defense UPDATE

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PRODUCT LIABILITY LAW IN IOWA IN THE POST-WRIGHT ERA

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Introduction

It has been nearly seven years since the Iowa Supreme Court adopted Section 1 and Section 2 of the Restatement (Third) of Torts: Product Liability, in Wright v. Brooke Group, Ltd., 652 N.W.2d 159 (Iowa 2002). The Wright decision significantly changed several major components of product liability law in Iowa. Perhaps most critically, it constituted an unequivocal move away from the traditional "doctrinal labels" of product liability claims toward the more coherent and functional set of definitions contained in Section 1 and Section 2 of the Restatement (Third) and the end of the "consumer expectations" test as a determinative factor in a product liability case.

Much time has passed since Wright, but its significance in shaping Iowa product liability law is still widely misunderstood – or sometimes missed entirely. This article presents a broad overview of product liability law in Iowa in the post-Wright era and a consideration of several potential future developments, based upon sections of the Restatement (Third) that have been adopted so far and other sections of the Restatement (Third) that may soon be addressed by the Iowa Supreme Court.

The Restatement (Third) of Torts: Product Liability

After a long and sometimes controversial development, the final version of the Restatement (Third) of Torts: Product Liability was adopted by the American Law Institute (ALI) in 1997. The adoption of the Restatement (Third) represented a fairly dramatic shift away from the traditional framework for product liability cases that had prevailed in most American jurisdictions for several decades, when strict liability under Restatement (Second) of Torts, Section 402A, was generally considered the primary theory of liability in product liability cases.

Just two years after the ALI's adoption of the Restatement (Third), the Iowa Supreme Court, in Lovick v. Wil-Rich, 588 N.W.2d 688 (Iowa 1999), adopted Section 10 of the Restatement (Third) as the standard for claims based upon post-sale duty to warn.

Even before the Restatement (Third) was adopted by the ALI, however, the Iowa Supreme Court had signaled some reluctance to continue endorsing the traditional "strict liability" and "negligence" categories that had been applied in product liability cases in Iowa since 1970. See Olson v. Prosoco, 522 N.W.2d 284 (Iowa 1994) (rejecting

Continued on page 2

WHAT'S INSIDE

PRODUCT LIABILITY LAW IN IOWA IN THE POST-WRIGHT ERA ... *CONTINUED FROM PAGE 1*

submission of both strict liability and negligence theories in failure to warn case and holding that warnings claims should be submitted on negligence theory only). Cf. Hawkeye Security Ins. Co. v. Ford Motor Co., 174 N.W.2d 672, 684 (Iowa 1970) (adopting standard of strict liability under Section 402A). See also Aller v. Rodgers Machinery Mfg. Co., 268 N.W.2d 830, 832 (Iowa 1978) (concluding that theories of strict liability and negligence were distinguishable, despite presence of "unreasonably dangerous" element for proof of strict liability).

The traditional labels proved to be problematic in practice, often permitting the submission of both strict liability and negligence as alternate theories of recovery in the same case (based upon a strained effort to identify some viable "distinction" between them) and creating much confusion as to whether the applicable test for design defect was based upon a "risk/utility analysis," the "consumer expectations" test, or both. See Chown v. USM Corp., 297 N.W.2d 218 (Iowa 1980); Fell v. Kewanee Farm Equip. Co., 457 N.W.2d 911, 916-18 (Iowa 1990); Weyerhauser Co. v. Thermogas Co., 620 N.W.2d 819, 828 (Iowa 2000). Submission of multiple claims based upon the same defective condition also raised the specter of an inconsistent jury verdict, possibly necessitating a re-trial of the entire case.

Olson represented the Iowa Supreme Court's first major step away from the traditional labels, rejecting the distinction between strict liability and negligence in failure to warn claims. Wright represented the next logical step in the movement toward abandonment of the traditional labels, explicitly rejecting the "illusory" distinction between strict liability and negligence in design defect claims and replacing the traditional labels with the more "intellectually sound" and "functional" definitions of product liability claims in Section 1 and Section 2 of the Restatement (Third).

Current Categories of Product Liability Claims Under the Restatement (Third)

Section 1 of the Restatement (Third) provides that one "engaged in the business of selling or otherwise distributing products" and who "sells or distributes a defective product" is subject to "liability for harm to persons or property caused by the defect." Its counterpart, Section 2, defines when a product is defective, by reference to three separate categories of product liability claims:

Section 2(a) defines "manufacturing defect." A product contains a manufacturing defect "when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product." As such, a claim based upon the alleged presence of a manufacturing defect under Section 2(a) essentially imposes a strict liability standard.

Section 2(b) defines "design defect." A product contains a design defect "when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design" and "the omission of the alternative design renders the product not reasonably safe." Adoption of Section 2(b) thus represented the end of the "strict liability" era in Iowa product liability law for design defect claims. It also confirmed that "risk-utility balancing" is now the determinative test, relegating "consumer expectations" to one of several factors that can be considered in assessing whether a design defect exists, but are not considered determinative.

Section 2(c) defines "failure to warn" claims. A product can also be considered "defective" because of "inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings," when "the omission of the instructions or warnings renders the product not reasonably safe." Consistent with the Iowa Supreme Court's holding in Olson, the adoption of Section 2(c) confirmed the end of the strict liability era for failure to warn claims in Iowa.

Practical Consequences of *Wright*

Beyond simply changing the operative definitions of product liability claims in Iowa law, Wright has had a major substantive impact on product liability law in Iowa in several ways.

Eliminating "Two Bites At the Apple" on the Same Claim

Despite Wright being "on the books" for nearly seven years, many plaintiff's attorneys still persist in pleading both "strict liability" and "negligence" claims, usually styled as alternative theories of relief. Whether the presence of the now abandoned doctrinal labels indicates lack of attention to the developing case law or an intentional attempt to submit separate and alternative theories of recovery for a single species of product liability claim, the Wright decision provides defense attorneys with a means to "clean up" the pleadings, through a dispositive motion, and eliminate the old tactic of permitting the plaintiff "two bites" at the proverbial "apple" through creative pleadings. See Wright, 652 N.W.2d at 165-68 (design defect and failure to warn claims properly submitted on negligence theory only). See also Johnson v. Harley Davison Motor Co., Inc., 2004 Iowa App. LEXIS 344 (Iowa App. 2004) (affirming summary judgment on strict liability claim plead as alternative theory of relief to design defect claim).

Requirement of a "Reasonable Alternative Design" in Design Defect Cases

Among the most critical consequences of the adoption of Section 2(b) as the standard for design defect claims in Iowa was the explicit recognition that a plaintiff is required to present evidence of a "reasonable alternative design" ("RAD") in order to present a *prima facie* case for a design defect claim.

Continued on page 3

PRODUCT LIABILITY LAW IN IOWA IN THE POST-WRIGHT ERA ... *CONTINUED FROM PAGE 2*

While the requirement of a RAD in a design defect case is no longer subject to debate, under Section 2(b), it remains to be seen exactly how far plaintiffs will be required to go in order to satisfy that requirement. In most cases, the practical effect of the RAD requirement will be to necessitate reliance upon expert witness testimony to create a submissible design defect claim. However, the level of detail reflected in expert opinions concerning the existence of a RAD tends to range from sketches hastily scribbled on a napkin the evening before an expert's deposition to fully developed and extensively tested prototype products, with the latter category a somewhat rare exception. While the former category presumably falls well short of the requirement imposed by Section 2(b), the Iowa Supreme Court has so far provided little guidance on the critical question of how far a plaintiff must go to satisfy the RAD requirement now imposed by Section 2(b), under Wright.

As a practical matter, the distinction between a plaintiff satisfying that requirement, or falling short of it, can depend on whether the case is pending in state court or federal court. Although the substantive law remains identical, the opportunity to pair the RAD requirement with a Daubert challenge presents a formidable tool when faced with a design defect claim that lacks a fully developed RAD, compared to the far less stringent state court standard for admissibility of expert testimony generally applied under Iowa Rule of Evidence 5.702.

Exception for "Manifestly Unreasonable" Products

One of the most controversial issues faced by the ALI in adopting the Restatement (Third) was the inclusion of the "Habush Amendment," set forth in comment "e" to Section 2(b), which created a limited exception to the reasonable alternative design (RAD) requirement in design defect cases for "manifestly unreasonable products." Comment "e" to Section 2(b) specifically provides that if a product is found to be "manifestly unreasonable," the RAD requirement does not apply.

At the time the Restatement (Third) was adopted, many commentators and defense attorneys feared that the limited exception to the RAD requirement contained in comment "e" would be liberally construed by courts in a manner that would result in many products being classified as "manifestly unreasonable," thereby "watering down" the RAD requirement in design defect cases.

Fortunately, that prediction hasn't proven to be correct, in Iowa or most other jurisdictions. In Parish v. Icon Health & Fitness, Inc., 719 N.W.2d 540 (Iowa 2006), a design defect case involving a trampoline, the Iowa Supreme Court refused to apply the "manifestly unreasonable" product exception to trampolines, explaining that the limited exception described in comment "e" to Section 2(b) – and "virtually all commentary on it" – necessitate that it must be "sparingly applied."

Circumstantial Evidence to Support Product Defect?

Section 3 of the Restatement (Third) identifies circumstances in which a plaintiff may prove the existence of a product defect through circumstantial evidence (the "mere" happening of an event) rather than with direct evidence (generally through expert testimony). Section 3 articulates a two-pronged test for situations in which a jury may be allowed to infer "that the harm sustained by the plaintiff was caused by a product defect existing at the time of sale or distribution, without proof of a specific defect." A product defect may be proven under Section 3 if: (1) the incident was of a kind that ordinarily occurs as a result of product defect; and (2) the incident was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution.

The lineage of Section 3 can be traced to the body of *res ipsa loquitur* case law which recognizes that an inference of negligence can be drawn where negligence is the best explanation for the cause of an accident, even if the plaintiff cannot explain the exact nature of the defendant's conduct. See Comment (a) to Section 3, Restatement (Third), *citing* Restatement (Second), § 328D.

Of course, *res ipsa loquitur* is not a rule of substantive law; it is a rule of evidence that relaxes the plaintiff's burden of proof. See Palleson v. Jewell Coop. Elevator, 219 N.W.2d 8, 13 (Iowa 1974). Iowa courts have consistently held that *res ipsa loquitur* applies when: (1) the injury is caused by an instrumentality under the exclusive control of the defendant; and (2) the occurrence is such that in the ordinary course of things would not happen if reasonable care had been used. Brewster v. United States, 542 N.W.2d 524, 529 (Iowa 1996). In this sense, *res ipsa loquitur* is a type of circumstantial evidence. *Id.* at 528.

