political, sociological, and psychological variables. As Judge Benjamin Cardozo wrote nearly half a century ago:

> There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs . . . which, when reasons are nicely balanced, must determine where choice shall fall. In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.[29]

Thus, within a healthy framework of individual and group diversity, the members of the Iowa supreme court discuss, debate, and decide the merits on each side of a legal controversy.

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[29] B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, 12-13 (1921).

SURVEY OF IOWA LAW

IOWA INSURANCE LAW

M. G. Woodroof III†

About eleven o'clock on the dark night of December 4, 1868, the steamship America, while ascending the Ohio river, near Warsaw, Kentucky, at a point about fifty miles below Cincinnati, collided with the descending steamboat United States. That collision was allegedly the result of barratry[1] on the part of the America's pilots.[2]

> The sharp bow of the America struck the United States, about three feet from the stem, on the larboard side, cutting through her side and deck timbers diagonally some thirty feet. The United States was discovered immediately after the collision to be on fire, above and on deck. As the America backed away from the United States, leaving a gap in the side of the latter of the width of the bow of the former, the injured boat immediately took water and sank to the bottom of the river. The deck of the boat was thus submerged and protected, but the cabins were consumed to the water's edge, within two or three feet of the deck.[3]

Both the America and the United States were owned by the United States Mail Line Company, Thomas Sherlock, Treasurer. The Globe Insurance Company was held liable to Sherlock, its policy insuring the United States from loss by fire, and sought recovery from Sherlock on the basis of subrogation of the claim of the United States against the America. The subrogation was unsuccessful because the court reasoned that Globe could proceed only upon the rights of the owners of the United States, and that because the owners of the United States, and the owners of the America were the same, the only rights to which Globe was subrogated were the rights of the United States Mail Line Company *against itself*, or no rights at all. True, Globe was subrogated to the rights of the United States; it was just that the United States' owners *had no rights* on these unique facts.

Some years later, on August 17, 1895, an engine of the Lake Erie & Western Railroad, allegedly as a result of the company's negligence in omitting to use a spark arrestor or other appliance to prevent the emission of

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[1] "Barratry", in this context, referred to gross negligence to the degree of criminal misconduct, and was based upon failure to observe the navigational rules established by Congress. For contemporary definitions see citations given in Globe Ins. Co. v. Sherlock, 25 Ohio St. 50, 54-55 (1874).

[2] The facts here paraphrased are contained in Globe Ins. Co. v. Sherlock, 25 Ohio St. 50 (1874), and its companion case, Germania Ins. Co. v. Sherlock, 25 Ohio St. 33 (1874).

[3] Globe Ins. Co. v. Sherlock, 25 Ohio St. 50, 52 (1874).

sparks from the locomotive, caused a fire to originate upon the land along the line belonging to the railroad. That fire spread to the adjoining land of one Falk, and consumed a grain elevator and the contained chattel property owned by Falk and insured by the Phoenix Insurance Company.[4]

In the ensuing controversy the railroad company contended that the statutory liability imposed upon it gave it an insurable interest in the property of others along the line of its road, and that it was therefore not liable to the Phoenix Insurance Company under the doctrine of subrogation. The Ohio court rejected that contention, however, and properly interpreted the rule in *Globe Insurance Co. v. Sherlock.*

> The rule that an insurer who has paid the loss resulting from a peril insured against may be subrogated to all the claims which the insured may have against any person by whose negligence the injury was caused, was recognized by this court in the *Globe Insurance Co. v. Sherlock.* . . . There is . . . no ground for the insistence that the rule was there stated in language appropriate to the facts presented by the case which was under consideration. It was not intended to place an arbitrary restriction upon the doctrine of subrogation. Under that doctrine one is substituted for another as creditor or possessor of property or any other rightful claim. When one is substituted to the rights of a creditor, it is to the end that a liability may be alleged and adjudged against him upon whom it should ultimately rest, and in favor of another by whom it has been discharged in the performance of any legal obligation. The right does not depend upon contract nor upon privity of obligation. The cases collected by Mr. Sheldon in his work on subrogation justify his statement that "The doctrine is broad enough to include every instance in which one party pays a debt for which another is primarily answerable, and which in equity and good conscience should have been discharged by the latter."[5]

