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A NEWSLETTER FROM THE PERSONAL INJURY ATTORNEYS AT PARR RICHEY OBREMSKEY FRANDSEN & PATTERSON

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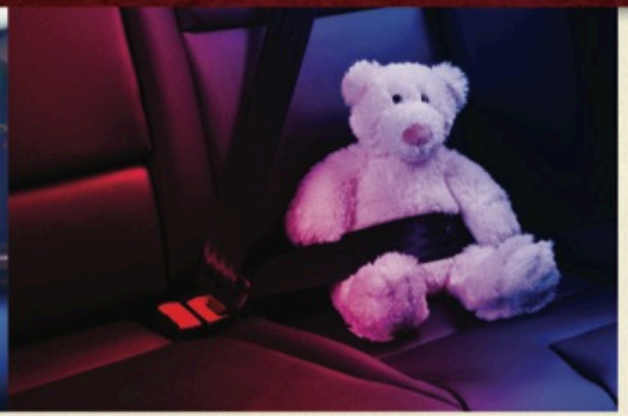
BEWARE OF UIM PROVISIONS THAT SHORTEN THE STATUTE OF LIMITATIONS

by Paul Kruse & John McLaughlin

Be on the lookout for insurance policy provisions that must be complied with to protect your client's underinsured motorist ("UIM") claim under his or her automobile insurance or commercial policy. One fear concerns time limitations in the policy that shorten the applicable statute of limitations. For example, some UIM coverage provisions require the insured's lawsuit for UIM benefits to be filed within two or three years from the date of the collision despite Indiana's ten year statute of limitations for breach of written contracts. In this circumstance, Indiana courts have enforced contractual provisions that shorten the time to commence suit as long as reasonable time is afforded. *Bradshaw v. Chandler*, 916 N.E.2d 163, 166 (Ind. 2009).

These time shortening provisions often put your client (more importantly the insurance company's insured) in an awkward and unfair predicament. Most automobile insurance policies dictate that the insured must comply with all provisions of the policy before the insured can file a UIM lawsuit against the insurance company. These policies often provide that any lawsuit must be filed within some time shortened period (usually 2 or 3 years from the date of the accident). Conversely, the same policy will also state that the insurance company will not pay UIM coverage until the tortfeasor motorist's insurance coverage has been



BEWARE OF UIM PROVISIONS (Continued from cover)

exhausted. Herein lies the conflict.

Frequently, our clients do not exhaust the policy limits of the third party tortfeasor's insurance coverage until more than two years after the accident. This creates a situation where our client's auto policy requires them to do two different things that are in conflict with each other. Recently, the Indiana Supreme Court shed light on this problem. In *State Farm Mut. Auto. Ins. Co. v. Jakubowicz*, the Court noted that in situations like this, the insured cannot both exhaust the tortfeasor's policy limits **and** file a UIM suit within the time shortened period prescribed by the policy. *State Farm Mut. Auto. Ins. Co. v. Jakubowicz*, 2016 Ind. LEXIS 522 (Ind. July 26, 2016).

In *Jakubowicz*, a mother and her two sons ("Jakubowiczs") were involved in a car accident resulting in serious injuries in August 2007. The Jakubowiczs filed their lawsuit against the responsible driver in October 2008 and put their UIM carrier, State Farm, on notice of a possible UIM claim in December 2009. After resolving the third party claim, they sought leave to add State Farm as a defendant in March 2011 to pursue their UIM claims. State Farm moved for summary judgment arguing the UIM claims were barred when being made more than three (3) years past the date of the accident because the insurance policy required legal action for UIM coverage to be filed within three (3) years after the date of the accident.

The trial court denied State Farm's motion for summary judgment and the Indiana Supreme Court agreed with that ruling. Likening State Farm's policy to the insurance policy that was analyzed in *Wert v. Meridian Sec. Ins. Co.*, the Court held Jakubowiczs' policy with State Farm "is ambiguous to [the] extent it contains conflicting provisions." Those provisions included:

- Lawsuit for UIM coverage must be brought within three years from the date of the accident.
- Legal action may not be brought against State Farm until full compliance with all the provisions of the policy.
- State Farm will pay UIM only if the full amount of available limits of all third party bodily injury liability bonds, policies, and self-insurance plans have been exhausted or offered in writing.

