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IOWA DEFENSE COUNSEL ASSOCIATION

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2019 Legislative Session Report

By Brad Epperly, IDCA Lobbyist, Nyemaster Goode PC, Des Moines, Iowa

Brad Epperly

It was another busy year at the Iowa Capitol. The 88th General Assembly adjourned a week early this year, wrapping up business on Saturday, April 27. This year's assembly filed 1,947 bills, along with 589 amendments. In the end, 169 bills and resolutions were passed by both chambers. Although the Governor has until May 27 to sign or veto the bills sent to her for review, most of the bills have been signed. For this session, far and away the most significant bill passed was the bill amending the judicial nominating process.

For the first time in almost 60 years, the Iowa legislature took up serious consideration of the judicial nominating process in the State. In 1962, Iowans approved a constitutional amendment to replace judicial elections with a less political, merit-based approach. Under the current system, the Governor appoints eight members of the State Judicial Nominating Commission (subject to Senate confirmation) and five members on each of the district commissions. Licensed attorneys elect the other eight members of the state-level commission and the five members of each district commission. The Governor must appoint judges from a short list of candidates provided by the commissions. The State Judicial Nominating Commission picks three finalists for any

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WHAT'S INSIDE

IDCA President's Letter

Michael Moreland
IDCA President

CIVILITY REVISITED

At a recent legal seminar, a panel of attorneys was asked to discuss the current nature of civility in our profession. Some speakers weighed in that they still see mutual respect among attorneys and their respective clients. A few panelists described their experiences with out-of-state attorneys who have adopted a toxic posture in every case litigated in our state. Regardless of your experience, we as legal professionals—attorneys, judges, court officers, and clerk personnel—need to foster a respectful and civil environment for all of our legal matters.

With the advent of social media, we have seen a lowered bar of civility. I often read emails from clients and, sometimes, other attorneys that would never be repeated to my face. In situations of snarky emails from attorneys, I immediately think that the demeaning language is meant for my client's benefit rather than for mine. Unfortunately, the public discourse has devolved into condescension and sarcasm. It is not enough to respectfully disagree with someone today; we see bullying and often times bad nicknames. Folks now use harsh language to criticize one another and often hide behind the internet as a place of comfort for acting uncivil.

The term "civility" comes from the Latin word *civilis*, which means "relating to public life, befitting a citizen." Civility among politicians has eroded to make it the norm for communication in the harshest of language. We see it not only in politics, but also among athletes, artists and social movements.

When did it become so cool to be so unkind? Has incivility become normal communication among attorneys and their clients? As attorneys, we are not only leaders in our own communities, but we often set the tone for respectful communication inside and outside of the courtroom. I recall several occasions growing up watching my father, John Moreland, and his fellow attorney, Kenny Keith, fight like cats and dogs in the courtroom. This was back in the day when attorneys argued "at each other" rather than to the Court. However, as soon as they left the courtroom, Dad and Kenny would share jokes and stories and were long-time friends. It was a great lesson for me prior to entering the profession, and I have never forgotten that you can be respectful as a zealous advocate yet friendly with your adversary despite your differences.

The best example of maintaining civility with adversaries is the relationship between former Presidents Gerald Ford and Jimmy Carter. Prior to President Ford's death, he and President Carter shared at a symposium that, after their hard-fought election in 1976, they became and remained close friends for many years after leaving office. President Ford attributed the philosophy he adopted from Speaker Sam Rayburn of Texas, who told all freshman legislators that they need to "learn to disagree without being disagreeable." That is the attitude Iowa lawyers show for each other and we need to continue our respectful nature in the face of growing, distasteful rhetoric seen daily among the general public.

It is too easy after receiving a sarcastic email to immediately fire back a "nastygram" without first taking a deep breath. We all have received threatening demand letters and motions that cause a knee-jerk reaction. After typing the response, we need to wait 30 minutes before pushing the Send button. Clients often ask us to send an attack letter in cases of high emotion. Resist the temptation. You are not being "soft," just professional. Most often, we do not respond with flaming language and the sender likely feels embarrassed after reading your civil reply.

We should all be thankful that our mentors trained us to be above the civility bar and treat everyone in our profession with equal respect.

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vacancy on the Iowa Supreme Court or Court of Appeals. The district commissions choose two finalists for each open position.

