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## INSURANCE AT TRIAL: WHAT CAN YOU SAY? by Tony Patterson



In jury trials involving personal injuries, disputes often arise regarding what can be said about insurance during the course of proceedings. Unfortunately, many assumptions about what can and cannot be said about insurance are based upon evidentiary rule misconceptions rather than upon the actual rules of evidence.

Obviously, what can be said will depend upon the nature of the case. If the claim is a first-party insurance case brought by an insured against her insurer, such as an uninsured or underinsured motorist claim, the insurance company is a party to the action and its identity should be appropriate for discussion as these claims are technically based upon contract. *Malott v. State Farm*, 798 N.E.2d 924, 926 (Ind.Ct.App. 2003). Under these claims, not only

can you discuss the identity of the insurance company, but a plaintiff may introduce into evidence portions of the written insurance policy to establish the contract upon which the claim is based. (*See Indiana Trial Rule 9.2(A)* requiring written contracts to be filed with the complaint and made part of the record.)

In the context of traditional third-party injury cases however, issues of insurance coverage can become more problematic. In most third-party personal injury trials, the existence of insurance coverage is withheld from evidence, leaving jurors in the dark about the matter. Although there is rarely a spoken reference to whether a defendant is protected by insurance, the unanswered question for jurors is the elephant in the

room which is not discussed.

The traditional basis for the exclusion of a defendant's liability coverage is fairly narrow and found in Indiana Rule of Evidence 411 ("IRE 411") which provides:

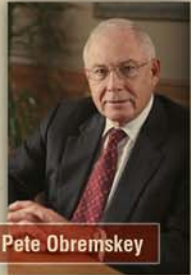
*"Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness."*

Because of this rule, defendant's counsel inevitably files a motion to prevent the admission of a defendant's liability insurance. With little discussion or contest, trial courts routinely grant defendants' motions. Unfortunately, the motions and resulting orders are usually much broader than the rule. The result is that plaintiff's lawyers and litigants are cautioned to refrain from even mentioning the word "insurance" in front of the jury, even when it would otherwise be appropriate for discussion.

Although the Rules of Evidence expressly prohibit the admission of evidence regarding liability insurance to prove negligence, evidence of insurance may clearly be introduced and

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## MEET OUR LAWYERS



Pete Obremskey

Congratulations to Pete Obremskey on the 50th Anniversary of his 1958 Indiana University Big Ten Basketball Championship. Pete was team captain of the Hurryin' Hoosiers. Pete and his teammates advanced to the NCAA tournament before losing to Notre Dame in the Midwest Regional. The 1958 championship was the final Big Ten title won by legendary Hoosier coach Branch McCracken.

Pete's competitive spirit has carried over to his professional career where he has fought for the rights of injured Hoosiers for over 45 years. In recognition of his career efforts, Pete is a past recipient of the Lifetime Achievement Award from the Indiana Trial Lawyer's Association. ■



Pete Obremskey,  
front row,  
second from left;  
#43, was team  
captain of the  
Hurryin' Hoosiers

## INDIANA TORT LAW UPDATES

For up to date information regarding Indiana tort law, accident information, legislation and firm news, we invite you to visit our blog located at [www.indianainjuryblog.com](http://www.indianainjuryblog.com). ■

## INSURANCE AT TRIAL (Continued from cover)

discussed for other purposes. Other permissive uses for the admission of insurance include, but are not limited to, proof of agency, ownership or control, and to establish bias or prejudice of a witness. In these circumstances, the issue of admissibility turns on whether the probative value of the evidence outweighs any prejudice to the defendant.

While defendant's counsel understandably wants to prohibit plaintiffs from introducing evidence of defendant's liability insurance coverage, some defense counsel may attempt to use the protection of IRE 411 as an opportunity to mislead the jury into believing the absence of discussion about the defendant's insurance means the defendant has no insurance. Just as a defendant may potentially be prejudiced by a jury's knowledge of her insurance, plaintiffs can clearly be prejudiced by a jury's mistaken belief that the defendant is personally paying the verdict. *Miller v. Alvey*, 207 N.E.2d 633 (Ind. 1965); see also, *Gardner v. Lake Eliza Resort*, 390 N.E.2d 666 (Ind.Ct.App. 1979), where the court found the interjection of the defendant's lack of insurance at trial constituted grounds for mistrial.