Best practice – review all provisions of your client's applicable automobile, umbrella and/or commercial policies as soon as possible to identify time shortening provisions for filing underinsured motorist claims. •

REASONABLE VALUE OF MEDICAL EXPENSES

In Indiana, a plaintiff in a personal injury case is entitled to seek damages for the reasonable value of that person's medical expenses. *Patchett v. Lee*, 46 N.E.3d 476, 487 (Ind. Ct. App. 2015) citing *Stanley v. Walker*, 906 N.E.2d 852 (Ind. 2009). In Patchett, the Indiana Court of Appeals held that because Indiana's Healthy Indiana Plan ("HIP") payments (program under Indiana state Medicaid) were not calculated based upon market negotiation, but instead are set by governmental regulation, the amounts paid by HIP are not probative evidence of the reasonable value of the medical expenses. Id. Thus, the trial court in *Patchett* properly excluded from evidence the HIP payment amounts. Id.

In *Patchett*, plaintiff's gross medical expenses totaled $87,706.36, but $12,051.48 was accepted by plaintiff's medical providers from HIP in full and complete satisfaction of plaintiff's medical bills. Id. at 478.

The *Patchett* holding should apply in all cases involving Medicare payments and state Medicaid program payments to the extent those programs provide reimbursement payments set by governmental regulation and not based upon market negotiation.

The ruling in *Patchett* differentiates itself from the Indiana Supreme Court's ruling in Stanley where the discounted amounts paid to the medical providers from plaintiff's private health insurance company were determined to be admissible evidence as to the reasonable value of plaintiff's medical expenses.

Defendant in *Patchett* has filed a petition for transfer to the Indiana Supreme Court. •

RECENT COURT DECISIONS – HOW IT IMPACTS YOUR PRACTICE, YOUR CLIENT

BYSTANDER RULE

CLIFTON V. McCAMMACK, 43 N.E.3d 213 (Ind. 2015)

While Indiana does recognize the negligent infliction of emotional distress to a bystander who sustains a direct impact by the negligence of another ("the bystander rule"), the Indiana Supreme Court again declined to extend the bystander rule beyond its current application. Citing the need for bright line rules for this tort, the Court continued to restrict recovery for the negligent infliction of emotional distress to those who satisfy relationship and proximity criteria. To satisfy proximity, "the scene viewed by the claimant must be essentially as it was at the time of the incident, the victim must be in essentially the same condition as immediately following the incident, and the claimant must not have been informed of the incident before coming upon the scene." In the case under review, the claimant learned of the incident on the news and, neither the victim nor the scene was essentially the same when the claimant arrived. As a result, the claimant was not entitled to recover for negligent infliction of emotional distress. •

ATTORNEY'S FEES IN WRONGFUL DEATH ACTIONS

SCI PROPANE, LLC V. FREDERICK, 39 N.E.3D 675 (IND. 2015) AND HOKER TRUCKING, LLC V. ROBBINS, 43 N.E.3D 677 (IND. CT. APP. 2015)

After the Indiana Supreme Court determined that attorney's fees are not recoverable damages for a decedent who is survived by a spouse and/or children in *SCI Propane, LLC v. Frederick*, the Indiana Court of Appeals applied that precedent to reverse a post-verdict award of attorney fees in *Hoker Trucking, LLC v. Robbins*.

The Indiana Supreme Court held that it was logical that the statute would provide extra incentive to those pursuing wrongful death actions on behalf of decedent's without survivors, because the "existence of a surviving spouse or dependent of a decedent creates a significant incentive for the personal representative of the estate to pursue a wrongful death claim for the benefit of the survivors, who were perhaps financially dependent upon the decedent and could face significant hardship without his or her income," then "in the absence of such survivors, however, the only 'party' arguably damaged as a matter of law is the decedent, and thus the estate itself." *SCI Propane*, at 681. The Indiana Court of Appeals noted that while the Child Wrongful Death Statute (I.C. § 34-23-2-1) expressly provides for an award of attorney's fees and the Adult Wrongful Death Statute (I.C. § 34-23-1-2) has been construed to allow for an award of attorney's fees, the General Wrongful Death Statute (I.C. §34-23-1-1) allows for an award of attorney's fees only for those decedents who are not survived by a spouse and/or dependents. *Hoker Trucking*, at 679. •

