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RECENT DEVELOPMENTS IN ILLINOIS CASUALTY INSURANCE LAW

John L. Kirkland*

Mr. Kirkland reviews recent case law in Illinois interpreting various provisions in casualty insurance policies. In particular, he analyzes the important cases dealing with commercial risk coverages, the new expansive coverage for permissive users of automobiles, and the strong public policy emphasis in Uninsured Motorist Act cases.

The case law dealing with casualty insurance is rapidly expanding despite the decreasing amount of litigation arising out of the use of the automobile. The insurance industry is issuing coverages for new kinds of risks as commerce, industry and technology continue to complicate modern society, and a periodic review of the treatment accorded these policies in the courts is necessary to maintain a proper perspective of insurance law.

During the past year, the Illinois Supreme Court made significant interpretations of provisions covering the commercial risks of completed operations and products liability. The appellate court refused to extend coverage for property damage to loss of anticipated profits and financial interests of a commercial enterprise. In a recent case, the Illinois Supreme Court revised the law for determining whether successive permissive users of an automobile will be afforded coverage under standard omnibus clauses, resulting in expansive coverage for an indefinite number of successive permissive users. Further, the meaning of “care, custody and control” in property casualty policies was explored, as well as the extent to which a delayed notice of an occurrence will result in loss of coverage under a liability policy.

Provisions of uninsured motorist coverages often result in contractual limitations upon that coverage. In a series of appellate court cases, provisions restricting the time within which an action can be brought and the location of insured in a land motor vehicle

* Partner: Hinshaw, Culbertson, Moelmann, Hoban & Fuller, Chicago, Illinois.
not qualifying as an insured vehicle under the policy were declared void as against public policy. An insurer may be estopped from denying uninsured motorist coverage where its agents take affirmatively actions which reasonably lead the insured to believe he will be compensated. An automobile is an uninsured automobile even when the insurance carrier is declared insolvent after an accident. Finally, the appellate court refused to allow aggregation of benefits for uninsured motorist coverage under separate policies, even where those policies are issued by the same insurance company.

CASES INTERPRETING LIABILITY INSURANCE POLICIES

Commercial Risks—Completed Operations and Products Liability Coverages

The insurance industry is experiencing a rapidly developing increase in the issuance of commercial-type liability policies as a result of an ever expanding economy. The principal hazards for which an insured is likely to desire coverage are accidents occurring on the commercial premises, accidents occurring after the insured's operations have been completed at a site other than the insured's premises, and accidents arising out of the use of the insured's products. Two cases were decided during the past year which illustrate the questions of contract interpretation likely to arise out of claims allegedly coming within the terms of such policies.

The Illinois Supreme Court interpreted the scope of a policy covering "premises-operations" in Cobbins v. General Accident Fire & Life Assurance Corporation.1 The insured operated a retail store and purchased a policy of liability insurance covering only operations on the premises, although "products liability" and "completed operations" coverages were available at an additional premium.2 The policy terms covering the "premises-operations" hazard specifically excluded products liability and completed operations coverages.

The insured sold fireworks to an eleven year old child, who was injured at his own home when he lit the fireworks. Since the sale

2. Plaintiff's policy provided coverage for liability which might arise out of "[T]he ownership, maintenance or use of the premises, and all operations necessary or incidental thereto." Id. at 288, 290 N.E.2d at 875.
was unlawful under the Fireworks Regulation Act of Illinois, and hence allegedly negligent, it was contended that the “premises-operations” policy afforded coverage because the act of negligence in the sale took place on the premises of the insured, even though the product subsequently caused injury away from the insured’s premises.

Although a question of first impression in Illinois, a number of other courts have ruled on the issue of the breadth of “premises-operations” coverage, resulting in two distinct lines of cases. Focusing on the complete insurance contract, including all of the hazard definitions and specific exclusions, rather than the provisions of the “premises-operations” hazard coverage in isolation, the Illinois court found:

The insurance policy in question specifically excludes coverage under the “Premises-Operations” hazard for injuries arising out of the “Products-Completed Operations” hazard. There is no valid basis for suggesting that the case at bar falls outside of the “Products-Completed Operations” definition. If a sale of a product is also deemed an operation incidental to the use of the premises, then it is a “completed operation” when the sale is consummated.

The appellate court’s finding of coverage was therefore reversed.

Justice Davis noted that the cases which have found coverage under the “premises-operations” hazard have done so by treating the negligent sale as an “accident” because of an apparent attitude that the insurance policies contain many confusing and unintelligible provisions rendering it difficult for the policyholder to know exactly what hazards he is insured against.

This does not, however, justify construing the contract against the insurer when no real ambiguity exists, nor does it justify distorting the meaning

3. ILL. REV. STAT. ch. 127½, § 112 (1971), wherein the sale of fireworks to a minor under age 12 without parental consent is declared unlawful.

4. As identified by the Illinois Supreme Court, one line of cases requires that the injury must occur on the premises to be covered under a “premises-operations” provision. See, e.g., Bitts v. General Accident & Life Assur. Corp., 282 F.2d 542 (9th Cir. 1960) (injury from explosion of refrigerator coil after insured’s customer took it from the premises); Smith v. Maryland Cas. Co., 246 Md. 485, 229 A.2d 120 (1967) (injury to child from use of a sling shot acquired at a church bazaar).

The other line of cases identified by the court found coverage under “premises-operations” provisions regardless of the location of the occurrence. See, e.g., St. Paul Fire and Marine Ins. Co. v. Coleman, 316 F.2d 77 (8th Cir. 1963) (policy held applicable to fire on boat caused by insured’s refueling operation); Atkins v. Hartford Accident & Indemnity Co., 7 Mich. App. 414, 151 N.W.2d 846 (1967) (injury caused by ingestion of pills sold by defendant pharmacist).

