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IOWA DEFENSE COUNSEL ASSOCIATION

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Iowa Consumer Fraud Class Actions: A Status Report and Look Into the Future

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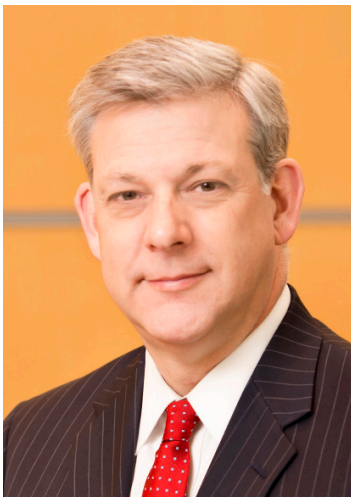

Thomas H. Walton

A result of Iowa's enactment of a consumer fraud private cause of action in 2009 was expected to be a sudden and significant increase in the number of consumer fraud class actions filed in Iowa state courts. That expectation has not come to pass it seems, with a yearly average of only two class actions filed since enactment. However, it may be too early to tell, as Iowa is fertile ground given Iowa's liberal class action requirements and increased scrutiny of class actions by federal courts.

I. IOWA CONSUMER FRAUD ACT CLASS ACTIONS

Iowa Code Chapter 714H became effective July 1, 2009. It provides a private cause of action to any consumer who has sustained actual damages arising from "deception" or any "unfair practice" arising from the sale of consumer merchandise.[1] A class action lawsuit alleging violation of the chapter cannot be filed unless it has been approved by the Iowa Attorney General; however, the Attorney General is obligated to approve the filing of a class action unless the Attorney General determines that the lawsuit is frivolous.[2] It is not expected that this review process will be a significant barrier to filing. The Attorney General has not promulgated any rules or regulations setting forth any guidelines or procedures for this review process.

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WHAT'S INSIDE

IDCA President's Letter

This September we will celebrate the 50th anniversary of the Iowa Defense Counsel Association. This provides a great opportunity to look back and celebrate our accomplishments of the last 50 years. I hope you all will make plans to join us for our annual meeting and dinner celebration at the Jasper Winery on Thursday, September 18, 2014.

As President of the IDCA, I have had the opportunity to attend many DRI meetings designed to help state and local defense organizations like ours plan for the future. This year the focus has been on how SLDOs can attract young members to ensure our continued viability. We learned that while baby boomers still dominate the work force, their numbers are declining due to mortality and retirement. It is estimated that currently 35 percent of most bar organizations' membership is 55 years or older and that most of those members will leave the practice and bar membership in 10 years or less. However, Gen-Y workers, those born between 1982 and 1996, currently represent 80 million workers in our work force. They will represent nearly 40 percent of the work force by 2015!

The DRI is proactively addressing the challenge of this demographic change which has resulted in the number retiring members exceeding the number of new members joining. Our board recognized the IDCA needed to do the same! As a result, during the last two years the IDCA has adopted the following changes to attract new members:

- Developed a first year free membership policy for first time members of all ages;
- Newly minted lawyers benefit from five year graduated membership rates to prevent the cost of membership being an obstacle to joining;
- Developed LinkedIn, Twitter and Facebook pages to allow our tech savvy new members additional communication opportunities for networking, asking questions and sharing experiences;
- Established a Young Lawyers Committee intended to guide the IDCA in enhancing our technical capabilities, our networking opportunities, our community outreach and our diversity from a young member perspective;
- Added an additional young lawyer position to our Board;
- Changed the *Defense Update* by adding young lawyer spotlights and articles written by and of particular interest to young lawyers;
- Approved an overhaul of our website to enhance its capabilities to timely provide information to our members, improve our Listserve to ease communications between our Board, our Executive Director and our members and to better publicize our activities. You will begin to see changes this fall;
- Last, but certainly not least, at the request of our young lawyer members, we have brought back our hospitality room on Wednesday and Thursday nights of the annual meeting. This again will provide more networking opportunities for young and old members alike.

We will continue to provide high quality CLE geared towards the defense lawyer and claims professional at our annual meeting and in our webinars. We will continue to strive to bring value to our membership through the filing of amicus briefs, our legislative program and the educational opportunities we provide.

This is my last letter as President of the IDCA as my term ends in September. I have thoroughly enjoyed my time as your President.

James P. Craig
IDCA President

Thank you for the opportunity to serve. My job was much easier because of a committed and involved Board of Directors and the skills of our Executive Director, Heather Tamminga, and IDCA staff team. I am confident under the future leadership of Christine Conover and Noel McKibbin the IDCA will continue to prosper and be a valuable resource for our members as we embark upon our next 50 years!

Thank you again for your membership.

Very truly yours,

James P. Craig

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The Iowa Attorney General advises the following areas may be sources for future consumer fraud actions, including class actions:

– New and used auto advertising, sales and repair

– Home improvement

– Predatory mortgage lending

– Cellular telephone sales and services

– Satellite television sales and services

– Door-to-door sales

– Telemarketing and sweepstakes

– Misleading charitable solicitation.[3]

The legislation does exclude certain businesses from coverage, which will not be discussed in detail in this article. However, product manufacturers and retailers are not entirely exempt. Product manufacturers and retailers are exposed to consumer fraud claims based upon allegedly defective products.[4] Under Section 714H.4(1)(b), retailers of products may be liable under the Act for false advertising, even if the advertising is provided by the supplier of the product, if the retailer "participated in the preparation of the advertisement or knew or should have known that the advertisement was deceptive, false, or misleading."

Other perhaps unexpected industries are also exposed to consumer fraud claims. For example, in Scenic Builders, L.L.C., v. Peiffer, No. 10-0794, 2011 WL 2078225 (Iowa Ct. App. May 25, 2011), the court held the Act applies to contracts for construction of personal residences. Scenic Builders is the only Iowa appeals court decision considering the Act since its effective date.

II. CLASS ACTIONS APPROVED SINCE 2009

The Iowa Attorney General reports that approximately 100 lawsuits have been filed alleging violation of the Act.[5] The Attorney General has approved for filing ten consumer fraud class actions.[6] The approved class actions have involved unintended accelerations of motor vehicles,[7] lack of licensure to offer certain medical care ("memory care" in a senior center),[8] bed bugs in a senior citizen facility,[9] the practice of medicine without a license (nurses in a pain center),[10] hospitals charging cash-paying patients higher prices than those covered by insurance or government programs,[11] defective window regulators in automobiles,[12] defective building materials,[13] margarine spray labeled "fat free" or as "zero calories,"[14] necklaces and bracelets marketed with alleged health benefits,[15] and antitrust violations by online travel and hotel booking companies.[16]

Of these ten cases, four were filed in state court,[17] four were filed in Iowa federal courts, and two were filed in out-of-state federal courts.[18] Defendants have included product manufacturers,[19] healthcare providers,[20] senior centers,[21] and property owners,[22] among others. The four Iowa state court class actions so far have involved Iowa-based non-exempt businesses that provided a service to many persons that was uniformly defective or in violation of the law in some alleged manner.

One of these class actions that gained the most notoriety was Residents of Elsie Mason Manor v. First Baptist Elderly Housing Foundation, filed in the Iowa District Court for Polk County (No. CVCV008116). On November 8, 2011, the court certified a class of low income residents of two senior living centers based upon an infestation of bedbugs.[23] The claims included a subclass of plaintiffs who alleged violation of Chapter 714H based upon alleged material misrepresentations by the defendants that the rental units were habitable when in fact they were not because of the bedbug infestation.[24] The trial court certified the class despite individualized issues regarding the damages sustained by members of the class.[25] The court held individualized damage claims do not preclude certification if liability issues remained common to the class.[26] The court contemplated that a separate proceeding would be required to determine individual class members' entitlement to damages.[27]

Regarding the consumer fraud claim, the court held the Act did not include a reliance requirement.[28] If reliance had been required, then proof of reliance by each individual would require a highly individualized inquiry that could result in individual questions of law or fact predominating over common question, thus weighing against certification of the class.[29] However, the court stated: "It is clear Chapter 714H contains no express reliance language."[30] The court rejected the defendants' argument that proof of reliance was required by the statute because it did not contain a general rule stating that it was unnecessary to allege or prove reliance, as found in Iowa Code Section 714.16(7), and because the statute did include a causation requirement for damages.[31] The court held the statute was not ambiguous and held the statute's requirement that the consumer must demonstrate loss "as a result of" prohibited conduct did not imply any reliance requirement.[32] Even if the statute were ambiguous, the court, applying rules of statutory construction, held it was reasonable to assume that had the legislature intended proof of reliance as a requirement as found in Section 714.16 to apply in Chapter 714H actions, it would have expressly provided.[33] On appeal, the district court's ruling was affirmed by operation of rule due to a 3-3 vote in the Iowa Supreme Court.[34]

In 2014, the parties settled their bedbug dispute for $2.45 million dollars.[35] This covered compensation for sixty-nine months of infestation involving 279 apartment units.[36] This breaks down to $8,700 per unit in settlement.

III. FEDERAL OR STATE VENUES FOR CLASS ACTIONS

There are incentives to keep a consumer fraud class action in Iowa's state court. Recent trends in federal court have made that venue less attractive to plaintiffs seeking to start class actions. These trends include an increased willingness to resolve factual disputes that overlap with the merits of the plaintiffs' claims at the certification stage, tightened standards requiring judicial findings to support courts' determinations that plaintiffs have met Rule 23 requirements, the insistence on trial plans, clarification of the applicable burden of proof for satisfying Rule 23, and increased scrutiny of expert opinions under Daubert offered during the certification stage.

