defense UPDATE

The Iowa Defense Counsel Association Newsletter July, 1992 Vol. V, No. 3

FEES V. MUTUAL FIRE: THE EXPANDING DOCTRINE OF ECONOMIC DURESS AND THE VANISHING OPTION OF SETTLEMENT AND RELEASE

By Joel S. Hjelmaas, Des Moines, Iowa

A recent decision of the Iowa Court of Appeals will, if left to stand, have a profound impact on the validity of settlements in Iowa. In *Fees v. Mutual Fire and Automobile Insurance Co., No. 2-044/91-919 (Iowa App. March 24, 1992),* the Court of Appeals used the doctrine of economic duress to find that a release between an insurance company and its insured was insufficient to prevent a subsequent lawsuit. The release in *Fees* was not sufficient to support a summary judgment, even though the insureds settled with Mutual Fire for within $1,000.00 of their original demands; they were represented by an attorney during the settlement process; and they accepted the benefit of the settlement for almost 19 months before bringing suit.

Many troubling questions arise in the wake of *Fees.* It is clear that *Fees* expands the doctrine of economic duress, however, the limits of that doctrine are now very unclear. The most troubling question is whether a client can ever settle with a party facing financial difficulty if that party can later avoid the release by claiming economic duress. Examination of *Fees v. Mutual Fire* will highlight the problems created by this decision.

On April 1, 1988, Kenneth and Janet Fees' home was destroyed by fire. The Fees had insurance through Mutual Fire. Mutual Fire considered this to be a questionable claim because the origin of the fire was disputed and there appeared to be certain discrepancies in the values of property claimed by Mr. and Mrs. Fees.

The State Fire Marshal's investigation concluded that the fire was accidental and had been caused by faulty wiring. Mutual Fire hired John Woodland, an experienced fire investigator, to look into this fire. Mr. Woodland's investigation concluded that the fire was incendiary in nature and was not accidentally caused. Mr. Woodland told Mr. Fees, "The fire is arson. We are not saying that you started it. We are saying someone started this fire." That investigation showed two points of origin for the fire, one in the first floor hallway and one on the basement stairs. Evidence indicated the presence of a liquid accelerant. Contrary to the State Fire Marshal's report, Mr. Woodland's investigation ruled out electrical malfunction as a cause of the fire.

In addition to the dispute over the cause of the fire, Mutual Fire disputed the values of the property claimed by Mr. and Mrs. Fees. Mutual Fire believed that the proof of loss submitted by Mr. and Mrs. Fees conflicted with financial statements filed in connection to their bankruptcy proceedings in 1987. According to Mutual Fire, the proof of loss claimed a significantly higher value for some items of personal property, and showed many items that were not claimed in bankruptcy. Mr. and Mrs. Fees countered by arguing that the bankruptcy schedules indicated fair market value and the proof of loss indicated replacement value. Nonetheless, the proof of loss as submitted indicated that Mr. and Mrs. Fees purchased approximately $9,000.00 worth of additional personal property between January of 1987 and April 1, 1988. These purchases were made when the Fees had an annual income of approximately $12,000.00 to $14,000.00.

During the time that they were making this claim, Mr. and Mrs. Fees were represented by an attorney. On August 17, 1988, their attorney made a demand on Mutual Fire for $45,637.41. Mr. Fees received a copy of this letter. Mutual Fire settled with the Fees for $43,257.92, and waived the deductible. Mr. and Mrs. Fees had previously received an advance of $1,000.00 from Mutual Fire to use in renting a place to stay. Mr. Fees acknowledged that this settlement was within about $1,000.00 of the amount they requested on August 17, 1988.

On September 3, 1988, Mr. and Mrs. Fees executed a release. They sought the advice of their attorney in regard to this release. Their attorney explained that signing the release would result in a full and final settlement of their claim. Mr and Mrs. Fees' signatures were notarized by their attorney. The attorney's notarization stated that Mr. and Mrs. Fees executed the release as their voluntary act and deed. Interestingly, Mr. Fees had sold health and life insurance before the fire. Upon questioning, Mr. Fees acknowledged that he had received training in insurance, and conceded that he must have understood the impact of the policy release.

Almost 19 months after the Fees executed the release and received the

Continued on page 6

MESSAGE FROM THE PRESIDENT

David L. Hammer

Recently while attending a lawyer's meeting in the West, I experienced my first, and so far as I am concerned, my last earthquake. My wife, Audrey, who is far more adventurous than I, responded when I told her about it, with almost the same words when I advised her I had been in a crash landing at the Minneapolis Airport--"You have all the fun."

The earthquake was not the only cataclysmic event from the West coast, for recently also was the national tragedy of a trial, a verdict and a devastating and divisive social response. The trial will undoubtedly be examined at length and there will be those extremists who will predictably find what they want to find in the verdict, which is the failure of the American legal system.

We, as lawyers, and particularly as advocates, should continually and critically re-examine our legal system and its component parts; that is not only a professional obligation but a professional necessity. And any analysis, however brief, of our legal system must consider that the component parts are the judges, the lawyers and the litigants as the representatives of a larger public. My concerns, which grow more troublesome as I grow older, are my own, as they have been offered to nor endorsed by this Association. Indeed, my concerns are not even those of a defense lawyer, but simply as an advocate who for over 35 years has had the privilege of appearing in the courts of this State.

THE PUBLIC'S VIEW

The public's view of the lawyer as advocate is the easiest to state for the public pulls no punches. The estate of the lawyer has fallen appreciably and increasingly--one can almost say exponentially-- in recent years. It is now almost impossible for younger lawyers to appreciate the high esteem in which lawyers have historically been held.

The laity believes that lawyers will cheerfully sacrifice truth for result and integrity for pay. It is not important, unfortunately, whether that is true or false, for the belief itself carries with it a frightening force. We are all too close to the problem to be able to take the long view, but the problem centers around the lawyer as advocate. That means litigation and while some may claim there has not been increased litigation, the public perceives it as so, and if the annual incremental increases in litigation may be regarded as not large, the totals on the basis of a decade or two gives a different picture. Certainly since World War II we have had what the public regards as "a litigation explosion." This is how it has been styled by the public and the designating language itself carries its own particular implication.

It is reasonable to expect that because we have substantially more lawyers, there will be substantially more litigation. There is also a greater willingness on the part of the public to litigate. "We'll sue" is the all-too-frequent cry of the laymen, rather than lawyers. Lawyers should know the hazards of litigation for it is the ultimate "crap shoot" where someone wins and someone else loses. And by the formulation of the issues in the heat of conflict, the issues sometimes transform into other issues.

When I started practicing, some say before the Civil War, a plaintiff in this State had to prove his/her freedom from contributory negligence in any manner or in any degree. Later, the burden was more reasonably limited to a proximately caused conduct, and still later the burden was shifted entirely to the defendant. This constitutes a profound change, and has undoubtedly contributed to more litigation. How much of this change has been the result of a change in social consciousness and how much the result of pressure by members of the bar, I cannot opine. I do know that changes in the law do not last longer than the public wishes them to last, for in the long run the public does and should have the last word.

