A misdemeanor.

### 2. The Standards for Compensatory and Punitive Damages

- Compensatory Damages:

The standard for compensatory damages asserted against an insurer are generally based upon damages awarded in a breach of contract action. The insured has the burden of proving the value of their compensatory damages by a preponderance of the evidence.

In a cause of action for fraud against an insurer, the measure of damages is the difference between the value of what the plaintiff has parted with and the value of what he or she has received. *Shepher v. Truex*, 823 N.E.2d 320 (Ind. 2005). An insured who proves fraud is entitled to compensation for damage she suffered as a result of the fraudulent representation. The damage must be the proximate consequence of the insured's reliance on the fraudulent representations. *Captain & Co., Inc. v. Stenberg*, 505 N.E.2d 88 (Ind. Ct. App. 1987).

- Punitive Damages:

In addition to the actual or compensatory damages, courts may award punitive damages if clear and convincing evidence demonstrates that an insurer acted with malice, fraud, gross negligence or oppressiveness which was not the result of a mistake of fact or law, honest error or judgment, overzealousness, mere negligence, or other human failing. Clear and convincing evidence may be defined as an intermediate standard of proof greater than a preponderance of the evidence and less than proof beyond a reasonable doubt and requires the existence of a fact be highly probable.

The terms relating to punitive damages have the following meanings:

“Malice” is an act or a failure to act done:

- (1) intentionally,
- (2) without legal authority or excuse, and
- (3) with the intent to harm.

“Fraud” is an act, a failure to act, or a concealment done knowingly or intentionally to cheat or deceive another person.

“Gross negligence” is a voluntary act or failure to act done with reckless disregard of the consequences to another person.

“Oppressiveness” is an act or a failure to act done in a domineering, overbearing, or controlling manner that subjects another person to a cruel and unjust hardship.

*Craft v. Economy Fire & Cas. Co.*, 572 F.2d 565 (7th Cir. 1978) (applying Indiana law); *Thompson ex rel. Thompson v. Owensby*, 704 N.E.2d 134 (Ind. Ct. App. 1998). *Logan v. Commercial Union Ins. Co.*, 96 F.3d 971, 36 Fed. R. Serv. 3d 106 (7th Cir. 1996) (applying Indiana law); *Erie Ins. Co. v. Hickman by Smith*, 622 N.E.2d 515 (Ind. 1993); *Colley v. Indiana Farmers Mut. Ins. Group*, 691 N.E.2d 1259 (Ind. Ct. App. 1998); *Jackson v. Allstate Ins. Co.*, 780 F.Supp.2d 781 (SD. Ind. 2011); *Continental Cas. Co. v. Novy*, 437 N.E.2d 1338 (Ind. App. 1982); *Allstate Ins. Co. v. Fields*, 885 N.E.2d 728, 732 (Ind. Ct. App. 2008); *Monroe Guar. Ins. Co. v. Magwerks Corp.*, 829 N.E.2d 968 (Ind. 2005); *USA Life One Ins. Co. of Indiana v. Nuckolls*, 682 N.E.2d 534 (Ind. 1997); *Erie Ins. Co. v. Hickman by Smith*, 622 N.E.2d 515 (Ind. 1993); *Allstate Ins. Co. v. Hennings*, 827 N.E.2d 1244 (Ind. Ct. App. 2005); *Firstmark Standard Life Ins. Co. v. Goss*, 699 N.E.2d 689 (Ind. Ct. App. 1998).

### 3. State Arbitration and Mediation Procedures

There is no state-mandated or restrictions on arbitration or mediation procedures for insurance matters. Parties may engage in private mediation. Most courts will recommend or require a settlement conference before the court, depending on the local rules of that county, for all matters filed in that court.

#### 4. State Administrative Entity Rule-Making Authority

The Indiana Department of Insurance (DOI) is the administrative agency charged with enforcing Indiana's insurance laws, as set forth in Indiana's Insurance Code (Ind. Code Title 27), and Indiana's Insurance Regulations (Ind. Admin. Code, Title 760)

