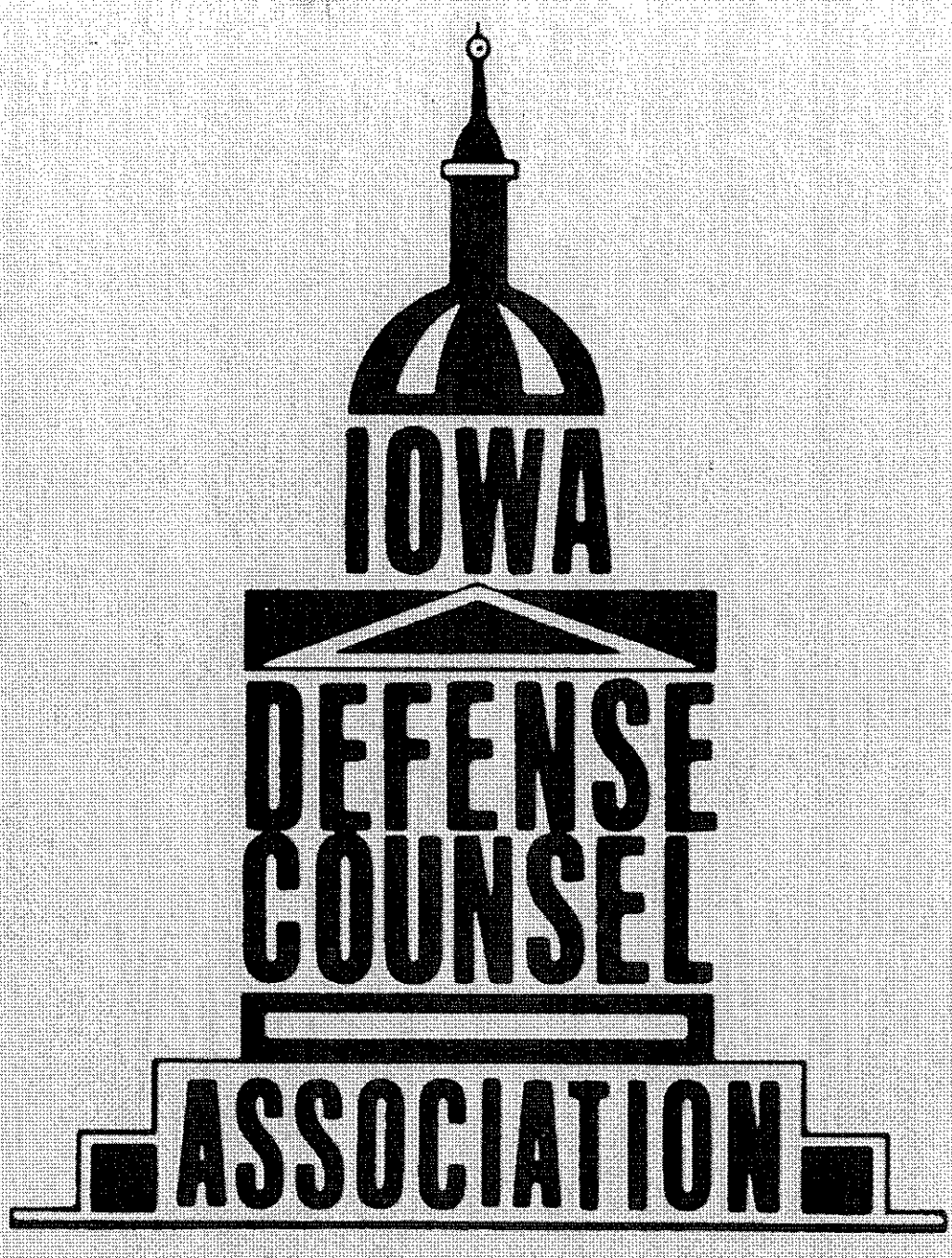

1987 Annual Meeting

OCTOBER 8, 9 & 10, 1987
RAMADA AIRPORT HOTEL
DES MOINES, IOWA

OFFICERS AND DIRECTORS
1985-1986

PRESIDENT
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Des Moines, Iowa 50309

PRESIDENT - ELECT
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Des Moines, Iowa 50309

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Cedar Rapids, Iowa 52006

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West Des Moines, Iowa 50265

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(Date is Term Expiration Date)

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Dubuque, Iowa 52001

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Sioux City, Iowa 51102

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700 Davenport Bank Bldg
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623 Second Street
Webster City, Iowa 50595

*Edward J. Kelly, 1977-1978

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

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200 Home Federal Building
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* Albert D. Vasey (Hon.) 1983

Harold R. Grigg, 1983-1984
1521 Elm Avenue
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807 American Building
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Claire F. Carlson, 1985-1986
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Edward F. Seitzinger
General Program Chairperson

Thomas D. Hanson
Program Chairperson

* Deceased

1987 Annual Meeting

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THURSDAY, OCTOBER 8, 1987

7:00 a.m.

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8:00 a.m.

REGISTRATION

8:45-9:00 a.m.

REPORT OF ASSOCIATION

9:00-10:00 a.m.

ANNUAL WORKERS' COMPENSATION UPDATE
LORRAINE MAY
Duncan, Jones, Riley & Finley
Des Moines, Iowa

10:00-10:15 a.m.

COFFEE BREAK

10:15-11:00 a.m.

DEFENDING CORPORATE CLIENTS AND OFFICERS IN CRIMINAL CASES
RAYMOND ROSENBERG
Rosenberg, Rosenberg & Rosenberg
Des Moines, Iowa

11:00-12:00 a.m.

FDIC PRACTICES AND PROCEDURES IN CLOSED BANKS
MICHAEL NOYES
Rehling, Lindburg & Gosma
Davenport, Iowa

12:00-1:30 p.m.

LUNCHEON
GEORGE G. FAGG
Judge U.S. Court of Appeals
Des Moines, Iowa

1:30-2:30 p.m.

EVALUATING THE EMPLOYMENT DISCRIMINATION CASE
MARK BENNETT
Babich, Bennett & Nickerson
Des Moines, Iowa

2:30-3:30 p.m.

CURRENT ISSUES IN INSURANCE COMPANY REGULATION
WILLIAM HAGER
Commissioner of Insurance
Des Moines, Iowa

3:30-3:45 p.m.

COFFEE BREAK

3:45-4:45 p.m.

IMMUNITIES IN IOWA, IF ANY
ROGER LATHROP
Betty, Neuman & McMahon
Davenport, Iowa

FRIDAY, OCTOBER 9, 1987

(Morning Session)

OUTSIDE COUNSEL

8:30-9:30 a.m.

UNINSURED AND UNDER INSURED MOTORIST CLAIMS
MARK TRIPP
Bradshaw, Fowler, Proctor & Fairgrave
Des Moines, Iowa

9:30-10:00 a.m.

GREETINGS FROM NATIONAL ASSOCIATIONS

10:00-10:15 a.m.

COFFEE BREAK

10:15-11:00 a.m.

LAW OF CLOSING STATEMENT
(T) ALAN E. FREDREGILL
Eidsmoe, Heidman, Redmond
Fredregill, Patterson & Schatz
Sioux City, Iowa

11:00-12:00 a.m.

RECENT AND EXPECTED CHANGES IN RULES RELATING TO IOWA CIVIL PRACTICE
DAVID WALKER
Dean, Drake University Law School
Des Moines, Iowa

INSURANCE COMPANY REPRESENTATIVES

8:30-9:15 a.m.

ADJUSTMENT OF CREDITOR CLAIMS TO PROPERTY INSURANCE PROCEEDS
JAMES PUGH
Morain, Burlingame, Pugh, Juhl & Peyton
West Des Moines, Iowa

9:15-10:00 a.m.

SELECTED ISSUES IN HANDLING IOWA UNINSURED AND UNDER INSURED MOTORIST CLAIMS
(T) DENNIS DAY
Grinnell Mutual Reinsurance Co.
Grinnell, Iowa

10:00-10:15 a.m.

COFFEE BREAK

10:15-11:00 a.m.

INVESTIGATION AND ADJUSTMENT OF ARSON CLAIMS
ROBERT BURELL
Borgelt, Powell, Peterson & Frauen, S.C.
Milwaukee, Wisconsin

11:00-11:45 a.m.

CONTROLLING DEFENSE COSTS WHEN POSSIBLE POLICY DEFENSES ARE AVAILABLE
EUGEN J. CONNOR
Allied Insurance Group
Des Moines, Iowa

11:45-12:00 a.m.

PANEL DISCUSSION

(Afternoon Session)

12:00-1:30 p.m.

LUNCHEON
HONORABLE JERRY L. LARSON
Iowa Supreme Court Justice
Des Moines, Iowa

1:30-2:30 p.m.

CONTRIBUTION AND INDEMNITY AFTER GOETZMAN
HENRY HARMON
Grefe & Sidney
Des Moines, Iowa

2:30-3:30 p.m.

DEFENSE CHALLENGES TO EXPERT TESTIMONY
RICHARD SAPP
Nyemaster, Goode, McLaughlin, Emery & O'Brien
Des Moines, Iowa

3:30-3:45 p.m.

COFFEE BREAK

3:45-4:45 p.m.

UNDERMINING THE VALUE OF PLAINTIFF'S CASE BY CROSS-EXAMINATION - THE SEVENTH JUROR
(T) NEIL GOLDBERG
Buffalo, New York

6:30-7:30 p.m.

COCKTAIL RECEPTION

7:30-9:30 p.m.

BANQUET
PROFESSOR ROBERT CLINTON
University of Iowa
College of Law
Iowa City, Iowa

SATURDAY, OCTOBER 10, 1987

9:00-10:00 a.m.

INSURERS SUSPENSION, REHABILITATION AND LIQUIDATION ACT, CHAPTER 507.C
KENT FORNEY
Bradshaw, Fowler, Proctor & Fairgrave
Des Moines, Iowa

10:00-10:15 a.m.

COFFEE BREAK

10:15-11:15 a.m.

ANNUAL APPELLATE COURT REVIEW
GREGORY LEDERER
Simmons, Perrine, Albright & Ellwood
Cedar Rapids, Iowa

11:15 a.m.

ANNUAL BUSINESS MEETING
Election of Officers

12:00 Noon

BOARD MEETING

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WORKERS' COMPENSATION UPDATE

LORRAINE J. MAY
DUNCAN, JONES, RILEY & FINLEY, P.C.
Fourth Floor, Equitable Building
Des Moines, Iowa 50309

A

Introduction

The following is a summary of some of the more significant developments in the law of workers' compensation within the past eighteen months. At the risk of stating the obvious, it is not all-inclusive. Furthermore, with the resignation of former Industrial Commissioner Robert Landess and the recent appointment of David Lindquist to that position, it will be interesting to monitor the decisions and rule changes coming from the agency in order to identify any markedly different approaches in the substantive and procedural law. Time will tell whether or not the change of Commissioners will have a significant impact on the practicing workers' compensation attorney, the injured parties, employers and insurance carriers.

I. RULE CHANGES

Two recent rule changes have been made by the agency. Their impact has yet to be fully measured but practitioners before the agency should be aware of their existence.

Rule 343-4.2(86) previously provided for mandatory bifurcation of 86.13 penalty issues, effective July 22, 1987, the third unnumbered paragraph of Rule 343-4.2(86) is replaced with the following:

> Entitlement to denial or delay benefits provided in Iowa Code section 86.13 shall be pled, and if pled, discovery shall be limited to matters discoverable in the absence of such pleading unless it is bifurcated. The claimant may bifurcate the denial or delay issue by filing and serving a notice of bifurcation at any time before a case is assigned for hearing, in which case discovery on that issue may proceed only after the final decision of the agency on all other issues.

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The new rule is interesting in that it gives the option to bifurcate the 86.13 penalty issue exclusively to the claimant. Furthermore, if the penalty issue is not bifurcated, it limits only discovery relevant to the 86.13 issue; it does not purport to limit introduction of evidence on the issue under any circumstances. What then is to prohibit a claimant from subpoenaing and introducing the insurer's file at the time of hearing even though it couldn't be discovered in advance? Potentially the insurer's own evaluations of the claim and its reserves are admissible in evidence under these circumstances. The potential for prejudice to the defendants which was eliminated under the previous rule has been reintroduced effective July 22, 1987.

Secondly, the second unnumbered paragraph of Rule 343-4.27 (17A, 86) was amended to provide as follows:

> ITEM 2. Amend rule 343-4.27(17A,86) second unnumbered paragraph to read as follows:
>
> No appeal shall be separately taken under this or 4.25(17A,86) from an interlocutory decision, order or ruling of a deputy industrial commissioner. A decision, order or ruling is interlocutory if it does not dispose of the contested case, unless the sole issue remaining for determination is claimant's entitlement to additional compensation for unreasonable denial or delay of payment pursuant to Iowa Code section 86.13.

Again, the impact of the new rule has yet to be fully appreciated. However, the claimant may not ultimately approve of the rule as written and applied although the language itself is not markedly different from the previous rules. It is not atypical for a wide variety of issues to be raised in a single contested case. Assume, for example, that the employer and insurance company deny liability and question whether or not the injury arose out of and in the course of employment. The claimant sues for healing period benefits, permanent partial disability and medical benefits pursuant to Iowa Code §85.27. Assume also that the claimant needs surgery and will experience a lengthy healing period of six months or more. Given the rule as written, the claimant may not be able to selectively litigate the case by trying the 85.27 and healing period issues so that the claimant can have surgery and receive healing period benefits during recuperation and then reserve the permanent partial disability issue because, even if the Deputy finds in favor of the claimant, the defendants cannot appeal the decision until ALL of the issues raised in the contested case proceeding (including permanency) can be resolved. In effect, ultimate resolution of the claim and payment to the claimant might be substantially delayed.

Furthermore, it should be noted that beginning in 1987, Releases, Receipts, Satisfactions, and Dismissals which accompany settlement papers will no longer be filed. prior to March 1, 1987 they were returned to the sender; thereafter, they are simply destroyed.

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II. 'FILING' AN APPEAL WITHIN THE AGENCY

Does a notice of appeal from a Deputy's decision or order have to be received at the agency within the twenty-day appeal period or is mailing now considered 'filing' for the purpose of perfecting an appeal to the Industrial Commissioner? As noted by Deputy Industrial Commissioner Thomas J. McSweeney in a paper recently prepared for a speech he will be giving at the October, 1987 I.A.W.C.L. Seminar, effective July 1, 1987 mailing is considered filing for intraagency appeal purposes. According to Deputy Industrial Commissioner McSweeney, an internal memo to agency personnel dated June 24, 1987 reads in relevant part as follows:

> House File 193, signed by the Governor, requires that requests or demands for a contested case proceeding be in writing and that they are deemed to be filed with the agency on the date of the U.S. postal service postmark or the date of personal service.
>
> Therefore, in compliance with this new legislation, all envelopes accompanying all types of petitions will be saved, file stamped on the date of receipt into this office, and stapled to the appropriate petition. Do not stamp over the envelope postmark. This date must be clearly visible. The petitions will continue to be stamped as usual.

All hand delivered petitions without envelopes will be stamped "Hand Delivered No Envelope," and initialed by the front desk handler.....

House File 193 of the 1987 session legislatively overruled Miller v. Civil Constructors, 373 N.W.2d 115 (Iowa 1985).

III. HEARING LOSS--IOWA CODE CHAPTER 85B

Iowa Code Chapter 85B was adopted in 1981, but the first appellate interpretations of the law were just handed down by the Iowa Supreme Court this summer. Chapter 85B is designed to compensate for occupational hearing loss and the statute itself contains rather detailed charts concerning noise exposures. Given the charts and detailed specifications provided by the legislature, an issue was raised concerning the compensability of hearing losses resulting from exposure to noise below the intensities and for shorter periods of time than those set forth in the Code itself. In an opinion written by Justice McGiverin, the Court held that prolonged exposure at work to noise at levels below the Section 85B.5 standards may still result in a compensable occupational hearing loss. The Court noted that by adopting time and intensity exposure standards, the legislature did not intend to rule out hearing losses that do not rise to those levels, rather the legislature sought to simplify prior problems of proof by recognizing presumptive exposure levels for gradual noise-induced hearing loss. When the tables are not

implicated, the claimant must prove the loss of hearing was due to exposure at work to sound capable of producing that loss. Muscatine County v. Morrison, Supreme Ct. 86-1010, decided July 22, 1987.

A claim brought under the occupational hearing loss statute must be filed within two years after the "date of occurrence" as defined in Iowa Code §85B.8. But what is the "date of occurrence"? In John Deere Dubuque Works of Deere & Company v. Meyers, Supreme Ct. 86-385 decided August 19, 1987, the Supreme Court addressed the issue of the applicability of the discovery rule in 85B cases. The Industrial Commissioner and the District Court found that the discovery rule was applicable; the Supreme Court affirmed. If an employee exercising the diligence of a reasonable person does not discover an occupational hearing loss until after leaving a noisy work environment, the employee will have the full two-year period after discovery of the injury to file a claim for workers' compensation benefits.

IV. AGENCY JURISDICTION TO APPROVE SETTLEMENTS AFTER APPEAL

Iowa Code §86.27 provides as follows: "Notwithstanding the terms of the Iowa Administrative Procedure Act, no paraty to a contested case under any provision of the 'Workers' Compensation Act' may settle a controversy without the approval of the industrial commissioner."

An interesting question arises, therefore, if the parties agree to settle a case after a Petition for Judicial Review has been filed and is pending before the district or appellate court. Does the Commissioner retain jurisdiction to approve (or deny) the settlement or are the parties forced to pursue the appeal because of the lack of a procedural method to vest the Commissioner with authority necessary to address the issue? Apparently, at least under some circumstances, the Commissioner retains such jurisdiction. As noted by Deputy Industrial Commissioner Thomas J. McSweeney in the paper cited above.

...The answer is yes under some circumstances based on the following order authored by Chief Justice W.W. Reynoldson and filed on May 28, 1986 in Gary Fremont v. Gomaco Corporation, et al, Supreme Court No. 84-1336):

> Although ordinarily under the Iowa Administrative Procedure Act an agency's jurisdiction to act in the dispute ceases once the matter is removed by judicial review, Iowa Code section 85.35 expressly provides that the industrial commissioner's decision to approve a settlement agreement submitted under that section is final and not an original proceeding subject to judicial review in the usual manner. See Dameron v. Neumann Bros., Inc., 339 N.W.2d 160, 162 (Iowa 1983), indicating that the contested case proceeding and the proceeding involving a joint submission of written documentation to the commissioner for settlement approval are independent of each other.

Thus, action taken in an adjudicated contested case proceeding would not defeat the same parties' right to submit a settlement agreement to the commissioner in pursuit of an independent remedy. If complete relief is obtained through one of the procedures there would be no lack of jurisdiction in proceedings arising out of the other procedure, which instead would be rendered moot. Toomer v. Iowa Dept. of Job Service, 340 N.W.2d 594 (Iowa 1983). Such mootness would be the result in the present case if the commissioner were to approve the parties' proposed settlement which, under section 85.35, would be final and binding on the parties.

It is ORDERED that the pendency of this proceeding in this court for judicial review does not deprive the industrial commissioner of jurisdiction to consider a settlement proposal under Iowa Code section 85.35 relating to the same underlying injury. The parties are ordered and directed to submit their proposed settlement to the industrial commissioner as mandated by our prior order.

It is further ORDERED that our prior direction of May 2, 1986, should be considered as entered in the context of a fact situation in which the parties in their workers' compensation case have agreed to the terms of a proposed settlement while an application for further review is pending. It did not, and does not, contemplate a resubmission of the controversy.

V. CUMULATIVE INJURY

McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985) formally recognized the cumulative injury rule in Iowa. The nature of a 'cumulative injury' can perhaps best be determined by example and reference to the Supreme Court's description of the claimant's injury in McKeever:

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> ...that the original two nondisabling incidents were only the beginning of a series of hurts and that his compensable disability gradually came into being as he continued to pound with hammers and sand with vibrators over a period of time--an accumulation of traumas to the wrist. Nor is his claim founded on the development of a disease, but rather, on repeated impacts to his wrist by external forces.

McKeever at 373.

With the official recognition of the cumulative trauma claim, a number of additional issues arise. For example, when does the injury "occur" for purposes of the statutes of limitations? These and other relevant issues concerning the cumulative trauma cases were recently addressed by Deputy Industrial Commissioner Helen Jean Walleser at the Twenty-Fifth Annual Workers' Compensation Symposium on June 4-5, 1987 and I refer you to that work for a thorough analysis of these issues; however, the following are excerpts from that outline addressing what, in my experience, are the most common issues facing the workers' compensation practitioner in this area (reprinted with permission from and thanks to Deputy Industrial Commissioner Helen Jean Walleser).

A

Occurrence of injury for Time Limitation Purposes Generally.

a. Two alternatives posed:

1) Injury occurs when pain prevents the employee from continuing to work.

2) Injury occurs when pain occasions the need for medical attention.

Alternative one chosen.

"[C]learly the employee is disabled or injured when, because of pain or physical inability, he can no longer work." McKeever at 374 (citations omitted).

The court's language and the fact patterns of the cases cited in support of the selected alternative suggest that time taken from work to seek medical treatment is insufficient to establish the occurrence of an injury for statute of limitations purposes where claimant can "continue to work" while seeking medical care....ie:

> Smith's wrist pain finally com-compelled him to give up his job about May 1, 1981. We hold that he had one compensable injury, that it occurred for time limitation purposes when Smith gave up his job, and that the...statute of limitations then began to run. McKeever at 375. (Emphasis added.)

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3. Section 85.26 - Statute of Limitations

The McKeever court was presented with a straightforward section 85.26 problem, readily resolved upon choice of occurrence of the injury date. In situations such as that outlined immediately above, the court is likely to rely on Orr v. Lewis Central School District, 298 N.W.2d 256, (Iowa 1980), i.e.:

> ...The limitation period under section 85.26...began to run when the employee discovered or in the exercise of reasonable diligence should have discovered the nature, seriousness and probable compensable character of the [injury].

Orr at 261.

Where the circumstances demonstrate claimant had reason to know the work microtrauma could possible produce the claimed impairment/disability, the court would expect claimant to exercise ordinary or reasonable care in discovering the nature of his condition and in accepting medical treatment even if the treatment compelled him to leave work, that is, gainful employment, on account of his cumulative injury. Cf Mousel v. Bituminous Material & Supply Co., 169 N.W.2d 763 (Iowa 1969). This reasoning is consistent with the court's treatment of the healing period issue in McKeever. The court affirmed the commissioner in delaying healing period commencement until Smith actually had wrist fusion surgery, thereby, requiring Smith to minimize damages. Arguably, a claimant cannot delay acting on a manifest cumulative impairment/disability for such extended period that his degree of impairment/disability is far more seriously aggravated than it would have been had he diligently sought medical care, even if medical treatment would compel his leaving work.

6. Obligated Insurer - Last Injurious Exposure Rule Adopted.

The McKeever court rejected the arguments of the insurer on the risk at the date of the occurrence of claimant's injury that the insurer from 1978 to February 1980 should be liable on account of the 1978 and 1979 incidents or at least proportionately liable for the time the two insurers were on the risk as Smith's wrist worsened. The court cited section 85.3(1) which requires the employer to pay compensaton for personal injuries and secton 87.1 which requires the employer to insure its liability. The court reasoned the employer's liability to pay was triggered on the date of the occurrence of the injury, the date of the disabling impairment/disability. It required the insurance carrier on the risk on that date to discharge the employer's obligation to pay.

a. Employer last Injurious Exposure

Of significance, is the court's statement with regard to section 85A.10 that our occupational disease statute places entire liability on the last employer in whose employment the employee was injuriously exposed [to the disease causing agent] and the court's reference to Doerfer Division of CCA v. Nicol, 359 N.W.2d 428 (Iowa 1984), where the time of disablity test was adopted as determining the last injurious exposure employer, and where the court justified its adoption of the time of disability standard as a spreading of the risk over the long run. McKeever did not involve successive in state employers for whom Smith performed cabinetmaking duties. It's analysis

of the successive insurer's issue suggests that the court will adopt a similar last injurious exposure/time of disability rule when the question of successive employers arises in the cumulative injury rule context. Adoption of such a standard would be consistent with the reasoning that a cumulative injury does not occur until disabling impairment/disability compels the employee to stop working. It also suggests that a claimant who leaves employment with one employer but enters employment with a successive employer where claimant does similar work involving similar microtrauma has no claim against the first employer as his impairment/disability did not compel his leaving that work.

VI. SECOND INJURY FUND

The compensability and nature of the employer's liability pursuant to the Second Injury Fund has changed remarkably in the past year. In short, the statute at issue (Iowa Code §85.64) provides as follows:

> If an employee who has previously lost, or lost the use of, one hand, one arm, one foot, one leg, or one eye, becomes permanently disabled by a compensable injury which has resulted in the loss of or loss of use of another member or organ, the employer shall be liable only for the degree of disability which would have resulted from the latter injury if there had been no pre-existing disability. In addition to such compensation, and after the expiration of the full period provided by law for the payments thereof by the employer, the employee shall be paid out of the "Second Injury Fund" created by this division the remainder of such compensation as would be payable for the degree of permanent disability involved after first deducting from such remainder the compensable value of the previously lost member or organ.

While it reads easily, determination of its proper application has caused the Commissioner and the Courts more than a little difficulty. Former Commissioner Robert Landess recently reviewed the history of the act and its evolution in an Appeal Decision entitled Fulton v. Jimmy Dean Meat Company, et al, File No. 755039. In relevant part the former Commissioner stated:

The first Iowa Supreme Court pronouncement concerning the second injury fund was in Irish v. McCreary Saw Mill, 175 N.W.2d 364 (Iowa 1970). In that case claimant was awarded benefits against the second injury fund (the fund) as the result of an injury he received on July 21, 1965. That injury resulted in a thirty-seven and one-half percent permanent disability to claimant's right hand. Claimant had previously lost ninety percent of his left arm as the result of an injury with the same employer. The industrial commissioner found that as a consequence of both injuries claimant had suffered an industrial disability of seventy-five percent of the body as a whole pursuant to section 85.34(2)(u), The Code. After deducting the value of the left arm (207 weeks) and the right hand (65 5/7 weeks) the fund was ordered to pay 102 2/7 weeks of additional compensation to the claimant. An appeal was taken by the fund.

The fund argued that claimant must show (1) he is permanently totally disabled as a result of the two injuries and/or (2) he has had a total loss of two listed members before liability can be imposed on the fund. The court cited legislative amendments to the act in support of its rejection of the fund's first proposition. The court also rejected the second proposition citing Hoenig v. Mason & Hanger, Inc., 162 N.W.2d 188 (Iowa 1968) for the general proposition that our workers' compensation law is for the benefit of the worker and should be liberally construed to that end. The court held that the language referring to a "loss of use" was not intended to imply "total loss of use" of a member of the body or the body as a whole.

The supreme court next discussed the second injury compensation act in Anderson v. Second Injury Fund, 262 N.W.2d 789 (Iowa 1978). The narrow holding in that case was that fund liability is not established when the loss or loss of use of the member or organ is the same member in both the first and second injury. The court did, however, cite with approval Kacena, Workmen's Compensation in Tennessee: The Second Injury Fund, 6 Memphis State U.L.Rev. 715, 716-719 (1976) which explains the background and purpose of such acts:

"II. The Concept of the Second Injury Fund. The milieu in which the second or subsequent injury fund statute operates is the situation of an individual within the labor force, whether or not he is at the moment an 'employee' within the meaning of the Workmen's Compensation Act, who is suffering from some condition of permanent disability that affects his employability. The source of this pre-existing disability is normally of no importance but it must be permanent and must tend to act as a hindrance to the individual's ability to obtain or retain effective employment. Such individuals are what society commonly refers to as 'the handicapped,' and the primary purpose of second injury statutes is to encourage the hiring of the handicapped.

"Upon the enactment of workmen's compensation statutes in most states during the third and fourth decades of this century, it quickly became apparent to most employers that it could be much more expensive to employ partially disabled or handicapped workers in their businesses than it would be to employ healthy, unimpaired individuals. The reason was that most state workmen's compensation statutes, then as now, provided for specific, scheduled benefits to be paid to employees who incur permanent disabilities on the job consisting of a certain percentage of their previous average weekly wages for a certain number of weeks. The number of weeks the benefits can be received depends on the severity of the disability; * * *. On the other hand, when a worker suffers an injury that renders him permanently and totally disabled, the scheduled benefit period is much longer than for partial disabilities. Therefore, if an employer hires a worker who is perfectly healthy and subsequently that worker loses his eye while on the job, the employer's liability would be limited to the scheduled amount for loss of an eye. But if an employer hires a worker who is already blind in one eye, or has already lost an arm or a leg, and that worker subsequently loses his other eye, arm, or leg while on the job, the employer's compensation liability would be much greater than just the scheduled benefit for loss of that member. The combined effect to the two losses would very likely be total disability, and the employer would, under the earliest workmen's compensation statutes, ordinarily be liable for the entire total disability compensation. This principle is known as the 'full responsiblity rule,' and unless a state's workmen's compensation statute has a provision apportioning disability between distinct injuries, the employer's liability does indeed extend to whatever disability the employee has after his single work related injury, regardless of other pre-existing, contributory factors.

"* * *

"Against the background of * * * early principles of subsequent injury law, the 'full responsiblity rule' and the 'apportionment statutes,' the second injury fund statutes were encacted in most state workmen's compensation laws. Regardless of which of the above principles was adhered to by a state, the ultimate consequences for handicapped, disabled individuals were dire indeed. While the apportionment rules might mean inadequate compensation on which to subsist in the event that a second injury did occur, the full responsibility rule might mean no employment in the first place. The solution to this dilemma was the second injury fund.

"In basic outline, most statutes, * * * provide that when an employee, having previously suffered a permanent disability through the loss of some body member such as an arm, hand, foot, leg, or eye, and subsequently, while working for his present employer, suffers a disability, the effect of which, when taken in combination with the first, is to render the employee permanently and totally disabled, the employer shall be liable only for the disability benefits that would be payable for the second injury alone. This is basically the same effect that was achieved by the apportionment statutes. However, the remainder of the benefits to which the employee would be entitled for his permanent total disability will be paid to him by the state out of the second injury fund. The fund is typically maintained by the state labor department or workmen's compensation commission and is funded by assessments on or contributions from employers, or by public taxes. The authorities are in virtual unanimous agreement that the primary end sought to be achieved by the enactment of second injury fund legislation is to encourage the employment of handicapped persons by removing some of the principal objections that employers have to hiring them. If employers no longer need to fear greatly increased workmen's compensation costs as a result of hiring handicapped employees, then at least there is little rationale for their financial objections. * * *." (emphasis added)

The last occasion upon which the court examined the second injury fund act was Second Injury Fund v. Mich Coal Co., 274 N.W.2d 300 (Iowa 1979). The direct holding in Mich Coal was stated at page 304 of the decision:

> We hold that in a second injury fund case under §85.64 when the commissioner finds as to claimant's present condition an industrial disability of the body as a whole, the commissioner must also make a factual finding as to the degree of disability to the body as a whole of the claimant caused by the second injury. (emphasis added)

A

As the claimant's present condition after a second injury consists of the combined effects of the prior loss and the post second injury loss of a claimant, it (the present condition) normally will result in an industrial disability to the body as a whole. Since Mich Coal, following the language quoted above, this tribunal has in all cases determined what the industrial disability of a claimant was due to his or her present condition and then determined how much of this overall industrial disability to the body as a whole was contributed to by the effects of the second injury alone. This was believed to be in compliance with the directions in Mich Coal even though the effects of the second injury may have been limited to a scheduled member.

The result, of course, is that the Employer and Insurance Carrier ultimately bore the brunt of an injured claimant's industrial disability even though it resulted from injury to a scheduled member. This would appear to be directly contrary to the holdings of the Iowa Supreme Court in Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983) and Simbro v. DeLong's Sportswear, 332 N.W.2d 886 (Iowa 1983). The Commissioner availed himself of the opportunity of Fulton v. Jimmy Dean to correct that situation in the Appeal Decision filed July 28, 1986. In relevant part he held as follows:

Further reading of Mich Coal and the facts upon which it was based together with subsequent pronouncements of the court recognizing the limitation of benefits in scheduled member cases (Graves v. Eagle Iron Works, 331 N.W.2d 116 [Iowa 1983], Simbro v. DeLong's Sportswear, 332 N.W.2d 886 [Iowa 1983]), leads to the conclusion that the holding in Mich Coal was intended to apply only to a situation in which the effects of the second injury, although including a listed scheduled member, extended beyond the scheduled member and included portions of the body as a whole. In such instance the second injury should be looked at independently regardless of any other conditions relating to the claimant. If the effects of that injury alone, isolated from prior losses of bodily members listed in the statute, would justify a finding of disability under section 85.34(2)(u) or section 85.34(3), then the extent of that disability will be attributed to the employer at the time of the second injury. If, however, the effects of the second injury, when looked at independently of any other conditions related to the claimant, are confined to a scheduled member and would limit the claimant to benefits under section 85.34(2)(a)-(t), then the employer will be liable for that amount only without regard to consideration of the factors for determining industrial disability. This is so regardless of whether or not the amount of the benefits would be greater or less than the amount which could be awarded if the disability were determined industrially.

In either instance if there is greater industrial disability due to the combined effects of the prior loss and the secondary loss than equals the value of the prior and secondary losses combined, then the fund will be charged with the difference.

This approach is not contrary, as argued by the fund, to the plain meaning of the act as interpreted by Mich Coal. Nor is it clear, as the fund argues, that the second injury must be limited to a scheduled member before fund liability is created. The Mich Coal case did in fact involve a body as a whole injury which included the loss of use of a scheduled member. See Lewis v. Mich Coal Company, Thirty-Four Biennial Report of the Industrial Commissioner 188 at 189: "[w]hat appears at first glance to be a scheduled injury is, upon review of the medical and lay testimony, a disability that affected the soles of the feet, the circulatory system and the back." Thus, Mich Coal merely stands for the proposition that when the second injury affects loss of use of a member and also extends to the body as a whole, a determination must be made as to the degree of industrial disability caused by the second injury. It does not mean that a scheduled loss is to be rated industrially.

This holding better effectuates the intended purpose of the second injury fund to encourage hiring of handicapped persons.

Fulton v. Jimmy Dean is now on appeal and was recently argued before the district court. Final determination by the Iowa Supreme Court is not, therefore, expected until next year.

VII. JURISDICTIONAL AND STATUTE OF LIMITATIONS ISSUES

A number of jurisdictional issues and related topics have been addressed recently by the appellate courts and the Commissioner. As noted earlier, these are the subject of presentation to be made by Deputy Industrial Commissioner Thomas J. McSweeney at a I.A.W.C.A. conference later this month. Having no desire to rephrase that which is already so well-stated, however, excerpts from his much more comprehensive presentation are printed below with his permission.

"III. How and when is a challenge to the subject matter jurisdiction of a judicial tribunal or administrative tribunal raised? As previously noted, subject matter jurisdiction cannot be conferred by waiver, counsel or estoppel and, therefore, a tribunal can raise the question of subject matter on its own motion. See, e.g., Uchtorff v. Dahlin, 363 N.W.2d 264, 267 (Iowa 1985). In other words, a tribunal has jurisdiction to determine whether it has jurisdiction. Litigants have raised the question of absence of jurisdiction by a number of procedural means such as motion to dismiss, see Brown v. Garman, 364 N.W.2d 566, 568 (Iowa 1985); motion for summary judgment, see Troester v. Sisters of Mercy Health Corp., 328 N.W.2d 308, 311 (Iowa 1982); or special appearance, see DeCook v. Environmental Sec. Corp., Inc., 258 N.W.2d 721, 726 (Iowa 1977). However, effective

July 1, 1987, an amendment to Iowa Rule of Civil Procedure 66 abolished the special appearance. A motion to dismiss would allow only a review of the pleadings, see Riediger v. Marrland Development Corp., 253 N.W.2d 915, 916 (Iowa 1977), and, therefore a motion for summary judgment is the preferable approach. If the facts are not in dispute and, therefore, a question of law is presented, a ruling on a motion for summary judgement could terminate the proceedings. The preferred procedural means to resolve a jurisdictional dispute in a workers' compensation case is a motion for summary judgment with attached affidavits, if necessary, and such other materials as described in Iowa Rule of Civil Procedure 237(c). These other materials, such as depositions, need only be referred to in the motion for summary judgment.

Acting Industrial Commissioner Linquist stated in an appeal ruling filed on June 12, 1987 in file number 768495:

> Claimant appeals from a ruling on motion for summary judgment which found that claimant's action is barred by the two-year statute of limitations period of section 85.26(1), Code of Iowa.
>
> ....
>
> As claimant specifies no errors on appeal, the summary judgment will be considered generally to determine its compliance with the law.
>
> Claimant filed his petition for arbitration on September 11, 1986 alleging an injury date of October 18, 1983. Claimant's petition failed to indicate that any weekly benefits had been paid. In his resistance to defendant's motion for summary judgment, claimant asserts that he was paid weekly

benefits within three years from the date of the original notice in this case. However, claimant presents no affidavits in support of this assertion. Review of the industrial commissioner's file in this case indicates that no payment reports have been filed by defendant. Further, in his affidavit, Larry Ruschill, safety supervisor at defendant-J.I. Case Co., states that no payments of weekly benefits have been made to claimant.

Claimant has pled no facts which would indicate that he was unaware of the compensable nature of his injury when that injury occured. (Emphasis added.)

***

D. May the applicable statute of limitations be waived by the industrial commissioner or his or her designee? May an action that has been dismissed by the agency be "reinstated" by the industrial commissioner or his or her designee? What, if anything, tolls the limitation or statutory periods of Iowa Code section 85.26? The above three questions are resolved by essentially the same legal principles and are perhaps three different ways of posing the same question. In Lynn Lewis Lewis, Jr. v. Wilson Food Corporation, (Appeal Decision in File No. 415334 filed on July 1, 1986 with direct appeal to the Iowa Supreme Court voluntarily dismissed) the industrial commissioner stated:

> The claimant's brief challenges the appropriateness of [the deputy's] action in overturning the previous reinstatement of the review-reopening petition by [another deputy]. The claimant correctly realizes that [the] action in reinstating the claimant's review-reopening is itself based upon reversing [yet another deputy's] earlier dismissal of the petition.
>
> In support of his position that [the] reinstatement was appropriate, the claimant relies upon Industrial Commissioner Rules 500-2.1 and 500-4.34(3) for the proposition that a deputy may reinstate an action at any time for good cause.

Industrial Commissioner Rule 500-4.34(3) reads:

> The action or actions dismissed may at the discretion of the industrial commissioner and shall upon a showing that such dismissal was the result of oversight, mistake or other reasonable cause, be reinstated. Applications for such reinstatement, setting forth the grounds, shall be filed within three months from the date of dismissal.

Industrial Commissioner Rule 500-2.1 reads:

> "For good cause the industrial commissioner or the commissioner's designee may modify the time to comply with any rule."
>
> Further, the claimant argues that [a deputy] was without authority to

rescind [another deputy's] reinstatement of the review-reopening petition. The claimant cites section 86.24 for the proposition that the appropriate avenue for appeal from the resinstatement order was an appeal to the commissioner, not a deputy's subsequent consideration of the issue on his own motion. Section 86.24 reads in relevant part: "Any party aggrieved by a decision, order, ruling, finding or other act of a deputy commissioner in a contested case proceeding arising under this chapter or chapter 85 or 85A may appeal to the industrial commissioner in the time and manner provided by rule."

The industrial commissioner's scrutiny of a review-reopening or arbitration petition on appeal is de novo. Paveglio v. Firestone Tire & Rubber Co., 167 N.W.2d 636, 640 (1969).

Although [the deputy's] analysis of this agency's subject matter jurisdiction in classes of cases within which this review-reopening petition arguably falls is both interesting and thorough, an analysis of the review-reopening petition at hand does not require the undersigned to pass upon that general issue. Rather, the appropriate focus of analysis is more properly upon the specific application of this agency's rules for reinstatement.

At the outset, the exceptionally protracted nature of this matter, beginning in April of 1974 and lasting fully twelve years without final adjudication, unquestionably visits hardship upon both parties. Unrealized expectations, uncertainties, frustrations, and the impossibility of presenting well preserved evidence are factors which underscore the necessity of timeliness concerns within the Act and those rules necessary to administer the Act. Yet under this agency's rules, oversight, mistake, or other manifestations of good cause may, when

appropriate, remove the inflexibility of application.

Industrial Commissioner Rule 500-4.36 states:

> If any party to a contested case or an attorney representing such party shall fail to comply with these rules or any order of a deputy commissioner or the industrial commissioner, the deputy commissioner or industrial commissioner may dismiss the action. Such dismissal shall be without prejudice. The deputy commissioner or industrial commissioner may enter an order closing the record to further activity or evidence by any party for failure to comply with these rules or an order of a deputy commissioner or the industrial commissioner.
>
> This rule is intended to implement the provisions of section 86.8, Iowa Code.

Deputy Commissioner Jackwig's dismissal of the claimant's petition for review-reopening, based upon Rule 500-4.36, was rooted in the claimant's failure to prosecute his petition (see review of evidence, points 10, 11, 12, supra). Although this was not an interlocutory order, the claimant did not appeal from the dismissal. Neither did claimant apply for reinstatement within the time provided by Rule 500-4.34(3).

The claimant argues, however, that [the deputy's] reinstatement of the review-reopening petition, fully 20 months after its dismissal, was based upon a showing of good cause. However, the claimant's reliance upon Rules 500-4.34(3) and 500-2.1, supra, is misplaced. The language of these rules themselves must be the corner stone of a reinstatement of a dismissed petition. Although Rule 500-2.1 allows a modification of time limitations for seeking a petition's reinstatement when read in conjunction with Rule 500-4.34(3), the clear language of Rule 500-2.1 is restricted

> to "the commissioner or the commissioner's designee." [The deputy], in reinstating the petition (see review of the evidence, point 15, supra), was not acting as a "designee" of the commissioner. Under the provisions of section 86.3, a deputy may be designated or delegated authority to act in the commissioner's place in order to perform necessary specified powers. However, [the deputy] was not delegated authority to modify the good cause provisions of Rule 500-4.34(3). Further, any analogy to provisions within the Iowa Rules of Civil Procedure for reinstatement also undercuts the claimant's argument in support of [the deputy's] reinstatement. Iowa Rules of Civil Procedure 236, 252, and 253 allow a petition from relief for a final judgment or reinstatement but only upon a motion up to and including one year from dismissal, not fully 20 months after the dismissal.

Even if [the deputy] was empowered to modify the time provisions of Rule 500-4.34(3), Wilson's resistance to the application for reinstatement preserves the issue upon appeal (see review of the evidence, point 14), as to whether the reasonable cause existed for the timeliness modification. Although the claimant's motion for reinstatement states that the claimant was unaware of the dismissal of his action and implies professional deficiency on the part of his original counsel, reasonableness would require that the claimant more diligently track a matter of such concern in his life. Wilson should not now bear the burden of matters beyond its control and wholly within the reasonable diligence of the claimant.

In Burgess v. Great Plains Bag Corp. (Appeal Decision in File No. 697113 filed October 8, 1985), the industrial commissioner stated in part:

> Claimant appeals from a ruling denying reinstatement of his contested case.

> Claimant first filed a petition on March 24, 1982 alleging an injury on or about September 4, 1981. At that time he was represented by [an] attorney....In August 1982 this attorney asked for and in September 1982 received permission to withdraw as claimant's counsel based on lack of cooperation from claimant.
>
> Claimant was allowed time to secure other counsel or proceed pro se. Claimant did neither and after an order to show cause was unanswered the case was dismissed December 17, 1982. No appeal or motion to set aside or refiling of petition was done at that time.
>
> On April 1, 1985 claimant, through his present counsel, petitions to have his claim reinstated. Defendants resist and a deputy ruled on April 29, 1985 that the application would not lie.
>
> The matter has been reviewed and the ruling of the deputy must be affirmed.
>
> There is no legal justification to allow such a reinstatement and (if it were applicable - which it is not) no compelling equitable reason to reinstate claimant's case. Claimant failed to respond to certified mail in 1982 and indeed took no further action at all until some twenty-eight months later. By that time the statute of limitations on his claim had run. Claimant chose his course of inaction.
>
> Cases relied on by claimant to support reinstatement of the petition are not precedential.
>
> WHEREFORE, the ruling is affirmed.
>
> THEREFORE, claimant's application to reinstate is denied.

In Burgess, the Iowa District Court (in a ruling filed on May 20, 1986) ordered the agency to reinstate

claimant's action; however, the Iowa Supreme Court on July 22, 1987 reversed the district court and stated as follows on page 8 of the slip opinion:

> The employer argues the law provides that in the absence of a statutory exception nothing will toll a statutory period of limitations. Because Iowa Code chapter 85 provides no such exception, the dismissal without prejudice here did not toll the running of the two-year period of limitations in section 85.26. We agree.

On page 10 of the supreme court slip opinion, the Iowa Supreme Court stated as follows:

> III. Because the result may seem harsh, at first blush, we address Burgess's claim of "extenuating circumstances." In doing so, we do not intend to imply there would be any set of circumstances that would toll the statute of limitations in the event a case is dismissed without prejudice except, perhaps, for some irregularity such as fraud by the other party.

Given the language of Burgess quoted above, a strong argument could be made that Rule 343-4.34(3) is void ("ultra vires") because the reinstatement procedure outlined in this rule has not been authorized by the legislature. The extension procedure of Rule 343-2.1 may face similar difficulties.

VIII. THE RISE AND FALL OF DIRECT APPEAL

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1986 Iowa Acts H.F. 2066 §913 purported to amend Iowa Code §913, purported to amend Iowa aCode §§86.24 and 86.26 (1985) to provide for direct appeal to the Iowa Supreme Court from the actions, orders and decisions of the Iowa Industrial Commissioner. The constitutionality of that statute was analayzed by the Supreme Court in Western International and National Union Fire Insurance Co. v. Kirkpatrick, 396 N.W.2d 359 (Iowa 1986). The Court firmly rejected the amendment on constitutional grounds and appeal from the Commissioner's decisions must, once again, be directed to the district court pursuant to Iowa Code Chapter 17A.

IX. MISCELLANEOUS COURT DECISIONS

The following case summaries by the Court or the Commissioner's office provide a review of some of the more significant recent decisions in workers' compensation law.

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CATERPILLAR TRACTOR CO. V. MEJORADO (No. 86-485)

On review from the Iowa Court of Appeals. Appeal from the Iowa District Court for Scott County, Margaret S. Briles, Judge. Decision of court of appeals vacated; district court judgment reversed. Considered en banc. Per curiam.

Mejorado was injured at the job site where he was employed by plaintiff Caterpillar Tractor Company. Caterpillar subsequently filed a memorandum of agreement with the commissioner. In his request for a review-reopening hearing Mejorado contended he had sustained greater permanent partial disability to the body as a whole than had been thought. The industrial commissioner awarded increased benefits, but the district court and the court of appeals overturned the commissioner's award. Mejorado has applied for further review. OPINION HOLDS: Review-reopening is a procedure through which the commissioner may modify the amount of workers' compensation benefits paid pursuant to an initial award or agreement for settlement. We do not give retroactive effect to the 1982 amendments to Iowa Code section 86.13. II. The memorandum of agreement filed by Caterpillar, which Mejorado neither approved nor executed, was not the equivalent of a formal settlement agreement or award of compensation following an evidentiary hearing. When a workers' compensation award has not been commuted, the filing of a memorandum of agreement leaves open for adjustment in a review-reopening proceeding the extent of disability. The memorandum of agreement settled only (1) the Caterpillar-Mejorado employment relationship and (2) the fact that Mejorado's injury arose out of and in the course of his employment. Mejorado was not required to prove a change in his condition after filing the memorandum of agreement, but he was required to prove that increased disability for which no compensation had been paid was proximately caused by the injury.

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IOWA SUPREME COURT DECISION

Synopsis by the Court.

BROWN V. HY-VEE FOOD STORES, INC. (No. 85-1082)
407 N.W.2d 598 (Iowa 1987)

Appeal from the Iowa District Court for Lucas County, M. C. Herrick, Judge. Affirmed. Considered by Harris P.J., and McGiverin, Larson, Schultz, and Carter, JJ. Opinion by Harris, J.

The question is whether an injured worker qualifies as a "disabled person" under the Iowa civil rights Act. The trial court found he did not. OPINION HOLDS: I. There was substantial evidence to support the trial court's view that Brown was not disabled within the meaning of Iowa Code chapter 601A by his injury. Testimony at trial indicated, even after his November 1980 disc injury, Brown engaged in farming chores, heavy lifting, coaching little league baseball, and wood cutting. Neither Brown nor his employer perceived or regarded the injury as a substantial handicap. Indeed, several employees and agents of the employer testified they believed from the outset Brown's problem was that he had been untruthful about the nature of his injuries, falsely characterizing his ability to return to his job as a truck driver in order to maximize his workers' compensatic claim. II. The civil rights Act and its rules were designed to protect only "qualified handicapped employees." Brown simply does not belong to this class.

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IOWA COURT OF APPEALS DECISIONS

Synopses by the Court.

PAPPAS V. HUGHES (No. 86-910) 406 N.W.2d 459 (Iowa App. 1987)

Appeal from the Iowa District Court for Montgomery County (Nos. 16585 and J 30-319), Leo Connolly, Judge. Affirmed. Considered by Donielson, P.J., and Snell and Schlegel, JJ. Opinion by Snell, J.

The plaintiff appeals the district court's grant of summary judgment to the defendant, who owned the employer corporation and was also employed as co-employee. Pappas contends both that there are material fact issues to be resolved at trial and that Hughes' status as sole officer, sole shareholder, and sole director of Mondo's Restaurant, Inc. does not bar her right to sue under Iowa Code section 85.20. OPINION HOLDS: The determination of Hughes' status is critical to the district court's jurisdiction of this case. Although the determination of the subject matter jurisdiction issue in the case at bar turned on an arguably "factual" matter, i.e., whether Hughes is an "employer or a "co-employee," we disagree with Pappas' contention that she is entitled to have that question submitted to a jury. The determination of jurisdictional facts such as Hughes' status is a matter which rests with the court. In sustaining Hughes' motion for summary judgment, the district court implicitly found that he was Pappas' employer for purposes of section 85.20. In the case at bar, the evidence is clear that Hughes is the alter ego of the corporation. The record provides substantial support for the district court's determination that Hughes was Pappas' employer. The district court's determination of the jurisdictional fact issue renders the issue of gross negligence moot. There remain no issues of material fact for jury submission, and Hughes is entitled to judgment as a matter of law.

HOOTMAN V. WEYERHAEUSER COMPANY (No. 86-563)

Appeal from the Iowa District Court for Linn County (No. LA 13851), Thomas M. Horan, Judge. Affirmed. Heard by Donielson, P.J., and Snell and Schlegel, JJ. Per Curiam.

Respondent appeals the district court's order which reversed the industrial commissioner designee's denial of benefits from Second Injury Fund. OPINION HOLDS: As is obvious from her decision, the deputy industrial commissioner was operating on the understanding that, as a matter of law, in order for Hootman to be eligible for Second Injury Fund benefits she was obligated to prove that her second disability was the result of a "specific traumatic event." We think the deputy industrial commissioner's understanding of the type of "injury" which gives rise to a claim against the Second Injury Fund is too narrow. Our courts, in interpreting the workers' compensation statute, long ago rejected the notion that a personal injury must arise from a specific accident, special incident, or unusual occurrence. Hootman was rendered permanently disabled by a compensable injury to her left hand after previously losing partial use of her right hand. We think, therefore, she is eligible for Second Injury Fund benefits and that the result reached by the district court is correct. The Fund also argues that the district court erred in allowing Hootman to argue on apeal that her first injury was the deQuervain's disease in her right wrist, whereas her administrative petition claimed a 1979 episode of carpal tunnel syndrome as her first injury. We think the issue of whether her deQuervain's injuries constituted qualifying disabilities under Iowa Code section 85.64 was tried by consent.

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MCCOLLOUGH V. CAMPBELL MILL & LUMBER COMPANY (No. 86-128)
406 N.W.2d 812 (Iowa App. 1987)

Appeal from the Iowa District Court for Hamilton County (22972), Carl D. Baker, Judge. Affirmed. Heard by Schlegel, P.J., Hayden, and Sackett, JJ. Opinion by Schlegel, P.J.

Plaintiff appeals a summary judgment for defendants in an action seeking to set aside a 1971 order of the deputy industrial commissioner commuting plaintiff's workers' compensation award based upon a 60% permanent industrial disability. OPINION HOLDS: An agreement to compromise unknown injuries and future damages is valid and enforceable if the parties intended such a result at the time of settlement. Mutual ignorance of the evidence of unknown conditions cannot constitute mutual mistake. Apparently, the plaintiff knew his condition might worsen. The parties clearly intended to settle all present and future claims. We agree with the trial court that the plaintiff did not present any facts which could indicate there was any mutual mistake of fact between the parties concerning the plaintiff's future condition.

IOWA SUPREME COURT DECISIONS

Synopses by the Court.

WOODRUFF CONSTRUCTION COMPANY V. BARRICK ROOFERS, INC.
(No. 85-1800) 406 N.W.2d 783 (Iowa 1987)

Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge. Affirmed. Considered by Reynoldson, C.J., and McGiverin, Larson, Lavorato, and Neuman, JJ. Opinion by Larson, J.

Craig West, an employee of Barrick Roofers, Inc., was seriously injured when he fell through the roof of a gymnasium being repaired by Barrick under a subcontract with Woodruff Construction Company, the general contractor. West collected workers' compensation from Barrick and also brought a negligence suit against Woodruff. Woodruff settled with West and then brought the present action for indemnity against West's employer, Barrick. The district court held that Barrick had no implied duty to indemnify Woodruff for the breach of its duty to perform the roofing subcontract with due care. Woodruff has appealed. OPINION HOLDS: When an employer is the proposed indemnitor, the question whether an indemnity agreement will be implied under the circumstances of a particular case is a complex one, and its resolution turns on application of diverse and often competing, interests including public policy, simplicity of administration, fairness, and the underlying philosophy of workers' compensation law. In the present case, Woodruff does not contend the parties actually intended to provide for indemnity; the issue was apparently never considered by either of them. The question then becomes whether the law, for policy or other reasons, should impose such a duty on Barrick to indemnify Woodruff regardless of the circumstances, including Woodruff's own negligence. We hold that, in this case, where the proposed indemnitee (Woodruff) aided in the creation of the hazard, the law should not imply a right to indemnity from the employer. We do not believe a contrary result is required by Blackford v. Sioux City Dressed Pork, Inc., 254 Iowa 845, 118 N.W.2d 559 (1962). In any event, to the extent Blackford may be read as holding that an implied agreement to indemnify will be read into all service contracts, regardless of the circumstances, and without regard to the fault of the proposed indemnitee, it is hereby expressly overruled.

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WOODRUFF CONSTRUCTION COMPANY v. MAINS (No. 85-1801)
406 N.W.2d 787 (Iowa 1987)

Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge. Reversed and remanded. Considered by Reynoldson, C.J. and McGiverin, Larson, Lavorato, and Neuman, JJ. Opinion by Larson, J.

Craig West, an employee of Barrick Roofers, Inc., fell through a hole on a roofing project. Woodruff Construction Company was the general contractor and carpenter on the job, and Barrick was the roofing subcontractor. Dale Mains, another Barrick employee, was Craig West's supervisor and the working foreman on the job. West received workers' compensation benefits from Barrick pursuant to Iowa Code chapter 85. He also brought an action against Woodruff. Woodruff settled with Craig West for $468,496.80 and then filed the present action against Dale Mains seeking contribution. The jury found that Mains was grossly negligent and Woodruff was negligent, attributing Woodruff's ordinary negligence as sixty percent of the cause of the fall and Mains' gross negligence as forty percent. The court entered judgment against Mains for forty percent of Woodruff's claim, and Mains has appealed. OPINION HOLDS: The evidence was not sufficient to permit a jury to find that Mains had committed gross negligence. Therefore, the district court should have sustained Mains' motions for directed verdict and for judgment notwithstanding the verdict.

B

DEFENDING CORPORATE CLIENTS AND OFFICERS IN CRIMINAL CASES

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INTRODUCTION

This discussion focuses on two of the more important phases of a criminal case:

I. The Investigatory Phase

II. The Grand Jury Investigations

Each of these stages of a criminal case help define the battlegrounds and the positions of the antagonists if and when the combat shifts to a court of law.

I.

INVESTIGATION

1. Investigator contacts client. - Client is under no obligation to talk. If he does elect to talk to investigators, beware of some pitfalls.

A. 18 U.S.C. 1001 covers false statements made in a matter within the jurisdiction of a department or agency whether they are oral or written. U.S. v. Beacon Brass Co., 344 U.S. 43, 46 (1952). The statement need not be made under oath. The elements of the offense are:

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(1) The statement must be false, must constitute a false representation or the concealment of a material fact. U.S. v. Diogo, 320 F.2d 898, 902 (2nd Cir. 1963).

(2) Statement made by the Defendant must be material. Whether or not the statement is material is a matter of law in as such as a matter in the first impression for the court. A statement is considered material if it has a natural tendency to influence or is capable of influencing the decision of the department or agency. U.S. v. Richmond, 700 F.2d 1183, 1188-89 (8th Cir. 1983).

(3) There must be an intent. The false statement must be knowingly and willfully made in order to violate §1001. U.S. v. Goodwin, 566 Fd 975-976 (5th Cir. 1978).

B. 18 U.S.C. 1512. The passage of the Comprehensive Crime Control Act of 1984, is one of the most threatening steps yet taken by Court or Congress against traditional attorney-client relationships. The 1984 Act has given the government power which, by indiscretion or misguided zeal, can wreak havoc in our criminal justice system. Few had the foresight to consider such potential changes, although with the 1982 enactment of 18 U.S.C. §1512, some realized that the worst was yet to come. Vol. 22 American Criminal Law Review No. 4 page 737.

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18 U.S.C. 1512 covers "misleading conduct" such as statements to potential witnesses, or "any person" involved in an official proceeding. It is not limited to pending official proceedings. U.S. v. Risken (8th Cir. April 18, 1986).

2. 5th Amendment Privilege.

A. The 5th Amendment applies only to natural persons. Bellis v. U.S., 417 U.S. 85 (1974). Doesn't apply to a corporation or a partnership.

B. 5th Amendment can be claimed in civil, investigatory and adjudicatory proceedings. Kastigar v. U.S., 406 U.S. 441 (1972).

C. 5th Amendment applies to documents - personal papers in claimants hands. Possession and not ownership is the standard. Couch v. U.S., 409 U.S. 322 (1973).

D. Required documents exception.

(1) Documents the law requires to be kept.

(2) Corporate records.

E. Compulsion: Testimony must be compelled to be protected and applies to:

(1) Courts: Subpoena.

(2) Legislature: Legislative required testimony.

(3) Executive: Police or agency required testing.

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F. If not compelled, as in an application for a loan, can be required to answer such questions as are you registered for the draft. Selective Service v. Minn, 104 S.Ct. 3348 (1984).

G. Documents in the hands of an attorney are only protected under 5th Amendment if they would have been protected if in the hands of the client. U.S. v. Osborn, 561 F.2d 1334.

H. Under some circumstances the mere act of producing the documents can be considered testimonial and therefore protected under 5th Amendment. Fisher v. U.S., 425 U.S. 391 (1976).

I. A sole proprietor can claim the 5th Amendment privilege to protect against business records when the act of producing is testimonial and self-incriminating. U.S. v. Doe, 104 S.Ct. 1237 (1984).

3. Attorneys' Investigation.

A. Attorney-Client Privilege.

(1) The privilege does not extend to communications "which are in aid or furtherance of a crime or fraud. Clark v. U.S., 289 U.S.1; U.S. v. Mardian, 546 F.2d 973 (D.C. Cir. 1976). (An attorney's failure to disclose to another attorney what he learned from a witness became part of a conspiracy to obstruct justice).

B

(2) Duty to zealously represent client is no defense to a conspiracy charging attorney as a participant for concealing the fraud from the victims. U.S. v. Sablosky, 773 F.2d 216 (8th Cir. 1985).

(3) Make sure who is the client.

Statements made to the in-house counsel may be protected by the attorney-client privilege (Fed. R. Evid. 501) and the work product privilege (Fed. R. Civil Proc. 26).

(4) Fed. R. Cr. Proc. 26.2.

Production of witnesses prior statements may be required to be produced from cross-examination. Fed. R. Cr. Proc. 262. U.S. v. Nobles, 422 U.S. 225. This rule does not apply to a defendant called by his own attorney.

(5) The attorney-client privilege extends only to confidential communications from a client to his attorney. Confidential communication encourages that information communicated on the understanding that it would not be revealed to others and matters constituting protected attorney work product. In Re Grand Jury Proceedings, (85 Misc. 140) (Filed May 29, 1986, 8th Cir.).

B. Attorney Statements to Investigator or Other Parties.

(1) Rule 801(d)2 admission of party opponent can include attorneys statements:

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(2) Rule 801(d)2(B) manifest adoption.

(3) Rule 801(d)2(C) person authorized to make a statement.

(4) Rule 801(d)2(D) statement by agent or servant concerning a matter within scope of agency.

(2) U.S. v. Agri, 763 F.2d 312 (1985).

Statements or conclusions of in-house counsel concluding that a "serious federal violation occurred" made to officers of the company was excluded and constituted reversible error.

(3) U.S. v. McKeon, 738 F.2d 26 (2nd Cir. 1984) discussed in Vol. 24 American Criminal Law Review No. 1, page 93.

Statements of attorney on opening statement of trial offered as inconsistent statement on re-trial under Rule 801(d)2(B) and (C).

II.

GRAND JURY PROCEEDING

1. Procedure

A. Rule 6 of the Fed. R. Cr. Proc. and 18 U.S.C. 3331 - 3334 rest in the district courts power to summon grand juries. Term of Grand Jury is 18 months and numbers of 16 to 23. Indictment on concurrence of 12 or more. U.S. Attorney must concur and sign indictment.

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B. Although the grand jury must turn to the court for enforcement of its orders, it has an independent constitutional identity and is not subject to the courts direction or order. U.S. v. U.S. District Court, 238 F.2d 713 (4th Cir. 1956).

C. A potential defendant may be subpoenaed to appear before a grand jury. U.S. v. Mandujano, 425 U.S. 564, (1976). U.S. v. Wong, 431 U.S. 174 (1972).

D. A target may request to testify (not unusual in white collar crimes) is not required to be granted. U.S. v. Gardner, 516 F.2d 334 (7th Cir. 1975).

In appropriate cases a target letter is frequently sent to individuals.

E. Where target is subpoenaed he will not usually be called if attorney by letter informs U.S. Attorney that client will assert privilege.

F. Witness need not be told he is a potential defendant, although justice department policy is to advise the witness that he is a target.

(2) Grand jury can subpoena physical evidence in addition to testimony such as voice exemplars, handwriting samples and appearance at a lineup. U.S. v. Dionisio, 410 U.S. 1 (1973); U.S. v. Mara, 410 U.S. 19 (1973); In Re Melvin, 550 F.2d 674 (1st Cir. 1977).

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(3) Rule 17C of Fed. R. Cr. Proc. governs grand jury subpoena court. The court can quash or modify subpoena if unreasonable or oppressive. Can be raised by motion to quash or refusal to comply.

3. Production of Documents

A. Documents in the hands of an attorney can be subpoenaed unless there is an attorney-client relationship and the documents if in the hands of the client would be protected under 5th Amendment. U.S. v. Fisher, 425 U.S. 391 (1976). See cases cited under preceding discussion at 1.(H) and 1.(I).

B. If subpoena duces tecum require anything that is testimonial the 5th Amendment can be urged.

C. Subpoena of material protected under work product can be quashed.

D. Work product claim by attorney may be broader than 5th Amendment or attorney-client privilege.

4. Immunity 18 U.S.C. 6001 - 6005.

A. Use immunity must be as broad or co-extensive with the 5th Amendment privilege. Kasligar v. U.S., 406 U.S. 441 (1972).

B. Because the 5th Amendment privilege extends only to use in criminal proceedings, compelled testimony can be used in subsequent civil proceedings. Ryan v. Commissioner, 568 F.2d 531 (7th Cir. 1977).

B

C. State and Federal grants of immunity are recognized by each other. U.S. v. Watkins, 505 F.2d 545 (7th Cir. 1974).

D. Rule 6e of the Fed. R. Cr. Proc. strictly limits disclosure of grand jury proceedings. In Re Grand Jury Proceedings, 559 F.2d 234 (5th Cir. 1977).

E. Immunity granted to a natural person will not shield the corporate entity.

Respectfully submitted,

Raymond Rosenberg

FDIC PRACTICES AND PROCEDURES IN CLOSED BANKS

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C

I. DUAL CAPACITIES OF THE FDIC

A. CORPORATE FDIC. In an effort to restore public confidence and safeguard bank deposits through a comprehensive deposit insurance program sponsored and regulated by the national government, Congress, in 1933, established the Federal Deposit Insurance Corporation. See generally, 12 U.S.C. §§ 1811-1832. The role of the FDIC is to regulate banking practices and provide deposit insurance coverage. Its goal is to provide a safe and sound banking system to foster a healthy economic environment.

