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IOWA DEFENSE COUNSEL ASSOCIATION

DEFENSE UPDATE

WINTER 2020 VOL. XXII, No. 1

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LEVERAGING THE EXCEPTIONS: NAVIGATING IOWA'S COLLATERAL SOURCE RULE

Joshua R. Strief[1]*, Elverson Vasey, Des Moines, Iowa*

Joshua R. Strief

The scenario: Plaintiff, let's call him Alweighs ("Al") Hertzalot, sues your client, Bill Badluck. Al claims he was injured due to a vehicle accident caused by your client. In the same lawsuit, Al asserts a claim for underinsured benefits against his underinsured motorist insurance carrier, I-M-Insured Co. I-M-Insured Co. also provided medical payments coverage to Al and paid $5,000.00 of Al's $7,300.00 of medical bills. Al later learns that your client, Bill, has liability limits of $250,000.00. Upon learning the amount of your client's limits, Al agrees to dismiss his underinsured motorist claim against I-M-Insured Co. in exchange for I-M-Insured Co. waiving its $5,000.00 subrogation claim.

The case proceeds to trial. Al claims the entire amount of his medical bills, including the $5,000.00 paid by his insurer, I-M-Insured Co. During your brilliant cross-examination, you start to ask Al about the fact I-M-Insured Co paid for $5,000.00 of his medical bills and I-M-Insured Co. doesn't have to be repaid, but Al's attorney objects. Is the fact Al didn't actually pay the

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WHAT'S INSIDE

IDCA President's Letter

Kami Holmes
IDCA President

Relationships. What do you think about when you hear that word? You probably think of your spouse, significant other, your children, family in general, maybe your colleagues, but do you think about the insurance adjusters that you work with on files that are assigned to you from insurance companies? If not, I'd like to suggest that you should.

Of course, relationships come in all forms, good ones, bad ones, even sad ones, but the relationship you have with your in-house insurance adjuster should be one you hold in high regard, at least when it comes to your work life.

An integral part of any good relationship is trust. A relationship without trust doesn't work and will not last. It's no secret that us in-house counsel/adjusters rely on outside counsel to keep us abreast of the claim(s) made against our insured(s) and sometimes against our companies directly. You are the gatekeepers to the up to date information that surrounds the case; on the flip side, we are the gatekeepers to ensure that work is being done appropriately and efficiently. Communication is key here. In-house adjusters need to be able to wholly understand the risks associated with the claim and maintain a strong partnership with you in order to effectively evaluate the claim on our end. This information is necessary to ensure not only that our insureds are being well taken care of, but to make sure we are appropriately evaluating the case for the company we work for. We need current and up to date information and we need to be able to trust that you are getting us accurate and timely information.

On the other hand, you need to be able to trust that we have your backs as well. Billing. I hear ya. I have always questioned the third-party billing service. Outsourcing of the audit of your bill for services rendered has become the norm and it looks like it is here to stay. While I honestly question whether trust in a relationship can survive this third-party auditing and subsequent fee cutting that usually follows, I would implore you to understand where those companies are coming from.

An article from this month's Best's Review speaks about the challenges insurance companies are facing everyday with regard to general liability losses. While not a new issue, the article references the fact that general liability loss trends have become a major topic of conversation over the last year as insurers face rising loss costs due to increased litigation and nuclear verdicts. Doesn't that sound timely? Iowa has had its fair share of nuclear verdicts in the past few years. Those cases are hard on everyone involved. Yes, companies are always looking for ways to reduce business costs, but that is what keeps a good company relevant, so long as it can do so without sacrificing quality.

In addition to keeping us up to speed on our cases, any good relationship with in-house staff requires that you understand our corporate culture. I often times hear that it is hard to facilitate a relationship with in-house staff because in some cases the person you speak with changes each time you make contact on a case. I understand. That is certainly an impediment in building a one on one relationship; however, in those cases it is imperative that you work on understanding the corporate culture even more so and work on building a relationship with the company as a whole.

I realize that this is a complicated relationship. I would guess that both sides feel taken advantage of at one time or another, which is probably not unlike any other relationship. Towards that end, just like any other relationship, you must work at it to make it successful. Ask questions. Make sure you have a good working knowledge of the company's expectations and communication style. Check in before the adjuster has to call you. If the company does internal fee audits, make sure you have thoroughly gone through your bill to make sure that it is reasonable. On the flip side, ask for what you need, don't assume we know. Let us know how we can better help you. All of these things will help build up a solid foundation of trust and your relationship will be a partnership, just as it should be.

In closing, I'd like to thank you again for allowing me to serve as your President. I will repeat what I said in the last issue, the main goal of our organization has been, and will be always be, to serve our members. I will work very hard to continue this model by supporting, engaging, and promoting our members and their interests in whatever way necessary to accomplish this goal. As always, the Board welcomes your comments and suggestions on what we can do to help you.

Justice Susan Christensen Named Chief Justice of Iowa Supreme Court

Des Moines, Iowa, February 24, 2020—The Iowa Supreme Court has selected Justice Susan Christensen, Harlan, as its next chief justice. Justice Christensen will succeed Chief Justice Mark Cady who passed away suddenly November 15, 2019. Justice David Wiggins has served as acting chief justice since Chief Justice Cady's passing. Justice Christensen will be the second woman to serve as chief justice of Iowa's highest court.

