defense UPDATE

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DEFENDING AGAINST EMOTIONAL DISTRESS CLAIMS BASED UPON FEAR OF BLOOD DISEASE

By Kerry A. Finley, Des Moines, Iowa

INTRODUCTION

The increase in public awareness and concern regarding HIV and Hepatitis has been mirrored by a rise in emotional damage claims based upon a purported fear of having contracted a blood disease or pathogen. These claims can arise in any case where a person may have been exposed to blood or body fluids. In addition to the health care context, such claims have been asserted in the domestic context based on extramarital affairs and in simple negligence and assault cases where blood or bodily fluids were present.

In the vast majority of these cases, the plaintiff does not actually contract any disease. In fact, plaintiffs generally cannot demonstrate exposure or even the presence of a disease causing agent. The claim is based merely on an undifferentiated fear of disease.

No Iowa appellate court has recognized a cause of action based upon a fear of exposure to HIV or other similar virus or pathogen. Several Iowa district courts that have addressed the issue have dismissed such claims on the grounds that they fail to state a cause of action upon which relief can be granted. In so doing, the Iowa district courts have relied primarily upon the law of other jurisdictions. This article is meant to provide an overview of the law in other jurisdictions that may be helpful in defending against these types of claims.[1]

ANALYSIS

I. ACTUAL EXPOSURE STANDARD

The overwhelming majority of jurisdictions in this country require a showing of actual exposure to a virus or pathogen to support a cause of action based upon a fear of contracting a disease. *See Drury v. Baptist Memorial Hosp. System,* 933 S.W.2d 668 (Tex. App. 1996) (no recovery for patient given blood other than that specifically banked for patient as fear of contracting a virus or disease is unreasonable as a matter of law without some proof of actual exposure); *Brzoska v. Olsen,* 668 A.2d 1355 (Del. 1995) (no recovery for patients treated by HIV positive dentist where plaintiffs unable to demonstrate actual exposure to the HIV virus as fear infection is *per se* unreasonable where there has been no exposure to a disease); *K.A.C. v. Benson,* 527 N.W.2d 553 (Minn. 1995) (no recovery for patient operated on by HIV infected surgeon with open sores on his hands absent proof of actual exposure to HIV); *Carroll v. Sisters of St. Francis Health Services, Inc.,* 868 S.W.2d 585 (Tenn. 1995) (no recovery for hospital visitor who was stuck with needle in sharp objects box absent demonstration of actual exposure to virus or disease); *Barrett v. Danbury Hosp.,* 656 A.2d 748 (Conn. 1995) (no recovery for patient sitting in pool of blood during rectal examination absent a showing of exposure to the HIV virus where patient tested HIV negative after the incident); *Doe v. Surgicare of Joliet, Inc.,* 643 N.W.2d 1200 (Ill. App. 1994) *cert. denied* 645 N.E.2d 1357 (Ill. 1994); *Vallery v. Southern Baptist Hosp.,* 630 So.2d 861 (La. App. 1993) *cert. denied* 643 So. 2d 860 (La. 1994) (no recovery for hospital security guard bled upon by patient where no demonstration of actual exposure to virus) *Lubowitz v. Albert Einstein Med. Ctr.,* 623 A.2d 3 (Pa.Super. 1993) (no recovery for patient who was misinformed that donated placental blood was HIV positive where plaintiff was unable to prove actual exposure to the HIV virus); *Seimon v. Becton Dickinson & Co.,* 632 N.E.2d 603 (Oh. App. 1993) (no recovery for nurse who sustained puncture wound from needle where she could not demonstrate actual exposure to virus); *Neal v. Neal,* 873 P.2d 881 (Id. App. 1993) (no recovery for wife based on husband's extramarital affair where wife was unable to demonstrate husband or partner was

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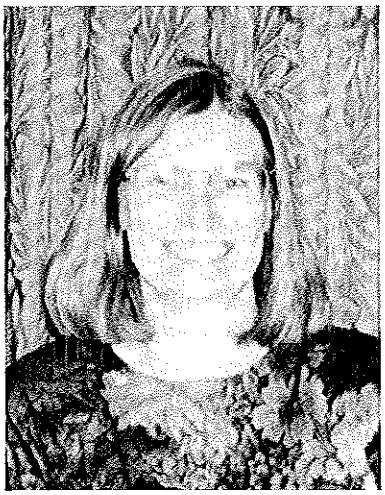
MESSAGE FROM THE PRESIDENT



Jaki K. Samuelson
President

The Iowa Defense Counsel Association Annual Meeting and seminar is rapidly approaching. The annual meeting has traditionally presented an opportunity for IDCA members and other Iowa lawyers to fulfill their entire state and federal continuing legal education responsibilities, and also to network with many of the finest trial lawyers in Iowa. This year's meeting continues that tradition.

We are hopeful that you will also take advantage of this year's annual meeting as an opportunity to commit yourself to more active involvement in the activities of IDCA. The best way to become more involved or to continue your involvement in the Association is to become a member of one of the Association's committees.

The committees and their responsibilities include:

Amicus Curiae
Annual Meeting
Client Relations
Commercial Litigation
Jury Instructions
Law School Programs/Trial Academy
Legislative
Membership
Tort and Insurance Law
Product Liability
Rules

IDCA committees are instrumental in forming and expressing on behalf of the Association, IDCA's positions on important legal and professional issues. On behalf of the IDCA, they are in contact with the courts, the law schools, the legislature, and Iowa lawyers and law students. Your participation gives you a unique opportunity to have an active voice with respect to issues that are of particular interest to you.

Whether or not you attend the annual meeting, please contact me, President-Elect Mark Tripp, or any member of the IDCA Board of Directors to let us know that you are interested in serving on a committee. If there are other committees that you would like to see formed or in which you would like to participate, let us know that as well. Although every member of the IDCA enjoys many benefits and advantages of membership, the more you contribute to the activities of the Association, the more you and your practice will benefit.

We hope to see you in September!

SECTION 228.9, CODE OF IOWA: A ROADBLOCK TO FUNDAMENTAL JUSTICE

By Patrick L. Woodward, Davenport, Iowa

Fundamental to our system of civil justice is the right of fair and open discovery of each person's evidence. The Rules of Civil Procedure are intended to advance this proposition as demonstrated by Iowa Rule of Civil Procedure 122 which provides:

> **"Scope of discovery.** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> a. *In general.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of anydiscoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.
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> • • • •

Despite what our rules say and what our courts have held sacred, the legislature in 1994 adopted §228.9, CODE OF IOWA, which prohibits disclosure of psychological test materials, including raw data, even if the psychological condition of a party is at issue in pending litigation. Specifically, §228.9 states:

> **"228.9 Disclosure of psychological test material.**
>
> Except as otherwise provided in this section, a person in possession of psychological test material shall not disclose the material to any other person, including the individual who is a subject of the test. In addition, the test material shall not be disclosed in any administrative, *judicial,* or legislative proceeding. However, upon the request of an individual who is the subject of a test, all records associated with a psychological test of that individual shall be disclosed to a psychologist licensed pursuant to chapter 154B designated by the individual. An individual's request for the records shall be in writing and shall comply with the requirements of section 228.3, relating to voluntary disclosures of mental health information, except that the individual shall not have the right to inspect the test materials. [emphasis added]

The legality of §228.9, CODE OF IOWA has not yet been determined by the Iowa Supreme Court; however, District Courts across the State that have been confronted with this issue in pending litigation have issued differing rulings, with several Courts striking down the statute while others have enforced the provisions thereof.[1] It is suggested that §228.9 deprives litigants of necessary and important information where a psychological condition is at issue and that this statute is subject to criticism on at least three grounds.

EQUAL PROTECTION AND DUE PROCESS

There is a constitutional right to a fair trial in a civil case. *Lemons v. Skidmore,* 985 F.2d 354, 357 (7th Circuit 1993); *Chicago Council of Lawyers v. Bauer,* 552 F.2d 242, 248 (7th Circuit 1975), *cert. denied,* 427 U.S. 912, 96 S.Ct. 3201, 49 L.Ed. 1204 (1976). Part of the concept of a fair trial is the right to have access to the data upon which opinions are rendered. In the present case, the legislature has chosen to create a special classification for psychological test materials in the name of a privilege which is unlike any other privilege recognized by law.[2]

First, the privilege created by §228.9 extends to the professional, and not to the individual who has confided in such professional or sought such professional's service. No other privilege recognized by the law places the right to assert the privilege with the professional and not with the individual. *See,* §622.10, CODE OF IOWA. Section 228.9 has not created a privilege for the protection of the individual, but instead purports to protect what may be the unreliable nature of the data and procedures utilized within the psychological profession.

