defense UPDATE

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A REVIEW OF THE NEW RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY

By David L. Phipps, Des Moines Iowa

The American Law Institute adopted the Restatement (Third) of Torts: Products Liability in May of 1997. Although the Restatement, of course, is not itself law, it is certainly anticipated that many courts in various jurisdictions will adopt part or all of the Restatement as an expression of the current "Products Liability Law." The Restatement (Third) is thought by many to be the most comprehensive and significant expression of product liability law since the original adoption of Section 402A, Restatement (Second) in 1963.

With that brief introduction, I am setting forth in this article the key provisions of the Restatement (Third) of Torts: Products Liability, together with a brief description of the impact of this new enactment. Hopefully, this will allow defense counsel to identify a starting place for analysis of current product liability issues.

GENERAL PHILOSOPHY OF THE RESTATEMENT (THIRD)

The Restatement (Third) attempts to do a much more thorough analysis of products liability than was permitted in the Restatement of Torts (Second). Most of the individual issues in products liability have been addressed by specific sections in the Restatement (Third). In addition, the overall philosophy of products liability has been significantly altered by the Restatement (Third). Under the previous Section 402A, all products liability claims were analyzed in terms of whether or not the property was "defective" or "unreasonably dangerous." Cases involving claims of improper design or inadequate warning were included under that analysis. Under the new Restatement (Third), however, the principle of "strict liability" or liability without negligence should be applied only to defects in manufacturing or construction of the product. The related concepts of improper design or inadequate warning are left to analysis in a "fault based" system or treated as "negligence" claims.

Likewise, with specific reference to design cases, liability is conceptually limited under the Restatement (Third) to cases where a safer alternative design is available with existing technology. The Restatement (Third) in that regard tends to avoid the imposition of liability where the risk cannot be eliminated from the product without eliminating the usefulness or desirability of the product.

SPECIFIC PROVISIONS OF THE RESTATEMENT (THIRD)

Some of the significant sections of the Restatement (Third) with which Iowa practitioners will wish to become acquainted are set forth here with a very brief analysis of their meaning.

GENERAL STATEMENT OF PRODUCT LIABILITY

"§ 1. Liability of Commercial Seller or Distributor for Harm Caused by Defective Products
One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect."

CATEGORIES OF PRODUCT DEFECT

"§ 2(a) Manufacturing Defect
A product: contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;"

The Restatement with respect to manufacturing defects imposes classical or true "strict liability."

" § 2(b) Design Defect
A product: is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distrbutor, or a

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MESSAGE FROM THE PRESIDENT

Mark L. Tripp

LEGAL FEES–COST CONTROL

Now that I have your attention, let me use my first opportunity as President of IDCA to discuss a topic that only recently has started to surface in Iowa and that is, use of third-party audits to control legal costs. I know this is a hot topic and, therefore, a topic many choose to ignore. I also know it is a topic that could very well define the future relationship between insurers and insurance defense counsel.

In October, IDCA officers attended the annual DRI Seminar in San Francisco. It was a great opportunity to meet with other state representatives in order to discuss current issues related to the defense practice. A considerable amount of time was devoted to discussing issues related to third-party audits. The conversations were interesting because they included not only insurance defense counsel but also insurance industry representatives. Considerable time was spent discussing ethical issues related to use of third-party audits. In fact, a summary of twelve state ethics opinions concerning thirdparty audits was provided.

In a breakout session of state representatives I was asked to share what we were doing in Iowa to address this particular issue. I told the group about the efforts of our Client Relations Committee. I also told them that so far, third-party audits had not been a hot topic in Iowa. The group was somewhat surprised to hear that Iowa, for some reason, was isolated from this issue which obviously was having an inpact on long standing relationships that had existed between insurance defense counsel and the insurance industry. I speculated that Iowa was somewhat isolated from this problem due to the fact that we have so many regional carriers in Iowa who have invested considerable time in developing professional relationships with the defense attorneys who represent their insureds.

A few weeks after returning from the DRI meeting, I was pleased to read the headlines in the business section of the Des Moines Register that read "Insurers Post Lower Losses. Iowa Companies are More Efficient than Rest of the Industry." The article went on to state that Iowa property and liability insurers have had lower combined ratios for losses and expenses as a percent of premiums compared to the rest of the industry since 1984. The article reinforced my belief that we must be doing something right in Iowa and every member of the IDCA has a right to be proud of that accomplishment whether they work directly for the insurance industry or serve as private counsel.

When and if the national carriers start to assimilate some of Iowa's regional carriers, we might see more of an effort to inject third-party audits into the relationship between insurers and insurance defense counsel. Hopefully, the relationships between clients and counsel, built upon years of mutual respect and trust, will continue to be an example to others of how we can effectively work together without the intrusion of third parties.

The IDCA knows this is an important issue and for that reason our Client Relations Committee will continue to monitor developments in this area. In the meantime, I am sure property and casualty insurance carriers doing business outside of Iowa will look to Iowa regional carriers for guidance since they are obviously doing something right. ❑

UNINSURED MOTORISTS CLAIMS: THE PLAINTIFFS' DUTIES AND OBLIGATIONS

By Anne M. Henry, Bettendorf, Iowa

The plaintiff in an uninsured motorist [UM] lawsuit has a unique status under the law. Aside from the fact that the damages for this plaintiff sound in tort, certainly with respect to the tortfeasor, the duties and obligations of the plaintiff sound in contract, also, with respect to the insurer. It is this unusual relationship that lends challenge and opportunity in the defense of the insurer.

STATUTE

Uninsured motorist coverage is required by statute. Iowa Code Section 516A states that:

> "No automobile liability or motor vehicle liability insurance policy insuring against liability for bodily injury or death arising out of the ownership, maintenance, or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state, unless coverage is provided in such policy or supplemental thereto, for the protection of persons insured under such policy who are legally entitled to recover damages from the owner or operator of an uninsured motor vehicle or a hit-and-run motor vehicle. . .because of bodily injury, sickness, or disease, including death resulting therefrom. . . ."

