defense UPDATE

The Iowa Defense Counsel Association Newsletter July, 1990 Vol. III, No.3

FIRST-PARTY BAD FAITH ACTIONS

So You're a Defendant in a First-Party Bad Faith Claim . . . Some Options to Consider in Your Procedural Approach

By David A. McNeill

Attorneys who spend any considerable portion of their practice in insurance defense work inevitably find themselves on the receiving end of a first-party bad faith claim. Many other attorneys who dabble in litigation are liable to find themselves involved in a first-party bad faith case as well. Very briefly, a claim for first-party bad faith arises out of a plaintiff/insured's claim that an insurer has breached the insurance contract between them. This alleged breach of contract, resulting in the denial of some contract benefit, gives rise to the claims of the intentional tort of bad faith. The fact that the contract was breached is not the decisive issue. Bad faith arises when the breach involves an unreasonable denial of benefits, as discussed in more detail below.

The Iowa Supreme Court has never found an insurance company to be liable on a theory of first-party bad faith. However, in the case of *Dolan v. AID Insurance Company,* 431 N.W.2d 790 (Iowa 1988), the Court, in an unusual move from an appellate review perspective, determined that a cause of action for first-party bad faith does exist in Iowa. *Id.*

The move was somewhat unusual because, as had been the case in the various first-party bad faith cases preceding *Dolan,* including the cases of *Hoekstra v. Farm Bureau Mutual Insurance Company,* 382 N.W.2d 100 (Iowa 1986), *Pirkl v. Northwestern Mutual Insurance Association,* 348 N.W.2d 633 (Iowa 1984) and *M-Z Enterprises v. Hawkeye-Security Insurance Company,* 318 N.W.2d 408 (Iowa 1982), the Court determined that there was no need to adopt such a theory because the Court found that the facts of those cases did not constitute bad faith. In *Dolan,* the Court again rejected the plaintiff's claims of bad faith, but in a ruling that arguably was *obiter dictum,* determined that such a cause of action existed, from a pleading perspective. The Court then reversed the District Court's denial of the insurer's motion for summary judgment.

The result of the *Dolan* decision is that pleading a first-party bad faith cause of action states a claim upon which

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Damages in First-Party Bad Faith Actions . . . Peering Through the Fog

By William H. Roemerman

The tort of "first-party bad faith", approved by the Iowa Supreme Court in *Dolan v. AID Insurance Company,* 431 N.W.2d 790 (Iowa 1988), altered the landscape of insurance law in this state. Unfortunately, many of the details of the new landscape remain shrouded in fog. The Supreme Court has not yet reached any of the damage questions generated by its adoption of the tort. This article will attempt to briefly outline and analyze the types of damage which have been claimed in first-party bad faith actions.

POLICY PROCEEDS AND LIMITS. Strictly speaking, the proceeds due under the insurance policy are not damages under the bad faith tort. Even before the advent of the tort, sums due under the policy were recoverable by the insured by way of a breach of contract actions.

CONSEQUENTIAL DAMAGES. It seems clear that foreseeable losses which result directly from the insurance company's bad faith refusal to pay policy proceeds will be recoverable. For example, suppose an insured suffers a covered fire loss at a business property. If the insurance company refuses to pay and the insured cannot collect his ordinary rents from the property, the insurance company may be liable for the lost rents even though the policy provides only for a repair or a replacement of the structure. *cf. Asher v. Reliance Insurance Co.,* 308 F. Supp. 847 (N.D. Cal. 1970). The types of consequential economic damages which might be suffered by the insured will vary tremendously depending upon the insured's situation and the type of insurance, but in a proper case, those could include lost profits from a business, loss of credit reputation, loss of property to a creditor and loss of use of the property.

It also seems clear that consequential damages should be governed by the normal rule that any plaintiff must take reasonable steps to mitigate his damages. *See Whewell v. Dobson,* 227 N.W.2d 115 (Iowa 1975).

EMOTIONAL DISTRESS. In the *Dolan* decision, the Court specifically mentioned the tort of intentional

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MESSAGE FROM THE PRESIDENT

Craig D. Warner

We now have in place our computerized case reporting system and shortly you will be receiving case report forms and be asked to take a few minutes and report to the Association certain vital information on cases you have or are involved with. I am thoroughly convinced that by utilizing a case reporting system as a base, we will have a unique and valuable litigation support service for our members. The success of the endeavor will, however, be wholly dependent on each member's participation.

Other trial organizations provide for publication of case reports, list of experts offering their services and brief banks indexed by substantive topics and digests. However, the uniqueness of IDCA's service by using case reports as a data base is that it serves as a facilitator of communication amongst members. Information of the case report form will be stored on computer as to the location and type of case, attorneys involved, nature of injury and damages, experts used, subjects briefed, outcome of trial or settlement, theories used and claims made. Access to the information is made by contacting the Association office and the computer entries can either be received over the telephone or printed off and mailed to the inquiring member. Documents such as expert reports, depositions, unique jury instructions and briefs may be obtained directly from the member who submitted the case report. In addition to asking members to submit case reports, we are requesting members to retain documents which may be of interest to other members.

As stated, we feel that our case reporting system and the collateral benefits derived from it is unique. For example, most experts witness listings are simply listings of people holding themselves out for consultation in various fields of their expertise. Our system will enable the Iowa defense lawyer to learn the basic who, where, what and when a particlar expert has given a report or testified at the trial level. Most importantly, it enables the Iowa defense lawyer to readily ascertain if others have had similar cases or similar aspects of cases at the trial level and provides the opportunity for direct communication amongst the membership.

