defense UPDATE

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# ALLOCATION OF DAMAGES AND STRUCTURED SETTLEMENTS

By William L. Neff, Washington, DC

## I. GENERAL RULES ON ALLOCATION OF SETTLEMENTS

### A. Exclusion for Damages

Under section 104(a)(2), gross income does not include "the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or sickness." Treasury Regulations section 1.104-1(c), provides that "[T]he term 'damages received (whether by suit or agreement)' means an amount received . . . through prosecution of a legal suit or action based upon tort or tort type rights, or through a settlement agreement entered into in lieu of such prosecution." Payments may be excluded from gross income only when received both: (1) Through prosecution or settlement of an action based upon tort or tort type rights and (2) on account of personal injuries or sickness. Sec. 104(a)(2); *O'Gilvie v. United States*, 519 U.S.__, 117 S. Ct. 452, 454 (1996); *Commissioner v. Schleier* [95-1 USTC ¶50,309], 515 U.S. at __, 115 S. Ct. at 2164 (1995); *P & X Mkts., Inc. v. Commissioner* [Dec. 51,400], 106 T.C. 441, 443-444 (1996); sec. 1.104-1(c), Income Tax Regs.

### B. General Rule for Allocation of Damages in the Settlement Agreements

In *Glynn v. Commissioner* [Dec. 37,625], 76 T.C. 116, 120 (1981), affd. without published opinion 676 F.2d 682 (1st Cir. 1982), the Tax Court stated that the most important fact in determining the purpose of the payment is "express language [in the agreement] stating that the payment was made on account of personal injuries." Settlement agreement should be respected if entered into in good faith between adverse parties at arm's length. The express allocation of the proceeds in the settlement agreement will be disregarded if the agreement is not entered into by the parties in an adversarial context at arm's length and in good faith.

### C. Recent Cases on the Proper Allocation of Damages

*Robinson v. Commissioner* [Dec. 49,648], 102 T.C. 116 (1994), affd. in part, revd. in part and remanded [95-2 USTC [50,644] 70 F.3d 34 (5th Cir. 1995); *Horton v. Commissioner* [Dec. 48,856], 100 T.C. 93 (1993), affd. [94-2 USTC ¶50,440] 33 F.3d 625 (6th Cir. 1994); *Stocks v. Commissioner* [Dec. 47,901], 98 T.C. 1 (1992); *Metzger v. Commissioner* [Dec. 43,832], 88 T.C. 834 (1987), affd. without published opinion 845 F.2d 1013 (3d Cir. 1988); *Threlkeld v. Commissioner* [Dec. 43,530], 87 T.C. 1294 (1986), affd. [88-1 USTC ¶9370] 848 F.2d 81 (6th Cir. 1988); *Bent v. Commissioner* [Dec. 43,206], 87 T.C. 236 (1986), affd. [88-1 USTC ¶9101] 835 F.2d 67 (3d Cir. 1987); *Fono v. Commissioner* [Dec. 39,454], 79 T.C. 680 (1982), affd. without published opinion 749 F.2d 37 (9th Cir. 1984); *Glynn v. Commissioner, supra; Seay v. Commissioner* [Dec. 31,331], 58 T.C. 32 (1972).

## II. ELEMENTS IN THE ALLOCATION OF DAMAGES

### A. Basis of the Settlement Not the Validity of the Claims

Where amounts are received pursuant to a settlement agreement, the nature of the claim that was the actual basis for settlement, rather than the validity of the claim, controls whether such amounts are excludable under section 104(a)(2). *United States v. Burke* [92-1 USTC ¶50,254], 504 U.S. 229, 237 (1992); *Robinson v. Commissioner, supra* at 126. Ascertaining the nature of the claim is a factual determination that is generally made by reference to the settlement agreement, in light of the facts and circumstances surrounding it. *Knuckles v. Commissioner* [65-2 USTC ¶9629], 349 F.2d 610, 613 (10th Cir. 1965), affg. [Dec. 26,649(M)] T.C. Memo. 1964-33; *Seay v. Commissioner, supra* at 37. Another way of stating this is "in lieu of what was the settlement amount paid?"

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# MESSAGE FROM THE PRESIDENT

**Jaki K. Samuelson**
**President**

At the recent DRI mid-region meeting in Nebraska City, Nebraska, representatives of the Iowa Defense Counsel Association had a unique opportunity to discuss with representatives of two major insurance companies an issue that has become one of the foremost concerns of lawyers in the defense practice - legal fee audits. Many of us have experienced audits of our bills by third party auditing companies retained by an insurance company that has retained our firm to represent its insureds. Few of us have found such audits to be pleasant experiences. Many of us who have not experienced such audits will have the opportunity to do so in the future.

In our discussions with the insurance company representatives, it was not surprising to learn that the companies' primary motivation in conducting audits is to save money. Although we, as lawyers can certainly understand and appreciate the business necessity for doing so, the use of outside auditors as a mechanism for doing so presents very difficult issues for us in providing quality representation to our clients. Auditors' limitations on the amount of time that will be approved for particular tasks may conflict with our personal judgement concerning the time that is needed under the circumstances of our client's particular case. Further, auditors sometimes require verification of lawyer's activities in the form of client communications. By providing copies of such communications to an audit company, a lawyer may jeopardize the attorney-client privilege. This places counsel in the unfair position of having to forego payment for his or her services in order to protect the interests of the client. Several states have found that it is a breach of their ethical canons for a lawyer to produce privileged communications to a third party audit company.

Insurance company representatives, at least those in attendance at the DRI mid-region meeting recognize the difficult issues that audits present for the lawyers they retain, but feel they must balance those concerns with their business' needs to hold the line on expenses. Organizations such as the IDCA and DRI are in a unique position to communicate with company representatives and seek solutions that will meet the needs of both the legal and insurance communities. Whereas it is often difficult for an individual lawyer to risk alienating an insurance company client or sometimes even to have access to the person in the client's organization who has the responsibility for decision making about the audit process (who is usually a financial/administrative person rather than the claims person with whom the lawyer works), bar organizations can address the economic, representation, and ethical issues in a general rather than personal way. There is certainly no guarantee that any lawyer or organization of lawyers can make legal fee audits go away. It is guaranteed, however, that audits won't go away until the insurance industry decides that there is a better way to address its concerns about the expense of legal defense for the insureds. It is certainly in our interest to participate in the process of identifying alternatives.

The IDCA is studying the legal audit issue in Iowa. If you have concerns or suggestions related to the audit issue, contact a board member or officer of the organization.

