defense UPDATE

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THE ENFORCEABILITY OF PROSPECTIVE LIABILITY WAIVERS IN IOWA: *GALLOWAY V. STATE* AND *BORGMAN V. KEDLEY* AND *WILD ROSE CLINTON, LLC*

By Stacey Hall, Lane & Waterman LLP, Davenport, Iowa

Stacey Hall

Two recent decisions adjudicate the enforceability of liability waivers. A recent federal court decision discussed below granted summary judgment and disposed of common challenges to pre-accident liability waivers and upheld the assignability of such contracts to the business purchaser. But first, some bad news….

Galloway v. State: The Iowa Supreme Court Invalidates Parental Pre-injury Waiver of Minors' Claims

On November 5, 2010, the Iowa Supreme Court issued a decision which will affect the willingness and ability of numerous organizations to provide youth activities in Iowa. In *Galloway v. State*, 790 N.W.2d 252 (Iowa 2010), the Court, in a split decision, held a parent cannot prospectively waive a child's personal injury claim as a condition of the child's participation in an activity. The decision is authored by Justice Hecht, with Justices Cady and Ternus dissenting.

At issue in *Galloway* were two releases executed by Galloway's mother when Galloway was 14 years old. *Id*. at 253. Galloway was injured in 2005 while on a field trip organized by the University of Northern Iowa and the state of Iowa when she was struck by a car as she attempted to cross the street. *Id*. The forms released the University and state from "all liability including claims and suits of law or in equity for injury (fatal or otherwise) which may result from any negligence and/or the student taking part in program activities." *Id*. at 254. Galloway brought suit against the state (and other parties). The state moved for summary judgment, arguing the releases were a valid waiver of Galloway's claims. *Id*. The district court granted the state summary judgment and Galloway appealed. *Id*.

Galloway urged the Iowa Supreme Court to hold pre-injury releases executed by parents on behalf of their minor children violates public policy and are unenforceable. *Id*. at 255. Galloway claimed public policy precluded enforcement of such releases because parents could not assess in advance the nature of the risks of injuries to children participating in activities at remote locations under the supervision of others and because parents were uninformed of the nature and gravity of possible injuries to their children when signing the release. *Id*. The state argued waivers of liability for minors' injuries should be upheld for the same reasons the Court upheld adult's releases of their own injuries. The state also argued the Court should give deference to parent's child-rearing choices, including the choice to "release third parties in advance for negligent injury to children." *Id*.

After defining public policy broadly and vaguely to include the "public good" and "established interests of society," the Court lists the areas in which "public policy" has required it to intervene in matters concerning family members and parental decision-making, including abrogating interspousal and parental immunity, and its decision prohibiting waiver of child support payments in exchange for relinquishment of visitation rights. *Id*. at 255-56. The Court also notes that Iowa law requires parents to obtain court approval prior to settling a minor's claim, unless the claim is worth $25,000 or less. *Id*. at 256. The Court then concludes these cases and statutes are "derived from a well-established public policy that chil-

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dren must be accorded a measure of protection against improvident decisions of their parents" and this public policy "demands minor children be protected from forfeiture of their personal injury claims by parents' execution of pre-injury releases." *Id.*

The *Galloway* majority gives several justifications for invalidating a parent's preinjury release of his or her child's claim, none of which withstands scrutiny. The first justification given by the Court is that if a parent cannot afford to care for an injured child and a release is upheld, "financial demands may be made on the public fisc to cover the cost of care." *Id.* This justification is weak considering that the claim for a minor child's past and future medical costs belong to the *parent*, not the child. *Goookin v. Norris*, 261 N.W.2d 692 (Iowa 1978). Because a parent may still prospectively waive his or her own claim, (and will most likely be required to do so), the cost of the injured child's care will still be borne by the parent. Concern that an injured individual may rely on public funds for care applies equally to children and adults, yet adult waivers are enforced. Further, entities seeking prospective waivers for a minor's injuries are typically small or non-profit organizations with limited resources. Absent liability insurance, these organizations may lack the funds to pay for the care required by a severely injured child and so demands would still be made on the parents or the public for such care.

Second, the *Galloway* majority concludes a parent's waiver of a child's claim should be invalid because a parent may not read a release. *Galloway*, 790 N.W.2d at 257. However, the Court gives no satisfactory explanation as to why an adult's failure to read a release will invalidate the release of a child's claim, but not an adult's. *See Huber v. Hovey*, 501 N.W.2d 53, 55 (Iowa 1993) ("It is well settled that failure to read a contract before signing it will not invalidate the contract. Absent fraud or mistake, ignorance of a written contract's contents will not negate its effects.").

Third, the *Galloway* Court cites a case from Washington for the proposition that "if a parent lacks authority without court approval to compromise and settle her minor child's personal injury claim after an injury has occurred, it makes little, if any, sense to conclude a parent has the authority to release a child's cause of action prior to an injury." *Galloway,* 790 N.W.2d at 257. (quoting Scott ex rel. *Scott v. Pac. W. Mountain Resort*, 119 Wash.2d 484, 834 P.2d 6, 10-11 (1992)). While it is true in Washington that parents have no authority to settle a minor's claim without approval, this is simply not the case in Iowa. Iowa parents *do* have the authority, without court approval, to settle a minor's personal injury claim for up to $25,000. *Compare* Wash. SPR Rule 98.16W(a); with Iowa Code § 633.574. Following the *Galloway* court's reasoning, a parent should have authority to execute a preinjury waiver which releases a child's injury worth $25,000 or less. Surely, the mere possibility of an injury on a field trip is not a claim worth more than $25,000.

Finally, the *Galloway* Court concludes releases of a minor's claims should be invalid because a child may not be aware "what has been forfeited" and may not be able to assess and avoid the risks of injury. *Galloway,* 790 N.W.2d at 257. The Court notes that in the absence of a parent "even if the child is uncomfortable with some aspect of the activity or senses a risk of injury while participating in the activity, the child may or may not have the ability to remove herself from it. The child's ability to avoid the risk of injury will vary greatly, depending on the age and maturity of the child, the type of activity, her access to a phone, the personality and competence of the people supervising the activity, and other factors." *Id.* at 258. However, the Court ignores the fact that a parent is in the best position to know whether the child has access to a cell phone, the maturity, personality, and information to successfully remove themselves from a risky activity. The Court also fails to explain why a the release of a child's cause of action should be invalidated when a parent attends an activity and can remove the child from any danger.

