defense UPDATE

The Iowa Defense Counsel Association Newsletter

January, 1991 Vol. IV, No. 1

ANNUAL MEETING REPORT AND HIGHLIGHTS

By John B. Grier, Marshalltown, Iowa

1990 ANNUAL MEETING A HUGE SUCCESS

The Annual Meeting of the Iowa Defense Counsel Association was held at the University Park Holiday Inn, West Des Moines, Iowa, October 18, 19 and 20, 1990. Edward F. Seitzinger served as the General Program Chairman, and as is the custom of IDCA, the President-Elect, Alan E. Fredregill, served as the Program Chairman. Each did a superb Job.

THE EDUCATIONAL PROGRAM ARRANGED BY ALAN E. FREDREGILL

Alan E. Fredregill continued the tradition of our Presidents-Elect in arranging an outstanding educational program. Fredregill arranged for Thursday presentations on workers' compensation, arson investigation, evaluation of medical records, defense counsel's duties to the insured and insurer, lawyer advertising and legal liability. The programs were attended by approximately 150 registrants. The speakers prepared outlines and made outstanding oral presentations. On Friday the program included presentations involving defense lawyer in-house training, communication with the jury, conflicts of interest, thermography, opening statements and closing arguments, and releases. Comments about the speakers and presentations on Friday were unanimous in the fine presentations that were made. Buddy Sutton traveled from Little Rock, Arkansas, to present a paper on opening statements and closing arguments which the attendees found especially interesting. On Saturday morning, Greg Lederer again gave his most informative presentation on the annual update of appellate decisions rendered in Iowa, followed by presentations on the 1990 Legislature program, ERISA and Judge Wolle's presentation on judicial ethics, Federal Rule 11 and Iowa Rule 80. Fredregill was also in charge of arranging for Governor Terry Branstad to speak at the Thursday luncheon and Donald Kaul at the Friday night banquet.

Following the educational program on Saturday morning, the Annual Meeting of the Association was held and officers and directors for the upcoming year were elected. Alan E. Fredregill will serve as President, David L. Hammer as President-Elect, John B. Grier as Secretary, and Eugene Marlett as Treasurer. Those members of the Board of Directors are as follows: District I, Robert L. Sudmeier, District II, Craig L. Johnson, District III, Emmanuel S. Bikakis, District IV, Gregory G. Barntsen. District V, Richard J. Sapp, District VI, Richard A. Stefani, District VII, Charles E. Miller, District VIII, Robert A. Engberg, At-Large Jaki L. Samuelson, William C. Hoffman and Ronald J. Shea.

ENTERTAINMENT AT THE ANNUAL MEETING

Edward F. Seitzinger continued the tradition that he has carried out for many years in providing outstanding entertainment and meals for our Annual Meeting. This year Ed arranged a western style barbecue on Thursday night which featured an opportunity for members to be photographed in western style costumes. Friday night was the annual banquet which was highlighted by Donald Kaul as the featured speaker. Ed Seitzinger unveiled the final design of the "Eddie Award," the highest award given annually by the IDCA. This award was established in 1988, through the leadership of then President Patrick M. Roby of Cedar Rapids, to recognize exceptional contributions and meritorious service by a board member to the Association for the year. The recipient of the 1989-90 annual award named at the annual banquet was Richard J. Sapp of Des Moines, who was recognized for his leadership in heading the Iowa Defense Counsel's Civil Jury Instruction Task Force, which resulted in the Association's report on civil jury instructions distributed to members in October of 1990.

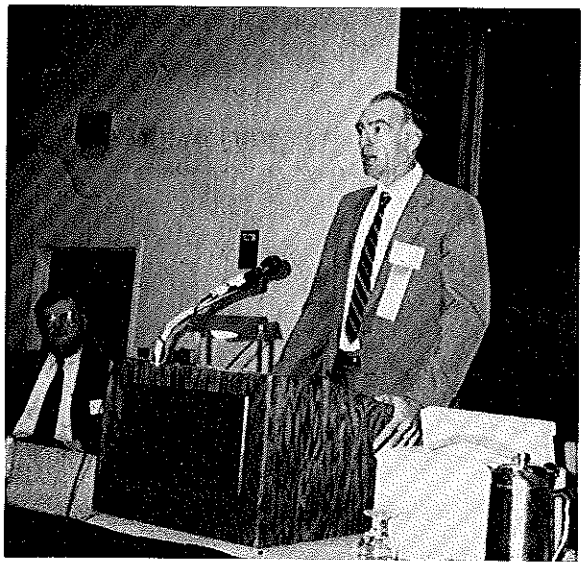
ASSOCIATION RECEIVES HONOR FROM DRI

During the Annual Meeting, Carol M. Welch of Denver, Colorado, the Regional Vice President of DRI, presented to President Craig D. Warner DRI's exceptional service award in recognition of the outstanding activities of the Iowa Defense Counsel Association during the past year.

