defense UPDATE

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TENSIONS IN THE UNDERINSURED MOTORIST ARENA

By Sharon Soorholtz Greer, Marshalltown, Iowa

All of us have had the experience of watching a plaintiff's attorney salivate when faced with an underinsured motorist (UIM) claim directly made against a company. Tom Henderson of the Whitfield law firm and Sharon Greer of the Cartwright, Druker & Ryden firm, had such a situation this year when both of our insurance company clients were brought in as the underinsurance carriers, albeit with a primary/secondary order, to pay over and above what the tortfeasor had paid in his limits. Plaintiff's attorney was so excited at the prospect of having two insurance companies sitting at the defense table that it appeared that he could hardly wait for the trial!

In the underinsurance area, strategic planning is ever so important. As we look at the history of the cases in this area and review what the courts are doing across Iowa, this continues to be an unsettled area of the law. In conducting many interviews with various carriers, various judges and various attorneys, the solutions and strategies to be crafted are not always so clear.

Chapter 516A provides that underinsured motorist coverage is "for the protection of persons insured under the policy who are legally entitled to recover damages from the owner of an underinsured driver. " §516A.1, *Iowa Code* (1997) In *Wetherbee v. Economy Fire and Casualty Co.*, 508 N.W.2d 657, 661 (Iowa 1993), the court indicated that "legally entitled to recover damages" means that the insured must have suffered damages caused by the fault of the UIM driver and be entitled to receive those damages under the policy. The statute's purpose is to provide compensation to an insured who is the victim of an underinsured motorist's negligence to the same extent as if the underinsured motorist was adequately insured. *American States Ins. Co. v. Estate of Tollari,* 362 N.W.2d 519, 522 (Iowa 1985). Therefore, an element of the insured's claim is that they show that they are legally entitled to damages from the underinsured owner/operator.

"[The statute] does not purport to define the proper party who may bring an action on the policy against the insurance company." *Wetherbee v. Economy Fire and Casualty,* 508 N.W.2d at 660. In the Wetherbee case, the court looked at whether another person other than that person or entity with the capacity to sue the direct tortfeasor could bring an action for underinsurance benefits. The *Wetherbee* court determined that the insured under the policy is the one entitled to underinsured motorist benefits. *Id.* at 661. Additionally, it is clear that the phrase "legally entitled to recover" does not mean that the insured must establish liability in a separate lawsuit against the underinsured motorist prior to seeking benefits under his or her own policy. *Leuchtenmacher v. Farm Bureau Mut. Ins. Co.*, 461 N.W.2d 291, 293-94 (Iowa 1990).

In the *Wetherbee* case, Chief Justice McGivern specifically concurred that a claim for UIM benefits is a "melding of contract and tort principles." *Wetherbee v. Economy Fire & Casualty Co.*, 508 N.W.2d at 662. He further said "although the basis of the suit itself against the UIM insurer may be contractual in nature, *the insurer stands in the shoes of the alleged tortfeasor,* and basically can defend the claim as the tortfeasor would."*Id.* (Emphasis added). McGivern opined that the UIM carrier would be able to assert the same defenses the tortfeasor could assert in defense of a direct suit by plaintiff against the tortfeasor. *Id.*

Oftentimes, the court is confused about the relevance of evidence of the insurance contract between the insured and the UIM carrier. In grappling with the issues which are presented before a jury in the standard UIM case, defense counsel typically crafts stipulations to prohibit the jury from hearing evidence of the insurance contract and its terms. The court determines, outside of the presence of the jury, the application of the policy after the jury determines liability and damages. At the jury trial, defense counsel typically insist that the underlying issues and elements, such as the extent of the injury and the liability for such injury, be resolved by the jurors.

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MESSAGE FROM THE PRESIDENT

Jaki K. Samuelson
President

As an organization and as individual members of the legal profession, the Iowa Defense Counsel Association and its members have a continuing responsibility to maintain the quality and integrity of the legal services provided by the defense bar. One important way of fulfilling that obligation is to educate those young lawyers who are entering the profession with respect to both the substantive and the professionalism issues that they will be facing throughout their careers. The Iowa Defense Counsel Association has, historically, provided opportunities for educational and professional enhancement to all its members, including its young members, in a number of ways including:

- this newsletter, which provides updates on a variety of contemporary legal issues;
- the Annual Meeting and Seminar program which can fulfill for an attending member a full year of state, federal and ethics CLE requirements and, in addition, provides an opportunity for Iowa Defense Counsel Association members, including young members, to meet and network with many of the outstanding trial attorneys in the state who are active members of the Association;
- Iowa Defense Counsel Association committees which provide members an opportunity for active participation in preparing amicus briefs, evaluation of legislative issues, analyzing and recommending jury instructions, presenting educational programs, addressing issues arising between insurance companies and defense counsel, and a variety of other professional activities; and
- IDCA's link to the Defense Research Institute (DRI) and the many educational and professional opportunities offered by that organization.

In addition, the IDCA has participated in a number of educational opportunities that are targeted directly to younger lawyers and law students, such as the annual trial demonstration put on by IDCA members at both the University of Iowa and Drake Law Schools and the Joint Trial Academy put on by the IDCA, the Iowa Trial Lawyers Association, the Iowa Academy of Trial Lawyers and the American Board of Trial Advocates.

