defense UPDATE

The Iowa Defense Counsel Association Newsletter

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TENANTS AND SUBROGATION
FROM CONNOR TO NEUBAUER AND BACK

By William H. Roemerman, Cedar Rapids, Iowa

On May 13, 1992, the Iowa Supreme Court provided a welcome clarification to the law of subrogation. But the clairification that was provided is a mixed blessing which should provoke some thought within the insurance industry regarding the drafting of real estate casualty policies.

The case - *Neubauer v. Hostetter,* 485 N.W.2d 87, (No. 118/90 - 1875 Iowa 1992) - called upon the court to determine whether a tenant is an "implied co-insured" under a landlord's fire and casualty policy. It is, of course, a fundamental principle of subrogation law that no insurance company, after making a payment pursuant to a casualty policy, may bring a subrogation action against someone who is an insured under that same policy. *See e.g. Conner v. Thompson Const. & Dev. Co.,* 106 N.W.2d 109, 113 (Iowa 1969).

A majority of the negligently caused fires at rental units are caused by the tenants. Since the tenants are physically present at the rental property, they have the most "opportunity" to commit negligent acts. If tenants were to be considered insureds under landlords' policies then tenants would be insulated from subrogation lawsuits, regardless of their negligence. Conversely, if tenants are not insureds under the landlords' policies, they are available subrogation targets.

In the *Neubauer* case, the court rejected the theory that a tenant is an "implied co-insured" under the landlords' policy. However, the court left open the possibility that landlords and tenants may alter this rule by contract and may do so without notice to their insurance company.

The facts of the *Neubauer* case were as follows: The nominal Plaintiffs, Duane and Evelyn Neubauer, were the owners of a farm house. They rented the farm house to Mr. Hostetter pursuant to an oral lease. At the time the property was first leased, there was no discussion of insurance. The Neubauers did have casualty insurance on the property.

After some wind damage to the property the Neubauers informed the Hostetters that the existing insurance policy covered only the farm house structure and that if the Hostetters wanted coverage for their own personal property, they should obtain a renter's policy. Subsequently, the Hostettlers obtained a renter's policy.

In March, 1988, there was a fire which destroyed the farm house. By stipulation of the parties, it was established that Mrs. Hostetter's negligence was the cause of the fire.

The fire loss was paid by the landlords' casualty insurer (Farmers Mutual). Farmers Mutual brought a subrogation action which was defended by Auto Owners Mutual Insurance Company via the liability portion of the renter's policy written for the Hostetters.

In defending the case, Auto Owners asserted that the Hostetters were "implied co-insureds" under the Neubauer/Farmers Mutual policy. In support of its position, Auto Owners urged (in essence) that as a matter of property law, both the landlord and the tennant have a legal (insurable) interest in the property. The casualty insurer, when it agrees to repair or replace the rental property, in effect protects the interest of both the landlord and the tenant. Moreover (according to the argument), the cost of the insurance was one factor used in setting the amount of the rent. The tenant therefore, provided the funds necessary to pay the insurance premium.

In rejecting this view, the court took a position which is contrary to the view held by a majority of the states which have considered the issue.

The court seems to have done so consciously. The Iowa court's opinion cites cases from Michigan, Nebraska, Oklahoma, Alaska, California, Idaho, Nevada, Utah and Virginia which have held that the landlord's insurer may not subrogate against a tenant. See slip opinion at page 3. Washington should be added to the court's list. *See Rizzuto v. Morris,* 259 P.2d 688 (Washington 1979). Missouri should also probably be added. *See Rock Springs Reality v. Waid,* 392 S.W.2d 270 (Mo. 1965).

The Iowa court's opinion also notes that the appellate courts of two states -Illinois and New York- are split on this issue. (See slip opinion at page 3.) Opposing this body of case law, the Iowa court found only three jurisdictions that allow subrogation by a landlord's insurer against a tenant.

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MESSAGE FROM THE PRESIDENT

David L. Hammer

This will be my last letter as president since my term expires in a few days and thusfar, no one has suggested that my term continue longer. In fact, the suggestions have all been to the contrary.

All of us have sustained a major loss in the tragic death of Kevin Kelly and perhaps the loss to our Association is even greater. In view of the stalwart representation that he brought us in the legislature. Not having much money to operate with, it was always necessary for Kevin to use reason and he was a master at that.