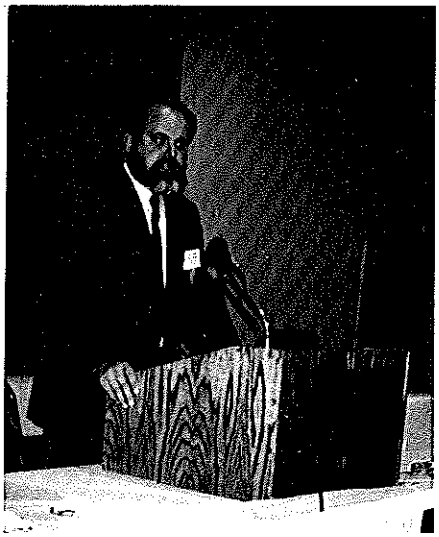
At the board Meeting following the Annual Meeting, the Board of Directors voted to fix the dates for the 1991 Annual Meeting to be held in Des Moines on **October 24, October 25, and October 26, 1991**. Everyone should make their plans accordingly. □

ANNUAL MEETING HIGHLIGHTS

Governor Branstad speaking at Thursday's Luncheon with President Warner and President-elect Fredregill

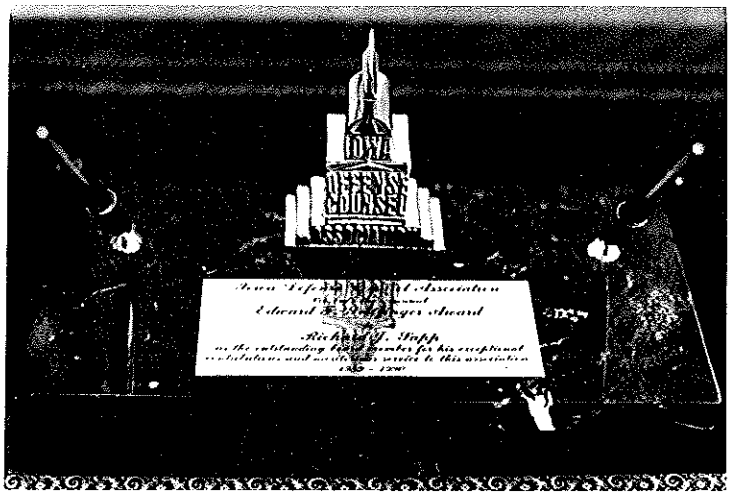


Judge Charles A. Wolle addressing the Saturday morning seminar



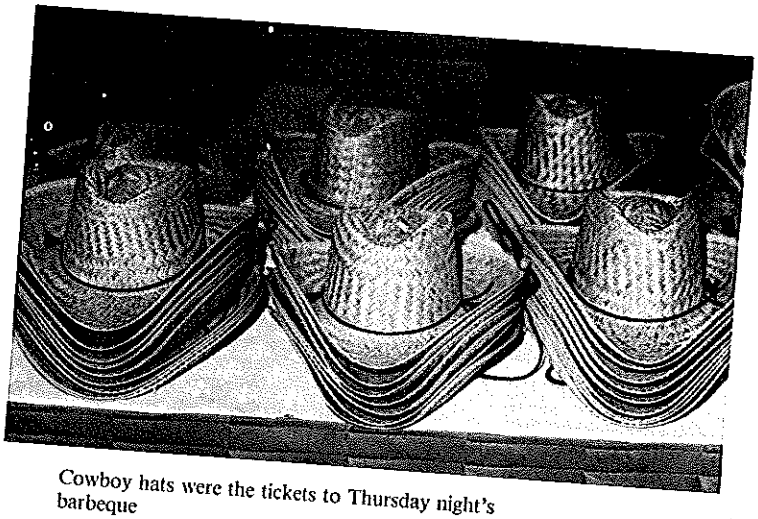
Judge Ross A. Walters of Des Moines addressing the Friday seminar

Donald Kaul speaking at the Friday night banquet with President Craig Warner and his wife Ana Maria

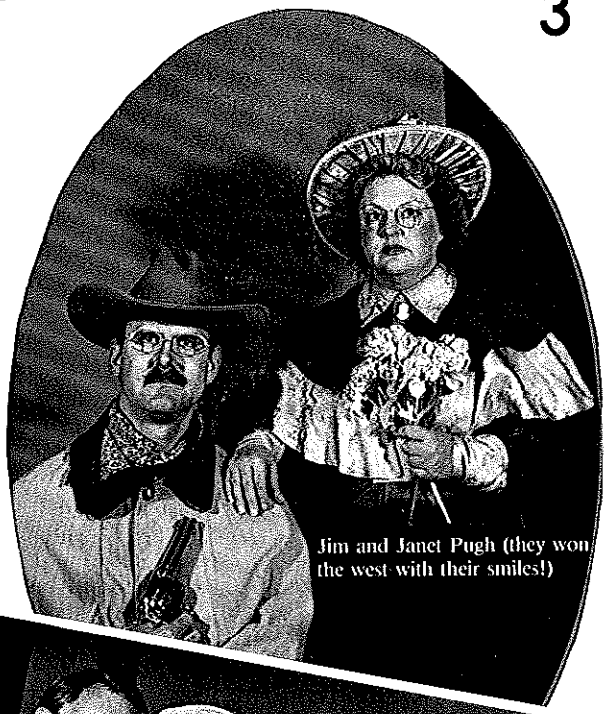


The "Edward F. Seitzinger Award" ("Eddie Award"); 14 karat gold plate custom designed figure representing IDCA's registered logo, rests upon a black marble base. This award is given annually to a board member in recognition of exceptional service to IDCA for the year.

Richard J. Sapp receives the 1989-90 "Eddie Award" at the Friday night banquet from Ed Seitzinger.



