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## Insurance Law

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# Insurance Law

Michael M. Marick\*  
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## I. INTRODUCTION

During the *Survey* year, Illinois courts and the Illinois General Assembly addressed a variety of insurance issues. The Illinois Supreme Court considered issues relating to insurance company liquidations, the measure of an insured's remedy for an insurer's failure to offer its insured underinsured motorist coverage, and the enforcement of premium due notice requirements in a life insurance forfeiture. The Illinois appellate courts resolved important issues regarding the interpretation of the pollution exclusion in the comprehensive general liability policy and the extent to which liability insurance will cover the repair or replacement of a defective component product manufactured by the insured. Finally, the Illi-

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nois General Assembly passed legislation mandating that motorists carry liability insurance on all vehicles registered in Illinois.

## II. THE PRIORITY STATUS OF REINSUREDS IN THE LIQUIDATION PROCEEDINGS OF INSOLVENT REINSURERS

When a large commercial enterprise is declared bankrupt, complicated issues often arise with respect to the priority of claims against the debtor corporation. In the case of insurance companies, which are exempt from the application of federal bankruptcy laws,<sup>1</sup> these issues typically are governed by state statute.<sup>2</sup> The Illinois liquidation statute provides that an insurer's "policyholders" have a higher priority status than do general creditors.<sup>3</sup> In *In re Liquidations of Reserve Insurance Co.*,<sup>4</sup> the Illinois Supreme Court construed the Illinois liquidation statute and held that reinsurance<sup>5</sup> claims have a lower priority status in the distribution of an insolvent insurer's assets than do "direct insurance"<sup>6</sup> claims.<sup>7</sup>

In *Reserve Insurance*, the Illinois Director of Insurance ("Director"), acting as the liquidator<sup>8</sup> in the liquidation proceedings of Reserve Insurance Company and Security Casualty Company, successfully petitioned the circuit court to declare that all reinsurance claims filed by insurance companies ("reinsureds") were claims of "general creditors" under section 205(1)(d) of the liquidation statute.<sup>9</sup> In a direct appeal to the Illinois Supreme Court,<sup>10</sup> the rein-

1. See 11 U.S.C. § 109 (1982).

2. See generally 2A G. COUCH, R. ANDERSON & M. RHODES, COUCH ON INSURANCE § 22.52 (2d ed. rev. 1984) (explaining the general scope of such statutes and the state interests involved).

3. ILL. REV. STAT. ch. 73, para. 817 (1987). For the pertinent text of this statute, see *infra* note 9.

4. 122 Ill. 2d 555, 524 N.E.2d 538 (1988) [hereinafter *Reserve Insurance*].

5. Reinsurance is defined as: "A contract by which an insurer procures a third person to insure him against loss or liability by reason of original insurance. A contract that one insurer makes with another to protect the latter from a risk already assumed . . ." BLACK'S LAW DICTIONARY 1157 (5th ed. 1979).

6. The term "direct insurance," as used by the court, is perhaps best understood by reference to the definition of reinsurance. See *supra* note 5. Direct insurance is the "original insurance" or the "risk already assumed" referred to in that definition.

7. *Reserve Ins.*, 122 Ill. 2d at 563-64, 524 N.E.2d at 542.

8. Upon court order directing the liquidation of an insurance company, the Director is authorized to liquidate the company. ILL. REV. STAT. ch. 73, para. 805 (1987).

9. *Reserve Ins.*, 122 Ill. 2d at 557-58, 524 N.E.2d at 539. The liquidation statute provides, in pertinent part:

Distribution of general assets from company's estate — Priorities

(1) The priorities of distribution of general assets from the company's estate is to be as follows:

sureds argued that they were “policyholders” covered under “insurance policies” or “insurance contracts” issued by Reserve and that they were therefore entitled to the higher priority status of section 205(1)(c) (“priority (c)”) of the liquidation statute.<sup>11</sup>

In affirming the circuit court’s decision, the Illinois Supreme Court first drew a sharp distinction between reinsurance and direct insurance.<sup>12</sup> The court stressed that reinsurance agreements, unlike direct insurance contracts, are negotiated between parties in relatively equal bargaining positions.<sup>13</sup> The court further emphasized that reinsurance contracts remain distinct from and unconnected to direct policies.<sup>14</sup> Additionally, the *Reserve Insurance* court observed that reinsurance protects against insurance liability rather than the hazards commonly associated with contracts of direct insurance.<sup>15</sup>

Consistent with these differences, the court observed that the Illinois Insurance Code makes specific reference to reinsurance,<sup>16</sup> at least twice within the same statutory provision as the word “insur-

(a) The costs and expenses of administration . . . .

(b) Wages actually owing to employees for services rendered . . . and secured claims . . . .

(c) Claims by policyholders, beneficiaries, insureds and liability claims against insureds covered under insurance policies and insurance contracts issued by the company, and claims of the Illinois Insurance Guaranty Fund, the Illinois Life and Health Guaranty Association and any similar organization in another state . . . .

(d) All other claims of general creditors not falling within any other priority under this Section . . . .

ILL. REV. STAT. ch. 73, para. 817 (1987).

The record in the *Reserve Insurance* case reveals that if the reinsureds were classified as “general creditors” pursuant to priority (d), then it is likely that they would have recovered nothing for their claims. *Reserve Ins.*, 122 Ill. 2d at 558, 524 N.E.2d at 539. On the other hand, if the reinsureds were afforded the higher status of priority (c), then it is possible that they could have recovered their reinsurance claims on a pro rata basis. *Id.*

10. *Reserve Ins.*, 122 Ill. 2d at 558, 524 N.E.2d at 539. The supreme court allowed the direct appeal pursuant to Supreme Court Rule 302(b). *Id.* (citing ILL. S. CT. R. 302(b), ILL. REV. STAT. ch. 110A, para. 302(b) (1987)).

11. *Id.* For the pertinent text of the Illinois liquidation statute, see *supra* note 9.

12. *Reserve Ins.*, 122 Ill. 2d at 561-62, 524 N.E.2d at 540-41.

13. *Id.* at 561, 524 N.E.2d at 541.

14. *Id.* The court explained that the direct insurance policyholder is not a party to the reinsurance agreement. *Id.*

15. *Id.* at 562, 524 N.E.2d at 541. Referring to section 4 of the Illinois Insurance Code, ILL. REV. STAT. ch. 73, para. 616 (1987), the court explained that insurance liability, the risk assumed by reinsurers, is markedly different from the risks typically assumed by direct insurers, such as fire, death, or accident. *Reserve Ins.*, 122 Ill. 2d at 562, 524 N.E.2d at 541.