The website for the Indiana Department of Insurance: <http://www.in.gov/idoi/>

## EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

### Bad Faith Claim Handling/Bad Faith Failure to Settle Within Limits

#### 3. First Party

Indiana law recognizes a legal duty, implied in all insurance contracts, for the insurer to deal in good faith with its insured. *Freidline v. Shelby Ins. Co.*, 774 N.E.2d 37, 40 (Ind. 2002) (citing *Erie Ins. Co. v. Hickman*, 622 N.E.2d 515, 518 (Ind. 1993)). This obligation of good faith and fair dealing includes the obligation to refrain from: (1) making an unfounded refusal to pay policy proceeds; (2) causing an unfounded delay in payment; (3) deceiving the insured; and (4) exercising an unfair advantage to pressure an insured into settlement of his claim. A good faith dispute as to the validity of a claim is not grounds for recovery in tort for the breach of the obligation to exercise good faith. An insurer must deny liability knowing there is no rational, principled basis for doing so to breach its duty. *Erie*, 622 N.E.2d at 519; *see also Auto-Owners Ins. Co. v. Shirk*, No. 3:10-CV-018-JD-CAN, 2013 WL 832685 (N.D. Ind. Mar. 5, 2013); [\*Inman v. State Farm Mut. Auto. Ins. Co.\*, 981 N.E.2d 1202 \(Ind. 2012\)](#).

The evidentiary standard for insurer bad faith is high. Bad faith is shown when there is clear and convincing evidence establishing that "the insurer had knowledge that there was no legitimate basis for denying liability." *Freidline v. Shelby Ins. Co.*, 774 N.E.2d 37, 40 (Ind. 2002); *Monroe Guar. Ins. Co. v. Magwerks Corp.*, 829 N.E.2d 968, 976 (Ind. 2005). "Poor judgment or negligence does not amount to bad faith; the additional element of conscious wrongdoing must be present. A finding of bad faith requires evidence of a state of mind reflecting dishonest purpose, moral obliquity, furtive design, or ill will." *Allstate Ins. Co. v. Fields*, 885 N.E.2d 728, 732 (Ind. Ct. App. 2008) (quoting *Lumbermens Mut. Cas. Co. v. Combs*, 873 N.E.2d 692, 714 (Ind. Ct. App. 2007), *trans. denied*).

#### 4. Third-Party

The tort action of bad faith in Indiana arises from the breach of the implied duty of good faith and fair dealing that an insurer owes to its insured. *Erie Ins. Co. v. Hickman*, 622 N.E.2d 515, 518 (Ind. 1993). That tort was established in light of the "special relationship" that exists between an insured



and an insurer. *Id.* at 519. That duty however has not been held to exist with respect to a third party claim. *Cain v. Griffin*, 849 N.E.2d 507 (Ind. 2006); *Myers v. Deets*, 968 N.E.2d 299 (Ind. Ct. App. 2012); *Menefee v. Schurr*, 751 N.E.2d 757 (Ind. Ct. App. 2001). However, the cause of action is assignable so that an insured may assign his cause of action to a third-party claimant. *Allstate Ins. Co. v. Axsom*, 696 N.E.2d 482 (Ind. Ct. App. 1998).

## Fraud

To establish a cause of action for actual fraud, it must be found that:

- the representation was false;
- the representation was made with knowledge or in reckless ignorance of the falsity;
- the representation was relied upon by the complaining party; and
- the representation proximately caused the complaining party injury.

*Am. United Life Ins. Co. v. Douglas*, 808 N.E.2d 690 (Ind. Ct. App. 2004). “The failure to disclose all material facts by one on whom the law imposes a duty to disclose constitutes actionable fraud.” *Id.*

## Intentional or Negligent Infliction of Emotional Distress

The tort of intentional infliction of emotional distress (IIED) occurs when the defendant “(1) engages in extreme and outrageous conduct (2) which intentionally or recklessly (3) causes (4) severe emotional distress to another.” *McCullough v. Noblesville Sch.*, 63 N.E.3d 334, 341–42 (Ind. Ct. App. 2016). The requirements to prove this tort are rigorous, and at its foundation is “the intent to harm the plaintiff emotionally. *Id.* at 342.

It is not enough that the defendant acted with intent to cause emotional distress that is tortious or even criminal, or that he intended to inflict emotional distress, or even that his conduct was malicious. The conduct must also have been “extreme and outrageous” as Indiana courts have interpreted that phrase. *Creel v. I.C.E. Assoc. Inc.*, 771 N.E.2d 1276, 1282 (Ind. Ct. App. 2002). IIED will be found only where the conduct has been so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community. *Id.*

Indiana recognizes two forms of negligent infliction of emotional distress (“NIED”) arising under the *modified impact rule* (including the precursor impact rule) and the *bystander rule*. The original “impact rule” requires that there be some kind of physical contact sustained by a plaintiff which causes physical injury and emotional injury arises as a result. This rule was expanded by the Indiana Supreme Court into what is now known as the “modified impact rule.” *Shuamber v. Henderson*, 579 N.E.2d 452 (Ind. 1991). In *Shuamber*, the Court dropped the requirement that a plaintiff sustain physical injury, but retained the requirement of a physical impact: “sustains a direct impact by the negligence of another and by virtue of the direct involvement sustains emotional trauma.” The exception to physical impact for NIED is the “bystander rule” adopted by the Indiana Supreme Court in 2000, which held that if a party witnesses or comes upon the scene of the death or severe injury of a loved one with a close relationship such as spouse, parent or child, a cause of action for NIED may be maintained even absent direct impact. *Groves v. Taylor*, 729 N.E.2d 569 (Ind. 2000).

