defense UPDATE

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CONTRACTUAL INDEMNIFICATION CLAUSES - PROPER CONSIDERATIONS BEFORE ACCEPTING TENDERS OF DEFENSE IN WORK SITE CASES

By: Bruce L. Walker, Iowa City, IA

A contractual indemnification provision can be used to tender the defense of extensive litigation early in the process. It can, also, be used to shift the common law duty to indemnify. However, if your client is the recipient of such a tender, I urge you, before rendering an opinion on the probability of success or failure of the tender, to carefully review the pleadings in the case. Once accepted it is much more difficult to return the defense than to later justify an adverse result post jury verdict.

Analysis of the shifting of the duty to defend pre-verdict can be a very difficult task. This is true even if substantial discovery has taken place. It requires you to try to predict how the evidence will be submitted to the trier of fact, usually by multiple parties, and what theories of recovery and defenses will be submitted. Then, you must predict the basis of a jury's ultimate verdict. As a result, it is important for counsel to carefully review all pleadings and amendments to be able to understand the theories of recovery and defense asserted by all parties. Once that has been accomplished, counsel needs to understand the case law in this area.

Fortunately, the Iowa Supreme Court has provided us guidance to help in the process of making this determination. *Truscheff v. Abel-Howe Co.*, 239 NW2d 116 (Iowa, 1976) involved a roofing contractor employee who sued his employer's general contractor, a steel supplier, and others for injuries sustained in a fall through a hole cut in the roof of Linn Hall on the Area Ten Community College campus. The trial court upheld the verdict against the general contractor and denied the indemnification claims because the duty to provide a safe place to work overrode the duty to comply with the contract and specifications. In this case, the general contractor supervised and inspected the work of its subcontractors. *Truscheff* supra at 124. There was, also, evidence of custom and practice that curbs and toe boards are generally placed around roof cuts. *Id*. at 124-125. The Court held that the duty of general contractors is not limited to the contract and specifications. Id. at 126. Custom and practice must be considered. *Id*. In dealing with the general contractor's claims for indemnity, the Court held that the duty to provide a safe place to work is non-delegable, citing 52 Iowa Law Review 31, 35-36 (1966). This was true even though the injured worker's employer was contractually obligated to cut the holes in the roof properly because the subcontract did not impose a duty to indemnify the general contractor and the employer was insulated from a direct action by its employee under the Iowa Workers' Compensation Act. *Id*. Further citing to 46 Restat. Torts 2d Comment C the Court found that the delegated contractual duties did not involve the provision of a safe place to work. *Id*. at 127. Finally, the Court found at 133-134 that the contractual indemnity clause did not include language that indemnity would be provided for the fault of the general contractor. The general rule expressed

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MESSAGE FROM THE PRESIDENT

Mike Ellwanger

ALL HEAT AND NO LIGHT

The Presidential campaign of 1800 (*John Adams v. Thomas Jefferson*) is generally regarded as the dirtiest campaign in the history of this country. John Adams, a Federalist running for his second term, was accused of being "a hoaryheaded incendiary" who wanted to declare war on France and declare himself President for life. Thomas Jefferson stated that "a reign of witches" was running the government. He was accused of being "quite mad." Even fellow Federalist Alexander Hamilton turned on John Adams, describing him as an inherently unstable creature, driven by vanity and his own perverse version of independence, "a pathetic bundle of twitches and tantrums." It has been suggested that the animosity of the campaign is possibly attributable to the fact that political parties, for the first time, were running the campaigns and directing the combat.

I was reminded of the above during the recent legislative session, specifically with reference to the IDCA sponsored bill concerning the apportionment of a worker's compensation award, when the claimant has suffered a previous compensable injury. The current state of the law is that where a claimant suffers a previous compensable injury, e.g., 25% to the body as a whole; and then suffers a second injury which increases his disability to 50%, the subsequent employer has to pay the full 50%, even though the employee has already recovered 25% for the previous injury. The worker's compensation subcommittee of the IDCA felt that this law was patently unfair and was inconsistent with the concept of comparative fault, in which each defendant is required to pay his or her own proportionate share of the liability.