"I am honored to be selected by my colleagues as chief justice of the Iowa Supreme Court," Chief Justice Christensen said. "Three months ago, our court faced a sudden crisis with the unexpected death of Chief Justice Cady. I am deeply appreciative of the immediate leadership by acting Chief Justice David Wiggins. He provided the stability to push forward with the court's work while the judicial branch and entire state grieved for the Cady family. As chief justice, I will maintain my passion for child welfare and juvenile justice and do my best to lead Iowa's judiciary in a manner which provides all 99 counties with fair and impartial justice."

In addition to judicial duties and writing opinions, the chief justice presides over oral arguments and court conferences, sets the court's oral argument schedule, and delivers the state of the judiciary address to the legislature each January. As administrative head of the Iowa Judicial Branch, the chief justice presides over the judicial council and works with the state court administrator to manage judicial branch operations with a FY 2020 appropriation of $181 million, 334 judicial officers, and more than 1,700 employees in all 99 counties. The chief justice also appoints members to supreme court committees and task forces to propose policies and rules of procedure and practice.

Chief Justice Christensen was appointed to the Iowa Supreme Court in 2018 by Governor Reynolds. She will be up for retention in November 2020. Prior to her appointment to the supreme court, Chief Justice Christensen was appointed a district associate judge in 2007 and a district court judge in 2015. Before becoming a judge, she practiced law in Harlan for 16 years. Chief Justice Christensen currently chairs the Children's Justice State Council as well as the Family First Task Force. She previously served on the Supreme Court's Family Law Pro Se Forms Committee, Child Support Guidelines Review Committee, and Parents Representation Standards Committee. She is a member of The Iowa State Bar Association, the Southwest Iowa Bar Association, and the Shelby County Bar Association.

Chief Justice Christensen was born and raised in Harlan, Iowa. She earned her bachelor's degree from Judson College in 1988 and her law degree from Creighton University School of Law in 1991. She is married with five children and five grandchildren.

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$5,000.00 admissible? Can you bring up the fact Al doesn't have to repay the $5,000.00 to his insurer?

The answer to these questions lies with Iowa's treatment of the Collateral Source Rule, a common law rule concerning payments made by third parties, aka collateral sources, to or on behalf of the plaintiff or claimant. This article will discuss the definition of the Rule, Iowa's exceptions to the Rule, and tips for application of the Rule and its exceptions.

THE COLLATERAL SOURCE RULE: DEFINITION AND JUSTIFICATION

Under Iowa common law, the Collateral Source Rule has two components, both of which reinforce each other. First, the Rule prohibits a plaintiff's recovery from being "reduced by sums the plaintiff has received or will receive from another source." *Collins v. King*, 545 N.W.2d 310, 311 (Iowa 1996); see *Nieman v. Heil Co.*, 471 N.W.2d 790, 791 (Iowa 1991). The second component of the Collateral Source Rule enforces the first via an evidentiary rule, which the Iowa Supreme Court has summarized as follows:

> "The collateral source rule is a common law rule of evidence that bars evidence of compensation received by an injured party from a collateral source."

Pexa v. Auto Owners Ins. Co., 686 N.W.2d 150, 155–56 (Iowa 2004). In other words, the two parts of the rule work hand-in-hand: plaintiffs' recoveries cannot be reduced by collateral source payments and evidence of such payments is inadmissible at trial.

One criticism of the Rule is that it unfairly benefits plaintiffs, especially when the collateral benefits received do not have to be repaid. Consider a twenty-five-year-old plaintiff, Lucky Zuckerburg, who was injured in a vehicle accident. The plaintiff's uncle, Mark Zuckerburg, pays the entire $20,000 of Lucky's medical bills and does not want to be repaid. Lucky then sues the party responsible for the accident. Under the Collateral Source Rule, plaintiff Lucky is allowed to claim the entire $20,000 of medical bills in his lawsuit, even though he doesn't have to repay his uncle for those bills. At trial, the Collateral Source Rule prevents defendant from both telling the jury the uncle paid all of the bills and telling the jury plaintiff doesn't have to repay his uncle. A jury award of the full $20,000 sought for the medical bills results in plaintiff Lucky being compensated twice for the medical bills. Meanwhile, the jury believes the plaintiff has only been reimbursed the medical bills one time. The illusion to the jury allows plaintiffs to "double-dip" and receive twice as much compensation.

On the other hand, plaintiff Lucky would argue it is more unfair to give the tortfeasor a credit for his bad actions just because plaintiff's uncle was willing to help him. If the tortfeasor is provided such a credit, he would also benefit from the collateral source payment by not being held responsible for the full extent of his actions. In weighing these two positions, Iowa courts have thus far agreed with plaintiff Lucky's reasoning, holding it is more just for the injured party to profit from collateral benefits. *See e.g. Collins v. King*, 545 N.W.2d 310, 312 (Iowa 1996).

Iowa's common law treatment of the Collateral Source Rule has been historically more favorable to plaintiffs. However, there have been some modifications of the Rule by Iowa's legislature and courts that have leveled the playing field for plaintiffs and defendants.

MODIFICATION OF THE COMMON LAW COLLATERAL SOURCE RULE

A. COMPARATIVE FAULT CASES—IOWA CODE § 668.14

In 1987 the Iowa legislature amended the Comparative Fault Act by enacting Iowa Code § 668.14. This code section acts as a partial abrogation of the Collateral Source Rule, likely to prevent the "double-dipping" of plaintiffs in comparative fault cases. *See Pexa v. Auto Owners Ins. Co.*, 686 N.W.2d 150, 155–56 (Iowa 2004).

