defense UPDATE

The Iowa Defense Counsel Association Newsletter July, 1997 Vol. X, No.3

SELECTED PRETRIAL PROCEDURES IN FIRST PARTY BAD FAITH ACTIONS

By Patrick L. Woodward, Davenport, Iowa

The frequency of first party bad faith claims asserted together with a UM/UIM claim in a single lawsuit appears to be increasing in light of the Iowa Supreme Court's decision in *Handley v. Farm Bureau Mutual Insurance Co.*, 467 N.W.2d 247 (Iowa 1991), where the Court held that a plaintiff is not required to make a prima facie showing of bad faith before discovery of the insurance company's investigative file may be obtained. Aggressive plaintiffs' attorneys are using the *Handley* decision for at least two reasons unrelated to the merits of such claim. First, plaintiffs are using a claim of bad faith to obtain access to the insurance company's investigation of the underlying UM/UIM claim. Second, plaintiffs are using allegations of bad faith in an attempt to enhance the value, either through settlement or trial, of the underlying UM/UIM claim. As this use of first party bad faith is expanding, counsel and their insurance company defendants must adopt an aggressive approach to defending not only the allegations of the first party bad faith claim itself, but to preclude plaintiffs from abusing first party bad faith for ulterior purposes. This article will examine two pretrial procedures which should be considered any time a first party bad faith case is joined with a UM/UIM.

I. DISCOVERY OF THE CLAIM FILE

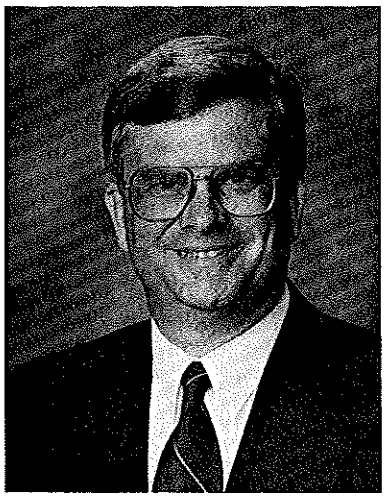
While most often the claim file does not contain evidence of bad faith, plaintiffs believe that such file is the ultimate Pandora's Box - it generally contains a complete investigation of the underlying UM/UIM claim, the mental impressions of insurance company personnel, loss reserves and documentation as to how the plaintiff's claim has been administered. It provides an insight into the thought process of the insurance company in defending the UM/UIM claim and what may be perceived as an advantage to plaintiffs' attorneys in that they have insight into the opposition's strategy up to the time litigation is commenced. In virtually every bad faith case, numerous interrogatories from the plaintiff seek information contained in the claim file and usually one of the first requests for documents is the production of the claim file itself. Any discovery requesting information involving the claim file should be carefully reviewed and proper objections and/or motions for protective orders vigorously pursued so that plaintiffs cannot obtain unfettered discovery of this material as is their goal.

The starting point in any analysis of the protections available for the claim file begins with *Handley v. Farm Bureau, supra*, in which the Iowa Supreme Court held that a motion for protective order citing simply prejudice as the basis therefor under Iowa Rule of Civil Procedure123 is not sufficient to justify the protection of the insurance company's investigative file. Subsequently, however, in *Johnson v. State Farm Mutual Insurance Co.*, 504 N.W.2d 135 (Iowa App. 1993), it was held that the provisions of Iowa Rule of Civil Procedure 122(a) and (c) are applicable to discovery of such investigative file. Iowa Rule of Civil Procedure 122(a) provides in relevant part:

> "The parties may obtain discovery regarding any matter, not privileged, which is *relevant* to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, ... It is not ground for objection that the information sought will be admissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

Continued on page 6

MESSAGE FROM THE PRESIDENT



Robert A. Engberg
President

The Iowa Defense Counsel Association was privileged to host a very successful and productive Defense Research Institute Mid-Region Meeting in Des Moines on May 1 and 2, 1997. Officers, representatives, and their guests attended from each of the DRI Mid-Region State Defense Organizations of Colorado, Iowa, Kansas, Missouri, Nebraska, and Utah. Those present also included DRI President Bob Fanter and his wife, Mary; Liaison and Membership Director Sandie Schmidt; and Mid-Region Board Member Wayne Taff.

I am very appreciative of the efforts of IDCA's immediate Past-President Chuck Miller, President-Elect Jaki Samuelson, Secretary Mark Tripp, Treasurer Jim Pugh, Board Member Mike Weston, and Lobbyist Bob Kreamer for their attendance and generous contributions to the success of that meeting. I am especially grateful to the following for their additional contributions:

- Board members Marion Beatty and Wendy Munyon and IDCA members Sue Brown, John McCoy, and Sam Waters for their Client Relations Committee presentation entitled "Coordinating, Accommodating, and Capitalizing on Cooperation."
- IDCA Past-President and DRI State Representative David Phipps for his program entitled "Defining the Defense Organization's Culture - Who Are We Now?"
- Secretary and Legislative Committee Chairperson Mark Tripp for leading a roundtable discussion entitled "Legislative Opportunities for the Mid-Region."
- Past IDCA Board Member and DRI President Bob Fanter for his timely after dinner remarks and seminar presentation entitled "You and DRI — Great Opportunities," and to Bob and Mary Fanter for hosting a wonderful reception in their lovely home.
- Honorary Life Member Ginger Plummer for her countless hours assisting in the implementation of this meeting.

I have been able to attend several DRI meetings such as these and to share substantive discussions of ongoing activities, seminars, and other opportunities within the various state organizations. Each of those meetings have given me renewed enthusiasm and an even greater appreciation of our own Association. The IDCA can continue to grow and to prosper through ongoing participation in DRI activities, whether through individual memberships or through national meetings or state sponsored events such as these.

Our continued commitment to DRI includes our Board's proposal of David Phipps as a candidate for Mid-Region Director. I am pleased to have been selected as a nominator to join nominators from each of the other five states of the Mid-Region in choosing a nominee or nominees for that election. This nomination process will be completed by the conclusion of the DRI Annual Meeting to be held November 5-9, 1997 in Baltimore. Individual DRI members from our Mid-Region will then have an opportunity to vote for the person to be elected to the Board. Additional information as to the balloting process will be supplied later this year.

Continued on page 8

MEDICAL DISCOVERY IN ILLINOIS: A MODEL FOR IOWA

By Todd L. Stevensen, Dubuque, Iowa

I read with interest Mark Brownlee's comments in the January issue regarding the discovery of medical records. As the reader may remember, he was advocating the expansion of the civil discovery rules to mirror those currently in place for workers' compensation cases. After reading the article, I felt compelled to speak with Mr. Brownlee and share with him my experiences in utilizing such discovery in Illinois. We felt a short article on the issue might be of benefit to the members, given the fact that the Iowa legislature has now expanded the discovery rules regarding medical records.