Coming into the 2019 session, Senate leadership and the Governor's office identified reforms to the judicial nominating process among their priorities. The concerns with the system raised were two-fold: 1) because half of the commissioners were elected by licensed attorneys, this small sub-set of our population were essentially "super citizens" that had a disproportionate impact on the process; and 2) the system was resulting in left leaning judges who did not reflect the views of the public. Although the judicial nominating system was created by constitutional amendment, an amendment to the Constitution is not necessary to change the manner and make-up of the commissions. The 1962 constitutional amendment contained a provision that kept the original manner and composition the same until 1973. After that point, it could be changed legislatively.[1]

The original bill filed in both the House and Senate on February 11 would have substantially changed our current system. The election of commissioners by attorneys was completely eliminated. These commissioners were replaced by appointees named by legislative caucus leadership: two by the Speaker of the House; two by the House Minority Leader; two by the Senate Majority Leader; and two by the Senate Minority Leader. The Governor still retained eight appointments. Half of the Governor's appointees had to be practicing attorneys and each legislator had to appoint at least one practicing attorney. The Supreme Court also got one of its members as an appointee, elected by a majority of the Court. Similar changes were proposed to the District Court Nominating process. The Iowa State Bar Association (ISBA) immediately registered against the bill and although both the Iowa Defense Counsel Association (IDCA) and the Iowa Association for Justice (IAJ) initially registered undecided on the bill in an effort to affect changes to the legislation, little was changed in the bill after numerous discussions and both changed their registrations to against.

The Senate passed its bill on March 12 and sent it over to the House for consideration. By this time, the "No" votes among House Republicans were pretty well established. Republicans held a 54–46 majority in the House, but were somewhere between three to five votes shy of the 51 votes needed for passage. The Senate did amend its original bill, removing the sections that struck the attorney election of district commissioners and also adding a section providing for the election of one commissioner per district by the Supreme Court.

As the session wore on, internal caucus discussions continued among House Republicans on the bill. On April 26, in what turned out to be the next to last day of the session, Amendment H-1321 to the Standings Bill, SF 638, was filed by Representative Holt, the House Judiciary Chair. H-1321 was the negotiated compromise on the Judicial Nominating Bill. Democrats objected to the amendment on the basis that it was not germane to the Standings Bill. The Speaker agreed, ruling the amendment was not germane and Representative Holt then moved to suspend the rules in order to consider the amendment. After a successful vote to suspend the rules, the amendment was adopted, 52–46, with only one Republican voting against the amendment.

Amendment H-1321 further stripped down the earlier proposed changes to the Judicial Nominating System.

- The Governor has one additional appointment to the State Judicial Nominating Commission, giving her nine appointees.
- The other eight appointees are still elected by practicing attorneys.
- Appointees chosen by the Governor are without regard to party affiliation.
- At least one appointee must be chosen from each congressional district and no more than two from each district unless all districts have two already appointed.
- If an appointive commissioner misses a meeting, the person is deemed to have submitted their resignation and the Governor may appoint someone new to fill the vacancy.
- Neither appointed nor elective commissioners (both State and District commissions) may hold over until their successor is elected and qualified.
- The senior Justice participation as Chair of the State commission is removed. Members of the State commission elect the chair from their membership.
- The District commission chair will continue to be the senior judge.
- The District nominating commissions otherwise remain unchanged.
- The term of the Chief Justice of the Supreme Court is now limited to a two-year term, but may be re-elected to unlimited terms.

The Governor signed the Standings Bill on May 8 and two days later she exercised her new additional appointment, nominating Dan Huitink as the ninth appointee. One week after signing the bill, a lawsuit was filed in Polk County District Court challenging the constitutionality of the Judicial Nominating

Commission provisions amended onto the Standings under the Iowa Constitution and seeking injunctive relief. The plaintiffs in the suit are former representative Robert Rush[2] and eight current representatives.

The basis for the first two counts of the constitutional challenge is Article III Section 29 of the Iowa Constitution:

> Sec. 29. **Acts—one subject—expressed in title.** Every Act shall embrace but one subject, and matters properly connected therewith; which subject shall be expressed in the title. But if any subject shall be embraced in an Act which shall not be expressed in the title, such Act shall be void only as to so much thereof as shall not be expressed in the title.

Count I of the Petition alleges that the inclusion of the policy language regarding the Judicial Nominating sections to the Standings Bill, which is an appropriation bill, violates that Constitutional requirement that every bill contain only one subject. This is a protection against what is referred to as "logrolling."[3] Count II of the Petition also objects to the Judicial Nominating language under this same Constitutional section, but alleges that the subject of the bill was not stated in the title of the bill.

Count III of the Petition does not identify a specific Constitutional provision, but asserts that the portion of the bill concerning the election of the Chief Justice violates the Constitution's separation of powers.