In the context of attorney-client privilege, clergy-penitent, physician-patient or husband-wife, the privilege is waived when the subject matter of the privileged communi-

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APPELLATE CASE UPDATE

By Rex B. Staub, Des Moines, Iowa

1. Bellach v. IMT Ins. Co., 573 N.W.2d 903 (Iowa 1998)

Civil Procedure - Notice of Appeal

Mr. and Mrs. Bellach were insureds under a homeowner's policy which contained an exclusion for intentional acts committed by or at the direction of an insured. Mrs. Bellach burned the family home and then committed suicide. Mr. Bellach commenced an action against the homeowner's carrier after his claim was denied under the intentional acts exclusion. At trial, the issue presented was whether, given Mrs. Bellach's mental state, she intended to cause a loss. Mr. Bellach argued that her mental state was such that she did not intend to cause loss, rather she intended to merely kill and cremate herself. After the jury returned a verdict in favor of Mr. Bellach, Bellach and the insurer filed combined post-trial motions. Nine days after the district court denied the motions, the insurer moved for an enlargement or amendment of the court's ruling under Iowa R. Civ. P. 179(b). Five months later, the district court denied the rule 179(b), and within thirty days of this denial, the insurer filed its notice of appeal. The question presented was whether the insurers notice of appeal was timely. The Iowa Supreme Court first noted that rule 179(b) motions generally lie only when addressed to a ruling made in a case tried without a jury - which was not the case here. Moreover, motions to enlarge or amend findings and conclusions filed for an improper purpose will not toll the 30-day period for appeal. With this in mind, the Court concluded the insurer's rule 179(b) motion was a rehash of legal issues which had previously been raised and decided upon, and found the motion did not serve to toll the 30 day period for appeal.

2. Dolan v. State Farm Fire & Cas. Co., 573 N.W.2d 254 (Iowa 1998)

Insurance - Res Judicata

Dolan, a Golf Pro Shop employee, filed a negligence suit against an irate golfer who assaulted him in the course of a dispute over the location of the golfer's clubs. The golfer was provided with a defense under a reservation of rights to contest coverage by his homeowner's carrier, State Farm. The action proceeded to trial solely upon a claim of negligence after the golfer filed for bankruptcy and the automatic stay order from the bankruptcy action was lifted. Although the court rendered a verdict for Dolan, the damages he was awarded were subsequently discharged in bankruptcy. As a result, Dolan proceeded directly against State Farm under the Direct Action Statute, (Iowa Code §516.1). In his direct action against State Farm, Dolan claimed the underlying suit was res judicata against State Farm. Following a bench trial, the district court ruled as follows: (1) res judicata did not apply because the issue of whether the golfer had committed an intentional act had not been litigated in the suit between Dolan and the golfer; and (2) that, in any event, the golfer had committed an intentional act which precluded any coverage under the State Farm policy for the underlying damage award.

The Iowa Supreme Court affirmed the judgment in favor of State Farm finding that a liability insurer who provides a defense to an insured under a reservation of rights to contest coverage based on the intentional acts exclusion, may raise that policy defense in a subsequent direct action in instances where the victim sues the insured tortfeaser only for negligence.

3. Hayward v. P. D. A., Inc., 573 N.W.2d 29 (Iowa 1997)

Dram Shop Liability - Superseding Act

A Polk County Deputy Sheriff was struck and killed by a *passing* intoxicated driver while investigating the traffic death of *another, unrelated* intoxicated motorist. The deputy's wife and executor of his estate filed a dram shop suit against the bar that had sold and served the intoxicated motorist whose accident was being investigated, as opposed to the intoxicated motorist whom struck and killed the deputy. The bar moved for summary judgment on two grounds: (1) that the fireman's rule barred recovery because the deputy was in a performance of his duties at time of the fatal injury; and (2) that the conduct of the intoxicated motorist who actually struck the deputy were an intervening superseding cause of the deputy's death. The district court granted the motion for summary judgment on the second point.

The Iowa Supreme Court noted that although the question of proximate causation is ordinarily for the jury to decide, the question may nonetheless be decided as a matter of law in exceptional cases. In affirming the lower court, the Court found this case was the exception. The passing motorist's negligence and illegal act of driving while intoxicated was, as a matter of law, a superseding act in the death of the deputy.

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SELECTED TOPICS RE: STRUCTURED SETTLEMENTS

By Jerry Lothrop Capital Planning, Inc., St. Louis Park, Minnesota

Selling your future periodic payments . . . What is going on?

For the past two years you may have heard ads on television or radio that offer to give you cash today in exchange for you giving them your future periodic payment. It is called the "Gray-Market" or Factoring Transaction or Secondary Market. The major players in this market that function as funding sources for these transactions are as follows: J. G. Wentworth, Metropolitan Mortgage and Securities, Settlement Capital Corporation, Singer Asset Financial and Stone Street Capital.

While there is no reliable data as to how large the settlement-purchaser industry is, J.G. Wentworth made 3,759 purchases in 1987 after running a 200 employee phone bank and airing 56,000 TV commercials.

As a settlement annuity professional, why am I and the rest of the people in our industry concerned about this development? In addition, why are our elected politicians concerned? Simply because people receiving annuity payments are not getting the full facts and selling their future payments for huge discounts. The following true story illustrates the potential problem:

> Anita Alsabrook, a high school drop-out in Kentucky, was desperate for money. She needed a lawyer to regain custody of her daughter, then an infant. Seeing a commercial on a Lexington television station gave her an idea. She could obtain instant cash by selling future payments from a 1992 settlement of her personal-injury lawsuit against a Louisville hospital. Alsabrook says her fateful call to the Delaware based J. G. Wentworth S.S.C. Limited Partner-ship resulted in a nightmare of high-pressure sales tactics and questionable legal maneuvers that caused her to give up her right to monthly payments totaling more than $53,000.00 for only $9,550 in cash. "I didn't know what I was doing," she said.

Currently, there are two movements in motion to limit and control this expanding industry:

1. Impose excise tax on purchase of structured settlement.

Current law facilitates the use of structured personal injury settlements because recipients of annuities under these settlements are less likely than recipients of lump sum awards to consume their awards too quickly and require public assistance. Consistent with that policy, this favorable treatment is conditional upon a requirement that the period payments cannot be accelerated, deferred, increased or decreased by the injured person. Nonetheless, certain factoring companies are able to purchase a portion of the annuities from the recipients for heavily discounted lump sums. These purchases are inconsistent with the policy underlying favorable tax treatment of structured settlements. Accordingly, the Administration proposes to impose on any person who purchases (or otherwise acquires for consideration) a structured settlement payment stream, a 20-percent excise tax on the purchase price unless such purchase is pursuant to a court order finding that the extraordinary and unanticipated needs of the original intended recipient render such a transaction desirable. The proposal would apply to purchases occurring after the date of enactment. No inference is intended as to the contractual validity of the purchase or the effect of the purchase transaction on the tax treatment of any party other than the purchaser.

2. Model legislation that may be proposed by each state.

Since Illinois passed the first version of what is now the Structured Settlement Protection Act, several states have considered similar legislation. In two cases, it has been passed by the Legislature.

In Illinois, attempts by the National Association of Settlement Purchasers (NASP) to veto and later to alter the terms of the Illinois legislation were unsuccessful, and the Act became law on January 1, 1998. Cases under that Act have now started to move through the courts in Illinois.

In March of this year, NASP promoted their own version of the National Structured Settlements Trade Association (NSSTA) model act which attempts to equate the sale of structured settlements with the settlement purchase industry and is intended to impose new restrictions on the sale of structures while weakening the consumer protections now in place in Illinois on the purchase of settlement payments. That bill was withdrawn in the face of overwhelming opposition in the Illinois Senate Judiciary Committee before it could come to a vote.

In Kentucky, Legislation very close to the NSSTA model act passed the Kentucky House by a vote of 99-0 and the Kentucky Senate by a vote of 37-0, and was signed by the Governor on April 7, 1998.

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CUTTING COSTS BY TAKING RISKS

By Edwin Green, Los Angles, California

(Reprinted with permission from *FOR THE DEFENSE*, March, 1993)

Although *the following article is dated, the thrust of the article is one still worthy of consideration in today's discovery quagmire.*

Noel Mckibbin

Imagine a world in which a lawyer cross-examines a witness without a 300-page deposition in hand, costing $7,000 to create. In this imaginary world, all trials last no more than one week, save only the most complicated. The average case costs $15,000, start to finish. Rather than endless depositions, an investigator merely takes written statements from potential witnesses to control them on the stand.

Does this sound like a dream world? Maybe, but this was life as I knew it as a young trial lawyer in 1960. I think this world is one which we can, and must, restore in order to relieve the burden of a massively inefficient legal system, regain the confidence of a cynical public, and protect the integrity of the legal profession.

