INSURANCE LAW

DRAKE GENERAL PRACTICE REVIEW

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I. INTRODUCTION

Perhaps no area of the law (other than family law) demonstrates the poignant intersection between life and the legal system more frequently than insurance law. It regularly impacts our lives, relationships and financial status. That assures that insurance law remains endlessly intriguing.

As always, what follows is a compilation of selected case law and an expression of my opinion based upon my readings of recent cases and interesting issues. It is not a substitute for your own research and should not be relied upon in isolation.

II. ADDITIONAL INSURED AND EXISTENCE OF A CLAIM

In order to understand the implications of *Hausmann Construction, Inc. v. Nationwide Mut. Ins. Co.,* No. 21-1430, 2023 WL 2151229 (Iowa Ct. App. Febr. 22, 2023), an unpublished decision, it if first necessary to identify the relevant parties and the stacked obligations among them. Hausmann Construction entered into a contract with Iowa Western Community College to build a new wellness facility on the college's campus. Under the contract, Hausmann was responsible for any property damage occurring as a result of the construction.

Hausmann then entered into a subcontract with Advanced Trenching & Utilities, LLC. Under the terms of that contract, Advanced Trenching was responsible for property damage arising from its work. It was also required to – and did – make Hausmann an additional insured under its liability insurance policy with Nationwide.

Advanced Trenching then entered into a subcontract with Torco Enterprises, Inc. The employees of Torco struck a watermain and areas of the work site were flooded. Hausmann paid the costs and expenses for repairing the water main and replacing a damaged retaining wall. It then asked Advanced Trenching to submit a claim for the damages to Nationwide. Advanced Trenching refused so Hausmann submitted the claim for nearly $200,000 directly to Nationwide. There was no response from Nationwide and this litigation was therefore filed.

There were two interesting issues presented:

1) Did the litigation filed by Haussman directly against Advanced Trenching's insurer violate the Direct Action statute?

Nationwide contended that as the injured party, Haussman could not sue it directly. Keep in mind that Advanced Trenching (under whose auspices the damages occurred) was its named insured and if Haussman had a claim against Nationwide as a result of the negligence of Advanced Trenching, it was the injured third party to the contract and therefore prohibited from suing the tortfeasor's insurer by the Direct Action Statute (Iowa Code chapter 516).

Haussman, the trial court and the Court of Appeals agreed with the legal standard but disagreed with the result urged by Nationwide. While Hausmann could not proceed to sue the insurer, Nationwide, under section 516.1 of the Iowa Code until it had obtained a judgment that remained unsatisfied after execution, Haussman was more than a third party/injured victim. It was in fact an "additional insured" under the terms of the insurance policy and entitled to all of the protections inherent in that status, including the right to sue directly as a beneficiary of the contract.

2) Was Haussman seeking to recover what it was "legally obligated to pay as damages?"

And here is where Haussman's claim hit the wall. While Haussman asserted that its payments were covered under the liability policy, Nationwide asserted that those were voluntary payments that Haussman was not "legally obligated to pay as damages." Haussman countered by citing *Red Giant Oil Co. v. Lawlor*, 528 N.W.2d 524 (Iowa 1995) in which the Court found that the phrase "legally obligated to pay" is ambiguous. *Id.* 528 N.W.2d at 533. If the phrase were ambiguous, it would be construed against the insurance carrier as the author of the contract.

However, the Court of Appeals sided with Nationwide and rejected the argument that the phrase was ambiguous. Why? In a footnote, it distinguished *Red Giant* as follows:

> First, although the policy language at issue was identical (i.e., the insuring agreement included the phrase "legally obligated to pay as damages"), the court found only the "legally obligated to pay" language ambiguous, giving no explanation for why it did not address the modifying language of "as damages." Perhaps neither party made an argument about the modifying language. For reasons we will discuss later, the modifying language "as damages" matters. Second, the situation in *Red Giant* differed significantly from the situation here in that a claim was made against the insured, the insurer refused to defend the insured, and the insured reached a settlement with the party making a claim against it after the insurer's refusal to defend. *Id*. at 527. It was in this context that the court found the phrase "legally obligated to pay" ambiguous. In contrast, no one asserted a claim again Hausmann, and Nationwide was never given the opportunity to defend Hausmann before Hausmann incurred the expenses for which it now seeks coverage. So, while the *Red Giant* court found part of the policy language ambiguous within the context of the issue at hand in that case, we are evaluating the meaning of that language in a different context. We determine whether the policy language is ambiguous "in the context of the policy as a whole." (citation omitted). Given the different context involved here, we do not find *Red Giant* dispositive of the issue of ambiguity. *Id.* at *6

