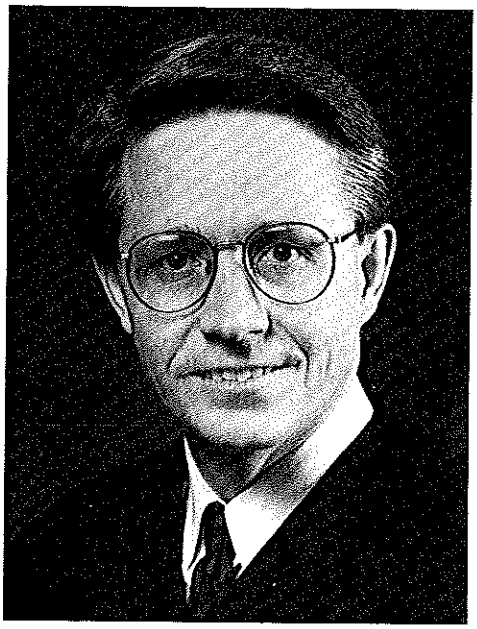
defense UPDATE

The Iowa Defense Counsel Association Newsletter April, 1996 Vol. IX, No. 2

HOW OUR APPELLATE COURTS FUNCTION

AN INSIDE LOOK AFTER THE BRIEFS ARE IN...



Mark S. Cady, Judge
Iowa Court of Appeals

Appellate court decisions touch the full spectrum of human interaction and can impact the development of the law into the future. They become familiar and important resources for trial judges and lawyers, who rely on them in making tomorrow's decisions and arguments. The bench and bar understand an appellate decision reflects the collective view of the majority of the court, but little is known about the internal process which leads to an opinion. The purpose of this article is to examine the intriguing set of rules, procedures, and customs which produces an appellate decision in Iowa by following the typical path of a case on appeal after the preparatory work of the lawyers has been completed.

Background

The Supreme Court and the Court of Appeals make up the two appellate courts in Iowa. The Supreme Court is a court of last resort, and has nine members. The Court of Appeals is an intermediate court, with six members. All appeals are filed with the clerk of the Supreme Court, and the Court of Appeals considers only cases transferred by the Supreme Court. The Supreme Court may also review decisions of the Court of Appeals.

The two appellate courts jointly produce nearly 1100 formal opinions each year, with approximately 65% authored by the Court of Appeals.[1] The Supreme Court is also responsible for a variety of administrative matters, and prepares a multitude of nondispositional orders each year. The average time between the filing of a notice of appeal in a case and the filing of a formal opinion is just over 13 months.[2] Priority civil cases, such as termination of parental rights, are normally completed in less than nine months, while other civil cases average around 15 months from notice of appeal to opinion.[3]

Just over one-half of the appellate period is consumed by those activities performed by lawyers to prepare the case for submission. Under the rules of appellate procedures, approximately four months are allotted to prepare the briefs and appendix, and transmit the final record. This time period can be lengthened or shortened to meet the particular needs of the case or the lawyers. It generally averages around seven months.[4] During this period of time, the case typically remains in the office of the clerk, with no contact from a judge.

Initial Review by Research Staff

After the final briefs have been filed and the remaining record transmitted, every case is transferred from the clerk to the central research staff of the Supreme Court[5] This is the first step in the internal process which will eventually lead to a formal opinion.

The research staff is comprised of eight attorneys. Each case is assigned under a priority system to one of the eight attorneys who, after reading the briefs and appendix, prepares a case statement. The case statement describes the general background and status of the case, including the scope of review. It also contains a statement of the facts and legal issues presented. The issues are discussed and analyzed in the case statement only as needed to explain them.[6]

The staff attorneys also make several important recommendations in the case statement, but do not suggest a particular result or disposition for the case.[7] Their recommendations are limited to whether the case should be

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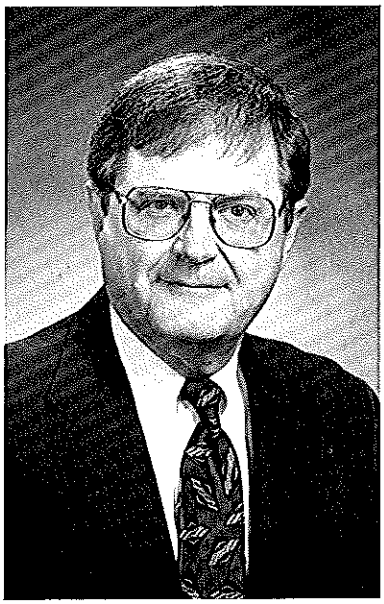
MESSAGE FROM THE PRESIDENT



Charles E. Miller
President

The officers of IDCA have just returned from the annual Mid-Region meeting of The Defense Research Institute. Our region includes Iowa, Missouri, Kansas, Nebraska, Colorado, and Utah. This year's meeting was in Salt Lake City. The schedule was very busy and focused in great part on the relationships between our state organizations and the newly reorganized DRI. As part of the effort to enhance membership in both organizations, DRI has extended its offer of a free year's membership in DRI for new IDCA members. For our members who are not members of DRI, I urge you to consider joining. I might mention that the DRI President Elect is Bob Fanter from Des Moines' Whitfield law firm. To honor his year as President, the IDCA has offered to host next year's Mid-Region meeting in Des Moines.

The second main topic of discussion focused on the continuing evolution of the relationship between the insurance defense bar and insurers. It is clear that on both coasts and metropolitan areas, many national companies are utilizing more in-house counsel to represent their insureds. The carriers' view is that house counsel provide comparable results at a significant savings over retained counsel. The carriers' focus is on speed of claim resolution and lower costs of service. Interestingly, hourly rates are not necessarily a major issue with many large carriers who are concerned more about aggregate expense. In other words, the higher priced partner may still be preferred to a low cost associate due to an ability to obtain "acceptable" results in a much shorter time and a lower total cost.

Lest our insurance company brethren feel like targets, lawyers too must recognize change and adjust their practices. We have to learn to work smarter and find ways to deliver quality services economically. We must concentrate on fast and flexible claim resolution. (Of course, if the carrier likes working with you, that helps as well.) It is obvious none of us can afford to bury our heads during these days of change.

On a more upbeat note, Bob Houghton and a cast of several have conducted trial demonstrations at Drake and Iowa. The practical demonstrations were well attended and appreciated. Our thanks to Bob and his colleagues. The Association also donates $1,000 to each school for their advocacy programs.

The legislative session is nearing a close, but it is still too early to tell how our program will fare. We have received encouragement on several bills and hope to have good news to report in the next issue.

Your Association has adopted a resolution asking the Governor and General Assembly to provide adequate funding for legal services programs. In a system built upon the rule of law and not men, it is imperative that all citizens have access to the courts. The Association joins ATLA and the Iowa Bar in advocating adequate funding. You are all encouraged help by supporting the Volunteer Lawyer Project activities in your home towns and by contributing to the "Iowa Lawyers Campaign for Legal Services."

OCCUPYING THE VEHICLE - AN ANALYSIS FOR DEFENDING UIM CASES

By Thomas B. Read, Cedar Rapids, Iowa

Who is an "insured" for uninsured/underinsured motorist (UM/UIM) coverage under the standard auto policy? Obviously, the named insured and his or her spouse as well as other family members, as those terms are defined in the policy. But, also other persons who are "occupying" the auto covered by the policy are insured. Many policies define the word "occupying" as "in, upon, getting in, on, out or off."

This means that your passengers are covered by your policy, both while they are riding in your car and while they are getting in or out of your car. But, what about someone who is standing beside your car when they are injured? Someone who may be a total stranger to you, who has never been a passenger in your car and who never will be a passenger? Can they come under the wing of your policy as "occupying" your car? In some circumstances, yes.

This article deals with the situation where the claimant is hit by another car while positioned somewhere in the vicinity of your car and looks to your policy to provide him UM/UIM coverage. To trigger your UM/UIM coverage, of course, the tortfeasor striking car is either uninsured or underinsured. (The issues of whether the claimant has his own auto policy containing UM/UIM coverage and, if so, the application of the "antistacking" and "priority of coverage" clauses in your policy and the claimant's policy issue is beyond the scope of this article. In fact, between your policy and the claimant's policy, your policy would be primary and the claimant's own policy would be secondary!)

The trend of the cases is to extend coverage to persons outside your car if they are "vehicle oriented" as opposed to "highway oriented." Courts appear to be abandoning the requirement that the claimant needs to be in physical contact with your car to get coverage. A "geographical proximity" seems to be sufficient. Does this mean that someone who is merely walking past your car in a parking lot when struck down gets coverage? No, there must be something more.

As the Ohio court noted in *Robson v. Lightning Rod Mut. Ins. Co.*, 393 N.E.2d 1053 (Ohio 1978), there are three approaches the courts have taken with these cases. The first is to strictly construe the policy to restrict coverage and allow coverage only when a person is actually "in, upon, getting in, on, out or off" as those words are popularly understood. A second approach is to at least require physical contact between the claimant and the car at the time of injury. A third approach, the more liberal approach, is to allow coverage ". . . so long as the drivers or passengers are within the area or engaged in a task related to the operation of the vehicle. . ." at least whenever there is a "gray area" in determining if the person is "occupying" the vehicle.

Rhode Island took the third approach in *General Accident Ins. Co. v. Olivier*, 574 A.2d 1240 (R.I. 1990) and created elements for determining whether there is coverage for a person who is outside the insured vehicle:

1. There is a causal relation or connection between the injury and the use of the insured vehicle;

2. The person asserting coverage must be in a reasonably close geographic proximity to the insured vehicle, although the person need not be touching it;

3. The person must be vehicle oriented rather than highway oriented/sidewalk-oriented at the time; and

4. The person must be engaged in a transaction essential to the use of the insured vehicle at the time.

Our neighboring states - Wisconsin and Minnesota - likewise take the more liberal approach. In *Kreuser v. Heritage Mut. Ins. Co.*, 461 N.W.2d 806 (Wis. App. 1990) the claimant Kreuser rode to work with one Hoffman in the morning and was going to catch a ride home with him after work. That evening while the claimant was standing on the curb and Hoffman was pulling up to pick her up, a motorcycle hit Hoffman's car. The motorcycle then hit Kreuser. The collision happened about ten feet from Kreuser. The Wisconsin court found that Hoffman's auto policy covered Kreuser. "Application of the vehicle orientation test leads us to the conclusion that Kreuser was 'occupying' Hoffman's automobile and she was beginning to turn to enter the vehicle when she was struck by the motorcycle. There is no doubt that both her intent and Hoffman's intent was to have Kreuser occupy the automobile. . . .We are satisfied that an ordinary lay person would expect that people preparing to board an automobile come within the definition of occupying and would be afforded coverage if injured during the boarding process. If we were to say that the boarding person had to have actual physical contact with the insured vehicle, we would unduly restrict coverage."

In *Conlin v. City of Eagan*, 482 N.W.2d 519 (Minn. App. 1992) a police officer requested a tow truck operator to remove the license plates of a vehicle he was going to tow. While the tow truck operator was doing this, an uninsured vehicle hit him. He argued that he was still "occupying" the tow truck at the time he was injured and the Minnesota court agreed with him.