Note, however, that the Indiana Court of Appeals has repeatedly tested the limits imposed by Indiana's Supreme Court to expand this cause of action and attempt to abandon the strictures of the modified impact and bystander rules. In two cases, *Atl. Coast Airlines v. Cook*, 857 N.E.2d 989 (Ind. 2006) and *South v. Toney*, 862 N.E.2d 656 (Ind. 2007), the Indiana Supreme Court has emphasized the limitations of this cause of action.

## State Consumer Protection Laws, Rules and Regulations

Indiana has enacted several statutes to protect Hoosier consumers. For example, Indiana passed the Indiana Deceptive Consumer Sales Act, Ind. Code §§ 24–5–0.5–1 to 24–5–0.5–12, which protects consumers against certain deceptive and unconscionable sales practices. There are also laws regulating the sale of specific types of products such as the Cigarette Fair Trade Act, Ind. Code § 24-3-2, *et seq.* Likewise, Ind. Code § 9-23-3, *et seq.*, defines unfair practices in the manufacture and sale of motor vehicles. The insurance industry in particular is heavily regulated. Ind. Code § 27-4-1-4 defines unfair or deceptive acts and practices in the industry. Ind. Code § 27-1-22-14 is concerned with the regulation of insurance rates with respect to the underwriting of insurance policies.

## DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS

### Discoverability of Claims Files Generally

A claim file is not automatically discoverable merely because an insured contends that a bad faith action cannot be proven without access to its content. *See Zurich American Insurance Company v. Circle Centre Mall, LLC*, 113 N.E.3d 1220 (Ind. Ct. App. 2018). Moreover, Indiana law suggests that a work product privilege exists for insurer claim file materials where "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been *prepared or obtained because of the prospect of litigation.*" *Burr v. United Farm Bureau Mut. Ins. Co.*, 560 N.E.2d 1250, 1255 (Ind. Ct. App. 1990) (emphasis added). Under this "prospect of litigation" test, Indiana courts are liberal in upholding the protections afforded by the work product doctrine, and will protect as privileged even the "mental impressions, opinions, legal theories or conclusions" of the insurer in the investigation and evaluation of a claim. *Id.*; see also, *Indiana State Bd. of Pub. Welfare v. Tioga Pines Living Ctr., Inc.*, 592 N.E.2d 1274, 1277 (Ind. Ct. App. 1992); *National Eng'g & Contracting Co., Inc. v. C & P Eng'g & Mfg. Co., Inc.*, 676 N.E.2d 372, 378 (Ind. Ct. App. 1997). Generally, courts will look at the communications and the role of parties – including the role of outside counsel – to determine whether the parties were engaged in claims adjusting or the rendering of legal advice. *See Hartford Fin. Servs. Group, Inc. v. Lake County Park and Recreation Bd.*, 717 N.E.2d 1232, 1235-1236 (Ind. Ct. App. 1999) ("The role of Hartford's counsel was not one of mere negotiator; nor was the attorney retained to act in the capacity of an agent other than an attorney such as a type of "outside claims adjuster" or to give simple business advice . . . simply put, Hartford retained counsel to investigate Lake County's claim, render legal advice and make a coverage determination under the policy.") (citation omitted).

### Discoverability of Reserves

At least one Indiana case held that insurance reserve information related to an insurance policy, including aggregate reserve information, is discoverable. In *Auto-Owners Ins. Co. v. C & J Real Estate, Inc.*, 996 N.E.2d 803, 807 (Ind. Ct. App. 2013), the court upheld a trial court's motion to compel discovery as to a plaintiff's request for "reserve information regarding or relating to [the plaintiff's] file and/or Insurance Policy, including but not limited to any aggregate reserve information." *Id.* The insurer objected and argued that any documentation regarding the issue was prepared in anticipation of litigation and was undiscoverable. *Id.* The court noted that, while evidence or remarks about liability insurance in a negligence case is inadmissible, a case involving bad faith is a tort that contains elements that are different than negligence. *Id.* The court also stated that, while a discovery request from a third party regarding insurance reserves is invalid, such a request from an insurer of an insured is not invalid. *Id.* at 807-8 (rejecting insurer's reliance on Ind. R. Trial P. 26(B)(3) and *Richey v. Chappell*, 594 N.E.2d 443 (Ind. 1992), which involved litigation between the insured and a third party in which the third party was



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requesting discovery of statements by the insured to the insurer).