As a result, Iowa state courts could see an increase in the number of consumer fraud class actions filed alleging violation of Chapter 714H. However, the 2005 Class Action Fairness Act ("CAFA")[37] may counteract attempts to file and keep consumer fraud class actions in Iowa state courts. This act makes it easier to remove class actions to federal court. CAFA creates federal diversity jurisdiction over a class action if there is "minimal diversity"—meaning that at least one class member is a citizen of a different state than one defendant, the proposed class contains at least one hundred members, and the amount in controversy is at least $5 million in aggregate.[38] The Act allows the defendant to remove even if there is an in-state named defendant.[39] A defendant removing the state class action on the basis of CAFA has the burden to establish the elements of CAFA are present by a preponderance of the evidence.[40] Therefore, under CAFA, it is no longer possible for a plaintiff to join a non-diverse defendant to keep the matter in state court. Plaintiffs also cannot stipulate the class has suffered less than $5 million in damages to avoid application of CAFA and removal to federal court.[41]

Because of this expansion of federal court diversity jurisdiction under CAFA, plaintiffs may attempt to fit an Iowa consumer fraud class action within the "local controversy" exception to the act.[42] This exception requires federal courts to decline jurisdiction when the case satisfies four elements:

- More than two-thirds of the class members are citizens of the original forum;
- At least one defendant from whom "significant relief" is sought and whose conduct is a "significant basis" for the claims is a citizen of the original forum;
- The "principal injuries resulting from the alleged conduct or any related conduct of such defendant" occurred in the original forum; and
- In the three-year period preceding the filing of the class action, no other class action has been filed "asserting the same or similar factual allegations against any of the defendants" on behalf of any person.[43]

To maintain state court jurisdiction, plaintiffs may attempt to add a non-diverse defendant, such as a "significant" state-based retailer of a product, in an attempt to meet the local controversy exception requirements. Plaintiffs will have the burden to establish the local controversy exception.[44] The act does not define "significant relief." Other courts have held that whether a class seeks "significant relief" against a defendant is determined by whether the relief sought against that defendant is "significant relative to the relief sought against the other co-defendants."[45] Other courts have looked to the dictionary definition of "significant," which means "important."[46]

Plaintiffs have succeeded in keeping consumer class actions in state court under this exception. In Kaufman v. Allstate New Jersey Insurance Co., 561 F.3d 144 (3rd Cir. 2009), for example, the court remanded a putative class action back to state court based upon CAFA's local controversy exception. In Kaufman, the plaintiffs alleged the defendant violated the state consumer fraud act by not paying "diminished value" insurance claims.[47] One of the named insurance company defendants was a New Jersey citizen. The other two insurance defendants were not. Defendants challenged federal court jurisdiction on the basis that the local defendants' conduct did not form a "significant basis" for the claims asserted.[48] Regarding the requirement that the in-state defendants' conduct must form a "significant basis" of all the claims asserted, the court reasoned that this required it to compare the conduct of the in-state defendant with the alleged conduct of the out-of-state defendant.[49] If based upon this comparison the local defendants' alleged conduct can be characterized as "important" as a basis for the asserted claims, the requirement for the local controversy exception had been met.[50]

The other exception to CAFA is the "home state exception."[51] This exception requires the federal court to decline jurisdiction if two-thirds or more of the members of the plaintiff class and the "primary defendants" are citizens of the original forum state.[52] The term "primary defendants" is not defined by CAFA. Courts have looked to the dictionary definition of "primary," which includes "first and important; chief; principal; main."[53]

For example, in In re Sprint Nextel Corp., 593 F.3d 669 (7th Cir. 2010), the district court granted the plaintiffs' motion to remand the claims to state court based upon the home state exception in CAFA. The plaintiffs were a putative class of Kansas citizens who allegedly paid artificially inflated prices for text messaging service offered by the defendant, a Kansas corporation.[54] Under that exception, the Seventh Circuit concluded the requirement that two-thirds of the plaintiffs be citizens of the forum is viewed in terms of the

composition of the putative class before the court, regardless of whether there may be other class actions filed in other jurisdictions involving the same claims.[55] The court remanded the matter to district court to give the plaintiffs an opportunity to submit evidence that the proposed class satisfied the requirement that at least two-thirds of its members were citizens of the forum state.[56] Relying on these exceptions to avoid removal to federal court under CAFA, plaintiff's counsel may seek to use the new Iowa consumer fraud private cause of action to file class actions in state court involving at least one "significant" or "primary" Iowa defendant and involving largely Iowa citizens.

IV. IOWA'S LIBERAL CLASS ACTION RULE

Another incentive to file consumer fraud actions in Iowa is its liberal class action rules. Iowa rules regarding class actions are not the same as Federal Rule 23. Iowa, by omitting the additional requirements for class certification set forth in Federal Rule 23(b), endorsed a more expansive view of class action availability than under the federal rules. Iowa has adopted the Uniform Class Action Act.[57] That Act does not require a separate inquiry into whether a class action is superior to individual adjudication, as does Federal Rule 23(b).[58] North Dakota, which also adopted the Uniform Class Action Act (Iowa and North Dakota are the only states to have done so), has held that the purpose of its class action rule is "to provide an open and receptive attitude toward class actions."[59]

The Iowa Supreme Court has also observed that the state's class action rules "should be liberally construed to favor the maintenance of class actions."[60] The statutory factors used to guide the trial court's determination as to whether a class action will provide a fair and efficient adjudication of the controversy under the Iowa Act requires only a weighing of competing factors, and no one factor predominates over the others.[61] Further, under Iowa class action rules, the courts are not required to specifically address each of the thirteen factors or find the absence or presence of any of the thirteen factors.[62]

Moreover, whether common questions of law and fact predominate over individual questions is a required finding under the federal class action rules; under the Iowa rule, it is only a factor to be weighed in the balance.[63] While the federal courts accept the proposition that a "rigorous analysis" of the class certification criteria may require some consideration of the merits of the plaintiffs' claims,[64] courts applying the Uniform Act have refused to consider even tangentially the merits of plaintiffs' claims at the class certification stage.[65] Similarly, Iowa has repeated the mantra that it will not inquire into the merits of class action claims.[66] Iowa district courts have broad discretion in considering the factors in Iowa Rule 1.263(1).[67] The Iowa Supreme Court will only require that the trial court came to a "reasoned conclusion" as to whether a class action would permit a fair and efficient adjudication of the controversy.[68] Several recent decisions by the Iowa Supreme Court under the Iowa Rules do not indicate much tightening of Iowa's class certification rules.[69] The court's decision in Anderson Contracting, Inc. v. DSM Copolymers, Inc., 776 N.W.2d 846 (Iowa 2009), however, did encourage trial courts to conduct "a more searching analysis" of class requirements and approved of trial courts resolving "any factual disputes necessary to determine if the class certification requirements are met." [70]

Despite Iowa's more expansive class action rule, the decision of the Iowa Supreme Court in Vos v. Farm Bureau Life Ins. Co., 667 N.W.2d 36 (Iowa 2003), regarding the propriety of the certification of a class of policy holders alleging claims of misrepresentation or fraud, may impact future class certification decisions under the new consumer fraud act. In Vos, the policy holders brought a class action against the defendant life insurance company alleging misrepresentation and fraud arising out of the sale of policies with "vanishing" premiums.[71] The Court affirmed the trial court's de-certification of the class action on the basis that individual questions predominated over common questions.[72] Depending upon future interpretations of the elements of a cause of action for consumer fraud under Chapter 714H—particularly its "proximate cause" element—the Vos decision may be helpful in resisting class certification of consumer fraud claims based upon alleged misrepresentations.

The allegations in Vos were premised on claims of misrepresentation, failure to disclose, and fraud. Such claims may also form a basis for a private cause of action for consumer fraud. Despite the predominance of common issues not being a required criterion for certification of a class under the Iowa rule, the Court in Vos placed significant reliance on it.[73] The Vos Court also appeared willing to at least take a preliminary look at the legal and factual sufficiency of the plaintiffs' claim as part of the certification issue.[74] The Court also sanctioned the trial court's "probe behind the pleading on the issue of predominance."[75] In considering the plaintiffs' claims of misrepre¬sentation or fraud, the trial court determined that questions of justifiable reliance were unique to each member of the putative class and the question of what representations may have been made to putative class members tended to cause individualized issues of fact to predominate over common issues.[76] The court noted that these facts went to an important element of plaintiffs' claims of misrepresentation—justifiable reliance.[77] That required element informed the trial court's finding that individualized issues of fact relating to whether a particular policyholder justifiably relied upon any misrepresentations or omissions precluded certification of the class.[78]

V. CONCLUSION

In conclusion, the creation of a private cause of action in Iowa for consumer fraud has not yet launched a thousand state court class actions as some feared. If and when filings of class actions alleging

violations of the Act pick up, these class actions may be expected to take the following forms:

- State court class actions by Iowa citizens against only Iowa non-exempt defendants;
- State court class actions by Iowa citizens against both diverse and non-diverse defendants that qualify for the "local controversy" or "home state" exceptions to CAFA; and
- State or federal court class actions filed as part of a coordinated multi-state litigation effort against defendants alleging violation of the Iowa Consumer Fraud Act.

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[1] *Iowa Code Section 714H.3.*
[2] *Iowa Code Section 714H.3.*
[3] *Publication of Iowa Attorney General.*
[4] *The retailer immunity provided by Iowa Code Section 668.12 only applies to immunize retailers from claims governed by Iowa's Comparative Fault Act.*
[5] *September 17, 2013, correspondence with William Bruuch, Special Assistant Attorney General, Director-Consumer Protection Division, with attached pleadings.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *November 8, 2011, Ruling on Plaintiffs' Motion for Class Certification, in the Iowa District Court for Polk County*
[24] *Id. at 7.*
[25] *Id. at 11-12.*
[26] *Id. at 13.*
[27] *Id.*
[28] *Id. at 22.*
[29] *Id.*
[30] *Id.*
[31] *Id. at 22-23.*
[32] *Id. at 24.*
[33] *Id.*
[34] *"Bedbug Lawsuit May Produce $2.45 Million Settlement: Des Moines Register; April 24, 2014.*
[35] *Plaintiff's Motion for Order Granting Preliminary Approval of Class Action Settlement, filed March 10, 2014, in the Iowa District Court for Polk County.*
[36] *Id.*
[37] *28 U.S.C. §§ 1332D, 1453, 1711-1715.*
[38] *Plubell v. Merck Inc., 434 F.3d 1070, 1071 (8th Cir. 2006).*
[39] *28 U.S.C. § 1453(b).*
[40] *Larsen v. Pioneer Hybrid Int'l, Inc., No. 4:06-cv-0077-JAJ, 2007 WL 3341698, at *3 (S.D. Iowa Nov. 9, 2007) (involving class action filed in state court alleging violation of Iowa's antitrust law against non-diverse defendant involving in-state purchasers of soy bean seed).*
[41] *Standard Fire Ins. Co. v. Knowles, 133 S. Ct. 1345 (2013).*
[42] *28 U.S.C. § 1332(d)(4)(A).*
[43] *Johnson v. MFA Petroleum Co., 701 F.3d 243, 253 (8th Cir. 2012).*
[44] *Larsen, 2007 WL 3341698, at *6.*
[45] *Evans v. Walter Ind., Inc., 449 F.3d 1159, 1167 (11th Cir. 2006).*
[46] *Caruso v. Allstate Ins. Co., 469 F. Supp. 2d 364, 369 (E.D. La. 2007) (court found local controversy exception established where a non-diverse insurance company held about 7.5% of the property insurance market in the state); Stevens v. Diversicare Leasing Corp., Civil No. 09-6008, 2009 WL 1212488 (W.D. Ark. May 4, 2009) (class action against diverse corporate owner of care center and non-diverse care center administrator fell within CAFA's local controversy exception).*
[47] *Id. at 145.*
[48] *Id. at 152.*
[49] *Id. at 157.*
[50] *Id.*
[51] *Larsen, 2007 WL 3341698, at *6 (court held putative class action plaintiffs failed to show home state exception to CAFA where definition of class potentially included out of state purchasers of soybean seed).*
[52] *28 U.S.C. § 1332(d)(3).*
[53] *Id. at 369.*
[54] *Id. at 671.*
[55] *Id. at 672.*
[56] *Id. at 676.*
[57] *Kramersmeier v. R.G. Dickinson & Co., 440 N.W.2d 783, 876 (Iowa 1989).*
[58] *See Iowa R. Civ. P. 1.261-1.263.*
[59] *Howe v. Microsoft Corp., 656 N.W.2d 285, 288 (N.D. 2003).*
[60] *Comes v. Microsoft Corp., 696 N.W.2d 318, 320 (Iowa 2005).*
[61] *Id. at 288.*
[62] *Id.*
[63] *Comes, 696 N.W.2d at 320 (court held a showing of predominance of common questions of law and fact was not a condition precedent to certification but "is only one of 13 factors to be considered").*
[64] *Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011); Elizabeth M. v. Montenez, 458 F.3d 779, 784 (8th Cir. 2006).*
[65] *Id. at 291-92.*
[66] *Luttenegger v. Conseco Fin. Serv. Corp., 671 N.W.2d 425, 438 (Iowa 2003).*
[67] *Vos v. Farm Bureau Life Ins. Co., 667 N.W.2d 36 (Iowa 2003).*
[68] *Luttenegger, 671 N.W.2d at 437.*
[69] *Staley v. Barkalow, No. 12-1031, 2013 WL 2368825 (Iowa Ct. App. May 30, 2013) (court reversed district court's failure to certify class of tenants alleging common violations of Iowa Uniform Residential Landlord and Tenant Act); Kragness v. City of Des Moines, 810 N.W.2d 492 (Iowa 2012).*
[70] *Id. at 853.*
[71] *Id. at 39.*
[72] *Id. at 54.*
[73] *Id. at 53.*
[74] *Id. at 46.*
[75] *Id. at 49.*
[76] *Id. at 53.*
[77] *Id.*
[78] *Id.*