16. *Reserve Ins.*, 122 Ill. 2d at 563, 524 N.E.2d at 541-42 (citing ILL. REV. STAT. ch. 73, paras. 617, 671, 694, 711, 755.11, 756(4)(a), 767.9, 816.974(a), 1065.18-3, 1065.407 (1987)).

ance."<sup>17</sup> The court reasoned that these references demonstrate the legislature's recognition of the distinction between the two terms and its intention to use them independently.<sup>18</sup> The court concluded that if the legislature had intended to include reinsurance claims in priority (c), then it would have mentioned specifically reinsurance claims.<sup>19</sup>

Finally, after supporting its conclusion with case law from Illinois and other jurisdictions,<sup>20</sup> the *Reserve Insurance* court considered an argument that the reinsureds advanced regarding the Illinois Insurance Guaranty Fund<sup>21</sup> and other state guaranty funds.<sup>22</sup> The reinsureds argued that construing section 205(1)(c) to protect only direct insureds is unwarranted because state guaranty fund statutes are designed to and do provide protection to direct insureds against insurer insolvencies.<sup>23</sup> Therefore, according to the reinsureds, there is no policy justification for excluding reinsureds from priority (c) under the guise of protecting direct insureds.<sup>24</sup> The court rejected this argument, reasoning that some states do not have guaranty funds and that the funds that do exist might not

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17. *Id.* at 562, 524 N.E.2d at 541 (citing ILL. REV. STAT. ch. 73, paras. 719.02, 719.21 (1987)).

18. *Id.* at 563, 524 N.E.2d at 541.

19. *Id.* at 563, 524 N.E.2d at 542.

20. *Id.* at 564, 524 N.E.2d at 542. The court cited four Illinois cases to demonstrate that its conclusion was consistent with well-established legal principles distinguishing reinsurance from insurance. See *People ex rel. Baylor v. Highway Ins. Co.*, 57 Ill. 2d 590, 316 N.E.2d 633 (1974); *Union Cent. Life Ins. Co. v. Lowe*, 349 Ill. 464, 182 N.E. 611 (1932); *Baltica Ins. Co. v. Carr*, 330 Ill. 608, 162 N.E. 178 (1928); *Vial v. Norwich Union Fire Ins. Soc'y*, 257 Ill. 355, 100 N.E. 929 (1913). The court cited decisions from other jurisdictions as persuasive authority. See *Foremost Life Ins. Co. v. Department of Ins.*, 409 N.E.2d 1092 (Ind. 1980); *Neff v. Cherokee Ins. Co.*, 704 S.W.2d 1 (Tenn. 1986).

21. ILL. REV. STAT. ch. 73, paras. 1065.82-1065.103 (1987).

22. *Reserve Ins.*, 122 Ill. 2d at 569, 524 N.E.2d at 542. Concern over property and casualty insurer insolvencies in the 1950s and 1960s led to the creation of guaranty funds by state legislatures. These funds bear the responsibility of paying on behalf of insolvent insurers' claims that are covered under the terms of the statute. Blaine, *State Insurance Guaranty Laws*, 12 FORUM 808 (1977); Annotation, *Insurer Insolvency Claims*, 30 A.L.R. 4th 1110 (1984).

The activities of the Illinois Guaranty Fund are funded by companies authorized to transact insurance business in Illinois. ILL. REV. STAT. ch. 73, para. 1065.87-6 (1987). Each company is assessed up to 1% of that company's net direct written premiums for the preceding calendar year. *Id.*

23. *Reserve Ins.*, 122 Ill. 2d at 565, 524 N.E.2d at 542. In Illinois, for example, an insured may collect up to \$150,000 per claim from the Illinois Guaranty Fund if its insurer is declared insolvent. ILL. REV. STAT. ch. 73, para. 1065.87-2 (1987). Claims of insurers are specifically excluded from coverage under this statute. ILL. REV. STAT. ch. 73, para. 1065.84-3(b)(ii)(1987).

24. *Reserve Ins.*, 122 Ill. 2d at 565, 524 N.E.2d at 542.

fully protect direct insureds.<sup>25</sup> The *Reserve Insurance* court also noted that the priorities established by section 205(1)(c) are relevant not only in liquidations, but also in rehabilitation proceedings, which do not even trigger the protection of the guaranty funds.<sup>26</sup>

As a matter of statutory interpretation, the decision in *Reserve Insurance* raises many interesting questions. First, the court's conclusion that under the Insurance Code the meaning of the term "insurance" does not extend to embrace reinsurance is somewhat strained. The court's own distinction between reinsurance and "direct insurance"<sup>27</sup> belies this conclusion. The term "direct insurance" is not used in the liquidation statute or anywhere else in the Insurance Code. Rather, the liquidation statute only refers to insurance contracts and policies.<sup>28</sup> Significantly, reinsurance commonly has been referred to as a form of insurance by insurance industry commentators<sup>29</sup> and Illinois courts.<sup>30</sup> Moreover, the liquidator in *Reserve Insurance*, the Illinois Director of Insurance, regulates reinsurance under the Insurance Code.<sup>31</sup>

Furthermore, although the *Reserve Insurance* court chose not to address this issue, the Illinois Insurance Guaranty Fund statute<sup>32</sup> contains a provision that expressly excludes reinsurance claims from coverage.<sup>33</sup> The express exclusion casts considerable doubt

25. *Id.* at 566, 524 N.E.2d at 543. The court explained that some claims could exceed caps imposed by guaranty funds and that coverage for certain types of claims might be unavailable. *Id.*

26. *Id.* at 566-67, 524 N.E.2d at 543 (citing ILL. REV. STAT. ch. 73, para. 804(4)(1987)).

27. *See supra* notes 4-7, 12-15 and accompanying text.

28. *See supra* note 9.

29. For example, one commentator explained: "Reinsurance is a form of insurance. As such, a contract of reinsurance is an insurance contract. It is so established in law, and the general characteristics that distinguish a contract of insurance from other contracts are required and found in contracts of reinsurance." Kramer, *The Nature of Reinsurance*, in REINSURANCE 4 (R.W. Strain ed. 1980).

30. *See, e.g.*, *Pioneer Life Ins. Co. v. Alliance Life Ins. Co.*, 374 Ill. 576, 587, 30 N.E.2d 66, 72 (1940) ("reinsurance policies . . . are contracts of insurance"); *American Mut. Reinsurance Co. v. Calvert Fire Ins. Co.*, 52 Ill. App. 3d 922, 923, 928, 367 N.E.2d 104, 106, 109-10 (1st Dist. 1977), *cert. denied*, 436 U.S. 906 (1978) (referring to a reinsurance agreement as a "contract of insurance" and reinsurance is "insurance" for purposes of establishing exemption from regulation as provided under the McCarran-Ferguson Insurance Regulation Act, 15 U.S.C. §§ 1011-1015 (1982)); *People v. Cosmopolitan Ins. Co.*, 89 Ill. App. 2d 225, 229, 233 N.E.2d 90, 93 (1st Dist. 1967) ("[b]y this [reinsurance] contract an insurance company purchased insurance").

31. *See, e.g.*, ILL. REV. STAT. ch. 73, paras. 636, 617, 748 (1987); ILL. ADMIN. CODE tit. 50, § 923 (1985).

32. ILL. REV. STAT. ch. 73, paras. 1065.82-1065.103 (1987).

33. The statute provides:

.....