OTHER BILLS OF NOTE

- **Practicing Law in Iowa** (SF379)—This bill was brought by the Judicial System to modernize qualifications for the bar to reflect that an applicant may not be an inhabitant of the state. Signed by the Governor.
- **Attorney General Restriction** (SF615)—Division III on Page 19 of the Justice Systems appropriations bill was a late amendment that requires the Iowa Attorney General to gain approval from the Governor, Executive Council or the General Assembly to join actions outside of the State of Iowa. The new language also requires monetary awards to be reported to the Department of Management. Vetoed by Governor.
- **Notice and Opportunity to Repair Construction Defects in New Construction** (SF532)—Provides a mandatory dispute resolution process for construction defects to new property, which are originally brought as class actions. The bill is effective upon enactment and applies to actions for which litigation has not commenced prior to the effective date of the bill. A claimant must comply with the requirements set forth in the bill before filing an action, otherwise, the court shall stay the action without prejudice until the requirements have been met. Sets forth specific time frames for each part of the dispute resolution. Signed by the Governor.
- **Idiopathic Falls** (SF507)—Exclusion of idiopathic falls as compensable under workers compensation. Signed by the Governor.
- **Franchisor-franchisee** (HF327)—Legislation pushed nationwide by the National Federation of Independent Businesses (NFIB) that limits liability for franchisors for activities undertaken by franchisees. Signed by Governor.
- **Negligent Hiring of Convicted Felon** (HF650)—Limits liability for employers for negligent hiring of convicted felons. Signed by Governor.
- **Judicial Budget** (SF616)—The overall judicial budget was $181,126,293 which is just over a $3 million increase from the FY2018 budget. The budget also included a slight salary rate increase for judges. Signed by Governor.

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1 For a detailed history of the passage of the constitutional amendment see: https://www.bleedingheartland.com/2019/02/07/how-one-democrats-work-will-let-iowa-republicans-pack-the-courts/

2 Robert Rush is an attorney from Cedar Rapids who served in the Iowa Senate from January 1977 to January 1983. He sued Governor Ray over the exercise of his line item veto. See *Rush v. Ray*, 322 N.W. 2d 325 (Iowa 1983); and *Rush v. Ray*, 362 N.W.2d 479 (Iowa 1985).

3 For Iowa case law discussing the one subject and title issues, see *State v. Mabry*, 460 N.W.2d 472 (Iowa 1990); *State v. Iowa Dist. Court*, 410 N.W.2d 684 (Iowa 1987); *Colton v. Branstad*, 372 N.W.2d 184 (Iowa 1985).

Samuel De Dios v. Indemnity Insurance Company of North America and Broadspire Services, Inc., __ N.W.2d __ (Iowa May 10, 2019) (Amended May 14, 2019) (Case No. 18-1227).

By Keith P. Duffy, Nyemaster Goode PC, Des Moines, IA

Keith P. Duffy

Editor's Note: The Iowa Defense Counsel Association and The American Insurance Association filed an amicus brief authored by IDCA member Keith Duffy. The brief is available at www.iowadefensecounsel.org by clicking Amicus Briefs under the Members tab.

In a case that attracted nationwide attention, the Iowa Supreme Court, in a five-to-two decision, recently issued an opinion concluding that "under Iowa law, a common law cause of action for bad-faith failure to pay workers' compensation benefits is not available against a third-party claims administrator of a workers' compensation insurance carrier." In addition to stating that Iowa did not recognize the cause of action, the opinion elaborated on the nature of, and justifications for, a claim of bad-faith denial of workers' compensation benefits.

PROCEDURAL BACKGROUND

De Dios filed suit against his employer's workers' compensation insurance carrier, Indemnity Insurance Company of North America ("Indemnity"), and Broadspire Services, Incorporated ("Broadspire"), alleging Indemnity "delegated its authority of investigating, handling, managing, administering, and paying benefits under Iowa Workers' Compensation Laws to [Broadspire]" and that "Broadspire or, in the alternative, Indemnity made the decision to deny him workers' compensation benefits" in bad faith. Opinion, at 3-4. Broadspire moved to dismiss the claims against it for failure to state a claim and Judge Bennett of the Northern District of Iowa certified the following question to the Iowa Supreme Court: "In what circumstances, if any, can an injured employee hold a third-party claims administrator liable for the tort of bad faith for failure to pay workers' compensation benefits?" Opinion, at 2.

BAD FAITH DENIAL OF WORKERS' COMPENSATION CLAIMS PRIOR TO *DE DIOS*

Writing for the majority, Justice Mansfield noted in *De Dios* that the Iowa Supreme Court first recognized the tort of first-party insurer bad faith in *Dolan v. Aid Insurance Company*, 431 N.W.2d 790 (Iowa 1988) (en banc). The *Dolan* decision was based on the fact "that insurance policies are contracts of adhesion . . . due to the inherently unequal bargaining power between the insurer and insured, which persists throughout the parties' relationship and becomes particularly acute when the insured sustains a physical injury or economic loss for which coverage is sought." According to the *Dolan* court, "Recognition of the first-party bad faith tort redresses this inequality."

