defense UPDATE

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AN ALTERNATIVE PREJUDICE: Settling Underlying Claims Without Permission

By Ted J. Wallace, Bettendorf, Iowa

Most insurance policies contain language that does not permit the settling of a tort claim without the permission of the claimant's insurer if they have any intention of making an underinsured (UIM) motorist claim. The provision of the insurance policy relative to this issue is often called the consent-to-settle clause. This provision is intended to work hand-in-glove with insurance policy provisions that transfer the rights of the insured to the insurer upon payment of underinsured motorist benefits.[1]

One example of a consent-to-settle clause was at issue in the case of *Kapadia v. Preferred Risk Mut. Ins. Co.*[2] An examination of *Kapadia* and later cases reveal that the Iowa Supreme Court does not permit a literal application of a consent-to-settle clause due to a breach in order to avoid a payment under the insurance policy. Instead, the Court has chosen to focus on the issue of whether or not an insurance company has been prejudiced by the unauthorized settlement.[3] The type of prejudice necessary from the view by the Court seems to be exclusively monetary prejudice.[4] This was seemingly based on a "public policy" type of approach to avoid a possibly harsh effect to a literal interpretation of the clause.[5]

Iowa Court decisions have been consistent in requiring a showing of "actual prejudice" since the *Kapadia* decision. In *Elliot v. Farm Bureau Mut. Ins. Co.*,[6] the Supreme Court reiterated the requirement of "actual prejudice" to an insurer prior to finding a breach of the insurance contract sufficient to possibly void coverage.[7] In *Hale v. Classified Ins. Co.*,[8] the insurer was able to establish that the liable party was a going concern that had assets to satisfy a judgment above the applicable policy limits. There was also no dispute that Hale, the insured, had settled the claim against the underlying tortfeasor without the insurers permission. The question was whether or not the insurer could establish some level of prejudice. The Court found in *Hale* that the tortfeasor had assets from which a subrogation recovery could be lie. Accordingly, the policy coverage for UIM benefits was void due to the breach of the consent-to-settle clause.[9]

Another case addressing the issue was *Grinnell Mut. Reinsurance Co.* v. *Recker.*[10] In *Recker* the insured settled his underlying tort claim without the permission of the insurer. Grinnell contended that this breached both the consent-to-settle and cooperation clauses.[11] The trial court noted that the tortfeasor in this case had sufficient nonexempt assets to pay for damages in excess of that paid by the underlying insurance. Accordingly, the requirement of actual prejudice was met and the UIM lawsuit against Grinnell was dismissed due to the breach of the consent-to-settle clause.

Since the *Kapadia* decision in 1988 the Iowa Court's have taken a consistent and uniform approach to the issue of applying the consent-to-settle clause and the breach of same. Although it seems facially reasonable to limit the question of breach to this issue, the author believes that another argument calling for voiding the UIM coverage exists due to the breach of the consent-

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MESSAGE FROM THE PRESIDENT

Mark L. Tripp

The Rules of Professional Conduct should be amended to permit the following:

1. A lawyer should be permitted to share legal fees with a non-lawyer.
2. A lawyer should be allowed to deliver legal services as part of an association that includes non-lawyers. The members of the association should be allowed to share directly or indirectly in profits derived from the association.

I know the above comments sound like a radical change from the way we practice law in Iowa and before my voice mail starts to fill up let me tell you that the above ideas are not mine. They are, however, part of the recommendations of the American Bar Association Commission on Multidisciplinary Practice. The Commission's recommendations will be presented to the ABA House of Delegates at its annual meeting in Atlanta this August. For a complete copy of the Commission's report check the ABA's web site at www.abanet.org.

The Commission's recommendations deal with the issue of multidisciplinary practice (MDP). A MDP is basically an association owned wholly or partly by non-lawyers with a focus on delivering multiple personal services, including legal services, to a client. A Wal-Mart of the professional service industry, if you will. One stop shopping for professional services including tax advice, financial planning, employment matters, litigation, etc.

Like many lawyers, I just recently became aware of the Commission's work and recommendations. At this point I don't have enough information to know whether MDP's are a good idea or not. I do know that in light of the Commission's recommendations, I took the time to review the Iowa Code of Professional Responsibility for Lawyers. After all, one of the Commission's recommendations reads "All rules of professional conduct that apply to a law firm should also apply to an MDP."

Canon 5 of the Iowa Code of Professional Responsibilities for Lawyers requires that a lawyer exercise independent professional judgment on behalf of a client. Even in the limited time I have had to think about this issue, I can think of numerous scenarios wherein providing legal services through an MDP might cause an erosion of the duty an attorney owes to a client to exercise independent professional judgment. Apparently, the Commission shares those concerns since another of its recommendations states "A lawyer acting in accordance with a non-lawyer's supervisor's resolution of a question of professional duty should not thereby be excused from failing to observe the rules of professional conduct."

The MDP issue is not a plaintiff issue or a defendants' issue. It is an issue that will have an impact on all lawyers. Even if the ABA House of Delegates tables the Commission's recommendations, and requests further study, the MDP issue is not going to go away. Recently, Jay Eaton and Bruce Graves co-authored an article for the Iowa Lawyer, not only summarizing the developing MDP issue but also inviting members of the Bar to contact representatives of the ISBA Board of Governors with their thoughts on this issue. I strongly suggest that you take the time to review the Commission's full report and the Iowa Code of Professional Responsibility for Lawyers and accept the ISBA's offer to be included in this debate. □

SAVING OUR CIVIL JUDICIAL SYSTEM THROUGH ADR

By Peter J. Gartelos, Waterloo, Iowa

In the last several years Alternative Dispute Resolution (ADR) has become "a household word" in the insurance industry and legal profession. Many representatives from both segments firmly believe that the process has the potential of saving our civil judicial system which currently consists of overcrowded courts, runaway litigation costs and most importantly, the uncertainties associated with jury verdicts. All of these factors are of equal concern to both sides of any civil dispute. On the other hand, many view the ADR process as a threat to the integrity of the judicial system and certainly to the "pocket books" of many lawyers. However, ADR and in particular the mediation process is here to stay and anyone participating in the judicial system needs to accept that fact.

Mediation is one of, if not the, most important form of ADR as it not only provides a process to resolve disputes but also provides peace and healing between the parties to those disputes. Mediation is a peacemaking mechanism in existence for resolving differences between disputing parties and for this reason it has a positive impact not only on the principals involved but also to the lawyers and insurance representatives who participate in the process.

Many do not realize that mediation predates the creation of any formal law and can be traced back to the Confucian Chinese who considered "litigation" as "second best" in resolving disputes. It's development in the United States was first associated with the resolution of labor/management disputes and then later developed in our civil judicial process even to the extent of being a mandatory requirement for small claims disputes in many jurisdictions. Today, the mediation process is being utilized in all types of civil disputes from personal injury to the resolution of divorces and involves monetary claims of a few thousand dollars to several million dollars. It is truly revolutionizing our American civil judicial process and for several good reasons:

1. *The Mediation Process Works.* Simply put, the vast majority of all cases mediated are settled or if not settled, the mediation process enhances and many times ultimately leads to final settlement before actual litigation. An experienced mediator who has the ability to utilize the proper techniques applicable to the many situations that can arise in a mediation along with the good faith participation of the parties and their respective representatives should be able to settle through this peacemaking process a minimum of 85% to 90% of all cases mediated. Certainly there are some disputes that simply must be litigated but based on this author's experience, not many.