The benefit to young lawyers of involvement in the IDCA reaches far beyond the availability of these various programs. A key factor in the development of "professionalism" over and above professional competence, is an opportunity to observe and associate with experienced attorneys who demonstrate a high degree of integrity, ethics, collegiality and pride in the legal system in which they work. The members of the Iowa Defense Counsel Association are, on the whole, outstanding examples of what it takes to be successful in the "professional" as well as technical aspects of the practice. Participation in the IDCA and its programs allows young lawyers an opportunity to be actively involve with such lawyers. The value of association with such professionals is impossible to calculate, but is also undeniable.

One of the goals of this administration of the Iowa Defense Counsel will be to broaden the participation of younger lawyers in the Iowa Defense Counsel Association. We hope first to expand the number of young lawyers among our membership and hope that our current members will encourage the associates within their firms and other new members of the defense bar to become IDCA members. We also hope to expand participation in Iowa Defense Counsel Association committees by

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RULE 49: WHAT CONSTITUTES TIMELY SERVICE?

By Mark S. Brownlee, Fort Dodge, Iowa

The numerous amendments to the Iowa Rules Of Civil Procedure recently approved by the Iowa Supreme Court take effect on January 23, 1998. They include significant changes to Rule 49, regarding service. The new rule essentially combines former rules 49, 50 and 52. It contains several changes (i.e. inclusion of facsimile number and ADA notice), but the new provision pertinent to this article is Rule 49(f):

> f. If service of the original notice is not made upon the defendant, respondent, or other party to be served within 90 days after filing the petition, the court, upon motion or its own initiative after notice to the party filing the petition, shall dismiss the action without prejudice as to that defendant, respondent, or other party to be served or direct an alternate time or manner of service. If the party filing the papers shows good cause for the failure of service, the court shall extend the time for service for an appropriate period.

In short, the rule provides that a petition not served within 90 days is subject to dismissal in the absence of a showing of good cause for the delay. The Comment to Rule 49(f) explains that, "Ninety days was chosen in order that service would be perfected prior to the issuance of scheduling orders by most courts."

Until the adoption of Rule 49(f), no rule specifically prescribed how soon service need be made to satisfy the requirement of prompt service under former Rule 49(b). Rule 49(f) constitutes the Iowa rule counterpart to Federal Rule 4(m), formerly 4(j), which provides that service is prompt if made within 120 days of filing a complaint.

The matter of timely service is primarily significant with respect to the statute of limitations, as the applicable limitations period may expire before a petition dismissed for untimely service is refiled. Rule 49(f) now clarifies what constitutes timely service (90 days), but the evolution of that rule through a series of appellate decisions provides valuable insight to be utilized in connection with any dispute regarding the timeliness of service or claimed justification for delay.

In *Scieszinski v. City of Wilton*, 270 N.W.2d 450 (Iowa 1978), the plaintiff filed his petition alleging wrongful imprisonment on March 8, 1977. He quickly obtained an ex parte order requiring the clerk to seal the petition, motion, order and original notice. After his acquittal on a charge of drunk driving, the file was unsealed and service was made upon the defendant. Notwithstanding the change in Rule 55, the Iowa Supreme Court reasoned that the pertinent rules (48, 49, 55) must be read together. 270 N.W.2d at 452. Because the plaintiff intentionally delayed service for three months, the Court ruled that the mere filing of the petition was insufficient to toll the statute of limitations. The significance of the intentional nature of the delay is reflected in the following passage at p. 452:

> "We have no intention to retreat from the advance made in the amendment. Here however we have an unusual case. We do not have a bungle by a clerk while processing papers or a botch by an officer in delivering them. We have an intentional bypass by a plaintiff of some of the steps for starting an action - the requirements for contemporaneously placing in the clerk's hands the petition and the notice papers and for prompt delivery of those papers by the clerk to the serving officer. The plan for starting actions contemplates that ordinarily the defendants will promptly learn of the action, but this objective is defeated if the plaintiff intentionally makes its accomplishment impossible."

The matter of timely service was at issue in several subsequent cases, the outcome of which generally turned on whether or not the delay was deemed intentional or justified.

In *Becker v. Star Auto, Inc.*, 376 N.W.2d 645 (Iowa App. 1985), the plaintiffs received a Rule 215.1 "try-or-dismiss" notice before effecting service upon Chrysler Corporation. Chrysler's registered agent was served one year after the notice was received, by which time the statute of limitations had expired. Citing the requirement in Rule 215.1 of "due diligence in attempting to cause process to be served," the Court found no good cause for the two and one-half year delay in service, particularly in view of the fact that the Chrysler had a registered agent for process. Accordingly, the Court concluded that the filing of the petition was insufficient to toll the statute of limitations.

In *Taylor v. Wiebold*, 390 N.W.2d 128 (Iowa 1986), although the plaintiff reportedly offered no explanation for the delay, an eight month delay in service was deemed unintentional, such that the filing of the petition tolled the statute of limitations.