Kevin was a good friend to everyone, but he was no mere hale-fellow-well-met. His friendships were important to him and he always gave more than he gained. Although he was only 49 when he was killed, his zest for life and his gentle sense of humor will extend his life well past those few years. In recollection there is resurrection.

Herb Selby's legislative committee will be reporting to the board at its October meeting about candidates for Kevin's successor at the Hill.

At the request of the board, David Phipps prepared and filed an Amicus brief on behalf of the Association in the case of *Fees v. Mutual Fire.* I will be recommending to the board at its next meeting that a standing committee be appointed to offer a smoother and easier mechanism than contacting each board member.

Your Association received letters of thanks from Chief Justice McGivern as well as David Hendrickson, the President of the District Judges' Association, with regard to our Association's efforts in obtaining salary increases for the judiciary.

It has been my great and good pleasure to have represented our Association in a different capacity this year and I am pleased that no member declined any assignment. In the long run, that remains the best test of the viability of any organization.

David L. Hammer
President, IDCA

CASE NOTE SUMMARY

By Richard J. Barry, Spencer, Iowa

Fisher v. Keller Industries, Inc., 485 N.W.2d 626 (Iowa 1992)

Fisher's claim for personal injuries, his wife's claim for loss of spousal consortium and his children's claim for loss of parental consortium were submitted to the jury under theories of strict liability and negligence. The jury found Fisher to be fifty percent (50%) at fault and Keller Industries fifty percent (50%) at fault. The jury found that Fisher sustained damages of $182,134.00. The Court reduced the total damages in favor of Fisher by fifty percent (50%) and entered judgment in his favor for $91,067.00. The amount of benefits paid by the Hartford was $82,621.00 (about one-third in medical, one third in healing period benefits and one-third in permanent disability benefits.) The Trial Court also entered judgments in favor of Fisher's spouse for $65,000.00 and $23,750.00 for loss of parental consortium for Fisher's children. The underlying case was appealed by Keller Industries. The Court of Appeals affirmed in an unpublished opinion. Keller Industries' Application for Further Review was denied by the Supreme Court, and Keller satisfied the judgment by making payment to the Clerk of Court.

The injured worker receiving Workers' Comp benefits and then recovering from a third party tortfeasor is a common factual situation occurring hundreds of times each year in Iowa. The authority for the Work Comp carrier to recover the amounts it paid to the injured worker is found at Chapter 85.22, CODE OF IOWA. Given the ambiguity of the statute and the frequency of the fact pattern when the statute applies it is amazing the number of issues that had never been decided prior to the *Fisher* case.

The statute provides in 85.22(1) that if the injured worker commences suit against a third party tortfeasor the Work Comp carrier

> "...shall be indemnified out of the recovery of damages to the extent of payments so made..."

The Supreme Court in *Fisher* calls this the "indemnification" section.

Pursuant to 85.22(2), if the injured worker has not commenced suit the Work Comp carrier can give written notice to the injured worker requiring him/her to bring suit within ninety (90) days. If the worker files suit within ninety (90) days the "indemnification" provision of 85.22(1) will apply. If suit is not commenced within ninety (90) days the Work comp carrier has the right to bring suit in the place of the injured worker. The Supreme Court in *Fisher* calls this the "subrogation" section.

The two issues decided in *Fisher* likely to have the greatest impact in day-to-day situations will yield different results under the "indemnification" section than under the "subrogation" section.

Fisher argued in the Trial Court and on appeal that the extent of The Hartford's lien should be reduced by the fifty percent (50%) comparative fault that had reduced Fisher's award of damages. The Iowa Court had never previously addressed the issue directly, although inferentially it had ruled that the comparative fault of Plaintiff did not reduce the Work Comp lien. *Schonberger v. Roberts*, 456 N.W.2d 201-203 (Iowa 1990). Fisher argued that if he had not brought suit against Keller, but had simply left the matter for The Hartford to pursue in his name pursuant to 85.22(2), that The Hartford would step into his shoes and any judgment they obtained would be reduced by his fifty percent (50%) fault. Fisher argued that it made no sense to allow The Hartford to recover a greater amount when Fisher ran all of the risk of litigation than The Hartford could recover if The Hartford ran the risk of litigation.

The Hartford contended that the language of 85.22(1) creates an absolute right to "indemnity" and that the language of the statute - "...shall be indemnified out of the recovery of damages to the extent of the payment so made" is not ambiguous and requires full payment by Fisher to The Hartford to the extent of payments made by The Hartford.