2. *The Time Factor.* Depending upon the jurisdiction, the average civil lawsuit can take anywhere from 18 months to several years to prepare and ultimately get to trial. On the other handt a mediated settlement of the same case can be completed in one day or less which is a very important and positive factor to all parties, especially in those cases that are mediated at an early stage of the litigation process or even before the case is filed. Getting the dispute behind the parties early in the process is probably one of the most compelling advantages of a mediated settlement which ends the matter and totally eliminates the uncertainties that trials, verdicts, appeals, and retrials can create. The mediated settlement permits both sides to go on with their lives, unencumbered by the stress of further litigation and with at least some sense of victory.

3. *The Expense Factor.* Compared to the cost of extended pre-trial discovery and the trial itself, not to mention the rising costs of medical and other expert opinions, the expenses associated with a one day or less mediation are almost nonexistent. At the time a case is mediated, costs are always a factor even in those cases that are well into the litigation time table. However, costs are especially a factor in those cases that are mediated early in the litigation process or before they are actually filed. The cost factor is especially important to the insurance carriers as the industry well recognizes that mediated settlements eliminate all risks that a case will go to trial and result in an unconscionable verdict for the Plaintiff. In short, mediated settlements not only lower costs in most all circumstances, but also give a guaranteed result to both sides of the controversy.

4. *Mediation is an Equitable and Friendly Process.* It is well recognized that when Plaintiff's counsel presents his case at trial, he "argues" his client's position to the jury. Likewise, defense counsel also "argues" his client's position to the jury making it clear that litigation is an *argumentative* process from opening statements to closing arguments. Mediation on the other hand is a friendly peace-making process and has little room for argument. This is probably the single most important reason why mediation has become so successful in resolving civil disputes as it makes peace and initiates the healing process between the parties.

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DISABILITY DISCRIMINATION CLAIMS & EFFECT OF MITIGATING MEASURES

By Douglas L. Phillips, Sioux City, Iowa

Two common sources of employment related litigation in Iowa are the Iowa Civil Rights Act (ICRA) (IOWA CODE Chapter 216) and the Americans With Disabilities Act (ADA) (42 U.S.C. § 12101, *et seq*).

Under Iowa law, it is an unfair employment practice for a person to "refuse to hire, accept, register, classify, or refer for employment, to discharge any employee, or to otherwise discriminate in employment against any applicant for employment or any employee because of" disability (unless based upon the nature of the occupation). IOWA CODE § 216.6(1)(a). The federal statute provides that: "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a).

In order to establish a prima facie case of disability discrimination under either the state or the federal statute, a plaintiff is required to show: (1) that he is disabled within the meaning of the statute; (2) that he is qualified to perform the essential functions of his job, with or without reasonable accommodation; and (3) that he suffered an adverse employment action because of his disability. *Bearshield v. John Morrell & Co.*, 570 N.W.2d 915, 918 (Iowa 1997) (ICRA); *Buckles v. First Data Resources, Inc.*, 176 F.3d 1098, 1999 U.S. App. LEXIS 11199, pp. 4-5 (8th Cir. 1999) (ADA).

This first element, disability, is frequently a point of contention. "Disability" is defined under the ADA as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 2 U.S.C. § 12102(2). The ICRA defines disability as "the physical or mental condition of a person which constitutes a substantial handicap." IOWA CODE § 216.2(5). "Substantial" limitations are those which leave an individual either unable to perform a major life activity, or those which significantly restrict the condition, manner or duration under which an individual can perform the activity. 29 C.F.R. § 1630.2(j)(1). *Cf.* IOWA ADMIN. CODE § 161-8.26(1) (defining "substantially handicapped" as having a physical or mental impairment which substantially limits one or more major life activities).

In many, if not most situations, the impaired employee uses an assistive device (*e.g.* a hearing aid, glasses or contact lenses), or takes some type of medication, to mitigate his limitations. The issue in many disability discrimination cases is whether, and to what extent, the mitigating effects of medication or other assistive devices may be considered in deciding if one is "disabled" as defined by the statutes.

In *Fuller v. Iowa Department of Human Services*, 576 N.W.2d 324 (Iowa 1998), the Supreme Court of Iowa addressed the question of mitigating measures in the context of an employee suffering from depression.

DHS discharged Fuller from her employment as an income maintenance worker because she had been "nonproductive" for a period of approximately 15 months; a period during which Fuller was frequently absent from work, on medical leave and under the care of a psychiatrist. Fuller filed suit, alleging discrimination based upon disability.

After a bench trial, the district court entered judgment for the employer, finding that plaintiff was not disabled because her depression could be controlled with medication; and that while on this medication, (Prozac), plaintiff's depression did not substantially impact any major life activity. Plaintiff appealed, claiming among other things that the district court should not have considered the mitigating effects of her medication in deciding whether she was disabled. 576 N.W.2d at 325-328.

In this case of first impression, the Court adopted a "common-sense approach to analyzing whether an impairment substantially limits a major life activity." *Id.* at 333.

> We thus hold that in a disability discrimination case, a fact finder *may not* consider the mitigating effects of medication or assistive devices in determining *the existence of an impairment,* but that the mitigating effects of medication or other assistive devices *may be considered* in determining whether the *impairment substantially limits a major life activity.*

Id. (emphasis in original).

The Court explained its holding as follows:

> To conclude otherwise would in effect allow plaintiffs to bypass the substantially limiting requirement. This result would also directly conflict with the ADA's statutory requirement that a disability-discrimination-plaintiff prove his or her impairment substantially limits a major life activity. Fuller cannot have it both ways. For example, without medication, Fuller's depression would substantially limit her ability to work or to care for herself, in which case she would not be able to perform the essential functions of her job and thus would not be qualified for her position. Conversely, with the assistance of medication, Fuller's depression does not

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RECENT WORKERS' COMPENSATION CASES OF INTEREST

By Suzan E. Boden, Sioux City, Iowa

Aurora Marin v. DCS Sanitation and Crawford & Co.
Third Party Recovery and Allocation of Attorney Fees and Costs Between Employer, Workers' Compensation Carrier and Claimant.

Aurora Marin, claimant, is the surviving spouse of Lorenzo Marin who was killed on February 12, 1992 in an accident arising out of and in the course of his employment with DCS Sanitization. Weekly workers' compensation surviving benefits were paid by DCS Sanitization.