The FDIC is managed by a board of directors consisting of three members, one of whom is the Comptroller of the Currency and two of whom are United States citizens appointed by the President with the advice and consent of the Senate. 12 U.S.C. §1812. As an agency of the federal government, the FDIC has been provided governmental protections to aid in its functioning. Those include benefit of the Federal Tort Claims Act, federal common law and specific statutory defenses.

B. RECEIVER FDIC. Pursuant to 12 U.S.C. §1821(c) and (e), the FDIC is authorized to be appointed as Receiver of closed banks. 12 U.S.C. §1821(c) and (d) apply to failed national banks. 12 U.S.C. 1821(e) applies to failed state banks. In Iowa, that section is to be read in conjunction with Sections 524.1310 and

.1313, Code. Under those sections the Iowa Superintendent of Banking orders the closing of the Bank, has himself appointed receiver, and tenders the appointment to the FDIC. The FDIC, as Receiver, then becomes subject to the jurisdiction of the receivership court and no longer operates in its corporate capacity. The rights of the FDIC as Receiver are determined by state law.

II. PURCHASE AND ASSUMPTION.

When a bank threatens to fail the FDIC has several methods available to protect insured depositors. It may wait until the appropriate authority closes the bank (Comptroller of the Currency or State Superintendent of Banking), liquidate the assets and pay the depositors (making up any shortfall out of its own funds). 12 U.S.C. §1821(d)-(g). It may organize a Deposit Insurance National Bank to assume the insured deposit liabilities. 12 U.S.C. §1821(h). It may render direct financial assistance to keep the bank open. It also has the preferred option of entering into a "Purchase and Assumption" arrangement. Under the "P and A" the FDIC, as Receiver, sells the closed banks desirable assets to a healthy bank. That healthy bank pays a determined price for the assets plus an agreed upon premium. It also assumes the deposit liabilities of the closed bank. The undesirable assets are sold by the FDIC, as Receiver, to the FDIC in its corporate capacity. Corporate FDIC pays the Receiver sufficient monies to make up the difference between what the healthy bank must pay on the assumed deposit liabilities less what the healthy bank paid

for the desirable assets and the premium. That sum is transferred to the healthy bank for the deposit liability. Corporate FDIC then collects on the undesirable assets and, if it recovers a surplus, pays that surplus to the FDIC, as Receiver, who pays creditors under the state receivership statutes. See Fed. Dep. Ins. Corp. v. LaRambla Shopping Center, 791 F. 2d 215 (1st Cir. 1986).

C

Therefore, the FDIC finds itself in dual roles. The assets of the failed bank (to the extent not sold to the healthy bank) are collected by Corporate FDIC utilizing all the powers of a federal agency. The liabilities of the failed bank and any surplus recovered ultimately are owned by the FDIC, as Receiver. The dual roles ". . .provide the FDIC with two virtually separate, legal identities, one as a "corporation", when,for example, it buys a failed bank's assets, and another, a "receiver" of a failed bank." LaRambla, p. 218. See also, FDIC v. de Jesus Velez, 678 F. 2d 371, 374 (1st Cir. 1982). ("The statute expressly creates separate receiver and corporate/purchaser functions for the FDIC."); FDIC v. Merchants National Bank of Mobile, 725 F. 2d 634, 638 (11th Cir. 1984) ("FDIC as receiver contracts with FDIC in its corporate capacity to purchase the assets that are unacceptable to the assuming bank."); FDIC v. Citizens Bank & Trust Co., 592 F 2d 364, 366 (7th Cir. 1979) ("When acting as a receiver of a closed bank, FDIC may deal with itself. Thus it may act in two capacites, as receiver and on its own behalf as insurer of deposits and often as a creditor.")

III. FEDERAL V. STATE LAW.

12 U.S.C. §1819(4) provides that the FDIC has the power

> To sue and be sued, complain and defend, in any court of law or equity, State or Federal. All suits of a civil nature at common law or in equity to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy; and the Corporation may, without bond or security, remove any such action, suit or proceeding from a State court to the United States district court for the district or division embracing the place where the same is pending by following any procedure for removal now or hereafter in effect, except that any such suit to which the Corporation is a party in its capacity as receiver of a State Bank and which involves only the rights or obligations of depositors, creditors, stockholders, and such State bank under State law shall not be deemed to arise under the laws of the United States. No attachment or execution shall be issued against the Corporation or its property before final judgment in any suit, action, or proceeding in any State, county, municipal, or United States court. The Board of Directors shall designate an agent upon whom service of process may be made in any State, Territory, or jurisdiction in which any insured bank is located.

In its corporate capacity, therefore, the FDIC can bring suit in or remove a suit to federal court. (It can even intervene in state court and remove to federal court as plaintiff.) In its capacity as Receiver, it finds itself in state court unless other federal jurisdictional grounds are met. As Receiver, however, it cannot use diversity as a ground. FDIC v. National Surety Corp., 345 F. Supp. 885 (S.D. Iowa 1972).

IV. STATUTE OF LIMITATIONS.

As Receiver, the FDIC is bound by the state statute of limitations. In its corporate capacity, the FDIC is not subject to the individual states' statute of limitations. The relevant statute of limitations which applies provides that suits for money damages founded upon contract are to be brought within six years. Suits for money damages founded upon tort shall be brought within three years. 28 U.S.C. §2415(a). Rauscher Pierce Refsnes, Inc., v. F.D.I.C., 789 F. 2d 313, 315 (5th Cir. 1986), Federal Deposit Ins. Corp. v. Bird, 516 F. Supp. 647, 650 (D.P.R. 1981).

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V. D'Oench, Duhme & Co. v. FDIC and 18 U.S.C. 1823(e).

In its corporate capacity the FDIC is afforded both federal common law and statutory protection against various defenses.

A. D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed 956 (1942). Defendant executed a demand note in renewal of stale notes. With the renewal, a receipt for the old notes was given. It stated, "This note is given with the understanding it will not be called for payment. All interest payments to be repaid." The Supreme Court held the maker estopped from using this "secret agreement" (not shown on the books of the bank) as a defense to collection. The purpose of the note was to mislead the FDIC as to the quality of the assets of the bank. The courts continue to recognize D'Oench, Duhme and apply it to complement the statutes enacted after the decision.

Federal Deposit Ins. Corp. v. McClanahan, 795 F. 2d 515 (5th Cir. 1986).

B. 12 U.S.C. §1823(e).

> "No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank."

Through the application of 12 U.S.C. §1823(e), the courts have excluded most defenses, including defenses of Truth in Lending violations, Federal Deposit Ins. Corp. v. Webb, 464 F. Supp. 520 (E.D. Tenn. 1978); fraud in inducement, Federal Deposit Ins. Corp. v. Lesselyoung, 476 F. Supp. 938 (E.D. Wis. 1979), affd. 626 F. 2d 1327 (7th Cir. 1980); usury, Federal Deposit Ins. Corp. v. Leach, 772 F. 2d 1262 (6th Cir. 1985); failure of consideration and material alteration, Federal Deposit Ins. Corp. v. Armstrong, 784 F. 2d 741 (6th Cir. 1986); estoppel due to knowledge of the FDIC, Federal Deposit Ins. Corp. v. Allen, 801 F. 2d 863 (6th Cir. 1986); "in blank" defense, FDIC v. Hatmaker, 756 F. 2d 34 (6th Cir. 1985); holder in due course, Federal Deposit Ins. Corp. v. Roldan Fonseca, 795 F. 2d 1102 (2st Cir.

1986); failure to perform bilateral obligations, Federal Deposit Inc. Co. v. O'Neil, 809 F. 2d 350 (7th Cir. 1987); and contributory negligence, estoppel and mitigation of damages, Federal Deposit Ins. Corp. v. Dempster, 637 F. Supp. 362 (E.D. Tenn. 1986).

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Defendants have unsuccessfully continued to raise these defenses to the extent that the Tenth Circuit in Federal Deposit Ins. Corp. v. Van Laanen, 769 F. 2d 666 (10th Cir. 1985) held an appeal on the issue of 12 U.S.C. §1823(e) to be legally frivolous. In assessing double costs and $500.00 in attorney's fees, the court stated "Such meritless appeals are a burden on the federal court system and justify the exercise of our discretionary power to award attorney's fees and double or single costs against the litigants who prosecute frivolous appeals."

VI. DIRECTOR AND OFFICER LIABILITY.

In addition to the general assets, corporate FDIC purchases any cause of action which the failed bank had, including claims against its directors and officers. The liabilities on such claims are determined by common law, the National Bank Act (for national banks) and the appropriate state banking laws (Generally Chapter 524 in Iowa). D & O suits are generally based on negligence to avoid policy coverage issues. The allegations are normally mismanagement, negligent supervision, improvidence in making and collecting loans, and loans in excess of legal lending limits. They can also be based on fraud or defalcation. The later are usually pursued against

the bankers blanket bond and not the individual directors and officers.

Affirmative defenses such as contributory negligence in examinations are generally unavailable due to absence of duty and the existence of the Federal Tort Claim Act. First State Bank of Hudson County v. U.S., 599 F. 2d 558 (3rd Cir. 1979).

All shareholder derivative rights are owned by the FDIC Shareholders can assert independent rights such as violations of federal securities laws. Any effort to extend those independent claims to derivative claims will result in the FDIC intervening in the action and obtaining a stay order.

VII. SUMMARY.

When dealing with the FDIC, the first determination to be made is whether the FDIC is acting in its corporate capacity or as Receiver. As state court Receiver, traditional theories and defenses will be available. If suing in its corporate capacity, few defenses will be available and reference must first be made to 12 U.S.C. §1811-1832. Most issues which can be raised have been discussed by the federal courts within the last five years. Those decisions will most likely be changed only in further favor of the FDIC. A review of those decisions reflects a growing tendency by the courts to create a presumption in favor of the claims of the FDIC.

D

EVALUATING THE EMPLOYMENT DISCRIMINATION CASE

Prepared for the
Iowa Defense Counsel Association
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A. FEDERAL STATUTES AND EXECUTIVE ORDERS.

1. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, 42 U.S.C. § 2000e, et seq.

D

Title VII makes it unlawful for an employer to refuse to hire or to discharge any individual, or otherwise to discriminate against any individual, with respect to his or her compensation, terms and conditions of employment because of such individual's race, color, religion, sex or national origin. Effective October 30, 1978, sex discrimination is defined to include discrimination on the basis of pregnancy, childbirth or related medical conditions. Employment agencies are also barred from refusing to refer for employment or from otherwise discriminating against any individual because of his or her race, color, religion, sex or national origin. Title VII makes it unlawful for a labor organization to exclude from its membership or otherwise discriminate against any individual; to refuse to refer for employment any individual; or to cause or attempt to cause an employer to discriminate against any individual because of race, color, religion, sex or national origin. Finally, Title VII applies only to an employer "engaged in an industry affecting commerce who has 15 or more employees." 42 U.S.C. § 2000e-b.

Title VII is administered by the Equal Employment Opportunity Commission. If charges are not first resolved by conference and conciliation at the Commission level, either the charging party or the EEOC may sue in federal district court for relief.

The statute does not generally protect the right to effect a certain appearance, even if that appearance is closely associated with a racial or ethnic group. Baker v. California Land Title Co., 507 F.2d 895 (9th Cir. 1984), cert denied, 422 U.S. 1046 (1975); Brown v. District of Columbia Transit System, Inc., 523 F.2d 725 (D.C. Cir. 1975), cert, denied, 423 U.S. 862 (1975).

Sex is generally held to include only gender, not sexual preference. Holloway v. Arthur Andersen & Co., 556 F.2d 659 (9th Cir. 1977).

IMPORTANT FEATURES.

(a) Two main theories of recovery:

(1) Disparate treatment, which requires proof of intent. See, e.g., McDonnell Douglas Corp. v. Green, 411 U.S. 972 (1973); Garlington v. St. Anthony's Hospital Association, 792 F.2d 752 (8th Cir. 1986); Smith v. Honeywell, Inc., 735 F.2d 1067 (8th Cir. 1984).

(2) Disparate impact -- no proof of intent required -- plaintiff may recover by proving that an employment practice has a disparate impact on persons of a particular race, national origin, sex or religion. If the plaintiff proves disparate impact, then the burden of proof shifts to the defendant to prove that the employment practice is justified by business necessity or is related to job performance. See, e.g., Griggs v. Duke Power Co., 401 U.S. 424 (1971); Talley v. Postal Service, 720 F.2d 505 (8th Cir. 1983).

(3) Examples of cases in which facially neutral employment policies have been found to have a disparate impact upon protected classes include the following: United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973) (high school diploma requirement had disproportionate impact on blacks since in the 25-44 age group in the south, 64.7% of white males, 35% of black males, 63% of white females, and 34.7% of black females had then completed high school); Dothard v. Rawlinson, 433 U.S. 321 (1977) (female applicant rejected as prison guard for failure to meet 120 pound weight requirement of statute which also imposed 5'2" minimum height requirement, where national statistics indicated that statutory standards would exclude 41.38% of the female population but less than 1% of the male population).

(b) Charge of discrimination must be filed with the EEOC and the Iowa Civil Rights Commission within 180 days of the alleged discrimination. 42 U.S.C. § 2000e-5(e); Iowa Code § 601A.15(12) (1985).

(c) No compensatory or punitive damages. Statute is equitable in nature, entitling prevailing plaintiff to limited relief: declaratory, injunctive, back pay, reinstatement, or in lieu thereof, front pay, and attorneys' fees and costs. See, e.g., Walker v. Ford Motor Co., 684 F.2d 1355 (11th Cir. 1982) (summarizing case law from the various United States Courts of Appeals holding that compensatory and punitive damages may not be awarded under Title VII).

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(d) No right to jury trial. Harmon v. May Broadcasting Co., 583 F.2d 410 (8th Cir. 1978).

(e) Must obtain right to sue letter from EEOC after EEOC has had charge on file for at least 180 days. 42 U.S.C. § 2000e-5(f)(1).

(f) Suit must be filed within 90 days of receipt of right to sue letter. 42 U.S.C. § 2000e-5(f)(1).

(g) Applies to employers of 15 or more employees. 42 U.S.C. § 2000e(b).

(h) May be brought as class action under Fed. R. Civ. P. 23. Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867 (1984).

2. AGE DISCRIMINATION IN EMPLOYMENT ACT, AS AMENDED, 29 U.S.C. § 621, et seq.

The Age Discrimination in Employment Act of 1967 (as amended in 1978) prohibits discrimination on the basis of age between the ages of 40 and 70, unless age is a bona fide occupational qualification. Compulsory retirement of employees in bona fide executive or high policymaking positions at the age of 65 is permissible if they will receive nonforfeitable annual retirement benefits of at least $44,000.00. This act was originally administered and enforced by the Department of Labor, but as the result of a consolidation in 1979, it is now administered by the EEOC. Suit may be filed by either the EEOC or the individual complainant.

IMPORTANT FEATURES.

(a) Liquidated or double damages in addition to back pay for willful violations. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985); Dickerson

v. Deluxe Check Printers, Inc., 703 F.2d 276 (8th Cir. 1983).

(b) No compensatory or punitive damages. Statute is equitable in nature, entitling prevailing plaintiff to limited relief: declaratory, injunctive, back pay, reinstatement, or in lieu thereof, front pay and attorneys' fees and costs. Hill v. Spiegel, Inc., 708 F.2d 233 (6th Cir. 1983); Johnson v. Al Tech Specialties Steel Corp., 731 F.2d 143 (2d Cir. 1984). Generally compensatory damages for pain and suffering are not recoverable. See Naton v. Bank of California, 649 F.2d 691 (9th Cir. 1981); Slatin v. Stanford Research Institute, 590 F.2d 1292 (4th Cir. 1979); contra Flynn v. Morgan Guaranty Trust Co. of New York, 463 F. Supp. 676 (E.D. N.Y. 1979); Morton v. Sheboygan Memorial Hospital, 458 F. Supp. 804 (E.D. Wis. 1978) (granting recovery of compensable damages under ADEA).

(c) Right to jury trial. 29 U.S.C. § 626(c)(2).

(d) No administrative exhaustion requirement -- 60 day deferral with EEOC. Potential plaintiff must file a charge of discrimination with EEOC and Iowa Civil Rights Commission within 180 days of alleged discrimination. Late filing with ICRC does not deprive federal court of jurisdiction. See Evans v. Oscar Mayer & Co., 441 U.S. 750 (1979).

(e) No class action under Fed. R. Civ. P. 23. However, multiple joinder provisions of Fair Labor Standards Act apply. See 29 U.S.C. § 626(b); 29 U.S.C. § 216(b).

(f) There is a split in authority concerning whether the issue of liquidated damages, like other damage questions, should be determined by the jury. Cleverly v. Western Electric Co., 594 F.2d 638 (8th Cir. 1979) (jury permitted to determine liquidated damages issue); but see, e.g., Chilton v. National Cash Register Co., 370 F. Supp. 660 (S.D. Ohio 1974) (judge should determine the issues of willfulness and whether to award liquidated damages). Issues concerning whether to order reinstatement, promotion or hiring are equitable issues demanding resolution by the judge. Lorillard v. Pons, 434 U.S. 575 (1978) ("it is clear that judgments compelling 'employment, reinstatement or promotion' are equitable in nature"). Because the availability of front pay is typically only granted as a substitute for

reinstatement, the appropriateness of a front pay award and the amount of that award are arguably also best resolved by the judge. Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979) (if recoverable, front pay damages in lieu of reinstatement would be equitable in nature, like back pay).

3. CIVIL RIGHTS ACT OF 1866, 42 U.S.C. § 1981.

Section 1981 of the Civil Rights Act of 1866 provides all persons the same right as white persons to make and enforce contracts. This act has been interpreted to prohibit race discrimination in employment by private employers and provides rights parallel to those provided under Title VII. However, § 1981 provides for broader monetary remedies.

IMPORTANT FEATURES.

(a) Unlike Title VII, remedies are much broader. Plaintiff may recover compensatory and punitive damages. Block v. R.H. Macy & Co., 712 F.2d 1241 (8th Cir. 1983); Wilmington v. J.I. Case Co., 793 F.2d 909 (8th Cir. 1986).

(b) Right to jury trial. Setser v. Novack Investment Co., 483 F. Supp. 1147 (E.D. Mo. 1980), rev'd, 638 F.2d 1137 (8th Cir. 1981), vacated, 657 F.2d 962 (1981) (en banc), cert. denied, 454 U.S. 1064 (1981).

(c) No administrative exhaustion requirement. Smith v. Pan American World Airways, 706 F.2d 771 (6th Cir. 1983); Mitchell v. Keith, 725 F.2d 385 (9th Cir. 1985).

(d) No federal statute of limitations -- most applicable state statute of limitations applies. Harris v. Norfolk & Western Railway Co., 616 F.2d 377 (8th Cir. 1980); Guy v. Swift & Co., 612 F.2d 383 (8th Cir. 1980).

(e) Section 1981, unlike Title VII, contains no explicit prohibition against retaliation. The courts have been divided over the issue of whether claims for retaliation for filing administrative charges or participating in administrative proceedings may be maintained under § 1981. Some courts have stated

that retaliation for involvement in administrative proceedings does not entail the racial discrimination necessary for a § 1981 claim. Tramble v. Converters, Inc. Co., 343 F. Supp. 1350 (N.D. Ill. 1972); Grant v. Bethlehem Steel Corp., 22 Fed. Empl. Prac. Cas. 680 (BNA) (S.D. N.Y. 1978), aff'd, 622 F.2d 43 (2d Cir. 1980). Generally, the courts have agreed that claims of retaliation for advocating rights or opposing practices, at least when such rights or practices involve racial discrimination, may be raised under § 1981. Winston v. Lear-Siegler, Inc., 558 F.2d 1266 (6th Cir. 1977); see also Sullivan v. Little Hunting Park, 396 U.S. 229 (1969).

4. CIVIL RIGHTS ACT OF 1871, 42 U.S.C. § 1983.

This statute will apply to private employers only where a private employer is acting in concert with persons or governmental agencies acting under color of state or local law, or where there is otherwise state action. Any person who under color of state or local law deprives a citizen of the rights, privileges and immunities provided by the Constitution and laws, shall be liable to the person injured. This act has been interpreted to prohibit race, sex and national origin discrimination by public employers.

IMPORTANT FEATURES.

(a) Usually only applicable in public employment matters because of a lack of state action or acting in concert with governmental officials in the private sector. Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Mendez v. Belton, 739 F.2d 15 (1st Cir. 1984).

(b) In situations where both § 1983 and Title VII apply, plaintiff may pursue remedies under § 1983 even where plaintiff misses the procedural time deadlines under Title VII, if the plaintiff alleges an independent constitutional violation rather than simply a statutory violation of Title VII. Trigg v. Fort Wayne Community Schools, 766 F.2d 299, 302 (7th Cir. 1985); Day v. Wayne County Board of Auditors, 749 F.2d 1199, 1205 (6th Cir. 1984).

(c) Right to jury trial. Goodwin v. St. Louis County Circuit Court, 729 F.2d 541 (8th Cir. 1984).

(d) Compensatory and punitive damages available. Goodwin v. St. Louis County Circuit Court, 729 F.2d 541 (8th Cir. 1984); Smith v. Wade, 461 U.S. 30 (1983) (punitive damages).

(e) No federal statute of limitations -- most applicable state statute of limitations applies. Wilson v. Garcia, 471 U.S. 261 (1985).

(f) The showing necessary to demonstrate a deprivation of rights under color of law has generally been equated with that required to demonstrate the state action necessary under the fourteenth amendment. Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982).

D

5. EQUAL PAY ACT OF 1963, 29 U.S.C. § 206.

The Equal Pay Act (EPA) of 1963, an amendment to the Fair Labor Standards Act, makes it illegal to discriminate in the payment of wages on the basis of sex for equal work on jobs which require equal skill, effort and responsibility under similar working conditions. Unlike Title VII, the EPA is limited to discrimination in wages and does not apply to hiring, firing, promotion or other types of discrimination.

The EPA prohibits differences in pay between men and women for the performance of "substantially equal jobs," unless the differences are due to a bona fide merit system, training program or seniority system, or some other factor other than sex. See 29 U.S.C. § 206(d)(1). This act was originally administered and enforced by the Department of Labor, but as the result of a consolidation in 1979, it is now administered by the EEOC. Suit may be filed by either the EEOC or the individual complainant.

IMPORTANT FEATURES.

(a) Individuals not required to file with any state or federal agency as a prerequisite to any lawsuit. The individual may go directly to a court of competent jurisdiction, federal or state. Alternatively, an individual may bring a claim of EPA violation to the EEOC and rely on the Commission to investigate and litigate on the individual's behalf, although the EEOC is not obligated to do so.

(b) Statute of limitations for suit under EPA is two years from the date of the violation, three years in the case of a willful violation. The statute of limitations is not tolled for an individual who relies on the EEOC to pursue a claim of violation. 29 U.S.C. § 255(a); EEOC v. Hernando Bank, Inc., 724 F.2d 1188 (5th Cir. 1984); EEOC v. Affiliated Foods, Inc., 34 Fed. Empl. Prac. Cas. (BNA) 943 (W.D. Mo. 1984).

(c) Liquidated damages (double damages) may also be available for willful violations. See Grayboff v. Pendelton, 36 Fed. Empl. Prac. Cas. (BNA) 350 (N.D. Ga. 1984).

(d) Jury trial available. Carter v. Marshall, 457 F. Supp. 38 (D. D.C. 1978).

(e) The burden of proving that two jobs are substantially equal is on the plaintiff. Similar job descriptions alone do not require a finding of substantial equality of jobs. Epstein v. United States Secretary, Treasury, 739 F.2d 274 (7th Cir. 1984). The failure of a plaintiff to demonstrate that jobs require equal effort, skill and responsibility, and were performed under similar working conditions can be fatal to plaintiff's case. McKee v. McDonnell Douglas Technical Services Co., 700 F.2d 260 (5th Cir. 1983).

(f) In assessing an equal pay violation claim, it has been held that it is permissible to compare the complainant's compensation with that of non-immediate predecessors and successors in the position. A defense argument that only the immediate predecessor or successor to the complainant could be used for a comparison of equal pay was rejected in Clymore v. Far-Mar-Co., Inc., 702 F.2d 499 (8th Cir. 1983).

6. REHABILITATION ACT OF 1973, 29 U.S.C. §§ 701-709, et seq.

This act prohibits discrimination against the physically or mentally handicapped by employers with federal contracts or employers receiving federal assistance. See Prewitt v. USPS, 262 F.2d 292 (5th Cir. 1981). The act requires that affirmative action efforts be made to employ and accommodate physically or mentally handicapped individuals. "Handicapped" is broadly defined and judicial

interpretation has even included addicts and alcoholics in its definition. See, e.g., Tinch v. Walters, 765 F.2d 599 (6th Cir. 1985) (recovered alcoholic was an "otherwise qualified handicapped individual" within meaning of Rehabilitation Act); Davis v. Bucher, 451 F. Supp. 791, 796 (E.D. Pa. 1978) (alcoholism is recognized as a substantial handicap). The act requires preparation of a written affirmative action program if the employer has 50 or more employees and $50,000.00 or more annually in government contracts or subcontracts.

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Under the Rehabilitation Act of 1973, there is no requirement for exhaustion of administrative remedies. See Adashunas v. Negley, 626 F.2d 600 (7th Cir. 1980).

Definition of "handicapped" pursuant to 29 U.S.C. § 706(7)(B) states that there is no obligation to employ alcoholics and drug abusers whose current use of alcohol or drugs (a) prevents them from "performing the duties of the job in question"; or (b) would result in their employment constituting a "direct threat to property or the safety of others." 29 U.S.C. § 706(7)(B).

There is no recognized private right of action under § 503 of the Rehabilitation Act of 1978. Under § 504, the Supreme Court has recently permitted suits against employers even where the primary objective of the federal aid awarded was not for the purpose of promoting employment. Consolidated Rail Corp. v. LeStrange, 465 U.S. 624 (1984).

7. VIETNAM ERA VETERANS READJUSTMENT ACT.

The Vietnam Era Veterans Readjustment Act of 1974, 38 U.S.C. § 101, et seq., requires employers with government contracts or federal assistance to take affirmative action to employ and advance both disabled veterans and veterans of the Vietnam era (service between 8/5/64 and 5/7/75). The Act requires preparation of a written affirmative action program if the employer has 50 or more employees and $50,000.00 or more annually in government contracts or subcontracts.

8. EXECUTIVE ORDERS 11246 AND 11375.

These two executive orders prohibit discrimination against and require affirmative action efforts to employ minorities and women if the employer is a government contractor or subcontractor. The orders require preparation of a written affirmative action program if the employer has 50 or more employees and $50,000.00 or more annually in

government contracts or subcontracts. (Although as of September 1, 1981, there are outstanding proposed rules to raise the threshold to 250 or more employees and a contract of $1 million or more.) The orders are administered and enforced by the Office of Federal Contract Compliance Programs, an agency within the Department of Labor.

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9. VETERANS' REEMPLOYMENT RIGHTS ACT.

The Veterans' Reemployment Rights Act, 38 U.S.C. § 2021, et seq., guarantees rights of employees called into military service to return to their former jobs with no loss of pay or seniority rights, including benefits which would have been accumulated in their absence on the basis of seniority. See, e.g., Bryan v. Griffin, 166 F.2d 748 (6th Cir. 1948); Greathouse v. Babcock & Wilcox Co., 381 F. Supp. 156 (N.D. Ohio 1974); Kidder v. Eastern Airlines, Inc., 469 F. Supp. 1060 (S.D. Fla. 1979).

B. STATE STATUTES.

1. IOWA CIVIL RIGHTS ACT -- CHAPTER 601A.

Iowa Code § 601A.6 makes it illegal for an employer to refuse to hire, accept, register, classify or refer for employment, to discharge any employee, or to otherwise discriminate in employment against any applicant for employment or any employee because of the age, race, creed, color, sex, national origin, religion or disability of such applicant or employee. Discrimination by labor organizations is also prohibited. Iowa Code § 601A.6(1)(b). Discrimination by employment agencies is also prohibited. Iowa Code § 601A.6(1)(c).

Emotional distress damages have been awarded under the Iowa Civil Rights Act. See, e.g. Ridenour v. Montgomery Ward, 786 F.2d 867 (8th Cir. 1986).

IMPORTANT FEATURES

(a) Complaint of discrimination must be filed with Iowa Civil Rights Commission within 180 days after the alleged discriminatory or unfair practice occurred.

(b) Complainant may commence suit in state district court after the complaint has been on file with the Commission for at least 120 days, and the

complainant has obtained a release from the Commission, and suit is commenced within 90 days after issuance by the Commission of the release, or within one year after the filing of the complaint, whichever occurs first. Iowa Code § 601A.16(3).

2. RECENT IOWA DRUG TESTING LEGISLATION.

(a) AN OVERVIEW OF RECENT IOWA LEGISLATION.

On July 1, 1987, House File 469 became law. This statute regulates the circumstances and procedures under which an employer may request a drug test of an employee or applicant for employment, including private employers, and provides both civil and criminal penalties for violation of the statute. The statute contains a prohibitions on random of blanket drug testing. Section 730.5(2) provides: "An employer shall not request, require or conduct random or blanket drug testing of employees." The statute does allow an employer to require a specific employee to submit to a drug test subject to several mandatory conditions. The statute further provides that an employer "shall take no disciplinary action against an employee due to the employee's drug involvement the first time the employee's drug test indicates the presence of alcohol or a controlled substance if the employee undergoes a substance abuse evaluation, and if the employee successfully completes substance abuse treatment."

(b) CONDITIONS REQUIRED FOR A DRUG TEST TO PASS STATUTORY MUSTER.

All of the following conditions must be met in order for a drug test to pass statutory muster.

(1) The employer must have probable cause to believe that an employee's faculties are impaired on the job. Iowa Code § 730.5(3)(a) (1987).

(2) The employee is in a position where such impairment presents a danger to the safety of the employee, another employee, member

of the public, or property of the employer, or when impairment due to the effects of a controlled substance is a violation of a known rule of the employer. Iowa Code § 730.5(3)(b) (1987).

(3) The test sample must be analyzed by a laboratory or testing facility approved by the Department of Public Health. Iowa Code § 730.5(3)(c) (1987).

(4) If the first test is positive, a second test using an alternative method of analysis must be conducted. Iowa Code § 730.5(3)(d) (1987).

(5) The employee must be accorded a reasonable opportunity to rebut or explain the results of the drug test. Iowa Code § 730.5(3)(e) (1987).

(6) The employer must provide substance abuse evaluation and treatment if recommended by the evaluation, with costs apportioned as provided under the employee benefit plan or at employer's expense, if there is no employee benefit plan, the first time the employee's drug test indicates the presence of alcohol or a controlled substance. The employer shall take no disciplinary action against the employee based on a first-time positive test if the employee undergoes a substance abuse evaluation, and if the employee successfully completes substance abuse treatment, if treatment is recommended by the evaluation. Iowa Code § 730.5(3)(f) (1987).

(c) PRE-EMPLOYMENT AND ROUTINE PHYSICALS.

Drug tests may be conducted as part of a physical examination performed as a part of a pre-employment physical or as part of a regularly scheduled physical, subject to the following conditions:

(1) The employer must include a notice that the drug tests will be part of a pre-employment physical in any notice or advertisement

soliciting applicants for employment. Iowa Code § 730.5(7)(a) (1987).

(2) An applicant for employment shall be personally informed of the requirements of a drug test at the first interview. Iowa Code § 730.5(7)(a) (1987).

(3) For a regularly scheduled physical, the employer shall give notice that a drug test will be part of the physical at least 30 days prior to the date on which the physical is scheduled. Iowa Code § 730.5(7)(b) (1987).

(4) The test sample must be analyzed by a laboratory or testing facility approved by the Department of Public Health; if the first test is positive, a second test using an alternative method of analysis must be conducted; and the employee must be accorded a reasonable opportunity to rebut or explain the results of the drug test. The requirement that no disciplinary action may be taken against an employee based on a first-time positive test, if the employee undergoes a substance abuse evaluation, and if the employee successfully completes substance abuse treatment, applies to drug tests conducted pursuant to a regularly scheduled physical but not to pre-employment drug tests.

(d) REMEDIES.

If an employer breaches an employee's rights under the statute, the statute provides for a civil action against the employer pursuant to Iowa Code § 730.5(9) (1987). Furthermore, the statute contains a specific provision outlawing retaliation for employees who bring civil actions under the statute. Iowa Code § 730.5(10) (1987). Finally, in addition to the private civil right of action, the statute provides that any person who violates it is guilty of a simple misdemeanor. Iowa Code § 730.5(11) (1987).

3. POLYGRAPH EXAMINATIONS PROHIBITED.

Iowa Code § 730.4 (1987) states:

> 730.4 Polygraph examination prohibited.
>
> 1. For the purpose of this section "polygraph means any mechanical or electrical instrument or device of any type used or allegedly used to examine, test or question individuals for the purpose of determining truthfulness.
>
> 2. An employer shall not require an applicant for employment or a current employee to take a polygraph examination as a condition of employment. An employer who requires a polygraph examination as a condition of employment is guilty of a simple misdemeanor.
>
> 3. Subsection 2 shall not apply to the state or a political subdivision of the state when in the process of selecting a candidate for employment as a peace officer.

There is no Iowa Supreme Court decision interpreting the statute as of this time.

4. ANTI-BLACKLISTING STATUTE.

Iowa Code Chapter 730 (1987) provides, inter alia, that an employer shall be liable in treble damages to discharged employees who are blacklisted from employment with other prospective employers.

II. BURDENS OF PROOF UNDER TITLE VII AND THE IOWA CIVIL RIGHTS ACT.

A. INTRODUCTION.

Plaintiff's prima facie case and the burden of proof differs depending upon whether the plaintiff is proceeding upon a disparate treatment or disparate impact theory. The United

States Court of Appeals for the Eighth Circuit recently commented on U.S. Supreme Court analysis involving the distinctions between disparate treatment and disparate impact:

> The Supreme Court discussed the distinctions between disparate treatment and disparate impact theories of discrimination in International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335-36 n.15, 97 S.Ct. 1843, 1854-55 n.15, 52 L.Ed.2d 396 (1977). Disparate treatment occurs where "[t]he employer simply treats some people less favorably than others because of their race * * *." Id. Proof of discriminatory intent is critical. In contrast, disparate impact "involve[s] employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." Id. Both theories may be applied to a particular set of facts. See also Jones v. International Paper Co., 720 F.2d 496, 499 (8th Cir. 1983).

Easley v. Anheuser-Busch, Inc., 758 F.2d 251, 255 n.6 (8th Cir. 1985).

An example of the plaintiff's prima facie case under a disparate treatment theory may be found in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). In McDonnell Douglas, the Court stated that a prima facie case of race discrimination in hiring is established under Title VII by showing that a member of a racial minority applied for a position the employer was attempting to fill, that he or she was qualified for that position, that he or she was rejected, and that the employer thereafter continued to seek applicants with similar qualifications. The burden of going forward then shifts to the employer to articulate a nondiscriminatory business justification for the rejection. Assuming such legitimate reason has been articulated, plaintiff is then required to prove the employer's reason is pretextual.

B. DISPARATE IMPACT CLAIM: PLAINTIFF'S PRIMA FACIE CASE.

In Easley v. Anheuser-Busch, Inc., 758 F.2d 251, 255 n.7 (8th Cir. 1985), the court discussed the elements of a plaintiff's prima facie case on a disparate impact claim:

> To establish a prima facie case on a disparate impact claim, plaintiffs must show that a facially neutral employment practice has a significantly adverse impact on a protected group. Once that showing is made, the burden shifts to the employer to demonstrate that the practice has a manifest relationship to the employment in question and is justified by business necessity. If the employer meets this burden, the plaintiffs may then show that other practices, which lack a similarly discriminatory effect, would satisfy the employer's legitimate interests. Such a showing would be evidence that the employer was using the practice as a mere pretext for discrimination. See, e.g., Connecticut v. Teal, 457 U.S. 440, 446-47, 102 S.Ct. 2525, 2530-31, 73 L.Ed.2d 130 (1982); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425, 95 S.Ct. 2362, 2375, 45 L.Ed.2d 280 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 430-32, 91 S.Ct. 849, 853-54, 28 L.Ed.2d 158 (1971).

C. DISPARATE TREATMENT CLAIM: PLAINTIFF'S PRIMA FACIE CASE.

In Easley v. Anheuser-Busch, Inc., 758 F.2d 251, 256 n.10 (8th Cir. 1985), the court discussed the elements of a plaintiff's prima facie case on a disparate treatment claim when it stated:

> To establish a prima facie case disparate treatment case, plaintiffs must prove that they applied for an available position for which they were qualified, but were "rejected under circumstances which give rise to an inference of unlawful discrimination." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981). See also McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). Establishment of a prima facie case creates a "legally mandatory, rebuttable presumption" of discrimination. Burdine, 450 U.S. at 254 n.7, 101 S.Ct. at 1094 n.7. The burden of production then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employees' rejection. "[I]f the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case." Id. at 254, 101 S.Ct. at 1094. However, if the employer carries the burden of

production, the presumption of illegal discrimination drops from the case, and the plaintiffs must show that the employer's proffered reasons were merely a pretext. Plaintiffs retain the burden of persuasion throughout, and must convince the trier of fact by a preponderance of the evidence that they were victims of intentional discrimination. Id. at 253-54, 101 S.Ct. at 1093-94; Craik v. Minn. State Univ. Bd., 731 F.2d 465, 469 (8th Cir. 1984).

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In Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), the Supreme Court made it clear that the employer's only obligation under the McDonnell Douglas formula articulated above is the burden of proffering a legitimate reason which is "clear and reasonably specific." Id. at 258.

III. WRONGFUL DISCHARGE.

A. EMPLOYMENT AT WILL.

The Iowa Supreme Court continues to adhere to the employment at will doctrine which it recently expressed in Northrup v. Farmland Industries, Inc., 372 N.W.2d 193, 195 (Iowa 1985) ("The general rule is that an at-will employee may be terminated at any time, for any reason").

B. JUDICIALLY CREATED EXCEPTIONS TO THE AT-WILL DOCTRINE.

1. VIOLATION OF PUBLIC POLICY.

(a) IOWA.

Iowa has not yet recognized a public policy exception to the employee at will doctrine but has hinted that it would adopt it on the right set of facts. See Abrisz v. Pulley Freight Lines, Inc., 270 N.W.2d 454 (Iowa 1978). Northrup v. Farmland Industries, Inc., 372 N.W.2d 193, 196 (Iowa 1985), the court interpreted its holding in Abrisz as follows:

> While we hinted in Abrisz that, under proper circumstances,

> we would recognize a common-law claim for a discharge violating public policy, we did not apply it there because the facts did not establish such a violation. We observed, moreover, that "[c]ourts should not declare conduct violative of public policy unless it is clearly so." Abrisz, 270 N.W.2d at 456. It has been observed, in fact, that successful common-law claims for wrongful discharge have been based in large part on violations of independent statutory policy, not those established by court decisions. See Note, Protecting At-Will Employees [Against Wrongful Discharge: The Duty to Terminate Only in Good Faith, 93 Harv. L. Rev. 1816, 1822-23 (1980)].

The court again referred to its holding in Abrisz in Haldeman v. Total Petroleum, Inc., 376 N.W.2d 98, 105 (Iowa 1985):

> Without foreclosing the possibility suggested in Abrisz that we might recognize an exception to the general rule if a discharge was based on reasons contrary to public policy, 270 N.W.2d at 455, we simply observe that this case would not fall into such an exception.

(b) OTHER JURISDICTIONS.

(1) THE MAJORITY VIEW.

Most other jurisdictions that have examined the question have found a public policy exception to the employee at will doctrine. See, e.g., Nees v. Hocks, 536 P.2d 512 (Ore. 1975) (employee participation as juror); Reuther v. Fowler & Williams, Inc., 386 A.2d 119 (Pa. 1978) (jury service); Wiskotoni v. Michigan National Bank, 716 F.2d 378 (6th Cir. 1983) (discharge for honoring subpoena to testify before grand

jury); Thompson v. St. Regis Paper Co., 658 P.2d 1081 (Wash. 1984) (discharge of employee for instituting accounting practices complying with federal statute); Perry v. Hartz Mountain Corp., 537 F. Supp. 1387 (S.D. Ind. 1982) (discharge for refusal to engage in participation in violation of antitrust laws); Petermann v. Teamsters Local 396, 344 P.2d 25 (1959) (employee refusal to commit perjury before state legislative committee); Wagenseller v. Scottsdale Memorial Hospital, 710 P.2d 1025 (Ariz. 1985) (plaintiff fired after she refused to "moon" audience as part of skit during employer-sponsored social event); Palmateer v. International Harvester Co., 421 N.E.2d 876 (Ill. 1981) (dismissal of plaintiff for supplying information to police about suspected wrongdoing of fellow employee protected by public policy which favors citizen crime-fighters); Novosel v. Nationwide Insurance Co., 721 F.2d 894 (3d Cir. 1983) (at-will private employee allegedly discharged for his refusal to participate in employer's lobbying effort and for privately stating his opposition to employer's political stand on No-Fault Reform Act may maintain action in tort for wrongful discharge based on public policy as expressed by state and federal constitutional rights of political association and expression, even though these rights do not directly apply to private employee); Ludwick v. This Minute of Carolina, 337 S.E.2d 213 (S.C. 1985) (employee who alleged that she was dismissed in retaliation for answering subpoena to testify before state Employment Security Commission stated claim for wrongful discharge in violation of clear mandate of public policy embodied in state statute providing penalty for failure to obey such subpoena); Tameny v. Atlantic Richfield Co., 27 Cal.3d 167, 610 P.2d 1330 (1980) (discharge for refusing to engage in price-fixing); Harless v. First National Bank, 246 S.E.2d 270 (W. Va. 1978) (discharge for refusal to violate consumer credit code); O'Sullivan v. Mallon, 390 A.2d 149 (N.J. 1978) (discharge for refusing to practice medicine without a license); Sventko v. Kroger Co., 245 N.W.2d 151 (Mich. 1976) (discharge for filing a claim under a workers' compensation statute);

Frampton v. Central Indiana Gas Co., 297 N.E.2d 425 (Ind. 1973) (discharge for filing a claim under a workers' compensation statute); Kelsay v. Motorola, Inc., 384 N.W.2d 353 (Ill. 1978) (discharge for filing a claim under a workers' compensation statute).

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(2) THE MINORITY VIEW.

Although a clear minority, several courts have rejected the public policy exception. See, e.g., Johnson v. Gary, 443 So.2d 924 (Ala. 1983).

2. IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING.

(a) THE MINORITY VIEW.

A minority of jurisdictions have found an implied covenant of good faith and fair dealing in the employment at will context. See, e.g., Wagenseller v. Scottsdale Memorial Hospital, 710 P.2d 1025 (Ariz. 1985) (implied-in-law covenant of good faith and fair dealing protects right of parties to agreement to receive benefit of agreement into which they have entered; parties to at-will contract agree that employee will do work required by employer and employer will provide necessary working conditions and pay employee for work done; it cannot be said, however, that one of the agreed-upon benefits is guarantee of continued employment or tenure); Cleary v. American Airlines, Inc., 111 Cal. App. 3d 433, 168 Cal. Rptr. 722 (1980) (long service coupled with discharge without cause violates covenant of good faith and fair dealing); Khanna v. Microdata Corp., 170 Cal. App. 3d 250, 215 Cal. Rptr. 860 (1985); Foley v. Interactive Data Corp., 184 Cal. App. 3d 241, 219 Cal. Rptr. 866 (1985); Magnan v. Anaconda Industries, Inc., 193 Conn. 558, 479 A.2d 781 (1984); Cort v. Bristol-Myers Co., 385 Mass. 300, 431 N.E.2d 908 (1982); Mitford v. de Lasala, 666 P.2d 1000 (Alaska 1983); Dare v. Montana Petroleum Marketing Co., 687 P.2d 1015 (Mont. 1984).

(b) THE MAJORITY VIEW.

A majority of courts that have addressed the question have not found an implied covenant of good faith and fair dealing in the employment at will context. See, e.g., Hillesland v. Federal Land Bank Association of Grand Forks, 407 N.W.2d 206 (N.D. 1987); Zick v. Verson Allsteel Press Co., 623 F. Supp. 927 (N.D. Ill. 1985) (applying Illinois law); Parker v. National Corporation for Housing Partnerships, 619 F. Supp. 1061 (D. D.C. 1985) (applying District of Columbia law); Satterfield v. Lockheed Missiles and Space Co., 617 F. Supp. 1359 (D. S.C. 1985) (applying South Carolina law); Fletcher v. Wesley Medical Center, 585 F. Supp. 1260 (D. Kan. 1984) (applying Kansas law); Parnar v. Americana Hotels, Inc., 65 Hawaii 370, 652 P.2d 625 (1982); Hunt v. IBM Mid America Employees Federal Credit Union, 384 N.W.2d 853, 858 (Minn. 1986); Neighbors v. Kirksville College of Osteopathic Medicine, 694 S.W.2d 822 (Mo. Ct. App. 1985); Murphy v. American Home Products Corp., 58 N.Y.2d 293, 461 N.Y.S.2d 232, 448 N.E.2d 86 (1983); Thompson v. St. Regis Paper Co., 102 Wash.2d 219, 685 P.2d 1081 (1984); Brockmeyer v. Dun & Bradstreet, 113 Wis.2d 561, 335 N.W.2d 834 (1983).

3. THE ENFORCEABILITY OF POLICIES AND PROCEDURES IN PERSONNEL MANUALS -- BREACH OF IMPLIED CONTRACT TERMS.

(a) CASES HOLDING POLICIES IN PERSONNEL MANUALS TO BE AN ENFORCEABLE IMPLIED CONTRACT.

Policies and procedures in personnel manuals have been interpreted to be an implied contract restricting an employer's freedom to discharge at will. See, e.g., Kinoshita v. Canadian Pacific Airlines, 724 P.2d 110 (Hawaii 1986) (employee rules constitute contract enforceable by at-will employees who were discharged without appeal procedures outlined in rules after their arrest by narcotics agents); Duldulao v. St. Mary of Nazareth Hospital Center, 505 N.E.2d 314 (Ill. 1987) (provision in handbook

that employee would not be terminated without proper notice and investigation following 90-day probationary period created contract binding employer, since traditional contract formation requirements of offer, acceptance and consideration are present; employee's continued work constitutes consideration for promises contained in handbook statement); Watson v. Idaho Falls Consolidated Hospitals, 720 P.2d 632 (Idaho 1986) (manual and handbook that were compiled by hospital and followed by employees and management were part of hospital's employment contract with discharged ward clerk, and reasons for which clerk could be terminated were limited by these documents; analysis applicable to unilateral contracts, not "mutuality of obligation" analysis applicable to bilateral contracts, is test for determining whether handbook constitutes enforceable contract between employer and employee, since handbook is offer, and employee's continuing to work is bargained-for exchange necessary to make offer binding); Tossaint v. Blue Cross & Blue Shield of Michigan, 292 N.W.2d 880 (Mich. 1980) (statement indicating discharge only for "just cause" contained in written employer policy constituted implied contract); Pine River State Bank v. Mettile, 333 N.W.2d 622 (Minn. 1983) (failure to follow employer handbook's discipline procedures breaches implied contract).

(b) CASES REFUSING TO FIND POLICIES AND PROCEDURES IN PERSONNEL MANUALS TO BE AN IMPLIED CONTRACT.

Some courts have refused to find an implied contract in employer personnel manuals. See, e.g., Hunt v. IBM Mid-America Employees Federation, 384 N.W.2d 853 (Minn. 1986) (employer's discipline and termination phraseology in employment manual was too indefinite to form basis of enforceable employment contract; court distinguished its prior holding in Pine River State Bank); Rupinsky v. Miller Brewing Co., 627 F. Supp. 1181 (W.D. Pa. 1986) (state law does not imply employment contract for personnel policies included in company's employee benefits handbook or by those mentioned at human relations seminar); Gates v. Life of Montana Insurance Co., 638 P.2d 1063 (Mont. 1982) (employee handbook is a unilateral company policy statement without a meeting of the "minds" such as would establish a contract).

IMMUNITIES IN IOWA

By: Roger Lathrop

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I. IMMUNITIES DEFINED

A. Black's Law Dictionary

B. Prosser, Handbook of the Law of Torts

II. HISTORICAL PERSPECTIVE

A. Municipal Immunity

1. Russell v. Men of Devon, 1798 2 Term Rep. 667, 100 Eng. Rep. 359

2. Hack v. City of Salem, 189 N.W.2d 857 (1963 Ohio) - Judge Gibson mid 1970's - one-half of states in United States had abolished the immunity by direct judicial action, legislation or both.

3. Other states enacted "insurance-waiver provisions" allowing municipalities to be held liable to the extent of applicable insurance coverage.

B. 1987 - American Law Institute now recognizes the view that municipalities have no general immunities at all. Section 895C Restatement (Second) of Torts.

Note: It is still normal or customary for states to impose proscriptive rules or carve out limited exceptions for municipal liability (such as 613A Code of Iowa)

Note: Even in states that attempt to maintain municipal immunity, there is a never ending attack on the constitutionality or applicability of them. For example, a city's water or electric utility company "looks like" private business. Therefore, the distinction has been drawn between "proprietary" versus "governmental" functions. Cities may be immune from liability for governmental functions, but subject to liability for proprietary functions.

III. INDIVIDUAL'S IMMUNITY WHEN ACTING AS "PUBLIC" EMPLOYEE

A. Police and fireman are generally liable for their negligent acts or tortious acts.

Firemen's rule discussion re limitation on civil recovery to - Gail v. Clark, et al, Sup. Ct. No. 86-493, filed July 22, 1987

1. Section 613A.4 - Officer or employee of municipality not liable for act or ommission when exercising due care in extension of statute or ordinance or regulation (regardless of whether statute, ordinance or regulation is later found to be valid) . . .

and officer or employee of municipality not liable for failure to exercise or perform a discretionary function on duty (regardless of whether or not "discretion" is found to have been abused).

However: See Section 613A.12 - Officer and employees may be liable for punitive damages and for actions permitted under Section 8520 ("Co-employee" actions under Iowa Worker's Compensation Act)

Punitive damages only recoverable where officer or employee's conduct "in performance of a duty" is proven to be "willful, wanton and reckless."

Co-employee suits only allowed where conduct is proven to be "gross negligence amounting to such lack of care as to amount to wanton neglect for the safety of another" - Section 85.20. See infra IIIA(3)

Arguably, it is more difficult to plead and prove a "co-employee" case against an employee or officer of a municipality than it is to prove the same case against a non-municipal co-employee.

2. Limitations on civil recovery for "public employee" - Fireman's Rule -

a. Traditionally - "Fireman's Rule" denies recovery for firefighter or police officer when their cause of action is based on the same conduct that initially created the need for the firefighter/police officer's presence in his or her official capacity.

b. Adopted in Iowa - The Iowa Supreme Court adopted the "Fireman's Rule" in the 1984 case of Pottebaum v. Hinds, 347 N.W.2d 642, 645, 647 (Iowa 1984).

c. Iowa's latest view of "Fireman's Rule" - The rule was re-examined and explained in the case of Gail v. Clark, et al, - Sup. Ct. No. 86-493, filed July 22, 1987. The rule was found to be inapplicable under the facts of Gail.

3. Co-employee immunity from suit unless the injury is "caused by the other employee's gross negligence amounting to such lack of care as to amount to wanton neglect for the safety of another." Iowa Code Section 85.20 (1987).

a. Standard of care (Judicially defined in Thompson v. Bohlken, 312 N.W.2d 501, 505 (1981)) requires 3 elements:

(1) knowledge of the peril to be apprehended;

(2) knowledge that the injury is probable as opposed to possible result of the danger;

(3) a concious failure to avoid peril.

b. Delegation by Employer to Co-employee. Compare Kerrigan v. Errett, 256 N.W.2d 394, 396-97 (Iowa 1977) (criterian for co-employee liability included delegation of duty which has not been abrogated by any subsequent court or legislation).

B. Legislators, judges and state officers generally are given absolute immunity for their actions which are legislative or judicial in nature.

C. Quasi-Legislative/Quasi-Judicial Immunity -

1. Professional and occupational licensing boards and "Peer-Review" committees -
Section 258A.1 (definition)
Section 285A.8 (immunity

Note: Immunity includes "acts, ommissions or decisions in good faith" and extends to disclosure of information in connection with proceedings of a peer review committee. THIS DOES NOT APPLY IF SUCH ACT IS DONE WITH MALICE. §258A.8(2)

2. Iowa Supreme Court Rule 118.19 - effective September 1, 1987 - "Complaints submitted to the grievance commission or to the committee on professional ethics and conduct, or testimony with respect thereto shall be privileged and no lawsuit predicated thereon may be instituted.

"Members of the grievance commission, members of the committee on professional ethics and conduct, and their respective staffs shall be immune from suit for any conduct in the course of their official duties."

D. General Assembly Members Const. Iowa, III, 11; Iowa Code Section 2.17 Freedom of Speech.

IV. STATE'S IMMUNITY IN IOWA

A. Statutory

1. Chapter 25A Code of Iowa - State Tort Claims Act. [Question: Notice privisions of §25A.5 subject to same attack as §613A.5?]

2. Chapter 668.10 Code of Iowa - Immunity from apportionment of fault for failure to erect traffic control devices, failure to remove natural or unnatural accumulations of ice or snow and immunity from claims for contribution unless Chapter 25A has been complied with.

3. Chapter 25A.8 & 9 Code of Iowa - Regarding design of highway bridges and guardrails.

4. Fritz v. Parkinson - existence of trees, shubbery or other "visual obstructions" on property adjacent to the roadway does not expose the adjoining property owner to liability. Rather, it is the municipality that has responsibility for maintaining the roadway who was liable for any "visual obstruction" and resulting injury or damages. 397 N.W.2d 714. Applies to state and local governments.

5. Chapter 25A.14 Exceptions - No state employee personally liable for any claim exempted under 25A.14. 25A.23

6. No writs of execution against state or state employee. Section 25A.6.

V. MUNICIPALITIES IMMUNITY IN IOWA

A. 613A, Code of Iowa - "Tort liability of governmental subdivisions".

1. The State of Iowa acknowledges that, with certain limited exceptions, every municipality in Iowa "is subject to liability for its torts and those of its officers and employees, acting within the scope of their employment or duties, whether arising out of a governmental or proprietary function. Ten specific exceptions were listed in 613A.4. Actual knowledge of the defect was set up as an affirmative defense in 613A.3. The major limitation or requirement established by 613A was set forth in 613A.5 requiring written notice within sixty days after the alleged occurrence or institution of lawsuit within six months. If notice was given, then the lawsuit had to be commenced within two years. Incapacitation caused by the injury complained of would extend the length of time for filing notice by no more than ninety days.

B. 1986 - Miller v. Boone County Hospital, 394 N.W.2d 776 (Iowa 1986) Justice Lavorato, writing for a majority, held that 613A.5 was unconstitutional and violated the equal protection clause of the U.S. Constitution (14th Amendment) in that it has created an impermissible class of Plaintiffs injured by local governments visavee plaintiffs injured by private tort feasors.

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C. Case law limited municipalities liability for defects in sidewalk or failure to remove ice and snow where Plaintiff had actual knowledge of the defect or an alternate safe route. Moreover, the municipality had to have actual knowledge of the defect or the defect had to exist for such a length of time that the City was presumed to have had knowledge.

Iowa Code Section 364.12(b) relating to responsibilities of abutting property owners has been examined and explained by the Iowa Supreme Court. The effect has been to limit liability of the abutting property owner and to expand the municipality's responsibilities.

See: Peffers v. City of Des Moines, 299 N.W.2d 675 (Iowa 1986) and Spechtenhauser v. City of Dubuque, 319 N.W.2d 213 (Iowa 1986).

VI. LIMITATIONS ON PRODUCT LIABILITY OF "NON-MANUFACTURERS" SECTION 613.18 ESTABLISHES AN IMMUNITY FROM LIABILITY OR A RETAILER OF A PRODUCT WHO DOES NOT ACTIVELY ASSEMBLE, DESIGN, LABEL OR INSTRUCT CONCERNING THE PRODUCT.

A. Includes retailers, sellers, distributors and wholesalers.

B. Immune from strict liability lawsuit or breach of implied warranty of merchantability which arises solely from an alleged defect in the original design or manufacture of a product. Section 613.18(1)(a)

Note: Does not cover warranty of fitness for particular purpose!!

C. Not liable for breach of implied warranty of merchantability for product upon proof that manufacturer is (1) subject to jurisdiction of Iowa Courts, and (2) not yet declared individually insolvent. Section 613.18(1)(b).

D. Retailer who assembles product, such assembly having no casual relationship to the injury from which claim arises is NOT LIABLE under strict liability or breach of implied warranty if merchantability IF (1) Manufacturer is subject to jurisdiction in Iowa and (2) manufacturer has not been individually declared insolvent. Section 618.18(1)(b)(2).

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VII. INTER-SPOUSAL IMMUNITIES IN IOWA - ABROGATED BY IOWA SUPREME COURT ON BASIS OF "PUBLIC POLICY" IN SHOOK V. CRABB, 281 N.W.2d 616 (Iowa 1979).

VIII. IMMUNITY OF DIRECTORS AND OFFICERS

IX. OTHER IMMUNITIES

A. Children - "Sliding scale" standard of care applied in determininng negligence of children. Ruby v. Easton, 207 N.W.2d 10 (Iowa 1973).

B. Parents - Limited liability for acts of their children. Section 613.16

1. $1,000.00 maximum per act.

2. $2,000.00 maximum (to same claimant) for two or more acts.

C. Abutting Property Owners - Defects in sidewalks are City's responsibility; not abutting property owners.

Spechtenhauser v. City of Dubuque, 391 N.W.2d 213 (Iowa 1986)

Pffers v. City of Des Moines, 299 N.W.2d 675 (Iowa 1986) Section 364.12(b)

Compare accumulation of ice and snow Iowa Code Section 618.18 and local ordinances.

X. PSEUDO-IMMUNITIES - (EXEMPTIONS, LIMITATIONS & PRIVILEGES)

A. Limitations on medical malpractie.

B. Privileges in defense of Defamation actions, generally.

C. Privileges for Intentional Torts.

D. Exemptions from Civil Rights Unfair Housing Laws, Iowa Code Section 601A.12.

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I. History of UM and UDM Statutes

A. Development of UM and UDM Concept

Attempts to deal with the problem of "financially irresponsible" motorists date back to 1925 when Connecticut and Massachusetts first adopted legislation in an attempt to encourage motorists to somehow provide for liability they might incur. 1 Widiss, Uninsured and Underinsured Motorist Insurance 4-5 (2dEd. 1985). Since then nearly every state in the union has adopted some form of legislation designed to help compensate the innocent motorist who is injured or damaged by another motorist who is either uninsured or financially unable to pay for the damages caused.

Obviously the need for this type of insurance only arose with the advent of the automobile. When automobiles were first introduced only the relatively affluent could afford them, and generally these people were able to pay for any damages they might cause. It was not until automobiles were mass produced and widely available that the problems of uninsured motorists became serious. With the increase in the number of automobiles and the resulting increase in the number of automobile accidents, it became apparent that it would be necessary to devise a system which would assure

compensation for those persons injured by a motorist who had no means of compensating the innocent victim. Widiss, § 1.1, at 3.

Several different solutions were suggested and implemented in different jurisdictions. Among the possible remedies were:

1. Enact legislation which would encourage motorists to obtain insurance;
2. Enact legislation requiring all motor vehicles or all motorists to be insured; and
3. Set up a guaranty or indemnity fund.

From 1925 to 1955 very little action was taken. However, from the years 1955 to 1970, many states adopted some form of the above solutions.

Under the first approach, in order to encourage motorists to obtain insurance, many states would threaten to revoke the driving privileges of a person who was unable to pay a judgment. This was the basis of the Connecticut legislation and the most popular approach overall. However, this scheme required a judgment to be entered against the person before any action would be taken. Where a tortfeasor was judgment proof, the Plaintiff was unlikely to bring any action and the motorist was allowed to continue driving uninsured.

Widiss, § 1.3, at 6. A modification of this type of legislation was the "security-type" law. In this situation no judgment was necessary. Once a motorist was in an accident, he had to prove his ability to pay damages of a certain amount or lose his driving privilege. Widiss, § 1.4, at 7.

A second approach was to mandate insurance for all motorists. The Massachusetts Act of 1925 was the first and only legislation of this kind for some thirty years. There was support for this type of legislation, however, and in 1956 New York became the second state to adopt it. There was also a great deal of opposition to state mandated automobile insurance, particularly from the insurance industry which did not want a major change in the current structure of automobile insurance.

A third possibility was to set up an indemnity fund whereby uninsured motorists, or all motorists and insurance companies would be assessed a fee to establish a pool of funds. ANNOT., 2 A.L.R.3d 760 (1965). From this pool of funds, uncompensated victims of automobile accidents could be compensated at least partially. For obvious reasons, the insurance industry opposed this plan as well. Widiss, § 1.6, at 9-10.

As an alternative to the above-discussed solutions, the insurance industry came up with its own

proposal. It proposed a new type of insurance whereby the motorist insures himself against the possibility of being injured by someone financially unable to meet their liability. If the insured could show that he was injured by an uninsured motorist and was legally entitled to recover, he would be compensated for his injuries to the extent of the minimum amount of coverage required by the state's financial responsibility law. Widiss, § 1.8 at 11. In 1957, New Hampshire became the first state to require an uninsured motorist provision in every automobile liability policy issued in the state on any motor vehicle principally used or garaged in the state. N.H. Rev. Stat. Ann. § 268.1. Over the next ten years states rapidly adopted similar types of requirements.

B. Iowa's UM and UDM Statute - 516A

In 1967, Iowa joined the majority of other states and enacted its own uninsured motorist legislation. Act of May 16, 1967, ch. 374, 1967 Iowa Acts 727. Iowa's uninsured motorist statute has seen few modifications since its enactment. In fact, the only significant changes occurred in 1980 when the statute was amended to require coverage for underinsured motorist in addition to uninsured motorist.

It would be a grave error to assume that the states took a uniform approach in adopting uninsured motorist statutes. The wording in the statutes may contain significant variations and, as will be discussed later, Iowa's statute is unique in many respects. It is important to be familiar with the wording of the uninsured motorist statute because the code requirements are by law incorporated into every auto policy offered in the state. The statutory requirements and legislative intent become a part of every policy just as if written into the policy. Benzer vs. Iowa Mutual Tornado Insurance Assn., 216 N.W.2d 835 [Iowa, 1974]. Therefore, one must read both the statute and the applicable policy in order to determine coverage. In those cases where there is a conflict between the statute and its intent and the wording of the policy, the statutory language and intent will nullify and take precedence over the policy language. Rodman vs. State Farm, 208 N.W.2d 903 [Iowa, 1973].

II. Significant Statutory Terms

A. Mandatory Coverage

Every auto policy offered in the State of Iowa must contain uninsured motorist coverage, underinsured motorist coverage, and hit-and-run motorist coverage.

Iowa Code, 516A.1 (1985). This coverage may be waived by an insured provided such rejection is in written form. The Iowa Court has held that written rejection of such coverage is valid even if the rejection is signed by a minor. Langstraat vs. Midwest Mutual Insurance Company. 217 N.W.2d 570 [Iowa, 1974].

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B. Uninsured Auto.

The code definition of an uninsured auto is not designed to be all inclusive. In fact the code definition is mainly concerned with including within the definition of uninsured auto those situations where the tortfeasor's insurance carrier becomes involved in insolvency proceedings. Iowa Code, 516A.3 (1985).

The standard policy definition of uninsured auto goes into much greater detail and defines not only what an uninsured automobile is but also what it is not. Some policies define an uninsured auto to include an insured vehicle with limits lower than those required by law. This could be significant particularly in those situations where your underinsured coverage exceeds your uninsured coverage. Furthermore, in those situations where the tortfeasor does have a policy with limits lower than the amounts required by the Iowa statute, you should initially be concerned with deter-

mining which state's law will be used in interpreting the amount of coverage available. In other words, you may have a situation where the uninsured motorist coverage available will be interpreted pursuant to the laws of another state. If that is the case many of the restrictive provisions of Iowa's uninsured motorist coverage statute may be avoided. For example, in Cole vs. State Auto and Casualty Underwriters, 296 N.W.2d 779 [Iowa, 1980], the Court, interpreting the coverage available under a hit and run vehicle claim, determined that Minnesota law should apply and, therefore, Iowa's physical contact rule with respect to hit and run drivers was not applicable.

Regardless of how a particular policy defines an uninsured auto, the insured will bear the initial burden of proving the uninsured status of the alleged tortfeasor. Griffith vs. Farm and City Insurance Company, 324 N.W.2d 327 [Iowa, 1982].

C. Underinsured Auto

The Iowa Code does not make any attempt to define the term "Underinsured." In a case which predates Iowa's requirement for underinsured motorist coverage, the Court in Detrick vs. Aetna Casualty and Surety Company, 158 N.W. 99 [Iowa, 1968], noted that according

to Webster's Third New International Dictionary "under-insurance means insurance in an amount insufficient to cover the possible loss or to satisfy the requirements of a co-insurance clause," Detrick at 104.

When the offering of underinsured motorist coverage became mandatory in 1980, however, some companies chose not to adopt the Webster Dictionary definition of underinsurance. For example, the definition of underinsurance which was presented to the Court in American State's Insurance Company vs. Tollari, 362 N.W.2d 519 [Iowa, 1985] reads as follows:

> "Underinsured motor vehicle means a land or motor vehicle or trailer of any type to which a bodily injury liability bond or policy applies at the time of the accident, but its limit for bodily injury liability is less than the limit of liability for this coverage."

