defense UPDATE

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RECENT AMENDMENTS TO THE AMERICANS WITH DISABILITIES ACT AND REASSIGNMENT AS A REASONABLE ACCOMMODATION UNDER THE AMERICANS WITH DISABILITIES ACT

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Deborah Tharnish

The Americans with Disabilities Act (ADA) prohibits discrimination against individuals who are disabled. *See* 42 U.S.C. §12110 et seq. The Iowa Civil Rights Act, Iowa Code Chapter 216, provides the same cause of action under Iowa law. Disability discrimination claims and failure to accommodate claims under the Iowa Civil Rights Act are analyzed within the same framework as claims brought under the ADA. See Libel v. Adventurelands of America, Inc., 482 F.3d 1028, 1034 n.5 (8th Cir. 2007); Fuller v. Iowa Department of Human Services, 576 N.W.2d 324, 329 (Iowa 1998).

On January 1, 2009, amendments to the ADA took effect. These amendments emphasize that the definition of disability should be construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of the ADA. In other words, the amendments make it easier for an individual seeking protection under the ADA to establish that he or she has a disability. When enacting the amendments to the ADA, Congress expressed certain conclusions and "findings" that provide further explanation of the changes made. Congress made clear that it felt that numerous Supreme Court cases, including Sutton v. United Airlines, 527 U.S. 471 (1999) and Toyota Motor Manufacturing v. Williams, 534 U.S. 184 (2002), had narrowed the broad scope of protection intended to be afforded by the ADA. Congress noted that it felt that the Supreme Court cases, which eliminated protection for many individuals whom Congress intended to protect, caused lower courts to incorrectly find that people with a range of substantially limiting impairments were not people with disabilities. Congress stated that its purpose in enacting the amendments to the ADA was to reinstate a broad scope of protection under the ADA, reject the Supreme Court cases that Congress felt had incorrectly narrowed the protections of the ADA, convey to the public that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and convey to the public that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis.

The amendments to the ADA retained the original definition of disability, but instructed the court system to interpret this definition more broadly. The amendments also provide that mitigating measures other than "ordinary eyeglasses or contact lenses shall not be considered in assessing whether an individual has a disability." The amendments also clarify that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. New regulations are anticipated in 2009 or early 2010. The amendments also provide that the EEOC will be evaluating the impact of these changes on its enforcement, guidance and other publications addressing the ADA.

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RECENT AMENDMENTS TO THE AMERICANS WITH DISABILITIES ACT AND REASSIGNMENT AS A REASONABLE ACCOMMODATION UNDER THE AMERICANS WITH DISABILITIES ACT ... *Continued from page 1*

The amendments to the ADA will impact the extent of protection provided by the ADA. Like other employment discrimination statutes, ADA claims are analyzed under the McDonnell Douglas burden shifting analysis. The employee bears the initial burden of proving a prima facia case of discrimination. The employer then has the burden to articulate a legitimate, non-discriminatory reason for the adverse employment action. Finally, to prevail, the employee must show that the employer's proffered reason for the adverse employment action was a pretext for discrimination. *See* McNary v. Schreiber Foods, Inc., 535 F.3d 765, 768 (8th Cir. 2008).

Often times, disability discrimination cases involve a claim that the employee is unable to perform the essential job functions of the employee's then-current job, but a reasonable accommodation can be made by modifying the requirements of the job or by assigning the employee to a different job.

Reassignment to a vacant position within the employer may be a reasonable accommodation under certain circumstances. An employer and employer's counsel must understand the accommodation responsibilities, including determining whether the employee must be assigned to another job, in order to avoid liability. In Cravens v. Blue Cross and Blue Shield of Kansas City, 214 F.3d 1011, 1018 (8th Cir. 2000), the court discussed the scope of an employer's duty to reassign a disabled employee. There are a number of constraints that limit an employer's obligation to reassign.

First, the prospect of reassignment does not arise unless "accommodation within the individual's current position would pose an undue hardship." 29 C.F.R. §1630.2(o). Reassignment is often referred to as an accommodation of last resort. *See* AKA v. Washington Hospital Center, 156 F.3d 1284, 1301 (8th Cir.1998). The Eighth Circuit has noted that if the requested accommodation is a transfer, the employee must demonstrate that he or she cannot be accommodated in the current position. *See* Burchett v. Target Corp., 340 F.3d 510, 517 (8th Cir 2003).

The law is clear that an employer is not required to create a new position as an accommodation. Cravens, 214 F.3d at 1019. Further, an employer is not required to "bump" another employee in order to reassign a disabled person to that position, nor is an employer required to promote a disabled employee or to provide the accommodation requested or preferred by the employee. Id. Further, the employee must be otherwise "qualified" for the reassigned position. To be considered qualified for a position, the individual must satisfy the legitimate prerequisites for the alternative position and be able to perform the essential functions of that position with or without accommodations. Id. The Eighth Circuit has held that the ADA does not require an employer to reassign a qualified disabled employee to a vacant position when such a reassignment would violate a legitimate nondiscriminatory policy of the employer to hire the most qualified candidate for the position. *See* Huber v. Wal-Mart Stores, Inc., 486 F.3d 480, 483 (8th Cir. 2007).

In McPherson v. O'Reilly Automotive, Inc., 491 F.3d 726 (8th Cir 2007), an employee was unable to perform his original job because of his medical restrictions. The employer offered him another position that fit within his restrictions, but the employee refused the job on the advice of his doctor. When no other vacant positions for which the employee was qualified became available, he was terminated. He then sued for disability discrimination. The court found that the employee had produced no evidence that he would have been able to perform the essential functions of whatever alternative positions might have been available. Id. at 731. Further, the employee never applied for any of the positions that he claimed were available. Thus, the court concluded that because the employee failed to show that there were vacant positions at O'Reilly for which he was qualified, the district court correctly granted summary judgment.

The recent amendments to the ADA make clear that Congress believes the courts have construed the protections provided by the ADA too narrowly. The need to make reasonable accommodations for employees may become an increasingly large responsibility for employers. One of the potential ways to accommodate a disabled employee is to offer a reassignment in appropriate circumstances. While reassignment is a reasonable accommodation in certain factual circumstances, employers do not have a responsibility to reassign employees in all circumstances. ■

MESSAGE FROM THE PRESIDENT

Megan Antenucci

The economic experts in the past few days have begun to speculate that the national economy has perhaps "bottomed out" and we will begin to experience improvements and a return to prosperity. Somehow, however, in my non-economist's mind I have a mental picture of the economy coming in like an inexperienced pilot, who bounces against the runway a couple times before the aircraft actually rolls on its wheels to a gate or hanger. Your Iowa Defense Counsel Association is along with you for the ride, bounces and all. The IDCA is an organization dedicated to its members, and has been working to bring value to you in an economical and efficient manner in these difficult times.

Most recently, the Annual Spring Seminar was concluded at the Coralville Marriott Hotel and Conference Center. The speakers covered a variety of topics on insurance coverage and bad faith litigation. We had excellent attendance, and the evaluations have come back very positive. Moving outside of the Des Moines area was an experiment to serve those not practicing in the Greater Des Moines area, and it was well received. A thank you goes out to Steve Powell, IDCA Staff, and many other unnamed helpers for putting together an excellent event at a good value for our members.

On the legislative front, this was one of the most active sessions for the IDCA in a number of years. I recently received a thank you message from Chief Justice Ternus for the IDCA's support for full funding for the Iowa Judicial Branch. I attended several meetings with the Chief Justice, Judicial Branch staff, and leaders of the various legal organizations around the state.