The Iowa Supreme Court has not adopted Section 3 of the Restatement (Third). However, given the Court's previous adoption of Sections 1 and 2, it seems quite possible that the Court may also be inclined to adopt Section 3 if presented with the opportunity.

A pre-Wright opinion may signal the Court's inclinations towards adopting Section 3 as well. In Weyerhaeuser Co. v. Thermogas Co., 620 N.W.2d 819 (Iowa 2000), the Court was presented with a case involving an allegedly defective propane gas tank delivered to Weyerhaeuser by Thermogas. The Court held that the trial court committed reversible error by refusing to submit Weyerhaeuser's proposed *res ipsa loquitur* jury instruction. In concluding that Weyerhaeuser had presented sufficient evidence to present a *res ipsa loquitur* theory to the jury, the Court noted that a plaintiff relying upon *res ipsa loquitur* need not prove that the defendant had exclusive control of the instrumentality when the injury occurred. The plaintiff need only show that the defendant controlled the instrumentality at the

Continued on page 4

PRODUCT LIABILITY LAW IN IOWA IN THE POST-WRIGHT ERA ... *CONTINUED FROM PAGE 3*

time of the alleged negligent act. Additionally, the plaintiff must demonstrate by a preponderance of the evidence that: (1) there was no change in the condition of the instrumentality; and (2) no intervening act occurred that could have caused the event resulting in the injury.

The Iowa Supreme Court further noted that Weyerhaeuser claimed that Thermogas was negligent in supplying an allegedly defective and unreasonable dangerous propane tank, but failed to specify how it contended the tank to be defective and unreasonably dangerous. During discovery, Weyerhaeuser's expert testified that the propane tank exploded more quickly than a tank of proper integrity. However, the expert neither identified why or how the tank lacked proper integrity nor did he identify a specific defect. In opposing Thermogas' motion *in limine* to bar the expert's testimony, Weyerhaeuser's counsel argued that the expert's opinion was based on circumstantial evidence. Essentially, Weyerhaeuser was simply arguing the propane tank was defective *because* it blew up. By allowing Weyerhaeuser to present its *res ipsa loquitur* theory to be submitted to the jury, the Court essentially permitted Weyerhaeuser the opportunity to prove a product liability case based upon circumstantial evidence and without proof of a specific defect. Although Weyerhaeuser preceded Wright by two years and did not specifically address Section 3 of the Restatement (Third), one can conclude that when it is presented with the opportunity to specifically adopt Section 3, the Iowa Supreme Court seems likely to do so.

Although the illustrations provided in Section 3 of the Restatement (Third) reflect a temporal component in proving a product defect through the use of circumstantial evidence (because, as time progresses, it becomes less likely that a plaintiff can eliminate reasonable secondary causes), formal adoption of Section 3 by the Iowa Supreme Court would pose potentially troubling issues for product liability defendants. Proceeding under a Section 3 (essentially *res ipsa loquitur*) "theory" would eliminate the need for an expert witness to testify regarding a reasonable alternative design in some cases. It may be possible for a Section 3 case to be submitted to a jury if the expert witness merely presents opinions consistent with Section 3, so adoption of Section 3 potentially "lowers the bar" for plaintiffs to assert a viable products liability claim even when there is no direct evidence of an actual product "defect" under Section 3.

Failure to Warn Under Section 2(c) of the Restatement (Third)

In Parish v. Icon Health & Fitness, 719 N.W.2d 540 (Iowa 2006), the Iowa Supreme Court had its first opportunity to substantively address a failure to warn claim under the new definition set forth in Section 2(c). The plaintiff contended that a genuine issue of material fact had been generated concerning the adequacy of warnings furnished by the manufacturer of a trampoline.

The record in Parish showed that the manufacturer had supplied numerous warnings, prominently placed on multiple locations on the product and in an owner's manual supplied with it. The Iowa Supreme Court noted that the warnings included specific clear language and "nationally recognized warning symbols" that specifically cautioned against the activities (attempting a backward flip or somersault) that the plaintiff was engaged in when he sustained his injury.

Although the Restatement (Third), Section 2(c) eliminated the "heeding presumption" formerly available to product manufacturers under the Restatement (Second) of Torts, Section 402A, Comment "j," the Iowa Supreme Court still concluded that under Section 2(c), comment "a," product "users must pay some attention for their own safety." Therefore, where it is undisputed that multiple warnings were provided and those warnings clearly identified "the specific conduct in which the plaintiff was engaged at the time of his injury," summary judgment by the district court was proper. On that record, "a reasonable fact finder could not conclude that the defendant's warning was inadequate," under Section 2(c), so summary judgment for the defendant was proper.

The result reached in the Parish case illustrates that summary judgment *can* be a realistic goal in a failure to warn case, under Section 2(c), when the evidence presented in a case demonstrates that clear and specific warnings were provided but the plaintiff still engaged in conduct that was contrary to those warnings.

What's Next

Will A "Duty to Recall" Be Imposed?

Although Iowa law recognizes a post-sale duty to warn, there is no "duty to recall" imposed upon a product seller or distributor. See Iowa Code § 668.12; Lovick v. Wil-Rich, 588 N.W.2d 688, (Iowa 1999). Section 11 of the Restatement (Third) imposes a duty to recall only when "a governmental directive issued pursuant to a statute or an administrative regulation specifically requires the seller or distributor to recall the product." In those situations, a seller or distributor's recall is governed by a reasonableness standard. Although Section 11 does not impose a duty to recall, absent a "governmental directive," Section 11 imposes a "reasonableness" requirement upon a seller or distributor who voluntarily chooses to recall a product.

There is an open question whether the Iowa Supreme Court would recognize a claim for "negligent recall." In Krull v. Thermogas Co., 522 N.W.2d 607 (Iowa 1994), the Court faced a case in which the plaintiff claimed that Thermogas negligently conducted a product recall. The Court did not decide the issue of whether a claim for negligent recall exists under Iowa law by ruling that, even if such a claim existed, it was barred by the applicable statute of limitations.

Continued on page 5

PRODUCT LIABILITY LAW IN IOWA IN THE POST-WRIGHT ERA ... *CONTINUED FROM PAGE 4*

Even if the Court were to ultimately recognize a cause of action for "negligent recall," it is unlikely that the Court would impose duties upon sellers and distributors which are more stringent than the specific duties identified in Section 11. Strong public policy considerations weigh against imposing higher burdens upon product sellers and distributors. Section 11 recognizes that product recalls place an onerous burden upon sellers and distributors. Given that Iowa law already imposes a post-sale duty to warn, it is doubtful that the Court would expand upon that duty and also impose an even more burdensome duty of recalling a product, absent a governmental directive. It is more likely that the Court would impose a reasonableness requirement upon any product recall effort, whether ordered by the government or undertaken voluntarily -- consistent with the requirements found in Section 11.

Enhanced Injury - "Crashworthiness"

The Iowa Supreme Court should soon decide very soon whether it will adopt Section 16 and Section 17 of the Restatement (Third) as the new standards for product liability cases involving claims of "enhanced injury" or "crashworthiness".

Since1992, Iowa has been among a minority of jurisdictions that have refused to consider the comparative fault of either the plaintiff or other parties in an "enhanced injury" case. When the issue was first presented to the Iowa Supreme Court in 1991, in Hillrichs v. Avco Corp., 478 N.W.2d 70 (Iowa 1991), it held that evidence of the plaintiff's comparative fault was properly considered by the jury, consistent with the principles of comparative fault set forth in Iowa Code Chapter 668, because it would generally "be a proximate cause of the enhanced injury as well as the initial injury." See also Wernimont v. International Harvester, 309 N.W.2d 137 (Iowa App. 1981). Just over one year later, however, in Reed v. Chrysler Corp., 494 N.W.2d 224 (Iowa 1992), it abruptly changed course, holding that the plaintiff's comparative fault (which included evidence of intoxication and reckless driving that resulted in a roll-over motor vehicle accident) could not be considered by the jury, "unless it is shown to be a proximate cause of the enhanced injury." Under the majority opinion in Reed, "any participation by the plaintiff in bringing the accident about is quite beside the point."

It should be noted that the latter statement is too broad and is actually inconsistent with the holding of Reed. For example, if a plaintiff was operating his or her vehicle at 100 mph and collides with another vehicle or object, resulting in serious injuries, the plaintiff's conduct in driving so far in excess of the speed limit undoubtedly was a proximate cause of "enhancement" of their injuries and therefore should be considered by the jury, even based upon current Iowa law pursuant to the Reed decision.

The Reed decision, as applied by Iowa federal and state courts, set the stage for troubling results in many subsequent "enhanced injury" cases in Iowa, with plaintiffs and third parties successfully evading responsibility for negligent or even reckless conduct.

The Iowa Supreme Court currently has before it another "enhanced injury" case to consider, on certified questions of law from the U.S. District Court for the Southern District of Iowa, Jahn v. Hyundai Motor Co., Iowa Supreme Court No. 07-1595. In Jahn, the plaintiff was severely injured when his vehicle was struck by another vehicle that failed to stop at a stop sign. The issues presented in the Jahn case are: (1) whether the Iowa Supreme Court will adopt Section 16 and Section 17 of the Restatement (Third); and (2) whether Iowa Code Chapter 668 permits the comparative fault of a "released person" to be considered by the jury in the context of a "crashworthiness" or "enhanced injury" case.

IDCA member Richard J. Sapp of Nyemaster, Goode, West, Hansell & O'Brien, P.C., who is representing Hyundai Motor Co. in the Jahn case, reports that a decision from the Iowa Supreme Court is expected soon.

Jason M. Casini and Matthew D. Jacobson are members of Whitfield & Eddy, P.L.C. Jay is the Chairperson of the IDCA's Product Liability Committee. Matt recently joined Whitfield & Eddy, P.L.C. as a member after practicing law in Chicago and Lisle, Illinois. Jay and Matt want to express their appreciation to Cole Feldman, a summer law clerk at Whitfield & Eddy, P.L.C., for his contribution to this article. They also want to express their appreciation to their colleague on the Product Liability Committee, Dick Sapp of the Nyemaster law firm, for sharing his status report on the Jahn case.■

MESSAGE FROM THE PRESIDENT

Megan Antenucci

The Iowa Defense Counsel Association is committed to being the voice of the Iowa defense bar, and is not shy about publicly professing its views. There is a phenomenon across the nation taking place in public debates and town hall meetings related to free speech, and response to opposition opinions. For lawyers, it can be a fascinating study in free speech, a representative style of government, civil disobedience in the extreme cases, and public outcry to the current economic situation. The IDCA Board is currently working on positions for the organization in the upcoming legislative session, and your voice will be heard.