The *Galloway* majority concludes it is joining a "majority of state courts who have examined the issue and have concluded public policy precludes enforcement of a parent's preinjury waiver of her child's cause of action for injuries caused by negligence." *Id.* at 256, (citing *Apicella v. Valley Forge Military Acad. & Junior Coll.*, 630 F. Supp. 20, 24 (E.D. Penn. 1985); *Fedor v. Mauwehu Council*, 143 A.2d 466, 468 Conn. Super. Ct. (1958); *Kirton v. Fields*, 997 So. 2d 349, 358 (Fla. 2008); *Meyer v. Naperville Manner, Inc.*, 634 N.E.2d 411, 414 (Ill. 1994); *Hojnowski v. Vans Skate Park*, 901 A.2d 381, 386 (N.J. 2006); *Fitzgerald v. Newark Morning Ledger Co.*, 267 A.2d 557, 558 (N.J. Law Div. 1970); *Rogers v. Donelson-Hermitage Chamber of Commerce*, 807 S.W.2d 242, 245 (Tenn. Ct. App. 1990); *Munoz v. II Jaz Inc.*, 863 S.W.2d 207, 209-10 (Tex. App. 1993); *Hawkins ex rel. Hawkins v. Peart*, 37 P.3d 1062, 1066 (Utah 2001); *Scott ex rel. Scott v. Pac. W. Mountain Resort*, 119 Wash.2d 484, 834 P.2d 6, 10-11 (1992)). However, the *Galloway* Court ignores that in both Florida and New Jersey only parental waivers of a child's claim made to a commercial entity are invalid. *See Kirton*, 997 So.2d at 358; *Hojnowski*, 901 A.2d at 38. Thus, courts in two of the six states in the "majority" would have upheld the release at issue in *Galloway*, which was given in connection with Galloway's participation in a non-commercial, publicly funded program providing a free academic skills program to low-income high school students or students from families in which neither parent or guardian holds a four-year degree. *See About Classic Upward Bound* at http://www.uni.edu/eop/cub/aboutcub.htm. When the holdings of the Florida and New Jersey supreme courts are considered along with the decisions of the supreme courts in California, Massachusetts and Ohio (noted by the Galloway court to be in the minority) upholding parental preinjury releases in "litigation filed against

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schools, municipalities or clubs providing activities for children," it is clear a slight majority of jurisdictions (6-5) would not uphold a parental release given to a non-commercial entity. *Galloway,* 790 N.W.2d at 258. (citing *Hohe v. San Diego Unified Sch. Dist.*, 274 Cal. Rptr. 647, 649 (1990) (upholding a preinjury release executed by a father on behalf of his minor child waiving any claims resulting from the child's participation in a school-sponsored event); *Sharon v. City of Newton*, 769 N.E.2d 738, 747 (Mass. 2002) (holding a parent has the authority to bind a minor child to a waiver of liability as a condition of a child's participation in public school extracurricular sports activities); *Zivich v. Mentor Soccer Club, Inc.*, 696 N.E.2d 201, 205 (Ohio 1998) (concluding a parent may bind a minor child to a release of volunteers and sponsors of a non-profit sports activity).

More alarming than the weak and invalid reasons given by the *Galloway* majority for invalidating prospective releases of minor's claims, is the precedent set by majority in relying on a muddled "public policy" to void an otherwise valid contract when competing public policies warrant enforcement. The competing public interests include freedom of contract, parental authority to make child-rearing decisions, and liability protection to encourage and support youth educational and recreational activities. As correctly noted by Justices Cady and Ternus in their dissent, the court should decide "legal issues based on public policy" only "when the public policy is clear and apparent." *Id.* at 259, (*citing Fitzgerald v. Salsbury Chem., Inc.*, 613 N.W.2d 275, 283 (Iowa 2000) ("The need for clarity in public policy is ... recognized in our reluctance to search too far beyond our legislative pronouncements and constitution to find public policy to support an action.")). The *Galloway* majority opinion conflicts with the only clear legislative pronouncement on a parent's ability to compromise a child's injury claim, Iowa Code sections 633.574 and 565B.7(3), that expressly allow a parent to settle her child's claims for $25,000 or less. Further, as noted by the New Jersey Supreme Court, "volunteer, community, and non-profit organizations involved different policy considerations than those associated with commercial enterprises." *Hojnowski*, 901 A.2d at 389. The Iowa legislature, like the legislative bodies in states who uphold preinjury parental waivers given to non-commercial entities, has expressed a public policy of supporting volunteer, community and non-profit organizations by enacting several laws exempting persons from liability in connection with volunteer activities or public service. *See e.g.*, Iowa Code § 669.24 (exempting unpaid volunteers providing services to state government, agency or subdivision from liability of negligent acts); § 135.24 (exempting certain volunteer health care providers from personal liability in connection with provision of free health care); § 461C.3 (exempting private land owners who open land for recreational purposes from duty to keep premises safe or warn of dangerous conditions); § 613.17 (exempting persons who render emergency assistance free of charge from liability); *see also Hojnowski*, 901 A.2d at 389; *Zivich*, 696 N.E.2d at 204-05.

Justices Cady and Ternus are correct that "whether it is imprudent as a matter of law for a parent to waive legal liability on behalf of a child as a condition for the child's participation in an educational field trip is a matter for the legislature, not judges." *Galloway,* 790 N.W.2d at 259. The majority also acknowledges that it is the legislature who should determine whether parental waivers are enforced. After outright refusing to "believe opportunities for recreational, cultural, and educational activities for youths" would be compromised by its ruling, the majority acknowledges that if it has "misapprehended the public policy considerations at work on this issue, the political branches of our government will adopt a different rule." *Id.*

The Iowa General Assembly should accept this invitation by the Iowa Supreme Court to legislatively abrogate the *Galloway* decision. The Iowa legislature should support the numerous non-profits, governmental and educational entities operating with limited resources by passing legislation that will allow them continue to provide services to Iowa youth without fear that a liability claim will bankrupt their organizations. The General Assembly should restore to Iowa's parents the child-rearing discretion and authority the *Galloway* decision took away from them.

