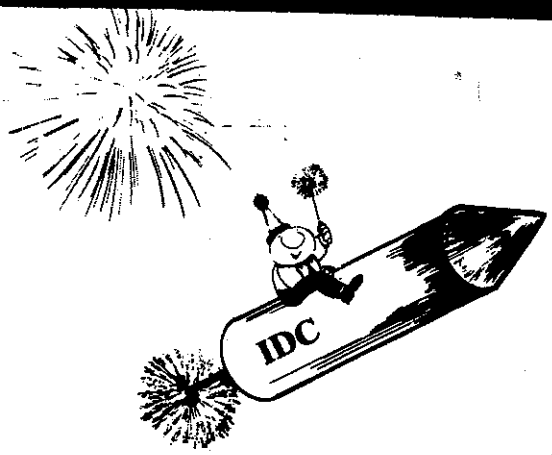

IOWA DEFENSE COUNSEL ASSOCIATION

20th Anniversary Annual Meeting

OCTOBER 11, 12 & 13, 1984
HYATT DES MOINES
DES MOINES, IOWA

THURSDAY, OCTOBER 11, 1984

7:00 a.m.

BOARD MEETING-CAPTAIN'S ROOM

8:00 a.m.

REGISTRATION

8:30-9:00 a.m.

PRESIDENT'S REPORT
ANNUAL BUSINESS MEETING

9:00-10:00 a.m.

JURY COMMUNICATION AND SELECTION
CHARLES E. CLEVELAND, Ph.D
Des Moines, Iowa

10:00-10:15 a.m.

COFFEE BREAK

10:15-11:15 a.m.

PANEL-FOR THE GOOD OF THE ORDER OF DEFENSE COUNSEL
E.W. MULLINS, JR., President Elect
Defense Research Institute
Columbia, South Carolina

THOMAS H. SHARP, JR., President
International Association of Insurance Counsel
San Antonio, Texas

PATRICK H. DICKINSON, President
Federation of Insurance Counsel
Sarasota, Florida

PAUL CARRIERE, President
Association of Insurance Attorneys
Montreal, Quebec, Canada

11:15-12:00 Noon

AVOIDING LIABILITY WHEN REPOSSESSING AND DISPOSING OF COLLETERAL UNDER ARTCLE IX-IOWA UNIFORM COMMERCIAL CODE
EDGAR F. HANSELL, Attorney
Nyemaster, Goode, McLaughlin, Emery & O'Brien
Des Moines, Iowa

12:00-1:30 p.m.

LUNCHEON

Speaker: THE HON. DONALD E. O'BRIEN, Judge
United States District Court
Sioux City, Iowa

1:30-2:30 p.m.

WORKERS' COMPENSATION UPDATE
ROBERT C. LANDESS
Iowa Industrial Commissioner
Des Moines, Iowa

2:30-3:00 p.m.

VOCATIONAL DISABILITY EVALUATIONS
THE CLAIMANT'S EMPLOYABLE SKILLS
MARIAN S. JACOBS, M.S. President
Rehabilitation Resources
Des Moines, Iowa

3:00-3:15 p.m.

COFFEE BREAK

3:15-4:15 p.m.

RECENT DEVELOPMENTS WITH SETTLEMENT ANNUITIES
D. GRANT PETERSON
Settlement Planning, Incorporated
Edina, Minnesota

4:15-5:00 p.m.

DEFENSE CONSIDERATIONS UNDER IOWA'S COMPARATIVE FAULT
PATRICK M. ROBY
Shuttleworth & Ingersoll
Cedar Rapids, Iowa

THURSDAY EVENING

Dinner at the Des Moines Club for all registrants and their spouse or guest and speakers and their spouses. (Buses leave south door of motel at 6:15 p.m.)

FRIDAY, OCTOBER 12, 1984

9:00-9:45 a.m.

FEDERAL RULES OF CIVIL PROCEDURE-AMENDED RULES-THE COURT'S REQUIREMENTS
HON. R.E. LONGSTAFF
United States Magistrate
U.S. District Court
Des Moines, Iowa

RULE 16 (b) - A DEFENSE PERSPECTIVE
ROGER A. LATHROP
Betty, Neuman, McMahon, Hellstrom & Bittner
Davenport, Iowa

9:45 a.m.

LADIES COMPLIMENTARY TOUR AND LUNCHEON
(Buses leave south door of motel)

9:45-10:30 a.m.

DEFENSIVE USE OF FEDERAL RULES-SELECTED EXCEPTIONS TO HEARSAY RULE
M. GENE BLACKBURN
Blackburn, Stockdale & Brownlee
Fort Dodge, Iowa

10:30-10:45 a.m.

COFFEE BREAK

10:45-11:15 a.m.

DEFENSE PRACTICE UNDER ABA MODEL-RULES OF PROFESSIONAL CONDUCT
DAVID L. PHIPPS
Whitfield, Musgrave, Selvy, Kelly & Eddy
Des Moines, Iowa

11:15-12:00 Noon

CROSS-EXAMINATION OF THE CHIROPRACTOR
H. LEE TURNER
Turner & Boisseau
Great Bend, Kansas

12:00-1:30 p.m.

LUNCHEON

Speaker: THE HON. WARD W. REYNOLDSON
Chief Justice, Iowa Supreme Court
Des Moines, Iowa

1:30-2:30 p.m.

DEMONSTRATIVE AIDS IN THE COURTROOM
R.L. STANSIFER, P.E.
Systems Engineering Associates
Columbus, Ohio

2:30-3:00 p.m.

AMENDMENTS TO RULES OF CIVIL PROCEDURE-DEFENSE ALERT
ALAN E. FREDREGILL
Gleysteen, Harper, Eidsmoe, Heidman & Redmond
Sioux City, Iowa

3:00-3:15 p.m.

COFFEE BREAK

3:15-4:15 p.m.

TRIAL STRATEGY UNDER COMPARATIVE NEGLIGENCE AND CONTRIBUTION -THE DEFENSE PERSPECTIVE
DENNIS J. HORAN
Hinshaw, Culbertson, Moelmann, Hoban & Fuller
Chicago, Illinois

4:15-5:00 p.m.

DIAGNOSTIC RADIOLOGY-INTERPRETING RADIOGRAPHS
JOHN H. LOHNES, M.D.
Cedar Rapids Radiologists, P.C.
Cedar Rapids, Iowa

6:30 p.m.

COCKTAIL RECEPTION

7:30 p.m.

BANQUET

Speaker: THE HON. TERRY E. BRANSTAD
Governor of Iowa

SATURDAY, OCTOBER 13, 1984

9:00-9:45 a.m.

DEFENSE TECHNIQUES UNDER IOWA'S COMPARATIVE FAULT ACT
PHILIP J. WILLSON
Smith, Peterson, Beckman & Willson
Council Bluffs, Iowa

9:45-10:15 a.m.

LEGISLATIVE UPDATE
E. KEVIN KELLY
Legislative Counsel
Des Moines, Iowa

10:15-11:15 a.m.

ANNUAL APPELLATE DECISIONS REVIEW
BRUCE L. BRALEY
Mosier, Thomas, Beatty, Dutton, Braun & Staack
Waterloo, Iowa

11:15 a.m.

RECESSED ANNUAL BUSINESS MEETING
Election of Officers

12:00 Noon

BOARD MEETING

OFFICERS AND DIRECTORS
1983-1984

PRESIDENT

Harold R Grigg
1521 Elm Avenue
Primghar, Iowa 51245

PRESIDENT - ELECT

Raymond R. Stefani
807 American Building
Cedar Rapids, Iowa 52401

SECRETARY

Claire F Carlson
7th Floor - Snell Bldg.
Ft Dodge Iowa 50501

TREASURER

Eugene Marlett
5400 University Avenue
West Des Moines, Iowa 50265

BOARD OF DIRECTORS
(Date is Term Expiration Date)

District I

David L. Hammer - 1984
200 Dubuque Building
Dubuque, Iowa 52001

District II

* G. Arthur Minnich - 1985
721 N. Main Street
Carroll, Iowa 51401

District III

Alan E Fredregill - 1984
200 Home Federal Building
Sioux City, Iowa 51102

District IV

Robert J. Laubenthal - 1984
307 Midlands Mall
Council Bluffs, Iowa 51501

District V

David L Phipps - 1984
1400 United Central Bank Bldg
Des Moines, Iowa 50309

District VI

Patrick M Roby - 1985
500 Merchants Nat'l. Bank Bldg
Cedar Rapids, Iowa 52406

District VII

Larry L. Shepler - 1984
600 Union Arcade Building
Davenport Iowa 52801

District VIII

Craig D. Warner - 1986
Mississippi Valley Savings Bldg
Burlington Iowa 52601

AT LARGE

John B Grier - 1984
P.O. Box 496
Marshalltown Iowa 50158

Warren DeVries - 1985
30 Fourth St. N.W.
Mason City, Iowa 50401

Thomas D Hanson - 1986
1300 Des Moines Bldg.
Des Moines, Iowa 50309

PAST PRESIDENTS & DIRECTORS

Edward F Seitzinger, 1964-1965
1223 Cummins Parkway
Des Moines, Iowa 50311

* Frank W. Davis, 1965-1966

D. J. Goode, 1966-1967
10th Floor Hubbell Bldg
Des Moines, Iowa 50309

Harry Druker, 1967-1968
112 West Church Street
Marshalltown, Iowa 50158

Philip H. Cless, 1968-1969
1300 Des Moines Building
Des Moines, Iowa 50309

Philip J Willson, 1969-1970
307 Midlands Mall
Council Bluffs, Iowa 51501

Dudley Weible, 1970-1971
134½ N. Clark Street
Forest City, Iowa 50436

Kenneth L. Keith, 1971-1972
Union Bank & Trust Building
P O Box 218
Ottumwa, Iowa 52501

Robert G. Allbee, 1972-1973
300 Liberty Building
Des Moines, Iowa 50309

Craig H Mosier, 1973-1974
3151 Brockway Road
Waterloo, Iowa 50705

Ralph W Gearhart, 1974-1975
500 Merchants Nat'l Bank Bldg
Cedar Rapids, Iowa 52406

Robert V.P. Waterman, 1975-1976
700 Davenport Bank Bldg.
Davenport, Iowa 52801

Stewart H.M. Lund, 1976-1977
623 Second Street
Webster City, Iowa 50595

Edward J Kelly, 1977-1978
1400 United Central Bank Bldg
Des Moines, Iowa 50309

Don F. Kersten, 1978-1979
Seventh Floor - Snell Bldg
Fort Dodge, Iowa 50501

Marvin F. Heidman, 1979-1980
200 Home Federal Building
Sioux City Iowa 51101

Herbert S. Selby, 1980-1981
P.O. Box 845
Newton, Iowa 50208

L. R. Voigts, 1981-1982
10th Floor Hubbell Bldg
Des Moines, Iowa 50309

Alanson K Elgar, 1982-1983
207 East Washington
Mt Pleasant, Iowa 52641

* Albert D. Vasey (Hon.) 1983

IOWA DEFENSE COUNSEL FOUNDERS AND OFFICERS

Edward F. Seitzinger
President

D.J. Fairgrave
Vice-President

* Frank W Davis
Secretary

Edward J Kelly

Mike McCrary
Treasurer

William J Hancock

Paul D Wilson

20th ANNIVERSARY CHAIRPERSONS

Edward F. Seitzinger
General Program Chairperson

Thomas D. Hanson
Public Relations Chairperson

Raymond R. Stefani
Program Chairperson

Marian B Seitzinger
Ladies Program Chairperson

* Deceased

20th Anniversary
1984 Annual Meeting

INDEX

JURY COMMUNICATION AND JURY SELECTION

By
Charles E. Cleveland, Ph. D.
Quester
West Des Moines, Iowa

A

Jurors understand lay English. They don't understand legalese, businessese or technicalese. This presentation will address the issue of how to translate the lawyer's ideas into language the juror will understand and how to pick jurors who are most favorable to the defense case.

I. Jury Communication

A. Case strategy based on the mind of the juror.

B. Language the juror will understand.

C. Organization of issues so jurors will hear what they are waiting on the edge of their seat to hear.

D. Controlling what jurors "read between the lines."

II. Jury Selection

A. Determining juror types, types of jurors pro-defense and anti-defense.

B. Juror decision-making -- how a juror processes or understands what the lawyer is saying.

C. Selecting jurors who will more easily understand the defense case and be more prone to decide in favor of the defense.

D. The computer as a tool in modeling and selecting a jury.

REPOSSESSION AND DISPOSITION OF COLLATERAL UNDER ARTICLE 9 OF THE IOWA UNIFORM COMMERCIAL CODE

B

Edgar F. Hansell, Attorney
Nyemaster, Goode, McLaughlin, Emery & O'Brien, P.C.
Des Moines, Iowa 50309

Article 9 of the Uniform Commercial Code ("UCC") applies to any transaction "intended to create a security interest" in personal property or fixtures and to sales of accounts and chattel paper.[1] Part V of Article 9 addresses the rights and remedies of parties to a secured transaction following default and is the subject of this presentation. In particular, this presentation examines postdefault repossession and disposition or retention of collateral. The UCC does not provide a definition of default; therefore, absent definition in the security agreement, default is likely to be limited to its generally accepted meaning of failure to perform or pay.[2] Customarily, the security agreement itself will contain a list of events of default, such as failure to make a payment when due, failure to keep the collateral insured, removal of the collateral from the state, bankruptcy of the debtor, etcetera. For purposes of this presentation, default is presumed to have occurred.

Understanding the mechanics of Article 9 requires familiarity with its classification scheme, because different rules apply to various types of collateral.[3] Collateral essentially is classified by use in seven principal categories: 1) goods, 2) accounts, 3) chattel paper, 4) documents, 5) instruments, 6) money, and 7) general intangibles. Goods are divided further into consumer goods, equipment, farm products, and inventory.[4] Since classification is based on the use, rather than type, of collateral, any one good may be characterized differently under varying circumstances. For instance, an automobile in the possession of a dealer is considered inventory.[5] On the other hand, the auto is considered a consumer good in the hands of an individual being used for personal, family, or household purposes,[6] or equipment if used primarily for business purposes.[7] Accordingly, when pursuing UCC remedies, a practitioner's initial duty is to determine the type of collateral involved in the secured transaction. Once the type of collateral has been identified, repossession and disposition or retention can be sought in conformance with the appropriate rules. Collateral occasionally will be used for more than one purpose, in which case the collateral with the most rigorous requirements should govern the practitioner's conduct.

The rights and remedies provided in part V of Article 9 do not displace other legal remedies. Consequently, once a debtor has defaulted on a secured obligation, the secured party may "reduce his claim to judgment, foreclose or otherwise enforce the security

interest by any available judicial procedure."[8] For instance, a secured creditor may obtain and seek enforcement of a judgment on the debtor's in personam obligation. In Iowa, the judgment creditor can attach property of a debtor,[9] garnish third parties,[10] and levy and execute on a debtor's nonexempt property to obtain satisfaction of the judgment.[11] Additionally, the parties are permitted to specify rights and remedies in the security agreement itself within certain limits.[12]

An in personam judgment enables the secured party to levy on property of the debtor other than the collateral itself, and in the case of real estate, a lien automatically attaches to all of the debtor's property interests upon judgment for the creditor.[13] If an in personam judgment is obtained against the debtor, the lien acquired by virtue of levy on the collateral retroactively dates back to the perfection of the security interest.[14] A judicial sale operates as a foreclosure of the secured party's interest in the collateral, and the secured party is permitted to purchase the collateral at the judicial sale without any further obligations under Article 9.[15] The disadvantage of formal legal proceedings, however, is the time and expense of such action in comparison to the UCC's summary provisions.

Creditor remedies under part V of Article 9 are cumulative.[16] In other words, a secured party is not required to elect a single remedy nor pursue potential remedies in any particular order.[17] Thus, a secured creditor simultaneously can pursue separate remedies, subject, of course, to the condition that there can be no double recovery on an individual claim.[18] The cumulative nature of creditors' remedies is illustrated by banks' rights of setoff. The common-law doctrine of setoff entitles a bank to apply the deposits of a debtor-depositor against a matured indebtedness to the bank.[19] Courts differ on whether a bank can exercise its right of setoff when the collateral itself provides sufficient security, but a majority hold there is no requirement that banks first exhaust their remedies against the collateral.[20]

In addition to a secured party's choice of which remedies to pursue, default may require a number of other preliminary decisions. For example, if the collateral consists of documents, the secured creditor may choose to proceed either against the documents or the goods covered thereby.[21] If the secured transaction involves both real and personal property, the secured party may elect to proceed separately as to the personal property according to Article 9 or against both according to the rights and remedies outside the UCC regarding real property.[22]

The rights and remedies conferred in part V of Article 9 sometimes are affected by non-UCC law. Federal bankruptcy provisions are among the most noteworthy considerations outside the

default procedures of Article 9. Once a debtor has filed a petition in bankruptcy, an automatic stay normally broad enough to suspend a secured creditor's attempts to satisfy the delinquent obligation is imposed.[23] Until the stay is terminated[24] the collateral is subject to the bankruptcy rules, which conceivably can render the security interest void[25] and discharge the debtor's personal liability.[26]

Another significant influence on Article 9's default procedures is the Iowa Consumer Credit Code[27] ("ICCC") governing "consumer credit transactions." [28] Consequently, when a secured transaction involves consumer credit, the practitioner must be aware of the additional rights and remedies contained in the ICCC. Article 5 of the ICCC, dealing with remedies and penalties, is of special significance in the default context. Among other restrictions, the statute prohibits prejudgment garnishment of consumers' earnings and bank deposits,[29] and places greater-than-normal limitations on postjudgment garnishment.[30] The statute incorporates by reference the repossession and disposition provisions of Article 9 of the Iowa UCC[31] and explicitly requires a secured creditor to dispose of collateral in good faith and in a commercially reasonable manner before a deficiency judgment can be rendered against a consumer.[32]

Consistent with its protectionary nature, the ICCC provides special rules for cure of consumer default that apply despite an agreement to the contrary.[33] A creditor[34] must notify the consumer of the right to cure his default before repossession is made or legal action is taken, except in cases of attachment sought on certain grounds.[35] Notice of the right to cure must be in writing and conform with the specific requirements articulated in the statute.[36] A consumer is entitled to such notice unless the creditor has given proper notice of the right to cure with respect to a prior default within 360 days of the default in question or the consumer voluntarily surrenders possession of the goods and the creditor accepts them in full satisfaction of the debt.[37]

When notice of default is given, a consumer can restore his rights under the agreement by tendering within twenty days the lesser of the amount of matured, unaccelerated installments, plus unpaid delinquency or deferral charges, or the amount stated in the notice to cure. For default resulting from other than nonpayment, a consumer may cure by performing in accordance with the notice to cure within twenty days.[38] If the creditor in a consumer credit transaction institutes legal proceedings without complying with the notice requirements and allowing twenty days to cure default, the action will be dismissed without prejudice.[39] Consumers are granted a private cause of action for actual damages and an additional right to recover between $100 and $1,000 per action from creditors failing to provide notice of the right to cure default.[40]

The balance of this presentation deals with the practitioner's concerns after pre-repossession requirements have been satisfied. The influence of statutes other than the UCC will be noted when relevant. In part I, the secured party's right to take possession of the collateral following default will be examined. After default, a secured party has the option of proceeding extrajudicially, if repossession can be accomplished without breach of the peace, or instituting legal proceedings.[41] Part I will discuss each party's rights and obligations in the repossession context, including constitutional concerns. Part II will focus on pertinent considerations following repossession when a secured party proposes to dispose of collateral. In certain situations a creditor may elect to retain collateral in satisfaction of an outstanding debt. Part II explains the circumstances in which retention is appropriate, as well as the procedures requisite to a valid sale when disposition is elected. Finally, in part III the presentation will examine a secured party's liability for noncompliance with the UCC default procedures.

I. REPOSSESSION OF COLLATERAL BY SECURED PARTIES

A secured party is entitled to possession of tangible collateral on default.[42] When the collateral consists of intangible obligations owed to the debtor, a secured party may instruct an account debtor or obligor after default to make payments directly to him.[43] Perfection of the secured interest is not required for a secured party to exercise his right of possession or collection.[44] If a secured party chooses to take possession of the collateral, he can proceed without judicial process, when it can be done without "breach of the peace," or bring a possessory action[45] such as replevin.[46] Alternatively, when the collateral consists of "equipment"[47] a secured party is authorized to render the equipment unusable pending disposition on the debtor's premises.[48] Ordinarily, however, the secured party is likely to procure actual dominion and control of the collateral by judicial procedures or self-help.

A. Self-Help Repossession

Repossession of collateral without judicial action may afford quicker and less expensive repossession for the secured party than by judicial action. "Self-help" is a relatively ancient concept with its origin long before promulgation of the UCC.[49] The drafters elected to incorporate pre-UCC law by providing that a secured party can obtain possession of collateral by means of self-help as long as such possession is accomplished without "breach of the peace."[50] The UCC does not define breach of the peace, however, and leaves the language open to judicial construction.

In Girard v. Anderson,[51] the Iowa Supreme Court considered the validity of a contractual arrangement purporting to authorize repossession by the secured creditor "'peaceably or forcibly, and without process of law.'"[52] The court rejected the defendant's argument that the agreement represented a waiver of the debtor's rights, thereby permitting entry of a locked residence when the owner was away, and held that the provision was void for public policy reasons.[53] Logically, then, as a public policy matter courts are likely to frown on any conduct amounting to force or overreaching by the party resorting to self-help, whether provided for by agreement or not. The underlying rationale, of course, is that social harmony is more important than creditors' rights to possession and should be preserved above all else. When a secured party breaches the peace in taking possession of the collateral, his actions may render him liable for damages for conversion and possibly punitive damages.[54]

Girard represents perhaps one of the clearest cases of a breach of the peace: unauthorized entry into a private residence. In Girard there was some dispute as to whether or not the residence was locked, but that factor apparently is of little material consequence.[55] The case for breach of peace is more ambiguous when the collateral is located on commercial, as opposed to residential, premises; courts have been more likely to tolerate repossessions bordering on forceful action when collateral is located on commercial property,[56] although a lower threshold of protection may be unjustified in those circumstances.[57] Similarly, less scrutiny has been accorded to repossession of collateral located within nonresidential structures, but not to the extent of permitting breaking and entry.[58]

Repossession of collateral located on property to which there is public access is less likely to result in a finding of a breach of the peace.[59] In the Iowa case of Lloyd's Plan, Inc. v. Brown,[60] the plaintiff repossessed the defendant's vehicle from a street adjacent to the defendant's mobile home. In the plaintiff's action for a deficiency judgment, the defendant counterclaimed for trespass. The Iowa Supreme Court dismissed the defendant's claim but stated: "We do not decide whether plaintiff's right of repossession would have been affected if the automobile had been seized from defendant's driveway."[61] Likewise, collateral that is located on a third party's premises justifies a lower level of protection, since the concern is invasion of the debtor's real property interests.[62] The secured party, however, does not possess carte blanche authority to enter third-party premises to retake collateral.

By objecting to the repossession, the debtor may preclude a peaceful taking by a secured party, merely due to the potential for violent confrontation. It matters not that the debtor actually does

not resort to force to prevent repossession; an unequivocal objection is sufficient to render the taking in violation of the breach-of-peace standard.[63] Neither is it important that the debtor has previously consented to repossession. Apparently, only the debtor's protest at the time of the attempt to repossess is pertinent.[64]

Protest by a third party generally is considered sufficient to revoke the secured party's right to possession by self-help,[65] but whether or not a special relationship between the third party and the debtor must exist and what type of relationship may be required is unsettled.[66] A court quite possibly would consider the objection of a disinterested party ineffective to foreclose the secured party's right to take possession; objection by a third party, however, is to be distinguished from third-party consent, the latter which merits closer scrutiny of the relationship between the debtor and the third party.[67] Whether a third party or the debtor objects, however, an isolated objection generally is insufficient to prevent future attempts to repossess the collateral.[68] On the other hand, the objection of a guarantor of the debtor probably would most likely be treated as equivalent to an objection of the debtor himself.

Consent to repossession by the debtor is sufficient to preclude a finding of breach of the peace.[69] Consent by third parties, however, is a more difficult question. Minors are generally incapable of valid consent unless they are mature enough to understand the consequences of their consent and are closely related to the debtor.[70] Third-party adults are competent to consent to repossession, but generally either must be clothed with apparent authority to speak for the debtor or have some connection with the collateral.[71]

Courts seem to recognize that repossession is tricky business. For this reason, most courts allow stealth and even false representations by secured parties in obtaining possession of their collateral.[72] Of course, the rule is not unlimited, and, therefore, conduct rising to a level considered to be bad public policy may render the repossession wrongful. Thus, when a secured party attempted self-help repossession by bringing the sheriff along to take the collateral, the Washington Court of Appeals held that the party's conduct constituted a breach of the peace since it amounted to "constructive force" by falsely implying legal process.[73] In other words, a little cleverness may be acceptable, but conduct that can be construed as a forceful act is likely to violate the breach-of-peace standard.

Even a valid repossession may create a trap for an unwary secured party. Other unsecured property inadvertently may be taken with the collateral, such as personal property contained in the

trunk of a car, and may render a secured party liable for conversion.[74] In some jurisdictions, courts have restricted the liability of a party taking possession to property that is "plainly visible."[75] Nonetheless, a secured creditor is wise to check for additional unsecured property before removing the collateral. Also, a secured party must be careful not to cause excess damage in retaking possession of the collateral. While minor damages caused in obtaining possession may not be considered an interference with the debtor's interests in the collateral, excessive damage may subject the secured party to liability for breach of the peace.[76]

Since self-help repossession in many cases amounts to a deprivation of property without prior notice to the debtor and an opportunity to be heard, the question whether the UCC's self-help provision violates the due process clause of the fourteenth amendment has been raised. In general, the due process guarantee of the fourteenth amendment has not been construed to impose notice and hearing requirements on self-help repossession because of an absence of requisite state action.[77] The Eighth Circuit Court of Appeals has held that the fact that a secured party merely proceeds according to a state-enacted statute authorizing self-help is insufficient to "significantly involve" the state in otherwise private conduct so as to subject the conduct to due process limitations.[78] The same rationale apparently enables banks to exercise their rights of setoff without violating a debtor's due process rights.[79]

In summary, self-help can be the most convenient and least costly means of repossession. For the secured party who violates his duty to repossess without breach of the peace, severe consequences can result. Therefore, even if the debtor voluntarily relinquishes possession of the collateral, a secured party should take steps to assure proof of rightful taking if the issue is later disputed. Breach of the peace is a subjective standard and, in light of the relative lack of Iowa case law on the issue, the secured party rather should pursue judicial action if there is any reason to believe that repossession may constitute a breach of the peace.

B. Repossession by Judicial Process

In Iowa, reacquiring possession of collateral by judicial process normally involves seeking a writ of replevin.[80] Unlike self-help, proceeding with the aid of judicial process is considered state action, and, consequently, due process concerns are brought into play. In Fuentes v. Shevin,[81] the United States Supreme Court held unconstitutional Florida and Pennsylvania replevin statutes, typical of traditional replevin statutes in effect in most jurisdictions at the time, that permitted deprivation of property

without preseizure notice and opportunity for hearing. The Supreme Court's subsequent decision in Mitchell v. W. T. Grant Co.[82] seemed to retreat, at least momentarily, from the strong pro-debtor approach taken in Fuentes. Mitchell involved a Louisiana writ of sequestration by which an agent of the court seized and held disputed property until resolution of the case. In Mitchell, the majority essentially distinguished the case from Fuentes and purported to balance the competing interests of the debtor and creditor.[83] The Court ultimately concluded that the Louisiana statute survived constitutional challenge due to several distinguishing characteristics. Perhaps the most important distinction was the fact that the Louisiana sequestration procedure required a judge, rather than a clerk, to issue the writ. Additionally, the creditor was required to state under oath the facts that entitled him to possession, as opposed to the "bare assertion" of a right to possession in Fuentes,[84] and the Louisiana statute provided an immediate postseizure hearing in which the plaintiff bore the burden of demonstrating the validity of the sequestration.

Whatever doubts were raised following Mitchell seemingly were answered in North Georgia Finishing, Inc. v. Di-Chem, Inc.[85] The Di-Chem opinion made it clear that Mitchell was factually distinguishable from Fuentes, emphasizing that in Mitchell a judge, rather than a clerk, had issued the writ.[86] The Court eventually concluded that the Georgia garnishment statute at issue contained "none of the saving characteristics of the Louisiana statute"[87] and held that garnishment under the statute, even of a corporate debtor, violated due process protections of the fourteenth amendment.[88]

Shortly after Fuentes, the Iowa replevin procedure came under attack in Thorp Credit, Inc. v. Barr.[89] In Thorp the Iowa Supreme Court concluded that the Iowa replevin statute, Iowa Code chapter 643, was in all material respects identical to the Florida statute held unconstitutional in Fuentes and declared that the replevin procedure provided in chapter 643 was invalid for lack of notice and hearing prior to seizure. The court went on to hold, however, that the failure to quash the original writ of replevin was a harmless error, since subsequent testimony of the defendant was sufficient to establish the plaintiff's right to possession. The Iowa Legislature responded by amending the replevin procedure to substantially comply with the minimum standard of due process articulated in Fuentes, Mitchell, and Di-Chem. As amended, the statute provides that a writ of replevin shall be issued "[u]pon direction of the court after notice and opportunity for such hearing as [the court] may prescribe."[90] Thus, although yet untested, the current Iowa replevin procedure seems to pass constitutional muster. Even if the statute is invalidated later, it is unlikely that any cause of action will exist against secured creditors for actions taken under the purportedly valid statute.[91]

C. Rights and Duties of a Secured Party After Repossession

The rights and duties of a secured party who has obtained possession of collateral are enumerated in Iowa Code section 554.9207.[92] The secured party is obligated to use "reasonable care" to preserve the collateral, which, in the case of instruments or chattel paper, includes taking steps to preserve the debtor's rights against other parties unless otherwise agreed[93]--for example, presenting a note payable to the party indebted to the secured party at maturity and giving proper notice of dishonor.[94] The duty to preserve the debtor's rights, however, can be discharged merely by notifying the debtor so that he can take the necessary action to preserve rights against third parties himself.[95]

The duty to exercise due care to preserve the collateral apparently does not mean that a secured party is responsible for a decline in value of the collateral while in possession, at least absent a showing of bad faith.[96] Such a decline, however, may impact on consideration of whether disposition occurred within a commercially reasonable time period following repossession, which could subject the secured party to more serious consequences than liability for the amount of the decline in value.[97] A secured party is entitled, but not required, to use or operate collateral in order to preserve its value.[98] Additionally, the court may order such use or operation for the mutual benefit of the parties or, except for consumer goods, the security agreement may provide for use or operation by the secured party.[99] This so-called "business workout," as opposed to liquidation, is based on the assumption that the collateral may be worth more as a going concern.[100]

Unless otherwise agreed, the secured party is permitted to charge the debtor with the reasonable expenses incurred in holding, preserving, or using the collateral while in possession.[101] Moreover, such reasonable expenses are deemed secured by the collateral[102] and, on disposition, are satisfied from the proceeds prior to the secured obligation.[103] "Increase or profits" from collateral, such as stock dividends, also are automatically considered additional security for the underlying debt unless provided otherwise.[104] Securities received in a reorganization, however, are not covered by the automatic security interest in increase or profits unless provided for in the security agreement.[105] Also, money received either must be remitted to the debtor or retained in reduction of the secured debt.[106]

Risk of accidental loss or damage due to insufficient insurance coverage is placed on the debtor absent specific allocation by the parties.[107] In other words, absent agreement, the debtor is liable to the secured party to the extent of the deficiency in insurance coverage, whether insurance is procured by the debtor or the secured

party.[108] Therefore, if a secured party has insured the collateral for his own protection, he cannot receive reparation from both the insurer and the debtor for any loss sustained. Thus, a debtor is able to benefit from a secured party's foresight to insure the collateral. The insurer on the other hand, is not subrogated to a secured party's rights against the debtor by virtue of indemnification for any loss or damage to the collateral.[109]

Other responsibilities of a secured party in possession include the duty to keep the collateral identifiable, unless it is fungible,[110] and, in cases in which collateral is repledged by the secured party, the obligation to repledge without impairing the debtor's right to redeem.[111] Failure to fulfill these and the other aforementioned duties will render a secured party liable for any loss sustained as a result thereof, although the security interest will continue to exist.[112] Consequently, regardless of the secured party's compliance or noncompliance with the duties of possession imposed by the UCC, the secured party's next concern is disposition or retention of the collateral to satisfy the underlying secured obligation.

II. DISPOSITION OR RETENTION OF COLLATERAL BY SECURED PARTIES

Following default, a secured party is empowered to "sell, lease or otherwise dispose of any or all of the collateral."[113] Most often, collateral is disposed of by public or private sale.[114] All of the collateral need not be disposed of; if the collateral consists of severable properties, the secured party can dispose of a portion of the collateral sufficient to remedy the debtor's fault.[115]

Debtors or other secured parties or lienors possess the right to redeem collateral before a secured party has disposed of it, entered into a contract for its disposition, or accepted it in discharge of the obligation.[116] Redemption is accomplished by a tender of all matured obligations secured by the collateral--not just those of the party in possession--as well as the secured party's reasonable expenses incurred and, if provided in the agreement, attorneys' fees and legal expenses.[117] Unmatured obligations continue to be secured as if there had been no default.[118] The fact that part of the collateral is no longer subject to redemption does not prevent redemption of the remaining collateral with due credit against the amount to be tendered for collateral already disposed of.[119] The debtor's right to redeem can only be waived by postdefault agreement.[120]

A purchaser of collateral for value acquires all the rights of the debtor in such collateral.[121] Disposition of the collateral

discharges the underlying security interest as well as junior security interests and liens.[122] Security interests superior to the security interest that led to disposition survive the disposition, and a purchaser for value takes the collateral subject to the interest of senior secured parties and lienholders just as purchasers at judicial sales.

The rights of a purchaser for value remain intact even though the secured party has not proceeded in accordance with proper disposition procedures, unless, in the case of a public sale, the purchaser knows of defects in the sale and buys "in collusion with the secured party, other bidders or the person conducting the sale," or, in any other case, acts in bad faith.[123] Secured parties are permitted to purchase the collateral at a public sale, and, if the collateral is subject to a recognized market or widely distributed standard price quotations, they may purchase at private sale.[124]

Part V of Article 9 provides a formal distribution scheme for proceeds from the disposition of collateral. Reasonable selling or leasing expenses and legal expenses and attorneys' fees are first satisfied from the proceeds.[125] Only then are proceeds applied in satisfaction of the secured indebtedness under which the disposition was made.[126] Finally, any remaining proceeds are applied toward indebtedness secured by subordinate security interests or liens, but only if written notifications of the subordinate interests are received prior to distribution.[127] When more than one party with a subordinate interest asserts a right to the proceeds of disposition and the remaining proceeds are not sufficient to satisfy all subordinate claims, one method of settling the dispute is to interplead the claimants.[128] If any proceeds remain after distribution is completed, the debtor is entitled to receive the surplus,[129] which right cannot be waived.[130] The secured party may hold the debtor liable for any deficiency unless provided otherwise by agreement, except that the UCC distinguishes a sale of accounts or chattel paper, requiring that the security agreement must provide for such rights before the debtor can be held liable for a deficiency or is entitled to a surplus.[131]

Occasionally, a secured party in possession of the collateral after default may elect to retain, rather than dispose of, the collateral in return for a total discharge of the debtor's obligation. Retention is permitted unless objection in writing is made within twenty-one days after written notice of the proposal to retain the collateral by a party entitled to notice.[132] If the collateral consists of consumer goods, only the debtor is entitled to written notice of proposed retention.[133] Otherwise, the secured party also must notify other secured parties or lienors that have provided written notice of their claims of interest in the collateral before written notice is given to the debtor or, alternatively, the debtor's renunciation of his rights.[134]

Therefore, by waiving his rights to notice and renouncing his rights, the debtor also can waive the rights of other secured parties and lienors (who have not theretofore given the secured party notification of a claim of an interest in the collateral) to receive notice and thus object to the retention (since only those persons entitled to notice may object). Renunciation or modification of a debtor's right to notice of the proposed retention and opportunity to object thereto is ineffective unless it is the result of a signed statement by the debtor after default.[135]

Normally, the incentive to retain collateral is greatest when its value exceeds, or at least equals, the secured obligation. Conversely, there is little or no incentive to retain collateral in satisfaction of the debt when its value is less than the amount of the debt since no deficiency judgment can be obtained under such procedure.[136] The debtor, on the other hand, is motivated to object to the retention in precisely the same circumstances that provide incentive for retention (value of collateral exceeds secured debt), since the secured party must account for surplus proceeds when normal disposition occurs.[137]

Secured parties are not always entitled to accept collateral for discharge of the debtor's obligation. When the collateral is consumer goods and the debtor has paid sixty percent of either the price, in the case of a purchase-money security interest,[138] or the amount of the loan, in other cases, disposition is mandatory.[139] Failure to dispose of consumer-goods collateral qualifying for compulsory disposition within ninety days after possession thereof is acquired renders the secured party liable for conversion at the debtor's option.[140] The sixty-percent rule is subject to waiver by the debtor only if agreed to in a postdefault waiver.[141]

Whether disposition of collateral is elected by the secured party or compelled by Article 9, a secured party has considerable discretion in the method of disposition, subject to the amorphous standard of "commercial reasonableness." Commercial reasonableness, like default and breach of peace, is not defined in the UCC. The UCC does provide, however, that a secured party who sells collateral in the usual manner in a recognized market or at a current price established by such market at the time of the sale, or otherwise conforms with "reasonable commercial practices among dealers in the type of property sold," shall be deemed to have proceeded in a commercially reasonable manner.[142] Collateral sold pursuant to judicial approval or approval by a bona fide creditors' committee or creditors' representative manifests a conclusive presumption that the sale was made in a commercially reasonable manner, even though the failure to obtain such approval does not prevent the sale from being considered commercially reasonable.[143]

One aspect of disposition affected by the commercial reasonableness standard is the UCC's notice-of-sale provision. Unless the debtor has renounced his right to notification of the sale after default, the secured party must provide him with reasonable notice of the time and place of a public sale or the time after which a private sale or other disposition is to be made.[144] Such notice is intended to protect a debtor's right of redemption[145] and enable the debtor to stimulate the interest of potential bidders.[146]

Taken literally, the UCC apparently allows a secured party the discretion to choose whether disposition will be by public or private sale. The official comments, however, seem to suggest that a private sale should be encouraged whenever it is more likely to obtain a higher price.[147] The distinction between public and private sales is particularly relevant to the type of notice that is required. In the case of public sales, the notice must include, at a minimum, both the time and place of sale. With private sales, only the time after which the sale or other disposition is to be made is required.[148]

Another important distinction that affects who is entitled to notice is based on whether the collateral consists of consumer goods. When the collateral is consumer goods, only the debtor[149] need be notified of the sale.[150] With other types of collateral, however, the secured party must notify other secured parties that have given written notice of an interest in the collateral either before notice is sent to the debtor or before the debtor renounces his right to such notice.[151] In certain circumstances no notice is required at all. If the collateral is perishable, threatens to decline speedily in value, or is of a type customarily sold on a recognized market, the UCC permits disposition without notice to the debtor.[152] Used cars and mobile homes have consistently been held not to be of a type customarily sold on a recognized market and, therefore, are not excepted from the notice provision.[153]

In cases in which notice of sale is required, the UCC does not establish a minimum time limit following notice before disposition can proceed. As one might expect, judicial interpretation has failed to yield a simple, precise answer. Rather, the question seems to depend on what is commercially reasonable based on the particular circumstances surrounding a proposed disposition.[154] To be relatively certain that sufficient time has been allowed, the secured party should give at least ten days notice.[155]

The UCC is also unclear on whether notice must be in writing, speaking only in terms of notice being "sent."[156] In an action for a deficiency judgment, however, the burden of pleading and proving proper notice of sale is on the secured party,[157] and therefore, as a practical matter, the secured party is well-advised to give notice

in writing.[158] In Northwest Bank & Trust Co. v. Gutshall,[159] the Iowa Supreme Court noted that although actual receipt of notice by persons entitled thereto is not a prerequisite to recovery of a deficiency, proof of proper mailing is required. In Gutshall, the testimony of a bank official that the ordinary business practice of the bank was to mail notice was insufficient to support a finding that notice had been sent.[161] Consequently, the secured party should take steps to assure proof of mailing. Perhaps the most persuasive evidence of mailing, although not specifically required by the UCC, is notice by registered or certified mail. If the party to whom the registered or certified mail is addressed refuses delivery and a diligent effort is made to notify such party, the attempt to provide notice of sale will be considered reasonable and, therefore, sufficient to satisfy UCC requirements.[162]

Commercial reasonableness not only requires that adequate notice be given to interested parties, but that an attempt is made to attract a sufficient number of potential purchasers. In essence, the secured party is obligated to publicize the disposition in a manner that is normally adequate to generate competitive bidding.[163] In publicizing the disposition, the secured party must be cautious not to omit or misstate essential information concerning the disposition. At a minimum, the publicity to potential bidders should accurately describe the nature of the collateral and the time, place, and terms of the disposition.[164]

Not only should publicity of disposition contain essential information, but it should be accomplished through the most appropriate medium. For instance, the sale of collateral that appeals to a relatively narrow market, such as an oil rig, should be advertised in a specialized trade journal.[165] On the other hand, the sale of farm equipment appropriately may be advertised by posted sale bills and in local or regional newspapers of general circulation. The information publicized must be correct for the disposition to be deemed proper.[166] If an omission or error in the publicity is discovered before disposition of the collateral, the secured party should readvertise with the correct information to avoid risking a later denial of a deficiency judgment.[167] Closely related to a secured party's duty to publicize disposition is the duty to allow prospective bidders reasonable opportunity to inspect the collateral. Failure to allow inspection may be a commercially unreasonable disposition and may render the secured party liable for the difference between the price obtained and the collateral's fair market value.[168]

An additional obligation to prepare collateral for disposition may be imposed on the secured party. The UCC seems to confer a permissive right on the secured party to prepare or process collateral for disposition in a commercially reasonable manner.[169] Some courts, however, have interpreted the UCC's "commercially

reasonable" language to impose an affirmative duty to improve the collateral before disposition in certain circumstances.[170] Generally, if the cost to prepare or process is considerably less than the extra value that reasonably can be expected from disposition, the secured creditor should take steps to improve the condition of the collateral.[171] Arguably, a secured party may recover preparation costs even though on disposition collateral fails to yield extra return sufficient to offset the costs of preparation, as long as the costs are incurred with a commercially reasonable belief that the net value of the collateral will be increased.[172]

After adequate predisposition formalities have been satisfied, the collateral must be disposed of within a commercially reasonable time after repossession. Again, with the sole exception of compulsory disposition of consumer goods,[173] the UCC has not attempted to establish an absolute time limit within which disposition must occur.[174] Commercial reasonableness dictates that the disposition be made after adequate time to stimulate the interest of enough potential bidders has passed but before delay is unreasonably costly to the debtor. The question of how much time is adequate but not excessive is answered in familiar fashion by clearly defined extremes and a somewhat ambiguous middle-ground; depending on the type of collateral, a few days may be too little time[175] and a year may be too much.[176] Obviously, perishable and rapidly depreciating collateral should be disposed of as soon as possible, provided there has been adequate publicity of the disposition. Disposition must take place at a commercially reasonable time and place.[177] Consequently, a secured party should accommodate the reasonable convenience of prospective purchasers if the disposition is to withstand later attack.

The UCC permits disposition as a unit or as separate parcels.[178] If a higher net price can be realized from collateral by piecemeal disposition, the secured party may be bound by commercial reasonableness to pursue such method of disposition.[179] Of course, the secured party must consider the additional transaction costs of the piecemeal disposition, which may render it less attractive than disposition as a unit, though piecemeal disposition might result in higher gross receipts. If collateral is disposed of as a unit, the secured party should be prepared to justify its conduct with a commercially reasonable explanation, such as maximization of the total value of the collateral.

The UCC provides that the fact a better price could have been realized by disposition in a different manner is not sufficient to establish commercial unreasonableness.[180] Notwithstanding this provision, an inadequate price may be a significant factor in determining the reasonableness of the disposition and is particularly persuasive evidence of unreasonableness when combined with other

flaws in the disposition. In Beneficial Finance Co. v. Reed[181] the Iowa Supreme Court stopped short of holding that gross disparity between the price received at an Article 9 foreclosure sale and the fair market value of the collateral was sufficient to render the sale commercially unreasonable. The court recognized, however, that the adequacy of the price received on disposition was relevant to the commercial reasonableness of the sale, but held that deficiencies in notice of sale made the disposition commercially unreasonable.[182] Nonetheless, a grossly inadequate price is likely to cause a reviewing court to be less tolerant of other minor defects in the disposition or to increase its scrutiny of other aspects of the disposition.[183] Only a few courts have held that a low price alone is enough to render a foreclosure sale commercially unreasonable.[184]

When a secured party exercises his right to purchase the collateral,[185] courts may be suspicious of the disposition, particularly if the collateral is resold by the secured party at a higher price.[186] The same may not be true of disinterested third-party purchasers, however, since apparently Article 9 authorizes wholesale, as opposed to retail, dispositions of collateral.[187] Nevertheless, resale by a person who acquires rights in collateral by virtue of a "guaranty, endorsement, repurchase agreement or the like" may create problems independent of commercial reasonableness concerns;[188] most notably, the subsequent resale of collateral so acquired is considered the actual foreclosure sale and, as such, must conform with the formal requirements of disposition just as though the sale was conducted by a secured party.[189]

In summary, the disposition procedures enumerated in Article 9 are subject to a general proviso that every aspect of the disposition be commercially reasonable. In a practical sense, commercial reasonableness requires that the secured party in possession make a good-faith effort to dispose of the collateral as quickly and efficiently as possible and in a manner most likely to enhance the ultimate value of the collateral. The Article 9 provisions governing disposition and prior notice thereof cannot be waived by a debtor,[190] except that notice can be waived in a post-default statement.[191]

III. CONSEQUENCES OF NONCOMPLIANCE

Failure to comply with the requirements of part V of Article 9 can result in relatively serious consequences for the secured party. The UCC provides several debtors' remedies in the event that a secured party fails to follow the methods laid out in part V. For instance, foreclosure can be enjoined if the secured party has repossessed the collateral incorrectly or otherwise failed to comply

with proper procedure.[192] The injunction may then stipulate "appropriate terms and conditions" for proceeding with disposition.[193] An injunction, however, requires a relatively quick reaction by the debtor to prevent foreclosure.

B

When disposition occurs before an injunction can be obtained, the secured party is liable for damages resulting from the noncompliance with part V.[194] If, for example, the disposition was not conducted in a commercially reasonable manner, the secured party would be liable for the difference between the actual price received and the price that would have been received had disposition been commercially reasonable--normally the value of the collateral at the time of the deficient disposition[195]--less any still unpaid balance of the obligation owed to the secured party by the debtor. Some courts have even awarded punitive damages, although not specifically authorized by part V, if the secured party's conduct is particularly offensive.[196] Moreover, when collateral consists of consumer goods, the debtor is entitled to a minimum recovery equal to at least the total finance charges plus ten percent of the amount financed or the time price differential plus ten percent of the cash price, regardless of actual damages.[197] The secured party's duty to conform his conduct to the standards articulated in part V of Article 9 is not limited to the debtor. Thus, damages may be owing to persons entitled to notice of the disposition or who gave notice of a security interest prior to foreclosure, subject, of course, to the caveat that the secured party's failure to comply caused such loss.[198]

An additional sanction limiting the secured party's right to a deficiency has been extrapolated by the courts from the language of the UCC. There appears to be two methods of dealing with a secured party's right to a deficiency judgment when that party has failed to comply with part V. One view articulated in Norton v. National Bank of Commerce[199] creates a presumption that the collateral is worth at least the amount of the debt owing, and allows a setoff by the debtor against the deficiency judgment for the difference between the value of the collateral and the price received on disposition. An alternative view, and the one adopted by the Iowa Supreme Court, interprets the UCC to preclude recovery of a deficiency judgment when the secured party violates its provisions. In Herman Ford-Mercury, Inc. v. Betts[200] the trial court found that the plaintiff-secured parties had failed to proceed in a commercially reasonable manner, but allowed them the difference between the remaining deficiency and what the collateral should have sold for had the sale been commercially reasonable. The Iowa Supreme Court reversed on the issue of whether the secured parties could recover a partial deficiency, holding that a commercially reasonable sale was a condition precedent to a secured party's right to obtain a deficiency judgment against a debtor.[201] The underlying rationale of the court's position is that noncompliance--in particular, a com-

mercially unreasonable sale or sale without proper notice--interferes with the debtor's right to redeem the collateral or encourage competitive bidding at the sale.[202] Therefore, the prospect of denial of a deficiency is strong incentive for secured parties to comply with the UCC.

FOOTNOTES

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1. U.C.C. § 9-102(1). Hereinafter, all citations to the Uniform Commercial Code will be to the Iowa Uniform Commercial Code, Iowa Code ch. 554 (1983), unless the citation is to the official comments of the UCC. In Iowa the Official Comments to the 1972 text of the UCC are evidence of legislative intent. Id. § 554.11109.

2. E.g., Whisenhunt v. Allen Parker Co., 119 Ga. App. 813, 168 S.E.2d 827, 830 (1969). For a comprehensive, nonexhaustive list of typical default provisions, see B. Clark, The Law of Secured Transactions Under the Uniform Commercial Code ¶ 4.2[1] (1980) [hereinafter cited as B. Clark]. The ability to define default in the security agreement is limited by good faith, Iowa Code § 554.1203 (1983); unconscionability, in the case of goods, id. § 554.2302; and general contract principles, id. § 554.1103. In consumer credit transactions governed by the Iowa Consumer Credit Code ("ICCC"), see infra text accompanying notes 27-40, a general definition of default is provided in Iowa Code § 537.5109 (1983). Therefore, a secured party may not have the same freedom to define default in the security agreement in consumer credit transactions. B. Clark, supra, ¶ 12.5[1][b].

3. See, e.g., Iowa Code § 554.9502(2) (1983) (surplus and deficiency only as provided by security agreement when underlying transaction is sale of accounts or chattel paper); id. § 554.9505 (compulsory disposition of consumer goods).

4. Id. § 554.9109.

5. See id. § 554.9109(4).

6. See id. § 554.9109(1).

7. See id. § 554.9109(2).

8. Id. § 554.9501(1).

9. Id. ch. 639.

10. Id. ch. 642.

11. Id. ch. 626.

12. U.C.C. § 9-501(2) & comment 1 (1972). Iowa Code § 554.9501(3) (1983) provides that certain rights of the debtor and duties of the secured party cannot be waived by agreement, id., although some UCC provisions can be waived by the debtor after default. E.g., id. § 554.9506 (debtor's right to redeem collateral). Throughout this presentation reference is made to the ability to waive the rights and duties conferred by part V of Article 9 whenever relevant.

13. Iowa Code § 624.23(1) (1983).

14. Id. § 554.9501(5). The relation-back principle is particularly important in regard to bankruptcy proceedings since the execution will be considered a foreclosure of the original security interest rather than as a preferential transfer that may be avoided by the trustee in bankruptcy reducing the secured creditor to an unsecured position. B. Clark, supra note 2, ¶ 4.3[2], at 4-15 to -16; see 11 U.S.C. § 547 (Supp. V 1981).

15. Iowa Code § 554.9501(5) (1983).

16. Id. § 554.9501(1).

17. E.g., Hill v. Bank of Colorado, 648 F.2d 1282, 1285 (10th Cir. 1981); Ceres Fertilizer, Inc. v. Beekman, 209 Neb. 447, 308 N.W. 2d 347, 349 (1981); see Sheet Metal Workers Local #76 Credit Union v. Hufnagle, 295 N.W.2d 259, 261-62 (Minn. 1980). But see In re Wilson, 390 F. Supp. 1121, 1125 (D. Kan. 1975) (secured creditor having obtained in personam judgment is precluded by res judicata from bringing subsequent action to enforce security interest and likewise is precluded from asserting security interest against trustee in bankruptcy); Community Bank v. Jones, 278 Or. 647, 566 P.2d 470, 488 (1977) (secured creditor having recourse to two funds must first seek to satisfy debt from fund in which junior secured creditor has no interest).

18. See Jensen v. State Bank of Allison, 518 F.2d 1, 7 (8th Cir. 1975).

19. E.g., Olsen v. Harlan Nat'l Bank, 162 N.W.2d 755, 759 (Iowa 1968) (citing Hanby v. First Sav. Bank, 197 Iowa 150, 197 N.W. 51, 52 (1924)); see also Farmers Coop. Elev., Inc. v. State Bank, 236 N.W.2d 674, 678 (Iowa 1975) (bank not liable for wrongful dishonor and tortious interference for setoff in good faith); Ames Trust & Sav. Bank v. Reichardt, 254 Iowa 1272, 121 N.W.2d 200, 203 (1963) (adhering to majority rule that setoff is allowed against unmatured debt when insolvency is proven).

The right of setoff is excluded from UCC coverage. Iowa Code § 554.9104(i) (1983).

20. See, e.g., Jensen v. State Bank of Allison, 518 F.2d 1, 6-7 (8th Cir. 1975).

21. Iowa Code § 554.9501(1) (1983).

22. Id. § 554.9501(4). Transfers of real estate interests, except for fixtures, id. § 554.9313, are excluded from coverage under Article 9. Id. § 554.9104(j). Note that when the secured creditor proceeds against real and personal property in separate actions, he is precluded from treating the personal property under real property rules. State Bank of Towner v. Hansen, 302 N.W.2d 760, 764 (N.D. 1981).

23. See 11 U.S.C. § 362(a) (Supp. V 1981).

24. Id. § 362(c).

25. See id. §§ 522(f), 547.

26. Id. § 524.

27. Iowa Code ch. 537 (1983).

28. Id. § 537.1301(11). A consumer credit transaction includes consumer credit sales, id. § 537.1301(12); consumer loans, id. § 537.1301(14), or refinancings or consolidations thereof; and consumer leases, id. § 537.1301(13). The common denominators in these types of transactions are that they must involve goods used for personal, family, or household purposes; the debtor is a person other than an organization; and the amount of the transaction is $25,000 or less.

29. Id. § 537.5104.

30. Compare id. §§ 537.5105-.5106 with id. § 642.21.

31. Id. § 537.5103(2), (3).

32. Id. § 537.5103(1). Bars to deficiency judgments have been read into the langugage of the UCC in other contexts. See infra text accompanying notes 200-01.

33. Iowa Code § 537.5110(1) (1983).

34. "Creditor" is defined as the person granting credit, id. § 537.1301(15), or, except as otherwise provided, an assignee of the creditor. Id. § 537.1301(17).

35. Id. § 537.5110(2). See generally id. § 639.3(3)-(12) (grounds for attachment for which notice to cure need not be given).

36. Iowa Code § 537.5111 (1983) specifically describes the form of notice, which includes among others a brief identification of the transaction, the nature of the right to cure default, and the exact amount required to cure and the exact date by which tender is required. Id.

37. Id. § 537.5110(3). The notice-to-cure provisions do not cover insurance premium loan transactions. Id.

38. Id. § 537.5110(4)(c).

39. Id. § 537.5110(7).

40. Id. § 537.5201(1)(z).

41. Iowa Code § 554.9503 (1983).

42. Id. The security agreement may provide otherwise. Id.

43. Id. § 554.9502(1). The secured party must proceed in a commercially reasonable manner, see infra text accompanying notes 141-91, and is entitled to deduct reasonable expenses from the collections. Any surplus must be remitted to the debtor and the debtor is liable for any deficiency, unless the transaction involved a sale of accounts, defined in Iowa Code § 554.9106 (1983), or chattel paper, defined in id. § 554.9105(1)(b), in which case a deficiency or surplus is not owing unless provided for in the security agreement. Id. § 554.9502(2).

44. Perfection is important for purposes of relation-back of a lien acquired pursuant to execution, however. See supra text accompanying note 14. Section 554.9501(5) (relation-back) speaks of "perfection"; sections 554.9502 (collection rights) and 554.9503 (right to possession) speak only in terms of a "secured party." Therefore, the only requirement for a secured party to exercise rights of collection or possession is that a security interest has attached. Cf. Iowa Code § 554.9203 (1983).

45. Iowa Code § 554.9503 (1983).

46. Id. ch. 643.

47. Iowa Code § 554.9109(2) describes equipment as goods used or bought for use primarily in a business, or by a debtor who is a

nonprofit organization, or governmental subdivision or agency, or if the goods are not included in the definition of inventory, farm products or consumer goods. Id.

48. Id. § 554.9503.

49. See Comment, Breach of Peace and Section 9-503 of the Uniform Commercial Code--A Modern Definition for an Ancient Restriction, 82 Dick. L. Rev. 351, 352 (1978) [hereinafter cited as Breach of Peace].

50. Iowa Code § 554.9503 (1983).

51. 219 Iowa 142, 257 N.W. 400 (1934).

52. Id. at 143, 257 N.W. at 400 (emphasis omitted).

53. Id. at 148, 257 N.W. at 403. In reaching its decision the court concluded: "If resort to force be had, [possession] should be secured through proper legal outlets." Id. at 149, 257 N.W. at 403.

54. See, e.g., Deavers v. Standridge, 144 Ga. App. 673, 242 S.E.2d 331, 333-34 (1978).

55. B. Clark, supra note 2, ¶ 4.5[2][b], at 4-36.

56. See Wirth v. Heavy, 508 S.W.2d 263, 266 (Mo. Ct. App. 1974); Cherno v. Bank of Babylon, 54 Misc. 2d 277, 282 N.Y.S. 2d 114, 119-20 (N.Y. Sup. Ct. 1967).

57. See Breach of Peace, supra note 49, at 361 (social harmony is no less disturbed by violent conduct against commercial property than against personal residences).

58. See, e.g., Henderson v. Security Nat'l Bank, 72 Cal. App. 3d 764, 140 Cal. Rptr. 388 (1977) (breaking lock on garage constitutes breach of peace); C.I.T. Corp. v. Short, 273 Ky. 190, 115 S.W.2d 899, 900 (1938) (taking car from "open" garage is not breach of peace); Kroeger v. Ogsden, 429 P.2d 781, 786 (Okla. 1967) (taking airplane from "open" hangar is not breach of peace); B. Clark, supra note 2, ¶ 4.5[2][b] & n.139.

59. See, e.g., King v. GMAC, 140 F. Supp. 259, 259-60 (M.D.N.C. 1956) (public street); Thompson v. Ford Motor Credit Co., 324 F. Supp. 108, 115-16 (D.S.C. 1971) (parking lot); see also B. Clark, supra note 2, ¶ 4.5[2][b], at 4-36.

60. 268 N.W.2d 192 (Iowa 1978).

61. Id. at 196.

62. Breach of Peace, supra note 49, at 361-62.

63. Ben Cooper Motor Co. v. Amey, 143 Okla. 75, 76, 287 P. 1017, 1018 (1930); see Morris v. First Nat'l Bank & Trust Co. of Ravenna, 21 Ohio St. 2d 25, 254 N.E.2d 683, 685-86 (1970).

64. Breach of Peace, supra note 49, at 364.

65. B. Clark, supra note 2, ¶ 4.5[2][b], at 4-37; Breach of Peace, supra note 49, at 366; see Freeman v. GMAC, 205 N.C. 257, 171 S.E. 63, 63-64 (1933); Morris v. First Nat'l Bank & Trust Co. of Ravenna, 21 Ohio St. 2d 25, 254 N.E.2d 683, 685 (1970).

66. See Breach of Peace, supra note 49, at 366.

67. Id. at 366 n.96; see infra text accompanying notes 69-71.

68. E.g., Ford Motor Credit Co. v. Ditton, 52 Ala. App. 555, 295 So. 2d 408, 411 (1974); Breach of Peace, supra note 49, at 366.

69. Klett v. Security Acceptance Co., 38 Cal. 2d 770, 242 P.2d 873, 886 (1952); Sims v. Horton, 43 Wash. 2d 907, 264 P.2d 879, 881 (1954); B. Clark, supra note 2, ¶ 4.5[2][b], at 4-37.

70. See Bullock v. Young, 118 A.2d 917, 918 (D.C. 1955); Breach of Peace, supra note 49, at 374.

71. See Breach of Peace, supra note 49, at 374.

72. See, e.g., Thompson v. Ford Motor Credit Co., 550 F.2d 256, 258 (5th Cir. 1977) (merely conniving to repossess does not constitute breach of peace); Moody v. Nides Finance Co., 115 Ga. App. 859, 156 S.E.2d 310, 311 (1967) (debtor's sister-in-law induced to turn over car for "road test"); Ford Motor Credit Corp. v. Cole, 503 S.W.2d 853, 855 (Tex. Civ. App. 1973) (repossession by stealth).

73. Stone Machinery Co. v. Kessler, 1 Wash. App. 2d 750, 463 P.2d 651, 655 (1970); see also Walker v. Walthall, 588 P.2d 863, 866 (Ariz. Ct. App. 1978) (participation of law enforcement officers in self-help repossession constitutes state action and renders repossession invalid on due process grounds); B. Clark, supra note 2, ¶ 4.5[2][b], at 4-38.

74. B. Clark, supra note 2, ¶ 4.5[2][b], at 4-38; see Southern Indus. Sav. Bank v. Greene, 224 So. 2d 416, 418-19 (Fla. Dist. Ct. App. 1969) (secured party inadvertently obtaining possession of other property while repossessing collateral must exercise care of constructive bailee).

75. Sanders v. GMAC, 180 S.C. 138, 146-47, 185 S.E. 180, 183 (1936).

76. E.g., GMAC v. Vincent, 183 Okla. 547, 548, 83 P.2d 539, 540-41 (1938) (door handle on car broken during repossession); Breach of Peace, supra note 49, at 362-63.

77. See Brodsky, Constitutionality of Self-Help Repossession Under the Uniform Commercial Code: the Eighth and Ninth Circuits Speak, 19 S.D.L. Rev. 295, 298-301 (1973).

78. Bichel Optical Laboratories, Inc. v. Marquette Nat'l Bank, 487 F.2d 906, 907 (8th Cir. 1973). See also Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324 (9th Cir. 1973), cert. denied, 419 U.S. 1006 (1974). Compare Walker v. Walthall, 588 P.2d 863, 866 (Ariz. Ct. App. 1978), in which the court held that participation of law enforcement personnel in self-help repossession constituted color of state law sufficient to require due process.

79. Kruger v. Wells Fargo Bank, 11 Cal. App. 3d 352, 113 Cal. Rptr. 449, 521 P.2d 441, 447 (1974); B. Clark, supra note 2, ¶ 4.5[1][b].

80. Iowa Code ch. 643 (1983).

81. 407 U.S. 67 (1972). For a comprehensive discussion of Fuentes and related Supreme Court decisions, see Catz & Robinson, Due Process and Creditor's Remedies: from Sniadach and Fuentes to Mitchell, North Georgia and Beyond, 28 Rutgers L. Rev. 541 (1975).

82. 416 U.S. 600 (1974).

83. Id. at 615-18.

84. 407 U.S. at 74.

85. 419 U.S. 601 (1975).

86. Id. at 607.

87. Id.

88. Id. at 608.

89. 200 N.W.2d 535 (Iowa 1972).

90. Iowa Code § 643.5 (1983).

91. See B. Clark, supra note 2, ¶ 12.5[4][b], at 12-36.

92. Iowa Code § 554.9501(1) (1983). Section 554.9207 also applies in cases in which the secured party possesses property prior to default, such as a pledgee. U.C.C. § 9-207 comment 4 (1972).

93. Iowa Code § 554.9207(1) (1983). Reasonable care is a standard that cannot be waived, although the parties may establish criteria for performance of the duty to preserve collateral provided they are not manifestly unreasonable. Id. § 554.1102(3).

94. B. Clark, supra note 2, ¶ 7.14[3]; see also Iowa Code § 554.3503 (1983).

95. U.C.C. § 9-207 comment 1 (1972).

96. New Jersey Bank v. Toffler, 139 N.J. Super. 161, 353 A.2d 116, 118 (App. Div. 1976).

97. See infra text accompanying notes 172-77, 200-02.

98. Iowa Code § 554.9207(4) (1983).

99. Id.

100. For a comprehensive discussion of the business workout, see B. Clark, supra note 2, ¶ 4.3(1).

101. Iowa Code § 554.9207(2)(a) (1983).

102. Id.

103. Id. § 554.9504(1)(a); infra note 125 and accompanying text.

104. Iowa Code § 554.9207(2)(c) (1983).

105. B. Clark, supra note 2, ¶ 7.15.

106. Iowa Code § 554.9207(2)(c) (1983).

107. Id. § 554.9207(2)(b).

108. B. Clark, supra note 2, ¶ 7.14[4][b].

109. Id. ¶ 7.14[4][b], at 7-42.

110. Iowa Code § 554.9207(2)(d) (1983).

111. Id. § 554.9207(2)(e).

112. Id. § 554.9207(3). The "right" of the secured party to operate the collateral as a going concern (id. § 554.9207(4); see supra text accompanying notes 98-100) is not subject to this restriction. See Iowa Code § 554.9207(3) (1983) (liability for failure to satisfy "preceding subsections" (emphasis added)).

113. Iowa Code § 554.9504(1) (1983).

114. B. Clark, supra note 2, ¶ 4.6, at 4-40.

115. Iowa Code § 554.9504(1) (1983).

116. Iowa Code § 554.9506 (1983). For a discussion of a secured party's right to accept collateral in satisfaction of the underlying debt, see infra text accompanying notes 131-41.

117. Iowa Code § 554.9506 (1983). Tender, in this sense, means payment in full, including accelerated payments, and not merely a renewed promise to perform. U.C.C. § 9-506 comment (1972). Notice that under the ICCC the amount required to cure consumer default does not include accelerated payments. Iowa Code § 537.5110(4)(c) (1983); see supra text accompanying notes 37-38.

118. U.C.C. § 9-506 comment (1972).

119. Id.

120. Iowa Code § 554.9501(3)(d) (1983); id. § 554.9506.

121. Id. § 554.9504(4).

122. Id.; U.C.C. § 9-504 comment 1 (1972). Application of the proceeds from sale may be applied toward a junior creditor's secured interest, however. Iowa Code § 554.9504(1)(c) (1983); see infra text accompanying notes 127-28. Also, the junior creditor's right to obtain an in personam judgment on the debtor's obligation survives. See Iowa Code § 554.9501(1) (cumulative remedies); supra text accompanying notes 8-11, 13-18.

123. Iowa Code § 554.9504(4) (1983). Motor vehicles and mobile homes are not considered subject to recognized markets or widely distributed standard price quotations. See infra text accompanying note 153.

124. Id. § 554.9504(3).

125. Iowa Code § 554.9504(1)(a) (1983). The reasonable expenses of selling or leasing include the expenses of taking possession of the collateral and the expenses of preparing collateral for sale, see infra text accompanying notes 168-72. Attorneys' fees and legal expenses are only permitted "to the extent provided for in the agreement and not prohibited by law." Iowa Code § 554.9504(1)(a) (1983). If the secured interest arises out of a consumer credit transaction, the secured party is prohibited from shifting the burden of attorneys' fees to the debtor, and any provision to the contrary is unenforceable. Id. § 537.2507.

126. Id. § 554.9504(1)(b).

127. Id. § 554.9504(1)(c). The secured party need not comply with the demand of a junior interest if the secured party requests and does not receive reasonable proof of the demand. Id. A copy of the security agreement is normally adequate proof of the junior security interest. B. Clark, supra note 2, ¶ 4.6[3]. A subordinate secured party or lien-holder interest is extinguished by the sale. Iowa Code § 554.9504(4) (1983); see supra text accompanying note 122. Thus, the provision allowing the junior secured creditor to share in the distribution of proceeds from disposition provides some minimal protection of the junior creditor's interest in the collateral. Also, the secured party is still free to pursue other in personam remedies. The section does not provide similar protection for a mere judgment creditor prior to levy and corresponding lien attachment. Most judgment creditors, therefore, resort to garnishment of any excess proceeds. B. Clark, supra note 2, ¶ 4.6[3].

128. B. Clark, supra note 2, ¶ 4.6[3].

129. Iowa Code § 554.9504(2) (1983).

130. Id. § 554.9501(3)(a).

131. Id. § 554.9504(2); see supra note 43.

132. Iowa Code § 554.9505(2) (1983).

133. Id.

134. Id.

135. Id. § 554.9501(3)(c); id. § 554.9505(2).

136. See id. § 554.9505(2).

137. Id. § 554.9504(2); see supra text accompanying note 129.

138. A purchase-money security interest is an interest retained by the seller of collateral to secure all or part of its purchase price or that of a person who extends funds to an obligor to acquire rights in property that will serve as collateral, provided the funds are so used. Iowa Code § 554.9107 (1983).

139. Id. § 554.9505(1).

140. Id. § 554.9505(1); see also id. § 554.9507(1); infra text accompanying notes 191-202.

141. Iowa Code § 554.9501(3)(c) (1983); id. § 554.9505(1).

142. Id. § 554.9507(2). The UCC makes it clear that although commercial reasonableness is described in terms of a sale, the same principles apply to other types of disposition. Id.

143. Id.

144. Id. § 554.9504(3).

145. See id. § 554.9506; supra text accompanying note 115-20.

146. B. Clark, supra note 2, ¶ 4.8[2].

147. U.C.C. § 9-504 comment 1 (1972).

148. Iowa Code § 554.9504(3) (1983); B. Clark, supra note 2, ¶ 4.8[7][e]. Professor Clark argues that "[a]s a matter of good practice," notice to the debtor also should include a description of the event of default, reference to the note and security agreement, the unpaid balance and the amount needed to redeem, the terms of the prospective disposition, and a statement of the right to inspect the collateral. Id.

149. "Debtor" may include more than just the obligor in a secured transaction. For instance, debtor may mean the owner of the collateral, if different from the obligor under the secured transaction. Iowa Code § 554.9105(1)(d). In the context of notice of disposition, debtor probably includes both the obligor and owner of the collateral, see id., and thus, notice of sale should be given to both parties.

150. Id. § 554.9504(3).

151. Id. Note that, unlike § 554.9505(2), dealing with retention of collateral in satisfaction of an outstanding debt, § 554.9504(3) does not provide for notice to "lienors."

152. Id. § 554.9504(3).

153. FDIC v. Farrar, 231 N.W.2d 602, 605 (Iowa 1975); Beneficial Finance Co. v. Reed, 212 N.W.2d 454, 459 (Iowa 1973).

154. See B. Clark, supra note 2, ¶ 4.8[7][c].

155. Id.

156. "Sent," as defined in the UCC, apparently is broad enough to encompass oral communications. See Iowa Code § 554.1201(38) (1983).

157. Twin Bridges Truck City, Inc. v. Halling, 205 N.W.2d 736, 738-39 (Iowa 1973).

158. At least one court has held that notice of sale must be in writing. DeLay First Nat'l Bank & Trust Co. v. Jacobson Appliance Co., 243 N.W.2d 745, 749 (Neb. 1976). The majority of jurisdictions, however, have not read this requirement into the UCC. B. Clark, supra note 2, ¶ 4.8[7][a].

159. 274 N.W.2d 713 (Iowa 1979).

160. Id. at 717.

161. Id. at 718.

162. Lloyd's Plan, Inc. v. Brown, 268 N.W.2d 192, 196 (Iowa 1978).

163. See, e.g., B. Clark, supra note 2, ¶ 4.8[5][a], [d].

164. See id. ¶ 4.8[5][a].

165. See Liberty Nat'l Bank & Trust Co. v. Acme Tool Div. of Rucker Co., 540 F.2d 1375, 1381-82 (10th Cir. 1976); B. Clark, supra note 2, ¶ 4.8[5][b].

166. B. Clark, supra note 2, ¶ 4.8[5][b]; see, e.g., Barbour v. United States, 562 F.2d 19, 21 (10th Cir. 1977) (sale advertised as sale of separate items then sold as a unit); California Airmotive Corp. v. Jones, 415 F.2d 554, 555-56 (6th Cir. 1969) (incorrect date given in publicity of sale).

167. See infra text accompanying notes 199-201.

168. See Connex Press, Inc. v. International Airmotive, Inc., 436 F. Supp. 51, 57 (D.D.C. 1977); Dynalectron Corp. v. Jack Richards Aircraft Co., 337 F. Supp. 659, 662-63 (1972); B. Clark, supra note 2, ¶ 4.8[5][c].

169. Iowa Code § 554.9504(1) (1983) provides: A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. Id. § 554.9504(1).

170. Franklin State Bank v. Parker, 136 N.J. Super. 476, 346 A.2d 632, 635 (1975); B. Clark, supra note 2, ¶ 4.8[1]; see also Dynalectron Corp. v. Jack Richards Aircraft Co., 337 F. Supp. 659, 662-63 (1972) (secured party made no effort to make collateral "attractive for showing or sale").

171. B. Clark, supra note 2, ¶ 4.8[1].

172. Cf. Davis v. Small Business Inv. Co., 535 S.W.2d 740, 744-45 (Tex. Civ. App. 1976) ("necessary" expenses are not necessarily "reasonable").

173. See supra text accompanying notes 138-41. The UCC provides that if the debtor has paid 60% of the cash price with a purchase-money security interest or 60% of the loan amount with other security interests, the secured party must dispose of the collateral within ninety days following repossession. Iowa Code § 554.9505(1) (1983).

174. The deliberate omission of a specific time limit is designed to encourage private disposition through regular commercial channels. U.C.C. § 9-504 comment 6 (1972).

175. See United States v. Terrey, 554 F.2d 685, 695 (5th Cir. 1977) (sale of collateral two days after repossession); B. Clark, supra note 2, ¶ 4.8[6].

176. See Farmers State Bank of Parkston v. Otten, 204 N.W.2d 178, 181 (S.D. 1973) (collateral sold pursuant to execution sale more than one year after repossession); B. Clark, supra note 2, ¶ 4.8[6].

177. B. Clark, supra note 2, ¶ 4.8[5][b]; see Liberty Nat'l Bank & Trust Co. v. Acme Tool Div. of Rucker Co., 540 F.2d 1375, 1382 (10th Cir. 1976) (sale conducted in a snowstorm at an "inconvenient" place); see also Mercantile Finance Corp. v. Miller, 292 F. Supp. 797, 801 (E.D. Pa. 1968) (sale held in early evening at only one of three locations of collateral).

178. Iowa Code § 554.9504(3) (1983).

179. United States v. Terrey, 554 F.2d 685, 693-94 (5th Cir. 1977); B. Clark, supra note 2, ¶ 4.8[4]. But see Talcott, Inc. v.

Reynolds, 529 P.2d 352, 354-55 (Mont. 1974) (commercial reasonableness does not require sale by parts even if greater price could be received).

180. Iowa Code § 554.9507(2) (1983).

181. 212 N.W.2d 454 (Iowa 1973).

182. Id. at 458.

183. See Franklin State Bank v. Parker, 136 N.J. Super. 476, 346 A.2d 632, 635 (Union County Ct. 1975); B. Clark, supra note 2, ¶ 4.8[8][a]; see also Connex Press, Inc. v. International Airmotive, Inc., 436 F. Supp. 51, 56 (D.D.C. 1977).

184. E.g., Credit Bureau Metro, Inc. v. Mims, 45 Cal. App. 3d 12, 15, 119 Cal. Rptr. 622, 623 (1975); see B. Clark, supra note 2, ¶ 4.8[8][b]. In some jurisdictions there is a presumption that the value of collateral equals at least the amount of the debtor's outstanding obligation and any disposition at less than the presumed value is considered commercially unreasonable unless the secured party can prove otherwise. E.g., Investors Acceptance Co. v. James Talcott, Inc., 454 S.W.2d 130, 141 (Tenn. Ct. App. 1970); Credit Bureau Metro, supra at 15, 119 Cal. Rptr. at 624.

185. Iowa Code § 554.9504(3) (1983); see supra text accompanying note 124.

186. See B. Clark, supra note 2, ¶ 12.5[5][c].

187. B. Clark, supra note 2, ¶ 4.8[3]; see U.C.C. § 9-507 comment 2 (1972).

188. See Iowa Code § 554.9504(5) (1983).

189. B. Clark, supra note 2, ¶ 4.8[8][c].

190. Iowa Code § 554.9501(3)(b) (1983).

191. Id. § 554.9504(3).

192. B. Clark, supra note 2, ¶ 4.12[1].

193. Iowa Code § 554.9507(1) (1983).

194. Id.

195. See B. Clark, supra note 2, ¶ 4.12[2].

196. B. Clark, supra note 2, ¶ 4.12[2], at 4-92; see Klingbiel v. Commercial Credit Corp., 439 F.2d 1303 (10th Cir. 1971); Davidson v. First Bank & Trust Co., 559 P.2d 1228 (Okla. 1976). But see Massey-Ferguson Credit Corp. v. Peterson, 102 Idaho 111, 626 P.2d 767 (1980).

197. Iowa Code § 554.9507(1) (1983). See also Northwest Bank & Trust Co. v. Gutshall, 274 N.W.2d 713, 718-19 (Iowa 1979) (interpreting § 554.9507(1) as providing for minimum, rather than additional, recovery).

198. Iowa Code § 554.9507(1) (1983).

199. 240 Ark. 143, 147-49, 398 S.W.2d 538, 541-42 (1966).

200. 251 N.W.2d 492 (Iowa 1977).

201. Id. at 496. See also Northwest Bank & Trust Co. v. Gutshall, 274 N.W.2d 713, 718 (Iowa 1979) (failure to prove reasonable notice of sale precludes deficiency judgment); Case Note, Secured Transactions--Reasonable Notification as to the Disposition of Collateral Security is a Condition Precedent to a Secured Creditor's Right to Recover any Deficiency Between the Sale Price of the Collateral and the Amount of the Debtor's Unpaid Balance--Herman Ford-Mercury, Inc. v. Betts (Iowa 1977), 27 Drake L. Rev. 594, 596-98 (1978). Compare the court's interpretation implying authority from the UCC to deny a deficiency judgment for noncompliance, to the ICCC, which explicitly provides that a consumer is not liable for a deficiency unless the creditor has disposed of the goods in good faith and in a commercially reasonable manner. Iowa Code § 537.5103(1) (1983); see supra text accompanying note 32.

202. Herman Ford, 251 N.W.2d at 495; Clark, supra note 2, ¶ 4.12[4].

B

APPENDIX A

OUTLINE OF REPOSSESSION AND DISPOSITION PROCEDURES UNDER THE IOWA UNIFORM COMMERCIAL CODE (IOWA CODE SECTIONS 554.9501 THROUGH 554.9507)

© Edgar F. Hansell, Attorney
Nyemaster, Goode, McLaughlin, Emery & O'Brien, P.C.
Des Moines, Iowa 50309

The UCC sets out certain rights and remedies of the debtor and the secured party. Upon default, the secured party has the rights given by the UCC and those given by the security agreement, except that certain rights of the debtor cannot be waived, which are:

1. The debtor has the right to receive any surplus after the sale of the collateral and the deduction of allowable expenses of the secured party, if the security agreement secures an indebtedness (but not with respect to the sale of accounts or chattel paper unless the security agreement otherwise provides).

2. The debtor has certain rights contained in Sections 554.9504(3) and 554.9505(1), which provide for the method of disposition of collateral after default (see "Disposition of the Collateral After Default", and "Disposition or Retention of Collateral", paragraph 1, below).

3. If the secured party elects to retain the collateral as satisfaction of the obligation, certain notice must be given the debtor (see "Disposition or Retention of Collateral", paragraph 2, below).

4. The debtor has certain rights of redemption of the collateral (see "Debtor's Right to Redeem" below).

5. The debtor has certain rights and the secured party incurs certain liabilities if there is a failure to comply with the mandatory Code sections. (See "Secured Party's Liability For Failure to Comply With the Code" below).

A debtor can, however, (1) sign after default a statement renouncing or modifying his right to notification of sale (see "Disposition of the Collateral After Default" below), (2) sign after default a statement renouncing or modifying his rights under the compulsory sale rule where debtor has paid sixty percent of the cash price in the case of a purchase money security interest in consumer

goods or sixty percent of the loan in the case of another security interest in consumer goods (see "Disposition Or Retention Of Collateral--Consumer Goods" below), or (3) sign a statement after default renouncing or modifying his rights to notice and to object to retention of the collateral in full satisfaction of the debt (see "Disposition or Retention of the Collateral--All Other Goods" below) or (4) agree in writing after default to waive his right to redeem the collateral (see "Debtors Right to Redeem" below).

Surplus or Deficiency Remaining After Sale

The Code provides in Sections 554.9502(2) and 554.9504(2) that if the security agreement secures an indebtedness (but not a sale of accounts or chattel paper) any surplus remaining after the allowable expenses of the sale must be paid over to the debtor, and the debtor will be liable for any deficiency. In the event the collateral is a sale of accounts or chattel paper, the security agreement must provide for a surplus and/or deficiency in order for such to be allowed.

Possession After Default

The secured party has a right to possession of the collateral upon default after notice to cure and lapse of time to cure have occurred, if the loan was a consumer loan under the ICCC. However, possession without legal process can only be effected if it can be accomplished without a breach of the peace. One recent Iowa case suggested that repossessing a motor vehicle from the debtor's driveway might be improper, although repossessing it off the street was permitted. Until the rules are better defined, it is recommended that if at all possible legal process be resorted to in all cases except where the debtor voluntarily relinquishes the collateral.

Disposition of the Collateral After Default

Upon default the secured party may sell, lease, or otherwise dispose of any or all of the collateral. The secured party may prepare and process the collateral for sale as long as it is "commercially reasonable." Proceeds from the sale will be applied in the following order:

1. To the reasonable expenses of retaking, holding, preparing for sale or lease, selling, leasing and the like and reasonable attorneys' fees and legal expenses (attorneys' fees are not allowed in consumer credit transactions),

2. To the satisfaction of the indebtedness secured,

3. To the satisfaction of any subordinate security interest, if written notification of demand therefor is received before distribution of the proceeds is completed, and

4. Disposition of surplus (if any).

The following procedures MUST be followed (UNLESS the property is perishable, or threatens to decline rapidly in value, or is the type customarily sold on a recognized market) in order for the secured party to avoid the liabilities discussed in "Secured Party's Liability for Failure to Comply With the Code" and in order to collect a deficiency:

1. If the collateral is CONSUMER GOODS:

   a. Reasonable notification of time and place of public sale or time after which a private sale or other intended disposition may occur must be given, and

   b. Such notice must be given to the debtor.

2. If any other type of goods is the collateral, the same reasonable notification as pertains to consumer goods must be given, PLUS such notice must be given to any other secured party from whom the secured party has received (before sending its notification to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral.

   The debtor can sign after default a statement renouncing or modifying his right to notification of sale.

If the property is perishable, threatens to decline rapidly in value or is a type customarily sold on a recognized market, the property can be sold without following the foregoing procedures concerning notice. It should be noted that motor vehicles have been held not to be collateral of a "type customarily sold on a recognized market", and, therefore, the provisions for notice should be followed when automobiles are the collateral. NOTE: Due to recent court decisions, it may be necessary to introduce rather definitive evidence in court to prove that reasonable notice of the time of place of sale, etc. was given the debtor. In order to satisfy the evidentiary requirements, it is suggested that the notice be sent by certified mail with a request for a return receipt showing to whom, date and address where delivered, and at least 10 days notice be given.

Disposition or Retention of Collateral

1. CONSUMER GOODS (60% Rule).

Where the debtor has paid 60% or more of the cash price (in the case of a purchase-money security interest) or of the loan (in the case of a non-purchase-money security interest) the secured party MUST dispose of the collateral by public or private sale in accordance with the paragraph entitled "Disposition of the Collateral After Default" AND such disposition must be within 90 days of taking possession in order to avoid liability under Section 554.9507. This can be waived by debtor after default occurs by signing a statement renouncing or modifying his rights.

2. ALL OTHER GOODS. (Including Consumer Goods Upon Which the 60% Has Not Been Paid).

In the case of all other goods AND all other situations involving consumer goods (less than 60% paid) the secured party (if in possession) may, after default, propose to retain the collateral in satisfaction of the obligation, without the necessity of public or private sale. A notice must be sent to the debtor and (except with respect to consumer goods) to any other secured party or lienor from whom the secured party has received (before sending its notice to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral. The debtor can sign after default a statement renouncing or modifying his rights to notice and to object to retention of the collateral in full satisfaction of the obligation.

The debtor or others entitled to notification can object within twenty-one days of the date the notice was sent and in such event the secured party MUST dispose of the property in accordance with the steps set out in the paragraph entitled "Disposition of the Collateral After Default". If no one objects, the secured party can retain the collateral in full satisfaction of the debt and then proceed to dispose of it as it wishes.

Purchase of Collateral by the Secured Party

The secured party may purchase the collateral at public sale and, if the collateral is of the type customarily sold on a recognized market or "is of a type which is the subject of widely distributed standard price quotations", at a private sale.

B

Debtor's Right to Redeem

The debtor or any other secured party or lienor can redeem the property by paying the full obligation secured by the collateral, plus reasonable expenses of retaking, holding and preparing the collateral for disposition, and, to the extent provided in the security agreement and not prohibited by law, reasonable attorneys' fees (attorneys' fees prohibited in connection with consumer loans). Such redemption can be elected by the debtor or any other secured party or lienor at any time before the secured party has entered into contract of disposition of the property or has actually sold the property, or before the twenty-one days has elapsed if the secured party has elected to proceed as set out in "Disposition or Retention of Collateral" above. [The debtor (and any other secured party or lienor) can waive in writing this right of redemption after default in which event this right of redemption can not thereafter be exercised.]

Secured Party's Liability for Failure to Comply With the Code

The secured party may be enjoined from violating the Code if disposition has not yet occurred. If disposition has already occurred, the debtor or any person entitled to have received notice (or who has notified the secured party of their security interest prior to the disposition) can sue for any loss they have suffered because of the failure of the secured party to comply with the required Code provisions. Hence, it is most wise to follow the steps as set forth herein.

If the collateral is consumer goods, a debtor can recover, in any event:

1. The credit service charge plus 10% of the principal amount of the debt, or

2. The time price differential, plus 10% of the cash price.

The following is, in chart form, a list of the steps that should be followed in repossessing and attempting to realize upon the collateral in the event of the default of the debtor. The first step, of course, in any situation is to determine whether or not the goods are consumer goods.. Then the following steps should be taken:

	CONSUMER GOODS	ALL OTHER COLLATERAL
1.	Repossession without legal process (after notice to cure and if the loan was a consumer loan under the ICCC), if such can be obtained peaceably, otherwise by legal process.	1. Repossession without legal process, if such can be obtained peaceably, otherwise by legal process.
2.	Give debtor reasonable notification of public sale or time after which private sale or other disposition may occur.	2. Give debtor reasonable notification of any public sale or time after which private sale or other disposition may occur.
3.	No notice is necessary to be sent to other secured parties.	3. Same notice as provided in paragraph 2 above must be given to <u>others</u> claiming a security interest in the property from whom the secured party has received (before sending its notification to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral.
4.	(a) If 60% has been paid, the property <u>must</u> be disposed of at public or private sale or other disposition as above provided; <u>and</u> such disposition <u>must</u> take place within 90 days of the taking of possession (this can be waived by debtor after default). (b) If 60% <u>has not</u> been paid, the secured party may elect to retain	4. The secured party can elect to retain the goods in <u>full</u> satisfaction of the debt. In such event it must send notice of its intent to retain the goods to: (1) the debtor, and (2) those secured parties and other lienors from whom the secured party has received (before sending its

B

CONSUMER GOODS	ALL OTHER COLLATERAL
the goods in full satisfaction of the debt. In such event it must send notice of its intent to retain the goods to: (1) the debtor. If no objection is received from the debtor within twenty-one days of the sending of the notice, the secured party can do as they please with the property (retain or sell) with no further obligation to the debtor. If the secured party receives objection in writing from the debtor within twenty-one days after notice is sent, the secured party must proceed to dispose of the collateral as provided in "Disposition of the Collateral After Default" above.	notice to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral. If no objection is received from any of the above parties from twenty-one days from the sending of the notice, the secured party can do as they please with the property (retain or sell) with no further obligation to the debtor. If the secured party receives objection in writing from a person entitled to notice within twenty-one days after the notice is sent, the secured party must proceed to dispose of the collateral as provided in "Disposition of the Collateral After Default" above.
5. Return surplus to debtor remaining after application of proceeds as provided in "Disposition of the Collateral After Default if any surplus remains.	5. Return surplus to debtor remaining after application of proceeds as provided in "Disposition of the Collateral After Default" if any surplus remains.

C

RECENT CASES AND NEW LEGISLATION

Robert C. Landess
Iowa Industrial Commissioner
Des Moines, Iowa

PUBLISHED SUPREME COURT AND COURT OF APPEALS

DECISIONS ON JUDICIAL REVIEW OF

INDUSTRIAL COMMISSIONER DECISIONS

C

JURISDICTION

GEORGE H. WENTZ, INC. V. SABASTA, 337 N.W.2d 495 (Iowa 1983)

Review from the Iowa Court of Appeals decision affirming an award of workers' compensation benefits to a claimant injured out of state. The supreme court reversed.

The employer is a Nebraska corporation with its principal place of business in Lincoln, Nebraska. Claimant, an asbestos worker, was at all pertinent times a resident of Sioux City, Iowa. In early April 1979, claimant contacted the business agent of Asbestos Workers' Local 57, headquartered in Sioux City, and was told a job was available at employer's work site in Sioux Falls, South Dakota. Claimant reported to employer's foreman at the Sioux Falls site, filled out income tax forms, and commenced work. On April 26, 1979 claimant sustained an injury during the course of his employment at the Sioux Falls jobsite. The employer had not engaged in any construction projects in Iowa during the five-year period prior to claimant's injury, and had no registered agent in Iowa at the time. Claimant had performed no services for the employer within the state of Iowa.

The court held that to the extent employer's association's collective bargaining contract (with a local to which claimant did not belong) and alleged indirect reliance on a pool of Iowa

workers indicate dependence on Iowa workers, the case is indistinguishable from Iowa Beef Processors, Inc. v. Miller, 312 N.W.2d 530 (Iowa 1981), where advertising by an employer with a work site located near the Iowa, Nebraska border would have supported the same contention. Claimant's local had an agreement with a contractor's association in which the employer was not a member. Claimant's referral by his local union in this case was no more materially related to his employer - employee relationship than the newspaper advertisement in Iowa Beef Processors, Inc. In neither instance were the employee's services attributable to business transacted in this state, nor was any portion of the employee's services performed here. The court held that claimant's employment was not principally localized in Iowa, and the commissioner lacked subject matter jurisdiction to award claimant Iowa workers' compensation benefits under the provisions of section 85.71(1).

Because subject matter jurisdiction is lacking, the court did not address the employer's contentions it possessed insufficient contacts in Iowa to constitutionally support assertion of personal jurisdiction, and the award therefore deprived it of property without due process of law.

SCHEDULED PERMANENT PARTIAL DISABILITY AND MEDICAL BENEFITS

CAYLOR V. EMPLOYERS MUT. CAS. CO., 337 N.W.2d 890 (Iowa App. 1983)

Claimant appealed from the district court's decision on judicial review affirming the industrial commissioner's review-reopening decision. The court of appeals affirmed.

Claimant injured his right leg in a fall on the job in 1976. After a period of hospitalization, he returned to work in his capacity as a truck driver. He continued to work, without apparent difficulty, until his retirement in 1977. Following his retirement, claimant continued to work on a temporary basis until the summer of 1979.

In 1979, claimant returned to his treating physician complaining of problems with his right leg. The diagnosis indicated that the cartilage in his right knee was possibly torn, and claimant was referred to an orthopedist. The orthopedist's diagnosis was degenerative arthritis of the right knee and estimated claimant's impairment at seven percent of the leg. The commissioner determined that claimant's disability was a scheduled loss and that the functional impairment was ten percent. Claimant contends he should be awarded permanent total disability.

The court held that all of the competent evidence in the record supports the conclusion that claimant's impairment is limited to a partial functional loss of his right leg. The loss of a leg is a scheduled disability. An impairment to a scheduled member which is less severe than total loss of the member is still a scheduled disability. The holding of the industrial commissioner that claimant's impairment constituted a scheduled partial disability rather than a permanent total disability was required by law and did not amount to an abuse of discretion.

The court further held that claimant is not entitled to reimbursement for medical bills unless he shows that he paid

them from his own funds. In the present case, claimant's medical expenses were paid by defendant employer's group insurance carrier. The industrial commissioner correctly refused to order that claimant be reimbursed for expenses that he never incurred.

COMMUTATIONS

DAMERON V. NEUMANN BROS., INC., 339 N.W.2d 160 (Iowa 1983)

Defendants appealed from the decision on judicial review upholding the commissioner's approval of a full commutation. The supreme court affirmed.

Claimant sustained a job related injury and in an arbitation decision was found to be totally and permanently disabled. Claimant immediately filed a petition for full commutation which defendants resisted stating that a commutation would not be in claimant's best interest.

Claimant was 63 years of age, divorced, and partially supporting his ex-wife, the two children she had adopted, and the woman with whom he was living. He had only a third grade education. Though his monthly earnings before the accident exceeded $1,500, he had never used bank or savings and loan accounts but was generally able to make ends meet. After the accident, he encountered considerable additional expense and incurred substantial indebtedness, which necessitated borrowing at high interest rates. He owed substantial attorney's fees as a result of the contested workers' compensation proceedings.

Defendants first argued that claimant's petition for commutation was insufficient because it failed to satisfy certain

requirements of the industrial commissioner's administrative rules. The court adopted the deputy's finding that those rules were not applicable to contested cases but rather were designed only for cases in which the parties jointly submit written documentation to the commissioner for approval.

Defendants further contended that the industrial commissioner applied incorrect guidelines in allowing commutation of claimant's award. The thrust of their argument is that the principles cited in Diamond v. Parsons Co., 256 Iowa 915, 129 N.W.2d 608 (1964) are less restrictive than those applied in other states and should be replaced by more stringent prerequisites for commutation which would make allowance of commutation the exception and periodic payments the rule in Iowa.

The court found that notwithstanding changes in Iowa Code section 85.45 since the Diamond decision, the Iowa legislature has retained "best interest of the claimant" as the fundamental touch stone for deciding commutation cases. Had the legislature intended or preferred a more restrictive approach and more stringent standards than Diamond suggested, tougher requirements would have been enacted when section 85.45 was amended to shift to the industrial commissioner the responsibility to make the initial "best interest" determination in contested cases. The court reemphasized that commutation turns on what is in the best interest of the worker, not on what is in the best interest of the employer or insurance carrier.

The evidence showed that a commutation was advantageous to

claimant in several important respects. Fundamentally, the evidence showed that claimant's financial condition would be greatly improved if he could immediately receive the entire lump sum payment in contrast to weekly payments otherwise due him. The establishment of a voluntary conservatorship, proposed by claimant and ordered by the commissioner, would require the conservator to provide an annual accounting of claimant's income and expenses. All of his outstanding bills including his attorney fees would be paid from the lump sum received. Even after those substantial bills were paid, the funds remaining for investment would provide him with about the same regular payments as the weekly compensation payments he would otherwise have received in the absence of a commutation. This resulted from the fact that the discount rate applicable to the commutation in this case was five percent in contrast with the 12 percent to 14 percent investments which the evidence showed were prudent and available. Consequently, claimant was able to show that the combination of commutation and a conservatorship would improve his financial condition while also bringing order to his financial affairs which previously had been lacking. Measured by the standards in Diamond, commutation was clearly shown to be in Dameron's best interest.

PROCEDURE--EXHAUSTION OF ADMINISTRATIVE REMEDIES

CONTINENTAL TELEPHONE COMPANY V. COLTON, 348 N.W.2d 623 (Iowa 1984)

Defendants appealed from a district court order in a workers' compensation proceeding remanding the proceeding to the industrial commissioner for a redetermination of his disability.

Defendants in the present case sought judicial review from a decision of a deputy industrial commissioner. No attempt was made to first seek review of the deputy's decision by the industrial commissioner.

Claimant urged in the district court that it was without jurisdiction under Iowa Code section 17A.19(1), to review a decision of a deputy industrial commissioner. The district court rejected claimant's contentions relying in part on the recent decision of Leaseamerica Corp. v. Iowa Department of Revenue, 333 N.W.2d 847 (Iowa 1983).

The supreme court held that except in those circumstances deleneated in Iowa Code section 86.3, a petition for judicial review will not be from a decision of a deputy industrial commissioner, even where that decision has become final by reason of passage of time. Consistent with the general policy outlined in Iowa Code section 17A.19(1), sections 86.3 and 86.26, considered in pari materia, contemplate that an intra-agency review by the industrial commissioner is necessary in order to establish exhaustion of administrative remedies for purposes of seeking judicial review.

The supreme court reversed the district court and remanded with directions to dismiss the petition for judicial review for lack of jurisdiction.

AGGRAVATION OF PREEXISTING HEART ATTACK

VARIED ENTERPRISES, INC. V. SUMNER, ___ N.W.2d ___ (Iowa 1984)

Defendants appealed from a district court decision upholding the industrial commissioner's award of workers' compensation benefits for disability attributable to acute myocardial infarction.

C

Claimant, while driving a truck for his employer, began to experience chest pains. He believed it was only indigestion and continued driving for two and one-half hours before pulling off the traveled portion of the roadway at a truck stop.

After stopping, claimant drank a bicarbonate of soda, whereupon the pain became much worse. He then asked for emergency assistance and was diagnosed as having incurred an acute myocardial infarction. A permanent and total disability resulted.

Conflicting expert testimony was presented concerning whether claimant's continued driving after the onset of the infarction materially aggravated the impact of the heart attack in terms of resulting industrial disability. The industrial commissioner accepted the views of claimant's expert that the continued driving did materially aggravate the impact of the infarction and increased the resulting disability. This finding was upheld by the district court on judicial review.

The primary issue on appeal was whether the commissioner erred in not apportioning claimant's disability between that which was produced by the onset of the myocardial infarction and that produced by continued driving. Stated somewhat differently, it was defendants' position that the commissioner and the court were required to carve out some portion of the total disability

as attributable to the original onset of the infarction which all parties agree was a noncompensable event.

The defendant's claim for apportionment was not based upon claimant's prior atherosclerotic condition which precipitated the infarction. The industrial commissioner found that there was no evidence from which it could be found that this diseased condition of claimant's arteries independently produced an industrial disability. That finding, which was not challenged, precludes apportionment based on the evidence of previously diseased arteries. The employer argued, however, that the initial infarction produced by the diseased arteries, which the parties agreed was not a compensable event, would have independently provided some portion of claimant's ultimate industrial disability even in the absence of the aggravating activities upon which his claim has been allowed.

While the court believed that the legal premises upon which the employer's arguments were based state a claim for apportionment they were convinced that the commissioner declined to apportion the disability because of his view of the facts rather than any misapplication of legal theory. The commissioner spoke directly to this point, stating:

> Since the medical opinions could not differentiate between the amount of damage caused by the continued exertions, this agency cannot interject or speculate on the apportionment of damage between the onset of the infarction and the aggravation caused by continued exertion.

The court believed that this is a negative finding of fact by the commissioner which undercuts the legal premise upon which

any claim of apportionment must rest. The appellants presented no basis for overturning the decision of the commissioner or the district court.

C

EXCLUSIVE REMEDY

HEUMPHREUS V. STATE 334 N.W.2d 757 (Iowa 1983)

Plaintiffs appealed from a district court's ruling sustaining defendant's special appearance in a wrongful death action. The supreme court held that if a correctional institution inmate working in connection with the maintenance of the institution suffers injury or death resulting from the performance of that work, the sole remedy is workers' compensation pursuant to Iowa Code section 85.59. However, if the injury or death does not result from the performance of the work, a tort claim against the state under Iowa Code chapter 25A may be available.

