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March 14 **2014**

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Indiana Supreme Court Analyzes Whether Workers' Compensation Applies to Diminish UIM Calculation

First, let me start by saying, welcome to my 100th installment on the Hoosier Litigation Blog. While one hundred blog posts is certainly not a noteworthy accomplishment for blogs dedicated to short blurbs, anyone who has read the HLB knows that my posts are far from short blurbs. My typical post runs around 5 pages of single typed text. That said, it has been an honor and a privilege to author these weekly pieces and I am always warmed by the numerous people who have commented to me about them. When I first started keeping track of readership, we were lucky to get as many as 25 readers per day. Now, a normal day results in more than 100 posts read on the HLB and we have reached more than 60,000 views on JD Supra. In 2013 alone, readers spent more than 1,279 hours on the HLB. That is more than 53 days spent on the HLB alone, let alone the amount of time spent on JD Supra. I started my posts by rejecting the advice of keeping blog posts short and sweet to maximize SEO. I held the opinion then as I do now that I will only post if I find that what I'm writing is useful and fun. Thanks to my consistent and loyal readers, writing my weekly posts has been fun and, so I am told, useful. With that said, let us now turn to this week's topic for discussion.

This week, as though to reward your author for having authored so many posts, both the Indiana Supreme Court and the Seventh Circuit have showered us in decisions that merit discussion. This has already sparked me to author a rare mid-week post. But, it also now leads me to do an unprecedented quadruple-post today. So, just as quickly as the 100-post mark has come, it will be surpassed. The four cases for todays discussions each strikes upon one of our favorite topics. From the Indiana Supreme Court, we have *Justice v. American Family Mutual Insurance Co.* – authored by Justice Mark Massa. Frequent readers will recognize that opinions authored by Justice Massa have very frequently found great praise on the HLB as will the *Justice* decision from yesterday. The Seventh Circuit has also provided three decisions that merit analysis: *McMahon v. LVNV Funding, LLC* – a class action decision authored by Chief Judge Dianne Wood – and, each from Judge Richard Posner, *Krien v. Harsco Corp.* and *Central States, Southeast & Southwest Areas Health & Welfare Fund v. Lewis*. After a convoluted coin flipping procedure, I have decided to dedicate this post to a discussion on the *Justice* case out of the Indiana Supreme Court.

To quote former District Judge Samuel B. Kent – a person on whom a very interesting post could be authored, largely due to his subsequent impeachment, resignation, and federal conviction leading to a 33-month prison sentence, "With Big Chief tablet readied, thick black pencil in hand, and a devil-may-care laugh in the face of death, life on the razor's edge sense of exhilaration, [your author] begins."

So without further ado, let us delve into *Justice v. American Family Mutual Insurance Co.*

In *Justice*, the singular issue was whether underinsured motorist coverage had to take into consideration payments made pursuant to workers' compensation. We have previously discussed the function of underinsured motorist coverage – typically known as UIM – in Indiana. For our purposes here, it is important to recognize that there is a substantial difference between UIM coverage and uninsured motorist (UM) coverage. UM coverage applies where the other driver has no insurance whatsoever or, as the policy will usually define it, when the other driver is impossible to ascertain–such as in a hit and run. UIM coverage is where the other motorist has insurance but the cap on his policy is less than your UIM coverage. An example of a typical UIM situation is where the driver who caused the accident has an insurance policy limit of $25,000 and the second driver who was injured has UIM coverage of up to $50,000. If the injured driver suffers $75,000 in injuries, he can recover $25,000 against the negligent driver's insurance policy. He can then seek to recover an additional amount from his insurance provider. However, he is not able to recover the full $50,000 from his insurance. He is only able to recover his policy limit minus the amount he recovered from the other

driver. This means that his policy would pay an additional $25,000. The total recovery for the injured driver then is $50,000.

The injured driver in *Justice* was Mr. Howard Justice, an Indianapolis city bus driver. The bus driven by Mr. Justice was hit by a car driven by Miss Wagner. Because Mr. Justice suffered on the job injuries, he was able to make a recovery under workers' compensation. The full breakdown of compensation to Mr. Justice was summarized by the court.