Because I practice in Dubuque, I am licensed in both Iowa and Illinois and defend civil cases in both jurisdictions. Over the past several years, Illinois has enacted sweeping tort reform measures. One of the many areas touched by this reform wave is the simplification of the discovery of medical records. I will not set out the entire statute here due to space limitations; but the provision, found at §2-1003 of the Code of Civil Procedure, provides in pertinent part that a plaintiff in a personal injury action, who alleges a claim for bodily injury, shall be deemed to waive any privilege between the injured person and each health care provider who has furnished care at any time to the injured person. I will briefly discuss this statute and then contrast it with the one recently passed by the Iowa legislature.

The Illinois provision is broad in scope of time for which discovery is allowed. It is not limited to only the injury for which the plaintiff is suing, but allows the discovery of treatment provided "at any time." Furthermore, the definition of health care provider means any person or entity who delivers or has delivered health care services, including diagnostic services, and includes, but is not limited to, physicians, psychologists, chiropractors, nurses, mental health workers, therapists, and other healing art practitioners. The rule requires a plaintiff to execute, within 28 days of a request, a consent to allow defense counsel to obtain various medical information. Counsel may obtain a complete copy of the chart or record in the provider's possession, including radiographic films. The consent must permit defense counsel to inspect the original chart or record of the health care provider upon seven days' written notice. The consent also requires the health care provider to accept and consider charts and other records of health care before giving testimony in any deposition, trial, or other hearing. The final requirement is that the health care provider can be consulted by defense counsel before giving testimony in a deposition, or trial, and can discuss with the attorney the health care provider's obersevations, opinions, and the testimony the health care provider would give in response to questioning.

I have utilized the above provision on numerous occasions since its enactment. I have found the consent form procedure quicker to produce results than awaiting the response to a Request for Production. However, unless there has been significant prefiling disclosure of treatment information, the consent form is of no value until one receives answers to interrogatories regarding past and present health care. Upon receiving those answers, the consent form can be used to obtain records quickly and easily,. Of course, the efficacy of this procedure is limited by the disclosures made by plaintiff.

I recently attended the deposition of a plaintiff for whom I had compiled two binders of medical records. During the course of the deposition, it was discovered that plaintiff had been treated at the Pain Clinic at the University of Iowa Hospitals and Clinics, received acupuncture from a local chiropractor, received psychological testing from a local psychologist, and was prescribed antidepressants by a local physician. Unfortunately, none of the above had been disclosed in prior discovery responses. The thought of holding such a powerful discovery tool, and finding it ineffective, was, to say the least, discouraging.

The Iowa legislature has just passed House File 693 regarding tort reform. One provision amends §622.10 of the Iowa Code, and applies to actions filed after July 1, 1997. It requires a plaintiff to execute a patients waiver when requested by a defendant. The waiver must be provided within sixty days of the receipt of the request. The waiver only applies to physicians, surgeons,

Continued on page 9

TWELVE YEARS UNDER COMPARATIVE FAULT ACT

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

The Following is a third excerpt from the booklet authored by Barry A. Lindahl and Les V. Reddick of Dubuque, and Chris Novak, University of Iowa College of Law, reviewing the history of comparative fault in Iowa. A complete copy of the booklet can be obtained from Les Reddick, Kane, Norby & Reddick, 2477 J. F. Kennedy Road, Suite 102, Dubuque, Iowa 52002; 319-582-7890.

Sec. 3. -- Goetzman "Collateral Issues."

As indicated, the *Goetzman* majority opinion emphasized that the Court was not deciding in advance certain "collateral issues" which eventually would be raised by the decision and would best be addressed and resolved in the context of concrete cases. Several decisions subsequent to *Goetzman* resolved some of those collateral issues.

The post-*Goetzman* cases continue to be significant, not only for what they may suggest about issues decided under the Iowa comparative fault statute, but also because of their applicability to negligence cases not governed by the Iowa comparative fault statute, including the following:

- Actions by an employee against an employer under Rule 97, Iowa Rules of Civil Procedure;
- Actions by a passenger against a common carrier.

Sec. 4. -- Joint and Several Liability

Rozevink v. Faris, 342 N.W.2d 845 (Iowa 1983) addressed the issue of whether the doctrine of joint and several liability was affected by the adoption of comparative negligence in *Goetzman.* The Court held that it was not. The plaintiff, a motorcycle passenger, brought an action for personal injuries against the operator of the motorcycle and of the pickup with which the motorcycle collided. The jury found the motorcycle operator 83% at fault and the operator of the pickup 17% at fault. However, the trial court held that the pickup operator was jointly and severally liable for the entire $27,611.31 damage award. The pickup driver argued that joint and several liability should not apply in the light of the *Goetzman* decision and that damages should be apportioned between the defendants according to their percentages of fault. The Court held, however, that Iowa's joint and several liability doctrine was sound as applied in the case and unaffected by *Goetzman.* The Court reasoned:

> . . .[T]he underlying basis for joint and several liability in Iowa is that when the negligent acts of two or more defendants proximately cause a plaintiff's injury and the injury is indivisible, the plaintiff may sue the defendants jointly and severally and recover against one or all. *McDonald v. Robinson,* 207 Iowa at 1295-97, 224 N.W. at 821-22; *see also* Restatement of Torts (Second) Sec. 875 (1977). This is compatible with comparative negligence; under Goetzman, the injury is not divided but the recovery for the injury is proportionately reduced. The actors who caused harm are liable not for the entire harm but for the proportionally reduced amount. For that amount defendants may, consistent with our theory of comparative negligence, be held jointly liable.
>
> Were we to modify or eliminate joint and several liability as Farises here advocate, the burden of the insolvent defendant would fall entirely on the plaintiff, and the plaintiff's damages would be reduced beyond the percentage of negligence attributable to that plaintiff. Comparative negligence does not mandate this further reduction.

The defendants were properly held to be jointly and severally liable for the entire amount of the plaintiff's judgment.

Sec. 5. -- Contribution.

Common Liability Requirement.

In *Thompson v. Stearns Chemical Corp.,* 345 N.W.2d 131 (Iowa 1984), another "ripple effect" case following *Goetzman,* the question was whether a manufacturer has a right of contribution from an employer for damages sustained by an injured employee through the joint fault of the manufacturer and the employer. Although the Court had previously approved an action for indemnity by a third party tortfeasor against an employer for damages suffered by an injured employee, the Court had denied similar claims if they were based on contribution, *Iowa Power and Light Co. v. Abild Construction Co.,* 259 Iowa 314, 144 N.W.2d 303 (1966), on the grounds

Continued on page 10

CASE NOTE SUMMARY

By Kermit B. Anderson, Des Moines, Iowa

Wilson v. IBP, Inc.