(b) "Covered Claim" does not include

on the supreme court's conclusion that in the liquidation statute the legislature would have expressly included reinsurance claims in priority (c) if it had intended to afford them that status.<sup>34</sup> Instead, given the absence of an exclusion for reinsurance claims, it seems more plausible to conclude that the legislature intended to include reinsurance claims within priority (c).

Overall, it is unclear what impact the *Reserve Insurance* decision will have on the insurance industry. Obviously, reinsureds now face greater risk that some claims will not be satisfied. The losses incurred by insurance companies when their reinsurance claims are not paid due to reinsurer insolvencies may make direct insurance more costly. Moreover, if insurance companies are less able to collect reinsurance claims, then the potential that those insurers will become financially impaired increases.<sup>35</sup> The Illinois Legislature should better integrate the current statutory scheme for protecting claimants of insolvent insurers because there is no end in sight to the significant problem of insurer insolvencies.<sup>36</sup>

### III. THE INSURER'S DUTY TO DEFEND AND INDEMNIFY

#### A. *The Pollution Exclusion*

For many years, commercial insurers and their policyholders debated the scope of the pollution exclusion<sup>37</sup> of the comprehensive

.....  
 v) any claim for any amount due any reinsurer, insurer, insurance pool or underwriting association as subrogated recoveries or otherwise.  
 ILL. REV. STAT. ch. 73, para. 1065.84-3(b)(v)(1987).

The difference in the legislature's treatment of the Illinois Insurance Guaranty Fund statute and the liquidation statute is important because of the similar purpose for which each was obviously passed — protecting claimants from insolvent insurers. The Guaranty Fund was created in 1971, ILL. ANN. STAT. ch. 73, para. 1065.82 (Smith-Hurd Supp. 1987), four years prior to the passage of the current version of the liquidation statute. ILL. ANN. STAT. ch. 73, para. 817 (Smith-Hurd Supp. 1988).

34. See *supra* notes 16-19 and accompanying text.

35. See *Security Mut. Casualty Co. v. Century Casualty Co.*, 531 F.2d 974, 978 (10th Cir. 1976)(by not being able to collect its reinsurance claims, "[a]n apparently solvent insurer might be plunged into insolvency").

36. See *Law and Practice of Insurance Company Insolvency* (A.B.A. Nat'l Inst. 1986).

37. The pollution exclusion first appeared in 1970 as an endorsement to the comprehensive general liability ("CGL") policy, but soon thereafter became part of the actual CGL form. Hendrick & Wiezel, *The New Commercial General Liability Forms — An Introduction and Critique*, 36 FED'N INS. & CORP. COUNS. 317, 344 (1986)[hereinafter Hendrick & Wiezel]. The pollution exclusion removes from coverage:

[B]odily injury or property damage arising out of the discharge, dispersal, release, or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, or waste materials or other irritants, contaminants or pollu-

general liability ("CGL") policy.<sup>38</sup> This debate has often focused on what meaning to ascribe to the "sudden and accidental" exception to the pollution exclusion.<sup>39</sup> In *International Minerals and Chemical Co. v. Liberty Mutual Insurance*,<sup>40</sup> the Illinois Appellate Court for the First District considered this issue and found that the pollution exclusion precluded coverage for the defense and indemnification costs relating to an environmental clean-up action brought against an insured.<sup>41</sup> In *International Minerals*, the Environmental Protection Agency ("EPA") brought suit in New Hampshire against International Minerals and Chemical Company ("IMC") under the Resource Conservation and Recovery Act of 1976 ("RCRA")<sup>42</sup> and the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA" or "Superfund").<sup>43</sup> The EPA alleged that the operation by IMC of a barrel reconditioning facility in New Hampshire caused environmental contamination.<sup>44</sup> In connection with the EPA suit, IMC filed a separate declaratory judgment action against its insurers in the Circuit Court of Cook County.<sup>45</sup> IMC sought a declaration that its liability insurers owed a duty to IMC to defend and indemnify the company in connection with the the EPA action.<sup>46</sup> IMC's various insurers denied having any such duty, raising the pollution

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tants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

*International Minerals & Chem. Co. v. Liberty Mut. Ins.*, 168 Ill. App. 3d 361, 369, 522 N.E.2d 758, 763 (1st Dist. 1988).

38. In an effort to further restrict pollution coverage, the pollution exclusion recently has been changed to delete the "sudden and accidental" exception to the exclusion. See *Hendrick & Wiesel*, *supra* note 37, at 343-50.

39. See *infra* notes 60-62 and accompanying text.

40. 168 Ill. App. 3d 361, 522 N.E.2d 758 (1st Dist. 1988).

41. *Id.* at 379-80, 522 N.E.2d at 770.

42. *Id.* at 365, 522 N.E.2d at 761 (citing 42 U.S.C. §§ 6901-6987 (1982)).

43. 42 U.S.C. §§ 9601-9657 (1982).

44. Specifically, the court summarized the EPA allegations as follows:

IMC operated a barrel reconditioning business on the GLCC site; that on the site was a storage area where up to 60,000 barrels were stored pending reconditioning; that in the course of the reconditioning process the barrels were emptied of all chemical wastes and residues and then washed, rinsed, and stripped of rust by various industrial processes, including the use of caustic solutions; that the wastes from the drums were deposited and discharged onto the ground at the site; that those wastes contaminated the soil, migrated to, entered and contaminated the groundwater, the flow of which carried contaminants into the ground and surface waters used by local residents.

*International Minerals*, 168 Ill. App. 3d at 376, 522 N.E.2d at 768.

45. *Id.* at 365-66, 522 N.E.2d at 761.

46. *Id.* at 366, 522 N.E.2d at 761.



exclusion as an affirmative defense.<sup>47</sup> In affirming the trial court's decision, the appellate court held that the pollution exclusion clearly and unambiguously removed from coverage the very type of liability alleged in the EPA complaint.<sup>48</sup>

The *International Minerals* court first determined that the allegations in the EPA complaint<sup>49</sup> brought IMC's claims at least "potentially" within the scope of the coverage grant<sup>50</sup> of the CGL policy.<sup>51</sup> The court had little difficulty, however, finding that the EPA's allegations triggered the application of the pollution exclusion because there was a polluting event as well as pollution damage.<sup>52</sup>

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47. *Id.*

48. *Id.* at 375, 522 N.E.2d at 767.

49. *See supra* note 44.

50. The coverage grant of the CGL policy provides coverage for an "occurrence," defined as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." *International Minerals*, 168 Ill. App. 3d at 361, 522 N.E.2d at 763. The *International Minerals* court determined that the relevant inquiry in applying this definition is whether the insured intended or expected the damage resulting from the polluting event. *Id.* at 371-72, 522 N.E.2d at 765. In this context, the *International Minerals* court held that the EPA suit against IMC potentially was covered by an "occurrence" as defined under the CGL policy. *Id.* at 375, 522 N.E.2d at 767. *But see* Great Lakes Container Corp. v. National Union Fire Ins. Co., 727 F.2d 30 (1st Cir. 1984)(finding no occurrence under the CGL policy in precisely the same context as the *International Minerals* case).