Fisher's medical expenses were appromimately $28,000.00. The Workers' Compensation carrier had paid $28,000.00. The evidence presented to the jury in the underlying case established medical expense of $28,000.00. Since the amount allowed by the jury - $28,000.00. - was reduced by fifty percent (50%) it meant Fisher actually recovered only $14,000.00 of medical expense from Keller Industries. Nonetheless, the Supreme Court held Fisher was obligated to pay $28,000.00 for medical expense back to The Hartford.

Recently the Court held that the statute requiring repayment to the State for Title XIX medical benefits was to be reduced by the Plaintiff's comparative fault. *Bales vs. Warren County*, 478 N.W.2d 398 (Iowa 1991). The court in *Fisher* distinguished *Bales* because 85.22(1) is an indemnification" statute (unlike *Bales*) while 85.22(2) is a "subrogation" statute (like *Bales*).

While the Supreme Court's literal interpretation of the language "shall be indemnified out of the recovery of

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IN THE PIPELINE

By Kermit B. Anderson, Des Moines, Iowa

Summarized below are cases in the appellate process which may be of interest to civil defense counsel.

1. *Essex Insurance Company vs. The Field House, Inc., et al,* Sup. Ct. No. 92-1040. Appeal from Johnson County District Court, Judge August Honsell presiding. General liability insurer brought declaratory judgment action against insured tavern. Tavern had been sued by a patron as the result of an altercation with tavern employees. Insurer sought a declaration that it had no duty to indemnify or defend the tavern and its employees on the basis of an assault and battery exclusion contained in its policy. The exclusion provided that no coverage applied to injuries arising out of an assault and/or battery or out of any act in connection with the prevention or suppression of such acts whether caused by or at the instigation or direction of the insured, his employees, patrons or any other person. The tavern argued that the exclusion did not apply because it was ambiguous and because the actions of the tavern employee were unintentional. The tavern also argued that it expected to have such coverage and was not aware of the exclusion and therefore coverage should be afforded through the doctrine of reasonable expectations.

The trial court granted insurer's Motion for Summary Judgment. The court held that the assault and battery exclusion in the insurer's policy is clear and unambiguous. The court also found nothing in the record that would tend to create a factual issue as to the applicability of the doctrine of reasonable expectations. The insured tavern appeals.

Issue on appeal. Was the lower court correct in finding the assault and battery exclusion clear, unambiguous, and a bar to coverage in the case? A further issue involves whether the lower court was correct in finding no genuine issue of fact as to the applicability of the doctrine of reasonable expections.

2. *Schminkey v. National Insurance Association.* Sup. Ct. No. 92-873. Appeal from Linn County District Court, Judge Paul Kilburg presiding. Insured brought declaratory judgment action against insurer seeking a declaration from the court that the "owned but not insured" exclusion contained in his automobile policy was invalid to prevent insured's recovery of underinsured motorist benefits. Insured was injured by an underinsured motorist while riding his motorcycle. The insured had an insurance policy covering certain automobiles owned by him but his motorcycle was not listed as an insured vehicle nor was it insured under any policy. The insurance contract covering insured's automobiles contained an underinsured motorist endorsement excluding such coverage for the insured "while occupying...any motor vehicle owned by you...which is not insured for this coverage under this policy."

The case was submitted to the district court on a joint stipulation of facts. The insured relied upon *Lindahl v. Howe,* 345 N.W.2d 548 (Iowa 1984) wherein the Iowa Supreme Court invalidated an "owned but not insured" exclusion that had been invoked against a claim for uninsured benefits. Insurer relied upon *Kluiter v. State Farm,* 417 N.W.2d 74 (Iowa 1987) in which the Iowa Supreme Court distinguished *Lindahl* and upheld the "owned but not insured" exclusion against a claim for underinsured benefits. The trial court concluded that the potential for duplicate benefits was the primary distinction between *Lindahl* and *Kluiter* and found no such potential in the instant case. Therefore, the court held the owned but not insured exclusion invalid and decreed that the insured's automobile policies providing underinsured motorist coverage also provided such coverage to him while riding his motorcycle. Insurer appeals.

Issue on appeal. Under the facts involved in this case, was the lower court correct in holding that the owned but not insured exclusion was unenforceable as against an insured seeking underinsured, rather than uninsured, benefits. The Appellate Court's decision can be expected to address *Lindahl* and *Kluiter* and the policy concerns underlying each case.