It is unfortunate that the scholarship of the Circuit Court of Appeals, Sixth Circuit, in the case of *Builders & Manufacturers Mutual Casualty Co. v. Preferred Automobile Insurance Co.*,[6] was somewhat less precise. In that case, resulting from an automobile accident in which the injured parties executed releases upon settlement after a collision caused by the negligence of Dwight W. Hummon, the settlor insurance company attempted to recover, under the doctrine of subrogation, against Hummon's liability insurer. Hummon was engaged in hauling interstate freight in his own truck at the time of the accident, for the Buffalo and Ohio Transfer Co., and the latter's insurer had settled the claim. The court interpreted the transfer company's policy in the light of an Ohio statute requiring such companies to maintain a blanket policy covering public liability, and concluded that Hummon, whether he be employed or independent contractor, was a "named insured" under the policy. Therefore, they reasoned:

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[4] Lake Erie & W. R.R. v. Falk, 62 Ohio St. 297, 56 N.E. 1020 (1900).
[5] *Id.* at 304-06, 56 N.E. at 1023.
[6] 118 F.2d 118 (6th Cir. 1941).

> The Mutual Company paid its own liability for the thing against which it had directly insured the Transfer Company when the settlements were consummated. It was primarily liable under the policy, and made the payments either in recognition of its liability or as a volunteer. In neither case can it recover from its own insured the payment made under its contract of insurance.[7]

In short, an insurer cannot sue its insured on the basis of liability for negligence when the event insured against was agreed to be liability for negligence.

The court's reasoning is, of course, sound. Unfortunately, the *Globe Insurance Co. v. Sherlock* rule is that cited as authority for this entirely different proposition, the court apparently relying upon the similarity in language.

> The role that an insurer who has paid the loss resulting from a peril insured against may be subrogated to all the claims which the insured may have against any person by whose negligence the injury was caused by the negligence of the insured himself. Globe Ins. v. Sherlock, 25 Ohio St. 50. Cf. American Automobile Ins. Co. v. Powers, 291 Mich. 306, 289 N.W. 170; Lake Erie & W. R. Co. v. Falk, 62 Ohio St. 297, 306, 56 N.E. 1020.[8]

The other citations are as questionable as the first. The *Falk* case has been discussed, and in this context is possibly not worthy of the "cf." reference, but the 1939 *Powers* case is clearly cited incorrectly, as it is directly in point. There, as in the principle case, subrogation was denied because the plaintiff insurer was held to be directly responsible for insuring the judgment debtor against loss through liability for negligence. Indeed, the Michigan court in *Powers* relied upon its clear and sound reasoning, and stated, *without cite*, that the insurer had "paid and discharged the liability . . . of defendant Powers; and defendant Powers is, therefore, not liable to plaintiff in any amount."[9]

Both the aforementioned doctrines were applied in the Wisconsin case of *Culver v. Webb*, another automobile accident case.[10] Webb was tired, and asked Culver to drive for him; therefore, Culver was found to be acting as Webb's agent when his (Culver's) negligence caused the accident. Webb's insurer, admittedly liable for the damages, sought subrogation against Culver. Subrogation was denied by the court, with Justice Wickhem pointing out that under the omnibus clause of the policy "the company is as liable to protect Culver as it is to protect Webb."[11] This is obviously the *Powers* doctrine. This court furthermore held that the insurer could not recover from Culver on the basis of Webb's rights because the insurer's claim was limited to the amount of policy limits, and the insurer's obligation to protect Culver was limited by the same amount, even though the *Globe Insurance Co. v. Sherlock* doctrine was recognized and abrogated by the statement "[a]s between Culver and Webb,

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[7] *Id.* at 121.
[8] *Id.* at 121-22.
[9] American Auto. Ins. Co. v. Powers, 291 Mich. 306, 312-13, 289 N.W. 170, 172 (1939).
[10] 244 Wis. 478, 12 N.W.2d 731 (1944).
[11] *Id.* at 491, 12 N.W.2d at 737.

Culver as the negligent agent is liable to indemnify Webb."[12]

On similar facts in 1958, the Wisconsin supreme court, in the case of *Miller v. Kujak*, cited *Webb* as authority for the proposition that "it is settled law in this state that an insurer cannot recover by right of subrogation from his own insured."[13] Perhaps because the application of the doctrine was identical to the *Webb* case, the court did not reexamine the reasoning, but merely cited *Webb*, with a collateral reference to *Builders & Manufacturers Mutual Casualty Co.* and *Powers*, both of which are automobile accident cases in which the negligent party was found to be a direct insured of the liability insurer seeking subrogation.

