defenseUPDATE

The Iowa Defense Counsel Association Newsletter Fall 2003 Vol. XVI, No. 4

WHAT TO DO AFTER KELLY V. IOWA MUTUAL INSURANCE CO.[1] ?

An Examination of Stipulated Judgments in the Context of a Reservation of Rights Defense

By: Wendy Munyon, Des Moines, IA

When presented with a lawsuit against its insured in which it believes some or all of the counts of the petition are not covered under its policy, an insurer may choose one of three possible courses of action:

1) it can deny coverage and refuse to defend or indemnify the insured;

2) it can agree to defend the insured pursuant to a reservation of its rights to deny coverage and withdraw the defense; or

3) it can choose not to exercise its coverage defenses and provide the insured an unqualified defense.

In many states, including Iowa, if the insurer chooses the first option, the insured may enter into an agreement with the injured plaintiff under which the insured consents to the entry of a judgment in favor of the plaintiff in a stipulated amount, without regard to the limits of the applicable insurance policy. In return, the plaintiff covenants not to execute the judgment against the insured. The insured then assigns all of his rights under the policy and any extra-contractual claims against the insurer to the plaintiff, who files a garnishment action against the insurance company. If the court determines in the garnishment action that 1) the insurance policy required the insurer to defend the insured and 2) the stipulated judgment is reasonable in amount and was not procured through fraud or collusion, it will likely enforce the judgment.[2]

If the insurer decides not to assert its coverage defenses and provides the insured an unqualified defense, a consent judgment is rarely viable. Absent a judgment in excess of the policy limits, the insured has not been damaged and has no cause of action against the insurer to assign to the plaintiff.[3]

This article examines chiefly the second situation presented above, in which an insurer believes it has a valid coverage defense but affords the insured a defense under a reservation of rights. It may or may not have filed a declaratory-judgment action. The plaintiff makes a settlement demand within policy limits and the insured demands that the insurer accept the settlement offer. If the insurer refuses to settle based on its policy defenses, and if the plaintiff and insured enter into a consent judgment, is the judgment binding on the insurer, assuming that it is later determined that the insured was entitled to coverage? Is such a refusal to settle bad faith that would entitle the plaintiff-assignee to extracontractual damages? The 1990 decision of the Iowa Supreme Court in *Kelly v. Iowa Mutual Insurance Co.*[4] is instructive on these issues. This article examines Kelly and cases from other jurisdictions in an effort to move toward workable options for the insurer confronted with an impending stipulated judgment.

The *Kelly* litigation occurred after Leo Kelly was killed while repairing farm equipment owned by Philip McCarthy. McCarthy was insured with Iowa Mutual Insurance Co. under a farm liability policy providing $500,000 per person coverage. The administrator of Kelly's estate made a wrongful death claim against McCarthy, which McCarthy tendered to Iowa Mutual for

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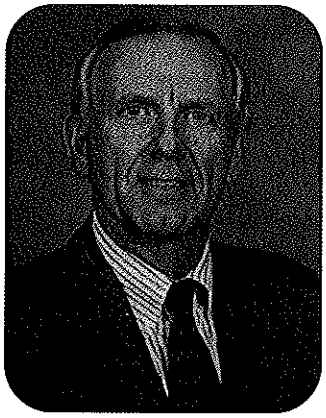
MESSAGE FROM THE PRESIDENT



Richard G. Santi

As your new President, I hope to continue the solid leadership which our association has been fortunate in having over the many years of its existence. I suspect that each new President has either voiced or held a similar view. Mike Weston did an outstanding job in his tenure as President and I want to sustain the momentum Mike generated over this past year.

The primary goal of every professional association should be to provide value to its members. I believe the IDCA meets and exceeds this goal. First of all, the IDCA just completed its 39th Annual Meeting and Seminar which had over 200 registrants, including several state and federal judges. The caliber of the speakers and the quality of the presentations on a myriad of subjects is a hallmark of the IDCA Annual Seminar. Based on a poll taken several years ago, the most important value expected by IDCA members was that the annual seminar, by itself, satisfy all state and federal CLE requirements, including the ethics requirement. As President-Elect, Sharon Greer has the responsibility of organizing the 2004 Annual Meeting and Seminar. Having just completed that task for 2003, I can attest to the amount of time which Sharon will be devoting to selecting speakers and topics for the 2004 seminar. Each of you can assist Sharon in this endeavor by either suggesting topics or, even better, volunteering to speak on a topic of your selection.

The commitment to putting on a comprehensive annual seminar, however, is not the only value provided by the IDCA to its members. The IDCA, through the assistance of its legislative committee, chaired by Mike Thrall, and its lobbyist, Bob Kreamer, provides a valuable service in monitoring and proposing legislation which will impact on the rights of the civil defense bar and our clients. The committee expects to present its 2003-2004 proposal to the IDCA Board at its December 2003 meeting.

Another significant and valuable benefit provided by the IDCA is the one-day seminar held in April of each year. IDCA uses the Mini-Seminar to highlight one or two specific areas of the defense practice. In addition, several years ago the IDCA went online with its own website (iowadefensecounsel.org). While the primary purpose of the IDCA website to date has been to provide information on civil jury verdicts throughout the state, the IDCA Board will be considering upgrading and expanding the website so it can be used to obtain and share information among members of the IDCA. At the recent DRI annual meeting held in Washington, D.C. in October 2003, there was a breakout session devoted to state and local defense organization websites which will prove helpful in revamping our website. Further details on this project will be reported in the coming months.

Another benefit of being a member is the IDCA newsletter which you are now reading. Thanks to a dedicated group of editors, each issue contains a scholarly discussion on various legal topics of interest to the Iowa defense community. These are just some of the benefits that membership in the IDCA provides.

I would be remiss in failing to acknowledge the contributions of two individuals who have given unselfishly of their time to the IDCA. Jim Pugh served as Treasurer of the IDCA for the past eleven years and has relinquished that office, which is now in the capable hands of Noel McKibbin. In addition, Terry Abernathy recently completed his term as a director. Both of these individuals deserve our heartfelt thanks for the contributions they have made to the IDCA over the years.

Finally, as your President, I welcome your comments and suggestions for what the IDCA can or should do to maintain the IDCA as a vital and viable organization. I look forward to serving as your President over this next year.

Yours very truly,

Richard G. Santi
President

SOME THOUGHTS REGARDING THE USE AND DISCOVERY OF SURVEILLANCE IN WORKERS' COMPENSATION CASES

By: Peter M. Sand, Des Moines, IA

This article lays out the views of one practitioner in workers' compensation defense, regarding the obtaining, use, and discovery of surveillance evidence.

I commonly order surveillance of injured workers who are suing my clients for workers' compensation. I do not do this in a majority of my cases, but certainly a significant minority. A Claimant with a subjective injury that is making a large settlement demand can nearly always count on being surveiled at some point during litigation. I don't always wait until I learn that the worker may be less than truthful about his abilities before ordering surveillance. Sometimes I order it even if my gut feeling is that a claim is on the up-and-up. Because when you are spending over $50,000 to settle a claim of completely subjective pain, it seems only prudent to spend $1000-2000 to see if the claimant is sincere.

When Should I Surveil?