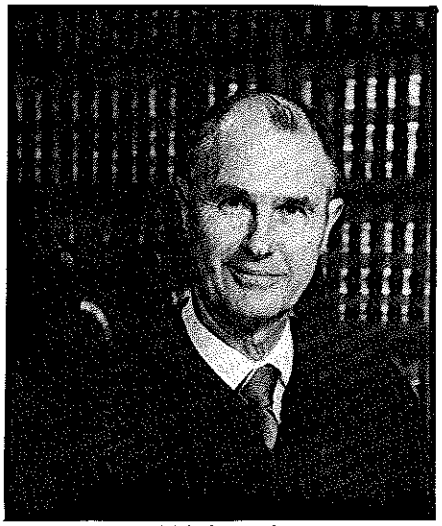
Your officers attended the National Conference of Defense Bar Leaders hosted by DRI in Oregon the end of May. Most of the state and local defense bar associations send representatives and the format of the conference provided opportunities for the attendees to learn of current issues involving litigation from a defense perspective and activities and solutions in dealing with these issues as they have been experienced by other states and regions of the country. While we certainly have our share of substantive and procedural issues affecting the litigation process in Iowa, our problems are pale as compared to other states and regions which are dominated by large metropolitan areas. Some of these problems are so overwhelming that the remedial measures being discussed tend to be rather radical. Even though we do not experience the immensity of the problem in Iowa, no doubt some of the measures used to solve the problems in the civil justice system will eventually be felt in Iowa.

The IDCA has once again been honored by DRI for its exceptional performance as a state defense association and we will be receiving the Exceptional Performance Award this October at our Annual Meeting. The award is given annually to those state and local defense associations which meet the DRI criteria for exceptional performance and we are indeed proud to receive this recognition which has become a tradition with the IDCA. □

Craig D. Warner
President

FROM THE BENCH

History of Iowa Grievance Procedure — By Chief Justice Arthur A. McGiverin



Chief Justice
Arthur A. McGiverin

The responsibility of judging other attorneys is an enormous, and most times, a difficult task. To put the role of the Grievance Commission into perspective, it helps to examine the background of disciplinary proceedings.

Almost from its inception, the practice of law has been subject to regulation to protect the public interest. In 1292, the King of England placed control of the Bar in the hands of the justices.

It was soon recognized that requirements for admission to practice were alone inadequate to maintain consistently high ethical standards. Parliament reasoned that a statute would remedy the situation and enacted the law that said attorneys are a part of the judiciary and their admission and disbarment is a court function.

The procedure for regulating the practice of law in Iowa has evolved over time into the system that we have today. The first CODE OF IOWA contained a statutory provision which authorized the Supreme Court or District Court to revoke or suspend the license of any attorney. Another section sets out specific causes for revocation or suspension from practice. These provisions were the predecessors of the discipline sections we have today in Chapter 602 of the IOWA CODE.

Initially, proceedings for revocation or suspension were commenced at the direction of the court or on the motion of an individual. If the proceedings were commenced by the court, the court was required to direct an attorney to draw up an accusation. Early Iowa cases illustrate the participation of lawyers in disciplinary proceedings.

The first reported attorney discipline case occurred in 1852. The name of the case is *Perry v. State.* In that case, an attorney by the name of Todhunter filed in district court an accusation against attorney Perry charging, among other things, that Perry had destroyed "so far as he could, the respect due the court by insulting language to the judge while officially occupied." Todhunter also charged Perry with "using offensive personalities to members of the bar by calling Todhunter a liar during court."

The District Court found Perry guilty of the accusations and Perry appealed. The Supreme Court reversed the judgment on the basis that it did not specify the particular charges upon which guilt was pronounced.

The further development of disciplinary proceedings and the role of lawyers in those proceedings is illustrated by an 1886 case entitled *Byington v. Moore.* In that case the plaintiff drew up an accusation charging the defendant with crimes and breach of professional duty. The plaintiff later filed a motion asking the court to appoint the district attorney and another member of the Bar to prosecute the case. The motion was overruled and the plaintiff appealed.

The Supreme Court held that although there was no express authority conferred by statute upon the court to appoint an attorney to conduct the prosecution, it was probable that the court in its exercise of inherent authority could require a member of the Bar to discharge the duty.

In time, disciplinary proceedings became more sophisticated and began to resemble the investigations we have today. In *State v. Mosier,* a 1905 disciplinary case, the court designated three members of the local Bar to draw up and file an accusation against the defendant. Mosier took exception to the order appointing three attorneys (as opposed to one attorney). However, the order was upheld.

Evidence of involvement by a Bar Association first appeared in a 1925 case entitled *In Re Hunt.* In that case the Bar Association of Union County took the initiative by appointing a committee to examine the alleged practices of the defendant. A report was filed with the Bar and then presented to the Court. The Court entered an order

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1990 LEGISLATIVE SESSION

The Long and The Short of It — By Herbert Selby

The 1990 Session of the Iowa General Assembly was one of the shortest to occur in recent memory in the State of Iowa, and it ended after one of the longest final days that the legislators and others have ever suffered through. The final gavel came down a little before 10:00 o'clock a.m. on a Sunday morning on a session having started the day before at 8:00 a.m. After almost 26 hours, they decided to call it a year, and most of the troops were not sure what had been accomplished, especially in that last marathon session.