# CASE NOTE SUMMARY

By T.J. Pattermann, Council Bluffs, Iowa

## *Allied vs. Costello*

## IN MEMORIAM

**Don N. Kersten**

Don N. Kersten, Fort Dodge, died on February 7, 1998, at St. Mary's Hospital in Rochester, Minnesota, from complications following vascular surgery. He was 72.

After growing up in Fort Dodge, Don graduated from Notre Dame in 1948. He then served in the Air Force from 1948 to 1952, which included active duty as an intelligence officer in Korea. Don received a law degree from Drake University in 1955. After practicing a year and a half with the O'Connor Law Firm in Dubuque, Don practiced in Fort Dodge until his death, specializing in trial practice with the firm of Kersten Brownlee Hendricks L.L.P. His son, Steve, is a member of the firm.

Don was very active in attorney organizations, serving as President of the Iowa State Bar Association and the Iowa Defense Counsel Association. Among others, he was also a member of the American College of Trial Lawyers, the Federation of Insurance Counsel and the Iowa Academy of Trial Lawyers.

Don was an avid pilot and hot air balloonist. He was well known among balloonists throughout the country and world, serving as President of the Balloon Federation of America in 1969-1971, and participating in balloon events all over the world.

Don married Merope Mitchell in 1949. Merope died in June of 1984. In 1987, he married Bonnie Wiewel, who survives him along with four children and 14 grandchildren.

In *Allied v. Costello*, the Iowa Supreme Court revisited the intentional act exclusion found in general liability policies. *Allied Mutual Ins. Co. and AMCO v. Costello and Costello Insurance Agency*, 557 N.W.2d 284 (Iowa 1996), Reh. denied. The policies issued to the defendants, William Costello, and his business, Costello Insurance Agency, Inc., contained an exclusion for "bodily injury intentionally caused or aggravated by you [the insured]."

Iowa Appellate Courts previously addressed this type of exclusion in *McAndrews v. Farm Bureau Mut. Ins. Co.*, 349 N.W.2d 117 (Iowa 1984), *Altena v. United Fire & Casualty*, 422 N.W.2d 485 (Iowa 1988), *AMCO Ins. Co. v. Haht*, 490 N.W.2d 843 (Iowa 1992), *American Family Mut. Ins. Co. v. DeGroot*, 453 N.W.2d 870 (Iowa 1996) and *American Family Mut. Ins. Co. v. Wubbena*, 496 N.W.2d 783 (Iowa App. 1992). In *McAndrews*, the Supreme Court determined that a claim of self-defense did not ameliorate the inferred intent to injure that necessarily accompanies deliberate blows (referring to the fact that the jury in the personal injury action did not believe McAndrews acted in self-defense as it rendered a verdict against him). *Id.* at 119, 120.

In *Altena v. United Fire & Casualty*, 422 N.W.2d 485 (Iowa 1988) the Iowa Supreme Court adopted the contention that an insured's "intent to do the act and to cause injury may be inferred by the nature of the act and the accompanying reasonable foreseeability of harm." The Court expressly adopted the majority view that for an act to be excluded under an intentional act exclusion, the company must show (1) the insured intended the act, and (2) the insured intended to cause some kind of bodily injury, (even if the actual injury sustained was of a different character or magnitude than the intended injury). *Id.* at 488. ("Although we did not expressly say so, we applied the majority view in *McAndrews v. Farm Bureau Mut. Ins. Co.*, 349 N.W.2d 117 (Iowa 1984))." This decision was handed down despite the fact that most policies exclude " *bodily injury* which is *expected* or *intended* by the insured." *Altena v. United Fire & Casualty*, 422 N.W.2d at 488. (Emphasis added). The *Altena* Court stated it was persuaded of the insured's intent based on (1) the nature of the acts, (2) the repetition, (3) the force used in carrying them out, (4) the victims admitted sexual naiveté, and (5) the criminal nature of the actions. *Id.* at 490 (referring to Iowa Code §709.1(1) and indicating that the first three, especially when combined with the fifth element, favor inferred intent. *Id).* at 490.

In *AMCO Ins. Co. v. Haht*, 490 N.W.2d 843 (Iowa 1992) the Supreme Court reaffirmed its endorsement of the majority view regarding intentional acts in holding that an "exclusion is triggered where the insured intended both (1) to do the act which caused the injury, and (2) to cause some kind of bodily injury. " *Id.* at 845. This ruling was made despite the fact that the Court found the exclusion was inapplicable in a case where an eleven-year-old boy deliberately threw a baseball at a playmate, as a result of a playground snit, which resulted in his death. *Id.* The Court reasoned that the child lacked the capacity to compose the necessary

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# APPLICATION OF THE COLLATERAL SOURCE RULE TO MEDICARE ADJUSTMENTS

By Michael W. Ellwanger, Sioux City, Iowa

*The plaintiff in a case is on Medicare or Medicaid. He is involved in an accident and his medical bills are substantial. However, Medicare adjusts those bills to 30-40% of their face value. The bills are then paid by Medicare, with a small additional amount being paid by a supplemental policy. The plaintiff takes the position: (1) he is entitled to recover the full face amount of the medical bills, before they are adjusted; (2) even if he cannot recover the full amount, he should at least be allowed to show the jury the face amount bills as proof of the extent of the injury.*

The above scenario should presumably be a common one. However, there appears to be no law in the State of Iowa on the issue. The issue was raised recently in the case of *Heuertz v. City of LeMars/Floyd Valley Hospital*, Plymouth County No. 28441. This was a slip and fall case on the grounds in front of the hospital. Plaintiff alleged inadequate removal of ice in front of the main entrance of the hospital. The plaintiff ended up requiring a cervical fusion, with over $25,000.00 in medical bills. At the time the plaintiff was 73 years of age. Medicare adjustments reduced the bills to approximately $9,500.00.

Plaintiff initially filed a Motion in Limine under Chapter 668.14 (Iowa Code). That section provided that the court shall permit evidence and argument as to collateral source payments, except to the extent that such payments have been made pursuant to a state or federal program, the assets of the claimant or members of the claimant's immediate family. The court ruled that the defendants could not offer evidence that the medical bills had been paid by Medicare.