Iowa Code § 668.14 states:

1. In an action brought pursuant to this chapter seeking damages for personal injury, the court shall permit evidence and argument as to the previous payment or future right of payment of actual economic losses incurred or to be incurred as a result of the personal injury for necessary medical care, rehabilitation services, and custodial care except to the extent that the previous payment or future right of payment is pursuant to a state or federal program or from assets of the claimant or the members of the claimant's immediate family.

2. If evidence and argument regarding previous payments or future rights of payment is permitted pursuant to subsection 1, the court shall also permit evidence and argument as to the costs to the claimant of procuring the previous payments or future rights of payment and as to any existing rights of indemnification or subrogation relating to the previous payments or future rights of payment.

3. If evidence or argument is permitted pursuant to subsection 1 or 2, the court shall, unless otherwise agreed to by all parties, instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating the effect of such evidence or argument on the verdict.

4. This section does not apply to actions governed by section 147.136.

Iowa Code § 668.14 (1987) (note "section 147.136" refers to a medical malpractice statute discussed later in this article). While § 668.14 prevents double-dipping by the plaintiff, it also appears to prevent the plaintiff from suffering a double reduction due to collateral benefit evidence. This is achieved through permitting evidence of subrogation rights, the cost of procuring the collateral benefits, if any, and requiring the court to submit special interrogatories regarding the effect of the collateral benefits on the verdict.

Scope of § 668.14: Because Iowa Code § 668.14 is implemented as part of Iowa's Comparative Fault Act, it only applies in cases dealing with "fault," such as negligence cases. This means § 668.14 does not apply to cases involving intentional torts or fraud, *see Carson v. Webb,* 486 N.W.2d 278, 280 (Iowa 1992), pure breach of contract actions, *see Midland Mut. Life Ins. Co. v. Mercy Clinics, Inc.*, 579 N.W.2d 823, 830 (Iowa 1998), or when the collateral benefit comes from a state or federal government program, *see* Iowa Code § 668.14(1); *Pexa,* 686 N.W.2d at 155-156).

Iowa Code § 668.14(1) indicates it is limited to collateral benefits involving medical care, rehabilitation services, and custodial care. Other collateral benefits, such as disability benefits, do not appear to fall under the § 668.14 exception. *See Collins v. King,* 545 N.W.2d 310, 312 (Iowa 1996). However, Iowa courts have also held collateral benefits outside the scope of Iowa Code § 668.14 may still be admissible in other scenarios, such as disability benefits when plaintiff claims the disabling condition was exacerbated, *see Knowlton v. Grinnell Select Ins. Co.,* 2016 WL 146307 (Iowa Ct. App. 2016) (cited in table at 880 N.W.2d 518), or to show the actual amount of medical expenses when adjustments and write-offs are involved, *see Pexa,* 686 N.W.2d at 156.

Medical Malpractice Cases: Iowa Code § 668.14 also doesn't apply to medical malpractice actions. Iowa Code § 668.14 (4). Medical malpractice actions are governed by Iowa Code § 147.136, which provides:

> [I]n an action for damages for personal injury against a physician or surgeon . . . *the damages awarded shall not include actual economic losses incurred or to be incurred in the future by the claimant by reason of the personal injury*, including but not limited to the cost of reasonable and necessary medical care, rehabilitation services, and custodial care, and the loss of services and loss of earned income, *to the extent that those losses are replaced or are indemnified by insurance, or by governmental, employment, or service benefit programs or from any other source.*

Iowa Code § 147.136(1) (2011) (emphasis added). In other words, § 147.136 prevents plaintiffs in medical malpractice cases from claiming damages that have already been paid or will be paid by a collateral source. Although Iowa Code § 147.136(1) provides strict limitations on recovery of collateral benefits, Iowa Code § 147.136(2) permits plaintiffs in medical malpractice actions to recover two types of collateral benefits: 1. Economic losses received under the § 249A medical assistance program; and 2. The assets of the plaintiff or plaintiff's immediate family. Because § 668.14 doesn't apply to medical malpractice cases, plaintiffs claiming the two types of damages in Iowa Code § 147.136(2) may potentially "double-dip," particularly if the plaintiff is under no obligation to repay the collateral benefits received.

B. WORKERS' COMPENSATION BENEFITS—AN EXCEPTION TO THE EXCEPTION?

Although Iowa Code § 668.14 appears straightforward, the Iowa Supreme Court has held § 668.14 is essentially inapplicable to workers' compensation benefits when the plaintiff or claimant has followed the requirements of Iowa Code § 85.22. *See Schonberger v. Roberts,* 456 N.W.2d 201, 203 (Iowa 1990). Under Iowa Code § 85.22, employees receiving workers' compensation payments are reserved the right to bring a separate action against third parties who are responsible for the injuries:

> When an employee receives an injury or incurs an occupational disease or an occupational hearing loss for which compensation is payable under this chapter, chapter 85A, or chapter 85B, and which injury or occupational disease or occupational hearing loss is caused under circumstances creating a legal liability against some person, other than the employee's employer or any employee of such employer as provided in section 85.20 to pay damages, the employee . . . may take proceedings against the employer for compensation, and the employee . . . may also maintain an action against such third party for damages . . . and the following rights and duties shall ensue:

