defense UPDATE

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WRIGHT V. BROOKE GROUP, LTD.

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INTRODUCTION

On October 9, 2002, the Iowa Supreme Court rendered its decision in *Wright v. Brooke Group, Ltd.*[1] The opinion answered several questions of Iowa product liability law certified to the supreme court by Chief Judge Mark Bennett of the United States District Court for the Northern District. *Wright* is undoubtedly one of the most significant product liability decisions rendered by the supreme court in recent history. While the issues arose in the context of a tobacco product liability case, the certified questions and the supreme court's resolution of those issues have broad implications for any product liability case in Iowa.

Most significant, the supreme court in *Wright* abandoned strict liability and adopted the test for product liability design defects set forth in the recently promulgated *Restatement (Third) of Torts: Products Liability*, §§1 and 2, discarding the longstanding provisions of *Restatement (Second)* Section 402A which have governed the development of Iowa product liability law for the last 32 years.[2] Liability for design defects will no longer be governed by strict liability principles or by a "consumer expectations" test of unreasonably dangerous. Henceforth, design defect cases will be determined under a negligence based risk/utility standard which includes proof of a reasonable alternative design. Strict liability remains an applicable theory only in cases of manufacturing defects as discussed below.

Wright contains an articulate discussion of the history of the development of Iowa product liability law and an extensive and thoughtful evaluation of the competing arguments on the specific issues presented. While defense counsel will disagree with the correctness of the supreme court's conclusions on some of the issues, the thoroughness of the supreme court's analysis is impressive and commendable.

The supreme court's ruling also has ramifications beyond the law of products liability. The supreme court expanded civil conspiracy, finding for the first time that one can conspire to be negligent. The supreme court further expanded fraudulent concealment, finding that an ultimate consumer can sue a manufacturer even in the absence of direct negotiations or "dealings" under certain circumstances.

The Iowa Defense Counsel Association, together with the Defense Research Institute,[3] filed an Amicus Curiae brief on questions 4 through 8.[4]

SUMMARY OF RULING

The supreme court provided the following succinct summary of its ruling on the questions certified to it by Judge Bennett:

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[1] Iowa Supreme Court No. 87/01-0712 filed October 9, 2002.

[2] *Compare, Hawkeye Security v. Ford Motor Co.*, 174 N.W.2d 672 (Iowa 1970); *Aller v. Rodgers Machinery & Manufacturing Co.*, 268 N.W.2d 830 (Iowa 1978).

[3] The Iowa Defense Counsel was represented on the amicus brief by the authors of this article. Defense Research Institute was represented by Kevin Reynolds and Rick Kirschman of Whitfield & Eddy.

[4] The Association refrained from weighing-in on the other certified questions as they were perceived to be specific to tobacco products at issue and not of general applicability to the defense bar.

MESSAGE FROM THE PRESIDENT

Mike Weston

SERVICE AND VALUE

How do we better serve the members of the Iowa Defense Counsel Association and bring the highest possible value to your membership? That is the challenge of the IDCA leadership as we start the 2002-2003 term. A successful 38th Annual Meeting was a strong start, but where do we go from here?

HERE IS WHAT WE PROPOSE TO DO:

1. **Continue Our Emphasis on Substantive Law and Skill Building.**

The IDCA will continue to provide quality programming to enhance the skills of its members. The 39th Annual Meeting, which will be held on September 24th - 26th, 2003, is under the able direction of President-Elect Rick Santi. Rick will, no doubt, continue the tradition that the IDCA has earned for presenting the finest comprehensive CLE opportunities in the State.

In addition, the Association will host its fifth annual one-day seminar at the Des Moines Golf and Country Club on Friday, April 25th, 2003. The topic is workers compensation, and will, no doubt, be as outstanding as our past programs on commercial litigation, product liability, employment, and insurance law.

2. **Enhance the Quality of our "Defense Update" Newsletter.**

"The Defense Update" has been recognized as one of the finest, substantive law newsletters in the country. Our able Editorial Board will continue to produce four quality issues, each with well-written articles on current developments in the substantive law affecting your practice. In addition, the IDCA substantive law committees will be providing articles, notes, and comments to expand the scope of our offerings. Look for the "Update" on-line in the members only section.

3. **Young Lawyers.**

For the past several months, Board Member Brent Ruther of Burlington has encouraged the Board to expand the reach of IDCA programming to include defense lawyers new to the practice. The Association will move to respond. Look for the creation of a Board position to be held by a member with ten years or less of experience. That Board member will serve as the chair of our Young Members Committee, a new permanent committee of the Association. The Committee will conduct special programming for young lawyers to coincide with the Association's regular programming. They will also assist with our one-day seminar and Annual Meeting. In addition, in conjunction with Trial Academy Committee Chair Sharon Greer, look for the IDCA to present its own Trial Academy for IDCA members in either 2003 or 2004.

4. **"Net 50 New Member" Initiative**

The defense practice has changed as it has stayed the same. Our insurance partners will continue to be a vital part of our programming and efforts, but our client base is getting more diverse. We are routinely called upon to defend employment and commercial cases. Our efforts need to track our evolving practices and will. We will reach out to new members who would benefit from IDCA programming, including corporate counsel, human relations counsel, government counsel, and counsel in the health care industry. In addition, we will seek new insurance and workers compensation counsel. All will be done in an effort to expand our numbers and to expose our clients to the fine benefits of IDCA membership.

5. **Technology**

For the first time at our 2002 Annual Meeting, more presenters used laptop/Powerpoint presentations than did not. The Association provided CD's of the program material, in addition to the written seminar booklets. CD's will be sent to Iowa's judges this year, instead of the written materials because they are easier to use and cost effective for the Association. This trend will continue.

The IDCA website will be updated. Jury verdict results will be maintained to give you comparative results in cases actually tried around the State. Links to other resources will be expanded to give you fingertip access to what you need to do your job. Additionally, the IDCA will study the launch of interactive member chat rooms or a listserve, an e-mail communication system so that members can exchange information on experts, briefs, trial strategy and the like. The plaintiff's bar has shared information much more effectively than the defense bar over the years. It is time to catch up.

6. **Diversity**

The civil defense lawyers of Iowa have a strong story to tell. Our practice is challenging, our judges talented and fair. Our opponents are well prepared and professional. We need to do a better job of promoting the civil trial practice in Iowa so that we can attract and keep talent in our State. We need to reach out to lawyers of color, men and women alike, to include them in our industry and in our Association. Much of the effort to reach out lies with you and your schools, as middle school and high school students consider the law as a career. It is furthered by the service of many of you in the fine moot court programs around the State. The IDCA will step up our efforts to go to the law schools and encourage

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WHEN LIMITATION OF LIABILITY CLAUSES ARE ENFORCED

By: Paul P. Morf[1]

This article is not intended for use as legal advice. By reading this article, you agree that the author is not liable for any damages sustained due to reliance on this article for legal advice, or for any use not contemplated by the author, such as recycle bin filler.

Exculpatory clauses like this one can significantly aid the successful defense of claims such as a breach of contract, breach of warranty, and negligence. They can also mean extra work for the defense since plaintiffs are likely to challenge them on public policy or ambiguity grounds.

This article provides an overview of situations where Iowa courts will enforce exculpatory and limitation of liability clauses. Exculpatory clauses used in this article completely insulate parties from liability, while limitation of liability clauses place a cap on the amount of a party's liability. It seems reasonable to assume, however, that Iowa courts will look at limitation of liability clauses with slightly more favor than exculpatory clauses, given that the former allows for some recovery by an injured party. At least one Iowa district court opinion suggests this. *See Cury-Schimmel Corp. v. R.E. Blattert & Associates, Inc.*, No. 36300, Nov. 9, 1995 Ruling (Story County) (upholding and enforcing a limitation of liability agreement in an engineering contract and briefly noting that the provision "merely places a limit on . . . liability" instead of completely insulating the defendant). Nonetheless, no Iowa appellate decision has recognized a distinction between the two. Accordingly, I will refer to both types of provisions as "limitation of liability clauses" in this article, except where the case specifically involved an exculpatory clause.

GENERAL RULE: FREEDOM OF CONTRACT

Limitation of liability clauses are generally enforceable. *Advance Elevator Co. v. Four State Supply Co.*, 572 N.W.2d 186, 188 (Iowa Ct. App. 1997) (*citing Bashford v. Slater*, 96 N.W.2d 904, 909 (Iowa 1959)).

They are contract provisions and their validity is thus examined according to contract law:

> In the construction of contracts, the cardinal principle is that the intent of the parties must control; and, except in cases of ambiguity, this is determined by what the contract itself says. Iowa R. App. P. 14(f)(14) [now Rule 6.14(6)(n)]. Construction of a contract is the process of determining its legal effect and is always a question of law for the court.

Korsmo v. Waverly Ski Club, 435 N.W.2d 746, 748 (Iowa Ct. App. 1988).

There are a few reasons why limitation of liability clauses are generally upheld. First, doing so promotes freedom of contract. *Id.* at 749. Second, they are voluntarily entered into, at least where neither of the parties are "under any economic or other compulsion to sign . . . ." *Id.* Third, such clauses allow services to be performed, or events to take place, at reasonable prices that might otherwise be prohibitively expensive. *Id.*

FACTORS GOVERNING CONSIDERATION OF LIMITATION OF LIABILITY CLAUSES

A limitation of liability clause in a contract will not be enforced if "the preservation of the general public welfare imperatively so demands invalidation so as to outweigh the weighty societal interest in the freedom of contract." *Rogers v. Webb*, 558 N.W.2d 155, 157 (Iowa 1997). The Iowa Supreme Court has further stated that "the power to invalidate a contract on public policy grounds must be used cautiously and exercised only in cases free from doubt." *Walker v. American Family Mut. Ins. Co.*, 340 N.W.2d 599, 601 (Iowa 1983).

The factors that Iowa courts use to evaluate public policy challenges to contractual provisions are as follows:

> "[W]hether (1) it concerns business of a type subject to public regulation,
> (2) the party seeking exculpation performs a service of great importance to the public which is of practical necessity for at least some members of the public,
> (3) that party holds itself out as willing to perform the service for any member of the public who seeks it,
> (4) due to the essential nature of the service the party possesses a decisive advantage in bargaining power,
> (5) the exculpatory clause appears in a standardized adhesion contract, and (6) the purchaser is placed under the control of the seller and is thus subject to the risk of carelessness by the seller or

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RIEFF V. EVANS:
GARNERING SUPPORT FOR THE FIDUCIARY EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE

By: Nathan Clark, Lane & Waterman, Davenport, Iowa

In *Rieff v. Evans*, No. CE 35780 (D. Iowa Sept. 9, 2002), Iowa District Judge Douglas F. Staskal granted Plaintiff Mary M. Rieff's motion to compel production of documents withheld by Nominal Defendant Allied Mutual Insurance Co. based on a claim of attorney-client privilege. *Rieff* involves a derivative and class action brought on behalf of the policyholders-owners of a mutual insurance company. On a matter of first impression for Iowa courts, Judge Staskal adopted the fiduciary exception to the attorney-client privilege established in *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970) (holding that a corporation may not assert the attorney-client privilege against its stockholders in certain circumstances). Judge Staskal held that because Allied Mutual owed a fiduciary duty to Rieff as a policyholder and owner, a duty akin to that owed by a corporation to its stockholder, and Rieff showed good cause for application of the fiduciary exception, Allied Mutual could not invoke the attorney-client privilege against her.