In essence, therefore, the Court of Appeals found that the addition of the words "as damages" rendered the entirety of the phrase beginning with "legally obligated to pay" unambiguous. The court explored the meaning and definition of the term "damages" at length and focused on the requirement that the amount must be claimed by another or ordered to be paid. In this case, there was never a claim made by anyone against Haussman. The insured simply fulfilled its

obligation. Furthermore, it is key that it made the payment before notifying Nationwide, thereby depriving Nationwide of the opportunity to explore the liability issues and reasonableness of any claim (in violation of a contractual exclusion in the policy that were not addressed other than to acknowledge their existence). Admittedly, Nationwide did not respond when the claim was actually made but that was essentially "no harm, no foul" because the payment had already been made.

The Court of Appeals ruled for Nationwide as there was no coverage afforded to Hausmann under the insuring agreement of the policy. It was therefore unnecessary for the court to analyze the applicability of any policy exclusions.

III. CHAPTER 321, MOTOR VEHICLE FINANCIAL RESPONSIBILITY

Several years ago, we all started getting little insurance verification cards to carry in our motor vehicles to demonstrate that the vehicle meets minimal liability coverage requirements set by Iowa law. Why? Iowa Code Chapter 321A is why. It requires that a person be able to demonstrate "proof of financial responsibility" in minimal amounts if involved in an accident that results in damages of $1500 or more or, alternatively, have his driver's license suspended. (Iowa Code section 321A.5(1)). The most common method used to demonstrate the "proof of financial responsibility" is through motor vehicle liability insurance although other methods are available.

But, as always, the issues can be complex.

The Code requires that the liability policy "shall insure the person named in the policy and any other person, as insured, using the motor vehicles with the express or implied permission of the named insured, against loss from the liability imposed by law for damages arising out of the ownership, maintenance, or use of the motor vehicles …subject to limits exclusive of interest and costs…" The limits set are "twenty thousand dollars because of bodily injury to or death of one person in any one accident and, subject to the limit for one person, forty thousand dollars because of bodily injury to or death of two or more persons in any one accident, and fifteen thousand dollars because of injury to or destruction of property of others in any one accident."

Significantly, Iowa Code section 321A.21(6)(a) contains strong language regarding the importance of the coverage mandated by the chapter. It provides that the "liability of the insurance carrier with respect to the insurance required by this chapter shall become ***absolute*** whenever injury or damage covered by said motor vehicle policy occurs; said policy may not be canceled or annulled as to such liability by any agreement between the insurance carrier and the insured after the occurrence of the injury or damage; no statement made by the insured or on the insured's behalf and no violation of said policy shall defeat or void said policy." (Emphasis added).

So, what about the standard exclusions found in motor vehicle liability policies? Are they valid?

Maybe.

The Code specifically permits exclusions for liability

a. Under any workers' compensation law;
b. For liability on account of bodily injury to or death of an employee of the insured while engaged in the employment, other than domestic, of the insured or while engaged in the operation, maintenance, or repair of any such motor vehicle; and
c. Any liability for damage to property owned by, rented to, in charge of, or transported by the insured.

Iowa Code Section 321A.21(5).

The Code is silent as to the impact of any other specific exclusions that might be contained in the policy. However, it does provide that provisions not in conflict with the provisions of Chapter 321A are considered part of the policy. (Iowa Code Section 321A.21(6)).

And then the policy meets life. The facts of *Briggs v. First Chicago In. Co*., No. 22-1264, 995 N.W.2d 818 (Table), 2023 WL 3856430 (Iowa Ct. App. June 7, 2023), an unpublished decision, are not complex. Briggs had an automobile insurance policy for his 2004 Dodge Grand Caravan that carried the $20k/$40k/$15k minimums set by statute. Monica Evison was listed as a covered driver. She borrowed the Grand Caravan to deliver newspapers one morning and, unfortunately, struck a parked vehicle owned by Mediacom, causing about $6,700 in damage. Mediacom demanded payment and Briggs filed an insurance claim against its insurer to pay the damages.

