INSURANCE LAW

DRAKE GENERAL PRACTICE REVIEW
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I. INTRODUCTION

There were very few insurance law decisions issued by the Iowa Supreme Court since last we met. However, the Court of Appeals has had several insurance disputes land on its bench and several are addressed below.

In view of the fact that this is a general practice review, in order to provide a resource that will hopefully be useful to the general practitioner, the discussion that follows and the topics chosen are designed to provide basic insurance law information with citations related to the issues that history and experience have shown come up most frequently. At a minimum, the cited cases should provide a starting point for basic research.

And we would be remiss without a "thank you" to Jeff Jeffries of Hopkins and Huebner, P.C., from whom much of the discussion regarding uninsured and underinsured motorist coverage was blatantly pilfered.

II. UPDATE: *SALEM UNITED METHODIST CHURCH OF CEDAR RAPIDS V. CHURCH MUT. INS. CO.*, 2017 WL 512494 (IOWA CT. APP., FEBRUARY 8, 2017).

Two years ago, we discussed this case in the context of the coverage available to the Salem United Methodist Church for damage occurring during the Cedar Rapids flood in 2008. In essence, the church was damaged when the sewer backed up because of the flood and it sought coverage for the property loss incurred. So, what is the problem? Succinctly stated, the policy provided coverage for damages resulting from sewer backup, but excluded coverage for damage resulting from flooding. In 2015, the Court of Appeals concluded that the exclusion for damage by flooding was unambiguous and the policy excluded coverage if damage "is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss." The case was remanded for a new trial.

At trial, the jury again returned a verdict in favor of Salem United Methodist Church in excess of $700,000. However, on post-trial motions, the trial court granted a motion for judgment notwithstanding the verdict, based upon its conclusion that the undisputed cause of loss was the flood, an excluded event.

On appeal, the Iowa Court of Appeals agreed with the district court, concluding that there was insufficient evidence to support a jury verdict that relied upon the conclusion that the flood was the cause of the loss and the reason that the sewer backed up. "Here it was undisputed the flood either directly caused the damage to the basement or indirectly caused the damage by causing the sewer to backup. No reasonable mind could reach a contrary conclusion."

III. CANCELLATION OF INSURANCE COVERAGE

Auto-Owners Ins. Co. v. Iowa Ins. Div., 887 N.W.2d 600 (Iowa 2016) is interesting if only for its statement of the obvious. In *Auto-Owners*, the insurers had issued workers' compensation policies under the auspices of the assigned risk pool. The insured, Health Dimensions, operated in several states, including Minnesota and Iowa. A dispute arose concerning premiums and Health Dimensions' status in the assigned risk pool. Auto-Owners cancelled the workers' compensation policy.

The insured responded by suing in district court in Minnesota and complaining to the Iowa Insurance Commission, claiming that the cancellation violated Iowa law. The Insurance Commission concluded that the matter was one for private litigation in the court rather than by regulatory proceeding because of the existence of a factual dispute. Auto-Owners filed a petition for judicial review contending that the Insurance Commission should have assumed jurisdiction and resolved the matter. The district court concluded that Auto-Owners did not have standing to litigate the issues and the insurer appealed.

The Supreme Court never reached the issue. At oral argument, the Court was informed that the insured had accepted a cancellation refund check from Auto-Owners and had not appeared at a

hearing scheduled to address the issue. The Supreme Court concluded that "an obligation is discharged when valid consideration is offered, intended and accepted as full satisfaction of the original claim" (citations omitted). The appeal was dismissed as moot.

IV. COVERAGE FOR CUSTOM FARMING

Schulz Farm Enters. v. IMT Ins., 2017 WL 108300 (Iowa Ct. App. January 11, 2017) provided an opportunity to again address liability coverage for custom farming operations. The result, however, was again not positive for the custom farmer.

Clark Swine Technology (Clark) contracted to custom feed hogs owned by Schulz Farm Enterprises, Inc. (Schulz). The hogs owned by Schulz were under the care and control of Clark, as the custom feeder. Unfortunately, a breaker in the building where the hogs were located tripped, resulting in the deaths of 837 hogs.