Using the above definition of underinsurance, the amount of underinsurance coverage would be the amount by which the tortfeasor's liability coverage was under the underinsured limits of the insured's policy. In Tollari, the Court rejected the insurance company's definition which would have limited the insured's recovery and held that the underinsurance should be defined as the difference between:

1. The liability coverage available to the victim; and

2. The insured's loss that the tortfeasor's liability insurance did not reach subject to the limits of the underinsured coverage. Tollari at 523.

Many policies will incorporate a much broader definition of underinsured motor vehicle than that which was reviewed by the Court in Tollari. For example, many policies define an uninsured motor vehicle to include a vehicle which has bodily injury liability coverage, but the limit of such coverage is either:

1. Insufficient to pay the amount the insured is legally entitled to recover as damages; or

2. The liabilty coverage available is reduced by payments to others injured in the accident to an amount which is not enough to pay the full amount the insured is legally entitled to recover damages from the tort-feasor.

In 1980 there were two significant statutory changes with respect to underinsured motorist coverage. 1980 Iowa Acts, Chapter 1106, para 6-7. The most apparent and significant change occurred in Iowa Code, 516A.1, wherein it became mandatory for insurers to offer underinsured motorist coverage in all policies issued after January 1, 1980. A less apparent change was made in the language of Iowa Code, 516A.2, never-

theless, the additional language added to 516A.2 could have a significant impact on claims premised on underinsured motorist coverage. The language of 516A.2 has been interpreted so as to permit insurance companies to include coverage provisions which operate to limit an insured's recovery to the minimum liability requirements set forth in Iowa Code, 321A.2 [10]. Lemrick vs. Grinnell Mut. Reinsurance Co., 263 N.W.2d 714 [Iowa, 1978]. In 1980 the introductory language to 516A.2 was modified to read:

> "Except with respect to a policy containing both underinsured motor vehicle coverage and uninsured motor vehicle or hit and run vehicle coverage . . ."

Shortly after the statutory changes to 516A.2, the Iowa Insurance Institute requested the Insurance Commissioner to issue an opinion as to the significance of the new introductory language to 516A.2. In response, the insurance commissioner rendered an opinion, which read in part:

> "In order for the term 'underinsured motor vehicle coverage' to be meaningful, it must afford minimum limits for bodily injury liability higher than $15,000.00 per person and $30,000.00 per occurrence. The insurance department, therefore, interprets the statute to require that insurers offer underinsured motorist coverage above these limits. How much higher is a matter to be determined by the insurer as is presently the case. Some insurers will offer higher coverage than others with premiums charged accordingly."

Declaratory Ruling 1980-81 Commissioner of Insurance September 16, 1980.

According to the Insurance Commissioner's interpretation of the new introductory language to 516A.2, the language of 516A.2, which has been interpreted as only requiring insurer's to offer limits at the minimum levels required by Iowa Code; 321A.1 [10] (1985) does not apply to uninsured motorist claims. Therefore, those cases which have upheld the validity of policy language restricting insured's recovery to the minimum limits set forth in Iowa Code, Section 321A.1 [10] are of questionable significance when dealing with underinsured motorist claims.

D. Hit and Run Motorists

Under 516A.1, automobile liability policies issued in the State of Iowa must offer coverage for hit-and-run motorists. Once again, Iowa's statute is more restrictive than similar statutes in other jurisdictions due to the fact that coverage need only be afforded for bodily injury or death "arising out of physical contact of such hit and run motor vehicle with the person insured or with the motor vehicle which the person insured is occupying at the time of the accident."

In other words, Iowa permits policies which require physical contact with the hit and run motor vehicle. It is common for policies to incorporate some type of

physical contact requirement. For example, in the standard policy which is attached to this material, an uninsured motor vehicle is defined to include a vehicle "which is a hit and run vehicle whose operator or owner cannot be identified and which hits . . ." (emphasis added)

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It appears that Iowa is one of the few states which has a statute requiring physical contact in hit-and-run cases. Annt. 25 A.L.R. 3d 1299. In Rohret vs. State Farm Mutual Auto, 276 N.W.2d 418 [Iowa, 1979] the plaintiff argued that coverage should be afforded under the uninsured motorist provisions of a policy in those situations where physical contact with a hit-and-run vehicle cannot be established. The Court rejected the plaintiff's argument that a presumption of uninsured motorist coverage existed with a hit-and-run situation. The Rohret Court recognized that Iowa's statute was in a minority in upholding the physical contact requirement.

In those jurisdictions such as Iowa, where physical contact is required by statute, the Courts have split on the issue of whether contact with an intervening vehicle is sufficient to satisfy the physical contact requirement. 25 A.L.R. 3d 1299. The Iowa Court has not decided whether contact with an intervening vehicle

would be sufficient to satisfy the physical contact requirement, however, the wording of the Iowa statute is sufficiently specific and narrow to require that the physical contact actually take place with the alleged hit-and-run vehicle.

E. 516A.2-Minimum Coverage.

Statutory language similar to that contained in Iowa Code, 516A.2 (1985) is found in only one other state. Davenport vs. Aid Insurance Co., 334 N.W.2d 711 [Iowa, 1983]. Due to the language of 516A.2, insurance companies are not required to offer uninsured coverage which exceeds the limits of Iowa Code, 321A.1. Benzor vs. Iowa Mutual Tornado Insurance Assn., 216 N.W.2d 835 [Iowa, 1974]. In other words, policies issued in Iowa can contain provisions which operate to limit an insured's recovery to an amount which would have been afforded had the insured been in an accident with a party having the minimum liability limits required in Iowa. McClure vs. Employer's Mut. Cas. Company, 238 N.W.2d 321 [Iowa,1976].

In McClure the Court recognized that the majority of jurisdictions have held invalid those policy provisions which "one way or another restrict the injured persons recovery to the amount of the highest limits in any one of the uninsured motorist policies covering him at the

time of the injury where his damage from his injury exceeded those limits." 238 N.W.2d at 325. The McClure Court, nevertheless, held that such provisions were valid in Iowa due to the language contained in 516A.2. But for this statutory language, Iowa, in all likelihood, would follow the majority rule. McClure vs. Employers Mut. Cas. Company, 238 N.W.2d 321, 326 [Iowa, 1976].

It is only because of the code language contained in 516A.2 that the anti-stacking and anti-pyramiding provisions are deemed to be valid in Iowa. Keep in mind, however, that 516A.2 in and of itself does not prohibit stacking coverages. It simply permits companies to insert restrictive provisions in their policies so as to preclude stacking or pyramiding. Lemrick vs. Grinnell Mut. Reinsurance Company, 263 N.W.2d 714, 718 [Iowa, 1978].

F. Legally Entitled to Recover

1. Statute of Limitations

The uninsured motorist coverages mandated by Iowa Code, 516A (1985) are intended to protect an insured for those injuries which he or she is "legally entitled to recover" from an uninsured motorist. The phrase "legally entitled to recover" is not defined in the statute nor is it defined in the standard insurance

policy. Many courts, however, have defined the term to mean that an insured's injuries must be proximately caused by the negligence of the uninsured motorist. Widiss, Uninsured Motorist Coverage, 68 Iowa L. Rev. 397(1983).

As with any legal action which seeks redress for injury, one of the claimant's first concerns must be compliance with the applicable statute of limitations. In order to be "legally entitled to recover," must the insured commence claim within the two year tort statute of limitations or within the ten year contract statute of limitations? In Lemrick vs. Grinnell Mut. Reinsurance Company, 263 N.W. 2d 714 [Iowa, 1978], the plaintiffs commenced an uninsured motorist claim two years and eight months after the date of injury. The insurer denied coverage, and in support of its denial, argued that the two year tort statute of limitations had expired and, therefore, the insured was no longer "legally entitled to recover" damages against the uninsured motorist. The Court rejected the insurer's argument and chose to follow the majority rule which holds that the claims arising under uninsured motorist coverage are governed by the statute of limitations applicable to a written contract.

It would not be wise to broadly interpret the significance of the Lemrick decision. I do not believe Lemrick stands for the proposition that an uninsured motorist claim will be deemed to be timely filed in all instances simply because such claim is filed within the statute of limitations applicable to written contract actions. The defendant in Lemrick argued that the two year statute of limitations applied merely because the insurer would otherwise lose its subrogation rights as to the uninsured motorist. While most policies of insurance require an insured to report a claim "as soon as practical" it does not appear that the insurer in Lemrick alleged any prejudice resulting from the late filing of the claim other than the loss of its subrogation rights. Furthermore, the contract in Lemrick apparently did not specify any time period in which uninsured claims must be filed. Courts have upheld notice of claim deadlines in policies which were shorter than the statute of limitations applicable to contract actions. For a general discussion of the cases in this area See Annt. 28 A.L.R. 3d 580.

2. Comparative Fault

Prior to the enactment of the comparative fault provisions contained in Iowa Code Section 668, the role of the insured's fault was obviously less

significant in making an uninsured motorist claim. While there have been very few decisions addressing the issue of contributory negligence or comparative fault in connection with an uninsured motorist claim, it appears that the affirmative defense of contributory negligence or comparative fault is a valid basis for denying coverage. Widiss, §§ 7.4 and 7.5 at 196-200.

3. Interest

Interest to which an insured is entitled under an uninsured motorist claim would be calculated the same as if the insured were to initiate an action directly against the uninsured motorist. Keep in mind, however, that interest on an uninsured motorist claim premised on a wrongful death will run from the date of the death. Lemrick vs. Grinnell Mutual Reinsurance Company, 263 N.W.2d 714 [Iowa, 1978].

III. Significant Policy Terms

The standard automobile policy provisions dealing with uninsured motorist coverage are usually broken down into five separate parts. Those parts can be identified as:

1. Insuring agreement
2. Exclusions

3. Limits of liability

4. Other insurance

5. Arbitration

Remember that Iowa Code Section 516A only requires that companies offer uninsured motorist coverage so as to provide the insured with the minimum protection afforded under Iowa Code, Section 321A.1 [10]. Lidahl vs. Howe 345 N.W.2d 548 [Iowa, 1984]. The wording of any particular policy may offer more than the required minimum protection. While it's true that many insurance companies may use a standard form policy, not all policies are identical and, therefore, careful reading of the policy in question is essential.

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A. Insuring Agreement

1. Bodily injury Coverage

The insuring agreement, as with the statutory language, provides that recovery for damages is permitted only to the extent the insured is legally entitled to recover from the uninsured motorist. But once again, there is no further definition of "legally entitled to recover" contained in the policy. Also, as required in the statute, the policies generally limit recovery to bodily injury claims. The coverage language appears to afford the insured a right to recover subject to the

limits of the policy for bodily injury damages to the same extent allowed to as if the tortfeasor were being sued.

While the standard policy language does not make reference to coverage for death claims, it is important to keep in mind that Iowa Code Section 516A does mandate coverage for wrongful death and, therefore, such coverage would be incorporated by law into the policy language. Benzer vs. Iowa Mutual Tornado Insurance Assn., 216 N.W.2d 385 [Iowa, 1974].

It is significant to note that the standard policy also provides coverage for "any person for damages that a person is entitled to recover because of bodily injury to which this coverage applies sustained by a person previously defined as a covered person." In other words, under the terms of the standard policy, a person may recover consequential damages for bodily injury or bodily injuries sustained to another person insured under the policy. Widiss, §§ 6.1 and 6.3 at 173-181.

2. Caused by an Accident

There is a split of authority as to whether the intentional acts of an uninsured motorist are covered under the provisions of the uninsured motorist coverage. The cases seem to be split based upon whether the

term "accident" is viewed from the perspective of the insured's state of mind or from the uninsured motorist state of mind. Annt. 72 A.L.R.3d 1161.

The New York cases contained in the above A.L.R. citation have upheld the denial of coverage where the injury resulted from intentional acts of the uninsured motorist. The approach of the New York cases apparently reason that since the intentional acts of the uninsured motorist would not be covered under a standard auto liability policy, then the insured, even if denied coverage, is in the same position he or she would have been in had the uninsured motorist maintained a standard auto policy.

Decisions from jurisdictions outside New York reached a different result. Other jurisdictions conclude the term "accidental" should be viewed from the standpoint of the insured. In Selena Mutual Insurance Company vs. Saylor, 35 Ohio Misc. 81, 301 N.E.2d 721 [1973], the Court stated that the focus should be on the intent in the mind of the insured at the time of the injury. To focus on the intent of the uninsured motorist, the Court reasoned, would twist the obvious purpose of the uninsured motorist coverage.

In considering which approach Iowa will take when it addresses this issue, it is important to note that

the Iowa Court in Benzor vs. Iowa Mutual Tornado Insurance Assn., 216 N.W.2d 385 [Iowa, 1974] determined that the purpose of uninsured motorist coverage is not to provide coverage for the uninsured vehicle, but to afford protection for the insured.

3. Ownership, Maintenance, or Use of Uninsured Motor Vehicle

The standard policy requires not only that the injuries result from an accident but also that the liability of the uninsured motorist "arise out of the ownership, maintenance or use of the uninsured motor vehicle." There are numerous cases which interpret separately the meaning of the terms ownership, maintenance, or use. The focus of all the cases seems to be on determining whether the alleged injury bears any causal connection to the use of the automobile in question. The problems resulting from the interpretation of the terms ownership, maintenance, or use are not unique to uninsured motorist coverage. These are terms of art that are contained in standard auto or liability policies which probably account for the large number of cases interpreting there phrases. For an excellent collection of cases interpreting the ownership, maintenance or use policy provision, please refer to Annt. 15 A.L.R.4th 10. Even though it may appear

from a common sense perspective that an injury bears little relationship to the ownership, maintenance or use of a vehicle, I would recommend that you review the case law in this particular since the decisions from the various jurisdictions are conflicting and not easily categorized. After reviewing the decisions in this area, it is apparent that some Courts will go out of their way to find some causal connection between an injury and the ownership, maintenance, or use of a motor vehicle. For example, in National Indemnity Company vs. Corbo 248 S.W.2d 238 [FLA. App., 1971] the palintiff was injured when she was bitten by the insured's dog while sitting in the insured's parked car. The Court found that the injury did arise out of the use of the automobile.

B. Exclusions

There have only been two cases in which the Iowa Supreme Court has addressed exclusionary provisions in the context of an uninsured motorist claim. It is apparent, however, that the rules of construction and interpretation used by the Court in connection with interpreting the language and intent of an insurance policy apply equally to interpretations of uninsured motorist coverage and/or exclusions therein. The Court

has held that an insurance company has a duty to define any limitations in an exclusionary clause in clear and explicit terms. Benzer vs. Iowa Mutual Tornado Insurance Assn. 216 N.W.2d 385 [Iowa, 1974].

In Rodman vs. State Farm Mutual Automobile Insurance Company 208 N.W.2d 903 [Iowa, 1973], the insured was injured while a passenger in his own insured motor vehicle which at the time of the accident was being operated by an uninsured motorist. Under the definition section of the insured's policy, it was stated that the term uninsured automobile would not include:

1. An autombile defined herein as an insured automobile;

2. A land motor vehicle owned by the named insured or by any resident of the same household. 208 N.W.2d at 909. Since the auto in which the insured was injured was an insured auto, the company denied uninsured motorist coverage. The Rodman Court held that the above provision was invalid insofar as it was contrary to the legislative intent behind Iowa Code 516A. The Court stated:

> "There is no reason to believe that legislature intended to deny the purchaser of uninsured motorist coverage the protection he purchased just because the liability coverage is abstractly applicable to someone else." 208 N.W. 2d at 909.

The Rodman decision is also illustrative of the rules of construction used by the Court in interpreting exclusionary provisons in insurance policies.

In Lindahl vs. Howe 345 N.W.2d 548 [Iowa, 1984], the Court was asked to determine the validity of an exclusion which precluded uninsured motorist coverage for injuries sustained:

"A. While occupying; or

B. While being struck by a motor vehicle owned by the insured, insured's spouse, or any relative of the insured if it is not insured for this coverage under this policy."

The carrier denied uninsured motorist coverage because its insured was injured while riding a motorcycle which was not an insured vehicle under the auto policy. In other words, the insured had automobile liability coverage, however, the coverage was purchased for vehicles other than the one involved in the accident. The Court, delcaring the exclusion invalid, held that the legislative intent of 516A was to provide protection to an insured in any case to the same extent as if the tortfeasor had carried minimum liability insurance.

In both Rodman and Lindahl, the Court relied on legislative intent in declaring the exclusionary provision in question invalid. It should be noted that in Lindahl four justices dissented arguing that the facts

of Lindahl were distinguishable from the facts in Rodman. The dissent noted that the insured in Rodman acutally paid a premium for the vehicle in which he was injured while the plaintiff in Lindahl paid no premiums whatsoever for coverage in connection with the vehicle he was operating at the time of his injury.

C. Limits of Liability

The limits of liability section in the standard policy not only limits the maximum exposure of the insurer, but it also gives the insurer the right to offset its liability exposure to the extent the insured receives compensation for bodily injury under other policy provisons or from other forms of specified insurance.

Thus far the Iowa Court has recognized the validity of policy provisions which either limit the insured's maximum exposure or which provide to the insured certain rights of offset. In Holland vs. Hawkeye Security Insurance Company 230 N.W.2d 5 [Iowa, 1975] the Court held that an insurer could limit its maximum exposure under the uninsured motorist coverage so as to provide the minimum protection specified in Iowa Code 321A.1 [10]. The plaintiff in Holland carried one automobile liability policy which listed nine separate automobiles in the policy. The plaintiff paid an additional premium

for each listed vehicle with respect to uninsured motorist coverage. One of the plaintiff's insured vehicles was involved in a collision with an uninsured motorist resulting in several deaths and injuries to parties in the insured's vehicle. At the time of the accident, the insured's policy specified that the uninsured motorist liability limits were $10,000 for each person and $20,000 per accident. The insured argued that since he paid an uninsured motorist premium for each of the nine vehicles listed on his policy, he should have uninsured motorist coverage of $180,000. In short, the insured wanted to stack the uninsured motorist coverage for each of his nine vehicles. The Court interpreted the limit of liability section set forth in the policy and concluded that it was clear and unambiguous. The Court further held that while the policy did limit the insured's uninsured motorist liability exposure, such limitation was sufficient to satisfy the mandates of Iowa Code 516A.

With respect to the provisions in a policy which prohibit the stacking of coverages, the sample policy which is attached to this material also makes it clear that the coverage limits set forth in the declaration are the maximum coverages regardless of the number of vehicles or premiums shown in the declaration.

The Court has also addressed the validity of the setoff provisions in the limit of liability section of the policy. It is important to keep in mind that while the Iowa Courts have upheld the validity of anti-stacking and offset provisions contained in the policy it is only because Iowa Code 516A.2 permits such a result. But for the language of 516A.2, the Iowa Court in all likelihood would permit stacking of uninsured motorist coverage and would invalidate much of the offset language contained in the policy. McClure vs. Employers Mut. Cas. Company 238 N.W.2d 321 [Iowa, 1976].

The significance of the language contained in 516A.2 was discussed in Davenport vs. AID Insurance Company 334 N.W.2d 711 (Iowa, 1983). In Davenport, the insured was killed by an uninsured motorist and the insured's administrator subsequently obtained a $100,000 judgment against the uninsured motorist which naturally was not collectable. The administrator then filed a products liability claim against the manufacturer of the insured's motor vehicle and obtained a settlement of $60,000. When the administrator made a claim for $10,000 under the deceased insured's uninsured motorist coverage, the claim was denied. One of the reasons for denying the claim was based on policy language which

provided that the amount due under the uninsured motorist coverage could be reduced by sums paid to the injured party by a third party tortfeasor. The Court in upholding the policy setoff provision recognized that the majority of jurisdictions would not permit such a setoff until an insured had obtained full recovery for his or her injury. Nevertheless, the Court went on to explain that its decision to reject the majority approach was mandated by the language contained in 516A.2. The Court stated:

> "Although our conclusion indicates that we are favorable to the majority view, we have on two previous occasions arrived at another result after examining all sections of 516A." 334 N.W.2d at 714.

Language in the standard policy which is attached to this material also allows the insurer to reduce its coverage by all sums paid or payable because of bodily injury under worker's compensation or disabiltiy benefit laws. The Court in McClure vs. Employers Mut. Cas. Company, 238 N.W.2d 321 [Iowa, 1976], was asked to decide whether such an offset provision was permissible. The McClure Court stated that 516A.2 permits policies which include terms, exclusions, limitations, conditions, and offsets which are designed to avoid duplication of insurance or other benefits. In McClure that Court

went on to state that the words "insurance" or "other benefits" in the second paragraph of 516A.2 encompass workman's compensation. 238 N.W.2d at 329.

The Iowa Court has also recognized that an insurance policy may be drafted to allow a reduction of uninsured motorist benefits based on the payments made under the medical payment provisions of a policy. Lemrick vs. Grinnell Mut. Reinsurance Company, 263 N.W.2d 714 [Iowa, 1978]. It should be noted, however, that the Lemrick Court found the offset language in that case to be ambiguous and, therefore, refused to allow the medical payment offset requested by the insurer. 263 N.W.2d at 718.

D. Other Insurance

The wording of the "Other Insurance Clause (OIC) has changed significantly over the years. The wording in the attached sample policy is identical to the language used in the Insurance Service Office Personal Auto Policy issued in 1970. 1 Widiss, § 13.

As with the wording in the older OIC, the more modern version does provide that the policy coverage is excess when the insured is injured in a nonowned auto which has similar coverage. The differences between the older policy language and the more modern language

are significant. The following are some of the more significant differences noted in Widiss, § 13.14 at 432:

1) By inserting the phrase "other collectible insurance," the clause no longer applies unless the claimant has been indemnified to the level specified by the financial responsibility laws of a particular state.

2) Unlike the older policy, there is no excess escape clause which allows the insurer to limit its liability only to the extent its coverage "exceeds the applicable limits of liability of such other insurance."

3) It does not appear that the language in the more modern OIC can be used by insurers to avoid stacking of coverages since the policy defines the company's share of a loss as "the proportion that our limit of liability bears to the total of all applicable limits." It is important to keep in mind here, however, that there are anti-stacking provisions contained in the limit of liability section of the policy which may apply.

The more modern OIC has not been subject to review by the Iowa Courts. Nevertheless, the older more lengthy OIC has been subject to judicial review here in Iowa.

The complexity of the older OIC is apparent in a reading of McClure vs. Employers Mut. Cas. Co. 238 N.W.2d 321 [Iowa, 1976]. A sample of the old OIC is set forth in full in the opinion. The McClure Court was asked to determine if the OIC was valid in Iowa. In holding that such clause was valid, the Court recognized that the majority of Courts have held similar OICs invalid. The Court went on to note that it was compelled to reject the majority approach due to the language contained in Iowa Code 516A.2 which specifically allows such provisions in connection with uninsured motorist coverage. The McClure Court held that OICs are valid so long as they do not reduce the uninsured motorist coverage below the liability limits that are required in Iowa Code, 321A.2 [10]. In Westhoff vs. American Inter Insurance Exchange 250 N.W.2d 404 [Iowa, 1977]. The Court reaffirmed the McClure decision. The appellant in Westhoff urged the Court once again to adopt the majority approach and hold OICs invalid. The Westhoff Court in reaffirming its approach in McClure stated:

> "The distinction between the majority position and the McClure holding is the existence of Section 516A.2. None of the cases cited by plaintiffs dealt with an equivalent statutory provision. [Citation omitted] Consequently, the plaintiff's contention that 'other insurance' provisions in motor vehicle liability insurance policies are contrary to Iowa law is clearly without merit." 250 N.W.2d at 409.

The Westhoff Court also held that the "excess-escape clause" contained in the older OIC was permissable in Iowa once again due to the language of 516A.2.

In Lemrick vs. Grinnell Mut. Reinsurance Company 263 N.W.2d 714 [Iowa, 1978], the Court reaffirmed the holdings in McClure and Westhoff, however, the Court did hold that under some circumstances the OIC may conflict with the legislative intent of Iowa Code 516A.1. In Lemrick, two separate insurers attempted to use the OIC in their policy so as to reduce the coverage available to the injured insureds below the statutory minimum required by Iowa Law. In rejecting the insurer's reliance on the OIC, the Court distinguished the McClure and Westhoff holdings by stating that in the facts of the present case there was:

> "Not an attempt by any insured to stack and collect more than $10,000 but an attempt by each of the three insureds to recover $10,000 when the bodily injury damage of each is at least $10,000 and the uninsured motorist limits add up to $30,000. 363 N.W.2d at 719."

The Lemrick Court held that insurance companies cannot rely on the language in the OIC of their policies to reduce coverage to the injured insureds below the statutory minimum required by Iowa Code, 321A.2 [10].

Conclusion

A review of both the applicable uninsured motorist statute and the insurance policy in question is absolutely essential in determining the amount of coverage which may be available in any particular uninsured motorist claim. The amount of coverage available to an insured may vary significantly depending upon which states' laws apply and depending upon the wording of the insured's policy.

PART C—UNINSURED MOTORISTS COVERAGE

INSURING AGREEMENT

We will pay damages which a covered person is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of bodily injury:

1. Sustained by a covered person; and
2. Caused by an accident.

The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the uninsured motor vehicle.

Any judgment for damages arising out of a suit brought without our written consent is not binding on us.

"Covered person" as used in this Part means:

1. You or any family member.
2. Any other person occupying your covered auto.
3. Any person for damages that person is entitled to recover because of bodily injury to which this coverage applies sustained by a person described in 1. or 2. above.

"Uninsured motor vehicle" means a land motor vehicle or trailer of any type:

1. To which no bodily injury liability bond or policy applies at the time of the accident.
2. To which a bodily injury liability bond or policy applies at the time of the accident. In this case its limit for bodily injury liability must be less than the minimum limit for bodily injury liability specified by the financial responsibility law of the state in which your covered auto is principally garaged.
3. Which is a hit and run vehicle whose operator or owner cannot be identified and which hits:
   a. you or any family member;
   b. a vehicle which you or any family member are occupying; or
   c. your covered auto.
4. To which a bodily injury liability bond or policy applies at the time of the accident but the bonding or insuring company:
   a. denies coverage; or
   b. is or becomes insolvent.

However, "uninsured motor vehicle" does not include any vehicle or equipment:

1. Owned by or furnished or available for the regular use of you or any family member.
2. Owned or operated by a self-insurer under any applicable motor vehicle law.
3. Owned by any governmental unit or agency.
4. Operated on rails or crawler treads.
5. Designed mainly for use off public roads while not on public roads.
6. While located for use as a residence or premises.

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EXCLUSIONS

A. We do not provide Uninsured Motorists Coverage for bodily injury sustained by any person:

1. While occupying, or when struck by, any motor vehicle owned by you or any family member which is not insured for this coverage under this policy. This includes a trailer of any type used with that vehicle.
2. If that person or the legal representative settles the bodily injury claim without our consent.
3. While occupying your covered auto when it is being used to carry persons or property for a fee. This exclusion does not apply to a share-the-expense car pool.
4. Using a vehicle without a reasonable belief that that person is entitled to do so.

B. This coverage shall not apply directly or indirectly to benefit any insurer or self-insurer under any of the following or similar law:

1. workers' compensation law; or
2. disability benefits law.

LIMIT OF LIABILITY

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The limit of liability shown in the Declarations for this coverage is our maximum limit of liability for all damages resulting from any one accident. This is the most we will pay regardless of the number of:

1. Covered persons;
2. Claims made;
3. Vehicles or premiums shown in the Declarations; or
4. Vehicles involved in the accident.

Any amounts otherwise payable for damages under this coverage shall be reduced by all sums:

1. Paid because of the bodily injury by or on behalf of persons or organizations who may be legally responsible. This includes all sums paid under Part A; and
2. Paid or payable because of the bodily injury under any of the following or similar law:
   a. workers' compensation law; or
   b. disability benefits law.

Any payment under this coverage will reduce any amount that person is entitled to recover for the same damages under Part A.

OTHER INSURANCE

If there is other applicable similar insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance.

ARBITRATION

If we and a covered person do not agree:

1. Whether that person is legally entitled to recover damages under this Part; or
2. As to the amount of damages;

either party may make a written demand for arbitration. In this event, each party will select an arbitrator. The two arbitrators will select a third. If they cannot agree within 30 days, either may request that selection be made by a judge of a court having jurisdiction. Each party will:

1. Pay the expenses it incurs; and
2. Bear the expenses of the third arbitrator equally.

Unless both parties agree otherwise, arbitration will take place in the county in which the covered person lives. Local rules of law as to procedure and evidence will apply. A decision agreed to by two of the arbitrators will be binding as to:

1. Whether the covered person is legally entitled to recover damages; and
2. The amount of damages. This applies only if the amount does not exceed the minimum limit for bodily injury liability specified by the financial responsibility law of the state in which your covered auto is principally garaged. If the amount exceeds that limit, either party may demand the right to a trial. This demand must be made within 60 days of the arbitrators' decision. If this demand is not made, the amount of damages agreed to by the arbitrators will be binding.

LAW OF CLOSING ARGUMENT

ALAN E. FREDREGILL
EIDSMOE, HEIDMAN, REDMOND, FREDREGILL, PATTERSON & SCHATZ
SIOUX CITY, IOWA

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I. AUTHORITY

A. Iowa Rule of Civil Procedure 195: Arguments.

> The parties may either submit the case or argue it. The party with the burden of the issue shall have the opening and closing arguments. In opening, he shall disclose all points he relies on, and if his closing argument refers to any new material or fact not so disclosed, the adverse party may reply thereto, which shall close the argument. A party waiving opening argument is limited, in closing, to reply to the adverse argument; otherwise the adverse party shall have the closing argument. The court may limit the time for argument to itself, but not for arguments to the jury.
>
> 1. However, the trial court does have the discretion to limit the scope of discussion on matters dealt with in closing argument. Carter v. Wiese Corp., 360 N.W.2d 122 (Iowa App. 1984).

B. Iowa Rule of Criminal Procedure 18(b): Order of argument.

> When the evidence is concluded, unless the case is submitted to the jury on both sides without argument, the prosecuting attorney must commence, the defendant follow by one or two counsel, at the defendant's option, unless the court permits the defendant to be heard by a larger number, and the prosecuting attorney conclude, confining himself to a response to the arguments of the defendant's counsel. When two or more defendants are on trial for the same offense, they may be heard by one counsel each.

C. Federal Rule of Civil Procedure 51:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests.

The court shall inform counsel of its proposed action upon the requests prior to arguments to the jury. The court, at its election, may instruct the jury before or after argument, or both. . . . [Amended rule, effective Aug. 1, 1987.]

[This appears to be the only reference to closing arguments anywhere in the Federal Rules of Civil Procedure. And they say there is no federal common law!]

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D. United States District Court, Northern and Southern Districts of Iowa, Local Rules of Court, adopted September 22, 1981, Rule 1.6: General procedure in Jury Trials:

.5 FINAL ARGUMENTS: In like order, parties shall offer their proofs, and at the conclusion of evidence, each party may make a final argument to the jury. Unless otherwise ordered counsel will be limited to one hour upon each side for the argument of cases to the jury. The counsel upon each side may divide their time between themselves, but the counsel who opens the argument shall make a fair statement of the points urged by his side. No more than two attorneys upon each side will be allowed to address the jury except by the permission of the court granted before the argument opens.

E. Iowa Code of Professional Responsibility for Lawyers, Disciplinary Rule 7-106(C), Trial Conduct:

In appearing in his professional capacity before a tribunal, a lawyer shall not:

* * * *

(3) Assert his personal knowledge of the facts in issue, except when testifying as a witness.
(4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

F. Iowa Code of Professional Responsibility for Lawyers, Ethical Consideration 7-24:

In order to bring about just and informed decisions, evidentiary and procedural rules have been established by tribunals to permit the inclusion of relevant evidence and argument and the exclusion of all other considerations. The expression by a lawyer of his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused is not a proper subject for argument to the trier of fact. It is improper as to factual matters because admissible evidence possessed by a lawyer should be presented only as sworn testimony. It is improper as to all other matters because, were the rule otherwise, the silence of a lawyer on a given occasion could be construed unfavorably to his client. However, a lawyer may argue, on his analysis of the evidence, for any position or conclusion with respect to any of the foregoing matters.

1. The Ethical Considerations of the Iowa Code of Professional Responsibility for Lawyers are mandatory, not merely aspirational. Matter of Frerichs, 238 N.W.2d 764, 768-69 (Iowa 1976); Committee on Professional Ethics v. Behnke, 276 N.W.2d 838, 840 (Iowa 1979).

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II. IMPROPER ARGUMENT

A. Mention of Insurance:

1. Price v. King, 255 Iowa 314, 122 N.W.2d 318, 323 (1963):

> We adhere to the long standing and well established rule that it is improper to suggest to the jury either directly or indirectly that the damages sued for are covered by insurance protecting against personal liability. . . .

2. Suggesting that damages are not covered by insurance, when in fact they are, is also objectionable. Laguna v. Prouty, 300 N.W.2d 98, 100-01 (Iowa 1981):

> Mr. Kersten acknowledged telling the jury plaintiff 'has come into Boone County asking a Boone County jury to take $200,000 out of the pocket . . . of the defendant.'
> * * * *
> [W]e also believe the argument that plaintiff was asking the jury to take $200,000 'out of the pocket' of defendant could reasonably be taken to imply defendant was uninsured.

[However, a new trial was denied because, in the words of the Court, it did not "appear prejudice resulted or a different result could have been probable." Id. at 102.]

3. Inadvertent reference followed by cautionary comment by the court is not prejudicial error.
Carter v. Chicago, Rock Island & Pacific Ry. Co., 247 Iowa 429, 74 N.W.2d 356 (1956).

4. Stewart v. Hilton, 247 Iowa 429, 437, 77 N.W.2d 637, 643 (1956):

> Error arises only when a party intentionally brings before the jury on an immaterial or irrelevant matter the fact that the opposite party carries insurance.

5. Defendant's closing argument that his client was the only person sued implied that she was uninsured and was objectionable.
Kratzke v. Meyer, 398 N.W.2d 200, 205-06 (Iowa App. 1986):

> Although the respective counsels disagree on the content of the statements and the inferences suggested thereby, Meyer's counsel agreed that 'to the best of my recollection I did say it would come in the form of a judgment against Teresa Meyer and she is the only person in the world here.'
> * * * *
> We think the defendant's argument to the jury could reasonably be taken to imply that

> the defendant is uninsured. As such, the argument is objectionable . . . .
>
> [This is all dicta, however, because the case was already reversed for the court's failure to give a requested instruction.]

6. Statement of plaintiff's counsel that the defendant would not have to pay and that they knew who would pay was error requiring reversal. McCornack v. Pickerell, 225 Iowa 1076, 283 N.W. 899 (1939).

7. Eloy v. Hubbard, 227 Iowa 149, 287 N.W. 829 (1939). Jury told the only party interested in preventing a verdict for plaintiff was an insurance company.

B. The "Golden Rule."

1. Oldsen v. Jarvis, 159 N.W.2d 431 (Iowa 1968).

> During closing argument to the jury here plaintiff's counsel made this statement in substance: 'It's been suggested that my suggestion of $10,000 or $20,000 was ridiculous or something to that effect, but let me ask you this question: Would counsel for the defendant or his client or I or you ___"
> * * * *
> Counsel then asked that opposing counsel be admonished that use of the 'Golden Rule' argument was misconduct and improper. Plaintiff's counsel denied he had said anything improper yet; the court remarked he appeared to be moving toward the 'Golden Rule' argument . . . . [Emphasis in original.]
>
> [But new trial was denied conditioned upon remittitur.]

2. Cardamon v. Iowa Lutheran Hospital, 256 Iowa 506, 128 N.W.2d 226, 2__ (1964):

In a speculative vein counsel then hypothesized a person with injuries such as were claimed. He compared the hospital cost per day with the total number of days decedent had been disabled. In discussing pain and suffering counsel at one point said: 'It's easy to speak of pain and say how much would you stand for $2? Would you take $2 for an hour of pain? I am going to impose upon you one hour of pain for $2.'

Defendant's counsel promptly objected to the argument as being in violation of the 'Golden Rule' Argument.'

The statement was promptly withdrawn by counsel with an apology and the court mentioned a previous admonishment that the jurors were not to put themselves in that position. The error of the argument was not so serious as to prevent cure. The withdrawal and admonishment make us reluctant to interfere.

3. Russell v. Chicago, Rock Island & Pacific R. Co., 249 Iowa 664, 86 N.W.2d 843 (1957). Jury asked how much they would take to go through life injured as plaintiff was.

C. Comparative financial status between parties.

1. Bisgaard v. Duvall, 169 Iowa 711, 151 N.W. 1051 (1915).

2. Burke v. Reiter, 241 Iowa 807, 42 N.W.2d 875 (1950). Jury told that plaintiff was a machinist and that defendant had a 700 acre farm and 500 steers worth $240,000.

3. Mongar v. Barnard, 248 Iowa 899, 82 N.W.2d 765 (1957).

4. Team Central, Inc. v. Teamco, Inc., 271

N.W.2d 914 (Iowa 1978).

5. Vanarsdal v. Farlow, 200 Iowa 495, 203 N.W. 794 (1925).

E. Reading from or reference to any matter outside the record.

1. Medical Books: Bixby v. Omaha-Council Bluffs Ry. & Bridge Co., Co., 105 Iowa 295, 72 N.W. 182 (19__).

2. Law Books or Statutes: State v. Mayes, 286 N.W.2d 387 (Iowa 1979).

3. Facts not in evidence:

a. Sheldon Fixture Co. v. Atlas Oil Co., 178 Iowa 413, 159 N.W. 983 (1916). Explanation of amended pleading.

b. Minutes of evidence from former trial. Martin v. Orndorff, 22 Iowa 504, 505 (1867).

c. Result of former trial. Miller v. Boone County, 95 Iowa 5, 63 N.W. 352, 355 (1895). [But not reversible error.]

d. Reading original notice and mention of attorney's lien. Caplan v. Reynolds, 191 Iowa 453, 182 N.W. 641, 642 (1921). [Failure to timely object failed to preserve the error.]

e. Withdrawn, amended or superseded pleadings. Riley v. Iowa Falls, 83 Iowa 761, 50 N.W. 33 (1891); Shipley v. Reasoner, 87 Iowa 555, 54 N.W. 470 (1893).

III. FAIR GAME

A. Failure of party to call witness or [in civil case] to testify on own behalf, or produce testimony within his control.

1. Johnson v. Kinney, 232 Iowa 1016, 7 N.W.2d

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188, 194 144 A.L.R. 997 (1942).

2. But see, Moore v.Vanderloo, 386 N.W.2d 108 (Iowa 1986), where plaintiff's counsel was not allowed to comment on the absence of defendant's expert witness who was mentioned in opening statement but not called to testify.

B. Faulty Logic: Moore v. Chicago & Northwestern Ry. Co., 151 Iowa 353, 131 N.W. 30, 33 (1911):

> Counsel has the right to draw conclusions from the testimony and give them to the jury, even though his logic may be at fault, or the opinions expressed by him unjust. So long as he does not go outside of the record in a manner from which we may fairly infer prejudice to the other party, and does not abuse his privilge by appealing to prejudice and passion, rather than to reason, the field is his own, and the court should not interfere.

C. The effect of the answers to the special interrogatories in a comparative fault case under Chapter 668 of the Iowa Code.

> 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. [Iowa Code Section 668.3(5) (1987).]

1. See also, Royzer v. McGraw, 360 N.W.2d 748 (Iowa 1985):

> [I]t is commonly thought to be inappropriate in a special verdicts submission for counsel to direct the jury's attention to the impact of any specific findings. . . . [However] under the circumstances here it does not seem appropriate to consider whether the trial court's ruling, rejecting the challenge to the argument was an abuse of discretion. Although there were special verdicts, there

was also a general verdict. Because the submission was a combination of special verdicts and a general verdict we decline to review the assignment. [note 1] We need not, and do not, decide the effect, if any, of Iowa Code section 668.3 recently enacted . . . . The new provision does not apply in this case.

C. Retaliation

1. Smith v. Cedar Rapids Country Club, 255 Iowa 1199, 124 N.W.2d 557, 567 (1964):

> The trial court, in refusing to certify defendant's bill of exceptions, said he well remembered what counsel had said to the jury in that regard and stated: 'I thought at the time that you were leading with your chin, and it would undoubtedly not be passed by by the plaintiffs in their closing argument.'

D. Wide Latitude

1. Johnson v. Kinney, 232 Iowa 1016, 7 N.W.2d 188, 194, 144 A.L.R. 997 (1942):

> Appellee's counsel then said he had read in the Saturday Evening Post what a trickster lawyer does to ingratiate himself with the jurors; he bows, nods and smiles through the trial and when arguing calls them individually by name.
> * * * *
> Was the reference to the "trickster lawyer" such misconduct as to require reversal? While we think that statement should have been omitted, we are not justified in reversing on that account.

IV. Bibliography

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V. Other works of interest:

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"Closing Arguments," W. Barnes, Trial Tactics and Evidence, Association of Trial Lawyers of Iowa, pps. 202-03 (1978).

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"Voir Dire - Opening and Closing Arguments," D. Dutton & H. Smith, 1985 Iowa Defense Counsel Annual Meeting, pps. K1-5.

"Great Arguments," a monthly feature of the publication Litigation, American Bar Association Litigation Section, by Jacob A. Stein, Senior Editor.

RECENT CHANGES IN RULES

RELATING TO IOWA CIVIL PRACTICE

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David S. Walker
Drake Law School
Des Moines, Iowa

* Comments submitted by the Supreme Court Advisory Committee on Rules are not adopted by the Supreme Court.

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* Comments submitted by the Supreme Court Advisory Committee on Rules are not adopted by the Supreme Court.

49. Original notice--issuance and form.

(a) Written directions for the service of the original notice and copy of petition shall be delivered to the clerk with the petition. There shall also be delivered to the clerk with the petition the original notice to be served and sufficient copies of both. The original notice shall contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to serve, and within a reasonable time thereafter file, a ~~written special appearance,~~ motion~~,~~ or answer, and shall notify the defendant that in case of the defendant's failure to do so, judgment by default will be rendered against the defendant for the relief demanded in the petition. Except in small claims and cases involving only liquidated damages, the original notice shall not state the amount of any money damages claimed.

* * * *

R5/SA-A.1

53. **Time for ~~special appearance,~~ motion or answer.** A defendant served as provided in these rules by publication or by publication and mailing must serve, and within a reasonable time thereafter file, a ~~written special appearance,~~ motion or answer on or before the date fixed in the notice as published, which date shall not be less than twenty days after the date of last publication.

A defendant served in a manner prescribed by a statute or order of court shall serve, and within a reasonable time thereafter file, a ~~written special appearance,~~ motion or answer on or before the date fixed as provided by said statute or order of court.

In the event service of process is made by mail under R.C.P. 56.2 the date for such action shall be on the date fixed in the original notice which shall not be less than sixty days following the date of mailing.

In all other cases the defendant shall serve, and within a reasonable time thereafter file, a ~~written special appearance,~~ motion or answer within twenty days after the service of the original notice and petition upon such defendant.

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54. Special cases--response of garnishee.

(a) Any statute of Iowa which specially requires response by a particular defendant, or in a particular action, within a specified time, shall govern the time for serving, and within a reasonable time thereafter filing, a ~~written special appearance,~~ motion or answer in such cases, rather than R.C.P. 53.

(b) The officer serving a writ of attachment or execution shall garnish such persons as the plaintiff may direct as supposed debtors, or having in possession property of the principal defendant, which shall be effected by a notice served in the manner and as an original notice in civil actions, forbidding ~~his~~ the garnishee from paying any debt owing such defendant, due or to become due, and requiring ~~him~~ the garnishee to retain possession of all property of the defendant in ~~his~~ the garnishee's hands or under ~~his~~ the garnishee's control, to the end that the same may be dealt with according to law, and, unless answers are required to be taken as provided by statute, it shall cite the garnishee to appear in not less than ten days after service of the notice and at a time specified when court will be in session and a judge will be present, and answer such interrogatories as may be propounded, or ~~he~~ the garnishee will be liable to pay any judgment which the plaintiff may obtain against the defendant.

R5/SA-C.1

58. **Member of general assembly.** No member of the general assembly shall be held to ~~specially appear,~~ move or answer in any civil action in any court in this state while such general assembly is in session.

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~~66. Special appearance. A defendant may appear specially for the sole purpose of attacking the jurisdiction of the court, but only before taking any part in a hearing or trial of the case, personally or by attorney, or filing a motion, written appearance, or pleading. The special appearance shall be in writing, filed with the clerk and shall state the grounds thereof. If the special appearance is erroneously overruled, defendant may plead to the merits or proceed to trial without waiving such error.~~

66. Objections to jurisdiction. The special appearance is abolished. A defendant may not appear specially for the sole purpose of attacking the jurisdiction of the court. Subject to R.C.P. 111, the defenses of lack of jurisdiction over the person may be asserted by pre-answer motion under R.C.P. 104(a), in the answer, or in an amendment to the answer made within twenty days after service of the answer.

85. Time to move or plead.

* * * *

(c) Time after filing motions ~~or special appearances~~. The service of a motion ~~or special appearance~~ permitted under these rules alters these periods of time as follows, unless a different time is fixed by order of the court.

If the motion ~~or special appearance~~ is so disposed of as to require further pleading, such pleading shall be served within ten days after notice of the court's action.

* * * *

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R5/SA-F.1

87. Appearance alone. ~~An appearance without motion or pleading shall have the effect only of submitting to the jurisdiction.~~ The court shall have no power to treat ~~such~~ an appearance as sufficient to delay or prevent a default or any other order which would be made in absence thereof, or of timely pleading. Notice and opportunity to respond to any motion for judgment under R.C.P. 232("b") shall be given to any party who has appeared.

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104. ~~Exceptions~~ Defenses which must or may be asserted by pre-answer motion. Every defense in law or fact to any pleading must be asserted in the pleading responsive thereto, if one is required, or if none is required, then at the trial, except that:

(a) ~~Want of jurisdiction of the person, or insufficiency of the original notice, or its service must be raised by special appearance before any other appearance, motion or pleading is filed, and want of jurisdiction of the subject matter may be so raised,~~ If a motion under R.C.P. 111(a) is filed before a responsive pleading, the defenses of want of jurisdiction over the person, or insufficiency of the original notice or its service, must be raised in the motion or are waived. Want of jurisdiction of the subject matter may be raised by pre-answer motion; but the court shall dismiss the action at any time it finds, by suggestion of the parties or otherwise, that the court lacks jurisdiction of the subject matter.

* * * *

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111. Motions combined; waiver regarding jurisdiction and venue.

(a) Motions challenging personal jurisdiction under R.C.P. 104(a), ~~M~~motions to recast or strike, for a more specific statement, and to dismiss for failure to state a claim upon which any relief may be granted, shall be contained in a single motion and only one such motion assailing the same pleading shall be permitted, unless the pleading is amended thereafter.

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(b) At the same time that a party makes a motion as described in subdivision "a" of this rule, the party, if the grounds therefor exist, shall move to dismiss under R.C.P. 104(a) or for a change of venue to the proper county under R.C.P. 175. Failure to do so shall constitute a waiver of the defenses of lack of personal jurisdiction and improper venue.

R5/SA-I.1

117. Motion days--disposition of motions.

* * * *

(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~~.

* * * *

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230. **Default defined.** A party shall be in default whenever ~~he~~ that party: (a) fails to serve, and within a reasonable time thereafter file, a ~~written special appearance,~~ motion or answer as required in R.C.P. 53 or 54, or, has appeared, without thereafter serving any motion or pleading as stated in R.C.P. 87; or (b) fails to move or plead further as required in R.C.P. 86, unless judgment has already resulted under R.C.P. 87; or (c) withdraws ~~his~~ a pleading without permission to replead, or withdraws ~~his~~ an appearance or fails to be present ~~himself~~ for trial; or (d) fails to comply with any order of court or do any act which permits entry of default ~~against him,~~ under any rule or statute.

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R5/SA-K.1

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 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.

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EXHIBIT "M"

1. FORM OF ORIGINAL NOTICE FOR PERSONAL SERVICE.

IN THE IOWA DISTRICT COURT FOR ..... COUNTY

Plaintiff(s), ... (INSERT "LAW" OR "EQUITY".) No.....

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 is ....., Iowa .....

You are further notified that unless, within 20 days after service of this original notice upon you, 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 county courthouse in ....., Iowa, judgment by default will be rendered against you for the relief demanded in the petition.

.....

(SEAL) CLERK OF THE ABOVE COURT

.....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.

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R5/SA-M.1-2

EXHIBIT "N"

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), ... (INSERT "LAW" OR "EQUITY".) No.....

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 is ....., Iowa .....

You are further notified that unless, 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.

.....

(SEAL) CLERK OF THE ABOVE COURT

.....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.

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EXHIBIT "O"

3. **FORM OF ORIGINAL NOTICE AGAINST FOREIGN CORPORATION OR NONRESIDENT UNDER ~~§617.3, THE~~ IOWA CODE SECTION 617.3.**

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 is ....., Iowa .....

You are further notified that unless, within 60 days following the filing of this notice with the secretary of state of the State of Iowa, 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.

.....

(SEAL) CLERK OF THE ABOVE COURT

.....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.

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4. FORM OF ORIGINAL NOTICE FOR PUBLICATION.

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, which petition prays(1) ..... The plaintiff's attorney is ....., whose address is ....., Iowa .....

You are further notified that unless, on or before the(2) ..... day of ....., 19....., 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, judgment by default will be rendered against you for the relief demanded in the petition.

.....
(SEAL) CLERK OF THE ABOVE COURT

.....County Courthouse

.....,Iowa.....

NOTE:
The attorney who is expected to represent the defendant ~~shall~~ should be promptly advised by defendant of the service of this notice.

[(1)Here make a general statement of the claim or claims and, subject to the limitation in R.C.P. 69(a), the relief demanded (R.C.P. 50).
(2)Date inserted here must not be less than 20 days after the day of the last publication of the original notice (R.C.P. 53).]

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Committee Comment

Reasons for Abolishing Special Appearance Procedure. The special appearance rule is abolished for several reasons. First, since commencement of the action tolls the statute of limitations under R.C.P. 48 and 55, a special appearance merely challenging the form or content of the original notice will ordinarily not lead to dismissal of the action, and special appearances in these circumstances are quite properly discouraged. Second, the prohibition on joining with a bona fide jurisdictional challenge any matters addressing the merits or even requesting other relief tends to delay the disposition of controversies, increase the cost of litigation, and waste judicial resources through necessitating additional motions and hearings as well as additional judicial consideration of the case. Finally, nonresidents who have been sued in Iowa's state courts and who intend to raise objections to personal jurisdiction ordinarily do not object to the form or content of the original notice but object instead to the court's exercise of power over them. As to these defendants the Rule's provision for waiver of jurisdictional challenges through seeking additional relief or joining with the special appearance one or more nonjurisdictional challenges is harsh and inconsistent with the policy of deciding issues on their merits; and because the federal courts and most state courts have abolished the special appearance, the existence of the rule itself may be surprising.

Effect of Proposed Amendments. A defendant, therefore, may no longer appear specially for the sole purpose of attacking the jurisdiction of the court. R.C.P. 66 is substantially rewritten. Its title is changed to reflect proposed practice; and references to special appearances are deleted in the rules, namely, rules 49, 53, 54, 58, 85, 87, 104, 117, 230 and 332, and in the forms provided for original notices. Further, R.C.P. 104(a) is amended to make clear that a party is not required to raise jurisdictional objections by motion before answer.

Defendant does not forfeit the right to object to jurisdiction, including claimed defects in the original notice or its service, by failing to appear "specially" or by including other matters with the challenge to jurisdiction. Objections to jurisdiction may be raised by pre-answer motion which addresses the merits or seeks other relief, or in the answer, or in an amendment to the answer permitted to be made without obtaining leave of court.

A party does not have to file any pre-answer motion; and if he files none, he may to object to jurisdiction in the answer as a separate defense. The answer may be amended to include jurisdictional objections, but only if the amendment is one which may be made without leave of court under Rule 88. Rule 88 provides that a defendant need not obtain leave of court to amend the answer provided defendant does so "at any time within twenty days after [the answer sought to be amended] is served" and provided that the "the action has not been placed upon the trial calendar." That means, in effect, defendant has twenty days from the serving or filing of the answer, whichever is earlier, within which to amend the answer to include the jurisdictional defenses which have been omitted. A party who has chosen not to file a pre-answer motion and who neglects to assert objections to jurisdiction as separate defenses in the answer waives any such objection.

Waiver. The choice of the manner in which to raise jurisdictional objections is "subject to Rule 111," and defendant's right to object to personal jurisdiction may be waived. Under Rule 111(a), which the Committee recommends be amended to include motions to recast, if a party files a motion attacking a pleading, all pre-answer motions attacking a pleading must be combined in a single motion. Similarly, under proposed Rule 111(b), if a motion attacking a pleading is made, the party must also move to dismiss under Rule 104(a) as well as for change of venue under Rule 175, if either is available. "Failure to do so shall constitute a waiver of such defenses."

The proposed rule does not provide for waiver of the right to file a motion attacking plaintiff's pleading where defendant moves to dismiss for want of either subject matter or personal jurisdiction and does not join with his motion any challenge or objection to the merits of the suit or the manner in which the claim is pleaded, i.e., a motion to recast, a motion for more definite statement, a motion to strike, or a motion to dismiss for failure to state a claim upon which relief can be granted. As under current procedure, these motions may be made after a jurisdictional motion is overruled. The Advisory Committee believes that waiver is inappropriate in this context and that the Rules of Civil Procedure should continue to provide for a challenge to jurisdiction uncomplicated by additional matters attacking the pleadings, even at the possible cost of successive motions.

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The Committee believes otherwise where the defendant does move to strike or recast, to secure a more definite statement, or to dismiss for failure to state a claim upon which relief can be granted. In this situation no reason is apparent why objections to jurisdiction or venue, including objections to the original notice or the manner in which it is served, should not also be raised at that time; and the policy of current R.C.P. 111 supports a requirement that such matters be included in one consolidated motion if defendant does choose to file a motion attacking the pleading. Hence, if defendant moves to strike or to recast, for more definite statement, or to dismiss for failure to state a claim, defendant must include any objection to personal jurisdictional or venue in such a motion, else it will be waived.

Subject Matter Jurisdiction. Objections to subject matter jurisdiction, like objections to personal jurisdiction, may be raised by pre-answer motion or in the answer. Unlike personal jurisdiction, however, subject matter jurisdiction is never waived and may be raised at any time. Subject matter jurisdiction, therefore, is not included in the waiver provisions of new Rule 111(b), and R.C.P. 104(a) is amended to make clear that "the court shall dismiss the action whenever it appears, by suggestion of the parties or otherwise, that the court lacks jurisdiction of the subject matter."

103. ~~All defenses in answer. Every defense in bar or abatement, or to the jurisdiction after a general appearance, shall be made in the answer or reply, save as allowed by R.C.P. 104. No such defense shall overrule any other. But a party who presents and tries a defense in abatement alone, shall not thereafter be allowed to plead in bar.~~ Preliminary hearings. On application of any party, the motion for judgment on the pleadings under R.C.P. 222, and the defenses of (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, and (7) failure to join a party under R.C.P. 25, whether made in a pleading or by motion, shall be heard and determined before trial, unless the court orders that the hearing and determination thereof be deferred until the trial.

RULE 103
ALL DEFENSES IN ANSWER

The committee recommends that Iowa R.Civ.P. 103 be stricken and the following rule on a different topic be substituted:

RULE 103. PRELIMINARY HEARINGS. The defenses of (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 25, whether made in a pleading or by motion, and the motion for judgment on the pleadings under R.C.P. 222, shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

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Committee Comment

At common law defendant could seek dismissal of the suit, as now, for reasons unrelated to the merits of the case and based instead on reasons like lack of jurisdiction, improper venue, lack of capacity of the party bringing the suit, improper joinder, or the pendency of the same or substantially the same action in another court of the state. Defendant did so by filing a plea in abatement. If the court rejected the plea, defendant was then permitted to address the merits of the case through a plea in bar.

The effects of the common law procedure were to delay the disposition of most civil litigation and, through multiplying motions, filings and hearings, increase the cost of litigation and waste judicial resources. To avoid these consequences code procedure abolished the "dilatory pleas" as separate pleadings and, with limited exceptions like objections to jurisdiction and motions to dismiss for failure to state a claim upon which relief can be granted, required every defense in law or fact, whether in bar or abatement, to be included in the answer. Iowa Rules of Civil Procedure 103 and 104 adopt this position.

Current Rule 103 is substantially repetetive of Rules 69, 72, and 104, as amended or interpreted. Rules 72 and 104 require the answer to include all defenses, or they will be regarded as waived in the absence of permissible amendment. Rule 69 authorizes alternate or inconsistent defenses, subject to Rule 80's requirement of reasonable basis and good faith, so that that rule is itself authority that "[n]o such defense shall overrule any other."

No rule authorizes a preliminary hearing to consider and dispose of certain matters which historically, at common law, would have been determined in advance of trial on the merits; and the last sentence of Rule 103 strongly suggests that early presentation and trial of such matters is not permitted separate and apart from the merits. Otherwise matters "in bar" will be waived.

There is a need for a clear statement that certain matters should be determined early so that needless expense and delay in disposition of the action does not occur. Contrary to the suggestion in the last sentence of current Rule 103, the approved practice is to hear and determine these matters before trial unless the court orders otherwise. Martin v. JuLi Corp., 332 N.W.2d 871, 873 (Ia. 1973).

The proposed amendment to Rule 103 does not change the law that all defenses in law or fact must be stated in the answer; eliminates matter covered in Rule 69; identifies matters which may properly be heard and resolved in advance of trial; and provides for preliminary hearings to determine such matters unless the court orders otherwise.

The subject of waiver is not addressed in the rule as amended. That subject is covered by Rule 111, as proposed to be amended, and Rule 72 as interpreted.

EXHIBIT "R"

RULE 34. THIRD PARTY PRACTICE

(a) When defendant may bring in third party. At any time after commencement of the action a defending party, as a third-party plaintiff, may file a cross-petition and cause an original notice to be served upon a person not a party to the action who is or may be liable for all or part of the plaintiff's claim. The third-party plaintiff need not obtain leave to make the service if the cross-petition is filed not later than ten days after the filing of the original answer. Otherwise leave may be obtained by motion upon notice to all parties to the action.

The person served with the original notice, the third-party defendant, shall assert defenses to the third-party plaintiff's claim as provided in R.C.P. 85 and counterclaims against the third-party plaintiff as provided in R.C.P. 29 and cross-claims against other third-party defendants as provided in R.C.P. 33.

The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the plaintiff shall assert defenses as provided in R.C.P. 85 and counterclaims under R.C.P. 29.

The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert defenses as provided in R.C.P. 85, counterclaims as provided in R.C.P. 29, and cross-claims as provided in R.C.P. 33. Any party may move to strike the third-party claim or for its severance or for separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable for all or part of the claim made in the action against the third-party defendant.

(b) When plaintiff may bring in third party. When a counterclaim is asserted against a plaintiff, that plaintiff may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

Adopted by Acts 1973 (65 G.A.) ch. 315, § 1. Amended by Acts 1973 (65 G.A.) ch. 316; S.Ct. Report of May 27, 1987, effective Aug 3, 1987.

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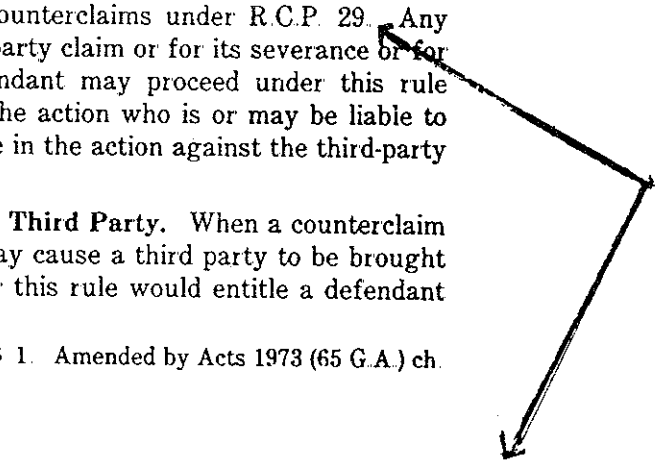
PROPOSED AMENDMENT TO RULE 34

RULE 34. THIRD PARTY PRACTICE

(a) When Defendant May Bring in Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may file a cross-petition and cause an original notice to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the cross-petition not later than 10 days after he files his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the original notice, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in R.C.P. 85 and his counterclaims against the third-party plaintiff as provided in R.C.P. 29 and cross-claims against other third-party defendants as provided in R.C.P. 33. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the plaintiff thereupon shall assert his defenses as provided in R.C.P. 85 and his counterclaims under R.C.P. 29. Any party may move to strike the third-party claim or for its severance or for separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant.

(b) When Plaintiff May Bring in Third Party. When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

Adopted by Acts 1973 (65 G.A.) ch. 315, § 1. Amended by Acts 1973 (65 G.A.) ch. 316.



INSERT: The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 85, his counterclaims as provided in Rule 29, and his cross-claims as provided in Rule 33.

Iowa R.C.P. 34 follows Federal R.C.P. 14 almost verbatim but omits the language in that rule which explicitly authorizes the plaintiff to assert any claims against the third-party defendant. The omission of the language in the federal rule, coupled with the reference in the state rule to plaintiff's assertion of counterclaims against the third-party defendant, may suggest that plaintiff can only proceed against the third-party defendant if the latter first states a claim against plaintiff.

This issue can be an important one, particularly in actions subject to Chapter 668 of the Iowa Code where plaintiff may have to proceed against the third-party defendant in order to be assured of collecting a judgment rendered for the plaintiff. See Reese v. Werts Corp., 379 N.W.2d 1 (Ia. 1985).

Once defendant has filed a cross-petition under Rule 34, there is no apparent reason why plaintiff should not be able seasonably to amend the petition under Rule 88 to join the third-party defendant under Rule 22 as a co-defendant on the original claim. Rule 34 is amended, therefore, to eliminate any suggestion that plaintiff may not do so. The new language is drawn from the omitted portion of Federal Rule 14(a).

DIVISION V. DISCOVERY AND INSPECTION

RULE 121. DISCOVERY METHODS

(a) 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.

(b) The rules providing for discovery and inspection shall be liberally construed and shall be enforced to provide the parties with access to all relevant facts. Discovery shall be conducted in good faith, and responses to discovery requests, however made, shall fairly address and meet the substance of the request.

(c) Unless the court orders otherwise under R.C.P. 123, the frequency of use of these methods is not limited. The court shall order otherwise if it determines that: (1) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (2) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (3) 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.

(d) A rule requiring a matter to be under oath may be satisfied by an unsworn written statement in substantially the following form: "I certify under penalty of perjury and pursuant to the laws of the state of Iowa that the preceding is true and correct.

Date Signature"

Adopted by Acts 1973 (65 G.A.) ch. 316. Amended by S.Ct. Report of Feb. 13, 1986, effective July 1, 1986; S.Ct. Report of May 28, 1987, effective Aug. 3, 1987

Committee Comment

No changes are made to present Rule 121, except that language is added to address specific complaints made by attorneys in the survey regarding discovery practice and enforcement of the discovery rules. Attorneys cited "evasive or incomplete responses to discovery requests" as the most frequent (median = 35% of civil cases) discovery problem; and, while less than half (106 of 240, or 44.2%, with nine attorneys, or 3.8%, not answering), a substantial number answered "no" to the question whether courts provide sufficient assistance in resolving discovery problems or disputes that arise in civil litigation. The study did not reveal overdiscovery generally to be a problem in state court, largely on account of the nature of the state court docket, but it is strongly suspected in many cases. Moreover, in certain kinds of cases--for example, cases involving multiple defendants or complex cases, or cases typically sharing these characteristics, like products liability or professional malpractice cases--discovery problems, including overdiscovery, were described as significantly more likely to occur. The proposed additional language, drawn from Federal Rule 26(b)(1), addresses this problem wherever it occurs.

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Paragraph (a). This paragraph is presently a part of R. Civ. P. 121 and is not changed. It merely delineates the different discovery devices provided by the Rules.

Paragraph (b). This paragraph in new. The first sentence of paragraph (b)--providing that the discovery rules "shall be liberally construed and shall be enforced to provide the parties with access to all material facts"--is drawn from many Iowa cases. The Supreme Court has stated on a number of occasions, in fact repeatedly, that Iowa's "discovery rules are to be liberally construed. The trend is to broaden the scope of discovery to the end that litigants may have the opportunity to ascertain and present at the trial all the material facts not protected by privilege." Bengford v. Carlem Corp., 156 N.W.2d 855, 867 (Iowa 1968). See, e.g., Pollock v. Deere & Co., 282 N.W.2d 735, 738 (Iowa 1982); Schroedel v. McTague, 169 N.W.2d 860, 865 (Iowa 1969); Schaap v. Chicago and North Western Ry. Co., 261 Iowa 645, 649, 155 N.W.2d 531, 533 (1968); Christ v. Iowa State Highway Comm'n, 255 Iowa 615, 626, 123 N.W.2d 424, 431 (1963); Wheatley v. Heideman, 251 Iowa 695, 702, 102 N.W.2d 343, 348 (1960); Hitchcock v. Ginsberg, 240 Iowa 678, 678, 37 N.W.2d 302, 303 (1949). Rule 134 makes clear that the discovery rules are to be enforced to accomplish their purposes. The specific language "and shall be enforced" is suggested by Rule 67, governing pleadings and motions, and providing that "the form and sufficiency of all motions and pleadings shall be determined by these rules, construed and enforced to secure a just, speedy and inexpensive determination of all controversies on their merits." (Emphasis added).