The insurer, First Chicago Ins. Co., declined coverage, citing two policy exclusions:

a. There was an exclusion "arising out of the ownership, maintenance or operation of any vehicle while it is being used in a delivery-related business" (defined to include using the car for "pickup or delivery or return from a pickup or delivery of persons, products, documents, newspapers, or food").

b. The second exclusion was for "the business-related use of an auto, unless we have so agreed and charged an additional premium." "Business" was defined to include "any full or part-time profession, occupation trade, business or commercial enterprise." There was no specific agreement (or additional premium paid) for business-related use of the Grand Caravan.

Briggs and Evison sued. The insurer immediately filed a motion to dismiss, arguing that the petition failed to state a claim upon which relief could be granted because the "narrow" exclusions satisfied Iowa's minimum financial liability requirements. The district court concluded that there was a "question of fact whether the breadth of the exclusions thwart the intent of Section 321A.21 by lessening insurance protection to the public." Not to be deterred, the parties thereafter filed cross motions for summary judgment. The district court granted summary judgment to the insurer, First Chicago, finding that section 321A.21(6)(a) "does not require carriers to provide coverage for all damages, regardless of circumstances."

This appeal followed. And immediately the case veered off in a completely different direction.

In the first paragraph of the decision, Court of Appeals Judge Tabor stated as follows: "Trouble is, the injured third party did not bring this suit and did not join Briggs and Evison in seeking damages from First Chicago. Although First Chicago did not raise standing, we may do so on our own motion. (citation omitted). But we decline to determine that issue for the first time on appeal. Instead, we reverse the grant of summary judgment as premature and remand for the district court to determine whether Briggs and Evison have standing to bring this lawsuit." The coverage issue raised by the parties on appeal was not addressed. Instead, the case was remanded for an evidentiary hearing to determine whether Briggs and Evison have standing to pursue the claim or whether the claim belongs to the injured party, Mediacom.

The decision and the comment implying that the injured party, Mediacom, should have brought the suit directly against the tortfeasor's insurance carrier are particularly interesting in view of three factors:

1) The Iowa Supreme Court has long held that the injured third party (in this case, Mediacom) has NO right to directly sue the tortfeasor's liability carrier. Since *Long v. McAllister*, 319 N.W.2d 256 (Iowa 1982), the Iowa Supreme Court has consistently held that the injured third party is only an incidental beneficiary to the insurance contract and, since that injured party has no contractual relationship with the insurance company, direct suit against the carrier is not permitted in the absence of either assignment or compliance with the Direct Action Statute. See also *Peak v. Adams,* 799 N.W.2d 535 (Iowa 2011)*; Red Giant v. Lawlor*, 528 N.W.2d 524 (Iowa 1995); *Steffens v. Am. Standard Ins. Co*., 181 N.W.2d 174 (Iowa 1970); *Bates v. Allied Mut. Ins. Co*., 467 N.W.2d 255 (Iowa 1991). The comments from the Appeals Court in this case imply that the tort victim is a necessary party to determination of coverage available under a policy to which it is not a party. While it has been standard practice for insurers to make tort victims parties to declaratory judgment actions determining the availability of coverage, to my knowledge, they have not been considered necessary to determination of the coverage issues by the court.
2) The right of an injured third party to sue the tortfeasor's liability carrier directly can be obtained through assignment. There is no indication that there has been an assignment.
3) The right of an injured third party to sue the tortfeasor's liability carrier directly can be obtained through compliance with the Direct Action Statute (Iowa Code Chapter 516). But there is no indication that Mediacom has even obtained a judgment let alone have it returned unsatisfied, both of which are prerequisites for an injured party to sue the tortfeasor's insurer directly as required by the Direct Action Statute.

So why should Mediacom, the injured victim, even be considered a party, let alone a necessary party, to resolution of this coverage issue? The Court of Appeals asserts that the rule against an injured party suing the tortfeasor's insurer directly is overcome by the strong public policy evidenced in the statute that moves the victim's status from that of an incidental beneficiary of the liability insurance policy to that of an intended beneficiary. Note the following language from 7A Steven Plitt et al., *Couch on Insurance* 3d section 109:36 (Revised ed. 2013) quoted favorably by the Court:

> The purpose of a Financial Responsibility Act is to furnish compensation for innocent persons and members of the general public who are injured by the negligent operation of automobiles and to protect them from financially irresponsible persons. The purpose is not generally to protect tortfeasor insureds against their own negligence.