The Iowa Supreme Court issued a good news bad news decision for defendants in its recent opinion in *Wilson v. IBP, Inc.*, 558 N.W. 2d 132 (Iowa 1996). The good news was that the Court held that a $15 million punitive verdict accompanying a compensatory award of $4,000 was legally excessive. The bad news was that the appellate court ignored the trial court's remittitur of the punitive award to $100,000 and affirmed a punitive verdict in the amount of $2 million.

The case arose out of a work related back injury claim by an employee of IBP. IBP sent the employee to two physicians who prescribed conservative therapy (primarily rest) and authorized the employee's return to light duty work. The second of these physicians was informed by IBP's manager of occupational health services that IBP had a video tape of the employee showing that he was not following his prescribed treatment regimen. This statement was based upon surveillance observations by IBP corporate security of the employee driving his children to school and running errands when he was instructed to be in bed. In fact, the occupational health services manager knew that no such tape existed. The employee ultimately requested that IBP refer him to a neurosurgeon who performed surgery to correct the employee's condition.

Claims of breach of fiduciary duty and slander were asserted against IBP and its health services manager. Evidence was produced at trial showing that IBP officials attempted to minimize employee injuries and influence for its benefit the medical care and treatment being afforded to them. The jury awarded the plaintiff a general verdict of four thousand dollars in actual damages based primarily on claimed reputational injury from IBP's attempts to picture him as a malingerer to his examining physicians. The jury also awarded fifteen million dollars in punitive damages, but curiously found that IBP's conduct was not directed specifically at the plaintiff. The jury was apparently incensed generally at the climate of suspicion it found to exist at IBP toward the injury claims of its workers and IBP's various efforts to influence medical treatment and minimize its costs.

On post trial review, the district court found the punitive award excessive and ordered a remittitur of all amounts exceeding one hundred thousand dollars, Having heard the evidence and testimony, the trial court obviously disagreed with the jury as to the degree of outrageousness of IBP's conduct. Both sides appealed.

The Iowa Supreme Court sitting en banc reviewed the development of recent United States Supreme Court decisions constraining punitive awards as well as Iowa's own case law on the subject. The Court recited evidence from the record which it felt supported the jury's finding of a willflll and wanton disregard of the rights and safety of the plaintiff employee as well as other workers by IBP officials. The Court went on to find the record supportive of a punitive award in the amount of two million dollars and affirmed a verdict in this amount if the plaintiff agreed to remit the balance of the award. No mention was made of Iowa cases extending discretion to the trial court not only as to its decision to grant a new trial but also as to the amount of any remittitur it sets. *See Hurtig v. Bjork,* 138 N,W.2d 62, 65 (Iowa 1965).

This case illustrates at least one effect recent decisions of the United States Supreme Court have had on the Iowa law pertaining to punitive damages. Iowa law previously held that no remittitur was allowed where a punitive verdict was excessive; the remedy was to set aside the entire award. *See Claude v. Weaver Construction Co.,* 158 N.W.2d 139, 145 (Iowa 1968). However, the Supreme Courts decision in *Honda Motor Co. v. Oberg,* 512 U.S. 415 (1994) has been read to constitutionally require review of the size of a punitive award and order remittitur where appropriate. *See Ezzone v. Riccardi,* 525 N,W.2d 388, 398-99 (Iowa 1934). The courts decision in *Wilson v.IBP, Inc.,* shows what a mixed blessing this can be for defendants and how deference usually afforded trial courts on the amount of a remittitur may become devalued in the process. ❑

SELECTED PRETRIAL PROCEDURES IN FIRST PARTY BAD FAITH ACTIONS ... *Continued from page 1*

Under this provision, the first question which must be addressed is relevancy which turns upon the plaintiff's theory underlying the claim for first party bad faith. While the Court in *Handley* stated in broad terms that the insurance company's investigation may provide the only evidence of bad faith, *Handley* should not be read as requiring production of the entire claim file simply upon plaintiff's demand therefor. If necessary, the trial court should require the plaintiff to state, at a minimum, the theory behind the allegations of bad faith. Once this has been done, a preliminary determination of what is relevant in the claim file can be made. For instance, if the bad faith claim is based upon contract interpretation, only those matters pertaining to that issue should be deemed relevant.

Once the initial determination as to relevancy is made, the next step is to examine whether there are any applicable limitations pertaining to the relevant file material under Iowa Rule of Civil Procedure 122(c). Iowa Rule of Civil Procedure 122(c) provides in part:

> "*c. Trial Preparation - Materials.* Subject to the provisions of subdivision 'd' of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision 'a' of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the Court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation."
>
> . . . .

While other jurisdictions have held that an insurance claim file is prepared in the ordinary course of the insurance company's business, in *Johnson v. State Farm Mutual Insurance Co.*, 504 N.W.2d at 137, the Iowa Court unequivocally found under *Ashmead v. Harris*, 336 N.W.2d 197, 201 (Iowa 1983) that a routine investigation of an accident by a liability insurer is conducted in anticipation of litigation within the meaning of IRCP 122(c). Therefore, under *Johnson*, before relevant claim file materials are produced, plaintiff's counsel must make the requisite showing of substantial need and undue hardship. Further, IRCP 122(c) makes no exception, even if this dual requirement is met, for the mental impressions, conclusions, opinions, legal theories of an attorney or other representative concerning the subject litigation.

Utilization of Iowa Rule of Civil Procedure 122(a) and (c) provides defense counsel with a tool to prevent the unfettered discovery of the claim file when plaintiffs assert first party bad faith with UM/UIM claims. This rule should be used to require plaintiffs to conduct their own factual investigation of the underlying accident and not to rely upon the work product of the insurance company defendant. Such things as interviews with witnesses or mental impressions of the insurance company personnel regarding the parties or witnesses should not be produced to the plaintiff unless the plaintiff makes the requisite showing of substantial need and undue hardship.

Finally, special mention needs to be made regarding claim reserves. Generally, this information is contained in the claim file but should not be discoverable in any situation. Reserves are an accounting function required to be made by insurance companies pursuant to the Iowa Administrative Code and do not necessarily reflect claim evaluation, and each insurer may have different standards for setting of reserves. Reserves are therefore not relevant to any issue, including liability and damages, and therefore, it should be argued that reserves are neither relevant nor discoverable under Iowa Rule of Civil Procedure 122(a).

To summarize, defense counsel and their insurance company defendants should be aware that

Continued on page 7

SELECTED PRETRIAL PROCEDURES IN FIRST PARTY BAD FAITH ACTIONS ... *Continued from page 6*

one reason plaintiffs are utilizing allegations of first party bad faith in conjunction with UM/UIM claims is to obtain unwarranted discovery of the insurance company claim file. It is incumbent upon defense counsel, and not an insurance company representative, to review each page and each entry of the claim file in light of the provisions of Iowa Rule of Civil Procedure 122(a) and (c). An initial determination by counsel as to relevancy must be made and then, as to those materials which are relevant to the bad faith claim, plaintiff's counsel should be required to establish the dual requirements of substantial need and undue hardship before those materials are produced. Iowa Rule of Civil Procedure 122(a) and (c) provide the means to protect substantial portions of the claim file. However, trial courts are not always informed or receptive to protective orders which may appear to be impediments to discovery and therefore, care must be given to the drafting of objections to discovery requests and motions for protective orders. A well-reasoned motion with legal memorandum establishing not only the factual basis, but the legal basis for protection is essential to protecting the claim file generated in anticipation of litigation.