Defendants then filed a Motion in Limine, and also a motion pursuant to Rule 104, Iowa Rules of Evidence. Defendants requested that the Plaintiff be prohibited from offering or referring to the $25,000.00 in medical bills, because those bills were subsequently adjusted and were therefore not relevant to any issue in the case. Alternatively, defendants requested the court to rule that if the plaintiff was allowed to offer the $25,000.00 in bills, then the defendant should be permitted to offer evidence that the bills were adjusted downward and that the lower amount was all that the plaintiff would ever have to pay for his medical care and that this would be the most that could be recovered in the case.

It should also be noted that the plaintiff had deposition testimony from his medical care provider that the $25,000.00 figure was a fair and reasonable amount for the services that were rendered. On cross-examination the defendants established that the amounts were adjusted to a lower figure and that this was all that could ever be recovered.

The position of the plaintiff was that the reduction in the medical bills was a "collateral source benefit," and that the guilty party should not be permitted to take advantage of that benefit. Plaintiff argued that although the collateral source rule appears to have been abrogated by §668.14, such abrogation does not apply to government payments. (NOTE: It does not appear that §668.14 abrogates the collateral source rule—it only allows evidence concerning collateral source payments.)

Defendants took the position that even under the old collateral source rule, plaintiff could never recover the $25,000.00, because this was not the actual medical bill that was finally submitted and paid for the services rendered.

Under the collateral source rule, payments to an injured party from a collateral source do not reduce the amount otherwise owed by the defendant whose negligence proximately caused the injury. *Nieman v. Heil Co.*, 471 N.W.2d 790 (Iowa 1991); *Schonberger v. Roberts*, 456 N.W.2d 201 (Iowa 1990).

The Restatement of Torts, 2d, §920A(2), describes the collateral source rule as follows:

> Payments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable.

Comment "c" to §920A provides that the following collateral benefits are not subtracted from the plaintiff's recovery:

(1) Insurance payments, whether made by the plaintiff or a third party.
(2) Employment benefits.
(3) Gratuities.
(4) Social legislation benefits.

Interestingly, under gratuities, it is stated that the fact that the doctor did not charge for his services or that the plaintiff was treated in a veteran's hospital does not prevent his recovery for the reasonable value of those services. This would appear to be consistent with Iowa damage law which specifies that a plaintiff can recover the reasonable "value" of necessary medical expenses. See Iowa Uniform Jury Instruction 200.6.

With reference to social legislation benefits, the Restatement comment specifically refers to social

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*Bagley v. Commissioner* [Dec. 51,047], 105 T.C. 396, 406 (1995). A key factor in that determination is the intent of the payor, or the payor's dominant reason, in making the payment. *Robinson v. Commissioner, supra* at 127; *Britell v. Commissioner* [Dec. 50,696(M)], T.C. Memo. 1995-264; see *Agar v. Commissioner* [61-1 USTC ¶9457], 290 F.2d 283, 284 (2d Cir. 1961), affg. [Dec. 24,056(M)] T.C. Memo. 1960-21; *Metzger v. Commissioner, supra* at 847-848.

**B. Allocation in the Settlement Agreement**

Where the settlement agreement expressly allocates the settlement proceeds between tort-like personal injury damages and other damages, the allocation is generally binding for tax purposes (and the tort-like personal injury damages are excludable under section 104(a)(2)). *Bagley v. Commissioner, supra at 406; Robinson v. Commissioner, supra* at 127; *Threlkeld v. Commissioner, supra* at 1306-1307; *Fono v. Commissioner, supra* at 694. However, an express allocation set forth in the settlement is not necessarily determinative of the nature of the claim if the agreement is not entered into by the parties in an adversarial context at arm's length and in good faith, or if other factors indicate that the payment was intended by the parties to be for a different purpose. *Bagley v. Commissioner, supra* at 406; *Threlkeld v. Commissioner, supra* at 1306-1307. Where the express allocation is not to be respected, other factors, which include the payor's intent and the background of the litigation, rise to the fore in determining the nature of the claim. *See Knuckles v. Commissioner, supra* at 613; *Eisler v. Commissioner,* [Dec. 31,835], 59 T.C. 634, 640 (1973).

**C. Settlement Agreements That Are Not Entered Into by the Parties in an Adversarial Context at Arm's Length**

*Robinson v. Commissioner, supra,* involved an action initiated by the taxpayers in State court against a Texas bank for failure to release its lien on the taxpayers' property. After the jury returned a verdict in the taxpayers' favor for approximately $60 million, including $6 million for lost profits, $1.5 million for mental anguish, and $50 million in punitive damages, the parties settled. In the final judgment reflecting the settlement, which was drafted by the parties and signed by the trial judge, 95 percent of the settlement proceeds were allocated to mental anguish and 5 percent were allocated to lost profits. The Tax Court held that the allocation in the final judgment did not control the tax effects of the settlement proceeds to the recipients because it was "uncontested, nonadversarial, and entirely tax motivated" and did not accurately "reflect the realities of . . . [the parties'] settlement." *Id.* at 129.

In *Bagley v. Commissioner, supra* at 410, the Tax Court concluded that the express allocation of $1.5 million as damages for personal injuries provided for in the settlement agreement was not controlling, and the Tax Court determined that $500,000 of that sum was to be allocated as punitive damages. The payor's primary concern was to pay as little as possible to dispose of all claims of the taxpayer. Moreover, the Tax Court noted that it was clearly in the interest of both parties not to allocate an amount to punitive damages, despite the fact that the record showed that both parties had considered the strong possibility of petitioner's recovering punitive damages. Both parties worked on the terms of the settlement document, and the taxpayer had consulted a tax attorney concerning the allocation of the settlement proceeds.

In contrast with *Robinson v. Commissioner, supra,* and *Bagley v. Commissioner, supra,* in *McKay v. Commissioner, supra,* the Tax Court found that the settlement was made by hostile parties who continued to be adverse with respect to the allocations to be made therein. The "allocation of the settlement proceeds between the wrongful discharge tort claim and the breach of contract claim was based on . . . counsels' estimates of probability of . . . success on the merits, recognition of the jury verdict, and mutual assessment of the total and relative values of the claims." *McKay v. Commissioner supra* at 472.

