defense UPDATE

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ERISA PREEMPTION OVERVIEW AND UPDATE

By Kevin Caster, Cedar Rapids, Iowa

Congress established the Employee Retirement Income Security Act of 1974 (ERISA) to provide minimum standards for employee benefit plans, particularly pension plans, and to assure the equitable character of such plans and their financial soundness. 29 U.S.C. §§ 1001 (1988). In order to achieve uniform regulation, ERISA preempts state laws relating to employee benefit plans except laws that regulate insurance. Recent Supreme Court opinions appear to have narrowed, or at least limited further expansion of the scope of ERISA preemption. Those cases are reviewed here, following a perfunctory review of the fundamentals.

In disputes that involve employee benefits other than pensions, there are a number of reasons why the typical defendant may prefer federal law instead of state law. ERISA preempts a variety of state common law claims against plan providers, administrators and insurers ranging from wrongful death claims (e.g., for denial of health benefits) to bad faith claims (e.g., wrongful refusal to pay disability benefits). Defense counsel faced with a state court claim has the option to remove the matter to federal court. Defense counsel also has the option to seek dismissal of any claims for which ERISA provides no remedy. One court derisively characterized these options: "As is typical in these preemption cases, a removing defendant tows the case into the federal harbor only to try to sink it once it is in port." *La Buhn v. Bulkmatic Transp. Co.* 644 F. Supp. 942, 948 (N.D. Ill. 1986), *affd.*, 865 F.2d 119 (7th Cir. 1988).

ERISA does provide a remedy for some claims, for example a contract claim for benefits due. 29 USC §1132(a)(1)(B). Those claims that survive preemption frequently face deferential courts. Federal law enforces the ERISA plan contract and requires that the court defer to the decisions of plan administrators if the contract provides the administrator with discretion. *Layes v. Mead Corp.*, 132 F.3d 1246, 1250 (8th Cir. 1998); *Armstrong v. Aetna Life Ins. Co.*, 128 F.3d 1263, 1265 (8th Cir. 1997). However, note that the Eighth Circuit employs a "less deferential review" in cases where the plan administrator has a conflict of interest that causes a breach in the administrator's fiduciary duty to the employee. *Woo v. Deluxe Corp.*, 144 F.3d 1157, 1161 '8th Cir. 1998); *Armstrong v. Aetna Life Ins. Co.*, 128 F.3d 1263, 1265 (8th Cir. 1997); *cf. Barnhart v. UNUM Life Ins. Co. of America,* 179 F.3d 583 (8th Cir. 1999) (both Woo prongs necessary for de novo review).

Of course if the plan administrator has no discretion under the terms of the contract, the court should review the decision *de novo. Firestone Tire and Rubber Company v. Burch,* 489 U.S. 101, 115 (1989). *See Grady v. The Paul Revere Life Ins. Co.,* 10 F.Supp.2d 100 (D R.I. 1998) for an excellent summary of the circuit split on de novo review of plan administrator's interpretations of policy. When engaged in a de novo review, district courts in the Eighth Circuit may allow parties to introduce evidence in addition to that presented to the plan administrator. *Donatelli v. Home Ins. Co.,* 992 F.2d 763, 765 (8th Cir. 1993). However, the *Donatelli* court expressly limited such judicial review by saying that the district court should not exercise the discretion to go beyond the evidence presented to the plan administrator unless the district court had good cause to do so. *Id.* (affirming the court's decision to permit expert testimony about the decedent's sanity at the time of his suicide).

Also, in what is probably a disadvantage to the employee seeking benefits from a plan provider, ERISA does not provide a right to a jury in the Eighth Circuit. *Houghton v. SIPCO,* 38 F.3d 953, 957 (8th Cir. 1994). Specific ERISA remedies contain provisions that may or may not be an advantage when compared to state law. For example, ERISA uses a three-year statute of

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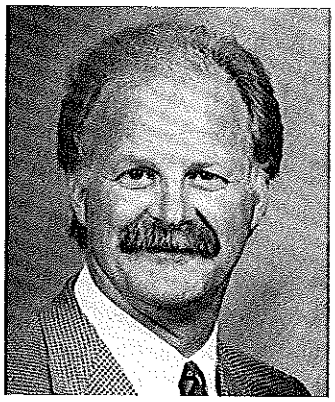
MESSAGE FROM THE PRESIDENT



Marion L. Beatty

Thank you for this opportunity to serve the IDCA as your President for the coming year. We have unlimited opportunities this year to enhance our membership services and to strengthen our organization. Bob Kreamer, our lobbyist, has been hired for the year 2001 as our Executive Director. Bob is both enthusiastic and proud of the opportunity to represent our organization in such a capacity. I have had the good fortune of working with Bob over the past several years as a board member of this organization and I know him to be regarded around the state as a thoughtful, energetic and highly productive individual. The high regard in which Bob is held extends far beyond the Iowa Statehouse.

It is our hope this year to increase our membership and allow more educational opportunities for our members. We hope to enhance our mini seminar program and, of course, provide you with the same high quality annual seminar that we so successfully completed in September. We had over 200 participants at our annual meeting. Thanks to all of those extremely busy lawyers and judges who contributed their time and energy in preparing outlines and speaking.

I extend to the membership the opportunity to participate in the annual meeting. Michael Ellwanger is already at work preparing next year's program for September 26, 27 and 28, 2001 in Des Moines, Iowa. If you are interested in becoming involved in the organization or participating in the annual meeting as a speaker, please contact Michael Ellwanger.

Our committee structure continues to include 14 different opportunities for you to participate in the organization:

Amicus Curiae	Michael W. Thrall
CLE Committee	Michael W. Ellwanger
Client Relations	Jonn T. McCoy
Commercial Litigation	Richard G. Santi
Jury Instructions	Lyle W. Ditmars
Law School Program/Trial Academy	Sharon Soorholtz Greer
Legislative	J. Michael Weston
Membership/DRI State Representative	Gregory M. Lederer
Tort and Insurance Law	Terry J. Abernathy
Product Liability	Kevin M. Reynolds
Rules	Michael W. Thrall
Workers' Compensation	E. J. Kelly
Professional Liability	Joseph L. Fitzgibbons
Employment Law	Gordon R. Fischer

It is your organization and this is your opportunity to become involved. We will continue to monitor legislative activities affecting the judicial system and assist in maintaining a level playing field for all litigants in our court system.

EIGHTH CIRCUIT UPHOLDS IOWA STATUTE OF REPOSE PERTAINING TO PRODUCTS

By: Richard J. Sapp and Kathryn Atkinson Overberg, Des Moines, Iowa

In what is believed to be the first appellate decision on the issue, the Eighth Circuit Court of Appeals has rejected a constitutional challenge to Iowa's recently-enacted statute of repose pertaining to products, Iowa Code § 614.1(2A) (1997). *Estate of Joseph L. Branson et al v. O.F. Mossberg & Sons, Inc.*, 221 F. 3d 1064 (8th Cir. Aug. 9, 2000). In doing so, the Eighth Circuit extended its line of decisions and those of the Iowa Supreme Court consistently finding similar statutes of repose to be constitutional.

Plaintiffs commenced an action against gun manufacturer O.F. Mossberg & Sons, Inc. alleging, among others claims, negligence, strict liability, and implied warranty in the manufacture of a Mossberg shotgun. Plaintiffs' decedent, a 14-year old boy, was killed on September 7, 1997, when struck by fire from the shotgun being handled by his 14-year old hunting companion. Plaintiffs filed their lawsuit on May 21, 1999. The shotgun was manufactured on August 4, 1976 and sold by Mossberg on September 8, 1976, more than twenty years before Plaintiff's injury. After removal from state court, Mossberg moved for summary judgment under Iowa's applicable statute of repose, Iowa Code § 614.1(2A), which bars claims involving products more than 15 years after the first purchase or use of the product.