5. 53 Ill. 2d at 291, 290 N.E.2d at 877.
of words in order to reach a given result when the words should and can reasonably be given their plain, ordinary and popular meaning.\textsuperscript{6}

Hence, the case is important in that it indicates a recognition that coverage should be furnished only for those hazards for which the insured has paid a premium.\textsuperscript{7}

In an appellate court decision, \textit{Leakakos Construction Co. v. American Surety Company of New York},\textsuperscript{8} a products liability provision in a commercial policy was interpreted. Plaintiff, a mason contractor, constructed a chimney and incinerator system in an apartment building and approximately one year after the construction was completed, a tenant claimed that he was injured by fumes because of defective installation.

Plaintiff had purchased a comprehensive general liability policy, but did not purchase products or completed operations coverages, and as in \textit{Cobbins}, these hazards were the subject of an exclusion. The appellate court affirmed the finding of the trial court in favor of the insurance company, holding that the chimney-incinerator system was a product,\textsuperscript{9} and further that the insured's operations were completed.\textsuperscript{10} Plaintiff argued that the product's hazard was ambiguous as applied to contractors, that other courts had found contractors provide a \textit{service} rather than a product, and that he had purchased the policy in contemplation of acquiring coverage for \textit{all} of its operations as a contractor. As Justice Davis shortly afterward affirmed in \textit{Cobbins}, the appellate court noted that the insured under a commercial liability policy is to be covered only for those risks for which he pays a premium:

\begin{itemize}
  \item \textit{Id.} at 294, 290 N.E.2d at 878.
  \item But see the discussion of \textit{Maryland Cas. Co. v. Iowa Nat'l Mut. Ins. Co.}, 54 Ill. 2d 333, 297 N.E.2d 163 (1973), in the text accompanying notes 25-44, infra.
  \item 8 Ill. App. 3d 842, 291 N.E.2d 176 (1972).
  \item \textit{Id.} at 846, 291 N.E.2d at 179. A similar question often arises in determining whether a particular transaction is subject to the provisions of the Uniform Commercial Code as a sale of goods under UCC § 2-102. \textit{See}, e.g., Epstein v. Giannattasio, 25 Conn. Supp. 109, 197 A.2d 342 (1963), wherein it was noted that in building and construction transactions which include materials to be incorporated into the structure, \textit{service} is the \textit{predominant} feature of the transaction and sale of goods is merely incidental.
  \item 8 Ill. App. 3d at 846, 291 N.E.2d at 179. The court held that accidents due to defective workmanship occurring after completion of the work process constitute a separate risk.
  \item 8 Ill. App. 3d at 846, 291 N.E.2d at 179.
\end{itemize}
When the policy is viewed as a whole, it is clear that it excludes from liability any claim for damages arising from an internal defectiveness in the work product of the insured. Herein, the operation had been completed and liability occurred because of defective workmanship. This constitutes a separate risk which is ordinarily referred to as completed operations or products liability insurance. In the instant policy, the uninsured risk is set out, thus putting the insured on notice that a separate premium is required for completed operations coverage and for sales of products. This type of coverage is exclusive from general liability coverage, and a separate premium, which was not paid in this case, is generally required for such coverage. Therefore, we conclude that the policy in the case at bar does not cover a claim for damages arising from such a fact basis.¹¹

Thus the court examined the facts of the case, analyzing each of the risks excluded and found that plaintiff's installation of a 'chimney involved sale of both a service and a product, and that the completed operations exclusion clearly limited the insurer's liability to accidents occurring during the process of work.¹²

The future coverage problem may well have its beginning at the time the policy is sold. It is obvious that a separate premium must be charged and collected for each hazard that the insured wants covered. There are a variety of possibilities. The insured may purchase only the premises coverage because the premium is relatively nominal, and desire to gamble that he will never have a completed operations or products liability claim. The insured may purchase premises coverage only because he simply does not understand the meaning of completed operations or products liability. It is always possible that an overzealous insurance broker or agent, upon meeting stiff resistance because of high premium costs, may sell the insured only the premises coverage and fail to clearly explain to the insured the contingencies that are not covered by the policy.

One conclusion that can be drawn from the Cobbins and Leaakos cases is that the trend of the law in Illinois, insofar as commercial risks are concerned, is to enforce the policy as written.¹³ If the face of the policy reflects that the insured simply did not purchase the products liability or completed operations coverages,

¹². Id.

the *Cobbins* case indicates that the Supreme Court of Illinois is not going to abort the policy language to furnish coverage when none exists. This attitude of the court leads to a further observation.

Justice Goldenhersh, in a brief dissent in *Cobbins*,\(^{14}\) seemed to indicate that some insurance companies engage in false sales practices and that, on this basis alone, exclusions should not be enforced. But if the insured believes he did not receive the coverage for which he bargained, other remedies may be available.

The insured can sue to have the policy reformed to include the coverages that he "ordered" but which were not contained in the policy. This doctrine was recognized recently in the case of *State Farm Mutual Automobile Insurance Co. v. Hanson*\(^{15}\) in which the insured sued for reformation on an automobile policy to remove an exclusion relating to claims brought by the named insured or members of the family under the automobile bodily injury liability coverage. The insured testified that the sales agent told her that members of her family would be covered if there were an accident. The trial court reformed the policy to delete that exclusion and this action was sustained on appeal.

Another possible cause of action on the part of the insured who did not receive the coverage that he ordered is a negligence or malpractice action against the broker or agent. This theory of recovery is recognized in Illinois case law, as in *Johnson v. Illini Mutual Insurance Co.*,\(^{16}\) where it was noted that an insurance broker, as agent for the insured, is liable to that insured for damage caused by the broker's mistake or act of omission or commission.