The task before us is immense. In California alone, more than 16.3 million cases were filed during fiscal year 1991-92. The annual cost of the California judicial system, not including capital outlay for facilities, is over $1.1 billion. The California Supreme Court's work load has more than doubled in the past 25 years, with annual filings increasing from 1,872 to over 5,000 in fiscal year 1991-92.

According to former Vice President Quayle, who headed the President's Council on Competitiveness, there's one lawsuit filed each year for every 15 Americans; the liability crisis is now a $300 billion drag on the economy.

This situation has been building ever since I began my practice in 1960, when the purpose of a law firm was to represent a client professionally and to serve as a trusted adviser. Over the past thirty years, law has become big business, where the goal of maximizing profits may compromise top-flight representation.

We have replaced the "trial lawyer" with the "litigator," who uses the various—and expensive— tools of litigation as offensive weapons in a battle of attrition. This litigator may never have tried a case to verdict, or perhaps to a jury at all. His or her idea of the adversary process is to conduct meaningless, often obstructive, discovery in an attempt to win a battle, with little or no thought being given to the war. Unless this trend toward enlarging pretrial procedures (at an astounding cost to litigants and society) is reversed, the law profession will quickly become extinct—and probably should.

The worst victim of the current state of affairs is, of course, the public. And they know it. The public's view of our profession has never been worse.

I find myself constantly on the defensive. Clients are justifiably outraged that law firms have been hiring law school graduates at salaries in excess of $75,00 a year so that they can be taught how to practice law at the expense of the client. Clients are sick of lawyers who base law-firm economics on principles of "full-time equivalents" and "leverage between partners and associates." They are angry about the transition of the law from a profession to a business.

Above all, clients are angry that law firm cash-flow is more important to some lawyers than a quality product, and the more inefficient some lawyers are, the more they seem to charge.

The law is at a crossroads, as is the adversary system of justice. Our course of action over the next decade will dramatically affect the way law is practiced in this country. Although I do not claim to know all the answers, I have some ideas on how to control costs and give clients quality service in a professional manner.

COST OF INFORMATION

In deciding whether to litigate, there are only two questions that a lawyer and his or her client must ask: (1) what is my exposure; and (2) must I try this case, or can I settle it for less I than the exposure that it presents? The process of pretrial discovery, or obtaining information, is used to evaluate ultimate exposure and overall value of the case. Its purpose is *not* to "keep the meter running," to fill boxes and boxes of documents that may or may not be helpful. Once there is sufficient information as to exposure and value, the case can be settled or, if there is not a meeting of the minds, tried.

Most lawyers I meet today believe that they must engage in extensive discovery and ask every possible question in order to best represent their client. Research clearly shows that this perception is simply not accurate. If the client were to analyze *closely* the cost of searching for doc-

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infected or that she had contracted a disease); *Marriott v. Sedcro Forex Int'l Resources, Ltd.*, 827 F. Supp. 59 (D. Mass. 1993) (seaman inoculated with HIV vaccine could demonstrate actual exposure and maintain cause of action); *Ordway v. County of Suffolk,* 154 Misc. 2d 269 (N.Y. Sup. Suff. Cty 1992) (no recovery for surgeon who operated on HIV infected patient absent evidence that surgeon had actually been exposed to the virus); *Hare v. State,* 173 A.D. 2d 523 (N.Y. App. Div. 2d 1991) (no recovery for hospital employee bitten by inmate where employee could not demonstrate inmate was HIV positive and where employee had tested HIV negative); *Johnson v. West Va. Univ. Hosp.*, 413 S.E. 2d 889 (W.Va. 1991) (police officer could maintain cause of action where actual exposure was demonstrated when AIDS infected patient drew his own infected blood into his mouth before biting officer); *Funeral Services by Gregory, Inc. v. Bluefield Comm. Hosp.*, 413 S.E. 2d 79 (W.Va. 1991) *overruled on other grounds Courtney v. Courtney,* 437 S.E. 2d 436, 443 (W.Va. 1993) (no recovery for mortician who had embalmed AIDS infected corpse where he could not demonstrate exposure to HIV virus); *Burk v. Sage Products, Inc.*, 747 F. Supp. 285, 287 (E.D. Pa. 1990) (no recovery for patient stuck with needle where patient unable to demonstrate that needle had actually been previously used on infected patient); *Doe v. Doe,* 136 Misc. 2d 1015 (N.Y. Sup. Kinds Cty. 1987) (no recovery for wife based on husband's alleged homosexual affair where wife did not allege that husband was infected or that she had contracted HIV).

As stated by the West Virginia Supreme Court after considering many of the cases cited herein:

> It is evident from the above cases that before a recovery for emotional distress damages may be made due to a fear of contracting a disease, such as AIDS, there must first be exposure to the disease. If there is no exposure, then emotional damages will be denied.

Johnson, 413 S.E. 2d at 893.

The rationale underlying these decisions is that, without proof of actual exposure to a virus and a likelihood of contracting a disease, the fear of acquiring the disease is too speculative as a matter of law. Indeed, a few jurisdictions have gone so far as to require proof of actual injury, *i.e.*, contraction of the virus and the disease, even where the plaintiff has demonstrated exposure to the virus. *See, Transamerica Insurance Co. v. Doe,* 840 P. 2d 288, 291 (Ariz. App. 1992) (no recovery for plaintiff who rendered medical assistance to injured HIV positive motorist where plaintiff could not demonstrate actual physical injury); *Petri v. Bank of New York,* 153 Misc. 2d 426 (Sup. Ct. N.Y. Cty. 1992) (no recovery for plaintiff who had sexual relationship for three years with HIV infected defendant where plaintiff did not test HIV positive because plaintiff could not demonstrate actual physical injury). *See also, Poole v. Alpha Therapeutic Corp.*, 698 F. Supp. 1367 (N.D. Ill. 1989).

The reasoning in these cases require proof of actual exposure to the disease, concluding a mere presence of the disease is not a sufficient injury. For example, in *Burk,* a paramedic brought an action after being stuck by a needle that could have been used on an AIDS patient. The court rejected the plaintiff's claim based on his fear of contracting the HIV virus finding he could not establish actual exposure to the HIV virus. Despite a showing that several AIDS patients were on the floor of the hospital on which plaintiff had been working when he sustained his injury, the court found the plaintiff could not demonstrate that the needle that stuck him was contaminated or that it had been used on an AIDS patient. *Id.* at 286-86. The court held that the plaintiff had suffered no compensable injury as any injuries sustained resulted from plaintiff's fear of exposure rather than from actual exposure to the HIV virus. *Id.* at 288.

These courts also consider the fact that most of the plaintiffs in these cases test negative for disease. Again, in *Burk,* the plaintiff had tested negative after the time when HIV antibodies would have been present if he had been exposed. The court noted that it was medically presumed that plaintiff was free from disease. *Id.* Because the blood tests indicated to a high degree of certainty that the plaintiff had not contracted the HIV virus, the court reasoned that the plaintiff's fears of exposure were unfounded. *Id.*

Similarly, in *Carroll,* 868 S.W. 2d 585, the Supreme Court of

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Tennessee addressed a case wherein the plaintiff was pricked by a needle while visiting her sister in the hospital. After washing her hands, the plaintiff reached inside a sharp objects container she mistook for a paper towel dispenser and was stuck by a discarded needle.

In upholding the trial court's award of summary judgment, the Court adopted the "actual exposure" requirement and found that a plaintiff must prove, at a minimum, actual exposure to the HIV virus. Accordingly, the Court determined that plaintiff's claim was insufficient as a matter of law as she could not prove that the needle that had pricked her was contaminated with HIV. *See, Carroll,* 868 S.W.2d at 594.

Finally, in *Surgicare,* 643 N.E. 2d 1200, a patient learned that, during her surgery, a medical technician stuck himself with a needle before using that same needle to administer an anesthetic to her. Because the medical technician refused to submit to a blood test, the treating physician recommended that the patient and her husband be tested for the HIV virus. The patient and her husband filed a complaint alleging medical negligence and negligent infliction of emotional distress.

In upholding the trial court's dismissal of the action, the *Surgicare* court stated that it would follow the lead of other jurisdictions to require proof of actual exposure to the HIV virus as a prerequisite to recovery. In support of its decision, the court cited, *inter alia, Burk* and *Carroll.*

> If a suit for damages is based solely upon plaintiff's fear of acquiring AIDS, but there is no allegation of an actual exposure to the virus, a legally compensable claim cannot be recognized. We agree with the trial court that without such an allegation, plaintiffs' claim is simply too speculative to be cognizable as a matter of law. Recovery in this situation should be based on the likelihood of contracting AIDS, not the fear that it could have happened, but did not.

Surgicare, 643 N.E. 2d at 1204.