3. *Cummings, et al vs. Schafer,* Sup. Ct. No. 92-1102. Appeal from Jefferson County District Court, Judge James Jenkins presiding. Personal injury action brought by plaintiff and her parents against defendant who had been operating his vehicle while intoxicated. Evidence showed that Defendant's vehicle rear-ended the vehicle in which the Plaintiff was a passenger. Trial to the court resulted in a verdict for the plaintiffs of over $1.3 million in compensatory damages and $250,000 in punitive damages. Defendant appeals.

Issue on appeal. This appeal raises issues primarily concerning the sufficiency of the evidence for the various elements of damage awarded by the district court. With respect to punitive damages, an issue is raised as to whether the record must reflect some information of the defendant's financial condition in order to sustain such an award. The district court's written decision acknowledges that the court knew "little" of the defendant and that the record did not expand much upon him or his net worth.

4. *Principal Casualty Insurance Company v. Blair,* Sup. Ct. No. 92-930. Appeal from Polk County District Court, Judge Richard Strickler presiding. Insurer brought declaratory

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These are Arkansas, Kentucky and New Jersey. (See slip opinion at page 4.) To the list of states which allow subrogation against a tenant Texas should probably be added. *See Wichita City Lines v. Puckett,* 295 S.W.2d 894 (Tx. 1956).

The Iowa court's decision is clearly not "pro insurance company" or "anti insurance company." The companies that write casualty insurance for rental properties have gained by reason of the recognition of their subrogation rights against tenants. However, these same insurance companies usually also write tenants' policies. These are the policies that will ultimately pay the subrogation claims. Therefore, the court's opinion will generally be a wash for the industry as a whole requiring, at most, an adjustment of premiums between the two policy types.

What keeps the court's opinion from being a complete wash from the insurance company point of view is the language appearing in the next to the last paragraph of the court's opinion. In that paragraph, the court states:

> "If the landlords had agreed to insure the tenants' interest in the property and failed to do so, the result might be different. *See Conner v. Thompson Constr. Dev. Co.,* 166 N.W.2d 109, 111-113 (Iowa 1969)." Slip opinion at page 5.

In *Conner*, the Plaintiffs were the owners of a newly constructed house. The Defendant was the general contractor for the construction of the house. There was a fire loss at the house caused by the faulty installation of an electical outlet. That fire loss was paid by the Plaintiffs' insurance company, which then brought the subrogation action against the contractor.

The Plaintiffs contract with Thompson Construction called upon the Plaintiffs (homeowners) to insure the property and called upon them to name the builder as a co-insured. When purchasing a policy, the homeowner neglected to name the builder as a co-insured. The *Conner* court reasoned that the construction contract between the owner and builder called upon the owner to protect the builder against losses attributable to fires at the insured premises. By reason of this contract, the builder was deemed to be insured by the owner. Thus, the insurance company insured the owners and the owners insured the builder.

When the insurance company brought its subrogation action, it stepped into the homeowners' shoes. The insurance company's rights could rise no higher than the owners' rights. The owner never had a right to sue its own insured, the builder. Therefore, the insurance company could not recover from the builder. The claim against the builder was barred even though the insurance company had no pre-loss knowledge of the owners' agreement to provide insurance for the builder. Subrogation was allowed as to the homeowners' personal property loss and temporary living expenses, but only because the court determined that the construction contract made the builder an "insured" as to the structure only. Clearly the owners could have contracted to make the builder an "insured" as to the whole loss.

By signaling that the *Conner v. Thompson Constr.* case continues to be good law, the *Neubauer* opinion suggests that tenants may be transformed into "co-insureds" under landlords' policies by reason of lease language. Such lease language will apparently be binding on the insurance company regardless of whether the insurance company has been informed of the lease terms.

It is difficult to tell what lease language will be sufficient to transform a tenant into a co-insured. Must the landlord specifically agree to protect the tenant? Will it be sufficient if the lease merely recites that the landlord has insurance on the leased property? *c.f. Rock Springs Realty v. Waid,* 392 S.W.2d 270 (Mo. 1965).

The Iowa State Bar Association's "Lease - Business Property" form (official form number 164) specifically calls upon landlords and tenants to determine whether or not the tenant should be subject to subrogation. Thus, the possibility that some landlords might bargain away their insurance company's subrogation rights is very real. Insurance companies could very easily find themselves in the situation of bringing a subrogation action against a tenant, as permitted by the *Neubauer v. Hostetter*, only to find that a lease entered into without the company's prior knowledge defeats the company's subrogation rights.