Until the legislature takes such action, organizations providing services to youth should consider the additional costs they could incur from a claim for a minor's injury. It should also be noted that the court did not invalidate provisions requiring a parent to indemnify an organization for injuries to a child. Entities may still seek to enforce indemnification provisions in existing releases and may continue to require parents to sign indemnification provisions as a condition of the child's participation in the activity.

Borgman v. Kedley and Wild Rose Clinton, LLC: Southern District of Iowa Upholds Release Against Numerous Attacks

While the Iowa Supreme Court has invalidated parental releases of their children's claims, Magistrate Ross Walters of the United States District Court of Southern District of Iowa recently upheld an adult's release of liability against numerous challenges. Ruling on Defendants' Motions for Summary Judgment, *Borgman v. Kedley and Wild Rose Clinton, LLC*, 3:09-cv-00062-RAW, (Sept. 15, 2010). Magistrate Walters granted summary judgment to Wild

[1] Borgman has appealed Magistrate Walter's ruling to the Eighth Circuit Court of Appeals.

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Rose Clinton, ruling that Borgman had released her claims against the casino.[1]

The release at issue in *Borgman* is contained in a 2005 self-exclusion form signed by Borgman after she was discovered gambling at the casino in violation of a 2002 self-exclusion request, by which she had voluntarily barred herself from the casino, then being operated as the Mississippi Belle II. *Id*. at 6-7. After she was discovered gambling in 2005, Ms. Borgman claimed she believed she could "undo" the first self-exclusion. *Id*. at 6. She was told she could not. *Id*. Ms. Borgman was asked to sign another self exclusion form and when she did she was paid a $1,400 jackpot she had won while violating the 2002 self-exclusion request. *Id*. The 2005 self-exclusion notified Ms. Borgman that she would subject to arrest if she entered the casino and contained the following release:

> I will not seek to hold the Casino liable in any way should I continue gambling at the casino despite this exclusion request. I agree to indemnify the Casino for any liability the casino may incur relating to this request. Specifically, I, for myself, my family members, heirs, and legal representatives hereby release and forever discharge the Casino and all of its direct and indirect subsidiaries, its partners, agents, employees, officers, affiliates, directors, successors, and assigns, and those with whom the Casino may lawfully share information regarding this exclusion, including the Iowa Racing and Gaming Commission, from any and all claims in law or equity that I now have or may have in the future against any or all of the Released Parties arising out of, or by reason of, the performance or non-performance of this Self Exclusion Request, or any other matter relating to it, including the release of information contained in this form. I further agree, in consideration for the Released Parties efforts to implement my exclusion, to indemnify and hold harmless the Released Parties to the fullest extent permitted by law for any and all liabilities, judgments, damages, and expenses of any kind, including reasonable attorneys' fees, resulting from or in connection with the performance or nonperformance of this self-exclusion request.

Id. at 6-7. Borgman claims she did not read the 2005 form before signing it. *Id*. at 7.

In 2006, Wild Rose Clinton purchased all the assets and property of the Mississippi Belle II and assumed a number of its liabilities. *Id*. In 2008, the casino was reopened as the Wild Rose Casino and Borgman was discovered on the property when she attempted to cash a check. *Id*. at 8-9. Borgman was arrested for trespass by DCI Agent Kedley after it was determined she had signed two prior self-exclusion requests. *Id*. at 10-11. Borgman sued both Agent Kedley and Wild Rose for civil rights violations and false arrest and imprisonment. *Id*. at 1.

Wild Rose moved for summary judgment claiming, among other things, that the release contained in the 2005 self-exclusion barred Borgman's claims. *Id*. at 22. In her resistance, Borgman claimed the release was not valid because "(1) she did not read the 2005 self-exclusion form and thought she could "undo" its effect; (2) she was coerced because the casino would not pay the $1,400 jackpot she had won in June 2005 unless she signed the form; (3) there was no consideration for the release; (4) the evidence is insufficient to support the claimed assignment of the self-exclusion document to the Wild Rose and Ms. Borgman was not aware of the assignment; and (5) Wild Rose is estopped from enforcing the release because it allowed Ms. Borgman to cash several checks before the date in question." *Id*. at 23.

Magistrate Walters found none of Ms. Borgman's arguments persuasive and granted summary judgment for Wild Rose.[2] *Id*. at 28. Walters first noted that Ms. Borgman's alleged failure to read the self-exclusion did not invalidate the release because, under Iowa law, absent fraud or mistake, ignorance of the contents of a release would not negate its effect. *Id*. at 23-24 (citing *Huber*, 501 N.W.2d at 55). Ms. Borgman was not subject to fraud and her unilateral mistake as to the "undoability" of the release did not make the release unenforceable. *Id*. at 24-25 (citing *Dept. of Human Servs., ex rel. Palmer v. Unisys Corp*., 637 N.W.2d 142, 150 (Iowa 2001)).

Nor was Borgman coerced by the casino's requirement that she sign the 2005 self-exclusion prior to receiving the jackpot she won while violating the 2002 exclusion. *Id*. at 25. The casino "was not obliged to pay the $1,400 jackpot to Ms. Borgman… and Ms. Borgman's execution of the 2005 self-exclusion thus was not the product of a wrongful or unlawful threat … nor [were] the elements of economic duress present." *Id*. (citing *Blackford v. Prairie Meadows Racetrack and Casino*, 778 N.W.2d 184, 189-90 (Iowa 2010); *In re Marriage of Shanks*, 758 N.W.2d 506, 512 (Iowa 2008); *City of Asbury v. Iowa City Dev*. Bd., 723 N.W.2d 188, 200 (Iowa 2006)). Walters found Borgman had a reasonable alternative to forego the jackpot to which she had no right. *Id*.

Walters also rejected Borgman's claim that the 2005 self-exclusion was not supported by consideration. *Id*. at 26. The Ruling

2 Agent Kedley was also granted summary judgment in the same ruling on different grounds.

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notes that not only does Iowa law create a presumption that a written and signed agreement is supported by consideration, but the release itself identified "the released parties efforts to implement the exclusion" as consideration supporting the release. *Id.* (citing *Margeson v. Artis*, 776 N.W.2d 652, 656 (Iowa 2009)). Further, payment of the $1,400 jackpot could also be consideration for the release. *Id.*

Despite Ms. Borgman's contentions otherwise, Walters also found the self-exclusion was an ordinary business contract that was assignable under Iowa law. *Id.* (citing *Des Moines Blue Ribbon Distribs., Inc. v. Drewys Ltd.*, 129 N.W.2d 731, 738-39 (Iowa 1964)). The release provision expressly included "assigns" as a released party, indicating "assignment was contemplated by the parties and not restricted." *Id.* Ms. Borgman was not required to consent to the assignment. *Id.* The court also found the agreement "was in fact assigned" under the purchase agreement, which assigned all "general business records, written information … and documents to the extent relating to the Business," and "[a]ll books, files, documents and records of any type, and in any format relating to the operation of the Business." *Id.* at 27.

