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IOWA DEFENSE COUNSEL ASSOCIATION

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Misnamed Corporate Entities and Iowa's "Relation Back" Rule: A Potential Sword for Defendants

by Kevin M. Reynolds, Whitfield and Eddy Law, Des Moines, Iowa

Kevin M. Reynolds

As a dedicated and hard-working defense lawyer and life-long member of the Iowa Defense Counsel Association (IDCA), you are busy at your desk putting the finishing touches on some carefully-worded and meritorious discovery objections. The telephone rings. It's a client. A new lawsuit has been filed. It involves a serious personal injury. You ask the client whether any pre-suit investigation has been done. The answer is "no," this involves an incident that occurred two years ago. Plaintiff's counsel is a well-known and respected personal injury lawyer in your locale. She has waited until nearly the last day of the two-year statute of limitations within which to file the action. "Hmm," you mutter to yourself, "she probably did that so the trail would be cold by the time my client even knew about the incident. She probably has all of her experts lined up and all of her 'ducks in a row.' The delay in filing suit also makes it more difficult to do an investigation, determine the facts, identify witnesses, gather documents and prepare a defense." Oh well, what's new!

Within a few minutes the suit papers are e-mailed to your desktop. You run the standard checks: Was suit filed within two years of the date of the incident? Is service of process proper? Is it

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WHAT'S INSIDE

IDCA President's Letter

Richard Whitty
IDCA President

Dear Colleagues,

On the drive home from the 52nd Annual Meeting of the Iowa Defense Counsel I reflected on the events of that week and wondered:

> *Does the IDCA provide sufficient value to justify each and every individual's annual membership dues?*

Over 180 members attended the Annual Meeting. In exchange, they received 12 hours of general continuing education credits, seven of hours Federal continuing education credits and two hours of ethics credits.

Several members attended the 7:00 a.m. networking breakfasts for such diverse groups as the Women in Law Committee, Past Presidents Breakfast, New Lawyers Committee, and the Editors of the *Defense Update*. Many more enjoyed the company of fellow practitioners at the State Historical Museum, as well as at the hospitality room. Several members received awards, all but one of which were well deserved. It is hard to imagine that any person walked away from the Annual Meeting not having met one new person and/or not having learned one new skill.

In addition to networking with other private practitioners, at the 52nd Annual Meeting, we had 26 insurance industry attendees. Their attendance helped them better identify the complexities associated with our respective professions and witness their counsel "*in action*" whether from behind the microphone, through questions or through any of the numerous conversations that took place during the breaks, over lunch or over a beverage of their choice.

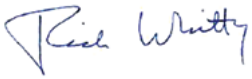
Speaking of the *Defense Update*, are you aware of any other volunteer organization that produces a finer newsletter? Chair Tom Read and his colleagues on the Board of Editors (Kevin Reynolds, Susan Hess, Stacey Cormican, Ben Patterson, Clay Baker and Brent Ruther), time and time again provide us with critical analysis of significant developments in the law.

In addition to the Annual Meeting, the Association provides other value. By the time you read this, your Association will have conducted a Deposition Bootcamp, designed for attorneys with five or fewer years of experience who are focused on improving their deposition skills, as well as two webinars. Our third webinar, "Ethics in the Digital Age," is scheduled for December 6 and is a great way to earn ethics CLE before year-end.

Your Association's Directors and Officers know that our Association competes with many other demands for your time, talents and treasure. For over half a century, the Association has delivered a recognizable and significant return on its members' investment. With your continued assistance, your Association will continue to do so and for this every member has a right to be proud.

Thank you for your attendance at our events. Thank you for your membership. Thank you for your service. And thank you for your collegiality and camaraderie.

Best personal regards.



Richard Whitty

In Memorium

Marion L. Beatty
1953–2016

Marion Beatty, age 63, of Decorah, Iowa, died Monday, August 29, 2016, at his home following a valiant 5-year battle with colon cancer.

Marion attended Luther College, where he met the love of his life, Peggy Hall, in a Shakespeare class. He received his Bachelor of Arts degree in 1975, graduating magna cum laude with degrees in English and History. Two days after graduating, Marion began law school at the University of Iowa. He was in the "accelerated" program at Iowa, graduating in 1977. Marion and Peggy were united in marriage on May 15, 1976 at First Presbyterian Church in Iowa City. In September, 1977, Marion returned to Decorah, where he began his legal career with the law firm of Miller, Pearson, Gloe, Burns, and Beatty, the firm he was with throughout his 39-year career.

In the early years of his law practice, Marion handled both criminal and civil cases. During the last 30 years, he focused primarily on civil litigation, handling both insurance defense and plaintiff's cases. Marion was a member of the), Iowa Defense Counsel Association (President 2000-2001), American College of Trial Lawyers, the Iowa State Bar Association (President 2006-2007), a Fellow of the Iowa Academy of Trial Lawyers (President 2010 American Bar Association, Minnesota State Bar Association, Winneshiek County Bar Association (President 1979), and a Life Fellow of the Iowa State Bar Foundation.

Some of Marion's honors and recognitions that reflect the respect he earned from his peers in the legal field include: the Iowa Defense Counsel Association's Meritorious Service Award (2014) and EDDIE Award (1994) and the Iowa State Bar Association's Award of Merit (2012). He was an AV preeminent rated lawyer, recognized as one of The Best Lawyers of America, Super Lawyers of Iowa, and Super Lawyers of the Great Plains.

Marion was honored with the Distinguished Service Award from his alma mater, Luther College in 2005. Marion's community service included serving on various boards and committees, including the Decorah Chamber of Commerce (President 1983), Winneshiek Medical Center Foundation board (Past President), Oneota Golf & Country Club (President 1994-1995), Silvercrest Golf & Country Club (President 1983), Winneshiek County United Way (former Chairperson), Winneshiek County Historical Society (Past President), and Rotary Club (Paul Harris fellow).