Thus, in cases where plaintiffs cannot demonstrate actual exposure to any virus or pathogen, the majority of courts will dismiss emotional damages claims based upon a fear of exposure.

II. ACTUAL PRESENSE STANDARD

While the majority of courts will deny recovery even where a virus is present absent a showing that the plaintiff was actually exposed to the virus, at least one court has found that the actual presence of a virus coupled with the likelihood of exposure during surgery or intrusive medical procedures is sufficient to maintain a cause of action based upon a fear of acquiring a disease. *See, Faya v. Almaraz,* 620 A.2d 326 (Md. App. 1993). The *Faya* Court based its decision largely upon the holding of the Tennessee Court of Appeals in *Carroll,* however, which was later reversed by the Tennessee Supreme Court. *See Carroll,* 868 S.W. 2d at 592.

Even under the more lenient *Faya* analysis, it can be argued that plaintiffs are still required to demonstrate the presence of a virus or pathogen. In *Faya,* it was undisputed that the medical professional performing the invasive procedure was a carrier of the HIV virus. The *Faya* court also limited recovery, concluding that, as a matter of law, the fear of exposure to a virus is compensable only during "a reasonable window of anxiety." This window exists only between the time the patients learn of the possible exposure and when they receive negative test results constituting evidence of non-transmission. *Faya,* 620 A. 2d 332.

III. ABERRANT DECISIONS

A very few jurisdictions have rendered holdings that are contrary to the law in all other jurisdictions (as well as much of the applicable law in their own jurisdictions) and have allowed plaintiffs to proceed to trial to determine the reasonableness of plaintiffs' fear even where the plaintiffs could not demonstrate the presence of a virus. *Compare Castro v. New York Life Ins. Co.,* 153 Misc. 2d 1 (N.Y. Supp. 1991) (factual issue existed whether it was reasonable for cleaning woman stuck by discarded hypodermic needle in wastebasket to develop a fear of AIDS); *Marchia v. Long Island R.R.,* 810 F. Supp. 445 (E.D.N.Y. 1993) (question of fact existed in connection with FELA claim by a railroad worker pricked by a hypodermic needle) *with Petri,* 153 Misc. 2d 42; *Ordway,* 154 Misc. 2d 269;*Hare,* 173 A.D. 2d 523; *Doe,* 136 Mis. 2d 1015. *See also, Tischler v. Dimmena,* 160 Misc. 2d 525 (N.Y. Supp. 1994). In light of the vast number and overwhelming strength of contrary authorities, many of which have expressly declined to follow these aberrant decisions, these few isolated

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cases are neither binding nor compelling. Moreover, public policy considerations clearly mandate the adoption of the actual exposure standard.

IV. PUBLIC POLICY CONSIDERATIONS FAVORING ACTUAL EXPOSURE STANDARD

In *Kerins v. Hartley*, 33 Cal. Rptr. 2d 172 (Cal. App. 1993), the California Court of Appeals overruled its previous holdings and upheld the trial court's award of summary judgement, finding that the plaintiffs would develop AIDS was statistically insignificant based upon negative blood test results, despite the actual presence of the HIV virus during surgery. In rendering its decision on remand, the court noted the significant policy rationales supporting the reversal of its previous position and requiring proof of actual exposure.

> The magnitude of a class of plaintiffs seeking emotional distress damages for negligent exposure to HIV or AIDS cannot be overstated. As another division of this court recently observed, "[t]he devastating effects of AIDS and the widespread fear of contamination at home, work, school, healthcare facilities and elsewhere are, sadly, too well known to require further discussion at this point." Proliferation of fear of AIDS claims in the absence of meaningful restrictions would run an equal risk of compromising the availability and affordability of medical, dental and malpractice insurance, medical and dental care, prescription drugs, and blood products. Juries deliberating in fear of AIDS lawsuits would be just as likely to reach inconsistent results, discouraging early resolution or settlement of such claims. Last but not least, the coffers of defendants and their insurers would risk being emptied to pay for emotional suffering of the many plaintiffs uninfected by exposure to HIV or AIDS, possibly leaving inadequate compensation for plaintiffs to whom the fatal AIDS virus was actually transmitted. *Kerin II (citations omitted).*

CONCLUSION

It seems likely that the Iowa Supreme Court would follow the well reasoned approach of the vast majority of other jurisdictions to determine that actual exposure to the virus or pathogen is required to support a cause of action. Until the Iowa Supreme Court has an opportunity to address this issue, however, the cases cited herein should be helpful to the district courts in resolving these claims. ❐

[1] It should be noted that an entirely different body of law addresses the fear of contracting cancer in the environmental or asbestos contexts. These two types of cases utilize totally different analyses. The factual patterns presented also are different, particularly in the cancer as context there generally is no question that the plaintiff actually has been exposed to a purported disease causing agent. The issue is whether the plaintiff can demonstrate that the pathogen is the proximate cause of the disease. In blood cases, if a person actually contracts the disease or pathogen, causation is fairly easy to establish. However, in most blood cases, the plaintiff has not actually contracted the disease.

SECTION 228.9, CODE OF IOWA... *Continued from page 3*

cations is placed at issue in litigation. *See*, §622.10, CODE OF IOWA. In each context, the privilege lies with the individual, not the professional and that person's evidence must be disclosed through waiver of the privilege in order to prosecute a claim based upon such information. Further, the privileges recognized by §622.10 allow the individual to waive the privilege voluntarily, or in certain contexts, the privilege is automatically waived. Section 228.9, CODE OF IOWA does not provide for any such waiver. Instead, it creates an entirely new category of privilege. It does not protect the individual, but instead, protects the professional.

Not only does §228.9 deny equal protection through the placement of the privilege with the professional, but §228.9 denies substantive due process since it purports to allow an expert to render opinions based upon privileged information without disclosing the same. In the context of an alleged brain injury, neuropsychologists regularly perform batteries of tests, including the "tinker toy test," "Purdue pegboard test," "Wisconsin card sorting test," etc., interpret the results thereof, and generate opinions thereon. No other privilege recognized by the law allows an expert to examine, review and formulate opin-

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SECTION 228.9, CODE OF IOWA... *Continued from page 9*

ions based upon privileged information without disclosing the same. It certainly appears that a party is denied substantive due process if an expert is allowed to render opinions without disclosure during discovery of the information upon which such opinions are based. Therefore, it is arguable that §228.9 is susceptible to challenge pursuant to equal protection and substantive due process claims under the Fourteenth Amendment of the United States Constitution.

IOWA COURTS ARE REQUIRED TO PERFORM A GATEKEEPING FUNCTION WHICH IS ABROGATED BY §228.9

The Iowa Supreme Court has recognized that a trial court has a responsibility to be a gatekeeper to ensure that expert opinions comply with the requirements of Iowa Rule of Evidence 702. *See, Williams v. Hedican,* 561 N.W.2d 817, 822 (Iowa 1997); *see also, Daubert v. Merrill Dow Pharmaceuticals Co.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); *Hutchison v.* American Family Mutual Ins. Co., 514 N.W.2d 882 (Iowa 1994). Iowa Rule of Evidence 702, governing the admissibility of expert testimony states:

> "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise."

In *Williams v. Hedican,* the Court utilized the requirements established in *Daubert v. Merril Dow Pharmaceuticals Co.,* in examining the admissibility of expert testimony[3] and found, regardless of whether the *Daubert* analysis is utilized or Iowa's traditional analysis under Iowa Rule of Evidence 702 is used, the trial court has a gatekeeping responsibility to ensure that proffered expert testimony is reliable and of such a nature to assist the jury. *Williams v. Hedican,* 561 N.W.2d at 823-825.

In performing its gatekeeping responsibilities, the trial court must examine the underlying methodology and data, not the conclusions or opinions reached therefrom. In *Williams,* the Supreme Court concluded that the trial court improperly excluded the plaintiff's expert testimony where the court simply disagreed with the plaintiff's expert opinions but did not examine the data and test results which were available to determine whether or not the same met the scientific, technical or other specialized knowledge requirement and would assist the jury. What is important about *Williams* is that the information upon which the expert's conclusions are drawn was available and that the court was required to examine the same in determining the admissibility of the evidence. *See, Williams v. Hedican,* 561 N.W.2d at 824-825. This is the trial court's gatekeeping responsibility which must be conducted before expert testimony is introduced and which must be met in each and every case under our Rules of Evidence.

Section 228.9, CODE OF IOWA, deprives the trial court of performing its gatekeeping responsibility. On its face, the statute prevents a psychologist from disclosing the psychological raw data and test results, rendering it virtually impossible for the trial court to determine whether the data and methodology utilized in formulating the purported expert opinions are reliable and of a type which we want our juries to be exposed to. In other words, §228.9, CODE OF IOWA, deprives the trial court from making the minimal foundational determination which Iowa Rule of Evidence 702 requires.