Finally, Magistrate Walters found that Wild Rose was not estopped from enforcing the release because Ms. Borgman had cashed checks at the casino on two earlier occasions. *Id.* The court found the cashing of Ms. Borgman's checks because her identity as an excluded person has not yet been entered into the casino's database "cannot reasonably be seen as the kind of unequivocal and decisive relinquishment of rights which would support estoppels by abandonment of contract." *Id.* (citing *Iowa Glass Deport, Inc. v. Jindrich*, 338 N.W.2d 376, 380 (Iowa 1983)).

Because there was "no genuine issue of material fact about the scope, validity and enforceability of the release," the court found Borgman had released Wild Rose as Mississippi Belle's "successor from liability on her constitutional and common law false arrest claims associated with the casino's attempt to enforce the exclusion." *Id.* at 28. Walters entered judgment for Wild Rose Clinton. Borgman has appealed the matter to the Eighth Circuit Court of Appeals and has made the same arguments regarding the validity of the release in her appellant's brief. Wild Rose expects the Eighth Circuit will affirm Magistrate Walter's ruling.

IDCA SCHEDULE OF EVENTS

September 15–16, 2011

47th 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

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MESSAGE FROM THE PRESIDENT

Stephen J. Powell

The health and well-being of any organization, including the IDCA, is largely dependent on the vitality, energy and diversity of the organization's members. It was with that thought in mind that I determined that the President's Letter for this issue of the Defense Update would touch upon the continuing need of the IDCA to attract new members in order to maintain and grow the quality and relevance that the IDCA has brought to its membership for almost five decades.

Since its founding in 1964, the IDCA has grown to over 300 members. There are currently 324 members. As an organization, we have been extremely fortunate to have selected persons for membership who have demonstrated a genuine concern for the Defense Bar as well as exemplifying outstanding legal talent, high moral and professional standards.

In the February 2011 Edition of the Iowa Lawyer, ISBA President Frank Carroll made several interesting observations about diversity and inclusiveness. I would highly recommend to our membership that each one of us take the time to read those comments as I believe they have relevance to our mission at the IDCA. I think that we can all agree that every one of us should renew our commitment to advance the representation of minorities and women in the IDCA as well as the legal profession in general. Our organization's statistics, much like the statistics of the Iowa State Bar Association, show that less than 1% of the IDCA membership is nonwhite. There are currently 72 women that are members of IDCA. This means that approximately 23% of our membership is women.

Past President Jaki K. Samuelson was the first woman president of the Iowa Defense Counsel Association in 1997-1998. She was followed by Sharon Greer in 2004-2005, Martha Shaff in 2007-2008 and Megan Antenucci in 2008-2009.

Megan Antenucci currently serves as the Regional Representative to DRI. She is also providing leadership in the newly formed Women in the Law Committee, which was established by DRI as a formal committee approximately one year ago and currently has more than 250 members.

The mission of the Women in the Law Committee is to provide a forum for female lawyers to work together to develop and advance their careers and to promote the status of women involved in defending the interests of business and individuals in litigation.

The Women in the Law Committee focuses on a number of goals which would include the following:

- Providing opportunities to develop and strengthen personal and professional relationships to facilitate business growth and development;
- Assisting in the career advancement of female attorneys through education, training and mentoring;
- Retaining and promoting female members by offering a forum for leadership and professional development …;

I would ask that each one of us take a moment to consider the promotion of IDCA to potential new members. It is clear that the future of IDCA is dependent upon what each of us does individually to seek out and encourage a diverse pool of defense lawyers who can benefit from and expand upon the opportunities that the IDCA and sister organizations such as the DRI can provide to defense lawyers of different gender, race, temperament, talents, and convictions.

LANGWITH V. AMERICAN NATIONAL GENERAL INS. CO. – A TEST FOR DETERMINING THE SCOPE OF DUTY OF INSURANCE AGENTS

By: Benjamin J. Patterson, Lane & Waterman LLP, Davenport, Iowa

Benjamin J. Patterson

I. INTRODUCTION

Liability for damages and a lack of insurance coverage for those damages is a two-part recipe that inevitably leads to panic and creative lawyering. Certainly the point can be made that over the years, as insurance policies have evolved to keep pace with the law, they have become more complex with various limitations and exclusions to coverage. The result is the uninsured looking for alternative legal theories to obtain coverage or recoup uninsured damages, such as the "reasonable expectations doctrine." *See* Bituminous Casualty Corp. v. Sand Livestock Systems—*The Absolute Pollution Exclusion and The Reasonable Expectations Doctrine*, by Thomas D. Waterman and Benjamin J. Patterson, Defense Update, Vol. XVIII, No. 4 (Fall 2008).

Another theory that often emerges in these cases is the liability of the insurance agent for failing to procure coverage or failing to advise the client about the lack of, and need for, additional coverage. Although this type of claim is not a novel one, the recent Iowa Supreme Court case of *Langwith v. American Nat'l General Ins. Co.* made some significant change in the law regarding an insurance agent's duty to their insurance client. This article discusses the liability of insurance agents both before and after the *Langwith* decision. In particular, this article examines what changes were made by *Langwith*, and perhaps just as important, what was left unchanged.

II. *COLLEGIATE MANUFACTURING AND SANDBULTE V. FARM BUREAU MUTUAL INSURANCE*

Prior to *Langwith*, Iowa courts and practitioners relied primarily on two key Iowa Supreme Court decisions when analyzing negligence claims against insurance agents. Because these decisions are essential for a complete understanding of *Langwith* and its effect, a preliminary discussion of each is necessary.