The use of reformation or malpractice type remedies against a

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14. 53 Ill. 2d at 295, 290 N.E.2d at 879.
*In General Cas. Co. v. Elam*, 8 Ill. App. 3d 315, 289 N.E.2d 699 (1972), the court refused to find a clause providing automatic coverage for automobiles acquired after issuance of the policy to contain any ambiguity. Thus the trial court's finding was upheld where there was conflicting testimony indicating in part that the purchaser told the agent that she did not intend for the vehicle in question to be covered under the new policy.
broker or agent with regard to commercial risks raises interesting questions with regard to bargaining power. Again, Justice Goldenhersh's dissent suggesting disregard of the written insurance contract may be based in part on the feeling that most purchasers of insurance are unable to understand the meaning of various provisions. Disparity of bargaining power has been the focus of consumer oriented movements in other areas of the law, as with consumer goods purchasers,\(^{17}\) and it is not an unlikely possibility that the argument will find broadened use in the insurance field.

Finally, the identity of the insured is a most important factor in considering the remedies of reformation and actions against the broker and agent. The insured certainly has the burden of proof and must convince the court that there was, indeed, a bargain for insurance coverage other than that which he received. One factor to be considered in making this determination is whether the insured read the policy when it was received and why he did not complain at that time. This, at least, would be admissible to consider the credibility of the insured-witness. An insured with a fourth grade education who built his own small business through long, hard and tedious work and dedication could make a rather convincing witness. On the other hand, a multi-million dollar corporation with a huge insurance and legal department might find some difficulty in reforming a policy that had been sitting on one of its employee's desks for eight months.

**The Definition of Property**

An interesting argument regarding the definition of "property" in the coverage provision of a liability policy was considered in *Hartford Accident & Indemnity Co. v. Case Foundation Co.*\(^{18}\) The litigation arose out of the construction of the John Hancock Center in Chicago. In a separate action, the owner/developer sued the architects and contractors, all of whom were insured by Hartford under a liability policy providing coverage for property damage liability. He contended that damages were loss of investment, anticipated profits and financial interests, but Hartford refused to defend on the

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basis that the alleged damages were not "property" as that term was used in the policy provisions. Rather, Hartford contended that the insureds were incorrectly confusing liability with damages—that property was a term which defines liability, not one which has to provide coverage for "every conceivable type of damage for which its insureds might become liable." 

The appellate court upheld the trial court's declaration that the policy did not cover the alleged claims, principally on the basis that throughout the policy the term property clearly meant tangible property:

The pertinent provisions of Hartford's policy provided coverage for "... damages because of injury to or destruction of property, including the loss of use thereof. ..." But, even a cursory reading that the owner's complaint reveals that he did not allege injury to or destruction of property by insureds within the meaning of the policy. Nor did he allege that as a result of what insureds did or did not do, he suffered damages which were the consequences of injury to or destruction of other property he owned. What Wolman alleged were breaches of contracts and negligence by insureds which he claimed caused him to lose his investment in and anticipated profits from the John Hancock Center project and his financial interests in other business ventures. This being so, we must decide whether investments, anticipated profits and financial interests are property as that word is used in the coverage provisions of Hartford's policy.

In our judgment, when Coverage D of Hartford's policy is read in light of its applicable exclusions, it becomes clear that the word property as used in that provision means physical or tangible property. ... Investments, anticipated profits and financial interests in business ventures are intangibles; they are not property as that word is used in Coverage D of Hartford's liability policy. 

It should be noted the insured contended that the owner's suit was for consequential damages, arising out of the destruction or injury to some portion of the John Hancock Center property. The court found this argument of no merit because the owner failed to allege injury or destruction to the property, thus eliminating in its inception the question of damages. The court did seem to indicate that had there been allegation of damage to tangible property, the consequential damages might well include investments and anticipat-

19. Plaintiff's argument is reminiscent of the expansive concepts of property, as advocated in Reich, The New Property, 73 YALE L.J. 733 (1964).
20. 10 Ill. App. 3d at 120, 294 N.E.2d at 11.
21. Id. at 123-124, 294 N.E.2d at 13.
ed profits. Absent the exclusion of damages, such as had been made in the policy, significant recoveries could well ensue. However, the court ultimately concluded that even this argument would have been of no avail, since another exclusionary clause excepted coverage for any "‘injury to or destruction of any good . . . or work completed by or for the named insured out of which the accident arises,'"22 precluding "coverage for any injury to or destruction of any part of the John Hancock Center."23

Permissive Users

The extent to which successive permissive users are afforded coverage under omnibus clauses24 in an automobile liability policy was reevaluated by the Illinois Supreme Court in Maryland Casualty Co. v. Iowa National Mutual Insurance Co.25 In effect, the decision eliminates any former distinction between coverage under an omnibus clause to subsequent permissive users of automobiles and initial permissive users who deviate from the scope of the permission granted them while not relinquishing the insured auto to another driver. In Maryland Casualty, the initial permissive user of the insured auto exchanged vehicles with a third person who was subsequently involved in an accident.26 On appeal to the Illinois Supreme Court, the ultimate social policy issue was raised: When may a plaintiff, who was injured as a result of a successive permissive user's negligence, recover damages under the omnibus clause of a standard automobile liability policy?