Notably, the *International Minerals* court did not address the issue of whether government-mandated clean-up costs are recoverable as "property damage." Other courts have addressed this issue, and there is a split of authority. *See, e.g.,* Continental Ins. Co. v. Northeastern Pharmaceutical & Chem. Co., 842 F.2d 977 (8th Cir. 1988)(clean-up costs are not recoverable as property damage); Maryland Casualty Co. v. Armco, Inc., 643 F. Supp. 430 (D. Md. 1986), *aff'd*, 822 F.2d 1348 (4th Cir. 1987)(EPA claim for response costs does not constitute a claim for damages); Verlan, Ltd. v. John L. Armitage & Co., 695 F. Supp. 950 (N.D. Ill. 1988)(clean-up costs do not constitute property damage); *But see* Intel Corp. v. Hartford Accident & Indem. Co., 662 F. Supp. 1507 (N.D. Cal. 1987)(government-mandated clean-up expenses are fully compensable); United States Fidelity & Guar. v. Thomas Solvent Co., 683 F. Supp. 1139 (W.D. Mich. 1988)(clean-up costs are recoverable as property damage). For a general discussion of other decisions considering the issue of whether environmental clean-up costs constitute "property damage," see Pope & Bates, *Significant Insurance Coverage Issues of the 1980's*, 53 INS. COUNS. J. 276, 291-92 (1986)[hereinafter Pope & Bates].

51. *International Minerals*, 168 Ill. App. 3d at 375, 522 N.E.2d at 767. In assessing whether an insurer has a duty to defend, Illinois courts first will compare the allegations in the complaint to the insurance policy provisions and determine whether the allegations potentially bring the claims within the scope of coverage. *Zurich Ins. Co. v. Raymark Indus. Inc.*, 118 Ill. 2d 23, 514 N.E.2d 150 (1987).

52. *International Minerals*, 168 Ill. App. 3d at 375, 522 N.E.2d at 767. The court reasoned that an insurer must satisfy only two elements to trigger the exclusion. First, the underlying complaint must allege a polluting activity or event. *Id.* Second, the underlying complaint must allege environmental damage. Both allegations were at the heart of the EPA complaint. *Id.* at 375-76, 522 N.E.2d at 767.

After finding that the pollution exclusion applied to IMC's claim, the court considered whether the matters asserted in the EPA complaint fell within the "sudden and accidental" exception to the pollution exclusion. The court initially analyzed the plain language of the exclusion<sup>53</sup> and determined that the exception relates to pollution activity, not pollution damage.<sup>54</sup> Consistent with this observation, the court focused on IMC's alleged activities and noted the considerable magnitude and ongoing nature of IMC's barrel reconditioning business.<sup>55</sup> The *International Minerals* court reasoned that although the systematic discharge or release of pollutants alleged in the EPA complaint arguably could be characterized as "accidental,"<sup>56</sup> it could not properly be described as "sudden."<sup>57</sup> The court explained that the term sudden, as commonly understood, has temporal significance, describing events occurring "with very brief notice," "abruptly," or "hastily."<sup>58</sup> The court concluded that IMC's alleged pollution activity did not fall within this common understanding of "sudden."<sup>59</sup>

Unlike other decisions that have improperly strained to find ambiguity in the "sudden and accidental" language of the pollution exclusion,<sup>60</sup> the *International Minerals* decision presents a well-rea-

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53. *Id.* at 376, 522 N.E.2d at 767-68. The exception to the pollution exclusion provides that the exclusion "does not apply if such discharge, dispersal, release or escape is sudden and accidental." *Id.*

54. *Id.* at 375, 522 N.E.2d at 767.

55. IMC operated the reconditioning facilities from May 1973 to August 1976. *Id.* at 365, 522 N.E.2d at 761.

56. *Id.* at 377, 522 N.E.2d at 768. The court was reluctant to concede that the discharge was accidental. *Id.* The court found it "highly unlikely" that IMC would not have expected a discharge, given the nature of its barrel reconditioning process. *Id.*

57. *Id.*

58. *Id.* at 378, 522 N.E.2d at 769 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2284 (1986)).

59. *Id.*

60. Under the coverage grant of the CGL policy, coverage is provided for an "occurrence." An occurrence is defined as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." *Id.* at 361, 522 N.E.2d at 763. Some courts view the "sudden and accidental" exception to the pollution exclusion as a mere restatement of the fact that coverage is provided for "unexpected or unintended" damage. *See, e.g.,* Peppers Steel & Alloys, Inc. v. United States Fidelity & Guar., 668 F. Supp. 1541, 1549 (S.D. Fla. 1987) ("if a spill or release of chemical substances . . . is neither expected nor intended . . . it follows that it was 'sudden and accidental'"); Payne v. United States Fidelity & Guar. Co., 625 F. Supp. 1189 (S.D. Fla. 1985) (because the complaint was devoid of any allegations suggesting that the release of PCBs was intended or expected, the release was sudden and accidental); Travelers Indem. Co. v. Dingwell, 414 A.2d 220, 225 (Me. 1980) ("[i]t is possible that the release could have been unexpected and unintended, and thus outside of [the sudden and accidental] exclusion"); Jackson Township Mun. Utils. Auth. v. Hartford Accident & Indem. Co., 186 N.J. Super. 156,

soned and straightforward interpretation of that language. In reaching its decision, the court departed from its earlier position<sup>61</sup> and joined those courts that construe each word in the "sudden and accidental" exception to have independent meaning.<sup>62</sup>

Illinois courts adopting the *International Minerals* analysis will find that coverage for pollution-related damage exists only where the activity causing pollution damage occurred abruptly, hastily, or with little notice. Thus, in situations where pollution damage is caused by continuous activity over a period of time, courts will find that liability coverage will not apply. This result will properly place the burden of controlling pollution damage on insureds who are in the best position to regulate and control their pollution-related activities.<sup>63</sup>

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164, 451 A.2d 990, 994 (1982)(the pollution exclusion can be interpreted as simply a restatement of the definition of occurrence); *Buckeye Union Ins. Co. v. Liberty Solvents & Chems. Co.*, 17 Ohio App. 3d 127, 477 N.E.2d 1227 (1984)(release of hazardous waste was sudden and accidental because there were no allegations that it was intended or expected); *United Pacific Ins. Co. v. Van's Westlake Union, Inc.*, 34 Wash. App. 708, 714, 664 P.2d 1262, 1266 (1983) (quoting *Jackson Township*, 186 N.J. Super. at 164, 451 A.2d at 994) (the pollution exclusion "clause can be interpreted as simply a restatement of the definition of 'occurrence'").

For summaries and analyses of many of these cases and of cases taking similar approaches, see Pope & Bates, *supra* note 50, at 292-99.