II. SEVERANCE OF THE UM/UIM CLAIM FROM THE BAD FAITH CLAIM

Iowa Rule of Civil Procedure 186 states:

> **Separate Trials.** In any action the court may, for convenience or to avoid prejudice, order a separate trial of any claim, counterclaim, cross-claim, or any separate issue of fact, or any number of any of them. Any claim against a party may be thus severed and proceeded with separately.

The Iowa Supreme Court has held that it is an abuse of discretion for the court to refuse to sever UIM and bad faith claims from an underlying liability claim. *See, Handley v. Farm Bureau Mutual Insurance Co.*, 467 N.W. 2d 247, 250 (Iowa 1991). The Court of Appeals in *Johnson v. State Farm Mutual Insurance Co.*, 504 N.W.2d 135, 137 (Iowa App. 1993) held that it was not an abuse of discretion for a trial court to sever a UIM claim from a bad faith claim. While it would appear from *Handley* and *Johnson* that severance of a UM/UIM claim from a first party bad faith claim would be granted in the ordinary course of litigation, unfortunately some trial courts are still routinely denying such request. The basis most often given by trial courts for denying severance of a UM/UIM claim from a first party bad faith claim is that neither *Handley* nor *Johnson* mandates severance in such situations and plaintiffs should not be required to try cases twice against the same defendant. Therefore, it should not be taken for granted that a motion to sever the UM/UIM claim from the first party bad faith claim will be granted.

The key to obtaining severance under Iowa Rule of Civil Procedure 186 is prejudice. Establishment of a factual basis for a finding of prejudice is the essential prerequisite to severance and this basis requires that such motion should not be prematurely made. Pleadings, requests for discovery and resistances to motions for protective orders are all good sources for the factual basis supporting a finding of prejudice.

In *Handley,* the Iowa Supreme Court found as a matter of law that the existence of insurance to fund a plaintiff's recovery is prejudicial. While in a UM or UIM claim the existence of insurance will by necessity be known to the jury, the insurance policy itself, its terms and limits of liability may not be. As properly recognized by the Court of Appeals in *Johnson,* not all first party bad faith claims require the introduction of this information. Only UM/UIM cases which involve a contract dispute will require the introduction of the insurance policy and its terms into evidence. *See, Leuchtenmacher v. Farm Bureau Mutual Insurance Co.*, 461 N.W. 2d 291, 294 (Iowa 1990). Where there is no actual contract dispute because the insurer admits it would be liable if the plaintiff proves causation and damages, the insurance policy and its terms are not admissible on the UM/UIM claim and the intention of the plaintiff to offer the same on the bad faith claim under *Handley* should be found to be prejudicial per se requiring severance. Therefore, through the discovery process sufficient

Continued on page 8

SELECTED PRETRIAL PROCEDURES IN FIRST PARTY BAD FAITH ACTIONS ... *Continued from page 7*

information should be obtained to establish a factual basis that it is the intent of the plaintiffs to introduce such evidence on the bad faith claim.

There are numerous other possible sources of prejudice which counsel must consider from the outset and formulate a theory of discovery to reveal to bolster a claim for severance. This could include the introduction of settlement offers or negotiations on the bad faith claim to show good faith by the insurance company defendant which by virtue of Iowa Rule of Evidence 408, are prejudicial on the underlying UM/UIM claim as a matter of law. Each and every possible basis for supporting a finding of prejudice must be thoroughly documented at the time the motion is filed and should be tailored upon the facts as developed in each specific case.

In addition to the potential sources of prejudice disclosed in the pretrial proceedings, when filing a motion to sever, counsel should also consider two other reasons which often do not appear until trial justifying severance - voir dire and jury instructions. Regarding voir dire, the types of inquiries on the bad faith claim potentially can give rise to prejudice against the insurance company defendant on the UIM claim. Therefore, early consideration of the type of voir dire which will be conducted and the potential responses thereto should be brought to the court's attention in the motion to sever. As to jury instructions, the joinder of a UM/UIM claim and bad faith claim creates an extremely difficult task for the trial court to fully and fairly instruct the jury as to each claim and each defense. Although this may not be the source of prejudice, it will alert the trial court to the extremely difficult task it will face at some future point and under Iowa Rule of Civil Procedure 186, the trial court may order severance for its own convenience.

As with protection of the insurance company claim file, severance of the UM/UIM claim from the first party bad faith claim is necessary. Severance will thwart the second unspoken goal of plaintiffs in filing first party bad faith claims which is to enhance the value of the UM/UIM claim. Severance is not, however, automatic and requires care and planning to establish the factual basis supporting the determination of prejudice under Iowa Rule of Civil Procedure 186.

III. CONCLUSION

As plaintiffs increasingly attempt to use first party bad faith claims in conjunction with UM/UIM claims without having to establish a prima facie showing of bad faith, defense counsel and their insurance company clients must be cognizant of the unspoken goals which are sought to be achieved and take appropriate action to limit the viability of the same. Two such tools to use in this battle are protective orders regarding the claim file and severance of the underlying claim from the bad faith claim. Until a definitive case is rendered by the Appellate Courts, the burden of protecting the fundamental fairness of the trial process falls upon the trial courts and it is the responsibility of defendants to provide these courts with a sufficient foundation to preserve justice. ❑

MESSAGE FROM THE PRESIDENT ... *Continued from page 2*

Many of us have been fortunate to develop numerous friendships and professional resources around the country which would not have been possible without becoming involved in the various opportunities DRI has offered. I encourage you to strongly consider joining DRI if you are not already a member and to become even more involved if you already do belong.

Information as to DRI opportunities will be available at IDCA's Annual Meeting and Seminar to be held September 24-26 at the Embassy Suites Hotel in Des Moines. President-Elect and Seminar Chairperson Jaki Samuelson has put together a tremendous program which you will not want to miss. Please mark your calendar for what promises to be another exceptional opportunity for education and fellowship. ❑

MEDICAL DISCOVERY IN ILLINOIS... *Continued from page 3*

physician assistants, advanced registered nurse practitioners and mental health professionals. Furthermore, it is limited to requiring one of the above to provide a complete copy of the patient's records and requiring them to consult with the attorney for the adverse party prior to providing testimony regarding the plaintiff's medical history and the condition alleged, and opinions regarding etiology and prognosis.