Even when a *motion in limine* is in place, defendant's counsel

can "open the door" to allow evidence of a defendant's liability insurance coverage. Examples of attempts to mislead the jury include suggestions that the defendant will have to "write a check" if the jury renders an adverse verdict or that the plaintiff is "asking for money from my client." Statements such as these can open the door for the admission of insurance coverage, if the court finds that the evidence or statements leaves "the trier of fact with a false or misleading impression of the facts related." *Bryant v. State*, 802 N.E.2d 486, 501 (Ind.Ct.App. 2004).

In addition to improperly prejudicing a plaintiff through improper statements, defense counsel is also prohibited by the Indiana Rules of Professional Conduct from making misleading representations. Specifically, Professional Conduct Rule 3.3, provides that, "a lawyer shall not knowingly...make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."

Any attempt to benefit from a *motion in limine* regarding insurance and then to later imply that the defendant will have to pay the judgment is disingenuous, at best, and is arguably an ethical

violation. If a defense attorney makes such statements, then evidence of liability insurance should be admitted in order to correct the improper inference. See *Hoffman v. Brandt* 421 P.2d 425 (1966), where the court held that it was reversible error to falsely imply that the defendant was not insured; see also 68 A.L.R. 4th 954. Given the obvious prejudice resulting to plaintiffs from potential improper arguments and implications, the best practice is to file proactive *motions in limine* preventing defense counsel from making such misleading statements.



Paul Kruse

Tony Patterson

From a plaintiff's perspective, it is important to remember that IRE 411, contrary to popular belief, does not universally prohibit the discussion of insurance at trial. During jury selection, it is proper to question potential jurors as to whether they are

familiar with, or covered by liability insurance. A potential juror may also be questioned about their personal experiences with accidents and injury claims, as well as how the claims were resolved, even if the discussion involves information regarding insurance. When considering these discussions, it is important to remember that IRE 411 only prohibits admitting evidence that the defendant has insurance; it does not prevent discussion with juries about claims and insurance companies in general.

With regard to the insurance company that actually insures the defendant, plaintiff's counsel should be allowed to question potential jurors as to the possibility of biases, conflicts, personal relationships or investment interests relating to the defendant's insurance company. See *Pfisterer v. Key*, 27 N.E.2d 892, 897 (Ind.Ct.App. 1940), citing *Swanson v. Slagal*, 8 N.E.2d 993, 1003 (Ind. 1937). This questioning should be done, however, in a manner that does not imply or state that the insurance company would be paying any judgment that may be entered against the defendant in the matter.

Other circumstances may lead to the admissibility of insurance during a trial, such as the necessity of proving control or witness bias. For example, in *Pickett v.*

*Kolb*, 237 N.E.2d 105 (Ind. 1968), the Indiana Supreme Court found reversible error where the plaintiff's counsel was prohibited from asking a defense expert who paid him for his services. The *Pickett* court recognized that "proof of liability insurance in and of itself is not admissible, but such a principle may not be expanded to the extent that it serves as a means of excluding otherwise competent evidence which is relevant to the issues involved in the trial. We do not think that a trial court may arbitrarily exclude otherwise competent and relevant evidence merely on the ground that it will reveal an insurance carrier is involved." *Pickett*, 237 N.E.2d at 108.

Although the myth that liability insurance is strictly inadmissible often still prevails, it is important that plaintiff's attorneys refute the myth and educate the tribunal regarding the narrow breadth of IRE 411. In doing so, it is also important to aggressively head off any pleas of poverty from the defense. In the end, while modern jurors have proven to be quite savvy regarding the existence of insurance, it is incumbent upon the plaintiff's attorney to carefully review all motions in limine, even when they appear standard or routine. ■

## RECENT COURT DECISIONS — HOW IT IMPACTS YOUR PRACTICE, YOUR CLIENT

### INSURANCE WRITE-OFFS INADMISSIBLE

A plaintiff injured in an automobile accident received medical treatment and incurred \$11,569.99 in medical expenses. The gross charges were adjusted downward by \$4,749.84 due to write-offs negotiated by the plaintiff's health insurance company. The defendant's attempts to introduce the write-offs were denied by the trial court and the court of appeals affirmed. The court ruled that introduction of write-offs received through insurance benefits which the plaintiff had paid premiums for violated the rationale of the collateral source rule codified in I.C. §34-44-1-2. *Stanley v. Walker*, 888 N.E. 2d 222 (Ind. Ct. App. 2008). ■



### CHANGE IN EXPERT'S TESTIMONY FOUND TO BE GROUNDS FOR NEW TRIAL

The plaintiff was injured in an automobile accident. The defendant retained a medical expert who offered opinions regarding the plaintiff's injuries during discovery. At trial, the expert testified for the first time that he diagnosed the plaintiff with a degenerative disc disease which was a material deviation from his prior deposition testimony.