At the time of the loss, Clark was covered by an insurance policy issued by IMT. Clark had worked with an insurance agent to obtain appropriate coverage. He informed his independent agent that he owned neither the building not the hogs, but was responsible for expenses, including insurance and feed and care for the hogs. Clark purchased a Custom Feeding endorsement to its IMT Insurance Farmers Personal Liability Coverage policy. The policy itself excluded coverage for "custom feeding" but the endorsement amended the policy to delete the exclusions "*pertaining to* 'custom feeding'".

IMT denied coverage for the loss of the hogs. However, the denial was not based upon the fact that it was a custom feeding operation, but that the particular property for which recovery was sought was property "in the care of an 'insured'" - - namely the hogs.

The insured argued that the endorsement must necessarily be interpreted to remove not only the exclusion for custom farming, but also the exclusion for loss to property "in the care of" the insured. The Court of Appeals disagreed, stating that the endorsement functioned "only to remove the discrete custom feeding exclusion" and could not be interpreted more broadly to eliminate all other exclusions simply because the insured was a custom feeding operation.

So, isn't coverage illusory? Shouldn't the doctrine of reasonable expectations be applied to provide coverage? Not according to the Court of Appeals (or the Iowa Supreme Court in an earlier decision entitled *Boelman v. Grinnell Mut. Reinsurance Co.*, 826 N.W.2d 494 (Iowa 2013)). Although the loss of the hogs was not covered as they were property in the insured's care, custody and control, other loss would have been covered, such as damage to other property caused by the hogs. Denial of coverage was upheld.

V. BAD FAITH – AGAIN

Bad faith in the workers' compensation setting had long been recognized in Iowa. However, the issue was recently addressed by the Iowa Supreme Court again in *Thornton v. Am. Interstate Ins.*

Co., 897 N.W.2d 445 (Iowa 2017). The case is unusual in several regards. First, and foremost, in this case the workers' compensation insurance carrier had paid all of the weekly benefits due as they became due. The carrier argued that it therefore could not be found to be acting in bad faith. The injured workers disagreed and based his claim of bad faith on the insurer's refusal to acknowledge that he was permanently, totally disabled and entitled to a commutation, thereby unreasonably delaying his lump-sum payment. The finding of the Court markedly expands the law in this area – and the obligations of the workers' compensation insurer.

On cross motions for summary judgment, the trial court rejected the insurer's position that bad faith could not occur without a denial of payment and found that, as a matter of law, the insurance company had no reasonable basis for denying that the claimant was permanently totally disabled or that a partial commutation was in his best interest.

The Supreme Court (Justice Waterman) considered the workers' compensation bad faith claim to be in the first-party context, namely, similar to a claim of bad faith denial of health insurance payments, disability payments, underinsured benefits, or property loss. To establish the claim, the plaintiff must show "(1) that the insurer had no reasonable basis for denying benefits under the policy and, (2) the insurer knew, or had reason to know, that its denial was without basis." 897 at 461-62. However, in this case, the Court was challenged to identify a term or provision of the obligation of payment of workers' compensation benefits that had been denied or withheld. Can bad faith be proven without a specific break of a policy term?

Courts in other jurisdictions are divided "on whether bad faith can be proven without a specific breach of a policy provision." Some hold that if benefits "'are fully and promptly paid' there can be no bad faith 'no matter how hostile or egregious the insurer's conduct toward the insured may have been prior to such payment'." In essence, those courts hold that if the insurer's conduct does not affect the parties' contractual rights, there is no bad faith.

In contrast, other courts hold that bad faith is not a " "tortious breach of contract, but rather a separate and distinct wrong which results from the breach of a duty imposed as a consequence of the relationship established by contract. Therefore, the tort of bad faith allows an insured to recover even if the insurer performs the express covenant to pay claims.'" 897 N.W.2d at 464. In Iowa, prior case law held that to be liable for bad faith, a workers' compensation carrier must have 'denied' the injured worker benefits to which he was entitled. And then the Court held that "the requisite 'denial' may occur when an insurer unreasonably contests a claimant's PTD status or delays delivery of necessary medical equipment." 897 N.W.2d at 465. It was concluded that this "rationale comports with our long-held view that first-party bad faith arises out of the breach of the affirmative good-faith obligations 'that [our workers' compensation] statutes and administrative regulations place on the insurer.'" 897 N.W.2d at 495 (quoting *Boylan v. Am. Motorists Ins.,* 489 N.W.2d 742 (Iowa 1992).