In denying primary liability under the Maryland Casualty policy,

22. 10 Ill. App. 3d at 125, 294 N.E.2d at 15.
23. Id.
24. Omnibus clauses in automobile liability policies define what persons are insured under the policy, and typically include the named insured, residents of the insured's household and any other person who is using the automobile with the permission of the named insured. For an excellent summary of permissive user cases prior to Maryland Casualty see Larrabee, Who's Aboard the Omnibus? The "Additional Permittee" Rule Re-Examined, 60 Ill. B.J. 470 (1972).
25. 54 Ill. 2d 333, 297 N.E.2d 163 (1973).
26. There was some evidence that the initial permittee had been told by the named insured never to permit anyone other than a member of the family to use a family automobile, but the court noted that the initial permittee did not tell the successive permittee of that prohibition. The court did not specifically discuss the impact of such a prohibition, but the holding clearly indicates that such a prohibition will not operate to cut off coverage.
the appellate court\textsuperscript{27} relied on the principal Illinois subsequent permissive user case, \textit{Hays v. Country Mutual Insurance Co.}\textsuperscript{28} \textit{Hays} affirmed the rule that express prohibition by an insured to the initial permissive user forbidding the use of a car except for a specified purpose would be effective to deny coverage under an omnibus clause to successive permittees.\textsuperscript{29} But Justice Schaefer, speaking for the court in \textit{Hays}, went on to note that a subsequent permittee could be covered under the terms of an omnibus clause where there was either express permission by the insured, or implied permission based on: (1) the initial permittee's \textit{apparent ownership}; (2) the presence of the initial permittee in the auto as a passenger so as to indicate \textit{control}; (3) use by the subsequent permittee for a purpose which was of \textit{benefit to the initial permittee}; or (4) a course of conduct which inferred the insured's \textit{knowledge of} and \textit{acquiescence in} use by the subsequent permittee.\textsuperscript{30} Numerous cases have relied upon the \textit{Hays} tests in determining subsequent permissive user questions,\textsuperscript{31} not without some confusion in application of the standards.\textsuperscript{32} However, the overall rationale of the \textit{Hays} decision is clear: An insured's mere granting of permission to one user does not inherently carry with it, without express or implied permission, a delegation of authority to the borrower to grant permission to a third person to use the vehicle.\textsuperscript{33}

When the insured purchases extended coverage he seeks to protect those whom he allows to use his car from the risks of financial disaster as he would guard them against danger from mechanical defects. Ordinarily he has no interest in buying protection for those who use his car without his permission. The insurer, on the other hand, limits the risk assumed by requiring permission, since usually the insured will use discretion in

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\textsuperscript{28} 28 Ill. 2d 601, 192 N.E.2d 855 (1963).
\textsuperscript{29} \textit{Id.} at 605, 192 N.E.2d at 858.
\textsuperscript{30} \textit{Id.} at 608-60, 192 N.E.2d at 859-60.
\textsuperscript{33} 28 Ill. 2d at 606, 192 N.E.2d at 858.
\end{flushleft}
permitting others to use his car, if only as a matter of self interest in avoiding damage to his property. . .

Public policy . . . does not require extension of the insurance contract beyond these interests of the parties and their expressed intentions.\textsuperscript{34}

An earlier Illinois appellate court case, \textit{Konrad v. Hartford Accident Indemnity Co.},\textsuperscript{35} represents what is known as the "initial permittee rule," under which the initial permissive user is covered under the omnibus clause provision for any use he makes of a vehicle \textit{while it remains in his possession} as long as he received permission to take the vehicle in the first instance. Justice Schaefer in \textit{Hays} was careful to note that this rule of expansive liability coverage was based on fact circumstances and consequent policy considerations which are distinct from the subsequent permittee situation where the initial permittee has delegated his driving duties to another person:

Decisions holding that coverage persists despite a deviation from the permitted scope in route, purpose, or duration of use do not therefor compel the conclusion that coverage should also extend to third persons whom the permittee has, without authority, allowed to use the car. The rule that initial permission will suffice applies in reason only when that permission was granted to the user sought to be brought within the coverage of the policy.\textsuperscript{36}

Although regarded as a workable, utilitarian set of guidelines for dealing with the successive permittee question,\textsuperscript{37} Justice Goldenhersh's opinion in \textit{Maryland Casualty} notes that the \textit{Hays} tests for establishing implied permission should \textit{not} be considered all conclusive because

\begin{quote}
\textit{circumstances surrounding the original granting of permission may show it to have been sufficiently broad to include the implied authority to permit another to use the insured vehicle.}\textsuperscript{38}
\end{quote}

However, it was subsequently concluded in the opinion that "whether coverage is provided under an omnibus clause should not depend upon . . . tenuous factual distinctions. . . ."\textsuperscript{39} Thus having implied that the factual analysis under the \textit{Hays} tests is unworkably imprecise for determining liability, the court then turned to a consider-

\begin{itemize}
\item \textsuperscript{34} Id. at 607, 192 N.E.2d at 859 (emphasis added).
\item \textsuperscript{35} 11 Ill. App. 2d 503, 137 N.E.2d 855 (1956).
\item \textsuperscript{36} 28 Ill. 2d at 608, 192 N.E.2d at 859.
\item \textsuperscript{37} Larrabee, supra note 24, at 477.
\item \textsuperscript{38} 54 Ill. 2d at 339, 297 N.E.2d at 166, quoting from Hays v. Country Mut. Ins. Co., 28 Ill. 2d at 608, 192 N.E.2d at 859.
\item \textsuperscript{39} Id. at 342, 297 N.E.2d at 168.
\end{itemize}
ation of the initial permittee cases, wherein analysis of factual distinction has been likewise discarded in favor of the overall social policy analysis based on the "theory that the insurance contract is as much for the benefit of the public as for the insured. . . ." 40

Relying on the recent New Jersey Supreme Court decision which eliminated the distinction between successive permissive user cases and initial permittee cases, 41 and without identifying the distinct kind of fact situation and consequent policy considerations underlying the Hays successive permittee rule, the Illinois Supreme Court simply reiterated the initial permittee rule:

If the named insured has initially given permission to another to use the insured vehicle, a deviation from the authorized use does not serve to terminate the permission. 42

And in what certainly amounts to a sub silentio overruling of Hays, Justice Goldenhersh concluded:

We agree with the Supreme Court of New Jersey "that once the initial permission has been given by the named insured, coverage is fixed, barring theft or the like." 43

The Maryland Casualty decision is consistent with modern tendencies of the courts in automobile insurance coverage questions to expand coverage on the basis that insurance is issued for the benefit of the public as well as the contracting parties. 44 But in any event, while use of vehicles by successive permittees is not uncommon or rare, it does involve only a minor portion of the accident volume.


