defense UPDATE

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Employment Law Cases After *Desert Palace, Inc. v. Costa*

By: Deb Tharnish, Des Moines, IA

On June 9, 2003, the United States Supreme Court issued its decision in *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148, 156 L. Ed, 2d 84 (2003). *Desert Palace* addressed the question of whether a plaintiff must present direct evidence of discrimination in order to obtain a mixed-motive instruction under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991. The Court concluded that direct evidence was not required to obtain a mixed motive instruction. This article will address the Supreme Court's holding in *Desert Palace* and the effect of the *Desert Palace* decision on future employment discrimination cases.

Ms. Costa was the only woman who worked for Desert Palace as a warehouse worker and heavy equipment operator. She experienced problems with management and co-workers, and she was eventually terminated after she was involved in a physical altercation with a male co-employee who was suspended for five days but was not terminated. Costa sued claiming sex discrimination and sex harassment. The district court gave the jury a mixed motive instruction, which Desert Palace objected to on the basis that Costa had failed to adduce "direct evidence" that sex was a motivating factor in her dismissal. Mixed motive cases arise when there is evidence that an employer acted for both unlawful and legitimate reasons. Desert Palace's objection was based on the direct evidence requirement imposed by many courts in mixed motive cases. This position was based primarily on Justice O'Connor's concurrence in *Price Waterhouse v. Hopkins*. 490 U.S. 228 (1989), which many had interpreted as imposing a direct evidence requirement to obtain a mixed motive instruction. The *Desert Palace* trial court did not require direct evidence to obtain the mixed motive instruction, the jury awarded Costa damages, and Desert Palace appealed. Initially, the Ninth Circuit vacated and remanded the case, holding the district court erred in giving the mixed motive instruction because there was no direct evidence of discrimination. After rehearing en bane, the Ninth Circuit held that 42 U.S.C. § 2000e-2(m) imposed no special evidentiary requirement of direct evidence to prove a case of discrimination. Instead, Costa could establish by either direct or circumstantial evidence that a protected characteristic played a motivating factor in the adverse employment decision.

After the Ninth Circuit's decision in *Desert Palace*, the Supreme Court granted certiorari and concluded that section 2000e-2(m) imposed no special requirement of proof by direct evidence and, indeed, discrimination cases should follow the conventional rule of civil litigation which treats circumstantial and direct evidence the same. Thus, no heightened showing was required under § 2000e-2(m), and to obtain an instruction under this section, a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that a protected characteristic was a motivating factor for the employment practice or decision.

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MESSAGE FROM THE PRESIDENT

Richard G. Santi

Dear IDCA Member:

Your IDCA has been busy these past several weeks on several fronts. First, we are completely revamping the IDCA website. The new site will have up-to-date verdict reports from both Iowa state and federal courts. Obviously, this feature of the IDCA website is only as good as the input received. If you become aware of a recent civil verdict which is not on the website, e-mail the information to cconover@simmonsperrine.com so it can be posted. In addition, the new website will permit IDCA members to query other members on topics ranging from substantive questions to locating experts. Only IDCA members will have access to the on-line verdict reports and the "list serve" feature. It is anticipated the new website will be operational by April 1. Specific information on the new website and how to use it will be forthcoming soon.

Second, with the legislature back in session, the IDCA Board has approved a list of legislative proposals which seek to level the playing field as between plaintiffs and defendants. One of these proposals calls for repeal of the 5% cap on reduction of damages for failure to wear a seat belt. Iowa Code section 321.445(4)(b). There is no rational reason for such an artificial cap in view of the law requiring use of seat belts. Thus, even if the defense proves that the brain-injured plaintiff would have escaped with minor injuries had the plaintiff been wearing a seat belt, the jury is only permitted to reduce damages by a maximum of 5%. The counter-argument by plaintiff's bar is that repeal of the 5% cap rewards the negligent, intoxicated driver who runs a stop sign and severely injures an unbelted driver or passenger who otherwise was lawfully and soberly crossing the intersection.

I personally doubt we will ever be successful in persuading either the legislature or the governor to do away with some cap. Therefore, we need to reexamine this issue, recognize the merit on both sides of the question, and, like every good defense lawyer, propose a reasonable compromise. Thus, rather than the 5% cap, why not a maximum 50% reduction in damages for failure to wear a seat belt? This higher cap protects against either wrongdoer from escaping responsibility and gives the jury appropriate latitude to render a more just verdict.

Third, we have been reviewing the Iowa rules relating to *pro hac vice* admissions. Each of us took and passed an examination to be admitted to the Iowa bar which includes the privilege of representing clients in Iowa courtrooms and administrative tribunals. In order to keep our Iowa licenses, we are required to take at least 15 hours of continuing legal education each year as a means of ensuring a minimum level of competency. Also (thank goodness), Iowa lawyers must abide by restrictive rules governing advertising and marketing which surrounding states do not have.

Over the past 35 years, I have had the opportunity of having cases with and against many different Iowa lawyers as well as out-of-state lawyers. I have found the overall quality of the Iowa lawyer in terms of competency, courtroom skill, professionalism, and collegiality is almost always superior when compared to the out-of-state lawyer. In addition, the cost of the services of an Iowa attorney are usually substantially less than what out-of-state attorneys charge. Why then are there out-of-state, non-Iowa licensed lawyers regularly appearing and representing litigants in our Iowa courtrooms and tribunals, even at the appellate level? The IDCA believes it is due in large part because the rules governing *pro hac vice* admission are too lax and too many Iowa lawyers are willing to "rent" their licenses and reputations for a few dollars.

Presently, all an out-of-state attorney needs to do to be admitted to practice law and represent clients in an Iowa courtroom or administrative tribunal is to find an Iowa lawyer who is willing to serve as "local counsel" for the limited purposes of in-state mailing of court papers. *See Rule 31.14, Iowa Rules of Court, Bar Admission and Conduct; Iowa Code section 602.10111*. Thus, admission *pro hac vice* is rarely, if ever, denied. Beware of the out-of-state counsel who asks you to serve as "local counsel." "Local counsel" means different things to different lawyers. If "local counsel" means nothing more than your name

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IOWA 'TORT REFORM:' THE BREADTH OF THE STATUTE OF REPOSE

By: Kevin M. Reynolds, Whitfield & Eddy, PLC, Des Moines, IA

In 1997 and as a part of a "tort reform" package, the Iowa Legislature adopted a statute of repose for claims based on allegedly "defective" products. The ostensible purpose of this law was to limit liability for injuries resulting from products that are so well-made that they last for many years. *Albrecht v. Gen. Motors Corp.*, 648 N.W.2d 87, 92 (Iowa 2002) (discussing enactment of the statute of repose in 1997). The legislature determined that fifteen years is an appropriate ceiling, beyond which persons should no longer be liable for any alleged product defect or failure of whatever nature or kind, to protect product suppliers (including, but not limited to, product "distributors and lessors") from defending claims based on allegedly "defective" products that were more than 15 years old. Iowa Code § 614.1(2A) (2001); *Id.* at 91.