Therefore, the plaintiff requested a new trial.

The trial court found the defendant committed misconduct by not disclosing its medical expert's new diagnosis prior to trial and granted the plaintiff's motion for a new trial. The Supreme Court affirmed the trial court, finding that the defendant should have supplemented its medical expert's opinion prior to trial. *Nature's Link v. Przybyla*, 885 N.E.2d 709, 719 (Ind. Ct. App. 2008). ■

## DID YOU KNOW?

The Indiana Trial Rules do not distinguish between "trial" and "discovery" depositions. Trial Rule 30 allows either party to conduct a deposition provided that the party gives reasonable notice in writing to other parties to the action. If a deposition is properly taken in accordance with Trial Rule 30, the deposition may later be used at trial for evidentiary purposes if the witness is unavailable to testify at trial and the party against whom the testimony is offered had an opportunity and similar motive to examine the witness during the deposition. (*Ind. Rule of Evidence 804(b)(1)*) It does not matter that the deposition was not noticed as a "trial" or "evidentiary" deposition, as the "Indiana Rules of Trial Procedure do not recognize such a distinction."

—*Hagerman v. Copeland*, 697 N.E.2d 948, 953. (Ind.Ct.App. 1998)

## IS A PLAINTIFF'S FAILURE TO COMPLETE MEDICAL TREATMENT COMPARATIVE FAULT?

Under the Indiana Comparative Fault Act, plaintiffs can be comparatively at fault for negligently contributing to an accident, or in some circumstances, by engaging in conduct that aggravates or increases their injuries. *Willis v. Westerfield*, 839 N.E.2d 1179, 1187 (Ind. 2006).

Recently, in *Simmons v. Erie Ins. Exchange*, 2008 WL 3271552 (Ind. Ct. App. 2008), the plaintiff's underinsured motorist (UIM) carrier argued the plaintiff was comparatively at fault for failing to undergo foot surgery and failing to regularly use his medications and orthotics, even though the underinsured driver was 100% at fault for the accident.

The *Simmons* court held that while the question of whether a reasonable person would submit to surgery is generally one for the jury, "under some circumstances, courts will be able to answer the question as a matter of law." The court noted that if the issue gives rise to a factual question, the finder of fact should consider: 1) The likelihood the surgery will correct or improve the condition; 2) The risk involved in the surgery; 3) The pain or inconvenience caused by the surgery; and 4) The ability of the plaintiff to bear the cost of surgery. The court found that because the UIM carrier failed to introduce expert testimony on these issues, the trial court should not have instructed the jury on the issue of the plaintiff's comparative fault.

Following *Willis*, the *Simmons* court noted that even though expert medical opinion would usually be necessary to evaluate the first three factors, no bright-line rule exists on this point. ■

## OCTOBER SEMINARS

**Paul Kruse** will serve as a faculty member at the National Institute for Trial Advocacy (NITA) week-long Mid Central Regional Trial Skills Program at Indiana University School of Law—Indianapolis, on October 12-17, 2008.

**Tony Patterson** is Co-Chairing an ICLEF seminar entitled "Planning Your First," a program directed at young attorneys or attorneys entering new practice areas, on October 24, 2008 in Indianapolis. Tony will be speaking on handling personal injury cases. ■

## HONORS

Congratulations to **Tony Patterson** and **Pete Obremsky** for being listed in the 2008 edition of *The Best Lawyers in America* in the field of personal injury. Both were also honored as 2008 *Indiana SuperLawyers* in personal injury law. ■



Paul Kruse

Pete Obremsky

Tony Patterson

PARR RICHEY  
OBREMSKEY  
& MORTON  
ATTORNEYS  
Our Strengths. Your Advantage.



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