The second sentence in paragraph (b) restates the obligation, implicit in the rules but sometimes stated explicitly, to conduct discovery in good faith and to respond to discovery requests--whether the request be made through interrogatories, requests for production, requests for admission, or at deposition--in a way which fairly addresses and meets the substance of the discovery requested. The concept of good faith includes an honest effort to comply with the rules and not to seek or respond to discovery for any improper purpose. It finds some expression in R. Civ. P. 122(e), which requires counsel to make "a good faith" attempt to resolve discovery problems with opposing counsel before filing a motion with the court. With reference to pleadings and motions in Division IV of the Rules of Civil Procedure, Rule 80 provides, "Counsel's signature to every motion or pleading shall

be deemed his certificate that there are good grounds for making the claims therein, and that it is not interposed for delay." The obligation to conduct discovery in good faith is analogous.

The language of the second part of the second sentence of paragraph (b) is drawn from the Rule 127 on requests for admission. That language is drawn from Federal Rule 36, which is paralleled by Federal Rule 8(b), requiring denials in the answer to "fairly meet the substance of the averments denied." There is, in fact, ample authority to require responses to discovery requests to "fairly address and meet the substance of the request." Rule 126 provides that interrogatories shall be answered "fully," and Schaap v. Chicago & North Western Ry. Co., supra, interprets this to require responses to interrogatories to include information within the knowledge of a litigant's attorney, unless the information is privileged. Rule 127 explicitly provides that "[a] denial shall fairly meet the substance of the requested 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." The Supreme Court long ago recognized the difficulty that a party seeking production of documents often has in being specific, Davis v. District Court, 195 Iowa 688, 693, 192 N.W. 852, 854 (1923)("It is not always easy for the petitioner to specify with absolute precision the papers or documents desired, and some latitude must necessarily be allowed where this is true."), and Rule 130 only requires that parties seeking production of documents and things describe an item or category "with reasonable particularity." Finally, Rule 134(a) provides that "an evasive or incomplete answer is to be treated as a failure to answer" for purposes of a motion for an order compelling discovery.

Paragraph (c). The first sentence of paragraph (c) is unchanged from present Rule 121. The second sentence is drawn almost verbatim from Federal Rule 26(b)(1) The only change made is that the Federal Rule does not provide that in the absence of a protective order the frequency of use of discovery methods is not limited. Iowa's rule, in contrast, will continue to provide that subject to Rule 123, frequency of use of discovery is not limited. Overdiscovery, while not widespread, has disproportionate impact where it occurs upon the court and the parties. The language of the proposed rule reflects frequently stated concerns of the Supreme Court, e.g., Farley v. Seiser, 316 N.W.2d 857 (Iowa 1982)(en banc) (disapproving a discovery" or non-evidentiary deposition, under present rules, in part because such a procedure would likely" inject a new, duplicitous, and costly proceeding into discovery processes that are already under thoughtful criticism for being too expensive"); Nichols v. Hocke, 297 N.W2d 205 (Iowa 1980)(holding that a trial court had no power under the Rules of Civil Procedure, nor any inherent power, to order a pretrial hearing for the purpose of requiring plaintiffs to substantiate a punitive damages claim, and stating that "[t]o whatever extent it might be imagined that the procedure attempted here would go further in rooting out prejudice, we reject the procedure because the imagined improvement comes at too high a price in expense to the litigants."); Pollock v. Deere and Co., 282 N.W.2d 735 (Iowa 1979) (discussing use of a protective order to accommodate the interests of the parties in obtaining access to material facts while minimizing inconvenience, burden and expense); and the proposed language places the principle of liberal construction of the discovery rules in the context of judicial control. Rule 123 provides as much, and the Supreme Court has also made this clear. See Jones v. Iowa State Highway Comm'n, 261 Iowa 1064, 1067, 157 N.W.2d 86, 87)(1968)("This court has repeatedly held rules relative to discovery are to be interpreted liberally . . . . However, trial courts are vested with discretion measurably to control, limit and even pre-

discovery in any form where, for cause shown or evident, it will not in the opinion of the court promote the administration of justice in a particular case.") (denying motion to compel production of documents where parties seeking discovery had "filed interrogatories seeking substantially the same information now sought by their application to produce records," to which "answers [had been] given in detail," and where plaintiffs had conducted cross-examination at first trial of persons from whom reports were sought, during which they elicited "most if not all the information here solicited"); Cook v. Cook, 259 Iowa 825, 836, 146 N.W.2d 273, 279 (1966)(recognizing District Court's "discretion measurably to control, limit and even prevent" discovery but expressing "serious doubt" on the facts that the trial court had properly denied leave to take a deposition).

H

126. Interrogatories to parties.

* * * *

(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 names of witnesses the party expects to call to testify at the trial. Interrogatory answers may be used to the extent permitted by the rules of evidence.

H

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.

* * * *

(d) Notwithstanding the provisions of R.C.P. 82"(d)", copies of the interrogatories which are served need not be filed with the clerk. Parties who serve interrogatories shall serve and file a notice of serving interrogatories stating the parties upon whom interrogatories were served, the numbers of the interrogatories, and the date of service.

R5/126-A

COMMITTEE COMMENT

This amendment providing for discovery of the identities of non-expert trial witnesses eliminates any doubt as to the intention for repealing former R.C.P. 139 and 143, which prohibited such discovery, and the effect of repeal. This clarifying change in R.C.P. 126 furthers the goals of discovery to advance trial preparation and eliminate surprise so that trial may proceed on the merits of the case. It is recognized that at the time of preparing answers to interrogatories a party may not know all of the witnesses whom the party expects to call to testify at the trial. In such cases the court may extend the time within which to answer; and Rule 122(d), as amended, imposes a duty to supplement responses.

H

122. Scope of discovery.

* * * *

[NEW]

(d) Supplementation of responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement the response with respect to any question directly addressed to:

(A) The identity and location of persons having knowledge of discoverable matters; and

(B) The identity of each person expected to be called as a witness at trial;

(2) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which:

(A) The party knows that the response was incorrect when made; or

(B) The party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment;

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

* * * *

R5/122D

RULE 122
SUPPLEMENTATION OF RESPONSES

RULE 125
DISCOVERY OF EXPERTS

The committee recommends that rules 122 and 125 be amended as follows:

RULE ~~125.~~ 122(d): SUPPLEMENTATION OF RESPONSES. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement ~~his~~ the response to include information thereafter acquired, except as follows:

(a1) A party is under a duty seasonably to supplement ~~his~~ the response with respect to any question directly addressed to

(~~1~~a) The identity and location of persons having knowledge of discoverable matters, and

(2b) The identity of each person expected to be called as ~~an expert~~ witness at trial. ~~the subject matter on which he is expected to testify and the substance of his testimony.~~

(~~b~~2) A party is under a duty seasonably to amend a prior response if ~~he~~ the party obtains information upon the basis of which

(~~1~~a) ~~He~~ The party knows that the response was incorrect when made, or

(2b) ~~He~~ The party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(c3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

Committee Comment

The rule on supplementation of responses is moved to the general rule on discovery matters, Rule 122, so that all matters relating to expert witness discovery may be covered in one separate rule in Rule 125. Supplementation of responses concerning experts is covered in that rule. The rule on supplementation is amended to reflect the right of a party to obtain discovery of the identity of witnesses whom another party expects to call to testify at trial whether or not they may be called as experts.

[NEW]

124.2 **Discovery conference.** At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:

(a) A statement of the issues as they then appear;

(b) A proposed plan and schedule of discovery;

(c) Any limitations proposed to be placed on discovery;

(d) Any other proposed orders with respect to discovery;

(e) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion. Each party and that party's attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than ten days after service of the motion.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery, setting limitations on discovery, if any, and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the

action. An order may be altered or amended whenever justice so requires.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pre-trial conference authorized by R.C.P. 136.

H

R5/124.2.1-2

[NEW]

125. Discovery of experts.

(a) **Expert who is expected to be called as a witness.** In addition to discovery provided pursuant to R.C.P. 133, discovery of facts known, mental impressions, and opinions held by an expert whom the other party expects to call as a witness at trial, otherwise discoverable under the provisions of R.C.P. 122(a) and acquired or developed in anticipation of litigation or for trial may be obtained as follows:

(1) A party may through interrogatories require any other party to state the name and address of each person whom the other party expects to call as an expert witness at trial and to state, with reasonable particularity:

(A) The subject matter on which the expert is expected to testify;

(B) The designated person's qualifications to testify as an expert on such subject; and

(C) The mental impressions and opinions held by the expert and the facts known to the expert (regardless of when the factual information was acquired) which relate to, or form the basis of, the mental impressions and opinions held by the expert.

Nothing in this rule shall be construed to preclude a witness from testifying as to (1) knowledge of the facts obtained by the witness prior to being retained as an expert

or (2) mental impressions or opinions formed by the witness which are based on such knowledge.

In the case of an expert retained in anticipation of litigation or for trial, answers to interrogatories asking for the qualifications of the person expected to testify as an expert, the mental impressions and opinions held by the expert, and the facts known to the expert shall be prepared and separately signed by the designated expert witness. If the party serving such interrogatories believes that they were required to be answered by the expert and they were not so answered, the party may object on that basis and move for an order compelling discovery. An objection based on the failure of such interrogatories to be answered by the designated expert shall be asserted within thirty days of service of such answers; otherwise the objection is waived.

H

(2) Discovery by other means is available without leave of court in lieu of or in addition to interrogatories:

(A) A party may take the deposition of any person identified by any other party as a person expected to be called as an expert witness at trial;

(B) A party may also obtain discovery of documents and tangible things including all tangible reports, physical models, compilations of data, and other material prepared by an expert or for an expert in anticipation of the expert's trial and deposition testimony. The disclosure of material prepared by an expert used for consultation is required

even if it was prepared in anticipation of litigation or for trial when it forms a basis, either in whole or in part, of the opinions of an expert who is expected to be called as a witness.

(C) If the discoverable factual observations, tests, supporting data, calculations, photographs, or opinions of an expert who will be called as a witness have not been recorded and reduced to tangible form, the court may order these matters be reduced to tangible form and produced within a reasonable time before the date of trial.

H

(b) **Expert who is not expected to be called as a witness.** The disclosure of the same information concerning an expert used for consultation and who is not expected to be called as a witness at trial is required if the expert's work product forms a basis, either in whole or in part, of the opinions of an expert who is expected to be called as a witness. Otherwise, a party may discover the identity of and facts known, or mental impressions and opinions held, by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in R.C.P. 133, or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(c) **Duty to supplement discovery as to experts.** If a party expects to call an expert witness when the identity or

the subject of such expert witness' testimony has not been previously disclosed in response to an appropriate inquiry directly addressed to these matters, such response must be supplemented to include the information described in subdivisions (a)(1)(A)-(C) of this rule, as soon as practicable, but in no event less than thirty days prior to the beginning of trial except on leave of court. If the identity of an expert witness and the information described in subdivisions (a)(1)(A)-(C) are not disclosed in compliance with this rule, the court in its discretion may exclude or limit the testimony of such expert, or make such orders in regard to the nondisclosure as are just.

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(d) **Expert testimony at trial.** To the extent that the facts known, or mental impressions and opinions held, by an expert have been developed in discovery proceedings under subdivisions (a)(1) or (2) of this rule, the expert's direct testimony at trial may not be inconsistent with or go beyond the fair scope of the expert's testimony in the discovery proceedings as set forth in the expert's deposition, answer to interrogatories, separate report, or supplement thereto. However, the expert shall not be prevented from testifying as to facts or mental impressions and opinions on matters with respect to which the expert has not been interrogated in the discovery proceedings.

(e) **Court's discretion to compel disclosure of experts.** The court has discretion to compel a party to make the determination and disclosure of whether an expert is

expected to be called as a witness and shall do so to ensure that determination and the disclosures required by this rule within a reasonable and specific time before the date of trial. Upon motion, or at a discovery conference held pursuant to R.C.P. 124.2, or on its own initiative, the court may prescribe the sequence in which the parties make the determination and disclosures provided for under this rule.

(f) **Expert fees during discovery.** Unless manifest injustice would result, the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (a)(2) and (b) of this rule. With respect to discovery obtained under subdivision (a)(2) of this rule the court may require, and with respect to discovery obtained under subdivision (b) of this rule, the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert. Any fee which the court requires to be paid shall not exceed the expert's customary hourly or daily fee; and, in connection with a party's deposition of another party's expert, shall include the time reasonably and necessarily spent in connection with such deposition, including time spent in travel to and from the deposition, but excluding time spent in preparation.

R5/125.1-5

Committee Comment

Proposed Rule 125 replaces current rule 122(d) and revises the rules concerning expert witness discovery. The revision reflects current law and practice and addresses problems identified by the Advisory Committee. Current rule 125, concerning supplementation of responses, is moved to rule 122(d) and is changed only to eliminate from that rule supplementation concerning expert witnesses. That subject is included in proposed rule 125, which is designed to cover, separately, all aspects of expert witness discovery.

As under the present rule, a party may through interrogatories discover the identity of an expert whom another party expects to call as a witness. Changes are made, however, to ensure that responses to interrogatories are more complete and that this form of discovery can serve as a meaningful alternative to depositions, the scheduling of which sometimes delays litigation and the cost of which many may prefer not to incur. Thus, "the answers to interrogatories must state, with reasonable particularity. . . the mental impressions and opinions held by the expert and the facts known to the expert (regardless of when the factual information was acquired) which relate to or form the basis of the mental impressions and opinions held by the expert." In addition, the answers must include "the designated person's qualifications to testify as an expert." Finally, answers to interrogatories concerning experts, other than those asking for the expert's identity, must be prepared and separately signed by the designated expert.

The current rule requiring leave of court to pursue further discovery from an expert whom another party expects to call at a witness at trial is changed. Discovery by other means, including depositions and requests for production, is available without leave of court in addition to or in lieu of interrogatories. In circumstances described by rules 121(c) and 123, a party may seek and the court grant a protective order prohibiting or limiting such further discovery.

As under the present rule, discovery is not available from an expert who has been retained or specially employed in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial. Exceptions to this general rule, contained in the present rule and continued in this proposal, are recognized "as provided in R.C.P. 133" and "upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means." In addition, consistent with Rules 703 and 705 of the Iowa Rules of Evidence, a party may obtain discovery concerning an expert who is not expected to be called as a witness at trial, to the same extent as if the expert were going to testify, "if the expert's work product forms a basis either in whole or in part of the opinions of an expert who is expected to be called as a witness."

Current provision for supplementation of responses to expert witness discovery is continued in proposed 125(c). The current law is amended to provided that supplementation must be made "in no event less than thirty (30) days prior to the beginning of trial except on leave of

court." The purpose of this requirement is to ensure that expert witness discovery does not result in unfair suprise or necessitate a continuance as well as to ensure that any settlement or final pretrial conference is meaningful. The district court currently has "inherent power" to enforce provisions for expert witness discovery. This power is made explicit in proposed rule 125(c), which recognizes the trial court's "discretion . . . [to] exclude or limit the testimony of such expert [as to whom required disclosures have not been made], or make such orders in regard to the nondisclosure as are just."

Proposed rule 125(d) limits the expert's "direct testimony at the trial." It provides that the expert's testimony "may not be inconsistent with or go beyond the fair scope of the expert's testimony in the discovery proceedings as set forth in the expert's deposition, answer to interrogatories, separate report, or supplement thereto." This rule essentially codifies White v. Citizens Bank of Boone, 262 N.W.2d 812 (Ia. 1978), and Hoekstra v. Farm Bureau Mut. Ins. Co., 382 N.W.2d 100 (Ia. 1986). If the expert has not been interrogated on the point in question, however, he may not be prevented from testifying as to facts or mental impressions and opinions with respect to it.

Rule 136 presently provides the court with authority to fix dates for closing discovery. In recognition that expert witness discovery is a cause of delay, proposed rule 125(e) makes explicit the court's authority to compel parties to determine and disclose required information concerning experts expected to be called at trial; and the court is directed to exercise this discretion to ensure that experts are identified and required disclosures made "within a reasonable and specific time before the date of trial." The proposed amendment restates current law empowering the court to "prescribe the sequence" in which the parties identify experts expected to be called at trial and make the disclosures which are required.

Proposed rule 125(f) is substantially the same as current rule 122(d)(3). Even though a designated expert must answer interrogatories, the discovering party does not have to compensate the expert for time spent in doing so. The rule is amended to provide that any fee which a party is required to pay to another party's expert "shall not exceed the expert's customary hourly or daily fee." This language makes explicit a principle assumed in the current rule, namely, that the party seeking discovery may not be charged more than the party retaining the expert would have been charged. This does not prevent an expert from charging more for time during deposition than for time in travel or preparation, provided the charge is "the expert's customary fee" for doing so. The fees which a discovering party may be required to pay may not include compensatation for "time spent in preparation" for deposition. Time spent in preparation is principally for the benefit of the party retaining the expert, whereas time spent during travel and deposition is principally for the discovering party. Thus, a distinction is recognized for purposes of allocating responsibility for fees.

Comment to Proposed Rule 125

Introduction. The responses of attorneys and judges to the questionnaire distributed as a part of the Advisory Committee's Study of Civil Litigation in Iowa revealed many problems in practice with the rules concerning discovery of experts, namely, R. Civ. P. 122(d) and 125. A substantial majority of those responding cited expert witness discovery as a major source of expense and/or delay in disposing of civil cases. The most widely noted objections were delay in identification of testifying experts and "last minute" supplementation of interrogatories disclosing experts who might be called to testify at trial. This created a need for further discovery, including hurriedly arranged and often more expensive depositions on the eve of or during trial, or a continuance of the trial, resulting in duplicate trial preparation and needless expense. Aggravating problems attendant to late identification of experts or supplementation were (1) the frequently difficult task of coordinating the schedules of trial lawyers and testifying experts for depositions; (2) the frequently realized need following the deposition to locate a rebuttal expert; and (3) the conduct of more tests and the development of "new" theories by an expert following his or her deposition. Many attorneys wrote that it was essential to establish a schedule--"deadlines"--for identification and discovery of experts. Others noted that judicial practice in this respect was not uniform throughout the state and that there was a need for reasonable rules and time limits to be established and enforced. This proposed rule is submitted in response to these concerns as well as the guidelines set by the Committee in 1985.

Scope. The rule on supplementation of responses, presently Rule 125, is proposed to be moved to rule 122, the general discovery rule, and the rule on discovery of experts, presently Rule 122(d), is proposed to be moved to Rule 125, in accordance with the Committee's desire to treat discovery of experts separately. The proposed rule continues to distinguish between the expert whom another party expects to call as a witness at trial and the expert whom another party does not expect to call as a witness at trial. In both cases the expert referred to is one retained or specially employed in anticipation of litigation or in preparation for trial. Like the present Iowa Rule and the present Federal Rule 26(b)(4), the proposed rule does not provide for discovery of experts who, in anticipation of litigation, are merely informally consulted and are not "retained or specially employed." Discovery is available from them if their work product forms a basis, either in whole or in part, of the opinions of an expert who is expected to be called as a witness. Otherwise, as to experts who are only informally consulted, there is no discovery available under the present or the proposed rule.

Nor does the proposed rule cover the expert whose expertise or knowledge was not acquired in anticipation of litigation or in preparation for trial, for example, an actor or viewer of the events. See Metropolitan Transfer Station, Inc. v. Design Structures, Inc., 328 N.W.2d 532, 538-39 (Iowa Ct. App. 1982)(over plaintiff's objection, defendant was allowed to call as a witness a structural engineering expert whom plaintiff had retained to develop plans for the renovation of plaintiff's facility, held on appeal, trial court did not err in admitting the testimony because he was not retained in anticipation of litigation). As to persons, albeit experts, whose expertise or knowledge was not acquired an anticipation of litigation or preparation for trial, discovery continues to be available under Rule 122(b), without regard to present Rule 122(d) or proposed Rule 125. Parties and employees of parties (1) are ordinarily not specially retained or employed and (2) do not ordinarily acquire their knowledge or expertise in anticipation of litigation or preparation for trial. However, a party or employee may qualify as an expert, Shinrone, Inc. v. Tasco, Inc., 283 N.W.2d 280 (Ia. 1979); Barker v. Dunham, 551 S.W.2d 41 (Tex. 1977), and if either is expected to testify as such or if the work product of either "forms a basis in whole or in part of the opinions of an expert who is expected to be called as a witness," the provisions of this rule govern.

Paragraph (a). Paragraph (a) and its subparts address discovery of an expert "whom the other party expects to call as an expert witness at trial." In addition to discovery of facts known and opinions held by experts who are expected to be called as witnesses, discovery of testifying experts' mental impressions is authorized. The language is drawn from Texas Rule of Civil Procedure 166(e). The additional language clarifies that discovery is permitted with respect to preliminary findings, tentative conclusions, "non-final" opinions and the like. See Sullivan v. Chicago & N.W. Transportation Co., 326 N.W.2d 320, 328 (Ia. 1982), citing Quadrini v. Sikorsky Aircraft Div. United Aircraft Corp., 74 F.R.D. 594, 595 (D. Conn. 1977).

Paragraph (a)(1). This subdivision, like present 122(d)(1), authorizes the use of interrogatories to obtain discovery with respect to trial experts. Certain changes, however, have been made. First, the word "identify" is deleted, and the Rule provides instead for a party to state the name and address of each person whom the party expects to call as an expert witness at trial. The Texas rule's inclusion of the expert's telephone number has been omitted. Second, the proposed rule would require expert witness interrogatories to be answered "with reasonable particularity." The requirement of "reasonable particularity" is implicit in the notion of a "full" and "complete" answer, as now required, and is necessary if

interrogatories are (1) to provide those who prefer not to take a deposition a meaningful discovery alternative; and (2) to enable those who will be taking an expert's deposition--which may be introduced in evidence--a meaningful opportunity to prepare for it. Otherwise, what is in reality a "discovery" deposition is in legal effect an "evidentiary" deposition, and surprise and unfairness from its use at trial can ensue. Subparagraph (A) is the same as the pertinent part of present Rule 122(d)(1)(A). Subparagraph (B) is new but in requiring disclosure of qualifications, the proposed rule makes effective preparation for trial, including cross-examination, possible and addresses what is frequently covered at the deposition in any event. Paragraph (C) of the proposed rule deletes the language of the present rule--calling for the responding party "to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion"--and substitutes the language of the Texas rule on expert witness discovery.

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As the Committee intended, the proposed rule provides that interrogatories regarding an expert who is expected to be called as a witness--other than the one asking a party to state the name and address of each expert whom he expects to all--must be answered by the expert expected to be called. The response is to be both prepared and separately signed by the designated expert.

Paragraph (a)(2). This paragraph provides for discovery by other means. It substantially changes the present rule, which provides that discovery with respect to experts, other than interrogatories, is available only with leave of court; but the Study showed that in point of fact further discovery, without leave of court being sought, was the rule and not the exception. In fact, of 240 attorneys generally engaged in trial practice, the median response was that a deposition of the adverse party's expert is taken 90% of the time and that 95% of the time this was done without court order. Hence, paragraph (a)(2)(A) provides that as a matter of course a party may take the deposition of another party's trial expert(s). In unusual and exceptional cases, to limit or prevent such discovery, a protective order may be sought under R.C.P. 123.

Paragraph (a)(2)(B). This paragraph provides for discovery of documents and tangible things, including all tangible reports, physical models, compilations of data and other material, either prepared by an expert expected to be called as a witness or prepared for an expert in anticipation of the expert's trial and deposition testimony. Discovery of such material is proper, if not essential, and its concealment and belated disclosure has been sanctioned. See Haumersen v. Ford Motor Co., 257 N.W.2d 7 (Ia. 1977).

Even material prepared by an expert who is not expected to be called as a witness must be disclosed "when it forms a basis either in whole or in part of the opinions of an expert who is to be called as a witness." This rule is drawn from the Texas Rule of Civil Procedure dealing with expert witness discovery. It has basis in Iowa Rule of Evidence 705 [Disclosure of Facts or Data Underlying Expert Opinion], which provides "[t]he expert may in any event be required to disclose the underlying facts or data [relating to his opinion or inference] on cross-examination." Rule 703 provides that the facts or data on which the expert bases an opinion or inference "need not be admissible in evidence," and this rule, too, necessarily contemplates liberal discovery. Compare Sullivan v. Chicago & N.W. Transportation Co., 326 N.W.2d 320 326-28, (Ia. 1982) (suggesting that further discovery of trial experts was appropriate "if the purpose is to provide for effective cross-examination" and citing as "illustrative" of cases interpreting parallel federal rule a case allowing discovery of nontrial experts whose findings were relied upon by testifying experts).

Paragraph (a)(2)(C). This paragraph addresses the frequent situation where a trial expert does not prepare a report or otherwise reduce to tangible form the expert's facts or observations, tests, supporting data, calculations, photographs or opinions. This Rule is drawn verbatim from the Texas Rule which was read to the Committee. The Rules of Evidence contemplate disclosure of such information at trial, on cross-examination, and thus also contemplate discovery necessary to conduct such cross-examination effectively. The power given the court here to require reduction of observations, tests, supporting data, and the like to tangible form is a function of the court's power to exclude evidence with respect to which proper discovery has not been permitted.

Paragraph (b). This paragraph addresses the expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial. Other than the discovery provided through Rule 133 [Physical and Mental Examinations], discovery of such experts is barred unless the party seeking discovery makes "a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means." That is the present rule. An amendment is made to make clear that even the identity of such an expert may not be discovered, except upon a showing of exceptional circumstances. Ager v. Jane C. Stormont Hospital and Training School for Nurses, 622 F.2d 496, 502-03 (10th Cir. 1980). However, if the work of an expert not expected to be called "forms a basis either in whole or in part of the opinions of an expert who is to be

called as a witness," discovery as provided in subparagraph (a) is available. See the discussion of Iowa Rules of Evidence 703 and 705, supra; Pearl Brewing Co. v. Jos. Schlitz Brewing Co., 415 F. Supp. 1122, 1138-40 (S.D. Tex. 1976)(where testifying expert relied in part on findings of non-trial expert, discovery of the latter was permitted, although discovery on "alternative claims" was barred), cited in Sullivan v. Chicago Northwestern Transportation Co., 326 N.W.2d 320, 326 (Iowa 1982); cf. Bogosian v. Gulf Oil Corp., 738 F.2d 587, 595 (3d Cir. 1984)(Federal Rule 26(b)(4), allowing for discovery relating to expert witnesses, did not authorize disclosure of attorney work product shown to adverse party's trial expert which contained attorney's mental impressions, conclusions, opinions, and legal theories; but where same document also contained statements of fact, district court directed to conduct in camera examination and "redact the document so that full disclosure is made of facts presented to the expert and considered in formulating his or her opinion, while protection is accorded the legal theories and the attorney-expert dialectic.").

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Paragraph (c). Paragraph (c) addresses the duty to answer and to supplement responses to expert witness discovery. Present Rule 125 provides in paragraph (a) that "[a] party is under a duty seasonably to supplement his response with respect to any question directly addressed to . . . (2) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony." Proposed Rule 125(c) is to substantially the same effect, with two additions.

First, supplementation must be made "as soon as practicable"--Rule 125(a) presently says "seasonably"--but the proposed rule goes on to provide that supplementation shall "in no event [be] less than thirty (30) days prior to the beginning of trial except on leave of court." This specific time period is drawn from the current Texas Rule, itself amended from an earlier version which required only 14 days, and is believed to be consistent with local rules and pretrial practice in many of the Judicial Districts. It is included here to provide a standard for practice and some predictability. There is currently inconsistency in application of the "sanction" of exclusion for failure in timely fashion to identify experts. This specific time limitation is also responsive to the comment of many attorneys and many judges, seeking a deadline sufficiently far in advance of trial to permit meaningful negotiations, settlement conferences and pretrial conferences.

Second, the rule provides for exclusion or limitation of the testimony of an expert where there is a failure to comply with its disclosure provisions. Existing law

provides for the sanctions of exclusion, M-Z Enterprises, Inc. v. Hawkeye-Security Insurance Co., 318 N.W.2d 408, 413-14 (Iowa 1982), and limitation on testimony. White v. Citizens National Bank of Boone, 262 N.W.2d 812, 816-17 (Iowa 1978). Whether to impose a sanction and which sanction, if any, to impose are matters addressed to the district court's discretion. Hoekstra v. Farm Bureau Mut. Ins. Co., 382 N.W.2d 100, 108-09 (Ia. 1986); Haumersen v. Ford Motor Co., 257 N.W.2d 7, 13-14 (Ia. 1977). "Exclusion of an expert as a witness is the most severe sanction and should not be imposed lightly; other sanctions are available such as a continuation of the trial or limitation of testimony." Lambert v. Sisters of Mercy Health Corp., 369 N.W.2d 417, 421 (Ia. 1985). The Iowa Supreme Court in Lambert quoted from a Minnesota Supreme Court opinion, Cornfeldt v. Tongen, 262 N.W.2d 684 (Minn. 1977), in which the Minnesota court suggested alternatives to exclusion where the failure to disclose was not willful, including "granting a continuance and assessing costs against the offending party." Id. at 697, citing Krech v. Erdman, 305 Minn. 215, 218, 233 N.W.2d 555, 557 (1975). The concluding language, of the rule, namely, "or make such orders in regard to the nondisclosure as are just" is developed from R. Civ. P. 134(b)(2) and the Lambert opinion.

Paragraph (d). This paragraph responds to a frequent complaint of attorneys responding to the survey, namely, that trial experts conducted new tests, developed new theories, or formulated different opinions following deposition, often on the eve of trial, resulting in surprise, or a need for additional discovery, or a motion for continuance. Paragraph (d) is drawn verbatim from the Pennsylvania rule on expert witness discovery, Rule 4003.5(c), which the Committee considered and approved. Pennsylvania courts interpret this rule as one favoring liberal discovery of expert witnesses and disfavoring unfair and prejudicial surprise. In Wilkes-Barre Iron & Wire Works, Inc. v. Paragas of Wilkes-Barre, Inc., 502 A.2d 210, 212-13 (Pa. Super. 1985), the court stated:

> [I]n deciding whether an expert's trial testimony is within the fair scope of his report, the accent is on the word "fair." The question to be answered is whether, under the particular facts and circumstances of the case, the discrepancy between the expert's pretrial report and his trial testimony is of a nature which would prevent the adversary from preparing a meaningful response, or which would mislead the adversary as to the nature of the appropriate response.

"[R]easonable explanation and even an enlargement of the expert's written words" are contemplated by the rule as "fair;" new and different allegations are not. The Pennsylvania rule as construed is consistent with present

law, limiting expert witness testimony to that provided through discovery. White v. Citizens National Bank of Boone, supra, 262 N.W.2d at 816; Hoekstra v. Farm Bureau Mut. Ins. Co., 382 N.W.2d 100, 108-09 Ia. 1986)(affirming order limiting scope of expert's testimony where expert's answer was misleading and "new" opinion was disclosed during opening statement). As under existing law, the requirement is one of consistency with "the fair scope" of the discovery. See Hubby v. State, 331 N.W.2d 690, 697 (Iowa 1983)(departure from answers to interrogatories found insignificant, where questions at trial concerning vehicle's speed and location at relevant time were "closely allied" with the deposition testimony concerning the "path of the vehicle")("We would be too fastidious if we would decide that the trial court was unreasonable in allowing facts in the record on the same subject to be considered in rendering the opinion."). The last sentence provides that if no discovery has been sought concerning certain matters, the expert shall not be prevented from testifying with respect to them.

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Paragraph (e). This paragraph is drawn from the Texas rule on discovery of experts. The trial court, of course, has authority to compel disclosure of witnesses, including expert witnesses, under the rule providing for a pretrial conference; and Rule 124 presently provides that the court may regulate the sequence of discovery for cause shown, i.e., "methods of discovery may be used in any sequence," "unless the court upon motion orders otherwise for the convenience of parties and witnesses and in the interest of justice." The proposed rule attempts to respond to the views and opinions of attorneys and district court judges, a substantial majority of whom stated that the timing of discovery of adverse parties' experts expected to be called at trial was "a significant factor contributing either to undue delay in the resolution of a case or increased costs to the parties or both." The language "and shall do so to ensure such determination and the disclosures required by this rule" is added to the Texas Rule to emphasize the importance of judicial attention to civil litigation involving expert witnesses. In effect, the proposed rule requires the court to impose a deadline "within a reasonable and specific time before the date of trial." Predictability and uniformity should result, and conclusion of expert witness discovery reasonably in advance of trial should facilitate settlement discussions and expedite trial.

Paragraph (f). This paragraph deals with allocation of costs of expert witness discovery. Although the expert will be preparing the responses to expert witness interrogatories--which is a change from existing law--the proposed rule continues the existing rule (R.C.P. 122(d)(3)), which does not provide for payment of an expert expected to testify if the only discovery is by way of

interrogatories. The rationale for this provision is that the discovery sought is no more than the expert will be providing the attorney retaining him and that the purpose of the discovery is to prepare for cross-examination at trial, not to support the discovering party's own claim(s).

Where further discovery is sought of an expert expected to be called as a witness at trial, pursuant to subparagraph (a)(2), the party seeking the discovery is required to pay the expert "a reasonable fee" for the time spent in responding to such discovery. The proposed rule includes language from California's rules on expert witness discovery providing that (1) the expert's fee is not to exceed his customary hourly or daily fee, to prevent the party seeking discovery from being charged more than the party retaining the expert, and (2) the expert is entitled to be paid for time reasonably and necessarily spent in connection with his deposition, including travel time, but not including any time spent in preparation for the deposition. In case of any dispute concerning the reasonableness of the fee which the parties are unable to resolve, it is for the court to determine what constitutes "a reasonable fee." Cotton v. Consolidation Coal Co., 457 F.2d 641, 646-47 (6th Cir. 1972). The court is also authorized, under the present as well as the proposed rule, to require the discovering party seeking "further" discovery "to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert." The exercise of discretion in this regard "should depend on whether the discovering party is simply learning about the other party's case or is going beyond this to develop his own case." C. Wright & A. Miller, 18 Federal Practice and Procedure Sec. 2034 (1970).

Where exceptional circumstances are shown and, under proposed 125(b), discovery is ordered from experts not expected to be called as witnesses by the adverse party, the fee provisions of the rule are mandatory. The reason for this is that ordinarily the discovery sought is in aid of the discovering party's own case. However, where the discovery is ordered under proposed 125(a)(2)(B) or (b) because a trial expert considered, in whole or in part, the findings, impressions or opinions of a non-trial expert, the court has discretion under the "manifest injustice" standard which begins this paragraph (f) to deny the adverse party payment of the non-trial expert's fee.

[NEW]

136. Pretrial conferences; scheduling; management.

(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 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. Upon application of any party or on the court's own motion, except in categories of cases exempted by supreme court rule as inappropriate, the court or its designee shall enter a scheduling order setting time limits for:

(1) Joining other parties;

(2) Designating experts;

(3) Completing discovery;

(4) Amending the pleadings; and

(5) Filing and hearing motions.

After consulting with the attorneys for the parties and any unrepresented parties, the court may also order:

(6) Special procedures, including assignment to a single judge, for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(7) The date or dates for conferences before trial, a final pretrial conference and trial; and

(8) Any other matters appropriate in the circumstances of the case including extension of those deadlines which are then justified.

A schedule shall not be modified except by leave of the court upon a showing of good cause.

(c) Subjects to be discussed at pretrial conferences. The court 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 including limitation of the number of expert witnesses and of cumulative evidence;

(5) The 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) The advisability of referring matters to a master;

(7) The possibility of settlement and imposition of a settlement deadline 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) Settling any facts of which the court is to be asked to take judicial notice;

(11) Specifying all damage claims in detail as of the date of conference;

(12) All proposed exhibits and mortality tables and proof thereof;

(13) Consolidation, separation for trial, and determination of points of law;

(14) Questions relating to voir dire examination of jurors;

(15) Filing of advance briefs when required; and

(16) 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.** A 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) **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 of party's attorney fails to participate in good faith, the court, upon motion or the court's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in R.C.P. 134(b)(2)(B)-(D). In lieu of or in addition to any other sanction, the court shall require the party or the attorney representing that party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the court finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

[NEW]

138. **Pretrial orders.** After any conference held pursuant to R.C.P. 136, 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 in accordance with the final pretrial order form found in the Appendix of Forms and shall be modified only to prevent manifest injustice.

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R5/138

EXHIBIT "Y" (cont.)

[NEW]

IN THE IOWA DISTRICT COURT FOR _____ COUNTY

Plaintiff(s)	)	No. _____
vs.	)	
Defendant(s)	)	FINAL PRETRIAL ORDER

FOLLOWING THE FINAL PRETRIAL CONFERENCE IT IS ORDERED:

1. The following facts are undisputed:

[list facts not in dispute]

2A. The following exhibits are received without objection:

2B. The following exhibits are subject to objection to be made at trial:

3. The legal issues to be tried are:

[list theories of recovery or defense]

4. The factual issues to be tried are:

[list the principal factual disputes and specifications of negligence or fault asserted by each party if applicable]

5. Requested instructions, motions in limine, and trial briefs shall be filed by _____.

6. Trial will commence at _____.m. on _____.

7. It is further ordered that:

[list other matters which the court desires to include]

_____

Judge for the _____ Judicial District of Iowa

R5/FORM-FPO

TIME STANDARDS FOR CASE PROCESSING

CRIMINAL STANDARDS

Felony:	
From Arrest to Trial	6 Months
Misdemeanor:	
From Arrest to Trial	4 Months

CIVIL STANDARDS

Civil Jury Cases:	
From Filing to Disposition	18 Months
Nonjury Civil Cases:	
From Filing to Disposition	12 Months
Contested Domestic Relations Cases:	
From Filing to Disposition	8 Months
Uncontested Domestic Relations Cases:	
From Filing to Disposition	4 Months

JUVENILE STANDARDS

Detention and Shelter Hearings

Within 24 Hours of Admission to Facility

Adjudicatory or Transfer (Waiver) Hearings

Within 15 Days Following Admission to a Detention or Shelter Facility.

Within 30 Days Following the Filing of a Petition if the Juvenile is not in a Detention or Shelter Facility.

Dispositional Hearings

Within 15 Days of the Adjudicatory Hearing

These time standards are subject to statutes and rules affecting the same proceedings. The standards in this order are to be utilized as guidelines, and while not mandatory, are urged upon both counsel and the court as an aid to their actions and deliberations.

The state court administrator shall continue the efforts toward establishment of a statewide information system insuring that such system has the capability of monitoring compliance with these standards.

Adopted by Court Order August 22, 1985, effective October 1, 1985.

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EXHIBIT "Z"

ADMINISTRATIVE DIRECTIVE
REGARDING IMPLEMENTATION
OF TIME STANDARDS FOR CASE PROCESSING

Pursuant to Time Standards for Case Processing implemented by the supreme court order dated August 22, 1985, the supreme court has approved for statewide usage the attached amended 120-Day Notice of Civil Trial Setting Conference form and the attached Civil Trial Setting Conference Memorandum form which are to be used as guidelines in monitoring civil case processing within each judicial district. This directive is issued pursuant to an action taken by the supreme court on June 10, 1987, and shall be effective commencing September 1, 1987. It shall apply to all civil cases which on that date have been on file for 120 days or more. The previous administrative directive on this subject dated May 28, 1987, is hereby rescinded.

Dated this 16th day of June, 1987.

William J. O'Brien
State Court Administrator

6/AD-0611

Exhibit "Z"
(cont'd)

IN THE IOWA DISIRICI COURT FOR _____ COUNIY

_____)) _____,)) Plaintiffs(s),)) vs.)) _____)) _____,)) Defendant(s).)	No. _____ CIVIL IRIAL SETIING CONFERENCE MEMORANDUM

Appearances:

For Plaintiff(s) _____

For Defendant(s) _____

A trial setting conference was held this date, and good cause appearing, the following determinations were made with reference to disposition of the above-entitled matter:

1. Nonjury/jury: Estimated length of trial ____ day(s).
2. Trial date should/should not be assigned.
3. Scheduling order:
   a. _____.
   b. _____.
   c. _____.
   d. _____.
   e. _____.
   f. _____.

Trial Attorney(s) _____
_____ Plaintiff(s)
_____
_____ Defendant(s)

TRIAL NOTICE

Trial is set for _____ at _____ __.m.

Settlement conference, if required, is set for _____, at _____ __.m. All provisions of any settlement conference order are to be complied with prior to this time.

Pretrial conference, if required, is set for _____, at _____ __.m. All provisions of any pre-trial order or orders are to be complied with prior to this time.

The Clerk of Court shall notify all counsel of record and parties not represented by counsel.

Dated this _____ day of _____, 19___.

_____
District Court Administrator

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Exhibit "Z"
(cont'd)

_____ _____, Plaintiff(s), vs. _____ _____, Defendant(s).	NO._____ 120-DAY NOTICE OF CIVIL TRIAL SETTING CONFERENCE

To the parties or their attorneys of record:

This case has now been on file 120 days or more. In accordance with the Iowa Supreme Court Order Concerning Time Standards For Case Processing,* notice is hereby given that this case has been set for trial setting conference on _____ at _____ .m.** (date)

before _____. (person and location)

This conference shall be held:

___ By telephone.
___ In person.

Attorneys for all parties appearing in the case shall participate at this conference. A party shall participate in person if he or she does not have an attorney.

At this trial setting conference, every case will be set for trial no sooner than thirty days, but no later than four months for nonjury cases and six months for jury cases, after the conference.

At the trial setting conference, each party shall be prepared to certify to the court that:

(1) No additional parties are necessary;
(2) Experts, if any, have been disclosed;
(3) Discovery has been completed;
(4) The pleadings are closed;
(5) Dispositive motions have been filed and ruled upon by the court.

As an alternative to this certification, the parties may report the terms of a mutual, written scheduling agreement, which accomplishes all of the foregoing matters in compliance with the intent of the Supreme Court's Order Concerning Time Standards for Case Processing. If the case is not ready to be assigned for trial, an appropriate scheduling order will be prepared establishing deadlines necessary to effect the purpose of the time standards order.

The trial date that is agreed upon at this conference shall be a firm date. Continuances will not be granted even if all parties agree unless for a crucial cause that could not have been foreseen.

The Clerk of Court shall notify all counsel of record and parties not represented by counsel.

Dated this ____ day of _____, 19__.

_____
DISTRICT COURT ADMINISTRATOR

* The order dated August 22, 1985, found in the loose-leaf binders for the Iowa Court Rules, provides that in the absence of exigent circumstances, all cases filed must be tried or disposed of within the following deadlines: uncontested domestic relations, four months; contested domestic relations, eight months; civil nonjury, twelve months; and civil jury, eighteen months.

** This date shall not be sooner than 240 days after the filing of

EXHIBIT "AA"

181. Trial certificate, response.

* * * *

(c) On each motion day, the clerk of court shall present to the court the file in each civil case in which a trial certificate and an objection to it have been on file for more than seven days or in which a trial certificate has been on file, without objection, for more than twenty days.

(d) After a trial certificate is served and filed, a pretrial conference of the case will be held under R.C.P. 136, if requested by a party or ordered by the court.

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R5/181

[NEW]

181.2 Trial assignments.

(a) Civil cases. The court, in the exercise of its discretion, may assign a case for trial by order upon any one of the following:

(1) The conclusion of a scheduling or pretrial conference;

(2) The filing of a trial certificate and consultation with counsel for all parties;

(3) The agreement of all parties or their counsel; or

(4) The court's own motion after consultation with counsel for all parties. Trial of a dissolution of marriage or a small claim may be set without consulting counsel subject to rescheduling by the court administrator upon the request of counsel in the event of a scheduling conflict.

The court may delegate its power and duty to assign cases for trial to the court administrator or other suitable person.

* * * *

R5/181.2A

ADJUSTMENT OF CREDITOR CLAIMS TO PROPERTY INSURANCE PROCEEDS

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ADJUSTMENT OF CREDITOR CLAIMS
TO PROPERTY INSURANCE PROCEEDS

It is not unusual, during the course of adjusting a property loss, to be approached by a creditor of the insured who wishes to have his interest in the proceeds protected. Ordinarily the claims handler places both the insured's name and the creditor's name on the settlement draft and nothing further is heard on the matter. Occasionally, however, a dispute arises between the insured and the creditor, or between the creditor and the insurer, as to the respective rights of the parties in and to the settlement proceeds.

When such a dispute arises, the claims handler's first impulse is to run to his attorney with directions to deposit the proceeds with the court and file an interpleader. In the majority of cases, this type of response is not only expensive and time consuming, but, for the most part, is unnecessary. By working through the following step by step procedure, the claims handler will be in a position, in most cases, to arrive at a definitive answer concerning the respective rights of the parties.

STEP 1

Determine whether or not the creditor is listed as a named party to the insurance contract. If the creditor is named in the policy, go to STEP 2. If the creditor is not named, go to STEP 9.

STEP 2

There are two generally accepted "loss-payable" clauses used to delineate the rights of creditors who are named in an

insurance policy. These are the "simple" or "open" clause, and the "New York", "standard" or "union" clause. Wholesale Sports Warehouse Co. v. Pekin Ins. Co., 587 F. Supp. 916 (S.D. Iowa 1984); Farmers & Merchants Savings Bank v. Farm Bureau Mut. Ins. Co., 405 N.W.2d 834 (Iowa 1987); 5A J. Appleman, Insurance Law and Practice §3401, at 282 (1970). If the creditor is listed under a "simple" or "open" clause, go to STEP 3. If the creditor is listed under a "New York", "standard" or "union" clause, go to STEP 6.

STEP 3

A creditor under a "simple" or "open" clause is a mere appointee; a party designated to receive payment in case of loss. Carlile v. Home Mut. Ins. Ass'n., 218 Iowa 248, 254 N.W. 805 (1934); Union Building Ass'n. v. Rockford Insurance Co., 83 Iowa 647, 49 N.W. 1032 (1891). As such, if a valid defense exists as to the named insured, the creditor is also barred from recovery. Conard v. Moreland, 230 Iowa 520, 298 N.W. 628 (1941); Carlile v. Home Mut. Ins. Ass'n., 218 Iowa 248, 254 N.W. 805 (1934). Therefore, if a defense exists against the named insured such that payment is denied thereto, payment should also be denied to the creditor. If payment is not denied to the named insured, go to STEP 4.

STEP 4

You are now to the point where payment is to be made to a named insured and you have a creditor listed in the policy.

The creditor at that point has a right to have his interest in the proceeds protected. That interest is measured by the amount due on the debt from insured to creditor as of the date of loss. Kintzel v. Wheatland Mut. Ins. Ass'n, 203 N.W.2d 799 (Iowa 1973). If the debt has been paid or otherwise extinguished, the creditor loses any further rights to the proceeds. Farmers Savings Bank, Joice v. Gerhart, 372 N.W.2d 238 (Iowa 1985); Bartling v. German Mut. Lightning & Tornado Ins. Co., 154 Iowa 335, 134 N.W. 864 (1912). (See caveat at STEP 8.) Therefore, if the creditor's debt has been paid or otherwise extinguished, he need not be included on the proceeds draft. If the creditor retains debt in existence at the time of payout, go to STEP 5.

STEP 5

The creditor is entitled to have his interest in the proceeds protected, but only to the extent of his debt. Therefore, if the named insured wants a separate draft issued for the amount by which his claim exceeds the creditor's debt, he is entitled thereto. The remaining amount will generally be delivered in a draft payable to the named insured and the creditor, and the named insured cannot complain of this procedure.

If the contract between the named insured and the creditor so provides, the creditor can demand that the proceeds be paid

directly to him for application on the debt. Giberson v. First Federal Savings & Loan Ass'n of Waterloo, 329 N.W.2d 9 (Iowa 1983). Absent such an agreement, the named insured is entitled to use the proceeds for reconstruction. Hatch v. Commerce Ins. Co., 216 Iowa 860, 249 N.W. 164 (1933).

STEP 6

A creditor under a "New York", "standard" or "union" clause, is considered to have a separate contract with the insurer, independent of the contract between insured and insurer. Guaranty Life Insurance Co. v. Farmers Mut. Ins. Ass'n, 224 Iowa 1207, 278 N.W.913 (1938); Union Central Life Ins. Co. v. Franklin County Mutual Insurance Ass'n, 222 Iowa 964, 270 N.W. 398 (1936). Thus, a creditor's claim for insurance proceeds will not be barred by defenses against the named insured. Farmers & Merchants Savings Bank v. Farm Bureau Mut. Ins. Co., 405 N.W.2d 834 (Iowa 1987); People's Savings Bank v. Retail Merchants' Mut. Fire Ins. Ass'n, 146 Iowa 536, 123 N.W. 198 (1909). If the named insured's claim is denied, go to STEP 7. If payment is not denied to the named insured, go to STEP 4.

STEP 7

Although you have sufficient policy defenses to deny the claim of the named insured, those defenses cannot be used against the creditor. Absent an independent defense against the creditor himself, payment must be made thereto. However, when payment is made to a creditor under these circumstances, the

insurer is entitled to a subrogation interest in the creditor's note and security. Wholesale Sports Warehouse Co. v. Pekin Ins. Co., 587 F. Supp. 916 (S.D. Iowa 1984). Therefore, upon payment to the creditor, a proper assignment should be demanded to cover creditor's debt instrument and security.

The amount of payment will depend upon the creditor's insurable interest. That interest is measured by the amount due on the debt from insured to creditor as of the date of loss. Kintzel vs. Wheatland Mut. Ins. Ass'n, 203 N.W. 2d 799 (Iowa 1973). If the debt has been paid or otherwise extinguished, the creditor loses any further rights to the proceeds. Farmers Savings Bank, Joice v. Gerhart, 372 N.W.2d 238 (Iowa 1985); Bartling v. German Mut. Lightning & Tornado Ins. Co., 154 Iowa 335, 134 N.W. 864 (1912). (See caveat at STEP 8). Therefore, if the creditor's debt has been paid or otherwise extinguished, he need not be paid anything further.

STEP 8

A distinction must be made between foreclosures or forfeitures which occur subsequent to a loss, and those which occur prior to a loss. When a creditor forecloses or forfeits after a loss has occurred, said activity diminishes or extinguishes the creditor's insurable interest. Farmers & Merchants Savings Bank v. Farm Bureau Mut. Ins. Co., 405 N.W.2d 834 (Iowa 1987); Union Central Life Ins. Co. v. Bracewell, 209 Iowa 802, 229 N.W. 185 (1930). However, when a creditor

foreclosures or takes back the secured property prior to the loss, the Iowa Supreme Court has ruled that such action increases rather than decreases the creditor's insurable interest. Guaranty Life Ins. Co. v. Farmers Mut. Ins. Ass'n, 224 Iowa 1207, 278 N.W. 913 (1938); Union Central Life Ins. Co. v. Franklin County Farmers Mut. Ins. Ass'n, 222 Iowa 964, 270 N.W. 398 (1936); Esch v. Home Ins. Co., 78 Iowa 334, 43 N.W. 229 (1889). Therefore, if you are dealing with a creditor who has acquired the secured property prior to a loss, you should consult your legal counsel as to the proper steps for adjusting and payment of said claim. Return to STEP 4 or STEP 7 (wherever you came from).

STEP 9

Generally, a creditor has no interest in an insurance policy issued solely to the debtor upon secured property. The insurance contract is strictly personal between the insurer and insured. Winneshiek Mut. Ins. Ass'n v. Roach, 257 Iowa 354, 132 N.W.2d 436 (1965). However, if the debt instrument between the creditor and the named insured provides that the named insured was supposed to insure the property for the creditor's benefit, then the creditor will be deemed to have an equitable lien in any proceeds, even when not named in the insurance contract. Kintzel v. Wheatland Mut. Ins. Co., 203 N.W.2d 799 (Iowa 1973); Johnson v. Northern Minnesota Land & Investment Co., 168 Iowa 340, 150 N.W. 596 (1915). If no such agreement exists, no steps need be taken to protect the creditor. If such an agreement does exist, go to STEP 10.

STEP 10

Since the creditor has an equitable lien in the proceeds, his rights should be protected at the time of settlement by including his name on the settlement draft. If the named insured requests a separate draft for those sums by which his loss exceeds the debt, he should be accommodated.

Since the creditor's name does not appear on the insurance policy, the insurer need protect the creditor's equitable lien only when it has knowledge of the appropriate agreement giving rise thereto. Fortunately, the Iowa Supreme Court has ruled that insurers have no obligation to search the courthouse records for such agreement. The burden is on the creditor to come forward with such information. Judah AMC & Jeep, Inc. v. Old Republic Ins. Co., 293 N.W.2d 212 (Iowa 1980).

SELECTED ISSUES IN HANDLING IOWA UNINSURED MOTORIST AND UNDERINSURED MOTORIST CLAIMS

J

by

Dennis G. Day

SELECTED ISSUES
IN HANDLING IOWA UNINSURED MOTORIST
AND UNDERINSURED MOTORIST CLAIMS

I. CALCULATION OF COVERAGE AVAILABLE FOR PAYMENT OF UNINSURED MOTORIST AND UNDERINSURED MOTORIST CLAIMS.

A. The purpose of uninsured motorist coverage is to assure those injured by an uninsured motorist tortfeasor of protection to the same extent as if the tortfeasor had carried liability insurance in the amounts required under the financial responsiblity laws. Lemrick v. Grinnell Mutual Reinsurance Co., 263 N.W.2d 714 (Iowa 1978). The amount of uninsured motorist coverage available for payment under a policy is calculated by subtracting payments received by the insured from sources identified in the uninsured motorist coverage as reductions to the amounts otherwise payable under the uninsured motorist coverage.

J

1. Uninsured motorist coverage "may include terms, exclusions, limitations, conditions, and offsets which are designed to avoid duplication of insurance or other benefits." 516A.2 Iowa Code 1987.

2. Uninsured motorist coverage may include an offset for Worker's Compensation. McClure v. Employers Mutual Casualty Co., 238 N.W.2d, 321 (Iowa 1976).

3. Uninsured motorist coverage may include an offset for payments made under the medical payments portion of the policy. Lemrick v. Grinnell Mutual Reinsurance Co., 263 N.W.2d 714 (Iowa 1978).

4. Uninsured motorist coverage may include an offset for sums paid by persons or organizations jointly or severally liable together with the uninsured motorist. Davenport v. AID Insurance Co., 334 N.W.2d 711 (Iowa 1983).

B. The amount available to pay an underinsured motorist claim is the insured's loss less proceeds available under the tortfeasor's liability insurance policy, subject to the limit of the underinsured motorist coverage and assuming no duplication of benefits. American States Insurance Co. v. Estate of Tollari, 362 N.W.2d 519 (Iowa 1985). (Offsets are most likely allowed as in uninsured motorist coverage except offsets are against the loss and not against the amount of coverage available to pay claims).

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C. Limitations may be placed in policies to prevent the stacking of uninsured and underinsured motorist coverages. Tri-State Insurance Co. of Minnesota v. DeGooyer, 379 N.W.2d 16 (Iowa 1985); McClure v. Employers Mutual Casualty Co., 238 N.W.2d 321 (Iowa

1976); Holland v. Hawkeye Security Ins. Co., 230 N.W. 2d 517 (Iowa 1975).

II. COVERAGE/DEFENSE ISSUES

A. STATUTE OF LIMITATIONS

1. The Iowa Supreme Court has applied the 10 year statute for written contracts. Lemrick v. Grinnell Mutual Reinsurance Co., 236 N.W.2d 714 (Iowa 1978).

2. Line of cases from other juridictions have interpreted the words "legally entitled to recover" to mean that the insured must be able to establish fault on the part of the uninsured motorist giving rise to damages and to prove the extent of those damages.

3. Other limitations within the contract.

B. NEGLIGENCE OF THE TORTFEASOR

C. PUNITIVE DAMAGES

1. The Iowa Court has not directly considered coverage for punitive damages in underinsured and uninsured motorist cases.

2. Punitive damages are insurable. Skyline Harvestore Systems, Inc. v. Centennial Insurance Co., 331 N.W.2d 106 (Iowa 1983).

3. Reasons for not finding punitives recoverable in a uninsured motorist or uninsured motorist claim:

(a) Public policy for awarding punitive damages is not furthered since the tortfeasor is not a party. The reason for uninsured motorist or underinsured motorist coverage is to compensate a party for injuries sustained by reason of a financially irresponsible driver. The reason for allowing punitive damages is to punish a wrongdoer and serve as an example to others.

(b) Judicial determination that punitive damages are not bodliy injury as defined in the policy.

See "Punitive Damages and First Party Automobile Liability Insurance Coverages" by David L. Leitner, 54 Defense Counsel Journal 112 (1987).

4. Extra-contractual damages for delay in handling uninsured and underinsured motorist claims.

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D. DEFINITION OF UNINSURED VEHICLE AND UNDERINSURED VEHICLE

1. An automobile not named as a vehicle in any liability insurance policy is not an "uninsured motor vehicle" if its operator was covered by an automobile insurance policy. Vadnais v. State Farm Mutual Automobile Insurance Co., 354 N.W.2d 607 (Minn. App. 1984).

2. Broadened definition of underinsured vehicle by reason of American States case.

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E. EXHAUSTION OF LIABILITY LIMITS PRIOR TO PAYING UNDERINSURED MOTORIST CLAIMS

1. Has not been considered by the Iowa Court.

2. Consider waiving in proper situations.

F. CONSENT TO SETTLE

1. Not considered by the Iowa Court.

2. Advances insurer's legitimate interest of protecting subrogation rights.

G. EXCLUSIONS

1. Excluding a motor vehicle which is owned by the named insured or any resident of the same household from the definition of uninsured automobile has been held void under Iowa Law. Rodman v. State Farm Mutual Automobile Insurance Co., 208 N.W.2d 903 (Iowa 1973).

2. Application of uninsured motorist coverage with policy containing exclusion for liability coverage for bodily injury to insured or members of the household. Rodman.

3. Exclusion from uninsured motorist coverage for injuries arising while occupying or being struck by a vehicle owned by the insured but not insured under a policy has been found to be invalid. Lindahl v. Howe, 345 N.W.2d 548 (Iowa 1984).

H. PHYSICAL CONTACT WITH A HIT AND RUN VEHICLE

1. A policy can contain a requirement of physical contact when the hit and run motorist is not identified. Rohret v. State Farm Mutual Automobile Insurance Co., 276 N.W.2d 418 (Iowa 1979).

2. It may be sufficient if there is collision between the insured's automobile and an intermediary automobile, caused when the intermediary vehicle was struck by the unidentified hit and run vehicle. See, Hartford Accident and Indemnity Co. v. LeJune, 499 N.E.2d 464 (Ill. 1986).

III. SETTLING THE CLAIM

A. UNINSURED MOTORIST - CONSIDER SUBROGATION POSSIBILITIES

B. UNDERINSURED MOTORIST

1. Relationship of consent to settle requirement, exhaustion of limits clause, demand of release by tortfeasor's insurance carrier, and underinsured motorist insurers subrogation rights.

2. Consider waiving subrogation rights after evaluating tortfeasor's assets, possibility of bankruptcy by the tortfeasor, extent of insured's loss, and tortfeasor's liability limits.

3. Consider preserving subrogation rights by advancing an amount to the insured equal to the tortfeasor's limits of liability and proceeding against the tortfeasor. See, Schmidt v. Clothier,

338 N.W.2d 256 (Minn. 1983); and Smith-Hurd Illinois Annotated Statutes Chapter 73, Section 755a - 2 (7).

IV. RESOLUTION OF UNSETTLED UNINSURED MOTORIST AND UNDERINSURED MOTORIST CLAIMS

A. ARBITRATION

1. Policy provisions in insurance contracts providing for arbitration of claims relate to future controversies and are unenforceable. Mutual Service Casualty Insurance Co. v. Iowa District Court For Woodbury County, 372 N.W.2d 261 (Iowa 1985).

2. Written agreements after claim arises pursuant to Chapter 679A Iowa Code 1987.

B. LITIGATION

INVESTIGATION AND ADJUSTMENT OF ARSON CLAIMS

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I. Nature and importance of first party bad faith.

A. Initial insurer claims processing.

1. Upon receipt of first notice, insurer must initiate claims handling steps.

a. Prompt investigation necessary. Efforts to determine amount of loss should proceed simultaneously with liability investigation.

b. Nonwaiver/reservation of rights needed where coverage questions are presented.

c. Initial decisions on experts should be made.

1. Cause and origin expert retained.

2. Consider experts to eliminate non-incendiary causes, i.e., electrical wiring.

3. Subrogation experts.

2. Loss scene.

a. Meeting with insured, if possible at loss scene.

b. Insured has duty under policy to cooperate. See Standard Fire Policy, lines 90-122.

c. Take statements of available witnesses, i.e., firefighters, observers, persons on the scene.

d. Take plenty of photographs of key areas.

3. Suspicious circumstances - Examples of how to spot a potential arson case.

a. Incendiary origin indicators.

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1. Multiple points of origin.

2. Difficulties of fire department in extinguishing.

3. Horizontal spread of fire - i.e., doors, windows left open to provide ventilation; should also check vertical ascension of fire if, for example, attic doors are left open.

4. Discoloration of concrete floors, walls, especially in low spots of building.

5. Contents of rooms:

   a. Valuables missing in drawers.

   b. Items out of place - i.e., plastic jugs in a room of books, waffle iron in bedroom.

   c. Depreciated items recently moved into building.

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6. Trailers.

7. Items planted in area of origin such as newspapers, cotton, kerosene.

8. If liquid accelerant involved, subject glass samples to spectograph.

9. Frustration of sprinkler system or of other fire protection devices.

b. Motive of insured.

   1. Financial problems are most predominant.

      a. Heavy or unpaid debts.

      b. Declining business.

      c. Attempts to sell property.

      d. Unusual expenses, i.e. gambling, stock market, medical.

e. Foreclosure threats.

f. Outstanding unsatisfied liens, judgments.

g. Alimony, support obligations.

2. Excessive insurance.

3. Lack of motive for others to set fire.

c. Opportunity of insured to set fire.

1. Locate all keys.

2. Establish lack of forced entry.

3. Establish whereabouts of all interested persons.

4. Determine and check out insured's alibi.

d. Other inculpating circumstances.

1. Removal of valuable or sentimental property just before fire.

2. Increase in insurance.

3. Insureds discussions with agent - "Is my policy still in effect?" "How fast are claims handled?"

4. Extent of uninsured loss.

B. Insured's duties after loss occurs.

1. "give immediate written notice to this Company of any loss: (lines 90-91);

a. Purpose of this requirement is to afford insurer adequate opportunity to timely investigate while facts are still available. 5A J. Appleman, "Insurance Law and Practice" §3481; 13 R. Anderson, "Couch on Insurance 2d", §49:2.

b. Unless waived, such immediate notice constitutes a condition precedent to suit under the policy. See RTE Corp. v. Maryland Cas. Co., 74 Wis. 2d 614, 626, 247 N.W.2d 171 (1976); Siravo v. Great

American Ins. Co., 410 A.2d 116 (R.I. 1980).

c. The term "immediate" as used here means only that notice is to be given in such time as is reasonably required under the circumstances RTE Corp. v. Maryland Cas. Co., 74 Wis. 2d 614, 247 N.W.2d 171 (1976).

2. "protect the propety from further damage" (lines 91-92);

a. No recovery will be allowed to the extent the insured could have salvaged some of the goods. Henri's Food Prods. Co., Inc. v. Home Ins. Co., 474 F. Supp. 889 (E.D. Wis. 1979).

3. "forthwith separate the damaged and undamaged personal property" (lines 92-93);

a. Fact question presented on whether weather made it hazardous to separate damaged from undamaged property. Taubman v. Allied Fire Ins. Co., 160 F.2d 157 (4th Cir. 1947)

4. "put it in the best possible order" (lines 93-94);

5. "furnish a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, costs, actual cash value and amount of loss claimed" (lines 94-97).

6. "and within sixty (60) days after the loss, unless such time is extended in writing by this Company, the insured shall render to this Company a proof of loss" (lines 97-99).

a. 60 day time period commences after fire has abated sufficiently to permit inspection to determine the loss. Slocum v. Saratoga & Washington Fire Ins. Co., 134 N.Y.S. 72 (App. Div. 1912).

b. Most courts even consider the 60 days to commence at the date of discovery of the loss. See, Zaffuto v. Northern Ins. Co., 167 A. 298 (Pa. Super. 1933).

c. The Proof of Loss must be:

1. "signed and sworn to by the insured" (lines 99-100).