Please note that this case is factually unique in that the claimed damages fall squarely and solely within the minimum coverage requirements established by Chapter 321A. This is not a case in which the damages exceed those minimum coverages to permit an argument that the tortfeasor has an interest in the coverage issue because the protection beyond the minimum coverage amount directly protects the tortfeasor.

Can Briggs and Evison show a specific, personal, and legal interest in the litigation and injury under these unique facts? The Court gave some guidance regarding its concern to the trial court in that regard. The statute specifically provides that the policy can include a provision that requires the insured to reimburse the carrier for any payment the carrier would not have been obligated to make under the terms of the policy except for the provisions of Chapter 321A. Assuming that provision is in the policy (not available), Briggs and Evison would still ultimately be responsible for payment to Mediacom and reimbursement to the carrier. Since their sole argument is based upon the application of the financial responsibility law, they could effectively lose by winning their argument.

Still there is arguably some support for Briggs and Evison as parties even to the litigation. Iowa Code section 321A.21(6)(b) states that "satisfaction by the insured of a judgment for such injury or damage shall not be a condition precedent to the right or duty of the insurance carrier to make payment on account of such injury or damage." That provision could be read two ways: either 1) it is further indication that the sole intended beneficiary of the statute is the injured victim who should not be dependent upon the insured to make payment as the obligation of the insurance carrier to the victim is direct or 2) the insured tortfeasor has an interest in payment under the policy even before the tortfeasor makes any out-of-pocket payment to the injured victim. Comments by the Court of Appeals together with the overall tenor of the statutory structure and a reading of that section in conjunction with the entirety of the chapter would give greater weight to success of the first argument.

In passing, it should be noted that the Appeals Court has another interesting point by questioning the existence of a judiciable controversy. Is Mediacom even pursuing the claim? Does this devolve into a request for an advisory opinion since there is no evidence reported in the decision that would indicate that the injured party and the tortfeasor in fact have an active – as opposed to a potential – dispute? That issue too remains unresolved.

PRACTICE NOTE: While it has long been the practice for insurance carriers to make the injured person a party to any declaratory judgment for coverage determination, arguably, in the context of automobile liability coverage, for at least the first $20,000/$40,000/$15,000, the injured person might be a **necessary** party to resolution. Even though this is not binding

authority in Iowa as it is an unpublished decision of the Court of Appeals, it offers a cautionary tale for the practitioner.

IV. UNINSURED/UNDERINSURED MOTORIST

First some background. Iowa Code Chapter 516A sets out the statutory structure for uninsured/underinsured motorist coverage in Iowa. It provides that all motor vehicle insurance policies issued in this state include uninsured/underinsured motorist coverage at minimal levels unless the coverage is specifically rejected by the insured. On June 30, 2017, Brandi Fipps purchased coverage for her pickup from Progressive Universal Insurance Company. At the time, she signed off to reject uninsured/underinsured motorist coverage. Shortly thereafter (on July 24th), she replaced the pickup with a sport utility vehicle. No new declination of UM/UIM coverage was signed by Ms. Fipps. However, a series of Declarations Pages issued thereafter (including July 24th, August 20 and September 3) specifically stated that Ms. Fipps had rejected UIM and UM coverage on the covered vehicle and that the policy was effective June 30 (when the initial policy covering the pickup was issued) until December 30 of that year.

As fate would have it, about a month after swapping the SUV for the pickup, Ms. Fipps was involved in an automobile accident. She settled with the tortfeasor and then sought UIM benefits under her policy. Progressive denied that UIM coverage was in effect under the policy, relying on the rejection signed when the policy was initially issued on June 30, 2017. Ms. Fipps sued; the trial court agreed with Progressive and this appeal followed.