In *McKay v. Commissioner, supra,* while the taxpayer wanted the settlement award to be as high an amount as possible to compensate him for his losses, he also desired that the other party be punished for its behavior. However, the settlement agreement stated affirmatively that no amount was paid to the taxpayer to satisfy damages under RICO or to satisfy punitive damages claims. The taxpayer was never given free reign to structure the settlement allocation. *See also Fono v. Commissioner* [Dec. 39,454], 79 T.C. at 694 (express allocation made in an earlier settlement agreement between Quaker Oats Co. (Quaker) and taxpayers was upheld as one entered into at arm's length and in good faith. The taxpayers sought an allocation of a portion of

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the agreed payment to personal injury--"damages for emotional distress"--but Quaker emphatically rejected that request.) *McShane v. Commissioner, supra* (express language in settlement agreement was respected where evidence in the record established that the inclusion of the language in the settlement agreements was the result of bona fide arm's-length negotiations and the tax consequences of the settlement were "never considered in the negotiations, but instead the settlement amounts were arrived at solely from a consideration by each party of the risks it would be subjected to by continuing the appeal.")

In *LeFleur v. Commissioner*, TC Memo 1997-312, 74 TCM 37 (1997), the underlying litigation was adversarial, but by the time the settlement agreement was executed, the parties were no longer adversaries. The record reflects that the defendant was not concerned with the amount of the settlement proceeds that was allocated to tort-like personal injury damages vis-a-vis other damages. As a result, petitioner in effect was able to unilaterally allocate the proceeds. The defendant's only concerns were that all of petitioner's claims be settled and that nothing be done to compromise the deductibility of the settlement to the defendant. While not controlling, the deductibility of the payor's payment is a factor to be considered in determining whether the parties have adverse interests in regard to their allocations. *See McKay v. Commissioner* [Dec. 49,736], 102 T.C. at 485. To the extent that an allocation to nontaxable damages results in a larger net recovery to petitioner and has no corresponding negative impact on the defendant, such allocation is equally favorable to the defendant in that it aided its ability to resolve the lawsuit for the smallest settlement payment amount possible.

In *LeFleur*, the Tax Court noted that the attorneys for both sides felt that petitioner's contract and fraud claims were the strongest, and his tort claim of outrageous conduct among the weakest. The defendant especially feared a runaway jury on punitive damages in the event that the case were remanded to state court, since Alabama juries were "known" for their large punitive damages awards. Despite the foregoing, the settlement agreement allocated 80 percent of the lump-sum proceeds to personal injury claims, only 20 percent to the contract claim, and nothing whatsoever to the fraud claims and punitive damages claims. In contrast to *McKay v. Commissioner, supra*, the settlement agreement was not based on counsels' estimates of the probability of success on the merits had the case gone to trial. *See McShane v. Commissioner* [Dec. 43,785(M)], T.C. Memo. 1987-151. Moreover, the tax effects of the allocation were considered by petitioner during the negotiations.

**D. Supporting the Allocation**

In order to ascertain the nature of the damages, courts look to the allegations contained in the taxpayer's original and amended complaints, the evidence presented, and the arguments made. In particular, the settlement agreement should provide for an express allocation of damages. *R.J. Durkee*, 162 F.2d 184, ruled that the exclusion for person injuries is only available in a case involving both excludable and non-excludable damages if an allocation is made in the settlement agreement. "In the absence of an allocation of the settlement among the various types of claims, all of the payment must be included in petitioner's gross income." *William H. Evans*, 40 T.C.M. 260, 264 (1980), citing *Durkee*.

In order to ascertain the nature of the damages, courts look to the allegations contained in the taxpayer's original and amended complaints, the evidence presented, and the arguments made.

> Even if we were to find that [plaintiff] compromised all of the allegations in the complaint petitioner would still not be entitled to exclude the payment. The release makes no reference to any allocation of the $18,000. The only testimony relative to an allocation was that of petitioner, who stated that he believed the award represented a pro rata settlement of the various claims alleged in the complaint. On this record, we cannot allocate any part of the settlement. In order to ascertain the nature of the damages, courts look to the allegations contained in the taxpayer's original and amended complaints, the evidence presented, and the arguments made. *Lawryn W. McKim*, 40 T.C.M. 9, 13 (1980).

On the other hand,

> If the settlement agreement lacks express language stating that the payment was (or was not) made on account of personal injury, then the most important fact in determining how section 104(a)(2) is to be applied is 'the intent of the payor.' In order to ascertain the nature of the damages, courts look to the allegations contained

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in the taxpayer's original and amended complaints, the evidence presented, and the arguments made as to the purpose in making the allocation. In order to ascertain the nature of the damages, courts look to the allegations contained in the taxpayer's original and amended complaints, the evidence presented, and the arguments made. In order to ascertain the nature of the damages, courts look to the allegations contained in the taxpayer's original and amended complaints, the evidence presented, and the arguments made. *Ana Maria Metzoer*, 88 T.C. 834, 847-48 (1987).

Even where a finding might be made that payment in a mixed claim included a personal injury payment, the settlement agreement and the record of the case must support an allocation to a specific number for the exclusion to be available.

> [E]ven if we were to find that some portion of the settlement agreement and release actually was intended . . . to compensate . . . for tort claims, the release or settlement payment does not allocate the $22,000 among various claims and there is no evidence in the record upon which we can base as allocation.

*Vernon L. Anderson*, 38 T.C.M. 1206, 1209 (1979).

In analyzing an allocation, the Internal Revenue Service will review the complaint and correspondence between the two sides. Correspondence is considered a step in the negotiating process which resulted in the execution of the settlement agreement.

### 1. To interest

Amounts paid in settlement, either before or after judgment, may be computed using the amount of the judgment, increased by pre- and/or postjudgment interest, discounted by the cost of further litigation and risk to each party. The question is raised whether amounts that are received in such a settlement are taxed the same as or differently from the components that enter into that computation. For example, is there an interest element in a negotiated settlement that is taxable? Is some portion of the settlement amount a reimbursement of medical expenses previously deducted that requires the recognition of income in an otherwise tax-free personal injury recovery? In general, the Service will make an allocation based upon the "best evidence, which may be the complaint, proof at trial or prior payments."

Taxpayers frequently take the position that statutory prejudgment interest itself is excludable as "*damages* received . . . on account of personal injury or sickness," because the "gross income" exclusion under section 104(a)(2) embraces all amounts recovered, by settlement or otherwise, as compensation for personal injuries, without regard to the stage in the litigation process at which settlement occurs. The leading precedent is *Kovacs v. Commissioner* [CCH Dec. 48,871], 100 T.C. 124 (1993), aff'd, 25 F.3d 1048 (Table) (6th Cir.), *cert. denied*, -- U.S. --, 115 S. Ct. 424 (1994), which holds that the prejudgment interest component in a compensatory damages recovery for personal injuries is taxable.