Chief Justice Ternus reports that the legislature approved funding that greatly improves the judicial branch budget outlook for fiscal year 2010. The estimated $15.4 million budget shortfall shrank to a $4.2 million shortfall, with the revised funding. The legislature approved $760,000 in supplemental appropriations for the current fiscal year, as well. These funds, if approved by the Governor, will enable the judicial branch to reduce the number of court furlough days scheduled to occur yet this fiscal year. In addition, she states, that as soon as the bill is signed, the court will take steps to increase the availability of judicial services to Iowa counties that do not have a resident judge.

The additional appropriations for both fiscal years 2009 and 2010 were made possible by the legislature's approval of increases in a number of court fees. While these fees will be deposited into the state general fund, the new revenue they will generate helps offset the higher appropriations to the judicial branch.

Chief Justice Ternus wrote, "Approval of fee increases would not have been possible without the endorsement and active support of your associations for which we are grateful."

Again, hats off to all IDCA members who contacted their legislators in support of full funding for Iowa's Judicial Branch.

A number of members testified in front of legislative committees this session, through the coordination of our executive director and lobbyist, Bob Kreamer. The private cause of action for consumer fraud bill was passed, but only after significant amendments that made it into a good bill for Iowa citizens and businesses alike. House File 758, a bill that would have created an element of damages for the value of loss of enjoyment of life in wrongful death cases, was defeated. Likewise, bills allowing for workers to have a personal choice of doctors in workers compensation treatment and a bill calling for mandatory increases in the underinsured/uninsured motorist limits for automobile coverage did not pass. We had a true team effort on the Hill this year, and had a successful legislative session.

Next on the agenda, the IDCA is pleased to host the 2009 DRI Mid-Region meeting June 12 – 13 at the Embassy Suites on the River in Des Moines. We will join with the leadership of our fellow state and local defense organizations and DRI leadership to share ideas and learn from each others successes. We will provide a report in the next edition of *The Defense Update.*

Even in a lean year, our members have taken time away from their day-to-day practices and assisted the IDCA Board in successful endeavors across a number of issues. We will continue to press ahead, to provide "value added" for your membership in the IDCA. ■

CAN I GET AN EXAMINATION OVER HERE?

by Peter Sand, Scheldrup Law Firm, Des Moines, IA

Peter Sand

It has been a basic tenet of civil litigation for over 60 years, that when a plaintiff asserts a claim for personal injury, the defense has a right to obtain an examination of the plaintiff with a doctor the defense chooses—until now.

There is a rapidly developing crisis in Iowa workers' compensation law. Some defendants in these cases have been completely refused the right of examination, and the workers' compensation agency appears to approve of this. This short note will review the applicable law and discuss how this crisis has developed.

The statutes and rules governing workers' compensation cases show a number of different ways in which the defense is granted a right of examination.

First, the right to a defense examination of a personal injury plaintiff is found at I.R.C.P. 1.515. The rules of procedure are applicable to actions before the workers' compensation commissioner pursuant to 876 IAC 4.35, unless the rule of procedure "is in conflict with" the commissioner's rules "and Iowa Code Chapter 85" (the workers' compensation chapter of the Code). This is one source of the right to a defense examination.

If a WC insurance carrier accepts liability for a claim of work injury, the carrier has the right to choose the care. This is provided in clear wording in Iowa Code 85.27.

If the carrier denies liability, or is still investigating whether the claim is compensable, it has no right to choose the care the worker receives for the injury. However, there is a separate right to a defense examination in workers' compensation cases, appearing in Iowa Code 85.39. That section provides: "After an injury, the employee, if requested by the employer, shall submit for examination at some reasonable time and place and as often as reasonably requested, to a physician or physicians."[1] The employee must be reimbursed for lost wages and travel costs for such an IME.[2]

Given these various rights, why is obtaining an examination becoming such a problem?

Section 85.39 is the real fighting ground currently. In past years, the writer would simply arrange an examination for a worker, and send notice a few weeks early in a letter to claimant's counsel. The letter would notify the attorney of the time, date, and location of the examination, and thank them for ensuring their client's attendance. In several recent cases, however, counsel has sent a return letter saying that the worker will not be attending. In the past, the writer has made a motion to compel to the agency, seeking to compel attendance at an IME, and has obtained such an order.

But times are changing. With the recent cases, despite the clear language of 85.39, counsel often denies that that section gives any right of examination to the defense. In most instances, claimants take the position that the defendant has no right to an exam under 85.39 unless the defense accepts liability for the claim of work injury.

That position is not supported by the structure of Chapter 85 or the language of 85.39 itself. Again, 85.39 simply says that "after an injury" the employer/carrier obtains the right to an examination. There is no requirement in that section that the carrier accept liability.

Structurally, because the employer has the power to choose the doctor to treat an accepted work injury, under 85.27, the main use of 85.39 is for employers who have denied liability for an injury. When an employer denies liability, the worker is free to treat with whomever they want. If the case is eventually held compensable by the agency, then the care chosen by the worker, if it is deemed reasonable, will be ordered to be paid by the carrier. Section 85.39 is useful to the defense mostly in this context, as a tool to assess the progress of the worker-chosen care. In other words, there is rarely a need for the carrier to seek an 85.39 examination in cases where the carrier has accepted liability. In accepted cases, the carrier is already choosing the treating doctor.

Nevertheless, in several cases, the agency has agreed with this argument by claimants, and held that the employer has no right to an 85.39 exam unless they have accepted liability of the claim. It is believed the original such decision was Martin v. Armour-Dial Inc., file 754732[3] (Arb. Dec. 7/31/85): "In those cases where liability is denied by the employer and not otherwise established, the employer

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1 I.R.C.P. 1.515 provides that the examination be with a "health care practitioner."

2 An interesting side note addressed later in the text surrounds refusal to attend appointments. Sec. 85.39 provides that a worker forfeits the right to weekly benefits for the period that they refuse to submit to a defense examination. There is no similar provision in 85.27 of the Code, which deals with ongoing medical treatment of accepted claims of work injury.

3 It should be noted by the reader that this and all rulings cited in this note are not available online. The Martin arbitration decision pre-dated posting of decisions, and subsequent rulings cited in this note were pre-trial decisions that are not web-posted, unless so indicated. The writer asks readers to send him other examples and counter-examples of difficulty in obtaining examination of claimants. The rule from Martin was cited in the posted decision of Messersmith v. Jordan Millwork, file 1290559, 11/19/01.

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has no more right to require an examination than the employee has to receive one." Similar rulings were issued in Worder v. French & Hecht, file 846992 (appeal dec. 11/30/93); Perry v. Molly Maid, file 5022428 (11/2/07); and Kuennen v. Festina Livestock Equipment, file 5013389 (7/20/05).

To the extent that the writer has been able to lay hands on these decisions, there is little or no analysis given. However, claimant attorneys assert that the phrase "after an injury" in 85.39 necessarily means that liability for an injury has been accepted. The argument goes that a denial of liability is a denial that work injury has occurred, therefore language in the Code referring to "after an injury" implies an acceptance of liability. Under this argument, that phrase operationally means 'after an accepted injury.' Whereas defendants are asserting that that phrase means 'after a claim of injury is made.' This writer contends that this is an awfully strange twist to put on such straightforward Code language. It makes no sense for the party claiming to be injured to avoid the effect of 85.39 due to that party not being considered injured.