I am not a worker's compensation lawyer. I do, however, understand the position of the IDCA. If I wanted some enlightened discussion from the other side, I would not have received it. Instead, I saw the old "class warfare" mentality that is frequently resorted to in an effort to defeat legislation that is deemed to be anti-plaintiff.

In correspondence to all Iowa Trial Lawyers Association members, the bill was referred to as "insidious legislation" which would "eviscerate the established legal principle that employers are fully responsible for workplace injuries, and thus drastically curtail worker's compensation benefits for a multitude of injured Iowa workers."

A March 31, 2002, editorial in the *Des Moines Register*, stated that the legislation was "mean spirited" and a "slap in the face to the State's working people."

In a recent article in the *Sioux City Journal*, a former Democratic legislator and practicing attorney in Sioux City, stated "This is just another example of mean-spirited, anti-worker legislation that the Republicans continue to pass that is really an insult to the working people of this state."

Certainly people can make good faith proposals for legislative change. Those proposals deserve to be discussed on the merits. Some proposals appear to expand claimant's/plaintiff's rights and causes of action, others perhaps curtail them. However, the knee jerk hysteria that is generated every time a piece of legislation is proposed which might have the latter effect is growing a bit tiresome. This bill did not come out of the minds of some evil capitalist who is trying to take money out of the hands of needy Iowa families. Rather, it came out of the IDCA worker's compensation committee because it was unfair. It does in fact appear, on its face, to be unfair. If we are wrong, please give us some "light" on the subject, rather than all of the "heat" that contributes nothing to the public's knowledge of the issue.

Incidentally, the Bill was passed by both houses of the legislature but vetoed by Governor Vilsack.

ADDENDUM: To avoid accusations of plagiarism, the information in paragraph one of this editorial can be found in *Founding Fathers* by Joseph Ellis, and *John Adams* by David McCullough.

Michael W. Ellwanger

OWNERSHIP, POSSESSION AND CONTROL
RESULTING IN PREMISES LIABILITY IN IOWA

By: Patrick L. Woodward, Davenport, IA

Premises liability in Iowa turns on possession and control, not ownership. *Van Essen v. McCormick Enterprises, Co.*, 599 N.W.2d 716, 718 (Iowa 1999). In this, Iowa follows Section 343 of the *Restatement (Second) of Torts*, (1965) which provides:

A possessor of land is subject to liability for physical harm caused to invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitee, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

Restatement (Second) of Torts, §343. The Restatement further defines a possessor as follows:

A possessor of land is

(a) a person who is in occupation of the land with intent to control it, or

(b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or

(c) a person who is entitled to immediate occupation of the land, if no other person is in possession under clauses (a) and (b).

Restatement (Second) of Torts, §328E.

Through a series of cases, the Iowa Supreme Court has sought to define a possessor for the purposes of premises liability in light of the changing complexity of business relationships. When these cases are examined, the common theme that runs through the Court's decisions is that it seeks to place liability on that party which has the most immediate legal right to occupation so as to discover the dangerous condition and exercise control to rectify it.

Almost fifteen years ago in Galloway v. Bankers Trust Company, 420 N.W.2d 437 (Iowa 1988), the Court recognized that the owner of land may loan its possession to another, thus rendering that party the possessor and negating the owner's status as such. In *Galloway*, First National Bank of Chicago was the trustee of a trust which owned a shopping mall in Iowa, but First National had placed title to the property with an ancillary trustee, Bankers Trust Company. Under this arrangement, Bankers Trust was serving at the will of First National Bank and could be removed at any time, thus returning the full incidence of ownership, including possession and control to First National. Further, First National was entitled to the net profits from the property. However, in absolving First National from any duty to invitees to the mall and thus, liability for damages resulting in injury to an invitee, the Court found that First National had loaned possession and day-to-day control to Bankers Trust. Without saying it directly, the Court appeared to recognize that Bankers Trust, and not First National, was the party with not only a legal right to possession under the trust, but was the party in the best position to discover the alleged dangers and taking a necessary step to cure the same.