After a careful review of the facts and the insurer's own tacit recognition that it had no facts to support an argument that the worker was not totally/permanently disabled, the Court concluded that the trial court's summary conclusion that the insured acted in bad faith in that regard was affirmed. The Court further concluded, however, that there were sufficient facts to support the insurer's decision to challenge the requested partial commutation. Relying on the contention that

a claim can be reasonably debatable on a point of law, the Court concluded that the insurer's conduct in challenging the entitlement to a partial communication was indeed reasonable.

VI. GENERAL LIABILITY POLICIES AND GOVERNING PRINCIPLES

Standard liability policies actually contain several types of coverage: indemnity, duty to defend, and medical payments. Indemnity coverage is that protection against the amount for which the insured might be found liable to a third party – the amount of a settlement or the amount of a judgment. In addition, however, the policies generally agree to provide a defense for claims against the insured, whether those claims are with merit or not. And finally, they generally contain a provision providing for medical payments to injured parties at your home, business or automobile, regardless of your fault of liability on your part. The medical payments provisions are often not used or recognized as valuable protection to an insured.

The following are general rules applicable to construction and interpretation of insurance policies and the principles arise frequently:

- It is axiomatic that in construing and interpreting a contract, it is the intent of the parties that must control. Iowa R. App. P. 6.14(6)(n).
- It is equally widely recognized that specific terms addressing the same issue as more general provisions will be given precedence. As the Iowa Supreme Court stated in *Small v. Ogden*, 259 Iowa 1126, 1131, 147 N.W.2d 18, 21 (1966), "In this connection we have a well-established rule of construction that where in a contract there are general and special agreements referring to the same subject, the special controls." (citing *Schlosser v. Van Dusseldorp*, 251 Iowa 521, 526, 101 N.W.2d 715 (1960). See also, *Iowa Fuel & Minerals, Inc. v. Iowa State Bd. of Regents, 471 N.W.2d 859* (Iowa1991) (principle of contract construction provides that when contract contains both general and specific provisions on particular issue, specific provisions are controlling).
- Ambiguities are construed against the insurer as the author of the policy. It is a "fundamental rule" for interpreting insurance policies that when the meaning of a term in an insurance policy is ambiguous, it must be construed in the light most favorable to the insured. *Cincinnati Ins. Co.*, 522 N.W.2d at 839; *AMCO Ins. Co*., 518 N.W.2d at 334 ("When the meaning of terms of an insurance policy is susceptible to two interpretations, the one favoring the insured is adopted."); *Jensen*, 510 N.W.2d at 871; *A.Y. McDonald Indus., Inc*., 475 N.W.2d at 619; *North Star Mut. Ins. Co*., 402 N.W.2d at 454; *Rich v. Dyna Technology, Inc.*, 204 N.W.2d 867, 872 (Iowa 1973) ("Where insurance contracts are ambiguous, require interpretation, or are susceptible to equally proper constructions, the court will adopt the construction most favorable to the insured."); *The Travelers v. Mays*, 434 N.W.2d 133, 134 (Iowa Ct.App.1988) (quoting *Rich*). The reason underlying this rule is that insurance contracts are contracts of adhesion. *Joffer*, 574 N.W.2d at 306; *Cincinnati Ins. Co*., 522 N.W.2d at 839; *Jensen*, 510 N.W.2d at 871; *A.Y. McDonald Indus., Inc.*, 475 N.W.2d at 619.
- In interpreting a contract, the court will give effect to the language of the entire contract in accordance with its commonly accepted and ordinary meaning. *Lange v. Lang*, 520 N.W.2d 113, 119 (Iowa 1994).