The Perry case *infra* was defended by this writer, and posed a situation where the worker asserted this argument against a defense right of exam under 85.39. In that case, claimant's counsel agreed with the defense that the defense had a right to an examination under I.R.C.P. 1.515 regardless of Section 85.39. However, counsel asserted that if the defense proceeded under 1.515, the examining doctor had to be designated as an expert by the defense, and the defense could only get one examination (whereas 85.39 allows more than one examination). This writer disagreed with that interpretation of 1.515, but the case ended up being settled soon thereafter.

Further complicating this area is a deputy ruling in Burbach v. Federal Express, file 5016308 (3/22/07). Depending on how one reads this ruling, one might come to the conclusion that the defense only gets an 85.39 exam if they deny liability, and cannot get one if they accept liability. The deputy in that case even refused to compel an examination under 1.515. That decision states: "As I.R.C.P. 1.515 is inconsistent with Iowa Code sec. 85.39 in cases where there is an admission of liability, it does not apply to those cases." Burbach p. 2.

Burbach also points out a key difference between Section 85.39 and Rule 1.515. The former allows only examinations with physicians; the latter allows the examination with any health care practitioner. The agency has ruled in some cases (Burbach is an example) that the defense cannot use 85.39 to force the worker to undergo an FCE with a physical therapist, because a physical therapist is not a physician.[4] The fact that the defense could pay extra to have a doctor stand around during the FCE is not discussed in these decisions which this writer has seen.

Another difficulty concerns the argument of what remedy is available to the defense under 85.39 for refusal by the worker to attend a scheduled examination. Because this is a basic form of discovery for the defense, defendants take the view that they can make a motion to compel attendance and obtain an order from a deputy commissioner ordering the worker to attend examinations under threat of sanction or dismissal for not attending.

In numerous decisions, the agency disagrees. Some deputies take the view that they do not have the power to compel attendance or issue sanctions for non-attendance. Section 85.39 provides that a worker forfeits the right to benefits for the period they refuse to attend an 85.39 IME. Because that section describes a sanction for non-attendance, some deputies conclude that that described sanction must be the sole remedy for the defense, and therefore compelling attendance is not an available remedy.[5] For some reason, regarding this one section of Chapter 85, the agency charged with the duty of faithfully executing the workers' compensation law takes the view that it has no power to order litigants to comply with the law.

Regarding the remedy that is listed in Section 85.39, the agency's willingness to truly enforce the forfeiture language is preciously rare. If the worker refuses to submit to examination, and that refusal is still the status quo at the time of trial, then the worker should not be able to collect any weekly benefits from the time of refusal until refusal ends—even if that means no permanency compensation for the injury. But the writer could not locate an agency case where the precise question of the extent of the forfeiture was addressed. In two cases, no forfeiture of benefits was allowed, because the refusal occurred after the period of time during which all of the awarded benefits accrued.[6] One heartening decision in this area was Ball v. Fleetguard, file 1221646 (2/21/02). In that case, the deputy decided that, due to the refusal to attend an 85.39 appointment, he could not declare the worker to be at MMI, but was in a period of refusal prior to MMI. Of course this could have later allowed the agency to award full permanency benefits, rather than allow for the possibility of 85.39 forfeiting those benefits.

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4 This dichotomy is also referred to in the posted decision of Fields v. Wal-Mart, file 1154162, 3/6/01.
5 In addition to refusing to compel attendance, the agency has ruled that the defense has no right to seek credit or repayment for a non-refundable fee to hold an appointment time that the worker blew off. Lunsford v. Barr Nunn, file 5006028 (4/22/04).
6 Nichols v. Second Injury Fund, file 1220030 (2/12/02); Webb v. John Deere Waterloo Works, file 5002209 (2/11/04).

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Going beyond these issues, what if a worker refuses to attend appointments under 85.27 itself? This writer has had that happen many times. Some workers assert that they don't have to go to appointments or make any effort to recover from injury, and the carrier must pay them weekly benefits indefinitely nonetheless. When the suspension language in 85.39 is pointed out to them, their attorneys commonly assert that that language doesn't apply. Because that language appears in 85.39 and not in 85.27, there is simply no sanction available to prevent a worker from claiming a right to benefits while shirking all care.

This precise issue has been litigated several times before the agency, and the agency finds in favor of the worker. This precise question of disregarding care offered under 85.27 is addressed in a paragraph that is identical in many reported cases, which appears, for example, in McCleland v. Pro Pak Logistics, file 5002791 (1/15/03) among other cases. That paragraph holds that there is no sanction for a worker refusing to attend care under 85.27, except that the agency will consider that refusal in affixing the award of permanency. Refusing to attend appointments may lead to reduction, suspension, or forfeiture of permanency benefits.

I consider this holding to be legal error. When I have a worker who refuses to attend an appointment, I make a new appointment and send a letter informing the worker that I am requesting the next visit pursuant to my right to an examination under 85.39, and if they don't go, I am suspending their benefits pursuant to that section. I am sure that someday I will have to argue in vindication of that position in a future case.

Certainly, in a situation where the worker refuses to attend 85.27 care or follow recommendations, it would be wise for defense counsel to seek opinions from the treating caregiver regarding how the offered care would be expected to improve the worker's function. It would be especially helpful if the doctor opines that following treatment recommendations would be expected to allow the worker to return to the same type of work performed before the injury. Of course, nobody can force a worker to undergo care the worker doesn't want to undergo—especially if the offered care is surgery. The writer has argued in those cases that the worker's disability no longer results from the injury, though, but from the worker's volitional refusal of care. The agency tends, nonetheless, to assign industrial disability percentages based upon the untreated condition the worker chose.[7] But this begins to go beyond the scope of this note.

This writer experienced an especially frustrating case two years ago involving examination issues. The worker in that case was a truck driver living in New England, but he filed Iowa workers' compensation litigation. He asserted that he suffered significant injury in a rush hour fender bender in New York, that he could not work, that he was owed ongoing benefits, and that he was significantly disabled by the incident. Prior to the litigation my client had succeeded in obtaining one examination with an Iowa occupational doctor of their choosing.

I began the defense of the client by noticing the worker to deposition at the office of his Iowa attorney. My hope was to have him examined by the same Iowa doctor while he was in town. The worker moved to quash the notice, claiming that it was a hardship to come give deposition in Iowa. I resisted that motion, noting that I.R.C.P. 1.701(5) provided that parties to the litigation needed to attend deposition at the venue of the case. The agency noted that 1.701(5), while ordering parties to give deposition at the venue, that rule ends with: "unless otherwise ordered by the court." The agency sustained the motion to quash my notice. The agency simply exercised its power to 'order otherwise,' and did not require the worker that chose this forum for litigation to come here and give testimony. The deputy stated that allowing defense counsel to "be able to assess claimant's demeanor is not a compelling reason to require claimant to travel to Iowa for a deposition." The deputy instructed me to obtain video of the deposition if I wanted to see his reactions to questions.

The writer then decided to pay the full cost of the claimant's trip to Iowa for deposition, and set up an examination with the Iowa occupational doctor. The defense position was that if we could not force the worker to Iowa to give deposition, we could certainly force him to come here at the defendants' cost in order to undergo examination by our own chosen doctor. Here again, the worker filed a motion for a protective order, seeking to avoid the Iowa IME. The worker asserted that he did not have the time to travel to Iowa for the examination; it was an inconvenience and a hardship. The agency agreed and refused to force the worker to attend the IME. The defense was told to find a new doctor out in the worker's state of residence for an IME.[8]

As the reader can see, the ability of workers' compensation defendants to defend litigation is becoming untenable. Cases cannot be defended if the defense cannot obtain discovery over the worker's medical condition. It is difficult enough to win a workers' compensation for an employer. If the worker is the only one showing up to trial with supporting medical evidence, the hill is that much steeper.