In its next case of substance on this issue, *Hoffnagle v. McDonald's Corporation*, 522 N.W.2d 808 (Iowa 1994), the Iowa Supreme Court took a further step in clarifying the necessity of possession and control as prerequisites for premises liability. In this case, Hoffnagle was an employee of a McDonald's franchisee, Rapid-Mac, Inc., and was the victim of an attempted abduction not once, but twice, at the McDonald's restaurant operated by the franchisee. Hoffnagle brought a workers' compensation proceeding against Rapid-Mac and a civil suit against McDonald's Corporation as owner of the land. McDonald's Corporation was the titled owner of the land, leasing the restaurant to Rapid-Mac, and further, as franchisor and licensee of Rapid-

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IN THE PIPELINE

By: Tom Waterman, Davenport, Iowa

On June 6, 2002, the Iowa Supreme Court heard oral argument on eight questions of law certified by the Honorable Mark W. Bennett, U.S. District Judge for the Northern District of Iowa, in *Wright v. Brooke Group, Limited, et al*, No. C99-3090MWB (Iowa Supreme Court No. 01-712). The certified questions are as follows:

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?

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

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. Between 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?

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?

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 Defendant is solely that of a customer/buyer and manufacturer?

6. Does an "undertaking" arise under §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?

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

8. Does Iowa law allow Plaintiff to recover from a cigarette manufacturer for breach of implied warranty of merchantability when the cigarettes smoked by Plaintiff were in the condition intended by the manufacturer and Plaintiff alleges Defendants' cigarettes are "substantially interchangeable"?

The Iowa Defense Counsel Association and Defense Research Institute submitted a joint brief as *amicus curiae* urging that certified questions 4-8 be answered "No." The *amicus curiae* brief took no position on certified questions 1, 2 or 3. The Iowa Supreme Court's decision on the certified questions is expected this Autumn, 2002. There will be a follow-up article when that decision is available.

RUBES VS. MEGA LIFE

LIABILITY EQUITABLE RESCISSION DUE TO MISREPRESENTATIONS IN INSURANCE APPLICATION

By: Jason M. Casini*, Des Moines, IA

The Iowa Supreme Court recently issued a decision that provides important guidance for defense counsel representing insurance carriers who seek the rescission of policies based upon material misrepresentations in the application process. In *Rubes v. Mega Life & Health Ins. Co.*, 642 N.W.2d 263 (Iowa 2002), the Court clarified the distinction between the elements of claims for equitable rescission and fraudulent misrepresentation in the context of an insurance coverage dispute. The Rubes decision also represents an apparent departure from a line of older Iowa cases that made it difficult for insurance carriers to raise material misrepresentations in an insured's application as a defense in a coverage dispute if an agent helped prepare the application.

The *Rubes* Case

In *Rubes*, the plaintiff, a practicing lawyer, was hospitalized for several days after experiencing symptoms of fever, chills, and shortness of breath. The admitting physicians diagnosed his condition as pneumonia. During his hospitalization, tests revealed extremely low white blood cell counts and highly elevated liver enzymes as well as an enlarged liver and spleen. He also tested positive for hepatitis C and the antibody for hepatitis B, although it was unclear if the test results were conveyed to him before his discharge. Rubes' physicians directed him to seek follow up treatment to monitor his highly elevated liver enzymes, but Rubes did not keep his follow up appointment.

Approximately six weeks after his discharge from the hospital, Rubes prepared an application for life and health insurance with the assistance of an independent agent for Mega Life. It was undisputed that the agent prepared the application, but that Rubes was given an opportunity to review the completed application and signed it to verify the accuracy of the representations contained in it.

Although Rubes had a history of alcohol and drug abuse and had received outpatient treatment for alcoholism after being arrested for driving while intoxicated, he responded "no" to questions on the application inquiring about past treatment for alcoholism or arrests for DWI. Rubes disclosed his recent hospitalization, but described it as a "bacterial infection" from which he had a "100% full recovery," with "no follow up medication or treatment." He also denied inquires regarding prior treatment for "respiratory disorder ... or breathing problems."

Several months after Mega Life approved his application and issued his insurance policy, Rubes was hospitalized after episodes of severe gastrointestinal bleeding. He was diagnosed with advanced liver disease and placed on a transplant list. He eventually received a liver transplant.