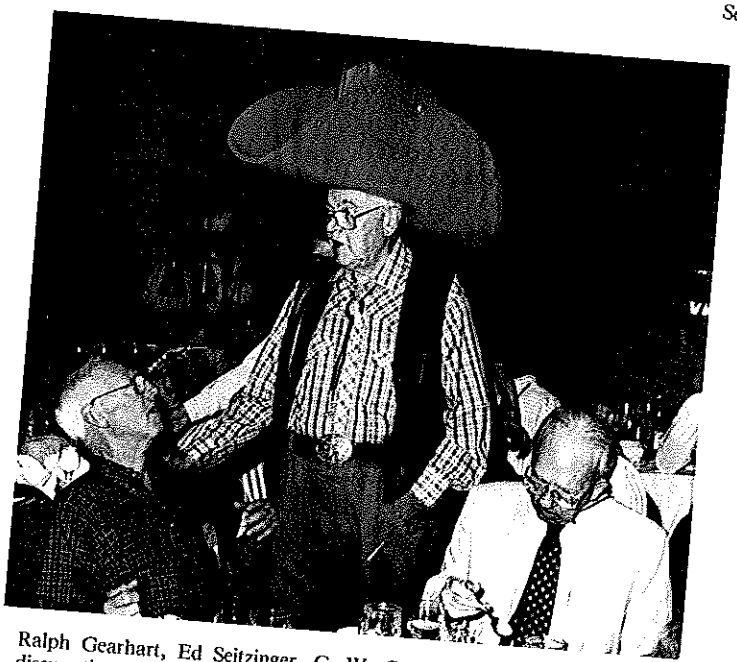
Cowboy hats were the tickets to Thursday night's barbeque



Jim and Janet Pugh (they won the west with their smiles!)

Maurie Goodman Band provided dinner and dance music at the barbeque

Bob Babcock, Past President of Federation of Insurance & Corporate Counsel, President-elect Al Fredregill and Ed Seitzinger enjoying the Thursday night festivities.



Ralph Gearhart, Ed Seitzinger, C. W. Garberson, at the barbeque, discuss the ramifications of cattle rustling.

Ginger Plummer, Betty Hyndman, Angela Swanson - shall we bring back these styles??

MESSAGE FROM THE PRESIDENT

Alan E. Fredregill
President

IDCA Report on Civil Jury Instructions

By now each member of the Association, along with each Iowa Dictrict Court Judge, has received a copy of the IDCA Report on Civil Jury Instructions. The Report was prepared and distributed at Association expense as a member benefit. This outstanding service to the Bench and Bar was recognized at the 26th Annual Meeting of the Association held in West Des Moines October 18-20th. Dick Sapp of Des Moines, one of your directors, chaired the committee which produced the Report, and received the Association's highest award, the "Eddie Award," for his efforts.

The extensive review, analysis, research and redrafting required to compile the Report took nearly 1½ years to complete. This initial work, however, has paved the way for Volume II. Director Greg Barntsen of Council Bluffs is chairing the second committee. He has an ambitious mid-March, 1991, target for completion, followed by Board consideration in April, with publication to follow soon thereafter.

Any feedback from your use of the IDCA instructions should be forwarded to Greg for consideration by this committee.

Defense Lawyer In-House Training

At its October 20, 1990, meeting, the board of the Association approved the purchase of the training materials of the International Association of Defense Counsel Defense Lawyer In-House Training Program. Those in attendance at the annual meeting heard Jay Tressler, the International's President, present an outline of the Program, which consists of a series of video tapes and a course book that is supplemented by live presentations by members of your own firm. The video tapes and the course book are broken down into the various phases of a trial, and each subject is thoroughly covered. Some firms have used the Program to obtain special continuing legal education credit.

The program will be maintained by the Association at its central office in Des Moines, and will be available to loan at no charge (other than mailing costs) to members who wish to implement the program for their firms.

Legislature Report

The Legislative Committee of the Iowa Defense Counsel Association, ably chaired these many years by past-president Herb Selby of Newton, will once again be heading for Capital Hill in Des Moines with an aggressive "laundry list" of projects to be tackled in the new legislative session beginning in January. Many of the issues of concern have lingered for several years. In the last several sessions of the legislature, for instance, attempts have been made to erode the long-standing "employment at will" doctrine in Iowa, and the committee will be watching for indications of further activity. Joint and several liability, prejudgment interest, and the collateral source rule are past priorities that have yet to be resolved to Association's satisfaction. The committee welcomes input from the membership.

PAC Progress

The Iowa Defense Counsel Association Political Action Committee has already begun receiving funds and making contributions to the campaigns of key state legislators. The Association has employed a lobbyist, E. Kevin Kelly, for over 10 years, to promote the Association's legislative activities. Kevin has reported in the past his difficulties in gaining the ear of our senators and representatives without a PAC in place. Our new presence should enhance the chances of completing a successful legislative session.