- A contract is not ambiguous merely because the parties disagree over its meaning. *Tom Riley Law Firm, P.C. v. Tang*, 521 N.W.2d 758, 759 (Iowa App. 1994). However, it is ambiguous if, after the application of pertinent rules of interpretation to the insurance policy, a genuine uncertainty results as to which one of two or more meanings is the proper one. *Iowa Comprehensive Petroleum Underground Storage Tank Fund Board v. Federated Mut. Insurance Co.*, 596 N.W.2d 546 (Iowa 1999).
- The policy is to be construed as a whole, giving the words used their ordinary, not technical meaning, to achieve a practical and fair interpretation. *West Trucking Line, Inc. v. Northland Ins. Co.*, 459 N.W.2d 262, 263 (Iowa 1990).

VII. APPROPRIATENESS OF SUMMARY JUDGMENT

Disputes involving interpretation and construction of insurance policies, are particularly amendable to resolution by summary judgment. Interpretation of an insurance policy is the process of determining the meaning of the words used; construction of an insurance policy is the process of determining its legal effect. *Grinnell Mut. Reinsurance Co. v. Jungling*, 654 N.W.2d 530 (Iowa 2002). However, ***both*** construction and interpretation of an insurance policy are questions of law for the court and are not in the province of the jury. See, e.g., *Johnson v. Farm Bureau Mut. Ins. Co.*, 533 N.W.2d 203, 206 (Iowa 1995); *American Family Mut. Ins. Co. v. Peterson*, 679 N.W.2d 571 (Iowa 2004); *Lee v. Grinnell Mut. Reinsurance Co*., 646 N.W.2d 403 (Iowa 2002). The Court can resolve a matter on summary judgment "if the record reveals a conflict concerning only the legal consequences of undisputed facts." *Boelman v. Grinnell Mut. Reinsurnace Co*., 826 N.W.2d 494, 501 (Iowa 2013) citing *Pecenka v. Fareway Stores, Inc.*, 672 N.W.2d 800, 802 (Iowa 2003). Many insurance disputes are therefore amenable to resolution by summary judgment.

VIII. DUTY TO DEFEND

While the duty to defend and the duty to indemnify are somewhat interdependent, the duty to defend is broader than the duty to indemnity. For insureds, this is very good news because the cost of defense of a claim is often equal to or greater than the indemnity value of the claim against the insured. The most-often cited case articulating the principle in Iowa is *Employers Mut. Cas. Co. v. Cedar Rapids TV Co.*, N.W.2d 639 (Iowa 1996) wherein the Court stated:

> An insurer's duty to defend is ***separate*** from its duty to indemnify; the duty to defend is ***broader*** than the duty to indemnify. The duty to defend arises 'whenever there is potential or possible liability to indemnify the insured based on the facts appearing at the outset of the case." (citation omitted) In other words, the duty to defend rests solely on whether the petition contains any allegations that arguably or potentially bring the action within the policy coverage. If any claim alleged against the insured can rationally be said to fall within such coverage, the insurer must defend the entire action. In case of doubt as to whether the petition alleges a claim that is covered by the policy, the doubt is resolved in

> favor of the insured. *A.Y. McDonald Indus., Inc. v. Insurance Co. of N. Am.*, 475 N.W.2d 607, 627 (Iowa 1991) (en banc) (citations omitted) (emphasis added).

Because a plaintiff's basis of recovery is necessarily to some extent indeterminable until a case is tried, the duty to defend arises:

> whenever there is potential or possible liability to indemnify the insured based on the *facts* appearing at the outset of the case. In other words, *the duty to defend* rests *solely on whether the petition contains any allegations that arguably or potentially* bring the action within the policy coverage. If any claim alleged against the insured can rationally be said to fall within such coverage, the insurer must defend the entire action. *In case of doubt as to whether the petition alleges a claim that is covered by the policy, the doubt is resolved in favor of the insured.*

United Fire & Cas. Co. v. Shelly Funeral Home, Inc., 642 N.W.2d 648, 656-57 (Iowa 2002) (citations and quotations omitted).

To the same effect, *see e.g., United Fire & Cas. Co. v. Gethmann Constru. Co.,* 872 N.W.2d 407 (Iowa App. 2014); *McAndrews v. Farm Bureau Mut. Ins. Co.*, 329 N.W.2d 117 (Iowa 1984); *West Bend Mut. Ins. Co. v. Iowa Iron Works, Inc.*, 503 N.w.2d 596 (Iowa 1993); *Maxim Techs., Inc. v. City of Dubuque,* 690 N.w.2d 896 (Iowa 2005).