Iowa Code § 614, Limitations of Actions, has included various statutes of limitation or repose for some time. In 1997, the Iowa Legislature enacted § 614.1(2A), "with respect to products," which states in relevant part:

> (a). Those founded on the death of a person or injuries to the person or property brought against the manufacturer, assembler, designer, supplier of specifications, seller, lessor, or distributor of a product based upon an alleged defect in the design, inspection, testing, manufacturing, formulation, marketing, packaging, warning, labeling of the product, or any other alleged defect or failure of whatever nature or kind, based on the theories of strict liability in tort, negligence, or breach of an implied warranty shall not be commenced more than fifteen years after the product was first purchased, leased, bailed, or installed for use or consumption unless expressly warranted for a longer period of time by the manufacturer, assembler, designer, supplier of specifications, seller, lessor, or distributor of the product.

Plaintiffs' sole response to the summary judgment motion was an attack on the constitutionality of the statute, alleging it deprived Plaintiffs of their rights to "open courts" under the Iowa Constitution as well as their rights to due process and equal protection under the United States and Iowa Constitutions.

Under Iowa law, there is a strong presumption that statutes enacted by a state are constitutional. *See Gavin v. Branstad,* 122 F.3d 1081, 1089 (8th Cir. 1997) (presuming legislation to be valid); *Fitz v. Dolyak, D.O.*, 712 F.2d 330, 333 (8th Cir. 1983) (finding plaintiffs failed to satisfy "heavy burden" to show that Iowa statute of repose for medical malpractice claims was unconstitutional, noting that "a presumption of constitutionality attaches to state legislative enactments"); *Norland v. Grinnell Mut. Reinsurance Co.*, 578 N.W.2d 239, 241 (Iowa 1998); *Krull v. Thermogas Co.*, 522 N.W.2d 607, 614 (Iowa 1994). A party challenging the constitutionality of a statute must "demonstrate beyond a reasonable doubt that the act violates the constitutional provision invoked and to [sic] point out with particularity the details of the alleged invalidity. To sustain this burden plaintiffs *must negate every reasonable basis which would support the statute.* Every reasonable doubt is resolved in favor of constitutionality." *Patel v. Fleur De Lis Motor Inns, Inc.*, 771 F. Supp. 961, 968 (S.D. Iowa 1991) (emphasis added); *see also Krull v. Thermogas Co.*, 522 N.W.2d 607, 614 (Iowa 1994); *Glowacki v. Board of Med. Exam.*, 501 N.W.2d 539, 541 (Iowa 1993) (to satisfy plaintiff's "heavy burden," the "statute must clearly, palpably, and without a doubt infringe upon the constitution before we will declare it unconstitutional.") (citations omitted) The Iowa Supreme Court and Eighth Circuit Court of Appeals review both state and federal due process or equal protection challenges together under the same analysis. *See Knapp v. Hanson,* 183 F.3d 786, 788 (8th Cir. 1999); *Koster v. City of Davenport,* 183 F.3d 762, 768 n.4 (8th Cir. 1999); *Exira Comm. Schl. Dist. v. State of Iowa,* 512 N.W.2d 787, 792 (Iowa 1994).

In *Branson*, the federal district court (Hon. Charles Wolle) granted Defendant's motion, finding Plaintiffs had not satisfied their burden to prove the statute unconstitutional. Applying rational basis review, Judge Wolle concluded that "the legislature reasonably decided to limit the time during which a manufacturer can be expected fairly to defend itself against suits alleging wrongful conduct in design and manufacture of products. The differentiation between persons section 614.1(2A) protects, and persons it does not protect, is not irrational nor arbitrary."

Plaintiffs appealed to the Eighth Circuit, reasserting the same constitutional challenges, and also arguing that the district court applied the incorrect standard of review. Plaintiffs urged the Court to apply an "intermediate" standard of review rather than the more deferential rational basis standard. Plaintiffs could not provide any applicable Iowa or Eighth Circuit authority to support their argument or analysis, but instead relied on state supreme court decisions from other jurisdictions. Iowa state and federal courts, however, have squarely held that the rational basis test is the appropriate review to be applied to

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PARADISE LOST - PART II
THE EXPERTS' FALL FROM MASTERY TO SPECIALIZATION

By Russell D. Melton, J.D., Minneapolis, Minnesota

The following is Part II of the above named article. Part I was printed in the July, 2000 issue of this publication.

Summary : Fires, explosions, product failures, structural collapse, and catastrophic losses, by their very nature, are destructive. Often, they destroy the evidence necessary to determine who should bear the responsibility for their occurrence. Sometimes, they tragically injure the persons who might otherwise shed light on what took place in the moments before a catastrophe. Because of this, the use of experts in the areas of fire, explosions, product failures, and construction losses has become a necessity. The highly technical nature of this field has, in turn, gone from an expert to testify on all issues to an expert to testify on each specialty issue. Thus, the experts' fall from mastery to specialization.

PART II
STANDARDS/ RECOMMENDATIONS

The National Fire Protection Association (NFPA) is a private association whose goal is the "Development, publication, and dissemination of timely consensus standards that are responsive to the needs of society, which are produced through a democratic, dynamic, expeditious system, and that so far as practicable, are based upon performance criteria." The NFPA promulgates codes and standards on many different fire protection topics. For example, NFPA 58 contains standards for the storage and handling of liquified petroleum gases. NFPA 54 is the National Fuel Gas Code. Further, NFPA 59 covers liquified petroleum gases at gas utility plants. NFPA 505 contains standards pertaining to industrial trucks. Attorneys practicing in the areas of fire and explosion litigation are well advised to have a thorough understanding of applicable NFPA sections because many levels of state and local government have adopted the NFPA standards, thereby giving them the force of law.

NFPA 921, *Guide for Fire and Explosion Investigations,* is one of the most significant authoritative treatises in the field of fire investigation. NFPA 921 was developed by the NFPA's Technical Committee on Fire Investigations to assist in improving the fire investigation process and the quality of information on fires resulting from the investigation process. The goal of the Committee is to provide guidance to investigators that is based on accepted scientific principles and scientific research.

NFPA 921 introduces definitions, concepts and theories of the science of fire investigation. It outlines the many steps involved in the investigation of a wide variety of fires. It is, therefore, a beneficial guide to investigators and attorneys alike. NFPA 921 outlines for investigators what evidence is relevant, where to look, how to interpret the evidence, and how to properly preserve the evidence.

NFPA 921 is also used by opposing attorneys to attack the validity and reliability of a fire expert's analysis and conclusions. NFPA 921 should be applied in the courtroom by attorneys as the "standard" for proper fire investigation methodology. The implication is that a "proper" anaysis of a fire scene requires strict compliance with each and every aspect of NFPA 921.

Therefore, NFPA 921 is a double-edged sword. It can be used to attack the opposing expert's analysis and opinions. However, one's own experts must follow its guidelines or they may be vulnerable to attack as well. **Because of the litigation value of NFPA 921, it should be considered mandatory for both the attorney and the fire Cause & Origin expert to know and abide by the tenants of the Guide.**

The American Society for Testing and Materials (ASTM) is one of the foremost developers and providers of voluntary consensus standards, related technical information, and services having internationally recognized quality and applicability that promote public health and safety, and the overall quality of life; contribute to the reliability of materials, products, systems and services; and facilitate national, regional, and international commerce. The following are several examples of ASTM standards which are applicable to the science of Cause & Origin investigation.