42. 54 Ill. 2d at 341, 297 N.E.2d at 167.

43. Id. at 342, 297 N.E.2d at 168 (emphasis added).

44. But see Larrabee, supra note 24, at 477 where the author concludes: "[A]n automobile liability policy does not nor should not . . . insure the earth and all creatures that crupeth and crawleth thereon." See also Mid-Century Ins. Co. v. Safeco Ins. Co. of America, 7 Ill. App. 3d 408, 287 N.E.2d 529 (1972), where the court upheld an automobile policy containing a restrictive endorsement which limited coverage to the insured and members of insured's family related by blood, marriage or adoption. This restriction on the operation of the omnibus clause was held not to be against public policy.
It can be argued that it is logical to afford coverage to successive permittees, as a benefit to the innocently injured, and allow the cost to be spread among all insureds through a slight rate adjustment, thereby doing away with the “building of categories” as was the result under Hays.

The Meaning of “Care, Custody and Control” and “Notice” in Casualty Policies

A troublesome exclusion frequently called upon for interpretation relating to property in the “care, custody or control” of the insured was considered in Bituminous Casualty Co. v. Chicago Rock Island and Pacific R.R.45 The insured contractor was hired by a railroad to remove the contents of a box car which had become derailed and tipped over. While conducting these operations, a fire resulted from a torch being used by one of the insured’s employees to cut an opening in the car. The resulting fire damaged both the box car and its contents.

The railroad sued the contractor for the damage and Bituminous refused to defend on the basis that the comprehensive general liability policy excluded “property damage to property in the care, custody or control of the insured or as to which the insured is for any purpose exercising physical control.”46 Illinois cases have relieved the insurer of liability where the facts establish a bailment,47 but found coverage where the insured only has temporary or incidental access to the property.48

In the declaratory judgment action by the insurer, the appellate court applied the temporary access theory, and held that the exclusion was inapplicable:

Here, the railroad retained the care, custody and control of its own box car. It was on its right of way, and while it was a chattel it was certainly immovable at the time of loss. We believe that in this case the insured only had temporary access to the property rather than the care, custody or control of the property itself.49

45. 8 Ill. App. 3d 172, 289 N.E.2d 464 (1972).
46. Id. at 174, 289 N.E.2d at 465-66.
49. 8 Ill. App. 3d at 174, 289 N.E.2d at 466.
Notice provisions in insurance policies are another source of interpretive questions, and the issue was again raised in *Barrington Consolidated High School, School District 224 v. American Insurance Co.* The high school and one of its teachers sued American Insurance for declaration of coverage in a negligence suit by a student under a liability policy issued to the school. The policy contained a provision requiring written notice to the insurance company of an occurrence as soon as practicable.

In determining whether the receipt of the summons and complaint more than four years after the occurrence was within the provision requiring notice "as soon as practicable," the court noted that there are four possible excuses for a delayed notice in insurance liability cases: where the insured was ignorant of the accident or injury; where the insured reasonably believed he was not liable; where the occurrence was so trivial as to not be the basis of a claim; or where the insured reasonably believed the accident could not be covered by the policy.

The appellate court reversed the trial court's finding of coverage for the school district, holding that failure to notify for four years constituted late notice as a matter of law, and that none of the recognized excuses for delay would apply to these facts, especially in light of a letter from the student's parents to the school officials within nine months of the occurrence, and the impact a four-year delay has on the insurance company's ability to prepare an efficient defense. Further, the appellate court held the teacher was not covered as an additional insured since the school's failure to give notice bound her, in absence of independent action which she may have taken, such as notifying the school officials, but which she failed to do.

The *Barrington* decision did evoke a dissent wherein it was argued that different inferences could be drawn from the facts—such that a reasonable man could believe that the accident was trivial, that it was reasonable to believe the parents did not hold the school

51. *Id.* at 181, 296 N.E.2d at 63.
53. 11 Ill. App. 3d at 185, 296 N.E.2d at 66-67.
54. *Id.*
at fault, that no claim would be filed, and that the insurer had failed to provide proper guidelines for reporting claims.\textsuperscript{55} The dissent seemed principally to raise a caution that the general terms of notice provisions should not be construed literally so as to be an unexpected source of coverage denials, and that the facts of each case can and should be closely scrutinized. But, as in the Barrington case, material delays may well result in loss of coverage since the burden in defending a suit arising out of an "old" occurrence is nearly insurmountable.

The duty to notify the insurer may rest with an insurance broker, as in Western Fire Insurance Co. v. Moss\textsuperscript{56} where the broker took an application for boat insurance and the potential insured had an accident between the time that the application was filled out and the time that it was sent to the plaintiff insurance carrier. Unaware that an accident had occurred, the carrier issued a policy with the same effective date as that on the application. The trial court refused to impute any fault on the part of the broker to the insured, and held that the insurer was estopped from denying coverage. In reversing that decision, the appellate court held in effect that the broker has an obligation to notify the carrier of an accident which occurred prior to the time an application is forwarded and that failure to fulfill this obligation "vitiates the policy and bars any recovery as against the insurance company."\textsuperscript{57}

\textbf{UNINSURED MOTORIST COVERAGE}

\textit{Contractual Limitations Which Are Void as Against Public Policy}

Uninsured motorist coverage is a mandatory coverage, required by statute,\textsuperscript{58} to be included in all policies of automobile liability insurance issued in Illinois. Two of the recent decisions dealing with uninsured motorist coverage held policy provisions void as against public policy, principally for the reason that they conflicted with the purposes of the mandatory coverage statute, as perceived by the state supreme court.