In *Matter Of Estate of Steinberg*, 443 N.W.2d 711 (Iowa 1989), a 37 day delay in service was deemed unintentional, such that the filing of the petition tolled the statute of limitations.

In *Benn v. Midwest Battery & Metal, Inc.*, 449 N.W.2d 353 (Iowa 1989), the plaintiff offered no justification

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CHANGES IN IOWA RULES OF CIVIL PROCEDURE

By Michael W. Ellwanger, Sioux City, Iowa

Effective January 23, 1998, a comprehensive set of changes to the Iowa Rules of Civil Procedure went into effect. The majority of changes should have no great impact on litigation practice. Many of the changes were initiated in order to make the Rules gender neutral or to delete unused and archaic rules.

Two Rules do appear to have an immediate impact of some significance. RULE 49 deals with the ORIGINAL NOTICE. It now must include the telephone number and fax number of the attorney, an ADA notice, and language that a default judgment "may be rendered" (see new Rule 231 regarding default judgments). More importantly, the Rule requires that service of the Original Notice be obtained within 90 days. If service is not obtained within 90 days, the court on motion or its own initiative after notice, may dismiss the action without prejudice unless good cause is shown why service was not made.

Also of significance is the new RULE 231. PROCEDURE FOR ENTRY OF DEFAULT. The party requesting the default must make a written application to the clerk. The moving party must send written notice of "intention to file the written application for default" at least 10 days prior to the filing of said written application. After the 10 days expires, the party files a certification that the 10-day notice has expired, in which case the clerk shall enter the default without any order of court. The notice shall be sent by ordinary mail to the last known address of the party claimed to be in default. If the moving party is aware that the defaulting party is represented by an attorney, a copy of the notice shall be sent by ordinary mail to said attorney.

Other Rule changes of perhaps lesser significance are as follows:

RULE 2. REAL PARTY IN INTEREST

Allows a reasonable time to substitute the real party in interest in order to avoid dismissal.

RULE 70. CLAIMS FOR RELIEF

Reaffirms that a pleading shall not state the specific amount of damages sought, unless in small claims or involving only liquidated damages. Now contains language that "the specific amount and elements of monetary damages sought may be obtained through discovery. "

RULE 78. CAPTION AND SIGNATURE

Each pleading shall contain the personal identification number, telephone number and facsimile number of the party/attorney filing it. The caption of the first papers filed on behalf of any named party shall include the "personal identification number of each named party."(Note: This Rule applies only on the "first papers" filed or served by a party.)

RULE 80. VERIFICATION ABOLISHED; AFFIDAVIT; CERTIFICATION

In lieu of verification, this Rule allows certification pursuant to Iowa Rule §622.1. Section 622.1 provides that a person may attest the matter by an unsworn written statement reciting that the person certifies the matter to be true under penalty of perjury.

RULE 100. MOTION PRACTICE; GENERALLY

Written resistances must be filed within 10 days after a motion has been served. The movant has 7 days to file a concise reply brief addressing new and unanticipated matters.

RULE 105. TIME TO MOVE OR PLEAD

Motions attacking pleadings if no other responsive pleading is required must be filed within 20 after service of the pleading, e.g., a motion attacking an answer.

RULE 106. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

Service is now allowed by fax.

RULE 122. SCOPE OF DISCOVERY

The Rule now contains language that a party must supplement or amend his responses to include information thereafter acquired as to any matter that bears materially upon a claim or defense asserted by any party to the action.

RULE 125. DISCOVERY OF EXPERTS

A party must supplement his discovery regarding experts if the substance of the witness's testimony has been updated, revised or changed since the previous response to discovery.

RULE 126. INTERROGATORIES TO PARTIES

Interrogatories can require that a party provide a "statement of the specific dollar amount of money damages claimed," and "the amounts claimed for separate items of damage." There is no longer a requirement that notice of service of interrogatories be filed.

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CASE NOTE SUMMARY

By Patrick L.Woodward, Davenport, Iowa

Lamb vs. Manitowoc Company, Inc.

The Iowa Supreme Court recently issued a good reminder for defendants in its recent case of *Lamb vs. Manitowoc Co., Inc.*, 570 N.W.2d 65 (Iowa 1997). In reversing a jury verdict for the plaintiff, the Supreme Court held that Manitowoc had not breached its duty to warn. The importance of this case is twofold: First, the Court reaffirmed that failure to warn of a dangerous condition involved in a product is based upon a theory of negligence and not strict liability. Second, and more important for those of us defending negligence cases is that the Court once again reminds us that the essence of negligence is the foreseeability of the harm which may arise.