ASTM E 860-82: Standard Practice for Examining and Testing Items That Are or May Become Involved in Products Liability Litigation

This standard sets forth the guidelines for the examination and testing of evidence (components & products) that may become involved in litigation. It outlines the procedure to follow in documenting the nature, state, or condition of the evidence. It also describes the specific actions that are required if there is any planned testing, examination, disassembly, or other action likely to alter the nature, state, or condition of the evidence which precludes or adversely limits further examination and testing.

ASTM E 1188-95: Standard Practice for Collection and Preservation of Information and Physical Items by a Technical Investigator

This standard covers identification, collection, and preservation of items and information traceable to a fire incident. It is important to properly preserve evidence because the quality of evidence may change over time. This section provides the investigator with a process for collection of information and physical evidence associated with the incident and guidelines for preserving it for later analysis.

ASTM E 1459-92: Standard Guide for Physical Evidence Labeling and Related Documentation

This standard provides guidelines for the methodology to be used for labeling physical evidence collected during field investigations. These guidelines apply to evidence

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limitation on claims of breach of fiduciary duty.

Regardless of its lure, ERISA preemption is not automatic. Some courts have developed pleading requirements for the Notice of Removal. *See, e.g. Hensley v. Philadelphia Life Ins. Co.* 878 F. Supp. 1465, 1468 (N.D. Ala. 1995) ("As this court has stated on previous occasions, the entrance to federal court does not swing wide, like Ali Baba's cave, at the mere invocation: 'this is an ERISA plan."') Even without pleading requirements, the removing party must argue the preemption analysis in some form of dispositive motion in order to avoid the offending state law claims.

Preemption

The statutory structure of ERISA preemption can be condensed into three statements. ERISA explicitly supersedes state laws that "relate to any employee benefit plan." 29 U.S.C. § 1144(a). Acknowledging that regulation of the insurance industry is traditionally a state concern, ERISA saves from preemption "any law of any state which regulates insurance." 29 U.S.C. § 1144(b)(2)(A). However, states may not "deem" an employee benefit plan to be an insurance plan for the purposes of any law "purporting" to regulate insurance companies. 29 U.S.C. § 1144(b)(2)(B). Those three statements provide a convenient organization for the following preemption analysis.

Relate To Employee Welfare Benefit Plan: In some cases, analysis of preemption should ascertain whether the subject of the controversy is an employee welfare benefit plan. ERISA defines an employee welfare benefit plan as "any plan, fund, or program . . . established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, . . . medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment. . . ." 29 U.S.C. § 1002(1). An employer's purchase of a commercially available insurance product may be an employee welfare benefit plan even if the employer does not play any role in the administration of the plan. *Robinson v. Linomaz,* 58 F.3d 365, 368 (8th Cir. 1995). However, ERISA requires that the employer must have "established or maintained" the plan or program. 29 U.S.C. § 1002.

The Department of Labor has issued regulations that assist in identifying whether a particular plan is "established or maintained" by the employer and therefore covered by ERISA. 29 C.F.R. § 2510.3-1. Among other requirements, the regulations create a safe harbor that excludes from ERISA coverage group insurance plans that are offered to employees. State law claims relating to excluded plans are not preempted. To reach safe harbor, the aggrieved beneficiary must show that those insurance plans meet all four of the following requirements:

> (1) the employer makes no contribution to the policy; (2) employee participation in the policy is completely voluntary; (3) the employer's sole functions are, without endorsing the policy, to permit the insurer to publicize the policy to employees, collect premiums through payroll deductions and remit them to the insurer; and (4) the employer receives no consideration in connection with the policy other than reasonable compensation for administrative services actually rendered in connection with payroll deduction.

29 C.F.R. § 2510.3-1(j).

The United States District Court for the Northern District of Iowa, Western Division recently analyzed the third of the four safe harbor requirements. *Bonestroo v. Continental Life and Accident Company,* 79 F. Supp. 2d 1041, 1048-49 (1999). The Court in *Bonestroo* found that a series of eight facts were sufficient to conclude, on a motion for summary judgment, that the employer "established or maintained" the plan. 1) The employer chose the insurer and entered into a written contract with that insurer. 2) Employees could not independently subscribe to the plan, they had to go through the employer. 3) Some of the employee benefits would be lost if the employer ceased to be insured. 4) If an employee ceased to be employed, their coverage under that policy ceased. 5) The employer determined which employees were eligible and for what benefits. 6) The employer was responsible for telling the employees that were covered and had a right to continue coverage. 7) The employer was liable for all premium payments during the grace period after premiums were due. 8) The contract designated the employer as a trustee. One would suspect that analogous facts might be found in many fringe benefit plans.

For the defense counsel, escaping the regulatory safe harbor is insufficient by itself to guarantee preemption. The subject plan must meet other regulatory and common law criteria to qualify as an employee welfare benefit plan. For example, The DOL regulations require the plan to include "employees" as participants in order to come within ERISA's coverage. The regulations exclude from the definition of "employees" sole proprietors, sole owners of corporations, and partners. Therefore a plan that provides benefits to a sole shareholder of a professional corporation, but does not provide benefits to any "common-law employee" of the corporation is excluded from ERISA. 29 C.F.R. § 2510.3-3(b-c).

There is currently a split in the circuits on whether an owner, partner, or shareholder who participates in an employee welfare benefit plan must exclusively

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resort to ERISA for their remedy. The Eighth Circuit takes the majority view that owners are bound by ERISA for their claims as beneficiaries of employee welfare benefit plans despite an ERISA rule preventing the assets of a plan from inuring to the benefits of an employer. *Prudential Ins. Co. of American v. John Doe,* 76 F.3d 206 (8th Cir. 1996) (plan was covered by ERISA because controlling shareholder of law firm was both a beneficiary of a plan that included employees and he was probably an employee). For example, where a sole proprietor is a participant in a disability plan together with his employees, and where the disability plan otherwise meets the definition of an employee welfare benefit plan, the sole proprietor's state law claims may be preempted by ERISA.

Having established that the plan is an employee benefit plan, preemption analysis next focuses on whether the state laws that one is seeking to avoid "relate to" the plan. In *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,* 514 U.S. 645 (1995), the Supreme Court without backing away from the breadth of ERISA preemption defined ERISA's outer limits. *Travelers* was decided in the context of a national health care reform debate in which ERISA was criticized as a roadblock for state health care reform movements. *See* James Saya, *Note: Removing A Roadblock To Reforming Health Care: New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,* 3 Conn. Ins. L.J. 127 (1996/97) (criticizing preemption). The *Travelers* Court resolved a split in the circuits over state rate setting schemes that disproportionately taxed ERISA plans. The Court pointed to a historic presumption against preemption and ruled against ERISA preemption, stating:

> If "relate to" were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes preemption would never run its course, for "really, universally, relations stop nowhere [citation omitted]." But that, of course, would be to read Congress's words of limitations as mere sham, and to read the presumption against preemption out of the law whenever Congress speaks to the matter with generality.

514 U.S. at 655.

Referring to *Travelers,* the Eighth Circuit has described the Supreme Court as "troubled" by the scope of ERISA preemption. *Prudential Ins. Co. of Am. v. National Park Med. Ctr.,* 154 F.3d 812 (8th Cir. 1998) (reasoning that a law relates to ERISA if makes "reference to" ERISA or has a sufficient "connection with" ERISA, and holding that the Arkansas Patient Protection Act referred to and had a connection with and was therefore preempted by ERISA). The *Prudential* opinion contrasted the arguments of those who claim that *Travelers* narrowed ERISA preemption with those who claim that preemption remained broad. *Id.* at 819-20. Subsequent USSC decisions have continued to define the limits of preemption, leading some to describe these decisions as a trend toward narrowing ERISA preemption. Robert Eccles and David Godon, *ERISA Day at the Supreme Court,* 8/3 ERISA Litig. Reporter 1 (August 2000). Two of those subsequent decisions are addressed in more detail below.