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DEFENDING THE TORTFEASOR: A PROPOSAL FOR UIM INSURERS

By William Roemerman, Cedar Rapids, Iowa

HERE'S THE PROBLEM:

The current Iowa practice for litigating Underinsured Motorist (UIM) claims presents major problems for insurers. Under *Leuchtenmacher v. Farm Bureau Mut. Ins. Co.* 461 N.W.2d 291, 294 (Iowa 1990) the insurer can be sued in its own name before the suit against the tortfeasor is resolved. In that suit the entire contract is admissible in evidence - including the policy limits. The injection of insurance into a personal injury law suit may cause a jury to find liability based upon scant evidence and may cause a jury to enhance the damages awarded. Precisely because of this problem the Supreme Court, in *Handley v. Farm Bureau Mut. Ins. Co.*, 467 N.W.2d 247, 250 (Iowa 1991), granted UIM carriers an absolute right to have UIM cases severed from the trials of the tortfeasors.

However, the *Handley* solution is far from perfect. Even when the insurance company severs itself from the trial of the tortfeasor, it will almost certainly be bound by the liability and damage findings in that first trial. *See Handley* at p. 250. *See also Hunter v. City of Des Moines*, 300 N.W.2d 121 (Iowa 1981). Thus, the insurance company is faced with a lose-lose choice. It can either participate in the trial in its own name, thus subjecting itself to anti-insurance bias, or it can opt for severance and allow its fate to be decided in a case where it can't participate.

The purpose of this article is to suggest a third alternative for some UIM cases. In the right case, the UIM company may elect to sever itself from the trial of the tortfeasor but still have its attorney actively participate in defense by appearing on behalf of the defendant. This solution should be considered where the facts present a very significant damage or liability issue so that the defendant's liability carrier has a good faith reason to defend but, at the same time, the UIM carrier has significant exposure. Such cases are illustrated by the following examples.

Example 1: Sunshine Insurance Company insures, Denton Bumper. The policy contains underinsured motorist coverage with limits of $300,000. Mr. Bumper was rear ended at a stop sign by I. M. Broke. Mr. Broke has insurance with Mutual of Iraq. His liability limits are $50,000. The accident seems like a clear case of liability but the damages appear to be minor. However, it soon develops that Mr. Bumper is claiming a closed head injury. Mutual of Iraq doubts the validity of the head injury claim and proceeds to defend.

Example 2: The same parties have an intersection accident and Mr. Bumper, Sunshine's insured, is paralyzed. There is a serious liability issue. Mr. Bumper contends he entered the intersection on a green light. Mr. Broke and his passengers (who happen to be members of the College of Cardinals) contend Broke's light was green and Bumper's light was red. Liability is doubtful, but the damages are huge. Mutual of Iraq again defends the lawsuit.

Under either of these scenarios, Mr. Bumper's attorney will probably sue both I. M. Broke and the UIM carrier, Sunshine. *See Handley supra.* Whether or not the UIM carrier is brought into the suit, it has a very significant financial interest in participating in the defense of Mr. Broke.

HERE'S THE SOLUTION

Obviously, the solution for Sunshine is to gain some control over the defense of the lawsuit without appearing in its own name. The solution suggested above will meet this need. With the consent of the alleged tortfeasor (Mr. Broke) and the consent of his insurer (Mutual of Iraq) the UIM carrier (Sunshine) can have its attorney enter an appearance for Mr. Broke. Sunshine will then be in a position to meaningfully participate in the lawsuit from discovery through trial without the disadvantages of appearing before the jury in its own name.

WILL THE SOLUTION WORK?

This solution has been attempted. (The names have been changed to protect the guilty.) However, no reported Iowa case has passed on the propriety of the UIM carrier's attorney appearing for a defendant. When attempted, the proposed solution met with a number of objections from the plaintiff/insured's attorney. Those objections are set out below along with the response.

Objection #1: The insurance company's attorney has a conflict of interest which precludes representation of both the UIM carrier and the defendant.

Answer: Whenever an insurance company hires an attorney to represent a defendant in a civil lawsuit, both the defendant and the insurance company are the attorney's clients. *Henke v. Iowa Home Mut. Cas. Co.*, 87 N.W.2d 920, 923, 249 Iowa 614 (Iowa 1958). Thus, the lawyer hired by the UIM carrier to represent the defendant has two clients. However, there is nothing improper about an attorney having multiple clients if the interests of the clients are aligned. A conflict arises only when an attorney represents two or more clients who may have "conflicting, inconsistent, diverse, or otherwise discordant" interests. EC 5-15.

The defendant and the UIM carrier do have conflicting interests if the

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IN THE PIPELINE

By James A. Pugh, West Des Moines, Iowa

SUPREME COURT TO REVISIT *Principal v. Norwood*

In *Principal Casualty Insurance Co. v. Norwood*, 463 N.W.2d 66 (Iowa 1990), the Supreme Court first addressed the mandate contained in §§ 668.5(3) and (4), Code of Iowa, regarding an insurance Company's responsibility for a pro rata portion of attorney fees incurred in the collection of its subrogation interests. The most common example of this situation concerns medical payments advanced by an insurance company which are eventually recovered as a part of its insured's bodily injury settlement or verdict. Assuming no active participation by the insurance company in the procurement of that recovery, § 668.5 clearly requires the insurance company to bear a pro rata portion of legal and administrative expenses. The Supreme Court did, however, find the following observation relevant:

> If the [insured] had employed its own attorney and had actively participated in the action against [the tortfeasor] it could not have been compelled to contribute to [the insured's attorney's] fee.

Id. at 68; quoting *Washington Fire Marine Ins. Co. v. Hammett*, 237 Ark. 954, 956, 337 S.W.2d 811, 813 (1964). The Supreme Court, this spring, has now been presented with this very situation which was addressed in dicta in *Principal.*

In *Krapfl v. Yearous*, Linn County No. 20963, the Farm Bureau Mutual Insurance Company intervened in an action brought by its insured brought to recover bodily injury damages incurred in an automobile accident. Farm Bureau had paid its insured $10,000.00 in contract medical payments and intervened to recover the same from the responsible tortfeasor. During the course of the proceedings, Farm Bureau's attorneys participated in written discovery, court hearings and settlement conference, and were prepared to participate at trial to the extent of Farm Bureau's interest. Several days prior to trial, the insured and tortfeasor, without Farm Bureau's involvement, agreed to settle the case for $93,333.00. Following settlement, the insured offered Farm Bureau its $10,000.00 subrogation interest, minus a one-third deduction for attorney fees. Farm Bureau moved the District Court for an order compelling the return of its full $10,000.00 interest.

In January 1995, Judge William Thomas ordered that the full $10,000.00 subrogation interest be returned to Farm Bureau. His ruling was based on the following findings:

> The Court concludes that the record in the present case demonstrates that the insurer hired its own counsel, intervened in the action, and actively participated in the discovery process and in settlement discussions. In this situation, under the dicta in *Norwood*, the insurer is not obligated to pay its pro rata share of Plaintiffs' attorneys' fees. Plaintiffs' counsel, therefore, is not entitled to attorneys' fees from the intervenor's share in this action.

The Plaintiff-insured has appealed from this ruling.

The Plaintiffs' appellate argument centers on the conflict between the mandatory language in the Code (". . .subrogated persons **shall** be responsible. . . ") and the exception delineated in the *Washington Fire* case. Additionally, Plaintiff argues that the intervention of insurers into these types of actions merely serves to complicate the issues and increase the cost of the litigation. In contract, Farm Bureau submits that the purposes of § 668.5 and the purposes of equity are both served by allowing each party to retain and compensate their own counsel, if they choose to do so.

This matter was set for oral argument before the Supreme Court on April 11, 1996. ❑

Welcome New Members

Kevin R. Rogers
Waterloo, IA 50704

Samuel C. Anderson
Waterloo, IA 50704

Heidi L. DeLanoit
West Des Moines, IA 50265

Noel K. McKibbin
West Des Moines, IA 50265

Donald Morgan
West Des Moines, IA 50266

Susan M. Brown
Des Moines, IA 50315

APPELLATE CASE UPDATE

By Kermit B. Anderson, Des Moines, Iowa

1. *Farm and City Insurance Company v. Gilmore*, 539 N.W.2d 154 (Iowa 1995)

Insurance Coverage; Consent Driver

Declaratory action brought by insurer based on accident occurring after vehicle owner's permittee gave permission to an underage driver to use vehicle. The trial court ruled in favor of coverage. Insurer appeals.

On appeal the insurer cited a provision in its policy which excluded coverage for anyone "using a vehicle without a reasonable belief that that person is entitled to do so." The Supreme Court found the word "entitled" ambiguous and construed the exclusion to deny coverage only if the driver did not have a reasonable belief that he had permission of the owner or apparent owner to use the car. Since the facts showed that the owner's initial permittee requested the underage driver to drive the car, the lower court's ruling in favor of coverage was upheld. The Supreme Court also upheld the lower court's finding of coverage in favor of the vehicle owner. The insurer had argued that the owner could not be liable as a matter of law because his car was driven without his consent. However, the court stated that the initial grant of authority was unrestricted and broad enough to include an implied grant to a second permittee. Thus, the owner had coverage under the policy for his liability exposure.

2. *Gabe's Construction v. United Capitol Ins. Co.* 539 N.W.2d 144 (Iowa 1995)

Indemnification; Construction Contracts

General contractor and its insurer brought action against subcontractor's insurer seeking reimbursement for amounts paid to settle tort claims against general contractor. Subcontractor's carrier refused coverage based upon an "auto exclusion" contained in the policy. The lower court held against the subcontractor's insurer and an appeal was taken.

On appeal the primary issue involved a choice of law question, the answer to which controlled the merits of the coverage issue. The subcontractor's insurer argued for the application of Minnesota law stating that the policy had been procured in Minnesota by a Minnesota company through a Minnesota agent. The Supreme Court rejected this argument holding that Iowa had the most significant relationship to the transaction and the parties. Citing the Restatement (Second) of Conflicts of Laws, the court found that the "principal location" of the risk was Iowa where the work was being performed and therefore Iowa's law applied.

3. *Hoth v. Sexton,* 539 N.W.2d 137 (Iowa 1995)

Forum Non Conveniens

Wrongful death action brought in Iowa by relatives of Iowa decedent against Iowa tortfeasors based upon accident occurring in Wisconsin. Lower court dismissed case on grounds of forum non conveniens finding Wisconsin to be a more convenient forum where a related action brought by the owner of the decedent's car had been commenced.

On appeal the Iowa Supreme Court noted that the doctrine of forum non conveniens was not intended to promote judicial efficiency and the desire to achieve economy is an insufficient reason to deny a plaintiff his chosen forum. Rather, the doctrine is a means of protecting a defendant from defending in an unreasonably inconvenient place. The convenience of another forum is not an issue until the defendant shows the host forum to be unreasonably burdensome.

Thus, the court determined that the lower court used the wrong legal standard in applying the doctrine and found no evidence that Iowa was an unreasonably inconvenient forum in which to defend. Reversed.

4. *Benavides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352 (Iowa 1995)

Life Insurance Benefits; Exclusion for Intoxication Related Deaths

The insured died in a closed garage at the wheel of his car after spending 10 hours at a bar. His blood alcohol level 14 hours post death was .290. Insurer denied recovery on life insurance policy citing exclusion for death resulting from "an injury occurring while the insured is intoxicated." The district court granted summary judgment to the insurance company and the plaintiff appealed.

The Supreme Court first rejected the insurer's argument that "intoxicated" is equivalent to having a blood alcohol level in excess of the legal limit for operating a motor vehicle. Many factors are relevant, the court said, to the issue of intoxication, only one of which is blood alcohol content. The court went on to say, however, that under the undisputed facts reasonable minds could not differ on whether the insured was intoxicated at the time of his death. Although the extent of the insured's impairment could perhaps be open to debate, this was not the issue. The court held as a matter of law that the insured was intoxicated at the time of his death.