Barbados Adventure

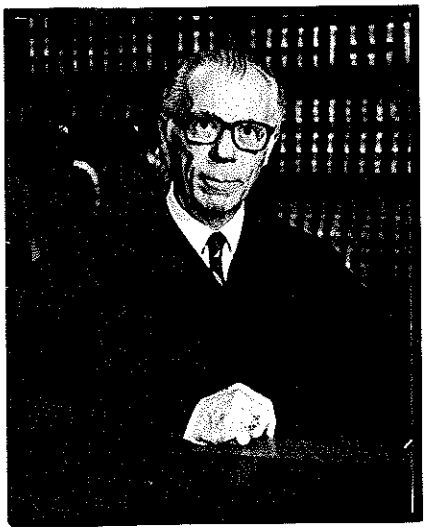
By the time this newsletter reaches you, you should have received registration materials for an exciting Caribbean seminar jointly sponsored by the Iowa Defense Counsel Association and the Minnesota Defense Lawyers Association to be held on the island of Barbados March 6-13, 1991. As of this writing, there will be at least one speaker from our Association. This promises to be an informative event, as well as a wonderful vacation. The best part is that even under the new tax rules, expenses for continuing education are deductible. The Caribbean is one of the "protected" areas that is a permissible destination.

Case Reports

Judy Oggero, of Rohm & Oggero Association Services, Inc., keepers of our central office in Des Moines, reports a slow start for the Brief Bank/Expert Witness/Case Report system recently installed by the Association. For this project to be truly successful, each member needs to supply to the Association a very brief description of cases in which the member has been or is now involved. Hired-gun expert witnesses travel fast and light, and the most up-to-date information is necessary to pin them down with transcripts from prior testimony. Take a minute today to report on one of your cases. Send it to the Iowa Defense Counsel Association, 520 35th Street, Des Moines, Iowa 50312. Call Judy at 515-274-5918 if you have a question or need a form. □

FROM THE BENCH

Do Judges Have A Sense Of Humor?



Justice Bruce Snell
Iowa Supreme Court

(The following is Judge Snell's speech as given at Friday's Annual Meeting Luncheon.)

My interest today is in talking about a topic of concern not just to those of us in this room, but one that really has universal fascination. That subject is: do Judges have a sense of humor?

Alan Fredregill and Dave Hammer approved my topic without knowing its content, indicating courtesy and desperation. In visiting with Dave, after a few minutes of unrelated chatter, he double checked the subject matter by saying: "now, is your topic: 'Are Judges Funny?" I suggested that would make a great speech for some other time, probably by Dave. I also reflected on what Dave was thinking and how easily the communication between Bench and Bar goes awry.

But I have digressed. My subject is; "Do Judges Have a Sense of Humor?" I suppose this is sort of in the same category with some of Carl Conway's burning issues, like how to guard and preserve your notary public seal. We older practitioners recall Carl as a fine lawyer, former President of the State Bar Association and spinner of many fables as the "Sage Of Osage." In my imagination, Carl's fellow citizens would frequently stop the "Sage Of Osage" on his way to the courthouse, to get his opinion on whether Judges have a sense of humor. Carl would tell them that he had given thoughtful observation and deep library research to this issue, but that he wasn't quite ready to make a definitive statement.

I too have thought about this, off and on, for many years. The subject came to my personal attention about ten years ago. Judge Janet Johnson, at one of our Court of Appeals conferences, told me that one of the lawyers asked her "does Judge Snell ever smile? He always looks so serious up there on the bench." I was, of course, mildly shocked. However, as soon as appropriate, I did look in the mirror and noticed a slight down turn of the mouth that I hadn't known was there. I concluded that age was creeping in and perhaps listening to the arguments in 7000 cases was taking its toll.

An example might be from a Court of Appeals brief that advised me with 95 cent phrases as follows:

"The agency's inability in its brief to document a "method to its madness" should demonstrate to this Court the error of the agency's ways throughout these proceedings. The hearing officers haughty refusal to consider any issue other than the mechanical blurb generated by the agency computer, and the apparent inability of the burgeoning bureaucracy to deal with an anomalous dual employment situation require that this Court rectify the injustice that has been done and hold that the hotel is not responsible for the unemployment benefits."

Some arguments call to mind a Chaplain who had preached the assize sermon and failed to obtain by indirect methods any compliments from the Judge. At last, he asked his lordship point blank what he thought of the discourse. "It was a devine Sermon" said Lord Hawkins. "For it was like the peace of God which passeth all understanding. And like his mercy, it seemed to endure forever." I suppose this is judicial humor.

There are other types of humor, though, that in truth are somewhat muted. Sometimes arguments prompt recall of the Court of Appeals mandate to write short opinions, though none so short as one by the Lord Chief Justice Gordon Hewart. He said:

> "The counsel for the appellant has taken 17 objections to his conviction. He has argued each one. We have listened to him and we find that each one comes to nothing. Nothing multiplied by 17 is still nothing. The appeal is dismissed."

Another example of British brevity, if not humor, comes from the Court Of Lord Kames (1696-1782). In 1780 at Ayr, Lord Kames tried Matthew Haye, with whom he used to play chess, on a charge of murder. On learning that a verdict of guilty had been returned, his Lordship exclaimed "that's checkmate to you, Matthew."

Abraham Lincoln brought forth humor from his witnesses and his illustrations. On one occasion when he was defending a case of assault and battery, it was proved that the plaintiff had been the aggressor but the opposing counsel argued that the defendent might have protected himself without inflicting injuries on his assailant."That reminds me of the man who was attacked by a farmer's dog, which he killed with a pitchfork," commented Lincoln. "What made you kill my dog?" demanded the farmer. "What made him try to bite me?" retorted the offender. "But why didn't you go at him with the other end of your pitchfork?" persisted the farmer. "Well, why didn't he come at me with his other end?" was the retort.