Saving Insurance Regulations: To preempt a law that relates to an employee welfare benefit plan, analysis frequently must address the exception for laws that regulate insurance. The Supreme Court initially developed two alternatives for determining whether a state insurance regulation is saved from ERISA preemption. *Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 740-43 (1985). The first method is a common sense assessment of whether the law regulates insurance contracts. *Id.* at 740-41. If the law directly regulates insurance contracts, ERISA does not preempt the state law. *Id.*

The second alternative assesses whether the law regulates the "business of insurance." *Id.* Congress used the phrase "business of insurance" when it enacted the McCarran-Ferguson Act, which ensured that states would have the power to regulate insurance. Drawing upon McCarran-Ferguson case law, the Court settled on three factors that are "considerations to be weighed" in determining whether a law regulates the business of insurance:

> *[F]irst,* whether the practice has the effect of transferring or spreading a policyholder's risk; *second,* whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third,* whether the practice is limited to entities within the insurance industry.

Pilot Life Ins Co. v. Dedeaux, 481 U.S. 41, 48-49 (1987).

In *UNUM Life Ins. Co. of America v. Ward,* 526 U.S. 358 (1999), the Court held that the California notice-prejudice rule was uniquely an insurance law and therefore saved from ERISA preemption. The notice-prejudice rule requires an insurer to prove that it suffered prejudice from an insured's failure to give timely notice of a claim in order to deny benefits that would otherwise be due under the applicable policy. The *Ward* ruling had the effect of permitting an employee to advance a state law doctrine for disability benefits due under an ERISA plan.

Affirming the Appellate Court's "common sense," the *Ward* Court held that the notice-prejudice rule was specifically directed at insurance contracts. Additionally, the Court examined the McCarran-Ferguson factors, noted that the first did not apply and held that the second and third factors did apply. Most significantly, the Court held that the notice-prejudice rule was uniquely an insurance regulation even though it was derived from the general common law equitable maxim that

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"the law abhors a forfeiture." The *Ward* Court found it significant that there were no examples of states law cases using this maxim and shifting the burden to the party invoking its use, except for the notice-prejudice rule.

The significance of the *Ward* decision should not be overlooked. It has been reported elsewhere that a Colorado federal district court held, in an unpublished opinion, that ERISA does not preempt state law claims for bad faith because bad faith, like the notice-prejudice rule, uniquely regulates insurance. Stephen S. Ashley, XV Bad Faith Law Report 9, 1 (Nov. 1999). The Colorado Court, according to Ashley, implied that *Ward* overrules or severely limits *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41 (1987).

In *Pilot Life* the Court held that the Mississippi cause of action for bad faith was not a law that regulates insurance because bad faith is a doctrine that generally applies to all contracts. Federal Courts have applied the same analysis to other state bad faith claims, finding that ERISA preempts state law and does not provide a remedy for bad faith. *In Re Life Ins. Co. of North America,* 857 F.2d 1190, 1194-95 (8th Cir. 1988). *Also Smith v. Provident Bank,* 170 F.3d 609, 615 (6th Cir. 1999); *Bast v. Prudential Ins. Co. of America,* 150 F.3d 1003, 1008 (9th Cir. 1998). If *Ward* does overrule *Pilot Life,* then *Ward* would be a dramatic narrowing of ERISA preemption.

However, the *Ward* opinion expressly distinguishes the *Pilot Life* reasoning on this point and reinforces the argument that bad faith claims are not unique to insurance contracts. 526 U.S. at 368 ("We do not find it fair to bracket California's notice-prejudice rule for insurance contracts with Mississippi's broad gauged "bad faith" claim for relief.") The implication is that bad faith claims that are based in contract law are not the kind of insurance regulations that are saved from ERISA preemption.

Iowa's bad faith law is also rooted in contract law. This foundation is reflected in the early decisions of the Iowa Supreme Court recognizing claims for bad faith. *Koovman v. Farm Bureau Mut. Ins. Co.,* 315 N.W.2d 30 (Iowa 1982):

> "Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized [in other contexts] as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness." *Restatement (Second) of Contracts* § 205, comment a (1981). "Bad faith" under the circumstances of this case refers simply to the absence of good faith required by the implied contract.

Thus, the Iowa cause of action for bad faith, like Mississippi, is not directed uniquely at insurance companies. As required by the *Pilot Life* decision, ERISA should preempt an Iowa claim for bad faith directed toward an ERISA plan provider, administrator, or insurer. *See In Re Life Ins. Co.,* 857 F.2d at 1194-95 ("There can be no doubt after *Pilot Life* that a state vexatious refusal to pay claim is preempted by ERISA...."); *Cf. Wilson v. Zoellner,* 114 F.3d 713 (8th Cir. 1997) (declining to preempt the Missouri action for negligent misrepresentation on the grounds that it did not relate (either by "reference" or "connection") to the ERISA plan).

The *Ward* opinion also included a tantalizing footnote reciting a change in the Solicitor General's position from the *Pilot Life* proceedings. 526 U.S. 377 n.7. The Solicitor General's new position would eliminate an alternative ground for preemption that the Supreme Court appeared to embrace in *Pilot Life.* The alternative ground was that ERISA's remedy clause is an independent source of preemption in addition to the express preemption clause. This *Ward* footnote signals that the Supreme Court could back away from that particular alternative ground for preemption in some future decision. That change, if it occurs, should not affect the savings clause analysis used in *Pilot Life* to preempt the Mississippi bad faith claim.

Although not ruling directly on a question of preemption, the Supreme Court explicitly acknowledged this past summer that it intended to prevent expansion of ERISA preemption into the area of medical provider malpractice cast in the language of a breach of fiduciary duty. *Pegram v. Herdrich,* 120 S. Ct. 2143, 2158 (2000). Ms. Pegram, injured by a delay in an appendectomy, sued her physician for breach of fiduciary duty under ERISA. Pegram alleged that the physician was an owner of Pegram's HMO and that the physician therefore had a divided loyalty and an incentive to postpone the appendectomy. Preemption was not an issue squarely before the court because Pegram's medical malpractice state claim had already been tried. Nevertheless the court concluded that ERISA did not provide a remedy for Pegram's claim because the doctor was not a fiduciary. The decision made clear that the Court would not permit ERISA to open the federal courthouse doors to claims of fiduciary-medical malpractice. The danger, according to the court's reasoning, is that fiduciary-medical malpractice would completely preempt state law medical malpractice claims.

Pegram, Travelers, and *Ward* all represent refusals by the United States Supreme Court to extend ERISA preemption. They also represent a decisional style that is more explicitly tied to public policy as a means to divine congressional intent rather than the earlier textual reading of the statute. *Travelers,* 514 U.S. 656 (rejecting "uncritical literalism" in

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favor of looking at the objectives of ERISA and the effect of the state law on ERISA). This change in decisional style seems to have obviated the last part of the preemption statute, the "deemer" clause.

Preempted if Merely Deemed Insurance

Although insurance plans are generally exempt from preemption the ERISA deemer clause stipulates that states may not 'deem' certain employee benefit plans to be insurance plans and, therefore, may not regulate those plans. The Supreme Court, in *FMC Corp. v. Holiday* 498 U.S. 52, 61(1990), and *Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 747 (1985), construed this clause to cover self-funded health plans, thereby allowing federal preemption of these plans while leaving traditional health insurance subject to state regulation. While otherwise indistinguishable from traditional health insurance plans self-funded health plans are funded through employer contributions and administered by or on behalf of employers.

No Supreme Court opinion since *FMC Corp.,* has mentioned the "deemer" clause. Unless the case or controversy involves a self-funded health plan, the deemer clause analysis will probably not come into play. However, for a more elaborate recitation of the issues involved in the deemer clause, *see* Kevin Caster, Note: *The Future of Self-Funded Health Plans,* 79 Iowa L. Rev. 413 (1994).