It is important to note that the statute of repose does not only protect manufacturers and designers of products. The purpose of this article is to introduce Iowa defense practitioners to the breadth of the Iowa statute of repose. In an appropriate case, the statute may provide a complete defense to the action.

a) The statute protects product "distributors and lessors."

Several aspects of the Iowa statute of repose are key to a complete understanding of its provisions. The protections afforded by the statute are exceedingly broad. First, the statute protects not only product designers or manufacturers. By its very terms, it also protects product "distributors and lessors." Although the primary intent of such a law is to protect original product manufacturers, its protections are *explicitly* not limited to just product manufacturers. If the Iowa Legislature had wanted to limit the protections of the law to just product manufacturers, it could have easily said so; but, it did not. Instead, the statute protects a wide range of product suppliers. In an appropriate case, a person or entity who supplies or provides a product may be a "distributor" or "lessor" or both within the meaning and intent of the statute. As a result, the complete immunity from liability provided by the statute may extend well beyond traditional product manufacturers and designers.

b) The statute protects against liability based on negligence.

The statute not only immunizes product suppliers from claims based on strict liability in tort or breach of warranty (which are claims typically made against product manufacturers or designers), but also for claims based on "negligence." The wording of the statute is broad and all-inclusive, and covers any and all liability based on tort. Thus, the type of claim expressly made by a plaintiffs (whether it be based on strict liability, negligence or warranty) will not limit the application of the defense.

c) The statute protects against liability based on "any alleged defect or failure of whatever kind or nature."

The statute not only immunizes *design* conduct, as would be the more typical case against a product manufacturer, but also immunizes a wide range of conduct, described as "inspection, testing, manufacturing, formulation, marketing, packaging, warning, labeling of the product, or any other alleged defect or failure of whatever nature or kind." A more broad wording of the factual types of claims that can arise in a products case, and falling within the purview of the statute of repose, would be virtually impossible. As a result, the reach of this statute is exceedingly broad and virtually all-encompassing. So long as a claimant's injury is caused by a product that was first put to use more than fifteen (15) years before suit is filed (which is the case here), the statute's protections apply.

d) The time period begins to run when the product is "first" put into use.

The breadth of the statute is enhanced by the fact that the 15-year time period begins to run when the product is "first" put to use. In other words, a particular plaintiff need not have used the product for a 15-year period of time prior to the injury, before it will apply to immunize the defendant from liability, so long as the product was "first" put to use more than 15 years prior to the commencement of the suit.

e) The applicability of the statute is a pure question of law.

In the vast majority of cases, the

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WHEN A PARTY IS PRO SE

By: Angela Swanson, City, State

More and more frequently we are involved in litigation where one party is proceeding pro se. The reasons seem to be lack of resources to hire counsel, dislike of attorneys, or inability to find an attorney willing to take the case for lack of merit.

Both lawyers and judges are left to deal with the many issues these pro se litigants can create. Often it seems that pro se litigants believe the Rules of Civil Procedure don't apply to them. Of course, they may not be aware of the rules at all. Should judges and court personnel be required or allowed to educate these pro se litigants? Should opposing counsel? Should they be given "breaks" when they miss deadlines or otherwise violate the rules or court orders? The Iowa courts say no. "We do not utilize a deferential standard when persons choose to represent themselves. The law does not judge by two standards, one for lawyers and the other for lay persons. Rather, all are expected to act with equal competence. If lay persons choose to proceed pro se, they do so at their own risk." *Metropolitan Jacobson Development Venture v. Bd. of Review of Des Moines*, 476 N.W.2d 726, 729 (Iowa Ct. App. 1991). Is that really how it works in the courtroom? Do pro se litigants get more "second chances" when it comes to missing discovery and other pretrial deadlines? Are motions to compel and subsequent motions to dismiss for failure to provide discovery as readily granted when the offending party has no attorney?

In a legal malpractice case, the pro se plaintiff claimed his criminal attorney had, among other things, failed to file an appeal. *Kubik v. Burk*, 540 N.W.2d 60 (Iowa Ct. App. 1995). In prosecuting the legal malpractice claim the pro se plaintiff failed to designate an expert witness as required in professional liability cases. *Id.* at 62. In response to a motion for summary judgment for failure to provide expert testimony, the pro se plaintiff moved for an extension of time to identify an expert. *Id.* He argued that it was difficult to find an expert because he was representing himself and he stated that "he had not been trained in the law and he was not aware of the need to identify an expert." *Id.* The Court of Appeals refused to utilize a deferential standard for the Plaintiff and found good cause did not exist for failure to comply with the expert rule and granted summary judgment. *Id.*

In an interesting tough luck case, even though the district court clerk didn't serve the pro se defendant with a copy of the unfavorable judgment in a forcible entry and detainer action, the Court of Appeals affirmed the denial of a request for new trial based on failing to file it within the required ten days. *Polk Co. v. Davis*, 525 N.W.2d 434, 436 (Iowa Ct. App. 1994).

In a case before the Industrial Commissioner the pro se claimant failed to appear for the hearing and his case was dismissed. *Parham v. Gateway Ford, Inc.*, #1283757 (2002). The application for rehearing was denied in spite of the fact that the claimant was at the hearing building address but could not find the hearing room and was misdirected to another location across town by someone working in the building. *Id.*

Another issue that arises with pro se litigants is whether attorneys, judges or court staff may or must assist them. There are cases holding that ghostwriting, helping pro se litigants fill out forms or draft documents, is sanctionable under Rule 11. *In Re Merriam*, 250 B.R. 724 (Bkrtcy D. Colo. 2000). Colorado has rules that require the drafting attorney provide their name and address and bar registration number on the document but provides that doing so is not an entry of appearance by the attorney (C.R.C.P. 1999).

The Fourth Circuit has held that a court does not have a duty to inform a pro se litigant of the need to respond to a motion for summary judgment but the litigant is entitled to be warned they must obtain counter affidavits or other evidentiary material to avoid entry of judgment against them. *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975).