61. See *Reliance Ins. Co. v. Martin*, 126 Ill. App. 3d 94, 467 N.E.2d 287 (1st Dist. 1984) (citing courts holding that the terms "sudden" and "accidental" have the same meaning). The *International Minerals* court expressly disavowed its earlier approval of those cases. *International Minerals*, 168 Ill. App. 3d at 379, 522 N.E.2d at 770.

62. *International Minerals*, 168 Ill. App. 3d at 379, 522 N.E.2d at 770. See, e.g., *Claussen v. Aetna Casualty & Sur.*, 676 F. Supp. 1571, 1580 (S.D. Ga. 1987)("[o]nly in the minds of hypercreative lawyers could the word 'sudden' be stripped of its essential temporal attributes"); *Fischer & Porter Co. v. Liberty Mut. Ins. Co.*, 656 F. Supp. 132, 140 (E.D. Pa. 1986) ("[c]ontamination that results from continuous dumping of toxic chemicals . . . is not sudden, even if one could argue that the spillage was accidental or the resulting damage unexpected"); *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 340 S.E.2d 374 (1986)(although the leaching of contaminants into groundwater over a number of years arguably might be characterized as accidental, it cannot properly be called sudden); *Techalloy Co. v. Reliance Ins. Co.*, 338 Pa. Super. 1, 487 A.2d 820 (1984)(while the discharge at issue might have been accidental, it was not sudden).

For summaries and analyses of many of these cases and others, see Pope & Bates, *supra* note 50, at 292-99.

63. This policy concern was articulated in *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 340 S.E.2d 374 (1986). In explaining the policy reasons behind the pollution exclusion, the *Waste Management* court stated that "if an insured knows that liability incurred by all manner of negligent or careless spills and releases is covered by his liability policy, he is tempted to diminish his precautions and relax his vigilance." *Id.* at 693, 340 S.E.2d at 381.

*B. The Repair and Replacement of Defective Component Products Manufactured by the Insured*

Although the CGL policy covers "property damage" caused to a third party, a standard exclusion in the policy removes from coverage "property damage to the named insured's products arising out of such products" (the "product exclusion").<sup>64</sup> The exclusion was drafted to prevent recovery for damage to an insured's products caused by the insured's own mistakes.<sup>65</sup> In *Marathon Plastics v. International Insurance Co.*,<sup>66</sup> the Illinois Appellate Court for the Fourth District held that the product exclusion did not preclude coverage for the cost of repairing and replacing a defective product that the court determined had caused damage to a third party's property.<sup>67</sup>

In *Marathon Plastics*, the plaintiff, Marathon Plastics Company ("Marathon"), sold polyvinylchloride ("PVC") pipe that it had manufactured to Albrecht Well Drilling ("Albrecht").<sup>68</sup> Albrecht installed the PVC piping in an underground water system.<sup>69</sup> The piping had defective seals that caused the installed system to leak.<sup>70</sup> As a result, Albrecht had to make repairs.<sup>71</sup> Albrecht sought recovery from Marathon for the costs expended in making the repairs.<sup>72</sup> Marathon settled with Albrecht and then brought suit against its insurer, International Insurance Company ("International"), which had denied liability coverage for Albrecht's claim.<sup>73</sup> The trial court held that International's policy afforded indemnity coverage for Albrecht's claim.<sup>74</sup>

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64. Hamilton & Morse, *The Comprehensive General Liability Policy*, LIABILITY INSURANCE § 3.25 (IICLE 1989).

65. Hamilton & Marick, *Comprehensive General Liability Professional & Excess Coverage*, ATTORNEY'S GUIDE TO LIABILITY INSURANCE § 3.30 (IICLE 1985). The exclusion limits the scope of products liability coverage and is intended to prevent an insurer from becoming the guarantor of the quality of the insured's products. *Id.* Other types of insurance coverage is available to specifically cover product performance. Hamilton & Marick, *Comprehensive General Liability Professional & Excess Coverage*, ATTORNEY'S GUIDE TO LIABILITY INSURANCE § 3.28 (IICLE 1985).

66. 161 Ill. App. 3d 452, 514 N.E.2d 479 (4th Dist. 1987).

67. *Id.* at 465, 514 N.E.2d at 487.

68. *Id.* at 456, 514 N.E.2d at 481.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 457, 514 N.E.2d at 481. Marathon argued, and both the trial and appellate courts agreed, that International had actually authorized the settlement with Albrecht. *Id.*

74. *Id.* at 458, 514 N.E.2d at 482.

On appeal,<sup>75</sup> International argued that Marathon's alleged damages consisted entirely of defects in its own product, the PVC pipe, and thus fell within the product exclusion.<sup>76</sup> Marathon asserted that it did not seek recovery for the cost of its defective products, but instead for damages caused to Albrecht, a third party.<sup>77</sup> In affirming the trial court's decision in favor of the insured, the appellate court relied primarily on *Pittway Corp. v. American Motorists Insurance Co.*<sup>78</sup> and *Elco Industries, Inc. v. Liberty Mutual Insurance.*<sup>79</sup> According to the *Marathon Plastics* court, these decisions held that the term "property damage," as used in the CGL policy, encompasses more than just physical harm or injury to property.<sup>80</sup> The term also includes property that was diminished in value or made useless.<sup>81</sup> Accordingly, the *Marathon Plastics* court determined that the defective PVC pipe had rendered Albrecht's entire water system useless and had diminished its value.<sup>82</sup> Therefore, the court concluded that Marathon had caused property damage to a third party and held that Marathon's claim was not excluded from coverage.<sup>83</sup>

The *Marathon Plastics* decision expands considerably the scope of liability coverage for problems caused by the insured's own products. Although the court placed emphasis on the *Pittway* and *Elco* decisions, both cases, unlike *Marathon Plastics*, involved actual physical damage to the property of a third party caused by the insured's products.<sup>84</sup> The *Marathon Plastics* court, while conced-

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75. In addition to the central issue in this appeal concerning the product exclusion, International raised several other issues, all of which were resolved in Marathon's favor. Most significantly, the court concluded that International was estopped from raising certain policy defenses because of evidence establishing that International had actually authorized the settlement agreement. *Id.* at 459, 514 N.E.2d at 483.

76. *Id.* at 461, 514 N.E.2d at 484.

77. *Id.*

78. *Id.* (citing *Pittway Corp. v. American Motorists Ins. Co.*, 56 Ill. App. 3d 338, 370 N.E.2d 1271 (2d Dist. 1977)). In *Pittway*, the insured manufactured defective aerosol valves that rendered a third party's aerosol cans completely inoperable. *Pittway*, 56 Ill. App. 3d at 340, 370 N.E.2d at 1272-73.

79. *Marathon*, 161 Ill. App. 3d at 462, 514 N.E.2d at 485 (citing *Elco Indus., Inc. v. Liberty Mut. Ins.*, 90 Ill. App. 3d 1106, 414 N.E.2d 41 (1st Dist. 1980)). In *Elco*, the insured supplied defective regulating pins to an engine manufacturer. *Elco*, 90 Ill. App. 3d at 1108, 414 N.E.2d at 43. The repair and replacement of the the defective pins ruined gaskets and plugs contained in the engines. *Id.* at 1110, 414 N.E.2d at 46.

