defense UPDATE

The Iowa Defense Counsel Association Newsletter Winter/Spring 2005 Vol. XIV, No. 1

"FAILURE TO WARN:" STATUTORY CHANGES IN IOWA LAW

By George Eichhorn, Stratford, IA and Kevin M. Reynolds, Des Moines, IA[1]

Effective July 1, 2004, failure to warn law in Iowa was changed by a little-known and not-well-publicized statutory enactment of the Iowa Legislature. House File 2170, designed as an amendment and addition to Iowa Code Section 668.12, formerly the "state of the art" defense, has changed §668.12 to read as follows:

668.12 LIABILITY FOR PRODUCTS - DEFENSES.

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3. An assembler, designer, supplier of specifications, distributor, manufacturer, or seller shall not be subject to liability for failure to warn regarding risks and risk-avoidance measures that should be obvious to, or generally known by, foreseeable product users. When reasonable minds may differ as to whether the risk or risk-avoidance measure was obvious or generally known, the issues shall be decided by the trier of fact.

4. In any action brought pursuant to this chapter against an assembler, designer, supplier of specifications, distributor, manufacturer, or seller for damages arising from an alleged defect in packaging, warning, or labeling of a product, a product bearing or accompanied by a reasonable and visible warning or instruction that is reasonably safe for use if the warning or instruction is followed shall not be deemed defective or unreasonably dangerous on the basis of failure to warn or instruct. When reasonable minds may differ as to whether the warning or instruction is reasonable and visible, the issues shall be decided by the trier of fact.

Whether this statute will be a significant change in Iowa "failure to warn" law remains to be seen. One potential interpretation is that it portends change in favor of product liability defendants, such as manufacturers, designers, and assemblers of products. At the very least, this statute and its provisions are worthy of closer analysis.

I. THE STATUTE MAY GIVE RENEWED VITALITY TO THE "OPEN AND OBVIOUS" DEFENSE TO FAILURE TO WARN CLAIMS.

In early product liability formulations, if a product hazard or danger was "open and obvious," there was no legal duty to warn.

[W]e hardly believe it is anymore necessary to tell an experienced factory worker that he should not put his hand into a machine that is at that moment breaking glass than it would be necessary to tell a zookeeper to keep his head out of a hippopotamus' mouth.

Bartkewich v. Billinger, 432 Pa. 351, 356, 247 A.2d 603, 606 (1968); *see also Nichols v. Westfield Industries, Inc.*, 380 N.W.2d 392 (Iowa 1985)(there is no duty to warn where the danger is open and obvious). In the past several years, however, the "open and obvious" defense fell upon disfavor to a majority of courts and is no longer a complete defense to claim of design defect. *See, e.g., Micallef v. Miehle Co.*, 39 N.Y.2d 376, 384 N.Y.S.2d 115, 348 N.E.2d 571 (1976)("...the openness and obviousness of the danger should be available to the defendant on the issue of whether plaintiff exercised that degree of reasonable care as was required under the circumstances.") This is known as the "patent danger" rule. The rule makes sense from the standpoint that a product designer should not be permitted to ignore its duty to design a reasonably safe product, simply because the hazard presented is obvious. This continues to be the case even in light of this statutory enactment.

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MESSAGE FROM THE PRESIDENT

Sharon Greer

Dear Friends:

Recently, IDCA sponsored another successful Spring Seminar under the leadership of the Employment Law Committee chair, Deborah Tharnish and Vice President Michael Thrall. The seminar drew many members and non-members and we were able to use our contacts with the Defense Research Institute (DRI) to draw an out-of-state speaker. I am always proud of the high quality of our seminars. Congrats to the Committee for such a successful effort. If you are interested in this area of the law, contact the association or Deborah Tharnish to get involved with the Employment Law Committee. It will look "impressive" on your Curriculum Vitae!

As I write this, our top legislative objective - court funding - was underway. The extra revenue for the Courts is tied to a speed limit bill, but it does help resolve a crisis situation for our Court. From my perspective, I am just relieved there will not be any deeper cuts in a system that was struggling. I am hopeful that support staff, such as court attendants for jury trials, can be funded. The quality of our system depends on the efficient operation of the Court.

Speaking of legislation, we are working with the Iowa Bar Association to resolve potential conflicts of interest when the legislative session begins. While we primarily monitor legislation that might interfere with a fair resolution of a case, we have always hoped to not have the Iowa Bar lobbying against our interests. We have always hoped that if significant differences exist between the plaintiff and defense attorney organizations, that the Iowa Bar Association would not chose sides. Since both the plaintiff and defense organizations are well organized and well informed, it would seem the issues could be adequately argued in the legislative process without the entire Iowa Bar, which actually represents members from both camps, becoming vocal. It is our plan to conduct a meeting prior to the legislative session each year to work out these issues. I am hopeful that the conflicts can be reduced with this effort.