While the language is very broad and the quotations appear definitive, there are nuances to the duty to defend that have been added and/or more clearly articulated over time. Note, for example:

A. There are circumstances in which there is no duty to defend:

"'When a claim against the insured is based on facts which show that it is outside the scope of the coverage afforded by the policy, the insurer is justified in refusing to defend the action. Such refusal does not constitute a breach of the policy provisions and does not subject the insurer to any legal liability. This rule applies even though the policy provisions require the insurer to defend groundless, false, or fraudulent suits. Such provisions do not require the insurer to defend when the claim is based on facts which show it to be outside the scope of the coverage.'"

Inghram v. Dairyland Mut. Ins. Co., 178 N.W.2d 299, 302 (Iowa 1970) (quoting 1 Long, The Law of Liability Insurance, section 5.03).

Similarly, as the Supreme Court Stated in Weber v. IMT Ins. Co., 462 N.S.2d 283, 285 (Iowa 1990), "[t]he insurer has no duty to defend if after construing both the policy in question, the pleadings of the injured party and any other admissible and relevant facts in the record, it appears the claim made is not covered by the indemnity insurance contract." quoting *McAndrews,* 349 N.W.2d at 119, in turn, citing *Central Bearings Co. v. Wolverine Ins. Co.,* 179 N.W.2d 443, 445 (Iowa 1970)).

B. The duty to defend can now clearly be based upon facts other than those alleged in the petition.

As noted above, the initial cases governing the duty to defend stated that the determination was to be made based upon the allegations in the petition or complaint. That has been broadened. Note the following from *Talen v. Employers Mut. Ins. Co.*, 703 N.W.2d 395, 405-06 (Iowa 2005):

> Talen and the Vinton bank contend that Employers may not avail itself of the employment-related-practices exclusion in the present case because the allegations of Pearson's petition setting forth his defamation claim did not identify what was said in Talen's conversations with the owner and executive officer of the Oelwein bank. The petition only alleged that what was said was disparaging towards Pearson. Thus, Talen and the bank argue, it may not be assumed that the alleged disparagement related to Pearson's performance as an employee of the bank. We have recognized that it is permissible for a liability insurer, in determining whether to accept a tendered defense to consider facts beyond the allegations of the petition. *McAndrews v. Farm Bureau Mut. Ins. Co.*, 349 N.W.2d 117, 119 (Iowa 1984).
>
> In *McAndrews* we stated this principle as follows: "The scope of inquiry, however, must sometimes be expanded beyond the petition, especially under 'notice pleading' petitions which often give few facts upon which to assess an insurer's duty to defend." Id. Quoting from an earlier case, we stated that an insurer has no duty to defend "if after construing both the policy in question, the pleadings of the injured party *and any other admissible and relevant facts in the record*, it appears the claim made is not covered by the indemnity insurance contract." *Id.* (quoting *Cent. Bearings Co. v. Wolverine Ins. Co.*, 179 N.W.2d 443, 445 (Iowa 1970)). We find this principle to be especially relevant when the basis for withholding coverage is a policy exclusion the application of which is not readily ascertainable from the allegations of the petition and will not necessarily be determined in the tort litigation. (citation omitted)." (emphasis added).

C. Determination is to be made upon facts currently available but is subject to repeated review.

Under Iowa law, an insurance carrier need not, "read between the lines" or be clairvoyant enough to assume factual allegations that might be raised later in order to find coverage. In *First Newton National Bank of Missouri Valley v. Fidelity & Deposit Company of Maryland*, 545 N.W.2d 332, 335 quoting *McAndrews v. Farm Bureau Mut. Ins. Co*., 349 N.W.2d 117, 119 (Iowa 1984), the court stated: "On the other hand, an insurer is not required to provide a defense when no facts presently available to it indicate coverage of the claim merely because such facts might later be added by amendment or introduced as evidence at trial."

