defense UPDATE

The Iowa Defense Counsel Association Newsletter January, 1992 Vol. V, No. 1

Pandora's Box Revisited:

A Critique of Defense Costs Insurance

By John D. Stonebraker and Mark D. Cleve, Davenport, Iowa

In a recent article, Professor Alan Widiss offers the notion that the duty of liability insurers to defend as well as indemnify their insureds creates conflicts of interest requiring separation of the duty to indemnify from the duty to defend. *See Abrogating the Right and Duty of Liability Insurers to Defend Their Insureds,* **The Iowa Advocate,** Spring-Summer, 1991. He suggests that the insured should have the right to select defense counsel and the right to design and implement defense strategy, both of which rights now repose in, and are enjoyed by, the insurers. Excessive costs, bad faith, coverage disputes, and conflicts of interest would all go the way of the dodo if the industry were to adopt his solution: defense expenses insurance. Such a policy of insurance might even create cost savings to some, reasons Widiss, because many consumers have a number of different policies for specific risks such as auto, homeowners, rental property and recreational equipment insurance. Instead of paying premiums for defense costs within each policy, the consumer would purchase one policy which would provide defense costs for any suit predicated upon negligence, whether insured under one or more policies or not. Widiss conceded that to achieve these goals the salutary benefits of the present system must be sacrificed. This article will address the issues of whether the problems with the present system are as serious as Widiss believes, the advantages of the present system, and illustrations of problems associated with the solutions he proposes.

Professor Widiss acknowledges some of the advantages inherent in the existing system, wherein liability insurers provide a defense to their insureds. The professor concludes that such advantages should be scrapped in favor of the numerous benefits he attributes to his proposed segregation of the defense and indemnity functions of liability insurance coverage. We submit that Widiss greatly undervalues the advantages of the present system, which include the following:

1. Allowing the party with knowledge and experience to control the litigation - liability insurers are plainly well-grounded in the complexities of investigating, evaluating, and settling claims. Moreover, as Widiss acknowledges, the insurer has the primary financial stake in the vast majority of claims, which are settled or are otherwise concluded within policy limits;

2. Cost Control - Attorneys retained by insurers to represent the insured have an incentive to keep the costs of litigation down, due to the lawyers' ongoing relationship with the liability carrier;

3. Ensuring high quality representation of the insured - liability carriers are sophisticated purchasers of attorneys' services. They seek out attorneys who are experienced in handling insurance defense matters. It is critically important to the interests of both parties to the insurance contract to make sure that the insured is represented by a skilled lawyer who specializes in the defense of civil litigation;

4. Judicial Economy - It is in the interests of the insurer and defense counsel to handle insurance claims thoroughly but expeditiously, without resort to the "marginally productive" work which Professor Widiss claims may be beneficial to the defense of the insured, but is not undertaken by the liability insurer under the present system in order to save costs. What Widiss really proposes is shifting the role of watchdog from one insurer to the other. If Widiss seriously proposes that defense cost insurers will be any less likely to save money where possible than liability insurers currently are under the present system, he is simply naive.

5. Professor Widiss claims that his proposal would avoid virtually all conflicts between the liability insurer and insured. In practice, most of the actual conflicts between these parties involve either coverage or excess liability issues. The existing legal framework provides excellent, workable mechanisms and guidance for the resolution of these types of conflicts. Declaratory judgment actions, or "friendly suits", as they are often called, provide a quick and relatively inexpensive means to resolve coverage matters. The existing case law on Bad Faith provides the parties with an understandable and workable framework of rights, responsibilities, and remedies in the relatively small number of cases which arise from denials of coverage, or excess liability.

In addition to negating the proven advantages of the existing system, the Widiss proposal would generate an impressive number of intended and unintended negative consequences.

If adopted, defense costs insurance would separate accountability for results from the insurer who bears the primary risk of loss. An attorney selected by the insured has almost no expectation of continued employment by the defense costs insurer, under Widiss' plan. Rather than striving to contain costs, the lawyer is free of the checks and balances on excess spending in the defense of the insured. In addition, for better or for worse, one of the primary settlement incentives to an insurer currently is costs of defense. An insurer who bears no responsibility for costs of defense is more likely to litigate rather than settle, especially in smaller claims where anticipated attorney's fees are a significant bargaining chip. Our already overburdened court system would undoubtedly see a greater proportion of suits being tried rather than settled under Widiss' plan. Would the defense costs' insurer be willing to contribute to a settlement by paying something to settle? Perhaps, but in doing so it alters its role from a defense costs underwriter to an indemnitor, or partial indemnitor, of third-party claims.

Continued on page 8

MESSAGE FROM THE PRESIDENT

Under Alan Fredregill's leadership our Association had another productive and successful year. Congratulations to all.

David L. Hammer

ANNUAL MEETING

The former Presidents came through exceptionally well in fleshing out the Old Master's Course. Justice Holmes, who was not a judge with whom to trifle, once stated that the young lawyers knew the law but the old lawyers knew the exceptions. We have all learned a lot of exceptions in the course of the program, and owe a strong debt of gratitude to our old masters.

LEGISLATIVE PROGRAM

Your Directors approved the legislative program at their first meeting immediately following the Annual Meeting. The program is a continuation of that of last year and Herb Selby will undoubtedly be reporting to you on it in a future issue of the Defense Update.

INSTRUCTIONS, PART II

Part II of the IDCA Civil Jury Instructions should have been received by you by now and you will have found them of the same high quality as Part I. They are receiving an increasing acceptance by the Trial Judges, and the Iowa State Bar Association Instructions Committee is, we understand, reviewing them.