The history in this area of the law, as developed in these six cases, is fairly clear. *Globe Insurance* presented the doctrine that subrogation to a party's rights *against himself* is no subrogation at all, and the limited nature of that proposal was reaffirmed in *Falk* in 1900. Thirty-nine years later, the *Powers* case became the vehicle for the entirely different doctrine that subrogation could not be based upon the very negligence against which the liability policy was intended to protect, and the court there, obviously recognizing that a new doctrine was involved, presented its decision without citation of authority, based upon the clarity of legal reasoning alone. The *Webb* case reaffirmed the *Powers* doctrine, supported both by a restatement of the reasoning and by a cite to *Powers*. And the Wisconsin court correctly applied the doctrine to the facts in *Kujak*, relying upon the *Webb* cite only. Throughout this development of the law, these six cases have relied upon cites only to each other.[14]

The Sixth Circuit Court of Appeals in the *Mutual Casualty Co.* case was first to cloud the issue, in 1941. Evidently confused by the similarity of the wording of the different doctrines of *Globe Insurance* and *Powers*, that court applied the *Powers* proposition correctly to the facts of its case, but relied upon citation of *Globe Insurance* as authority, mentioning *Powers* collaterally and including, for reasons known only to itself, a cite to *Falk*.

Hopefully, the subsequent opinions of the Wisconsin court in *Webb* in 1944 and *Kujak* in 1958 would have cleared the air and laid the confusion to rest. Unfortunately, the Iowa supreme court fell into the same trap in 1969, and, for the first time in this saga, with untoward results.

On or about October 28, 1964, the one-story newly constructed frame home of William and Selma Connor, just outside the city limits of Iowa City, Iowa, was destroyed by fire. Losses from that fire were $33,971.08, of which $25,348.66 represented damage to the structure. The fire was the result of

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12 *Id.*

13 4 Wis. 2d 80, 86, 90 N.W.2d 137, 140 (1958).

14 *Kujak* correctly cited *Webb* as direct authority. *Webb* discussed the issues and reached a reasoned conclusion, correctly citing *Powers* as additional support for the doctrine. *Powers* developed the doctrine independently without resorting to incorrect citations. *Builders & Mfrs. Mut. Cas. Co.* applied the doctrine correctly, but incorrectly cited *Globe Ins.* as authority, with incorrect *cf.* citations to *Powers* and *Falk*. *Falk* had correctly cited *Globe Ins.* and differentiated the facts of that case.

faulty installation of an electrical outlet in the screened-in porch of the home.[15]

The Connors were reimbursed by their fire insurer, and the insurer sought recovery, by way of subrogation, from the contractors. The insurer appealed from an adverse decision in Johnson County district court, and the Iowa supreme court affirmed, with regard to the $25,348.66 damage to the dwelling, in an opinion of March 11, 1969.

Justice Rawlings, all other justices concurring, first seized upon a contract provision requiring the Connors to name the contractors co-insureds in the full structural fire insurance they (the Connors) were required to obtain, and reasoned that the breach thereof by the Connors placed them in the position of insurers of the contractor, citing several treatises[16] and a Florida case.[17] Assuming the correctness of that conclusion, the position of the parties would be: the insurance company insuring the interest of the Connors in the structure, and the Connors insuring the interest of the contractors in the structure. Indisputably the intentions of all these parties were to provide for insurance of the *insurable interests* in the *structure*, by *fire insurance*; nowhere was liability insurance contemplated. How, then, do the previously discussed doctrines apply to these facts?

The *Powers* doctrine, as presented in the principal case and as cited and applied in all three of the subsequent (*Mutual Casualty*, *Webb*, and *Kujak*) cases, is a *liability insurance* doctrine, to the effect that a liability insurer has no action under subrogation principles against the insured whom it has undertaken to protect from liability. That reasoning, clearly, has no relation to the Iowa fire insurance facts. Extension to a "direct insurance" situation, as here, might be possible, but the logical result would be a conclusion that an insurer who insures a party against loss resulting from *his* (*the insured's*) interest in property cannot sue the insured under subrogation for *destruction of that interest*. Such a doctrine is reasonable and implicit, but also somewhat innocuous, and certainly has no application to the *Connor* facts. The insurance company is not attempting to sue the Connors for loss resulting from their interest in the structure nor are the Connors attempting to sue the contractor for loss resulting from the contractor's interest in the structure, nor is the insurer attempting to sue the contractor on that basis.