The legislation requires defense counsel to provide a written notice to plaintiff's counsel at least ten days prior to meeting with plaintiff's physician, surgeon, physician assistant, advanced registered nurse practitioners or mental health professional. It allows plaintiff's counsel to be present at the meeting and to seek a protective order structuring all communication by making application to the court. The statute is silent on what is meant by "structuring all communication."

Obviously, the Iowa legislation is extremely limited when compared with that enacted by Illinois. It does not contain language indicating the plaintiff waives any privilege by filing suit. However Iowa Code §622.10 contains a limited abrogation of the physician-patient privilege regarding testimony in civil actions. The Iowa statute is limited in scope to "the condition of the plaintiff" which is an element or factor of the claim or defense. Therefore, the waiver contemplated by the Iowa act would be of limited use in exploring past treatment. Furthermore, the Iowa act is extremely limited in the scope of health care providers to which the provision applies. Specifically excluded are chiropractors and therapists.

One major concern with the waiver under Iowa's legislation, and the consent as contemplated under the Illinois law, is the absence of any requirement of plaintiff to disclose past and present health care providers. The defendant remains at the mercy of plaintiff making a full and accurate response to discovery, in a timely manner, of his or her past and present medical treatment. Any intended simplification is dependent upon complete disclosure by the plaintiff.

One final note is warranted before closing. Judge Kenneth L. Gillis of the Circuit Court of Cook County has ruled that §2-1003 of the Illinois Code of Civil Procedure is unconstitutional as a violation of the right to privacy. Furthermore, Judge Gillis found a violation of the separation of powers provision of the Illinois Constitution in that the legislature, by statute, created an alternative method of discovery which conflicts with a Supreme Court rule. The Illinois provision has also been held unconstitutional by a downstate judge as well. As of this writing, no ruling has been made by the Court of Appeals in either district. One would expect similar challenges to the Iowa legislation.❑

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SEPTEMBER 1997						
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
			IDCA Annual Meeting			
21	22	23	24	25	26	27
28	29	30				

Does your calender look something like this? It should! Registration materials will be in your hands mid-August and we urge you to register early. You may reserve a room at the Embassy Suites now if you wish by calling 515-244-1700 and ask to be included in the block of rooms held for the Iowa Defense Counsel. (Cut off date is September 12.)
See you in September!

TWELVE YEARS UNDER COMPARATIVE FAULT ACT... *Continued from Page 4*

that since common liability forms the basis for recovery in a claim for equitable contribution between joint tortfeasors and the employer's liability by virtue of the Iowa Workers' Compensation Act is statutorily limited and not dependent on negligence, no common liability exists between an employer and a third party tortfeasor allowing contribution. The Court in *Thompson* declined to abandon the holding in *Abild:*

> . . . The adoption of comparative negligence does not constitute legitimate reason to overturn the rule announced in *Abild* denying contribution against an employer who is liable under the Workers' Compensation Act. In particular, the adoption of comparative negligence was limited to those cases "in which contributory negligence has previously been a complete defense...." *Goetzman*, 327 N.W.2d at 754. Although we reserved various collateral issues for future cases so the salient facts could be fully developed and the issues thoroughly briefed, our contribution rule no more turns on the doctrine of comparative negligence than it did on the displaced doctrine of contributory negligence. . . . .
>
> We conclude that the adoption of comparative negligence is of little aid to *Stearns*. The issue of whether we should extend the comparative negligence doctrine to strict liability cases is not before us; thus we do not address this question. Any impact on strict liability by comparative negligence would have minimal effect on a denial of contribution based on the lack of common liability between a third party and an employer. A manufacturer's liability, whether premised on grounds of negligence, strict liability or implied warranty, is still established by showing a breach of legal duty. Adoption of comparative negligence principles, while possibly mitigating the defense available to a tortfeasor, does not change that legal duty. On the other hand, an employer's liability to an employee is not dependent on a breach of legal duty, but is governed exclusively by statute under our Workers' Compensation Act. *Jansen v. Harmon*, 164 N.W.2d 323, 326-27 (Iowa 1969). The real issue is whether we wish to cast out or redefine our rule conditioning contribution on the common liability of joint tortfeasors. . . . .
>
> Although some jurisdictions allow contribution from a negligent employer, we decide now, as we decided in *Abild*, that the right of contribution in Iowa is conditioned on the existence of common liability.

See also Speck v. Unit Handling Division, 366 N.W.2d 543 (Iowa 1985)(right of contribution is conditioned on the existence of common liability; employer may not be held liable for contribution because of statutory liability under workers' compensation law).

Proportionate Liability. In *Franke v. Junko*, 366 N.W.2d 536 (Iowa 1995), the Court held that in cases not governed by Chapter 668, and based on the holding in *Goetzman*, the traditional rule of equal contribution among joint tortfeasors was abolished and the rule that contribution should be exacted on the basis of comparable causal negligence was adopted. The plaintiff was a passenger in a car owned and operated by her husband when it collided with a pickup. The plaintiff sued the pickup driver and was found entitled to damages of $30,000. The pickup driver, who cross-petitioned against the husband for 50% contribution, was found 75% at fault; the husband was found 25% at fault. The trial court reduced the plaintiff's judgment against the pickup driver by 25% and dismissed the contribution claim. The Court held it was inappropriate to reduce the judgment but that the pickup driver was entitled to contribution from the husband proportional to the husband's 25% negligence. Based on *Goetzman*, the Court abolished the prior rule of equal contribution among joint tortfeasors and adopted the rule that contribution should be exacted on the basis of comparable causal negligence. And the finding that the pickup driver was entitled to contribution does not apply to or bar a plaintiff's right to full recovery

Sec. 6. -- Effect of Settlement.

In *Glidden v. German, et al,* 360 N.W.2d 716 (Iowa 1984), the Court held that the pro tanto credit rule

Continued on page 11

TWELVE YEARS UNDER COMPARATIVE FAULT ACT. . . *Continued from Page 10*

was unaffected by *Goetzman* and that the trial court should have applied it rather than a pro-rata rule in determining the amount to be credited against each plaintiff's judgment by reason of the settlement each made with third-party tortfeasors. The pro tanto rule was adopted in *Greiner v. Hicks*, 231 Iowa 141, 300 N.W. 727 (1941), a case in which one tortfeasor paid the plaintiff $2,750 for a covenant not to sue. A second tortfeasor, the defendant Hicks, contended he was entitled to a full dollar-for-dollar credit against any recovery the plaintiff might receive. The Court followed "the decided weight of authority" in holding that "whatever consideration is received from a joint tortfeasor for a covenant not to sue reduces pro tanto the recovery against the other wrongdoers" on the theory that while a party is entitled to full compensation for his or her injuries, there can be only one satisfaction.