In the present case the survivors allege that their decedent, an inmate, suffered a heart attack while working and died because of negligent post-attack care. Since the petition does not allege that the work caused the heart attack, the supreme court held that the trial court was premature in sustaining the special appearance in this tort claim on the ground that workers' compensation was the sole remedy. The court went on to state that if a trial shows that the heart attack resulted from work the special appearance should be sustained, but if a trial shows that the heart attack would have occurred regardless of the work the special appearance should be overruled.

Carter, J.D. concurring specially wrote:

> Under the holding of the majority, a determina-

tion by the fact finder that the heart attack resulted from decedent's performance of work would conclusively establish that compensation for his death may only be based on the worker's [sic] compensation law. I believe that it would be possible for the evidence to show that decedent's heart attack was caused by the performance of work but that his death was not. If this were found to be the case and if it is also shown that the death resulted from the negligence of agents of the state, this circumstance should permit a claim under chapter 25A regardless of whether the heart attack resulted from the performance of work.

McCormick, J., joins in this special concurrence.

THOMPSON V. STEARNS CHEMICAL CORP., 345 N.W.2d 131 (Iowa 1984)

Pursuant to Iowa Code section 684A.1 (1983), the United States District Court certified legal questions involving the right of contribution from an employer to a manufacturer for damages paid to an employee on account of injuries caused from the concurrent fault of the manufacturer and employer.

Thompson was injured while attempting to unplug a drain at the Oscar Mayer plant with a substance known as "Experimental Cleaner 3013." When Thompson poured the cleaner into the drain, there was a reaction, and the product backed up and "exploded" in his face seriously injuring him. These injuries occurred in the course of his employment with Oscar Mayer. Although the chemical cleaner was prepared and packaged by Stearns and technically sold to Oscar Mayer, Mayer developed and formulated the substance and gave express contractual instructions on product content, labeling, and packaging. Oscar Mayer had its own research personnel and laboratory facilities and has long been involved in the development of chemical cleaners for use in

its plants. Stearns is in the business of mixing and selling chemical products. The formula for this cleaner belonged solely to Oscar Mayer, and Stearns cannot and does not sell the product to any other person or entitly.

The U.S. District Court certified the following questions:

> (1) After adoption of comparative negligence, does Iowa law permit consideration of comparative fault of the injured employee's employer so as to allow a third-party manufacturer or seller who is sued by an injured employee under theories of negligence and strict products liability, for an injury covered by the Iowa Workers' Compensation Act, to seek contribution from the injured employee's employer where that employer is alleged to have designed and formulated the product and provided all specifications for packaging, labeling and warnings for the product?
>
> (2) If such contribution is allowed under Iowa law, is the amount of the contribution claim limited to the extent of the employer's workers' compensation lien?

Although some jurisdictions allow contribution from a negligent employer, the court adhered to the holding in Iowa Power and Light Co. v. Abild Construction Co., 259 Iowa 314, 144 N.W.2d 303 (1966), that the right of contribution in Iowa is conditioned on the existence of common liability. Since no common liability exists between a third-party tortfeasor and an employer by virtue of our Workers' Compensation Act, the court's answer to certified question one is no. Having answered the first question negatively, the court did not answer certified question number two.

CARLSON V. CARLSON, 346 N.W.2d 525 (Iowa 1984)

Plaintiff appealed from a summary judgment for defendant in

a negligence action. The supreme court affirmed.

Plaintiff was injured while working on a farm combine with defendant Greg Carlson. At the time of the injury, plaintiff was an employee of a farm partnership whose members were the defendant and Richard Carlson. Plaintiff was injured in the course of his employment and received compensation benefits from the partnership's insurance carrier.

In the present action, plaintiff filed a petition for damages against defendant Greg Carlson as an individual alleging that Greg's negligence in turning a switch which started the combine caused an injury to his hand.

Defendant filed a motion for summary judgment contending that workers' compensation was the plaintiff's exclusive remedy against defendant. Plaintiff's resistance pointed out that this was an action against defendant as the tortfeasor in his individual capacity and was not an action against the partnership.

The supreme court affirmed the sustaining of defendant's motion and held that a member of a partnership is an employer of the partnership's employees. Accordingly, Iowa Code section 85.20 precludes an injured employee and his dependents from suing a partner in an independent tort action for his injuries received during the course of his employment for the partnership.

SEIVERT V. RESNICK, 342 N.W.2d 484 (Iowa 1984)

Appeal from district court denying a constitutional challenge to the limited co-employee liability established by the workers' compensation statute. The supreme court affirmed.

As originally commenced, plaintiff's action alleged "gross negligence amounting to willful and wanton neglect" of the defendants, all of whom were co-employees of the plaintiff's decedent. Subsequently, the petition was amended to assert an additional claim for liability based only on simple negligence. The defendants' motion to dismiss the amended claim was sustained by the district court.

Plaintiffs contend that the limited immunity granted negligent co-employees under section 85.20, The Code, as opposed to tortfeasors who are not co-employees, does not rationally further any of the purposes underlying chapter 85. Plaintiffs note in this regard that employees of more than one employer may work side-by-side on a job site. From this circumstance they contend that an impermissible discrimination exists under the act as to (a) the protection granted tortfeasors on the job site depending upon the fortuitous circumstance of whose employee is injured; and (b) the recovery permitted to injured employees on the job site depending on whose employee caused their injuries.

The court stated that ordinarily a co-employee is working under the direction of the employer and comporting his conduct to the employer's directions, a circumstance which supports a legislative decision to grant the co-employee at least a partial share of the employer's immunity from common law tort suits. The legislature may choose the functional unit to which its social legislation can most effectively extend. In regard to section 85.20 that unit has been deemed to be the rights and

obligations between the employees of a single employer and that employer. The legislature was not required to integrate the rights of employees of different employers on the same job in dealing with the compensation to be afforded for industrial injuries. The court found no basis for overturning the judgment of the district court.

GLENN V. FARMLAND FOODS, INC., 344 N.W.2d 240 (Iowa 1984)

Plaintiff appealed from dismissal of his action against defendant Farmland Foods, Inc., for lack of subject matter jurisdiction and dismissal of his action against defendant Tierney, pursuant to Iowa Rule of Civil Procedure 215.1. The supreme court affirmed.

On August 11, 1980 plaintiff filed a petition in district court seeking damages from his employer, Farmland Foods, Inc., and from a supervisory co-employee, Steve Tierney. The employer filed an answer and signed it as "attorney for the defendants." Plaintiff's attorney incorrectly assumed from this signature that defendant Tierney had been served and was appearing in the case.

Concerning the first issue on appeal, it was plaintiff's contention that cases that interpreted section 85.20, The Code, as prohibiting an employee from suing his or her employer for damages were nullified by a 1974 amendment to the statute. The court disagreed stating that the 1974 amendment acted primarily to define the status of co-employees, making them statutorily immune from suit except in cases of gross negligence. The

statutory immunity remained unchanged for employers; the amendment created no new cause of action against the employer flowing from an allegation of co-employee gross negligence. Section 85.20 clearly and plainly bars plaintiff's tort suit against his employer.

The district court dismissed Farmland from the case on July 6, 1981. On August 13, 1982 the clerk of court sent plaintiff's attorney the try-or-dismiss notice required by Iowa Rule of Civil Procedure 215.1. Plaintiff's attorney then contacted Farmland's attorney whom he incorrectly believed to be acting for the defendant co-employee, Tierney. He then learned for the first time this defendant had never been served. Service on Tierney finally was effected on December 1, 1982. Tierney responded by filing a motion to dismiss based on plaintiff's receipt of the try-or-dismiss notice. Plaintiff then sought a continuance of his action against Tierney, or alternatively, its reinstatement following the inevitable January 1, 1983 dismissal. The supreme court held that the trial court correctly denied Tierney's motion to dismiss. The court further found that there was sixteen months of total inactivity on plaintiff's part following dismissal of plaintiff's action against Farmland. The court stated plaintiff failed to show that the dismissal resulted from oversight, mistake or other reasonable cause. The court affirmed the trial court's refusal to reinstate plaintiff's action.

BURDEN OF PROOF

OESTENSTAD V. QUAIL CONSTRUCTION CO., (Iowa Court of Appeals 1983)

Claimant appealed from a district court decision affirming the agency's denial of workers' compensation benefits. The court of appeals affirmed.

Claimant cut his thumb while operating machinery in the course of his employment. Claimant went to the doctor's office to have stitches. He suffered a stroke while undergoing treatment for his thumb, resulting in paralysis and total disability.

Claimant contended that due to the difficulty in determining the exact cause of a stroke, he should be eligible to receive workers' compensation upon a showing that the work-related injury was one possible cause of the stroke.

The court found the evidence to be somewhat conflicting as to the exact time lapse between the thumb injury and the stroke. It appeared, however, that the stroke occurred twenty minutes to one hour after the claimant cut his thumb. There was an excessive loss of blood from the injury which may have contributed to the stroke. In fact, the medical experts testified that the cut may have been a possible cause of the stroke. However, there was no evidence that the cut was the probable cause of the stroke or even one proximate cause of the stroke. Further all agreed that evidence of claimant's blood pressure reading would have been helpful in determining the cause of the stroke, but no such

evidence was documented. The court stated they could not rely on speculation or the assumption that claimant's blood pressure level, if documented, would have supported claimant's theory.

While recognizing that the workers' compensation statute is to be applied liberally, the court recited that it must be administered by the application of logical and consistent rules or formulas notwithstanding its benevolent purpose. There is no authority for applying a more lenient burden of proof in those cases in which the claimant has suffered a stroke.

INJURY BY TREATMENT

QUAKER OATS V. FURLER, (Iowa Court of Appeals 1983)

Defendants appealed and claimant cross-appealed from the district court decision affirming the industrial commissioner's finding on causation and remanding for recomptutation of benefits. The court of appeals affirmed.

Claimant, who sustained a compensable back injury, was told to exercise as a part of her treatment. She injured her knee while running. The defendants contended that claimant deviated from the recommended exercises by running, and that the cause of the knee injury cannot be attributed to the prescribed activity. They did not challenge that an injury sustained while engaged in medically prescribed activity for a compensable injury is also compensable. See DeShaw v. Energy Manufacturing Co., 192 N.W.2d 777, 780 (Iowa 1971). The record is not clear whether the prescribed exercise included running. However, the court of appeals agreed with the district court "that whether 'running a

little' was a prescribed activity or that it was so like walking that it should be considered such an activity was a matter to be considered by the factfinder."

The defendants further contended that there was a lack of direct medical testimony whether the knee injury was caused by running. The court held that the treating physician's notes and records can be treated as a medical opinion based on an incomplete history as in Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128, 133, and may be considered in light of the omission in the history and in the surrounding circumstances in the record. Uncontroverted testimony disclosed immediate discoloration and inflexibility of the knee following the running accident. The court of appeals concluded there was sufficient evidence to support the agency's finding that the running incident caused the knee injury.

On appeal before the agency, claimant was awarded disability to the body as a whole for the combined effects of the two injuries. The court of appeals held that since the knee injury was a scheduled disability, the case was to be remanded to consider the knee injury as separate and subject to a scheduled rating and to render a decision on the disability rating for the back.

REASONABLE TREATMENT

DAILY INDUSTRIES, INC., v. HAMILTON, (Iowa App. 1984)

Defendants appealed from the district court decision on judicial review affirming the industrial commissioner's award of

permanent partial disability benefits asserting that substantial record evidence failed to support a finding that the amputation of claimant's leg, chosen as a remedy for a prior condition of osteomyelitis, was causally related to the injury he sustained at work. The court of appeals affirmed.

Claimant received a gunshot wound while serving in Vietnam. As a result, he developed osteomyelitis which required approximately twenty hospitalizations and surgeries to treat. Claimant testified that he had not had any flare-ups of the condition from March 1973 until August 1975. On August 7, 1975 claimant suffered a work-related injury when he stepped onto a trailer bed and the floor gave way, causing his right leg to go through the floor of the trailer bed. The injury caused his osteomyelitis condition to flare up. The condition became progressively worse until his physician gave him three options: He could continue to have his leg opened, cleaned, drained and scraped whenever it flared up; he could have his leg shortened and have a knee fusion performed; or he could have his leg amputated. He chose amputation.

The industrial commissioner found that the work-related injury caused a series of flare-ups of claimant's preexisting osteomyelitis, that the aggravation caused claimant's condition to deteriorate to the point that amputation was suggested by his physician, and that claimant's leg was amputated as a treatment for the condition. The decision was affirmed on judicial review. The defendants admitted that the work-related injury caused a

temporary aggravation of claimant's preexisting condition; however, they denied that the injury was the proximate cause of the need for amputation. The issue, as stated, was whether the defendants were responsible for treatments to put claimant in the same condition he was before the accident, or whether the employer was responsible for essentially curing the preexisting condition by the extreme remedy of amputation.

The court of appeals held that while the injury may have been slight, the natural consequences flowing from the injury to claimant were to aggravate the osteomyelitis condition. The physician's and patient's choice of treatment cannot be second guessed. Thus, the amputation of claimant's leg was caused by the work-related injury and the defendants must compensate claimant for that extreme result.

LENGTH OF HEALING PERIOD

THOMAS V. KNUDSON & SON, INC., (Iowa App. 1984)

Appeal from a district court decision on judicial review affirming the decision of the industrial commissioner as to the proper date for terminating claimant's healing period. The court of appeals reversed.

Claimant's treating physician's testimony was the only medical evidence on the healing period issue. The physician testified as follows:

> In trying to clear this out and clarify it, the way I usually handle them is that it's about a one year's time. So I would say that in according to what we were progressing along, I would say in December of 1980 that he got as good as he was

going to get. In retrospect, I could have said May of 1980, but I didn't know that in May of 1980. [emphasis supplied]

The deputy industrial commissioner found that claimant was entitled to healing period benefits through December 31, 1980 (one year after the injury). On appeal, the industrial commissioner found that claimant's physical condition did not improve after May 1980 and ruled that the healing period terminated in May.

The court of appeals held that it is only at the point at which a disability can be determined that the disability award can be made. Until such time, healing period benefits are awarded the injured worker. The court found that the evidence clearly indicated that the physician could make no determination as to the end of the healing period until December 1980. There was no medical evidence which could be found or inferred that a determination could have been made in May that no further improvement was anticipated, nor was there any evidence that the doctor did or could determine in May that no further improvement would be made.

The court of appeals reversed the decision of the trial court and directed that healing period benefits be paid through December of 1980.

AGGRAVATION OF PREEXISTING CONDITION

BLEVINS V. WILSON FOODS CORPORATION, (Iowa Supreme Court 1984)

The supreme court in a per curiam decision vacated the decision of the court of appeals and affirmed the decision on judicial review.

Claimant, who suffered from a degenerative low back problem, contended that his back condition was compensable as an occupational disease because the heavy lifting required in his employment aggravated his back problem. The agency denied claimant benefits finding claimant had not shown a causal connection between his disabling back condition and his employment. The district court affirmed the agency's denial of benefits: The court of appeals reversed, however, deciding (1) that on remand the agency should determine whether claimant's employment aggravated a preexisting condition rather than requiring claimant to show a direct causal connection between the employment and the origin of the disease, and (2) that as a matter of law harmful weight-lifting requirements were more prevalent in claimant's job than in everyday life or other occupations.

Claimant's principal treating physician diagnosed the back problem as extensive degenerative disc disease and spinal stenosis. The physician testified that the underlying degenerative disease process would not be connected with claimant's work and that the work did not cause the degenerative condition. He distinguished between work-related aggravation of the symptoms of the disease and aggravation of the disease itself, explaining that the symptoms of the disease were amplified by his work activities but that the underlying degenerative condition was neither caused nor aggravated by claimant's work.

To prove causation of an occupational disease, section 85A.8, The Code requires a claimant to show that the disease must be

causally related to the exposure to harmful conditions of the field of employment. While the aggravation of the disease itself may be compensable, the aggravation of the symptomotology not produced by a concomitant aggravation of the preexisting disease is not compensable.

The supreme court found, as did the district court, that the commissioner's appeal decision on the issue of causation was supported by substantial evidence.

JURISDICTION

HERRICK V. AMERICAN FREIGHT SYSTEM, INC.

AND

BISHOP V. AMERICAN FREIGHT SYSTEM, INC., (Iowa Court of Appeals 1984)

Claimants, in a consolidated proceeding appealed from the district court decision dismissing as moot their petitions for judicial review, asserting that the industrial commissioner had authority to grant the substantive relief requested. The court of appeals dismissed the appeal for lack of jurisdiction.

The claimants are two employees who suffered work-related injuries. Their attorney was informed by two employer-retained physicians that relevant medical records would not be released when no legal action had been commenced. Claimant then filed separate but identical requests before the industrial commissioner seeking permission to select their own doctor, ordering the two doctors to release the records, and barring the two doctors from practice before the industrial commissioner as a sanction for

failure to release the records. The industrial commissioner held that he lacked authority to limit the practice of a physician, that a doctor was not a proper party in a workers' compensation proceeding, and that the petitioners' request for permission to select another doctor for treatment should be set for further hearing. One of the physicians subsequently died.

The disctict court dismissed the case on judicial review as moot on the ground that all medical records sought by claimants had been delivered by the employer.

The court of appeals found that only the counsel for the employer was served with a copy of the notice of appeal. Neither the industrial commissioner nor the doctor, both parties to the action, were served. The court held that compliance with the rules pertaining to notice of appeal is mandatory and jurisdictional. Because the claimants failed to serve a copy of the notice of appeal on "each other party" as required by rule 6(a), the court dismissed the appeal for lack of judisdiction.

INTEREST -- ENTITLEMENT IN SUBROGATION

FARRIS V. GENERAL GROWTH DEVELOPMENT CORPORATION, (Iowa Court of Appeals 1984)

Defendant appealed from judgment upon verdicts for the plaintiffs in a tort case arising from a construction accident. The defendant's numerous issues revolve around its contention that it, as an employer of the independent contractor, owed only a limited duty of care to the employee of an independent contractor.

The general rule is that an employer of an independent contractor is not vicariously liable for injuries arising out of the contractor's negligence. The explanation most commonly given for that rule is that since the employer has no power to control over the manner in which the work is to be done by the contractor, it is to be regarded as the contractor's own enterprise. There are exceptions to the rule.

Restatement (Second) of Torts section 422 provides that normally an owner of property is liable for injuries caused to others by the unsafe condition of the property as long as he has possession of the land. Here, the defendant had a supervisor on the site and exercised control over the premises. Therefore, the court held that the trial court did not err by instructing the jury that defendant owed plaintiff a duty to provide a reasonably safe place to work.

Defendant further contended that if General Growth is responsible for plaintiff's injury, it should be entitled to the benefits of the exclusive remedy provisions of the workers' compensation law. The court held the argument was without merit since section 85.20, The Code, provides that the rights and remedies provided under the workers' compensation law are to be the exclusive rights and remedies against the injured employee's employer. In the present case, there was no employer-employee relationship between plaintiff and General Growth.

Plaintiff cross-appealed from the judgment, challenging the trial court's refusal to award statutory interest on that part of the award to which a workers' compensation insurer possessed a

right of subrogation. The court held the argument to be without merit.

At the time of trial the employer's insurance carrier had a workers' compensation lien against any recovery which plaintiff might receive. Neither the lien nor its amount was ever challenged by the plaintiff. When judgment was entered for plaintiff, the insurance carrier was entitled to the amount of its lien. Plaintiff, pursuant to section 535.3, was entitled to interest on the excess over the amount of the lien, but it is the insurance carrier who is entitled to the interest on the workers' compensation amount. To permit statutory interest on the amount of the compensation lein to insure the plaintiff's benefit would permit him to recover interest twice on the same sums. The court held that they would not sanction such a result.

C

SELECTED
INDUSTRIAL COMMISSIONER
APPEAL DECISIONS

ATTORNEY FEES

Francis v. Ryder Truck Rental (September 30, 1983)

C

Claimant was originally represented by an attorney. In August of 1982 claimant discharged the first attorney and retained a second attorney for the purpose of seeking further rehabilitation benefits. The second attorney secured another medical examination, but claimant's application for rehabilitation benefits was withdrawn once it became apparent that the examination merely confirmed earlier findings. Claimant later visited a third attorney in regard to a separate legal matter. Discussion concerning claimant's disability ensued, and claimant retained the third attorney to represent him in further efforts to gain additional rehabilitation benefits. The newly retained attorney arranged for yet another examination of claimant which resulted in claimant's hospitalization and rotator cuff surgery. Medical expenses were paid and workers' compensation benefits were reinstated retroactive to January 5, 1982.

On March 7, 1983 the parties entered into a 33 1/3 percent contingency fee agreement. Payment of claimant's benefits continued as stated in the agreement. On May 13, 1983 claimant wrote a note discharging the third attorney. Claimant subsequently retained a fourth attorney to represent him in the matter of payment of further attorney's fees to the third attorney.

It is apparent that but for the labors of the third attorney, claimant's workers' compensation benefits would not have been reinstated, nor would claimant have received needed medical care.

Claimant knowingly signed a contingency fee contract to pay one-third of his recovery to his attorney. Although the percentage set forth in the contract may or may not be as recommended by this agency, it is within the range of charge for attorney's services in workers' compensation cases in this locale. The claimant signed the agreement and accepted the successful services of his attorneys. The deputy's order that claimant pay one-third of his recovery to this third attorney is not unreasonable and is affirmed. (Appealed to District Court; Pending)

COMMUTATION-USE OF LIFE EXPECTANCY AND REMARRIAGE TABLES

Strait v. Agri Industries (December 39, 1983)

Claimant was married to decedent who was killed in an industrial accident. Claimant is 28 years old and has no dependents. She has a college degree and is currently training to become a buyer for a retail store. Upon decedent's death, claimant received $124,000 in life insurance benefits. Claimant used $24,000 as a downpayment on a home and has enlisted the services of an attorney and a broker to invest the remaining $100,000. She is currently in an investments course and her only debt is the house mortgage. She has thus far spent none of the workers' compensation benefits she has received on personal living expenses. The deputy awarded claimant a full commutation of benefits to enable her to invest the money.

The best interest of the claimant and not the employer or insurance carrier is the fundamental touchstone for deciding commutation cases. Economic opportunity would be decidedly in

the claimant's best interest.

Claimant is in her late 20's, in good health, college educated and favorably employed. The actuarial tables applicable to this claim would indicate that she would be entitled to just over 18 years of benefits under the life and remarriage probability tables. Periodic payments would continue for life or until remarriage in which event claimant would be entitled to a two year lump sum of benefits. Although there is no direct indication one way or the other, indications are that claimant may well remarry within the next sixteen years.

Although this result effectively circumvents the remarriage contingency of the survivors benefits portion of the Workers' Compensation Act, it would appear we have been directed by the legislature and the courts to consider that as a favorable factor in determining the best interests of the claimant.

Assuming that the remarriage expectancy should be looked at in the same manner as life expectancy, i.e., actual as contrasted with information provided by actuarial tables, it would be in claimant's best interest to receive the money in a lump sum.

The deputy's decision is affirmed. (Appealed to District Court; Pending)

DEPENDENTS--PARENTS OF DECEDENT

Johnson v. Brown Construction Company (April 30, 1984)

Deceased was 18 at the time of his death. The record shows that decedent provided for his own personal needs with the money earned from the employer. He at one time assisted his father in

the installation of a bathroom in the family home. He also assisted his father in the latter's part-time work as a water superintendent. Held that the parents were dependent upon deceased to the extent of 50 percent of his earnings.

C

DISCOVERY--COMMUNICATING WITH PHYSICIAN

Junge v. Century Engineering Corp. (March 13, 1984)

Claimant's counsel instructed a treating physician not to talk to defendants' attorneys out of his presence. The deputy concluded claimant's counsel violated Iowa Code section 85.27 with that instruction.

Iowa Code section 85.27 contemplates the free flow of medical information during contested case proceedings. By filing her action claimant agreed to the release of information concerning her physical condition. While section 85.27 does not provide for an unlimited waiver of an individual's health history from birth to death, it does prescribe open access to information concerning an individual's physical or mental condition relative to a claim for benefits. The affidavit of the physician clearly indicates that his treatment of claimant relates to the condition for which a claim for workers' compensation benefits has been initiated. As such, claimant shall be considered to have agreed to the release of medical information held by the physician.

Claimant's contention that defendants are precluded from communicating with the physician in an ex parte fashion is unfounded. Nowhere in section 85.27 does the legislature

indicate an intent to proscribe such communications, nor would such a rule promote expediency of discovery and settlement of claims. Moreover, it would seem inconsistent to permit claimant to conduct ex parte communication with a practitioner while at the same time denying defendants a similar opportunity. The deputy's order is affirmed. (No Appeal)

EMOTIONAL AND PSYCHOLOGICAL INJURY

Schreckengast v. Hammermills, Inc. (November 29, 1983)

Claimant worked for the employer some 31 years before he became disabled by a psychiatric disorder known as unipolar major affective disorder, a form of depression. Claimant had had psychiatric problems during World War II when he was in the navy and was hospitalized in a psychiatric ward for 12 weeks. However, after his discharge he was able to function all right for many years, and the evidence did not reveal that his problem during World War II was in any way the cause of his unipolar major affective disorder.

Claimant began work for the defendant in 1950 and progressed quickly from a laborer to a position in the engineering department. His duties included working with sales quotations, drawing and designing machines, and some travel to meet with prospective customers. The record is in dispute as to whether or not he often worked evenings and weekends and whether or not he traveled as much as two weeks every month. The evidence was clear that claimant worked a full 40 hour week and more and that his schedule could be characterized as heavy. He was responsive to

the needs of others by helping fellow employees at the sacrifice of his own work. There were vexacious changes in assignment and priorities. The evidence was in dispute as to whether or not any of these circumstances resulted in lost sales. Claimant developed a fear of flying (again the cause was disputed) which resulted in his being less able to travel about the country in his work.

His psychological problem began to occur in early 1979. He last worked at the employer's place of business on April 15, 1981. He received social security disability.

The lay evidence supports the proposition that claimant's work was sometimes hectic and provoking.

The major expert evidence in this case comes from five practitioners: four medical doctors and one psychologist. They all agreed that claimant suffered from a major depressive disorder.

The family practitioner stated he first saw claimant in 1978 for abdominal complaints. These complaints and subsequent treatment culminated in claimant being referred to a psychiatrist who diagnosed claimant as having unipolar affective disorder, depressed type. The psychiatrist stated that such a depression is not caused by external events but is occasioned by a change in the biochemistry of the brain. A second psychiatrist agreed with the diagnosis but was equivocal about causation. A psychologist stated the cause of the recurrent depressive episodes is stress related to his work conditions. A third psychiatrist testified

that claimant's depression had no causal relationship to work. He testified further that claimant's work difficulties represented the symptoms of the depression rather than the cause thereof. He further stated that in a majority of cases, environmental circumstances have absolutely nothing to do with the onset of major depressive episode.

A question of whether a gradual stimulus causing a nervous injury is compensable is covered in Larson, The Law of Workmen's Compensation Law, Vol. 1B, p. 7-637 and following, §42.23(b). According to Larson, there is no question but what a gradual problem is one of proof. The polarity in cases is exemplified in Swiss Colony v. Department of ILAR, 72 Wis.2d 46, 240 N.W.2d 128 (1976) and Carter v. General Motors Corporation, 261 Mich. 577, 106 N.W.2d 105 (1960). Wisconsin, which represents the so-called objective view, ruled that "in order for nontraumatically caused mental injury to be compensable in a workmen's compensation case, the injury must have resulted from a situation of greater dimensions than the day-to-day mental stress tensions which all employees must experience." 240 N.W.2d at 130, quoting 215 N.W.2d at 373. Michigan, holding with the subjective test, ruled that a claimant who had prior emotional trouble was eligible for workers' compensation where the evidence showed his inability to keep up on the assembly line and subsequent berating by his foreman made him fear losing his job and resulted in a psychosis.

Neither the Iowa Court nor the industrial commissioner has ruled upon the issue of which standard should apply in such

cases in Iowa. The objective standard has the virtue of clarity and is recommended by Larson. It will be adopted here.

Defendants prevail because three of the medical doctors do not connect the illness to work, while the fourth was at least somewhat equivocal in his opinion as to causation. Only the psychologist's opinion stands for claimant. His testimony, while impressive, does not in any way refute arguments the cause relates to a chemical imbalance in the brain. Thus, although one does not like to conceive of the brain in such a mechanist fashion, the testimony supports such a model, and it is clear that claimant cannot prevail under the objective test adopted here. That is, claimant has not shown that his work was a substantial factor in causing his unipolar major affective disorder. (Appealed to District Court; Affirmed. Appealed to Supreme Court; Pending)

EMPLOYEE-EMPLOYER RELATIONSHIP--RELIEF WORKER

Steinbach v. Polk County, Iowa (April 23, 1984)

Claimant applied for some relief assistance at the Polk County Department of Social Welfare. Upon being qualified, claimant was told he would have to repay Polk County for the financial assistance. However, he was also told that he could participate in the Polk County Work Experience Program in order to reduce the amount of that money. Claimant elected to work and sustained an injury while cleaning walls and woodwork.

Defendant concedes that it had the right to control the work and was a responsible party in charge of the work. As to the

right to discharge, the stipulation filed by the parties shows claimant could be removed from his assigned duties if he was unable to perform as requested. It is clear that claimant was paid wages.

C

Defendant suggests that claimant's work was part of a make-work project and that creation of such a project showed no intention to create an employment relationship. To the contrary, it would seem that the county could benefit from the labor of persons such as claimant who are able to do such cleanup tasks.

Considering all of the elements of the employee-employer relationship, it is found that claimant was an employee of Polk County at the time he was injured.

ESTOPPEL

Carter v. Continental Telephone Co. (August 11, 1983)

In March of 1979 claimant read doctor reports in the possession of the employer which indicated that his dermatitis was caused by a substance he came into contact with on his job, and further, that claimant should not return to his job. Because claimant was charged with knowledge of the nature, seriousness and probable compensable character of his condition upon reading the reports in March of 1979, the two year statute of limitations barred his action which was commenced in July of 1981.

Claimant contends that defendants should be estopped from asserting the statute of limitations as a defense. To successfully argue estoppel of the statute of limitations, claimant must prove all four elements thereof as set forth in Paveglio v. Firestone

Tire & Rubber Co., 167 N.W.2d 636 (Iowa 1969). The first of these elements is a false representation or concealment of material facts. Claimant attempts to argue that the concealment of material fact in this case was the failure of defendants to inform him of the existence and effect of the two year limitation period. It is believed, however, that "material facts" as intended in this first element goes to those facts which concern the merits of a case, and not to the existence of the very defense to which estoppel is being asserted. It has been established that claimant had access to the same medical correspondence and reports as did defendants. Nowhere in the record is there any indication whatsoever that defendants concealed any information from claimant as regarded his dermatitis and its possible connection to his work. The facts in defendants' possession do not appear to be any different from those which were in the possession of claimant. Therefore, no misrepresentation or concealment of material facts is found to exist and claimant's estoppel argument must fail. (Appealed to District Court; Pending)

EVIDENCE--SUBMISSION OF VOC REHAB REPORT

Thrasher v. J. P. Cullen & Son (April 16, 1984)

Defendants objected to the deposition and testimony of a vocational rehabilitation counselor, in addition to letters written by the counselor.

Industrial Commissioner Rule 500-4.18 states:

> In any contested case a signed narrative report of a doctor or practitioner setting forth the

history, diagnosis, findings and conclusions of the doctor or practitioner and which is relevant to the contested case shall be considered evidence on which a reasonably prudent person is accustomed to rely in the conduct of serious affairs. The industrial commissioner takes official notice that such narrative reports are used daily by the insurance industry, attorneys, doctors and practitioners and the industrial commissioner's office in decisionmaking concerning injuries under the jurisdiction of the industrial commissioner.

Any party against whom the report may be used shall have the right, at the party's own initial expense, of cross-examination of the doctor or practitioner. Nothing in this rule shall prevent direct testimony of the doctor or practitioner.

This rule is intended to implement sections 86.8 and 86.18 and to interpret section 17A.14, The Code.

There is no definition of the word "practitioner" provided, but the rule contains no technical language, and agency decisions construing the rule do not ascribe peculiar meanings, known only to the agency, to the words and phrases therein. "Practitioner" is defined in Black's Law Dictionary as "[h]e who is engaged in the exercise or employment of any are or profession." Black's Law Dictionary, 4th Ed. Rev. 1968, p. 1335. A profession is defined as:

> A vocation, calling, occupation or employment involving labor, skill, education, special knowledge and compensation or profit, but the labor and skill involved is predominantly mental or intellectual, rather than physical or manual. Maryland Casualty Co. v. Crazy Water Co., Tex.Civ.App., 160 S.W.2d 102, 104. The method or means pursued by persons of technical or scientific training. Board of Sup'rs of Amherst County v. Boaz, 176 Va. 126, 10 S.E.2d 498, 499. Supra, at 1375.

Clearly, a vocational rehabilitation counselor is a practitioner. Therefore, a counselor's narrative report, as long as it meets

the requirements set out in Rule 500-4.18, will be admissible as evidence. Likewise, his deposition and direct testimony will also be admissible as evidence. (No Appeal)

C

HEART ATTACK

Suehl v. Allied Structural Steel Co. (July 28, 1983)

Claimant received a series of 220 volt electrical shocks while working on July 9, 1981. Claimant testified that he returned to work later on the same day but felt very tired and beat. He did not see a doctor on the day he received the shock.

The following day claimant was requested by his supervisor to visit the company doctor. No medication or treatment was prescribed.

Claimant suffered a myocardial infarction on either July 21 or July 22, 1981. The medical evidence indicated that claimant had a preexisting occlusion of the left anterior descending artery which was typical of atherosclerosis. The evidence did not indicate that claimant had symptoms of cardiac problems during the days immediately following the shocks. The thoracic cardiovascular surgeon who performed bypass surgery on claimant testified that he was unconvinced that an electrical shock could produce atherosclerosis, particularly during the time frame of July of 1981 through November of 1981 (the date of surgery). The surgeon stated that it would be purely spectulative to say whether a shock was a factor which increased oxygen demand and resulted in an infarction.

The medical evidence, viewed as a whole, does not support a

conclusion that claimant's myocardial infarction was causally related to the electrical shocks he received. The deputy's denial of benefits is affirmed. (No Appeal)

IN THE COURSE OF

Smith v. M. D. and Associates, Inc. (November 9, 1983)

Claimant parked his vehicle at the home of the vice-president of defendant in Newton and rode to the job site in Des Moines with the foreman in a truck owned by defendant. He worked until 1:00 or 2:00 when the foreman's wife appeared at the work site. Claimant testified that the foreman wished to ride with his wife to their home in Winterset and asked claimant if he wanted to drive the truck back to Newton. Claimant was involved in an accident after stopping at a convenience store on the way back to Newton, suffering multiple injuries.

Claimant testified that while knowing that the truck he had been driving was owned by defendant, he understood it to be in the complete control of the foreman. He stated that the foreman generally took the truck home with him in the evenings and weekends. Claimant admitted that he rode to Des Moines with the foreman only "once in a great while."

The foreman testified that he normally would have driven the truck to Winterset, and there was no reason for the truck to return to Newton other than to provide claimant transportation. He did not recall whether he had been asked by claimant or had volunteered the use of the truck.

The general rule is that an employee is not entitled to

compensation while off the employer's premises on the way to and from work. An exception exists when the employee performs an errand or task which in some way benefits the employer or is incidental to the employee's work duties. The greater weight of the evidence in this case indicates that defendant stood to benefit not at all from claimant's action of driving the truck back to Newton. The employer testified that there was no reason for the truck to return to Newton and that it had been provided for the use of the foreman. The foreman testified to the effect that the truck would have been driven to Winterset had claimant not needed transportation back to Newton. Claimant made no employment related stops in route to Newton and was not paid for the time spent traveling to and from work. Furthermore, claimant did not regularly depend on the foreman or any other employee of defendant for rides to and from work. For these reasons, claimant's injury is found not to have occurred in the course of his employment. (No Appeal)

INDUSTRIAL DISABILITY--EMPLOYER'S REFUSAL TO OFFER WORK

Kniesley v. Brazos Transport, Inc. (July 28, 1983)

Claimant had a history of suffering from high air temperatures. In June of 1981, while driving a truck for the employer, the heat outside and inside of the truck's cab combined to cause him to become uncomfortable and disoriented. He had another episode in July. Defendants filed a memorandum of agreement for the June injury and did not contest that claimant sustained temporary total disability. There is no evidence of any permanent partial

disability as a result of the heat related injury. Claimant received two notices from the employer: The first stated that claimant would not be put back to work until the employer received a full release; the second stated that due to the fact the doctor reported that claimant hyperventilates from exposure to high temperatures or excessive work, he was placed on indefinite layoff until such time as he could pass a company physical showing he would not hyperventilate in the performance of his duties.

The employer stated that claimant had a release from a doctor that stated he could go back to work as long as he was driving an air conditioned cab.

The employer testified that while the company was required by labor contract to have air conditioned trucks, they were not required by the labor agreement to have them in working order. That testimony leads one to believe that claimant was laid off because of his injury and that the employer was unwilling to offer any work environment or a job that claimant's condition could tolerate.

Therefore, although claimant had no permanent partial disability, it was found he was laid off because of his injury and the deputy's award of ten percent industrial disability is affirmed. (Appealed to District Court; Affirmed and Modified. Awarded temporary total benefits for a term certain only. No award for permanency. Appealed to Supreme Court; Pending)

MEDICAL REPORTS--RELEASE OF

Haindfield v. Thomas Ullrich (March 27, 1984)

Petitioner-insurance carrier brought an action against respondent-chiropractor for release of medical records pertaining to treatment of an injured employee. No claim or proceeding for benefits had been initiated by the employee. The deputy's order, sustaining respondent's motion to dismiss, was affirmed upon appeal on the basis that petitioner was an improper party to bring an action.

The provisions of Iowa Code section 85.27 clearly indicate that an employee, employer or insurance carrier making or defending a claim for benefits may be compelled to release information concerning the employee's physical or mental condition. While the record does indicate that the injured employee did authorize respondent-chiropractor to release treatment records to petitioner, that does not make respondent a proper party to this type of proceeding before this tribunal. Furthermore, Iowa Code section 85.26(4) appears to preclude petitioner-insurance carrier from initiating a claim of this type on its own behalf. (No Appeal)

MEDICAL TREATMENT--AUTHORIZATION

Hurst v. John Deere Des Moines Works (September 30, 1983)

Claimant sustained a traumatic amputation of his thumb during the course of his employment on October 27, 1981. He was treated by the employer retained physician whose notes reflect that claimant complained of pain in the stump. On December 14, 1981 claimant again saw the physician and was advised to resume

his job. Claimant did not see any physician between December 14, 1981 and May 3, 1982.

The pain did not subside, and claimant, on his own, consulted with another physician who referred claimant to an orthopedist who performed surgery to remove a neuroma encased in scar tissue. The pain in the stump has diminished, and claimant is no longer suffering from the pain which had existed prior to the surgery. The employer refused to pay the medical expenses incurred as a result of the treatment of the second physician and orthopedist.

The employer had not withdrawn any authorization for claimant to see the original treating physician. Claimant did not communicate any dissatisfaction with the employer retained physician either orally or in writing, and the employer did not know claimant was dissatisfied with the care. The employer did not agree to alternate care and was not requested to agree to alternate care. The treatment and surgery were not in the nature of an emergency. The employer could have been reached by the claimant to request approval before such care was rendered.

Under section 85.27 the employer can choose the medical care as long as it is reasonable. The choice does not become unreasonable simply because the employee disagrees with it. An employee who is not satisfied with the type of care being provided by an employer may apply to the industrial commissioner for an order directing alternative care. The employer will not be held accountable for the expenses incurred by claimant for treatment and care provided by the second physician and orthopedist. (Appealed to District Court; Pending)

MEDICAL TREATMENT--AUTHORIZATION

Kimrey v. Swift Independent Packing (December 30, 1983)

Defendants appealed from an order, in response to claimant's application for alternate care, that they provide substitute care from a list of three orthopedic surgeons.

Claimant filed an action asking for alternate medical care from that being provided by the employer retained physician. Although this action was dismissed due to lack of proof of service, it is inconceivable defendants were not apprised of claimant's dissatisfaction with the care offered by defendants.

Claimant on his own went to an orthopedist after which he filed this current application for alternate care. Defendants thereafter filed a request for examination by a different orthopedist which was granted.

Defendants claim on appeal that no reasons for dissatisfaction of the offered alternate care by their chosen orthopedist has been stated. Claimant stated his dissatisfaction with the original offered care. He then stated his desire for the treatment by his chosen orthopedist. Defendants offered care by another orthopedist. This constitutes a disagreement over alternate care.

The deputy, pursuant to the application, allowed and ordered other care. The record is sufficient to show "reasonable" proofs of the necessity therefore. The order is affirmed. (No Appeal)

MEDICAL TREATMENT--AUTHORIZATION

Smith v. Owens Brush Company (November 20, 1983)

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Claimant hurt her back in a lifting incident at work. Thereafter, she saw numerous doctors. An orthopedist at University Hospitals suggested claimant had a possible ruptured disc and contemplated surgery; however, he received a telegram from the insurance company which stated they were not in a position to authorize surgery until they had an opportunity to review the surgeon's findings. The surgery was not performed.

Finally, claimant's son insisted she move to Chicago where she had surgery for a disc herniation. Claimant did not seek authorization from defendants for the surgery.

In considering the issue of choice of care for treatment, one presumes that claimant had a herniated intevertebral disc which could not definitely be diagnosed until surgery. As a result, although surgery was suggested, nothing was done until the Illinois surgeon took the initiative. It is clear that claimant knew the employer had the choice of care, because it was explained to her when she had been to a chiropractor without prior authorization. Further, she had had telephone conversations with a representative of the insurance carrier with respect to choice of care.

Even so, it appears the surgery may lower defendants' ultimate liability and therefore benefits defendants. Defendants are ordered to pay the medical expenses. (Appealed to District Court; Pending)

NOTICE--TERMINATION OF BENEFITS

Kelly v. Wilson Foods Corporation (December 29, 1983)

Claimant appealed from a review-reopening decision wherein he was denied further benefits.

Claimant received workers' compensation benefits until he returned to work on January 17, 1982. Claimant was unable to perform the assigned work after the first day. He was then placed on sick leave which he drew until August 1982. Claimant's action was served February 12, 1982. The form 2 indicates that last payment of workers' compensation benefits was made February 14, 1982. He received no notice of termination of benefits.

Due to the fact that claimant was aware of his rights and exercised those rights as well as the fact that claimant was not cut loose with no payments at all but received some six months of sick leave benefits, the fundamental fairness-due process provisions of the Auxier v. Woodward State Hosp.-Sch., decision would appear to have been satisfied. (No Appeal)

OCCUPATIONAL DISEASE

Calahan v. Oscar Mayer (July 29, 1983)

Claimant was found to have an occupational disease caused by the rapid and repetitive motions with his right arm and shoulder while cutting hams and loins. While the medical evidence in this case indicated that claimant suffers from an occupational disease which resulted in a five percent functional disability, the record did not contain any evidence as to whether claimant could earn equal wages elsewhere. In addition, claimant was not

shown to be incapacitated from performing numerous jobs which had been available to him within the meat packing industry. In an occupational disease claim it must be shown that the inability to perform his work or earn equal wages in other suitable employment is related to his disease. This is not the same as reduction in earning capacity which is applicable to an injury situation under chapter 85. The deputy's finding that claimant had not established disability was affirmed. (No Appeal)

OCCUPATIONAL DISEASE--ASBESTOSIS

Anderson v. Iowa Power & Light Company (October 19, 1983)

Claimant, who has a long history of cigarette smoking, worked for 29 years as an operating shift supervisor in defendant's plant. Claimant came in contact with excessive levels of asbestos on many occasions during the years he worked for defendant and developed asbestosis. The medical evidence presented indicated that claimant has no functional impairment as a result of his asbestosis, rather his physical problems are related to smoking. The evidence indicates that claimant's transfer to a lower paying technician job was unrelated to his asbestosis, rather was due to an unwillingness on his part to take on additional responsibilities as an operating shift supervisor. Claimant's earning capacity was held not to have diminished as a result of his asbestosis and the deputy's order that claimant not be entitled to permanent partial, healing period, or total disability funds was affirmed. (Appealed to District Court; Pending)

OCCUPATIONAL DISEASE--OBSTRUCTIVE LUNG DISEASE

Adelmund v. Viking Pump (October 31, 1983)

During the course of his 34 years of employment with defendant, 56 year old claimant was exposed to excessive levels of dust, smoke and steam. Claimant smoked one pack of cigarettes per day from age 16 to age 55. While all three doctors who testified by deposition agreed that the current status of claimant's lung disease had evolved as a combination of smoking and his work environment, none of the doctors could determine to what degree each cause had contributed on an individual basis. The doctors indicated that claimant's smoking was the primary cause of his lung disease and also indicated that most physical changes related to obstructive lung disease are irreversible.

Iowa Code section 85A.7(4) contemplates an apportionment where a disease not otherwise compensable is aggravated or heightened by conditions of employment. Claimant's obstructive lung disease, therefore, to the degree that it was caused by claimant's smoking habits, is not compensable. Under the evidence presented in this case, it was not unreasonable for the deputy to conclude that only 35 percent of the total finding of 90 percent industrial disability was attributable to a work related aggravation or heightening of claimant's obstructive lung disease. (No Appeal)

SECOND INJURY FUND

Lambert v. The Second Injury Fund of Iowa (September 30, 1983)

Claimant filed a petition in arbitration for an injury to

his left foot and leg. Claimant further claimed benefits from the second injury fund due to the prior loss of his right foot. In May 1983 claimant entered into a special case settlement with the defendant employer and its insurance carrier. The settlement denied the existence of a job related injury affecting claimant's left lower extremity and barred any further claim against the employer or insurance carrier related to the alleged injury.

The issue on appeal is whether the special case settlement entered into by claimant, employer and its insurance carrier without the participation of the second injury fund bars the claim for benefits against the fund. It was found that the establishment of employer liability, either by admission or adjudication prior to redemption, is an absolute prerequisite to second injury fund liability. Therefore, the deputy's ruling that claimant's claim for second injury fund benefits is barred by the special case settlement is affirmed. (Appealed to District Court; Pending)

EQUITABLE ESTOPPEL

Veach v. Wolff Transportation Co. (August 15, 1984)

Claimant was paid compensation for permanent disability based upon a five percent functional impairment resulting from a work injury. The last date of benefit payment was in May of 1979 and claimant filed a petition in review-reopening in June of 1982, more than the three years statutory period.

On February 10, 1982 defendants sent a letter to claimant stating that his file had been requested and that an adjuster would be calling him. The record discloses that claimant's file

was not requested from the home office until May 4, 1982 at which time it was virtually impossible for claimant to meet the limitations time period.

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On appeal it was held that the February 10, 1982 letter contained a false statement that an adjuster would be in contact with the claimant, that the statement was material, and claimant reasonably relied upon it to his prejudice. Claimant established by clear and convincing evidence the elements of equitable estoppel. Defendants are therefore estopped from asserting the statute of limitations.

PROCEDURE--PROPER PARTY TO AN ACTION

Poindexter v. Grant's Carpet Service (August 10, 1984)

In response to an application for determination of reasonableness of medical fees filed by the employer and insurance carrier, Plastic Surgery Institute, P.C. (P.S.I.) filed an appearance and initiated discovery proceedings. The employer and insurance carrier resisted and moved to quash notice of the taking of a deposition by P.S.I. On appeal it was held that the injured worker, who has the burden of proving his medical costs, had filed no claim for medical payment, and the question of reasonableness of fees was not therefore, properly before this agency. Furthermore, it was found that a treating physician has no authority under compensation law to proceed directly against the employer. Further, the action commenced by the employer and insurer was dismissed.

RATE OF COMPENSATION

Lang v. Humboldt Community School (June 21, 1984)

Claimant sustained a work-related injury while driving a school bus for defendant employer. Claimant contended that his earnings as a school bus driver were part-time wages, and his total earnings for purposes of computing the applicable rate of compensation should include income from his other job.

Implied in claimant's argument is the supposition that his wages as a school bus driver are less than the regular full time earnings for that line of industry. In fact, the line of industry in question is school bus driving. The earnings of school bus drivers for their regularly scheduled hours do not represent part-time employment within a category of full time bus driving, but are full time wages for that particular line of industry. Since the record indicates that claimant's employment contract with defendant employer provides for claimant to receive wages based on the regularly scheduled 39 weeks of school bus driving, the provisions of section 85.36(10) are not applicable, and other income may not be included in total earnings.

The first report of injury indicates claimant's pay period basis to be monthly. Since claimant is paid on a monthly basis, his rate of compensation is computed under the provisions of section 85.36(4), The Code. (Appealed to District Court; Pending)

RATE OF COMPENSATION

Moore v. Posters 'N Things, Ltd. (June 21, 1984)

Claimant, who was a sales manager for defendant employer, had an employment contract which provided for a salary of $57,500

per year. Claimant was to receive $50,000 in wages and the remaining $7,500 was to be paid into a SEP IRA on his behalf. By agreement with the defendant employer, claimant drew a varied weekly salary dependent on cash flow. He was to receive any balance due on the contract at the end of the year. Following his work-related injury, claimant did not return to work and did not receive the remainder of his contract salary.

Claimant's employment contract entitled him to a yearly salary of $57,000. Had he received set equal payments of that salary on a weekly or monthly basis, other provisions of section 85.36 would govern, depending upon the pay period to which his contract adhered. But in a situation where an employee receives a portion of his contractual salary in a form other than wages, as the IRA, and then draws against the base salary a variable weekly wage that is at least partially influenced by the employer's cash flow, annual earnings as the basis of computation under section 85.36(5), The Code, is the correct method of obtaining a representative of the employee's contracted remuneration for his services. (No Appeal)

VOCATIONAL DISABILITY EVALUATION AND THE CLAIMANT'S EMPLOYABLE SKILLS

Marian S. Jacobs, President
Rehabilitation Resources
Des Moines, Iowa

D

I. Bridging the gap between functional disability and industrial disability.

II. Two case histories:

A. The truck Driver with a "bad back"

B. The victim of a job-related heart attack

III. Employment alternatives: Are there any?

IV. Vocational disability evaluation: Results

[See the following example of a Vocational Summary and actual "bad back" case.]

EXAMPLE

OF

VOCATIONAL SUMMARY

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II. AGE; EDUCATION

A. Age:

Mr. Claimant is 58 years old.

B. Education:

Following graduation from high school, Mr. Claimant attended Gannon College, 1947-48, the University of New Mexico, September, 1948 to June, 1949, and Gannon College, 1949 to 1950. His major course of study was Biology and English. Mr. Claimant did not receive a college degree.

Mr. Claimant had no formal vocational education.

III. WORK EXPERIENCE:
(Information from Mr. Claimant's Interrogatory Answer #7, pages 6-14 of his Deposition and my interview with Mr. Claimant.)

1948: Creamland Dairy:
Factory Labor

1950-51; 1962-65: Anson Tools:
Machinist:
"...Building tools and dies and plastic molds...fabrication of molds and dies."

1951-53: Self-Employed Farmer

1953-55: Cambridge Farm Equipment:
Co-Owner, Agricultural Implement Retail Dealership

1955-57: General Electric Company:
Machinist

1957-58: Unemployed.

1958-62: Lang Electric Company:
Factory Foreman

1965-68: Lovell Manufacturing Company:
Tool Superintendent:
"Responsible for tool room facility of about 12 tool makers...building and maintenance of stamping dies, rubber molds, gauges and fixtures.... Some design work and quoting work." "Responsibility for three maintenance mechanics...repaired and maintained machine tools throughout factory."

1968-69: Brown Rubber Company:
Duties: "Same as at Lovell."

1969-73: Continental Rubber Company:
Chief Tool Engineer:
Duties: Estimated cost of tool design for customers; designed tools; "...procured them and make sure that they ran properly and produced an acceptable product."

1973-82: Hawkeye Rubber Company:
Plant Engineer:
Duties: "...Responsible for all of the physical plant, the buildings and parking lot, all of the machinery in the buildings, all of the process machinery...to keep it going, to keep it replaced, to keep it maintained... responsible for all of the existing tools that we had, rubber molds, dies, fixtures gauges. I was responsible for the procurement of new tools, for the quoting of tools to customers, potential customers.... I had to make sure that the new tools worked properly when they were received. I was responsible for quality control on manufactured products. I made recommendation for new processes, for new equipment."
"Administration, I had 2 people who reported to me." "...I was responsible for all of the machinery in the factory, the rubber mills, extruders, compressors, boilers, and so on. I had to make sure that all of this was operating, functioning properly... The actual functioning of the plant itself was my responsibility. If something broke my men and I had to fix it." "I had to inspect those areas that might need some attention, and I had to issue directions to my maintenance people how best to correct any problems that there might be."
"...Work...in the machine shop facility...repairing and maintaining of molds, building dies, building gauges and fixtures, sometimes building parts for equipment that had to be repaired...working...with steel material when...performing this activity.... We had objects that weighed 1 pound and we had objects that weighed 800 pounds.... We used chain hoists and fork lifts and mold trucks."

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IV. INTERVIEWS AND JOB SITE VISIT:

A. Interviews with Mr. & Mrs. Claimant:

I interviewed Mr. Claimant in his attractive country home in Toddville, Iowa, on August 23, 1984, for approximately 1 hour. His wife was present during part of our interview.

Mr. Claimant allowed me to tour the 5,500 square foot house set on 32 acres, which he, his wife and daughter built over a 6-year period. He served as architect, contractor and builder, having had past experience in remodeling homes. Mr. Claimant installed all electrical wiring, built and stained the kitchen cabinets,

the curving walnut stair bannister and parquet floor in the kitchen. The plastering work and some of the concrete work was sub-contracted.

We reviewed Mr. Claimant's work experience. (See "Work Experience", Pages 4 and 5 of this report) He stated that, using blueprints, he could estimate the design and production costs, then design the molds for tools. Additional skills include tool and die making and maintenance of plant machinery. As Chief Tool Engineer at Continental Rubber Company, he not only estimated the cost of tools to be designed but also designed the tools and was responsible for the production of a satisfactory product.

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Mr. Claimant stated that he would like to work, if there were a job available within his physical limitations; that he recognized he still had the skills to estimate costs, to design tools and molds. However, he stated he had not contacted any employers for work in the Cedar Rapids area nor had he been to Job Service or the State Vocational Rehabilitation Agency. Mr. Claimant stated he was not receiving any benefits.

He evaluated his physical limitations as follows:

Walk: Yes.
Drive: 1 hour at a time. (It is approximately 14 miles to downtown Cedar Rapids.)
Walk up/down stairs: Yes.
Sit: 1 hour at a time. He experiences stiffness and pain in the morning upon arising.

Mr. Claimant stated he has some degree of pain at all times, predominantly in his left leg. His current medication includes aspirin; occasionally he takes codeine.

He is no longer taking Elavil for depression. Mr. Claimant stated he does his back exercises daily as prescribed by his physician.

According to Mr. Claimant, his daily activities include walking around his property, reading and resting. He believes his diminished stamina would prevent his working for a full 8-hour day.

During our interview, Mr. Claimant demonstrated excellent communication skills, expressing himself succinctly and fluently.

B. InterviewsHawkeye Rubber Company:

I interviewed Mr. Fred Good, General Manager, Hawkeye Rubber Company, on August 23, 1984. We reviewed Mr. Claimant's job duties as "Plant Engineer" in some detail, since the Company has no written job description.

Hawkeye Rubber Company is essentially a custom job shop, producing rubber molded products as component parts for manufacturers and retail firms. The firm currently employs 45 to 50 people in a variety of positions. The majority of the Company employees are production workers.

Mr. Good stated that Mr. Claimant supervised 2 plant maintenance persons. His supervisory skills included exercising independent judgment, coordinating work tasks and designating work priorities. The major portion of Mr. Claimant's time was spent supervising plant maintenance, keeping plant machines in good working condition. Mr. Good stated that Mr. Claimant's hands-on work, maintaining and repairing machines, was done "by choice."

Mr. Claimant also operated a lathe and a bridgeport machine. Both require a high degree of precision tooling skills.

Initially, Mr. Claimant was in charge of installing all production machinery in the plant.

As "Plant Engineer" Mr. Claimant was also responsible for accurate record keeping, ordering spare parts and writing purchase orders.

Mr. Good stated that, after Mr. Claimant left the Company at the end of the fiscal year in August, 1982, his job duties as Plant Maintenance Supervisor were assigned to Mr. I. M. Supervisor, Plant Superintendent.

We reviewed Mr. Claimant's earnings:

> 1980: $39,538.60 (Earnings plus bonus; bonus: $14,913.60) 1981: $40,643.60 (Earnings plus bonus; bonus: $14,913.60) 1982: $21,484.00 (Earnings plus bonus; bonus: $ 5,519.00)

Mr. Good noted that the decrease in earnings/bonus in 1982 was due to the economic recession.

Following my interview with Mr. Good, Mr. I. M. Supervisor, Plant Superintendent, conducted a plant tour and job site visit for me.

Lathe and/or bridgeport machine operation is primarily a standing job; operators could sit occasionally if necessary. Mr. Supervisor stated that Mr. Claimant performed machine work "infrequently"; that the majority of his work tasks were performed at a desk in the office adjacent to the production work area. Here Mr. Claimant pre-pared written reports and orders, often using the telephone to contact customers and suppliers.

V. ADDITIONAL SOURCES CONTACTED:

> Job Service, Cedar Rapids, Iowa: Mike Mallard, Job Placement Director

Kirkwood Community College:
Mr. Wendell Mackstad, Director, Skill Center
Mr. David Kerton, Testing Director, Skill Center
Mr. David Popelka, Coordinator/Instructor, Machinist Program, Mr. Richard Wanton, Assistant Dean

Wage Survey, Cedar Rapids Labor Area, 1983, published by Job Service of Iowa

Mr. Clark Borland, Vocational Counselor, State Vocational Rehabilitation Agency, Des Moines, Iowa

Various employers in the Cedar Rapids area.

VI. INFORMATION FROM SOURCES:

A. Testing Information:

Mr. Claimant was tested at my request through Kirkwood Community Colleges, Skill Center. His testing results indicated:

General Learning Ability: 99th percentile
Verbal Aptitude: 93rd percentile
Numerical Aptitude: 96th percentile
Spatial Aptitude: 80th percentile
Form Perception: 68th percentile
Clerical Perception: 98th percentile
Motor Coordination: 60th percentile
Finger dexterity: 94th percentile
Manual dexterity: 7th percentile

(See testing results, Pages IA through 5A in the Appendix.)

B. Job Possibilities:

1. Within limits stated in Dr. Orthopedist's deposition: Viable job categories suitable to Mr. Claimant's test results, demonstrated work skills and within Dr. Orthopedist's limits as stated in his deposition,* include:

Instructor, Drafting or machinist programs, Kirkwood Community College: Requisite skills: Work experience and skills in drafting or precision machine operations; good communication skills; ability to work with people. Beginning Pay Scales: $15,000.00 to $17,000.00 per year.

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* Lift up to 40 pounds; minimal bending (250 to 300) and stooping; sit 1 hour at a time; sitting/walking flexibility ; unlimited walking.

Manager, Retail Store (Farm Supply, Hardware, etc.): (In 1953-55 Mr. Claimant was co-owner, agricultural implement retail store.)
Pay Scales: $4.59 to $9.38 per hour ($9,547.00 to $19,510.00 per year)
(See Job Service Wage Scales, Page 6A in the Appendix.)
Estimator and/or Designer, Molds and Tools (Job Shop): (In his deposition, Page 50, Mr. Claimant stated he "...could handle quoting of tools and tool design".)
Required skills: Work experience in estimating and/or designing molds for customers.
Pay Scales: $10.81 to $13.58 per hour ($22,484.00 to $28,246.00 per year.)
(See Job Service Wage Scales, Page 7A in the Appendix.)
Shipping/Receiving Clerk:
Pay Scales: $6.45 to $8.35 per hour ($13,416.00 to $17,368.00 per year)
(See Job Service Wage Scales, Page 8A in the Appendix.)
Salesperson or Service Counter Worker, Retail Lumber Store:
Required skills: A working knowledge of building and remodeling products.
Service Counter Worker:
Duties: Selling and estimating.
Floor Salesperson:
Duties: Selling, ordering and inventory control.
Pay Scales: $3.75 per hour.
(See Job Service Wage Scales, Page 9A in the Appendix.)

2. Within limitations stated on the "Functional Capacity Form": Viable job categories suitable to Mr. Claimant's test results, demonstrated work skills and within Dr. Orthopedist's limits as stated on the Functional Capacity Form,* include:

Self-Employed Furniture Crafter/Refinisher:
Because Mr. Claimant has demonstrated skills and a fully equipped "shop" in his home, in my opinion, he has

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* Frequently lift up to 10 pounds; occasionally lift up to 34 pounds; frequently carry up to 10 pounds; occasionally carry up to 24 pounds; frequently push/pull while seated or standing; occasional bending/squatting; never crawling/climbing; frequently reach above shoulder level; use both hands for repetitive actions; use both feet for repetitive movements; no unprotected heights; moderate being around moving machinery; moderate driving automotive equipment; mild exposure to marked changes in temperature and humidity; mild exposure to dust, fumes, gases; work 4 hours per day.

potential for self-employment as a furniture crafter and refinisher of wood products weighing up to 24 pounds. This would allow him to work at his own pace, using mechanical lifting aides such as hoists.
Pay Scales: $4,800.00 to $7,280 per year.

Part-time Instructor, Drafting, Tool and Die Making or Machine Machinists Programs: Kirkwood Community College contracts with employers in the Cedar Rapids area for on-the-job-training of employees. Part-time teachers with Mr. Claimant's demonstrated skills are needed for the short-term courses.
Pay Scales: $9.00 to $18.00 per contact hour.
In addition, part-time teachers are utilized in the college's scheduled vocational courses.
Pay Scales: $7,500.00 to $8,500.00 per year.
Self-Employed Designer or Estimator, Molds:
Several custom job shops in the Cedar Rapids area utilize independent contractors to estimate and design molds. Mr. Claimant, in my opinion, is self-employable, working at his own pace, in his home. Pay Scales vary, depending on the complexity of the individual project.
Pay Scales: $6.50 to $30.00 per hour (average per: $15.00 per hour: $15,600.00 per year.)

Part-time Shipping/Receiving Clerk:
Pay Scales: $6.45 to $8.35 per hour ($6,708.00 to $8,684.00 per year).
Part-time Salesperson or Service Counter Worker (Retail Lumber Store).
(See Job Service Wage Scales, Page 9A in the Appendix.)

VII. CONCLUSIONS:

A. Pre-Injury Earning Capacity:

As an employee of Hawkeye Rubber Company, Mr. Claimant earned an annual salary in 1981 of $25,730.00 (plus a bonus of $14,913.60); in 1982, Mr. Claimant earned a salary of $15,965.00 (plus a bonus of $5,519.00).

B. Post-Injury Earning Capacity:

Given Dr. Orthopedist's limits as stated in his deposition, Mr. Claimant's demonstrated skills and testing results, in my opinion, Mr. Claimant can expect to earn from $7,800.00 per year (Service Counter or Floor Salesperson) to $28,246.00 per year (Job Shop estimator/designer).

Given Mr. Claimant's limits as stated on the "Functional Capacity Form", his demonstrated skills and testing results, in my

opinion, Mr. Claimant can expect to earn from $3,900.00 (part-time Service Counter or Floor Salesperson) to $15,600.00 Per year (Self-Employed Independent Contractor, Mold and Tool Estimator/Designer).

C. Age:

Mr. Claimant is 58 years old. He can expect to work for an additional 7 years, assuming he retires at age 65. However, if self-employed, Mr. Claimant s retirement age would be at his own discretion.

Mr. Claimant's age can be considered an advantage in that he has a demonstrated ability to organize tasks and workers and to produce results. On the other hand, Mr. Claimant's age could be considered a disadvantage by those employers who must provide employee pension benefits. However, if Mr. Claimant were self-employed, this potential disadvantage would not exist.

D. Education:

Mr. Claimant has approximately 3 years of post-injury secondary education. His test scores place him in the top 1% of adults in learning ability. (See test results, Pages 1A to 4A in the Appendix.)

E. Qualifications:

Mr. Claimant is highly skilled as a:

Mold Designer
Mold and Tool Estimator
Machinist
Construction Contractor/Builder
Woodworking Craftsman

Supervisor of Machinery, installation, maintenance and repair. His mental capacities to use independent judgment, to coordinate work tasks, to designate work priorities have not been diminished by his current physical restrictions.

In my opinion, Mr. Claimant is fortunate to have a variety of vocational abilities in spite of his physical disability. For example, his skills as a designer and estimator and crafter are highly marketable and, in my opinion, Mr. Claimant could continue to perform in the work world with pride and satisfaction should he actually seek employment.

F. Nature of Disability:

Mr. Claimant's disability is not disfiguring nor apparent. On the other hand, his treating physician has suggested a vocational change to job duties less physically demanding. In addition, Mr.

Claimant will be competing in the work world with qualified workers without a disability. These workers are predictably hired over those individuals who are qualified but disabled.

However, because of disabling condition, Mr. Claimant is eligible for certain employer hiring incentives such as on-the-job-training or retraining through Targeted Jobs Tax Credits or Job Training Partnership Act monies. Both programs allow employers substantial tax credits or training funds for hiring individuals in need of a vocational change because of a disabling condition.

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G. Motivation:

Mr. Claimant has stated he has not contacted employers or job placement resources in the community for possible jobs suitable to his skills and physical limitations.

H. Ability to Engage in Employment:

If Mr. Claimant is motivated to seek work in the skills areas for which he is fitted, his opportunities are somewhat limited because of his physical restrictions. For example, Mr. Claimant is precluded from utilizing his skills as a:

Working Machinist
Home Builder
Production Machine Installer, Maintenance Worker and Repairer

However, given Dr. Orthopedist's stated restrictions and the testing results, I believe Mr. Claimant is employable within the Cedar Rapids area with marketable skills transferable to jobs within his physical limits. For example:

Instructor
Supervisor
Estimator
Designer

In fact, if Mr. Claimant is resourceful in making employer contacts and utilizing employer incentives (tax credits and training funds), in my opinion, his post-injury earnings would not be substantially decreased from his pre-injury earnings.

Respectfully submitted,

_____
Marian S. Jacobs

Date: _____

A NEW LOOK AT STRUCTURED SETTLEMENTS

D. Grant Peterson, J.D.
Settlement Planning, Incorporated
Minneapolis, Minnesota

E

A. Overview of Revenue Ruling

B. Examination of amended Code Section and added Section (104 & 130)

C. Legislative activity

D. Program scope

E. Documentation

F. Attorney fees (legal review)

Insurers pay $5 million to settle with youths

By LAURENCE H. GROSS

DENVER—Four insurers are paying about $5 million toward a structured settlement for five boys who were seriously burned in a methane gas explosion underneath a Denver-area landfill more than six years ago.

James W. Buchanan, a Boulder, Colo., attoney representing the boys, said the settlement will pay the youths at least $14.5 million during the next 30 years. The maximum value of the settlement is estimated at approximately $50 million.

Under the settlement, the insurers will contribute $4.9 million. Part of the money will be used to purchase annuities for the claimants, according to attorneys for the insurers.

Mr. Buchanan says the five boys, who ranged in age from 6 to 12 at the time of the August 1976 accident, will immediately collect $2.025 million.

The boys will receive payments ranging from $1,225 to $3,100 per month for the rest of their lives, he said, adding that this amount will increase by 6% annually.

Four of the five boys will also receive lump-sum payments ranging from $250,000 to $1 million apiece when they each reach the ages of 28, 38 and 48.

The settlement was negotiated with insurers for the Denver Board of Water Commissioners, the city of Sheridan, Waste Management Inc. of Oakbrook, Ill., and Colorado Disposal Inc., a Waste Management subsidiary.

The water commission and the city of Sheridan jointly maintained a drainage pipe in which the boys were playing when the blast occurred. The water commission also owned the landfill, which was operated by Waste Management Inc. and its subsidiary.

The water commission carried a $1 million first-dollar general liability policy with Liberty Mutual Insurance Co. and a $20 million excess policy underwritten by C.V. Star Insurance Co., a subsidiary of American International Group Inc., sources close to the case said.

Although the terms of the settlement were not released under a court order, the sources said Liberty Mutual paid the entire limits of its policy, while Star paid about $1 million.

The entire $300,000 of first-dollar liability coverage carried by the city of Sheridan was also paid toward the settlement. The coverage was underwritten by Fireman's Fund Insurance Cos.

Waste Management carried a $500,000 primary policy with Fireman's Fund and $5 million in excess liability coverage with Stonewall Insurance Co. Its subsidiary, Colorado Disposal, maintained a $1.3 million primary policy with Reliance Insurance Co.

Neither the Fireman's Fund nor the Reliance policy required a deductible, sources say.

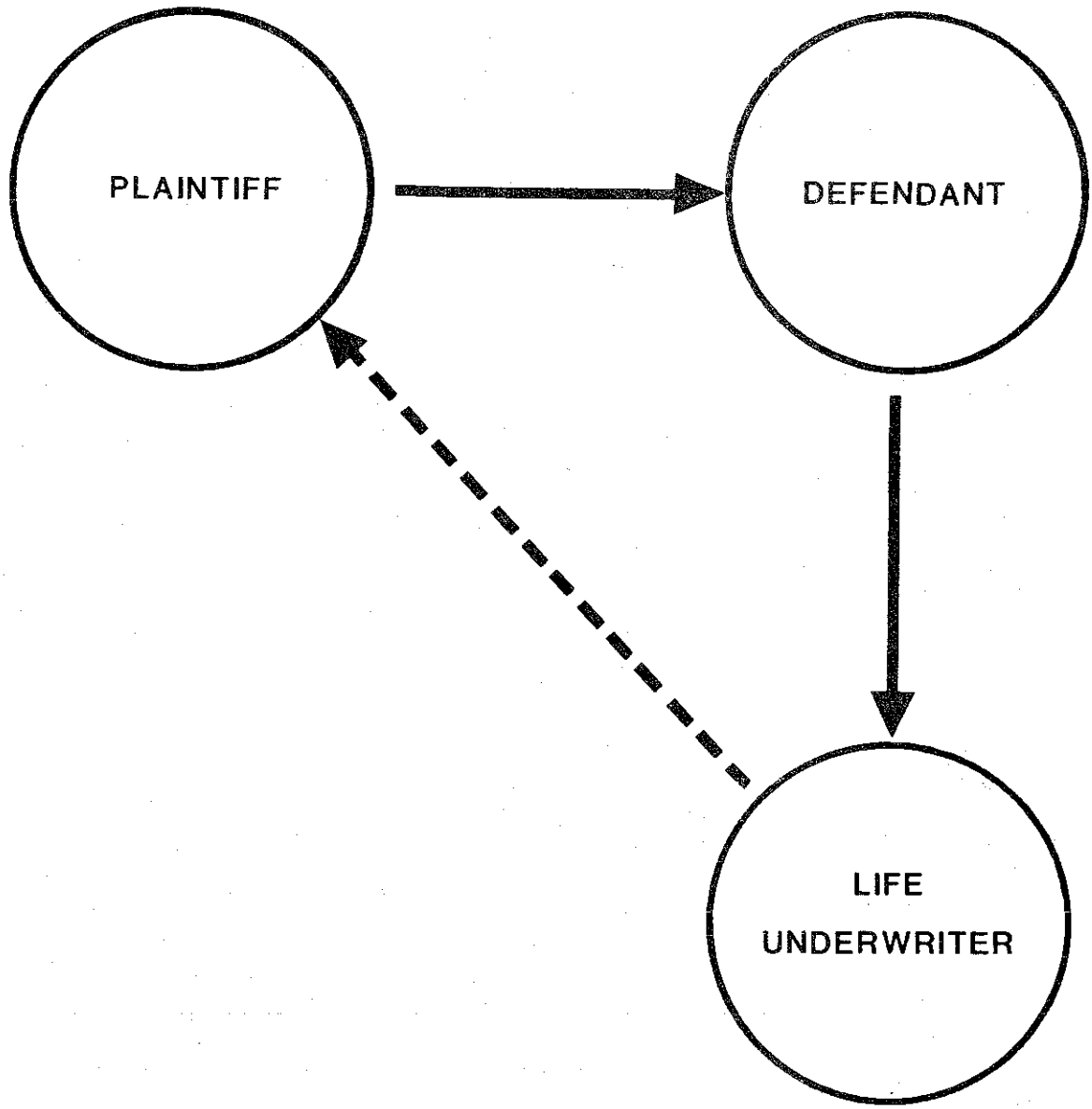
Fireman's Fund and Reliance paid the full limits of their coverage, the sources say, while Stonewall paid just less than $1 million.

Mr. Buchanan, the boys' attorney, said the five youths had been playing near the 48-inch storm drainage pipe under the landfill. The pipe began near their homes in Sheridan and extended about a quarter-mile to the South Platte River in Denver.

The explosion was triggered after one of the boys lit a candle while exploring the drainage pipe, igniting methane gas that was produced by the landfill overhead.

All five boys were seriously burned, with then-6-year-old Ronald Vigil of Sheridan suffering second- and third-degree burns over 45% of his body.

The other youths who will receive payments are Randolph M. Salazar, who was 12 at the time of the explosion; Juan D. Salazar, who was 6; Kenneth L. Salazar, who was 9; and Lawrence R. Ball, who was 7 at the time of the accident. All of the youths are residents of Sheridan. ■


PLAINTIFF
DEFENDANT
LIFE
UNDERWRITER

Part I. Rulings and Decisions Under the Internal Revenue Code of 1954

Section 61.—Gross Income Defined

26 CFR 1.61-1 Gross income

Whether the recipient must include in gross income any part of monthly payments received in settlement of a damage suit. See Rev. Rul. 79-220 below.

Section 104.—Compensation for Injuries or Sickness

26 CFR 1.104-1 Compensation for injuries or sickness.
(Also Sections 61, 451; 1.61-1, 1.451-1.)

Damages; monthly payments; amount excludable. An insurance company purchased and retained exclusive ownership in a single premium annuity contract to fund monthly payments stipulated in settlement of a damage suit. The recipient may exclude the full amount of the payments from gross income under section 104(a)(2) of the Code rather than the discounted present value. Payments made to the estate after the recipient's death are also fully excludable.

Rev. Rul. 79-220

ISSUE

Does the exclusion from gross income provided by section 104(a)(2) of the Internal Revenue Code of 1954 apply to the full amount of monthly payments received in settlement of a damage suit or only to the discounted present value of such payments?

FACTS

A, an individual, sued *B* for damages for personal injuries. *B* is insured by *M*, an insurance company. Before trial, *A* accepted *M*'s offer to settle the suit for a lump-sum payment of $8,000 and *M*'s agreement to provide *A* with monthly payments of $250 for *A*'s lifetime or 20 years, whichever is longer, the payments to be made to *A*'s estate after *A*'s death if *A* should die before the end of 20 years. *A* had no right to the discounted present value of the monthly income (the present value of which, at date of settlement, was less than the total monthly payments to be provided) or to control the investment of that amount.

To provide the monthly payments for *A*, *M* purchased a single premium annuity contract from *O*, another insurance company. *M* advised *O* to make payments directly to *A*. However, *M* is the owner of the annuity contract and has all rights of ownership, including the right to change the beneficiary. *A* can rely on only the general credit of *M* for collection of the monthly payments.

LAW AND ANALYSIS

Section 61(a) of the Code and the Income Tax Regulations thereunder provide that, except as otherwise provided by law, gross income means all income from whatever source derived.

Section 104(a)(2) of the Code provides that except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical and dental expenses) for any prior taxable year, gross income does not include the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness.

Section 1.104-1(c) of the regulations provides, in part, that the term "damages received (whether by suit or agreement)" means an amount received (other than workmen's compensation) through prosecution of a legal suit or action based upon tort or tort type rights, or through a settlement agreement entered into in lieu of such prosecution.

However, if a lump-sum damage payment is invested for the benefit of a claimant who has actual or constructive receipt or the economic benefit of the lump-sum payment, only the lump-sum payment is received as damages within the meaning of section 104(a)(2) of the Code, and none of the income from the investment of such payment is excludable under section 104. See Rev. Rul. 65-29, 1965-1 C.B. 59, relating to damages awarded a claimant for tortious injuries in a lump-sum payment of 416*x* dollars over which claimant had unfettered control. The 416*x* dollars represented the discounted value of 520*x* dollars, which was found to be the reasonable cost of care, medicine, and medical attention for the injured person over a 10-year period. Rev. Rul. 65-29 holds that only the lump-sum payment, 416*x* dollars, is received as damages within the meaning of section 104(a)(2). See also Rev. Rul. 76-133, 1976-1 C.B. 34, which reaches a similar conclusion with regard to a court approved settlement awarded a minor and transmitted by the clerk of the court, in the name of the minor, to a savings and loan association for deposit in certificates of deposit.

In the instant case, there is a continuing obligation by *M* to pay $250 per month to *A* for the agreed period. *M*'s purchase of a single premium annuity contract from the other insurance company was merely an investment by *M* to provide a source of funds for *M* to satisfy its obligation to *A*. See Rev. Rul. 72-25, 1972-1 C.B. 127, which relates to a similar arrangement made by an employer to provide for payment of deferred compensation to an employee. In Rev. Rul. 72-25, as here, the arrangement was merely a matter of convenience to the obligor and did not give the recipient any right in the annuity itself.

HOLDINGS

The exclusion from gross income provided by section 104(a)(2) of the Code applies to the full amount of the monthly payments received by *A* in settlement of the damage suit because *A* had a right to receive only the monthly payments and did not have the actual or constructive receipt or the economic benefit of the lump-sum amount that was invested to yield that monthly payment. If *A* should die before the end of 20 years, the payments made to *A*'s estate under the settlement agreement are also excludable from income under section 104.

1954 CODE SECTIONS ADDED, AMENDED OR REPEALED BY THE ACT RELATING TO PERIODIC PAYMENTS/INDIAN TRIBAL GOVERNMENTS (H. R. 5470, SIGNED ON JANUARY 14, 1983)

[¶ 501] CODE SEC. 41. CONTRIBUTIONS TO CANDIDATES FOR PUBLIC OFFICE.

* * *

(d) Cross References.—

(1) For disallowance of credits to estates and trusts, see section 642(a)(2).

(2) For treatment of Indian tribal governments as States (and the political subdivisions of Indian tribal governments as political subdivisions of States) see section 7871.

Amendment Note

● Act Sec. 202(b)(1) amended Code Sec. 41(d) to read as above. Prior to amendment, Code Sec. 41(d) read as follows:

"(d) Cross References.—

For disallowance of credits to estates and trusts, see section 642(a)(2)."

For the effective date of the above amendment, see the amendment note for Act Sec. 204, following Code Sec. 7871, ¶ 519.

[¶ 502] CODE SEC. 103. INTEREST ON CERTAIN GOVERNMENTAL OBLIGATIONS.

* * *

(m) Cross References.—

For provisions relating to the taxable status of—

(1) Certain obligations issued by Indian tribal governments (or their subdivisions), see section 7871.

(2) Exempt interest dividends of regulated investment companies, see section 852(b)(5)(B).

(3) Puerto Rican bonds, see section 3 of the Act of March 2, 1917, as amended (48 U. S. C. 745).

(4) Virgin Islands insular and municipal bonds, see section 1 of the Act of October 27, 1919 (48 U. S. C. 1402).

(5) Certain obligations issued under title I of the Housing Act of 1949, see section 102(g) of title I of such Act (42 U. S. C. 1452(g)).

Amendment Note

● Act Sec. 202(b)(2) amended Code Sec. 103(m) to read as above. Prior to amendment, Code Sec. 103(m) read as follows:

"(m) Cross References.—

For provisions relating to the taxable status of—

(1) Puerto Rican bonds see section 3 of the Act of March 2 1917, as amended (48 U.S.C. 745).

(2) Virgin Islands insular and municipal bonds, see section 1 of the Act of October 27, 1919 (48 U.S.C. 1403).

(3) Certain obligations issued under title I of the Housing Act of 1949, see section 102(g) of title I of such Act (42 U.S.C. 1452(g))."

For the effective date of the above amendment, see the amendment note for Act Sec. 204 following Code Sec. 7871, ¶ 519.

[¶ 503] CODE SEC. 104. COMPENSATION FOR INJURIES OR SICKNESS.

(a) In General.—Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include—

* * *

(2) the amount of any damages received *(whether by suit or agreement and whether as lump sums or as periodic payments)* on account of personal injuries or sickness;

* * *

Amendment Note

● Act Sec. 101(a) amended Code Sec. 104 (a) (2) by striking out "whether by suit or agreement" and inserting "whether by suit or agreement and whether as lump sums or as periodic payments".

Applicable to taxable years beginning after December 31, 1982

[¶ 504] ***CODE SEC. 130. CERTAIN PERSONAL INJURY LIABILITY ASSIGNMENTS.***

(a) In General.—Any amount received for agreeing to a qualified assignment shall not be included in gross income to the extent that such amount does not exceed the aggregate cost of any qualified funding assets.

(b) Treatment of Qualified Funding Asset.—In the case of any qualified funding asset—

(1) the basis of such assets shall be reduced by the amount excluded from gross income under subsection (a) by reason of the purchase of such asset, and

(2) any gain recognized on a disposition of such asset shall be treated as ordinary income.

(c) Qualified Assignment.—For purposes of this section, the term "qualified assignment" means any assignment of a liability to make periodic payments as damages (whether by suit or agreement) on account of personal injury or sickness—

(1) if the assignee assumes such liability from a person who is a party to the suit or agreement, and

(2) if—

(A) such periodic payments are fixed and determinable as to amount and time of payment,

(B) such periodic payments cannot be accelerated, deferred, increased, or decreased by the recipient of such payments,

(C) the assignee does not provide to the recipient of such payments rights against the assignee which are greater than those of a general creditor,

(D) the assignee's obligation on account of the personal injuries or sickness is no greater than the obligation of the person who assigned the liability, and

(E) such periodic payments are excludable from the gross income of the recipient under section 104(a)(2).

(d) Qualified Funding Asset.—For purposes of this section, the term "qualified funding asset" means any annuity contract issued by a company licensed to do business as an insurance company under the laws of any State, or any obligation of the United States, if—

(1) such annuity contract or obligation is used by the assignee to fund periodic payments under any qualified assignment,

(2) the periods of the payments under the annuity contract or obligation are reasonably related to the periodic payments under the qualified assignment, and the amount of any such payment under the contract or obligation does not exceed the periodic payment to which it relates,

(3) such annuity contract or obligation is designated by the taxpayer (in such manner as the Secretary shall by regulations prescribe) as being taken into account under this section with respect to such qualified assignment, and

(4) such annuity contract or obligation is purchased by the taxpayer not more than 60 days before the date of the qualified assignment and not later than 60 days after the date of such assignment.

Amendment Note

● Act Sec. 101(b)(1) redesignated Code Sec. 130 as Code Sec. 131 and added new Code Sec. 130 to read as above.

Applicable to taxable years ending after December 31, 1982.

¶ 504 Code Sec. 130

MINNESOTA STATUTES

E

540.08 Injury to child or ward; suit by parent or guardian

A parent may maintain an action for the injury of a minor son or daughter. A general guardian may maintain an action for an injury to the ward. A guardian of a dependent, neglected, or delinquent child, appointed by a court having jurisdiction, may maintain an action for the injury of the child. If no action is brought by the father or mother, an action for the injury may be brought by a guardian ad litem, either before or after the death of the parent. Before a parent receives property as a result of the action, the parent shall file a bond as the court prescribes and approves as security therefor. In lieu of this bond, upon petition of the parent, the court may order that the property received be invested in securities issued by the United States, which shall be deposited pursuant to the order of the court, or that the property be invested in a savings account, savings certificate, or certificate of deposit, in a bank, savings and loan association, or trust company, or an annuity or other form of structured settlement, subject to the order of the court. A copy of the court's order and the evidence of the deposit shall be filed with the clerk of the court. No settlement or compromise of the action is valid unless it is approved by a judge of the court in which the action is pending.

Amended by Laws 1951, c. 347, § 1; Laws 1961, c. 346, § 1; Laws 1969, c. 660, § 2, eff. May 24, 1969; Laws 1981, c. 31, § 15; Laws 1981, c. 313, § 25.

This section is excepted from the Rules of Civil Procedure governing the procedure in the district courts in all suits of a civil nature, effective July 1, 1959, insofar as it is inconsistent or in conflict with the pleadings, practice and procedure provided in the Rules.

Laws 1981, 2nd Spec., c. 6, § 1, provides: "Laws 1980, Chapter 493 and Laws 1981, Chapter 313, are effective October 1, 1981."

1961 Amendment. Added "Savings and loan association" as proper depositary.

1969 Amendment. Permitted the investment of property in savings certificates or certificates of deposit.

1981 Amendments. Laws 1981, c. 31, substituted "parent" for "father" as person maintaining the action, and "son or daughter" for "child." Deleted provisions relating to instances where the father deserted or there is a custody question.

Laws 1981, c. 31 did not contain appropriation items or a specific effective date. See § 645.02 for method of determining the effective date.

Laws 1981, c. 313 added "or an annuity or other form of structured settlement" to the next to the last sentence.

PLAN

MEASURING LIFE	-	Male, age 6
COST FACTOR	-	$25,000

Deferring the above cost factor for a period of 12 years will provide the following economic benefit:

A. Commencing at age 18, an annual income of $12,000 for a period of five consecutive years.

B. Also, singular payments to be made as follows:

Age 25	-	$30,000
Age 30	-	$55,000
Age 35	-	$80,000

C. Total Guaranteed Benefit:

$225,000

PLAN

MEASURING LIFE	-	Male, age 2
COST FACTOR	-	$12,000

Deferring the above cost factor will provide the following economic benefit:

A. Commencing at age 18, a monthly income of $500 for four consecutive years.

B. Also, singular payments made at:

Age 25	-	$50,000
Age 30	-	$75,000

C. Total Guaranteed Benefit:

$149,000

PLAN

MEASURING LIFE ..... Female, age 35

COST FACTOR ..... Plaintiff $67,500

Attorney fees $22,500

Total $90,000

The plaintiff's portion of the above cost factor ($67,500) will provide the following economic benefit:

A. Monthly income for life of $550 with 30 years certain.

B. Child, age 2; commencing in 16 years, a monthly income of $500 for 5 consecutive years.

C. Child, age 4; commencing in 14 years, a monthly income of $500 for 5 consecutive years.

D. Total guaranteed benefit:

$258,000

E. Total projected benefit, assuming a life expectancy of 44 years:

$350,400

PLAN

MEASURING LIFE	-	Male, age 55	
COST FACTOR	-	Plaintiff	$24,000
		Attorney fees	$ 8,000
		TOTAL	$32,000

The plaintiff's portion of the above cost factor ($24,000) will provide the following economic benefit:

A. "Up front" dollars $5,000

B. Commencing at age 62, a monthly income of $390 for life with 30 years certain.

C. Total Guaranteed Benefit (including "up front" dollars):

$145,400

PLAN

MEASURING LIFE ..... Female, age 35

COST FACTOR	Plaintiff	$210,000
	Attorney fees	$ 70,000
	Total	$280,000

The plaintiff's portion of the above cost factor ($210,000) will provide the following economic benefit:

A. Monthly income with 30 years certain, beginning at $855 with 6% annual increases.*

B. Child, age 2:

1. At age 18, monthly income of $500 for five consecutive years.

2. Singular payments to be made at:

Age 25 = $25,000
Age 30 = $50,000

C. Child, age 4:

1. At age 18, monthly income of $500 for five consecutive years.

2. Singular payments to be made at:

Age 25 = $25,000
Age 30 = $50,000

D. Total guaranteed benefit:

$1,021,137*

E. Total projected benefit, assuming a life expectancy of 44 years:

$2,259,517*

* See annuity benefit illustration

Settlement Planning Inc.
Annuity Escalation & Accumulation

Escalation Factor: 6 %

Initial Annual Benefit: $10,260.00

Year	Annual Benefit	Monthly Benefit	Annuity Accumulation Value
1	10260.00	855.00	10260.00
2	10875.60	906.30	21135.60
3	11528.14	960.68	32663.74
4	12219.82	1018.32	44883.56
5	12953.01	1079.42	57836.57
6	13730.19	1144.18	71566.76
7	14554.00	1212.83	86120.76
8	15427.24	1285.60	101548.00
9	16352.87	1362.74	117900.90
10	17334.05	1444.50	135234.90
11	18374.09	1531.17	153609.00
12	19476.53	1623.04	173085.50
13	20645.12	1720.43	193730.70
14	21883.83	1823.65	215614.50
15	23196.85	1933.07	238811.40
16	24588.66	2049.06	263400.00
17	26063.98	2172.00	289464.00
18	27627.82	2302.32	317091.80
19	29285.49	2440.46	346377.30
20	31042.61	2586.88	377419.90
21	32905.17	2742.10	410325.00
22	34879.47	2906.62	445204.50
23	36972.24	3081.02	482176.80
24	39190.57	3265.88	521367.30
25	41542.00	3461.83	562909.30
26	44034.52	3669.54	606943.80
27	46676.59	3889.72	653620.40
28	49477.18	4123.10	703097.60
29	52445.81	4370.49	755543.40
30	55592.56	4632.71	811136.00

E

SETTLEMENT AGREEMENT

This agreement is entered into this _____ day of _____ month, 198 _____
between plaintiff _____
and the defendant _____
together with insurer _____

It is agreed that in consideration for the full discharge of past, present, and future claims arising out of the alleged injury regarding an automobile accident on _____ at _____, as a result of the alleged actions or omissions of the defendant, the defendants agree to pay the sum hereinafter specified. This release shall apply to all claims, whether known or unknown, on the part of all parties to this agreement, to the effect that this agreement shall be a full, binding, and complete settlement between the parties to this agreement.

E

Defendants, together with insurer, _____, hereby agree to pay to the plaintiff, _____, as follows:

1. The defendant, together with insurer, _____, shall arrange for payments of the following sums, amounts, and at the times hereinafter set forth;

   A. Payment of lump sum amount of $_____ upon the properly executed releases directly from the _____.

   B. _____ shall arrange payment of $_____ per month commencing on _____ to continue as an income for life with ___ years certain.

   C. Singular lump sum payments to be made as follows:
      (1) Age _____ $ _____
      (2) Age _____ $ _____

2. The defendants through their insurer, _____, as an additional security for said monthly periodic payments, shall purchase Annuity Contract through or with the insurance company _____. Payments made pursuant to this said contract shall operate as a pro tanto discharge of lump sum and monthly periodic payments set forth in the preceding paragraph.

3. In the event of insolvency, bankruptcy, or any other contingency which renders _____ Insurance Company unable to meet its contractual obligations under the Annuity Contract hereinbefore mentioned, it is understood that _____ will pay each and every payment agreed upon under the preceding paragraph.

Executed at _____, Minnesota, on _____, 198__.

Plaintiff _____ Witnessed By _____

Defendant's Insurer _____

By _____ Witnessed By _____

Richard CARDENAS, Appellant,

v.

RAMSEY COUNTY and Special Care Associates, Inc. Defendants,

David O'Connor, intervenor, Respondent.

No. 81-1052.

Supreme Court of Minnesota.

July 23, 1982.

Client appealed from the District Court, Ramsey County, Otis Godfrey, Jr., J., directing payment to his attorney of fees of $39,054.33 and of expenses of $1,411.26 which he had advanced to client from a $45,000 "front money" payment due client under structured settlement of action for personal injuries. The Supreme Court, Otis, J., held that in absence of an explicit agreement, in writing or entered on the record before the trial court at the time a structured settlement is completed, providing that an attorney shall receive his entire compensation for his services in procuring the settlement from the front money paid thereunder, a contingent fee contract which provides that his fees are to be one third "of the total amount recovered" will be construed to provide that the attorney will receive one third of each payment received by his client under the settlement as and when he receives it.

Affirmed in part and reversed in part.

1. Attorney and Client ⇐148(3)

In absence of an explicit agreement, in writing or entered on the record before the trial court at the time a structured settlement is completed, providing that an attorney shall receive his entire compensation for his services in procuring the settlement from the front money paid thereunder, a contingent fee contract which provides that his fees are to be one third of the total amount recovered will be construed to provide that the attorney will receive one third of each payment received by his client under the settlement as and when he receives it.

2. Attorney and Client ⇐130

Provision of the Code of Professional Responsibility squarely placed upon attorney the obligations of making it perfectly clear to client in their discussion of settlement offers that attorney desired to receive all of his fees from the front money and of obtaining the client's agreement to such payment. 52 M.S.A. Code of Prof.Resp., EC2-19.

3. Attorney and Client ⇐148(1)

Fiduciary relationship between attorney and client requires that the contingent fee contract be construed to fulfill client's expectations. 52 M.S.A. Code of Prof.Resp., EC2-19.

Syllabus by the Court

In the absence of an explicit agreement, in writing or entered on the record before the trial court at the time a structured settlement is completed, providing that an attorney shall receive his entire compensation for his services in procuring the settlement from the front money paid thereunder, a contingent fee contract which provides that his fees are to be one-third "of the total amount recovered" will be construed to provide that the attorney will receive one-third of each payment received by his client under the settlement as and when he receives it.

Bassford, Heckt, Lockhart & Mullin, Rebecca Egge Moos and Charles E. Lindberg, Minneapolis, for appellant.

John Flanagan, Woodbury, for O'Connor.

Heard, considered and decided by the court en banc.

OTIS, Justice.

Richard Cardenas appeals from an order of the district court directing payment to

his attorney, respondent David O'Connor, of attorney's fees of $39,054.33 and of expenses of $1,411.26 which he had advanced to appellant from a $45,000 "front money" payment due appellant under a structured settlement of his action for personal injuries against Ramsey County and Special Care Associates, Inc. Appellant contends that, although he entered a contingent fee agreement under which he promised to pay respondent "one-third (⅓) of the total amount recovered, or of a compromised amount upon settlement" of his claim, he is not required to pay his attorney more than one-third of each payment due under the settlement as and when he receives the payment. We agree and reverse the order insofar as it directs payment of attorney's fees of $39,054.33, representing one-third of the present value of the total structured settlement based on a 4% acceleration rate and a 7½% discount rate.

The parties to the appeal entered the contingent fee contract in October 1979. Respondent commenced an action on the claim and on May 8, 1981, completed negotiation of the structured settlement after the jury was selected and trial of the action was about to begin. The settlement provided for a front money payment of $45,000 and further specified payments totaling $110,800 over a 10-year period. The deferred payments were guaranteed and the defendants agreed also to hold appellant harmless if any demands were made on him for payment of medical expenses of approximately $23,000. The parties placed the terms of the settlement on record before the trial court without making any reference to the attorney's fees to be paid respondent. Appellant recognizes that the settlement was favorable and does not dispute his liability to pay one-third of it to respondent. The dispute between the attorney and client focuses only on whether the attorney is not entitled to one-third of the present value of the structured settlement or, as appellant contends, to one-third of the front money, as well as the expenses respondent had advanced, and to one-third of each future payment as appellant receives it. When efforts to resolve the controversy failed, respondent retained counsel and moved the trial court for an order determining whether he is entitled to receive his entire fees from the front money and, if so, determining their amount.

At the hearing respondent testified that he discussed with appellant three offers involving front money payments of $15,000, $30,000, and $45,000 respectively; that he advised rejection of the $15,000 offer because it was too low and would not pay his attorney's fees; that in discussing the second offer appellant said he could buy a new van and respondent replied that appellant should not forget he would have to pay attorney's fees; and that in discussing the final offer appellant again said he could buy a van and could pay off a contract for deed, to which respondent replied that appellant was "forgetting something very important," attorney's fees. Respondent said also that he had had no prior experience with structured settlements, that the negotiations were "harried" and that he could not determine the present value of his fees before completing the settlement because actuarial calculation of the present value of the settlement was required. After the settlement was made, respondent obtained a computation based on a 4% discount rate and sent appellant a statement requesting payment of fees of $43,104.66 based thereon. Appellant refused to pay the requested fees and at his request they were recomputed on the basis of a 7½% discount rate. This amount, $39,540.33, appellant also refused to pay, claiming that he had never agreed to pay all of the fees from the front money and would never have entered the settlement if he had been informed that he would be required to do so.

Appellant testified that when the structured settlement was being discussed he asked respondent how his attorney's fees would be paid if appellant himself was paid over a period of time and was told that "we would work that out and that would come out of the guarantee—the guaranteed money." His sister corroborated this testimony. Appellant also said that he told the attorney several times that he (appellant) would

accept a structured settlement only if he could obtain some cash immediately because of his need for funds.

The trial court ruled that respondent was entitled to receive reimbursement for expenses advanced for appellant and also was entitled to his entire fees immediately. Accepting the discount rate of 7½% as the basis for determining the present value of the total settlement, he directed the payment as stated of $39,540.33 for respondent's fees. In a memorandum accompanying his order the trial court indicated that his resolution of the dispute concerning the time the attorney's fees were due was based on equitable grounds. He stressed that the amount of the settlement was large under the circumstances of the case and that its provisions were in his view clearly beneficial to appellant; he stressed also that the settlement was achieved by respondent's skill and ability and that respondent had completely performed the professional services required by the parties' retainer agreement.

We cannot agree that these considerations entitle respondent to payment of all compensation he has earned from the front money. In fact, in our view, these factors are irrelevant to the issue presented by the circumstances of the case, which is how the disputed contingent fee contract should be construed when applied to the structured settlement. The parties agree that they did not contemplate the possibility of obtaining a structured settlement when they entered the contingent fee contract, and respondent admitted that, had he thought about the meaning of the contract's provision that his fee was to be one-third "of the total amount recovered," he would have expected that he would be paid his fees at the time appellant received his money either by way of judgment or settlement. Once the structured settlement was reached, respondent took the position that appellant has "recovered" the amount to which he is unconditionally entitled under the settlement, while appellant insisted that "recovered" means "received" and he has thus far recovered only the front money. Their different interpretations demonstrate that this provision of the fee agreement became ambiguous when the structured settlement was made. Respondent contends that the amount to be received by appellant under the settlement is fixed and that respondent's services have been completed, as a consequence of which he is entitled to receive his entire fee from the front money payment. He cites in support of this proposition *Sayble v. Feinman*, 76 Cal.App.3d 509, 142 Cal.Rptr. 895 (Cal.Ct.App.1978). We do not choose to follow that authority because we do not base the decision here on whether appellant's right to the proceeds of the settlement is absolute or not.

[1] Appellant urges that the ambiguity in the contingent fee contract must be resolved against respondent as the drafter of the agreement. That principle is well established. We prefer, however, to base our decision on the obligations imposed on respondent by the unique fiduciary relationship existing between attorney and client. We have concluded that that relationship requires that when an attorney and client have entered a contingent fee contract under which the attorney is entitled to a third "of the total amount recovered" and the attorney thereafter negotiates a structured settlement of the client's claim without reaching an explicit agreement with the client governing the time and manner of payment of his fees, either put into writing or read into the record when the settlement is placed on record before the trial court, then as a matter of law the word "recovered" in the contingent fee contract must be construed to mean "received," with the consequence that the attorney is entitled to one-third of each payment his client receives under the structured settlement as and when he receives it.

[2, 3] The policy expressed in EC 2–19 of the Code of Professional Responsibility which governs the conduct of attorneys in this state mandates this construction of the contingent fee contract. That provision states:

As soon as feasible after a lawyer has been employed, it is desirable that he

> reach a clear agreement with his client as to the basis of the fee charges to be made. Such a course will not only prevent later misunderstanding but will also work for good relations between the lawyer and the client. It is usually beneficial to reduce to writing the understanding of the parties regarding the fee, particularly when it is contingent. A lawyer should be mindful that many persons who desire to employ him may have had little or no experience with fee charges of lawyers, and for this reason he should explain fully to such persons the reasons for the particular fee arrangement he proposes.

This provision squarely placed upon respondent the obligations of making it perfectly clear to appellant in their discussions of the settlement offers that respondent desired to receive all of his attorney's fees from the front money and of obtaining the client's agreement to such payment. To place these obligations upon the attorney is entirely reasonable, both because of his greater knowledge and experience with respect to fee arrangements and because of the trust his client has placed in him as his attorney. Appellant's understanding that he was to pay his attorney one-third of each payment he received under the structured settlement and that he himself would receive nearly $30,000 of the front money clearly was an important consideration in his decision to accept the settlement. The fiduciary relationship between the parties requires that the contingent fee contract be construed to fulfill appellant's expectations.