It would be nice to say that the Iowa Defense had an outstanding and productive legislative session. It would also be nice to say that we had a good session or a fair session or a reasonable session, but none of the above would be true so there is no sense in misleading the membership with false claims of glory. It was not, however, an adverse session nor was it a session without some benefits. The most important thing is that no legislation passed which in any way was a setback or caused the practicing defense bar any problems. That, in itself, is frequently an accomplishment in this process.

One Bill the Iowa Defense Counsel should find of benefit is Senate File 2395 which is an act relating to the protection of trade secrets. It is, in fact, based on the model act called the "Uniform Trade Secrets Act" and it provides a cause of action by the owner of a trade secret against any person misappropriating the secret. It provides for obtaining injunctive relief, damages, including punitive damages, and payment of attorney fees. Most specifically, it provides that a Court may preserve the secrecy of a trade secret during a legal proceeding. This will give specific statutory authority to obtain a protective order to seal those parts of the record that can be deemed trade secrets, and thereby protect your clients.

One of our primary projects for the 1990 Session was trying to obtain a piece of legislation that would provide for ex parte communications with medical personnel who are witnesses for the plaintiff. It was the Board's opinion that allowing defense counsel to visit informally with the medical expert concerning the nature of the injuries, the extent of the injuries, the prognosis and the possible various medical theories that the plaintiff may be presenting, rather than having defense counsel restricted to the formal discovery process or in-court cross examination, could reduce the cost of litigation and promote early settlement in appropriate cases without incurring extensive discovery cost. The legislation was reported out of the House Committee and passed the House without controversy, and then moved to the Senate where it came out of Committee and was awaiting debate on the floor. One of the Senators who had a legislative proposal not related to the topic of our Bill, decided that our Bill would be a good vehicle to ride, and

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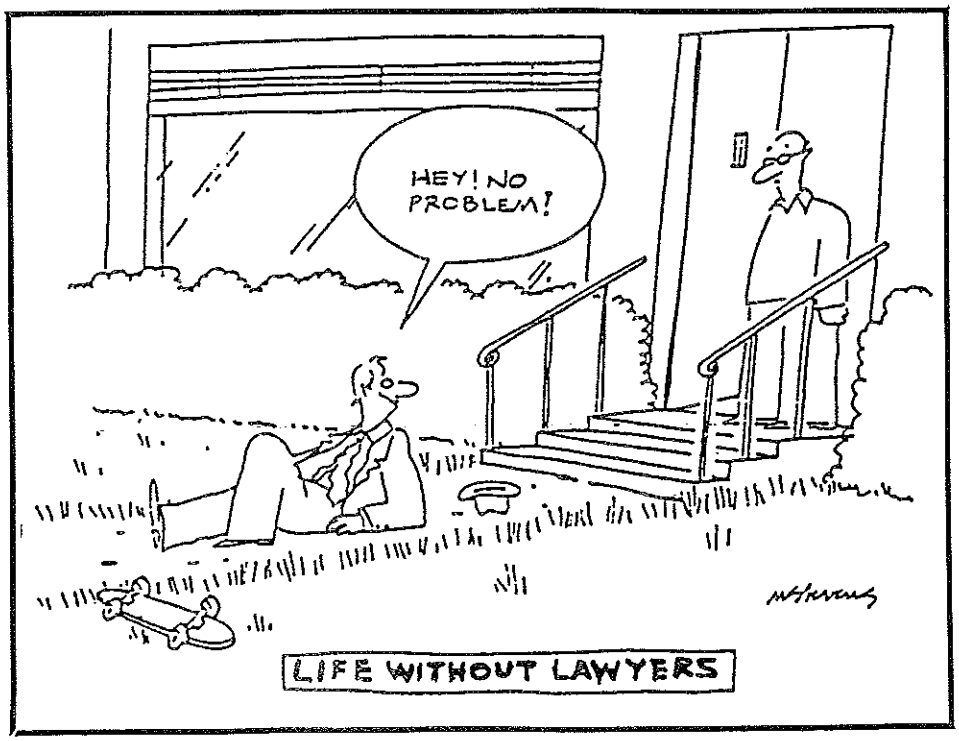

CASE NOTE SUMMARY

Recent Bad Faith, Excess Verdict Case — Wierck v. Grinnell Mutual

Analyzed by Gregory M. Lederer

The Iowa Supreme Court has not rendered a substantive decision in third-party bad faith litigation for over eight years. Up to now, insurers and insurance-defense attorneys have cringed at the thought of more precedent in this area. Good news was long overdue, and it has arrived in the form of *Wierck v. Grinnell Mutual Insurance Co.*, S. Ct. No. 89-132 (May 23, 1990).

Wierck's son was involved in an accedent while operating a vehicle listed under Wierck's liability insurance policy. The per-person, bodily-injury policy limit was $100,000. The son pled guilty to drunk driving. A person injured in the accident, Toni Ague, sued. Defense Counsel hired by Grinnell evaluated the case as one of pure liability with verdict potential in excess of limits.

The only settlement demand ever made by the plaintiff before trial was $300,000, first communicated in her prayer for relief and repeated several months before trial.