Subsequently, claimant obtained a recovery of $484,406.00 from a third party for Lorenzo's wrongful death. Pursuant to the employer and insurance carrier's right of indemnification and lien rights under Iowa Code Section 85.22(1), employer and carrier sought recoupment from the third-party recovery for past workers' compensation benefits paid and a credit against future benefits.

The employer and carrier, with respect to the recoupment of benefits already paid, reduced their claim by a proportionate share of the costs and attorney fees incurred by plaintiff in obtaining the third-party recovery. However, the employer and carrier refused to contribute an additional sum towards claimant's costs and attorney fees based on their intended reduction of future workers' compensation benefits as a result of the third-party recovery.

After hearing, the Deputy Industrial Commissioner required further contribution by the carrier and employer towards claimant's attorney fees and costs in the third-party proceeding as a result of the future reduction of workers' compensation payments due to the third-party recovery. The Industrial Commissioner reversed that decision and stated:

> The only amount subject to indemnification is the amount which the claimant is able, figuratively, to put in his or her own "pocket." The amount put in claimant's own pocket has already been reduced by attorney fees and a pro rata share of costs. To hold otherwise would result in double recovery for claimant or claimant's attorney.

Claimant then filed a Petition for Judicial Review and the district court reversed the Industrial Commissioner. In challenging the district court's ruling, the employer and insurance carrier stated that the commissioner's conclusions concerning double recovery were well taken. Claimant, on the other hand, argued that the district court's decision merely provided for an equitable allocation of the costs of the third-party recovery while the commissioner's ruling grants a windfall to the employer and carrier .

The supreme court was unable to ascertain any double recovery that would result from granting claimant's request that the employer and insurance carrier make an additional contribution toward her attorney fees and costs in the third-party litigation. "These attorney fees and costs have been paid once and will not be paid again. That payment has been made by claimant except for a pro rata contribution by respondents based on the amount of workers' compensation benefits recouped from the third-party recovery up to a particular point in time. Not taken into account in that calculation were future workers' compensation obligations of which respondents will be relieved as a result of the third-party recovery." *Id.*

Continuing on, the supreme court opined that if the employer and insurance carrier were not required to contribute a proportionate share of attorney fees and costs incurred in obtaining the portion of the third-party recovery that will be credited against future workers' compensation obligations, the claimant will have paid a disproportionate share of those costs. *See also Ewing v. Allied Construction Services,* ___ N.W.2d, ___, (Iowa 1999), where the supreme court determined that it is the obligation of the employer or insurer to contribute toward the cost of bringing the third-party action in proportion to the benefits received. The ruling of the district court was affirmed.

The supreme court also noted that although *Ewing* approved a rule in which the employer or insurance carrier's liability to contribute to the cost of the third-party recovery accrued over time as the future workers' compensation benefits were accruing, a stipulation of the parties in the present case authorized an order for lump sum payment of an agreed amount should the claimant prevail on the merits.

Myers v. F.C.A. Services, Inc.,
592 N.W.2d 354 (Iowa 1999)
Factors to Consider When Determining the Termination of Healing Period.

Claimant, Kevin Myers, was employed by Fiber Control Asbestos Services (FCA) as an asbestos abatement worker. Shortly after Myers began working for FCA he sustained an injury to his lower back and sought and received workers' compensation benefits. Following an appeal process, Myers assigned three errors to the supreme court from the district court's affirmance of his

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CASE NOTE SUMMARY
INSURER'S DUTY TO DEFEND

By Angela A. Swanson, West Des Moines, Iowa

Stine Seed Farm, Inc. v. Farm Bureau Mut. Ins. Co.
Comments on an insurer's duty to defend in light of a recent Iowa Supreme Court decision.

One of the more frequently litigated issues in insurance law today is whether, in a specific case, an insurer's duty to defend is implicated by a third-party's claims against its insured. The Iowa Supreme Court has addressed this issue several times in the last ten years and just recently, in addressing it once more, reaffirmed the age-old principle that cases rise or fall based on their facts. In *Stine Seed Farm, Inc. v. Farm Bureau Mut. Ins. Co.*, 591 N.W.2d 17 (Iowa 1999), the Court held that the facts in a plaintiff's petition determine whether the duty to defend arises, regardless of the legal nomenclature under which the suit is brought.

It is well known that the duty to defend is broader than the duty to indemnify. *A. Y. McDonald Indus., Inc. v. Insurance Co. of N.A.*, 475 N.W.2d 607, 627 (Iowa 1991). It logically follows that where there is no duty to defend, there can be no duty to indemnify. *Stine Seed,* 591 N.W.2d at 18. Thus, the initial question debated in courtrooms across the state in these cases is whether the insurer must defend its insured against the third-party's claims.

In *McAndrews v. Farm Bureau Mut. Ins. Co.*, 349 N.W.2d 117 (Iowa 1984) (en banc), the Iowa Supreme Court summarized Iowa law on an insurer's duty to defend and stated an insurer's "duty to defend arises whenever there is a potential or possible liability to pay based on the facts at the outset of the case." The Court further explained the facts at the outset of the case are those alleged in the petition against the insured. The Court recognized that under notice pleading there will sometimes be too few facts upon which to adequately assess an insurer's duty to defend and, accordingly, instructed courts (and, by implication, insurers) to also look at "any other admissible and relevant facts in the record." Two recent Iowa cases demonstrate the application of *McAndrews* in situations where a dispute exists over the duty to defend.

In *First National Bank v. Fidelity & Deposit Co.*, 545 N.W.2d 332 (Iowa Ct. App. 1996), a bank brought suit against its insurers for failure to defend the bank in a lawsuit arising out of a credit arrangement that went awry. The third party alleged the bank had breached a written contract and an implied contract of good faith and fair dealing and that the bank's actions were intentional. After successfully defending the suit, the bank sought to recover its legal expenses from its insurers. The insurers contended there had been no occurrence, as defined in the policies, and that coverage was excluded for damages resulting from intentional acts of the insured. The plaintiff's claim was based on breach of contract and no facts at the outset of the trial indicated that a negligence action would be pursued.

The Court of Appeals affirmed the trial court's grant of summary judgment in favor of the insurers based on the factual allegations in the petition, all of which claimed the bank had acted intentionally throughout the course of conduct giving rise to litigation. Nevertheless, the bank argued that, because of notice pleading and Iowa's liberal policy of allowing amendments to petitions, the plaintiff could have added a negligence claim later in the suit. The court rejected the bank's argument and stated that an insurer is "not required to give a defense when there are no facts presently available to it which indicated coverage, merely because such facts might later be added by amendment or introduced at trial."

In *Employers Mut. Cas. Co. v. Cedar Rapids Television Co.*, 552 N.W.2d 639 (Iowa 1996) (en banc), the Court considered whether an insurer's duty to defend could be "untriggered" after the plaintiff in the suit against its insured (CRTV) withdrew the only claim explicitly covered by the insured's liability policy. Originally, the plaintiff sued CRTV for tortious interference with an existing contract, abuse of process, malicious prosecution, and intentional infliction of emotional distress. These claims arose out of CRTV's attempts to prevent a license assignment from a television station to one of CRTV's competitors. The plaintiff later withdrew its claim for malicious prosecution – the claim that gave rise to the insurer's duty to defend. The Court formulated the issue as "whether an insurer has a duty to defend an action brought by a plaintiff based on a theory of recovery not mentioned among those listed for coverage in the policy, when the operative facts contain allegations of conduct expressly covered in the policy."