Surveillance usually brings a cost in the neighborhood of $1500 per day. Sometimes you can get an investigator to give you a bulk rate for several days worth of work authorized at once. Surveillance can be very difficult or impossible to obtain if the worker lives in a rural area. If your investigator has difficulty in locating a worker or getting any footage at all, remember that you can arrange an appointment for the worker, which will guarantee an opportunity to find and film him. You might, for instance, schedule an IME that the worker must attend. You can surveil him traveling to the appointment, and his activities after the appointment. That at least ensures that your investigator is not just sitting around for nothing. You can set the deposition of the worker and accomplish the same thing.

Now that I have written that in a magazine, will all injured workers closely limit their activities on such occasions to guard against surveillance? Surprisingly, most will not. One of the few nice things about the length of time litigation lasts is that it is nearly impossible for injured workers to keep their guard up the entire time. There are some injured workers who are incredibly cagey. They were so before I wrote this article, and won't be changed by it.

I find that I have much better luck in finding out the truth about an injured worker if I learn all I can about the person from the employer–what are their hobbies? Do they belong to any clubs? Did they play on the employer's softball team?

Though catching a worker in bald-faced, demonstrable lies about his condition is rare, it can sometimes happen. I have known of a few cases where the results were turned over to a county attorney, and resulted in a criminal prosecution for violations of Iowa Code Chapter 507E–the Chapter dealing with insurance fraud.

Discovery of Surveillance Results

You will receive an interrogatory seeking the results of any surveillance you have conducted. In fact, in the standard set of claimant interrogatories, it is interrogatory #6. Are you required to answer that interrogatory and reveal the results of your surveillance?

It is my position that you do not have to answer that interrogatory, and I never do. I always object to that interrogatory and any accompanying request for production, on the grounds that such questions invade protected work product. I litigated this question in the matter of Bradley v. Des Moines Register, file 1091930 (appeal dec. 3/31/98).

In that case, when I objected to the surveillance interrogatory, my opponent made a motion to compel, which I resisted. There were two rulings made by Deputies, that vindicated the position that I took. Claimant's counsel argued that under the well-known Hoover decision, I was required to produce the results, that surveillance was not work product, and that even if surveillance is work product, it is still discoverable.

I argued first that Hoover did not apply. The facts in Hoover v. Iowa Department of Agriculture, 90-91 Comm'r Rept. p. 151 (appeal dec. 4/30/91), were inaposite, because defense counsel in that case had not objected to the surveillance interrogatory. The interrogatory had been answered with the reply that no surveillance had been done. Subsequent to answering interrogatories, surveillance was conducted by the defense, and then subsequent to that, the worker was deposed. The deposition testimony was squarely at odds with what the surveillance showed. When the surveillance results were offered at trial, the worker objected, claiming that the defense had failed to "seasonably supplement" discovery responses. The deputy hearing that case had agreed, and excluded the surveillance tape from evidence. The issue in Hoover, thus was not whether surveillance is work product. The issue was whether the defense had failed to seasonably supplement discovery, as that phrase is intended by the Iowa Rules. On appeal, the Commissioner ruled that the defense is never required to reveal surveillance results until after deposition. Any

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EXPERT ISSUES: THE UNWILLING EXPERT

By: Michael W, Ellwanger Sioux City, IA

This article is the first in a series of articles dealing with various issues which may arise.

One situation which frequently arises, most often in medical malpractice cases but in other cases as well, is when the interrogator at a discovery deposition asks the witness to render opinions about the conduct of another party. This frequently happens in medical malpractice cases where treaters, whether or not they are defendants, are asked to comment upon the standard of care exercised by other treaters. Defense counsel usually object. If the deponent is the attorney's own client, defense counsel may even direct the deponent not to answer. The authority for such action has historically been based upon the case of Mason v. Robinson, 340 N.W.2d 236 (Iowa 1983). In that case the holding was that "a litigant does not have an absolute right to compel an unwilling expert to give an opinion on facts outside the expert's personal knowledge . . .." The plaintiff in this case was the husband of a lady who died during gastric bypass surgery. The plaintiff subpoenaed the director of the National Bariatric Surgery Registry at the University of Iowa Hospitals and Clinics. A defendant doctor had provided factual information to this individual. The witness was required to divulge the information provided to him. However, the Court did not require him to provide expert testimony regarding the care received by the decedent. The Trial Court ordered the physician to answer deposition questions about "the general standard of care in this type of surgery and any hypothetical questions about the particular standard of care received by decedent in the underlying medical malpractice action." The plaintiff contended on appeal that she had a right to opinion testimony as long as it did not require the expert to engage in any preparation. The Supreme Court rejected this contention. The Court elected not to follow the approach of some jurisdictions which totally excuse an "unwilling expert without factual knowledge" from testifying. On the other hand, the Court did not believe that under the circumstances of this particular case that the plaintiff should have unlimited power to compel expert testimony from a "stranger to the litigation." The Court pointed out that in this particular case the expert witness did not have any "singular personal knowledge of the disputed events." Additionally, many individuals possessed the necessary qualifications to render expert opinions on the issues in the case and the testimony was "duplicable." The Court stated, at page 242: "Consequently, unlike factual testimony, expert testimony is not unique and a litigant will not be usually deprived of critical evidence if he cannot have the expert of his choice." The Court finally concluded that it would take a middle ground "between total excuse and unlimited compulsion of expert opinions from a stranger to the litigation. We deem that generally an expert witness, absent some other connection with the litigation, is free to decide whether or not he wishes to provide opinion testimony for a party." The Court further held that if a party could affirmatively demonstrate some compelling necessity for the expert's testimony, then the Court could order such testimony for the public's need for protection. Practice pointer: The Court did rely in part upon an affidavit that other physicians in the State are qualified to render expert opinion in this type of case.

Although Mason v. Robinson is frequently used by counsel to preclude an involuntary expert from testifying, it does not go quite as far as one would like. It refers on more than one occasion to an expert who is a "stranger to the litigation." What about an expert who is a co-defendant? What about an expert who, though not named as a party, was factually involved in the case and has personal knowledge of facts upon which he could formulate an opinion?

I think the rule should still be the same, although it is not clear. There is a clear distinction between offering testimony about one's own factual involvement or one's observations of events involving others, and the mental exercise which is required to evaluate what others have done and to offer opinions upon whether such acts are negligent, wrongful or a breach of the standard of care. Furthermore, there is a clear distinction to be drawn between factual testimony and general testimony regarding the appropriateness of conduct in which the witness was not personally involved.

In In Re: Imposition of Sanctions Alt v. Cline, 589 N.W.2d 21 (Wisc. 1999), the Wisconsin Supreme Court rendered a lengthy opinion on these issues. The Court started with the premise that parties in litigation are entitled to every person's evidence, except when a person has a privilege not to give evidence that is inherent or implicit in a statute or in rules adopted by the Supreme Court or required by the Constitution. The Court looked at a Wisconsin statute which allows the Trial Judge to appoint an expert, but further states that the expert shall not be appointed by the Judge unless the expert witness consents to act. The Court concluded that this created a privilege on the part of an expert to refuse to testify. If a Court cannot compel an expert to testify, a litigant should not be able to compel an expert. As a consequence, the Court held that a witness need not be required to testify. The decision of the Wisconsin Court noted that cases around the country varied in their approach to compelling experts to testify. The Court noted that some states have adopted an "absolute privilege,"

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WHAT TO DO AFTER *KELLY V. IOWA MUTUAL INSURANCE CO.* . . . *continued from page 1*

defense. Iowa Mutual notified McCarthy that it disputed coverage based on an exclusion for bodily injury sustained by an employee of the insured and commenced a declaratory-judgment action against McCarthy and the Kelly Estate in September 1993. The Estate cross-claimed against McCarthy, and Iowa Mutual provided him a defense pursuant to a reservation of rights. Iowa Mutual moved to have the tort claim and the declaratory-judgment actions severed and the motion was granted.[5]

The declaratory-judgment action proceeded to trial, with the jury rendering a verdict for McCarthy. The court granted a judgment to Iowa Mutual notwithstanding the verdict, ruling that Kelly was McCarthy's employee as a matter of law. McCarthy appealed, and the Supreme Court reversed the district court's decision in 1997,[6] holding there was substantial evidence to support the jury's finding that Kelly was not McCarthy's employee at the time of Kelly's death.