This article will attempt to accomplish three tasks. First, it will instruct on the *Garner* holding and its rationale for establishing a fiduciary exception to the attorney-client privilege. Second, this article will outline the background of *Rieff* to provide the context in which Judge Staskal decided to adopt *Garner*. Third, and most importantly, this article will review Judge Staskal's rationale for adopting *Garner* in an effort to identify arguments that may be made to counter future attempts to invoke the fiduciary exception to the attorney-client privilege.

GARNER V. WOLFINBARGER

Garner involved a class action brought by stockholders against First American Life Insurance Company of Alabama (FAL) and its individual directors and officers, alleging violation of federal and state securities laws as well as common law fraud. 430 F.2d at 1095. In addition, the stockholders claimed that FAL was damaged by fraud perpetrated by the individual defendants and asserted a derivative action against them. *Id.* During discovery, the stockholders served a subpoena on the attorney who represented FAL at the time of the relevant transactions. *Id.* at 1096. The subpoena requested that the former attorney bring documents to his deposition. *Id.* FAL objected on the ground of attorney-client privilege. *Id.* The district court ruled that FAL could not assert the privilege against the stockholders, and FAL subsequently appealed. *Id.*

In addressing the issue of whether FAL could assert the attorney-client privilege against its stockholders, the United States Court of Appeals for the Fifth Circuit began its analysis by acknowledging "the fundamental principle that the public has the right to every man's evidence, and exemptions from the general duty to give testimony that one is capable of giving are distinctly exceptional." *Id.* at 1100 (citing 8 John Henry Wigmore, *Evidence* § 2192, at 70 (McNaughton Rev. 1961)). The court defined such distinctly exceptional exemptions as situations in which policy demands derogation of the responsibility of every person to give testimony. *Id.* The court identified as one of the policies necessary for the establishment of a privilege that "[t]he *injury* that would inure to the relation by the disclosure of the communication must be *greater than the benefit* thereby gained for the correct disposal of litigation." *Id.* at 1100 (quoting 8 Wigmore, *Evidence* § 2285, at 527).

Applying this policy to the case before it, the court determined that disclosure of communications between FAL and its attorney would not necessarily cause injury outweighing the benefit of the correct disposal of the class action and derivative litigation. The court reasoned that while a corporation must manage its business, including seeking legal counsel, and necessarily takes positions that not all of its stockholders would support, "management judgment must stand on it merits, not behind an ironclad veil of secrecy which under all circumstances preserves it from being questioned by those for whom it is, at least in part, exercised." 430 F.2d at 1101. Therefore, the court reasoned, "obligations ... that run from corporation to stockholder ... must be given recognition in determining the applicability of the privilege." *Id.* at 1102.

Building upon its recognition that the duties of a corporation to its stockholders militated against an absolute attorney-client privilege, the court identified the joint client exception to the attorney-client privilege as additional support. The court described the joint client privilege, stating, "In many situations in which the same attorney acts for two or more parties having a common interest, neither party may exercise the privilege

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1. In a design defect products liability case, what test applies under Iowa law to determine whether cigarettes are unreasonably dangerous? What requirements must be met under the applicable test?

Answer: The test and requirements of *Restatement (Third) of Torts: Product Liability sections 1-2* (1998) apply.

2. Under Iowa law, can the defendants rely on comment i of section 402A of the *Restatement (Second) of Torts* to show that cigarettes are not unreasonably dangerous?

Answer: Because Iowa has abandoned section 402A and the requirement of unreasonably dangerous, the defendants cannot rely on the statement made in comment i pertaining to tobacco.

3. Under Iowa law, does the common knowledge of the health risks associated with smoking, including addiction, preclude tort and warranty liability of cigarette manufacturers to smokers because cigarettes are not unreasonably dangerous insofar as the risks are commonly known?

If yes, then:

a. During what period of time would such knowledge be common?
b. Is there a duty to warn of the risks associated with smoking cigarettes in light of such common knowledge?
c. Is reliance on advertisements, statements or representations suggesting that there are no risks associated with smoking, including addiction, justifiable in light of such common knowledge?

Answer: Generally speaking, consumer knowledge is merely one factor in assessing liability for design defects or for failure to warn of product risks. The remainder of this question calls for factual determinations that are beyond the scope of a certified-question proceeding. In the absence of a factual finding with respect to the common knowledge of consumers during the relevant time frame, we cannot determine whether such knowledge would, as a matter of law, preclude liability under the principles set forth in the Products Restatement.

4. Under Iowa law, can a plaintiff bring a civil conspiracy claim arising out of alleged wrongful conduct that may or may not have been an intentional tort—i.e., strict liability for manufacturing a defective product or intentionally agreeing to produce an unreasonably dangerous product?

Answer: Yes, a plaintiff may base a civil conspiracy claim on wrongful conduct that does not constitute an intentional tort.

5. Under Iowa law, can a manufacturer's alleged failure to warn or to disclose material information give rise to a fraud claim when the relationship between a plaintiff and a defendant is solely that of a customer/buyer and manufacturer?

Answer: Yes, but only when disclosure is required (1) to correct misleading statements of fact made by the manufacturer with the intent to influence consumers, or (2) to correct statements of fact made by the manufacturer to influence consumers that were true when made but become untrue or misleading in light of subsequently acquired information.

6. Does an "undertaking" arise under section 323 of the Restatement (Second) of Torts, as adopted in Iowa, by reason of a product manufacturer's advertisements or statements directed to its customers?

Answer: Not within the factual parameters presented by this case.

7. Does Iowa law allow a plaintiff to recover from a cigarette manufacturer under a manufacturing defect theory when the cigarettes smoked by the plaintiff were in the condition intended by the manufacturer?

Answer: No.

8. Does Iowa law allow a plaintiff to recover from a cigarette manufacturer for breach of implied warranty of merchantability when the cigarettes smoked by the plaintiff were in the condition intended

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by the manufacturer and the plaintiff alleges the defendants' cigarettes are "substantially interchangeable"?

Answer: If the breach is based on a manufacturing defect, recovery is not allowed. If the breach is based on a defective design or inadequate instructions or warnings, recovery is not precluded under the stated facts.[5]

I. IN A DESIGN DEFECT CASE, WHAT DETERMINES WHETHER THE PRODUCT IS UNREASONABLY DANGEROUS?

The supreme court answered this question by adopting the risk/utility test of design defect set forth in *Restatement 3d* Section 2(b). *Restatement 3d* abandons the consumer expectations test and replaces the "unreasonably dangerous" requirement of *Restatement 2d* Section 402A with a revised definition of "defective" applicable to design cases. Under *Restatement 3d*, 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 . . . and the omission of the alternative design renders the product not reasonably safe."[6] The *Restatement 3d* separately defines two other categories of product defects, defects in manufacturing (§2(a)) and defects in warnings (§2(c)). Defects in manufacturing continue to be governed by strict liability, but alleged inadequate instructions or warnings are measured by essentially the same negligence-based standard that applies to design defect claims.

The adoption of the *Restatement 3d* in *Wright* made it unnecessary for the supreme court to reconcile its past decisions which confusingly applied both the consumer expectations test and a risk/utility balancing test in weighing the safety of product design.[7] Language in more recent decisions of the supreme court further acknowledged the similarity of the risk/utility test in strict liability product design cases and negligence principles applicable in negligent design cases.[8] In the context of product warning claims, the supreme court had previously found the distinction between strict liability and negligence to be illusory, and held that warning claims should be governed by a negligence standard.[9] The supreme court had recently declined a previous opportunity to adopt the risk/utility negligence-based standard of design defect liability under *Restatement 3d* §2.[10]

In applying the *Restatement 3d*, the supreme court in *Wright* finally concluded that the distinction between strict liability and negligence is as illusory in a product design case as in a failure to warn case.[11] Expressing its "dissatisfaction" with the consumer expectations test as "inadequate to differentiate a strict liability design defect claim from a negligent design claim," the supreme court found that the *Restatement 3d*'s approach to design defect analysis was the correct one, noting that negligence principles are more suitable than strict liability in product design cases.[12]

Because the revised test of design defect liability under *Restatement 3d* is not dependent on a particular label of "strict liability" or "negligence", the supreme court stated that a trial court should not submit both a negligence claim and strict liability claim based on the same design defect, "since both claims rest on an identical risk/utility evaluation."[13] The supreme court voiced its preference that such a claim in the future simply be referred to as a "design defect claim" without reference to either strict liability or negligence.

With the adoption of the risk/utility test in design liability cases and abandonment of the consumer expectations test in the tobacco context of *Wright*, a question for future cases arises as to what level of consumer awareness of a product's obvious dangers will defeat a design defect claim. Despite the foregoing discussion, it should be noted that the supreme court in *Wright* observed that "consumer expectations remain relevant in design

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[5] *Wright*, slip op. at 37-39.

[6] *Restatement 3d* § 2(b).

[7] *Wright*, slip op. at 6-9. *See Aller v. Rodgers Machinery Manufacturing Co., supra*, at 835 (applying consumer expectations test but recognizing risk/utility balancing process is the same in both strict liability and negligence); *Chown v. USM Corp.*, 297 N.W.2d 218, 220 (Iowa 1980) (recognizing both tests).

[8] *See Hillrichs v. Avco Corp.*, 478 N.W.2d 70, 75 (Iowa 1991).

[9] *Olson v. Prosoco, Inc.*, 522 N.W.2d 284, 289 Iowa (1994).

[10] *Lovick v. Wil-Rich*, 588 N.W.2d 688, 698-99 (Iowa 1999).

[11] *Wright*, slip op. at 11.

[12] *Wright*, slip op. at 12.

[13] *Wright*, slip op. at 14-15.