The plaintiff also attempted to argue that a causal connection between intoxication and death must be established before the exclusion bars recovery, but the plaintiff had not properly preserved this issue for appellate review. The court also rejected the argument that the intoxication exclusion violated the insured's reasonable expectations.

5. *Woodroffe v. Hasenclever*, 540 N.W.2d 45 (Iowa 1995) (en banc)

Iowa Code Section 614.8A

Plaintiff brought sexual abuse and related claims against her uncle based upon acts allegedly occurring when she was between the ages of 18 months and 13 years. Plaintiff was more than 40 years old when her petition was filed on

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routed to the Court of Appeals or retained by the Supreme Court, receive oral argument, and be considered en banc or by a panel. The staff attorneys also recommend whether the case might be appropriately resolved by summary disposition. The statement of facts and recommendations are confidential papers and do not become part of the court file.

Review by Supreme Court Panel

The next step in the process initiates input from the judges for the first time. All case statements prepared by the research staff, except those involving termination of parental rights, are forwarded to a rotating panel of three Supreme Court Justices for review.[8] The panel members rotate every month. Parental termination cases are exempt from screening review and are transferred directly to the Court of Appeals.[9]

The Supreme Court panel reviews the case statements and initially determines whether the case will be retained by the Supreme Court for full appellate review, retained by the Supreme Court for summary disposition, or transferred to the Court of Appeals. If a case is to be retained by the Supreme Court for full review, the panel also decides whether the case will be submitted en banc or to a panel of the court and if it will receive oral argument.

The length of time between the transfer of the case to the research staff and the transfer decision by the Supreme Court panel depends on the priority of the case. Cases involving the termination of a parent-child relationship are given the highest priority at all stages of the appellate process, followed by child custody and criminal cases. The time between the transfer to the research staff and the routing decision by the Supreme Court reviewing panel for a priority civil case is just over one month, while it is slightly less than two months for a criminal case.[10] The time period for non-priority civil cases is typically four months.[11]

Internal Structure

The next step is for the case to enter into the internal decision-making structure of one of the two courts. The Supreme Court and Court of Appeals are both set up to produce opinions on a monthly cycle. The cycle begins as cases are funneled from the reviewing panel to one of the two courts and ends when final opinions are collectively filed on a predetermined date, although a case which enters the cycle in one month for full consideration does not typically result in an opinion in the same cycle. The process is repeated each month when new cases again pass through the Supreme Court reviewing panel.

Court Panels

Cases from the review panel are first routed to divisions or panels of each court. Only three percent of cases are originally considered en banc.[12] Panels are used to decide cases in order for the two courts to keep up with the increased number of appeals filed over the years. Since 1977, for example, the number of appeals filed in Iowa increased 83%, from 1,231 to 2,248.13.

Panel members are randomly selected and rotate each month pursuant to a schedule prepared each year by the Chief Justice and Chief Judge of the courts. Cases retained by the Supreme Court for full review are assigned to one of two panels of five justices, while cases retained for summary disposition are assigned to a panel of three justices for a per curiam opinion. Cases transferred to the Court of Appeals are typically assigned to one of two three-member panels. A separate three judge Court of Appeals panel screens cases not immediately assigned by the Chief Judge for submission to a panel to preliminarily determine which would be appropriate for a short memorandum opinion.

Thus, the panel system establishes three tracks for a case to follow after assignment to one of the two courts. It may be assigned to a panel for oral argument, assigned to a panel without argument, or assigned to a panel for summary disposition or memorandum opinion.

Supreme Court Panels

The Chief Justice randomly assigns the cases selected by the review panel for consideration by the Supreme Court to one of two panels, with priority cases assigned first. Both oral and nonoral cases are assigned, with an equal number given to each panel. At the same time, the Chief Justice randomly designates one of the panel members to be the author of the opinion for each case. Each justice is assigned to write an equal number of opinions. Additionally, the Chief Justice mails a notice to the attorneys in each case informing them their case has initially been selected to be considered without argument, or informing them of the time of the oral argument.[14] This notice is usually sent five weeks prior to the scheduled oral argument. Thus, cases which enter the cycle in one month for full consideration are not submitted to the court until the following month. Attorneys may challenge a nonoral assignment by submitting a written statement of reasons within seven days of the notice.

Those cases selected for summary disposition are assigned to a separate three member panel, which rotates

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every three months. This route is commonly called the "fast track." The most senior judge on the panel is responsible for the prompt preparation of a short per curiam opinion, with input from the other panel members. The opinions are then circulated to the other members of the court for approval, and filed separately from the full opinions of the court. "Fast track" cases often involve single issues governed by established legal principles or a limited standard of review. Approximately 30% of the cases retained by the Supreme Court follow the "fast track" or result in a per curiam opinion.[15]

Court of Appeals Panels

The Supreme Court transfers an average of 62 cases to the Court of Appeals each month.[16] When the transfer is made, the case statement, briefs, appendix, transcript, and complete district court file for each case are delivered to the court.

The Chief Judge reviews the case statements and tentatively selects those cases which merit oral argument, and those cases which should be considered without argument.[17]

The Chief Judge then randomly assigns the cases to one of the two panels. Thirty-six cases are selected for oral argument each month, 18 by each panel. Additionally, each panel is randomly assigned 12 nonoral cases by the Chief Judge each month. The Chief Judge also randomly assigns judges to be responsible for writing the opinion for nonoral cases.

At the same time, the Chief Judge informs the attorneys of the assignment schedule by sending a notice explaining their case has either been assigned for hearing or has been tentatively selected to be submitted to a panel without argument.[18] Attorneys may challenge the nonoral or panel assignment by submitting a written statement of reasons within seven days of the notice. Approximately 60% of the cases are given oral argument, while the remaining cases follow the nonoral track.[19]

A case selected for oral argument is typically heard three weeks following transfer, while a nonpriority, nonoral case may not be submitted to a panel for several months. This delay results because the Court of Appeals typically receives more cases each month than it is structured to handle. The average time between transfer and submission for all cases is one and one-half months.[20] Nonoral non-priority cases are assigned each month in the order received.

Under a recently implemented procedure, a rotating panel of three judges makes a further review of those cases not selected by the Chief Judge for oral argument to determine if they could be decided by a short memorandum opinion. Case selected by the panel for memorandum opinion are then removed from the regular assignment list and a short, per curiam, memorandum opinion is promptly prepared under the direction of the most senior judge on the panel. The opinion is circulated to the other court members for any comments, and filed if no objection is lodged. Any member of the court may reject the memorandum opinion and request the case be returned to the system for full consideration. It is hoped this process will enable more cases to be submitted each month and help ease the backlog of nonoral, nonpriority cases. The Supreme Court has also appointed several retired judges to serve on the Court of Appeals as senior judges. These judges are available to assist in reducing the backlog of cases.

Shortly after the chief judge assigns the cases to the panels, the panels meet to randomly assign a judge on the panel to be responsible for drafting the opinions for the cases assigned for oral argument. This is done by placing all the names of the cases on a small piece of paper and allowing the judges to take turns drawing a case. Consequently, as with the Supreme Court, the initial author of a case is known at the time oral argument is held. However, the panel does not discuss the case prior to oral argument.

Hearing Week

After the panel assignments have been made in both courts the briefs, appendix and case statement for each case assigned to a panel are transferred to each judge on the panel as well as his or her law clerk. Additionally, the judge assigned to write the opinion for the case is given the full transcript and district court file. The judges and their law clerks typically review the briefs and appendix for the cases assigned to their panel in preparation of the oral arguments. The clerks may be required to prepare short memoranda on specific issues of interest, or do other work on cases. The judge may also begin writing opinions for the nonoral cases, or continue to work on opinions from the preceding month.

All cases assigned to the panels, including nonoral cases, are formally submitted for decision during hearing week. The Supreme Court and Court of Appeals hold their hearings on separate weeks, generally the first and second week of each month. Immediately following oral arguments, the panel who heard the case retires to conference or discuss the merits of the case for the first time. A nonbinding vote is taken by the panel members on each case, and

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suggestions are made to the writer. However. the writer is free to draft the initial opinion without regard to the vote or position of the other panel members. If the writer is in the minority at the preliminary conference, the preliminary opinion may be written in an effort to win over one or both of the other judges. During hearing week, the panels may also conduct a preliminary conference on those cases assigned to the panel without argument.

Court Conference

Following hearing week, the judges individually work on their assigned cases. They are assisted only by their law clerks. Preliminary opinions for both oral and nonoral cases are completed and circulated to all members of the court. A formal conference is then conducted each month by the full court to consider each opinion which has been circulated to all court members. An opinion must be circulated prior to a specific date approximately one week prior to conference if the author wants it considered at conference. This allows the other members of the court ample time to study the opinion, and decide whether to join, specially concur, dissent, or take no part. If an opinion is not completed prior to the cut-off date, the case will be considered at conference the following month. Generally, a case submitted to a panel in one month is not conferenced until the following month.

Once a proposed opinion of one of the judges has been circulated, the other judges, including non-panel members, may convey their suggestions or criticisms to the writer, and the writer may change or modify the opinion by re-circulating a different opinion prior to conference. This may be done informally by a phone call or more formally by a letter or memorandum. Additionally, judges may draft dissenting or concurring opinions in response to a proposed opinion, which are then circulated to all judges prior to the conference. The exchange of positions is helped. The judges submit these forms prior to conference. indicating their general position on the opinion. The positions are not binding at conference, but serve to inform the court members of the preliminary position of each judge before conference.

At final conference, the full court gathers to consider each circulated opinion and any accompanying dissenting or concurring opinions. The judges sit at a large conference table, with the Chief Justice or Chief Judge presiding at the head of the table. At the Court of Appeals Conference, the remaining judges sit to the right and left of the Chief Judge according to seniority, as they do on the bench. In the Supreme Court, justices sit in the chairs formerly occupied by the justices they replaced.

Each case is discussed separately and a vote is taken on each opinion, after all court members who desire to be heard have spoken. The order of voting is also predetermined. In the Supreme Court, the justice to the right of the opinion writer votes first, and the voting then proceeds counterclockwise around the table. In the Court of Appeals, voting begins with the most senior judge and moves counterclockwise around the table ending with the Chief Judge.

Nonpanel members usually do not actively participate in the discussion of the opinion of another panel, although any member of the court may enter the discussion and request en banc consideration of any case, mandating a vote of the full court. Thus, if a case was heard by a panel, but decided en banc, it is likely a dissenting panel member sought support from the nonpanel members at conference or a nonpanel judge disagreed with the opinion and opened it to the full court. Other times, the importance of an issue may suggest full court participation.

Some of the discussion at conference may not concern the result of the case, but the language of the opinion. These discussions often lead to modifications in the proposed opinion. If a dissenting opinion receives a majority of the votes at conference, the author of the dissenting opinion is assigned to prepare the majority opinion and the original writer may circulate a dissent. If any judge wants more time to study the opinion before voting, the case may be held and reconsidered at conference the following month.

Majority vote prevails at conference. If the Court of Appeals is evenly divided, the case is affirmed by operation of law without an opinion.[21]

The opinions approved by the court at conference are filed with the clerk approximately one week following the conference. The Iowa State Bar Association, as an authorized agent of the clerk, mails the opinions to the attorneys of record as well as the trial judge in the case.[22] The average length of time between the submission of a case and the filing of an opinion is slightly less than two months.[23] Cases which take longer than the average period usually signal the presence of a difficult issue in the case which has generated disagreement among the court members or the need for extended study and research.