\textsuperscript{55} Id. at 186, 296 N.E.2d at 67.

\textsuperscript{56} 11 Ill. App. 3d 802, 298 N.E.2d 304 (1973).

\textsuperscript{57} Id. at 816, 298 N.E.2d at 314.

In Burgo v. Illinois Farmers Insurance Co., a provision requiring the insured to sue the uninsured motorist or formally institute arbitration proceedings within one year was held void.

Earlier Illinois Supreme Court decisions have determined that the purpose of the Uninsured Motorist Act is essentially to ensure that injured motorists will be compensated to the same extent whether the tortfeasor is an uninsured motorist or one who has the minimum statutory coverage required by the Financial Responsibility Act.

Guided by the principal that a "contractual limitation may not place an insured in a substantially different position than he would have been had the tort-feasor carried the required insurance coverage," the appellate court refused to give effect to the one year contractual provision. Had the driver been insured, plaintiff would have had two years within which to bring the action. In addition to being a diminution of the insured's rights as they would exist against the tortfeasor, the court noted that it would be unfair to allow the insurance company to collect the coverage premium and then limit its liability in the contract, especially since "the policy holder has little or no experience and cannot be expected to understand the impact of such a provision."

Finally, that a motorist is "uninsured" is often not determined until years after the accident, as where the tortfeasor's insurance company becomes insolvent.

Judge Burman filed a dissenting opinion in Burgo wherein he emphasized the court's obligation to enforce unambiguous contract provisions, and that other Illinois Supreme Court decisions have not voided contractual shortening of appropriate statutes of limitation. He suggested that the need for speedy resort to the courts while facts are still "fresh" is a sufficient countervailing policy to the purpose of the mandatory uninsured motorist coverage statute.

60. The insured and defendant insurer could not agree as to the amount of compensation due for injuries insured suffered in a collision with an uninsured motorist, and the insurer refused to appoint an arbitrator when the insured made demand more than one year after the accident.
62. 8 Ill. App. 3d at 263, 290 N.E.2d at 373.
63. Id., 290 N.E.2d at 374.
64. Id.
65. Id. at 264-66, 290 N.E.2d at 374-76.
The potential problem alluded to in *Burgo*, where automobiles become uninsured when an insurance company is declared insolvent after the motorist is involved in an accident, was dealt with by the Illinois Supreme Court in *Kaszewski v. Fire and Casualty Co.*\(^{66}\) The supreme court reversed the appellate court decision and specifically held that an automobile becomes uninsured when the insurance carrier is declared insolvent after the accident. The policy in *Kaszewski* included within the definition of uninsured automobile, those vehicles for which the carrier had denied coverage. The Illinois Supreme Court indicated that since the Uninsured Motorist Statute required automobile liability insurance policies to afford coverage for uninsured motor vehicles, the date of the accident should not be determinative as to whether or not a vehicle was uninsured within the meaning of a policy.\(^{67}\) Thus, the insurance carrier cannot place any language of limitation or restriction on an uninsured motor vehicle as that term is defined in the statute.\(^{68}\) The *Kaszewski* decision resolves the conflicting decisions of the appellate courts when dealing with similar policy provisions.\(^{69}\) In addition, since the court's language is so broad in *Kaszewski*, it would also seem to overrule the appellate court cases which have denied coverage under different policy terms.\(^{70}\)

The underlying purpose of the Uninsured Motorist Act was again the basis for the decision in *Doxtater v. State Farm Mutual Automobile Insurance Co.*\(^{71}\) Plaintiff was injured while riding a motorcycle which collided with an automobile operated by an uninsured motorist. The policy under which plaintiff was insured for bodily injury caused by uninsured motor vehicles contained an exclusion which provided that the coverage was not to apply where the insured was injured "while occupying or through being struck by a

\(^{66}\) 54 Ill. 2d 241, 296 N.E.2d 743 (1973).

\(^{67}\)  Id. at 246-47, 296 N.E.2d at 746.

\(^{68}\)  Id. at 246, 296 N.E.2d at 746.


\(^{71}\)  8 Ill. App. 3d 547, 290 N.E.2d 284 (1972).
land motor vehicle owned by the insured' 72 but not qualifying as an owned motor vehicle under the policy. Insured's motorcycle fell precisely within the exclusionary provision.

Plaintiff argued that to deny coverage for injuries incurred while occupying a vehicle not described in the declarations of the policy is violative of the statute requiring uninsured motorist coverage, on the basis that uninsured motorist coverage should be provided for all insureds under an automobile policy, irrespective of the location of the insured at the time of the injury. The appellate court accepted this argument, even though in doing so it expressly overruled its recent decision in McElyea v. Safeway Insurance Co. 73 which found that a similar exclusion did not conflict with the public policy expressed in the Uninsured Motorist Act.