After Mega Life learned of the hospitalization, it began to review Rubes' medical records and the representations on his application. Before Mega Life completed its investigation, Rubes filed a declaratory judgment action seeking to compel Mega Life to pay his medical expenses. Mega Life filed an Answer and asserted a Counterclaim for equitable rescission of Rubes' policy.

The Proper Elements of Equitable Rescission

At trial, Mega Life presented undisputed evidence that it would never have issued Rubes' policy if Rubes had provided complete and accurate information about his medical history in his application. Rubes acknowledged that the representations concerning his medical history were objectively false, but claimed that he was unaware of his physicians' actual diagnosis. Therefore, according to Rubes, rescission of his policy was improper under Iowa law because Mega Life could not establish that he knew the representations in his application were false or made with an intent to deceive.

Mega Life asserted that whether Rubes knew his representations were false (scienter) or intended to deceive Mega Life were entirely irrelevant, since its Counterclaim was based upon the less stringent standards for equitable rescission announced by the Iowa Supreme Court in *Hyler v. Garner*, 548 N.W.2d 864 (Iowa 1996)

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is that indemnity will not be provided for the parties' own fault unless it is clearly and unequivocally expressed. *Id*. see also, *Farmers Elevator v. Chicago RI & Pacific RR Co.*, 149 NW2d 866 at 870 (Iowa, 1967). This ruling may well have been influenced by *Rauch v. Senegal*, 112 NW2d 886 (Iowa, 1962) in which the Court found at 888 that a party could recover its attorneys' fees based on a theory of indemnity following a jury verdict and judgment if the recovering party was not at fault and the exclusive reason for the claim against that party is the fault of another party.

The decision in *Payne Plumbing & Heating Co. v. Bob McKiness Excavating & Grading, Inc.*, 382 NW2d 156, 160 (Iowa, 1986) held that, unless the agreement is stated in "clear and unequivocal" language, a party will not be indemnified for its own negligent act. The American Institute of Architects has tried to cure this problem by providing fairly tight language in its forms.

However, the Iowa Supreme Court in *Martin & Pitz Associates, Inc. v. Insurance Co. of North America,* 602 NW2d 805, 809 (Iowa, 1999) after reciting the rule of the *Payne* case, found the language used was inadequate(the contract involved provided for indemnification "regardless of whether or not such claim is caused in part by a party indemnified").

There is also an excellent annotation available for review on this subject found at 68 ALR 3d 7 entitled "Liability of a Subcontractor Upon Bond or Other Agreement Indemnifying General Contractor Against Liability for Damage to Person or Property". I urge you to obtain the annotation to the American Institute of Architects forms to review the text, interpretation and annotations supplied. In addition, there is a seminar being conducted by Webb Wassmer for Lohrman on this topic in Cedar Rapids on July 9.

After a review of the pleadings and case law, you should obtain the AIA form contract signed by all parties if they exist. This would include the form signed by the owner, the architect, the general contractor and subcontractors, or all prime contractors. The reason this is essential is that the form agreement A201, if applicable, should contain paragraph 3.18 which deals with indemnification. Standard language is as follows:

3.18.1 – To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's Consultants and agents and employees or any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees arising out of or resulting from performance of the Work, whether such claim, damage, loss or expense including attorneys' fees accrues or is incurred during contract performance or subsequent to completion of the Work, provided that such claim, damage, loss or expense is attributable to bodily destruction of tangible property (other than the Work itself) including loss of use resulting from, but only to the extent caused in whole or in part of negligent acts or omissions of the Contractor, Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations or indemnity which would otherwise exist as to party or person described in this Paragraph 3.18.

3.18.1.1 – In addition to any indemnification required under Paragraph 3.18, the contractor shall purchase insurance as provided in Minnesota Statute Section 337.05, as most recently amended, for the benefit of the Owner and the Architect and their agents, consultants and employees, which shall compensate them from any loss due to any and all claims, damages, losses and expenses arising out of the circumstance described in this Paragraph 3.18, including, but not less than, the coverage amounts required by Article 11.1.2 (amended herein), and shall be provided in accordance with General Conditions Paragraph 11.1. Copies of the contract of insurance shall be provided to the Owner and Architect and shall name these parties as insureds.