We affirm that part of the trial court's order directing that respondent be reimbursed from the front money for the expenses he had advanced on behalf of his client. We reverse the award of attorney's fees and direct that he receive $15,000 from the front money for his fees now due and one-third of each future payment made pursuant to the structured settlement.

Affirmed in part; reversed in part.

Bruce A. BROWN, et al., Relators,

v.

COMMISSIONER OF REVENUE, Respondent,

Thomas J. POLLOCK, Relator,

v.

COMMISSIONER OF REVENUE, Respondent.

Nos. 81-1075, 81-1092.

Supreme Court of Minnesota.

July 23, 1982.

Relators appealed from separate determinations by the Tax Court that it was proper to assess use tax on transactions which had occurred more than three years before. The Supreme Court, Otis, J., held that: (1) statute of limitations did not bar collection of use tax from consumers beyond three-year time limit provided therein when consumers did not pay use tax on item at time of purchase and did not file consumer's use tax return, and (2) when original Tax Court judge retired from bench, another judge regularly sitting in or assigned to court had power to review and amend conclusions of law.

Affirmed.

1. Taxation ⇐1337

Purchaser cannot rely upon filing of retailer's annual sales tax return to commence running of statute of limitations on collection of use tax. M.S.A. § 297A.34, subd. 1.

2. Taxation ⇐1337

Statute of limitations did not bar collection of use tax from consumers beyond three-year time limit provided therein when consumers did not pay use tax on item at time of purchase and did not file consumer's use tax return. M.S.A. § 297A.34, subd. 1.

PRACTICE UNDER IOWA'S NEW COMPARATIVE FAULT ACT (H.F. 2487)

Patrick M. Roby
Shuttleworth & Ingersoll, P.C.
Cedar Rapids, Iowa

F

I. WHAT IS FAULT - §668.1(1).

A. One or more acts or omissions . . .

1) in any measure negligent or

2) reckless or

3) that subject a person to strict tort liability

IT INCLUDES:

4) breach of warranty. [Is fault a defense to breach of express warranty? See: Bahlman v. Hudson Motor Car Co., 288 N.W. 309 (Mich. 1939); 2 Frumer & Friedman, Products Liability §16.01[3]; UCC §2-316(3)(b) Comment 8.]

5) unreasonable assumption of risk not constituting an enforeceable express consent. [Does this make assumption of risk a separate defense even where contributory fault applies? Rosenau v. Estherville, 199 N.W.2d 125 (Iowa 1972)]

6) misuse of a product for which the defendant otherwise would be liable. [Is it still part of plaintiff's burden in strict liability cases? Hughes v. Magic Chef, 288 N.W.2d 542 (Iowa 1980). Foreseeable vs. Unforeseeable.]

7) unreasonable failure to:

a. avoid an injury.

b. mitigate damages.

B. This section essentially adopts §1(b) of the Uniform Act.

C. Is failure to discover or guard against a defect a defense in strict liability cases? Hawkeye Security Ins. Co. v. Ford Motor Co., 199 N.W.2d 373 (Iowa 1972).

II. WHO MAY SUE WHOM - WHEN AND HOW - §668.8.

F

A. §668.8 - Tolling of Statute. The filing of a petition under this chapter tolls the statute of limitations for the commencement of an action against all parties who may be assed any percentage of fault under this chapter.

B. IRCP 48 - Commencement of Actions. A civil action is commenced by filing a petition with the court.

C. Is the statute tolled to permit plaintiff to add new parties - as opposed to making direct claim against third parties? This section refers to commencement of action against parties. When does a person who may be liable become a "party" for purposes of the statute being tolled?

D. "Party" is defined in §668.2 as:

1. A claimant (why not plaintiff?).
2. A person named as defendant.
3. A person who has been released pursuant to §668.7.
4. A third-party defendant. [Fourth-party defendant?]

E. Is there any time limit for plaintiff to make direct claim against a third-party defendant? How about after trial?

III. CLAIMS FOR CONTRIBUTION - §668.5.

A. §668.5 - Right of Contribution.

1. A right of contribution exists between or among two or more persons who are liable upon the same indivisible claim for the same injury, death, or harm, whether or not judgment has been recovered against all or any of them. It may be enforced either in the original action or by a separate action brought for that purpose. The basis for contribution is each person's equitable share of the obligations, including the share of fault of a claimant, as determined in accordance with section 668.3.

2. Contribution is available to a person who enters into a settlement with the claimant only if the liability of the person against whom contribution is sought has been extinguished and only to the extent that the amount paid in settlement was reasonable.

B. Adopts §4 of the Uniform Act.

C. Abolishes 50 - 50 contribution. Hawkeye Security Ins. Co. v. Lowe Constr. Co., 99 N.W.2d 421 (Iowa 1959).

D. No change in common liability doctrine. Federated Mutual v. Dunkelberger, 172 N.W.2d 137 (Iowa 1969); Commissioner's Comment to Uniform Act §4.

E. May be made as part of original action or by separate action - §668.5(1).

F. Example - separate action:

1) A sues B - damages of 80,000

2) A is 50% at fault

3) B is 50% at fault

4) B pays A - 40,000 judgment

5) B sues C

6) C is found to be liable for same injury and as between B and C -

7) C is found to be 60% at fault

8) B is awarded 24,000 judgment against C. [See Commissioner's Comments, Illustration no. 9.]

IV. CONTRIBUTION - WHEN AND HOW - §668.6

A. After judgment against party seeking contribution where percentages of fault of the party seeking contribution and the party from whom contribution is sought have both been established.

1) May recover by motion or separate action - §668.6(1).

2) Separate action after judgment must be brought within 1 year - 668.6(3).

3) When must motion be filed? (Who would wait?)

B. After judgment against the party seeking contribution where no percentage of fault has been established against the party from whom contribution is sought.

1) Action must be brought within one year after judgment becomes final §668.6(3).

C. Where no judgment has been rendered the party seeking contribution must establish:

1) Discharge of liability of the person from whom contribution is sought by payment within the time of claimant's statute of limitation and commencement of an action for contribution within one year of payment. §668.6(3)(a).

OR

2) Agreement, while claimant's action was pending, to discharge the obligation of the person from whom contribution is sought and within one year of that Agreement discharge the liability and commence an action for contribution. §668.6(3)(b).

V. RELEASES

A. §668.7 - Effect of Release. A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other perscns liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation, as determined in section 668.3, subsection 4.

1) What effect does the release have on claims for indemnity by a non-settling defendant against a settling defendant?

2) If the settling defendant testifies, can evidence of the settlement be introduced? To what extent? Iowa R. Evid. 408; Frey v. Snelgrove, 269 N.W.2d 918 (Minn. 1978).

3) What happens when a defendant settles during trial and there are pending cross-claims by non-settling co-defendants? See Frey v. Snelgrove, supra.

4) Plaintiff's claim against non-settling parties is reduced by the amount paid by the settling party or parties.

VI. TRIAL CONSIDERATIONS

A. §668.3(3) - In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party and the extent of the causal relation between the conduct and the damages claimed.

1) What happened to proximate cause? In jure non remota causa, sed proxima, spectatur. [In law the near cause is looked to, not the remote one.] Bacon, Maxims of Law, Reg. I.

2) The Restatement, Second, Torts (1965) has dropped the term "proximate cause" and now uses the term "legal cause". §430.

3) Restatement uses a "substantial factor" test. §431.

4) Under §668.3(3) the trier of fact considers both the nature of the conduct and the extent of the causal relation between the conduct and the damages.

5) Adopts amended §2(b) of Uniform Act.

B. §668.4(5) - If the claim is tried to a jury, the court shall give instructions and permit evidence and argument with respect to the effects of the answers to be returned to the interrogatories submitted under this section.

1) When should the court give these instructions? IRCP 196.

2) This section specifically permits evidence relating to the effects of answers to jury interrogatories. What evidence is appropriate?

3) Can the argument on the effects of the interrogatories be made using the actual forms to be given to the jury?

VII. SET OFF

A. IRCP 225 - On Claim and Counterclaim. A claim and counterclaim shall not be set off against each other, except by agreement of both parties or unless required by statute. On motion, however, the court, if it finds that the obligation of either party is likely to be uncollectible, may order that both parties make payment into court for distribution. If there are multiple parties and separate set-off issues, each set-off issue should be determined independently of the others. The court shall distribute the funds received and declare obligations discharged as if the payment into

court by either party had been a payment to the other party and any distribution of those funds back to the party making payment had been a payment to him by the other party.

B. Where plaintiff and defendant are both insured and each obtains judgment against the other - both insurers pay and all contingent fees are collected.

F

HOUSE FILE 2487

An Act relating to liability in tort by establishing comparative fault as the basis for liablity in relation to claims for damages arising from injury to or death of a person or harm to property and modifying the liability of governmental entities.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

Section 1. NEW SECTION. 668.1 FAULT DEFINED

1. As used in this Chapter, "fault" means one or more acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages.

2. The legal requirements of cause in fact and proximate cause apply both to fault as the basis for liability and to contributory fault.

Section 2. NEW SECTION. 668.2 PARTY DEFINED.

As used in this chapter, unless otherwise required, "party" means any of the following:

1. A claimant.
2. A person named as defendant.
3. A person who has been released pursuant to section 668.7.
4. A third-party defendant.

Section 3. NEW SECTION. 668.3 COMPARATIVE FAULT-EFFECT.

1. Contributory fault shall not bar recovery in an action by a claimant to recover damages for fault resulting in death or in injury to person or property, unless the claimant bears a greater percentage of fault than the combined percentage of fault attributed to the defendants, third-party defendants and persons who have been released pursuant to section 668.7, but any damages allowed shall be diminished in proportion to the amount of fault attributable to the claimant.

2. In the trial of a claim involving the fault of more than one party to the claim, including third-party defendants and persons who have been released

pursuant to section 668.7, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating all of the following:

a. The amount of damages each claimant will be entitled to recover if contributory fault is disregarded.

b. The percentage of the total fault allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under section 668.7. For this purpose the court may determine that two or more persons are to be treated as a single party.

3. In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party and the extent of the casual relation between the conduct and the damages claimed.

4. The court shall determine the amount of damages payable to each claimant by each other party, if any, in accordance with the findings of the court or jury.

5. If the claim is tried to a jury, the court shall give instructions and permit evidence and argument with respect to the effects of the answers to be returned to the interrogatories submitted under this section.

6. In an action brought under this chapter and tried to a jury, the court shall not discharge the jury until the court has determined that the verdict or verdicts are consistent with the total damages and percentages of fault, and if inconsistencies exist the court shall do all of the following:

a. Inform the jury of the inconsistencies.

b. Order the jury to resume deliberations to correct the inconsistencies.

c. Instruct the jury that it is at liberty to change any portion or portions of the verdicts to correct the inconsistencies.

Section 4. NEW SECTION. 668.4 JOINT AND SEVERAL LIABILITY.

In actions brought under this chapter, the rule of joint and several liability shall not apply to defendants who are found to bear less than fifty percent of the total fault assigned to all parties.

Section 5. NEW SECTION. 668.5 RIGHT OF CONTRIBUTION.

1. A right of contribution exists between or among two or more persons who are liable upon the same indivisible claim for the same injury, death, or harm whether or not judgment has been recovered against all or any of them. It may be enforced either in the original action or by a separate action brought for that purpose. The basis for contribution is each person's equitable share of the obligations, including the share of fault of a claimant, as determined in accordance with section 668.3.

2. Contribution is available to a person who enters into a settlement with the claimant only if the liability of the person against whom contribution is sought has been extinguished and only to the extent that the amount paid in settlement was reasonable.

Section 6. NEW SECTION. 668.6 ENFORCEMENT OF CONTRIBUTION.

1. If the percentages of fault of each of the parties to a claim for contribution have been established previously by the court as provided in section 668.3, a party paying more than the party's percentage share of damages may recover judgment for contribution upon motion to the court or in a separate action.

2. If the percentages of fault of each of the parties to a claim for contribution have not been established by the court, contribution may be enforced in a separate action, whether or not a judgment has been rendered against either the person seeking contribution or the person from whom contribution is sought.

3. If a judgment has been rendered, an action for contribution must be commenced within one year after the judgment becomes final. If a judgment has not been rendered, a claim for contribution is enforceable only upon satisfaction of one of the following sets of conditions:

a. The person bringing the action for contribution must have discharged the liability of the person from whom contribution is sought by payment made within the period of the statute of limitations applicable to the claimant's right of action and must have commenced the action for contribution within one year after the date of the payment.

b. The person seeking contribution must have agreed while the action of the claimant was pending to discharge the liability of the person from whom contribution is sought and within one year after the date of the agreement must have discharged that liability and commenced the action for contribution.

Section 7. NEW SECTION. 668.7 EFFECT OF RELEASE.

A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable, discharges that person from all liability for

contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation, as determined in seciton 668.3, subsection 4.

Section 8. NEW SECTION. 668.8 TOLLING OF STATUTE.

The filing of a petition under this chapter tolls the statute of limitiation for the commencement of an action against all parties who may be assessed any percentage of fault under this chapter.

Section 9. NEW SECTION. 668.9 INSURANCE PRACTICE.

It shall be an unfair trade practice as defined in chapter 507B, if an insurer assigns a percentage of fault to a claimant, for the purpose of reducing a settlement, when there exists no reasonable evidence upon which the assigned percentage of fault could be based. The prohibitions and sanctions of chapter 507B shall apply to violations of this section.

Section 10. NEW SECTION. 668.10 GOVERNMENTAL EXEMPTIONS.

In any action brought pursuant to this chapter, the state or municipality shall not be assigned a percentage of fault for any of the following:

1. The failure to place, erect, or install a stop sign, traffic control device, or other regulatory sign as defined in the uniform manual for traffic control devices adopted pursuant to section 321.252. However, once a regulatory device has been placed, created or installed, the state or municipality may be assigned a percentage of fault for its failure to maintain the device.

2. The failure to remove natural or unnatural accumlations of snow or ice, or to place sand, salt, or other abrasive material on a highway, road, or street if the state or municipality establishes that it has complied with its policy or level of service for snow and ice removal or placing sand, salt or other abrasive material on its highways, roads, or streets.

3. For contribution unless the party claiming contribution has given the state or municpality notice of the claim pursuant to sections 25A.13 and 613A.5.

Section 11.

The supreme court shall submit in the manner provided in section 602.4202 changes in the rules of procedure for courts which are necessitated by the enactment of this chapter.

Section 12.

Section 613.3, Code Supplement 1983, is repealed.

Section 13.

Section 619.17, Code 1983, is amended to read as follows:

619.17 CONTRIBUTORY FAULT-BURDEN. *** A plaintff *** does not *** have the burden of pleading and proving *** the plaintiff's freedom from contributory *** fault. If a defendant relies upon *** contributory fault of plaintiff to diminish the amount to be awarded as compensatory damages, the defendant *** has the burden of pleading and proving *** fault of the plaintiff, if any, and that it was a proximate cause of the injury or damage. As used in this section, *** "plaintiff" *** includes a defendant filing a counterclaim or cross-petition, and the term "defendant" *** includes a plaintiff against whom a counterclaim or cross-petition has been filed.

Section 14.

The commissioner of insurance shall study and report to the legislative council and the senate committee on judiciary and the house committee on judiciary and law enforcement by January 15, 1985, on the issue of insurance practices developed in response to the adoption of comparative fault in the State of Iowa. The report shall include proposals for legislative action and an explanation of the steps taken by the department of insurance to alleviate existing or potential problems in insurance practice under comparative fault.

Section 15.

This Act, except for section 4, applies to all cases filed on or after July 1, 1984. Section 4 of this Act applies to all cases tried on or after July 1, 1984.

* underline denotes new language.

*** denotes former language omitted.

Perspectives | **Strategy**

Comparative Negligence — Apportionment of Fault Checklist

F

In analyzing a comparative negligence case, one of our most important objectives is to develop all available evidence that tends to reduce the percent of fault that might be allocated to our side of the case, and to increase the percent of fault that might be assigned to others

Liability is usually based on objective tests. "Negligence is conduct, and not a state of mind." W. Prosser, Law of Torts 145 (4th ed. 1971), quoting Terry, *Negligence*, 29 Harvard L. Rev. 40 (1915) [hereinafter cited as Prosser]

In allocating fault, however, subjective criteria are probably more important. "Fault" is an evaluative judgment; the term fault indicates that moral components are involved. Thus, the quality of the fault must be considered Fairness is the rationale for adopting comparative negligence, but fault is the basis for apportionment of damages.

The following checklist is submitted as a guide for developing evidence relating to the allocation of fault. The guide also suggests kinds of evidence that could be relevant. Finally, the guide is intended for use in preparing arguments to influence the apportionment of fault

Apportionment of Fault Checklist

- The likelihood of harm resulting from the conduct. Restatement (Second) of Torts §§ 289(a), 298 comment b (1965) [hereinafter cited as Restatement]; W. Prosser, *supra* at 150.
- The magnitude of the risk created by the conduct — the number endangered, the potential seriousness of the injury. Restatement, *supra* at §§ 291, 293, 294, 295, 298 comment b.
- Whether the fault endangers only the actor or others. Would a reasonable person take more or less precaution for the safety of others than for his own safety? Was the risk of harm to others more apparent, or apparently more serious, than the risk of harm to the actor? Did the actor have reasonable confidence in his own awareness of the risk and his ability to avoid it? Did the actor undertake a responsibility toward another which required him to exercise an amount of care for the protection of the other which he would not be required to exercise for his own safety? Restatement, *supra* at § 464 comment f.
- The extent to which the actor could reasonably assume an awareness of the risk by the injured person or the ability of the injured person to avoid the risk Restatement, *supra* at § 464 comment f
- Whether inadvertence of awareness of danger was involved. Active or passive negligence? Would a reasonable person have recognized the risk? Was there such attention, perception, memory, knowledge, intelligence, and judgment as a reasonable person would exercise? Restatement, *supra* at §§ 298 comment a, 289(a), 290; W. Prosser, *supra* at 157-161.
- The significance of what the actor was seeking to attain by the conduct. The utility of the actor's conduct Restatement, *supra* at §§ 292, 299 comment b.
- Were there more reasonable ways to accomplish the act — alternate safe route? Alternate designs? Restatement, *supra* at § 292(c).
- Burden of adequate precautions, *E.g.*, product guards, warnings

• Was there a lack of competence (ability or capacity to use care) involved or a lack of attention and caution in the use made of that competence, or both? If a trade or profession is involved, was there a lack of skill? Restatement, *supra* at §§ 298 comment a, 299, 299A

• Particular circumstances. Emergency. Distraction. Restatement, *supra* at §§ 296, 299 comment e, 289 comment k; W. Prosser, *supra* at 168-70.

• Elements contained in the policy causing rule or law to be adopted in the first place.

• Is the act dangerous intrinsically or because of the manner of performance, or both? Restatement, *supra* at §§ 297, 298 comment c.

• Is want of preparation involved? Restatement, *supra* at § 300.

• Should a warning have been given? Restatement, *supra* at § 301.

• To what extent a reasonable person would have anticipated forces of nature, the conduct of an animal, or of others — including third persons. Restatement, *supra* at §§ 290, 302, 302A.

• The reasonableness of reliance on others to take precautions. W. Prosser, *supra* at 176, 177.

• Whether there was a failure to follow a general custom, a person's habit, or rules of a party. Restatement, *supra* at §§ 290 (b), 295A; W. Prosser, *supra* at 166-68.

• Did the actor have superior attention, perception of the circumstances, memory, knowledge of other pertinent matters, intelligence or judgment? Restatement, *supra* at §§ 289(b), 298 comment c, 299 comment f; W. Prosser, *supra* at 157-66.

• Did the actor have inferior capacities, as a child, or from illness or physical disability? Restatement, *supra* at §§ 283A, 283B, 283C; W. Prosser, *supra* at 151-57.

• Any prior knowledge and experience of actor, or warnings to the actor that would help realization of risk. *Cf.* elements of assumption of risk. Restatement, *supra* at § 290 comments b and f; Annot., 16 A.L.R.4th 700 (1982).

• Closeness of the cause to the event. *Cf.*, elements of last clear chance.

• The comparison is not determined by the kind or character or number of elements of negligence but by the degree of contribution. *Lovesee v. Allied Development Corp.*, 45 Wis.2d 340, 173 N.W.2d 196, 199, 200 (1970).

• Most authorities hold that both causation of the accident and causation of damages are to be compared. Some would limit consideration to fault causing damage. H. Woods, Comparative Fault, § 5.5 (1978). *See Fietzer v. Ford Motor Co.*, 622 F.2d 282, 286-88 (7th Cir. 1980); Annot., 92 A.L.R.3d 9 (1979); Woods, *supra* at § 5.6.

• Courts may consider failure to mitigate damages as a separate defense or may merely submit it as one element in the apportionment. *Le Mons v. Regents of the Univ. of Cal.*, 21 Cal.3d 869, 874, 148 Cal.Rptr. 355, 358 (1978); California CEB, Comparative Fault Practice, program material 23, 24; (Aug./Sept. 1981); Annot., 80 A.L.R.3d 1033 (1977).

General Authorities

• *State v. Kaatz* (Alaska 1977) 572 P.2d 775, 784.

• *Li v. Yellow Cab Co.*, 13 Cal.3d 804, 823, 119 Cal.Rptr. 858, 872, 532 P.2d 1226 (1975).

• Comments to § 1 of Uniform Comparative Fault Act; ULA Vol. 12, pocket part.

• V. Schwartz, Comparative Negligence, §§ 12.7, 17.1 (1974).

• Aiken, *Proportioning Comparative Negligence — Problems in Theory and Special Verdict Formation*, 53 Marquette L. Rev. 293, 294-97 (1970).

• California Jury Instructions Civil, BAJI 14.91.

Philip J. Willson
Smith, Peterson, Beckman & Willson
Council Bluffs, Iowa

F

FEDERAL RULES OF CIVIL PROCEDURE, AMENDED RULES 7, 11 & 26 - RULE 16 (b) - THE COURT'S REQUIREMENTS

By
Hon. R.E. Longstaff
United States Magistrate
U.S. District Court
Des Moines,Iowa

G

Rule 7. Pleadings Allowed; Form of Motions

* * *

(b) MOTIONS AND OTHER PAPERS

* * *

(2) The rules applicable to captions~~,~~ ~~signing,~~ and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(3) All motions shall be signed in accordance with Rule 11.

* * *

Rule 11. Signing of Pleadings, Motions, and Other Papers; Sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by

corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief ~~there is good ground to support it; and that it is not interposed for delay~~ formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. ~~or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.~~ If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

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Rule 16. Pretrial Conferences; Scheduling; Management
~~Pre-Trial Procedure; Formulating issues~~

(a) PRETRIAL CONFERENCES; OBJECTIVES. In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial ~~to consider~~ for such purposes as

(1) expediting the disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation, and;

(5) facilitating the settlement of the case.

(b) SCHEDULING AND PLANNING. Except in categories of actions exempted by district court rule as inappropriate, the judge, or a magistrate when authorized by district court rule, shall, after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time

(1) to join other parties and to amend the pleadings;

(2) to file and hear motions; and

(3) to complete discovery.

The scheduling order also may include

(4) the date or dates for conferences before trial, a final pretrial conference, and trial; and

(5) any other matters appropriate in the circumstances of the case.

The order shall issue as soon as practicable but in no event more than 120 days after filing of the complaint. A schedule shall not be modified except by leave of the judge or a magistrate when authorized by district court rule upon a showing of good cause.

(c) SUBJECTS TO BE DISCUSSED AT PRETRIAL CONFERENCES. The participants at any conference under this rule may consider and take action with respect to

(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

(2) the necessity or desirability of amendments to the pleadings;

(3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;

(4) the avoidance of unnecessary proof and of cumulative evidence;

(5)~~(4)~~ the ~~limitation of the number of expert~~ identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;

(6)~~(5)~~ the advisability of a ~~preliminary reference of~~ referring ~~issues~~ matters to a magistrate or master ~~for findings to be used as evidence when the trial is to be by jury~~;

(7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute;

(8) the form and substance of the pretrial order;

(9) the disposition of pending motions;

(10) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; and

(11)~~(6)~~ such other matters as may aid in the disposition of the action.

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed.

(d) FINAL PRETRIAL CONFERENCE. Any final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances. The participants at any such conference shall formulate a plan for trial, including a program for facilitating the admission of evidence. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.

(e) PRETRIAL ORDERS. After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

(f) SANCTIONS. If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or his own initiative, may make

such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing him or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

~~The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel, and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pretrial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.~~

such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing him or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

~~The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel, and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pretrial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.~~

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Rule 26. General Provisions Governing Discovery

(a) DISCOVERY METHODS. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land

or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. ~~Unless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited.~~

(b) ~~SCOPE OF DISCOVERY~~ DISCOVERY SCOPE AND LIMITS. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less

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expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

* * *

(g) SIGNING OF DISCOVERY REQUESTS, RESPONSES, AND OBJECTIONS. Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state his address. The signature of the attorney or party constitutes a certification that he has read the request, response, or objection, and that to the best of his knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the

needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response or objection and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

The Fifth Circuit has approved procedural review of the Secretary's determinations, at least to the extent of assessing whether the Secretary conformed with her agency's own rules and regulations. *See Hollingsworth v. Harris*, 608 F.2d 1026, 1027 (5th Cir.1979) (per curiam). *Hollingsworth* noted that despite Congress' attempted withdrawal of judicial review, agency action may be reviewed for compliance with the agency's own procedures as outlined in its regulations. *Id.* (citing *Graham v. Caston*, 568 F.2d 1092, 1097 (5th Cir.1978)). In *Casari*, the Eighth Circuit cited *Hollingsworth* with approval. 667 F.2d at 740. We hold that at a minimum, judicial review of the Secretary's compliance with the procedures of section 1122 and the regulations thereunder [12] is available despite section 1122(f).

V. Conclusion

We affirm the district court's dismissal of Humana's complaint for lack of jurisdiction due to failure to exhaust administrative remedies. In the event that Humana's concerns are not resolved in the administrative process, we hold that upon exhaustion of its administrative remedies Humana may turn to the federal courts for review of the Secretary's final determination.

firmed a district court ruling that the proposed relocation evidenced no discriminatory purpose or effect. *NAACP v. Medical Center, Inc.*, 657 F.2d 1322 (3d Cir.1981). The court had dismissed HEW as a defendant when remanding for trial on the alleged discrimination so the agency approval was not under review. *See NAACP v. Medical Center, Inc.*, 599 F.2d 1247, 1250 n. 10, 1259 n. 49 (3d Cir.1979). The Third Circuit also held that the Secretary's role in following the state DPA's approval recommendation was minimal federal involvement insufficient to necessitate an environmental impact statement. *NAACP v. Medical Center, Inc.*, 584 F.2d 619 (3d Cir.1978).

12. A close reading of § 1122(d)(1), *see supra* note 7, suggests that not only must the Secretary conform her actions to certain procedural requirements, but the state DPA's and hearing officer's actions must conform with the procedures mentioned in subsection (d)(1)(B). This subsection could be used as a means for the Secretary to investigate the state agency's compliance with the mentioned procedures. We do not think that such an investigation would so overburden the Secretary and HHS as to defeat the statutory purposes of streamlining implementation of approved health care projects and leaving control over health care planning in state and local hands. We think it better to encourage resolution of any questions concerning state agency compliance with § 1122 at the federal administrative level rather than in the courts.

In contrast, the Fifth Circuit has held that the Secretary is not required to police the state agency's actions for compliance with required procedures. *See Hollingsworth v. Schweiker*, 664 F.2d 526, 529 (5th Cir.1981), *on appeal from remand in Hollingsworth v. Harris*, 608 F.2d 1026 (5th Cir.1979). The Secretary must include in each 1122 agreement a provision whereby the state agrees to implement certain procedures in its administration of the 1122 program. If the state misapplies these procedures, the Fifth Circuit held that HHS could seek to enforce its contract with the state in a particular situation, or could bring up the matter upon negotiation of contract renewal; but the DPA's procedural irregularities alone would not make the Secretary's determination vulnerable to attack. *Id.* at 530. Insofar as the procedures in question are *state* administrative procedures, state court review may be appropriate. *See supra* note 9.

In the Matter of Attorney Robert J. SNYDER.

No. 84-8017.

United States Court of Appeals, Eighth Circuit.

Submitted Feb. 16, 1984

Decided April 13, 1984.

Order Denying Petition for Rehearing En Banc May 31, 1984

Disciplinary proceedings were brought. The Court of Appeals, Lay, Chief Judge, held that: (1) being disrespectful to the court in responding to request for additional information on application for attorney fees under the Criminal Justice Act war-

rants suspension from practice in federal courts of the Eighth Circuit for six months, and (2) question whether plan for implementation of Criminal Justice Act's requirement for attorneys to represent indigent clients in criminal cases would be referred for study to district courts and Judicial Council in light of burden that plan, which contemplated that only lawyers willingly volunteering for appointments will be assigned, places on those volunteers and in light of ability of attorneys in civil litigation practice to represent criminal indigents

Suspension ordered.

1. **Attorney and Client** ⇐58

Being disrespectful to the court in responding to request for additional information on application for attorney fees under the Criminal Justice Act warrants suspension from practice in federal courts of the Eighth Circuit for six months. F.R.A.P. Rule 46(c), 28 U.S.C.A.; ABA Code of Prof. Resp., DR1-102(A)(5)

2. **Attorney and Client** ⇐23

Question whether plan for implementation of Criminal Justice Act's requirement for attorneys to represent indigent clients in criminal cases should include attorneys specializing in civil litigation as well as those specializing in criminal litigation would be referred for study to district courts and Judicial Council in light of burden that plan, which contemplates that only lawyers volunteering for appointments will be assigned, places on those volunteers and in light of ability of attorneys in civil litigation practice to represent criminal indigents. 18 U.S.C.A. § 3006A.

On Petition for Rehearing En Banc

3. **Judges** ⇐47(1)

Chief judge of Court of Appeals was not disqualified from sitting in proceeding to show cause why attorney should not be suspended from federal court practice where any factual information gained by the chief judge in processing attorney's claim did not arise in extrajudicial capacity. 28 U.S.C.A. § 455.

4. **Constitutional Law** ⇐90.1(1.5)

Disciplining attorney for tone taken in letter to Court of Appeals did not violate attorney's First Amendment right of free speech since disrespectful remarks were not protected. U.S.C.A. Const. Amend. 1.

Robert J. Snyder, Bismarck, N.D., for appellant.

David L. Peterson, Bismarck, N.D., for appellee.

Before LAY, Chief Judge, and HEANEY and ARNOLD, Circuit Judges.

LAY, Chief Judge.

This case comes before us on an order issued to attorney Robert Snyder of Bismarck, North Dakota, to show cause why he should not be suspended from practice in the federal courts. Attorney Snyder has been cited: (1) for his refusal to continue to perform services in indigent cases under the Criminal Justice Act (CJA) 18 U.S.C. § 3006A (1982); and (2) for his disrespectful refusal to comply with the guidelines under the CJA relating to the submission of expenses and attorney fees.

Facts

On March 14, 1983, Attorney Snyder was appointed by Judge Bruce Van Sickle of the District of North Dakota to represent an indigent defendant under the CJA. There is no issue concerning his services being performed competently. After the proceedings, pursuant to § 3006A(d)(4) of the CJA, Attorney Snyder submitted to the district court a claim for services and expenses in the amount of $1,898.55. On August 17, the district court judge reduced the claim by $102.50 and approved the modified request.

Under the CJA, the chief judge of this court must review and approve any expenditures for compensation in excess of the $1,000 limit. 18 U.S.C. § 3006A(d)(3). Snyder's application was deficient in that the CJA requires an attorney to attach a mem-

orandum of hours expended and an itemized list of expenses.[1] Snyder did not attach the necessary information to his application. Accordingly, his application was returned to the district court with the request that Attorney Snyder provide the proper attachments. Thereafter, Snyder returned the application to the secretary of the district judge with a monetary, not an hourly, breakdown of his time and again without the requested itemization of expenses.[2] Once again his application was returned by the chief judge with the notation that compliance with the CJA guidelines was still necessary to process the application.

Snyder then sent to the district judge's secretary a letter, dated October 6, "for the purpose of responding to" the chief judge's request. Snyder stated that he was "appalled" at the small amount paid to attorneys for indigent criminal defense work. He indicated his displeasure at the "extreme gymnastics" required to receive "puny amounts." He then stated to the court: "We have sent you everything we have concerning our representation, and I am not sending you anything else. You can take it or leave it." Snyder concluded his letter by stating that he was "extremely disgusted" by the treatment of him by the Eighth Circuit, that he wished to be taken off the list of attorneys willing to accept appointment in indigent cases, and that he had "simply had it."[3]

Upon receipt of this information, the chief judge requested the district court to confer with Snyder and to determine if Snyder would retract his disrespectful remarks to the court. Snyder refused. On December 22, 1983, this court issued an order to show cause why he should not be suspended from the practice of law in the federal courts for his refusal to offer services under the CJA and to comply with relevant guidelines. Snyder requested a hearing by the full court. *See* Fed.R.App.P. 46(c). The full court voted to refer the matter to a panel.

At oral argument, Attorney Snyder was requested once again to purge himself, as an officer of the court, by agreeing to accept appointment under the Act and by otherwise complying with the Act's guidelines. The panel also requested him to demonstrate in writing that he would be respectful in his relations with the federal courts and to offer a retraction and sincere apology for his disrespectful remarks rendered in his letter of October 6. Snyder conditionally offered his continued services under the CJA, but contumaciously refused to retract his previous remarks or apologize to the court.

Attorney Snyder's Remarks to the Court

[1] We first turn to Snyder's refusal to comply with the guidelines under the CJA for documentation of expenses. An integral part of Snyder's refusal to comply with CJA guidelines was his explicit statement of disrespect to the federal court. Snyder's conduct not only constituted disrespect but served as well to impede the orderly processing of attorney fee applications. In this direct sense he has served to impede the administration of justice.

As a member of the North Dakota bar and as a licensed practitioner in both the federal district court and the court of appeals, Attorney Snyder is bound by the ethical canons of the legal profession.[4] The relevant disciplinary rule states: "A lawyer shall not: . . Engage in conduct

1. *Guidelines for the Administration of the Criminal Justice Act*, Ch. 2 § 3, Vol. VII, Guide to Judiciary Policies & Procedures.

2. Snyder's note accompanying the returned application stated that "the amounts [on the time sheet] aren't exactly right due to our computer's lack of the right money codes."

3. Based upon his refusal to comply with the CJA guidelines, Snyder was denied excess attorney fees and denied unitemized expenses.

4. The ethical code adopted by each state defines the professional responsibility of every attorney who is a member of that state's bar. However, as a federal court, our authority to discipline Attorney Snyder is defined in Fed.R.App.P. 46(c):

> Disciplinary Power of the Court over Attorneys. A court [of] appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it

that is prejudicial to the administration of justice." The Model Code of Professional Responsibility, DR 1–102(A)(5).[5] Equally important is the recognition that an attorney must maintain the proper respect for the court as an institution. As stated in the Model Code:

> Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and the judges thereof; to observe the Code of Professional Responsibility; to act as a member of a learned profession, one dedicated to public service; to cooperate with his brother lawyers in supporting the organized bar through the devoting of his time, efforts, and financial support as his professional standing and ability reasonably permit; to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.

Id. at EC 9–6.

As we will discuss, Snyder now conditionally has offered to serve in indigent cases and to comply with the CJA guidelines. However, in a letter to the court he has otherwise refused to retract or apologize for his disrespectful remarks to the court. He asserts that, although his remarks were "harsh," as a "matter of principle" no further statement is due the court. Letter from Robert J. Snyder to Chief Judge Lay (February 27, 1984).

We find Snyder's present statement that he will conditionally comply with the guidelines not enough. His refusal to show continuing respect for the court and his refusal to demonstrate a sincere retraction of his admittedly "harsh" statements are sufficient to demonstrate to this court that he is not presently fit to practice law in the federal courts. All courts depend upon the highest level of integrity and respect not only from the judiciary but from the lawyers who serve in the court as well. Without public display of respect for the judicial branch of government as an institution by lawyers, the law cannot survive.[6] This is not to say that courts cannot and should not be subject to proper criticism and comment; however, when an attorney becomes disrespectful in response to a court's request that counsel comply with a congressional mandate, then we deal with a different matter. Without hesitation we find Snyder's disrespectful statements as to this court's administration of CJA contumacious conduct. We deem this unfortunate.

We find that Robert Snyder shall be suspended from the practice of law in the federal courts of the Eighth Circuit for a period of six months; thereafter Snyder should make application to both this court and the federal district court of North Dakota to be readmitted.

Implementation of the CJA in North Dakota

[2] In further response to the show cause order Attorney Snyder alleges that

> for conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of the court.

5. Although the American Bar Association has recently adopted new Model Rules of Professional Conduct, the older Model Code of Professional Responsibility is still in effect in North Dakota (the state in which Attorney Snyder practices).

6. It is not respect for the judge personally that is required of attorneys; it is respect for the legal institution that the judge represents. As the Supreme Court of Pennsylvania recently stated:

> The "law" is given corporeal existence in the form of the judge. When carrying out the judicial function, the judge becomes a personification of justice itself. When presiding over any aspect of the judicial process, the judge is not merely another person in the courtroom, subject to affront and insult by lawyers. "The obligation of the lawyer to maintain a respectful attitude toward the court is 'not for the sake of the temporary incumbent of the judicial office,' but to give due recognition to the position held by the judge in the administration of the law." ABA Standards, The Defense Function, § 7.1, Commentary at 259. The judge *is* the court, and a display of insolence and disrespect to him is an insult to the majesty of the law itself.

Commonwealth of Pennsylvania v. Rubright, 489 Pa. 356, 414 A.2d 106, 110 (1980).

the implementation of the CJA in North Dakota relies exclusively on an attorney list of those "willing" to serve. He therefore asserts that his refusal to accept any future CJA cases was in compliance with the plan and that he should not be censured for his lack of willingness to serve any more than the vast number of lawyers within the district who were not on the list by reason of their unwillingness to serve. Second, Snyder asserts that, because he lives in a rural area with a smaller population and his firm is willing to try criminal cases, whereas the vast number of lawyers in the district are not so willing, his firm receives a disproportionate number of appointments under the CJA. He also protests that the statutory fee under the CJA is inadequate to compensate him even for his overhead. Third, Snyder complains that the North Dakota list of attorneys willing to serve is not a current list; it does not include lawyers newly admitted to the bar and includes a number of lawyers who are deceased or inactive. He asserts, however, that he is now willing to continue to serve on the CJA panel provided that other qualified attorneys are placed on the list for appointment. We find merit in Snyder's conditional offer of service.

This court has consistently recognized the duty of an attorney practicing in the federal courts, as an implied obligation, to serve willingly as an officer of the court in a capacity *pro bono publico* (for the public good). *See, e.g., Peterson v. Nadler*, 452 F.2d 754, 758 (8th Cir.1971). In the case of *Tyler v. Lark* we noted:

> "An applicant for admission to practice law may justly be deemed to be aware of the traditions of the profession which he is joining, and to know that one of these traditions is that a lawyer is an officer of the court obligated to represent indigents for little or no compensation upon court order. Thus, the lawyer has consented to, and assumed, this obligation and when he is called upon to fulfill it, he cannot contend that it is a 'taking of his services.'"

Tyler v. Lark, 472 F.2d 1077, 1079 (8th Cir.1973) (quoting *United States v. Dillon*, 346 F.2d 633, 635 (9th Cir.1965), *cert. denied*, 382 U.S. 978, 86 S.Ct. 550, 15 L.Ed.2d 469 (1966)), *cert. denied*, 414 U.S. 864, 94 S.Ct. 114, 38 L.Ed.2d 84 (1973).

Many state courts have similarly observed that counsel must assist the court by carrying on *pro bono* representation in criminal cases. *See, e.g., Ex parte Dibble*, 310 S.E.2d 440, 441 (S.C.Ct.App.1983) ("It has been traditionally held that a lawyer, by accepting a license to practice law, becomes an officer of the court and assumes the obligation of representing, without pay, indigent defendants in criminal cases."); *Yarbrough v. Superior Court of Napa County*, 150 Cal.App.3d 388, 395, 197 Cal.Rptr. 737, 741 (Ct.App.1983) ("An attorney is an officer of the court before which he or she was admitted to practice and is expected to discharge his or her professional responsibilities [to represent indigents] at all times, particularly when expressly called upon by the courts to do so."). Recently, the Supreme Court of Missouri held that attorneys licensed to practice in the state could be appointed to serve in criminal cases with no compensation:

> "The term 'profession,' it should be borne in mind, as a rule is applied to a group of people pursuing a learned art as a common calling in the spirit of public service where economic rewards are definitely an incidental, though under the existing economic conditions undoubtedly a necessary by-product. In this a profession differs radically from any trade or business which looks upon money-making and personal gain as its primary purpose. The lawyer cannot possibly get away from the fact that his is a public task . . ."

State ex rel. Wolff v. Ruddy, 617 S.W.2d 64, 65-66 (Mo.1981) (quoting Anton-Hermann Chroust, 1 *The Rise of the Legal Profession in America* x-xi (1965)), *cert. denied*, 454 U.S. 1142, 102 S.Ct. 1000, 71 L.Ed.2d 293 (1982).

The profession of law rests upon its commitment to public service and has long been recognized as a profession that re-

quires its membership to engage in *pro bono* activities. Acceptance of appointment under the CJA, a service that lawyers do not perform totally without compensation, is consistent with this obligation of the members of the bar.[7] Before the CJA provided for compensation, many lawyers willingly accepted the defense of indigents in federal criminal cases without expectation of any compensation. The CJA was a recognition by Congress that indigent criminal defendants should have an opportunity to receive the services of competent counsel. Although the compensation allowed by the Act was never intended to fully recompense the lawyer for the time spent on a case, Congress intended that the amount allowed would at least approach the cost of a lawyer's overhead. It is true that the allowances awarded are much lower than the fees charged by many lawyers in non-indigent cases. However, the Act is intended to contain elements of *pro bono* work and not to be merely a government-subsidized, employment service.[8]

The North Dakota plan which contemplates that only lawyers who willingly volunteer for appointments will be assigned to indigent cases appears to rest on the Model Plan approved by the Criminal Justice Committee of the Judicial Conference.[9] Nonetheless, we find that Snyder's objections raise considerable concern as to the efficacy of any plan which depends totally upon voluntary participation.[10]

We find merit in the reasoning that there is an implied obligation to perform *pro bono* trial services on every licensed attorney who is engaged in litigation, not just those who are willing to come forward. The plan as now constituted penalizes those who specialize in criminal law because more than their share of the district's *pro bono* work falls on their shoulders; under a voluntary plan, particularly in rural areas, only a few attorneys come forward and this unduly results in a disproportion of assignments to a minority of the lawyers practicing in the district. Also, appointing only those who feel they have competence in criminal cases in no way assures competency; it is common knowledge that many counsel appointed by district courts under the CJA are young lawyers just out of law school trying to gain early experience in the trial of cases.

Because Snyder is participating under a plan which is purely voluntary, his refusal to serve is in technical compliance with the plan. However, his conditional agreement to serve in the future, if other attorneys who are competent to try cases are included on the panel, also has considerable merit. Under the Criminal Justice Act each district is required to submit for approval its plan for implementation of the CJA to the Judicial Council of the Circuit. 18 U.S.C. § 3006A(a). We therefore refer the study as to alleged insufficiency of partici-

7. Although some compensation is afforded an attorney under the CJA, the Act does not attempt to fully compensate an attorney for the work performed. Thus, the Act has a *pro bono* factor built into its compensation scheme. *See infra* note 8 and accompanying text.

8. The legislative history of the CJA states:

> As reported by the subcommittee, H.R. 4816 provided for compensation to court-appointed attorneys at a rate not to exceed $15 per hour for time reasonably spent, and carefully accounted for, on behalf of an impoverished defendant. This amount was conceded by virtually every witness at the hearings to be below normal levels of compensation in legal practice. It was nevertheless widely supported as a reasonable basis upon which lawyers could carry out their profession's responsibility to except [sic] court appointments without either personal profiteering or undue financial sacrifice. . .

H.R.Rep. No. 864, 88th Cong., 2nd Sess., *reprinted in* 1964 U.S.Code Cong. & Ad.News 2990, 2997-98. Since the enactment of the CJA, the hourly rate of compensation for attorneys has increased to $20 for preparation time and $30 for trial time.

9. "Model Plan for the Composition, Administration and Management of the Panel of Private Attorneys under the Criminal Justice Act" *Guidelines for the Administration of the Criminal Justice Act*, Vol. VII, App. G, Guide to Judiciary Policies and Procedures.

10. We note that, in districts where a federal public defender program assumes a substantial representation of indigents in criminal cases, the plan adopted may be more flexible in accepting volunteers.

pation of the bar in the panels of the CJA to the district courts and the Judicial Council.

We recognize that any requirement that all active, licensed trial practitioners be eligible for appointment under the CJA raises the immediate question of competency and the continuing concern of the courts and the bar over the increasing number of suits relating to the charge of ineffective assistance of counsel in criminal cases. But in our judgment the fear of incompetent counsel being appointed is, for the most part, exaggerated.

The most common successful complaint relating to ineffective assistance of counsel is the failure of the lawyer to adequately investigate the case and to call defense witnesses. *See, e.g., United States v Baynes*, 687 F.2d 659 (3rd Cir.1982); *Eldridge v. Atkins*, 665 F.2d 228 (8th Cir. 1981), *cert. denied*, 456 U.S. 910, 102 S.Ct. 1760, 72 L.Ed.2d 168 (1982); *Rummel v Estelle*, 590 F.2d 103 (5th Cir.1979). Competent lawyers who specialize in civil trials know that the success or failure of a trial depends on the thoroughness of the investigation of facts and of the trial preparation. This basic rule of trial preparation is true for civil as well as criminal cases; the attorney who is competent to practice in civil matters is competent to appear in criminal cases. Lawyers who specialize in civil cases must necessarily engage in a diversity of study in all spheres of our social, political, and economic systems. The step across to the criminal law, by the experienced civil trial attorney, is really no step at all.

We also recognize that many civil trial lawyers are not currently conversant with the Rules of Criminal Procedure and the various rules governing the practice of criminal law.[11] Nonetheless we would deem it incumbent on the civil trial bar to become familiar with these rules, as they would any other procedural or substantive rule of law not previously encountered. Most civil lawyers are generalists; when confronted with a specialized area of litigation, they quickly master the law and the facts. Few lawyers process their first appeal to this court or to the Supreme Court of the United States without doing special study to master the new procedure at hand. We suggest that it is no more difficult to conduct a criminal trial than it is to conduct an intricate 10b–5 securities case or a complicated products-liability case.

Much of the criticism that has been leveled at the trial bar as to the lack of effective representation has focused on lawyers representing indigents in criminal cases.[12] While ineffective assistance of

11. The Model Plan provides:

> Attorneys who serve on the CJA Panel must be members in good standing of the federal bar of this district, and have demonstrated experience in, and knowledge of, the Federal Rules of Criminal Procedure and the Federal Rules of Evidence.

We note, generally, that knowledge of the Federal Rules of Criminal Procedure and Federal Rules of Evidence is necessary to pass most state bars. It is reasonable to assume that a lawyer may be called upon some day to use the skills which he or she was required to demonstrate to enter the legal profession.

12. For example, Chief Justice Burger has expressed concern that indigents suffer most from "incompetent trial advocates." Burger, *Some Further Reflections on the Problem of Adequacy of Trial Counsel*, 49 Fordham L.Rev. 1, 8 (1980). Judge Bazelon, a distinguished jurist of the D.C. Circuit, has been critical of the competency of the criminal defense bar for years. *See, e.g.*, Bazelon, *The Defective Assistance of Counsel*, 42 U.Cin.L.Rev. 1 (1973). Our opinion disagrees with Judge Bazelon's views that civil trial lawyers are not competent to try criminal cases. Judge Bazelon states that the time and money spent by a civil lawyer in learning how to try a criminal case "would be immense" and that too many of these lawyers would have to "rediscover the wheel." He also adds that the "uptown lawyer' often has a serious communication problem with the indigent client and that they are 'not prepared for the cultural shock of learning that their client is neither middle class nor cast in their image of the 'deserving poor.'"

We must respectfully disagree. There is no empirical data to support Judge Bazelon's theory. The fact is, the present system of allowing only volunteers to come forward for appointment under the CJA brings forth many inexperienced young lawyers looking for their first case to try. Appointing only those who specialize in criminal cases conveniently shields a vast number of experienced lawyers who seek an exclu-

unsel certainly can occur in appointed unsel cases, charges of incompetency of e criminal trial bar are distorted by the acing of the burden of indigent represen- ation totally on a small segment of the ar Skilled and experienced civil trial at- rneys, some of the best advocates in the rofession, are excused from service under e CJA by the Model Plan and district lans adopted in conformity therewith It s immaterial whether their absence is re- ated to the lack of economic incentive to rve under the CJA or to their alleged ck of experience in the criminal field learly, when such a large number of com- tent trial attorneys are categorically re- moved from participation, services ren- lered to indigents will not consistently meet the highest standards of criminal rep- resentation We do not believe that Con- gress, in passing the CJA, intended *pro bono* representations to fall upon the few; in this sense we think careful study by the district courts and the Judicial Council should be given to the idea that all active trial lawyers in the federal courts be obli- gated to provide *pro bono* services to the indigent either in the civil law or in the criminal defense field *Cf Nelson v. Red- field Lithograph Printing*, 728 F 2d 1003 (8th Cir 1984)

Before LAY, Chief Judge, and HEA- NEY, BRIGHT, ROSS, McMILLIAN, AR- NOLD, JOHN R GIBSON, FAGG and BOWMAN Circuit Judges

ORDER DENYING PETITION FOR REHEARING EN BANC

HEANEY, Circuit Judge

This matter comes before the Court on a petition for rehearing en banc Attorney Snyder, now represented by counsel, raises several points in his petition: (1) that Chief Judge Lay should recuse himself under 28 U S C § 455(b)(1) because of his personal knowledge of facts gained under the Crimi- nal Justice Act (CJA); (2) that Snyder was not given proper notice that his allegedly disrespectful letter could be a basis for discipline; (3) that Snyder's letter of com- plaint was an exercise of free speech pro- tected by the First Amendment; (4) that his letter was not disrespectful; and (5) that the district court and the court secre- tary encouraged Mr Snyder in directing that the letter of complaint be sent

Before dealing with these arguments, we think it wise to state the facts more pre- cisely. Robert Snyder was appointed by the United States District Court for the District of North Dakota to represent 12 defendants in a period from January 1, 1979 to early 1984 It appears from the record that eight of these cases were dis- posed of without trial and four involved at least some court appearances According to the records that have been furnished to this Court, Mr Snyder devoted approxi- mately 270 hours to these cases over a four and one-half year period

On August 9, 1983, Mr Snyder complet- ed work on a case in which he had been appointed to represent an indigent, and submitted a voucher in the sum of $1,898 55 to the district court for payment Judge Bruce Van Sickle reduced the claim by $102 50 and forwarded this voucher to this Court on August 17 On September 6, this Court returned the voucher to Mr. Snyder requesting him to submit a detailed memorandum pursuant to 22 2 B of the guidelines, and to support his claim for long distance calls by attaching an itemized statement The voucher was returned to us on September 26, but because he did not have both the number of hours expended as well as the dollar amounts, requested by the guidelines, it was returned by this Court to Mr Snyder on the same date On October 20, the completed voucher was re- turned to this Court Included in the re- turn was Mr Snyder s letter of October 6; this letter is attached hereto as Addendum No 1 The letter stated in part:

> sive civil practice because of the higher mone- tary rewards involved The CJA is not designed to compensate any lawyer for his or her self-ed- ucation Nonetheless we are confident that skilled civil trial lawyers could adjust to crimi- nal practice, first, out of the professional obliga- tion to provide effective counsel for the defend- ant; and second, out of concern for the quality of representation to be found generally in our courts and our profession

We have sent you everything we have concerning our representation, and I am not sending you anything else. You can take it or leave it.

Further, I am extremely disgusted by the treatment of us by the Eighth Circuit in this case, and you are instructed to remove my name from the list of attorneys who will accept criminal indigent defense work. I have simply had it.

On November 3, 1983, Chief Judge Lay wrote to Judge Van Sickle the letter which is attached hereto as Addendum No. 2. A copy of this letter was sent to Mr. Snyder. In that letter Chief Judge Lay stated in part:

I consider Mr. Snyder's letter to your secretary as being totally disrespectful to the federal courts and to the judicial system. It demonstrates a total lack of respect for the legal process and the courts.

* * * * * *

Mr. Snyder indicates that he would like to have his name removed from the list of attorneys who will be appointed to represent indigent criminal defendants. As far as the court is concerned, I will honor that request and I instruct you to remove his name from the list of attorneys who will be appointed in criminal cases. However, in view of the letter that Mr. Snyder forwarded, I question whether he is worthy of practicing law in the federal courts on any matter. It is my intention to issue an order to show cause as to why he should not be suspended from practicing in any federal court in this circuit for a period of one year. This suspension, of course, will apply to his appearance in federal court in North Dakota. We will, of course, give Mr. Snyder an opportunity to respond before any final determination is made.

On December 20, 1983, Chief Judge Lay caused to be issued the order to show cause which forms the basis of the present proceedings. A hearing on the order to show cause was held on February 15, 1983. At the hearing to show cause, Judge Richard Arnold read excerpts of Snyder's letter of October 6 to Mr. Snyder and asked Mr. Snyder the following question: "I am asking you sir if you are prepared to apologize to the Court for the tone of your letter." Mr. Snyder responded as follows: "That is not the basis that I am being brought forth before the Court today. It is not an apology and I could have apologized when an apology was demanded from Judge Lay and I declined * * * but I did not apologize then and I am not apologizing now." Judge Arnold stated to Mr. Snyder: "I just want to get this clear that you are declining to aplogize for the letter of October 6." Snyder said: "I am." At the close of the hearing the Court gave Mr. Snyder an additional ten days in which to state that he was willing and ready to represent indigent defendants, that he would comply with the guidelines, and that he would apologize to the Court for his letter of October 6.

On February 22, Snyder wrote to this Court stating:

If and when a new Plan for the implementation of the Criminal Justice Act in the State of North Dakota is enacted, the undersigned will enthusiastically obey its mandates, just as he has obeyed the mandates, or lack thereof, in the existing Plan.

Further, the undersigned states that he will make every good faith effort possible to comply with the Court's guidelines regarding the payment of attorney's fees and expenses. [*See* Addendum No. 3.]

No apology for the October 6 letter was made. Thereafter, on February 24, 1984, Chief Judge Lay wrote to Mr. Snyder giving him another opportunity to apologize. He stated: "I am confident that if such a letter is forthcoming that the Court will dissolve the order." *See* Addendum No. 4.

Mr. Snyder responded as follows:

I am in receipt of your letter dated February 24, 1984. Please be advised that my letter of February 22, 1984 entirely states my position concerning this matter.

I cannot, and will never, in justice to my conscience, apologize for what I con-

sider to be telling the truth, albeit in harsh terms. You must therefore search your conscience and determine what course of action will best serve the interest of justice and the administration of the Eighth Circuit.

It is unfortunate that the respective positions in the proceeding have so hardened. However, I consider this to be a matter of principle, and if one stands on principle, one must be willing to accept the consequences.

Thank you for your time and attention.

We turn now to the arguments raised by Snyder on his petition for rehearing en banc. We deal with them seriatim.

[3] First, it is clear that a judicial officer is not disqualified under 28 U.S.C. § 455 because of personal knowledge of facts unless the knowledge arises out of extra-judicial observation or misconduct. *See United States v. Coven*, 662 F.2d 162, 168 (2d Cir.1981), *cert. denied* 456 U.S. 916, 102 S.Ct. 1771, 72 L.Ed.2d 176 (1982). Chief Judge Lay, in processing Snyder's claim and in seeking information to process the claim, was carrying out his judicial responsibilities. Any factual information gained in doing so or any judicial action taken by him as chief judge did not in any way arise in an extra-judicial capacity. Chief Judge Lay possesses no personal bias against Snyder and properly served on the panel to hear Mr. Snyder's response to the Court's show cause order.

Second, it is abundantly clear from the record that Snyder had notice that his disrespectful letter could be a basis for discipline. Snyder was given at least three opportunities to apologize for the letter and declined to do so.

[4] Third, Snyder's counsel states that Mr. Snyder's letter was an exercise of free speech. Snyder urges that he should not be disciplined for exercising his First Amendment rights to criticize, and express frustration toward, the Court. The gravamen of the situation is that Snyder in his letter became harsh and disrespectful to the Court. It is one thing for a lawyer to complain factually to the Court, it is another for counsel to be disrespectful in doing so.

It is well settled that disrespectful remarks by an officer of the court do not fall within the ambit of protected speech. As Justice Stewart stated: "Obedience to official precepts may require abstention from what in other circumstances might be constitutionally protected speech." *In re Sawyer*, 360 U.S. 622, 646–647, 79 S.Ct. 1376, 1388, 3 L.Ed.2d 1473 (1959) (Stewart, J., concurring).[1]

Fourth, Snyder states that his letter is not disrespectful. We disagree. In our view, the letter speaks for itself.

Snyder seeks to mitigate his conduct by stating that the district court and the district court's secretary directed that the letter be sent. It appears from the affidavit of Judge Bruce Van Sickle that he was aware of Mr. Snyder's letter to his secretary and viewed it as that of a frustrated lawyer hoping that his comments with respect to the fee schedule and the paperwork would severe as a basis for some change in the process. There is nothing in the record to indicate that Judge Van Sickle instructed Mr. Snyder to be disrespectful to this Court. Snyder wrote the letter, he is intelligent and capable of independently evaluating the ramifications of his conduct, and he must take responsibility for his own actions.

We have difficulty with the proposition that we should condone, or that anyone should approve, a lawyer's exercise of open disrespect for the court before which the lawyer practices. To repeat what we have earlier observed, "a display of insolence and disrespect to [the Court] is an insult to the majesty of the law itself." *In the*

1. *See also State v. Nelson*, 210 Kan. 637, 504 P.2d 211, 214 (1972), which states:

> Concerning respondent's argument that DR 1-102(A)(5) creates an impermissible and chilling effect on 'First Amendment freedoms," an examination of decisions on the point (12 A.L.R.3d, Anno., p. 1408) reveals the consensus to be that an attorney's right to free speech is tempered by his obligation to both the courts and the bar, an obligation to which ordinary citizens are not held

Matter of: Attorney Robert J. Snyder, 734 F.2d 334, 337 n. 6 (8th Cir. April 13, 1984). However, because of Snyder's past cooperation with the district court in serving on *pro bono* matters, because of his now professed willingness to continue to do so and to comply with the CJA guidelines, and because of the alleged misunderstanding as to the reasons for his suspension—we conditionally vacate the panel's order of suspension and provide an additional 10 days from the date of this order for Attorney Snyder to provide a sincere letter of apology to this Court for the disrespectful comments directed to the Court in his letter of October 6, 1983, sent to Judge Van Sickle's secretary. The clerk is directed that if Snyder fails to comply with this request, our original order of suspension will be reinstated with the six month suspension to run from the date of the original order. The Clerk is further directed to send a copy of this order to each of the lawyers who signed the petition for rehearing en banc and to the president and secretary of the Burleigh County Bar Association.

The petition for rehearing en banc is denied on the ground that the majority of judges in regular active service did not vote to grant the petition as required by Fed.R.App.P. 35.

BRIGHT and McMILLIAN, Circuit Judges, would grant the petition for rehearing en banc.

ADDENDUM NO. 1

BICKLE COLES AND SNYDER CHARTERED

ATTORNEYS AT LAW

219½ EAST BROADWAY

THE LITTLE BUILDING

P O BOX 2071

BISMARCK NORTH DAKOTA 58502-2071

October 6, 1983

Helen Monteith
Federal Building
3rd Street & Rosser Avenue
Bismarck, ND 58501

Re: United States of America vs. Dennis Warren

Dear Helen:

I am in receipt of the letter of September 26, 1983, from the Eighth Circuit Court of Appeals, in which our latest attempt to justify our time and expenses for Dennis Warren has again been set back. This letter is for the purpose of responding to that letter.

In the first place, I am appalled by the amount of money which the federal court pays for indigent criminal defense work. The reason that so few attorneys in Bismarck accept this work is for that exact reason. We have, up to this point, still accepted the indigent appointments, because of a duty to our profession, and the fact that nobody else will do it.

Now, however, not only are we paid an amount of money which does not even cover our overhead, but we have to go through extreme gymnastics even to receive the puny amounts which the federal courts authorize for this work. We have sent you everything we have concerning our representation, and I am not sending you anything else. You can take it or leave it.

Further, I am extremely disgusted by the treatment of us by the Eighth Circuit in this case, and you are instructed to remove my name from the list of attorneys who will accept criminal indigent defense work. I have simply had it.

Thank you for your time and attention.

Very truly yours,

BICKLE, COLES AND SNYDER, CHARTERED

/s/ Robert J. Snyder
Robert J. Snyder
Attorney at Law

ADDENDUM NO. 2

UNITED STATES COURT OF APPEALS

EIGHTH CIRCUIT

DONALD P. LAY
CHIEF JUDGE

November 3, 1983
The Hon. Bruce M. Van Sickle
United States District Judge
P.O. Box 670
Bismarck, North Dakota 58501

Re: Cl-83-4-01 U.S.A. v. Dennis Warren

Dear Judge Van Sickle:

I am enclosing copies of recent correspondence of attorney Robert J. Snyder to your secretary, Helen Montieth, and from your secretary to my administrative assistant, June Boadwine. It is unfortunate that this matter now requires additional time, but because of the responses made by your secretary and Mr. Snyder, it is necessary for me to intervene.

I consider Mr. Snyder's letter to your secretary as being totally disrespectful to the federal courts and to the judicial system. It demonstrates a total lack of respect for the legal process and the courts.

The Criminal Justice Act was passed as a response to the inadequacy of a prior system which did not award any type of reimbursement of expenses or time spent by a lawyer. I'm confident it was true when you were in practice as it was when I represented indigents that the bar performed without any reimbursement of either expenses or attorneys' fees. This pro bono work was considered to be a part of our professional responsibility. The CJA was never intended to provide a reasonable attorney fee, only to provide funds to cover overhead and expenses.

Regardless of an attorney's view as to whether he feels obligated to provide pro bono work, my concern now is related to the apparent refusal of the attorney involved in this case to comply with the Criminal Justice Act and the guidelines promulgated under it. In the original instance, Mr. Snyder failed to forward any time itemization, contrary to the statutory guidelines, and on that basis and based upon my direction to my administrative assistant, the claim for services was returned to you with the request that compliance be obtained. Mr. Snyder then itemized the amounts in dollars, but failed, as requested by the Administrative Office, to set forth the number of hours or portions of hours in each instance on his itemized schedule.

We are unable to ascertain whether he was charging time under his own fee schedule or that of the statute. In addition, he failed to itemize his out-of-pocket expenses on a separate sheet. Although these requirements may seem technical, under the Criminal Justice Act the federal government is dealing in millions of dollars and Congress requires proper itemization so that budgetary limitations may be accounted for in a proper manner.

As you know, processing these vouchers takes a good deal of time on my part, as well as on the part of every district judge who must approve them. If a district judge's staff is to assist, it is essential they understand the guidelines and require attorneys to comply with them. If a voucher is not properly submitted and checked by the district court, it requires a great deal of time on my part in getting ultimate approval of it by the Administrative Office. Volume VII of the Guide to Judiciary Policies and Procedures contains the guidelines. However, when a lawyer becomes disrespectful and refuses to follow the guidelines and refuses to cooperate with the court, then it is a more significant problem.

Mr. Snyder indicates that he would like to have his name removed from the list of attorneys who will be appointed to represent indigent criminal defendants. As far as the court is concerned, I will honor that request and I instruct you to remove his name from the list of attorneys who will be appointed in criminal cases. However, in view of the letter that Mr. Snyder forwarded, I question whether he is worthy of practicing law in the federal courts on any matter. It is my intention to issue an order to show cause as to why he should not be suspended from practicing in any federal court in this circuit for a period of one year. This suspension, of course, will apply to his appearance in federal court in North Dakota. We will, of course, give Mr. Snyder an opportunity to respond before any final determination is made.

In view of Mr. Snyder's attitude and refusal to assist the court in processing this voucher under the guidelines, I am approving a fee for him only to the statutory limit and properly itemized expenses.

Before taking the steps noted above, I would appreciate your views on the matter.

Sincerely,

/s/ Donald P. Lay
Donald P. Lay

/j

Encls.

cc: Mr. Robert Snyder

Encls

ADDENDUM NO. 3

BICKLE, COLES AND SNYDER CHARTERED

ATTORNEYS AT LAW

219½ EAST BROADWAY

THE LITTLE BUILDING

P O BOX 2071

BISMARCK NORTH DAKOTA 58502-2071

February 22, 1984

Clerk
United States Court of Appeals
For the Eighth Circuit
525 Federal Courts Building
316 North Robert Street
St Paul, MN 55101

Re: Robert J. Snyder—Misc. 84-8017

Dear Sir:

In response to the oral demands made by the Court to the undersigned at the hearing on the Order to Show Cause, held in St. Paul on February 16, 1984, the undersigned responds as follows:

If and when a new Plan for the implementation of the Criminal Justice Act in the State of North Dakota is enacted, the undersigned will enthusiastically obey its mandates, just as he has obeyed the mandates, or lack thereof, in the existing Plan.

Further, the undersigned states that he will make every good faith effort possible to comply with the Court's guidelines regarding the payment of attorney's fees and expenses.

Thank you for your time and attention

Very truly yours,

BICKLE, COLES AND SNYDER, CHARTERED

/s/ Robert J. Snyder
Robert J Snyder
Attorney at Law

RJS/cjm
cc: Judge Van Sickle
Judge Benson
Dewey Kautzmann

ADDENDUM NO. 4

UNITED STATES COURT OF APPEALS

EIGHTH CIRCUIT

DONALD P LAY
CHIEF JUDGE

February 24, 1984

Mr. Robert J. Snyder
Bickle, Coles and Snyder
Attorneys at Law
P.O. Box 2071
Bismarck, North Dakota 58502-2071

Re: Order to Show Cause. Misc. No. 84-8017.

Dear Mr. Snyder:

The clerk has forwarded to me a copy of your letter you have written to the court indicating that you will continue to offer your services for pro bono representation under the Criminal Justice Plan.

The court expressed its opinion at the time of the oral hearing that interrelated with our concern and the issuance of the order to show cause was the disrespect that you displayed to the court by way of your letter addressed to Helen Montieth, Judge Van Sickle's secretary, of October 6, 1983. The court expressly asked if you would be willing to apologize for the tone of the letter and the disrespect displayed. You serve as an officer of the court and, as such, the Canons of Ethics require every lawyer to maintain a respect for the court as an institution

Before circulating your letter of February 23, I would appreciate your response to Judge Arnold's specific request, and the court's request, for you to apologize for the letter that you wrote.

Please let me hear from you by return mail. I am confident that if such a letter is forthcoming that the court will dissolve the order.

Sincerely,

/s/ Donald P. Lay
Donald P. Lay

cc: Chief Judge Benson
Judge Van Sickle
Mr. Maland, Clerk's Office

ARKLA EXPLORATION COMPANY and State of Arkansas, Appellees,

v.

TEXAS OIL & GAS CORP., Appellant.

James G. Watt, Secretary of Interior. (Two cases)

ARKLA EXPLORATION COMPANY and State of Arkansas, Appellees,

v.

TEXAS OIL & GAS CORP., James G. Watt, Secretary of Interior, Appellant. (Two cases).

Nos. 82-2228, 82-2386, 83-1586 and 83-1682.

United States Court of Appeals, Eighth Circuit.

Submitted Sept. 15, 1983.

Decided May 7, 1984.

An action was brought seeking cancellation of leases of certain government lands for oil or gas exploration. The United States District Court for the Western District of Arkansas, 562 F.Supp. 1214, H. Franklin Waters, Chief Judge, determined that the leases were not validly issued, and appeal was taken. The Court of Appeals, Bowman, Circuit Judge, held that since Department of Interior applied an arbitrary mileage rule without even considering geologic information or competitive interest, determination that lands on military reservation were not within "known geological structures of producing oil or gas fields" was unlawful.

Affirmed.

John R. Gibson, Circuit Judge, filed dissenting opinion.

1. **Federal Courts ⇐1158**

Order of District of Columbia District Court ruling on timeliness of applications for lease of government land for oil or gas exploration without competitive bidding and order of Arkansas District Court concerning lawfulness of determination that the leased lands were not within a known geological structure of a producing oil or gas field were not mutually inconsistent and therefore the Arkansas District Court did not abuse its discretion in denying lessee's motion to transfer to D.C. District Court case in which an exploration company sought cancellation of the leases. 28 U.S.C.A. § 1404(a).

2. **Federal Courts ⇐103, 819**

Motion for transfer is addressed to discretion of trial court and its actions will not be disturbed on appeal unless there has been an abuse of discretion. 28 U.S.C.A. § 1404(a).

3. **Federal Civil Procedure ⇐103**

In order to have standing a plaintiff must allege an actual or threatened injury as a result of conduct of the defendant, injury alleged by plaintiff must be fairly traceable to action of defendant that is challenged in the lawsuit and injury alleged must be likely to be redressed by a favorable decision of the court. U.S.C.A. Const. Art. 3, § 1 et seq.

4. **Mines and Minerals ⇐5.1(9)**

Exploration company, which asserted right to bid competitively for lease of certain government lands, and state of Arkansas, which alleged the loss of revenue to

degree of certainty who will succeed or not succeed. The appropriate procedure is thus set forth in *Dataphase* where we said:

> It follows that the court ordinarily is not required at an early stage to draw the fine line between a mathematical probability and a substantial possibility of success. This endeavor may, of course, be necessary in some circumstances when the balance of equities may come to require a more careful evaluation of the merits. *But where the balance of other factors tips decidedly toward movant a preliminary injunction may issue if movant has raised questions so serious and difficult as to call for more deliberate investigation.*

Id. (emphasis added). *See also William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 526 F.2d 86 (9th Cir.1975); *Gresham v. Chambers*, 501 F.2d 687, 691 (2d Cir.1974). We reemphasize that the merits are not to be predetermined at the preliminary stage of a hearing on a preliminary injunction.

[2] Here, we think the balance of equities did not favor O'Connor and thus the district court was "not required at an early stage to draw the fine line between a mathematical probability and a substantial possibility of success." *Dataphase*, 640 F.2d at 113. Although O'Connor may be harmed by the termination of employment, it is clear that the harm is not necessarily irreparable and that it can be compensated for by money damages. Moreover, an outright grant of preliminary relief in employee discharge cases defeats the employer's prerogative of discharge. A preliminary injunction could put off the discharge of a potentially incompetent employee for many months. This is not to say that preliminary relief should never be granted in an employment discharge case. Rather, we merely note that in the present case the circumstances of discharge demonstrate that the balance of equities lies with the employer, and that O'Connor has not demonstrated sufficient factors to offset the balance. In our remand, we caution that any earlier findings of the district court relating to the termination should not be considered; plaintiff is entitled to a plenary trial and the merits of her case are to be decided de novo on the basis of the evidence to be adduced at trial.

On this basis, we affirm the district court's decision denying a preliminary injunction. Each party shall pay its own costs.

Brett Aaron NELSON, Appellant,

v.

REDFIELD LITHOGRAPH PRINTING, Sam Demere, and Paul Roach, Appellees.

No. 83-2248.

United States Court of Appeals, Eighth Circuit.

Submitted Feb. 15, 1984.

Decided Feb. 22, 1984.

In an action treated as a Title VII action, the United States District Court for the District of Nebraska, Albert G. Schatz, J., decided not to appoint counsel for the plaintiff. Plaintiff appealed. The Court of Appeals, Lay, Chief Judge, held that, although the District Court set too high a standard by requiring the plaintiff to show a "compelling and meritorious" need for counsel, the District Court did not abuse its discretion in refusing to appoint counsel for the plaintiff.

Affirmed.

1. Civil Rights ⇐45

In case treated as Title VII action, district court set too high a standard in

determining whether plaintiff was entitled to appointed counsel by requiring showing of "compelling and meritorious" need for counsel. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; 28 U.S.C.A. § 1915(d).

2. **Civil Rights** ⇐45

To be entitled to appointed counsel in civil rights action, plaintiff must establish prima facie claim in pleadings which, if proven, would result in some form of relief and, once court is satisfied that plaintiff has alleged valid prima facie claim, then further inquiry should be made as to need. 28 U.S.C.A. § 1915.

3. **Federal Civil Procedure** ⇐2734

Although section permitting district court to request attorney to represent person unable to employ counsel in a civil proceeding and to dismiss case of allegation of poverty as untrue, or if satisfied action is malicious or frivolous does not provide for payment of attorney fees, upon proper showing court may reimburse appointed counsel for expenses, made in good faith, from funds contributed by attorneys admitted to the court. 28 U.S.C.A. § 1915.

4. **Attorney and Client** ⇐2, 3

It is incumbent on chief judge of each district to seek the cooperation of the bar associations and federal practice committees of judge's district to obtain sufficient list of attorneys practicing throughout district so as to supply court with competent attorneys who will serve in pro bono situations. 28 U.S.C.A. § 1915.

5. **Civil Rights** ⇐45

District court did not abuse its discretion in deciding not to appoint counsel to represent plaintiff in action treated as Title VII action where court explored facts and found, in effect, that counsel would not have altered the conclusion that the trial court reached. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; 28 U.S.C.A. § 1915(d).

George C. Rozmarin, Jean A. Mahon-Pettit, Swarr, May, Smith & Andersen, Omaha, Neb., for appellees.

Betty L. Egan of Walsh, Walentine, Miles, Fullenkamp & O'Toole, Omaha, Neb., for appellant.

Before LAY, Chief Judge, HEANEY and BOWMAN, Circuit Judges.

LAY, Chief Judge.

This matter comes before us on appeal of the singular issue of whether the trial court abused its discretion in failing to appoint counsel for plaintiff. The instant case was treated in the court below as a Title VII action. Upon review of the record, we find no abuse of discretion in the court's refusal to appoint counsel but we must respectfully disagree with the standard the district court set forth governing such appointment.

Title 28 U.S.C. § 1915(d) (1976 & Supp. V 1981) governs the request for counsel in a civil proceeding. It states simply: "The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious." Although we acknowledge that there is no constitutional or statutory right for an indigent to have counsel appointed in a civil case, we have in the past acknowledged the express authority of the district court to make such appointments. *White v. Walsh*, 649 F.2d 560 (8th Cir.1981); *Peterson v. Nadler*, 452 F.2d 754 (8th Cir.1971).

The district court in denying the requests of plaintiff observed:

> In the instant case there is simply no showing of compelling and meritorious grounds for such request. This case is a straight-forward racial discrimination case brought pursuant to 42 U.S.C. § 2000e, *et seq.* The issues do not appear to be complex or convoluted, and it would appear from the previous filings and pleadings of the plaintiff that plaintiff can adequately represent himself in this matter. Of course, the door remains

open for plaintiff to engage the services of counsel, on a contingent fee basis, if he chooses to do so and is able to do so.

[1, 2] We must respectfully disagree with the court that an indigent has to show a "compelling and meritorious" need for counsel. We think this is too high a standard and not in conformity with the statute. We do agree that a plaintiff must establish a prima facie claim in the pleadings which, if proven, would result in some form of relief for the plaintiff. However, this statement is really no more than an acknowledgment that the appointment of counsel should be given serious consideration by the district court if the plaintiff has not alleged a frivolous or malicious claim. If a frivolous claim has been alleged, the district court may dismiss the claim. However, once the court is satisfied that plaintiff has alleged a valid prima facie claim, then further inquiry should be made as to need. The court should satisfy itself that plaintiff has in good faith attempted to retain counsel and has been unsuccessful. The court should also determine whether the nature of the litigation is such that plaintiff as well as the court will benefit from the assistance of counsel.

[3] We recognize that under § 1915 there is no provision for the payment of attorneys fees; however, upon proper showing the court may reimburse appointed counsel for expenses, made in good faith, from funds contributed by attorneys admitted to the court. If a similar fund is not available in the district court, until such fund is established the court of appeals has such a fund and will temporarily allow its disbursement for district court representation upon proper application. This court traditionally has reimbursed counsel for expenses on appeal in pro bono representations.

There has been reluctance by some judges to request lawyers to appear in pro bono litigation. We disapprove of such reluctance. As we stated in *Peterson v. Nadler*:

> Lawyers have long served in state and federal practice as appointed counsel for indigents in both criminal and civil cases. The vast majority of the bar have viewed such appointments to be integrally within their professional duty to provide public service. Only rarely are lawyers asked to serve in civil matters. We have the utmost confidence that lawyers will always be found who will fully cooperate in rendering the indigent equal justice at the bar.

452 F.2d at 758.

[4] We write here under our general supervisory authority involving the district courts. We think it incumbent upon the chief judge of each district to seek the cooperation of the bar associations and the federal practice committees of the judge's district to obtain a sufficient list of attorneys practicing throughout the district so as to supply the court with competent attorneys who will serve in pro bono situations such as the case presented.

[5] We now turn to the facts at hand. Plaintiff filed his complaint in July of 1982. At the time of filing his complaint he specifically rejected the appointment of counsel. In December, when he made a request for appointed counsel, the court informed him that he should attempt to get private counsel. He later demonstrated, producing letters, that he was unable to do so. He once again applied for counsel in February of 1983 and was again refused counsel. The court heard evidence and dismissed the case, stating:

> At trial, although given every latitude and reasonable opportunity to do so, the plaintiff has failed to produce any testimonial or documentary evidence which would corroborate or buttress his naked averments of disparate treatment in terms of discharge. There is not a shred or scintilla of evidence in this record of an intent on the part of the defendant or its agents to discriminate against plaintiff in any of the conditions of his em-

ployment on account of his race, and the Court finds in accordance therewith.

We note that the only alleged ground of prejudice arising from the denial of plaintiff's request for counsel relates to his inability to exercise discovery procedures. The trial itself produced no evidence of discrimination. The facts are clear. They lend themselves to straight forward proofs and the suggested discovery would in our judgment be nothing more than a fishing expedition. This is not to say that counsel could not have assisted the plaintiff in his endeavors. What we emphasize is that the trial judge has now explored the facts and found, in effect, that counsel would not have altered the conclusion that the trial court reached. It is only speculation to suggest otherwise.

There are other factors to be considered. First, plaintiff's own "statement of claim" to the court does not assert racial discrimination, but states that plaintiff was not retained at his job because his supervisor "did not like me personally, and because everyone was concerned about my health except he only cared about work and who he could step on." Second, we note that after an investigation by the Equal Employment Opportunity Commission "[n]o reasonable cause was found to believe that the allegations made" in plaintiff's charge were true. Therefore, on review of the record as a whole, we find that the district court's determination not to appoint counsel for the plaintiff was not an abuse of discretion.

Each party shall pay its own costs.

ROCHESTER METHODIST HOSPITAL, a Minnesota non-profit corporation, Appellee,

v.

The TRAVELERS INSURANCE COMPANY, a Connecticut corporation, U.S. Department of Health and Human Services, Appellant.

ROCHESTER METHODIST HOSPITAL, a Minnesota non-profit corporation, Appellee,

v.

The TRAVELERS INSURANCE COMPANY, a Connecticut corporation, Appellant,

U.S. Department of Health and Human Services.

ROCHESTER METHODIST HOSPITAL, a Minnesota non-profit corporation, Appellant,

v.

The TRAVELERS INSURANCE COMPANY, a Connecticut corporation, and U.S. Department of Health and Human Services, Appellees.

Nos. 83-1190, 83-1260 and 83-1261.

United States Court of Appeals, Eighth Circuit.

Submitted Oct. 10, 1983.

Decided Feb. 23, 1984.

Medicare provider brought action seeking to obtain reimbursement from fiscal intermediary under medicare program of costs incurred in connection with nursing education program. The United States District Court for the District of Minnesota, Earl R. Larson, Senior District Judge, entered judgment in favor of medicare provider, and an appeal was taken. The Court of Appeals, Arnold, Circuit Judge, held that: (1) fiscal intermediary's notice of appeal, which was filed 41 days after entry of judgment, was not untimely; (2) suit was not in fact one against United States for

Rule 2.4

PRE-TRIAL PROCEDURE

.1 MANDATORY SCHEDULING CONFERENCE FRCP 16(b):

.11 Within fourteen (14) days after the date provided for answer under FRCP 12(a), but in no event, later than eighty (80) days after the filing of the complaint, whichever comes first, except in those actions exempted by paragraph 2.4.12, counsel for the parties shall confer and file with the Clerk a report containing a proposed schedule for the disposition of the action. The report shall include the following:

.111 An estimate of the time needed to complete discovery including a statement as to the methods of discovery contemplated and a list of witnesses with knowledge of the facts of the lawsuit presently available to the parties.

.112 A statement as to whether expert witnesses will be retained by either party, and if so the general area of their testimony and an estimate of the date they will be retained and prepared for deposition.

.113 A statement of whether either party contemplates adding additional parties or amending pleadings and if so, an estimate of the date by which this can be completed.

.114 A statement as to whether either party contemplates filing any pre-trial motions that may be dispositive of all or part of the litigation.

.115 A statement by counsel as to the estimated length of trial.

.116 A statement by counsel as to the status of settlement and whether an early settlement conference would be useful.

.117 Any other matters which counsel or the parties believe should be brought to the attention of the court that will aid in realistically developing a schedule of deadlines for the disposition of the litigation.

.12 A proposed schedule report as required in paragraph .11 shall be submitted in all civil actions, except where plaintiff is pro se, social security disability review cases, habeas corpus petitions, actions under 42 USC Section 1983 filed by persons confined in penal institutions, actions to collect student loans, civil forfeitures, actions seeking review of administrative actions, or any other class of cases designated by order of the court. Plaintiff's counsel shall have the responsibility for initiating the conference and preparation and submission of the scheduling report. All other counsel shall have a duty to cooperate in good faith to insure that the report is timely filed. The report shall be filed after consultation with counsel for all parties and while it need not be signed by all counsel shall contain a statement that all counsel concur in the report.

.13 If it appears from the report that the case will be ready for trial within one year of the date of filing, a Judge or Magistrate may issue the scheduling order required by FRCP 16(b) without a further conference.

.14 If no report is submitted or the report indicates that the case will not be ready for trial within one year from the date of filing the Magistrate shall forthwith set the matter for a scheduling conference. Said conference may be in person or by telephone at the Magistrate's discretion. If the parties request or in the judgment of the District Judge and Magistrate the case appears to be complex, the above conference may be set before the District Judge to whom the case has been assigned.

.15 After the scheduling conference, but in no event later than one hundred-twenty (120) days after filing of the action, the Judge or Magistrate shall issue the scheduling order required by FRCP 16(b).

.16 The deadlines established by the scheduling order may be extended by the Judge or Magistrate only upon written motion and a showing of good cause.

.17 The Clerk shall notify the parties of the requirement of this rule by handing or mailing a copy of the rule to plaintiff or his representative at the time an action is filed and as to other parties by attaching copies of the rule to the complaint and summons, when served.

.18 All full-time Magistrates are authorized to make all orders necessary to enforce this rule.

.2 FINAL PRE-TRIAL CONFERENCE:

.21 Final Pre-Trial Conference: Upon expiration of the discovery deadline set in accordance with the above, the presiding Judge or Magistrate may order a final pre-trial conference to be held at a convenient time and place with reasonable notice thereof mailed by the Clerk to counsel for all parties by certified mail, return receipt requested.

.22 All parties must be represented at the final pre-trial conference by counsel familiar with the facts, who have full authority to act on behalf of their clients and who will participate in the trial. An attorney who will participate in the trial must attend for each party.

.3 NORTHERN DISTRICT - FINAL PRE-TRIAL CONFERENCE:

.31 Prior to said conference, counsel for all parties shall meet, prepare and sign a proposed order in the form supplied by the Clerk (standard pre-trial order #2) and submit the same to the court at least three (3) days prior to the time of the conference unless otherwise ordered. Plaintiff's counsel shall have the responsibility for the initiation of the meeting to prepare the proposed final pre-trial order. All counsel shall have a duty to see that the purpose of the final pre-trial conference is fulfilled. In the absence of agreement, the meeting of attorneys will be held in the office of counsel for the plaintiff if said office is located in the city wherein the District Court for the division is situated; otherwise, it shall be held in the office of the attorney located in the city nearest the division of the District Court in which the case is pending.

.4 SOUTHERN DISTRICT - FINAL PRE-TRIAL CONFERENCE:

.41 A final pre-trial conference shall be held in every case approximately ten (10) to fifteen (15) days before the scheduled trial date. The Clerk shall attach an addendum to each order for final pre-trial conference which shall contain a complete listing of all items to be filed and discussed at the final pre-trial conference.

FEDERAL RULE OF CIVIL PROCEDURE 16 (b): A DEFENSE PERSPECTIVE

By
Roger A. Lathrop
Betty, Neuman, McMahon, Hellstrom & Bittner
Davenport, Iowa

I. 1983 AMENDEMENTS TO FEDERAL RULE OF CIVIL PROCEDURE 16.

A. Overview. Effective August 1, 1983, Rule 16 of the Federal Rules of Civil Procedure was amended for the first time since its promulgation in 1937. The Rule was subdivided into six (6) sections and its title amended to "Pre-trial conferences; scheduling, management." The title change reflects the wide spread opinion that modern litigation, particularly complex and protracted cases, requires more intensive judicial management. The most significant change is Rule 16(b), which requires the Federal District Court to enter a Scheduling Order.

H

B. Rationale for Rule 16(b). The Advisory Committee Notes of 1983 to Rule 16(b) indicate the Committees belief that early judicial intervention in a case will result in a more efficient and less costly litigation. By Rule, the Scheduling Order sets time limits to:

1. Join other parties and amend the pleadings;
2. To file and hear motions;
3. To complete discovery.

The Notes cite a 1979 report of the National Commission for the Review of Anti-Trust Laws and Procedure, which states that fixing these types of time limits forces lawyers to concentrate on the truly relevent and material areas of inquiry and advocacy. Litigation time is therefore compressed and resources invested are reduced.

C. Requirements of 16(b). A copy of Rule 16, as amended, is included in this outline. It cannot be read in isolation of Local Rule 2.4.1, which is also included in this outline. Some of the more important points are as follows:

1. Rule 16(b) mandates a Scheduling Order that limits the time:

1. To join other parties and to amend the pleadings;
2. To file and hear motions;
3. To complete discovery.

THEREFORE EVERY CIVIL CASE IS SUBJECT TO THIS RULE, REGARDLESS OF WHETHER THE PARTIES WANT OR BELIEVE THEY NEED A SCHEDULING ORDER. The Rule and especially the Advisory Committee Notes do recognize that not all cases require early judicial intervention and there is a provision to exempt certain cases by local District Court Rule. The only cases now exempt under our local Rules are, where Plaintiff is pro se in Social Security disability review cases; habeas corpus petitions; actions under 42USC Section 1983 filed by persons confined in penal institutions; actions to collect student loans; civil forfeitures; actions seeking review of administration actions; or any other class of cases designated by order of the Court.

2. To assist the Court in entering a Scheduling Order, Local Rule 2.4.1 requires the parties to prepare a proposed schedule for disposition of the case. This report must represent the joint efforts of all counsel. While the Plaintiff is charged with the responsibility of initiating a conference between the parties to prepare the report and to prepare and submit the report to the Court, defense counsel have a duty to cooperate in good faith to insure the report is filed on time.

3. The report outlined above is due within fourteen (14) days after the date provided for answer under Federal Rule of Civil Procedure 12(a), but in no event later than eighty (80) days after the filing of the complaint, whichever comes first.

4. After the report is filed, one of three events will occur:

a. If the case will be ready for trial within one (1) year, the Scheduling Order will likely issue without a scheduling conference.

b. If the case will not be ready for trial within one (1) year or if the report is not filed, the Magistrate will hold a scheduling conference and thereupon issue a Scheduling Order.

c. If the case is complex, the scheduling conference may be set before the District Court Judge to whom the case has been assigned.

5. Extension of deadlines in a Scheduling Order will be granted only upon written motion and a showing of good cause. This will be discussed in more detail later in the outline.

6. The sanctions contained in Rule 16(f) apply to failure to obey a Scheduling Order. These sanctions will be discussed in more detail later in the outline.

II. DEFENSE COUNSEL CONSIDERATIONS

A. Overview. The Rule 16 amendments make clear that scheduling and case management are no longer restricted to trial but are extended to the entire pre-trial procedure, including discovery and pre-trial motions. This change in emphasis will require more diligent preparation in the early stages of a case. Although there is empirical evidence available that more intensive judical management at these early stages is desirable, certain problems must still be addressed.

B. Practical Considerations.

1. Amendements of Pleadings. One of the deadlines to be contained in the Scheduling Order is a deadline to join other parties and to amend the pleadings. Local Rules go on to state that this deadline cannot be extended except by written motion and a showing of good cause. Yet according to Rule 15, leave to amend a pleading shall be freely given when justice so requires. 15(b) also permits amendments to conform to evidence of trial, even after judgment. The question naturally arises whether a pleading can be amended after the deadline has passed and if so, what showing must be made. The answer would seem to be that the pleading could be amended after the passage of the deadline and that the good cause requirement of 16(b) would have to be the same standard applied in Rule 15 amendments. In other words, if an amendment is permissable under the standards developed under Rule 15, it should satisfy the " good cause" standard of Rule 16(b). Intensive pre-trial case management may reduce the need to amend pleadings at later dates.

2. Discovery Schedules. The Scheduling Order also contains a deadline to complete discovery. The Advisory Committee Notes state that this is where there is a serious problem with attorney delay and procrastination. Defense counsel are somewhat at a disadvantage when it comes to scheduling discovery because their first familiarity with a case may come after it has been filed. To be able to set a realistic discovery deadline by the time a Scheduling Order comes up for hearing probably means that defense counsel must initiate some discovery at about the time the answer is filed. This is particularly true in more complex litigation where numerous persons need to be deposed. Local rules are somewhat helpful in this regard because the scheduling report filed with the clerk requires both sides to

include a statement on the methods of discovery contemplated, a list of witnesses with knowledge of the facts of the lawsuit presently available to the parties, and a statement on whether expert witnesses will be retained by either party and if so, the general area of their testimony and an estimate of the date they will be retained and prepared for deposition. Since the same information must be provided not only by the Plaintiff to the Defendant but by the Defendant to the Plaintiff, defense counsel must know their case sufficiently well to be able to provide this information for the scheduling report. Again, the emphasis is on preparation in the very early stages of a lawsuit.

3. **Modifying the Deadlines in the Scheduling Order.** Although Scheduling Orders may be changed, our Local Rules require a WRITTEN MOTION (this is not required by the Rule itself) and a showing of good cause (this is required under the Rule). What constitutes "good cause" remains to be seen, but the Advisory Committee Notes state that the deadlines may be extended if they cannot be met reasonably despite the diligence of the party seeking the extension. The standard of "manifest injustice" or "substantial hardship" was rejected because a Scheduling Order is entered so early in the litigation. One of the fears was that if extensions could be granted only under such showing, this would encourage counsel to set deadlines as far ahead as possible. This would be contrary to the spirit of the new Rule.

C. **Sanctions.** If there was any doubt that the new Rule is designed to encourage "forceful judicial management" the sanctions of 16(f) should dispel that doubt. Rule 16(f) incorporates portions of Rule 37(b)(2), with which courts and lawyers are already familiar. The sanctions that can be imposed on a non-complying party are: preclusion order, striking a pleading, staying the proceeding, default judgment, contempt, and charging a party, his attorney, or both with expenses (including attorney's fees) caused by non compliance. Sanctions may be sought by the court or party. A Court's imposition of sanctions is reviewable under an "abuse of discretion" standard.

Rule 2.4

PRE-TRIAL PROCEDURE

.1 MANDATORY SCHEDULING CONFERENCE FRCP 16(b):

.11 Within fourteen (14) days after the date provided for answer under FRCP 12(a), but in no event, later than eighty (80) days after the filing of the complaint, whichever comes first, except in those actions exempted by paragraph 2.4.12, counsel for the parties shall confer and file with the Clerk a report containing a proposed schedule for the disposition of the action. The report shall include the following:

.111 An estimate of the time needed to complete discovery including a statement as to the methods of discovery contemplated and a list of witnesses with knowledge of the facts of the lawsuit presently available to the parties.

.112 A statement as to whether expert witnesses will be retained by either party, and if so the general area of their testimony and an estimate of the date they will be retained and prepared for deposition.

.113 A statement of whether either party contemplates adding additional parties or amending pleadings and if so, an estimate of the date by which this can be completed.

.114 A statement as to whether either party contemplates filing any pre-trial motions that may be dispositive of all or part of the litigation.

.115 A statement by counsel as to the estimated length of trial.

.116 A statement by counsel as to the status of settlement and whether an early settlement conference would be useful.

.117 Any other matters which counsel or the parties believe should be brought to the attention of the court that will aid in realistically developing a schedule of deadlines for the disposition of the litigation.

.12 A proposed schedule report as required in paragraph .11 shall be submitted in all civil actions, except where plaintiff is pro se, social security disability review cases, habeas corpus petitions, actions under 42 USC Section 1983 filed by persons confined in penal institutions, actions to collect student loans, civil forfeitures, actions seeking review of administrative actions, or any other class of cases designated by order of the court. Plaintiff's counsel shall have the responsibility for initiating the conference and preparation and submission of the scheduling report. All other counsel shall have a duty to cooperate in good faith to insure that the report is timely filed. The report shall be filed after consultation with counsel for all parties and while it need not be signed by all counsel shall contain a statement that all counsel concur in the report.

.13 If it appears from the report that the case will be ready for trial within one year of the date of filing, a Judge or Magistrate may issue the scheduling order required by FRCP 16(b) without a further conference.

.14 If no report is submitted or the report indicates that the case will not be ready for trial within one year from the date of filing the Magistrate shall forthwith set the matter for a scheduling conference. Said conference may be in person or by telephone at the Magistrate's discretion. If the parties request or in the judgment of the District Judge and Magistrate the case appears to be complex, the above conference may be set before the District Judge to whom the case has been assigned.

.15 After the scheduling conference, but in no event later than one hundred-twenty (120) days after filing of the action, the Judge or Magistrate shall issue the scheduling order required by FRCP 16(b).

.16 The deadlines established by the scheduling order may be extended by the Judge or Magistrate only upon written motion and a showing of good cause.

.17 The Clerk shall notify the parties of the requirement of this rule by handing or mailing a copy of the rule to plaintiff or his representative at the time an action is filed and as to other parties by attaching copies of the rule to the complaint and summons, when served.

.18 All full-time Magistrates are authorized to make all orders necessary to enforce this rule.

.2 FINAL PRE-TRIAL CONFERENCE:

.21 Final Pre-Trial Conference: Upon expiration of the discovery deadline set in accordance with the above, the presiding Judge or Magistrate may order a final pre-trial conference to be held at a convenient time and place with reasonable notice thereof mailed by the Clerk to counsel for all parties by certified mail, return receipt requested.

.22 All parties must be represented at the final pre-trial conference by counsel familiar with the facts, who have full authority to act on behalf of their clients and who will participate in the trial. An attorney who will participate in the trial must attend for each party.

.3 NORTHERN DISTRICT - FINAL PRE-TRIAL CONFERENCE:

.31 Prior to said conference, counsel for all parties shall meet, prepare and sign a proposed order in the form supplied by the Clerk (standard pre-trial order #2) and submit the same to the court at least three (3) days prior to the time of the conference unless otherwise ordered. Plaintiff's counsel shall have the responsibility for the initiation of the meeting to prepare the proposed final pre-trial order. All counsel shall have a duty to see that the purpose of the final pre-trial conference is fulfilled. In the absence of agreement, the meeting of attorneys will be held in the office of counsel for the plaintiff if said office is located in the city wherein the District Court for the division is situated; otherwise, it shall be held in the office of the attorney located in the city nearest the division of the District Court in which the case is pending.

H

.4 SOUTHERN DISTRICT - FINAL PRE-TRIAL CONFERENCE:

.41 A final pre-trial conference shall be held in every case approximately ten (10) to fifteen (15) days before the scheduled trial date. The Clerk shall attach an addendum to each order for final pre-trial conference which shall contain a complete listing of all items to be filed and discussed at the final pre-trial conference.

SOME COMMENTS ON THE HEARSAY RULE AND SELECTED COMMON EXCEPTIONS

By
M. Gene Blackburn
Fort Dodge, Iowa

A. DEFINITION OF HEARSAY

Prior to the adoption by the Iowa Supreme Court of the Iowa Rules of Evidence, the Iowa Court had adopted the definition of hearsay found in Federal Rule of Evidence 801. See Egan v. Egan, 212 N.W.2d 461 (Iowa 1973). See also State v. Fingert, 298 N.W.2d 249 (Iowa 1980). That rule as now established is as follows:

> "(a) A "statement" is (1) an oral or written assertion or (2) non-verbal conduct of a person if it is intended by him as an assertion. Hearsay is a statement other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

The above definition of hearsay does not appear to be substantially different than the more traditional definition which had been previously applied by the Iowa Court: "Hearsay evidence is testimony or written evidence of an assertion made by a declarant not offered as a witness for cross-examination and offered in evidence to show the truth of the matters asserted therein. The credibility of the assertion thus depends on the credibility of the extra-judicial asserter." State v. Grady, 183 N.W.2d 707, 712 (1971); see also Crane v. Cedar Rapids & I.C.Ry.Co., 160 N.W.2d 838 (1968).

B. STATEMENTS WHICH ARE NOT HEARSAY

It seems appropriate to briefly discuss some out of court statements which are not subject to the objection against hearsay and which are not excluded by the definitional statement.

(1) Verbal acts or verbal parts of an act: It is generally held that verbal acts are not hearsay (a) where the conduct is independently material to the issue; (b) where the conduct is equivocal or incomplete and requires the words to explain its total mean; (c) where the words must aid in giving legal significance to the conduct and (d) where the words accompany and are contemporaneous with the conduct. See 6 Wigmore, Evidence, Section 1772. These are sometimes referred to as res gestae statements; statements which are a part of an act. They are not offered testimonially as assertions to evidence the truth of the matter asserted, but as part and parcel of what was done.

(2) Utterances which are part of the issue: If the utterance or assertion and the making of it is the ultimate thing to be proven, rather than a device for proving it, there is little suspicion of its truth, and it is not hearsay. Typical examples are, in a defamation case, the words: "A stated that B is a crook and a shyster." In a case to prove a contract, W testifies that he heard D say, "It's settled, we have a deal." These matters are the ultimate fact to be proven in the case and are not within the rule against hearsay. Another example is in a case involving whether an automobile was driven with the consent of the owner. If W testifies, "I heard owner say to driver, 'Here are the keys.

You may take the car.'" this would prove a fact giving an inference to consent within the issues of the case. See 6 Wigmore, Evidence, §1770.

(3) Admissions: Admissions of a party opponent, sometimes referred to as admissions against interest are not, under modern analysis, either hearsay or a recognized exception to the hearsay rule. See Federal Rule of Evidence 801(d)(2). The reasons for this are that admissions of a party opponent are independently admissible as substantive proof of the statements or the existence of facts which they have a tendency to establish. Thus, where a person who was ticketed for a motor vehicle accident pled guilty to the charge, the plea of guilty was admissible as substantive evidence sufficient to raise an inference of a statutory violation of the laws of the road. Book v. Detema, 256 Iowa 1330, 131 N.W.2d 470 (1964). Such an admission is not conclusive, but is merely a fact to be taken into account with all the other facts and circumstances of the case. Nassif v. Pipkin, 178 N.W.2d 334 (Iowa 1970). An admission is simply a statement which has a quality of inconsistency with a party's present claim or contention in court. Bill v. Farm Bureau, 254 Iowa 1215, 119 N.W.2d 768; In Re Malli's Estate, 260 Iowa 252, 149 N.W.2d 155.