Your IDCA board has just completed a brochure make over. If you want any copies for your office, please let us know. It is a much better looking brochure. We are also tackling another membership drive and would ask that you help us with that effort. Look around your firm or city and let us know if there are any potential attorneys to propose for membership. We are proud of our 400+ membership and would like to remain at that level. Our Membership Committee is chaired by Michael Weston and Heidi Delanoit. Additionally, we are planning a future young lawyer "basic" seminar and we should be announcing the time and place for that event. We hope to have that evolve again into a trial academy format but for now it will be a one day event. Our Young Lawyer chairperson is Christine Conover. Contact her if you are a new lawyer and want to be involved with the IDCA. The Board decided to hire intern law students to monitor our jury verdict section of the web site. We would like to have a student from Drake and Iowa, so if you know of any outstanding candidates, please let me know as soon as possible.

Note also that the Iowa Supreme Court has issued the new Iowa Code of Professional Responsibility, effective July 1, 2005. You should go to the court web site (www.judicial.state.ia.us) and check this out. I know it is a bunch of pages, but they can be deadly if you do not know what they hold! Now that the new Rules are in place, we will start our discussion of the Pro Hac Vice issue in Iowa. This is a subject that affects both the defense and plaintiff bar. My personal experience has been with out of state attorneys hired through an internet search. Our rules may need tweaking , such as charging a fee to practice in Iowa. Enforcement of the rules are important to protect Iowa citizens from some of these attorneys that do not know our rules or seem to care about them. Martha Shaff and Darrell Isaacson are the co-chairs of the Rules Committee and any ideas about this area can be sent to them.

As always, this organization exists for you and your needs. We urge you to contact any Board Member or Officer and voice your concerns or suggestions. I love the email I get from all of you and would love even more (sharon@cdrlaw.com). It makes me feel so vital! Seriously, your ideas help build a stronger organization which in turn may help you with the next legal quandary you face. We are here to help educate and to provide networking. Please get involved. ■

DEFENDING NON-PARTIES AGAINST A SUBPOENA DUCES TECUM

By John F. Lorentzen, Des Moines, IA

Subpoenas duces tecum are the typical method for obtaining compulsory document discovery from non-parties.[1] The documents or things requested can impose significant burdens on the person to whom the subpoena is directed, and they can include privileged or otherwise protected information. These circumstances may give rise to the need for the person subpoenaed to seek legal advice. The non-party may also have the right to recover all of its expenses related to responding to the subpoena, including attorney fees.

Courts have recognized the need for providing significant safeguards to non-parties in these cases. A non-party may incur "significant expense as a result of its involuntary involvement in a stranger's quarrel." *Kahn v. General Motors Corp.* No. 88 Civ. 2982, 1992 WL 208286 (S.D.N.Y. Aug. 14, 1992) at *2. Courts must protect the non-party against these expenses. *See Linder v. Calero-Portocarrero*, 183 F.R.D. 314, 322-23 (D.D.C. 1998). Courts addressing the issue of how the costs of subpoena compliance should be allocated have consistently emphasized that non-parties who have no interest in the pending litigation should not be required to subsidize the costs of that litigation. *See Broussard v. Lemons*, 186 F.R.D. 396, 398 (W.D. La. 1999); *First American Corporation v. Price-Waterhouse, L.L.P.*, 184 F.R.D. 234, 239-241 (S.D.N.Y. 1998); *In re Letters Rogatory*, 144 F.R.D. 272, 278 (E.D. Pa. 1992) ("A witnesses' non-party status is an important factor to be considered in determining whether to allocate discovery costs on the demanding or the producing party"); *see also Tutor-Salibi Corp. v. United States*, 32 Fed. Cl. 609, 611-12 (1995) (holding that when a non-party indicates its intention to seek costs as a condition to responding to a subpoena, if the court orders the non-party to comply, its order must protect the non-party from significant expense).

The starting point for advising a non-party client about responding to a subpoena duces tecum is Iowa Rule of Civil Procedure 1.1701 or Rule 45 of the Federal Rules of Civil Procedure. The Iowa rule, which first took effect in January 1998, has never been interpreted in any reported Iowa appellate court case. Nevertheless, it is closely patterned after Rule 45 of the Federal Rules of Civil Procedure, for which there is a substantial body of interpretive case law.

The first provision of the Rules that is relevant for responding to a subpoena duces tecum is found in the subsections concerning "protection of persons subject to a subpoena":

> [A] party or an attorney responsible for the issuance and service of the subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena.

I.R.C.P. 1.1701(2)(a); F.R.C.P. 45(c)(1). The use of the word "shall" makes this provision mandatory.[2] This same subsection provides that the Court: "shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and reasonable attorneys fees." While this portion of the rule suggests that a court award of lost earnings or reasonable attorneys fees is a "sanction", federal cases, some of which are discussed below, allow for a broad range of compensation to the person subpoenaed based on reasonable costs associated with responding to the subpoena regardless of any "sanctionable" conduct by the party issuing the subpoena.

One of the more significant provisions of the Rules concerns the subsection dealing with the method for making objections and their effect on enforcement of the subpoena. I.R.C.P. 1.1701(2)(b)(2); F.R.C.P. 45(c)(2)(B). Under that subsection:

> [A] person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance, if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to the inspection or copying of any or all of the designated materials or of the premises.

As will be discussed below, the advantage of making timely, written objections relieves the non-party who makes them from complying with the subpoena unless the party issuing the subpoena seeks a court order.

The subsection on written objections does not describe what objections

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1 Iowa Rule of Civil Procedure 1.514 also appears to recognize an independent action against a person not a party for production of documents and things and permission to enter land.