The *Greiner* pro tanto rule was revisited and reaffirmed in *Wadle v. Jones*, 312 N.W.2d 510 (Iowa 1981), in which the plaintiff received $45,000 in settlement from two tortfeasors and subsequently obtained a judgment against a third for $45,125.59. When the trial court followed *Greiner* and entered judgment for only $125.59, the plaintiff urged the Court to abandon the pro tanto rule in favor of a prorata rule. The plaintiff complained that the nonsettling defendant had received a windfall from the partial settlement and should instead be required to pay his full proportionate share of the damages. In confirming preference for the pro tanto approach, the Court repeated what *Greiner* had said about the purpose of the pro tanto rule, and then expressed disapproval of the pro-rata rule by adding that adoption of the pro-rata credit rule would allow a claimant who has made a settlement that exceeds the settling tortfeasor's pro-rata share of the verdict to recover more than full compensation for personal injuries. The Court also noted that the plaintiff could hardly complain about application of the pro tanto credit rule when she had reason to know of its existence when she negotiated a settlement agreement which later proved to be very favorable to the plaintiff, if not to the settling tortfeasors.

Both *Greiner* and *Wadle* turned on the Court's expressed concern that persons not be permitted to receive more than a full 100% damage recovery for a single injury, even when the excess resulted from a favorable settlement with fewer than all the tortfeasors. Since *Wadle*, the Court had adhered to the pro tanto rule while refining its applicability to differing fact patterns. *See, e.g., Knauss v. City of Des Moines*, 357 N.W.2d 573, 578 (Iowa 1984) (party seeking pro tanto credit must bear burden of showing right to credit); *Jones v. City of Des Moines*, 355 N.W.2d 49, 52 (Iowa 1984) (pro tanto settlement credit to be allocated to two verdicts in same proportion as amounts of verdicts).

The plaintiffs in *Glidden* argued that the pro tanto rule cannot be squared with the adoption of pure comparative negligence in *Goetzman*, but the Court found no conflict between the holding and rationale of *Goetzman* and the basic policy against excessive recovery of damages for a single injury that underlies the pro tanto concept. The Court emphasized:

> The holding of *Goetzman* was clear and specific. We supplanted contributory negligence with a pure form of comparative negligence in cases where contributory negligence had formerly been a complete defense. 327 N.W.2d at 754. That holding delineated a new tort doctrine for a specific category of cases and displaced a single doctrine, that of contributory negligence. *Thompson v. Stearns Chemical Corp.*, 345 N.W.2d 131, 133 (Iowa 1984); *Rozevink v. Faris*, 342 N.W.2d 845, 849 (Iowa 1983). It did not require a new and different division of a plaintiff's damage recovery among defendants, as plaintiffs here suggest. *Goetzman* was a landmark decision, but it did not mandate a wholesale revision of Iowa tort law. *See, e.g., Thompson v. Stearns Chemical Corp.*, 345 N.W.2d at 133-34 (adoption of comparative negligence did not affect rule denying contribution from employer liable for workers' compensation); *Rozevink v. Faris*, 342 N.W.2d at 849-50 (adoption of comparative negligence did not abrogate doctrine of joint and

Continued on page 12

TWELVE YEARS UNDER COMPARATIVE FAULT ACT. . . *Continued from Page 11*

several liability).

It is noteworthy that our pro tanto credit rule had nothing to do with the doctrine of contributory negligence which *Goetzman* eliminated. For the pro tanto rule to come into play a plaintiff must first receive a verdict against which a defendant seeks a credit for settlement funds paid to the plaintiff. Before *Goetzman* a contributorily negligent plaintiff was barred from recovering any verdict for damages. Consequently, *Goetzman* had no direct effect on those cases in which our pro tanto credit rule had previously been applied.

Moreover, in analyzing the manner in which a plaintiff's damages should fairly be apportioned among several tortfeasors, it is instructive to compare our pro tanto credit rule with the doctrine of joint and several liability which we recently retained as being compatible with pure comparative negligence. *Rozevink v. Faris,* 342 N.W.2d at 848-50. We decided that under our doctrine of comparative negligence the injury a plaintiff sustains need not be divided among the several tortfeasors, whether they be a plaintiff and defendant or several defendants. Under the doctrine of comparative negligence the negligent plaintiff's recovery for the injury is reduced proportionately to the negligence. Because of joint and several liability, all tortfeasors who cause a plaintiff's harm are jointly liable for the total proportionately reduced amount. The plaintiff cannot recover more than is fair, but the plaintiff is allowed to collect the fair amount of a verdict from all tortfeasors. 342 N.W.2d at 850.

Our pro tanto rule satisfies these same objectives. The plaintiff may by settlement recover part of a full and fair recovery from one tortfeasor and the balance from all others, but the plaintiff cannot recover more than full and fair compensation from all tortfeasors combined. Only under the pro rata rule which plaintiffs espouse can a plaintiff recover more than the fair compensation fixed by a jury verdict or judge's determination of damages. We prefer the rule that does not permit that result and therefore choose not to adopt a pro rata approach.

The Court concluded:

Our pro tanto rule remains viable in cases not affected by Iowa's new comparative fault act, notwithstanding the arguments plaintiffs have arrayed against it. The trial court should have credited against each plaintiff's damage verdict the full amount each had received in settlement from Goc and the city. On remand, Glidden's judgment against German should be reduced from $20,000 to $16,000, and judgment should be entered for German and against Wilson, based on the appropriate dollar-for-dollar credits which our Greiner-Wadle pro tanto rule required.

Sec. 7. -- Strict Liability.

Speck v. Unit Handling Division, 366 N.W.2d 543 (Iowa 1985) involved the question whether the principles governing strict liability for the sale of defective products should be modified to comport with the adoption of pure comparative negligence in *Goetzman.* The Court held that *Goetzman* did not overturn the established common law principles in such cases. The Court also said that *Goetzman* did not change the law governing ordinary contributory negligence as a defense to strict liability in cases involving defective products, because when *Goetzman* was decided contributory negligence was not a defense in such cases. Thus, the plaintiff's contributory negligence is not a defense to a strict liability case involving defective products.

Sec. 8. -- Dramshop Cases.

In *Martin v. Heddinger,* 373 N.W.2d 486 (Iowa 1985), the Court rejected the plaintiff's argument that any complicity or assumption of risk should only work to reduced, rather than to bar, recovery and held that the trial court did not err in rejecting the plaintiff's contention that *Goetzman's* comparative fault concepts apply to the defenses of complicity and assumption of risk in dramshop cases.

Sec. 9. -- Consortium Claims.

In *Goetzman* situations, there is no imputation of fault to the deprived spouse as a result of the negligence of the injured spouse. *Schwennen v. Abell,* 430 N.W.2d 98 (Iowa 1988). In *Fuller v. Buhrow,*

Continued on page 13

TWELVE YEARS UNDER COMPARATIVE FAULT ACT... *Continued from Page 12*

292 N.W.2d 672 (Iowa 1980), the Court had held that the contributory fault of an injured spouse does not provide a defense to a loss of consortium claim brought on behalf of the deprived spouse against a third-party tortfeasor. The Court found no persuasive reasons why the adoption of comparative fault should require a departure from that position.