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defect cases."[14] Quoting comment g to *Restatement 3d*, Section 2, the supreme court acknowledged that whether a product design meets consumer expectations may substantially influence the risk/utility analysis, and "while consumer expectations are generally not determinative in a design defect case, they are one factor to be considered."[15]

Future cases must further define the parameters of this new basis for design defect liability in Iowa under *Restatement 3d*. The development of revised jury instructions to accommodate the adoption of *Restatement 3d*'s fault-based test must give due attention to appropriate explanatory comments of the *Restatement 3d* Reporters, as well as the text of the *Restatement* itself. The *Restatement* expressly "takes no position" on the specifics of how a jury should be instructed as to the various factors relevant to design liability under §2(b).[16] Hypothetical examples in the *Restatement* comments illustrate that eliminating entire categories of certain product designs may "unduly restrict the range of consumer choice", and that simply because one design may be safer than the product design at issue does not alone render the subject product "not reasonably safe."[17]

The inclusion of proof of a reasonable alternative design as an element of plaintiff's proof places additional importance on reliable expert testimony, and, for example, further attempts to persuade the supreme court to adopt a *Daubert*-like approach in evaluating the reliability of such testimony will be appropriate. The comments to the *Restatement 3d* make clear that proof of a reasonable alternative design is a necessary "predicate" for establishing a design defect, and that "sufficient evidence must be presented so that reasonable persons could conclude that a reasonable alternative could have been practically adopted."[18]

II. DOES A CONSUMER'S KNOWLEDGE OF THE PRODUCT'S DANGEROUS CHARACTERISTICS AS STATED IN COMMENT i OF SECTION 402A OF THE RESTATEMENT (SECOND) DEFEAT A DESIGN DEFECT CLAIM?

The adoption of the *Restatement 3d*, in the view of the supreme court, rendered comment i of *Restatement 2d* Section 402A inapplicable. The defendants in *Wright* relied on comment i because of its statement that proof of defect under §402A requires that the product be more dangerous than a user would expect, *i.e.*, dangerous "to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics". As applied to tobacco cases, the specific explanatory statement in comment i that "good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful" seems to preclude design defect liability. With the abandonment of *Restatement 2d* § 402A, however, the supreme court deemed comment i inapplicable. The supreme court went on to discuss the role of a consumer's common knowledge of a product's dangers under newly adopted *Restatement 3d* in answer to Question No. 3 discussed below.[19]

III. DOES A CONSUMER'S KNOWLEDGE OF THE RISKS OF SMOKING PRECLUDE TORT LIABILITY OF CIGARETTE MANUFACTURERS?

Because of its adoption of the *Restatement 3d* test of design defect liability, based on a "risk/utility" analysis, the supreme court found "any examination of the unreasonable dangerousness of cigarettes as that test is used in Section 402A" to be "unnecessary", and therefore held the "common knowledge of consumers of the health risks associated with smoking does not necessarily preclude liability."[20] The supreme court went on to observe, however, that while consumer expectations are no longer determinative of design defect claims, consumer expectations remain relevant as "one factor to be considered" in deciding whether an alternative design is reasonable and whether its omission would render a product not reasonably safe.[21]

The question left unanswered by the supreme court in *Wright* is what "alternative design" exists to a tobacco cigarette assuming that society will continue to accept cigarettes as lawfully

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[14] *Wright*, slip op. at 16-17.
[15] *Wright*, slip op. at 17.
[16] *See Restatement*, §2(b) comment f.
[17] *Id.*
[18] *Restatement 2d* §2, comment f.
[19] *Wright*, slip op. at 16.
[20] *Wright*, slip op. at 16.
[21] *Wright*, slip op. at 17.

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sold products. The significance and role of a consumer's knowledge of the risks and dangers of a particular product for purposes of other product liability cases will have to await development of case law under the newly adopted *Restatement 3d* test in Iowa. Some explanation of the role of consumer expectations and consumer knowledge of product defects in relation to design defect liability is set forth by the Reporters to the *Restatement 3d* in comment g to Section 2, and defense counsel would be well advised to study that comment. Moreover, the mere fact that the risks of a product design are open and obvious, while perhaps a complete defense to a warning claim, has never previously been embraced by the supreme court as a necessarily complete defense to a design defect claim. Whether the adoption of *Restatement 3d* in this regard is truly a significant departure from previous Iowa law on design defect liability is therefore somewhat questionable. It appears likely that proof of a consumer's knowledge of potential dangers of a product will remain relevant as one factor to be considered in determining liability, but the definition of design "defect" no longer is couched in those terms.

IV. CAN A PLAINTIFF BRING A CIVIL CONSPIRACY CLAIM ARISING OUT OF ALLEGED WRONGFUL CONDUCT THAT MAY OR MAY NOT HAVE BEEN AN INTENTIONAL TORT?

One of the more troubling aspects of the supreme court's ruling is the expansion of civil conspiracy in Iowa. Prior to the supreme court's decision, civil conspiracy had not been applied to anything other than conspiracies to commit intentional torts.[22] Civil conspiracy had never been extended in Iowa to negligence claims[23], much less claims, such as strict products liability, where the culpability of defendant's conduct is not relevant to the underlying tort. Indeed, Judge Bennett, in ruling on defendant's Motion to Dismiss in this very action, found plaintiff's contention that the underlying tort in a civil conspiracy claim may be based on negligence "to be a paradox."[24] Judge Bennett held, "because conspiracy requires an agreement to commit a wrong, there can hardly be a conspiracy to be negligent – that is to intend to act negligently."[25] Other courts that have addressed this issue are in accord.[26]

Judge Bennett did not decide whether civil conspiracy could be predicated on strict products liability[27], and it was in that context that the question was certified to the supreme court.[28] However, the supreme court did not reach the question of whether civil conspiracy could be predicated on strict liability.[29] The supreme court concluded that it did not need to decide this issue "because we have abandoned strict liability as a basis for design defect cases

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[22] *See Revere Transducers, Inc. v. Deere & Co.*, 595 N.W.2d 751 (Iowa 1999) (conspiracy to tortiously interfere with contract); *Tubbs v. United Central Bank, N.A.*, 451 N.W.2d 177 (Iowa 1990) (conspiracy to commit fraud and other wrongs); *Ezzone v. Riccardi*, 525 N.W.2d 388 (Iowa 1994) (conspiracy to intentionally interfere with contractual rights, conversion of corporate assets); *Adam v. Mt. Pleasant Bank & Trust Co.*, 387 N.W.2d 771 (Iowa 1986) (conspiracy to defraud); *Countryman v. Mt. Pleasant Bank & Trust Co.*, 357 N.W.2d 599 (Iowa 1984) (conspiracy to defraud); *Locksley v. Anesthesiologists of Cedar Rapids, P.C.*, 333 N.W.2d 451 (Iowa 1983) (conspiracy to tortiously interfere with contract); *Basic Chemicals, Inc. v. Benson*, 251 N.W.2d 220 (Iowa 1977) (conspiracy to engage in Apalming off@ products or unfair competition); *Murphy v. First Nat'l Bank of Chicago*, 228 N.W.2d 372 (Iowa 1975) (conspiracy to induce the commission of a colorable act of bankruptcy justifying filing of involuntary petition in bankruptcy); *Ducommun v. Johnson*, 252 Iowa 1192, 110 N.W.2d 271 (1961) (conspiracy to deprive real estate broker of commission); *Des Moines Bank & Trust Co. v. George M. Bechtel & Co.*, 243 Iowa 1007, 51 N.W.2d 174 (1952) (conspiracy to defraud corporation); *Weber v. Paul*, 241 Iowa 121, 40 N.W.2d 8 (1949) (conspiracy to commit assault and battery); *Stambaugh v. Haffa*, 217 Iowa 1161, 253 N.W. 137 (1934) (conspiracy to defraud); *Faust v. Parker*, 204 Iowa 297, 213 N.W. 794 (1927) (conspiracy to defraud); *Robbins v. Heritage Acres*, 578 N.W.2d 262 (Iowa App. 1998) (intentionally withholding or depriving patient of necessary medical or nursing home care in breach of contract or violation of standards of professional care and conduct).

[23] Judge Bennett in his ruling on defendants' Motion to Dismiss in this case correctly concluded that plaintiff's allegations in *Robbins v. Heritage Acres*, 578 N.W.2d 262 (Iowa App. 1998) were predicated not on negligence but on breach of contract or violations of professional standards. *Wright v. Brooke Group Ltd.*, 114 F. Supp. 2d 797, 837 (N.D. Iowa 2000). While not citing *Robbins*, the supreme court acknowledged that "[its]" cases applying a civil conspiracy theory involve agreements to commit an intentional tort." Wright, slip op. at 19.

[24] *Wright*, 114 F. Supp. 2d at 837.

[25] *Id.*

[26] *See Sackman v. Liggett Group, Inc.*, 965 F. Supp. 391, 395 (E.D.N.Y. 1997); *Rogers v. Furlow*, 699 F. Supp. 672, 675 (N.D. Ill. 1988); *Campbell v. A. H. Robins Co.*, 615 F. Supp. 496, 500 (W.D. Wis. 1985)(applying Wisconsin law); *Cresser v. American Tobacco Co.*, 662 N.Y.S.2d 374, 379 (1997)(applying New York law); *Triplex Communications, Inc. v. Riley*, 900 S.W. 2d 716, 719 n.2 (Tex. 1995); *Sonnenreich v. Philip Morris Inc.*, 929 F. Supp. 416, 419 (S.D. Fla. 1996).

[27] *Wright*, 114 F. Supp. 2d at 837.

[28] The question certified to the Iowa Supreme Court was:

> 4. Under Iowa law, can Plaintiffs bring a civil conspiracy claim arising out of alleged wrongful conduct that may or may not have been an intentional tort – i.e., strict liability for manufacturing a defective product or intentionally agreeing to produce an unreasonably dangerous product?

[29] *Wright*, slip op. at 20, n.2.

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and failure to warn cases and because we conclude . . . that the present case does not present an actionable manufacturing defect claim."[30] Surprisingly, however, the supreme court did conclude that civil conspiracy could be predicated on mere negligence.[31]

The supreme court acknowledged, "conspiracy is merely an avenue for imposing vicarious liability on a party for the wrongful conduct of another with whom the party has acted in concert."[32] Conceding its prior conspiracy cases involved agreements to commit intentional torts, the supreme court however noted it had never required conspiracy to be based on such an agreement.[33] The supreme court held "so long as the underlying actionable conduct is of the type that one can plan ahead to do, it should not matter that the legal system allows recovery upon a mere showing of unreasonableness (negligence) rather than requiring an intent to harm."[34]

The supreme court looked first to *Restatement (Second) of Torts*, finding the supreme court's past reliance on Section 876 of the *Restatement* "would seem to indicate an inclination to apply civil conspiracy whenever the underlying conduct was simply tortious."[35] However, the *Restatement* illustration cited by the supreme court provides little support for its conclusion. The illustration appears to have been included in the *Restatement* to exemplify that the agreement required for a conspiracy need not be express but can be implied from the circumstances. The underlying wrong of drag racing in the illustration is in fact a crime under Iowa law. *See* Iowa Code §§ 321.277, 321.278 (2001). There is no dispute conspiracy can be predicated upon an agreement to commit a criminal act. Furthermore, both actors were actively engaged in the conduct giving rise to the damage. *See Restatement (Second) of Torts* § 876 cmt a, illus. 1, at 316 (". . . a race for a mile down the highway, with the two cars abreast and both traveling at dangerous speed."). One questions whether one would even need a "civil conspiracy" theory under these circumstances to find both drivers at fault for the damages incurred.