Section 516A requires that uninsured motorist coverage be included in every auto liability policy sold in Iowa, unless it is specifically waived by the insured. The limits are required to be the minimum financial responsibility limits for bodily injury (20,000 per person, 40,000 per accident), property damage ($15,000 per accident) and are designed to provide minimum coverage, i.e., minimum compensation, for those unlucky enough to be involved in an accident that is the fault of an uninsured driver.

So what, exactly, are the obligations of the UM driver to the insurance carrier in making a claim? The Iowa courts have addressed this issue on a number of different fronts.

BACKGROUND - GENERAL CONTRACT LANGUAGE

The basis for a UM claim is the insurance contract. A direct action for uninsured motorist benefits is considered to be an action on a contract, not a tort. Thus, the contract language is key, and a complete review of the applicable insurance policy is key to providing an adequate defense.

Most standard automobile liability policies read as follows (generally in the "If You Have An Auto Accident/Loss" section of the policy):

IF YOU HAVE AN AUTO ACCIDENT OR LOSS NOTIFY US

Tell us promptly. Give time, place, and details. Include names and addresses of injured persons and witnesses.

OTHER DUTIES

- Assist us in any claims or suits.
- Promptly send us any legal papers received relating to any claims or suit.
- Have a physical exam at our expense as often as we may reasonably ask. We will select the doctor.
- Provide us with medical, employment and other records and documents we request, as often as we may reasonably ask, and permit us to make copies.
- Give us statements and answer questions under oath when asked by any person we name, as often as we reasonably ask, and sign copies of the answers.

Each person claiming Uninsure-Motorists coverage must promptly notify the police if a hit-and-run driver is involved.

It is around these duties that most of the case law addressing this issue lie.

COOPERATION OF THE INSURED/PLAINTIFF

Cooperation is the key for any insured attempting to be covered for a loss. The insured has an affirmative obligation to cooperate with the insurer; the insurer can deny a claim and/or properly have it dismissed if in litigation, once it has been proven that the insured has failed to cooperate with the insurer. *See Simpson v. United States Fidelity and Guaranty Co.*, 562 N.W.2d 627 (Iowa 1997) (insured's settlement with tortfeasor without notice to or consent of insurance carrier violated the cooperation clause); *Brown v. Danish Mutual Ins. Association*, 550 N.W.2d 171 (Iowa 1996) (insured's failure to submit to an examination under oath violated policy provision); and *Fireman's Fund Ins. Co. v. ACC Chemical Co.*, 538 N.W.2d 259 (Iowa 1995) rehearing denied, (insured's failure to give notice of potential loss for five years prejudiced insurer). Thus, it is imperative that the insured provide timely notice of loss, and cooperate with the insurer in its investigation.

But how does this apply to medical treatment, usually the subject of UM litigation? This is the crux of the UM case. There are many issues that arise concerning medical treatment in the liability and uninsured motorist arenas. UM claims are unique because they are first party claims, whereas liability claims are third party claims. Due to the fact that the

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EXPERTS' DEPOSITION FEE PER RULE 125(F)

By Mark S. Brownlee, Fort Dodge, Iowa

I.R.C.P. 125(f) prescribes that a party deposing another party's expert shall compensate the expert for "the time reasonably and necessarily spent in connection with such deposition, including the time spent in travel to and from the deposition, but excluding time spent in preparation." The fee "shall not exceed the expert's customary hourly or daily fee." This prescription is simple enough in principle, but the proliferation of professional (expert) witnesses has, not surprisingly, produced some abuse in practice. Much of the problem lies in the interpretation of the term "customary." For experts that earn a livelihood outside of the litigation arena, the prevailing concept would appear to be that they should not "lose" money when devoting time to the deposition process. In other words, they should be reimbursed for the loss of productive time from their normal professional endeavors. *See Pierce v. Nelson,* 509 N.W.2d 471 (Iowa 1993), wherein the following factors were adopted from *Jochims v. Isuzu Motors Ltd.,* 141 F.R.D. 493, to assess the reasonableness of experts' deposition fees charged to opposing parties:

> "(1) the witness's area of expertise; (2) the education and training required to provide the expert insight which is sought; (3) the prevailing rates of other comparably respected available experts; (4) the nature, quality, and complexity of the discovery responses provided; (5) the fee actually being charged to the party who retained the expert; (6) fees traditionally charged by the expert on related matters; and (7) any other factor likely to be of assistance to the court in balancing the interests implicated by rule 26."

Notwithstanding the various other adopted factors, *Pierce* provides that the deposition fee of a treating physician "should ordinarily be commensurate with the reasonable compensation lost by virtue of the doctor's required participation in the legal proceedings." 509 N.W.2d at 471. There is no reason why the same thinking should not apply to nonmedical experts.

Unfortunately, as any litigator knows, many experts do not set their deposition fees on the basis of lost revenue. Rather, they typically charge a rate or fee for depositions which is unique to that task and significantly greater than their nonlitigation professional charges. Hourly rates of $500 to $750, with prepayment often required, are commonplace for medical depositions. Such fees are characterized as standard or customary, so they superficially comport with Rule 125(f), but in actuality, they are customary for depositions only.

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Applying the concept of "customary" charges for deposition fees becomes even more problematic when dealing with experts who devote all or most of their time to litigation consulting and testifying. Because these"professional witnesses" have no nonlitigation rates or fees on which to base their Rule 125(f) deposition fees, their deposition fee schedule purportedly reflects customary charges, notwithstanding its largely arbitrary nature. Such schedules usually prescribe quite ambitious rates, the highest relating to time spent testifying.

The notion that experts be compensated for travel time raises further questions of reasonableness.