Post Filing Period

The filing of an opinion is not always the end of the process. Following the filing of an opinion from

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the Court of Appeals a case may continue to follow one of two final paths. If a petition for rehearing is granted, the Court of Appeals may vacate the opinion and file a new opinion with or without oral argument.[24] The initial decision to grant a petition for rehearing is typically made by the Chief Judge or the judge who authored the opinion.

The case follows a second path if a petition for further review by the Supreme Court is filed. Each petition is transferred to the research staff, who prepares a memorandum on each case.[25] The memorandum is similar to a case statement, and includes a recommended ruling on the petition. No final recommendation is made, however, on the ultimate result in the event further review is granted. The recommendations, like the case statements, are confidential and do not become part of the court file.

Each further review application is then transferred to a rotating panel of three justices, together with the resistance, briefs, appendix, and memorandum. The panel reviews the request and makes a recommendation to the full court. Each application is then considered by the court en banc at a conference. The vote of five justices is required for an application for further review to be granted.[26] If granted, the court determines the manner of submission and the case proceeds much like a case originally retained by the Supreme Court. If the further review application is denied, the opinion previously filed by the Court of Appeals becomes final.

Following the filing of an opinion from the Supreme Court, the case may be granted a rehearing.[27] If this occurs, the Supreme Court may enter a substituted or amended opinion without reargument, or order the case argued and resubmitted. If rehearing is denied, the opinion becomes final.

Publication

The last path a case may take after the opinion has become final is publication in the North Western Reporter. The Supreme Court publishes all signed opinions. Per Curiam opinions are typically not published. The Court of Appeals publishes approximately 20% of its opinions. The initial decision to publish a Court of Appeals opinion is made by the author, subject to a majority vote of all members of the court. The criteria to consider for the publication of an opinion are whether the case involves an important legal issue, a factual situation of broad public interest, or a legal issue of first impression.[28] When further review is granted the Supreme Court decides whether the opinion should be published.[29]

Conclusion

Justice Potter Stewart remarked many years ago that appellate courts have an obligation to consider new procedures to improve efficiency, but wisely cautioned that "judicial decisions are not articles of commerce, and courts are not Detroit assembly lines."[30] The operating procedures outlined in this article allow the Iowa appellate courts to operate with a high degree of efficiency, while maintaining the essential quality and character of justice in each case. The volumes of appellate opinions which fill library and office shelves are more than an important resource, they are also a symbol of the remarkable strength and integrity of the appellate process.❑

1. State Court Administrator, Annual Statistical Report of the Iowa Judicial Dept., 1995. (Hereafter Report of State Court Adm.)
2. *Id.*
3. *Id.*
4. *Id.*
5. Iowa Sup. Ct. R. 4 (a)
6. *Id.*
7. *Id.*
8. Iowa Sup. Ct. R. 4 (b)
9. Iowa Sup. Ct. Supervisory Directive (effective July 1, 1988)
10. Report of State Court Adm.
11. *Id.*
12. *Id.*
13. *Id.*
14. Iowa Sup. Ct. R. 7
15. Report of State Court Adm.
16. *Id.*
17. Iowa Sup. Ct. R 3
18. Iowa Sup. Ct. R. 3.1, 7
19. Report of State Court Adm.
20. *Id.*
21. Iowa Code §602.5106 (1995)
22. Iowa Sup. Ct. R. 8
23. Report of State Court Adm.
24. Iowa Sup. Ct. R. 3.5
25. Iowa Sup. Ct. R. 12 (a)
26. Iowa Sup. Ct. R. 12 (c)
27. Iowa R. App. Proc. 402
28. Iowa Sup. Ct. R. 10
29. *Id.*
30. Leflar, Robert A., Appellate Judicial Opinions, 252 (1974)

DONIELSON TO BE HONORED BY OPPERMAN STUDY ROOM

Plans for a gift project to honor Chief Judge Allen (Barney) Donielson are underway as Drake Law School alumni and friends work to fund a student study room in Opperman Hall. The goal is to raise $15,000.

"As chief judge of the Court of Appeals, Judge Donielson served on the Court since its inception in 1976 and has been a longtime supporter of Drake Law School programs," said Judge Mark Cady. "We thought it would be appropriate to recognize both these accomplishments by having a study room dedicated to his name."

Judge Terry Huitink, Judge Mark Cady, Bill Scherle, Dan Marvin, Dick Smith, Bob Allbee, and Dean David Walker are heading up the memorial project.

"Judge Donielson made a true contribution to his profession, his community and his state," Cady said. "This memorial is an opportunity for us to recognize that and remember it for a long time." Those interested in making a contribution should contact Penny Brown, director of alumni and development for the Law School, at:

515-271-4176 or
1-800-44-DRAKE, ext. **4176**.

OCCUPYING THE VEHICLE - AN ANALYSIS FOR DEFENDING UIM CASES

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"The nature of the injured person's activity, considering time and distance factors, determine the existence of a continuing relationship or reasonable geographic perimeter." "We conclude that [the tow truck operator] did not sever his status as an occupant of the tow truck."

The Iowa Supreme court faced this question once. But the situation presented to the Iowa Supreme Court really wasn't a close call. In *Huebner v. MSI Ins. Co.*, 506 N.W.2d 438 (Iowa 1993) a 14 year old Monte Huebner was injured by a hit-and-run car while he was walking along a county road. The hit-and-run driver was later found and his liability carrier paid policy limits. The limits were inadequate for the damages so Monte looked to his father's policy. One of the issues was whether Monte was "occupying" his father's truck at the time of the accident. The Supreme Court said, "Clearly, Monte was not a person occupying a covered auto at the time of his injury. He was a pedestrian walking alongside the road." *Huebner* at 441.

But, the Iowa Court found coverage under the medical pay provisions of a policy in *Henderson v. Hawkeye Security Ins. Co.*, 106 N.W.2d 86 (Iowa 1960). Hawkeye Security issued a standard automobile policy to John Henderson which provided medical payments of a maximum of $1,000 for each person injured while *in or upon or while entering into or alighting from* Henderson's automobile. Ruby Henderson was injured when she was struck by another automobile as she was standing beside Henderson's stalled automobile. The Court found there was coverage:

"By the clear weight of authority actual physical contact with the insured's automobile, when shown, is sufficient to sustain a recovery. It is the rule generally recognized that such words as 'while in or upon' in an insurance policy of this nature, require a broad and liberal construction. Where one has alighted and is not in physical contact with the car, but is standing or walking away from it, many authorities reject claims under such provisions. The issue here became one of fact, and while we may not have agreed with the trial court's finding on this question, we think it was amply supported by the evidence and is conclusive of that fact. There is evidence in the record that Ruby Henderson, when struck down, was leaning against the car attempting to put down the hood which she had raised to look for the cause of the stall." *Henderson* at 90 (citations omitted).

Sometimes a court will conclude that the words "in, upon, getting in, on, out or off" are ambiguous. In *Michigan Mutual Ins. Co. v. Combs,* 446 N.E.2d 1001 (Ind. App. 1983) the claimant was working on the wires to a distributor when he was hit by an uninsured vehicle.

"This case is an exercise in semantics as we must determine the intended meaning of the word 'upon' when used as a part of a definition of an insured as being one 'occupying' an insured automobile - an exacting task in view of the diverse opinions on this subject, and our factual setting is different from many of the reported cases. Most cases involve a claimant who had been or intended to be a driver or passenger of the insured vehicle. In such cases, the claimants fit more easily into the mold of 'occupants' as that word is commonly understood. Here, we are presented with a claimant who, although his actions were directly related to the operation of the vehicle, was not a driver or passenger of the insured car. The reported cases do, however, provide us with some guidance. We agree with the determination of numerous courts that an ambiguity is created by the use of the term 'upon' in a clause providing coverage for injuries inflicted while the insured is 'in or upon or entering into or alighting from' a motor vehicle."

The court then noted that a standard dictionary has many definitions of the word "upon." "[I]t is obvious that reasonable persons could differ in the opinions as to the meaning of the word 'upon.' So, to be 'upon'; a car is not necessarily to be 'on' or even in contact with it. . .There are respectable lines of authority producing conflicting interpretations of the word 'upon'; regardless of which interpretation we might prefer, that operative word is ambiguous. And because the ambiguity was created by language used by the insurer, the interpretation favoring coverage, whether it be in application of the physical contact rule or the. . . claimant-vehicle relationship analysis, it must be applied."

As put by the Court succinctly, "Insurance companies may intend to insure only those persons with operator/passenger status, but in defining the word "occupying" as meaning "upon," they have failed to clearly so state. Thus, the result[s] in [other cases finding coverage] were mandated by the use of ambiguous contract language-language which requires a construction favorable to coverage."

Let's look at situations that motorists commonly find themselves in to get an understanding of the coverage problems in deciding if a person is "occupying" a vehicle.

Some of the cases that follow are old and might not be decided the same way today. Some of the courts either require physical contact at a mini-

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OCCUPYING THE VEHICLE - AN ANALYSIS FOR DEFENDING UIM CASES *Continued from page 11*

mum before finding "occupying" or may not be as liberal in their conclusions as other courts. Some of these cases concern medical pay coverage, a coverage that generally requires "occupancy" of the vehicle, too. And, of course, these decisions are often based upon jury verdicts since it is generally a question of fact whether a person is "occupying" a vehicle.

But the following cases may be helpful to understanding that courts go beyond the literal definitions of the words "in, upon, getting in, on, out or off" in deciding whether a person is "occupying" a vehicle at the time of the injury. Remember, in each of the UM/UIM cases the claimant is trying to become an insured under someone else's policy and either exhausted his own UM/UIM policy or didn't have the foresight to have his own policy in the first place.

A common driving situation is an accident. Oftentimes people get out of their cars at the accident scene. Typically, courts find that a person is still "occupying" the vehicle after the accident at least so long as they are injured relatively promptly after getting out of their cars and aren't too far from them. In *Cepeda v. U.S.F. & G. Co.*, 326 N.Y.S.2d 864 (N.Y. 1971) a passenger got out of the car and went to its rear to inspect the damage from the accident when he was hit by another vehicle. The passenger was still "occupying" the vehicle he was riding in at the time of the accident. Where drivers are outside their vehicles exchanging information after an accident and another accident occurs, two courts have found that they were still "occupying" their vehicles. *Wolf v. American Casualty Co.*, 118 N.E.2d 777 (Ill.1954), *In re Nassau Ins. Co.*, 477 N.Y.S. 415 (N.Y. 1984). But, in *Greer v. Kenilworth Ins. Co*, 376 N.E.2d 346 (Ill. 1978), the claimant was a passenger in an automobile which collided with another car. The two vehicles then pulled over to opposite sides of an expressway exit ramp. After inspecting the automobile in which she was riding, the claimant attempted to cross the highway to inspect the other car and was struck by a third automobile. The Court found that the claimant was not "occupying" the vehicle in which she had been a passenger because there was no contact between the claimant and the insured vehicle and there was no relationship between the insured vehicle and the cause of the alleged injuries.

In *Day v. Coca-Cola Bottling Co.*, 420 So.2d 518 (La. App. 1982), Day was driving his employer's pickup truck when he stopped and got out to help a car that had skidded onto the median. As the car was backing off the median, a Coca-Cola truck jack knifed to avoid striking the car and Day was killed. Day's estate got UM/UIM coverage from his employer's truck's policy. The Court concluded that at some time after exiting the vehicle and at some distance from it, the person loses uninsured motorist protection. The Court noted that determination must be made upon the circumstances of each case. The Court found that Day was never more than about 24 feet from his truck and that only several seconds lapsed after he parked the truck until the accident. But, in *Fajen v. Allstate Ins. Co.*, 538 P.2d 1190 (Idaho 1975) the driver left his car to help his wife who was involved in a collision between a car she was driving and another car. He injured himself while attempting to lift his wife's car. He was found not "occupying" the car he had been driving.