Other courts interpreting Indiana law have held that, once litigation is anticipated, loss reserves are protected by the work product doctrine, as long as there is evidence that the loss reserves were established or adjusted in consultation with counsel in anticipate of or during litigation. *See, e.g., G&S Metal Consultants, Inc. v. Cont'l Cas. Co.*, No. 3:09-CV-493-JD-PRC, 2014 U.S. Dist. LEXIS 151431, at \*16 (N.D. Ind. Oct. 24, 2014) (applying Indiana law and stating that pre-litigation loss reserves may be discoverable).

### Discoverability of Existence of Reinsurance and Communications with Reinsurers

This issue has not been directly addressed in a reported Indiana state court case. However, federal courts sitting in Indiana have provided some guidance on the issue. For example, Magistrate Debra McVicker Lynch's order in *Cummins, Inc. v. ACE Am. Ins. Co.*, No. 1:09-cv-00738-JMS-DML, 2011 U.S. Dist. LEXIS 4568 (S.D. Ind. Jan. 14, 2011) addresses the discoverability of the existence of reinsurance and communications with reinsurers. In that case, the court denied a wide discovery request for all reinsurance information. *Id.* at \*30-31. However, discovery was allowed with respect to communications with reinsurers as to the specific claim at issue. *Id.* at \*31-21 (stating communications between the insurers and their reinsurers regarding the claim at issue are different and may reveal the insurer's views on coverage that may lead to evidence admissible to plaintiff's claims).

### Attorney/Client Communications

As discussed above, the discoverability of correspondence with counsel depends on the role counsel is playing. Indiana courts have recognized that communications between a property insurer and its own legal counsel before the insured sued the insurer for bad faith in handling the claim were protected by the attorney-client privilege and, thus, were not subject to discovery in the suit where the documents concerned the insurer's request for legal advice relating to the claim. *Hartford Fin. Servs. Group, Inc. v. Lake County Park and Recreation Bd.*, 717 N.E.2d 1232, 1235-1237 (Ind. Ct. App. 1999). However, insurers can waive their privilege in bad faith cases by arguing it did not commit bad faith because it reasonably relied upon the advice of counsel. *Id.* An insurer does not waive its attorney-client privilege by the mere denial of an allegation that it acted in bad faith. *Id.*

In third-party claims, Indiana courts have acknowledged that the attorney-client privilege extends to communications between the insurer and chosen defense counsel by virtue of the common interest doctrine. *Zurich American Ins. Co. v. Circle Centre Mall, LLC*, 113 N.E.3d 1220 (Ind. Ct. App. 2019). Indiana courts have also acknowledged an "insurer-insured" privilege, which is essentially an extension of the attorney-client privilege, to protect communications between the insurer and insured from discovery by a third party. *Richey v. Chappell*, 594 N.E.2d 442 (Ind. 1992).

## DEFENSES IN ACTIONS AGAINST INSURERS

### Misrepresentations/Omissions: During Underwriting or During Claim

A material misrepresentation or omission of fact in an insurance application relied on by the insurer in issuing the policy renders the coverage voidable at the insurance company's option. *Colonial Penn Ins. Co. v. Guzorek*, 690 N.E.2d 664 (Ind. 1997); *Doaks v. Safeco Ins. Co. of Am.*, 3:09 CV 367, 2013 WL 951202 (N.D. Ind. Mar. 12, 2013). The materiality of the misrepresentation is a question of fact unless reasonable minds could not differ. *Id.*

Innocent mistakes made in submitting proofs of loss on a claim will not amount to fraud or false swearing, nor bar

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the insured under policy provisions with respect to misrepresentation. *Palace Café v. Hartford Fire Ins. Co.*, 97 F.2d 766 (7th Cir. Ind. 1938) (applying Indiana law). However, willful and intentional fraud or false swearing in submission of a claim to an insurer may bar the insured under the terms of the relevant policy from recovery. *Am. Econ. Ins. Co. v. Liggett*, 426 N.E.2d 136 (Ind. Ct. App. 1981).