   (a) But probably signing by the agent of the insured may be sufficient, at least where the insured is unavailable or in other appropriate circumstances. Gump v. National Union Fire Ins. Co., 99 N.E. 1130 (Ohio 1912)

2. "stating the knowledge and belief of the insured" as to the following:

3. "the time and origin of the loss" (lines 100-101);

4. "the interest of the insured and of all others in the property" (lines 101-102);

5. "the actual cash value of each item thereof" (lines 102-103);

6. "the amount of loss thereto" (line 103);

7. "all encumbrances thereon" (lines 103-104);

8. "all other contracts of insurance, whether valid or not, covering any of said property" (lines 104-105);

9. "any changes in the title, use, occupation, location, possession or exposures of said property since the issuing of this policy" (lines 105-107);

10. "by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of loss" (lines 107-109);

11. "whether or not it then stood on leased ground" (lines 109-110).

d. Purpose of the Proof of Loss is to acquaint the insurer with the circumstances surrounding the loss and the nature and extent of the loss, so as to allow the insurer to determine what further steps are to be taken. 5A J. Appleman; "Insurance Law and Practice", §3531.

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e. Courts generally hold merely "reasonable" and "substantial" compliance with Proof of Loss policy requirements is sufficient. See 5A J. Appleman, "Insurance Law and Practice", §3532-3548.

7. "Easy Read" policies and the new ISO Commercial Property policy modify the Proof of Loss timing to require the Proof within 60 days after request by the insurer.

   a. Typical of such policies: "Give us a signed, sworn description of your loss within 60 days after we ask."

   b. Besides the timing change, the Easy Read policies modify somewhat the contents of the "signed sworn description of your loss" as compared to the proof of loss requirements under the Standard Form Fire Insurance Policy.

8. "and shall furnish a copy of all the descriptions and schedules in all policies" (lines 110-111).

9. "and, if required, verified plans and specifications of any building, fixtures or machinery destroyed or damaged" (lines 111-113)

10. "the insured, as often as may be reasonably required, shall exhibit to any person designated by this Company all that remains of any property herein described" (lines 113-116)

   a. Fourth Amendment problems applicable to law enforcement agencies give investigating agencies fewer rights and more restrictions as compared to the insurer in the investigation of the loss. Michigan v. Tyler, 436 U.S. 499 (1978); greater and possibly contrary restrictions on law enforcement are contained in Michigan v. Clifford, 464 U.S. 287 (1984).

   b. Policy provisions give the insurer the right to search without a warrant Honeycutt v. Aetna Ins. Co., 510 F.2d 340 (7th Cir. 1975) cert. den. 421 U.S. 1011 (1975). But see dicta in Terpstra v. Niagara Fire Ins. Co., 256 N.E. 2d 536 (N.Y. App. 1970).

11. Mortgagee obligations.

a. Mortgagee named under New York standard mortgage clause is deemed to have a separate contract with the insurer; the mortgagee must comply with that contract.

b. A contract vendor is considered to be the same as a mortgagee, even where listed on the policy as a loss payee **Kintzel v. Wheatland Mut. Ins. Ass'n.**, 203 N.W.2d 799, 803 (Iowa 1973). Wholesale Sports Warehouse Co. v. Pekin Ins. Co., 587 F. Supp. 916, 919-20 (S.D. Iowa 1984); 5A J. Appleman "Insurance and Law Practice" §3401, p. 282-84 (1970).

c. "If the insured fails to render proof of loss such mortgagee, upon notice, shall render proof of loss in the form herein specified within sixty (60) days thereafter and shall be subject to the provisions hereof relating to appraisal and time of payment and bringing suit". (lines 74-78)

II. Examinations Under Oath.

A. Policy Requirements.

1. The policy requires the insured: "submit to examinations under oath by any person named by this Company and subscribe the same" (lines 116-117);

2. "and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this Company or its representative, and shall permit extracts and copies thereof to be made" (lines 118-122).

B. Permissible Examination Under Oath purposes.

1. To enable the insurer to obtain all information and material in the possession of the insured regarding the claim, the company's rights and its obligations under its policy of insurance. Happy Hank Auction Co. v. American Eagle Ins. Co., 136 N.E.2d. 842 (N.Y. App. 1956); Claflin v. Commonwealth Ins. Co., 110 U.S. 81 (1884).

2. To protect the insurance company against fraud by

discouraging exaggerated or improper claims. Hart v. Mechanics & Traders Ins. Co., 46 F. Supp. 166 (La. 1942).

3. Expedite evaluation and settlement of valid claims.

4. Examination Under Oath differs from a discovery deposition.

   a. Insured's obligations arise from contract rather than from rules of civil procedure.

   b. Insured lacks the right to ask questions or have his own lawyer cross examine. Liverpool & London & Globe Ins. Co. v. Cargill, 145 P. 1134 (Okla. 1914).

C. Case authorities refine and interpret policy requirements regarding Examination Under Oath.

   1. Insured's refusal to submit to Examination may preclude recovery under the policy. Gross v. United States Fire Ins. Co., 337 N.Y.S. 2d 221 (1974); Restina v. Aetna Cas. & Sur. Co., 360 N.Y.S.2d 331 (1969); Bonner v. Home Ins. Co., 13 Wis. 758 (1861).

      a. Insured's deportation prior to his Examination Under Oath was a valid excuse for his failure to appear. Roberto v. Hartford Fire Ins. Co., 177 F.2d 811 (7th Cir. 1949).

      b. Insured's pending criminal prosecution may prevent denial because of refusal to submit to Examination Under Oath. Greenberg v. Aetna Ins. Co., 501 P.2d 1032 (Cal. 1973).

      c. Insurer must make formal demand for Examination Under Oath in clear and unambiguous language. C-Suzanne Beauty Salon Ltd. v. General Ins. Co., 574 F.2d 106 (2d Cir. 1978).

      d. Insurer waives right to Examination Under Oath if claim is denied before Examination Under Oath is conducted. Lititz Mut. Ins. Co. v. Lengacher, 248 F.2d 850 (7th Cir. 1957).

   2. At the Examination Under Oath, the insurer is entitled to all documentary evidence material to the insurer's liability.

a. Insured is required to produce "all books of account, bills, invoices and other vouchers, or certified copies thereof if the originals be lost..." (lines 118-120).

b. Income tax records and returns and his financial position. McIntosh v. Eagle Fire Ins. Co. of New York, 325 F.2d 99 (8th Cir. 1963); Kisting v. Westchester Fire Ins. Co., 290 F. Supp. 141 (W.D. Wis. 1968); aff'd 416 F.2d 967 (7th Cir. 1969). Kisting holds that denial of insured's claim was appropriate based upon insured's failure to produce, at this Examination Under Oath, tax returns, his salary records and other financial information.

c. Other examples of documents insureds have been required to provide include virtually all items and variations of documents designated in the policy.

d. Insured must answer all material questions, and every relevant and pertinent question relating to the bona fide nature of the claim is material. Happy Hank Auction Co. v. American Eagle Ins. Co., 136 N.E.2d 842 (N.Y. App. 1956). Materiality means: all such matters as have a bearing on the insurance and the loss. 5A Appleman, "Insurance Law and Practice" §3551 (1970). 13A Couch on Insurance 2d §49A:362, p. 762-63.

3. Corporate officers, employees and agents are proper examinees but independent contractors or attorneys are not. Palace Cafe v. Hartford Fire Ins. Co., 97 F.2d 766 (7th Cir. 1938).

4. Attorney authorized by insurer is a proper person to administer the Examination Under Oath. American Macaroni Mfg. Co. v. Niagara Fire Ins. Co., 164 F.2d 878 (5th Cir. 1947).

5. Examination Under Oath may establish evidence of fraud and false swearing necessary to void the policy. Miele v. Boston Ins. Co., 288 F.2d 178 (8th Cir. 1961); Juneau Store Co. v. Badger Mut. Fire Ins. Co., 216 Wis. 342, 257 N.W. 144 (1934); Fink v. La Crosse Mut. Fire Ins. Co., 203 Wis. 350, 234 N.W. 339 (1931).

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6. Procedural formalities of Examination Under Oath.

a. Time, place, and person designated to take the examination must be explicitly stated. Citizens Ins. Co. v. Herpolsheimer, 109 N.W. 160 (Neb. 1906); Nicolai v. Transcontinental Ins. Co., 378 P.2d 287 (Wash. 1963). See also Brookins v. State Farm Fire & Cas. Co., 529 F.Supp. 386 (S.D. Ga. 1982) and Saft America, Inc. v. Insurance Co. of North America, 271 S.E.2d 641 (Ga. 1980).

1. Appearance by insured and submission to examination waives right to object to sufficiency of notice and demand. Davidson v. Providence Washington Ins. Co., 157 A. 148 (N.J. 1931).

b. Make formal demand for the Examination in clear and unambiguous language. C-Suzanne Beauty Salon, Ltd. v. General Ins. Co., 574 F.2d 106 (2d Cir. 1978).

c. Demand the examination within a reasonable time after the loss and submission of the proof of loss. 5A Appleman, "Insurance Law and Practice", §3551 (1970). Beckley v. Ostego County Farmers Coop Fire Ins. Co., 159 N.Y.S.2d 270 (1957).

d. Take the Examination in the county where the loss ocurred or where the insured resides. Pierce v. Globe & Rectors Fire Ins. Co., 182 P. 586 (Wash. 1919); American Central Ins. Co. v. Simpson, 43 Ill. App. 98 (1892).

e. Permit the insured to be accompanied by his attorney or other representative. Gordon v. St. Paul Fire & Marine Ins. Co., 163 N.W. 956 (Mich. 1917).

f. Provide the person examined with a free copy of the transcript. Hart v. Mechanics & Traders Ins. Co., 46 F. Supp. 166 (La. 1942).

g. Before taking the Examination Under Oath, the claim must not be denied or the right to conduct an Examination Under Oath may be waived. 17A Appleman, "Insurance Law and Practice", §9783 (1970). Lititz Mut. Ins. Co. v. Lengacher, 248 F.2d 850 (7th Cir. 1957).

III. Claim Resolution.

A. Initial decisions.

1. Validity of claim.

2. Extent of coverage.

a. Property covered.

b. "Direct Loss".

c. Business interruption portion of claim requires particular attention. Arrange informal document exchange between insurer and insured accounting representatives prior to Examination Under Oath.

d. Determine what exclusions may apply.

2. Proof of Loss.

a. Provide written notice to insured requesting Sworn Statement in Proof of Loss. Trend is to require insurer to formally notify insured of his policy obligations, particularly concerning Proof of Loss.

b. Normally one should grant insured's requests for reasonable extensions of time to file Proof of Loss and other claim information.

c. Reject Proof of Loss if incomplete or if deficient for technical reasons.

3. Pay mortgagee promptly if mortgagee is uninvolved with loss.

4. Valued policy law.

5. Outside assistance.

a. Experts.

1. Cause and origin.

2. Contractors.

3. Accountants.

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4. Product engineer

B. Decision makers.

1. Attorney recommends to insurer, based on whether evidence is legally sufficient to support arson defense.

2. Adjuster, claim supervisor must make ultimate decision based on recommendations and evidence.

C. Denial Decision.

1. Decision must be made promptly and promptly communicated to the insured. Denial should be formal and in writing by a personal and confidential correspondence to the insured. Letter should preferably be sent by insurer. Reasons for the denial, with reference to policy provisions, must be clearly set forth. There is authority to support the position that a failure to list some defenses in a denial letter constitutes a waiver of the right by the insurer to raise those defenses at a later stage. Morris v. Reed, 510 S.W.2d 234 (Mo. App. 1974); See also Lawndale National Bank v. American Casualty Company, 489 F.2d 1384 (7th Cir. 1973).

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D. Insurer should consider filing Declaratory Judgment action.

1. Advantages.

a. Selection of forum.

b. Good faith can be argued in seeking prompt resolution and assistance in resolving controversy.

c. Tactical advantage of arguing first, last and in structuring case.

2. Disadvantages.

a. Assures litigation, where otherwise only possible.

b. Motion to dismiss may be argued, since jurisdictions are split on appropriateness of Declaratory Judgment actions.

1. Cases holding Declaratory Judgment action appropriate: California Union Ins. Co. Trinity River Land Co., 80 C.C.H. Fire & Cas. Cases 1507, 163 Cal. Rptr. 802 (Cal. App. 1980); Farmers Ins. Group of Ore. v. Hanson, 611 P.2d 696 (Ore. 1980); Unigard Mut. Ins. Co. v. Bleumel, 485 F. Supp. 668, 670 (D. Wyo. 1979); Great American Ins. Co. v. K & W Log, Inc., 591 P.2d 457 (Wash. App. 1979); American Home Assur. Co. v. Essy, 3 Cal. Rptr. 586, 179 Cal. App. 2d 19 (1960);

2. Cases holding Declaratory Judgment action inappropriate: State Farm Fire & Cas Co. v. Fuller, 258 S.E.2d 13 (Ga. App. 1979).

c. Insured will contend Declaratory Judgment action is itself bad faith.

IV. Legal Requirements to Establish Arson Fraud and Related Defenses.

A. Arson.

1. Arson may be established by circumstantial evidence. Gregory's Continental Coiffures & Boutique, Inc. v. St. Paul Fire & Marine Ins. Co., 536 F.2d 1187 (7th Cir. 1976); Elgi Holding, Inc. v. Insurance Co. of North America, 511 F.2d 957 (2d Cir. 1975); Mele v. All-Star Ins. Corp., 453 F. Supp. 1338 (E.D. Pa. 1978); Manis v. Hartford Fire Ins. Co., 681 P.2d 760 (Okla. 1984); Great American Ins. Co. v. K & W Log, Inc., 591 P.2d 457 (Wash. App. 1979); Quast v. Prudential Prop. & Cas. Co., 267 N.W.2d 493 (Minn. 1978).

2. Burden of Proof. Many states allow the carrier to prove fraud merely by a preponderance of the evidence. Esquire Restaurant, Inc. v. Commonwealth Ins. Co., 393 F.2d 111 (7th Cir. 1968); Hammann v. Hartford Acc. & Indem. Co., 620 F.2d 588 (6th Cir. 1980); Summer v. Stark County Patrons' Mut. Ins. Co., 26 N.E.2d 1021 (Ohio App. 1940). These rulings are based on the fact that a fraudulent fire insurance claim is a violation of a contract. As a species of contract fraud, it differs from common law fraud. Because the policy itself contains a fraud exclusion (Standard Fire Policy lines 1-6) the insurer is merely attempting to demonstrate a violation of an express contract clause. However, Iowa generally

requires that fraud be proved by "clear and convincing" evidence. Beeck v. Aquaslide 'N' Dive Corp., 350 N.W.2d 149, 155 (Iowa 1984). Given the rationale of the cases supporting the preponderance burden of proof, an argument can be made that the preponderance standard applies in Iowa as well.

3. Incendiary origin.

   a. Absolutely necessary for arson defense. L & S Ent. Co. v. Great American Ins. Co., 454 F.2d 457 (7th Cir. 1971).

   b. Expert testimony may be admissible to establish cause of fire Gichner v. Antonio Troiano Tile & Marble Co., 410 F.2d 238 (D.C. Cir. 1969); Carpenter v. Union Ins. Co., 284 F.2d 155 (4th Cir. 1960).

4. Motive.

   a. Examples of financial motive cases: Elgi Holding Inc. v. Insurance Co. of North America, 511 F.2d 957 (2d Cir. 1975) - threats of foreclosure and outstanding liens, judgments.

   b. Boone v. Royal Indem. Co., 460 F.2d 26 (10th Cir. 1972) - plaintiff was "plagued with financial problems".

   c. Cora Pub Inc. v. Continental Cas. Co., 619 F.2d 482 (5th Cir. 1980) - restaurant losing money and was for sale.

5. Opportunity.

   a. A good statement of what is sometimes mistakenly referred to as "opportunity", is contained in Mele v. All-Star Ins. Co., 453 F. Supp. 1338 (E.D. Pa. 1978):

      "Thus in a civil matter to determine whether a reasonable inference exists that an insured is responsible for the fire which damaged the insured property, a jury should consider a combination of evidence of: (1) an incendiary fire; (2) a motive by the insured to destroy the property and (3) circumstantial evidence connecting the insured to the fire."

See also Sperrazza v. Cambridge Mutual Fire Ins. Co., 459 A.2d 409 (Pa. Super. 1983); Quast v. Prudential Prop. and Cas. Co., 267 N.W.2d 493 (Minn. 1978); George v. Travelers Indem. Co., 265 N.W.2d 59 (Mich. App. 1978).

B. Fraud/False Swearing.

1. Standard Fire Policy, lines 1-6.

2. The misrepresentation must relate to a material fact, defined broadly as one which "might have affected the attitude and action of the insurer" with respect to the claim. Fine v. Bellefonte Underwriters Ins. Co., 725 F.2d 179 (2d Cir. 1984). Examples of material misrepresentations which have allowed voiding policies include:

   a. Misrepresentations as to the cause of the fire. Miele v. Boston Ins. Co., 288 F.2d 178 (8th Cir. 1961).

   b. Misrepresentations on removal of personal property prior to fire. Mercantile Trust Co. v. New York Underwriters Ins. Co., 376 F.2d 502 (7th Cir. 1967).

   c. Misrepresentations on valuation are the most important type. These are the most frequently made by insureds. A substantial or gross overvaluation voids the policy and has been held to create a presumption of fraud. Lykos v. American Home Assur. Co., 452 F. Supp. 533 (N.D. Ill. 1978), aff'd 609 F.2d 314 (7th Cir. 1979); Gregorys Continental Coiffures & Boutique, Inc. v. St. Paul Fire & Mar. Ins. Co., 536 F.2d 1187 (7th Cir. 1976); Atlas Assur. Co., Ltd. v. Hurst, 11 F.2d 250 (8th Cir. 1926).

3. Fraud and false swearing may occur in the Proof of Loss, at the Examination Under Oath. Some cases have even involved statements made not under oath but during the insurer's investigaion and adjustment process. See American Driver's Supply & Mfg. Co. v. Boltz, 482 F.2d 795 (10th Cir. 1973).

C. Increase of Hazard Defense.

1. Standard Fire Policy, lines 28-32.

2. Insured must be shown and have both knowledge and control of the increased hazard. St. Paul Fire & Mar. Ins. Co. v. Bachman, 285 U.S. 112 (1932); American Manufactures Mut. Ins. Co. v. Wilson-Keith & Co., 247 F.2d 249 (8th Cir. 1957). See generally Collins v. Fireman's Fund Ins. Co., 296 F.2d 562 (7th Cir. 1961); Goldman v. Piedmont Fire Ins. Co., 198 F.2d 712 (3rd Cir. 1952).

D. Failure to preserve and protect property.

1. Standard Fire Policy, lines 11-13 and 21-22.

2. Dearth of case authority.

V. Suggestions for insurers throughout the first party claims process.

A. Know the policy - both the rights and obligations of the company and the insured.

B. Investigate promptly.

C. Respond promptly.

D. Do not prejudge.

E. Be courteous.

F. Record objective facts, not impressions.

G. Do not make derogatory remarks in claim file about the insured.

H. Respond courteously and in writing to all letters of the insured. Make your requests for significant additional information in writing.

I. Admit mistakes if made.

J. Avoid telling the insured he will be hearing from you within a specified time unless you are positively certain you'll be able to do so.

K. Complex matters, particularly unique policy interpretation questions or arson issues, should be reviewed by counsel.

L. Before denial of any claim receive review of property loss manager or supervisor. If you do deny, do so promptly without keeping your decision a secret while requesting

more information.

M. If all or parts of a claim are denied, explain reasons to the insured and provide precise policy language. If some portion of the claim is undisputed, pay it.

N. Do not attempt to settle for less than the amount to which you consider claimant entitled - no "low ball" offers.

O. If the issue is which of two insurers covers the loss, consider payment to the insured and resolve the insurers' dispute later.

P. Overriding Rule - put nothing in the claim file you'll be ashamed to have read on television!

STANDARD PROVISIONS—IOWA ONLY

Concealment, fraud. This entire policy shall be void if, whether before or after a loss, the insured has wilfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.

Uninsurable and excepted property. This policy shall not cover accounts, bills, currency, deeds, evidences of debt, money or securities; nor, unless specifically named hereon in writing, bullion or manuscripts.

Perils not included. This Company shall not be liable for loss by fire or other perils insured against in this policy caused, directly or indirectly, by: (a) enemy attack by armed forces, including action taken by military, naval or air forces in resisting an actual or an immediately impending enemy attack; (b) invasion; (c) insurrection; (d) rebellion; (e) revolution; (f) civil war; (g) usurped power; (h) order of any civil authority except acts of destruction at the time of and for the purpose of preventing the spread of fire, provided that such fire did not originate from any of the perils excluded by this policy; (i) neglect of the insured to use all reasonable means to save and preserve the property at and after a loss, or when the property is endangered by fire in neighboring premises; (j) nor shall this Company be liable for loss by theft.

Other insurance. Other insurance may be prohibited or the amount of insurance may be limited by endorsement attached hereto.

Conditions suspending or restricting insurance. Unless otherwise provided in writing added hereto this Company shall not be liable for loss occurring

(a) while the hazard is increased by any means within the control or knowledge of the insured; or

(b) while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of sixty consecutive days; or

(c) as a result of explosion or riot, unless fire ensue, and in that event for loss by fire only.

Other perils or subjects. Any other peril to be insured against or subject of insurance to be covered in this policy shall be by endorsement in writing hereon or added hereto.

Added provisions. The extent of the application of insurance under this policy and of the contribution to be made by this Company in case of loss, and any other provision or agreement not inconsistent with the provisions of this policy, may be provided for in writing added hereto, but no provision may be waived except such as by the terms of this policy is subject to change.

Waiver provisions. No permission affecting this insurance shall exist, or waiver of any provision be valid, unless granted herein or expressed in writing added hereto. No provision, stipulation or forfeiture shall be held to be waived by any requirement or proceeding on the part of this Company relating to appraisal or to any examination provided for herein.

Cancellation of policy. This policy shall be cancelled at any time at the request of the insured, in which case this Company shall, upon demand and surrender of this policy, refund the excess of paid premium above

STANDARD PROVISIONS—IOWA ONLY
(Continued)

the customary short rates for the expired time. This policy may be cancelled at any time by this Company by giving to the insured a five days' written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said excess premium (if not tendered) will be refunded on demand.

Mortgagee interests and obligations. If loss hereunder is made payable, in whole or in part, to a designated mortgagee not named herein as the insured, such interest in this policy may be cancelled by giving to such mortgagee a ten days' written notice of cancellation.

If the insured fails to render proof of loss such mortgagee, upon notice, shall render proof of loss in the form herein specified within sixty (60) days thereafter and shall be subject to the provisions hereof relating to appraisal and time of payment and of bringing suit. If this Company shall claim that no liability existed as to the mortgagor or owner, it shall, to the extent of payment of loss to the mortgagee, be subrogated to all the mortgagee's rights of recovery, but without impairing mortgagee's right to sue; or it may pay off the mortgage debt and require an assignment thereof and of the mortgage. Other provisions relating to the interests and obligations of such mortgagee may be added hereto by agreement in writing.

Pro rata liability. This Company shall not be liable for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved, whether collectible or not.

Requirements in case loss occurs. The insured shall give immediate written notice to this Company of any loss, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, costs, actual cash value and amount of loss claimed; and within sixty days after the loss, unless such time is extended in writing by this Company, the insured shall render to this Company a proof of loss, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: the time and origin of the loss, the interest of the insured and of all others in the property, the actual cash value of each item thereof and the amount of loss thereto, all encumbrances thereon, all other contracts of insurance, whether valid or not, covering any of said property, any changes in the title, use, occupation, location, possession or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of loss and whether or not it then stood on leased ground, and shall furnish a copy of all the descriptions and schedules in all policies and, if required, verified plans and specifications of any building, fixtures or machinery destroyed or damaged. The insured, as often as may be reasonably required, shall exhibit to any person designated by this Company all that remains of any property herein described, and submit to examinations under oath by any person named by this Company, and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this Company or its representative, and shall permit extracts and copies thereof to be made.

K

STANDARD PROVISIONS—IOWA ONLY
(Continued)

Appraisal. In case the insured and this Company shall fail to agree as to the actual cash value or the amount of loss, then on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within twenty days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire, then, on request of the insured or this Company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this Company shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally.

Company's options. It shall be optional with this Company to take all, or any part, of the property at the agreed or appraised value, and also to repair, rebuild or replace the property destroyed or damaged with other of like kind and quality within a reasonable time, on giving notice of its intention so to do within thirty days after the receipt of the proof of loss herein required.

Abandonment. There can be no abandonment to this Company of any property.

When loss payable. The amount of loss for which this Company may be liable shall be payable sixty days after proof of loss, as herein provided, is received by this Company and ascertainment of the loss is made either by agreement between the insured and this Company expressed in writing or by the filing with this Company of an award as herein provided.

Suit. No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss.

Subrogation. This Company may require from the insured an assignment of all right of recovery against any party for loss to the extent that payment therefor is made by this Company.

K

CONTROLLING DEFENSE COSTS WHEN POSSIBLE POLICY DEFENSES ARE AVAILABLE

E. J. Connor

Vice President, Claims

ALLIED Group Insurance Company

I. Who has the contract "Right" to control? The insurer or the policyholder?

A. Can the insured reject a RR? Butters v. City of Independence 513 SW2 418 (MO 1974); 7C Appleman, Sec. 4686 (1979); Hawkeye Cas. Co. v. Stoker 48 NW2d 623 (Nebr. 1951).

B. When can the insured retain control of the defense? Policyholder has the basic right to control.

C. When does an insurer retain the right to control?

D. What triggers control? A contract conflict of rights?

E. Can an insured waive his rights when a conflict arises?

II. What is a conflict of interest?

A. Is any coverage question a conflict?

B. The duty to defend--a conflict?

A fiduciary duty breach?

C. The investigative duty?

D. The duty to inform? Farmers Ins. Co. v. Vagnozzi 675 P2d 703 (Arizona 1983) at p. 708; 7C Appleman, Ins. Law and Practice, Sec. 4692.

III. Whose lawyer is the defense attorney? Why?

A. Who has a right to select counsel?

B. What is a Cumis attorney? San Diego Naval Credit Union v. Cumis Insurance Society 162 Cal. App. 3d 358 (1985).

C. If a coverage defense arises, does an insurer have a right to monitor the original case?

EJ/CC

III. Whose lawyer is the defense attorney? Why? (continued)

D. What if there are multiple insureds to defend? Are more Cumis counsel appointed? Is each insured in a conflict with others?

IV. Is a declaratory judgment feasible?

A. What are the related costs?

B. Is there a cost-benefit ratio?

V. Does the Miller v. Shugart rule apply? (See 316 NW2d 729 Minn 1982).

A. Who defends a garnishment action directly against the insurer after a confession of judgment by Cumis Counsel? (or the insured).

B. Is a petition in intervention a viable alternative in the original suit to avoid Miller v. Shugart, supra.

C. Does an insured violate the contract cooperation clause by stipulating to a judgment and an agreement to execute against the insurer only? Taylor v. Safeco Ins. Co. 361 So.2d 743 (FLA. App. 1978).

D. What limits are there to insured's rights to settle even if insurer is defending under a reservation of rights? See Vagnozzi, supra. Also see Hawkeye Casualty Co. v. Johnson 48 NW2d 623 (Nebr. 1951); see Sargent v. Johnson 551 F.2d 221 (8 Cir 1977)

VI. Unconditional defense of a cause of action by an insurer avoids the relinquishment of control of costs. Cay Divers, Inc. v. Raven 812F2d 866 (3rd Cir 1987).

A. Retaining the right to "control" costs of litigation are pivotal in early decision making of policy defenses.

B. The "reasonable basis" for that good faith decision is critical. See Hoekstra v. Farm Bureau 382 NW2d 100 (Iowa 1986).

C. The insured may agree to a waiver of any Cumis rights. In some states waivers are covered by statute reflecting public policy.

EJ/CC

CONTRIBUTION AND INDEMNITY AFTER GOETZMAN V. WICHERN

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Introduction: Prior to December of 1982, contributory negligence was a complete defense in Iowa. The case of Goetzman v. Wichern, 327 N.W.2d 742, 754 (Iowa 1982), replaced the doctrine of contributory negligence with the doctrine of pure comparative negligence. In 1984, the Iowa Legislature adopted Iowa Code Chapter 668, which replaced the doctrine of pure comparative negligence with comparative fault.

I. CONTRIBUTION

A. Contribution is a right one tortfeasor has against another tortfeasor when the first tortfeasor: shares a common liability with the other tortfeasor; and has paid more than his fair share of the injured plaintiff's damages. Restatement (Second) of Torts § 886A (1979); Iowa Code § 668.5(1) (1987).

B. Contribution is based upon equitable principles. Iowa Electric Light and Power Co. v. General Electric Co., 352 N.W.2d 231, 234 (Iowa 1984). Contribution now has a statutory basis. Iowa Code § 668.5.

C. Common liability.

1. Common liability exists when two or more actors are liable to an injured party for the same damages, even though their liability may rest on different grounds. Federated Mutual Implement and Hardware Insurance Co. v. Dunkelberger, 172 N.W.2d 137, 142 (Iowa 1969).

2. Common liability is liability for the same harm. Where the plaintiff's damages are severable, one tortfeasor cannot get contribution for damages caused solely by that tortfeasor. Iowa Code § 668.5(1); Hunt v. Ernzen, 252 N.W.2d 445, 448 (Iowa 1977).

3. The Iowa Supreme Court has adhered to the common liability requirement for cases under Goetzman.

   a. In Thompson v. Stearns Chemical Corp., 345 N.W.2d 131, 136 (Iowa 1984), and Speck v. Unit Handling Division, 366 N.W.2d 543, 548 (Iowa 1985), the Iowa Supreme Court held that a tortfeasor liable to a plaintiff injured on the

job is not entitled to contribution from the plaintiff's employer. By paying worker's compensation benefits, the employer has discharged any liability to the plaintiff employee. Thus, there can be no common liability between the tortfeasor and the employer.

b. In McIntosh v. Barr, 397 N.W.2d 516, 517 (Iowa 1986), the Iowa Supreme Court held that a tortfeasor liable to one spouse for a consortium claim could not get contribution from the other spouse. Since one spouse has no right against the other for a loss of consortium caused in part by the other, there is no common liability which can support a claim for contribution.

4. Does a strict common liability requirement remain under Chapter 668?

a. The Iowa Supreme Court has indicated that contribution under Chapter 668 requires common liability. Rees v. Dallas County, 372 N.W.2d 503, 506 (Iowa 1985); see Automobile Underwriters Corp. v. Harrelson, 409 N.W.2d 688, 690 (Iowa 1987); Telegraph Herald, Inc. v. McDowell, 397 N.W.2d 518, 520 (Iowa 1986).

b. Iowa Code § 668.6(3) (1987) is based upon Section 4 of the Uniform Comparative Fault Act. The Uniform Comparative Fault Act twice refers to "common liability," but in both instances the Iowa Legislature struck the word "common." Whether this indicates some intent by the Legislature to relax the strict common liability requirement is not known, since the matter has not been presented to the Iowa Supreme Court.

D. Procedure.

1. Prior to Goetzman. The right of contribution was determinable by a cross-petition in the original suit or by separate action.

2. After Goetzman but before Chapter 668. The right of contribution was determinable in the original suit or in a separate action. Franke v. Junko, 366 N.W.2d 536, 540 (Iowa 1985). The right of contribution, while determinable in the original suit, was not enforceable until a tortfeasor has paid more than his fair share to the plaintiff. Id.; Telegraph Herald, Inc. v. McDowell, 397 N.W.2d 518, 519-20 (Iowa 1986).

3. After Chapter 668. A right of contribution may be enforced either in the original action or by a separate action brought for that purpose. Iowa Code § 668.5(1). If enforced in the original action, the tortfeasor entitled to contribution may obtain a judgment against other tortfeasors upon a motion to the court. Iowa Code § 668.6(1). If enforced in a separate action, the separate action may be brought within one year of the judgment; if no judgment has been rendered, the tortfeasor must have actually discharged the liability or agreed to discharge it, and the separate action must be brought within one year of the discharge or agreement. Iowa Code § 668.6(3).

E. Paying more than one's fair share.

1. A tortfeasor may pay more than his fair share if he is jointly and severally liable. Goetzman did not affect the doctrine of joint and several liability. Rosevink v. Faris, 342 N.W.2d 845, 850 (Iowa 1983). Iowa Code § 668.4 modified joint and several liability so that it does not apply to defendants who bear less than fifty percent of the total fault.

2. A tortfeasor may also pay more than his fair share through settlement. A tortfeasor who makes a reasonable settlement with the plaintiff may obtain contribution from other tortfeasors. Allied Mutual Casualty Co. v. Long, 252 Iowa 829, 833-39, 107 N.W.2d 682, 684-87 (1961); Iowa Code § 668.5(2). Prior to the effective date of Chapter 668, the tortfeasor seeking contribution had to plead and prove his own negligence. Ke-Wash Co. v. Stauffer Chemical Co., 177 N.W.2d 5, 9-10 (Iowa 1970). Under Chapter 668, the liability of the person against whom contribution is sought must be extinguished and the settlement must be reasonable. Iowa Code § 668.5(2).

M

F. Amount.

1. Before Goetzman, contribution was apportioned by dividing the total amount of the judgment equally among those liable to the injured person. Schnebly v. Baker, 217 N.W.2d 708, 731 (Iowa 1974).

2. Under Goetzman's pure comparative negligence and under the comparative fault scheme of Chapter 668, contribution is exacted upon the basis of comparable causal negligence or fault. Franke v. Junko, 366 N.W.2d 536, 540 (Iowa 1985); Iowa Code § 668.5(1).

II. INDEMNITY

A. Indemnity is right of reimbursement created by contract, equity or law which arises in one who has incurred a liability for which another is responsible. Howell v. River Products Co., 379 N.W.2d 919, 921 (Iowa 1986).

B. Indemnity, like contribution, is based upon equitable principles. Iowa Electric Light and Power Co. v. General Electric Co., 352 N.W.2d 231, 234 (Iowa 1984).

C. The Iowa Supreme Court has listed four ways in which a right of indemnity maly be created. Rees v. Dallas County, 372 N.W.2d 503, 505 (Iowa 1985).

1. Express contract. An indemnifying agreement may be the basis for an indemnity claim. The one seeking indemnity may not be indemnified for its own fault unless the agreement so provides in clear and unequivocal language. Payne Plumbing & Heating Co., Inc. v. Bob McKiness Excavating & Grading, Inc., 382 N.W.2d 156, 160 (Iowa 1986).

2. Vicarious liability. If a plaintiff recovers a judgment against one whose liability is vicarious, the one vicariously liable has a right to indemnity from the actual tortfeasor. Dairyland Insurance Co. v. Concrete Products Co., 203 N.W.2d 558, 564 (Iowa 1973).

3. Independent duty. An independent duty to indemnify is based upon the relationship between the indemnitor and the indemnity. An independent duty may be implied in a contract. Woodruff Construction Co. v. Barrick Roofers, Inc., 406 N.W.2d 783, 787 (Iowa 1987). Whether an implied agreement to indemnify exists depends upon the circumstances, and an implied

DEFENSE CHALLENGES TO EXPERT TESTIMONY

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October 8-10, 1987

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I. LIMITATIONS ON EXPERT TESTIMONY

A. In general.

1. Any discussion of limitations on expert testimony must of course be tempered by the announced commitment of the Iowa Supreme Court to a liberal rule of admissibility. Haumersen v. Ford Motor Co., 257 N.W.2d 7, 11 (Iowa 1977) (Iowa is committed to a liberal rule which allows opinion testimony if it is of a nature which will aid the jury). This view, combined with the liberal parameters of Federal Rules of Evidence 702-705, now adopted in Iowa (Iowa Rules of Evidence 702-705), gives the trial court broad but not unlimited discretion concerning the admissibility of expert testimony.

2. Despite the latitude created by the rules and reinforced by the supreme court's position, it is clear that there are recognized and identifiable limitations on what even a highly-qualified expert can testify to. The pervasiveness of expert testimony in modern

litigation has perhaps caused both the bench and bar to accept the propriety of expert testimony with almost fatalistic resignation, and legitimate challenges to expert testimony are many times overlooked, or perhaps more often, erroneously presumed not to be worth the effort of legitimate objection or challenge.

3. A review of cases where expert testimony has been rightly rejected or limited reveals that limitations can generally be classified in three categories:

(a) The matter is not properly the subject of expert testimony. See Part B, infra;

(b) The witness is not qualified, or even if generally qualified, is not sufficiently qualified to answer a specific question relating to a narrower field of expertise. See Part C, infra;

(c) The basis for the opinion is unreliable, See Part II A and B, infra.

4. Federal Rules of Evidence 702-705, and their adaptation in Iowa, while broad, do not contemplate unlimited expert testimony. See, Committee Comments to Iowa Rule 704 ("testimony from experts is not without limitations," noting particularly that it is improper for experts to express opinions as to legal standards). The committee also expressed "concern" that under both Rule 702 and existing state practice in the trial courts, "persons with marginal credentials will be given 'expert' status and thereby automatically gain unwarranted recognition of their ideas." Iowa R. Evid. 702, Committee Comment.

5. Whether expert testimony will be permitted depends initially upon a threshold finding that the matter is one involving "scientific, technical or other specialized knowledge." Rule 702. It must also be shown that the testimony is helpful to the jury in reaching an understanding and resolution of the issue involved. See Federal Rule of Evidence 702, Notes of Advisory Committee (whether the situation is a proper one for the use of expert

testimony is to be determined on the basis of whether the testimony will assist the trier of fact). These basic and elementary requirements implicit in the rules seem to be often overlooked when one considers the myriad of ordinary, day-to-day topics upon which experts are commonly allowed to opine.

6. Thus, while designed to remove the inflexibility of common law rules governing expert testimony, the present rules of evidence do in fact contemplate some limitations on expert testimony, if properly interpreted and applied. See, Notes of Advisory Committee to Fed. R. Evid. 702 (recognizing unhelpful and superfluous opinions will be excluded); Notes of Advisory Committee to Rule 704 (abolition of ultimate issue rule does not operate to admit opinions phrased in terms of legal criteria or which merely tell the jury what result to reach); Notes of Advisory Committee to Rules 703 and 705 (while underlying data supporting opinion need not be admissible or even initially disclosed, it must be of a type reasonably relied upon in the field, and may be subject to rigorous prior

foundation examination in the discretion of the trial judge).

7. Recent legislation in the medical malpractice area has additionally added statutory limitations to the nature of permissible expert testimony in such cases. Iowa Code § 147.139 provides that the court shall allow a person to qualify as an expert on the issue of the appropriate standard of care only if "the person's medical or dental qualifications relate directly to the medical problem or problems at issue and the type of treatment administered in the case."

B. Matters not Properly the Subject of Expert Testimony

1. Expert testimony is properly allowed only where the matter calls for scientific, technical or other specialized knowledge without which the jury will have difficulty resolving the issue or determining the fact. The test for determining whether the testimony will so assist the jury is a "common sense inquiry" as to whether the

untrained layman would be qualified to determine the issue intelligently without such expert assistance. Notes of Advisory Committee, Fed. R. Evid. 702.

2. It can thus be urged that examination of the subject matter upon which the expert testimony is sought is properly the initial step of the inquiry, even more so than examining the qualifications of the witness. See, e.g., State v. Galloway, 275 N.W.2d 736, (Iowa 1979) (Reynoldson, C.J., concurring) (possibility of mistaken eye-witness identifications based on experimental studies not a proper subject of expert testimony).

3. If the issue is one fully within the comprehension and understanding of the jury, expert testimony may properly be excluded. A common example of such limitation is found in the exclusion of expert testimony on issues of warnings or similar issues involving questions of "reasonableness."

4. In Haynes v. American Motors Corp., 691 F.2d 1268 (8th Cir. 1982), the Eighth Circuit held it was not error for the trial court to exclude an expert's proffered testimony as to whether defendant should have warned about roll-over propensities of Jeep C-5's, where substantial testimony had already been introduced on the Jeep's high center of gravity, over-steer characteristics and roll-over propensity. The court found the jury was thus capable of forming its own conclusions on the necessity of a warning and that the expert's opinion "would have added nothing." 691 F.2d at 1271.

5. Similarly, the Eighth Circuit in Brassette v. Burlington Northern, Inc., 687 F.2d 153 (8th Cir. 1982), found that the trial court had properly excluded an expert's opinion testimony as to whether a warning was necessary to make a hydraulic trailer hitch reasonably safe, where the expert's opinion "was not necessary to the jury's understanding of the case." The court held that the question of whether a warning is necessary is not ordinarily "the kind of issue on which expert assistance is essential for the trier of fact." 687 F.2d at 158.

6. The Iowa Supreme Court has also held that the exclusion of expert testimony is proper where it is concluded that the subject matter is such that the jury did not require expert assistance to evaluate the evidence. In State v. Galloway, 275 N.W.2d 736 (Iowa 1979), Defendant offered the testimony of an expert concerning the statistical possibilities of erroneous eye-witness identifications, based in part on experiments performed by another expert. The concurring opinion, in which seven justices joined, stated that the proffered testimony was properly excluded not so much because the underlying basis was unreliable, but because the opinion was not a proper subject of expert testimony. The court found that the proffered testimony, distilled to its essence, was that the longer the period of time between an incident and a witness' recollection of the incident, the less accurate and less complete would be the witness' recollection. 275 N.W.2d at 740. The court noted that the predominate rationale for excluding such testimony is that the subject of the opinion offered is not beyond the knowledge and experience of the average juror. Stated the court:

"In the final analysis, jurors daily experience the fragility of their own memories. They know recollection fades with time and it is affected by the relative significance of the incident. Probably most have experienced on several occassions their own or another's misidentification in social or business relationships. Explanation of the scientifically identified mechanisms which bring about memory decay may be of academic interest, but it is of little aid to the jury in judging reliability of the particular eye witness identification before them." 275 N.W.2d at 741. (emphasis supplied).

7. The court in Galloway, supra, also expressed concern for the cost and time which would be expended in "collateral battles of experts concerning the dynamics of the memory process," and observed that "we should be slow to approve a rule which would inject another group of expensive forensic experts into an area historically reserved as the jury's domain." 275 N.W.2d at 741-42.

8. The foregoing rationale of the concurring opinion in Galloway obviously has applicability in any case where a party seeks to offer expert testimony on an issue which should be within the ordinary comprehension of the jury.

9. Other examples of decisions in which expert testimony has been excluded because the subject matter was deemed not properly the subject of such expert opinion include the following:

(a) State v. Vincik, 398 N.W.2d 788 (Iowa 1987). In Vincik, defendant's expert psychologist was asked to render an opinion as to whether he had any indication the defendant had been "deceiving him" when he interviewed the defendant. The trial court's exclusion of such testimony was upheld on appeal on the basis that the truthfulness of a witness is not deemed a "fact in issue," but is solely a matter to be determined by the jury, and therefore not properly the subject of expert testimony. State v. Vincik, 398 N.W.2d 795-96.

(b) State v. Myers, 382 N.W.2d 91 (Iowa 1986). In Myers, the defendant appealed his conviction of indecent contact with a child. Defendant urged that the trial court had erred in permitting two

prosecution expert witnesses, the principal of an elementary school attended by the complainant, and a child abuse investigator employed by the state, to express opinions that children generally tell the truth when they report that they have been sexually abused. Defendant challenged the testimony under State v. Galloway, 275 N.W.2d 736 (Iowa 1979) (special concurrance of seven justices) on the basis that such matters were not the proper subject of expert testimony. The supreme court reversed the conviction and held that the testimony was improperly admitted. The court held that the ultimate determination of the credibility or truthfulness of a witness, which essentially was what the expert testimony related to, was not "a fact in issue" but was a matter solely for the jury's determination. The court concluded that expert opinions as to the truthfulness of a witness are therefore not admissible under Rule 702. State v. Myers, 382 N.W.2d at 97.

NOTE: State v. Myers contains an extensive and thorough discussion of the admissibility of expert testimony on matters which are close to the "fine but essential" line between opinions which would be truly helpful to the jury and those which merely convey a conclusion concerning the defendant's ultimate guilt. Id., 382 N.W.2d 93-98.

(c) Zimmer v. Miller Trucking Co., Inc., 743 F.2d 601 (8th Cir. 1984). In Zimmer, a wrongful death action in which the plaintiff attempted to introduce expert testimony regarding the cause of the accident, the trial court had excluded the proffered testimony from a highway patrolman as to whether an "emergency or other dire necessity," as used in Iowa Code § 321.366(5), existed at the time of the accident. The Eighth Circuit affirmed the exclusion of the evidence, and agreed with the trial court that the expert's opinion on this issue was not only a mixed question of fact and law, but involved an issue that

the jurors, as laymen, were as capable of answering as the patrolman/expert. The court held that if the subject matter of the opinion is within the knowledge or experience of laymen, the testimony was superfluous, and therefore properly excluded.

(d) United States v. Arenal, 768 F.2d 263 (8th Cir. 1985). In a prosecution for conspiracy to distribute cocaine, the government's expert witness was allowed to testify that the fact that the cocaine had been cut with only one substance indicated it was from a "common source." On appeal, the Eighth Circuit held that the expert testimony should have been excluded because the subject matter was found not to meet the "helpfulness" criterian of Rule 702. Once the expert testified that cocaine on the street has more than one cut and that it is unusual to find cocaine at several locations cut only with the same material, the jury was then competent to draw its own conclusions regarding a "common source."

(e) Strong v. E.I. DuPont de Nemours Co., Inc., 667 F.2d 682 (8th Cir. 1981). The appellate court affirmed the exclusion in a products liability case of proffered expert testimony from plaintiff's expert as to whether a lack of warnings and instructions made the product unreasonably dangerous, in part, because the jury was deemed capable of drawing its own inferences from the available evidence. This case also deals with the issue of whether expert testimony should be excluded when couched in terms of legal criteria or legal standards. See Paragraphs 10-17, infra.

(f) Otwell v. Motel 6, Inc., 755 F.2d 665 (8th Cir. 1985). Otwell involved a wrongful death action in which the plaintiff attempted to introduce expert testimony as to the incidence of crime at a particular hotel as compared with other motels, the standard of care in the security industry, and the cause of the incident. The trial court excluded such testimony, which was upheld on appeal by the Eighth Circuit.

The appellate court found that the jury had before it evidence of other crimes which had occurred at the motel, and evidence of the security devices at the motel and how they compared with other motels. The answer to the question posed to the expert as to what caused the accident was deemed a matter within the knowledge and experience of laypersons, and therefore not properly a subject of expert testimony.

(g) Ellis v. Miller Oil Purchasing Co., 738 F.2d 269 (8th Cir. 1984). In a negligence action arising out of an automobile accident, the plaintiff attempted to have an accident reconstruction expert testify as to the proper conduct for the defendant's driver just prior to the accident. Defendant's objection to the testimony was sustained by the trial court, and upheld on appeal, the Eighth Circuit finding that the expert was in no better position to answer the question posed than was the jury. As such, the matter was within the knowledge or experience of

laypeople, was superfluous, and therefore not a proper subject of expert testimony.

10. Another common ground for limitation or exclusion of expert testimony is with respect to testimony which is couched in terms of legal standards or "inadequately explored legal criteria." See, Notes of Advisory Committee, Federal Rule 704. The grounds for objection and exclusion of such testimony are that it relates to a matter which is not properly the subject of expert testimony.

11. While Rule 704 abandons the "ultimate issue" objection as a basis for exclusion, the drafters of the rules make clear that this does not signal the admission of all opinions, since the opinion still must meet the requirement that it be helpful to the jury's understanding of the issue:

> "These provisions [Rules 701, 702 and 403] afford ample assurance against the admission of opinions which would merely tell the jury what result to reach. . . They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria." Notes of Advisory Committee, Federal Rule 704.

12. The Committee Comments accompanying Iowa Rule of Evidence 704 recognize similar limitations:

> "While this section and prior Iowa case law abolish the so-called ultimate issue rule, testimony from experts is not without limitations. Experts are not to state opinions as to legal standards. On this basis, questions such as whether X was negligent or whether a product was unreasonably dangerous may be excluded." Citing, Aller v. Rodgers Machinery Mfg. Co., Inc., 268 N.W.2d 930 (Iowa 1978).

13. Probably the best known example of the application of this limitation is the Iowa Supreme Court's decision in Aller, supra. There, plaintiff sought to have his expert testify as to whether or not the product in question was "dangerous to the operator of the machine when it was used in the manner and purpose for which it was intended." 268 N.W.2d at 840. The trial court excluded the testimony on the basis that it invaded the province of the jury. The supreme court upheld the exclusion of the testimony, although it stated that the trial court would have been more accurate in considering the question as one calling for an opinion on a question of law. Id. The court held that the requirement of "unreasonable danger is a legal standard upon which no

witness, expert or non-expert, may express an opinion . . . ." Id.

14. In analyzing Aller, it should be noted that the question posed did not ask the expert to testify as to whether the condition of the product was unreasonably dangerous, which is the legal standard incorporated in the elements of strict liability and the decision may therefore be subject to question. Whether the trial court's discretion would have been upheld had such testimony been admitted is academic; the case does stand for the principle that expert testimony which is couched in terms of legal standards and represents issues solely to be decided by the jury, is properly excluded.

15. A further question raised by Aller is whether expert testimony, commonly admitted in the trial courts, as to whether a product is "defective" should be properly received. "Defective" is also a legally defined standard under Restatement § 402A, just as is the concept of "unreasonably dangerous." It is difficult to see the distinction given the rationale of the supreme court in Aller.

16. Another decision of the Iowa Supreme Court in which expert testimony was held properly excluded because couched in terms of applicable legal standards is Kooyman v. Farm Bureau Mutual Insurance Co., 315 N.W.2d 30 (Iowa 1982). There, the court upheld the exclusion of expert testimony as to whether there had been a "sufficient investigation" by the defendant. The court held that since bad faith was the legal standard by which the defendant's liability was to be measured, the proffered testimony as to the sufficiency of the investigation was in effect an opinion that the attorney's actions did not meet the requisite standard of care, and was therefore inadmissible.

17. Other examples of the exclusion of expert testimony on the basis that it is couched in terms of legal standards or similar improper bases include:

(a) Strong v. E. I. DePont de Nemours Co., Inc., 667 F.2d 682 (8th Cir. 1981). In a product liability action in which the plaintiff

attempted to have an expert testify as to whether a lack of warnings and instructions made the product unreasonably dangerous, the trial court excluded the testimony. The Eighth Circuit affirmed the exclusion of the testimony on appeal, holding that exclusion was proper since the opinion called for legal conclusions and was not essential to the trier of fact. It reasoned that the jury was capable of drawing its own inferences from the evidence available in the record.

(b) Brassette v. Burlington Northern, Inc., 687 F.2d 153 (8th Cir. 1982) involved an action for injuries received when an employee used a cutting torch on a hydraulic trailer hitch which exploded. The defendant attempted to offer expert testimony as to whether a warning on the hitch was needed to make it reasonably safe. The court of appeals affirmed the trial court's exclusion of the proffered testimony for the reason that the "question of whether a warning is necessary is not ordinarily the kind of issue on which

expert assistance is essential for the trier of fact." 687 F.2d at 158, quoting, Strong v. E.I. DuPont de Nemours, supra, 667 F.2d at 686.

(c) Hayes Brothers, Inc. v. Economy Fire and Casualty Co., 634 F.2d 1119 (8th Cir. 1980). In a case involving a third-party bad-faith claim, the defendant sought to have an expert testify as to the reasonableness of its conduct during settlement negotiations. The trial court excluded the testimony, and the court of appeals upheld the ruling on the basis that questions of "reasonableness" are outside the scope of proper expert testimony.

(d) F. H. Krear & Co. v. Nineteen Named Trustees, 810 F.2d 1250 (2d Cir. 1987). In a breach of contract action against trustees of a union pension fund, defendants attempted to have their expert testify that the contracts in question were unenforceable because of lack of essential terms. The district court excluded the testimony, and

the Second Circuit upheld this ruling on appeal. The court stated that it is not proper for witnesses to instruct the jury as to applicable principles of law, and that such questions are for the judge. 810 F.2d 1250, 1258.

(e) Adalman v. Baker, Watts & Co., 807 F.2d 359 (4th Cir. 1986). In a securities case where the defendant attempted to call an expert witness to testify as to the applicable law regarding disclosure documents, the trial court excluded this testimony. On appeal, the Fourth Circuit upheld the exclusion of such testimony on the basis that what the applicable law does or does not require is not a proper subject of expert testimony, even where the witnesses were attorneys with great experience relative to disclosure documents under the securities laws. 807 F.2d 359, 365-69.

(f) Stissi v. Interstate & Ocean Transport Co., 765 F.2d 370 (2d Cir. 1985). In an action for damages caused by the collision of two

boats, the trial court permitted an experienced tug boat captain to testify at length concerning what various nautical rules required or prohibited. The Second Circuit held admission of this testimony was error and that such was not the proper subject of expert testimony since what the nautical rules did or did not require was a matter for the court to decide. 765 F.2d 370, 374-376.

(g) Matthews v. Ashland Chemical, Inc., 770 F.2d 1303 (5th Cir. 1985). The Fifth Circuit affirmed the trial court's exclusion of proffered expert testimony concerning whether the defendant had violated certain safety codes and whether the defendant's premises, under the safety codes, were unreasonably dangerous. The case represents an example of the distinction to be drawn between an expert properly testifying as to the existence and content of standards which are deemed applicable to the case, as opposed to going the further step and opining as to whose legal responsibility it

was to comply with the standards in question. 770 F.2d 1303, 1309-11.

(h) FAA v. Landy, 705 F.2d 624 (2d Cir. 1983). On appeal from a judgment imposing civil penalties for violations of FAA safety regulations, the appellate court held certain expert testimony was properly excluded. Specifically, defendants sought to have their expert, a former FAA office supervisor, testify as to the meaning and applicability of certain of the regulations. The Second Circuit held the testimony was properly excluded as it would have invaded the province of the court to determine the applicable law and to instruct the jury as to that law. 705 F.2d at 632.

C. Lack of Qualifications

1. While the liberal policy of the Iowa Supreme Court in according "expert" status to a broad range of witnesses is well established, see, e.g., Van Wyk v. Norden Laboratories, Inc., 345 N.W.2d 81 (Iowa 1984) (veterinarian permitted

to testify as to possible ways in which defendant's cattle vaccine could have become contaminated); State v. Taylor, 336 N.W.2d 721 (Iowa 1983) (detective allowed to testify as an expert on the effect of narcotics on defendant's behavior); Ganrud v. Smith, 200 N.W.2d 311 (Iowa 1973) (expert who was not a licensed physician but who held degrees in science, chemistry and physiology permitted to testify concerning memory loss of person involved in an auto accident), limitations again do exist and have been applied.

2. The Committee Comments to Iowa Rule 702 express concern in this regard:

> "There is concern that under both proposed Rule 702 and existing state practice, persons with marginal credentials will be given "expert" status and thereby automatically gain unwarranted recognition of their ideas."

The comments go on to state that it is the committee's judgment that proper use of Iowa R. of Evid. 104 (permitting pre-trial challenge to expert testimony or qualifications) and the relevancy standards of Iowa R. of Evid. 403 will act as safeguards to prevent unwarranted expert testimony.

3. It is not enough that an expert be generally qualified; the witness must be qualified to answer the specific question asked. Tiemeyer v. McIntosh, 176 N.W.2d 819, 824 (Iowa 1970); see, also, Henkel v. Heri, 274 N.W.2d 317, 323 (Iowa 1979) (upholding exclusion of expert testimony as to vehicle speed based on an unreliable method of analysis).

4. The capacity of an expert to testify in a given case is therefore a relative one, i.e., relative to the topic about which the witness is asked to make his or her statement. Henkel, supra, 274 N.W.2d 317, 323.

5. The following are case examples where the witness was held not qualified:

(a) Moore v. Vanderloo, 386 N.W.2d 108 (Iowa 1986). In an action against a chiropractor and a pharmaceutical company for a stroke allegedly induced by chiropractic manipulations given to the plaintiff during a time when she was using oral contraceptives, the chiropractic

expert was held not qualified to testify as to the effect of oral contraceptives. 386 N.W.2d 108, 115-16.

(b) Brown v. Syntex Laboratories, Inc., 755 F.2d 668 (8th Cir. 1985). In a products liability action claiming a minor child's speech and memory were impaired by use of chloride-deficient baby formula, trial court did not abuse its discretion in finding plaintiff's proffered expert's qualifications "marginal" and in rejecting the expert's opinions.

(c) Brasette v. Burlington Northern, Inc., 687 F.2d 153 (8th Cir. 1982). On appeal, the trial court's exclusion of certain expert testimony was upheld where the proffered testimony would have concerned whether a warning was necessary, and the expert was found not to be an expert on warnings.

(d) United States v. Marabelles, 724 F.2d 1374 (9th Cir. 1984). In a tax evasion case in which the defendant attempted to use a

bank loan officer as an expert witness, the proffered testimony was excluded. The court found that the defendant's offer of proof qualified the witness as an expert on bank loans generally, but that it did not show he had sufficient expertise in taxation or accounting to opine upon the financial projections or statistics in question.

(e) Rimer v. Rockwell International Corp., 641 F.2d 450 (6th Cir. 1981). In a negligence and strict liability action arising out of an emergency landing of a private aircraft, the plaintiff attempted to introduce the testimony of an alleged expert regarding the design of the plane's fuel system. The witness was an experienced pilot, and was permitted to testify extensively concerning his experiences as a pilot including forced landings in similar model planes. The court prevented him from testifying, however, as to whether the fuel system of such planes was defectively designed.

While the reason for exclusion is not clearly expressed in the opinion, it appears the court felt the testimony was outside of the witness' field of expertise.

(f) Dawsey v. Olin Corp., 782 F.2d 1254 (5th Cir. 1986). In an action to recover for personal injuries sustained as a result of the release of a gas into the air, plaintiff attempted to qualify an expert witness concerning the toxicity of the gas and whether the same type of gas had caused the deaths of soldiers in World War I. The trial court excluded the proffered testimony on the basis that the witness was not a toxicologist or pharmacologist, and had not done any studies concerning the toxicological effects of the gas on humans or animals. The appellate court affirmed the trial court's exclusion of the testimony on the basis that the witness was admittedly not qualified in the two subjects which were contained in the precise questions asked: toxicitiy of

the gas and cause of death to exposure to gas.

II. PERMISSIBLE BASES OF EXPERT OPINION

A. In general.

1. Even if the court determines that the matter in question is a proper subject of expert testimony and the witness is qualified, the basis for the proffered opinion may be so lacking or unreliable as to warrant exclusion of the testimony.

2. Despite the breadth of Rule 703 and its relaxation of foundation, it is not without limitations. Iowa R. Evid. 703 states:

> "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the trial or hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

3. The Notes of the Advisory Committee to Federal Rule 703, recognizing that the rule broadens the allowable bases for expert testimony, state that any fear that the rule will "tend to break down the rules of exclusion unduly" is balanced by the fact that the rule requires that the facts or data be of a type "reasonably relied upon by experts in the particular field." The Notes give the example that under the rule the opinion of an "accidentologist" as to the point of impact in an automobile collision based on statements of bystanders would not be permitted, since the requirement of reliability is not satisfied.

4. The Committee Comments to Iowa Rule 703 note that the rule "represents a departure from Iowa common law," since under the rule the factual basis for the opinion need not be in the record or independently admissible. Again, however, the Committee specifically states that "liberal use of Rule 104(a)" should be made to test whether the underlying factual basis meets the requirements of the Rule in advance of the jury hearing the testimony.

5. The procedural mechanism for challenging opinions suspected to be lacking in reliability are beyond the scope of this outline, but note should be made that the drafters of the Rules urge liberal and frequent use of pre-trial admissibility procedures set forth in Iowa R. Evid. 104.

6. The foregoing is significant in addressing the issue of whether the expert witness whose testimony is in question is the proper source to determine whether the data he or she used is "of a type reasonably relied upon by experts in the particular field." Clearly, some independent determination of this threshold issue is often required.

B. Lack of General Scientific Acceptance as an Indicia of Unreliability

1. Opinions of an expert which are based on scientific theories or principles which have not gained general acceptance in the particular field may often be excluded. The rule requiring "general scientific acceptance" can

be traced to the landmark case of Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), in which the court rejected the admissibility of evidence from the precursor of the polygraph. The Frye court discussed the difficulties encountered in determining whether "general scientific acceptance" should be a foundational predicate to the admissibility of expert testimony:

> "Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential forces of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well recognized scientific priniciple or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." Frye, supra at 1014.

3. The exclusionary rule of Frye, however, has often been criticized as imposing requirements of "general acceptance" not imposed on other types of expert opinion testimony. See, McCormick, Handbook of the Law of Evidence, § 203, pp. 488-89 (2d Ed. 1972). Nevertheless, stringent foundation requirements continue to be imposed on expert opinions which involve

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technical or complex questions of science or medicine. See, e.g., Henkel v. Heri, 274 N.W.2d 317 (Iowa 1979) (rejecting opinion testimony as to vehicle speed based on conservation of momentum-vector analysis as not sufficiently reliable); State v. Conner, 241 N.W.2d 447 (Iowa 1976) (rejecting polygraph evidence). The real issue is whether the proffered evidence is reliable. See, e.g., State v. Conner, supra, (treating "general acceptance" as one indicia of reliability).

4. A close reading of the relevant cases leads to the conclusion that a foundational showing of reliability remains essential where technical and complex issues are involved; whether the "reliability" requirement is measured at least in part by the "general acceptance" standard depends on the nature of the subject matter. See, State v. Hall, 297 N.W.2d 80, 85 (Iowa 1980) (the complexity of the subject matter will influence the foundational showing of reliability, and certain types of subject matter require greater input from the scientific community).

5. The Iowa Supreme Court has specifically rejected blanket application of the "general acceptability" requirement of Frye in cases where "the reliability of the evidence is otherwise established." State v. Hall, 297 N.W.2d 80 (Iowa 1980). In Hall, the supreme court rejected across-the-board application of the rule based in part on the fact that "acceptance in the scientific community" is a nebulous concept, and expressed concern that the court cannot surrender to "a vote of scientists" the determination of admissiblity of the evidence. Id. at 85.

6. In Hall, a murder case where the defendant was accused of stabbing the victim, the court admitted expert testimony based on a "blood spatter pattern" theory of a criminalist who had spent years studying and doing experiments on the "flight characterics" of blood. While the theory was not shown to have gained "general acceptance" in the field, the court found the testimony reliable because (a) the study of blood characteristics is "relatively uncomplicated"; (b) the theory is based

primarily on commonly understood principles of physics and mathematics; (c) it involved observations "based on common sense" and which lie "close to the ken of an average layman"; (d) the "inherent understandability of the evidence" provided sufficient basis for its admission. State v. Hall, supra, at 83-86.

7. The test for the foundational showing necessary for admission of expert testimony on technical matters of science or medicine in Iowa, derived from Hall, supra, is as follows:

> "[t]he rationale of Frye should apply insofar as it bears upon the reliability of the proffered evidence. Accordingly, we do not believe that "general scientific acceptance" is a prerequisite to admission of evidence, scientific or otherwise, if the reliability of the evidence is otherwise established." (emphasis supplied). Hall, supra at 85.

8. The court in Hall recognized that the complexity of the subject matter will influence the foundational showing of reliability necessary for admission, and notes as examples that the foundation for such subject matters as neutron-activation analysis (United States v. Stifel, 433 F.2d 431, 441 (6th Cir. 1970)) requires greater input from the scientific community. Hall, supra, at 85.

9. Thus, a showing of reliablity must be made in advance of the jury hearing an expert's testimony where the subject matter is complex and the "scientific acceptance" of the underlying basis of the expert testimony is suspect.

10. Note that reliability may be established, depending on the subject matter, by the expert's qualifications and facts which take the expert opinion "out of the realm of speculation and conjecture." Van Wyk v. Norden Laboratories, Inc., 345 N.W.2d 81, 87 (Iowa 1984) (veterinarian permitted to express opinion that cause of harm to livestock was vaccine previously administered, over objection that his opinions on vaccine contamination were not generally accepted). But see, State v. Conner, supra, (excluding polygraph evidence and finding "resolution of this issue is not controlled by the qualifications of the witnesses or the foundation for their testimony"). In Conner, the court reasoned that the problem was actually one of the appropriateness of polygraph evidence as a

proper subject of expert testimony. The court held that the breadth, sensitivity and importance of the polygraph evidence there in question demanded a higher standard of trustworthiness than is required of other kinds of scientific evidence, and therefore required a strong showing of scientific acceptance and evidentiary reliabilitiy. Conner, supra at 459.

11. In sum, what the Iowa Supreme Court requires after Hall is that an independent determination indeed needs to be made as to whether the underlying foundation for the evidence is reliable, but that the court refuses to be bound by the restrictions of the Frye "general scientific acceptance" test in making that determination.

12. Cases where the proffered testimony involves technically complex matters of science or medicine may demand limitations under a Frye analysis, and should be distinguished from the court's "inherent understandability"-type evidence discussed in Hall, supra.

13. For an excellent discussion of the application of the "general scientific acceptance" test in cases involving complex issues, see Judge Weinstein's opinions in In Re Agent Orange Product Liability Litigation, 611 F.Supp. 1223 (E. D. N.Y., 1985) and In Re Agent Orange Product Liability Litigation, Lilley v. Dow Chemical Co., 611 F.Supp. 1267 (E. D. N.Y., 1985). Judge Weinstein there held that the assessment of novel testimony involves a balancing of the relevance, reliability and helpfulness of the evidence against the likelihood of waste of time, confusion and prejudice. When either the expert's qualifications or the testimony lie at the periphery of what the scientific community considers acceptable, special care should be used in evaluating the reliability and probative worth under Rule 703. In Re Agent Orange Product Liability Litigation, supra, 611 F.Supp. at 1242.