In addition to the possibility that some landlords and tenants may "legitimately" bargain away subrogation rights, there appears to be some potential for "creative recollections" after a loss. Landlords and tenants frequenty have other relationships. Parents rent to their children, co-workers rent property to each other, etc. Where the landlord and tenant have a personal relationship, the landlord's loyalty to the tenant will certainly be stronger than the landlord's loyaty to the insurance company. For property rented pursuant to an oral lease, the only information concerning the terms of the oral lease will be the testimony of the landlord and the

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"The will to win means nothing without the will to prepare."

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damages to the extent of the payment so made" was disappointing to Fisher, the Supreme Court's literal reading of the same language in the statute will have enormous consequences to the insurance industry as a whole.

The Hartford sought a determination from the Court that it was entitled to a credit against any future payments that it might otherwise be obligated to make under the Workers' Compensation law to the extent that Fisher was recovering monies now from Keller. The Supreme Court turned to the same language - "shall be indemnified out of the recovery of damages to the extent of the payment so made" - and concluded that in deciding whether to allow a furure credit that it was bound to interpret this language in a literal sense, and that the language clearly spoke only to payments already made at the time of distribution of the proceeds from the lawsuit. The Court determined that the language "to the extent of payments so made" is past tense only and has no applicability to future payments required to be made under Workers' Compensation law. The court indicated under the "subrogation" provisions of 85.22(2) the Work Comp carrier is entitled to a credit against future payments.

On the two key issues raised in the *Fisher* appeal the Supreme Court was consistent - it looked directly at the language "shall be indemnified out of the recovery of damages to the extent of the payment so made" and interpreted it literally - to the detriment of Fisher with respect to whether his comparative fault should reduce the amount of the lien and to the substantial detriment of the insurance industry is determining whether payments recieved by a Plaintiff reduced or eliminate the Plaintiff's entitlement to future Workers' Compensaion benefits.

Following the filing of the initial opinion by the Supreme Court on May 13, 1992 The Hartford filed its Motion for Rehearing and tried to tell the Iowa Supreme Court that the ramifications of its decision on refusing to allow a credit for future benefits was contrary to long established practice and custom of the Iowa Workers' Compensation insurance industry, and attempted to point out the errors of the Supreme Court's decision. On June 18, 1992, the Supreme Court denied the Motion for Rehearing, but substantially amended its earlier order and rewrote the section of its opinion pertaining to a credit for future payment of Workers' Compensation benefits. In doing so the Supreme Court added further support of its opinion and did nothing but bolster and solidify its position that 85.22(1) does not allow for a credit to the employer or Workers' Compensation carrier against benefits that will be paid in the future. Thus, in Fisher's case, all further medical that may be required to be paid during his lifetime for injuries arising out of or in the course of his employment will be paid by The Hartford without any right of The Hartford to recover back against the proceeds Fisher recovered from Keller Industries.

It is not difficult to imagine many scenarios in which the Fisher case is going to have a profound effect upon the handling of third party claims. In a situation involving a death arising out of and in the course of employment it may well behoove Plaintiff's counsel to immediately settle with the potential third party tortfeasor; reimburse the Workers' Compensation carrier for payments made to that point in time; and the spouse and children can thereafter proceed to receive Workers' Compensation benefits on a weekly basis without any offset.

In a motor vehicle context the recent decision of *March v. Pekin Ins. Co.*, 465 N.W.2d 852 (Iowa 1991), may also come into play. In *March* the Supreme Court ruled the lien of Section 85.22 did not apply to underinsurance payments. If the tortfeasor in an automobile case has short limits the injured worker will maximize his recovery by promptly settling with the third party tortfeasor; pay back the Work Comp carrier for amounts paid to date; and then be entitled to both ongoing Workers' Compensation payments and the full right to the underinsurance coverage.

Any such Plaintiff can settle the claim with the third party torfeaser with the consent of the employer or insurer, and if the employer or insurer refuses to consent, upon the written approval of the Industrial Commissioner, 85.22(3). While the employer or insurer might object to the settlement and delay the settlement for some period of time, if the amount of the settlement covers the indemnification due to the insurance carrier at the point in time the application is made there would not seem to be any basis upon which the Industrial Commissioner could deny approval of the settlement and/or delay the settlement to allow further benefits to be paid by the Workers' Compensation carrier that would then be subject to the lien.