Admissions differ from hearsay statements in that (a) they are offered only against the party, (b) have little relationship to the testimonial assertions of witnesses other than they may be used for the impeachment of a party who takes the

stand as a witness, (c) there is no objective guarantee of trustworthiness in admissions as there are in those statements which qualify as exceptions to the hearsay rule, (d) the party against whom the admission is offered is not required to have first-hand knowledge of the fact, (e) there is no right to object on the basis of lack of confrontation or lack of opportunity to cross-examine the declarant, (f) there is no absolute guarantee of relevancy, (g) the statement of admission might even be an opinion, (h) and there is no need to lay a foundation as in impeachment testimony. All of these comments are brought into focus in the case of Bill v. Farm Bureau Life Ins. Co., 254 Iowa 1215, 119 N.W.2d 768, where the claim was a father-mother beneficiary of a life insurance policy on the death of their son. The question was whether he died of accidental cause or whether he had taken his own life. A doctor came to the plaintiff's residence and asked the father, who was sitting at the kitchen table with his head in his hands. The doctor testified, "I asked him if there was any doubt in his mind that his son committed suicide?" The answer, if permitted, would have been, "He just shook his head." This was permitted as an admission of a party opponent. Consider: the confused nature of the question; there was no objective guarantee of trustworthiness in the answer; the father did not have first-hand knowledge of the cause of his son's death; the evidence is admissible regardless of the question of confrontation; the answer may not even have been relevant (as to

what the father thought, knew or doubted), at best the father's response probably would qualify as a lay opinion, not based upon any observed fact even though admissions in the form of opinion are not ordinarily competent. Cowan v. Allamakee Benefit Soc., 232 Iowa 1387, 8 N.W.2d 433 (1943). The father remained silent, the mere shaking of his head was evidence of an admission.

Silence is an admission: Silence is not ordinarily an admission in a criminal case unless it is an adoptive admission. The admission must be adopted, rather than tacitly agreed to. See State v. Fingert, 298 N.W.2d 249 (Iowa 1980). In fact an accusation heard and comprehended with the opportunity to respond where a normal person would is not admissible in a criminal case, even though it would be admissible in a civil case. State v. Weaver, 57 Iowa 730, 11 N.W. 675 (1882). However, in a civil case a failure to deny a charge to which a normal response would ordinarily be expected is admissible. McGulpin v. Bessmer, 241 Iowa 1119, 43 N.W.2d 121. See also State v. Cotton, 240 Iowa 609 33 N.W.2d 1212, a malpractice case. Dr. Bessmer, the defendant, told plaintiff, "We are going to have to take that foot off right away." When plaintiff went up in the air and accused doctor of making him a cripple, the defendant made no denial of the charge. Thus, a definite statement of fact in connection with a failure to reply thereto is allowed as an admission of the truth of the statement, and where no other explanation is equally consistent with silence. Freidman v. Forest City, 239 Iowa 112, 30 N.W.2d 752 (1948); Whetstine v. Moravec, 228 Iowa 352, 291 N.W. 425.

Admissions by third parties: Statements and declarations of an agent not authorized by the principal, or not within the scope of employment, are not admissible against the principal to establish liability, but are binding as against the agent. Cooley v. Killingsworth, 209 Iowa 646, 228 N.W. 880 (1930); Glass v. Hutchinson Ice Cream Co., 214 Iowa 835, 243 N.W. 352 (1932). Assume, for example, an employee who has an accident while driving his employer's truck. Assume he admits his negligence. The admission may be admissible against him but not against the owner because it is beyond the scope of authority. An assignee of a claim or chose in action is bound by the admissions made by the assignor before assignment. Lake v. Moots, 215 Iowa 126.

Miscellaneous rules regarding admissions: The record of testimony of a party at a formal trial is admissible on retrial as an admission where the party was in the courtroom and did not testify even though no foundation was laid. Benson v. Custer, 236 Iowa 345, 17 N.W.2d 889 (1945). Admissions connected with offers of compromise settlement before controversy arises are admissible but offers made without respect to legal liability are not admissible. There is a difference between attempting to buy one's peace as a result of a disputed claim and an admission of a party opponent. Langdon v. Ahrends, 166 Iowa 636, 147 N.W. 940 (1914). However, there may be a question of relevancy connected with such matters. See Nehring v. Smith, 243 Iowa 225, 49 N.W.2d 831.

Admissions as fact or opinion: A doctor's admissions in the form of an opinion, "It must be those damn sutures again," on a subject on which he was competent to testify were not inadmissible simply because they were opinions. Shepherd v. McGinnis, 257 Iowa 35, 131 N.W.2d 475 (1964).

C. SELECTED EXCEPTIONS TO THE HEARSAY RULE

In general, at common law, certain recognized out of court assertions were permitted in evidence even though they were of a hearsay nature because they have a certain quality of trustworthiness which obviates the usual and traditional methods of assuring truthfulness, e.g., the right and opportunity to cross-examine, the oath, and the first-hand knowledge rule. Iowa Rules of Evidence 803 and 804, patterned after Federal Rules of Evidence 803 and 804, are generally an attempt to codify, clarify, and restate the common law rules of evidence with some minor changes. The attempt will be made to point out those changes from the traditional rules as they have been known to the Iowa practitioner.

Iowa Rule 803 identifies twenty-four incidents in which the evidence is not excluded by the hearsay rule, even though the declarant is available as a witness. Rule 804 identifies five incidents where the evidence is not excluded by the hearsay rule upon a showing that the declarant is unavailable as a witness. This paper will attempt to discuss selected exceptions within Rule

803 and 804 and compare them with prior decisions of the Iowa Court. Because of time constraints, both in preparation and presentation, it is virtually impossible to discuss all the exceptions.

IOWA RULE OF EVIDENCE, SECTION 803(2) - EXCITED UTTERANCE.

> "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event of conditions."

COMMENT: Prior to the adoption of the Iowa Rules of Evidence, the Iowa Supreme Court adopted, as part of the Iowa law, Federal Rule of Evidence 803(2) "as conforming to the meaning given to the exception by the Iowa Courts." State v. Ogilive, 310 N.W.2d 192 (Iowa 1981). See Iowa Code Annotated Rules of Evidence 154.

In prior practice often times the reference was made to "res gestae" to describe what in effect was an excited utterance. The Iowa Court in State v. Ogilive, criticized the use of that terminology and stated that "in its use to identify a category of hearsay exceptions, the 'res gestae' term is an inexact anachronism." Thus, the term "res gestae" to describe a contemporaneous excited utterance is not now in favor and should be eliminated as such a descriptive term. The term "res gestae" statements are generally statements which are a part of an act and arise as merely a verbal part of an act. See, e.g., 5 Wigmore,

Evidence, §1772. See discussion of res gestae statements, supra. Likewise, statements of operative fact or utterances which are part of the issue are not hearsay.

The common law foundation requirements for excited utterances were:

> (1) There must be an occasion startling enough to produce the nervous excitement and render the utterance spontaneous and unreflecting;
>
> (2) The statement must be made before there was time to contrive and misrepresent;
>
> (3) The utterance must relate to the circumstances of the event preceding it;
>
> (4) The declarant must have had an opportunity to observe the matter personally.
>
> 6 Wigmore, Evidence, Chadbourn Revision §1750

An Iowa case which pre-dated the adoption of the Iowa Rules of Evidence holds that the declaration must relate to and be explanatory of the principle occurence; there must be sponteneity, and there must be a sufficiently close connection in point of time to exclude any presumption of fabrication. See Bass v. Muenchow, 146 N.W.2d 93 (Iowa 1966) where three seconds before an automobile accident, the declarant exclaimed, "What is that fool trying to do?"

The Iowa Court had also held, prior to the adoption of the current rules, that although the rules require sponteneity, a statement made in response to a question does not render the statement inadmissible if they are made under the excitement of the

principal transaction. See State v. Redding, 169 N.W.2d 788 (Iowa 1969).

The question also arises as to whether the exclamation can be in the form of an opinion. In this regard, the proper analysis seems to be whether or not the incident which is the subject of the assertion is sufficiently startling to disturb the declarant's repose. The test is, is it spontaneous, excited or impulsive, or is it the product of reflection and deliberation? See 4 Weinstein & Berger, Weinstein's Evidence, Section 803(2)[01].

The quality of the statement may enter into the question of admissibility. For example, some statements in the form of admissions by a driver agent may not be competent as an admission, may not be admissible against the owner if the admission is not within the scope of the authority of the driver/agent/servant, etc. See, e.g., Cooley v. Killingsworth, 209 Iowa 646, 228 N.W. 880 (1930); Glass v. Hutchinson Ice Cream Co., 214 Iowa 835, 243 N.W. 352 (1932). However, an excited utterance not in the form of an admission may be admissible against the owner. See Hackman v. Beckwith, 245 Iowa 791, 64 N.W.2d 275 (1954). It is suggested that these cases would not be affected by the adoption of Iowa Rule of Evidence 803(2).

IOWA RULE OF EVIDENCE, SECTION 803(3) - THEN EXISTING MENTAL, EMOTIONAL, OR PHYSICAL CONDITION

> "A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's Will."

The leading case in this area is the classic Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285, 12 S.Ct. 909 (1892), where the declarant, one Walters, wrote a letter to his girl friend and parents in Iowa from Kansas, that he was planning to leave Wichita. The fighting issue was whether a body found at a frontier camp site was Hillmon, the insured, or Walters, the declarant. The United State Supreme Court held that the statement by Walters of his present intention to leave Wichita was sufficient to lay a foundation for the introduction of other evidence that he probably did leave and that the body found was Walters and not Hillmon. The Iowa Court, shortly thereafter followed the Hillmon rule in a case where the issue was the death damages to a woman who was killed by defendant's train. The decedent, who was also the declarant, was trained as a nurse but had never practiced. However, she had made statements during her lifetime that "she would take employment, but her husbsand might be opposed to it;" "she might start nursing again if her health improved."

On another occasion, she said, "I would like to take the case." The Iowa Court held that the statements were within the present intention exception. Nolte v. C.R.I.&P. Ry. Co., 165 Iowa 725, 147 N.W. 192 (1914). One unimportant difference between the Hillmon case and Nolte case lies in this: in Hillmon, there was corroborating evidence tending to show that the declarant's present intention was carried out. In Nolte, there was no evidence that the decedent's intentions to return to nursing were carried out. She died in the interim.

Rule 803(3) goes beyond statements of present intention as discussed in the Hillmon and Nolte cases. It also encompasses the declarant's then existing emotion, sensation, or physical condition. The justification for this exception is the trustworthy nature of the statement "the factor of contemporaneousness provides some assurance against fabrication." See 4 Weinstein and Berger, Weinsteins' Evidence 803(3)[01] p. 803-92.

It is to be noted that Rule 803(3) also encompasses the "then existing mental or emotional condition." Some observations should be made. If the declarant himself is called to the stand to testify about his state of mind at a particular time, the hearsay rule is not involved. See 4 Weinstein and Berger, Weinstein's Evidence, Section 803(3)[02] p. 803-94. It is also observed that a state of mind "can be proved circumstantially by statements or conduct which are not hearsay because they are not intended to assert the truth of the fact being proved." In this case one should be reminded of the basic definition of hearsay and

ask: (1) Whether or not it is a statement, and (2) if it is a statement, for what is it offered? If it is not a statement or a testimonial assertion, no hearsay problem is involved at all. The classic example is that where the sanity of a testator is in issue. Proof of an irrational statement by him such as "I am Napolean" does not entail a hearsay use because the statement is not used to prove the truth of the asserted fact. See Weinstein and Berger, Section 803(3)[02].

IOWA RULE OF EVIDENCE, SECTION 803(4) - STATEMENTS FOR THE PURPOSE OF MEDICAL DIAGNOSIS OR TREATMENT

Iowa Rule of Evidence 803(4) states:

> "Statements made for the purpose of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

This provision appears to be broader than the previous Iowa common law rule. It has generally been the rule that a statement made to a physician by a person seeking treatment is an exception to the hearsay rule because where the person is seeking treatment for illness or pain, there would be no reason to falsify the statement but would be in aid of treatment. This is true if the statement made is germane to the treatment. This includes statements as to history or as to how the injury occurred. Thus, if the patient seeks medical relief from a doctor and the history is relevant and germane to treatment, the patient's declaration as

to the manner in which the event occurred falls within the exception of the hearsay rule. However, it has also been the rule that if the patient merely seeks out the doctor for the purpose of diagnosis and prognosis as in preparation for trial or to prepare the doctor as a witness and the doctor is not engaged as a treating doctor, the declarations or assertions as to history are considered hearsay and not within the exception. See Pierce v. Heusinkveld, 234 Iowa 1348, 14 N.W.2d 275 (1944) and DeVore v. Schaffer, 245 Iowa 1017, 65 N.W.2d 553 (1954).

Thus, it must be generally assumed that the Iowa Court may broaden the scope of the rule to include within the exception statements made for purposes of medical diagnosis as well as treatment. Weinstein notes a split of authority on this issue, but concludes that:

> "Rule 803(4) rejects the distinction between retreating and nontreating physicians because, as a practical matter, the advisory committee found that jurors do not distinguish between facts admitted for their truth and facts revealed as a basis for the expert's opinion . . . The test for statements made for purposes of medical diagnosis under rule 803(4) is the same as that in Rule 703 -- is this particular fact one that an expert in this particular field would be justified in relying upon in rendering his opinion?"
>
> Weinstein and Berger, Weinstein's Evidence §804(4)[01]

One might question whether this analysis begs the first question relating to exceptions to the rule against hearsay, "Does the declaration have a quality of trustworthiness about it to

dispel the need for cross-examination of the declarant?" On the other hand, if the declarant is the injured party the opportunity to test the trustworthiness of the statement is available through discovery and cross-examination.

A fairly recent case, interpreting Iowa law prior to adoption of the Rules of Evidence touches upon, but does not appear to be a clear decision on the issue. In In Re Marriage of Reschly, 334 N.W.2d 720 (Iowa 1983) a custody case where the petitioner retained a psychiatrist over respondent and intervenor grandparents objections, the Iowa Court held a report inadmissible. The opinion is not entirely clear as to the reason other than petitioner did not make it clear as to what exception was relied upon. The Court noted in a footnote that the report may have been admissible under the Public Records exception, Rule 803(8)(c), but that "reports of investigations made pursuant to" authority granted by law means "statutory law."

IOWA RULE OF EVIDENCE, SECTION 803(5) - RECORDED RECOLLECTION

> "A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party."

Rule 803(5) attempts to deal with the hearsay problems associated with using a memorandum to refresh recollection. The

Iowa Rules Advisory Committee suggests that the rule in its present form eliminates any problem relating to blurring the distinctions between the concepts of present recollection revived and past recollection recorded.

Present recollection revived and past recollection recorded distinguished: A witness on the stand may ordinarily refresh his present recollection from memoranda, writings, or any other manner. See, however, the discussion of U. S. Home v. Yates, infra. The concept presupposes that the witness has always had a present recollection of the events and facts to which he testifies. However, his or her present memory (which always existed) is merely refreshed by reference to the document or memorandum. Common examples are medical doctors who testify from clinical notes, office records or report letters, or the highway trooper who testifies from his personal notes made at the scene. It is the credibility of the witness that is to be tested. The notes are not offered as documentary exhibits in aid of the testimony of the witness but may be used by the opponent for cross-examination to challenge the credibility of the witness, e.g., to show that there is more in the report than was testified to that would affect the fact finder's interpretation of the evidence. The federal rules and Iowa Rule of Evidence 612 provide for using writings to refresh memory, with the limitations, that if a witness uses such a memorandum, either before testifying or while testifying, the adverse party is entitled to have the writing

produced, and to cross-examine the witness from it. In addition, the rule provides that the court may in-camera excise parts of the writing which are not relevant. Iowa Rule of Evidence 612; Federal Rule of Evidence 612.

Prior to the adoption of the Iowa Rules the Iowa Court in U. S. Home v. Yates, 174 N.W.2d 402 (1970) held that the witness may not refresh his present recollection from a copy and that the attempt to do so was subject to the best evidence objection. This holding may be subject to criticism if it is kept in mind that the person who testifies has always had a present recollection of the event testified to; that he merely refreshes his recollection by reference to the memorandum or by reference to any other source in existence, e.g., a scent, a breeze, a picture on the wall, etc.

On the other hand, the concept of past recollection recorded presupposes that the witness does not have a present recollection of the contents of a document to be introduced.

> "It often happened, however, that, although examining the writing did not bring the facts recorded back to the witness' memory, he was able to recognize the writing as one prepared by him and was willing to testify on the basis of the writing that the facts recited in it were true."
>
> McCormick on Evidence, 2nd Ed. 712

For a discussion of the two concepts, see 4 Weinstein and Berger, Weinstein's Evidence, 803(5)[01], p. 803-136 and McCormick, The Law of Evidence, 2nd Ed., 15. Judge Weinstein concludes that Rule 803(5) acknowledges that a memorandum of

recorded recollection is hearsay, but eligible for admission if certain conditions are met. Weinstein, id.

The important thing to keep in mind is that under the prior doctrine, present memory refreshed, it is the testimony of the witness that is offered, not the writing. In the latter, past recollection recorded, it is the writing which speaks. McCormick, the Law of Evidence, 2nd Ed., 15.

The foundation is enumerated from the rule:

a) The witness once had knowledge;

b) The witness has no present recollection to enable him to testify full and accurately;

c) The matters contained were known by the witness when they were fresh in his memory.

Thus, the issue is more likely to be one of foundation or authentication, rather than hearsay.

IOWA RULE OF EVIDENCE, SECTION 803(6) - RECORDS OF A REGULARLY CONDUCTED ACTIVITY

> "A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and the regular practice of that business activity was to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit."

This topic was formerly covered by an Iowa statutory provision found in Section 622.28, The Code. It was popularly known as "entries made in the ordinary course of business". Under the old statute sometimes the issue arose as to what was a "business" within the meaning of the exception. In one case prior to the adoption of the new rules the Iowa Court had no problem with that question, however, in holding that the electronic recordings of a police radio transmission and reception was a record kept within the meaning of the statute. State v. Anderson, 159 N.W.2d 809 (Iowa 1968).

It should be noted that the exception is expanded beyond records kept in the ordinary course of business to memoranda(s), report(s), record or data compilation kept in the course of a regularly conducted business activity.

The question is more often than not one of authentication rather than showing that the proffered evidence is within the exception. The advisory committee points out that the threshhold question to be determined by the court is whether the "business record" is sufficiently trustworthy to come within the exception. Then the question is one of authentication and the following proof is necessary:

(1) That it is a business record;

(2) That it is made at or near the time of an act;

(3) That it was made by, or from information transmitted by, a person with knowledge;

(4) That it is kept in the course of a regularly conducted business activity;

(5) That it was a regular practice of that business activity to make such a business record.

The foundation requirements are not that much different from those under the former rule. See, e.g., State v. Fisher, 178 N.W.2d 384 (Iowa 1970). Prior to the adoption of the Iowa Rules the Iowa Court indicated that the trial court has wide discretion, particularly on the issue of whether or not the entry was made at or near (about) the time of an act in question. See Shinrone, Inc. v. Tasco, Inc., 283 N.W.2d 280, 287 (Iowa 1979). See also Prestype, Inc. v. Carr, 248 N.W.2d 111, 117 (Iowa 1976); Graen's Mens Wear v. Stille-Pierce Agency, 329 N.W.2d 295, 298 (Iowa 1983) (interpreting Section 622.28, The Code), but Cf. State v. Fingert, 298 N.W.2d 249 (Iowa 1980).

D. DOUBLE HEARSAY

At this point it becomes necessary to briefly discuss hearsay statements contained within hearsay statements. A typical example is a physician or hospital report which includes the report of a roetgenologist, psychiatrist or clinical psychologist, upon which perhaps a medical doctor bases his opinion. Rule 805 attempts to handle this problem by suggesting that hearsay within hearsay is not excluded under the hearsay rule if each part of the combined statement conforms with the exception to the hearsay rule provided within the rules. The rule is as follows:

"Rule 805. Hearsay within hearsay.

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules."

Thus, if the psychiatrist's report satisfies the exception relating to the then existing mental, emotional or physical condition of the declarant, or if it fits within the business records exception or some other exception to the hearsay rule, it would be independently admissible and would not destroy the admissibility of the report itself. However, the foundation requirements of the report within a report cannot be taken for granted. See, e.g., Madison v. Colby, 348 N.W.2d 202 (Iowa 1984) where a report by one doctor, offered through the testimony of another, was held inadmissible under former §622.28 for lack of foundation. The foundation for each exception must be shown.

IOWA RULE OF EVIDENCE, SECTION 803(8) - PUBLIC RECORDS AND REPORTS

"Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (c) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness."

COMMENT: OFFICIAL WRITTEN STATEMENTS. Official written statements of public officials were formerly governed by Iowa Code,

Section 622.43. The theory behind the exception and its trustworthy character is based upon a presumption that a public official will do his duty and will not falsify the record. The best logistical way of introducing the record is by a certified copy with the proper certificate. In addition, the matter should qualify as a statement based upon the first-hand knowledge of the declarant, and an opinion contained in the public document is suspect. Thus, there is the question of hearsay, the exception, authentication and whether or not the official record is factual or the mere opinion of the declarant.

Prior to the adoption of the Iowa Rules of Evidence, the question was raised as to what is a public record. In Linder v. Eckard, 261 Iowa 216, 152 N.W.2d 833 (1967) the Court held that not every document which comes into the possession of a public official is a public record. It noted that at common law a public record was one that was required to be kept; but it expanded the definition to one also that is "convenient and appropriate to be preserved as evidence of public action."

As noted in the discussion above, the Iowa Court in a footnote in In Re Marriage of Reschly, 334 N.W.2d 720, 723 (Iowa 1983), the reference in Federal Rule 803(8)(c) to "investigations[s] made pursuant to authority granted by law" refers to statutory law.

The rule excludes several items which are not within [this] exception to the hearsay rule.

Investigative reports filed by investigating officers pursuant to §321.271, The Code are admissible. Grocers Wholesale Co-op, Inc. v. Nussberger Trucking Co., 192 N.W.2d 753 (Iowa 1971).

Section 68A.7, The Code identifies several types of public records which are confidential, unless otherwise ordered by the Court, not necessarily because of their hearsay quality.

The Consumer Price Index prepared by the U. S. Department of Labor's Bureau of Labor Statistics was held admissible under the common law government records exception to the hearsay rule. Hunt v. State, 252 N.W.2d 715 (Iowa 1977).

However, the Iowa Court has also held that a government report which consisted of a series of unverified complaints from consumers did not qualify under the government records exception to the hearsay rule because it was not "otherwise trustworthy." Henkle v. R. & S. Bottling Co., 323 N.W.2d 185 (Iowa).

IOWA RULES OF EVIDENCE, CHAPTER 804 - UNAVAILABILITY AS A WITNESS.

Unavailability as a witness and former testimony . . .

Exceptions under Ch. 804 of the Iowa Rules which includes prior testimony require a showing that the declarant is unavailable. "Unavailable" is defined as:

> "(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant --
>
> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of his statement; or

(4) is unable to be present or to testify at the trial or hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the trial or hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

The above definition of unavailability is somewhat more restrictive than previous Iowa practice, at least with respect to shorthand notes on a retrial of the same case. In Lucia v. Utterback, 197 Iowa 1181, 198 N.W. 626 (1924) the Court held that the proponent need only show that the declarant was not present in court. See also Rubin Bros. Butter and Egg Co. v. Larson, 247 Iowa 541, 74 N.W.2d 574 (1956).

State v. Holderness, 191 N.W.2d 642 (Iowa 1971) permitted the transcript of previous testimony in a retrial of the same case pursuant to former §622.97 upon an apparent showing of physical inability to attend.

In applying the requirement of a showing of unavailability in a case involving a declaration against interest, the Iowa Court in Weber v. C.R.I.P.Ry.Co., 175 Iowa 358, 151 N.W. 852

(1915) held that the requirement was met by a showing that the declarant was an inmate of a mental health institution.

However, former §622.97 restricted former testimony to retrials of the same case. See State v. Washington, 160 N.W.2d 337 (Iowa 1968). The new Rule expands on that use:

RULE 804(b)(1)

> "(1) Former testimony. Testimony given as a witness at another trial or hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."

IOWA RULES OF EVIDENCE, RULE 804(b)(2) - STATEMENT UNDER BELIEF OF IMPENDING DEATH

> "A statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death."

COMMENT: Dying declarations (declarant unavailable): The foundation for the introduction of a dying declaration (or a statement under belief of impending death) as an exception to the hearsay rule is that the deceased was fully conscious of the fact of impending death at the time of the assertion and that there was no hope of recovery. The testimonial Iowa rule has been that the decedent must have actual belief of impending death. If his words indicate that he has hope of recovery, the exception would not apply. State v. Brooks, 192 Iowa 1107, 186 N.W. 46.

The assertion is generally received as a statement of fact only. It cannot be admitted if in the form of an opinion. See, e.g., State v. Wright, 112 Iowa 436, 84 N.W. 541 (1900); State v. Sale, 119 Iowa 1, 92 N.W. 680, 95 N.W. 193 (1902). Wigmore criticizes this view. See Wigmore, Section 1447.

Traditionally, the declaration made under belief of impending death has been confined to criminal homicide cases. However, Federal Rule of Evidence 804(b)(2) applies it "in a prosecution for homicide" or "in a civil action or proceeding, a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death." (Emphasis added.) The Iowa Rules Advisory Committee and the Court eliminated any limitations concerning this issue by striking the first sentence of the Federal rule.

IOWA RULES OF EVIDENCE, RULE 804(b)(3) - STATEMENT AGAINST INTEREST

> "A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."

COMMENT: Declaration against propriety or pecuniary interest (declarant unavailable): A statement against the proprietary or pecuniary interest of the declarant is presumed to

have such an aura of trustworthiness about it that it qualifies as a recognized exception to the rule against hearsay statements. The person simply wouldn't have made such an untrue statement knowing that his pecuniary interest was threatened. Rule 804(b)(3) requires the witness to be unavailable (for definition of unavailability, see discussion above) and includes statements which would expose the declarant to criminal as well as civil liability. Thus, the element of penal interest is included in the rule. The Iowa Court has not previously expressly held that penal interest would suffice, but has taken a back door approach to the same problem. In Iowa, there is a long standing statute which states that civil remedy is not merged in crime. Sections 611.21, 611.22, The Code. Thus, a person who is criminally liable for an offense is also subject to civil sanctions arising from the commission of act and the "penal" interest applied somewhat by indirection, Weber v. C.R.I.P.Ry.Co., 175 Iowa 358, 151 N.W. 852 (1915).

IOWA RULES OF EVIDENCE, RULE 804(b)(4) - STATEMENT OF PERSONAL OR FAMILY HISTORY

> "(A) A statement concerning the declarant's own birth, adoption, marriage, divorce, dissolution, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared."

COMMENT: Statements of pedigree: (Statements of personal or family history.) As a general rule statements of pedigree or family history must be made before the controversy arose or "ante litem mortam." See 5 Wigmore, Evidence §1483. This requirement seems to be eliminated. The declarant who made the assertion must be unavailable, which has been suggested by dictum within this context to mean, in addition to death, that "his insanity or absence from the jurisdiction would be sufficient." See In Re Frey, 207 Iowa 1129, 1233, 224 N.W. 597 (1929). The Iowa Court has permitted statements of family relationships when found in ancient documents such as the family bible. In Sinkora v. Walsh, 239 Iowa 1392, 35 N.W.2d 40 (1948), a passport of a parent held by an ancestor was admitted as an ancient document bearing on the issue of family relationship.

The question sometimes arises whether the declarant must be a blood member of the person or family whose pedigree is in issue. This was the traditional rule. Iowa Rule 804(b)(4)(B) permits the statement which is attributable to a person who is related by blood, adoption, or marriage or who "was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared." This appears to represent a considerable extension and liberalization of the common law rule.

CROSS-EXAMINATION OF CHIROPRACTORS

Lee Turner
Turner and Boisseau
Chartered
Great Bend, Kansas

I. Chiropractic

A. Manipulation of joints, tissues, muscles, and tendons supposedly for either curing or therapeutic effects.

1. Palmer school - multitudinous diseases cured by manipulation when cannot be cured by medicine.

2. Eclectic - chiropractors now contend they are trained in many different theories of chiropractic including anatomy. Also claim they study from medical textbooks including anatomy, radiology and orthopedics.

B. Chiropractic can be dangerous

1. Fractures of the vertebrae with resulting paralysis

2. Occlusion of carotid artery resulting in a stroke

II. Limitations Imposed by Statute

A. Treatment of humans prohibited = examples

1. Chicken pox, mumps, measles

2. Obstetrical, delivery of babies

a. midwives can be licensed to deliver babies, not chiropractors

3. Sutures, patient cuts a finger then needs a stitch or two - chiropractors can't do

4. Warts - can't remove

5. Shots - nurses can give, chiropractors cannot

B. Prescription drugs - prohibited

1. Vitamin therapy - chiropractors prescribe routinely. Anything prescribed by a chiropractor can be readily purchased at the local grocery or health food store cheaper.

C. Hospital - medical

1. Named principal hospitals in an area - Ask the chiropractor on each if he is permitted to admit patients on his own orders in any such hospital.

2. Compel admission - no medical hospital will permit a chiropractor to admit patients.

III. Prohibited practice medicine in any form.

A. Science

1. Chiropractor can read about science such as nuclear physics and can even talk about it but has no training in the field and hence cannot comprehend or understand in the manner of an atomic physicist.

B. Medical tests

1. Lawyers can ask clients to submit to urinalysis, blood pressure, lungs, examination, eye, ear, nose and throat, reflexes, but the tests are meaningless if the individual has not been trained in medicine and to correlate the various clinical findings with objective findings.

2. Chiropractors doing these tests may mislead a patient into believing he has received a clear bill of health.

(In Re James Beno, Mich. Ct. of Appeals - reported AMA News 22 April 1983)

C. Review muscle and nerve patterns, ask the chiropractor to delineate various nerves and the functions and areas they entervate.

1. Cranial nerves

   a. Smell loss - 1
   b. Eyes do not focus - 2
   c. Movement limited and eyelid squint and droop - 3
   d. Diplopia - down - 4
   e. Paralysis one side - 7
   f. Hearing loss - 8

2. Cervical nerves

3. Pattern of injury to disc

   a. Neurological impairment
   b. Anatomy - function of disc
   c. Nerve pathway
   d. Atrophy
   e. X-ray changes - several months

IV. Chiropractic - requirements of:

A. History

1. Cause and effect - accurate

   a. Litigation - testify - must have all facts

2. Review chiropractic history - demand see records before jury

   a. Review history chiropractor doesn't have

B. Subjective findings

C. Objective findings

D. Radiology

1. Trauma to bones - length of time, x-ray changes appear = min. 6 months to 1 year absent fracture.

2. Developmental changes

   a. Scoliosis
   b. Pars defects

E. Correlation = all facts to be valid

V. Specific case

VI. Thermograms

A. What is it? Picture of body temperature patterns shown in different colors which represent gradations of temperatures. It is not a picture of pain.

1. Definitive thermograms + cost between $35,000 and $50,000. Camera takes infrared type heat sensitive pictures and electonically forms color patterns.

a. Infrared telethermography - requires carefully controlled environment as to vibrations, room temperatures, etc.

b. Contact thermography or liquid crystal thermography - plyable sheets of containing liquid crystals is applied to various parts of the body and color photographs taken of this demonstrating temperature patterns.

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B. Premise:

Nerve root irritation of the spine or extremities can alter both the sensory and motor aspects. More essentially alter the sympathetic system that is associated with each nerve. If the sympathetic system which provides nerve energy to blood vessels is altered, a vessel may be dilated and cause increased heat, may be constricted and cause coldness in the areas the nerve supplies. Compare one extremity with the other or one area with the other and determine which side is normal and which side is abnormal.

1. Pain - alleged sensation or mental conclusion. Thermograms are a picture of body temperature only.

a. One can have nerve root involvement and no pain

2. Old wear and tear changes can cause temperature variation but be unrelated to nerve involvement or trauma or, indeed, pain.

a. Previous surgery can alter tissue response as can the following:

(1) Soft tissue injury with scarring

(2) Arthritis - multiple pregnancies affecting the vessles of the leg

(3) Raynaud's disease

(4) Arteriosclerosis

(5) Smoking affects the sympathetic and parasympathetic system

(6) Previous EMG's alter the test

(7) Crossing the legs for a period of time can produce a false result

Summary: Previous injuries, surgery, disease, mechanical problems involving blood vessels or nerves, mental conditions, and environmental conditions can all affect the validity of the thermogram.

C. Error - 1 degree difference in temperature can result in a different color.

D. Tests that must correlate with other clinical findings.

1. Clinical picture is derived from diagnostic process accumulating medical evidence from history, past history, physical findings, x-ray findings that form a known and valid diagnostic pattern. For example a thermogram showing coldness of the great toe is not diagnostic of a herniated disc between L-4 and L-5 when the man has no back or leg pain and gives a history of ingrown toenail surgery. Thermographic findings must be correlated with EMG, myelograms, CT scan, arteriogram, along with clinical findings and history.

E. Positive thermograms are non-specific as to cause.

1. A spur from arthritic changes of the facet impinging on a nerve causing temperature changes?

2. Leakage of material from an intervertebral disc of long standing duration cause temperature change.

F. Thermograms v. Cat Scan -

1. Thermograms only a picture of heat changes.

2. Cat scan provides an effective 3 dimensional picture of the actual anatomy.

G. Interpretation of thermograms and correlation with other clinical and objective findings must be based upon knowledge, training and experience in the medical process. Any individual can be trained to do the actual mechanical process of obtaining a thermogram. Chiropractors are not trained to medically interpret or medically correlate this information and, indeed, by law are prohibited from so doing.

VII. Review chiropractors membership in or subscriptions to organizations and literature involving various chiropractor practice building tactics.

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VIII. Effective cross-examination of the chiropractor discloses the extreme limitations of chiropractic, the hazards attended thereto, and the total lack of basis of chiropractic testimony as opposed to expert medical testimony in the specialized fields.

ACCIDENT RECONSTRUCTION USING DEMONSTRATIVE AIDS IN THE COURTROOM

By
Rickey L. Stansifer, P.E.
Systems Engineering Associates
Columbus, Ohio

1. Accident Scene Photographs

2. Accident Scene Drawings

3. Accident Scene Models

4. Slide Sequences with Drawings and Models

5. Mechanical Detail Models

K

AMENDMENTS TO RULES OF CIVIL PROCEDURE DEFENSE ALERT

Alan E. Fredergill
Eidsmoe, Heidman, Redmond, Fredergill, Patterson & Schatz
200 Home Federal Building
Sioux City, Iowa

I. SCOPE OF REVIEW.

A. No published Review for over five years by Defense Counsel.

B. Chronological order from 1980 on.

II. 1980.

A. Significant Amendments and additions.

1. I.R.C.P. 42.1-42.20--New Rules on Class Actions.

2. I.R.C.P. 45-47 stricken (former Class Action Rules).

3. I.R.C.P. 84--copy fees--stricken--copy fees of ten cents per hundred words "to be the property of the attorney filing or serving the copy".

4. I.R.C.P. 122--Scope of Discovery--amended to add 122(e)--the Affidavit that you have conferred in good faith with opposing counsel to resolve your discovery dispute before filing your motion to compel.

5. I.R.C.P. 126--Interrogatories--amended to:

a. Require you to leave space for opponent's answers on your Interrogatories;

b. Limited Interrogatories to 30;

c. Required to file only a Notice of Serving Interrogatories rather than the complete set with the clerk of court.

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6. I.R.C.P. 152 (relating to deposition transcripts)--amended to delete the requirement that depositions be filed with the court--still "may" be filed, but "filing is not required unless requested by the court".

7. I.R.C.P. 187--Impaneling Jury--eight person jury--peremptory challenges eliminated--strikes increased from two to four.

8. I.R.C.P. 189--Alternate Jurors--stricken--in it's stead, new Rule permits decision by as few as six if up to two jurors are incapacitated.

9. I.R.C.P. 203--Rendering verdict and answering Interrogatories--five-sixth verdict is now seven-eighths verdict after six hours of deliberation.

10. I.R.C.P. 237(c)--Motion and proceedings on Summary Judgments--amended to provide that Rule 179(b) (enlargement or amendment of Courts Findings and Conclusions) applies if Summary Judgment is rendered upon the entire case.

11. I.R.C.P. 331-333--New Rules adopted re: proceedings for judicial review of agency action.

III. 1981.

A. No significant changes.

IV. 1982.

A. I.R.C.P. 82(g)--Proof of service--amended to require disclosure of the name and address of persons served.

B. I.R.C.P. 136(b)(10)--Pretrial conference--amended to permit the imposition of a settlement deadline.

C. I.R.C.P. 138.1--New Rule--Sanctions for late settlement--court "may" impose monetary or other appropriate sanctions for violating settlement deadline "without prior approval of the court".

D. I.R.C.P. 187(a)--Impaneling Jury--amended Rules on means of selecting entire jury panel to allow for computer selection by Clerk.

E. I.R.C.P. 215--Voluntary dismissal--amended to co-ordinate with 138.1 on imposition of sanctions for late settlements.

F. I.R.C.P. 371--Vetoed by Legislature--Court's attempt to specify 8 1/2 by 11 inch paper.

V. 1983.

A. I.R.C.P. 82(f)--Notice of orders or judgments--amended to provide that a Clerk's failure to give the required notice strips only the district court of power to relieve a party from the consequences of failing to meet an applicable deadline because of the failure.

B. I.R.C.P. 117--Motion days--amended to allow telephonic hearings on motions.

C. I.R.C.P. 126(b)--Scope of Interrogatories--enlarged to permit inquiry upon "the specific dollar amount of money damages claimed".

D. I.R.C.P. 136(b)--Pretrial conference--amended to permit telephonic conferences.

E. I.R.C.P. 139 and 143--Stricken:

1. Old Rule 139--Restriction on orders--the court shall not, under any pretrial procedure or other rules, require a party to list or name the witnesses he expects to call to testify at the trial.

2. Old Rule 143--Witness lists--except as provided in Rule 122, a party shall not be required to list the witnesses expected to be called at trial.

F. 1983 also saw a change in the manner in which the Supreme Court Rules are promulgated. The old way was specified in the now repealed Code Sections 684.18 and 684.19. Those Sections provided that the Supreme Court was to submit a report to the Legislature within 20 days after the commencement of a session. If the Rules were not changed by the Legislature they became law on July first

following their submission to the Legislature. New Iowa Code Section 602.4202 provides that the Supreme Court merely submits such new rules to various committee chairs and ranking members of House and Senate along with the Legislative Counsel within 20 days of the issuance of the rules or forms. If not modified or delayed by the Legislature, the rules become effective within 60 days after issuance, or upon such later date specified by the Supreme Court. To date the court has not availed itself of the 60 day provision but has provided, as in the past, that such rules would become effective upon July first of the year of their submission to the Legislature.

VI. 1984.

A. I.R.C.P. 91--Contracts--amended to delete the requirement of setting forth the contract in full.

B. I.R.C.P. 106--New Rule--amendments to conform to the evidence. "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice that party in maintaining the action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence."

1. Old Rule 106--Variance; failure of proof. "No variance between pleading and proof shall be deemed material unless it is shown to have mislead the opposite party to his prejudice in maintaining his cause of action or defense. But where an allegation or defense is unproved in its general meaning, this shall not be held a mere variance but a failure of proof.

C. I.R.C.P. 126--Interrogatories, 127--Request for Admission, and 130--procedure on requests for production--all amended to allow the responding party 60 days, instead of the old 45, to respond to the discovery request when it is served with, or more than 30 days after, the service of the Original Notice.

D. I.R.C.P. 181--Trial Certificate and response--amended to state whether or not a jury has been demanded, rather than the old paragraph requesting trial by jury or by the court.

E. I.R.C.P. 181.4--New Rule--Fee for late settlement--if settled later than two full working days prior to trial, a fee of $500 shall be assessed as costs.

1. Solutions:

a. Have the case continued;

b. Upon information and belief, some Chief Judges reportedly have instructed their district judges to "ignore" the rule.

F. I.R.C.P. 225--New Rule--on claim and counterclaim. "A claim and counterclaim shall not be set-off against each other, except by agreement of both parties or unless required by statute. On motion, however, the court, if it finds that the obligation of either party is likely to be uncollectible, may order that both parties make payment into court for distribution. If there are multiple parties and separate set-off issues, each set-off issue should be determined independently of the others. The court shall distribute the funds received and declare obligations discharged as if the payment into court by either party had been a payment to the other party and any distribution of those funds back to the party making payment had been a payment to him by the other party.

1. Old Rule 225--on counterclaims; excess.

"If any party recovers judgment against an adverse party in excess of a judgment recovered by the latter against him, judgment shall be given for the excess, with any other affirmative relief to which either may be entitled."

2. The rule was obviously amended to co-ordinate with comparative negligence where both sides frequently get paid and where there is insurance available to cover both judgments.

G. I.R.C.P. 381 Form 2--Motor Vehicle Long Arm Original Notice--amended to require defendant's appearance within 60 days, rather than before noon of the sixtieth day, as was formerly required.

1. The court notes that the form should not be adopted until a corresponding change is made in Iowa Code Section 321.500. According to the 1983 Session Laws, Section 321.500 was so amended effective July 1, 1983.

VII. Appendix.

IN THE MATTER OF THE	)	REPORT OF THE
RULES OF CIVIL PROCEDURE	)	SUPREME COURT

TO THE 1982 REGULAR SESSION OF THE SIXTY-NINTH GENERAL ASSEMBLY OF THE STATE OF IOWA:

Pursuant to sections 684.18(1) and 684.19, The Code, the Supreme Court of Iowa has prescribed and hereby reports to the General Assembly a change in existing Rules of Civil Procedure as follows:

Rule 82(g).

That rule 82(g) be amended as follows:

"(g) PROOF OF SERVICE. Proof of service of all papers required or permitted to be served~~,~~ shall be filed in the clerk's office promptly, and in any event before action is to be taken thereon by the court or the parties. The proof shall show the time and manner of service and the names and addresses of the persons served. The proof may be by written acknowledgment of service, by certification ~~of a member of the bar of this state, by affidavit~~ of the person who served the papers, or by any other proof satisfactory to the court."

Rule 136(b).

That rule 136(b) be amended as follows:

"(b) PRETRIAL CONFERENCE. After issues are joined the court may in its discretion, and shall on written request of any attorney in the case, direct all attorneys in the action to appear before it for a conference to consider so far as applicable to the particular case:

(1) The necessity or desirability of amending pleadings by formal amendment or pretrial order;

(2) Agreeing to admissions of facts, documents or records not really controverted, to avoid unnecessary proof;

(3) Limiting the number of expert witnesses;

(4) Settling any facts of which the court is to be asked to take judicial notice;

(5) Stating and simplifying the factual and legal issues to be litigated;

(6) Specifying all damage claims in detail as of the date of the conference;

(7) All proposed exhibits and mortality tables and proof thereof;

(8) Consolidation, separation for trial, and determination of points of law;

(9) Questions relating to voir dire examination of jurors and selection of alternate jurors, to serve if a juror becomes incapacitated;

(10) Possibility of settlement and imposition of a settlement deadline;

(11) Filing of advance briefs when required;

(12) Setting dates for closing of pleadings and discovery;

(13) Assigning a date for trial;

(14) Any other matter which may aid, expedite or simplify the trial of any issue.

The pretrial judge may direct the parties to the action to be present or immediately available at the time of conference."

Rule 138.1.

That the following new rule 138.1 be added:

"138.1. SANCTION FOR LATE SETTLEMENT. If an action is settled without prior approval of the court after a deadline established in an order entered pursuant to rule 138, the court may, after giving the parties and their counsel an opportunity to be heard, assess costs incurred by the failure to settle the action prior to the deadline, including the expense of assembling the jury panel and compensating jurors, or impose other appropriate sanction against one or more of the parties for violation of the settlement deadline."

Rule 187(a).

That rule 187(a) be amended as follows:

"(a) SELECTION. The clerk shall prepare and deposit in a box separate ballots containing the names of all persons returned or added as jurors. At each jury trial he the clerk shall select sixteen jurors by closing and shaking the box

to intermingle the ballots, and drawing them from the box without seeing the names. He The clerk shall list all jurors so drawn. Computer selection processes may be used instead of separate ballots to select jury panels. Before drawing begins, either party may require that the names of all jurors be called, and have an attachment for those absent who are not engaged in other trials; but the court may wait for its return or not, in its discretion."

Rule 215.

That rule 215 be amended as follows:

"215. VOLUNTARY DISMISSAL. A party may, without order of court, dismiss his own petition, counterclaim, cross-petition or petition for intervention, at any time before the trial has begun, subject to the provisions of rule 138.1. Thereafter a party may dismiss his action or his claim therein only by consent of the court which may impose such terms or conditions as it deems proper; and it shall require the consent of any other party asserting a counterclaim against the movant, unless that will still remain for an independent adjudication. A dismissal under this rule shall be without prejudice, unless otherwise stated; but if made by any party who has previously dismissed an action against the same defendant, in any court of any state or of the United States, including or based on the same cause, such dismissal shall operate as an adjudication against him on the merits, unless otherwise ordered by the court, in the interests of justice."

Rule 309.

That rule 309 be amended as follows:

"309. THE WRIT. The writ may be granted only by the district court acting through a district judge unless it is directed to that court, a district judge, or a district associate judge, ~~or a full-time magistrate appointed pursuant to § 602.51 or § 602.59, The Code,~~ and then by the supreme court or a justice thereof. Only the district court acting through a district judge may grant the writ directed at a ~~part-time~~ judicial magistrate appointed pursuant to § 602.50 or § 602.58, The Code. The writ shall be issued by the clerk of the court where the petition is filed, under its seal. It shall command the defendant to certify to that court, at a specified time

and place, a transcript of so much of defendant's records and proceedings as are complained of in the petition or as may be pertinent thereto, together with the facts of the case, describing or referring to them or any of them with convenient certainty; and also to have then and there the writ."

Rule 371.

That the following new rule 371 be added:

"371. FORM OF PAPERS. Effective July 1, 1983, all notices, pleadings, motions, orders, and other papers filed in the district court shall be typewritten in black on plain, opaque, unglazed, white paper 8 1/2 by 11 inches in size. Lines of typewritten text shall be double spaced. Typewriting shall be standard pica size with ten characters per inch. Typed matter shall be 6 inches wide by 8 1/2 inches long. The margin on each side shall be not less than 1 1/8 inches. Consecutive sheets shall be attached at the upper left corner.

Before July 1, 1983, paper 8 1/2 by 11 inches, 8 1/2 by 13 inches, or 8 1/2 by 14 inches in size may be used. The margin on each side shall be not less than 1 1/8 inches."

Editorial Note

Proposed new rule 371 stricken by Senate File 2270. See Certificate.

Respectfully submitted,
THE SUPREME COURT OF IOWA

/s/ W. W. Reynoldson
W. W. REYNOLDSON, CHIEF JUSTICE

Des Moines, Iowa
January 27, 1982

ACKNOWLEDGMENT

I, the undersigned, Secretary of the Senate of the State of Iowa, hereby acknowledge delivery to me on the twenty-seventh day of January, 1982, of the foregoing report of the Supreme Court of Iowa pertaining to the Rules of Civil Procedure.

/s/ K. Marie Thayer
Secretary of the Senate, 1982 Regular Session of the Sixty-ninth General Assembly of the State of Iowa

ACKNOWLEDGMENT

I, the undersigned, Chief Clerk of the House of Representatives of the State of Iowa, hereby acknowledge delivery to me on the twenty-seventh day of January, 1982, of the foregoing report of the Supreme Court of Iowa pertaining to the Rules of Civil Procedure.

Elizabeth A. Isaacson
/s/ Elizabeth A. Isaacson
Chief Clerk of the House of Representatives, 1982 Regular Session of the Sixty-ninth General Assembly of the State of Iowa

CERTIFICATE

I, Terry E. Branstad, do hereby certify that I am the President of the Senate of the 1982 Regular Session of the Sixty-ninth General Assembly of the State of Iowa; and I, K. Marie Thayer, do hereby certify that I am the Secretary of the Senate of the 1982 Regular Session of the Sixty-ninth General Assembly of the State of Iowa, and we do hereby jointly certify as President and Secretary that on the twenty-seventh day of January, 1982, the Supreme Court of the State of Iowa reported to Senate, and filed with it, the attached and foregoing Rules of Civil Procedure;

THAT the date of making that report to the 1982 Regular Session of the Sixty-ninth General Assembly was within twenty days subsequent to the convening of the 1982 Regular Session of the Sixty-ninth General Assembly;

THAT no other report pertaining to the Rules of Civil Procedure was made or filed by the Supreme Court with the Senate;

THAT there was enacted at the 1982 Regular Session of the Sixty-ninth General Assembly an Act known as Senate File 2270, wherein the proposed new Rule 371 was stricken;

THAT no other changes, modifications, amendments, revisions or additions to the Rules of Civil Procedure as reported by the Supreme Court were made or enacted at the 1982 Regular Session of the Sixty-ninth General Assembly.

Signed this 24th day of April, 1982, being the sine die adjournment of the 1982 Regular Session of the Sixty-ninth General Assembly.

/s/ Terry E. Branstad
TERRY E. BRANSTAD
President of the Senate

/s/ K. Marie Thayer
K. MARIE THAYER
Secretary of the Senate, 1982 Regular Session of the Sixty-ninth General Assembly of the State of Iowa.

CERTIFICATE

I, Delwyn Stromer, do hereby certify that I am the Speaker of the House of Representatives of the 1982 Regular Session of the Sixty-ninth General Assembly of the State of Iowa; and I, Elizabeth A. Isaacson, do hereby certify that I am the Chief Clerk of the House of Representatives of the 1982 Regular Session of the Sixty-ninth General Assembly of the State of Iowa, and we do hereby jointly certify as Speaker and Chief Clerk that on the twenty-seventh day of January, 1982, the Supreme Court of the State of Iowa reported to the House of Representatives, and filed with it, the attached and foregoing Rules of Civil Procedure;

THAT the date of making that report to the 1982 Regular Session of the Sixty-ninth General Assembly was within twenty days subsequent to the convening of the 1982 Regular Session of the Sixty-ninth General Assembly;

THAT no other report pertaining to the Rules of Civil Procedure was made or filed by the Supreme Court with the House of Representatives;

THAT there was enacted at the 1982 Regular Session of the Sixty-ninth General Assembly an Act known as Senate File 2270, wherein the proposed new Rule 371 was stricken;

THAT no other changes, modifications, amendments, revisions or additions to the Rules of Civil Procedure as reported by the Supreme Court were made or enacted at the 1982 Regular Session of the Sixty-ninth General Assembly.

Signed this 24th day of April, 1982, being the sine die adjournment of the 1982 Regular Session of the Sixty-ninth General Assembly.

/s/ Delwyn Stromer
DELWYN STROMER
Speaker of the House

/s/ Elizabeth A. Isaacson
ELIZABETH A. ISAACSON
Chief Clerk of the House of Representatives, 1982 Regular Session of the Sixty-ninth General Assembly of the State of Iowa.

APPENDIX

COURT RULES

The new court rules or amendments of existing rules as published in this Legislative Service are those contained in the promulgating orders supplied to West Publishing Company by the various Courts. Additional current rule information may be obtained from the Clerk of Court. For a full and complete treatment of the court rules, researchers should be sure to examine the permanent repository of the rules in Iowa Code Annotated and/or the Iowa Court Rules Pamphlet as annually updated.

RULES OF CIVIL PROCEDURE

IN THE MATTER OF THE RULES	)	REPORT OF THE
OF CIVIL PROCEDURE	)	SUPREME COURT

TO THE 1983 REGULAR SESSION OF THE SEVENTIETH GENERAL ASSEMBLY OF THE STATE OF IOWA:

Pursuant to Iowa Code sections 684.18(1) and 684.19, the Supreme Court of Iowa has prescribed and hereby reports to the General Assembly changes in existing Rules of Civil Procedure as follows:

Rule 82(f).

That rule 82(f) be amended as follows:

"(f) NOTICE OF ORDERS OR JUDGMENTS. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in this rule upon each party except a party against whom a default has been entered and shall make a note in the docket of the mailing. In the event a case involves an appeal or review

relating to an administrative agency, officer, commissioner, board, administrator, or judge, the clerk shall mail without cost to the applicable administrative agency, officer, commissioner, board, administrator, or judge a copy of any remand order, final judgment or decision in the case and a copy of any procedendo from the supreme court.

Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in this rule for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the district court to relieve a party for failure to appeal within the time allowed."

Rule 117.

That rule 117 be amended as follows:

"117. MOTION DAYS--DISPOSITION OF MOTIONS.

(a) The chief judge of each judicial district shall provide by order for at least one motion day to be held each month in each county, when all motions made prior to trial on issues of fact on file ten days or more shall be deemed submitted unless by other rule, statute or order of court entered for good cause shown another time for submission is fixed. Such motions not orally or telephonically argued for any reason shall be deemed submitted without argument unless they are then, or have previously been, set down for argument at some time somewhere in the judicial district not more than ten days thereafter, when they must be submitted without further postponement. Each motion filed shall set out the specific points upon which it is based. A concise memorandum brief may be appended if it is desired to cite supporting rules, statutes or other authorities.

(b) The court may hear and rule on any motion prior to motion day so as not to delay completing the issues or trial of the case.

(c) The trial court shall rule on all motions within thirty days after their submission, unless it extends the time for reasons stated on record.

(d) A "motion" within this rule is any paper denominated as such, or any other matter requiring attention or order of court before the trial of the issues on their merits, including a special appearance and objections to interrogatories.

(e) The clerk of each court shall maintain a motion calendar on which every "motion" within the purview of (d), above, shall be entered. It shall be arranged to show (1) docket, page and cause number of action in which filed, (2) abbreviated title of the case with surname of the first-named party on each side, (3) counsel of record for parties, (4) denomination of the "motion", (5) date filed, (6) party by whom filed, (7) date entered on calendar, and (8) date of disposition by ruling, order or otherwise. Separate motion calendars for law, equity or other divisions may be maintained.

(f) The court may arrange for the submission of motions under these rules by telephone conference call unless oral testimony may be offered."

Rule 126(b).

That rule 126(b) be amended as follows:

"(b) SCOPE--USE AT TRIAL. Interrogatories may relate to any matters which can be inquired into under R.C.P. 122, including a statement of the specific dollar amount of money damages claimed, and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time."

Rule 136(b).

That rule 136(b) be amended as follows:

"(b) PRETRIAL CONFERENCE. After issues are joined the court may in its discretion, and shall on written request of any attorney in the case, direct all attorneys in the action to appear before it for, or arrange for their

participation by telephone conference call in, a conference to consider, so far as applicable to the particular case:

(1) The necessity or desirability of amending pleadings by formal amendment or pretrial order;

(2) Agreeing to admissions of facts, documents or records not really controverted, to avoid unnecessary proof;

(3) Limiting the number of expert witnesses;

(4) Settling any facts of which the court is to be asked to take judicial notice;

(5) Stating and simplifying the factual and legal issues to be litigated;

(6) Specifying all damage claims in detail as of the date of the conference;

(7) All proposed exhibits and mortality tables and proof thereof;

(8) Consolidation, separation for trial, and determination of points of law;

(9) Questions relating to voir dire examination of jurors ~~and selection of alternate jurors, to serve if a juror becomes incapacitated~~;

(10) Possibility of settlement and imposition of a settlement deadline;

(11) Filing of advance briefs when required;

(12) Setting dates for closing of pleadings and discovery;

(13) Assigning a date for trial;

(14) Any other matter which may aid, expedite or simplify the trial of any issue.

The pretrial judge may direct the parties to the action to be present or immediately available at the time of conference."

Rules 139 and 143.

That rules 139 and 143 be stricken.

Respectfully submitted,
THE SUPREME COURT OF IOWA

/s/ W. W. Reynoldson
W. W. REYNOLDSON, Chief Justice

Des Moines, Iowa
January 14, 1983

ACKNOWLEDGMENT

I, the undersigned, Secretary of the Senate of the State of Iowa, hereby acknowledge delivery to me on the fourteenth day of January, 1983, of the foregoing report of the Supreme Court of Iowa pertaining to the Rules of Civil Procedure.

/s/ K. Marie Thayer
Secretary of the Senate, 1983 Regular Session of the Seventieth General Assembly of the State of Iowa

ACKNOWLEDGMENT

I, the undersigned, Chief Clerk of the House of Representatives of the State of Iowa, hereby acknowledge delivery to me on the fourteenth day of January, 1983, of the foregoing report of the Supreme Court of Iowa pertaining to the Rules of Civil Procedure.

/s/ Joseph O'Hern
Chief Clerk of the House of Representatives, 1983 Regular Session of the Seventieth General Assembly of the State of Iowa

CERTIFICATE

I, Robert Anderson, do hereby certify that I am the President of the Senate of the 1983 Regular Session of the Seventieth General Assembly of the State of Iowa; and I, K. Marie Thayer, do hereby certify that I am the Secretary of the Senate of the 1983 Regular Session of the Seventieth General Assembly of the State of Iowa, and we do hereby jointly certify as President and Secretary that on the fourteenth day of January, 1983, the Supreme Court of the State of Iowa reported to the Senate, and filed with it, the attached and foregoing Rules of Civil Procedure;

THAT the date of making that report to the 1983 Regular Session of the Seventieth General Assembly was within twenty days subsequent to the convening of the 1983 Regular Session of the Seventieth General Assembly;

THAT on the fourteenth day of January, 1983, the Supreme Court of the State of Iowa submitted to the Senate and filed with it, the attached and foregoing correction of the report of the Supreme Court regarding the attached and foregoing Rules of Civil Procedure;

THAT no other report pertaining to the Rules of Civil Procedure was made or filed by the Supreme Court with the Senate;

THAT no changes, modifications, amendments, revisions or additions to the Rules of Civil Procedure as reported by the Supreme Court were made or enacted at the 1983 Regular Session of the Seventieth General Assembly.

Signed this 14th day of May, 1983, being the sine die adjournment of the 1983 Regular Session of the Seventieth General Assembly.

/s/ Robert Anderson
ROBERT ANDERSON
President of the Senate

/s/ K. Marie Thayer
K. MARIE THAYER
Secretary of the Senate, 1983 Regular Session of the Seventieth General Assembly of the State of Iowa

CERTIFICATE

I, Donald Avenson, do hereby certify that I am the Speaker of the House of Representatives of the 1983 Regular Session of the Seventieth General Assembly of the State of Iowa; and I, Joseph O'Hern, do hereby certify that I am the Chief Clerk of the House of Representatives of the 1983 Regular Session of the Seventieth General Assembly of the State of Iowa, and we do hereby jointly certify as Speaker and Chief Clerk that on the fourteenth day of January, 1983, the Supreme Court of the State of Iowa reported to the House of Representatives, and filed with it, the attached and foregoing Rules of Civil Procedure;

THAT the date of making that report to the 1983 Regular Session of the Seventieth General Assembly was within twenty days subsequent to the convening of the 1983 Regular Session of the Seventieth General Assembly;

THAT on the fourteenth day of January, 1983, the Supreme Court of the State of Iowa submitted to the Senate and filed with it, the attached and foregoing correction of the report of the Supreme Court regarding the attached and foregoing Rules of Civil Procedure;

THAT no other report pertaining to the Rules of Civil Procedure was made or filed by the Supreme Court with the House of Representatives;

THAT no changes, modifications, amendments, revisions or additions to the Rules of Civil Procedure as reported by the Supreme Court were made or enacted at the 1983 Regular Session of the Seventieth General Assembly.

Signed this 14th day of May, 1983, being the sine die adjournment of the 1983 Regular Session of the Seventieth General Assembly.

/s/ Donald Avenson
DONALD AVENSON
Speaker of the House

/s/ Joseph O'Hern
JOSEPH O'HERN
Chief Clerk of the House of Representatives, 1983 Regular Session of the Seventieth General Assembly of the State of Iowa

RULES OF CIVIL PROCEDURE

IN THE MATTER OF CHANGES IN) REPORT OF THE
RULES OF CIVIL PROCEDURE) SUPREME COURT

TO: SERGE H. GARRISON, SECRETARY OF THE LEGISLATIVE COUNCIL OF THE STATE OF IOWA:

Pursuant to Iowa Code sections 602.4201 and 602.4202 (Supp. 1983), the Supreme Court of Iowa has prescribed and hereby reports to the Legislative Council the attached Exhibit A, constituting changes in Rules of Civil Procedure, which have been issued on this date. Pursuant to Iowa Code section 602.4202(3) (Supp. 1983), these rules and forms are to take effect on July 1, 1984.

Respectfully submitted,
THE SUPREME COURT OF IOWA

/s/ W. W. Reynoldson
W. W. REYNOLDSON, Chief Justice

Des Moines, Iowa
March 27, 1984

ACKNOWLEDGMENT

I, the undersigned, Secretary of the Legislative Council of the State of Iowa, hereby acknowledge delivery to me on the twenty-seventh day of March, 1984, of the Report of the Supreme Court pertaining to Rules of Civil Procedure.

/s/ Serge H. Garrison
Secretary of the Legislative Council

EXHIBIT "A"
RULES OF CIVIL PROCEDURE

Amend Rule 91 as follows:

91. Contract. Every pleading referring to a contract must state whether it is written or oral. ~~If the contract is the basis of the action or defense, it must be set forth in full.~~

Strike existing Rule 106 and substitute the following:

106. Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice that party in maintaining the action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Amend Rule 126(a) as follows:

126(a) Availability--procedures for use. Except in small claims, any party may serve written interrogatories to be answered by another party or, if the other party is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Copies of interrogatories and answers shall be served on each adverse party. Interrogatories may, without leave of court, be directed to the plaintiff after commencement of the action and upon any other party with or after service of the original notice upon that party.

Additions in text are indicated by underline; deletions by ~~strikeouts~~

Each interrogatory shall be followed by a reasonable space for insertion of the answer. An interrogatory which does not comply with this requirement shall be subject to objection.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer.

A party answering interrogatories must answer in the space provided or must set out each interrogatory immediately preceding the answer to it. A failure to comply with this rule shall be deemed a failure to answer and shall be subject to sanctions as provided in R.C.P. 134. The answers are to be signed by the person making them. The party to whom the interrogatories are directed shall file the answers, and objections if any, within thirty days after they are served, except that a defendant may file answers or objections within ~~forty-five-days~~ sixty days after service of the original notice upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under R.C.P. 134 "a" with respect to any objection to or other failure to answer an interrogatory. Copies of answers shall be delivered as provided in R.C.P. 82.

A party shall not serve more than thirty interrogatories on any other party except upon agreement of the parties or leave of court granted upon a showing of good cause. A motion for leave of court to serve more than thirty interrogatories must be in writing and shall set forth the proposed interrogatories and the reasons establishing good cause for their use.

Amend the second paragraph of Rule 127 as follows:

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within thirty days after service of the request, or within such shorter or longer time as the court may on motion allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection ad-

dressed to the matter, signed by the party or his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of ~~forty-five-days~~ sixty days after service of the original notice upon him. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the request admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of R.C.P. 134 "c", deny the matter or set forth reasons why he cannot admit or deny it.

Amend the second paragraph of Rule 130 as follows:

The party upon whom the request is served shall serve a written response within thirty days after the service of the request, except that a defendant may serve a response within ~~forty-five-days~~ sixty days after service of the original notice upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under R.C.P. 134 with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

Amend Rule 181(a) as follows:

181. Trial certificate, response.

(a) When a trial certificate is filed in any action, the action shall be entered on the Trial Certificate List. The certificate shall be in the following form:

IN THE IOWA DISTRICT COURT
FOR _____ COUNTY

(Caption) Law) TRIAL CERTIFICATE
)
Equity)
)
Probate) Filed by _____
(Party)

1. The above party believes the issues are joined and states that such party (a) is ready for trial, or (b) will be ready for trial by _____
(date)

2. Discovery has been completed except as follows:

3. Pretrial conference (a) is, or (b) is not requested.

4. ~~Assignment for trial (a) by jury, or (b) by the court, is requested.~~
A jury demand (a) has, or (b) has not been filed and assignment for trial is requested.

5. Names, addresses and telephone numbers of other attorneys and parties appearing pro se:

Dated this _____ day of _____, 19__.

_____
Attorney for _____
P.O. Address _____
_____
Telephone No. _____

Additions in text are indicated by underline; deletions by ~~strikeouts~~

Strike existing Rule 138.1 and add a new Rule 181.4:

181.4 Fee for Late Settlement of Jury Trial. In the event notice of settlement is given later than two full working days before a civil action is scheduled to be tried to a jury or is reached for jury trial, whichever is later, a fee of $500 shall be assessed as court costs. Fees so collected shall be remitted by the clerk to the treasure of state to be deposited in the general fund of the state.

Strike existing Rule 225 and substitute the following:

225. On Claim and Counterclaim. A claim and counterclaim shall not be set off against each other, except by agreement of both parties or unless required by statute. On motion, however, the court, if it finds that the obligation of either party is likely to be uncollectible, may order that both parties make payment into court for distribution. If there are multiple parties and separate set-off issues, each set-off issue should be determined independently of the others. The court shall distribute the funds received and declare obligations discharged as if the payment into court by either party had been a payment to the other party and any distribution of those funds back to the party making payment had been a payment to him by the other party.

Amend Rule 328 as follows:

328. ~~Dissolution.~~ Hearing to Dissolve Temporary Injunction. A party against whom a temporary injunction is issued without notice may, at any time, move the court where the action is pending to dissolve, vacate or modify it. Such motion shall be submitted to that court. But if the injunction was granted by a justice or court of a different district under R.C.P. 324, the court or justice that ordered it shall hear the motion, if it be shown by affidavit, that prompt hearing cannot be obtained in the court where the action is pending.

Amend Rule 332 as follows:

332. Time for Special Appearance, Motion or Answer. Respondent shall, within twenty days from the date of personal service or mailing of a petition for judicial review under

Additions in text are indicated by underline; deletions by ~~strikeouts~~

Iowa Code section 17A.19(2), serve upon petitioner and all others upon whom the petition is required to be served, and within a reasonable time thereafter file, a written special appearance, motion, or answer.

In addition, the court recommends the following change in an official form which should not be adopted until a corresponding change is made in Iowa Code section 321.500:

2. FORM OF ORIGINAL NOTICE AGAINST A NONRESIDENT MOTOR VEHICLE OWNER OR OPERATOR UNDER IOWA CODE SECTION 321.500

IN THE IOWA DISTRICT COURT
FOR _____ COUNTY

Plaintiff(s), _____ No. _____
(INSERT "LAW" OR "EQUITY")

vs.

Defendant(s). ORIGINAL NOTICE

TO THE ABOVE-NAMED DEFENDANT(S):

You are hereby notified that there is now on file in the office of the clerk of the above court, a petition in the above-entitled action, a copy of which petition is attached hereto. The plaintiff's attorney is _____, whose address if _____, Iowa _____.

You are further notified that unless, ~~before noon of the sixtieth day~~ within sixty days following the filing of this notice with the director of transportation of this state, you serve, and within a reasonable time thereafter file, a written special appearance, motion or answer, in the Iowa District Court for _____ County, at the courthouse in

_____, Iowa, default will be entered and judgment rendered against you by the court.

_____
CLERK OF THE ABOVE COURT

(SEAL)

_____ County Courthouse

_____ Iowa _____

NOTE:
The attorney who is expected to represent the defendant should be promptly advised by defendant of the service of this notice.

TRIAL STRATEGY UNDER COMPARATIVE NEGLIGENCE AND CONTRIBUTION - THE DEFENSE PERSPECTIVE

Dennis J. Horan
of
Hinshaw, Culbertson, Moelmann, Hoban & Fuller
Chicago, Illinois

TRIAL STRATEGY UNDER COMPARATIVE NEGLIGENCE AND CONTRIBUTION - THE DEFENSE PERSPECTIVE

I. INTRODUCTION

A. Comparative Negligence
B. Contribution

II. VOIR DIRE

III. OPENING STATEMENT

IV. BURDEN OF PROOF ON ISSUE OF COMPARATIVE NEGLIGENCE

V. DIRECTED VERDICT

VI. CLOSING ARGUMENT

VII. JURY INSTRUCTIONS

A. Contribution
B. Comparative Negligence

VIII. SPECIAL INTERROGATORIES

IX. VERDICT FORMS

X. CONCLUSION

I. INTRODUCTION

Comparative negligence and contribution are substantial changes in Illinois law which have a dramatic effect on the rights of plaintiffs and defendants in tort cases. There are many aspects of this law which affect pleadings, settlements and other various stages of litigation. This article will treat a number of considerations in the law of comparative negligence and contribution affecting trial stategy from a defense view point.

A. Comparative Negligence

The Illinois Supreme Court decision in Alvis v. Ribar, 85 Ill. 2d 1, 421 N.E.2d 886 (1981), abolished contributory negligence as a bar to the plaintiff's right to recover in negligence cases and substituted a "pure form" of comparative negligence which reduces the plaintiff's recovery in proportion to his percentage of fault in the occurrence. The doctrine of comparative negligence is applicable to cases tried after June 8, 1981.

In the case of Coney v. J. L. G. Industries, Inc., 97 Ill.2d 104,454 N.E.2d 197 (1983), the Illinois Supreme Court held that the principles of comparative fault are applicable to strict liability cases on the issue of diminution of the plaintiff's damages. More specifically, the court held at p.119:

II. VOIR DIRE

The scope of voir dire is limited by Supreme Court Rule 234 which provides in pertinent part:

> The judge shall initiate voir dire. . .The parties or their attorneys shall be allowed a reasonable opportunity to supplement such examination, but shall not directly or indirectly examine jurors concerning matters of law or instructions.

However, the trial judge has some discretion in the scope of voir dire and the attorneys should discuss with the judge the permissable limits of inquiry concerning comparative negligence and contribution since a complex case may justify some inquiry into these areas.

In a liability situation against several defendants where a less culpable defendant is seeking contribution from the more culpable defendants, the defense attorney asserting the contribution claim may wish to educate the jury from the outset regarding the contribution claim so that the jury will be favorably disposed toward the idea of liability based on relative fault as they hear the evidence. A sample voir dire question might be:

> Under Illinois law, a defendant may recover contribution from other defendants based upon their relative fault in some circumstances which will be explained to you by the court. Do any of you feel that you would be unable to apply that law if instructed by the court?

III. OPENING STATEMENT

The defense attorney should have a theory of the case, before trial, as to the relative fault among the parties. That theory may be that the plaintiffs and defendants each share some fault in the occurrence, or that the conduct of one party was the sole proximate cause of the occurrence. The defense attorney should educate the jury during opening statement regarding the relative fault among the parties in order to acclimate the jury to his theory of the case and to prepare the jury for the instructions on the law of comparative negligence and contribution at the conclusion of the trial.

IV. BURDEN OF PROOF ON ISSUE OF COMPARATIVE NEGLIGENCE

Neither the plaintiff nor the defendant has the burden of proof on the issue of comparative negligence and either party can assume the burden of going forward with evidence of the plaintiff's contributory negligence. The Illinois Supreme Court Committee on Jury Instructions in Civil Cases (hereinafter, Instructions Committee) made the following comments to IPI A 20.01 entitled: "Issues made by the pleadings . . ." state in pertinent part:

> Although Alvis v. Ribar, 85 Ill.2d 1, 52 Ill.Dec.23, 421 N.E.2d 886 (1981), does not touch on this question, the Committee believes that under the doctrine of comparative negligence, contributory

negligence is not an affirmative defense. If it is an issue, it simply goes to the diminution of damages, (citation). If plaintiff puts his contributory negligence before the jury, either by direct evidence or by inference, it may be considered by the jury, even though it has not been specifically pleaded by the defendant(s), . . . and defendant is entitled to an instruction on contributory negligence mitigating damages, (citation). If evidence of his contributory negligence has not been put before the jury by the plaintiff, the defendant would then have the burden of going forward with such evidence if he wished plaintiff's contributory negligence to be considered by the jury.

V. DIRECTED VERDICT

In a comparative negligence case, a directed verdict on the issue of negligence against the defendant does not preclude the jury from considering the issue of the plaintiff's contributory negligence.

In Korpalski v. Lyman, 114 Ill. App. 3d 563, 449 N.E.2d 211 (1st Dist. 5th Div. 1983), the trial court directed a verdict on the issue of negligence in favor

of the plaintiff who was a passenger in a car that was struck from the rear. The court allowed the issue of proximate cause and the question of damages to go to the jury. On a appeal, the defendant contended that the directed verdict against him on the issue of negligence constituted error because it precluded jury consideration of the plaintiff's contributory negligence. The appellate court rejected the defendant's argument because the trial judge had made no finding regarding comparative negligence and thus, the issue was left for consideration by the jury. The appellate court noted, however, that the defendant's attorney did not tender instructions on comparative negligence so that he waived the issue.

VI. CLOSING ARGUMENT

Since closing argument is a manifestation of the art of persuasion, most approaches which an attorney finds effective generally will be appropriate for handling issues of comparative negligence and contribution. However, several key principles for closing argument are especially important in the attorney's presentation regarding issues of comparative negligence and contribution.

In discussing the relative fault of the various parties, specify the quality of the misconduct of the other parties, in detail, to persuade the jury of the

level of culpability of the plaintiff and other defendants. Then suggest a specific percentage of fault that the jury should attribute to each party.

Emphasize your theory of the case by commenting on favorable instructions and use key words from those instructions in your argument.

Demonstrate the fairness of the concepts of comparative negligence or contribution which you are relying on in your theory of the case. Inquire of the jury by means of rhetorical questions whether a reduction of the plaintiff award based upon his percentage of misconduct, or the allocation of damages among the defendants based upon their relative share of fault, squares with the jury's sense of fairness and justice?

If special interrogatories are submitted to the jury, it is critical that the jury understands them because a special finding which is inconsistent with the general verdict will control the outcome of the case. Counsel is permitted to read the special interrogatories to the jury and to discuss the evidence as it relates to the special interrogatories. Then ask the jury to make a specific answer to the special interrogatories, based on the evidence. However, be aware that counsel is not permitted to discuss the effect of the answers to special interrogatories upon the general verdict, or

to ask the jury to make their answers consistent with the general verdict, under penalty of reversible error, Sommese v Maling Bros. Inc., 36 Ill.2d 263, 222 N.E.2d 468 (1967).

VII. JURY INSTRUCTIONS

A. Contribution

There are no IPI instructions currently available on the law of contribution. The Instructions Committee has drafted a series of instructions for contribution cases but these instructions have not been published yet.

In this instance, counsel should draft instructions for contribution issues within the parameters of Supreme Court Rule 239, Ill. Rev. Stat. 1981, ch. 110A, Sec. 239 which states in pertinent part:

> ...Whenever IPI does not contain an instruction on a subject on which the court determines that the jury should be instructed, the instruction given on that subject should be simple, brief, impartial, and free from argument.

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B. Comparative Negligence

In 1981 the Instructions Committee published a Special Supplement "A" Series of Instructions on Comparative Negligence. However, the Committee noted that this was a preliminary set of instructions and verdict forms because the Alvis decision, which adopted comparative negligence, left many unresolved issues. Furthermore, the Committee stated in its introductory remarks:

> We invite the Bench and Bar of Illinois to employ such ingenuity as is necessary to tailor these instructions to foster the resolution of such issues.

Some of the more important changes in the "A" series of instructions, other than the deletion of the reference of a duty of the plaintiff to be free from contributory negligence, include:

1. "I.P.I. A 20.01 Issues Made By The Pleadings. . ."

The Committee comments to this instruction state that the plaintiff's contributory negligence is not an affirmative defense and does not have to be specifically pleaded by the defendant. Either the

plaintiff or the defendant can introduce evidence on the issue of contributory negligence and it is relevant to the diminution of damages.

2. "I.P.I. A 21.02.02 Burden Of Proof On The Issues. . . Wilful Wanton Counts"

There are several unresolved issue concerning the effect of the plaintiff's or the defendant's willful or intentional misconduct on the doctrine of comparative negligence. These issues are highlighted in the Committee comments to IPI A 21.02.02:

> Under Illinois law prior to Alvis v. Ribar, 85 Ill.2d 1,52, Ill. Dec.23, 421 N.E.2d 886 (1981), plaintiff's contributory negligence was not a defense if defendant's conduct was wilful and wanton. On the other hand, plaintiff's contributory wilful and wanton conduct was a complete bar to plaintiff's recovery. The Alvis case makes no reference to wilful and wanton conduct. Therefore, where the defendant is guilty of wilful and wanton conduct, questions remain as to:

(a) Does wilful and wanton contributory conduct bar plaintiff's recovery?

(b) Does wilful and wanton contributory conduct diminish plaintiff's recovery?

(c) Does contributory negligence diminish plaintiff's recovery.

The Committee believes that under the teachings of Alvis comparative negligence principles apply to such actions. However, the Committee recognizes negligence of the plaintiff does not diminish his damages in cases where only wilful and wanton conduct of the defendant is pleaded or is in issue. Likewise, the Committee recognizes that defendants may contend that contributory wilful and wanton conduct on the part of the plaintiff is a complete bar to his recovery.

Although the Committee does not intend to influence developing case law on these issues, it felt obligated to draft instructions in accordance with its own interpretation of Alvis. Accordingly, the Notes on Use permit the

court that reaches a different interpretation to use IPI 21.02.02 until this issue is authoritatively resolved by a reviewing court.

In the case of Lomonote v. A & P Food Stores, 438 N.Y.S. 2d 54 (1981) a New York court considered the issue of the plaintiff's intentional misconduct and the defendant's negligence. The plaintiff, who was injured in an altercation with a store employee was allowed to recover on the basis of the percentage of the negligence which the jury atrributed to the defendant even though the plaintiff was guilty of an intentional wrong in the incident.

In the case of Sorenson v. Allred, 112 Cal. App. 3d 717, 169 Cal. Rptr. 441 (1980), an auto case, a California Appellate court allowed the comparison of the plaintiff's negligence and the defendant's wilful misconduct to reduce the plaintiff's recovery.

In the case of Davis v. U.S., 716 F. 2d 418 (7th Cir. 1983), the Seventh Circuit Court of Appeals stated:

It is likely that the Illinois Courts will permit a comparison between the

plaintiff's contributory negligence and the defendant's wilful and wanton misconduct under principles of comparative negligence.

3. "I.P.I. A21.04 Burden of Proof - Counterclaim"

The doctrine of comparative negligence allows a defendant, who may share some fault in an occurrence, to pursue a counterclaim against the plaintiff. In such a case, the complaint and counterclaim would raise different causes of action which would require separate instructions and separate verdict forms. However, if for some reason, the plaintiff's cause of action is no longer pending at the time of trial, the Committee noted that IPI A 21.04 should not be used for the counterclaim but instead IPI A 21.02, regarding the burden of proof, should be given with appropriate modifications, accompanied by IPI 21.01 defining the burden of proof.

4. "I.P.I. A 45.05 Reduction of Damages Because of Contributory Negligence."

This is a new instruction on the law of comparative negligence for use when the

plaintiff's contributory negligence is in issue. In applying comparative negligence, the jury must consider the combined fault of all tortfeasors who contributed in causing the same injury, even if some tortfeasors were not joined as parties or if some defendants have settled, Cornell v. Langland, 109 Ill. App. 3d 472, 440 N.E.2d 985 (1st Dist. 4th Div. 1982). The Committee commented:

> . . . the contributory negligence of plaintiff must be compared to the combined negligence of plaintiff and of all the tortfeasors whose negligence proximately caused or contributed to plaintiff's injury. This includes absent tortfeasors as well as parties . . .

5. Instructions on Comparative Negligence in Strict Liability Cases.

The Instructions Committee has not drafted I.P.I. instructions incorporating the law in the Coney decision which applied principles of comparative fault to strict liability cases on the issue of diminution of the plaintiff's damages. Therefore, in a strict liability case, counsel must draft the

appropriate instructions within the parameter of Supreme Court Rule 239, Ill. Rev. Stat. 1981, ch. 110A, Sec. 239.

Most of the instructions in the I.P.I. second edition, which existed prior to Special Supplement Series A Instructions, will still be used in comparative negligence cases, although some of those instructions may need modification.

The defense of sole proximate cause and I.P.I. 36.01 "In absence of Liability No Occasion to Consider Damages" are still available to defendants under comparative negligence cases, Misch v. Meadows, 114 Ill.App.3d 792, 449 N.E.2d 1358 (4th Dist. 1983).

VIII. SPECIAL INTERROGATORIES

In Alvis, the Supreme Court suggested the use of special interrogatories and special verdicts to guide the jury in its application of the law of comparative negligence. A special verdict inquires into all material issues in a case and is not in general use in Illinois. Special interrogatories, which supplement a general verdict, inquire into only those material issues requested by one or more of the parties.

Special interrogatories are authorized by Section 2-1108 of the Code of Civil Procedure of Illinois, Ill. Rev. Stat. 1981 ch. 110, sec. 2-1108 which provides:

> Unless the nature of the case requires otherwise, the jury shall render a general verdict. The jury may be required by the court, and must be required on request of any party, to find specially upon any material question or questions of fact stated to them in writing. Special interrogatories shall be tendered, objected to, ruled upon and submitted to the jury as in the case of instructions. Submitting or refusing to submit a question of fact to the jury may be reviewed on appeal, as a ruling on a question of law. When the special finding of fact is inconsistent with the general verdict, the former controls the latter and the court may render judgment accordingly.

The purpose of special interrogatories is to assure that the jury follows the instructions of law submitted by the trial judge.

Special interrogatories must relate to material, ultimate questions of fact which directly affect the rights of parties and not to evidentiary facts or questions of law Packard v. Kennedy, 4 Ill.App.2d 177, 124 N.E.2d 55 (2nd Dist. 1955).

If the jury's answers to the special interrogatories are inconsistent with the general

verdict, then the special interrogatories will control the outcome of the case. In that instance, counsel must move for judgment on that special finding. Because of the possibility of the inconsistent special finding controlling the verdict, the defense attorney should exercise judgment in deciding whether or not to use special interrogatories in a case where he expects a favorable verdict.

If the special finding is consistent with an unfavorable general verdict, but both appear to be against the manifest weight of the evidence, then counsel must move to set aside both the general verdict and the special finding, Rubottom v. Crane Co., 302 Ill.App.58, 23 N.E.2d 354 (1st Dist 2nd Div. 1939).

An example of special interrogatories on the issue of plaintiff's contributory negligence in a comparative negligence case is:

> Was the plaintiff, John Smith, in the exercise of due care and caution for his own safety at the time of the occurrence?
>
> Answer:_____
>
> If you answer the above interrogatory in the negative, then answer the following interrogatory:
>
> Was the plaintiff's contributory negligence a proximate cause of his injury and the damage he sustained?
>
> Answer_____

IX. VERDICT FORMS

A. Itemized Verdict Forms

Section 2-1109 of the Code of Civil Procedure of Illinois, Ill. Rev. Stat. 1981, ch. 110, Sec. 2-1109, provides:

> Itemized verdicts. In every case where damages for injury to the person are assessed by the jury the verdict shall be itemized so as to reflect the monetary distribution among economic loss and noneconomic loss, if any.

Courts have held that a verdict which itemizes each element of damages beyond economic and non-economic categories (i.e. disability and disfigurement, pain and suffering, medical expenses, loss of earnings, etc.) is consistent with the legislative purpose in Section 2-1109, Doering v. Janssen, 76 Ill.App.3d 62, 394 N.E.2d 721 (3rd Dist. 1979), Stromquist v Burlington Northern, 112 Ill.App.3d 37, 444 N.E.2d 1113 (3rd Dist. 1983).

However, in Powers v. Ill. Central Gulf R.R. Co., 91 Ill.2d 375, 438 N.E.2d 152 (1982), the Supreme Court disallowed an instruction concerning the nature, extent and duration of the plaintiff's injury as a separate compensable item of damages

where the jury was also instructed regarding other I.P.I. items, such as pain and suffering and disability, as separate compensable items of damages. The court reasoned that an award on the other items of damages necessarily involved consideration of the nature, extent and duration of the injury so to allow it as a separate compensable item of damages would result in a duplicate recovery for the plaintiff.

B. General Verdict Form v. the Modified General Verdict Form (Computational Form)

It is within the discretion of the trial judge to present the jury with a computational verdict form or a general verdict form.

The Special Supplement "A" Series on comparative negligence instructions contains several modified general verdict forms which allow the jury to compute the percentage of negligence attributable to the plaintiff. I.P.I. A 45.06 applies to a verdict against one or all of the defendants and I.P.I. A 45.06 applies to a verdict against some but not all of the defendants. The pertinent portion of the computational language in both of these verdict forms is:

> . . .First: Without taking into consideration the question of reduction of damages due to the negligence of the plaintiff, if any, we

find that the total amount of damages suffered by the plaintiff as a proximate result of the occurrence in question is $_____.

Second: Assuming that 100% represents the total combined negligence of the plaintiff and of the defendant(s) [and of other persons] we find that the percentage of negligence that was a proximate cause of the plaintiff's [injury] [or] [damage] attributable solely to the plaintiff is _____ percent (%).

Third: After reducing the total damages sustained by the plaintiff by the percentage of negligence attributable to the plaintiff, we assess plaintiff's recoverable damages in the sum of $_____. . .

The Special Supplement "A" Series also contains a General Verdict for the plaintiff in I.P.I. 45.09 which states:

We, the jury, find for the plaintiff and against [all] the defendant[s] and assess the plaintiff's damages in the sum of $_____.

[Signature Lines]

In Hunter v. Sukkan, 111 Ill.App.3d 169, 443 N.E.2d 774 (4th Dist. 1982) the appellate court upheld the discretion of the trial judge in

the jury the computational verdict form as set out in I.P.I. A 45.06 instead of the general verdict form as set out in I.P.I. A 45.09.

On the other hand, in Hazelwood v Ill. Central Gulf RR, 114 Ill.App.3d 703, 450 N.E.2d 1199 (4th Dist. 1983) the appellate court upheld the discretion of the trial judge in giving the jury the general verdict form as set out in I.P.I. A 45.09 instead of the computational verdict form as set out in I.P.I. A 45.06.

X. CONCLUSION

Comparative negligence and contribution which may appear simple at first glance, but these concepts can become quite complex when applied to a specific factual situation at trial. The defense trial strategy under the law of comparative negligence and contribution, like trial strategy generally, requires a good working understanding of the law and thorough preparation on the issues under this law.

Richard L. Berdelle
Pretzel & Stouffer, Chartered

Dennis J. Horan
Hinshaw, Culbertson,
Moelmann,Hoban & Fuller

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FINAL FINAL DRAFT

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CONTRIBUTION

Analysis of Instructions

INTRODUCTION

Contribution cases fall into three general categories and these instructions follow those categories: (1) where contribution is sought in the same action, tried either concurrently with the main action or consecutively, but to the same jury; (2) where contribution is sought in a separate trial and to a separate jury; and (3) where contribution is sought after settlement. The contribution action is basically the same in each of the three categories. However, significant differences exist which require separate approaches in the instructions, as explained in the Notes on Use.

Contribution should not be confused with indemnity and equitable apportionment. Although these instructions deal only with contribution, some of the distinctions which exist between these concepts are discussed later in this Introduction.

CONTRIBUTION

Tort practice in Illinois was revolutionized by the Supreme Court's historic decision in Skinner v. Reed-Prentice Division Package Machinery Co., 70 Ill. 2d 1, 374 N.E. 2d 437, 15 Ill. Dec. 829 (1978), as modified March 1, 1978. That decision gave birth to a doctrine of contribution based on "equitable principles," in which the court held that "ultimate liability for plaintiff's injuries be apportioned on the basis of the relative degree to which the defective product and the employer's conduct proximately caused them." Id. at 14, 374 N.E.2d at 442, 15 Ill. Dec. at 834. The opinion gives the new doctrine prospective operation to "causes of action arising out of occurrences on and after March 1, 1978." Skinner, 70 Ill. 2d at 17, 374 N.E.2d at 444, 15 Ill. Dec. at 836.

On September 14, 1979, "An Act in Relation to Contribution Among Joint Tortfeasors" became effective, retroactively applying to all causes of action arising on and after March 1, 1978. Ill. Rev. Stat. ch. 70, ¶¶ 301-305 (1981). The act does not apply to causes of action based on occurrences prior to March 1, 1978. Verson Allsteel Press Co. v. Major Spring & Mfg. Co., 105 Ill. App. 3d 419, 434 N.E.2d 456, 61

Ill. Dec. 303 (1st Dist. 1982); Balmes v. Hiab-Foco, A.B., 105 Ill. App. 3d 572, 434 N.E.2d 482, 61 Ill. Dec. 329 (1st Dist. 1982).

Skinner and the contribution statute govern only the rights of tortfeasors inter se. They have no application to the liability of the tortfeasors to the injured plaintiff. ¶ 304; Buehler v. Whalen, 70 Ill. 2d 51, 374 N.E.2d 460, 15 Ill. Dec. 852 (1977). Those tortfeasors may, by third party action, counterclaim, or separate suit, ask the trier of fact to apportion the plaintiff's damages among them in accordance with their "relative degree of fault." Skinner, supra; Ill. Rev. Stat. ch. 70, ¶ ¶ 301-305 (1981).

Although Skinner was a strict product liability case, a subsequent decision applied the doctrine of contribution in a negligence case. Erickson v. Gilden, 76 Ill. App. 3d 218, 394 N.E.2d 1076, 31 Ill. Dec. 758 (2nd Dist. 1979). The contribution statute has expressly extended the doctrine to all cases "where two or more persons are subject to liability in tort arising out of the same injury to person or property, or the same wrongful death." Ill. Rev. Stat. ch. 70, ¶ 302(a) (1981). It has been held that contribution can be based on a violation of the Road Construction Injuries Act (Doyle v. Rhodes, 109 Ill. App. 3d 590, 440 N.E.2d 895, 65 Ill. Dec. 40 (2d Dist. 1982)) and on a violation of the Structural Work Act (LeMaster v. Amsted Industries, Inc., 110 Ill. App. 3d 729, 442 N.E.2d 1367, 66 Ill. Dec. 454 (5th Dist. 1982)). However, it has been held that contribution is not available to an intentional tortfeasor. Neuman v. City of Chicago, 110 Ill. App. 3d 907, 443 N.E.2d 626, 66 Ill. Dec. 700 (1st Dist. 1982).

The statute is entitled "An Act in Relation to Contribution Among Joint Tortfeasors" but it does not require that the tortfeasors' actions be joint in the sense that they acted simultaneously or in concert before contribution can be sought. The only requirement is that the liability sought to be imposed arises out of the same injury.

The words "subject to liability in tort" mean that the persons from whom contribution is sought are potentially liable to the injured person. Defenses which any tortfeasor might have against the injured person as a result of status or immunity do

not necessarily bar an action for contribution against that tortfeasor. See Houser v. Witt, 111 Ill. App. 3d 123, 443 N.E.2d 725, 66 Ill. Dec. 799 (4th Dist. 1982); Morgan v. Kirk Bros., 111 Ill. App. 3d 914, 444 N.E.2d 504, 67 Ill. Dec. 268 (2d Dist. 1982); Wirth v. City of Highland Park, 102 Ill. App. 3d 1074, 430 N.E.2d 236, 58 Ill. Dec. 294 (2nd Dist. 1981) (interspousal immunity not a bar to contribution); Doyle v. Rhodes, 109 Ill. App. 3d 590, 440 N.E.2d 895, 65 Ill. Dec. 40 (2d Dist. 1982) (status as employer not a bar to contribution); Larson v. Buschkamp, 105 Ill. App. 3d 965, 435 N.E.2d 221, 61 Ill. Dec. 732 (2d Dist. 1982) (parental immunity not a bar to contribution); cf. Stephens v. McBride, 105 Ill. App. 3d 880, 435 N.E.2d 162, 61 Ill. Dec. 673 (1st Dist. 1982), leave to appeal allowed (notice requirement of Local Governmental and Governmental Employees Tort Immunity Act does not apply in contribution action against municipality). Whether other statutory and common law immunities affect the contribution statute remains to be seen.

The right to seek contribution exists from the time of the initial injury, and "may be asserted by a separate action before or after payment, by counterclaim or by third party complaint in a pending action." ¶ 305. It is not necessary for judgment to be entered against any tortfeasor before that tortfeasor may bring an action seeking contribution. ¶ 302(a). However, one case has ruled that if a defendant fails to assert his contribution claim in the primary action, he has no standing to appeal a judgment in that action favorable to a co-defenant. Thus, the failure to present a contribution claim in the primary action could adversely affect the contribution claim itself. Tisoncik v. Szczepankiewicz, 113 Ill. App. 3d 240, 446 N.E.2d 1271, 68 Ill. Dec. 874 (1st Dist. 1983).

Under ¶ 302(b), a tortfeasor's liability for contribution may not exceed his pro rata share of the common liability. "Pro rata" as used in this statute merely means the percentage share as assessed by the trier of fact. "Common liability" means the total sum of the liability of all persons who contributed as a cause to the plaintiff's injury, no matter how small each share of that liability might be. One tortfeasor may

seek contribution from another, even though the one seeking contribution is more at fault. "Active" or "major" fault does not bar an action for contribution.

The pro rata share of each tortfeasor shall be determined in accordance with his relative culpability (¶ 303) and expressed as a percentage set by the trier of fact. That percentage will be controlling only as between the parties to the contribution action. The injured person can still collect in full from any tortfeasor against whom he has a judgment. ¶ 304.

The words "relative culpability" include two essential concepts. The word "relative" connotes comparison. The conduct of the contribution parties is to be compared among themselves. Unlike the comparative negligence cases, no percentage of fault is to be assigned to the injured person in the contribution action. The jury compares the conduct of the contribution parties by setting percentages to reflect the relative fault of each. In the opinion of the committee, the total of these must equal 100%, and no percentage should be assigned to the fault of a tortfeasor not joined in the contribution action.

The second concept, "culpability," is intended in its broadest sense. It is not limited to actions such as negligence, where fault must be found, but includes other forms of tortious conduct proximately causing the injured person's injury. The culpability concept does not change the elements of any existing tort.

INDEMNITY

Prior to Skinner, there were three types of indemnity in Illinois: (1) "implied" or quasi-contractual indemnity based on qualitative differences in the relative fault of the parties (i.e., "active-passive" or "major-minor" fault), which was the most common theory of third party recovery; (2) indemnity by operation of law, such as where an employer may seek indemnity from the employee or contractor whose tortious conduct caused the employer to be vicariously liable; and (3) express indemnity — i.e., where

the parties' contract expressly provides that one party will indemnify another under specified circumstances.

Skinner apparently has had no effect on the second and third types of indemnity (indemnity by operation of law and express indemnity), and its effect on the first type is uncertain. See Van Jacobs v. Parikh, 97 Ill. App. 3d 610, 422 N.E.2d 979, 52 Ill. Dec. 770 (1st Dist. 1981); Davis v. FMC Corp., 537 F. Supp. 466 (C.D. Ill. 1982). Implied indemnity based on distinctions in relative fault ("active-passive" or "major-minor") may have been superseded by contribution, and therefore may no longer be available in actions based on occurrences on and after March 1, 1978. Appel & Michael, Contribution Among Joint Tortfeasors in Illinois: An Opportunity for Legislative and Judicial Cooperation, 10 Loy. U. Chi. L.J. 169 (1979); Widland, Contribution: The End To Active-Passive Indemnity, 69 Ill. B.J. 78 (1980); Ferrini, The Evolution from Indemnity to Contribution—A Question of the Future, If Any, of Indemnity, 59 Chicago Bar Record 254 (1978). However, other than equitable apportionment, it remains the only theory of third party recovery for actions based on occurrences prior to March 1, 1978.

IPI instructions applicable in indemnity cases begin at 500.00.

EQUITABLE APPORTIONMENT

Equitable apportionment differs from both indemnity and contribution. While contribution deals with the apportionment of damages based on joint liability for the same injury, equitable apportionment focuses on liability for separable injuries to the injured person. A leading case illustrating this doctrine is Gertz v. Campbell, 55 Ill. 2d 84, 302 N.E.2d 40 (1973), where the defendant responsible for plaintiff's fractured leg sought reimbursement from a physician for that part of plaintiff's damages attributable to the alleged negligence of the physician which resulted in amputation of the leg. (Under applicable tort law principles, defendant was subject to liability for all of plaintiff's damages, including the amputation for which the doctor was responsible.)

Gertz was followed in Alberstett v. Country Mut. Ins. Co., 79 Ill. App. 3d 407, 398 N.E.2d 611, 34 Ill. Dec. 788 (2d Dist. 1979). The physicians who settled a malpractice suit sought equitable apportionment from subsequent treating physicians whose alleged malpractice aggravated the original injury. Although Alberstett was filed after the Skinner decision, the occurrence out of which the suit arose took place in January, 1976 — more than two years prior to the effective date of contribution under both Skinner and the statute.

More recently, Van Jacobs v. Parikh, 97 Ill. App. 3d 610, 422 N.E.2d 979, 52 Ill. Dec. 770 (1st Dist. 1981), suggested that actions for equitable apportionment may be superseded by the contribution statute. However, it should be noted that the injury in that case resulted in death, and therefore was indivisible. Since equitable apportionment is available only when the injury is divisible, the complaint failed to state a cause of action under traditional equitable apportionment doctrine. Thus, it remains to be seen whether the court's conclusion about the effect of the contribution act on the equitable apportionment doctrine will be adopted in future cases involving divisible injuries.

Since equitable apportionment cases have been rare, the committee has not drafted equitable apportionment instructions.

CONCLUSION

With the advent of Skinner, three theories of liability may be available for third party recovery:

1. **contribution** (apportionment based on degree of fault);
2. **indemnity** (all or nothing at all); and

3. **equitable apportionment** (each wrongdoer pays the amount of plaintiff's damage that he caused).

In a given case, one or more of these theories may be available. However, many important questions remain unanswered, including the effect of Skinner and the contribution statute on implied indemnity and equitable apportionment.

600.01 Apportionment of Responsibility—Contribution—General Statement of Law

One who [is required to pay] [may be required to pay] [has paid] money for causing injury to another may be entitled to contribution for a percentage of that sum from a third party. The circumstances under which such contribution is permitted will be explained to you in the following instructions.

Notes on Use

An action for contribution is available against alleged tortfeasors whose liability is based on theories other than, or in addition to, negligence — e.g., strict liability in tort. The following series of contribution instructions were drafted for use in negligence cases. Therefore, if the right of contribution is based on a theory other than negligence, in whole or in part, certain of these instructions will need to be modified.

One of the modifications required will be the substitution of an appropriate term in lieu of the terms "negligence" and "fault," such as the term "responsibility." "Responsibility" was selected as an alternative term because it is broad and meets the problem described in the dissenting opinions in the Skinner decision. In commenting upon the situation where the party or parties seeking contribution are held liable to the plaintiff on a theory such as strict liability in tort, one of the dissents stated:

> **How can there be a comparison between the manufacturer's fault and the employer's fault, when fault is not the question? If the unreasonably dangerous product is put in commerce and is a proximate cause of injury, how can contribution and indemnification on the basis of the employer's negligence be in proportion to the wrong of a manufacturer?**
>
> **That strict liability is not based on fault is well recognized. In Suvada v. White Motor Co. (1965), 32 Ill. 2d 612, where this State adopted the doctrine as well as section 402A of the Restatement (Second) of Torts (1965), such considerations as public interest in human life and health, the manufacturer's solicitations to purchase, and the justice of imposing liability on one who creates the risk and reaps the profit, are described as the motivating forces for the adoption of the doctrine.**
>
> * * *
>
> **Under strict liability, responsibility is imposed because of the character of the product, not because of fault.**

70 Ill. 2d at 24-26.

The committee concluded that the term "responsibility" is sufficiently understandable and does not require further definition.

In addition to this substitution, other modifications may be necessary to accommodate any other theory or theories.

If indemnity is also sought, see the indemnity instructions in the 500-series.

