

# defense UPDATE

The Iowa Defense Counsel Association Newsletter

July 2001 Vol. XIV, No. 3

## A PRIMER FOR POST-TRAUMATIC FIBROMYALGIA CLAIMS

By: Patrick L. Woodward, Davenport, IA

Long before automobiles and whiplash claims, individuals experienced unexplained body pain and aches. For years, healthcare providers have recorded complaints of individuals with widespread musculoskeletal pain, fatigue and depression.<sup>1</sup> Now, enterprising attorneys with the assistance of the healthcare community, have developed a cause of action based upon a totally subjective complaint of pain which potentially can result in large verdicts from very minor accidents. This cause of action is based upon a theoretical link between trauma, most often associated with minor whiplash, and complaints of widespread diffuse musculoskeletal pain which is now called fibromyalgia.

The purpose of this article is to provide basic information about fibromyalgia, to make defense attorneys aware of the increasing prevalence of post-traumatic fibromyalgia claims and to discuss some of the issues which are involved in defending such claims.

### WHAT IS FIBROMYALGIA?

Fibromyalgia is not an objective injury such as a broken leg or a bruise, it is not a disease such as cancer or rheumatoid arthritis, and it is not a condition such as spondylosis or degenerative disc disease. There are no objective tests or studies to substantiate the presence of fibromyalgia. Blood tests, urine tests, radiographic studies, muscle biopsies and all other tests which have been performed to determine fibromyalgia or at least identify some positive finding with persons determined to have fibromyalgia have been negative.<sup>2,3</sup> Further, extensive medical research has failed to establish any etiology for fibromyalgia and medical practitioners have found no cure.<sup>3</sup>

As stated above, symptoms now labeled as fibromyalgia have been known to exist in individuals for years. Its evolution has, however, waxed and waned. In 1904, an English physician by the name of William Gowers saw patients with diverse complaints of pain without any objective signs of injury and believed such symptoms were the result of an inflammation of fibrous tissues, and gave this condition the name of fibrositis.<sup>4</sup> By the 1970s, a Chicago internist correlated symptoms of widespread musculoskeletal pain with insomnia and fatigue and expanded the concept of fibrositis to include these symptoms.<sup>5</sup>

After the 1970s, with the development of muscle biopsies, it was determined that in fact there was no inflammation of muscles

or tissues accompanying the complaints of widespread pain, and the terms fibrositis began to be replaced by the term fibromyalgia.

Research continued into this phenomenon and in 1988, the Multicenter Criteria Committee of the American College of Rheumatology (ACR), led by Frederick Wolfe, M.D., developed a classification criteria for research of a constellation of symptoms falling within the rubric of fibromyalgia—the symptoms include persistent widespread pain accompanied by some or all of the following: fatigue, insomnia, diarrhea, bladder irritation and headache.<sup>6</sup> The committee report was adopted by the ACR in 1990 and was an attempt to establish a single criteria, not for diagnostic purposes, but for basic clinical investigation

*continued on page 6*

### Inside This Issue

#### A Primer for Post-Traumatic Fibromyalgia Claims

Patrick L. Woodward .....Page 1

#### Message From the President: DRI MID-REGION MEETING

Marion L. Beatty .....Page 2

#### Advertising Injury

Noel K. McKibbin .....Page 3

#### Recent Lessons in Proximate Cause

Michael S. Jones .....Page 4

State Representative Election .....Page 5

Attend DRI Annual Meeting  
in October .....Page 5

Editorial .....Page 16

## MESSAGE FROM THE PRESIDENT DRI MID-REGION MEETING



Marion L. Beatty

The annual DRI Mid-Region Meeting was held at the Fairmont Hotel in Kansas City on April 27 and 28, 2001. The Kansas Association of Defense Counsel did an outstanding job of organizing the meeting and activities. State and Local Defense Organization (SLDO) leaders from Utah, Colorado, Nebraska, Iowa, Missouri and Kansas attended the meeting and shared ideas and plans for

the state organizations and DRI. Approximately 34 state and local defense organization representatives were in attendance for the meeting. Second Vice President of DRI, Bill Sampson and Sharrel Tillman of the DRI staff were also in attendance and presented information on current DRI issues and ideas for improving the quality of practice of defense lawyers.

One of the key items of business at this year's mid-region meeting was the selection of the mid-region regional director to succeed Tim Schimberg from Colorado whose 3-year term will end at the DRI annual meeting in October. I am pleased to announce that Greg Lederer was selected as our nominee as the mid-region representative. As many of you know, Greg is a member of Simmons, Perrine, Albright & Ellwood, P.L.C. in Cedar Rapids, where he has practiced since 1979. He is also a past president of the Iowa Defense Counsel Association.

By the time you read this letter the election should be over and hopefully Greg Lederer has been elected. We hope you all remembered to vote when you received the ballot.

The entire selection committee was convinced that Greg was the right person to fill the shoes of Tim Schimberg who also has done an extraordinary job in representing our region and addressing issues of particular concern to small law firms. Greg intends to continue to advocate more member services as he has done in his current role as DRI State Representative for Iowa.

One of the new member services through DRI, and the only one of its kind in the United States is the drihelp.com program. DRI has reached an agreement with McCallister Consultants to provide our members with a unique service, drihelp.com, which is designed to assist the defense practitioner in answering management questions faced in their daily professional life. If you are not a DRI member it might be a good time to join and if you are interested in this service you

may wish to log on and check out this program. There is no cost to visit this website and you will get a great overview of this DRI service. If you elect to subscribe the cost is only \$15.00 per month or \$180.00 per year. The drihelp.com program will feature:

- A weekly desktop video featuring a variety of practice management tips.
- Free text downloads and audio sessions
- Online newsletter
- Access to law firm classifieds
- The opportunity to ask questions and receive expert advice from McCallister Consultants.

While this has not been a particularly profitable venture for the DRI it is viewed as a very worthwhile endeavor by those lawyers who have participated in small law firm symposiums and have subscribed to this service. The DRI along with the state and local defense organization hopes to make this a useful practice aid to the defense lawyers in Iowa.

### JUNE 1, 2001 IDCA MEETING

Chief Justice Louis Lavorato attended the IDCA's June 1 meeting held in Decorah, Iowa. It was a wonderful opportunity to exchange ideas and perspectives on the state of the judiciary and the future of our courts. Justice Lavorato has made the effort to visit with each of the trial groups in Iowa including the Iowa Trial Lawyers Association, Iowa Academy of Trial Lawyers, Iowa State Bar Association, Iowa County Attorneys Association, and Iowa Association of Criminal Defense Lawyers groups in an effort to bring a variety of perspectives on how we might better serve the citizens of Iowa. He is committed to bringing our courts up to speed for the twenty-first century in spite of the budget constraints confronting our courts today. He candidly shared with us his views and sought ours on how we might better prepare to meet the challenges of



# ADVERTISING INJURY

By: Noel K. McKibbin, West Des Moines, IA

**Y**ou receive a call from an insurer describing to you a set of facts and requesting your opinion on whether there is coverage under a Comprehensive General Liability (hereafter CGL) contract form. A lawsuit has been filed seeking damages relating to a trademark and copyright infringement pursuant to 15 U.S.C. § 1121, 17 U.S.C. § 501, 28 U.S.C. § 1338 (a) and 28, U.S.C. § 1331. A nonwaiver/reservation of rights has been obtained from the insured.

## FACTS

The insured owns a small retail store which sells new computer hardware and software. The insured purchases software from salvage companies. On occasion, a product that is shipped remains in the possession of a shipper such as U.P.S. or Federal Express because the intended recipient had refused delivery. The product was damaged during shipping, or the person/company simply did not pick up the product. After ninety days, the shipper has the right to sell this merchandise. The insured purchased the software from the shipper and then sold the products to consumers.

The owner of the trademark for the software is Microsoft. Microsoft sent an investigator to the insured's store and purchased the software. Microsoft examined the product and determined that while the license and certificate of authentication were valid, the CD containing the program was a counterfeit.