INDIANA'S GUEST STATUTE UPHELD

SASSO V. STATE FARM MUT. AUTO. INS. CO., 43 N.E.3D 668 (IND. CT. APP. 2015)

Indiana's Guest Statute (I.C. § 34-30-11-1) provides that an operator of a motor vehicle is not liable for injury to designated relatives (or hitchhikers) resulting from the operation of the motor vehicle when the designated relative is being transported without payment to the driver. That payment to the driver has been interpreted to require that the operator be directly compensated in a "substantial and material or business sense." *Sasso*, at 672. The Court of Appeals found that the statute applied in this case where a mother was transporting her daughter, who was injured. Turning from that finding, the Court evaluated whether the Guest Statute violated either the United States Constitution or the Constitution of the State of Indiana. The Court's lengthy and thorough analysis found that the Indiana Guest Statute did not violate either the United States Constitution or the Constitution of the State of Indiana. The Indiana Court of Appeals then upheld the Indiana Guest Statute. •

GOVERNMENTAL IMMUNITY

CITY OF BEECH GROVE V. BELOAT, 39 N.E.3D 691 (IND. CT. APP. 2015)

After a pedestrian suffered a broken leg after stepping in a pothole, she sued the City which defended on a number of points including discretionary function immunity under I.C. 34-13-3-3(7). The Court of Appeals looked to the Indiana Supreme Court's ruling in *Peavler v. Bd. Of Commissioners of Monroe County*, 528 N.E.2d 40 (Ind. 1998), which held that government decisions which involve the assessment of competing priorities and the weighing of budgetary considerations are planning activities and therefore are immune from liability. *Peavler* at 46. In dissent, Judge Robb opined that the evidence did not support the proposition that the city either made a conscious policy decision to forego repairs or engaged in an assessment and established a policy regarding repairs that might need to be made pending the start of the reconstruction project. *City of Beech Grove*, at 697. •

FIRM NEWS

Paul Kruse will participate on the faculty for an area Trial Skills Workshop presented by the National Institute of Trial Advocacy in October.

Tony Patterson has been selected to serve as President of the Indiana chapter of The American Board of Trial Advocates, ABOTA is a national association of experienced trial lawyers and judges dedicated to the preservation and promotion of the civil jury trial right provided by the Seventh Amendment to the U.S. Constitution.

John McLaughlin presented at the NBI seminar held in Indianapolis on September 23rd. His presentation was related to using medical records and doctors' testimony to prove pain and suffering in personal injury cases. John will also be speaking at the 52nd Annual ITLA Annual Institute during the Sunrise Program on November 4th. His topic will be *Multi-State Litigation in the Heartland: A Brief Comparison.*

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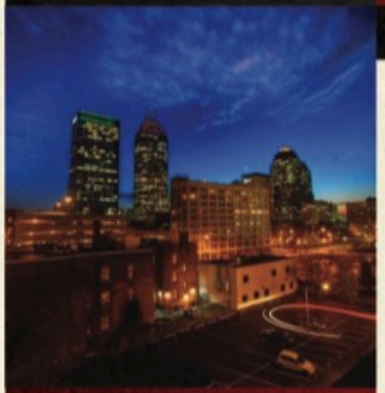

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IN THE NEWS

Super Lawyers 2015

Parr Richey partner **Tony Patterson** was listed as one of the Top 50 overall attorneys in the State of Indiana and is one of only twenty Indiana attorneys to earn this distinction for the past five years in a row.

Paul Kruse was also voted a Super Lawyer in personal injury litigation for the eighth straight year.

Rising Stars Super Lawyers 2015

We are proud to announce that **John McLaughlin** was recently recognized as a Rising Star for 2015 in the Indiana Super Lawyers magazine in the area Plaintiff Personal Injury. This is his third consecutive year making the list.