Marion is survived by his wife, Peggy; his son Benjamin Beatty (Arrilla) of Denver, CO, daughter Laura Newton (Samuel) of Cottage Grove, MN, and son Jeffrey Beatty (Mallory) of Coralville, IA; four grandchildren, and several family members.

IDCA members wishing to remember Marion may send a donation to: Winneshiek Medical Center Home Health and Hospice (901 Montgomery Street, Decorah, IA 52101), the Marion and Peggy Beatty Family Scholarship (Loyalty Hall, Luther College, 700 College Drive, Decorah, IA 52101), Decorah Lutheran Church (309 Winnebago Street, Decorah, IA 52101), or the Food Pantry at First Lutheran Church (604 West Broadway, Decorah, IA 52101).

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timely with respect to the filing of the suit, i.e., has it been done within 90 days? Are we in default? When is the answer or other response due? Are there any pre-suit motions? Has the plaintiff named the proper party defendant?

Upon further investigation, you note that your client, a corporation, is not properly named. They have sued "ABC Inc." but the name of your client is "ABC Co." You also learn that legal service of process was not made on your client until approximately two weeks after the suit was filed. At that time the statute of limitations had expired. You surmise that nevertheless, plaintiff can likely amend the Petition and state the proper name of the corporate defendant, and that the amendment will likely "relate back" to the date of the filing of the suit. If the case were filed in federal court and Fed. R. Civ. P. 15(c) applied, the amendment would relate back and plaintiff's case would be saved. However, if the case were filed in Iowa and Iowa R. Civ. P. 1.402(5) applied, the amendment would not relate back and Plaintiff's case would be subject to dismissal based on expiration of the statute of limitations.

This is essentially what happened in the unpublished Iowa Court of Appeals opinion in *Richardson v. Walgreens*, No. 4-036/03-0817, filed February 27, 2004. In *Richardson*, a plaintiff misnamed the corporate defendant in a suit, the statute of limitations for personal injury actions expired, and later, plaintiff sought to fix the error and have the amendment relate back to the original filing date. In *Richardson*, the trial granted a summary judgment of dismissal that was affirmed by the Iowa Court of Appeals, based on Iowa R. Civ. P. 1.402(5). Some defense practitioners may not be aware that the Iowa rule on relation back of amendments is distinctly different than the federal rule. This difference may be case determinative, and for this reason, the operation of Iowa's relation back rule is the focus of this article.

RICHARDSON v. WALGREENS: DISMISSAL WITH PREJUDICE FOR A MISNAMED DEFENDANT

In *Richardson*, an elderly Rose Richardson fell in a Walgreens store and fractured her ankle. Her husband, Ralph Richardson, sued for loss of consortium. Their counsel sued two entities, "Walgreens, Inc." and "Walgreens Properties, Inc." for personal injury damages based on premises liability and negligence. There was only one problem: the store in question was not owned or operated by "Walgreens, Inc." or "Walgreens Properties, Inc.," but instead was owned and operated by "Walgreen Co.," a Delaware corporation with a principal place of business in the State of Illinois.

The *Richardson* accident occurred on December 4, 2002. Suit was filed on December 3, 2004, nearly two full years after the accident. The Petition was filed with one day remaining in the applicable two-year statute of limitations governing personal injury actions in Iowa. *See* Iowa Code § 614.1(2)(2002). Walgreen Co., the proper defendant, was timely served with legal process but not until December 12, 2004, after the limitations period had expired. Walgreen Co. provided the trial court with an uncontroverted affidavit stating that, prior to December 4, 2004, it was unaware that the Richardsons had filed suit. Based on these facts, the trial court granted Walgreens a summary judgment and the case was dismissed. Plaintiffs filed an appeal. On appeal, the Iowa Court of Appeals concluded that "under the foregoing undisputed facts, it is clear the Richardsons failed to bring suit against the properly-named party within the two-year statute of limitations." Slip op., p. 3. The Iowa Court of Appeals affirmed the dismissal.

In *Richardson*, the Plaintiffs contended that Rule 1.402(5) was inapplicable because they did not seek to change the party defendant, but merely to correct the defendant's name. Slip op., p. 3. In some jurisdictions, a mere misnaming of a corporate party, referred to as a "misnomer," does not create a relation back or statute of limitations problem. Yet, this is not true in Iowa under its relation back rule, Iowa R. Civ. P. 1.402(5), and established caselaw. The appellate court in *Richardson* noted: "However, our supreme court has interpreted rule 1.402(5) as applying to misnomers as well as to wholly new parties." *See Grant v. Cedar Falls Oil Co.*, 480 N.W.2d 863, 866 (Iowa 1992) ("we reject plaintiffs' contention that rule [1.402(5)] only applies to amendments changing parties and not to amendments correcting names"). The plaintiffs in *Richardson* also attempted to distinguish *Grant* based on the fact that the names sued upon in that case were distinctly dissimilar. The *Richardson* court answered this argument by noting in footnote 3 of the opinion that "a petition that misnames a defendant 'does not serve to effectively bring the claim against the proper party.'" The court concluded by stating "[t]hat concern remains even when the two names are similar."

Finally, the plaintiffs in *Richardson* made two additional arguments. First, they argued their claims were not barred because Walgreen Co. uses a commonly-known tradename, "Walgreens," and that plaintiff sued them under their tradename; and second, that Walgreens should be estopped from arguing that it was sued under the wrong name, since it uses the tradename "Walgreens." The court dismissed these arguments by noting that the suit did not name "Walgreens" as the party defendant. Instead, plaintiffs had only sued "Walgreens, Inc." and "Walgreens Properties, Inc." The court said that even if plaintiff had sued just the name "Walgreens," rule 1.402(5) would still apply. The court then cited to *Guiterrez v. Wal-Mart Stores, Inc.*, 638 N.W.2d 702, at 706 (2002) for additional support. In *Gutierrez*, the Iowa Supreme Court concluded that an amendment from "WALMART" to "Wal-Mart Stores, Inc." related back to the time of filing, since

the agent of the corporation had received notice of the suit within the limitations period. In *Richardson*, the correct party defendant, Walgreen Co., did not receive notice of suit until after the limitations period had expired.