One area of concern is the stress on court staff. Pro se litigants obviously need help and often ask advice. Court staff must be extremely careful to ensure they do not engage in the unauthorized practice of law. Iowa has developed "Guidelines and Instructions for Clerks who Assist Pro Se Litigants in Iowa's Courts". Iowa Judicial Branch Customer Service Advisory Committee,

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IN THE PIPELINE

Iowa Supreme Court To Determine Validity of Governor's Item-Veto of Tort Reform Legislation

By: Tom Waterman, Davenport, IA

The Iowa Supreme Court this year will determine the fate of "tort reform" provisions Governor Vilsack item-vetoed last summer from HF 692, a major economic development bill enacted in special session. Final briefs were submitted by February 9, 2004 in *Rants v. Vilsack*, No. 03-1948, but at this writing the Court has not yet scheduled oral argument. If the Supreme Court invalidates the item-vetoes, then tort reform provisions will go into effect that will 1) raise the bar for recovering punitive damages; 2) legislatively override the Court's recent common law expansion of the civil conspiracy theory in products liability cases; and 3) reduce the exposure of Iowa businesses on workers' compensation claims by employees with prior work-related injuries. The provisions are applicable to cases filed on or after July 1, 2003, and work-related injuries occurring on or after that date. The appeal challenging the item-vetoes has a strong chance of success. Accordingly, this author believes that defense counsel should preserve error in any cases to which the provisions may apply that are adjudicated before the Iowa Supreme Court decides this appeal.

The item-veto litigation arose out of a struggle between the Executive and Legislative branches of our state government over economic development legislation. The Republican majorities in the Iowa House and Senate were willing to enact a "Grow Iowa Values Fund" sought by Governor Vilsack, but only if combined with state income tax cuts and tort reform provisions intended to further promote economic development. On June 4, 2003, the General Assembly sent both HF 692, the policy bill creating new economic development tools, and HF 683, the appropriation bill that paid for those tools, to the Governor for his signature. The Governor, at the urging of the plaintiffs' bar and various labor organizations, item-vetoed the tort reform provisions and income tax cuts as well as certain other provisions from the policy bill. Under the Iowa Constitution, the Governor can only item-veto "items" of an "appropriation bill." Ia. Const. Art. III, § 16. This case marks the first time an Iowa Governor has item-vetoed policy provisions from legislation that was not a traditional appropriations bill. Republican legislative leaders last summer filed suit in the Iowa District Court for Polk County seeking a declaratory judgment invalidating the item-vetoes. The plaintiff legislators contend the Governor exceeded his authority by item-vetoing policy provisions from a nonappropriations bill.

On December 1, 2003, the Honorable Don C. Nickerson upheld the item-vetoes in a ruling adopted nearly verbatim from the proposed ruling submitted by Attorney General Tom Miller as counsel for Governor Vilsack. The appeal promptly followed. Briefs amici curiae supporting the plaintiff-legislators' challenge to the item-vetoes were filed by the Iowa Association of Business and Industry, Iowans for Tax Relief, and the National Conference of State Legislatures. Briefs amici curiae supporting the Governor were filed by the Iowa Trial Lawyers Association, the Iowa State Education Association, the Federation of Labor, AFL-CIO, the Iowa State Building & Construction Trade Council, and several state legislators.

The Iowa Supreme Court will determine whether HF 692 is an appropriations bill within the meaning of Art. III, § 16 of the Iowa Constitution, and if so, whether the Governor could item-veto non-appropriation items. If the item-vetoes are held unconstitutional, then provisions that will be restored as law include the following:

- **Punitive Damages.** HF 692 would amend Iowa Code Chapter 668A to permit a punitive damage award only when the plaintiff "proves by clear and convincing evidence that the plaintiff's harm was the result of actual malice," which is statutorily defined to mean "either conduct which is specifically intended by the defendant to cause tangible or intangible serious injury to the plaintiff or conduct that is carried out by the defendant both with a flagrant indifference to the rights of the plaintiff and with a subjective awareness that such conduct will result in tangible serious injury." HF 692, §§ 117-119;

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CASE NOTE: Iowa Code section 614.1(9) Schlote v. Dawson, ___N.W.2d ___, Iowa Supreme Court, filed January 22, 2004

Statute of limitations for medical malpractice actions commences upon knowledge of physical harm. Fraudulent concealment doctrine requires affirmative act of concealment of the injury and not of the cause of action.

By Thomas Joensen, Des Moines, Iowa

I. OVERVIEW

Iowa Code section 614.1(9) requires that personal injury actions against health care providers be brought within two years of the date the claimant knew or should have known of the existence of the "injury" for which damages are sought in the action. In its recent decision in *Schlote v. Dawson*, ___N.W.2d___, filed January 22, 2004, the Supreme Court reviewed the background of section 614.1(9) and discussed the proper interpretation of its terms. The court confirmed that the word "injury" as used in section 614.1(9) refers simply to physical harm and not to the wrongful act that caused the injury. Acknowledging that its interpretation essentially eliminated the discovery rule as it had been known for medical malpractice claims, the statutory language was nevertheless found to be clear and unambiguous; any problem presented by such an interpretation should be addressed by "the legislature and not this court."

The litigation arose after Defendant Dr. Douglas Dawson completely removed Plaintiff James Schlote's voice box as a treatment for cancer on May 2, 1996. Some years later, Schlote learned that the Iowa Board of Medical Examiners suspended Dr. Dawson's medical license for various reasons including excessive surgery. On February 17, 2000, Schlote and his wife filed an action against Dr. Lawson seeking damages based on the allegation that the removal of his voice box was unnecessary.

Dr. Dawson moved for summary judgment, arguing that Iowa Code § 614.1(9) barred the claim. The February 17, 2000 filing date was almost four years after the surgery. Dawson contended that "injury" for the purposes of the statute meant the loss of Schlote's natural voice. The Schlotes maintained that "injury" was the excessive surgery resulting in the unnecessary removal of the voice box, an awareness of which they did not have until long after the surgery itself was performed. The Schlotes further argued that even if the injury was the removal of the voice box, the circumstances warranted application of the "fraudulent concealment" exception to section 614.1(9). Specifically, the Schlotes argued that the doctrine applied because James Schlote was not informed that the surgery was unnecessary and that Dr. Dawson had an undisclosed drug problem.

The trial court denied Dr. Dawson's motion for summary judgment. The Supreme Court granted his application for interlocutory appeal regarding 1) whether the District Court erred in finding that there was a genuine issue of material fact about Schlote's awareness of the injury and 2) whether the District Court erred in finding that there was a genuine issue of fact whether the fraudulent concealment doctrine applied. In the end, the Court concluded that there was no genuine issue of material fact as to the application of the discovery rule or as to the application of the fraudulent concealment doctrine. The Court reversed the district court's decision and remanded the case for an order sustaining the defendant's for summary judgment.

II. MEANING OF "INJURY"

In what appears to be an attempt to resolve the any remaining confusion relating to the interpretation of the word "injury" in section 614.1(9), the Court in *Schlote* began its analysis with a review of case law relating to the statute of limitations for medical malpractice actions before and after the adoption of section 614.1(9).