In *Collegiate Mfg. Co. v. McDowell's Agency, Inc.*, 200 N.W.2d 854 (Iowa 1972), plaintiff sued its insurance agent and his agency following a fire at plaintiff's building claiming the agent was negligent by failing to provide adequate insurance coverage. *Id.* at 856. For many years prior to the fire, the agent handled most of plaintiff's insurance problems. *Id.* Plaintiff relied heavily on the agent's expertise to handle all the insurance affairs of the company and placed complete confidence in him. *Id.* On various occasions, the agent contacted plaintiff with suggestions for additional or expanded coverage. *Id.* These suggestions were usually followed by plaintiff. *Id.* One such suggestion was for plaintiff to obtain an inventory reporting policy, which plaintiff did. *Id.* The damage caused by the fire, however, exceeded the limits of the inventory policy by $114,000. *Id.* After a jury verdict in favor of the defendants, plaintiff appealed, arguing the jury instructions did not adequately present its theory of the case. *Id.*

The *Collegiate* Court began its analysis by setting forth the general duty of care owed by an insurance agent: "Generally, an agent owes his principal the use of such skill as is required to accomplish the object of his employment. If he fails to exercise reasonable care, diligence, and judgment in this task, he is liable to his principal for any loss or damage occasioned thereby." *Id.* at 857. The court acknowledged that this "general rule may be altered, either to limit or enlarge the ordinary duties, by agreement of the parties." *Id.*

Reviewing the evidence, the court concluded there was no evidence of any arrangement or agreement that would enlarge the agent's duty beyond the general duty. *Id.* at 857-58. Specifically, the court gave little weight to the fact that plaintiff "relied on defendant, had great confidence in him, and frequently followed his advice on insurance matters" because "this is usually the case." *Id.* at 858. The court concluded "[t]here was no evidence of any agreement, express or implied, that defendant was to assume responsibility far beyond that which would normally attach to his conduct as plaintiff's agent. The principal-agent relationship cannot be so drastically expanded unilaterally." *Id.* Importantly, the *Collegiate* Court did not set forth a test for what circumstances will give rise to an expanded agreement—just that the facts in that case were insufficient. *Id.*

A dozen years later in *Sandbulte v. Farm Bureau Mut. Ins. Co.*, 343 N.W.2d 457 (Iowa 1984), the Iowa Supreme Court discussed the circumstances that give rise to an expanded duty beyond the general duty set forth in *Collegiate*. The genesis of the *Sandbulte* case was an automobile accident involving a truck driven by the insureds' son, Wendell. *Id.* at 460. The accident resulted in a personal injury suit against Wendell and his father. *Id.* There was no dispute that Wendell was liable for the accident. *Id.* At the time, the Sandbultes had an automobile policy with a $50,000 limit and a farm liability policy with a $300,000 limit. *Id.* Farm Bureau issued both polices. *Id.*

A dispute arose between the Sandbultes and Farm Bureau regarding coverage for the accident under the farm liability policy. *Id.* Farm Bureau filed a declaratory judgment action, seeking a decla-

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ration that there was no coverage under the farm policy. *Id*. at 461. After Farm Bureau filed its declaratory judgment action, the Sandbultes settled the personal injury suit for $375,000. *Id*. In *Farm Bureau Mut. Ins. Co. v. Sandbulte*, 302 N.W.2d 104 (Iowa 1981), the Iowa Supreme Court held that the farm policy did not provide coverage. *Id*. Although Farm Bureau tendered the $50,000 from the auto policy, the Sandbultes' farm was eventually sold at a sheriff's sale to satisfy the judgment. *Id*.

The Sandbultes then filed suit against Farm Bureau and its two agents, alleging the agents breached an implied expanded agency agreement to "'advise plaintiffs of the extent of their liability insurance coverage, and suggest and implement for plaintiffs proper, complete and adequate liability insurance coverage.'" *Id*. The trial court granted summary judgment for the agents, holding plaintiffs "'failed to show as a matter of law any duty or breach of duty to perform in an expanded agency relationship, or of any duty to the Plaintiffs in the acquisition of insurance.'" *Id*.

In their appeal of the summary judgment ruling in favor of the agents, the Sandbultes cited *Collegiate* for the proposition that "'there *could* have been delegated to defendant [insurance agent] the burden of deciding for plaintiff both the type and amount of insurance to be provided . . ..'" *Id*. at 464 (emphasis in original). The court recognized that under *Collegiate*, the Sandbultes' claim would, "require an 'agreement or arrangement which would enlarge defendant's duty beyond the general duty an agent owes his principal.'" *Id*. (quoting *Collegiate*, 200 N.W.2d at 857-58). Expanding on the *Collegiate* decision, the court stated

> An expanded agency agreement, arrangement or relationship, sufficient to require a greater duty from the agent than the general duty, generally exists when the agent holds himself out as an insurance specialist, consultant or counselor and is receiving compensation for consultation and advice apart from premiums paid by the insured.

Id. (citing *Hardt v. Brink*, 192 F. Supp. 879, 880-81 (W.D. Wash. 1961); *Nowell v. Dawn-Leavitt Agency, Inc*., 617 P.2d 1164, 1168 (Ariz. Ct. App. 1980); 16A Appleman, Insurance Law & Practice § 8836, at 64-66 (1981)).

In support of their contention that an expanded agency relationship existed, the Sandbultes relied on the fact that Dennis Sandbulte asked the agent for "sufficient coverage" on his automobile and that he was assured his auto policy provided "sufficient coverage." *Id*. at 465.[1] Concluding that "merely asking for 'sufficient coverage' is an insufficient factual basis for asserting the existence of an expanded agency agreement," the court reasoned that "this exchange . . . is the type of conversation that usually takes place within the context of the general principal-agent relationship. Purchasers of insurance generally seek 'sufficient coverage.'" *Id*. "To permit a conversation such as this to serve as the basis for an issue of fact leading to a finding of an expanded principal-agent relationship would in substance make the agent a blanket insurer for his principal." *Id*.

Arguably, the court's decision was limited to holding that merely asking for "sufficient coverage" did not create an expanded agency agreement and the court's discussion of when an expanded agency agreement "generally" arises, *i.e*., "when the agent holds himself out as an insurance specialist, consultant or counselor and is receiving compensation for consultation and advice apart from premiums paid by the insured," was merely *dicta*. Nonetheless, practitioners, and even some courts, have applied the *Sandbulte* analysis as the test for determining what circumstances give rise to an expanded agency relationship. *See Brandt v. Geico General Ins. Co*., 3 F.3d 1172, 1173 (8th Cir. 1993) ("Under Iowa law, the duty to provide advice about insurance coverage exists only when the insurance counselor holds himself out as an insurance specialist and receives compensation, apart from the insurance premiums, for consultation and advice." (citing *Sandbulte*)); *see also Langwith v. American Nat'l General Ins. Co*., 793 N.W.2d 215, 221 (Iowa 2011) ("Moreover, the circumstances under which an expanded agency agreement could arise were narrowly circumscribed in *Sandbulte* . . .").