> 1. If compensation is paid the employee or dependent or the trustee of such dependent under this chapter, *the employer by whom the same was paid, or the employer's insurer which paid it, shall be indemnified out of the recovery of damages to the extent of the payment so made,* with legal interest, except for such attorney fees as may be allowed, by the district court, to the injured employee's attorney or the attorney of the employee's personal representative, *and shall have a lien on the claim for such recovery and the judgment thereon for the compensation for which the employer or insurer is liable.*

Iowa Code § 85.22(1) (2018) (emphasis added). In other words, § 85.22(1) provides "that the employer or the employer's insurer, who has made compensation payments, shall have a lien on the claim and shall be indemnified out of the recovery of damages." *Nieman v. Heil Co.,* 471 N.W.2d 790, 791 (Iowa 1991).

Neither Iowa Code §§ 85.22 or 668.14 indicate on their face that § 668.14 shouldn't apply to workers' compensation benefits, but this didn't stop the Iowa Supreme Court from fashioning such a rule in the case of *Schonberger v. Roberts,* 456 N.W.2d 201 (Iowa 1990). In *Schonberger,* the Court's majority opinion held that Iowa Code § 668.14 does not allow evidence of workers' compensation payments if the claimant/plaintiff complies with the requirements of Iowa Code § 85.22. Compliance requires the plaintiff to confirm the proceeds of any recovery by plaintiff are pledged to reimburse the workers' compensation insurer or employer who paid workers' compensation benefits to plaintiff. The *Schonberger* Court believed the only reason to inform the jury of the existence of workers' compensation payments "is to invite the jury to reduce [plaintiff's] recovery because of them," and allowing such evidence while forcing plaintiff to pay back the entirety of his workers' compensation benefits would lead to a double reduction for the plaintiff. *Schonberger*, 456 N.W.2d at 203.

From a black letter of the law standpoint, there is little support for the majority's decision in *Schonberger* in the involved statutes, a fact highlighted by the *Schonberger* dissent authored by Chief Justice McGiverin:

> Under subsection (1) of [Iowa Code § 668.14], evidence of certain collateral benefits paid the plaintiff is clearly admissible. The statute says "the court *shall permit*" such evidence. Subsection (2) allows the plaintiff to counter this evidence by introducing evidence of the cost of obtaining the collateral benefits and evidence of any rights of subrogation relating to the benefits. The language could not be more clear.

Schonberger, 456 N.W.2d at 205 (also noting the legislature specifically rejected the approach taken by the majority opinion and instead opted to enact Iowa Code § 668.14). Apart from his scathing criticism of the majority's disregard for the letter of the law and legislature's intent, Chief Justice McGiverin also proposed a solution to the problem identified by the majority, which would have allowed the district court to follow Iowa Code § 668.14 while preventing the double reduction of a plaintiff's award:

> Under section 668.14, evidence of collateral benefits should be admitted pursuant to subsections (1) and (2). Then, pursuant to subsection (3), the jury should be instructed that if it finds liability it must find whether any of the plaintiff's claimed damages were or will be paid by collateral sources and, if so, how much. The jury should also be instructed to find whether any of those collateral sources are subrogated to the plaintiff's recovery from the tort defendant. Next, the jury should be instructed that if it finds that such rights of subrogation do exist, the plaintiff's recovery from the defendant *may not* be reduced by the amount of those collateral benefits. Finally, the jury should be asked to state the amount of economic losses of the plaintiff that were or will be paid by collateral sources and which are also included in its jury award to the plaintiff.

Schonberger, 456 N.W.2d at 205. This framework prevents double reduction by preventing the jury from eliminating collateral source damages from their damages award when the collateral source is subject to subrogation.

The *Schonberger* Court's holding is somewhat strange considering the traditional role of the Court in not infringing upon legislative intent. Since *Schonberger*, the Iowa courts have essentially continued to disregard Iowa Code § 668.14 in cases involving workers' compensation benefits and § 85.22. This is true despite the fact the Iowa Supreme Court has since considered cases which undermine the *Schonberger* Court's rationale for disregarding § 668.14. *See Kuta v. Newberg,* 600 N.W.2d 280, 290-91 (Iowa 1999) (plaintiff, not defendant, argued for admission of evidence of the workers' compensation benefits to show what plaintiff's family *did not* receive, contradicting the *Schonberger* Court's assertion the only reason for informing the jury of workers' compensation benefits is to reduce plaintiff's recovery). Luckily, Iowa Courts have not chosen to expand upon the reasoning of the *Schonberger* majority's opinion to further eviscerate Iowa Code § 668.14. *See Loftsgard v. Dorrian*, 476 N.W.2d 730, 734 (Iowa Ct. App. 1991) (stating the McGiverin dissent in *Schonberger* "may well set the tune" for cases where subrogation and indemnity rights are not statutory).

The Case for Abandoning *Schonberger*: Iowa courts should re-examine the *Schonberger* majority's opinion regarding admissibility of workers' compensation benefits under Iowa Code § 668.14. More recent decisions indicate a growing willingness of Iowa courts to utilize jury instructions and special interrogatories to prevent double reductions involving collateral source payments. For instance, in *Le v. Vaknin*, the district court submitted interrogatories for the jury to determine whether the damages award included collateral source payments of medical expenses by plaintiff's health insurer. Based on the finding, the district court then reduced the damages awarded by the amount of the health insurer's payment without the jury determining whether the subrogation rights of the health insurer had been waived. The Iowa Supreme Court held the district court erred by not including an instruction concerning whether the health insurer had a subrogation right. *Le v. Vaknin,* 722 N.W.2d 412, 418 (Iowa 2006).