Microsoft's counsel sent the insured a letter advising that the software was counterfeit and demanded to know from whom the product was purchased. The insured contacted Microsoft and was told by them that the letter was only a warning, but refused to explain to the insured how to detect a counterfeit piece of hardware. The insured changed his business practices and discontinued purchases from salvors

for products that were not in a complete package format.

Microsoft sent another investigator to the store eight months later. Software was purchased and it too was deemed to be a counterfeit even though it was contained in a sealed Microsoft container. As a result of this investigative finding the lawsuit was filed.

Under the copyright infringement count the plaintiff seeks to recover profits made by the insured, statutory damages, injunctive relief and an impoundment of the insured's inventory. Under the trademark infringement count, relief is sought for treble the profits the insured enjoyed and injunctive relief.

## DAMAGES AND LIABILITY

The Lanham Act, 15 U.S.C.S. § 1114 et seq. (1991) provides that lack of knowledge is not a defense. Under 15 U.S.C. § 1117 (1991) a plaintiff may recover actual damages, profits of the infringer, attorney fees and costs. Although intent may have an influence on damages, i.e. treble damages, a plaintiff need only show that the product was counterfeit, and that the insured sold the product.<sup>1</sup>

Although the insured's profit was less than \$50.00 for both programs sold, the Lanham Act (as amended by Congress in 1996) provides that statutory damages may be elected by the plaintiff instead of actual damages and profits.<sup>2</sup> These statutory damages must be awarded at an amount between \$500.00 and \$100,000.00 per mark.<sup>3</sup>

## CGL

The pertinent portion of the CGL policy provides:

"[W]e will pay those sums that

the insured becomes legally obligated to pay as damages because of 'personal advertising injury' to which this insurance applies. We will have the right and duty to defend the insured against any 'suit' seeking those damages. However, we will have no duty to defend the insured against any 'suit' seeking damages for 'personal and advertising injury' to which this insurance does not apply. We may, at our discretion, investigate any offense and settle any claim or 'suit' that may result.<sup>4</sup>

The definition Section defines personal and advertising injury to mean "injury, including consequential bodily injury; arising out of one or more of the following offenses:... The use of another's advertising idea in your 'advertisement' or infringing upon another's copyright, trade dress or slogan in your advertisement".<sup>5</sup>

Under the exclusion section, "[T]his insurance does not apply to 'Personal and Advertising injury': Committed by an insured whose business is advertising, broadcasting, publishing, or telecasting."<sup>6</sup>

## COVERAGE ANALYSIS

Your research should start with a recent Iowa Court of Appeals case, which addresses the patent infringement issue, *IMT Insurance Company v. Paper Systems, Incorporated*, 2001 WL 98545 (Iowa App 2001), wherein, IMT was successful in a declaratory judgment ruling and was affirmed on appeal.

The insured in the IMT case asserted three primary arguments relevant to the case you are analyzing: (1) The policy language covering advertising injuries for "infringement of ... title" encompasses a patent infringement lawsuit;<sup>7</sup> (2) the offer

## RECENT LESSONS IN PROXIMATE CAUSE

By: Michael S. Jones, Des Moines, IA

In the 1996 decision in *Gerst v. Marshal*, the Iowa Supreme Court recognized some inconsistency in proximate cause analysis.<sup>1</sup> *Gerst*, and several other important cases decided in the last five years, clarify the elements and analysis of causation.

**“But for” cause.** The question in *Gerst* was whether Iowa law includes both “but for” causation and a “substantial factor” requirement.<sup>2</sup> While leaving open the possibility that “the substantial factor” requirement might be removed from the jury’s factual inquiry regarding causation, the court reaffirmed that a plaintiff must establish both but for causation and satisfy the substantial factor test.<sup>3</sup> Although the substantial factor test is commonly associated with the Restatement (Second) Torts, the Restatement’s position, when first adopted in Iowa, was perceived as expressing existing Iowa law rather than adding an additional requirement.<sup>4</sup>

Conceptually, “but for” is an absolute minimum for causation.<sup>5</sup> Any attempt to find liability absent actual causation is an attempt to connect the defendant with an injury or event that the defendant had nothing to do with.<sup>6</sup> Mere logic and common sense dictate that there be some causal relationship between the defendant’s conduct and the injury or event for which damages are sought.<sup>7</sup> It is the basic requirement that a plaintiff prove the defendant in fact produced the plaintiff’s damages.<sup>8</sup> To ignore this requirement would substitute causation in fact with the policy determination that someone would pay for the unfortunate situation in which the plaintiffs have found themselves, even if the fact finder must speculate on whether the paying parties actually caused the problem.<sup>9</sup>

The defendants in *Gerst* prevailed as a matter of law as the plaintiffs were unable to establish but for cause. There, although the experts agreed that gasoline from a fuel

delivery system had contaminated the soil and groundwater, they could not identify how or when the release of gasoline occurred. This left the jury to speculate as to whether the defendants were responsible for the plaintiffs’ damages.<sup>10</sup>

The analysis in *Gerst* led to a similar result in the 1999 Iowa Supreme Court decision in *Hasselman v. Hasselman*.<sup>11</sup> There, a directed verdict for the defendant was affirmed. The plaintiff, who fell from a ladder, alleged that the defendant failed to extend the ladder to the proper height or place the ladder in an unsafe position. But the jury was left to speculate on the cause of the failure.<sup>12</sup> Explained the court:

It is just as likely under the evidence presented to the jury that they failed because some component of the clamp mechanism was worn and gave out. When a jury is left to speculate on whether the defendant’s conduct in fact caused the plaintiff’s damages, the evidence is insufficient to support a finding of proximate cause.<sup>13</sup>

**“Substantial factor” test.** While *Gerst* was decided on the but for cause component of causation, it was soon followed by a leading substantial factor test when, in the 1997 Iowa Supreme Court case of *Scoggins v. Wal-Mart Stores, Inc.*, a directed verdict for the defendant was affirmed.<sup>14</sup> There, the defendant “was clearly negligent in selling ammunition to a minor.”<sup>15</sup> The minor used the ammunition to kill himself. The parties did not dispute the “but for” component of causation. The analysis turned to the substantial factor test.

In determining whether conduct meets the substantial factor test, the court looks to the “proximity and foreseeability of the harm flowing from the actor’s conduct, although it is not necessary that the actual

consequences of a defendant’s negligence should have been foreseen.”<sup>16</sup> In order for Wal-Mart to be held liable, the suicide must have been foreseeable when it sold the ammunition. As there was no indication in the record that the clerk who sold the ammunition had any reason to believe that the customer was suicidal or that he intended to use the ammunition to injure himself, the plaintiff’s case failed as a matter of law.<sup>17</sup>

The substantial factor test was further explained in the 1996 decision in *Hollingsworth v. Schminkey*.<sup>18</sup> In discussing the substantial factor prong the court stated:

[The] line between what is sufficiently proximate and is too remote is often a thin one. If looking back from the injury, the connection between the negligence and the injury appears unnatural, unreasonable, and improbable in the light of common experience, such negligence would be a remote rather than a proximate cause. If, however, by a fair consideration of the facts based upon common human experience and logic, there is nothing particularly unnatural or unreasonable in connecting the injury with the negligence, a jury question would be created.<sup>19</sup>

That is a more descriptive definition than appears in the current Uniform Jury Instruction which reads:

**700.3 Proximate Cause - Defined.** The conduct of a party is a proximate cause of damage when it is a substantial factor in producing damage and when the damage would not have happened except for the conduct.

“Substantial” means the party’s

*continued on page 12*

## STATE REPRESENTATIVE ELECTION

---

**A**t the June 1 board meeting, the IDCA directors elected Marion Beatty to serve for up to three years as the Iowa State Representative to the Defense Research Institute. Marion, 48, is a partner with the Miller firm in Decorah. He currently serves as President of IDCA.

DRI created the State Representative position to serve as liaison between DRI and the state defense organizations. As State Representative, Marion will be responsible for facilitating communication and cooperation between DRI and IDCA and the DRI members in Iowa. He also will be responsible for recruiting new DRI members and retaining current members. Because of these membership responsibilities, IDCA also makes the State Representative its chair of the IDCA membership committee.