Sec. 10. -- Who Can Be Assessed Fault.

Only "parties" can be assessed fault under *Goetzman*. However, a party named as a defendant in the petition, but never served and never brought within the jurisdiction of the court is not a party and cannot be allocated fault for such purposes. *Collier v. General Inns Corp.*, 431 N.W.2d 189 (Iowa App. 1988).❑

IN RESPONSE

By John M. French, Council Bluffs, Iowa

While I, and I suspect a significant number of other attorneys, vehemently disagree with virtually every comment contained in the article by Kevin Reynolds, "Comparative Fault: 'Effect' of Jury's Answers Should Not Be Relevant to Their Decision," I was most struck by the statement "The only problem is that juries are not finding plaintiffs more than 50% at fault and the reason they are not doing so is because they are told what the 'effect' of their answers are." This statement is a blatant misstatement of what is occurring in our trials.

On more than one occasion, I have had a jury find a plaintiff more than 50% at fault and deny recovery. I know other attorneys have experienced the same.

Section 668.3(5) of the Iowa Comparative Fault Act is not insidious nor contrary to law. It does not invite jurors to engage in "frontier justice" or to decide cases based upon the "effect" of their decision instead of the facts and evidence presented.

The "more logical alternative" of instructing the jury to fill in the verdict forms based on the evidence presented and nothing else would truly result in frontier justice and a virtual false representation to the jury.

Judge Henry Woods has addressed this issue in his treatise on comparative fault as follows:

> "A majority of jurisdictions permit the jury to be told the effect of the answers to the Interrogatories. This is accomplished by statute, court rule, or judicial decision. A few jurisdictions require that the jury be blindfolded and not given this information."

See Woods & Darrah, Comparative Fault, §18.2, at 441- 42 (3d ed. 1996).

It would seem that frontier justice and erroneous results would be more aptly applied in those situations suggested by Mr. Reynolds: as, for example, where a jury found plaintiff 80% at fault, but entitled to 20% of the damages awarded when, in fact, the plaintiff would then receive nothing.

The attack on §668.3(5) is misplaced. That section requires the Court to correctly set forth the law in the jury instructions including the effect of the jury's answers to the interrogatories. To do otherwise would allow the jury to award damages which the law would then take away and blindfold the jury. ❑

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1997 DRI SEMINAR SCHEDULE

Dates	Topic	Hotel/City
September 11-12	Insurance Bad Faith and Extra-Contractual Liability	Renaissance Stanford Court Hotel San Francisco, CA
September 11-12	Business Litigation	Doubletree Hotel Chicago, IL
September 18-19	Employment Law	Boston Marriott Copley Place Boston, MA
September 25-26	Medical Professional Negligence	Loews Santa Monica Santa Monica, CA
October 16-17	Insurance Coverage for Environmental Claims	Boston Marriott Copley Place Boston, MA
October 23-24	Insurance Fraud and Suspicious Claims	Sheraton Hotel Seattle, WA
November 5-9	DRI Second Annual Meeting	Omni Inner Harbor Radisson Hotel Baltimore, MD
November 13-14	Asbestos Litigation	Hotel del Coronado San Diego, CA
November 20-21	Psychological Injury Claims	Stanford Court San Francisco, CA
December 11-12	Insurance Coverage and Practice	Marriott Marquis Hotel New York, NY

1998 DRI SEMINAR SCHEDULE

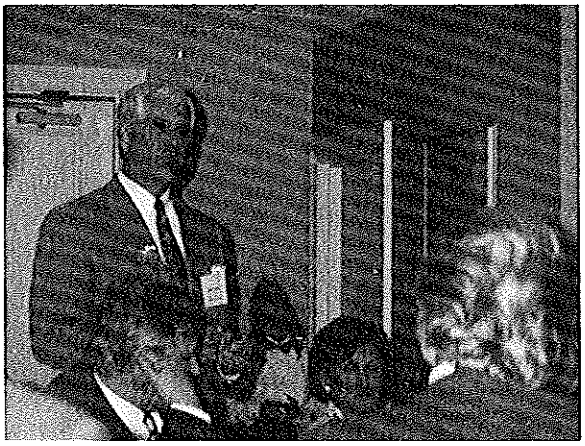
February 4-6	Products Liability	Fairmont Hotel Chicago, IL
May 14-15	Drug and Medical Device Litigation	Fairmont Hotel New Orleans, LA
October 6-10	DRI Annual Meeting	San Francisco Hilton San Francisco, CA
October 29-30	Insurance Coverage for Environmental Claims	Marriott Copley Hotel Boston, MA
December 10-11	Insurance Coverage and Practice	Marriott Marquis Hotel New York, NY

DRI Mid-Region Conference

On May 1st and 2nd, the Iowa Defense Counsel Association hosted the Defense Research Institute Mid-Region Conference at Glen Oaks Country Club in West Des Moines.

Attorneys from six states met to discuss issues effecting the defense bar

DRI Membership Director, Sandie Schmidt helps the conference run smoothly



DRI President, Bob Fanter addresses group

1997 Iowa Defense Counsel

Wednesday, September 24

9:00 a.m. Registration

11:00 a.m. Board of Directors Meeting

1:00 p.m. Welcome & Report of Association
- IDCA President, Robert Engberg
  Aspelmeier, Fisch, Power, Warner & Engberg, P.L.C.
  Burlington, Iowa

1:15-2:00 p.m. Appellate Update, Part I
- Richard Kirschman
  Whitfield & Eddy, P.L.C.
  Des Moines, Iowa

2:00-3:00 p.m. Pretrial Practice, the Judicial Perspective
- Honorable Patrick Grady
  Judge, 6th Judicial District
- Honorable Linda Reade
  Judge, 5th Judicial District
- Honorable Stephen P. Carroll
  Judge, 2nd Judicial District

3:00-3:15 p.m. BREAK

3:15-4:00 p.m. Maximizing Jury Effectiveness: Innovations & Communications
- Honorable Celeste Bremer
  United States Magistrate Judge
  United States District Court,
  Southern District of Iowa

4:00-4:30 p.m. Legislative Update
- Robert Kreamer
  IDCA Legislative Lobbyist
  Des Moines, Iowa

4:30-4:45 p.m. DRI - What's New
- Robert L. Fanter
  President, Defense Research Institute
  Whitfield & Eddy, P.L.C.
  Des Moines, Iowa

4:45-5:15 p.m. Non-Competition Agreements
- Mark Zaiger
  Shuttleworth & Ingersoll
  Cedar Rapids, Iowa

5:15-7:30 p.m. Cocktails - Embassy Suites Hotel
Dinner on your own

Thursday, September 25

8:30-9:00 a.m. Ethical Responsibilities and Legal Malpractice
- Mariclare Thinnes Culver
  Duncan, Green, Brown, Langeness & Eckley, P.L.C.
  Des Moines, Iowa