The *Vaknin* Court's decision is interesting for two reasons. First, it indicates that courts should protect against a double reduction of the award when the third-party payor (the health insurer) remains subrogated to the recovery. But what happens when the third-party is *not subrogated?* If the court can protect against double reduction, it presumably has the power to protect against double recovery, meaning a district court could eliminate collateral source payments from a damages award when there is no right of subrogation for those payments. Second, and more importantly, the *Vaknin* Court framework of jury instructions mimic those suggested in Chief Justice McGiverin's *Schonberger* dissent. There is little difference between a health insurer who is subrogated to a recovery and a workers' compensation payor who is owed indemnification—both must be reimbursed from the recovery. Thus, the framework dictated in *Vaknin* should be able to be successfully used for worker's compensation benefits, meaning the *Schonberger* Court's approach of disregarding Iowa Code § 668.14 should be discontinued.

Admissibility Despite *Schonberger*?: What happens when plaintiff/claimant is not required to repay the workers' compensation benefits? In that situation, it appears defendants should be able to admit evidence of the workers' compensation payments received by plaintiff. The *Schonberger* case held evidence of workers' compensation payments must be excluded when the plaintiff's recovery is pledged to reimburse the workers' compensation employer or insured. When the plaintiff's recovery is *no longer* pledged for reimbursement under § 85.22, it seems reasonable to assume the *Schonberger* restrictions on § 668.14 would no longer apply.

TIPS FOR NAVIGATING IOWA'S COLLATERAL SOURCE RULE AND ITS EXCEPTIONS AT TRIAL

Common Collateral Benefit and Questioning: A common collateral source benefit encountered by litigants is medical payment coverage benefits, in which an insurance policy provides for payment of up to a certain amount of an insured's medical bills arising from an automobile accident. Iowa Code § 668.14 permits defendants to question plaintiffs about the fact these payments have been made to or on behalf of the plaintiff. This questioning can be accomplished with a series of short questions. Let's return to the case of Al Hertzalot and Bill Badluck, where Al Hertzalot is now under cross-examination:

Q: Mr. Hertzalot, you're claiming medical bills from Hospitals R Us totaling $5,000.00?

Q: Those bills have been paid?

Q: You didn't pay those bills?

The next questions asked will likely depend on whether or not the source of the collateral benefits, in this case the insurer who provided medical payment coverage benefits, is to be indemnified or is subrogated to the recovery. If the insurer still has a right to indemnification or subrogation, it may be best to limit the questioning to the three questions above and leave it to plaintiff's attorney to rehabilitate plaintiff as to whether the bills must be repaid. If the insurer has waived the right to subrogation or indemnification, you may want to consider adding to your line of questioning about the benefits, for example:

Q: Are you aware I-M-Insured Co. paid your medical bills from Hospitals R Us?

Q: Are you aware you don't have to repay I-M-Insured Co.?

Q: After this lawsuit, you don't have to pay anyone back for those bills?

One situation where defendants may encounter the waiver of indemnification/subrogation is when the plaintiff sues an alleged tortfeasor and his or her own insurer for underinsured motorist benefits (similar to Al Hertzalot at the start of this article). If that insurer paid all or part of plaintiff's medical bills under its policy's medical payments coverage, plaintiff may later decide to dismiss the claim against their insurer in exchange for a waiver of the insurer's indemnification/subrogation rights for the medical payments coverage benefits paid. In that situation, you may want to adjust your questioning to address the fact the insurer was a party and has been dismissed from the case. Also, you may want

to anticipate and be prepared for a situation in which the plaintiff does not know or understand the intricacies involved with their insurer's payment, waiver of indemnification/subrogation rights, and dismissal.

Plaintiffs have two responses when evidence of collateral benefits is admissible under § 668.14. First, a plaintiff may ask questions about whether the source of the collateral benefits has a right of indemnification or subrogation, a/k/a whether the bills have to be repaid. Second, plaintiffs may attempt to submit evidence as to the "costs to the claimant of procuring the previous payments or future rights of payment." Iowa Code § 668.14(2). There is no definition of these "costs", but one example could be plaintiff's premium payments for medical payments coverage benefits (which will typically be a low value). Plaintiffs may have difficulty admitting evidence of "costs" unless they have specifically prepared to address "costs." Defense attorneys should pay careful attention to any testimony about "costs", as a plaintiff's attorney may resort to improper leading questions to admit evidence of "costs" at trial.

Jury Instructions: Iowa Code § 668.14(3) requires the Court to submit special interrogatories to the jury concerning collateral source benefits. The jury instructions sought at trial will depend on the type of collateral benefit and whether indemnification or subrogation rights exist. Parties may first look to the McGiverin dissent in *Schonberger* for a framework on what special interrogatories to submit. Depending on the situation, litigants may choose to employ the multi-question format suggest by the *McGiverin* dissent or attempt to shorten the analysis for the jury to one question, similar to that in *Joslin v. Howell,* 822 N.W.2d 745 (Iowa Ct. App. 2012):

1. What amount of damage caused by Bill Badluck has been or will be paid by I-M-Insured Co. and must be refunded by Plaintiff, Al Hertzalot, to I-M-Insured Co.?