In its analysis, the Court again referred to the principles it set forth in *McAndrews:* an insurer is "to look at the allegations of fact in the third-party plaintiff's petition against the insured and not the legal theories on which the third-party claims the insured is liable." The Court found the duty to defend remained after the malicious prosecution claim was

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to-settle clause. Specifically, by settling an underlying tort claim without the permission, the insurer has lost the ability to substitute a payment equivalent to the underlying insurance limits in order to maintain the lawsuit against an individual instead of an insurance company and to preserve its rights of subrogation.

In the *Recker* decision, the Iowa Supreme Court recognized the right of an insurer to "protect its contingent subrogation rights by tendering an amount equal to the tortfeasors' settlement offer and substituting its payment for that offer." [12] Essentially, when an insurer gives permission to settle an underlying tort action, it is in exchange for a full and complete release of the tortfeasor. By issuing such a release, any potential subrogation rights of the insurer, which necessarily stem from the insured, will be lost. The issuance of a substitute draft will prevent the granting of a release to the tortfeasor–and thereby preserve whatever subrogation rights might exist.

A second benefit to the substitution of a draft is that any future claims, should the allegations of damages being sought by the insured exceed the underlying tortfeasors limits, is that the claim will continue against the individual tortfeasor and not against the insurer directly. The potential benefit here will not be lost upon even the most casual observer. It would seem incontrovertible that a defense attorney would rather have for a client an individual as opposed to an insurance company. This seems particularly true for jury trials. Indeed, Iowa courts have seemingly recognized this truth by generally prohibiting introduction of liability insurance at trial.[13]

The purposes for prohibiting the introduction of liability insurance at trial generally falls into three categories: (1) such evidence is irrelevant, (2) such evidence tends to influence jurors to bring in a verdict based upon insufficient evidence, and (3) such evidence tends to create larger verdicts.[14] The second and third stated purposes are particularly important to the egos of defense attorneys. In addition, the Supreme Court recently reiterated the third purpose in *Handley v. Farm Bureau Mut. Ins. Co.*[15] and in *Waits v. United Fire & Casualty Co.*[16]

By allowing an insurer to substitute a draft for the underlying insurance policy limits, a trial would then proceed against the underlying tortfeasor without the prejudicial baggage which inures to an insurance company defendant. When an insured settles the underlying claim without permission of the insured, regardless of the "actual prejudice" caused by the monetary issue, there remains the additional prejudice against the insurer of not being afforded the opportunity to substitute it's draft. This argument would seemingly give more "bite" to the actual language of the insurance policy and require insureds to follow the language of the policy in order to secure those benefits to which they believe they may be entitled.□

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[1]Most insurance policies contain language that will allow the insurer the right to attempt recovery against an individual causing the insurer to make a payment under the policy. These are commonly called "subrogation" clauses.

[2]418 N.W.2d 848 (Iowa 1988). In *Kapadia*, the exact language of the clause was as follows: "This insurance policy does not apply: . . . b. to bodily injury to an insured with respect to which such insured, his legal representative or any other person entitled to payment under this insurance, shall, without written consent of the company, make any settlements with any person or organization who may be legally liable therefore...."

[3]In *Kapdia*, for example, the actual validity of the consent-to-settle clause was upheld. However, the analysis did not end there. Instead, the approach adopted, along with some other jurisdictions, is that the insurer must show prejudice before the breach can be used to potentially deny coverage. *See Prudential Property & Casualty Ins. Co. v. Nayerhamadi*, 593 F.Supp. 216 (E.D.Pa. 1984); *Marsh v. Prestige Ins.Group*, 58 Ill. App.3d 894, 16 Ill. Dec. 390, 374 N.E.2d 1268 (1978); *MacInnis Aetna Life & Casualty Co.*, 403 Mass. 220, 526 N.E.2d 1255 (1988); *Silvers v. Horace Mann Ins. Co.*, 324 N.C.289, 378 S.E.2d 21 (1998). Other courts have determined from the outset that the consent-to-settle clause is in violation of their respective public policies. *See e.g. Longworth v. Van Houten*, 223 N.J.Super. 174, 538 A.2d 414 (N.J.Super.Ct.App.Div. 1988); *Schmidt v. Clothier*, 338 N.W.2d 256 (Minn. 1983); *Elovich v. Nationwide Ins. Co.*, 104 Wash.2d 543, 707 P.2d 1319 (Wash. 1985); *Dairyland Ins. Co. v. Lopez*, 22 Ariz. App. 309, 526 P.2d 1264 (Ariz.Ct.App. 1974); *Muir v. Hartford Accident and Indem. Co.*, 147 Vt. 590, 522 A.2d 236 (Vt. 1987). Finally, at least one court has held that their is no need for the insurer to show prejudice to enforce the consent-to-settle clause. *See Estate of Harry v. Hawkeye Security Ins. Co.*, 972 P.2d 279 (Colo.App. 1998).

[4]"[W]e hold that the insurer may establish the breach of the consent-to-settle clause as an affirmative defense to recovery on the underinsurance endorsement if it proves that, absent such a breach, it could have collected from the tortfeasor under its rights embraced by the contractual subrogation clause." *Kapadia*, 418 N.W.2d at 852.

[5]While recognizing the technical presence of a breach of contract in *Kapadia*, the Court found strict application without proof of prejudice to the insurer inconsistent with the established public policy of full underinsured motorist compensation as established in cases such as *American States Ins. Co. v. Tollari*, 362 N.W.2d 519, 522 (Iowa 1985).

[6]494 N.W.2d 731 (Iowa 1992).

[7]494 NW.2d at 733.

[8]535 N.W.2d 164 (Iowa App. 1995).

[9]535 N.W.2d at 168.

[10]561 N W.2d 63 (Iowa 1997).

[11]A "cooperation" clause is typically found in most, if not all, insurance policies. Its purpose is to prevent collusion by an insured with a tortfeasor and to require the insureds assistance in the defense of claims made against the insureds insurance policy. *Recker*

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recognized that standard automobile policies contained a duty of cooperation on the part ofthe insured. 561 N.W.2d at 68.

[12]561 N.W.2d at 70.

[13]In *Laguna v. Prouty*, 300 N.W.2d 98 (Iowa 1981), for example, it was noted that an intentional reference to insurance could not be cured by an instruction to disregard. In addition, Iowa Rules of Evidence have prohibited the introduction of proof of insurance with regard to negligence. *See* Ia.R.Ev. 411 (Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully.")