The appellate court based the change in its position on the Illinois Supreme Court's interpretation of the purpose of the mandatory uninsured motorist coverage statute in Barnes v. Powell 74 and Madison County Automobile Insurance Co. v. Goodpasture 75 and cited Putnam v. New Amsterdam Casualty Co., 76 relied on by the court in Burgo, as a restrictive interpretation of the statute. The court found further support in state supreme court interpretations of similar statutory provisions in Florida and Nevada, 77 though there is hardly national unanimity on the force to be given such statutes. 78

However, the facts of Barnes were clearly distinguishable from those in Doxtater, which the court admitted, since the insured in Barnes had paid a liability premium and an uninsured motorist premium on the vehicle involved in the accident, but his policy specifi-

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72. *Id.* at 548, 290 N.E.2d at 286.
74. 49 Ill. 2d 449, 275 N.E.2d 377 (1971).
75. 49 Ill. 2d 555, 276 N.E.2d 289 (1971).
ically excluded an insured automobile as an uninsured automobile. Thus, the only question for the court in Barnes was whether an automobile which plaintiff owned and was insured under the policy became an uninsured automobile when occupied by insured but driven by an uninsured motorist. It would seem that the appellate court in Doxtater arrived at an incorrect conclusion, for the reason that the holding allows coverage to an insured while operating or occupying vehicles which he owns but on which he has paid no premium for uninsured motorist coverage.

In another case arising out of an insurer's refusal to arbitrate for compensation under uninsured motorist coverage provisions, the doctrine of estoppel was held applicable against the insurance company. The insurance claim manager had requested a physical examination of the insured and completion of various claim forms and designated an arbitrator. After taking these steps, the company attempted to assert a defense of no coverage due to unsatisfactory proof of the uninsured status of the offending driver. The court held that the carrier was estopped to raise this coverage defense because of the other actions taken by the claims manager.

An exclusionary provision very similar to the one dealt with in Doxtater was at issue in Home Indemnity Co. v. Hunter. The insured was riding a motorcycle and sustained fatal injuries when struck by an automobile operated by an uninsured motorist. The decedent had purchased separate policies on both his motorcycle and on the family automobile, each containing uninsured motorist coverage. But the policy on the family automobile excluded coverage where insured was occupying an automobile which he owned but not including the insured automobile. The issue then was whether a motorcycle was an automobile within the meaning of that exclusion. Citing several cases from other jurisdictions, the court found that the exclusion was inapplicable since "the word 'automobile' means one thing and the word 'motorcycle' means something essentially different." Thus, the carriers were held to be co-insurers of

80. 7 Ill. App. 3d 786, 288 N.E.2d 879 (1972).
82. 7 Ill. App. 3d at 790, 288 N.E.2d at 883.
plaintiff's loss, and the wisdom of the exclusion in light of the public policy issues presented in Burgo and Doxtater did not have to be discussed because the only question was who the insured would be compensated by, rather than whether he would be compensated at all.

"Stacking" Benefits Under Separate Policies

The last issue in the area of uninsured motorist coverage which the courts dealt with this year was the extent to which the uninsured motorist coverage can be "stacked" (aggregating benefits from more than one policy) where several policies were issued to the same insured. In Glidden v. Farmers Automobile Insurance Assn., the plaintiff had purchased three family automobile liability policies from the insurance carrier covering three separate vehicles, each offering uninsured motorist coverage to the standard $10,000.00 limit. Plaintiff's wife was struck and killed as a pedestrian by an automobile driven by an uninsured motorist.

The policy contained an "other insurance" clause limiting the applicability of each policy's coverage to the excess over any other similar insurance held by the insured. Plaintiff, relying on a recent decision in Nevada, argued that such clauses were only intended to protect a carrier from paying a disproportionate amount of a loss when one insured holds policies issued by different carriers. But the court noted that the Illinois Supreme Court in Putnam v. New Amsterdam Casualty Co. and Morelock v. Miller's Mutual Insurance Assn. of Ill. expressed disapproval of the stacking of policies, because it would have the undesirable impact of placing motorists... in the unusual position of preferring that any injuries sustained be at the hands of uninsured motorists rather than motorists who comply with the Financial Responsibility Law. Thus the court held that the coverages in Glidden's policies could not be "stacked," limiting his recovery under the uninsured motor-

83. 11 Ill. App. 3d 81, 296 N.E.2d 84 (1973).
84. United States Auto. Ass'n v. Dokter, 86 Nev. 917, 478 P.2d 583 (1970), where the court held that the "other insurance" clause became ambiguous when contained in two policies issued by the same company and hence the ambiguity should be resolved in favor of the insured.
85. 48 Ill. 2d 71, 269 N.E.2d 97 (1970).
86. 49 Ill. 2d 234, 274 N.E.2d 1 (1971).
87. 48 Ill. 2d at 86, 269 N.E.2d at 104.
ist provisions to $10,000.00.

Justice Seidenfeld dissented from this portion of the case, noting that the Morelock and Putnam decisions were distinguishable, since in those cases the multiple policies were issued by the same company, but they were not issued to the same person. The Uninsured Motorist Act does not prevent motorists from obtaining coverage in excess of the minimum statutory requirements. The dissent noted that Glidden did pay separate premiums for the coverage under each policy, and therefore he would not necessarily be put in a better position simply because his wife had been struck by an uninsured motorist. Rather, in contrast to Morelock and Putnam, he would only be receiving benefits from policies he had in fact paid for. That the insured should be allowed to recover benefits for which he has paid a premium is reminiscent of the majority reasoning in Burgo where the insurer was not allowed to limit his liability, due in part to the insured's having already paid for the coverage.

The court correctly found that plaintiff could aggregate the medical payment coverages under the policies because there was no limiting language in the contracts as to "other insurance."

Specifically, as with many standard "other insurance" provisions relating to medical payments, the policy in this case only required that the payments be pro-rated with amounts received under other policies. The trial court had failed to note this distinction and incorrectly limited plaintiff's recovery to $2,000.00 rather than a total aggregate maximum coverage of $6,000.00 from all three policies.