2 Iowa Code § 4.1(30)(a) ("The word 'shall' imposes a duty.").

APPORTIONMENT UPDATE

By Peter Sand, Des Moines, IA

The readers may recall that the legislature passed a bill attempting to curb what Iowa employers and insurers saw as double recovery in the workers' compensation system.

Double recovery peaked with the case of *Venegas v. IBP*, 638 N.W.2d 699 (Iowa 2002). In that case, the worker had previously won an award of 35% industrial disability in California. He came to Iowa, and claimed re-injury of the same body part. The Commissioner adjudged him to be 55% disabled after the second injury. The Court admitted that the 55% award included the prior disability from California, and yet nothing was subtracted, or apportioned, from the 55% award. As a result, NCCI petitioned the Commissioner of Insurance for a 14% increase in workers' compensation insurance rates for Iowa.

The apportionment bill that passed the legislature was part of a larger bill addressing many economic development concerns, including the founding of the Iowa Values Fund. This passage occurred in the 2003 session of the legislature. In May of that year, Governor Vilsack purported to sign the Values Fund part of the bill into law, while using his line-item veto power to void the apportionment change to workers' compensation law. His action was challenged by members of the legislature in a legal action filed in Polk County. The District Court granted the Governor summary judgment in the case that December.

Last May, in the case of *Rants v. Vilsack*, 684 N.W.2d 193 (Iowa 2004), the Iowa Supreme Court reversed, and declared that the Governor's use of the line-item veto power in this way was unconstitutional. The Court voided the entire bill.

In response, last September, a special session of the legislature re-passed the bill in substantially the same form, and the Governor signed it into law.

Immediately, attorneys Mark Soldat and Martin Ozga, for the Iowa Trial Lawyers' Association, filed a declaratory judgment action in Polk County, seeking a declaration that the law violated a different provision of the Constitution of Iowa. The suit names a taxpayer-citizen of Iowa as plaintiff, seeking to void the apportionment law. The suit claims that the law passed in the special session contains so many and varied provisions that it violates the "single subject" rule. The suit is styled *Gertrude Godfrey v. State of Iowa, et.al.* and is Polk County case # CV5396.

Article III, section 29 of the Iowa Constitution states: "Every act shall embrace but one subject, and matters properly connected therewith; which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."

The legislation's proponents argue that the "single subject" of the legislation is 'economic development', and that every part of the bill is important to economic development in Iowa. The plaintiff asserts that a bill touching on things as diverse as workers' compensation, venture capital, and business taxes, violates section 29.

A glance at the Iowa Supreme Court precedent seems, to this writer, to strongly support the constitutionality of the legislation. Interestingly, most such claims fail for being untimely. The Court has ruled that once a law is codified in the next bi-annual publication of the Iowa Code, such publication cures violation of the single subject rule, making untimely any subsequent challenge under this section of the Iowa Constitution. Obviously, this action was timely filed.

The most recent detailed exposition of legal standard applying to the single subject rule was in *Utilicorp United Inc. v. Iowa Utilities Board*, 570 N.W.2d 451 (Iowa 1997). In that case, a constitutional challenge was brought to a large bill that passed the legislature and was signed by the governor. The bill contained more than 100 sections divided into thirteen divisions, and the plaintiff argued that the varying subject matter of the sections showed a bill that violated section 29. The Court stated that review on that issue is extremely deferential to the legislature. In order to be constitutional, the legislature only needed to show that "all matters treated within the act should fall under some one general idea and be so connected with or related to each other, either logically or in popular understanding, as to be part of one general subject." And again: "legislation will not be held unconstitutional unless clearly, plainly and palpably so." And again: "it is only in ex-

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LETTER TO THE EDITOR

By Mike Weston, Cedar Rapids, IA

Currently, a jury can only reduce the award to an injured party who has failed to use a seatbelt by up to 5%. Iowa Code §321.445(4)(b)(2). The Iowa Legislature is currently considering House Study Bill 70 which would eliminate this artificial cap and give Iowa juries the discretion to decide what truly caused a plaintiff's injury. The ISBA's active opposition to HSB 70 is puzzling.

Every lawyer group in Iowa trusts the judgment of a well instructed Iowa jury. All factions of the trial bar oppose artificial caps on damage awards. We know that a well instructed Iowa jury will fairly assess the fault that has caused an injury. The jury will fairly assess the damages. We leave these decisions in the jury's hands everyday as the conscience of the community, unaffected by special interest groups who would try to pre-ordain a result in a given case, or give one side an unfair advantage over another. And, yet, for some reason, the ISBA's position is that we cannot trust an Iowa jury to decide the extent to which the failure of a Plaintiff to wear a seat belt has lead to his or her own damages. Why not?

The ISBA is also condoning the unsafe practice of neglecting to wear a seatbelt, a violation of Iowa law. Iowa's mandatory seatbelt law has been in force for years. The 5% damage cap was enacted in 1986. Iowans know that they are to wear seatbelts. They know it is unlawful not to. Iowans accept the consequences of their actions every day. In spite of this, the ISBA takes the position that it is perfectly acceptable for a person to disobey the law and then proceed to civil suit expecting their neglect to be ignored. Why?