If one takes the long view, it is clear that the pioneer concept of self-reliance has not survived the increased urbanization of our society. Being interdependent socially rather than independent, has brought its own social consequences, but since the Rooseveltian Revolution, a response to the Great Depression, there has not been an increasing public desire for society to level the playing field. The concept of fault by one party has given way to the concept of need by another as a justification for the transfer of funds, and as the law of damages is the process of the orderly transfer of funds from one to another, this has been profoundly reflected in the law. As it is procedurally easier to sue so the requirements of a successful suit have been reduced. The history of the law over the last 40 years has been to make it easier to sue and easier to

Continued on page 9

Avoiding "Excess" Exposure For "Excess" Verdicts—A Suggestion

By Booth Muller, CPCU

Reprinted with permission of the *Claims Section Quarterly,* The Society of Chartered Property and Casualty Underwriters (CPCU), Malvern, Pennsylvania.

Having the jury return a verdict in excess of the defendant's liability insurance limits is never desirable from the insurer's standpoint. It is even more distasteful, however, if the insurer is obliged to pay the "excess" portion of the verdict because a court decides that it has, in bad faith, been responsible for the excess verdict by reason of having placed its own interests over those of its insured.

How can an insurer be certain of avoiding this exposure?

One solution, of course is to offer to pay limits early on.

Another possible solution, however, may be available in certain circumstances. Although I have never actually seen this solution used, and although it carries some dangers with it, it seems to me that it could be of significant value in the right situation. I would welcome input from readers of *CQ*.

Let's present a hypothetical situation. (Well, sort of hypothetical—I was recently involved in the handling of a case with very similar facts involved.) The insured and an acquaintance were operating jet skis on a small lake. The acquaintance lost control of his craft and pitched into the water right in front of the insured's machine. The insured was unable to avoid striking him, and he suffered a very severe head injury. When suit was filed, he had already incurred nearly $100,000 in medicals, and he clearly had a severe permanent total disability. In terms of damages, the case probably was worth in excess of $1 million. Liability, on the other hand, appeared very doubtful. In the jurisdiction in which suit was filed, the plaintiff was barred from recovery if his negligence exceeded the insured's; we believed we had a 75 or 80 percent chance for a defense verdict. On the other hand, if the jury were to decide that the plaintiff was only 50 percent at fault, and his injuries were worth $1 million, the insured would be faced with a $500,000 verdict. Liability insurance limits were $100,000.

The plaintiff's attorney began talking about the bad faith exposure for the insurance company. Indeed, if there was a 20 percent chance of a $500,000 verdict, that would indicate that the insurer should be willing to pay $100,000 to protect its insured.

"The way a plaintiff attacks a defendant's insurance . . . is to take an assignment from the insured/defendant when the excess verdict is returned by the jury."

The proposed solution: The insurer approached the insured with an offer to pay $5,000 to the insured himself in return for a species of policyholder's release. The insurer explained its position that this was a no-liability case, but that there was a small (but significant) possibility of a verdict in excess of the policy limits. The insurer would defend the lawsuit to a verdict. If the jury came back with a defense verdict, that would, of course, be the end of it. On the other hand, if the jury came back with an "excess" verdict, the insured would have relieved the insurance company of any obligation it might have had to settle within policy limits and would expressly represent that he had signed away any claim he might otherwise have for "bad faith" handling by reason of this excess verdict.

Obviously, if there was an excess verdict, the insured would probably want to go through bankruptcy to discharge the obligation. But, he would have $5,000 to pay for that. And remember, if a defense verdict were returned, he would still have $5,000 to do with as he wished.

The way a plaintiff attacks a defendant's insurance policy (for amounts in excess of policy limits) is to take an assignment from the insured/defendant when the excess verdict is returned by the jury. In this case, since the insured would have already given up his right to pursue the insurer for bad faith, there would be nothing to assign.

A number of concerns might be raised by thoughtful claims handlers; for example:

1. One of the primary objections to this proposal may be one of ethics. Is it ethical to put a person into a situation where, if things go wrong, he will be essentially forced into entering bankruptcy proceedings?

Personally, I don't think this is a significant problem if—but only if—a full disclosure has been made to the insured and his consent to the proposal is an informed one. Before agreeing to such a proposal, an unsophisticated claimant should almost certainly be represented by counsel. If we are doing our jobs, we will have already recommended that he seek counsel to give him advice on the excess exposure.

2. What about controlling the defense? If we enter into an agreement like the one proposed, we certainly still would want to see our insured receive a defense verdict. However, if there is an excess verdict, we would no longer care, perhaps, if it was a "banger" of an excess verdict. Does that create some sort of conflict of interest for defense counsel? I don't think so. In

Continued on page 8

"Vicarious" Liability For The Sale Or Delivery Of An Alcoholic Beverage To A Person Under The Legal Age Of 21

By F. Joseph Dubray, Sioux City, Iowa

On the phone is Mr. I.M. Clean, the excited president of XYZ, Inc., a corporation that you represent. Mr. Clean has just been served with a citation charging him, individually, and XYZ, Inc., with the sale or delivery of alcoholic beverages to a person under the legal age of 21 in violation of Iowa Code Section 123.49(2)(h). "How can this be?" he asks. He has never sold or delivered any alcoholic beverage to anyone from any of the company stores and was not in any of the company stores on the date described in the citation.

An improbable or unlikely scene? Unfortunately no. Mr. Clean and XYZ, Inc. have just become victims of one of the "sting" operations being conducted in the State of Iowa focusing on the sale or delivery of alcoholic beverages to persons under the age of 21. Similar prosecutions against corporate officers have been attempted in other jurisdictions.

Can you remove the "stinger" from Mr. Clean and your corporate client, XYZ, Inc. and protect them from the lingering stigma of a criminal prosecution and conviction? Perhaps. Consider the following.

Under the provisions of Iowa Code Section 123.49(2)(h), the State of Iowa is required to prove beyond a reasonable doubt that Mr. Clean and XYZ, Inc. did:

> Sell, give or otherwise supply an alcoholic beverage, wine, or beer to any person, knowing or having reasonable cause to believe the person to be under legal age. Iowa Code Section 123.49(2)(h) (1991).

If an XYZ, Inc. employee sold or delivered an alcoholic beverage to a person under legal age, the issues for Mr. Clean and XYZ, Inc. would be proof of their knowledge of and actions regarding the sale. Due process, language of the Iowa Code and standards established by the Iowa Supreme Court should require proof that Mr. Clean and XYZ, Inc. "knew or had reasonable cause to believe" the illegal sale would take place or that the illegal sale was made with their direction, sanction or approval, focusing on whether:

1. They authorized the sale of an alcoholic beverage to a person under the age of 21 ("the illegal sale");
2. They had knowledge of the illegal sale prior to or during the sale and did not act to prevent it;
3. XYZ, Inc. had a policy that prohibited the illegal sale;
4. The XYZ, Inc. policy against such sales was monitored and enforced by instruction and training of XYZ, Inc. employees and posting of notices of such policy in the store; and
5. The employee who made the sale, knew of the XYZ, Inc. policy against such sale, had received instruction and training from XYZ, Inc. regarding that policy and in making the sale violated the policy without the consent or authority of Mr. Clean and XYZ, Inc.