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7 OTC Holdings v. Prucha, #08-0079, Court of Appeals, 8/27/08. See, for instance, Strelow v. Wal-Mart, file 5014436 (arb. Dec. 9/26/06), in which the employer was held liable for the level of disability resulting from a surgery that was unauthorized. The employer was not held liable for the cost of surgery, but was held liable for the disability resulting from it.

8 The posted decision of Jones v. Florilli, file 5080641 (2/19/07) shows a worker who refused to attend an out-of-state IME, and the deputy held that the location of the IME was not "reasonable," and this nullified the forfeiture language of 85.39.

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And yet, the current situation contains all of the following elements:

(a) Workers can refuse to attend 85.27 care, seemingly without punishment, other than possible reduction in their claim;

(b) Workers can refuse to attend 85.39 examinations by claiming either that the defense cannot claim a right to an exam because the defense has accepted the claim, or because the defense has denied the claim.

(c) Workers cannot be forced to attend by bringing a motion to compel, because several deputy commissioners believe that is not a remedy available to the defendants.

The defense brought an interlocutory appeal in one of these cases a few years ago, seeking to get this issue worked out in advance of trial. The granting of an interlocutory appeal is within the discretion of the Commissioner. The Commissioner declined to grant the appeal and address these issues, stating that "Cases have been defended without the defendants having an independent medical examination under sec. 85.39 or I.R.C.P. 1.515." Schoenhair v. Key Components, file 5012161 (5/20/05).

A further frustration for defendants is that issues of this sort are very hard to get worked out through the appellate process. When you are on the eve of trial with no medical evidence to respond to a worker's assertions, the pressure to cave and settle is extreme. The worker is certain to win the case if it goes to trial on the prepared record. If the evidence is that one-sided, there arises the possibility of penalty and the dreaded bad faith lawsuit. And continuing on would be based upon the hope that the courts would eventually do something about this odious status quo. Given those risks and the stakes, settlement nearly always follows. And such settlements reflect the worker having a superior bargaining position.

Attorney Joe Quinn also experienced these various difficulties in obtaining his clients' rights under the Code. In February of this year, he took action by filing a petition for Declaratory Order with the Workers' Compensation Commissioner, under Chapter 5 of the Commissioner's rules. 876 IAC 5.1 states that "any person may file a petition with the workers' compensation commissioner for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the workers' compensation commissioner." Quinn did just that, asking that the Commissioner give a single, uniform answer to the questions above on behalf of his agency.

The Commissioner issued a decision on the petition in March (Petition by Snap-On Tools Mfg., file 5026716, 3/17/09). The Commissioner declined to comply with the request of this petition; he declined to establish a single, uniform rule on behalf of the agency by stating what he believes are the rights of employers and carriers under sec. 85.39, and what remedies are available to them. The Commissioner stated: "The petition requests a declaratory order that would necessarily determine the legal rights, duties, or responsibilities of other persons who have not joined in the petition, intervened separately, or filed a similar petition and whose position on the questions presented may fairly be presumed to be adverse to that of petitioner. Therefore, a declaratory order on the pending petition is declined."

Because nearly any attempt to obtain a declaration of law from the agency head will affect the substantial rights of those who litigate before the agency, this ruling seems to nullify declaratory judgment actions as an avenue for working out problems in this area. The hope had been that, without the pressure to settle a specific case, and approaching these issues in the abstract in a declaratory judgment setting, the results could be appealed into the courts with a clean record for appellate review.

The status of these controversies is that the defense in workers' compensation is severely hampered in the ability to generate evidence and properly defend cases currently. We are looking for a few brave souls to take cases to trial, and preserve the issues above for appellate review within the agency and in the courts. In the meantime, this writer is left asking himself, "Can I get an examination over here?" ■

PRE-ACCIDENT LIABILITY WAIVERS: "CLEAR BUT EQUIVOCAL" IN LIGHT OF *SWEENEY*

by Edward J. Rose, Betty, Neuman & McMahon, P.L.C, Davenport, IA

Edward Rose

A recent Iowa Supreme Court decision, Sweeney v. City of Bettendorf, rekindled debate over the effectiveness, validity and craftsmanship of pre-accident liability waivers[1] in Iowa. 762 N.W.2d 873 (Iowa 2009). The Sweeney Court arguably diverged from earlier decisions when it strongly implied the absence of specific reference to the released party's own "negligence" invalidated the waiver. Id. at 789–80. Moreover, the Sweeney Court expressly left open the question whether pre-accident waivers signed by parents on behalf of minor children are void as against public policy. Id. at 880 n.3. This article hypothesizes that Iowa courts would enforce waivers that protect non-profit sponsors of recreational activities in this context.

I. THE "SWING" IN SWEENEY

Eight-year-old Tara Sweeney attended a baseball game at John O'Donnell Stadium[2] in Davenport, Iowa. Sweeney, 762 N.W.2d at 875. The Bettendorf Parks and Recreation Department sponsored this trip. Id. Tara's mother signed a "Permission Slip" before the game, which stated:

> I hereby give permission for my child Tara M. Sweeney to attend the Bettendorf Park Board field trip to John O'Donnell Stadium with the Playgrounds Program on Monday, June 30, 2003. **I realize that the Bettendorf Park Board is not responsible or liable for any accidents or injuries that may occur while on this special occasion.** Failure to sign this release as is without amendment or alteration is grounds for denial of participation. (emphasis added)

Id.

Tara sat in the third or fourth row along the third-base line in the general admission bleachers. Id. A baseball player lost his grip while swinging at a pitch, hurling the bat through the air. Id. The bat travelled approximately 120 feet and struck Tara on the head. Id.

The Sweeneys sued the City of Bettendorf and Bettendorf Parks & Recreation for negligence. Id. at 875–76. The City moved for summary judgment based in part on the "Permission Slip" signed by the mother. Id. at 876. The trial court granted summary judgment for the City, stating, "[t]hough the Plaintiffs in the present case argue that the permission slip was not a clear and unequivocal expression of intent to protect the released party, the Court determines that the permission slip was in fact unambiguous because it would be apparent to the casual reader that the permission slip was intended to release the Defendant of liability attending the baseball game at John O'Donnell Stadium." Id.

The Iowa Supreme Court reversed, stating:

> The permission slip in this case is much closer to the document in *Baker* than in *Huber*. As in *Baker*, the permission slip contains no clear and unequivocal language that would notify a casual reader that by signing the document, a parent would be waiving all claims relating to future acts or omissions of negligence by the City. [citation omitted]. **The language at issue here refers only to "accidents" generally and contains nothing specifically indicating that a parent would be waiving potential claims for the City's negligence**. [citation omitted]. As noted in a recent best seller, the term "accident" normally means "unpreventable random occurrences." [citation omitted]. The general language in this permission slip simply does not meet the demanding legal standards of our Iowa cases.
>
> While we have not previously considered the effect of exculpatory provisions in the specific context of sponsored recreational activities[3], we see no basis for departing from the *Baker-Huber* principles in this context. The cases from other jurisdictions demonstrate the reluctance of Courts to provide defendants who sponsor recreational activities a more lenient framework for analyzing exculpatory clauses seeking to limit liability for the sponsor's own negligence. Several state courts in a recreational context have adhered to a bright-line test, requiring that the specific words negligence or fault be expressly used if an exculpatory provision is to relieve a defendant from liability for its own negligent acts or omissions. [citations omitted].