Employee benefit plans have flourished in this environment of uniform and minimal regulation. Employees in the aggregate have benefited from lower contribution costs. Recent Supreme Court opinions indicate that ERISA will continue to preempt state law regarding issues commonly raised by plaintiffs. The defense counsel's service is to invoke ERISA to preempt state laws. ❑

DRI
MID-REGION MEETING HELD IN STEAMBOAT SPRINGS

The Mid-Region Meeting of DRI was held August 18-19, 2000, at Steamboat Springs, Colorado. In attendance were Marion Beatty, Michael Ellwanger and Greg Lederer.

By way of background, the Defense Research Institute (DRI) is a national organization which is completely independent of the various state defense organizations. It has a National Board of Directors. David Phipps of Des Moines, a Past President of the Iowa Defense Counsel, sits on the National Board.

Each State Defense Counsel Organization (SDCO) is entitled to a state representative which serves as a liaison with DRI. The state reps are not necessarily on the Board. Our state rep is Greg Lederer of Cedar Rapids.

The United States is divided into various regions. Each region is entitled to have one state rep sitting on the National Board of DRI. Iowa is in the Mid-Region. The following is a list of states in the Mid-Region, along with their approximate membership:

Missouri - 1,200 members
Colorado - 600 members
Iowa - 425 members
Kansas - 225 members
Nebraska - 190 members
Utah - 125 members

Currently, Tim Schimberg of Colorado is the state rep for the Mid-Region who is on the National Board.

The Mid-Region has a meeting every year, usually in the spring. Each defense organization takes turn hosting the meeting. This year's meeting was hosted by Colorado and next year's meeting will be hosted by Kansas.

A variety of topics were discussed at the meeting including multi-disciplinary practice, executive directors, technology uses, insurance issues, small law firm economics and other matters. Perhaps the most interesting piece of information to come out of the meeting was from Lloyd Milliken, President of DRI. He stated that the "third party audit issue" is either dead or dying. Most insurance companies have abandoned third party audits. He stated that if any member was having a problem with third party audits, he wanted to be notified. Apparently DRI is visiting with the various insurance companies and explaining the problems associated with third party audits.

Mr. Milliken also advised that DRI has come up with a proposed set of guidelines for insurance companies to propose to their insurance counsel. At least one insurance company (St. Paul) has adopted the DRI guidelines. The guidelines were published in the April 2000 issue of *FOR THE DEFENSE.* ❑

EIGHTH CIRCUIT UPHOLDS IOWA STATUTE . . . *Continued from page 3*

statutes of limitations and repose challenged under due process and equal protection arguments. *Fitz v. Dolyak,* 712 F.2d 330, 332 (8th Cir. 1983) (recognizing "[a]s the majority of courts have held, legislation regulating medical malpractice litigation involves neither a suspect classification, nor a fundamental right, so the strict scrutiny standard is inappropriate. The heightened scrutiny test is similarly inappropriate since this case involves none of the classifications to which the Supreme Court has applied an intermediate standard of statutory review."); *see also Norwest Bank v. W.R. Grace & Co.,* 960 F.2d 754, 757 (8th Cir. 1992); *Van Den Hul v. Baltic Farmers Elevator Co.,* 716 F.2d 504, 511 (8th Cir. 1983); *Patel v. Fleur De Lis Motor Inns Inc.,* 771 F. Supp. 961, 968 (S.D. Iowa 1991); *Fisher v. McCrary-Rost Clinic. P.C.,* 580 N.W.2d 723, 725 (Iowa 1998); *Krull v. Thermogas Co.,* 522 N.W.2d 607, 614 (Iowa 1994); *Koppes v. Pearson,* 384 N.W.2d 381, 385 (Iowa 1986).

Plaintiffs alleged the statute of repose violated their right to "open courts" in addition to their due process and equal protection claims. Upon reviewing the Iowa Constitution, however, there is no reference to a "right" to "open courts" in the State of Iowa. Plaintiffs' reliance on an "open courts" constitutional provision was not surprising, since all of the cases Plaintiffs cited to the Court finding statutes of repose unconstitutional were decided under dissimilar state constitutions containing an "open courts" provision. *Lankford v. Sullivan,* 416 So. 2d 996 (Ala. 1982) (ALA. CONST. art. I, § 13); *Heath v. Sears Robuck & Co.,* 464 A.2d 288 (N.H. 1983) (N.H. CONST. art. 14, pt. 1); *Hanson v. Williams County,* 389 N.W.2d 319 (N.D. 1986) (N.D. CONST. art. I, § 9). Those cases were, therefore, wholly inapposite to the interpretation of the Iowa statute of repose. Plaintiffs cited no authonty finding a statute of repose was declared unconstitutional in a state having constitutional provisions worded like Iowa's.

The Court of Appeals affirmed the district court's granting of summary judgment, finding the statute was "free of constitutional defect." *Branson,* 221 F.3d at 1065. The panel of Justices Bowman, Morris Arnold, and Floyd Gibson, in an opinion authored by Justice Bowman, relied on the Circuit's past panel decisions as well as decisions of the Iowa Supreme Court, all of which have rejected due process and equal protection challenges to statutes of repose under rational basis review. *See Norwest Bank v. W.R. Grace & Co.,* 960 F.2d 754, 756-58 (8th Cir. 1992); *Van Den Hul v. Baltic Farmers Elevator Co.,* 716 F.2d 504, 510-12 (8th Cir. 1983); *Krull v. Thermogas Co.,* 522 N.W.2d 607, 613-15 (Iowa 1994); *Bob McKiness Excavating & Grading, Inc. v. Morton Bldgs., Inc.,* 507 N.W.2d 405, 410 (Iowa 1993). The Court also rejected Plaintiffs' claim that Iowa's statute of repose violated their right to "open courts" under the Iowa Constitution, recognizing Iowa's Constitution does not guarantee access to the courts. *Branson,* 221 F.3d at 1065. Even so, the Court of Appeals did not agree with Plaintiffs that the statute would violate such a guarantee even if one existed. *Id.*

While technically not binding on the Iowa Supreme Court, the Eighth Circuit decision in *Branson* is dispositive on this issue as a practical matter, since the Iowa Supreme Court has repeatedly held that its standard of review on such constitutional issues is the same as the Eighth Circuit's. ❑

AMICUS CURIAE COMMITTEE

The Amicus Curiae Committee of the Iowa Defense Counsel monitors cases pending in the Iowa Supreme Court and identifies significant cases warranting amicus curiae participation by the Counsel. The committee is particularly interested at this time in the continuing development of the law on the admissibility of expert testimony in Iowa courts. If you are involved in appeals in which the extension, application, or refinement of *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993), by Iowa courts is at issue, please contact the Amicus Curiae Committee. In addition, please contact the Amicus Curiae Committee if you are involved in any appeals which you believe present significant issues of interest to members of the Iowa Defense Counsel and on which you would like to ask the Counsel to submit an amicus brief in your appeal.

You may contact the Amicus Curiae Committee through its chairman;

Michael W. Thrall
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West, Hansell & O'Brien, P.C.
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mwt@nyemaster.com

"It's amazing what you can accomplish if you do not care who gets the credit."

Harry S. Truman

PARADISE LOST . . . *Continued from page 4*

received in the forensic laboratory as well as any evidence isolated, generated, or prepared from the items submitted for laboratory examination. Persons collecting, packaging, storing, and analyzing the evidence must take precautions appropriate to the hazardous nature of the particular evidence.