80. *Marathon*, 161 Ill. App. 3d at 461-63, 514 N.E.2d at 484-85.

81. *Id.* at 462, 514 N.E.2d at 485.

82. *Id.* at 463, 514 N.E.2d at 485.

83. *Id.* at 465, 514 N.E.2d at 487. The cost of the actual replacement pipe, Marathon's own product, was neither sought nor allowed as damages. Marathon only recovered labor and related costs. *Id.* at 463, 514 N.E.2d at 486.

84. See *supra* notes 78 and 79.

ing that “no physical damage occurred to the water system,”<sup>85</sup> nonetheless found that coverage existed for the settlement with Albrecht.<sup>86</sup> The court based its decision solely on the premise that the water system had suffered a “diminution in value.”<sup>87</sup> This conclusion cannot be reconciled with either the CGL policy’s property damage definition requiring “physical injury to or destruction of tangible property”<sup>88</sup> or with prior Illinois case law.<sup>89</sup> The court’s decision in effect transforms a liability policy into a guaranty of product quality.

#### IV. UNDERINSURED MOTORIST COVERAGE

Underinsured motorist (“UIM”) coverage is first-party coverage<sup>90</sup> available to an injured insured when a tortfeasor carries some liability protection, but not enough to fully compensate the insured for his injuries.<sup>91</sup> Between September 3, 1980, and July 1, 1983, no automobile liability insurance policy could be issued or renewed in Illinois unless a proper “offer”<sup>92</sup> of UIM coverage had been made

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85. *Marathon*, 161 Ill. App. 3d at 463, 514 N.E.2d at 485.

86. *Id.*

87. *Id.*

88. *Id.* at 461, 514 N.E.2d at 484.

89. For example, in *Qualls v. Country Mut. Ins. Co.*, 123 Ill. App. 3d 831, 462 N.E.2d 1288 (4th Dist. 1984), the court held that a carpenter’s poor workmanship that resulted in the diminished value of a home was not covered property damage. The court found that diminution in value is the inevitable result of defective workmanship and is not covered. *Id.* at 835, 462 N.E.2d at 1292. See also *Dreis & Krump Mfg. Co. v. Phoenix Ins. Co.*, 548 F.2d 681 (7th Cir. 1977); *Hamilton Die Cast v. United States Fidelity & Guar. Co.*, 508 F.2d 417 (7th Cir. 1975); *CMO Graphics v. CNA Ins.*, 115 Ill. App. 3d 491, 450 N.E.2d 860 (1st Dist. 1983).

90. First-party insurance is defined as “insurance which applies to the insured’s own property or person.” BLACK’S LAW DICTIONARY 722 (5th ed. 1979).

91. Currently, under Illinois law, UIM insurance provides coverage against an “underinsured motor vehicle.” ILL. REV. STAT. ch. 73, para. 755a-2(3)(1987). An “underinsured motor vehicle” is defined as “a motor vehicle whose ownership, maintenance or use has resulted in bodily injury or death of the insured . . . and for which the sum of the limits of liability under all bodily injury liability insurance policies . . . is less than the limits for underinsured coverage provided the insured.” *Id.*

92. Significant litigation has resulted over insurers’ attempts to comply with the statutory requirement that uninsured motorist (“UM”) or UIM coverage be “offered” to the insured. The Illinois Supreme Court set forth the criteria for satisfying the required “offer” of coverage in *Cloninger v. National Gen. Ins. Co.*, 109 Ill. 2d 419, 488 N.E.2d 548 (1985). The *Cloninger* court adopted a four-part test to aid in determining whether an “offer” of UIM coverage was properly made:

- (1) notification must be commercially reasonable if the offer is made in other than face-to-face negotiations;
- (2) the limits of the optional coverage must be specified and not set forth in general terms;
- (3) the insured must be intelligibly advised by the insurer of the nature of the option; and
- (4) the insurer must advise the insured that the optional coverage is available for relatively modest premium increases.

to the insured.<sup>93</sup> In *Fuoss v. Auto Owners (Mutual) Insurance Co.*,<sup>94</sup> the Illinois Supreme Court resolved a conflict at the appellate court level<sup>95</sup> over the proper remedy to afford an insured for the insurer's failure to make a proper offer of UIM coverage.

In *Fuoss*, Edward K. Fuoss, the plaintiff, sustained injuries in a car accident for which he was not at fault.<sup>96</sup> Fuoss had an auto policy with Auto Owners (Mutual) Insurance Company ("Auto Owners"). The policy provided bodily injury ("BI") liability limits of \$25,000 per person and \$50,000 per occurrence (*i.e.*, coverage of \$25,000/\$50,000) and UM limits of \$15,000/\$30,000.<sup>97</sup> The policy provided no UIM coverage.<sup>98</sup> Fuoss settled his claim against the tortfeasor for \$100,000, the maximum amount recoverable under the tortfeasor's policy.<sup>99</sup> Because Fuoss's damages apparently exceeded that amount, he maintained a declaratory judgment action against Auto Owners in an attempt to recover first-party benefits under his own policy.<sup>100</sup> Fuoss charged that Auto Owners' failure to present him with an offer for UIM coverage as required under Illinois law<sup>101</sup> caused his coverage gap.<sup>102</sup> Fuoss argued that the insurance policy should be reformed to include UIM coverage in

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*Id.* at 425-26, 488 N.E.2d at 550. See also *Petersen v. Allstate Ins. Co.*, 171 Ill. App. 3d 909, 525 N.E.2d 1094 (1st Dist. 1988).

93. An "offer" was required after September 3, 1980, pursuant to ILL. REV. STAT. ch. 73, para. 755a-2(3) (Supp. 1980)(amended 1982). Effective July 1, 1983, the Insurance Code requires that UIM coverage be included in automobile liability policies in an amount equal to the UM coverage purchased by the insured. ILL. REV. STAT. ch. 73, para. 755a-2(5)(1987).

94. 118 Ill. 2d 430, 516 N.E.2d 268 (1987).

95. In *Tucker v. Country Mut. Ins. Co.*, 125 Ill. App. 3d 329, 465 N.E.2d 956 (4th Dist. 1984), the appellate court suggested in *dicta* that the proper remedy for an insurer's failure to offer UIM coverage was to imply coverage equal to the insured party's UM coverage. *Id.* at 328, 465 N.E.2d at 936. In contrast, in *Logsdon v. Shelter Mut. Ins. Co.*, 143 Ill. App. 3d 957, 493 N.E.2d 748 (3d Dist. 1986), the court held that in the absence of a proper offer of UIM coverage, coverage should be implied after a loss in an amount equal to the maximum amount of bodily injury coverage offered by the insurer for the last renewal period prior to the injury. *Id.* at 964, 493 N.E.2d at 753.