RULES GOVERNING THE RELATION BACK OF AMENDMENTS CHANGING THE PARTY TO BE SUED OR THE NAME OF A PARTY TO BE SUED

Iowa's relation back rule is Iowa R. Civ. P. 1.402(5), which provides as follows:

> An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party, the party to be brought in by amendment has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

This rule was based on (and is identical to) the former federal rule on relation back that was used prior to the 1991 amendments to the federal rules. However, the current federal rule on relation back is distinctly different.

Fed. R. Civ. P. 15(c) provides as follows:

> ***When an amendment relates back***. An amendment to a pleading relates back to the date of the original pleading when
>
> (C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:
>
> (i) received such notice of the action that it will not be prejudiced in defending on the merits; and
>
> (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

The federal rule governing relation back of amendments applicable to misnamed parties was amended in 1991 to specifically avoid what some thought was a "harsh" result in *Schiavone v. Fortune*, 106 S.Ct. 2379 (1986). Amended Rule 15(c) differs from the Iowa rule in several respects. It applies to situations where a party is misnamed by the use of a misnomer, but also applies where the wrong party has been sued and claimant attempts to bring a "new" party into court. The amended federal rule also omits the terms "institution of the action" and replaces that language with a test defined by the time period allowed for service. This allows a plaintiff, who has waited until the statute of limitations has nearly expired, extra time to get the correct party in the suit so long as service is effected within the time permitted by the service rules. In federal court under Rule 4(m) as amended on December 1, 2015, that time period is 90 days. In state court the time for service is also 90 days. *See* Iowa R. Civ. P. 1.302(5). If service is not effected within this time and good cause for the delay is not demonstrated, the case is subject to dismissal. *See, e.g., Palmer v. Hofman*, 745 N.W.2d 745 (Iowa Ct. App. 2008).

In *Schiavone* the Court upheld the dismissal of an action with a misnamed defendant based on the express language of the Rule, when the defendant did not have knowledge of the pendency of the action within the applicable limitations period. The result in *Schiavone* was consistent with the result in *Richardson* in the Iowa Court of Appeals.

SCHIAVONE V. FORTUNE

Schiavone was a libel case. Plaintiffs filed suit in federal court in New Jersey and claimed they had been defamed in a cover story entitled "[T]he Charges Against Reagan's Labor Secretary," which appeared in the May 31, 1982, issue of Fortune magazine. The caption of each complaint (there were three plaintiffs, whose cases had been consolidated on appeal) named "Fortune," without embellishment, as the defendant. "Fortune," however, was only a trademark and the name of an internal division of Time, Incorporated, a New York corporation.

Plaintiff's counsel mailed the complaints to Time's registered agent for service of process. The complaints were received on May 23, 1983, but the agent refused service because Time was not named as a defendant. Later, on July 18, 1983, each plaintiff amended their complaint to name as the captioned defendant "Fortune, also known as Time, Incorporated" and the body of each amended complaint contained similar references to Time. The amended complaints were served on Time by certified mail on July 21, 1983.

Time moved to dismiss the complaints and the district court granted those motions. Under New Jersey substantive law, a libel action must be commenced within one year of the alleged libel. Although Time admitted that the original filings were within the limitations period, it took the position that it could not be named as a party after the period had expired. Time contended that a

party must be substituted within the limitations period in order for the amendment to relate back to the original filing date pursuant to Rule 15(c). The district court reasoned that the amendments did not relate back to the original filing of the complaints because it had not been shown that Time received notice of the filing of the suits within the limitations period.

On appeal to the Third Circuit, the court affirmed the orders of the district court and ruled that the statute of limitations ran at the latest on May 19, 1983, because a "substantial distribution" of the May 31, 1982, issue had occurred on that date. It also regarded the language of Rule 15(c) to be "clear and unequivocal. 750 F.2d, at 18. It also said: "While we are sympathetic to plaintiff's arguments, we agree with the defendant that it is not this court's role to amend procedural rules in accordance with our own policy preferences." *Ibid.* The Petitioners then sought review in the U. S. Supreme Court, and "because of an apparent conflict among the Courts of Appeal," 477 U.S. 21, at 22, certiorari was granted.

In a 6-3 decision authored by Justice Blackmun, the Supreme Court affirmed the dismissal of the cases, based on the express language of Rule 15(c). After reiterating the factual chronology and relevant dates of filing and service which were not in dispute, the Court noted:

> We do not have before us a choice between a "liberal" approach toward Rule 15(c), on the one hand, and a "technical" interpretation of the Rule, on the other hand. The choice, instead, is between recognizing or ignoring what the Rule provides in plain language. We accept the Rule as meaning what it says.

477 U. S. 21, at 30. The Court then concluded:

> The linchpin is notice, and notice within the limitations period. Of course, there is an element of arbitrariness here, but that is a characteristic of any limitations period. And it is an arbitrariness imposed by the legislature and not by the judicial process.