The Supreme Court in *Fisher* affirmatively recognized that the decision on "future credit" and whether to reduce the lien by the Plaintiff's comparative fault were affected "by the recoupment method employed by Hartford" without addressing the fact The Hartford was proceeding under the only avenue available to it.

The determination of whether the insurance carrier will be proceeding

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under the "indemnity" route or the "subrogation" route is dictated by the injured worker. Under the statutory scheme the injured worker has the absolute right to bring the case in his/her own name and upon doing so is obligated to serve upon the employer a copy of the original notice. If the Plaintiff files suit and serves the notice upon the employer, the only way the Workers' Compensation carrier can protect the monies it has advanced is by filing a Notice of Lien under the "indemnification" provisions of 85.22(1). The "subrogation" method of recoupment is not available to the Workers' Compensation carrier under such circumstances.

An interesting side issue not applicable in *Fisher* has to do with the interpretation of 85.22(5). This section provides that all payments made as a consequence of the injury are deemed subject to the lien. Now that the Supreme Court in *Fisher* has made the strong dichotomy between the "indemnification" route (defined by the Court as 85.22(1) and the "subrogation" route (defined by the Court as 85.22(2)) one has to wonder about the interpretation of 85.22(5) which begins "For subrogation purposes hereunder ..." Using the Court's new definitions it would seem that 85.22(5) applies only to 85.22(2) and would not apply to 85.22(1). If so, devious Plaintiffs may want to structure payments to spouses, children, or otherwise put receipts from third party tortfeasors beyond the receipt of the injured worker and claim that the Workers' Compensation carrier right to indemnification does not attach to such proceeds. Until now the industry has typically viewed 85.22(5) as applying to both the "indemnification" route and the "subrogation" route of 85.22(1) and 85.22(2). With the new definitions 85.22(5) may no longer apply as the definitional section to limit devious payments to those claiming through the injured worker.

The *Fisher* decision also addressed other issues for the first time in Iowa. These include:

1. Subject Matter Jurisdiction - The Hartford contended that the Industrial Commissioner had exclusive subject matter jurisdiction to determine all issues raised. (In keeping with the spirit of its approach to the matter The Hartford also sought sanctions against Plaintiff's counsel for contending otherwise.) The Iowa Supreme Court held that the District Court - not the Industrial Commissioner - was the proper forum.

2. Personal Jurisdition - The Trial Court found that the filing of the Notice of Lien by The Hartford subjected it to personal jurisdiction and the service by mail on its attorney proper service. The Supreme Court found The Hartford consented to personal jurisdiction when it affirmatively requested the Court to order distribution of the funds pursuant to Chapter 85.22.

3. Cost of Litigation - The out-of-pcket expences incurred by Fisher in the *Keller* case exceeded $17,000.00. The Trial Court required The Hartford to pay all the expenses from its share. The Hartford appealed contending the Court had no authority to require it to pay any expenses; alternatively, that the expenses should be paid proportionately by Fisher, his spouse and his children.

The Supreme Court held that The Hartford had not preserved error with respect to its argument that the cost of litigation should have been shared proportionately by The Hartford, Fisher, and Fisher's spouse and children. The *Fisher* case makes it clear that the cost of litigation is an expense for which the Trial Court has jurisdiction to equitably allocate between the parties. The allocation of expenses is left open to be decided equitably on a case by case basis.

4. Interest - The statute says the Work Comp carrier can recover its payments "with legal interest." The *Fisher* case doesn't address when the interest starts or what is the appropiate rate of interest. The Trial Court allowed The Hartford interest at the same rate that the Plaintiff recovered from the third party tortfeasor. Thus if this pattern were followed, in most cases the interest recovered by the compensation carrier would be the floating interest rate allowed under Chapter 668. The Trial Court allowed The Hartford interest from the day the Petition was filed by Plaintiff against Keller Industries (that being the same day Fisher began earning prejudgment interest) with respect to amounts that had been paid by The Hartford by that point in time; the Trial Court then allowed The Hartford interest on payments it made after the underlying suit was filed from the date The Hartford actually made payments. The Trial Court further ruled that the total amount recoverable by The Hartford could not exceed $91,067.00, the amount of Fisher's judgment without interest against Keller. The Supreme Court elimin-mated this restriction, but otherwise affirmed the Trial Court without otherwise discussing the Trial Court's approach. The issues likely to be raised in the future would include the appropriate interest rate (Does "with legal interest" mean 5% or the floating interest rate under Chapter 668?); and when does interest start. Since the statute uses the phrase "with legal interest" the argument is available that this means five percent) 5% as defined in Chapter 535, THE CODE.