Under Iowa law, Chapter 516A forms a basic part of the motor vehicle insurance policy and is treated as if it had actually been written into the policy. *Thomas v. Progressive Cas. Ins Co*., 749 N.W.2d 678, 682 (Iowa 2008). The relevant part of Chapter 516A is found in subsection 1:

> No automobile liability or motor vehicle liability insurance policy … shall be delivered or issued for delivery in this state … unless coverage is provided in such policy or supplemental thereto, for the protection of persons insured under such policy who are legally entitled to recover damages from the owner or operator of an uninsured (or underinsured) motor vehicle … caused by accident and arising out of the ownership, maintenance, or use of such uninsured or underinsured motor vehicle.

However, section 516A.1(2) allows the insured to reject such coverage if it is in writing signed by the named insured on a form or document furnished by the insurance company or insurance producer on a separate sheet of paper which contains only the rejection and information directly related to it. The statute then specifically provides that once the UM/UIM coverage has been rejected, the coverage need not be provided in or supplemental to a renewal policy.

So, when the pickup was swapped for the SUV, was a new signed rejection required?

There are significant factors weighing against requiring a new signed rejection:

1) Nothing in the statute requires the issuance of a new policy when coverage is moved to another vehicle.
2) The Declarations Pages defined the period of the policy to be from June 30, 2017 (when the declination was signed) through the end of the year and that is inclusive of the date of the accident. The court found that to be an indication that the parties treated coverage on the SUV as a continuation of the same policy and not a new policy.

3) The Declarations Pages noted consistently that UM and UIM coverage had been rejected and that included Declarations Pages issued after the swap of the vehicles.

4) The policy specifically anticipated the replacement of vehicles under the terms of the same policy. The policy defined "covered auto" to include a "replacement auto" (which is defined as an "auto that permanently replaces an auto shown on the declarations page").

And Nationwide wins the day. There was no UIM coverage available to Ms. Fipps. *Fipps v. Progressive Universal Ins. Co.*, 989 N.W.2d 801 (Table), No. 21-1105, 2022 WL 16631192 (Iowa Ct. App. November 2, 2022) (unpublished opinion).

V. IMPACT OF ONGOING NEGOTIATIONS WITH INSURER

This is probably as much a civil procedure case as an insurance law case but as it impacts those working with insurance law, I include it for your information. In *Johnston v. McCargar*, 990 N.W.2d 813 (Table), No. 21-2003, 2022 WL 17826874 (Iowa Ct. App. December 21, 2022) (unpublished opinion), Joseph Johnston and Hollie McCargar were involved in an automobile accident. Mr. Johnston asserted that he was waiting for the red stoplight to change when the vehicle driven by Ms. McCargar rearended his vehicle. Suit was filed by Mr. Johnston on April 29, 2021 and he therefore had until July 28th to serve the Petition under Iowa R. Civ. P. 1.302(5). On July 14th, an extension to complete the service was filed on behalf of Mr. Johnson because he was "in active discussion with the insurance company for the tort Defendant to try to resolve this matter." It was asserted that a "short amount of additional time is needed in order to complete … those discussion." The request was granted on July 16th and the time to complete the required service on the alleged tortfeasor was extended to September 10th. The negotiations failed and the defendant was served on August 25th, well before the deadline established by the trial court when granting the extension. On September 14th, the defendant moved to dismiss the suit because of the allegedly late service. Mr. Johnston resisted. Because the trial court concluded that Mr. Johnston was actively engaged in settlement negotiations during the relevant time, the motion to dismiss was denied and this appeal followed.

The history of whether or not ongoing settlement negotiations constitute "good cause" for extending the deadline for service of the Petition was articulated by the court. In *Antolik v. McMahon*, 744 N.W.2d 82, 85 (Iowa 2007), the Iowa Supreme Court held that "[s]ettlement negotiations, even if done in good faith, do not constitute … good cause for delaying service

(quoting *Henry v. Shober*, 566 N.W.2d 190, 193 (Iowa 1997)). The Court then revisited the topic in *Rucker v. Taylor*, 828 N.W.2d 595, 601 (Iowa 2013) in which it was held that "although settlement negotiations have not historically constituted good cause for delaying service, instances exist in which dismissal against that backdrop would be unfair." Instead it was determined that the good-cause standard "considers ***all the surrounding circumstances***, including circumstances that would make it inequitable for a defendant to successfully move to dismiss." (Emphasis added). 828 N.W.2d at 601.