9:00-9:30 a.m. Discovery and Evidentiary Use of Jounalistic Evidence
- R. Todd Gaffney
  Finley, Alt, Smith, Scharnberg, May and Craig, P.C.
  Des Moines, Iowa

9:30-10:00 a.m. Protecting Your Client When The Civil Case Has Criminal Ramifications
- William B. Serangeli
  Smith, Schneider, Stiles, Hudson, Serangeli, Mallaney, Shindler & Scalise, P.C.
  Des Moines, Iowa

10:00-10:15 a.m. BREAK

10:15-11:00 a.m. Workers Compensation Issues: Penalty, Benefits, Interest and Attorneys Fees
- Maureen Tobin
  Whitfield & Eddy, P. L.C.
  Des Moines, Iowa

11:00-11.45 a.m. Defending the Govenmental Entity
- Eliza J. Ovrum
  First Assistant Polk County Attorney, Civil Bureau
  Des Moines, Iowa

11:45-12:30 p.m. Appellate Update II
- Webb Wassmer
  Simmons Perrine Albright & Ellwood
  Cedar Rapids, Iowa

12:30-1:00 p.m. Supreme Court Report
- Honorable Marsha K. Ternus
  Justice, Iowa Supreme Court

1:00-2:00 p.m. LUNCH - Embassy Suites Hotel

ANNUAL MEETING & SEMINAR

2:00-2:30 p.m. Strategic Use of Summary Judgement Motions
• Michel J. Coyle
Fuerste, Carew, Coyle, Juergens & Sudmeier, P.C.
Dubuque, Iowa

2:30-3:15 p.m. Effective Use of Video Deposition
• Guy R. Cook
Grefe & Sidney
Des Moines, Iowa

3:15-3:30 p.m. BREAK

3:30-4:00 p.m. Ethical Responsibilities in Dealing With the Uncooperative Client
• John D. Stonebraker
McDonald, Stonebraker & Cepican, P.C.
Davenport, Iowa

4:00-4:30 p.m. Protecting Your "Middleman" Client in Product Liability Cases
• W. Curtis Hewett
Smith, Peterson Law Firm
Council Bluffs, Iowa

4:30-5:00 p.m. Annual Meeting of IDCA and Election of Officers & Directors

6:30-9:00 p.m. Reception and Banquet
Glen Oaks Country Club
6:30-Reception 7:30-Banquet

Friday, September 26

8:30-9:00 a.m. Worker Compensation Update
• Honorable Iris Post
Iowa Industrial Commissioner

9:00-10:00 a.m. The Tripartite Relationship: Update on Ethical Issues
– Insurance Company Perspective
• David O. Narigon
Employers Mutual Companies
Des Moines, Iowa
– Private Defense Counsel Perspective
• Mark S. Lagomarcino

10:00-10:15 a.m. BREAK

10:15-11:00 a.m. Emerging Medical Technologies –New Liability Issues
• L. W. Rosebrook
Ahlers, Cooney,Dorweiler, Haynie, Smith & Allbee, P. C.
Des Moines, Iowa

11:00-11:45 a.m. Recent Issues in Environmental Law
• Lawrence P. McLellan
Bradshaw, Fowler, Proctor & Fairgrave, P.C.
Des Moines, Iowa

11:45-12.30 p.m. LUNCH – Embassy Suites Hotel

12:30-1:00 p.m. Federal Court Report
• Honorable Ronald E. Longstaff
Judge, United States District Court,
Southern District of Iowa

1:00-1:30 p.m. Family and Medical Leave Act Issues and Defenses
• Patricia J. Martin
Counsel, Maytag Corp.
Newton, Iowa

1:30-2:15 p.m. Defending the Age Discrimination Case
• Helen C. Adams
Dickinson, Mackaman, Tyler & Hagen, P.C.
Des Moines, Iowa

2:15-3 :00 p.m. Appellate Update III
• Sean O'Brien
Bradshaw, Fowler, Proctor & Fairgrave, P.C.
Des Moines, Iowa

The Iowa Defense Counsel Association Annual Meeting and Seminar is accredited under the regulations of the Iowa Supreme Court Commission on Continuing Legal Education. It is planned that this program will provide 15.5 hours of credit towards the mandatory continuing legal education requirements under the Iowa rule, including 2 hours of credit devoted exclusively to the area of legal ethics. This program has also been approved for 6.0 hours of Federal Continuing Legal Education.

IDCA ROSTER

PLEASE NOTE: We are advised that the IDCA Roster will be updated in January 1998. Some changes have already been sent in, however, it would be appreciated if everyone would take a minute to check their entries in the last edition. If there are any corrections or additions you wish to make, send them to Jim Pugh at the following address no later than January 10, 1998.

Jim Pugh
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Insurance Fraud

If insurance fraud were a business, it would rank among the Fortune 500 companies. For property-causalty insurance alone, insurance fraud is estimated to cost $17 billion annually.

–Battelle Seattle Research Center

FROM THE EDITORS

Just over a year ago we congratulated the Iowa Supreme Court for finally getting it right on bad faith. The Court had just recently handed down its decision in *Wetherbee v. Economy Fire & Cas. Co.*, and had determined that "[W]hether a claim is fairly debatable in any given situation is appropriately decided by the court as a matter of law." The analysis behind this ruling was entirely logical. If there is a jury issue as to the validity of the insurance claim itself, that claim must be fairly debatable. Since the court determines as a matter of law whether or not such a jury question is engendered, it is also deciding, a fortiori, as a matter of law, whether or not the claim was fairly debatable.

Recently, in *Thompson v. United States Fidelity and Guaranty Co.*, the Supreme Court seems to have backtracked from its decision in *Wetherbee*. (It is interesting to note that the panels in *Wetherbee* and *Thompson* were exactly the same except for the Justices who wrote the two opinions.) We are concerned that this recent pronouncement on the matter muddles, rather than clarifies the issue. The Eight Circuit has expressed the same frustration.

> This diversity case presents the question of whether a judge or jury should decide whether an insurer had a reasonable basis for denying a claim in a first party bad faith action. Cases from the Iowa Supreme Court go both directions.

Chadima v. National Fidelity Life Ins. Co., 55 F.3d 345, 345 (8th Cir. 1995).

We suggest a two step approach to remedy the perceived contradictions in this area of the law. First, the next decision concerning the legal and/or factual requirements of first party bad faith actions should be decided en banc. It appears that much of the problem we face in this area results from different panels and justices voicing differing opinions on the subject without regard to prior rulings. Second, the focus of the court's analysis should be placed on a narrow issue: If an insurance company creates a jury question with respect to it's insured's contractual claim, isn't that claim, by definition, fairly debatable? Stated otherwise, doesn't the definition of"fairly debatable" include having enough support for your position to engender a jury question on the issue. The answer would seem obvious. ❑

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