The American National Standards Institute (ANSI) is a voluntary standardization organization established in 1918. ANSI's goal is to promote consensus standards and conformity assessment systems. ANSI does not directly develop ANSI standards, rather, it facilitates their development by establishing consensus between qualified groups. There are currently over 13,000 ANSI-approved standards. One example of a valuable ANSI standard is the National Fuel Gas Code. The National Fuel Gas Code serves as a guide for the installation of propane appliances.

The American Society of Mechanical Engineers (ASME) is a professional engineering society founded in 1880 which conducts over 30 technical conferences and 200 professional development courses each year. It also sets many industrial and manufacturing standards on a variety of subject matters. One example of ASME standards is the manufacturing standards for pressure vessels (tanks) used in liquid propane (LP) gas service. The ASME Unfired Boiler and Pressure Vessel Code (Division I, Section III) applies to all tanks over 5 gallons and less than 120,000 gallons water capacity. ASME also publishes standards for the pressure relief valves used in these ASME tanks.

The Underwriters Laboratory, Inc. (UL) was founded in 1894 and is a non-profit product safety testing and certification organization. Each year more than 14 billion UL marks are applied to products worldwide. Among others, UL provides detailed construction and performance requirements for equipment used in hazardous locations. In particular, UL-132 provides standards for safety relief valves for anhydrous ammonia and LP-gas.

The Institute of Electrical and Electronic Engineers, Inc. (IEEE) promotes the engineering process of creating, developing, integrating, sharing, and applying knowledge about electrical information technologies and sciences for the benefit of humanity and the profession. Examples of IEEE standards are those standards applicable to wiring of electrical appliances.

The National Propane Gas Association (NPGA) is a private industry association. The mission of the NPGA is to promote the safe and increased use of propane; to work for a favorable environment for propane production, distribution, and marketing; and to demonstrate the value of propane as an energy source. The NPGA organizes and coordinates the education of the propane industry and its consumers. It also works to keep its members updated on industry technology advances.

There are many different governmental agencies that may become involved when an accident occurs. For example, several different agencies would be involved if a tanker truck were to overturn and spill its contents or the fire-fighting activities to extinguish a fire at an agri-business facility. The Department of Transportation (DOT) may have an interest because (among other items) it establishes rules and regulations governing *interstate* transportation of hazardous materials. The Department of Labor (DOL) might also become involved because it enforces safety and health regulations for employees. The DOL also enforces the guidelines set forth in the Occupational Safety and Health Act of 1970. Because there is a spill or the residue of a potentially polluting substance, the Environmental Protection Agency (EPA) might also perform an investigation. The EPA promulgates regulations for reporting requirements, hazard communications, and emergency planning procedures.

Fire spread theory and fire dynamics are both very detailed sciences which deal with the modeling of fire scenes to determine how the fire spreads throughout the structure. Again, due to space constraints, we will proceed directly to the laboratory and field analysis of a fire. Please note that a variety of laboratory services aid in the investigation of fires. . . also true for construction, product liability and catastrophic loss. The testing may analyze evidence recovered from the scene to verify our refute proposed fire mechanisms or component failure.

Production laboratories perform highly standardized tests on a regular basis. Fire evidence may be analyzed to identify material and its flash point. Failure analysis of electrical or mechanical devices may determine whether bad wiring or a broken part was the cause or result of the fire. Accelerants may be identified through the use of a gas chromatograph. Test samples may be sectioned from artifacts amd subjected to metallurgical testing to determine levels of mechanical or thermal stress exerted on the artifacts.

Scientific laboratories can create specialized testing for specific test objectives. Laboratory tests may also evaluate the reputed mechanism of the fire. Deciding precisely how to define and perform the test demands a combination of legal and technical skills. Both a legal analysis and a technical analysis are required to determine what facts and measurements the test needs to be establish.

The expert's communication skills and experience with court or deposition testimony should be considered apart from his or her industrial and/or academic background. It would be unwise to base the outcome of a multimillion dollar case on the testimony of an expert new to the courtroom. Laboratory selection follows a similar pattern. Certain laboratory equipment is so large or expensive, such as an environmental chamber large enough to

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PARADISE LOST . . . *Continued from page 10*

accommodate an automobile, that few laboratories have such equipment. In addition to the quality of the laboratory equipment, the laboratory personnel themselves must be evaluated. Laboratory technicians may range in education from a technical school graduate to a PhD. Each has their place in the test process, but it is essential to assign appropriate personnel to the appropriate task. Senior scientists will have valuable input for the testing methodology while skilled technicians can operate test equipment and take necessary measurements.

Technical analysis is required to establish a test protocol which will yield the desired outcome (remember *Daubert*). Typically, an attorney, working with one or more experts, would begin the process by identifying the essential points of the opposing experts' disclosures. At this point, the attorney, with the aid of retained experts, determines which portions of the opinion were technically suspect. The next step would be to research test standards, from such organizations as the ASTM, IEEE, and NFPA, which bear on the technically suspect portions. The test standards would also lead to the appropriate sampling techniques required to yield supportable test results. The attorney or expert contacts an independent laboratory to perform tests conforming to, or similar to, the relevant standards. The attorney and the expert play an integral part in ensuring laboratory compliance with test protocol. Strict compliance is necessary in order for the conclusions to be valid and repeatable. Finally, the attorney uses the test results and conclusions, with the aid of the experts, to determine how to conduct depositions of opposing experts, prepare for depositions of friendly experts, and present the best merits of the case to the judge and jury.

EXPLOSIONS

Due to the explosive nature of propane gas and the severe damage that can result, courts and legislatures have created a comprehensive set of duties for those who work in all facets of the propane industry. Those duties include the duty of the supplier for an initial delivery, the duty to inspect after refill (depressurization), the duty of the supplier to notice excessive gas consumption, and the duty of the installer to inspect gas lines.

Common dust explosions occur with flour dust in grain elevators, metallic dust in machine shops, sawdust in lumber mills and coal dust in mines. These explosions all share the characteristics of small particles of fuel dust, with correspondingly large surface areas, being dispersed optimally through the air to produce an explosive fuel-air mixture. If the dust particles are too large or the concentration of dust too small or too great, an explosion will not occur. It is not uncommon for the initial explosion to stir up a second dust cloud leading to a series of explosions as each explosion produces a dust cloud to fuel the next explosion. Dust explosions may be ignited by any source of heat, including open flames, lights, sparks and welding torches.

Ammonium Nitrate (AN) is an oxidizing agent that will increase the intensity of a fire. Fertilizer grade ammonium nitrate is different than that used in combustible material mixtures used in explosive devices. However, all grades of ammonium nitrate can be detonated as explosives when the requisite conditions are sufficient. Considerations during an investigation of an ammonium nitrate explosion include: (1) the form of ammonium nitrate present; (2) the initiating source; (3) the quantity and purity of the ammonium nitrate mixture; and (4) the confinement conditions of the space where detonation occurred. ATF and military personnel as well as chemists are typically used as experts in these types of situations. The same can be said for situations involving ammonium nitrate and fuel oil.

Ammonium Nitrate and Fuel Oil (ANFO) explosive is commonly used by farmers to remove tree stumps from their land. ANFO is simply a fertilizer having a high ammonium nitrate content mixed with common fuel oil. It is classified with dynamite and TNT as a high explosive. ANFO earned notoriety in relation to the Oklahoma City bombing.

It may be useful to provide a brief explanation of the type of investigation and analysis in connection with an actual explosion. Any type of explosion requires an exhaustive effort to document and investigate the explosion scene. Complementary photographic techniques may be required to determine the seat of the explosion. The "seat" of the explosion is the crater located at the epicenter of the explosion. A photographer working from a helicopter or a fixed wing aircraft may be necessary in these instances because the photographs can provide both a pictorial overview of the scene and a means of understanding the mechanism of the blast through a study of the wreckage. A surveyor should also be retained to establish a grid to locate blast artifacts about the scene. Both seated or unseated explosions can disperse fragments over a very wide area. A rule of thumb is to look for fragments at least twice as far from the explosion as fragments have already been discovered. A scene search pattern must be established and followed to ensure that the greatest amount of evidence is recovered. Again, experts qualified in munitions/explosives, having experience with the Bureau of Alcohol Tobacco and Firearms or having experience in military investigation should investigate the blast scene.