Comment

The rule of contribution was adopted in Skinner v. Reed-Prentice Division Package Machinery Co., 70 Ill. 2d 1, 374 N.E.2d 437, 15 Ill. Dec. 829 (1978), and was codified in Ill. Rev. Stat. ch. 70, ¶ ¶ 301-305 (1981). The rule is applicable to causes of action arising from occurrences on or after March 1, 1978.

600.02 Apportionment of Responsibility—Complaint and Claims for Contribution Tried Concurrently (Same Issues)—Negligence

[1] If you find for [the plaintiff] [one or more plaintiffs], and if you also find that more than one defendant is liable to the plaintiff [or plaintiffs], then you must apportion damages by determining the relative degree of fault of each of those defendants for the plaintiff's [or plaintiffs'] [injuries] [and] [damages].

[2] In making that determination you should consider the duty owed by each defendant to **(Name of Injured Person)**; the extent to which the conduct of each defendant deviated from the duty that [he] [or] [she] [or] [it] owed to **(Name of Injured Person)**; and the extent to which the negligent conduct of each defendant proximately caused **(Name of Injured Person)**'s [injuries] [and] [damages].

[3] In [your verdict] [Verdict Form __], you will state the percentage of fault of each of those defendants, and the total of those percentages must add up to 100.

Notes on Use

This instruction should be used only in those cases where the issues in the case for contribution are the same as those in the action by the plaintiff(s). If the issues are not the same, use issues instruction 600.08 with appropriate modifications and 600.12.

If the right of contribution is based on a theory other than negligence, the instruction should be modified as necessary. See Notes on Use to 600.01.

When multiple verdict forms are submitted, the court or parties may wish to have each verdict form designated by a separate number or letter. This option is provided in paragraph 3.

When this instruction is used, do not use 600.11.

Comment

Apportionment can be accomplished only as between tortfeasors who are parties to the lawsuit. Therefore, the jury is instructed that the percentages of fault must add up to 100. No percentage is allocated to tortfeasors who are not parties to this action.

600.03 Apportionment of Responsibility—Complaint and Claims for Contribution Tried or Submitted Consecutively to Same Jury (Same Issues)—Negligence

[1] You have found that the defendants **(Names of Defendants Found Liable)** are liable to **(Name(s) of Successful Plaintiff(s))**. You must now apportion damages by determining, under the instructions already given you, the relative degree of fault of each of those defendants for **(Name(s) of Successful Plaintiff(s))** ('s)(s') [injuries] [and] [damages].

[2] In making that determination you should consider the duty owed by each defendant to **(Name of Injured Person)**; the extent to which the conduct of each defendant deviated from the duty that [he] [or] [she] [or] [it] owed to **(Name of Injured Person)**; and the extent to which the negligent conduct of each defendant proximately caused **(Name of Injured Person)**'s [injuries] [and] [damages].

[3] In your verdict, you will state the percentage of fault of each of those defendants and the total of those percentages must add up to 100.

Notes On Use

This instruction should be used when counterclaims are to be submitted to the same jury which has previously awarded the plaintiff(s) damages and where the parties seeking contribution do not make charges of negligence different from those made by the plaintiff(s) in the prime action. All relevant instructions submitted in the prime action should be resubmitted to the jury. If the parties make additional charges of negligence, issue instruction 600.08 must also be used with appropriate modifications.

If the right of contribution is based on a theory other than negligence, the instruction should be modified as necessary. See Notes on Use to 600.01.

When this instruction is used, do not use 600.11.

Comment

Apportionment can be accomplished only as between tortfeasors who are parties to the lawsuit. Therefore, the jury is instructed that the percentages of fault must add up to 100. No percentage is allocated to tortfeasors who are not parties to this action.

600.04 Issues—Liability Over—Apportionment of Responsibility—Third Party Complaint Tried and Submitted Concurrently—Negligence

[1] In addition to the claim[s] of **(Name(s) of Plaintiff(s))** against **(Name(s) of Defendant(s))**, **(Name(s) of Third Party Plaintiff(s))** make[s] a claim against **(Name(s) of Third Party Defendant(s))**. **(Names of Third Party Plaintiff(s))** claim[s] that if (he/she/it/they) [is] [are] liable to **(Name(s) of Plaintiff(s))** for damages, then (he/she/it/they) [is] [are] entitled to contribution from **(Name(s) of Third Party Defendant(s))** for a percentage of those damages.

[2] If you find [**(Name of Defendant)**] [one or more defendants] liable to **(Name(s) of Plaintiff(s))**, then you must consider the claim for contribution by [**(Name of Defendant)**] [each such defendant].

[3] **(Name(s) of Third Party Plaintiff(s))** claim[s] that **(Name(s) of Third Party Defendant(s))** (was/were) negligent in one or more of the following respects:

> [Set forth in simple form, without undue emphasis or repetition, those allegations of the third party complaint as to the conduct of the third party defendant which have not been withdrawn or ruled out by the court and which are supported by evidence.]

(Name(s) of Third Party Plaintiff(s)) further claim[s] that one or more of the foregoing was a proximate cause of **(Name(s) of Plaintiff(s))** ('s)(s') [injuries] [and] [damages].

[4] **(Name(s) of Third Party Defendant(s))**

[(deny/denies) that (he/she/it/they) did any of the things claimed by **(Name(s) of Third Party Plaintiff(s))**;]

[(deny/denies) that (he/she/it/they) (was/were) negligent (in doing any of the things claimed by **(Name(s) of Third Party Plaintiff(s))**;]

[and (deny/denies) that any claimed act or omission on the part of **(Name(s) of Third Party Defendant(s))** was a proximate cause of **(Name of Injured Person)** 's (injuries) (and) (damages)].

[5] [**(Name(s) of Third Party Defendant(s))** also assert(s) the following affirmative defense(s):

(Set forth in simple form without undue emphasis or repetition those affirmative defenses in the third party answer which have not been withdrawn or ruled out by the Court and are supported by the evidence.)]

[6] [**(Name(s) of Third Party Plaintiff(s))** (deny/denies) (that/those) affirmative defense(s).]

Notes on Use

This instruction is to be used where parties who were not sued by the plaintiff are brought into the suit in a claim for contribution.

If the right of contribution is based on a theory other than negligence, the instruction should be modified as necessary. See Notes on Use to 600.01.

If the third party defendant alleges in his pleadings specific acts or omissions of the third party plaintiff, then this instruction should be modified to include paragraphs 5, 6, and 7 of instruction 600.08.

As used in this instruction, the term "affirmative defense(s)" refers only to the traditional affirmative defenses that operate as a complete bar to recovery — for example, statute of limitations, release, and satisfaction. See Civil Practice Law § 2—613(d). Do not include comparative negligence or other comparative fault in the paragraphs referring to affirmative defenses, even if comparative negligence or comparative fault are referred to as affirmative defenses in the pleadings. Comparative negligence or comparative fault only reduces damages; it has no effect on liability.

600.05 Issues—Liability Over—Apportionment of Responsibility—Separate or Third Party Complaint Tried and Submitted Consecutively to Same Jury—Negligence

[1] You have found that **(Name(s) of Defendant(s) Found Liable)** (is/are) liable to **(Name(s) of Successful Plaintiff(s))**. You must now decide **(Name(s) of Third Party Plaintiff(s))** ('s)(s') claim that (he/she/it/they) (is/are) entitled to contribution from **(Name(s) of Third Party Defendant(s))** for a percentage of the damages awarded to **(Name(s) of Successful Plaintiff(s))**.

[2] **(Name(s) of Third Party Plaintiff(s))** claim[s] that **(Name(s) of Third Party Defendant(s))** (was/were) also negligent in one or more of the following respects:

> [Set forth in simple form, without undue emphasis or repetition, those allegations of the third party complaint as to the conduct of the third party defendant which have not been withdrawn or ruled out by the court and which are supported by the evidence.]

(Name(s) of Third Party Plaintiff(s)) further claim[s] that one or more of the foregoing was a proximate cause of **(Name(s) of Successful Plaintiff(s))** ('s)(s') [injuries] [and] [damages].

[3] **(Name(s) of Third Party Defendant(s))**

[(deny/denies) that (he/she/it/they) did any of the things claimed by **(Name(s) of Third Party Plaintiff(s))**;]

[(deny/denies) that (he/she/it/they) (was/were) negligent (in doing any of the things claimed by **(Name(s) of Third Party Plaintiff(s))**);]

[and (deny/denies) that any claimed act or omission on the part of **(Name(s) of Third Party Defendant(s))** was a proximate cause of **(Name of Injured Person)**'s (injuries) (and) (damages)].

[4] [**(Name(s) of Third Party Defendant(s))** also assert(s) the following affirmative defense(s):

(Set forth in simple form, without undue emphasis or repetition, those affirmative defenses in the third party answer which have not been withdrawn or ruled out by the court and which are supported by the evidence.)]

[5] [**(Name(s) of Third Party Plaintiff(s))** (deny/denies) (that/those) affirmative defenses(s).]

Notes on Use

This instruction is to be used where parties who were not sued by the plaintiff are brought into the suit in a claim for contribution.

If the right of contribution is based on a theory other than negligence, the instruction should be modified as necessary. See Notes on Use to 600.01.

If the third party defendant alleges in his pleadings specific acts or omissions of the third party plaintiff, then this instruction should be modified to include paragraphs 5, 6, and 7 of instruction 600.08.

All relevant instructions submitted in the prime action should be resubmitted to the jury.

In this instruction, use only the parties' names; do not refer to their pleading status (i.e., plaintiff, counterplaintiff, etc.).

As used in this instruction, the term "affirmative defense(s)" refers only to the traditional affirmative defenses that operate as a complete bar to recovery — for example, statute of limitations, release, and satisfaction. See Civil Practice Law § 2—613(d). Do not include comparative negligence or other comparative fault in the paragraphs referring to affirmative defenses, even if comparative negligence or comparative fault are referred to as affirmative defenses in the pleadings. Comparative negligence or comparative fault only reduces damages; it has no effect on liability.

600.06 Issues—Apportionment of Responsibility—Separate Suit—One or More Defendants Not Parties to Prior Suit—Negligence

[1] In a prior lawsuit brought by **(Name of Injured Person)** against **(Name(s) of Plaintiff(s) [and Defendants, if any were parties to prior suit])** for [injuries] [and] [damages], a judgment has been entered requiring **(Name(s) of Plaintiff(s) [and Defendants, if any were parties to prior suit])** to pay a sum of money to **(Name of Injured Person)**. **(Name(s) of Plaintiff(s))** now claim(s) that **(Name(s) of Defendant(s) not party to prior suit)** (is/are) liable for a percentage of that sum [and seek(s) apportionment of that sum among **(Names of All Parties)**].

[2] [With respect to **(Name(s) of Plaintiff(s))** ('s)(s') claim against **(Name(s) of Defendant(s) not party to prior suit)**,] **(Name(s) of Plaintiff(s))** claim(s) that (he/she/it/they) (is/are) entitled to contribution from **(Name(s) of Defendant(s) not party to prior suit)** for the reason that **(Name(s) of Defendant(s) not party to prior suit)** (was/were) negligent in one or more of the following respects:

> [Set forth in simple form, without undue emphasis, those allegations as to the conduct of the defendant(s) which are set forth in the complaint for contribution which have not been withdrawn or ruled out by the court and are supported by the evidence.]

[3] **(Name(s) of Plaintiff(s))** further claim(s) that one or more of the foregoing was a proximate cause of **(Name of Injured Person)**'s [injuries] [and] [damages].

[4] **(Name(s) of Defendant(s) not party to prior suit)**

[(deny/denies) that (he/she/it/they) did any of the things claimed by **(Name(s) of Plaintiff(s))**;]

[(deny/denies) that (he/she/it/they) (was/were) negligent (in doing any of the things claimed by **(Name(s) of Plaintiff(s))**);]

[and (deny/denies) that any claimed act or omission on the part of **(Name(s) of Defendant(s) not party to prior suit)** was a proximate cause of **(Name of Injured Person)**'s (injuries) (and) (damages)].

[5] [**(Name(s) of Defendant(s) not party to prior suit)** also assert(s) the following affirmative defense(s):

(Set forth in simple form, without undue emphasis or repetition, those affirmative defenses in the defendant's answer which have not been withdrawn or ruled out by the court and are supported by the evidence.)]

[6] [**(Name(s) of Plaintiff(s))** (deny/denies) (that/those) affirmative defense(s).]

[7] [**(Name(s) of Defendant(s) not party to prior suit)** (also) claim(s) that **(Name(s) of Plaintiff(s) and any Defendants who were parties to prior suit)** (was/were) negligent in one or more of the following respects:

(Set forth in simple form, without undue emphasis, those allegations as to the conduct of the plaintiff in the defendant's answer which have not been withdrawn or ruled out by the court and are supported by the evidence.)]

[8] [**(Name(s) of Defendant(s) not party to prior suit)** further claim(s) that one or more of the foregoing was (a) (the sole) proximate cause of **(Name of Injured Person)**'s (injuries) (and) (damages.)]

[9] [**(Name(s) of Plaintiff(s))** (admit(s) (deny/denies)

(Set forth in simple form, without undue emphasis, the admissions, if any, and denials contained in plaintiff's reply to defendant's allegations.)]

Notes On Use

This instruction covers only plaintiff's(s') claim(s) against new defendants who were not parties to the prior suit. To the extent that plaintiff makes specific claims against defendants who were parties to the prior suit, also give 600.08 omitting the first paragraph.

If the right of contribution is based on a theory other than negligence, the instruction should be modified as necessary. See Notes on Use to 600.01.

Paragraphs 7, 8, and 9 should be used only if the defendant alleges in his pleadings specific acts or omissions of the plaintiff.

This instruction and 600.07 should be used only when there are one or more defendants who were not parties to the lawsuit brought by the injured person. If all parties to this lawsuit were found liable in the prior lawsuit, use 600.08 and no burden of proof instruction. As to those parties, liability has already been established and there is no burden of proof; the only issue is the apportionment of the damages. Each party has the burden of going forward with the evidence to support his claim for contribution. In lieu of the traditional burden of proof instruction, 600.11 sets forth the basis for the jury's determination of the apportionment issue.

In this instruction, use only the parties' names; do not refer to their pleading status (i.e., plaintiff, counterplaintiff, etc.).

As used in this instruction, the term "affirmative defense(s)" refers only to the traditional affirmative defenses that operate as a complete bar to recovery — for example, statute of limitations, release, and satisfaction. See Civil Practice Law § 2—613(d). Do not include comparative negligence or other comparative fault in the paragraphs referring to affirmative defenses, even if comparative negligence or comparative fault are referred to as affirmative defenses in the pleadings. Comparative negligence or comparative fault only reduces damages; it has no effect on liability.

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600.07 Burden of Proof—Apportionment of Responsibility—Separate Suit—Defendants Not A Party to Prior Suit—Negligence

To be entitled to contribution from **(Name of Defendant not a party to prior suit)**, **(Name(s) of Plaintiff(s))** (has/have) the burden of proving each of the following propositions:

First, that **(Name of Defendant not a party to prior suit)** acted or failed to act in one of the ways claimed in these instructions, and that in so acting, or failing to act, **(Name of Defendant not a party to prior suit)** was negligent.

Second, that the negligence of **(Name of Defendant not a party to prior suit)** was a proximate cause of [the injury to **(Name of Injured Person)**] [the damage to **(Name of Injured Person)**'s property].

[**(Name of Defendant not a party to prior suit)** has the burden of proving the affirmative defense(s):

(Concisely state any affirmative defenses.)]

If you find from your consideration of all the evidence that each of the propositions required of **(Name(s) of Plaintiff(s))** has been proved [and that none of the affirmative defenses has been proved] [and that the affirmative defense has not been proved], then your verdict should be for **(Name(s) of Plaintiff(s))** and you should include **(Name of Defendant not a party to prior suit)** when you apportion damages.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions required of **(Name(s) of Plaintiff(s))** has not been proved, [or that any one of the affirmative defenses has been proved,] [or that the affirmative defense has been proved,], then your verdict should be for **(Name of Defendant not a party to prior suit)** and you will have no occasion to consider the apportionment of damages as to **(Name of Defendant not a party to prior suit)**.

[7] [**(Name(s) of Plaintiff(s))** (admit(s)) (deny/denies)

(Set forth in simple form, without undue emphasis, the admissions, if any, and denials contained in plaintiff's reply to defendant's allegations.)]

Notes on Use

If the right of contribution is based on a theory other than negligence, the instruction should be modified as necessary. See Notes on Use to 600.01.

This instruction should be used only between parties who were found liable in the prior lawsuit brought by the injured person.

Since all parties to this lawsuit were found liable in the prior lawsuit, no burden of proof instruction is used with this instruction. The parties' liability has already been established and there is no burden of proof; the only issue is the apportionment of the damages. Each party has the burden of going forward with the evidence to support his claim for contribution. In lieu of the traditional burden of proof instruction, 600.11 sets forth the basis for the jury's determination of the apportionment issue and should be used with this instruction.

When there is more than one plaintiff or more than one defendant, the plaintiff(s) may make different claims against the defendant(s). As to each different claim, use a separate issues instruction (600.08) and include the bracketed phrase at the beginning of paragraph 2 in each instruction. If there is only one claim, and therefore only one issues instruction, omit that bracketed paragraph.

Paragraphs 5, 6 and 7 should be used only if the defendant alleges in his pleadings specific acts or omissions of the plaintiff.

In this instruction, use only the parties' names; do not refer to their pleading status (i.e., plaintiff, counterplaintiff, etc.).

600.09 Issues—Contribution Following Settlement—Negligence

[1] **(Name(s) of Plaintiff(s))** (has/have) paid a sum of money to **(Name of Injured Person)** in settlement of **(Name of Injured Person)**'s claim for (his/her/its/their) [injuries] [and] [damages]. **(Name(s) of Plaintiff(s))** now claim[s] that (he/she/it/they) (is/are) entitled to contribution from **(Name(s) of Defendant(s))** for a percentage of that sum paid.

[2] [**(Name(s) of Plaintiff(s))** further claim(s) that the payment was made in reasonable anticipation of (his/her/its/their) liability to **(Name of Injured Person)**.]

[3] **(Name(s) of Plaintiff(s))** claim(s) that **(Name(s) of Defendant(s))** (was/were) negligent in one or more of the following respects:

> (Set forth in simple form, without undue emphasis, those allegations as to the conduct of the defendant(s) which are set forth in the complaint for contribution which have not been withdrawn or ruled out by the court and are supported by the evidence.)

[4] **(Name(s) of Plaintiff(s))** further claim(s) that one or more of the foregoing was a proximate cause of **(Name of Injured Person)**'s [injuries] [and] [damages].

[5] **(Name(s) of Defendant(s))**

[(deny/denies) that the payment was made in reasonable anticipation of liability;]

[(deny/denies) that (he/she/it/they) did any of the things claimed by **(Name(s) of Plaintiff(s))**;]

[(deny/denies) that (he/she/it/they) (was/were) negligent (in doing any of the things claimed by **(Name(s) of Plaintiff(s))**;]

[and (deny/denies) that any claimed act or omission on the part of **(Name(s) of Defendant(s))** was a proximate cause of **(Name of Injured Person)**'s (injuries) (and) (damages)].

[6] [**(Name(s) of Defendant(s))** also assert(s) the following affirmative defense(s):

(Set forth in simple form, without undue emphasis or repetition, those affirmative defenses in the defendant's answer which have not been withdrawn or ruled out by the court and are supported by the evidence.)]

[7] [**(Name(s) of Plaintiff(s))** (deny/denies) (that/those) affirmative defense(s).]

[8] [**(Name(s) of Defendant(s))** (also) claim(s) that **(Name(s) of Plaintiff(s))** (was/were) negligent in one or more of the following respects:

(Set forth in simple form, without undue emphasis, those allegations as to the conduct of the plaintiff which have been set forth in the defendant's answer which have not been withdrawn or ruled out by the court and are supported by the evidence.)]

[9] [**(Name(s) of Defendant(s))** further claim(s) that one or more of the foregoing was (a) (the) proximate cause of **(Name of Injured Person)** 's (injuries) (and) (damages).]

[10] [**(Name(s) of Plaintiff(s))** (admit(s)) (deny/denies)

(Set forth in simple form, without undue emphasis, the admissions, if any, and denials contained in plaintiff's reply to defendant's allegations.)]

Notes on Use

If the right of contribution is based on a theory other than negligence, the instruction should be modified as necessary. See Notes on Use to 600.01.

The instruction presumes that there is no issue that payment was made. If an issue as to payment arises, the instruction should be modified.

Paragraphs 8, 9 and 10 should be used only if the defendant alleges in his pleadings specific acts or omissions of the plaintiff.

As used in this instruction, the term "affirmative defense(s)" refers only to the traditional affirmative defenses that operate as a complete bar to recovery — for example, statute of limitations, release, and satisfaction. See Civil Practice Law § 2—613(d). Do not include comparative negligence or other comparative fault in the paragraphs referring to affirmative defenses, even if comparative negligence or comparative fault are referred to as affirmative defenses in the pleadings. Comparative negligence or comparative fault only reduces damages; it has no effect on liability.

Comment

Paragraph 2 is consistent with the requirement in indemnity cases that the plaintiff show that his payment was made in the reasonable anticipation of liability. St. Paul Fire & Marine Ins. Co. v. Michelin Tire Corp., 12 Ill. App. 3d 165, 298 N.E.2d

289 (1st Dist. 1973); Nogacz v. Proctor & Gamble Mfg. Co., 37 Ill. App. 3d 636, 347 N.E.2d 112, 122-24 (1st Dist. 1975); N. E. Finch Co. v. R. C. Mahon Co., 54 Ill. App. 3d 573, 370 N.E.2d 160, 12 Ill. Dec. 537 (3d Dist. 1977); Houser v. Witt, 111 Ill. App. 3d 123, 443 N.E.2d 725, 66 Ill. Dec. 799 (4th Dist. 1982).

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600.10 Burden of Proof—Contribution Following Settlement—Negligence

(Name(s) of Plaintiff(s)) (has/have) the burden of proving each of the following propositions:

First, that **(Name(s) of Defendant(s))** acted or failed to act in one of the ways claimed in these instructions, and that in so acting, or failing to act, **(Name(s) of Defendant(s))** (was/were) negligent;

Second, that the negligence of **(Name(s) of Defendant(s))** was a proximate cause of [the injury to **(Name(s) of Injured Person(s))**] [and] [the damage to **(Name(s) of Injured Person(s))** ('s)(s') property] [;] [.]

[Third, that the payment **(Name(s) of Plaintiff(s))** made was in reasonable anticipation of liability to **(Name(s) of Injured Person(s))**.]

[**(Name(s) of Defendant(s))** (has/have) the burden of proving the affirmative defense(s) that:

(Concisely state any affirmative defenses.)]

If you find from your consideration of all the evidence that each of the propositions required of **(Name(s) of Plaintiff(s))** has been proved [and that none of the affirmative defenses has been proved] [and that the affirmative defense has not been proved], then your verdict should be for **(Name(s) of Plaintiff(s))** and you should apportion damages.

If, on the other hand, you find from your consideration of all the evidence that any of the propositions required of **(Name(s) of Plaintiff(s))** has not been proved, [or that any one of the affirmative defenses has been proved,] [or that the affirmative defense has been proved,] then your verdict should be for **(Name(s) of Defendant(s))** and you will have no occasion to consider the apportionment of damages.

Notes on Use

If the right of contribution is based on a theory other than negligence, the instruction should be modified as necessary. See Notes on Use to 600.01.

As used in this instruction, the term "affirmative defense(s)" refers only to the traditional affirmative defenses that operate as a complete bar to recovery — for example, statute of limitations, release, and satisfaction. See Civil Practice Law § 2—613(d). Do not include comparative negligence or other comparative fault in the paragraphs referring to affirmative defenses, even if comparative negligence or comparative fault are referred to as affirmative defenses in the pleadings. Comparative negligence or comparative fault only reduces damages; it has no effect on liability.

600.11 Apportionment of Responsibility—Separate Suit—Negligence

To apportion damages, you must determine from all the evidence the relative degree of fault of each party to this lawsuit.

In making that determination you should consider the duty owed by each party to **(Name of Injured Person)**; the extent to which the conduct of each party deviated from the duty that [he] [or] [she] [or] [it] owed to **(Name of Injured Person)**; and the extent to which the negligent conduct of each party proximately caused **(Name of Injured Person)**'s [injuries] [and] [damages].

In [your verdict] [Verdict Form ___], you will apportion damages by stating the percentage of fault of each party. [If your verdict is for **(Name(s) of Defendant(s) Not Party To Prior Suit, Stated In the Alternative If More Than One (e.g., "Defendant Smith or Defendant Jones"))** (or both of them) (or some or all of them), then you must fill in zero (0) percent contribution for (**(Name of Defendant Not Party To Prior Suit)**) (that defendant or those defendants you find not liable) and apportion damages among all the other parties.] The total of those percentages must add up to 100.

Notes on Use

This instruction should be given in every contribution case tried separately from the prime action — that is, when issues instruction 600.06, 600.07, 600.08, or 600.09 is used. In cases tried and submitted concurrently (600.04) or consecutively (600.05) to the same jury, instructions 600.02 or 600.03 will be given.

If the right of contribution is based on a theory other than negligence, the instruction should be modified as necessary. See Notes on Use to 600.01.

The second (bracketed) sentence in the third paragraph will be used only if there are one or more contribution defendants who were not parties to the lawsuit brought by the injured person. If all parties were found liable in the prior suit, apportionment is required and the second (bracketed) sentence of the third paragraph should be omitted. If there is more than one defendant who was not a party to the prior suit, then the appropriate parenthetical alternatives must be selected.

When multiple verdict forms are submitted, the court or parties may wish to have each verdict form designated by a separate number or letter. This option is provided in the first line of paragraph 3.

Comment

Apportionment can be accomplished only as between tortfeasors who are parties to the lawsuit. Therefore, the jury is instructed that the percentages of fault must add up to 100. No percentage is allocated to tortfeasors who are not parties to this action.

600.12 Apportionment of Responsibility—Instruction on Use of Verdict Forms—Separate Suit—One or More Defendants Not Parties to Prior Suit

Forms of verdict are supplied with these instructions. After you have reached your verdict, fill in and sign the appropriate forms of verdict and return them into court. Each verdict should be signed by each of you. You should not write or mark upon this or any of the other instructions given to you by the court.

The parties in this case are:

Plaintiff[s]: **(Name of First Plaintiff)**

(Name of Second Plaintiff)

(etc.)

Defendant[s]: **(Name of First Defendant)**

(Name of Second Defendant)

(etc.)

If you find for **(Name(s) of Plaintiff(s))** and against defendant **(Name of Defendant Not a Party To Prior Suit)**, then you should use the form of verdict which says:

"As to the claim of **(Name(s) of Plaintiff(s))** against **(Name of Defendant Not a Party to Prior Suit)**, we, the Jury, find in favor of **(Name(s) of Plaintiff(s))** and against **(Name of Defendant Not a Party To Prior Suit)**."

If you find for the defendant **(Name of Defendant Not a Party To Prior Suit)** and against **(Name(s) of Plaintiff(s))**, then you should us the form of verdict which says:

"As to the claim of **(Name(s) of Plaintiff(s))** against **(Name of Defendant Not a Party to Prior Suit)**, we, the Jury, find in favor of **(Name of Defendant Not a Party To Prior Suit)** and against **(Name(s) of Plaintiff(s))**."

[Repeat the preceding two paragraphs, each beginning with "If you find . . . ," for each defendant who was not a party to the prior suit.]

You should also complete the form of verdict which says:

"We, the Jury, apportion damages as follows:

(Name of Party)	_____ %
(Name of Party)	_____ %
(Name of Party)	_____ %
TOTAL =	100%"

You must fill in a percentage for each party, except that if you find in favor of **(Name(s) of Defendant(s) Not Party To Prior Suit Stated In the Alternative, e.g., "Defendant Smith or Defendant Jones")**, then you must fill in zero (0) percent for that defendant [or those defendants].

Notes on Use

Fill in the names of the parties before submitting this instruction to the jury.

Submit separate verdict forms for each defendant who was not a party to the prior suit and whose liability is therefore being determined for the first time in this case.

This instruction may be modified for use in actions for contribution following settlement.

600.13 Apportionment of Responsibility—Instruction on Use of Verdict Form—Separate Suit—All Parties Were Parties to Prior Suit

A form of verdict is supplied with these instructions. After you have reached your verdict, fill in and sign the form of verdict and return it into court. The verdict should be signed by each of you. You should not write or mark upon this or any of the other instructions given to you by the court.

The parties in this case are:

Plaintiff[s]: (Name of First Plaintiff)

(Name of Second Plaintiff)

(etc.)

Defendant[s]: (Name of First Defendant)

(Name of Second Defendant)

(etc.)

Notes on Use

This instruction should be used when all parties to this contribution action were parties to the prior suit. In that case, the only verdict form necessary will be 600.16.

If the contribution action is tried to the same jury that tried the prime action, this instruction may be modified so as to redefine the designations of the parties (e.g., third party plaintiff, third party defendant, etc.) and to indicate that these are the parties to the contribution part of the case.

600.14 Verdict Form—Apportionment of Responsibility—Separate Suit—One Or More Defendants Not Parties to Prior Suit—Verdict for Plaintiff

[Verdict Form ___]

As to the claim of **(Name(s) of Plaintiff(s))** against **(Name of Defendant Not a Party to Prior Suit)** we, the Jury, find in favor of **(Names(s) of Plaintiff(s))** and against **(Name of Defendant Not A Party To Prior Suit)**.

_____

_____

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_____

_____

_____

_____

_____

_____

M

Notes on Use

Submit a separate form filled in for each defendant who was not a party to the prime action.

This form can also be used in actions for contribution following settlement.

600.15 Verdict Form—Apportionment of Responsibility—Separate Suit—One Or More Defendants Not Parties to Prior Suit—Verdict for Defendant

[Verdict Form ___]

As to the claim of **(Name(s) of Plaintiff(s))** against **(Name of Defendant Not a Party to Prior Suit)** we, the Jury, find in favor of **(Name of Defendant Not A Party To Prior Suit)** and against **(Name(s) of Plaintiff(s))**.

_____

_____

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_____

_____

_____

_____

M

Notes on Use

Submit a separate form filled in for each defendant who was not a party to the prime action.

This form can also be used in actions for contribution following settlement.

600.16 Verdict Form—Apportionment of Responsibility

[Verdict Form ___]

We, the Jury, apportion damages as follows:

(Name of Party)	____%
(Name of Party)	____%
(Name of Party)	____%
TOTAL =	100%

Notes on Use

This form can be used in any type of contribution action.

Fill in the names of all parties to the contribution action before submitting this form to the jury.

600.17 Apportionment of Responsibility—Treatment of Parties as a Unit

For the purposes of these instructions, you will consider **(Name of Party)** and **(Name of Party)** as one [defendant] [plaintiff] [party].

Notes on Use

This instruction must be given where two or more parties are combined as a unit as described in Ill. Rev. Stat. ch. 70, ¶ 303 which provides, "If equity requires, the collective liability of some as a group shall constitute a single share."

When this instruction is used, place the names of both such parties on a single line of the apportionment verdict form, 600.16.

RADIOLOGY - MEDICAL-LEGAL IMPLICATIONS

By
John H. Lohnes, M.D.
Cedar Rapids Radiologists, P.C.
Cedar Rapids, Iowa

I. Radiology

A. Diagnostic
B. Therapeutic

Diagnostic Radiology (Imaging)

A. X-rays
B. Ultrasound
C. Nuclear
D. CT
E. MR

Radiologists

II. Film Interpretation

A. Quality of films

1. Definition and resolution
2. Density
3. Contrast
4. Distortion

B. Viewing the film

1. Approach
2. Impressions

III. Litigation

A. Why
B. Record
C. Standards of Care

because it was felt there would be no chance of the trier of fact accepting those as a complete bar. However, under comparative fault all possible defenses should be raised even if it is expected that only a small percent of fault would be assigned because of that defense.

(1) Urge all possible grounds of contributory negligence and other fault. Apportionment of negligence is not based solely on the number of respects in which a party was at fault. DeGoff v. Schmude, (Wis. 1976) 238 N.W.2d 730, 736. Although not determinative, the number of respects in which a party is at fault is a factor to be considered in allocation of fault. Leckwee v. Gibson, (Wis. 1979) 280 N.W.2d 186, 192.

(d) Failure of lookout by a guest. See headnotes 20, 22 to Iowa Code Section 321.493.

(e) Failure of guest to warn driver. See form 1403, 3 Am. Jur. PL and PR forms (REV) on page _____.

(f) Defective equipment. See 8 Am. Jur. 2d Autos and Highway Traffic §500.

(g) Riding with an unsafe driver. Anno: Contributory negligence or assumption of risk by passenger as to injury resulting from automobile operator's inexperience or a lack of skill. 43 A.L.R. 2d 1155; Christopherson v. Christensen, (Iowa 1966) 140 N.W.2d 146, 152.

(h) Intoxication Drinking on the part of a plaintiff driver that does not rise to the level of intoxication.

(i) Failure of an owner riding as a passenger in a car to exercise control over the driver.

(j) Lack of care in hiring or retaining, 2 POF2d 609; 29 Am. Jur. Trials §72.

(k) Negligent entrustment. See Kraufnick v. Haegg Roofing Co., 20 N.W.2d 432, 236 Iowa 985, 163 A.L.R. 1413 and Hardwick v. Bublitz, 254 Iowa 1253, 119 N.W.2d 86. Campbell v. Van Roekel (Iowa 1984) holds that evidence of the owner's personal knowledge of the driver's prior driving record and drinking habits was proper where there was an issue of negligent entrustment.

(l) Acquiescence, encouragement or ratification by a guest of the manner of operation by the host. 58 Am. Jur. 2d Negligence §§461, 463.

(m) Other possible grounds are set out in the annotations listed on page _____.

II. IMPUTED CONTRIBUTORY NEGLIGENCE.

A. In allocating fault a plaintiff is charged with plaintiff's own fault and negligence "attributed" to plaintiff. Iowa Code §668.3(1).

B. Imputed contributory negligence must be affirmatively alleged. Anno: 59 A.L.R. 2d 273.

C. Situations where negligence is imputed.

1. Agency ". . .when one person is driving another's automobile for the latter's benefit an inference of agency may be drawn" (Citing authorities) Duffy v. Harden, 179 N.W.2d 496, 502. The test of agency is the right to exercise control of the actions and conduct of another. Houlahan v. Brockmeier, (Iowa 1966) 141 N.W.2d 545, 548. See forms set out on pages _____. An annotation at 53 A.L.R. 3rd 664 sets out the general rule but shows that some courts have refused to impute negligence in comparative negligence situations. It can be argued that in most cases the concepts of vicarious liability are "unfair" as the term is used in Goetzman v. Wichern, (Iowa 1983) 327 N.W.2d 742.

O

Restatement Torts 2d §485; 8 Am. Jur. 2d Autos and Highway Traffic §672.

2. Negligence may be imputed to an owner who is a passenger in the owner's car. See Uniform Jury Instruction 2.10 set out on page _____. Everhard v. Thompson, (Iowa 1972) 202 N.W.2d 58, 60 recognizes the rule but states that it is based on a "nebulous premise". The Everhard case, supra, holds that co-ownership between a passenger and a host is not sufficient to impute the negligence of the driver to the co-owner-passenger.

3. Joint Enterprise. See Restatement of the Law of Torts 2nd §491, 58 Am. Jur. 2nd §§457, 459, 460, 465, 466, 468; headnotes 21 and 23 of Iowa Code Section 321.493; Restatement Torts 2d §471. Forms of pleadings are set out at pages _____. A form instruction is set out on page _____.

D. Situations where negligence is not imputed.

1. Iowa has consistently refused to impute negligence under a family purpose theory. See Everhard v. Thompson, (Iowa 1973) 202 N.W.2d 58, 60; Houlahan v. Brockmeier, (Iowa 1966) 141 N.W.2d 545, 549.

2. Contributory negligence of a consent driver has not been imputed to an owner merely by reason of giving consent or by reason of the owner liability statute §321.493. Everhard v. Thompson (Iowa 1972) 202 N.W.2d 58, 60. The adoption of comparative negligence will probably not have any effect on this concept. Schwartz: Comparative negligence §16.1.

3. §668.1 is based on the Uniform Comparative Fault Act, but the Iowa Statute omitted the following sentence from §1(a) of the Uniform Act: "This rule applies whether or not under prior law the claimant's contributory fault constituted a defense or was disregarded under applicable legal doctrines, such as last clear chance." The failure to include this sentence in the Iowa Statute probably indicates that comparative negligence cannot be considered with reference to consortium

claims or parents' claims, since said claims have heretofore been considered as independent claims. Madison v. Colby (Iowa 1984) 348 N.W.2d 202; Uniform Jury instructions 2.2D and 2.2E.

E. Effect of comparative negligence on imputed negligence and contributory negligence.

1. It can be argued that the concept of imputed negligence is not consistent with the philosophy of comparative negligence that damages should be allocated on the basis of fault. However, the adoption of comparative negligence does not seem to have caused any reconsideration of the principals of imputed negligence. Schwartz suggests that a more realistic basis for imputed negligence is that the person not at fault set in motion an enterprise which is profitable to the person and which involves negligent parties. Thus, the enterpriser, rather than an innocent party, should bear the cost of accidents which occur in the course of business. Schwartz, Comparative Negligence, §16.1, Page 247, citing 2 Harper & James, The Law of Torts, §26.5 (1956); Prosser, Torts, §69 (4th Ed., 1971); Anno: 53 A.L.R.3d 664.

2. Imputed Contributory Negligence. Ordinarily, contributory negligence of one person is not imputed to another unless there would be vicarious liability for injury to a third person caused by the negligent person. See Prosser, Torts, §74 at 488 (4th Ed., 1971). However, in Stuart v. Pilgrim, (1956) 247 Iowa 709, 74 N.W.2d 212, the Iowa Court abandoned the "both ways" test, in that case. See discussion in Houlahan v. Brockmeier, (1966), 141 N.W.2d 545, at 548, 549, 258 Iowa 1197, supplemented 141 N.W.2d 924, 258 Iowa 1197. Before the adoption of comparative negligence, Minnesota refused to impute a servant's contributory negligence to bar his master's claim for vehicle damage. Weber v. Stokely-Van Camp, Inc., (1966), 274 Minn. 482, 144 N.W.2d 540. After the adoption of comparative negligence, the Minnesota court held that negligence of the bailee of an automobile would not be imputed to the

bailor. Smedsrud v. Brown, (1975), 303 Minn. 330, 227 N.W.2d 572.

3. Schwartz points out that the reasons justifying vicarious liability do not always support the imputation of contributory negligence. He further contends that since comparative negligence is predicated on the general philosophy that damages should be allocated on the basis of fault, there is justification for arguing that the "both ways" test should not always be followed.

III. FAILURE TO AVOID OR MITIGATE DAMAGES.

A. "Fault" includes unreasonable failure to avoid an injury. §668.1(1).

1. Prosser and the Restatement call this the doctrine of "avoidable consequences". This occurs after a legal wrong has been done, but at a time when some damages may be avoided. Prosser 4th Ed. pp. 422-424, 610; Restatement Torts 2d 918. Examples: Delay in getting medical care, failure to close a gate left open by defendant thereby allowing cattle to escape; allowing animals to drink water polluted by defendant. See pleading form on Page _____.

B. "Fault" also includes unreasonable failure to mitigate damages. §668.1.

1. Section 619.7 requires that "facts" be set forth in a "distinct division" of the answer. §619.8 prohibits showing mitigating circumstances unless pleased "except such as are shown by or grow out of the testimony introduced by the adverse party". Vawter v. McKissick, (Iowa 1968) 159 N.W.2d 538, 541.

2. Neither Prosser nor the Restatement include a separate discussion of mitigation.

3. Section 668.1 seems to distinguish avoiding an injury and failure to mitigate damages. A failure of a motorcycle operator to wear a helmet might be a failure to avoid injuries if it is shown that some or all of the injuries would have been avoided if the

helmet had been worn. Halvorson v. Voeller, (N.D. 1983) 336 N.W.2d 118. If a seat-belt defense is permitted on the theory that Chapter 668 supersedes the present statute or if the proposed federal legislation on use of seat-belts changes the law, then the failure to wear a seat-belt could be a negligent failure to avoid damages. Foley v. City of West Allis, (Wis. 1983) 335 N.W.2d 824, 113 Wis. 2d 475. Failure to mitigate damages might include evidence of failing to obtain physical therapy or otherwise cooperate with the doctor, failing to do exercises recommended by a doctor, failure to lose weight, etc. See Uniform Jury Instruction 3.22 at Page _____; Annot: Duty of injured person to submit the non-surgical medical treatment to minimize tort damages, 62 A.L.R. 3rd 70; Annot: Duty of injured person to submit to surgery to minimize tort damages 62 A.L.R. 3rd 9.

C. Unreasonably refusing offers of mitigation from a defendant may constitute fault if a defendant in good faith has offered to prevent all or part of the harm. Restatement Torts 2d §918 Comment i.

1. The phrase "mitigation of damages" has other meanings. 22 Am. Jur. 2d Damages §200. One of the meanings is that plaintiff's damages are not as large as the plaintiff asserts. This would not be an affirmative defense. For example in Ehlinger v. State, (Iowa 1976) 237 N.W.2d 784, 792 it was held that shortened life expectancy caused by the injury may be used to reduce damages when determining loss of earning capacity, future pain, suffering and medical expenses. Iowa Code §668.1 deals only with the affirmative defense of unreasonably failure of a claimant to avoid injury or mitigate damages.

IV. ASSUMPTION OF RISK

A. Meanings of assumption of risk.

1. Rosenau v. City of Esterville, (Iowa 1972) 199 N.W.2d 125 divided "assumption of risk" as follows:

(a) An alternative expression for the proposition that the defendant was not negligent either because no duty was owed or the duty was not breached.

(b) The "secondary meaning" is used where the injured person acted unreasonably in assuming a particular risk, "and the defense of assumption of risk coincides with the defense of contributory negligence." 199 N.W.2d at 131.

(c) The Court held that where contributory negligence is available as a defense the defense of assumption of risk is not available as a separate defense.

2. The drafters of the restatement of the law of torts had difficulty reaching agreement relating to assumption or risk. See Wade: The place of Assumption of Risk in the Law of Negligence, XXII Louisiana Law Review 5. Section 466, Restatement of Torts 2nd in defining the "types of contributory negligence" includes as the first type plaintiff's "intentional and unreasonable exposure of himself to danger. . .of which (he) knows or has reason to know" §§496A through 496G deal with assumption of risk and assigns four different meanings to the term. See page _____.

3. The comment to §1(b) of the Uniform Comparative Fault Act (which is incorporated in Iowa Code §668.1(1)) assigns three different meanings to the term.

B. Status of the law before Chapter 668.

1. The Rosenau case, supra, adopted the rule that assumption of risk was not available as a defense in any situation where contributory negligence was available.

2. Parsons v. Nat. Dairy Cattle Congress, (Iowa 1979) 277 N.W.2d 620, involved an injury to a hockey spectator from a flying puck, and therefore involved the primary meaning of assumption of risk. The court held that the primary assumption of risk is not an

affirmative defense and that contributory negligence is available as an affirmative defense in situations where primary assumption of risk is applicable.

3. Weik v. Ace Rents, (Iowa 1958) 87 N.W.2d 314 held that a plaintiff who rented a power lawn mower from defendant and signed a written agreement agreeing to exonerate, indemnify and save harmless the defendant from all claims and liability arising out of the use of the mower could not maintain an action against the defendant either for negligence or a breach of express warranty. This concept is similar to contractual assumption of risk and the defense of consent to intentional torts. See Restatement Contracts §§574, 575.

4. Assumption of risk was available as a complete defense in strict products liability actions. Hughes v. Magic Chef, Inc., (Iowa 1980) 288 N.W.2d 542, 548; Aller v. Rogers Machine Manufacturing Co. Inc., (Iowa 1978) 268 N.W.2d 830, 838, 839.

5. Assumption of risk was a complete defense in other types of strict liability. See Franken v. City of Sioux Center, (Iowa 1979) 272 N.W.2d 422, 425 re duties arising from possession of a wild animal.

6. Assumption of risk was a complete defense to a dram shop action by a passenger knowingly and voluntarily riding with an intoxicated driver. Rippel v. J. H. M. of Waterloo, Inc., (Iowa 1983) 328 N.W.2d 499, 500, 501.

7. Assumption of risk was available in cases based on recklessness or intoxication in the guest-passenger type of case. Six v. Freshour, 231 N.W.2d 588, 591 (Iowa 1975); Dutcher v. Lewis, 221 N.W.2d 755, 762 (Iowa 1974).

8. In Campbell v. Van Roekel, (Iowa 1984) 347 N.W.2d 406, a passenger sued the host driver for alleged negligence and intoxication and sought compensatory and punitive damages. The Supreme Court held that it was not proper

to combine the defense of assumption of risk and negligence of the plaintiff. The Court held that the jury should have been instructed "under the usual reasonable person or objective standard without reference to assumption of risk terminology or strictly subjective standards." 347 N.W.2d at 410.

C. Status of assumption of risk under Chapter 668.

1. A contractual defense based on a valid and enforceable consent would presumably be a complete defense and would not be affected by Chapter 668. See Comment to Section 1 of the Uniform Comparative Fault Act; Schwartz, Comparative Negligence, §9.2. Assumption of risk in its "primary meaning" as an alternative expression for the proposition that the defendant was not negligent because there was either no duty or no breach of duty is not affected by Chapter 668.

2. The status of assumption of risk in its secondary meaning is uncertain.

(a) Can both defenses be submitted in the same action?

(1) The court could say that the rule in the Campbell case, supra, is still the law and that assumption of risk in its secondary meaning cannot be submitted if contributory negligence is submitted. On the other hand, the court could say that by listing both in Iowa Code §668.1 the legislature intended that both defenses could be submitted in the same action. The primary rationale of the court for the rule in the Rosenau case, supra, was to prohibit what was perceived to be undue emphasis if a defendant were given an instruction on both contributory negligence and assumption of risk. 199 N.W.2d at 133, 347 N.W.2d at 414. On the other hand defendant in the Campbell case, supra, argued that plaintiff had an unfair advantage

in having both compensatory and punitive damages submitted and allowing the jury to be instructed on "gross negligence", "recklessness", and "wantonness", without giving defendant an instruction on the claimed defense that the plaintiff knowingly and voluntarily rode with an intoxicated driver. Iowa Code §668.1 provides that both negligence and the secondary meaning of assumption of risk constitute "fault" and Iowa Code §668.2 provides that such contributory fault "shall" diminish damages.

(b) In a case where contributory negligence is available as a defense, why would a defendant also ask that assumption of risk in a secondary sense be submitted since there is a greater burden of proof involved in proving actual knowledge of the danger and voluntary assumption of the risk?

(1) The Campbell case, supra, where the defense seemed to be offered primarily to try to offset punitive damages, is an example of a situation where a defendant may ask for the instruction. One of the goals of a defendant is to increase the extent of culpability assigned to the plaintiff. To the extent that a defendant can show that a plaintiff had actual knowledge of the danger and voluntarily assumed the risk, the defendant should be able to persuade the trier of fact to assign a higher percent of fault to the plaintiff. However, this argument will not help in defending against punitive damages unless the court should rule that punitive damages are to be apportioned

in the same manner as compensatory damages.

3. The court could hold that in strict products liability cases and other strict liability cases assumption of risk is the only type of affirmative defense that is submissible. If so, Iowa Code §668.3 provides that it would not be a complete bar but merely diminish damages. The majority of jurisdictions that have adopted comparative negligence have allowed contributory negligence as a defense in strict liability actions. There is included in the addendum the case of Coney v. J. L. G. Industries, Inc., (Illinois 1983) 454 N.E.2d 197. Page 201 of the opinion lists the various jurisdictions and shows that the "vast majority" have found that comparative negligence is applicable in strict liability cases.

4. Re statutory liability cases the comment to the Uniform Act indicates that it is intended that the act will apply unless the court decides that no recovery is intended. If the court decides that the act does not apply, then the same defenses would be available as existed prior to the adoption of Chapter 668.

5. Since Iowa Code §668.1 provides that "unreasonable assumption of risk not constituting an enforceable expressed consent" is a type of fault that shall diminish damages, it is apparently intended that there would be some situations where a jury would be instructed on this defense. Until the Supreme Court has interpreted Chapter 668 it will be difficult to try to draft an instruction. The Campbell case, supra, indicates the most recent position of the Supreme Court prior to the adoption of Chapter 668. Two alternatives could be followed in drafting an instruction on assumption of risk in its secondary meaning.

   (a) The standard type of assumption of risk defense could be submitted. The comment to Uniform Act states that the Uniform Act states that the Uniform Act intended to refer to conduct which was voluntary

and with knowledge of the danger. The Restatement of Torts 2nd §§496A through 496G relate to this concept. Uniform Instruction 24.9 can be used as a guide. In addition, the type of instruction that was used under the guest statute could be used as a model. See White v. McVicker, 216 Iowa 90, 246 N.W. 385 (1933); Miller v. Mathis, 233 Iowa 221, 8 N.W.2d 726 (1943); and Manley v. O'Brien Cty. Rural Elec. Coop., (Iowa 1978) 267 N.W.2d 39.

(b) A more conservative approach would be to use as a guide Restatement of Torts 2nd §466; the discussion in Headnote 9 of the Rosenau case at 199 N.W.2d 133; and the discussion in the Wisconsin case of McConville v. State Farm Mutual Automobile Ins. Co., (Wis. 1962) 113 N.W.2d 14; 19, 20. Such an approach might attempt to follow the Campbell case at 347 N.W.2d 410 by avoiding any reference to assumption of risk terminology or strictly subjective standards. However, if the Campbell case were followed and there was no reference to assumption of risk terminology or subjective standards, the instruction would not be an assumption of risk instruction but would be a contributory negligence instruction.

V. MISUSE OF A PRODUCT

A. In a product case based on strict liability in tort plaintiff has the burden of proof that the proximate cause of the injury was a product defect which rendered the product unreasonably dangerous in a reasonably foreseeable use. Therefore negligent use does not prevent recovery it if was reasonably foreseeable. Hughes v. Magic Chef, Inc., (Iowa 1980) 288 N.W.2d 542; Henkel v. R and S Bottling Co., (Iowa 1982) 323 N.W.2d 185; Uniform Jury Instructions 24.3, 24.4.

B. Therefore a plaintiff can recover in spite of misuse by the plaintiff, if the misuse was reasonably foreseeable. The Henkel case, supra, 323 N.W.2d at 192 gives the following examples of the

right of a plaintiff to recover in spite of misuse:

1. Seller of a bottle of catsup could reasonably expect users to strike the bottom of the bottle with their hand to loosen the cap.

2. It was foreseeable that the operator, while standing on the ground, would start a tractor having a safety mechanism to prevent starting in gear.

3. Driving without a seat belt is a foreseeable misuse of the vehicle. (It could be argued that when the legislature provided for misuse as a defense in Chapter 668 knowing that the court included driving without a seat belt as misuse that the legislature intended to allow a seat belt defense in spite of Iowa Code §321.445).

4. A jury question existed as to whether removal of a cotter key was a reasonably foreseeable act.

C. Misuse would be an affirmative defense. A form is set out on Page _____. The court might allow misuse to be submitted as a separate affirmative defense or it might hold that misuse is merely a specification of contributory negligence. See discussion re assumption of risk in IV above.

VI. PLEADINGS RELATING TO SETTLEMENT.

A. Effect of Release. §668.7

1. When there is a partial settlement, plaintiff absorbs plaintiff's own percent of fault and the percent of the settling party. Clients should be informed.

2. Remaining defendants must assume the burden of pleading, producing evidence, proving and arguing fault of the settling party. Plaintiff will be defending the settling party. As a practical matter the parties are realigned and plaintiff is the real party in interest in defending the settler.

3. If a partial settlement is likely, defendant should get depositions of the plaintiff while plaintiff is still making a claim against that party.

4. A defendant who makes a partial settlement with a plaintiff gives up the right of contribution if trial shows that too much was paid. Contribution is only available if the person from whom it is claimed has been released. Section 668.5(2). Clients should be informed.

5. A person who obtains a release, covenant not to sue, or similar agreement, is discharged from all liability for contribution.

B. Effect of settlement before suit.

1. Remaining defendant must plead negligence and proximate cause of the settling party and assume the burden of producing evidence and proving liability of the settling party.

C. Effect of settlement after suit is commenced.

1. If a contribution claim has been filed against the settling party, the cross-claim or third party claim for contribution will set out the claimed liability of the settling party. After settlement, the pleading should be amended to include the contribution claims as a partial defense to the claims of the plaintiff.

2. If settlement occurs after pleadings are closed there might be a problem in getting permission to raise the defense against the plaintiff. This may be an additional reason for having a contribution claim on file.

D. Essentials of an affirmative defense to reduce plaintiff's recovery by reason of fault of a settler §668.5.

1. Settler was liable to plaintiff because negligence of settler was a proximate cause.

2. The liability of a settler is on the same indivisible claim as the claim against defendant.

3. The liability of a settler was for the same injury, death or harm as involved in the pending case. Restatement Torts 2d §433A.

4. The plaintiff gave settler a release, covenant not to sue or similar agreement.

5. Fault of the settler should be determined by the trier of fact.

6. The claim of the plaintiff should be reduced by the percent of fault attributable to the settler.

VII. CONTRIBUTION

A. Equitable contribution is adopted. Contribution is based on the percent of fault established by the trier of fact. §668.5(1).

1. For this purpose the court may determine that two or more persons are to be treated as a single party. §668.3(2)(b).

B. A settling party may obtain contribution is settling party obtained a release of the party from whom contribution is being claimed and if the amount of the settlement was reasonable. §668.5(2).

C. A party claiming contribution must have paid more than their share before they are entitled to recover for contribution. §668.6.

D. The statute of limitations for action for contribution is one year after a judgment. If judgment has not been rendered, claims for contribution can only be made if the liability was discharged in the period of limitations and action commenced within one year after the date of payment; or while an action pending an agreement was made to discharge the liability and within one year after date of agreement the liability was discharged and action commenced. §668.6.

E. Apparently, there is no statute of limitations for time for filing motion for contribution after judgment.

F. Illustrations 9 and 10 in the comment to §5 of the Uniform Act shows examples.

G. The act does not contemplate bifurcation of issues of contribution. If a defendant believes there might be too much prejudice involved in the defendants arguing among themselves as to their percentages of fault, defendant might request bifurcation of that issue.

H. Under prior law contribution was not permitted where there was intentional wrong, moral turpitude or concerted action (Best v. Yerkes, 247 Iowa 800, 77 N.W.2d 23) or by a reckless joint tortfeasor. Beeck v. Aqua Slide 'N Drive Corporation, (Iowa 1984) 350 N.W.2d 149, 170. Under Chapter 668, contribution is permitted if comparative fault is applicable. Chapter 668 refers to "equitable contribution". On this basis it might be possible to argue defenses to contribution based on equitable grounds even though the court has permitted comparison of fault. However, it appears that the Uniform Act, upon which the Iowa statutes are based, assumes that once a court has ruled that fault will be compared, the same percentages will be used for contribution purposes.

I. §668.6 provides ". . .A party paying more than the party's percentage share of damages may recover judgment for contribution upon motion to the court or in a separate action." It could be argued that a defendant could wait until after verdict before making a contribution claim. There might be a question of due process if a claim for contribution were raised for the first time by motion after judgment. On the other hand, defendants would be charged with knowledge that the percentages of fault determined by the jury would be the basis for contribution claims. For many reasons, it would seem to be safer to make claims of contribution by cross-claim or third party claim. If so, an effort should be made to persuade the court to enter a form of judgment similar to the form recommended by Judge Graven in Brandt v. Olson, (N.D. Iowa, 1961) 190 Fed. Supp. 683, 688, copy of which is included at Page _____. Unless

the court has entered the form of judgment suggested by Judge Graven, which has the effect of making the decision on contribution and reserving jurisdiction to enter judgment for contribution, there could be a question as to whether the court would have jurisdiction to entertain a motion for judgment for contribution after judgment unless the motion were served on the client rather than the attorney. In connection with dissolutions of marriage, the court has held that in divorce proceedings an equity court retains jurisdiction to modify decrees; that the jurisdiction of the court continues after a decree but an attorney's representation does not; and that notice of a request for modification must be served on a party for the entry of a personal judgment. In re Marriage of Meyer, (Iowa 1979) 285 N.W.2d 10.

Annotations: Failure of guest to leave automobile because of host's misconduct or negligence or assumption of risk constituting defense to automobile guest's action against owner or driver 154 ALR 924

Contributory negligence or assumption of risk by passenger as to injury resulting from automobile operator's inexperience or lack of skill 43 ALR2d 1155, 1160.

Contributory negligence, assumption of risk, or related defenses as available in action based on automobile guest statute or similar common-law rule. 44 ALR2d 1342.

Form 1402 Attempt to drive in front of truck when too late to avoid collision

That plaintiff attempted to and did drive in front of the truck mentioned in plaintiff's complaint, at a time when said truck was so near in point of time and place as to make it inevitable that plaintiff should collide therewith, and that in so doing plaintiff realized the danger of being unable to cross in front of said truck at said time and place in safety, and that the injuries sustained by plaintiff were proximately caused by his conduct in so doing, and that plaintiff assumed the risk of so doing, and that said assumption of risk proximately contributed to the injuries suffered by plaintiff.

Notes

See 7 Am Jur 2d AUTOMOBILES AND HIGHWAY TRAFFIC § 363; 8 Am Jur 2d AUTOMOBILES AND HIGHWAY TRAFFIC § 887.

Annotations: Assumption of risk or contributory negligence in riding in defective automobile. 138 ALR 838.

Attempt to board moving car or train as contributory negligence or assumption of risk. 31 ALR2d 931.

For statutes and rules relating to pleading of the defense of assumption of risk, see:

Alaska RCP 8(c);
Ariz RCP 8(d);
Cal CCP § 437;
Conn Rules for the Supreme Court, Rule 120;
Del RCP, Sup CR 8(c);
Fed RCP 8(c);
Fla RCP 1.8(d);
Ga C 1933 81-307;
Idaho RCP 8(c);
Ill RS 1955 ch 110 § 43;
Ind Rules of Supreme and Appellate Courts, Rules 1-2, 1-3;
Iowa RCP 101;
Kan Stat 1963 60-208(c);
Ky RCP 8.03;
La CCP art 1005;
Me RCP 8(c);
Mass Gen L ch 231 § 28;
Mich Ct Rules, Rule 111;
Minn RCP 8.03;
Miss C 1942 § 1475.5;
Mo Supreme Court Rules, Rule 55.10;
Mont RCP 8(c);
Nev RCP 8(c);
N J RR 4:8-3;
N Mex Stat 1953 21-1-1(c)(c);
N Y CPLR 3018;
N D RCP 8(c);
Ohio RC 1953 § 2309.13;
Ore RS 1953 16.290;
Pa RCP 1030;
S Dak C 1939 33.0905;
Tenn C 1956 §§ 20-916–20-920;
Tex RCP 94;
Utah RCP 8(c);
Vt RS 1959 tit 12 § 1024;
Wash RPPP 8(c);
W Va RCP 8(c);
Wyo RCP 8(c)

[Local statutes or rules should be examined]

Form 1403 By occupant of automobile—Failure to warn operator

That plaintiff assumed whatever risk or hazard existed at the time of said accident in the following respects:

1 Plaintiff failed to warn defendant that defendant was approaching a dangerous curve, when plaintiff knew that defendant was approaching said curve.

2 Plaintiff made no protest to defendant as to the alleged high and excessive rate of speed at which defendant was operating said automobile.

3. Plaintiff made no protest to defendant as to defendant's failure to use due care and to pay proper attention to defendant's driving of said automobile.

That by plaintiff's said acts and omissions plaintiff acquiesced in defendant's conduct in operating said automobile and said acquiescence by plaintiff directly and proximately contributed to said accident and injuries

Notes

See 7 Am Jur 2d AUTOMOBILES AND HIGHWAY TRAFFIC §§ 361–363; 8 Am Jur 2d AUTOMOBILES AND HIGHWAY TRAFFIC § 528.

g MISCELLANEOUS DEFENSES

Form 1411 Nonliability under guest statute of state where accident occurred

1. That the accident or mishap referred to in the plaintiff's complaint occurred in the State of ____1____ [A]; and that in the State of ____2____ [A] there was, at the time of the said accident or mishap, in full force and effect, what is known and described as a guest statute, as follows, to wit: ____3____ [*set out statute*]

2. That at the time and place of the said accident or mishap, the plaintiff was a guest passenger in the motor vehicle being driven by defendant; that plaintiff would be subject to the terms and conditions of the said guest statute; that the allegations of plaintiff's complaint that defendant was guilty of carelessness and negligence are not sufficient to state a cause of action under said statute

Notes

See 7 Am Jur 2d AUTOMOBILES AND HIGHWAY TRAFFIC § 352; 8 Am Jur 2d AUTOMOBILES AND HIGHWAY TRAFFIC §§ 471–474, 601.

Proof of Facts: Status as guests 5 Am Jur Proof of Facts, GUESTS, p. 523.

Form 1412 Emergency vehicle operated by defendant in performance of duties

That on ____1____, 19__2__, this defendant was a duly appointed, qualified, and regularly employed and acting member of the ____3____ Department of the defendant City of ____4____, County of ____5____, State of ____6____. That on said day, at the time and place of the collision described in plaintiff's complaint, this defendant was operating an authorized emergency vehicle, owned by defendant City of ____7____, County of ____8____, State of ____8.1____, and described as follows: ____9____ [*describe*] in the performance of this defendant's duties as ____10____ of the ____11____ City of ____12____ on official business, namely ____13____: [responding to an emergency ____14____ call, *or* engaged at the time in the immediate pursuit of an actual or suspected violator of the law]

Notes

See 7 Am Jur 2d AUTOMOBILES AND HIGHWAY TRAFFIC §§ 206, 212; 8 Am Jur 2d AUTOMOBILES AND HIGHWAY TRAFFIC §§ 754–757.

Annotations: Liability for personal injury or damage from operation of fire department vehicle 82 ALR2d 312.

Liability arising from accidents involving police vehicles. 83 ALR2d 383

Liability for personal injury or property damage from operation of ambulance 84 ALR2d 121

c In failing to give defendant's automobile the right of way at said intersection;

d In failing to decrease the speed of his automobile as he approached said intersection so as to avoid a collision with defendant's automobile;

e In failing to sound his horn before approaching said intersection under the conditions then existing.

Notes

Care required at intersections 8 Am Jur 2d AUTOMOBILES AND HIGHWAY TRAFFIC §§ 735–740

Form 1314.1 Negligence of operator of plaintiff's vehicle—Defective condition of vehicle—Action for property damage sustained in collision with animal

Now comes defendant and admits that he is the owner of a farm located at ___1___, which said farm lies on both sides of Highway ___2___, and that on ___3___ 19__4__, he was the owner of ___5___ *[designation and description of animals]*.

Plaintiff further admits that, at about ___6___ o'clock ___7___ m. on said date, one of said ___8___ *[animals]* crossed the road and that a certain motor vehicle, namely, a 19__9__ ___10___ was being operated on Highway ___11___ by one ___12___ in a ___13___ direction and that ___14___ lost control thereof and wrecked said motor vehicle, but states that he has no knowledge of the damages thereto and therefore denies the amount and extent of the damages set out in plaintiff's petition.

Defendant further denies each and every other allegation in the petition contained and not herein specifically admitted to be true.

Defendant further alleges that any damage which resulted from the wrecking of said motor vehicle was caused solely and proximately by the defective condition of said motor vehicle and the careless and negligent manner in which ___15___ operated it.

Notes

Defective or unsafe condition of vehicle as negligence 8 Am Jur 2d AUTOMOBILES AND HIGHWAY TRAFFIC § 500

b CONTRIBUTORY NEGLIGENCE

ANNOTATIONS

Permitting child to walk to school unattended as contributory negligence of parents in action for injury or death of child 62 ALR3d 541.

Liability or recovery of automobile negligence action arising out of collision or upset as affected by operation of vehicle without front lights, or with improper front lights. 62 ALR3d 560

Liability or recovery in automobile negligence action arising out of collision or upset as affected by operation of vehicle without or with improper taillights or rear reflectors 62 ALR3d 771

Liability or recovery in automobile negligence action arising out of collision or upset as affected by operation of vehicle without or with improper clearance, load, or similar auxiliary lights 62 ALR3d 844.

Motor vehicle passenger's contributory negligence or assumption of risk where accident resulted from driver's drowsiness, physical defect, or illness 1 ALR4th 556

Evidence of automobile passenger's blood alcohol level as admissible in support of defense that passenger was contributorily negligent or assumed risk of automobile accident 5 ALR4th 1194

Form 1331 General form [Rules change]

Notes

Ala Rules of Practice in Circuit and Inferior Court Rule 37 is now **Ala** RCP 8(c)
Cal CCP § 431.30
Del Super Ct (Civ) Rule 8(c)
Fla RCP 1.110
Ga C 81A-101, 81A-181, 81A-201

[3 Am Jur Pl & Pr Supp]

d She failed to have plaintiff's automobile under control.

6. That said negligent acts of ____6____ [A.B.] proximately caused or contributed to said accident and are imputable to plaintiff, and for said reason plaintiff cannot recover from defendant.

[*Prayer for relief, Signature, Verification, see* Captions, Prayers, Etc.]

Notes

See 7 Am Jur 2d Automobiles and Highway Traffic §§ 361, 362; 8 Am Jur 2d Automobiles and Highway Traffic §§ 588–594, 887.

See statutory citations set out following Forms 696, 698.

Annotations: Negligence of driver of automobile as imputable to passenger. 123 ALR 1171.

Failure to look for or discover automobile approaching on wrong side of road as negligence. 145 ALR 536.

Form 1382 Family purpose doctrine—Minor child riding in automobile being operated by parent—Sudden stop on highway, improper lookout

Plaintiff is ____1____ years of age and is the daughter of ____2____ [A.B.] and at all times herein mentioned resided in ____3____ [A.B.'s] household. That at the time and place of said collision the automobile in which plaintiff was riding was owned, provided, and maintained by ____4____ [A.B.] for the general use, convenience, and pleasure of ____5____ [A.B.'s] family and was being operated for the joint and mutual use and benefit of plaintiff and ____6____ [A.B.] for the purpose of transporting and conveying plaintiff to her school, and for the purpose of conveying ____7____ [A.B.] to his place of business in ____8____. That such injuries as plaintiff sustained, if any, while on said joint enterprise, were the direct and proximate result of the negligent and careless operation by ____9____ [A.B.] of said automobile, in the following respects:

a ____10____ [A.B.] brought said automobile to a sudden stop in a public street highly congested with traffic.

b. ____11____ [A.B.] brought said automobile to a sudden stop upon a public street without giving any signal, warning, or notice of his intention to do so.

c ____12____ [A.B.] and plaintiff failed to maintain a proper lookout for traffic and traffic hazards on said public street.

Notes

See 8 Am Jur 2d Automobiles and Highway Traffic §§ 588, 670.

Annotation: Member of family riding in car driven by another member as within guest statute. 2 ALR2d 932.

Form 1383 Agency—Plaintiff's employee as operator of plaintiff's vehicle—Failure to signal, improper lookout

At all times herein mentioned said ____1____ [A.B.] was the duly appointed, qualified, and acting agent, servant, and employee of plaintiff, and was operating plaintiff's vehicle with the knowledge, permission, and consent of plaintiff. Plaintiff was negligent through said agent, servant, and employee in that immediately prior to said collision:

NO. 2.10 CLAIM BY OWNER - VEHICLE DRIVEN BY ANOTHER

It appears without dispute that plaintiff's (counter-claimant's) car was being driven by _____ with the owner's consent.

If _____, the driver, was negligent in the operation of the car and such negligence was a promixate cause of the damage, the negligence of the driver is chargeable to the owner unless the owner establishes that he did not actually have control of the operation of the car. The burden is on the owner to establish surrender of control or that because of the circumstances he could not exercise control.

If the owner has established that control of the car has been surrendered or under the circumstances could not be exercised, then, in that event, the negligence of the driver would not bar the owner's right to recover damages.

AUTHORITY

Phillips v. Foster, 252 Iowa 1075, 109 N.W.2d 604 (1961).
Stuart v. Pilgrim, 247 Iowa 709, 74 N.W.2d 212 (1956).

NOTE: This instruction should be adapted to the situations discussed in Phillips v. Foster. It is not applicable where owner has right of control arising from certain relationships, such as principal and agent, master and servant, partnership or joint venturer mentioned in Stuart v. Pilgrim.

a. Said ___2___ [A.B.] failed to give a proper signal before passing defendant's automobile.

b. Said ___3___ [A.B.] failed to keep a proper lookout so as to avoid said collision.

c. Said ___4___ [A.B.] failed to keep plaintiff's automobile under proper control.

Notes

See 8 Am Jur 2d AUTOMOBILES AND HIGHWAY TRAFFIC §§ 615 et seq., 667–678.

Form 1384 Agency—Plaintiff's employee as operator of plaintiff's vehicle—Changing lanes without signaling

At all times herein mentioned ___1___ [A.B.] was the duly appointed, qualified, and acting agent, servant, and employee of plaintiff. That immediately prior to the time of said collision ___2___ [A.B.] was operating defendant's vehicle over a railroad overpass on said highway. That defendant was operating his vehicle over said railroad overpass and attempted to pass plaintiff's vehicle. ___3___ [A.B.] suddenly and without any warning or signal whatsoever operated plaintiff's vehicle from the right to the left lane of said highway and directly into the path of defendant's overtaking vehicle. As a proximate result of ___4___ [A.B.'s] said acts a collision resulted between said vehicles.

Notes

See 8 Am Jur 2d AUTOMOBILES AND HIGHWAY TRAFFIC §§ 615 et seq., 667 et seq.

Form 1385 Joint enterprise—Husband and wife—Inspection of jointly owned property

For further answer and defense, defendant states that on the occasion described in plaintiff's complaint, plaintiff and her husband, who was the operator of the motor vehicle in which plaintiff was riding, were on an inspection trip of property that was owned by plaintiff and her husband as a joint business venture by reason of which fact plaintiff and her husband were, at the time of the occurrence described in plaintiff's complaint, engaged in a joint enterprise, and that because plaintiff and her husband were engaged in said joint enterprise, the negligence of plaintiff's said husband is imputed to plaintiff. That whatever injuries and damages, if any, were sustained by plaintiff on said occasion, were directly contributed to by the negligence of plaintiff's said husband in the following particulars: ___1___ [*recite various acts of negligence*]

Notes

See 8 Am Jur 2d AUTOMOBILES AND HIGHWAY TRAFFIC §§ 471 et seq., 679–681.

Form 1386 Joint enterprise—Parents and child

That should the court hold that the defendant was guilty of any negligence in the premises, all of which defendant denies, then and in such event, defendant avers that the automobile driven by plaintiffs' son, ___1___ [A.B.], at the time of the occur-

rence of said accident was owned by plaintiffs ....2..... [C.D.] and ....3..... [E.F.] That when the accident happened, plaintiffs were passengers in said automobile and were proceeding to their home at the end of the day. That, accordingly, plaintiffs and ....4..... [A.B.] were then engaged in a joint adventure or enterprise That plaintiffs had at all times the right to control the operation of the automobile driven by ....5..... [A.B.] and that the negligence of ....6..... [A.B.] was imputed to the plaintiffs and that plaintiffs cannot recover anything from defendant

Notes

See 8 Am Jur 2d AUTOMOBILES AND HIGHWAY TRAFFIC § 680

e. COMPARATIVE NEGLIGENCE

Form 1391 Plaintiff's negligence more than slight compared to defendant's

The collision alleged in the complaint, and the resulting damage, if any, to plaintiff, were proximately caused or contributed to by plaintiff's own negligence and such negligence was more than slight compared to the negligence, if any, of defendant

Notes

See 7 Am Jur 2d AUTOMOBILES AND HIGHWAY TRAFFIC §§ 361, 560 et seq.; 8 Am Jur 2d AUTOMOBILES AND HIGHWAY TRAFFIC § 887

Annotation: Comparative negligence statute as applicable to actions under automobile guest statute. 149 ALR 1050.

Form 1392 Plaintiff's negligence more than slight compared to defendant's—Another form

Defendant states that plaintiff was guilty of negligence on his own part which caused or contributed to said accident, and to whatever injuries plaintiff sustained in said accident, and that such negligence on the part of plaintiff was more than slight compared to defendant's

Notes

See 8 Am Jur 2d AUTOMOBILES AND HIGHWAY TRAFFIC §§ 524 et seq.

f. ASSUMPTION OF RISK

Form 1401 General form

Defendant alleges that any damage the plaintiff sustained was due to, or contributed to by, the acts of the plaintiff himself in that he assumed the risk in connection with the accident alleged to have given rise to his injuries in that defendant ....1..... [*state facts showing assumption of risk*].

Notes

See 7 Am Jur 2d AUTOMOBILES AND HIGHWAY TRAFFIC §§ 363, 537, 538, 541, 544

Proof of Facts: Assumption of risk. 2 Am Jur Proof of Facts p. 177.

have exercised, both as to her own conduct and as to any influence and control she had, or in the exercise of ordinary care could or should have had, over the conduct of the driver.

Notes

See 8 Am Jur 2d AUTOMOBILES AND HIGHWAY TRAFFIC §§ 669, 1023

Form 1565 Members of family—Parent and child

You are instructed that when the court in these instructions has used or may us the word "plaintiff" in connection with her duty to use ordinary care, or with reference to any contributory negligence upon her part, you are to understand that it includes also any negligence or want of ordinary care upon the part of her son in the operation of the automobile as his negligence, if any, is to be imputed to plaintiff

Notes

See 8 Am Jur 2d AUTOMOBILES AND HIGHWAY TRAFFIC §§ 670, 1033

Form 1566 Driver and owner—Driver's negligence imputed to owner who granted driver permission to use vehicle

You are instructed that every owner of a motor vehicle is liable and responsible for injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner.

Notes

See 8 Am Jur 2d AUTOMOBILES AND HIGHWAY TRAFFIC §§ 595 et seq, 667, 1033

Form 1567 Master and servant

You are instructed that a principal is liable for the negligence of his agent if such negligence be committed by the agent while acting within the scope of his authority, and a master likewise is liable for the negligence of his servant or employee if such negligence be committed in the course of the employment. The test for determining whether or not a particular act was done in the course of the servant's employment, is whether the act was done in the prosecution of the business in which the servant was employed to assist. The act of the servant must be connected directly or indirectly with the business of the employer and be in furtherance of the object for which the servant was employed. In other words, if the act is for the benefit of the employer, either directly or incidentally, the act is within the general scope of the servant's employment.

Notes

See 8 Am Jur 2d AUTOMOBILES AND HIGHWAY TRAFFIC §§ 615 et seq, 672, 1033

Form 1568 Master and servant—Contributory negligence of driver-agent imputed to principal-passenger

You are instructed that it is an admitted fact in this case that ..... was driving the automobile in which plaintiff was riding at the time of the accident, and that in

so doing he was acting as the agent and servant of the plaintiff. If, therefore, you believe from a preponderance of the evidence that at the time and place of the accident ____2_____ was negligent in the manner in which he drove the automobile in which plaintiff was riding, and that said negligence proximately contributed to the injuries complained of by him, then you must return a verdict in favor of defendant regardless of whether you believe that the defendant was also negligent

Notes

See 8 Am Jur 2d AUTOMOBILES AND HIGHWAY TRAFFIC §§ 668–673, 1033.

Form 1569 Driver and occupant—Driver's negligence imputed to occupant—Joint venture

The negligence, if any, of the driver of the plaintiff's car is imputed to and becomes the negligence of the plaintiff, since plaintiff and his driver were engaged in a joint venture. If you find that the driver of plaintiff's car was negligent in one or more particulars and that such negligence proximately contributed to causing the alleged injury to plaintiff, then the plaintiff is barred from recovery against the defendant in spite of the defendant's negligence, if any, in driving the other car, and your verdict must be for the defendant.

Notes

See 8 Am Jur 2d AUTOMOBILES AND HIGHWAY TRAFFIC §§ 668, 679, 1023

Annotation: When occupants of automobile deemed to be engaged in joint enterprise so that negligence of one is imputable to other. 138 ALR 968

Form 1570 Driver and occupant—Driver's negligence not imputed to occupant

Negligence, if any, on the part of the driver of the car in which plaintiff was riding is not imputable to plaintiff and will not bar a recovery for any injuries plaintiff received as a proximate result of negligence, if any, on the part of defendant. As I have heretofore instructed you, contributory negligence on the part of the plaintiff driver will defeat a recovery on his part. Such contributory negligence, however, on the part of the driver is not imputable to the plaintiff passenger and will not bar a recovery for any injuries such passenger received as a proximate result of negligence, if any, on the part of defendant

Notes

See 8 Am Jur 2d AUTOMOBILES AND HIGHWAY TRAFFIC §§ 668, 1023

Annotations: Imputing negligence of driver to owner of automobile riding in car operated by another 147 ALR 960, 50 ALR2d 1281

Negligence of inexperienced automobile operator as imputable to passenger charged with contributory negligence. 43 ALR2d 1155.

Form 1571 Driver and occupant—Driver's negligence not imputed to occupant—Collision of automobile with streetcar

You are further instructed that the right of precedence at a crossing, whether given by law or established by custom, has no proper application except where the travelers,

Notes

Absence of command, cooperation, or control as defeating liability of guest passenger for negligence of driver. 58 Am Jur 2d NEGLIGENCE § 461

Form 330 Instruction to jury—Liability of all members of joint enterprise for negligence of one member—Joint enterprise defined

You are instructed that when the negligence of a member of a joint enterprise causes injury to a third person, such negligence is imputable to the other members of the enterprise, and all may be held liable for the injury.

You are further instructed that for the purposes of this instruction, the term 'joint enterprise" is the pursuit of an undertaking by two or more persons having a community of interest in the object and purposes of the undertaking and an equal right to direct and govern the movements and conduct of each other, which arises only out of a contract or agreement between the parties, which contract or agreement may be express or implied.

Notes

Liability of coventurers for negligence of one coventurer. 58 Am Jur 2d NEGLIGENCE § 459

Form 331 Instruction to jury—Imputability of negligence between spouses—In community property state

You are hereby instructed that in this jurisdiction ____ [*cite statute*] provides that the proceeds of a recovery for a personal injury suffered by one spouse constitute community property. Consequently, in an action by one spouse to recover damages for injuries arising out of an accident in which the other spouse was contributorily negligent, such contributory negligence is imputable to the injured spouse and defeats the latter's action for damages.

Notes

Imputability of negligence between spouses. 58 Am Jur 2d NEGLIGENCE §§ 467, 468.

Annotations: Effect of imputed negligence rule in action for injury to one of the spouses in community property jurisdictions. 35 ALR2d 1199.

Form 332 Instruction to jury—Imputability of negligence between spouses—In noncommunity property state

You are hereby instructed that in this jurisdiction the negligence of one spouse does not bar the other spouse from recovery for his or her own physical harm solely on the basis of the marital relationship. On the other hand, if the spouses enter into a master and servant relationship, or become participants in a joint enterprise, the negligence of one may be imputable to the other on the basis of such a relation, but an inference is not warranted that a husband and wife have entered into a master and servant, or mutual agency, relationship, merely on the basis that their activity is one that results from the marital relationship.

Notes

Imputability of negligence between spouses. 58 Am Jur 2d NEGLIGENCE §§ 467, 468.

No. 3.22 MITIGATION OF DAMAGES IN PERSONAL INJURY CASES

If under the evidence and these instructions you find that the plaintiff is entitled to recover damages herein, you are instructed that it was the duty of the plaintiff to make use of reasonable means to effect as speedy and complete a cure of his injuries as could be reasonably accomplished under all the circumstances. If you find from the evidence that plaintiff failed to act as a reasonable prudent person to make use of reasonable means to effect as speedy and complete a cure of his injuries as could be reasonably accomplished under all the circumstances, he cannot recover for any injuries, suffering, or disability caused or induced by such failure.

You are further instructed that evidence has been introduced in this case that plaintiff's disability or suffering would have been relieved to some degree or extent by plaintiff submitting to a surgical operation. You are instructed that plaintiff has no duty to undergo a serious or speculative surgical operation; however, if by slight expense and by slight inconvenience, plaintiff acting as a reasonable prudent person might have avoided the consequences of his injury, if any, it was the duty of plaintiff to alleviate his injury, and if you find from the evidence that he failed and neglected to do so, he cannot recover for suffering, inconvenience or disability that might thus have been avoided.

The burden of proving that plaintiff failed to minimize his damages lies with the defendant.

Updegraff v. City of Ottumwa, 210 Iowa 382 226 N.W 928 (1929).

Bailey v. City of Centerville, 108 Iowa 20, 78 N.W. 831 (1899).

White v. Chicago NW Ry Co., 145 Iowa 408, 124 N.W, 309 (1910).

Shewry vs. Heuer, 243 Iowa 567, 121 N.W. 2d 529 (1963).

is done to one who consents. The distinction is, however, one without a difference, of terminology only, and the rules applied are the same in either case.

c. Meanings of assumption of risk. "Assumption of risk" is a term which has been surrounded by much confusion, because it has been used by the courts in at least four different senses, and the distinctions seldom have been made clear. These meanings are as follows:

1. In its simplest form, assumption of risk means that the plaintiff has given his express consent to relieve the defendant of an obligation to exercise care for his protection, and agrees to take his chances as to injury from a known or possible risk. The result is that the defendant, who would otherwise be under a duty to exercise such care, is relieved of that responsibility, and is no longer under any duty to protect the plaintiff. As to such express assumption of risk, see § 496 B.

2. A second, and closely related, meaning is that the plaintiff has entered voluntarily into some relation with the defendant which he knows to involve the risk, and so is regarded as tacitly or impliedly agreeing to relieve the defendant of responsibility, and to take his own chances. Thus a spectator entering a baseball park may be regarded as consenting that the players may proceed with the game without taking precautions to protect him from being hit by the ball. Again the legal result is that the defendant is relieved of his duty to the plaintiff. As to such implied assumption of risk, see § 496 C.

3. In a third type of situation the plaintiff, aware of a risk created by the negligence of the defendant, proceeds or continues voluntarily to encounter it. For example, an independent contractor who finds that he has been furnished by his employer with a machine which is in dangerous condition, and that the employer, after notice, has failed to repair it or to substitute another, may continue to work with the machine. He may not be negligent in doing so, since his decision may be an entirely reasonable one, because the risk is relatively slight in comparison with the utility of his own conduct; and he may even act with unusual caution because he is aware of the danger. The same policy of the common law which denies recovery to one who expressly consents to accept a risk will, however, prevent his recovery in such a case. As to such implied assumption of risk, see § 496 C. As to the necessity that the plaintiff's conduct be voluntary, see § 496 E.

See Appendix for Reporter's Notes, Court Citations, and Cross References

4. To be distinguished from these three situations is the fourth, in which the plaintiff's conduct in voluntarily encountering a known risk is itself unreasonable, and amounts to contributory negligence. There is thus negligence on the part of both plaintiff and defendant; and the plaintiff is barred from recovery, not only by his implied consent to accept the risk, but also by the policy of the law which refuses to allow him to impose upon the defendant a loss for which his own negligence was in part responsible. (See § 467.)

d. Relation to contributory negligence. The same conduct on the part of the plaintiff may thus amount to both assumption of risk and contributory negligence, and may subject him to both defenses. His conduct in accepting the risk may be unreasonable and thus negligent, because the danger is out of all proportion to the interest he is seeking to advance, as where he consents to ride with a drunken driver in an unlighted car on a dark night, or dashes into a burning building to save his hat. Likewise, even after accepting an entirely reasonable risk, he may fail to exercise reasonable care for his own protection against that risk.

The great majority of the cases involving assumption of risk have been of this type, where the defense overlaps that of contributory negligence. The same kind of conduct frequently is given either name, or both. Ordinarily it makes no difference which the defense is called. In theory the distinction between the two is that assumption of risk rests upon the voluntary consent of the plaintiff to encounter the risk and take his chances, while contributory negligence rests upon his failure to exercise the care of a reasonable man for his own protection. Where the plaintiff voluntarily consents to take an unreasonable chance, there may obviously be both.

There may be, however, differences between the two defenses. A subjective standard is applied to assumption of risk, in determining whether the plaintiff knows, understands, and appreciates the risk. (See § 496 D.) An objective standard is applied to contributory negligence, and the plaintiff is required to have the knowledge, understanding, and judgment of the standard reasonable man. (See §§ 464, 289, and 290.) Assumption of risk operates as a defense against liability not only for negligent conduct, but also for reckless conduct, and conduct for which the defendant is subject to strict liability. Contributory negligence, on the other hand, is not a defense where the defendant's con-

See Appendix for Reporter's Notes, Court Citations, and Cross References

duct is reckless. (See §§ 482 and 503.) It is a defense to strict liability only when it amounts to voluntarily encountering a known unreasonable risk, or in other words, to assumption of risk. (See §§ 515 and 524.) It is also possible that where the plaintiff is injured by the concurring negligence of two persons, he may be barred from recovery against one by his contributory negligence, and against the other by his assumption of risk.

There are statutes which make contributory negligence only a partial defense, with the effect of reducing the recoverable damages, which have been construed to leave assumption of risk as a complete defense. It would appear that, unless such a construction is clearly called for, it defeats the intent of the statute in any case where the same conduct constitutes both contributory negligence and assumption of risk, since the purpose of the act would appear to be to reduce the damages in the case of all such negligent conduct, whatever the defense may be called. On the other hand, there are statutes which have abrogated the defense of assumption of risk in certain situations, while contributory negligence is left either as a complete or a partial defense. (See Comment *e* below.)

Illustrations:

1. A is setting off dangerous fireworks in a public place with reckless indifference to a serious risk of harm to persons in the vicinity. B and C approach the place where A is acting. B, fully aware of the risk, approaches for the purpose of enjoying the spectacle. C is not aware of the risk, but in the exercise of reasonable care for his own protection should discover or appreciate it. B and C are injured by a rocket which goes off at the wrong angle. B is barred from recovery against A by his assumption of the risk, but C is not barred from recovery for A's reckless conduct by his contributory negligence.

2. A statute provides that a guest in an automobile shall be entitled to recover from his host for harm caused by the host's driving only if the host is guilty of wilful, wanton, or reckless conduct. A invites B to ride with him. B accepts, knowing that A is drunk, but unreasonably hoping that A will be able to drive safely. B is hurt as a result of A's drunken driving. B is barred from recovery against A by his assumption of risk, although he would not be barred

The "public interest" standard involved in this case is no more specific than the "reasonable" and "relevant" standard involved in *Thygesen*. Moreover, the *harm* to be alleviated by the exemption is no more precisely identified here than it was in *Thygesen*. Contrary to the majority's assertion, the purpose the legislature had in providing the exemption in section 12 is not evident from the statement of the legislature's purpose in enacting the Franchise Disclosure Act. As noted above, the statute clearly indicates that it aims to provide Illinois franchisees with easy access to information about both the financial health of the franchisor *and* the terms and conditions of the franchise contract. (See, *e.g.*, Ill. Rev.Stat.1977, ch. 121½, pars. 702, 705(18) through 705(21).) This policy is as relevant to franchisors with their shares listed on a national stock exchange as it is to the smaller, less well-capitalized franchisors, and it does not provide any meaningful guidance to the Attorney General on how to use the power to grant exemptions from the disclosure requirements "in the public interest."

The "public interest" exemption provided in section 12 fails to identify sufficiently the *persons* who may receive the exemption and the *harms* that it is intended to alleviate. It therefore violates the nondelegation doctrine and is unconstitutional and void.

III

In conclusion, I believe that the granting of an untrammeled power to the Attorney General to exempt certain persons from criminal liability violates equal protection and the nondelegation doctrine. The vague "public interest" standard for granting the exemptions creates too great a danger of arbitrary classification to uphold, especially when the personal liberty of the defendant may be at stake in a criminal proceeding. I would declare section 12 unconstitutional; and because it is an integral component of the criminal sanctions imposed under the Act, I would declare void all criminal sanctions that are subject to the exemption.

In the present case I would affirm the appellate court's conclusion that the convictions based on counts I, II and IV are void. For the reasons stated in Justice Moran's separate opinion, I would also affirm the appellate court's judgment which reversed the conviction based on count III.

Jack A. CONEY, Adm'r, Appellee,

v.

J.L.G. INDUSTRIES, INC., Appellant.

No. 56306.

Supreme Court of Illinois.

May 18, 1983.

As Modified on Denial of Rehearing Sept. 30, 1983.

Administrator filed a two-count complaint under the wrongful death and survival acts based on a strict products liability theory. The Circuit Court, Peoria County, Robert E. Hunt, J., struck the manufacturer's affirmative defenses, but certified three questions for appeal. In an unpublished order, the Appellate Court denied the defendant's application for leave to appeal. Leave to appeal was granted. The Supreme Court, Thomas J. Moran, J., held that: (1) the doctrine of comparative negligence is applicable to actions or claims seeking recovery under products liability or strict liability in tort theories; (2) the doctrine of comparative negligence does not eliminate joint and several liability; and (3) the retention of joint and several liability and a system of comparative negligence or fault does not deny equal protection of the law in causes of action arising before March 1, 1978.

Affirmed and remanded with directions.

Products Liability ⇐4

Imposition of strict liability on manufacturer of defective product was not meant to make manufacturer an absolute insurer.

2. Products Liability ⇐75

In products liability action, plaintiff must prove that injury or damage resulted from condition of product, that condition was unreasonably dangerous and that condition existed at time product left manufacturer's control.

3. Negligence ⇐97

Application of comparative fault principles in strict liability actions would not frustrate fundamental reasons for adopting strict products liability in that plaintiff would still be relieved of proof problems associated with negligence in warranty actions, privity and manufacturer's negligence would be irrelevant, manufacturer's duty to produce reasonably safe products would not be lessened and only manufacturer's responsibility for damages would be lessened to the extent consumer's conduct contributed to injuries.

4. Products Liability ⇐10

Manufacturer is under nondelegable duty to produce product which is reasonably safe.

5. Negligence ⇐97

Equitable principles require that total damages for plaintiff's injuries be apportioned on basis of relative degree to which defective product and plaintiff's conduct proximately caused them and, therefore, defense of comparative fault is applicable to strict liability cases.

6. Negligence ⇐97

Consumer's unobservant, inattentive, ignorant or awkward failure to discover or guard against defect in product should not be compared as a damage-reducing factor.

7. Negligence ⇐97

Products Liability ⇐27

Defenses of misuse and assumption of risk do not bar recovery in strict products liability actions; instead, that misconduct will be compared in apportionment of damages.

8. Negligence ⇐97

Once defendant's liability is established and where both defective product and plaintiff's misconduct contribute to cause damages, comparative fault principle will operate to reduce plaintiff's recovery by that amount which trier of fact finds him at fault.

9. Torts ⇐22

Common-law doctrine of joint and several liability holds joint tort-feasors responsible for plaintiff's entire injury, allowing plaintiff to pursue all, some or one of the tort-feasors responsible for his injury for full amount of damages.

10. Products Liability ⇐23

Adoption of comparative negligence doctrine in strict products liability cases does not mandate abolition of joint and several liability. S.H.A. ch. 70, ¶¶ 301 et seq., 304.

11. Constitutional Law ⇐253(4)

Courts ⇐100(1)

Prospective application of new doctrine or rule of law does not violate equal protection. S.H.A. ch. 70, ¶ 302; S.H.A. Const. Art. 1, § 2; U.S.C.A. Const.Amend. 14, § 1.

12. Courts ⇐100(1)

Prospective application of rule that contribution in strict liability actions may be sought from joint tort-feasors only for causes of action arising out of occurrences on or after March 1, 1978, is neither arbitrary nor invidious discrimination against defendants in actions arising out of accidents which occur before that date. S.H.A. ch. 70, ¶¶ 301–303; S.H.A. Const. Art. 1, § 2; U.S.C.A. Const.Amend. 14, § 1.

13. Products Liability ⇐23

Doctrine of joint and several liability was inapplicable in strict products liability action where there was only one defendant. S.H.A. ch. 70, ¶ 302; S.H.A. Const. Art. 1, § 2; U.S.C.A. Const.Amend. 14, § 1.

Cassidy & Mueller, Peoria, for appellant; David B. Mueller, David F. Buysse, Chicago, of counsel.

Richard L. Steagall, John P. Nicoara, Peoria, for appellee.

John Bernard Cashion, George M. Elsener, Vice Chairman Amicus Curiae Committee, Ill. Trial Lawyers Ass'n, William J. Harte, Ltd., Chicago, for amicus curiae Ill. Trial Lawyers Ass'n.

Phelan, Pope & John, Ltd., Chicago, for amicus curiae; Michael A. Pope, Peter C. John, Mary Patricia Benz, Suzanne M. Metzel, Chicago, of counsel.

Abramson & Fox, Chicago, for amicus curiae Illinois Defense Counsel; John E. Guy, Chicago, of counsel.

Kiesler & Berman, Chicago, for Chicago Park Dist., amicus curiae; Robert L. Kiesler, Lyle F. Koester, Chicago, of counsel.

Baker & McKenzie, Chicago, for the Motor Vehicle Mfrs. Ass'n of the U.S., Inc., amicus curiae; Francis D. Morrissey, Thomas F. Tobin, John T. Coleman, J. Kent Mathewson, Chicago, of counsel.

THOMAS J. MORAN, Justice:

Clifford M. Jasper died as a result of injuries sustained on January 24, 1978, while operating a hydraulic aerial work platform manufactured by defendant, J.L.G. Industries, Inc. Plaintiff, Jack A. Coney, administrator of Jasper's estate, filed a two-count complaint in the circuit court of Peoria County under the wrongful death and survival acts (Ill.Rev.Stat.1977, ch. 70, par. 1 *et seq.*, ch. 110½, par. 27–6) based on a strict products liability theory. Defendant filed two affirmative defenses. The first asserted that Jasper was guilty of comparative negligence or fault in his operation of the platform. The second contended that Jasper's employer, V. Jobst & Sons, Inc., was also guilty of comparative negligence in failing to instruct and train Jasper on the operation of the platform and by failing to provide a "groundman." In these defenses, defendant requested that its fault, if any, be compared to the total fault of all parties and any judgment against defendant reflect only its percentage of the overall liability, *i.e.*, that defendant not be held jointly and severally liable.

On plaintiff's motion, the trial court struck the defenses, but it certified three questions for appeal pursuant to Supreme Court Rule 308 (73 Ill.2d R. 308). In an unpublished order, the appellate court denied defendant's application for leave to appeal, indicating the short record supplied did not provide sufficient facts to allow proper consideration of the policy questions involved. We allowed defendant leave to appeal.

The three certified questions are:

"Whether the doctrine of comparative negligence or fault is applicable to actions or claims seeking recovery under products liability or strict liability in tort theories?

Whether the doctrine of comparative negligence or fault eliminates joint and several liability?

Whether the retention of joint and several liability in a system of comparative negligence or fault denies defendants equal protection of the laws in violation of U.S. Const.Amend. XIV, § 1 and Ill. Const.1970, § 2 as to causes of action arising on or after [*sic*] March 1, 1978. (Ill.Rev.Stat.1979, ch. 70, § 301 *et seq.*)?"

I

COMPARATIVE FAULT AND STRICT LIABILITY

In *Suvada v. White Motor Co.* (1965), 32 Ill.2d 612, 210 N.E.2d 182, this court eliminated the need for privity of contract or proving the negligence of the manufacturer and instead imposed strict liability in tort as set out in Restatement (Second) of Torts section 402A (1965):

"(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

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(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller."

In adopting strict liability in tort, this court said:

"[P]ublic interest in human life and health, the invitations and solicitations to purchase the product and the justice of imposing the loss on the one creating the risk and reaping the profit are present and as compelling in cases involving motor vehicles and other products, where the defective condition makes them unreasonably dangerous to the user, as they are in food cases." 32 Ill.2d 612, 619, 210 N.E.2d 182.

[1, 2] But imposition of strict liability was not meant to make the manufacturer an absolute insurer. (*Liberty Mutual Insurance Co. v. Williams Machine & Tool Co.* (1975), 62 Ill.2d 77, 85, 338 N.E.2d 857; *Suvada v. White Motor Co.* (1965), 32 Ill.2d 612, 623, 210 N.E.2d 182.) The plaintiff must prove that the injury or damage resulted from the condition of the product, that the condition was an unreasonably dangerous one, and that the condition existed at the time the product left the manufacturer's control. (*Woodill v. Parke Davis & Co.* (1980), 79 Ill.2d 26, 31, 37 Ill.Dec. 304, 402 N.E.2d 194; *Rios v. Niagara Machine & Tool Works* (1974), 59 Ill.2d 79, 83, 319 N.E.2d 232; *Suvada v. White Motor Co.* (1965), 32 Ill.2d 612, 623, 210 N.E.2d 182.) Moreover, the court has heretofore followed the reasoning of the Restatement concerning the available defenses to a strict liability action. It has been held that a manufacturer can assert a user's negligence as a complete bar to recovery when it rises to the level of misuse of the product, or assumption of the risk; but contributory negligence is not a defense. *Liberty Mutual Insurance Co. v. Williams Machine & Tool Co.* (1975), 62 Ill.2d 77, 81, 338 N.E.2d 857; *Williams v. Brown Manufacturing Co.* (1970), 45 Ill.2d 418, 261 N.E.2d 305; Restatement (Second) of Torts sec. 402A, comment *n* (1965).

Traditionally in negligence actions, however, any contributory negligence by the plaintiff was an absolute defense which barred recovery. (*Mueller v. Sangamo Construction Co.* (1975), 61 Ill.2d 441, 446, 338 N.E.2d 1; *Maki v. Frelk* (1968), 40 Ill.2d 193, 195, 239 N.E.2d 445.) In response to the harshness of this doctrine, the court adopted comparative negligence in *Alvis v. Ribar* (1981), 85 Ill.2d 1, 52 Ill.Dec. 23, 421 N.E.2d 886, and indicated that this concept produced "a more just and socially desirable distribution of loss" and was "demanded by today's society." (85 Ill.2d 1, 17, 52 Ill.Dec. 23, 421 N.E.2d 886.) In *Alvis*, we adopted the "pure" form of comparative negligence, reasoning that it "is the only system which truly apportions damages according to the relative fault of the parties and, thus, achieves total justice." 85 Ill.2d 1, 27, 52 Ill.Dec. 23, 421 N.E.2d 886.

In the instant case, defendant argues that *Alvis* requires the adoption of a comparative fault system in strict products liability cases. Defendant maintains "total justice" can only be achieved where the relative fault of all the parties is considered in apportioning damages. To illustrate its argument, defendant points to the anomalous situation where, in a single case with alternate counts of negligence and strict liability, the identical conduct by the plaintiff which amounts to an assumption of the risk will completely bar recovery in the strict liability count, yet, as a result of *Alvis*, will only reduce his award under the negligence count. Moreover, if the plaintiff is only contributorily negligent, he recovers all his damages under strict liability, but his recovery is diminished under the negligence count. Defendant argues that common sense mandates an approach which is consistent in its treatment of all the parties to

an action, whether founded on common law negligence or strict liability.

We are not the first to consider the impact of comparative negligence upon strict liability. Some jurisdictions have declined to apply comparative negligence or fault principles in strict liability actions:

Colorado *Kinard v. Coats Co.* (1976), 37 Colo.App. 555, 553 P.2d 835; but see Colo.Rev.Stat. sec. 13–21–406 (Supp. 1982), as interpreted in *Welch v. F.R. Stokes, Inc.* (D.Colo.1983), 555 F.Supp. 1054.

Nebraska *Melia v. Ford Motor Co.* (8th Cir.1976), 534 F.2d 795 (applying Nebraska law).

Oklahoma *Kirkland v. General Motors Corp.* (Okl.1974), 521 P.2d 1353 (comparative negligence statute not applicable to products liability).

Rhode Island *Roy v. Star Chopper Co.* (1st Cir.1978), 584 F.2d 1124, *cert. denied* (1979), 440 U.S. 916, 99 S.Ct. 1234, 59 L.Ed.2d 466 (applying Rhode Island law).