Personal counsel for Wierck and the plaintiff's attorney both pressed defense counsel throughout the litigation to make (or cause Grinnell to make) an offer. Grinnell eventually offered its policy limits before trial, but this offer, communicated several times, was rejected by plaintiff. Just before trial, Ague's counsel indicated that Ague might take $150,000, but Wierck could not pay the difference. The tort case went to trial and plaintiff obtained a verdict in excess of $200,000.

Wierck and Ague (plaintiffs) sued Grinnell for bad faith (Wierck's suit actually came in the form of a counterclaim to a declaratory judgment action filed by Grinnell to contest coverage; more about that in a moment). They adduced substantial evidence that Ague's counsel "would have recommended" that she take $100,000 early on in the case, before her medical condition deteriorated. It was undisputed, however, that this position had not been communicated to defense counsel.

The jury found for plaintiffs on all theories submitted: bad faith, breach of contract, abuse of process, malicious prosecution, and tortious infliction of emotional distress. The total verdict for plaintiffs approached $1 million.

The Iowa Supreme Court reversed and held that a directed verdict should have been sustained as to the entire case because of a fundamental flaw in plaintiffs' bad-faith case: They did not establish that a settlement offer was made by Ague and then rejected - in bad faith - by Grinnell. The only firm demand by Ague was for $300,000, and not even Ague or Wierch had suggested that it constituted bad faith for Grinnell to reject the $300,000 demand. No other firm demands were made.

The court expressly rejected the argument consistently pressed by plaintiff and Wierck throughout both cases that Grinnell had an affirmative obligation to offer its limits, regardless of Ague's settlement posture.

Both parties insist it was incumbent upon the other to state a specific offer of settlement, and on this issue we are convinced Grinnell is right. The only specific offer was the $300,000 demand previously mentioned. There is nothing in the record to suggest Grinnell would have settled for that amount if the policy had provided coverage to that extent.

It is an extraordinary thing to require an insurer to pay more than the policy limits. A bad faith claim cannot be based on settlements never presented to the liability insurance carrier. It is thus incumbent on the person claiming bad faith to show that a settlement offer was extended to and was in bad faith rejected by the insurer. Bad faith arises when the rejection can be traced to misconduct of the insurer which irresponsibly exposes the insured to unreasonable risk because an offer was rejected only because of policy limits. This is a matter of set amounts, and the burden of showing the amounts is upon the person claiming bad faith.

In so holding, the court also reaffirmed its use of the so-called "no limits" test in testing a liability insurer's good faith. Paraphrasing its earlier opinions on the subject, the court stated:

It is bad faith for the company to factor in its consideration of settlement offers the limited amount between an offer and the policy limits.

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relief can be granted. *Dolan,* however, in confirming the existence of this intentional tort, also confirms prior decisions regarding some of the procedural aspects of such a claim.

In order to prevail in a first-party bad faith claim, the plaintiff has the burden of proving the absence of a reasonable basis, by the insurer, for denying the benefits sought under the contract by the insured. *Dolan* at 794. Since the burden is on the plaintiff to prove the absence of a reasonable basis (either factual or legal) for the denial, it would appear that the defendant need not plead the existence of a reasonable basis for the denial as an affirmative defense. The Iowa Supreme Court has not addressed the need to assert this as an affirmative defense, however, so practitioners should take such caution as they feel necessary. If there is no evidence of a reasonable basis for the insurer's denial of the contract claim, the Court indicated that it was proper to consider whether a claim was properly investigated and whether the results of the investigation were subjected to a reasonable evaluation and review. *Id.*

The *Dolan* decision obviates the need for a Rule 105 motion to determine the existence of the tort of first-party bad faith. However, a strong argument can be made that a first-party bad faith claim is particularly susceptible for resolution by a motion for summary judgment and is almost never a proper issue for consideration by the jury.

Several cases, a few of which were cited earlier, have reached the Iowa Supreme Court on the issue of first-party bad faith. While each case has been unique, the Iowa Supreme Court has been consistent in at least three respects in denying the plaintiffs' claims.

First, the Court has not seen any facts warranting a finding of first-party bad faith (though the Court claims "we shall know it when we see it", *Hoekstra v. Farm Bureau Mutual Insurance Company,* 382 N.W.2d at 112.) Second, and perhaps most important at this stage of the proceedings, if the claim is "fairly debatable" as to whether the insurer was entitled to debate the issue of awarding benefits, it has not acted in bad faith. *Dolan v. AID Insurance Company,* 431 N.W.2d at 794, *Hoekstra v. Farm Bureau Mutual Insurance Company,* 382 N.W.2d at 112, *Higgins v. Blue Cross,* 319 N.W.2d 232, 236 (Iowa 1982), *M-Z Enterprises v. Hawkeye Security Insurance Company,* 318 N.W.2d at 415. Third, if the case goes to trial and the plaintiff is not entitled to a verdict on its contract claim as a matter of law, the defendant is entitled to a directed verdict on the bad faith claim. *Higgins v. Blue Cross,* 319 N.W.2d at 236, *M-Z Enterprises v. Hawkeye-Security Ins. Co.,* 318 N.W.2d at 415.