### 2. To medical expenses

In Private Letter Ruling 8751011, the taxpayer allocated a lump sum settlement after judgment to medical expenses, relying on Rev. Rul. 75-230, 1975-1 C.B. 93, which presumes that medical expenses are recovered first out of settlement proceeds, in the absence of express allocation of the settlement amount. Note that an allocation will be respected under Rev. Rul. 75-23 unless unreasonable on its face. Also note, however, that the Ninth Circuit has rejected the Service's position. The rationale of Rev. Rul. 75-230, as summarized in later rulings, is that "the best evidence available on which to base an allocation [of medical expense] . . . is the amount of previously paid medical expenses, which is a sum certain, in contrast with the generally speculative nature of pain and suffering damages alleged in a personal injury suit." Rev. Rul. 85-98, 1985-2 C.B. 51.

### 3. To punitive damages

#### (a)The complaint

The Service believes that the "best evidence" upon which to base an allocation to punitive damages in a settlement agreement prior to verdict is the complaint. In relying upon that evidence, however, the agent is instructed to determine that the complaint ratio of compensatory to punitive damages bears "a reasonable relationship to what a jury might be expected to award." Rev. Rul. 85-98, 1985-1 C.B. 51.[1] Such a determination is highly speculative. In many cases, prayers for relief do not identify dollar amounts for damages. Therefore, the allocation could not be based upon such evidence. In states where such prayers are used, the reliance upon the ratio of compensatory damages to punitive

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damages in the prayer as a substitute for the judgment in deciding whether a jury might award the ratio in the complaint is dangerous. Moreover, the decision as to the ratio sought in the complaint may be heavily influenced by litigation strategy having no relationship to the eventual award (for example, to attract the attention of the jury to a class of damages or to inflame the jury).

**(b) No allegations in complaint**

In many states, there is no dollar prayer in the complaint. Thus, allocation in a settlement reached before any proof is put on is difficult for the Service to challenge. In Private Letter Ruling 8547025 (August 27, 1985), the Service relied instead on an estimate of actual damages and ruled that, since the actual damages would have exceeded the settlement amount, none of the settlement should be attributable to taxable punitive damages.

**(c) Allocation based on the reason the defendant paid**

As noted above, in *LeFleur*, the Tax Court concluded that petitioner suffered no injury to his health that could be attributed to the actions of the defendants. Rather, the defendant's dominant reasons for payment were to avoid a large punitive damages award as well as to avoid losing on the contract claim. Settlement proceeds recovered under either of these claims would not have been excludable from income under section 104(a)(2). Therefore, an allocation to punitive damages was required.

**4. To deductible attorneys fees and costs**

Treasury Regulations section 1.265-1(c) requires an allocation of amounts between taxable and nontaxable recoveries:

> Expenses and amounts otherwise allowable [as deductions] which are directly allocable to any class or classes of exempt income [such as personal injury damages] shall be allocated thereto; and expenses and amounts directly allocable to any class or classes of nonexempt income shall be allocated thereto. If an expense or amount otherwise allowable is indirectly allocable to both a class of nonexempt income and a class of exempt income, a reasonable proportion thereof determined in the light of all the facts and circumstances in each case shall be allocated to each.

If a portion of a personal injury recovery is taxable, such as the recovery of punitive damages or medical expenses that must be included in income because the expenses were deducted in prior years, then an allocation is necessary of otherwise nondeductible attorneys' fees and costs to deductible fees and costs. The method used to perform that allocation is generally the same method that is used to allocate the underlying taxable and nontaxable amounts. For example, if the ratio of compensatory to punitive damages in the complaint is used to allocate settlement damages, then the same ratio is used in allocating deductible and nondeductible fees. *See, e.g.*, Rev. Rul. 58-418, 1958-2 C.B. 18 at 19 ("Inasmuch as the taxpayer has realized income to the extent of 37 percent of the amount received in settlement, 37 percent of the expense of obtaining such settlement is deductible for federal income tax purposes under the provisions of Section 212 of the Code.") *See also Church v. Commissioner*, 80 T.C. 1104, 1110-11 (1983).□

[1] Rev. Rul. 85-98 describes a taxpayer who sued for defamation, seeking in the complaint 15X dollars as compensatory damages and 45X dollars as punitive damages. That ratio of 1:3 was applied to allocate 16X dollars of the 24X dollar settlement to punitive damages, because the agent believed that the jury would have awarded the ratio set forth in the complaint.

## FOR THE RECORD

### IOWA RANKS HIGH IN LAWSUITS FILED

In 1997, Iowa ranked sixth in the number of civil cases filed per capita.

| | |
|---|---|
| 1. New Jersey | 6. **Iowa** |
| 2. Massachusetts | 7. Connecticut |
| 3. South Dakota | 8. Wisconsin |
| 4. Kansas | 9. Illinois |
| 5. Oklahoma | 10. Indiana |

**Source:** United States Department of Justice and National Center for State Courts.

## CASE NOTE SUMMARY *ALLIED V. COSTELLO*... *Continued from page 3*

intent that would be found in an adult or older child. *Id.* The Court cited its previous ruling in *Altena* and stated it remained unchanged, but that it did not apply in the "special circumstances" presented in the *Haht* case involving the single throw of a baseball and the "vague, uncertain meanderings in the mind of an eleven-year-old child involved in a playground spat." *Id.* at 846. In contrast, in *American Family Mut. Ins. Co. v. Wubbena*, 496 N.W.2d 783 (Iowa App. 1992) the Court of Appeals held it was proper to infer an intent to injure when a fifteen-year-old boy intentionally fired a BB gun twice at the victim. In *American Family Mut. Ins. Co. v. DeGroot*, 543 N.W.2d 870 (Iowa 1996), the Supreme Court once again reaffirmed its previous decisions in *Altena, McAndrews*, and *Wubbena* and inferred intent to injure from the actions of a thirteen-year-old babysitter in striking a five month old baby's head on the floor three times out of frustration when she could not stop the infant's crying. The infant died as a result of the blows. *Id.* The *DeGroot* Court specifically noted the repetitious nature of the acts and the force used to carry out them out in supporting its finding of inferred intent. *Id.* at 872. For a more detailed analysis of the *DeGroot* decision, see John Grief, "Current Status of Intentional Act Exclusion"*Defense Update*, Vol. IX, No. 3, July, 1969, page 6.