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1 The terms "releases", "waivers" and "exculpatory clauses" are synonymous in meaning and legal authorities use them interchangeably. For purposes of this article, the term "waivers" is used.

2 The baseball stadium for the Triple-A Quad City River Bandits was since changed to "Modern Woodmen Park" after its corporate sponsor.

3 *But c.f.*, Huber v. Hovey, 501 N.W.2d 53 (Iowa 1993) (auto racing); Grabill v. Adams Cty. Fair & Racing Assoc., 666 N.W.2d 592 (2003) (race-tracks); Forrester, 2009 Iowa App. LEXIS 170 (Iowa Ct. App. 2009) (athletic club); and Earhart v. State of Iowa, 2002 Iowa App. LEXIS 231 (Iowa Ct. App. 2002) (Iowa State University group sponsoring solar power car racing). Of course, the Iowa Court of Appeals also dealt with snow skiing in Korsmo v. Waverly Ski Club, 435 N.W.2d 746 (Iowa Ct. App. 1988).

PRE-ACCIDENT LIABILITY WAIVERS: "CLEAR BUT EQUIVOCAL" IN LIGHT OF *SWEENEY* ... *Continued from page 8*

> Other Courts in the context of recreational activities have not required magic words, but have imposed a demanding requirement that the intention to exclude liability for acts and omissions of a party must be expressed in clear terms. [citations omitted]. We see no reason to relax from the approach in *Baker* merely because this case involves recreational activity.

(emphasis added). Id. at 878–80.

The Sweeney Court relied upon the juxtaposition between Baker v. Stewart's, Inc., 433 N.W.2d 706 (Iowa 1988), and Huber v. Hovey, 501 N.W.2d 53 (Iowa 1993). Thus, an understanding of those decisions is necessary.

In Baker, the plaintiff went to a cosmetology school to get her hair straightened, and signed the following waiver:

> I, Baker, Denise…do hereby acknowledge that this is a student training facility and thus there is a price consideration less than would be charged in a salon. Therefore, I will not hold the Stewart School, its management, owners, agents, or students liable for any damage or injury, should any result from this service.

433 N.W.2d at 706–707. Two instructors, both licensed cosmetologists, guided the student who used a potent chemical on the plaintiff's hair. Id. at 707. The chemical caused hair loss "until she had large bald patches on her scalp." Id. She sued and the defendant cosmetology school moved for summary judgment based on the waiver. "In granting defendant's motion for summary judgment, the trial Court concluded that, assuming the student's services were negligent, the exculpatory agreement executed by the plaintiff barred recovery." Id. The Iowa Supreme Court reversed, stating:

> In reviewing the language of the exculpatory clause at issue in the present case, we do not believe that it would be apparent to the casual reader asked to sign this form as a condition for receiving cosmetology services that its effect was to absolve the establishment from liability based upon the acts or omissions of its professional staff. To construe the agreement in this light would be contrary to the requirement recognized in the *Poling* and *Evans* cases that such intention must be clearly and unequivocally expressed.

Id. at 709.

The Baker Court invalidated the school's waiver because it did not expressly mention "instructors" or "professional staff." The plaintiff's suit probably would have been barred by the waiver had the alleged negligence only concerned the student. There is no indication the Court invalidated the waiver in Baker simply because it did not expressly include the term "negligence". Indeed, the Iowa Court of Appeals one month earlier held that a waiver is not ambiguous merely on grounds the terms "negligence" or "negligence acts" are omitted. Korsmo v. Waverly Ski Club, 435 N.W.2d 746, 748 (Iowa Ct. App. 1988).

Huber involved a spectator who was injured in the restricted pit area at a racetrack when he was struck by a car's detached wheel. 501 NW2d at 54. The "Release and Waiver of Liability and Indemnity Agreement" signed by the plaintiff in Huber provided:

> IN CONSIDERATION of being permitted to enter for any purpose any RESTRICTED AREA.:including… pit areas…EACH OF THE UNDERSIGNED… HEREBY RELEASES, WAIVES, DISCHARGES AND COVENANTS NOT TO SUE the promoters, participants,…track operator, track owner, officials, car owners, drivers, pit crews, any persons in any restricted area…owners and lessees premises used to conduct the events…for the purposes herein referred to as "releasees," from all liability to the undersigned, his personal representatives, assigns, heirs, and next of kin for any and all loss or damage, and any claim or demands therefore on account of injury…whether caused by the negligence of the releasees or otherwise while the undersigned is in or upon the restricted area….

Id.

The Huber plaintiff claimed this waiver was ambiguous on grounds it was "unclear whether the parties intended to release claims by spectators, or just participants, and whether the parties contemplated the specific accident that occurred." Id. at 56. The Iowa Supreme Court disagreed and expounded:

> By its terms, however, the release applies to anyone who, like Dale, enters a restricted area. It makes no distinction between spectators and participants. It clearly identifies the track's owner, operator, and lessee, as well as race participants, as releasees. The release covers personal injuries, including injuries caused by the releasee's own negligence.

Id. Unlike Baker, the Huber waiver contained express language that the defendants would not be liable for injuries caused by their own

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"negligence." Although referenced by the Huber Court in its analysis, it seems the inclusion of such language was not the dispositive distinction between the respective waivers in Baker and Huber. Rather, the difference in outcome turns on the fact that in Baker the waiver failed to identify all the released parties, i.e., "instructors"; in Huber the waiver did so.

In any event, because the Sweeney Court deemed the "Permission Slip" ambiguous and thus invalid, it expressly declined to address the plaintiffs' other objections, notably whether the waiver was ineffective on public policy grounds that a parent cannot release the claims of a minor child for the anticipated negligence of a recreational sponsor. 762 NW2d at 880 n.3.

Justice Cady dissented, noting: "The release of liability signed by the parents of the child hit by the baseball bat in this case was valid and prevents the parents from suing." Id. at 885. Justice Cady reasoned in part:

> …the release did have meaning, and that meaning was the city would at least not be liable for those inherent injuries known to occur to spectators of a baseball game – the subject of the release. The release clearly identified the baseball stadium as the subject of the trip and stated the city would not be "liable for any accidents." At a minimum, a parent signing the release would understand that those accidents known to occur to spectators were contemplated under the release of liability.

Id.

Justice Cady concluded the injurious event in Sweeney fell under the "broad type" of injury contemplated by the waiver, and thereby it mattered not whether the waiver used the terms "accident" or "negligence." In fact, Justice Cady emphasized that it has not been the law in Iowa that a release specify a party's "own negligence" to be valid, and as discussed above, that the Baker waiver did not turn on inclusion of the term "negligence". Id. at 885–86.

II. LESSONS LEARNED FROM *SWEENEY*

The Iowa Supreme Court's basic problem with the waiver in Sweeney was that it "refers only to 'accidents' generally and contains nothing specifically indicating that a parent would be waiving claims for the City's negligence." Id. at 879. This ostensibly represents a shift in philosophy regarding the specificity required in waivers.