Notably, the appellate court in *Fuoss v. Auto Owners (Mutual) Ins. Co.*, 148 Ill. App. 3d 526, 499 N.E.2d 539 (5th Dist. 1986), while purporting to follow *Tucker*, held that UIM coverage is to be implied in an amount equal to the injured insured's bodily injury liability coverage. *Id.* at 535, 499 N.E.2d at 545.

96. *Fuoss*, 118 Ill. 2d at 432, 516 N.E.2d at 269.

97. *Id.* at 431-32, 516 N.E.2d at 265.

98. *Id.* at 432, 516 N.E.2d at 265.

99. *Id.* at 432, 516 N.E.2d at 269.

100. *Id.*

101. *Id.* Fuoss invoked ILL. REV. STAT. ch. 73, para. 755a-(2)(1987).

102. *Fuoss*, 118 Ill. 2d at 432, 516 N.E.2d at 269.

an amount sufficient to fully cover his loss.<sup>103</sup> Auto Owners asserted that Fuoss was not entitled to any further recovery. Auto Owners argued that the \$100,000 Fuoss already had received exceeded any amount that he would be entitled to under the Illinois Insurance Code.<sup>104</sup>

The supreme court affirmed the appellate court and rejected Fuoss's argument.<sup>105</sup> The court noted that an insured could not purchase UIM coverage in an amount exceeding the insured's UM limit.<sup>106</sup> Additionally, the court noted that UM coverage could not exceed the insured's BI coverage.<sup>107</sup> Thus, the court reasoned, the most UIM coverage that could be imputed as part of Fuoss' insurance policy was \$25,000, the amount of BI coverage that he had purchased.<sup>108</sup> This amount was less than the \$100,000 Fuoss already had received from the tortfeasor's insurer.<sup>109</sup> Therefore, the court concluded that he was not entitled to further recovery.<sup>110</sup>

Since 1983, Illinois law has required automobile liability policies to include UIM coverage in an amount equal to the insured's UM limits. Therefore, there are presumably few cases remaining upon which *Fuoss* will have a direct impact.<sup>111</sup> Nevertheless, on a

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103. *Id.* In making this argument, Fuoss partly relied on *Logsdon v. Shelter Mut. Ins. Co.*, 143 Ill. App. 3d 957, 493 N.E.2d 748 (1986), discussed *supra* note 95.

104. *Fuoss*, 118 Ill. 2d at 434-35, 516 N.E.2d 270-71. The Insurance Code provides that "[t]he limits of liability for an insurer providing underinsured motorist coverage shall be the limits of such coverage, less those amounts actually recovered under the applicable bodily injury insurance . . . on the underinsured motor vehicle." ILL. REV. STAT. ch. 73, para. 755a-2(3)(1987).

At the appellate level, Auto Owners urged the court to follow *Tucker v. Country Mut. Ins. Co.*, 125 Ill. App. 3d 329, 465 N.E.2d 956 (3d Dist. 1984), and impute UIM coverage in an amount equal to Fuoss' UM coverage (\$15,000/\$30,000). *Fuoss v. Auto Owners (Mutual) Ins. Co.*, 148 Ill. App. 3d 526, 530, 499 N.E.2d 539, 542 (5th Dist. 1986). It is not clear whether this argument was presented to the supreme court.

105. *Fuoss*, 118 Ill. 2d at 435, 516 N.E.2d at 271.

106. *Id.* at 435, 516 N.E.2d at 270. The Insurance Code states that "the named insured may elect to purchase limits of underinsured motorist coverage in an amount up to the uninsured motorist coverage on the insured vehicle." ILL. REV. STAT. ch. 73, para. 755a-2(4)(1987).

107. *Fuoss*, 118 Ill. 2d at 435, 516 N.E.2d at 270. The Insurance Code further provides that uninsured motorist coverage must be "offered in an amount up to the insured's bodily injury liability limits." ILL. REV. STAT. ch. 73, para. 755a-2(1) (1987).

108. *Fuoss*, 118 Ill. 2d at 434, 516 N.E.2d at 270.

109. *Id.* at 432, 516 N.E.2d at 269.

110. *Id.* at 434, 516 N.E.2d at 270. The court based its conclusion on ILL. REV. STAT. ch. 73, para. 755a-2 (1987). See *supra* note 104.

111. Notably, the precise issue addressed in *Fuoss* arose again in *Overbey v. Illinois Farmers Ins. Co.*, 170 Ill. App. 3d 594, 525 N.E.2d 1076 (2d Dist. 1988). Following the *Fuoss* decision, the *Overbey* court denied the insured's request to imply UIM coverage in an amount equal to the maximum bodily injury liability limits offered by the insurer. *Id.* at 604, 525 N.E.2d at 1083.



broader level, the *Fuoss* decision demonstrates the Illinois Supreme Court's unwillingness to recognize a speculative remedy for an insurer's violation of the Insurance Code.

#### V. LIFE INSURANCE: PREMIUM DUE NOTICE REQUIREMENTS

Generally, a life insurance company must comply with statutory premium due notice requirements before it may enforce a declaration of forfeiture.<sup>112</sup> In Illinois, section 234 of the Insurance Code governs notice of premium due requirements.<sup>113</sup> In *First National Bank v. Mutual Trust*,<sup>114</sup> the Illinois Supreme Court determined that the notice requirements under section 234(1) are not applicable when an insured defaults on premium payments due on a life insurance policy beyond the time allowed by the statute.<sup>115</sup>

In *First National Bank*, First National Bank ("Bank") was assigned a \$100,000 life insurance policy issued by the Mutual Trust Life Insurance Company ("Mutual") as collateral for a loan.<sup>116</sup> Mutual received and acknowledged the assignment.<sup>117</sup> Following the death of the insured, the Bank filed a claim under the policy, but it learned that Mutual had declared a forfeiture of the policy approximately twenty months earlier.<sup>118</sup> Mutual had declared the forfeiture because the insured failed to make a premium payment.<sup>119</sup> The Bank filed suit against Mutual for the life insurance proceeds, arguing that Mutual violated the notice provisions in section 234(1).<sup>120</sup> The Bank contended that Mutual's action was void because Mutual had failed to send it the required advance notice.<sup>121</sup>

112. 2A G. COUCH, R. ANDERSON, & M. RHODES, *COUCH ON INSURANCE* § 30:124 (2d ed. rev. 1984).

113. Section 234 provides in pertinent part:

No life company . . . shall declare any policy forfeited or lapsed within six months after default in payment . . . unless a written notice . . . of such premium . . . shall have been [sent] to the person whose life is insured, or the assignee of the policy . . . at least fifteen days and not more than forty-five days prior to the day when the same is due and payable . . . .

ILL. REV. STAT. ch. 73, para. 846 (1987).

114. 122 Ill. 2d 116, 522 N.E.2d 70 (1988).

115. *Id.* at 122, 522 N.E.2d at 72. Generally, the period will be six months. *See supra* note 113. However, the statute allows for an extension of that time if the policy contains a nonforfeiture provision. ILL. REV. STAT. ch. 73, para. 846(1) (1987).