In *Manitowoc Co.* the plaintiff James Lamb brought an action for injuries which he received while helping two co-workers replace the wire rope used by the crane to move objects. This rope was threaded through the boom of the crane to a spool located at the base of the boom. Lamb, an employee of the contractors who were operating the crane designed and manufactured by Manitowoc, was standing on the lowered crane boom where he wrapped a choker, made of a short piece of smaller diameter wire rope with fasteners on both ends, around the new rope, fastening one end to the boom and the other end to a metal sleeve bar. The tightened choker created tension on the new rope as his co-workers wound the rope onto the drum. Shortly after the threading of the new rope had commenced, Lamb noticed that the rope was wearing through the choker and signaled to his co-workers to stop the procedure. At that point, Lamb reached down to show a co-worker the amount of tension that was on the sleeve bar and when he touched the bar, it came loose and tension on the rope was lost. This release of tension caused the rope to twist around Lamb's arm, causing the injuries to his forearm and hand. As a result of these injuries, Lamb brought an action against Manitowoc, asserting first a theory of strict liability based upon defective design and second, for failure to warn users of the risks and dangers of stringing wire rope. While the jury returned the verdict from Manitowoc on plaintiff's strict liability claim, the jury did find that the plaintiff was entitled to recover from Manitowoc for failure to warn of the risks and dangers of stringing wire rope. Subsequent to the verdict, the trial court denied Manitowoc's motion for judgment notwithstanding the verdict. On appeal, the Iowa Supreme Court reaffirmed that a duty to warn of a dangerous condition is a theory of negligence and not strict liability. The Court then went on to explain that a duty to warn arises from the foresee ability of the risks or dangers which caused the damage complained of. The Supreme Court in finding that the plaintiffs injuries were not foreseeable examined the lack of evidence of other injuries within the industry while changing wire rope and lack of notice of such injuries to Manitowoc itself. Further, the Court appears to say that notice of injuries in general was not sufficient, but that the prior injuries must be of a similar nature so as to create a duty to warn.

This case illustrates the necessity of foreseeability to establish an action of negligence. While an actor's conduct is to be judged by what is reasonable, one of the elements which determine reasonableness is the foreseeability of the harm which results. It should be kept in mind that in those cases where the consequences complained of do not naturally flow from the conduct of the actor, theplaintiff may have to prove as an element of moot the foresee ability of the consequences before the conduct can be found to be negligent. ❐

WELCOME NOEL

Noel McKibbin of Farm Bureau joins us as co-editor with this issue.

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Numerous problems arise as plaintiffs' counsel attempt to discover and submit to the jurors information regarding how the claim has been handled through internal insurance files or testimony from the adjuster highlighting the insurance company's presence. A true UIM claim should not involve this evidence, but it is injected in at every corner. This creates confusion if the court insists upon looking at the UIM claim as solely a contract claim.

In determining what jurors can hear and know, it is important to look at how the case law has developed in the underinsurance area. In the *Leuchtenmacher* case, Leuchtenmacher was killed when a drunk driver crossed the center line and struck her car. *Leuchtenmacher v. Farm Bureau Mut. Ins. Co.*, 461 N.W.2d 291, 293-94 (Iowa 1990). The tortfeasor's carrier settled by paying the full amount of the liability limits and the suit continued against the underinsurance carrier. *Id.* at 292. Other issues were raised in this case, including further definition of the "legally entitled to recover" concept, the insurance company did remain as a named party before the jury.

Troublesome in this case was the fact that the jury was allowed to see evidence of the policy limits available under the UIM coverage and the tortfeasor's liability policy. *Id.* at 294. The *Leuchtenmacher* court justified evidence of limits by indicating that the evidence was offered by the estate to prove its claim under the insurance contract. *Id.* at 294. This case has led defense counsel to provide specific stipulations as to the existence of the insurance contract and its application in each particular case. These stipulations are crafted with the idea that evidence of the policy limits and the insurance contract itself should be kept out of the determination of whether the tortfeasor acted negligently and out of the determination of what amount of damage the plaintiff has sustained.

Shortly after the *Leuchtenmacher* case, followed *Handley v. Farm Bureau Mut. Ins. Co.*, 467 N.W.2d 247 Iowa 1991). The *Handley* case involved a suit by the estate against the tortfeasor and the deceased driver's insurer. *Id.* at 248. Instructive in this UIM area, this case clarified for defense counsel that the insurer could move to sever for separate trial the plaintiff's claim against the insurance company from the plaintiff's claim against the tortfeasor. *Id.* at 249. One other item of note was that the *Handley* case involved a bad faith claim by the plaintiff against the UIM carrier. *Id.* In *Handley*, the carrier argued that it would be prejudiced by a probable inflated verdict if the plaintiff's claims against the tortfeasor and the insurance company were tried together. *Id.* Because the *Leuchtenmacher* court held that a direct claim against the insurer would involve introduction of the insurance policy and its terms and because this *Handley* case involved underinsured motorist issues and bad faith claims, Farm Bureau saw that there was a risk of inciting the jury into a larger verdict than in the simple negligence action against the tortfeasor. It is significant that the *Handley* court then reaffirmed the following:

> This court has recognized that evidence of insurance can prejudice defendants by influencing jurors into returning liability verdicts against defendants on insufficient evidence and by causing jurors to bring in larger damage verdicts than they would if they believed the defendant would be required to pay it. See generally *Laguna v. Prouty*, 300 N.W.2d 98, 101 (Iowa 1981).

Handley v. Farm Bureau Mut. Ins. Co., 467 N.W.2d at 249.