While the declaratory action appeal was pending, McCarthy and the Kelly Estate notified Iowa Mutual that they were beginning settlement negotiations. Iowa Mutual declined to participate because of the pending declaratory-judgment action and objected to any settlement based on its contention that McCarthy had strong liability defenses. Despite Iowa Mutual's objection, the Estate and McCarthy agreed to a settlement in the amount of $507,500, of which McCarthy would pay $7,500 directly. He would assign all his rights against Iowa Mutual to the Estate in exchange for a promise that the Estate would seek recovery only from Iowa Mutual. Following the Supreme Court's ruling in the coverage action, the Estate sued Iowa Mutual to recover the $500,000 settlement amount.

Iowa Mutual moved for summary judgment, arguing that McCarthy had failed to comply with the conditions of the insurance policy and thereby forfeited coverage. The specific breach alleged was the prohibition against any insured voluntarily making any payment or incurring any obligation without the consent of the insurer.[7] The district court granted Iowa Mutual's motion. The Estate then appealed, arguing that the insured's duty to cooperate was extinguished when Iowa Mutual breached the contract by: 1) defending under a reservation of rights; 2) commencing a declaratory-judgment action; and 3) refusing to approve the settlement between the Estate and McCarthy.[8]

The Iowa Supreme Court quickly rejected the Estate's contentions that Iowa Mutual had breached the insurance contract when it afforded a defense under a reservation of rights and instituted the declaratory-judgment action.[9] The third question, however, was more complicated and represented

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[1] 620 N.W.2d 637 (Iowa 2000).

[2] *See, e.g., United Services Auto Ass'n v. Morris*, 741 P.2d 246 (Ariz. 1987); *Samson v. Transamerica Ins. Co.*, 636 P.2d 32 (Cal. 1981); *Shook v. Allstate Ins. Co.*, 498 So.2d 498 (Fla. App. 1986); *Bishop v. Crowther*, 428 N.E.2d 1021 (Ill. App. 1981); *American Family Mut. Ins. Co. v. Kivela*, 408 N.E.2d 805 (Ind. App. 1980); *Red Giant Oil Co. v. Lawlor*, 528 N.W.2d 524 (Iowa 1995); *Glenn v. Fleming*, 799 P.2d 79 (Kan. 1990); *Miller v. Shugart*, 316 N.W.2d 729 (Minn. 1982); *Metcalf v. Hartford Acc. & Indem. Co.*, 126 N.W.2d 471 (Neb. 1964); *Griggs v. Bertram*, 443 A.2d 163 (N.J. 1982); *Lancaster v. Royal Ins. Co.*, 726 P.2d 371 (Or. 1986); *Kobbeman v. Oleson*, 574 N.W.2d 633 (S.D. 1998); *Greer v. Northwestern Nat'l Ins.* Co., 743 P.2d 1244 (Wash. 1987). For more thorough discussion of the procedural issues involved in consent or stipulated judgments and of determinations regarding reasonableness, collusion, and fraud, see *Note: Judicial Approaches to Stipulated Judgments, Assignments of Rights, and Covenants Not to Execute in Insurance Litigation*, 47 Drake L. Rev. 853 (1999) and DiMugno, *Consent Judgments and Covenants Not to Execute: Good Deals or Too Good to Be True*, Insurance Litigation Reporter Vol. 24, No. 22 (Part I) and Vol. 25, No. 1 (Part II) (West 2003).

[3] *See, e.g., Anderson v. Martinez*, 762 P.2d 645 (Ariz. App. 1988).

[4] 620 N.W.2d 637 (Iowa 2000)

[5] Id. at 640.

[6] Iowa Mut. Ins. Co. v. McCarthy, 572 N.W.2d 537 (Iowa 1997)

[7] The Iowa Mutual policy required the policyholder to "[c]ooperate with us in the investigation, settlement, or defense of the claim or 'suit'". In addition, the policy mandated that the insured not "voluntarily make any payment, assume any obligation, or incur any expense, . . without [the insurer's] consent." 630 N.W.2d at 640.

[8] Id. at 642.

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a case of first impression in Iowa.

The Supreme Court recognized that an insurer may refuse to settle a claim in good faith if it has fairly debatable policy defenses and would do so irrespective of the policy limits, citing *Wierck v. Grinnell Mut. Reins. Co.*[10] Turning to the issue of whether such refusal represents a breach of its agreement with the insured, the court stated:

> Certainly . . . where the insured may ultimately be responsible for a judgment if coverage is found not to exist, it is extremely important that the insurance company, who is controlling the defense, fulfill its contractual obligation to settle where appropriate. One commentator has observed that an insurer may breach the contract by failing to settle an appropriate case, even though its failure to settle is attributable solely to the company's negligence. . . . This commentator suggests that,
>
> > recognizing that the company has, despite the absence of bad faith, breached the insurance contract, the company should be precluded from enforcing the provisions in the policy inuring to its benefit, such as the one prohibiting unauthorized settlements by the insured.
>
> We agree. An insurance company cannot use its erroneous belief that it has no coverage to justify a refusal to settle. . . . At the point in time that the insurer is faced with a fair and reasonable settlement demand that a reasonable and prudent insurer would pay, the insurer must either abandon its coverage defense and pay the demand or lose its right to control the conditions of settlement. If the insurer prefers to debate coverage and, accordingly, refuses to pay the settlement demand, the insured is free to either pay the settlement demand or stipulate to the entry of judgment in the amount of the demand. The insurer, if found to have coverage, will be liable for the insured's settlement if the settlement is found to be fair and reasonable.[11]

In a footnote, the Court indicated that it did not mean to imply that the insurer's refusal to settle in these circumstances would constitute bad faith justifying extracontractual payments, citing *Cay Divers, Inc. v. Raven*[12] and *Associated Wholesale Grocers, Inc. v. Americold Corp.*[13], both of which found no bad faith when insurers declined to settle in the face of "genuine" or "good faith" questions of coverage.[14] That question, however, was not presented in *Kelly* because the portion of the settlement to be paid by Iowa Mutual was within the policy limits.