One court went so far as to find a continuing "occupancy" where a driver left his vehicle to seek shelter after an accident. In *Nelson v. Iowa Mutual Ins. Co.*, 515 P.2d 362 (Mont. 1973), the Court found that the insured was entitled to medical pay benefits where his car went into a ditch on a rural road at night in sub-zero blizard conditions, causing him to expire while attempting to reach a place of safety.

Where there is no accident but a person exits the vehicle and is still in the immediate vicinity courts generally find that the person still "occupies" the vehicle. In the following cases the claimant was found to be "occupying" the vehicle at the time of the injury.

A paraplegic was exiting a car in a garage when he heard a hissing sound and smelled gasoline. He traveled toward the left rear fender by pulling himself along the car holding onto its fender. He then noticed flame and was burned in the process of leaving the garage. *Stoddard v. Aid Ins. Co.*, 547 P.2d 1113 (Idaho 1976). In *Newcomb v. Fountain*, 357 A.2d 836 (N.J. 1976) the passenger was outside the car at a gas station watching the mechanic add fluid to the radiator when the radiator exploded. In *White v. Williams*, 563 So.2d 1316 (La. App. 1990) the claimant had paid for his gas at a filling station and was walking back to his car when he was injured.

In *Whitmire v. Nationwide Mut. Ins. Co.*, 174 S.E.2d 391 (S.C. 1970) the claimant got out of the car and walked around the front of it to get to the shoulder when he was hit by another car. Wisconsin found coverage for a virtually identical situation in *Sentry Ins. Co. v. Providence Ins.*

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OCCUPYING THE VEHICLE - AN ANALYSIS FOR DEFENDING UIM CASES *Continued from page 12*

Co., 283 N.W.2d 455 (Wis. App. 1979). In *Nickerson v. Citizen's Mut. Ins. Co.*, 224 N.W.2d 896 (Mich. 1975) the car had stalled and the passenger and the driver pushed it to the side of the road. The passenger walked around to the front of the auto and another car struck the auto, and pushed it into the passenger. The court noted that "physical contact" between the passenger and the insured vehicle is not a requirement for coverage.

But in *Rosebrooks v. National General Ins. Co.*, 434 N.E.2d 675 (Mass. App. 1982) the wife of the insured slipped on a patch of ice as she walked around the insured's car to enter by the rear door. She had one hand on the car. The court held she was not "in," "upon," "entering into," or "getting out of," the car, and was thus not an "occupant" within the meaning of the policy provisions for medical payments. And in *Carta v. Providence Washington Indemnity Co.*, 122 A.2d 734 (Conn. 1956), the plaintiff had parked the car, set the hand brake, got out of the car and was proceeding around the front of the car when it rolled forward and struck her. The Court held that she was not within the coverage of the medical pay provisions of her policy.

Another common situation is where a person is merely approaching a vehicle to get into it. Generally, without more, courts have denied coverage even when the claimant had the intent to enter the vehicle. The typical situation involves a person being struck by another vehicle while crossing the street to get into a car.

In *Menchaca v. Farmers Insurance Exchange*, 59 Cal. App. 3d 117 (1976), the claimant left a movie theater and was crossing a street toward her companion's parked car when she was struck by an uninsured motorist. The Court held that she was not an insured under her companion's uninsured motorist policy. The Court concluded that the insured was not in close proximity to the car and was not performing acts physically and directly related to the automobile or its use.

In *Allstate Ins. Co. v. Horn*, 321 N.E.2d 285 (Ill. 1974), the claimant was crossing a street and was about 24 feet from the car he was going to get into when another car struck him. The Court ruled that he was not "entering into" the vehicle under a policy that defined "occupying" a vehicle to include entering it. In *Ostendorf v. Arrow Ins. Co.*, 182 N.W.2d 190 (Minn. 1970), the claimant was about ten feet away from the car. The Court found no coverage. In *Gleason v. Merchants Mut. Ins. Co.*, 589 F.Supp. 1474 (D.C. R.I. 1984), the claimant was about four or five feet from the car when the accident occurred. The Court held that she was not "getting into" her automobile at the time of the accident. Nor did the courts find coverage in situations where the claimant was injured while walking toward the rear of the car to open the trunk. Nor where the claimant reached to unlock the car's door and slipped on a patch of ice and fell. Here, the Court concluded that, rather than entering into the car, the claimant was merely preparing to enter it. In *Ritchie v. Federal Ins. Co.*, 347 N.W.2d 478 (Mich. 1984), the insured was carrying a 50-pound block of ice toward his parked truck with the intent of loading it on the truck. He was injured when a stairway which he was descending collapsed. The Court ruled that he was neither entering into nor alighting from a vehicle.

But in *Haagenson v. National Farmers Union Property and Casualty Co.*, 277 N.W.2d 648 (Minn. 1979), the insured was electrocuted by a nearby downed power line while approaching his truck and grasping the handle of the door. The insured's companion heard the truck passenger door click, saw it move from halfway to completely open and, immediately afterwards, saw a flash and heard the insured scream. The Court held that the insured was injured in sufficiently close proximity to the truck to be considered entering into it. The Court observed that the words "entering into" would be given their popular, ordinary and plain meaning. The Court said it was a question of degree as to how close a person must be to a vehicle to be found entering into it. And, in the *Kreuser* case mentioned earlier in this article the Court allowed coverage when the accident happened ten feet from Kreuser as she was beginning to turn to enter Hoffman's vehicle.

Another common situation is where someone is injured while making a roadside repair of a disabled vehicle. An accident happens and the person making the repairs claims coverage from the policy covering the disabled vehicle. Generally, courts find coverage if the injury happened while the claimant was in the act of working on the disabled vehicle. In *Kentucky Farm Bureau v. Gray*, 814 S.W.2d 928 (Ky. App. 1991) the claimant took the battery from his car and was putting it in the disabled car when the disabled car rolled into him. In *Michigan Mut. Ins. Co. v. Combs*, 446 N.E.2d 1001 (Ind. App. 1983)

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OCCUPYING THE VEHICLE - AN ANALYSIS FOR DEFENDING UIM CASES *Continued from page 13*

the claimant was working on the wires to a distributor when he was hit by an uninsured vehicle. In *Hart v. Traders & General Ins. Co.*, 487 S.W.2d 415 (Tex. App. 1972) the claimant was injured while connecting a gas line to the engine. In *Pope v. Stolts*, 712 S.W.2d 434 (Mo. App. 1986) the claimant was leaning over the hood with jumper cables in hand. Where a claimant is standing beside the car pouring gas into it, the courts have found that the claimant is sufficiently "vehicle oriented" to allow the claimant access to the car's UM/UIM coverage. *See Halterman v. Motorists Mut. Ins. Co.*, 443 N.E.2d 189 (Ohio 1981).

But in *Washington v. Allstate Ins. Co.*, 499 So.2d 1255 (La. App. 1986), a motorist was injured when a third party's vehicle collided with his stalled car while he was standing between it and the insured car. He intended to get a jump start from the insured car. He was held not "in, on, getting into or out of" the insured car. The Court noted that the motorist was never an occupant of the insured car, and, therefore, clearly never in, entering, or exiting from it.

When the claimant is in the process of loading or unloading the vehicle, typically putting items into or taking them out of the trunk, courts have little problem in affording coverage. In *Robson v. Lightning Rod Mut. Ins Co.*, 393 N.E.2d 1053 (Ohio 1978), the claimant was leaning into a friend's truck to load stereo equipment when he was hit by another vehicle. He had been a passenger in this vehicle immediately before and after the injury. The Court held that he was "entering" his friend's vehicle at the time of the accident and was, therefore, covered by the uninsured motorist policy of the vehicle he was loading. The Court admitted that it was unclear at just what point a person was entering or alighting from a vehicle. The Court defined coverage in terms of a reasonable geographic perimeter around an insured vehicle, or a kind of relationship between the vehicle and the claimant, finding that so long as a claimant was within that area or engaged in any task related to the vehicle's operation, he would be covered. In *Madden v. Farm Bureau Mut. Auto Ins. Co.*, 79 N.E.2d 586 (Ohio 1948), the insured changed a tire and placed the flat tire in the trunk of a car. While standing at the rear of the automobile leaning forward with the upper part of his body and arms in the trunk, he was struck by another automobile. He was held to be "in or upon" his own automobile at the time of the accident within the meaning of the medical payment provisions. Similarly, in *Hendricks v. American Employers Ins. Co.*, 176 So.2d 827 (La. App. 1965), the Court held that the claimant who was leaning over the closed tailgate of a pickup truck trying to lift a bucket of burning fuel from its bed was "upon" the truck and insured even though he was not resting on the vehicle. Coverage was also afforded to three claimants who got chains out of the trunk, who got a present out of the trunk and who put a tire back into the trunk.

Pushing a vehicle also probably will qualify a claimant for UM/UIM coverage of the vehicle being pushed. In *United Farm Bureau Mut. Ins. Co. v. Pierce*, 283 N.E.2d 788 (Ind. 1972), the insured was "upon" an automobile at the time of the accident and was within a medical pay provision of a policy covering his vehicle where he slipped, cutting his fingers, while pushing on the front fender of his automobile that had become stuck in snow. In *Union Mut. Fire v. King*, 300 A.2d 335 (N.H. 1973) the claimant was pushing a vehicle when he slipped on ice. Changing a tire or putting on snow chains will qualify a claimant for UM/UIM coverage of the vehicle. See *Christoffer v. Hartford Accident & Indemnity Co.*, 267 P.2d 887 (Cal. 1954) and *Cocking v. State Farm*, 6 Cal.App.3d 965 (1970).

School bus cases are different. In school bus accident cases, for reasons unique to school busses, the courts have found coverage of the busses' uninsured motorist or medical payments coverage even though the child is not literally aboard the bus. In *Westerfield v. LeFleur*, 493 So.2d 600 (La. 1986), a child was killed by a passing uninsured motorist as she crossed the highway to board a school bus. The bus had been stopped on the street with its signals flashing waiting for the child. The bus owner's uninsured motorist insurance policy covered persons occupying the bus and defined "occupying" to include the act of entering into the vehicle. The Court found that the child's relationship with the vehicle, in terms of time and distance, with regard to the risk of entering it, would determine coverage. The Court noted that a child was legally "protected" during the entire process of crossing a roadway to enter a stopped school bus with its signals on. The Court found that because the parties to the insurance contract probably were aware of this and that they intended that "entering into" a school bus included the entire process of crossing a roadway and reaching a safe place within the bus.

In deciding the likelihood or not of the court finding coverage, ask yourself these questions. Had the claimant been a passenger in the vehicle just before the injury? Coverage seems to stick with a passen-

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OCCUPYING THE VEHICLE - AN ANALYSIS FOR DEFENDING UIM CASES *Continued from page 14*

ger after leaving the vehicle, whereas it might not extend to a person in the same exact location who was going to get into the car. Was the claimant in contact with the insured vehicle at the time of the accident? Was the claimant doing something with the insured vehicle at the time of the accident such as repairing it, towing it, pushing it or loading or unloading it? Did the use of the vehicle whose UM/UIM coverage is sought place the claimant in the position where he was when he was injured?