The *Globe Insurance* doctrine, on the other hand, often cited but applied only in the principle case on unique facts, provides that if the only rights of the insured are *against itself*, then these are no real rights at all to which the insurer will be subrogated. Inasmuch as the Connors and the contractor are distinctly separate parties, that doctrine obviously has no application here. And

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[15] Connor v. Thompson Constr. & Dev. Co., 166 N.W.2d 109 (Iowa 1969). Additional information was obtained from the record through the office of the Clerk of the Supreme Court of Iowa.

[16] 17 AM. JUR. 2d *Contracts* § 425 (1964); 4A J. APPLEMAN, INSURANCE LAW & PRACTICE § 2661 (1969); RESTATEMENT OF CONTRACTS § 312 (1932); L. SIMPSON, CONTRACTS § 187 (2d ed. 1965).

[17] Smith v. Ryan, 142 So. 2d 139 (Fla. 1962).

because the contractor has not shifted its *liability burden* to the Connors as insurer, even extension of the doctrine is unprofitable.

The author of the opinion, however, perhaps as the result of insufficient research, accepted the bare statement that ". . . an insurer cannot recover by right of subrogation from his own insured,"[18] citing *Kujak* as authority, with a collateral reference to *Mutual Casualty Co.* Without further examination of that statement, he applied it to deny the insurance company's subrogation rights against the contractor for the $25,348.66 damage to the dwelling, despite the fact that these circumstances typify the classic type of subrogation action, where a third party's negligence results in damage to the interests of the insured, who is paid by the insurance company, with a resultant need to shift the loss back to the negligent party. Here the insurance company bore the burden of the negligence of the contractor, even though it issued *no liability coverage at all* and even though it was *not an insurer* of the contractor in any capacity.

It is possible, though unlikely, that there may be some justificiation in Iowa judicial policy for this highly aberrational distribution of loss. If so, however, it was certainly not met and discussed by the author of the opinion in *Connor*, and the result is a precedent in Iowa law which will likely be as incorrectly and unthinkingly applied in future cases as it was imported into this one. Perhaps policy decisions are difficult, and "hard cases make bad law," but surely the blind acceptance of such misleading statements of settled law as this one, without analysis and examination, cannot be preferable to forthright discussion of the real issues of the case, regardless of the difficulty of the questions which may then need to be answered.

In several other recent cases, the Iowa supreme court has relied upon precedent with much more satisfactory results. In *Linderholm v. State Automobile and Casualty Underwriters*,[19] for example, the issue concerned the timeliness to notice of the insurance company in a situation wherein the incident in question occurred July 20, 1962. The injured party did not indicate to the insured that the injuries were other than trivial, and the first notice of the claimant-executrix of the estate of the alleged tortfeasor was a claim against the estate made July 20, 1964. The executrix gave notice of the claim to the insurer on July 29, 1964, and the insurer, denying compliance with the policy condition of "notice," refused to defend or pay the claim. The supreme court cited *Leytem v. Fireman's Fund Indemnity Co.* for the propositions:

> [W]here a provision in an insurance policy requires notice of an accident be given the insurer as soon as practicable, it does not mean that every trivial accident that occurs should be reported, but only an accident that an ordinarily prudent individual acting reasonably would consider under all the circumstances as consequential and which could afford the basis of a claim. . . .
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> . . . [W]hether a delay in serving notice of an accident was ex-

[18] Connor v. Thompson Constr. & Dev. Co., 166 N.W.2d 109, 113 (Iowa 1969).
[19] 169 N.W.2d 561 (Iowa 1969).

> cused so as to avoid a breach of contract is a fact question, depending upon the existing conditions.[20]

On that authority, with no dispute as to the late notice but with an alleged excuse for the delay, the case was remanded for presentation to a jury.

In *Rasmussen v. Nebraska National Life Insurance Co.*,[21] the lower court had held that a debtor could recover on a credit life master policy which provided that "[i]nsurance granted to any insured debtor hereunder shall terminate: . . . (c) upon repayment of the indebtedness in connection with which this insurance is granted."[22] The debtor had repaid the loan before his death, but had incurred other indebtedness after September 22, 1965, at which time a different master policy for credit life insurance for the bank's debtors, for which this debtor was ineligible, became effective; and this latter debt remained unpaid at the time of the debtor's death. The lower court had relied upon the policy's "incontestable" clause to support liability. The supreme court reversed, examining cited authority at some length, after initial reliance upon an earlier Iowa case,[23] and ultimately ratifying the majority view that "incontestability" does not preclude allegations asking for specific enforcement of the specific contractual provisions, albeit that termination is the subject matter thereof.