Of course, a good story can turn the tide, especially when the defense is short on witnesses. That is the problem attorney Oswald Vischi ran into after he succumbed to his client's entreaty. She wrote to him: "they tell me you're a good lawyer so will you take my case? The police raided this burlesque theater where I do my striptease bubble dance and arrested me for indecent exposure, but don't worry, they can't pin a thing on me." Signed, Toodles.

Vischi tried to get I.E. Meyers to testify but struck out when Meyers wrote: "in answer to your query, yes, I

Continued on Page 8

CASE NOTE SUMMARY

Underinsured Motorist Coverage - "Full Compensation" - *By Micheal P. Byrne, Davenport, Iowa*

I. Introduction

On September 19, 1990, the Iowa Supreme Court issued two opinions which further defined the Court's position that it will seek to fully compensate a victim through underinsured motorist ("UIM") coverage subject to the policy's limits: *Hernandez v. Farmers Ins. Co.*, 460 N.W. 2d 842 (Iowa 1990); and *Veach v. Farmers Ins. Co.*, 460 N.W.2d 845 (Iowa 1990). These opinions survey the Court's prior rulings on UIM coverage and briefly address the Court's view on uninsured motorists ("UM") coverage. In short the Court will strictly review exclusions which purport to limit or reduce UIM coverage below the policy limits but if UM coverage is in issue, the Court will take a narrow view and only ensure minimum compensation to the victims of uninsured motorists.

II. Hernandez v. Farmers Insurance Company

Steven Hernandez (Hernandez) was severly injured while a passenger in a vehicle driven by an underinsured motorist. He recovered from the drivers insurance carrier but his injuries exceeded that insurance coverage. (It was stipulated that his uncompensated damages were in excess of $225,000.00.) Hernandez sought to recover UIM coverage under three different policies: his own policy ($25,000 UIM limit) and two policies issued to his mother ($100,000 UIM limits each.) Each of the policies cotained an "other insurance" clause which read:

> 5. If any applicable insurance other than this policy is issued to you by us or any other member company of the Farmers Insurance Group of Companies, the total amount payable among all such policies shall not exceed the limits provided by the single policy with the highest limits of liability.

Farmers Insurance Group of Companies (Farmers) agreed to pay Hernandez the $25,000 limits under his own policy and $75,000 as an"insured person"under his mother's policies. Hernandez sued to recover the $200,000 limits of his mother's two policies. *Hernandez*, 460 N.W.2d at 842.

The "other insurance" clause in Hernandez' policy was not applicable to the payment made under his policy because no other policy was issued by Farmers to Hernandez. The policy in question defined "you" as meaning the "*named insured.*" *Id.* at 844.

With regard to the policies issued to Hernandez' mother, the Court found that the "other insurance" clause was void as a matter of public policy. The Court, citing its own precedent, stated that the purpose of UIM coverage was to provide "full compensation" to the victim. Therefore, any anti-stacking provision which would frustrate that purpose would be void as against public policy. *Id.* at 844-845.

The Court recognized that it has previously upheld some anti-stacking provisions relating to UIM benefits but distinguished those cases and stated that they had limited application in this matter. The court distinguished the case of *Tri-State Ins. Co. of Minn. v. DeGooyer*, 379 N.W.2d 16 (Iowa 1985), by stating that it involved intra-policy stacking. In *DeGooyer*, the policy in question provided insurance coverage on two separate vehicles but contained a maximum limit of liability for all damages resulting from any one accident. The Court upheld the limitation on the recovery. *Id.* at 843.

The Court also discussed its holding in *Kluiter v. State Farm Mut. Ins. Co.*, 417 N.W.2d 74 (Iowa 1987), wherein it upheld an "owned but not insured" exclusion. *Id.* at 843-844. The insureds in *Kluiter* recovered UIM benefits under their motorcycle policy. They then sought to recover under three separate policies covering three other automobiles they owned. The policies, however, excluded coverage for any vehicle which the insured owned but did not cover under the policy. The *Kluiter* Court found that the exclusion was aimed at potential duplication and prevented the insured from receiving UIM benefits when the insured was injured while occupying a vehicle he owned but chose not to insure under that policy. The *Hernandez* decision (and also the *Veach* decision discussed below) distinguished *Kluiter* on the basis that the insured in *Kluiter* had a choice as to whether to insure a vehicle which he or she owned. However, if the insured is in a non-owned vehicle, he or she does not have a choice whether to insure such a vehicle. *Id.* at 843-844; *Veach* 460 N.W. 2d 847.

In *Hernandez*, the Court reiterated its position that "the purpose of underinsured motorist coverage is aimed at full compensation of the victim." *Id.* at 844 (citing *McClure v. Northland Ins. Co.*, 424 N.W.2d 448, 450 (Iowa 1988)). Further, the Court stated "we see no duplication of benefits until the victim has been fully compensated." *Id.* at 844. The Court concluded that "enforcement of the anti-stacking provisions contained in the policies issued by Farmers would frustrate the protection given to the insureds under Iowa Code Section 516A.1." *Id.* at 845.