The time commitment is onerous. In addition to the membership and communication responsibilities, Marion is obligated to attend the IDCA board meetings, the DRI annual meeting, the DRI national State Representatives meeting, and the DRI Mid Region regional meeting, all of which will take him away from his practice for at least fifteen days.

Marion begins his term at the end of the DRI annual meeting in October.

---

---

## ATTEND DRI ANNUAL MEETING IN OCTOBER

**T**he Defense Research Institute is bringing its spectacular annual meeting back to Chicago on October 3 through 6. Any DRI member can attend, and it will never be closer to Iowa than Chicago. DRI will provide you with a full plate of worthwhile CLE, with speakers from all across the country and cutting edge technology. You also can meet and network with defense lawyers from other states, participate in substantive committee meetings, and visit a myriad of vendor booths. DRI caps off each day of meetings with elaborate and unusual social events. And of course there's always Chicago itself.

By the time that you read this, registration materials should have arrived in your mail. You may see those materials and get any answers to your questions at [www.dri.org/events/meetings.html](http://www.dri.org/events/meetings.html). If you have any questions, please telephone current DRI State Representative Greg Lederer at 319-366-7641 or e-mail him at [gledere@simmonsperine.com](mailto:gledere@simmonsperine.com).

---

## POST TRAUMATIC FIBROMYALGIA CLAIMS . . . continued from page 1

and research.<sup>6</sup> The specific criteria adopted for research purposes by the ACR was based upon **patient self report** of (1) widespread muscle pain for greater than three months, in combination with (2) reported pain, not just tenderness, elicited by manual pressure of about 4 kg/cm<sup>2</sup> at 11 or more of 18 designated tender point sites. Additionally, there should be an additional self report of fatigue, insomnia, diarrhea, bladder irritation and/or headache.<sup>6</sup>

The establishment of this criteria has resulted in the medicalization of fibromyalgia. In Iowa and other states, there exists a complete industry based upon fibromyalgia and its association with various compensation systems, from health insurance and disability insurance to workers' compensation claims and personal injury tort suits. For many rheumatologists, persons whom they diagnosis as having fibromyalgia account for 20- 25% of their patient loads.<sup>7</sup> Hospitals and medical centers are sponsoring fibromyalgia seminars and support groups which help people "identify" themselves as having fibromyalgia and offering hospital-associated services to provide palliative care. The medicalization of fibromyalgia has directly led to the increased prevalence of claims based upon the alleged tort of post-traumatic fibromyalgia.<sup>8</sup>

As stated above, there is no known etiology for fibromyalgia. However, with the medicalization of fibromyalgia, a group of advocates has published "studies" to support a theory that fibromyalgia can be traumatically induced. These studies attempt to link the onset of the symptoms labeled fibromyalgia with a specific trauma, but are based upon the self-report of the individuals associating such symptoms with the trauma. Further, many of the individuals reporting the onset of fibromyalgia symptoms with trauma are involved in a compensation setting.<sup>2</sup>

A dispute within the medical community exists as to fibromyalgia claims in the context of a compensation setting. Dr. Frederick Wolfe, known as the father of fibromyalgia, has stated:

Within the setting of compensation, work injury, disability or litigation, however, fibromyalgia has a different meaning. For although we know something about the validity and reliability of our diagnosis in the clinic (where causation is rarely a question), almost nothing is known about diagnostic validity and reliability in the compensation setting. Although, there are no research data on this point, the author has seen and is convinced that both the tender point count and dolorimetry score can be manipulated by the patient.<sup>9</sup>

Despite the complete lack of objective tests, there are many "experts," even local rheumatologists, who support claims of post-traumatic fibromyalgia for their patients. Whether due to the medicalization aspect of such claims or simply the tried and true "I believe my patient," the fact remains that these claims are being made and supported by "legitimate" medical professionals.

The danger of such claims may seem obvious. There is no way to prove or disprove the assertion that the plaintiff is suffering from widespread musculoskeletal pain. There is no cure for fibromyalgia and the palliative care, including physical therapy, massage therapy and low dose antidepressive medication can be lifelong. From a minor auto accident, the effects of fibromyalgia can result in a determination of permanent disability and, at least is so recognized in the Social Security Disability setting by one U. S. Circuit Court of Appeals.<sup>10</sup>

### ISSUES IN DEFENDING FIBROMYALGIA CLAIMS

Every lawyer defending a fibromyalgia claim will have to consider certain issues from the time the file is received. Some of the issues to be considered are as follows:

#### 1. Does fibromyalgia really exist?

Undoubtedly, there are individuals who perceive that they are suffering widespread musculoskeletal pain for no apparent reason. Is it psychosomatic? Is there a reason for the pain? Are plaintiffs claiming fibromyalgia malingerers? From personal experience, the prevalence of fibromyalgia is greater than one would ever expect. In a trial approximately eighteen months ago where fibromyalgia was the claimed condition resulting from whiplash, five out of the first sixteen potential jurors in the box related during voir dire that they themselves suffer from fibromyalgia or had a close friend or relative who had been diagnosed as having fibromyalgia. Regardless of personal belief, the citizens who comprise juries do believe. Therefore, perhaps the best course is to accept the description or definition of fibromyalgia espoused by John Winfield, M.D., Chief of the Division of Rheumatology and Immunology at the University of North Carolina, Chapel Hill. In discussing fibromyalgia, Dr. Winfield writes:

Fibromyalgia is not a disease. It is a clinical construct that describes a chronic syndrome with many associated somatic symptoms, particularly fatigue . . . . Pain in fibromyalgia is due to a combination of psychologic, neuroendocrine, and central pain regulatory processes that lower

## POST TRAUMATIC FIBROMYALGIA CLAIMS . . . continued from page 6

thresholds for pain, perception and pain tolerance. Female gender, chronic stress, psychologic distress, and associated blunting of the stress response appear to be central elements in this regard. Overall morbidity and disability are potentiated by environmental and sociocultural variables.<sup>3</sup>

Utilization of this definition while obtuse, acknowledges that persons perceive widespread musculoskeletal pain but sets out a reasonable explanation for the same. Dr. Winfield does not acknowledge trauma as a basis for fibromyalgia and his theory at least encompasses what is known about fibromyalgia and is compatible with historical nature of widespread complaints of musculoskeletal pain.

### 2. Are the constellation of symptoms documented?

The analysis of any case involving a claim of post-traumatic fibromyalgia requires a complete copy of all medical records. Once the medical records are obtained, it must be determined whether the plaintiff meets the criteria for fibromyalgia. With the proliferation of fibromyalgia support groups and seminars, it is unlikely that a competent plaintiff's attorney would pursue a claim based upon post-traumatic fibromyalgia without ensuring that the client has or develops the relevant criteria. However, examination of this issue is essential.

### 3. Examination of relevant articles and publications.

The footnotes to this article contain references to some of the many articles on fibromyalgia and are a good starting point in learning about fibromyalgia. Equally

important, however, is an examination of articles supporting the concept of post-traumatic fibromyalgia. Some of these articles are:

- a. Greenfield, S., Fitzcharles, M., Esdaile, J. M.: *Reactive Fibromyalgia Syndrome*. *Arthritis Rheum.* 1992, 35: 678-681
- b. Goldenberg, D. L., Mossey, C. J., Schmid, C. H.: *A Model to Assess Severity and Impact of Fibromyalgia*. *J. Rheumatol* 1995, 22: 2313-2318
- c. Buskila, D., Neuman, L., Valsberg, G., et al.: *Increased Rates of Fibromyalgia Following Cervical Spine Injury*. *Arthritis Rheum.* 1997, 40: 446-451
- d. Waylonis, G. W., Perkins, H.: *Post-Traumatic Fibromyalgia, A Long-Term Follow-Up*, *Am. J. Phys. Med. Rehabil.*, Vol. 73, No. 6, Nov/Dec. 1994: 403-412

In reviewing these articles it is important to note that the studies are based upon patient self-report of the association of a traumatic event and widespread musculoskeletal pain. Further, the most cited study is that of Buskila which is based upon an Israeli study of persons suffering a cervical injury of a minor or moderate degree and the development of fibromyalgia compared with a control group of lower extremity fractures and fibromyalgia. Although cited as support for a relationship between trauma and fibromyalgia, it is interesting that the minor whiplash injury, according to self report, results in a much greater chance of an association of fibromyalgia than the more traumatic leg fracture.