Four years later, the court extended the holding in *Dolan* to workers' compensation in *Boylan v. Am. Motorists Ins.*, 489 N.W.2d 742 (Iowa 1992). The *Boylan* court recognized that Iowa Code Section 85.27 and Iowa Administrative Code rules 876—2.3 and r. 876—4.10 placed affirmative obligations on insurers. Opinion, at 8-9. These "affirmative obligations" placed upon an insurer were "the predominant justification for recognizing a bad-faith tort against workers' compensation carriers." Opinion, at 9-10. The bad-faith tort was later extended to "self-insured" employers in *Reedy v. White Consolidated Industries, Incorporated*, 503 N.W.2d 601 (Iowa 1993), where the court noted there was "no distinction between a workers' compensation insurance carrier for an employer and an employer who voluntarily assumes self-insured status under the act." Opinion, at 11. The court then determined in *Bremer v. Wallace*, 728 N.W.2d 803, 804 (Iowa 2007), that an employer who fails to obtain workers' compensation insurance or qualify as "self-insured" under the statute cannot be liable for common law bad-faith refusal to pay workers' compensation benefits because the employer "is not an insurer, nor is he the substantial equivalent of an insurer." Opinion, at 11-12.

It was against this backdrop that the Iowa Supreme Court addressed the certified question presented in *De Dios*.

POSITIONS OF THE PARTIES

De Dios asked the Court to "answer the certified question in the following manner: a third-party claims administrator may be held liable under the tort of bad faith when there exists a special relationship between a third-party administrator and an injured worker." Appellant's Br., at 14. Specifically, he urged the Court to adopt a

> factor test to determine whether a third-party has a special relationship with an injured worker: (1) whether a third-party administrator has the power to decide to deny the payment of workers' compensation benefits without the approval of an insurer; (2) whether a third-party administrator has the power to pay workers' compensation benefits without the approval of the an insurer; (3) whether a third-party administrator has the financial motivation to act unscrupulously in the investigation and servicing of the claim; and (4) whether the third-party administrator assumes some of the financial risk of loss from the claim.

Appellant's Br., at 14; Appellant's Reply Br., at 8-9. De Dios asserted that the same "public policy" justifications that led to the Court's recognition of bad faith claims by an employee against the employee's workers' compensation carrier in *Boylan v. American Motors Insurance Company*, 489 N.W.2d 742 (Iowa) also justified recognition of bad faith claim against a third-party administrator under the circumstances detailed above. Appellant's Br., at 16-17. De Dios also argued that recognition of a bad faith claim against a third-party administrator was necessary because he "need[ed] extra leverage against the corporation that has the discretionary power to impact his statutory rights." Appellant's Br., at 21.

Broadspire, on the other hand, argued "that bad faith tort liability for failing to impose workers' compensation benefits cannot be imposed absent an insurer/insured relationship" and that bad faith claims should not be imposed on third-party administrators because, unlike insurance carriers and self-insurance employers, these administrators do not have "financial responsibility" for the claims of an injured worker. Appellee's Br., at 9-13. Broadspire also asserted that third-party administrators are not the "substantial equivalent" of insurers and therefore should not be liable for bad faith claims and that an injured worker's claim against the insurer or self-insured employer is an adequate remedy. Appellee's Br., at 18-24. Finally, Broadspire pointed out that other jurisdictions within the Eighth Circuit refused to recognize such a claim.

The Iowa Defense Counsel Association and American Insurance Association filed an *amici curiae* brief in support of Broadspire, pointing out that statutes and regulations relied on in *Boylan* to justify a bad faith claim against insurance carrier did not apply to third-party administrators and therefore the rationale for recognizing the claim against insurers and self-insured employers did not apply to third-party administrators. *Amici* Br., at 7-10. The *amici* also argued that the existence of a bad faith claim should not depend on the terms of the contract between the insurer or self-insured employer and the third-party administrator. *Amici* Br., at 11-12.

THE COURT'S ANALYSIS & CONCLUSION

After examining the history of the tort of bad faith denial of workers' compensation claims in Iowa, the court noted, "When we consider these existing grounds for bad-faith liability in the workers' compensation field, it is difficult to see how they would apply to third-party administrators." Opinion, at 13. The "third-party administrator is not in an insurer/insured relationship with anyone. And unlike a self-insured employer, a third-party administrator does not have to meet rigorous financial requirements and is not under the ongoing supervision of the workers' compensation commissioner." Opinion, at 13-14.