III. Veach v. Farmers Insurance Co.

On the same day the Court issued the *Hernandez* decision, it also issued the *Veach* decision. *Veach v. Farmers Ins. Co.* 460 N.W.2d 845 (Iowa 1990). Veach was riding his motorcycle when he was injured by an underinsured motorist. He recovered from the tortfeasor, but his injuries were stipulated to exceed the amount of his recovery. Veach's motorcycle was recovered by a policy issued by a member of the Farmers Insurance Group of Companies (Farmers) and contained $25,000 in UIM coverage which was paid to Veach. Veach was also defined as an "insured" under his mother's policy because he was a family member. His mother's policy contained UIM coverage of $50,000 per person but contained an exclusion which read:

> This coverage does not apply to bodily injuries sustained by a person:
>
> . . .
>
> 4. If the injured person was occupying a vehicle you do not own which is insured for this coverage under another policy.

Additionally, the policy contained the "other insurance" clause cited above in the discussion of *Hernandez v. Farmers Ins. Co.*, 460 N.W.2d at 842. Veach sued

Continued on Page 9

IN THE PIPELINE

By Michael W. Ellwanger, Sioux City, Iowa

"In the Pipeline" is a column which features information concerning matters wnich are presently under appeal that may be of interest to the defense bar. A brief attempt will be made to describe the issue in the case. For further particulars one should contact the designated attorney.

1. **Verdict Error.** In a comparative fault case the jury filled out the verdict form with plaintiff 60% at fault and defendant 40%. After hearing and interview of jurors, the Judge decided that the numbers were inadvertently reversed. Judge revises the verdict form to allow plaintiff's recovery. John M. French, Council Bluffs, Iowa.

2. **Municipal Liability.** Summary judgment in favor of municipal defendant. Plaintiff's allegations include failure to properly install traffic control devices including "pedestrian" signs, crosswalk, etc. Case involves interpretation of Section 668.10. Joseph L. Fitzgibbons, Estherville, Iowa.

3. **Act of God.** In multi-car snow accident whether there was a factual basis to submit the Act of God defense. Joseph L. Fitzgibbons, Estherville, Iowa.

4. **Insurance.** Plaintiff alleged that he was the third-party beneficiary of an agreement between his farmer-brother and the insurance agent wherein the agent allegedly stated that he would obtain insurance that would protect the plaintiff in the event plaintiff was injured while providing farm labor for the brother. Summary judgment granted in favor of insurance company. Alan E. Fredregill, Sioux City, Iowa.

5. **Vehicle Ownership.** Plaintiff sues driver and purported owner. Issue is whether there had been a bona fide sale to the purported owner where all the details of the transactions had not yet been completed. Maurice B. Neiland, Sioux City, Iowa.

6. **Law of The Case.** Defendant's motion for summary judgment was initially overruled. A few days from trial a different judge who had been assigned to hear the case, while reviewing the file in preparation for the trial, decides that the motion for summary judgment should have been sustained and sua sponte overrules the prior Judge and dismisses the case. Michael R. Hellige, Sioux City, Iowa.

"Can I play with Barry, Mom? He's covered by insurance."

7. **Rescission of Insurance Contract.** Trial Court held that insured had misrepresented information concerning the prior state of health of the insured. Applicant had been treated for several years for problems which became much more serious after insurance was obtained. Trial Court ruled in favor of insurance company and rescinded the insurance contract. F. Joseph Du Bray, Sioux City, Iowa.

8. **Collateral Source.** Defendant conceded liability. Plaintiff contends that if there is no comparative fault for the jury to consider, evidence of collateral source payments under section 668.14 should not come into evidence. John C. Gray, Sioux City, Iowa.

9. **Malpractice Experts.** Plaintiff's counsel notified defense counsel one month before trial that a subsequent treating physician would now testify concerning breach of standard of care. The Court sustained motion to strike and also sustained motion for summary judgment for lack of expert testimony. Plaintiff contends that the certification requirements of Chapter 668.11 do not apply to treating physicians whose identity is known to defendant. Michael W. Ellwanger, Sioux City, Iowa.

10. **Pain and Suffering.** Should the Court submit pain and suffering damages to a jury where the plaintiff saw a doctor one time and where there was no medical evidence of future pain at trial. The trial court did submit the issue and the jury returned a verdict for the plaintiff, with bulk of damage allocated to future pain. Philip J. Willson / Matthew V. Stierman, Council Bluffs, Iowa. □

LAWYER: The only person in whom ignorance of the law is not punished.

FROM THE BENCH *Continued from Page 5*

was present at the Carnival Burlesque but I can't identify the girls. You see they'll all be dressed in Court. At the Burlesque they wasn't and I wasn't looking at their faces."

Sometimes a witness makes the point better than the lawyer. In an Irish case the lawyer made an admirable argument that a dung heap was real property. Then the farmer was called upon to reply and said, "I'm puzzled indeed by all these strange words." But the lawyer says "that cows is personal property and the hay they eat is personal property and I ask your honor how barring miracles, personal property can go on eating personal property and evacuating (he used a homelier word) real property. Well, your honor, it's beyond my understanding."

Wills have been the source or some mirth not lost on the judiciary. The will of a well known Wall Street banker said:

> "To my wife I leave her lover, and the knowledge that I wasn't the fool she thought I was. To my son, I leave the pleasure of earning a living. For 35 years he thought the pleasure was mine. He was mistaken. To my daughter, I leave 100,000 dollars. She will need it. The only good piece of business her husband ever did was to marry her. To my valet I leave the clothes he has been stealing from me for the past ten years. Also the fur coat that he wore last winter at Palm Beach. To my chauffeur I leave my cars. He almost ruined them and I want him to have the satisfaction of finishing the job. And lastly, to my partner, I leave the suggestion that he take some other man in with him if he expects to do business." And from Wall Street to Back Street the theme remains.