When the source of the collateral benefit no longer has indemnification or subrogation rights, defendants may consider additional modifications to typical jury instructions. For example, the "Past Medical Expenses" instruction and/or special interrogatory could instruct the jury to exclude the collateral benefit from their award in the case. Defendants may also request the parties stipulate to a reduced maximum amount of medical expenses that the jury may be allowed to award (also known as the *Pexa* amount) so as to remove the collateral benefits from the maximum medical expenses. This strategy of reducing the maximum medical expense amount in the jury instructions was successfully used during my June 2019 jury trial, which allowed tension between the parties concerning the Rule to diffuse, reduced the total amount the jury could award for damages, and possibly signaled to the jury that Plaintiff may have been attempting to recover too much money (in that case, the jury was already aware of the total amount of medical bills being claimed by Plaintiff before we agreed the *Pexa* number should be reduced due to the collateral benefits).

Conclusion: With the wide variety of collateral benefits and payment scenarios for plaintiffs and claimants, one thing is certain: it is important for attorneys to be familiar with Iowa's Collateral Source Rule and its exceptions. Proper use of the exceptions may boost an attorney's credibility with the jury. More importantly, successfully leveraging the exceptions to Iowa's Collateral Source Rule provides courts and juries with a more accurate picture concerning the true extent of a plaintiff's damages.

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[1] Joshua R. Strief is an associate attorney at Elverson Vasey in Des Moines, Iowa. His practice areas include insurance defense and subrogation. In September 2018, he was awarded the Iowa Defense Counsel Association's Rising Star Award. For more about Josh, please visit: elversonvasey.com/attorneys/joshua-strief

Proposed New Case Scheduling Rules: A Potential Pitfall for the Successful Defense Attorney

By Amanda M. Richards

Amanda M. Richards

As defense attorneys, our ultimate goal is to build and expand our practice. We continuously seek out new opportunities and clients in an attempt to grow our client base.

As our practice expands, setting trials on our calendars becomes an increasing challenge. Between our ever-growing case load, meetings, conferences, and personal commitments, our calendars become ever so difficult to schedule. However, these challenges become almost like a right of passage indicating the success of our practice by the fact our trial calendars expand out years in advance.

Chapter 23 of our Judicial Administration Rules contains the standards and deadlines for scheduling trials. However, in practice these deadlines are often not realistic after considerations are made for the calendars of the Plaintiff's attorney, the Court, and the defense. It is commonplace for trials to be expended far past the standard 18-month deadline. Chapter 23 in its current form provides us this flexibility, allowing the Court the ability to extend that date using as guidance for civil actions a 24-month time frame. This allows a busy attorney breathing room to expand his or her practice and take more cases.

However, on December 20, 2019, Proposed Rule 23 was released, setting forth a new philosophy to tighten up on expanding calendars. This Rule will provide new challenges and pitfalls for the ever-busy defense attorney.

Proposed Rule 23 removes the old time standards, and provides a new set of "case processing goals". Although it should be noted that the proposed rule provides that these are "goals, not strict deadlines", the wording of the actual Proposed Rule seems to convey entirely the opposite.

The Proposed Rule sets forth goals for 75%, 90% and 98% percent of cases, giving a clear indication that the cases are expected to move faster through the docket. For example, regular civil actions are encouraged to have 75% tried in 180 days, 90% within 365 days, and 98% within 540 days (approximately 18 months).

However, the true changes to rule are most evident in Proposed Rule 23.2 which provides the standards for extending cases past the scheduling goals.

Under Proposed Rule 23.2, if there is a need to go beyond the established deadlines, a party can file a motion establishing good cause for scheduling a later trial start date, but the "court may grant a trial start date that will **not be more than 90 days beyond the standard of disposing 98% of the cases for that case type".** Therefore, Proposed Rule 23.2 sets forth that the farthest a case can be pushed out for trial on a regular civil matter is 21 months. Other types of cases are set forth within the rule.

The practical effects of this proposed rule could be daunting for the defense bar. This Proposed Rule could lead to forcing double setting of trials upon our calendars and dealing with situations where we are unable to get a continuance when both of the scheduled trials proceed. This Proposed Rule could max out a defense attorney at a certain number of cases, preventing the expansion of business and force clients into choosing another attorney to try their cases based on the calendar of their chosen attorney.

Further, the rigidity in this rule fails to take into consideration differences between how trials are scheduled in districts and even counties throughout the state. Some districts start trials on different days of the week, while others only hold civil trials once a month. Some counties assign judges at the outset of a case, while others immediately before trial. Further difficulties arise for trials that are scheduled for longer than one week. A two or three week trial can clog an attorney's schedule such that meeting these deadlines becomes impossible and forces the attorney to either decline a case or pass it off just because of this deadline. Adding multiple attorneys to a case only multiplies the potential problems.

IDCA has provided input on this proposed rule change and as of the date of publication this rule change is still pending.

IDCA Case Law Update—Winter 2020

Frank M. Swanson

KARON V. ELLIOT AVIATION AIRCRAFT SALES, 18-1199 (IOWA JAN. 10, 2020)

WHY IT MATTERS?