IX. BURDEN OF PROOF

Initially, the burden of proof lies with the insured. If it is a property loss, it is the burden of the insured to prove both the property and the peril were covered under the terms of the policy. If it is a liability claim under a Commercial General Liability policy, it is the obligation of the insured to prove that there was an occurrence and a covered loss. See, e.g., However, once the insured has "established a prima facie case, '[t]he burden of proving that coverage is excluded by an exclusion or exception in the policy rests upon the insurer.'" *W. Bend Mut. Ins. Co. v. Iowa Iron Works, Inc.*, 503 N.W.2d 596, 598 (Iowa 1993). The insured must not exclude all exclusions in order to meet its obligation and establish a prima facie case.

Regardless of the carrier of the burden, the standard of proof is preponderance of the evidence, absent any higher burden required by statute.

X. CHOICE OF LAW

With increasing societal mobility and ease of travel, issues concerning choice of law governing insurance disputes are becoming increasingly frequent and of greater significant.

The choice of law rules of the forum will be applied. *Hussemann ex re. Ritter v. Hussemann*, 847 N.W.2d 219, 222 (Iowa 2014).

The Iowa Supreme Court has repeatedly relied upon the Restatement to analyze choice of law issues and has consistently applied the criteria reflected in its second edition. *See, e.g., Veasley v. CRST Int'l., Inc.*, 553 N.W.2d 896, 897 (Iowa 1996) (noting, in the context of a personal injury case, that "[w]e now follow the Restatement's 'most significant relationship' methodology for choice of law issues." (citations omitted)); *Cameron v. Hardisy*, 407 N.W.2d 595, 597 (Iowa 1987) ("Iowa has adopted the 'modern' choice of law rules [with respect to tort issues] ...."); *see also Grove v. Principal Mut. Life Ins. Co.*, 14 F.Supp. 2d 1101, 1106 (S.D.Iowa 1998) ("Iowa has adopted the Second Restatement of Conflicts as its choice-of-law provision."); *Harlan Feeders, Inc. v. Grand Labs., Inc.*, 881 F.Supp. 1400, 1405 (N.D. Iowa 1995) ("Iowa applies the 'most significant relationship test' to conflict-of-laws or choice-of-law questions involving either contract or tort claims.").

The Court specifically adopted the Restatement, section 188 as the guiding principle in Iowa in an insurance case governing the application of a commercial general liability policy. *Cole v. State Auto. & Cas. Underwriters*, 296 N.W.2d 779, 781 (Iowa 1980) ("We think it is clear that choice-of-law questions [involving contract issues] are now to be determined under the Restatement (Second) test: intent of the parties or the most significant relationship."); *Gabe's Construction. Co., Inc. v. United Capitol Ins. Co.*, 539 N.W.2d 144, 146 (Iowa 1995) ("We determine choice-of-law issues in insurance policy cases by the intent of the parties or the most significant relationship test.")

In keeping with the general principle that all contract interpretation is designed to ascertain the intent of the parties, it is first necessary to review the contracts for the purpose of determining whether or not the parties agreed to be governed by the law of any particular state. Restatement, section 187; *Cole* v. *State Automobile & Casualty Underwriters*, 296 N.W.2d 779, 781 (Iowa 1980). Most policies, however, will not include any stated agreement with regard to the governing law (the exception generally being large commercial contracts negotiated between parties of more equal bargaining power). That leaves us seeking alternate methods of determination.

Restatement section 188 provides as follows:

> (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, ***with respect to that issue***, has the ***most significant relationship*** to the transaction and the parties under the principles stated in section 6.
>
> (2) In the absence of an effective choice of law by the parties . . . the contracts to be taken into account in applying the principles of section 6 to determine the law applicable to an issue include:
>
> a) the place of contracting,
> b) the place of negotiation of the contract;
> c) the place of performance;
> d) the location of the subject matter of the contract, and
> e) the domicile, residence, nationality, place of incorporation and place of business of the parties.
>
> ***These contracts are to be evaluated according to their relative importance with respect to the particular issue.*** (Emphasis added).
>
> (3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in sections 189-199 and 203.