Iowa lawyers consistently and emphatically champion our civil jury system and encourage Iowans to obey the law. The artificial 5% cap should be eliminated. We should not only drop our opposition to HSB 70; we should support it. To do otherwise sends the wrong message to Iowans about what we believe. ■

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seemed inapplicable. The court, however, withdrew what it said in *Schlote* and held that a plaintiff may establish fraudulent concealment, not only as an exception to the discovery rule, but also as a form of equitable estoppel to prevent assertion of the limitations defense at all. Thus, even where a plaintiff is aware of his injury more than two years before suit is filed, the operation of 614.1(9) may be avoided altogether if a concealment of the plaintiff's cause of action can be shown.

Christy seems to be an effort to soften the effect of a literal application of section 614.1(9)'s language. If, as the court has made clear in previous cases, knowledge of a "cause of action" is irrelevant to the running of the statute, one might ask why concealment of this irrelevant information should preclude the statute's effect. In any event, *Christy* will not be the last case to apply section 614.1(9) in difficult factual scenarios, and defense practitioners should now be prepared to see fraudulent concealment claims on a much more frequent basis. ■

IOWA DEFENSE COUNSEL ASSOCIATION

WELCOME NEW MEMBER

Scott M. Brennan, Des Moines, IA

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However, some courts have confused this distinction, and have held that the open and obvious nature of a hazard is no longer a defense to even a failure to warn claim. *See, e.g., Wright v. Brooke Group Ltd.*, 652 N.W.2d 159, 171 (Iowa 2002)("In summary, consumer knowledge is merely one factor in assessing liability for design defects or for failure to warn of product risks.")(emphasis added). This may be incorrect, and this statute may clear up this aspect of Iowa product liability law. *See* Restatement (Third) of Torts, Products Liability, §2, cmt. j, at 31 ("In general, a product seller is not subject to liability for failing to warn or instruct regarding risks and risk-avoidance measures that should be obvious to, or generally known by, foreseeable product users.") It is ironic that *Wright*, a case where the Iowa Supreme court adopted the Restatement Third, nevertheless held that the "obvious" nature of a defect was not a defense to a failure to warn claim. Yet this is contrary to the Restatement's comment j to §2.

New subsection 3 of Iowa Code §668.12 makes it clear that the "obvious" or generally known nature of a hazard is a complete defense to a failure to warn claim. This much makes sense; if the danger is obvious, this aspect of the product itself serves as a sufficient warning. Further, the title to §668.12 was amended to read "[L]iability for products--defenses" from its prior title of simply "state of the art." The change in title supports the argument that this change codifies the defenses that may be made in defense of a product liability claim. Defendants in products cases may now allege the "open and obvious" defense as a complete defense to any and claims for failure to warn or instruct.

At this point it is unclear whether "open and obvious" is an affirmative defense that must be pled by defendant. Further, if it is a true affirmative defense, the defendant may have the burden of proof on that issue. The state of the art defense, also a part of §668.12, has been held by the Iowa Supreme Court to be in the nature of an affirmative defense, and is to be submitted to the jury on a special interrogatory. *See Hillrichs v. Avco Corp.*, 478 N.W.2d 70, rehearing denied (Iowa 1991). Whether this will be the case with regard to the new statutory open and obvious defense remains to be seen. Perhaps the "safe" way to proceed would be for defense counsel to affirmatively allege this defense, where applicable, and request the court for a special verdict interrogatory on it. In that manner, if the jury returns a verdict for plaintiff for failure to warn or instruct, but the jury has also specifically found that the hazard was open and obvious, the defense can urge that a defendant's verdict should be entered, since there is no duty under Iowa statutory law to warn or instruct where the hazard is obvious. Yet, the defense should be mindful of the risk that the court will place the burden of proof of this issue on the defendant.

II. THE STATUTE PROVIDES AN OBJECTIVE TEST FOR "OPEN AND OBVIOUS."

New subsection 3 of Iowa Code §668.12 also sets in place an objective test for this defense. If the "risks. . . should be obvious to, or generally known by, foreseeable product users," then there is no responsibility for failure to warn. Thus, even if a particular plaintiff testifies that they were unaware of the specific danger (which they often, not surprisingly, do), so long as the trier of fact determines that the risks were "obvious" or "generally known," the product seller would have no liability.

What does this change mean in the "real world"? Prior to this statute, if a plaintiff claimed they were unaware of the hazard, and the manufacturer did not warn about it, the case might proceed to the jury. The jury would then determine whether an adequate warning would have properly advised the plaintiff, the plaintiff would have read and heeded the warning, and if so, whether the accident would have occurred. If a particular plaintiff was ignorant of a hazard that might be generally known, that deficit might be considered "fault" under the Iowa Comparative Fault Act. Instead of being barred from a recovery, plaintiff's judgment might only be reduced to the extent of that fault. With this statutory change, however, the jury will now be entitled to disregard a particular plaintiff's subjective ignorance of a hazard. A plaintiff's "ignorance" will now be supplanted with legally-imputed knowledge through application of §668.12(3)'s objective test.