Normally, in order to prevail on a motion for summary judgment the moving party has the burden of showing the absence of a dispute of a material fact. The converse should be true in motion for summary judgment opposing a first-party bad faith claim. These unique circumstances arise, primarily, because the first-party bad faith plaintiff is required to prove the absence of factual evidence (regarding the reasonableness of a denial of benefits) as an element of his case. This may be the only element of any cause of action where the moving party has the burden of proving the absence of evidence in order to prevail in its case. Technically, the defendant/insurer will not need to put on any evidence that there was a reasonable basis for its denial. Practically, such a strategy may be unwise.

Arguably, if the insurer provides any evidence of a reasonable legal or factual basis for its denial, the plaintiff's bad faith claim must fail. In other words, if evidence is presented sufficient to create a jury question on the contract claim issue, the bad faith issue must fail as a matter of law. This analysis has been adopted on at least two separate occasions by the Iowa Supreme Court. In *Higgins v. Blue Cross,* 319 N.W.2d at 236, the Court approved the trial court's directed verdict in favor of the defendant/insurer on the bad faith claim, noting:

The evidence adduced by defendants in support of their defense of misrepresentation clearly made plaintiff's contract claim "fairly debatable," and the trial court must have determined this was so when it denied plaintiff's motion for a directed verdict on that claim.

Id. In *M-Z Enterprises v. Hawkeye-Security Ins. Co.,* 318 N.W.2d at 415, the Supreme Court made the same analysis, and reached the same result. In *M-Z Enterprises* both the contract issue and the bad faith issue were submitted to the jury. The Supreme Court found this to be error. The bad faith claim should not have been submitted to the jury. The Court explained that since the contract claim was submitted to the jury, "M-Z's claim must have been 'fairly debatable'". *Id.*

In order to get the bad faith issue to the jury, the Court has held, it must go without the contract claim. If the contract claim is submitted to the jury, it must be fairly debatable and the defendant is entitled to a directed verdict on the bad faith claim. These same arguments are equally applicable at the summary judgment stage of a case involving a first-party bad faith claim. If the claimant cannot show he is entitled

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infliction of emotional distress. *Dolan* at 794. However, the meaning of the Court's comment is not clear. The Court's comment could be taken to suggest emotional distress damages will be available on an altered basis in a first-party bad faith case. On the other hand, the comment could be read to suggest that the new tort was created to provide a remedy for the consequential damages that fall outside "emotional distress."

Prior to *Dolan,* the Iowa law generally did not allow emotional distress damages in a breach of contract claim. *Pogge v. Fullerton Lumber,* 227 N.W.2d 916 (Iowa 1977). Emotional distress damages were only available in the contract context when the plaintiff could prove the tort of "intentional infliction" of emotional distress. It is very rare that a plaintiff can meet the high standard of the intentional infliction tort.

In the absence of the intentional infliction tort, the Iowa Supreme Court has refused to grant emotional distress damages even in situations that involve intentional wrongs or breaches of fiduciary duty. *See Knau v. Pillars,* 404 N.W.2d 573 (Iowa App. 1987). *cf. Wambsgan v. Price,* 274 N.W.2d 362 (Iowa 1979). It is difficult to envision why the Court would allow emotional distress for bad faith when it has not allowed that element of damages in cases involving frauds, malicious prosecutions and the like.

On the other hand, in adopting first-party bad faith, the Iowa Court relied heavily on *Anderson v. Continental Insurance Co.,* 271 N.W.2d 368 (Wis. 1978). In *Anderson,* the Wisconsin court held that emotional distress damages would be available in a first-party bad faith action if the plaintiff has suffered substantial damages (aside from emotional distress) as a result of the bad faith and if "severe" emotional distress was caused by the bad faith. *Id.* at 378. The contract damages do not count in determining if there were "substantial damages" arising from the bad faith. Also, the claimed emotional distress must result from the bad faith acts.

For example, suppose an insurance company fails to pay a business for a fire loss. As a direct result of the failure to pay, the insured is forced into bankruptcy and loses a previously profitable business. Under these circumstances, the insured has suffered a significant loss other than the loss of the policy proceeds. If the insured suffers "severe" emotional distress that is related to the loss of the business, emotional distress damages may be awarded under the Wisconsin rule.

It appears that most jurisdictions follow what has been called here the "Wisconsin rule." The Wisconsin rule, however, is apparently based upon RESTATEMENT OF TORTS 2d, Section 47. The Iowa Supreme Court has never adopted that section of the RESTATEMENT.

ATTORNEY'S FEES. Iowa has long recognized the rule that attorney's fees are not recoverable by a successful litigant in the absence of a statute or contract provision to the contrary. *Suss v. Schammel,* 375 N.W.2d 252, 256 (Iowa 1985). The only generally recognized exception seems to be that attorney's fees are recoverable when the defendant's actions force the plaintiff into separate, foreseeable litigation with a third party. *Turner v. Zip Motors,* 65 N.W.2d 427, 431-432 (Iowa 1954). *Peters v. Lyons,* 168 N.W.2d 759, 769 (Iowa 1969).

In the typical first-party bad faith situation, there is no third-party litigation to trigger exception to the rule. The majority of states (except those that have an attorney's fees statute on point) rely on the lack of third-party litigation to deny recovery of attorney's fees in first-party bad faith cases. *See, e.g., Fehring v. Republic Insurance Co.,* 347 N.W.2d 595 (Wis. 1984) and *G & D Company v. Durrand Milling Co.,* 240 N.W.2d 765 (Mich. App. 1976).