### 4. Is there a temporal relationship?

The studies cited in paragraph 3 above

and the "legitimacy" of claims of post-traumatic fibromyalgia require the existence of a temporal relationship between the onset of symptoms and the traumatic event.<sup>11, 12</sup> Since there is no known etiology for fibromyalgia, the only support for a claim of post-traumatic fibromyalgia is the onset of symptoms immediately or shortly after the traumatic event. If symptoms are present prior to the traumatic event or don't develop until a substantial lapse of time, the claim of post-traumatic fibromyalgia is significantly weaker.

### 5. Should an expert be utilized?

An important determination is whether to utilize expert witnesses. Unfortunately because of the nature of fibromyalgia claims, these cases have a large potential exposure. As most local rheumatologists believe in fibromyalgia and often will not have the knowledge to rebut assertions of post-traumatic fibromyalgia, the best sources of expert witnesses are academics and research institutions. These practitioners are more likely than not to be familiar with the vast amount of literature on the subject and often have had hands-on experience in examining, treating and researching fibromyalgia. Further, these experts are often helpful in assisting in a defense attempt to exclude the plaintiff's claims of post-traumatic fibromyalgia through providing the necessary affidavits and testimony in support of such motions.

### 6. What are the obvious weaknesses of claims of post-traumatic fibromyalgia?

The most obvious weakness of a claim based upon post-traumatic fibromyalgia is the total lack of any scientific or medical causation. As stated above, the etiology of

## MESSAGE FROM THE PRESIDENT

... continued from page 2

ever increasing numbers of cases on the criminal and civil dockets of our district courts.

It is going to be necessary for all trial lawyers in our state to encourage Iowa's legislature to adequately fund our courts to meet the demands of our citizens. With the strong voice of Justice Lavorato it is likely we will meet those demands.

Our membership should take pride and comfort in Justice Lavorato's bold and determined leadership of our courts.

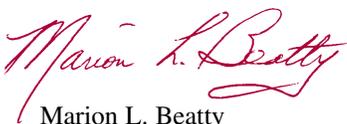
### IDCA ANNUAL MEETING

Mark your calendars and intend to participate in the annual IDCA meeting at the Embassy Suites in Des Moines, Iowa on September 26, 27 and 28, 2001. Michael Ellwanger has prepared an outstanding program which will meet all CLE requirements for state, federal and ethics hours. It promises to be one of the best programs yet offered by IDCA.

### IDCA WEBSITE

If you have not visited the Iowa Defense Counsel Association's website you should do so. Please log on at [www.iowadefensecounsel.org](http://www.iowadefensecounsel.org) to see what Julie Garrison and Bob Kreamer have accomplished. The Defense Update is available online now, along with jury verdict results, membership information and CLE information. For current DRI members or those who may wish to join you can log on at [www.dri.org](http://www.dri.org) for more information about DRI and its educational opportunities.

Very truly yours,



Marion L. Beatty  
President

## POST TRAUMATIC FIBROMYALGIA CLAIMS

... continued from page 7

fibromyalgia is unknown and there are no objective tests to establish the presence of the same. Therefore, it would seem that claims based upon post-traumatic fibromyalgia should be subject to pretrial attack, but in Iowa, trial courts have been reluctant to rule for defendants in the same and to date, no cases involving this issue have reached the Iowa Supreme Court.

### CONCLUSION

Fibromyalgia claims present challenges to the defense attorney. From a legal standpoint, the judiciability of such claims is certainly subject to debate and should be the subject of pretrial motions. From a fact standpoint, issues of proximate cause and damages invite a fact intensive presentation of the evidence and certainly allow the lawyer room for creativity in crafting arguments. As post-traumatic fibromyalgia claims present potentially large verdicts, plaintiffs and their attorneys are becoming more sophisticated and more aggressive. Undoubtedly, we will be seeing an increasing number of post-traumatic fibromyalgia claims arising from low velocity rear-end accidents.

1Kolar, E. Hartz, A., Roumm, A., Ryan, L. Jones, R., Kirchoerfer, E.: *Factors Associated With Severity of Symptoms in Patients with Unexplained Muscle Aching*. *An of Rheu Dis* 1989; 48: 317-321

2Gardner, G. C.: *Fibromyalgia Following Trauma: Psychology or Biology?* *Current Review of Pain* 2000. 4: 295-300

3Winfield, J. B.: *Pain in Fibromyalgia*. *Rheum Clinics of N. America*, 1999, 25: 55-79

4Gowers, W.: *Lumago: 1 Lessons and Analogues*. *Brit Med J*, 1904, 1-117

5Bohr, T.W.: *Fibromyalgia Syndrome and Myofascial Pain Syndrome. Do They Exist?* *Neurologic Clinics, Malingering and Conversion Reactions*. Vol. 13. No. 2. May 1995, 365-384.

6Wolfe, F. R., et al.: *Report of the Multicenter Criteria Committee: The American College of Rheumatology 1990 Criteria for the Classification of*

*Fibromyalgia*. *Arthritis & Rheum*. Vol. 33, No. 21, 160, et seq. (Feb. 1990).

7Personal Interview with David Staub, M.D., Orthopaedic & Rheumatology Association, P.C., Davenport, IA

8Groopman, J.: *Annals of Medicine, Hurting All Over*, *The New Yorker Magazine*, November 13, 2000

9Wolfe, F.: *When to Diagnose Fibromyalgia*. *Rheum Dis Clin North Am* 1994, May: 20(2): 485-501

10Sarchet v. Shirley, S. Charter, Comm. Of Social Security, 78 F.3d 305 (7th Cir. 1996)

11Yunus, M.B., Bennett, R. M., Romano, J. M., Russell, J., et al. *Fibromyalgia Consensus Report: Additional Comments*.: *J. Clin Rheumatol* 1997: 324-327.

12Wolfe, F., Winfield, J.B.: *Fibromyalgia Consensus Report: A Few More Comments*. *J. Clin. Rheumatol* 1998: 118-119.

## UPCOMING EVENTS

**Annual Meeting  
Sept. 26-28**

**Embassy Suites  
on the River**

**Des Moines, IA**

## ADVERTISING INJURY . . . continued from page 3

to sell was equivalent to an advertising; and (3) the action complained of occurred in the course of advertising.<sup>8</sup>

### TITLE / TRADE DRESS

The Court of Appeals determined that infringement of title offense specified in the policy does not encompass a patent infringement claim.<sup>9</sup>

The court was persuaded by a host of jurisdictions that had held that the absence of the term patent infringement in the policy language was significant. A California Federal Court in response to an insured's argument for coverage stated that the glaring absence of the word patent anywhere in the policy was most significant.<sup>10</sup> "The language defining 'advertising injury' includes 'slander', 'libel', 'right of privacy', 'advertising ideas' ... and 'copyright'."<sup>11</sup> "These are specific terms connected to well-known legal categories, just as a claim of patent infringement is a distinct legal claim."<sup>12</sup> "But there is not a mention of 'patent' anywhere in the definition or elsewhere in the policy."<sup>13</sup> "Surely if coverage for patent infringement were anticipated there would be some mention of the term itself just as 'copyright' is explicitly listed."<sup>14</sup> As Judge Levi concluded in *Owen-Brockway*, one cannot interpret the enumerated torts in a vacuum, divorced from the plain meaning of the concept "advertising":

There is nothing about the term "advertising injury" itself that remotely suggests coverage of patent infringement. Owens argues that the term "advertising" should not be understood as a word in common usage, but as a collection of letters defined for the first time in the policy. This is not a

reasonable approach to policy interpretation. The term was chosen for a reason, that reason was to cover advertising related injuries, and patent infringement is a tort that does not normally occur in connection with advertising.<sup>15</sup>

Advertising liability coverage necessarily involves conduct which is incidental to the insured's principal business operation; it does not cover the insured's core operations themselves. The policy excludes "advertising injury committed by an insured whose business is advertising, broadcasting, publishing or telecasting".<sup>16</sup> Consequently, if an insured's products are so distinctive that their mere existence is deemed "advertising", then the insured by definition is in the "business of advertising", that is, it manufactures distributes or sells advertisements for itself. To avoid this exclusion, the insured's "advertising" must be something incidental to its core operations.