Over the last several years, while the court has recognized that more and more jurors may be sophisticated about insurance coverage, at least the law in Iowa remains that there is the risk that evidence of insurance might bring in verdicts for more than they would if they had believed the defense themselves would be required to pay the judgment. *Mihalovich v. Appanoose County*, 217 N.W.2d 564, 567 (Iowa 1974). The *Handley* court recognized that because it was likely that evidence of insurance would cause a jury to return a larger verdict against the tortfeasor that Farm Bureau could sever their portion of the claim for trial from the claim against the tortfeasor. *Handley v. Farm Bureau Mut. Ins. Co.*, 467 N.W.2d at 250. The "catch" to a severance of the trials was that there would not be a redetermination of any damages for plaintiff's claim against the tortfeasor because dicta suggested that the insurance company would still be precluded from re-litigating the damage issue even if there was not a preexisting agreement to be bound by the determination in the original trial. *Id.*

In light of the *Handley* decision, a new analysis began by defense attorneys in developing strategy. If the company determined that it should sever the claim to avoid an inflated verdict based upon the evidence of the insurance contract, could the

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tortfeasor's attorney be trusted to try the case appropriately or develop the important issues? If the tortfeasor was judgment proof and limits were low, there would not be the same incentive by the tortfeasor's defense attorney to prepare the case in the manner that the insurance carrier might require. Since we all know independent medical exams and depositions are expensive, perhaps many issues would not be developed fully without the help of defense counsel for the UIM carrier. Without a clear determination about whether the company would be bound by the underlying case, defense attorneys had to assume that the message was that they would be.

One strategy is to stay in the matter through the duration of the discovery and then move to sever prior to trial after the case was developed with the help of the tortfeasor's and the carrier's attorneys. Another option in the defense strategy is to agree to substitute as counsel the UIM carrier's attorney as the tortfeasor's attorney and to try the issues as if you were representing the tortfeasor. Because of the common goal, (that being to get the lowest verdict possible) no conflict of interest appeared. Another option is to allow both attorneys, the UIM carriers' and the tortfeasors', to sit in the chair of the tortfeasor. Use of a stipulation concerning application of the insurance coverage issues and an agreement between the two defense attorneys regarding evidence presentation, prohibits the jury from hearing evidence of the insurance coverage. This option requires that the two attorneys work together and agree on the presentation of the case since only one of the attorneys could take an active role at any given point in the trial. These are all tactical concerns and were dependent upon how the tortfeasor looked, the experience of the tortfeasor's attorney, the ability of counsel to work together and the trial court's perception of what the cases allow and what the jury should be told. Finally, it required knowing what your court would do with these issues far in advance of trial and having good communication with both the plaintiff's counsel and any other defense counsel.

Next came the *Johnson* case. *Johnson v. State Farm Auto. Ins. Co.*, 504 N.W.2d 135 (Iowa App. 1993). Johnson was rear ended by King and claimed back injuries. *Id.* at 136. King's insurer agreed to pay Johnson the $20,000 policy limits available to her. *Id.* State Farm consented to the settlement and made payments to Johnson of $5,000 under the policy medical pay provision. *Id.* Plaintiff made both an UIM claim and a bad faith claim against her carrier. State Farm admitted that it would be liable under the insurance policy if causation and damages were proven. *Id.* The *Johnson* jury determined that the accident with King was not the proximate cause of Johnson's injuries due to the extensive medical history that Johnson had prior to the collision. *Id.* The issue before the Court of Appeals became whether the bad faith claim should be separated from the UIM case. The court allowed the severance. *Id.* at 137.

In the *Johnson* case, like many of these cases, plaintiff's counsel tried several creative moves. *Id.* at 137-138. Counsel requested through discovery the insurer's company file on its investigation of their insured's claim. Counsel also wanted to tell the jury about plaintiff's settlement with King, that State Farm consented to the settlement, that the suit was being brought under an UIM provision and wanted to discuss evidence pertaining to the bad faith claim. *Id.* at 138. The court aptly saw through these attempts to inject insurance and raise the passions of the jury. First of all, the trial court determined that the only issues to be tried were causation and damages *Id.* at 138. Because there was no contract dispute in the *Johnson* case, there was absolutely no reason to introduce the insurance contract. The court looked at the discovery request regarding the insurer's file, determined that this would be investigation conducted in anticipation of litigation, and did not feel the plaintiff had met her burden of showing substantial need or undue hardship. *Id.* at 137. Finally, another tactic tried by the plaintiff's attorney and often seen prove UIM cases was an attempt to admit before the jury the carrier's agreement to the underlying settlement and evidence of the payment by the UIM carrier of medical bills to prove liability. *Id.* at 138. The court correctly prohibited either of these issues from being thrown before the jury. The court, in pairing down the issues that the jury would hear, brought the case back to the requirements under the statute that the plaintiff must show that she was legally entitled to recover from the tortfeasor.