The Iowa Supreme Court embraced the question as to how a contractually agreed upon forum-selection clause can be avoided by a party during litigation, specifically focusing on what level of fraud is required to set aside the provision. Ultimately, the Court joined the United States Supreme Court and several other state supreme courts in holding that the fraud alleged must relate to the forum-selection clause itself, finding general fraud in the negotiation process to be sufficient.

SUMMARY

Roy Karon (hereafter "Karon") was the sole member of an Iowa limited liability company called Peddler, LLC, a company that leased its aircrafts back to Karon and his non-party corporation, BVS, Inc. BVS and Karon use these aircrafts to transport personnel around North America to provide training to financial institutions.

In the spring of 2014, Karon began the process of upgrading one of Peddler's aircrafts to a larger, faster, and newer aircraft. He sought assistance in purchasing the aircraft from Elliot Aviation Aircraft Sales (hereafter "Elliot"), who he had a thirty-plus year relationship with. Karon was to locate and negotiate the purchase of the airplane, with Elliot acting as an intermediate broker to satisfy federal tax provisions. Once notified of the plane Karon had chosen, Elliot would procure the aircraft and Karon would trade his obsolete aircraft and cash to Elliot for the newer aircraft. Elliot was to be paid a fee of $100,000, plus any profit if received in the resale of the obsolete plain. Elliot orally agreed to this proposed course of action when Karon presented it.

Karon and Elliot searched for the newer model together, eventually finding a suitable model being sold in Kansas by Cessna Aircraft Company (hereafter "Cessna"), with whom an Elliot representative had a previous relationship. The Elliot representative offered to negotiate the deal himself as he could negotiate a lower price due to his relationship, which Karon agreed to.

Karon alleged Elliot relayed an asking price of $6 million dollars, which Karon rejected, stating he would pay no more than $5.8 million. Elliot and Cessna reached an agreed upon price, relaying that price to Karon as $5.8 million, which Karon accepted. A written purchase agreement was drafted after further ancillary negotiations, with the final price reaching roughly $6.7 million. The purchase agreement also included a choice of law and jurisdiction clause, agreeing to be governed by the laws of Kansas, with a forum selection of Kansas Federal Court, or, if that court lacked jurisdiction, Kansas' 18th Judicial District. The purchase agreement also included a severability clause. The agreement was signed by Karon on behalf of Peddler, LLC, and by Elliot, and the plane was transferred to Peddler on June 26, 2014.

In early 2015, Karon was contacted by a source who warned him that the actual purchase price between Cessna and Elliot was likely far less than $5.8 million, leading Karon to request documentation from Cessna and Elliot proving the price between them. Karon later alleged he heard from a second source that the actual purchase price was $5.4 million, leading him to demand a $400,000 refund, which was denied by Elliot.

On February 26, 2016, Peddler brought suit against Elliot in the Iowa District Court for Linn County. Elliot motioned for summary judgment but was ultimately denied. On December 29, 2016, just 11 days before trial, Peddler moved for voluntary dismissal of its claims without prejudice, which was granted.

On February 23, 2018, Peddler and Karon joined to refile their action in the Iowa District Court against Elliot, alleging: (1) Elliot breached the oral brokerage contract; (2) Elliot had fraudulently misrepresented the acquisition price; and (3) Elliot's representative had personally breached a fiduciary duty to Peddler.

Elliot quickly moved to dismiss the lawsuit on three grounds, with the most relevant being Iowa constituted an improper venue under the purchase agreement's forum selection clause. The Polk County District Court dismissed the case without prejudice on June 13, 2018, finding an improper venue for the suit. The district court noted that Peddler and Karon had asserted fraudulent misrepresentation as to the whole contract, not as to the forum selection clause, which was insufficient.

ANALYSIS

The threshold question for the Iowa Supreme Court was whether the *Prima Paint* rule applied to Iowa forum-selection clauses, as the Iowa District Court had held. *Prima Paint* (388 U.S. 395 (1967)) was a contracts case where the plaintiffs sought rescission of the entire contract, asserting fraud had been perpetuated in the inducement of the contract, but not as to the arbitration provision. The US Supreme Court held that general fraud in the procurement of a contract was not enough to abandon a specific arbitration clause, without a more specific showing of fraud as to the arbitration provision. The Iowa Supreme Court adopted this rule in regards to arbitration provisions in 1996.

The Iowa Supreme Court surveyed several fellow jurisdictions, noting several state appellate courts had followed *Prima Paint* in regards to forum-selection clauses. In adopting the *Prima Paint* rule, the Court noted the Restatement (Second) Conflict of Laws was also in line with the rule, leaving Courts to find a "strong" and *specific* showing that a forum selection clause should be set aside. This "strong" showing should seek to prove enforcement of the forum selection clause is "unfair or unreasonable."

HOLDING

The Court reversed the district court's decision. In doing so, the Court held that a party seeking to avoid a forum-selection clause must make a strong showing that there was fraud in the inducement of the clause itself. Accordingly, general allegations of fraud in the inducement of the contract will be insufficient to set aside the clause.

HOLLINGSHEAD V. DC MISFITS, LLC, NO. 18-1225 (IOWA JAN. 17, 2020)

SUMMARY

In December of 2015, Jeremy Hollingshead (hereafter "Hollingshead") was injured at Misfits, a Des Moines bar. Pursuant to Iowa Code section 123.93, Hollingshead sent notice via certified mail to Founders Insurance Company on June 8, 2016. The notice identified the owner of the liquor license as "Leonard LLC DBA Misfits" and stated Hollingshead intended to bring a dramshop action for damages stemming from an assault perpetrated by intoxicated patrons of the bar.