Before enactment of section 614.1(9), medical malpractice actions were governed by the general statute of limitations for tort cases set forth at section 614.1(2). In *Baines v. Blenderman*, 223 N.W.2d 199 (Iowa 1974) the Court had held that under the discovery rule of *Chrischilles v. Griswold*, 150 N.W.2d 94 (Iowa 1967) the limitations period begins to run in a medical malpractice case when the claimant has knowledge of the existence of a "cause of action." *Baines*, 223 N.W.2d at 202. Mere knowledge of the injury, said the court in *Baines*, "may or may not be sufficient to alert a reasonably diligent person to the basis" of the claim depending on the circumstances. *Id.* at 201.

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The employer facing a mixed motive instruction and significant potential liability will attempt to show that it would have taken the same action in the absence of the impermissible motivating factor. If the employer establishes the "same decision" defense, the plaintiff's remedies are limited to declaratory or injunctive relief and attorney fees and costs attributable to the claim under 2000e-2(m). Thus, employers may make a strategic decision to seek a "compromise verdict" of limited remedies rather than risk a total defeat by a jury finding of an illicit motivation and full remedies.

Lower courts have considered the impact of *Desert Palace* beyond whether plaintiff is entitled to a mixed-motive instruction, In *Dare v. Wal-Mart Stores, Inc.*, 267 F. Supp. 2d 987 (D. Minn. 2003), the court applied *Desert Palace* to "single motive" claims. The court in Dare also concluded that the *McDonnell-Douglas* burden-shifting analysis created a "false dichotomy" between cases in which the defendant's proffered reason was true and valid, resulting in victory for the defendant, and cases in which it is false and invalid, resulting in victory for the plaintiff. The court in *Dare* held that after *Desert Palace*, courts are no longer obliged to apply the *McDonnell-Douglas* framework when considering a motion for summary judgment on a "single motive" Title VII claim. Judge Pratt has adopted *Dare's* view of the impact of *Desert Palace* on the *McDonneIl-Douglas* burden-shifting paradigm in *Griffith v. City of Des Moines*, 2003 U.S. Dist. LEXIS 14365 (S.D. Iowa 2003). The Griffith court concluded that to survive summary judgment, a plaintiff must simply demonstrate that a genuine issue of material fact exists as to whether or not a protected characteristic was a motivating factor in an adverse employment action plaintiff suffered.

Recently, in *Dunbar v. Pepsi-Cola General Bottlers*, 285 F. Supp. 2d 1180 (N.D. Iowa 2003), Judge Bennett concluded that *Desert Palace* does not necessarily spell the demise of the entire *McDonnell-Douglas* burden-shifting paradigm. Instead, Judge Bennett concluded that the *McDonnell-Douglas* burden-shifting paradigm must only be modified in light of *Desert Palace*, and only in its final stage, so that it is framed in terms of whether the plaintiff can meet his or her "ultimate burden" to prove intentional discrimination, rather than in terms of whether the plaintiff can prove "pretext." Under this approach, once the defendant produces a legitimate, nondiscriminatory reason for this conduct, the plaintiff must prove by the preponderance of the evidence either (1) that the defendant's reason for the adverse employment action is not true, but is instead a pretext for discrimination, *see Reeves v. Sanderson Plumbing*, 530 U.S. 133, 143 (2000), or (2) that the defendant's reason, while true, is only one of the reasons for its conduct, and another "motivating factor" is the plaintiff's protected characteristic (shown by either direct or circumstantial evidence). If the plaintiff prevails under the second alternative, then if the defendant is to limit the plaintiff's remedies to injunctive relief, attorneys' fees, and costs -- i.e. to escape liability for damages -- the burden shifts back to the defendant to prove the "same action" affirmative defense stated in section 2000e-5(g)(2)(B). *See Dunbar*, 285 F. Supp. 2d at 1198.

Courts have also considered whether *Desert Palace* applies to discrimination cases brought under statutory sections other than Title VII. In *LeClair v. Wells Fargo Bank Iowa, N.A.*, 2003 U.S. Dist. LEXIS 18980 (S.D. Iowa 2003), Judge Longstaff found that *Desert Palace* applies to claims brought under the Americans with Disabilities Act (the ADA) and, therefore, declined to follow the *McDonnell-Douglas* burden-shifting framework. S*ee Skomsky v. Speedway SuperAmerica. L.L.C.*, 2003 WL 21382495 (D. Minn. 2003). Questions remain on whether the Eighth Circuit will apply *Desert Palace* to ADA cases, age discrimination cases (*see Trammel v. Simmons Trust Bank of Searcy*, 345 F. 3d 611 (8th Cir. 2003) (refusing to decide whether Desert Palace applied to ADEA cases)), or retaliation cases.

As Judge Bennett commented in *Dunbar v. Pepsi*, the full impact of *Desert Palace* will only be known as more courts grapple with the issues raised by the *Desert Palace* decision or as the Supreme Court has the opportunity to revisit related issues. Will the *McDonnell-Douglas* framework continue to be viable in a summary judgment analysis? In what cases are mixed motive instructions appropriate and in what cases should a single motive instruction be given? Answers to these and other questions will await developments in the lower courts.

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appearing on pleadings, motions, briefs, etc., you should decline the representation or be prepared to risk potential embarrassment, sanctions, and a malpractice suit. However, if "local counsel" means that you will at a minimum review all court filings and other papers before service or filing and be an integral part of the representation, including being present at any court proceeding, then the only remaining question you should ask yourself is whether the matter at issue warrants participation by out-of-state counsel.

Clearly, some situations, such as nationwide mass tort litigation against a particular defendant, mandate such representation in the interest of consistency and avoiding duplication of effort. However, other situations should raise a red flag as to why out-of-state counsel's participation is necessary at all. For example, does an automobile accident, slip and fall, or a simple contract dispute really require plaintiff or defendant to be represented by *pro hac vice* counsel? In such cases, I believe professionalism dictates that the local counsel representation be declined. Unfortunately, the non-Iowa lawyer will keep calling Iowa attorneys until an unwitting and naive lawyer accepts the status of a "mail drop."

Because of these concerns and abuses, the IDCA has been studying the issue of *pro hac vice* admissions for the purpose of recommending revisions to the rules such that judges, in whose tribunals the applications are made, will be provided certain basic and uniform information as well as standards on which to decide if the application should be granted. Even under the present rules, *pro hac vice* admission is not a right but is at the sound discretion of the judge.