No Iowa Court decision upholds the constitutionality of Iowa Code Section 123.49(2)(h) when applied to a corporate employer in an effort to hold the corporate employer "vicariously" criminally liable for the unauthorized illegal conduct of an employee. The issue has recently been presented in Minnesota and Georgia with the Supreme Court in each state finding unconstitutional attempts to impose the type of vicarious criminal liability with which Mr. Clean and XYZ, Inc. are threatened. See *State v. Guminga,* 395 N.W.2d 344 (Minn. 1986) and *Davis v. City of Peach Tree City,* 304 S.E.2d 701 (Ga. 1983). For an earlier conflicting view see *Commonwealth v. Koczwara,* 397 Pa. 575, 155 A.2d 825 (1959), cert. denied, 363 U.S. 848, 80 S.Ct. 1624, 4 L.Ed.2d 1731 (1960).

As the language of the statute clearly provides, proof of knowledge is a required element of proof of criminal liability under Iowa Code Section 123.49. In several cases in which the Iowa Supreme Court has considered similar issues, they have established that Iowa Code Section 123.49 requires that to be criminally liable a defendant must be shown to have been actively involved with the illegal sale. See *Bauer v. Cole,* 467 N.W.2d 221 (Iowa 1991). In contrast, in civil administrative proceedings under other provisions of the Iowa Code that regulate sale of alcohol beverages and expressly provide for employer liability, Iowa courts have held that the licensee-employer may be held responsible for the acts of its employees without regard to the direct managerial culpability without violating due process requirements. See *Randall's International Inc. v. Hearing Board of Iowa,* 429 N.W.2d 163, 165 (Iowa 1988); and *R. & V. Ltd. v. Iowa Department of Commerce,* 470 N.W.2d 59, 60 (Iowa App. 1991).

In *Bauer* an injured passenger and his parents sued the hosts of a party claiming that the hosts allegedly furnished beer to the driver who was

Continurd on page 12

Are Defense Costs Controllable?

By Kenneth L. Allers, Jr., Cedar Rapids, Iowa

"The more things change, the more they remain the same." I do not know who should receive credit for that quote, but it certainly applies to the continuing relationship between insurance companies and defense counsel. Anyone who has practiced law in the last twenty years can tell you that both the law and their practice have changed considerably. However, the constant has been that the insurance company continues to look for any method to control defense costs. The debate over the use of in-house counsel versus outside counsel has been explored extensively, and no further comment is needed on that topic.

Three ideas have developed or evolved from attempts to control the traditional time and expense billing. Careful examination of all three is required by an insurance company and defense counsel.

The first is what can be named "lump sum defense cost". In this system, the insurance company agrees to send to a law firm all of the files requiring legal work in exchange for a predetermined dollar amount or lump sum for an entire year. As an example, the XYZ Insurance Company contracts with the ABC Law Firm to handle all of its defense work for one year for the sum of $100,000.

The second arrangement could be called "discounted rates". In this system, the insurance company will send to a law firm a guaranteed number of files in exchange for a discounted rate on legal fees, i.e. lowering the hourly rate from $95 to $75.

The last system could be labelled as "task billing". The insurance company and the law firm agree that each task performed by the law firm will be billed at an agreed upon dollar amount. For example, the law firm may receive $300 for a deposition regardless of the number of hours put into it, or for the filing of a set of interrogatories the law firm would receive $100, regardless of the number of interrogatories.

The motivation behind these creative billing systems is found in the unique system in which the insurance companies must attempt to price their products. Unlike manufacturers, the insurance company is not able to price out its material, labor, overhead, and then develop a profit. The insurance company can determine what its overhead will be, but its material cost (claim cost and adjustment expense) is projected on past experience.

Unfortunately, with our changing law, those numbers can quickly become flawed. Therefore, there is a never ending quest within all insurance companies to attempt to solidify any claim expense to a set figure, eliminating as much uncertainty as possible.

There are advantages to these systems to both the insurance company and the defense attorney. These systems allow the insurance company to control, to an extent, its defense cost to ensure that it can price and receive a profit on its product. By agreeing to one of these systems, the defense firm can guarantee itself work in the future, reducing or eliminating second guessing or justification of fee bills, and reduce the amount of effort required in the billing process itself.

There is no need to debate which system is superior to the others. In fact, all of these systems are useless unless one key element is added. No system will work unless the insurance company finds a law firm which is both effective and efficient. What benefits are there in the "discounted rate" system of billing at $75 instead of $95, if it takes the law firm an hour and a half to prepare interrogatories rather than one hour. Unless my math skills have gone awry, one hour of legal work at $95 an hour is cheaper than one and one half hours of legal work at $75 an hour.

If the law firm has agreed to a lump sum payment for all legal work for the year, a situation could arise wherein the law firm finds that after nine months, the amount it received is going to be insufficient to cover its efforts for the year. Now they are faced with the conscious or subconscious dilemma of two competing files: Do they work on the file from the insurance company for which the lump sum agreement was made and is no longer profitable, or work on the file from an insurance company which can be billed out at their normal hourly rate?

What this boils down to is what every insurance company claims department must live by. You must do your homework and your legwork in any claims investigation. You must do the same homework and legwork in investigating the law firm with which you wish to make any agreement. Cheaper is not always better, as we all have learned at one time or another. The first step to any agreement must be the search for a law firm which is both effective and efficient, otherwise, any agreement you reach with a law firm is a waste of resources, and will probably be more expensive than your current system. The rule that applies to corporate America applies to law firms. Those who are effective and efficient will survive; those who are not, will fall by the wayside. The agreement is not the key to reducing defense costs. The key for insurance companies is finding a law firm which is effective and efficient. The key for the law firm is to be effective and efficient.□

Fees v. Mutual Fire Continued from page 1

money, they filed suit against Mutual Fire for breach of contract and bad faith failure to settle the claim. The defendants raised the previously executed release as an affirmative defense and moved for summary judgment. The Fees resisted the defendants' motion for summary judgment claiming that they had been coerced into signing the release.

The financial condition of Mr. and Mrs. Fees was considered by the court. Prior to the fire, Mr. and Mrs. Fees had been through bankruptcy. At the time of the fire, Mr. Fees was selling insurance and working at a bar. Mrs. Fees was working in Des Moines for Greyhound. Apparently, Mr. and Mrs. Fees also ran a marina at Wall Lake after the fire. After going through the initial advance of money from Mutual Fire, they lived in a tent at Wall Lake. According to Mr. Fees, living in a tent was "a little deal we cooked up."