The supreme court next looked to those cases that have refused to predicate a "civil conspiracy" on conduct that was merely negligent. The supreme court considered but simply rejected the logic of those cases.[36] The supreme court concluded that individuals can conspire to commit negligence.[37]

The scope of potential conspiracy claims is as broad as one's imagination. It is important to note, however, that the issue is addressed by the supreme court in the abstract in the context of questions certified by the United States District Court. The law in this area will no doubt develop further as specific factual situations are placed before the supreme court on appeal in future cases. In that regard, the supreme court's opinion provides some insight into how far they may permit this tort to be taken.

The Iowa Defense Counsel and DRI argued in their amicus brief that the extension of civil conspiracy "would open a flood gate to civil conspiracy claims in every products liability action." We argued that "every company that belongs to a trade association, industry group, or product advisory group would face conspiracy charges predicated on nothing more than the fact that had manufactured a product that had characteristics of those within the industry." We argued that "component suppliers, as well as, conceivably, even the bank in extending financing to the manufacturers, could be brought within the expanding web of a 'conspiracy' theory based on nothing more than the condition of the product itself." The supreme court specifically addressed this argument in its opinion. The supreme court held that "a company's mere membership in an industry group would not make that company liable for the tortious acts of other members of the group."[38] The supreme court held that "liability results only from a defendant's knowing and voluntary participation in a common scheme to take action, lawful or unlawful, that ultimately subjects the actor to liability to another."[39] Accordingly, the supreme court's holding heads off at least one potential

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[30] *Id.*
[31] *Wright*, slip op. at 18-23.
[32] *Wright*, slip op. 19.
[33] *Id.* at 19.
[34] *Wright*, slip op. at 21-22.
[35] *Wright*, slip op. at 19-20.
[36] *Wright*, slip op. at 20-23.
[37] *Id.* at 21-22.
[38] *Id.* at 22.
[39] *Id.* at 22.

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claim in this area. Plaintiffs asserting "civil conspiracy" claims must show more than membership in an industry group or trade association.

Second, the supreme court focused on "underlying actionable conduct . . . of the type that one can plan ahead to do."[40] A good part of negligent conduct is spontaneous. That is, the actor does not plan ahead. However, in the products area, most if not all product design, manufacture, and marketing is planned. There should be concern that the breadth of the supreme court's language threatens to convert what is clearly an intentional tort in the common law into something which imposes vicarious liability for far lesser conduct. Manufacturers' decisions concerning product design and determining what warning information to provide are by definition not accidental, and in this sense, any action may be deemed "intentional." Voluntariness of conscious action, however, is not "intent" to commit unlawful actions for purposes of civil conspiracy. In this regard, the supreme court's suggestion in *Wright* that even lawful actions, which if taken by agreement and unintentionally produce "injurious results," nevertheless can constitute "civil conspiracy" is extreme and in the view of these authors, unsupported. The suggestion that the "intentional" element of civil conspiracy can be replaced by such open-ended characterizations of conduct as "tortious" or "injurious results," without regard to intent, is a dramatic expansion of civil conspiracy. If so interpreted, this effectively creates a new form of vicarious (strict) liability imposed on product sellers for the conduct or products of others.

The examples cited by the supreme court, however, are extreme. For example, the analogies drawn by the supreme court to the asbestos litigation and the allegation raised in *Wright* itself as to the conduct of the tobacco industry are unusual situations. In *Adock v. Brakegate, Ltd.*,[41] the Illinois asbestos case cited by the supreme court, plaintiff alleged "'asbestos manufacturers engaged in an industrywide conspiracy to conceal and affirmatively misstate the hazards associated with asbestos exposure' and 'performed tortious acts in furtherance of the conspiracy.'"[42] In *Wright*, plaintiffs allege that the defendants conspired:

> 1. to conceal knowledge of the harmful and addictive effects of cigarette smoking from the public;
> 2. to frustrate the flow of information from the medical and scientific community to the general public on the health risks and addictive nature of cigarettes;
> 3. to create an illusion of conducting scientific research on cigarettes so as to mislead the public into believing that cigarettes were safe to smoke, when in reality no such bona fide research was ever conducted;
> 4. to improperly influence law and policy in local, state and national government by misrepresenting the state of scientific knowledge about the health and addictive effects of cigarettes;
> 5. to improperly influence physicians, health workers, teachers, and otherwise in the community to subvert these persons' belief in the dangers of cigarette smoking, so as to minimize the instructions and recommendations on smoking cessation that would otherwise have been forthcoming;
> 6. to sell cigarettes to minors to ensure a future lucrative market for cigarettes as older smokers died or quit; and,
> 7. to create the illusion that a medical and scientific "controversy" existed as to whether or not cigarettes were harmful to human health when in truth and fact no such controversy existed, so as to encourage the public to start or to continue smoking cigarettes.[43]

Plaintiff also alleged a number of overt acts undertaken by the defendants in furtherance of the alleged conspiracy.[44] Allegations of the type asserted in the asbestos and tobacco cases are not likely to arise in most products liability cases.

The supreme court's expansion of civil conspiracy arises in tobacco products liability litigation. Unfortunately, the supreme court's expansion of the civil conspiracy tort is potentially applicable to all product defendants. Undoubtedly, the supreme court's opinion will result in the addition of yet another stock count of "civil conspiracy" in every products case. We will have to await further

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[40] *Wright*, slip op. at 21-22.

[41] *Adock v. Brakegate, Ltd.*, 645 N.E.2d 888 (Ill. 1995).

[42] *Wright*, slip op. at 21, citing *Adock*, 645 N.E. 2d at 895..

[43] *Wright*, Petition at Law, ¶ 12.5 (October 29, 1999).

[44] *Id.* at ¶ 12.6.

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developments by the supreme court of the factual boundaries of this tort as future cases reach it on appeal.

V. CAN A MANUFACTURER'S ALLEGED FAILURE TO WARN OR TO DISCLOSE MATERIAL INFORMATION GIVE RISE TO A FRAUD CLAIM WHEN THE RELATIONSHIP BETWEEN A PLAINTIFF AND A DEFENDANT IS SOLELY THAT OF A CUSTOMER/BUYER AND MANUFACTURER?

The supreme court similarly expanded the tort of fraudulent concealment, finding for the first time that a manufacturer has a limited duty to disclose information to consumers notwithstanding the absence of any direct contact or "dealings" between the manufacturer and the consumer.[45] The supreme court held that "a manufacturer has a duty to a consumer under *Restatement (Second) of Torts* section 551(2)(b) to disclose 'matters know to [the manufacturer] that [it] knows to be necessary to prevent [its] partial or ambiguous statement of the facts from being misleading' and under section 551(2)(c) to disclose subsequently acquired information that would prevent a prior statement from being false or misleading."[46] The supreme court held that the failure to disclose information under these circumstances can form the basis for a claim of fraudulent concealment.

A duty to disclose has been recognized under Iowa law for some time where there have been direct dealings or negotiations between the parties.[47] However, as the supreme court pointed out, "generally there is no 'dealing' between a manufacturer and the ultimate customer of the manufacturer's product."[48] The supreme court noted, however, that there was support in Iowa case law recognizing fraud even where the parties had not dealt directly with each other.[49] In this regard, the supreme court cited dicta in its 1931 decision *Markworth v. State Savings Bank*.[50] The supreme court in *Markworth* held an "action [for fraud] can only be brought by the one to whom the fraudulent representations were made."[51] In *Markworth*, the supreme court noted that it had "quoted approvingly" from *2 Cooley, on Torts* (3d Ed.) which provided:

> No one has a right to accept and rely upon the representation of others but those to influence whose actions they were made. When statements are made for the express purpose of influencing the action of another, it is to be assumed they are made deliberately, after due inquiry, and it is not hardship to hold the party making them to their truth. But he is morally accountable to no person whomsoever but the very person he seeks to influence. * * *[52]

The supreme court in *Wright*, relying on this reference, concluded "that what is really important is that the statements were made for the purpose of influencing the action of another."[53]

The supreme court held "the fact that this element is usually found in transactions where the parties deal directly with another does not mean that the same goal of influencing another's action cannot be present in business transactions that do not involve direct contact between the plaintiff and the defendant."[54] The supreme court held "that a manufacturer who makes statements for the purposes of influencing the purchasing decisions of consumers has a duty to disclose sufficient information so as to prevent the statements made from being misleading, as well as the duty to reveal subsequently acquired information that prevents a prior statement, true when made, from being misleading."[55]

The supreme court has acknowledged that determinations of the duty to disclose "do not lend themselves to scientific formulation."[56] However, in the past, the supreme court has looked to the relationship of the parties in determining whether a duty to

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[45] *Wright*, slip op. at 23-28.
[46] *Id.*, slip op. at 25.
[47] *Cornell v. Wunschel*, 408 N.W.2d 369, 374 (Iowa 1987).
[48] *Wright*, slip op. at 25.
[49] *Id.*, slip op. at 26.
[50] *Markworth v. State Savings Bank*, 212 Iowa 954, 237 N.W. 471 (1931).
[51] *Id.*, 237 N.W. at 474.
[52] *Id.* [5]
[3] *Id.*, *Wright*, slip op. at 26.
[54] *Id.*
[55] *Id.*, slip op. at 27.
[56] *Sinnard v. Roach*, 414 N.W.2d 100, 106 (Iowa 1987).

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disclose had arisen.[57] The supreme court has generally required special circumstances.[58] In *Wright*, however, the supreme court looked not to the relationship but to the purpose of the statement.[59]

The supreme court next looked to whether that duty encompasses a general duty "to warn or to disclose material information" or is limited to a duty to correct misleading statements made by the manufacturer. The supreme court declined to extend the duty of disclosure in this context to a general duty to warn, or a duty to disclose under Restatement Section 551(2)(e).[60]

The supreme court reaffirmed that a manufacturer's failure to warn or failure to disclose material information does not generally give rise to a fraud claim where the relationship between a plaintiff and a defendant is solely that of a customer/buyer and manufacturer. However, the two exceptions recognized by the supreme court where (1) the manufacturer has made misleading statements of fact intended to mislead consumers or (2) has made true statements of fact designed to influence consumers and subsequently acquires information rendering the prior statements untrue or misleading will provide fruitful grounds for future litigation. As most manufacturers advertise their products in some manner, the exceptions may indeed swallow the general rule.

It must not be forgotten that the supreme court's decision addresses only one of the elements of fraudulent concealment – the duty to disclose. The plaintiff alleging fraudulent concealment will still be required to prove the undisclosed information was material, the defendant knowingly failed to make the disclosure, the defendant intended to deceive the plaintiff by withholding the information, the plaintiff acted in reliance upon defendant's failure to disclose, the plaintiff's reliance was justified, and the failure to disclose was approximate cause of plaintiff's damage.[61] Furthermore, proof of fraud must be by "clear, convincing and satisfactory preponderance of the evidence." One is left to wonder why a plaintiff with a host of existing products liability theories would undertake to prove "fraud" other than perhaps to attempt to avoid comparative fault in a failure to warn case. Nevertheless, one should expect plaintiffs to now cast "failure to warn" claims also as "fraudulent concealment" claims.