CONCLUSION. The Hartford may not have done much of a service to the Workers' Compensation industry by appealing the Trial Court's decision in this case to recover a little extra interest that it felt the Trial Court had kept from them.□

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judgment action against its insured against whom a personal injury action had been brought on behalf of his son alleging negligent assembly of his son's bicycle. Insured sought liability coverage under his homeowner's policy which was denied on the basis of language in the policy excluding coverage for bodily injuries to "relatives residing in your household." The lower court granted the insurer's Motion for Summary Judgment. Insured apeals.

Issue on appeal. Is the household relative exclusion in a homeowner's policy valid and not violative of public policy. The insured does not argue that the language of the exclusion does not apply, rather insured argues that the exclusion does not apply, rather insured argues that the exclusion is contrary to public policy and amounts to an unconstitutional denial of equal protection.

5. *Gleason v. Amco Insurance Company*, Sup. Ct. No. 92-999. Appeal from Dallas County District Court, Judge William Joy presiding. Direct action against the insurer by holder of wrongful death judgment against insured. Trial to the court resulted in judgment against the insurer based upon a determination that coverage existed under insured's homeowner's policy. Insurer had denied coverage based upon language in its policy excluding coverage for bodily harm to "relatives". Insurer had argued that decedent and insured were married by common law and were therefore "relatives". The trial court found that the elements necessary to establish a common law marriage had been demonstrated as to the husband/insured, but not as to the decedent/wife. Insurer appeals.

Issue on appeal. The issue on appeal concerns the suffiency of the evidence to support the trial court's conclusion that all elements of common law marriage had been demonstrated by the insurer as to its insured, but not as to insured's putative wife. An interesting collateral issue has been raised by the plaintiff/appellee by moving to discharge the supersedeas bond as insufficient on the basis that the surety and the defendant insurer are both members of the same holding company and thus do not have "separate personalities" and cannot act as surety for each other. This motion is pending before the district court.□

DEFENSE COUNSEL FILES AMICUS BRIEF

In our last issue we highlighted the recent case of *Fees v. Mutual Fire and Automobile Insurance Co.*, which had been handed down by the Court of Appeals in March, 1992. As indicated in our report, the Supreme Court granted further review and oral argument was presented on July 12. Prior to the oral argument, the Iowa Defense Counsel filed an amicus brief in support of the Defendant. Former IDCA President David Phipps drafted the brief and argued that the Court of Appeals decision should be reversed. The following is an exerpt from David's argument.

> Stated differently, the scenario depicted by the Plaintiffs' posturing is not a description of "economic duress," but rather is simply a description of rather typical facts and circumstances which, in reality, induce both Plaintiffs and Defendants to settle. Obviously, no reasonably astute claimants would accept any settlement if they felt that the alternative forms of resolution would certainly produce a better result. Conversely, no well-informed Defendant (or their insurer) would pay any money in compromise of a potential claim unless, by doing so, they were deriving the benefit of a final and lasting resolution. To suggest that the Plaintiff's own subjective perception of the urgency to settle is a basis to claim "economic duress" completely ignores the realities of the current "claims marketplace" and would, in fact, destroy the meaningful process of settlement.□

On September 23, 1992, the Supreme Court reversed the Court of Appeals and affirmed the District Court's Summary Judgment.

ONE JUDGE'S OPINION

ORDER

Defendant's Motion to Dismiss or in the Alternative to Continue Trial is denied. If the recitals in the briefs from both sides are accepted at face value, neither side has conducted discovery according to the letter and spirit of the Oklahoma County Bar Association Lawyer's Creed. This is an aspirational creed not subject to enforcement by this Court, but violative conduct does call for judicial disapprobation at least. if there is a hell to which disputatious, uncivil, vituperative lawyers go, let it be one in which the damned are eternally locked in discovery disputes with other lawyers of equally repugnant attributes.

It is so ordered this 24th day of February, 1989.

s/Wayne E. Alley
United States District Judge
Western District of
Oklahoma

FROM THE EDITORS

PROFESSIONALISM, CIVILITY AND THE LAW

John E. Sinnett is an Associate Justice of the Minnesota Supreme Court. He has had an opportunity to reflect upon our profession, first as a practicing lawyer from 1951 to 1980, and since that time, as a member of Minnesota's highest court.