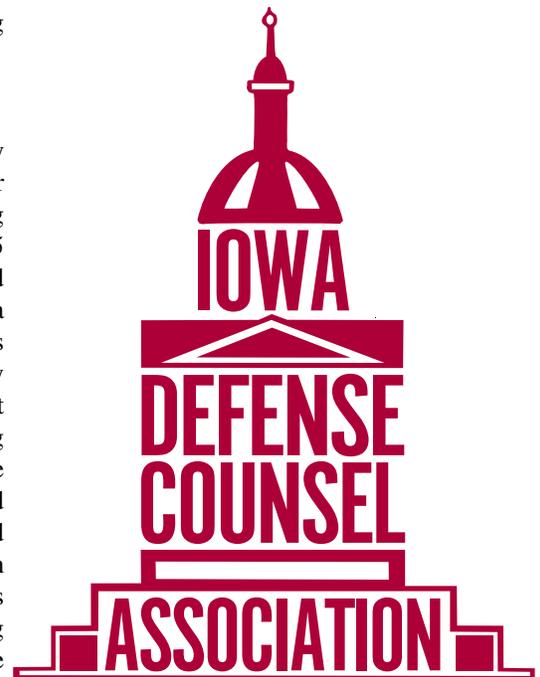
### ADVERTISING INJURY

Another argument propounded by insureds seeking coverage is that an "offer to sell" created a covered "advertising injury". Effective January 1, 1996, 45 U.S.C. § 271 (a), was amended and expressly included an offer to sell as a patent infringement.<sup>17</sup> Prior to this amendment courts were virtually unanimous in their holdings that a patent infringement was not an advertising injury.<sup>18</sup> "The prevailing law required the manufacture, use or sale of the patented invention."<sup>19</sup> An "offer to sell" a patented device was not regarded as an infringement.<sup>20</sup> The *Trade Soft* court was unpersuaded by the amendment equating "offer to sell" with "sale" because, in the

court's opinion, the policy language did not support coverage. "The language is clear, unambiguous, and exclusive in its meaning that patent infringement, whether by offer to sell or otherwise, is simply not within the commonly understood meaning of "advertising ideas".<sup>21</sup>

The Iowa court holding was similar but its rationale was distinct.<sup>22</sup> "The argument presented was that the 'offer to sell' the products was an allegation of advertising the product and accordingly created an advertising injury".<sup>23</sup> The court explained that an 'offer to sell' as used in a patent infringement claim was a term of art, "defined as that in which the sale will occur before the expiration of the term of the patent".<sup>24</sup> The technical definition contemplates an actual sale rather than

*continued on page 10*



## ADVERTISING INJURY . . . continued from page 9

general words of praise about the product to members of the public.<sup>25</sup> Therefore, a reference to an offer to sell does not create an advertising injury.<sup>26</sup>

### IN COURSE OF ADVERTISING

This legal argument for coverage is essentially a causation requirement. In order for coverage to apply the policy states that the injury must occur in the course of advertising.<sup>27</sup>

In *Siliconix*, the insured argued for coverage in a patent infringement case because it advertised the infringing product.<sup>28</sup> This “but for” theory of causation was held unreasonable, however, because it rendered the term “advertising” meaningless:

Although defendant’s argument is facially appealing, it contains a fundamental flaw in that it reads the requirement that the infringement occur in the course of advertising out of the policy. Taken to its extreme, this argument would lead to the conclusion that any harmful act, if it were advertised in some way, would fall under the grant of coverage merely because it was advertised.<sup>29</sup>

A result which the court held would make the advertising activity requirement meaningless was unacceptable because “[T]he court must attempt to give meaning to each clause of the policy, including the clause which requires an offense occur in the course of advertising.”<sup>30</sup>

The California Supreme Court in *Bank of the West* also advanced this tenet when it noted that “it has been held that a claim of patent infringement does not ‘occur in the course of . . . advertising activities’ within the meaning of the policy even though the

insured advertises the infringing product if the claim of infringement is based on the sale or importation of the product rather than its advertisement.”<sup>31</sup> The ruling in *Bank of the West* was based, in substantial part, on the California’s Supreme Court’s view of common sense:

[A]n objectively reasonable insured would not expect ‘advertising injury’ coverage to extend as far as the Bank argues it should extend. Virtually every business that sells a product or service advertises, if only in the sense of making representations to potential customers. If no casual relationship were required between ‘advertising activities and ‘advertising injuries’ then ‘advertising injury’ coverage, also, would encompass most claims related to the insured’s business. However, insureds generally expect to obtain such broad coverage, if at all, only by purchasing several forms of insurance.”<sup>32</sup>

Under *Siliconix* and *Bank of the West*, then, there is coverage under an advertising liability policy if the insureds liability arises from an advertisement itself and is independent of any liability caused by an underlying business practice.

The causal nexus between the alleged injury and the advertising activities of the insured was further explained in *Atlantic Mutual Ins. Co. vs. Brotech*, 857 F. Supp. 423 (E.D. Pa. 1994). Brotech was insured by Atlantic Mutual under two separate CGL policies and was being sued for patent infringement.<sup>33</sup> The holders of the patents were alleging that Brotech was selling or using the products made by the processes defined by the claims of those patents.<sup>34</sup> Atlantic Mutual had denied coverage for the patent infringement on the

basis that it did not qualify as an “advertising injury.”<sup>35</sup> The insured isolated the term “title” from the phrase the “infringement of copyright, title, or slogan” and argued that infringement of title encompasses patent infringement.<sup>36</sup> The court responded that the term “title” refers to a distinctive name or designation used to identify a literary or artistic work and not to the legal concept of ownership of property.<sup>37</sup> According to the theory propounded by the insured, the insurance companies could be liable under this provision for an insured’s theft, misappropriation or conversion of any personal property of any other if such were then advertised for sale.<sup>38</sup> “Even if the term ‘title’ were equated with any property right, the infringement of a patent holder’s property right in the course of the infringer’s advertising activities would necessarily entail use of the property to advertise and not merely the advertisement of the property.”<sup>39</sup> The court observed that “[S]ince the gravamen of patent infringement is the unauthorized production, use or sale of a patented product and not its advertisement, it could not arise out of or occur in the course of advertising activities.”<sup>40</sup> The claim here is that Brotech has been infringing the claims (of the patent holders) by using and/or selling products defined by the patents.<sup>41</sup> “There is no causal nexus between this alleged injury and the advertising activities of the insured.”<sup>42</sup> “The mere advertising of a patented product would not support a claim of patent infringement and the advertising of a patented product is not an element of a patent infringement claim.”<sup>43</sup>

The Iowa Court agreed with the majority of jurisdictions on this causation requirement.<sup>44</sup> In affirming the district court’s opinion, this court stated that ‘the record contains no evidence of a direct causal link between the asserted patent

## ADVERTISING INJURY . . . continued from page 10

infringement and advertising.”<sup>45</sup> As such, the assertion that the patent infringement offense was committed in the course of advertising and thus covered by the CGL is invalid.<sup>46</sup> The court did, however, leave the door ajar in stating that “[W]e need not adopt a rule that patent infringement claims can never be ‘committed in the course of advertising’ because, as a factual matter, the record contains no evidence of the causal link.”<sup>47</sup>

### COPYRIGHT INFRINGEMENT

The issue presented in the *IMT* case was coverage consideration for a patent infringement claim. The copyright infringement is a case of first impression in Iowa, however, similarities as to the legal analysis other jurisdictions have employed may provide an insight to the future outcome in Iowa.