The District Court granted the defendants' motions for summary judgment. In making this decision, Judge Seiser stated:

> In my opinion, there was no coercion, duress or fraud as a matter of law, but they're estopped because of the course of their conduct and the document and the release that they executed. This was a compromise of a disputed matter, and the fire losses and values of property, and whether it was or was not arson are often matters that are in dispute in negotiations.

On appeal, a divided panel of the Court of Appeals reversed the District Court. Chief Judge Oxberger and Judge Hayden ruled that they could not say as a matter of law that the plaintiffs did not suffer economic duress. Judge Habhab dissented, arguing that as a matter of law the Fees could not establish economic duress. When this decision is examined, it becomes apparent that the majority's analysis is based on a generalization that equates the legal doctrine of economic duress with general ideas of financial difficulty.

A release is a contract, and the validity of a release must be examined under the principles of contract law. *Wright v. Scott,* 410 N.W.2d 247, 249 (Iowa 1987). *Wright* provides the following perspective on releases:

> Settlement agreements are by their very nature the voluntary resolution of uncertain claims and defenses. Because parties are unsure about the outcome of litigation they have a real incentive to accept a compromise settlement agreement, realizing that if they continue they may fare better but they may fare worse.

Id. at 249. The *Wright* Court applied contract law principles to a disputed settlement, and held that a unilateral mistake of law was not, as a matter of law, sufficient to set aside a release. The backdrop to the analysis in *Wright* was the basic principle that the law favors settlement of controversies. *Id.* at 249-50.

As with any other contract, a release may be set aside if the release was obtained by wrongful coercion or duress. The doctrine of economic duress has been the source of considerable confusion. The legal doctrine of economic duress does not protect parties solely on the basis of financial hardship or disparity in bargaining power. Every contract is a choice between alternative evils, and "all contracts involve some degree of coercion." Note, *Economic Duress After the Demise of Free Will Theory: A Proposed Tort Analysis, 53* IOWA L. REV. 892, 897 (1986).

In Iowa, the doctrine of economic duress was discussed in *Turner v. Low Rent Housing Agency,* 387 N.W.2d 596 (Iowa 1986). The *Turner* Court adopted the rule as set out in RESTATEMENT (SECOND) OF CONTRACTS, section 175(1), at 475 (1981):

> If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.

Turner, 387 N.W.2d at 598. Under this standard, duress exists where:

1) One party involuntarily accepted the terms of another;
2) circumstances permitted no alternative; and
3) such circumstances were the result of coercive acts of the other party.

Id. The *Turner* Court defined economic duress by quoting the Eighth Circuit:

> the plaintiff must go beyond the mere showing of a reluctance to accept and of financial embarrassment. There must be a showing of acts on the part of the defendant which produced these two factors. The assertion of duress must be proven by evidence that the duress resulted from the defendant's wrongful and oppressive conduct *and not by plaintiff's necessities.*

Id. at 599 (quoting *W.R. Grimshaw Co. v. Nevil C. Withrow Co.,* 248 F.2d 896, 904 (8th Cir. 1957)). This standard, which requires wrongful and oppressive conduct by the defendant, is also illustrated in decisions from other states. For example, in *Sorensen v. Coast-to-Coast Stores, Inc.,* 353 N.W.2d 666, 670 (Minn. App. 1984), the Minnesota Court of Appeals addressed the concept that the financial difficulties of a party are not equivalent to the legal doctrine of economic duress:

Continued on page 7

Fees v. Mutual Fire Continued from page 6

> The loss of his [the plaintiff's] business and his escalating debts may have created great stress upon Sorensen [the plaintiff] but, absent coercive acts by defendant, it will not rebut his intent to execute the release.

Id.

One major area of difficulty in analyzing *Fees,* and other cases involving economic duress, is the lack of definition for "wrongful" or "improper" conduct by the defendant. As discussed earlier, many, if not most, contracts involve some level of economic coercion as well as a disparity in bargaining power. Ambiguous terms like "wrongful," "improper" and "coercive" have virtually no meaning in the abstract. To be consistent with a contract law analysis, wrongfulness or coercion in this context should be examined under the good faith standard that applies to all contracts. *See e.g.* Iowa Code § 554.1203 (1991) (obligation of good faith in UCC). If, as a matter of law, the facts will not support a finding that the defendant acted in bad faith, the defendant should be entitled to summary judgment.

When the facts of *Fees v. Mutual Fire* are closely examined, it is difficult to understand the decision of the Court of Appeals. Two particular aspects of this settlement show that the release was voluntarily executed and that the acts of Mutual Fire could not amount to bad faith. First, the consideration that the plaintiffs received was almost exactly what they asked for. Second, the attorney for the plaintiffs participated in the settlement process, advised the plaintiffs, and signed off on execution of the release as voluntary.

Mutual Fire settled the plaintiffs' claim for within approximately $1,000.00 of the amount demanded by Mr. and Mrs. Fees. This demand was made by their attorney. In addition, the plaintiffs avoided further scrutiny of their bankruptcy records and the cause of the fire by executing the release. Because the plaintiffs received the equivalent of what they asked for, they cannot claim economic duress.

One commentator described this rule of law:

> The threshold issue in common-law economic duress cases is adequacy of consideration...a rough standard of equivalency of consideration normally insulates a contracting party from a claim of economic duress. On the other hand, if the consideration is seriously imbalanced, the inequality could serve as a tip-off to courts that closer scrutiny is necessary.

Hillman, *Policing Contract Modifications Under The UCC: Good Faith and the Doctrine of Economic Duress,* 64 Iowa L. Rev. 849, 882 (1979) (citations omitted).

Another factor that demonstrates voluntariness by the plaintiffs is the participation of their attorney in this settlement process. The presence of counsel is a strong factor indicating the intent to release a claim. *Sorensen v. Coast-to-Coast Stores, Inc.,* 353 N.W.2d 666, 669 (Minn. App. 1984). The plaintiff's attorney made the demand on Mutual Fire and informed the plaintiffs of that demand. The defendant must be allowed to assume that this demand was reasonable. The plaintiff's attorney certainly had the knowledge and experience to make a demand that was in the best interests of his clients. Once Mutual Fire made its counteroffer, the plaintiffs were counseled by their attorney about the merits of their case and the effect of the release. This level of representation and involvement by the plaintiffs' attorney cannot be ignored, and indicates that Mr. and Mrs. Fees voluntarily agreed to the terms of the settlement.

The *Fees* decision also fails to provide any guidance in determining how much financial stress must be present to invoke the doctrine of economic duress, and whether those financial difficulties must result from the defendant's conduct. As previously discussed, the doctrine of economic duress involves more than considering whether one party was facing financial difficulty. Economic difficulty is a concept that escapes a universal standard and means different things to different people. By definition, almost everyone making a fire claim will be under financial stress. The law clearly provides that financial stress, in itself, will not render a contract voidable, and that the economic duress must be caused by the wrongful acts of the defendant. In spite of these legal standards, *Fees* indicates that many parties will be incapable of executing a release, even if the other party acts in good faith.