He spoke at the Eighth Circuit Judicial Conference held in July 1992 in Minneapolis. The theme of that conference was "Professionalism: Our Challenge for the Nineties." Justice Simonett offered three conclusions about why there had been a lessening of professionalism and civility in the practice of law in recent times:

1. Loss of collegiality.
2. Preoccupation with the bottom line.
3. A fluid client base.

A deeper analysis of Justice Simonett's conclusion is warranted.

Loss of collegiality speaks more about the breakdown of respect among lawyers for each other and the judiciary than it does for an argument that it merely translates into more zealous representation. Collegiality does not mean capitulation; it defines the professional relationship that should exist among lawyers without compromising their abilities to zealously and competently represent their clients. Too often the term "Rambo" litigation is bantered about. Some clients feel that without a Rambo litigator they cannot prevail. Such litigation, however, has as its victims integrity, honesty and respect.

A prominent tool of this new type of litigation is the motion for sanctions. Lawyers are threatened with sanctions by their opponents if they even file a lawsuit. Motions for sanctions are filed in discovery matters before any opportunity is afforded opposing councel to attempt to work out the dispute without intervention of the court. The threat of sanctions has now become an offense tool designed to do nothing more than force opposing parties into defensive postures and expensive motions.

Obviously situations exist when sanctions are appropriate. However, loss of collegiality among attorneys has promoted threatening of sanctions and the filing of sanction motions because if looks good to the client and attorneys believe it promotes that aura of being a "tough litigator."

Has the proliferation of the number of lawyers in Iowa and elsewhere contributed to this loss of collegiality? The unfortunate conclusion is that that appears to be the case. As more and more unseasoned attorneys vie for clients and, far too often, positions with more experienced attorneys, competitive pressures take hold and the economic realities set in.

From the largest cities to the smallest towns in America, no lawyer has been exempt from the economic pressures of the last several years. Multi-national law firms are laying off partners and associates with frequency, a phenomenon unknown barely five years ago. Sole practitioners and those in the smaller rural communities find very rapidly that as their clients' incomes shrink or evaporate, so does their ability to pay legal fees. Those are economic realities with which everyone must live.

Some lawyers and firms seem to concentrate solely on means and methods to increase billable hours per attorney to increase billable dollars. As the interest shifts from practicing good, competent law to how to improve net income, professionalism and civility become orphans. The win-at-any-cost mentality becomes paramount.

As attorneys have felt economic pressures, so have clients. Client loyalty seems to be in doubt. The preoccupation with the bottom line encourages lawyers to become marketers and to become solicitors of other lawyers' clients.

Insecurity grips the lawyers because of the perception that clients are no longer stable sources of income. Those lawyers who take their clients for granted, fail to bill them fairly, or fail to keep them adequately informed should expect to lose clients.

As legal marketing becomes paramount, lawyers place that endeavour on a different plane. What is unfair or unethical in the courtroom becomes acceptable in the marketplace.

The loss of civility and professionalism is not limited to the plaintiff's bar or the defense bar; it affects all lawyers. It is a matter so serious that the Seventh Judicial Circuit Court of Appeals created a committee to study this very issue. Chaired by Judge Marvin E. Aspen, that committee issued its lengthy final report in June, 1992.

One Judge, interviewed by the committee, made a poignant comment which in closing deserves consideration and thought:

> Today our talk is coarse and rude, our entertainment is vulgar and violent, our music is hard and loud, our institutions are weakened, our values are superficial, egoism has replaced altruism and cynicism pervades. Amid these surroundings none should be suprised that the courtroom is less tranquil. Cardozo reminds us that "judges are never free from the feelings of the times..."□

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testimony of the tenant. If a landlord has a personal or family interest in protecting a tenant from a subrogation lawsuit, the landlord might easily be induced to "remember" a lease term which called upon the landlord to insure the tenant's interest in the property.

Most ISO homeowners policy forms provide that an insured "may waive in writing before a loss all rights of [subrogation] recovery against any person." Thus, under policies as currently written, the insurance companies will have no recourse in the event that a landlord/insured elects to waive subrobgation rights with regard to a tenant.

If this is perceived as a problem within the insurance industry, there appears to be only one way to resolve it. The insurance companies are certainly at liberty to rewrite their underwriting procedures to require landlords to identify any tenants that have been granted the status of an "additional insured." Any tenants so identified can then be listed in the policy much the same as mortgage companies and other "loss payees" are now identified on policy declaration pages. Armed with this information, the insurance company can then make an informed decision with regard to writing the business and/or setting the amount of the premium.□

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