Given the underlying basis of Rule 125(f), why should an opposing party have to pay a higher rate to depose a professional witness than the witness is charging the party that hired him or her? Does it seem reasonable for an expert to receive a higher rate for talking about his or her opinions than for exercising the expertise to formulate those opinions? Clearly not."[T]he fee actually being charged to the party who retained the expert" is one of six specific factors to be considered under the framework adopted in *Pierce,* but it does not seem to receive due consideration.

The notion that experts be compensated for travel time raises further questions of reasonableness. Aside from sometimes exorbitant rates, i.e., $200 per hour for travel time, it doesn't seem quite right for a party who elects to employ an expert 1500 miles away not to share in the travel time expenses associated with bringing the expert to the venue of the case to be deposed. Traveling to an expert's place of business is an option, but there are obviously substantial associated costs which may make it impractical. A tenable argument exists that the costs associated with bringing an expert to the venue of the case to be deposed should be borne by the party who retained the expert. (Note - Rule 125(f) makes no reference to travel expenses, as distinguished from travel time.)

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predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;"

With respect to design defect cases, the Restatement requires that there be a reasonable alternative design. That now becomes a part of the plaintiff's burden of proof in design cases. As seen by Comment (e) to § 2, however, there are certain exceptions to the "reasonable alternative design" requirement for products which may be said to be based upon a "manifestly unreasonable design." This topic will no doubt be the source of much litigation when plaintiffs' lawyers attempt to prove liability by characterization of the product rather than by specific proof of an alternative design.

CIRCUMSTANTIAL EVIDENCE OF PRODUCT DEFECT

"§ 3. Circumstantial Evidence Supporting Inference of Product Defect

It may be inferred that the harm sustained by the plaintiff was caused by a product defect existing at the time of sale or distribution, without proof of a specific defect, when the incident that harmed the plaintiff:

(a) was of a kind that ordinarily occurs as a result of product defect; and

(b) was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution."

Section 3 of the Restatement creates for the product liability field what has traditionally been recognized in the negligence field under the doctrine of 'res ipsa loquitur." It is an attempt to fill in the gap for situations where there really is no other reasonable explanation for an injury except for some type of product defect (even though the plaintiff cannot prove what specific defect brought about the incident). The traditional concept of "exclusive control" expressed in res ipsa loquitur cases seems to be inherently accepted because of the fact that the defendant has manufactured or "sold" the product. Section 3 is designed to apply only in such situations that "the situation speaks for itself."

COMPLIANCE OR NONCOMPLIANCE WITH SAFETY STATUTES OR REGULATIONS

"§ 4. Noncompliance and Compliance with Product Safety Statutes or Regulations. In connection with liability for defective design or inadequate instructions or warnings:

(a) a product's noncompliance with an applicable product safety statute or administrative regulation renders the product defective with respect to the risks sought to be reduced by the statute or regulation; and

(b) a product's compliance with an applicable product safety statute or administrative regulation is properly considered in determining whether the product is defective with respect to the risks sought to be reduced by the statute or regulation, but such compliance does not preclude as a matter of law a finding of product defect."

This section by comment applies to all safety statutes and administrative regulations promulgated by federal, state and local legislative bodies and agencies intended to promote safety in the design and marketing of products. It covers both the concepts of "negligence per se" (where the defendant has failed to comply with safety statutes or regulations and the failure can be causally connected to the plaintiff's injury) and the traditional "compliance with standards doctrine" (where the defendant can show that it has in fact complied with the applicable statute or regulation). The section does create absolute liability in the event of "negligence per se" and does not specifically adopt the former common law rule excusing manufacturers from negligence per se when they neither knew nor could have known about the regulation. Instead, it seems to adopt the off quoted standard that "ignorance of the law is no excuse."

Compliance with the applicable safety statute or regulation on the other hand is considered "as evidence" that the product was not defective. Compliance does not constitute an absolute defense but may be considered by the jurors along with all of the other circumstances.

PRODUCT MISREPRESENTATION

"§ 9. Liability of Commercial Product Seller or Distributor for Harm Caused by Misrepresentation

One engaged in the business of selling or otherwise distributing products who, in connection with the sale of a product, makes a fraudulent, negligent, or innocent misrepresentation concerning the product is subject to liability for harm to persons or property caused by the misrepresentation."

Section 9 of the Restatement incorporates the former Section 402b of the Restatement (Second). This section promises to be a fruitful source of litigation. Section 9 imposes liability for "innocent misrepresentation" and in that sense establishes another source of "strict liability" even where the product

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itself may not be proven to be "defective." Plaintiff can still recover if they show that there was a misrepresentation concerning a "material fact" and the plaintiff's injury is causally related to that misrepresentation. The plaintiff is not required to show that he or she saw or relied upon the misrepresentation. This section will encompass the concept of "advertising liability."

POST-SALE DUTY TO WARN

"§ 10. Liability of Commercial Product Seller or Distributor for Harm Caused by Post-Sale Failure to Warn

(a) One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller's failure to provide a warning after the time of sale or distribution of a product when a reasonable person in the seller's position would provide such a warning.

(b) A reasonable person in the seller's position would provide a warning after the time of sale when:

(1) the seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and

(2) those to whom a warning might be provided can be identified and may reasonably be assumed to be unaware of the risk of harm; and

(3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and

(4) the risk of harm is sufficiently great to justify the burden of providing a warning."

Section 10 of the Restatement creates a newly articulated duty which did not exist in the Restatement Second, namely the duty to provide information to the consumer after the sale. There are still many factors to be established by litigation, however, such as the question of when the post-sale duty to warn attaches; the question of the parties who would be entitled to warning after the sale; and the question of whether or not the warning actually provided is legally sufficient.

POST-SALE DUTY TO RECALL

"§ 11. Liability of Commercial Product Seller or Distributor for Harm Caused by Post-Sale Failure to Recall Product.