South Dakota *Smith v. Smith* (S.D.1979), 278 N.W.2d 155.

The vast majority, though, have found comparative negligence theory applicable in strict liability cases.

Alaska *Butaud v. Suburban Marine & Sporting Goods, Inc.* (Alaska 1976), 555 P.2d 42.

Arkansas Ark.Stat.Ann. secs. 27–1763 to 27–1765 (1979).

California *Daly v. General Motors Corp.* (1978), 20 Cal.3d 725, 575 P.2d 1162, 144 Cal.Rptr. 380.

Florida *West v. Caterpillar Tractor Co.* (Fla.1976), 336 So.2d 80.

Idaho *Sun Valley Airlines, Inc. v. Avco-Lycoming Corp.* (D. Idaho 1976), 411 F.Supp. 598 (applying Idaho law).

Kansas *Kennedy v. City of Sawyer* (1980), 228 Kan. 439, 618 P.2d 788.

Maine Me.Rev.Stat. tit. 14, sec. 156 (1964).

Michigan Mich.Comp.Laws Ann. sec. 600.2949 (Supp.1982).

Minnesota *Busch v. Busch Construction, Inc.* (Minn.1977), 262 N.W.2d 377.

Mississippi *Edwards v. Sears, Roebuck & Co.* (5th Cir.1975), 512 F.2d 276 (applying Mississippi law).

Montana *Zahrte v. Sturm, Ruger & Co.* (D.Mont.1980), 498 F.Supp. 389 (stating Montana law).

New Hampshire *Reid v. Spadone Machine Co.* (1979), 119 N.H. 457, 404 A.2d 1094; *Thibault v. Sears, Roebuck & Co.* (1978), 118 N.H. 802, 395 A.2d 843.

New Jersey *Suter v. San Angelo Foundry & Machine Co.* (1979), 81 N.J. 150, 406 A.2d 140.

New York N.Y.Civ.Prac.Law sec. 1411 (McKinney 1976).

Oregon *Wilson v. B.F. Goodrich* (1982), 292 Or. 626, 642 P.2d 644; *Baccelleri v. Hyster Co.* (1979), 287 Or. 3, 597 P.2d 351.

Utah *Mulherin v. Ingersoll-Rand Co.* (Utah 1981), 628 P.2d 1301.

Washington Wash.Rev.Code Ann. secs. 4.22.005 to 4.22.015 (Supp.1982).

Wisconsin *Dippel v. Sciano* (1967), 37 Wis.2d 443, 155 N.W.2d 55.

In the case at bar, plaintiff argues that applying comparative fault principles in strict liability actions would raise the conduct of the product user to a position equal to that of the manufacturer in regard to the prevention of injury; and that it would thereby give undue advantage to the manufacturer. The Illinois Trial Lawyers Association, in their *amicus curiae* brief, assert that comparative fault applied in this instance would undermine the policy basis that led to the imposition of strict liability. Further, they argue that reducing a plaintiff's recovery according to his fault would lessen the manufacturer's incentive to design and market a defect-free, safe product. As authority for their position, plaintiff and *amicus curiae* rely primarily on *Smith v. Smith* (S.D.1979), 278 N.W.2d 155, *Seay v. Chrysler Corp.* (1980), 93 Wash.2d 319, 609 P.2d 1382, *Kinard v. Coats Co.* (1976), 37 Colo.App. 555, 553 P.2d 835, and the dissenting opinions in *Daly v. General Motors Corp.* (1978), 20 Cal.3d 725, 575 P.2d 1162,

144 Cal.Rptr. 380. We find this authority unpersuasive.

In *Smith v. Smith* (S.D.1979), 278 N.W.2d 155, the issue before the court was which defenses were available to a manufacturer in a strict products liability action. Following the traditional analysis set out in section 402A, comment *n* of the Restatement, the court held that contributory negligence was not a defense, but misuse and assumption of the risk would bar recovery. In a footnote, without extended discussion, the court summarily rejected applying comparative fault principles, indicating it would negate the underlying basis of strict liability and present unworkable problems for the jury.

In *Kinard v. Coats Co.* (1976), 37 Colo. App. 555, 553 P.2d 835, the court refused to extend the concept of comparative fault found in the Colorado comparative negligence statute (Colo.Rev.Stat. sec. 13–21–111 (1973)) to actions sounding in strict liability. However, the recent enactment of a comparative fault provision in Colorado's product liability statute (Colo.Rev.Stat. sec. 13–21–406 (Supp.1982)) renders this case of little precedential value to the issue at bar. See *Welch v. F.R. Stokes, Inc.* (D.Colo.1983), 555 F.Supp. 1054.

Similarly, the court in *Seay v. Chrysler Corp.* (1980), 93 Wash.2d 319, 609 P.2d 1382, held that the Washington comparative negligence statute did not apply to strict liability cases. A recent Washington statute, however, has been interpreted as mandating that comparative fault be applied in strict liability cases as a damage-reducing factor. See *South v. A.B. Chance Co.* (1981), 96 Wash.2d 439, 635 P.2d 728.

[3] We believe that application of comparative fault principles in strict products liability actions would not frustrate this court's fundamental reasons for adopting strict products liability as set out in *Suvada*. The plaintiff will still be relieved of the proof problems associated with negligence and warranty actions. Privity and a manufacturer's negligence continue to be irrelevant. Nor would comparative fault lessen the manufacturer's duty to produce reasonably safe products. The manufacturer's liability remains strict; only its responsibility for damages is lessened by the extent the trier of fact finds the consumer's conduct contributed to the injuries. *Daly v. General Motors Corp.* (1978), 20 Cal.3d 725, 575 P.2d 1162, 144 Cal.Rptr. 380.

Further, the risk associated with the product defect is still spread among all consumers. Only that portion due to plaintiff's own conduct or fault is borne by the plaintiff. Where the allocation of losses properly can be apportioned, we see no reason to spread the cost of the loss resulting from plaintiff's own fault on to the consuming public. See *Daly v. General Motors Corp.* (1978), 20 Cal.3d 725, 737–38, 575 P.2d 1162, 1169, 144 Cal.Rptr. 380, 387; D. Fischer, *Products Liability—Applicability of Comparative Negligence*, 43 Mo.L.Rev. 431, 433 (1978).

Plaintiff and *amicus curiae* next argue that the comparison of the plaintiff's fault with the defendant's defective product is a comparison of noncomparables, an attempt to compare "apples and oranges," and that this comparison cannot be applied logically and consistently in strict products liability cases. See *Daly v. General Motors Corp.* (1978), 20 Cal.3d 725, 575 P.2d 1162, 144 Cal.Rptr. 380 (Jefferson and Mosk, JJ., dissenting).

Although it appears theoretically difficult to balance the defendant's strict liability against the user's negligence, other courts and their juries have been able to do so. In this regard, Professor Schwartz said:

> "It is true that the jury might have some difficulty in making the calculation required under comparative negligence when defendant's responsibility is based on strict liability. Nevertheless, this obstacle is more conceptual than practical. The jury should always be capable, when the plaintiff has been objectively at fault, of taking into account how much bearing that fault had on the amount of damage suffered and of adjusting and reducing the award accordingly. Triers of fact are apparently able to do this, and the bene-

fits from the approach suggest that it be applied in all comparative negligence jurisdictions." V. Schwartz, Comparative Negligence sec. 12.7, at 208-09 (1974).

[4] A manufacturer is under a nondelegable duty to produce a product which is reasonably safe. (*Anderson v. Hyster Co.* (1979), 74 Ill.2d 364, 368, 24 Ill.Dec. 549, 385 N.E.2d 690; *Rios v. Niagara Machine & Tool Works* (1974), 59 Ill.2d 79, 85, 319 N.E.2d 232.) Defendant contends that when a manufacturer breaches this duty and places a defective product on the market, he is at "fault." Correspondingly, it argues, the plaintiff has a duty to exercise ordinary care in using the product; breach of this duty creates his "fault." Defendant maintains that these two types of "fault" should not be compared against each other in determining liability. Rather, they should be compared in terms of the causative role each played in producing the total damages sustained. Defendant postulates that once plaintiff has established his *prima facie* case and after defendant is found strictly liable, then plaintiff's recovery should be reduced by that amount which his fault contributed to the damages.

The court in *Murray v. Fairbanks Morse* (3d Cir.1979), 610 F.2d 149, came to a similar result. The court there said the key conceptual distinction between strict products liability and negligence is that in strict liability the plaintiff need not prove faulty conduct on the part of the defendant in order to recover. The focus is on the condition of the product. In applying comparative negligence to strict products liability, the court stated a direct comparison of the defective product with the plaintiff's negligence is both conceptually and pragmatically inappropriate. "[T]he only conceptual basis for comparison is the causative contribution of each to the particular loss or injury. In apportioning damages we are really asking how much of the injury was caused by the defect in the product versus how much was caused by the plaintiff's own actions." 610 F.2d 149, 159. See also *Butaud v. Suburban Marine & Sporting Goods, Inc.* (Alaska 1976), 555 P.2d 42, 47 (Rabinowitz, J., concurring); *Busch v. Busch Construction, Inc.* (Minn.1977), 262 N.W.2d 377; *Thibault v. Sears, Roebuck & Co.* (1978), 118 N.H. 802, 395 A.2d 843.

In *Skinner v. Reed-Prentice Division Package Machinery Co.* (1977), 70 Ill.2d 1, 15 Ill.Dec. 829, 374 N.E.2d 437, *cert. denied* (1978), 436 U.S. 946, 98 S.Ct. 2849, 56 L.Ed.2d 787, this court resolved the issue of contribution between concurrent tortfeasors under the principles of comparative negligence. There it was said that "governing equitable principles require that ultimate liability for plaintiff's injuries be apportioned on the basis of the relative degree to which the defective product and the employer's conduct proximately caused them." 70 Ill.2d 1, 14, 15 Ill.Dec. 829, 374 N.E.2d 437.

[5] Similarly, we believe that equitable principles require that the total damages for plaintiff's injuries be apportioned on the basis of the relative degree to which the defective product and plaintiff's conduct proximately caused them. Accordingly, we hold that the defense of comparative fault is applicable to strict liability cases.

[6] *Amicus curiae* argues that, if comparative fault is to be applied in strict products liability cases, we should not reduce a plaintiff's award if he merely fails to "inspect," "discover," or "guard against" a defective product. *Butaud v. Suburban Marine & Sporting Goods, Inc.* (Alaska 1976), 555 P.2d 42, 46; *Busch v. Busch Construction, Inc.* (Minn.1977), 262 N.W.2d 377, 394; *Thibault v. Sears, Roebuck & Co.* (1978), 118 N.H. 802, 395 A.2d 843; *Suter v. San Angelo Foundry & Machine Co.* (1979), 81 N.J. 150, 406 A.2d 140.

Following the Restatement, this court, in *Williams v. Brown Manufacturing Co.* (1970), 45 Ill.2d 418, 261 N.E.2d 305, adopted misuse and assumption of the risk as complete defenses to a strict products liability action. But, at the same time, it was said there that "[c]ontributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard

against the possibility of its existence." (45 Ill.2d 418, 423, 261 N.E.2d 305.) We adhere to this statement. We believe that a consumer's unobservant, inattentive, ignorant, or awkward failure to discover or guard against a defect should not be compared as a damage-reducing factor. As the court in *West v. Caterpillar Tractor Co.* (Fla.1976), 336 So.2d 80, 92, said: "The consumer or user is entitled to believe that the product will do the job for which it was built."

[7, 8] However, the defenses of misuse and assumption of the risk will no longer bar recovery. Instead, such misconduct will be compared in the apportionment of damages. Specifically, we hold: Once defendant's liability is established, and where both the defective product and plaintiff's misconduct contribute to cause the damages, the comparative fault principle will operate to reduce plaintiff's recovery by that amount which the trier of fact finds him at fault.

Thus, the defendant remains strictly liable for the harm caused by its defective product, except for that part caused by the consumer's own misconduct.

II

JOINT AND SEVERAL LIABILITY

[9] The common law doctrine of joint and several liability holds joint tortfeasors responsible for the plaintiff's entire injury, allowing plaintiff to pursue all, some, or one of the tortfeasors responsible for his injury for the full amount of the damages. *Paul Harris Furniture Co. v. Morse* (1956), 10 Ill.2d 28, 43, 139 N.E.2d 275; *Nordhaus v. Vandalia R.R. Co.* (1909), 242 Ill. 166, 174, 89 N.E. 974; *Wabash, St. Louis & Pacific Ry. Co. v. Shacklet* (1883), 105 Ill. 364, 381.

Defendant asserts joint and several liability is a corollary of the contributory negligence doctrine. Prior to *Alvis*, a plaintiff who was guilty of even slight contributory negligence was barred from recovery. Defendant maintains that joint and several liability balanced this inequity by permitting a faultless plaintiff to collect his entire judgment from any defendant who was guilty of even slight negligence. With the adoption of comparative negligence where damages are apportioned according to each party's fault, defendant argues it is no longer rational to hold a defendant liable beyond his share of the total damages. Defendant relies primarily on a line of cases where joint and several liability was abolished or limited in the course of construing a statutory scheme of liability. *Brown v. Keill* (1978), 224 Kan. 195, 580 P.2d 867; *Laubach v. Morgan* (Okl.1978), 588 P.2d 1071; *Howard v. Spafford* (1974), 132 Vt. 434, 321 A.2d 74; and *Bartlett v. New Mexico Welding Supply, Inc.* (1982), 98 N.M. 152, 646 P.2d 579.

The vast majority of jurisdictions, however, which have adopted comparative negligence have retained joint and several liability as a part of their comparative negligence doctrine:

Alaska *Arctic Structures, Inc. v. Wedmore* (Alaska 1979), 605 P.2d 426.

Arkansas Ark.Stat.Ann. secs. 34–1001 to 34–1009 (1981).

California *American Motorcycle Association v. Superior Court* (1978), 20 Cal.3d 578, 578 P.2d 899, 146 Cal.Rptr. 182.

Colorado Colo.Rev.Stat. sec. 13–50.5–103 (1977).

Connecticut Conn.Gen.Stat.Ann. sec. 52–572*o* (Supp.1982).

Florida *Lincenberg v. Issen* (Fla.1975), 318 So.2d 386.

Georgia *Gazaway v. Nicholson* (1940), 190 Ga. 345, 9 S.E.2d 154.

Idaho *Tucker v. Union Oil Co.* (1979), 100 Idaho 590, 603 P.2d 156.

Maine Me.Rev.Stat. tit. 14, sec. 156 (1965).

Michigan *Conkright v. Ballantyne of Omaha, Inc.* (W.D.Mich.1980), 496 F.Supp. 147.

Minnesota *Maday v. Yellow Taxi Co.* (Minn.1981), 311 N.W.2d 849.

Nebraska *Royal Indemnity Co. v. Aetna Casualty & Surety Co.* (1975), 193 Neb. 752, 229 N.W.2d 183.

New Jersey N.J.Stat.Ann. sec. 2A:15–5.1 (Supp.1982).

New York *Kelly v. Long Island Lighting Co.* (1972), 31 N.Y.2d 25, 334 N.Y.S.2d 851, 286 N.E.2d 241.

North Dakota N.D.Cent.Code sec. 9–10–07 (1973).

Washington Wash.Rev.Code Ann. sec. 4.22.030 (Supp.1982).

Wisconsin *Wisconsin Natural Gas Co. v. Ford, Bacon & Davis Construction Corp.* (1980), 96 Wis.2d 314, 291 N.W.2d 825.

Generally, four reasons have been advanced for retaining joint and several liability:

(1) The feasibility of apportioning fault on a comparative basis does not render an indivisible injury "divisible" for purposes of the joint and several liability rule. A concurrent tortfeasor is liable for the whole of an indivisible injury when his negligence is a proximate cause of that damage. In many instances, the negligence of a concurrent tortfeasor may be sufficient by itself to cause the entire loss. The mere fact that it may be possible to assign some percentage figure to the relative culpability of one negligent defendant as compared to another does not in any way suggest that each defendant's negligence is not a proximate cause of the entire indivisible injury.

(2) In those instances where the plaintiff is not guilty of negligence, he would be forced to bear a portion of the loss should one of the tortfeasors prove financially unable to satisfy his share of the damages.

(3) Even in cases where a plaintiff is partially at fault, his culpability is not equivalent to that of a defendant. The plaintiff's negligence relates only to a lack of due care for his own safety while the defendant's negligence relates to a lack of due care for the safety of others; the latter is tortious, but the former is not.

(4) Elimination of joint and several liability would work a serious and unwarranted deleterious effect on the ability of an injured plaintiff to obtain adequate compensation for his injuries. *American Motorcycle Association v. Superior Court* (1978), 20 Cal.3d 578, 578 P.2d 899, 146 Cal.Rptr. 182. See *Arctic Structures, Inc. v. Wedmore* (Alaska 1979), 605 P.2d 426; *Tucker v. Union Oil Co.* (1979), 100 Idaho 590, 603 P.2d 156; *Seattle First National Bank v. Shoreline Concrete Co.* (1978), 91 Wash.2d 230, 588 P.2d 1308. See also *Wisconsin Natural Gas Co. v. Ford, Bacon & Davis Construction Corp.* (1980), 96 Wis.2d 314, 291 N.W.2d 825.

[10] In adopting comparative negligence, this court eliminated the total bar to recovery which a plaintiff had faced under contributory negligence. In return for allowing a negligent plaintiff to recover, this court said fairness requires that a plaintiff's damages be "reduced by the percentage of fault *attributable to him.*" (Emphasis added.) (*Alvis v. Ribar* (1981), 85 Ill.2d 1, 25, 52 Ill.Dec. 23, 421 N.E.2d 886.) Were we to eliminate joint and several liability as the defendant advocates, the burden of the insolvent or immune defendant would fall on the plaintiff; in that circumstance, plaintiff's damages would be reduced beyond the percentage of fault *attributable to him.* We do not believe the doctrine of comparative negligence requires this further reduction. Nor do we believe this burden is the price plaintiffs must pay for being relieved of the contributory negligence bar. The *quid pro quo* is the reduction of plaintiff's damages. What was said in *American Motorcycle Association v. Superior Court* (1978), 20 Cal.3d 578, 590, 578 P.2d 899, 906, 146 Cal.Rptr. 182, 189, is applicable here: "[F]airness dictates that the 'wronged party should not be deprived of his right to redress,' * * * '[t]he wrongdoers should be left to work out between themselves any apportionment.' "

Further support for retaining joint and several liability is found in "An Act in relation to contribution among joint tortfeasors" (Act) (Ill.Rev.Stat.1979, ch. 70, par. 301 *et seq.*). Although the instant case accrued prior to its effective date, the Act expresses the intent of our legislature concerning joint and several liability:

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"Sec. 4 Rights of Plaintiff Unaffected. A plaintiff's right to recover the full amount of his judgment from any one or more defendants subject to liability in tort for the same injury to person or property, or for wrongful death, is not affected by the provisions of this Act." Ill.Rev.Stat.1979, ch. 70, par. 304.

Moreover, under the Act, it is the defendant or defendants who must bear the burden of the insolvent or immune defendant:

"Sec. 3. Amount of Contribution. The pro rata share of each tortfeasor shall be determined in accordance with his relative culpability. However, no person shall be required to contribute to one seeking contribution an amount greater than his pro rata share unless the obligation of one or more of the joint tortfeasors is uncollectible. In that event, the remaining tortfeasors shall share the unpaid portions of the uncollectible obligation in accordance with their pro rata liability.

If equity requires, the collective liability of some as a group shall constitute a single share." Ill.Rev.Stat.1979, ch. 70, par. 303.

Defendant concedes that where the plaintiff is free from fault each defendant should still be held jointly and severally liable. It also admits in its reply brief that the Act leaves unaffected the common law doctrine of joint and several liability. Defendant points out, however, that it was subsequent to the enactment of the Act that this court adopted comparative negligence. Now, under *Alvis*, damages are allocated according to fault. As such, defendant argues, *Alvis* mandates that a tortfeasor should be liable only to the extent that his negligent acts or omissions produced the damages.

We find nothing in *Alvis* which mandates either a shift in who shall bear the risk of the insolvent defendant or the elimination of joint and several liability. Defendant has not cited nor have we found persuasive judicial authority for the proposition that comparative negligence compels the abolition of joint and several liability. On the contrary, most jurisdictions which have adopted comparative negligence have retained the doctrine. Therefore, we hold that our adoption of comparative negligence in *Alvis* does not change the long-standing doctrine of joint and several liability.

III

EQUAL PROTECTION

Initially, defendant notes that contribution in strict liability actions may be sought from joint tortfeasors only for causes of action arising out of occurrences on or after March 1, 1978 (Ill.Rev.Stat.1979, ch. 70, par. 301; *Skinner v. Reed-Prentice Division Package Machinery Co.* (1977), 70 Ill.2d 1, 16–17, 15 Ill.Dec. 829, 374 N.E.2d 437). Here the accident occurred on January 24, 1978. As a result, defendant argues, it runs the risk of bearing not only its proportionate share of plaintiff's damages, but also the damages attributed to the fault of insolvent, immune, or unjoined tortfeasors. Defendant contends that judicial application of joint and several liability under these circumstances is an arbitrary and invidious discrimination against a class of tortfeasors in violation of the Federal and Illinois constitutional guarantees of equal protection of the laws (U.S. Const., amend. XIV, sec. 1; Ill. Const.1970, art. I, sec. 2.) Defendant cites no case upholding its position.

Basically, defendant's argument is directed toward the prospective application of *Skinner*, wherein the court set forth a new rule of law in strict liability cases. Since the rule was not applied retroactively, so as to include the instant case, defendant reasons it was denied equal protection under the law. Based upon this premise, it argues joint and several liability should be abrogated in cases where comparative fault principles control. We find defendant's argument to be without merit.

[11, 12] Prospective application of a new doctrine or rule of law does not violate the equal protection of laws under either the Federal or Illinois constitution. (See *Great Northern Ry. Co. v. Sunburst Oil & Refin-*

Comment Note—Distinction between assumption of risk and contributory negligence. 82 ALR2d 1218.

Necessity and manner of pleading assumption of risk as a defense. 59 ALR2d 239.

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Woods, Comparative Fault

§ 2. Summary and comment

The courts have employed a wide variety of analyses in determining the effect of a plaintiff's assumption of risk upon the apportionment process prescribed by the doctrine of comparative negligence. The generic term "assumption of risk" has been held to subsume a number of discrete and overlaping concepts so that even in cases where there is a legislative enactment which explicitly treats the effect of assumption of risk under a comparative negligence system, some interpretative issues invariably remain.

A number of decisions have dealt with assumption of risk as an undifferentiated concept and have held that the legislative enactment or judicial adoption of a comparative negligence system which did not originally deal with the effect of assumption of risk did not vitiate that common-law defense as an absolute bar to an injured person's claim for damages (§ 3[a] infra). These decisions appear to be predicated upon the notion that the doctrines of assumption of risk and contributory negligence embody distinguishable concepts and do not overlap to any extent in that the former employs a subjective standard to assess whether a particular plaintiff appreciated a risk prior to voluntarily proceeding to encounter it whereas contributory negligence implicates an objective reasonableness criterion.

Other decisions dealing with assumption of risk as an undifferentiated concept have held that comparative negligence has relegated assumption of risk to the status of a damage-reducing factor in the apportionment calculus (§ 3[b], infra). To similar practical effect are cases which have held that the institution of comparative negligence entailed the complete abrogation of the defense of assumption of risk. The foregoing results have often been predicated upon a conception of undifferentiated assumption of risk as a species of contributory negligence or as essentially equivalent to contributory negligence. Some courts have held that in light of the conceptual and functional similarities obtaining between assumption of risk and contributory negligence, the promulgation of a comparative negligence statute explicitly abrogating only contributory negligence as a categorical defense must be construed as intending to abolish the absolute defense of assumption of risk as well. Where the doctrine of assumption of risk has been abrogated as an absolute defense, some courts have prohibited the submission of separate instructions with respect to this defense rationalizing that such a charge would be redundant and misleading, as the standard comparative negligence instruction necessarily subsumes the effect of a plaintiff's assumption of risk.

A number of decisions recognizing that several distinct concepts are subsumed under the rubric of assumption of risk have differentiated between a strain of assumption of risk which also constitutes contributory negligence and a strain which does not (§ 4, infra). These decisions have held that the defense of assumption of risk is merged into the general scheme of comparative negligence in circumstances where the strain of assumption of risk involved is merely a

variant of contributory negligence. Some of these cases have also held that in the event an assumption of risk is not a variant of contributory negligence, the plaintiff is categorically foreclosed from recovery while other cases have suggested that it would be inequitable to foreclose any recovery by a plaintiff whose conduct in encountering a risk was reasonable while at the same time countenancing a proportionate recovery by a plaintiff whose actions in an analogous situation were unreasonable. Where a plaintiff's conduct has been found not inclusive of any element of assumption of risk not also subsumed by contributory negligence, it has been deemed erroneous to instruct the jury with respect to the defense of assumption of risk.

A distinction between "primary" and "secondary" assumption of risk has been employed in some cases to determine the effect of certain kinds of assumption of risk under comparative negligence (§ 5, infra). This distinction has occasionally been utilized in conjunction with other methods of differentiating various types of assumption of risk. Secondary assumption of risk, which has been characterized as an affirmative defense asserted by a causally negligent defendant where a plaintiff has encountered an appreciated risk created by the defendant without an attendant manifestation that the plaintiff consents to relieve the defendant of his duty, has been held to constitute merely one aspect of contributory negligence and as such has been deemed abrogated as an absolute bar to recovery by virtue of the advent of comparative negligence. Primary assumption of risk, which has been described as a legal theory which relieves a defendant of a duty which he might otherwise owe to the plaintiff with respect to a particular risk and which has been said to be dependent upon the plaintiff's manifestation of consent express or implied, to relieve the defendant of a duty remains unimpaired as an absolute defense in some jurisdictions in the wake of the institution of comparative negligence. It has been said that comparison and apportionment of primary assumption of risk under the comparative negligence doctrine would be conceptually impossible as consent either categorically exculpates the defendant or is entirely irrelevant. In cases wherein secondary assumption of risk has been abrogated as a complete defense under comparative negligence, the courts have often stated that secondary assumption of risk is but a subspecies of contributory negligence and consequently no instructions with regard to assumption of risk need be given.

The concept of assumption of risk has also been analyzed in terms of "express" and "implied" assumption of risk in some jurisdictions. This mode of analysis, which has occasionally been used in concert with other bases for distinguishing various types of assumption of risk, has resulted in holdings in a number of cases that implied assumption of risk is no longer viable as an absolute defense under comparative negligence (§ 6[a], infra). Some cases, in reaching such an outcome, have reasoned that implied assumption of risk is indistinguishable from contributory negligence, and therefore should be treated as such under the comparative negligence apportionment process. Other cases have justified extending the application of the comparative negligence apportionment system to implied assumption of risk on the basis that the benefits of comparative

negligence will thereby be made available to a wider range of plaintiffs.

Some cases, recognizing a distinction between express and implied assumption of risk, have held that express assumption of risk has retained its viability as an absolute bar to a plaintiff's recovery subsequent to the establishment of a comparative negligence system (§ 6[b], infra). Similarly, in a few cases, the courts have held that conduct variously characterized as an agreement, a release, or a contractual assumption of the risk operated to categorically foreclose a plaintiff's recovery in a comparative negligence jurisdiction (§ 6[b], infra).

II. Determinations with respect to particular concepts of assumption of risk

§ 3. Undifferentiated assumption of risk

[a] Held to preclude recovery

The following cases dealt with assumption of risk as an indivisible concept and held that a plaintiff's assumption of risk categorically precluded his recovery of any damages under a legislatively or judicially promulgated comparative negligence system.

A footnote in Shenebeck v Sterling Drug, Inc. (1968, ED Ark) 291 F Supp 368, affd (CA8 Ark) 423 F2d 919 declared that assumption of risk is a complete defense under the Arkansas comparative negligence statute.

An ironworker who was found to have assumed the risk of working in close proximity to an uninsulated energized powerline was precluded from recovering any of his damages against a general contractor determined to be 85 percent negligent under an Arkansas comparative negligence statute in Harris v Hercules, Inc. (1971, ED Ark) 328 F Supp 360, affd (CA8 Ark) 455 F2d 267. The court conceded that the application of the doctrine of assumption of risk as a complete bar to recovery in all negligence actions is not consistent with the philosophy of comparative negligence and seemed harsh and unfair, particularly when applied to a working man who has little real choice over his working conditions. Although the court opined that assumption of risk in cases such as this should be treated simply as another aspect of contributory negligence and handled under the comparative negligence statute as such, the decision of the court was that the law of Arkansas prescribed that a finding that the plaintiff has assumed a particular risk operates to categorically preclude his recovery for injuries sustained in encountering such risk.

The court stated that the Arkansas comparative negligence statute did not abolish the common-law defense of assumption of risk and that in most tort situations, assumption of risk, if established, remains viable as a complete defense to an injured person's claim for damages in Rhoads v Service Machine Co. (1971, ED Ark) 329 F Supp 367.

In Henry Grady Hotel Corp. v Watts (1969) 119 Ga App 251, 167 SE2d 205 (disapproved on other grounds Vinson v Howe Builders Asso., 233 Ga 948, 213 SE2d 890), wherein there was no finding of assumption of risk, the court opined that one who knowingly and voluntarily takes a risk of physical injury, the danger of which is so obvious that the act of taking such risk in and of itself amounts to a failure to exercise ordinary care and diligence for his own safety, cannot hold another liable for damages resulting from a hurt

"Ordinarily the right to contribution becomes complete and enforceable only upon payment by a claimant which discharges more than his just share of the common obligation * * *"

In the present case, if the jury returned a verdict in favor of the plaintiff and against the defendants and also made findings of fact which would impose liability against the third-party defendant, it would not be permissible to enter a joint judgment against the defendants and the third-party defendant in favor of the plaintiff. McPherson v. Hoffman, 6 Cir., 1960, 275 F.2d 466. Further, since the defendants would have no claim against the third-party defendant until they had paid more than their share of such judgment, such judgment would have to be conditional so far as the defendants and third-party defendant were concerned and would have to provide that upon payment of the judgment by the defendants they would be entitled to judgment over against the third-party defendant for one-half of the amount of the same. In the case of Smith v. Whitmore, supra, the Court stated (at page 746 of 270 F.2d):

"The quiver of the judgment should contain but two arrows—one directed to the liability of the defendant and one to the existence of the right of contribution. The defendant who, after the entry of such a judgment, 'discharged the common liability or * * * paid more than his pro rata share thereof * * *' could then obtain a money judgment against the third-party defendant for the excess which he has paid over his pro rata share * * *

"Such a judgment would * * * read as follows:

"'And now, to wit, (date), in accordance with the verdict and the jury's answer to an interrogatory, it is

"'Ordered that Judgment be and the same is hereby entered in favor of Plaintiff, * * * [name of plaintiff], and against the defendant, * * * [name of defendant], in the sum of * * * [amount of judgment], together with costs, and it is further

"'Ordered and Adjudged, that the defendant, * * * [name of defendant], and the third-party defendant, * * * [name of third-party defendant], are joint tortfeasors and that the right of contribution exists in favor of the said * * * [name of defendant] and against the said * * * [name of third-party defendant], and the said * * * [name of defendant] may hereafter have judgment against the said * * * [name of third-party defendant] for the amount which he proves he has paid to the Plaintiff, * * * [name of plaintiff] in excess of the sum of * * * [defendant's pro rata share of plaintiff's judgment].'"

Prior to the payment of the judgment by the defendants, any claim they might have against the third-party defendant would be anticipatory in nature. For an action involving anticipatory indemnity, see The Gray Line Company v. The Goodyear Tire & Rubber Company, 9 Cir., 1960, 280 F.2d 294.

[5] The features as to claims for indemnity or contribution tend to point up the question of the use of a general verdict in connection with the third-party claim, which is the subject of concern to the defendants and the third-party defendant. It would appear that the use of a general verdict would be of doubtful propriety. It was heretofore noted that in third-party claims for contribution or indemnity it is the duty of the jury to find the facts and it is the duty of the Court to determine the right to indemnity or contribution in accord with equitable principles based upon the find-

UNIFORM COMPARATIVE FAULT ACT

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS EIGHTY-SIXTH YEAR
IN VAIL, COLORADO
JULY 29 - AUGUST 5, 1977

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WITH PREFATORY NOTE AND COMMENTS

The committee which acted for the National Conference of Commissioners on Uniform State Laws in preparing the Uniform Comparative Fault Act was as follows:

JOHN W. WADE, Vanderbilt University, School of Law, Nashville, TN 37240, *Chairman*

FRANCIS BERGAN, 5 Circle Lane, Albany, NY 12203

WINDSOR DEAN CALKINS, 1163 Olive Street, Eugene, OR 97401

FLOYD R. GIBSON, 837 United States Courthouse, Kansas City, MO 64106

ELMER R. OETTINGER, Institute of Government, University of North Carolina, Chapel Hill, NC 27514

JAMES H. CLARKE, 800 Pacific Building, Portland, OR 97204, *Chairman, Division F, Ex Officio*

JAMES M. BUSH, 363 North First Avenue, Phoenix, AZ 85003, *President, Ex Officio*

VICTOR E. SCHWARTZ, University of Cincinnati, College of Law, Cincinnati, OH 45221, *Consultant*

REVIEW COMMITTEE

LINDSEY COWEN, Case Western Reserve Law School, Cleveland, OH 44106, *Chairman*

JOHN A. CHANIN, Suite 1933, 700 Bishop Street, Honolulu, HI 96813

JOHN F. HAYES, P.O. Box 705, Hutchison, KS 67501

RICHARD L. JONES, 3153 Warrington Road, Birmingham, AL 35223

JOHN R. PARKER, P.O. Box 289, Clinton, NC 28328

Copies of all Uniform and Model Acts and other printed matter issued by the Conference may be obtained from:

National Conference of Commissioners
on Uniform State Laws
645 North Michigan Avenue, Suite 510
Chicago, Illinois 60611

UNIFORM COMPARATIVE FAULT ACT

Commissioners' Prefatory Note

Plaintiff's Fault. The harsh all-or-nothing rule of contributory negligence at common law has not been properly ameliorated by the several exceptions also developed at common law. Whether the general rule or an exception applies, one party or the other is always treated unfairly. This has been widely recognized and, at the present time (1977), the Federal Government and two-thirds of the States (33) have adopted some form of comparative fault. This is usually by statute but also by judicial decision.

The language of the statutes varies considerably, and the form adopted often comes about as a result of a political compromise and without adequate consideration of the practical implications This Uniform Act has been worked on for five years by a special committee, which has had the benefit of comments from many sources. Careful consideration has been given to all potential problems, and specific provisions are made for most of them. This Act therefore serves two important purposes: (1) it addresses the problems and provides what are regarded as the best solutions for them, and (2) it provides the opportunity for creating a desirable uniformity throughout the country.

A very important question arises in the very beginning: What type of comparative fault should be adopted? The "pure type" is presently followed by the Federal Government, nine states and almost all common law jurisdictions outside the United States. Many states, however, have adopted a modified type, which takes one of two forms, providing that a plaintiff who is at fault can recover diminished damages but that he cannot recover if his negligence either (1) "is equal to," or (2) "is greater than," that of the defendant.

The modified type has several serious logical and practical disadvantages:

1. If both parties have been injured, the modified type forces one party to bear all of his own loss, together with the greater part of the other party's loss, in addition. This result is therefore worse than that of the common law contributory negligence rule A slight alleviation under the not-greater-than form, which allows recovery when the parties are each 50% at fault, forces a cognizant jury always to find for 50% negligence if it wants to reach a fair result.

2. If there are several defendants at fault, the modified type produces a confused jumble. The plaintiff's fault may be less than that of some defendants and greater than that of others. If defendants having to pay seek contribution from those not under obligation to the plaintiff, the answer is uncertain; and when counterclaims arise, no solution seems available. The problem is avoided in some modified-type states by providing that the plaintiff's negligence bars recovery only if it is greater than the combined negligence of all the defendants. Although this is a helpful provision, it is essentially adopting the pure form in this situation.

3. If the plaintiff's fault is greater than that of the defendant, he cannot recover under the modified type. Yet, if, as a result of this, the statute leaves him under the common law, including its exceptions (such as last clear chance, or ordinary contributory negligence in an action based on strict liability) he can nevertheless recover full damages, if he comes within an exception. The anomaly therefore arises that he may be better off if his negligence is found to be greater than that of the defendant and he thus recovers full damages, than if his negligence is found to be less than that of the defendant and his damages are diminished.

4. A difference of a single point in the percentage of fault allocated to the claimant may determine whether he can recover anything at all—not just how much. It is quite unrealistic to expect a jury to reach a decision this precise and then require the whole issue of liability to depend upon it. An arbitrary decision of this nature is very conducive to appeals and the development of highly technical distinctions by the appellate court.

The single disadvantage urged against the pure type is that it fails to prevent the bringing of "nuisance suits." Yet the cure of the modified form is distinctly an overcure, and therefore worse than the disease. How many more times is the plaintiff's negligence likely to be from 51% to 90% of the total than it is to be 90 to 100% of the total? And when it approximates 100%—the true nuisance claim—the trial court may be expected to control the matter.

The innate fairness of the pure type contrasts with the nondiscriminating rough justice of the modified type, which casts out many justified claims in order to be sure to eliminate a few unjustified ones, and impels the decision for the pure form. It is significant that when the courts, as distinguished from the legislatures have adopted a form of comparative fault, the great majority of them have selected the pure type, and that England, Ireland, the Canadian provinces and Australian states have all adopted the pure form.

Contribution. The original common law rule was that there is no contribution among joint tortfeasors, no matter what the nature of the tort. Some states, however, have judicially modified this rule, especially in the case of negligence. Many more states have passed statutes of various kinds providing for contribution, with the result that a substantial majority of the states now have contribution in some form and the Restatement (Second) of Torts § 886A, now provides for it.

The NCCUSL has promulgated two uniform contribution Acts—the first in 1939, superseded by a revised act in 1955. Both of these Acts provide for pro rata contribution, which may be suitable in a state not applying the principle of comparative fault, but is inappropriate in a comparative-fault state apportioning ultimate responsibility on the basis of the proportionate fault of the parties involved.

It has therefore been decided not to amend the separate Uniform Contribution Among Tortfeasors Act, 1955, but to leave that Act for possible use by states not adopting the principle of comparative fault. Instead, the present Act contains appropriate sections covering the rights existing between the parties who are jointly and severally liable in tort. The 1955 Act should be replaced by this Act in any state that adopts the comparative fault principle, and would be eventually replaced.

UNIFORM COMPARATIVE FAULT ACT

Sec.

Section 1. [Effect of Contributory Fault]

(a) In an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery. This rule applies whether or not under prior law the claimant's contributory fault constituted a defense or was disregarded under applicable legal doctrines, such as last clear chance.

(b) "Fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

Commissioners' Comment

This Section states the general principle, that a plaintiff's contributory fault does not bar his recovery but instead apportions damages according

to the proportionate fault of the parties.

Harms Covered. The specific application of that principle, as provided for in this Act, is confined to physical harm to person or property. But it necessarily includes consequential damages deriving from the physical harm, such as doctor's bills, loss of wages or costs of repair or replacement of property. It does not include matters like economic loss resulting from a tort such as negligent misrepresentation, or interference with contractual relations or injurious falsehood, or harm to reputation resulting from defamation. But failure to include these harms specifically in the Act is not intended to preclude application of the general principle to them if a court determines that the common law of the state would make the application.

Conduct Covered. (a) Defendant's Conduct. The Act applies to "acts or omissions that are in any measure negligent or reckless toward the person or property . . . of others." This includes the traditional action for negligence but covers all negligent conduct, whether it comes within the traditional negligence action or not. It includes negligence as a matter of law, arising from court decision or criminal statute. "In any measure" is intended to cover all degrees and kinds of negligent conduct without the need of listing them specifically.

In some states reckless conduct goes by a different name, such as willful or wanton misconduct. The decision must be made in the particular state whether the language used is sufficiently broad for the purpose or if additional language is needed.

Although strict liability is sometimes called absolute liability or liability without fault, it is still included. Strict liability for both abnormally dangerous activities and for products bears a strong similarity to negligence as a matter of law (negligence per se), and the factfinder should have no real difficulty in setting percentages of fault. Putting out a product that is dangerous to the user or the public or engaging in an activity that is dangerous to those in the vicinity involves a measure of fault that can be weighed and compared, even though it is not characterized as negligence.

An action for breach of warranty is held to sound sometimes in tort and sometimes in contract. There is no intent to include in the coverage of the Act actions that are fully contractual in their gravamen and in which the plaintiff is suing solely because he did not recover what he contracted to receive. The restriction of coverage to physical harms to person or property excludes these claims.

The Act does not include intentional torts. Statutes and decisions have not applied the comparative fault principle to them. But a court determining that the general principle should apply at common law to a case before it of an intentional tort is not precluded from that holding by the Act.

For certain types of torts, such as nuisance, the defendant's conduct may be intentional, negligent or subject to strict liability. In the latter two instances the Act would apply, but not in a case in which the defendant intentionally inflicts the injury on the plaintiff.

A tort action based on violation of a statute is within the coverage of the Act if the conduct comes within the definition of fault and unless the statute is construed as intended to provide for recovery of full damage irrespective of contributory fault.

(b) Plaintiff's Conduct. "Fault," as defined in Subsection (b), includes conduct of the plaintiff or other claimant, as well as a defendant.

"Contributory fault chargeable to the claimant" includes legally imputed fault as in the cases of principal and agent and of an action for loss of services of a spouse. It also covers a situation in which fault is not imputed but would still have barred recovery prior to passage of the Act—as, for example, a wrongful-death action in which the decedent's contributory negligence would have barred recovery even though it was not imputed to the person bringing the action.

Contributory fault diminishes recovery whether it was previously a bar or not, as, for example, in the case of ordinary contributory negligence in an action based on strict liability or recklessness. Last clear chance is expressly included with its variations.

"Assumption of risk" is a term with a number of different meanings—only one of which is "fault" within the meaning of this Act. This is the case of unreasonable assumption of risk, which might be likened to deliberate contributory negligence and means that the conduct must have been voluntary and with knowledge of the danger. As used in this Act, the term does not include the meanings (1) of a valid and enforceable consent (which is treated like other contracts), (2) of

a lack of violation of duty by the defendant (as in the failure of a landowner to warn a licensee of a patent danger on the premises), or (3) of a reasonable assumption of risk (which is not fault and should not have the effect of barring recovery).

"Misuse of a product" is a term also with several meanings. The meaning in this Section is confined to a misuse giving rise to a danger that could have been reasonably anticipated and guarded against. The Act does not apply to a misuse giving rise to a danger that could not reasonably have been anticipated and guarded against by the manufacturer, so that the product was therefore not defective or unreasonably dangerous.

The doctrine of avoidable consequences is expressly included in the coverage.

Causation. For the conduct stigmatized as fault to have any effect under the provisions of this Act it must have had an adequate causal relation to the claimant's damage. This includes the rules of both cause in fact and proximate cause.

"Injury attributable to the claimant's contributory fault" refers to the requirement of a causal relation for the particular damage. Thus, negligent failure to fasten a seat belt would diminish recovery only for damages in which the lack of a seat-belt restraint played a part, and not, for example, to the damage to the car. A similar rule applies to a defendant's fault: a physician, for example, negligently setting a broken arm, is not liable for other injuries received in an automobile accident.

Adaptation of the Act of Modified Form of Comparative Negligence. **If a state now using the modified form of comparative negligence should decide that in the light of its experience it is wedded to that form and not willing to change to the pure form, the Act may be adapted for this purpose, as indicated below, by adding the words in italics:**

Section 1. [Effect of Contributory Fault]

(a) In an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant, *if not greater than the combined fault of all other parties to the claim, including third-party defendants and persons released under Section 6,* diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery. This rule applies whether or not under prior law the claimant's contributory fault constituted a defense or was disregarded under applicable legal doctrines, such as last clear chance.

(b) *Whenever both parties to a claim and counterclaim have sustained damage caused by fault or both, each party can recover from the other in proportion to their relative fault in accordance with Section 3, regardless of whose fault is the greater.*

(c) "Fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting and enforceable express consent, measure of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

Section 2. [Apportionment of Damages]

(a) In all actions involving fault of more than one party to the action, including third-party defendants and persons who have been released under Section 6, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating:

(1) the amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and

(2) the percentage of the total fault of all of the parties to each claim that is allocated to each claimant, defendant, third-party defendant,

and person who has been released from liability under Section 6. For this purpose the court may determine that two or more persons are to be treated as a single party.

(b) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed.

(c) The court shall determine the award of damages to each claimant in accordance with the findings, subject to any reduction under Section 6, and enter judgment against each party liable on the basis of rules of joint-and-several liability. For purposes of contribution under Sections 4 and 5, the court also shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault.

(d) Upon motion made not later than [one year] after judgment is entered, the court shall determine whether all or part of a party's equitable share of the obligation is uncollectible from that party, and shall reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault. The party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.

Commissioners' Comment

Parties. It is assumed that the state procedure provides for bringing in third-party defendants as parties. If not, the procedural statutes or rules may need to be amended to permit it, at least for purposes of contribution.

The limitation to parties to the action means ignoring other persons who may have been at fault with regard to the particular injury but who have not been joined as parties. This is a deliberate decision. It cannot be told with certainty whether that person was actually at fault or what amount of fault should be attributed to him, or whether he will ever be sued, or whether the statute of limitations will run on him, etc. An attempt to settle these matters in a suit to which he is not a party would not be binding on him. Both plaintiff and defendants will have significant incentive for joining available defendants who may be liable. The more parties joined whose fault contributed to the injury, the smaller the percentage of fault allocated to each of the other parties, whether plaintiff or defendant.

In situations such as that of principal and agent, driver and owner of a car, or manufacturer and retailer of a product, the court may under appropriate circumstances find that the two persons should be treated as a single party for purposes of allocating fault.

Percentages of fault. In comparing the fault of the several parties for the purpose of obtaining percentages there are a number of implications arising from the concept of fault. The conduct of the claimant or of any defendant may be more or less at fault, depending upon all the circumstances including such matters as (1) whether the conduct was mere inadvertence or engaged in with an awareness of the danger involved, (2) the magnitude of the risk created by the conduct, including the number of persons endangered and the potential seriousness of the injury, (3) the significance of what the actor was seeking to attain by his conduct, (4) the actor's superior or inferior capacities, and (5) the particular circumstances, such as the existence of an emergency requiring a hasty decision.

A rule of law that a particular defendant owes a higher degree of care (as in the case of a common carrier of passengers) or a lesser degree of care (as in the case of an automobile host in a state having a valid automobile-guest statute) or that no negligence is required (as in the case of conducting blasting operations in an urban area) is important in determining whether he is liable at all. If the liability has been established, however, the rule itself does not play a part in determining the relative proportion of fault of this party in comparison with the others. But the policy behind the rule may be quite important. An error in driving on the part of a bus driver with a load of passengers may properly produce an evaluation of greater fault than the same error on the part of a housewife gratuitously giving her neighbor a ride to the shopping center; and an auto-

mobile manufacturer putting out a car with a cracked brake cylinder may, even in the absence of proof of negligence in failing to discover the crack, properly be held to a greater measure of fault than another manufacturer producing a mechanical pencil with a defective clasp that due care would have discovered.

In determining the relative fault of the parties, the fact-finder will also give consideration to the relative closeness of the causal relationship of the negligent conduct of the defendants and the harm to the plaintiff. Degrees of fault and proximity of causation are inextricably mixed, as a study of last clear chance indicates, and that common law doctrine has been absorbed in this Act. This position has been followed under statutes making no specific provision for it.

Joint and Several Liability and Equitable Shares of the Obligation. The common law rule of joint-and-several liability of joint tortfeasors continues to apply under this Act. This is true whether the claimant was contributorily negligent or not. The plaintiff can recover the total amount of his judgment against any defendant who is liable.

The judgment for each claimant also sets forth, however, the equitable share of the total obligation to the claimant for each party, based on his established percentage of fault. This indicates the amount that each party should eventually be responsible for as a result of the rules of contribution. Stated in the judgment itself, it makes the information available to the parties and will normally be a basis for contribution without the need for a court order arising from motion or separate action.

Reallocation. Reallocation of the equitable share of the obligation of a party takes place when his share is uncollectible.

Reallocation takes place among all parties at fault. This includes a claimant who is contributorily at fault. It avoids the unfairness both of the common law rule at joint-and-several liability, which would cast the total risk of uncollectibility upon the solvent defendants, and of a rule abolishing joint-and-several liability, which would cast the total risk of uncollectibility upon the claimant.

Control by the court. The total of the several percentages of fault for the plaintiff and all defendants, as found in the special interrogatories, should add up to 100%. Whether the court will inform the jury of this will depend upon the local practice.

The court should be able to exercise any usual powers under existing law of setting aside or modifying a verdict if it is internally inconsistent or shows bias or prejudice, etc. On the same basis as the remittitur principle, a court might indicate its intent to set aside a percentage allocation unless the parties agreed to a somewhat different one.

Illustration No. 1. (Simple 2-party situation).
A sues B. A's damages are $10,000.
A is found 40% at fault.
B is found 60% at fault.
A recovers judgment for $6,000.

Illustration No. 2. (Multiple-party situation).
A sues B, C and D. A's damages are $10,000.
A is found 40% at fault.
B is found 30% at fault.
C is found 30% at fault.
D is found 0% at fault.
A is awarded judgment jointly and severally against B & C for $6,000. The court also states in the judgment the equitable share of the obligation of each party:
A's equitable share is $4,000 (40% of $10,000).
B's equitable share is $3,000 (30% of $10,000).
C's equitable share is $3,000 (30% of $10,000).

Illustration No. 3. (Reallocation computation under Subsection (d)).
Same facts as in Illustration No. 2. On proper motion to the court, C shows that B's share is uncollectible. The court orders that B's equitable share be reallocated between A and C.
A's equitable share is increased by $1,714 (4/7 of $3,000).
C's equitable share is increased by $1,286 (3/7 of $3,000).

Section 3. [Set-off]

A claim and counterclaim shall not be set off against each other, except by agreement of both parties. On motion, however, the court, if it finds that the obligation of either party is likely to be uncollectible, may order that both parties make payment into court for distribution. The court shall distribute the funds received and declare obligations discharged as if the payment into court by either party had been a payment to the other party and any distribution of those funds back to the party making payment had been a payment to him by the other party.

Commissioners' Comment

A set-off involves a single claim and counterclaim. If there are multiple defendants, separate set-off issues may arise between a claimant and each of several defendants, but each set-off would be a separate issue, determined independently of the others. The same principle applies in case of a cross-claim subject to a counterclaim.

Whether the rule is for or against set-off, if it should be applied categorically to all situations it would produce unfair results in some of them. In attaining a fair application to a particular factual situation, consideration needs to be given to the circumstances of whether each party is able to pay his obligation and whether the payment comes from his own pocket or from liability insurance covering him. The provisions of this Section provide a fair solution to each situation, as illustrated below.

Illustration No. 4. (Parties fully covered by liability insurance.) A sues B. B counterclaims. Each is found to have suffered $100,000 in damage. Each is fully covered by liability insurance. A is found 30% at fault. B is found 70% at fault. Under the statutory provision there is no set-off except by agreement of the parties, and it would not be in their best interests here to agree to a set-off. A recovers $70,000 from B, and B recovers $30,000 from A.

Illustration No. 5. (No insurance but both parties able to pay judgments.) The same facts as in Illustration 4, but there is no liability insurance. Each is able to pay the judgment against him. If the parties do not agree to a set-off, A receives $70,000 from B, and B receives $30,000 from A. For their own convenience they may find it simpler to agree on a set-off, with A receiving $40,000 from B.

Illustration No. 6. (No insurance; B is able to pay and A is not.) As in Illustration 4, each party has $100,000 damages, A is 30% at fault and B is 70% at fault. Neither party has liability insurance coverage. B moves the court to require both parties to make payment into court for distribution. Finding it likely that A's obligation will be uncollectible the court issues the order. B pays into court $70,000; A can pay nothing. The court distributes $40,000 to A and $30,000 back to B. This is treated as if B had directly paid A $70,000 and A had directly paid B $30,000 and the obligations of both parties are extinguished.

Illustration No. 7. (A has insurance; B does not and is unable to pay.) The same facts as in Illustration 6, but B has no insurance and cannot pay, while A has full liability insurance. A's motion that both parties pay into court is granted. A's insurance company pays $30,000. A pays nothing. The court distributes the $30,000 to A. This extinguishes the liability of A and his insurance company under the liability coverage, and B's liability to A reduced from $70,000 to $40,000. For application of any uninsured-motorist coverage contained in A's insurance policy, the court's delivery of the $30,000 to A is treated as a direct payment by B to A.

Illustration No. 8. (Both parties have inadequate insurance coverage and no other available funds.)

A is 30% negligent, has damages of $50,000 and carries liability insurance of $20,000. B is 70% negligent, has damages of $100,000 and carries liability insurance of $30,000.

A therefore owes B $30,000 and has a claim against B of $35,000; and B owes A $35,000 and has a claim against A of $30,000.

On granting of a motion to pay into court, A's carrier pays $20,000 which is initially allocated to B as payment to him of $20,000 and reduces A's debt to B to $10,000 and

B's carrier pays $30,000, which is initially allocated to A as payment to him of $30,000 and reduces B's debt to A to $5,000.

The court now reallocates to B $10,000 from A's initial allocation of $30,000, leaving $20,000 for A. It also reallocates to A $5,000 from B's initial allocation of $20,000, leaving $15,000 for B.

A is thus entitled to the $20,000 remaining in the initial allocation, plus $5,000 from the subsequent allocation, making a total of $25,000; and

B is entitled to the $15,000 remaining in the initial allocation, plus $10,000 from the subsequent allocation, making a total of $25,000.

Of the $50,000 paid in, A receives $25,000 and B receives $25,000. All obligations are discharged.

For a complex illustration like No. 8, the process of tracking literally the language of the Section is somewhat laborous and difficult to work out. Fortunately, it is possible to reach exactly the same result much more simply and easily by using the formula, D=C−O+P to determine the amount each claimant is entitled to receive. D signifies the amount to be distributed to the particular claimant from the funds paid into court; C signifies the amount of his claim after it has been reduced by the court because of his own negligence; O signifies the amount that he is found by the court to owe to the other party; and P signifies the amount that he has paid into court.

Use of this formula in each of illustrations above will reach exactly the same result as that which is stated in the illustration. Thus, in Illustration 8, the formula D=C−O+P operates like this: For A: $35,000−$30,000+$20,000 = $25,000. For B: $30,000−$35,000+$30,000 = $25,000.

Observe that if use of the formula produces a negative number for one of the two parties, it corresponds with a number larger by that figure than the amount of deposit with the court and indicates that the party with the negative figure continues to owe that amount to the other party. This occurs, for example, in Illustration No. 7.

The system for distributing the funds outlined by the section is not the only one that could be utilized but it appears to be the fairest and most equitable. It gives due consideration to the relative amounts owed by each party and the relative amounts paid by each; and their relative fault is of course already taken into consideration in determining the amounts of their enforceable claims.

Section 4. [Right of Contribution]

(a) A right of contribution exists between or among two or more persons who are jointly and severally liable upon the same indivisible claim for the same injury, death, or harm, whether or not judgment has been recovered against all or any of them. It may be enforced either in the original action or by a separate action brought for that purpose. The basis for contribution is each person's equitable share of the obligation, including the equitable share of a claimant at fault, as determined in accordance with the provisions of Section 2.

(b) Contribution is available to a person who enters into a settlement with a claimant only (1) if the liability of the person against whom contribution is sought has been extinguished and (2) to the extent that the amount paid in settlement was reasonable.

Commissioners' Comment

Sections 4, 5 and 6 are expected to replace the Uniform Contribution Among Tortfeasors Act (1955) in a state following the principle of comparative fault. The three sections, however, apply whether the plaintiff was contributorily at fault or not.

Section 4 is in general accord with the provisions of the 1955 Uniform Act, but the test for determining the measure of contribution and thus establishing the ultimate responsibility is no longer on a pro rata basis. Instead, it is on a basis of proportionate fault determined in accordance with the provisions of Section 2. A plaintiff who is contributorily at fault also shares in the proportionate responsibility.

Joint-and-several liability under the common law means that each defendant contributing to the same harm is liable to him for the whole amount of the recoverable damages. This is not changed by the Act. Between the defendants themselves, however, the apportionment is in accordance with the equitable shares of the obligation, as established under Section 2.

If the defendants cause separate harms or if the harm is found to be divisible on a reasonable basis, however, the liability may become several for a particular harm, and contribution is not appropriate. See Restatement (Second) of Torts § 433A (1965).

Section 5. [Enforcement of Contribution]

(a) If the proportionate fault of the parties to a claim for contribution has been established previously by the court, as provided by Section 2, a party paying more than his equitable share of the obligation, upon motion, may recover judgment for contribution.

(b) If the proportionate fault of the parties to the claim for contribution has not been established by the court, contribution may be enforced in a separate action, whether or not a judgment has been rendered against either the person seeking contribution or the person from whom contribution is being sought.

(c) If a judgment has been rendered, the action for contribution must be commenced within [one year] after the judgment becomes final. If no judgment has been rendered, the person bringing the action for contribution either must have (1) discharged by payment the common liability within the period of the statute of limitations applicable to the claimant's right of action against him and commenced the action for contribution within [one year] after payment, or (2) agreed while action was pending to discharge the common liability and, within [one year] after the agreement, have paid the liability and commenced an action for contribution.

Commissioners' Comment

Illustration No. 9. (Equitable shares previously established by court).

A sues B and C. His damages are $20,000.

A is found 40% at fault.

B is found 30% at fault.

C is found 30% at fault.

A, with a joint-and-several judgment for $6,000 against B and C, collects the whole amount from B.

On proper motion to the court, B is entitled to contribution from C in the amount of $3,000.

Illustration No. 10. (Equitable shares not established).

A sues B. His damages are $20,000.

A is found 40% at fault.

B is found 60% at fault.

Judgment for A for $12,000 is paid by B.

B then brings a separate action seeking contribution from C, who was not a party to the original action.

C is found to be liable for the same injury, and as between B and C, C is found to be 50% at fault.

Judgment for contribution for $6,000 is awarded to B.

If A had voluntarily joined or been brought in as a party to this second action, proportionate fault would have been determined for all parties, including A and B, and contribution against C would have been awarded on that basis.

Section 6. [Effect of Release]

A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation, determined in accordance with the provisions of Section 2.

Commissioners' Comment

Effect of release on liability of other tortfeasors. The provision that release of one tortfeasor does not release the others unless the release so provides is taken from the Uniform Contribution Among Tortfeasors Act (1955). It is a common statutory provision.

Effect of release on right of contribution. The question of the contribution rights of tortfeasors A and B against tortfeasor C, who settled and obtained a release or covenant not to sue admits of three answers: (1) A and B are still able to obtain contribution against C, despite the release, (2) A and B are not entitled to contribution unless the release was given not in good faith but by way of collusion, and (3) the plaintiff's total claim is reduced by the proportionate share of C. Each of the three solutions has substantial disadvantages, yet each has been adopted in one of the uniform acts. The first solution was adopted by the 1939 Uniform Contribution Act. Its disadvantage is that it discourages settlements; a tortfeasor has no incentive to settle if he remains liable for contribution. The second solution was adopted by the 1955 Contribution Act. While it theoretically encourages settlements, it may be unfair to the other defendants and if the good-faith requirement is conscientiously enforced settlements may be discouraged.

The third solution is adopted in this Section. Although it may have some tendency to discourage a claimant from entering into a settlement, this solution is fairly based on the proportionate-fault principle.

"Discharges from all liability for contribution." A reallocated share of contribution, as provided in Section 2(d), comes within the meaning of this phrase, and the discharge of the released person under this Section applies to that liability as well. Since the claim is reduced by the amount of the released person's equitable share, the increased amount of that share as a result of the reallocation is charged against the releasing person.

Illustration No. 11. (Effect of release).

A was injured through the concurrent negligence of B, C and D. His damages are $20,000. A settles with B for $2,000.

The trial produces the following results:

A, 40% at fault (equitable share, $8,000)

B, 30% at fault (equitable share, $6,000)

C, 20% at fault (equitable share, $4,000)

D, 10% at fault (equitable share, $2,000)

A's claim is reduced by B's equitable share ($6,000). He is awarded a judgment against C and D, making them jointly and severally liable for $6,000.

Their equitable shares of the obligation are $4,000 and $2,000 respectively.

Illustration No. 12. Release to one tortfeasor; another's share is uncollectible).

Same facts as in Illustration No. *11*. It is now found that D's share of $2,000 is uncollectible. Upon proper motion to the court that share is reallocated as follows:

A's equitable share is increased by ⅔ (his own proportionate fault), plus ⅔ (B's proportionate fault), or $1,556.

C's equitable share is increased by ⅓, or $444.

Immunities. The problem of a wrongdoer who is entitled to a legal immunity could be treated like a released tortfeasor in this Section—join him to the action to determine his equitable share of the obligation and subtract it from the amount of the claimant's recovery. But this would unfairly cast the whole loss on the claimant. This might be adjusted by spreading the immune party's obligation among all of the parties at fault, including the claimant, as in Subsection 2(d). But this same result is also accomplished by leaving the immune party out of the action altogether; a far easier and simpler solution. This Act therefore makes no provision for immunities. It must be borne in mind, however, that some states treat some immunities as not applying to a suit for contribution. This raises different problems, which can be handled under third-party practice.

Worker's compensation. An injured employee who has received or is entitled to worker's compensation benefits from his employer may ordinarily bring a tort action against a third party, such as the manufacturer of the machine that injured him, and recover for his injury in full. Under the rule in most states, the defendant is not entitled to contribution from the employer, even though the employer was negligent in maintaining the machine or instructing the employee in its use. This casting of the whole loss on the tort defendant may be unfair and greatly in need of legislative adjustment. It is so affected by the policies underlying the worker's compensation systems, however, and these policies vary so substantially in the several states that it was felt inappropriate to include a section on the problem in a uniform act.

Several solutions are possible. Thus, contribution against the employer may be provided for. Or the recovery by the employee may be reduced by the proportionate share of the employer. Or the amount of that proportionate share may be divided evenly between the employer and employee, so that the compensation system bears responsibility for it. Provision also needs to be made for the relation of the tort defendant to the compensation benefits. In any event, contributory negligence on the part of the employee will come within the scope of this Act and will affect the amount of recovery.

Section 7. [Uniformity of Application and Construction]

This Act shall be applied and construed so as to effectuate its general purpose to make uniform the law with respect to the subject of this Act among states enacting it.

Section 8. [Short Title]

This Act may be cited as the Uniform Comparative Fault Act.

Section 9. [Severability]

If any provision of this Act or application of it to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the Act that can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

Section 10. [Prospective Effect of Act]

This Act applies to all [claims for relief] [causes of action] accruing after its effective date.

Section 11. [Repeal]

The following acts and parts of acts are repealed:

Commissioners' Comment

A state that has adopted either of the two Uniform Contribution Among Tortfeasors Acts will of course plan to repeal it. This is also true of other statutory provisions on contribution for tortfeasors.

This Act does not necessitate any changes in the statutory language of Article 2 of the Uniform Commercial Code, but it may have the effect of slightly modifying some of the Comments to §§ 2-314 to 2-316 and 2-715 on proximate cause and the effect of contributory fault.

Strike existing Rule 225 and substitute the following:

225. On Claim and Counterclaim. A claim and counterclaim shall not be set off against each other, except by agreement of both parties or unless required by statute. On motion, however, the court, if it finds that the obligation of either party is likely to be uncollectible, may order that both parties make payment into court for distribution. If there are multiple parties and separate set-off issues, each set-off issue should be determined independently of the others. The court shall distribute the funds received and declare obligations discharged as if the payment into court by either party had been a payment to the other party and any distribution of those funds back to the party making payment had been a payment to him by the other party.

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AFFIRMATIVE DEFENSES - GENERAL

A-1. Negligence of plaintiff(s) is a proximate cause of plaintiff('s/s') injuries or damages which should either bar recovery or be apportioned to determine the amount of damages to which plaintiff(s) (is/are) entitled.

A-2. By the use of reasonable effort or expenditure, the plaintiff(s) could have completely or partially avoided the damages claimed in the pleadings by _____.

A-3. Plaintiff(s) claimed damages could have been completely or partially avoided by reasonable conduct on the part of plaintiff(s) if plaintiff(s) had _____.

A-4. The negligence of ___(claimant's employer)___ either standing alone or combined with the negligence ___(claimant)___, was the sole proximate cause of the injuries and damages claimed herein. Correia v. Firestone Tire & Rubber Co., 446 N.E.2d 1033 (Mass. 1983)

A-5. Defendant driver was confronted with a sudden emergency, not brought about by his own fault, and because thereof was required to act upon the impulse of the moment without sufficient time to determine with certainty the best course to pursue by reason of _____.

A-6. Just prior to the collision, defendant was in a position of peril; plaintiff had knowledge of defendant's presence; plaintiff realized or in the exercise of reasonable care should have realized that defendant was in a

position of peril; and plaintiff had the time and ability to avoid the collision through the exercise of ordinary care and failed to do so. See Uniform 2.7D But compare Peterman 516 F.238 Restat. 479, 480, Cummings v. Reuken, Iowa Ct. App. 8-82

A-7. Defendant driver has a legal excuse for any alleged violation by reason of (a sudden encounter of an unanticipated slick spot on the road surface) . 333 N.W.2d 470 (6)

A-8. Such an unusual and extraordinary manifestation of the forces of nature that it could not under normal conditions have been anticipated or expected (either standing alone or combined with the negligence of plaintiff _____) was the sole proximate cause of the injuries and damages claimed herein. 329d664, 271d902, 159d517, 138d93 Uniform 1.22

A-9. The alleged accident and damages, if any, were the result of intervening and superseding acts of third persons over whom this defendant has and had no control, or right of control, and for whom defendant is not responsible.

A-10. The alleged injuries and damages complained of by plaintiff were proximately caused by a new, independent, and efficient superseding intervening cause, namely, (describe intervening cause) which constitutes a superseding cause. Restatement §§442, 323d197

A-11. This court lacks personal jurisdiction over defendant(s). (Federal Court Only)

A-12. This court lacks jurisdiction over the subject matter of this action.

A-13. The right of action set forth by plaintiff did not accrue within the applicable period of limitations.

A-14. Unreasonable assumption of risk by plaintiff(s) was a cause of the injuries and damages claimed herein in that plaintiff, having full knowledge of the conditions existing at or near the place the alleged incident occurred, assumed the risk of injury. Any injury and/or damage resulting from the incident complained of was sustained by the plaintiff by reason of assumption of risk of injury and not otherwise. Such assumption of risk is a complete bar to the claims herein or proportionately reduces the recovery of plaintiff(s).

A-15. The relationship between plaintiff and _____ was (employer and employee) (principal and agent) (joint venture) and by reason thereof negligence of _____ is imputed to plaintiff.

Negligence of plaintiff through said _____ was a proximate cause of plaintiff('s/s') damages as follows:

AFFIRMATIVE DEFENSES - PRODUCT CASES

P-1. The only damages that could be sustained by the third party petitioner in this case are economic damages and the Iowa law does not recognize a recovery for economic damages under the strict liability theory.

P-2. That the product which was allegedly manufactured by the defendant(s) was accompanied by a limited express warranty under the terms of which the defendant(s) could not be held liable as prayed for.

P-3. That the product allegedly manufactured by the defendant(s) was accompanied by express disclaimers of any other express or implied warranties of fitness or merchantability.

P-4. Claims are made herein based upon breach of implied warranty. Said claims are barred and plaintiff(s) fail(s) to state a claim against defendant(s) on which any relief can be granted for the reason that no timely notice of any breach of implied warranty, as required by Iowa Code §554.2607, was given by the buyer to defendant(s), such notice being a condition precedent to any claimed cause of action. Winters v. Honeggers' & Co., Inc., 215 N.W.2d 316.

P-5. Plaintiff makes claims on both strict liability and implied warranty. Since the plaintiff claims personal injuries, the theory of strict tort liability overrides recovery on a warranty theory and plaintiff is not entitled to have any warranty theory submitted to the jury. The allegations relating to implied warranty fail to state a claim upon which relief can be granted. Hawkeye-Security Ins. Co. v. Ford Motor Co., 174 N.W.2d 672(13), 199 N.W.2d 373, 382.

P-6. Any warranties deemed to have been made by defendant(s) were either fulfilled, terminated or disclaimed.

P-7. Plaintiff(s) did not give notice to defendant(s) of any alleged breach of warranty within a reasonable time. Plaintiff(s) (has/have), therefore, waived any claim predicated upon a purported breach of warranty.

P-8. The negligence of (claimant's employer) either standing alone or combined with the negligence of (claimant), was the sole proximate cause of the injuries and damages claimed herein. Correia v. Firestone Tire & Rubber Co., 446 N.E.2d 1033 (Mass. 1983)

P-9. Misuse of the product was a proximate cause of the claimed injuries and damages.

AFFIRMATIVE DEFENSES - SLIP AND FALL

S-1. In doing _____ or allowing _____, when plaintiff knew, or in the exercise of reasonable diligence, should have known, that _____ would cause injury to plaintiff. Manley v. O'Brien Cty. Rural Elec. Coop., 267 N.W.2d 39 (Iowa 1978), headnote 2. RE: Jury Instructions, see: Adam v. T.I.P. Rural Elec. Coop., (Iowa 1978), 271 N.W.2d 896

S-2. In failing to keep a proper lookout. Schuller v. Hy-Vee Food Stores, Inc. 328 N.W.2d 328 (Iowa 1982) (13, 14)

LEGISLATIVE UPDATE

By
E. Kevin Kelly
1400 Dean Ave.
Des Moines, Iowa 50316

I. Bills of Specific Interest to Defense Lawyers
SF 253 - SF -292 - SF 2098 - HF 359 - HF 2487

II. Bills of General Interest to Attorneys
SJR 9 - SF 24 - SF 163 - SF 256 - SF 420 - SF 441
SF 475 - SF 2002 - SF 2021 - SF 2137 - SF 2138
SF 2163 - SF 2173 - SF 2268 - SF 2323 - HF 2187
HF 2330 - HF 2335 - HF 2373 - HF 2423 - HF 2459
HF 2463 - HF 2471

III. Bills of General Interest to Society
SJR 2001 - SF 2366 - HF 591 - HF 2472
SF 2330 - SF 2089

For a brief explanation of these bills, please see following pages.

P

Senate Files Passed

SENATE JOINT RESOLUTION 9
A joint resolution proposing an amendment to the Constitution of the State of Iowa which would allow the General Assembly to specify the effective date of legislation. Requires ratification by the voters.

SENATE JOINT RESOLUTION 2001
A joint resolution proposing amendments to the Iowa Constitution regarding the joint election of the governor and lieutenant governor, their terms of office, and the manner of succession. Requires ratification by the voters.

SENATE FILE 24
An act making procedural changes in the conduct of small claims actions. Effective 7/1/84.

SENATE FILE 159
An act authorizing the establishment and maintenance of emergency warning systems within townships having a common boundary with cities over 180,000 population. Effective 7/1/84.

SENATE FILE 163
An act providing for liens to be placed on personal property stored in self-service storage facilities for obligations incurred for the storage of said property. Effective 7/1/84.

SENATE FILE 176
An act allocating funds appropriated to regional libraries. Effective 7/1/84.

SENATE FILE 190
An act providing for leaves of absence to be granted to persons elected to municipal, county, state and federal offices. Effective 7/1/84.

SENATE FILE 244
An act allowing employees to choose the care given under workers' compensation medical benefits. VETOED.

SENATE FILE 253
An act relating to the qualifications for and exemptions from jury service. Effective 7/1/84.

SENATE FILE 256
An act permitting the code editor to editorially correct certain errors in the Code of Iowa. Effective 7/1/84.

SENATE FILE 292
An act relating to the qualifications and compensation of court interpreters. Effective 7/1/84.

SENATE FILE 324
An act relating to the responsibilities of insurers providing coverage for skilled nursing care. Effective 7/1/84.

SENATE FILE 345
An act governing the dispensing of prescription drugs and the delegation of certain dispensing functions. Effective 7/1/84.

SENATE FILE 347
An act providing for the issuance of special registration plates to former prisoners of war. Effective 12/1/84.

SENATE FILE 400
An act relating to the appointment of the director of the Office for Planning and Programming. Effective 12/1/84.

SENATE FILE 407
An act relating to the eligibility for and annuities of the senior judge program. Effective 7/1/84.

SENATE FILE 414
An act relating to the licensing of psychologists and the contracts between nonprofit medical service plans and certain health care providers. Effective 7/1/84.

SENATE FILE 420
An act relating to the collection of dishonored checks, drafts, or other negotiable instruments. Effective 7/1/84.

SENATE FILE 441
An act relating to eminent domain procedures governing notice, the recording of condemnation proceedings, and the transfer of property title. Effective 7/1/84.

SENATE FILE 442
An act relating to access to library records by criminal justice agencies. Effective 7/1/84.

SENATE FILE 449
An act providing for the licensing of private investigative agencies and private security agencies. Effective 1/1/85.

SENATE FILE 451
An act relating to the powers of investigators hired by the Board of Medical Examiners. Effective 7/1/84.

SENATE FILE 465
An act relating to procedures for construction, repair, and improvement projects at institutions under the control of the Department of Human Services. Effective 7/1/84.

SENATE FILE 475
An act providing for regulatory flexibility in the promulgation of administrative rules affecting small businesses. Effective 7/1/84.

SENATE FILE 480
An act relating to the jurisdiction of the district court in the reconsideration of a sentence. Effective 7/1/84.

SENATE FILE 497
An act relating to the activities of the Citizens' Aide and members of the Citizens' Aide staff. Effective 7/1/84.

SENATE FILE 505
An act relating to the value of property for the purposes of certain crimes and penalties. Effective 7/1/84.

SENATE FILE 510
An act providing for liens against crops and livestock to secure payment for agricultural products used in their production. Effective 7/1/84.

SENATE FILE 511
An act relating to construction near buried electrical transmission lines. Effective 7/1/84.

SENATE FILE 513
An act relating to state banks by providing for the name and location of the bank's principal place of business and offices. Effective 7/1/84.

SENATE FILE 517
An act relating to missing persons and missing person investigations. Effective 7/1/84.

SENATE FILE 2002
An act relating to the ownership rights to dies, molds, and forms. Effective 7/1/84.

SENATE FILE 2005
An act relating to actions to enforce the terms of a dissolution, annulment, or separate maintenance decree. Effective 7/1/84.

SENATE FILE 2014
An act to provide for an independent study of campaign financing of candidates for state office and the expenditures of political committees. Effective 7/1/84.

SENATE FILE 2021
An act removing the statue of limitations on civil actions in cases where restitution has been ordered. Effective 7/1/84.

SENATE FILE 2035
An act relating to the requirement that the court personally address a defendant when a guilty plea is entered. Effective 7/1/84.

SENATE FILE 2040
An act amending Iowa's unemployment compensation law by crediting interest from and making transfers from the special employment security contingency fund to the temporary emergency surcharge fund. Effective 7/1/84.

SENATE FILE 2042
An act abolishing the Council on Child Abuse Information. Effective 7/1/84.

SENATE FILE 2043
An act to provide a partial property tax exemption for warehouses and distribution centers on which improvements have been made. Effective 7/1/84.

SENATE FILE 2045
An act increasing the membership of the Tax Study Committee from nine to eleven members. Effective upon publication.

SENATE FILE 2050
An act relating to the election and terms of office of sanitary district trustees. Effective 7/1/84.

SENATE FILE 2053
An act specifying the number of affirmative votes needed before an action can be taken by the board of the Iowa Product Development Corporation. Effective 7/1/84.

SENATE FILE 2057
An act legalizing the actions of the Lee County Board of Supervisors regarding the compensation of certain employees. Effective 7/1/84.

SENATE FILE 2059
An act relating to the authority of a standing committee of the General Assembly to obtain assistance and information from state agencies and political subdivisions. Effective 7/1/84.

SENATE FILE 2063
An act making revisions in the Iowa Product Development Corporation Act. Effective 7/1/84.

SENATE FILE 2069
An act relating to the exemption certificate furnished for the delivery of tax exempt motor fuel. Effective 7/1/84.

SENATE FILE 2082
An act relating to the confidentiality of Iowa Department of Corrections' records. Effective upon publication.

SENATE FILE 2084
An act providing transition legislation for the Iowa Department of Corrections. Effective 7/1/84.

SENATE FILE 2089
An act requiring that children under the age of six be secured in a restraint system when being transported in a motor vehicle. Effective 1/1/85.

SENATE FILE 2091
An act relating to the acquisition of legal settlement by minors and by persons receiving treatment at a state mental health institute or state hospital school. Effective 7/1/84.

SENATE FILE 2095
An act providing a penalty for violating the requirements for handicapped parking spaces. Effective 7/1/84.

SENATE FILE 2098
An act specifying that the state assumes liability for injuries to and torts committed by offenders performing unpaid community service work. Effective 7/1/84.

SENATE FILE 2101
An act relating to the commitment of children beyond their eighteenth birthday to the state training school. Effective 7/1/84.

SENATE FILE 2102
An act relating to the executive director, staff, and administrative expenses of the Iowa Family Farm Development Authority. Effective 7/1/84.

SENATE FILE 2104
An act relating to the collection of fines and penalties by a county attorney. Effective 7/1/84.

SENATE FILE 2116
An act to provide resale rights to a holder of a farm implements or parts franchise upon termination of the franchise. Effective 7/1/84.

SENATE FILE 2119
An act making the three day notice to quit given by mobile/manufactured home landlords concurrent with the three day notice for failure to pay rent. Effective 7/1/84.

SENATE FILE 2121
An act establishing a State Historic Building Code and advisory board. Effective 7/1/84.

SENATE FILE 2122
An act relating to county libraries. Effective 7/1/84.

SENATE FILE 2129
An act making nonsubstantive corrections to the Code of Iowa. Effective 7/1/84.

SENATE FILE 2132
An act relating to intestate succession with respect to the share of the surviving spouse and limitations on inheritance by remote heirs. VETOED.

SENATE FILE 2135
An act relating to electric transmission line, wire or cable franchises. Effective 7/1/84.

SENATE FILE 2137
An act relating to the certification of certain documents. Effective 7/1/84.

SENATE FILE 2138
An act relating to the time within which to contest wills, file claims, make spousal elections, and take certain other actions with respect to a decedents' estate. Effective 7/1/84.

SENATE FILE 2153
An act relating to drainage district expenses and assessments. Effective 7/1/84.

SENATE FILE 2154
An act extending the sunset provision on community action agencies to July 1, 1986. Effective 7/1/84.

SENATE FILE 2155
An act relating to internal expense reporting and payroll procedures in the office of the Auditor of State. Effective 7/1/84.

SENATE FILE 2156
An act relating to the administration of the extraordinary property tax credit or reimbursement. Effective 7/1/84.

SENATE FILE 2159
An act to allow limited child modeling under the child labor laws. Effective 7/1/84.

SENATE FILE 2160
An act providing a preference for residents in the awarding of certain public contracts. Effective upon publication.

SENATE FILE 2163
An act making changes in the law relating to child custody. Effective 7/1/84.

SENATE FILE 2167
An act to repeal certain meeting requirements regarding general obligation bond issues for the construction and renovation of a school building. Effective 7/1/84.

SENATE FILE 2168
An act relating to programs for returning dropouts and dropout prevention by local school districts. Effective 7/1/84.

SENATE FILE 2169
An act including vehicles used to transport agricultural products being pulled by a tractor as implements of husbandry. Effective 7/1/84.

SENATE FILE 2170
An act to provide temporary funding for the brucellosis and tuberculosis eradication fund. Effective 7/1/84.

SENATE FILE 2173
An act relating to appeals of awards by compensation commissions in condemnation proceedings. Effective 7/1/84.

SENATE FILE 2175
An act relating to the dispensing of generically equivalent drugs. Effective 7/1/84.

SENATE FILE 2176
An act eliminating the requirement that a facility licensed by the Department of Substance Abuse providing child foster care be licensed by the Department of Human Services. Effective 7/1/84.

SENATE FILE 2182
An act relating to the membership of the Iowa Development Commission. Effective 7/1/84.

SENATE FILE 2183
An act relating to sexual abuse committed by engaging in a sex act against the will of the other participant. Effective 7/1/84.

SENATE FILE 2184
An act relating to the qualifications of the superintendent of public instruction. Effective 7/1/84.

SENATE FILE 2188
An act allowing a county treasurer to issue a restricted certificate of title to a person who was issued a junking certificate. Effective 7/1/84.

SENATE FILE 2189
An act relating to bacterial and organoleptic milk standards. Effective 7/1/86.

SENATE FILE 2197
An act relating to the establishment and dissolution of a sanitary district. Effective 7/1/84.

SENATE FILE 2202
An act relating to the procedure required for a savings and loan association chartered in another state or country to transact business in Iowa. Effective 7/1/84.

SENATE FILE 2205
An act relating to the fees for the registration of vessels. Effective 7/1/84.

SENATE FILE 2212
An act relating to pay scale standards for members of the Iowa National Guard. Effective 7/1/84.

SENATE FILE 2213
An act relating to the authority of the Department of Water, Air and Waste Management over waste water disposal systems. Effective 7/1/84.

SENATE FILE 2214
An act relating to the regulation of hazardous waste and subjecting violators to penalties Effective 7/1/84.

SENATE FILE 2215
An act to establish the issuance of separate teaching and extracurricular activities contracts by school boards and to set criteria for coaching authorization. Effective 7/1/84.

SENATE FILE 2217
An act establishing uniform enforcement remedies for the Department of Water, Air and Waste Management and imposing penalties. Effective 7/1/84.

SENATE FILE 2220
An act expanding the number of financial institutions eligible to receive public funds; providing for the investment of public funds; providing for the dissolution of the state sinking fund; and expanding the deposit limits for bank holding companies. Effective 7/1/84.

SENATE FILE 2221
An act relating to tests and standards for motor vehicle fuel. Effective 7/1/84.

SENATE FILE 2222
An act allowing a city to redraw precinct lines when adopting a system providing for the election of council members from wards or changing the number of wards. Effective 7/1/84.

SENATE FILE 2223
An act relating to the maximum fine assessable for conviction of a class "c" or "d" felony. Effective 7/1/84.

SENATE FILE 2228
An act prohibiting zoning regulations or other ordinances which discriminate against manufactured dwellings. Effective 7/1/84.

SENATE FILE 2232
An act relating to industrial loan licensees by allowing them to collect appraisal fees on loans secured by a mortgage and requiring them to pay interest on finds held in escrow. Effective 7/1/84.

SENATE FILE 2233
An act providing for the transfer of fiduciary accounts among affiliates and between independent banks. Effective 7/1/84.

SENATE FILE 2235
An act relating to the penalties for operating a motor vehicle when the operator's license has been suspended or revoked. Effective 7/1/84.

SENATE FILE 2237
An act relating to the appointment, terms, retention, and qualifications of magistrates. VETOED.

SENATE FILE 2238
An act making corrections in the Code of Iowa by striking or replacing incorrect references, expired provisions, and making statutes consistent. Effective 7/1/84.

SENATE FILE 2243
An act specifying which claims paid to county employees must be published in official newspapers. Effective 7/1/84.

SENATE FILE 2244
An act relating to public bonds and obligations by correcting references and providing for payment of the costs of registration. Effective 7/1/84.

SENATE FILE 2247
An act relating to the crimes of unauthorized access, computer damage, and computer theft and providing penalties. Effective 7/1/84.

SENATE FILE 2248
An act relating to the collection and dissemination of information regarding hazardous chemicals and authorizing the Department of Water, Air and Waste Management to adopt hazardous waste rules and providing penalties. Effective 7/1/84.

SENATE FILE 2250
An act relating to the budget year and annual report provision regarding secondary roads. Effective various dates.

SENATE FILE 2253
An act relating to the penalty for violating the Iowa competition law and prohibiting persons convicted of violations from bidding on governmental contracts. Effective 7/1/84.

SENATE FILE 2254
An act relating to the state employee suggestion system. Effective 7/1/84.

SENATE FILE 2257
An act relating to the ownership of joint transmission facilites. Effective 7/1/84.

SENATE FILE 2261
An act relating to the powers of state chartered savings and loan associations. Effective 7/1/84.

SENATE FILE 2262
An act relating to health insurance by requiring that coverage for educational programs for diabetes be offered. Effective 7/1/84.

SENATE FILE 2263
An act requiring the Department of Public Instruction to adopt rules relating to the review of special education programs. Effective 7/1/84.

SENATE FILE 2268
An act relating to the collection of court ordered payments by providing for the mandatory assignment of income when a person is delinquent in making payments. Effective 7/1/84.

SENATE FILE 2269
An act limiting the amount charged employed county prisoners for meals. Effective 7/1/84.

SENATE FILE 2270
An act relating to the application of the crime victim reparation program to victims of persons operating a motor vehicle under the influence of alcohol or drugs. VETOED.

SENATE FILE 2271
An act modifying the criminal and civil liability of state employees under the state tort claims act. Effective 7/1/84.

SENATE FILE 2273
An act to ratify an interstate compact between Iowa, Kansas, Missouri, and Nebraska for the development of the Missouri River for barge traffic. Effective 7/1/84.

SENATE FILE 2276
An act relating to the State Board of Engineering Examiners. Effective 7/1/84.

SENATE FILE 2277
An act relating to the selection process of subscriber and provider directors of the boards of various health care service corporations. Effective upon publication.

SENATE FILE 2283
An act relating to the death of a fire fighter during an arson and providing a penalty. Effective 7/1/84.

SENATE FILE 2284
An act relating to lease-purchase agreements made by area education agencies. Effective 7/1/84.

SENATE FILE 2285
An act permitting the deposit of a credit union certified share draft as security on a bid for a contract for a public improvement. Effective 7/1/84.

SENATE FILE 2293
An act relating to child protection by creating foster care review boards, providing for rehabilitation for children receiving foster care, amending Iowa's child abuse law, permitting peace officers to remove a child from a facility under certain circumstances, and providing that financial assistance go to certain facilities. Effective 7/1/84.

SENATE FILE 2294
An act relating to the examination of government records by providing for their availability, examination procedures, and the duties of lawful custodians. Effective 7/1/84.

SENATE FILE 2295
An act prohibiting reductions in sick leave, vacation leave, or compensatory time entitlements while an employee is receiving workers' compensation benefits. Effective upon publication.

SENATE FILE 2297
An act relating to the payment of workers' compensation benefits in pneumoconiosis cases. Effective 7/1/84.

SENATE FILE 2298
An act to require the State Department of Transportation and other state departments to include estimated federal funds in their annual or biennial budgets. Effective 7/1/84.

SENATE FILE 2301
An act relating to the protection of lienholders and certificate holders advancements. Effective 7/1/84.

SENATE FILE 2304
An act relating to the penalties for fraudulently obtaining, manufacturing, delivering, or possessing with intent to manufacture or deliver, a controlled substance. Effective 7/1/84.

SENATE FILE 2306
An act authorizing and requiring the adoption of rules for the use of computer data storage systems for intelligence data. Effective 7/1/84.

SENATE FILE 2310
An act relating to payments to state employees for accrued sick leave and disability. Effective 7/1/84.

SENATE FILE 2311
An act relating to access to records by the Legislative Fiscal Bureau. Effective 7/1/84.

SENATE FILE 2312
An act relating to the deposit of interest earnings in designated employee insurance funds. Effective 7/1/84.

SENATE FILE 2317
An act relating to the purchase of Iowa coal by state and local government institutions. Effective 7/1/84.

SENATE FILE 2318
An act relating to the computation of interest on overpayments for individual, corporate, and franchise taxes. Effective upon publication.

SENATE FILE 2323
An act making changes in the state inheritance tax law. Effective 7/1/84.

SENATE FILE 2327
An act defining discounts on certain transactions involving farm equipment for the purposes of the state sales, services, and use tax. Retroactive to 6/1/82.

SENATE FILE 2328
An act amending the Iowa Pari-mutuel Wagering Act and providing for certain employees of the Racing Commission. Effective 7/1/84.

SENATE FILE 2330
An act relating to the financing of state government by reducing certain appropriations, updating references to the internal revenue code, increasing certain fees, creating an economic emergency fund, and imposing the sales, service and use tax on certain goods and services. ITEM VETOED. Effective upon publication.

SENATE FILE 2332
An act relating to the Iowa Finance Authority. Effective 7/1/84.

SENATE FILE 2333
An act relating to the administration and financing of correctional, mental health, mental retardation, and veterans programs. Effective 7/1/84.

SENATE FILE 2334
An act appropriating funds for designated service programs in health, civil rights, veterans' services, and programs for minority, elderly, and disadvantaged persons for fiscal year 1985 and making supplemental appropriations to the Department of Health and Board of Regents. ITEM VETOED. Effective upon publication.

SENATE FILE 2335
An act appropriatating funds to the Department of Human Services for certain recipients of aid to dependent children and to the United States Department of Health and Human Services for certain audit exceptions. Effective upon publication.

SENATE FILE 2337
An act making an appropriation to state agencies with responsibilities in the areas of transportation, public safety, and public defense. ITEM VETOED. Effective upon publication.

HOUSE FILE 582
An act relating to the postconviction procedure act. Effective 7/1/84.

HOUSE FILE 590
An act relating to the requirements that certain buildings be designed by registered architects. Effective 7/1/84.

HOUSE FILE 591
An act prohibiting the General Assembly from passing any bill that uses gender as the basis for differential treatment. Effective 7/1/84.

HOUSE FILE 595
An act relating to the deferring of judgment or deferring of sentence of a person previously convicted of a felony. VETOED.

HOUSE FILE 601
An act relating to appeal of bond set after parole revocation. Effective 7/1/84.

HOUSE FILE 602
An act repealing the requirement for a study to determine the percentage of motor fuel tax collected that derives from motor fuel used in watercraft. Effective 7/1/84.

HOUSE FILE 658
An act relating to the direct deposits of revenue and special assessments collected by a county treasurer. Effective 7/1/84.

HOUSE FILE 2015
An act relating to the holding of games of skill, chance, and raffles including bingo and providing penalties. Effective 7/1/84.

HOUSE FILE 2019
An act to protect state employees from personnel actions as reprisals for providing information to legislators or disclosing waste, mismanagement, or violations of law, and subjecting violators to a penalty. Effective 7/1/84.

HOUSE FILE 2031
An act stipulating collective bargaining representation for employees of a district board of correctional services VETOED.

HOUSE FILE 2043
An act requiring the reporting of property owned by a city utility. Effective 7/1/84.

HOUSE FILE 2048
An act relating to conservation easements held by a private, nonprofit organization for public benefit. Effective 7/1/84.

HOUSE FILE 2062
An act providing for a moratorium on certain disconnections of gas and electricity by regulated public utilities from November 1, to April 1, for certain residents and making civil penalties applicable. Effective 7/1/84.

HOUSE FILE 2065
An limiting gas or electric service deposits. Effective 7/1/84.

HOUSE FILE 2067
An act prohibiting a person over the age of thirty from participating as a contestant in an organized amateur boxing contest unless each contestant is over thirty. Effective 7/1/84.

HOUSE FILE 2068
An act requiring certain public utilities to include in each of their ads a listing of the percentage of the ad's expenses which are to be charged to customers and the percentages which are to be charged to the stockholders. Effective 7/1/84.

HOUSE FILE 2071
An act to provide for the Transportation Commission to submit the results of the quadrennial need study to the General Assembly by January 1, of the year in which the quadrennial need study becomes effective. Effective 7/1/84.

HOUSE FILE 2100
An act relating to the location and operation of anhydrous ammonia plants and defining nuisance as the term relates to the plants. Effective 7/1/84.

HOUSE FILE 2101
An act authorizing an area education agency to issue warrants and anticipatory warrants and providing for the payment of interest. Effective 7/1/84.

HOUSE FILE 2110
An act relating to the regulation of radiation machines and radioactive materials. Effective 7/1/84.

HOUSE FILE 2111
An act authorizing cities to issue revenue bonds or pledge orders to refund general obligation bonds if they were issued or the proceeds were expended for certain city projects. Effective 7/1/84.

HOUSE FILE 2126
An act relating to the membership of legislative visitation committees. Effective 7/1/84.

HOUSE FILE 2136
An act relating to the licensing and regulation of social workers, the deposit of license fees for the purpose of administration, and providing penalties for violations. Effective 1/1/85.

HOUSE FILE 2164
An act relating to the duties and responsibilities fo a peace officer to a victim of domestic abuse and requiring the Department of Public Safety to submit a proposal to the General Assembly by January 15, 1985 for the collection of domestic violence data. Effective 7/1/84.

HOUSE FILE 2167
An act relating to the cost of permanent soil and water conservation practices constructed under administrative order with public cost-sharing funds. Effective 7/1/84.

HOUSE FILE 2170
An act relating to duties and responsibilities of probation officers. Effective 7/1/84.

HOUSE FILE 2172
An act relating to the surety bond required for an employment agency license. Effective 7/1/84.

HOUSE FILE 2180
An act relating to vehicle requirements by allowing a county treasurer to transfer title by operation of law in the county of the new owner's residence, and making odometer statement requirements affect model years after the eleventh year prior to the current registration year. Effective 7/1/84.

HOUSE FILE 2183
An act relating to the regulation of business entities and workers engaging in the removal or encapsulation of asbestos. Effective 7/1/84.

HOUSE FILE 2184
An act relating to publication of notice for zoning actions taken under Chapter 414. Effective 7/1/84.

HOUSE FILE 2187
An act increasing the filling or recording fee collected by the country recorder from three dollars to five dollars for each page or fraction of a page of an instrument filed or recorded in the recorder's office. Effective 7/1/84.

HOUSE FILE 2189
An act creating a Commission on Children, Youth, and Families and providing its purpose and duties. Effective 7/1/84.

HOUSE FILE 2194
An act relating to the reporting of receipts by the county treasurer. Effective 7/1/84.

HOUSE FILE 2211
An act making changes in the practice act relating to physical therapy. Effective 7/1/84.

HOUSE FILE 2212
An act to provide for the placement of validation stickers on only the rear registration plate for certain motor vehicles. Effective 12/11/84.

HOUSE FILE 2217
An act to establish a Board of Educational Examiners and to prescribe their duties. VETOED.

HOUSE FILE 2219
An act allowing an eligible elector to register to vote at the polling place on election day. VETOED.

HOUSE FILE 2229
An act modifying the definitions and schedules of controlled substances and providing a penalty. Effective 7/1/84.

HOUSE FILE 2232
An act to allow the operation of articulated buses not exceeding sixty-one feet in length on the public streets and highways. Effective 7/1/84.

HOUSE FILE 2234
An act requiring repair or replacement of a new motor vehicle which does not conform to express warranties. Effective 7/1/84.

HOUSE FILE 2243
An act providing that a person who provides assistance or advice in the abatement or attempted abatement or cleanup of a hazardous condition is not liable for damages resulting from the assistance or advice. Effective 7/1/84.

HOUSE FILE 2247
An act relating to the reimbursement of law enforcement officer training costs incurred by cities or counties. Effective 7/1/84.

HOUSE FILE 2263
An act to regulate interest rates on life insurance policy loans. Effective 7/1/84.

HOUSE FILE 2265
An act permitting certain teachers at the Iowa School for the Deaf and Iowa Braille and Sight-saving School to be eligible for certain repayment criteria for loan programs. Effective 7/1/84.

HOUSE FILE 2267
An act relating to the waiver of presentence investigations for class "b", "c", and "d" felonies. Effective 7/1/84.

HOUSE FILE 2272
An act to authorize certain motor trucks and motor homes to tow a four-wheeled trailer with a steering axle and more than one trailer or semitrailer or both, subject to penalties provided by law. Effective 7/1/84.

HOUSE FILE 2274
An act relating to the designation of moneys to be paid to the state fish and game protection fund by a taxpayer on an income tax return. Retroactive to January 1, 1984.

HOUSE FILE 2284
An act relating to agreements for indemnification by the state in the event of loss of or damage to certain art objects and artifacts borrowed by nonprofit organizations or governmental entities for special exhibits. Effective 7/1/84.

HOUSE FILE 2295
An act providing for a state lottery. VETOED.

HOUSE FILE 2301
An act transferring responsibility for the regulation of explosives and the inspection of explosive storage facilities to the State Fire Marshal. Effective 7/1/84.

HOUSE FILE 2302
An act relating to the definition of child abuse, investigations of child abuse and the admissibility of certain tape recordings as evidence in child in need of assistance cases. Effective 7/1/84.

HOUSE FILE 2306
An act permitting the Conservation Commission to alter or restrict the taking of wildlife. Effective 7/1/84.

HOUSE FILE 2323
An act relating to the payment of special assessments of drainage districts. Effective 7/1/84.

HOUSE FILE 2326
An act to eliminate the county auditor's annual property valuation and tax report to the Department of Revenue. Effective 7/1/84.

HOUSE FILE 2330
An act relating to parking violations and providing, with certain exceptions, that parking violations not be considered for license suspensions or revocations. Effective 7/1/84.

HOUSE FILE 2331
An act relating to the filing of refund claims resulting from the carryback of net operating losses or net capital losses for tax years ending on or before December 31, 1978 for personal and corporate and franchise tax purposes. Effective 7/1/84.

HOUSE FILE 2334
An act relating to the definition of burglary and attempted burglary. Effective 7/1/84.

HOUSE FILE 2335
An act relating to the liability of a county or city, or an administrative or legal entity created by a county or city, under the Iowa competition law. Effective 7/1/84.

HOUSE FILE 2338
An act requiring telephone companies to provide a listing of directory assistance charges and striking a prohibition against directory assistance charges for telephone numbers which do not appear in the most recent telephone directory. Effective 7/1/84.

HOUSE FILE 2340
An act relating to the investigations and findings of a complaint filed against a health care facility. Effective 7/1/84.

HOUSE FILE 2347
An act relating to the appropriation of funds for the construction of a new state historical building and providing effective dates. Various effective dates.

HOUSE FILE 2348
An act relating to correctional procedures by expanding the circumstances under which homework release may be granted, requiring counties to confine parole or work release violators, allowing a designee of the warden or superintendent to hear certain appeals, extending the time for the board of directors of a judicial district department of correctional services to file its annual report, and providing penalties for violations of parole. Effective 7/1/84.

HOUSE FILE 2354
An act relating to the purchase of equipment and supplies by the board of trustees of a county public hospital. Effective 7/1/84.

HOUSE FILE 2372
An act relating to real property legalizing acts. Effective 7/1/84.

HOUSE FILE 2373
An act relating to attorney fees in proceedings to modify decrees relating to dissolution of marriage. Effective 7/1/84.

HOUSE FILE 2375
An act providing for the surrender and disposition of earnings of persons committed to residential treatment centers operated by judicial district departments of correctional services. Effective 7/1/84.

HOUSE FILE 2378
An act relating to the Board of Parole. Effective 7/1/84.

HOUSE FILE 2379
An act extending the dates for application and approval of community mental health and mental retardation funding. Effective 7/1/84.

HOUSE FILE 2380
An act authorizing the dissemination of criminal history data to certain youth service agencies. Effective 7/1/84.

HOUSE FILE 2385
An act stating the frequency of inspection of grain dealers to be not less than twice during each twelve month period, but not more than five times in a twenty-four month period without good cause. Effective 7/1/84.

HOUSE FILE 2386
An act relating to transportation programs by defining a public transit system, requiring coordinated funding and services, and establishing criteria to determine compliance. Effective 7/1/84.

HOUSE FILE 2387
An act relating to the authority of the Department of Water, Air and Waste Management over public water supply systems. Effective 7/1/84.

HOUSE FILE 2389
An act relating to the interest of a city officer or employee in contracts for the purchase of goods and services by a city. Effective 7/1/84.

HOUSE FILE 2390
An act relating to county finance by deleting or amending incorrect references to county funds and making amendments to resolve conflicts in county finance laws. Effective 7/1/84.