PRODUCT LIABILITY

Product liability situations arise in a multitude of different settings in which

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PARADISE LOST . . . *Continued from page 11*

locating and retaining the appropriate expert is crucial to (1) identify a particular failure mode, (2) survive any *Daubert* based pre-trial motions, and (3) to advise the client regarding appropriate remedial steps necessary to alleviate future problems. In order to retain the appropriate expert, several steps should be taken when a lawyer is notified of a potential claim.

The initial contact with the adjuster, the respective client, relevant state or federal authorities and/or any other fact witnesses will help provide information to form a potential failure mode. Once this is done, the attorney should select an expert in a particular specialized field based on the data received.

Depending upon the type of failure mode identified, the attorney and expert should consult and develop a protocol for both sampling and testing that conforms to all applicable professional standards. Once this is done, another expert *may* have to be retained to perform the testing. At this point, it is desirable to retain the expert doing the testing as a consulting expert. This has the discovery-associated advantage of not allowing production of this expert's facts or opinions without a showing of exceptional circumstances.

The on-site investigation will help gather additional data and define a failure mode with a finer degree of clarity. The site investigation includes sampling conducted pursuant to a predetermined protocol. It is at this point that the consulting expert should be given the collected evidence with respect to the on-site investigation and testing should be done according to the testing protocol. Additionally, due to possible privilege implications, all testing and site coordination should be done under the direction of an attorney.

Depending upon the scope and magnitude of the problem, company-wide remedial measures may be necessary to prevent future injuries and claims. At this point, the attorney should recommend that a functional hazard type of analysis be conducted by a committee comprising all levels of the business associated with the distribution of the product to evaluate: if the potential hazard can be designed out or protected via additional safety devices; if warnings or additional training material should accompany the product; or if training should be mandated before the product is sold.

Additionally, depending on the failure mode and the particular facts, the attorney should then look at which defenses are available. Possible defenses include (1) misuse and alteration, (2) an open and obvious hazard, (3) primary and secondary assumption of risk, (4) the product was "state of the art" at the time of manufacture, (4) professional user, or (6) preemption. Additionally, and sometimes most importantly, the attorney should look at the potential for subrogation depending on the particular set of facts presented.

CONSTRUCTION

Construction litigation is another area in which a "truly" qualified expert is essential. The type of expert necessarily depends upon the type of failure mode experienced. Any given failure mode may be classified in one of three ways: a design failure, a materials failure, or a methodology/process failure.

A design failure occurs when there is a failure of the structure even though it was built in conformance with the specified design. As in a products liability action, a design failure is a failure resulting from an insufficient design. Construction design failures often involve non-compliance with the applicable building code provisions, inadequate concrete mix design, inadequate structural members, inadequate fastening/support, and/or erroneous assumptions/conclusions regarding soil characteristics. A structural engineer may be needed to determine the integrity of the specified design. A geotechnical engineer may be needed to determine the given soil characteristics. An expert that actively practices in the state of the occurrence is preferred, if not essential. An expert native to the locale is typically preferred because of his/her knowledge of the regional building code provisions, soil conditions, and local industry practices.

A materials failure occurs when there is a design failure due to the structural members nonconformance or deviation from its intended design. This is a products liability action based on a manufacturing defect. Whether a metallurgical engineer is needed to examine the failed structural member or a structural engineer is needed to take concrete core samples, the same factors considered for the selection and use of an expert in a products liability action apply.

A methodology/process failure occurs when the contractor fails to build the structure as specified or otherwise failed to follow instructions provided for the particular installation or construction. Such deviation may result in fire, collapse, frost heave/subsidence, or other failure. Several different disciplines may be involved in a method or process failure such as: Uniform Fire Code, Life Safety Code, and the Uniform Building Code. A geotechnical engineer may be used for subsidence and/or frost heave which is often the result of inadequate compaction, the use of improper fill material, or the use of frozen fill material. An electrician may be needed for a fire which often results from the improper routing of wire or use of improper wire gauge. A civil engineer knowledgeable in building design may be needed to assess improper processes such as the failure to use a vapor barrier, inadequate vibration resulting in voids and honeycombs, improper mix designs, and inadequate/improper curing of concrete.

A catastrophic loss is any event which has the potential for the loss of human life, the large scale destruction of property, and/or the loss of a great sum of moneys.

Continued on page 13

PARADISE LOST . . . *Continued from page 12*

Common types of catastrophic losses include derailments, environmental incidents, and high voltage electrical contact. Derailments can take lives and destroy property immediately during the incident and, depending on the cargo carried, may force the evacuation of nearby areas. Environmental incidents include underground storage tanks, rollovers, and fertilizer/herbicide fires. Issues of containment, design, and warnings are implicated in these type of situations.

Catastrophic losses typically require a wide array of experts with each unique loss dictating its own specific blend of experts to fully investigate all aspects of the case. For example, a loss which appears to involve a mechanical or structural failure, such as a derailment, will probably need to be analyzed by a mechanical engineer, a structural engineer, and a metallurgical engineer. Electrical engineers, human factors engineers, and surveyors would become involved in electrical contact cases to determine whether the requirements of the National Electric Safety Code (NESC) had been adhered to.

On the other hand, chemists, environmental sciences experts, and hazardous material specialists would all be involved in derailments and rollovers involving hazardous cargos as well as herbicide fires. Human factors experts may play a part in determining whether the warnings associated with underground storage tanks and electrical utility facilities were sufficient. Physicians, toxicologists, and psychologists would assess and treat the injuries of individuals surviving their initial exposure to toxic materials or their contact with high voltage electricity. Additionally, accountants would be needed to calculate the present and future effect on business profits and earning potential for establishments and individuals affected by catastrophic losses.

Regardless of whether the loss is a fire loss, an explosion, product liability, construction failure or a catastrophic loss, the selection of the expert(s) is critical for the success of the case. The rule of *Daubert* analysis, *Fire Science v. Fire Service,* the technical standards/recommendations, governmental agencies, the laboratory and field analysis of the loss, are important elements to be controlled by counsel. Control of the expert is synonymous with control of the case. ❑

"Never let the fear of stricking out get in your way."

Babe Ruth

WELCOME NEW MEMBERS

John Breitbach
Cedar Rapids, Iowa

Mike Rolling
Des Moines, Iowa

Michael Jones
Des Moines, Iowa

Stephen Doohen
Des Moines, Iowa

Jodi Ahlmen
Des Moines, Iowa

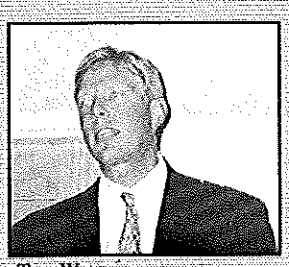
IOWA DEFENSE COUNSEL
WEBSITE NEWS

We have received very favorable feedback on our new Website. We want to remind everyone of this additional resource tool that is now available. The Website is located at *iowadefensecounsel.org*. Our jury verdict summary program has been very successful. The IDCA has initiated a program whereby we are reporting the civil jury verdicts in the ten most litigious counties in Iowa. By reporting verdicts in these ten counties we are able to capture over 50% of the civil jury verdicts annually in the state. The jury verdict summaries are available on the Website. In the future the IDCA will implement a password so that only IDCA members will have access to the jury verdict summaries. At the present time, however, the jury verdict summaries are available to members and non-members alike. By simply typing in IDCA in the password protected box, a viewer will have access to all of the jury verdict summaries collected to date.