2014 Iowa Defense Counsel Legislative Report

by IDCA Lobbyists Scott Sundstrom and Brad Epperly, Nyemaster Goode PC

The second session of the 85th Iowa General Assembly convened on January 13, 2014 (the Iowa Constitution requires the legislature to convene on the second Monday of January of each year). Despite numerous assurances by legislators before – and during – the session that this was going to be a short session, for the fourth year in a row the legislative session lasted longer than the per diem payments to legislators (legislators receive per diem payments for 100 calendar days on even years). Additionally, in a most unusual twist, the House and Senate did not adjourn on the same day. The House adjourned on May 1, for a total of 109 legislative days, which was 9 days after legislators' per diem expired. The Senate adjourned the following day, May 2, or 110 legislative days. The Senate adjourned a day after the House in order to take up a resolution authorizing the Senate Government Oversight Committee to issue subpoenas compelling the attendance of witnesses as part of that Committee's ongoing investigations into employment practices by state agencies.

The partisan divide of the legislature remained unchanged in 2014. Democrats controlled the Senate by the same narrow 26 to 24 margin. Top leadership remained the same as well: Majority Leader Mike Gronstal (D-Council Bluffs), President Pam Jochum (D-Dubuque), and Minority Leader Bill Dix (R-Shell Rock). There was one change in membership in the Senate. Kent Sorensen (R-Indianola) resigned his seat after a scandal. Elected to take his seat was then-Rep. Julian Garrett (R-Indianola). Republicans kept their control of the House by the same 53 to 47 margin. The two Republican leaders, Speaker Kraig Paulsen (R-Hiawatha) and Majority Leader Linda Upmeyer (R-Clear Lake), remained the same. House Democrats had a new Minority Leader, Mark Smith (D-Marshalltown) after former Minority Leader Kevin McCarthy (D-Des Moines) resigned in August 2013 to take a job in the Attorney General's office. As a result of Kevin McCarthy's resignation and Julian Garret's election to the Senate, special elections were held for their House seats. Brian Meyer (D-Des Moines) and Stan Gustafson (R-Cumming) won the former McCarthy and Garret seats easily.

The 2014 session, as expected, was not as momentous as the 2013 session. Eying the 2014 elections and confident that the successes of 2013 provided sufficient achievements for campaigns, legislators promised 2014 would be a short session. The first weeks of session seemed to bear out this prediction: the legislative "funnel" deadlines were moved up by a couple of weeks; bipartisan budget targets (i.e., agreed upon spending numbers) were agreed upon in record time; and a distinct bipartisan spirit pervaded the Capitol. Alas, it was not to be. The legislative session became mired down by investigations led by the Senate Government Oversight Committee into state employee hiring and discharge practices and by disagreements over the details in budget bills. The result was not a short session, but one that went 10 days past the expiration of legislators' per diem expenses.

In 2014 we monitored the following legislative activity for the Iowa Defense Counsel Association ("IDCA"):

- 1,256 bills and study bills (study bills are prospective committee bills)
- 70 resolutions
- 598 amendments (amendments can be as simple as changing a single word or number in a bill or can be the equivalent of lengthy, complicated bills in themselves)
- 144 bills passed both chambers

This year we registered on 58 bills, study bills, and resolutions on behalf of the IDCA.

The governor had 30 days after the legislature adjourned (i.e., until June 1, 2014) to approve or veto legislation sent to him in the last three days before adjournment or sent to him after the legislature adjourns. If the Governor does not approve or disapprove a bill within the thirty-day period after the legislature has adjourned it is a "pocket veto" and the bill does not become law. Budget bills are subject to item vetoes, meaning the Governor has the power to veto parts of those bills and allow other parts to become law. This report will state whether each bill referenced has been enacted. Unless otherwise noted, enacted bills take effect on July 1, 2014.

Bills that were not finally acted upon during the 2014 will die and do carry over to the next General Assembly. The first session of the 86th Iowa General Assembly will convene on January 12, 2015.

I. ENACTED LEGISLATION

A. Judicial Branch Funding

1. General Operations

Continuing the tradition of cooperation within the legal community, the IDCA again worked in conjunction with other lawyer groups (the Iowa State Bar Association, and the Iowa Association for Justice), judges, court reporters, and others to seek full funding for Iowa's judicial branch. The judicial branch requested a budget increase

of approximately $5.9 million for FY 2015 (which begins on July 1, 2014). The increase is comprised of the following components:

- Maintaining increased services from FY 2014 (i.e., full time Clerk of Court offices in every county, increased juvenile court staff, additional court reporters, and EDMS transition) -- $4.3 million
- New additional services -- $1.6 million

The efforts of the supporters of full funding for the judicial branch were successful this year. The final judicial branch appropriations bill, **House File 2449**, appropriates $171,486,612 for the judicial branch for salaries of judicial branch employees, which includes the full requested increase for FY 2015. The bill appropriates an additional $3.1 million for witness and jury fees. The bill also included language stating that it was the intent of the General Assembly that the Judicial Branch emphasize the expansion of family treatment courts on a statewide basis. This language was included in response to the Chief Justice's remarks about the importance of family treatment courts during his Condition of the Judiciary speech in January. House File 2449 was **ENACTED**.

2. Judges' Salaries

In 2013, after many years of no increase in pay, all justices, judges, and magistrates received a salary increase of 4.5%. Because the increase in 2013 was not the full amount originally requested, there was some discussion with legislative leadership about further increasing judges' salaries in 2014. It became clear by mid-March that there was not the appetite for the increase, particularly among House Republicans. Consequently, no change in judicial salaries was enacted in 2014.

B. Insurance Agent Liability

House File 398, which concerns the duties of insurance producers, was enacted after two years of extensive lobbying by the insurance industry and IDCA in the face of opposition by the Iowa Association for Justice. The bill addresses concerns that arose from the Iowa Supreme Court's 2013 decision in *Pitts v. Farm Bureau,* where the Court held that claims could be brought against insurance agents for violations of duty to intended beneficiaries of life insurance policies and could be liable for negligent misrepresentation, significantly expanding the potential liability of insurance agents and insurers. Efforts to address the *Pitts* case began in 2013 and continued this session. House File 398 in its final form was the result of hours of discussions with the respective Judiciary Committee chairs in the House and Senate, as well as a contentious conference committee that did not finish its work until after 1:00 a.m. on the final night of the legislative session.

House File 398 does the following:

- Clarifies that insurance producers are generally not in the business of supplying information to others (and thus not subject to claims of negligent misrepresentation) unless they hold themselves out as experts and receive compensation from their clients in addition to commissions from an insurer.
- States that insurance producers have no duty to change the beneficiary on an insurance policy unless clear written evidence of the policyholder's intent to make the change is presented to the producer or the insurer prior to a claim.
- Limits the classes of persons to whom an agent owes duties as a result of an agency relationship: the policy owner, persons in privity of contract with the insurance producer, and the principal in an agency relationship with the producer.

Even though they agreed to passage, several Senators, particularly Senate Judiciary Chair Robb Hogg (D-Cedar Rapids), remained concerned about the provisions in the bill limiting the classes of persons to whom an insurance producer owes duties. That particular issue will likely be revisited next session.

C. "Good Samaritan" Law for Architects

Senate File 2239 provides additional liability protections for architects and professional engineers who provide voluntary professional assistance after a disaster. The purpose of the bill was to ensure that "good Samaritan" architects and professional engineers would not be discouraged from volunteering their services to assist with disaster recovery due to fears of potential liability. The bill does this by amending the Iowa Tort Claims Act (Iowa Code chapter 669) to provide that architects and professional engineers who:

1) voluntarily and without compensation (other than reimbursement of expenses) provide initial structural or building systems inspections for the purposes of determining whether a building is safe for human occupancy at the scene of a disaster; and

2) who are acting at the request and under the direction of the Commissioner of Public Safety and in coordination with the local emergency management commission are considered to be "employees of the state" for purposes of the Tort Claims Act. Senate File 2255 was **ENACTED.**

D. Volunteers on State Lands

House File 2397 directs the Department of Natural Resources to create a program to provide liability protection for nonprofit organizations and individuals working for such organizations who volunteer to provide services for state lands under the DNR's jurisdiction. The DNR will develop, by administrative rules, qualifications and requirements for participating organizations and individuals. Organizations and individuals that qualify for the program will be considered state volunteers for purposes of Iowa

Code section 669.24, which protects volunteers for the state from personal liability. House File 2397 was **ENACTED.**

E. Removal of Clerks of District Courts

Senate File 2313 modifies the procedures for removing Clerks of District Courts. Under current law, a Clerk of a District Court is removed by a majority vote of all district court judges in the judicial district. Senate File 2313 changes the procedure to empower the chief judge to remove the Clerk of Court after consultation with the other district judges in the judicial district. Senate File 2313 was **ENACTED.**

II. LEGISLATION CONSIDERED, BUT NOT ENACTED

The following bills received some amount of consideration this session (either passing one chamber or at least receiving some subcommittee consideration), but were not enacted into law.

A. Statute of Repose for Building Defect Claims

The Master Builders of Iowa and the Iowa Chapter of the American Institute of Architects again sought legislation this session, as they did in 2013 and 2012, to shorten the statute of repose for building defect claims. Iowa currently has a fifteen-year statute of repose, which is among the longest in the nation. **House File 2094** proposed to shorten the 15-year statute of repose. As originally introduced, the bill would have shortened the statute of repose to eight years for claims relating to all types of real property. In an attempt to reduce opposition to the bill, it was amended on the House floor to reduce the statute of repose to 10 years and to limit that change to only nonresidential property (the statute of repose for residential property would have remained at 15 years). The bill passed the House on a largely partisan vote in the fact of intense opposition from the Iowa Association for Justice and the Iowa State Bar Association. The bill was referred to the senate Judiciary Committee, where it died without further action.