Given the statute's "objective" test, what role then does the subjective knowledge (if any) of a particular plaintiff play in the trial of a failure to warn case? Clearly, if a particular plaintiff has subjective or actual knowledge of a hazard, then any failure to warn would not be a proximate cause of the injury. *See, e.g., Cansler v. Grove Manufacturing Co.*, 826 F.2d 1507 (8th Cir. 1987)(plaintiff crane operator knew of the danger; no proximate cause between any alleged "inadequate" warning and the accident). Some courts analyze this (incorrectly in the authors' view) in terms of

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the product seller having "no duty" to warn where the plaintiff knows of the hazard. *See, e.g., Strong v. E. I. duPont de Nemours & Co.*, 667 F.2d 682 (8th Cir. 1981)(no duty to warn of dangers within the professional knowledge of the user). On the other hand, if a plaintiff is subjectively ignorant and does not have actual knowledge of a hazard that, nevertheless, would be known to persons of average intelligence, that plaintiff would be legally charged with that knowledge under the statute, and could not recover based on failure to warn.

III. THE STATUTE LIMITS FAILURE TO WARN LIABILITY TO "FORESEEABLE PRODUCT USERS."

The first sentence of subsection 3 also states that a product seller has failure to warn liability only to "foreseeable product users". This limitation may be helpful in a particular case. For example, if a child is injured in the course of using a product designed only for adults, there can be no liability based on failure to warn. The Restatement (Second) of Torts, §402A as it was originally interpreted, required that a plaintiff be an ordinary "user or consumer" in order to establish strict tort liability. For example, it would be impossible to make a chain saw reasonably safe for the use of a child. However, the Iowa Supreme Court in *Wright v. Brooke Group Ltd.*, 652 N.W.2d 159 (2002) "abandoned" 402A and adopted in its stead, the Restatement (Third) of Torts, Products Liability (1997). The Restatement Third's §2(c) governs product defect claims for failure to warn or instruct. Notably, that section contains no requirement that the particular injured plaintiff be a "foreseeable product user" or "an ordinary user or consumer" of the product. *But see* Iowa Uniform Civil Jury Instruction No. 1000.4 (knowledge of foreseeable product uses is incorporated into definition of "reasonable alternative design"). Thus, this portion of the statute may serve as a further, useful limitation on liability based on failure to warn based on the specific facts of a particular case.

IV. THE LIMITING LANGUAGE IN SECTION 3 IS CONSISTENT WITH CURRENT LAW.

Subsection 3 contains the following limiting language:

When reasonable minds may differ as to whether the risk or risk-avoidance measure was obvious or generally known, the issue shall be decided by the trier of fact.

The practical effect of this language remains to be seen; however, it is clear that with regard to any issue, *if reasonable minds may differ*, then a jury issue is presented. "Close" cases will obviously go to the jury, while clear cases will be decided by the court as a matter of law. To this extent, this language does not change current law.

V. THE STATUTE ADOPTS A WATERED-DOWN "HEEDING PRESUMPTION" OF DUBIOUS UTILITY.

Subsection 4 of the amended Iowa Code Section 668.12 contains another provision that may be of doubtful utility to product liability defendants. That portion of the amended statute reads in pertinent part as follows:

A product bearing or accompanied by a reasonable and visible warning or instruction that is reasonably safe for use if the warning is followed shall not be deemed defective or unreasonably dangerous on the basis of a failure to warn or instruct.

The Restatement Third, §2(c) utilizes a "reasonableness" or negligence-based standard for product warnings, and this is consistent with the court's prior decision in *Olson v. Prosoco, Inc.*, 522 N.W.2d 284 (Iowa 1994). *Olson* held that failure to warn claims in Iowa are based on a negligence standard. Thus, this portion of this provision is not a material change from current law.

Official comment j to the former Restatement (Second) of Torts, §402A, was known as the "heeding presumption". Comment j provided in pertinent part as follows:

Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous.

Amended §668.12 is essentially an emasculated version of the heeding presumption set forth in comment j to 402A. The real thrust of the comment j heeding presumption was likely lost during the amendment process by virtue of the successful lobbying efforts of the plaintiff's bar. First, the "heeding" language of comment j is completely excluded. Second, amended §668.12 merely provides that if a reasonable warning is given, there is no liability for failure to warn or instruct. It does not

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can be made, but other provisions of the Rules suggest various grounds for making those objections. First, it is important to investigate the cost of responding to the subpoena. The client, particularly corporate clients, will need to identify the form the materials are in and the amount of time necessary to gather the information together for production. Once this is done, efforts should be made to quantify the value of that time, using client rates for their employees, if available, or other methods of calculating the value of the time needed to respond. In responding to the subpoena, estimates of the cost of production should be communicated to the attorney responsible for issuing the subpoena and methods of compensation proposed. One of the first objections that could be made is that there is no agreement between the party responsible for the issuance of the subpoena and the nonparty for compensating the non-party for the costs of production, *i.e.*, there has been no "steps to avoid imposing undue burden or expense" within the meaning of the Rules.

Second, Rule 1.1701(6) requires that:

> Prior notice of any commanded production of documents and things or inspection of premises shall be served on each party . . . in a manner reasonably calculated to give all parties an opportunity to object before the commanded production or inspection is to occur.