The extension of your policy to cover persons who are outside your car may have a certain humanitarian appeal. But the courts need to be somewhat cautious about doling out your coverage to oftentimes total strangers. What if you, too, were injured in the accident? No problem if the tortfeasor has plenty of liability coverage to pay for all the injuries caused by the accident - yours and the stranger's. And there is no problem letting the claimant invade your UM/UIM coverage if you have enough UM/UIM coverage for your injuries and the stranger's injuries (or you have a split limit UM/UIM policy).

But what if you don't have enough UM/UIM coverage for both you and the stranger? Suddenly, part of your insurance - insurance that you bought and paid for - is being claimed by an interloper, and sometimes a stranger at that. And a stranger who wouldn't even care about your policy if he had purchased adequate UM/UIM coverage himself. ❑

DEFENDING THE TORTFEASOR: A PROPOSAL FOR UIM INSURERS *Continued from page 4*

UIM carrier is asserting a policy defense. The defendant is benefited, in a second hand way, by the UIM coverage and he has no desire to see a policy defense succeed. The UIM carrier and the defendant also have divergent interests if the UIM carrier has a potential subrogation claim against the defendant. If there is a policy defense or if the company is unwilling to waive subrogation, the plaintiff/insured's conflict argument is valid.

There is some question of whether the plaintiff/insured has any standing to raise a conflict argument. It is doubtful that an "outsider" to the attorney client relationship is in any position to interfere in the relationship. There are no reported Iowa cases where a private party, who has never been the attorney's client, successfully raised a conflict of interest challenge.

Notwithstanding questions about who might be available to raise a challenge, it probably is improper for an attorney to simultaneously represent the UIM carrier and the defendant unless the UIM carrier concedes coverage and waives subrogation.

In most cases there is no policy defense and the UIM company gives up nothing by conceding as much. Likewise, UIM subrogation claims are usually worthless because they are uncollectable. Typically, the UIM company gives up little or nothing by waiving its subrogation.

If the UIM carrier waives subrogation and any policy defense, its obligations will rise or fall with the defendant's case. *American States Ins. Co. v. Estate of Tollari*, 362 N.W.2d 519, 522 (Iowa 1985). The extent of the company's liability is defined by reference to the amount the plaintiff/insured is "legally entitled to recover" from the defendant, and the insurance company will be bound by the determinations made in the defendant's trial. Thus, the insurance company and the defendant have a perfect community of interests. They both have a financial interest in seeing the defendant prevail on liability, if possible, and otherwise in reducing the damages.

Because there is a community of interest between the two clients, the lawyer has no conflict. If policy defenses and subrogation are removed from the picture, the situation presented by the proposed solution is really no different from the situation presented in a liability insurance case. In the liability insurance case, the lawyer has an insurance company client and an individual client but both clients have a common adversary, so the duel representation is acceptable. *See Henke v. Iowa Home Mut. Cas. Co., supra.* The Iowa

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DEFENDING THE TORTFEASOR: A PROPOSAL FOR UIM INSURERS

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Code of Professional Responsibility at DR 5-105(D) provides:

> "A lawyer may represent multiple clients if it is obvious that the lawyer can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of the lawyer's independent professional judgment on behalf of each."

Objection #2: It is "bad faith" for the insurance company to align itself with the defendant in an attempt to defeat the claim of its own insured.

Answer: This objection fails to recognize the distinction between liability insurance and casualty insurance. A *liability* insurer owes a fiduciary duty to protect the interest of its insured. A casualty insurance carrier owes no such fiduciary duty. *Pirkl v. Northwestern Mut. Insurance Association*, 348 N.W.2d 633 (Iowa 1984). This proposition is clearly established but it seems to be lost on many members of the bar, so it is worthwhile to review the precedents which draw this distinction.

In *Pirkl* the Supreme Court said:

> "The relationship between the insurer and its insured in the two situations is markedly different. In the former [liability insurance] situation, a clear fiduciary duty arises which places an affirmative duty on the insurer to investigate the claim and take such additional affirmative action as is required in the best interests of its insured. *In the casualty insurance situation, the relationship between insurer and insured is for many purposes at arms length. . . . The two parties are on opposite sides of the issue rather than being partners on the same side as in the liability insurance situation.*" *Id.* at 635. (emphases supplied)

This language was quoted by the court in *Dolan v. Aid Ins. Co.*, 431 N.W.2d 790 (Iowa 1988), an underinsured motorist case. *Dolan* made it clear that in the UIM situation, the insured and insurer are "on opposite sides of the issue rather than being partners on the same side. . ." *Dolan* at p. 793. The *Dolan* Court concluded that "[w]hen a claim is 'fairly debatable', the insurer is entitled to debate it." *Id.* at 793.

> The amount of damages in a personal injury case is almost always subject to a "fair debate." The Iowa Supreme Court has faced at least seven attempts to apply the bad faith doctrine to underinsured motorist coverage and in each instance has determined that liability or damages or both were "fairly debatable" as a matter of law.[1]

Few would doubt that nearly every UIM case presents a "fairly debatable issue." It would be illogical if the insurance company were forced into a choice of either forgoing its right to debate (by severing itself completely from the tort suit) or submitting to an unfair debate (by participating in its own name).

Objection #3: If the UIM carrier hires an attorney to defend the defendant, it creates a situation where the insurance company is (or could be) litigating both sides of the case. This is an impermissible conflict of interest for the insurance company which precludes an appearance on behalf of the defendant.

Answer: This objection correctly recognizes a problem, but the prescription makes no sense. In almost every case, the same policy which creates the UIM coverage also includes liability coverage. Any time an accident leads to the potential of simultaneous liability insurance and UIM claims, the insurance company has a built-in conflict of interest. This is true whether or not the insurance company defends under its UIM policy. The company's liability coverage interest is to see the insured win the lawsuit. The UIM interest is to see the insured lose the lawsuit. The insurance company did not ask for this conflict. The legislature mandates that underinsurance be offered in conjunction with liability policies.

Depriving the insurance company of the opportunity to defend its UIM interest does nothing to solve the legislatively created conflict. It merely drives it underground. One state, Texas, has ruled that this legislatively created conflict does prevent the insurance company from defending its UIM interest. However, the vast majority of American jurisdictions have found ways to allow the insurer to litigate its UIM interest while still providing the insured with the defense promised in the liability policy.

In the Texas case, *Allstate Ins. Co. v. Hunt*, 469 S.W.2d 151 (Texas 1971), a UIM carrier sought to provide representation for the tortfeasor. Even though there was no counterclaim pending against the insured, the court blocked the representation. The court reasoned that a counter claim is always possible. If one were filed, the insurance company would have a fiduciary duty to defend its insured. Meanwhile, having committed itself to helping the original defendant, the company would have a fiduciary duty to the defendant. The insurance company's own interest (according to the Court) would be to produce a split of liability between its two "wards." The Court perceived that the mere possibility of such a conflict precludes the

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DEFENDING THE TORTFEASOR: A PROPOSAL FOR UIM INSURERS

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company from participation on behalf of the defendant.

The majority view is illustrated by a Missouri case, *Alsbach v. Bader,* 616 S.W.2d 147 (Mo. 1981). The *Alsbach* court found that it is proper for the UIM carrier to enter the case against its own insured. The court reasoned that once the insured makes a UIM claim, the insured and the insurance company are *already* on opposite sides of the issue. The conflict was not created by the company's appearance for the defendant. It was created by the sale of a policy and the insured's claim.

Until there is actually a counterclaim filed against the plaintiff /insured, there is nothing to be done about this conflict. According to *Alsbach,* if a counterclaim is filed the conflict may be resolved by turning the control of the insured's defense over to the insured (with the insurance company still being required to pay the cost of the defense).

Alsbach seems better reasoned than the Texas case. *Alsbach* recognizes the legislatively created built-in conflict and it deals with it in a straight-forward manner. The vast majority of the courts that have faced this question have adopted a similar approach. The annotation appearing at 35 A.L.R. 4th 757 collects 38 cases from 16 jurisdictions which adopt a rule similar to the one adopted in *Alsbach.*

The Iowa courts have not had occasion to approve or disapprove the *Alsbach* approach. However, the tenor of the Iowa Court's prior pronouncements suggests *Alsbach* would be approved here. In *Handley supra.,* the Court ruled that a claim for underinsured motorist coverage is ripe for litigation even before the claim against the tortfeasor has been resolved. The Court recognized that joinder of the insurance carrier in the suit against the tortfeasor is permissible. Thus, the court has already recognized the insurance company may be placed in a position contrary to its own insured in the tort case. *Dolan supra* recognized that when the insurance company has a fairly debatable issue, it is entitled to debate it. Such a "debate" necessarily has the insurance company opposing its insured. The Texas approach would banish the UIM insurer from the lawsuit contrary to *Handley* and deprive the company of its "debate" contrary to *Dolan.*

Handley contemplated that the insured/plaintiff would be the one to bring the insurance company into the suit against the tortfeasor. However, if there is a ripe dispute, as *Handley* held, either party (the insured or the insurance company) should have an opportunity to move that dispute to judgment. It makes no sense that the insurance company can be brought into or kept out of the tort suit at the whim of the insured.

Handley teaches that to avoid possible prejudice, the jury should be shielded from knowledge of the insurance company's participation in the claim against the tortfeasor. The arrangement of having the insurance company protect its UIM interest by appearing for the defendant perfectly satisfies the competing interests that the Iowa Supreme Court attempted to balance in *Handley.*

MAKING THE SOLUTION WORK

The UIM company's interest in appearing for the defendant is obvious, but it can only do so with the agreement of the defendant and his liability carrier. Why should they agree?

The defendant has plenty of incentive to agree to the proposed arrangement. As noted above, the UIM carrier should only offer to defend the tortfeasor if it is willing to waive its subrogation rights and policy defenses. Although the UIM carrier may believe the subrogation claim is uncollectable and therefore worthless, the defendant is (or should be) bothered by the possibility of a further suit being filed against him. Moreover, the promise of UIM coverage without subrogation, has the practical effect of raising the defendant's liability limits. Few defendants will refuse to allow the UIM carrier's participation if the quid pro quo is higher limits and protection from an additional lawsuit.

Of course the representation of the defendant is, by contract, under the control of the defendant's liability carrier. Therefore the liability carrier must also be convinced of the merits of allowing the UIM carrier to participate in the defense. The liability carrier's motivation for agreeing to the proposed arrangement is similar to the defendant's. It has a fiduciary duty to take such "affirmative action as is required in the best interests of its insured." *Pirkl supra.* Allowing the UIM carrier to participate in the defense will provide the liability carrier's insured with greater protection. In the examples given above, the coverage of the defendant (I.M. Broke) effectively gets a boost from $50,000 to $350,000.

The liability carrier has at least two additional motivations for agreeing. First, allowing the UIM carrier to participate has the potential of lowering the defense costs. The particulars of how defense responsibilities will be shared may be worked out on a case by case basis, but there is no reason for there to be a complete duplication of effort between the two attorneys. Moreover, on claims that are expensive to defend (such as the head injury example above) the cost of experts can be shared. In the absence

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DEFENDING THE TORTFEASOR: A PROPOSAL FOR UIM INSURERS *Continued from page 17*

of this arrangement, one carrier or the other (typically the liability carrier) will be stuck with the whole cost of the expert and the UIM carrier will have no voice in selecting of the expert.