One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller's failure to recall a product after the time of sale or distribution if:

(a)(1) a statute or other governmental regulation specifically requires the seller or distributor to recall the product; or

(2) the seller or distributor, in the absence of a recall requirement under Subsection (1), undertakes to recall the product; and

(b) the seller or distributor fails to act as a reasonable person in recalling the product."

Section 11 of the Restatement basically leaves the matter of recall to appropriate governmental agencies. There is no fault-based duty to recall imposed by this section. Liability can be imposed under § 11, however, in the event either a governmental agency has mandated the recall or the manufacturer has voluntarily undertaken the duty to recall the product. In either of those events, the seller's recall activity will be judged against the conduct of a "reasonable person."

SUCCESSOR LIABILITY

"§ 12. Liability of Successor for Harm Caused by Defective Products Sold Commercially by Predecessor. A successor corporation or other business entity that acquires assets of a predecessor corporation or other business entity is subject to liability for harm to persons or property caused by a defective product sold or otherwise distributed commercially by the predecessor if the acquisition:

(a) is accompanied by an agreement for the successor to assume such liability; or

(b) results from a fraudulent conveyance to escape liability for the debts or liabilities of the predecessor; or

(c) constitutes a consolidation or merger with the predecessor; or

(d) results in the successor's becoming a continuation of the predecessor."

Section 12 adopts a rather traditional standard and rejected several proffered new theories for successor liability. It has been suggested that the reporters notes may be helpful in defending successor liability cases to illustrate that the proffered new theories were in fact knowingly rejected by the American Law Institute.

PRODUCTS MADE BY OTHERS BUT MARKETED UNDER THE SELLER'S NAME

"§ 14. Selling or Otherwise Distributing as One's Own a Product Manufactured by Another

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> One engaged in the business of selling or otherwise distributing products who sells or distributes as its own a product manufactured by another is subject to the same liability as though the seller or distributor were the product's manufacturer. "

Section 14 imposes liability upon a commercial seller for a product bearing its trade name, brand, symbol or logo the same as if it were a manufacturer of the product. The theory for such liability is that the consumer is "relying upon the seller's reputation as an implied assurance of the quality of the product...." This section may be argued to "undo" or avoid certain tort reform measures which have been adopted in various jurisdictions shielding or limiting the liability of certain nonmanufacturing defendants. Hopefully, however, the courts will in such instances, follow the provisions of the specific statutory provisions of the jurisdiction rather than resorting to the generalized Restatement.

CAUSATION

> "§ 15. General Rule Governing Causal Connection Between Product Defect and Harm
> Whether a product defect caused harm to persons or property is determined by the prevailing rules and principles governing causation in tort."

Section 15 adopts a general "tort" standard for causation which typically would require some type of causation in fact. By comment, the section also includes the concepts of "misuse," "alteration" and "modification" which means that all of those concepts can be argued from a defense standpoint under the general concept of "causation." The generality of § 15, however, will permit tremendous variation in the jurisdictional concepts of "causation" including the potential of "proportional liability" and "market liability" which have been recognized in some jurisdictions. See illustration (c) to § 15.

ENHANCED INJURY

> "§ 16. Increased Harm Due to Product Defect
> (a) When a product is defective at the time of sale and the defect is a substantial factor in increasing the plaintiff's harm beyond that which would have resulted from other causes, the product seller is subject to liability for the increased harm.
> (b) If proof supports a determination of the harm that would have resulted from other causes in the absence of the product defect, the product seller's liability is limited to the increased harm attributable solely to the product defect.
> (c) If proof does not support a determination under Subsection (b) of the harm that would have resulted in the absence of the product defect, the product seller is liable for all of the plaintiff's harm attributable to the defect and other causes.
> (d) A seller of a defective product who is held liable for part of the harm suffered by the plaintiff under Subsection (b), or all of the harm suffered by the plaintiff under Subsection (c), is jointly and severally liable with other parties who bear legal responsibility for causing the harm, determined by applicable rules of joint and several liability. "

Section 16 embodies the concept of liability for "enhanced harm" which has frequently been litigated in the context of automobile cases under the description "secondary collision." The concept recognizes liability where the design or manufacturing defect has caused a severe injury even though it was not responsible for the original accident or mishap. On the design side of the equation, however, § 16 reverts back to the requirement of a "reasonable alternative design" as required under § 2(b) discussed above. There are still many definitional questions such as when is the defect a "substantial factor in increasing the plaintiff's harm?" and "where does liability for increased harm stop?"

Section 16 addresses specifically the question of joint and several liability, but does not address the concept of "comparative fault." Consequently, it would appear that comparative fault in the context of enhanced injury would apply in the case of a design defect (where liability is fault related) but would not apply in the case of a manufacturing defect (where liability is strict). Thus the plaintiff's choice of liability claims may also determine whether or not the plaintiff's own fault in causing the accident is considered in the apportionment of fault.

AFFIRMATIVE DEFENSES

a. Apportionment of Responsibility

> "§ 17. Apportionment of Responsibility Between or Among Plaintiff, Sellers and Distributors of Defective Products, and Others
> (a) A plaintiff's recovery of damages for harm caused by a product defect may be reduced if the conduct of the plaintiff combines with the product defect to cause the harm and the plaintiff's conduct

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fails to conform to generally applicable rules establishing appropriate standards of care.

(b) The manner and extent of the reduction under Subsection (a) and the apportionment of plaintiff's recovery among multiple defendants are governed by generally applicable rules apportioning responsibility."