Indeed, prior to Sweeney, we had the Korsmo decision from the Iowa Court of Appeals. 435 N.W.2d 746. The waiver in Korsmo used broad "any and all" type language without referring to the releasee's own "negligence". Id. at 747. A principal argument raised by the plaintiff in resistance to summary judgment was that the release language did not expressly exculpate the defendants from their own "negligent acts". Id. at 747. The Court held that under Iowa law "a contract need not expressly specify that it will operate for negligent acts if the clear intent of the language is to provide for such a release." Id. at 748 (citations omitted). Rather, the terminology "any and all rights, claims, demands and actions of any and every nature whatsoever…for any and all loss, damage or injury" encompassed the defendants' purported negligent acts. Id. Accordingly, it has long been Iowa law that a waiver may *implicitly* rather than *explicitly* exculpate a defendant's own negligence.

In addition, the Baker decision relied upon by the Sweeney majority did not invalidate that waiver because it omitted specific mention of the defendant's "negligence," but rather because it omitted the identity of one of the defendants. Justice Cady recognized this. 762 N.W.2d at 886.

The Sweeney majority thus could have upheld the waiver under existing law because the language "the Bettendorf Park Board is *not responsible or liable for any accidents* that may occur…" *implicitly* encompassed Bettendorf's own purportedly negligent conduct and the event which led to Tara Sweeney's injuries. One would be hard-pressed to posit that Tara's injury from the baseball bat was not an "accident" in the truest sense of the word.[4]

Although the Sweeney Court does not definitively require reference to the releasee's own negligence, it made clear this represents the best approach to avoid ambiguity. Id. at 880 n.2 ("Even in these jurisdictions, the better practice is to expressly use the term 'negligence' in the exculpatory agreement.")[5]. The old standby "any and all liability" language of the past may no longer suffice and the drafter of a waiver takes an unnecessary risk by not including express language concerning the releasee's own "negligence." Of course, it is also advisable to carefully critique a proposed waiver to ensure it is unambiguous.

III. PUBLIC POLICY AND A PARENT'S POWER

Sweeney not only illuminates the tricky "semantics gymnastics" that accompany waivers, but also highlights the open question whether public policy permits an Iowa parent or guardian to contractually release a minor child's anticipatory negligence claim against a recreational sponsor by signing a pre-accident liability waiver. This

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4 The word "accident" per the standard dictionary definition means "a happening that is not expected, foreseen or intended," and "an unpleasant and unintended happening, sometimes resulting from negligence, that results in injury." Webster's New World Dictionary, 8 (Third College Ed. 1991).

5 Citing Calarco v. YMCA of Greater Metro. Chicago, 501 N.E.2d 268, 272–73, (Ill. App. Ct. 1986) (holding provisions to hold YMCA "free from any and all liability" and discharging "any and all rights and claims for damages" not sufficient to relieve YMCA of liability for its own negligence).

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question is an important one in our contemporary society where children are involved in myriad private and community sponsored recreational endeavors. Iowa appellate courts have not decided this issue. Given the split in authority and competing policy arguments, it is difficult to predict how the Iowa Supreme Court ultimately will decide this question.

A. Public Policy Review Generally

Many jurisdictions follow the lead of California, where an "exculpatory clause which affects the public interest cannot stand." City of Santa Barbara v. The Superior Court of Santa Barbara Cty., 161 P.3d 1095, 1100 (Cal. 2007) (quoting Tunkl v. Regents of University of California, 383 P.2d 441 (Cal. 1963)).[6] Under this approach, courts commonly decline to enforce liability waivers used by common carriers, medical providers, public utilities, innkeepers, financial services, public warehouseman, employers, and parties engaged in ultra-hazardous activities. *See* Schlobohm v. Spa Petite, Inc., 326 N.W.2d 920, 925 (Minn. 1982).

In contrast, under Iowa law, contracts releasing persons from liability for their own negligence are not generally contrary to public policy. Grabill, 666 N.W.2d at 596 (enforcing waiver signed by adult participant in auto racing event). The Iowa tolerance for freedom of contract is particularly evident in the domain of recreational activities, as pre-accident waivers are enforceable against adult participants and spectators at recreational or sporting activities. Id.; Huber, 501 N.W.2d at 55 (auto racing); Korsmo 435 N.W.2d at 748 (snow skiing). Iowa and a majority of states hold that an adult's pre-accident waivers for recreational activities do not per se violate public policy.[7]

B. Parent's Power to Release a Minor Child's Anticipatory Claim for Negligence.

However, the majority of states hold that a parent generally may ***not*** release a minor child's anticipatory cause of action.[8] The ubiquitously applied justification is based upon public policy considerations affording children significant protections as illustrated by legislative acts, including statutes governing a minor child's post-injury settlement rights. Courts rationalize that if a child is shielded from a parent's imprudent acts post-injury, then the same policy should likewise apply pre-injury. *See* Cooper v. The Aspen Skiing Co., 48 P.3d 1229 (Colo. 2002).[9]

Iowa too has numerous laws protecting children.[10] An example is Iowa Code section 633.574, which in layman's terms disallows a parent, as acting guardian, from taking funds in settlement of a minor child's claim in excess of $25,000 without court approval and appointment of a guardian ad litem or conservatorship. This obviously protects children from a parent's impropriety, but section 633.574 could also be cited to *support* the enforcement of parental pre-accident waivers, because it allows a parent control over a minor child's post-injury settlement up to $25,000 without any court involvement.

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6 California's "rough outline" for a standard, which may be broken down into six parts, provides:

> [T]he attempted but invalid exemption involves a transaction which exhibits some or all of the following characteristics. [1] It concerns a business of a type generally thought suitable for public regulation. [2] The party seeking exculpation is engaged in performing a service of great importance to the public, which is often of practical necessity for some members of the public. [3] The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. [4] As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. [5] In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provisions whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. [6] Finally, as a result of this transaction, the person or property of the purchaser is placed under the seller, subject to the risk of carelessness by the seller or his agents.

City of Santa Barbara v. The Superior Court of Santa Barbara Cty., 161P.3d 1095, 1100 (Cal. 2007) (quoting Tunkl v. Regents of University of California, 383 P.2d 441 (Cal. 1963))

7 The majority of states identify that recreation and sporting activities generally do not implicate the public interest and thus allow otherwise valid releases to stand. *See, e.g.*, Westyle v. Look Sports, Inc., 17 Cal.App.4th, 22 Cal.Rptr.2d 781 (1993) (snow skiing); Barker v. Colorado Region-Sports Care Club of America, 532 P.2d 372 (Colo. App. 1974) (race track); Ciofalo v. Vic Tanney Gyms, Inc., 10 N.Y.2d 294, 220 N.Y.S.2d 962, 177 N.E.2d 925 (1961) (membership at a health club); Empress Health & Beauty Spa v. Turner, 503 S.W.2d 188 (Tenn. 1973) (spa and rental). Pre-accident recreational waivers typically stand on grounds they "do not concern necessary services, and hence do not transcend the realm of purely private matters and implicate the 'public interest'…." *See* City of Santa Barbara, *supra*, 161 P.3d at 1102.