Unbeknownst to Hollingshead, the holder of the liquor license was actually "DC Misfits, LLC", and not "Leonard LLC DBA Misfits", the previous holder of the license, although the bar's operating name had not changed from "Misfits."

Hollingshead presented uncontroverted facts showing Founders Insurance Company had provided dramshop insurance to Misfits, regardless of its owner, since 2014. Founders responded to Hollingshead's notice, denying coverage for the incident as the Leonard LLC DBA Misfits policy had been canceled on February 1, 2015. Further, Founders did not deny it was the insurer for Misfits, under its new ownership.

Hollingshead filed his dramshop petition in April of 2017, naming DC Misfits, LLC as the defendant. Misfits moved for summary judgment, contending Hollingshead had not complied with Iowa Code section 123.93's notice provision for dramshop actions.

The record showed Leonard LLC DBA Misfits had been in existence from January 2014 to 2015, owned by Daniel Leonard. Further, DC Misfits, LLC and its owner, Ricky Folkerts had taken ownership of the bar in 2015, and was operating the bar at the time of Hollingshead's injury.

The district court granted DC Misfits, LLC's motion for summary judgment and the Iowa court of appeals affirmed the dismissal.

ANALYSIS

Iowa Code section 123. 92 provides statutory prerequisites to the initiation of a dramshop action, including "Within six months of the occurrence of an injury, the injured person shall give written notice to the licensee or permittee or such licensee's *or permittee's insurance carrier* of the person's intention to bring an action under this section, indicating the time, place and circumstances causing the injury." The purpose of which is to provide defendants with notice of the circumstances surrounding a potential claim, while the claim is still fresh and can be adequately investigated. Further, only substantial compliance is required to satisfy the provision, and questions as to the sufficiency of the notice should be left to jury.

The Court cited *Arnold* (259 N.W.2d 749 (Iowa 1977)), a dramshop case where the plaintiff's notice did not make reference to the location or circumstances surrounding the alleged incident, nor did it express the plaintiffs intent to bring a dramshop action. Both of which are "essential in order" to substantially comply with Iowa law.

Hollingshead was distinguishable from *Arnold*, however, as he had provided notice to the correct insurance carrier, had delineated the exact time and circumstances of his injury, and had expressed his intent to bring a dramshop action. Further, he had correctly identified the name of the bar. This clearly delineated notice, despite the misnaming of the bar's owning entity, was clearly sufficient to satisfy Iowa Code section 123.92.

HOLDING

Dramshop notice under Iowa Code section 123.92 may still be substantially complied with, even if the Plaintiff fails to identify the correct entity who holds a liquor license, if they sufficiently identify the time, place, and circumstances of the injury. When judging the sufficiency of the notice, it should be determined if the Defendant or their insurance carrier were given the ability to investigate the facts of the claim while they were still fresh.

WHY THIS MATTERS IN IOWA

While this ruling seemingly provides plaintiffs with more leeway in effecting notice under Iowa Code section 123.92, allowing them to misname the entity owning the bar at the time of injury, it should be noted that plaintiffs had the wherewithal to ultimately name the correct insurance provider. While this leeway may help the rare plaintiff, Hollingshead likely would not have had the same outcome if he named another insurer who did not insure Misfits.

New Lawyer Profile

Courtney Wilson

In every issue of *Defense Update*, we will highlight a new lawyer. This issue, we get to know Courtney Wilson of Hopkins & Huebner, P.C., in Davenport.

Courtney Wilson is a new member of the IDCA, and a Shareholder at the law firm of Hopkins & Huebner, P.C., where she practices in the area of Liability Defense. Courtney practices in both Iowa and Illinois, and represents insurance companies, employers, and municipalities in the district and appellate courts.

Courtney received her Bachelor's Degree in Political Science and Gender Studies from the University of Notre Dame in 2007. She earned her law degree from Drake University Law School in 2011, with an International and Comparative Law and Human Rights Certificate. While at Drake, Courtney was a member of Delta Theta Pi, Philanthropy Chair for Drake Law Women, and Communications Director for the Black Law Student Association. Courtney also worked as a Student Attorney in the Criminal Defense Clinic, and as a Home Design and Special Interest Media Contributor at Meredith Corporation.

Courtney previously worked for five years as a criminal defense attorney before joining her current firm. In those five years, she had four convictions reversed and remanded for new trial. While at Hopkins & Huebner, P.C., Courtney has had the opportunity to try numerous cases before the district courts, and the privilege to have argued in front of the Iowa Supreme Court.

Courtney is a third-generation lawyer and her sister and husband are also lawyers. She was born and raised in Tampa, Florida, and is proud to call Iowa her new home. In her free time, Courtney enjoys caching up with friends, exploring new happenings in the Quad Cities, trying new restaurants, and being a pet mom.

Courtney is a member of the Iowa State and Scott County Bar Associations, a member of the Iowa Organization of Women Attorneys (I.O.W.A), and currently serves on the Scott County Bar Association Executive Council. Courtney is also a Sustainer and Past President of the Junior League of the Quad Cities, and has served on the committee for the Trinity Freedom Run in East Moline, IL.

IDCA Annual Meetings

September 17–18, 2020

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

September 16–17, 2021

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