RETIREMENT

Gene Marlett, our Association's Treasurer, has retired, and in appreciation of his many years of dedicated service, Gene received the "Eddie Award" at the Annual Meeting Banquet. Gene also was honored by being elected a life member of the Association. Congratulations, Gene! His successor is DeWayne Stroud, of Farm Bureau Mutual Insurance Company. Our Association continues to be indebted to Farm Bureau for its much appreciated assistance in this important regard.

JUDGES

The handbook of the Annual Meeting seminar will again be distributed to Iowa judges as well as the *Defense Update* and Part II of the Iowa Defense Counsel's Civil Jury Instructions.

DEFENSE UPDATE

Our official periodical continues to present important legal matters and is a continuing rich source of materials for the bench and the bar. The Editorial Board, whose names appear altogether too modestly on the last page, are to be commended for their fine product, all of which is produced without payment to either authors or editors.

IDCA COLLEGE

Your Directors have empowered the IDCA College of Trial Practice Committee to proceed with a Second Annual Program in 1992. The initial program was a pronounced success under the leadership of Chancellor David L. Phipps and Dean Edward F. Seitzinger. They are already involved in the planning for the second and the dates should be announced soon.

Word has been received of the death the first week of November of Steward H. M. Lund, a former President of our association, and an active attendee of our meetings.

We are now in the twenty-eighth year of our Association's life and it continues to materially assist the Iowa defense practitioner. If there are any suggestions which any member has with regard to the rendering of additional services or the improvement of existing services, please advise me by letter, phone or fax.

The following are the newly elected officials:
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President Elect - John B. Grier
Secretary - Richard J. Sapp
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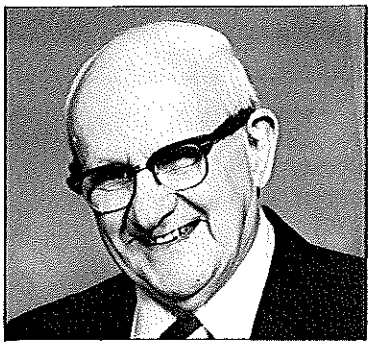
CASE NOTE SUMMARY

IN MEMORIAM



STEWARD H. M. LUND
7-20-11 - 10-31-91

It was just five days following our Annual Meeting that Stew passed away and it was certainly a great shock to all of us. Stew served on the board before becomming President for the 1976-77 year. He continued to attend board meetings and was one of the great contributors to the organization - he will be sorely missed.

The Iowa Defense Counsel Association extends its sincere condolences to his lovely wife Bee and their family.

Eighth Circuit Reviews Joint & Several Liability Under Chapter 668

By Kermit B. Anderson, Des Moines, Iowa

In *Christopherson v. Deere & Company,* 941 F.2d 692 (8th Cir. 1991) the Eighth Circuit Court of Appeals decided an interesting issue of joint several liability arising under Iowa's scheme of comparative fault. The decision is noteworthy because it contributes to the growing body of cases resolving issues under Iowa Code Chapter 668 and because its holding will govern diversity cases tried in Iowa's federal courts.

Plaintiffs Curtis and Monica Christopherson brought a product liability action against sole defendant Deere & Company in the Western Division of the U.S. District Court for the Southern District of Iowa. Defendant Deere in turn impleaded Plaintiff Curtis Christopherson's father, Howard, in a third party complaint. No claim was ever asserted against the third party defendant by the plaintiffs.

The case thus proceeded to trial before a jury with Judge Donald O'Brien presiding. The jury found total damages to the injured plaintiff, Curtis Christopherson, to be $100,000 and assessed fault 20% to him, 50% to Deere, and 30% to the third party defendant. Judge O'Brien entered judgement against Deere for $50,000 but refused to hold it jointly and severally liable for the fault of the third party defendant. The court reasoned that plaintiffs had elected their remedy by chosing not to sue the third party defendant and to hold Deere jointly liable for Howard Christopherson's fault under such circumstances would be inequitable. Plaintiffs appealed arguing that the traditional rule of joint and several liability applied and that a judgment of $80,000 should have been entered against Deere. A divided panel of the Eighth Circuit affirmed Judge O'Brien's handling of this issue.

The issue before the appellate court was whether the common law rule of joint and several liability applied in an action brought under Iowa Code Chapter 668 where the defendant is found at least 50% at fault but another tortfeasor, although a "party" under Section 668.2, was never sued by the plaintiffs. No Iowa court has addressed this specific question. In approaching the issue, Judge Bowman, writing for the majority, first emphasized the narrow scope of the argument advanced by the plaintiffs. Plaintiffs made no challenge to the district court's conclusion that application of the joint and several doctrine was inappropriate by virtue of Iowa's doctrine of election of remedies or its conclusion that recovery from Deere of fault attributed to the third party defendant would be inequitable. 941 F.2d at 695. Rather, the court noted, plaintiff based its argument solely upon an "overly broad" reading of Iowa Code Section 668.4 (joint and several does not apply to defendants found less than 50% at fault) and Section 668.3(1) (claimant's fault no bar only diminishment unless greater than that of all other parties.) Plaintiffs contended that Section 668.4 mandated joint and several liability whenever a defendant is at least 50% at fault and that policies underlying Chapter 668 required that joint and several apply to the fault of all parties even those the claimant had not sued.

The panel majority stated that neither provision relied upon by the plaintiffs addressed the issue before the court nor did the court find either section susceptible to construction beyond their express terms. 941 F.2d at 695-696. The court further discerned no public policy from the various sections of Chapter 668 as urged by the plaintiffs. Indeed, the court felt that other sections of Chapter 668 evidenced a public policy supportive of the district court's decision. The court therefore rejected the plaintiff's argument and held that the lower court's judgment did not conflict with the letter or spirit of Iowa Code Chapter 668.