> To compensate him for the damages he sustained as a result of the accident, Justice received $77,469.56 in workers' compensation . . . . That workers' compensation award comprised $51,829.81 paid to Justice's medical providers, $18,939.75 for his lost wages and temporary disability, and $6,700 for his permanent partial impairment. Pursuant to those payments, [the workers' compensation insurer] asserted a lien in the amount of $77,469.56 against Justice's bodily injury claim. Justice settled this lien for $5,511.06, bringing his net workers' compensation to $71,958.50. Justice also received $25,000 from Wagner's insurer, bringing his total recovery to $96,958.50.

In addition to this recovery, Mr. Justice had an insurance policy with American Family that provided for $50,000 in UIM coverage. Thus, the issue was whether the workers' compensation recovery figured into the UIM calculation. If the workers' compensation recovery figured in to the UIM calculation, then Mr. Justice could not recover anything for UIM. However, if the workers' comp. money was excluded, then Mr. Justice could recover up to $25,000.

A very important distinction between UM and UIM coverage is the nature of recovery against a person's own insurance policy. In the case of UM coverage, the driver's own insurance company stands in the shoes of the negligent driver that caused the accident. Thus, the method of recovery against the UM driver arises under tort law, whereas, UIM coverage is entirely a creature of contract law. Consequently, the focus of the *Justice* decision turns on interpreting the specific language of Mr. Justice's insurance policy. The policy states:

> We will pay compensatory damages for bodily injury which an insured person is legally entitled to recover from the owner or operator of an underinsured motor vehicle. The bodily injury must be sustained by an insured person and must be caused by accident and arise out of the use of the underinsured motor vehicle.
>
> . . .

> EXCLUSIONS
>
> . . .
>
> Underinsured Motorists Coverage shall not apply to the benefit of any insurer or self-insurer under any workers' compensation or disability benefits law or any similar law.
>
> LIMITS OF LIABILITY
>
> The limits of liability of this coverage as shown in the declarations apply, subject to the following:
>
> 1. The limit for each person is the maximum for all damages sustained by all persons as the result of bodily injury to one person in any one accident.
>
> 2. Subject to the limit for each person, the limit for each accident is the maximum for bodily injury sustained by two or more persons in any one accident.
>
> We will pay no more than these maximums no matter how many vehicles are described in the declarations, insured persons, claims, claimants or policies or vehicles are involved in the accident.
>
> The ***limits of liability of this coverage*** will be reduced by:
>
> 1. ***A payment made or amount payable by or on behalf of any person or organization which may be legally liable***, or under any collectible auto liability insurance, for loss caused by an accident with an underinsured motor vehicle.
>
> 2. A payment under the Liability coverage of this policy.
>
> 3. ***A payment made or amount payable because of bodily injury under any workers' compensation or disability benefits law*** or any similar law.

Mr. Justice sued his insurance company for breach of contract after it denied him compensation under the UIM coverage. The trial court agreed with American Family's interpretation and granted summary judgment against Mr. Justice. He appealed and argued: "(1) the setoff should not apply at all because his policy expressly excluded coverage of injuries eligible for workers' compensation benefits;

(2) even if the setoff did apply, the plain language of the policy required it to apply against his total damages, not the policy limit; and (3) the policy language was ambiguous and should be construed in favor of the insured." The court of appeals agreed with his second argument and thereby reversed the trial court. American Family sought and received transfer to the Indiana Supreme Court.

The Supreme Court broke its analysis into three sections roughly corresponding to Mr. Justice's three arguments. The first section was the only portion that was not unanimous. Chief Justice Brent E. Dickson disagreed with the analysis agreed upon by the other four justices. The majority's analysis of whether the workers' compensation exclusion clause voids the setoff provision is surprisingly cursory – likely impetus for Chief Justice Dickson's dissent on this point. The entirety of the majority's analysis is first to summarize Mr. Justice's argument: "In essence, Justice claims American Family voided the workers' compensation setoff provision by excluding payments from applying to the benefit of a workers' compensation insurer[.]" Then, to reject a case cited by him to support his argument as not "instructive here." Peculiarly, to even see the court's conclusion on this argument, we have to look to the title of the section: "The Workers' Compensation Exclusion Clause Does Not Void the Setoff Provision." No other substantive analysis is made in this section.