VI. DOES AN "UNDERTAKING" ARISE UNDER SECTION 323 OF THE RESTATEMENT (SECOND) OF TORTS, AS ADOPTED IN IOWA, BY REASON OF A PRODUCT MANUFACTURER'S ADVERTISEMENTS OR STATEMENTS DIRECTED TO ITS CUSTOMERS?

Plaintiffs also sought to expand *Restatement (Second) of Torts*, § 323 to a product manufacturer's advertisement or statements directed to its customers. Section 323 of the *Restatement* has generally been referred to as the "Good Samaritan" rule. The *Restatement* provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

This section of the *Restatement* had never been applied to a manufacturer's advertisements in Iowa. Fortunately, the supreme court declined to extend the reach of the section in this case. The supreme court concluded that a manufacturer's mere marketing of its product does not constitute the requisite "undertaking" required by the *Restatement*.[62] The supreme court refused to extend Iowa law, even assuming the truth of the specific allegations made by the plaintiffs in this case that the defendants had promised to "report honestly and confidently on all research regarding smoking and health regarding their tobacco products through their public pronouncements."[63] The supreme court found that a manufacturer's

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[57] *Wilden Clinic Inc. v. City of Des Moines*, 229 N.W.2d 286, 293 (Iowa 1975) (There must be a "legal duty to communicate to the other contracting party whether the duty arises from a relation of trust, from confidence, from inequality of condition and knowledge or other attendant circumstances.")

[58] *Id.*

[59] *Wright*, slip op. at 26-27.

[60] *Id.*, slip op. at 27. *Restatement (Second) of Torts*, Section 551(2)(e), at 119, imposes a duty to disclose "facts basic to the transaction, if [the defendant] knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts."

[61] Iowa Uniform Civil Jury Instruction No. 810.2 (12/93).

[62] *Wright*, slip op. at 29.

[63] *Id.*

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advertisements simply were not an undertaking to render a service to its customers actionable under the *Restatement*.[64]

VII. DOES LIABILITY FOR "MANUFACTURING DEFECT" EXIST WHEN THE PRODUCT WAS IN THE CONDITION INTENDED BY THE MANUFACTURER?

In *Wright*, one of the claims asserted by Plaintiffs is that the cigarettes were defective in manufacture as well as design. The supreme court held that the answer to this question is "no," since the *Restatement 3d*'s definition of "defective" with reference to manufacturing defects applies only "when the product departs from its intended design." *Restatement 3d* §2(a).

Under *Restatement 3d*, defects in manufacturing are the only product claims which remain governed by a strict liability standard. The issue is simply whether the product that is manufactured deviates in some material way from the manner in which the product was intended to be produced and whether the product was rendered unsafe by an error in the manufacturing process. The condition in which the product was intended is of course measured by the manufacturer's internal manufacturing standards, and where the product ultimately produced, regardless of its dangers, is in accordance with those standards as intended by the manufacturer, liability for "manufacturing defect" does not exist under *Restatement 3d*, but must be based upon other grounds of design or warning defects.

VIII. DOES IOWA LAW ALLOW A PLAINTIFF TO RECOVER FROM A CIGARETTE MANUFACTURING FOR BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY WHEN THE CIGARETTES SMOKED BY THE PLAINTIFF WERE IN THE CONDITION INTENDED BY THE MANUFACTURER AND THE PLAINTIFF ALLEGES THE DEFENDANTS' CIGARETTES ARE "SUBSTANTIALLY INTERCHANGEABLE"?

In *Wright*, the plaintiff essentially defined himself out of a breach of warranty of merchantability claim. Plaintiff alleged that the cigarettes "were in the condition intended by the manufacturer" and that they "substantially interchangeable."[65] Plaintiff essentially therefore conceded that the goods were "merchantable" as defined in Iowa Code § 554.2314 (1999). The supreme court concluded that a plaintiff would not have a separate cause of action for breach of implied warranty of merchantability when the product was in the condition intended by the manufacturer and substantially interchangeable with other products in the industry.[66] Thus, a plaintiff does not have a breach of implied warranty of merchantability claim where a manufacturing defect is alleged.[67]

The supreme court, however, left open the possibility of a breach of warranty of merchantability claim where "the defect alleged arises from a defective design or inadequate instructions or warnings."[68] What the supreme court did not answer in *Wright* is what difference the additional warranty claim makes in a product's liability case where a design defect claim is asserted. Since the supreme court equated the definition of "unmerchantable" in a personal injury accident to the test of design defect liability applied in a tort action, the question arises as to what is gained by the duplicative assertion of both theories in a single case. There is ample authority in not only the supreme court's prior decisions, but in the body of product liability law nationwide, that recovery under breach of warranty should properly be confined to commercial losses in commercial contexts, and that modern tort remedies adequately provide a basis of recovery in personal injury accidents. The supreme court's decision in Wright does not provide explanation of such purpose.

CONCLUSION

The full impact of the supreme court's decision in Wright must await further development of the law in the context of specific factual situations and future appeals in which the issues are raised. The supreme court has certainly changed and in some aspects expanded the law. Plaintiffs in future cases can be expected to test the outer bounds of the supreme court's opinion. The supreme court will undoubtedly have numerous opportunities over the next few years to resolve further issues which are now opened by this decision. As these issues arise in future appeals, you are encouraged to contact the Amicus Committee of the Iowa Defense Counsel.

[64] *Wright*, slip op. at 29-30.
[65] *Wright*, slip op. at 36.
[66] *Id.*, slip op. at 36-37.
[67] *Id.*
[68] *Wright*, slip op. at 37.

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

their students to pursue a career in the civil defense practice in Iowa. In particular, we will meet with the leaders of women and minority law student associations to tell our story and encourage their talented members to join our ranks. We will continue to call upon the most talented lawyers of both genders to participate in the IDCA and its programming. We were pleased to have seven women address the 2002 Annual Meeting, including Christy Jones, Esq. of Jackson, Mississippi, one of our two featured speakers. We will continue this trend in the future.

7. **Legislative Initiative**

The IDCA will again represent its members in the activities of the Iowa Legislature. Executive Director, Bob Kreamer and Legislative Chair, Mike Thrall will lead the effort. Our goal will remain to level the playing field for all civil litigants in the State of Iowa. Through these efforts, we will do our best to assure that you are well represented in legislative affairs.

8. **Outreach to the National Defense Practice**

Increasingly, the defense practice is becoming regional and national. The links with Iowa to these groups will continue to be enhanced. Iowa will host the Mid-Region Meeting of the Defense Research Institute in Council Bluffs on June 6th and 7th. Representatives of defense organizations from Utah, Nebraska, Colorado, Missouri, and Kansas, will attend the meeting. The leadership of the Association will continue to stay abreast of developments in our industry so that we can keep our Iowa membership in the loop. Additionally, through our cooperative efforts, we will continue to keep Iowa in the forefront of national defense leadership in keeping with the efforts of leaders who so ably served in the past.

A full plate? Yes. Necessary? Absolutely. We know there is much competition for your membership and seminar dollar. The IDCA will strive to earn yours. We want you to be able to say that you get more value from your IDCA dues and seminar expenditures than from any other money you spend to educate yourself and enhance your practice. That is our charge and that is what we will strive to do. Thank you for giving us the privilege of serving you.

Mike Weston

President

MIKE ELLWANGER'S OUTGOING MESSAGE

I would state at the outset that I have enjoyed very much being on the Board of IDCA and "going through the chairs" the last three years. This is an age when not only does everyone want compensation, they want a lot of it. I do think we serve a very valid function in response to what I consider a destructive drift in our society.

On a more philosophical note, I once heard a speaker state that people are less afraid of death than they are of having wasted their life. I think most lawyers do suffer periodically from the "wasted life syndrome." One way of dealing with these concerns is to focus on the personal side of our lives. I recall another speaker stating that one should never let his job define who he or she is as a person. Nevertheless, our profession is definitely a very significant part of our lives, and it is a part that we hopefully will never consider having wasted.

I do occasionally ponder what societal role I fill as a defense attorney--is it positive or negative? What actual good have I done by being a civil defense lawyer? Occasionally I feel as though I advance the noble objective of conflict resolution. I help clients solve legal problems. I am a peacemaker. However, many times I am not. If my true objective was to solve problems and make peace, the first thing I would do after receiving a new lawsuit would be to call the opposing attorney and find out what it would take to settle the case. I wouldn't stay employed very long if I utilized that tactic. More often than not our clients hire us to win, not to peaceably settle.

Perhaps another way to look at the issue is that our legal system provides a process for conflict resolution. That process can be extremely stressful and frightening for clients--plaintiffs and defendants alike. One of the best things we can do for those clients is to make this process as painless as possible; to be available for them; to explain the process and what they can anticipate; to help them develop a sense of perspective, i.e., that the process they are currently involved in is not going to destroy their lives. Lawyers are neither social workers nor therapists, but they can serve similar functions.

I would add that there are cases in which it is apparent from the outset that our proper role is to act as peacemaker--to resolve the problem. However, we have all seen cases in which the opposing attorney becomes an obstacle to making peace rather than an asset in accomplishing an acceptable result. This, to me, is the exact opposite of what lawyers are supposed to be.

Anyway, these are my thoughts. I guess we each have to find a way to become comfortable in our own skin. Being around intelligent, thoughtful and ethical lawyers certainly helps--and that has been perhaps the best benefit that I have received from being President of IDCA. At least while they were sober.

WHEN LIMITATION OF LIABILITY CLAUSES ARE ENFORCED . . . *continued from page 3*

its employees."

Baker v. Stewarts' Inc., 433 N.W.2d 706, 708 (Iowa 1988) (*citing Tunkl v. Regents of Univ. of Cal.*, 383 P.2d 441, 444-46 (Cal. 1963)).

Those professions that are subject to licensure and are considered to be of great public importance, such as medicine and law, are prototypical examples of the types of contract situations where limitation of liability clauses will be invalidated on public policy grounds. *See Baker*, 433 N.W.2d at 707. The Iowa Code of Professional Responsibility for Lawyers expressly states in Ethical Consideration 6-6 that "[a] lawyer should not seek, by contract or other means, to limit the lawyer's individual liability to clients for malpractice." However, "extension of this principle to transactions by 'tradesmen in the market place' has been rejected." *Baker*, 433 N.W.2d at 707.

OTHER CONSIDERATIONS

A limitation of liability clause must be "clear and unambiguous." *Employers Mut. Cas. Co. v. Chicago and N. W. Transp. Co.*, 521 N.W.2d 692, 694 (Iowa 1994). However, "[u]nder Iowa law, a contract need not expressly specify that it will operate for negligent acts if the clear intent of the language is to provide for such a release." *Korsmo v. Waverly Ski Club*, 435 N.W.2d 746, 748 (Iowa Ct. App. 1988).