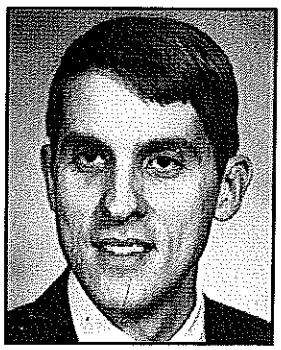
In a vigorous dissent, Judge Heaney felt that the majority's decision contradicted Iowa statutory and decisional law. To Judge Heaney the issue was simple: Since Deere was found 50% or more at fault, the common law rule of joint and several liability clearly applied. He scolded the majority and the district court for what he saw as a disregard for established Iowa law. 941 F.2d at 696-699.

Continued on page 8

FROM THE BENCH

From Advocate to Judge

By The Honorable Robert A. Hutchinson, Judge, Fifth Judicial District



Robert A. Hutchinson
Judge, Fifth Judicial District

The publication of this column will coincide with the retirement of Judge Ray Hanrahan, Fifth District Court Judge. For thirteen years, I practiced before Judge Hanrahan. For the last two years, I have had the privilege to work as a fellow judge with Ray in Polk County. When I was asked to contribute to this column, one suggested topic was a discussion of the change in perspective from advocate to judge. To the extent that I have learned valuable lessons to be shared with the readers of this column, I wish to express my gratitude to Judge Ray Hanrahan.

As I gained experience as a trial attorney, I came to view my most precious asset to be my credibility with judges. Working as a district court judge myself for nearly two years has only confirmed my belief that lawyers must be totally honest and candid with judges. The following example will illustrate my concern.

During a trial last year, the parties were in severe disagreement over the admissibility of a critical piece of evidence. The issue of admissibility had first surfaced in a motion in limine filed by defense counsel prior to trial. Neither party had cited any cases in the course of our discussions.

Quite by accident during the course of trial, I learned that the Iowa Supreme Court had within the past month issued an opinion in which the admissibility of such evidence had been discussed. I told the attorneys that I had heard of the case, and that I wished to recess until I could get a copy from the Supreme Court. Defense counsel then told me that he had a copy, and that the case was not controlling.

After reading the case in question, my conclusion was that the case was controlling. However, I understood defense counsel's position that the case was distinguishable. What I could not understand was why counsel had not advised me from the outset of the existence of the case. The attorney's view was that the Code of Professional Responsibility required him only to advise the Court of "controlling" cases. Even if correct, the attorney failed to gauge the effect of his actions on the judge. Ultimately, it matters little if a judge concludes that the attorney has tried to mislead the Court, or simply that his or her scholarship and judgment is unreliable. The effect in either case is that the judge will simply not accept at face value any representation from that attorney. The result is bound to be greater difficulty in practicing law for the attorney, and a system that cannot operate efficiently when judges cannot rely on the attorneys.

The trial court also cannot operate efficiently when the attorneys are not prepared for trial. While I am certain that most lawyers do their best to be ready for trial, I am not convinced that they understand what "prepared" means from the judge's perspective.

Current statistics indicate that almost 2,000 cases per year are being filed per district court judge. Certainly, most cases are settled, and few come to trial. Nevertheless, the number of trials per year continues to climb as well. As a consequence, judges feel increasing pressure to be more efficient in the dispostion of cases. The advent of pretrial scheduling orders has attempted to increase the speed of trials by requiring the filing of instructions and briefs prior to trials, and the listing of witnesses and exhibits well in advance ot the trial date.

Since becoming a judge, I have been continually amazed by the lack of compliance with pretrial scheduling orders. Attorneys who would not dream of disobeying a court order to appear in court or that directed their client to perform or refrain from some act, routinely ignore the Court's requirements for preparing for trial. Frequently, counsel will then advise the Court that "the attorneys got together and agreed informally to an extension." Then at trial a dispute arises between the attorneys as to exactly what the agreement was, and whether it covered the vital new exhibit which has suddenly surfaced.

There is nothing more distasteful to a trial judge than to be asked to decide, in the middle of trial, which attorney to believe, and which version of an informal agreement should be enforced. Most judges refuse to become involved in such a dispute. The fact is that the attorneys cannot extend a scheduling order by their agreement alone. The Court has its own interest in seeing that compliance with scheduling orders is accomplished. If attorneys try to rely on informal agreements not approved by the Court, and a problem arises during the trial, they should not be surprised when their pleas to the judge fall on deaf ears.

Perhaps the greatest problem I have had with compliance with scheduling orders has been with deadlines for

Continued on page 10

ARTICLE OF INTEREST

Characteristics Of An Explosion

By James R. Belina, P.E. of Omaha, Nebraska

The determination of the cause and origin of fires is a complex science including knowledge of physics, thermodynamics, construction methods and fire science. The explosion is a specialized fire. Understanding the complex nature of the oxidation process known as an explosion requires specialized scientific training and knowledge. A general knowledge of the explosive process may be helpful to professionals who occasionally must determine the facts of a particular case.

Explosions occur much less often than fires, but they can cause extremely serious damage and physical harm. Although there are many ways to classify explosions, we can place them into two broad categories; high-yield explosions and low-yield explosions, in order to simplify our understanding. High-yield explosions are those caused by commercial explosives, such as dynamite, TNT, nitroglycerin, etc. Low-yield explosions include those from flammable liquids and gases and combustible dusts. We will limit this discussion to explosions from combustible liquids and gases since these are the more common sources of explosions encountered.

To solve the mystery of the explosive process, it is important to be familiar with several properties of combustible liquids and gases.

Explosive Limits

The explosive limit of a gas or vapor is the percentage range, by volume, in which the vapor or gas can be mixed with air and result in an explosive mixture. Above a certain percentage the mixture will be too rich to burn or explode, and below a certain percentage the mixture will be too lean to explode. For example, the explosive limits of natural gas when mixed with air are approximately 5% to 15%. If a mixture of air and natural gas has less than 5% natural gas, the mixture will not explode. If a mixture of air and natural gas has more than 15% natural gas, the mixture will not explode. If the air and natural gas mixture has between 5% and 15% natural gas, the mixture is very dangerous and potentially explosive.