California has adopted a different rule which allows for a limited recovery of attorney's fees in first-party bad faith actions. In California, upon a showing of bad faith, the insured may recover attorney's fees incurred in prosecuting the contract action. *Brandt v. Superior Court,* 693 P.2d 796 (Cal. 1985). Since first-party bad faith actions are typically joined with the contract action (most states hold that the actions must be joined), the California cases present a practical problem. How can attorney's fees be realistically allocated between separate divisions of the same lawsuit?

PUNITIVE DAMAGES. Punitive damages are, perhaps, the most confusing aspect of first-party bad faith damages. In *Pirkl v. Northwestern Mutual Insurance Assn.,* 348 N.W.2d 633, 636 (Iowa 1984), the Court said that punitive damages were "recoverable in situations involving 'positive misconduct of a malicious, illegal or immoral' nature." After the *Pirkl* decision, the legislature passed Chapter 668A which allows punitive damages upon a showing of a "willful and wanton disregard" for the rights of another. The statutory formula is essentially a recklessness standard. *See* PROSSER, LAW OF TORTS, 4th Ed. 1971, pg. 184. Since "recklessness" is a lower standard than "intentional", the statutory formula, standing alone, makes little sense when applied to an intentional tort. After the passage of Chapter 668A, the Supreme Court, in *Dolan,* said, "With regard to the recovery of punitive damages, we

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to summary judgment on his contract claim, it must be fairly debatable. This should result in summary judgment for the defendant/insurer on the bad faith claim.

This is also the holding in the *Dolan* case, though stated in different terms. In *Dolan,* the Court found that the plaintiff had failed as a matter of law to show the absence of a reasonable basis for the defendant/insurer's denial of benefits at the summary judgment hearing and ordered that summary judgment be entered for the defendant/insurer on remand. *Dolan,* 431 N.W.2d at 794-95.

The *Dolan* Court adopted two elements for proving a first-party bad faith claim. If the plaintiff can show the absence of a reasonable basis for denying benefits of the policy, he must still show "defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim." *Id.* at 794. This second element, perhaps, would be a jury issue if the denial of the contract claim were not fairly debatable. Evidence which would tend to prove this second element would involve a determination of whether:

> *a claim was properly investigated and whether the results of the investigation were subjected to a reasonable review.*

Id., quoting *Anderson v. Continental Insurance Company,* 85 Wis.2d at 692, 271 N.W.2d at 377.

Since a first-party bad faith plaintiff has never presented facts indicating the absence of a reasonable basis for the denial of benefits, the Iowa Supreme Court has never had an opportunity to consider the application of this second issue. Undoubtedly, other isues will also arise regarding this popular theory in the future. While the precise nature of the future of first-party bad faith claims is unclear, it is safe to assume that there is one. □

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adhere to the standards applied in *Pirkl." Dolan, supra* at 794.

On its face, the statutory formula for punitive damages applies, but according to *Dolan,* the *Pirkl* formula applies. The only apparent way to reconcile *Dolan* and Chapter 668A is to assume that both formulas apply. While the two formulas are different, they are not inconsistent. A court could easily instruct a jury that to award punitive damages it must find the insurance company committed a "willful and wanton act of a malicious, illegal or immoral nature." This formula complies with the statute and with *Pirkl.* It also eliminates the difficulty of applying a statutory recklessness formula to an intentional tort.

The doctrines which limit corporate responsibility for punitive damages may serve to limit the insurance company's exposure. See *Briner v. Hyslop,* 377 N.W.2d 858 (Iowa 1983). However, the *Briner* rules will not provide protection to claims personnel individually.

CONCLUSION. The uncertainty surrounding the damages recoverable for the first-party bad faith tort will persist for some time to come. At this point, the best that insurers and their counsel can do is to peer through the fog but not be distracted by the smoke which their opponents will certainly blow. □

William H. Roemerman is a partner with Crawford, Sullivan, Read, Roemerman & Brady of Cedar Rapids, Iowa.

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placed his controversial amendment on the Bill for consideration. Because of this controversy, several of my colleagues in the third House became concerned and asked for a deferral of the Bill, and after this deferral, and because of some absentee Senators, the opportunity to take up the Bill prior to reaching the deadline under the rules was lost and, the Bill died on the calendar without getting its chance for action by the Senate. It was a close shot, but unlike horseshoes, close doesn't make a lot of difference in the legislative process.

We had several other projects, but because of the short and accelerated session, the desire to avoid controversy when Bills were thought to be not essential, and with some very good opposition lobbying, these proposed pieces of legislation failed to come up for discussion.

There was a piece of legislation proposed by our loyal opposition that would re-establish the old doctrine of joint and several liability if the plaintiff was found to be 100% free of any fault. Fortunately, that, like most of our projects, did not come up for discussion and will not be of concern for us this year. It will, however, in all probability, be back for consideration in 1991.

The Board of Directors has voted to proceed with a political action committee. I would hope that the membership gives this committee its whole-hearted support. There are many who object to that kind of politics, but those are the rules of the game which we are playing now and if we are going to be a player, we need to have the same skills and tools that the rest of the players have. □

Herbert Selby, Newton, Iowa attorney, is chairman of the Iowa Defense Counsel legislative committee.

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appointing a committee of the Bar to draw up the formal accusations.

Although case law reveals an evolution in disciplinary procedures, the statutory provisions regarding attorney discipline did not change much between 1851 and 1939.