477 U.S. 21, at 32.

THE *SCHIAVONE* DISSENT: "MAGIC WORDS" AND "TRAPDOORS"

A strident dissent in *Schiavone*, authored by Justice Stevens and joined by Chief Justice Burger and Justice White, framed the issue in this manner:

> Certain principles are undisputed. If petitioners had filed their suits alleging that Fortune magazine libeled them on precisely the same date; had added the magic words "also known as Time, Incorporated" to the word "Fortune;" and had done everything else exactly the same, petitioners would be entitled to proceed with their legal actions. Because petitioners committed the "fatal" error, *ante* at 30, of identifying the defendant by its name of publication rather than its name of incorporation, however, the Court finds that they fell through a trapdoor—despite the fact that the magazine's publisher's agent contemporaneously noted his understanding that the suits were directed against the magazine published (Time, Incorporated) fully as much as if petitioners had included the magic words.
>
> In my view, the Court's decision represents an aberrational—and, let us hope, isolated—return to the "sporting theory of justice" condemned by Roscoe Pound 80 years ago. The Court's result is supported neither by the language nor purposes of the Federal Rules, or of Rule 15(c) in particular.

477 U.S. 21, at 32-33. The dissent argued several points. First, the then federal rule governing time for service of process, at that time Rule 4(j), was met, since it allowed 120 days after filing for service of process. Second, the dissent noted that the suit papers were served on Time's registered agent, and were forwarded to Time's legal counsel with the notation:

> Remarks: Discrepancy in corporate title noted. Letter from atty. indicates papers are for Time, Incorporated as publisher of Fortune. Service was made by mail pursuant to Rule 4(c) of the Federal Rules of Civil Procedure.

477 U.S. 21, at 34. Next, the dissent noted that there "is no suggestion that [the amendment] did cause, or could have caused, Time, Incorporated any prejudice in maintaining its defense on the merits of the case." On this point, the dissent summarized:

> The only question is whether Rule 15(c) should be construed to render petitioner's complaints untimely even though they were filed within the statute of limitations and even though Time, Incorporated, clearly had adequate notice of the timely filed complaints.

477 U.S. 21, at 34. Continuing, the dissent argued that the amendments at issue did not "change the party against whom a claim is asserted," and thus the express language of Rule 15(c) did not apply in this instance. Finally, the dissent argued that the Rule could be interpreted to encompass the time permitted for service of process on a defendant in construing the terms "the period provided by law for commencing the action against him." 477 U.S. 21, at 37.

In 1991, Rule 15(c) was amended to avoid the result in *Schiavone v. Fortune*. *See* Advisory Committee Notes, 1991 Amendment, Paragraph (c)(3)("The paragraph has been revised to change the result in *Schiavone v. Fortune* with respect to the problem of a misnamed defendant. An intended defendant who is notified of an action within the period allowed by Rule 4(m) for service of a summons and complaint may not under the revised rule defeat the action on account of a defect in the pleading with respect to a defendant's name.").

Notwithstanding *Schiavone* and the federal rule amendments, Iowa's relation back rule, worded identically with the former federal Rule 15(c), persists. Iowa is not alone, however; approximately sixteen states and Puerto Rico have relation back rules that are either identical in language or are the functional equivalent of Iowa Rule 1.402(5).

STRATEGIC DEFENSE CONSIDERATIONS REGARDING RELATION BACK

The "harsh" result in *Richardson* was, to a large extent, self-imposed by plaintiff's counsel: the dismissal would not have happened if the plaintiff had diligently investigated the owner and operator of the store prior to filing suit. He had a full two years to do so. Another way to avoid this calamity would have been for plaintiff's counsel to not wait until the two year statute of limitations had nearly expired before filing the case. The problem he brought about was twofold: he waited too late to sue, and then sued the wrong defendant. In *Richardson*, if counsel had filed the case with a month or two left in the statute, Walgreens would have been served with notice of suit before the limitations period had expired, and any amendment to change or correct the name of the party-defendant would have related back to the initial filing of the suit under the current version of Iowa Rule 1.402(5). Since some IDCA members may occasionally dabble in plaintiff's work, they should know the potential effects of Rule 1.402(5) pertaining to relation back as it may relate to their claimants' cases.

What if before suit is filed, the claimant and/or their attorney is engaged in settlement negotiations with the putative defendant's insurance carrier? Does this constitute notice such that relation back under the Iowa rule will apply? The answer under Iowa law is clearly "no." Notice of a *claim* held by a potential plaintiff, or discussions between a claimant or claimant's attorney and a potential defendant or that defendant's liability insurance carrier, does not equate to "*notice of the institution of the action*" under Rule 1.402(5). This is an important point. In many cases a potential defendant, insured or insurer will have knowledge of a claim or potential claim, through pre-suit negotiations; yet, in order for relation back to apply, the defendant must have knowledge "of the institution of the action," i.e., the actual filing of a lawsuit. *See Alvarez v. Meadow Lane Mall Limited Partnership*, 560 N.W.2d 588 (Iowa 1997); *Jacobson v. Union Story Trust & Sav. Bank*, 338 N.W.2d 161, 164 (Iowa 1983)(notice of intention to bring suit is in no way tantamount to notice of its filing). This was not an issue in the *Richardson* case and nothing about *Richardson* changed this rule. Also, notice of a claim or potential claim to an insurer is not notice to its insured. *Id.*

A further consideration with respect to the relation-back rule in Iowa may apply to those cases where jurisdiction in federal court is available to a defendant. Where subject matter jurisdiction exists based on diversity of citizenship, *see* 28 U. S. C. § 1332, some defense counsel might prefer removing the case to federal court. This must be done relatively quickly, and within 30 days. *See* 28 U.S.C. § 1446(b). Defense counsel might prefer federal court in certain cases for a wide variety of reasons, for example: the application of *Daubert* and arguably stricter standards governing the admissibility of expert witness testimony; to some, federal courts may be thought to be more amenable to granting summary judgment motions; and in some venues, the federal court venire may be somewhat more conservative, with potential jurors drawn from outlying rural areas in the federal district, instead of only from urban areas that make up the entirety of some Iowa counties (e.g., Polk County). In any event, if federal court jurisdiction is an option in the particular case, the law of relation back in Iowa should be considered if the case is filed late in the limitations period and the plaintiff has misnamed or misidentified the defendant. This is because the issue of relation back may be case-dispositive, as it was true in *Richardson.*