The *Johnson* case seems to bring us to the point where the true role of the jury in a UIM case is to determine causation and the damages allowed to the plaintiff as if the tortfeasor were the only party involved. Therefore, defense counsel is faced

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with an additional strategic maneuver. Some defense counsel have requested of the trial court that they be allowed to present their defense, which is actually the defense of the tortfeasor, in a "legal fiction." Often, if you have the cooperation of the tortfeasor and the tortfeasor makes a good presentation, trial courts have allowed requests by counsel for the UIM carrier to present their evidence and defense in the name of the tortfeasor with the tortfeasor present. Many defense counsel use this strategy to avoid the risk of a higher verdict because of the presence of insurance coverage. Even if limits are not disclosed, a jury is left to its imagination as to what the limits are or may look at the situation as having a "blank check." One judge told me that as a jury wandered out of the jury room after making a decision against an insurance company in a case they stated "That is the largest check we have ever written!"

It is especially important, from a strategy standpoint, to sit as the tortfeasor if you have a plaintiff who makes an excellent impression and is very sympathetic, or if you have a close issue the jury needs to resolve that puts you at risk for making a jury feel that you are taking advantage of the plaintiff or being too mean. The image of a large insurance company pushing around the individual policyholder is exactly what must be avoided in these cases.

There are several risks that come along with attempting to sit in the courtroom as the tortfeasor's attorney. If your tortfeasor makes a terrible impression or is negligent through his drunken driving, there are good reasons not to have the tortfeasor present or to introduce the tortfeasor to the jury. Another concern is compelling the tortfeasor to be in the courtroom with you, or to even be cooperative with you. Approaching these trials as the tortfeasor's attorney, you must first establish that you can have a good relationship with the tortfeasor and that they do feel motivated and compelled to cooperate. Also, while many judges have allowed this "legal fiction" to occur, many judges are very uncomfortable with "pretending that you are someone else's attorney. "

Both Henderson and Greer interviewed judges and talked with carriers about these situations and the strategies that remain open to attorneys under the existing case law. While we did not conduct a scientific study, we were left with several impressions. First of all, all of us, judges, insurance companies and defense attorneys, agree that this is an area that requires careful planning. Many of us are seeing cases where we believe juries are becoming more sophisticated and realize on their own that insurance coverage is involved. It was apparent that all of us could cite examples where the insurance company as a party did indeed inflate the verdict by the jury. We found and heard about examples in low "specials" cases, where the insurance company was a party, that resulted in higher verdicts. In one case, where the medicals were $17,000 and lost wages were $5,000, the jury verdict was $207,000. In another case, where teeth were knocked out, the verdict was $149,000. Likewise, in another where the plaintiff had $15,000 in medicals, $16,000 in lost wages and had herniated disc surgery, the jury awarded $178,000. Judges have indicated that many of the UIM cases settle before reaching trial or are tried directly to the court.

Some carriers reported that overall, they did not believe, with careful case selection, sitting as an insurance company party harmed them. For example, a case that involved a rear-end collision, injury to the hip, approximately $860 in actual medical expenses but a claim for more future medical resulted in a jury verdict of $8,000. Additionally, another involved a case where an individual struck by a vehicle, resulting in one leg being shorter than the other, received a jury award of $80,000.

Several cases were found in rural counties involving soft tissue injuries where verdicts in excess of $300,000-400,000 occurred. Again, the "jury" is still out on this issue and it would be helpful to do a survey of Iowa cases over the next year to determine what is occurring in the rural factions and what is occurring in the urban areas. We are getting mixed messages in this area. We all seem to agree that having the insurance company as a party requires a different caution, even though the *issues* are the same as the underlying case against the tortfeasor. Because the issues are identical, our goal is to receive verdicts no different than if it were the case against the tortfeasor directly. We want to know what is happening to all of you. We would request that if you have a case and it does go trial, that you send to either Tom Henderson or Sharon Greer information regarding the following: (1) whether or not the to insurance company sat as a party at trial or as the tortfeasor, (2) the details of the case including plaintiff's appearance, (3) the county where it was tried, (4) any unusual issues before the court, (5) the amount of medical and other specials, and(6) the jury verdict. We will do a synopsis and report in one year to see if any trends can be established. Please feel free to send us your cases. ❐

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for an eight month delay in service. The Court deemed the delay presumptively abusive and dismissed the case, stating, "We think, when a delay is so protracted as to become presumptively abusive, the burden should fall upon a plaintiff to justify it." 449 N.W.2d at 356.

Dennis v. Christianson, 482 N.W.2d 448 (Iowa 1992) produced the same result as *Benn* insofar as a 2½ year delay in service was deemed presumptively abusive. *Dennis* is notable for the fact that the plaintiff professed great difficulty effecting service upon defendants that moved from Iowa to Phoenix several months after suit was filed. The Court concluded that the plaintiff's single attempt to locate and serve the defendants over a 2½ year period did not constitute justification for the delay. The Court rejected the plaintiff's suggestion that the defendants intentionally evaded service, pointing out various methods by which the plaintiff could have attempted to locate the defendants, i.e., public records from the Iowa D.O.T. and Secretary of State's office, local directories, directory assistance, consulting with competitors.