This brings us to the *Allied Mut. Ins. Co. and AMCO Ins. Co. v. Costello and Costello Insurance Agency, Inc.*, 557 N.W.2d 284 (Iowa 1986) case. This case focused on whether the defendant's mental state deprived him of the ability to form the requisite intent for committing the assault on his secretary. Also addressed in this appeal were issues of whether the intentional act exclusion present in the pertinent policy was ambiguous, whether issue preclusion should have been used to determine intent as a matter of law, and whether the case was tried in equity or at law. The trial court found the exclusion was ambiguous and the insured was unable to form requisite intent. It, therefore, held the exclusion did not apply. The Supreme Court, however, found the opposite and held the exclusion was not ambiguous, the insured was able to form the requisite intent and, therefore, the exclusion was applicable.

William Costello, the owner of Costello Insurance Agency, Inc., committed an assault upon his 68 year old secretary, Mary Anderson, on March 10, 1994. *Allied Mut. Ins. Co. and AMCO Ins. Co. v. Costello and Costello Insurance Agency Inc.*, 557 N.W.2d 284 (Iowa 1986). The assault occurred after Mr. Costello became angry when Ms. Anderson confronted him regarding an office policy concerning the mail. Mr. Costello's anger grew until he finally "just lost it" and "completely came unglued." Mr. Costello then lunged at his secretary, grabbed her shoulder and punched her in the face. After she was knocked to the ground, Mr. Costello straddled her body and continued to punch her in the face. Testimony was given by a witness that the witness entered the premises and yelled at the insured to "get off" Ms. Anderson. The witness stated she was not sure whether Mr. Costello heard her. The insured claimed to remember the events leading up to the assault, but testified that for five to ten minutes "I don't really remember very much." *Id.* at 285.

Mr. Costello was charged with intent to commit serious injury in violation of Iowa Code §708.1 and 708.2(1) (1993). *Id.* In the course of the criminal case, Mr. Costello pled not guilty, waived his right to a jury trial and requested a bench trial. *Id.* Mr. Costello stipulated to the facts presented by the prosecution, including the testimony of the state's psychiatrist, Michael Taylor, who stated that "at the time of the [assault], Mr. Costello was fully capable of understanding the nature and quality of his acts, of understanding the wrongfulness of his acts, and affirming the requisite intent." *Id.* at 285. Mr. Costello was found guilty of assault with intent to commit serious injury. *Id.*

Anderson then sued Costello for damages resulting from the assault. *Id.* Mr. Costello and Costello Insurance Agency, Inc. submitted the defense of the tort action to their insurance company, Allied Mutual Insurance. *Id.* Allied then brought the declaratory judgment action to resolve the question of its duty to defend and indemnify Mr. Costello and Costello Insurance Agency for the assault. *Id.* The District Court found that the intentional act exclusion found in Allied's policy was ambiguous and, therefore, not enforceable. *Id.* It determined that Mr. Costello's actions towards Mary Anderson were:

> " An isolated incident which involved the complete loss of self control. He neither premeditated the assault nor was he aware of the actions he was taking. He neither intended the act nor its consequences, but rather acted in a blind rage. As he indicated, in statements to others, his complete loss of temper is something he will regret all of his life."

*Continued on page 10*

## CASE NOTE SUMMARY *ALLIED V. COSTELLO*... *Continued from page 9*

Based on this decision by the District Court wherein it found Mr. Costello's actions were not intentional, Allied was responsible for the defense and indemnification of Mr. Costello for any damages awarded to Mary Anderson in her civil action. *Id.*

On appeal, Allied claimed the standard review for the case was de novo as the case was tried in equity. *Id.* The insured asserted that the case was actually tried at law as it was carried on the District Court's law calendar. The issue of at law or in equity was first raised on appeal. The Supreme Court determined that the action construing the insurance policy was indeed tried in equity as the case was heard in a bench trial where the trial court reserved ruling on several evidentiary matters *Id.* (Citing *Ernst v. Johnson County,* 522 N.W.2d 599, 602 (Iowa 1994) for the indicia of an equitable trial.) There is no clear ruling whether such actions are at law or in equity. The Supreme Court has made this decision on a case by case basis. (Citations omitted.)

On appeal, the insured also reasserted its position that the intentional act exclusion contained in the policy was ambiguous. The Supreme Court, however, found that the exclusion was not ambiguous and reaffirmed its position on Iowa adhering to the majority rule that such a policy exclusion is triggered where (1) the insured intended to do the act which caused the injury, and (2) caused some bodily injury. *Id.* at 286. [Stating the language found in Mr. Costello's policy was nearly identical to that found in *AMCO Ins. Co. v. Haht. Id.* at 286 (previously discussed.)]

In its appeal, Allied asked the Court to apply issue preclusion as to whether Mr. Costello's actions were intentional as a plea of nolo contendre is not available in Iowa, and he was convicted of assault with intent to commit injury. Allied claimed that all four elements of issue preclusion, as interpreted and applied by the Iowa Supreme Court, were present in the case. *See AID Ins. Co. v. Crest,* 386 N.W.2d 437 (Iowa 1983). Further, Allied argued that offensive use of issue preclusion was applicable in this case, even thought there was not the mutuality of parties, as Mr. Costello (1) had a full and fair opportunity to litigate the issue (criminal case), and (2) had sufficient incentive to litigate the issue (incarceration). *Ideal Mut. Ins. Co. v. Winker,* 319 N.W.2d 289, 292 (Iowa 1982). (Adopting Prof. Allan D. Vestal's proposal to apply issue preclusion without mutuality of parties with the two additional elements, regardless of whether the issue was actually litigated in the prior action.) Alternatively, Allied asserted that even without such preclusions that Mr. Costello's actions could be inferred as intentional by their very nature. Costello on the other hand still claimed he was unable to formulate the requisite intent to commit the assault due to mental illness and claimed that issue preclusion should not apply as the substantial rights of an innocent third party, Mary Anderson, would be adversely affected by its application.

In its ruling, the Supreme Court never addressed whether issue preclusion, upon the facts of this case, could be used to prove intent as a matter of law. *Id.* Rather the Court reviewed its prior decisions on this topic and reaffirmed its holding that intent to injure can be inferred as a matter of law by (1) the nature of the act and (2) the accompanying reasonable foreseeability of harm. The Court restated that an insured's intent to act and injure can be found from (1) the nature of the acts, (2) the repetition, (3) the force used in carrying them out, and (4) the criminal nature of the action. (Citations omitted.)