The House made another attempt to enact the statute of repose change through an amendment to Senate File 2349, the Rebuild Iowa Infrastructure Fund Appropriations bill. Although the House adopted the amendment, the Senate would not accept it, and it was not included in the final version of the bill.

B. Statute of Limitations for Claims of Sexual Abuse of Minors

Senate File 2109 would have increased the statute of limitations for claims of sexual abuse of minors. Currently, such claims must be brought within one year of the attainment of majority or within four years of discovery of the claim if the discovery occurred after the attainment of majority. The bill would have increased the time periods to bring a claim to 25 years after the alleged victim turned 18, or 25 years after the discovery of the claim if the discovery occurred after the alleged victim turned 18. The bill received emotional support from advocates for victims of child sexual abuse. The Senate passed the bill with little fanfare. The IDCA then determined to oppose the bill based on concerns about the difficulties of defending claims involving conduct that occurred decades earlier and the difficulties of finding witnesses and evidence about such claims. IDCA President Jim Craig appeared before a House subcommittee considering the bill and provided legislators with the IDCA's concerns about the bill. Ultimately, the House Judiciary Committee did not approve the bill and Senate File 2109 did not move forward in the House.

C. Construction Contracts

Senate File 2155 would have created a new Iowa Code chapter entitled the Iowa Fairness in Private Construction Contracts Act to regulate the contractual rights of parties to construction contracts. The bill contained a number of provisions to protect subcontractors against what they viewed as abuses by general contractors. Among other provisions, the bill would have: (1) prohibited provisions in contracts allowing general contracts to pay subcontractors only after the general contractor had been paid; (2) banned contractual provisions waiving litigation rights; (3) required payments due to general contracts be made within 30 days and payments due to subcontractors be paid within 10 days. The bill passed the Senate, but was not approved by the House Judiciary Committee.

D. Ethical Standards for Shorthand Reports

Senate File 2114 would have created a set of ethical standards applicable to shorthand reporters. The standards included conflict of interest provisions and limits on fees charged. The bill passed the Senate but was not approved by the House Judiciary Committee.

E. Abortion-Related Torts

A pair of bills in the House supported by legislators opposed to abortion would have made changes to tort law for claims arising from an abortion. **House File 2098** would have created a cause of action on behalf of a woman who had an abortion against the physician who performed the abortion for physical injury or emotional distress resulting from failure of the physician to obtain informed consent. House File 2098 was approved by a subcommittee of the House Judiciary Committee, but was not approved by the full committee.

House Study Bill 598 would have amended Iowa Code section 611.20 to state that claims by an unborn, but viable, child survive the death of the child. The bill did not advance.

F. Municipal Tort Claims Act

Senate File 2012 would have amended the Iowa Municipal Tort Claims Act to exempt municipal employees from liability for claims arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander,

misrepresentation, deceit, and interference with contract. State employees are exempt from such claims under the State Tort Claims Act, but similar exemptions are not present in the Municipal Tort Claims Act. In *Thomas v. Gavin,* 838 N.W. 518 (Iowa 2013), the Iowa Supreme Court held that municipal employees were subject to such claims due to differences in the language between the two tort claims acts. The bill did not advance.

G. Municipal Trails

Senate Study Bill 3147 would have protected municipalities against liability for claims of negligent design or specification, negligent adoption of design or specification, or negligent construction or reconstruction of a recreational trail that was constructed or reconstructed, reasonably and in good faith, in accordance with generally recognized engineering or safety standards or design theories in existence at the time of the construction or reconstruction. The bill did not advance.

H. School Employee Liability

Senate Study Bill 3113 would have exempted school districts from claims arising out of conduct on school grounds during a non-school-sponsored extracurricular activity, except for claims of gross negligence. The bill did not advance.

I. Employment of Outside Counsel by the State

Senate Study Bill 3078 would have amended the procedures by which state agencies retain outside counsel when the Iowa Attorney General's office is unable to represent the agency. The bill would have required proposed outside counsel to submit an estimate of their legal fees. The outside counsel would have been prohibited from charging more than the estimate without the approval of the Executive Council. The bill did not advance.

CONCLUSION

In the interest of brevity we have focused on the most significant issues considered by the Legislature in 2014 which were of particular interest to the IDCA's members. The discussions of bills in this legislative report are general summaries only. For those bills which were enacted, the enrolled bills themselves should be referred to for specifics. Enrolled bills can be found at the General Assembly's website: www.legis.iowa.gov

Sallee v. Stewart : Revisiting Iowa's Recreational Use Act

by Kami L. Holmes, Grinnell Mutual Reinsurance Company, Grinnell, IA

Kami Holmes

The general recreational use statute immunity defense is unique in that all 50 states have some kind of statutory provision. In 1965, the Council of State Governments published suggested legislation regarding recreational use on private lands that would provide immunity for individuals who opened their land, entitled "Public recreation on private lands: limitations on liability." 24 *Suggested State Legislation* 150 (Council of State Governments 1965). This suggested legislation became known as the "Model Act." The purpose of the Model Act was to encourage private landowners to make their properties available to the public for recreational purposes without charge. In exchange, the landowners would have limited immunity from legal liability to persons who entered their land for recreational purposes. Iowa's recreational use statute was enacted a few short years later in 1967, the purpose of which was to "encourage landowners to make land and water areas available to the public for recreational purposes" while "limiting an owner's liability toward persons entering onto the owner's property for such purposes." Explanation to H.F. 151 at 3, 62nd G.A. (Iowa 1967); Iowa Code § 461C.1.

In rural Iowa, it is commonplace for private landowners to permit members of the public onto their land for recreational activities, including but not limited to hunting, fishing, nature viewing, snowmobiling, and ATV riding, to name a few, which sustains the very purpose that the Model Act, published in 1965, was intended to accomplish. *24 Suggested State Legislation* 150 (Council of State Governments 1965).

The recreational use statute immunity defense has become widely recognized in Iowa over the past year due to a case known as *Sallee v. Stewart,* 827 N.W.2d 128 (Iowa 2013). At the time that the *Sallee* decision was rendered, the Iowa recreational use statute listed specific activities that were considered "recreational purposes" that would trigger the immunity protections of the statute. Iowa Code § 461C.2(5) (2009). Under the Iowa statute, "recreational purpose" was defined as "hunting, trapping, horseback riding, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, motorcycling, all-terrain vehicle riding, nature study, water skiing, snowmobiling, other summer and winter sports, and viewing or enjoying historical, archaeological, scenic, or scientific sites while going to and from or actually engaged therein" or "any combination thereof." Iowa Code § 461C.2(5) (2009). This take on the Model Act varied from many other states in that many states simply define "recreational purpose" by using a list of activities coupled with a catchall provision such as "any other recreational activities" or "including, but not limited to."

The story of the *Sallee* case really begins approximately 25 years ago when the Stewart family first started welcoming a kindergarten class from Sacred Heart School in Oelwein, Iowa, a town of approximately 6,415 people, to tour their dairy farm operation known as Stewartland Holsteins in rural Oelwein. See U.S. Census Bureau (2010). The Stewarts had also allowed other classes to tour their dairy farm on occasion. This tour was, in part, designed to provide an educational experience for the children to increase their understanding of where and how their food is grown and simply to provide the children an opportunity to see how a farm operates. While touring the farm, the children were allowed to feed calves, ride horses, see a tractor, and play in a hayloft in a barn. The Stewarts would set up various stations on their farm so that the children could experience the above-mentioned activities. If everything went as planned, and if there was time, the children would be allowed to play in the hayloft at the end of the tour.

On May 18, 2010, the Sacred Heart kindergarten class toured the Stewart farm. Similar to past years, the children were allowed to ride a horse, view and feed a bottle calf, view other cows, and view a tractor during the tour of the farm. The children were supervised by various teachers and parent chaperones, along with Mr. Stewart. After the children were through with the stations as mentioned above, they were allowed to play in the hayloft. Plaintiff, Ms. Sallee, was a parent chaperone for the tour and was described as "a very large woman" in the opinion subsequently rendered by the Iowa Supreme Court. *Sallee v. Stewart,* 827 N.W.2d 128, 154 (Iowa 2013). While there is some disagreement in the record about what was said and what happened before Ms. Sallee climbed into the hayloft, both parties agreed that ultimately Ms. Sallee climbed up into the hayloft with the children, along with another chaperone and a teacher. Ms. Sallee, among others, supervised the children as they ran around and climbed on the hay bales in the old barn. The hayloft had several "hay drops" or rectangular holes in the floor to allow throwing hay to the animals below; however, these holes were often covered with stack bales of hay to insulate the lower part of the barn. *Sallee*, at 131–32. Mr. Stewart had inspected the hayloft before the children had arrived. The hay drops were still covered with hay bales at the time; Mr. Stewart stood on the bales of hay covering the holes to make sure they would support his weight. *Sallee,* at 132. While supervising the children in the hayloft, Ms. Sallee was standing on top of a bale covering one of the holes when she felt the bale start to shake and subsequently give way which in

turn caused Ms. Sallee to fall through the chute. Ms. Sallee broke her wrist and ankle in the fall.

Ms. Sallee and her husband subsequently filed a negligence lawsuit against the dairy farm's owners, Mr. and Mrs. Stewart. The Stewarts maintained that the Iowa Recreational Use Statute provided them with immunity under the circumstances and filed a motion for summary judgment. The district court granted the summary judgment to the Stewarts, concluding that the Iowa Recreational Use Statute barred the plaintiffs' claims. The district court concluded that Ms. Sallee was a recreational user because she was "a chaperone of children's activities, which included horseback riding, nature study, and play in the Stewart's hayloft." Sallee, at 132. Ms. Sallee and her husband appealed and the matter was taken up by the Iowa Court of Appeals.

The Iowa Court of Appeals agreed that the Iowa Recreational Use Statute applied and that Ms. Sallee was engaged in a recreational purpose, but found that the plaintiffs could still maintain a lawsuit against the Stewarts due to the fact that the Stewarts acted outside of the scope of the statute when they acted as tour guides to the users of their land. The Iowa Court of Appeals reasoned that recreational use immunity did not extend to the Stewarts "once they undertook responsibility for guiding the field trip attendees." *Id.* The Stewarts requested further review from the Iowa Supreme Court, which was granted.

The Iowa Supreme Court vacated the decision of the Iowa Court of Appeals, reversed the judgment of the district court, and remanded the case, holding namely that the recreational use immunity did not extend to the Stewarts because Ms. Sallee was not engaged in a recreational purpose within the scope of the statute at the time that she was injured. Notably, there were two dissenters who would have affirmed the judgment of the district court in its entirety.