In *Turnbull v Horan*, 522 N.W.2d 860 (Iowa App. 1994), the plaintiff contended that a 126-day delay in service was justified because her attorney needed more time to investigate her claim and ensure service on the proper defendants. She also made the creative argument that the delay was necessary to avoid possible sanctions under Rule 80. The Court noted that while there may be cases in which lengthy delays are justified, this was not one of them. Referring to F.R.C.P. 4(j) (service is prompt if made within 120 days), the Court deemed the 125-day delay presumptively abusive. It is notable that the Court made reference to the fact that "the delay in this case was lengthy enough to place the case in conflict with the Iowa Supreme Court's order concerning time standards for case processing." 522 N.W.2d at 861.

Alvarez v. Meadow Lane Mall, 560 N .W.2d 588 (Iowa 1997) tracks the judicial application of the prompt service requirement to that point. *Alvarez* involved a 159-day delay which the Court deemed presumptively abusive, thereby placing the burden on the plaintiff to prove the delay was justified in order to avoid dismissal. The Court further noted that, "Even if the delay was not presumptively abusive, an intentional delay can still require dismissal." 560 N.W.2d at 591, citing *Sciezinski*, 270 N.W.2d at 452-453. It is difficult to say whether or not this rule would apply after the adoption of Rule 49(f). I suspect it would not apply to any service effected within 90 days of filing.

Alvarez is primarily significant as the case in which the Court judicially adopted the federal rule that service is prompt if made within 120 days of filing. The following passage from 560 N.W.2d at 591 sets forth the Court's reasoning in doing so:

> "We think the 159-day delay in the present case was presumptively abusive. In Turnbull, 522 N.W.2d at 861, the court of appeals relied in part on the rationale underlying federal rule of civil procedure 4(j) (now renumbered federal rule of civil procedure 4(m)) under which service is prompt if it is made within 120 days of filing the complaint. Iowa procedural rules provide no such bright line. We nevertheless agree with the court of appeals that any delay beyond 120 days indicates the plaintiff filed the petition, not to seriously institute litigation, but rather to "ice" the statute of limitations for a later determination on whether to proceed with suit. We recognize that it is sometimes both appropriate and prudent to maintain options on whether to sue or not sue. But when it comes to courthouse filings, it is necessary to draw a line between bringing a suit and merely filing a petition in order to delay deciding whether to do so. It is not appropriate to expect judicial process to wait 159 days while a plaintiff decides."

Because the delay was presumptively abusive, the Court then considered the plaintiff's claim of justification. Plaintiff's counsel contended that the defendants' insurer's claims representative indicated on the telephone two weeks after the petition was filed that the insurer would accept service on behalf of the defendants. The Court found that no commitment to accept service was made during that conversation. At most, the claims representative stated that she would have to check with her supervisor. Plaintiff's counsel followed up the telephone conversation with a letter to the claims representative, enclosing an original notice, petition and acceptance of service form, requesting immediate notification if service would not be accepted so that he could take other steps to obtain service, if needed. The insurer did not respond to the letter. The plaintiff argued that the lack of a response produced a mistaken belief that the insurer would accept service.

The Court rejected the plaintiffs claim that the delay in service was justified by the insurer's actions, stating

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RULE 49: WHAT CONSTITUTES TIMELY SERVICE? ... *Continued from page 9*

that, "Most of all, the justification fails because Alvarez simply cannot, by such a tactic, shift to defendant's insurer her own responsibility to provide for service as required by Iowa Rule Of Civil Procedure 49(c)." 560 N.W.2d at 588.

Henry v. Shober, 566 N.W.2d 190 (Iowa 1997) is the most recent case addressing the prompt service requirement. The plaintiffs contended the (presumptively abusive) 169-day delay in service was justified because good faith settlement negotiations were ongoing when the petition was filed, the defendants' insurer was aware of the action and was not prejudiced by the delay. The plaintiffs further contended "the delay was intended to benefit both parties by preventing litigation costs." 566 N.W.2d at 192.

The Court found the plaintiffs' various claims of justification to be without merit. The Court concluded that even good faith settlement negotiations do not constitute adequate justification or good cause for delaying service, observing that service is not an impediment to the settlement process, as it allows a defendant "to investigate the claims and prepare its defense, thus contributing to its evaluation of a case. If the parties wish to continue settlement discussions beyond the limitations period, the plaintiff should secure a statute of limitations extension, in writing, from the defendant and the defendant's insurer. "*Id.*

At pages 192-193, the Court quoted a federal case, *Vincent v. Reynolds Mem'l. Hosp., Inc.,* 141 F.R.D. 346, 437-438 (N.D. W. Va. 1992), for guidance regarding what constitutes good cause or adequate justification for a delay in service:

> "[T]he plaintiff must have taken some affirmative action to effectuate service of process upon the defendant or have been prohibited, through no fault of his [or her] own, from taking such an affirmative action. Inadvertence, neglect, misunderstanding, ignorance of the rule or its burden, or half-hearted attempts at service have generally been waived as insufficient to show good cause. Moreover, intentional non-service in order to delay the development of a civil action or to allow time for additional information to be gathered prior to "activating" the lawsuit has been held to fall short of the good cause showing required for noncompliance with Rule 4(j) [now 4(m)]."

Finally, it is worth noting that the Court, as in *Turnbull,* made reference to the Iowa Supreme Court order concerning time standards for case processing in considering the length of the delay in service. 566 N.W.2d at 190. Similarly, the Court noted that, "It is important that scheduling orders, as provided by Iowa Rule Of Civil Procedure 136, not be delayed because service upon the defendant has not been perfected." 566 N.W.2d at 193. (See Comment to Rule 49(f).)