Finally, the Supreme Court addressed the insured's claim of mental illness. *Id.* The Court referenced authority which indicated "mental illness may affect the application of an intentional-act exclusion, but disagree as to when that occurs." *Id.* at 287. It cited authorities from both lines of thought in this area. *Id.* The Court cited authorities advocating the "broad view," which state that if an insured suffers from a mental illness or derangement, such illness deprives the insured of the capacity to govern his conduct and, therefore, the insured's act is not intentional under the exclusion. (Citations omitted.) The Court also addressed authorities referring to the "narrow view," which hold "that injury caused by a mentally ill insured who is incapable of distinguishing right from wrong is still intentional where the insured understands the physical nature of the consequences of the acts and intends to cause injury." (Citations omitted.) After referencing both schools of thought, the Court refused to adopt the "broad view" as urged by Costello. The Supreme Court stated the facts in this case did not support such a finding unless the Court desired to overrule cases such as *McAndrews, Altena, Wubbenna* and *DeGroot.* Clearly the Court did not desire to do this. The Supreme Court determined that "it seems apparent that Costello intended the injuries resulting from this assault unless he can establish otherwise

*Continued on page 11*

## CASE NOTE SUMMARY *ALLIED V. COSTELLO*... *Continued from page 10*

because the burden of proof on the issue rests squarely on him." *Id.* at 288. The Court appears to have stated that as the intentional act exclusion is not ambiguous, once the intent to act and injure is inferred, the insured has the burden of proving the inapplicability of the exclusion, or otherwise prove that their actions were not intentional. The Court also stated that "[w]hatever superficial attraction there is to be found in Costello's theory is derived from his bizarre behavior," even though his actions were irrational they are not necessarily unintentional *Id.* Thus the Court found that Mr. Costello's extreme anger seemed to actually elevate his intent rather than ameliorate it. *Id.*

Consequently, the Court's ruling in *Allied v. Costello* continues to be consistent with its line of rulings that the violent nature of a person's actions are sufficient to determine intent as a matter of law, even though the Court refused to apply issue preclusion. The ruling, in essence further clarifies that blind rage, rather than mitigating a person's intent, is actually another factor to support intent as a matter of law. ❐

**Editorial Note:**

The Iowa Supreme Court in *Costello* remains consistent with their precedent that the intent to injure can be inferred by the nature of the act. The Court also made a finding that the burden of proof rests squarely on Costello (Apellee/Insured) that he did not intend the injuries inflicted. This would appear to be a shift from the company to the insured for the burden of proof on these intentional act cases.

## APLLICATION OF THE COLATERAL SOURCE RULE.. *Continued from page 4*

security benefits, welfare payments and pensions under special retirement acts.

The defendants' response to this was that this is not a case of a gratuity, nor is it the payment of a bill by a third party. The federal government determines, under the circumstances of each case, what the fair and reasonable value of the service is. Indeed, there are a few rare cases in which the government may actually pay more than the customary charge of the physician.

The court in this case ruled that all the plaintiff could recover was the post-adjusted bill, and that the plaintiff could not offer evidence as to the preadjusted bill. Herewith the opinion:

**OPINION OF**
**JUDGE PATRICK M. CARR**
**3/30/98**

On March 25, 1998 pending evidentiary motions in the above file were heard. Counsel of record appeared voluntarily without notice. The matter was submitted upon the non-record argument of counsel and the contents of the court file.

The Plaintiff claims damages resulting from a slip and fall occurring on the Defendant's premises. He submitted to two principal medical procedures, cervical spine surgery and carpal tunnel surgery, each performed by Dr. Quinten (sic) Durward. The Plaintiff's initial medical bills, which Dr. Durward opined were "reasonable," amounted to approximately $25,000.00. Because of the Plaintiff's age, approximately 75 years, he is covered by the federal Medicare program, and also had a small Medicare supplement health insurance policy. Medicare secured a downward adjustment of the bills to about $10,000.00, most of which were paid by Medicare and a small amount which were paid by the private Medicare supplement carrier. It was agreed that the Plaintiff's obligation to pay all medical providers has been discharged by the Medicare payments. The Plaintiff seeks to admit the aggregate, preadjusted medical bills of approximately $25,000.00 at trial. The Defendants seek an order in limine prohibiting the Plaintiff from introducing this evidence.

The Plaintiff seeks to sustain admission of the preadjusted bills stating that (1) they are relevant to show the other elements of damage claimed, and (2) he is entitled in any event to seek damages of $25,000.00, and is not limited to the $10,000.00 sum authorized by and paid by Medicare.

*Continued on page 12*

## APPLICATION OF THE COLLATERAL SOURCE RULE .. *Continued from page 11*

It is clear that care gratuitously provided by family members, if a reasonable value is proven of the same, is recoverable, despite the fact that care was rendered as a gratuity. *Muldownes v. Illinois Central Railway Co.*, 36 Iowa 462 (Iowa 1873). The court said: "And if this became a proper charge against him, *which he was obligated to pay* in consequence of the injury, he should recover therefore from the defendant." *Id.* at 469. In *Varnam v. City of Council Bluffs,* 52 Iowa 698 (Iowa 1879), the plaintiff was treated by a physician who later moved away and to thus never rendered bills for his services. The plaintiff proved the reasonable value of care provided by the treating physician with the testimony by opinion of a different doctor. The question was whether these charges, for which bills had not been rendered, could be recovered by the plaintiff. The court said: "Plaintiff *being under obligation to pay for these services,* she may recover therefor, the indulgence she received from her physician will not defeat her claim against the defendant." *Id.* at 699.

Care provided by V.A. hospital is without charge to the plaintiff is still recoverable by the plaintiff, despite the fact that care was rendered at no cost to the plaintiff. *Hudson v. Lazarus*, 217 F(2d) 344 (D.C. Cir. 1954).

The italicized language in the quotations from the Iowa cases above show that while gratuitous care may be compensated, gratuity is central to the analyses.

In this case, the Court entertains extreme doubt as to whether the Plaintiff has any entitlement to recover the $25,000.00 represented by the gross amount of medical bills. The care given in this case was not gratuitous. It was paid after a downward adjustment in full. No one remains obligated to pay any amount. As such, bills representing that amount, preadjustment, are irrelevant under Rule of Evidence 402. Further the receipt of this evidence, under Rule 403, would lead to confusion and complexity of the issues, and the probative value of the evidence would be outweighed by the potential for unfair prejudice, confusion of the issues, misleading of the jury, and should thus be excluded.