The court was also helped by Iowa precedent in the case of *Pedersen v. Life of Mid-America Insurance Co.*,[24] in which the decedent part-time insurance agent for the defendant company failed to make a good-faith disclosure of facts, specifically that he was responsible for shortages and discrepancies in certain accounts under his supervision, in his own application for insurance on his life. The court disposed of the "binder" problem easily, quoting "[i]t is the settled rule of law that an agent cannot represent both himself and his employer in transactions where their interests are adverse."[25] That holding (that the agent could not bind the company on his own application) is also in accord with other Iowa cases.[26]

The court then squarely faced the issue whether the company should be allowed to reject the application on the basis of information which would not have been received in the course of routine examination, and decided the issue on a policy basis, admitting "we have been unable to find any direct authority for our position."[27] The court reasoned:

> We are of the opinion that if an insurance company conducted a good faith investigation of an applicant in the proper exercise of its

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[20] *Id.* at 564-65 quoting from Leytem v. Fireman's Fund Indem. Co., 249 Iowa 524, 85 N.W.2d 921 (1957).

[21] 170 N.W.2d 370 (Iowa 1969).

[22] *Id.* at 372.

[23] Wilson v. Equitable Life Ins. Co., 220 Iowa 321, 262 N.W. 525 (1935).

[24] 164 N.W.2d 337 (Iowa 1969).

[25] Clapp v. Wallace, 221 Iowa 672, 676, 266 N.W. 493, 495 (1936).

[26] *See, e.g.*, Hawkeye Clay Works v. Globe & Rutgers Fire Inc. Co., 202 Iowa 1270, 211 N.W. 860 (1927); Nertney v. National Fire Ins. Co., 199 Iowa 1358, 203 N.W. 826 (1925).

[27] Pedersen v. Life of Mid-America Ins. Co., 164 N.W.2d 337, 341 (Iowa 1969).

> right to determine insurability and thereby learned the applicant was involved in shortages and discrepancies in bank accounts under his supervision, it could properly reject the applicant as uninsurable.
>
> The difficulty lies not with the principle but with its application to the facts. It is also essential to define "good faith investigation by the company in the proper exercise of its rights". Not only must the information disclosed be such that the company could reasonably conclude the applicant was a moral hazard, but the investigation which disclosed the fact must have been one conducted in good faith to determine insurability rather than to uncover facts to defeat liability. When death intervenes between the time the conditional receipt is given and the determination of insurability is made, there is an obvious temptation for the company to make an intensive after the fact investigation to discover reasonable grounds for finding the applicant uninsurable. It is against public policy to place the insurance company in a position to benefit by dragging skeletons from a dead man's closet, which would not come to light in the course of its ordinary routine investigation. If an intensive investigation after the death brings to light facts which would tend to prove fraud or suicide, such defense should be alleged. The company should not be permitted to use such information to attack insurability.[28]

State Automobile and Casualty Underwriters v. Hartford Accident and Indemnity Co.[29] was another case in which the Iowa court, with little help in the form of precedent, disposed of the issue through the application of accepted legal principles, thus establishing a new doctrine. There, an employee's automobile liability insurer sought contribution from the employer's liability coverage on the basis that the latter's policy did not so specifically define "insured" as to rule out coverage for the employee. The court analyzed the policy as a whole, and held that the employee was not an "insured" thereunder.

The case of *Truck Insurance Exchange v. Maryland Casualty Co.*[30] presented a similar situation in that the court was free to decide the issue on its merits. There, in an automobile accident situation, two different liability policies, issued to different "named insureds," would admittedly each cover the loss. The issue was *not* subrogation, but contribution. Both policies contained "excess insurance" clauses which were applicable to the facts of the accident, and one company paid the claim and brought this action for contribution from the other. Justice Stuart, recognizing the case as one of first impression,[31] and distinguishing the earlier Iowa decisions settling the responsibility in conflicts between "pro rata" and "excess" clauses and between "pro rata" and "excess-escape" clauses,[32] adopted the majority rule on the strength of its reasoning, stating:

> As applied to the facts of the present case, both policies provide

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[28] *Id.* at 340-41.
[29] 166 N.W.2d 761 (Iowa 1969).
[30] 167 N.W.2d 163 (Iowa 1969).
[31] *Id.* at 164. "[T]his is a case of first impression involving two simple 'excess' insurance clauses."
[32] *See* Burcham v. Farmers Ins. Exch., 255 Iowa 69, 121 N.W.2d 500 (1963); Motor Vehicle Cas. Co. v. LeMars Mut. Ins. Co., 254 Iowa 68, 116 N.W.2d 434 (1962).