Sometimes attorneys issuing a subpoena omit to give this notice.[3] It should be grounds for objection to the subpoena, particularly when the documents or things in the custody of the non-party concern a party to the action who has not been given notice.

Third, privileges, such as the attorney-client privilege, or the work product doctrine, are recognized objections to all or parts of a subpoena duces tecum. However, it is important to note that when these objections are made, the claims shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

I.R.C.P. 1.1701(3)(b); F.R.C.P. 45(d)(2). In other words, a privilege log must accompany the objections. This may be difficult to accomplish within the 14 days provided by the Rules. But it raises another issue concerning the issuing party's duty to avoid imposing undue burden or expense. Typically, these types of objections will require review by the non-party's counsel, and these efforts should be the subject of compensation discussions.

Other objections are suggested in the subsection of the Rules concerning motions to quash. This procedure, of course, would be in the form of a motion filed on behalf of the non-party who is subject to the subpoena rather than an objection. However, the same grounds recognized for a motion to quash could be used as part of written objections made within 14 days of service of the subpoena. These objections could be made if the subpoena does any of the following:

1. Fails to allow reasonable time for compliance.
2. Requires a person who is not a party or an officer of a party to travel to a place outside the county in which that person resides, is employed or regularly transacts business in person [except for trial purposes].
3. Requires disclosure of privileged or other protected matter and no exception or waiver applies.
4. Subject a person to undue burden.

These are considered objections for which it would be mandatory for the Court to quash the subpoena (*i.e.*, "shall quash or modify"). Another subsection of the rule provides for objections when the court should quash or modify the subpoena if it does any of the following:

1. Requires disclosure of a trade secret or other confidential . . . commercial information.
2. Requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute in resulting from the expert's study made not at the request of any party.

I.R.C.P. 1.1701(c)(2); F.R.C.P. 45(c)(2)(B).

The significance of making written objections relates to shifting the burden onto the party responsible for the issuance of the subpoena.

> If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the

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[3] There is no corresponding part of Rule 45. But the duty to give such a notice in federal court may be implied.

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subpoena was issued. I.R.C.P. 1.1701(b)(2); F.R.C.P. 45(c)(2)(B). By making written objections, the issuing party typically must move for an order to compel production. *Id.* When this is done, the court is under a duty to "protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded." *Id.* As part of any order compelling production, the court is required to award costs and expenses associated with it.

A non-party may also move for a protective order. It is probably the better practice to make such a motion if the party issuing the subpoena moves to compel the production. In this way, the court may also use rules relating to protective orders to give it maximum flexibility in protecting the non-party from the inspection and copying commanded.

Requiring the party responsible for the issuance of the subpoena to pay for non-party costs of production serves an important public interest in keeping the costs of litigation from being imposed on non-parties. At least one court has addressed this precise issue and noted:

> In addition to keeping non-parties from "being forced to subsidize an unreasonable share of the costs of a litigation to which they were not a party," *United States v. Columbia Broadcasting Sys., Inc.*, 666 F.2d 364, 371 (9th Cir. 1981), Rule 45's mandatory cost-shifting provisions promote the most efficient use of resources in the discovery process. When non-parties are forced to pay the cost of discovery, the requesting party has no incentive to deter it from engaging in fishing expeditions for marginally relevant material. Requesters forced to internalize the cost of discovery will be more inclined to make narrowly-tailored requests reflecting a reasonable balance between the likely relevance of the evidence that will be discovered and the costs of compliance.

Linder, 183 F.R.D. at 322-23.

A non-party's legal fees, especially where the work benefits the requesting party, have been considered a cost of compliance reimbursable under Rule 45(c)(2)(B). *See First American*, 184 F.R.D at 239-241 (finding that since Price-Waterhouse was not a party to the underlying litigation, the "American Rule" regarding attorneys fees did not apply and the non-party's legal fees were to be paid by the party serving the subpoena); *Kahn v. General Motors Corp.*, No. 88 Civ. 2982, 1992 WL 208286, at *2 (S.D.N.Y. Aug. 14, 1992) (awarding a non-party reimbursement of legal fees incurred "in connection with the retrieval, identification and review of documents called for by the subpoena"); *In re Exxon Valdez* 142 F.R.D. 380, 383-85 (D.D.C. 1992) (ordering party to reimburse non-party for a portion of the reasonable costs of compliance, including the costs of producing, inspecting and photocopying the requested documents). For these reasons, the legal fees incurred by a non-party in responding to a subpoena (either through outside counsel or expenses associated with diverting the non-party's in-house counsel away from assigned duties) are part of the expenses that should be paid by the party responsible for issuing the subpoena. *See First American*, 184 F.R.D at 239-241 (finding that a narrow reading of Rule 45(c)(2)(B) that distinguishes between the "costs of production" as opposed to the "costs of inspection and copying" such that only the latter are protected runs afoul of the spirit and purpose of the Rule); *Kahn v. General Motors Corp.*, No. 88 Civ. 2982 1992 WL 208286 (S.D.N.Y. Aug. 14, 1992) (awarding $14,589 in legal fees and copying expenses to the non-party incurred "as a result of its involuntary involvement in a stranger's quarrel"); *Standard Chlorine of Delaware, Inc. v. Sinidaldi*, 821 F. Supp. 232, 262-65 (D. Del. 1992) ("the non-party bank is entitled to reimbursement of all reasonable charges incurred in both producing and copying the documents"). ■

[3] There is no corresponding part of Rule 45. But the duty to give such a notice in federal court may be implied.