The Supreme Court reversed the district court's granting of summary judgment and remanded for factual findings consistent with its decision. Thus, under the current state of Iowa law, an insurer defending its insured under a reservation of rights may be bound by a consent or stipulated judgment between its insured and the plaintiff, providing: 1) the insurer receives notice of the settlement discussions[15]; 2) the settlement is not fraudulent or collusive;[16] and 3) the insurer refuses to pay a settlement demand that is reasonable and one that a "reasonable and prudent insurer would pay."[17]

The success rate of insurers challenging stipulated judgments as collusive or unreasonable is not impressive.[18] Even though in Iowa the insured bears the burden, under *Red Giant Oil Co. v. Lawlor, supra*, of demonstrating the reasonableness of

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[9] Id.
[10] 456 N.W.2d 191, 194-95 (Iowa 1990).
[11] *Id.* at 644-45, citing 1 Allan D. Windt, Insurance Claims & Disputes § 3.09 (West, 3rd ed. 1995), at 138-39.
[12] 812 F.2d 866 (3rd Cir. 1987)
[13] 934 P.2d 65 (Kan. 1997)
[14] *See also, Stevenson v. State Farm Fire & Cas. Co.*, 628 N.E.2d 810 (Ill. App. 3rd 1993)(Insurer not liable for bad faith refusal to settle within its policy limits where coverage was fairly debatable); *Mowry v. Badger State Mut. Cas. Co.*, 385 N.W.2d 171 (Wis. 1986)(When a coverage issue is fairly debatable, an insurer will not have acted in bad faith in refusing to settle within policy limits, even when the insured's liability for the incident is undisputed and damages appear to exceed policy limits).
[15] The *Kelly* opinion is not explicit with respect to whether the insurer must have an opportunity to participate in the negotiations.
[16] *Red Giant Oil Co. v. Lawlor, supra*, at 534-35.
[17] *Kelly*, 620 N.W.2d at 645. The question that is begged in this characterization of a "reasonable and prudent insurer" is whether the strength of the coverage defense may be considered to reduce the award, or whether the reasonableness of the amount depends only on the severity of the loss.

WHAT TO DO AFTER *KELLY V. IOWA MUTUAL INSURANCE CO.* . . . *continued from page 7*

the settlement, a court is likely to afford the insured significant latitude in the evidence that will support the agreement. An insurer that is unwilling to forego its coverage defense is thus faced with the likelihood of paying significantly inflated damages in the event its coverage defense is not validated.

This article suggests two possible alternative courses of action when an insurer faces a demand to settle a claim being defended under a reservation of rights and must choose between settling and relinquishing the coverage defense or allowing an inflated consent judgment to be entered in favor of the plaintiff. The first was used in *Blue Ridge Insurance Co. v. Jacobsen*,[20] in which the California Supreme Court decided in favor of the insurer in response to the following question referred by the Ninth Circuit Court of Appeals: "Whether an insurer defending a personal injury suit under a reservation of rights may recover settlement payments made over the objection of the insured when it is later determined that the underlying claims are not covered under the policy?"

In that case, Blue Ridge Insurance Company's policyholders, the Jacobsens, had been sued by E'dee Bolognesi, who was severely mauled by a Rottweiler that the Jacobsens had helped her obtain. She sustained 17 fractures in the attack and underwent 17 surgeries that generated more than $200,000 in medical bills. Blue Ridge disputed coverage based on the "business pursuits" and "professional services" exclusions in its homeowner's policy but defended the Jacobsens under a reservation of rights and provided them with independent counsel as required by California statute.

In the letter informing the Jacobsens of its reservation, Blue Ridge enumerated several specific rights it retained, including the right to obtain recovery from the Jacobsens for any costs or expenses, including fees for legal services, and to request the Jacobsens' participation in any settlement, with the understanding that any participation by Blue Ridge would be subject to its reservation of the right to dispute coverage.[21] Blue Ridge filed a declaratory judgment motion that was stayed pending trial of the underlying action, pursuant to the Jacobsens' request.

On May 23, 1996, plaintiffs made a time-limit demand for the policy limits of $300,000. They offered simultaneously to accept an assignment of the Jacobsens' rights against Blue Ridge in the event the settlement offer was not accepted. On June 4, Blue Ridge wrote to the Jacobsens, informing them that it determined the offer to be reasonable and intended to accept under a reservation of its right to recover the settlement amount from the insureds if its declaratory-judgment action succeeded. It offered them the opportunity to assume their own defense if they did not think the proposed settlement was reasonable.[22] The Jacobsens objected strenuously in a series of letters between Blue Ridge and their counsel. Blue Ridge sought to intervene in the underlying action to obtain the trial court's permission to participate in the settlement under a reservation of rights, but the motion was denied. Blue Ridge then accepted the settlement on behalf of the Jacobsens but over their objection, and the settlement was approved and found to be in good faith by the court in the underlying action. The federal district court then granted Blue Ridge summary judgment in its declaratory-judgment action, held it was entitled to reimbursement from the Jacobsens, and found the amount of the settlement reasonable.

The Ninth Circuit affirmed the district court holdings on coverage and reasonableness but referred the question of reimbursement to the California Supreme Court.

The California Supreme Court held that Blue Ridge was entitled to seek reimbursement from its insureds. From the policy language, the original

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[18] *See, e.g., Midwestern Indem. Co. v. Laikin*, 119 F. Supp. 831 (S.D. Ind. 2000); *Besel v. Viking Ins. Co.*, 49 P.3d 887 (Wash. 2002)(Amount of stipulated judgment is reasonable absent fraud or collusion); *Norris v. Nationwide Mut. Ins. Co.*, 55 S.W.3d 36 (Mo. App. 2001)($300,000 stipulated judgment reasonable even though verdict after first trial in underlying action was $28,000 after additur);

[19] Several courts have noted that an insured offered the opportunity to assign rights against an insurance company in exchange for a covenant not to execute against the insured's personal assets is unlikely to quibble as to the amount of damages the plaintiff is entitled to collect. *See, e.g., Himes v. Safeway Ins. Co.*, 66 P.3d 74 (Ariz. App. 2003)("[I]nsureds, when faced with the choice between personal liability or a judgment enforceable only against their insurer, would be 'quite willing to agree to anything as long as plaintiff promised them full immunity.'"); *Chaussee v. Maryland Cas. Co.*, 803 P.2d 1339(Wash. App. 1st 1991)(court indicated concern that "an insured may settle for an inflated amount to escape exposure" in order to obtain consent judgment); *Koehnan v. Herald Fire Ins. Co.*, 89 F.3d 525 (8th Cir. 1996)(same, applying Minnesota law).

[20] 22 P.3d 313 (Cal. 2001)

[21] Id. at 315.

[22] Id.