> that they shall be "excess" insurance. However, it is obvious that there can be no "excess" insurance in the absence of "primary" insurance. Since neither policy by its terms is a policy of "primary" insurance, neither can operate as a policy of "excess" insurance. The excess insurance provisions are mutually repugnant, and as against each other are impossible of accomplishment. Each provision becomes inoperative in the same manner that such a provision is inoperative if there is no other insurance available. Therefore, the general coverage of each policy applies and each company is obligated to share in the cost of the settlement and expenses. We think that such a conclusion affords the only rational solution of the present dispute.[33]

The *Truck Insurance Exchange* case also contained a trap similar to that which misled the court in the *Connor* case discussed previously. The general statement of law which was involved here originated in the case of *National Indemnity Co. v. Lead Supplies, Inc.* "An insurance company, like any other obligor under a contract, cannot be held responsible for more than it became obligated to perform. Such obligations can *only be determined from the insuring agreements.*"[34]

In the *Lead Supplies* case the statement was innocuously included in the middle of an analytical expository paragraph. It was next applied in *Motor Vehicle Casualty Co. v. LeMars Mutual Insurance Co.*[35] where it was excerpted from the paragraph and presented as a general statement of the applicable law. Furthermore, it was praised as "this . . . appeals to us as not debatable . . . ."[36] At least in that case the opinion included reference to the specific facts upon which the statement was based.

Justice Stuart in the instant (*Truck Insurance*) case quoted the statement again, writing "In Motor Vehicle Casualty Co. . . . we state the following . . . is not debatable . . . ."[37] It would therefore appear that the statement is being presented as a *not debatable* principle of settled law.

So the statement has evolved. First a minor but detailed paragraph, it was shortened to become more general in application and quoted as "appealing to us . . . as not debatable," and then shortened further to become even more general and quoted as "stated to be" not debatable. Doubtless it will presently be paraphrased to become even more general and quoted by some court as *purely* "not debatable."

Justice Stuart, however, avoided that mistake in the *Truck Insurance Exchange* opinion. He clearly points out, that "[w]e do not consider this question is properly before us on the record. It appears to involve many legal

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[33] Truck Ins. Exch. v. Maryland Cas. Co., 167 N.W.2d 163, 164-65 (Iowa 1969), quoting from Cosmopolitan Mut. Ins. Co. v. Continental Cas. Co., 28 N.J. 554, 562, 147 A.2d 529, 533 (1959).

[34] National Indem. Co. v. Lead Supplies, Inc., 195 F. Supp. 249, 255 (D. Minn. 1960) (emphasis added).

[35] Motor Vehicle Cas. Co. v. LeMars Mut. Ins. Co., 254 Iowa 68, 116 N.W.2d 434 (1962).

[36] *Id.* at 75, 116 N.W.2d at 438.

[37] Truck Ins. Exch. v. Maryland Cas. Co., 167 N.W.2d 163, 165 (Iowa 1969).

problems and factual questions which go far beyond a dispute between two insurers."[38] Thus he alludes to the extremely complex legal issues masked by the simple quote and avoids the trap.

Another issue of first impression in Iowa was presented by *Bates v. United Security Insurance Co.*[39] In that case Bates was injured when the truck he was driving in the course of his employment was struck from behind by an approaching automobile. Bates contended that he was covered by the "Medical Payments" part of his family automobile policy, under the policy provision for payment of expenses incurred "through being struck by an automobile," but the company maintained that the offending automobile did not actually come into contact with Bates and that he was not therefore "struck by an automobile" within the meaning of the policy. The company prevailed, and Bates appealed.

Though this issue had not been litigated in Iowa, there is a good deal of precedent on a national basis. The company cited an earlier Washington case in support of its position,[40] but the distinct trend in recent years has been to the contrary, as indicated by the reasoning in the oft-cited Ohio case of *Carson v. Nationwide Mutual Insurance Co.*[41] The Iowa supreme court, in the instant case, quoting from *Carson*, adopted the now majority view, and reversed. It is entirely possible that the insurer's position may have been intellectually superior originally, but with the necessary realization that insurance policies are written with full appreciation of the state of the law, rather than in a vacuum, the Iowa court was obviously wise in aligning itself with the position representing both the recent trend and the national majority.