Vapor Density

The vapor density of a gas or vapor is its relative weight compared to air, which is considered to have a vapor density of 1.0. For example, natural gas has a vapor density of approximately 0.6, which means that a given amount of natural gas weighs 60% of the same amount of air. If natural gas is placed in a room with air, the natural gas will tend to rise or to accumulate near the ceiling. Propane has a vapor density of approximately 1.6. This means that a given amount of propane will weigh 1.6 times the same amount of air. Therefore, if propane is released in a room, it will have a tendency to collect near the floor. As one might guess, the explosions resulting from natural gas and propane leave considerably different force footprints.

Flash Point

A characteristic of lesser importance than the two described above is the flash point. Liquids neither burn nor explode. What really burns is the vapor that comes off the surface of a liquid as it evaporates. The temperature at which vapor will come off the surface of a liquid in sufficient quantities to form a combustible mixture with air is called the flash point. For example, the flash point of gasoline is -50°F. The flash point of ethyl alcohol is 40°F. Only liquids have flash points. Gases do not have flash points because they are already gaseous at normal temperatures.

Ignition Temperature

Another characteristic of an explosive mixture is the ignition temperature, which is the temperature necessary to ignite a given vapor/air mixture. The ignition temperature of natural gas is approximately 1000°F. Unfortunately, a small spark is sufficient to ignite a whole room containing the proper mixture of natural gas and air. The ignition temperature of paper is normally around 451°F.

The damage caused by an explosion depends upon many factors, of which one of the most important is the percentage of gas in the air/gas mixture. If the gas is near the lower explosive limit (5% for natural gas), the explosion will be what is called a lean mixture explosion. A lean mixture explosion is sometimes accompanied by a small "pop" with a light "whoosh" of air. There is usually little damage and rarely a fire.

If the percentage of gas is in the middle of the explosive range (8% for natural gas), the explosion is referred to as an ideal mixture explosion. This explosion is characterized by extreme destruction. If an ideal mixture explosion occurs in a structure, the structure may be leveled by the force. There may be a fire accompanying the explosion, but many times there is not. As the gas mixture ignites, a fire ball is formed at a rate of approximately 1000 ft./sec. Flesh will be severely burned, but wood may only be slightly singed.

If the percentage of gas is near the upper explosive limit (15% for natural gas), the explosion is referred to as a rich mixture explosion. The rich mixture explosion is normally characterized by a destruction pattern between that of a lean mixture explosion and an ideal mixture explosion. The rich mixture explosion is normally followed by an intense structural fire. The resulting fire may make it difficult to even determine that an explosion had occurred because the explosion-

Continued on page 9

POINT OF VIEW

The Changing Relationship Between the Insurance Company and its Defense Counsel

Editors Solicit Responses

The Board of Editors recently solicited responses from various insurance companies regarding the changing relationship between insurance companies and their trial lawyers. Some defense attorneys have observed that the handling of files is being increasingly scrutinized and subject to numerous rules and regulations. Some attorneys have suggested that something close to an "adversarial relationship" has developed between the defense attorneys and the company he represents. In order to continue the good relationship between most Iowa defense lawyers and the companies they represent, the Board of Editors solicited comments from various insurance companies concerning their "pet peeves," observations regarding the changing relationship, and ways in which this relationship could be enhanced.

Some insurance companies responded that they would rather not put their thoughts in print (we don't know if this is good or bad.) Others said that they had a fine relationship with their defense counsel and really couldn't think of anything to say. Some have indicated that there was in fact a changing relationship and offered specific observations. The following is such an article.

Other articles on this same topic will be featured in future issues. If you have any thoughts or responses concerning this matter, please address them to the Board of Editors.

The following article was submitted by darci Beacom, Claim Manager, Kansas City Branch, CNA Insurance Companies.

DEFENSE COUNSEL/INSURANCE COMPANY RELATIONS by darci Beacom

My pet peeve concerns defense counsel who talk about an adversarial relationship between insurance companies and themselves. Although this topic has been reported in several publications, the concept that there is an adversarial relationship is unfounded. Not a day goes by that we're not asked to consider an additional law firm to add to the panel of approved counsel.

Successful defense counsel have adapted to the new insurance defense environment. CNA, a well managed company which looks to develop long term relationships, has weathered the new environment well. But for some insurance companies, a new emphasis on cost containment, streamlined management, and emphasis on service to the consumer has created some wrenching decisions. The new environment has been created not only because insurance companies must be competitive with one another to succeed, but because consumers and voters have become dissatisfied with those insurance companies that operate as pass-through mechanisms for expenses or costs.

The responsibility that insurance companies have to provide quality service at a fair price means that we tend our business carefully. We pay what we owe and offer protection to our insureds from unfounded or unfettered claims. We work to control the predictability of losses and to provide a framework in which the insured may know his exposures.

Insurance companies are involved with tort reform activities. This is not done to spite defense counsel. It is done to try to restore a level of predictability to the claims handling process. Remember, insurance companies must underwrite and market based on actual exposures. Unfortunately, the price paid by the insureds for those exposures can become prohibitive to the point that insureds decide to avoid activities, cut back on activities, purchase insurance at the expense of other corporate expenses, or "go bare". Tort reform then is not an adversarial position as much as it is an attempt to control an increasingly unpredictable legal environment.

CNA also works closely with its attorneys to achieve its goal of a fair settlement at the earliest opportunity. The issues involved in any claim can be resolved by one of five methods: investigation, negotiation, discovery practice, motion practice or trial. We rely on defense counsel to help identify the issues in a case but we also expect to work closely with them to find the most cost effective way to resolve those issues. It's not unusual for us to question the use of discovery where investigation would serve the same purpose. We will suggest motion practice to limit the extraneous issues; we request that motion practice be limited if it has no ultimate bearing on the disposition of the claim.