If a contract provision limiting liability is not clear and unambiguous, it will be "strictly construed" against the person or entity seeking to enforce it. *Baker v. Stewarts Inc.*, 433 N.W.2d 706, 709 (Iowa 1988) (*quoting Sears, Roebuck & Co. v. Poling*, 81 N.W.2d 462, 465 (Iowa 1957)); *Weik v. Ace Rents, Inc.*, 249 Iowa 510, 514-15 (1958). For instance, in Baker, the Iowa Supreme Court held that a cosmetology school's exculpatory clause did not relieve it from the negligence of its supervisory personnel (i.e., its professional staff). *Id.* The waiver that the school had patrons sign read:

> I, [patron] ... do hereby acknowledge that this is a student training facility and thus there is a price consideration less than would be charged in a salon. Therefore, I will not hold the Stewart School, its management, owners, agents, or students liable for any damage or injury, should any result from this service.

Id. at 706-07.

Despite the language in the waiver referring to management and agents of the school, the Court held that while the waiver was sufficient to relieve the school from liability for the negligence of its students, it was insufficient to relieve it from the negligence of the instructors who oversaw the students. *Id.* at 708-09; cf. *Farmers Elevator Co. v. Chicago, Rock Island and Pac. R.R. Co.*, 260 Iowa 478, 488 (Iowa 1967) (act in question not covered by exculpatory clause). The Court did not rule on whether an agreement limiting the liability of a cosmetology school for its instructors' negligence could be valid under some circumstances. *See Baker*, 433 N.W.2d at 708.

From *Baker* we can glean that it is necessary for those seeking to limit their liability for the negligence of their agents to expressly state both who *and* what are relieved from liability, especially when the other party is not sophisticated and the contract they are signing is a standard adhesion contract. In *Baker*, the Court did not believe that the average patron would understand that the waiver they were signing allowed the school's supervisory personnel to act negligently without compensating the patron. *Id.* at 709.

The Iowa Court of Appeals was more forgiving (from a defense perspective) in *Korsmo v. Waverly Ski Club*, 435 N.W.2d 746, 747 (Iowa Ct. App. 1998), involving a release of liability in order to participate in a water skiing tournament. The agreement for participants in the tournament read:

> In consideration of your accepting this entry, I hereby, for myself, my heirs, executors and administrators, and/or for the minor for whom I am signing:
>
> 1. Release and forever discharge the sponsoring club of the above named tournament, the American Water Ski Association and any television broadcasting or news gathering agency that may be assigned rights to cover the tournament, their agents, servants and all persons connected with these competitions, of and from any and all rights, claims, demands and actions of any and every nature whatsoever that I may have, for any and all loss, damage or injury sustained by me and my equipment, or by the minor for whom I am signing, or by his equipment before, during and after said competitions; . . . .

Korsmo, 435 N.W.2d at 747.

The plaintiff in *Korsmo* argued that

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WHEN LIMITATION OF LIABILITY CLAUSES ARE ENFORCED . . . *continued from page 15*

the term "release" was ambiguous—does it refer to the present tournament or to existing claims the participant might have against the Water Ski Association? The Court disagreed, citing Black's Law Dictionary in ruling that the term "release" could refer to existing *and* future claims and concluding that "[t]here [was] no question that the parties intended to be released from liability in exchange for allowing [Plaintiff] to participate in the current tournament." *Id.* at 748.

Another relevant factor is whether the Plaintiff knew or should reasonably have known that the provision in question was included in the Contract. In *Woodburn and Advance Elevator Co.*, discussed below, the courts scrutinized the extent to which the party against whom the exculpatory clause was to be enforced knew or should have known that they were agreeing to an exculpatory provision written on the back of the agreement with no reference to the clause on the front.

The following section discusses particular situations where Iowa courts have examined the enforceability of limitation of liability clauses.

SPECIFIC CIRCUMSTANCES

When Limitation of Liability Clauses Have Been Struck Down

Common carriers, defined as "one who undertakes to transport, indiscriminately, persons and property from one place to another," along with doctors and lawyers are the most recognizable group, not allowed to exempt themselves from liability. *See Employers Mut. Cas. Co. v. Chicago and N. W. Transp. Co.*, 521 N.W.2d 692, 694 (Iowa 1994). Common carriers are not allowed to exempt themselves for three reasons:

> First, the law imposes on railroads an absolute duty to transport passengers and freight with care, as well as a duty to provide reasonably safe machinery and appliances for railroad employees. Second, parties to a transportation contract are not on equal footing because of the monopoly railroad companies enjoy over rail transportation facilities. Third, any attempt by railroads to exempt themselves from their absolute duty to transport passengers and freight with care would unreasonably endanger the lives of passengers and employees.

Id. at 695 (citations omitted).

Railroad companies acting outside of their public transportation function, however, may absolve themselves of liability. *Id. In Employers Mut. Cas. Co.*, the Court upheld a clause relieving the railroad of liability to a licensee of its rail property. *See id.*

When Limitation of Liability Clauses Have Been Upheld

A limitation of liability clause in an uninsured motorist provision of an auto insurance policy was upheld in *Krause v. Krause*, 589 N.W.2d 721 (Iowa 1999), though the issue was whether the provision was ambiguous, not whether it violated public policy.

The Iowa Supreme Court has also upheld waivers absolving racing tracks from liability for injuries sustained to patrons who were allowed to enter restricted areas after signing a waiver. *See generally Huber v. Hovey*, 501 N.W.2d 53 (Iowa 1993); *Bashford v. Slater*, 96 N.W.2d 904 (Iowa 1959).

In *Huber*, the plaintiff had been injured after a wheel and part of the axle came off one of the race cars and struck him. *Huber*, 501 N.W.2d at 55. The plaintiff initially argued that because he had not read the waiver and did not understand the risk of injury inherent in his activity, the waiver should not be enforced. The Court rejected this argument, holding that the plaintiff's risk of injury was neither "unusual [nor] exceptional" and, as a result, the exculpatory clause was enforceable. *Id.* at 56-57.

On August 14, 2002, the Iowa Court of Appeals decided *Adams v. Frieden, Inc.*, No. 2-163/01-1593, (Iowa App., August 14, 2002), another "racetrack release" appeal. As in *Huber*, the Plaintiff in *Adams* was injured while in a restricted area at a racetrack, and after signing a "release, waiver of liability, and indemnity agreement." The Plaintiff in *Adams*, however, was visually impaired, and argued that this handicap made it impractical if not impossible for her to read the release and rendered it unenforceable against her. The Iowa Court of Appeals disagreed, noting that the Iowa Supreme Court recognizes no "disability exception to the general rule that people are bound by documents they sign even if they have not read them," and that the Iowa Supreme Court "has adhered to the long established rule that a party who 'is able to read and has the opportunity to do so' must suffer the consequences of failing to do so." *Adams* at ___ (citing various Iowa cases). The Court stressed that Plaintiff was given an opportunity to read the document and admittedly could have done so (partially without magnification, partially with the aid of magnification), and was unconvinced by her argument that her disability (together with certain other

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WHEN LIMITATION OF LIABILITY CLAUSES ARE ENFORCED . . . *continued from page 16*

circumstances) led her to misunderstand the nature of the document she was signing. It is not clear how the Court of Appeals would have resolved *Adams* had the plaintiff been totally blind. It is likely that, at a minimum, the court would examine whether a blind plaintiff had been afforded a meaningful opportunity to have someone read the contract aloud.

Iowa courts have also upheld exculpatory clauses in the context of other possibly dangerous sporting events. *See Korsmo v. Waverly Ski Club*, 435 N.W.2d 746, 747 (Iowa Ct. App. 1988) (trial court's determination that release from liability provision should be enforced against a participant in a water skiing tournament was not challenged on appeal).

The Iowa Supreme Court upheld an exculpatory clause against a public policy attack in the context of a contract for a listing in a phone directory. *See Woodburn v. Northwestern Bell Tel. Co.*, 275 N.W.2d 403, 405 (Iowa 1979). The plaintiff had contracted for a bold-type listing in the yellow pages, but the defendant failed to make the proper listing. Id. at 404. The Court remanded, however, for a determination of whether there was mutuality of assent to the exculpatory clause. *Id.* at 406. The clause was on the back side of the standard contract form and the plaintiff had argued that he had not read or known about it. *Id.* at 405; *see also Advance Elevator Co. v. Four State Supply Co.*, 572 N.W.2d 186, 189 (Iowa 1987) (not questioning public policy of exculpatory clauses in elevator maintenance contracts, but finding that there was insufficient evidence to support a holding that the clause, located on the back of the form, was part of the agreed-upon terms). This situation is apparently different from the situation where a party is aware that there are terms to what he or she is signing but decides not to read those terms (see discussion of *Huber* and *Adams* cases above).

In *Weik v. Ace Rents, Inc.*, 249 Iowa 510 (1958), the Iowa Supreme Court upheld an exculpatory clause in an equipment rental agreement (a lawnmower that the plaintiff alleged was defective). *Id.* at 515.

Two relatively recent Iowa district court opinions have upheld limitation of liability clauses for home inspectors. *See Beelner v. Iowa Pro Home Inspections, Inc.*, No. LACV 58961, Nov. 30, 1999 Order (Johnson County District Court, Hon. Douglas S. Russell) (finding home inspector breached duty to Plaintiffs, but limiting liability of home inspector to refund of $210.00 inspection fee, pursuant to contractual limitation of liability); *Johannsson v. Blount*, Cl. No. 00078618, Feb. 17, 2000 Order (Polk County Dist. Court, Hon. Joel D. Novak) (upholding contractual limit-of-liability clause in home inspection contract (limiting recovery to refund of fee), even where home inspection contract was first delivered to Plaintiff after services were completed).

SAMPLE CLAUSES

The following is an example of a limitation of liability clause in a Design Professional contract:

> To the maximum extent permitted by law, the Client agrees to limit the Design Professional's liability for the Client's damages to the sum of $_____ or the Design Professional's fee, whichever is greater. This limitation shall apply regardless of the cause of action or legal theory pled or asserted.

The following is an example of a clause that contains more legalese:

> To the fullest extent permitted by law, and notwithstanding any other provision of this Agreement, the total liability, in the aggregate, of the Design Professional and the Design Professional's officers, directors, partners, employees, agents and sub-consultants, and any of them, to the Client and anyone claiming by, through, or under the Client, for any and all claims, losses, costs, or damages of any nature whatsoever arising out of, resulting from or in any way related to the Project or the Agreement from any cause or causes, including but not limited to the negligence, professional errors or omissions, strict liability, breach of contract or warranty, express or implied, of the Design Professional or the Design Professional's officers, directors, employees, agents, or sub-consultants, or any of them, shall not exceed the total compensation received by the Design Professional under this Agreement, or the total amount of $_____, whichever is greater.