Much the same situation existed in the appeal of the insured David L. Bringle in the case of *Bringle v. Economy Fire & Casualty Co.*[42] Bringle was injured while returning from his job of installing carpeting in one of five panel trucks regularly furnished by his employer to its carpet-laying crews, and had sought recovery from his insurer despite the exclusion in the policy of coverage for injuries sustained while occupying a vehicle "furnished for the regular use of . . . the named insured . . . ."[43] The supreme court, in an opinion by Justice Mason, relying upon a previous Iowa case, stated:

> [W]e recognize . . . that no hard and fast rule has been nor in the opinion of the Court can be established for determining this question [what constitutes furnishing for regular use] but that each case must stand or fall upon examination of the facts in the particular case before the Court. The best that can be done is to observe the signposts that aided other Courts in determining this question."[44]

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38 *Id.* at 165.
39 163 N.W.2d 390 (Iowa 1968).
40 Johnson v. Maryland Cas. Co., 22 Wash. 2d 305, 155 P.2d 806 (1945).
41 84 Ohio L. Abs. 378, 169 N.E.2d 506 (C.P. Clark Co. 1969).
42 169 N.W.2d 879 (Iowa 1969).
43 *Id.* at 880.
44 *Id.* at 883, quoting from General Cas. Co. v. Hines, 156 N.W.2d 118 (Iowa 1968). The Iowa court in the latter case borrowed from the New Jersey federal district court case of Farm Bureau Mut. Auto. Ins. Co. v. Marr, 128 F. Supp. 67, 70 (D.N.J. 1955).

The court borrowed the "signposts" from the same opinion:

> "The signposts that are indicated to this Court from the foregoing are:
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> "1. Was the use of the car in question made available most of the time to the insured?
>
> "2. Did the insured make more than mere occasional use of the car?
>
> "3. Did the insured need to obtain permission to use the car or had that been granted by blanket authority?
>
> "4. Was there a purpose for the use of the car in the permission granted or by the blanket authority and was it being used for such purpose?
>
> "5. Was it being used in the area where such car would be expected to be used?"[45]

Applying these "signposts" to its facts, the supreme court determined that the panel truck was "furnished for regular use" within the meaning of the policy, affirmed the lower court judgment for the defendant insurance company and aligned Iowa with the majority in regard to this narrow issue, and more importantly, in regard to this approach to the question.

Justice Moore, speaking for the court, also aligned Iowa with the majority in his opinion in *Hein v. American Family Mutual Insurance Co.*[46] The issue was whether an insured who was admittedly legally liable for hospital, ambulance, and doctor expenses in the sum of $323.45 resulting from an accident could also recover an additional $1,250.00 anticipated medical expenses under insurance coverage by which the insurer agreed to "pay all reasonable medical expenses incurred within one year from the date of the accident."

The District Court, Black Hawk County, entered judgment for the defendant insurer, and Hein appealed, relying heavily upon the case of *Maryland Casualty Co. v. Thomas.*[47] In that case certain necessary dental work resulting from the accident had to be postponed until after the expiration of the one year period, but that work had been contracted and paid for within the one year period. Under these facts the court held that the expense had been "incurred" within the period.

That *Thomas* doctrine, of course, represents a liberalization of the earlier position that "incurred" means "paid for" or "thrust upon one by operation of law,"[48] and Hein sought a further liberalization, so that expenses resulting from the accident would be covered if "anticipated" within the one year period, even though not "contracted for" within that period. The continuum, obviously, is infinite, and circumstances may range from expenses "paid for" within the period, through expenses "contracted for and partially paid for" and expenses merely "contracted for" and expenses "known to be required but not yet con-

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[45] Bringle v. Economy Fire & Cas. Co., 169 N.W.2d 879, 882 (Iowa 1969).
[46] 166 N.W.2d 363 (Iowa 1969).
[47] 289 S.W.2d 652 (Tex. 1956).
[48] *See, e.g.*, Drearr v. Connecticut Gen. Life Ins. Co., 119 So. 2d 149 (La. 1960).

tracted for" during the one year, all the way to expenses "possibly anticipated" in the future; and the question is where to draw the line. Like other courts,[49] the Iowa supreme court refused to further liberalize the rule, and affirmed for the defendant insurer.

Here again, Iowa has joined the national majority, implicitly recognizing the *Thomas* doctrine but refusing to extend it. The question is whether this is a good place to be in regard to the public policy of the state. Apparently if Hein had exercised the foresight to contract for and prepay the $1,250.00 worth of services within the one year period, the claim would have been recognized, notwithstanding the fact that the services themselves were not yet performed. This, at least, would be the result under the *Thomas* doctrine.