8 *See, e.g.*, Apicella v. Valley Forge Military Acad. & Junior Coll., 630 F. Supp. 20, 24 (E.D. Pa. 1985) ("…parents do not possess the authority to release the claims or potential claims of a minor child merely because of the parental relationship."); Fedor v. Mauwehu Council, Boy Scouts of Am., 143 A.2d 466, 468 (Conn. Super. Ct. 1958) ("it is doubtful that either the mother or father of his minor plaintiff had the power or authority to waive his rights against the defendant arising out of acts of negligence…"); Meyer v. Naperville Manner, Inc., 634 N.E.2d 411, 415 (Ill. App. Ct. 1994) ("Since parent's waiver of liability was not authorized by any statute or judicial approval, it had no effect to bar the minor child's (future) cause of action…."); Doyle v. Bowdoin Coll., 403 A.2d 1206, 1208 n. 3 (Me. 1979) (stating in dicta that "a parent, or guardian, cannot release the child's, or ward's, cause of action"); Fitzgerald v. Newark Morning Ledger Co., 267 A.2d 557, 559 (N.J. Super. Ct. Law Div. 1970) (release and indemnity provision signed by father on behalf of his minor son was void as against public policy); Alexander v. Kendall Cent. Sch. Dist., 221 A.D.2d 898, 634 N.Y.S.2d 318, 319 (N.Y. App. Div. 1995) (stating in dicta that "a minor is not bound by a release executed by his parent"); Childress v. Madison County, 777 S.W.2d 1, 7 (Tenn. Ct. App. 1989) (holding that mother could not execute a valid release or exculpatory clause on behalf of her minor son); Munoz v. II Jaz Inc., 863 S.W.2d 207, 209–10 (Tex. Ct. App. 1993) (provision of Family Code did not give parents the power to waive a child's cause of action for personal injuries); Hawkins v. Peart, 37 P.3d 1062, 1065–66 (Utah 2001) (based on public policy and statutes favoring protection of minors with respect to contractual obligations, a parent may not release a minor's prospective claim for negligence); Scott v. Pacific West Mountain Resort, 834 P.2d 6, 11–12 (Wash. 1992) ("since a parent generally may not release a child's cause of action after injury, it makes little, if any, sense to conclude a parent has the authority to release a child's cause of action prior to an injury"); *See also* 67A C.J.S. *Parent and Child* § 114, at 469 (1978) ("In the absence of statutory or judicial authorization, the parent has no authority, merely because of the parental relation, to waive, release, or compromise claims by or against the child.").

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Other aspects of Iowa law unequivocally demonstrate a parent's important role with respect to minor children, thus supporting the premise that a parent may sign an enforceable pre-accident waiver.[11] In Horst v. Holtzen, the Iowa Supreme Court held that a parent allowing her children to ride in another individual's vehicle made the child a "guest" under the Iowa guest statute, thus barring any negligence claim against the driver who was at fault for an accident. 90 N.W.2d 41, 46 (Iowa 1958). Notably, the Horst Court criticized a Colorado decision finding that a parent or guardian could not consent to transportation on behalf of a child. Id. at 44. In so doing, the Horst Court reasoned:

> …that many important decisions, such as whether an operation shall be performed or other medical services rendered, are made constantly and necessarily for minors by their parents. To this might be added decisions as to what church, and what school, the child shall attend; where it shall live, in what amusements it may indulge, what journeys it may take, and a host of other important determinations. There seems to be no good reason why the natural guardian, usually parent, could not accept an invitation to ride gratuitously in a motor vehicle, for the child.

Id. (citations omitted). The Iowa legislature later repealed the guest statute; however, the salient point from Horst and other facets of Iowa law is that parents can legally make decisions, both superficial and life-changing, on behalf of their children.[12] Well reasoned decisions upholding parental waivers rely upon this very point.

In Zivich v. Mentor Soccer Club, Inc., a seven-year-old boy was injured when the soccer goal post he was swinging from tipped and fell on him. 696 N.E.2d 201, 203 (Ohio 1998). The Ohio Supreme Court enforced a pre-accident release signed by the boy's mother, noting a parent's capacity to weigh the benefits and risks on behalf of her child:

> [w]hen Mrs. Zivich signed the release she did so because she wanted Bryan to play soccer. She made an important family decision and she assumed the risk of physical injury on the behalf of her child and the financial risk to the family as a whole….Apparently, she made a decision that the benefits to her child outweighed the risk of physical injury. Mrs. Zivich did her best to protect Bryan's interest and we will not disturb her judgment.

Id. at 207. Other state courts are in accord.[13]

Parental rights and statutory protections for children thus cut both ways. Courts in other jurisdictions are divided. Iowa law is unsettled. It is this writer's postulation that the enforceability of a parental waiver may depend on the status of the entity sponsoring the recreational activity, because Courts are more likely to enforce a non-profit's pre-accident waiver. The Zivich Court stated:

> It cannot be disputed that volunteers in community recreational activities serve an important function. Organized recreational activities offer children the opportunity to learn valuable life skills….Due in great part to the assistance of volunteers, nonprofit Organizations are able to offer these activities at minimal cost….Yet the threat of liability strongly deters many individuals from volunteering for nonprofit organizations….Therefore, faced with the very real threat of a lawsuit, and the potential for substantial damage awards, nonprofit organizations and their volunteers could very well decide that the risks are not worth the effort. Hence, invalidation of exculpatory agreements would reduce the number of activities made possible through the uncompensated services of volunteers and their sponsoring organizations.

696 N.E.2d at 205. Other courts agree.[14]

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9 Ironically, the Colorado Supreme Court's stance on this issue in Cooper was later abrogated by the Colorado legislature via enactment of Colo. Rev. Stat. § 13-22-107, which prescribes that parents may "release or waive the child's prospective claim for negligence" via execution of pre-activity release. Of import, this statute makes no differentiation between for-profit and non-profit activity sponsors.

10 *See, e.g.,* Iowa Code Ch. 92 (child labor); Iowa Code Ch. 234 (child and family services); Iowa Code Ch. 235 (children welfare, children in need of assistance); Iowa Code Ch. 237A (child care and child care facilities); Iowa Code § 726.6 (child endangerment). This list is far from exhaustive.

11 Iowa law illustrates parental consent and control on myriad issues. *See, e.g.,* Iowa Code § 123.47(2) (parent may consent to child being served alcohol in private home); Iowa Code § 232.11(2) (parent can waive the right of a child fifteen or younger to have counsel present during police questioning); Iowa Code § 142C.3 (parent may consent to donation of minor's organs); Iowa Code § 613.16 (parents of unemancipated minor child are responsible for actual damages to person or property caused by unlawful acts of minor child to certain monetary limits); In Interest of W.B., 328 N.W.2d 518, 520 n. 1 (Iowa 1983) (parent can consent to medical treatment for child); Buchholz v. Iowa Dept. of Public Instructions, 315 N.W.2d 789, 791 (Iowa 1982) (parent can consent to placement of child into learning disabled classroom); State v. Kelly, 284 N.W.2d 236, 238 (Iowa 1979) (parent may consent to police search of child's room).

12 In addition, there is authority, from the United States Supreme Court regarding parents' fundamental rights in raising their children. *See* Troxel v. Granville, 530 U.S. 57, 65 (2000). In Troxel, the Supreme Court officially recognized the broad rights or parents to control the raising of their children. Id. at 66. Justice O'Connor wrote, "It cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental rights of parents to make decisions concerning the care, custody and control of their children." Id.

13 *See also* Hohe v. San Diego Unified School District, 274 Cal. Rptr. 647, 649 (Cal. Ct. App. 1990) ("A parent may contract on behalf of his or her own children."); Sharon v. City of Newton, 769 N.E.2d 738 (Mass. 2002); C.R.S. § 13-22-107 (2008) (Colorado statute allowing parents to release minor child's prospective claims for negligence, citing in part parent's fundamental right to make decisions for children).

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The non-profit community plays a vital role in expanding affordable recreational opportunities for children. This is good for kids. This is good for communities. Moreover, non-profit entities often lack the proverbial "deep pockets" and resources of a commercial sponsor for defending lawsuits.