The record shows that Mr. & Mrs. Fees experienced financial stress, including bankruptcy, long before their house caught fire. Under *Turner,* the Court must consider the defendant's role in creating the plaintiffs' economic difficulty. Even if that portion of the *Turner* analysis is ignored, the question remains of whether the plaintiffs' financial difficulties were so extreme that they were rendered incapable of voluntarily accepting the terms of the settlement. The record shows that Mr. and Mrs. Fees were both working, that they received an advance from Mutual Fire, and they ultimately received basically what they asked for.

Finally, even if this release was obtained through economic duress, Mr. and Mrs. Fees have ratified this settlement by accepting the money and waiting almost 19 months to assert

Continued on page 8

Fees v. Mutual Fire Continued from page 7

their claims. In *Turner,* the Iowa Supreme Court stated, "an alleged victim of economic duress may not obtain part of the benefits of an agreement and disavow the rest." 387 N.W.2d 599. This statement is consistent with the rule of law that a transaction executed under duress is not considered void, but merely voidable at the option of the person coerced. "[C]onduct on the part of the plaintiff, such as acceptance of monies tendered in accordance with the settlement, may constitute such a ratification of the settlement as to make it binding upon the plaintiff." Annotation, *Refusal to Pay Debt as Economic Duress or Business Compulsion Avoiding Compromise or Release,* 9 A.L.R. 4th 942, 948. In this case, the plaintiffs accepted the money, apparently used it up, and 19 months after the settlement asked for more money through this lawsuit. Under the principles of contract law, the plaintiffs ratified this agreement, regardless of whether there was economic duress.

In summary, the decision of *Fees v. Mutual Fire* is flawed and should be reversed by the Iowa Supreme Court. Although the majority paid lip-service to the standards set out in *Turner,* their decision ignored several important factors, such as the adequacy of consideration provided to the plaintiffs, their representation by counsel, and the 19 months that elapsed between the settlement and the time they filed this lawsuit. This decision also provides no guidance for determining what conduct is "wrongful" or "coercive," and infers that a general condition of financial stress is equivalent to the legal doctrine of economic duress. Iowa lawyers are left to guess as to the application of the doctrine of economic duress. It is reasonable to assume that, in the wake of *Fees,* economic duress will be present in virtually all settlements that involve a party facing financial difficulties.

Not only does *Fees* cloud the application of the doctrine of economic duress, it has placed that doctrine at odds with the well-established principle that the law favors settlement of controversies. After *Fees,* one must ask the question of when a settlement with a party facing financial difficulty can be valid. Apparently, neither adequacy of consideration nor active representation by counsel will ensure the validity of a release. It also appears that a party will not be found to have ratified a settlement agreement by accepting the terms of the agreement and spending the money. Perhaps parties to releases will have to seek court approval of each settlement.

The misapplication of the doctrine of economic duress by the Iowa Court of Appeals and the confusion resulting from this decision must be corrected. The Iowa Supreme Court should apply the well-established principles of contract law to this case and reverse the decision of the Court of Appeals.□

Editor's Note: **The Supreme Court has granted the Defendant's Motion for Futher Review and set oral argument for the week of July 12, 1992.**

Excess Verdicts

Continued from page 3

point of fact, the insured probably doesn't care if there is a "banger" either. In fact, with an agreement like this, there may be less potential for conflict of interests for defense counsel than in the ordinary case with an excess exposure.

3. Is this fair to the injured party? He seems to be the only potential loser. I would submit that the variability in the collectibility of a tortfeasor is often "unfair"—but we have no ethical duty to address that matter. Our obligation is to protect both our insured and the assets of the company. The tortfeasor could be completely uninsured. That would be unfortunate for the injured party; but sometimes, life isn't fair.

4. If the insured rejects our offer, haven't we announced that this is an "excess" case and set ourselves up for a bad faith claim? Maybe. Perhaps such proposals should be made only in cases where, if rejected, the insurer is willing to tender its policy limits.

5. From where does the $5,000 (which the insurer is going to pay to the insured) come? Is it a loss payment or an expense payment? An argument can be made for either case, actually. However, I could well imagine some state insurance departments objecting to the characterization of such payment as an expense. Can it legitimately be paid as a loss? If so, it would seem that the available monies for payment of any judgment would be reduced.

If the injured party were to get a judgment against the insured and file an action against the insurer in the nature of a garnishment, might he successfully argue that he should be entitled to the full $100,000? I don't think he should be able to succeed in such an argument. In the first place, the insured is not required to carry that much liability insurance protection. Until a judgment is rendered against the insured, the duty on the part of the insurer to pay out monies on the insured's behalf remains a contingent obligation. I see no reason, in theory, why an insured and insurer could not contract, subsequent to an accident, to reduce the amount of the policy limits available for that accident. In a case of this nature, it might even be conceivable to approach the insured and offer him $75,000 for a full and final policyholder's release. He could then use that money to settle or defend the

Excess Verdicts Continued from page 8

claim as he saw fit. The insurance company would be out of it. If he spent $10,000 on legal fees and walked away with a defense verdict, he would have $65,000 to put in his pocket or spend as he liked. On the other hand, if the plaintiff obtained a verdict of more than $65,000, the (former) insured would simply declare himself to be bankrupt.

Admittedly, this is an unconventional approach. I suspect it will make many claims people squirm uncomfortably. Frankly, it makes me a little nervous. But I've been unable to discover why it wouldn't work if the insured were agreeable. (In the case with which I was involved, the insured was not agreeable and the insurer wound up the case by paying its $100,000 policy limits.)

Booth Muller, CPCU, is with the Claims Technical Services Administration of State Auto's Home Office.

Message from the President Continued from page 2

suceed. Any fault by a party no longer suffices to bar his or her claim and now respective fault is the rule. Our society has, at least for the last 70 years, sought to ameliorate risks by extending the social safety net. If in our time Communism has failed as a national force, it has prevailed conceptually through the aegis of taxation in the concept of from each according to his means to each according to his need. So it is that the public itself must bear some considerable responsibility in the litigation explosion.

While the lawyer surely cannot be blamed for carrying out what the public wants, the lawyer can be blamed for seeking to change the system for his or her own professional gain.

If analysis of the increase in litigation should not rest on numbers, which after all is an easy quantitative analysis, how should it be viewed? A qualitative view is the answer and it would ask questions like these: Are serious matters being presented or merely quibbles? Is litigation the appropriate remedy for the problem? Have other less expensive and less time and cost-intensive remedies been tried? Have the parties been obliged to try to talk out their difficulties? Have appropriate and available grievance procedures outside the law been followed? If the problem is, say a school issue, have the available non-legal methods been pursued? As litigation is the ultimate resolution of any problem within our legal system, have other less-consequential procedures been followed?

Insurers, a group to which I have always felt the plaintiff's bar has not been sufficiently grateful, are intimately involved in the litigation process, and that industry, claimed by some not to be a lawyer-favoring one, are using alternative dispute resolutions which still call for a substantial role by attorneys. The public may not.