An insurer that seeks to void/rescind a policy based upon a representation made during underwriting must first offer to return the premiums it has collected from the insured within a reasonable time after the discovery of the alleged breach. *Dodd v. Am. Family Mut. Ins. Co.*, 983 N.E.2d 568 (Ind. 2013). A failure to offer such return of premiums, or if refused, to pay it into court, constitutes a waiver of the alleged fraud. *Id.* However, there is an exception to this rule: “such a tender is not necessary where . . . the insurer has paid a claim thereon which is greater in amount than the premiums paid.” *Id.* (quoting *Am. Standard Ins. Co. v. Durham*, 403 N.E.2d 879, 881 (Ind. Ct. App. 1980)).

### Failure to Comply with Conditions

The duty to notify an insurance company of potential liability is a condition precedent to the company's liability to its insured. *Shelter Mut. Ins. Co. v. Barron*, 615 N.E.2d 503, 507 (Ind. Ct. App. 1993), *trans. denied*; *Dreaded, Inc. v. St. Paul Guardian Ins. Co.*, 904 N.E.2d 1267 (Ind. 2009); *Indiana Farm Bureau Ins. Co. v. Harleysville Ins. Co.*, 965 N.E.2d 62 (Ind. Ct. App. 2012). However, policy requirements such as notice and cooperation will not bar recovery unless the insurer suffers prejudice as a result of the delay or lack of cooperation. *Tri-etch, Inc. v. Cincinnati Ins. Co.*, 909 N.E.2d 997 (Ind. 2009); *Miller v. Dilts*, 463 N.E.2d 257, 265-66 (Ind. 1984). Furthermore, Indiana courts enforce the policy condition that an insured not misrepresent a fact material to the insured's claim for coverage at any time – including after a claim is filed. *State Farm Fire & Cas. Ins. Co. v. Graham*, 567 N.E.2d 1139 (Ind. 1991). To defend under a misrepresentation clause, an insurer need not show detrimental reliance. *Id.* However, an insured can avoid the application of such a clause by showing it withdrew or corrected the misrepresentation prior to reliance by the insurance company. *Id.* Reliance for purposes of enforcing such a clause is very broad and does not require the payment of a claim. *Acuity v. Auto Tech Auto. Inc.*, 09 CV 336, 2012 WL 124928, at \*9 (N.D. Ind. January 18, 2012).

### Challenging Stipulated Judgments: Consent and/or No-Action Clause

Where an insurer has defended under a reservation of rights or has filed a declaratory judgment action, a judgment between an insured and a tort plaintiff will bind the insurer as to the issues not related to coverage, at least so long as the insured has acted reasonably and in good faith. *Frankenmuth Mut. Ins. Co. v. Williams*, 690 N.E.2d 675, 679 (Ind. 1997).

No-action clauses barring collusive settlements can bar action against the insurer until there has been a judgment or settlement approved by the insurer although these cases have presented in Indiana with mixed issues including failure of conditions. See *Smithers v. Mettert*, 513 N.E.2d 660 (Ind. Ct. App. 1987). The court noted that the no-action clause should be interpreted not to include trial determinations “which merely rubber stamp compromise agreements entered into by the litigants and not by the insurance company.” *Id.*

### Preexisting Illness or Disease Clauses

For long-term care insurance, a “preexisting condition” is defined in Ind. Code § 27-8-12-10 as:

- As used in this section, “preexisting condition” means “the existence of:

- Either:
  - (A) Symptoms that would cause an ordinary prudent person to seek diagnosis, care, or treatment; or
  - (B) A condition for which medical advice or treatment was recommended by, or received from, a provider of health care services; within
- A period not to exceed either:
  - Twelve (12) months preceding the effective date of coverage of an insured person who is sixty-five (65) years of age or older on the effective date of coverage; or
  - Twenty-four (24) months preceding the effective date of coverage of an insured person who is less than sixty-five (65) years of age on the effective date of coverage.
- A long-term care insurance policy may exclude coverage for a loss or confinement that is the result of a preexisting condition only if that loss or confinement begins within:
  - Twelve (12) months following the effective date of coverage of an insured person who is sixty-five (65) years of age or older on the effective date of coverage; or
  - Twenty-four (24) months following the effective date of coverage of an insured person who is less than sixty-five (65) years of age on the effective date of coverage.
- The insurance commissioner may extend the limitation periods set forth in subsections (a)(2)(A), (a)(2)(B), and (b), concerning specific age group categories in specific policies upon a finding that the extension is in the best interest of the public.

For accident and life insurance policies, the Indiana Code sets limits on how a policy can define a preexisting condition. Ind. Code § 27-8-5-2.5(c) directs that an individual policy of accident and sickness insurance may not define a preexisting condition, a rider, or an endorsement more restrictively than as:

- a condition that would have caused an ordinarily prudent person to seek medical advice, diagnosis, care, or treatment during the twelve (12) months immediately preceding the effective date of the plan;
- a condition for which medical advice, diagnosis, care, or treatment was recommended or received during the twelve (12) months immediately preceding the effective date of the plan; or
- a pregnancy existing on the effective date of the plan.