Iowa appellate courts have not had the opportunity to rule whether limitation of liability clauses in design professional contracts are valid. The California Court of Appeals upheld one, though, where the parties were of relatively equal bargaining strength. *See Markborough California, Inc. v. Superior Court*, 277 Cal. Rptr. 919 (Cal. Ct. App. 1991).

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WHEN LIMITATION OF LIABILITY CLAUSES ARE ENFORCED . . . continued from page 17

CONCLUSION

After a review of the cases discussed in this article, it is apparent that Iowa courts will usually uphold limitation of liability agreements, assuming traditional contract principles like mutuality of assent are apparent. The types of cases where Iowa courts will not upheld such agreements typically involve necessary services, such as medical, legal, and transportation services, that are subject to significant public regulation. Outside of those contexts, the courts generally recognize the parties' ability to contract as they choose.

The moral of this story? Next time you get your haircut at a cosmetology school, be careful what you sign.

[1] The Author wishes to thank Jason Steffens, an Iowa Law Student, who played a major role in developing this Article.

EDITOR'S UPDATE

By: Tom Waterman, Davenport, IA

After Mr. Morf submitted the foregoing article for publication, the Iowa District Court for Scott County addressed a question of first impression in this state and ruled that pre-accident liability waivers signed by parents on behalf of their minor children are enforceable, rejecting Plaintiff's argument that such contractual provisions were void as against public policy. *See Wallen v. Scott County Family Y*, file number 98496, September 6, 2002 Order (Scott County Dist. Court, Hon. Gary D. McKenrick). Plaintiff Mary Wallen's three-year-old daughter broke her arm playing in the kid's gym while in a babysitting service at the Defendant YMCA. She brought a negligence action against the YMCA, seeking recovery for her child's personal injuries. The YMCA moved for summary judgment based on a liability waiver printed above the mother's signature on their family membership application. The parties' briefs noted the absence of Iowa appellate authority on the enforceability of such waivers. Judge McKenrick concluded in pertinent part:

> "The Court finds the defendant's argument concerning the validity of parental pre-accident liability waivers to be persuasive. The cases cited in the defendant's briefs in that regard, and the rational underlying the decisions therein, accurately reflect the broad public policy of this state to give effect to contracts freely entered into by competent individuals and to support parental decisions on behalf of their children in the absence of patent conflicts of interest or clear and convincing evidence of harm resulting to a child from parental action or inaction. In other words, the liability waiver executed by the plaintiff bars the plaintiff's individual claims and the claims of her child against the defendant to the extent that those claims fall within the scope of the waiver.

Ruling at 3.

Judge McKenrick, however, determined that the contract was ambiguous as to whether the YMCA's babysitting service was an "activity of the Y" within the scope of the liability waiver. Accordingly, the court denied the YMCA's motion for summary judgment, and the case is proceeding to trial.

The leading decisions in other jurisdictions enforcing waivers are *Sharon v. City of Newton*, 769 N.E.2d 728 (Mass. 2002) and *Zivich v. Mentor Soccer Club, Inc.*, 696 N.E.2d 201 (Ohio 1998). The leading decisions holding such waivers are unenforceable include *Cooper v. Aspen Skiing Co.*, 2002 WL 1358725 (Colo. June 24, 2002) and *Meyer v. Naperville Manner Inc.*, 634 N.E.2d 411 (Ill. Ct. App. 1994). These decisions review the policy arguments for and against upholding such waivers and cite additional cases on both sides of the issue.

SCHEDULE OF EVENTS

December 13, 2002
- Iowa Defense Counsel Association Board Meeting
  Des Moines Club, Des Moines, IA

February 21, 2003
- Iowa Defense Counsel Association Board Meeting
  Des Moines Club, Des Moines, IA

April 25, 2003
- Iowa Defense Counsel Association Board Meeting
  Des Moines Golf & Country Club
  West Des Moines, IA

April 25, 2003
- Iowa Defense Counsel Association Mini-Seminar
  Des Moines Golf & Country Club
  West Des Moines, IA

June 5-6, 2003
- Iowa Defense Counsel Association Board Meeting
  Ameristar Hotel, Council Bluffs, IA

June 6-7, 2003
- Defense Research Institute Mid-Region Meeting
  Ameristar Hotel, Council Bluffs, IA

RIEFF V. EVANS: GARNERING SUPPORT FOR THE FIDUCIARY EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE . . . *continued from page 4*

in a subsequent controversy with the other." *Id.* at 1103. Applying the rationale of this exception to the corporate context, the court reasoned that because a corporation's attorneys worked "for the benefit of all the stockholders," the attorney-client privilege would not protect the corporation from being required to disclose its attorney-client communications to its stockholders. Id. (discussing *Pattie Lea, Inc. v. District Court*, 423 P.2d 27 (Colo. 1967)).

The court, however, did not remove completely the attorney-client privilege from the corporate context and stressed, "The corporation is not barred from asserting [the privilege] merely because those demanding information enjoy the status of stockholders." 430 F.2d at 1103. Instead, the court stated that in order for a stockholder to overcome a corporation's assertion of privilege, the stockholder must allege that the corporation "act[ed] inimically to stockholder interests" and "show cause why [privilege] should not be invoked in a particular instance." *Id.* at 1103-04. Based upon the common law right of inspection of corporate books and records, the court identified a non-exclusive list of factors that "may contribute to a decision of presence or absence of good cause," including

- the number of shareholders and the percentage of stock they represent;
- the good faith of the shareholders;
- the nature of the shareholders' claim and whether it is colorable;
- the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources;
- whether, if the shareholders' claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality;
- whether the communication related to past or to prospective actions;
- whether the advice is concerning the litigation itself;
- the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; and
- the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.

Id. at 1104.

The majority of federal courts that have addressed *Garner* have adopted its rationale and good cause analysis.[1] In fact, many federal courts have expanded *Garner* from the traditional fiduciary relationship between a corporation and its stockholders to other fiduciary relationships such as the relationship between a union and its members.[2] State courts have also adopted *Garner* but with less consensus.[3]

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[1] *See, e.g., Sandberg v. Va. Bankshares, Inc.*, 979 F.2d 332, 351-54 (4th Cir. 1992) (concluding, "[T]he *Garner* analysis provides a sound basis for balancing a corporation's need to communicate confidentiality with its attorneys against the shareholder's interests as beneficiaries of a fiduciary relationship" and holding that a corporation could not shield certain communications from minority shareholders), vacated on other grounds, 1993 WL 524680 (4th Cir. Apr. 7, 1993); *In re Gen. Instrument Corp. Sec. Litig.*, 190 F.R.D. 527, 529-32 (N.D. Ill. 2000) (applying *Garner* in a class and derivative action to prevent a corporation from asserting the attorney-client privilege and recognizing that *Garner* was widely accepted in the district); *In re Dayco Corp. Derivative Sec. Litig.*, 99 F.R.D. 616, 620 n.3 (S.D. Ohio 1983) (declaring that *Garner* correctly interpreted the law and should be applied in the circuit). But *see Milroy v. Hunson*, 875 F. Supp. 646, 651-52 (D. Neb. 1995) (rejecting *Garner*); *Shirvani v. Cap. Inv. Corp.*, 112 F.R.D. 389, 390-91 (D. Conn. 1986) (rejecting *Garner*).

[2] *See, e.g., In re Occidental Petroleum Corp.*, 217 F.3d 293, 297-98 (5th Cir. 2000) (applying *Garner* to permit participants in a corporation's employee stock ownership plan to "pierce the corporation's attorney-client privilege"); *Fausek v. White*, 965 F.2d 126, 129-33 (6th Cir. 1992) (holding that *Garner* applied in a lawsuit filed by former minority shareholders against the former majority shareholder/director/chief executive officer of a corporation to prevent the corporation from asserting the attorney-client privilege); *Ward v. Succession of Freeman*, 854 F.2d 780, 786 (5th Cir. 1988) (acknowledging the Fifth Circuit's expansion of *Garner* beyond derivative suits); *Arcuri v. Trump Taj Mahal Assocs.*, 154 F.R.D. 97, 105-06 (D.N.J. 1994) (adopting and expanding *Garner* to apply to the relationship between a union and its members based in part on the wide acceptance of *Garner*); *In re Bairnco Corp. Sec. Litig.*, 148 F.R.D. 91, 97-99 (S.D.N.Y. 1993) (accepting *Garner* and expanding it to cases involving purchasers who were not shareholders during the relevant time); *Helt v. Metro. Dist. Comm'n*, 113 F.R.D. 7, 9-10 (D. Conn. 1986) (acknowledging *Garner* and concurring with courts that have expanded it to the point that in the case of a pension fund beneficiary, the beneficiary need not establish good cause for the privilege not to apply); *Aguinaga v. John Morrell & Co.*, 112 F.R.D. 671, 676-82 (D. Kan. 1986) (approving *Garner* and expanding it to the context of unions); *Wash.-Baltimore Newspaper Guild, Local 35 v. Wash. Star Co.*, 543 F. Supp. 906, 909 n. 5 (D.D.C. 1982) (acknowledging the propriety of *Garner* in the corporate setting but concluding that the good cause showing was unnecessary in the trustee relationship); *Cohen v. Uniroyal, Inc.*, 80 F.R.D. 480, 485 (E.D. Pa. 1978) (applying *Garner* to purchasers of stock and granting their motion to compel a corporation to answer interrogatories involving legal opinions and all attorney-client communications concerning the corporation's allegedly fraudulent conduct). But *see Weil v. Investment/Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 23 (9th Cir. 1981) (limiting *Garner* to derivative suits brought by current shareholders).

[3] *See, e.g., Grimes v. DSC Communications Corp.*, 724 A.2d 561, 568 (Del. Ch. 1998) (noting Delaware's acceptance of *Garner*); *Omega Consulting Group v. Templeton*, 805 So.2d 1058, 1060 (Fla. Dist. Ct. App. 2002) (applying *Garner* to reject a corporation's claim of attorney-client privilege); *In re Halter*, 1999 Tex. App. LEXIS 6478, at *12-14 (Tex. Ct. App. Aug. 27, 1999) (describing *Garner* as helpful and applying it to hold that attorney-client privilege did not apply). But *see Agster v. Barmada*, 43 Pa. D. & C. 4th 353, 363-64 (C.P. Allegheny County 1999) (rejecting *Garner*).

RIEFF V. EVANS: GARNERING SUPPORT FOR THE FIDUCIARY EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE . . . *continued from page 19*

BACKGROUND OF *RIEFF V. EVANS*

In December 1997, Rieff filed a derivative suit against Allied Group, Inc. and individual directors and officers of Allied Group and Allied Mutual. The suit was later amended to include class action claims. Rieff's derivative claims included breach of fiduciary duty, waste of corporate assets, improper transfer of control, intentional interference with business advantage and contracts, and equitable relief. Rieff's class action claims were for breach of fiduciary duty and intentional interference with business advantage and contracts. At the heart of these claims, Rieff alleged that through a series of transactions between the closely related Allied Mutual and Allied Group, the defendants improperly converted control of Allied Mutual and its assets to Allied Group, and in doing so breached fiduciary duties owed to the policyholders of Allied Mutual. Following dismissal of all of Rieff's claims, Rieff's appealed to the Iowa Supreme Court, which reversed the dismissal of seven of the eight claims. *Rieff v. Evans*, 630 N.W.2d 278, 296 (Iowa 2001).