Advocates are criticized both by judges and by the public for a too extensive use of the discovery process. Discovery is expensive, yet it has to be used to narrow the factual issues and the lawyer who does not do so is failing both the client and profession, and will probably result in a grievance procedure or a malpractice suit.

What are the answers? What can we do as advocates? Certainly not countenance specious suits. Certainly view each suit qualitatively and see if it cannot be resolved as early as possible in the legal process. Certainly avoid any unnecessary discovery and certainly act appropriately as officers of the court. These actions may not solve the social problems of our day, but they will satisfy our professional responsibilities. Every advocate is, as was long ago wisely pointed out, a debtor to the profession.

THE ADVOCATE'S PERCEPTION OF THE ADVOCATE

If the public's perception of the advocate is low, the advocate's view of the advocate may not be much higher.

The absence of civility has been increasingly marked as a professional problem. Some long-beards point to the overcrowding of the profession as a reason, others point to the law schools as bringing in unqualified students and others sigh deeply and offer other reasons. Speaking individually, and not in any representative capacity for the Iowa Defense Counsel or any other group, it seems to me that the problem will not be solved until the reason is addressed and neither judicial exhortations nor new rules will suffice. We live in an increasingly crowded profession which does cause problems. We have more lawyers per capita in this country than elsewhere in the world and the numbers are increasing. One judge recently suggested facetiously, always a dangerous practice for a judge, that

Continued on page 10

Message from the President

Continued from page 9

every American ought to have his own lawyer and that necessarily meant a one-on-one relationship.

Because lawyers, as advocates, easily become the personification of the issue, professional courtesy was early recognized as a necessity to our profession. That is why there is no place for a personality or a character attack. We will always have in our profession, until their conduct weeds them out, lawyers who have no understanding of the ethics of advocacy. Recently I saw an attorney take two separate instruments, combine them and offer them as one instrument prepared by the adverse party.

So long as an advocate regards the role of the advocate as being merely a technician we will have these problems. Advocates are more than technicians; indeed they are officers of the Court. But they are more than that, for in the life of the law they stand in the long line of advocates who have professionally acted for their peers for 1,500 years. All who appreciate the history of our profession will see themselves as being a part in a whole extending as far back as one can see historically and as far forward as one can providently predict.

Soon after I was accepted at Northwestern University Law School, just before the Korean War, the Dean sent to all new students a list of suggested reading. The list included *Orley Farm, Bleak House, The Eustace Diamonds*-- a list which will surprise altogether too many people who read this. The purpose was to give some understanding of the life of the law in historic and social contexts, for after all, the seamless web of the law is a part of the seamless web of life. Those of us who forget that or have no understanding of it become only technicians.

The lawyer who has never read with pleasure the *Holmes-Pollock Letters* or the *Holmes-Einstein Letters* or the stories of Henry Cecil or the *Law as Literature* or any one of the long series of *Notable British Jury Trials* has lost much pleasant professional reading. For as life is a process, so is law and the narrower our interests in either, the less satisfactory the professional result. Plunkett's *History of the Common Law* is not read much anymore and I doubt if any law school even makes it suggested reading, but one cannot read even more than one chapter in such a book and not realize that he or she is but a current occupant in a long line of advocates who have each been given an opportunity to fashion in some degree by the advocate's acumen, a portion of the law.

Ours is not a mean profession. It is an honorable one, and if we grace it as have those before, there will be no lack of civility, nor innocence of integrity.

THE JUDGE'S PERCEPTION OF THE ADVOCATE

This is the most troublesome of all to candidly discuss, for there are exceptional inhibitions professionally placed upon the advocate regarding a discussion of the judiciary. Imposed respect has little to commend it, and earned respect is often quite another matter.

To be called to be a judge over one's brothers and sisters is to embark upon a profession requiring alike the greatest of those qualities of restraint and fairness. The judge who does not bring these qualities to every case fails as a judge, and thus fails the law.

And yet judges are demonstrably human, and so what is demanded of them is almost super-human. One appellate judge I recently talked with, said that on some days nothing seemed to him to be constitutional.

The diminution of the role of the lawyer as an officer of the court is a consequence of the augmentation of the role of the judge.

That problem is anecdotally evidenced by a phrase used frequently by trial judges. You've all heard it. "I tried thus and so case." This represents a confusion of roles, as judges do not try cases. Lawyers do. Judges hear cases, sit on cases, or more properly put, preside.

Certainly the role of the judge is not to try a case, which is after all best left to the advocates. In the pursuit of truth, which must be the role of the advocate, each side presents a profile--one-half of the face--and justice is obtained in this manner when the jury sees the full face.

It is the job of the judge to see that fairness obtains, fairness in presentation of the evidence by the advocates, both in manner and substance. It is the judicial disinterest and fairness which creates a bond between the jury and the judge. The jury is there to see the full face, and the judge is as well.

That is why it is so important that a judge, not even by manner, shows no hostility or anger or disappointment. Manner is the easiest judgment to telegraph to a jury. Jurors understand that, even if they have difficulty with the legal rubric. Any crack in the judicial demeanor, such a grimace or scowl, weighs heavily, and perhaps unfairly, with a jury.

Today the judiciary is much younger than it has been historically and that places a greater burden on younger judges because it is experience which most surely brings judgment. In the last few years many judges have been selected who have not had any great experience in litigation as advocates. This too presents added burdens to those judges.

Message from the President

Continued from page 10

The diminishment of the role of the advocate lies in two areas. The first is the reduction of the rules of evidence from predictable rules of law to unpredictable judicial balancing of equities resting largely in the discretion of the judge. What lawyer can successfully predict the result of a balancing of the equities in the mind of a judge? (Remember the judge who said that some days hardly anything was constitutional.)

The second area of concern in the reduced position of the advocate is the present trend to deny the advocate the opportunity of oral argument. This now has become a matter of judicial grace, although it is a discretion which denies the litigant the opportunity for the litigant's representative to be heard orally. If oral arguments are not desirable, why then historically are causes *heard?* This denotes oral argument and there is at least always the possibility that the advocate will say something of worth beyond a written brief.

Moreover, it is the theory of the Western World, held since the time of the Greeks, that in the marketplace of ideas, truth will win out. There is something in the combative process called litigation which does bring out truth and in the clash of ideas, new ideas and new answers appear. This is denied when oral arguments are denied.

Judges are faced with increased case loads and demands upon their time, but while each judge hears many matters in a day, each litigant will be heard only once. Many years ago one of the Roman emperors, all of whom were required to give weekly audiences to anyone who wished to be heard, cut short the audience time, undoubtedly due to the press of other business. One old woman who was waiting to be heard, urged the emperor to wait and when he responded while hurrying out of the audience chamber, "I don't have time," she said. "Then don't be emperor."□

David Hammer
President, IDCA

The following is a reprint of letter sent to The Honorable Robert Arnould voicing the Association's position on judicial salaries:

"May 29, 1992

The Honorable Robert Arnould
Speaker of the House of Representatives
Statehouse
Des Moines, IA

Dear Mr. Speaker:

The Iowa Defense Counsel Association respectfully requests that the General Assembly, at its next convening, raise judicial salaries to a appropriate level, consistent with the weighty responsibilities placed upon jurists. This request is made at the instance of the Board of Directors of our organization.