In the very lengthy ruling of the Iowa Supreme Court, the majority determined that "frolicking" in a hayloft did not constitute a recreational use under the Iowa statute and thus the Stewarts were not within the scope of the immunity provided under that statute. *Sallee v. Stewart,* 827 N.W.2d 128, 151 (Iowa 2013). Due to the specific list of activities included in the Iowa Recreational Use Statute, and without language that would allow the court to expand the list of recreational purposes, the Iowa Supreme Court reasoned that it was without the ability to conclude that what happened at the Stewart Farm that day in May was within the reach of the Iowa Recreational Use Statute, and thus the court remanded the case back to the district court.

The decision rendered in *Sallee* left many, who had previously opened up their land to others for recreational purposes, with questions about how it would affect their own liability in the future and whether they should continue to allow the public to use their land. This decision also caused quite a stir with insurers of the people who had previously opened up their private land for public use due to the concerns about future litigation and the effect it would have on their insureds.

The *Sallee* decision was issued on February 15, 2013, in the midst of the Iowa 2013 legislative session. The only way the law could be changed was through legislation, and it was already late in the session. Ironically, the deadline for individual legislator bill requests had also been February 15, 2013, and the first funnel deadline was set for March 8, 2013. Thus the only way that the legislature could possibly change the law in the 2013 session was by introducing a study bill or an amendment to another bill. Surprisingly, a study bill was introduced in the 2013 session, and though there were many revisions, the Iowa House and the Iowa Senate voted unanimously to approve a proposed change to the Iowa Recreational Use Statute before the end of the session.

On June 20, 2013, the Iowa Recreational Use statute was officially amended to provide language that allowed the recreational use statute to be "construed liberally and broadly in favor of private holders of land to accomplish the purposes of [the recreational use statute.]" Iowa Code § 461C.1 (2013). The revision to the Iowa statute also expanded the scope of liability by specifically including "educational activities" as a "recreational purpose" and specifying that "recreational purpose" also included the activity of accompanying another person who is engaging in such activities, or by essentially acting as a "tour guide" thus quashing the possibility of future litigation based on the theory set forth by the Iowa Court of Appeals in *Sallee.* Iowa Code § 461C.2(5) (2013). Another important revision to the Iowa statute, which was also based upon the decision in *Sallee,* was the elimination of any requirement that injuries must be sustained while engaging in a specific recreational purpose in order to fall within the scope and protections of the statute by including language that indicates that "[r]recreational purpose" is not limited to active engagement in such activities, but includes entry onto, use of, passage over, and presence on any part of the land in connection with or during the course of such activities." *Id.*

While the case of *Sallee v. Stewart* is a good example of how a statute, its purpose and meaning previously thought to be fairly straight forward, can be construed in so many different ways, it also reminds us that the recreational use statute is alive and well, waiting for people to take advantage of the benefits that it provides in a variety of situations. *Sallee* also teaches us that while all 50 states currently have some form of recreational use statute, each state has its own, unique take on the Model Act first proposed in 1965 and that we must look closely at the individual statute when asserting it as an affirmative defense.

**This article is a revision to an article originally published in the February 2014 issue of DRI's monthly publication, For The Defense, which was co-authored by Amber K. Rutledge.*

Case Note: Hagenow v. Schmidt, 842 N.W.2d 661 (Iowa 2014).

Sudden Emergency/Legal Excuse

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Jon Foley

In Hagenow v. Schmidt, 842 N.W.2d 661 (Iowa 2014), the Iowa Supreme Court revisited the doctrines of legal excuse and sudden emergency in a case involving a rear-end collision and conflicting medical evidence from which the jury could have found the accident was caused by defendant's stroke and resulting partial loss of vision.

FACTS AND PRIOR PROCEEDINGS

On November 10, 2008, 75-year-old Betty Schmidt was in her first car accident, which ended her driving career. Schmidt was driving home from grocery shopping, heading east on University Avenue in Cedar Falls at about 1:30 in the afternoon. The weather was clear and the roads were dry. She felt fine and perceived no problems with her vision or health that would impair her driving. As she approached the intersection with Cedar Heights Drive, Schmidt prepared to make a right turn and moved into the right turn lane. She saw the light was red, but she did not see Dennis Hagenow's pickup stopped in the right turn lane. Schmidt rear-ended Hagenow's pickup, lodging her 1999 Buick LeSabre under his pickup. Schmidt's airbag deployed, and the pickup was later deemed totaled. After submitting to and passing a breathalyzer test, Schmidt was cited for failing to stop in an assured clear distance.

Schmidt was taken by ambulance to the hospital, where she realized that she was unable to see someone who was speaking to her. After alerting medical staff that she could not see to her left side, she was given a CT scan and diagnosed with left homonymous hemianopsia, which is the absence of vision in the left side of each eye resulting from injury to the brain. A neurologist concluded Schmidt had suffered a stroke and that this stroke caused her vision loss, but the neurologist's notes indicated it was unclear whether the stroke occurred before or after the accident.

Hagenow and his wife subsequently filed a lawsuit against Schmidt alleging negligence. Schmidt filed an answer denying negligence and pleading the following affirmative defenses:

1) Defendant was confronted by a sudden medical emergency, not of her own making, providing her with a legal excuse for any failure to observe the requirements of any statute, ordinances, or common law duties concerning the operation of her vehicle.

2) The sole cause of the accident was an act of God in the form of an unexpected medical emergency.

On April 6, 2011, Schmidt served answers to the Hagenows' interrogatories, including her answer to an "expert" interrogatory in which she stated she had not yet retained any experts but that "[w]e do expect the need to call as an expert witness my treating physicians who will testify to my medical condition at the time of the accident." She then named Dr. Bekavac as one of her physicians. The district court entered a scheduling order that set the jury trial for May 1, 2012, and that required the plaintiffs to disclose experts no later than 210 days before trial and defendant to do so 150 days before trial.

On November 29, 2011, Schmidt served a "Designation of Experts" that stated her intent to call as an expert at the time of trial, "[t] reating physician, Dr. Ivo Bekavac." Counsel for the Hagenows wrote to Schmidt's counsel asserting Dr. Bekavac's comment, "It is not clear whether [the stroke] happened before or after the accident," established Schmidt would be unable to prove her stroke occurred prior to the accident. Schmidt's counsel responded on February 21, 2012, explaining that Dr. Bekavac's comment merely reflected the reality that it was impossible to know with absolute certainty when the stroke occurred, and that it was Dr. Bekavac's belief that the stroke most likely preceded the accident.

Both sides filed motions for summary judgment. Meanwhile, the Hagenows designated a rebuttal expert, Dr. David Friedgood, on March 5, 2011. That same day, the Hagenows filed a motion to exclude Dr. Bekavac's testimony on grounds of late disclosure. At an unreported hearing on March 21, the District Court ruled it would allow Dr. Bekavac to testify and directed the parties to cooperate in scheduling depositions of Drs. Bekavac and Friedgood before trial. On March 29, the Hagenows filed a motion to reconsider and, on April 16, they filed a motion in limine seeking the exclusion of Dr. Bekavac's testimony. Attached to the motion in limine was an affidavit from Dr. Friedgood opining that Schmidt suffered her stroke one hour after the accident while she was in the emergency room.

On April 17, the district court filed written orders denying the Hagenows' motions to exclude Dr. Bekavac's testimony and providing:

> This is not a case where the plaintiffs were unaware of the existence of an expert. This is also not a case in which the plaintiffs

were unaware the treating physician had a professional medical opinion. This is merely a case in which the treating physician, for whatever reason, now has a different opinion than the opinion he expressed earlier.

Although the district court acknowledged the timing of the change of opinion was "unfortunate," it pointed out Schmidt had informed the Hagenows of Dr. Bekavac's changed opinion more than 30 days before trial, as required by Iowa Rule of Civil Procedure 1.508(3). The district court offered the Hagenows' counsel a continuance "should he determine he is unable to adequately prepare and obtain the necessary expert opinion prior to trial in May." Dr. Bekavac was deposed on April 9, and Dr. Friedgood was deposed on April 25.

On April 26, the district court denied both parties' motions for summary judgment based on its finding that the parties' experts presented conflicting opinions regarding the timing of Schmidt's stroke, and, therefore, Schmidt's sudden emergency defense presented a genuine issue for trial.

The case proceeded to jury trial where, over objection by the Hagenows, the jury was instructed that a driver who, through no fault of her own, is placed in a sudden emergency, is not chargeable with negligence if she uses the care which a reasonably careful person would have exercised under those circumstances. The jury also was instructed as to legal excuse as follows:

> Betty Schmidt claims that if you find that she violated the law in the operation of her vehicle, she had a legal excuse for doing so because of a sudden medical emergency and, therefore, is not negligent. "Legal excuse" means that someone seeks to avoid the consequences of his or her conduct by justifying acts which would otherwise be considered negligent. The burden is upon Betty Schmidt to establish as a legal excuse:
>
> 1) That Betty Schmidt had no control over the sudden medical emergency she alleges occurred which placed her vehicle in a position contrary to the law.
>
> 2) That her failure to obey the law when she was confronted with a sudden medical emergency was not a circumstance of her own making.
>
> If you find that Betty Schmidt has violated the law as submitted to you in other instructions and that she has established a legal excuse for doing so under either of the two definitions set forth above, then you should find that Betty Schmidt was not negligent for violating the particular law involved.

On May 7, 2012, the jury returned a verdict in favor of Schmidt, answering "no" to the first question, "Was the defendant, Betty Schmidt, at fault?"

The Hagenows moved for a judgment NOV, arguing Schmidt "failed to prove there was a stroke that transpired prior to the collision in question and most importantly that the stroke in any manner impaired Mrs. Schmidt in the operation of her vehicle." The district court denied this motion. The Hagenows appealed, arguing the district court erred in failing to exclude Dr. Bekavac's testimony and in instructing the jury on sudden medical emergency.

In its opinion, the Iowa Court of Appeals stated that because there was evidence that Schmidt experienced a stroke depriving her of her left visual field before the accident, it believed an instruction on legal excuse was warranted, reasoning "if Schmidt was unable to see Hagenow's vehicle, it would have been impossible or beyond her control to have stopped behind him." *Hagenow v. Schmidt*, 834 N.W.2d 82 (Table), 2013 WL 1749779, at *4 (Iowa Ct. App. Apr. 24, 2013). However, the Court of Appeals further concluded "the type of legal excuse warranted by the evidence was not included in the instructions given." *Hagenow,* 2013 WL 1749779, at *4. Focusing on the language in the sudden emergency instruction that "calls for immediate action or a sudden or unexpected occasion for action," the Court of Appeals concluded that, since Schmidt was not then aware she suffered a stroke and lost a portion of her visual field, she was not called upon for taking immediate action and, therefore, the doctrine had no logical application. *Hagenow,* 2013 WL 1749779, at *4-6. Although the Court of Appeals found there was sufficient evidence to submit an instruction on some type of legal excuse, it reversed and remanded the case for a new trial because there was no basis to instruct the jury on the particular type of legal excuse asserted by Schmidt, i.e., sudden medical emergency. In light of this conclusion, the Court of Appeals did not reach the issue of whether Dr. Bekavac's opinion should have been excluded.