Closer to home, the IDCA has been continuing participation in the Supreme Court's efforts to work on budgeting issues, and long range planning for administration of justice in the state. Your President Elect, Jim Pugh, and I have attended several meetings and volunteered to be on study committees being established by the Supreme Court to address Iowa's judicial needs and economic squeeze.

The IDCA also continues to be an excellent resource for members as far as high quality CLE in close proximity to your offices. The 45th Annual Meeting & Seminar is set for the West Des Moines Marriott September 17 – 18. It is approved for 10.5 Federal CLE hours, and 14.5 State credits. This year's blockbuster speaker is Larry Pozner. Mr. Pozner is a past President of the 10,000-member National Association of Criminal Defense Lawyers. He served many years on the faculty of the University of Denver Sturm College of Law, where he was voted Best Professor. He is a nationally-recognized legal commentator, lecturer, and has presented more than 400 seminars in 48 states on trial tactics and cross examination. He consults on cross examination drafting and strategy and jury selection. He frequently appears on such shows as the NBC Today show, Countdown with Keith Olberman, Fox News, CNN and Court TV. His presentation on Friday, September 18, is entitled Advanced Techniques for Cross-Examination Using the Chapter Method, and will provide new and effective methods of cross-examination.

Registration is now open for the Seminar. The two-day event will present the highest quality in CLE in a local venue. Other topics include case law updates, legislative updates, effective mediations, and Defense Lawyers in the Crosshairs: Ethics and Professional Liability, among others. Additional information, highlights and registration can be found on the IDCA website at www.iowadefensecounsel.org. I hope to see you there for quality CLE, networking, and a great social event Thursday evening.

It has been an honor and pleasure to serve as President of the IDCA for the past year. At the Annual Meeting over the Noon hour on September 18, I will pass the gavel to Jim Pugh, your incoming President. Steve Powell will move up to President-Elect. Jim and Steve will be a powerful team for the coming year, and will continue the tradition of excellence in the IDCA legislative, legal education, member representation, and judicial efforts.

We had a year of voicing strong opinions, participating in our representative style of a democracy, and enjoyed the freedom of speech that allows all of us to express the opinions of the IDCA throughout the legislative session and in study committee meetings. Thank you for putting your trust in me for the past year. Also, thanks to the many board and general members who stepped up to the plate on important projects and events, made my presidency an enjoyable term, and group effort. ■

2009 IOWA LEGISLATIVE REPORT

by Robert M. Kreamer, IDCA Executive Director

Robert M. Kreamer

The Iowa Democratic party in 2008 controlled the legislative process in Iowa with a 54–46 margin of control in the Iowa House of Representatives and a 30–20 margin in the Iowa Senate. After the November 2008 general election, this control increased for the Democratic party in the Iowa Senate to a 32–18 margin and in the House of Representatives to a 56–44 Republican margin but, because of a session-long deployment to Iraq of one Republican member, the actual working margin was 56–43. These new political margins, coupled with Governor Chet Culver serving only his third year of a four-year term, gave the Democratic party their strongest control of the legislative process since 1965.

With this strengthened control, most of the prior legislative priorities of the Iowa Defense Counsel Association were challenged from the beginning since they had historically been opposed by organized labor and by the Iowa Trial Lawyers Association (currently operating under the name of Iowa Association for Justice), two key support groups of the Iowa Democratic party. Because of this strong history, the IDCA Board of Directors elected to abandon almost all of their prior legislative priorities and instead concentrate on defending against anticipated legislative proposals that would be initiated by organized labor and the Iowa Association for Justice. During the course of the 2009 legislative session, there were numerous bills introduced and supported by these two groups that were of grave concern and interest to your IDCA Board, including the following:

House File 712 – This piece of legislation created a private cause of action for certain consumer fraud violations. This bill originally lacked many necessary components and contained numerous flawed or negative provisions. The bill initially contained no statute of limitations. The initial bill, while providing for punitive damages, provided no standard for the granting of such damages. The bill lacked any requirement of knowledge that the person must have that the conduct was false or fraudulent. Also lacking was any exemption from the provisions of the bill for licensed and well-regulated professionals.

The Iowa State Bar Association in the Fall of 2008 convened a task force of interested members to look at the above omissions from HF 712 and other problems and made recommendations, along with recommendations from other interest groups, including IDCA, to the 2009 Legislature.

After many meetings and many discussions, HF 712 was approved by the Legislature and signed into law by Governor Culver on May 26th, effective July 1, 2009. The approved legislation contained a two-year statute of limitations. The awarding of punitive damages would be on the same basis as in Iowa Code Chapter 668A. The requirement of knowledge was added so that the alleged wrongdoer "knows or reasonably should know" the conduct was wrong or fraudulent must be proven. Finally, the bill contains approximately 35 exclusions from the bill for highly regulated entities and professionals.

House File 795 – This legislation would allow an injured employee the right to select their own doctor and health care in Worker's Compensation cases. This legislation was strongly promoted by organized labor and the Iowa Association for Justice. This legislation was approved by the House Labor Committee and placed on the House Debate Calendar. While there was no further action taken by the Iowa House, an amendment (H-1650) was offered in the final days of the session that was an attempt to compromise this issue by the floor manager of HF 795. This bill and amendment will be alive and pending in the 2010 Legislature and will again be opposed by IDCA and our allies on this issue.

Senate File 321 – This legislation was initiated by the Iowa Association for Justice and they referred to it as the "Car Insurance Consumer Fairness Act of 2009." This legislation was strongly opposed by IDCA, the insurance industry and business interests. One reason for opposition was that it would require insurance companies selling UM/UIM coverage to cover injuries caused by "physical contact with or reasonable avoidance of physical contact with" another vehicle. A second reason for opposition to this legislation was that it would require those selling UM/UIM coverage to offer policies with UM/UIM limits at least equal to those of the liability (the "bodily injury or death") portion of the policy. Finally, this legislation would have allowed an injured person who paid premiums for UM/UIM coverage to sue UM/UIM insurance companies who unreasonably refused to pay claims for benefits in good faith. The problem, however, with this legislation is that the insurer would have the burden of proving that it acted in good faith. This legislation was approved on a party-line vote by the Senate Judiciary Committee but received no further attention during the balance of the session. It remains alive, however, for the 2010 session.

House File 758 – This bill provided, under Iowa's wrongful-death statute, Code Section 633.336, that damages recoverable may include damage for a decedent's loss of enjoyment of life, measured separate and apart from the economic productive value the decedent would have had if the decedent had lived. This legislation was the number one priority of the Iowa Association for

Continued on page 8

2009 IOWA LEGISLATIVE REPORT

... *CONTINUED FROM PAGE 7*

Justice later in the 2009 session and had passed the Iowa House on a vote of 58–41 and was still under consideration by Senate leadership until the very final hours of the last session day.

Presently only five states – Alabama, Arkansas, Georgia, Hawaii and North Carolina – allow an estate to recover these damages for a decedent's loss of enjoyment of life. Interestingly, these five states, in a study commissioned by the United States Chamber of Commerce to evaluate the overall quality and treatment of tort and contract litigation in the 50 states, ranked Alabama 20, Arkansas 34, Georgia 28, Hawaii 45, North Carolina 21, and Iowa 7. These five states are hardly the states Iowa should want to model in adopting new tort law.

In a March 25th Legislative Alert to IDCA members, Past-President Michael Thrall gave the following reasons to oppose HF 758:

1. Loss of enjoyment of life is too speculative in a death case to be awarded.
2. Loss of enjoyment of life will necessarily be based on emotion, sentiment and sympathy.
3. HF 758 creates an entirely new category of damages never recognized nor awarded in Iowa wrongful-death cases.

House File 758 is still alive for the 2010 legislative session and is certain to be the subject of intense lobbying throughout.

In conclusion, the 2009 legislative session, while extremely difficult, was highly successful. A large reason for this success was the willingness of IDCA leadership to come to the Capitol to provide expert testimony as to why the above-mentioned legislative bills were unnecessary and would make bad law for the State of Iowa. Additionally, a big thank you goes out to you, the IDCA membership, for promptly responding to the IDCA Legislative Alerts in contacting your legislator and voicing your concerns over the identified legislation. Legislators generally respond favorable to constituent contacts and in 2009 your contacts helped make the difference – thank you!

Finally, a big thank you to Megan Antenucci, President, and to Greg Witke, IDCA Legislative Chair, for their leadership and support throughout this past session and to you, the IDCA membership, for allowing me the opportunity to represent you on Capitol Hill – THANKS! ■

IDCA SCHEDULE OF EVENTS

September 16, 2009
IDCA Board Meeting & Dinner
3:45 p.m. Executive Committee
4:00 p.m. – 8:00 p.m. Full Board Meeting/Dinner
West Des Moines Marriott, 1250 Jordan Creek Pkwy., West Des Moines, IA

September 17–18, 2009
45th Annual Meeting & Seminar
8:00 a.m. – 5:00 p.m. both days
West Des Moines Marriott, 1250 Jordan Creek Pkwy., West Des Moines, IA

October 7–11, 2009
DRI Annual Meeting
Chicago, IL

December 3, 2009
IDCA Audio Conference
12:00 – 1:30 p.m.
Watch for registration details

December 4, 2009
IDCA Board Meeting & Lunch
10:00 a.m. Executive Committee
11:00 a.m. Board Meeting
Location: TBD

April 9, 2010
IDCA Spring CLE Seminar
Marriott Coralville Hotel & Conference Center
300 East 9th Street, Coralville, IA
8:30 a.m. – 4:30 p.m.