The IDCA views this issue as one in which all Iowa lawyers including members of the ISBA, the Iowa Academy, ITLA, and ABOTA, should share a common interest -- preventing use of *pro hac vice* admission as an indirect means of practicing law in Iowa without benefit of an Iowa license and without meeting the other requirements imposed on Iowa lawyers. Revision and adoption of new rules governing *pro hac vice* admission would have no chilling effect on legitimate requests for admission *pro hac vice* but would weed out illegitimate requests. Our effort on this project is not undertaken as a means of protecting Iowa lawyers from out-of-state competition. Instead, we look at this issue from the standpoint of fairness to Iowa lawyers as well as protecting the rights of users of Iowa legal services to competent and ethical legal representation. After all, if the user of legal services is represented by an Iowa lawyer, that Iowa lawyer is required to have passed the Iowa bar, have an office in Iowa, have satisfied and maintained a certain level of competency by attending mandatory CLE, and has advertised and marketed within the parameters set by the Iowa Supreme Court. Why then should these rules, designed to protect the users of legal services in Iowa courts, be abandoned when it comes to a *pro hac vice* admission absent legitimate and justifiable reasons to do so?

Finally, a current "hot" topic impacting trial lawyers, judges, and clients is whether an injured plaintiff is entitled to recover all reasonable and necessary medical expenses or whether a plaintiff is only entitled to recover what actually was paid out in medical expense. This issue arises in situations where the medical service provider is contractually or legally bound to accept less than the provider's customary charges. Plaintiff's counsel argue that under present Iowa law an injured plaintiff is entitled to recover the amount of all reasonable and necessary charges whether paid or not. Defense counsel justifiably argue that this unfairly enriches plaintiff and recovery should be limited to the amount actually paid and accepted in full payment of the medical services provided. Some trial judges facing this issue permit evidence to be introduced as to the medical provider's agreement to accept the lesser amount, the amount actually paid, and the fair and reasonable value of the services. These judges then leave it up to the attorneys to argue and the jury to decide the proper amount of medical expense to award.

This issue may become academic if medical providers modify their agreements with third party payors to provide that if the patient recovers against a tortfeasor the full value of the provider's medical services, the medical provider has a lien on the patient's recovery in the amount of the unreimbursed charges. Otherwise, it is an issue which surely will come before the Iowa appellate courts for judicial resolution.

Richard G. Santi
President

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applicability of the statute will present a pure question of law for the court to decide on a motion for summary judgment. In most cases the age of the product will be proven and there will be no dispute about the date that suit is filed. The statute's effective date makes it applicable to each and every case that is filed after July 1, 1997. *See* Iowa Code Section 614.1(2A) (1999)(subsection 2A applies to actions filed after July 1, 1997, with preservation of causes of action accrued as of July 1, 1997; 97 Acts, ch 197, §16). The applicability of the statute is a question well-suited for disposition on summary judgment. *See Robinson v. Poured Walls of Iowa, Inc.*, 553 N.W.2d 873, 875 (Iowa 1996) (even a negligence case can be subject to summary judgment if no legal duty exists); Iowa R. App. P. 6.14(6)(m)("In construing statutes the court searches for the legislative intent as shown by what the legislature said, rather than what it should or might have said").

f) The statute of repose applies to products that are leased.

The Iowa statute of repose for products applies to cases where a person was injured while using an "old" product, or one that is more than fifteen years old, and sues, alleging a defect or failure in the product of some kind. Under the statute, there is no requirement that the problem or condition sued upon has to be an aspect of the product's "original" design. Thus, if a product becomes "defective" because it is worn out and has not been properly maintained, the statute nevertheless immunizes a defendant who is protected under its explicit provisions. Under the statute's plain language, "Actions may be brought within the times herein limited, respectively, after their causes accrue, **and not afterwards** . . ." Iowa Code § 614.1. The section applying specifically to products states:

> a. Those founded on the death of a person or injuries to the person or property brought against the manufacturer, assembler, designer, supplier of specification, seller, lessor, or distributor of a product based upon an alleged defect in the design, inspection, testing, manufacturing, formulation, marketing, packaging, warning, labeling of the product, or any other alleged defect or failure of whatever nature or kind, based on the theories of strict liability in tort, negligence, or breach of an implied warranty shall not be commenced more than fifteen years after the product was first purchased, leased, bailed, or installed for use of consumption . . .
>
> Iowa Code § 614.1(2A) (emphasis added).

g) If the transfer of possession of a product is a "lease" or constitutes "distribution," then a defendant is immunized from liability by virtue of the Iowa statute of repose.

Quite clearly, only specific product suppliers are entitled to receive the benefits of the statutory protections. In order for the statute of repose to apply for the benefit of a non-manufacturer, the non-manufacturer must be a *provider or supplier* of some kind with regard to the product. The protected entity is specifically identified in the statute to include a "manufacturer, assembler, designer, supplier of specifications, seller, lessor, or distributor." These terms are broad and all encompassing and include virtually every supplier or provider of a product. Yet, this broad scope makes sense, if the Iowa Legislature was intending to make suits and claims based on products older than 15-years impossible, as indeed the statute itself suggests was their intention. Many product defendants may be classified as either a "lessor" of the product, or a "distributor" of the product, or both.

h) Many defendants may qualify as "lessors"of a product, entitled to the protections of the Iowa statute of repose.

A "lease" under Iowa law is defined as an intent to divest oneself of the possession [of personalty] for a determinate amount of time. *See, e.g., Baie v. Nordstrom et.al.*, 238 Iowa 866, 29 N.W.2d 211 (1947). Most products would easily fit this definition, as they are personal property or personalty; possession, but not title or ownership, is transferred from a product supplier to plaintiff or plaintiff's employer; and the transfer in most cases is for a determinate length of time, i.e., until the work is done. Although in many cases there will be no *written* lease, it is important to note that a writing is not required under Iowa law in order to create a legally enforceable lease relationship. *See, e.g., Sunset Mobile Home Park v. Parsons*, 324 N.W.2d 452, 455 (Iowa 1982)(oral leases are

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valid, and may be inferred from the situation and surrounding circumstances). Although in many cases there may be no specific term (or length of use) for the lease specified, the lack of this contractual term is not fatal to the existence of a lease relationship. Clearly, most plaintiffs or their employers will be required to the product to the supplier when the work is completed. To this extent, this term of the lease was a contract implied in law. *See, e.g., Khan v. Heritage Property Management*, 584 N.W.2d 725 (Iowa Ct. App. 1998)(generally, a bailment can be based on either an expressed or implied agreement, and can arise by operation of law when justice requires); *Baie v. Nordstrom*, 238 Iowa 866, 29 N.W.2d 211, 214 (1947)(no particular form of words is necessary to constitute a lease, especially an oral lease between parties not trained in legal phraseology).

It the vast majority of cases it will be essentially undisputed that the product supplier loaned the plaintiff or plaintiff's employer the product and expected its return. Although there is a transfer of possession of a chattel or personalty, there is no change in title or ownership. Under Iowa law, this is a bailment. A "bailment" under Iowa law is defined as "when one gives possession and the right to use personal property to another who agrees to return the same property at a future time." The person who gives possession is known as a bailor. The person who takes possession is known as a bailee." *See* Iowa Uniform Civil Jury Instruction No. 2300.1 ("Bailment defined")(1987); *Farmers Butter and Dairy Co-op v. Farm Bureau Mut. Ins. Co.*, 196 N.W.2d 533, 538 (Iowa 1972). If the Court finds there was consideration for this exchange, under established Iowa law the bailment becomes a "lease." If a lease relationship exists, then a product defendant is a "lessor" with regard to this equipment and is entitled to the protections of the Iowa statute of repose for products.