Section 17 leaves several areas open for litigation or judicial decision in the various jurisdictions. It appears to leave the door open for the defenses of contributory fault or comparative fault where recognized in the particular jurisdiction. While the reporters did not attempt to adopt a uniform rule, their language in § 17 seems to suggest that comparative fault might be an appropriate affirmative defense even in cases which have traditionally not been construed to be subject to such a defense because they were "product liability" cases. Section 17 likewise does not create a separate category for assumption of the risk as an absolute defense. It has been observed by some commentators, however, that such a defense may still exist since § 17 is discussing "fault" only, whereas, assumption of the risk may apply to a person who has actually made a choice rather than simply been negligent in their conduct. There is also no attempt in § 17 to address the various types of "comparative fault," a concept which is apparently intended to be left to the jurisdiction in question.

b. Disclaimers, Limitations & Waivers

"§ 18. Disclaimers, Limitations, Waivers, and Other Contractual Exculpations as Defenses to Products Liability Claims for Harm to Persons

Disclaimers and limitations of remedies by product sellers or other distributors, waivers by product purchasers, and other similar contractual exculpations, oral or written, do not bar or reduce otherwise valid products liability claims against sellers or other distributors of new products for harm to persons."

Section 18 eliminates contractual defenses to products cases in the typical consumer context. Comments (c) and (d) to § 18, however, suggest that such contractual limitations may still be appropriate in the case of purely economic loss or the case of commercially sophisticated consumers. Comment (b) also points out that while particular language may not constitute a legally permissible "disclaimer," the language may serve as a legitimate "warning" which would constitute a defense for the distributor under appropriate circumstances.

DEFINITIONS

a. "Product"

" § 19. Definition of 'Product'

For purposes of Restatement:

(a) A product is tangible personal property distributed commercially for use or consumption. Other items, such as real property and electricity, are products when the context of their distribution and use is sufficiently analogous to the distribution and use of tangible personal property that it is appropriate to apply the rules stated in this Restatement.

(b) Services, even when provided commercially, are not products.

(c) Human blood and human tissue, even when provided commercially, are not subject to the rules of this Restatement."

The Restatement by definition limits "product" to an item of tangible personal property and specifically excludes "services" from the definition. There are certain to be some interesting cases revolving around the question of what is a "product?"

b. "One Who Sells or Otherwise Distributes"

"§ 20. Definition of 'One Who Sells or Otherwise Distributes'

For purposes of this Restatement:

(a) One sells a product when, in a commercial context, one transfers ownership thereto either for use or consumption or for resale leading to ultimate use or consumption. Commercial product sellers include, but are not limited to, manufacturers, wholesalers, and retailers.

(b) One otherwise distributes a product when, in a commercial transaction other than a sale, one provides the product to another either for use or consumption or as a preliminary step leading to ultimate use or consumption. Commercial nonsale product distributors include, but are not limited to, lessors, bailors, and those who provide products to others as a means of promoting either the use or consumption of such products or some other commercial activity.

(c) One also sells or otherwise distributes a product when, in a commercial transaction, one provides a combination of products and services and either the transaction taken as a whole, or the product component thereof, satisfies the criteria in Subsection (a) and (b)."

The Restatement definition of "seller" or "distributor" specifically includes commercial lessor, bailors and persons providing promotional

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supplies of a product. Comment (d) of § 20 specifically addresses the transactions which are combined sales-service transactions.

c. "Harm to Persons or Property"

"§ 21. Definition of 'Harm to Persons or Property': Recovery for Economic Loss

For purposes of this Restatement, harm to persons or property includes economic loss if caused by harm to:

(a) the plaintiff's person;

(b) the person of another when harm to the other interferes with a legally protected interest of the plaintiff; or

(c) the plaintiff's property other than the defective product itself."

Section 21 adopts the majority rule that pure economic losses, whether direct or indirect, are not included in the scope of "product liability." Economic losses are considered contract claims treated by Articles 2 and 2(a) of the Uniform Commercial Code. Such "economic" losses would include product deterioration or malfunction where the claim is for replacement of the product itself. When the product fails, causing injury to some other tangible property, however, that would be included in the topic of "product liability."

SPECIALTY AREAS

1. Section 5 covers liability of suppliers of raw materials and component parts.
2. Section 6 covers liability of sellers of prescription drugs and medical devices.
3. Section 7 covers liability of sellers of food products.
4. Section 8 covers liability for used products.

Obviously, which of these sections will be specifically "adopted" by the Iowa Supreme Court remains to be seem as the case law develops. Certainly, however, the issues outlined above promise to dominate the product liability landscape for years to come. Persons practicing in the product liability area specifically are referred to an excellent pamphlet by Victor E. Schwartz entitled "The Restatement (Third) of Torts: Products Liability - A Guide To Its Highlights," published by the National Legal Center for the Public Interest in February of 1998. For a more thorough discussion of this topic with reference to specific Iowa cases, see also Kevin M. Reynolds, "The Restatement (Third) of Torts: Products Liability and Iowa Law," Iowa Defense Counsel Association, 1998 Annual Meeting Outline. ❑

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insurer is dealing directly with the insured, it is important that both sides "play fair."

In *Reedy v. White Consolidated Industries, Inc.*, 890 F.Supp.1417, 1435, (N.D.Iowa 1995), the court reiterated a long-standing rule in Iowa that "insurance contracts . . . contain an implied covenant of good faith that neither party will do anything to injure the rights of the other in receiving the benefit of the agreement." *Johnson v. Farm Bureau Mut. Ins. Co.* 533 N.W.2d at 207; *Kooyman v. Farm Mut. Ins. Co.*, 315 N.W.2d 30, 33 (Iowa 1982). This applies both to insureds and insurers. So, while the insurer has an obligation to work in good faith with the insured, the insured has a reciprocal duty to the insurer. This is often forgotten in what is perceived by the plaintiffs' bar, and all too often by the defense bar, to be purely tort litigation.

In a recent supreme court case, *Sampson v. American Standard,* 1998 WL 426209 (Iowa) (slip opinion), the court found that the insured, due to the language of the policy, was put on notice [by the policy language] "concerning her duty to provide records to American Standard," and that her failure to do so resulted in failure to meet her burden of proof. The court went on to say that Sampson was also "put on notice that [American] would exercise its right to investigate any claims for benefits under the policy, including the right to determine whether medical bills presented by her were reasonable in amount, appropriate and necessary, and incurred because of the [accident]. *See AMCO Mut. Ins. Co. v. Lamphere,* 541 N.W.2d 910, 914 (Iowa App.1995) (insured's lack of cooperation in providing documents requested by insurer established an objectively reasonable basis for denial of coverage)."