The Iowa Supreme Court granted Schmidt's application for further review.

THE IOWA SUPREME COURT'S DECISION

Ultimately, the Iowa Supreme Court agreed with the District Court and reinstated the verdict. *Hagenow,* 842 N.W.2d at 678. First, it concluded the District Court did not abuse its discretion by allowing Dr. Bekavac's expert medical opinion because Schmidt disclosed her opinion more than two months before trial and the Hagenows suffered no unfair prejudice. *Id.* at 670-71. The Court noted the Hagenows were offered, but declined, a continuance, and they had time to depose Dr. Bekavac and obtain a rebuttal expert before trial. *Id.* at 671.

The Court then went on to find that the evidence presented was sufficient to submit a defense based on sudden emergency or legal excuse. The Court began its analysis of this issue by posing the following questions:

> The Hagenows had the burden to prove Schmidt's negligence. Crashing into a pickup truck stopped at a red light ordinarily would constitute negligence per se. But, what if the reason Schmidt failed to see the Hagenows' vehicle stopped in front of her is that her unforeseen stroke caused a sudden loss of vision? How did she fail to exercise reasonable care if she was unaware of her loss of vision before the crash?

Hagenow, 842 N.W.2d at 672-73.

The Court next summarized the law of "legal excuse" and "sudden emergency." The doctrine of legal excuse "permits the jury to excuse a defendant's failure to obey statutory law when confronted with an emergency not of his or her making." *Id.* at 673 (citation and inner markings omitted). The Court noted it had previously identified four categories of legal excuse:

1) anything that would make it impossible to comply with the statute or ordinance;

2) anything over which the driver has no control which places the driver's motor vehicle in a position contrary to the provisions of the statute or ordinance;

3) where the driver of the motor vehicle is confronted by an emergency not of the driver's own making, and by reason of such an emergency, the driver fails to obey the statute; and

4) where a statute specifically provides an excuse or exception.

Id. at 673 (citation omitted). The Court then distinguished legal excuse from sudden emergency, noting that, "[u]nlike the doctrine of legal excuse—which exonerates a party from liability for negligence per se—the sudden emergency doctrine is merely an expression of the reasonably prudent person standard of care." *Id.* (citation and inner markings omitted). The Court explained that the doctrine of sudden emergency "expresses the notion that the law requires no more from an actor than is reasonable to expect in the event of an emergency." *Id*. The Court noted it had repeatedly defined sudden emergency as:

1) an unforeseen combination of circumstances which calls for immediate action; (2) a perplexing contingency or complication of circumstances; [or] (3) a sudden or unexpected occasion for action, exigency, pressing necessity.

Hagenow, 842 N.W.2d at 674 (citations and inner markings omitted). Against this legal backdrop, the Court turned its attention to the Hangenow's argument that a sudden emergency instruction was inappropriate because the evidence was insufficient to prove that Schmidt suffered a stroke prior to the accident or that her stroke caused the accident.

Rejecting the Hagenows' argument, the Court found that the medical evidence supported the opinion that the stroke took place prior to the accident, that Schmidt lost half her vision as a result of the stroke, that Schmidt failed to realize that she had suffered a stroke, and that "because of the nature of her vision loss, it was possible Schmidt could have observed the red light and yet failed to perceive the Hagenows' vehicle." *Hagenow*, 842 N.W.2d at 675. The Court concluded that this evidence permitted the jury to find that Schmidt rear-ended the Hagenows' vehicle because of her stroke and loss of vision. *Id*. The Court held that the evidentiary record supported submission of a legal excuse defense based on Schmidt's sudden medical emergency. *Id.*

Finally, the Supreme Court held that any error in the wording of the sudden emergency instruction was harmless. The Hagenows had argued that the wording of the sudden emergency instruction did not fit the facts, as the instruction required the jury to find the emergency was an "unforeseen combination of circumstances that calls for immediate action or a sudden or unexpected occasion for action," yet Schmidt was unaware of her vision loss and thus had no sudden choice or action to take. The Court of Appeals had accepted this argument and reversed the District Court on this basis. *Hagenow,* 2013 WL 1749779 at *4-6.

This was the Iowa Supreme Court's first time considering the medical emergency defense in an accident that impaired a driver who at the time wasn't aware she was suffering a medical problem. *Hagenow,* 842 N.W.2d at 676. As the Court noted in its decision, courts in some jurisdictions have held that a sudden emergency instruction is inappropriate if the actor seeking to assert the sudden emergency doctrine was not aware of the existence of the emergency. *Id.* (citations omitted). However, the Court remarked that a contrary approach is taken in certain provisions of the Restatement (Third) of Torts: Liability for Physical and Emotional Harm. *Id.* Among these provisions, the Court noted, "[s]ection 11(b) on sudden incapacitation best fits the facts of this case." *Hagenow,* 842 N.W.2d at 676-77. As the Court went on to note in a footnote, that section of the Restatement, entitled "Disability," provides:

> The conduct of an actor during a period of sudden incapacitation or loss of consciousness resulting from physical illness is negligent only if the sudden incapacitation or loss of consciousness was reasonably foreseeable to the actor.

Hagenow, 842 N.W.2d at 676-77 n.8 (quoting Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 11(b), at 130 (2005)). The Court further explained that the comments to section 11(b) specifically identify a stroke as one possible cause of the sudden incapacitation, and that, "[s]ignificantly, section 11(b) does not require the driver's contemporaneous awareness of his medical emergency, nor a rapid decision or action to be taken, as that would be impossible

for a person who is unconscious or incapacitated." *Id.* The Court also noted that a related provision, section 15 of the Restatement (Third), entitled "Excused Violations," "states that a statutory violation is excused if 'the violation is reasonable in light of the actor's childhood, physical disability, or physical incapacitation.'" *Id.* (citing Rest. (3d) Torts, § 15(a), at 168). The Court further noted that the Restatement's "emergency" provision, section 9, differs from 11(b) in that it requires a rapid response. *Id.* ("This provision provides: 'If an actor is confronted with an unexpected emergency requiring rapid response, this is a circumstance to be taken into account in determining whether the actor's resulting conduct is that of the reasonably careful person.'" (citing Rest. (3d) Torts, § 9, at 111). However, the Court ultimately chose to defer its consideration of these provisions of the Restatement, as "neither the parties nor the district court raised the provisions of the Restatement (Third) when instructing the jury in this case," and, more important, the Court concluded that the submission of the instruction did not prejudice the Hagenows because any error in the wording of the sudden emergency instruction given was harmless. *Id.* at 677. "Any error in the wording of the sudden emergency instruction given was harmless," the Court went on to explain, because "[t]he alleged erroneous wording in the instruction made it more difficult for Schmidt to prove her sudden emergency defense." *Id.* (citations omitted). "The Hagenows . . . benefited from any error in the wording of the sudden emergency instruction, such that the alleged error was nonprejudicial to them." *Id.* Because the Hagenows could offer no reason that omission of the challenged wording would have led to a different verdict, the district court correctly denied their motion for new trial. *Id.*

SIGNIFICANCE OF DECISION

As noted, this was the Iowa Supreme Court's first time considering the medical emergency defense in an accident that impaired a driver who at the time was not aware she was suffering a medical problem. Despite expressly deferring its consideration of the provisions of the Restatement (Third) relevant to a sudden medical emergency, the Court appeared as if poised to adopt some or all of these provisions should the opportunity arise in a future case. Section 11(b) on sudden incapacitation, in particular, appeared to find favor with the Court, which remarked that this provision "best fits the facts of this case" and then cited for comparison its prior decision in *Weiss v. Bal,* 501 N.W.2d 478 (Iowa 1993), a decision in which the Court listed "a sudden heart attack" as an example of a situation that could warrant a sudden emergency instruction. See *Hagenow*, 842 N.W.2d at 676-77. Defense counsel involved in personal injury litigation arising from circumstances in which their client was confronted with an emergency situation should review the *Hagenow* decision carefully and consider whether to assert defenses, or request jury instructions, based on one or more of the Restatement provisions cited in the Court's decision.

YOUNG LAWYER PROFILE

In every issue of Defense Update, we will highlight a young lawyer. This month, we get to know Alex Grasso at Cartwright, Druker & Ryden in Marshalltown.

Alex Grasso is an attorney at Cartwright, Druker & Ryden in Marshalltown. Born in Minnetonka (MN), but raised in Johnston (IA), Alex graduated from Baylor University in 2009 and from law school at Iowa in 2013. Joining CDR in 2013, Alex practices primarily in insurance defense. He is a member of IDCA, DRI, and the Iowa Bar Association. He looks forward to working with other IDCA members to bring recruitment to law schools.

Alex and his wife, Kelsey, moved from Waukee to Marshalltown when he started his journey with CDR. Kelsey is a nurse and an incredible photographer. On the home front, Alex and Kelsey are usually chasing around Julia, their 22-month old daughter, who is usually chasing around Theo, their three-year-old mini Golden Doodle. They are expecting a baby boy in November 2014.

IN REMEMBRANCE

Alanson K. "Lany" Elgar, 86, of Mt. Pleasant, died May 2, 2014, at Meth-Wick Community in Cedar Rapids.

Born September 1, 1927, in Mt. Pleasant, he was the son of Herman E. Elgar and Clara (King) Elgar. He married his college sweetheart, Barbara (Dennis) Elgar on August 5, 1950.

Lany graduated from Mt. Pleasant High School in 1945 and Iowa Wesleyan College in 1949. After he graduated from the Drake University Law School and was admitted to the Iowa Bar in 1951, he returned to Mt. Pleasant to practice law with his father and later his brother at Elgar Law Office. He became Of Counsel with the Whitfield & Eddy Law Office in 2003. He retired in 2008 after practicing law for 57 years.

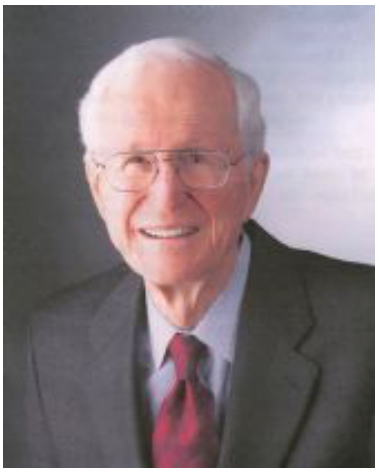
He served as President of the Iowa Defense Counsel Association in 1983 and was State Chairman (1985-1986) and Regional Vice President (1986–1988) of the Defense Research Institute, Inc. He was a past President of the Henry County Bar Association and belonged to the Iowa State Bar Association, American Bar Association and the International Association of Defense Counsel.

He was elected to the Iowa Wesleyan College Board of Trustees in 1968 and served as attorney for Iowa Wesleyan College for many years. He also served on the Administrative Council and Trustees of the United Methodist Church. He was an original member of the Old Threshers Foundation Board. He and Barb helped with the fundraising for the steam-powered carousel at Old Threshers and served as volunteer coordinators for the carousel for many years.