3.18.2 – In claims against any

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person or entity indemnified under this Paragraph 3.18 by an employee of…a Subcontractor, the indemnification obligation under this Paragraph 3.18 shall not be limited by a limitation on amount or type of damages, compensation or benefits payment by or for …a Subcontractor under worker's or workmen's compensation acts, disability benefit acts or other employee benefit acts.

3.18.3 – The obligations of the Contractor under this Paragraph 3.18 shall not extend to the liability of the Architect, the Architect's consultants, and agents and employees or any of them arising out of (1) the preparation or approval of maps, drawings, opinions, reports, surveys, change orders, designs or specifications, or (2) the giving of or the failure to give directions or instructions by the Architect, the Architect's consultants, and agents and employees of any of them provided such giving or failure to give is the primary cause of the injury or damage.

In addition, you should review paragraph 11.3 to determine what obligation is assumed by the parties to obtain insurance that could apply to indemnify the other parties to the agreements. A standard provision is as follows:

11.3.1 – Unless otherwise provided, the Owner shall purchase and maintain, in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located, property insurance in the amount of the initial Contract Sum as well as subsequent modifications thereto for the entire Work at the site on a replacement cost basis without voluntary deductibles. Such property insurance shall be maintained, unless otherwise provided in the Contract Documents or otherwise agreed upon in writing by all persons and entities who are beneficiaries of such insurance, until final payment has been made as provided in Paragraph 9.10 or until no person or entity other than the Owner has an insurable interest in the property required by this Paragraph 11.3 to be covered, whichever is earlier. This insurance shall include interests of the Owner, the Contractor, Subcontractors and Sub-subcontractors in the Work.

11.3.1.1 – Property insurance shall be on an all-risk policy from and shall insure against the perils of fire and extended coverage and physical loss or damage including, without duplication of coverage, theft, vandalism, malicious mischief, collapse, false work, temporary buildings and debris removal including demolition occasioned by enforcement of any applicable legal requirements, and shall cover reasonable compensation for Architect's services and expenses required as a result of such insured loss. Coverage for other perils shall not be required unless otherwise provided in the Contract Documents.

11.3.1.2 – If the Owner does not intend to purchase such property insurance required by the Contract and with all of the coverages in the amount described above, the Owner shall so inform the Contractor in writing prior to commencement of the Work. The Contractor may then effect insurance which will protect the interests of the Contractor, Subcontractors and Sub-subcontractors in the Work, and by appropriate Change Order the cost thereof shall be charged to the Owner. If the Contractor is damaged by the failure or neglect of the Owner to purchase or maintain insurance as described above, without so notifying the Contractor, then the Owner shall bear all reasonable costs properly attributable thereto.

11.3.1.3 – If the property insurance requires minimum deductibles and such deductibles are identified in the Contract Documents, the Contractor shall pay costs not covered because of such deductibles. If the Owner or insurer increases the required minimum deductibles above the amounts so identified or if the Owner elects to purchase this insurance with voluntary deductible amounts, the Owner shall be responsible for payment of the additional costs not covered because of such increase of voluntary deductibles. If deductibles are not identified in the Contract Documents, the Owner shall pay costs not covered because of deductibles.

11.3.1.4 – Unless otherwise provided in the Contract Documents, this property insurance shall cover portions of the Work stored off the site after written approval of the Owner at the value established in the approval, and also portions of the Work in transit.

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Mac, established the standards by which Rapid-Mac was to operate its business, retaining for itself the right to inspect the restaurant at all times and ensure the restaurant was being operated in conformance with McDonald's policies and procedures. If the franchisee failed to comply with McDonald's standards in any respect, McDonald's had the right to terminate the franchise agreement, license agreement and the lease. Although through its various capacities McDonald's ultimately could be possessor of the restaurant and exercise control, the Iowa Supreme Court held that McDonald's was not liable for the plaintiff's claimed damages because it owed no legal duty to her. Relying on §414 of the *Restatement (Second) of Torts* for its decision, the Court built on its holding in *Galloway*, requiring not only the right to possession and authority to exercise control, but that a party must actually be exercising possession and control before it owed a duty to another. While noting that McDonald's retained certain rights which it could exercise, it was the fact that the franchisee was in actual possession and exercised control on a day-to-day basis which placed it in the best position to discover and remedy the danger and, therefore, the franchisee, not McDonald's, would have owed a duty to Hoffnagle.