After 1939, the provisions regarding attorney discipline cases were expanded and refined. The Legislature added provisions concerning the involvement of the Supreme Court and the Attorney General. At one point the Attorney General had authorization to handle the prosecution of the case. Later, the Supreme Court was given authority to designate a three judge court to hear charges.

Rules governing the Grievance Commission and Disciplinary proceedings first appear in the CODE in 1954 when the court adopted Rule 118, the rule upon which the current disciplinary proceedings are based. At that time, the Committee on Grievances of the Bar Association was appointed the Commission of the Court to handle grievance procedures.

1964 marks the first of many significant changes in Court Rule 118. In 1964 the Rule was amended by adding the procedures for appeal and stating that the Board of Governors of the State Bar Association was responsible for designating a member of the Bar, or to request the Attorney General, to prosecute the appeal.

The provisions regarding reinstatement were added in 1970.

In 1981, upon the recommendations of the Bar Association, the Court set out in Rule 118 the composition of the Grievance Commission. The Commission was composed of two lawyers from each judicial election district appointed by the president-elect of the Bar, and five to nine laypeople appointed by the Court. Later, the membership of the Grievance Commission was increased to what it is today.

The participation of attorneys and laypeople from each judicial district is important because those people are closer to the problem and are better equipped to investigate the matter in question. I believe that the effectiveness of our investigations are directly related to this involvement.

I agree with the theory stated in the recent Annual Report that the thoroughness with which ethical investigations are conducted in Iowa may explain the fact that Iowa leads the nation in disciplining attorneys.

Some people will accuse us of going too far in the endeavor to achieve high standards for the practice of law in this State. The maintenance of high professional standards, however, is not only noble and laudable, it is a necessity.

One of the primary purposes for attorney discipline actions is to protect the public. Furthermore, attorney misconduct, of any kind, tarnishes the profession as a whole. It undermines public confidence and trust in the profession of law which cannot be tolerated. Whether we like it or not, the role of attorneys goes beyond the immediate responsibilities to clients and affects the overall welfare of society.

The importance of the profession to society was recognized many years ago by one of the first authors of professional standards for lawyers. In 1854, Judge George Sharswood of Philadelphia, wrote:

There is, perhaps, no profession after that of the sacred ministry in which a high toned morality is more imperatively necessary than that of the law. There is certainly without exception no profession in which so many temptations beset the path to swerve from the lines of strict integrity; and in which so many delicate and difficult questions of duty are constantly arising.

These words of wisdom from a judge who lived more than 100 years ago will not make the Grievance Commission's job any easier. I hope, however, that it will make its role more meaningful. □

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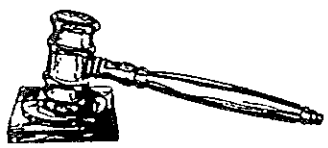
* This article is based on remarks delivered on June 17, 1988, to the Grievance Commission of the Iowa State Bar Association.



CASE NOTE SUMMARY *Continued from Page 5*

Recent Bad Faith, Excess Verdict Case . . .

The best standard for good faith in a specific negotiation is to ignore the policy limits. If but for the policy limits, the insurer would settle for an offered amount, it is obliged to do so (and pay toward settlement up to the policy limits). But the insurer is free to reject the offer if it would have refected the same offer under policy limits covering the whole claim.

This test is not new, but it has not been applied previously in the context of demands that exceed policy limits. Its application in that context by the court is helpful to insurers, who have sought guidance before on what affirmative obligation an insurer has with respect to its limits when presented with a demand in excess of limits. The answer appears to be determined by following the same test as is applied to demands for or within limits. The insurer should evaluate the demand as if its policy has no limit. If the demand would be accepted by the insurer under those circumstances, the insured should be advised of this conclusion and the limits tendered (with the insured's approval, presumably), so that the offer can be accepted by the insured (if he or she chooses to pay the difference).

Plaintiffs also accused Grinnell of bad faith (as well as abuse of process and malicious prosecution) for its prosecution of a declaratory judgment action to contest coverage. Defense counsel reported to Grinnell on non-confidential and non-privileged matters (relating to who actually owned the vehicle listed in Wierck's policy) that triggered Grinnell's inquiry into coverage issues. Grinnell retained separate counsel and commenced a declaratory judgment action. The declaratory judgment action was tried to the court, who found coverage. Grinnell did not appeal.

In the bad-faith case, plaintiffs adduced substantial evidence that defense counsel "broached" the issue of coverage with Grinnell and encouraged them to pursue it, that declaratory judgment counsel advised Grinnell, at least initially, that the coverage action had no merit, and that Wierck's defense of the coverage action deprived him of the ability to pay the difference between Grinnell's limits and the "soft" $150,000 demand made by Ague just before trial.

The court measured the reasonableness of Grinnell's pursuit of the coverage action in part by examining Grinnell's view of the facts. Given Grinnell's version of the facts and with the advice of "experienced and competent" counsel, "it was eminently reasonable for Grinnell to bring the declaratory judgment action, and doing so was no indication of bad faith." Clearly, the court is not interested in discouraging insurers who undertake the defense of their insureds and, at the same time, resort to the courts for resolution of coverage disputes. □

Gregory M. Lederer is a partner in the firm of Simmons, Perrine, Albright & Ellwood of Cedar Rapids, Iowa.