The increase is needed to fairly recompense the existing judges and to attract judges in the future. A cost benefit analysis reveals the judiciary produces income for the State from fees and fines. But more than that, the judicial system is the only alternative for the peaceful resolution of disputes.

If, as it appears, the omission of the judicial increase was the result of inavertence in the general salary increases recently enacted, it is requested that that omission be given a high legislative priority.

Respectfully submitted,

By: s/David
David L. Hammer, President
Iowa Defense Counsel Association

DLH:jh
cc: The Honorable Terry E. Branstad
Governor of the State of Iowa"

Liability - Alcoholic Beverages Continued from page 4

under legal age. The statute at issue was Iowa Code Section 123.47, the provisions of which at issue there are similar to the provisions of Iowa Code Section 123.49(2)(h). In *Bauer* the trial court originally granted summary judgment for the defendant hosts, which summary judgment was reversed and remanded for trial, and on trial a jury verdict for the hosts was entered and affirmed on appeal. In affirming the finding of no liability for the hosts, the Iowa Supreme Court rejected the notion that the host was liable without proof of criminal intent on the part of the host.

A similar issue was addressed by the Iowa Supreme Court in *DeMore v. Dieters,* 334 N.W.2d 734 (Iowa 1983). In *DeMore* the Iowa Supreme Court was asked to answer certified questions from United States District Judge Donald O'Brien with regard to the meaning and application of Iowa Code Section 123.47 as applied to the liability of the owner of real property for damages resulting from sale of alcoholic beverages on the owner's property by another to a minor. The issue concerned the liability of a farmer for beer sold by another to minors at a beer party held on the farmer's property.

In *DeMore* the Iowa Supreme Court found Iowa Code Section 123.47 to not be ambiguous on its face or as applied to the facts and held that the plain and rational meaning of the verbs "sell", "give", and "supply" in their context in the statute was clear. The court noted that all are active verbs and require that a person must affirmatively deliver or transfer liquor or beer to the underaged person before a violation can occur. Because of the owner's lack of active personal involvement with the sale, the court held he was therefore not personally liable for the illegal sale. The court rejected the argument that the defendant by permitting minors to hold a beer party on his property engaged in the sale, giving or supplying of alcohol in violation of Iowa Code Secton 123.47. In emphasizing the statutory requirement of active participation in the illegal conduct to give rise to liability, the court made reference to Iowa Code Section 123.49(2)(h). *Demore,* 334 N.W.2d at page 738.

In *Iowa City v. Nolan,* 239 N.W.2d 102 (Iowa 1976) the Iowa Supreme Court gave limited recognition to "vicarious" criminal liability in public welfare legislation but specifically rejected the notion that a government may make conduct criminal which is wholly passive. Nolan was charged with parking violations and raised a constitutional due process challenge to the charges on the grounds that he was only the registered owner of the vehicle and that the prosecution did not present any evidence regarding the identity of the operator who placed the vehicle in the illegal parking situation. The court concluded that in public welfare legislation the State may dispense with a mens rea or scienter requirement and impose vicarious "criminal" liability for the acts of another. *Nolan,* 239 N.W.2d at page 104.

The "Nolan Parking Rule" for public welfare legislation should not apply to save the charge against Mr. Clean and XYZ, Inc. because, unlike the parking ordinance, Iowa Code Section 123.42 (2) (h) itself requires proof of knowledge. And, unlike in *Nolan,* the actual perpetrator of the illegal conduct (the person who illegally "parked" the alcohol in the hands of the minor) is known and that person is available for prosecution by the State of Iowa.

If used to attempt to impose vicarious criminal liability on a passive (as concerns the illegal sale) non-participating, non-approving defendant, Iowa Code Section 123.49 (2) (h) is unconstitutional in violation of the due process provisions of the Iowa and United States Constitutions. When facts are available to establish the lack of knowledge of the illegal conduct or lack of active culpability on the part of the corporate defendant or its officer such charge should be vulnerable to a motion to dismiss.□

The United States creates enough waste to fill the Superdome two times a day, half of which is paper — time to conserve!

ASSOCIATION NEWS

BOARD ACTIVITIES

The following matters were discussed at the meeting of the Board of Directors of the Iowa Defense Counsel on April 10, 1992.

1. Herb Selby reported concerning the legislation committee. The bills of interest to the Association (see January issue) either were not reported out of committee or did not reach the floor for debate during the session. The bill to limit protective orders, sponsored by the Plaintiff's Bar, was not reported out of committee. There was some brief discussion concerning a bill which was recently introduced to reverse the Supreme Court's decision concerning non-assumption of risk by a patron of a golf course struck by a golf ball. It was determined that the Association would not take a position on this legislation.

2. There was discussion of proposed Rule 122, which would require lawyers practicing in this State to comply with our local ethical Rules. The greatest impact of this proposed Rule, which is quite lengthy, relates to advertising limitations on lawyers from other states. A formal position on the proposed Rule was deferred pending further review of the entire Rule.

3. The Board voted to take a position opposing sales tax on lawyers fees. The members are encouraged to contact their legislators to express their opinions on this issue.

4. It appears that the Federal Advisory Rules Committee is now opposed to the mandatory disclosure Rules that were being proposed as part of the overhaul of the Federal Rules of Civil Procedure. The Iowa Defense Association had previously forwarded its comments, joining an avalanche of opposition to such proposed changes. This appears to have dissuaded the judicial conference from adoption of such changes.

5. The board decided not to proceed with any study concerning the elimination of local Rules.

6. Reports were received concerning the recent annual convention of the DRI in Pinehurst, North Carolina.

7. The Association will once again give $1,000.00 to the Drake Law School and Iowa Law School Foundations.

8. Mark Tripp has agreed to head the second annual "Iowa Defense Counsel Association College Of Trial Practice."

WELCOME NEW MEMBERS

The Iowa Defense Counsel welcomes the following new members to the Association:

Brian E. Kennedy, Des Moines
Gregg E. Williams, Sioux City
Jerry Miller, Des Moines (after one year absence)

IMPORTANT NUMBERS

For general information regarding the Iowa Defense Counsel Association or for address changes please contact:

DeWayne Stroud
5400 University Avenue
West Des Moines, IA 50265
515-225-5608; or

Edward F. Seitzinger
1223 Cummins Parkway
Des Moines, IA 50311
515-277-4622

ATTENTION!

It's official - the second IDCA **College of Trial Practice** will be held **April 1, 2 & 3, 1993.** The first College was a tremendous success and the participants were so enthused it was decided the College would become a standard part of IDCA's programming. The first College carried C.L.E. hours of 15.25 Iowa, 10 Federal, which we anticipate will continue for each College. The administrative staff for the second College is Mark L. Tripp, Chancellor, DeWayne Stroud, Registrar, and Edward F. Seitzinger, Dean of Student Affairs; the faculty will be announced at a later date.