IT IS THEREFORE ORDERED that the Motion in Limine is sustained. The Plaintiff is Ordered to refrain from bringing to the attention of the jury, whether by direct examination, opening statement, cross-examination, or otherwise, from introducing into evidence the initial, preadjusted medical bills. The Plaintiff is Ordered to caution his witnesses as to the scope and effect of this order. This ruling is not a final evidentiary ruling and shall not prejudice the Plaintiff from making necessary objections or offers of proof during the course of trial.

SO ORDERED. ❐

**Epilogue**

This case was tried to a jury in Plymouth County commencing March 31. The jury found the hospital negligent and the plaintiff 25% at fault. The parties had stipulated that the medical was $9,500.00. The gross verdict was $27,132.00, and the net verdict was $20,349.00.

## *WELCOME NEW MEMBERS*

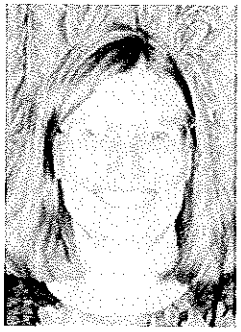
Kathryn V. Atkinson
Des Moines

John B. Tuffnell
Des Moines

Angel A. West
Des Moines

Merrill C. Swartz
Marshalltown

# *1997-1998 OFFICERS*

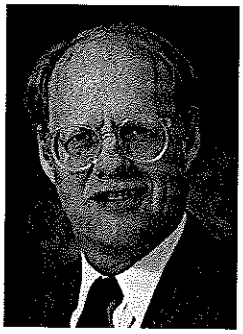


**Jaki K. Samuelson**
**President**

Jaki is a member of Whitfield & Eddy, P.L.C. and is a graduate of the University of Iowa Law School. She served as a law clerk to then United States Magistrate Judge Ronald E. Longstaff prior to joining Whitfield & Eddy. Jaki has been an active member of various bar associations and the DRI. She was the first president of the Iowa Organization of Women Attorneys and is currently a member of the Board of Governors of the Iowa Bar Association. Jaki resides in Des Moines and has two daughters.

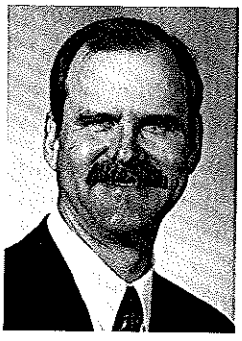
**Mark L. Tripp**
**President-Elect**

Mark is a shareholder with Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, Iowa. Mark practices primarily in the area of insurance defense and product liability defense. He is a graduate of Drake University Law School, and is a member of the Iowa Bar Association, ABA, and DRI. Mark and his wife, Patty, live in Dallas County and have two children.



**Robert D. Houghton**
**Secretary**

Bob is a partner with Shuttleworth & Ingersoll, Cedar Rapids, and is a graduate of the University of Iowa Law School. He is a member of, and active in, numerous bar organizations. He and his wife, Debbie, live in Swisher, Iowa. Debbie has returned to Mt. Mercy College, and is studying social work. Bob has two daughters: Heidi, who is an attorney in Chicago, and Amy, who is pursuing her Masters in Education at Drake. Bob and Debbie are looking forward to fishing this summer with their new neighbors, Pat and Claudette Roby, on their pontoon boat.



**James A. Pugh**
**Treasurer**

Jim is a partner in Morain, Burlingame & Pugh, P.L.C., West Des Moines, IA, which acts as general counsel to Farm Bureau Mutual Insurance Company. Jim graduated from Iowa State University in 1974 and from Creighton University Law School in 1977. Besides being Treasurer for IDCA, Jim is a member of the ABA, DRI, ISBA and PCBA. He and his wife, Janet, have three children, and live in Urbandale, Iowa. Jim enjoys hunting, fishing, and running.

# JOINT TRIAL ADVOCACY PROGRAM

The Iowa Academy of Trial Lawyers, the Iowa Defense Counsel Association and the Iowa Chapter of ABOTA are combining efforts to present another Joint Trial Advocacy Program. The Program will be aimed at young Iowa lawyers. The Program will be held at the University of Iowa, College of Law, on August 13, 14, and 15, 1998. The purpose of the Program will be to assist young lawyers in the fundamentals of trial practice.

**The faculty for the Program will be the following:**

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Bob Houghton at the Shuttleworth & Ingersoll firm in Cedar Rapids can be contacted for further information about the Program. Bob's phone number is (319) 365-9461 and e-mail address is: RDH@sil-law.com.

# DRI MEMBERSHIP INCENTIVES

We have received word from Sandie Schmidt, DRI Liaison and Membership Director, that the DRI Board of Directors recently approved the following special membership promotions:

**Free Membership:** Effective February 15, 1998, any individual who joins their state defense association is eligible for a one-year free membership in DRI.

**Half-Price Membership:** Also effective February 15, 1998, if an individual is already a member of a state association, he or she will be entitled to a half-price membership in DRI. The dues would be $75.00 for a regular member and $47.50 for a young lawyer.

In both above cases, the Young Lawyers' membership will include a certificate for complimentary attendance at a DRI seminar.

Now is the time to join DRI and their 20,000-plus defense lawyers. If you have any questions, you may call Sandie Schmitt or her assistant Shannon Gill at 1-800-423-7059. You may also contact IDCA's membership chairman Manny Bikakis at 712-277-1434 or DRI state representative, Greg Lederer at (319) 366-7641.

# FROM THE EDITORS

The *Defense Update* is published as a service to members of the Iowa Defense Counsel Association. It is intended to provide members not only with news and information regarding IDCA, but to assist members in keeping abreast of developments in the law and in representing their clients. This is done through case notes regarding recent developments of the Appellate Courts or articles on substantive matters of interest. For example, in this issue there is a comprehensive article on the Allocation of Damages and Structured Settlements. It provides a thorough examination of the applicable law and the tax ramifications of the settlements our clients enter into on a daily basis.

In order to continue to be not only a publication of interest, but also one of value to the members of IDCA, the *Defense Update* continues to seek articles for publication. Each member of this organization has informative and interesting experiences, which if shared would benefit many others. Whether it is an issue that has been researched for a motion in a pending lawsuit, a case that has been briefed for an Appellate Court or a scholarly treatise in an area of particular interests, the other members of this organization would benefit in sharing same through the *Defense Update.*

The Board of Editors therefore encourages all members of IDCA to participate by submitting articles for publication. To do so, simply call one of the editors listed below, or better yet, send one of the editors your article or case note today!

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