Chief Justice Dickson's dissent is not much more insightful. The totality of his dissent states: "contrary to Part A, [Chief Justice Dickson] believes that the workers' compensation setoff provision cannot apply to reduce benefits payable under the underinsured motorist policy because the policy expressly excludes coverage of injuries eligible for workers' compensation."

As this argument was not afforded great attention and, ultimately, was not outcome-determinative, we shall move on to the second section. Since the section titles succinctly summarize the conclusion, it merits note that the title of Section B is "The Policy Language Unambiguously Provides for a Setoff Against the Policy Limit." The now-unanimous court summarized Mr. Justice's argument on this point:

> Justice next argues the language in the "LIMITS OF LIABILITY" section of his policy is clear and requires the setoff be applied not against the policy limit but against his total damages. Alternatively, he argues the policy language is ambiguous and must therefore be construed in his favor—specifically, such that the setoff applies against his total damages and thus he may recover $25,000 from American Family.

The court did not agree.

In analyzing the argument, the court recognized that an insurance policy is interpreted like any other contract with "some specialized rules of construction in recognition of the frequently unequal bargaining power between insurance companies and insureds." One rule argued by Mr. Justice, though certainly not unique to insurance policies, is that any ambiguity in the policy should be construed against the insurer. In general, contract law mandates that ambiguities be construed against the drafter; in insurance law, the drafter is always the insurer.

Both parties agreed that the case *Beam v. Wausau Insurance Co.* was the controlling precedent on this issue, but they disagreed on its application. In *Beam*, a truck driver was injured and received a jury award in excess of $700,000 against the other driver. The trial court reduced the verdict by the $20,000 the other driver's insurer had already paid, the $80,000 paid by the driver's personal UIM, by $300,000+ in worker's comp. medical benefits, and roughly $87,000 in workers' comp. disability payments. The result was an award of just over $204,000 payable by the driver's employer's UIM policy that was capped at $1 million. On appeal, the truck driver claimed the policy was ambiguous. The Indiana Supreme Court disagreed and affirmed the trial court.

The *Justice* court found one provision of the *Beam* policy analogous to the *Justice* policy:

> D. LIMIT OF INSURANCE
>
> . . .
>
> 2. The Limit of Insurance under this coverage shall be reduced by all sums paid or payable by or for anyone who is legally responsible, including all sums paid under the Coverage Form's LIABILITY COVERAGE.

The court found this portion of the *Beam* policy to match the portion of the *Justice* policy that states that the "limits of liability of this coverage will be reduced by . . . [a] payment made or amount payable by or on behalf of any person or organization which may be legally liable [and] . . .[a] payment made or amount payable because of bodily injury under any workers' compensation or disability benefits law." The court construed "limits of liability of this coverage" to "clearly refer[ ] to the $50,000 policy limit, not to Justice's total damages." Meaning, the UIM coverage should be reduced by both the $25k from the other driver's insurance as well as the $72k from workers' comp.

However, the court's analysis did not end there. Section C was titled "The

Set-Off Provision Contravenes Indiana Code § 27-7-5-2." For those of you who have been following along, you will realize that this section is where Mr. Justice finds his justice (pun obviously intended). A quick Google search of "Indiana Code 27-7-5-2" will yield my not-so-smiley mug as the third result. That is because our previously mentioned prior discussion on UIM coverage cited to this code section. It is a very lengthy code section that outlines the requirements for UIM and UM coverage in Indiana automobile/motor vehicle insurance policies. The reason the court's analysis moved on to interpreting the applicability of section 27-7-5-2 is because the insurance policy language controls **unless** it is inconsistent with statute, then it is unenforceable.