As before, there will be lots of "hands on" practice of trial skills with professional critique and videotaped reviews of performances; the College will culminate in each participant joining in a full mock trial.

Details and registration will be mailed in the near future but we wanted to give you advance notice so you could reserve these dates for this most informative and challenging event!

"The College was a valuable opportunity to learn from experienced and prominent trial attorneys."

"The lectures and materials were very informative and the critiques of our performances were particularly worthwhile!"

"The presentations given were the best I've ever seen at any type of CLE program!"

"Very rarely do participants at seminars get to actually participate directly - The College was a very worthwhile experience!"

1992 Annual Meeting Program

October 1, 2 & 3, 1992
Embassy Suites Hotel
101 Locust Street
Des Moines, IA

Thursday, October 1

7:00 a.m.	Board of Directors Meeting
8:00 a.m.	Registration Desk Opens
8:45-9:00 a.m.	Introductions and Report of the Association
9:00-9:45 a.m.	Chapter 668 Update Current Issues Under Comparative Fault - Richard G. Santi Des Moines, IA
9:45-10:30 a.m.	Selected Problems Involving Workers' Compensation Liens and Subrogation Rights Affecting Personal Injury Litigation - Roger L. Ferris Des Moines, IA
10:30-10:45 a.m.	Break
10:45-11:30 a.m.	The Intentional Acts Exclusion of Personal Liability Insurance Policies. Is it Still Viable? - Sharon Soorholtz Greer Marshalltown, IA
11:30-12:15 p.m.	Underinsured Motorist Coverage - James A. Pugh; David A. McNeill West Des Moines, IA
12:15-1:00 p.m.	Lunch
1:00-1:30 p.m.	Federal Court Update and Report on the New Federal Courthouse - Speaker to be announced
1:30-2:15 p.m.	Hedonic Damages - Megan Manning Antenucci Des Moines, IA
2:15-3:00 p.m.	Selected Problems in Business and Commercial Litigation - David J. Dutton Waterloo, IA
3:00-3:15 p.m.	Break
3:15-4:45 p.m.	Insurance Defense Litigation; The Insurer's Perspective - Speaker to be announced
4:45-5:15 p.m.	Question and Answer Period for Thursday's Speakers
6:00 p.m.	Cocktails/Dinner

Waiter No. 1: "We're going to get away early tonight."
Waiter No. 2: "How do you know?"
Waiter No. 1: "When I cleared the Head table, I picked up four pages of somebody's speech!"

Friday October 2

9:00-9:45 a.m.	Selected Problems Between an Insurer and an Insured Who is Insolvent, Including Strategies for Bankruptcy, the Effect of Bankruptcy, Stays, Lifting Stays - Eric W. Lam Cedar Rapids, IA
9:45-10:30 a.m.	Medical Malpractice Update - David L. Brown Des Moines, IA
10:30-10:45 a.m.	Break
10:45-11:30 a.m.	Selected Problems Created by Passage of the Americans with Disability Act - Constance A. Schriver Davenport IA
11:30-12:15 p.m.	To be announced
12:15-1:00 p.m.	Lunch
1:00-1:30 p.m.	Report From the Judiciary - Arthur A McGiverin Iowa Supreme Court Chief Justice
1:30-2:15 p.m.	Protection for the Middleman Section 613.18 - John Werner Des Moines, IA
2:15-3:00 p.m.	Selected Liability Insurance Coverage Problems - Frank A Comito Des Moines, IA
3:00-3:15 p.m.	Break
3:15-4:45 p.m.	Problems with the Defense; The Judicial Perspective - Speakers to be announced
4:45-5:15 p.m.	Question and Answer Period for Friday's Speakers
6:00-7:00 p.m.	Reception
7:00 p.m.	Annual Banquet - Speaker to be announced

Saturday, October 3

9:00-9:30 a.m.	Report on the Legislature - Legislative Action Committee
9:30-10:30 a.m.	Annual Appellat Case Review - Gregory M. Lederer Cedar Rapids, IA
10:30-10:45 a.m.	Break
10:45-11:30 a.m.	Workers' Compensation Update - Byron K. Orton Iowa Industrial Commissioner
11:30-11:45 a.m.	Election of Officers and Directors and Annual Meeting of Iowa Defense Counsel Association
11:45 a.m.	Board of Directors Meeting

Registration Material & Further Details to Follow.

FROM THE EDITORS

The Bush Administration's Civil Justice Reform Bill was introduced February 4, 1992, in the Senate by Iowa Senator Charles Grassley and in the House by Congressman Hamilton Fish, Jr. of New York. The "Access to Justice Act of 1992" embodies recommendations made by the President's Council on Competitiveness under the chairmanship of Vice President Dan Quayle. These recommendations are said to seek to restore fairness to our judicial system and to eliminate the economic burden placed on American society by excessive litigation. Provisions in the bill that would have the greatest impact on federal practice are discussed below.

The Act would require in diversity cases that the amount in controversy be determined irrespective of damages for pain and suffering, mental anguish, punitive damages, and fees and costs. This would leave only tangible economic losses as the basis for determining jurisdictional amount and would obviously reduce the number of cases eligible for filing in Federal Court. On February 1 of each year the jurisdictional amount would be adjusted to reflect the previous calendar year's change in the consumer price index.

The Act also implements in diversity cases the so-called English Rule whereby the losing party would pay the attorney fees of the prevailing party, but only up to the amount of the losing party's own attorney fees. A "prevailing party" is defined as one who obtains a favorable final judgment on all or a portion of the claims asserted. This provision is made inapplicable to any action removed from State to Federal Court.

The Act institutes a pre-litigation notice requirement for filing an action in Federal Court. A claimant must give written notice to the intended defendant at least 30 days before filing suit of the nature of the claim and the damages sought. In the event notice is not given, the defendant may raise such noncompliance within 60 days of service of summons or complaint and the claim shall then be dismissed without prejudice and the costs of the action including attorney fees shall be imposed upon the plaintiff. The action may be refiled within 60 days following dismissal providing the 30 day notice is given. This procedure is intended to allow parties to settle their disputes at the earliest stages without court involvement.

The Act further provides for the designation of one district court within each circuit to be a pilot "multidoor" courthouse to foster the avoidance of litigation as a means of settling disputes. Each designated court would develop and adopt an alternative dispute resolution plan authorizing parties to select procedures such as early neutral evaluation, traditional mediation, outcome determinative mediation, minitrials, summary jury trials, and arbitration to resolve claims. Judges assigned to each new case would conduct a conference with counsel within 120 days of filing the complaint to review the alternative procedures that may be used in lieu of litigation.

No hearings on the bill have been scheduled and the likelihood of passage of any of its provisions is unknown. However, the Act proposes changes in the conduct of federal litigation which the practitioner should be aware are being considered. Your editors have a copy of the complete bill and would be happy to provide one to anyone with a further interest.□

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.

Kermit B. Anderson
1800 Financial Center
Des Moines, Iowa 50309