In many cases where an old product is supplied for someone's use, the defendant will be a "bailor," and the plaintiff or his employer will be a "bailee." According to Black's Law Dictionary, a bailment is created by "[a] delivery of goods or personal property by one person to another, in trust for the execution of a special object upon or in relation to such goods." Black's Law Dictionary, 4th Ed. (1972). This relationship was one of mutual benefit. *See* 8 Am. Jur.2d § 24 (explaining bailment incidental to business in which bailee earns a profit is considered bailment for mutual benefit). No actual money need change hands to serve as an exchange of consideration. *Kristerin Devel. Co. v. Granson Inv.*, 394 N.W.2d 331, 331 (Iowa 1986). A benefit to plaintiff or detriment to defendant will suffice.

A lease is a specific type of bailment. *See* 8 Am. Jur.2d § 39. Under Iowa law, a lease means "a transfer of the right to possession and use of goods for a term in return for consideration." Iowa Code § 554.13103(j) (2003). In a factually similar case, a plaintiff rented scaffolding for use on a painting job. *Rinkleff v. Knox*, 375 N.W.2d 262, 265 (Iowa 1985). The court held the business that furnished the scaffolding for rent was a bailor. *Id*. The critical distinction, then, between a lease and a gratuitous bailment is consideration.

At least one case in another jurisdiction has held that a "bailor" of a product should receive the protections of the statute of repose. *See, e.g., Winningham v. Ciba Geigy Corp.*, No. 97-5777, 1998 U.S. App. Lexis 16388, at *10 (6th Cir. July 14, 1998) (unpublished) (applying Tennessee's statute of repose to a bailor, finding products liability suit barred by statute of repose).

i) One who loans or provides a product may be a "distributor" of the product, and subject to the protections of the statute.

The term "distributor" is not defined in the statute; thus, under Iowa law we must give it its ordinary, everyday meaning. *See, e.g., State v. Wells*, 629 N.W.2d 346, at 354 (Iowa 2001)(undefined statutory terms should be accorded their plain and ordinary meaning). Webster's Third New International Dictionary (unabridged) (1997) defines "distributor" as "one that distributes." *Id*. at 660. It defines "distribute" as "to divide among several or many; deal out; apportion." *Id*. at 660. If the Iowa Legislature had intended for this term to have a specific meaning, such as, for

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example, only applying to commercial distributors only, it could have provided one in the statute; but it did not. Most defendants will fit the definition of a "distributor" in this general sense, and as a result, they may be found immune from liability under the Iowa statute of repose.

The new Restatement Third of Torts, Product Liability, Section 20 supports this view. This section is entitled "Definition of 'One Who Sells or Otherwise Distributes.'" That section provides in pertinent part as follows:

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

The Iowa Supreme Court has adopted other provisions of the Restatement Third. *See, e.g., Lovick v. Wil-Rich*, 588 N.W.2d 688 (Iowa 1999)(adopting Section 10 relating to post-sale duty to warn); *Wright v. Brooke Group*, 652 N.W.2d 159 (2002)(adopting Section 2(b) relating to design defect). Although the Court has not yet had a chance to adopt Section 20 of the Restatement Third, its definition of what constitutes "a person who otherwise distributes" a product is persuasive authority for what "distributor" should be interpreted to mean in the context of the Iowa statute of repose.

e) The Iowa statute of repose for products is constitutional.

Even though the statute of repose acts to bar a plaintiffs' cause of action before it has even accrued, this is the very nature and essence of a statute of repose, and this result is permissible under the law. *Albrecht*, 648 N.W.2d at 90-91. This is what distinguishes a statute of repose from a statute of limitations. The statute of repose has been found constitutional by the Eighth Circuit Court of Appeals, in a case based on Iowa law. *See Estate of Branson v. O.F. Mossberg & Sons, Inc.*, 221 F.3d 1064 (8th Cir. 2000). A very similar statute of repose, found at Iowa Code Section 614.1(11) and applying to "improvements to real property," has been considered by the Iowa Supreme and found to be a constitutionally permissible limitation on plaintiffs' rights to bring causes of action. *Eastern Iowa Propane v. Honeywell*, 652 N.W.2d 462, 466 (Iowa 2002); *Krull v. Thermogas Co.*, 522 N.W.2d 607, 613-15 (Iowa 1994)(equal protection); *Bob McKiness Excavating & Grading, Inc. v. Morton Bldgs., Inc.*, 507 N.W.2d 405, 410 (Iowa 1993)(due process). As a result, Section 614.1(2A) is a legitimate and constitutional exercise of the legislative power.

A recent decision by a federal district court in Iowa supports the argument that the Iowa statute of repose should be applied as it is written, and that exceptions that are not written into the statute should not be read into it through judicial interpretation. In *Alley v. Johnson & Johnson, Inc.*, No. 1:02-cv-40043 (U.S. District Court, Southern District of Iowa, Western Division)(order filed January 5, 2004)((Judge James E. Gritzner), a summary judgment was granted for a defendant in a medical device products case. In *Alley*, although the product in question, an air drill used in spinal surgery, was more than 15 years old, it had been refurbished since the original date of manufacturer. Plaintiff in *Alley* argued to the court that this should start the 15-year repose period running anew. However, the court rejected that argument since the statute contained no such exception.

CONCLUSION

The statute of repose bars actions for personal injuries resulting from any failure in a product more than fifteen years old at the time suit is filed. It is likely that this statute can be applied to non-traditional cases involving injuries caused by products, where non-manufacturers and other product suppliers are involved.

CASE NOTE: . . . continued from page 6

One year after the *Baines* decision, and in a direct response thereto, the legislature adopted section 614.1(9). It was part of a comprehensive package aimed at alleviating the medical insurance crisis and was enacted "to restrict the discovery rule under section 614.1(2)." *Langner v. Simpson*, 533 N.W.2d 511, 517 (Iowa 1995). As the *Langner* Court explained, "[s]ubsection 9 means the statute of limitations now begins to run when the patient knew, or through the use of reasonable diligence should have known, of the *injury* for which damages are sought." *Id*. (emphasis added.) Knowledge that the injury was caused by negligence is unnecessary. *Id*.

The *Schlote* court then turned to the application of the statute to the facts of the case before it, recognizing that the issue turned on the proper interpretation of the word "injury" as used in section 614.1(9). The Court discussed several different meanings of the word "injury," and also examined a section 614.1(9) wrongful death case, *Schultze v. Landmark Hotel Corp.*, 463 N.W.2d 47 (Iowa 1990), which determined that the statute began to run on the discovery of death, not upon the discovery of the wrongful act that caused the death.