HOUSE FILE 2391
An act relating to license fees, inspection fees, and other fees charged by the Commerce Commission. Effective 7/1/84.

HOUSE FILE 2392
An act relating to the psychological testing of law enforcement and correctional officers. Effective 1/1/85.

HOUSE FILE 2393
An act relating to the authority of the Department of Water, Air and Waste Management over used oil. Effective 7/1/84.

HOUSE FILE 2396
An act relating to the exemption of law enforcement officials from the licensing requirements for private detectives. Effective 7/1/84.

HOUSE FILE 2398
An act allowing a maximum set-aside of ten percent of the total dollar amount of federal aid contracts let by the State Department of Transportation for bidding by prequalified disadvantaged business enterprises. Effective 7/1/84.

HOUSE FILE 2400
An act providing for uniform search warrants, applications for warrants, endorsements for search warrants, and returns of search warrants. Effective 7/1/84.

HOUSE FILE 2401
An act relating to the creation of a public outdoor recreation and resources program, an advisory council, and a county conservation board fund. Effective 7/1/84.

HOUSE FILE 2404
An act relating to the definition of telephone companies not generally subject to rate regulation. Effective 7/1/84.

HOUSE FILE 2405
An act relating to the annual meetings of shareholders and the loans to officers of state banks. Effective 7/1/84.

HOUSE FILE 2409
An act removing the priority of a mortgage given by the trustees of a cooperative housing association over any mortgage, lien, or encumbrance against an individual apartment or room or the owner's interest in an individual apartment or room. Effective 7/1/84.

HOUSE FILE 2412
An act relating to informing defendants of an applicable mandatory minimum sentence. Effective 7/1/84.

HOUSE FILE 2414
An act relating to a credit union's par value of shares, deposits, investments, powers, membership, and reserves. Effective 7/1/84.

HOUSE FILE 2415
An act providing for the creation of a home equity line of credit and priority of advances under mortgages securing the home equity line of credit. Effective 7/1/84.

HOUSE FILE 2416
An act relating to employee continuation rights under an employer-provided health benefit plan and to employer liability for breaking an agreement to provide a health benefit plan for employees. Effective 7/1/84.

HOUSE FILE 2417
An act relating to the inspection of jails and municipal holding facilities by the Iowa Department of Corrections. Effective 7/1/84.

HOUSE FILE 2421
An act relating to the collection, transportation, storage and disposal of solid waste. Effective 7/1/84.

HOUSE FILE 2423
An act establishing court jurisdiction over certain nonresidents in paternity and child support cases. Effective 7/1/84.

HOUSE FILE 2424
An act relating to expenses incurred by health care facilities in receivership and the liability of the receiver for the expenses and for suits filed against the receiver. Effective 7/1/84.

HOUSE FILE 2425
An act relating to the commitment of children and certain adults either to the state training school or the appropriate adult correctional facility. Effective 7/1/84.

HOUSE FILE 2426
An act relating to the study of the feasibility of a state-owned hazardous waste treatment and resource recovery facility. Effective upon publication.

HOUSE FILE 2427
An act relating to disclosure of the court's decision on whether to reconsider a felon's sentence of confinement. Effective 7/1/84.

HOUSE FILE 2428
An act relating to mortgage redemption periods. Effective 7/1/84.

HOUSE FILE 2430
An act relating to the selection and operation of foster care review committees under the Department of Human Services. Effective 7/1/84.

HOUSE FILE 2431
An act relating to the issuance of arrest warrants for work release violators or escapees. Effective 7/1/84.

HOUSE FILE 2432
An act to establish a public transit assistance fund. Effective 7/1/84.

HOUSE FILE 2433
An act amending Iowa's unemployment compensation law regarding job bumping situations, the treatment of educational employees, the burden of proof in certain cases, special contribution rate requirements, employer rates in certain overpayment cases, by crediting earned interest to the temporary emergency surcharge fund, and by providing for contribution refunds in overpayment cases. Various effective dates.

HOUSE FILE 2436
An act relating to the licensure and operation of a hospice program. Effective 7/1/84.

HOUSE FILE 2437
An act relating to the regulation of advanced emergency medical technicians and paramedics. Effective 7/1/84.

HOUSE FILE 2438
An act relating to the repayment of loans made under the science and mathematics loan program. Effective 7/1/84.

HOUSE FILE 2439
An act relating to pari-mutuel betting by requiring certain information from license applicants and employees, permitting warrantless searches, authorizing the expulsion of certain people from racetrack facilities, prohibiting the use or possession of devices to stimulate or depress racing animals permitting the disclosure of confidential information to the State Racing Commission, setting fees, and providing penalties. Effective 7/1/84.

HOUSE FILE 2440
An act relating to the Iowa Veterans Home and its administration. Effective 7/1/84.

HOUSE FILE 2444
An act to provide that the taxable value of a building shall not be increased where the dollar amount of normal and necessary repairs to the building does not exceed two thousand five hundred dollars. Effective 7/1/84.

HOUSE FILE 2447
An act relating to the providing of interpreters for hearing impaired persons who are arrested. Effective 7/1/84.

HOUSE FILE 2452
An act relating to the requirement of bail during and after a period of deferred judgment and to the discharge of surety bail upon the occurrence of specified conditions. Effective 7/1/84.

HOUSE FILE 2454
An act relating to the filing of a list of unpaid obligations by state agencies with the State Comptroller. Effective 7/1/84.

HOUSE FILE 2457
An act redefining what persons are subject to guardianships and conservatorships, providing representation for certain wards and revising the powers and duties of guardians and conservators. Effective 7/1/84.

HOUSE FILE 2458
An act relating to school district reorganization procedures. Effective 7/1/84.

HOUSE FILE 2459
An act allowing a vendor to charge for reasonable attorneys fees in the forfeiture of a real estate contract. Effective 7/1/84.

HOUSE FILE 2463
An act relating to the priority of construction mortgage liens. Effective 7/1/84.

HOUSE FILE 2465
An act relating to the discharge of mentally impaired persons involuntarily hospitalized in connection with a criminal conviction, unresolved criminal charge, or pursuant to an acquittal due to insanity or diminished responsibility. Effective 7/1/84.

HOUSE FILE 2466
An act relating to the definition of public accommodation and extending the time for bringing an action under the Iowa Civil Rights Act. Effective 7/1/84.

HOUSE FILE 2467
An act relating to administrative procedures for the establishment, determination, and collection of certain child support debts. Effective 7/1/84.

HOUSE FILE 2468
An act relating to the election laws by providing a method for challenging nomination petitions, eliminating the requirement for notarization of absentee ballots, regulating the office hours of the county commissioner of elections, revising the delivery of registration forms, requiring identification of political advertisers, providing assistance to certain voters, and making certain technical corrections to the voting laws. Various effective dates.

HOUSE FILE 2470
An act relating to real property by modifying the platting requirements upon the subdivision of a parcel of land and the vacating of certain public streets, alleys, and other public lands. Effective 7/1/84.

HOUSE FILE 2471
An act creating a hazardous waste remedial fund and providing for the cleanup of hazardous conditions and the management and cleanup of abandoned or uncontrolled hazardous waste disposal sites. Effective 7/1/84.

HOUSE FILE 2472
An act relating to the transportation of open containers of alcoholic beverages and beer, the hours of sale of alcoholic beverages and beer, the notification of parents or legal guardians of a child that appears before the court for certain violations, and the motor vehicle license or nonoperator's identification card issued to persons under nineteen. Effective 7/1/84.

HOUSE FILE 2473
An act to implement certain recommendations of the governor's task force by limiting leaves of absence for certain military purposes, providing for a phased retirement incentive program, providing for the use of investment income from certain retirement programs, specifying how certain part-time employees are paid, and reducing appropriations to state departments agencies by the amount of out-of-state travel. Various effective dates.

HOUSE FILE 2474
An act relating to the form of probate inventory. Effective 7/1/84.

HOUSE FILE 2478
An act relating to the administration of special assessments and other property tax laws. Effective 7/1/84.

HOUSE FILE 2480
An act ceding to the United States concurrent legislature jurisdiction over and within certain lands and waters dedicated to national park purposes. Effective 7/1/84.

HOUSE FILE 2481
An act relating to the taxation, valuation, and qualification of fruit-tree or forest reservations for property tax purposes. Effective 1/1/85.

HOUSE FILE 2485
An act relating to the management of state government forms. Effective 7/1/84.

HOUSE FILE 2486
An act relating to the offense of operating a motor vehicle while intoxicated by providing for various penalties, defining alcohol concentration, requiring a substance abuse evaluation for certain offenders, providing a special license for persons age nineteen and under, allocating certain moneys to the victim reparation fund, and establishing a study committee to review present laws and penalties. ITEM VETOED. Effective 7/1/84.

HOUSE FILE 2487
An act relating to tort liability by establishing comparative fault as the basis for liability in relation to claims for damages arising from injury, death, or harm to property and modifying the liability of governmental entities. Effective 7/1/84.

HOUSE FILE 2501
An act relating to the supervision, rehabilitation, and liquidation of insurance companies and providing penalties. Effective 7/1/85.

HOUSE FILE 2502
An act relating to material lift elevators. Effective 7/1/84.

HOUSE FILE 2503
An act relating to the taxation of engraving, photography, retouching, printing, and binding under the state sales, services, and use tax. Effective 7/1/84.

HOUSE FILE 2507
An act relating to the penalties for certain taxes including cigarette and tobacco taxes, state motor vehicle fuel taxes, freight line and equipment car mileage taxes, income taxes, withholding taxes, franchise taxes, inheritance and estate taxes, sales and use taxes, and generation skipping transfer taxes. Effective 1/1/85.

HOUSE FILE 2510
An act relating to the definition and taxation of real property within a self-supported municipal improvement district. Effective 7/1/84.

HOUSE FILE 2511
An act relating to and making appropriations to theAuditor of State and the Treasurer of State. Effective upon publication.

HOUSE FILE 2516
An act to provide funding for the removal or encapsulation of asbestos by school districts. Effective 7/1/84.

HOUSE FILE 2517
An act to legalize proceedings by the City Council of the City of Ryan, Iowa relating to the sale of certain property. Effective 7/1/84.

HOUSE FILE 2518
An act relating to and making appropriations to various executive, legislative and judicial departments and agencies. Effective 7/1/84.

HOUSE FILE 2519
An act relating to and making appropriations to agencies, institutions, commissions, departments, and boards responsible for education programs for this state. ITEM VETOED. Effective 7/1/84.

HOUSE FILE 2520
An act appropriating funds to various departments and agencies with responsibility in the areas of agricultural affairs, economic development, energy, and natural resources management. Various effective dates.

HOUSE FILE 2521
An act making appropriations to various state regulatory, administrative and finance departments, boards and commissions. ITEM VETOED. Various effective dates.

HOUSE FILE 2522
An act relating to the disposition of unclaimed property. Effective upon publication.

HOUSE FILE 2524
An act increasing the limit on the tax rate that may be certified by the board of directors of a school corporation to be levied on taxable property in a school district for the use of a free public library by residents of the school district. Effective 7/1/84.

HOUSE FILE 2525
An act to increase the authorized property tax levy for benefited law enforcement district. Effective 7/1/84.

HOUSE FILE 2528
An act relating to the administration and benefits of certain public retirement and benefit systems and to make an appropriation. Various effective dates.

HOUSE FILE 2531
An act relating to urban renewal. Effective 7/1/84.

HOUSE FILE 2532
An act allowing telephone utilities to offer certain services without filing a tariff with the Iowa State Commerce Commission and providing an effective date. Effective upon publication.

Sections Repealed or Amended Code 1983

* Indicates 1983 Code Supplement

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2.52	SF 2311	7-1-84
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3.1(3)	SF 2129	7-1-84
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8.15*	SF 2238	7-1-84
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8.33*	SF 2330	P.C.
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43.115	HF 2468	P.C.
47.2	HF 2468	P.C.
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48.6(9)*	SF 2129	7-1-84
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80B.11(5)	HF 2392	1-1-85
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99B.7(6)*	HF 2015	7-1-84	110.7	HF 406	12-15-84	147A 12	HF 2437	7-1-84
99B.9A	HF 2015	7-1-84	110.10	HF 406	12-15-84	148A.1	HF 2211	7-1-84
99B.14	HF 2015	7-1-84	110 11	HF 406	12-15-84	148A.3(4)	HF 2211	7-1-84
99B.19	HF 2015	7-1-84	110 12*	HF 406	12-15-84	148A.4(1)*	HF 2211	7-1-84
99B.20	HF 2015	7-1-84	110 17	HF 406	12-15-84	148A.5	HF 2211	7-1-84
99C.10	HF 2067	7-1-84	110 18	HF 406	12-15-84	148A.5	SF 2129	7-1-84
99D.2(1)*	HF 2439	7-1-84	110.24*	HF 406	12-15-84	154B 6(1)	SF 414	7-1-84
99D.2(6)*	SF 2328	7-1-84	110.26	HF 406	12-15-84	154B.6A	SF 414	7-1-84
99D.5(5)*	SF 2328	7-1-84	110.38	HF 406	12-15-84	155 30	SF 2304	7-1-84
99D 5(6)*	SF 2328	7-1-84	110, Ch	HF 406	12-15-84	155.37(2)"c"*	SF 2175	7-1-84
99D.6*	HF 2439	7-1-84	111.79	HF 2401	7-1-84	159.5(4)*	SF 2129	7-1-84
99D.7(2)	SF 2328	7-1-84	111.80	HF 2401	7-1-84	159.5(7)*	SF 2129	7-1-84
99D.7(6)	SF 2328	7-1-84	111A.4(6)	HF 425	7-1-84	161 3	HF 2481	1-1-85
99D.7(9)	HF 2439	7-1-84	111A.4(10)	HF 425	7-1-84	161 7	HF 2481	1-1-85
99D.8A	HF 2439	7-1-84	111A 5	HF 425	7-1-84	161.10	HF 2481	1-1-85
99D 8A(5)	SF 2328	7-1-84	111A.6*	HF 2401	7-1-84	161.12	HF 2481	1-1-85
99D 9(1)*	SF 2328	7-1-84	111A.10	HF 425	7-1-84	165.18(3)*	HF 2390	7-1-84
99D.9(2)"a"*	SF 2328	7-1-84	111D, Ch	HF 2048	7-1-84	169.5(8)"i"*	SF 2129	7-1-84
99D.9(2)"b"*	SF 2328	7-1-84	114.2	SF 2276	7-1-84	172C 1(11)"a"	SF 2238	7-1-84
99D.9(6)*	SF 2328	7-1-84	114.3	SF 2276	7-1-84	172D 1(2)	SF 2238	7-1-84
99D 11(3)*	SF 2328	7-1-84	114.11	SF 2276	7-1-84	172D.3(2)"b"(3)	SF 2238	7-1-84
99D.11(5)*	SF 2328	7-1-84	114 13	SF 2276	7-1-84	172D.3(2)"b"(4)	SF 2238	7-1-84
99D 11(6)*	SF 2328	7-1-84	114 14	SF 2276	7-1-84	174.14*	HF 2390	7-1-84
99D 12*	SF 2328	7-1-84	114 20	SF 2276	7-1-84	175.2(7)*	SF 2330	1-1-83
99D.14*	SF 2328	7-1-84	118 18	HF 590	7-1-84	175.6(9)	SF 2220	7-1-84
99D.14(4)*	SF 2328	7-1-84	123.28	HF 2472	7-1-84	175 7(1)	SF 2102	7-1-84
99D.15*	SF 2328	7-1-84	123 36(6)*	HF 2472	7-1-84	175.7(2)	SF 2102	7-1-84
99D.16	SF 2328	7-1-84	123.36(8)*	SF 2353	7-1-84	176A.12*	HF 658	7-1-84
99D.18*	SF 2328	7-1-84	123.49(2)"b"	HF 2472	7-1-84	179.2	SF 2346	P.C.
99D.21*	SF 2328	7-1-84	123.50(4)	HF 2472	7-1-84	194.6	SF 2189	7-1-86
99D.22*	SF 2328	7-1-84	123.50(4)	HF 2486 VETO	7-1-84	194.8	SF 2189	7-1-84
99D.22(2)*	SF 2328	7-1-84	123.50(5)	HF 2486	7-1-84	194.9	SF 2189	7-1-84
99D.22(3)*	SF 2328	7-1-84	123.134(5)	HF 2472	7-1-84	200.3(20)	HF 2100	7-1-84
99D.22(4)*	SF 2328	7-1-84	123 143(1)*	SF 2353	7-1-84	200 3(21)	HF 2100	7-1-84
99D.24(5)*	HF 2439	7-1-84	125 43*	SF 2129	7-1-84	200 3(22)	HF 2100	7-1-84
99D.24(6)*	HF 2439	7-1-84	125 78	SF 2238	7-1-84	200 3(23)	HF 2100	7-1-84
99D.27	SF 2328	7-1-84	135 90	HF 2436	7-1-84	200.3(24)	HF 2100	7-1-84
99D 28	SF 2328	7-1-84	135.91	HF 2436	7-1-84	200.3(25)	HF 2100	7-1-84
100.2	HF 257	7-1-84	135.92	HF 2436	7-1-84	200.3(26)	HF 2100	7-1-84
100 3	HF 257	7-1-84	135.93	HF 2436	7-1-84	200.21	HF 2100	7-1-84
100 4	HF 257	7-1-84	135.94	HF 2436	7-1-84	204 101(15)	HF 2229	7-1-84
100 5	HF 257	7-1-84	135 95	HF 2436	7-1-84	204 101(16)	HF 2229	7-1-84
100.12	HF 257	7-1-84	135.96	HF 2436	7-1-84	204.101(17)"d"	HF 2229	7-1-84
100.26	HF 257	7-1-84	135C 16(3)*	HF 2340	7-1-84	204.204(2)	HF 2229	7-1-84
100.28	HF 257	7-1-84	135C 19(1)	HF 2340	7-1-84	204.204(3)	HF 2229	7-1-84
100.55	HF 257	7-1-84	135C.30(4)	HF 2424	7-1-84	204.204(3)"i"	HF 2229	7-1-84
101.11	HF 257	7-1-84	135C.37	HF 2340	7-1-84	204 204(4)	HF 2229	7-1-84
101A.2(1)	HF 2301	7-1-84	135C.40(1)	HF 2340	7-1-84	204.204(6)"b"	HF 2229	7-1-84
101A.2(2)	HF 2301	7-1-84	136C.1	HF 2110	7-1-84	204.206	HF 2229	7-1-84
101A.3(1)*	HF 2301	7-1-84	136C.2	HF 2110	7-1-84	204.208	HF 2229	7-1-84
101A.3(2)*	HF 2301	7-1-84	136C.3	HF 2110	7-1-84	204.210	HF 2229	7-1-84
101A.4(1)	HF 2301	7-1-84	136C.4	HF 2110	7-1-84	204.212	HF 2229	7-1-84
101A.5	HF 2301	7-1-84	136C.5	HF 2110	7-1-84	204.401(1)"a"	HF 2229	7-1-84
101A.7*	HF 2301	7-1-84	136C 6	HF 2110	7-1-84	204.401(1)"c"	SF 2304	7-1-84
101A.8	HF 2301	7-1-84	136C 7	HF 2110	7-1-84	204.401(1)"d"	SF 2304	7-1-84
101A.9	HF 2301	7-1-84	136C.8	HF 2110	7-1-84	204.401(2)"a"	HF 2229	7-1-84
101A.14(2)	HF 2301	7-1-84	136C.9	HF 2110	7-1-84	204 406	HF 2229	7-1-84
103A.3(24)	SF 2121	7-1-84	136C.10	HF 2110	7-1-84	204 409(1)	HF 2229	7-1-84
103A.11(3)	SF 2129	7-1-84	136C.11	HF 2110	7-1-84	204.411(2)	HF 2229	7-1-84
103A.11(4)	SF 2129	7-1-84	136C.12	HF 2110	7-1-84	214A.2(2)	SF 2221	7-1-84
103A.24	SF 2121	7-1-84	136C.13	HF 2110	7-1-84	217A.2(4)*	SF 2084	7-1-84
103A.25	SF 2121	7-1-84	136C.15	HF 2110	7-1-84	217A 2(5)*	SF 2238	7-1-84
103A.26	SF 2121	7-1-84	144 57	SF 2238	7-1-84	217A 2(6)*	SF 2238	7-1-84
103A 27	SF 2121	7-1-84	147 1(2)	HF 2136	1-1-85	217A 2(7)*	SF 2238	7-1-84

217A.8(1)*	HF 2392	1-1-85	232.68(2)"b"*	HF 2302	7-1-84	246.16*	SF 2084	7-1-84	
217A.8(6)*	HF 2431	7-1-84	232.68(2)"d"*	HF 2302	7-1-84	246.17	SF 2084	7-1-84	
217A.18*	SF 2082	P.C.	232.69(1)*	SF 2293	7-1-84	246.46	HF 74	7-1-84	
217A.19*	SF 2082	P.C.	232.69(1)"b"*	SF 2293	7-1-84	247A.2*	HF 2348	7-1-84	
217A.31*	HF 2425	7-1-84	232.71*	HF 2302	7-1-84	247A.7*	SF 2084	7-1-84	
217A.32*	SF 2082	P.C.	232.71(4)*	SF 2293	7-1-84	247A.10*	HF 2348	7-1-84	
217A.33*	SF 2082	P.C.	232.71(9)*	SF 2293	7-1-84	249.9*	SF 2363	7-1-84	
217A.52*	SF 2084	7-1-84	232.71(13)*	SF 2293	7-1-84	249A.2*	SF 2363	7-1-84	
217A.80	SF 2084	7-1-84	232.78(1)	SF 2293	7-1-84	249A.3(2)"f"	SF 2363	7-1-84	
218.9*	HF 2440	7-1-84	232.78(2)	SF 2293	7-1-84	249A.3(2)"g"	SF 2363	7-1-84	
218.58	SF 465	7-1-84	232.79(1)*	SF 2293	7-1-84	249A.3(4)	SF 2363	7-1-84	
218.58*	SF 465	7-1-84	232.91	SF 2293	7-1-84	249A.3(4)	SF 2363	7-1-84	
218.59	SF 465	7-1-84	232.94A	SF 2293	7-1-84	249A.9	SF 2363	7-1-84	
218.60	SF 465	7-1-84	232.95(2)"a"	SF 2293	7-1-84	249A.12*	SF 2363	7-1-84	
218.61*	SF 465	7-1-84	232.96(6)*	HF 2302	7-1-84	252.16	SF 2091	7-1-84	
218.61*	SF 2285	7-1-84	232.97(1)*	SF 2293	7-1-84	252.22	SF 2091	7-1-84	
218.62	SF 465	7-1-84	232.97(3)*	SF 2293	7-1-84	252B.12	HF 2423	7-1-84	
218.63	SF 465	7-1-84	232.98(1)	SF 2293	7-1-84	252C.1	SF 2268	7-1-84	
218.64*	SF 465	7-1-84	232.102(3)"b"*	SF 2293	7-1-84	252C.1	HF 2467	7-1-84	
218.73*	SF 2084	7-1-84	232.102(5)*	SF 2293	7-1-84	252C.2	HF 2467	7-1-84	
218.74*	SF 2084	7-1-84	232.102(6)*	SF 2293	7-1-84	252C.2	SF 2268	7-1-84	
218, Ch	HF 74	7-1-84	232.116(4)"b"	SF 2293	7-1-84	252C.3	SF 2268	7-1-84	
219.1	HF 2440	7-1-84	232.116(4)"d"	SF 2293	7-1-84	252C.3	SF 2467	7-1-84	
219.2	HF 2440	7-1-84	232.116(5)"b"	SF 2293	7-1-84	252C.4	SF 2467	7-1-84	
219.3	HF 2440	7-1-84	232.117(5)*	SF 2293	7-1-84	252C.4	SF 2268	7-1-84	
219.4	HF 2440	7-1-84	232.147(3)"g"	HF 2430	7-1-84	252C.5	SF 2268	7-1-84	
219.5	HF 2440	7-1-84	233.2	SF 2238	7-1-84	252C.5	SF 2467	7-1-84	
219.6	HF 2440	7-1-84	234.11	SF 2293	7-1-84	252C.6	SF 2467	7-1-84	
219.7*	HF 2440	7-1-84	234.42	HF 2430	7-1-84	252C.6	SF 2268	7-1-84	
219.8	HF 2440	7-1-84	235A.12	SF 2042	7-1-84	252C.7	SF 2467	7-1-84	
219.9	HF 2440	7-1-84	235A.13	SF 2042	7-1-84	252C.8	SF 2467	7-1-84	
219.10	HF 2440	7-1-84	235A.17(5)	SF 2293	7-1-84	252C.9	SF 2467	7-1-84	
219.11	HF 2440	7-1-84	235A.18(2)*	SF 2293	7-1-84	252C.10	SF 2467	7-1-84	
219.12	HF 2440	7-1-84	235A.24*	SF 2042	7-1-84	255.28*	SF 2129	7-1-84	
219.13	HF 2440	7-1-84	235B.1(5)"c"*	HF 2390	7-1-84	255.29*	SF 2084	7-1-84	
219.14	HF 2440	7-1-84	236.12	HF 2164	7-1-84	257.10(11)	HF 2217	7-1-84	
219.15	HF 2440	7-1-84	237.4(6)	SF 2176	7-1-84	257.12	SF 2184	7-1-84	
219.16	HF 2440	7-1-84	237.15	SF 2293	7-1-84	257.18(4A)*	HF 2217	7-1-84	
219.17	HF 2440	7-1-84	237.16	SF 2293	7-1-84	257.41(3)*	HF 2519	7-1-84	
219.18	HF 2440	7-1-84	237.17	SF 2293	7-1-84	257.42*	HF 2519	7-1-84	
219.19	HF 2440	7-1-84	237.18	SF 2293	7-1-84	258A.1(1)"g"	SF 2129	7-1-84	
219.20	HF 2440	7-1-84	237.19	SF 2293	7-1-84	258A.3(1)"a"*	HF 580	7-1-84	
219.21	HF 2440	7-1-84	237.20	SF 2293	7-1-84	258A.3(2)"a"*	SF 2129	7-1-84	
219.23	HF 2440	7-1-84	237.21	SF 2293	7-1-84	258A.4(1)"f"*	SF 2129	7-1-84	
219.24*	HF 2440	7-1-84	237.22	SF 2293	7-1-84	260.1	HF 2217	7-1-84	
220.1(2)*	SF 2332	7-1-84	237A.13*	SF 2293	7-1-84	260.3	HF 2217	7-1-84	
220.1(28)*	SF 2332	7-1-84	237A.13(5)*	SF 2293	7-1-84	260.4	HF 2217	7-1-84	
220.1(28)"b"*	SF 2332	7-1-84	237A.14	SF 2293	7-1-84	260.5	HF 2217	7-1-84	
220.1(32)*	SF 2332	7-1-84	237A.15(1)	SF 2293	7-1-84	260.5A	HF 2217	7-1-84	
220.1*	SF 2332	7-1-84	237A.15(2)	SF 2293	7-1-84	260.6	HF 2217	7-1-84	
220.2(1)	SF 2332	7-1-84	237A.16	SF 2293	7-1-84	260.7	HF 2217	7-1-84	
220.5(9)	SF 2220	7-1-84	237A.17	SF 2293	7-1-84	260.8	HF 2217	7-1-84	
220.8	SF 2332	7-1-84	237A.18	SF 2293	7-1-84	260.8A	HF 2217	7-1-84	
220.10(1)*	SF 2102	7-1-84	237B.1	HF 2189	7-1-84	260.9*	HF 2217	7-1-84	
220.26(1)*	SF 2332	7-1-84	237B.2	HF 2189	7-1-84	260.9A	HF 2217	7-1-84	
220.38(2)	SF 2238	7-1-84	237B.3	HF 2189	7-1-84	260.10	HF 2217	7-1-84	
220.45	SF 2330	1-1-83	237B.4	HF 2189	7-1-84	260.11	HF 2217	7-1-84	
221, Ch.*	SF 2238	7-1-84	237B.5	HF 2189	7-1-84	260.12	HF 2217	7-1-84	
222.18	HF 2457	7-1-84	237B.6	HF 2189	7-1-84	260.13	HF 2217	7-1-84	
222.31*	HF 2457	7-1-84	237B.7	HF 2189	7-1-84	260.14	HF 2217	7-1-84	
222.31(1)*	HF 2457	7-1-84	238.1*	SF 2293	7-1-84	260.15	HF 2217	7-1-84	
222.33	HF 2457	7-1-84	239.1*	HF 558	7-1-84	260.18	HF 2217	7-1-84	
222.34	HF 2457	7-1-84	239.2	HF 558	7-1-84	260.20	HF 2217	7-1-84	
222.35	HF 2457	7-1-84	239.2(1)*	HF 558	7-1-84	260.21	HF 2217	7-1-84	
222.45	HF 2457	7-1-84	239.2(2)*	HF 558	7-1-84	260.24	HF 2217	7-1-84	
222.51	HF 2457	7-1-84	239 2(3)*	HF 558	7-1-84	260.25	HF 2217	7-1-84	
222.55	HF 2457	7-1-84	239.3	HF 558	7-1-84	260.28	HF 2217	7-1-84	
222.56	HF 2457	7-1-84	239 4	HF 558	7-1-84	260.31	HF 2217	7-1-84	
223.1*	SF 2084	7-1-84	239 5*	HF 558	7-1-84	260.31	SF 2215	7-1-84	
223.2*	SF 2084	7-1-84	239.6	HF 558	7-1-84	260.32	HF 2217	7-1-84	
223.4*	SF 2084	7-1-84	239.8	HF 558	7-1-84	260.33	HF 2217	7-1-84	
225C 10(1)"b"	HF 2379	7-1-84	239.9*	HF 558	7-1-84	260.34	HF 2217	7-1-84	
225C.10(3)	HF 2379	7-1-84	239.12*	SF 2129	7-1-84	260A.1	SF 2361	P.C.	
226.27	HF 2465	7-1-84	239.12*	HF 558	7-1-84	260A.2	SF 2361	P.C.	
226.28	HF 2465	7-1-84	239.15	HF 558	7-1-84	260A.3	SF 2361	P.C.	
226.29	HF 2465	7-1-84	239.17	HF 558	7-1-84	260A.4	SF 2361	P.C.	
229 1(1)	HF 2465	7-1-84	239.18*	HF 558	7-1-84	260A.5	SF 2361	P.C.	
229 20	HF 2465	7-1-84	239.20	HF 558	7-1-84	260A.6	SF 2361	P.C.	
229 26	HF 2465	7-1-84	242.6	HF 2425	7-1-84	261 12(1)"b"*	HF 2519	7-1-84	
232 2(4)*	SF 2293	7-1-84	245.1*	SF 2084	7-1-84	261.45*	HF 2519	7-1-84	
232.2(5)"m"*	SF 2293	7-1-84	245.3*	SF 2084	7-1-84	261.53*	HF 2519	7-1-84	
232.8(1)	HF 2472	7-1-84	245.5	HF 2425	7-1-84	261.54*	HF 2438	7-1-84	
232.13	SF 2098	7-1-84	245.8*	SF 2084	7-1-84	261B.1	HF 509	7-1-84	
232.37(2)	SF 2293	7-1-84	245.9*	SF 2084	7-1-84	261B.2	HF 509	7-1-84	
232.52(5)*	SF 2293	7-1-84	245.12*	SF 2084	7-1-84	261B.3	HF 509	7-1-84	
232.52(6)*	SF 2293	7-1-84	245.15*	SF 2084	7-1-84	261B 4	HF 509	7-1-84	
232.53	SF 2101	7-1-84	246.11*	SF 2084	7-1-84	261B 5	HF 509	7-1-84	

1B.6	HF 509	7-1-84	309.1	SF 2250	7-1-85	321 366(5)	SF 2238	7-1-84
261B.7	HF 509	7-1-84	309.10*	SF 2250	7-1-85	321.366(5)	HF 2330	7-1-84
261B.8	HF 509	7-1-84	309.10*	HF 2390	7-1-84	321.445	SF 2089	1-1-85
261B.9	HF 509	7-1-84	309.22	SF 2250	7-1-85	321.446	SF 2089	1-1-85
261B.10	HF 509	7-1-84	309.23	SF 2250	7-1-85	321.457(2)"b"*	HF 2232	7-1-84
261B.11	HF 509	7-1-84	309.93	SF 2250	7-1-85	321.482	SF 2129	7-1-84
261B.12	HF 509	7-1-84	309.94	SF 2250	7-1-85	321 492	SF 2330	P.C.
261.45(1)*	HF 2265	7-1-84	312.2(5)*	SF 2337	7-1-85	321 494	SF 2238	7-1-84
261.54*	HF 2265	7-1-84	312.2(8)*	HF 2390	7-1-84	321 555(2)	SF 2089	1-1-85
262.34	SF 2285	7-1-84	312.2(16)*	SF 2330	P.C	321.555(2)	HF 2330	7-1-84
263.11(2)	SF 2238	7-1-84	312.3(1)	SF 2238	7-1-84	321A.32(2)	SF 2235	7-1-84
266.31	SF 2361	P.C.	312.5	SF 2238	7-1-84	321B.1	HF 2486	7-1-84
266.32	SF 2361	P.C.	312.5"a"	SF 2238	7-1-84	321B.2	HF 2486	7-1-84
266.33	SF 2361	P.C.	312.5"b"	SF 2238	7-1-84	321B.2	SF 2238	7-1-84
266.34	SF 2361	P.C.	314.14	HF 2398	7-1-84	321B 4(1)	HF 2486	7-1-84
266.35	SF 2361	P.C.	314, Ch.	HF 111	7-1-84	321B.4(1)"d"	HF 2486	7-1-84
266.36	SF 2361	P.C.	317.19*	SF 2238	7-1-84	321B.12	HF 2486	7-1-84
272A, Ch.	HF 2217	7-1-84	321.1(2)*	SF 2238	7-1-84	321B.13	HF 2486	7-1-84
273.2	SF 2284	7-1-84	321.1(16)"c"*	SF 2169	7-1-84	321B.13	HF 2486	7-1-84
273.3(12)*	HF 2217	7-1-84	321.1*	HF 2486	7-1-84	321B.15	HF 2486	7-1-84
273.3(18)	HF 2101	7-1-84	321.19(1)*	SF 2342	7-1-84	321B.16	HF 2486	7-1-84
273.3(18)	SF 2361	P.C.	321.19(2)*	SF 2342	7-1-84	321B.26	HF 2486	7-1-84
273.8(1)	SF 2238	7-1-84	321.19(3)*	SF 2342	7-1-84	321B.28	HF 2486	7-1-84
273.8(3)	SF 2238	7-1-84	321.20	SF 2330	P.C.	321B.30	HF 2486	7-1-84
275.1	HF 2458	7-1-84	321.22	SF 2342	7-1-84	322D.1	SF 2116	7-1-84
275.2	HF 2458	7-1-84	321.23(1)*	SF 2330	P.C.	322D.2	SF 2116	7-1-84
275.4	HF 2458	7-1-84	321.23(4)*	SF 2330	P.C.	322D.3	SF 2116	7-1-84
275.5	HF 2458	7-1-84	321.34(2)*	HF 2212	12-1-84	322D 4	SF 2116	7-1-84
275.8(2)	HF 2458	7-1-84	321.34(5)"a"*	SF 2330	P.C	322D 5	SF 2116	7-1-84
275.12(1)*	HF 2458	7-1-84	321.34(8)*	SF 347	12-1-84	322D.6	SF 2116	7-1-84
275.12(2)*	HF 2458	7-1-84	321.37	SF 2330	P.C.	324 3(4)*	SF 2342	7-1-84
275.12(4)*	HF 2458	7-1-84	321 42	SF 2330	P.C.	324.3(5)*	SF 2069	7-1-84
275.15	HF 2458	7-1-84	321.43	SF 2129	7-1-84	324.11	HF 508	7-1-84
275.16	HF 2458	7-1-84	321.46(2)*	SF 2330	P.C.	324.12(1)	HF 508	7-1-84
275.27	HF 2458	7-1-84	321.47	SF 2330	P.C.	324.14	HF 508	7-1-84
275.29	HF 2458	7-1-84	321.47	HF 2180	7-1-84	324.35	SF 2342	7-1-84
279.8	SF 2361	P.C.	321.48(2)*	SF 2330	P.C.	324 53	HF 508	7-1-84
279.19A	SF 2215	7-1-84	321.48(2)*	SF 2188	7-1-84	324.55	HF 508	7-1-84
279.19B	SF 2215	7-1-84	321.50(1)*	SF 2330	P.C.	324.57(11)	SF 2342	7-1-84
279.43	HF 2516	7-1-84	321.51*	SF 2330	P.C.	324 65	HF 2507	1-1-85
280A.11	SF 2238	7-1-84	321.52(3)	SF 2188	7-1-84	324 76	HF 508	7-1-84
280A.17	HF 658	7-1-84	321.52(4)	SF 2330	7-1-84	324 83	HF 602	7-1-84
280A.22(1)"a"	HF 658	7-1-84	321.60	SF 2330	7-1-84	324.84	HF 602	7-1-84
280A.23(11)	SF 2361	P.C.	321.71(7)	HF 2180	7-1-84	325.1(10)	SF 2342	7-1-84
281.6	SF 2263	7-1-84	321.71(9)	HF 2180	7-1-84	325.6(3)	SF 2342	7-1-84
281.6(1)	SF 2263	7-1-84	321.71(11)	SF 2330	P.C.	326.34	HF 508	7-1-84
281.6(2)	SF 2263	7-1-84	321.89(4)	SF 2330	P.C.	326.35	HF 508	7-1-84
281.6(3)	SF 2263	7-1-84	321.109(1)	SF 2330	P.C.	326.36	HF 508	7-1-84
281.6(4)	SF 2263	7-1-84	321.116*	SF 2129	7-1-84	326.37	HF 508	7-1-84
281.6(5)	SF 2263	7-1-84	321.117*	SF 2330	P.C.	326.38	HF 508	7-1-84
281.8	HF 162	7-1-84	321.119	SF 2330	P.C.	327A.19	SF 2238	7-1-84
283.1	SF 2129	7-1-84	321 123*	SF 2330	P.C	327G.78*	SF 2129	7-1-84
285.2	HF 2519	7-1-84	321.135	SF 2238	7-1-84	331 321(1)"h"*	SF 2129	7-1-84
291.9(4)	SF 2238	7-1-84	321.152*	SF 2330	P.C.	331.302(2)	SF 2238	7-1-84
291.10(11)	SF 2238	7-1-84	321.178(2)"b"	HF 2330	7-1-84	331.402(2)	HF 48	7-1-84
294.15	HF 2528	7-1-84	321.184	SF 2238	7-1-84	331 421(1)*	HF 2390	7-1-84
297.7(3)	SF 2167	7-1-84	321.189(1)	HF 2486	7-1-84	331 421(2)*	HF 2390	7-1-84
298.7	HF 2524	7-1-84	321.189(2)"c"	HF 2330	7-1-84	331.424(1)"a"(4)	SF 2353	7-1-84
303A.10	SF 2129	7-1-84	321.190(1)	SF 2330	P.C.	331.424(1)"m"*	HF 2390	7-1-84
303B.6(9)	SF 2361	P.C.	321.191	SF 2330	P.C.	331.427(2)"l"*	HF 456	7-1-84
303B.8	SF 176	7-1-84	321.192*	SF 2330	P.C.	331.427(2)"k"*	HF 224	7-1-84
304 2	HF 2485	7-1-84	321.194*	SF 2238	7-1-84	331.429(1)"a"*	HF 2390	7-1-84
304 3	HF 2485	7-1-84	321.194*	HF 2330	7-1-84	331.429(1)"b"*	HF 2390	7-1-84
304 6	HF 2485	7-1-84	321.196	SF 2238	7-1-84	331.429(2)"i"*	HF 2390	7-1-84
304 7	HF 2485	7-1-84	321.197	SF 2330	P.C	331.430(2)"b"*	HF 2390	7-1-84
304.14	HF 2485	7-1-84	321.210	SF 2089	1-1-85	331.507(2)"a"	HF 4	7-1-84
304.18	HF 2485	7-1-84	321.210	HF 2330	7-1-84	331.552*	HF 658	7-1-84
304A.5	HF 2284	7-1-84	321.215(3)	HF 2330	7-1-84	331.557(3)	SF 2330	P.C.
304A.15	HF 2284	7-1-84	321.215(3)	SF 2238	7-1-84	331.559(10)	HF 658	7-1-84
304A.16	HF 2284	7-1-84	321.218	SF 2235	7-1-84	331.604	HF 2187	7-1-84
304A.17	HF 2284	7-1-84	321.238	SF 2330	P.C.	331.756(5)*	SF 2104	7-1-84
304A.18	HF 2284	7-1-84	321.281(1)	HF 2486	7-1-84	331.756(42)*	HF 2457	7-1-84
304A.19	HF 2284	7-1-84	321.281(2)	HF 2486	7-1-84	331.902(3)*	HF 2194	7-1-84
304A.20	HF 2284	7-1-84	321.281(7)	HF 2486	7-1-84	347.12	HF 658	7-1-84
304A.21	HF 2284	7-1-84	321.281(8)	HF 2486	7-1-84	347.13(2)	HF 2354	7-1-84
304A.22	HF 2284	7-1-84	321.281(9)"d"	HF 2486	7-1-84	347.13	HF 2354	7-1-84
304A.23	HF 2284	7-1-84	321.281(9)"e"	HF 2486	7-1-84	347A.1	HF 658	7-1-84
304A.24	HF 2284	7-1-84	321.281(10)	HF 2486	7-1-84	349.18*	SF 2243	7-1-84
307.10*	SF 2298	7-1-84	321.281	HF 2486	7-1-84	352, Ch.	HF 224	7-1-84
307.36	SF 2330	P.C.	321.283(13)	HF 2330	7-1-84	356.29	SF 2269	7-1-84
307A.2(14)	HF 2071	7-1-84	321.310	HF 2272	7-1-84	356.30	SF 2269	7-1-84
307B.7(11)*	SF 2220	7-1-84	321.354	HF 2330	7-1-84	356.36*	HF 2417	7-1-84
307B.23	SF 2356	P.C.	321.366	HF 2330	7-1-84	356.43*	HF 2417	7-1-84
307C.1	SF 2273	7-1-84	321 366	SF 2238	7-1-84	357.14	SF 2285	7-1-84
307C.2	SF 2273	7-1-84	321 366(1)	SF 2238	7-1-84	357A.2	SF 2285	7-1-84
307C.3	SF 2273	7-1-84	321.366(2)	SF 2238	7-1-84	357D.8	HF 2525	7-1-84
307C.4	SF 2273	7-1-84	321.366(3)	SF 2238	7-1-84	357D.10	HF 2525	7-1-84
307C.5	SF 2273	7-1-84	321.366(4)	SF 2238	7-1-84	358.2	SF 2285	7-1-84

358.4	SF 2197	7-1-84
358.5	SF 2197	7-1-84
358.9	SF 2050	7-1-84
358.9	SF 2197	7-1-84
358.40	SF 2197	7-1-84
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358B.13*	SF 2122	7-1-84
358B.16	SF 2122	7-1-84
359.21	HF 658	7-1-84
359.42	SF 159	7-1-84
359.43	SF 159	7-1-84
362.5(4)	HF 2389	7-1-84
362.5(11)	HF 2389	7-1-84
364.3(2)*	SF 2238	7-1-84
364.12(2)	HF 359	7-1-84
364, Ch.	SF 2043	7-1-84
384.11	HF 658	7-1-84
384.15	HF 2247	7-1-84
384.82(2)	HF 2111	7-1-84
384.84(1)*	HF 2478	7-1-84
384.97(5)	SF 2285	7-1-84
386.1(7)	HF 2510	7-1-84
390.1(10)	SF 2257	7-1-84
390.3	SF 2129	7-1-84
403.6*	HF 2531	7-1-84
403.8(1)	HF 2531	7-1-84
403.8(2)	HF 2531	7-1-84
403.8	HF 2531	7-1-84
409.1	HF 2470	7-1-84
409.25	HF 2470	7-1-84
411.1(12)	HF 2528	7-1-84
411.6(12)"a"(2)	HF 2528	7-1-84
414.4	HF 2184	7-1-84
414.5	HF 205	7-1-84
414.24	HF 2184	7-1-84
414, Ch.	SF 2228	7-1-84
419.1(2)"a"*	SF 2328	7-1-84
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422.4(17)*	SF 2330	1-1-83
422.4(19)*	SF 2330	1-1-83
422.5*	SF 2330 VETO	P.C.
422.6*	SF 2330	1-1-83
422.7(6)*	SF 2330	1-1-84
422.7(19)*	SF 2330	1-1-84
422.9(1)*	SF 2330	1-1-84
422.12(1)"a"*	SF 2330	1-1-83
422.16(10)"b"*	HF 2507	1-1-85
422.25(2)*	HF 2507	1-1-85
422.25(3)*	SF 2318	P.C.
422.32(4)*	SF 2330	1-1-83
422.32(12)*	SF 2330	1-1-83
422.43(2)*	SF 2330	P.C.
422.43(9)*	SF 2330	7-1-84
422.43(9)*	HF 2503	7-1-84
422.43(9)*	SF 2354	P.C.
422.43*	SF 2354	P.C.
422.43*	HF 2503	7-1-84
422.45(12)*	SF 2330	7-1-84
422.58(1)*	HF 2507	1-1-85
422.73(3)*	HF 2331	7-1-84
422.87	SF 2129	7-1-84
422.100*	SF 2129	7-1-84
422A.2(4)"d"*	SF 2129	7-1-84
423.1(4)*	HF 2503	7-1-84
423.1(4)*	SF 2354	P.C.
423.18(1)*	HF 2507	1-1-85
425.23(3)"b"*	SF 2330	1-1-83
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425.27	SF 2156	7-1-84
427.1(36)*	HF 2481	1-1-85
427.1(36)"e"*	HF 2481	1-1-85
427.3(1)*	SF 2238	7-1-84
427.3(2)*	SF 2238	7-1-84
427.5	HF 2478	7-1-84
427.8	SF 2238	7-1-84
427.10	SF 2238	7-1-84
427.12	SF 2238	7-1-84
427A.12(7)*	SF 2365	7-1-84
427A.13	SF 2365	7-1-84
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428.28	HF 2043	7-1-84
435.5	HF 2507	1-1-85
435.5(9)"a"	HF 2507	1-1-85
441.21	HF 2444	7-1-84
441.22	HF 2481	1-1-85
442.5(1)"b"	HF 2516	7-1-84
442.9(1)"a"*	SF 2361	P.C.
442.15	SF 2330	1-1-83
442.44*	HF 2519	7-1-84
442.51*	SF 2168	7-1-84
442.52*	SF 2168	7-1-84
442.53*	SF 2168	7-1-84
442.54*	SF 2168	7-1-84
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443.5	HF 2326	7-1-84
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445.8(2)	HF 2478	7-1-84
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446.7*	HF 2478	7-1-84
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455.43	SF 2285	7-1-84
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455B.381(9)	HF 2471	7-1-84
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FILED FEB 1 1984

SENATE FILE 2125

BY COMMITTEE ON JUDICIARY

(FORMERLY SSB ~~2012~~ 2054)

Passed Senate, Date_____ Passed House, Date_____

Vote: Ayes_____ Nays_____ Vote: Ayes_____ Nays_____

Approved_____

A BILL FOR

An Act relating to the accrual of prejudgment interest after a refusal to accept an offer to confess judgment.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

S.2125

Section 1. Section 535.3, Code 1983, is amended to read as follows:

535.3 INTEREST ON JUDGMENTS AND DECREES. Interest shall be allowed on all money due on judgments and decrees of courts at the rate of ten percent per year, unless a different rate is fixed by the contract on which the judgment or decree is rendered, in which case the judgment or decree shall draw interest at the rate expressed in the contract, not exceeding the maximum applicable rate permitted by ~~the provisions of~~ section 535.2, which rate must be expressed in the judgment or decree. The interest shall accrue from the date of the commencement of the action, subject to the limitations stated in sections 677.2, 677.5, 677.10, and 677.13.

Sec. 2. Section 677.2, Code 1983, is amended to read as follows:

677.2 NONACCEPTANCE--COSTS AND INTEREST. If ~~such~~ the person to whom the offer is made, having had the same notice as if ~~he were~~ the person were a defendant in an action that the offer would be made, of its amount, and of the time and place of making it, refuses to accept it, and afterwards commences an action upon ~~such~~ that cause, and does not recover more than the amount so offered to be confessed, ~~he~~ the accrual of prejudgment interest shall cease as of the date of the offer and the person shall pay all the costs of the action.

Sec. 3. Section 677.5, Code 1983, is amended to read as follows:

677.5 NONACCEPTANCE--COSTS AND INTEREST. If the plaintiff, being present, refuses to accept judgment for ~~such~~ the sum offered in full of ~~his~~ the plaintiff's demands in the action, or, having had three days' notice that the offer would be made, of its amount, and of the time of making it, fails to attend, and on the trial does not recover more than was offered to be confessed, ~~he~~ the accrual of prejudgment interest shall cease as of the date of the offer and the plaintiff shall pay the costs of the defendant incurred after the offer.

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Sec. 4. Section 677.10, Code 1983, is amended to read as follows:

677.10 COSTS AND INTEREST. If the plaintiff fails to obtain judgment for more than was offered by the defendant, ~~he cannot recover costs, but shall pay the defendant's costs from the time of the offer~~ the accrual of prejudgment interest shall cease as of the date of the offer and the plaintiff shall pay all costs incurred after the offer.

Sec. 5. Section 677.13, Code 1983, is amended to read as follows:

677.13 NONACCEPTANCE--EFFECT. If the plaintiff does not accept the offer, ~~he~~ the plaintiff shall prove the amount to be recovered as if the offer had not been made, and the offer shall not be given in evidence or mentioned on the trial, and if the amount recovered by the plaintiff does not exceed the sum mentioned in the offer, the ~~defendant shall recover his costs incurred in the defense~~ accrual of prejudgment interest shall cease as of the date of the offer and the plaintiff shall pay all costs incurred after the offer.

EXPLANATION

This bill provides for the limitation on prejudgment interest when an offer to confess judgment is refused, and the eventual judgment is not greater than the offer.

This bill takes effect July 1 following its enactment.

LSB 3572S 70
dl/sc/14

ANNUAL APPELLATE DECISIONS REVIEW

October 1983 - October 1984

336 N.W. - 352 N.W.2d

By
Bruce L. Braley
Mosier, Thomas, Beatty, Dutton, Braun & Staack
3151 Brockway Road
Waterloo, Iowa 50704

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APPELLATE PROCEDURE

Marriage of Pittman, 346 N.W.2d 33 (Iowa 1984).

In this case, the issue of child custody on appeal was first raised in appellant's brief, which was filed the same day as the appendix. The Court concluded that the appellant failed to make a proper appellate procedural record to raise the custody issue in its brief and sustained the appellee's motion to dismiss under Rule 19 of the Iowa Rules of Appellate Procedure to the extent that it requested the dismissal of the custody issue.

ATTORNEY AND CLIENT

Committee on Professional Ethics v. Lawler, 342 N.W.2d 486 (Iowa 1984).

In this case, the Supreme Court held that fee splitting with a layperson, failing to supervise legal assistant's work,neglect of client's affairs, accepting fees from client for unaccomplished work, and failure to file income tax returns and truthfully answer Client Security Commission questionnaire warrant indefinite suspension of license to practice law without reinstatement for at least three years. The facts leading up to this disposition are as follows: The respondent employed a former inmate of the Iowa Men's Reformatory as a legal assistant and investigator. Respondent agreed to use the services of the legal assistant and the legal assistant agreed to refer his former inmate client to respondent for legal representation. The legal assistant referred an inmate of the reformatory to respondent, who agreed to represent the inmate and pursue a post-conviction relief matter on his behalf. Respondent was advised before he accepted the case that the inmate had recently received a sizeable inheritance.

Respondent required the inmate to pay him an initial retainer of $1,500.00 and to pay the legal assistant $500.00 as an initial retainer as part of his initial agreement to represent him. The inmate was to pay $60.00 per hour for the services of an attorney and $25.00 per hour for the services of the legal assistant.

While still an inmate in the reformatory, the legal assistant had prepared an application for post-conviction relief for the inmate which was pending when the attorney agreed to represent the inmate. The legal assistant did not receive a salary or hourly fee from the attorney, and the costs of the legal assistant's services were not included in the respondent's overhead. The attorney did not file any

proceedings on behalf of the inmate, although he did bill the inmate for additional services for himself and the legal assistant. These and additional facts led to the Supreme Court's determination that the respondent was unfit to practice law for a period of three years.

ATTORNEY AND CLIENT: FEE COLLECTION

Heninger and Heninger v. Davenport Bank & Trust, 341 N.W.2d 43 (Iowa 1983).

This appeal involves the propriety of a partial allowance for a claim against the executors of a decedent's estate for legal fees based on services rendered to the decedent during his lifetime.

In this case, a Davenport attorney drew up an antenuptial agreement for a client in 1943. The client later moved to New York where he retained new counsel. In 1974, the client contacted Heninger again to represent him in a marriage dissolution in Iowa. When the client died, the law firm filed a claim against the estate for the balance due in attorney fees. The trial court found that the law firm was to be paid partially by the client's corporation and partially by the client individually.

A portion of the claim filed against the estate dealt with a bill for $5,158.95 which was to be paid to Professor Paul Neuhauser for an opinion on the law firm's ethical question regarding conflict of interest. The Court held that when a client retains an attorney, responsibility is on the attorney himself to ascertain whether he has a conflict of interest or other ethical impediment to acceptance of the employment; the responsibility is not on the client to investigate and decide that question for the attorney. "Absent an explicit agreement by the client to pay for an opinion on the problem of the attorney's ethical responsibility - and that would be a most unusual case - we hold the cost of an outside opinion is on the attorney if he chooses to obtain one." The Court ruled that the trial court should have reduced its allowance of the claim against the estate by the cost of the ethical opinion.

The Court further held that Heninger did not commit an ethical violation in initially accepting employment on his client's behalf even though he had executed the antenuptial contract 30 years previously. The Court reasoned that when the client asked Heninger to represent him, nothing indicated to Heninger that the contract was in dispute as to execution, content or otherwise. The Court stated that "in determining whether Heninger should have accepted the employment in the

first place, the crucial question is whether at that time he knew or the fact was obvious that he would have to testify."

Additionally, the Court held that Heninger's action in bringing suit for the fee against the estate was justifiable: "We do not think Heninger's can be justly criticized for believing that a fee write-off would constitute a gross imposition. (ethical consideration 2-25). Attorneys should endeavor to resolve fee questions amicably, but they should not be left helpless when they render valuable services and confront an alternative of a write-off or a suit."

ATTORNEY AND CLIENT

Committee on Professional Ethics and Conduct v. Ryan, 341 N.W.2d 755 (Iowa 1983).

In the Ryan case, the Court held that failure to file lawsuits prior to the expiration of the statute of limitations warrants license revocation.

The complaints against J. Patrick Ryan revolved around lawsuits that were referred to him from Nebraska attorneys. In these cases, Ryan informed his clients that he had filed suit when, in fact, he had not. He went so far as to tell one client that the case had been tried, and he had received an award of $25,000.00 even though the client had never appeared in court. Over the next four years, Ryan first told the client the case was being appealed and that the money was sent to an attorney in Nebraska who was handling the matter for the insurance company. In that case, the suit had never been filed, and the statute of limitations had run by the time the client had hired another attorney.

The Court found Ryan's conduct was fraudulent and deceitful in violation of D.R.1-102(a)(4) and that his account reflected adversely on his fitness to practice law in violation of D.R.1-102(a)(6).

ATTORNEY AND CLIENT

Committee on Professional Ethics and Conduct v. Freed, 341 N.W.2d 757 (Iowa 1983).

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The complainant hired William M. Freed to pursue an appeal from an adverse judgment in a paternity action. Freed accepted $150.00 retainer and filed notice of appeal. He did nothing further to pursue the appeal, and it was dismissed for lack of prosecution despite a default notice from clerk of

court. After the complainant complained to the Ethics Committee, Freed settled with him for $10,000.00.

This case held that an attorney's damage payment to his client, offered after client's complaint of violation of disciplinary rules, does not constitute mitigating circumstances that should avert sanctions. As a result, the Court held that the attorney's failure to attend to his client's case warrants indefinite suspension of license to practice law.

CIVIL PROCEDURE

Jacobson v. Union Story Trust and Savings Bank, 338 N.W.2d 161 (Iowa 1983).

A decedent does not have capacity to be sued.

Iowa Rule of Civil Procedure 15, which provides for substitution of legal representatives and successors in interest of a deceased party, contemplates substitution for someone who has been made party prior to his death, and thus is of no help to plaintiffs who filed action on last day of limitations period without knowing that defendant had died. Plaintiffs must, within limitations period, give notice of institution of lawsuit to substituted party such that he will not be prejudiced in his defense, and substituted party must know or should have known but for mistake concerning identity of proper party that action would have been brought against him.

In this case, notice to decedent's insurance company, with whom plaintiffs had been negotiating concerning possibility of suit for personal injuries arising out of automobile accident, was not tatamount to notice to executor of decedent's estate that suit had been filed for purposes of Rule of Civil Procedure providing authority for amendment to suit to relate back in time of filing of complaint. The Court held that this suit was barred by the statute of limitations when plaintiffs attempted to amend their complaint to name executor of decedent's estate as party-defendant but failed to do so within six (6) months after the death of the decedent, where plaintiffs had filed suit on the last day of the limitations period without knowing that defendant had died.

CIVIL PROCEDURE: DEFAULT JUDGMENT

Johnson v. Gibb's Western Kitchen, Inc., 338 N.W.2d 872 (Iowa 1983).

In this case, the plaintiff filed an action against a defendant and others arising out of a barroom brawl wherein bouncer allegedly assaulted plaintiff, and at the close of plaintiff's case, he orally moved for default judgment against defendant since defendant had failed to file an answer at that point. The District Court Judge refused to grant a default judgment, and the plaintiff appealed, contending that Iowa Rules of Civil Procedure 230-232 required the trial court to enter a default judgment, absent of showing by defendant of oversight, mistake or inadvertence causing his failure to answer.

The Court noted, "We have consistently held that the question of allowing a default is largely within the discretion of the trial court. In the present case, plaintiff did not move for default judgment until after the close of this evidence at trial.

We have also held that proceeding with a case without taking timely advantage of the default also constitutes a waiver of the right to a default." The Court held that the trial court did not abuse its discretion in refusing to grant the plaintiff a default judgment.

CIVIL PROCEDURE: DEFAULT JUDGMENT

Hastings v. Espanosa, 340N.W.2d 603 (Iowa App. 1983).

This was a wrongful death case brought by the administrators of the estates of two persons killed at a construction site asserting that the deaths resulted in the negligence of multiple defendants, including an employee of the company and the gross negligence of the company and five other employees. Default judgments were entered against four of the company's employees, and they filed motions to see the default judgments aside or vacate them. The plaintiff's attorney and a representative of the company's insurance company had agreed to an indefinite extension of time for the employees to file an answer to the complaint. The plaintiff later obtained default judgments against the defendants. These judgments were set aside by the trial court.

The Court of Appeals held that the plaintiff's attorney had a duty to inform the claims adjuster of the defendants' employer's insurer, which had the responsibility of defending the litigation, that the attorney no longer considered binding an agreement that gave the defendants an indefinite time to answer, before taking action to enter default judgment, particularly since the agreement was between an attorney and a non-attorney. The Court also held that the negligence of an insurer resulting in a default judgment is

not imputed to the insured under Iowa Rule of Civil Procedure 236 when the insured is seeking to set aside the default.

CIVIL PROCEDURE: TRADE SECRETS

Farnum v. G. D. Searle & Co., 339 N.W.2d 384 (Iowa 1983).

The facts in this case involved a wife, allegedly injured in taking birth control pills, who sought with her husband and children to recover against a drug manufacturer on a theory of products liability. The manufacturer sought a protective order to prevent the plaintiffs and their attorneys from disclosing to anyone else or from using in any other case, all copies of documents or information acquired by them during discovery of the defendant's previously private and unpublished records. The District Court denied the manufacturer's motion for protective order against discovery.

The Iowa Supreme Court had not previously interpreted Iowa Rule of Civil Procedure 123(g). The Court adopted the definition of trade secret or confidential information provided in Restatement of Torts §757: "Information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it."

The Court enumerated factors to be considered in determining whether information is a trade secret or confidential: (1) the extent to which the information is known outside the party's business; (2) the extent to which it is known by those involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and his competitors; (5) the amount of effort and money expended by him in developing information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. Restatement of Torts §757.

The Court ruled that in evaluating the factual showing, a trial court should employ three (3) criteria: "The harm posed by dissemination must be substantial and serious; the restraining order must be narrowly drawn and precise; and there must be no alternative means of protecting the public interest which intrudes less directly on expression."

The Court also noted that if disclosure is otherwise warranted, it should not be precluded merely because of a party's desire to keep adverse information from reaching the public or to bar the information from being used in other cases. The Court said that the potential for impropriety in dissemination of discovered information should be left to

appropriate attorney disciplinary proceeding; and unless it can be shown that the discovering party is exploiting the instant litigation solely to assist litigation in the foreign forum, the Court will allow full use of information in other forms. The Court ruled that to obtain a protective order to protect the information in the N.D.A. file sought by the plaintiff, the defendant still must make a particularized showing that the information it seeks to protect is a trade secret or confidential information. The Court held that the defendant did not state facts as opposed to conclusions from which the Court could identify what information in the N.D.A. file constituted trade secrets or confidential information.

CIVIL PROCEDURE: SUMMARY JUDGMENT

Toomer v. Iowa Department of Job Service, 340 N.W.2d 595 (Iowa 1983).

Counsel for the defendant in this case submitted a motion for summary judgment without annexing a supporting statement and memorandum of authorities to the motion. The Court of Appeals had held that I.R.C.P. 237(h) requires a party moving for summary judgment to annex a supporting statement and memorandum of authorities to his/her motion and that absent such an annexation, summary judgment cannot be properly granted. The Supreme Court disagreed with that interpretation of Rule 237(h) stating: "Although we agree that the use of the term 'shall' indicates a mandatory requirement with which counsel must comply, the failure of counsel to annex a statement of undisputed facts and memorandum of supporting authorities to his/her motion for summary judgment does not affect a court's authority to rule on the motion . . . Iowa Rule of Civil Procedure 237(h) was designed in part to assist trial court in examining the entire record before it . . . in light of allegations in the motion. The fact that a court takes under submission a motion for summary judgment without the 'assistance' provided by Rule 237(h) does not strip the court of authority to rule on such a motion."

CIVIL PROCEDURE: SPECIAL APPEARANCE

Eichhacker v. Speltz, 344 N.W.2d 571 (Iowa App. 1983).

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The Court of Appeals held that a special appearance was the proper way for the administrator of a driver's estate to contest jurisdiction of the Iowa Court and that the deceased driver's automobile policy, issued by a Kansas City insurance company and purchased through an Iowa agent, did not constitute property of the decedent driver in Iowa so to

provide the Iowa Courts with jurisdiction in a wrongful death lawsuit.

The Court distinguished two Iowa cases in which the Supreme Court held that if a non-resident decedent incurs liability in Iowa which is covered by a policy issued by an insurer licensed to do business in Iowa, the decedent is deemed to own property in the county where the liability occurred sufficient to support administration of the estate there. In Re Fagan's Estate, 246 Iowa 496, 499, 66 N.W.2d 920, 921 (1954); Liberty v. Kinney, 242 Iowa 656, 662-63, 47 N.W.2d 835, 838 (1951). "In both of the cited cases, the insurance policy of the non-resident was found to be property of the non-resident in the Iowa county where the accident occurred. In contrast, the case before us involves a non-resident killed in an accident in another state. The liability under the policy arose in Coffe County, Kansas, and any rights owned by the decedent arising out of the policy are situated there. For this reason, Fagan and Liberty are inapposite."

CIVIL PROCEDURE: RULE 179(b)

Peoples Trust & Savings Bank v. Baird, 346 N.W.2d 1 (Iowa 1984).

In this case, the Court held that a motion for rehearing on an award of attorney fees in a mortgage foreclosure action only asks the trial court to reconsider issues of law pertaining to the fact question of the reasonableness of attorney fees did not remove the motion from Rule 179(b) of the Iowa Rules of Civil Procedure which governs enlarged and amended findings which tolled the 30-day limit for filing notice of appeal. In order to be a motion for enlarged and amended findings, the motion must address a ruling made upon a trial of an issue of fact without a jury.

CIVIL PROCEDURE: RULE 179(b)

Osborne v. Iowa Natural Resources Council, 336 N.W.2d 745 (Iowa 1983).

See full case summary in ADMINISTRATIVE LAW section.

CIVIL PROCEDURE: PLEADINGS

Haughland v. Schmidt, 349 N.W.2d 121 (Iowa 1984).

Defendants filed a cross-petition against a third party alleging that, if cross-petitioners were liable for selling sows which infected an entire herd of swine, petitioners were entitled to indemnity for respondent's negligence in failing to report outbreak of infectious disease and for failing to quarantine the diseased animals. A third-party defendant filed a motion to dismiss claiming that the cross-petition failed to state a claim on which relief could be granted, and the trial judge granted their motion.

The Court held that a "claim" is not the equivalent of "cause of action." In alleging a claim showing that the pleader is entitled to relief, the pleader is not required to allege a legal theory or to spell out the elements of a cause of action as in a common law pleading. The Court held that although the allegations of the cross-petition were "meager," they minimally met the requirements under Rule 69(a) for stating a claim.

CIVIL PROCEDURE: JUDICIAL DISQUALIFICATION

Forsmark v. State, 349 N.W.2d 763 (Iowa 1984).

Husband, wife and children brought medical malpractice action against State after husband suffered partial paralysis following thoracic laminectomy operation at University Hospital. After judgment was entered for the State, the plaintiffs appealed and later petitioned to vacate the judgment on the ground that the trial judge had committed an irregularity within the meaning of I.R.C.P. 252(b) by failing to disqualify himself. The plaintiffs filed the petition to vacate judgment under I.R.C.P. 252 and 253 approximately six weeks after the trial court's judgment in the malpractice case and almost a month after taking their appeal. The basis for the plaintiffs' motion was that at the time of their trial, a wrongful death malpractice action was pending against their chief medical expert in behalf of the estate of the Judge's deceased brother. They alleged that the Judge had discussed the claim with his sister-in-law, who was the administrator of the estate, and with her attorney.

The Court held that the Judge's failure before trial to disclose facts creating a substantial and serious issue concerning his duty to disqualify himself denied the plaintiffs an opportunity to raise the issue or to be heard on it. This omission constituted an irregularity in the obtaining of the judgment within the meaning of Rule 252(b). The Court rejected the estate's contention that plaintiffs could not have recovered in any event and stated that if the trial court believed plaintiffs' interpretation, their expert's testimony provided substantial support for the

finding that the injury was caused by the State physician's negligence.

CIVIL PROCEDURE: PLEADINGS

Sulzberger Excavating, Inc. v. Glass, 351 N.W.2d 188 (Iowa App. 1984).

A contractor brought an equitable action to enforce and foreclose a mechanic's lien based upon builder's failure to pay agreed upon price for road construction work performed under an oral contract. The defendant contends that the plaintiff should not be permitted to recover amounts in addition to that originally agreed to by the parties because the plaintiff's petition seeks recovery only on the express oral contract made between the parties and not upon any implied contract which later arose between the parties as a result of the defendant's actions.

The Court held that the plaintiff established the existence of an express oral contract and the existence of an implied contract relating to the changes and additions subsequently requested by the defendants, permitting it to recover the reasonable value of its services rendered. The Court noted that recovery upon an implied contract theory for the additional work and changes requested in the construction project is not a new theory of Iowa law. "We do not believe that the rule that an express contract supercedes an implied contract relating to the same subject matter applies in this case. The facts in this case indicate that any implied contract which arose as a result of the parties' actions covered only those points not agreed to in the express contract. An implied contract on a point not covered by an express contract is not superceded by the express contract."

CIVIL RIGHTS

Iowa Beer & Liquor Control Department Store 1023 v. Iowa Civil Rights Commission, 337 N.W.2d 896 (Iowa App. 1983).

In this case, an employee of a state liquor store was fired after approximately eight (8) months because a physical disability (heart condition) prevented her from lifting more than ten (10) pounds. The written policies of the Iowa Beer & Liquor Control Department require all liquor store clerks to be able to perform every task enumerated in the job description, including lifting moderately heavy objects. The Iowa Civil Rights Commission had a rule stating that an employer must attempt to make a reasonable accommodation to the physical and mental limitations of an employee or applicant unless the employer can demonstrate that

such accommodation would impose an undue hardship on the conduct of the employer's business. In determining the extent of an employer's accommodation obligation, the following factors shall be included: (a) business necessity, and (b) financial cost and expenses. After her discharge, the employee filed a complaint with the Iowa Civil Rights Commission alleging her termination resulted from disability discrimination. The Commission found in her favor, ordered her reinstated and awarded back pay of $18,076.00.

The District Court reversed on judicial review, finding that the ability to lift more than ten (10) pounds was a bona fide occupational disqualification and that the employer had not failed to reasonably accommodate the employee's handicap. The Court of Appeals reversed, finding that the employer had failed to reasonably accommodate the claimant's handicap in light of the State's special obligation to have its operation serve as a model for business, industry, labor and education in the area of employment discrimination.

CLAIM PRECLUSION

Israel v. Farmers Mutual Insurance Association of Iowa, 339 N.W.2d 143 (Iowa 1983).

In this case, the customer of an insurance agency requested "full coverage" on a farm combine. The agency undertook to provide that coverage by forwarding to the insurance company an application for an endorsement of an existing policy that the insured had with the insurance company. The insurance company issued the endorsement to provide the coverage requested in the application. An agency employee, however, failed to request "upset" coverage on the application even though the farmer had requested "full coverage." The combine eventually overturned and was extensively damaged. When the agency and the insurance company refused to pay the loss sustained, the insured sued both the agency and the insurer for negligence.

The agency was found negligent for submitting an incomplete application for coverage and for failing to review the change of coverage endorsement to be sure that the farmer had full coverage. The insurance company was found negligent in failing to check with the agency to ascertain the type of coverage being requested and thereafter incorrectly assuming that more limited coverage was desired by the farmer.

Neither the agency nor the insurance company filed a cross-claim against the other in the first lawsuit although both contended that the entire liability for loss should fall on the other defendant.

The Court held that claim preclusion was not applicable to the facts in this case because neither the agency nor the insurer filed a cross-claim against the other for indemnity in the first lawsuit. Because such a cross-claim was not compulsory but permissive, the agency's claim for indemnity did not accrue until judgment was entered against him.

The Court further held that the agency's negligent conduct in preparing the application was found to be active in character; therefore, the agency was barred by issue preclusion from attempting to relitigate the issues of negligence and proximate cause and thereby recover indemnity on an active/passive negligence theory. The Court also held that issue preclusion presented a barrier to the agency's reformation of contract theory since the agency had a full and fair opportunity to litigate the reformation theory in the first case.

Additionally, the Court further declined to extend the holding or language of State Insurance Company v. Richmond, 71 Iowa 519, 32 N.W. 596 (1887), which suggested that only the insurer and not the agent should bear a loss occasioned by an agent's error whenever the undisclosed risk was one the insurer would have accepted for an appropriate premium. The Court stated that, "It seems basically unfair and inequitable to require an insurer to bear the entire loss resulting from a risk that an agent erroneously understates or fails to disclose."

CLAIM PRECLUSION/ISSUE PRECLUSION

Jorge Construction Co. v. Weigel Excavating and Grading Co. Corp., 343 N.W.2d 439 (Iowa 1984).

In this case, a contractor brought an action against a subcontractor asserting that excavation work for a school construction project was improperly done. The Court held that a prayer for general equitable relief ("such other and further relief as the Court may deem just and equitable") does not serve to delineate specific adjudication sought for purposes of res judicata in later litigation. The Court noted that at common law, "set-off" claim is akin to a counterclaim; "set-off is a remedial process by which the Court, upon the petition of one party, lessens or cancels the claim of an adverse party; "set-off" claim is not a defensive pleading; it is a separate cause of action by the party pleading it. Even though the general contractor and subcontractor held adverse interests in the outcome of prior litigation, the parties were not "opposing parties" for purposes of the Rule of Civil

Procedure governing compulsory counterclaims and, thus, the general contractor did not lose its claim against the subcontractor by failing to assert that claim against the subcontractor in prior litigation in which both parties were cross-claim defendants since neither the contractor nor the subcontractor filed any pleadings asserting a set-off claim against the other.

The doctrine of issue preclusion did not bar a subsequent suit by a contractor against the subcontractor for loss on the subcontract, since the issue in prior litigation was whether the contractor was entitled to the subcontractor's requested share of a school district's fund, whereas issue in subsequent litigation was whether the contractor was entitled to remainder of its claim over and above such requested share, and since the issue of contractor's entitlement to the remainder of its claim was neither raised nor litigated in and was neither material nor relevant to a disposition of the prior litigation.

The Court further held that certain post-trial orders granted by the trial court relating to (1) motion to reconsider; (2) setting aside motion to reconsider as being untimely; and (3) motion for order nunc pro tunc to correct decree, did not bar on the basis of claim preclusion, a claim by the contractor in a subsequent suit against the subcontractor for loss on the subcontract.

CLAIM PRECLUSION/ISSUE PRECLUSION

Matter of Kjos, 346 N.W.2d 25 (Iowa 1984).

The issue in this case was whether an adjudication of misconduct by the Iowa Department of Job Service will preclude an appeal from a civil service commission adjudication upholding a discharge for misconduct. The Court noted in its previous recognition that administrative agency decisions may be given preclusive effect in certain circumstances. It went on to state, however, that the applicability of res judicata principles either of issue or claim preclusion to agency determination is subject to exception, and cited the Restatement (2d) of Judgments, §83(3) and (4)(b) (1982).

The Court found that by establishing one administrative remedy for challenging the discharge and a separate remedy for seeking unemployment compensation, the legislature had provided a scheme of remedies in which an adjudication of one claim will not bar the other. "This case thus falls within the common scheme of remedies exception in Restatement (2d) of Judgments, §83(3)." For this reason, the

Court held that issue preclusion was unavailable to the employer in this case.

CONSORTIUM

Madison v. Colby, 348 N.W.2d 202 (Iowa 1984).

A woman injured when she fell on icy parking lot brought negligence action against those responsible for maintenance of lot. The trial court entered judgment on the jury verdict for $700.00 for the injured plaintiff and denied damages to her husband for his loss of consortium claim.

The Court held that all loss of consortium recoveries, whether pursuant to Common Law, Rule 8, or §613.15, go to the person who incurred the loss. In each incidence, recovery is for tangible and intangible elements as a unified whole. Only one recovery of consortium damages is allowed. (This interpretation does not affect the separate and independent right of the injured person to recover for loss of support as distinguished from loss of services. This right of recovery plainly belongs to the injured person under the statute until the injured person's death.

The Court held further that where the husband of an injured person asserted his independent claim for loss of consortium with the injured person's negligence action, the trial court should have included the tangible loss of services element in its instruction on the husband's damages.

Additionally, the Court held that consortium claims must be joined with the injured person's or administrator's action whenever feasible. If brought separately, the burden will be on the consortium claimant to show joinder was not feasible.

CONSTITUTIONAL LAW

Messina v. Iowa Department of Job Services, 341 N.W.2d 52 (Iowa 1983).

An employee applied for unemployment benefits after his discharge for writing a letter to a local newspaper editor calling for a wildcat strike in violation of his union's collective bargaining agreement with its employer. The Department of Job Service denied compensation, and the employee appealed.

The Supreme Court held that the employee contractually waived his asserted first amendment free speech

right to call for a wildcat strike and thus could not assert it to avoid a finding of statutory misconduct. To arrive at this conclusion, the Court held that the State had a compelling state interest which, balanced against the employee's asserted first amendment right, dictated the rejection of his claim for unemployment benefits.

Although the 1959 Landrum-Griffin amendments provide union members some protections to ensure fair procedures and free speech with respect to election of union officials, the union may bargain away the member's right to strike during a contract period, and may try to fine the member for working in defiance of a union-called strike. Courts, upon proper showing, recognize the concept of contractual waiver of constitutional rights in civil cases where the contractual waiver was based on good consideration. In this case, the waiver was expressly set out in the terms of the collective bargaining agreement. "We hold that this employee, in the circumstances presented by this case, contractually waived his asserted first amendment free speech right to call for a wildcat strike and cannot assert it now to avoid a finding of statutory misconduct. Finally, we hold compelling State interest, balanced against the employee's asserted first amendment right, dictate rejection of his claim for unemployment benefits in this instance. We judicially note the State unemployment compensation fund has not been and is not now a bottomless and overflowing source of money. The fiscal integrity of the fund should not be jeopardized by payments due employees who are discharged for deliberate violation of express provisions of their employment contract. Another compelling factor is the State's interest in collective bargaining and industrial peace. A related and compelling interest, which we judicially note has been the subject of feverish State activity, is to enhance employment in Iowa by retaining industry and by enticing industry to relocate here. This goal is thwarted by a hostile atmosphere in which employees discharged for misconduct nonetheless are paid unemployment benefits from funds extracted from employers."

The court laid out a balancing equation to be applied in cases like this: "The employee's right to publicly criticize or condemn his employer or his union is not implicated by this decision. Only his activity in calling for a wildcat strike in violation of his agreement, coupled with the resulting disruption to the employer's operations, is found to be misconduct disqualifying him from benefits. Such contract-violating speech involving a subject of little public interest, balanced against the State's compelling interest in the fiscal integrity of its insolvent compensation fund, in collective bargaining and industrial peace, and in retaining and attracting industry so as to enhance employment

opportunities in Iowa, does not and should not trigger a constitutionally mandated protection.

CONSTITUTIONAL LAW

Seivert v. Resnick, 342 N.W.2d 484 (Iowa 1984).

The sole issue presented by this appeal is whether the limited immunity granted to the co-employees of a worker's compensation claimant for negligent acts by reason of Iowa Code §85.20 (1981) constitutes a denial of equal protection under Article I, §6 of the Iowa Constitution. The Court applied the rational basis test to determine whether the classification of distinction drawn by the statute is reasonably related to one or more legitimate State interests. The Court concluded that the appellants failed to demonstrate a lack of rational basis in the challenged legislation sufficient to sustain an equal protection challenge.

Appellants had contended that the limited immunity granted negligent co-employees, as opposed to tort feasors who are not co-employees, does not rationally further any of the purposes underlying Chapter 85. The Court adopted the following rationale in sustaining the challenged legislation: "The reason for the employer's immunity is the Quid Pro Quo by which the employer gives up his normal defenses and assumes automatic liability, while the employee gives up his right to common law verdicts. This reasoning can be extended to the tort feasor co-employee; he, too, is involved in a compromise of rights . . . One of the things he is entitled to expect in return for what he has given us is the freedom of the common law suits based on industrial accidents in which he is at fault."

CONTRACTS: NON-COMPETITION AGREEMENT

Iowa Glass Depot, Inc. v. Jindrich, 338 N.W.2d 376 (Iowa 1983).

This case involves an employment contract which contained a covenant not to compete in the Iowa City area.

The Court held that although the position of manager of the automobile glass shop bore some similarity with the employees' positions in cases in which restricted covenants were upheld, other important differences, including facts that manager did not receive from his employer nor did he possess any special training or peculiar knowledge that would allow him to unjustly enrich himself at the expense of his former employer, the business did not lend itself to close personal

relationships with customers, and that manager did not attempt to solicit employer's customers for himself while he was employed by the employer and did not avail himself of a list of exclusive customers, supported manager's claim that the covenant was not necessary to protect the employer's business. Although the Court held that the manager's continued employment served as sufficient consideration for the restrictive convenant, it found that his gain from the contract was grossly disproportionate to the injury he would sustain from enforcement of the restrictive convenant in that he did not receive any additional compensation, security, promises or other benefits in return for signing the restrictive covenant. The Court also found that the employer failed to show that subsequent competition of former manager, who had signed three-year non-competitive covenant, caused substantial harm to its business where employer's new manager had eleven months without competition from former manager to establish himself with employer's customers and annual sales following former manager's termination or comparable to previous annual sales.

CONTRACTS: NON-COMPETITION AGREEMENT

Insurance Agents, Inc. v. Abel, 338 N.W.2d 531 (Iowa App. 1983).

In this case, the Court held that the promise of continuing employment did not provide consideration for a covenant not to compete where the sale of defendant's insurance agency was the major inducement to plaintiff to employ the defendant and where the plaintiff was obligated to employ the defendant under the contract of sale for at least three (3) years. A promise to do that which one is already obligated to do will not provide consideration for a return promise.

CONTRACTS: NON-COMPETITION AGREEMENT

Ma & Pa, Inc. v. Kelly, 342 N.W.2d 500 (Iowa 1984).

This appeal involves a covenant in an employment contract prohibiting competition after termination of the employment. The Supreme Court held that the employer was not entitled to an injunction prohibiting competition by a former employee, notwithstanding that non-competition clause was part of the employee's contract of employment, the employer did not breach the contract, and the employer did not terminate the employment relationship without cause. The Court noted that a factor in this case not present in most cases is the discharge of the employee by the employer as distinguished from a

resignation originating with the employee. Discharge by the employer is a factor opposing the grant of an injunction to be placed in the scales in reaching the decision as to whether the employer should be enjoined. The Court found that an injunction would work severe hardship on the employee and his family since selling is his only skill, and he had attempted to find employment for three weeks before he located the other job.

CONTRACTS: NON-COMPETITION AGREEMENT

Pathology Consultants v. Gratton, 343 N.W.2d 428 (Iowa 1984).

In this case, a partnership and corporation which provided pathology services to Waterloo area hospitals brought an action against a former partner based on alleged breach of partnership and corporation agreements and against a former employee alleging that waiver releasing such employee from his covenant not to compete was invalid. The Supreme Court held that the forfeiture provision of the corporate shareholder's deferred compensation agreement which provided that following termination of his employment with company, shareholder agrees to refrain, without express written consent of company, from performing services of any kind as an employee for any person, firm or corporation the director of the company determines are competitive with business of company and providing for forfeiture of all funds unpaid under deferred compensation agreement as penalty was unenforceable since injury to public from a monopoly by the company, injury to hospitals from obligation of withdrawing doctor to divert work from performing pathology services were not outweighed by company's need for restraint or the benefits that would be received from enforcement.

The Court noted that a party's failure to anticipate future events or contingencies is not a mistake as to a then existing or past fact that would normally entitle him to relief. Accordingly, the pathology partnership and corporation which released an employee pathologist from his employment contracts and waived the employee's covenants not to compete with the partnership or corporation, mistakenly assuming that the employee would limit his practice to the hospital where he was presently employed, were not entitled to avoid termination of the contract and waiver of covenants not to compete merely because of unforeseen termination of major partnership - hospital contract, which former employee pathologist later took over, dramatically altering a near monopoly that the partnership and corporation had among area hospitals for pathology services at the time of the waiver.

CONTRACTS

Sulzberger Excavating, Inc. v. Glass, 351 N.W.2d 188 (Iowa App. 1984).

A contractor brought an equitable action to enforce and foreclose a mechanic's lien based upon builder's failure to pay agreed upon price for road construction work performed under an oral contract. The defendant contends that the plaintiff should not be permitted to recover amounts in addition to that originally agreed to by the parties because the plaintiff's petition seeks recovery only on the express oral contract made between the parties and not upon any implied contract which later arose between the parties as a result of the defendant's actions.

The Court held that the plaintiff established the existence of an express oral contract and the existence of an implied contract relating to the changes and additions subsequently requested by the defendants, permit it to recover the reasonable value of its services rendered. The Court noted that recovery upon an implied contract theory for the additional work and changes requested in the construction project is not a new theory of Iowa law. "We do not believe that the rule that an express contract supercedes an implied contract relating to the same subject matter applies in this case. The facts in this case indicate that any implied contract which arose as a result of the parties' actions covered only those points not agreed to in the express contract. An implied contract on a point not covered by an express contract is not superceded by the express contract.

The Court also noted that this is not a proper case for application of the rule that where a contractor submits an estimate, the contractor can recover for the reasonable value of the services rendered but not exceeding the larger sum given in the estimate.

CORPORATION: DELEGATION OF POWER

Miller v. Register & Tribune Syndicate, Inc., 336 N.W.2d 709 (Iowa 1983).

This case addressed a certified question from the U. S. District Court for the Southern District of Iowa: whether Board of Directors who are parties to stockholder's derivative action may confer on special litigation committee the power to bind the corporation regarding prosecution, dismissal or settlement of the action.

The Court held that the special litigation committee appointed by the Board of Directors could not be endowed with the requisite corporate power to bind the corporation to its recommendation of dismissal.

The Court reasoned that if articles and by-laws provide, a Chapter 491 corporation may, acting through independent Board of Directors, appoint a special litigation committee and confer the power to investigate the merits of a derivative action brought by minority stockholders on behalf of the corporation and determine in good faith whether in business judgment of committee the best interest of the corporation would be served by the prosecution, dismissal or settlement of the derivative action.

"We believe the potential for structural bias on the part of the litigation committee appointed by directors who are parties to a derivative action is sufficiently great and sufficiently difficult of precise proof in an individual case to require the adoption of a prophylactic rule. We conclude that we should prevent the potential forestructural bias in some cases by effectively limiting the powers of such directors in all cases.

This is a case of first impression in Iowa: we hold that directors of Iowa corporations organized under Chapter 491 or any other corporate enabling legislation who are parties to a derivative action may not confer upon a special litigation committee the power to bind the corporation as to the conduct of its litigation. We conclude that a corporation may apply to the Court for the appointment of a special panel to make an investigation and report on the pursuit or dismissal of a stockholder derivative action, which panel may be invested for these purposes with the powers of a board of directors."

CORPORATIONS: PROFESSIONAL GOODWILL

Bump v. Stewart, Weimer & Bump, P.C., 336 N.W.2d 731 (Iowa 1983).

The Court held that although instances may exist in which goodwill of a law practice may be properly valued (i.e., property settlements in divorce), the transfer or withdrawal of a portion of a law practice by an attorney who was ousted from a professional legal corporation is not such a situation. The shareholders in a professional legal corporation have an interest in preserving an established law practice, and where all parties act openly and honestly in terminating the employment contract between an attorney and the corporation,

the Court will note find a tortious interference with the contract.

CORPORATIONS

Briner v. Hyslop, 337 N.W.2d 858 (Iowa 1983).

The question presented in this case was whether a corporate employer is liable for punitive damages for the willful acts of employees committed within the scope of their employment.

In this case, a truck driver drank several double Scotches, fell asleep, and drifted across the center line into an oncoming car, killing the driver of the car. The Court rejected the Course of Employment Rule in favor of the Complicity Rule of Restatement (2d) of Torts, §909 (1979), holding: Punitive damages can be properly awarded against a corporation because of an act by an agent, but only if: (a) principal authorized doing and manner of act; (b) agent was unfit and principal was reckless in employing him; (c) agent was employed in a managerial capacity and acting in the scope of employment; (d) principal or managerial agent ratified or approved act.

COURTS: SMALL CLAIMS

Lemon v. Pasternak, 340 N.W.3d 268 (Iowa 1983).

In this case, an associate District Judge ordered the losing party in a small claims case to post an appeal bond as a prerequisite to perfection of her appeal. The Court held that the District Court acted illegally in entering the order involved here since the Judge's alleged inherent common law power to adopt rules of practice for perfecting an appeal had been superceded by Iowa Code §631.13(1).

Although the posting of an appeal bond is a prerequisite to the staying of an execution of judgment entered in a small claims action, there is no provision requiring the posting of an appeal bond prior to perfection of an appeal from a small claims judgment.

COURTS

Kroblin v. RDR Motels, Inc., 347 N.W.2d 430 (Iowa 1984).

Corporations which owned and operated a motel in which they sold their corporate stock brought a declaratory

judgment action seeking a determination of the purchase price to be paid by the purchaser. The District Court Judge determined the principal amount owed to the sellers under the contract of purchase and filed a one-page decision on July 24, 1981. The buyer then filed post-trial motions asserting specific grounds for relief. Twenty-two months after the motions were filed, the trial court orally requested that the seller's attorney prepare orders denying the motion. The seller's attorney did so and mailed the orders to the Court, sending a copy of his cover letter to the buyer's attorney but not copies of the proposed orders. The trial court then signed and filed those orders.

The Supreme Court held that in those cases where the trial court asks counsel to assist in the preparation of findings and conclusions, this request should be made at or soon after submission of the case and prior to decision and should be made of both sides. "We further emphasize that in fairness all parties should be given the same opportunity to submit proposed findings and to comment on findings proposed by others."

(Since the buyer on appeal did not contend that any particular finding of fact or conclusion of law proposed by seller's counsel and adopted by the Court was unsupported by the evidence or incorrect, the buyer was not harmed by being deprived of its right to submit its own proposed rulings and comment on those suggested by the seller's counsel.)

COURTS

Forsmark v. State, 349 N.W.2d 763 (Iowa 1984).

See full case summary in the CIVIL PROCEDURE section.

DAMAGES: ECONOMIC LOSS

VanWyk v. Norden Laboratories, Inc., 345 N.W.2d 81 (Iowa 1984).

This case involved an action brought by cattle owners against producer of a cattle vaccine after a large number of cattle became sick following injection of the vaccine. The District Court submitted only the theory of liability based upon implied warranty of fitness for a particular purpose. The Supreme Court held that it was error to submit the theory of warranty of fitness for a particular purpose when there was not evidence that the seller had reason to know of any purpose for the plaintiff's use of the vaccine,

other than its ordinary use, or that the buyer was relying on the seller's skill and judgment in providing it. The District Court also failed to instruct on the theory of implied warranty of merchantability. The Court held that it was error for the Court to refuse submission of this theory since there was substantial circumstantial evidence to support a finding that the goods were not merchantable at the time of sale.

The trial court also refused to submit the strict liability theory found in Restatement (2d) of Torts, §402A. The defendant contended that the strict liability theory was inapplicable because the claim was for a "commercial and economic" loss which, it claims, is not recoverable under strict liability. "While this court has not ruled on this specific issue, the defendant relies on three Federal District Court opinions applying Iowa substantive law to support its argument (citations omitted). Even those damages, however, recognize that direct damage to property is recoverable under strict liability. The damages in this case, in contract to the "purely economic loss" by the merchant-plaintiffs indirectly affected by the closing of the defective bridge in Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp., 345 N.W.2d 124, 128 (Iowa 1984), are based on injury to their own property, the cattle, and the theory of strict liability applies."

DAMAGES: ECONOMIC LOSS

Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp., 345 N.W.2d 124 (Iowa 1984).

In this case, businesses affected by the closing of a bridge over the Missouri River near Sioux City brought an action against the alleged prime contractor, fabricator, and seller of structural steel members, in which cracks were discovered, used in construction with the bridge. The Supreme Court held that (1) businesses could not recover for purely economic or business losses sustained as a result of non-intentional harm to public bridge in absence of physical or direct harm to their property or persons; (2) businesses could not recover as alleged third-party beneficiaries for economic losses arising from alleged breach of warranty of merchantability and fitness for particular purpose; and (3) businesses, which did not suffer special damages, could not recover on a public nuisance theory.

This case was a question of first impression in Iowa.

"The common thread running through these cases establishes unequivocally that a plaintiff cannot recover for

purely economic loss, in the absence of physical injury, against a defendant who has negligently caused the closing of a public bridge or river. We conclude that these authorities are persuasive on the present issue before us and, accordingly, hold that plaintiffs cannot maintain a claim for purely economic damages arising out of defendant's alleged negligence because it lacks a legal foundation to support it. The Court distinguished the case of Schiltz v. Cullen-Schiltz & Associates, Inc., 228 N.W.2d 10 (Iowa 1975) in that the contractor's added expenses were not purely economic in nature but rather were an integral part of his direct or physical property damage.

The Court also concluded that the plaintiffs were not entitled to recover under a breach of warranty action under §554.2318 as a matter of law because they have not suffered physical harm to their person or property.

The Court also concluded that the plaintiffs were not entitled to maintain a public nuisance action based on the fact that they have not suffered special damages. The rationale for this conclusion was that a person must suffer special damages or special pecuniary harm from the loss of access in order to maintain an action for public nuisance. This special damage or injury must not be shared by the public generally.

DAMAGES: LOST PROFITS

Harsha v. State Savings Bank, 346 N.W.2d 791 (Iowa 1984).

This case involved an action for breach of contract, tortious interference with business relationships, and intentional infliction of severe emotional distress after the bank, through its president, failed to lend money to a borrower to open and operate a livestock feed sales business.

The Supreme Court held that the borrower could recover $126,000.00 for lost profits borrower would have reaped had the bank not breached its contract to lend; that circumstantial evidence in the record did not establish tortious interference by the bank or its president with borrower's prospective business relation; and that the evidence was insufficient to permit recovery for severe emotional distress.

The Court noted that Iowa recognizes the "new business rule" which deems "potential profits from an untried business" as too speculative to be recoverable. The rationale underlying the new business rule is that expected profits from a new commercial enterprise are too remote and speculative to

warrant judgment for their loss because there are no available data of past business from which the fact of anticipated profits could have been established. The Court further noted that the new business rule is not absolute and if factual data are presented which furnish a basis for compilation of probable loss of profits, evidence of future profits should be admitted, and its weight, if any, should be left to the jury.

The Court further held that the record did not contain substantial evidence showing that the defendant acted with a predominantly improper purpose or by improper means which would justify that plaintiff's claim for tortious interference with prospective business relations.

Additionally, the Court held that the evidence of plaintiff's emotional distress was insufficient to justify a finding of intentional infliction of severe emotional distress. The evidence submitted at trial showed that plaintiff was bothered by creditors at night, made enemies out of friends by trying to collect accounts receivable before they were due, was degraded by having to go into bankruptcy, had his credit destroyed, and had to give up plans to remodel his childhood school house into his home.

DAMAGES: PUNITIVE

Briner v. Hyslop, 337 N.W.2d 858 (Iowa 1983).

See full case summary in the CORPORATIONS section.

DAMAGES: PUNITIVE

Nelson v. Restaurants of Iowa, Inc., 338 N.W.2d 881 (Iowa 1983).

This appeal presents a single question: whether exemplary damages are recoverable under the Iowa Dram Shop Acts §123.92, Iowa Code (1981).

When the General Assembly enacted a new liquor control law in 1963, the words, "as well as exemplary damages" were deleted from the Dram Shop Act Right of Action. The Act now authorizes recovery of "all damages actually sustained."

The Supreme Court held in this case that the District Court ruled correctly that exemplary damages are not recoverable under the Iowa Dram Shop Act.

DAMAGES: PUNITIVE

Campbell v. Van Roekel, 347 N.W.2d 406 (Iowa 1984).

A passenger brought an action against the driver and the owner of the vehicle to recover damages for injuries he sustained in a one-vehicle accident.

The Supreme Court held that the change in the contributory negligence defense in Goetzman does not affect the holding in Rosenau v. City of Estherville, 199 N.W.2d 125, 133 (Iowa 1972) eliminating assumption of risk in its secondary meaning in negligence cases (after Rosenau, the term and defense of "assumption of risk" is no longer appropriate in the passenger-driver situation).

The Court further held that assumption of risk, which was not a defense to punitive damages before the adoption of comparative negligence to Goetzman, is not a defense to punitive damages after Goetzman.

The Court reasoned that comparative negligence is a method of providing compensation to the plaintiff in proportion to the relative fault of the parties, whereas the purpose of punitive damages is to punish the defendant for his grossly negligent, wanton, willful or reckless misconduct.

DAMAGES: PUNITIVE

Pirkl v. Northwestern Mutual Insurance Association, 348 N.W.2d 633 (Iowa 1984).

Insured brought an action against his insurer seeking compensatory damages for theft loss alleged to be covered by insurer's policy and punitive damages based upon alleged bad faith refusal to pay claim.

The Supreme Court noted that it did not equivocally reject a theory of liability based upon an insurer's bad faith in failing to settle a casualty loss claim with his own insured in Brown Township Mutual Insurance Association v. Kress, 330 N.W.2d 291, 298 (Iowa 1983). In Kress, and prior cases, the claims which the insurer failed to pay were as a matter of law "fairly debatable." ("If the issue were simply a theoretical one of whether the nature of this type of claim is one which should be properly recognized as a tort action, we would be inclined to respond in the negative.")

The Court held that in considering whether punitive damages should be permitted, the nature of the conduct of the insurer is more significant than the legal label which is

attached to that conduct. In some instances, denial of a valid claim by a casualty insurer will support a claim for punitive damages in addition to recovery of the loss which should have been paid under the policy; however, such recovery may not be predicated on an action which involves no more than upsetting the justified expectations of the insured.

The Court further held that punitive damages are recoverable only in situations involving "positive misconduct of a malicious, illegal, or an immoral nature."

DAMAGES

Beeck v. Aquaslide 'n' Dive Corporation, 350 N.W.2d 149 (Iowa 1984).

Plaintiff fractured his neck when he went down a slide into a swimming pool while attending a social event sponsored by his employer in Davenport. He has since been a quadraplegic. Plaintiff and his wife filed an action in Federal Court alleging that Aquaslide designed and manufactured the slide involved in the accident. After investigation by its insurance companies, Aquaslide stated in its answer to plaintiffs' petition and again in answers to interrogatories that it manufactured the slide.

The statute of limitations for plaintiffs' suit would expire on a personal injury claim on July 15, 1974. In February 1975, Aquaslide President Carl Meyer, discovered that the slide had not been manufactured by Aquaslide. Aquaslide then received permission to amend its answer in Federal Court to deny that it manufactured the slide. A separate trial was held on the issue of the identity of the manufacturer, and the jury found that Aquaslide did not manufacture the slide. The Federal Court then dismissed the action against Aquaslide on motion for summary judgment.

Plaintiffs appealed the Federal action and subsequently brought an action in Iowa District Court against Aquaslide and its insurance carrier, Employers Mutual Casualty Company, alleging theories of fraud and misrepresentation based upon Aquaslide's assertion that it had manufactured the slide. Aquaslide filed a cross-claim for contribution against Employers Mutual. After summary judgment was granted in favor of all defendants at the District Court level, plaintiffs appealed, and the Supreme Court held that plaintiffs had "at least generated an issue of fact on whether Meyer, on behalf of Aquaslide, reckless misrepresented to them that the slide was an Aquaslide." Beeck v. Kapalis, 302 N.W.2d 90, 96 (Iowa 1981).

On remand, the trial court found for plaintiffs and entered judgment in excess of three million dollars. The Court also dismissed Aquaslide's cross-claim for contribution against Employers Mutual.

[The Supreme Court upheld the trial court's judgment on appeal. The substantive aspects of this decision are treated below in the following sections and should be reviewed in conjunction with this summary on damages: FAMILY LAW, INDEMNITY/CONTRIBUTION, INSURANCE LAW, INTEREST, LIMITATION OF ACTIONS, PRODUCTS LIABILITY and TORTS. A comprehensive summary of this case is included under the heading TORTS: FRAUD.]

Plaintiffs economist testified that the award for future earnings should be increased by future inflation and then reduced to reach present value but that such a process was not necessary because the two rates created a standoff and his computation took into account both inflation and discount. Aquaslide argued that the record did not support the economist's assumptions in several particulars. The Supreme Court found that the alleged particulars went to the weight to be given to the economist's testimony, not to his qualifications as an expert. As such, the Court held that sufficient support existed for the finding that the future inflation rate and the discount rate offset each other.

The Supreme Court also held that the trial court erred in failing to take into account the effect of tax deductions or plaintiff's past and future earnings, as required by Adams v. Deur, 173 N.W.2d 100, 105 (Iowa 1969). This issue was remanded for consideration.

The trial court awarded Beeck $2,000,000.00 for past pain and suffering and for future disability. Aquaslide argued this award was excessive because it was considerably more than the amount sought as total damages against Aquaslide in the original lawsuit ($1,725,000.00). The Supreme Court pointed out that the plaintiffs were entitled to judgment only for the amount they could have recovered in an original lawsuit against the actual manufacturer of the waterslide. The Court noted that the original prayer of $1,725,000.00 in the prior action against Aquaslide was "some evidence" that an action against the original manufacturer at the same time would have been in the same amount. The court held, however, that this evidence was not conclusive, did not establish the fact as a matter of law, and did not require the trial court in the subsequent case to impose a cap of $1,725,000.00. The Court also noted that Aquaslide did not demonstrate error on its assertion that an award for future disability duplicates the award for future earnings.