That the court has placed a great premium upon the services of an attorney in these cases is clear, inasmuch as a competent attorney would obviously advise this claimant to contract for the services, and the average unrepresented claimant would hardly be aware of this technicality and would thus forfeit the claim. The opinion does not discuss the merits of this aspect of the court's position, or, indeed, mention that it exists. Perhaps it is bad; perhaps not.

More serious is the premium placed upon the creation of speculative contracts. The wise attorney will not only negotiate for his client a contract for future services required, thus binding the client within the one year period, but he will also see to it that the contract is for the *maximum amount* of future service which may be anticipated. The policy implications of this jockeying for position, which can be anticipated in future cases, are worthy of deep consideration. The Iowa supreme court declined to address itself to them in *Hein*, but we may be sure they will return. Perhaps they will be resolved in another jurisdiction before a similar case arises again in Iowa.

IOWA TAX LAWS AND PROCEEDINGS

Edward R. Hayes†

The 1967 session of the Iowa Legislature produced major tax legislation, changing both rates and structure of many of the taxes imposed by the state. The 1969 tax legislation is much less sweeping in scope or consequences, but does include a number of provisions of significance to taxpayers. Eight decisions of the Supreme Court of Iowa and a number of opinions from the Attorney General should be examined, to round out a study of recent developments in the state's tax law and procedures.

[49] *See, e.g.*, Reliance Mut. Life Ins. Co. v. Booher, 166 So. 2d 222 (Fla. 1964).

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I. Income Taxation

One novel feature of the 1967 legislation was the "sales tax credit", which was designed to enable Iowa resident individuals with "under $7,000" taxable income to claim a credit against income tax or a refund, in amounts varying according to taxable income and the number of personal exemptions and dependents.[1] This "credit" was intended to benefit the low-income family that could be burdened by sales tax. Either because of philosophical objections to the concept, or because of dissatisfaction with the many interpretive and administrative problems caused by the language of the statute, or both, the 1969 legislature abolished the "sales tax credit" for future years. Further, for 1968 income tax returns, the credit was limited to resident individuals with net income of less than $3,000. Clarifying definitions of "resident individual," "net income," and "personal exemption" were provided, as well as power to the Department of Revenue to make rules and regulations concerning the claiming of the refund.[2] Before the change was adopted the Attorney General ruled that such action would be constitutional even though it related to returns for a year already expired—as long as the time to file those returns had not expired.[3]

Some relief for the low-income taxpayer is found in the provision that resident and nonresident taxpayers do not have to pay tax on net incomes of $3,000 or less. If net income is over $3,000, but the tax thereon subtracted from net income would produce a result of less than $3,000, the effective tax must be such as will reduce net income to $3,000 after the tax is imposed.[4]

An Iowa resident on active duty in the armed forces of the United States for more than six months during the taxable year may exclude from his Iowa taxable income any income received from such service.[5] A literal interpretation would mean that income from eleven months of service is taxable, if service begins after July 1 and discharge occurs before six months of service is completed in the following year.

Although rates have not been increased, the requirement for filing returns has been enlarged, and now applies to every Iowa resident who must file a federal income tax return or who has net income of at least $1,000 from sources subject to tax by Iowa.[6] The personal exemption statute was restated

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1 Ch. 348, § 18, [1967] Iowa Acts 666-83; Iowa Code Ann. § 422.48 (Supp. 1969).
2 Ch. 244 [1969] Iowa Acts 319.
3 1969 Op. Iowa Att'y Gen. No. 69-2-13.
4 Ch. 243 [1969] Iowa Acts 317-18. The Department of Revenue prefers that each taxpayer entitled to partial relief pay the full tax, and the Department will compute the amount appropriate to obtain the proper effective tax and will refund the excess. Apparently no claim for refund need be made.
The exclusion is not available to families where the combined net incomes of husband and wife exceed $3,000, although either or both spouses have net income of less. A child under twenty-one, dependent on his parents, may not utilize this provision when a parent's income, or combined parental income, exceeds $3,000, but apparently both parent and child can if neither's net income exceeds $3,000.
5 *Id.* This Act refers to six months within the calendar year or the fiscal year, according to whether taxpayer uses a calendar or a fiscal year for his return.
6 *Id.* Nonresidents must file only if they meet *both* requirements.