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C. Unreliable Basis of Underlying Information.

1. In cases where the expert is qualified and which do not involve issues of "general scientific acceptance," the underlying foundation for proffered testimony may still be shown inadequate because the data is unreliable.

2. The Iowa Supreme Court has addressed examples of proffered expert testimony for which there was a lack of reliable factual foundation. In Tiemeyer v. McIntosh, 176 N.W.2d 819, 824-25 (Iowa 1970) the court found that an expert could not render an opinion on speed based solely on photographs of the vehicles and the accident scene.

3. State v. Vincik, 398 N.W.2d 788 (Iowa 1987). The Iowa Supreme Court in this case upheld the exclusion of proffered expert testimony from a psychologist whose opinions were based in part on what the doctor had been told by others concerning the defendant. The court held that while Rule 702 permits reliance on facts or data which are not independently admissible, the record did not show that psychologists

ordinarily and reasonably rely on such hearsay information. Id. at 795-96.

4. Holmquist v. Volkswagen of America, Inc., 261 N.W.2d 516 (Iowa Ct. App. 1977). In this case, the court of appeals upheld the exclusion of expert testimony from a research engineer who had specialized in "human factors" engineering. The expert was prepared to express an opinion as to what happened in the particular accident based on his study of certain "facts" surrounding the accident. Plaintiff objected on grounds of improper foundation, which was sustained. The trial court noted that there had been no actual measurements made at the accident scene, most of the physical facts relied upon by the witness in the hypothetical in question were estimates arrived at years after the accident, and other foundational shortcomings. The court observed that while Iowa is committed to a liberal rule allowing opinion testimony, the court could not find the trial court abused its discretion in excluding the proffered testimony because of the insufficiency and unreliability of the

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underlying data. See, also, Haumersen v. Ford Motor Co., 257 N.W.2d 7 (Iowa 1977) (while allowing expert opinion, the court discussed questionable foundational facts which made the expert's opinion approach "the outer limits of the trial court's discretion.")

5. In Re Agent Orange Product Liability Litigation, 611 F.Supp. 1267 (E. D. N.Y., 1985). Plaintiff's expert was prepared to testify that Agent Orange caused her husband's illness and death. The court found the testimony unreliable and granted summary judgment for defendant. The plaintiff's expert had based his opinions on hearsay information about the plaintiff's husband, and had never examined the decedent. The court held that Rule 703's requirement of reasonable reliance means that an expert may not base his or her testimony on hearsay that would not be used by experts in the field. The court held that hearsay information regarding the plaintiff's husband was untrustworthy and would not be relied upon by a physician in diagnosing an illness. The court also found that the central

problem with the expert's testimony was uncertainty surrounding the causation issue. The expert had applied a causation hypothisis without any scientific support and excluded other potential causes without any factual basis for doing so.

6. Viterbo v. Dow Chemical Co., 646 F.Supp. 1420 (E. D. Tex., 1986). In a strict liability action concerning the use of a particular chemical, the plaintiff attempted to create a causation issue through expert testimony. The trial court excluded the evidence, finding that the underlying data upon which the expert's opinion was based was not of a type reasonably relied upon by experts in the particular field. The court specifically noted that "rigorous examination is especially important in the toxic tort context," where presentation to the trier of fact depends almost entirely upon expert testimony. The court found that if the underlying data is so lacking in probative force or unreliability that no reasonable expert could base an opinion on such data, the opinion that rests upon that data must be

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excluded. The court particularly noted that the expert in question had reached his opinion based solely on the oral history of the plaintiff. The expert was shown to have no experience with the particular chemical, nor was there any literature to support the expert's conclusions. Further, one of the experts was a psychologist without any specialized training in toxicology, epidemiology or other fields of medicine, and the court thus found the underlying data to be suspect and excluded the testimony.

7. Twin Disc v. Big Bud Tractor, Inc., 772 F.2d 1329 (7th Cir. 1985). In this case, exclusion of expert testimony was upheld where the expert's estimate of projection of loss profits was based on the draft of a plan for reorganization in bankruptcy and upon trade association data from a trade organization which the trial court called an "outfit . . . that apparently no one has heard of before." 772 F.2d at 133.

8. Lima v. United States, 708 F.2d 502 (10th Cir. 1983). In a suit for damages arising out of swine flu inoculation in which one of the plaintiff's experts testified that the swine flu inoculation was the cause of the plaintiff's injuries, the court found the opinion was based upon one exhibit which was later determined to be unreliable and not the type of information an expert would ordinarily rely upon.

9. In Re Agent Orange Product Liability Litigation, 611 F.Supp. 1223 (E. D. N.Y., 1985). In a companion case to 611 F.Supp. 1267, supra, the court excluded expert testimony which was found to be based on "anecdotal information" and not actual observation. The court found the data to be untrustworthy and not of the type reasonably relied upon by experts in the field, which data consisted in part of hearsay checklists not supported by medical records and self-serving hearsay statements.

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UNDERMINING THE VALUE OF PLAINTIFF'S CASE BY CROSS - EXAMINATION - THE SEVENTH JUROR

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UNDERMINING THE VALUE OF PLAINTIFF'S CASE
BY CROSS-EXAMINATION - THE SEVENTH JUROR

A point of reference with respect to the subject matter of this article lies in the commentary which appeared in the April 22, 1985 edition of The New York Law Journal with regard to the case of Merrill v. Albany Medical Center Hospital. Merrill was a malpractice case involving a brain damaged girl in which the trial court reduced a jury verdict from $12.6 Million to $10.3 Million. In refusing to reduce the verdict further the court's decision as reported by the Law Journal stated as follows:

> "The plaintiffs' expert economist on the economic loss was, for all practical purposes, unchallenged on cross-examination and unrefuted by any expert or other proof for the defendant of any party defendant." (Emphasis supplied.)

Elsewhere in the article the commentary notes that:

> "The justice noted that during trial he said for the record that a $1.5 to $2 Million was an 'adequate' settlement if the defense could prove a $800,000 annuity ' would produce a payout over the life of the infant plaintiff of some $28 Million,' along with allowing from $700,000 to $1.2 Million for pain and suffering, depending upon the settlement.
>
> However, such proof was never made by any defendant and the evidence is totally barren of any proof to refute to any substantial degree the economic loss established by the plaintiffs' expert's testimony by a well-qualified economist; therefore, this court's prior expressed opinions during trial are now of no moment or to be considered at this time based on the evidence in this case."

The Merrill decision is not offered by way of criticism of the defense counsel involved or with the purported hindsight wisdom of a Monday quarterback. Rather, the decision is offered solely as an illustration of a judicial perspective

that the absence of proof in a case that possibly could have been developed by the defense through cross-examination or otherwise resulted in a very substantial and undoubtedly unanticipated jury verdict.

In significant personal injury cases involving substantial injuries it is not uncommon for plaintiff's counsel to attempt to secure a magnified damage award through the use of expert witnesses from disciplines such as economics and medicine. In the context of present day litigation, many experts and medical witnesses not only possess a degree of experience in their particular fields of endeavor, but also by frequent appearances in court have become experienced expert witnesses as well.

A runaway jury verdict is a possibility in every case. This is especially so where plaintiff's counsel has developed the damages issue by the use of formidable expert witnesses.

It is the premise of this article that even in the full liability case the goal of avoiding an excessive damage award often can be achieved if defense counsel is fully prepared to cross examine the expert economist and/or physician; has structured the cross examination with the primary principles, goals and techniques of cross examination in mind; and has by his demeanor and conduct created the perception in the eyes of the jury that he is their surrogate, that in effect he is the "Seventh Juror."

GOALS FOR CROSS-EXAMINATION OF THE DAMAGES EXPERT

The cross-examination of the economic or medical expert to reduce a damage award requires the development of an integrated plan which encompasses proper pre-trial investigation and discovery, the benefits of which come to fruition during trial. By crystallizing at the outset the goals of cross-examination sought to be achieved during trial in order to reduce an award for damages, counsel enhances his ability to focus on the investigation and pre-trial discovery techniques he should engage in prior to trial in order to achieve this result.

Broadly speaking, the goals of cross-examination as germane to this article can be lumped into two general categories:

(a) To impeach the testimony of the economist or medical expert.

(b) To secure admissions and factual testimony from the expert which tend to support either the defendant's theory of defense or defendant's valuation of plaintiff's damages.

The objective of impeaching either an economist or physician is likely to be accomplished, among other ways, by the following:

(a) demonstrating bias, prejudice, or clear partisanship;

(b) the use of prior inconsistent statements contained in reports letters issued in other cases, articles, writings, depositions or prior in-court testimony;

(c) demonstrating that the expert's testimony is self- contradictory;

(d) by demonstrating that the testimony of the witness is contrary to recognized authorities;

(e) by demonstrating that the testimony is unreasonable or improbable;

(f) by establishing that the credentials or qualifications of the witness do not entitle his opinions to consideration.

When some or all of the goals noted above are achieved, the experienced advocate is armed with the ammunition necessary to support the cogent arguments he will marshall during summation to convince the jury of the lack of credibility of the damages expert and that, due to the experts' lack of credibility, his testimony should be disregarded.

In cross-examining the damages expert, counsel should never lose sight of the significant benefits that can be obtained in minimizing the damages award by securing admissions from plaintiff's damages experts. More specifically, the purpose of this method of cross-examination is:

(a) to establish from your opponent's expert facts or opinions which form the predicate or foundation for the

testimony you expect to elicit from experts you will call as part of your case;

(b) to secure admissions which tend to contradict the testimony of other experts called by your opponent;

(c) to secure admissions which contradict testimony the expert has given on direct examination;

(d) to obtain testimony which in and of itself is favorable to your valuation of the damages issue.

PRE-TRIAL INVESTIGATION AND DISCOVERY

In both Federal Court practice and New York State practice, the identity of plaintiff's medical expert is readily ascertainable through discovery. Unfortunately, and perhaps inexplicably, determining whether your opponent intends to call on other damages expert, such as an economist, may be impossible. Because pre-trial preparation is the foundation of solid cross-examination and given the present state of New York law, defense counsel should always assume that in a case of any magnitude the distinct possibility exists that plaintiff's counsel will call an economist to the stand. The failure to work on this assumption and to conduct pre-trial investigation and discovery accordingly, can only serve to further magnify the advantage of surprise that plaintiff's counsel already possesses. When one considers that a significant reduction in the amount of a jury award can realistically result from proper

preparation and cross-examination of a damages expert, it becomes apparent that the benefits of preparing the case on the premise that an economist, for example, will be called, far outweigh the cost and effort associated with such preparation.

With respect to economists in particular, it is imperative to develop enough factual information from collateral sources so that the witness is effectively prevented from testifying in a factual vacuum. One of the focal points of effective cross-examination of an economist or physician is to establish that the data or information upon which the opinion is predicated is inaccurate or unreliable. Another benefit of a thorough investigation is that it affords the cross-examiner with the ability to posit questions to the witness premised on alternate accurate factual assumptions which will require the economist to reduce the amount of his calculations.

In many respects the investigation and discovery that is necessary to properly cross-examine an economist or physician overlap. A list of some appropriate information and data which defense counsel should seek to acquire depending on the facts of a given case is set forth below. The list is not intended to be all inclusive, and obviously counsel should select the areas which are applicable depending on the facts of his particular case.

INVESTIGATION CHECK-LIST

PERSONAL INFORMATION

1. Social Security Number
2. Previous residences
3. Marital status
4. Date of marriage
5. Number of children, age of all family members, date of birth of all family members.
6. Hereditary diseases of plaintiff, plaintiff's spouse and plaintiff's children
7. Identification of siblings and determination of hereditary diseases of same
8. Parents date of birth and death
9. Cause of parents death
10. Health of parents if living
11. Determination of services performed for family
12. Determination of whether services of outside parties were utilized for maintenance of house, car, etc.

PERSONAL HEALTH HISTORY OF PLAINTIFF AND OF FAMILY MEMBERS

1. Identify family physician
2. Identify physicians plaintiff has treated with other than plaintiff's family physician, including all specialists
3. Identification of pharmacy plaintiff's family uses
4. All medication plaintiff was taking before the accident
5. A determination of all prior periods of hospitalization, identification of each hospital, etc.
6. Determination of all prior disability claims

7. Whether plaintiff uses alcohol

8. Whether plaintiff smokes and, if so, a complete exploration of plaintiff's smoking habits.

SCHOOL RECORD AND EDUCATIONAL BACKGROUND

1. Highest level of education reached

2. Determination of grades

3. Intelligence scores

4. Aptitude tests

5. Health records

6. Interview with teachers regarding capabilities

OCCUPATIONAL RECORD

1. Complete work history - including identification of each employer.

2. Absentee record

3. Lay-off record

4. Disciplinary record

5. Health records, including physical exams and workers' compensation claims

6. Accident reports

7. Personnel records

8. Identification of employees plaintiff worked closest with

9. Salary level at the time of accident

10. Salary level for 10 years preceeding date of accident

11. Salary level post-accident

12. Bonuses

13. Fringe benefit packages and elements of same

14. Union contract

15. Union activities

16. Attendance at union meetings

17. Positions held if a union member

18. Evaluation of stability of industry plaintiff worked in

19. Discussions by plaintiff with workers or family members regarding change of employment

20. Discussions by plaintiff with third parties regarding dissatisfaction with job

21. Job position changes

MILITARY HISTORY

1. Date

2. Branch of Service

3. Securing all physical exam records, including pre-induction physical exams

4. Service job title and training

5. Changes in service job title

6. Highest rank achieved

7. Complete medical history while in the military

8. Complete personnel history while in the military

9. Disciplinary record while in the military

MEDICAL INSURANCE AND LIFE INSURANCE COVERAGE

1. Identification of companies

2. Examinations to secure coverage and the physician that conducted each such examination

3. Nature of exam and determination if x-rays were taken

4. Medically related claims made and all documentation regarding same

5. Rating determination if required to secure life insurance coverage.

POST-ACCIDENT/LOSS OF EARNING INFORMATION

1. Secure plaintiff's tax returns for five years preceding the accident

2. Secure all Federal tax returns for each post-accident year preceding trial

3. If plaintiff claims inability to work due to alleged injuries secure any and all correspondence between plaintiff's physicians and employer regarding inability to work

4. The total amount that plaintiff claims to have lost in lost wages and/or fringe benefits as a result of his injuries

5. Determination as to whether plaintiff will claim impairment of earning power or capacity as a result of his injuries

6. An exploration of all sources from which plaintiff derives income.

PRIOR LITIGATION

1. Whether plaintiff ever filed a lawsuit for a personal injury claim

2. Determine if any such suit involved the same or similar injuries as those claimed in the subject lawsuit

3. The ultimate disposition of the prior lawsuit(s)

4. Identify the attorney that handled the prior claim(s) for plaintiff

5. Secure copies of all pleadings, bills of particular and medical records from the prior action(s)

POST-ACCIDENT/MEDICAL

1. Each of the injuries claimed to have been sustained by plaintiff

2. The place and location where plaintiff claims to have received medical treatment for each such injury

3. Identification of each physician that treated plaintiff and the date of each such treatment

4. Identification of all hospitals where treatment was rendered

5. Secure all hospital records, including the following:

   (a) The name and address of each person or ambulance company that transported plaintiff from the scene of the accident to the hospital where he was treated;

   (b) All medical reports received by plaintiff's counsel from treating and/or consulting physicians;

   (c) Identification of all nurses or therapists that treated plaintiff at home and/or that treated plaintiff elsewhere

6. A determination of when plaintiff was first able to perform various activities subsequent to the accident

7. Determine the activities that plaintiff claims he is permanently precluded from performing

8. A determination of the activities plaintiff claims he is partially precluded from performing

9. Identification of each medical device, support or garment plaintiff claims he is required to use as a result of the accident

10. Identification of all medication plaintiff claims to have taken subsequent to accident

11. Identify the physician that prescribed the medication taken by plaintiff.

12. Identification of each pharmacy from which plaintiff purchased medication.

The scope of this article does not permit a comprehensive discussion of each of the important nuggets of information that potentially can be secured from the information sources listed above and from other sources that may be relevant to a particular case. One source of information that has general applicability to all significant claims is the hospital records.

Hospital records often contain invaluable data which must be analyzed and understood by the cross-examiner. A complete hospital chart should include the following:

1. Emergency Room Record
2. Admitting Record
3. Operative Record
4. Medication Sheet
5. Doctor's Progress Notes
6. Order Sheet
7. Medication Chart
8. Consultant's Reports
9. Lab Reports, X-ray Reports and Graphic Records of vital signs
10. Anesthesia Record
11. Nurse's Notes
12. Physiotherapist's Reports and Records
13. Discharge Summary Sheet

Each section of the medical charts should be dissected in an attempt to uncover key items of information

that can be utilized for purposes of cross-examining plaintiff's damages expert. Some examples of items to look for are:

1. The initial findings after the plaintiff was examined upon entry to the Emergency Room or admission to the hospital as bearing on the extent of plaintiff's injuries and his physical status, such as intoxication or drug usage before the accident.
2. Determine whether the plaintiff was on any prescribed medications before the accident.
3. The history taken from the patient regarding how he was injured and the nature of complaints.
4. The specific parts of the body that the plaintiff voiced complaints about at the time of his initial examination.
5. The history given by the plaintiff of his prior medical condition.
6. The comments and observations made by the plaintiff's physicians in the progress notes as bearing on the plaintiff's pain and suffering, the permanency of his condition, his prognosis for recovery, etc.
7. The consultation reports as bearing on verification by a specialist of whether the

plaintiff actually sustained a certain injury as a consequence of the accident.

8. The type, amount and frequency of medication prescribed for the plaintiff with regard to the issue of the plaintiff's pain and suffering.

9. The nurse's notes which often not only reflect the course of treatment received by the patient, but also indicate who visited him, his physical signs throughout the course of the day, his complaints, his stress and the status of his recovery.

10. The operative notes to establish the success or failure of the operations performed on the plaintiff.

Pre-trial discovery should be imaginatively utilized as defense counsel proceeds to secure the information required to develop a solid, factual foundation for cross-examining plaintiff's damage experts. For example, in a full liability case, where the plaintiff, a tractor-trailer operator, suffered severe and permanent injuries to both of his legs in a head-on collision with another tractor-trailer, scheduling a physical examination to be conducted by an orthopedist is not likely to lead to disclosure of information which will be helpful in the process of attempting to reduce plaintiff's damages. On the contrary, the report from your treating physician will tend to

only corroborate the information contained in all of the medical records you have secured from plaintiff's treating physicians and which are contained in the hospital records. On the other hand, in order to secure information to refute plaintiff's claim that he is permanently unable to work, defense counsel should consider noticing an examination by a vocational rehabilitation specialist. The information disclosed by such an examination may well reveal that a plaintiff is capable of an alternate form of employment thus reducing the ability of plaintiff's economist to use numerical gymnastics to predict a substantial lost wage claim figure.

Because an examination of this nature will be time-consuming for the plaintiff and generate information which will often be detrimental to plaintiff's damages claim, it is more likely than not that plaintiff's counsel will not voluntarily agree to extended vocational rehabilitation testing. In order to enhance the likelihood that you will prevail if you are required to make a motion to secure a court order, the relief you seek should be specified in detail in your motion papers. For example, in the tractor trailer case discussed above, the relief sought was:

1. That the plaintiff submit himself to a full team comprehensive rehabilitation examination to be held at a major rehabilitation institute located out of state with the plaintiff residing during

the course of the examination in a nearby hotel so that the examination could be conducted by a leading vocational rehabilitation specialist. The examination included four to six hours of standard aptitude testing to determine the plaintiff's potential for enagaging in different types of occupations.

2. That plaintiff submit to a series of mechanical and manipulative tests to determine usage and coordination of his hands to permit an evaluation of his abilities in different work settings and physical positions. It was further specified that these tests be selected from standard vocational and physical therapy evaluation systems such as the Tower System.

3. That depending upon plaintiff's aptitude, interests and physical abilities, that the examiner should have the latitude to schedule additional tests and subtests to further assess plaintiff's capabilities.

4. That plaintiff submit to approximately ten hours of endurance and mobility evaluation tests including standard muscle tests so that an accurate evaluation of plaintiff's present and future physical condition could be determined.

5. That plaintiff's status during the testing process would be continuously monitored in order to assure that plaintiff was not being unduly taxed and that only tests wholly relevant to an assessment of his abilities were being administered.

6. No formal medical procedures such as x-rays or blood testing was sought.

A copy of pertinent portions of the report generated as a consequence of the order issued by the Court which granted the motion is attached as Appendix "A".

PRE-TRIAL PREPARATION AND STRATEGY

In a case of significant magnitude serious consideration should be given to retaining an expert consultant. If the case presents unusually complex medical issues, for example, the physician you intend to retain to conduct the physical exam of plaintiff can be helpful in supplying you with materials that will help you educate yourself to become an expert in the particular area of medicine involved. Even if you do not intend to actually proceed with the physical exam, or call a physician as a witness, the benefit of retaining a physician to fully familiarize you with the medical nuances of the case and the benefits that this can generate in the development of a successful cross-examination should never be underestimated.

If you anticipate that an economist will be called by plaintiff's counsel, retaining a consulting economist to assist you may be indispensable. Even if the economist is not called as a witness at trial his input may provide you with significant insight in terms of where to focus your investigation and pre-trial discovery efforts. Secondly, the expert consultant can provide you with the data, articles and publications which will familiarize you with the lexicon employed by the economist. He should also be used to help you identify, review, understand and compile the tables it can be anticipated will be required to cross-examine your opponent's expert. As the various items of plaintiff's medical history, work history, etc. are developed due to your investigative efforts and through pre-trial discovery, the assumptions plaintiff's expert is likely to make and the tables he is most likely to rely on to jack up damages to the hilt, while at the same time maintaining that his calculations are "conservative" will start to become apparent. A consultant can help you zero in on these assumptions and show how to undermine them on the basis of sound, economic principles.

The ultimate goal you should seek to achieve, either working alone, or with a consultant in developing a cross-examination plan, should be to develop a file of appropriate discount tables, work life tables, and other data so that you can effectively confront your adversary's expert

during cross-examination and secure from him concessions as to substantially lower figures based upon the application of a different methodology, different factual assumptions, or the use of different statistical data. Able plaintiffs' counsel and economists who frequently testify are well aware of the fact that to the extent defense counsel is unable to extract alternate figures from the economist during cross-examination which are substantially less than the figures testified to during examination, the figures and lengthy computer pages plaintiff's economist has testified from may well be indelibly etched in the minds of the jurors. Thus, many expert economists will maintain that they are unable to engage in the calculations that your carefully structured cross-examination calls for because the discount tables, or work life tables you have referred to are not available, or because they haven't brought a calculator to Court. Having a defense package consisting of these materials and having the forethought to bring a calculator to Court will preclude plaintiff's expert in many instances from engaging in this ploy.

THE SEVENTH JUROR

Although every injury has a value, a verdict should accurately reflect that fact. The ability to avoid an excessive verdict in a liability case, especially in an era in which volatile verdicts are becoming increasingly frequent, in

and of itself is a victory for the defense. The psychology of persuasion that defense counsel must engage in to minimize damage awards begins during the voir dire in the case. This is the first opportunity counsel has to meet the jurors and to begin to sensitize them to the issue of damages. It is also defense counsel's first opportunity to begin to create the image, perception and state of mind that he wishes the jury to have when it enters the jury deliberation room. If defense counsel is able by his overall demeanor and conduct to develop a psychological bond with the jury during voir dire, his opening statement and during the course of the trial, the jury will be attentive and receptive to an effective cross examination of plaintiff's damage(s) experts. This in turn can significantly effect the amount of a jury verdict.

It stands to reason that to the extent that defense counsel has conducted himself appropriately by his demeanor, attitude and projection of sincerity and concern during the proceedings, that there is a likelihood that the jurors may associate this same affirmative image with the defendant. Trial counsel are nothing more than surrogates of their respective clients and this fact is not lost on most jurors. In short, it is the goal of defense counsel throughout the trial to create the illusion, although subtly, subconsciously or subliminally that he is a credible vehicle which the six other jurors should look to for assistance and guidance in

their attempt to fulfill their moral, social and legal responsibilities in rendering a fair, impartial and reasonable verdict in a given case.

METHODOLOGY

It is beyond the scope of this article to discuss in detail the nuances of jury selection. From the standpoint of the seventh juror a number of brief points should be noted:

1. At an early point during jury selection, defense counsel should take it upon himself to trace out for the jurors the order in which the case will proceed, from voir dire to jury deliberation, should they be afforded the privilege of being selected to sit on the jury. It goes without saying that with that privilege comes the obligation of being fair and impartial, just like each of the jurors would expect other good citizens in the community to act were they at some point in the future to be named defendants in a lawsuit. To the extent that counsel handles the issue of conveying this helpful information to the jurors in a matter of fact way, he will undoubtedly gain the appreciation of the jurors, who in many instances, have never had a jury duty before. At the same time,

defense counsel is also at this early state in the proceedings creating the image of the teacher; the attorney who is trying to be helpful; the attorney who should be listened to during the course of the trial. The appreciation earned from the jurors by your efforts to familiarize them with the nuances of the judicial proceeding should not be underestimated.

2. During the voir dire you will have also discussed with the jurors the function of cross-examination in the lawsuit and forewarned them that in order to secure the truth for them that your cross-examination may well be vigorous. Certainly were any of the jurors defendants they would expect the same vigorous approach from their own counsel. Further, the fact that this issue is openly discussed during jury selection may heighten the anticipation of the jurors and cause them to listen carefully and attribute significant weight to points scored during the cross-examination of plaintiff's damage experts.

3. In discussing the case with jurors, only simple language should be utilized. The courtroom is

not the place to try to impress people with your intelligence. Presumably you have convinced the most important individual of your intelligence, i.e., your client, or you would not have been retained. The simpler and more basic the presentation you make to the jurors during the voir dire, the greater the likelihood of building the illusion that you are the same as each and every one of them, i.e., you are the seventh juror.

4. During the jury selection process no opportunity should be lost to attempt to humanize the image of the defendant in the eyes of the jury while at the same time dealing with critical issues relating to damages. In dealing with the sympathy issue, for example, counsel should explain that <u>we all are human</u> and consequently it is only natural for <u>us</u> to have sympathy for an individual as seriously maimed as the plaintiff. On the other hand, our judicial system is based on the basic rule that the verdict to be issued by the jurors will be fair and impartial and not based on sympathy. Thus, whereas we may all have sympathy for the plaintiff, <u>we</u> also have to follow the rules of

law as provided by the court so that the verdict is not effected unfairly. Thus, even during voir dire it is important to create the perception that you and the other six jurors are going to try to reach a fair and impartial determination in the case based solely upon the evidence and absent sympathy on their part.

OPENING STATEMENT

The same theme should pervade the opening statement. As during voir dire your sincerity and credibility will assist in humanizing the defendant's image, especially if the defendant is a corporation. Further, during the opening, defense counsel should couch his language regarding what the evidence will show in terms of "we will see from the evidence that . . ." In order to maintain credibility, the seventh juror will carefully structure the opening to encompass only those facts that he is confident he can establish.

In a complex medical case, the opening statement should contain a fairly detailed explanation in layman's language, of the medical terms and issues involved in the lawsuit. The use of simple analogies and imagery to bring home basic and important points to the jurors during the opening will go a long way toward creating the perception that you want to achieve, i.e., that you are the juror's surrogate who will

assist them through cross-examination of plaintiff's experts to get to the real truth. The opportunities you are afforded during the course of your opening statement to explain complex damage related issues to the jurors in a simple manner (which will earn for you the jurors' gratitude) is limited only by your imagination.

OBJECTIONS

The topic of the proper way to assert objections could easily be the subject of a separate article. Suffice it to say from the standpoint of the seventh juror that two salient points should be noted:

1. Limit your objections during plaintiff's direct case to key points that are critical to your defense. Your objections should only be made if you believe there is a strong likelihood that they will be sustained. The seventh juror certainly does not want to be viewed as a party that is trying to keep evidence from his co-travelers who are on the road to a fair and reasonable verdict. If your objections are limited in number, and repeatedly sustained, sooner or later the jury will realize that it is your opponent who is attempting to act unfairly and not play by the legal rules.

2. When an objection is asserted during your cross-examination, from time to time your response should be phrased in terms of "what we are trying to determine . . ." In short, it's now plaintiff's counsel who is preventing "us" from getting to the heart of the matter.

CROSS-EXAMINATION

The cross-examination of an expert witness on the issue of damages, if conducted ineptly or incompletely, may so pervade the case that the result is an excessive verdict. As discussed above, effective cross-examination of a damages expert cannot be conducted without proper and complete pre-trial investigation and discovery. In addition, no matter how detailed counsel's preparation has been, unless you follow the major tenets of cross-examination and have familiarized yourself with the techniques and strategy to help accomplish the goals of cross-examination, your preparation will go for naught. There is no principle of cross-examination that is ironclad; every principle has its exceptions. Your instincts will be your best guide in assessing when to diverge from a principle of cross-examination. It is well recognized by the trial bar that the jurors will be most attentive during cross-examination. If you have been able to effectively create the perception that you are a surrogate for the jurors in their

effort to determine fact from fiction and get to the heart of the matter, you should be able to capitalize on your hard work when the jury is psychologically most receptive: during your cross-examination. Some key points that counsel should consider in cross-examining plaintiff's expert witnesses with regard to damages are the following:

I. YOUR POSITION IN THE COURTROOM

There are writings galore describing where counsel should stand while cross-examining a witness. Some authors advocate standing directly in front of the witness as if the potential benefit from this token act of intimidation is not outweighed by the sympathy that may well be generated for the witness by this tactic. From the standpoint of the seventh juror a significant percentage of the cross-examination should be conducted by counsel while he is positioned adjacent to the jurors. As a cross-examiner, you are endeavoring to generate evidence that you want the six other jurors to hear. Standing adjacent to the jurors will assure that the witnesses answers are loud enough for the jurors to hear. Further, because of your proximity to the jurors, you are continuing to maintain the illusion that you are the jurors surrogate.

II. LEADING QUESTIONS

One of the primary tools which should be used during the cross-examination of any witness is the leading question. This is especially appropriate with respect to all expert witnesses. The vast percentage of your questions should be structured in a manner that requires a yes or no answer from the witness. By keeping your questions succinct and to the point, the leading question affords defense counsel with a major vehicle for controlling the witness' testimony. Using leading questions effectively also permits you to literally put words into the witness' mouth. Since much of the time the seventh juror is standing near his co-jurors, the seventh juror can rest assured that his co-jurors have heard all of the questions.

III. DO NOT ASK A QUESTION TO WHICH TO YOU DO NOT KNOW THE ANSWER

The seventh juror should never pose a question to an expert witness to which he does not with a high degree of certainty know the answer. The failure to follow this principle is an invitation to disaster. Two corollaries are:

1. Never ask an economist or physician, "Why?"
2. Never give an economist or physician the opportunity to explain his answer.

It can be stated to a moral certainty that the responses to either of these questions will more often than not be detrimental to the jurors' evaluation of the damages issue.

IV. ALWAYS BE POLITE

Always keep in mind that another purpose of cross-examination is to expose the damages expert for what he is, a paid advocate. This is in direct contrast to the image the seventh juror is attempting to convey. If the expert makes a snide remark or attempts to be evasive, or otherwise attempts to antagonize you, all the better! Above all else, do not spar with the expert.

V. KEEP YOUR COMPOSURE

Despite the fact that you have used leading questions and structured your cross-examination adroitly, the sad fact is that an experienced expert witness will often try to squeeze in an unanticipated bad answer. It is imperative when this occurs that you maintain your composure and act as if nothing adverse has occurred. The seventh juror, more often than not, will merely state, "We know about that; let's get to the heart of this issue . . ." and move on to the next point of his cross-examination. Above all else the seventh juror will never let the other jurors think for a second that anything the witness has stated should have a negative impact on their evaluation of the damages issue in the case.

VI. DON'T OVER TRY YOUR CASE

Once you have obtained a key admission or secured information which impairs the credibility of the witness, move on to the next point of your cross-examination. The time to nail down the significance of the admission or the inference to be raised from the response that impairs the witness' credibility to the other jurors is during your summation.

VII. LIMIT YOUR CROSS-EXAMINATION TO KEY POINTS

When cross-examining a damages expert, it is important to be highly selective in choosing the areas you will examine the witness on. The disciplines of economics and medicine are very complex and difficult for jurors to completely comprehend. Quality, rather than quantity, should be the focus of your approach. Although the temptation to cross-examine the witness on every point will undoubtedly be great, keep in mind that there is just so much the other jurors can understand or retain.

VIII. START STRONG - END WITH A CLIMAX

During the direct examination of plaintiffs' damages experts, you should carefully scrutinize the expressions and mannerisms of the other jurors endeavoring to assess where the expert is making his greatest impression. It is a mistake to underestimate the impact an economist or physician can have on

a jury. After the jurors have heard about the witness' impressive credentials and the substance of his testimony with respect to the emotional issue of damages, the seventh juror must be ready to start his cross-examination on a strong note, so that the impression made by the expert is not permitted to ripen like a fine wine. Of equal, if not greater import, you should always attempt to conclude the cross-examination you have undertaken for the other jurors with a climax. This may well be the point that the other jurors will remember most vividly when you ask them to recall during your summation: "What we learned when we heard expert X respond to the last question we posed to him during cross-examination?"

IX. USE PLAIN ENGLISH

It has been emphasized repeatedly above that it is important that your questions be structured so that the jurors can understand them. If your cross-examination is to be effective, it must be understood. Jurors want to fulfill their responsibilities; give them a chance to do so by letting them understand the evidence. Enough said.

X. THE IMPACT OF SUMMATION

Always keep in mind the relationship, indeed the synergism that can be developed between what is established during cross-examination and the arguments that can be made to

the jury during summation. Once you have secured a point that discredits the witness or have obtained an admission from him, move on to the next point.

DEALING WITH THE HYPOTHETICAL QUESTION

The dangers presented by a hypothetical question are multifold. First, jurors are not trained to analyze the substance of a question. Due to their lack of sophistication, jurors may not appreciate that the facts used in the hypothetical question are assumed, and may not even be in evidence. The capable advocate in posing a hypothetical question may not ask the economist or physician to repeatedly "assume" facts. Rather, the experienced advocate may only use the word "assume" once at the beginning of the hypothetical question. By using this technique plaintiff's counsel doesn't underscore for the jury that the facts are, indeed, assumed.

Secondly, often the manner in which a hypothetical question is structured is so contrived and one-sided that it appeals to the jury's sense of logic. Trial counsel is able to structure hypothetical questions of this nature because under existing rules of evidence the advocate is not required when formulating a hypothetical question to include all of the facts in evidence in the question. Moreover, it is not necessary that the facts contained in the hypothetical question be conclusively established. (Richardson on Evidence §370 (10th

Edition) Thus, your adversary may ask what is in effect a wholly slanted question because he is able under existing rules to pick and choose the facts he wishes to include in the question while leaving out the facts deleterious to his case.

Under both State and Federal practice the cross-examiner is permitted to require the expert to specify the data and other criteria supporting the opinion he gave in response to the hypothetical question. However, unless you have carefully evaluated the question for factual deficiencies and have underscored the slanted nature of the hypothetical question by a properly worded, appropriate objection and a well-structured cross-examination, the jury may accept the opinion of the expert as conclusively establishing the existence of the assumed facts.

Another danger of the hypothetical question is that unless it is revealed for what it is, it in effect permits your opponent to repeatedly sum up the facts most favorable to his case while posing the question to his expert witness.

It is readily apparent in light of the dangers of the hypothetical question, that the charge of the cross-examiner is to demonstrate to the jury, among other things, that the accuracy of the question and the truth of the data contained in it is much more worthy of their detailed analysis and evaluation than the answer given. In short, a building is only as strong as its foundation.

There are a number of ways to deal with a hypothetical question. Each technique has to be carefully weighed before it is utilized, since generally speaking almost every question posed during cross-examination does present certain risks. A number of techniques that should be considered by the cross-examiner are:

1. Attempt to establish bias and partisanship on the expert's part by determining from him whether he helped your opponent develop the hypothetical question, or whether he has discussed it extensively with him. If discussions have taken place, you should further inquire as to whether the expert made any suggestions for modifying the hypothetical question, or provided any writings to your opponent containing such information.

2. You may determine that unless some doubt is cast on the logic or propriety of the question, and the opinion you know will be given in response to it before your cross-examination starts, the expert's opinion may have a dramatic impact on the jury. If you have made this assessment, you should promptly object to the question before the expert gives his opinion. Your objection should emphasize that the question contains

"assumed facts". You may also argue that the hypothetical question posed is incomplete because it fails to include all of the pertinent and relevant facts bearing on an objective evaluation of the issue being considered. A situation such as this might arise when a medical witness is on the stand and a hypothetical is posed to him which does not include the fact that the plaintiff had a significant pre-existing injury.

3. The witness can be asked to merely repeat the material factors he took into account in reaching his conclusion. This will assist you in identifying those factors which are irrelevant to his opinion. By proceeding in this way you can narrow down the question to the particular factors the expert actually relied upon. These factors can then subsequently be contested and cast into doubt during your cross-examination and by other testimony you intend to introduce into evidence.

4. If you have been able to pare down the bases upon which the expert witness has relied upon in rendering his opinion, you will be able to consult with your own expert as to the best

method to impeach the witness during cross-examinations. Further, your own expert will be in a position to zero in on the factors your adversary's expert has relied upon and explain in detail the reason why that reliance was improper under the circumstances presented by the case.

5. The witness should be questioned in regard to whether he has actual knowledge of the "assumed" facts contained in the hypothetical question as being true. As the expert undoubtedly will not be able to testify to the truthfulness of all of the factual data posed to him, he should then be asked whether his opinion might be different if the facts posed to him were not true. When this approach is taken, emphasis should be placed on the phrase: "Might your opinion be different?" One should not ask the expert: "Would your opinion be different?" as this may well backfire on the cross-examiner.

6. Ask the witness whether his opinion might change if certain facts were removed from the question and identify those facts.

7. Ask the witness whether his opinion might be different if additional facts which you know you

can establish were added to the question, especially if the facts have already been secured as admissions from one of your opponent's other witnesses. This can be accomplished by your own use of a hypothetical question.

8. Submit to the expert witness a hypothetical question in which the facts are most favorable to your theory of the case. As a general proposition there will be a conflict in the testimony regarding facts the expert has relied on as well as a dispute regarding the ultimate opinion he has reached. It is only natural that your opponent's expert will view the facts posed to him by your adversary in a manner favorable to that party. When the expert is required by a hypothetical question to assume facts you have developed which are consistent with your interpretation of the evidence, he may well have to render a different opinion or risk being exposed as a wholly biased witness. The use of this technique underscores for the jury that the expert's testimony is not unqualified and turns on the actual facts as the jury determines them to be.

Set forth below are some pertinent portions of the cross-examination of an economist and physician who testified on behalf of a Town worker who permanently lost the ability to perform his job after he severely injured his leg as a consequence of a work-related accident.

With respect to the issue of lost wages, the plaintiff's bill of particulars stated:

> "The plaintiff was employed on the date of the accident as a laborer by the Town of Z Highway Department . . . and was earning the sum of $246.40 per week. The plaintiff has lost earnings from the date of the accident until the present and it is expected that he will not be able to return to his employment."

In the same action the plaintiff's injuries as described by his bill of particulars and medical records were as follows:

a. Severe comminuted displaced right lateral tibial plateau

b. Pain and disability in the right knee and leg

c. Surgery requiring open reduction internal fixation of right lateral tibial plateau

d. Ankle edema secondary to vascular responses with weight bearing

e. Torn cartilage secondary to injury

f. Medial joint line pain with marked tenderness on flexion

g. Internal derangement of the medial compartment

h. Patella crepitation under the knee cap

i. Permanent limp.

A. RAISING QUESTIONS AS TO WHETHER THE EXPERT KNOWS IF THE ASSUMED FACTS PRESENTED TO HIM ARE TRUE.

CROSS-EXAMINATION BY MR. GOLDBERG:

Q. Well, can we agree: when you say "projection" you are really making a prediction?

A. Certainly.

Q. And you are making a prediction based upon certain assumptions. You told us: One of the assumptions is the statistical data, and one of the assumptions is based upon what you think you know about Mr. X.

A. That is correct.

Q. I take it, you have interviewed Mr. X.

A. Not personally, no.

Q. Have you ever met him?

A. Not personally, no.

Q. Have you ever talked to him?

A. No.

Q. Never talked to him on the phone?

A. That is correct, I have not.

Q. Part of your opinion, you told us, is based upon what you know about him.

A. That is correct.

Q. Somebody has supplied you with information.

A. That is correct.

Q. Is that Mr. X's attorney?

A. Yes.

Q. So then Mr. X, if I understand this, meets with his attorney right, and he knows the attorney is prosecuting a case for him in this courtroom, and then his attorney gives the information to you.

PLAINTIFF'S COUNSEL: This cross-examination does not relate to the witness' testimony.

MR. GOLDBERG: Certainly does.

PLAINTIFF'S COUNSEL: Purely collateral, nothing to do--

If he wants to challenge the Doctor's opinion, that's one thing. Now he's talking about my client meeting with me. How would he know the conversations with my client? I asked him a hypothetical, as Your Honor knows is proper. I assumed certain facts, and I asked for an opinion.

MR. GOLDBERG: This witness ---

THE COURT: Overrule the objection.

MR. GOLDERG: Thank you.

BY MR.GOLDBERG:

Q. So then (plaintiff's attorney) supplies you with certain information about Mr. X and you took that into account with the statistical data.

A. Not quite. I asked (plaintiff's attorney) to collect certain information. I in fact have a questionnaire where I ask him very specific questions, and I directed him to ask those questions of Mr. X, which he did, and sent me back the answers.

Q. Can I assume, since you have never met Mr. X, since you have never spoken to Mr. X, that there may be some things about him either physically or otherwise that you don't know?

A. I'm sure there are some things that I don't know.

* * *

B. FORMING YOUR OWN HYPOTHETICAL QUESTIONS.

Q. If we change some of the assumptions around, might your figures be different?

A. Possibly.

Q. For example, let's assume your worst projection, what I think your worst projection is, the projection where the wages increase 1.78 percent over and above the inflation rate, okay?

A. Uh-huh.

Q. And you forecast that all through his life up to sixty-four, right?

A. That is correct.

Q. Doesn't this figure assume -- the figure you gave us, doesn't it assume that for the next twenty years, Mr. X will never obtain any employment?

A. It projects simply what he lost as a result of not being able to perform the job that he held in the past.

Q. I understand that. What I'm getting at is this. I'm just a lawyer, you know. If you gave us a figure of three hundred some odd thousand dollars, right, and you said if he didn't work at the Town of Z, he would lose this much and years you added it up and got this big figure --

A. That is correct.

Q. That's what you calculated his lost wages would have been during the next twenty years.

A. From the Town of Z.

Q. Let's assume he got a job elsewhere and he worked elsewhere at a job he could perform and, as a matter of fact, will you please assume that there was medical testimony here in this courtroom yesterday -- I want you to assume that a doctor who told us he specialized in industrial medicine testified in this case, and I want you to assume during the course of that testimony, the doctor testified that in fact Mr. X was not disabled from all forms of employment as a result of this injury. Can you make those assumptions?

A. Sure.

Q. Assuming that's the case, and assuming that next month when this lawsuit is over Mr. X is able to obtain a job, and I want you to assume, further, he's able to obtain a job that pays somewhere between fifteen and twenty thousand dollars a year.

PLAINTIFF'S ATTORNEY: Your Honor --

BY MR. GOLDBERG:

Q. And I want you to --

MR. GOLDBERG: Let me finish the question.

BY MR. GOLDBERG:

Q. I want you to further assume he holds that job until the age of sixty-four, okay? Can you tell me: if that series of events were to occur, how much in the way of lost wages Mr. X would lose under your calculations?

A. If you tell me precisely how much he would earn in the future, I would subtract that from the calculations.

Q. Let's assume, to make it easy for mathematical purposes, let's assume a flat twenty thousand dollars.

A. I'd have to compute precisely the period. I could give you a rough estimate off the top of my head, that would yield wages of about $360,000.00.

Q. If that were to be the case, then -- you have your table in front of you?

A. No, but I could easily get it.

Q. Use mine. If that were to occur, and assume your 1.78 situation, how much in the way of lost wages would Mr. X have?

A. He would actually earn more than the wages he would have earned as a laborer for the Town of Z.

Q. So then he wouldn't have any lost wages.

A. That is correct.

* * *

C. CROSS-EXAMINATION BY ESTABLISHING THAT THE OPINION MIGHT BE DIFFERENT IF ADDITIONAL FACTORS WERE CONSIDERED.

Q. At twenty thousand. Okay. In this report that you received from (plaintiff's attorney) where you advised that if sedentary work were available to him, he could perform such tasks?

A. Yes.

Q. Could you tell us what "sedentary" means?

A. Work that's primarily done sitting down.

Q. Now, there are, since you are involved with respect to one of your specialties in statistics and with people -- right?

A. That is correct.

Q. And as a consequence of that, you know that there is such a thing as rehabilitation, correct?

A. That is correct.

Q. Will you tell us what "rehabilitation" is?

A. In this particular case, it means: Can be improving somebody's physical capabilities.

Q. And there is also a term called "job rehabilitation"; is there not?

A. I haven't heard of the specific term, but the concept makes sense.

Q. What is the concept?

A. Presumably to restore somebody's earning capacity.

Q. And you do that by training them to do certain jobs, do you not?

A. It's one possible way, yes.

Q. Are you aware of any statistics in this regard?

A. Not very much in the way of publicized national statistics, no.

Q. Are there -- is this statistical data which indicates the extent to which an individual could be rehabilitated to perform other work assuming he is otherwise healthy, he has the dexterity of his hands, the dexterity of the head and neck, dexterity of his torso?

A. Not to my knowledge, there are no national statistics. Generally, that kind of information is projected on an individual basis.

Q. In your studies and evaluation of people, have you not learned that there are a great, great, great many jobs in our economy that can be performed by individuals sitting down?

A. Yes.

* * *

D. UNDERSCORING THE PREMISE THAT IF THE FACTUAL BASIS FOR THE OPINION IS INACCURATE THE OPINION IS INACCURATE.

Q. The Plaintiff puts together some information with his attorney, gives it to you, and you based your figures on that.

A. That is correct.

Q. And if the figures are off -- you have been given -- then your prediction is off.

A. That is correct.

THE PROFESSIONAL WITNESS

The weight that a jury will attribute to a witness' testimony will be reduced to the extent that counsel is able to demonstrate to the jury that the expert is, in fact, a professional witness. As pertinent to the issue of damages, inquiry along these lines is developed to establish, or at a minimum to subliminally convey to the jurors, that the testimony they have heard is highly biased.

In an effort to underscore the point that the expert witness is biased, and that his testimony is not objective and impartial, the witness should be questioned as to his involvement in the litigation system. To the extent that the expert is a professional witness, this may reduce the amount of credibility and weight the jury is willing to attribute to his testimony.

In order to establish that the expert witness is indeed a "pro", consider discussing the following matters with him:

1. His fee.
2. The total income he earned during the preceeding year as a consequence of testifying and/or consulting for attorneys.
3. The number of times the expert has testified for your opponent's counsel.
4. The number of times he has testified for the plaintiff.
5. The number of times he has testified for the defense.
6. Whether the witness has ever advertised or given seminars or programs sponsored by bar associations or similar organizations.

CROSS EXAMINATION OF AN ECONOMIST BY MR. GOLDBERG

Q. You have a questionnaire.

A. That is correct.

Q. Do you have the questionnaire with you?

A. (Plaintiff's attorney) has it.

Q. You don't have it with you.

A. That is correct.

Q. When you say "a questionnaire," so I understand it, is this a form that you have to use for this kind of work?

A. Say a form that begins with the solicitation of information, yes.

Q. Well, did you put this information together yourself?

A. Yes.

Q. Can I assume that if you put this form together yourself, that it's because you do this kind of work on some kind of regular basis?

A. Yes.

Q. How often have you testified in a Court with respect to this kind of information?

A. Probably thirty times, roughly in that vicinity.

Q. And how many times had you done it before -- you put together the questionnaire?

A. Testifying? Or actual projections?

Q. How many times -- in other words, you testified thirty times. Do I understand you to be telling me: you have done a great many more projections?

A. Considerably more projections than that.

Q. How many projections have you done?

A. Probably a hundred, hundred and fifty.

Q. How many, sir?

A. Hundred, hundred and fifty.

Q. Predictions or projections?

A. Projections.

Q. All in different cases.

A. That is correct.

Q. You are now talking about thirty in Court and a hundred and fifty other ones.

A. Yes.

Q. Now, we have a hundred and eighty cases you are involved with.

A. I have been involved with.

MR. GOLDBERG: Can I have the questionnaire?

PLAINTIFF'S ATTORNEY: If I have it in here. I don't have it. What I have is the correspondence responding to it. If you would like to see that --

MR. GOLDBERG: Just wondering if you have the questionnaire.

PLAINTIFF'S ATTORNEY: I don't have the questionnaire. I'm not very good in filling out forms, so I answered it in letter form.

MR. GOLDBERG: The questionnaire is not here.

BY MR. GOLDBERG:

Q. Now, since you have done this so many times, I mean a hundred and eighty, I assume they're --

PLAINTIFF'S ATTORNEY: Pardon me. Did you want to see the response to the form? I'll be happy to give it to you.

MR. GOLDBERG: Thank you.

THE WITNESS: That's it in my file.

NOTE: Plaintiff's counsel is endeavoring to overcome the absence of the questionnaire in court. Despite his efforts this is a point to focus on during summation.

BY MR. GOLDBERG:

Q. Since you have done this approximately a hundred and eighty times, there must be some way that attorneys by whom you have been contacted have learned that you are involved in this area; is that so?

A. Yes, it is.

Q. Do you advertise?

A. I do not, no.

Q. How is it these attorneys find out you are involved giving this kind of testimony?

A. From other attorneys.

Q. You never advertised?

A. Never.

Q. It's all by word of mouth?

A. Completely.

Q. I take it that in these hundred and eighty cases, you appeared for the Plaintiff?

A. No, not exclusively. I work both sides: Defendants as well as Plaintiffs.

Q. How many times of one hundred and eighty have you represented the Defendant?

A. I would guess about -- perhaps about twenty times.

Q. And the other times you worked for the Plaintiffs?

A. That is correct.

* * *

Q. Now, I asked you, when I was asking you questions before, about advertising, and you indicated to me that you never advertised. When you went to the Allegany County Bar Association, was that a seminar of some kind?

A. Yes, it was.

Q. Was it a seminar involving the proof of economic loss in certain types of litigation?

A. Yes.

Q. Did you go there as a consequence of some economic pursuit, or was it basically to fuel this business you have developed in testifying in these types of cases?

A. I was asked by an attorney I worked for whether I would be willing to conduct the seminar for the Bar Association.

Q. Did you willingly do so?

A. Yes, I did.

Q. Were you delighted by the offer?

A. Flattered.

Q. Were you paid?

A. No I wasn't.

Q. You did it gratis just on the basis of being able to speak to these attorneys, about what you could do with these figures.

A. I did it for a few reasons. That was certainly one.

DEMONSTRATING THAT THE WITNESS' TESTIMONY IS UNREASONABLE OR IMPROBABLE

An expert witness must be able to render his opinion with a reasonable degree of certainty. Testimony which is speculative or which fails to substantially comply with this standard is inadmissible. Fisch on New York Evidence §430 (2nd edition); but see Mattot v. Ward, 48 N.Y.2d 455, 399 N.E.2d 532, 423 N.Y.S.2d 645 (1979). It stands to reason given this standard that every effort should be made to demonstrate the improbability of the witness' testimony. Depending upon how effective your cross-examination has been, you may be able to secure a concession from the witness that at least certain aspects of his testimony may not be based upon a reasonable degree of certainty. Again, as circumstance dictates, you may ask the question directly, or choose to collaterally secure admissions from the witness in this respect.

In the case of an economist, for example, this technique can be applied to introduce an important shred of uncertainty into isolated portions of the witness' testimony. During summation you will argue that all of the witness' testimony is "infected" with the same lack of certainty.

CROSS-EXAMINATION BY MR. GOLDBERG

Q. Can you predict with reasonable degree of certainty that this individual having sustained an injury to

his right leg (multiple compound fracture) will not be able to obtain any form of employment during the next nineteen to twenty years?

A. I can't predict. I can't predict that he will not get any form of employment, sir.

Q. Can you predict with a reasonable degree of certainty that this individual, if he wants to receive training in some other area which would earn him a reasonable income would not be able to do so?

A. I cannot predict that he wouldn't get training

Q. With respect to the issue of actual lost earnings, can we agree: that if you cannot predict with certainty whether he could be trained to do another job and if you cannot predict with reasonable certainty whether he could obtain another job, you are in no position to predict what his actual loss of earnings would be over the next twenty years?

A. I can't answer that. All I can say: I can't predict the difference between his actual earnings now and what he would have earned otherwise, if that's what you mean.

Q. That's exactly what I mean.

A. That's right.

Q. And the reason you can't predict that is because you can't predict whether he could be trained differently or whether he could obtain another job.

A. Not without more information.

* * *

Q. When you talk in terms of predicting, does a prediction mean: that you could be right but that you are not always right?

A. I'm not sure what it means to have a "right" prediction. If you mean: the exact number I would predict in the future would be exactly what would materialize, I would say there is no way of verifying that.

Q. The chances of being precisely accurate about the future are virtually negligible. There are times -- there are predictions in sports as to who is going to win, those predictions, in your experience, are not always correct.

A. As I said, never precisely correct.

ESTABLISHING BIAS, ATTACKING CREDENTIALS AND DEMONSTRATING LACK OF KNOWLEDGE OF CRITICAL FACTS OF A MEDICAL WITNESS

CROSS-EXAMINATION BY MR. GOLDBERG:

Q. Doctor, is the rate of payment you agreed to with attorney B based upon the aggravation you sustain in the courtroom? Is that what you told him?

A. I tell every attorney it's based on time and aggravation, yes.

Q. "We'll" try to go easy, Doctor. "We" don't want you to charge Mr. X too much. Doctor, do we understand that this area that you specialize in, industrial medicine, is there a Board certification for this?

A. Yes, there is.

Q. And are you Board certified?

A. I'm not certified. I'm certified by the State of New York as a specialist. I have no Board certification in this field.

Q. The area that we are dealing with would be the area of the knee, the knee joint, correct?

A. Yes.

Q. And that would be normally be an area, I guess, doctors would agree which would normally be treated by an orthopedic person; would it not?

A. Yes.

Q. Can you tell the Jurors what the specialty of orthopedic surgery deals with?

A. Treatment of injuries of the bones and joints.

Q. Now, you indicated that part of your own service included an examination and evaluation of treatment of injuries to the leg; is that correct?

A. Yes.

Q. You did not so treat Mr. X in this case, correct?

A. No.

Q. You merely examined Mr. X.

A. That is correct.

Q. You knew Mr. X was hospitalized on two occasions?

A. Yes.

Q. Do you have those hospital records?

A.

Q. Have you looked at those hospital records?

A. No.

Q. So the opinion you gave today was based solely on your own examination and x-rays?

A. That is correct.

Q. It wasn't based on any review or evaluation of either of the two hospital records.

A. Not the hospital. I did have reports -- copies of reports filed by Dr. R, which I had, was able to see; but the hospital records, no.

Q. So you don't know what happened during the first period of hospitalization; is that correct?

A. That is correct.

Q. And when you rendered your opinion, you didn't know what happened during the second period of hospitalization; is that correct?

A. No.

Q. Now, you indicated to "us" that the first time you saw the Plaintiff was, I guess, June 23; is that correct?

A. Yes.

Q. I'm reading from my notes. If I say something wrong, please let me know. Doctor, when you examined Mr. X on that occasion, did you find that his recovery had been slow but without complication?

A. I don't understand what you mean by "slow without complication."

Q. Did you issue a report on June 26th?

A. Yes.

Q. Can I ask you to please take a look at it?

A. Yes.

Q. Will you please take a look at the first paragraph, next to the last sentence.

A. That's in the history.

Q. That's what he told you.

A. I asked him questions which indicated that he had no complications.

Q. So then, as I understand it, you had a conversation with Mr. X in your office.

A. I asked him details about the accident which he didn't want me to discuss. Also asked him about what he did in the way of treatment, and also whether he would have to be rehospitalized after the original hospitalization period, whether there had been any swelling and redness in the leg which would indicate infection. Based on those questions, there had been no complications.

Q. And he told you that.

A. He didn't say "no complications". He answered the questions which indicated that.

Q. You put that in your report. Your report indicates: the recovery was slow but without complications isn't that so?

A. Based on the history, yes.

SECURING ADMISSION FROM A PHYSICIAN THAT PLAINTIFF COULD WORK AT ANOTHER JOB

Q. Now, the injury that Mr. X has is to his right leg.

A. Yes.

Q. And you say: that as a consequence, he can't return to his work doing heavy-duty labor, right?

A. For the Town Highway Department.

Q. Does the fact that Mr. X cannot do heavy-duty labor mean, from a medical standpoint, that he can do no work whatsoever.

A. No.

Q. So it only means with respect to heavy-duty labor, in your judgment, this man is disabled, correct?

A. Would you tell me what you mean by "heavy-duty labor"? I would like to qualify that rather than say, loosely, heavy duty labor.

Q. Does this injury, Doctor, prevent him from working on a daily basis at a desk job?

A. No.

Q. So he could do that without any problem whatsoever, in your judgment?

A. Yes.

CONTRADICTING A PHYSICIAN WITH ANOTHER TREATING PHYSICIAN'S REPORT

Q. Now, would you consider a ten-degree lack of extension to be a fifty-percent loss?

A. I'm talking about the overall function, the addition of flexion and extension all together.

Q. With respect to extension, now, would you consider a ten-percent limitation with respect to extension to be a fifty-percent loss of motion?

A. Oh, no, no. That would approximate maybe fifteen, twenty percent.

Q. So if a person were to have only a ten-percent loss, then that would be a much less significant type of limitation; is that correct?

A. Of that one motion, yes.

Q. Are you aware of the fact that the day before you examined this plaintiff, that he was examined by an orthopedic surgeon?

A. I don't recollect so, no.

Q. Do you have Dr. R's letter, an orthopedic surgeon, of June 26th, 1981, in your file, of the Western Group?

A. No, I don't.

Q. You have never seen that?

A. I may have. I didn't make any notes of it, no.

Q. I was under the impression you had all of Dr. R's reports.

A. I may have had them. I might have sent them back. I might have received the file and then sent it back.

* * *

BY MR. GOLDBERG:

Q. Well, Doctor, let me ask you this: I want you to assume that on June 22, 1981, the Plaintiff had been examined by Dr. R, and I want you to assume that Dr. R is an orthopedic surgeon; I want you to assume, further, that during the course of an examination performed by Dr. R, June 22 --

PLAINTIFF'S ATTORNEY: Objection. Counsel is reading, looking down at some statement he has.

MR. GOLDBERG: It's a hypothetical.

PLAINTIFF'S ATTORNEY: It's my understanding that the objection was sustained, and now he's trying to be very clever and get it in another way.

THE COURT: I'll overrule the objection. So it's clear to the Jury: the doctor is being asked a hypothetical question based on certain facts that the lawyer is reciting which at this time are not proof in this case. If they are never proven, there is no evidence that any such affect exists. The expectation, as you heard it from Counsel, is that this doctor is going to be here. If he is, he will tell us all about it.

PLAINTIFF'S ATTORNEY: Exactly, that's the basis for my objection. I think we should wait until the doctor comes in.

THE COURT: I'll allow this question.

BY MR. GOLDBERG:

Q. Well, Doctor, I want you to assume the Plaintiff was examined the day before you examined him and that that examination was performed by Dr. R, an orthopedic surgeon and a member of the Western Group;

I want you to assume that during that examination Dr. R found a ten-degree extension lag in the Plaintiff's right leg. Now, based on what you told us previously, isn't it a fact that, in your opinion, a ten-percent extension lag would be less of a disability than a disability you called a moderate limitation one day later; is that so? Yes or no, Doctor.

PLAINTIFF'S ATTORNEY: Objection.

THE COURT: I will allow it.

THE WITNESS: I'm not going to answer that yes or no. Let me finish.

BY MR. GOLDBERG:

Q. No, in this Court, I have the prerogative of asking the question. Can you answer that yes or no?

A. No.

Q. Can you tell "us" whether, in your judgment, Doctor -- and you have answered this -- tell us again: is a ten-percent lag in extension less than a moderate limitation?

A. If we are talking only of extension --

Q. Yes, with respect to extension?

A. Certainly, it's less than moderate, if we are only talking about extension.

Q. Thank you, Doctor. When you examined the Plaintiff on June 23, you also took x-rays; did you not?

A. I did, yes.

Q. Isn't it a fact that they indicated to you that the fracture this Plaintiff had sustained had healed?

A. Yes.

Q. Thank you, Doctor. Doctor, you indicated that you next examined the Plaintiff on October 5; is that correct?

A. That is correct.

Q. On October 5, did you find limitation in the range of motion?

A. Yes, I did.

Q. How much limitation did you find?

A. Approximately fifteen-percent extension loss and ninety-percent flexion.

Q. How much all together in terms of loss did you find?

A. I would say still around fifty percent, more or less.

Q. Five oh?

A. Fifty percent, 50.

Q. When you prepared this report of October 9, were you aware of the fact that on August 27, this Plaintiff has been examined again by Dr. R?

A. I wasn't aware of it, but I do have a note, which I received in my file saying that he was seen on August 27, yes.

Q. Other than having the note in your file indicating that he was seen on August 27, do you have any indication in your file in terms of what Dr. R, this man's treating physician, found as a result of that examination?

A. Yes.

Q. Well, can you tell us what your note reflects the doctor found with respect to the range of motion?

A. Says: he has a full range of motion.

Q. So then when Dr. R examined Dr. X approximately a month before, he found a full range of motion.

A. That's what he says.

Q. You examined him a month later and you found fifty percent less than that.

A. That is correct.

Q. You are not Board certified in orthopedic surgery.

A. I said: it is my opinion I'm as qualified to examine and render an opinion as Dr. R.

MR. GOLDBERG: Could "we" ask the doctor to respond to the question?

THE WITNESS: What is the question?

BY MR. GOLDBERG:

Q. My question is: you are not Board certified in the area of orthopedic surgery.

A. I am not.

Q. Now, when you examined Mr. X on October 5, you took X-rays.

A. That is correct.

Q. Have you looked at those X-rays in preparing for testimony?

A. Yes.

Q. When you looked at those X-rays, isn't it a fact that that indicated that Mr. X's fracture was well healed?

A. Yes.

Q. Thank you. And, Doctor, isn't it also a fact: as a consequence of your examination on October 5, you were of the opinion that Mr. X had obtained a good result from the treatment of the fracture to his right knee?

A. Yes.

Q. And you thought he was disabled to just a moderate partial degree; is that correct?

A. That is correct.

VOCATIONAL REHABILITATION DISCHARGE SUMMARY

page 2

Aptitude/Transferable Work Skill Assessment:

(Complete listing of Vocational Evaluation Assessment Results included with this report).

Assessment of mechanical reasoning aptitudes indicated that Mr. "X" demonstrated average to above average abilities in this area. He demonstrated average abilities of hand tool usuage as compared to manufacturing plant employees. Soldering/electrical assembly ability was also noted to be in the average range based on accuracy and performance norms. Mr. "X's" work speed, mechanical attention to detail, and accuracy of task performance on a small engine disassembly/assembly work sample was observed to be above average. Mechanical inspection aptitude demonstrated indicated an above average score.

Evaluation of Mr. "X's" academic aptitudes for further vocational training indicated overall above average scores. Abstract reasoning aptitude, ability to accurately follow oral and written instruction, and arithmatic problem solving ability were observed to be above average based on norms groups used for comparison. (i.e., 12th grade boys; vocational training students; and various employee groups).

Assessment of Mr. "X's" basic clerical sorting ability indicated an average accuracy and performance score. performance on names and number comparison subtest on a computer screen involving data entry on the computer keyboard was noted to be at the 20th percentile as compared to clerical applicants. Mr. "X's" typing speed and accuracy during a seven minuted timed assessment was observed to be 14 words per minute with two errors committed. Overall clerical accuracy on such tasks administered was average with performance being generally below average as compared to clerical applicants as a results of work speed and task familiarity limitations.

Evaluation of Mr. "X's" aptitude for training in the field of computer programming was conducted through administration of the SRA Computer Programmer Aptitude Battery. (Scores on the various subtests with comparison norms for Trainees and Experience Applicants are included in Vocational Evaluation Assessment results of this report). It was observed that Mr. "X" obtained a total score on this test which indicated overall average aptitude for computer programmer training as compared to both of these normative groups. In addition, as reported previously in this report, arithmatic problem solving ability as related to consideration of training in the field of computer programming, was above average

VOCATIONAL REHABILITATION DISCHARGE SUMMARY

based on vocational training student norms.

Physical Work Tolerance Assessment Results:

Assessment of Mr. "X's" physical tolerances in a work setting was conducted through observations made throughout the total period of vocational evaluation as well as through administration of specific work samples with normative performance data. Performance norms used were Skill Center as developed by Valpar Work Sample Corporation researchers. Work samples used were Valpar Simulated Assembly, Whole Body Range of Motion, and Eye-Hand-Foot Coordination as discussed below.