III. *LANGWITH V. AMERICAN NATIONAL GENERAL INS. CO.*

In *Langwith v. American Nat'l General Ins. Co*., the court overruled *Sandbulte* "to the extent it limits an expanded duty to those cases in which the agent holds himself out as an insurance specialist, consultant, or counselor and receives compensation for additional or specialized services." 793 N.W.2d at 223-24. Similar to *Sandbulte*, the *Langwith* case involved an automobile accident caused by the Langwiths' son, Ben. *Id*. at 217. Prior to the accident, the Langwiths carried an auto policy with a $250,000 limit and an umbrella policy with a $3,000,000 limit. *Id*. Both polices were issued by American National through their agent, Janet Fitzgerald. *Id*.

In 2003, Ben's license was suspended, which prompted American National to cancel Ben's coverage under the auto policy. *Id*.

[1] The court also noted the Sandbultes purchased insurance from the defendant agents for several years and received satisfactory service from them. *Id*. at 465. The court was not persuaded by this fact, holding that "this type of relationship does not suggest or imply the existence of an expanded agency agreement." *Id*. (citing *Collegiate*, 200 N.W.2d at 858).

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American National also required the Langwiths to sign a driver exclusion form for Ben under the umbrella policy to avoid cancellation of that policy. *Id.* After Ben's license was reinstated, the Langwiths discussed coverage for Ben with Fitzgerald. *Id.* The Langwiths testified that they asked Fitzgerald "what [they] could do about Ben." *Id.* at 225. At Fitzgerald's suggestion, the Langwiths purchased a high-risk auto policy for Ben. *Id.*[2] There was no discussion about the driver exclusion on the umbrella policy. *Id.*

In July 2006, Ben was involved in an accident while driving a Suburban titled in his father's name. *Id.* at 217. A passenger in the Langwith vehicle was severely injured and subsequently filed suit against Ben and his father under Iowa's owner liability statute, Iowa Code § 321.493. *Id.* American National acknowledged coverage under the high-risk policy, but denied coverage under the umbrella policy based on the driver exclusion. *Id.* As a result, the Langwiths filed suit against Fitzgerald, claiming she was negligent in "failing to disclose that the driver exclusion in the umbrella policy continued after Ben's license was reinstated" and "failing to advise the Langwiths that [the father] could avoid all personal liability for Ben's driving by transferring title to the Suburban to Ben." *Id.* The Langwiths alleged American National was vicariously liable for Fitzgerald's negligence. *Id.*

Relying on *Sandbulte*, the district court granted summary judgment against the Langwiths on both claims, holding Fitzgerald did not owe a duty beyond the general duty to procure the insurance requested by the Langwiths, Fitzgerald did not owe a duty to advise the Langwiths regarding coverage under the umbrella policy, and Fitzgerald did not owe a duty to render risk-management advice. *Id.* at 218. The Langwiths appealed.

The Supreme Court affirmed the summary judgment on the Langwiths' claim that Fitzgerald failed to advise them they could avoid liability by transferring title to the Suburban to Ben's name. *Id.* at 226-27. The court reasoned that "[t]here is a material distinction between insuring risk and avoiding risk, and there are no circumstances present here that support a finding the parties agreed Fitzgerald would advise the Langwiths on risk avoidance." *Id.*[3]

The court reversed summary judgment, however, on the issue of coverage under the umbrella policy. In doing so, the court began its analysis by reviewing the *Collegiate* and *Sandbulte* decisions. In reviewing *Collegiate*, the court reiterated the general rule that an insurance agent owes his principal the use of such skill as is required to accomplish the object of his employment. *Id.* at 219. In reviewing *Sandbulte*, the court quoted the language addressing the circumstances giving rise to an expanded agency agreement, and acknowledged that the *Sandbulte* Court rejected the notion that such an expanded agency relationship could be established solely by proof of a long-standing relationship between the insurance agent and his client. *Id.*

The Langwiths argued that a later decision, *Humiston Grain Co. v. Rowley Interstate Transportation Co.*, 512 N.W.2d 773 (Iowa 1994), "casts some doubt on the continuing validity of the Sandbulte requirements for expanding the duty owed by an insurance agent to his client." *Id.* Specifically, the Langwiths contended that "the court in *Humiston Grain Co.* discarded the requirements for an expanded agency duty 'without specifically saying so . . . and simply held that agents must adhere to the prevailing "standard of care" for insurance agents.'" *Id.* at 220. Rejecting this contention, the court noted that the *Humiston* case presented the issue of whether expert testimony was required to prove the agent's negligence. *Id.* at 219. Because the claim in *Humiston* was not a simple case where the agent "was directed to procure specific insurance and failed to do so," the court held that expert testimony was required to prove the agent's breach of duty. *Id.* at 220.

The court declined to read *Humiston* as suggested by the Langwiths:

> We decline to read into our decision in *Humiston Grain Co.* the sweeping changes suggested by the plaintiffs. Moreover, we think these three cases can be reconciled rather easily: *Collegiate Manufacturing Co.* and *Sandbulte* discuss the circumstances under which an insurance agent owes a more expansive duty to a client than the general duty to procure the requested insurance, and *Humiston Grain Co.* and Restatement (Second) of Torts §299A, cited in that decision, define the standard the care that applies to the agent's exercise of his or her duty and how a breach of that standard must be proved.

The court clarified that the question presented in *Langwith* was "the scope of the duty owed by an insurance agent to his client, not the standard by which performance of that duty is judged." *Id.* at 221. The result of the *Collegiate* and *Sandbulte* decisions "was to limit an agent's obligation to procurement of the coverage requested by the client, relieving the agent of any duty to advise his client of the kinds and amounts of insurance that would protect his client's insurable interests unless there was evidence of an expanded agency agreement." *Id. Sandbulte* added to this general rule by "narrowly circumscribing" "the circumstances under which

2 Fitzgerald's first suggestion was to "[g]et him a bike." *Id.* at 227, n.10.

3 The court was not persuaded by the Langwiths' argument that Fitzgerald's initial suggestion to "[g]et [Ben] a bike" amounted to risk avoidance advice. *Id.* at 227, n.10.