Our Supreme Court has determined what admissible expert testimony is and the test required for admission pursuant to a traditional analysis under Iowa Rule of Evidence 702. Section 228.9, CODE OF IOWA, deprives the court of its ability to perform the required analysis and as discussed below, deprives the jury of the ability to weigh the value of the opinions rendered.

SECTION 228.9 DEPRIVES THE DEFENDANT THE RIGHT OF CROSS-EXAMINATION AND THE JURY THE RIGHT TO EVALUATE EXPERT TESTIMONY

Under our traditional civil jury system, the ultimate responsibility for the evaluation of an expert's

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SECTION 228.9, CODE OF IOWA... *Continued from page 10*

proffered opinions, once elementary foundational requirements are met, lies with the jury. Whether under the traditional tests of Iowa Rule of Evidence 702 or under the *Daubert* analysis, it is ultimately the jury's ability to evaluate the credibility of an expert and determine the weight to be given to the expert testimony after cross-examination which is the ultimate litmus test for what are offered as expert opinions. *See, Williams v. Hedican,* 561 N.W.2d at 832. This responsibility, given to the juries, contemplates that the defendant (or even the plaintiff) has the information pertaining to the expert's data and test results in order to perform an effective cross-examination as in *Williams v. Hedican:*

> "If Balducci's (plaintiff's expert) opinion is as shaky as the defendants contend it is, they will have adequate opportunity to vigorously cross-examine him and present contrary evidence from their own expert to convince the jury to reject it. *See* 3 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence,* §703(03) at 703-42 (1994) ('Allowing extensive cross-examination so as to elicit the expert's assumptions and test the expert's data may be a more appropriate method of enabling the jury to perform its function than excluding information that passes the tests of relevancy and prejudice.') We have every confidence in a jury's ability to listen to all the evidence and reach a reasoned verdict based on proper instructions from the court."

Williams v. Hedican, 561 N.W.2d at 832. If §228.9 is literally applied during the civil litigation process, the most basic and long recognized responsibility of cross-examination cannot be performed. The data and test results upon which a psychologist bases his opinions are unknown. The foundation for the psychological expert's opinions cannot be probed. Instead, cross-examination would be meaningless and the psychologist left to tell the jury that he tested the plaintiff and these are his opinions—but he cannot tell the jury what the test results were or why he reached those opinions.

Our civil justice system depends upon litigants being allowed to examine the data and materials upon which opinions are based. If a medical doctor is going to testify that a party suffered a herniated disc, MRI test results are disclosed. If an accident reconstructionist is going to testify as to the speed of a vehicle, the facts upon which those opinions are based are required to be disclosed. The disclosure of the underlying facts is the essence of the essential elements which must be proved, proximate cause and in the case of psychological injury, nature and extent. To eliminate from the trial process, particularly in closed head injury cases, the results of the psychometric testing which are the basis for the opinions, effectively prevents the jury from weighing the evidence and renders the fact-finding process to a beauty contest—leaving the jury to determine which expert it likes the best, since they have no facts upon which to evaluate the opinions offered.[4]

On its face, it appears that §228.9, CODE OF IOWA attempts to reverse our system of jurisprudence which relies upon full disclosure and is intended to deprive the jury of relevant evidence necessary to reach its determination. If §228.9, CODE OF IOWA, protecting psychologists from disclosing the basis of their opinions is allowed to stand, it is an open invitation to every special interest group to seek creation of its own privilege which will render the fact-finding process of our jury system moot. ❐

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1 The author and members of his firm have been involved in or are aware of at least four District Court rulings, three of which have struck down the statute and one which has enforced the statute.

2 *See,* §622.10 defining other privileges and the waiver of the same.

3 The Iowa Supreme Court did not adopt *Daubert* for all cases, stating that a broad reference to *Daubert* in *Hutchison v. American Family Mutual Ins. Co.,* 514 N.W.2d 882 (Iowa 1994) "... was not a sweeping acceptance of the *Daubert* analysis for all expert testimony."

4 Section 228.9 provides that upon an executed release, psychological test materials and raw data can only be provided to another licensed psychologist, who is then prohibited from further dissemination of this relevant and necessary information.

APPELLATE CASE UPDATE... *Continued from page 4*

4. *Jarnagin v. Fisher Controls Int'l, Inc.*, 573 N.W.2d 34 (Iowa 1997)

Statute of Repose

After Jarnagin was severely injured while attempting to relight the pilot on his LP gas furnace, he filed suit in 1994 against, among others, Fisher Controls - one of the manufacturers of the first and second stage gas system regulators used in his LP system. Both regulators had been manufactured in the 1950's and were located on the tank and line outside Jarnagin's home. Fisher Controls' motion for summary judgment on the basis that Jarnagin's claims were barred by the 15-year statute of repose for injuries caused by improvements to real property (Iowa Code § 614.1(11)), was granted by the court.

The Iowa Supreme Court found the LP gas regulators were an improvement to real property so as to bring the claims within the Statute of Repose. The Court dismissed Jarnagin's argument that there was no intent to *permanently* attach the regulators to his property, finding that the element of permanence is just one of two alternative requirements for the statute of repose. Alternatively, an improvement is subject to the statute if it is a betterment of real property that enhances its capital value, regardless of whether it is temporary or permanent addition. Furthermore, it is insignificant whether the improvement was situated in or outside the home.

5. *Blume v. Auer,* 576 N.W.2d 122 (Iowa Ct. App. 1997)

Medical Malpractice - Damages

Blume brought a medical malpractice action against three of her treating physicians. At trial, the jury was provided with a verdict form containing the following six items of damage: past medical expenses; future medical expenses; past lost use of body and mind; future lost use of body and mind; past pain and suffering; future pain and suffering. The jury returned a verdict in favor of the plaintiff awarding her damages for past medical expenses, past pain and suffering, and future pain and suffering. No award was given for past or future loss of function of the body and mind, or for future pain and suffering. One of the issues raised by the plaintiff on appeal was that the jury's failure to award damages for past and future loss of function of body and mind was legally and logically inconsistent with its award of medical expenses and damages for pain and suffering.

The Supreme Court held that, in view of the record, the jury could reasonably conclude the plaintiff's loss of body function was an inevitable result of a disease rather than the medical negligence she sustained. Furthermore, no evidence was presented showing the plaintiff suffered functional impairment of her body in addition to any pain and suffering she suffered as a direct result of the medical negligence. Accordingly, the Court held the verdict was not inconsistent.

6. *Boughton v. McAllister,* 576 N.W.2d 94 (Iowa 1998)

Civil Procedure - Service of Process

One hundred fifty days after filing suit, the plaintiff finally perfected service on the defendants. The defendants moved to dismiss the action by reason that the delay in service was abusive and unjustified. After the district court granted the motion to dismiss, the plaintiff filed two separate motions to reconsider under Iowa R. Civ. P. 179(b). Both motions were denied and within thirty days of the court's ruling on the second motion to reconsider, the plaintiff filed his notice of appeal. However, the notice of appeal was filed fifty-three days after the court's ruling on the first motion to reconsider. On appeal, the defendants argued that, because the second motion was repetitive of the first motion, it did not serve to toll the 30 day period for appeal.

The Iowa Supreme Court initially pointed out that motions to reconsider under Rule 179(b) are permitted if they are not successive or repetitive of an earlier motion. In view of the facts of this case, the Court concluded the second motion to reconsider was, repetitive of the first. Consequently, the appeal was dismissed as untimely because the second motion did not toll the appeal period which terminated 30 days after the court's ruling on the first motion.

7. *Whicker v. Goodman, 576* N.W.2d 108 (Iowa 1998)

Insurance - UM Coverage - Definition of Insured

Whicker was in the process of installing a stock rack in the bed of his own pickup truck when struck by an uninsured driver. Shortly before the accident, Whicker had driven a vehicle, owned and insured by his grandfather, to a position nearby his own truck. The force of the collision threw Whicker against his grandfather's pickup truck resulting in injuries

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which exceeded the uninsured motorist limits provided under his own policy and the uninsured motorist limits in his grandfather's policy, although his grandfather's insurer had denied Whicker's claim. After Whicker commenced an action against for UM benefits under his grandfather's policy, the insurer moved for summary judgment contending Whicker was not an insured as defined in the policy because he was not "in, upon, entering or alighting from an automobile, covered under the policy." The district court granted the insurer's motion.

The Iowa Supreme Court affirmed holding that Whicker was not an insured as defined under the policy even through he had, less than five minutes earlier, moved his grandfather's pickup in an effort to gain access to his own vehicle for purposes of loading the stock rack. The Court concluded that because Whicker's activity related to the use of his grandfather's vehicle had ceased shortly, before the accident, he was not phrase "in, upon, entering or alighting from" his grandfather's vehicle at time of the accident.