IDCA SCHEDULE OF EVENTS
2005 Meeting Dates

JUNE 24, 2005
Iowa Defense Counsel Association Board Meeting
Marshalltown, IA
Details TBD

AUGUST 4-6, 2005
Defense Research Institute (DRI) Mid-Regional Meeting
Steamboat Springs, CO

SEPTEMBER 21, 2005
Iowa Defense Counsel Association Board Meeting
Hotel Fort Des Moines
Des Moines, IA

SEPTEMBER 21-23, 2005
Iowa Defense Counsel Annual Meeting & Seminar
Hotel Fort Des Moines
Des Moines, IA

OCTOBER 19-23, 2005
Defense Research Institute (DRI) Annual Meeting
Sheraton Chicago Hotel and Towers
Chicago, IL

APPORTIONMENT UPDATE . . . *continued from page 4*

treme cases, where unconstitutionality appears beyond a reasonable doubt, that this court can or should act."

The Court went on to uphold the act in question: "The act encompasses one general topic-public utilities-and amends nothing other than various provisions in the public utility chapter of the Code. It is not surprising, is in fact logical, that the legislature would consider the subject addressed" in different subsections together.

The most recent overturning of legislation under the single subject rule occurred in *State v. Taylor*, 557 N.W.2d 523 (Iowa 1996). In that case, the Court dealt with a bill entitled "Juvenile Justice." The bill contained 74 subsections. 68 of those specifically dealt with juvenile crime. Six subsections provided for criminal penalties without regard to the age of the defendant. The defendant in *Taylor* was charged with a crime under one of those six provisions. He made a timely challenge of his conviction, alleging violation of the single subject rule. Because that subsection did not fit the title of the bill, and was clearly severable, the conviction was voided as unconstitutional under section 29. Again, this writer believes the legislation passed last September is more similar to that in *Utilicorp*, than to that in *Taylor*.

The *Godfrey* petition prayed for the district court to issue an injunction holding up the application of the new apportionment law, pending the outcome of this litigation. The court denied that injunction, so the new apportionment section is currently the law of Iowa. This writer has yet to see the law be applied by the Commissioner's office. Two or three Deputy Commissioner decisions have had apportionment raised as an issue by the defense, but in each of those cases, the Deputy declined to apply the new law. Apportionment was previously limited to situations coming within section 85.36(9)(c), when benefit weeks for a first injury actually overlap weeks attributable to a second injury. However the law passed last September repealed section 85.36(9)(c). Perhaps, for some reason this writer does not know, the old law is being applied to actions that were pending as of the passage of this new law. That would normally not be surprising. However, language at the beginning of the law passed last September purports to have the law take effect immediately upon the Governor's signature (which occurred last September 7 or 8), and states that the law should be considered retroactive to January 1, 2003.

Again, there may be some good reason why the new apportionment law has not been applied by Deputy Commissioners since its passage, but I cannot discern it from reading the decisions.

In defense of the apportionment law, attorney Julie Pottorff with the Attorney General's office filed an appearance. She is charged with advocating that the law be upheld. IDCA member Richard Sapp filed a motion to intervene in the action. He successfully represented legislators Rants and Iverson in *Rants v. Vilsack*, and they sought to intervene on behalf of the legislature in the pending Polk County litigation. This is only a surmise by the writer, but perhaps the legislators worry that the AG's office will be less zealous than the legislature in protecting this legislation, since that office was, less than one year ago, advocating against the same provisions.

At the same time that the district court denied an injunction to the plaintiff, the court denied the motion to intervene. An interlocutory appeal was brought, but denied by the Iowa Supreme Court. The district court has set a briefing schedule, and the matter will submitted at oral argument to Judge Staskal on May 31 at 8:15 a.m. in Polk courtroom 305. Regardless of the outcome, an appeal is sure to follow.

To ITLA's credit, the organization attempted to litigate the single subject issue by intervening in the *Rants* litigation, but intervention was denied at that time.

This writer is intensely interested in the pending litigation, and will continue to monitor it; I am likewise interested in how the new law will be applied. That being said, however, I feel compelled to point out that three things have happened independent of these events that have already curtailed double recovery of workers' compensation in Iowa.

First, six months after *Venegas*, the Supreme Court ruled in *Floyd v. Quaker Oats*, 646 N.W.2d 105 (Iowa 2002) (argued by IDCA member Mark Woollums), that apportionment should be applied in cases of scheduled member injury. This limits potential double recovery to whole-body injuries.

Second, The Supreme Court reined in double recovery a bit further in *Excel Corp. v. Smithart*, 654 N.W.2d 891 (Iowa 2002)(argued by IDCA member Dorothy Kelly). In that case, the Court held that the mere fact that a worker's functional restrictions changed for the worse, could not, by itself, constitute a new injury bringing a brand new right of

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compensation. This made it much more difficult to claim compensation again for a problem previously compensated.