Consider what the result may have been in *Richardson* had defense counsel removed the case to federal court, simply because the Plaintiffs were Iowa citizens, Walgreens was a Delaware corporation with a principal place of business in Illinois, and more than $75,000 was in controversy. Once removal was effected, any effort to get the case dismissed based on misnaming the corporate defendant would have been met headlong by federal Rule 15(c). Under the federal relation-back rule, the Plaintiff in *Richardson* would have [then] had 120 days under the service of process rule, Rule 4(m), within which to serve the proper defendant, and even more time than that if good cause for an extension of time for service could be shown. In *Richardson*, the correct defendant was served within two weeks of the filing of the suit. This would have been well within the timeframe contemplated by Rule 4(m). If *Richardson* had been removed to federal court, or if Plaintiff had filed the case in federal court at the inception, the case would have survived Plaintiff's error in identifying the correct defendant. But since the matter was filed in Iowa state court and defendant chose to keep it there, Iowa

R. Civ. P. 1.402(5) was applied to mandate a complete dismissal of the case. Of course, the whole problem for the Plaintiff in *Richardson* could have also been avoided had they not waited until the second-to-the-last-day of the statute of limitations within which to file the action, or had they properly researched the owner/operator of the store.

THE CASE FOR KEEPING IOWA'S RELATION BACK RULE ON MISNAMED OR MISIDENTIFIED DEFENDANTS

Some argue that Iowa's relation back rule should be liberalized and amended to conform with Fed. R. Civ. P. 15(c). This change would allow relation back even after the statute of limitations had expired, so long as the proper defendant learns of the suit within the time permitted for service of process. *See, e.g.,* Relation Back—To The Future: Conforming Iowa Rule of Civil Procedure 1.402(5) to Federal Rule of Civil Procedure 15(c), 60 *Drake L. Rev.* 263 (2011). In Iowa courts, both state and federal, the time permitted for service of process (absent a court-ordered extension based on a showing of good cause) is 90 days. *See* Iowa R. Civ. P. 1.302(5); Fed. R. Civ. P. 4(m).

On the other hand, a principled argument can be made that Iowa's current relation back rule should be retained. Several states have a relation back rule identical to Iowa's. There is a simple "elegance" of a rule that requires a claimant to give actual notice of a claim in order to be afforded relation back where the correct defendant has not been sued within the limitations period. Ordinarily, if a defendant has not been sued within the limitations period, the claimant is completely barred from any recovery. "Relation back" is a notable exception to that rule. In order to be entitled to the "exception," it is not too much to ask to require the claimant to identify and notify the correct party defendant before the limitations period has run.

Personal injury actions have a two-year limitations period. This is a significant length of time. Part of the reason for this length of time is to afford a claimant and her attorney a reasonable chance to do a proper investigation and learn whether a cause of action against a potential defendant exists. The only claimants who would be saved by a liberalized relation back rule would be those who drag their feet and wait until the very last minute to file suit, and do so while not having done their homework to determine who the proper party defendant is. The rules should not reward or incentivize dilatory and sloppy conduct. As the majority in *Schiavone* noted:

> "We cannot understand why, in litigation of this asserted magnitude, Time was not named specifically as the defendant in the caption and in the body of each complaint. This was not a situation where the ascertainment of the defendant's identity was difficult for the plaintiffs. An examination of the magazine's masthead clearly would have revealed the corporate entity responsible for the publication."

477 U.S. at 28. Simply because the limitations period is two years, does not mean that a plaintiff has to wait one year and 364 days before filing a case. All too often delay in filing suit is done on purpose in order to gain a strategic advantage by allowing the fact trail on the claim to run cold for the defendant, while plaintiff's counsel is preparing his case. The rules plainly require the proper party to be sued within the applicable limitations period. Many times the parties are engaged in pre-suit settlement negotiations and there is no doubt as to the proper defendant. If the proper party is unknown, pre-suit discovery can be conducted to find out the proper party. *See, e.g.,* Iowa R. Civ. P. 1.722. Finally, the rules should require a claimant to notify the proper defendant sooner, rather than later. An important public policy which undergirds limitations statutes is to give the putative defendant sufficient and timely notice of the action so they can locate witnesses and gather documents, and do this while memories are fresh and not stale.

CONCLUSION

Given Iowa's rule on relation back for misnamed or misidentified defendants, defense counsel should be sensitive to situations where a suit has been filed on the eve of the expiration of the statute of limitations and the wrong party has been sued or the wrong name for the corporate party defendant has been used. In some situations, well-illustrated by the unpublished Iowa Court of Appeals decision in *Richardson* and the prior U. S. Supreme Court decision in *Schiavone*, a case-dispositive motion may be in order.

Section 230 of the Communications Decency Act and its Nearly Impenetrable Protection for Websites

by Ryan F. Gerdes, McDonald, Woodward & Carlson, PC, Davenport, Iowa

Ryan Gerdes

With social media dominating every facet of our information-gathering lives, it is no surprise that many businesses, big and small, have taken to social media as a cheap and effective advertising tool. Many websites and social media accounts used by companies allow individuals to post comments that can be viewed by the public. These comments can form the basis for tort lawsuits—defamation, tortious interference with business advantage, etc. A plaintiff in such lawsuits may name as defendants both the individual that posted the comment and the business that operated the website or social media account. The question becomes, then, whether a business can be liable for the comments of third parties posted to its social media account. The answer, as examined below, is almost certainly "no," and defense counsel for such businesses should consider asserting the immunity provided by section 230 of the Communications Decency Act ("CDA").