The court also agreed with the position asserted by the *amici* that Iowa's "workers' compensation statutes also do not impose 'affirmative obligations' on third-party administrators as they do on insurers." Opinion, at 14. While there are references to workers' compensation third-party administrators (indicating the legislature's awareness of these entities) neither the workers' compensation statutes nor the administrative regulations implementing them impose the same sort of affirmative obligations recognized underlying the *Boylan* decision. While the employer immunity for common law suits provided by Iowa Code Section 85.20 did not apply to third-party administrators, the court noted that the lack statutory immunity did not provide an "affirmative reason" to recognize a bad faith claim.

The Court also noted that refusing to recognize a claim against third-party administrators would somehow reduce or eliminate an insurer's liability for bad faith denials. If the third-party administrator was an agent of the carrier, "then vicarious liability applies." In addition, the "duties imposed by Iowa statutes and administrative regulations remain on the carrier regardless of any attempt to pass them to a third-party" because such duties are "nondelegable."

Turning to other jurisdictions, the court noted that Colorado was "the only jurisdiction that to our knowledge has allowed bad-faith claims against third-party administrators or other entities retained by workers' compensation carriers," and Colorado's statutory and regulatory scheme differed from that of Iowa's. Moreover, the court noted that even outside of the workers' compensation realm,

"most jurisdictions to have considered the issue have declined to recognize bad-faith claims against third-party administrators and other entities that are not in privity with the insured." The court observed that not only would imposing a duty of good faith on a third-party administrator be "redundant" because the insurer already faces liability in the event of bad faith, the administrator already "owes a duty to the insurer who engaged him. A new duty to the insured would conflict with that duty and interfere with its faithful performance. This is poor policy."

In a footnote, the Court also addressed De Dios' argument that, under *Bremer*, "any entity that is 'the substantial equivalent of an insurer' should be liable in bad faith." However, the court noted that *Bremer*'s "language needs to be read in context." The point made in *Bremer* was that under workers' compensation law, "a self-insured employer is the substantial equivalent of an insurer in terms of its statutory and regulatory duties," whereas a third-party administrator is not. This would appear to limit the "substantial equivalent" language in *Bremer* to an entity that qualifies as a self-insured employer.

Ultimately, the Iowa Supreme Court relied on its "precedent holding the compensation carrier to a duty of good faith and fair dealing vis-à-vis the injured worker rests upon statutes and regulations directed specifically at the carrier. These statutes and regulations do not apply to third-party administrators." Accordingly, the Court rejected De Dios' request for a factor based test in favor of a "workable bright line" rule already embodied in Iowa law and answered the certified question by holding that under Iowa law, a common law cause of action for bad-faith failure to pay workers' compensation benefits is not available against a third-party claims administrator of a worker's compensation insurance carrier.

Hawkins v. Grinnell Regional Medical Center, No. 17-1892

By Thomas M. Boes and Catherine Lucas, Bradshaw Fowler Proctor & Fairgrave, Des Moines, IA

On June 7, 2019, the Iowa Supreme Court issued its decision in *Hawkins v. Grinnell Regional Medical Center*, No. 17-1892. IDCA submitted an amicus curiae brief in conjunction with the Iowa Insurance Institute and the Iowa Association of Business and Industry. The amicus brief was focused solely on the issue of the improper, inflammatory, and prejudicial argumentation of plaintiff's counsel, including "Golden Rule" and "send a message" arguments that were made to the jury. However, the supreme court's written opinion ultimately did not reach this issue.

The Court reversed the judgment of the district court on appeal due to the improper admission of prejudicial hearsay evidence. The court further went on to approve and adopt "same-decision" affirmative defense in employment litigation. Both holdings are resounding victories for the defendant. Unfortunately, the court did not reach the issue of the improper, inflammatory, and prejudicial argumentation of plaintiff's counsel in its opinion. The issue did draw the interest of multiple Justices at oral argument, which can be found on the Court's YouTube channel (see generally timestamps 10:31 to 15:20, 25:59 to 28:16, 30:46 to 34:52 of the video).

The reasoning of the Iowa Supreme Court for not reaching the issue in its written opinion can only be speculated upon. Nonetheless, the challenge of this type of misconduct by plaintiff's counsel through a coordinated effort of a number of entities in filing the amicus brief was useful in demonstrating to the plaintiffs' bar that such misconduct will not be ignored.

Read the Iowa Supreme Court decision issued June 7, 2019.