Plaintiffs had received a settlement of $50,000.00 from the Kimberly Village Homeowners' Association, a party they could have sued but chose not to. The Supreme Court held that Aquaslide was entitled to a pro-tanto reduction in that amount on remand under Wadle v. Jones, 312 N.W.2d 510, 512-514 (Iowa 1941).

The plaintiffs contended on appeal that $65,000.00 was inadequate to compensate the wife of a quadraplegic for loss of consortium, citing to a 1977 Minnesota case where the wife of a quadraplegic was awarded $500,000.00 for loss of consortium. The Supreme Court stated that "a comparison of verdicts . . . is of little value in determining whether an award in a particular case is excessive or inadequate." The Court noted that the factual contexts in the two cases were "considerably different" and did not disturb the trial court's award.

DISCOVERY

Farnum v. G. D. Searle & Co., 339 N.W.2d 384 (Iowa 1983).

See full case summary in the CIVIL PROCEDURE section.

DISCOVERY

Mason v. Robinson, 340 N.W.2d 236 (Iowa 1983).

The issue in this action was whether a trial court has discretion to relieve an unwilling expert witness, who is a stranger to the litigation, from provision opinion testimony during a pre-trial discovery deposition. The Court held that a litigant does not have an absolute right to compel an unwilling expert to give an opinion on facts outside the expert's personal knowledge; therefore, the trial court has discretion to either relieve or compel expert testimony depending on the circumstances presented in a particular case.

The Court reasoned that the right to compel discovery should be no broader than the right to compel the same expert to testify at trial. The Court stated that generally an expert witness, absent some other connection with the litigation, is free to decide whether or not he wishes to provide opinion testimony for a party.

The Court set out a three-part test, based upon the principle of necessity, to determine whether an unwilling expert should be compelled to testify solely on the basis of his expertise and in the absence of any other connection to

the litigation: first, the compelling party should affirmatively demonstrate some compelling necessity for an expert's testimony that overcomes the expert's and the public's need for protection; second, an adequate plan of compensation must be presented; third, an expert only can be compelled to give previously formed opinions and cannot be required to engage in any out-of-court preparation.

In cases of necessity, a duty would arise on the part of the expert to provide opinion testimony. (Such a duty would run not to the compelling party but to society and its need for all relevant information in ascertaining the truth.) In the absence of such showing, a particular expert has no duty to provide opinion testimony.

DRAM SHOP

Nelson v. Restaurants of Iowa, Inc., 338 N.W.2d 881 (Iowa 1983).

See full case summary in the DAMAGES section.

DRAM SHOP

Haafke v. Mitchell, 347 N.W.2d 381 (Iowa 1984).

In this landmark case, parents of a deceased minor brought an action based upon the Dram Shop Act and common law liability principles against a liquor licensee, tavern employees, tavern owners, the surety on the licensee's dram shop bond, and the minor who had been driving the automobile in which their son was riding when he was killed in an automobile accident occurring after the driver had been served liquor at the tavern. The District Court had dismissed all claims based upon common law, dismissed the dram shop action against the surety, struck all claims for exemplary damages and the claim for grief, mental anguish, remorse and humiliation. The primary issue addressed in this case was close to that reserved in Snyder v. Davenport, 323 N.W.2d 225 (Iowa 1982): does common law liability lie against certain parties as to whom the dram shop is inapplicable. The Court noted that "while it is reasonable to assume that the legislature chose to limit strict liability to persons such as licensees or permittees who furnish intoxicants as a part of their business, it is not reasonable to assume it was intended to be a shield for all other persons against any form of liability where negligence and proximate cause are established.

The Court held that employees and owners of the bar who were not "licensees or permittees" may be held liable under common law for negligence in furnishing liquor to a minor or to an intoxicated person, and such negligence may be based upon violations of the Dram Shop Act or the statute or ordinance dealing with sales to minors. This liability is not preempted by the Dram Shop Act.

The Court further held that it would recognize a claim against a licensee or permittee for acts not covered by the Dram Shop Act. The Court resolved the issue reserved in Snyder and concluded that a negligent act, such as a sale to a minor, which is not covered by the Dram Shop Act, will support a common law claim against the licensee. "To immunize the licensee from any liability when a sale is made to a minor would be inconsistent with Lewis and would stand the public policy of our liquor act as stated by the Iowa Code §123.1 on its head.

Additionally, the Court held that the plaintiffs' damage claims for their "grief, mental anguish, remorse and humiliation" resulting from the death of their son are not recoverable under either the Dram Shop Act or the Wrongful Death Act.

It should be noted that the Court was equally divided on the issue of common law liability of the defendant/licensee for acts falling outside the coverage of the Dram Shop Act (here alleged to be the sale of beer to a minor), and this issue remains open to further debate.

DRAM SHOP: FIREMAN'S RULE

Potterbaum v. Hinds, 347 N.W.2d 642 (Iowa 1984).

Police officers sought to recover against a dram shop operator for injuries they sustained when an intoxicated patron assaulted them while they were attempting to break up a fight.

The question presented in this case was an issue of first impression: Whether Iowa should join the general trend and adopt the Fireman's Rule which limits liability for certain negligent acts or wrongful conduct causing on-the-job injuries to firefighters and policemen. If so, should that rule apply to a dram shop action brought pursuant to Iowa Code §123.92.

The Supreme Court held that public policy supports the adoption of a narrow rule denying recovery to a firefighter and policeman whenever their injuries are caused

by the very wrong that initially required the presence of an officer in an official capacity and subjected him to harm. Accordingly, police officers cannot recover under negligence or strict dram shop liability theories for injuries they sustained while attempting to break up a fight in a bar.

The Court added, however, that if an officer is performing a law enforcement activity unrelated to a violation of the Dram Shop Statute and is injured by an intoxicated person, he would be protected under the Act.

EDUCATION LAW: LABOR RELATIONS

Rankin v. Board of Education of Marshalltown Community School District, 337 N.W.2d 886 (Iowa App. 1983).

In this case, a teacher with six (6) years experience had her contract terminated for budgetary reasons. The school district planned to use administrative "curriculum coordinators" to fill her teaching position on a part-time basis. These curriculum coordinators were not part of the teachers' collective bargaining unit.

The issue in this case was whether the school board's decision to terminate the plaintiff's teaching contract was for just cause supported by a preponderance of competent evidence in the record. "Just cause" includes legitimate reasons relating to a district's personnel and budgetary requirements.

The Court held that the termination of a tenured teacher and concurrent assignment of a coordinator, not a member of the bargaining unit, into bargaining unit work violates the master contract of employment.

EDUCATION LAW: LABOR RELATIONS

Sac City Board of Education v. Schermerhorn, 340 N.W.2d 789 (Iowa App. 1983).

In this case, a teacher appealed from a ruling by the District Court affirming a decision of the school board to terminate his contract. The Court of Appeals reversed holding that the school board had violated the staff reduction terms of the collective bargaining agreement which required the application of various criteria to determine whose contract was to be terminated where the board considered only one criterion of teaching experience in the school district.

EDUCATION LAW: LABOR RELATIONS

Libe v. Board of Education of Twin Cedars, 350 N.WQ.2d 748 (Iowa App. 1984).

A teacher was terminated from his employment after a student testified at a hearing before the Board of Education that she had a relationship with the teacher which culminated in one act of sexual intercourse. Evidence was admitted over objection that the student had taken a polygraph test with results indicating that she was not deceptive when she stated she had engaged in sexual intercourse with the teacher.

The Court held that the school board was entitled to consider results of a polygraph examination given to the student; the teacher was not unduly prejudiced by the introduction of polygraph results; and evidence supported the termination.

The Iowa Supreme Court, while expressing reservations about the reliability of polygraph examinations, has not completely forbidden the introduction of such evidence in legal proceedings and has in fact stated that polygraph results "are of some value . . . if such evidence is admissible under limited circumstances in courts of law where the common law and statutory rules of evidence are fully applicable, it is surely admissible in school board hearings such as this case where those evidentiary rules are greatly relaxed."

The board stated that it was aware of the non-conclusive nature of the polygraph evidence and concluded only that the test results gave some indication that the student was being truthful indicating that the board viewed polygraph as merely supportive of other record evidence on which it based its decision to terminate the teacher's contract. When the polygraph evidence was considered with other evidence admitted at the hearing, it was sufficient to support the termination of the teacher.

EVIDENCE

Sechler v. State, 340 N.W.2d 759 (Iowa 1983).

In this case, the administrator of the estate of a motorcyclist brought a wrongful death action against the State and two of its employees based upon alleged negligence in barricading a closed highway. The main issue in this case was whether the term "gross negligence" as used in Iowa Code §306.41 is a higher degree of negligence that is subject to the defense of contributory negligence or a different kind of

conduct that is immune to such a defense. This question is treated in the section on NEGLIGENCE.

In a preliminary matter, the Court held that the plaintiff failed to preserve error on the issue of whether his repeated references to the impropriety of contributory negligence after Goetzman should have alerted the Court to substitute the standard of comparative fault and preserve the issue of comparative negligence for review. The Court further held that the plaintiff failed to preserve error on the doctrine of comparative negligence by his motion to amend conclusions of law concerning the trial court's ruling that decedent's contributory negligence barred recovery and in his subsequent motion for a new trial where he stated that contributory negligence is an improper defense to actions based on gross negligence.

Finally, the Court held that the inability of the mortician (who withdrew the blood sample of the decedent) to positively state that the syringe and bottle cap were sterile is not fatal to the required evidentiary foundation. The Court noted that the State does not have to negate absolutely the possibility of tampering or substitution; it only needs to show that it is reasonably probable it did not occur.

EVIDENCE: DEAD MAN STATUTE

Matter of Estate of Fisher, 344 N.W.2d 579 (Iowa App. 1983).

When decedent's original Will could not be found, her husband filed a copy of the Will together with a petition to establish the lost Will under which he was the sole beneficiary. The evidence at trial centered on whether or not the decedent had destroyed the Will with the intent to revoke it. Her husband testified over an objection based on the Dead Man Statute (Iowa Code §622.5 - since repealed by the Iowa Rules of Evidence) to certain observations concerning the existence of the orignal Will. The Court of Appeals held that the Dead Man Statute did not render her husband incompetent to testify as to observations and facts independent of the personal transaction with the deceased.

EVIDENCE: EXPERT TESTIMONY

Koeller v. Reynolds, 344 N.W.2d 556 (Iowa App. 1983).

In this case, the Court of Appeals held that the evidence presented by the plaintiff was insufficient to allow a jury to determine that the car accident she was involved in was the proximate cause of her subsequent back problems. At

trial, the plaintiff testified as to her previous extensive operations and the nature of her back conditions. "But Koeller is not qualified as an expert in diagnosing back conditions or in determining the probable cause of those conditions."

The Supreme Court has found that expert testimony indicating probability or likelihood of a causal connection between a factual circumstance and a plaintiff's injury is necessary to generate a fact question.

This case involved a legal malpractice action brought against plaintiff's former attorney who had been contacted about handling her personal injury claim arising from an automobile accident. Iowa Code §610.14(2) charges attorneys with the duty to "counsel or maintain no other actions, proceedings, or defenses than those which appear to him legal and just . . ." The attorney testified that he did not believe that maintaining an action in plaintiff's case would be just. "Consequently, we do not have a situation where malpractice is clear and obvious or where the lawyer's shortcomings would be plain to laymen without the testimony of those trained in the profession. We find it was necessary for Koeller to present expert testimony regarding the applicable standard of care for an attorney in this type of case."

The plaintiff did not present any expert testimony that the type of car accident she was involved in would be an adequate cause of the subsequent injuries she claimed. "Without expert testimony regarding her back condition both before and after the accident and considering the intervening days between the accident and the onset of back pain, the injury 'appears unnatural, unreasonable, and improbable in light of common experience.'" The Court reasoned that "without expert testimony, any determination of proximate cause under the circumstances in this case would be mere speculation by a jury."

EVIDENCE: EXPERT TESTIMONY

Edwards v. City of Des Moines, 349 N.W.2d 786 (Iowa App. 1984).

Mother, individually and as administrator of son's estate, brought wrongful death action against City alleging negligence with regard to various acts and omissions of police and medical personnel who arrived at the scene of a street disturbance during which son had been stabbed. At trial, plaintiff presented expert medical testimony regarding the cause of her son's death, but both of plaintiff's medical experts were unwilling to say even that there was a

possibility that the son might have survived if the actions which plaintiff alleges the police and medics should have taken had been taken.

The Court held that plaitniff had the burden to establish that defendant's negligence proximately caused the death of her son. Expert testimony indicating probability or likelihood of a causal connection between a factual circumstance and a plaintiff's injury is necessary to generate a fact question. When testimony of an expert witness that a described condition is merely "possible" or "might" exist as a consequence of a stated cause is coupled with other testimony, non-expert in nature, that the described condition of which complaint is made did not exist before occurrence of those facts alleged to be the cause thereof, a fact question as to causal relation is generated. Because neither expert testified that there was a possibility that the son might have survived, any determination of proximate cause under the circumstances of this case would be mere speculation by a jury.

EVIDENCE: HEARSAY

State v. Mueller, 344 N.W.2d 262 (Iowa App. 1983).

The Court of Appeals held that the testimony of a child psychologist regarding a three-year-old boy's oral assertions that his father had sexually abused him and the boy's non-verbal conduct with adults that psychologists interpreted as a sex act was "hearsay" and was not admissible as statements made for purpose of medical diagnosis and prosecution of father for second-degree sexual assault. The Court reasoned that since the boy did not consult the psychologist for medical aid and benefit but rather was taken by his mother to see the psychologist at the suggestion of the family physician for purpose of making a child abuse diagnosis and there was no evidence that the psychologist took any steps to assure a reliable response from the boy, the hearsay did not fall under any exception.

EVIDENCE: HEARSAY

State v. Snodgrass, 346 N.W.2d 472 (Iowa 1984).

In this case, the Supreme Court held that a defendant's tape-recorded statement to police authorities was a prior consistent statement and was therefore inadmissible as substantive evidence of the facts included in it because it was hearsay. The State had taken a tape-recorded statement from the defendant prior to trial but did not introduce the

statement in its case. The defendant testified in detail at the trial as to the events concerning the death of her husband. That testimony was mainly consistent with her prior recorded statement. When the defendant attempted to introduce into evidence her taped statement, her co-defendant objected on hearsay and self-serving grounds. The Court sustained the co-defendant's objection that the prior statement was self-serving. The Court concluded that the trial court properly excluded the evidence on hearsay grounds.

EVIDENCE: HEARSAY

Madison v. Colby, 348 N.W.2d 202 (Iowa 1984).

A woman injured when she fell on an icy parking lot brought a negligence action against those responsible for maintenance of the lot. The trial court entered judgment on the jury verdict of $700.00 for the injured plaintiff and denied damages to her husband on his loss of consortium claim.

Plaintiff's first treating physician left the country before trial, and defense counsel used a purported office record of that treating physician in cross-examining plaintiff and her husband. The record was offered during the testimony of a chiropractor who treated her more than a year after she was seen by the first treating physician.

The Supreme Court held that because the first treating physician's office record was offered at least in part to prove the truth of the matters asserted in it, the record was hearsay. First, if offered as a business record of the chiropractor to prove assertions of the first treating physician, exclusion would be required under the "hearsay within hearsay" or double hearsay rule. (This concept is now incorporated in Iowa Rule of Evidence 805.) Hearsay within hearsay must separately come within an exception to the hearsay rule to be admissible. No exception would make the first treating physician's record admissible as part of the chiropractor's record.

Second, the foundational requisites for admissibility of the record under §622.28 were not established since defendants failed to show that the first treating physician's record was made in the regular course of business at or about the time of the events recorded of that the sources of information and method of preparation were such as to indicate his trustworthiness. (The Court indicated by implication that this holding applies to Iowa Rule of Evidence 803(6).)

This case was also treated above in the CONSORTIUM section.

EVIDENCE: HYPNOSIS

State v. Greiman, 344 N.W.2d 249 (Iowa 1984).

In this case, a clinical psychologist used hypnosis as a form of psychotherapy. The trial court ruled that it would not allow any evidence as to testimony given or statements made by the defendant while under hypnosis. The Supreme Court held that it was not error for the court to exclude the hypnotically-enhanced evidence, citing State v. Seager, 341 N.W.2d 420 (Iowa 1983). The Court reasoned that the trial court's order was directed only to any testimony based upon hypnosis of the defendant at the time of his examination by the clinical psychologist; it did not prohibit introduction of his testimony in full.

EVIDENCE: POLYGRAPH

Libe v. Board of Education of Twin Cedars, 350 N.W.2d 748 (Iowa App. 1984).

See full case summary in the EDUCATION law section.

EXECUTION: GARNISHMENT

Padzensky v. Kinzenbaw, 343 N.W.2d 467 (Iowa 1984).

In this case, the judgment creditor/landlord garnished clerk of court for proceeds of a case appearance bond which judgment debtor/criminal defendant had assigned to his attorney. The judgment debtor filed an answer to the garnishment proceedings, asking the court to order payment of the bond money to the attorney pursuant to the assignment, and the attorney and the judgment debtor's uncle, who had put up 2/3 of the money, intervened asserting their claims to the money. The District Court ruled that the judgment debtor's uncle was entitled to the bond money which had been deposited by him, and that the judgment creditor was entitled to the balance, and the attorney appealed.

The Supreme Court held that evidence overwhelmingly showed the intent on the judgment debtor's part to effect the absolute transfer of his rights in the appearance bond to his attorney in payment of his legal fees. Therefore, the decision regarding the payment to the attorney was reversed and remanded. The Court also held that the intervenor's

failure to secure consent to verify his petition by amendment immediately prior to trial did not void his petition to intervene since trial court could have properly granted leave to amend, and although intervenor apparently never asked for leave to amend, his failure to obtain such leave was never before the trial court, and opposing party never moved to strike or object to petition containing verification. The Court held that Riley's failure to credit the $5,000.00 on the statement for his services did not support an inference that the assignment was a security transfer. No provision was made for retention of the assignment by Riley until the debt was paid from another source. No language in the agreement suggested the assignment was other than absolute transfer.

FAMILY LAW

Wood v. Wood, 338 N.W.2d 123 (Iowa 1983).

The issue in this case is whether a claim for damages may be asserted against a parent who has refused to return the parties' child within the time provided in the dissolution decree. The real question was whether Iowa should adopt Restatement (2d) of Torts §700 (1977), which provides as follows: "Section 700 causing a minor child to leave or not to return home. One who, with knowledge that the parent does not consent, abducts or otherwise compels or induces a minor child to leave a parent legally entitled to its custody or not to return to the parent after it has been left him, is subject to liability to the parent."

The Restatement Rule permits suits by parents against non-custodial parents, as well as non-relatives: "C. When both parents entitled to custody and earnings. When the parents are by law jointly entitled to the custody and earnings of the child, no action can be brought against one of the parents who abducts or induces the child to leave the other. When by law only one parent is entitled to the custody and earnings of the child, only that parent can maintain an action under the rule stated in this section. One parent may be liable to the other parent for the abduction of his own child if by judicial decree the sole custody of the child has been awarded to the other parent.

The Court concluded that Iowa should follow the majority of jurisdictions by recognizing and applying §700 of the Restatement. The Court indicated in dicta that all damages suffered by the plaintiff as a consequence of the wrongful conduct may be recovered in a tort action, including punitive damages in some instances, and any person who assists the defendant-parent in the abduction, retention or concealment of the child may conceivably be held liable. The

Court felt that this alternative was superior to other alternatives such as the Uniform Child Custody Jurisdiction Act, kidnapping or contempt. The Court noted that "a tort suit will be more likely to effect a speedy return of the child; it will result in better cooperation by a potential third-party defendant seeking to avoid the suit; potential punitive damages will serve as an additional deterrent; and increased knowledge of a child's whereabouts will result to the broad scope of civil case discovery."

FAMILY LAW

Wagner by Griffith v. Smith, 340 N.W.2d 255 (Iowa 1983).

In this landmark case, the Supreme Court held that children may not recover from their parents for injuries caused by the negligence of their parents in supervising them.

When the Court abrogated the doctrine of absolute parental immunity in tort actions in Turner v. Turner, 304 N.W.2d 786 (Iowa 1981), it expressly reserved the question of whether immunity should continue to exist in areas of parental authority and discretion. In this case, the defendant allowed his four-year-old son to enter a silo which was being emptied. The boy's leg somehow became entangled in a grain auger, and the auger amputated his leg a few inches below the hip. The son sued his father through a next friend alleging his father had a duty to exercise due care for him and that he did not do what an ordinarily reasonbly prudent person - taking into account the parent-child relationship - would have done under certain circumstances.

The Court held that a parent is immune from liability for alleged negligent acts emanating from the parent-child relationship if the act involves an exercise of: (1) parental authority over the child; or (2) parental discretion in respect to the provisions of food, clothing, shelter, education, medical and dental services, and other care.

The Court reasoned that the amount otherwise spent by parents for the care and rehabilitation of their child would be depleted by the money the parents lose in defending either an indemnity action by a third-party tort feasor or a direct action brought by a next friend for their child. The Court also dismissed the possibility of liability insurance as a factor to be considered and concluded by saying, "We also think parenting is too subjective and too personal a matter to lend itself to a 'reasonably prudent' tort standard."

FAMILY LAW

Brown v. Vonnahme, 343 N.W.2d 445 (Iowa 1984).

In this case, judgment creditors in a wrongful death action brought an action to impress a judgment lien on real property belonging to the deceased judgment debtor. The Court held that the judgment creditor's wrongful death judgment did not attach as a lien at any time on the decedent's joint tenancy interest in homestead property, even though the homestead property had not been platted and recorded as such and that the decedent's heirs, who received title to her fee simple interest in the property when she died intestate, were indispensable parties to an action involving such property. The Court also noted that absent judicial sale, a homestead is shielded from creditors of both parties when a dissolution decree awards such property to one of the parties since the purpose of the homestead laws is to provide a margin of safety to the family not only for the benefit of the family but for the public welfare and social benefit which accrues to the State by having families secure in their homes.

FAMILY LAW

Sorenson v. Nelson, 342 N.W.2d 477 (Iowa 1984).

The narrow issue in this case was whether a dissolution decree, which incorporates the stipulation for division of the parties' property interest, terminated a former spouse's interest as a named life insurance beneficiary when neither the policy nor the interest of the former spouse on the policy is expressly mentioned in either the decree or the underlying stipulation. The Court held that the interest of the former spouse was terminated by the dissolution decree. In so doing, the Court reasoned that whether the interest involved was a "mere expectancy" or a more substantial property interest, it is an interest which may be disposed of by the dissolution court if this was clearly shown to be the intent of the parties. In this case, the stipulation provided for the disposition of the parties' rights of "every kind and character which have arisen, . . . or might hereafter arise because of the marriage relationship . . . or otherwise." The Court held that this language "evidences an intent to 'wipe the slate clean' between the parties." Accordingly, the District Court was correct in concluding that the ex-wife had stipulated away her interest in the policy proceeds.

FAMILY LAW

Slocum v. Hammond, 346 N.W.2d 485 (Iowa 1984).

In this case, a woman who had cohabited with a male property owner brought an action seeking under various legal and equitable theories to obtain one-half the value of property allegedly acquired during the period in which the parties cohabited. The Supreme court held that (1) the owner's retention of a house constructed during the period of cohabitation did not constitute unjust enrichment; (2) a purchase money resulting trust did not arise with respect to the real property purchased by the owner; (3) the female plaintiff was not entitled to a constructive trust equal to an undivided one-half interest in the real estate; (4) the evidence did not support a finding of any oral contract between the parties; and (5) the plaintiff was not entitled to partition.

The Supreme Court made a point of reaffirming that: "The policy of this State is that the de jure family is the basic unit of social order. This policy is reflected in statutes governing the right to marry . . . The policy favoring marriages is not rooted only in community mores. It is also rooted in the necessity of providing an institutional basis for defining the fundamental relational rights and responsibilities of persons in organized society. This policy would be subverted if persons could gain marital legal rights without accepting correlating marital legal responsibilities.

FAMILY LAW

Nanke v. Napier, 346 N.W.2d 520 (Iowa 1984).

The sole question presented in this case was whether, under Iowa law, the parent of a normal, healthy child may maintain an action to recover the expenses of rearing that child from a physician whose alleged negligence in performing a therapeutic abortion permitted the birth of the child. The Supreme Court affirmed the trial court ruling that such expenses may not be recovered.

The Supreme Court adopted the majority approach and concluded that the cost of rearing a normal, healthy child cannot be recovered as damages to the parent or parents: "This conclusion is based on the public policy of Iowa which dictates that a parent cannot be said to have been damaged or injured by the birth and rearing of a normal, healthy child because the invaluable benefits of parenthood outweigh the mere monetary burdens as a matter of law . . . We hold only that the parent of a normal, healthy child may not maintain an action to recover the expenses of rearing that child from a physician whose alleged negligence in performing a therapeutic abortion permitted the birth of such child."

FAMILY LAW

Beeck v. Aquaslide 'n' Dive Corp., 350 N.W.2d 149 (Iowa 1984).

See the DAMAGES or TORTS section of this outline for a full discussion of the facts of this case.

Judy Beeck Bruinsma was married to Jerry Beeck at the time of his severe injury. When Jerry brought an action for personal injuries, Judy sought $500,000.00 for loss of consortium. The trial court awarded her $65,000.00. Between the date of filing and the entry of judgment, Jerry and Judy were divorced. At the time of the divorce, Jerry and Judy entered into a stipulation indicating that they were "jointly involved in civil litigation pertinent to personal injury or injuries sustained to [Jerry] in an accident." The stipulation identified the attorney and law firm representing them in this civil litigation, asserted that the parties would cooperate regarding this litigation and set forth a plan for distribution of any recovery and/or allocation of any costs.

Aquaslide argued that the language in this stipulation, which was incorporated into the dissolution decree, failed to "specifically preserve" Judy's loss of consortium claim (a "right acquired by marriage") and that Judy's claim was thereby forfeited as a matter of law.

The Supreme Court held that the language included in the stipulation was sufficient to preserve the loss of consortium claim, despite the absence of words that "the loss of consortium claim is specifically preserved." In doing so, the Court reasoned: "An unduly technical application of the words "specifically preserve" would not further a purpose of providing notice to the public and to each of the parties as to what marriage-based rights were retained. This is particularly so where the language chosen by the parties for use in the decree appears to have been selected to meet the statutory requirement and is susceptible of no other reasonable interpretation."

INDEMNITY/CONTRIBUTION: ATTORNEY FEES

Bunce v. Skyline Harvestore Systems, Inc., 348 N.W.2d 248 (Iowa 1984).

Plaintiff was injured when his hand was caught in a machine (corn drill) being used to free corn bridging in his silo. The corn drill was designed and owned by Skyline, a harvestore dealer, and had been constructed for it by another

manufacturer. A. O. Smith Harvestore had nothing to do with the design, manufacture or sale of the corn drill, and at the time of the incident, only Skyline's employees were on the plaintiff's farm.

Plaintiff, who had purchased the silo, brought an action against the manufacturer of the silo and against the local dealer (Skyline) who had contracted with the manufacturer to service silos, seeking to recover for personal injuries. A jury verdict was returned against the dealer, and a verdict was directed in favor of the manufacturer. On the manufacturer's cross-petition against the dealer to recover costs of defense of the suit, the trial court ruled that the manufacturer was entitled to indemnity.

The Supreme Court held that an indemnity agreement, whereby local dealer agreed to hold silo manufacturer harmless with respect to any defects in workmanship relating to service performed by dealer on the silos, covered the manufacturer's costs of defense of the suit brought by the owner of the silo based upon dealer's defective servicing of the product.

INDEMNITY/CONTRIBUTION

Beeck v. Aquaslide 'n' Dive Corp., 350 N.W.2d 149 (Iowa 1984).

See the DAMAGES or TORTS section of this outline for a full discussion of the facts of this case.

The trial court dismissed Aquaslide's third-party action for contribution from Employers Mutual Casualty Company, Illinois-Iowa Claims Service, Inc. and Vincent E. O'Toole. Employers Mutual was one of three insurance companies that initially investigated the accident and reported that the slide was manufactured by Aquaslide. Iowa-Illinois and O'Toole did the actual investigating.

The Supreme Court held that Aquaslide's recklessness "was of sufficient culpability to disqualify it from contribution, citing Restatement (2d) of Torts §886A, Comments j and k (1979)."

INSURANCE LAW

Freeman v. Bonnes Trucking, Inc., 337 N.W.2d 871 (Iowa 1983).

In this case, the insured was covered in a group medical plan through his employer, Bonnes Trucking. The employer failed to pay the monthly premiums to the insurance company including the amounts it withheld from the employee's

wages. The insurance company claimed to terminate the policy for non-payment of premiums by notifying the employer. Neither the insurance company nor the employer notified the insured of the termination.

The Supreme Court held that the insurance company's attempted cancellation of the insured's insurance without notice to him was of no effect under §515.80 of the Code. The insurance company claimed that this section did not apply to group insurance, but the Court held that the legislature intended the provisions in General Chapter 515 to apply to Chapter 509 on group insurance.

INSURANCE LAW

Israel v. Farmers Mutual Insurance Association of Iowa, 339 N.W.2d 143 (Iowa 1983).

This case was treated above in the CLAIM PRECLUSION/ISSUE PRECLUSION section.

In this case, the customer of an insurance agency requested "full coverage" on a farm combine. The agency undertook to provide that coverage by forwarding to the insurance company an application for an endorsement of an existing policy that the insured had with the insurance company. The insurance company issued the endorsement to provide the coverage requested in the application. An agency employee, however, failed to request "upset" coverage on the application even though the farmer had requested "full coverage." The combine eventually overturned and was extensively damaged. When the agency and the insurance company refused to pay the loss sustained, the insured sued both the agency and the insurer for negligence.

The agency was found negligent for submitting an incomplete application for coverage and for failing to review the change of coverage endorsement to be sure that the farmer had full coverage. The insurance company was found negligent in failing to check with the agency to ascertain the type of coverage being requested and thereafter incorrectly assuming that more limited coverage was desired by the farmer.

Neither the agency nor the insurance company filed a cross-claim against the other in the first lawsuit, although both contended that the entire liability for loss should fall on the other defendant.

The Court held that claim preclusion was not applicable to the facts in this case because neither the agency nor the insurer filed a cross-claim against the other

for indemnity in the first lawsuit. Because such a cross-claim was not compulsory but permissive, the agency's claim for indemnity did not accrue until judgment was entered against him.

The Court further held that the agency's negligent conduct in preparing the application was found to be active in character; therefore, the agency was barred by issue preclusion from attempting to relitigate the issues of negligence and proximate cause and thereby recover indemnity on an active/passive negligence theory. The Court also held that issue preclusion presented a barrier to the agency's reformation of contract theory since the agency had a full and fair opportunity to litigate the reformation theory in the first case.

The Court further declined to extend the holding or language of State Insurance Company v. Richmond, 71 Iowa 519, 32 N.W. 496 (1887), which suggested that only the insurer and not the agent should bear a loss occasioned by an agent's error whenever the undisclosed risk was one the insurer would have accepted for an appropriate premium. The Court stated that "It seems basically unfair and inequitable to require an insurer to bear the entire loss resulting from a risk that an agent erroneously understates or fails to disclose."

INSURANCE LAW

Walker v. American Family Mutual Insurance Company, 340 N.W.2d 599 (Iowa 1983).

The single issue raised in this case was whether Iowa public policy was violated when an automobile liability insurer excludes from coverage bodily injury to the insured owner. In this case, the victim of an automobile accident owned an automobile covered by an automobile liability insurance policy issued by American Family. He was a passenger in his automobile which was being driven with his consent by Walker. The policy contained an exclusion stating that the policy does not apply under liability coverage to bodily injury to the insured or any member of the family of the insured residing in the same household as the insured.

The Supreme Court held that the policy provisions in question did not violate public policy. "Our legislature has expressed in Chapter 321A an intent to allow motorists considerable freedom to decide what automobile liability coverage, if any, they wish to procure." The Court said that Iowa case law did not declare a judicial policy requiring automobile insurers to reimburse all persons injured by negligent operators of insured vehicles. This public policy

is grounds in recent decisions which have construed Chapter 321A more narrowly, finding no legislative intent to require all motorists to have liability insurance and therefore, no legislative expression of a public policy to protect all victims of traffic accidents.

INSURANCE LAW

Hastings v. Espanosa, 340 N.W.2d 603 (Iowa App. 1983).

This was a wrongful death case brought by the administrators of the estates of two persons killed at a construction site, asserting that the deaths resulted in the negligence of multiple defendants including an employee of the company and the gross negligence of the company and five other employees. Default judgments were entered against four of the company's employees, and they filed motions to set the default judgments aside or vacate them. The plaintiffs' attorney and a representative of the company's insurance company had agreed to an indefinite extension of time for the employees to file an answer to the complaint. The plaintiff later obtained default judgments against the defendants. These judgments were set aside by the trial court.

The Court of Appeals held that the plaintiffs' attorney had a duty to inform the claims adjuster of the defendants' employer's insurer, which had the responsibility of defending the litigation, that the attorney no longer considered binding an agreement that gave the defendants an indefinite time to answer before taking action to enter default judgment, particularly since the agreement was between an attorney and a non-attorney. The Court also held that the negligence of an insurer resulting in a default judgment is not imputed to the insured under I.R.C.P. 236 when the insured is seking to set aside the default.

INSURANCE LAW

Sorenson v. Nelson, 342 N.W.2d 477 (Iowa 1984).

See full case summary in the FAMILY LAW section.

INSURANCE LAW: BAD FAITH

Sandbulte v. Farm Bureau Mutual Ins. Co., 343 N.W.2d 457 (Iowa 1984).

In this case, the insureds brought an action against an automobile insurer and its agents alleging breach of an

implied good-faith duty to defend the insured against a third-party claimant in a personal injury action stemming from a collision between a vehicle driven by the insured's son and a motorcyclist and alleging breach of an implied expanded agency agreement to advise and implement adequate liability insurance coverage for the insured. The Supreme Court held that:

> (1) Insurer's alleged breach of its good-faith duty to defend an insured's claim of breach of implied expanded agency agreement accrued on date insured executed settlement and consent judgment in pending personal injury actions, and, five-year statute of limitations for actions based on unwritten contracts began to run from such date;
>
> (2) Claim for breach of an implied expanded agency agreement was not compulsory counter claim to insurer's declaratory judgment action seeking determination as to whether farm liability insurance coverage extended to personal injury actions;
>
> (3) No expanded agency agreement existed, as a matter of law, as to agents of insurer; and
>
> (4) The record did not establish insurer's bad faith as a matter of law under the "no-limit test of good faith.

A the time of the accident, Kenneth Sandbulte owned an automobile insurance policy with a liability limit of $50,000.00 and a farm liability policy with a limit of $300,000.00. Both of these policies were issued by Farm Bureau Mutual Insurance Company. Farm Bureau agreed to tender the full $50,000.00 limit on the automobile policy but claimed that Sandbulte's liability arising out of the accident was not covered by the contractual terms of the farm liability policy and therefore, refused to tender any amount under this policy for settlement purposes. Farm Bureau then filed a declaratory judgment action seeking a judicial interpretation of its contractual obligations to Sandbulte under the farm liability policy. Shortly after the Farm Bureau declaratory judgment action was filed, Sandbulte settled the underlying suit for $375,000.00. The terms of this settlement provided for Sandbulte to pay $25,000.00 in addition to the $50,000.00 tendered by Farm Bureau Mutual. Under the automobile policy, the remaining $300,000.00 entered as a consent judgment

against the Sanbultes. Execution on the consent judgment was ordered withheld until final disposition of the declaratory judgment action at the trial court level. This action was ultimately decided by the Supreme Court in Farm Bureau Mutual Insurance Company v. Sandbulte, 302 N.W.2d 104 (Iowa 1981) in which the Court found that Sandbulte was not covered, as to the accident, by the farm liability policy.

The Sandbultes then commenced an action against Farm Bureau consisting of two (2) counts. Count I asserted a claim against Farm Bureau alleging the breach of an implied good-faith duty to defend the insured under the automobile insurance policy against the third-party claimant. Count II asserted a claim against the insurance agents and Farm Bureau alleging the breach of an implied expanded agency agreement to "advise plaintiffs of the extent of their liability insurance coverage, and suggest and implement for plaintiffs proper, complete and adequate liability insurance coverage." The trial court entered summary judgments in favor of all defendants on both counts. As to Defendant Farm Bureau, the trial court held that the applicable statute of limitations was §614.1(2) which barred both of plaintiffs' counts and furthermore, that plaintiffs' second also was barred by I.R.C.P. 29 because it was a compulsory counterclaim to Farm Bureau's declaratory judgment action. Summary judgment was also entered for the agents as to Count II based on the Court's holding that the statute of limitations barred this action, and in addition, the Court found that the plaintiffs failed to show as a matter of law any duty or breach of duty to perform in an expanded agency relationship or of any duty to the plaintiff in the acquisition of insurance.

The Supreme Court held that since an excess liability claim against an insurer based on its bad faith handling of a third-party claim against its insured is a claim based on the implied covenant of good faith found in the insurance contract, it follows that the five-year statute of limitations for actions founded on unwritten contracts is the appropriate statute of limitations for an action based on an insurer's breach of a good-faith duty to defend an insured against third-party claimants.

The Court also held that the Sandbultes' right to institute and maintain a suit for an insurer's breach of its good-faith duty to defend matured on the date the case was finally settled and disposed of when Farm Bureau's duty to defend terminated. Accordingly, the claim accrual date for purposes of measuring the applicable five-year statute of limitations in a bad-faith action is the date on which the insured becomes liable for payment under a settlement or judgment. Since the plaintiffs' petition was clearly filed

within five years of the date of judgment, the statute of limitations did not bar the plaintiffs' claim for bad faith.

The Court also concluded the plaintiffs' claim for breach of an implied expanded agency agreement to advise and implement adequate liability insurance coverage was not a compulsory counterclaim to Farm Bureau's declaratory judgment action because a claim against an insurer for the neglect of its agents is a claim based on an altogether different transaction or occurrence than a declaratory judgment suit seeking an interpretation of policy coverage.

The Court also hinted that it might recognize the expanded agency: "An expanded agency agreement, arrangement, or relationship, sufficient to require a greater duty from the agent than the general duty, generally exists when the agent holds himself out as an insurance specialist, consultant or counselor and is receiving compensation for consultation and advice apart from premiums paid by the insured." The Court held, however, that the record disclosed no evidence in support of the Sandbultes' claim that they entered into an agreement with the insurance agents creating an expanded agency relationship in which the agents were to advise, suggest, counsel and procure liability insurance for the plaintiffs. The Court concluded that merely asking for "sufficient coverage" is an insufficient factual basis for asserting the existence of an expanded agency agreement and that therefore, the insurance agents were entitled to summary judgment as a matter of law.

The Court also concluded that the record does not establish Farm Bureau's bad faith as a matter of law and that therefore, plaintiffs are not entitled to summary judgment. Plaintiffs' motion for partial summary judgment had asserted that Farm Bureau had failed the "no limits" test of good faith set forth in Kooyman v. Farm Bureau Mutual Insurance Company, 315 N.W.2d 30, 34 (Iowa 1982). The Court did not comment on the "no limits" test in concluding that plaintiffs are not entitled to summary judgment.

INSURANCE LAW: BAD FAITH

Pirkl v. Northwestern Mutual Insurance Association, 348 N.W.2d 633 (Iowa 1984).

Insured brought an action against his insurer seeking compensatory damages for theft loss alleged to be covered by insurer's policy and punitive damages based upon alleged bad-faith refusal to pay claim.

The Supreme Court noted that it did not unequivocally reject a theory of liability based upon an insurer's bad faith in failing to settle a casualty loss claim with its own insured in Brown Township Mutual Insurance Association v. Kress, 330 N.W.2d 291, 298 (Iowa 1983). In Kress, and prior cases, the claims which the insurer failed to pay were as a matter of law "fairly debatable." ("If the issue were simply a theoretical one of whether the nature of this type of claim is one which should be properly recognized as a tort action, we would be inclined to respond in the negative.")

The Court held that in considering whether punitive damages should be permitted, the nature of the conduct of the insurer is more significant than the legal label which is attached to that conduct. In some instances, denial of a valid claim by a casualty insurer will support a claim for punitive damages in addition to recovery of the loss which should have been paid under the policy; however, such recovery may not be predicated on an action which involves no more than upsetting the justified expectations of the insured.

The Court held further that punitive damages are recoverable only in situations involving "positive misconduct of a malicious, illegal, or an immoral nature."

Finally, the Court noted that although a theft policy provided that notice of theft should be given insurer within 24 hours of time of loss, notice was not expressly made a condition precedent to payment of the claim; accordingly, if no prejudice resulted to the insurer from failure to comply with the provision, insured's right to recovery under policy would not be defeated.

INSURANCE LAW: DUTY TO DEFEND

McAndrews v. Farm Bureau Mutual Insurance Company, 249 N.W.2d 117 (Iowa 1984).

The insured (McAndrews) got into a dispute with another man at a county fair involving cattle being shown by their sons. The men exchanged words, and a scuffle followed during which the insured swung at the third party and injured him. The third party filed an assault and battery suit against the insured, who tendered defense to Farm Bureau under his general farm liability policy. The policy contained an exclusion for "any bodily injury or property damage which is either expected or intended from the standpoint of the insured." Farm Bureau refused to provide defense under this exclusion, and the insured brought action against them alleging breach of contractual duty to defend after he lost

the action brought by the third party for assault and battery. The trial court and the Court of Appeals issued judgment in favor of the insured for the cost of defense.

The Court held that Farm Bureau did not have a duty to defend in light of the policy exclusion for intentional acts since facts known at the beginning of the assault and battery action established that the insured had acted intentionally even if he had acted in self-defense as claimed.

The Court noted further that "if the totality of facts fail to disclose potential coverage, an insurer might proceed in two ways: it could initiate a declaratory judgment action against its insured, or it might elect to do nothing, running the risk, of course, that its insured will seek indemnity if coverage is established at trial."

Justice McCormick dissented from the Court's holding that even if McAndrew was acting in self-defense to prevent the third party from harming him, this would not change the fact that his action in hitting the third party was an intentional act. Justice McCormick argued that one line of cases held that when one acts in self-defense, the actor is not generally acting for the purpose of intending an injury to another, but rather, is acting for the purpose of attempting to prevent injury to himself. It can easily be said that such act, though resulting in bodily injury to another, was neither expected nor intended within the terms of the policy."

INSURANCE LAW: UNINSURED MOTORIST

Lindahl v. Howe, 345 N.W.2d 548 (Iowa 1984).

In this case, the Supreme Court held that an exclusion in an automobile policy for injuries arising while occupying a motorcycle, which was owned by the insured but was not insured under the policy, violated the mandatory statutory coverage requirements of Iowa Code Chapter 516A.1 and was therefore invalid. The owner of the motorcycle had an automobile isurance policy with State Farm on his 1981 Ford automobile containing uninsured motorist coverage of $15,000.00. His motorcycle was not covered under said policy, and he was struck while operating his motorcycle by an uninsured motorist.

State Farm denied uninsured motorist coverage under an exclusion which said, "There is no coverage for bodily injury to an insured while occupying a motor vehicle owned by you if it is not insured for this coverage under this policy. The Court reasoned that the Insurance Commissioner's acquiescence in the form of this policy was not an

adjudication of the validity of the exclusion and could not divest the courts of their duty to give the statute its ultimate authoritative interpretation.

INSURANCE LAW

Beeck v. Aquaslide 'n' Dive Corp., 350 N.W.2d 149 (Iowa 1984).

See the DAMAGES or TORTS section of this outline for a full discussion of the facts of this case. See the INDEMNITY/CONTRIBUTION section for the partial summary applicable to this section.

INSURANCE LAW

State Farm Mut. Auto. Ins. Co. v. Pflibsen, 350 N.W.2d 202 (Iowa 1984).

This case arose from a two-car accident which claimed the life of Clay Stephen Pflibsen. At the time of the accident, Pflibsen was driving a car owned by his father. He had obtained permission to use his father's car and had access to it for about two weeks prior to the accident.

At the time of the accident, Clay's wife owned a Mazda automobile which was insured with State Farm. Her liability coverage extended to the use by an insured of a non-owned car but defined "non-owned car" in part as: "a car not . . . furnished or available for the regular or frequent use of you, your spouse, or any relatives."

Clay's wife had filed a petition for dissolution of marriage during the policy period and prior to Clay's death. She had moved out of their home, taking the Mazda and leaving Clay without a car.

The driver of the other car was injured and sued both Clay's father as owner of the car involved in the accident and Clay's wife as personal representative of his estate. Clay's father settled with the second driver for the amount of his liability insurance policy limits. The second driver continued to pursue his claim against Clay's estate, however, on the theory that State Farm's non-owned car coverage provided additional liability coverage for the collision. State Farm then brought a declaratroy judgment action on the coverage question contending that Clay's father's car had been furnished and regularly available to Clay and therefore, did not come within the policy's coverage of non-owned cars. State Farm and Clay's father then filed motions for summary judgment.

The trial court granted summary judgment to State Farm finding that: "Prior to his death, Clay had the 1978 Oldsmobile available to him at all times, used it when he wanted without asking permission each time he used it. He had been granted blanket authority to use the car without restrictions for an indefinite period of time."

The sole issue on appeal was whether State Farm established its right to summary judgment on a question of policy coverage. The Supreme Court reversed, finding that the record disclosed genuine issues of fact material to the question of policy coverage. The Court concluded that reasonable minds could draw different inferences from the deposition testimony relied on by the other parties concerning the scope and extent of Clay's permission to use the Oldsmobile and his actual use of the car during the few days he had access to it prior to the collision.

This testimony suggested that reconcilation was being considered by Clay's wife ending his need to use his father's car. The testimony did not show that Clay actually drove the Oldsmobile between the day he received permission to drive it and the day of the collision. The testimony did show, however, that Clay had previously borrowed and temporarily used other vehicles owned by his father.

INTEREST

Oskaloosa Food Products v. Aetna Casualty & Surety Company, 337 N.W.2d 521 (Iowa 1983).

The insured won a jury verdict of $56,767.00 against the insurer based on the company's refusal to pay loss under contract of insurance. The District Court ordered interest accrued only from the date of judgment.

The Court held that §535.3 requires interest to be awarded from date of commencement of the action even though the plaintiff didnot request interest. The Court's rationale was that an award of pre-judgment interest is not waived under §535.3, as amended, by a party's failure to request it. The key to this holding is that §535.3 is mandatory.

INTEREST

Rowen v. Le Mars Mutual Insurance Company, 347 N.W.2d 630 (Iowa 1984).

Policyholders of Le Mars Mutual brought a derivative action against Le Mars Mutual, Iowa Mutual Insurance Company, and insurance agencies sold by Le Mars Mutual to Iowa Mutual and various officers and directors of both companies to set aside a contract between Iowa Mutual and the insurance agency. The action was filed in May of 1973, and an interlocutory order determining liability was filed October 3, 1977. Final judgment regarding restitution damages was not filed until after January 1, 1981.

The question presented in this case was whether plaintiffs were entitled to pre-judgment interest at ten percent under Iowa Code §535.3, made effective January 1, 1981.

The Iowa Supreme Court held that Iowa Code §535.3 applies to actions filed before January 1, 1981, if final judgment is after January 1, 1981.

The Court held further that Iowa Code §535.3 is mandatory, even in equity.

The Court reasoned that the Iowa legislature did not intend to have pre-judgment interest assessed on amounts due on transactions that did not occur until after litigation commenced. In those situations, the right to interest attaches when the transaction occurred. Accordingly, for those transactions which occurred prior to commencement of litigation, the plaintiff was entitled to interest at ten percent from May 1973. For those transactions which occurred after litigation commenced, however, interest at ten percent did not attach until the transaction itself occurred.

INTEREST

Beeck v. Aquaslide 'n' Dive Corp., 350 N.W.2d 149 (Iowa 1984).

See the DAMAGES or TORTS section of this outline for a full discussion of the facts of this case.

Pursuant to Iowa Code §535.3 (1981), the trial court awarded interest on the judgment at the statutory rate of ten percent from the date the plaintiffs' action against Aquaslide for fraudulent misrepresentation was commenced, February 4, 1977. Both parties appeal this award for pre-judgment interest under §535.3, as amended, which was enacted on March 28, 1980 and became effective January 1, 1981.

Aquaslide contended as follows: (1) the previous lower statutory interest rate of seven percent should apply because Aquaslide had no opportunity to try this case between

the date of enactment and the effective date; (2) the application of §535.3 would be unduly harsh because interest would be awarded on certain expenses before they occurred, and the plaintiffs would be overcompensated; (3) since the plaintiffs were granted permission to amend their prayer for damages from $1,750,000.00 to $3,500,000.00 on May 15, 1981, that date should be used as the "commencement date" of the lawsuit; and (4) retrospective application of §535.3 violates substantive due process under the United States and Iowa Constitutions because it is arbitrary, capricious, unduly harsh and oppressive.

Plaintiffs argued that interest should accrue from October 15, 1973, the date they filed their original complaint in Federal court against Aquaslide as manufacturer.

The Supreme Court held as follows: (1) The retrospective application of §535.3, as mandated by the legislature, contemplated that some cases would not be capable of an orderly disposition during the grace period, and this was such a case: "To sustain Aquaslide's argument would require us to overturn our decision in Janda [v. Iowa Industrial Hydraulics, Inc., 325 N.W.2d 339, 342 (Iowa 1982)] and to decide that §535.3 cannot be applied retrospectively. We are not inclined to do so." (2) The effect of §535.3 "is merely to recognize that all recoverable damages are due and owing on the date a lawsuit is commenced," which is the date, as determined by the legislature, when the plaintiffs were entitled to the use of their damage award. (3) Because plaintiffs' amendment served merely to set forth their claim more specifically and to enlarge their claim for damages (rather than adding a distinct new claim to the case), the amendment related back to the original filing date of February 4, 1977. (4) Section 535.3 is rational in its retrospective application - "It merely requires Aquaslide to pay an interest rate more closely related to the market value of the use of the money." (5) The action against Aquaslide is for fraudulent misrepresentation, not for products liability or negligence. Accordingly, it is distinct from the original suit filed in Federal court on October 15, 1973, and the proper date for accrual of interest was October 15, 1973.

JUDGMENT

Koeller v. Reynolds, 344 N.W.2d 556 (Iowa App. 1983).

In this case, the Court of Appeals held that the evidence presented by the plaintiff was insufficient to allow a jury to determine that the car accident she was involved in was the proximate cause of her subsequent back problems. At trial, the plaintiff testified as to her previous extensive

operations and the nature of her back conditions. "But Koeller is not qualified as an expert in diagnosing back conditions or in determining the probable cause of those conditions."

This case was discussed above in the EVIDENCE section.

In a related matter, the Court refused to adopt the rules set out in Wagner v. Tucker, 517 F.Supp. 1248, 1252 (S.D. N.Y. 1981) in which the New York Court held that where the issue of collectability was not raised by the defendant, no responsibility attaches to the plaintiff to prove collectability in a legal malpractice action. The Court reasoned that "because a judgment is limited to the amount which could have been collectable, it would have been necessary for Koeller to provide evidence of exact limits of any insurance policy or that a judgment was collectable from the negligent driver-defendant."

JUDGMENT: OFFER TO CONFESS

Weaver Construction Company v. Heitland, 348 N.W.2d 238 (Iowa 1984).

Plaintiff recovered less than defendant's offer to confess judgment in a breach of contract action, and defendant requested an assessment of court costs against the plaintiff, including attorney fees. A total of $997.07 in court costs was taxed against the parties. The trial court determined that §677.10 required the plaintiff to pay only the costs incurred after the offer to confess judgment was made ($827.47). The costs incurred prior to that time ($169.60) were taxed to the defendant.

The Supreme Court held that a plaintiff who recovers less than defendant's offer to confess a judgment cannot recover all costs ordinarily recoverable by a prevailing party but must pay those costs that are incurred after the time of the offer. The trial court properly allowed plaintiff to recover costs incurred before defendant made its offer to confess but properly shifted costs to plaintiff once it rejected and subsequently recovered less than that offer.

The Court also held that the legislature did not intend that the word "costs" in Chapter 677 should be liberally stretched to include attorney fees. Accordingly, attorney fees are not included in the cost-shifting which the statute allows because attorney fees are not explicitly mentioned in the statute.

JUDGMENT

Brown v. Vonnahme, 343 N.W.2d 445 (Iowa 1984).

See full case summary in the FAMILY LAW SECTION.

JUDGMENT: DEFAULT

Johnson v. Gibb's Western Kitchen, Inc., 338 N.W.2d 872 (Iowa 1983).

See full case summary in the CIVIL PROCEDURE section.

JUDGMENT: DEFAULT

Hastings v. Espanosa, 340 N.W.2d 603 (Iowa App. 1983).

See full case summary in the INSURANCE LAW section.

JUDGMENT: SUMMARY

Toomer v. Iowa Department of Job Service, 340 N.W.2d 595 (Iowa 1983).

See full case summary in the CIVIL PROCEDURE section.

LIMITATION OF ACTIONS

Jacobson v. Union Story Trust and Savings Bank, 338 N.W.2d 161 (Iowa 1983).

See full case summary in the CIVIL PROCEDURE section.

LIMITATION OF ACTIONS

Farnum v. G. D. Searle & Co., 339 N.W.2d 392 (Iowa 1983).

The facts of this case involved the wife, allegedly injured in taking birth control pills, who sought with her husband and children to recover against physicians employed by county hospital in a theory of negligence in prescribing birth control pills. The Court held that the proper statute of limitations for medical malpractice claims against doctors

employed by a county hospital was the six-month period set forth in §613A.5 governing damage claims against a municipality for wrongful death, loss or injury rather than the two-year period of limitation set forth in §614.1(9) governing claims against a physician for injuries. The Court also held that §613A.5 does not include a discovery rule so that claims against physicians were barred as untimely when not filed within six (6) months of the injury and when notice of claim was not given to the county within sixty (60) days of the injury. In addition, the Court held that the statutory classifications which gave victim of State doctor's tort two (2) years from the time of the discovery of the injury to initiate the claim process while limiting the victim of a county doctor's tort to only six (6) months to bring suit were not constitutional as violative of equal protection.

LIMITATION OF ACTIONS

Kohrt v. Yetter, 344 N.W.2d 245 (Iowa 1984).

The United States District Court for the Northern District of Iowa certified the following question of law to the Iowa Supreme Court: whether the six-year limitation set forth in Iowa Code §614.1(9) is tolled during the infancy of an injured person pursuant to Iowa Code §614.8. The Iowa Supreme Court answered yes concluding that the six-year limitation for bringing medical malpractice action is tolled during the infancy of an injured minor person.

LIMITATION OF ACTIONS

Beeck v. Aquaslide 'n' Dive Corp., 350 N.W.2d 149 (Iowa 1984).

See the DAMAGES or TORTS section of this outline for a full discussion of the facts of this case.

In its previous opinion on defendant's motion for summary judgment, the Supreme Court held that the plaintiffs "generated an issue of whether their original claim [against the true manufacturer of the slide was], in fact, barred by the statute of limitations . . . Plaintiffs should be given an opportunity to present their evidence on the damages and issue to a trier of fact" Beeck v. Kopalis, 302 N.W.2d 90, 94 (Iowa 1981).

At trial, the Beecks introduced these facts on the statute of limitations issue: the accident occurred on July 15, 1972, and the discovery of the true identity of the manufacturer of the slide was not made until February 1975. No other evidence was presented on this issue. Based on this

evidence, the trial court found that the statute of limitations ran out on July 15, 1974 and that the Beecks lost their cause of action against the true manufacturer by passage of time. The Supreme Court affirmed holding that "this showing was sufficient, subject to presentation of other evidence requiring a contrary conclusion."

Aquaslide responded that the Beecks could have equitably estopped the actual manufacturer from asserting a statute of limitations defense. The Supreme Court concluded that based upon the facts of the case, the Beecks would not have been able to assert an equitable estoppel defense against Purity Manufacturing Company in a subsequent suit for products liability. As to S. R. Smith and Company, the Court held that the trier of fact could find that Smith "deceived" the plaintiffs for the purposes of equitable estoppel if Purity substituted a Smith Slide for an Aquaslide, if Smith knew of or recklessly disregarded the substitution, and if Smith did not reveal the substitution." Since a fact question existed on this issue, it was remanded to the trial court for findings as to whether Smith would have been equitably estopped on the statute of limitations defense.

MUNICIPAL CORPORATIONS

Farnum v. G. D. Searle & Co., 339 N.W.2d 392 (Iowa 1983).

See full case summary in the LIMITATION OF ACTIONS section.

MUNICIPAL CORPORATIONS

Orr v. City of Knoxville, 346 N.W.2d 507 (Iowa 1984).

In this case, a husband and wife brought an action against the City of Knoxville for the husband's injuries arising from his fall into a hole located by a manhole and sewer drain on a city street. The Supreme Court held that the notice provided in a letter to the City from the husband's worker's compensation carrier was sufficient to sustain the husband's action under the Municipal Tort Claims Act. The Court reasoned: "Our practice has been to examine the notice given in light of the statute's purpose: to provide a method for prompt communication of the time, place and circumstances of the injury in order to afford the prospective defendant the opportunity to investigate while the facts are fresh."

The Court held that the letter from the insurance company to the City more than satisfied the minimum notice requirement set forth in Cook v. City of Council Bluffs, 264

N.W.2d 784 (Iowa 1978): it provided the name of the injured party, his employer, and the date, general nature and place of the accident. It alerted the City that medical expenses had been and would be sustained.

The Court refused to hold, however, that the wife's consortium claim was protected by the notice.

NEGLIGENCE

Israel v. Farmers Mutual Insurance Association of Iowa, 339 N.W.2d 143 (Iowa 1983).

See full case summary in the CLAIM PRECLUSION/ISSUE PRECLUSION section.

NEGLIGENCE: ASSUMPTION OF RISK

Campbell v. Van Roekel, 347 N.W.2d 406 (Iowa 1984).

Passenger brought an action against the driver and the owner of the vehicle to recover damages for injuries he sustained an a one-vehicle accident.

The Supreme Court held that the change in the contributory negligence defense in Goetzman does not affect the holding in Rosenau v. City of Estherville, 199 N.W.2d 125, 133 (Iowa 1972) eliminating assumption of risk in its secondary meaning in negligence cases (after Rosenau, the term and defense of "assumption of risk" is no longer appropriate in the passenger/driver situation.)

The Court also held that assumption of risk, which was not a defense to punitive damages before the adoption of comparative negligence in Goetzman, is not a defense to punitive damages after Goetzman.

The Court reasoned that comparative negligence is a method of providing compensation to the plaintiff in proportion to the relative fault of the parties, whereas the purpose of punitive damages is to punish the defendant for his grossly negligent, wanton, willful or reckless misconduct.

This case summary was also included above in the DAMAGES section.

NEGLIGENCE: GROSS NEGLIGENCE

Sechler v. State, 340 N.W.2d 759 (Iowa 1983).

In this case, the administrator of the estate of a motorcyclist brought a wrongful death action against the State and two of its employees based upon alleged negligence in barricading a closed highway. The main issue in this case was whether the term "gross negligence" as used in Iowa Code §306.41 is a higher degree of negligence that is subject to the defense of contributory negligence or a different kind of conduct that is immune to such a defense.

In answer to this principal question, the Court held that "gross negligence" under the statute governing liability of agencies for partially closed roads which places liability on agency having jurisdiction over those roads and person or contractors employed to carry out construction only in the event that damage to the vehicles or persons using roads is caused by "gross negligence" is a higher degree of negligence rather than a different kind. Therefore, an action based on gross negligence is subject to the defense of contributory negligence. The Court adopted the following definition of "gross negligence": "Signifies more than ordinary inadvertence or inattention, but less conscious indifference to consequences; in other words, merely an extreme departure from the ordinary standard of care."

A secondary aspect to this case was treated above in the EVIDENCE section.

NEGLIGENCE: INTOXICATING LIQUORS

Haafke v. Mitchell, 347 N.W.2d 381 (Iowa 1984).

See full case summary in the DRAM SHOP section.

NEGLIGENCE: JOINT AND SEVERAL LIABILITY

Rosevink v. Ferris, 342 N.W.2d 845 (Iowa 1983).

In an important decision following the Court's adoption of comparative negligence in Goetzman v. Weichern, 327 N.W.2d 742 (Iowa 1982), the Court held that Iowa's joint and several liability is unaffected by the adoption of pure comparative negligence.

In this case, the plaintiff was injured while riding on a motorcycle owned by Brian Freese and driven by James Mundell. The motorcycle was following a pickup truck owned by James and Gail Farris and driven by Gail Farris. The plaintiff was injured when Mundell attempted to pass the pickup truck on the right at the same time Farris made a turn

to the right and collided with the motorcycle. Under the comparative negligence instructions, the jury assigned 17 percent of the total negligence to Gail Farris and 83 percent of the total negligence to Brian Freese. The Farrises urged the trial court to enter judgment against them for only 17 percent of the plaintiff's damage award. The trial court, however, relied on traditional principles of Iowa law and decisions from other jurisdictions in holding the Farrises jointly and severally liable.

In refusing to abolish joint and several liability, the Court noted that the burden of the insolvent defendant would fall entirely on the plaintiff,and the plaintiff's damages would be reduced beyond the percentage of negligence attributable to that plaintiff. The Court concluded that comparative negligence "does not mandate this further reduction." The Court adopted the reasoning given by the Illinois Supreme Court for refusing to abolish joint and several liability:

> Were we to eliminate joint and several liability as the defendant advocates, the burden of the insolvent or immune defendant would fall on the plaintiff; in that circumstance, plaintiff's damages would be reduced beyond the percentage of fault attributable to him. We do not believe the doctrine of comparative negligence requires this further reduction. Nor do we believe this burden is the price plaintiff must pay for being relieved of the contributory negligence bar. The quid pro quo is the reduction of plaintiff's damages.

The Court noted in passing that neither party contended that the Court should base its decision on the recently-enacted Iowa statute which will take effect on July 1, 1984, and provides:

> The doctrine of joint and several liability shall not apply if a plaintiff is found to bear any comparative negligence with respect to any claim.

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NEGLIGENCE: PROXIMATE CAUSE

Edwards v. City of Des Moines, 349 N.W.2d 786 (Iowa App. 1984).

See full case summary in the EVIDENCE section.

PLEADING

Schmidt v. Wilkinson, 340 N.W.2d 282 (Iowa 1983).

The issue presented on Appeal was whether the trial court erred in granting defendant's motion to dismiss for plaintiff's alleged failure to properly plead an abuse of process claim. The Court held that the petition sufficiently stated an abuse of process claim in compliance with the notice pleading requirements of I.R.C.P. 69(a). In doing so, the Court adopted §682 and comments a and b of the Restatement (2d) of Torts (1977) and the additional commentary found in Restatement (2d) of Torts §682 Appendix (1981). Since the plaintiff's pleading was substantially identical to the language of §682, it provided a short and plain statement of the claim of abuse of process and therefore afforded fair notice of plaintiff's claim to the defendants in this case. The Court concluded that an improper use of civil process to attempt to avoid a lawful criminal conviction would support a claim of abuse of process under §682 of the Restatement.

PLEADING

Jorge Construction Co. v. Weigel Excavating and Grading Co. Corp., 343 N.W.2d 439 (Iowa 1984).

See full case summary in the CLAIM PRECLUSION/ISSUE PRECLUSION section.

PRODUCTS LIABILITY

Farnum v. G. D. Searle & Co., 339 N.W.2d 384 (Iowa 1983).

See full case summary in the CIVIL PROCEDURE section.

PRODUCTS LIABILITY

Houvenagle v. Wright, 340 N.W.2d 783 (Iowa App. 1983).

In this case, a pedestrian who had been injured when struck by a car while on a sidewalk brought a personal injury action against the driver and seller of the car, and her husband brought a related loss of consortium claim. The District Court confirmed the judgment in favor of the seller but ordered a new trial on the claim against the driver.

The Court held that where there was insufficient evidence to show that the car was defective when sold and the driver of the car testified that she had had no problems with it prior to the accident, the seller of the car could not be held liable for injuries resulting from the accident, thereby upholding the verdict in favor of the seller while at the same time granting the pedestrian a new trial against the driver. The Court also reiterated its position that there is no implied warranty of fitness from an automobile dealer to members of the general public and that strict liability is the proper theory for the general public to bring its claim.

PRODUCTS LIABILITY

VanWyk v. Norden Laboratories, Inc., 345 N.W.2d 81 (Iowa 1984).

See full case summary in the DAMAGES section.

PRODUCTS LIABILITY

Thompson v. Stearns Chemical Corp., 345 N.W.2d 131 (Iowa 1984).

In this case, the United States District Court for the Southern District of Iowa certified two questions of law to the Iowa Supreme Court. The Supreme Court answered that (1) the right of contribution of a third-party tort-feasor manufacturer, by an injured employee, against a negligent employer is conditioned on the existence of common liability, notwithstanding the adoption of comparative negligence in Iowa, and (2) since no common liability exists between a third-party tort feasor and an employer by virtue of the Worker's Compensation Act, Iowa law does not permit consideration of comparative fault of the employer so as to allow third-party manufacturer sued by an injured employee under theories of negligence and strict products liability, for an injury covered by the Workers' Compensation Act, to seek contribution from the employer.

PRODUCTS LIABILITY

Bunce v.Skyline Harvestore Systems, Inc., 348 N.W.2d 248 (Iowa 1984).

See full case summary in the INDEMNITY section.

Beeck v. Aquaslide 'n' Dive Corp., 350 N.W.2d 149 (Iowa 1984).

See the DAMAGES or TORTS section of this outline for a full discussion of the facts of this case.

The Supreme Court cited Restatement (2d) of Torts §402A, Comment j (1965) for the proposition that a manufacturer has a duty to give proper instructions where failure to do so would render a product defective and unreasonably dangerous. At trial, plaintiffs produced expert testimony that the slide in question was defective and unreasonably dangerous because instructions with it permitted installation where the water depth was only three feet. Plaintiffs' experts testified that purchasers should have been instructed to install slides where the water depth was eight or nine feet since a person descending such a slide entered the water with a force that would carry a person quickly to a depth of nine feet. These experts identified the hazard as being the fact that a person using the slide, partcularly for the first time (such as Beeck), would be unaware of danger.

Other evidence showed that the slide on which Beeck was injured was installed where the depth of water was four feet and that Beeck may have traveled down the slide head first or on his stomach - a foreseeable use of the slide.

Aquaslide argued that plaintiffs could not have obtained a judgment against the true manufacturer based on these facts, that such a judgment was not shown to be collectable if obtained, and that Aquaslide was therefore not liable for damages. The Beecks made no attempt to show that a judgment against the true manufacturer would have been collectable. They argued that such a showing would have been impossible and that Aquaslide did not preserve the issue for review.

The Supreme Court held that Iowa law required the Beecks to introduce substantial evidence from which the trier of fact could reasonably find that if the Beecks had obtained judgment against the original manufacturer, the judgment would have been collectable in full or could reasonably find the portion that would be collectable.

The Court gave two reasons for refusing to accept the Beecks' argument on the impossibility of proving collectability: "One is that the required showing of whether a judgment would or would not be collectable through assets or insurance is not usually impossible in fact, under modern discovery techniques. I.R.C.P. 122(b), 131, 140(a) and (e). the other reason is that a judgment aginst the present

defendant Aquaslide should in no event be granted unless substantial evidence shows a judgment in the underlying suit would be collectable in whole or ascertainable in part . . . The result is not different because the present one is based on reckless misrepresentation."

The Court also noted that Aquaslide was not required to interpose the issue of collectability as an affirmative defense since collectability was an element of the plaintiffs' cause of action. Aquaslide's trial brief properly argued the absence of proof that a judgment against the actual manufacturer would be collectable. The trial court did not incorporate this view in its decision, and Aquaslide moved under I.R.C.P. 179(b) to enlarge its conclusions. The court overruled this motion. In holding that error was preserved, the Supreme court distinguished Baker v. Beal, 225 N.W.2d 106 (Iowa 1957), where the defendants did not raise the collectability issue until appeal. The Court also noted that Aquaslide did not transform the issue into an affirmative defense by raising it for the first time on appeal. The Court concluded, however, that a new trial should be held on the issue of collectability. The reasoning for this decision was the Court's understanding that the Beecks "did believe the damage issue [as remanded by the Court in Beeck v. Kapalis, 302 N.W.2d 90 (Iowa 1981)] was established by proof of their own injuries."

TORTS: ABUSE OF PROCESS

Schmidt v. Wilkinson, 340 N.W.2d 282 (Iowa 1983).

The issue presented on appeal is whether the trial court erred in granting defendant's motion to dismiss for plaintiff's alleged failure to properly plead an abuse of process claim. The Court held that the petition sufficiently stated an abuse of process claim in compliance with the notice pleading requirements of I.R.C.P. 69(a). In doing so, the Court adopted §682 and comments a and b of the Restatement (2d) of Torts (1977) and the additional commentary found in Restatement (2d) of Torts §682 Appendix (1981). Since the plaintiff's pleading is substantially identical to the language of §682, it provided a short and plain statement of the claim of abuse of process and therefore afforded fair notice of plaintiff's claim to the defendants in this case. The Court concluded that an improper use of civil process to attempt to avoid a lawful criminal conviction would support a claim of abuse of process under §682 of the Restatement.

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This case summary was also included above in the PLEADING section.

TORTS: BUSINESS INTERFERENCE

Harsha v. State Savings Bank, 346 N.W.2d 791 (Iowa 1984).

See full case summary in the DAMAGES section.

TORTS: BUSINESS INTERFERENCE

Page County Appliance Center v. Honeywell, 347 N.W.2d 171 (Iowa 1984).

In this case, an appliance store owner brought a nuisance action against a travel agency, computer lessor and computer manufacturer alleging that radiation from the computer installed in the travel agency had interfered with reception of display televisions at the appliance store thus causing a nuisance and interfering with prospective contractual relations. The Supreme Court held that the jury could find that a nuisance existed, that there was no showing of intent to injure as required for showing of interference with contractual relations, and that the agreement between the manufacturer and the lessor waived the lessor's right to indemnity. The Court cited general principles governing consideration of nuisance claims: one's use of property should not unreasonably interfere with or disturb a neighbor's comfortable and reasonable use and enjoyment of his/her estate. A fair test of whether the operation of a lawful trade or industries constitutes a nuisance is the reasonableness of conducting it in the manner, at the place, and under the circumstances shown by the evidence. Each case turns on its own facts and ordinarily the ultimate issue is one of fact, not law. The existence of a nuisance is not affected by the intention of its creator not to injure anyone. Priority of occupation and location is a circumstance or considerable weight.

TORTS: CHILD ABDUCTION

Wood v. Wood, 338 N.W.2d 123 (Iowa 1983).

The issue in this case was whether a claim for damages may be asserted against a parent who has refused to return the parties' child within the time provided in the dissolution decree. The real question was whether Iowa should adopt Restatement (2d) of Torts §700 (1977) which provides as follows: "Section 700 causing minor child to leave or not to return home. One who, with knowledge that the parent does not consent, abducts or otherwise compels or induces a minor child to leave a parent legally entitled to its custody or not to

return to the parent after it has been left him, is subject to liability to the parent."

The Restatement Rule permits suits by parents against non-custodial parents as well as non-relatives: "C. When both parents entitled to custody and earnings. When the parents are by law jointly entitled to the custody and earnings of the child, no action can be brought against one of the parents who abducts or induces the child to leave the other. When by law only one parent is entitled to the custody and earnings of the child, only that parent can maintain an action under the rule stated in this section. One parent may be liable to the other parent for the abduction of his own child if by judicial decree the sole custody of the child had been awarded to the other parent."

The Court concluded that Iowa should follow the majority of jurisdictions by recognizing and applying §700 of the Restatement. The Court indicated in dicta that all damages suffered by the plaintiff as a consequence of the wrongful conduct may be recovered in a tort action including punitive damages in some instances, and any person who assists the defendant-parent in the abduction, retention or concealment of the child may conceivably be held liable. The Court felt that this alternative was superior to other alternatives such as the Uniform Child Custody Jurisdiction Act, kidnapping or contempt. The Court noted that "a tort suit will be more likely to effect a speedy return of the child; it will result in better cooperation by a potential third-party defendant seeking to avoid the suit; potential punitive damages will serve as an additional deterrent; and increased knowledge of a child's whereabouts will result in the broad scope of civil case discovery."

This case summary was also included above in the FAMILY LAW section.

TORTS: CONVERSION

Ottumwa Production Credit Association v. Keoco Auction, 347 N.W.2d 393 (Iowa 1984).

A P.C.A. brought a conversion action against an auctioneer for selling hogs in which the P.C.A. claimed a security interest.

The Supreme Court held that an auctioneer who sells property covered by a security interest is liable for conversion even though he is unaware of seller's lack of authority to sell.

The Court went on to state, however, that a security interest can be waived by prior course of conduct in allowing the borrower to sell livestock.

Accordingly, where the P.C.A. expressly consented to the sale by directing the borrower to liquidate his inventory, including the hogs sold by the auctioneer, and to apply the proceeds on his loan and where it was clear this was to be done by the borrower through normal sale channels and not by the P.C.A. through its enforcement procedures, the P.C.A. expressly waived its security interest.

TORTS: EMOTIONAL HARM

Oberreuter v.O'Ryan Industries, Inc., 342 N.W.2d 492 (Iowa 1984).

This case involves an interlocutory appeal from a ruling sustaining a motion to dismiss where the plaintiff sought to expand the holding in Barnhill v. Davis by asking the Court to recognize her claim for negligent infliction of emotional distress arising out of injuries to her husband and son even though she was neither a witness nor a bystander to the injury-causing incident. The Supreme Court held that Barnhill stakes out the parameters of plaintiff's causes of action for negligent infliction of emotional distress based on alleged tortious injuries to her husband and to her son. The Barnhill elements of geographic nearness and contemporaneous perception are required to ensure that the plaintiff will have been subject to the added shock required to sustain the cause of action. Since those elements are lacking in this case, the Court affirmed the motion to strike the claim for negligent infliction of emotional distress. In doing so, the Court stated: "To eliminate them now as requirements for recovery would surely launch a 'first excursion into the fantastic realm of infinite liability.'"

This case was brought by a father and son burned when a citizens band antenna they were handling came near to or in contact with an electrical transmission line; a son who was a bystander; and this plaintiff wife and mother who asserts claims based on loss of consortium and negligent infliction of emotional harm. Plaintiff argued she was a reasonably foreseeable and direct victim of defendant's allegedly negligent acts, to whom defendants owed a duty of care, despite the fact that she was neither a witness nor a bystander when her husband and son sustained the injuries.

Beeck v. Aquaslide 'n' Dive Corp., 350 N.W.2d 149 (Iowa 1984).

Plaintiff fractured his neck when he went down a slide into a swimming pool while attending a social event sponsored by his employer in Davenport. He has since been a quadraplegic. Plaintiff and his wife filed an action in Federal Court alleging that Aquaslide designed and manufactured the slide involved in the accident. After investigation by its insurance companies, Aquaslide stated in its answer to plaintiffs' petition and again in answers to interrogatories that it manufactured the slide.

The statute of limitations for plaintiffs' suit would expire on a personal injury claim on July 15, 1974. In February 1975, Aquaslide President Carl Meyer discoverd that the slide had not been manufactured by Aquaslide. Aquaslide then received permission to amend its answer in Federal Court to deny that it manufactured the slide. A separate trial was held on the issue of the identity of the manufacturer, and the jury found that Aquaslide did not manufacture the slide. The Federal Court then dismissed the action against Aquaslide on motion for summary judgment.

Plaintiffs appealed the Federal action and subsequently brought an action in Iowa District Court against Aquaslide and its insurance carrier, Employers Mutual Casualty Company, alleging theories of fraud and misrepresentation based upon Aquaslide's assertion that it had manufactured the slide. Aquaslide filed a cross-claim for contribution against Employers Mutual. After summary judgment was granted in favor of all defendants at the District Court level, plaintiffs appealed, and the Supreme Court held that plaintiffs had "at least generated an issue of fact on whether Meyer, on behalf of Aquaslide, recklessly misrepresented to them that the slide was an Aquaslide." Beeck v. Kapalis, 302 N.W.2d 90, 96 (Iowa 1981).

On remand, the trial court found for plaintiffs and entered judgment in excess of three million dollars. The court also dismissed Aquaslide's cross-claim for contribution against Employers Mutual.

In its previous opinion, the Supreme Court held that a party making reckless misrepresentations during litigation is not immune from civil liability for damages. Beeck v. Kapalis, 302 N.W.2d 90, 96 (Iowa 1981). To establish their subsequent cause of action for fraud against Aquaslide, the Beecks had to prove each of the following elements of fraud by a preponderance of clear, satisfactory and convincing evidence: (1) a material misrepresentation; (2) made

knowingly (scienter); (3) with intent to induce the plaintiff to act or refrain from action; (4) upon which the plaintiff justifiably relies; (5) with damages. Beeck, 302 N.W.2d at 94. The elements of materiality and misrepresentation were not contested. The elements of damages was addressed in the DAMAGES section.

The requirements of scienter and intent to deceive are closely related and are established not only when the speaker has actual knowledge of the falsity of his or her representations but also when he or she speaks in reckless disregard of whether the representations are true or false. The trial court found that the conduct of Aquaslide's president, Carl Meyer, was sufficiently reckless to permit the implication of the elements of scienter and intent. The Supreme Court held that the trial court's finding of recklessness had substantial evidentiary support. The evidence established that Meyer knew of the misidentification problem, realized that the adjusters and attorneys were ignorant of the problem but did not apprise them of the problem. The Court also held that the trial court's finding of reliance by the plaintiffs on Aquaslide's misrepresentations had sufficient evidentiary support.

Regarding the elements of damages, Aquaslide argued that plaintiffs could not have obtained a judgment against the true manufacturer based on these facts, that such a judgment was not shown to be collectable if obtained and that Aquaslide was therefore not liable for damages. The Beecks made no attempt to show that a judgment against the true manufacturer would have been collectable. They argued that such a showing would have been impossible and that Aquaslide did not preserve the issue for review.

The Supreme Court held that Iowa law required the Beecks to introduce substantial evidence from which the trier of fact could reasonably find that if the Beecks had obtained judgment against the original manufacturer, the judgment would have been collectable in full or could reasonably find the portion that would be collectable.

The Court gave two reasons for refusing to accept the Beecks' argument on the impossibility of proving collectability: "One is that the required showing of whether a judgment would or would not be collectable through assets or insurance is not usually impossible in fact, under modern discovery techniques. I.R.C.P. 122(b), 131, 140(a), 147(a) and (e). The other reason is that a judgment against the present defendant, Aquaslide, should in no event be granted unless substantial evidence shows a judgment in the underlying suit would be collectable in whole or ascertainable in part .

. . The result is not different because the present case is based on reckless misrepresentation."

The Court also noted that Aquaslide was not required to interpose the issue of collectability as an affirmative defense since collectability was an element of the plaintiffs' cause of action. Aquaslide's trial brief properly argued the absence of proof that a judgment against the actual manufacturer would be collectable. The trial court did not incorporate this view in its decision, and Aquaslide moved under I.R.C.P. 179(b) to enlarge its conclusions. The Court overruled this motion. In holding that error was preserved, the Supreme Court distinguished Baker v. Beal, 225 N.W.2d 106 (Iowa 1957), where the defendants did not raise the collectability issue until appeal. The Court also noted that Aquaslide did not transform the issue into an affirmative defense by raising it for the first time on appeal. The Court concluded, however, that a new trial should be held on the issue of collectability. The reasoning for this decision was the Court's understanding that the Beecks "did believe the damage issue [as remanded by the Court in Beeck v. Kapalis, 302 N.W.2d 90 (Iowa 1981)] was established by proof of their own injuries."

See the DAMAGES, FAMILY LAW, INTEREST, LIMITATION OF ACTIONS and PRODUCTS LIABILITY sections for further summaries related to this case.

TORTS: Iowa Tort Claims Act

Adam v. Mt. Pleasant Bank & Trust Co., 340 N.W.2d 251 (Iowa 1983).

The plaintiffs are farmers who lost grain when the Prairie Grain Company of Stockport went bankrupt. They brought the action against the State and other parties to recover the value of their grain, characterizing their action against the State as a negligence claim based on breach of statutory duties involving licensing, inspection, bonding and general regulation of grain companies by the State Commerce Commission. The State moved for summary judgment characterizing the action as based on misrepresentation and thus subject to an exception to the State's waiver of sovereign immunity under the Iowa Tort Claims Act.

The Court held that the misrepresentation exception in the Iowa Tort Claims Act did not bar the action against the State by the farmers when the damages were sustained as a proximate result of the breach of statutory duties outlined above, not on a negligent or intentional communication of misinformation on which the recipient relies.

TORTS: Iowa Tort Claims Act

Hoctel v. State, 343 N.W.2d 832 (Iowa 1984).

In this case, the Supreme Court held that the Iowa Tort Claims Act does not permit actions against the State based solely on the theory of strict liability. The plaintiffs in this case brought an action against the State of Iowa to recover for injuries incurred by their minor daughter after she received an immunization shot provided by the State. The petition was grounded solely in a strict liability cause of action, and the trial court granted the State's motion to dismiss.

Under Iowa Code §25A.2(5)(b) (1983), a claim is defined in part as a "negligent or wrongful act or omission." The Court looked to parallel Federal regulations interpreting the Federal Tort Claims Act: "The United States Supreme Court has consistently held that the Federal Tort Claims Act does not waive immunity for tort against the government based on strict liability . . . We think the Iowa legislature intended a similar result . . . We presume that when our legislature adopted the federal language defining permitted claims, it knew that the United States Supreme Court had excluded from that definition claims based on theories of strict liability."

TORTS: MUNICIPAL TORT CLAIMS ACT

Orr v. City of Knoxville, 346 N.W.2d 507 (Iowa 1984).

In this case, a husband and wife brought an action against the City of Knoxville for the husband's injuries arising from his fall into a hole located by a manhole and sewer drain on a city street. The Supreme Court held that the notice provided in a letter to the City from the husband's workers' compensation carrier was sufficient to sustain the husband's action under the Municipal Tort Claims Act. The Court reasoned: "Our practice has been to examine the notice given in light of the statute's purpose: to provide a method for prompt communication of the time, place and circumstances of the injury in order to afford the prospective defendant the opportunity to investigate while the facts are fresh."

The Court noted that the letter from the insurance company to the City more than satisfied the minimum notice requirement set forth in Cook v. City of Council Bluffs, 264 N.W.2d 784 (Iowa 1978): it provided the name of the injured party, his employer, and the date, general nature and place of accident. It alerted the City that medical expenses had been and would be sustained.

The Court refused to hold, however, that the wife's consortium claim was protected by the notice.

This case summary was also included above in the MUNICIPAL CORPORATIONS section.

TORTS: PARENTAL IMMUNITY

Wagner by Griffith v. Smith, 340 N.W.2d 255 (Iowa 1983).

In this landmark case, the Supreme Court held that children may not recover from their parents for injuries caused by the negligence of their parents in supervising them.

When the Court abrogated the doctrine of absolute parental immunity in tort actions in Turner v. Turner, 304 N.W.2d 786 (Iowa 1981), it expressly reserved the question of whether immunity should continue to exist in areas of parental authority and discretion. In this case, the defendant allowed his four-year-old son to enter a silo which was being emptied. The boy's leg somehow became entangled in a grain auger, and the auger amputated his leg a few inches below the hip. The son sued his father through a next friend alleging his father had a duty to exercise due care for him and that he did not do what an ordinarily reasonably prudent person - taking into account the parent/child relationship - would have done under certain circumstances.

The Court held that a parent is immune from liability for alleged negligent acts emanating from the parent/child relationship if the act involves an exercise of: (1) parental authority over the child; or (2) parental discretion in respect to the provisions of food, clothing, shelter, education, medical and dental services, and other care.

The rationale offered for this opinion is that the amount otherwise spent by parents for the care and rehabilitation of their child would be depleted by the money the parents lose in defending either an indemnity action by a third-party tort feasor or a direct action brought by a next friend for their child. The Court also dismissed the possibility of liability insurance as a factor to be considered and concluded by saying, "We also think parenting is too subjective and too personal a matter to lend itself to a 'reasonably prudent' tort standard."

This case summary was also included above in the FAMILY LAW section.

TORTS: WRONGFUL BIRTH

Nanke v. Napier, 346 N.W.2d 520 (Iowa 1984).

The sole question presented in this case was whether, under Iowa law, the parent of a normal, healthy child may maintain an action to recover the expense of rearing that child from a physician whose alleged negligence in performing a therapeutic abortion permitted the birth of the child. The Supreme Court affirmed the trial court ruling that such expenses may not be recovered.

The Supreme Court adopted the majority approach and concluded that the cost of rearing a normal, healthy child cannot be recovered as damages to the parent or parents: "This conclusion is based on the public policy of Iowa which dictates that a parent cannot be said to have been damaged or injured by the birth and rearing of a normal, healthy child because the invaluable benefits of parenthood outweigh the mere monetary burdens as a matter of law . . . We hold only that the parent of a normal, healthy child may not maintain an action to recover the expenses of rearing that child from a physician whose alleged negligence in performing a therapeutic abortion permitted the birth of such child.

This case summary was also included above in the FAMILY LAW section.

TRIAL: BURDEN OF PERSUASION - FIDUCIARY DUTY

Clinton Land Co. v. M/S Associates, Inc., 340 N.W.2d 232 (Iowa 1983).

This case involved a real estate broker who brought a claim for commission against the seller of a motel. The sellers argued in defense that the broker engaged in fraudulent misrepresentation.

Because of the fiduciary relationship between the broker and the principal, the broker bears the burden of persuasion when the principal produces substantial evidence of self-dealing or breach of stewardship. The broker owes the principal a duty of undivided honesty, loyalty and disclosure. The Supreme Court held that in this case, however, the burden was rightly left with the seller notwithstanding the fiduciary nature of the relationship because the seller's showing did not include sufficient evidence of self-dealing or breach of stewardship.

TRIAL

Kroblin v. RDR Motels, Inc., 347 N.W.2d 430 (Iowa 1984).

Corporations which owned and operated a motel in which they sold their corporate stock brought declaratory judgment action seeking a determination of the purchase price to be paid by the purchaser. The District Court Judge determined the principal amount owed to the sellers under the contract of purchase and filed a one-page decision on July 24, 1981. The buyer then filed post-trial motions asserting specific grounds for relief. Twenty-two months after the motions were filed, the trial court orally requested that the seller's attorney prepare orders denying the motion. The seller's attorney did so and mailed the orders to the court, sending a copy of his cover letter to the buyer's attorney but not copies of the proposed orders. The trial court then signed and filed those orders.

The Supreme Court held that in those cases where the trial court asks counsel to assist in the preparation of findings and conclusions, this request should be made at or soon after the submission of the case and prior to decision and should be made of both sides. "We further emphasize that in fairness all parties should be given the same opportunity to submit proposed findings and to comment on findings proposed by others."

(Since the buyer on appeal did not contend that any particular finding of fact or conclusion of law proposed by seller's counsel and adopted by the court was unsupported by the evidence or incorrect, the buyer was not harmed by being deprived of its right to submit its own proposed rulings and comment on those suggested by the seller's counsel.)

WORKERS' COMPENSATION

George H. Wentz, Inc. v. Sabasta, 337 N.W.2d 495 (Iowa 1983).

An employee hired in South Dakota was injured while working in Nebraska and was paid workers' compensation for forty-five (45) weeks from the State of Nebraska. This employee petitioned for an award of benefits under the Iowa Workers' Compensation Act.

The Supreme Court held that a claim may recover only if employment was principally localized in Iowa. Accordingly, where the claimant was hired in South Dakota and injured in Nebraska working for a Nebraska corporation, employment was not principally localized in Iowa, and Iowa Industrial

Commissioner lacked subject matter jurisdiction to award the claimant Iowa Workers' Compensation benefits under §85.71(1).

WORKERS' COMPENSATION

Dameron v. Newmann Bros., Inc., 339 N.W.2d 160 (Iowa 1983).

The narrow question on this appeal was whether Howell Dameron should be allowed to receive in one comminuted lump sum payment the lifetime workers' compensation benefits awarded to him in a decision of the Iowa Industrial Commissioner. The Court adopted the guidelines set forth in Diamond v. Parsons Co., 256 Iowa 915, 129 N.W.2d 608 (1964) as the proper factors to be considered by the Industrial Commissioner in determining whether commutation is proper. The Court reconsidered Diamond because the Iowa Code had been amended to provide that the Industrial Commissioner rather than a court of equity should decide whether to allow commutation; and also because the adoption of the Iowa Administrative Procedure Act delineates the standards for Courts to apply when reviewing administrative decisions.

The Court refused to adopt the reasoning of Arthur Larsen in his Treatise, Workman's Compensation Law, that the best interest of the injured worker is too broad a guideline to be applied in commutation cases. The Court found that the Commissioner's approval of commutation was supported by substantial evidence that commutation was in the best interests of the claimant.

WORKERS' COMPENSATION

Seivert v. Resnick, 342 N.W.2d 484 (Iowa 1984).

See full case summary in the CONSTITUTIONAL LAW section.

WORKERS' COMPENSATION

Glenn v. Farmland Foods, Inc., 344 N.W.2d 240 (Iowa 1984).

This case involves an action brought by an employee against his employer and a supervisory co-employee alleging their "gross negligence amounting to wanton neglect" which caused a work-related injury.

The issue in this case was whether the 1974 amendment to the Workers' Compensation Law nullified prior

cases which interpreted Iowa Code §85.20 to prohibit an employee from suing his/her employer for damages.

The Court held that the statutory immunity remained unchanged for employers under the 1974 amendment; the amendment created no new cause of action against the employer flowing from an allegation of co-employee gross negligence. "Our interpretation is supported both by the language of the present statute and by its legislative history."

WORKERS' COMPENSATION

Thompson v. Stearns Chemical Corp., 345 N.W.2d 131 (Iowa 1984).

See full case summary in the PRODUCTS LIABILITY section.

WORKERS' COMPENSATION

Carlson v. Carlson, 346 N.W.2d 525 (Iowa 1984).

In this case, the employee of a partnership brought an action against an individual partner alleging that the individual partner's negligence caused injury to the employee's hand. The Supreme Court held that since the employee had received and accepted workers' compensation benefits and the partner was an "employer" of the partnership's employees, the rights of the injured employee were limited by statute to workers' compensation.

WRONGFUL DEATH

Jacobson v. Union Story Trust & Savings Bank, 338 N.W.2d 161 (Iowa 1983).

See full case summary in the CIVIL PROCEDURE section.

WRONGFUL DEATH

Edwards v. City of Des Moines, 349 N.W.2d 786 (Iowa App. 1984).

See full case summary in the EVIDENCE section.

THE NEW ABA ETHICS CODE
SPECIAL PROVISIONS OF INTEREST TO DEFENSE ATTORNEYS

By
David L Phipps
Whitfield, Musgrave, Selvy, Kelly & Eddy
1300 United Central Bank Bldg
Des Moines, Iowa 50309-4173

A) ABA Model Rules of Professional Conduct adopted August, 1983 -- not yet adopted by Iowa Bar Association.

B) Model Rules are not designed to be the basis of civil liability but may be considered as evidence of the standard required of attorneys.

C) Rule 1.3 requires the lawyer to be diligent and prompt.

D) Rule 1.4 demands that the lawyer keep the client "reasonably informed" about the status of the matter and to respond to inquiries promptly."

E) The Rules establish new procedures for defense attorneys.

I) The lawyer may be paid by one party to represent another so long as precautions assure the independent judgment of the attorney. Rule 1.7

a) No involvement in coverage questions;

b) Duty not to report information adverse to insured to company on coverage issues;

c) No improper insurance company restrictions or limitations on necessary trial preparation or representation.

II) The lawyer shall not reveal information unless the client consents after "consultation" except as "impliedly authorized" to carry out the representation. Rule 1.6

III) The lawyer shall not accept compensation from someone other than the client unless:

a) The client "consents after consultation." Consultation" consists of the "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question" and would include discussion of:

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1) Potential conflicts of interest;

2) Counsel's obligation to report information;

3) The nature of the tripartate relationship.

b) There is no interference with the lawyers independence of professional judgment.

c) Information regarding the client is appropriately protected as required by Rule 1.6. Rule 1.8(f)

F) Practical questions for the defense attorney

I) How do you document all these factors?

II) How do you accomplish the "consultation" at a meaningful time?

III) What is the effect of adequate limits?

IV) Are there "reasonable" restrictions on representation?

V) What actions should we take as an organization to insure the adoption of acceptable standards?

See Appendix

APPENDIX

RULE 1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Comment

The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing

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or legally damaging subject matter.

The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

Authorized Disclosure

A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is

inhibited.

Several situations must be distinguished.

First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.2(d). Similarly, a lawyer has a duty under Rule 3.3(a)(4) not to use false evidence. This duty is essentially a special instance of the duty prescribed in Rule 1.2(d) to avoid assisting a client in criminal or fraudulent conduct.

Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(d), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.

Third, the lawyer may learn that a client intends prospective conduct that is criminal and likely to result in imminent death or substantial bodily harm. As stated in paragraph (b)(1), the lawyer has professional discretion to reveal information in order to prevent such consequences. The lawyer may make a disclosure in order to prevent homicide or serious bodily injury which the lawyer reasonably believes is intended by a client. It is very difficult for a lawyer to "know" when such a heinous purpose will actually be carried out, for the client may have a change of mind.

The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to take preventive action permitted by paragraph (b)(1) does not violate this Rule.

Withdrawal

If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).

After withdrawal the lawyer is required to refrain from making disclosure of the clients' confidences, except as otherwise provided in Rule 1.6. Neither this rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

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the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

Lawyer's Interests

The lawyer's own interests should not be permitted to have adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See Rules 1.1 and 1.5. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Conflicts in Litigation

Paragraph (a) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (b). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met. Compare Rule 2.2 involving intermediation between clients.

Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For

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example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

Interest of Person Paying for a Lawyer's Service

A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

Other Conflict Situations

Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

For example, a lawyer may not represent multiple parties to

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a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved.

A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

Conflict Charged by an Opposing Party

Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See Scope.

Model Code Comparison

DR 5-101(A) provided that "[e]xcept with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of the client will be or reasonably may be affected by his own financial, business, property, or personal interests." DR 5-105(A)

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provided that a lawyer "shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C). DR 5-105(C) provided that "a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each." DR 5-107(B) provided that a lawyer "shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such services."

Rule 1.7 clarifies DR 5-105(A) by requiring that, when the lawyer's other interests are involved, not only must the client consent after consultation but also that, independent of such consent, the representation reasonably appears not to be adversely affected by the lawyer's other interests. This requirement appears to be the intended meaning of the provision in DR 5-105(C) that "it is obvious that he can adequately represent the client, and was implicit in EC 5-2, which stated that a lawyer "should not accept proffered employment if his personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client."

RULE 1.8 CONFLICT OF INTEREST: PROHIBITED TRANSACTONS

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation.

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(c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client consents after consultation;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

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(i) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien granted by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

Comment

Transactions Between Client and Lawyer

As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

A lawyer may cccept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide. Paragraph (c) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

Literary Rights

An agreement by which a lawyer acquires literary or media

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rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a trasaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraph (j).

Person Paying for a Lawyer's Services

Paragraph (f) requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.6 concerning confidentiality and Rule 1.7 concerning conflict of interest. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure.

Limiting Liability

Paragraph (h) is not intended to apply to customary qualifications and limitations in legal opinions and memoranda.

Family Relationships Between Lawyers

Paragraph (i) applies to related lawyers who are in different firms. Related lawyers in the same firm are governed by Rules 1.7, 1.9, and 1.10. The disqualification stated in paragraph (i) is personal and is not imputed to members of firms with whom the lawyers are associated.

Acquisition of Interest in Litigation

Paragraph (j) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. This general rule, which has its basis in common law champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these Rules, such as the exception for reasonable contingent fees set forth in Rule 1.5 and the exception for certain advances of the costs of litigations set forth in paragraph (e).

Model Code Comparison

With regard to paragraph (a), DR 5-104(A) provided that a lawyer "shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the

protection of the client, unless the client has consented after full disclosure. EC 5-3 stated that a lawyer "should not seek to persuade his client to permit him to invest in an undertaking of his client nor make improper use of his professional relationship to influence his client to invest in an enterprise in which the lawyer is interested.

With regard to paragraph (b), DR 4-101(B)(3) provided that a lawyer should not use "a confidence or secret of his client for the advantage of himself, or of a third person, unless the client consents after full disclosure."

There was no counterpart to paragraph (c) in the Disciplinary Rules of the Model Code. EC 5-5 stated that a lawyer should not suggest to his client that a gift be made to himself or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or overreached the client. If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that the client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client."

Paragraph (d) is substantially similar to DR 5-104(B), but refers to "literary or media rights, a more generally inclusive term than "publication" rights.

Paragraph (e)(1) is similar to DR 5-103(B), but eliminates the requirement that "the client remains ultimately liable for such expenses.

Paragraph (e)(2) has no counterpart in the Model Code.

Paragraph (f) is substantially identical to DR 5-107(A)(1).

Paragraph (g) is substantially identical to DR 5-106.

The first clause of paragraph (h) is similar to DR 6-102(A). There was no counterpart in the Model Code to the second clause of paragraph (h).

Paragraph (i) has no counterpart in the Model Code.

Paragraph (j) is substantially identical to DR 5-103(A).

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SUGGESTED LETTER TO INSURED UPON ASSIGNMENT OF DEFENSE FROM INSURANCE COMPANY

Re: Connie Claimant v. Dennis Defendant
Iowa District Court, Polk County #16227

Dear _____:

As you may know, we have been asked by ABC Insurance Company to represent you in the above-captioned case. We are pleased to be asked to represent your interests but wish to clarify certain matters regarding the nature of our representation to be sure that we all understand the situation.

We understand the company's request to represent you to mean that you would be our primary client and we would be expected to protect your interests in the lawsuit. The insurance company, however, will be paying the expenses of your representation. Consequently, we will have some responsibility to the insurance company also. For example, the insurance company will expect us to report to them the status of the case from time to time, the information developed during the discovery aspect of the case or the investigation and any settlement discussions.

All parties to this arrangement should also understand, however, that in any situation where one party is being represented at the expense of another there is the potential for conflicts of interest to arise. If, for example, the discovery in this case should develop facts which create a question as to whether or not your insurance policy actually provides coverage for the loss alleged by Plaintiff, we would be required to protect your interest. We would not relay those facts to the insurance company (except for statements made by yourself or other witnesses in depositions, testimony, or other public statements) but we would advise the company of the existence of a possible conflict of interests so that they could conduct their own investigation.

(In case of multiple defendants) Likewise, the fact that we have been asked to represent more than one defendant provides for the possibility of conflicts of interests as the case develops. If we become aware of facts which would indicate the existence of a conflict of interest between the various defendants then we would have to divulge the existence of such a conflict. We may not, however, be able to divulge the nature of the conflict

because to do so might prejudice one of you. If we could not resolve such a conflict of interest then we would have to withdraw from representing each (or all) of you and you would have to get a different lawyer.

I apologize for the formailty of this letter but it is important that we all understand the nature of our representation. If you have any questions about our representation or the factors discussed above, please feel free to give me a call. If I do not hear from you within 10 days from the date of this letter, I will assume that you wish us to represent you under these guidelines. We look forward to working with you, and would remind you that you should not discuss any aspect of this case with anyone except a representative of this office or of ABC Insurance Company. I would also appreciate it if you would keep me apprised at all times of your current address and telephone number in case we need to contact you.

Thank you very much for your consideration in this matter.

Sincerely,

_____

Attorney at Law

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