Second, the UIM carrier's participation in the defense will reduce, and in some cases eliminate, the problem of a potential excess verdict. It will, therefore, reduce the possibility of a bad faith claim against the liability carrier and give it more freedom to dispute questionable claims.

CONCLUSION

The solution suggested here is not for every case. In those cases where liability is clear and damages obviously exceed the defendant's limits, the liability carrier will dump the limits and avoid the case altogether. Conversely, where the case is clearly worth less than the liability limits, the UIM carrier has no incentive to participate in the defense.

However, when the liability carrier has a reason to fight and the UIM carrier has real exposure, the solution suggested here provides advantages for the UIM carrier, for the liability carrier and for the defendant. ❑

[1] *See Dolan, supra*; *Kirk v. Farm and City Ins. Co.*, 457 N.W.2d 906 (Iowa 1990); *Hernandez v. Farmer's Ins. Co.*, 460 N.W.2d 824 (Iowa 1990); *Dirks v. Farm Bureau Mut. Ins. Co.*, 465 N.W.2d 857 (Iowa 1991); *Reuter v. State Farm*, 469 N.W.2d 250 (Iowa 1991); *Weatherbee v. Economy Fire and Cas.*, 508 N.W.2d 657 (Iowa 1993); *Morgan v. American Family Mut. Ins. Co.*, 534 N.W.2d 92 (Iowa 1995).

APPELLATE CASE UPDATE *Continued from page 6*

November 13, 1992. The lower court dismissed claims for assault and emotional distress and later granted defendant's motion for summary judgment on the claim of sexual abuse. Plaintiff appeals.

Iowa Code § 614.8A, effective July 1, 1990, provides that actions for sexual abuse occurring during childhood but not discovered until the injured person reaches majority shall be brought within four years of the discovery of both the injury and its causal relationship to the abuse. The court first confirmed its recent decision in *Frideres v. Schiltz* that Section 614.8A is not retroactive to revive previously barred claims. Evidence showed that plaintiff knew of the fact and cause of her injury in 1985 and therefore her claims were barred by the statute of limitations in existence at that time and could not be revived.

The Plaintiff also argued that she recalled specific incidents of abuse occurring within four years of the filing of her lawsuit and these newly discovered abuse claims are timely under 614.8A and should be independently actionable. The trial court thought to adopt such an argument would create a "moving window" of limitations. The appellate court agreed, applying the concept of "inquiry notice" from previous cases. When a plaintiff recalls an incident of sexual abuse and recognizes a causal relationship between the abuse and the injuries suffered, she is then on notice to make reasonable inquiry of other abuses or injuries.

6. *Anderson v. Douglas and Lomason Company*, 540 N.W.2d 277 (Iowa 1995)

Wrongful Termination; Employee Handbook

Plaintiff was discharged from his employment for taking a box of pencils. He thereafter brought breach of contract action against his employer for failing to follow progressive discipline policies outlined in an employee handbook. The trial court granted summary judgment to the defendant. Supreme Court affirms.

The Court's opinion contains a thorough discussion of the development of at-will employment and the exceptions thereto based upon an employee handbook. The court said that handbook claims should be analyzed as a traditional unilateral contract except that knowledge of the offer as a prerequisite to acceptance will not be required in employee handbook cases. The fact that the employee did not read the employee manual will not prevent him from relying on the promises contained therein.

The court did, however, follow traditional contract theory in determining whether the handbook constituted a binding offer to utilize progressive disciplinary procedures. Handbook language must be sufficiently definite to be enforceable. An offer that is indefinite and vague will not survive the court's objective search for an intent to be bound. Any disclaimer language is also properly considered in determining

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APPELLATE CASE UPDATE *Continued from page 18*

whether the employer intended to be bound by any specific handbook language.

The court rejected any special requirements for disclaimers. The language and context of the disclaimer were simply to be examined in the same manner as any other language to determine its impact on the employer's intent. In this regard, the court stated that it would be guided by two factors, i.e., is the disclaimer clear in its terms and is the scope of the applicability of the disclaimer unambiguous. The disclaimer at issue in this case stated that the employee handbook "is not intended to create any contractual rights in favor of you or the company. The company reserves the right to change the terms of this handbook at any time." Considering this language in context, the court held that a reasonable person could not believe that the employer intended to be bound by the provisions contained in the manual. Thus, the handbook was not sufficiently definite to constitute a valid offer. No contract existed and the plaintiff was employed at will.

7. *Frideres v. Schiltz*, 540 N.W.2d 261 (Iowa 1995) (en banc)

Statute of Limitations; Iowa Code 614.8A

Certified question from Judge O'Brien of the Northern District of Iowa. Plaintiff filed action in September of 1991 against her parents and two brothers alleging causes of action arising out of alleged instances of sexual abuse, the last of which allegedly occurred in 1967. Defendants filed motions for summary judgment raising issues concerning Iowa Code Section 614.8A which were referred to the Iowa court for decision.

The Supreme Court first held that Section 614.8A is not to be retroactively applied and will not revive claims that were otherwise barred by a statute of limitations in effect prior to Section 614.8A's effective date of July 1, 1990. The court further stated that the common law discovery rule applies to claims filed prior to the enactment of Section 614.8A to determine if they were otherwise barred. The statutory discovery rule contained within the language of 614.8A, on the other hand, applies to actions filed after its effective date. The court also upheld Section 614.8A as against challenges on due process and equal protection grounds.

8. *Henriksen v. Younglove Construction*, 540 N.W.2d 254 (Iowa 1995) (en banc)

Jurisdiction over Extraterritorial Work-Related Injuries; Iowa Code Section 85.71

Iowa claimant brought work comp claim against his Iowa employer based upon an injury occurring on a construction project in Nebraska. Under Iowa Code § 85.71(1) Iowa has jurisdiction over extraterritorial work-related injuries provided that the employment is "principally localized" in this state. In *Iowa Beef Processors, Inc. v. Miller*, 312 N.W.2d 530 (Iowa 1981) the court interpreted the language of § 85.71(1) and held that the employee's Iowa domicile was not sufficient to satisfy the "principally localized" test. Apparently relying on *Miller*, the industrial commissioner determined that it lacked jurisdiction over the employee's claim and the lower court affirmed.

On appeal the Iowa Supreme Court overruled its previous decisions in *Miller and George H. Wentz, Inc. v. Sabasta*, 337 N.W.2d 495 (Iowa 1983). Its decision was based upon the plain language of the statute which on its face clearly permitted domicile as an independent basis for subject matter jurisdiction. The court stated that the statutory language must be given effect and the court may not rely upon its own perception of legislative intent and rules of statutory construction to reach a result it finds more to its liking. Even though Section 85.71 was fashioned after a model act the legislature nevertheless failed to adopt fully the model act definition of "principally localized employment." It was thus improper for the court in Miller to define the term in accordance with the model act definition under the guise of statutory construction.

9. *Wieseler v. Sisters of Mercy Health Corp.*, 540 N.W.2d 445 (Iowa 1995)

Premises Liability; Restatement Sections 343, 343A

Slip and fall action based on alleged negligence in maintaining a visitor parking lot. Jury trial resulted in verdict for the plaintiffs. Lower court granted defendant's motion for judgment notwithstanding the verdict which was affirmed on appeal by the court of appeals. Supreme Court reverses.

The Supreme Court stated that the controlling question was whether substantial evidence showed defendant should have anticipated harm to the plaintiff even though plaintiff was aware of the slippery condition of defendant's parking lot. After reviewing Restatement Sections 343 and 343A in conjunction with the record, the court felt the dangerous condition of defendant's parking lot was or should have been just as obvious and known to the defendant as it was to the plaintiff. The fact that the danger was known or obvious to the plaintiff is important to determine whether he may be charged with negligence, but it is not conclusive in determining the hospital's duty under the circumstances. The jury could still conclude that the defendant should have realized the plaintiff might fail to protect himself from the slippery condition of the parking lot despite his knowledge of the hazard.

10. *Barron v. State Farm*, 540 N.W.2d 423 (Iowa 1995)

Underinsured Motorist Benefits; Iowa Code Section 516A.2

In 1991 the legislature amended Iowa Code Section 516A.2 in order to overrule

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APPELLATE CASE UPDATE *Continued from page 19*

Hernandez v. Farmers Ins. Co., 460 N.W.2d 842 (Iowa 1990). *Hernandez* had said that anti-stacking provisions pertaining to underinsured motorist coverage were unenforceable. The 1991 amendment abrogated *Hernandez* making such anti-stacking provisions valid. The amendment applies to all causes of action accruing on or after July 1, 1991 and to those before July 1, 1991 which are filed on or after September 15, 1991. The insured in this case brought an action against the underinsured motorist before September 15, 1991, based upon an accident in June 1990. However, he sued his insurer after September 15, 1991. The lower court held that the first suit was sufficient to preclude application of the new legislation. The Supreme Court reversed, holding that in order to avoid the effect of the amendment the insured needed to bring suit against his underinsurance carrier before September 15, 1991. The underlying cause of action against the underinsured motorist was not sufficient to prevent operation of the amendment.

11. *Smuck v. National Management Corp.*, 540 N.W.2d 669 (Iowa App. 1995)

Wrongful Termination; Violation of Public Policy

Former employee brings action against former employer. The lower court granted defendant's motion for summary judgment stating that because plaintiff's discharge claim was grounded in federal rather than state law it did not contravene a clearly expressed public policy of the State of Iowa. The court of appeals reversed holding that a violation of federal law may serve as a basis for a well-recognized public policy exception for purposes of wrongful termination claims. Where federal laws or statutes are implicated, any other finding, the court said, would leave employees with the difficult decision of either breaking federal law or losing their jobs. The court also noted that such a finding would allow employers to discharge employees who refuse to violate federal law while protecting those who refuse to violate state law. Such an inconsistency, the court stated, would defy common sense.

12. *Pirelli v. Midwest*, 540 N.W.2d 647 (Iowa 1995)

Indemnity; Workers' Comp

Employee settled work comp action with his employer on terms that included the employer's withdrawal of its statutory lien and indemnification rights against damages recovered in the employee's tort action against a third party tortfeasor. The employer then brought this action against the tortfeasor seeking indemnification for amounts paid in workers' compensation benefits. Judgment was entered in the district court in favor of the employer reduced by the percentage of causal fault attributed to it in causing the employee's injury.

On appeal to the Supreme Court, the Court held that in its settlement with its employee, the employer forfeited any right to recover indemnity by relinquishing its indemnification and lien rights under the workers' compensation statutes. A purported indemnitor who has paid the injured worker a full tort satisfaction should not also be forced to pay workers' compensation benefits in whole or in part where the tort satisfaction exceeds the workers' compensation liability. To hold otherwise would allow the injured parties to receive a double recovery for some of their damages and would force the tortfeasor to pay twice for the same loss. The court noted that all of this could have been avoided if the employer had simply continued to enforce its lien and indemnity rights under the Workers' Compensation Act in which case the liabilities of the parties would have been distributed where they belong according to law.

13. *Schrock v. Iowa District Court for Polk County*, 541 N.W.2d 256 (Iowa 1995)

Small Claims Procedure

Small claims action brought by plaintiffs to recover medical expenses arising from an automobile accident. Defendants confessed judgment for the amount claimed and judgment was thereupon entered. Trying to prevent a res judicata defense on the larger personal injury damage action plaintiffs intended to pursue in district court, they sought to set aside the small claims judgment pursuant to Rules 256 and 257. District Associate Judge granted the motion and defendants sought petition for writ of certiorari. Supreme Court granted writ, stating that Iowa statutes governing small claims actions do not allow for any form of post trial motion. Therefore, the small claims court did not have jurisdiction to consider and rule on the post trial motion and the proper avenue of relief would have been appeal to the district court.