Read the amicus brief here

Case Law Update

By Katie Anderegg; Bradshaw, Fowler, Proctor & Fairgrave P.C., Des Moines, Iowa

Katie Anderegg

DE DIOS V. INDEMNITY INSURANCE COMPANY OF NORTH BROADSPIRE SERVICES, INC., NO. 18-1227, 2019 WL 2063289 (IOWA MAY 10, 2019), AMENDED (MAY 14, 2019).

WHY IT MATTERS

The Supreme Court answered a question certified by the District Court and addressed, as a matter of first impression, under Iowa law, a common law claim for bad-faith failure to pay workers' compensation benefits was not available against third-party claims administrator.

SUMMARY

Samuel De Dios was injured on the job while working for Brand Energy & Infrastructure Services when his vehicle was rear-ended by another employee, damaging his vehicle and causing him injuries, including a lower back injury. De Dios reported the collision and his work injury to Brand's safety manager, who authorized him to choose whatever medical provider he would like to provide care for his work injury. De Dios chose to be treated at St. Luke's Hospital, where Dr. Jeffrey O'Tool provided him with medical care for his work injury. De Dios alleges that from the date of his injury, April 8, 2016, through May 9, 2016, Brand refused to provide him with "light duty" work. He further alleges that from April 15, 2016, Indemnity Insurance Company of North America, whom Brand had a workers' compensation insurance policy with, and Broadspire Services, Incorporated, knew or should have known that he had work restrictions as a result of his work injury; that Brand refused to provide light duty work within those restrictions; and that Indemnity and Broadspire were required to pay him Temporary Total Disability ("TTD") and/or Healing Period ("HP") Benefits until a determination of maximum medical improvement was made by a qualified medical expert.

De Dios alleges that Broadspire or, in the alternative, Indemnity made the decision to deny him workers' compensation benefits. He alleges that, prior to doing so, neither Indemnity nor Broadspire interviewed him, or interviewed or contacted the security guard, Tina Gregg, who had witnessed the accident, or his treating physicians, Dr. O'Tool and Dr. Olson. He alleges that the defendants' failure to contact these people violated an insurance industry standard of "Three-Point Contact" before denying him workers' compensation benefits.

On June 9, 2016, De Dios filed a workers' compensation claim with the Iowa Workers' Compensation Commissioner against Indemnity and Broadspire.

On August 23, 2016, Indemnity and Broadspire filed a joint answer with the Iowa Workers' Compensation Commissioner and denied liability for De Dios's work injury. De Dios alleges that Indemnity and Broadspire did not convey to him the basis for their decision to deny his claim at that time, that they, in fact, had no reasonable basis for denying his claim, and that they knew or should have known that no reasonable basis existed to deny his claim.

Later, he filed a bad-faith action in the district court against his employer's workers' compensation carrier, Indemnity and its third-party administrator, Broadspire. The action was removed to federal court.

The United States District Court for the Northern District of Iowa, Mark W. Bennett, certified a question of Iowa law, as to whether a third-party claims administrator could be liable for bad faith failure to pay workers' compensation benefits. The answer to the certified question determined whether De Dios's claim against Broadspire would proceed.

ANALYSIS

In Iowa, the bad-faith cause of action arises from (1) the special contractual relationship between insurer and insured, (2) the specific statutory and administrative duties imposed on insurers, or (3) some combination of the two.

Under Iowa law, to support a claim for bad faith against an insurer, a plaintiff must show the absence of a reasonable basis for denying benefits of the insurance policy and the insurer's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. Further, under Iowa law, bad-faith liability extends to workers compensation insurer because the law imposes certain affirmative obligations on both employers and insurance carriers, and the

employer's exclusive remedy defense is not available to carriers. Bad-faith liability extends to an employer who is self-insured for workers' compensation purposes because the statutory requirements and administrative oversight exercised over self-insured employers renders them the substantial equivalent of insurers.

The Court stated that when they considered the existing grounds for bad-faith liability in the workers' compensation field, it is difficult to see how they would apply to third-party administrators. A third-party administrator is not in an insurer/insured relationship with anyone. And unlike a self-insured employer, a third-party administrator does not have to meet rigorous financial requirements and is not under the ongoing supervision of the workers' compensation commissioner. Iowa's workers' compensation statutes also do not impose affirmative obligations on third-party administrators as they do on insurers.

HOLDING

The Court held that a third-party administrator does not possess the attributes that have led to the imposition of bad-faith liability. Accordingly, the Court answered the question as follows: under Iowa law, a common law cause of action for bad-faith failure to pay workers' compensation benefits is not available against a third-party claims administrator of a worker's compensation insurance carrier.