So, insureds have an obligation to give the insurer all reasonable information necessary for the insurer to properly evaluate the claim. This includes medical reports, medical records, prior medical records, wage loss information, employment information, etc. While the insurer does not have a right to interrogate an insured unreasonably, the supreme court, as shown above, has supported the contract provisions that allow an insurer to properly evaluate a UM claim.

Another interesting issue in the UM context is that of physical exams. The contract language generally provides that the insurer can have the insured examined, as many times as they reasonably require, at the doctor of the insurer's choosing. This can be very important when the insurer feels that an insured may be attempting to improperly inflate a claim, or may be falsely representing a claim. If the attorney or insurer faces resistance from the insured's attorney in this regard, a court order should be requested. *See generally Simpson v. United States Fidelity & Guaranty Co.*, 562 N.W.2d 627 (Iowa 1997).

INSURER RIGHTS - CASE LAW

The court has also clearly placed the burden of proof on the plaintiff to show policy compliance. In *Simpson, supra at 631,* the court also held that there was no excuse for breach of the cooperation clause and no waiver of the cooperation provision. The court began its analysis by saying that "whenever policy provisions are conditions precedent to coverage under an insurance contract [as in this case], an insured must show substantial compliance with such conditions. If an insured cannot prove substantial compliance, he or she just show that (1) failure to comply was excused, (2) the requirements of the condition were waived, or (3) failure to comply was not prejudicial to the insurer." (Citing *Fireman's Fund Ins. Co. v. ACC Chem. Co.*, 538 N.W.2d 259, 264 (Iowa 1995); *Met-Coil Sys. Corp. v. Columbia Cas. Co.*, 524 N.W.2d 650, 654 (Iowa 1994). The court went on to say that "the purpose of a cooperation clause is to protect insurers and prevent collusion." An insured's mistaken belief or lack of knowledge regarding coverage may be a justifiable excuse for noncompliance with an insurance policy's provision, but "mistaken belief or lack of knowledge regarding coverage does not rise to the level of a legal excuse for noncompliance with the. . . conditions of an insurance policy unless the [insured] exercised due diligence." "To satisfy the due diligence requirement, the insured must not have been negligent and must have at least made a reasonable effort to discover the existence of coverage." *Ibid.*

According to *Morgan v. American Family Mut. Ins. Co.*, 534 N.W.2d 92, 99 (Iowa 1995), the insured is also charged with knowledge of contents of policy including contractual limitations provisions. This case involved a policy provision that limited the UM statute of limitations to the applicable tort statute of limitations. The court found the provision valid, and also stated that the insurer did not have a duty to inform insured of approaching statute issue. "A party is charged with notice of the terms and conditions in a contract he or she entered into if the party is able to read the contract and has the opportunity

Continued on page 11

UNINSURED MOTORISTS CLAIMS: THE PLAINTIFFS' DUTIES AND OBLIGATIONS *Continued from page 10*

to read it." *Ibid.* The court also has stated that an insured's efforts to secure recovery from tortfeasors did not toll policy time for bringing a claim for benefits, *Douglass v. American Family Mut. Ins. Co.*, 508 N.W.2d 665, 668 (Iowa 1993). In *Douglass*, the court also addressed specific policy language that required that the tortfeasor be made a party to an action for UM benefits. The policy language was as follows:

> "If any suit is brought by you to determine liability or damages, the owner or operator of the uninsured motor vehicle must be made a defendant and you must notify us of the suit. Without our written consent we are not bound by any resulting judgment."

The court ruled that the insured was required by the policy to give the insurer notice of the lawsuit, and that the insurer would not be bound by the resulting judgment without the notice. Thus, again, the policy provisions govern the obligations of the insured.

The insurer has an absolute right of subrogation from any recovery from a tortfeasor. *Allgood v. Grinnell Mut. Reinsurance Co.* 509 N.W.2d 486, 487 (Iowa, 1993). "An insurer who has provided uninsured motorist coverage can recover from a tortfeasor's payments to the insured regardless of whether the insured has been fully compensated" (citing *Davenport v. AID Ins. Co.*, 417 N.W.2d 711, 715 (Iowa 1983). "We hold an insurer retains full subrogation rights for uninsured motorist coverage against an insured's dramshop recovery." *Ibid.*

The Iowa Supreme Court has consistently upheld policy provisions in relationship to UM coverages. Thus, a setoff clause permitting reduction in UM coverage for social security benefits is valid and enforceable (*Gentry v. Wise,* 537 N.W.2d 732 (Iowa 1995)); a vehicle must be used with the owner's consent for there to be coverage, *Grinnell Mut. Reinsurance Co. v. State Farm Mut. Ins. Co.,* 558 N.W.2d 176 (Iowa 1997); "other insurance" clause that limits liability applies to UM benefits, *Rodish v. State Farm Mut. Ins. Co.,* 501 N.W.2d 514 (Iowa 1993); and the policy definition of "occupying" prohibited an insured from recovering medical payments coverage, *Tropf v. American Family Mut. Ins. Co.*, 558 N.W.2d 158 (Iowa 1997).

PROVING UM STATUS

The burden for showing lack of insurance is on the claimant/insured. In *Frunzar v. Allied Prop. & Cas. Ins. Co.*, 548 N.W.2d 880 (Iowa 1996) the court discussed the "all reasonable efforts" rule, which requires the claimant to present evidence of all reasonable efforts used in any unsuccessful attempt to determine the existence of any applicable liability insurance. This can be done by a "professional statement" of the plaintiff's attorney, and the standard reads as follows:

> The [UM] claimant . . . can discharge his or her burden either by showing that the tortfeasor against whom he or she is claiming was uninsured . . . or by showing that the claimant used "all reasonable efforts" to ascertain the existence of any applicable liability insurance and was unsuccessful in this effort.