We expect the claims handlers to negotiate the cases. That's part of their job and they cannot delegate that responsibility to a law firm and do their job effectively. Successful defense counsel recognizes the close, cooperative role that must be played with the claims handler. The information supplied by counsel is only one piece of information the claims handler uses to evaluate a case. If defense counsel wants to be a hero, there are things that can be done to make the claims handler look good -- reporting accurately on the issues, giving information from which the claims handler can make informed decisions, responding quickly to inquiries from the claims handler, and helping the claims handler control the severity and expenses on each file.

The move to staff counsel, which is growing in all insurance companies including CNA, can benefit defense counsel as well as the insurance companies. The purpose of staff counsel at CNA is to

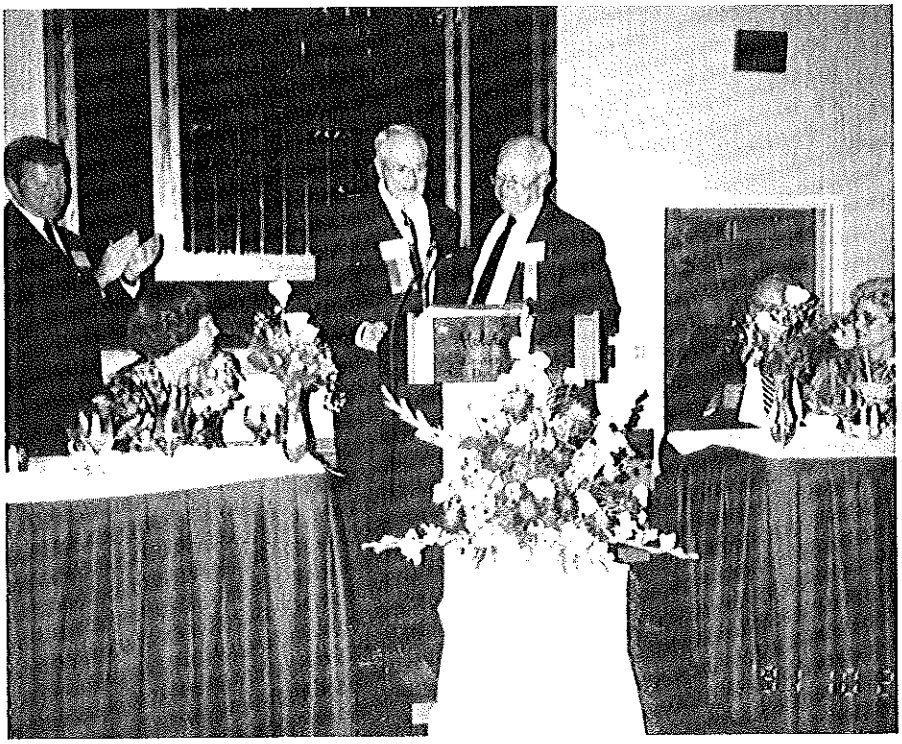
Point of View Continued

handle more routine cases in a cost-efficient manner. Our in-house counsel can handle a case to conclusion successfully at a cost savings of over 50%. Until outside law firms can offer us the same type of cost savings, we would be foolish and irresponsible to send cases to the more expensive law firm. On the other hand, it creates an opportunity for an outside law firm. The cases that are not handled by staff counsel are those that are significant, challenging, complex and resource-intensive. Defense counsel has the expertise and, if necessary, the manpower to devote to a successful defense of these more significant issues. From that standpoint, there will always be a need for outside counsel to handle certain lawsuits on behalf of insurance companies.

It's interesting to note the growth in volume of total claims reported. At CNA, we will handle in excess of one million claims annually. Of suits filed, only 3% will be tried to a conclusion. The 3% is minimal when compared to the total claims reported and has been a consistent percentage for years. Is the problem "adversarial" or is the defense bar just now feeling the competitive pinch we have felt for years in the marketing side of our business? I suggest there is no adversarial relationship. There's only an awakening in the insurance defense community of economic realities. Insurance companies must be more cost effective not only to compete with each other, but to be responsive to the demands of the consumers, voters and regulators. To be effective, insurance companies must work closely with defense counsel to identify ways to close cases earlier for less expense. Tort reform activities by insurance companies are efforts to make more definite coverages that will enable them to continue business safely.

Staff counsel operations only exist because insurance companies do more efficiently what outside counsel used to do on smaller, more routine cases. When outside counsel effectively compete with staff counsel, the idea of staff counsel will be obsolete. The most successful defense counsel recognizes these economic realities and works with the insurance company to make it more successful. Should insurance companies fade away or become less effective in what they do, defense counsel as we know it will no longer exist.□

1990-91 EDDIE AWARD



Gene Marlett receives the 1990-91 "Eddie Award" from Ed Seitzinger at the Annual Meeting Banquet.

Pandora's Box Revisited Continued from page 1

Leaving the insured to select the defense attorney is akin to letting the fans choose the football coach. Such a system would inevitably put well-meaning but inexperienced family lawyers, probate counsel, and others into an unfamiliar arena on a regular basis. Trial practice is in reality a highly specialized area of the profession which is unforgiving of inexperience and lack of skill. A few years ago former Chief Justice Warren Burger was strongly critical of the trial bar for its inexperience and ineffectiveness. Professor Widiss' plan would be a giant step backwards in the quest for improvement of the competence of the trial bar.