In 1996, during the Internet's infancy, Congress passed the Communications Decency Act ("CDA") to address a host of issues regarding the regulation of tortious content on the Internet. While many of the provisions of the CDA have been struck down by courts as violations of the First Amendment, the immunity afforded by section 230 of the CDA has survived. *See Reno v. ACLU*, 521 U.S. 844 (1991) (finding certain CDA provisions to be unconstitutionally-overbroad limitations on protected speech). The relevant portion of section 230 provides the following: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230 (West 2016). With the Internet still in its developmental years when the CDA was passed, it was difficult for Congress to predict all potential applications of section 230 immunity. As outlined below, section 230 has generally been interpreted to provide nearly unfettered immunity for ISPs with regard to third-party tortious statements.

Courts have nearly unanimously found that Congress intended section 230 immunity to be applied in a broad fashion. In *Zeran v. Am. Online, Inc.*, the Fourth Circuit was confronted with a plaintiff who claimed he was defamed by a message on an online bulletin board that displayed his telephone number and advertised that plaintiff was selling offensive t-shirts. 129 F.3d 327, 329 (4th Cir. 1997). On numerous occasions the plaintiff requested that AOL, the company that maintained the message board, remove the post. *Id.* The plaintiff then filed a negligence action against AOL, claiming AOL failed to promptly remove the defamatory statements and failed to screen for further posts. *Id.* at 327–28. AOL asserted immunity under section 230 of the CDA. *Id.* at 330–31. The Fourth Circuit upheld section 230 immunity despite AOL having knowledge of the alleged defamatory comments. *Id.* The court reasoned that applying notice-based liability in such situations would impose an "impossible burden" on ISPs to monitor the limitless communication between Internet users. *Id.* Thus, the court in *Zeran* confirmed that a website's knowledge of defamatory material is irrelevant for purposes of section 230 immunity.

In order to ensure that a business maintaining a website is afforded the immunity provided by section 230 of the CDA, it is important for the business to avoid playing any role in the generation of third-party content on the website. Remember, while a business can obviously be held liable for statements that it posts on its website, such a business will only be liable for third-party comments when it is considered an "information content provider" of those comments. The CDA defines "information content provider" as anyone who "is responsible, in whole or in part, for the creation or development of information provided through the Internet." 47 U.S.C. § 230(f)(3).

When a website operator crosses the threshold from being an innocent host of third-party information and an "information content provider" has been the subject of much litigation. In *Fair Housing Council of San Fernando Valley v. Roommates.com*, the Ninth Circuit refused to extend immunity to a housing website that required subscribers to elicit profiles from users that divulged their "sex, sexual orientation, and whether [they] would bring children to a household." 521 F.3d 1157, 1175 (9th Cir. 2008). The court reasoned that the website "both elicit[ed] the allegedly illegal content and [made] aggressive use of it in conducting its business;" therefore, according to the court, it became an "information content provider" not subject to section 230 immunity. *Id.* at 1172. The Tenth Circuit also opted for a narrower reading of section 230 in *FTC v. Accusearch Inc.*, where the ISP at issue was a website that paid investigators to obtain private phone records that the website operator's knew to have been obtained illegally. 570 F.3d 1187, 1191–92 (10th Cir. 2009). The court refused to apply section 230

immunity, finding the website acted as an information content provider "[b]y paying its researchers to acquire telephone records, knowing that the confidentiality of the records was protected by law, it contributed mightily to the unlawful conduct of its researchers." *Id.* at 1200. The distinction in these cases seems to be that the website either encouraged or left the third-party no choice but to post the tortious material.

Despite the decisions in *Roommates.com* and *Accusearch Inc.*, website operators should not be afraid to edit, remove, or control third-party content for fear of losing their section 230 immunity. The CDA expressly bars lawsuits seeking to hold website operators liable for performing "traditional editorial functions—such as deciding whether to publish, withdraw, postpone, or alter content." *Zeran v*, 129 F.3d at 330. Several of the circuit courts have adopted the "material contribution test" to determine if a website operator has acted as a content provider with regard to third-party conduct, which looks to whether the website is "responsible for what makes the displayed content allegedly unlawful." *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 410 (6th Cir. 2014). One case where "traditional editorial functions" were at issue is the Sixth Circuit case, *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 402 (6th Cir. 2014), which involved a "tabloid website" that enabled third-party users to anonymously upload comments which the website then selected and published along with its own distinct, editorial comments. The website was sued for defamation by a plaintiff that was subject of defamatory comments posed by a third-party to the website. *Id.* The Sixth Circuit upheld section 230 immunity, finding that, despite the website selecting the defamatory statements for publication and refusing to remove the posts, it did not "materially contributed to the defamatory content of the statements." *Id.* at 415. Another instructive ruling on this issue can be found in the very recently decided Ninth Circuit case, *Kimzey v. Yelp! Inc.*, No. 14-35487, 2016 WL 4729492 (9th Cir. Sept. 12, 2016). In *Kimzey*, the plaintiff brought a defamation claim against Yelp after a third-party left a negative Yelp review of the plaintiff's business. *Id.* Finding Yelp did not act as a content provider by employing a five-star rating system that reflected the aggregate scores posted by users, the Ninth Circuit extended section 230 immunity to the online business review giant. *Id.* at *5.

With courts showing no signs of scaling back the scope of section 230 immunity under the CDA, businesses should continue to feel safe in operating a website or social media account that allows the submission of third-party content. Defense attorneys, too, should feel confident in asserting section 230 immunity in nearly all instances where a website operator is sued based on material posted by a third-party. "Passive" websites which play no role in editing or selecting third-party content have almost no exposure to liability resulting from that third-party content. Although there have been recent decisions where section 230 immunity has been denied even when the website was not the literal author of the tortious comments—namely, *Roommates.com* and *Accusearch Inc.*—those websites actively encouraged third-parties or left them no choice but to post infringing material, thus becoming "information content providers" under the CDA. Websites are even free to exercise editorial power, such as removing content or selecting it for publication, and remain immune under section 230 so long as it does not materially contribute to the tortious nature of the content. Put simply, absent an "active" website that plays an extraordinary role in eliciting or developing third-party tortious material, section 230 immunity is a comprehensive bar to liability for nearly all lawsuits against websites for content of third-parties.