IOWA HOSTS DRI MID-REGION MEETING

The Iowa Defense Counsel Association hosted the DRI Mid-Region Meeting on June 12–13, 2009, in Des Moines. Representatives from the States of Missouri, Kansas, Nebraska, Colorado, and Utah, as well as representatives from the DRI National Board of Directors, participated in two days of meetings addressing a wide range of topics. Not too surprisingly, the focus of the meeting was on the economy and its impact on the defense lawyer, our clients, and the courts. The attendees brainstormed on how our respective state defense organizations can best serve our members in these trying economic times. The theme of the meeting was "A Vision of the Defense Practice and the SLDO in the Future." Topics ranged from how to run a profitable annual meeting during these economic times, membership, forward thinking strategic planning, the challenges of membership improvement and retention in the present economic environment, and the varying approaches taken by the different organizations and service of their membership. Dinner at the Iowa State Historical Building followed by dueling pianos at the Grand Piano Bistro at Historic East Village capped a successful DRI Mid-Region Meeting. ■

THE TIMES THEY ARE A 'CHANGIN'

by John Heggen, Summer Associate and Stephanie Techau, Member, Nyemaster, Goode, West, Hansell & O'Brien P.C.

After considering the issue for a number of years, the United States Supreme Court recently amended Appellate Rule 26, Bankruptcy Rule 9006, Civil Rule 6, and Criminal Rule 45[1] to change the way time periods are calculated. In addition, Congress altered the time periods for ninety-one federal rules and twenty-eight federal laws to be consistent with the Court's amendments. If Congress takes no further action, and it is not expected to, the time calculation amendments will take effect on December 1, 2009. The result is a time computation system that is intended to be simpler and to result in more consistent calculations of time periods. A full list of the rules and statutes that are scheduled for amendment can be found at http://www.uscourts.gov/rules/newrules6.htm#proposed0709.

The comments submitted during the Rule Committee's comment period show that a number of practitioners expressed concerns with the proposed new deadlines, particularly in the bankruptcy area, where some proposed longer deadlines were viewed as detrimental to the system. (*See*, for example, the comments of National Bankruptcy Conference filed January 15, 2008, http://www.uscourts.gov/rules/2007_Civil_Rules_Comments_Chart.html). Despite concerns, the proposed changes are anticipated to go into effect on December 1, 2009, in their current form.

Under the present time computation rules, it is the length of the time period which determines whether federal courts count weekends and legal holidays when calculating deadlines. If the time period is less than eleven days for civil, criminal, and appellate proceedings, and less than eight for bankruptcy proceedings, federal courts do not count the intervening weekends and legal holidays. In contrast, for civil, criminal, and appellate proceedings, when the period is eleven days or more, and when the period is eight days or more for bankruptcy proceedings, federal courts do count intervening weekends and legal holidays. Besides being a source of confusion, this could lead to anomalous results. For example, in a civil proceeding, a twelve-day time period will last twelve days, but a ten-day period will last at least fourteen days, and can last as many as sixteen days. From determining when weekends and legal holidays should be counted to figuring out what counts as a "legal holiday," the present system presents pitfalls to lawyers and litigants. In order to simplify the time computation system, the Judicial Conference Committee on Rules of Practice and Procedure decided to create a new method of counting days. The result is a time calculation method that is intended to be straightforward and consistent.

Under the new system, federal courts will count intervening weekends and legal holidays *regardless of the length of the time period*. Courts will continue to exclude the day of the act, event, or default that begins the period, so the actual counting of the days starts on the day after the act, event or default that begins the period. The new time rules will apply to all pending actions unless doing so would be infeasible or otherwise unjust. Rules Enabling Act, 28 U.S.C. § 2074. The Committee extended most of the shorter time periods to offset the new way of counting. For example, currently under Federal Rule of Civil Procedure 23, litigants have ten days to appeal a class certification ruling. Under the amended Rule 23, litigants will have fourteen days to file the appeal.

For any time periods that have a final day that lands on a weekend or legal holiday, the time period will continue to run until the next day that is not a Saturday, Sunday, or legal holiday. In an effort to reduce the likelihood of the end of a time period landing on a weekend, though, the Committee changed time periods of less than thirty days to multiples of seven. For example, under the current Federal Rule of Civil Procedure 12, a defendant has twenty days to serve an answer; under the amended rule, the defendant will have twenty-one days to answer.

In short, these amendments are intended to bring simplicity to the computation of time periods, even though, more often than not, the actual time period will be the same. The changes to the federal rules and statues will go into effect on December 1, 2009.

To comply with the changes, the local rules for the Northern and Southern Districts of Iowa are also being amended, with an effective date of December 1, 2009. Amended Local Rule 1(j) will provide:

Computing Time. When a period of time is prescribed in or allowed by a Local Rule, computation of the period of time is governed by Federal Rule of Civil Procedure 6(a).

> The Local Rules will continue to apply (even with the computation changes) the mailing rule in Federal Rule of Civil Procedure 6(d) to documents served electronically pursuant to Federal Rule of Civil Procedure 5(b)(2)(E). Thus, whenever a party is required to do something within a prescribed period after service, and service is completed electronically under Local Rule 5.2.k.1, a period of 3 days is added to the prescribed period, unless contrary to the specific requirements of an order of the court. The 3-day mailing rule applies only to deadlines precipitated by the service of a notice or other paper, and does not extend other deadlines established by the Federal Rules of Civil, Criminal, and Appellate Procedure; a Local Rule; an order; or a statute. (Local Rule 6)

Continued on page 10

1 Mr. Heggen utilized materials from *The Third Branch, Newsletter of the Federal Courts,* Vol. 41, No. 6, June 2009; http://www.uscourts.gov/rules/; and the Iowa State Bar Association Federal Practice Committee in preparing his summary of the upcoming changes.

THE TIMES THEY ARE A 'CHANGIN'

... *CONTINUED FROM PAGE 9*

Additional specific changes to the Local Rules include changing the time for submitting the final pre-trial order from one day to five days after the 16 (1)(b) conference (Local Rule 16 (1)(b)); changing the time before trial by which a party must submit requested voir dire questions from three court days to seven days (Local Rule 47(1)(c)), changing the deadline for filing a reply to a resistance to a motion for summary judgment from five court days to seven days (Local Rule 56 (d)), and changing the deadline by which the clerk of court must be notified of settlement before the costs for seating a jury are awarded from two court days before to seven days before the day of scheduled jury selection (Local Rule 83(3)(b)).

Iowa attorneys should be aware of the December 1, 2009, deadline and should carefully review all deadline calculations in their federal cases by checking the Federal Rules of Civil Procedure, any applicable federal statues, and the Local Rules when determining when something is due.■

REGISTER TODAY FOR THE IDCA ANNUAL MEETING

What: 45th IDCA Annual Meeting and Seminar

When: September 17 – 18, 2009

Where: Marriott West Des Moines in West Des Moines, Iowa

How to Register: Download a registration form online at www.iowadefensecounsel.org. Click on Calendar of Events.

A Must See: Learn powerful techniques for cross-examination from a leader in the field, Larry Pozner. This seminar, "Advanced Cross-Examination Techniques," is based on the best-selling book from LexisNexis®.

Learn how to harness the power of leading questions, establishing goal-oriented questioning sequences and other techniques that control testimony and persuade jurors.

About Larry Pozner: Pozner's law practice emphasized three primary areas: criminal defense work, complex commercial litigation and professional lecturing. He is a nationally recognized legal commentator and has frequently provided legal analysis for the *NBC Nightly News, The Today Show, MSNBC, CNN, NPR* and *Court TV.*■

DRI ANNUAL MEETING IN CHICAGO, OCTOBER 7–11, 2009

REGISTER BY SEPTEMBER 9, 2009, AND SAVE $100 ON YOUR REGISTRATION FEE.

DRI celebrates its 50th Anniversary at its Annual Meeting in Chicago on October 7 – 11, 2009. Once again, DRI has put together an outstanding combination of education, meetings, and networking events that are a great value in today's tight-economic times.

Historian and NBC commentator Doris Kerns Goodwin on her bestselling book, Team of Rivals: The Political Genius of Abraham Lincoln; former U.S. Labor Secretary Elaine Chao; former Oklahoma City bombing prosecutor Joseph Hartzler, and a panel of five former Solicitor Generals including Ken Starr discussing changes and challenges for the Supreme Court are but a few of the outstanding speakers appearing at the DRI Annual Meeting. Substantive topics include trial technology, private and public efforts to regulate business, ethics, proposed changes to the Federal Rules of Civil Procedure, trial presentation skills, and a discussion of the Duke lacrosse case. Ask any lawyer who has attended a DRI Annual Meeting – the CLE is among the best in the nation!

DRI has reserved the Shedd Aquarium for a private DRI reception on Thursday evening. The Welcome Reception on Wednesday night celebrates Lincoln's 200th Birthday and features the fare of Chicago's diverse neighborhoods. Our Mid Region is planning a social outing for Friday night, which always presents a great opportunity to network with the other defense attorneys from Missouri, Nebraska, Kansas, Colorado, and Utah. The Presidential Gala on Saturday features The Second City Comedy Troupe. There is never a shortage of things to do in Chicago. Who knows, the Cubs may be playing in division series on on their way to the World Series!

All of DRI's substantive and special committees meet at the Annual Meeting. If you want to become more active in DRI, this is the place to do it. Many committees will be organizing special committee networking events or presenting specialized CLE.

Times are tough and your CLE dollars are at a premium. However, the DRI Annual Meeting is a great event, an outstanding value, and one which I strongly encourage you to attend.

More information and a registration form can be found at www.dri.org.■

THE EFFECTIVE USE OF POWERPOINT® OR COREL PRESENTATIONS® DURING OPENING STATEMENT AND CLOSING ARGUMENT

by Kevin M. Reynolds and Nicholas S. J. Olivencia, Whitfield & Eddy, PLC, Des Moines, Iowa

Introduction

For over 10 years and in several mainly-products liability trials, we have used Corel Presentations® (or PowerPoint®) as a manufacturer-defendant with good results. These trials have been in both state and federal court, and in rural and urban jurisdictions. If you are a defense attorney and have not tried this yet in a trial, you need to consider adding this technology to your "tool kit"–by not taking advantage of this, you may not be as persuasive as you might otherwise be.

Do I need the court's permission?