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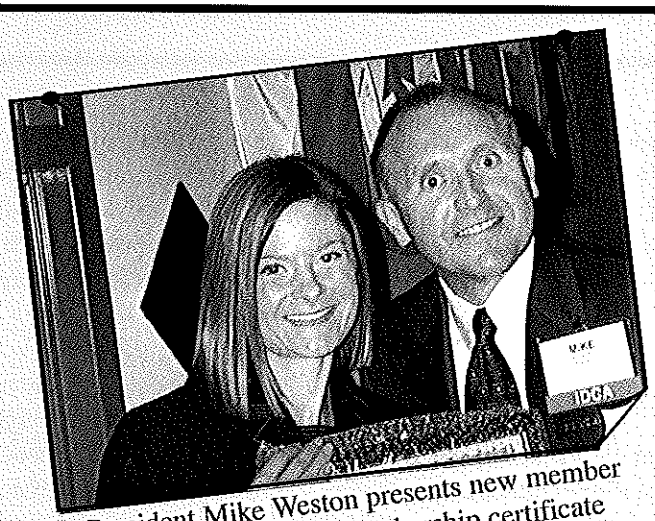
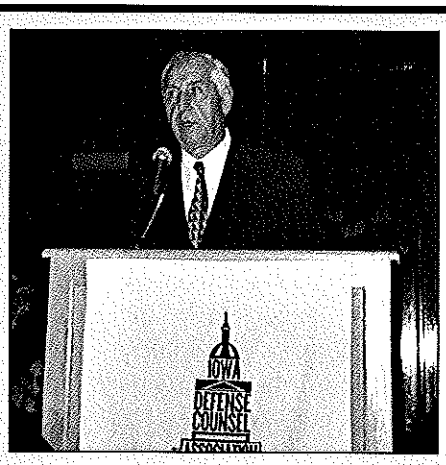
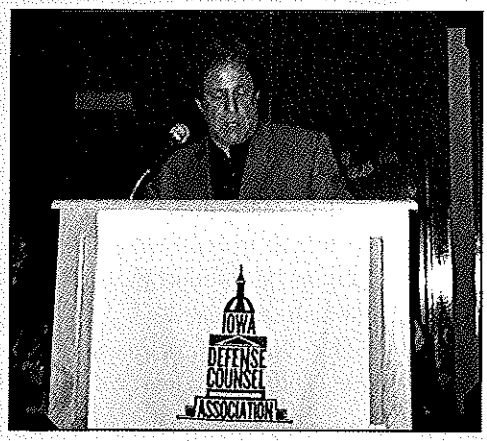


President Mike Weston presents new member Lori Cole with her membership certificate at the annual banquet

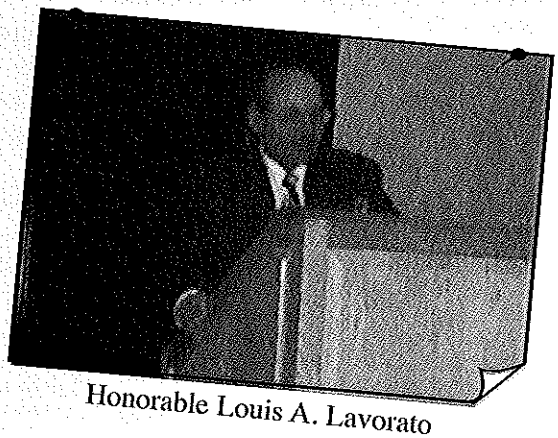


Theodore A. Borrillo



Honorable Mark. E. Bennett

President-Elect Rick Santi presents outgoing President Mike Weston with the President's plaque



Honorable Louis A. Lavorato

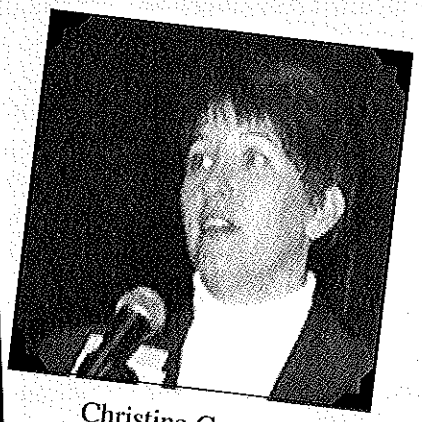
DRI Representative Marion Beatty presents the Outstanding Defense Organization Award

EETING AND SEMINAR HIGHLIGHTS

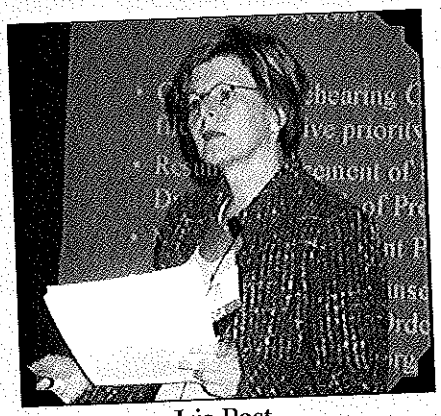
IDCA Executive Director
Bob Kreamer

2003-2004 Officers: Secretary, Mike Thrall,
Treasurer, Noel McKibbin, President-Elect,
Sharon Soorholtz Greer, President, Rick Santi

President-Elect Rick Santi



Christine Conover



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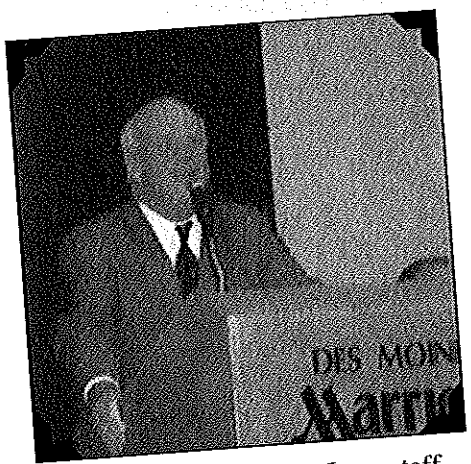

Honorable Ronald E. Longstaff

President Mike Weston and IDCA Founder
Ed Seitzinger's daughter Pam Nelson present board
member Brent Ruther with the Eddie Award

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reservation of rights letter, and the settlement correspondence, the Jacobsens had knowledge that Blue Ridge intended to seek repayment of the settlement if it succeeded in the declaratory-judgment action. Further, the insurer had made an express offer to the insureds that they could assume their own defense if they disagreed as to the prudence of accepting the offer. Noting that in California an insurer is not permitted to consider coverage when determining whether an offer to settle is reasonable, the court stated:

> [W]ere we to conclude insureds could, as in this case, refuse to assume their own defense, insisting an insurer settle a lawsuit or risk a bad faith action, but at the same time refuse to agree the insurer could seek reimbursement should the claim not be covered, the resulting Catch-22 would force insurers to indemnify noncovered claims. If an insurer could not unilaterally reserve its right to later assert noncoverage of any settled claim, it would have no practical avenue of recourse other than to settle and forgo reimbursement. An insured's mere objection to a reservation of right would create coverage contrary to the parties' agreement in the insurance policy and violate basic notions of fairness.[23]

In addition, the court based its decision in part on a theory of unjust enrichment and noted that significant public policy interests are served by permitting the insurer to settle and seek recovery from the insured in the event of a favorable coverage determination, in that the risk of the insured's inability to satisfy a judgment is transferred from the injured plaintiff to the insurer.[24]

Although several federal courts seem to have adopted reasoning similar to that in *Blue Ridge*,[25] the Texas Supreme Court in *Texas Association of Counties v. Matagorda County*[26] held that an insurer was not entitled to reimbursement from the insured. Two factors appeared to govern that court's decision. First, the insurer had not established an implied-in-fact contract by the insured to reimburse the insurer merely by the insured's silence in response to the insurer's reservation of rights letter and the insured's acknowledgement of the reasonableness of the settlement. Second, the insurer's appropriate remedy is to seek resolution of the coverage matter prior to the trial of the underlying suit.[27] In jurisdictions in which the courts will stay the underlying action in order to determine coverage, this is a fine solution. The granting of a stay of the underlying action, however, is not the norm because of courts' concern regarding the collateral estoppel effect of deciding issues in the declaratory-judgment action that may affect the insured's liability in the underlying tort suit.[28]

A second alternative to the insurer's dilemma regarding a consent judgment is suggested in *H.B.H. v. State Farm Fire & Cas. Co.*,[29] a case in which State Farm had reserved its rights to deny indemnity to its insured based on a policy provision excluding coverage for damages resulting from intentional acts of an insured.