Ruby was a pariah. She lived in a little house on a back street. She had no occupation, no pension, no visible means of support, but she lived well and always paid her bills. Everybody in town knew what she was, though of course some men knew better than the others. Dan Richman, when he became village president, proposed to clean up the town. He said Ruby must go. All his strenuous efforts to get rid of her were unavailing. She lived in the village until she died and was awarded a splendid funeral.

Her Will produced after the funeral provided that her entire estate be left in trust for the comfort, care benefit and burial of her brindle bitch, also called Ruby. After the death of her aforementioned namesake, the residue was bequeathed. "To one who was long been a valued friend, Dan Richman."

Dan Richman indignantly declined the request. He said that he had never spoken to the woman in his life, and that under no circumstances did he care to become the residuary legatee of a dog. The orphan asylum named as alternate legatee had no such scruples.

Although correspondence with judges is generally sparse, there are times when our constituents are moved to act. Judge Davidson of the New York Supreme Court received an inquiry as follows:

> "When I was in court yesterday, you offered to assign a lawyer to represent me free of charge. Do you think you could also get me a witness?"

Judge Bazelon of the U.S. Court of Appeals heard from a citizen inquiring "my uncle died without paying his income tax. Could I get out of paying mine without going to such an extreme?"

In 1984 our Court Of Appeals decided *Bain v. Gillespie*. That was the case that focused on a foul call in the closing moments of the 1982 Big Ten basketball game between Iowa and Purdue that cost Iowa the game and a shot at the league championship. Following the game an Iowa City novelty store marketed t-shirts that depicted a man with a rope around his neck and the caption "Jim Bain Fan Club." Jim Bain took umbrage at this and sued for injunctive relief and damages. The entrepreneur defendant counterclaimed alleging that the referee's bum call deprived him of making a killing on sales of Big Ten Championship memorabilia. Against this backdrop we said:

> "Referees are in the business of applying rules for the carrying out of atheletic contests, not in the work of creating a marketplace for others".

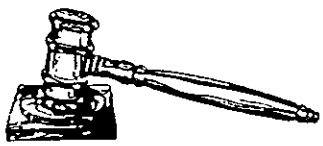
In legal talk, we held there is no such tort as "Referee Malpractice."

After we said this I received a letter from an overwrought fan. Parts of this letter in subtance said:

> "Dear Sir: Read your article in *Sioux City Journal* today 'Court Favors Bain'. Did you watch the game on TV? I have no one on Iowa team and I don't uphold Gillespies for what they did, but Bain was nowhere near when he made the call and it was not on that player. Did you watch the game on TV? We did including all the replays of the incident. How would you have felt if you had been the Iowa City coach? Did you ever play basketball? If so, I am sure you know a call such as this is taking the sportsmanship out of sports. 'Did you write the headline Court Favors Bain' or is the *Journal* at fault? I am 78 but basketball is my game. May I Please hear from you?"

I answered this letter that our call was only on the legal issue presented.

Do Judge's have a sense of humor? As Bryant Gumbel says,"we are out of time and we will have to leave the answer to another day."



CASE NOTE SUMMARY *Continued from Page 6*

to recover under his mother's UIM coverage. *Id.* at 846-847.

Iowa Code Section 516A.2 forms a basic part of an insurance policy and is treated as if it is actually written into the policy. *Id.* at 847. "Section 516A.2 permits an insurer to write exclusions and limitations into an auto policy relating to underinsured coverage so long as those exclusions are designed to avoid duplication of insurance or other benefits." *Id.* at 847 (citing *Poehls v. Guaranty Nat'l Ins. Co.*, 436 N.W.2d 62, 64 (Iowa 1989)). The Court upheld the trial court's decision that the exclusion was void as against public policy. Veach's mother's policy purportedly excluded from coverage any vehicle not owned by the named insured which had UIM coverage under another policy. The Court referred to this exclusion as a "not-owned-but-insured" exclusion. The Court distinguished between the "owned-but-not-insured" exclusion which was present in *Kluiter* and the "not-owned-but-insured" exclusion which was present in *Veach*. The Court ruled that the purpose of UIM coverage is full compensation to the victim to the extent of the injuries suffered as opposed to the purpose of uninsured (UM) coverage which is to ensure minimum compensation to the victims of uninsured motorists. The Court restated its position that it has adopted the "broad coverage" view of UIM coverage while taking the "narrow coverage" view of UM coverage. *Id.* at 847-848. The "other insurance" clause of the mother's policy had no application because only one policy was issued to Veach as a named insured. Veach was not a named insured under his mother's policy, and therefore, the other insurance exclusion was not applicable. *Id* at 848.

IV. Current Status of Anti-Stacking Provisions Under Iowa Law

The logical question one might ask is, what is left of anti-stacking provisions if UIM coverage is involved? Below are some of the permissible and impermissible anti-stacking or set-off provisions which the Iowa Supreme Court has addressed:

Enforceable provisions - UIM Coverage

— "owned-but-not-insured" exclusion is permissible. An insurer may exclude UIM coverage for injuries to insured occupying owned vehicles but which the insured chose not to insure under the policy in question. *Kluiter v. State Farm Mutual Auto Ins. Co.*, 417 N.W.2d 74 (Iowa 1987). (compare with *Veach v. Farmers Ins. Co.*, 460 N.W.2d 845 (Iowa 1990).