Creating an independent attorney paid for by a separate policy of defense costs insurance will increase, not decrease, the costs of the insurance industry, to the detriment of the consumer. For example, a liability insurer under Professor Widiss' proposal would predictably receive evaluations from independent defense attorneys recommending settlements in virtually all cases. The role of the defense attorney would be similar to the role of the attorney representing the insured on his personal exposure above the policy limits now: The insurer is exhorted to settle to avoid excess exposure, which is currently the proper role of excess counsel. Under Widiss' plan, to whom is the insurance company to turn? It must take the defense attorney's evaluation for exactly what it is, an advocate's position. Thus, the carrier must turn to other counsel for guidance on its risks of trial versus settlement, thus adding substantially to its costs.

Other conflicts are certain to arise. For example, what happens when the insured and its defense costs carrier want to settle and the primary insurer is inclined to try the case? A lengthy trial may expose the insured to a different kind of excess problem, viz. personal exposure when his defense costs insurance runs out. Under this scenario a reluctant defense attorney could be forced to litigate at the pleasure of the liability insurer regardless of the limits of the policy intended to cover his fees. The potential for a Bad Faith defense unreasonably jeopardizing the insured's personal assets would still exist, albeit in a different form.

Another conflict which will inevitably arise is the matter of the responsibility for defense decisions during the course of litigation. For example, the liability insurer may feel that retaining an expert witness is necessary to protect its interests. The defense costs insurer, ever mindful of its bottom line, rejects the idea.

As another example, suppose the liability insurer decides that it is necessary to take the deposition of an eyewitness who now resides on the west coast. Again, the defense costs insurer elects not to undertake that expense. In both instances the liability insurance company's prospects of a successful defense may be severely compromised by separating it from the responsibility for discovery and trial decisions, as Widiss proposes.

In our experience, the great majority of cases do not carry a serious risk of an excess judgment against the insured. To be sure, at least a theoretical risk is engendered merely by the advent of the requirement in Iowa that in cases other than small claims and for liquidated damages, a pleading shall not state a specific amount of money damages claimed, R.C.P. 69(a). Wisely, carriers now send excess letters to insureds at the outset of the litigation as a routine matter. The insured has the opportunity, but not the obligation, to select counsel to represent the insured's personal interests from the very beginning. Moreover, the insured may take the opportunity to compromise his uninsured exposure at any time.

Space limitations prevent a full exploration of the effects of Professor Widiss' proposal. In general, however, his plan would simply shift conflicts of interest from one form to others. We also believe that Widiss' proposal would multiply the opportunities for conflicts of interest, not reduce them. Furthermore, the proposal would not result in any cost savings. Indeed, it would far more likely result in a net increase in premium expense, due to the need for another layer of attorneys and costs of administration. Finally, it is likely that the volume of litigation itself would increase due to the tension between the interests of the defense cost insurer making strategy and decisions on the basis of its costs, and the interests of the liability carrier, whose financial interests are primarily at stake, on the other.□

Case Note

Continued from page 3

The *Christopherson* case squarely presented the Eighth Circuit with a difficult issue of first impression under the Iowa comparative fault regime. With little Iowa precedent to draw from and without the benefit of deference to district judges on questions of state law, *see Salve Regina College vs. Russell,* 111 S. Ct. 1217 (1991), the court charted a conservative course and addressed only the narrow argument urged by the plaintiffs. Judge Heaney in dissent perhaps oversimplified the issue and his argument that the court's decision disregards the Iowa Supreme Court's understanding of fairness is unconvincing. To deny plaintiff's an indirect recovery on a claim they chose not to assert directly hardly bespeaks blatant unfairness. Section 668.8 tolls the statute of limitations as to all parties who may be assessed any percentage of fault. Plaintiffs clearly could have asserted a claim against a third party defendant at any time. Indeed, the Iowa Supreme Court in *Reece v. Wertz Corp.,* 379 N.W.2d 1, 5 (Iowa 1985) observed that Section 668.8 was intended as a trade-off to soften the effect of Section 668.4 so that a plaintiff's right to joint and several judgment will not be defeated. What seems to be contemplated however, is that a claim, in fact, be asserted.□

Article Of Interest Continued from page 5

damaged remains may be consumed by the fire.

The determination of the percentage of gas in the air/gas mixture can be very important. If the percentage of gas in the confined area at the time of the explosion can be estimated, the amount of gas in the structure can be calculated.

The two most common explosions that we encounter are caused by the ignition of natural gas and of propane. These two gases are the most common fuel gases used in homes throughout the country. Both gases have many things in common, but each also has unique characteristics.

Natural Gas

Natural gas is essentially methane. Methane is a colorless, odorless flammable gas. The smell of natural gas comes from additives called mercaptanes which are added by the gas utility to help people detect a gas leak. As previously stated, the explosive limits are 5% to 15% by volume when mixed with air. Since natural gas is lighter than air and will rise to the highest point in a room, the force generated by a natural gas explosion will normally initiate high in a room. The upper walls will normally be displaced, with the wall/floor joint serving as a pivot point. Damage from a natural gas explosion will often be found in the higher portions of a structure.

Propane

Propane is a gas that is usually stored in a pressure tank in liquid form. As the pressure is released from the tank, the liquid becomes propane gas. Propane gas is used for the same purposes in a home as natural gas. However, propane's behavior is different from natural gas because of two very important characteristics. First, since the vapor density of propane is 1.6, propane is heavier than air and will tend to collect in low areas. When a propane explosion occurs, the bottoms of walls tend to blow out, and the wall/ceiling joint will be a pivot point. Secondly, the explosive limits of propane are lower than the explosive limits of natural gas. The lower explosive limit of propane is 2.1%, while the upper explosive limit is 9.5%. Since the lower explosive limit of propane is less than that of natural gas, it is more dangerous when a leak occurs.