Generally speaking, if you are in doubt as to whether a PowerPoint® presentation will be allowed, this issue should be brought to the court's attention outside the presence of the jury. The court has wide discretion on this issue. *See, e.g., State v. Sucharew*, 205 Ariz. 16, 66 P.3d 59 (Ariz. Ct. App. 2003), *review denied*, 205 Ariz. 16, 66 P.3d 59 (2003)(trial court did not abuse its discretion when it permitted the prosecution to use a PowerPoint presentation during its opening statement); *Miller v. Mullin*, 354 F.3d 1288, 1295 (10th Cir. 2004) ("We acknowledge that the decision to allow the use of visual aids, including pedagogical devices, rests squarely with the trial court."); *United States v. McGhee*, 532 F.3d 733, 741 (8th Cir. Ark. 2008) (citing *United States v. Wainright*, 351 F.3d 816, 820 (8th Cir. 2003) ("The use of summary charts, diagrams and other visual aids is generally permissible in the sound discretion of the trial court.") Over many years and several cases we have never been denied the right to do this. In our view, it is nothing more than an "outline" of the evidence at trial. The same could be done on a blackboard, "whiteboard" or flip chart. If you are allowed to orally explain something to a layperson jury, does it make any sense to take the position *that you cannot show them? Is the key here NOT to be an effective advocate?*

The sometimes difficult strategic call, then, is this: *when* do you make it known to the court (and *ergo*, to the other side) that you are going to do a PowerPoint® in opening statement? The preferred answer: *as late as possible!* If you do it too soon, e.g., at the time of the Final Pretrial Conference, then Plaintiff may try to "scramble around" at the last minute and put together a PowerPoint® of their own for opening statement. (This isn't all that bad; chances are it will be poorly done and counterproductive). But if you wait until it's too late, the other side may object and there is at least a possibility that the court will not permit it (since most judges don't like last minute surprises). Generally we make the request (or at least make it known to the court) on the morning of trial. At that time it is too late for the Plaintiff to put together a PowerPoint® presentation of their own. Also, in our experience most judges are familiar with these types of presentations and are actually quite receptive to them.

One issue that may come up is this: opposing counsel may want to "review" your PowerPoint®, before it is shown to the jury, to make sure they do not have any legal objections. The only problem with this is, normally a plaintiff's counsel doesn't get a "road map" of defense counsel's opening statement *ahead of time!* But here is a "practice pointer" to eliminate this problem: ask the court to take a short break after Plaintiff's opening, at which time opposing counsel can review and "approve" your slides. In this manner any objections can be taken care of outside the presence of the jury, and the Plaintiff's counsel will not have the unfair advantage of knowing what your opening statement is going to be, before they give theirs. This procedure has worked well in several cases.

"Making a Good First Impression"

All of us are familiar with the phrase: "[Y]ou only get one chance to make a good first impression." A well-done and thought out PowerPoint® or Presentations® slide show in opening statement can help you go a long way toward making a good first impression, which can be critically important in a jury trial. In a 1966 study culminating in the book "The American Jury," law professor-authors Kalven and Zeisel found that after opening statements, more than 50% of jurors had "made up their minds" as to the ultimate result in the case. A well-presented PowerPoint® will help the defense get off to a fast start. This is especially true because:

a. Since the Plaintiffs have the burden of proof, they go first.

b. In a trial that may be several days (if not weeks) in length, you want the jury to hear "the other side of the story" (the defense case) *as effectively and persuasively as possible*. This helps to eliminate the plaintiff's case that is a "runaway freight train," which is where a case builds up so much momentum over such a long period of time that it cannot be overcome.

c. Study after study has shown that *juror comprehension* and *retention* increase dramatically when something is *shown* to them, as well as explained to them orally. To hear it is one thing; to hear it *and see it* is quite another.

d. How would it look, if the Plaintiff's attorney has a professionally-looking PowerPoint®, and you do not? Will you feel "inadequate" as a result? Will you feel embarrassed in front of your client? Why risk the chance of this happening?

Learn the technology, or get some help setting things up

If you have decided to "buy in" to this technology, it will be important for you to learn how to use it and set it up correctly. We have used Corel Presentations® now for over 10 years, so we are quite

Continued on page 12

"THE EFFECTIVE USE OF POWERPOINT® OR COREL PRESENTATIONS® DURING OPENING STATEMENT AND CLOSING ARGUMENT" ... *CONTINUED FROM PAGE 11*

comfortable with it, and are able to prepare our own slide shows. If you can learn it (and, by the way, it is very "intuitive"), this gives you the additional advantage of being able to "change it on the fly" based on the evidence at trial, or the court's last-minute rulings. This is one big advantage of a computerized slide show over "flip charts." The pre-prepared "flip chart" is difficult, if not impossible, to change on a moment's notice. With PowerPoint® this can be done in a matter of seconds.

You will also need to learn how to hook up your laptop computer to an LCD projector. This device will take the image from your laptop and display it onto a screen. A polite phone call to the clerk's office will confirm whether or not the court will supply these items, or whether you should bring them along. In general, most federal courts have these technology items ready to go, while many state courts do not. If there is any doubt, take everything you will need, including plenty of heavy-duty outdoor extension cords and power strips. If you can get to the courtroom early enough, the cords can be taped down in order to eliminate (or at least reduce) tripping hazards.

In terms of setting up the equipment, we usually enlist the help of an administrative assistant (who is computer "savvy") or the Firm's IT personnel. We have them come to the Courthouse, hook everything up, and make sure it is working properly. We could probably do this, but at the start of a trial, we don't need or want any last minute "hassles" or disruptions. Also, you might want to have your technical person attend the opening statement or summation in case there are any "glitches." Law firm staff appreciates the opportunity to actually "see" the lawyers practice in the courtroom, which is a good learning experience for them.

Make sure you have a "Plan B"

Computers, as is true of any technology, are subject to faults and interruptions of various kinds. Some would even argue that unusual sunspot "activity" may have an effect! Probably the best advice that we can offer to someone considering doing a PowerPoint® or Presentations® slide show in opening statement or closing argument is this: *make sure you have a "Plan B."* "Plan B" is what you put into effect in case the laptop unexpectedly "locks up," crashes, a hamfisted lawyer hits the wrong button, someone trips over a power cord and pulls the laptop off counsel table onto the floor, busting it into a million pieces, and so forth. Some older laptops and their batteries have even been claimed to have started fires! Keeping in mind "Murphy's Law," here are some examples of "Plan Bs:"

a. A hard-copy of the slide show that you can use as an "outline" for your opening statement. This can be put onto an ELMO® machine and shown to the jury in that manner through the LCD projector.

b. A "stand-by" laptop with the same presentation.

c. Have on stand-by a "flip chart" with the same slides as your Presentations® show.

The key is this: if the technology blows up, you must be ready to continue without delay and without "skipping a beat."

Take some care in setting up the slides

The only thing that might be worse than not doing a PowerPoint® presentation at all, would be doing one *badly*. We have all seen countless examples at law (*but not IDCA!*) seminars. Take some real care in creating your slides. Show them to your spouse or "significant other" (or your mother in law!) to make sure they can be understood. Here are some general guidelines:

a. Make sure the color of printing you use is readable against the background. Over the years, we have most often used a standard "template" of a dark blue background with white printing. Also, there is a red line at the top.

b. DO NOT try to put too much information or words on one slide. This "rule" is probably "violated" the most.

c. To the fullest extent possible, set up each slide in "bullet point" fashion.

d. Have no more than 4 or 5 "bullets" per slide. If you need more than this, put the information on a series of 2 or 3 slides. Generally speaking, when it comes to slides, "less is more."

e. Make sure the printing is large enough in size to be read from anywhere in the courtroom. You don't want the jurors "squinting" their eyes, or working hard to try to read something that you've put on there. Make it easy for them!

f. It can be a good idea to break up "bullet point" slides with good, crisp photographs of critical pieces of evidence. Video works well, too. If using actual pieces of evidence, make sure they have been stipulated into evidence before trial (if using in the opening statement). Also, you need to make sure you know how to run the video, and that your laptop has enough memory to run the video properly. If you don't know how to do video, don't try.

g. Don't be argumentative, especially in the opening statement. If it is deemed argumentative, you may draw an objection that will be sustained. What then? *When in doubt, leave it out!*

h. When presenting the slides, don't just go through and "read" them. Instead, the "bullet points" are there to help you re-

Continued on page 13

"THE EFFECTIVE USE OF POWERPOINT® OR COREL PRESENTATIONS® DURING OPENING STATEMENT AND CLOSING ARGUMENT" ... *CONTINUED FROM PAGE 12*

member what it is that you want to explain to the jury. The slides are your outline, and the jury can see your outline.

i. If in doubt on anything, *leave it out*. Better to be "safe" than sorry! For example, if you are unsure that a certain piece of evidence will actually come into evidence, or there's a good chance it will be excluded, leave it out of your PowerPoint.®

j. The use of a remote device will allow you to go anywhere in the courtroom and advance the slides or bullets. Most remotes also have a built-in laser pointer. This way you won't be "trapped" into having to stand within reach of the laptop at all times.

Closing argument

While "primacy" is important in a jury trial, "recency" is just as (if not more) important. When the jury retires to the deliberations room, it would be nice if the defendant has presented them with something worth remembering. A well-done, persuasive and thorough PowerPoint®presentation used effectively in closing argument just might do the "trick." As a practice pointer, the PowerPoint® that you presented for opening statement may be a good place to start in creating the summation presentation. "Book-ended" by the opening, this has the psychological effect of tying the case up into a "nice little package," from beginning to end, and can create an aura of "thoroughness." On the other hand, if there are points made in plaintiff's summation that you feel must be addressed, address those and if necessary, leave your "pre-prepared" PowerPoint® closing for another day. In a trial, defense counsel must be ready to shift and change strategy, where change is called for and dictated by the needs of the particular situation. This tool is there for you as an aid, and is not a "straightjacket."

Mediations, Arbitrations, Bench Trials and Motion Hearings

We have also successfully used a PowerPoint® or Corel Presentations® slide show to effectively present the defense case at mediations, arbitrations, bench trials and motion hearings. Statistics show that over 95 percent of all cases are settled, and not tried. A fair number of the cases that are settled may be settled at mediation, arbitration or some form of alternative dispute resolution (ADR). Most mediators allow the parties' counsel to give an "opening statement." The use of a few slides outlining the defense case, and highlighting the critical exhibits, may go a long ways toward resolving the matter. It will also clearly show to the plaintiff that the defense is ready, willing and able to go to trial, if necessary. In the authors' view, the best way to reach a reasonable resolution of a case, is to demonstrate to the other side that if they go trial, there will be a significant risk of an adverse outcome.