— "Intra-policy stacking." An insurer may limit the maximum limit of recovery for one incident under a policy regardless of the number of vehicles covered under the policy. *Tri-State Ins. Co. of Minn. v. DeGooyer*, 379 N.W.2d 76 (Iowa 1985).

— provision reducing amounts payable under UIM coverage by the amounts payable under the Liability Coverage and Medical Payments Coverage of the same policy permissible if injured party is seeking recovery under another person's policy (i.e. as a passenger.) *Poehls v. Guaranty Nat'l Ins. Co.*, 436 N.W.2d 62 (Iowa 1989). However, this is arguably in conflict with a more recent decision. (*But see Leuchtenmacher v. Farm Bureau Mutual Ins. Co.*, 461 N.W.2d 291 (Iowa 1990) (medical payments not allowed to be set off in policy involving different language in insured's own policy.)

Unenforceable Provisions

— inter-policy stacking - other insurance clauses — *Hernandez v. Farmers Ins. Co.*, 460 N.W.2d 842 (Iowa 1990).

— "not-owned-but insured" clauses - An insurer cannot exclude UIM coverage because an insured is able to recover the same coverage under another policy if the insured is in a non-owned vehicle. *Veach v. Farmers Ins. Co.*, 460 N.W.2d 845 (Iowa 1990).

— no set-off for "med pay" provision payments if under insured's own policy. Additionally, the specific policy language should be reveiwed. *Leuchtenmacher v. Farm Bureau Mutual Ins. Co.*, 461 N.W.2d 291 (Iowa 1990). *But see Poehls v. Guaranty Nat'l Ins. Co.*, 436 N.W.2d 62 (Iowa 1989).

— no set-off for amounts recovered by insured under workers' compensation. *McClure v. Northland Ins. Co.*, 424 N.W.2d 448 (Iowa 1988).

The Court takes a narrower view towards UM coverage and permits certain provisions which are unenforceable if UIM coverage is involved.

Enforceable Provisions - UM Coverage

—permissible to set off amounts recovered by insured under workers' compensation. *McClure v. Employers Mut. Cas. Co.*, 238 N.W.2d 321 (Iowa 1976).

— permissible to set off recovery from a third party tortfeasor. *Davenport v. Aid Ins. Co.*, 334 N.W.2d 711 (Iowa 1983).

—permissible to set off amounts recovered by the insured from dram shops. *Gutknecht v. Farm and City Ins. Co.*, No. 0-137/89-594 (Iowa Ct. App., Sept. 26, 1990).

— "intra-policy stacking." An insurer may limit the maximum limit of recovery for one incident under a policy regardless of the number of vehicles under the policy. *Holland v. Hawkeye Security Ins. Co.*, 230 N.W.2d 517 (Iowa 1975).

Unenforceable Clauses - UM Coverage

— "owned but not insured" — invalid if the exclusion reduces recovery below the statutory minimum. *Lindahl v. Howe*, 345 N.W.2d 548 (Iowa 1984).

The Supreme Court is not alone in adopting the "broad view" as it relates to UIM coverage. *See* Annot. 28 A.L.R. 4th 362. *See also* Note, *Underinsured Motorist Coverage in Iowa: American States Insurance Co. v. Tollari* 71 Iowa L. Rev. 1569. (discussing the Iowa Supreme Court's adoption of the broad view towards UIM coverage.)

If UIM coverage is involved the Court will look to see if the injured person has been fully compensated for his or her injuries. Any provisions limiting this recovery will be strictly construed. On the other hand, if UM coverage is in question, the Court will seek to ensure that the injured party recovers up to the minimum amounts set forth by Iowa law. □

FROM THE EDITORS

During the last half of 1990, the Iowa Supreme Court handed down several decisions which will significantly enlarge recoveries available through underinsured motorist insurance. Although premised on the legislative goal of full compensation for the victims, these decisions will likely lead to a contrary result.

One of the simplest axioms in our society is the fact that there is no free lunch. This truism is no more evident than in the insurance industry - an increase in coverage will require an increase in premium. Consequently, as a result of the Supreme Court's recent UIM cases, the insurance carriers in this state have already begun to file for increased rates on their UIM coverages. These increases could easily result in premiums which are two or three times higher than at present, and it is not inconceivable that premiums for UM and UIM could eventually reach levels equivalent to liability coverages. If these increased premiums result in the public buying smaller UIM limits, or in the rejection of UIM coverage altogether, then the legislative policy favoring full compensation will be frustrated.

We believe that the legislature did not intend the goal of full compensation to be viewed in a vacuum. It must instead be balanced with the equally compelling objective of providing an atmosphere in which UIM coverage can be furnished at an affordable cost. The interests of the 98% of policyholders who pay their premiums but never incur a UIM loss should be given as much consideration as the 2% who do suffer a loss. We would hope that the Supreme Court would recognize these competing interests when they next examine a claim for expanded UIM benefits. □

Editor: a person who makes a long story short.

James A. Pugh
5400 University
West Des Moines, IA 50265