The complaint alleged that the insured had sexually molested the plaintiff's child on a number of occasions. State Farm filed a declaratory-judgment action to establish whether it had an obligation to defend and indemnify the insured in the tort suit. The plaintiff entered into an agreement with the insureds that provided the insureds would withdraw their answer, allow a default judgment to be entered, and not contest any of the plaintiff's damages at the default hearing. Plaintiffs also agreed to limit the damages sought from the insured to $32,500 and to collect any other damages from State Farm. Before the hearing, State Farm sought to intervene in order to present evidence

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[23] Id. at 321.
[24] Id.
[25] Sears, Roebuck & Co. v. Royal Surplus Lines Ins. Co., 2003 WL 1225691 (7th Cir.)(Unpublished, Ill.); *Interstate Fire & Cas. Co. v. Underwriters at Lloyd's*, 139 F.3d 1234 (9th Cir. 1998); *Nobel Ins. Co. v. Austin Powder Co.*, 256 F. Supp. 937 (W.D. Ark. 2003); *Swift v. Fitchburg Mut. Ins. Co.*, 700 N.E.2d 288 (Mass. App. 1998); *Medical Malpractice Joint Underwriting Ass'n v. Goldberg*, 680 N.E.2d 1121 (Mass. 1997).
[26] 52 S.W.3d 128 (Tex. 2000)
[27] *Id.* at 131-36.
[28] *See, e.g., Wells Dairy, Inc. v. Travelers Indemnity Co. of Illinois*, 241 F. Supp. 2d 945 (N.D. Iowa 2003); *Mutual Ben. Group v. Wise M. Bolt Co.*, 227 F. Supp. 2d 469 (D. Md. 2002); *Nationwide Mut. Ins. Co. v. Lowe*, 95 F. Supp. 2d 274 (E.D. Pa. 2000); *David Kleis, Inc. v. Superior Court*, 44 Cal. Rptr. 2d 181 (Cal. App. 2nd 1995).
[29] 823 P.2d 1332 (Ariz. App. 1st 1992).

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as to the plaintiff's damages. The trial court denied the motion, the hearing proceeded, and the court awarded the plaintiff $900,000. State Farm appealed the denial of its right to intervene at the damages hearing.

Reviewing the well developed Arizona case law on the effect of consent judgments on insurance coverage, the Court noted numerous cases in which an insurer had been allowed to intervene in an action in which the parties had agreed to consent judgments in order to contest the reasonableness of the settlement amount despite the existence of a reservation of rights or the rejection of an offer to settle within policy limits.[30] The court acknowledged that under *United Services Auto. Assoc. v. Morris*[31] the insurer's defense pursuant to a reservation of rights permits the insured to enter into a consent judgment to protect personal assets, but the agreement must be reasonable in amount. Plaintiffs in *H.B.H.* argued that the fact that the settlement amount would be court-approved would be sufficient protection for the insurer, and that allowing intervention would make the litigation more complex. The Court disagreed:

> The evidentiary hearing was . . . completely one-sided, without any cross-examination or opposing testimony or evidence. It thus was an inadequate substitute for a hearing with the participation of all parties, including the intervenor. . . . In light of State Farm's express right to question the reasonableness of the agreement, . . . the most appropriate time to do so is at the evidentiary hearing on damages when all the parties are present. . . The [insureds] claim that allowing State Farm to intervene will result in more complex litigation, which ultimately may be unnecessary and a waste of judicial resources if State Farm is absolved from liability under the policy in the declaratory action. However, further litigation will be a certainty if State Farm is found liable under the policy. A possible solution to avoid unnecessary litigation would be to stay the default hearing on damages until after the coverage question is resolved.[32]

This decision was refined in *Himes v. Safeway Ins. Co.*,[33] in which the Arizona Supreme Court undertook a detailed examination of what defines a reasonable settlement. The Court emphasized that the plaintiff has the burden of proof as to reasonableness of the settlement amount.[34] It then characterized the purpose of the hearing as re-creating the result that would have occurred had there been an arm's-length transaction between the plaintiff and a defendant who had sufficient resources to pay the agreed-upon amount and made the settlement decision as thought the payment came from his personal funds.[35] Factors to be considered and evaluated are

> the releasing person's damages; the merits of the releasing person's liability theory; the merits of the released person's defense theory; the released person's relative faults; the risks and expenses of continued litigation . . . ; any evidence of bad faith, collusion, or fraud; the extent of the releasing person's investigation and preparation of the case; and the interests of parties not being released.[36]

The court specifically declined to consider the released person's ability to pay and the risks and expenses of litigating any coverage issues.[37]

No Iowa case law found to date allows an insurer to intervene in an action to determine the reasonableness of a consent judgment. In *Six v. American Family Mut. Ins. Co.*,[38] the injured plaintiff, assignee of an insured's claims against American Family pursuant to a stipulated judgment, sued American Family in an action for a declaration that American

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[30] *See, e.g., McGough v. Ins. Co. of North America*, 691 P.2d 738 (Ariz. App. 1984)(insurer's defense under reservation did not constitute refusal to defend; insurer did not forfeit its right to intervene); *Anderson v. Martinez*, 762 P.2d 645 (*Ariz. App. 1988*)(trial court erred in denying insurer's motion to intervene to challenge reasonableness of settlement where it conceded coverage under one policy and contested coverage under another).
[31] 741 P.2d 246 (Ariz. 1987)
[32] 823 P.2d at 1338.
[33] 66 P.3d 74 (Ariz. 2003)
[34] *Id.* at 80.
[35] *Id.* at 81.
[36] *Id.* at 85, citing *Chaussee v. Maryland Cas. Co.*, supra, 803 P.2d at 1343.
[37] *Id.*

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Family owed coverage and that the stipulated amount of damages was reasonable. The jury found that no coverage was owed and that the judgment amount was not reasonable. On appeal, the Supreme Court of Iowa remanded for further findings as to coverage and instructed the trial court, in the event that coverage was found, to make a determination as to a reasonable amount and hold the insurer liable to the plaintiff to that extent.[39] The Court did not elaborate as to factors that should be considered in the determination of reasonableness.