In *Van Essen v. McCormick Enterprises Co.*, 599 N.W.2d 716 (Iowa 1999), the Iowa Supreme Court once again further refined the principles of possession and control in the context of premises liability. In *Van Essen*, a business invitee brought a personal injury action against the out-of-possession landlord, McCormick Enterprises, for injuries sustained when his leg was caught in an exposed auger which was part of a grain bin McCormick had built when it was in possession. The basis for the invitee's claim was that McCormick remained liable as landlord for unsafe conditions it had created before relinquishing possession to the lessee, or alternatively, that McCormick as landlord retained sufficient control so as to owe a duty to invitees. The Court, quoting the *Restatement (Second) of Torts*, §356 stated:

> A lessor of land is not liable to his lessee or to others on the land for physical harm caused by any dangerous condition, whether natural or artificial, which existed when the lessee took possession. *Van Essen v. McCormick*, 599 N.W.2d at 719.

The Court then went on to quote *Galloway v. Bankers Trust Co.*, 420 N.W.2d at 441, stating "possessory rights may be 'loaned' to another, thereby conferring the duty to make the premises safe while simultaneously absolving oneself of responsibility." (Quoting, *Merritt v. Nickelson*, 407 Mich. 544, 287 N.W.2d 178, 181 (1980)). Therefore, as to the claim based on possession, the Court held that McCormick owed no duty to the invitee, Van Essen, as it had turned possession over to the lessee via the lease.

As to the claim based upon control, the Court held that mere obligations under the lease to (1) insure the grain bin, (2) pay one-half of the costs of repairs, and (3) receive rent based upon a percent of the lessee's profits were not sufficient to support a claim that McCormick retained control. As in *Galloway and Hoffnagle*, the result of the Court's decision was to relieve the owner, even one with substantial rights, from liability where another with a legal interest in the property was in a better position to discover any dangers and more specifically, to take corrective action against such dangers. It appears that it is this knowledge, with authority to take remedial actions, which gives rise to a duty to an invitee.

Finally, this spring the Court issued its opinion in *Wiedmeyer v. The Equitable Life Assurance Society of the United States*, ____ N.W.2d ____, (2002 W.L. 865411 (Iowa 2002). In *Wiedmeyer*, the Court had the opportunity to examine whether an absentee owner who retained the services of an agent to manage its property owed a duty to invitees. The facts alleged that Wiedmeyer sustained a serious injury to her ankle when she slipped and fell on ice in the parking lot of Duck Creek Mall, a shopping center in Bettendorf, Iowa, which The Equitable owned. At the time of her fall, Duck Creek Mall was owned by The Equitable, but as The Equitable was in the insurance business, it had retained the services of General Growth Corporation to manage the mall as its agent. Under the agency agreement, General Growth was empowered to collect rents, negotiate

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leases and was required to maintain the mall and "keep the premises in a safe, clean and sightly condition...." After suit was filed, The Equitable moved for and obtained summary judgment from the trial court based upon the argument that it was an absentee landlord which had loaned its possessory interest to General Growth. Based upon *Galloway, Hoffnagle and Van Essen*, the trial court held that The Equitable was an absentee owner which had loaned possession and control of the mall to General Growth, and, therefore, owed no duty to an invitee.

On appeal, the Iowa Supreme Court reversed the trial court, finding that the employment of an agent was not the same as loaning possession and control to another. Instead, the Court recognized that unlike the other cases discussed above, The Equitable had not transferred a legal right of possession to General Growth, but instead, had simply employed General Growth to act as its alter ego at the mall. Specifically, the Supreme Court recognized that under the laws of agency and the specific provisions of the agency agreement between The Equitable and General Growth, the acts of General Growth were those of The Equitable, including acts of possession and control.