Third, the Commissioner has been very communicative about apportionment issues in various memos, speeches, and appeal decisions. He has consistently stated that he attempts to ascertain what universe of jobs was available to the worker immediately prior to the injury date being adjudicated, and compare that against the universe of jobs available after the injury date. Strict adherence to this philosophy should prevent the resulting award from compensating the worker again for things the worker already could not do, due to prior injuries. Litigants would be well advised to beef up their evidence of the worker's abilities immediately prior to injury, to avoid these issues altogether. Of course, this "new baseline" approach of the Commissioner's can be a double-edged sword. If the worker's abilities change only slightly due to their most recent injury, then a defendant should be succeed in arguing that only a minor disability has resulted from the second injury. However, if a prior injury has already reduced a worker to a very small universe of jobs when a second injury occurs, then even a minor change in functional abilities could lead to a very high industrial award.

Both sides of this debate put forth logical, well-supported arguments for their position. But frankly, as long as injured workers still routinely win more money in compensation for injuries than do similarly situated district court tort plaintiffs, employers are likely to continue the debate. ■

"FAILURE TO WARN:" STATUTORY CHANGES IN IOWA LAW . . . continued from page 6

extend this immunity to design defect claims as well. Thus, a reasonable and adequate warning is not a "safe harbor" against design defect liability.

VI. THE LIMITING LANGUAGE OF SUBSECTION 4 IS CONSISTENT WITH CURRENT LAW.

As is true with Subsection 3, Subsection 4 contains limiting language:

When reasonable minds may differ as to whether the warning or instruction is reasonable and visible, these issues shall be decided by the trier of fact.

Whether this language will be an invitation for most trial judges to just "punt" the adequacy issue to the jury, remains to be seen, but this is certainly not a change with current law. The "adequacy" of a warning or instruction has typically been viewed as an issue for the jury, except in the most obvious of cases where no reasonable person could dispute the reasonableness of the warning. Again, the "close" cases on adequacy will go to the jury, while the clear cases should be decided by the court as a matter of law.

VII. ADDITIONAL OBSERVATIONS.

The Legislature's use of the terms "unreasonably dangerous" in subsection 4 is quizzical and perhaps even legally incorrect, since the Section §402A element of "unreasonably dangerous" was abandoned by the Iowa Supreme Court in *Wright*, 652 N.W.2d 159, at 170. "Unreasonably dangerous" is no longer an element of a product defect case in Iowa.

The Legislature's re-enactment of the "state of the art" defense as set forth in Section 1 to §668.12, without modification, is also interesting in light of the court's holding in *Olson v. Prosoco, Inc.*, cited *supra*. In *Olson*, the court held that "state of the art" was *not a* defense to a failure to warn action, even though §668.12(1) states quite clearly that it is. This portion of §668.12 was not changed in HF 2710. An argument can be made that this aspect of *Olson's* holding is invalid as it is contrary to the express terms of the statute and the will of the legislature. Technically speaking, this aspect of *Olson's* holding is an unconstitutional violation of the separation of powers doctrine. A court, even the state's highest appellate court, cannot ignore a valid, constitutional enactment of the legislature.

VIII. CONCLUSION.

Only time will tell whether amended Iowa Code Section 668.12 will have a significant impact on product liability cases in Iowa. At the very least, this statute makes it clear that where a hazard is open and obvious to a reasonable person, there is not duty to warn. ■

[1] Mr. Eichhorn is a member of the Iowa House of Representatives and is General Counsel for Reuters, Inc. in Stratford, Iowa. Mr. Reynolds is a member of the Des Moines law firm of Whitfield & Eddy, PLC.

FROM THE EDITORS . . .

The Iowa Supreme Court continues to struggle with the statute of limitations for medical malpractice claims. Section 614.1(9) of the Code provides that such actions must be commenced within two years of a claimant's knowledge of the injury or death for which damages are sought. Iowa cases construing this statute have held that an awareness of "mere symptoms" of an injury commences its running, regardless of when facts suggesting negligence or causation may become known. The statute was specifically enacted to restrict the usual discovery rule for tort actions, where knowledge of facts indicating the existence of an actionable claim is necessary.

Application of section 614.1(9) can appear to yield harsh results. For example, in *Schlote v. Dawson*, 676 N.W.2d 187 (Iowa 2004) the plaintiff's voice box was removed after being told that its removal was essential to treat his throat cancer. He brought an action more than two years later alleging that the removal surgery was excessive and unnecessary. The court held that the plaintiff's "injury" was the removal of his voice box, thereby commencing the running of the statute even if plaintiff was unaware of facts to support the alleged wrongdoing of his doctor until more than two years later. The fraudulent concealment exception was also inapplicable since no facts showed concealment of the fact of the plaintiff's injury, the triggering event under the statute. The court said its interpretation of 614.1(9) eliminates the discovery rule for medical malpractice claims, but "it is up the legislature not this court to address this problem".

Despite the court's statement, it revisited the "problem" in the recent case of *Christy v. Miulli*, 692 N.W.2d 694 (Iowa 2005). In that case, the plaintiff's decedent died more than two years before the filing of the lawsuit making it clearly time barred under the language of 614.1(9). Although the plaintiff alleged that the defendant physician misrepresented circumstances surrounding the decedent's death, the death itself had not been concealed so the fraudulent concealment doctrine

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