On Simulated Assembly, which involved performance of a repetitive assembly task while seated, Mr. "X" demonstrated an average performance level. On the Whole -Body - Range - of Motion Work Sample which involves standing, stooping, crouching, and bending while manipulating objects, Mr. "X" demonstrated average performance level. On the Eye - Hand - Foot Coordination Work Sample which involved manuevering mtal balls to a maze with hand and foot pedal controls, Mr. "X's" performance was below average.

Mr. "X" indicated that his work tolerances were maximized in a work situation which allowed him to sit at tasks with feet elevated and the possibility of alternating this with standing and walking approximately every 20 minutes. Mr. "X" was involved in approximately six hours of vocational evaluation daily during the period covered with the above considerations implemented. Observations recorded during the evaluation tend to support Mr. "X's" contention that a work situation allowing him the flexibility of periodicly alternating sitting, standing, and walking activities may be beneficial to the maximization of his work tolerances.

INTERPRETATION

It is felt that Mr. "X" demonstrated work abilities and aptitudes suited to a variety of occupations as discussed below. In addition, he demonstrated a high level of aptitudes related to further vocational training in his expressed interest area of computer programming. Furthermore, it is felt that Mr. "X" demonstrated physical work tolerances which may be maximized in a work situation which allows him the ability to periodically alternate physical positions during task performance.

VOCATIONAL REHABILITATION DISCHARGE SUMMARY

page 4

Light and sedentary occupations (based on the Dictionary of Occupational Titles and its supplements) for which is it felt that Mr. "X" has aptitudes and abilities based on his transferable work skills and vocational evaluation results include, but are not limited to the following suggested jobs:

1. (Dispatcher, Relay #221.362-014; 2. (Stock Checker #761-381-034; 3. (Repair Order Clerk #221.382-022; 4. (Control Clerk, Data Processing #221.382-014; 5. (Inspector #710.381-038; 6. (Computer Programmer #007.167-018.

As an additional observation, it was felt that Mr. "X" was cooperative in putting forth his best efforts throughout the vocational evaluation and that his work abilities may be maximized in a work setting allowing him the flexibility of periodically alternatiing physical positions. It is felt that the above jobs may be structured so as to allow him to have his feet elevated while sitting and allow him the flexibility to periodcially to change physical positions as he feels necessary during work performance.

RECOMMENDATIONS:

1. Consideration be given to Mr. "X's" training/job placement in the above suggested occupations.

Ted M.S.
Vocational Evaluation
Vocational Rehabilitation Department

REHABILITATION INSTITUTE OF C
VOCATIONAL REHABILITATION DEPARTMENT

VOCATIONAL EVALUATION

ASSESSMENT RESULTS

IMPRINT PATIENT'S NAME PLATE

Name "X", William Jr.

RIC No. 30817

Physician Dr.

Act. No.

Date 7/20/82

KEY
1. ABOVE AVERAGE (AA)
2. AVERAGE (A)
3. BELOW AVERAGE (BA)

ASSESSMENT INSTRUMENT	DATE	TIME OR RAW SCORE	PERCENTILE OR RATING	NORM GROUPS	[illegible] SCORE	[illegible] SCORE	[illegible] SCORE	[illegible] SCORE	[illegible] SCORE	[illegible] SCORE	[illegible] SCORE
FACT-Mechanics	7/12	9	83	Employees	1	2	2	2	1	2	2
DAT-Mechanical Reasoning	7/13	64	95	12 Grd. Boys	1	2	2	2	1	2	2
Bennet Hand Tool	7/13	9'	60	Manufacturing Plant Employees	2	2	2	2	2	2	2
Valpar-Soldering & Inspection	7/14	32	75	Skill Center	2	2	2	2	2	2	2
FACT-Inspection	7/13	141	98	Employees	1	2	2	2	1	2	2
Tecumseh Small Engine Dis/Assembly	7/14	110	AA	Facility Norms	1	2	2	2	1	2	2
Valpar Simulated Assembly	7/15	248	55	Skill Center	2	2	2	2	2	2	2
Valpar Multi-Level Sorting	7/13	90	71	Skill Center	2	2	2	2	2	2	2
PTI-Oral Directions Test	7/13	38	99	Textile Employees	1	2	2	2	1	2	2
FACT-Judgment & Comprehension	7/12	20	92	Employees	1	2	2	2	1	2	2
DAT-Abstract Reasoning	7/13	45	85	12 Grd. Boys	1	2	2	2	1	2	2
SRA-Computer Programmer Aptitude Battery	7/12			Trainees/ Exp. Apps.							
-Verval Meaning	7/13	11	20/ 10	"	3/ 3	2 2	2 2	2 2	3/ 3	2 2	2 2
-Reasoning	7/12	9	40/ 25	"	2/ 3	2 2	2 2	2 2	2/ 3	2 2	2 2
-Number Ability	7/12	12	45/ 30	"	2/ 2	2 2	2 2	2 2	2/ 2	2 2	2 2
-Letter Series	7/13	13	40/ 30	"	2/ 2	2 2	2 2	2 2	2/ 2	2 2	2 2
-Diagramming	7/13	35	99/ 90	"	1/ 1	2 2	2 2	2 2	1/ 2	2 2	2 2
SRA-CPAB Total	7/13	80	55/ 30	"	2/ 2	2 2	2 2	2 2	2 2	2 2	2 2
ABLE III Arithmetic Problem Solving	7/13	38	97	Vocational Training Students	1	2	2	2	1	2	2
(Continued on following page)											

EVALUATORS — INITIALS — SIGNATURE — INITIALS — SIGNATURE

REHABILITATION INSTITUTE OF C
VOCATIONAL REHABILITATION DEPARTMENT

VOCATIONAL EVALUATION

ASSESSMENT RESULTS

IMPRINT PATIENT'S NAME PLATE

Name "X", William Jr.

RIC No. 30817

Physician Dr.

Act No.

Date 7/20/20

BEHAVIOR CHECK LIST

KEY
1. ABOVE AVERAGE (AA)
2. AVERAGE (A)
3. BELOW AVERAGE (BA)

ASSESSMENT INSTRUMENT	DATE	TIME OR RAW SCORE	PERCENTILE OR RATING	NORM GROUPS	FOLLOW INSTRUCTIONS	PHYSICAL STAMINA	CONCENTRATION	PERSISTENCE	UNDERSTANDS PROBLEMS	HANDLES STRESS	WORK HABITS	
Minneseta Clerical Test (On Computer)	7/16											
-Numbers	"	92	20	Clerical Apps.								
-Names	"	85	20		2	2	2	2	2	2	2	[illegible]
Timed Typing (7')	7/15	14wpm/ 2 errors		WPM/Errors	2	2	2	2	2	3	2	[illegible]
Valpar Whole Body Range of Motion	7/15	1159"	70	Skill Center	2	3	2	2	2	2	2	[illegible]
Valpar Eye-Hand-Foot Coordination	7/14	156	20	Skill center	2	3	2	2	2	2	2	[illegible]

EVALUATORS — INITIALS [illegible] SIGNATURE [illegible] INITIALS SIGNATURE

2-02257 10

INSURERS SUPERVISION, REHABILITATION AND LIQUIDATION ACT CHAPTER 507C

Kent M. Forney

I. General.

A. Applies to all insurers, whether admitted to do business or not. (507C.3).

B. The Insurance Commissioner is the only person authorized to institute proceedings. Stockholders, creditors, policyholders, etc. have no standing. Hamilton v. Safeway Insurance Co. 532 N.E.2d 996 (Ill. 1982). (507C.4(1)).

C. Any action must be venued in Polk County. (507C.4(5)).

D. Any actions are probably basically equity actions and the court has broad injunctive powers. (507C.5).

II. Supervision.

A. Non-judicial proceeding with provision for confidential hearing before the Commissioner and a provision for judicial review. (507C.9).

B. The Commissioner can appoint a Supervisor if it finds further business "is hazardous to the public or policyholders". (An undefined term - it apparently doesn't require insolvency). (507C.9(2)).

C. If he decides to supervise, he has authority to enter an Administrative Order with very broad powers. (507C.9(3)).

D. The insurer has 60 days to comply - cure the problem. (507C.(4)).

E. Commissioner can also apply to the Court for injunctions to enforce his Order. (507C.9(9)).

III. Seizure Orders.

A. Judicial Proceeding. (507C.10).

B. Commissioner files a Petition and grounds are (1) same as rehabilitation or liquidation; (2) interests of policyholders or public endangered; (3) an order of the Commissioner. (507C.10(1)).

C. Court can grant an ex-parte seizure order allowing Commissioner to seize the company and enjoin it from doing business. (507C.10(2)).

D. Order is to be vacated if Commissioner doesn't, within a reasonable time, commence rehabilitation or liquidation proceedings. (507C.10(3)).

E. Such orders are constitutional (Maloney v. Am. Ind. Medical and H. Assoc., 259 P.2d 503) and the Court will not inquire into Commissioner's motives (Financial Ind. Co. v. Sup. Ct., 389 P.2d 233).

IV. Rehabilitation Proceedings.

A. Formal judicial proceeding initiated by a Petition in Polk County District Court. (507C.12 and 507C.4(5)).

B. Grounds are very comprehensive and don't require a finding of insolvency. (507C.12).

C. The Commissioner is appointed Rehabilitator. (507C.13).

1. He takes possession and title to all assets. (507C.13(1)).

2. He has all the powers of the Board of Directors and Officers (but not stockholders). (507C.14(2)).

D. If feasible, he is to prepare a plan of rehabilitation, which can include merger or transformation (but probably not dissolution) and file it with the court for approval. (507C.14(4)).

E. A Rehabilitation Order allows an automatic 90 day stay of all proceedings in which the insurer (not the insured) is a party. (507C.15)(1)).

F. Guaranty Associations have standing to participate in rehabilitation proceedings. (507C.15(3)).

G. If Commissioner determines rehabilitation is futile, he can ask for liquidation. (507C.16(1)).

H. The approval of a rehabilitation plan by the Commissioner and the Court is discretionary and won't be reversed on appeal. (Am. Benefit Life v. Hill Cty. Life, 582 S.W.2d 227.)

I. The Court can't dictate policy or course of conduct the Commissioner is to follow. (Kueckelhan v. Federal Old Line Ins., 418 P.2d 443.)

J. Rehabilitation Order cancels policies. (Ballesteros v. New Jersey Prop. & Liab. I.G.A., 530 F. Supp 1367.)

V. Liquidation.

A. Begun by a Petition in Polk County District Court. (507C.17).

B. Grounds for liquidation. (507C.17).

1. Any of the grounds for rehabilitation. (507C.12).

2. Insolvency. (507C.2(11)).

a. Inability to pay liabilities as they come due.

b. Assets don't exceed liabilities by 2 million or par value of stock, if it is larger than 2 million.

3. Further transaction of business would be hazardous.

C. Order of Liquidation vests Commissioner with possession and title to all assets. (507C.18) (In re National Surety 7 F.Supp. 959).

D. Order freezes all rights and liabilities as of its date. (507C.18(2)).

E. Coverage is continued for policyholders for 30 days. (This is consistent with Guaranty Association obligations.) (507C.19).

F. At common law, the order dissolved the company. However, 507C.20 envisions that this can be delayed until a later date. (Common Law - People v. Peoria Life, 34 N.E.2d 289; In Re National Surety 26 N.Y.S. 2d 370).

1. Iowa amended 507C.20 to allow the corporation to be sold as an entity, along with its licenses. (H.F. 170) Query - what remains to sell after an Order of Liquidation?

G. The Liquidator has very broad powers to marshall assets, settle claims and generally administer the estate. (507C.21).

H. The Liquidator must give notice of the Order of Liquidation, unless the court orders otherwise. Notice is by mail to all potential claimants and agents. (507C.22).

1. Once an agent gets notice, he must notify all insureds within 15 days (507C.23), unless liquidation waives this requirement. (507C.23(3)).

2. Notice is critical. If a claimant doesn't get notice, you can't time bar his claim. Middleton v. Imperial Cas. Co., 666 P.2d 1 Contra: Jason v. Supt. of Ins., 402 N.E.2d 143).

I. The Order will also normally set the deadline for filing of claims.

1. A late filed claim has no meaningful priority. (507C.42(6)).

2. Claim filing deadline controls over rights of creditors who are bankruptcy (Matter of Fidelity Gen., 398 N.E.2d 1091) and also shortens or supersedes normal statutes of limitations. (Ohio In. G.A. v. Bera Roll & Bowl, 482 N.E.2d 995).

J. To perfect a claim it is necessary to timely file it (507C.35) and it must be in the form of a proof containing the statutory requirements. (507C.36).

K. There are particular provisions for secured claims (507C.41) contingent claims (507C.37) and third party claims (507C.38).

L. If a claim is denied, there is a procedure for securing a hearing at the creditor's request. (507C.39).

M. If an insurer pays bills, before liquidation and it is insolvent, or it pays within 4 months before the petition, or it pays its officers or attorney, these may be voidable preferences. (507C.28) (Jump v. Goldenhersh, 474 F.Supp. 1306 - atty fees).

N. Generally creditors can set off what the insurer owed them on mutual debts, except:

1. Premium owed the insurer can't be offset against what the insurer owed the creditor - policyholder (507C.30(d)).

2. Agents are denied the right of set-off. (507C.33).

3. Reinsurers may set-off premium against claims (O'Connor v. I.N.A., 622 F.Supp. 611); may not set-off (Melco Systems v. Rec. Trans. Am., 105 So. 2nd 43).

O. Interest is normally not recoverable on a claim. (Professional Const. Con. v. State, 646 P.2d 1262).

P. Once all assets are marshalled, the Liquidator will distribute by classes or priorities. (507C.42).

1. All assets usually absorbed by Liquidator's and Guaranty Association expenses plus claims paid by Guaranty Association.

2. Normally no money for unearned premium, taxes, late claims, etc.

VI. Interstate Relations Between Domiciliary Liquidator and Ancillary Liquidators.

A. If a Domiciliary Liquidator is appointed, another state can't administer same res or assets. (507C.52).

B. The concept is for the domiciliary to manage the liquidation and marshall assets nationwide.

C. The only exception is that states may retain special deposits and don't have to turn them over to the domiciliary. (507C.58).

P

ANNUAL APPELLATE DECISIONS REVIEW

October 1986 - October 1987
392 N.W.2d through 409 N.W.2d

By
Gregory M. Lederer
Simmons, Perrine, Albright & Ellwood
1200 Merchants National Bank Building
Cedar Rapids, IA 52401

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ADMINISTRATIVE LAW

Jew v. University of Iowa, 398 N.W.2d 861 (Iowa 87)

Rules

District court had original jurisdiction of professor's civil damage action against the university for sexual harassment. Chapter 17A does not provide an exclusive remedy for challenging agency action when it relates to rule-making, or more accurately, application of a rule.

Gooch v. IDOT, 398 N.W.2d 845 (Iowa 87)

Rules

IDOT's rule prohibiting issuance of license to anyone who has to wear bioptic telescopic lenses to meet the visual acuity standard required for a license does not violate § 601D.3, which provides that the partially blind have the same rights to use the streets.

Vennerberg Farms, Inc. v. IGF Insurance Co., 405 N.W.2d 810 (Iowa 87)

Finality

Plaintiff held deferred-payment contracts with grain dealer. Commerce Commission commenced proceedings against dealer for violations of licensing requirements. After evidentiary hearing, hearing examiner issued a ruling titled "Proposed Order Revoking License." Order revoked dealer's license and provided that order would "become the final order of the commission unless appealed . . . within twenty days." Dealer appealed and sought stay order. Stay was denied, and commerce commission ultimately issued an order affirming the proposed decision.

The commission then published a notice providing that claims against the dealer must be received by the commission, and the surety within 120 days of its last order. Plaintiff's written claim was received within 120 days of the last order, but the surety claimed that the 120 days began to run earlier.

HELD: Although the statute provides for commencement of the 120-day limitation period upon revocation, not upon expiration of the time for appeal or upon affirmance of the hearing examiner's proposed order, the facts of this case establish that revocation occurred when the commission affirmed the proposed decision.

Local Union No. 238 v Iowa Civil Rights Commission, 394 N.W.2d 375 (Iowa 1986)

Remedies

Chapter 601A's grant of authority to the Civil Rights Commission to "take the necessary remedial action as . . . will carry out the purposes of this Chapter" authorizes the awarding of damages for emotional distress but does not permit an award of punitive damages.

Sioux City Community School District v. Board of Public Instruction, 402 N.W.2d 739 (Iowa 87)

Intervention

In proceedings by insurance agent and unsuccessful bidder to have school district's decision to award health insurance contract to a competitor overturned, the board refused to permit the teachers' union to intervene, but did permit them to file written argument on the issues, all of which were legal (as opposed to factual) in nature. HELD: Harmless error at best.

Office of Consumer Advocate v. Commerce Commission, 395 N.W.2d 1 (Iowa 86)

Declaratory Ruling

A utility filed a petition seeking a declaratory ruling as to the future treatment by the commission of the cost of a proposed purchase by the utility in the determination of electricity rates charged to customers. Commission redocketed the action as a contested case. HELD: Proceedings "most nearly fit within the category of a declaratory ruling."

Q

Clinton Police Department Bargaining Unit v. PERB, 397 N.W.2d 764 (Iowa 86)

Judicial Review

Union sought judicial review of PERB decision that a particular proposal was a permissive, not mandatory, subject of bargaining. Union sought permission to present evidence on the matter to the district court. HELD: Final agency decision in this case presented only a legal question of statutory construction, and not an issue of fact as to whether or not the proposal was meritorious.

Blinder, Robinson & Co. v. Goettsch, 403 N.W.2d 772 (Iowa 87)

Judicial Review

The superintendent of securities commenced contested-case proceedings to suspend or revoke the license of a broker for alleged willful violations of the Uniform Securities Act. After hearing, but prior to a decision, a broker sought judicial review in order to obtain adjudication of its defense that a portion of the Iowa Uniform Securities Act was unconstitutional on vagueness grounds. The court noted its "disapproval of permitting an intermediate agency action to be reviewed for the purposes petitioner seeks to advance. The request for a judicial determination concerning the constitutional issue was, we believe, premature."

Bishop v. Board of Public Instruction, 395 N.W.2d 888 (Iowa 86)

Judicial Review

Remand by the district court in a petition for judicial review for further agency proceedings is nevertheless a final judgment for purposes of appeal.

Q

Western International v. Kirkpatrick, 396 N.W.2d 359 (Iowa 86)

Judicial Review

Statute allowing direct appeal to Iowa Supreme Court of industrial commissioner's decisions was unconstitutional expansion of original and/or appellate jurisdiction of Supreme Court.

Hurtado v. Job Service, 393 N.W.2d 309 (Iowa 1986)

Judicial Review

Administrative agency hearing officer found that employee was guilty of deliberate sleeping on the job in violation of company work rules and disqualified the terminated employee for unemployment compensation. On the employee's petition for judicial review, the district court reversed, and the Court of Appeals affirmed the district court's decision. The Supreme Court reversed, holding that the district court and Court of Appeals should have examined only whether the hearing officer's findings of fact were adequately supported by the evidence.

The court also noted that the absence of an express disposition by the finder of fact of the material factual issue may be excused if it is clear from the context of the issues considered and disposition of the case what the finding was on that issue.

McFee v. IDOT, 400 N.W.2d 578 (Iowa 87)

Absent a showing of actual prejudice, unreasonable delay in administrative procedures or adjudications is not grounds for reversal of the adjudication.

AGENCY

Kristerin Development Co v. Granson Investment, 394 N.W.2d 325 (Iowa 1986)

In suit for breach of contract for sale of real estate and for fraudulent misrepresentation, the Court affirmed a directed verdict for the seller's real estate agent. Plaintiff's best evidence was that they relied on no representation by the agent that was not also made by seller. HELD: Agent is not charged with personal responsibility where she has acted in good faith within general scope of authority and, in making representations, has acted simply as mouthpiece for her principle.

Farmers Grain Co. v Irving, 401 N.W.2d 596 (Iowa App. 1986)

Farm tenant and landlord executed written agreement, captioned as lease, that provided that tenant would be responsible for day-to-day operation, each party would provide 50% of the cattle and 50% of the expenses, and that each would receive 50% of the gross income from the operation. Plaintiff sold the grain to tenant, who then went bankrupt. Plaintiff then sued landlord. Court affirmed judgment entered on findings that plaintiff had not proved a principal-agent relationship between landlord and tenant.

Budget Premium Co v. Motor Ways, Inc., 400 N.W.2d 60 (Iowa App. 1986)

Plaintiff loaned money to insured for purchase of insurance policy on insured's trucking business. The financing agreement gave plaintiff the right to cancel the policy and receive unearned premium refund if insured failed to make a payment. Insured eventually failed to make a premium payment. Plaintiff notified the defendant insurer of cancellation through the insurance agency that had issued the policy. Defendant sent a check toward the unearned premiums to the issuing agency, who cashed the check and converted the proceeds to its own account. Plaintiff sued defendant for the unearned premium. The loan agreement provides that the insurance agent is the agent of the defendant insurer but is not the agent of plaintiff.

HELD: The insurance agent was the insured's agent. Plaintiff was the insured's "attorney-in-fact." Plaintiff paid the insurance agent, who in turn paid defendant insurer. Defendant insurer did business only with the agent. Even cancellation occurred through the agent. Defendant had the right to pay the insured's agent and released its obligation when it did so.

Q

APPELLATE PROCEDURE

In re Guardianship of Murphy, 397 N.W.2d 686 (Iowa 86)

Standard of Review

An order appointing a guardian is the result of ordinary proceedings, and is reviewed on errors of law, not de novo.

Peterson v. First National Bank of Iowa, 392 N.W.2d 158 (Iowa App. 86)

Standard of Review

District court granted new trial, citing erroneous instructions. Court did not review the grant of new trial on an abuse-of-discretion standard but instead examined on its own the instructional errors.

Budget Premium Co v. Motor Ways, Inc., 400 N.W.2d 60 (Iowa App. 1986)

On appeal from entry of summary judgment, Court of Appeals reversed and held that there were actual issues with respect to two issues. On remand, district court limited trial to those two issues. HELD: Trial court properly regarded previous appellate decision as a law of the case.

Western International v. Kirkpatrick, 396 N.W.2d 359 (Iowa 86)

Jurisdiction

Statute allowing direct appeal to Iowa Supreme Court of industrial commissioner's decisions was unconstitutional expansion of original and/or appellate jurisdiction of Supreme Court.

Neylan v. Moser, 400 N.W.2d 538 (Iowa 87)

Waiver

Attorney sued client for fee, and received judgment. Client was not permitted to counterclaim for legal malpractice

due to delay in asserting it. HELD: Client's payment of judgment for fees does not constitute waiver of client's appeal from court's refusal to permit counterclaim.

Lowery Investments Corp. v. Stephens Industries, Inc., 395 N.W.2d 850 (Iowa 86)

Cross-Appeal

In action to set aside forfeiture of interest in installment contract for sale of real estate, defendant raised an affirmative defense of claim preclusion based on favorable judgment rendered previously in an action for forcible entry and detainer. District court found that plaintiff had failed to establish any grounds for relief from the forfeiture, and did not consider the affirmative defense. HELD: Defendant who prevails at trial on the infirmity of plaintiff's allegations may, without cross-appealing, seek affirmance based on the validity of the affirmative defense not considered by the district court.

ATTORNEY AND CLIENT

Lundy, Butler & Lundy v. Bierman, 398 N.W.2d 212 (Iowa App. 86)

Fees

Law firm sued former client for $10,000.00 fee for representation of client in dissolution of marriage proceeding. Plaintiff came into the case late because client was dissatisfied with other counsel. The parties agreed on a fee of $100.00 per hour. HELD: Fact that client rejected, on attorney's advice, an offer that was greater than the value of her ultimate recovery after trial in dissolution does not support a claim that she received bad advice. Given the conflict between the parties, the amount of money involved, and the involvement of the custody of children, an hourly rate of $100.00 is not excessive.

Rouse v. IDOT, 408 N.W.2d 767 (Iowa 1987)

Fees

DOT appealed from order awarding attorney fees to condemnees in an imminent domain proceeding. HELD: An application for fees, verified by the attorney and containing a recitation that the amount was fair and reasonable, and that is accompanied by a brief description of the services rendered, but which does not contain a statement as to the hourly rate involved or the amount of time spent, does not provide the court with sufficient documentation for entering an order on fees without an evidentiary hearing.

Miller v. Continental Insurance Co., 392 N.W.2d 500 (Iowa 86)

Privilege

Plaintiffs in an underlying (and pending) action for injuries suffered in two-car accident sued an adjusting company for attempting to cause plaintiffs to lose their underlying tort claim to the statute of limitations by failing to return plaintiffs' phone calls at the 11th hour. Plaintiffs testified in deposition and submitted affidavits that they began to suffer emotional distress when their attorney advised them as to how the statute of limitations may affect their case. HELD: Plaintiffs waived the privilege by voluntarily disclosing the content of conversations with counsel in affidavits submitted in resistance to motion for summary judgment. Defendants may depose plaintiffs' counsel with respect to those conversations.

CIVIL PROCEDURE

Federal Land Bank v. Steinlage, 409 N.W.2d 173 (Iowa 87)

179(b)

In foreclosure action, debtor resisted bank's motion for summary judgment by alleging, among other things, that the interest rate charged by the bank was unconscionability. No

documents were submitted in support of the resistance and no evidence was adduced by debtor at hearing on motion for summary judgment. Unconscionability was not plead as an affirmative defense in debtor's answer. Order granting summary judgment makes no reference to allegation of unconscionability. HELD: Failure to include unconscionability as an affirmative defense means district court was not obligated to consider the defense. Single-sentence claim in resistance was totally unsupported by affidavit or other evidence. Rule 179(b) motion was necessary for preserving a "skipped" issue for appellate review.

Kanzmeier v. McCoppin, 398 N.W.2d 826 (Iowa 87)

179(b)

Before deciding (without details) that defendant's "motion to reconsider" was a proper 179(b) motion, the court described such motion as one "which has no authorization in our rules but often creeps into litigants' motions and practice. We strongly urge that lawyers discontinue the use of this label and correctly title motions in order to avoid issues concerning the timeliness of appeals."

Iowa Annual Conference of the United Methodist Church v. Bringle, 409 N.W.2d 471 (Iowa 87)

Class Action

Plaintiff and approximately 140 individuals own real property in an area commonly known as the "Methodist Campground." The church contends that it maintains the streets, public areas, sewer and water services, etc., assesses each individual property owner a fee, and establishes regulations for the use of the land. The church alleges that the named defendants and a few other of the property owners have refused to pay the assessments or comply with the rules. The church brought an action for declaratory judgment and requested certification as a class action, with the four named defendants as representatives of the class. They resisted, and the district court concluded that the defendants would not fairly and adequately protect the interests of the class.

HELD: While it would appear that a single question - whether the church owns the rights it claims as to all class

members - is involved, the district court was correct in concluding that each individual deed for each parcel of property will have to be examined for purposes of determining whether there are implied covenants. Such covenants would be effective only on subsequent grantees that had notice. Accordingly, there is "not one common question of liability, but many questions concerning notice to titleholders and the intents of the parties to numerous conveyances." Because conflicts of interest exist as between members of the class and the named defendants, the church has failed to establish all requirements for certification. The district court correctly considered the fact that many members of the class do not wish to challenge the church's right to charge fees and establish regulations.

Lake v. Schaffnit, 406 N.W.2d 437 (Iowa 1987)

Amendments

In action by parent on her own behalf and as next friend of her minor child for injuries in a car-pedestrian accident, the defendant first sought during trial to have the court reduce the parent's recovery by the amount of negligence assessed against the child and then, when that request was rejected, sought for the first time to amend his answer to seek contribution from the minor child toward liability for the mother's claim. HELD: Without deciding whether such an action for contribution may exist, the court did not abuse its discretion in concluding that the amendment would change the issues that the parties have litigated and could very well have changed the approach as to how the parties handled the evidence and other issues.

Ellwood v. Mid States Commodities, Inc., 404 N.W.2d 174 (Iowa 87)

Amendment

In action by customer against commodities broker for unauthorized trading on the customer's account, the district court permitted the broker to amend its answer during trial to add the affirmative defense of ratification. Noting that the customer had been questioned in his deposition on issues relating to ratification, the court found no abuse of discretion.

Q

Neylan v. Moser, 400 N.W.2d 538 (Iowa 87)

Amendments

7-month delay from time of answer to motion for leave to add counterclaim is insufficient by itself to support denial of motion for leave to amend. Court notes that district court's finding that client was negligent in delaying its counterclaim was without support in the record.

Lake v. Schaffnit, 406 N.W.2d 437 (Iowa 1987)

Pleadings

In trial arising from nighttime car-pedestrian accident, defendant objected to instructions on adequacy of headlights and claimed a lack of pretrial notice that headlight adequacy would be an issue. HELD: Plaintiff's supplemental answer (to interrogatory?) two months before trial that specifically cites statutory provisions on headlight adequacy were sufficient to notify defendant of issue.

Diamond Products Co. v. Skipton Painting & Insulating, 392 N.W.2d 137 (Iowa 86)

Pleadings

Plaintiff alleged sale of paint to defendant and no payment. Defendant admitted sale and no payment, but alleged that paint was defective and worthless. Court reversed entry of partial summary judgment for plaintiff, because defendant had created an issue of fact as to value. Plaintiff had not alleged that paint had been sold at an agreed-upon price.

O'Brien v. Mullapudi, 405 N.W.2d 815 (Iowa 1987)

215.1

Plaintiffs responded to the first 215.1 notice received in August 1984 by filing a motion on January 2, 1985, for continuance. Court determined that the automatic dismissal as of January 1 didn't deprive the court of jurisdiction to consider the motion for continuance, and the case was dismissed. Plaintiff filed an application for reinstatement on June 18, which the district court denied.

HELD: Plaintiff failed to show diligence in preparing the case for trial such that reinstatement was mandatory. Plaintiffs had been delinquent in serving answers to interrogatories by as long as eight months and filed one set of answers only after having been compelled by court order. Plaintiffs made no showing of any activity for the next eleven months, up to the time of dismissal. Plaintiffs' application for reinstatement was unverified, no affidavits were filed, and no evidence was introduced. District court's refusal to exercise its discretion to reinstate the case was appropriate.

COMMENT: Court finally noted the injustice in 215.1 continuances on a record such as this when defendants face the continual accumulation of pre-judgment interest.

Greif v. K-Mart Corp., 404 N.W.2d 151 (Iowa 87)

215.1

After first 215.1 notice, which followed a trial certificate by plaintiff, plaintiff filed a motion for continuance. Court granted the motion and continued the case for trial on March 12 of the next year. This trial date was passed because some criminal trials took precedence. Five months later, a second 215.1 notice was issued (routinely), and counsel inquired of the court administrator about reassignment. Counsel made no specific request, however, that the case be assigned for trial, and made no claim of urgency. The court administrator eventually rescheduled the trial, on its own initiative, for December 3. Shortly before this trial date, the district court notified counsel that the case had been dismissed and that no motion for reinstatement had been filed within six months.

The court affirmed the dismissal and stated that there was no jurisdiction after the passage of six months from the March trial date to consider a motion for reinstatement.

The decision was by vote of 5-3. The dissent objects to "secret and silent dismissals."

Q

Sladek v. G & M Midwest Floor Cleaning, Inc., 403 N.W.2d 774 (Iowa 87)

215.1

Plaintiff's suit was dismissed by operation of law pursuant to Rule 215.1 on January 8, 1985. Shortly thereafter, plaintiff moved for reinstatement, which was granted. The order reinstating plaintiff's case provided that the case "shall be tried or otherwise disposed of prior to August 5, 1985, or shall stand automatically dismissed." Plaintiff did not bring the case to trial by August 5, and case was dismissed again. Plaintiff moved again for reinstatement. Defendant argued that district court had no discretion to reinstate. The district court disagreed, but held on the merits that reinstatement would not be granted.

On appeal, a court holds that the district court did in fact have jurisdiction to reinstate a second time. When a case is either continued or reinstated, the case is not removed from the operation of Rule 215.1 but is given a later deadline. An automatic dismissal that results either from a 215.1 notice or from a order of continuance or order of reinstatement is subject to the provisions for reinstatement.

On the merits, the court did not abuse its discretion in declining to reinstate. Plaintiff did not establish that the dismissal was the result of oversight, mistake, or other reasonable cause, so reinstatement was not mandatory. Nor had sufficient activity been shown to render a refusal to reinstate an abuse of discretion. Although plaintiff had engaged in some discovery and settlement negotiations between the date of the first reinstatement and the second dismissal, plaintiff had not undertaken even to obtain a trial date and was not ready for trial.

Lundy, Butler & Lundy v. Bierman, 398 N.W.2d 212 (Iowa App. 86)

215.1

Q

In action by law firm against former client to recover fee for services rendered, district court did not abuse its discretion in granting a first continuance beyond the application of Rule 215.1 when plaintiff's application referred to unsuccessful settlement negotiations as a reason for delay.

Klooster v. North Iowa State Bank, 404 N.W.2d 564 (Iowa 1987)

Real Parties in Interest

In action by farmers against bank for, among other things, wrongful attachment, bank claimed that some of the plaintiffs had failed to demonstrate their status as real parties in interest. HELD: Where the record establishes that one or more of the plaintiffs, or a partnership to whose interest one or more of the plaintiffs succeed, would be real parties in interest, it is permissible for the parties jointly to present such claims without identifying the interest that each plaintiff has. The extent of each plaintiff's interest in the recovery may be settled between them. Absent evidence of a double recovery, no error in this procedure.

Klooster v. North Iowa State Bank, 404 N.W.2d 564 (Iowa 1987)

Summary Judgment

In action by farmers against bank for, among other things, wrongful attachment in underlying action to recover on promissory notes, the bank filed a motion for summary judgment with respect to each of the theories for which recovery was ultimately allowed. Bank reasserted the same arguments posed by its unsuccessful motion for summary judgment during trial in its motions for directed verdict, which also was overruled. HELD: On appeal from judgment following trial, review of the district court's ruling on the appellant's motion for summary judgment "should, we believe, be superceded by the court's rulings on motions for directed verdict. . . . Consequently, determinations made in advance of trial concerning a genuine issue of material fact will not constitute grounds for reversal where a full trial is subsequently held and sufficient evidence is produced to sustain the claim."

In re Marriage of Fairall, 403 N.W.2d 785 (Iowa 87)

Judgment

A petition to vacate a judgment under Rules 252 and 253 must be filed and served within one year from the entry of the judgment. This requirement is jurisdictional.

Snyder v. Allamakee County, 402 N.W.2d 416 (Iowa 87)

Default Judgment

Plaintiff obtained a default judgment in this replevin action against Burns. Burns filed a motion to set aside the default judgment eight days later. District court denied the motion. Thirty-seven days after this last order, Burns filed what was construed to be a 179(b) motion. At the hearing, the court orally rejected the motion and requested plaintiff's counsel to prepare an appropriate order. Immediately after the hearing, and after plaintiff's counsel left the court room, Burns' counsel explained to the court his failure to prepare an answer. Based on this ex parte conversation, the court reversed the earlier ruling and set aside the default judgment.

Four years later, with the case still pending, the district court ruled that the default judgment was final and that the order overruling the motion to set aside the default judgment had not been affected by the subsequent ruling.

On appeal, the court agreed, and held that the 179(b) motion was untimely. The court also rejected Burns' argument that plaintiff waived his right to make this claim by the passage of time. The 179(b) motion was due within 10 days of the order overruling the motion to set aside the default judgment. A order eventually entered on the late 179(b) motion was invalid, which Snyder could challenge at any time.

Whitehorn v. Lovik, 398 N.W.2d 851 (Iowa 87)

Default Judgment

Plaintiff-tenant brought an action in small claims court to recover amount retained by landlord from her damage deposit upon termination of tenancy. When defendant counterclaimed for damages, plaintiff hired counsel, who prepared a motion to dismiss the counterclaim. Plaintiff did not provide the notice of hearing to her counsel, and caused her counsel to rely upon her mistaken impression as to the date of hearing. Plaintiff and counsel arrived at the courthouse, with one witness, one week late. HELD: District court abused its discretion in refusing to set aside the default. "Our cases have drawn a distinction between justifications which amount to no more than excuse, plea, or apology, and those reasoned explanations which affirmatively show that the movant intended and set out to defend but failed to

do so because of some misunderstanding, accident, mistake or excusable neglect." While plaintiff was mistaken about the date and offers no explanation, Rule 236 does not contemplate a blameless party.

Bank of Craig v. Hughes, 398 N.W.2d 216 (Iowa App. 86)

Default Judgment

Plaintiff filed a petition to foreclose a mortgage on Iowa farmland owned by defendants, who were residents of Colorado. Defendants were served personally in Colorado with original notice on October 2. Defendants did not appear, and they were found to be in default on October 24 and a judgment of foreclosure was entered. Defendants answered and filed a motion to set aside the default on November 18, with an affidavit stating that the defendants had insufficient time to obtain an Iowa attorney. HELD: No abuse of discretion in refusing to set aside the default judgment. Failure to appear was attributable solely to the litigant's error.

Butzloff v. Quandt, 397 N.W.2d 159 (Iowa 86)

Default Judgment

In wrongful-death action, plaintiff filed a motion for default as a result of defendant's failure to comply with orders of court. Defendant appeared at hearing. As a result of hearing, court made calendar entry that provided, "hearing held on damages and default judgment. Order to be entered." Defendant then filed voluntary petition in bankruptcy, and a motion in this action for stay pursuant to the bankruptcy code. Thereafter, the court filed a written judgment entry. The court also overruled Defendant's motion to vacate and set aside the judgment entry. HELD: Even assuming that the court made a determination before the bankruptcy filing that Defendant was in default, the court could not enter judgment until it had considered the evidence and arrived at the amount of damages to be assessed. Judgment is void as a matter of bankruptcy law.

Q

Hyde v. Buckalew, 393 N.W.2d 800 (Iowa 1986)

Consolidation

Two-vehicle accident occurred in Chickasaw Count. The plaintiffs who were Dubuque residents commenced an action in Dubuque County. One plaintiff who was not an Iowa resident filed suit in Chickasaw County. District court overruled motion to consolidate cases for trial. HELD: While the district court has considerable discretion in determining whether or not to consolidate two or more actions for trial, "the modern and enlightened trend is to combine in one action for trial all claims and actions involving several persons injured in a single incident, even though there may be differences in the rules of law applicable to the parties as drivers or passengers or differences in testimony and instructions relating to damages.'" Because the court was remanding the case for other reasons, it merely asked the district court to reconsider its ruling.

IMT Insurance Co. v Roberts, 401 N.W.2d 228 (Iowa App. 1986)

Jury

Insurer brought declaratory judgment action to determine its contractual responsibilities to son of named insured (son's license was under suspension at time of accident, and son had encountered his brother, who was operating the family vehicle with permission for the evening, and had talked son into letting him drive). Car-accident victim filed a counterclaim against insurer with her answer and requested a jury trial on all issues. District Court severed the counterclaim from the declaratory judgment for purposes of trial, and ordered the declaratory judgment action to be tried to the Court. HELD: Victim was entitled to jury trial. Action for declaratory judgment is a proceeding at law and raised issues on matters normally submitted to a jury. Relevance of existence of insurance in declaratory judgment proceeding is no reason to deny trial by jury.

Q

Diamond Products Co. v. Skipton Painting & Insulating, 392 N.W.2d 137 (Iowa 86)

Summary judgment

Plaintiff alleged sale of paint to defendant and no payment. Defendant admitted sale and no payment, but alleged

that paint was defective and worthless. Court reversed entry of partial summary judgment for plaintiff, because defendant had created an issue of fact as to value. Plaintiff had not alleged that paint had been sold at an agreed-upon price.

CIVIL RIGHTS

Greene v. Friend of Court, 406 N.W.2d 433 (Iowa 1987)

Plaintiff was jailed on an ex parte order after Friend of Court application for failure to make child-support payments. Court previously held that this denied plaintiff due process. See Greene v. District Court, 342 N.W.2d 818 (Iowa 1983). Plaintiff sued county, Iowa Dept. of Human Services, and Friend of Court under 42 U.S.C. §1983. HELD: Although the district court improperly concluded that the governmental aid entities could rely on the immunity of the Friend of Court attorney, entry of summary judgment as to all defendants on grounds of immunity was proper under the Eleventh Amendment to the United States Constitution and Chapter 25A.

Frank v. American Freight Systems, Inc., 398 N.W.2d 797 (Iowa 87)

Physical Disability

Truck driver who had back surgery in 1966 but who had driven a truck since then, was refused employment due to the hiring company's rule, which automatically excluded him from consideration. HELD: Rule's actual purpose is apparent, and is reviewed only under a disparate treatment analysis, not a disparate impact analysis. Employer met its burden of establishing a "nature of the occupation" defense by showing an overriding, legitimate business purpose for its rule. Employer also established that alternative accommodations would be unreasonable.

Iowa City Human Rights Commission v. Roadway Express, Inc., 397 N.W.2d 508 (Iowa 86)

Comparative Employment Data

Complaint alleging discriminatory employment practices in defendant's office within the community can be investigated by use of subpoena requiring defendant to produce records from offices outside municipality.

Iowa City Human Rights Commission v. Roadway Express, Inc., 397 N.W.2d 508 (Iowa 86)

Subpoena

Exercise by municipality of subpoena power to enforce state civil rights act within its jurisdiction does not violate Iowa law.

Brown v. Hy-Vee Food Stores, Inc., 407 N.W.2d 598 (Iowa 1987)

Plaintiff suffered on-the-job injury. After six months of treatment, plaintiff was released to return to work. Store requested and obtained a second medical opinion. Second doctor found plaintiff to have a lumbar disc injury, and directed him to do only light work. Over time, plaintiff's condition improved and the doctor's restrictions were eased. Nevertheless, defendant terminated plaintiff. Defendant admitted that termination was based on fears that plaintiff might harm himself or others if permitted to drive. Defendant's representative testified that defendant did not believe plaintiff was disabled or handicapped by previous injury, and believed that he was physically capable of performing the job. HELD: Plaintiff's civil rights claim was properly dismissed. Plaintiff is not a "substantially handicapped person". Evidence established that plaintiff was able to engage in a variety of physical activities, and that neither plaintiff nor defendant perceived his injury as a substantial handicap.

Q

Trobaugh v. Hy-Vee Food Stores, Inc., 392 N.W.2d 154 (Iowa 86)

Justification

Plaintiff claimed he was discharged from his full-time job as stockman because of his mental disability. HELD: Substantial evidence to support district court's finding that plaintiff was discharged for economic reasons. Store had experienced net losses in two immediately preceding months, plaintiff was not replaced, and part-time employees who did his job thereafter were paid substantially less. Plaintiff confirmed that he was told he was terminated for economic reasons.

North v. State, 400 N.W.2d 566 (Iowa 87)

Due Process

Medical school's refusal to reinstate student unconditionally after a 1-year leave of absence did not violate due process, where student had opportunity to appear before the several committees involved in the decision.

COMMERCIAL LAW

Southwest FS, Inc. v Fisher, 401 N.W.2d 247 (Iowa App. 1986)

Landlord's Lien

Farm tenant who had previously given plaintiff a security interest in crops and was unable to pay his cash rent entered into an agreement with his landlord for the landlord to harvest the crop and take possession of his share in lieu of rent. Secured party filed action for declaratory judgment as to ownership of payment made for crops harvested by landlord. Parties agreed that landlord's statutory lien had preference over the secured party, but secured party contends that landlord failed to perfect lien. HELD: Statutory provision that lien may be enforced by commencement of action does not require such action to perfect lien when tenant voluntarily delivers collateral to landlord.

Farmers Grain Co. v Irving, 401 N.W.2d 596 (Iowa App. 1986)

Partnerships

Farm tenant and landlord executed written agreement, captioned as lease, that provided that tenant would be responsible for day-to-day operation, each party would provide 50% of the cattle and 50% of the expenses, and that each would receive 50% of the gross income from the operation. Plaintiff sold the grain to tenant, who then went bankrupt. Plaintiff then sued landlord. Court affirmed judgment for landlord based on findings of fact that plaintiff had not proved a partnership.

Kristerin Development Co v. Granson Investment, 394 N.W.2d 325 (Iowa 1986)

Partnerships

In breach of contract suit against 3-person partnership, plaintiff adduced evidence that two partners signed contract for sale of real estate and that third partner orally advised plaintiff that his signature was unnecessary. District Court directed a verdict for the partnership, holding that all three partners were required to execute the contract.

Court reversed. Because there was evidence that partnership's business was buying and selling real estate, and evidence that plaintiff did not know of any alleged agreement between the partners that required consent by all partners to bind the partnership by contract, Section 544.9(1) permits the act of a single partner to bind the partnership.

Interfirst Bank v. Hanson, 395 N.W.2d 857 (Iowa 86)

Self-Help Repossession

Bank which had financed automobile purchase commenced an action for replevin. Before hearing on prejudgment writ of replevin, bank's agent was successful in repossessing the vehicle. Debtor counterclaimed for wrongful conversion. HELD: Self-help repossession is a private action that does not require application of federal constitutional protections, such as procedural due process. Commencement of replevin proceedings does not preclude private self-help repossession during the pendency of the replevin action.

Van Dusseldorp v. State Bank, 395 N.W.2d 868 (Iowa 86)

Mortgage

In Farmers Trust and Savings Bank v. Manning, 311 N.W.2d 285 (Iowa 1981), court held that open-end advances made by a bank to only one of two mortgagors who jointly own the mortgaged real estate were not secured by the mortgage. In this case, the mortgage showed security for a total indebtedness of $60,000.00 at a time when the existing indebtedness was only $45,000.00. The open-end advance clause was filled in with the word "none." Debtors made principal payments in excess of $60,000.00 after execution of the mortgage, but also received additional loans, such that the balance owed by debtors at the time in question was $40,000.00. Some of the additional loans were memorialized by documents not signed by one of the several debtors.

The court distinguished Manning because this mortgage's open-end advance clause had been rendered inoperative. The mortgage was security for an indebtedness of up to $60,000.00, and the amount owed was less. The bank was entitled to apply debtor's payments to the unsecured portion of the total indebtedness at times when the loan balance exceeded $60,000.00.

First National Bank v. Heimke, 407 N.W.2d 344 (Iowa 87)

Mortgage

Farm mediation statute, codified at section 654A.6, was retrospectively applicable to actions pending at the time of its effective date.

Peoples Bank & Trust Co. v. Lala, 392 N.W.2d 179 (Iowa App. 86)

Mortgage

Court holds that a guarantee with language providing that it will be "continuing, absolute, and unconditional . . . until written notice of its discontinuance" survived subsequent guarantees and a release of a co-guarantor. Actions by bank to liquidate debtor, even at the expense of the relationship between guarantor and debtor, did not constitute a release of the guarantor.

Bank of Craig v. Hughes, 398 N.W.2d 216 (Iowa App. 86)

Foreclosure

Plaintiff filed a petition to foreclose a mortgage on Iowa farmland owned by defendants, who were residents of Colorado. Defendants did not appear, and they were found to be in default on October 24 and a judgment of foreclosure was entered. Defendants subsequently filed an answer, a motion to set aside the default judgment, and a request for a moratorium continuance under § 654.15. Governor Branstadt had declared an economic emergency on October 1, 1985, one day before defendants were served with original notice. HELD: While § 654.15(1) specifically provides that application for a continuance of the foreclosure action must be filed before the final decree, § 654.15(2), which provides for the moratorium arising from the Governor's decree, does not contain such language. Nevertheless, the district court did not abuse its discretion in refusing the moratorium continuance, because plaintiffs did not adduce evidence to support a finding of good faith or inability to pay.

Brenton State Bank v. Tiffany, 400 N.W.2d 576 (Iowa 87)

Foreclosure

Bank obtained a judgment of foreclosure against mortgaged property and then sought possession of secured property in an action for replevin. HELD: Because judgment of foreclosure was based on personal service, this exhausts a full major of the remedy available. Second action for replevin does not survive and is merged into the initial judgment.

Federal Land Bank v. Heeren, 398 N.W.2d 839 (Iowa 87)

Foreclosure

Plaintiff bought foreclosed real estate and applied for appointment of receiver. Heerens, the former owners, consented to the appointment of a receiver. Receiver leased to someone other than Heerens, and Heerens appeal from the district court's failure to give them preference.

HELD: Section 654.14 provides that in any action to foreclose a real estate mortgage where a receiver is appointed,

preference shall be given to the owner, subject to approval of the court, in leasing the mortgaged preference premises. "Preference means an opportunity to purchase on equal terms," which the receiver did not provide.

Heerens had also asked the district court to extend the period of redemption by one year, and contended that the one-year extension is now essential in light of the district court's erroneous approval of the lease without preference to Heerens. The court holds that the rights to preference and the rights of redemption are separate and independent, and refuses to grant the extension. The court remands instead for further proceedings with respect to the receivership, but notes that Heerens may be entitled to the net proceeds of the receivership after payment of the items listed in § 654.14 (cost of receivership, taxes, insurance).

Lumberman's Wholesale v. Ohio Farmers Insurance Co., 402 N.W.2d 413 (Iowa 87)

Construction Contract

Unpaid supplier of building materials to a subcontractor on a public improvement project appealed from denial of its claim against the retained percentage and general contractor's bond. HELD: Claims on behalf of subcontractor's or material suppliers, who have no contract with the general contractor, cannot "piggyback" onto a claim that triggers retainage of funds.

Blinder, Robinson & Co. v. Goettsch, 403 N.W.2d 772 (Iowa 87)

Securities

Exemption in State Uniform Securities Act for "isolated nonissuor transaction" was not so facially vague as to violate due process. The Iowa statute does not define the term.

Q

First Security Bank v. McClain, 403 N.W.2d 788 (Iowa 87)

Election of Remedies

Defendant's son borrowed $50,000 from bank, which extended financing as a result of defendant's guaranty. Guaranty

was limited to $50,000. Bank subsequently loaned an additional $70,000 to defendant's son. Bank brought an action to recover on the $50,000 debt. While that suit was still pending, bank obtained a judgment on the second loan, foreclosed the mortgage on the real estate curing that loan, and commenced another action against defendant on her guaranty for "the balance of $50,000." District court entered summary judgment in favor of bank.

Court held that bank's initial action against debtor and guarantor did not constitute an election of remedies, because that suit and the present suit against the guarantor were "factually consistent." When remedies are factually consistent, an inconsistency does not arise until one of the remedies is satisfied. "A party may pursue consistent remedies concurrently, even to file adjudication, until one of the claims is satisfied."

First Security Bank v. McClain, 403 N.W.2d 788 (Iowa 87)

Guaranty

HELD: Although guaranty was limited to $50,000, additional loans did not invalidate the guaranty. Guaranty agreement was very broad, and was expressly immunized against the effect of future extensions of credit.

Ellwood v. Mid States Commodities, Inc., 404 N.W.2d 174 (Iowa 87)

Brokerage Account

A knowledgeable investor opened a non-discretionary account with defendant. The documents confirming trades notified customer that trades on his account would be binding if not objected to within five days of receipt of confirmation, and gave the telephone number of the commodities trader who was a member of the Chicago Board of Trade (not a defendant). The employee of the local broker (defendant) made a series of unauthorized trades. Although the customer and the employee spoke repeatedly on the telephone about these trades, the customer never called defendant or the commodities trader and never sent any formal objection. Customer claimed he did nothing further because he received assurances from the employee that the trades were errors and that they would be corrected. Meanwhile margin calls on the unauthorized trades were slowly eating away at customer's account balance and even eventually creating a substantial deficit. Defendant broker learned of the employee's unauthorized trades

through another customer (who was getting the same treatment), and he was fired. In action by customer against broker and employee, broker counterclaimed for deficit balance of customer's account. At trial, district court found that broker did not have clean hands and denied recovery.

On appeal, the court held that the equitable doctrine of clean hands was neither pled by the customer nor available in a law action. The court's finding that a customer had ratified unauthorized trades compelled the conclusion that the broker was entitled to recover the amount owed to it by the customer for the trades.

Landon v. Mapco, Inc., 405 N.W.2d 825 (Iowa 1987)

Consumer Credit

Plaintiff entered into lease-purchase from defendant of a propane tank. Agreement required plaintiff to purchase the gas only from defendant. Agreement contained no provisions for the terms of such purchase, but ledger accounts maintained by defendant indicate that a finance charge was imposed on unpaid balances more than thirty days old. Plaintiff was frequently late in paying her account, and was eventually placed on a COD basis. In March 1984, plaintiff ran out of fuel and attempted to order more from defendant, who refused to deliver unless it was paid for in advance. A friend of plaintiff offered to personally guarantee payment and defendant delivered gas to plaintiff. No payment was made, and defendant sent plaintiff a 20-day notice of repossession of the tank. No payment was received, and defendant repossessed the tank and remaining fuel.

Plaintiff sued for violations of the Consumer Credit Code, breach of contract, and trespass. HELD: Delivery as a result of friend's guarantee took plaintiff off COD basis and restored her to her previous status, which included a finance charge. Charges were not "default charges" for unanticipated late payments, which would be excluded from the statutory definition of "finance charge".

Q

Farmers & Merchants Savings Bank v. Farm Bureau Mutual Insurance Co., 405 N.W.2d 834 (Iowa 1987)

Forfeiture

Shearer sold farm on contract. Contract provided that buyer had to keep insurance against loss by fire on all buildings with insurance payable to sellers and buyers as their interests may appear. After fire, buyer and Shearer made claims on insurance policy issued by Farm Bureau. Farm Bureau's policy contained a loss payable clause that provided that the "insurance as to the interest of the mortgagee . . . shall not be invalidated by . . . any foreclosure or other proceedings . . . nor by any change in the title or ownership of the property."

During Farm Bureau's investigation of the claims, Shearer notified Farm Bureau that he was contemplating forfeiture, because buyers had missed their yearly payment. Farm Bureau warned Shearer and his counsel that forfeiture might affect Shearer's insurance claim. Shearer proceeded to serve notice of forfeiture and completed the proceedings. Shearer subsequently resold the farm on contract to plaintiff for the amount owed by the original buyer at the time of forfeiture. Shearer assigned his interest in the fire loss to plaintiff. Farm Bureau refused to pay the claim, asserting that the forfeiture destroyed Shearer's insurable interest and Farm Bureau's subrogation rights.

The court described the two types of mortgage loss payable clauses available in insurance policies, and concluded that the clause in Farm Bureau's policy is the "New York, standard, or union form." The "standard" clause creates a new agreement between the mortgagee and the insurer such that the interest of the mortgagee is not subject to any defenses against the mortgagor and the mortgagee's interest and rights are fixed at the time of the loss. On the date of the fire, Shearer had an insurable interest measured by the unpaid purchase price. Forfeiture of the contract, followed by partial or full satisfaction of the debt giving rise to the insurance interest, reduced Shearer's interest in the insurance proceeds to the extent that the debt has been satisfied. When Shearer took back the property in satisfaction of the outstanding contract debt, the debt was extinguished. Because his interest in insurance proceeds is measured by the unpaid purchase price, his insurable interest was destroyed by the satisfaction of the contract debt, and he lost all rights under the policy.

Koch v. Kostichek, 409 N.W.2d 680 (Iowa 87)

Forfeiture

Moratorium statute, which provides for a continuance of foreclosure proceedings in event governor declares state of economic emergency, does not authorize continuance of forfeiture proceedings. Statute's distinction between forfeiture and foreclosure does not violate equal protection clauses of the federal and state constitutions.

Lowery Investments Corp. v. Stephens Industries, Inc., 395 N.W.2d 850 (Iowa 86)

Forfeiture

Defendant sold real estate to plaintiff on installment sales contract. Plaintiff failed to make certain installment payments, and eventually, after a series of notices of forfeiture, completed forfeiture by recording one of the notices and appropriate affidavits. Plaintiff brought an action in equity to set aside the forfeiture. At about the same time, defendant filed an action for forceable entry and detainer. In this latter action, the parties entered a stipulation into the record that permitted plaintiff to continue in possession, to make certain payments that would be kept by defendant either as rent or as payments toward the contract, and to be bound by the results of the plaintiff's action for relief from the forfeiture. The stipulation provided that upon plaintiff's failure to make the payments outlined in the stipulation, defendant was entitled to a writ of possession. Plaintiff failed to make the payments required by the stipulation, and judgment in the forceable entry and detainer action was entered.

HELD: The judgment in the forceable entry and detainer action and the doctrine of claim preclusion bars plaintiff from relitigating the validity of the forfeiture, because the seller's asserted right of possession in its forceable entry and detainer action was dependent upon the validity of the forfeiture.

Q

Barnhouse v. Hawkeye State Bank, 406 N.W.2d 181 (Iowa 1987)

Repossession of Security

Bank loaned money to plaintiff for plaintiff's new auto parts and repair business, and reserved a security interest in

the car parts and lease of the business premises. Business declined and additional loans were made. Business eventually found itself in serious financial trouble, and the loans were in default. Bank eventually sued and obtained judgments against plaintiff on the loans. With plaintiff on vacation out of the country, bank was told by the landlord that inventory was being removed from the business at night. The bank entered, and removed the parts and inventory. In the process, two miscellaneous articles were sold to observers for a total of $60.00. When Barnhouse complained about the sales, the bank's prompt efforts to recover the items were unsuccessful. Plaintiff's suit claimed that failure to give notice prior to sale of these items waived the bank's right to collect a deficiency and the value of all of the collateral seized.

HELD: There have been two basic approaches with respect to sanctions for violation of the notice requirement with respect to disposition of collateral by sale. Some courts have imposed an irrebuttable presumption that the value of the collateral equals the value of the debt or judgment obtained, and bars the creditor from seeking a deficiency. Other courts recognize a rebuttable presumption that the value of the collateral was the value of the debt. To the extent the creditor can show that the sale was commercially reasonable and that the reasonable market value is less than the total amount of the debt, deficiency can be obtained.

Although Iowa has consistently applied the first sanction, it would not be fair to apply it in this case. First, this was not a sales transaction in which the collateral bore direct relation to the debt incurred; "thus, any assumption the secured collateral necessarily reflects the amount of the debt is less compelling." Second, the amount of the collateral sold without notice "was but a bare fraction of the total collateral both as to bulk and as to value." Third, the purpose of the notice statute has not been violated by these facts.

Farmers Co-Op Elevator v. Union State Bank, 409 N.W.2d 178 (Iowa 87)

Q

Secured Transactions

Bank financed farmer and took security interest in, among other things, "livestock, and supplies used . . . in farming operations whether now or hereafter existing or acquired." Farmer bought feed and executed purchase money security agreements, which described the collateral as "all feed sold to farmer

and all of farmer's hogs now owned or hereafter acquired." Hogs ate feed and farmer defaulted as to bank and feed seller. HELD: Hogs did not come within the purchase money security interest by eating the feed. Court cited Colorado case that "was on all four hooves."

First National Bank v. Matt Bauer Farms Corp., 408 N.W.2d 51 (Iowa 1987)

Mortgage Foreclosure-Redemption

Bank obtained a decree of foreclosure regarding real estate owned by defendant, and scheduled a sheriff's sale. Over the next two years, defendant filed five different bankruptcy proceedings and used the automatic stay orders to postpone and avoid the sheriff's sale. Finding that the debtor had abused process, bankruptcy court finally lifted the stay on the bank's motion. Bank purchased the real estate and obtained a sheriff's deed. HELD: Section 628.4, which provides that "a party who has taken an appeal from the district court, or stayed execution on the judgment, is not entitled to redeem," should be interpreted to include bankruptcy stay orders within the definition of "stayed".

Federal Land Bank v. Bollin, 408 N.W.2d 56 (Iowa 1987)

Mortgage Foreclosure-Redemption

Following Matt Bauer, decided same day, court holds that stipulated order in bankruptcy that lifts the automatic stay revives debtor-mortgagor's right to redeem after foreclosure of mortgage.

Q

CONFLICTS OF LAW

Cameron v. Hardisty, 407 N.W.2d 595 (Iowa 1987)

Minnesota citizen sued Iowa resident in federal district court for injuries suffered in motor vehicle accident that

occurred in Nebraska. On certification of question, court held that statutes of limitations are viewed as procedural, and that Iowa would continue to apply the law of the forum with respect to statute of limitations. Iowa's two-year limitations period, rather than Nebraska's four-year statute, would apply to this case. Court also proceeds to include that Iowa, not Nebraska, has the most significant contact with this litigation.

Goetz v. Wells Ford Mercury, Inc., 405 N.W.2d 842 (Iowa 1987)

Iowa resident purchased her vehicle from defendant, a dealership in Minnesota. The vehicle was then involved in an accident in Iowa. Plaintiffs sued the dealership, alleging that it failed to comply with certain Minnesota statutory requirements for the transfer of automobiles and remained responsible as an owner at the time of the accident. HELD: "Minnesota's only relationship with the matter at hand is that the sale . . . occurred there. All other points involved have to do with Iowa. The alleged tortious conduct occurred here. The injuries occurred here, the plaintiffs are Iowa residents, as is defendant driver. The trial will be here and any judgment will be entered and enforced here." Iowa law with respect to liability of a dealer as "owner" for failure to comply with statutory requirements for transfer of automobile will be determined by Iowa law, not Minnesota law.

CONSTITUTIONAL LAW

In re T.C.F., 400 N.W.2d 544 (Iowa 87)

Due Process

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Chapter 229's procedure for involuntary hospitalization, which permits confinement prior to consideration of less restrictive alternatives, is not unconstitutional, because one of the primary purposes of the order for hospitalization is evaluation. The definition of "mental illness" is not unconstitutionally vague, because involuntary hospitalization is conditioned upon medical diagnosis. Also, proof by clear and convincing evidence meets due process requirements.

Gooch v. IDOT, 398 N.W.2d 845 (Iowa 87)

Due Process

IDOT's rule prohibiting issuance of license to anyone who has to wear bioptic telescopic lenses to meet the visual acuity standard required for a license does not create an irrebuttable presumption violative of the due process clause of the state constitution.

Knowles v IDOT, 394 N.W.2d 342 (Iowa 1986)

Equal Protection

Chapter 321 provides that driver who is convicted of drunk driving but whose license has not been revoked by IDOT for the same occurrence loses driving privileges for one year and is not eligible for a work permit. Chapter 321 also provides that the administrative revocation by IDOT is for no longer than 120 days, and such revocation does not preclude a work permit. HELD: Chapter 321 violates equal protection.

Miller v Boone County Hospital, 394 N.W.2d 776 (Iowa 1986)

Equal Protection

6-month statute of limitations for claims against political subdivisions in absence of a written claim within 60 days violates equal protection.

Fuhrman v. Total Petroleum, Inc., 398 N.W.2d 807 (Iowa 87)

Equal Protection

Juvenile purchased beer from store and drove to a park and consumed the beer. She resummed driving and was involved in an accident, in which plaintiffs were injured. Plaintiffs have sued store. Their case falls outside the dramshop law, because there was no claim that while on the premises, the juvenile was or become intoxicated.

HELD: § 123.92 as applied so as not to provide liability in a case such as this, does not violate equal protection clause. "The purpose of the act was to impose strict

liability for a tort which would be extremely difficult to prove by traditional methods." It was rational for the legislature to limit this strict liability to situations where the operator served persons who were or who thereby became intoxicated. COMMENT: The court also, by a vote of 5-4, refused to recognize a common-law cause of action in this situation, deferring to the legislature's involvement in the area. The dissent does not mention whether it finds the statute, as applied, to be unconstitutional.

Gooch v. IDOT, 398 N.W.2d 845 (Iowa 87)

Equal Protection

IDOT's rule prohibiting issuance of license to anyone who has to wear bioptic telescopic lenses to meet the visual acuity standard required for a license does not violate the equal protection clause.

Koch v. Kostichek, 409 N.W.2d 680 (Iowa 87)

Equal Protection

Moratorium statute, which provides for a continuance of foreclosure proceedings in event governor declares state of economic emergency, does not authorize continuance of forfeiture proceedings. Statute's distinction between forfeiture and foreclosure does not violate equal protection clauses of the federal and state constitutions.

Local Union No. 238 v Iowa Civil Rights Commission, 394 N.W.2d 375 (Iowa 1986)

Preemption

National Labor Relations Act does not preempt action by the Civil Rights Commission in a sex-discrimination proceeding.

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Western International v. Kirkpatrick, 396 N.W.2d 359 (Iowa 86)

Courts

Statute allowing direct appeal to Iowa Supreme Court of industrial commissioner's decisions was unconstitutional expansion of original and/or appellate jurisdiction of Supreme Court.

CONTRACTS

Steckelberg v. Randolph, 404 N.W.2d 144 (Iowa 87)

Mortgage

"Debt-stricken farm couple" contracted with defendant for assistance out of their financial troubles. By the agreement, plaintiffs conveyed their farm and interest in all real estate contracts, buildings, and equipment that they owned to defendant for the purpose of permitting him to compromise and settle their indebtedness. Agreement permitted either party to terminate on 60 days' notice, at which time plaintiffs would be entitled to the conveyance of the property upon payment of all sums owed to defendant. Plaintiffs remained in physical possession of the farm at all times. HELD: Though absolute on its face, the deed created only an equitable mortgage. Although there was no antecedent debt between plaintiffs and defendant prior to the transaction, the agreement clearly contemplated future advances by defendant, which would create a debtor-creditor relationship.