A disease or illness "exists" within the meaning of a health policy excluding preexisting conditions at the time it has become manifest or active and known to the insured, or when there is some distinct symptom or condition such that the illness is capable of accurate diagnosis by a physician. *Mut. Hosp. Ins. v. Klapper*, 288 N.E.2d 279, 281 (Ind. Ct. App. 1972). The medical origin of an illness does not determine its existence. Id.

Proximate cause issues also affect the construction of preexisting illness or disease clauses. Indiana does not follow the rule that a causative or contributory preexisting medical condition necessarily bars coverage for an injury. *Rozek v. Am. Family Mut. Ins. Co.*, 512 N.E.2d 232,235 (Ind. Ct. App. 1987).

A disease is not a proximate cause of death, for purposes of a policy excluding coverage for death resulting from disease, unless that disease has set the chain of events leading to the death into motion. *Am. States Ins. Co. v. Morrow*, 409 N.E.2d 1140, 1142 (Ind. Ct. App. 1980).

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With respect to medical plans, if ambiguity exists, terms of the policy should be interpreted most favorably to the insured. *DiDomenico v. Emp'rs Co-op. Indus. Trust*, 676 F. Supp. 903, 908 (N.D. Ind.1987). It is a well established principle that an ambiguous policy will be construed against the party who drafted its terms. *Am. Family Mut. Ins. Co. v. Coleman*, No. IP 88-835-C, 1989 WL 434885 (S.D. Ind. Sept. 20, 1989).

### Statutes of Limitations and Repose

The ten-year statute of limitation for written contracts contained at Ind. Code § 34-11-2-11 applies to an insured's suit against a liability insurer. *Perryman v. Motorist Mut. Ins. Co.*, 846 N.E.2d 683 (Ind. Ct. App. 2006). However, limitations contained within the policy limiting time to file suit are binding, unless in contravention of statute or public policy, so long as they afford a reasonable time for the insured to bring a claim. *Id.*

## TRIGGER AND ALLOCATION ISSUES FOR LONG-TAIL CLAIMS

### Trigger of Coverage

The trigger of coverage for long-tail/latent bodily injury claims has not been extensively examined by the Indiana courts. The Indiana Supreme Court has adopted the “multiple trigger” or “continuous trigger” theory for long-tail/latent bodily injury claims, holding that “coverage is triggered at any point between [initial exposure] and the manifestation” of the resultant disease/effect of the injurious exposure. *Eli Lilly & Co. v. Home Ins. Co.*, 482 N.E.2d 467, 471 (Ind. 1985). In *Lilly*, the underlying actions alleged that women had ingested Lilly's anti-miscarriage drug diethylstilbestrol (DES), and as a result those women and their female offspring were injured by developing cancer in later years. *Id.* at 468. The allegations also included claims by women who had not yet developed cancer, but who were at a higher risk and/or feared developing cancer in the future. *Id.* The Indiana Supreme Court relied extensively on the rationale of the decision in *Eagle-Picher Industries, Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12 (1<sup>st</sup> Cir. 1982) to support adoption of the “multiple trigger” theory of coverage.

Moreover, Indiana Court of Appeals has determined that “manifestation” occurs “when a latent disease ‘becomes clinically evident, that is, when it becomes reasonably capable of medical diagnosis.’” *Thomson Inc. v. Insurance Co. of North America*, 11 N.E.3d 982, 1016 (Ind. Ct. App. 2014)(quoting and adopting, *Eagle-Picher*, 682 F.2d at 25).

### Allocation Among Insurers

Whether or not the damaging effects of an occurrence continue beyond the end of the policy period depends on the language in the policy. In *Allstate Ins. Co. v. Dana*, 759 N.E.2d 1049 (Ind. 2001), the Indiana Supreme Court interpreted an Allstate insurance policy provision stating that it would pay “all sums” which Allstate “shall be obligated to pay” based on property damage “caused by an occurrence,” to provide indemnification for “all sums,” not just those sums accruing as a result of damages which arose during the policy period. Thus the Indiana Supreme Court adopted the “all sums” or “joint and several” allocation.