The Iowa Supreme Court has not to date had the opportunity to consider the settlement strategies presented in *Blue Ridge, H.B.H, and Himes*. After *Kelly* and without further guidance, an insurer that refuses to accept a settlement offer while defending under a reservation of rights is at significant risk of paying a highly inflated stipulated judgment if its policy defense is not upheld through declaratory judgment. In *Hamilton v. Maryland Cas. Co.*,[40] the Supreme Court of California held that an insurer that defends its insured under a reservation of rights is not bound by a stipulated judgment *even if the amount of the settlement is approved in a good faith hearing pursuant to the California statute*. The Court distinguished this type of case from a case in which the insurer refused the tender of defense outright and stated:

> [W]here the insurer has accepted defense of the action, no trial has been held to determine the insured's liability, and a covenant not to execute excuses the insured from bearing any actual liability from the stipulated judgment, the entry of a stipulated judgment is insufficient to show, even rebuttably, that the insured has been injured to any extent by the failure to settle, much less in the amount of the stipulated judgment. [41]

The law in California, as in Arizona after *H.B.H* and *Himes*, is thus that a carrier defending under a reservation of rights is entitled to participate in the determination of the settlement amount, and that a judgment arrived at without the insurer's participation is not entitled to a presumption of reasonableness.[42]

The public policy justification for such holding is sound. Prior to the entry of a judgment that would expose the insured to liability, the insured has suffered no damage. As noted in *Hamilton*, the insured may agree with the plaintiff, prior to trial, to assign to the claimant any cause of action for bad faith that may arise if the case is tried and an excess verdict results, in exchange for an agreement not to execute against the insured.[43] To permit the insured to stipulate to a judgment with the protection of a covenant not to execute deprives the insurer of any meaningful opportunity to contest the legitimacy of the plaintiff's damages. The insured is unlikely to provide the information necessary to the insurer's ability to contest liability issues or damages in a trial as to the reasonableness of the settlement.

For the foregoing reasons, an insurer who is notified that the insured is negotiating with plaintiff and may enter into a stipulated judgment should have the option of reserving its rights to seek restitution from the insured if its coverage action succeeds as in *Blue Ridge* or seeking intervention in the underlying action to contest the reasonableness of the settlement amount as in *Himes*.

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[38] 558 N.W.2d 205 (Iowa 1997).
[39] *Id.* at 207.
[40] 41 P.3d 128 (Cal. 2002)
[41] *Id.* at 133.
[42] *See also State Farm Fire and Cas. Co.*, 925 S.W.2d 696, 719 (Tex. 1996) ("Adjudication of an insurer's obligations before determination of the defendant insured's liability to the plaintiff removes the justification for a settlement like the one in this case in most instances. In no event should a judgment agreed to between plaintiff and defendant be binding on defendant's insurer. If an insurer's liability is to be litigated in an action by a plaintiff as a defendant's assignee after such a judgment is rendered, it should be done on the strength of the plaintiff's claims rather than the generosity of defendant's concessions.")
[43] 41 P.2d at 137.

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some have adopted a "narrow qualified privilege," and some have adopted a "broader qualified privilege." The Court cited Mason v. Robinson as placing Iowa within the latter group.

Under this broader qualified privilege, an expert may be forced to provide expert testimony but only if the compelling party affirmatively demonstrates some compelling necessity for an expert's testimony that overcomes the expert's and the public's need for protection. Additionally, an adequate plan of compensation must be presented. It does appear that the Wisconsin Court actually broadens the application of the Mason v. Robinson rule. It does not appear to limit that rule to experts who are "strangers to the litigation."

The undersigned was recently involved in a case in which a co-defendant refused to testify on standard of care issues involving other defendants. Michael Flores v. Stanley A. Bloustine, M.D., et al., Woodbury County No. LACV 119442. This was a malpractice case. A Motion to Compel was filed. The Plaintiff's lawyer asked the witness, who was a co-defendant, a number of standard of care questions which were unrelated to that witness's involvement in the case. The witness/party had very limited factual involvement. The standard of care questions all related to the conduct of other parties. The witness was not asked whether the co-defendant was negligent. Rather, the witness was simply asked general standard of care questions. The Court's ruling appears to make a distinction between whether the standard of care questions were relevant to the deponent's own conduct, as opposed to the conduct of the co-defendants. If the only relevance of the opinions related to the conduct of the co-defendants, then the expert did not have to answer. Herewith the relevant portions of the opinion.

"The plaintiffs sued the defendants alleging negligence for their part in giving medical care to a minor who was to undergo surgery to repair a cleft palate and a cleft lip. Dr. Adajar's involvement came early in the procedure, where he assisted in starting an IV. He was not present during the balance of the procedure and as best the Court can determine from the materials furnished it, Dr. Adajar was not present during the administration of anesthesia or when complications developed."

Dr. Adajar's deposition was taken by the plaintiff. Mr. Dowd asked certain questions to which Mr. Heidman objected.

1.) Mr. Dowd asked what other complications could occur, in terms of the administration of anesthesia, if we're looking at a small child who is dehydrated and what risks are associated with the administration of anesthesia on a child which is dehydrated? Mr. Heidman objected in that it asks for expert testimony dealing with the standard of care of another defendant and not with the care Dr. Adajar rendered.

2.) Mr. Dowd also asked about the heart rate of the child falling below 100, and "that would cause you concern." Mr. Heidman objected on the grounds of relevancy and that the doctor did not see it drop below 100.

3.) Mr. Dowd also asked Dr. Adajar if part of the reason he did not recall Michael's heart rate at the time he was present being above 100 was because you did not administer CPR? Mr. Heidman objected on the grounds of relevancy and that there was no showing Dr. Adajar was involved in any care that would potentially require CPR.

As to these three certified questions the Court rules:

1. Objection is sustained. The question calls for expert testimony involving treatment not rendered by Dr. Adajar.

2. Objection is sustained because it did not concern treatment rendered by Dr. Adajar.

3. Objection is overruled to the extent the question asks why the doctor recalls the heart rate was above 100. The Court believes that Dr. Adajar gave his reasons in his deposition, but concludes that this specific question may be asked.

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revelation of surveillance after that is a supplementation that is "seasonable." On appeal, the Commissioner considered the surveillance of Hoover, reversed the deputy, and awarded zero benefits.

What I take from Hoover is that even if you answer the surveillance interrogatory, you don't necessarily have to reveal subsequent surveillance results as soon as you receive them. You are allowed to sit on the results until you depose the claimant. I would put one caveat on this. The current scheme of exhibit production at the Commissioner's office is that the claimant will serve no new evidence on the defense after 60 days prior to trial, and the defense will serve no new evidence later than 30 days prior to trial. Trial exhibits are discoverable, and they need to be produced by the defense 30 days prior to trial, or there is a substantial risk of exclusion at trial. If you are going to depose the claimant, I would consider it a must to do so more than 30 days prior to trial, especially if you want to sit on some surveillance results until after deposition, and still offer the results at trial. Regardless of the language of Hoover, if you depose the claimant less than 30 days prior to trial, any surveillance you are sitting on could easily be excluded.

Again, the situation in Bradley was different than Hoover, because I objected to the surveillance interrogatory, claiming it was work product. I argued that surveillance is clearly an item generated in anticipation of litigation, and is work product. The leading Iowa cases in this area are Ashmead v. Harris, 336 N.W.2d 197 (Iowa 1983), and Shook v. City of Davenport, 497 N.W.2d 883 (Iowa 1993). Ashmead concerned the discoverability of an accident investigation conducted by an automobile insurer. Shook concerned an internal investigation of the Davenport police department, including witness statements, about an incident that resulted in a civil rights lawsuit. In both cases, the Supreme Court held the items to be work product, protected from discovery.

I pointed out that a claimant is perfectly aware of the activities in which they engage, whether the activities are inconsistent with their complaints or testimony, and the probative nature of that fact. Thus, the withholding of surveillance from discovery does not deprive a claimant of any probative information they do not already have. The only information withheld is the knowledge of defense counsel–the very core of the work product doctrine. The deputies and the Commissioner agreed and ruled that surveillance results are protected work product.