Some cases set for a bench trial or motion hearing can have complex issues. One way in which to organize your presentation, whether it be at a hearing on a motion for summary judgment or the actual trial of the case on the merits, is to present an outline of your position by using PowerPoint®. The authors have effectively presented a Corel Presentations® slide show at hearing on a motion for summary judgment. Alternatively, you may choose to make color hard copies of your slides, and then present those to the judge in a binder at the beginning of the argument.

Also, if the case is not settled or resolved at mediation, or if the court denies your dispositive motion, you will have the mediation PowerPoint® as a "head start" towards your opening statement and closing argument presentations at trial.

Conclusion

If you are not a particularly gifted "orator" by rote memorization, a PowerPoint® slide presentation can supply just the "prompts" you need to make a spellbinding and convincing closing argument. If the defendant uses this tool and the plaintiff does not, your tactical advantage increases exponentially. In the "good ole days," "grizzled" veterans of the defense bar used the time-honored tradition of the "flip chart:" a simple art or sketch pad with a spiral wire binding at top, and an outline of the argument hand-lettered by a Sharpie® on each page by counsel. In a smaller case, this may still be a very effective way to present the defense case. Although a simple flip chart may still fit the needs of a simple case, think of PowerPoint® as the 21st century rendition of the "flip chart" that can be effective in a more "weighty" matter.

In the past, it is possible that some defense counsel have "shied" away from this technology. One can legitimately ask the question: will a jury in a rural jurisdiction think that a PowerPoint® is "too flashy" or "too slick?" Will I come off too much like the proverbial "used car salesman?" Although this may have been a concern in some jurisdictions ten years ago, in our experience over several cases, both in state and federal court, it is not a real concern today. If done correctly and presented with the right "tone," there is little chance of this happening. We live in an age of the 24-hour news cycle and brilliant graphics on cable and satellite TV, as well as the internet. Many jurors (not to mention judges–keep in mind, there is no reason this tool cannot be used in bench trials, too, or for a complicated summary judgment motion!), from rural to the most urban of jurisdictions, will respond favorably to a well-done, well thought out PowerPoint® slide show for *both* defense counsel's opening statement and closing argument.■

EMOTIONAL DISTRESS DAMAGES: THE CHANGING ROLE OF THE EXPERT WITNESS

by Frank Harty, Nyemaster, Goode, West, Hansell & O'Brien P.C., Des Moines, IA

Frank Harty

INTRODUCTION

In many employment and common law tort cases, emotional distress damages play a central role in the litigation process, accounting for the lion's share of the defendant's exposure. Emotional distress damages are so ubiquitous because courts require plaintiffs to prove less to recover them than they do for the independent tort of the intentional infliction of emotional distress. Iowa courts allow plaintiffs to recover damages for emotional distress incidental to intentional torts without proof of physical injury, *see Niblo v. Parr Mfr., Inc.*, 445 N.W.2d 351, 354 (Iowa 1989), and "without requiring proof of severe emotional distress if the harm was reasonably to be expected from the interference." *See id.* at 357 (citing RESTATEMENT (SECOND) OF TORTS § 774A(1)(c) (1977)).

Seasoned defense counsel develop their often unique approach to dealing with the emotional distress damage element. One issue defendants face is whether to retain a consulting or forensic expert to combat emotional distress claims. Conventional wisdom dictates that a defendant should seldom, if ever, put an expert on the stand if the plaintiff does not offer emotional distress expert testimony. A harder question arises when the plaintiff proffers a forensic expert: Should the defendant offer a "dueling expert?" A recent decision by the Iowa Supreme Court may dictate that the harder question will confront defendants more frequently.

In *Doe v. Central Iowa Health System*, the Iowa Supreme Court held that, when the plaintiff suffers from emotional distress before the claim arises, fails to provide expert testimony to assist jurors in determining which aspects of the plaintiff's emotional distress are related to the allegedly wrongful conduct and which are attributable to the preexisting factors, and relies instead on his own conclusory testimony, then there is insufficient evidence to submit the issue of causation to the jury. *Doe v. Central Iowa Health System*, 766 NW2d 787 at 795 (Iowa 2009). The *Doe* decision will cause prudent plaintiff's counsel to use emotional distress experts whenever a plaintiff has a "checkered past" from an emotional distress standpoint.

FACTS

John Doe worked in the admissions department at Iowa Health System's Methodist and Lutheran Hospitals. All hospital admission employees had broad access to medical records as part of their job duties. While admission employees were trained to access records only for business reasons, there were no electronic barriers that would prevent an employee from improperly accessing medical records.

At trial, Doe testified that in December of 2003 he was very unhappy, that he generally did not care about life and that he thought suicide was his best option. The death of his mother, who had just passed away from a massive heart attack, upset him. On December 4, 2003, his car was repossessed. Later that day, he attempted suicide by taking a bottle of aspirin. Immediately after, Doe called several of his close friends to say goodbye. Fortunately, one of them convinced him to call the emergency room. Iowa Lutheran admitted him to the emergency room and confined him to its mental health unit for several days. He contacted his friends and coworkers and asked them to tell his supervisor that he would not be at work because he was hospitalized. Doe's supervisor testified that she cared deeply about him and that she visited him in the mental health unit. Doe asked her to tell two of his friends and coworkers that he was in the unit and that they were welcome to visit him. Doe never told his coworkers or his supervisor not to inform others that he was in the mental health unit.

After Doe returned to work on December 15, he became suspicious that several of his coworkers accessed his health records and told others about his suicide attempt. He complained to Iowa Health's privacy officer, who conducted an investigation, including an electronic audit. The investigation showed that six of Doe's coworkers improperly accessed his records. Iowa Health informed Doe that some of his coworkers accessed his records and that it disciplined those who had, but he was not told who had done so. Doe sued Iowa Health. He did not request damages for lost wages or medical expenses, but only sought recompense for emotional distress.

PROCEEDINGS AT TRIAL

In support of his claim for emotional distress, Doe offered his own statements and the testimony of one coworker. He did not offer the testimony of an expert witness. Doe testified that as a result of the unauthorized access, he became introverted, less social and that his sex drive greatly decreased. He explained that he did not seek professional treatment for his emotional distress because he was afraid that someone would improperly access his records and learn about the treatment. The coworker stated that when Doe returned to work after his suicide attempt he was "acting differently," and related the change in Doe's disposition to his return to work, but not to the unauthorized disclosure of information.

At the close of Doe's case, Iowa Health moved for a directed verdict. The directed verdict motion alleged, among other things, that Doe failed to present substantial evidence that he suffered any emotional

Continued on page 15

EMOTIONAL DISTRESS DAMAGES: THE CHANGING ROLE OF THE EXPERT WITNESS ... *CONTINUED FROM PAGE 14*

distress caused by the actions of Iowa Health. The court denied the motion. At the close of the evidence, Iowa Health renewed its motion for a directed verdict, which the court again denied. The court submitted the case to the jury, which returned a verdict in favor of Doe for $175,000. Iowa Health then filed a motion for judgment notwithstanding the verdict. The court sustained the motion for JNOV, holding that the alleged disclosures were not the proximate cause of any emotional distress that Doe suffered. On appeal, the Iowa Supreme Court affirmed the decision and held that the trial court properly granted JNOV because Doe failed to establish that any improper disclosure or accessing of his mental health records was the actual cause of his emotional distress.

EMOTIONAL DISTRESS, CAUSATION AND EXPERT TESTIMONY

In *Doe*, the Iowa Supreme Court explained when expert testimony is necessary. "When the causal connection between the tortfeaser's actions and the plaintiff's injury is not within the knowledge and experience of an ordinary layperson, the plaintiff needs expert testimony to create a jury question on causation." Citing *Bradshaw v. Iowa Methodist Hospital*, 251 Iowa 375 (1960). By contrast, when the causal connection between the wrongful act and the injury is "within the knowledge and experience of an ordinary layperson, the plaintiff does not need expert testimony to create a jury question on causation." *Doe* at 793. *Id.* at 793, citing *Stickleman v. Synhorst*, 243 Iowa 872 (1952).

The Iowa Supreme Court held that the plaintiff's failure to offer expert testimony connecting his malaise to the unauthorized disclosures was fatal. *Id.* at 795. The court noted that the facts of the case were clear: Doe was suffering from emotional distress at the time of his attempted suicide – he was hospitalized in the mental health unit. There is no evidence from the record concerning the treatment Doe received after his suicide attempt and whether it resolved or relieved his preexisting emotional distress. Although Doe made a number of self-serving statements regarding his emotional state after learning of the disclosures, it was impossible for a layperson to determine if the emotional distress he described was preexisting or created by the allegedly wrongful act. The court stated that "lay jurors, unaided by expert testimony, could not distinguish the emotional distress, if any, arising from the unauthorized disclosure of Doe's records from the preexisting emotional distress." *Id.*

IMPACT OF THE *DOE* DECISION

The *Doe* decision puts more pressure on plaintiffs to produce expert testimony regarding emotional distress. However, at least one emotional distress expert believes that examinations of plaintiffs by psychologists or psychiatrists are often harmful to plaintiffs personally and to their cases. Louise F. Fitzgerald, *A New Framework for Sexual Harassment Cases: Using Social Science Data to Prove Emotional Distress Can Protect Clients from Invasive Forensic Evaluations and Convince Jurors to Award Adequate Compensation*, TRIAL, Mar. 2003, at 36. This creates an interesting dilemma for plaintiff's counsel when trying to prove emotional distress damages. Counsel can either shield their client from a "highly intrusive" inquiry, but run the risk of the evidence being insufficient to make the causal connection obvious to the jury, or they can allow experts to examine their client, which will avoid the causation pitfall that doomed Doe, but will put their client's mental condition on trial.

It will not just be the occasional case that *Doe* impacts. For example, statistics show that nearly one in four females is the victim of harassment or sexual abuse of some sort. Thus, the chances are not insubstantial that the average plaintiff in a sexual harassment case will have been the victim of prior sexual abuse or harassment. To get causation to the jury and avoid the impact of the *Doe* decision, such plaintiffs in sexual harassment cases may have to offer expert testimony that reveals highly personal information.

Interestingly, the Plaintiff's bar appears to be very concerned about the scope of the *Doe* decision. The Iowa Association for Justice requested permission to file an amicus brief in support of Doe's request for a rehearing. The amicus brief argued that the Court improperly adopted negligence standards to intentional torts. In denying the request to file and the rehearing request, the Court added a footnote to the decision. Footnote 2 of the final decision clarifies that the *Doe* decision applies to statutory claims.