During discovery, Allied Mutual and Allied Group produced a 205-page privilege log, identifying several thousand documents withheld on the basis of attorney-client privilege. In response, Rieff filed a motion to compel arguing that Allied Mutual and Allied Group could not properly assert the attorney-client privilege against her because of *Garner*, which Rieff contended conformed closely to Iowa law. Allied Mutual argued that *Garner* has not and should not be adopted in Iowa. Allied Group argued that *Garner* should not apply to defeat its assertion of attorney-client privilege because it did not owe a fiduciary duty to Rieff.

Judge Staskal ruled in favor of Rieff and determined that the Iowa Supreme Court would adopt for several reasons:

> The court concludes that the Iowa Supreme Court would adopt a fiduciary exception to the attorney client privilege co-extensive with the rule for these reasons. First, the rule has received relatively wide acceptance, at least in the federal courts. Criticism of the rule appears to be a minority point of view. Some of the courts that have rejected the doctrine have done so where the issue was raised in the context of actions that were initiated only for the benefit of individual shareholders, personally. Second, our court has expressed a strong policy preference for liberal discovery and for the narrow construction of privileges that tend to defeat that preference. That includes the attorney client privilege. Third, the *Garner* doctrine is analogous to the "joint client" exception to the attorney client privilege, an exception that our Court has recognized. Finally, our court has affirmed the principle underlying the *Garner* doctrine - that corporate officers and directors owe a fiduciary duty to the owners of the corporation.

Rieff, slip op. at 4 (internal citations omitted). Judge Staskal ruled that because Allied Mutual owed a fiduciary duty to Rieff and Rieff showed good cause, Allied Mutual could not assert the attorney-client privilege against her. *Id.* at 7-8. With respect to Allied Group, Judge Staskal held that because Rieff had not yet demonstrated a fiduciary relationship with Allied Group, *Garner* did not apply to it. *Id.* at 8.

PRACTICE POINTERS

In adopting *Garner*, Judge Staskal's rationale is instructive because it highlights potential defenses against the application of *Garner*. As an initial matter, the Iowa Supreme Court has not ruled on the applicability of *Garner* under Iowa law. Therefore, Judge Staskal's ruling, while persuasive, does not represent binding authority in Iowa.

In addition, Judge Staskal recognized that the application of *Garner* depends upon the presence of a fiduciary duty: "There is no question that a fundamental prerequisite for application of the *Garner* rule is the existence of a fiduciary relationship between those seeking to pierce the privilege and the entity (and those acting for it) entitled to exercise the privilege." *Id.* at 8. It was because Allied Group was able to argue

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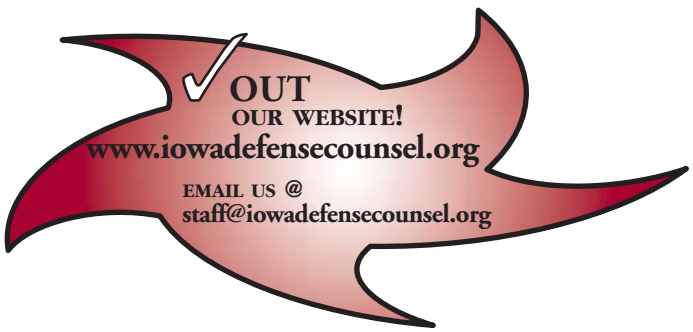

RIEFF V. EVANS: GARNERING SUPPORT FOR THE FIDUCIARY EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE . . . *continued from page 20*

successfully that Rieff had not demonstrated that it owed a fiduciary duty to her that Allied Group could sustain its attorney-client privilege claims.

However, in attempting to defend against the application of *Garner* by arguing the lack of a fiduciary duty, it is necessary to be aware that Iowa courts have defined fiduciary relationships quite broadly such that the reach of *Garner* may be similarly broad. In *Kurth v. Van Horn*, 380 N.W.2d 693 (Iowa 1986), the Iowa Supreme Court defined "fiduciary relationship" as

> [a] very broad term embracing both technical fiduciary relations and those informal relations which exist wherever one man trusts in or relies upon another. One founded on trust or confidence reposed by one person in the integrity and fidelity of another. A "fiduciary relation" arises whenever confidence is reposed on one side, and domination and influence result on the other; the relation can be legal, social, domestic, or merely personal. Such relationship exists when there is a reposing of faith, confidence and trust, and the placing of reliance by one upon the judgment and advice of the other.

Id. at 695-96 (quoting *Black's Law Dictionary* 564 (5th ed. 1979)). As examples of fiduciary relationships, the Court identified the relationships between attorney and client, guardian and ward, principal and agent, executor and heir, and trustee and *cestui que trust*. *Id.* at 696. Beyond such easily defined fiduciary relationships, the Court recognized that fiduciary relationships arise is such diverse circumstances that any such relationship "must be evaluated on the facts and circumstances of each individual case." *Id.* To counter the potentially broad application of *Garner*, it may be useful to rely on authority that limits Garner to the derivative context, and the relationship of corporation to stockholder.[4]

Further, despite ruling that Rieff established good cause for the application of *Garner* to Allied Mutual, Judge Staskal lamented the practicality of the good cause analysis:

> Obviously, application of these good cause factors is not a mathematical exercise. Some of them are vague (e.g. - what is a "colorable" claim beyond one which has survived a motion to dismiss), in some respects they are contradictory to the purpose of discovery itself (how can a party demonstrate a need for a particular piece of evidence without knowing what it is and, by the same token, how can a party determine whether there is another source for the information without knowing what it is) and there are serious problems with their application.

Rieff, slip op. at 6. Judge Staskal therefore reduced the good cause analysis to its primary purpose, "to guard against frivolous or harassing expeditions into corporate records by shareholders who are acting blindly or in bad faith," *Id.* at 6, and stated that the most significant indicia of good faith was whether the party seeking the information acts only in her personal interest, *Id.* at 6-7.[5]

Therefore, based on Judge Staskal's observations, in order to defend properly against an attempt to invoke *Garner*, it is necessary to challenge good cause and specifically take advantage of any indication that the party seeking to apply *Garner* is acting solely for her benefit. For example, if the party is a minority shareholder and seeks to recover damages from the corporation for herself, good cause is much less likely to exist.[6]

CONCLUSION

With the adoption of *Garner* and the fiduciary exception to the attorney-client privilege, the scope of Iowa's attorney-client privilege became more limited. However, as Judge Staskal's comments make clear, *Garner* is limited to situations involving fiduciary relationships in which the party seeking the information can show good cause to obtain access.

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[4] *See Weil*, 647 F.2d at 23 ("The *Garner* plaintiffs sought damages from other defendants [on] behalf of the corporation, whereas *Weil* seeks to recover damages from the corporation for herself and the members of the proposed class. *Garner's* holding and policy rationale do not apply here.").

[5] As support, Judge Staskal cited *Ward*, 854 F.2d at 786, which stated, "Where plaintiffs bring a derivative action against management for actions in which there are no adverse interests, then the strength of the plaintiffs' 'bona fides' may allow for a finding of good cause even though other factors are marginally demonstrated."). *Rieff*, slip op. at 7.

[6] *See Ward*, 854 F.2d at 786 (holding that plaintiffs who owned less than four percent of stock failed to establish good cause).

38th ANNUAL ME

The IDCA Board hard at work

Executive Committee:
Rick Santi, Jim Pugh, Sharon Greer & Mike Weston

Michael Thrall was awarded the Ed Seitzinger Award

Mike Ellwanger presents Dave Riley with his outgoing board member plaque

President Mike Weston presents Mike Ellwanger with his outgoing President award

ETING & SEMINAR

President Mike Ellwanger & President-Elect Mike Weston

Wednesday Night Reception

SPEAKERS

GLEN OAKS BANQUET

WHAT'S BAD ABOUT "THE VANISHING TRIAL?"

By: Thomas D. Waterman, Davenport, Iowa

Conventional wisdom lauds settlements and the alternative dispute resolution (ADR) techniques that help achieve them -- dockets are cleared and the costs and risks of a full blown trial avoided. Too little consideration has been given, however, to how the Iowa court system could be improved with more civil trials, rather than fewer. Iowa has not escaped the national trend that warranted a cover story on the October, 2002, ABA Journal ("The Vanishing Trial") -- trials have been "vanishing" here as well. Iowa's 99 counties combined had a total of 282 civil jury trials in 2001, down from 415 in 1998 and 552 in 1993. What is wrong with fewer trials? And if ADR settles cases without trials, what is bad about that?

First, the fewer the trials, the more difficult it becomes to value cases for settlement. Jury verdicts provide "market" data to more accurately estimate the settlement value and liability exposure for other cases involving similar facts or injuries.

Second, as trials vanish, trial skills suffer. Some lawyers from the "greatest generation" personally have tried hundreds, even thousands of cases. Today, it is not uncommon for experienced Iowa civil trial lawyers to have gaps of several years between jury trials. New attorneys hoping to develop courtroom skills find civil jury trials a rarity. Trying cases to private focus groups and NITA-style clinics is no substitute for the real thing. Moreover, as U.S. Magistrate Judge Celeste Bremer observed at last year's federal practice seminar, the prevalence of judicially sponsored settlement conferences and ADR seems to have undermined the ability of some lawyers to negotiate settlements on their own. Lawyers can grow dependent on having a third party authority figure do the armtwisting of clients and opponents, and lawyers understandably are reluctant to show all their cards (or offer top dollar) in direct negotiations before all parties convene. Cases that used to be settled between lawyers over the phone now go through costlier mediations or judicial settlement conferences.

Third, some clients are better off taking more cases to trial. Anecdotal reports suggest eastern Iowa's riverboat casinos have been well-served by refusing to pay nuisance settlements in thin or no-liability cases. These businesses enjoy millions of customer visits and slip and fall claims inevitably follow. Certainly, some of their cases could be settled for less than the cost to win at trial. But, word gets around to the plaintiffs' bar about a consistent policy to try cases instead of settling. The result: fewer lawsuits against these casinos and more voluntary dismissals by the plaintiffs' bar. Thus, these clients save money in the long run by electing to try more cases instead of settling.

I don't mean to denigrate the salutary benefits of mediation and mandatory judicial settlement conferences. Nevertheless, insurers, business owners, trial lawyers and judges should give more weight to the benefits of trying cases. Defendants and insurers shouldn't overpay just to get rid of cases, any more than claimants should walk away with less than fair value in a settlement. Furthermore, the best settlements often are achieved when the opposition knows you are prepared to take the case through trial. It is high time for the pendulum to swing back to reverse the "vanishing trial" trend.

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