[14]*See Mihalovich v. Appanoose County*, 217 N.W.2d 564, 567 (Iowa 1974). Some would argue that the introduction of insurance information is no longer relevant because of the general requirements to maintain insurance and that "everybody has" insurance. Even if no one else agrees, the author would maintain that it is still eminently easier to defend an individual as opposed to a corporate entity.

[15]467 N.W.2d 247, 250 (Iowa 1991)("It is, however, likely that evidence of insurance will cause the jury to return a larger verdict against Rogier than it would have if it were unaware that insurance existed and the amounts thereof.")

[16] 572 N.W.2d 565 (Iowa 1997).

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Generally speaking, if the mediator can get the parties on one side of the dispute to listen to and understand (not necessary agree with) the concerns of the other side, and just as importantly if the mediator can get the other side to listen to and understand the concerns of the other, the case will most always settle. Unfortunately, our American legal system today pits lawyer against lawyer in courtroom battles where winning is everything leaving their respective clients "caught" right in the middle with those clients having no conception of how vicious and ugly these battles can become or the price they will pay in terms of stress, frustration, and fear before the process is concluded. Whether they are winners, losers, or something in between, few persons having gone through a trial will describe it as a "positive" process or one they ever want to experience again.

On the other hand, mediation being a peacemaking/friendly process, is not a battle between advocates where the winner takes all. It is literally the opposite end of the scale from litigating the issues at trial where the goal is "winning at all costs" for each party. Mediation being the "user friendly" process that it is, has the goal of not winning for one party or the other, but to strive for a mutual settlement on behalf of both parties, i.e., a "win win" situation. The ultimate goal during a mediation is to heal and find peace between the parties making all participants the winners when the process concludes and the case settles.

As indicated above, ADR and in particular the mediation process is here to stay as a user friendly system for resolving disputes. It has provided both lawyers and insurance carriers a refreshing alternative in the resolution of disputes that has been proven to be extremely successful and cost effective. □

DISABILITY DISCRIMINATION CLAIMS. . . *Continued from page 4*

substantially limit her ability to work or to care for herself, and thus she is not disabled.

Id.

Thus, after *Fuller,* courts analyzing disability discrimination claims under the ICRA may not consider the mitigating effects of a medication like Prozac on a condition such as depression, in deciding whether a physical or mental impairment exists; but they may consider the effect of medications such as Prozac in deciding whether the depression substantially limits a major life activity.

On June 22, 1999, the Supreme Court decided *Sutton v. United Air Lines, Inc.*, and *Murphy v. United Parcel Service, Inc.* Each involved claims under the ADA; and each addressed the issue of whether to consider mitigating measures in deciding if an individual is disabled.

In *Sutton*, 67 USLW 4537, 1999 US LEXIS 4371, petitioners suffered from severe myopia. With the benefit of corrective lenses, however, they enjoyed 20/20 vision. They applied for work as commercial airline pilots, but were not hired because they did not meet respondent's minimum

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DISABILITY DISCRIMINATION CLAIMS. . . *Continued from page 8*

vision requirement. Petitioners brought suit under the ADA, claiming disability discrimination. The district court dismissed petitioners' claims, holding that they were not substantially limited in any major life activity, because they could fully correct their visual impairment. The Tenth Circuit Court of Appeals affirmed.

The Supreme Court held "that the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual's impairment, including, in this instance, eyeglasses and contact lenses." 1999 US LEXIS 4371, p. 9. The Court explained:

> We conclude that respondent is correct that the approach adopted by the agency guidelines–that persons are to be evaluated in their hypothetical uncorrected state–is an impermissible interpretation of the ADA. Looking at the Act as a whole, it is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures–both positive and negative–must be taken into account when judging whether that person is "substantially limited" in a major life activity and thus "disabled" under the Act.

1999 US LEXIS 4371, pp. 20-21.

In *Murphy v. United Parcel Service, Inc.*, 67 USLW 4549, 1999 US LEXIS 4370, respondent dismissed petitioner because he suffered from high blood pressure. Petitioner brought suit under the ADA, claiming disability discrimination. The district court granted summary judgment for the employer, and the Tenth Circuit affirmed. The Supreme Court granted *cert.* to consider "whether the Court of Appeals correctly considered petitioner in his medicated state when it held that petitioner's impairment does not 'substantially limit' one or more of his major life activities ...." 1999 US LEXIS 4370, pp. 5-6. Consistent with its earlier holding in *Sutton*, the Supreme Court affirmed, stating: "[T]he determination of petitioner's disability is made with reference to the mitigating measures he employs." 1999 US LEXIS 4370, p 9.

The apparent difference in analytical approaches under the state and federal statutes lies in *Fuller's* consideration of whether the individual is impaired, without regard to the effects of mitigating measures. No case since *Fuller* has discussed this prong of the analysis. It is difficult to predict whether, with a given set of facts, the *Fuller* test under the ICRA could lead to different results than an application of the *Sutton/Murphy* test under the ADA.

Traditionally, when Iowa courts have considered claims under the ICRA, they have looked to the ADA and to cases interpreting its language, because of the similarity of the legal principles and analytical framework. *See, e.g, Howell v. Merritt Co.*, 585 N.W.2d 278, 280 (Iowa 1998). The holding by the Court in *Fuller* may have marked the beginnings of a departure from that philosophy. At the time *Fuller* was decided, the Eight Circuit Court of Appeals had considered, but rejected a similar analysis. *Doane v. City of Omaha*, 115 F.3d 624, 627 (8th Cir. 1997) ("[O]ur analysis of whether he is disabled does not include consideration of mitigating measures.")

The remaining question is whether, in light of *Sutton* and *Murphy*, the Iowa Court will revisit the ADA, or further distance itself from federal interpretations of seemingly similar statutes. The answer to that question will have to await the appropriate case under the ICRA. ❐

WELCOME NEW MEMBERS

James H. Cook
Waterloo, Iowa

Beth E. Hansen
Waterloo, Iowa

Joseph T. Moreland
Iowa City, Iowa

Chris J. Scheldrup
Cedar Rapids, Iowa

David E. Brown
Iowa City, Iowa

RECENT WORKERS' COMPENSATION CASES OF INTEREST. . . . *Continued from page 5*

award. Myers found fault with the district court for justifying the industrial commissioner's 45% award, (and not 54.5% to 67.5%); by considering, among other things, two factors. The first, Myers' unwillingness to participate in physical therapy which might have reduced his disability, and secondly, jobs existed in the metropolitan areas which he might have been able to perform.

The reviewing court noted that the record supports the findings that Myers was unwilling to undergo physical therapy, and that physical therapy might have lessened his disability. Myers, however, did correctly point out that a worker's earning capacity is determined on the basis of that worker's community or residence. Myers at 357, citing *Guyton v. Irving Jensen Co.*, 373 N.W.2d 101, 104-05 (Iowa 1985).

In his second assignment of error, Myers requested that the court rule that IOWA CODE §85.34(2)(u) requires an award of lifetime expectancy benefits for all injured workers who suffer permanent, partial disabilities. The supreme court was convinced that the commissioner's interpretation was demanded by the clear wording of IOWA CODE § 85.34(2)(u) and they were not inclined to depart from this interpretation in the absence of legislative amendment.