Looking to section 27-7-5-2, the court recognized that the section required a minimum of $50k in UIM coverage. Specifically, an "[i]nsurer[ ] may not sell or provide [UIM] coverage in an amount less than" $50k. Thus, if the policy did not meet this requirement, then the law would imprint it upon the written text of the policy so as to meet the requirement. So as to not delve into the minutia of the lengthy discussion, it is sufficient to note that the court looked to the underlying policy of the statutory requirement – "to promote the recovery of damages for innocent victims of auto accidents with uninsured or underinsured motorists" – and precedent to conclude that the workers' comp. recovery should not be considered in the calculation. The rationale is actually rather simple and, unsurprisingly, well explained by the court.

> Justice . . . did not receive the full statutory minimum from the tortfeasor's insurer; the minimum was $50,000, but Justice received only $25,000. If Wagner had carried the required amount of liability insurance, Justice would have received $50,000, and the purpose of our uninsured/underinsured motorist statute is to put him in that position.

Put simply – if it even needs restated at all – the only Mr. Justice did not recover $50k from Miss Wagner was because her insurance policy did not go that high. If her policy did go up to $50k, then he would have gotten the $50k. Since the purpose of UIM is to cover what the other person should have paid to him, this avails him of the $50k total.

This is a phenomenal result because it upholds the full spirit of Indiana's UIM statute and prevents a crafty legal argument from circumventing it. Due to the ultimate conclusion of the court, it seems highly unlikely that even the most clever insurance policy drafters can find a way around this result. That said, the court could have so easily concluded, as Chief Justice Dickson did, that the policy itself did not allow the use of the workers' comp. recovery to be calculated into UIM. If the court had done so, the long-term applicability of this decision would have been in

doubt, as drafters could easily circumvent that conclusion. But, due to the decision turning on enforcement of section 27-7-5-2, the result seems to cement the conclusion that workers' compensation payments do not work their way into calculating UIM.

Join us again next time for further discussion of developments in the law.

Sources

- *Justice v. Am. Family Mut. Ins. Co.*, ---N.E.3d---, No. 49S02-1303-PL-221 (Ind. Mar. 13, 2014).

- *Justice v. Am. Family Mut. Ins. Co.*, 971 N.E.2d 1236 (Ind. Ct. App. 2012), *trans. granted, opinion vacated*.

- *McMahon v. LVNV Funding, LLC*, ---F.3d---, Nos. 12-3504 & 13-2030, 2014 WL 929358 (7th Cir. Mar. 11, 2014).

- *Krien v. Harsco Corp.*, ---F.3d---, No. 13-2272, 2014 WL 975482 (7th Cir. Mar. 13, 2014).

- *Cent. States, Se. & Sw. Areas Health & Welfare Fund v. Lewis*, ---F.3d---, No. 13-2214, 2014 WL 943412 (7th Cir. Mar. 12, 2014).

- *Bradshaw v. Unity Marine Corp., Inc.*, 147 F. Supp. 2d 668, 670 (S.D. Tex. 2001) (Kent, J.):
    - Before proceeding further, the Court notes that this case involves two extremely likable lawyers, who have together delivered some of the most amateurish pleadings ever to cross the hallowed causeway into Galveston, an effort which leads the Court to surmise but one plausible explanation. Both attorneys have obviously entered into a secret pact-complete with hats, handshakes and cryptic words-to draft their pleadings entirely in crayon on the back sides of gravy-stained paper place mats, in the hope that the Court would be so charmed by their child-like efforts that their utter dearth of legal authorities in their briefing would go unnoticed. Whatever actually occurred, the Court is now faced with the daunting task of deciphering their submissions. With Big Chief tablet readied, thick black pencil in hand, and a devil-may-care laugh in the face of death, life on the

razor's edge sense of exhilaration, the Court begins.

- *Beam v. Wausau Ins. Co.*, 765 N.E.2d 524 (Ind. 2002).

- Indiana Code § 27-7-5-2.

- S.A. Miller, *Impeached judge Samuel B. Kent tenders his resignation*, THE WASHINGTON TIMES (June 27, 2009), available at http://www.washingtontimes.com/news/2009/jun/27/impeached-judge-tenders-his-resignation/ (last visited Mar. 14, 2014).

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