Case Law Update: Contracts & Commercial Law

by Mitchell G Nass, Faegre Baker Daniels, Des Moines, Iowa

Mitchell Nass

***Baur v. Baur Farms, Inc.*, No. 14-1412, 2016 WL 4036105 (Iowa Ct. App. July 27, 2016).**

Why it matters: The case represents the most recent analysis of a claim for "oppression of a minority shareholder" and provides guidance concerning how to valuate shares of stock held in a closely-held corporation. The opinion also contains an application of the "reasonable expectations" test to a specific set of facts.

Summary: For nearly a decade, the owner of 26.29% of the shares of Baur Farms, Inc.—Jack Baur—has been pursuing claims of "oppression of a minority shareholder" and breach of fiduciary duties against the corporate entity and its majority shareholder. The claims are based on Jack Baur's efforts to sell his shares of Baur Farms, Inc. back to the company. Negotiations concerning the value of the shares broke down after Jack Baur offered to sell his share of the company for $1,825,000 in August of 2007. After Baur Farms, Inc. failed to respond to Jack Baur's final offer, Mr. Baur filed suit.

The case has been appealed and remanded multiple times since the lawsuit was originally filed in 2007. The Iowa Supreme Court heard the case in 2013 and outlined the test applicable in claims of "oppression of a minority shareholder." *See Baur v. Baur Farms, Inc.*, 832 N.W.2d 663, 673 (Iowa 2013). Specifically, the Court held "[t]he determination of whether the conduct of controlling directors and majority shareholders is oppressive under section 490.1430(2)(b) and supports a minority shareholder's action for dissolution of a corporation must focus on **whether the reasonable expectations of the minority shareholder have been frustrated under the circumstances**." *Id.* at 674 (emphasis added). The Court also held "majority shareholders act oppressively when, having the corporate financial resources to do so, they fail to satisfy the reasonable expectations of a minority shareholder by paying no return on shareholder equity while declining the minority shareholder's repeated offers to sell shares for fair value." *Id.* The Court remanded the case and instructed the district court to enter a decision in accordance with the reasonable expectations standard. On remand, the district court concluded the value of Jack Baur's shares must be discounted to factor in their "liquidation value," and concluded his reasonable expectations were not frustrated because the fair value of his shares was less than the $1,825,000 he had offered.

On appeal, the Court of Appeals agreed it was proper to factor in the "liquidation value"—the discount in value of the shares assuming a complete liquidation of the entity's assets—when determining the fair value of the shares. In other words, it is proper to take into account the taxes and other costs that would result from liquidation of the corporation. Part of the rationale for this approach is that dissolution of the corporate entity is the default statutory relief if a minority shareholder prevails on his or her oppression claim.

Holding: The district court properly factored in the "liquidation value" of the shares when determining their fair value. Because the fair value was less than the $1,825,000 price at which Jack Baur offered to sell his shares, however, Mr. Baur did not prevail on his oppression claim.

***Sysco Iowa, Inc. v. University of Iowa*, No. 15-0999, 2016 WL 4384628 (Iowa Ct. App. Aug. 17, 2016)**

Why it Matters: The case addresses the novel issue of whether a services contract entered into between a private vendor and a public university, which contains information concerning costs and pricing, is subject to Iowa's Open Records Act. The opinion therefore has important implications for businesses that contract with public entities.

Summary: Sysco Iowa, Inc. (hereinafter "Sysco") entered into a contract with the University of Iowa for food distribution services in 2008. The contract contained information concerning how Sysco calculates "costs," a margin schedule for certain categories of products, and details of certain of Sysco's marketing programs. In 2014, the Cedar Rapids Gazette filed an open records request pursuant to Iowa Code Chapter 22, seeking information regarding the contract. Sysco filed a petition seeking to enjoin the University from producing the contract, asserting the contract included trade secrets and therefore met one of the exceptions to Chapter 22's

disclosure requirement. Sysco argued the public disclosure of the contract would give its competitors an unfair advantage, because the contract contained information concerning its bidding process and how it set pricing. In other words, Sysco's concern was that public disclosure would allow competitors to undercut Sysco in future bids for public contracts.

The district court reasoned that if the information contained in the agreement met the definition of confidential "information" under Iowa Code section 550.2(4), it was protected from disclosure under Iowa Code section 22.7(3). The court applied the test that the "information" must have "independent economic value" to fall within the ambit of Section 550.2(4). The court determined the contract at issue failed under this test, and accordingly dismissed Sysco's request for an injunction. Sysco in turn appealed the district court's decision.

The Court of Appeals proceeded through the same analytical framework utilized by the district court, but reached the opposite outcome. In material part, the court concluded that "[t]he relevant portions of the contract would, if disclosed, effectively provide competitors with a blueprint of Sysco's operating model not otherwise available to them . . . Sysco derives independent economic value in keeping that knowledge away from its competitors, who would be able to use the information to gain an unfair advantage in bids for future contracts." The clear harm faced by Sysco in the event of the contract's disclosure therefore justified enjoining the University from disclosing it pursuant to Iowa Code section 22.7(3).

Holding: The court held the contract between Sysco and the University of Iowa contained trade secrets exempt from disclosure under Iowa's Open Record Act. Accordingly, the Court of Appeals reversed the district court.

NEW LAWYER PROFILE

In every issue of *Defense Update,* we will highlight a new lawyer. This issue, we get to know McKenzie R. Hill of O'Connor & Thomas, P.C., in Dubuque, Iowa.