What The Investigator Should Be Concerned With At The Scene

If the explosion occurs and an investigator/engineer is to be called to investigate the event, it is very important that the SITE BE PRESERVED WITHOUT MOVEMENT OF ANY MATERIAL. If objects are moved at a fire scene, they can usually be placed at their positions at the time of the fire by analyzing the burn patterns. Unfortunately, if a wall section or object has been moved at an explosion scene where there has been no fire, it may be impossible to return the item to its pre-explosion position because there is no record of the original position of the object similar to a burn pattern.

The position of debris at an exlposion site is the main source of information needed to determine the type of explosion, the point of ignition, the gas concentration and the type of explosive gas. If it is not possible to preserve the site, photos that will document the scene should be taken and a sketch showing the relative location of debris in the area should be drawn.

GAS PIPING SHOULD NOT BE REMOVED FOR TESTING. An explosion will usually do strange things to gas piping. To properly test a gas piping system at an explosion scene, the first step is to do a visual review of the system. The visual review is followed by a documentation of the system in place with video and/or photographic equipment. The system should then be tested in place at its operating pressure. The test in place will usually reveal leaks in pipe damaged by falling debris and may also locate leaks that were present prior to the explosion. All leaks have to be evaluated and documented prior to removal of any piping. The system can then be labeled and removed using normal preservation techniques.

THE READINGS OF ANY GAS MEASURING DEVICES SHOULD BE RECORDED AND PRESERVED. The reading on meters or tanks will normally provide information concering the amount of gas that was supplied to the site of the explosion. The utility or propane supplier normally keeps records which show the date and the last reading of the recording device.

THE INVESTIGATION SHOULD BE DOCUMENTED WITH PHOTOGRAPHY/VIDEO TAPE. Calculations and evaluation of theories about an explosion will usually be only as good as the site investigation. Photos and video tape can be reviewed again to refresh the memory and to ensure that all consideration has been given to any facts left at the scene.

Analysis of an explosion scene is difficult and must proceed slowly. The footprints left by an explosion can be very subtle. Many volumes of literature on the events which occur during the brief fraction of a second which we call an explosion have been written. We cannot cover all aspects of this fascinating phenomenon but hopefully have made the reader more aware of its general characteristics.

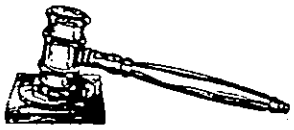
Mr. Belina is president of Belina Science & Engineering, a forensic engineering firm located in Omaha, NE. He has over 25 years of experience in engineering. He specializes in determing the causes of fires, structural failures and product failures.□

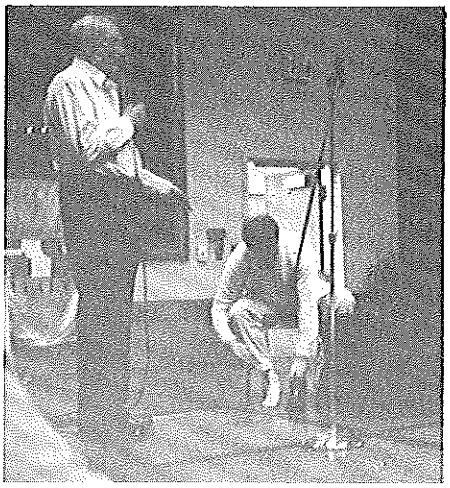
From The Bench Continued from page 4

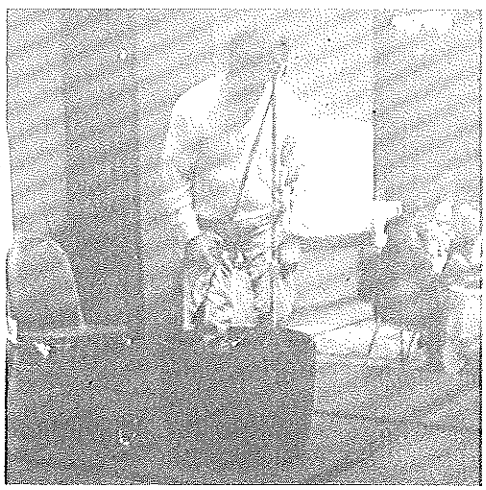
dispositive motions. Many attorneys simply cannot understand why deadlines for such motions are sixty days in advance of trial; those same attorneys have often delayed discovery until the end of the discovery period, and want the opportunity to file a motion for summary judgment after that last deposition is taken.

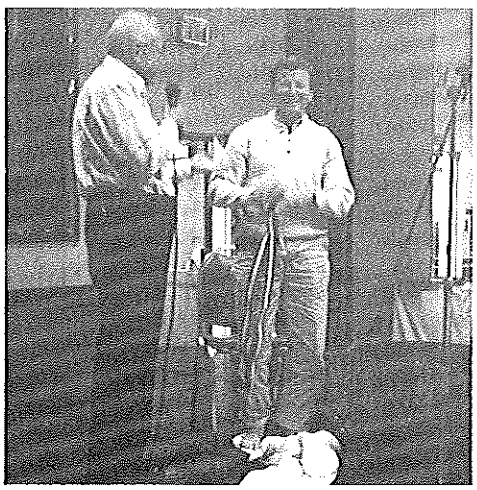
All too frequently I receive a call or visit from an attorney the week before trial requesting that I waive the deadline for dispositive motions or else continue the trial date so that I can carefully consider their dispositive motion and avoid the costly trial that is about to commence. Given the time and resources available to trial judges, they cannot in most instances carefully consider a substantial motion for summary judgment filed seven days before trial.