The Court came to the "inescapable conclusion" that the legislature had physical harm, or "the physical impairment of the human body," in mind when using the word "injury" rather than the wrongful act that caused the injury. The Court noted its previous ruling in *Langner v. Simpson*, 533 N.W.2d 511 (Iowa 1995), in which it stated that section 614.1(9) commences even though the patient does not know the physician had negligently caused the injury. 533 N.W.2d at 517. As a result, the Court held that statute of limitations began to run on May 21, 1996, the date of the plaintiff's surgery, i.e. his "injury," even though he was unaware of any facts indicating that the surgery may have been unnecessary. Since the plaintiffs did not file their action until February 17, 2000, it was time barred unless the fraudulent concealment doctrine applied.

It is important to note that the Court was aware of the limiting effects of its interpretation of the word "injury," noting that it "eliminates the discovery rule for medical malpractice claims" and that it restricts the rights of unsuspecting patients who may be injured because of unnecessary and excessive surgery. The Court left it to the legislature to address this anticipated problem.

III. FRAUDULENT CONCEALMENT

Fraudulent concealment is an exception to the general rule that the statute of limitations begins to run when a tort is committed. The plaintiff argued that their action should not be barred since there was fraudulent concealment because James Schlote was not informed that the surgery was unnecessary and because Dr. Dawson had an undisclosed drug problem

The Court observed that the doctrine of fraudulent concealment survived the adoption of section 614.1(9) according to *Koppes v. Pearson*, 384 N.W.2d 381, 387-388 (Iowa 1986), and that its elements include the showing that 1) the defendant did some affirmative act to conceal the cause of action and 2) the plaintiff exercised diligence to discover the cause of action.

However, based upon the Court's more definitive interpretation of section 614.1(9) earlier in the case, the Court held that in a medical malpractice case, the plaintiff must show the defendant concealed an *injury* rather than a cause of action. Furthermore, based upon the holding of *Van Overbeke v. Youberg*, 540 N.W.2d 273 (Iowa 1995), although the close relationship between patient and physician might obviate the need to prove an affirmative act of disclosure, the Court stated that there must be an independent act of concealment as well as temporal separation of the act of negligence and act of concealment to establish liability. The Court held that Dr. Dawson's failure to make the relevant disclosures was not an independent, subsequent act of concealment that could be a basis for an exception to the running of the statute.

IV. CONCLUSION

The Court's holdings in this case are neither groundbreaking nor radical. The Iowa Supreme Court merely cleared up some remnant confusion regarding the meaning of "injury" in section 614.1(9) after its holding in the 1995 *Langner* case. Simply put, it is the plaintiff's awareness of a physical impairment that commences the limitations period. Furthermore, there must be facts showing a concealment of this physical impairment in order to allow the plaintiff to utilize the fraudulent

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2000. The manual provides general policy principles, specific directions, examples of "legal advice" and a long list of frequently asked procedural and substantive questions from pro se litigants and appropriate responses. It is available on the Supreme Court website.

From a practice standpoint, dealing with a pro se litigant can be very emotional. During court proceedings attorneys should address all matters to the court and not the pro se litigant. The court is better equipped to deal with any ranting and raving. Objecting constantly will not be to your advantage. Obviously protect the record but avoid becoming part of the problem. Always treat the pro se litigant with respect, and if possible, kindness. Patience may not always come easy, but an angry pro se litigant is not going to make the case go better or faster, and can put the parties, attorneys and the court at personal risk.

The best defense is to paper your file with documentation of all contacts with the pro se litigant. Remember they do not have a code of ethics. It is much safer to rely on written communication or at least confirming in writing any oral communications.

With respect to settlements, get them in writing immediately. Pro se litigants often change their minds. Make sure the settlement documents are very clear.

Pro se litigants are here to stay. While the courts will hold them to the major procedural rules, we all need to work together so that justice can move along. Tread carefully and treat these litigants with the same respect as members of the bar. If you lose to a pro se litigants, take heart, others feel your pain.

IN THE PIPELINE

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- **Civil Conspiracy in Products Cases.** HF 692 would legislatively override the perceived expansion of products liability for civil conspiracy in Wright v. Brooke Group, Ltd., 652 N.W.159, 173-74 (Iowa 2002). Specifically, a new section is added to Iowa Code Section 668.12 to limit liability for civil conspiracy in products cases to defendants that "knowingly and voluntarily entered into an agreement, express or implied, to participate in a common plan with the intent to commit a tortious act upon another. Mere membership in a trade or industrial association or group is not, in and of itself, evidence of such an agreement." HF 692 § 116;

- **Workers' Compensation Apportionment for Prior Work-Related Injury.** HF 692 also adds a new paragraph to Section 85.34(2)(u) allowing the employer a deduction "for that portion of the employee's present disability caused by a prior work-related injury or illness." HF 692 § 121.

Practitioners defending tort actions filed on or after July 1, 2003, that go to trial before the Iowa Supreme Court decides the appeal, should keep in mind error preservation. For example, defense counsel in a case with punitive damages submitted to the jury should propose a jury instruction modeled off HF 692 § 117-19 requiring actual malice as statutorily defined. Objections should be lodged against instructions omitting those limitations, and a motion for directed verdict should include the amended requirements to preserve the right to seek relief based thereon in post-trial motions and on appeal.

CASE NOTE

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concealment exception to the statute of limitations.

The Court plainly acknowledged that its ruling restricts the rights of patients who may be injured from excessive surgery, while leaving it to the legislature to remedy this conceivable problem. Indeed, in his dissent, Justice Cady observed that a case such as this one is confusing because the plaintiff's discovery of the injurious nature of the surgery coincides with his discovery of his doctor's wrongful act. Cady believed that there is a difference in using discovery of the wrongful act as the date to commence the statute of limitations and using the wrongful act to discover the injury. He believed that by preventing a patient from using the discovery of the wrongful act as evidence of discovery of the injury, the majority has essentially written the concept of knowledge out of the discovery statute.

An explanation of the Court's decision, though, is that it is attempting to establish a clear, unequivocal, and uniform point to commence the limitations period under section 614.1(9). The Court also seems to be indicating that it will continue to interpret the statute in accordance with its plain language and will reject attempts to engraft exceptions through judicial interpretation. As the Court clearly stated, any problems or perceived injustices resulting from the application of the plain language of the statute are "up to the legislature and not this court" to address.

IDCA SCHEDULE OF EVENTS

2004 Meeting Dates

April 16, 2003
Iowa Defense Counsel Association Spring Seminar
The Cutting Edge of Worker's Compensation Defense
Des Moines Golf & Country Club
1600 74th Street
West Des Moines, IA

April 16, 2003
Iowa Defense Counsel Association Board Meeting
Des Moines Golf & Country Club
1600 74th Street
West Des Moines, IA
11:45 a.m.