However, several Courts, including the Indiana Court of Appeals, have recognized that an insuring agreement that provides for payment of “those sums” for which the insured is legally obligated to pay which arose during the relevant policy period. *Trinity Homes LLC v. Ohio Cas. Ins. Co.*, 864 F. Supp. 2d 744, 759 (S.D. Ind. 2012). Under the policy language in *Trinity* – utilizing the phrase “those sums” that Trinity becomes liable to pay for property damage which “occurs during the policy period” – Ohio Casualty was obligated to the insured “only for damages arising during its policy periods for pro rata liability as opposed to several and indivisible.” *Id.*; see also, *Irving*

*Materials, supra*, 2007 WL 1035098, at \*21-22.

The Indiana Court of Appeals adopted the rationale of the *Trinity* court, determined that the *Dana* decision was not controlling, and held that policies incorporating language obligating the insurer to pay “those sums” for which the insured becomes legally obligated to pay because of “bodily injury...that occurs during the policy period” requires pro rata allocation of defense and indemnity costs. *Thomson Inc. v. Insurance Co. of North America*, 11 N.E.3d 982, 1017-1023 (Ind. Ct. App. 2014). The court went on to decide that pro rata allocation methodology requires a “fact-based allocation,” if feasible, otherwise “time-on-the risk” methodology should be adopted. *Id.* at 1022.

## CONTRIBUTION ACTIONS

### Claim in Equity vs. Statutory

Though no statutory right exists, subrogation is a doctrine of equity long recognized in Indiana. *Erie Ins. Co. v. George*, 681 N.E.2d 183, 186 (Ind. 1997). It applies whenever a party, not acting as a volunteer, pays the debt of another that, in good conscience, should have been paid by the one primarily liable. *Id.* The ultimate purpose of the doctrine, as with other equitable principles, is to prevent unjust enrichment. *Id.* (citing 73 Am.Jur.2d Subrogation § 4 (1974)). Because subrogation is an equitable remedy, in determining whether an insurer may bring a subrogation action in a particular case, courts must weigh “the principles of equity and good conscience.” *LBM Realty, LLC v. Mannia*, 19 N.E.3d 379, 386 (Ind. Ct. App. 2014). When the insurer claims a right through subrogation, it stands in the shoes of the insured and takes no rights other than those which the insured had. *United Farm Bureau Mut. Ins. Co. v. Owen*, 660 N.E.2d 616, 619 (Ind. Ct. App. 1996). In the insurance industry, an insurer's right to subrogation arises only with respect to rights against third persons. No right of subrogation arises in favor of an insurer against its own insured. *N. Indiana Pub. Serv. Co. v. Bloom*, 847 N.E.2d 175, 186 (Ind. 2006).

In addition, Indiana does not recognize a statutory right to contribution. However, it is well-settled that to establish a right of contribution between insurance companies providing concurrent coverage, the policies must have: (1) the same parties; (2) in the same interest; (3) in the same property; and (4) against the same casualty.” *State Auto. Ins. Co. v. DMY Realty Co., LLP*, 977 N.E.2d 411, 432 (Ind. Ct. App. 2012). Also, “parties bringing contribution and indemnification claims must wait until after the obligation to pay is incurred, for otherwise the claim would lack the essential damage element.” *Pflanz v. Foster*, 888 N.E.2d 756, 759 (Ind. 2008) (citing *Comm'r, Ind. Dep't of Env'tl. Mgmt. v. Bourbon Mini-Mart, Inc.*, 741 N.E.2d 361, 372 n. 9 (Ind. Ct. App. 2000) (providing that “an obligation to indemnify or for contribution does not arise until the party seeking such remedy suffers loss of damages, i.e., at the time of payment of the underlying claim”); *Estate of Leinbach v. Leinbach*, 486 N.E.2d 2, 5 (providing that “to be entitled to contribution, the [claimant] must have first paid the debt”); *McLochlin v. Miller*, 139 Ind.App. 443, 448, 217 N.E.2d 50, 53 (Ind.Ct.App.1966) (providing that “payment must be made under compulsion to entitle payor to contribution”).

### Elements

Because subrogation is an equitable remedy, it should be used to avoid an “unearned windfall.” *Bank of America, N.A. v. Ping*, 879 N.E.2d 665, 671 (Ind. Ct. App. 2008). It should be given a liberal application, which the courts are inclined to extend rather than to restrict. *In re Paul Harris Stores, Inc.*, 342 B.R. 285 (Bankr. S.D. Ind. 2006). Subrogation will be granted when an equitable result will be obtained. Therefore, a person who has paid a debt under the colorable obligation to do so or under an honest belief that he is bound or who mistakenly but in good

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faith believes he is liable is entitled to subrogation. *Ohio Cas. Grp. of Ins. Companies v. Royal-Globe Ins. Companies*, 413 N.E.2d 678, 679 (Ind. Ct. App. 1980).