Iowa has focused on the portions of the Restatement that make determination of the appropriate law highly dependent upon the nature of the matter to be addressed. See, e.g., *Joseph L. Wilmotte & Co. v. Roseman Bros.*, 258 N.W.2d 317 (Iowa 1977) wherein the Iowa Supreme Court stated:

> Section 188 of the Restatement has reference to the "most significant relationship" rule to determine the law to be applied with respect to the rights and duties of the parties under a contract where the contract did not make an effective choice as to which state law should be applied in construing or enforcing the contract. In determining which state has the most significant relationship ***to the issue in question*** various contacts with the different states are determined.
> . . . . .

> However, this analysis would be specious in that it would not require one to make a determination of the most significant relationship with respect to the particular issue in dispute, but to take an overall view of the entire contract relationship of the parties.
>
> (Emphasis added). 258 N.W.2d at 326.

Iowa and the majority of states distinguish between the location of the occurrence that gave rise to the tort for which coverage is sought and the law applicable to the interpretation of the policy itself. *See, e.g.*, *Mill's Pride, Inc. v. Continental Insurance Company*, 300 F.3d 701 (6th Cir. 2002), wherein the Court stated:

> Unlike the dispute in *International Insurance*, which involved a question of coverage for an insured's liability to a tort plaintiff, the dispute in this case involves the effect to be given policy language that sets out an insured's duties to its insurer in the event of an occurrence. Specifically, the dispute involves policy language that requires Plaintiffs (1) to give timely notice of claims to Continental, (2) to immediately send Continental copies of any legal papers received in connection with a claim, (3) to cooperate with Continental in the investigation, . . . Such language was knowingly and intentionally included in the parties' insurance contract, a contract negotiated at arms-length primarily in Ohio where, according to the parties, performance of an insured's duties to its insurer is treated as a condition precedent to coverage under the policy. . . . Indeed, the only thing that ties this case to Michigan is an underlying tort case that was filed in Michigan and that has already been settled to the Michigan plaintiff's satisfaction." 300 F.3d at 708-09.

There was an interesting case from the Iowa Court of Appeals addressing conflict of law provisions this year. In *Bluescope Bldgs. N. Am., Inc. v. Cincinnati Ins. Co*., 2017 WL 706311 (Iowa Ct. App., February 22, 2017), the parties agreed on the law to be applied to the coverage dispute. Almost.

The facts: Concept Builders, based in Iowa, worked as a subcontractor to erect a metal building at a dairy farm in Minnesota. The building collapsed and the building owner's insurer, Travelers, paid for the property loss and then sought recovery against the buildings general contractor, BlueScope Buildings, and Concept, the subcontractor. The parties ultimately settled the litigation and agreed that the collapse of the farm buildings was due to the failure of both contractors.

Concept Builders was insured by Cincinnati Insurance Company. Presumably the policy was issued in Iowa as the parties stipulated that Iowa law applied to the construction and interpretation of the insurance policy. Cincinnati filed suit to determine the extent of coverage and BlueScope, as assignee of the insured's rights under the policy, became the adverse party.

The court ultimately entered judgment against Cincinnati for approximately $440,500 and correspondingly applied the Iowa interest rate to the judgment. BlueScope objected, contending

that Minnesota law should govern the interest rate calculation as (surprise) the Minnesota rate of interest was higher. The Court of Appeals was not amused by the argument, stating:

- It was questionable whether BlueScope properly pleaded and offered proof of the Minnesota statute as required, but it was assumed for purposes of the analysis.
- BlueScope cited no authority in support of its position that one state's law should govern the contractual rights of the parties, but the interest rate calculation should be governed by another and "we will not undertake a party's research."
- "Because the parties agreed Iowa law governed the court's interpretation of the CGL policy, Iowa law also governs the interest on the Iowa judgment."
- The "smorgasbord approach" by which a party shops or tries to "pick and choose between the laws of two states to its own advantage" was soundly rejected.

XI. UNINSURED/UNDERINSURED

In analyzing uninsured and underinsured cases, it is important to recognize the difference between the two coverages as espoused by the Iowa Supreme Court in *Veach v. Farmers Ins. Co.*, 460 N.W.2d 845 (Iowa 1990):

> The purpose of uninsured motorist coverage is to insure minimum compensation to victims of uninsured motorists. The goal of underinsured motorist coverage on the other hand is full compensation to the victims to the extent of the injuries suffered. We have adopted the "broad coverage" view of underinsured motorist coverage while taking a "narrow coverage" view of uninsured motorist coverage. This means that benefits that are duplicative in the uninsured motorist context are not necessarily so in the underinsured motorist context. 460 N.W.2d at 848.