McKenzie graduated from the University of Iowa in 2009 with a Bachelor of Arts degree in Political Science. While at Iowa, McKenzie was a member of the Honors Program, was on the Dean's List all semesters and served as Community Service Chair in her sorority. In 2012, McKenzie received her Juris Doctorate with high honors from the Drake University Law School where she was a student attorney at the Drake Legal Clinic, an intern for the Honorable Anita L. Shodeen at United States Bankruptcy Court in the Southern District of Iowa, a research assistant to the former Dean of Drake University Law School, David S. Walker, and was awarded the CALI Award for the Highest Grade in Insurance Law. Upon graduation from law school, McKenzie was elected to membership in the Order of the Coif. She joined O'Connor & Thomas, P.C. in Dubuque in August of 2012 and is licensed in Iowa and Illinois. McKenzie has also been admitted to practice before the Northern and Southern U.S. District Courts of Iowa. McKenzie is the Chair of the Dubuque Civic Center Commission. She is also the District 1A representative for the Iowa State Bar Association's Young Lawyers Division, a member of the Iowa State Bar Association's Business Law Section Council and secretary for the Young Lawyers Division of the Dubuque County Bar Association. Her general practice includes, but is not limited to the areas of business law, bankruptcy, appellate advocacy, litigation, and real estate.

IDCA Welcomes 8 New Members!

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Renew Your Dues Online

In November, IDCA mailed your membership dues renewal notice. **You may renew you dues online for faster processing!** A receipt is sent to you automatically.

- **Log into www.iowadefensecounsel.org.** Once logged in, you will automatically be directed to the Member Home Page.
- **Click the "Renew Now" button** found on the left side of the page. Follow the steps for renewal.
- Once renewal is complete, Update your **Member Profile.**
  - Ensure your **contact information is correct** and includes your website
  - **Upload your professional photo.**
  - Under your photo, click Public Profile and **edit your Areas of Practice/Areas of Specialty.** This allows other IDCA members to find you. (The Public Profile is available to IDCA members only.)

IDCA has an exciting year ahead, and the Board of Directors and staff appreciate your continued support.

IOWA DEFENSE COUNSEL ASSOCIATION

52ND ANNUAL MEETING & SEMINAR
September 22–23, 2016
Stoney Creek Conference Center, Johnston, Iowa

IDCA: EDUCATION AND NETWORKING

IDCA held its 52nd Annual Meeting & Seminar, September 22–23, 2016, at the Stoney Creek Hotel & Conference Center in Johnston. More than 200 attendees heard from national and local speakers, networked, and met with exhibitors. The highlight of the event was the Thursday evening reception at the State Historical Building. The weather was perfect and everyone enjoyed wonderful food and views of the State Judicial Building and Des Moines' skyline.

THANK YOU TO OUR EXHIBITORS

IDCA thanks the following exhibitors for their time and contribution at this year's event. Learn more about exhibitors online.

CED Technologies, Inc.
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Exponent
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Minnesota Lawyers Mutual Insurance Co.
Rimkus Consulting Group
Ringler Associates
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Women in Law Breakfast

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And the Award Goes to…

The IDCA Awards and Annual Business Meeting Lunch was a ideal time for attendees to celebrate IDCA's successes and honor members who have worked hard to help IDCA continually move forward. Congratulations to this year's Award recipients!

Rising Star Awards

The Rising Star Award is bestowed upon IDCA members who have shown outstanding commitment and leadership in the organization and who have been members of the organization for five years or less. Rising Star nominations are from committee chairs and voted on for approval by the Board of Directors.

Andrea D. Mason, Lane & Waterman LLP, Davenport, IA

Joshua J. McIntyre, Lane & Waterman LLP, Davenport, IA

President's Award

This Award is in honor and recognition of superior commitment and service to IDCA.

Frank B. Harty, Nyemaster Goode, P.C., Des Moines, IA

Kami L. Holmes, Grinnell Mutual Reinsurance Company, Grinnell, IA

Lisa Simonetta, EMC Insurance Companies, Des Moines, IA

EDDIE Award

In 1988 Patrick Roby proposed to the Board, in Edward F. Seitzinger's absence, that the IDCA honor Ed as a founder and first president of IDCA and for his continuous, complete dedication to IDCA for its first 25 years by authorizing the Edward F. Seitzinger Award, dubbed "The Eddie Award." This award is presented annually to the IDCA Board member who contributed most to IDCA during the year. It is considered IDCA's most prestigious award.

Congratulations, Richard K. Whitty of O'Connor & Thomas, P.C., Dubuque, IA

Meritorious Service Award

This award is bestowed upon those who showed extreme dedication to the preservation and furtherance of the civil trial system in Iowa through professional and personal accomplishments. This year, IDCA honored two past presidents with the Meritorious Service Award.

Gregory M. Lederer of Lederer Weston and Craig, PLC in Cedar Rapids and Des Moines

James A. Pugh
Des Moines, IA

IDCA Gives Back

For a second year, IDCA partnered with the Food Bank of Iowa and asked each attendee to bring a monetary donation or five or more items to be distributed to food pantries across Iowa. Those who participated were entered into a drawing for a complimentary Annual Meeting registration.

IDCA is pleased to announce that we collected 1,800 meals during the Annual Meeting!

IDCA Schedule of Events

December 6, 2016

WEBINAR: ETHICS IN THE DIGITAL AGE
Noon–1:00 p.m.
Presented by Mark Hudson, Shuttleworth and Intersoll, P.L.C.
Cedar Rapids, IA
Register online, www.iowadefensecounsel.org

September 14–15, 2017

53RD ANNUAL MEETING & SEMINAR
Stoney Creek Hotel & Conference Center
Johnston, IA

The Defense Update Board of Editors is seeking a candidate for an open position.

The Board of Editors is responsible for developing content, soliciting articles, and editing *Defense Update*. The newsletter is published quarterly; the committee meets quarterly.

If you are interested in serving, please contact Editor-In-Chief, Tom Read, read@elderkinpirnie.com.