14. *Celotex Corp. v. Auten*, 541 N.W.2d 252, (Iowa 1995)

Workers' Compensation; Apportionment

Claimant obtained decision from industrial commissioner awarding 100% permanent total disability benefits. District court affirmed as did court of appeals. Supreme Court granted further review to consider whether it is appropriate to apportion a present disability between a recent work-related injury and prior work-related injuries.

The employer argued that it should not be required to compensate the claimant for all of his present disability when a part of it was shown to be related to prior injuries for which the claimant had already been compensated. In rejecting the employer's argument, the court noted that it had previously disallowed apportionment where a prior unrelated injury produced some portion of the ultimate work-related disability. The court then held that apportionment would also not be allowed with respect to successive

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LETTER AND RESPONSE

Reaction to the article: Contingency Fees - "The Great American Aberration." October 1995, *Defense Update*

LETTER

Dear David:

I have read and reread your very brilliant writing above entitled and published, trying to decide exactly what villain you were exposing and what unethical practice you were really excoriating. I thought perhaps you were posturing that all personal injury victims who sought legal redress in the courts might be compared to welfare cheats if their entry into litigation to recover money damages was via a contingent fee contract device. Then I pondered whether you were really criticizing those members of the bar who entered such contracts and thereby, as I understand you, entered into an evil state of conflict of interest (I never did quite understand the exact mechanics of the conflict). The one thing I gathered with absolute certainty was that you felt that contingent fee contracts in personal injury cases are as evil as they are in any other legal transaction proscribed by established canons of ethics. I can't disagree with your position.

But, David, you have not told us in your treatise how the indigent personal injury victim is going to pay for the legal services our legal system seems to require that he have to secure justice in our Courts. If he doesn't strike a bargain of some kind to share the only asset he has, a bird in the bush of possible verdict recovery hopefully to be converted to a bird in the hand by a lawyer willing to take the case, what is he to do? The person or corporation which gets sued on the claim doesn't have to do that because fate has usually dealt the defendant a little greater share of this world's goods, either in private wealth or insurance protection, and that defendant will most assuredly go out and hire and pay the best counsel he or it can afford, even, perhaps, David L. Hammer.

My only point in this too long ramble on my primitive PC is that you haven't given the poor personal injury victim who needs to hire a lawyer any suggested alternative to going the contingent fee route, and I can't think of any other way out, either. In this respect you do indeed sound a lot like the freshman Republicans who want to abolish welfare because the system is prey to cheats. They never talk about what means they will use to support the indigent our society doesn't seem able to absorb as self-supporting citizens, usually dismissing the problem with expressions like, why don't you get a job, work harder, or eat cake.

It isn't original with him, but I recall Al Hughes' favorite expression on contingent fee contracts is that they are the poor man's key to the courthouse. What other key does he have?

Sincerely,
Bill Fuerste
Dubuque, IA

RESPONSE

Dear Bill:

Thank you very much for your thoughtful letter of January 5th, and I appreciate your kind words about my article.

Probably a discussion of how indigents would be treated without contingent fees should have been included in the article. I think your point is well taken.

But I do believe that the present system could handle indigency in the same manner as it is handled on other legal matters. I think, just as every lawyer is a debtor to his profession, we discharge that debt by representing the poor at no charge and by refusing no client for a reason personal to oneself. I know your firm, like ours, represents indigents as a necessary part of the practice of the law, and I would assume that most lawyers would be more than happy to represent an indigent who has a viable cause of action.

As you probably know, the matter in England is handled with an allowance of more than ordinary fees where there is a successful recovery, and while we don't have a fee master system in place, our courts are certainly willing enough to create new positions in the hierarchy of judicial administration, and I would not think that this would be a problem.

I guess it bothers me to see how personal injuries have become indistinguishable from selling snake oil.

In short, it would seem to me that the system without contingent fees would operate the same as it does now, except the clients would receive more money, the Plaintiff's lawyers less, and hopefully the legal profession would return to its pre-belli-s-esque position wherein lawyers were viewed by the laity as responsible professionals, more interested in their profession than a profit.

Good to hear from you. Best personal regards.

Very truly yours,
David Hammer
Dubuque, IA

APPELLATE CASE UPDATE *Continue from page 20*

work-related injuries. In support of its decision, the court noted that the legislature had allowed the employer a credit for a prior award where the employee suffered a permanent partial disability and total disability from the same injury. Had the legislature intended to allow apportionment as to all successive work-related injuries, it could easily have done so. Because it did not, the court held that the legislature did not intend to allow apportionment under the facts of this case. The court further noted that its result is consistent with its fundamental rule of construing workers' compensation law in favor of the employee and compensability.

15. *Double D Land and Cattle Company v. Brown*, 541 N.W.2d 547 (Iowa App. 1995)

Untimely Responses to Requests for Admission

Plaintiff failed to timely respond to requests for admission propounded by defendants. Defendants filed motions for summary judgment based upon the facts deemed admitted. District court granted the motions and plaintiff appealed. The court of appeals affirmed noting that Iowa law has clearly stated there is no right to file a late response to a request for admission. The trial court has discretion whether to allow a late response by considering (1) whether the presentation of the merits would be subserved by a late filing, and (2) whether the party who obtained or requested the admissions failed to satisfy the court that he would be prejudiced by a late filing. The court found no abuse of discretion in disallowing the late responses. The court also upheld the lower court's grant of summary judgment noting that default admissions can serve as the factual predicate for summary judgment. Moreover, default admissions cannot be refuted by affidavits and depositions submitted in opposition to a motion for summary judgment.

16. *Borchard v. Anderson*, 542 N.W.2d 247 (Iowa 1996)

Statute of Limitations; Discovery Rule

Former wife brought action against former husband based upon domestic abuse encountered in their marriage more than 12 years prior to the filing of her lawsuit. Former husband's motion for summary judgment was granted by the trial court based on statute of limitations grounds. Supreme Court affirmed.

The plaintiff was divorced from the defendant on July 17, 1981. She was diagnosed with PTSD on July 19, 1993 and filed suit on December 21, 1993. The Supreme Court determined that plaintiff's claims were governed by the two-year limitations period found in Iowa Code Section 614.1(2). Under the common law discovery rule, plaintiff's claim accrued upon her discovery of both the domestic abuse and its nexus to the claimed injury. Evidence showed plaintiff to be chargeable with knowledge of injury as early as 1981 when she requested a restraining order due to the defendant's physical and mental abuse. The court refused to apply the discovery rule to "traumatic injury/latent manifestation" cases where some injury is known but not its full extent. The law does not require knowledge of how previous abuse may still affect her, but only that the plaintiff be aware of the existence of a problem. The court thus found the discovery rule inapplicable to extend the statute of limitations and further refused to create a special exception for PTSD sufferers.

17. *Brewster v. United States*, 542 N.W.2d 524 (Iowa 1996)

Res ipsa loquitur; Automatic Doors

Action brought in federal district court by plaintiff who was injured when automatic door closed on her. Defendant moved for summary judgment. Magistrate certified question to Iowa Supreme Court whether the doctrine of res ipsa loquitur precluded summary judgment where the evidence was limited solely to the occurrence and resulting injury. There was apparently no evidence of any specific defect causing the door to malfunction nor was there evidence supporting any other type of specific negligence claim.

The Supreme Court sided with the majority of courts that have concluded an automatic door malfunction does not occur in the absence of negligence. Thus it was not incumbent on plaintiff to come forward with proof as to the precise nature of the probable malfunction and she was entitled to take her case to the jury using the doctrine of res ipsa loquitur. Justice Ternus dissented without opinion. ❑

RESOLUTION IN SUPPORT OF LEGAL SERVICES

WHEREAS, equal justice is fundamental to the American system of government under law; and

WHEREAS, the inability to afford legal counsel can effectively deny justice to individuals with legal needs; and

WHEREAS, representation of individuals who cannot afford legal counsel is essential to the efficient operation of the state court system; and

WHEREAS, representation of individuals with civil legal problems assists in their ability to be productive members of society, live in safety, obtain housing, health care and other essential services; and

WHEREAS, federal funds to Iowa's civil legal services programs is being cut by an estimated 30% or approximately $1 million; and

WHEREAS, this reduction in funding will result in thousands of Iowans being denied access to the assistance of an attorney to help resolve their individual civil legal problems and possibly the closure of regional offices; and

WHEREAS, the legal community in Iowa is assisting legal services programs through provision of pro bono services through Volunteer Lawyer Projects and participation in a fundraising campaign to the entire legal community; and

WHEREAS, the vast majority of the cases handled by legal services programs are handled in Iowa's state courts and administrative agencies; and

WHEREAS, legal services programs in Iowa have evolved over the past 30 years to become important institutions in the state working cooperatively with local community groups, senior citizens, farmers and the Iowa State Bar Association, including cooperative efforts on award winning projects arising from the 1993 flooding and in serving clients faced with domestic violence.

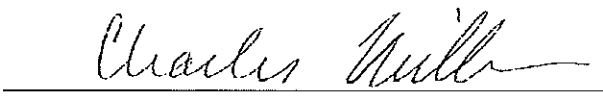
NOW, THEREFORE, BE IT RESOLVED: That the Iowa Defense Counsel Association:

(1) Urges Governor Branstad and the Iowa General Assembly to provide adequate funding to the existing legal services programs and that such funding, at a minimum, be provided to offset the loss of funding from the federal government; and

(2) That the members of the Iowa Defense Counsel Association are encouraged to become active participants in Volunteer Lawyer Project activities to increase the provision of pro bono services to low income Iowans; and

(3) That the members of the Iowa Defense Counsel Association are encouraged to contribute generously to the "Iowa Lawyers Campaign for Legal Services."

Adopted this 9th day of February, 1995.

BY 

Charles E. Miller, President

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1. Current IDCA members may join DRI and receive a 50% discount on the first year's membership dues, normally $125.00 (or $85.00 for lawyers out 5 years or less).
2. Persons who become IDCA members may join DRI and receive their first year free.
3. "Young" (5 years or less) lawyers who join DRI receive a waiver of the registration fee for any DRI seminar (more than a dozen a year, all over the country).

This offer is valid to October 31, 1996. Now is the time to join DRI and it's 20,000 defense-lawyer members. If you have any questions, please call Greg Lederer (319-366-7641) or Iowa's DRI state representative, David Phipps (515-288-6041).

FROM THE EDITORS

Scheduling conflicts - the Federal court schedules your trial for the same day as your District court trial is set to begin. Two different districts schedule trials for you on the same day. This is a dilemma that should not happen. We applaud the success the courts have in pushing trial schedules, but there is a downside. Scheduling conflicts between districts and between the Federal and State courts are becoming too frequent. Protests to the court administrators result in the suggestion, "One of them will settle."

Because of these scheduling conflicts, care must be taken that counsel are not forced to choose which cases settle and which can proceed to trial. Attorneys are to be advocates for their clients, not the mediators. The courts are to be open to all citizens. It is dangerous to assume that the attorney can always choose the case that should settle prior to trial. Such assumptions can lead to the denial of rights of the litigants. Everyone is entitled their day in court.

We are not suggesting that The courts alter their method of administration. We applaud the concentrated effort to move cases along and dispose of those not being prosecuted. We would, however, like to see an effort made to avoid these conflicts between districts and between Federal and State courts. The workload of the courts or the attorneys should not be the primary concern in scheduling- the rights of the litigants should be.

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