In essence, the Court of Appeals found that neither the lack of consent to the extension by the defendant nor the fact that continuing negotiations was the stated reason for the requested extension is dispositive of the good-faith determination. In this case, Mr. Johnston requested the extension two weeks before the expiration of the deadline. Had it not been granted by the trial court, he would still have had time to proceed with service within the requisite 90 days. Instead, he provided the settlement packet and still served the defendant within the date to which the trial court had granted the extension.

Furthermore, it was noted that the insurer continued to negotiate with Mr. Johnston after the original deadline for service, reinforcing the expectation that it was not necessary to meet the 90-day deadline but that he could rely upon the extension. That, the Court of Appeals noted, made it "understandable" that Mr. Johnson did not serve the defendant within the original ninety days. Besides, the case did not languish on the docket and support for the extension fulfilled the goal of deciding cases based on their merits.

For all of those reasons, the trial court's decision was upheld. In this case, the proactive conduct of plaintiff's counsel in communicating with defendant's insurer, in seeking an extension two weeks before the 90-day deadline and in effecting service significantly before the expiration of the time granted by the extension served the plaintiff well.

VI. LIFE INSURANCE

While *Willman v. Ellerbach*, 989 N.W.2d 805 (Table), No. 22-0096, 2022 WL 16631226 (Iowa Ct. App. November 2, 2022) (unpublished opinion) is one of the most rare of insurance law cases as it involves the distribution of life insurance payments. The facts are not complex. Jim Ellerbach loaned Gary Willman money secured by a life insurance policy. The assignment of proceeds of the life insurance policy signed by Mr. Willman provided in relevant part as follows: "The Assignee (Ellerbach) shall pay any balance of sums received hereunder from the Company remaining after payment of the then existing liabilities, matured or unmatured, to the person entitled thereto under the terms of the policy had this assignment not been executed." Mr. Willman's wife, Kelli Willman was and remained the primary beneficiary.

Over the next several years Mr. Ellerbach and Mr. Willman engaged in dozens of business transactions. Many loans were made and some, but not all, were accompanied by promissory notes. All of the promissory notes that were signed provided that the borrower (Mr. Willman)

granted an assignment of interest in his life insurance policy to Mr. Ellerbach but that the assignment was to be released upon the repayment of the investment or loan in full.

Mr. Willman passed away unexpectedly in 2020. Mr. Ellerbach made a claim for $170,000 (reportedly the outstanding balance of the loans) in the Willman Estate AND the life insurance company paid the entire face value of the life insurance policy ($500,000) to Mr. Ellerbach who retained the full amount. Mrs. Willman filed suit claiming that she was the rightful beneficiary of the insurance proceeds after the loan balances were repaid and asserted that there were no loans outstanding at the time of Mr. Willman's death.

At trial Mr. Ellerbach claimed that two additional loans were outstanding (bringing the total to close to $500,000) and that he was entitled to the full-face amount of the insurance policy because of oral assurances from the deceased that he could keep the full-face value regardless of the amount of the loans outstanding.

The trial court concluded that Mr. Ellerbach was owed $173,000 but that the balance of the insurance proceeds were due and owing to Mr. Willman's widow. This appeal followed.

On appeal, Mr. Ellerbach asserted that he was entitled to that portion of the insurance proceeds equal to the original amount of the promissory notes, even if they had been partially or wholly repaid. The court focused on the language of the assignment requiring release of the assignment upon the repayment of the loans and held that such provisions clearly precluded the outcome sought. That conclusion was further supported by the language requiring Mr. Ellerbach to "pay any balance of sum received hereunder from the Company remaining after payment of the then existing liabilities" to Mrs. Willman as the primary beneficiary. And finally, the Court of Appeals was unpersuaded by Mr. Ellerbach's testimony that he was assured by Mr. Willman that he would be holding the policy in his name and could do whatever he wanted with the proceeds. The Court of Appeals gave deference to the fact finding of the trial court who "implicitly found Jim (Ellerbach) was not credible …" The representation from Mr. Ellerbach was simply not consistent with the written documentation or logic.

VII. CONCLUSION

It's has been a pretty quiet year for insurance law in the Iowa Supreme Court after some significant decisions in 2022 but the topic remains an active field for the Court of Appeals. Stay tuned for more.