The decision in *Wiedmeyer* does not establish new law. To the contrary, the Court's decision follows a line of cases since *Galloway* refining the principles set forth in the *Restatement*. At the very essence of the Court's decisions is the principle that premises liability must be based upon a legal duty arising from a legal possessory interest in the land so as to provide an opportunity to discover a dangerous condition and control of the land so as to empower the party to rectify the same. Regardless of the nature and complexity of the ownership interest, it appears from the Court's decisions this duty will only be found where there is a legal right to possession and the authority to exercise control.

UPCOMING EVENTS

ANNUAL MEETING

September 25-27, 2002

Held again at

Embassy Suites

on the River,

Des Moines, IA

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(scienter and intent to deceive are not elements of claim for equitable rescission). Rubes, however, insisted that Iowa courts had consistently required insurance carriers to establish the elements of fraudulent misrepresentation before a policy was subject to rescission due to misrepresentations in the application. *See e.g. Deszi v. Mutual Benefit Health & Accid. Ass'n.*, 125 N.W.2d 219 (1963). The trial court ruled in Rubes' favor, concluding that the policy could not be rescinded absent proof of fraudulent misrepresentation.

The Iowa Supreme Court reversed, holding that the trial court incorrectly applied Iowa law by failing to distinguish between claims for equitable rescission and fraudulent misrepresentation. "When a party relies on the doctrine of equitable rescission to avoid a contract five elements must be proven: (1) A representation, (2) falsity, (3) materiality, (4) an intent to induce the other to act or refrain from acting, and (5) justifiable reliance." *Rubes, citing, Hyler*, 548 NW 2d. at 872. *See also Utica Mut. Ins. Co. v. Stockdale Agency*, 892 F. Supp. 1179, 1193 (N.D. Iowa 1995). The Court clarified that the elements of "scienter" and "intent to deceive" are inapplicable when a party's claim is based upon equitable rescission, so Rubes' knowledge of the falsity of his representations and intent to deceive were irrelevant where the undisputed medical evidence revealed his representations concerning his medical history to be objectively false.

The Consequences of the Applicant's Signature

Rubes conceded that the representations in his application concerning past substance abuse and OWI arrest were false, but he contended that he provided accurate information to the agent who prepared the policy. Citing a line of older Iowa case, Rubes claimed that his alleged disclosures to the agent prevented Mega Life from voiding his policy, since an agent's knowledge must be charged to the insurance carrier. *See e.g. Den Hartog v. Home Mut. Ins. Co.*, 195 N.W. 944 (Iowa 1924); Murray v. Pref'd. Acc. Ins. Co., 216 N.W. 702 (Iowa 1927).

The trial court accepted Rubes' position. However, in what appears to be a significant departure from the older Iowa cases, the Iowa Supreme Court flatly rejected Rubes' suggestion that he should be relieved of responsibility for the false representations contained in his application simply because the responses were recorded by the agent: "Rubes' bald allegation that the agent filled out the form and edited his answers cannot save him," the Court concluded. "Having been given an opportunity to review the document before signing it, but failing to do so, Rubes is now in no position to question the answers he certified with his signature."

The position followed by the Court in *Rubes* concerning the consequences of an insured's signature on an application is consistent with its prior holdings in the context of other contracts, as well as the modern view followed in recent insurance coverage disputes in other jurisdictions. *See e.g. Foster v. Auto-Owners Ins. Co.*, 703 N.E.2d 657 (Indiana 1998); *Claborn v. Washington Nat. Ins. Co.*, 910 P.2d 1046 (Oklahoma 1996); *Pinett v. Assurance Co. of America*, 52 F.3d 407 (2nd Cir. 1995); *Giles v. Allstate Ins. Co.*, 871 S.W.2d 154 (Tenn. App. 1993).

Practice Pointers

The Court's decision in *Rubes* provides some useful practice pointers for defense counsel who frequently represent insurance carriers in coverage disputes. In situations where it appears that the insured procured coverage by virtue of material misrepresentations in an application, defense counsel clearly need to give careful consideration to asserting a claim or counterclaim for equitable rescission to void the policy from its inception, as opposed to simply raising the affirmative defense of fraudulent misrepresentation and thereby interjecting the elements of the insured's knowledge of falsity and intent to deceive into the dispute.