Myers third and final challenge to the commissioner's findings was the date upon which it was determined the healing period ended, July 21, 1994. This date was selected pursuant to IOWA CODE § 85.34(1) which provides that the commissioner is required to fix the date when "it is medically indicated that significant improvement from the injury is not anticipated."

The supreme court noted the commissioner's findings that Myers could have helped his recovery by good faith past participation in physical therapy did not bar her separate finding that he subsequently reached maximum medical improvement. The two findings did not relate to events in a time vacuum. The physical therapy finding looked to what Myers could have done prior to July 21, 1994 to improve himself. The second finding merely indicates that by that date Myers - perhaps partly as a result of his nonparticipation, had stopped improving physically. *Id.* at 358.

In addition, the commissioner found that on July 21, 1994, Richard M. Salib, M.D., rated claimant at 10 to 12% of the body as a whole. July 21, 1994 was also found as the date Myers had reached maximum medical improvement.

Accordingly, the commissioner concluded that the doctor's willingness on July 21 to rate Myers' impairment was an indication that maximum medical improvement had been reached. This indication was also supported by the fact that as early as April 6, 1994, some fourteen weeks prior to the challenged termination date, Myers informed the doctor he felt ready to resume light duty work. *Id.* at 359.

A significant portion of claimant's factual recitation on this issue also eludes to extreme pain he suffered. When construing IOWA CODE § 85.34(1), the Court found that the persistence of pain may not itself prevent a finding that the healing period is over, provided the underlying condition is stable. *Myers* at 359, citing *Pitzer v. Rowley Interstate*, 507 N.W.2d 389, 391 (Iowa 1993). "Stability is gauged in terms of industrial disability. If, however, it is not likely that the treatment of continuing pain, however soothing to the claimant, will decrease the extent of permanent industrial disability, then continued pain management should not prolong the healing." Pitzer at 392. The fact that a claimant continues to experience pain does not necessarily extend the healing period. *Myers* at 359.

In Re Marriage of Carr, 591 N.W.2d 627 (Iowa 1999) Analysis of Workers' Compensation Payments Subject to Garnishment for Past Due Child Support.

Mr. Lex Parr appealed from a district court ruling concerning the amount to be withheld from his workers' compensation settlement for application to his child support obligation. The primary issue is what amount of his settlement is exempt from garnishment pursuant to IOWA CODE § 627.13 (1997). The Court concluded that 50% of the settlement was subject to garnishment but affirmed the district court's award of a lesser amount. They did this because the Child Support Recovery Unit which sought to enforce the child support order did not appeal.

The Child Support Recovery Unit (CSRU) filed an order for mandatory income withholding requiring Lex's employer or other income provider to deduct from his income $30.00 per week for current child support and to deduct an additional amount of $23,206.00 as a lump sum payment of delinquent child support due and owing as of July 25, 1996. The Child Support Recovery Unit served the order on Monfort, Inc., Lex's employer.

Subsequently, Lex and Monfort reached a special case agreement for $7,500.00 regarding his workers' compensation claim. Monfort issued a settlement check for $7,500.00 payable to Lex, his attorney, and the Iowa Department of Human Services.

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RECENT WORKERS' COMPENSATION CASES OF INTEREST. . . . *Continued from page 10*

Lex then filed in district court a "Motion to Determine Child Support Due and Amount of Child Support Lien." The district court ordered that $3,487.67 of the $7,500.00 settlement be delivered to the CSRU and the balance of $4,012.33 be delivered to Lex and his attorney for payment of attorney fees, costs, and repayment of a Title XIX claim. Basically, the court deducted attorney fees, costs and the Title XIX claim from the $7,500.00 settlement to arrive at the amount available for the child support delinquency. On appeal, Lex contended the district court should have deducted the costs, attorney fees and the Title XIX claim from the $7,500.00 and then should have divided the balance between the Child Support Recovery Unit and himself. Under this theory, Lex would have received $1,743.83 and CSRU would have received a like amount.

Although CSRU did not appeal the court's order, it too contended the district court did not correctly determine how the award should be divided. CSRU is contending that one-half of the award should have gone towards child support and the balance to Lex. Under this calculation, CSRU would have received $3,750.00 and the remaining $3,750.00 should have gone to Lex and his attorney for payment of fees, costs and the Title XIX claim. This calculation would have left Lex with nothing because the attorney fees, costs and Title XIX claim totalled more than $3,750.00 than he would have received.

The applicable statute here is IOWA CODE § 627.13. Under this provision, workers' compensation benefits are exempt from garnishment, execution, and assignment of income. Child support, however, is one exception. *Carr* at 629. In addition, 15 U.S.C. §1673(b), imposes a limitation on such benefits subject to garnishment. The federal statute is part of the Federal Consumer Protection Act. The primary purpose of this Act is to limit the "ills which flowed from the unrestricted garnishment of wages." *Carr* at 629 citing *Koethe v. Johnson,* 328 N.W.2d 293, 296 (Iowa 1982). "The Act provides the minimum protection afforded a debtor and must yield to any state that provides stricter laws."

Pursuant to 15 U.S.C. §1673(b):

> (2) The maximum part of the aggregate disposable earnings of any individual . . . which is subject to garnishment to enforce any order for the support of any person shall not exceed –
>
> (A) where such individual is supporting his spouse or dependent child (other than a spouse or child with respect to whose support such order is used), 50 per centum of such individual's disposable earnings . . ..

The court, when analyzing the construction of § 627.13, held the attorney fees, costs, and Title XIX claim would not be deducted from the lump sum settlement before applying the Act's 50% limitation of garnishment. Therefore, the district court should have applied the 50% limitation to the $7,500.00 lump sum settlement. This calculation would have resulted in 50% of the settlement being available for delinquent child support under the withholding order. The remaining 50% would not have been subject to the order. The court's construction of § 627.13 was faithful to the principle that "legislature places the highest priority on a child's right to receive parental support." *Carr* at 630, citing *In Re Marriage of McMorrow,* 342 N.W.2d 73, 76 (Iowa 1982) □

CASE NOTE SUMMARY – INSURERS' DUTY . . . *Continued from page 6*

withdrawn because the petition contained factual allegations, which if proven would support a claim for malicious prosecution. The Court concluded by noting "insurance coverage is predicated on the assessment of risk involved should the insured participate in a particular type of conduct and not the risk of the plaintiff's choice of legal theories."