He was also involved with the early industrial development in Mt. Pleasant. He served as a member of and attorney for the Henry County Industrial Development Commission for many years. He received the Mt. Pleasant Area Chamber Alliance Citizen of the Year Award in 1984.

He is survived by his wife, Barbara, sons Alan Elgar of Iowa City and Robert Elgar and his wife Susan Richers Elgar of Plainfield, Illinois and daughter Mary Elgar of Mt. Pleasant. He is also survived by his granddaughter, Meredith Elgar of Warrenville, Illinois; grandson Nicholas Elgar, stationed at Ramstein Air Force Base in Germany; and cousins, nieces, great nieces, nephews and great nephews.

The family established memorials for Iowa Wesleyan College, Old Threshers Foundation and First United Methodist Church.



Philip Willson, age 90, of Omaha, NE, passed away on May 8, 2014, at Hospice House in Omaha.

Phil was born in Morning Sun, IA, on September 30,1923, and raised in Fairfield. Phil received his undergraduate degree from Parsons College in Fairfield and J.D. from Yale University in 1949. He served in the U.S. Army during WWII, and co-authored Iowa Practice, Vestal & Willson, 1975. Phil was a co-founding partner of the law firm of Willson and Pechacek, P.L.C.

Phil received many honors and recognitions during his lifetime: The Iowa Defense Counsel Association Lifetime Member Award (2012); the Iowa State Bar Association Award of Merit; Iowa Southwest Bar Association Award for 50 years; Iowa State Bar Association Community Service Award; Iowa State Bar Association President's Award; and Council Bluffs Heritage Award (2002).

Phil was a member of the American Bar Association, the Iowa State Bar Association (President, 1977–1978), the Nebraska State Bar Association, the Southwest Iowa Bar Association, the Pottawattamie County Bar Association (President, 1963–1964), Iowa Defense Counsel Association (President, 1969–1970), the Iowa Association of Workers' Compensation Lawyers, the Defense Research Institute, a Fellow of the American College of Trial Lawyers, a Fellow of the Iowa Academy of Trial Lawyers, and a Fellow of the Iowa State Bar Foundation.

His community services included the Council Bluffs Library Board; Opera Omaha; Council Bluffs Community School Board Policy Review Committee (2002–2007); Joslyn Art Museum Board of Governors (2004–2007); Joslyn Committee on the Collection (2004–2007); chair of Subcommittee on Joslyn Modern Contemporary Art Committee; Past President Council Bluffs Chamber of Commerce (1964); Past President, Council Bluffs YMCA Board of Directors; Past President, Council Bluffs Public Library (1962–1964 and 1999–2001)

He is survived by his brother, Roger Willson (Maureen) of New York; friend, Sara Foxley; stepchildren, Victoria Hammeal (Clark) and David Hicks (Connie); grandchildren: Philip and Marta Willson; stepgrandchildren, Courtney Nardini (Kris) and Trevor Hicks; stepgreat-grandchildren: Alexis, Sydney, Delaney and Addison Nardini, and Madisyn and Morgan Hicks.

The family established memorials for the Joslyn Art Museum, Council Bluffs Public Library Association, or a charity of your choice.

IDCA Welcomes 5 New Members

SYDNEY CONRAD
EMC Insurance Companies
717 Mulberry St.
Des Moines, IA 50309
(515) 345-2079
sydney.a.conrad@emcins.com

MARK P.A. HUDSON
Shuttleworth & Ingersoll, PLC
115 Third Street SE, Suite 500
Cedar Rapids, IA 52401
(319) 365-8564
mph@shuttleworthlaw.com

DESIREE KILBURG
Elderkin & Pirnie, P.L.C.
316 2nd St S.E., Suite 124
Cedar Rapids, IA 52401
(319) 362-2137
dkilburg@elderkinpirnie.com

PAUL M. POWERS
Betty, Neuman & McMahon, P.L.C.
1900 E. 54th Street
Davenport, IA 52807
(563) 326-4491
pmp@bettylawfirm.com

JOHN TERPSTRA
Grinnell Mutual Reinsurance Company
4215 Highway 146, PO Box 790
Grinnell, IA 50112
(641) 269-8117
jterpstra@gmrc.com

IDCA/IAJ Hold Successful Trial Practice Academies at Drake and Iowa

by Kami L. Holmes, Grinnell Mutual Reinsurance Company, Grinnell, IA
Chair of the Trial Practice Academy

The Iowa Defense Counsel Association and the Iowa Association for Justice joined forces in May and successfully held their first Annual **Trial Practice Academy: A Guide to Hitting the Ground Running**, designed for second and third year law school students and new associates, at each of Iowa's two law schools.

The Trial Practice Academy was held on May 20, 2014, at the Drake University Law School and on May 22, 2014, at the University of Iowa College of Law. Approximately 60 participants participated in the Academy.

The Trial Practice Academy ran from 8:00 a.m.–5:00 p.m. each day and included topics ranging from the do's and don'ts in dealing with clients to preparing, taking and defending depositions which were presented by volunteer members of the Iowa Defense Counsel Association and of the Iowa Association for Justice; many topics were presented jointly so that both the plaintiff and defense sides were set forth which gave the attendees a very good look at how both sides of the bar work together and apart.

We were very fortunate to have presentations from four judges in our state, including District Court Judge Todd A. Geer from District 1B who presented at both Drake and Iowa, District Court Judge Carla Schemmel from District 5C, Iowa Supreme Court Justice Bruce Zager, and retired Bankruptcy Court Judge Paul J. Kilburg. These judges discussed their view from the bench and provided helpful tips on what to do and not do in the courtroom. The judges allowed the attendees to ask them questions on a variety of topics.

The main part of the afternoon session of the Academy was a split session where attendees could choose to attend either a mock small claims hearing or a mock family law hearing where they could be involved and ask questions about the procedures of each. Assisting us with the small claims and family law hearing demonstrations were District Court Judge Robert B. Hanson from District 5C, District Court Judge Scott D. Rosenberg also from District 5C, District Court Judge Brad McCall from District 5A, and District Court Judge Paul Miller from District 6. These presentations were well-received.

The Trial Academy was set up with the goal of assisting our up and coming lawyers and new lawyers in developing their trial advocacy skills and practice when they come out of law school as this is important for the legal community as a whole. The Academy successfully blended instruction, advice and demonstration with individual student participation. We received very good feedback from the participants and are planning to have the second annual Trial Practice Academy in the spring of 2015.

Women of IDCA

"A climate of acceptance and achievment"

As the dust of the Civil War was settling, Arabella Mansfield of Mount Pleasant, Iowa, was fighting for the right to vote and also the right to practice law. She passed Iowa's bar exam before women were permitted to practice law. Shortly after, the Iowa legislature amended its statute to allow women and minorities to practice law in the state, and Belle Babb Mansfield became the nation's first female lawyer in 1869.

A century later, in 1970 just under five percent of the nation's lawyers were women. One of those women, Claire F. Carlson of Fort Dodge, was accepted in 1975 as the first female member of the Iowa Defense Counsel. "The late Claire Ferguson Carlson... graduated from the University of Iowa in 1950...one of only three women in her law-school graduating class...was a prominent figure in the Fort Dodge community and in the legal profession in Iowa." (University of Iowa Foundation News Service). In 1977 Elizabeth Nolan joined the IDCA and in 1978 Marsha Ternus became a member.

For the Iowa Defense Counsel, Carlson paved the way for females taking on leadership roles starting in 1980 as a District Director. She served as the organization's Secretary and President-Elect, and in 1985 Carlson accepted the position of the organization's first female President. It was that same year, 1985, that Jaki Samuelson joined the IDCA.

Megan Antenucci recognizes outgoing President Martha Shaff

FIFTY 50 YEARS
IOWA DEFENSE COUNSEL ASSOCIATION

Each decade that passed the IDCA saw an increase in female memberships. At the time of Carlson's presidency, only about eight of the over 300 IDCA members, or just two percent, were women. Ten years later, in 1994 membership had increased to over 400 and the number of women to over 40, up to about 10 percent. Women participated in annual meetings and were becoming part of the fabric of the organization. By 1997 Jaki Samuelson accepted the position of IDCA President.

By the end of the 1990's Iowa had received its first female Supreme Court Justice. IDCA member Marsha Ternus was appointed to the Iowa Supreme Court in 1993 by Gov. Terry Branstad. In 2006 she became the first woman to serve as Chief Justice in the history of the Iowa Supreme Court.

As the century turned, the number of female lawyers in the United States continued to increase, growing to almost 33 percent according to the 2010 US Census data (*The Wall Street Journal* online). During this decade, three women were at the helm for the IDCA. Accepting Presidency in 2004 was Sharon Greer, in 2007 Martha Shaff, and in 2008 Megan Antenucci. The IDCA currently has over 360 members, of which close to 20 percent are now women.

Past President Marion Beatty described it this way:

"So as the profession has become more balanced with the sexes, so has this organization."

Sharon Greer talks about this cohesive group of lawyers who are "so inclusive with women and minorities...it really helps a young woman who's coming up through the ranks like I was to be part of a good group of attorneys."

We invite you to celebrate our history at our 50th Annual Meeting & Seminar, September 18 – 19, 2014, at the West Des Moines Marriott in West Des Moines. Registration information begins on page 22.

IDCA Schedule of Events

September 18 – 19, 2014

50TH ANNUAL MEETING & SEMINAR
West Des Moines Marriott
West Des Moines, IA
Registration begins on page 22

October 28, 2014

IDCA WEBINAR
Noon – 1:00 p.m.
Discovery and Expedited Civil Actions - the New Rules

December, 2014

IDCA WEBINAR
Noon – 1:00 p.m.
Date and Topic TBD

FIFTY 50 YEARS

IOWA DEFENSE COUNSEL ASSOCIATION

IOWA DEFENSE COUNSEL ASSOCIATION

50th ANNUAL MEETING & SEMINAR

SEPTEMBER 18 – 19

ATTENDEE REGISTRATION

2014

West Des Moines Marriot

1250 Jordan Creek Parkway

West Des Moines, IA 50266

Hotel Reservations

For reservations, call the West Des Moines Marriott directly at (515) 267-1500. Ask for the **Iowa Defense Counsel Association** group room rate.

Room Rates
$114.00/night plus tax (Single/Double/Triple/Quad)

Check-in: 3:00 p.m.
Check-out: 12:00 p.m.

The cut-off date for the IDCA room block is August 27, 2014.

Parking is complimentary at the hotel.