Shortly after the Rubes decision was announced, the United States District Court for the Northern District of Iowa concluded that where the insurance carrier's raised the insured's material misrepresentations as an affirmative defense based upon

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CONTRACTUAL INDEMNIFICATION CLAUSES -. . . *cont. from page 7*

RUBES VS. MEGA LIFE - *. . . cont. from page 7*

PRACTICE POINTERS

The contractual duty assumed isn't always complied with in the field, so I also urge you to check the policies of insurance that were issued to the parties to these agreements. The reason for this step is to assure yourself that the contractual indemnification insurance responsibility has been fulfilled and that it is insured (eg. disclosed to the insurer and coverage bound). In addition, the additional named insured language may reverse the duty to indemnify as agreed in the contract therefore you should also check that.

After a thorough review of these resources, it may be possible to render opinions about the relative probabilities of the success or failure of the tender of defense or cross or third party claims for indemnity based on these clauses in construction contracts. Any attempt, however, must be cautiously and strictly limited to the facts of a claim as defined in the opinion letter. If you fail to do so, your effort is probably doomed to failure and could subject the author to liability.

Even if your client decides to accept a tender of defense, it is critical that you limit or condition your acceptance to an assumed or recited set of facts. You must properly express your client's intent to rely on your recitation of fact to be able to send the defense back to the tenderor if the facts turn out to be different than you assumed or recited in your acceptance letter.

fraudulent misrepresentation, rather than a counterclaim for equitable rescission of the policy, the insurance carrier was required to prove scienter and intent to deceive under the heightened burden of proof for fraud claims under Iowa law. See Dishman v. American General Assur. Co., 193 F. Supp. 2d 1119 (N.D. Ia. 2002) (denying motion for reconsideration based upon Rubes because holding in Rubes is inapplicable to affirmative defense for fraudulent misrepresentation).

Defense counsel should also note the Court's apparent receptiveness to the modern view of the consequences of an insured's signature on an application containing misrepresentations. The Rubes decision appears to represent a significant step toward recognizing that allowing insureds to create jury questions simply by alleging that any mistake on the application was the fault of the agent, even after signing the completed application to verify their representations, is grossly unfair to the insurance carrier. See e.g. Giles v. Allstate Ins. Co., 871 S.W.2d at 157.

* Jason M. Casini is the chairman of the Litigation Section at Whitfield & Eddy, P.L.C. in Des Moines. He would like to acknowledge his partners, Timothy J. Walker and Jaki K. Samuelson, for their outstanding work on the Rubes case during the trial and the successful appeal.

FROM THE EDITORS . . . By: Mark Brownlee, Fort Dodge, IA

An issue which arises with increasing regularity is the proper measure of damages for medical services. Because of the frequent "re-pricing" of medical charges effected by Medicare, Medicaid, health insurance insurers and HMO's, the original charges rarely represent the amount accepted by the provider as full payment. The resulting issue is: What constitutes the proper measure of damages for medical services – the amount of the charges or the amount accepted as full payment? Or is it for the factfinder to decide? Since the "re-pricing" approaches 50% in some instances, the difference can be quite significant – potentially enough to materially affect settlement evaluation.

The most common argument against recognizing the amount accepted by medical providers as the proper measure of damages is that Iowa Civil Jury Instruction 200.5 speaks in terms of the "reasonable value" of necessary medical services and that is what the charges represent. A sensible response is that the amount accepted, typically pursuant to agreement or contract, represents a negotiated "reasonable" amount and anything above that constitutes a windfall for injured parties, making them more than whole.

Anecdotal reports reveal no judicial consensus or consistency of approach in handling this recurring issue, although measuring the amount of damages for medical services by the amount accepted seems to be the more common approach. Litigants need to know how medical expenses are to be measured for purposes of settlement evaluation and trial preparation. This matter demands and deserves a solution in the form of a uniform approach. The solution may be legislative or judicial and will need to consider the provisions of Iowa Code §668.14.

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