July 23, 2004
Iowa Defense Counsel Association Board Meeting
Tournament Club of Iowa
1000 Tradition Drive
Polk City, IA
10:00 a.m.

September 22, 2004
Iowa Defense Counsel Association Board Meeting
Marriott Des Moines Downtown
Des Moines, IA

September 23, 2004
Iowa Defense Counsel Association Board Meeting
Marriott Des Moines Downtown
Des Moines, IA

September 22-24, 2004
Iowa Defense Counsel Annual Meeting & Seminar
Marriott Des Moines Downtown
Des Moines, IA

The Cutting Edge of Workers' Compensation Defense Seminar

8:00 am **Continental Breakfast**

8:15-8:30 am **Opening Remarks**

8:30-9:15 am **The Arising Out of Standard - Making a Comeback**
Charles Cutler
Cutler Law Firm, P.C., Des Moines, IA

The worker's burden of showing that their injury arises out of the employment was a meaningless requirement ten years ago. Then the Miedema case breathed new life into employer's arguments regarding this element of the case. Since then, the Commissioner's office has tended to keep with the standard prior to Miedema, and essentially holds compensable anything that happens at work (with a few notable exceptions, such as Commissioner Post's decision in Karkosh in 1996). The recent decision in Bartle seems to take Miedema even further. Is the arising out of element becoming a real hurdle for workers?

9:15-10:15 am **Return To Work and The Concerns of FMLA and ADA**
Stephanie Glenn Techau
Nyemaster Law Firm, Des Moines, IA

Perhaps the single largest category of questions I get from insurers surround the issue of return to work. When can I force the worker to return to work? Can I stop the TTD? Do I need to pay TPD? If I stop the TTD, do I have to give a 30 day warning pursuant to Sec. 86.13? If the worker doesn't return to work, can I terminate employment? If so, what are the FMLA implications of doing that? If I think I am offering work within the doctor's restrictions, but the worker disagrees, what happens? If I accommodate, will I be forced by the ADA to accommodate forever? If I don't want to accommodate the worker's restrictions, will I run afoul of the ADA?

10:15-10:30 am **BREAK**

10:30-11:30 am **Dealing with Complaints of Ongoing Pain**
Mark Blankespoor
Work Fitness Center, Pella, IA

The medical demands and disability exposure due to subjective complaints of pain are a big problem for the defendants in any compensation case. What treatment options are most effective for helping truthful workers regain functionality? Will those options identify workers that are exaggerating their pain? How can the defense successfully prevent workers from essentially collecting pain and suffering damages?

11:30-12:15 pm **Nuts and Bolts of Workers' Compensation Defense**
Peter Sand
Des Moines, IA

A quick review of deadlines in a workers' compensation case, and a practical to do checklist at each point in the case. A practitioner's view of how the cases flow and how evidence is admitted at trial.

12:15-1:00 pm **LUNCH** *(included in registration fee)*

1:00-1:15 pm **IDCA Legislative Update on Workers' Comp**
Bob Kreamer
Kreamer Law Office/IDCA Exec. Dir., Des Moines, IA

IDCA services for workers' compensation practitioners, and IDCA lobbying efforts in the arena of workers' compensation.

April 16, 2004 • Des Moines Golf & Country Club

Registrations must be received by: April 9, 2004 *(Space is Limited)*

Applied for ---6.5 Federal Hours CLE • Applied For 6.5 State Credit Hours CLE

1:15-2:00 pm **Commission View of Effective Defense**
Commissioner Michael G. Trier
Division of Workers' Compensation, Des Moines, IA

What defense methods does the Commissioner find most persuasive? When examining conflicting medical opinions what sort of characteristics in the records typically win the day? What are the Commissioner's greatest pet peeves regarding the defense bar? A look at current agency statistics and case load is provided. Also, what are the changes in agency practice over the years and are there any unwritten rules? How can the practicing bar help this Commissioner and the effectiveness of the Commission?

2:00-2:30 pm **Alternative Dispute Resolution**
Robert Landess
Hopkins Law Firm, Des Moines, IA

Most workers' compensation cases are settled prior to trial. Years ago, that normally took place on the courthouse steps. Mediation at the Commissioner's office was very popular throughout the 1990s, because it was free. The Commissioner has drastically reduced the scope of the mediation program. It has also become less popular for other reasons. Has mediation peaked in workers' compensation, and is declining as a way to resolve cases? Or should litigants still use this resolution tool?

2:30-3:15 pm **Alternate Care and the Authorization Defense**
Steven Nadel
Ahlers & Cooney, P.C., Des Moines, IA

Alternate care proceedings are a very hot topic right now. The employer's only weapon in the fight against workers' compensation is the right to direct the care. But that right can be taken away by a worker filing for alternate care---the hearing on such petitions occurs in only ten days from filing. In addition, a recent Commissioner decision in the Haack case seems to allow workers to choose their own care and still force employers to pay the cost. In light of the summary nature of the proceedings, and the Haack case, does the authorization defense have any residual value for defendants? How can one defend against proceedings that are so quick to be decided?

3:15-3:30 pm **BREAK**

3:30-4:00 pm **Defending the Mental Injury**
Dr. James Gallagher, Des Moines, IA

Defending mental injuries is complicated and difficult. A primer on how to cut through the psychological jargon and to bring the claim down to earth. Tips on how to defend the case and minimize exposure to: (a) open-ended, never-ending doctor visits, (b) open-ended prescription drug costs; (c) problems with workers off work indefinitely due to depression or anxiety; and (d) dealing with the opinion that mental injuries permanently and totally disable patients.

4:00-5:00 pm **Case Law Update**
Speaker TBD

Overview of recent workers' compensation cases.

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FROM THE EDITORS . . .

By: Mark Brownlee, Fort Dodge, IA

As you know, a panel of editors is responsible for the content of each issue of Defense Update. Individual editors frequently author articles, but a majority of articles is obtained from IDCA members, usually at the request of an editor. We strive to maintain the quality and usefulness of this publication, but beyond our efforts, we remain largely dependent upon the excellent contributions of our fellow members.

We recognize how inconvenient, even stressful, it can be to take the time necessary to prepare an article in the middle of a busy practice and are gratified by the graciousness and generosity of our members when approached about authoring an article. We hope and expect this will continue to be the case. We further hope that our members will take the initiative to contact an editor (listed below) about submitting an article when they have encountered or researched an issue likely to be of interest or benefit to our membership, as articles emanating from work already performed are usually easier to prepare and often relate to timely issues or topics.

Please let us hear from you so that our fellow members may benefit from your efforts and expertise.

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