8.United Fire & Cas. Co. v. Victoria, 576 N.W.2d 118 (Iowa 1998)

Insurance - Automatic Termination - Similar Insurance

While a resident of Iowa, Mabel Victoria purchased an auto policy from United Fire. She subsequently moved to Colorado, and five days before the expiration of her United Fire policy, she applied for a new auto policy with State Farm. State Farm was bound as of the date of application, therefore, for five days, Victoria was arguably provided with coverage under both the United Fire and State Farm policies. During this five day period, Mabel, her son, Roger, and husband, Victor, were involved in an auto accident. Mabel was killed, Roger and Victor were injured and filed claims with both United Fire and State Farm. United Fire filed a declaratory judgment action asserting: (1) that, under automatic termination clause in the United Fire policy, Mabel Victoria's purchase of similar insurance served to automatically terminate the policy as of the effective date of the State Farm policy; and (2) that, under the family exclusion clause, the United policy did not provide liability coverage for bodily injury to the insured or any family member. The District Court ruled against the insurer.

The Supreme Court held that the United policy provided no specific definition for "similar" insurance. Moreover, the court noted there were a number of differences between the two policies: the coverage limits were not the same; the State Farm policy provided no-fault coverage, whereas the United policy did not; and the United policy included underinsured motorist coverage, whereas the State Farm policy did not. As a result, the court affirmed the lower court's finding that United could not rely on the automatic termination as grounds for denial of coverage. However, in reversing the lower court, the Supreme Court held the family exclusion clause in the United Fire policy was valid. On this point, the Victoria's asserted that, because the Victoria's were residents of Colorado at time of the accident, United Fire was required to conform the policy to Colorado law which apparently prohibits family exclusion clauses. The Court held the Victorias had failed to prove that Colorado law would prohibit the family exclusion clause in dispute and, due to the fact the Victorias had failed to plead or prove this, under Iowa law the law of a foreign state is presumed to be the same as Iowa's. Accordingly, the Supreme Court affirmed the District Court's denial of United's Motion for Summary Judgment on the issue of automatic termination, but reversed the District Court's finding that the family exclusion provision was inapplicable.

9. Diggan v. Cycle Sat, Inc., 576 N.W.2d 99 (Iowa 1998)

Statue of Limitations - Implied Contract

While employed with Cycle Sat, Diggan developed a software program and source code for use in the Cycle Sat satellite communications network. After Diggan refused to release the source code for the program, Cycle Sat threatened to fire him. Diggan elected to resign rather than turn over the code on January 18, 1990. On February 5, 1990, Diggan, through his attorney, demanded that Cycle Sat stop using the software program that he had developed. Shortly thereafter, Diggan commenced a copyright infringement suit in Federal Court. Although Diggan obtained a verdict in the Federal Court action, he was awarded no damages based upon the fact that Cycle Sat had prevailed on its affirmative defense of implied license. Furthermore, whether Diggan was entitled to compensation for Cycle Sat's use of the implied license (a state law claim) went unanswered by the

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federal court. Exactly five years to the day after Diggan demanded that Cycle Sat cease using his software program (February 5, 1990), he filed suit in state court for breach of implied contract and implied license. On motion for summary judgment, the district court concluded that all claims in Diggan's suit were subject to the five year statute of limitations for unwritten contracts under Iowa Code § 614.1(4). Holding the accrual date for the statute of limitations was the date Diggan resigned from Cycle Sat, (January 18, 1990), Diggan's suit was dismissed as untimely.

The Supreme Court held the statute of limitations governing unwritten contracts applied with equal force to implied contracts. Affirming the lower court, the Court held that Diggan's cause of action for breach of implied contract accrued on the date of his resignation, thereby rendering the claim untimely. However, the Supreme Court reversed the lower court's dismissal of the breach of implied license claim finding that the federal court action did not bar the claim and that there was a question of material fact as to whether the breach occurred in the limitations period.

10. *Etchen v. Holiday Rambler Corp.*, 574 N.W.2d 355 (Iowa Ct. App. 1997)

Breach of Warranty

Etchen purchased a motorhome manufactured by Holiday Rambler Corp. The rear axle to the motorhome was manufactured by Dexter Axle. Holiday Rambler provided an express warranty on the motorhome for the first twelve months or 12,000 miles. Dexter Axle's express warranty was for one year from date of purchase. Ten months and 3,400 miles after purchase, the rear brake housing and axle to the motorhome broke resulting in a fire that totally destroyed the motorhome and contents within it. After Holiday and Dexter Axle both refused to perform under the warranties, Etchen sued them for breach of express warranty. After a bench trial, the district court rendered a verdict in favor of Holiday Rambler and Dexter Axle concluding Etchen failed to sustain his burden of proof on the breach of warranty and tort claims.

The Court of Appeals held that Etchen had carried his burden of proof on the breach of warranty claim against both Holiday Rambler and Dexter Axle in view of the fact that Etchen presented sufficient evidence showing the motorhome and rear axle were not free of defects in material and workmanship. Moreover, because Etchen carried his burden, the district court erred in not requiring Dexter Axle prove the affirmative defense that the axle had been altered by Etchen after it had left Dexter's factory.

11. *Iowa Supreme Court Bd. v. Alexander, 574* N.W.2d 322 (Iowa 1998)

Attorney Misconduct

In the course of representing two different clients in dissolution actions, an attorney presented an order for modification of a dissolution decree to the court without providing notice to the opposing counsel under the false pretense that the opposing counsel had agreed to the order. Further, the attorney presented a letter which had been falsely dated and which contained misstatements aimed at gaining an advantage for her client. Finally, the attorney made a professional misstatement to the court which was later determined to be false. The Iowa Supreme Court Board of Professional Ethics and Conduct filed a four count complaint against the attorney with the Grievance Commission. Following a hearing, the Commission found the attorney had violated disciplinary rules on three of the four counts and recommended a thirty day suspension of the attorney's license.

On review, the Iowa Supreme Court found that a more severe sanction was warranted and ordered that the attorney's license be suspended indefinitely with no possibility of reinstatement for one hundred eighty days. Of import to the Court's decision to increase the recommended suspension by three times was the fact that the attorney had committed multiple violations.

12. *Wendland v. Sparks,* 574 N.W.2d 327 (Iowa 1998)

Medical Malpractice--Lost Chance of Survival

The estate of Callie Wendland filed suit against a hospital and attending physician for failure to administer CPR to Wendland after she went into respiratory arrest. At the time, Wendland had been suffering from several life-threatening diseases (including lung disease and cancer) which apparently impacted upon the doctor's decision not to attempt CPR, even though there was evidence that the resuscitation may have been successful. In fact, the physician testified at deposition that he had told the attending nurses that Wendland was

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a "no code" (i.e. that there would be no further attempts to resuscitate Wendland), although Wendland's family had not executed a "no code" request. In their motion for summary judgment, the defendants contended the estate could not generate a fact issue of proximate cause because they could not produce substantial evidence that Wendland's death was the "probable" result of the defendant's negligence, in light of her medical condition. In resistance to the motion, the estate asserted, for the first time, that the defendant's negligence deprived Wendland of a chance for survival - a claim for recovery that does not require the "more probable than not" showing of proximate cause. The district court granted summary judgment in favor of the hospital and physician without addressing the lost chance of survival theory proposed by the estate.

The Iowa Supreme Court held that, although the estate failed to specifically plead a lost chance of survival theory of recovery in the petition, under Iowa's notice-pleading rule, the pleadings had adequately raised the theory and placed the defendants on notice of the claim. Moreover, the estate's claim for lost chance of survival was nevertheless compensable even if the chances of survival were less than 50%. As stated by the Court, "even a small chance of survival is worth *something.*"

13. *LeMars Mut. Ins. Co. v. Joffer,* 574 N.W.2d 303 (Iowa 1998)

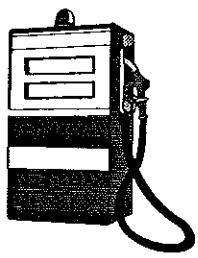
Insurance - UM Coverage - Temporary Substitute Vehicle/Owned But Not Insured

The Joffers had two separate automobile policies with LeMars Mutual. The first policy covered the Joffers' personal vehicles providing them with uninsured motorist coverage limits of $25,000 per person and $50,000 per accident. The second policy, a business automobile policy, provided the Joffers with an uninsured motorist coverage limit of $500,000 on their two-ton pickup truck which they used in connection with their farming operation. While using their personal automobile for farm business, the Joffers were struck by a negligent uninsured driver. The Joffers were using their personal vehicle at the time because their two-ton pickup truck was out of commission. Ultimately, LeMars Mutual paid the Joffers their uninsured motorist limits under the personal automobile policy but denied their claim for uninsured motorist coverage under the business automobile policy. In a subsequent declaratory judgment action filed by LeMars Mutual, the Joffers argued the clause in the business policy which extended coverage to "anyone else" occupying a temporary substitute for a covered auto provided them with coverage under the business policy. LeMars Mutual countered on two grounds on the business policy: First, a complete reading of the temporary substitute clause makes clear that coverage applies only to "anyone else" (other than the Joffers as named insureds) driving a covered business auto or temporary substitute for a covered business auto; Secondly, the "owned but not insured" clause would exclude coverage for bodily injury sustained by an insured while "occupying" any vehicle owned by the insured which is not a covered auto under the business policy. The district court ruled in favor of LeMars.