Unlike patent infringement, copyright infringement is a predicate offense under the CGL policy form. The policy states that advertising injury does include “infringing upon another’s copyright.”<sup>48</sup> In a similar analysis to patent infringement the majority of reported decisions have found that copyright infringement claims are not covered under the advertising injury coverage because of the failure to establish the required causal nexus between the alleged offense and the insured’s advertising.

An insured of United State Fire Insurance Company was sued for copyright infringement arising out of the misappropriation of computer software.<sup>49</sup> The software package was developed for the purpose of generating long distance resale bills, which would record the identity of the long distance callers and the length of long distance calls.<sup>50</sup> The computer program also allowed for the inclusion of advertisements along with the

text of the bills.<sup>51</sup> The insured had used the software in violation of the copyright and sought coverage under the CGL policy.<sup>52</sup>

The court denied the insured’s request for coverage because the causal connection between the injury alleged and the advertising requirement failed to exist.<sup>53</sup> “The underlying pleading states nothing about advertising. DCC did not complain of any injury suffered in the course of the TEC parties’ advertising, nor could a reference to advertising be fairly inferred from the language of the pleadings; rather, DCC’s claim is essentially for infringement of its copyrighted software program, which was developed primarily for billing purposes, not for advertising activity.”<sup>54</sup> The court concluded that the “copyright infringement stands on its own because even if the TEC parties had never discovered or used the software advertising feature in course of their billing activity, DCC could still have suffered the same injury and asserted the same software copyright infringement claim.”<sup>55</sup>

In *Jerry Madison Enterprises, Inc. v. Grasant Manufacturing Company Incorporated*, 1990 WL 13290 (S.D. N.Y. 1990) the complaint against the insured had alleged that Grasant had infringed on Madison’s copyright jewelry designs by “manufacturing, publishing, and/or placing upon the market, distinct jewelry which was copied largely or wholly from the designs.”<sup>56</sup> Grasant asserted that plaintiff’s use of the terms “placing upon the market” and “marketing” in the complaint and motions to produce advertisements make this an “advertising injury.”<sup>57</sup> The court explained “[t]o read the policy as Grasant requests would impose a duty to defend and indemnify under the clause whenever a defendant in a copyright case advertises allegedly infringing goods. In this case, it is irrelevant whether Grasant’s distribution of

brochures actually was ‘advertising activity,’ because the complaint does not allege injury arising out of these brochures, but rather focuses on the infringing manufacturer and sale of the jewelry.”<sup>58</sup> The court denied the insured’s request for coverage stating, “a comparison of the complaint with the ... insurance policies shows that under the most generous reading of the complaint there is no allegation of ‘advertising injury sufficient to engage coverage under the policy.’”<sup>59</sup> The court concluded stating that “the ordinary meaning of the phrase occurring in the course of the insured’s ‘advertising activities’ does not encompass the sale and manufacture of copyrighted jewelry.”<sup>60</sup>

### CONCLUSION

The Iowa Courts have held that coverage will not be provided under the CGL policy for trademark infringement. Although they have not specifically addressed a copyright infringement issue the rationale of their position on patent infringement would lead one to believe the position would be similar on the copyright infringement. The complaint and the facts alleged must be carefully reviewed on either issue to determine if the causal effect of the injury being claimed can be directly related to the advertising activities of the insured.

<sup>1</sup> 15 U.S.C.S. § 1114 et. Seq. (1991).

<sup>2</sup> 15 U.S.C.S. § 1117 (c) (1996).

<sup>3</sup> *Id.*

<sup>4</sup> *Insurance Services Office, Inc.*, Comprehensive General Liability Policy, hereafter *CGL*, 1997 at P.1.

<sup>5</sup> *Id.* *CGL* at 12.

<sup>6</sup> *Id.* *CGL* at 13.

<sup>7</sup> The *IMT* policy definition of advertising injury differs from ISO in that it includes “injury arising out of one or more of the following offenses... d. Infringement of copyright, *title* (emphasis added) or

## PROXIMATE CAUSE . . . continued from page 4

conduct has such an effect in producing damage as to lead a reasonable person to regard it as a cause.

In those situations where “substantial factor” appears to be a substantial issue, it may be beneficial to request that the term substantial factor be further defined for the jury by including the explanation that upon looking back from the injury the connection between the negligence and the injury must appear natural, reasonable and probable in light of common experience. Conceptually, the substantial factor test is more exacting than “but for” cause. Remember, but for cause is the minimum hurdle in proving causation. As seen in *Scoggins*, even when but for cause has been established, the conduct must still be a substantial factor in causing the damages alleged by the plaintiff. Conduct may cease to be a substantial factor even though it continues to be a but for cause.

Although the court in *Gerst* suggests that the substantial factor requirement may be an issue exclusively for the court and not the jury to decide, the substantial factor component of causation remains a jury’s issue.<sup>20</sup> Part of the confusion noted by the Supreme Court in *Gerst* arises, at least in part, from the several methods which continue to be used to categorize the elements of proximate cause. For example, in the court’s recent decision in *Cedar Falls v. Cedar Falls Sch. Dist.*,<sup>21</sup> it was explained that proximate cause has two components: (1) the defendant’s conduct must have in fact caused the damages; and (2) the policy of the law must require the defendant to be legally responsible for them.<sup>22</sup> The first component is known as the cause-in-factor component of causation.<sup>23</sup> While the second component, i.e., the policy of the law, is described as the proximate or legal cause.<sup>24</sup> Under this framework, the court lists “but for cause” and the “substantial

factor” requirement as the two tests comprising the cause-in-fact component.<sup>25</sup> However, “substantial factor” is also listed as part of the legal cause component. Legal cause is established if (1) the actor’s conduct is a “substantial factor” in bringing about the harm and (2) there is no other rule relieving the actor of liability because of the manner in which his negligence resulted in the harm.<sup>26</sup> What remains unclear is the extent, if any, that the “substantial factor” requirement is analyzed differently under the cause-in-fact component and the legal cause component.

Some additional confusion continues by use of the phrase “proximate cause” as a synonym for “legal cause,” which is merely one component of proximate cause. In other words, proximate cause in its narrow sense is one of two components of the tort element described by the same label, proximate cause.

Still, *Gerst* provides the most important principle for current Iowa law on proximate cause. The holding makes clear that both “but for” cause and the “substantial factor” requirement remain part of the plaintiff’s case in chief. The tests are conceptually quite different. And as *Gerst* and its progeny prove, each test may provide an effective line of attack in arguments to the court or to a jury.

**Superseding cause.** Another common causation issue is superseding intervening cause. In the 1998 Iowa Supreme Court decision in *Rieger v. Jacque*, summary judgment for the defendant was affirmed on the superseding intervening cause issue.<sup>27</sup> A superseding cause is defined as a third party’s act (or other force) that intervenes to protect the defendant from liability for harm to the plaintiff even though that defendant’s antecedent negligence was a substantial factor in bringing about the injury.<sup>28</sup> An intervening force is one which actively operates to produce harm to another after the actor’s

negligent act or omission has been committed.<sup>29</sup> Not every intervening force becomes a superseding cause.<sup>30</sup> The intervention of a force which is a normal consequence of a situation created by the actor’s negligent conduct is not a superseding cause of harm.<sup>31</sup> To relieve an individual from liability, the intervening act or force must not have been a normal consequence of his or her acts or have been reasonably foreseeable.<sup>32</sup> In *Rieger*, an attorney’s acts were an intervening cause that prevented any negligent tax advice previously given by the defendant from being considered a proximate cause of the customer’s injuries.

Likewise, in the 1998 Iowa Supreme Court decision in *Hayward v. T.D.A., Inc.*, summary judgment for the defendant was affirmed on a superseding cause argument.<sup>33</sup> A finding of superseding cause prevents a finding of proximate cause even when the actor’s conduct is found to be a cause-in-fact, i.e. but for cause, of the plaintiff’s harm.<sup>34</sup> In *Hayward*, the bar’s conduct in serving alcohol to an intoxicated patron was not the proximate cause of a police officer’s death, where the patron’s negligent and illegal act of driving while intoxicated and striking the police officer was a superseding act.