CONCLUSION

Under Rule 49(f), a delay in service beyond 90 days is presumptively abusive and constitutes grounds for dismissal in the absence of a showing of "good cause" for the delay by the plaintiff. Intentional delays are viewed more harshly. A need to obtain additional information, moderate difficulty in obtaining service or the existence of settlement negotiations are not enough. Defense counsel should carefully consider a motion to dismiss when service is delayed beyond 90 days, as the Iowa Supreme Court seemingly grows less tolerant of lengthy delays. ❐

CHANGES IN IOWA RULES OF CIVIL PROCEDURE ... *Continued from page 4*

RULE 132. PHYSICAL AND MENTAL EXAMINATION OF PERSONS

The Rule is changed to allow examination by any health care practitioner.

RULE 134. CONSEQUENCES OF FAILURE TO MAKE DISCOVERY

All orders granting a motion compelling discovery need to include a notice of the consequences for failure to comply with the order compelling discovery. All orders compelling discovery are to be mailed to the party whose conduct necessitated the motion to compel.

RULE 177. DEMAND FOR JURY TRIAL

The Jury Demand may be made in the pleading itself as long as it is noted in the caption.

RULE 181. CIVIL TRIAL SETTING CONFERENCE

Trial setting conferences shall occur no later than 120 days after the case has been commenced. There is no longer any such thing as a "trial certificate."

RULE 150. CONDITIONAL NEW TRIAL

If the court orders a remittitur, additur or otherwise modifies the judgment, a consent must be filed on or before 7 days before the date when an appeal must be taken. (NOTE: This Rule seems to explicitly approve additur in Iowa.)

RULE 326. NOTICE (TEMPORARY INJUNCTIONS)

If an applicant requests a temporary injunction without notice, the attorney must specify what efforts have been made to give notice to the adverse party or that party's attorney, or, some other reason supporting the claim that notice should not be required.

RULE 328. HEARING TO DISSOLVE TEMPORARY INJUNCTION

A hearing to dissolve a temporary injunction shall be held within 10 days after the filing of the motion to do the same.

RULE 365. SUBPOENAS

This is a new Rule governing subpoenas. A party or attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing an undue burden or expense on a person subject to the subpoena. If a person is commanded to produce records, he or she need not appear in person at the place of production unless commanded to appear for deposition, hearing or trial. The party required to produce the documents has 14 days to serve a written objection. The requesting party then must obtain an order of court. Subpoenas may be quashed for a variety of reasons. You cannot require a person to travel outside of his county of residence (or where he is employed), except for trial. Special protections are provided against requiring an "unretained expert" to provide opinion testimony. Notice of any subpoenaed documents or inspection of premises shall be served on each party in a manner reasonably calculated to give all parties an opportunity to object before the production or inspection. ❐

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

all members, including especially younger lawyers. Through committee work, members can make meaningful and recognizable contributions to the organization that can pave the way to participation in leadership positions in the future. We hope also to expand attendance by young lawyers at the Annual Meeting. We are open to suggestions and recommendations from all our members with respect to how we can better meet the needs of the younger members of our organization. The combination of tangible programs offered by the organization and the many intangible benefits of participating side-by-side with experienced and respected trial lawyers makes the value of involvement in IDCA far exceed the cost of membership dues and time commitments that may be devoted to IDCA activities. ❐

FROM THE EDITORS

The Iowa General Assembly convened on January 12. Last session saw the passage of a number of measures that had long been of interest to the defense bar. Uniformity in statutory interest rates, elimination of joint and several liability for claimant's medical records, and the overturning of case decisions concerning the valuation of future damages *(Brandt)* and comparative fault in consortium claims *(Schwennen)* were all enacted. Changes in certain limitations periods were also included in the overall package known as House File 693.

The defense agenda for the upcoming session will have two areas of focus. First, opponents of the legislation enacted last session are thought to be planning attempts to repeal or modify some or all of H.F. 693. Preserving what has been accomplished will therefore be a top priority. Second, tobacco legislation is expected to be a major topic. A bill has been proposed to provide the State with a civil action to recover from tobacco product manufacturers medical assistance payments made for conditions caused by tobacco use. Its provisions would effectively eliminate traditionally understood tort law principles for this newly crafted form of product liability action. Causation and damages would be permitted to be shown through "statistical analysis" without any proof concerning individual recipients of assistance payments. The bill further provides that the rules of evidence shall be "liberally construed" regarding causation and damages, and introduces the concept of "market share" liability under which damages are apportioned according to each manufacturers respective market share for tobacco in Iowa.

While the defense bar is certainly no champion of tobacco or its use, the bill that has been proposed raises serious concerns. The enactment of individualized legislation to alter long established rules governing civil liability seems a dangerous precedent. Litigation concepts that have served the system well should be preserved and not adjusted simply because they make recovery difficult in a particular case. Tobacco may be a product with few sympathgizers, but one wonders what product could be targeted for special treatment next. ❐

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