As both an attorney and judge, I have heard complaints that a judge has forgotten what the pressures and demands are of practicing attorneys, and should be more sympathetic to lawyers' concerns. These complaints undoubtedly have merit in some cases. However, lawyers also need to be mindful of the pressures and demands made upon the judges, and consider the reasons underlying the courts' scheduling requirements. Unless both lawyers and judges can operate with greater efficiency in the future, the current system will be unable to cope with a continually growing caseload.□

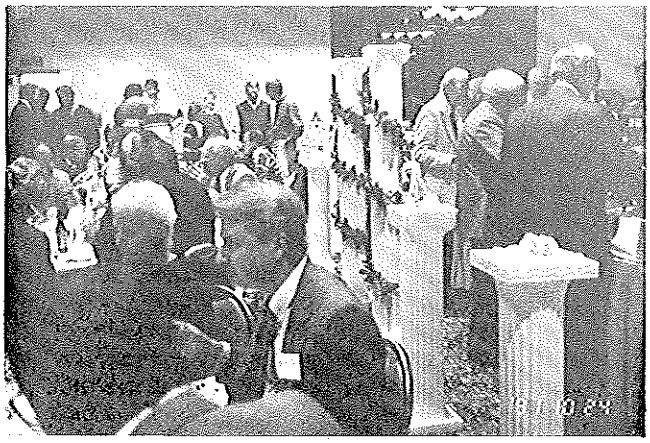








The U.S. North American, International, World and Interworld Grape Stompin' Champion, Alan E. Fredregill, demonstrates how he obtained his coveted titles during the Thursday evening Italian Fest -- **Way to go Champ!** In appreciation of his appearance, Mr. Fredregill received a pair of genuine Italian suspenders.



A relaxed atmosphere and fine Italian Cuisine made Thursday evening's Italian Fest most enjoyable.

FLASH! **We've just received word the bottlers have finished capping the fruits of the Champ's labor and we may serve you all from this stock come October!**

ANNOUNCING THE

1992 ANNUAL MEETING

OCTOBER 1, 2 & 3

Mark your calendars now! The location has been changed to the EMBASSY SUITES Hotel, On The River, 101 East Locust Street, Des Moines Iowa - Don't miss this one.

NOTE OF THANKS and INVITATION

The Editors want to take this opportunity to thank all authors of past issues of *The Defense Update* for their interesting and enlightening articles, all of which have contributed to the success it has enjoyed the past few years. The circulation has increased to include IDCA members (most distant is Hawaii), the Iowa Bench, Iowa Law Schools, and The Defense Research Institute, Inc.

As we start a new year, we want to encourage members to submit articles for consideration in future issues as well as your suggestions about what you would like to see in print. Remember, this is your vehicle of communication among your Iowa colleagues and an opportunity for you to share whatever is important to you, be it your expertise, case results, research, experience, findings of fact, etc. -- we would even consider something controversial (in good taste of course!)

The *Defense Update* is published quarterly, January, April, July and October, and articles must be in the hands of the Editors (back page) two months in advance of each issue for consideration. *If you are interested in a little PR - here's your opportunity!*

Jim, Ken, Kermit, Mike, Tom

Good-By Jack . . .
Welcome Tom!

Jack Grier has left our editorial board to assume his duties as President-Elect of the Association. Jack was the impetûs behind the establishment of this newsletter and his participation will be sorely missed. Jack's spot has been assumed by THOMAS J. SHIELDS of the law firm of Lane & Waterman, Davenport, Iowa. Tom began his duties with this edition. We look forward to the contributions Tom will make in the future.

'Tis The Season To Be Jolly?

T'was the night before Christmas
and all through the place
The employees were partying
'til one fell on his face.

The employer was sued
for supporting such fun
but who actually lost
and who actually won?

The employer defended a suit
it's insurance company paid money
The employee still hurt
and didn't think it funny.

Who won and who lost
you ask in remorse.
Need you really wonder
It was the lawyers, of course.

"Verses one and two are courtesy of *Impact*, the newsletter of Matchett, Attorneys at Law, P.O. Box 80523, Baton Rouge, La. 70898. Verses three and four are courtesy of an attorney in Cedar Rapids who prefers to remain anonymous lest judges request future pleadings and briefs in verse."

FARM FACTS

- Agriculture is the nation's largest employer, with 21 million people working in some phase - from growing food and fiber, to selling it at the supermarket.
- 45 percent of the 2.1 million farms in this country are operated by part-time farmers.
- 71 percent own all of the land that they operate.

FROM THE EDITORS

A disturbing trend has arisen in the past few years with respect to the field of medical discovery. We refer to the practice of doctors charging fees many times their normal hourly office rate for participation in depositions concerning their patients. It is unclear whether this practice arises as retaliation for the perceived medical malpractice crisis of the 80's, or is simply an attempt to "cut a fat hog." Perhaps their motivation is not to collect the fee at all, but to avoid participation in the process by pricing their time beyond an acceptable level. Whatever the cause, an ever increasing portion of the medical community is coming to the conclusion that it is acceptable to demand exorbitant fees (usually in advance) for the privilege of wasting their time on matters as insignificant as the compensation due their patients.

This practice must end. The physicians of this State must realize that they have become an integral part of the personal injury litigation process. Their participation cannot be avoided nor can they unjustly profit therefrom. They are entitled to courtesy in working discovery into their schedules and they can expect a reasonable fee commensurate with their normal hourly office rates. We in the defence bar, and the judicial system in general, owe them nothing more.

The time is ripe for the Iowa Defense Counsel Association to initiate a dialogue with the State Medical Society with an eye towards establishing guidelines in this area. Doing nothing is no longer acceptable as it leaves us with two intolerable alternatives: either pay exorbitantly high fees, or schedule all medical depositions by subpoena with fees set by the court. Hopefully by working together we can avoid these two extremes and reach a solution acceptable to both the legal and medical communities.

The Editors: Kenneth L. Allers, Jr., Cedar Rapids, Iowa; Kermit B. Anderson, Des Moines, Iowa; Michael W. Ellwanger, Sioux City, Iowa; James A. Pugh, West Des Moines, Iowa; Thomas J. Shields, Davenport, Iowa.

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