CONCLUSION

In UM cases, the plaintiff has the burden of proving the uninsured status of the tortfeasor in order to properly claim UM benefits from the insurer. The plaintiff also must comply with all of the policy provisions to prevail on a claim for these benefits. It is important that the defense attorney read the applicable insurance contract, understand the ramifications of its provisions, and ensure compliance with the provisions by the plaintiff. By understanding and working with the policies, we can be of better service to our clients and the courts. ❑

WELCOME NEW MEMBERS

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EXPERTS' DEPOSITION FEE PER RULE 125(F) *Continued from page 4*

The matter of experts' deposition fees should be re-visited by the bar committee that studies the Iowa Rules of Civil Procedure, with the guidance provided by *Pierce*.

In most cases, we hold our noses and pay the experts' inflated charges. In a sense, they are simply charging what the market will bear. However, this precept applies primarily because it often does not seem worth the time and trouble to challenge the charges in a particular case. By rule, the reasonableness of an expert's charges is subject to court determination, but the expense associated with submitting the issue to the court minimizes the net benefit of doing so.

The matter of experts' deposition fees should be revisited by the bar committee that studies the Iowa Rules of Civil Procedure, with the guidance provided by *Pierce*. The goals should include greater uniformity in experts' deposition fees and an efficient procedure for judicial review of such fees in dispute. Because their members are affected most by the application of the rule, it would be appropriate that the various trial lawyer associations be given the opportunity to provide input to the process. ❑

NOTICE

Membership Roster

Another feat of El Niño was preventing the production of an updated Roster this past January. (so *you* haven't used this as an excuse?) We have the New Roster scheduled, and without fail, it will be printed in January, 1999. Therefore, if you have a change you want to make (name, address, telephone, fax, spouse), or if you are not sure you sent the information before, please send or fax it, by **January 5, 1999,** to:

Ginger Tribby
5400 University Avenue
West Des Moines, IA 50266
Fax: 515-225-5569

- Do it right now while it's fresh in your mind - phone calls not acceptable, we want it in writing!

WE NEED YOUR HELP

A review of IDCA's "library" of printed material reveals that we are missing a few annual meeting outline books. If your firm has more than one member of IDCA you probably have more than one copy of the missing outlines. Get your heads together and see if someone would be willing to donate his/her copy to the cause. It would be greatly appreciated - we'll even accept any with artistic designs or words of wisdom (?) you may have added! The years we are missing are as follows:

1970	1974
1971	1995 - we need Volume II
1972	1996 - we need Volume I
1973	

We are uncertain if outlines were printed before 1970. If you are aware of, or have an outline prior to that date, please let us know.

Also, the University of Iowa Law School is missing both Volumes I and II for the years 1995 and 1996. If you would be willing to donate your volumes to them, please send them direct to the Law School. For your information, copies of the meeting outline books and the *Defense Update* are sent to the University of Iowa Law School and the Drake University School of Law.

<u>So there is no duplication</u>, please contact Ginger Plummer, 515-225-5470, before sending the outlines to us or to the University of Iowa Law School.

THE PERILS OF MODERN LIFE KEEP US LOOKING FOR LABELS

Here where I live, in weenie nation, the bad news is that life is still terribly, terribly - really, almost unbearably - dangerous. The good news is that, at last, we have gotten pretty much everything properly labeled to reflect this.

The other day, my wife and I dropped by a merry-go-round with our son, Tom, who is 2. In front of the carousel was a large sign, which read: "For Your Safety. Pregnant? Heart Problems? Motion Sickness? Neck Or Back Problems? Health Problems?" And then, in big red letters: "For Your Protection. You Should Not Ride! Anyone Under The Influence Of Alcohol Or Drugs Is Not Permitted to Ride." By the grace of God, this people-killer was closed for the day.

Escaping with our lives, we stopped at McDonald's to buv Tom a Happy Meal. It came with a little gift, a Disney girl warrior figure called Mulan. Mulan was enclosed in a plastic envelope which was printed with warnings in 30 languages, including Castellano, Cesky, Eesti, Hrvatski, Latviesu, Lietuva, Magyar, Proizvodac and Srpski: "This toy has been safety tested for children ages 3 and over. CAUTION: It May Contain Small Parts And Is Not Intended for Children Under 3. Please Retain Information for Reference."

We grabbed the deadly Disney baby-destroyer away trom Tom, which he did not appreciate. Back home, we decided to let Tom take a dip in his new wading pool, but this turned out to be another bad idea. "Warning! Not suitable for children under 36 months," informed the words imprinted in the pool's bottom. "In case of unforseseen (sic) use. In particular of small parts giving rise to harm." I wondered what small parts could be found in a seamless piece of plastic.

But, why take chances? I snatched Tom up and rushed him upstairs to put him back in his room, which his mother and I maintain as a sealed and medically sterile environment. Frankly, Tom does not like his room, but he is safe there, and that is the main thing.

I thought about going to the beach, but there is the sun, and the ocean, and they are known killers. Plus, there are the jet-skis. Those at least come with labels: "Riders of personal, watercraft may suffer injuries due to the forceful injection of water into body cavities." That helps.

Still, all in all, better to stay inside. The next day, I drove my new FWD-SUV to work, of course with the daytime running lights on. My lit-up behemoth makes a statement about me. It says: I am a bold, daring soul who routinely drives through the valley of death. On the other hand, please don't hit me. I felt safer at work, but to reassure myself completely, I checked the bottom of my desk chair, and the proper labels were there. One told me that my chair contained New Material Only, in accordance with The Upholstered and Stuffed Articles Act. The other said that my chair "meets all the flammability requirements of California Bureau of Home Furnishings Bulletins 116 and 117."