HOW TO REGISTER

By Fax:
(515) 334-1174

Mail:
Iowa Defense Counsel Association
1255 SW Prairie Trail Parkway
Ankeny, IA 50023-7068

Questions?
Email
staff@iowadefensecounsel.org

Call
(515) 244-2847

SCHEDULE OF EVENTS

WEDNESDAY, SEPTEMBER 17, 2014

8:00 p.m. **IDCA Hospitality Room Open**
Sponsored by Nyemaster Goode, PC and Hosted by Young Lawyers Committee

THURSDAY, SEPTEMBER 18, 2014

7:00 a.m. – 5:15 p.m. **Registration Open**

7:00 – 7:45 a.m. **Exhibitor Set-Up**

7:00 – 8:00 a.m. **Continental Breakfast**

7:45 a.m. – 5:15 p.m. **Exhibits Open**

8:00 – 8:15 a.m. **Welcome & Opening Remarks**

8:15 – 9:15 a.m. **Ethics Pitfalls: Forewarned is Forearmed**
Todd Scott, Minnesota Lawyers Mutual Insurance Co., Minneapolis, MN

9:15 – 10:00 a.m. **Anatomy of a Hoax**
Jim Cooney, Womble Carlyle Sandbridge & Rice, LLP, Charlotte, NC

10:00 – 10:30 a.m. **Local Counsel and Young Lawyers: The Ins and Outs of Being Second Chair**
Connie Alt, Shuttleworth & Ingersoll PLC, Cedar Rapids, IA

10:30 – 10:45 a.m. **Networking Break with Exhibitors**
Sponsored by Thomson Rueters and Hopkins & Huebner, P.C.

10:45 – 11:30 a.m. **Orthopedics 101**
Kary Schulte, M.D., Des Moines Orthopaedic Surgeons, P.C., West Des Moines, IA

11:30 a.m. – 12:00 p.m **Update from the Iowa Supreme Court, Justice Mansfield**

12:00 – 1:00 p.m. **Exhibits Open & Lunch on Own**
Past President's Lunch

1:00 – 1:45 p.m. **Looking Back, Looking Forward: Past Presidents Panel**
Robert Allbee, Ahlers & Cooney, P.C., West Des Moines, IA; Marion Beatty, Miller Pearson Gloe Burns Beatty & Cowie PC; Decorah, IA; Allan Fredregill, Heidman Law Firm, Sioux City, IA; Greg Lederer, Lederer Weston Craig, P.L.C., Cedar Rapids, IA; and Jaki Samuelson, Whitfield & Eddy, PLC, Des Moines, IA. Moderator: Ben Weston, Lederer Weston Craig, P.L.C., West Des Moines, IA

1:45 – 2:15 p.m. **Case Law Update**
John Lande, Dickinson, Mackaman, Tyler & Hagen, Des Moines, IA; Joshua J. McIntyre, Lane & Waterman LLP, Davenport, IA; Abhay Nadipuram, Lederer Weston Craig PLC, Cedar Rapids, IA

2:15 – 3:15 p.m. **Concurrent Sessions**

Lawyers Don't Retire, Do They?
A Strategic Look at Law Firm Succession Planning and Law Practice Management
Alan Olson, Altman Weil, Inc., Milwaukee, WI

Jury Selection Tips for Young (and Not-So-Young) Lawyers
William Kanasky, Ph.D., Courtroom Sciences, Inc., Irving, Texas

3:15 – 3:30 p.m. **Networking Break with Exhibitors**
Sponsored by Courtroom Sciences, Inc.

3:30 – 4:15 p.m. **Corporate Representative Depositions: Planning and Practice Makes Perfect**
Marlo Orlin Leach, Gonzalez Saggio & Harlan LLP, Atlanta, GA

4:15 – 5:15 p.m. **Thompson v. Kaczynski: A Five-Year Report Card**
Kevin Reynolds, Whitfield & Eddy, PLC, Des Moines, IA

6:00 – 8:45 p.m. **IDCA 50th Anniversary Celebration Dinner at Jasper Winery** *Sponsored by Minnesota Lawyers Mutual Ins. Co. (Meet in the hotel lobby at 5:30 p.m. to board shuttle.)*

9:15 p.m. **IDCA Hospitality Room Open**
Sponsored by Exponent, Inc., and Hosted by Young Lawyers Committee

FRIDAY, SEPTEMBER 19, 2014

7:00 a.m. – 3:00 p.m.	**Registration Open**
7:00 – 8:00 a.m.	**Continental Breakfast**
7:00 a.m. – 1:15 p.m.	**Exhibits Open**
8:00 – 8:30 a.m.	**Legislative Update & Annual Meeting** *Scott Sundstrom, Nyemaster Goode, PC, Des Moines, IA*
8:30 – 9:30 a.m.	**Ethics: It's What You Do When No One Is Looking** *Justice Michael Streit, Ahlers & Cooney, P.C., Des Moines, IA*
9:30 – 10:15 a.m.	**It *Can* Happen, Even In Iowa: Current Trends in Bad Faith Litigation** *Mike Aylward, Morrison Mahoney LLP, Boston, MA*
10:15 – 10:30 a.m.	**Networking Break with Exhibitors,** *Sponsored by EMC Insurance Companies*
	Concurrent Sessions
10:30 a.m. – 12:00 p.m.	**Successfully Challenging the Plaintiff Reptile Theory** *William Kanasky, Ph.D., Courtroom Sciences, Inc., Irving, Texas*
10:30 a.m. – 11:15 a.m.	**Workers' Compensation: An Update on Current Trends** *Theresa Davis, Shuttleworth & Ingersoll PLC, Cedar Rapids, IA; Paul J. McAndrew, Paul J. McAndrew Law Firm, Coralville, IA*
11:15 a.m. – 12:00 p.m.	**Employment Law Update: What is New, What is Interesting** *Magistrate Judge Adams, Southern Iowa District, Davenport, IA*
12:00 – 1:00 p.m.	**Exhibits Open & Lunch on Own**
12:00 – 1:00 p.m.	**New Members & Young Lawyers Lunch**
12:00 – 1:00 p.m.	***Defense Update* Board of Editors Lunch Meeting**
1:00 – 1:15 p.m.	**DRI Update** *Philip Willman, DRI Mid-Region Representative; J. Michael Weston, DRI President; and Sharon Greer, DRI State Representative*
1:15 – 1:45 p.m.	**Leveraging Technology for Optimal Outcomes in Discovery** *Connie Martin, Advantage Litigation, Minneapolis, MN; and Erin Nathan, Simmons Perrine Moyer Bergman PLC, Cedar Rapids, IA*
1:45 – 2:30 p.m.	**Social Media: Perils and Pitfalls** *Marie Trimble, Gordon & Rees LLP, San Francisco, CA*
2:30 – 3:15 p.m.	**What Can Iowa Lawyers and Law Firms do to Recruit and Retain Diverse Attorneys?: Meeting the Challenge is Easier Than You Think** *Doug Burrell, Drew Eckl & Farnham, LLP, Atlanta, GA*
3:15 – 3:45 p.m.	**Unraveling Technical Problems: Some Practical Solutions** *Sam Perlmutter, Exponent, Inc., Chicago, IL*

ANNUAL MEETING & SEMINAR CANCELLATION / REFUND POLICY

- If written cancellation is received by September 12, 2014, a full refund will be received.
- No refunds for cancellations after September 12, 2014.
- No refunds for No-Shows.

REGISTRATION INCLUDES

- **Full Registration** includes Thursday and Friday Continental Breakfast, 50th Anniversary Celebration Dinner, and all breaks on both days.
- **Thursday Only** Registration includes Thursday Continental Breakfast, 50th Anniversary Celebration Dinner and all breaks on Thursday.
- **Friday Only** Registration includes Friday Continental Breakfast and all breaks on Friday.
- **Speaker outlines will be provided on CD only**. Outlines will be emailed as a PDF to all attendees the week prior to the Annual Meeting & Seminar. Attendees may print and bring outlines to the Annual Meeting & Seminar. Printed materials will not be available from IDCA.

CLE HOURS

Approved for 14.0 State CLE Hours (Includes 2.0 Ethics Hours) Activity Number 148269. Approved for 5.50 Federal CLE Hours.

WHAT'S NEW

IDCA Hospitality Room

Wednesday, September 17, 2014 – 8:00 p.m.
Sponsored by Nyemaster Goode, PC

Thursday, September 18, 2014 – 9:15 p.m.
Sponsored by Exponent, Inc.

West Des Moines Marriott, Room 917
Hosted by the Young Lawyers Committee.
Everyone is welcome.

New Member and Young Lawyers Lunch

Friday, September 19, 2014 – 12:00 – 1:00 p.m.

West Des Moines Marriott, Salon C

Fees: Complimentary

All new members and young lawyers are invited to attend this lunch hosted by the IDCA Board of Directors. You will learn more about IDCA's programs and services, how you can get involved, and will meet and network with other new members and young lawyers. Check the registration form if you plan to attend.

FIFTY 50 YEARS

IOWA DEFENSE COUNSEL ASSOCIATION

IDCA 50th Anniversary Celebration Dinner

Thursday, September 18, 2014

6:00 – 8:45 p.m.

Jasper Winery

Fees: Included in Full Registration and Thursday Only Registration. $50 for additional tickets.

IDCA's pinnacle event – the 50th Anniversary Celebration Dinner – will held at Jasper Winery in Des Moines.
Join us as we celebrate our history in this estate-style winery.
Transportation is provided.

Contact IDCA Headquarters if you wish to sponsor a table.

Dinner sponsored by Minnesota Lawyers Mutual Ins. Co.

ATTENDEE REGISTRATION

IOWA DEFENSE COUNSEL ASSOCIATION 50th ANNUAL MEETING & SEMINAR

September 18 – 19, 2014
West Des Moines Marriot
1250 Jordan Creek Parkway
West Des Moines, IA 50266

FIFTY 50 YEARS
IOWA DEFENSE COUNSEL ASSOCIATION

CONTACT INFORMATION

Contact Name _____ **Company/Firm** _____

Mailing Address _____ **City** _____ **State**

Phone _____ **Email** _____ **What year did you join IDCA?** _____

Spouse / Guest Name Badge _____

(50th Anniversary Celelbration Dinner only. Must be registered to attend. Select Celebration Dinner Only registration option.)

Special Needs Request (Please specify) _____

(Food allergies, vegetarian meals, wheelchair access, etc.)

REGISTRATION FEES **Circle all that apply**

	Member	Young Lawyer Member*	Non-Member	Young Lawyer* Non-Member
Full Registration	$275	$175	$475	$275
Thursday Only	$185	$100	$285	$185
Friday Only	$120	$75	$220	$120
Celebration Dinner Only	$50	$50	$50	$50
Seminar Materials Only	$75	$75	$125	$125

**Young Lawyer Rate: Admitted to practice four (4) years or less.*
*** Claims Professionals Rate: Professionals not receiving CLE.*

Total _____

For planning purposes, check those that apply. I am attending the:

☐ **Thursday Celebration Dinner** ☐ **Past President's Lunch** ☐ **New Member and Young Lawyers Lunch**

METHOD OF PAYMENT

☐ Check ☐ Visa ☐ Mastercard ☐ AMEX

Card # _____ **Exp. Date** _____

Name on Card _____

Signature _____

Please register by September 12, 2014.

Return completed form and payment to:
Iowa Defense Counsel Association
1255 SW Prairie Trail Parkway
Ankeny, IA 50023
Phone: (515) 244-2847 Fax: (515) 334-1164
staff@iowadefensecounsel.org

For security purposes, please do not email payment information.