Accordingly, courts are quicker to invalidate waivers used by commercial enterprises. In Applegate v. Cable Water Ski, L.C., 974 So.2d 1112, 1115 (Fla. Ct. App. 2008), the appellate court explained:

> "We emphasize that our holding is limited to commercial enterprises. They can insure against the risk of loss and include these costs in the price of participation. Although we are not called upon to address the validity of exculpatory clauses in the context of activities for children sponsored by not-for-profit, community based organizations and entities, we can envision a public policy distinction supporting a different conclusion in that context. There are important societal interests in fostering these activities sponsored by community-based organizations, which often provide a benefit to the entire community and include all children, even those who are unable to afford activities offered by commercial enterprises. Exculpatory clauses might be vital to some of these organizations…."

Id.

This writer therefore predicts the Iowa Supreme Court may make a distinction between for-profit and non-profit sponsors, and thus enforce parental waivers used by non-profit entities providing recreational opportunities for children.[15] Only time will tell us the Court's position. ■

14 *See also* Hohe, 274 Cal. Rptr. at 647; Sharon, 769 N.E.2d at 746–47; Aaris v. Las Virgenes Unifies School Dist., 75 Cal. Rptr.2d 801, 805 (Cal. Ct. App. 1998); Mohney v. USA Hockey, Inc., 77 F.Supp.2d 859 (E.D. Ohio 1999); *but cf*., C.R.S. § 13-22-107 (2008) (Colorado statute allowing parents to release minor child's prospective negligence claim against *either private or non-profit* sponsor of sporting, recreational, educational, and other activities).

15 *See, e.g.,* Iowa Code §§ 461C.1-4 (limiting the liability of landowners who allow land to be used for recreational purposes without charge); Baker v. City of Ottumwa, 560 N.W.2d 578, 582 (Iowa 1997) (purpose of statute exempting city from liability for swimming pool accidents was "to foster community recreational activities and water safety training").

IDCA WELCOMES NEW MEMBER

Edward J. Rose
Betty, Newman, McMahon, PLC, Davenport, IA

IDCA SCHEDULE OF EVENTS

June 4–5, 2009
IDCA Trial Academy
9:00 a.m. -5:00 p.m.
Drake University Law School, 2400 University Avenue, Des Moines, IA

June 12, 2009
IDCA Board Meeting
8:30 a.m. Executive Committee
9:30 a.m. Full Board Meeting/Luncheon
Embassy Suites on the River, 101 East Locust Street, Des Moines, IA

June 12–13, 2009
DRI Mid-Region Meeting
Embassy Suites on the River, 101 East Locust Street, Des Moines, IA
Hosted by Iowa

September 16, 2009
IDCA Board Meeting & Dinner
3:00 p.m. Executive Committee
4:00 p.m. – 8:00 p.m. Full Board Meeting/Dinner
West Des Moines Marriott, 1250 Jordan Creek Pkwy., West Des Moines, IA

September 17–18, 2009
44th Annual Meeting & Seminar
West Des Moines Marriott, 1250 Jordan Creek Pkwy., West Des Moines, IA
8:00 a.m. – 5:00 p.m. both days
(Please dial (515) 267-1500 for the Marriott reservations for the evenings of 9/16 & 9/17 and state "IDCA: for the room rate of $119/night.)

October 7–11, 2009
DRI Annual Meeting
Chicago, IL

December 11, 2009
IDCA Board Meeting & Lunch
10:00 a.m. Executive Committee
11:00 a.m. Board Meeting
Location: TBD

MEGAN ANTENUCCI SELECTED TO MEMBERSHIP OF IOWA ACADEMY OF TRIAL LAWYERS

The IDCA wishes to congratulate Megan Antenucci for being selected to the membership of the Iowa Academy of Trial Lawyers. This recognition of Megan's abilities is well-deserved. Congratulations for receiving this prestigious honor.

HEATHER TAMMINGA, CAE, APPOINTED IDCA ASSOCIATE DIRECTOR

Heather Tamminga

Heather Tamminga, CAE, was appointed as Associate Director of the Iowa Defense Counsel Association (IDCA). The appointment became effective April 6, 2009. Heather is the Marketing Director and an Account Executive at Association Mangement, Ltd. (AML), assigned to multiple association clients for the company. Since 2001, AML has provided management for IDCA's Executive Director Bob Kreamer, and the IDCA.

"In addition to her AML responsibilities with international and state association clients, we are excited to appoint Heather to the Associate Director role with Bob Kreamer and the IDCA," said AML President Molly Lopez, CAE. "Lynn Harkin, the previous IDCA Associate Director, remains with AML and has been reappointed to another association client served by the company. All parties benefit from the staff repositioning. Heather and Lynn are excited about their new roles."

"We are excited that Heather Tamminga has been positioned as Associate Director with IDCA," said Bob Kreamer, IDCA Executive Director. "I have known Heather for many years and have worked with her in other professional capacities. Heather's personality, strategic focus and member-service attitude make her a great fit to work with me and with the IDCA staff team at AML. It is also nice that Lynn Harkin will remain with AML to provide IDCA insight if necessary."

About Heather:

- 10 years of experience in association management, and has been with AML since 2005.
- Received her Certified Association Executive (CAE) designation from the American Society of Association Executives in 2007. She is one of 42 CAEs in Iowa.
- Earned her BA in Journalism/Mass Communications and BA in International Studies from Iowa State University.
- Recently elected to the Board of Directors of the Iowa Society of Association Executives.
- Graduate of the Iowa Society of Association Executives Leadership Class.
- Participates in a monthly CAE Breakfast with peers.
- Areas of expertise include: leadership and volunteer management, strategic planning and visioning, communications, membership services, education program development, and meeting and event planning.

Heather resides in Des Moines with her husband, Brett; daughter, Ivy (10 months); and son, Chance (8 years).

Headquartered in Des Moines, Iowa, AML has provided full-service management for international, national, regional and state trade and professional associations since 1976. AML is an internationally accredited association management company through the AMC Institute. Please visit www.aml.org. ■

IDCA MEMBER DAVID HAMMER PUBLISHES NEW BOOK

Congratulations to long-time IDCA member David Hammer on the publication of his new book, "For the Record: My Name is Hammer." The book is about Dave's legal cases and should provide interesting and informative reading pleasure. For those interested in buying the book please contact its publisher, The Battered Silicon Dispatch Box, P.O. Box 122, Sauk City, WI, 53583-0122, gav@cablerocket.com. The book costs $20 plus mailing. Dave is a prolific writer in his spare time, having authored over 20 books of not only his essays and observations of life but also books containing entertaining and amusing vignettes of his personal history and travels. Many of his books center around the literary fascination of his life, Sherlock Holmes. ■

THE IDCA SPRING SEMINAR

The IDCA Spring Seminar was held April 3 at the Coralville Marriott Hotel and Conference Center in Coralville, Iowa.

The focus of the Seminar was insurance coverage and bad faith litigation. IDCA thanks Steve Powell and his committee for a great event!

Tom Waterman reviews pollution exclusions.

David May speaks with attendees about litigation issues.

Jeffrey Stone addresses construction issues.

Sean O'Brien reviews the intricacies of flood insurance.

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About Larry Pozner: Pozner's law practice emphasized three primary areas: criminal defense work, complex commercial litigation and professional lecturing. He is a nationally recognized legal commentator and has frequently provided legal analysis for the *NBC Nightly News, The Today Show, MSNBC, CNN, NRP* and *Court TV.*