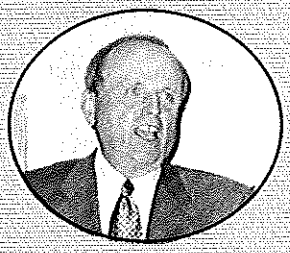
Our membership roster is now also available on the Website. Please use the membership roster to take advantage of the many professional contacts your membership in the IDCA provides.

The Website does contain a Legal Links section which provides ready access to the Iowa Supreme Court and Court of Appeals decisions; Iowa Court Rules, Iowa Code, etc. Legal Links should be a valuable and economic research tool for your use. We can increase the number of sites of Legal Links. If you have some suggestions on good resource sites or research sites, please e-mail your suggestions to Mark Tripp at *tripp.mark@bradshawlaw.com.* We are trying to update the Website quarterly and we will include your recommendations at the time of our next update. ❑

36th ANNUAL MEETING HIGHLIGHTS



Tom Waterman



Jack Grier

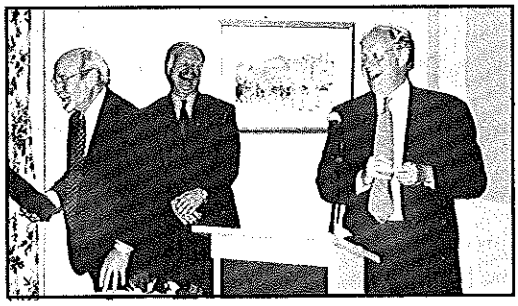
Iris Post

Jason Madden

Mike Coyle

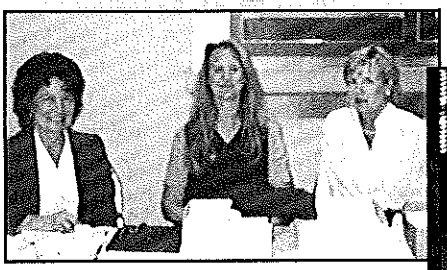
Paul Morf

Right: Tom Hanson receives special award for being the 200th person signing in for the Annual Meeting



Quarter Century IDCA members who attended the banquet; from left: Don Gloe, Ray & Phyllis Stefani, Dean & Billie Mitchell, Herb & Harriett Selby, Lanny & Barb Elgar, LeRoy & Darlene Voights, Bill & Mary Fanter

The *Defense Update* Board of Editors meet to discuss next issue



Ginger Plummer, Julie Miller, & Janet Reiter at Registration Desk

Enjoying the Wednesday evening reception; from left : Harriett Selby (sitting), Audrey Hammer, Dave Hammer, & Herb Selby

Left: Some of the award winning speakers of the 36th IDCA Annual Meeting

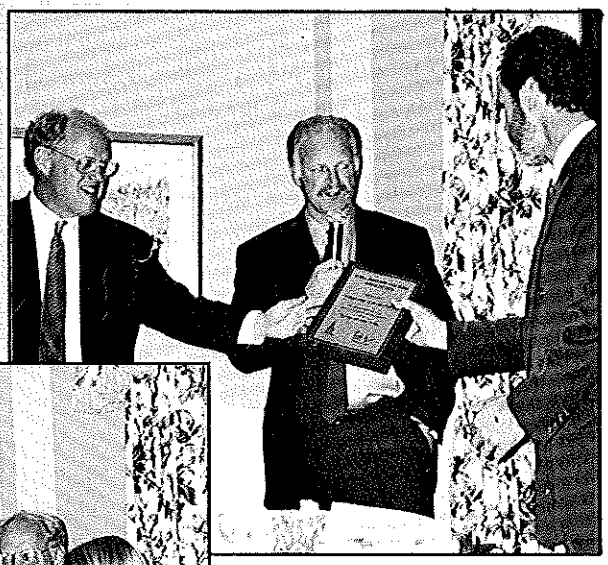
36th ANNUAL MEETING

The Iowa Defense Counsel Association held its 36th Annual Meeting and Seminar at the Embassy Suites in Des Moines September 20-22. Events of interest:

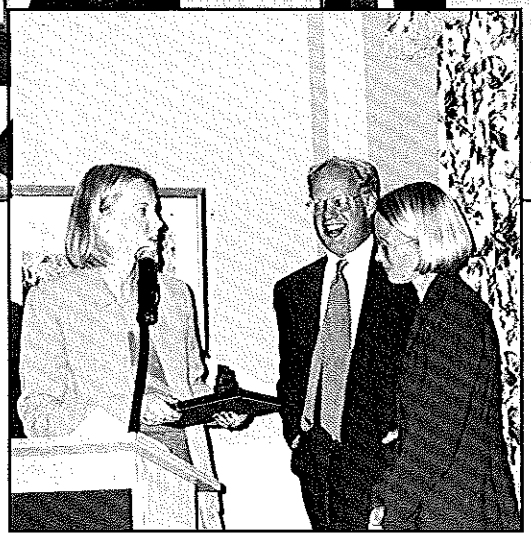
- Bob Houghton of Cedar Rapids retired as our President and Marion Beatty of Decorah assumed the presidency. Mike Ellwanger of Sioux City moved up to Vice President and Michael Weston of Cedar Rapids was elected Secretary.
- New elected Board members are Mark Brownlee of Fort Dodge, Lyle Ditmars of Council Bluffs and Bob Waterman Jr. of Davenport. Directors who were re-elected for new terms were Terry Abernathy of Cedar Rapids and Michael Thrall of Des Moines.
- The Board elected to hire Robert Kreamer of Des Moines as our Executive Director commencing January 1, 2001. Bob has been our lobbyist for several past years.
- Sharon Soorholtz Greer of Marshalltown received the "Eddie" award for outstanding service to the organization during the previous year.
- The Defense Counsel will have another "mini-seminar" this year, probably devoted to employment law. Gordon Fischer has volunteered to serve as chairman of the seminar.
- Our web page is up and operational.
- Special thanks to Marion Beatty for serving as chairman of this year's seminar with the assistance of Jim Pugh and Ginger Plummer. Marion's responsibility was to line up speakers and it was a great event.

Next year's seminar; September 26-28, 2001, Embassy Suites, Des Moines, Iowa

Incoming President Marion Beatty,(right) presents Bob Houghton with past President's Award



Outgoing board member, Greg Barnsten, receives plaque for many years of dedicated service



Sharon Soorholtz Greer,(right) receives the "Eddie Award" from Christina Holub, grandaughter of Edward F. Seitzinger

FROM THE EDITORS

The author of this editorial (Michael Ellwanger), is retiring from the editorial board of the *Defense Update* after this issue. It has been a very enjoyable experience, dating back to 1989 when the editorial board was initially formed. With my retirement, all of the original board members have now moved on and a complete new guard has taken over. I wish them the very best and I know that the quality of the publication will continue.

At the 2000 Annual Meeting, the "Eward F. Seitzinger Award" was given to Sharon Soorholtz Greer. This annual award is given to a board member for their extraordinary efforts on behalf of the IDCA. They do not receive as much credit as they should. Past award winners are as follows:

1989 - John (Jack) B. Grier
1990 - Richard J. Sapp
1991 - Eugene B. Marlett
1991 - Herbert S. Selby
*1992 - Edward F. Seitzinger
1993 - DeWayne E. Stroud
1994 - Marion L. Beatty
1995 - Robert D. Houghton
1996 - Mark L. Tripp
1997 - David L. Phipps
1998 - Gregory M. Lederer
1999 - J. Michael Weston
2000 - Sharon Soorholtz Greer

* First Special Edition "Eddie" Award

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