**Sole proximate cause.** In the 1997 decision in *Baker v. City of Ottumwa*, a defendant was properly permitted to argue that the City’s negligent supervision was the sole proximate cause of the plaintiff’s injuries, even though the City was immunized from liability.<sup>35</sup> The sole proximate cause defense applies whether or not the allegedly culpable party is joined in the action.<sup>36</sup> Any event not chargeable to the defendant, including an “act of God,” can insulate the defendant from liability.<sup>37</sup> Likewise, bankrupt entities or phantom defendants for which

## ADVERTISING INJURY . . . continued from page 11

slogan". *Id.* at 1.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 2.

<sup>10</sup> *Owens-Brockway Glass Container, Inc., v. International Ins. Co.*, 884 F Supp. 363 (ED Cal. 1995).

<sup>11</sup> *Id.* at 367.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 367-68.

<sup>16</sup> *CGL* at 5.

<sup>17</sup> *Trade Soft Technologies, Inc. v. Franklin Mut. Ins. Co., Inc.* 746 A 2 d 1078 (N.J. 2000) at 1085. *But see, Everett Associates, Inc. v. Transcontinental Ins. Co.*, 57 F. Supp. 2d § 74 (N.D. Cal., 1999), wherein the court found coverage based upon the amendment change in 35 U.S.C. § 271. This declaratory relief action sought coverage under the CGL policy for patent infringement. *Id.* The insured argued that the "offer to sell" language created an objectively reasonable expectation that the insured could be prosecuted for advertising injury in a claim for patent infringement. *Id.* At 882. This court reviewed the *Bank of the West* decision which stated that, "a claim for patent infringement does not occur in the course of advertising activities within the meaning of the policy even though the insured advertises the infringement product, if the claim of infringement is based on the sale or importation of the product rather than its advertisement". (Emphasis added) *Id.* In the case at hand the court held that "the claim is based, at least in part, on the advertisement of the patented product." Consequently, the adoption of the "offer to sell" language in the Patent Act, which may permit claims of patent infringement based on advertising alone was sufficient to find coverage. *Id.*

<sup>18</sup> *Supra, Trade Soft* at 1085.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* At 1086.

<sup>22</sup> *I.M.T. Insurance Company v. Paper Systems, Incorporated*, 2001, W. L. 98545 (Iowa App 2001).

<sup>23</sup> *Id.* At 2.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *CGL* at 12.

<sup>28</sup> *National Union Fire Ins. Co. v. Siliconix, Inc.*, 729 F. Supp. 77 (N.D. Cal. 1989).

<sup>29</sup> *Id.* At 80.

<sup>30</sup> *Id.*

<sup>31</sup> *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 10 Cal Rptr 2d 538, 833 P. 2d 545 (1992) at 1275.

<sup>32</sup> *Id.* At 1276-77.

<sup>33</sup> *Brotech* at 425.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 429.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *IMT 2001 WL 98545* (Iowa App. 2001).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *CGL* at 12.

<sup>49</sup> *Delta Computer Corp. v. Frank*, 196 F 3d 589 (5th Cir La) 1999.

<sup>50</sup> *Id.* at 590.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 3.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 5. *See also, Sentry Insurance v. R. J. Weber Co., Inc.*, 2 F 3d 554 (5th Cir. Texas, 1993) (Policy covers advertising injuries that are caused in the course of advertising your goods, product or services... the clear language provides that the policy covers a copyright infringement suit only if Weber infringes someone's copyright in the course of its advertising.) 2 F. 3d at 556; *Federal Insurance Company v. Microsoft Corporation*, 1993 WL 373843 (W.D. Wash. 1993) (If the policy required as Microsoft suggests that the injury need only occur in the course of advertising activity, then all trademark or copyright infringement cases in which the allegedly intriguing item was advertised would qualify for coverage). 1993 WL 2373843 at 5.

## PROXIMATE CAUSE

. . . continued from page 12

comparative fault may not be apportioned may still be the subject of a sole proximate cause instruction.<sup>38</sup>

<sup>1</sup>549 N.W.2d 810, 817 (Iowa 1996).

<sup>2</sup>*See*, 549 N.W.2d at 817.

<sup>3</sup>*See, Id.*

<sup>4</sup>*See*, 549 N.W.2d at 817 n. 4.

<sup>5</sup>549 N.W.2d at 817.

<sup>6</sup>*Id.*

<sup>7</sup>549 N.W.2d at 817-18.

<sup>8</sup>*Id.* at 818.

<sup>9</sup>*Id.*

<sup>10</sup>*Id.*

<sup>11</sup>596 N.W.2d 541.

<sup>12</sup>*Id.* at 546; *see also, Walls v. Jacob North Printing Co., Inc.*, 618 N.W.2d 282, 285 (Iowa 2000) (finding a genuine issue of material fact as to proximate cause element but affirming summary judgment on issue of breach).

<sup>13</sup>*Id.*

<sup>14</sup>560 N.W.2d 564.

<sup>15</sup>*Id.* at 567.

<sup>16</sup>*Id.* at 567.

<sup>17</sup>*Id.* at 567-570.

<sup>18</sup>553 N.W.2d 591.

<sup>19</sup>*Id.* at 597.

<sup>20</sup>*See, Cedar Falls v. Cedar Falls Sch. Dist.*, 617 N.W.2d 11, 17 (Iowa 2000) ("We believe a jury could conclude the District's negligence was a substantial factor").

<sup>21</sup>617 N.W.2d 11 (Iowa 2000).

<sup>22</sup>*Id.* at 17.

<sup>23</sup>*Id.*

<sup>24</sup>*Id.* at 18.

<sup>25</sup>*See, Id.* at 17.

<sup>26</sup>*Id.* at 18.

<sup>27</sup>584 N.W.2d 247.

<sup>28</sup>*Id.* at 251.

<sup>29</sup>*Id.*

<sup>30</sup>*Id.*

<sup>31</sup>*Id.*

<sup>32</sup>*Id.*

<sup>33</sup>573 N.W.2d 29.

<sup>34</sup>*Id.* at 32.

<sup>35</sup>560 N.W.2d 578.

<sup>36</sup>*Id.* at 583.

<sup>37</sup>*Id.*

<sup>38</sup>*See, Pepper v. Star Equip. Ltd.*, 484 N.W.2d 156, 161 (Iowa 1992).

# Iowa Defense Counsel 37th

September 26 – 28, 2001

This year's annual meeting and seminar of the Iowa Defense Counsel Association will be September 26-28 at the Embassy Suites in Des Moines, IA. The program has been assembled by Vice-President Mike Ellwanger. The program will begin on Wednesday, September 26, at 1:00 p.m. and runs through Friday, September 28, at 2:30 p.m. Registration material will follow in the mail. The topics and speakers are as follows:

## Wednesday, September 26, 2001

- 9:00 a.m. **Registration**  
 11:00 a.m. **Board of Directors Meeting**  
 1:00 - 1:15 p.m. **Welcome and Report of the Association**  
 IDCA President, Marion Beatty  
 1:15 - 1:55 p.m. **Appellate Review I (Negligence, Torts, Indemnity)**  
 Paul P. Morf  
 Simmons, Perrine, Albright & Ellwood, P.L.C.  
 Cedar Rapids, IA  
 1:55 - 2:20 p.m. **Five Iowa Rules of Civil Procedure You Can't Live Without**  
 Chad M. VonKampen  
 Simmons, Perrine, Albright & Ellwood, P.L.C.  
 Cedar Rapids, IA  
 2:20 - 3:00 p.m. **Worker Compensation Update**  
 Honorable Iris J. Post  
 Iowa Industrial Commissioner  
 Des Moines, IA  
 3:00 - 3:15 p.m. **BREAK**  
 3:15 - 3:45 p.m. **Independent Medical Exams**  
 Lyle W. Ditmars  
 Peters Law Firm, P.C.  
 Council Bluffs, IA  
 3:45 - 4:15 p.m. **Recent Developments and Thoughts on Defending Professional Liability Claims**  
 Joseph L. Fitzgibbons  
 Fitzgibbons Law Firm  
 Estherville, IA  
 4:15 - 5:00 p.m. **Professional Liability: Malpractice by the Divorce Lawyer**  
 George A. La Marca  
 La Marca & Landry, P.C.  
 West Des Moines, IA  
 5:30 - 7:00 p.m. **Welcome Reception**  
 Embassy Suites, 1st Floor