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an expanded agency agreement could arise." *Id.*

Relying heavily on the Restatement (Third) of Agency, the court concluded that a "more flexible method of determining the undertaking of an insurance agent is appropriate." *Id.* This new flexible approach was accomplished by the court's holding "[t]hat it is for the fact finder to determine, based on a consideration of all the circumstances, the agreement of the parties with respect to service to be rendered by the insurance agent and whether that service was performed with the skill and knowledge normally possessed by insurance agents under like circumstances." *Id.* at 222. The court instructed that some of the circumstances that may be considered by the fact finder in determining the undertaking of the insurance agent include:

- the nature and content of the discussions between the agent and client;
- the prior dealings of the parties, if any;
- the knowledge and sophistication of the client;
- whether the agent holds himself out as an insurance specialist, consultant, or counselor; and
- whether the agent receives compensation for additional or specialized services.

Id.

Finally, the court held that the client bears the burden of proving an agreement to render services beyond the general duty to obtain the coverage requested. *Id.* at 223. Importantly, the court reaffirmed that "[i]n the absence of circumstances indicating the insurance agent has assumed a duty beyond the procurement of the coverage requested by the client, the insurance agent has no obligation to advise a client regarding coverage or risk management." *Id.* In instituting this "flexible" approach, the court expressly overruled the *Sandbulte* decision "to the extent it limits an expanded duty to those cases in which the agent holds himself out as an insurance specialist, consultant, or counselor and receives compensation for additional or specialized services." *Id.* at 223-24.

Applying this new approach, the court held that summary judgment was inappropriate on the Langwiths' claim regarding coverage under the umbrella policy. *Id.* at 225-26. Specifically, the court noted the following facts as creating a genuine issue of material fact with respect to the Langwiths' claim that Fitzgerald should have told them that the driver exclusion remained on the umbrella policy:

- The Langwiths had purchased nearly all their insurance policies through Fitzgerald for ten to twelve years;
- Dennis Langwith had several conversations with Fitzgerald with respect to property insurance and general liability insurance on his business and business properties, as well as with respect to liability insurance on his business vehicles;
- Susan Langwith testified that their relationship with Fitzgerald was based solely upon the Langwiths' insurance liability and needs and that Fitzgerald gave the Langwiths advice on insurance matters, which they would usually follow;
- When Ben lost his driver's license, Susan called Fitzgerald to have him removed from their automobile liability policy and at the same time, Fitzgerald asked the Langwiths to sign an exclusion on their umbrella policy for any liability arising from Ben's operation of any vehicle in order to avoid cancellation of the umbrella policy;
- Once Ben's license was reinstated, Susan met with Fitzgerald at her office and asked her "what we could do about Ben." Susan testified she meant "how can we cover him? How can we provide liability coverage that protects him and all of us?" Susan said she "was asking for Fitzgerald's professional advice";
- Fitzgerald told Susan the Langwiths could get a high risk policy for Ben with limits of $250,000, which they did; and
- Although Susan and Fitzgerald did not discuss the umbrella coverage, the Langwiths assumed the umbrella policy covered Ben's driving once his license was reinstated. Fitzgerald did not inform the Langwiths that the driver's exclusion had been removed from the umbrella policy, nor did she tell them it had not been removed.

Id. at 224-25.

Based on all of the above, the court held that "[a] fact finder could conclude from Susan's inquiry regarding 'what [they] could do about Ben,' that she was seeking Fitzgerald's professional guidance regarding liability coverage that would protect him and the Langwiths." *Id.* at 225 (internal quotations omitted). The court further held that "[a] fact finder could also conclude Fitzgerald understood or should have understood the nature of this request and that she responded by finding an automobile liability policy to insure Ben." *Id.* at 225-26. In summary, "a fact finder could find that the parties had an implied agreement that Fitzgerald would advise the Langwiths with respect to the liability coverage that could or should be put in place to protect Ben and his parents, including umbrella liability coverage." *Id.* at 226.

IV. APPLYING THE LANGWITH TEST AND MERRIAM V. FARM BUREAU INS.

To the extent the *Sandbulte* decision was being used to defeat claims against insurance agents where there was no evidence the

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agent was holding herself out as a specialist, consultant or counselor and receiving compensation apart from premiums, the *Langwith* decision is a significant change. Under *Langwith*, claims against agents cannot be summarily defeated simply because the *Sandbulte* circumstances are not present. Rather, the analysis must continue, taking into consideration the discussions, prior dealings and the knowledge and sophistication of the client. *Id*. at 222.

Unquestionably, the *Langwith* test injects uncertainty into the law of insurance agent liability. Moreover, the *Langwith* Court assigned the task of analyzing these considerations and determining the agreement of the parties to the fact-finder. *Id*. Accordingly, one could certainly come away from *Langwith* with the belief that claims against insurance agents will rarely, if ever, be decided in favor of the agent as a matter of law. There are some key points, however, that can be taken from these cases and used effectively in defending these claims.

A. Langwith *Did Not Alter the "General Duty" from* Collegiate Mfg. Co.

As noted, *Collegiate* established the general duty of cared owed by an insurance agent: "Generally, an agent owes his principal the use of such skill as is required to accomplish the object of his employment. If he fails to exercise reasonable care, diligence, and judgment in this task, he is liable to his principal for any loss or damage occasioned thereby." *Collegiate Mfg. Co*., 200 N.W.2d at 857. The *Langwith* Court expressly stated that it was not overruling the *Collegiate* decision and reaffirmed the general duty of care that applies in the absence of an expanded agency agreement. *Langwith*, 793 N.W.2d at 224, n.6. The *Langwith* Court also reaffirmed the rule that "[i]n the absence of circumstances indicating the insurance agent has assumed a duty beyond the procurement of the coverage requested by the client, the insurance agent has no obligation to advise a client regarding additional coverage or risk management." *Id*. at 223; *see also Merriam v. Farm Bureau Ins*., 2011 WL 339177, at *4 (Iowa Feb. 4, 2011). *Langwith* expressly placed the burden of proving an expanded agreement on the plaintiff. *Langwith*, 793 N.W.2d at 223.