CONCLUSION

In *Doe*, the Iowa Supreme Court extended well-established principles of causation to the emotional distress landscape. Though the *Doe* decision should not come as a surprise to the practitioner, it does clearly highlight the dilemma some plaintiffs will face when seeking any recovery of emotional distress damages. Defense counsel should be aware that they will increasingly be faced with plaintiffs' emotional distress expert witnesses even in cases involving "garden variety" emotional distress.■

THE IOWA SUPREME COURT AND PRIVACY OF MENTAL HEALTH RECORDS

by Frank Harty, Nyemaster, Goode, West, Hansell & O'Brien P.C., Des Moines, IA

INTRODUCTION

Health care professionals and others who handle protected health information should note the Iowa Supreme Court's recent decision in *Doe v. Central Iowa Health System,* 766 N.W.2d 787 (Iowa 2009). The decision may be important not so much for what the court held, but for what it chose not to address. In *Doe*, the court had the opportunity to decide whether Iowa's mental health records statute, Iowa Code Chapter 228, implies a private cause of action. However, it avoided the issue, neither endorsing nor rejecting the trial court's holding that Chapter 228 implies a private cause of action. The Court disposed of the appeal on other grounds.

Arguably, the court should have held that Chapter 228 did not create a private cause of action. The Iowa Legislature did not state or imply that it intended to give individuals a private cause of action under Chapter 228. However, since the Iowa Supreme Court did not address the issue, the possibility remains open. Further, because the trial court in Doe held that it does, plaintiffs may be emboldened to bring claims under Chapter 228.

THE *DOE* DECISION

John Doe worked in the admissions department at Iowa Health System's Methodist and Lutheran Hospitals. All hospital admission employees had broad access to medical records as part of their job duties. While Iowa Health trained its admission employees to access records only for business reasons, there were no electronic barriers that would prevent an admissions employee from improperly accessing medical records.

Prior to the lawsuit, Doe's mother died, his car was repossessed and he had begun to drink heavily. Ultimately, he ate a bottle of aspirin in a failed suicide attempt. Iowa Lutheran admitted him to the emergency room and confined him to its mental health unit for several days. Doe contacted his friends and coworkers and asked them to tell his supervisor that he would not be at work because he was hospitalized. Doe's supervisor testified that she cared deeply about him and that she visited him in the mental health unit. He asked her to tell two of his friends and coworkers that he was in the unit and that they were welcome to visit him. When Doe returned to work, he became suspicious that several of his coworkers had accessed his records and told others about his suicide attempt. Doe complained to Iowa Health's privacy officer.

Iowa Health conducted an investigation including an electronic audit. The investigation showed evidence that six hospital employees had improperly accessed Doe's records. Iowa Health gave the six coworkers a "level 3" disciplinary warning, which was essentially a "last chance" final warning. Iowa Health informed Doe that his records had been accessed and that it had punished the guilty parties, but he was not told who accessed his records. Unhappy with this response, Doe sued Iowa Health.

PROCEEDINGS AT TRIAL

At the close of Doe's case, Iowa Health moved for a directed verdict. The directed verdict motion alleged: (1) Iowa Code Chapter 228 does not imply a private cause of action; (2) if Chapter 228 does provide a private cause of action, Iowa Health did not violate Chapter 228 because any disclosures made were not in violation of the terms of the Chapter; (3) any disclosures made by Iowa Health employees were done outside the scope of their employment; and (4) Doe failed to present substantial evidence that he suffered any emotional distress caused by the actions of Iowa Health.

The court overruled the motion for a directed verdict, stating that it believed Chapter 228 created a private cause of action. At the close of the evidence, Iowa Health renewed its motion for a directed verdict, which the court again overruled. The court submitted the case to the jury, which returned a verdict in favor of Doe for $175,000. Iowa Health then filed a motion for judgment notwithstanding the verdict. The trial court granted the motion and held that the alleged disclosures were not the proximate cause of any emotional distress to Doe. On appeal, the Iowa Supreme Court affirmed, holding that the trial court properly granted JNOV because Doe failed to establish that any alleged violation of Chapter 228 was the actual cause of emotional distress. However, the Iowa Supreme Court avoided deciding whether there is a private cause of action under Chapter 228.

DISCUSSION

Chapter 228 prohibits, among other things, a "mental health facility" from disclosing, or permitting the disclosure, of mental health information, except in certain clearly delineated situations. Iowa Code § 228.2(1). The statute contains nine separate sections, ten separate definitions, and is otherwise comprehensive in scope. Noticeably absent from the statute is any mention of civil remedies or any provision expressly authorizing a private cause of action. Hence, if a private cause of action exists under Chapter 228, that action must be implied. *See Meinders v. Dunkerton Cmty. Sch. Dist.*, 645 N.W.2d 632, 635 (Iowa 2002) ("[A] violation of a statutory duty gives rise to a tort claim only when the statute, explicitly or implicitly, provides for such a cause of action") (quoting *Kolbe v. State*, 625 N.W.2d 721, 726 (Iowa 2001)).

When a statute does not expressly provide for a private cause of action, the Iowa Supreme Court applies a four-pronged test to determine if a private right of action is implied.

1. Is the plaintiff a member of the class for whose benefit the

Continued on page 17

THE IOWA SUPREME COURT AND PRIVACY OF MENTAL HEALTH RECORDS ... *CONTINUED FROM PAGE 16*

statute was enacted?
2. Is there any indication of legislative intent, explicit or implicit, to either create or deny such a remedy?
3. Would allowing such a cause of action be consistent with the underlying purpose of the legislation?
4. Would the private cause of action intrude into an area over which the federal government or a state administrative agency holds exclusive jurisdiction?

Seeman v. Liberty Mut. Ins. Co., 322 N.W.2d 35, 38 (Iowa 1982) (citing *Cort v. Ash*, 422 U.S. 66, 78 (1975)). "No implied cause of action exists if any one of these factors is not satisfied." *Stotts v. Eveleth*, 688 N.W.2d 803, 808 (Iowa 2004); *Kolbe*, 625 N.W.2d at 727. Further, the second inquiry (i.e. whether there is any indication of legislative intent to create a private cause of action) is the "most relevant" of the four. *Raas v. State*, 729 N.W.2d 444, 447 (Iowa 2007); *Kolbe*, 625 N.W.2d at 727.[1]

Of the four factors, the first arguably favors Doe, while the third and fourth are essentially neutral. As a result, whether a claim exists under Chapter 228 rises or falls on the second factor; namely, whether Chapter 228 includes any indication of legislative intent to "either create or deny" a private right of action. When courts consider the second factor, they must appreciate that legislatures speak through the laws they enact, and that "it is not the province of the court to speculate as to probable legislative intent without regard to the wording used in the statute, and any determination must be based upon what the legislature actually said, rather than what it might or should have said." *Marcus v. Young*, 538 N.W.2d 285, 289 (Iowa 1995). In like manner, courts must recognize that they "cannot, under the guise of construction, enlarge or otherwise change the terms of a statute as the legislature adopted it." *Id.*

The clearest indication that the legislature intended to deny, rather than create, a private cause of action is Section 228.7, which applies to disclosures by claims administrations and peer review organizations and contains specific "Safeguards and Penalties" for disclosures by those specific entities. Under its express terms, an employee of a third party payor or peer review organization that "willfully uses or discloses mental health information . . . is guilty of a serious misdemeanor . . . ." Iowa Code § 228.7(3). Nowhere else does Chapter 228 express criminal or civil penalties.

That the legislature included criminal penalties for some disclosures in Chapter 228, but not for others, suggests that it considered what remedies to include in the statute and determined that limited criminal sanctions were sufficient to further the statute's purposes. Under the statutory construction rule expressio unius est excusio alterious (i.e. expression of one thing is the exclusion of another), the inclusion of criminal sanctions, coupled with the omission of civil remedies, confirms the legislature did not intend Chapter 228 to include a private right of action. *See Meinders*, 645 N.W.2d at 637 (determining that specific remedies dealing with teacher contract termination contained in Iowa Code Chapter 279 "signaled the legislature's intent 'not to provide a private cause of action for a violation of section 279.13'"); *Sanford v. Manernach*, 601 N.W.2d 360, 371 (Iowa 1999) (concluding that a provision in Iowa Code Chapter 822 providing inmates with a judicial remedy indicates legislative intent not to recognize an additional remedy in tort); *Marcus*, 538 N.W.2d at 289-90 (stating that remedies included in Iowa Code Chapter 22 preclude a private remedy for a violation of the statute).

In *Doe*, the trial court concluded that Chapter 228 implied a private cause. While the basis for its ruling is not entirely clear, it appears the trial court concluded that an oblique provision in Section 228.2(1) evinces a legislative intent to create the private right of action under which Doe seeks shelter. (App. 245, Tr. p. 341). Section 228.2(1) requires persons disclosing mental health information under one of the Chapter's exceptions (i.e. Sections 228.3, 228.5, 228.6, 228.7 or 228.8) to provide the recipient with written instructions regarding further disclosure of the information. The written instructions must, among other things, advise the recipient that "civil damages and criminal penalties may be applicable to the unauthorized disclosure of mental health information." Iowa Code § 228.2(2).

On appeal, Iowa Health argued that the trial judge's reasoning was misplaced for a number of reasons. First, the provision at issue is narrow in scope and pertains only to what information must be given to a person to whom mental health information is disclosed. The provision does not contain any other prohibitions or requirements. Second, the provision uses the term "may," thus implying that liability for the "unauthorized disclosure of mental health information" is not automatic. The legislature would not have equivocated on this point if it intended to include a private right of action in Chapter 228. *See Marcus*, 538 N.W.2d at 290 (finding that "had the legislature intended to create a private right of action . . . it would have said so clearly") (emphasis added).

Iowa Health also contended that when the trial judge concluded that Section 228.2(2) implies a private right of action, he erred by overlooking to whom the Section 228.2(2) warning is directed. Contrary

Continued on page 18

1 The Iowa Supreme Court's emphasis on the second factor of the four-pronged test initially stated in *Cort* is consistent with the sea of change that has occurred within the federal courts regarding implied rights of action. As the United States District Court for the Southern District of Iowa recently observed, the United States Supreme Court has "long since abandoned its hospitable attitude towards implied rights of action" absent a clear indication by the legislature that it intended to create a private right of action in addition to a private remedy. *Leach v. Mediacom*, 240 F. Supp. 2d 994, 996 (S.D. Iowa 2003); *see Gonzaga Univ. v. Doe*, 536 U.S. 273, 286 (2002) (concluding that if there is no intent, there is no basis for bringing a private suit under an implied right of action); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 67 n.3 (2001) (discussing the Supreme Court's "retreat from [its] previous willingness to imply a cause of action where Congress has not provided one"); *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001) (concluding that intent is determinative and "[w]ithout it a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute") (citations omitted); *Thompson v. Thompson*, 484 U.S. 174, 179 (1988) (finding the "focal point" in determining existence of a private cause of action is the "intent in enacting the statute" and "intent . . . remains the ultimate issue").