With regard to the LeMars' first argument that the temporary substitute clause in the business policy applied only to "anyone else" other than the Joffers, the Iowa Supreme Court held that a reading of the entire clause revealed that is was not ambiguous and was clearly intended to apply only to anyone other than the named insureds or their family members. With respect to the owned but not insured exclusion in the business policy, the Court found it to be a valid exclusion pursuant to Iowa Code Section 516A.2 primarily because payment of UM benefits under the business policy would result in a duplication of the UM benefits the Joffers had already received under their personal automobile policy. It should be noted that if there had been no second policy providing the Joffers with at least some degree of UM benefits, the Supreme Court may well have found the "owned but not insured" clause invalid. ❐

DID YOU KNOW?

Nearly 170 million bushels of Iowa corn are processed annually into ethanol.



SELECTED TOPICS RE: STRUCTURED SETTLEMENTS... *Continued from page 5*

The Kentucky Act requires court approval and disclosures to the payee before a transfer of structured settlement payments becomes effective or an annuity owner or annuity issuer can be required to make payments to a factoring company. The Act further requires:

A. That the transfer complies with the Kentucky Act and does not contravene any other applicable law;

B. That the court find that the transfer is necessary for the payee to avoid imminent financial hardship;

C. All protected parties, including the annuity issuer and the annuity owner have received at least twenty days advanced notice before any hearing on this matter so that they can appear before the court if they wish to do so;

D. The statute applies to transfers of structured settlement payment rights if either:
1) the settled claim was heard in the Kentucky courts, or
2) one of the protected parties is domiciled in Kentucky. (Protected parties include the payee, any beneficiary of the payee, the annuity issuer, or annuity owner.)

In Connecticut, a modified version of the model act was passed by the Connecticut Legislature which awaits the Governor's signature.

In the future, more states will be getting active to pass legislation to control this marketplace.

Good News . . . Workmen's Compensation Claims Now Assignable

In the past Workmen's compensation claims were not assignable. Under the taxpayer Relief Act of 1997 that was signed into law on August 5, 1997, it is now possible to use qualified assignments for workmen's compensation claims that are filed after the date of the date of the enactment of this act. Under present law, an exclusion from gross income is provided for amounts received for agreeing to a qualified assignment to the extent that the amount received does not exceed the aggregate cost of any qualified funding asset (sec. 130). A qualified assignment means any assignment of liability to make periodic payments as damages (whether by suit or agreement) on account of a personal injury or sickness (in a case involving physical injury or physical sickness), provided the liability is assume from a person who is a party to the suit or agreement, and the terms of the assignment satisfy certain requirements. Generally, these requirements are that (1) the periodic payments are fixed as to the amount and time; (2) the payments cannot be accelerated, deferred, increased, or decreased by the recipient; (3) the assignee's obligation is no greater than that of the assignor; and (4) the payments are excludable by the recipient under section 104(a)(9) as damages on account of personal injuries or sickness. Present law provides a separate exclusion under section 104(a)(1) for the recipient of amounts received under workmen's compensation acts as compensation for personal injuries or sickness, but a qualified assignment under section 130 does not include the assignment of liability to make such payments.

The new act extends the exclusion for qualified assignments under section 130 to amounts assigned for assuming a liability to pay compensation under any workmen's compensation act. The provision requires that the assignee assume the liability from a person who is a party to the workmen's compensation claim and requires that the periodic payment be excludable from the recipient's gross income under section 104(a)(1), in addition to the requirements of present law.

Annuity Interest Rates ... They Are Still Attractive

Some people think that the current rates of return are too low, so structured settlements are not a good buy. Not only is this wrong, but believing it may deprive injured people of a very useful benefit at a critical time in their lives. In fact, structured settlements continue to be one of the most economically effective ways to compensate for injuries, despite concerns over interest rates and more attractive" alternative investments.

For the sophisticated investor, it may be possible to beat fixed returns by investing in stocks. But an injured or ill person may not have the energy, or in some cases, the clear thinking needed to manage a complicated stock portfolio.

Of greater importance. investment returns are usually subject to federal, state and local taxes. So, the after-tax return on the stock must be compared to a structured settlement proposal. This substantially increases the performance required to just stay even with a structured settlement. See chart below.

When people aren't confident choosing an investment strategy, they typically keep their money in a safe, liquid investment, like a money market fund,

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SELECTED TOPICS RE: STRUCTURED SETTLEMENTS... *Continued from page 16*

and they wait and wait for that "better opportunity" to come along. This is probably the poorest strategy of all. Highly liquid investments, like money market funds, currently yield about 4%. Any significant period of waiting will result in certain loss due to foregone yield. If higher yields are attempted by locking into longer maturity dates, and interest rates then rise, the fund-holder will incur capital losses when liquidating those assets to pay living expenses or purchase alternative investments. And the temptation to spend the money on short-term wants, instead of long-term needs, is always present.

Any claimant who is tempted to forego the certain benefits of a structured settlement today and seek better yields in more risky markets may be left with much less, and in some cases, nothing. At least part of every claimant's future security should be funded in this way, before any other investment alternatives are considered. ❐

The chart below demonstrates how much interest the self investor would have to earn to equal the payout of a non-taxable structured settlement. The tax brackets refer to the recipients federal income tax level. The figures do not include state income taxes, which would make the differences even greater.

STRUCTURED RETURN RATE	15% TAX BRACKET	28% TAX BRACKET	31% TAX BRACKET	36% TAX BRACKET
5.00%	5.88%	6.94%	7.25%	7.81%
6.00%	7.06%	8.33%	8.69%	9.38%
7.00%	8.23%	9.72%	10.14%	10.94%

CUTTING COSTS BY TAKING RISKS... *Continued from page 6*

uments, copying, organizing, and indexing them, it would quickly recognize the need to save money.

Jury research indicates that the attention span of the average juror is seven minutes; he or she can retain no more than five concepts. Thus, the most effective trial lawyer is one who one who makes things simple, who doesn't get "lost in the trees," who can paint a clear, entertaining picture that will sell. Recognize the limitations of the average person to absorb data. More focus on these points and less on the need to obtain every tidbit of information will bring trial lawyers and clients increased rewards.

Unfortunately, discovery is rarely motivated by such straightforward concerns. Much of the information obtained by modern-day discovery is either obtained because the litigator has cash-flow requirements to satisfy, or because he fears criticism by the client in the event of a bad result (or worse yet, a malpractice claim). Many litigators have been brought into this discovery-oriented milieu at the beginning of their professional life and don't know any better way to prepare a case.

The system is further confounded by the fact that very fact litigators have significant trial experience. The thought of actually walking into a courtroom is upsetting to many lawyers. For those who don't have confidence in their trial skills, the trial option is not open. It is fraught with risk. "If I lose the case, I lose the account/client."

As a result, the client is never really given a chance to evaluate the trial card. Rather, it is subject to an endless parade of "horribles," which lead it to accepting a settlement—of course only after a small fortune has been spent preparing for a trial which the lawyer was never really able to perform in the first place.

The corporate counsel who supervises the litigator has a stake here as well. Like doctors who prescribe that extra X-ray as a hedge against malpractice suits, the corporate counsel sanctions all possiblee discovery to blunt management repercussions in the event of a bad result.

BE WILLING TO RISK TRIAL

Many years in the courtroom have taught me that the case one tries is never the case one prepares. The per-

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1998 Iowa Defense Counsel Annual Meeting & Seminar

Wednesday September 23-25; Embassy Suites Hotel, Des Moines, IA. **Please register early – hotel room cut off date is September 7!** Non-members many contact James A. Pugh at 515-225-5410 for registration materials.