GOOD V. IOWA DEPARTMENT OF HUMAN SERVICES, 924 N.W.2D 853 (IOWA 2019).

WHY IT MATTERS

Iowa is one of only 11 states and the District of Columbia that currently cover transition-related surgical care through their public health insurance programs.

SUMMARY

EerieAnna Good and Carol Beal are transgender women who have gender dysphoria. Gender dysphoria is a diagnostic category in the Diagnostic and Statistical Manual of Mental Disorders_V (DSM-V), which refers to the distress that may accompany the incongruence between one's experienced or expressed gender and one's assigned gender.

Good is a 29-year-old transgender woman and Medicaid recipient who was officially diagnosed with gender dysphoria in 2013, though she began presenting herself as a female fulltime in 2010. Good began hormone therapy in 2014 and legally changed her name, birth certificate, driver's license, and social security card to align with her gender identity in 2016. Good's gender dysphoria intensifies her depression and anxiety. After her healthcare providers determined that surgery was medically necessary to treat her gender dysphoria, Good initiated the process to seek Medicaid coverage of her Gender-affirming orchiectomy procedure from her MCO, AmeriHealth Caritas Iowa (AmeriHealth) in January 2017.

Beal is a 43-year-old transgender woman and Medicaid recipient who was officially diagnosed with gender dysphoria in 1989. Beal began presenting herself as a female fulltime at the age of ten and began hormone therapy in 1989. She legally changed her name, birth certificate, driver's license and Social Security card to align with her gender identity in 2014. Beal also experiences depression and anxiety due to her gender dysphoria. Beal's healthcare providers concluded gender-affirming surgery is medically necessary to treat her gender dysphoria. She began seeking Medicaid coverage for a gender-affirming vaginoplasty, penectomy, bilateral orchiectomy, clitoroplasty, urethroplasty, labiaplasty, and preineoplasty from her MCO, Amerigroup of Iowa Inc. (Amerigroup) in June 2017.

Medicaid is a joint federal-state program that helps states provide medical assistance to eligible low-income individuals. The Iowa DHS manages Iowa's Medicaid program consistent with state and federal requirements through a managed care model that required Medicaid recipients' enrollment in an MCO. The MCO is required to "provide, at a minimum, all benefits and services deemed *medically necessary* that are covered under the contract with the agency" in accordance with the DHS's standards. Iowa Admin. Code r. 441-73.6(1).

Iowa Medicaid generally provides coverage for medically necessary services and supplies provided by physicians subject to a few exclusions and limitations. For the purposes of the program, when a surgical procedure primarily restores bodily function, whether or not there is also a concomitant improvement in physical appearance, the surgical procedure is not considered cosmetic and is therefore not excluded under the provisions of Iowa Admin Code r. 441-78.1. Conversely, surgeries for the purposes of sex reassignment are not considered as restoring bodily function and are excluded from coverage. Iowa Admin. Code r. 441-78.1(4)(*b*)(2)-(4), (*d*)(2), (15).

Both women filed requests for Medicaid preapproval for their gender-affirming surgical procedures. The managed care organizations (MCOs) for both women denied coverage for their surgeries pursuant to rule 441—78.1(4). An administrative law judge (ALJ) and the director of the Iowa Department of Human Services (DHS) affirmed the MCO's decisions based on rule 441—78.1's exclusion of coverage for gender-affirming procedures.

Both women then filed a petition for judicial review in district court, arguing Iowa Administrative Code rule 441—78.1(4) violates the ICRA's prohibitions against sex and gender identity discrimination and the Equal Protection Clause of the Iowa

Constitution. They also claimed the DHS's application of the rule creates a disproportionate negative impact on private rights and is arbitrary and capricious. DHS filed pre-answer motions to dismiss for failure to state a claim upon which relief can be granted in both women's cases, which the district court denied. Good and Beal's cases were then consolidated.

Following briefing on the merits and a hearing, the district court reversed DHS's decision to deny Good and Beal Medicaid coverage for their gender-affirming surgical procedures. The district court concluded DHS is a public accommodation under the ICRA, and rule 441—78.1(4), which denies coverage for gender-affirming surgeries, violates the ICRA's prohibition on gender-identity discrimination. However, the district court rejected Good and Beale's claim that the rule also violates the ICRA's prohibition on sex discrimination, relying on the holding in *Sommers v. Iowa Civil Rights Commission*, which held that sex discrimination under the ICRA does not include "transsexuals." 337 N.W.2d 470, 474 (Iowa 1983). The district court also concluded rule 441—78.1(4) violates the equal protection clause of the Iowa Constitution. Moreover, the district court determined DHS's decision to enforce rule 441—78.1(4) should be reversed because it had a grossly disproportionate negative impact on private rights and was arbitrary and capricious. DHS appealed the district court ruling, and the Supreme Court retained the appeal.