In the context of insurance companies seeking contribution from one another, the general rule of law is as follows: before pro rata contribution may be required between insurers providing concurrent coverage, the policies must cover: (1) the same parties; (2) in the same interest; (3) in the same property; and (4) against the same casualty. *Indiana Ins. Co. v. Sentry Ins. Co.*, 437 N.E.2d 1381, 1388 (Ind. Ct. App. 1982).

### DUTY TO SETTLE

Under the Unfair Claim Settlement Practices Act, Ind. Code § 27-4-1 *et. seq.*, failing to acknowledge and act reasonably upon communications with respect to claims arising under insurance policies, failing to affirm or deny coverage of claims within a reasonable time, or failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed, all *may* subject an insurer to liability for unfair claims practices under the statute.

The principles underlying a duty to settle coincide with insurers' requirement to act in good faith, which includes the obligation to refrain from: (1) making an unfounded refusal to pay policy proceeds; (2) causing an unfounded delay in payment; (3) deceiving the insured; and (4) exercising an unfair advantage to pressure an insured into settlement of his claim. *Freidline v. Shelby Ins. Co.*, 774 N.E.2d 37, 40 (Ind. 2002). A "bad faith" failure to settle occurs where the insurance company makes a settlement decision on a basis that elevates the economic interest of the insurance carrier over the economic interest of the insured. *Economy Fire & Cas. Co. v. Collins*, 643 N.E.2d 382, 386 (Ind. Ct. App. 1994). Moreover, a liability insurer, having assumed control of the right of settlement of claims against the insured, may become liable in excess of its policy limit if it fails to exercise due care in representing its insured. *Bennett v. Slater*, 289 N.E.2d 144, 146 (Ind. 1972).

In addition, policies entitle the insurers to control the insured's defense against a covered claim and to negotiate a settlement, but this control is subject to their fiduciary duty to the insured: the insurer is forbidden to "sell out" an insured, for example by settling for the policy limit without making a reasonable effort to reduce the insured's liability above that limit. *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Mead Johnson & Co. LLC*, 735 F.3d 539, 543 (7th Cir. 2013).

### LH&D BENEFICIARY ISSUES

#### Change of Beneficiary

A life insurance policy provision making a change in beneficiary effective on the date signed, authorized a change in beneficiary request to be received after the death of the insured and, therefore, provided an exception to the general rule that life insurance proceeds fully vest upon the insured's death. *Bowers v. Kushnick*, 774 N.E.2d 884 (Ind. 2002).



## Effect of Divorce on Beneficiary Designation

A life insured's expression of intent to change beneficiary designation on his life insurance policies and eliminate his former wife, following recent divorce, is insufficient to effectuate a change and have policy proceeds transferred to his estate upon his death; insured's failure to change beneficiary designation left his former wife as beneficiary. *Hancock v. Kentucky Cent. Life Ins. Co.*, 527 N.E.2d 720 (Ind. Ct. App. 1988). A divorce decree alone does not result in change in beneficiary named in a life insurance policy; thus, an ex-spouse who is named beneficiary may collect proceeds unless an insured changes beneficiary designation or policy contains an automatic designation change provision. *Id.*

## INTERPLEADER ACTIONS

### Availability of Fee Recovery

Pursuant to Ind. Trial Rule 22, Indiana recognizes interpleader actions as a form of joinder to permit claimants into one single action and to require them to litigate among themselves to determine which, if any, has a valid claim. Insurance companies may use interpleader where adverse claims are unliquidated tort claims against insured. *Commercial Union Ins. Co. of New York v. Adams*, 231 F. Supp. 860 (S.D. Ind. 1964). See also *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 87 S. Ct. 1199, 18 L. Ed. 2d 270 (1967). Once the insurance company has deposited the disputed funds with the court, the insurer should not be liable beyond proceeds of policy. See *Borgman v. Borgman*, 420 N.E.2d 1261 (Ind. Ct. App. 1981).

Indiana T.R. 22 does not reference whether the court may award the interpleading party its costs or attorney fees as part of the relief granted; however, the Civil Code Study Commission suggests that such an award may be proper as part of the court's equitable power. On this point, the Study Commission states: "The right of the person seeking interpleader to recover his costs and attorney's fees will not necessarily co-exist with his rights under Rule 22, but will depend upon principles applicable to equity interpleader." Civil Code Study Commission Comments to Trial Rule 22.

### Differences in State vs. Federal

Because Ind. Trial Rule 22 on interpleader actions is based on the similar federal rule of civil procedure, there are no known different requirements or standards for interpleader actions between the jurisdictions.