WEDNESDAY, SEPTEMBER 24, 1998

9:00 a.m. Registration

11:00 a.m. Board of Directors Meeting

1:00 p.m. Welcome and Report of Association
- IDCA President, Jaki Samuelson
Whitfield & Eddy, P.L.C.,
Des Moines. IA

1:15 - 1:45 p.m. Supreme Court Update
- Honorable Marsha K. Ternus
Justice, Iowa Supreme Court

1:45 - 2:15 p.m. Consortium Claims
- Mike Galligan
Galligan, Tully, Doyle & Reid, P.C.,
Des Moines, IA
- Alan Fredregill
Heidman, Redmond, Fredregill,
Patterson, Plaza & Dykstra, L.L.P.,
Sioux City, IA

2:15 - 3:15 p.m. Proving and Disproving Intoxication in the Civil Case
- Kermit Dunahoo
Dunahoo Law Firm, Des Moines, IA

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

3:30 - 4:00 p.m. Evaluation of the Closed Head Injury
- Rick Cornfeld
St. Louis, MO

4:00 - 4:30 p.m. Work Comp Update
- Iris Post
Iowa Industrial Commissioner

4:30 - 5:15 p.m. Employment Law Claims – Damages
- Gordon Fischer
Bradshaw, Fowler, Proctor & Fairgrave
P.C., Des Moines, IA

5:15 - 8:00 p.m. Cocktails - Embassy Suites Hotel
(Dinner on your own in Des Moines)

THURSDAY, SEPTEMBER 24, 1998

8:30 - 9:00 a.m. Ethics and Settlement
- Phil Wilson
Wilson & Pechacek, P.L.C.,
Council Bluffs, IA

9:00 - 9:45 a.m. The Lawyer's Obligation to Third Parties – Recent Revisions to Restatement Section 215 – Ethical Considerations and Obligations
- William T. Barker
Sonnenschein, Nath & Rosenthal,
Chicago, IL

9:45 - 10:15 a.m. Ethics
- Megan M. Antenucci
Whitfield & Eddy, P.L.C.,
Des Moines, IA

10:15 - 10:30 a.m. BREAK

10:30 - 11:30 a.m. Analyzing Low Impact Collisions
- C. Bradley Price
DeVries. Price & Davenport, A.P.C.,
Mason City, IA
- Scott Palmer
Biodynamic Research Corp., San Antonio, TX

11:30 - 12:00 a.m. Handling Chiropractic Testimony
- Guy Cook
Grefe & Sidney, P.L.C.
Des Moines, IA

12:00 - 12:30 p.m. LUNCH

12:30 - 1:00 p.m. Views from the Federal Bench
- Hon. Robert Pratt
Judge, United States District Court

1:00 - 1:30 p.m. Defending the Sexual Harassment Claim
- Iris E. Muchmore
Simmons, Perrine, Albright, &
Ellwood, P.L.C., Cedar Rapids, IA

1:30 - 2:15 p.m. Recent Developments in Restatement of Torts
- Kevin Reynolds
Whitfield & Eddy, P.L.C.,
Des Moines, IA

2:15 - 3:15 p.m. When and How to Use Accident Reconstruction
- Rich Fay
Fay Engineering Corp.,
Denver, CO
- John Werner
Grefe & Sindey, P.L.C.,
Des Moines, IA

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

3:30 - 4:00 p.m. Iowa Court of Appeals Update
- Justice Mark Cady

4:00 - 4:30 p.m. What Does It Mean To Be Judgment Poof
- Paul Drey
Bradshaw, Fowler, Proctor &
Fairgrave, P.C., Des Moines, IA

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

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

FRIDAY, SEPTEMBER 25, 1998

7:30 - 8:30 a.m. Board of Directors Meeting

8:30 - 9:00 a.m. Liability of HMO's for Medical Malpractice
- John Lorentzen
Nyemaster, Goode, Voigts, West, Hansell
& O'Brief, A.P.C.
Des Moines, Iowa

9:00 - 9:45 a.m. Cross Examination Goes to Hollywood
- Jim Semple, Wilmington, DE

9:45 - 10:15 a.m.	Mediation and Court Ordered Settlement Conferences • Judge Art Gamble Chief Judge, 5th Judicial District • Paul C. Thune Peddicord, Wharton, Thune and Spencer A.P.C, Des Moines, IA
10:15 - 10:30 a.m.	BREAK
10:30 - 10:45 a.m.	What's New With DRI • Tim Schimberg Fowler, Schimberg & Flanagan, Denver, CO
10:45 - 11:00 a.m.	Legislative Update • Robert Kreamer IDCA Legislative Lobbyist, Des Moines, IA
11:00 - 11:30 a.m.	Uninsured and Underinsured Motorist Coverage • Sharon Greer Cartwright, Druker & Ryden, Marshalltown, IA
11:30 - 12:00 p.m.	Evaluating Wrongful Death Claims • Steven J. Pace Shuttleworth & Ingersoll, P.C., Cedar Rapids, IA
12:00 - 12.30 p.m.	LUNCH
12:30 - 1:00 p.m.	Committee Report
1:00 - 1:45 p.m.	Case Law Update and Review of Ethics Decisions • Dannette Kennedy Whitfield & Eddy, P.L.C., Des Moines, IA • Sean O'Brien Bradshaw, Fowler Proctor & Fairgrave, P.C., Des Moines, IA • Webb Wassmer Simmons, Perrine, Albright & Ellwood, Cedar Rapids, IA
1:45 - 2:30 p.m.	Analyzing Insurance Coverage Issues • Michael J. Weston Moyer & Bergman, P.L.C., Cedar Rapids, IA

CUTTING COSTS BY TAKING RISKS...

Continued from page 17

fect witness blows up. The witness that was destroyed in his deposition rises to the occasion and is loved by the jury. The star witness doesn't show up and the witness who was becoming an Iraqi citizen returns to the United States just in time to take the stand and testify against you.

In other words, no matter how much money you spend on discovery and preparation, you cannot do away with risk. The best you can hope for is management of risk, and management isn't necessarily accomplished by massive discovery.

The alternative is investigation. In a very short time you can meet with a witness and, if you are lucky, maybe even get a recorded or written statement. This statement is just as useful in court as the $7,000 deposition you had to sit through for two days while opposing counsel asked inane questions from their checklist, in the name of thoroughness.

Other changes must also take place. The corporation must hire outside counsel who is comfortable with the trial option and who is willing to take a matter to trial with a minimum of costly discovery. I realize that it is heresy to suggest that a case be tried "thin," but great results can be obtained by a talented lawyer who is ready to use his or her trial skills.

Finally, the corporation's general counsel must be willing to accept the fact that there is no risk-free litigation. He or she must be willing to share the risk of trying a case with limited discovery. If the case turns out well, he'll get credit for saving lots of money; if the result is disappointing, he must bear some responsibility for the outcome. Whatever the result, the general counsel will have the satisfaction of having put forth his best effort.

Lawyers should use careful investigation which is not lawyer-intensive. Do not conduct depositions unless there is a compelling reason to do so; and, most assuredly, do not take them if there is some other way to obtain the information needed. Don't overlook traditional forms of investigation in lieu of discovery. One thing we all have learned from history is that the attempt to reduce litigation through expanded federal and state discovery has failed dismally. The pendulum must swing back.

Contrary to popular belief, a client can still receive top-quality representation at a moderate price. But this can only be done through an improved, broader outlook and the use of experienced trial lawyers.

True participants in our system must have the stomach to take risks. Unless we are willing to meet this task, our profession and, indeed, the whole legal system, will continue to change for the worse. ❐

WELCOME NEW MEMBER

John F. McKinney III
Des Moines, IA

EDITORS LETTER

We are pleased to include in this issue the agenda for the 1998 Iowa Defense Counsel Annual Meeting and Seminar. The dates for the Seminar are Wednesday, September 23 through Friday, September 25, 1998.

It is apparent that Mark Tripp has assembled another outstanding compendium of speakers and subjects.

As members of the Iowa Defense Counsel it is incumbent upon us to support this annual seminar and to solicit additional attorney membership. Please do attend and encourage others to attend. On behalf of the Board of Editors for the Defense Update, we look forward to seeing you in September.

In this issue we have reprinted an article by Edwin Green, Cutting Cases by Taking Risks, which illustrates the tedious task of minimizing trial risks at the same time recognizing that it cannot be totally eliminated. Rex Staub provides an Appellate case update article, which updates us on recent decisions. Jerry Lothrop provides insight into the secondary structured settlement market that has developed in which cash is offered for existing annuities which were purchased to settle injury claims. Kerry Finley prognosticates as to how the Iowa Appellate Courts will address a cause of action based upon a fear of exposure to HIV or other similar virus. Fellow editor Patrick Woodward analyzes Iowa Code Section 228.9 from the perspective of its impact upon psychological expert opinions.

With this edition we have sought to provide timely and pertinent articles. We would invite each of you to participate in our publication with the submission of articles. Please accept this invitation to contribute by contacting any one of the editorial staff.

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