THE IOWA SUPREME COURT AND PRIVACY OF MENTAL HEALTH RECORDS ... *CONTINUED FROM PAGE 17*

to what the trial judge suggested, Section 228.2(2) requires those the statute covers to provide written instructions whenever they disclose mental information health information pursuant to one of Chapter 228's five exceptions; however, the recipients of that information may not be covered by the statute's provisions.[2] Thus, any warning that further disclosures "may" result in civil liability cannot pertain to civil penalties arising under Chapter 228 because, more often than not, the statute does not cover the persons so warned.

A practical example aptly illustrates this point: Suppose a covered entity discloses a patient's mental health to the adult sister of a patient pursuant to Section 228.8. Suppose further that the covered entity abides by Section 228.2 by noting the disclosure on the patient's chart and by providing the sister with a written statement that, among others things, advises her that "civil damages . . . may be applicable to the unauthorized disclosure of mental health information." Iowa Code § 228.2(2). Despite that warning, assume the sister discloses her sibling's mental health information to her neighbor, the town gossip.

In this example, the "civil damages" to which the statement refers cannot pertain to a cause of action under Chapter 228 because the sister is probably not a "mental health professional, data collector, or employee or agent of a mental health professional, or of a data collector, or of a mental health facility . . . " and, therefore, not covered by Chapter 228's restrictions. Iowa Code § 228.2(1). Because Chapter 228 does not cover the sister, her sibling cannot sue her under it. Instead, the sibling must file a tort claim if the disclosure damaged him or her. The Section 228.2(2) reference to "civil damages" pertains to the various tort theories the sibling can assert and not to a direct action under Chapter 228.[3]

As a final point, Chapter 228 is very similar in intent and application to HIPAA, although HIPAA is far broader in scope and applies to all private health information and not just mental health information. As the trial judge concluded when he granted Iowa Health's motion for summary judgment and dismissed Doe's HIPAA claim, numerous courts have concluded that HIPAA does not create a private of action, either express or implied. (App. 48). Those courts have reached that result because, like Chapter 228, HIPAA does not expressly provide for a private cause of action. Moreover, and again like Chapter 228, HIPAA's "structure or text" does not display a Congressional intent "to create not just a private right but also a private remedy." *O'Donnell v. Blue Cross Blue Shield of Wyoming*, 173 F. Supp. 2d 1176, 1179 (D. Wyoming 2001) (quoting *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001)).

Like HIPAA, Chapter 228 contains no clear provision explicitly creating a private cause of action for disclosure of mental health information. Further, Chapter 228's location within the Iowa Code suggests the legislature intended Iowa's Human Services Department to administer the statute, which it has done. *See* Iowa Admin. Code r. 441-9.1. Those factors suggest the Iowa General Assembly intended Chapter 228 to be regulatory in nature, and that it did not intend to create a private cause of action when it enacted Chapter 228.

Since 1996, the Iowa Supreme Court has applied the factors it first articulated in *Seeman v. Liberty Mutual Insurance Company* on at least eight occasions. In each of those decisions, it refused to read a statute or administrative rule as implying a private right of action either directly under the statute or indirectly through a negligence theory of recovery. *See, e.g., Stotts*, 688 N.W.2d at 807-09 (Iowa Code Sections 272.1 and 272.2, and Iowa Admin. Code r. 282-2.2(1)(c) do not imply a private right of action); *Baliff v. Adams County Corr. Bd.*, 650 N.W.2d 621, 626 (Iowa 2002) (Iowa Admin. Code r. 701-72.16(441)(1) does not imply a private right of action); *Meinders*, 645 N.W.2d at 635-36 (Iowa Code Section 279.13 does not imply a private right of action); *Kolbe*, 625 N.W.2d at 726-27 (Iowa Code Section 321.177(7) and Iowa Admin. Code r. 761-600.4(2) do not imply a private right of action); *Sanford*, 601 N.W.2d at 370-71 (Iowa Code Chapters 903A and 822 do not imply a private right of action); *Marcus*, 538 N.W.2d 288-89 (Iowa Code Chapter 22 and Iowa Admin. Code r. 681-17.13(22) do not imply a private right of action); *Teague v. Mosley*, 552 N.W.2d 646, 650-51 (Iowa 1996) (Iowa Code Section 331.322(10) does not imply a private right of action). Those decisions make real the principle that "the imposition of a statutory duty does not automatically create a private cause of action." *Marcus*, 538 N.W.2d at 288. So, too, they demonstrate the Iowa Supreme Court's appreciation that legislatures seldom bury causes of action in the minutia of the laws they pass.[4]

CONCLUSION

The Iowa Legislature neither expressly created a private cause of action in Chapter 228, nor implied that it intended one to exist. However, because the Iowa Supreme Court sidestepped the question in *Doe v. Central Iowa Health System*, the issue remains unsettled. Because violations of Chapter 228 often give rise to common law tort claims such as invasion of privacy or breach of fiduciary duty, the potential recognition of an implied cause of action may not dramatically alter the way covered entities do business. Nevertheless, this is an area that health care providers and professionals advising such entities should closely monitor.■

2 The five exceptions contained in Chapter 228 include disclosures made to private litigants (Section 228.6(4)), third party payors or peer review committees (Section 228.7), family members (Section 228.8), or to anyone else with the patient's consent (Section 228.8).

3 Potential civil liability for the "unauthorized disclosure of mental health information" exists under numerous tort theories including, but not necessarily limited to, invasion of privacy, breach of the duty of confidentiality, negligence, defamation, and intentional infliction of emotional distress. For whatever reason, Doe did not avail himself of those theories, but instead mistakenly hitched his litigation wagon to a statute that offers no recourse to private litigants.

4 The Iowa Code is rife with examples of instances where Iowa General Assemblies have passed acts that contained remedial provisions and other civil penalties. See, e.g., Iowa Code §§ 70A.29, 91A.12, 216.17A, 235B.71, 235A.20, 252A.8, 252D.19, 611.21, 692.6, 729A.5. These statutes show that the General Assembly knows how to create a private right of action if it intends one to exist.

CASE NOTE:
KOENIG V. KOENIG, 766 N.W.2d 635 (IOWA 2009)

by Bruce L. Walker, Plelan Tucker Walker, Tucker and Gelamn LLP., Iowa City, IA. and Nicholas Kilburg

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On June 5, 2009, the Iowa Supreme Court filed its decision in *Koenig v. Koenig*, 766 N.W.2d 635 (Iowa 2009), abolishing the common-law distinction between an invitee and a licensee in premises liability cases and replacing it with a duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors.

While her son Marc Koenig was ill, Plaintiff Valerie Koenig visited his home to care for him and help with chores. She fell on a carpet cleaner hose while carrying clothes, and required medical treatment. She filed suit against her son, alleging that his negligent conduct caused her permanent injuries, pain and suffering, loss of function, and medical expense. Marc denied her claim, and asserted that she was at fault.

At trial, Valerie offered evidence that Marc was aware that the hose was broken, but failed to warn her, that the hose blended in with the carpet in the room, and that only one of the two hallways lights was working. Marc offered evidence suggesting that the hose was an open and obvious hazard, and that Valerie had not turned on the one light in the area.

At the end of the trial, Valerie sought a general negligence instruction, rather than the Iowa Uniform Jury Instruction on the duty of care owed to a licensee. The district court found that the appropriate instruction for a premises liability case was not clear, and elected to use the Uniform Jury Instruction for licensees. The jury found in favor of Marc. Valerie filed a motion for a new trial based on the district court's failure to use her proposed general negligence instruction. The district court denied this motion as well, noting that the Supreme Court had not yet ruled that on this issue, and found no prejudice from the use of the uniform instruction.

The Iowa Supreme Court's opinion, written by Justice Appel, reviews the origin and rationale of the three categories of premises liability. It also outlines the trend in a number of other courts that criticize and move away from the common-law distinctions. Some courts abandoned the categories completely, others abolished the distinction between invitees and licensees while retaining the trespasser classification, and still others retained the common-law system, creating a split in the various jurisdictions.

The Court pointed out that prior decisions had criticized the common-law distinctions, while ultimately failing to move away from them in cases decided in *Pottebaum v. Hinds*, 347 N.W.2d 642, 645 (Iowa 1984), *Richardson v. Commodore, Inc.*, 599 N.W.2d 693 (Iowa 1999), *Alexander v. Medical Associates Clinic*, 646 N.W.2d 74 (Iowa 2002), *Anderson v. State*, 692 N.W.2d 360 (Iowa 2005), and *Benham v. King*, 700 N.W.2d 314 (Iowa 2005). Ultimately, the court held that the advantages of abolishing the invitee-licensee distinction outweighed the benefits of its retention. The court found that the abolition of the distinction served to avoid the confusion of applying categories adopted three hundred years ago to modern human interaction. The Court observed that people do not alter their behavior based upon the changing status of entrants and users of their property. The Court further found that the abandonment of the common-law distinction was consistent with modern notions of tort law and liability. There was little need to fear runaway jury verdicts by allowing the increased participation by the jury because jurors are likely to be landowners themselves. There was no reason to doubt a jury's ability to perform properly in premises liability cases as they have in other areas of tort law. Finally, the abandonment of these distinctions recognized a higher priority placed on public safety than on property rights.

The Court then adopted a multifactor approach, focusing on 1) the foreseeability or possibility of harm; 2) the purpose for which the entrant entered the premises; 3) the time, manner, and circumstances of the entry; 4) the use to which the premises are or were expected to be put; 5) the reasonableness of the inspection, repair, or warning; 6) the opportunity and ease of repair, correcting, or giving warning; and 7) the burden on the land occupier or community in terms of inconvenience or cost in providing adequate protection. As a result of the abandonment of the distinction, the district court's instruction was determined to be erroneous as well as material. The common law regarding liability toward trespassers continues. Justice Streit filed a special concurrence, urging the complete abolition of the classification system.■