ANALYSIS

The Iowa Supreme Court addressed several issues and ultimately ruled that the Department of Human Services was a government unit within Iowa Civil Rights Act's definition of a "public accommodation" and thus ICRA's prohibition on discriminatory practices based on gender identity applied to DHS's administration of Medicaid program. Although DHS was not a physical place, establishment, or facility, ICRA made clear that public accommodation included a unit of state government that offered benefits or grants to the public and DHS's administration of Medicaid program constituted such a benefit or grant.

The Court also ruled that Iowa Administrative Code rule 441-78.1(4) prohibiting Iowa Medicaid coverage of surgical procedures relate to gender identity disorders discriminated on the basis of gender identity, in violation of the Iowa Civil Rights Act, despite DHS's claim that the rule did not discriminate because it treated transgender and non-transgender Medicaid beneficiaries alike in denying coverage for cosmetic procedures performed primarily for psychological purposes.

HOLDING

Thus, the Supreme Court upheld the district court's judgment and granted judgment in favor of Beal and Good.

New Lawyer Profile

Spencer Vasey

In every issue of *Defense Update*, we will highlight a new lawyer. This issue, we get to know Spencer Vasey of Elverson Vasey in Des Moines.

Spencer Vasey is an associate attorney at Elverson Vasey in Des Moines, where she primarily practices insurance defense and subrogation litigation and drafts coverage opinions for a variety of clients. Spencer was born and raised in the Des Moines area. She earned her undergraduate degree summa cum laude from Drake University, where she played center midfield for the women's soccer team. After graduating from the University of Iowa College of Law with highest distinction in 2018, she moved back to Des Moines to fulfill her childhood dream of working alongside her father, Jon Vasey, a founding partner of Elverson Vasey.

During her time at the University of Iowa, Spencer was heavily involved in moot court. She was a member of the University of Iowa's National Moot Court team and traveled to New York City for the National Moot Court Competition, where her team was awarded the Harrison Tweed Award for Best Brief. Individually, Spencer earned the College of Trial Attorneys' Award for Best Oral Advocate. While at Iowa Law, Spencer clerked for U.S. District Court Judge C.J. Williams and spent a semester interning with the Federal Public Defender.

Spencer's experiences throughout law school have made for a smooth transition to practice. She loves being in a courtroom and has a particular fondness for drafting motions for summary judgment and coverage opinions.

In her free time, Spencer teaches yoga sculpt at Powerlife Yoga. She also enjoys running, reading and attending any of Des Moines' many summer festivals.

Attend the 2019 Annual Meeting & Seminar

Have you ever wondered what the judge really thought of your voir dire? Have you ever wanted to sit down with judges from **FIVE** different court benches to get their perspective on the judicial system? Have you ever wanted to attend a conference, other than the bench-bar conference, where you had an opportunity to get perspective from EIGHT judges and/or justices? If you answered yes to any of those questions, then you won't want to miss attending the 2019 Annual Meeting and Seminar on September 12–13 at the Embassy Suites in downtown Des Moines! We will have judges from the U.S. Court of Appeals 8th Circuit; the U.S. District Court for the Southern District; the U.S. District Court for the Northern District of Iowa, the Iowa Supreme Court; the Iowa Court of Appeals; and the Iowa District Court. Come get first-hand advice from top judges!

In addition, you will hear from inspirational speakers, learn about state constitutional tort claims, get two hours of ethics, gain information on how to use experts in alcohol & drug cases as well as how to use a forensic chiropractor. Interested in saving the jury trial? We've got a recently retired judge who has a law career spanning more than 40 years, with 24 of those spent as a U.S. District Court judge who will speak on that. Plus, more!

Watch your mailbox and Inbox for registration details this summer.

IDCA Annual Meetings

September 12–13, 2019

55th ANNUAL MEETING & SEMINAR
September 12–13, 2019
Embassy Suites by Hilton, Des Moines Downtown
Des Moines, IA
Registration opens in Summer 2019

October 25, 2019

DEPOSITION BOOTCAMP
October 25, 2019
Grinnell, IA
Registration opens August 1

September 17–18, 2020

56th ANNUAL MEETING & SEMINAR
September 17–18, 2020
Embassy Suites by Hilton, Des Moines Downtown
Des Moines, IA

September 16–17, 2021

57th ANNUAL MEETING & SEMINAR
September 16–17, 2021
Embassy Suites by Hilton, Des Moines Downtown
Des Moines, IA