Also, since the uninsured motorist was allegedly intoxicated at the time of the accident, plaintiff had a possible cause of action against the dram shop owner. The court held valid the trust agreement in the policies which subrogated plaintiff's interest in any future dram shop action arising out of the accident, even before plaintiff's right to recovery under the policies was established. Since the subrogation was limited to the extent of any benefits paid by the insurer, the anticipatory declaration of the insurer's rights was held proper as a means of forestalling possible future multiple litigation on the issue.

88. 11 Ill. App. 3d 81 at 88, 296 N.E.2d at 88-9.
89. Id. at 88, 296 N.E.2d at 89.
90. Id. at 88, 296 N.E.2d at 86.
91. Id. at 86, 296 N.E.2d at 88.
The past year has produced a number of very important decisions on Illinois insurance law, which have been reviewed in detail above. In addition, there was the normal flow of decisions, some of which are important for insurance lawyers to be aware of even though they do not stand for significant changes in the law.

The renewal of an automobile liability insurance policy conditioned upon the receipt of the premium by a certain date was held valid and enforceable in *Harmon v. House*. The insurance company was allowed to avoid coverage for an accident that occurred after the renewal date, even though it had held the late premium payment check until after the accident, but which it received before the accident occurred. However, in *Cheatem v. Cook*, an insurance agency sent a direction to the insurance company to cancel an automobile policy for non-payment of premium. When the question of coverage arose in litigation resulting from an accident which occurred after the cancellation order, the appellate court held that the cancellation request was inapplicable as to the insured since it did not constitute cancellation in accordance with the terms of the policy which required notice to the insured. In Illinois, an insurance company is required to give notice of *intention not to renew* an automobile liability insurance policy, and absence of such notice results in automatic renewal. The statute does not apply if the company has manifested a willingness to renew, and in *Shore v. Coronet*, the insurance company claimed that it had shown no intent of cancelling or refusing to renew and that this silence was a manifestation of willingness to renew under the statute such that plaintiff's failure to pay the premium caused the policy to expire. In its reversal of the trial court, the appellate court held that silence was *not* a manifestation of willingness to renew. Thus the company had to send notice of this willingness, and in absence of such notice the policy automatically was renewed and coverage was effective for an accident occurring after the premium due date.

94. ILL. REV. STAT. ch. 73, § 755.5 (1971).
95. 7 Ill. App. 3d 782, 288 N.E.2d 887 (1972).
An exclusion providing that a general insurance policy issued a summer camp does not apply "to the ownership, maintenance, operation, use, . . . of . . . automobiles if the accident occurs away from such premises or the ways immediately adjoining" was held applicable to an accident involving a camp counselor driving a vehicle on a public road one-half mile away from the camp entrance. Auto stereo tape players are a constant subject of theft, and in Duffy v. Republic Vanguard Insurance Co., the insured was denied recovery under a homeowner's policy for the theft of a tape player from his car since this item is not usual or incidental to the occupancy of the home of the insured. In another case, an insured could not recover under a fire policy for damage to his building which he had already contracted to have demolished as he did not suffer a loss or disadvantage by its destruction.

A workman's compensation claimant was allowed to recover directly from the reinsurer, after the original carrier was declared insolvent, despite a clear provision that the liquidator was to receive all funds from the reinsurer. In a dispute between insurance carriers where an accident occurred in another jurisdiction, the mere fact that the court has to apply the law of another state is not grounds to invoke the doctrine of forum non conveniens. The doctrine of judicial notice was relied upon by the appellate court in Wheeler v. Aetna Casualty & Surety Co. to establish that the insured architect does not install and operate scaffold devices at a work site, and that coverage for a Scaffold Act suit can only be within the terms of the architect's professional liability insurance policy, rather than under its public liability policy which specifically excluded professional services.

An appellate court decision held that a 60-day vacancy clause in a fire policy providing termination of coverage if the premises

97. Id.
have been unoccupied for that length of time prior to a fire, must be measured from the date of issuance or renewal of the policy.\textsuperscript{103} Thus, insurers who had issued new policies within the 60-day period were liable to provide coverage even though the destroyed premises had been unoccupied for a period more than 60 days prior to the fire, particularly in light of the fact that the insurers took no steps to inspect the property prior to issuing the policies.\textsuperscript{104}

Finally, a recent change in the Illinois Insurance Code resulted in allowing an insurer to cancel the renewal of a fire insurance policy even though the insured had been insured uninterruptedly for over three years.\textsuperscript{105} The Illinois Insurance Code was also revised to eliminate the Insurance Director's ability to impose contingent liability on policyholders, and the Illinois Supreme Court held that this revision does not apply to assessment proceedings instituted prior to the enactment.\textsuperscript{106}

\textbf{CONCLUSION}

It has been a banner year for growth and change in the field of insurance law, illustrating the ever increasing necessity for the insurance practitioner to closely survey reporter advance sheets. Further, the case law as a whole is a study in the legal process, where much can be learned about the extent to which the judicial institution will allow private law making by contract to control the operation of legislative enactments. Insurance contracts are recognized as having significant public interest import, as palliatives to the creation of risks attendant to an industrial society, and this year's cases illustrate the courts' willingness to take the "Olympian View" and prevent private law making from infringing on those directives of the legislature which have evident purpose in protecting the public interest.

\begin{itemize}
\item \textsuperscript{104} \textit{Id.} at 361, 290 N.E.2d at 359.
\item \textsuperscript{105} Hardy v. United States Fidelity and Guar. Co., 12 Ill. App. 3d 845, 299 N.E.2d 153 (1973), interpreting ILL. REV. STAT. ch. 73, § 755.1a (1971).
\item \textsuperscript{106} People \textit{ex rel.} Baylor v. Bell Mut. Cas. Co., 54 Ill. 2d 433, 298 N.E.2d 167 (1973).
\end{itemize}