These decisions were the background for the Court's decision in *Stine Seed.* The insured in *Stine Seed* argued that the legal nomenclature in the plaintiff's petition alone could trigger the duty to defend. Several third-parties brought suit against Stine, the insured, after Stine repudiated several seed purchase contracts made on its behalf by one of its agents, even though it had accepted

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1999 IOWA DEFENSE COUNSEL ASSOCIATION ANNUAL MEETING PROGRAM

Wednesday, September 22 through Friday, September 24; Embassy Suites Hotel, Des Moines, Iowa. **Please register early – our hotel room cut off date is September 6!** If you call after that date and a room is available, be sure and ask for the IDCA room rate. Non-members many contact James A. Pugh at 515-225-5410 for registration materials. *Please note Wednesday evening's reception will be held at Terrace Hill, the Iowa Governor's residence. Join us for what promises to be a very enjoyable evening!*

WEDNESDAY, SEPTEMBER 22, 1999

9:00 a.m. **Registration**

11:00 a.m. **Board of Directors Meeting**

1:00 - 1:15 p.m. **Welcome & Report of the Association**
- IDCA President, Mark L. Tripp
Bradshaw, Fowler, Proctor & Fairgrave, P.C.
Des Moines, Iowa

1:15 - 1:35 p.m. **Supreme Court Update**
- Hon. Arthur A. McGivern
Chief Justice, Iowa Supreme Court

1:35 - 2:15 p.m. **Defending the Products Liability Claim**
- Kevin M. Reynolds
Whitfield & Eddy, P.L.C.
Des Moines, Iowa

2:15 - 2:45 p.m. **Ethical Issues Relating to Third-Party Audits of Defense Counsel**
- John McCoy
Yagla, McCoy & Riley
Waterloo, Iowa
- Sam Watters
Continental Western Insurance Co.
Des Moines, Iowa

2:45 - 3:15 p.m. **Workers' Compensation Update**
- Honorable Iris Post
Iowa Industrial Commissioner

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

3:30 - 4:00 p.m. **Recent Developments in the Duty to Defend**
- Wendy N. Munyon
Grinnell Mutual Re-Insurance Co.
Grinnell, Iowa

4:00 - 5:00 p.m. **Representing the Insurance Company - UM/UIM/Bad Faith/Dec Actions**
- Anne M. Henry
American Family Insurance
Bettendorf, Iowa
- Patrick L. Woodward
McDonald, Stonebraker, Cepican & Woodward, P.C.
Davenport, Iowa

5:30 - 8:00 p.m. **Reception - Terrace Hill**
Iowa Governor's Residence
2300 Grand Avenue, Des Moines
(Dinner on your own)

THURSDAY, SEPTEMBER 23, 1999

8:30 - 9:00 a.m. **Ethical Considerations in Serving as Local Counsel**
- Richard G. Santi
Ahlers, Cooney, Dorweiler, Haynie, Smith & Albee, P.C.
Des Moines, Iowa

9:00 - 9:45 a.m. **Defending Commercial Litigation Claims**
- Stephen J. Holtman
Simmons, Perrine, Albright & Elwood, P.L.C.
Cedar Rapids, Iowa

9:45 - 10:15 a.m. **Legislative Update**
- Robert Kreamer
IDCA Legislative Lobbyist
Des Moines, Iowa

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

10:30 - 11:00 a.m. **Investigating Bad Faith Claims**
- Les V. Reddick
Kane, Norby & Reddick, P.C.,
Dubuque, Iowa

11:00 - 11:30 a.m. **Plaintiff's Theories in Employment Cases**
- Kevin J. Visser
Moyer & Bergman, P.L.C.,
Cedar Rapids, Iowa

11:30 - 12:00 p.m. **Defending the Employment Claim**
- Mark L. Zaiger
Shuttleworth & Ingersoll, P.C.,
Cedar Rapids, Iowa

12:00 - 12:30 p.m. **LUNCH - Embassy Suites Hotel**

12:30 - 1:00 p.m. **Views from the Court of Appeals**
- Hon David R. Hansen
Judge, United States 8th Circuit Court of Appeals

1:00 - 1:30 p.m. **Medicine for Lawyers**
- Charles T. Patterson
  Heidman, Redmond, Fredregill, Patterson, Plaza & Dykstra, L.L.P.
  Des Moines, Iowa

1:30 - 2:15 p.m. **Evidentiary Issues Relating to Recovery from Collateral Sources**
- Thomas D. Hanson
  Hanson, Bjork & Russell, L.L.P.
  Des Moines, Iowa

2:15 - 2:45 p.m. **Daubert/Kumho Update**
- Michael W. Thrall
  Nyemaster, Goode, Voights, West, Hansell & O'Brien, P.C.
  Des Moines, Iowa

2:45 - 3:15 p.m. **Court of Appeals Update**
- Honorable Van Zimmer
  Judge, Iowa Court of Appeals

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

3:30 - 5:00 p.m. **Case Law Update**
- Danette L. Kennedy
  Whitfield & Eddy, P.L.C.
  Des Moines, Iowa
- Jason Madden
  Bradshaw, Fowler, Proctor & Fairgrave, P.C.
  Des Moines, Iowa
- Paul Morf
  Simmons, Perrine, Albright & Ellwood, P.L.C.
  Cedar Rapids, Iowa

5:00 - 5:30 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 to 7:30 p.m. - Reception
7:30 p.m. - Banquet

FRIDAY, SEPTEMBER 24, 1999

7:45 - 8:30 a.m. **Board of Directors Meeting**

8:30 - 9:00 a.m. **Valuing Complex Plaintiff's Cases**
- Roxanne B. Conlin
  Roxanne B. Conlin & Associates, P.C.
  Des Moines, Iowa

9:00 - 9:20 a.m. **Defending Claims for Economic Damages - Recent Developments**
- Richard S. Fry
  Shuttleworth & Ingersoll, P.C.
  Cedar Rapids, Iowa

9:20 - 9:45 a.m. **Premises Liability Update**
- Michael W. Ellwanger
  Rewlings, Nieland, Probasco, Killinger, Ellwanger, Jacobs & Mohrhauser
  Sioux City, Iowa

9:45 - 10:15 a.m. **Ethical Issues in Conflicts of Interest**
- David L. Brown
  Hanson, McClintock & Riley
  Des Moines, Iowa

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

10:30 - 11:00 a.m. **Defending the School District and the Municipality**
- Matthew G. Novak
  Pickens, Barnes & Abernathy
  Cedar Rapids, Iowa

11:00 - 11:30 a.m. **Ethical Considerations in Adopting the Model Rules of Professional Conduct**
- John M. French
  Peters Law Firm, P.C.
  Council Bluffs, Iowa

11:30 - 12:00 p.m. **Factual and Legal Research - on the Internet**
- Lori E. Iwan
  Iwan, Cray, Huber, Horstman & VanAusdal, L.L.C.
  Chicago, Illinois

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

12:30 - 1:00 p.m. **Long Range Planning Committee Report**
- Mark L. Tripp
  Bradshaw, Fowler, Proctor & Fairgrave, P.C.
  Des Moines, IA
- J. Michael Weston
  Moyer & Bergman, P.L.C.
  Cedar Rapids, Iowa

1:00 - 2:30 p.m. **The Art of Jury Selection**
- Patrick M. Roby
  Elderkin & Pirnie, P.L.C.
  Cedar Rapids, Iowa
- Thomas Sannito, Ph.D.
  Forensic Psychologists
  Dubuque, Iowa
- Robert V.P. Waterman, Jr.
  Lane & Waterman
  Davenport, Iowa

CASE NOTE SUMMARY – INSURERS' DUTY . . . *Continued from page 11*

delivery of the seeds. The agent was sentenced to a prison term for fraud in connection with the seed dealings. In their petition, the third-parties set forth factual allegations supporting a breach of contract claim. The other counts of conversion, unjust enrichment, joint venture or partnership, and negligence, each incorporated the allegations of the breach of contract count. Each count derived from Stine's refusal to pay under the contracts its agent had negotiated.