- 5:00 - 5:15 p.m. **Executive Director's Report**  
 Robert (Bob) M. Kreamer  
 IDCA Executive Director/Lobbyist  
 Des Moines, IA

## Thursday, September 27, 2001

- 7:30 a.m. **Registration**  
 7:30 - 8:30 a.m. **Continental Breakfast**  
 8:30 - 9:10 a.m. **Appellate Review II (Appellate Procedure, Civil Procedure, Courts-Jurisdiction and Trial, Evidence, Insurance, Judgement and Limitation of Actions, Worker Compensation)**  
 Matthew J. Haindfield  
 Bradshaw, Fowler, Proctor & Fairgrave, P.C.  
 Des Moines, IA  
 9:10 - 9:40 a.m. **Ethical Behavior in and out of the Courtroom: The Law of Contempt**  
 Judge John D. Ackerman  
 Sioux City, IA  
 9:40 - 10:10 a.m. **Interviewing the Treating Physician, Getting the Records and Related Topics**  
 Cameron A. Davidson  
 Lane & Waterman  
 Davenport, IA  
 10:10 - 10:25 a.m. **BREAK**  
 10:25 - 11:00 a.m. **The New Federal and Local Rules**  
 James D. Hodges, Jr.  
 Clerk U.S. District Court, Northern District of Iowa  
 Cedar Rapids, IA  
 11:00 - 11:30 a.m. **Civil Liability for Improper Handling of Worker Compensation Claims – Erosion of the Exclusive Remedy Doctrine**  
 Charles E. Cutler  
 Patterson, Lorentzen, Duffield, Timmons, Irish,  
 Becker & Ordway, L.L.P.  
 Des Moines, IA



# Annual Meeting and Seminar

11:30 - 12:00 p.m. **A Primer on Defending a Product Liability Case**

Richard J. Kirschman  
Whitfield & Eddy, P.L.C.  
Des Moines, IA

2:00 - 12:30 p.m. **LUNCH**

12:30 - 1:15 p.m. **Luncheon Speaker: Issues Confronting the Iowa Supreme Court (and Iowa Lawyers)**

Supreme Court Chief Justice Louis A. Lavorato  
Des Moines, IA

1:15 - 1:45 p.m. **Recent Discipline Decisions of Interest**

David J. Grace  
Assistant Ethics Counsel, Iowa State Bar Association  
Des Moines, IA

1:45 - 3:00 p.m. **Developments in Motor Vehicle Litigation – Low Impact Crashes, the Little Black Box and Roadway Design**

David E. Daubert, P.E.  
Search Engineering, Inc.  
Hopkins, MN

3:00 - 3:15 p.m. **BREAK**

3:15 - 3:30 p.m. **What's Happening at the Defense Research Institute**

Timothy P. Schimberg  
DRI Representative  
Denver, CO

3:30 - 3:50 p.m. **Issues of Importance to the Iowa Bar**

C. Joseph Holland  
President, Iowa State Bar Association  
Holland Law Office  
Iowa City, IA

3:50 - 4:30 p.m. **Employment Law Update**

James C. Hanks  
Ahlers, Cooney, Dorweiler, Haynie, Smith & Allbee, P.C.  
Des Moines, IA

4:30 - 5:00 p.m. **Defending the Recreational Motor Vehicle Case**

William G. Nicholson  
White & Johnson, P.C.  
Cedar Rapids, IA

5:00 - 5:15 p.m. **General Meeting and Election of Officers**

6:30 - 9:00 p.m. **Reception and Banquet - Glen Oaks Country Club**

6:30 - 7:30 p.m. Reception  
7:30 p.m. Dinner/Banquet

*Transportation will be provided from the Embassy Suites Hotel*

## Friday, September 28, 2001

7:00 - 8:30 a.m. **Board of Directors Meeting**

8:00 - 8:30 a.m. **Continental Breakfast**

8:30 - 9:00 a.m. **Iowa Product Liability Law and Tobacco Litigation**

Michael W. Thrall  
Nyemaster, Goode, Voigts, West, Hansell & O'Brien, P.C.  
Des Moines, IA

9:00 - 10:30 a.m. **Techniques to Limit Damage Awards**

Aaron Abbott, Ph.D.  
Jury Behavior Research, Inc.  
Portland, OR

10:30 - 10:45 a.m. **BREAK**

10:45 - 11:15 a.m. **New Ethical Issues for the Trial Lawyer**

David L. Brown  
Hansen, McClintock & Riley  
Des Moines, IA

11:15 - 12:00 p.m. **Ten Ways to Successfully Defend a Lawsuit in Federal Court**

Judge Mark W. Bennett  
Sioux City, IA

12:00 - 12:30 p.m. **LUNCH**

12:30 - 1:00 p.m. **Luncheon Speaker: Issues Confronting the Attorney General's Office (and Iowa Lawyers)**

Thomas J. Miller  
Attorney General  
Des Moines, IA

1:00 - 1:30 p.m. **The Defenses of Sole Proximate Cause and Superceding and Intervening Cause**

Mark W. Thomas  
Grefe & Sidney, P.L.C.  
Des Moines, IA

1:30 - 2:00 p.m. **The Impaired Lawyer and Related Issues**

Hugh G. Grady  
Iowa Lawyers Assistance Program  
Des Moines, IA

2:00 - 2:30 p.m. **Appellate Update III**

Stephen E. Doohen  
Whitfield & Eddy, P.L.C.  
Des Moines, IA



---

## FROM THE EDITORS

---

The regular legislative session closed with mixed results for the IDCA's legislative agenda. The Association in some cases found itself actively opposed by the ITLA, which was expected, and the Iowa State Bar Association, which was not. Where factions within the practicing bar line up on different sides of a legislative proposal, the Bar Association, which purports to represent all lawyers, should remain officially neutral. Here is a rundown of select agenda items and their fate in this session.

1. The IDCA continues to monitor and be ready to oppose initiatives for mandatory mediation in civil cases. No bill was introduced by the Attorney General and the issue did not materialize.
2. The Association favors lifting the 5% limit on recovery reduction where failure to wear a seat belt is shown to have contributed to claimed injuries and damages. A subcommittee hearing was held and a bill was introduced. At hearing both the ITLA and the Bar Association opposed the proposal and the bill was defeated.
3. The Association favors repeal of Iowa Code § 228.9 so as to

make psychological records and test data discoverable. This issue essentially died for lack of support.

4. A bill was introduced, favored by the Association, to stop the running of all pre-judgment interest from the date a successful offer to confess judgment was served. The bill was opposed by the ITLA and the Iowa State Bar Association and was defeated.
5. The Association opposed a bill calling for the repeal of a local retailer's immunity under Code § 613.18 in cases where a product was manufactured overseas and jurisdiction could not be had over the manufacturer. The bill was reported out of committee but was stopped before consideration by the full Senate.
6. The Association favored a bill reducing the limitations period from 15 years to 8 years for claims relating to improvements to real estate. The measure passed both the House and the Senate, but was vetoed by Governor Vilsack when it reached his desk.

Our thanks to Bob Kreamer for his lobbying efforts on behalf of the IDCA.

---

*The Editors:* Kermit B. Anderson, Des Moines, Iowa; Mark S. Brownlee, Fort Dodge, Iowa; Michael W. Ellwanger, Sioux City, Iowa; Noel McKibbin, West Des Moines, Iowa; Bruce L. Walker, Iowa City, Iowa; Patrick L. Woodward, Davenport, Iowa

---

### **Iowa Defense Counsel Association**

431 East Locust Street, Suite, 300  
Des Moines, IA 50309  
Phone: (515) 244-2847  
Fax: (515) 243-2049  
E-mail: [staff@iowadefensecounsel.org](mailto:staff@iowadefensecounsel.org)  
Website: [www.iowadefensecounsel.org](http://www.iowadefensecounsel.org)

Presorted Standard US Postage Paid Des Moines IA Permit No. 3885
--