These made me feel beter, but then I began to worry. The more I thought about it, the labels raised troubling questions. What are "flammability requirements?" Wouldn't it better to impose non-flammability requirements?

So life goes where I live. Here, we are terrified of the weather. When it is hot, or cold, or snows, or rains, everyone rushes to the Safeway to buy bottled water and bread, and the television and radio weather reports take on a tone of apocalypse suitable to a plague of locusts. Here, we take Al Gore seriously. Here, we don't set off fireworks on Independence Day and we guard our children on Halloween. Here, we wear bike helmets. Here, we think that sneaking cigarettes is the greatest danger our teenagers will ever face, and we may well be right.

But not everything upsets us so. In the parts of the cities where we try very hard not to ever go, the schools are holding pens for illiterates, and two-thirds of the babies are being raised without fathers, and half the young men will end up in jail sometime, and the poverty rate among children is only equaled by the unemployment rate among adults. But those dangers we can live with, in weenie nation. □

Michael Kelly, *The Rocky Mountain News*, July 23, 1998 Reprinted by permission.

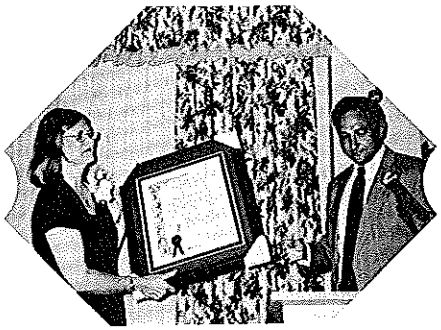
1998 Annual Meeting Highlights

1998-1999 OFFICERS

L-R Jim Pugh, Treasurer; Marion Beatty, Secretary;
Mark Tripp, President; Bob Houghton, President-Elect

Jaki Samuelson turns gavel over to Mark Tripp, who in turn presents the Presidential Plaque to Jaki

Iris Muchmore accepts the 1998 "Eddy Award" for recipient Greg Lederer

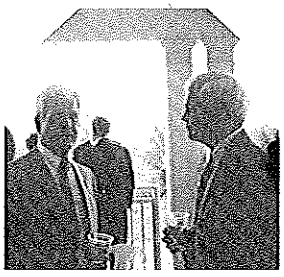


Defense Update editors meet to discuss upcoming issues;
L-R Former editor Jack Grier, Kermit Anderson, Ken Ahlers,
Noel McKibben, Mark Brownlee, Mike Ellwanger

Great weather allowed both Receptions to be enjoyed outdoors

Wednesday evening at Embassy Suites

Past Presidents Bob Engberg, Phil Willson and wife Barb, Herb Selby and wife Harriett



Bob and Bill Fanter
(or is it Bill and Bob?)

Thursday evening at Glen Oaks

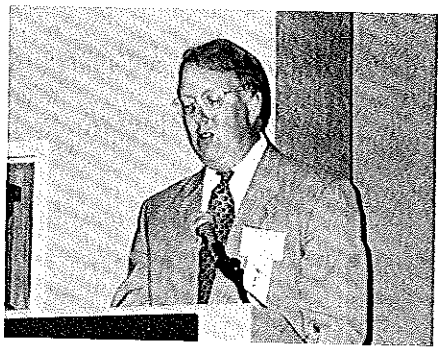
Long-time member
Dean Mitchell and wife Billie

Past President
Lanny Elgar

Neil Sedaka? No, it's
Mark Lagomarcino!

The general consensus is that the 1998 Annual Meeting and Seminar was the best yet! Congratulations to Program Chair, Mark Tripp; as founder Edward F. Seitzinger would say - *you done good!* A special thanks also goes out to all speakers for the excellent information they presented. Pictured below are a few of the speakers:

Justice Mark S. Cady

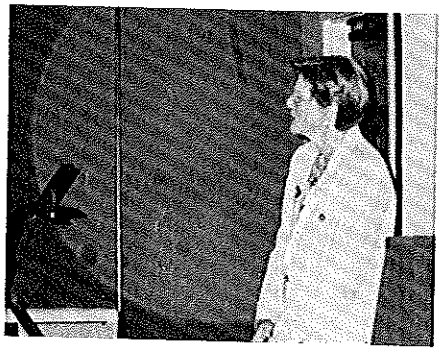


Chief Judge Arthur Gamble

Justice Marsha K. Ternus

Judge Robert W. Pratt

Iris E. Muchmore



Commisioner Iris J. Post

Full attention given to Judge Robert Pratt after lunch Wednesday

James W. Semple, Wilmington, DE

William T. Barker, Chicago, IL

Rick Cornfeld, St. Louis, MO

FROM THE EDITORS

The growing problem of excessive experts' deposition fees is discussed in this issue. On a lesser scale and in a more subtle way, the expense associated with simply obtaining medical records has climbed to a point that it is no longer insignificant. What was once regarded by providers as a necessary inconvenience for which they should receive modest reimbursement has evolved into a revenue source.

Copying charges of $1.00 per page, plus a "retrieval" fee, is now common among larger medical facilities. Prepayment is often required and some larger providers have contracted with outside firms to handle records requests. Higher speed copiers are capable of pumping out in excess of 2000 copies per hour. Because much of the expense not directly related to making copies is typically recouped in the form of a "retrieval" fee, the effective hourly rate charged for copying medical records may well exceed the physician's hourly rate for explaining what they mean in a deposition Things are clearly out of proportion, and with many cases involving thousands of pages of medical records, this is not a trivial concern.

What is the solution? Although no rule specifically addresses the matter of document production fees for parties or witnesses, a reasonableness standard is implicit. Perhaps the most effective way to invoke this standard is to utilize a subpoena duces tecum and challenge the reasonableness of any inflated copying charges. If successfully employed often enough, this approach might bring some fairness to the current 'whatever the market will bear' litigation culture. If we simply go on paying whatever charges we face, they will continue to escalate to a prohibitive level.

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