The insurance policy covered Stine for property damage or bodily injury caused by an "occurrence" (an accident that was not expected or intended from the standpoint of the insured). Coverage was also explicitly excluded for damages caused by failure to perform contracts.

The insurer asserted that it had no duty to defend because there were no factual allegations in the third-parties' petition that could potentially activate its duty to indemnify its insured. Stine argued that the duty to defend could be triggered by facts "implicitly pled in allegations of legal theories" and that the rule requiring the insurer to determine whether it owed a duty to defend based on the factual allegations of the petition "would require the resurrection of code pleading."

The Court's ruling in *Stine Seed* was consistent with the rules it formulated in the cases following *McAndrews*. In upholding the trial court's grant of summary judgment to the insurer upon finding no duty to defend, the Iowa Supreme Court found the insured's "coverage claim [was] not rescued by reasserting the identical facts as the basis for the second and subsequent counts it labeled as alternative legal theories." The latter counts, whatever their legal labels, "were each on their alleged facts, based purely on a deliberate refusal to pay" and this could not be changed by "artful draftsmanship" on behalf of the plaintiff's attorney. *Stine Seed*, 591 N.W.2d at 19.

Thus, the test for determining when an insurer owes a duty to defend remains the same. Insurers must look to the petition and decide whether the facts alleged at the outset of the case could potentially bring the claim within the policy's coverage. "When contrasted with the factual allegations, the legal nomenclature chosen by a plaintiff is 'relatively unimportant.'" *Stine Seed*, 551 N.W. 2d at 18. □

THE PC POET

If a packet hits a pocket on a socket on a port, and the bus is interrupted as a very last resort, and the address of the memory makes your floppy disk abort, then the socket packet pocket has an error to report.

If your cursor finds a menu item followed by a dash, and the double-clicking icon puts your window in the trash, and your data is corrupted 'cause the index doesn't hash, then your situation's hopeless and your system's gonna crash!

If the label on the cable on the table at your house, says the network is connected to the button on your mouse, but your packets want to tunnel on another protocol, that's repeatedly rejected by the printer down the hall, and your screen is all distorted by the side effects of gauss, so your icons in the windows are as wavy as a souse, then you may as well reboot and go out with a bang, 'cause as sure as I'm a poet, the sucker's gonna hang!

When the copy of your floppy's getting sloppy on the disk, and the microcode instructions cause unnecessary risk, then you have to flash your memory and you'll want to RAM your ROM. Quickly turn off the computer and be sure and tell your mom.

Author Unknown

FROM THE EDITORS

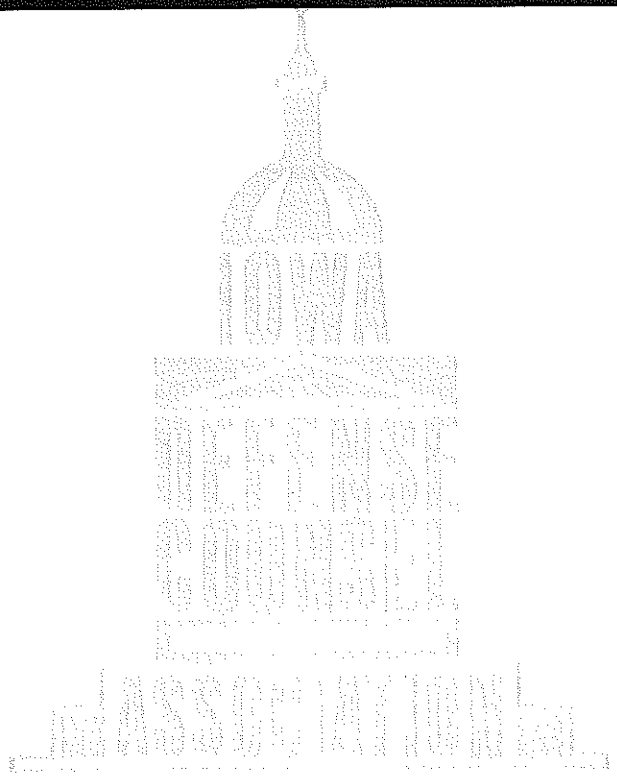
The last legislative session addressed only a couple of items of interest to defense practitioners. A bill limiting Y2K exposure passed both houses of the legislature, but was vetoed by Governor Vilsack. This bill, on which the IDCA was officially neutral, limited the liability of financial institutions, public utilities, and others with regard to damage claims based on a "year 2000 problem." The legislation also provided protection to persons whose inability to timely meet payment obligations is caused by such a problem.

In his veto message, Governor Vilsack expressed confidence that the financial institutions and others identified in the bill have undertaken reasonable and prudent steps to avoid a Y2K problem and therefore do not need legislative protection. Irresponsible parties should not be immunized against their irresponsibility at the expense of the general public, said the Governor. But such a statement seems to overstate the effect of the legislation. The Act placed the burden upon defendants to establish as an affirmative defense reasonable care or due diligence in attempting to avoid Y2K difficulties. Defendants unable to prove this defense would continue to have exposure for "actual monetary losses proximately caused by a year 2000 problem." For those who support such legislation, a federal Y2K bill was recently enacted into law after negotiations between the president and congress.

The other matter of interest to defense counsel in this session was H.F. 114. This was an omnibus tort reform bill which contained a range of items including removal the 5% fault cap for failing to wear a seat belt, elimination of joint and several liability, capping non-economic damages at $250,000, enactment of a *Daubert* style procedure for admission of expert testimony, repeal of limitations to disclosure of psychological test material, limitation of multiple punitive awards, and immunization of products from any percentage of fault where misuse, failure to maintain, or alteration are shown to be a substantial cause of the damage.

This bill, much of which the IDCA supports (although we have never supported damage caps) made little progress this session. It will certainly be reintroduced next year with the hope that some of its provisions may survive to be passed by both houses of the legislature. A recent editorial for this publication noted that it will be interesting to observe how Governor Vilsack handles any tort reform measures that may reach him given his background as a plaintiff's lawyer. For now, the observing will have to wait until next year.□

The Editors: Kermit B. Anderson, Des Moines, Iowa; Mark S. Brownlee, Fort Dodge, Iowa; Michael W. Ellwanger, Sioux City, Iowa; Noel McKibbin, West Des Moines Iowa; Patrick L. Woodward, Davenport, Iowa.



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