Also, *Langwith* only overruled *Sandbulte* to the extent it limited an expanded duty to cases where the agent holds herself out as a specialist, consultant or counselor and receives compensation for additional or specialized services. *Id*. The remainder of *Sandbulte* remains good law, including the court's rejection of the notion that an expanded agency relationship can be established solely on proof of a long-standing relationship between the agent and insured. *Sandbulte*, 343 N.W.2d at 465; *Langwith*, 793 N.W.2d at 219. Likewise, "merely asking for 'sufficient coverage' remains an insufficient factual basis for asserting the existence of an expanded agency agreement." *Sandbulte*, 343 N.W.2d at 465.

B. *The Court Can Decide the Scope of Duty As A Matter of Law.*

As the *Langwith* Court pointed out, the purpose of applying this "flexible" test is to determine "the scope of the duty owed by an insurance agent to his client." *Langwith*, 793 N.W.2d at 221. It is well settled in Iowa that the existence and scope of a duty is a question of law for the court. *See, e.g., Sweeney v. City of Bettendorf*, 762 N.W.2d 873, 880 (Iowa 2009) ("The question of the proper scope of legal duty is a question of law to be determined by the court."); *Thompson v. Kaczinski*, 774 N.W.2d 829, 834 (Iowa 2009) ("Whether a duty arises out of a given relationship is a matter of law for the court's determination."). Accordingly, despite *Langwith's* holding that the fact-finder is to determine the agreement of the parties, *i.e*., the scope of the duty, the argument exists that courts can, and should, determine the scope of the duty owed as a matter of law.

Merriam v. Farm Bureau Ins., 2011 WL 339177, is helpful support for the above proposition. In *Merriam*, the plaintiffs filed suit against their insurance agent and Farm Bureau alleging the agent breached his duty of care by failing to advise and recommend that Timothy Merriam obtain self-employment workers' compensation insurance. *Id*. at *1. The district court granted summary judgment for the defendants and the Iowa Supreme Court affirmed, finding no genuine issue of material fact that there was an expanded agency agreement. *Id*. at *4.

The court applied the *Langwith* considerations to the following facts. The defendant insurance agent started with Farm Bureau in August 2004 and was assigned the Merriams' account. *Id*. at *1. In March 2005, the Merriams met with the agent to discuss obtaining coverage for a second residence they were purchasing. *Id*. During this meeting, the agent also suggested the Merriams could insure their vehicles through Farm Bureau and save money with a "package policy." *Id*. The Merriams inquired about obtaining insurance coverage for their guns, horses, garage and chicken coop. *Id*. They also inquired about a life insurance policy for Timothy's mother. *Id*. During this meeting the agent learned Timothy was a self-employed truck driver and held a million dollar life insurance policy which applied if Timothy was killed in his truck. *Id*. at *2. A few

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weeks after this meeting, Timothy was patching the driveway where he parked his truck. *Id.* While performing this work, a dump truck malfunctioned and severely injured his arm. *Id.* The Merriams then brought suit against the agent, claiming the agent should have advised them that Timothy did not have workers' compensation coverage unless he purchased additional coverage. *Id.*

Applying the *Langwith* factors, the court noted that the relationship between the Merriams and the agent was of short duration. *Id.* at *3. The court also noted there was no evidence the agent held himself out as a specialist or that he received additional compensation from the insurance products he sold the Merriams. *Id.* at *4. The Merriams' primary argument was that the agent, being aware of Timothy's self-employed status and million-dollar life insurance policy, combined with the agent's unsolicited recommendations for other insurance coverage, supports the conclusion that the agent had more knowledge than the Merriams and was holding himself out as a specialist. *Id.* The court rejected this contention, holding that "[t]he fact that [the agent] was a trained and licensed insurance agent with arguably 'superior knowledge as to what insurance products someone in [Timothy's] position would require to be adequately protected from injury or loss' cannot be the basis to find an implied agreement to expand [the agent]'s duty." *Id.* The court reasoned that "[i]f that were the case, every trained and licensed insurance agent would have the duty to provide an assessment of all of an insured's insurance needs, whether requested or not." *Id.*

The *Merriam* decision provides two important points for practitioners. First, it is appropriate, at least in some cases, for the court to apply the *Langwith* test and determine the scope of an agent's duty as a matter of law. Second, the facts of *Merriam*—that the agent had superior knowledge as to what insurance a client needs to be protected and made unsolicited recommendations for additional insurance coverage—are insufficient to establish an expanded agency agreement as a matter of law.

C. *Do Not Forget About Humiston's Expert Witness Requirement.*

In Humiston Grain Co. v. Rowley Interstate Transp. Co., 512 N.W.2d 573 (Iowa 1994), the Iowa Supreme Court classified a failure to procure claim against an insurance agent as one for professional negligence. *Id.* at 575. Accordingly, the court applied well settled principles regarding the need for expert testimony in cases involving claims of professional negligence:

> Because insurance agents are professionally engaged in transactions ranging from simple to complex, the requirement of expert testimony varies from jurisdiction to jurisdiction depending on the nature of the alleged negligent act. At one end of the spectrum are those cases in which an agent negligently fails to procure requested coverage or permits coverage to lapse by failing to advance premiums due. Under these circumstances, commonly understood by laypersons, courts have held that expert testimony regarding the standard of care and its breach is not necessary.
>
> At the other end of the spectrum are cases involving the agent's alleged failure to discern coverage gaps or risks of exposure in more complex business transactions. In such cases, courts have required expert testimony to establish the applicable standard of care.

Id. (citations omitted).

The *Humiston* court concluded that in the case before it, which was "not a case in which [the agent] was directed to procure specific insurance and failed to do so," expert testimony was required. *Id.* at 576. In light of the *Langwith* decision and probable expansion of insurance agents' liability, practitioners should keep in mind *Humiston* and argue the need for plaintiffs to present expert testimony in all but the most basic factual cases.

IDCA Congratulates IDCA Member Thomas Waterman on Appointment to Iowa Supreme Court

Thomas Waterman

Gov. Branstad filled the three vacancies on the Iowa Supreme Court. Those selected include IDCA member Thomas Waterman, Pleasant Valley; Iowa Court of Appeals Judge Edward Mansfield; and District Judge Bruce Zager, Waterloo. Justice Waterman began his tenure in March.