That is not the end of the inquiry, however, because work product can be discoverable if the claimant cannot obtain the same evidence without "undue hardship." I do not worry much about surveillance being ordered produced under this standard, because the worker can take video of himself just as easily (more easily, in fact), than the defendants can. The Supreme Court in Shook stated: "At the very least, Shook must make an independent discovery effort to obtain the same information. He made no showing . . . ." Without that showing, no discovery of work product would be allowed.

The Bradley decision was made by Commissioner Post. Commissioner Trier has not ruled definitively on this question since assuming that office. I intend to argue strongly for the retention of the Bradley rule. I believe that surveillance evidence can be very valuable, and that value must be protected jealously. This can be a real fight, because there is precedent out there in the country holding surveillance to be discoverable. The most troublesome such precedent is Wegner v. Cliff Viessman, 153 F.R.D. 154 (N.D. Iowa 1994). That case said nothing about the timing of depositions in the case.

Remember that if you show the results of surveillance to a doctor, in an effort to obtain favorable medical opinions, the tape has become immediately discoverable. Such a tape is the same as the opinions of a non-testifying expert that are provided to a testifying expert. Once the tape has become the basis for evidence to be offered at trial, it is discoverable.

It is common practice in workers' compensation cases for the insurance carrier to hire a nurse to attend medical appointments and facilitate information between the doctor, the employer, the carrier, and the worker. An ongoing controversy regards the discoverability of communications between such nurses and carriers, and the nurse's notes. I take the view that notes are completely discoverable, and the fact that I have communicated with the nurse is also discoverable. Thus, when I have conducted surveillance of a worker, I never share that fact with the nurse; he or she must be kept in the dark about the investigation track of the claim. Once I decide to show the doctor a tape, and produce it to the other side, there is no continuing need for this Chinese Wall. Given the results in Wilson v. IBP, 558 N.W.2d 132 (Iowa 1997), I strongly urge a careful limitation in what is told the nurse. If you tell the nurse about surveillance, it is likely to be ruled discoverable by the Commissioner.

In summary, I always object to requests to discover surveillance. It is not the busin°eillance, you need not supplement your response any further. If you have done surveillance, and do not wish to offer the results into evidence, you need not supplement your response

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any further. If you have done surveillance, and wish to offer the results at trial, you need to withdraw your objection to discovery, answer the requests, and reveal the results at least 30 days prior to trial to ensure admissibility. If you have already taken the deposition of the worker, there is probably no reason to sit on the results further.

Effective Use of Surveillance Evidence

I have found that using the results of surveillance at a mediation can be very effective indeed. This seems especially true in a case where I have elicited deposition testimony that is at odds with what is seen on surveillance. In such a case, I may take the tape to mediation, and spring it on the Claimant when negotiations are beginning to bog down. If a Claimant cannot comprehend why you seem to be discussing a different neighborhood of settlement dollars than he expected, and negotiations are approaching an impasse, the tape is a revelation that often puts the Claimant(and his attorney) back on their heels.

I find that surveillance results have the most favorable impact if I avoid overplaying what I have. You will not see me walk into mediation, throw a videotape down on the table, point at the Claimant, and yell, "faker, faker, faker!" Likewise, I will not mention the tape over and over at trial, and talk about how great our surveillance tape is. In fact, to the contrary, I tend to consciously underplay the surveillance evidence.

For example, at a mediation, I want to strike a balance in how I treat what I have. If I am playing the situation right, then I will succeed in putting the Claimant back on his heels, without angering him by using inflammatory words like `fraud.' I try to be business-like, and avoid seeming judgmental of the Claimant. This evidence is just another of the factors in the case that affects the settlement value of the claim.

At trial, I like to underplay the results of surveillance. In a post-trial brief, I often make statements like, "The tape does not show the Claimant performing any extraordinary feats of strength." But it does show a person who seems to move in a completely natural fashion, while they claim they can do nothing without excruciating pain. I think that if you don't overplay the evidence, you maximize the impact upon the Deputy when they put the tape in a player later.

If your surveillance tape shows only non-strenuous activities of daily living being performed by the Claimant, do not despair of using the results at trial. Ask yourself the following questions. Is this worker saying he cannot go back to work? Was the work very strenuous compared to the activities of daily living? If the work was in light industry or a service industry job, you may want to use your surveillance results, even if they strike you as unimpressive. If you show the Deputy footage of the worker's job being performed, and show the light nature of the work, and then show the surveillance of the claimant performing activities of daily living, that side-by-side comparison can be devastating to a claimant's case.

In conclusion, I strongly advocate obtaining surveillance in workers' compensation cases. Surveillance should be obtained in cases where the employer can provide a hot tip that the worker is engaged in strenuous activity, or whenever the case will require a significant outlay to resolve, especially when the complaints are of the soft-tissue variety. I also advocate taking a position that the existence and results of surveillance should be jealously guarded as attorney work product. The practitioner must, however, remember to abide by the rules regarding timely disclosure, or admissibility at trial will be jeopardized.

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The motion itself is much broader than the questions asked of Dr. Adajar. The motion asks that Dr. Adajar provide testimony with respect to dehydration, effects of dehydration upon a child Michael's age, concerns present when a child's heart rate drops below 100 bpm during an operative procedure and the proper response thereto with respect to administration of CPR. To the extent this asks for expert testimony of Dr. Adajar in areas in which he did not render treatment, Dr. Adajar at this point cannot be required to answer such questions.

CONCLUSION

In the above cited case, the witness clearly was not a stranger to the litigation. He was a co-defendant. However, his involvement was separate and distinction from that of the other co-defendants. Judge Dandos obviously took the position that he could not be compelled to offer testimony on standard of care issues unrelated to his own individual treatment, even though he was a party to the litigation.

Although the law is not 100% clear in Iowa, I do believe that a lawyer can, in good faith, not only object to a question, but perhaps even direct the witness (assuming it is the lawyer's own client) not to answer. Perhaps a better approach would be to get the witness to state that he does not intend to express expert opinions about anyone's care other than his own. After having the witness make this statement on the record, the lawyer would be in a better position to direct the witness not to answer such questions.

EDITOR'S CONCERNS . . .

By: Patrick L. Woodward, Davenport, IA

In this issue of Defense Update, there are several changes which have occurred. First, we welcome our new President, Richard G. Santi, and his first Message from the President, which you will find on page 2. Further, with the assistance of the Board of Directors, each of the committees of the Iowa Defense Counsel will be submitting articles for publication on a regular basis. We begin in this issue with an article by Wendy Munyon of the Client Relations Committee and an article by Peter Sand of the Workers' Compensation Committee. We also offer Editor and Past President Mike Ellwanger's article on involuntary expert witnesses.. In future editions, you will find articles from the Professional Liability Committee, the Employment Law Committee, the Products Liability Committee, the Commercial Litigation Committee, the Tort and Insurance Law Committee and the Rules Committee. We look forward to tapping the wide breadth of knowledge and expertise throughout the organization and being able to share the same with the membership through the publication of these articles.

Although we will be regularly publishing articles from the various standing committees, we encourage all members to continue to submit articles over areas of interest so as to share your knowledge with the membership. If you have an idea for an article, whether it be from a recent case or simply an area of interest, please feel free to contact any of the Board of Editors.

We look forward to continuing to bring you the *Defense Update* four times a year, corresponding to the seasons with what we hope are relevant and informative articles of interest.

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