116. *First Nat'l Bank*, 122 Ill. 2d at 118, 522 N.E.2d at 70.

117. *Id.* at 118, 522 N.E.2d at 71.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 116, 522 N.E.2d at 71. *See supra* note 113 for the pertinent text of section 234.

Although the supreme court agreed that Mutual had not complied with the notice requirement of section 234(1), it nonetheless held in favor of the insurer.<sup>122</sup> The court noted that section 234(1) is only concerned with insurance policies that are in default for less than the six-month period specified in the statute.<sup>123</sup> Accordingly, the court determined that the premium due notice requirements of section 234(1) are applicable only when an insurer seeks to effect a forfeiture within the statutory period.<sup>124</sup> Noting that the policy at issue remained in default well beyond the statutory period,<sup>125</sup> the supreme court concluded that the notice requirements did not apply and, therefore, that the policy was subject to forfeiture.<sup>126</sup> The *First National Bank* decision appropriately gives full effect to the plain terms of section 234(1).

## VI. MANDATORY AUTOMOBILE LIABILITY INSURANCE

During the *Survey* year, the Illinois General Assembly approved legislation requiring Illinois motorists to carry minimum limits of liability insurance.<sup>127</sup> Governor James Thompson signed House Bill 3900 into law on August 25, 1988,<sup>128</sup> but enforcement will not begin until January 1, 1990.<sup>129</sup>

The new law will make it illegal to operate, register, or maintain registration of an automobile without first obtaining liability insurance coverage.<sup>130</sup> Enforcement is anticipated at two different levels. First, if a motorist fails to carry motor vehicle insurance, the law authorizes police officers to ticket motorists for four newly

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122. *First Nat'l Bank*, 122 Ill. 2d at 122, 522 N.E.2d at 72.

123. *Id.* The period may be longer if the policy contains a nonforfeiture provision. ILL. REV. STAT. ch. 73, para. 846(1) (1987).

124. *First Nat'l Bank*, 122 Ill. 2d at 122, 522 N.E.2d at 72.

125. The insured failed to make a premium payment that was due on May 1, 1983, but a nonforfeiture provision extended coverage through September 16, 1983. *Id.* at 120, 522 N.E.2d at 71-72. It is not clear which date started the statutory period running, but the point is moot because the Bank's suit was filed over two years after the latter of the two dates. *Id.* at 117, 522 N.E.2d at 70.

126. *Id.* at 122, 522 N.E.2d at 72.

127. 1988 Ill. Legis. Serv. 85-1201 (West)(to be codified at ILL. REV. STAT. ch. 95 1/2, para. 7-601).

128. *Id.*

129. *Id.*

130. *Id.* The law requires insurance "in amounts no less than the minimum amounts set for bodily injury or death and for destruction of property under Section 7-203 of [the Illinois Vehicle] Code." *Id.* Section 7-203, ILL. REV. STAT. ch. 95 1/2, para. 7-203 (1987), requires minimum bodily injury limits of \$20,000 per person, \$40,000 per occurrence, and minimum property damage limits of \$15,000.

instituted traffic offenses.<sup>131</sup> Each offense imposes a substantial fine plus the suspension of the registration of the vehicle involved.<sup>132</sup> Second, the law authorizes the Secretary of State to verify compliance with insurance requirements through random checks and inquiries.<sup>133</sup> Noncompliance will result in the suspension of vehicle registration.<sup>134</sup>

It is unclear what effect the new Illinois mandatory insurance law will have on reducing the number of uninsured vehicles in Illinois. Differing opinions on this issue prevented the passage of similar proposals in the Illinois General Assembly for nearly two decades.<sup>135</sup> Opponents of the new law pointed to the experiences of other states with similar laws, arguing that mandatory insurance would result in an increase in insurance premiums without producing any measurable benefit.<sup>136</sup> Supporters countered that the experiences in other states have been mixed, and that the Illinois Legislature drafted the Act guided by these experiences.<sup>137</sup>

Whatever the predictive value of the experiences of other states, Illinois' own experience over the next four years will ultimately determine the fate of mandatory insurance in Illinois. The Illinois mandatory insurance law contains a sunset clause that extends its application only through December 31, 1993.<sup>138</sup> Any further ex-

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131. 1988 Ill. Legis. Serv. 85-1201 (West) (to be codified at ILL. REV. STAT. ch. 95 1/2, para. 7-601).

132. *Id.* The four new traffic offenses include: (1) operating a motor vehicle not covered by insurance; (2) operating a motor vehicle when the registration of that vehicle has been suspended for noninsurance; (3) refusing to display a proper insurance card; and (4) displaying false evidence of insurance. The minimum fine is \$500 for conviction of either (1) or (3), and \$1000 for conviction of (2). Conviction of (4) is a class A misdemeanor. The minimum suspension for conviction of any one of these offenses is two months. *Id.*

133. *Id.*

134. *Id.*

135. Prior to passage of the current law, mandatory automobile insurance proposals had been introduced and debated in the Illinois General Assembly for 17 consecutive years with little success. The only such bill to pass both houses of the Illinois General Assembly was vetoed by Governor Dan Walker in 1975.

136. This conclusion rests upon the notion that mandatory insurance forces many more high-risk drivers to purchase insurance. The high cost of claims, it is argued, is eventually passed on to all drivers. See Campes, *Mandatory Insurance Has a Mixed Track Record*, Chicago Tribune, June 26, 1988, § 4, at 1, col. 1; Beck, *Mandatory Car Insurance Doesn't Work*, Chicago Tribune, June 6, 1988, § 1, at 14, col. 3 (written by Mr. Beck in his capacity as President of the National Association of Independent Insurers).

137. See Laurino, *Facts Back Mandatory Car Insurance*, Chicago Tribune, June 20, 1988, § 1, at 12, col. 3 (written by State Representative William Laurino, Chairman of the Illinois House of Representatives Committee on Insurance and a sponsor of House Bill 3900).

138. 1988 Ill. Legis. Serv. 85-1201 (West) (to be codified at ILL. REV. STAT. ch. 95 1/2, para. 7-601).

tension would require passage of a new bill by the Illinois General Assembly with the approval of the Governor. Thus, the issue once again will be subject to a full debate, at the center of which will surely be the statistical results of Illinois' four-year experiment.

## VII. CONCLUSION

Of the many issues arising during the *Survey* year, the passage of the new mandatory automobile insurance law stands out as having potentially the greatest long-term impact. The *Survey* year also included several significant judicial decisions. The Illinois Supreme Court resolved an important controversy regarding the priority status of reinsureds during liquidation proceedings. Also of note were appellate court decisions refining the scope of the pollution exclusion and narrowing the application of the product exclusion in the CGL policy. Finally, although the Illinois Supreme Court decisions regarding underinsured motorist coverage and premium due notice requirements are unlikely to have a direct impact on many future cases, both cases demonstrate the court's restrained approach to the interpretation of the Insurance Code.