All I Ever Really Needed To Know I Learned In Kindergarten

Most of what I really need to know about how to live, and what to do, and how to be, I learned in kindergarten. Wisdom was not at the top of the graduate school mountain but there in the sandbox in nursery school.

These are the things I learned: Share everything. Play fair. Don't hit people. Put things back where you found them. Clean up your own mess. Don't take things that aren't yours. Say you're sorry when you hurt somebody. Wash your hands before you eat. Flush. Warm cookies and cold milk are good for you. Live a balanced life. Learn some and think some and draw and paint and sing and dance and play and work every day some.

Take a nap every afternoon. When you go out into the world, watch for traffic, hold hands and stick together. Be aware of wonder. Remember the little seed in the plastic cup. The roots go down and the plant goes up and nobody really knows how or why, but we are all like that.

Gold fish and hamsters and white mice and even the little seed in the plastic cup — they all die. So do we.

And then remember the book about Dick and Jane and the first word you learned, the biggest word of all: LOOK. Everything you need to know is in there somewhere. The Golden Rule and love and basic sanitation. Ecology and politics and sane living.

Think of what a better world it would be if we all - the whole world - had cookies and milk about 3 o'clock every afternoon and then lay down with our blankets for a nap. Or if we had a basic policy in our nation and other nations to always put things back where we found them and cleaned up our messes. And it is still true, no matter how old you are, when you go out into the world, it is best to hold hands and stick together.

Robert Fulghum

FROM THE EDITORS

1990 ANNUAL MEETING

Planning for the 1990 Annual Meeting is well under way. This year Alan E. Fredregill, our president-elect, is in charge of the educational program and Edward F. Seitzinger is serving as co-chair, responsible for arrangements.

The annual meeting is scheduled for **October 18, 19 and 20, 1990** at the University Park Holiday Inn, West Des Moines, Iowa.

Alan Fredregill reports that the educational program is almost set and will include outstanding speakers from across the state and also speakers from Kansas City, Missouri, and West Palm Beach, Florida. There will be presentations on The Evaluation of Records Of A Chiropractor, Is Thermography On The Way Out, Closed Head Injury Cases, The New Uniform Plain English Jury Instructions, Direct And Cross-Examination Of A Claims Examiner In A Bad Faith Case With Courtroom Demonstation, The Annual Appellate Review, The Annual Legislative Update, The Annual Workers' Comp Update, plus many other subjects. The list of speakers is outstanding and it looks as though Alan has continued the tradition of outstanding speakers and subjects for our Annual Meeting. Mark you calendars now to attend on October 18, 19 and 20. □

SUMMARY JURY TRIAL PROGRAMS

The Iowa Defense Counsel Association law school summary jury trials have again received plaudits for their outstanding program. For the last several years, through the efforts of Ralph Gearhart and Magistrate Ronald E. Longstaff, the Association has presented live summary jury trials which are argued to student juries that deliberate before the audience and reach a consensus verdict.

This year's case, *Ballou v. Klug,* involved a lady bicyclist who was run over by the rear wheels of a semi truck and as a result lost a foot. The student jury at the Iowa law school awarded large damages but decided unanimously that the defendant was not at fault. The student jury at Drake also felt that the damages exceeded $1 million. The Drake jury was evenly divided on fault.

The most interesting aspect of this year's program is that the case that was presented by summary proceeding to the student juries was actually tried in the U.S. District Court for the Southern District of Iowa, following the Drake program. Magistrate Ronald E. Longstaff, who presided at the trial, advised that there was a jury verdict for the defendant.

The same attorneys who participated in the summary jury trials at the law schools tried the case in the Southern District of Iowa. Dwight W. James of Des Moines represented the Plaintiff and Patrick J. McNulty of Des Moines represented the Defendant. At the summary jury trial in Iowa City, Richard S. Fry of Cedar Rapids served as master of ceremonies and United States Magistrate John A. Jarvey served as the presiding Judge. At the Drake program, Ralph W. Gearhart served as the master of ceremonies and Ronald E. Longstaff, United States Magistrate for the Southern District of Iowa, served as the presiding Judge.

These programs have been a long tradition of the Iowa Defense Counsel Association. The Deans of Iowa and Drake law schools have always been, and were again this year, extremely complimentary of the program and the manner in which it is presented. Congratulations to Ralph Gearhart and the members of his team on a job well done.

It is interesting to note that the results of the summary jury proceedings matched the actual verdict in the United States District Court. □

FROM THE EDITORS *Continued form Page 11*

Good-By Ross . . .
Welcome Kermit

The Board of Editors wishes to congratulate ROSS A. WALTERS of Des Moines, Iowa, on his recent appointment as District Judge for the Fifth Judicial District. Ross was a "charter member" of the Board of Editors and provided a great deal of assistance in putting together this publication. Ross now looks forward to receiving the newsletter for free. Congratulations Judge Walters! The editors wish to welcome KERMIT B. ANDERSON of the law firm of Herrick, Langdon & Langdon, Des Moines, to the staff as co-editor. Kermit began his duties with this edition of the newsletter. We look forward to the contributions Kermit will make.

HELP US OUT!

In an effort to bring useful information to our readers, the editors have decided to include in our future issues a regular article detailing appellate cases which are "in the pipeline" but have not yet been decided. Hopefully information of this nature will help defense counsel pattern their motions and objections to take advantage of future appellate decisions. If you are in the process of appealing a case with significant defense or insurance issues, please send a summary to:

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