Iowa Code Section 516A.1 mandates that uninsured/ underinsured benefits be provided unless specifically rejected in writing by the insured. The Iowa law prevails over the policy language. *Rodman v. State Farm Mutual Ins. Co.*, 208 N.W.2d 903 (Iowa 1973). Also, *see Preferred Risk v. Federal Mutual*, 611 N.W.2d 283 (Iowa 2000) (an employer's policy that attempted to afford UM/UIM coverage for some categories of insureds, but not others, is unenforceable unless the named insured complies with Section 516A.1). Iowa Code Chapter 516A does not require umbrella policies to provide UM/UIM coverage. *Jalas v. State Farm*, 505 N.W.2d 811 (Iowa 1993).

Once the UM claimant presents evidence that he or she used "all reasonable efforts" to ascertain the existence of any applicable liability insurance and was unsuccessful, then an inference may be drawn that the other vehicles were uninsured. The burden of going forward with affirmative evidence to the contrary then shifts to the insurer, although the ultimate burden of persuasion remains with the claimant. *Frunzar v. Allied Property and Casualty Ins. Co.*, 548 N.W.2d 880 (Iowa 1996).

Stacking is taking the limits of several insurance policies and essentially adding them together by staking the policies. Anti-stacking clauses are valid and enforceable unless the accident occurred

before July 1, 1991, or a suit on the UIM claim was filed before September 15, 1991. Iowa Code Section 516A.2 and 1991 Iowa Acts Ch. 213, Section 30, even where the various policies involved are issued by different insurers. *Barron v. State Farm,* 540 N.W.2d 423 (Iowa 1995); *Hernandez v. Farmers Ins. Co.*, 460 N.W.2d 842 (Iowa 1990); *Mewes v. State Farm Auto Ins. Co*., 530 N.W.2d 718, 724 (Iowa 1995).

An insured can sue an insurer directly on UIM claim to recover damages insured as "legally entitled to recover," and is not required to sue underinsured motorist separately to determine those damages. *Leuchtenmacher v. Farm Bureau Mut. Ins. Co*., 461 N.W.2d 291 (Iowa 1990). An insured is entitled to make a UIM claim without fully exhausting the liability limits of the at fault party's coverage. The insured can even accept an offer of judgment for less than the underlying liability limits and still present a UIM claim. *Hoth v. Iowa Mutual Ins. Co.*, 577 N.W.2d 390 (Iowa 1998). However, the insured would only be entitled to the difference between the total liability limits and his damages, subject to the underinsurance limits. *In re Estate of Rucker*, 442 N.W.2d 113 (Iowa 1989).

Where insureds settled for liability limits and released the at-fault party, but failed to get the underinsurance carrier's consent to the settlement, the carrier can plead a breach of the "consent to settle" provisions as an affirmative defense, but must prove prejudice, i.e., that they could have successfully collected via subrogation from the underinsured driver. *Grinnell Mut. Reinsurance Co. v. Recker,* 561 N.W.2d 63 (Iowa 1997); *Kapadia v. Preferred Risk Mutual Ins. Co.,* 418 N.W.2d 848 (Iowa 1988); *Hale v. Classified Ins. Co*., 535 N.W.2d 164 (Iowa App. 1985). Further, the insurer must prove the amount that could be realized from the tort feasor's assets toward the satisfaction of a subrogation judgment at the time reasonably close to when the insurer's subrogation interest would have arisen if not released by the insured. *Hoth v. Iowa Mutual Ins. Co.*, 577 N.W.2d 390 (Iowa 1998).

So what is covered in a UM/UIM claim? Property damages are not covered. *West Trucking Line v. Northland Ins.*, 459 N.W.2d 262 (Iowa 1990). Consortium claims are covered if the claimant is a covered person under the policy and the consortium claim arises out of a bodily injury to the spouse, even if the injured spouse is not a covered person. *Hinners v. Pekin Ins. Co.*, 431 N.W.2d 345 (Iowa 1988).