Peoples Bank & Trust Co. v. Lala, 392 N.W.2d 179 (Iowa App. 86)

Guarantee

Court holds that a guarantee with language providing that it will be "continuing, absolute, and unconditional . . . until written notice of its discontinuance" survived subsequent guarantees and a release of a co-guarantor.

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Peoples Bank & Trust Co. v. Lala, 392 N.W.2d 179 (Iowa App. 86)

Capacity

In mortgage foreclosure action, debtor claimed that he did not have sufficient mental capacity to execute mortgages while in a coronary care unit with symptoms of myocardial infarction. HELD: Because evidence showed that defendant carried on other business while in the hospital, expert testimony of mental impairment was insufficient to establish lack of capacity.

Peterson v. First National Bank of Iowa, 392 N.W.2d 158 (Iowa App. 86)

Consideration

Although a promise to pay an amount already owed is not consideration sufficient to support a new contract, payment of debts in advance of date due does constitute sufficient consideration to support a promise to loan other funds.

Kristerin Development Co v. Granson Investment, 394 N.W.2d 325 (Iowa 1986)

Consideration

In suit for breach of contract, it appeared that defendant-seller's agent did not collect the $100 earnest money obligated by the $600,000 contract for sale of real estate. Court distinguished "failure of consideration" from "lack of consideration" and held that the failure of such a small portion of the total consideration would not serve as a defense to a breach of contract claim.

Bridgman v. Curry, 398 N.W.2d 167 (Iowa 86)

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Third-Party Beneficiary

Plaintiff sold farm to defendant. The contract provided remedies of forfeiture and foreclosure in the event of default. Defendant entered into a "joint venture contract" with "assignee defendants." Joint venture contract provided that assignee defendants agreed to be bound by the terms of the original sale agreement. All defendants defaulted, and plaintiffs

commenced a foreclosure action. HELD: Plaintiff was entitled to sue assignee defendants as a third-party beneficiary of the joint venture contract. Defendant obviously intended that the assignee defendants would be obligated to share with defendant the burden of paying plaintiff. "They thereby intended that plaintiffs be benefited to that extent."

Bridgman v. Curry, 398 N.W.2d 167 (Iowa 86)

Modification

Plaintiff sold farm to defendant. The contract provided remedies of forfeiture and foreclosure in the event of default. Defendant entered into a "joint venture contract" with "assignee defendants." Joint venture contract provided that assignee defendants agreed to be bound by the terms of the original sale agreement. All defendants defaulted, and plaintiffs commenced a foreclosure action.

Before plaintiff commenced the foreclosure action, but after the defendants were in default and after plaintiff had, by its conduct, manifested its assent to the joint venture contract (plaintiff accepted a payment on an account listing all of the joint venturers), assignee defendants attempted to reconvey and therefore terminate their obligations to plaintiff.

HELD: Manifestation of acceptance is sufficient to bind assignee defendants.

Kanzmeier v. McCoppin, 398 N.W.2d 826 (Iowa 87)

Formation

Order buyer contacted defendant to see if defendant wanted to sell his cattle. After discussing prices of sale at local sale barn earlier that day, defendant said he would be willing to sell at $60.00 per hundred weight. Order buyer called plaintiff, who agreed to buy the cattle and pay the order buyer's commission. Order buyer called defendant and accepted his offer, and reached a delivery date with him. The next day, defendant learned that some cattle had been sold at the sale barn for $62.00 per hundred weight, and eventually refused to perform his agreement. He sold his cattle to another party for $62.00. HELD: Sufficient evidence adduced to establish agency relationship between plaintiff and order buyer. Claim of negligent

misrepresentation is not sufficient to make a contract voidable when the representation is not material.

Risken v. Clayman, 398 N.W.2d 833 (Iowa 87)

Remedies

Defendant sold property to plaintiff. Contract provided that plaintiff was responsible for providing insurance from date of possession to date of final settlement. Fire damaged the building at a time when plaintiff was in default. The parties could not agree on how to use the insurance company's payment on the fire loss. Defendant served plaintiff with notice of forfeiture, and plaintiff commenced an action to enjoin forfeiture and seek possession of the insurance proceeds. Defendant completed forfeiture proceedings by filing notice and affidavit. The court found there to be a substantial default and allowed the forfeiture to stand. Plaintiff filed a petition for declaratory judgment on the issue of the ownership of the insurance proceeds.

HELD: At the time of the fire, there was a contract balance of approximately $32,000.00. Following the fire, the property was worth $40,000.00. By forfeiting the contract, the trustees reclaimed a $40,000.00 piece of property in satisfaction of the $32,000.00 debt. The insurance proceeds are no longer necessary as security. An election to forfeit the contract converts the debt into property. The seller takes the property in satisfaction of the debt. COMMENT: The insurance clause of the original contract provided that the insurance would be payable to sellers and buyers as their interest may appear.

Gildea v. Kapenis, 402 N.W.2d 457 (Iowa App. 87)

Condition Precedent

A purchase offer containing a clause that subjected the contract to "buyer obtaining suitable financing interest rate no greater than 12-3/4%," is sufficiently definite and certain as to be enforceable. The term "suitable financing" means suitable in terms of Kapenis' ability to repay. Since terms other than percentage were not prescribed, there was no "meeting of the minds" with respect to finance. Since the apparent intent of this condition precedent was to benefit Kapenis, his inability to obtain "suitable financing" renders the contract invalid and non-enforceable.

First National Bank v. Heimke, 407 N.W.2d 344 (Iowa 87)

Mootness

Mortgagors applied for mediation under new farm mediation statute in mortgage foreclosure action. District court found statute inapplicable, and mortgagors sought leave to appeal from interlocutory order. Application was granted, and while appeal was pending, mediation session occurred. HELD: Assuming without deciding that case is moot, case clearly falls within public policy exception. Case involves issues certain to recur, and the record indicates that judges in different counties have reached differing results in this issue.

Franzen v. Deere & Co., 409 N.W.2d 672 (Iowa 87)

Costs

The court rules that an application for sanctions pursuant to Rule 80(a) for frivolous litigation must be filed while the underlying action is pending and before the court's authority to act on issues within that lawsuit expires. In this case, the application was filed after the supreme court affirmed entry of summary judgment. "We do urge counsel, or the court in its own motion, to request sanctions at the earliest time Rule 80(a) violations occur. The determination whether a party, or the party's lawyer, or both, have violated the rule is inextricably intwined with the determination of issues in the underlying action. Certainly the optimum time for considering and deciding whether to impose sanctions is a time soon after violations have occurred and not later than the entry of final judgment in the district court. Whenever practicable the judge who decides the merits of the underlying lawsuit should also decide whether to impose Rule 80(a) sanctions. Simultaneous determination of the merits of the underlying action and merits of the alleged Rule 80(a) violations would permit all such related issues to be resolved in a single appeal." COMMENT: Three justices found it "preferable to withhold the filing of claims for sanctions under Rule 80(a) until the primary litigation is finally concluded."

Birusingh v. Knox, 409 N.W.2d 189 (Iowa 87)

Landowners brought mandamus action to enforce court-ordered reduction in real estate tax assessment. HELD: Damages cannot be awarded against assessor or chairman of board of review in mandamus action.

Yeggy v. Iowa District Court, 397 N.W.2d 506 (Iowa 86)

Bond

Plaintiffs deposited cash bond with clerk in connection with an action on a promissory note and for attachment of certain property. HELD: Interest earned on cash bond is to be paid to the state.

Iowa City Human Rights Commission v. Roadway Express, Inc., 397 N.W.2d 508 (Iowa 86)

Subpoena

Exercise by municipality of subpoena power to enforce state civil rights act within its jurisdiction does not violate Iowa law.

Western International v. Kirkpatrick, 396 N.W.2d 359 (Iowa 86)

Jurisdiction

Statute allowing direct appeal to Iowa Supreme Court of industrial commissioner's decisions was unconstitutional expansion of original and/or appellate jurisdiction of Supreme Court.

South Ottumwa Savings Bank v Sedore, 394 N.W.2d 349 (Iowa 1986)

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Receiver

Court found no abuse of discretion in appointing a receiver for property subject to dispute over conduct of execution sale.

Vrban v. Levin, 392 N.W.2d 850 (Iowa App. 86)

Certiorari

Child affected by declaratory judgment obtained by father, to effect that child-support obligation terminated when child became self-supporting, could challenge declaratory judgment by a certiorari proceeding.

DAMAGES

Schuller v. Hy-Vee Food Stores, Inc., 407 N.W.2d 347 (Iowa App. 87)

Punitives

In slip-and-fall case, plaintiff adduced evidence that ashtray canister in aisle way of grocery store was in an inappropriate location, where customers who were looking at merchandise displays would trip and fall over it. HELD: While the jury could have concluded that defendant was negligent (it did not), the evidence did not establish "a persistent course of conduct with disregard for the consequences that could lead to a finding of recklessness." District court properly refused to instruct on punitives. COMMENT: Proper standard?

Barnhouse v. Hawkeye State Bank, 406 N.W.2d 181 (Iowa 1987)

Punitives

Bank loaned money to plaintiff for plaintiff's new auto parts and repair business, and reserved a security interest in the car parts and lease of the business premises. Business declined and additional loans were made. Business eventually found itself in serious financial trouble, and the loans were in default. Bank eventually sued and obtained judgments against plaintiff on the loans. With plaintiff on vacation out of the country, bank was told by the landlord that inventory was being removed from the business at night. The bank entered, and removed the parts and inventory.

Plaintiff sued bank for negligence, conversion, and trespass. Jury found for the bank on the conversion and trespass claims, but awarded Barnhouse $40,000 in compensatory damages on the negligence claim and $60,000 in punitive damages. The bank argued that a favorable verdict on conversion and trespass precluded a verdict for punitive damages.

The court looked at all evidence from the point of view of plaintiff and found sufficient evidence to support a finding that the decision to seize the parts in the manner in which it was accomplished was accompanied by actual or legal malice.

Landon v. Mapco, Inc., 405 N.W.2d 825 (Iowa 1987)

Punitives

Plaintiff entered into lease-purchase from defendant of a propane tank. Agreement required plaintiff to purchase the gas only from defendant. Agreement contained no provisions for the terms of such purchase, but ledger accounts maintained by defendant indicate that a finance charge was imposed on unpaid balances more than thirty days old. Plaintiff was frequently late in paying her account, and was eventually placed on a COD basis. In March 1984, plaintiff ran out of fuel and attempted to order more from defendant, who refused to deliver unless it was paid for in advance. A friend of plaintiff offered to personally guarantee payment and defendant delivered gas to plaintiff. No payment was made, and defendant sent plaintiff a 20-day notice of repossession of the tank. No payment was received, and defendant repossessed the tank and remaining fuel.

Plaintiff sued for violations of the Consumer Credit Code, breach of contract, and trespass. Jury entered verdict in favor of plaintiff on all counts, including punitive damages. HELD: Defendant's failure to challenge the findings on breach of contract and trespass, either factually or legally, prevent the court from reversing award for punitive damages. Evidence viewed in light most favorable to plaintiff establishes a breach of contract accompanied by an independent tort. COMMENT: Court expressly noted it was not deciding whether an award for punitives could arise from a verdict on just a claim of violation of the Consumer Credit Code.

COMMENT: The court found that the district court erred in refusing to permit plaintiff to offer deposition testimony from defendant's managing agent, which testimony related to

disposition, motive, and purpose for repossession. Although the excluded testimony would have had a bearing on punitive damages, "we may reverse only if the admission of the excluded testimony likely would have resulted in a higher amount . . . . We believe that such likelihood is sufficiently in doubt . . . that an otherwise proper final judgment should not be overturned." The punitive verdict was for $1,000.

Klooster v. North Iowa State Bank, 404 N.W.2d 564 (Iowa 1987)

Punitives

Bank loaned money to plaintiffs and held promissory notes secured by farmers swineherd. Farmers were in default in notes, and bank learned that farmers were selling some of their hogs. Bank was successful in recovering proceeds from some of the sales, but farmers were successful in prevailing upon some buyers not to include the bank as a joint payee. Bank then brought an action against the farmers on the notes, and obtained an ex parte order for attachment. A surety bond for an amount two and one-half times the value of the logs attached was posted. Although the order authorizing attachment provided, based on the bank's affidavit, that the hogs should be sold immediately because they were perishable, farmers had no notice at that time or even at the time of the sheriff taking possession that the hogs were to be sold. The sheriff obtained private bids and sold the hogs.

The court affirmed a verdict for punitive damages. A jury could have found that the bank, with knowledge that the farmers were considering bankruptcy, acted deliberately to circumvent the statutory procedures, that the bank was aware that the method employed would not produce the best available price, and that the bank drafted the order to provide for immediate payment of the proceeds rather than holding them in escrow.

Taylor Enterprise, Inc. v. Clarinda Production Credit Association, 403 N.W.2d 794 (Iowa 87)

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Punitives

Distinguishing AgriVest, 373 N.W.2d 479 (Iowa 85) ("the sole issue we addressed . . . was the extent of discovery to which a PCA will be subjected in state court. Any language in that opinion stating PCAs should be treated like state-chartered

banks was solely for the purposes of discovery and is not controlling on the issue in this case."), the court held that punitive damages cannot be awarded in a state-court action against a production credit association of federal intermediate credit bank.

Cornell v. Wunschel, 408 N.W.2d 369 (Iowa 1987)

Fraudulent Misrepresentation

Plaintiff entered into a lease-purchase agreement covering a motel with a lawyer's wife. Lawyer represented his wife throughout the negotiations and drafted all of the documents. Plaintiffs encountered financial difficulties shortly after taking over operation of the motel, and sued defendants for fraudulent misrepresentation. Defendant lawyer and his wife appeal from verdict for compensatory and punitive damages.

HELD: Where defrauded party returned the property obtained in reliance upon the fraudulent misrepresentation, courts should apply the out-of-pocket damages rule in lieu of the benefit-of-the-bargain rule. Also, plaintiffs suing for fraudulent misrepresentation in a "business fraud case" cannot recover for emotional or mental distress.

Cornell v. Wunschel, 408 N.W.2d 369 (Iowa 1987)

Emotional Distress

In what the court called a "business fraud case" it held that a plaintiff suing for fraudulent misrepresentation may not recover damages for mental or emotional distress.

Schuller v. Hy-Vee Food Stores, Inc., 407 N.W.2d 347 (Iowa App. 87)

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Additar

In slip-and-fall case, jury assessed 90% of the fault on plaintiff and 10% on defendant. Plaintiff argues that district court should have sustained his motion for judgment n.o.v. on the issue of damages, or, in the alternative, granted his motion for additur to increase the judgment from $2,500.00 to $440,000.00. HELD: Three medical professionals all testified

that there were no objective or physical bases for plaintiff's claims of disability, disfunction, or inability to work as a dentist. Plaintiff's expert's testimony as to the value of plaintiff's dental practice was rebutted by a local dentist who testified as to the adverse economic circumstances for dentists in Cedar Rapids.

Barnhouse v. Hawkeye State Bank, 406 N.W.2d 181 (Iowa 1987)

Measure

Bank loaned money to plaintiff for plaintiff's new auto parts and repair business, and reserved a security interest in the car parts and lease of the business premises. Business declined and additional loans were made. Business eventually found itself in serious financial trouble, and the loans were in default. Bank eventually sued and obtained judgments against plaintiff on the loans. With plaintiff on vacation out of the country, bank was told by the landlord that inventory was being removed from the business at night. The bank entered, and removed the parts and inventory.

Plaintiff sued bank for negligence, conversion, and trespass. At trial, the court instructed that the measure of damages to plaintiff's inventory is the difference in reasonable market value immediately before the taking and at present. The bank contended that "market" should be defined "as a distress market for goods seized by a creditor."

HELD: Same argument was rejected in Kerr v. Tysseling, 239 N.W. 233 (Iowa 1931).

Kanzmeier v. McCoppin, 398 N.W.2d 826 (Iowa 87)

Measure

Order buyer contacted defendant to see if defendant wanted to sell his cattle. After discussing prices of sale at local sale barn earlier that day, defendant said he would be willing to sell at $60.00 per hundred weight. Order buyer called plaintiff, who agreed to buy the cattle and pay the order buyer's commission. Order buyer called defendant and accepted his offer, and reached a delivery date with him. The next day, defendant learned that some cattle had been sold at the sale barn for $62.00 per hundred weight, and eventually refused to perform his

agreement. He sold his cattle to another party for $62.00. To cover, plaintiff purchased cattle on four occasions within 60 days after the breach, but these cattle weighed 135 lbs. less than defendant's cattle. HELD: Replacement cattle were not a reasonable substitute and did not qualify as "cover" under § 554.2712. Plaintiff had been looking for "big steers" to send to market in early April. Defendant's cattle were big steers that had been fed corn and would not require a break-in period. They were local cattle, out of one group, and would not be prone to sickness. The replacement cattle would be ready for market two months later than defendant's cattle. The measure of damages must be the difference between the contract price and the market price at the time that the plaintiff learned of the breach, plus incidental and consequential damages.

Barnhouse v. Hawkeye State Bank, 406 N.W.2d 181 (Iowa 1987)

Set-off

Bank loaned money to plaintiff for plaintiff's new auto parts and repair business, and reserved a security interest in the car parts and lease of the business premises. Business declined and additional loans were made. Business eventually found itself in serious financial trouble and the loans were in default. Bank eventually sued and obtained judgments against plaintiff on the loans. With plaintiff on vacation out of the country, bank was told by the landlord that inventory was being removed from the business at night. The bank entered, and removed the parts and inventory.

Plaintiff sued bank for negligence, conversion, and trespass. At trial, the bank sought to amend its pleading to conform to the proof adduced at trial with respect to its claim for set-off to the extent of the judgments already rendered against the plaintiff on the notes. The court denied the motion.

HELD: The bank's pleadings set out the judgments against plaintiff, who admitted these allegations. Several of the bank's affirmative defenses were premised on the concept that the judgments were valid, existing, and enforceable. Barnhouse testified that the bank had obtained the judgments and that he had allowed this to occur by default. Barnhouse's own petition sought to nullify the judgments in a count seeking declaratory judgment. The court abused its discretion in refusing to consider the bank's claim for set off.

COMMENT: The court acknowledges Rule 225, which provides for an exception to the general rule (made necessary by adoption of comparative negligence) that a claim and counterclaim shall not be set-off against each other. The court finds that the general rule has no application to the circumstances of this case.

Ellwood v. Mid States Commodities, Inc., 404 N.W.2d 174 (Iowa 87)

Loss of Credit

Commodities broker employee forged two checks of customer in an attempt to generate money to repair damage to customer's account done by employee's unauthorized trades. Neither check was accepted by the bank, so customer's account did not suffer. In action against employee for damages arising from forgery, plaintiff called no witness from bank to testify about the impact of these forgeries on his relationship with customer, and presented no evidence that he was unable to borrow funds or that he lost credit as a result of the forgery. HELD: Substantial evidence supported district court's finding that customer had not been damaged by forgeries.

DeBurkarte v. Louvar, 393 N.W.2d 131 (Iowa 1986)

Consortium

Patient sued defendant doctor for failing to diagnose cancer, thus reducing her chances of survival. Because plaintiff did not adduce sufficient evidence that the cancer had spread after the doctor's initial examination, recovery was allowed only for lost chance of survival. Defendant contends that under these circumstances, the spouse's claim for loss of consortium must be denied because there is no underlying personal injury. Because the record permitted the jury to find pain, suffering, and disability on which the claim for loss of consortium could be predicated, the court affirmed the consortium verdict.

DeBurkarte v. Louvar, 393 N.W.2d 131 (Iowa 1986)

Pain & Suffering

Patient sued defendant doctor for failing to diagnose cancer, thus reducing her chances of survival. Court affirmed

verdict for past and future pain and suffering, including mental anguish. Plaintiff knew that breast cancer had spread to her skeletal system, that it was incurable, and that she was terminal. She knew that there was a chance that earlier diagnosis and treatment could have saved her life. Absence of expert testimony on future pain and suffering is not fatal to that claim, when plaintiff adduced testimony that pain had been suffered up to the time of trial and the evidence was such that plaintiff was not fully recovered at that time.

DeBurkarte v. Louvar, 393 N.W.2d 131 (Iowa 1986)

Excessiveness

Patient sued defendant doctor for failing to diagnose cancer, thus reducing her chances of survival. Jury awarded $405,000.00 to the patient and $40,000.00 to her husband for loss of consortium. Six justices rejected defendant's claim that these damages were excessive without difficulty. In a special concurrence, three justices were concerned about the amount but found no basis in the record to reduce or overturn the awards.

Peterson v. First National Bank of Iowa, 392 N.W.2d 158 (Iowa App. 86)

Lost Profits

Farm tenants who sued bank for lost financing and resulting damage to farming operation proved only that they sought replacement financing from one other bank. HELD: "New business" rule is not applicable. Because plaintiffs consulted only other bank with whom they had dealt, plaintiffs' attempts to find alternative financing were adequate. It is reasonable to assume that no other lending institution would have loaned them the necessary funds.

DISCOVERY

Bratton v. Bond, 408 N.W.2d 39 (Iowa 1987)

Experts

In medical malpractice action against doctor for negligence in failing properly to diagnose and treat heart condition, doctor defended by stating he did diagnose the heart condition and treated it with medication in lieu of surgical procedures that the patient elected not to undergo. At trial, defendant successfully objected to questions posed to plaintiff's expert with respect to whether plaintiff's life expectancy and quality of life would have improved had the doctor utilized surgical procedures. Identification of expert in answers to interrogatories referred only to the defendant's failure to utilize enumerated test. During expert's deposition, expert said he would be willing to respond to any question posed regarding his expert opinions. Expert also testified that surgery "could have changed the course of events. I say could have. I don't know." When asked in deposition if it was true that he could not testify to a reasonable degree of certainty that had something else been done differently that the outcome would have been different for this patient, expert testified, "I can't testify to that, but I can testify that in my opinion the thinking process that was followed left something to be desired." HELD: Plaintiffs did not alert defendant to expert's opinion with respect to life expectancy and quality of life. District court did not abuse its discretion in refusing to permit expert's testimony on these issues. Court notes that two other experts presented opinions on the same matters.

In re D. L., 401 N.W.2d 201 (Iowa App. 1986)

Experts

Expert-witness interrogatory answer's failure to list nuclear magnetic resonance test results as one of the documents examined by the expert witness did not require exclusion of the expert's opinions at trial. Interrogatory answer had referred to x-ray and computerized tomographic results.

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Postma v. Sioux Center News, 393 N.W.2d 314 (Iowa 1986)

Sanctions

In suit by county attorney proceeding pro se against newspaper and other area attorneys for defamation, defendants filed requests for admissions. Plaintiff ignored them. Defendant filed a notice of deposition. Plaintiff failed to appear. Defendant's motion to compel was granted, and plaintiff was ordered to appear for his deposition at a date certain. Plaintiff refused to appear. Plaintiff did not attend the subsequent hearing on defendant's resulting motion for sanctions. HELD: District court did not abuse its discretion in dismissing plaintiff's suit.

Roosevelt Hotel Limited Partnership v Sweeney, 394 N.W.2d 353 (Iowa 1986)

Privilege

In personal injury action, defendants obtained a Court Order requiring plaintiff to execute a patient's waiver of all rights of confidentiality between doctor and patient and an authorization of defense counsel to communicate ex parte with health professionals on the subject of the personal-injury plaintiff's physical condition. Court reversed. There is no common-law testimonial privilege in Iowa. The privilege (and waiver) provided by Section 622.10 applies only to testimony in Court or by deposition and does not affect private conversation between defense counsel and the physician. Court refuses to hold that commencement of action waives the confidential nature of the physician-patient relationship. The Court also finds no basis in the rules to force personal-injury plaintiff to execute a waiver.

Hutchinson v. Smith Laboratories, 392 N.W.2d 139 (Iowa 86)

Privilege

Hospital claimed common-law privilege from disclosing peer-review committee documents in discovery. Case arose before effective date of legislation creating such a privilege, see § 147.35, Code of Iowa, amended by 1986 Iowa Acts ch. 1211, § 14. HELD: No common-law privilege. Claim of privilege based on public policy considerations is tested by four factors:

1. communications must originate in confidence of non-disclosure,

2. confidentiality must be essential to full and satisfactory maintenance of relationship between the parties,

3. relationship must be one which ought to be fostered,

4. injury in the relationship resulting from disclosure must be greater than the benefit gained for correct disposal of litigation.

Miller v. Continental Insurance Co., 392 N.W.2d 500 (Iowa 86)

Trial Preparation Materials

Plaintiffs in an underlying (and pending) action for injuries suffered in two-car accident sued an adjusting company for attempting to cause plaintiffs to lose their underlying tort claim to the statute of limitations by failing to return plaintiffs' phone calls at the 11th hour. The district court issued a protective order barring production of the adjusting file and prohibiting inquiry into the adjuster's mental processes until the adjusting company's motion for summary judgment could be adjudicated. HELD: Plaintiff is entitled to discover content of file and adjuster's mental processes to the extent that they relate to conduct alleged to be tortious. Court should continue to protect investigative material and adjuster's state of mind with respect to evaluation of case.

EVIDENCE

Schuller v. Hy-Vee Food Stores, Inc., 407 N.W.2d 347 (Iowa App. 87)

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Hearsay

In slip-and-fall case, plaintiff testified that an unknown individual helped him up immediately after his accident in the grocery store and said, "It was a stupid place for an ashtray." HELD: While this statement could have been offered as a

present sense impression or excited utterance, the declarant is unknown. The statement was properly excluded on the basis of rule 403, which excludes evidence whose prohibitive value is substantially outweighed by prejudicial effect.

Landon v. Mapco, Inc., 405 N.W.2d 825 (Iowa 1987)

Hearsay

In action by lessee-purchaser of propane gas tank and gas against seller-lessor for violations of the Consumer Credit Code, breach of contract, and trespass, plaintiff attempted to introduce deposition testimony by defendant's managing agent with respect to motive, disposition, and purpose of repossession. Agent had testified out of order earlier in trial and had been excused. District court sustained defendant's objection to deposition testimony because plaintiff had failed to inquire of the witness on this issue when he was testifying in person. HELD: Proffered deposition testimony of the managing agent qualifies as an admission under Rule 801(d)(2)(D), and should have been admitted without regard to the witness' availability.

Kunau v. Pillers, Pillers & Pillers, P.C., 404 N.W.2d 573 (Iowa App. 87)

Hearsay

Trial court accepted into evidence the deposition testimony of several persons on grounds that the facts stated provided a factual basis for an expert's opinion testimony. The Court of Appeals found that plaintiff's objection to this evidence was insufficient to preserve for review on appeal, but proceeded to criticize the admission of such testimony. The court notes that Rule 703 provides that the underlying factual basis for an opinion need not be previously admitted or even admissible independently of the opinion. Under Rule 705, the expert can testify without prior disclosure of the underlying facts. Therefore, the depositions are not required to be admitted in order for the expert to testify (and, apparently, should not be admitted).

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Fratzke v. Meyer, 398 N.W.2d 200 (Iowa App. 86)

Hearsay

Decedent on gravel road with stop sign attempted to cross state highway on bicycle, when he was struck and killed by motorist. Over objection, deputy sheriff testified as to statements made to him by decedent's companion at accident scene, which statements included what the two boys said to each other, including decedent's statement, "Hurry up, there is a car coming."

HELD: Two levels of hearsay. As to the conversation between the two boys, decedent's statement is offered not to show there was a car coming but, rather to show that the decedent knew the car was coming. As such, it is not hearsay. Even if it were hearsay, it is within the state-of-mind exception of Rule 803(1). The second level of conversation, between the companion and the deputy, is covered by the same 803(1) present sense impression. The conversation occurred within 15 to 20 minutes of the accident, at the scene.

State v Sowder, 394 N.W.2d 368 (Iowa 1986)

Hearsay

Prosecution witness testified that "boyfriend" told her that defendant had told him that defendant had committed the robbery. Prosecution offered this testimony to impeach the boyfriend's testimony that defendant had not spoken with him about the robbery. Court utilizes an "objective" test as to the "real" purpose for such offered testimony and finds the purpose to be to disclose the content of the conversation between the boyfriend and defendant, and reverses a criminal conviction.

Bratton v. Bond, 408 N.W.2d 39 (Iowa 1987)

Hearsay

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In medical malpractice case, district court sustained objections to plaintiff's efforts to introduce six-page letter written over last two days of the patient's life. HELD: The time lapse in the preparation of the letter supported the district court's conclusion that the letter was reflective rather than spontaneous, and the district court did not abuse its

discretion in excluding the evidence as not coming within the exception for statements of then existing mental, emotional, or physical condition. Because the letter quotes a specialist as predicting at least several years of life for patient, and contained patient's discussion of drug treatment and dietary changes that he felt would lengthen his life expectancy, the district court did not abuse its discretion in excluding the document as failing to come within the exception for statements under belief of impending death. The district court noted that the patient did not believe that imminent death was certain and had contacted an attorney about a lawsuit against defendant. Also, patient had died while in the process of reworking the document.

State v. Brown, 400 N.W.2d 74 (Iowa App. 86)

Hearsay

Testimony by police officer regarding statements made by sexual-abuse victim were admissible under 801(b)(1)(B) because defendant had asserted that victim's testimony was the subject of improper influence.

State v. Thompson, 397 N.W.2d 679 (Iowa 86)

Hearsay

In criminal prosecution for false use of financial instrument, defendant's "girlfriend" testified on direct examination by prosecution that she did not recall any discussion between her and defendant about using the stolen credit cards right away before their loss was reported. When shown a copy of her pre-trial deposition, she said it did not refresh her recollection regarding a statement by the defendant to that effect.

HELD: District court properly overruled hearsay objection to prosecutor's reading, as substantive evidence, from girlfriend's deposition testimony that defendant said they should use the cards quickly before their loss was reported. Rule 803(5) should be applied on a question-by-question basis. General recollection of events on the day of the crime is insufficient to prevent use of particular answer, the content of which currently escapes the witness' memory. The "freshness" requirement of Rule 803(5) is not satisfied simply by showing that recollection at the time of the recording was better than at

trial, but is satisfied by showing that the deposition was taken only 30-days following the crime. The "adopted by witness" language in the Rule is not satisfied by the witness' testimony that she attempted to testify truthfully at her deposition. The witness also must acknowledge the accuracy of the transcript.

Prosecution's failure to ask this final foundational question is not fatal to the conviction, because the transcript evidence is also admissible under Rule 801(d)(1)(A) as a prior inconsistent statement, which the Rules define as outside the definition of hearsay as opposed to being relegated to an exception of the hearsay rule.

Automobile Underwriters Corp. v. Harrelson, 409 N.W.2d 688 (Iowa 87)

Stipulation

Plaintiff settled with injured party and sued defendant for contribution and indemnity. Prior to trial, the parties stipulated to, among other things, the amount of the underlying settlement and its reasonableness. Plaintiff filed a motion in limine seeking to exclude the amount of the settlement from the jury, which motion was overruled. When defendant read that portion of the stipulation to the jury, plaintiff objected again.

Under either contribution or indemnity, a settling tort feasor must prove reasonableness of the underlying settlement. Plaintiff claimed that the amount was irrelevant as a result of the stipulation or, if relevant, was unduly prejudicial under Rule 403.

HELD: Without determining whether the evidence is relevant, plaintiff has failed to prove it was prejudiced by a disclosure of the settlement amount. The record reflects no effort by defendant to emphasize the amount of the settlement, and plaintiff's objection in the presence of the jury simply referred to the reasons asserted in the pre-trial motion in limine. Plaintiff never asked the court to be relieved of the stipulation.

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Montgomery Ward, Inc. v. Davis, 398 N.W.2d 869 (Iowa 87)

Presumptions

Plaintiff sued to collect on installment purchase agreement. Section 537.5110 provides that creditor must give consumer written notice of the default and, if appropriate, the right to cure. The court held that evidence as to how plaintiff's computerized process works was sufficient to support an inference that the notice was mailed.

Budget Premium Co v. Motor Ways, Inc., 400 N.W.2d 60 (Iowa App. 1986)

Presumptions

Evidence of an insurance premium financing company's business practice of notifying insurers of the financier's interest in the insurance policy and any refunds of unearned premiums was insufficient to raise a presumption of receipt of notice. Financier offered evidence of mailing a copy of the premium financing contract to the insurer, absence of any returned mail, and performance of this task of the same secretary for seven years without error. Court held that "plaintiff merely showed the general practice regarding plaintiff's notification procedure," not the office custom. Court also noted the six steps established by prior cases were not met:

1. Contents and execution of paper,
2. Enclosure in wrapper or other preparation for transmission through mails,
3. Correct address of addressee,
4. Proper addressing of wrapper,
5. Prepaid postage, and
6. Depositing in the mail.

Oberreuter v. Orion Industries, Inc., 398 N.W.2d 206 (Iowa App. 86)

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Safety Standards

In product liability case, court properly excluded evidence of CPSC standards enacted four years after manufacture of the product involved in accident.

Oberreuter v. Orion Industries, Inc., 398 N.W.2d 206 (Iowa App. 86)

Similar Accidents

Plaintiffs were injured when the CB radio antenna they were removing from their house came into contact with uninsulated power lines. Plaintiffs sued the Rural Electric Cooperative that installed the power lines on plaintiffs' property. Plaintiffs attempted to introduce evidence that the Cooperative knew of an accident prior to this one in which someone removing "some kind of antenna" was killed when the antenna came into contact with a live power line. HELD: District court did not abuse its discretion in concluding that the other accident was not sufficiently similar. Iowa cases on similar accidents involve accidents at same location. Further, plaintiffs did not show that other accident involved a CB antenna or an antenna manufactured by Orion. Plaintiffs also failed to show similar weather conditions, the same time of year, or same factual situation of removing an antenna.

DeBurkarte v. Louvar, 393 N.W.2d 131 (Iowa 1986)

Experts

Patient sued defendant doctor for failing to diagnose cancer, thus reducing her chances of survival. Defendant objected at trial to plaintiff's expert on grounds of lack of qualifications. HELD: an osteopath in general family practice in Philadelphia for 24 years, during which he had examined thousands of women for breast cancer, was sufficiently qualified such that the district court did not abuse its discretion in permitting him to testify. Expert was familiar with medical literature on breast cancer and survival statistics, had served on a mortality review committee, and had taught at an osteopathic college. In response to defendant's claim that the expert was unfamiliar with practice of medicine in Iowa, court noted that evidence was adduced that diagnosis of breast cancer does not vary from locale to locale.

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Blakely v. Bates, 394 N.W.2d 320 (Iowa 1986)

Character

Where defense counsel's trial strategy was to accuse personal-injury plaintiff of fabricating or at least grossly

exaggerating extent of injury, the District Court did not abuse its discretion in permitting plaintiff to adduce evidence of his character for truth and veracity. Although rule 608(a) permits evidence of truthful character "only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise," and although defense put on no "opinion or reputation evidence," the Court found that the defendant's opening statement, cross-examination of plaintiff, and direct examination of plaintiff's initial treating physician constituted an attack on plaintiff's character for truthfulness.

Van Iperen v. Van Bramer, 392 N.W.2d 480 (Iowa 86)

Criminal Record

Cross-examination of an expert in medical malpractice case as to the criminal record of an associate in the same consulting firm was improper on grounds of relevancy.

In re T.C.F., 400 N.W.2d 544 (Iowa 87)

Privilege

Physician-patient privilege provided by Section 622.10 is not applicable to involuntary hospitalization proceedings under Chapter 229.

State v. Richardson, 400 N.W.2d 70 (Iowa App. 86)

Other Crimes

Court of Appeals approved admission of evidence of other robberies by defendant under exceptions for proof of identity and proof of plan.

State v. Brown, 400 N.W.2d 74 (Iowa App. 86)

Witness - Competency

No abuse of discretion in holding that a 32-year-old afflicted with down's syndrome was competent to testify as to sexual abuse committed by her step-father.

State v. Kern, 392 N.W.2d 134 (Iowa 86)

Prior Acts

In prosecution of doctor for delivering narcotics to an undercover officer without a prescription (but for sexual favors), court permitted evidence of two years of such transactions with someone else. HELD: R. Evid. 404(b) permits evidence of prior acts to prove, among other things, intent. Because defendant claimed valid medical purpose, intent was in issue. Evidence of similar conduct is probative on intent in instant conduct.

FAMILY LAW

In re Guardianship of Murphy, 397 N.W.2d 686 (Iowa 86)

Guardianship

An order appointing a guardian is the result of ordinary proceedings, and is reviewed on errors of law, not de novo.

Dwyer v. Clerk of District Court, 404 N.W.2d 167 (Iowa 87)

Support Payments

Plaintiff made child support payments directly to former spouse, not through the Clerk's office. Although the Code requires such payments to be made to the Clerk, the court, 5-4, held it was error for the Clerk not to enter a satisfaction affidavit on the dissolution judgment docket, which affidavit was representative of the payments made directly to the former spouse.

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Serrano v. Hendricks, 400 N.W.2d 77 (Iowa App. 86)

Support

Divorce decree required husband to provide support for wife until she died, remarried, or reached 65, and required

husband to make wife primary beneficiary of life insurance policy. Husband died without having named wife as beneficiary and with support obligations still intact. HELD: Wife is not entitled to proceeds of insurance policy. Instead, policy is deemed to be security for continuing support obligation. On the other hand, decedent's failure to make wife the beneficiary does not deprive the court of jurisdiction to order that monthly support obligation be paid from proceeds of insurance policy.

In re Marriage of Luebbert, 400 N.W.2d 80 (Iowa App. 86)

Support

Court reversed award of alimony due to brief duration of marriage, but affirmed requirement that husband pay health insurance premiums because wife had forfeited comparable health benefits to get married.

In re Marriage of Wiedemann, 402 N.W.2d 744 (Iowa 87)

Dissolution

Property division that gave husband stock in closely held corporations and cash to the wife was inequitable because the trial court failed to account for the risk assumed by the husband in accepting the stock.

In re Marriage of Rohlfsen, 398 N.W.2d 197 (Iowa App. 86)

Dissolution

Decree ordering father to provide for children's college education is premature, when oldest child is 9. Decree is modified to provide support until each child reaches 18, marries, or otherwise becomes self-supporting, but in any event until completion of high school education. Modification in the event of child's election to obtain additional education is always available to either party.

In re Marriage of Jensen, 396 N.W.2d 367 (Iowa App. 86)

Dissolution

In an effort to equalize the parties' retirement benefits, the parties had stipulated that Steven would transfer $20,000.00 of his $58,000.00 retirement plan to Mary's existing plan worth $18,000.00. Trial court proceeded, however, to require Steven to pay Mary $25.00 per week as alimony to account for her obligation to put $250.00 per month into her retirement plan and the absence of any such obligation on Steven. The court of appeals agreed with the district court's aim, but found "that lump sum payments of retirement supplements better serve our purpose in equalizing spousal expectancies," and required Steven to transfer an additional $5,000.00 from his retirement account to Mary's account as a present value of the periodic payments, which the court terminated.

In re Marriage of Voss, 396 N.W.2d 801 (Iowa App. 86)

Dissolution

For purposes of dividing property between divorcing spouses, value of retirement plan as of date of dissolution is the only relevant figure that should be considered, not the value of the plan at some date in the future when this spouse retires.

In re Marriage of Schroeder, 393 N.W.2d 808 (Iowa 1986)

Dissolution

Husband's answer to dissolution petition denied the allegation that appointment of a conciliator would not preserve the marriage and stated that he believed conciliation would preserve the marriage. The answer's prayer requested the court to continue the action until conciliation has been experienced. The court did not act on the request, although the parties undertook conciliation on their own. Husband then resisted the trial certificate and asked for appointment of conciliation. The trial court overruled the request.

In appeal from a decree of dissolution after trial, the court reversed and remanded with directions for the district court to order conciliation. The court noted that the conciliation requirement "is not universally popular," and that the

parties have now been separated for 18 months. The court invited anyone who is refused a request for conciliation to file an application for interlocutory appeal and to couple it with a request for summary reversal. Lastly, the court notes that on remand, if conciliation is unsuccessful, the original decree of dissolution shall stand affirmed. COMMENT: Any predictions as to what will happen?

In re Marriage of Meredith, 394 N.W.2d 336 (Iowa 1986)

Dissolution

Wife is held to be entitled to discover information about discretionary spend-thrift trust in which husband has a beneficial interest.

In re Marriage of Kern, 408 N.W.2d 387 (Iowa App. 1987)

Dissolution

Doctor sought modification of support provisions of dissolution decree on grounds that his criminal conviction and subsequent five-year suspension of license to practice medicine constituted sufficient changes in circumstances to justify a decrease or a total elimination of support obligations. HELD: Petitioner's current inability to pay support is self-inflicted and does not support modification, especially where petitioner possesses valuable assets to satisfy the court obligation.

In re Marriage of Marshall, 394 N.W.2d 392 (Iowa 1986)

Dissolution

Court has jurisdiction of application for modification to reinstate spousal support payments after obligation to make payments has ceased by terms of original decree.

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Gremillion v. Erenberg, 402 N.W.2d 410 (Iowa 87)

Paternity

Natural mother and her husband divorced shortly after birth of child that is the subject of this paternity action. The

dissolution stipulation referred to the child as the husband's and wife's minor child and provided that the husband would provide medical insurance for the parties' several children (but no child support). Evidence in the paternity proceeding established that the mother was aware of the strong possibility that defendant was the child's father. HELD: Section 675.30, which provides that an agreement or compromise between the mother and the father shall be binding only when proved or secured by performance, was not met by the dissolution decree, and does not bar the paternity suit against defendant.

In re K.J.K, 396 N.W.2d 370 (Iowa App. 86)

Termination of Parental Rights

After father's paternity was established, father released custody of the child to the natural mother (he was married to someone else) and filed a petition for termination of his own parental rights. Guardian ad litem objected. HELD: Natural mother's support of termination, lack of relationship between father and child, effects of tension between the natural parents, natural mother's opposition to visitation rights, and the possibility of an adoptive father do not suffice to permit termination of the father's parental rights and obligations. Father makes $40,000.00 a year, and mother is a college freshman.

In re Marriage of Bolson, 394 N.W.2d 361 (Iowa 1986)

Termination of Parental Rights

Grandparents petitioned for modification and visitation filed in a dissolution proceeding two months after issuance of decree and one month after mother and children moved to California was within Court's jurisdiction under Chapter 598 and the Uniform Child Custody Jurisdiction Act, Chapter 598A. Because the mother's petition for termination of the father's parental rights, based on a consent filed by him as part of the divorce settlement and then revoked, is still pending, the grandparent's petition must be stayed pending a decision in the termination procedure.

In re E.J.R., 400 N.W.2d 531 (Iowa 87)

Termination of Parental Rights

Statutory exceptions to hearsay rule for documentary evidence is applicable to termination proceeding regardless of whether or not there has been a prior CHINA adjudication.

In re Marriage of Bolson, 394 N.W.2d 361 (Iowa 1986)

Visitation

Grandparents petitioned for modification and visitation filed in a dissolution proceeding two months after issuance of decree and one month after mother and children moved to California was within Court's jurisdiction under Chapter 598 and the Uniform Child Custody Jurisdiction Act, Chapter 598A. Because the mother's petition for termination of the father's parental rights, based on a consent filed by him as part of the divorce settlement and then revoked, is still pending, the grandparent's petition must be stayed pending a decision in the termination procedure.

Vrban v. Levin, 392 N.W.2d 850 (Iowa App. 86)

Modification

Where mother's application for modification resulted in litigating the issue as to whether a particular child had become self-supporting, a subsequent application by the father for declaratory relief, in which he sought relief from child support for the same child on grounds that the child had become self-supporting, was barred by issue preclusion. Court also noted that a declaratory judgment action is no substitute for an application for modification of dissolution decree.

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GOVERNMENTAL ENTITIES

Miller v Boone County Hospital, 394 N.W.2d 776 (Iowa 1986)

Claim Notice

6-month statute of limitations for claims against political subdivisions in absence of a written claim within 60 days violates equal protection.

Hyde v. Buckalew, 393 N.W.2d 800 (Iowa 1986)

Venue

The court first holds that §25A.4, which provides where an action against a state can be commenced, is not jurisdictional but instead relates to venue. As a result, the state waived its objection to venue to challenging venue by first answering a cross-petition for indemnity/contribution.

Nordbrock v. State, 395 N.W.2d 872 (Iowa 86)

Immunity

Bank shareholders sued the State, the State Banking Board, Superintendent of Banking, and the Iowa Department of Banking for negligence in carrying out their responsibilities to properly examine, supervise, and regulate the bank. HELD: Conduct of bank examiners was in the nature of a policy decision, and arose out of regulatory activities. It falls within the discretionary function exception to liability in Ch. 25A.

INDEMNITY

Automobile Underwriters Corp. v. Harrelson, 409 N.W.2d 688 (Iowa 87)

Plaintiff settled with injured party and sued defendant for contribution and indemnity. Prior to trial, the parties

stipulated to, among other things, the amount of the underlying settlement and its reasonableness. Plaintiff filed a motion in limine seeking to exclude the amount of the settlement from the jury, which motion was overruled. When defendant read that portion of the stipulation to the jury, plaintiff objected again.

Under either contribution or indemnity, a settling tort feasor must prove reasonableness of the underlying settlement. Plaintiff claimed that the amount was irrelevant as a result of the stipulation or, if relevant, was unduly prejudicial under Rule 403.

HELD: Without determining whether the evidence is relevant, plaintiff has failed to prove it was prejudiced by a disclosure of the settlement amount. The record reflects no effort by defendant to emphasize the amount of the settlement, and plaintiff's objection in the presence of the jury simply referred to the reasons asserted in the pre-trial motion in limine. Plaintiff never asked the court to be relieved of the stipulation.

Automobile Underwriters Corp. v. Harrelson, 409 N.W.2d 688 (Iowa 87)

Comparative Fault

Plaintiff settled with injured party and sued defendant for contribution and indemnity. At trial, district court directed a verdict on plaintiff's indemnity count based on active/passive negligent theory. The jury returned a verdict on plaintiff's claim of contribution by finding that defendant was not negligent. On appeal, plaintiff asserts that the directed verdict was error, because plaintiff's negligence was passive and defendant's negligence was active.

The court held that the finding of no negligence on the contribution claim forces the conclusion that defendant would not have been negligent for purposes of the indemnification claim either. The court takes the opportunity, however, to suggest, with the benefit of voluminous citations, "that the active/passive negligence theory of indemnification does not survive in a comparative fault tort system."

Woodruff Construction Co. v. Barrick Roofers, Inc., 406 N.W.2d 783 (Iowa 1987)

Defendant's employee was injured on a construction site at which plaintiff was general contractor and defendant was sub-contractor to plaintiff. Plaintiff settled with employee and sued defendant and another of defendant's employees for indemnity and/or contribution. At trial, jury found that the co-employee was grossly negligent, and that plaintiff was negligent. The jury assessed 60% of the negligence to plaintiff and 40% to co-employee.

The court affirmed the denial of plaintiff's claim against defendant for indemnity. The sub-contract contains no express clause of indemnity, and plaintiff did not adduce evidence that the parties actually intended to provide for indemnity. The question is whether the law, for policy or other reasons, should impose such a duty, regardless of the circumstances, including plaintiff's own negligence. At least "where the proposed indemnitee aided in the creation of the hazard, the law should not imply a right to indemnity from the employer." Professor Larson's suggestion "that a duty to indemnify might be implied where a proposed indemnitee has merely failed to discover a hazard, as opposed to causing one," is not applicable to these facts. To the extent that Blackford v. Sioux City Dressed Pork, Inc., 254 Iowa 845, 118 N.W.2d 559 (1962), supports an implied agreement to indemnify in all "service contracts," without regard to the fault of the proposed indemnity, it is overruled.

INSURANCE

Bruns v. Hartford Accident & Indemnity Company, 407 N.W.2d 576 (Iowa 1987)

Notice of Accident

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Insured was involved in a motor vehicle accident, and successfully left the scene without detection and concealed his identity for 28 months. The insured then sued his insurers for refusing to defend. Person injured by the insured's conduct

(intervenor) intervened and sought to claim coverage on an estoppel theory.

HELD: Insured clearly failed to comply with his duties under the policy. Iowa law provides that insured must prove a lack of prejudice. Delay of 28 months deprived insurers of immediate descriptions of scene, opportunity to photograph it, opportunity to inspect the vehicles, opportunity to make inquiry into what parties had done up to the time of the accident, and opportunity to investigate adequately plaintiff's injuries and damages. Insurers were not able to rely on police investigation, since its focus was on identification of driver rather than analysis of comparative fault or determination of injuries. Police report identifies two persons at the scene but there is no indication in the record that they were interviewed.

Intervenor cannot establish estoppel, because she did not rely in any way on the insurers. Intervenor's claim that insurers should provide coverage because they sold policy to insured, who had a poor driving record, is without merit.

Craig v. IMT Insurance Co., 407 N.W.2d 584 (Iowa 1987)

Insured

Uninsured motorist struck a pregnant Joan Craig, causing injury to her and death to the fetus, which was viable at the time of the accident. The Craigs had 25/50 uninsured motorist coverage with IMT. IMT paid $25,000 for Joan Craig's injuries but denied the Craigs' claim for loss of consortium of the unborn child. Craigs sued, bringing a single claim for coverage based on Rule 8. They allege no wrongful death claim.

Following Lepic v. Iowa Mutual Insurance Company, 402 N.W.2d 758 (Iowa 1987), majority of the court (6-3) held that the Craigs were entitled to recover from the uninsured motorist for loss of consortium of the unborn child. The policy does not define "person" for purposes of determining who is a "covered person". Although an unborn child is not a person for purposes of a wrongful death action, Iowa law already provides that parents may claim loss of consortium of an unborn child. Dunn v. Rose Way, Inc., 333 N.W.2d 830 (Iowa 1983). Because the Craigs were legally entitled to recover damages for loss of consortium of the unborn child, "they had good reason to believe the term 'person' in their policy would encompass . . . their unborn child."

COMMENT: One might wonder why Lepic was so helpful. The essence taken from Lepic by the majority in this case is that loss of consortium is a personal injury to a parent but does not constitute "a bodily injury" to the parent. Accordingly, IMT's payment of $25,000 to Joan Craig for her bodily injuries did not include compensation for the loss of consortium.

Cairns v. Grinnell Mutual Reinsurance Corp., 398 N.W.2d 821 (Iowa 87)

Coverage

Plaintiffs had a farm liability policy from Grinnell and a motor vehicle insurance policy issued by Farmland. Mrs. Cairns was operating her vehicle, covered by the Farmland policy, when she was involved in an accident that resulted in the death of the occupant of another vehicle. The decedent's estate sued Mr. and Mrs. Cairns. Counts against Mr. Cairns alleged that she was his employee acting within the scope of her employment, or was engaged in a joint venture with him, at the time of the collision. Mr. Cairns tendered defense to Grinnell, who declined. Mr. Cairns contributed to the settlement of the underlying wrongful-death case, and sued Grinnell.

Relevant exclusion in the Grinnell's policy provides an exclusion for use of "automobiles . . . while away from the premises, except under Coverage A with respect to automobiles not owned by, rented or leased to an insured but used in connection with operations by independent contractors for non-farming or non-business purposes of an insured, or operated by a farm employee of the insured while engaged in the employment of the insured . . . ." Court holds that exclusion applies equally to use of owned automobiles in connection with operations by independent contractors and use of owned automobiles by farm employees. Both exceptions apply only when the automobile "is not owned by, rented or leased to an insured." Allegation that Mrs. Cairns was an employee is irrelevant, because Grinnell had excluded coverage for a collision involved in own vehicle away from the premises, regardless of the status of the driver.

Court also held that plaintiffs had adduced no evidence to support a claim of reasonable expectations that the farm policy covered automobiles in accidents not involving farm employees doing farm work.

Wohlenhaus v. Pottawattamie Mutual Insurance Association, 407 N.W.2d 572 (Iowa 1987)

Coverage

Plaintiff purchased wind-damage coverage for a particular prefabricated building that he was erecting on his farm. After erection, tornado destroyed building. Building was still under warranty and was replaced free of charge by manufacturer. Insurer denied plaintiff's claim for loss and relied on policy provision that made insurance excess as to warranty recovery.

Plaintiff sued for policy coverage. On its own, district court bifurcated "declaratory judgment portion" of case and, over plaintiff's objections and despite a jury demand, proceeded to adjudicate those issues in a "mini-trial" to the court. The court ruled that interpretation of the policy presented only an issue of law, that plaintiff was not entitled to reformation of policy, and that warranty clause in policy precluded coverage.

On appeal, the court rejects the procedures utilized by the district court. Plaintiff's jury demand was applicable to all claims except the request for reformation of the policy. Plaintiff did not present the case as strictly a matter of interpretation of the meaning of words in a written contract. Plaintiff's grounded his claim in part on the understanding of the parties within the context of the transaction. The policy was amended to provide wind coverage for this particular building only. The additional coverage resulted in an additional premium. "We believe a jury might reasonably conclude that a county mutual insurance company . . . would be aware that this new [building] . . . was under a manufacturer's warranty. If so, defendant purported to sell wind damage coverage . . . with knowledge that the building being insured was of a type to which its policy did not extend if the disputed clauses given the meaning advocated by the defendant." Court also notes that its decision "appears to be sustainable under the principles of reasonable expectation."

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North Star Mutual Insurance Co. v. Holty, 402 N.W.2d 452 (Iowa 87)

Holty had renovated his 5-ton truck in 1967 to permit it to haul fertilizer and shelled corn. An auger was permanently affixed to the truck to assist in unloading. The truck had been used to haul corn into town in the past, but had been used in recent years only around and between Holty's farms. Through

1982, Holty had licensed the truck and had purchased automobile liability insurance for it. In 1983, he did not farm his rental land, and the registration and insurance lapsed. In 1984, Holty was farming his rental land and was driving the truck when the auger came loose and caused another motorist injuries. Holty demanded a defense from his farm liability insurer, who filed this action for declaratory judgment.

HELD: Allegations by the plaintiffs in the underlying tort suit with respect to Holty's "failure to keep his vehicle free from protrusion" relate to maintenance of a truck, liability for which is expressly excluded in the farm liability policy. The policy's definition of motor vehicle includes machinery or apparatus attached to it. Separate argument that the truck is farm equipment as opposed to a motor vehicle is disposed of by Sandbulte, 302 N.W.2d 104 (Iowa 81).

Lepic v. Iowa Mutual Insurance Co., 402 N.W.2d 758 (Iowa 87)

Consortium vs. Limits

Insurance policy provided a limit of liability "for all damages for bodily injuries sustained by any one person in any one accident," and another limit of liability "for all damages for bodily injury resulting from any one accident, . . . regardless of the number of claims made." An injured minor sought to recover for bodily injuries, and her parents sought to recover for medical expenses and loss of consortium. HELD: Plaintiffs have not shown the necessary ingredients for an examination of reasonable expectations pursuant to C & J Fertilizer. The policy language expressly applies the initial policy limit to all damages that arise out of the injury to a single person, including the damages suffered by a parent for loss of consortium due to the injury of a child. Loss of consortium is not a "bodily injury" for purposes of the insurance coverage language.

Ludwig v. Farm Bureau Mutual Insurance Co., 393 N.W.2d 143 (Iowa 1986)

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Subrogation

Plaintiff was insured by Farm Bureau in a policy containing a medical payments clause and a subrogation clause. Plaintiff and two relatives were injured in plaintiff's car in an accident. Farm Bureau paid the medical expenses and served

notice of subrogation rights on the other vehicle's insurance company. Plaintiff's suit against the other vehicle's owner resulted in a settlement in excess of the medical expenses. One of the other vehicle's insurer issued a check payable to plaintiff and Farm Bureau for an amount equal to the subrogation claim. Plaintiff sued Farm Bureau, alleging that Farm Bureau should not be compensated in full because she and her relatives had not been paid in full either.

HELD: Insured need not be compensated in full before subrogee is allowed to recover its interest entirely. Farm Bureau did not agree to insure plaintiff for pain and suffering or disability. Denial of Farm Bureau's claim for medical expenses because plaintiff has not been fully compensated (because of a compromise settlement) on her claims for pain and suffering and disability would have the affect of making Farm Bureau an insurer against these losses as well, against its will and without the benefit of premiums from plaintiff.

Vennerberg Farms, Inc. v. IGF Insurance Co., 405 N.W.2d 810 (Iowa 87)

Surety

Plaintiff held deferred-payment contracts with grain dealer. Commerce Commission commenced proceedings against dealer for violations of licensing requirements. After evidentiary hearing, hearing examiner issued a ruling titled "Proposed Order Revoking License." Order revoked dealer's license and provided that order would "become the final order of the commission unless appealed . . . within twenty days." Dealer appealed and sought stay order. Stay was denied, and commerce commission ultimately issued an order affirming the proposed decision.

The commission then published a notice providing that claims against the dealer must be received by the commission, and the surety within 120 days of its last order. Plaintiff's written claim was received within 120 days of the last order, but the surety claimed that the 120 days began to run earlier.

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HELD: Although the statute provides for commencement of the 120-day limitation period upon revocation, not upon expiration of the time for appeal or upon affirmance of the hearing examiner's proposed order, the facts of this case establish that revocation occurred when the commission affirmed the proposed decision.

Farmers & Merchants Savings Bank v. Farm Bureau Mutual Insurance Co., 405 N.W.2d 834 (Iowa 1987)

Mortgage Loss Payable Clause

Shearer sold farm on contract. Contract provided that buyer had to keep insurance against loss by fire on all buildings, with insurance payable to sellers and buyers as their interests may appear. After fire, buyer and Shearer made claims on insurance policy issued by Farm Bureau. Farm Bureau's policy contained a loss payable clause that provided that the "insurance as to the interest of the mortgagee . . . shall not be invalidated by . . . any foreclosure or other proceedings . . . nor by any change in the title or ownership of the property."

During Farm Bureau's investigation of the claims, Shearer notified Farm Bureau that he was contemplating forfeiture, because buyers had missed their yearly payment. Farm Bureau warned Shearer and his counsel that forfeiture might affect Shearer's insurance claim. Shearer proceeded to serve notice of forfeiture and completed the proceedings. Shearer subsequently resold the farm on contract to plaintiff for the amount owed by the original buyer at the time of forfeiture. Shearer assigned his interest in the fire loss to plaintiff. Farm Bureau refused to pay the claim, asserting that the forfeiture destroyed Shearer's insurable interest and Farm Bureau's subrogation rights.

The court described the two types of mortgage loss payable clauses available in insurance policies, and concluded that the clause in Farm Bureau's policy is the "New York, standard, or union form." The "standard" clause creates a new agreement between the mortgagee and the insurer such that the interest of the mortgagee is not subject to any defenses against the mortgagor, and that the mortgagee's interest and rights are fixed at the time of the loss. On the date of the fire, Shearer had an insurable interest measured by the unpaid purchase price. Forfeiture of the contract, followed by partial or full satisfaction of the debt giving rise to the insurance interest, reduced Shearer's interest in the insurance proceeds to the extent that the debt has been satisfied. When Shearer took back the property in satisfaction of the outstanding contract debt, the debt was extinguished. Because his interest in insurance proceeds is measured by the unpaid purchase price, his insurable interest was destroyed by the satisfaction of the contract debt, and he lost all rights under the policy.

Q

Lowery Investments Corp. v. Stephens Industries, Inc., 395 N.W.2d 850 (Iowa 86)

Preclusion

Defendant sold real estate to plaintiff on installment sales contract. Plaintiff failed to make certain installment payments, and eventually, after a series of notices of forfeiture, completed forfeiture by recording one of the notices and appropriate affidavits. Plaintiff brought an action in equity to set aside the forfeiture. At about the same time, defendant filed an action for forceable entry and detainer. In this latter action, the parties entered a stipulation into the record that permitted plaintiff to continue in possession, to make certain payments that would be kept by defendant either as rent or as payments toward the contract, and to be bound by the results of the plaintiff's action for relief from the forfeiture. The stipulation provided that upon plaintiff's failure to make the payments outlined in the stipulation, defendant was entitled to a writ of possession. Plaintiff failed to make the payments required by the stipulation, and judgment in the forceable entry and detainer action was entered.

HELD: The judgment in the forceable entry and detainer action and the doctrine of claim preclusion bars plaintiff from relitigating the validity of the forfeiture, because the seller's asserted right of possession in its forceable entry and detainer action was dependent upon the validity of the forfeiture.

Kraft v. El View Construction, Inc., 394 N.W.2d 365 (Iowa 1986)

Preclusion

Defendant in personal injury suit cross-petitioned against plaintiff's union, alleging that union was negligent in permitting plaintiff to work on this particular construction project. Union did not appear generally or specially, and defendant obtained a default judgment. Union filed a motion to set aside the default judgment nine months later, and disputed jurisdiction. The District Court found the motion to be untimely and found that the substance of motion constituted a collateral attack on an otherwise valid judgment. Two years later, union sued defendant for wrongful execution. HELD: Issue preclusion bars union from litigating jurisdictional issues created by the

defendant's cross-petition against the union, because of the ruling on the untimely motion to set aside the default judgment.

Bascom v. Joseph Schlitz Brewing Co., 395 N.W.2d 879 (Iowa 86)

Preclusion

Plaintiffs sued two breweries for injuries suffered while loading kegs of beer. Breweries specially appeared. District court sustained the special appearances and found insufficient minimum contacts with Iowa to assert jurisdiction over either brewery. Instead of appealing that decision, plaintiffs filed a second suit against the breweries, with identical allegations plus additional allegations that the breweries are nation-wide manufacturers of beer and have numerous contacts within Iowa through shipment of their products and advertising of same, and that the empty kegs that fell on plaintiff were "emptied" in Iowa. HELD: Although plaintiffs assert additional factual allegations or even evidence, the issue of sufficient minimum contacts has been litigated. The second suit's effort to relitigate jurisdiction is barred by the doctrine of issue preclusion.

Buckingham v. Federal Land Bank, 398 N.W.2d 873 (Iowa 87)

Preclusion

Harriot Buckingham entered into an agreement with Clinton Buckingham to leave certain property to him in her Will, on the promise by Clinton to pay the first mortgage presently due Federal Land Bank on that property. Harriot subsequently increased the mortgage amount with Clinton's consent, but then increased it again without his consent. Upon her death, Clinton filed a claim in the estate for an amount equal to the additional debt and interest incurred for this property. The executor denied Clinton's claim and the matter proceeded to trial. The jury found for the estate. Clinton appealed, but while the appeal was pending, the parties (including Clinton's wife, Norma) entered into a settlement agreement. Shortly thereafter, Clinton and Norma sued Federal Land Bank in an effort to determine the legal effect of the original agreement between Harriot and Clinton and the effect of the subsequent increases and indebtedness. HELD: Plaintiffs' suit against Federal Land Bank is barred by the doctrine of issue preclusion. Norma's lack of involvement in the estate proceeding is of no consequence, since

her only claim against Federal Land Bank must arise through her status as spouse. She also was actively involved in the underlying case, as indicated by her participation in the settlement agreement. The fact that case was settled before appeal was adjudicated does not bar defensive use of issue preclusion. The final judgment on the merits of the issues was entered by the district court.

Risken v. Clayman, 398 N.W.2d 833 (Iowa 87)

Preclusion

Defendant sold property to plaintiff. Contract provided that plaintiff was responsible for providing insurance from date of possession to date of final settlement. Fire damaged the building at a time when plaintiff was in default. The parties could not agree on how to use the insurance company's payment on the fire loss. Defendant served plaintiff with notice of forfeiture, and plaintiff commenced an action to enjoin forfeiture and seek possession of the insurance proceeds. Defendant completed forfeiture proceedings by filing notice and affidavit. The court found there to be a substantial default and allowed the forfeiture to stand. Plaintiff filed a petition for declaratory judgment on the issue of the ownership of the insurance proceeds. The parties stipulated that the district court in plaintiff's first suit "declined to apply the insurance proceeds toward the delinquent contract obligations . . . for the reason that such a disposition of the insurance proceeds would not be in accord with the contract."

HELD: The issue in the first action was whether the insurance proceeds could be used to hear the default. The issue in this case is which party owns the insurance proceeds now that the contract has been forfeited. Judgment in first case does not bar litigation of this issue in second case on doctrines of claim or issue preclusion.

Q

World Teacher Seminar, Inc. v. Iowa District Court, 406 N.W.2d 173 (Iowa 1987)

Plaintiff sued Maharishi International University and others affiliated with the transcendental meditation movement for interfering with plaintiff's teaching practices. After extensive litigation but no trial, the parties entered into an agreement to resolve the matter by submitting four questions to the Mahareshi

Mahesh Yogi regarding plaintiff's activities and to submit his answers to the court for review and/or interpretation. Depending on the Maharishi's answers, one or the other of the parties would be entitled to a form of consent decree. The court listened to the tape recording of the Maharishi's answers, and determined that the answers favored the Maharishi International University. As a result, the parties submitted the consent decree favoring the University to the court, and the court signed the decree. The decree was filed with the clerk and shown on the docket, but was then withdrawn with the parties' and court's approval from the court file and not formally entered in the record book. The stipulation of the parties provided that the decree could be returned to the court file and entered formally of record if necessary to seek its enforcement.

The University soon felt a need to enforce a portion of the decree, filed it of record, and initiated contempt proceedings. Plaintiff sought to deny the decree on grounds that it was void as being against public policy. Plaintiff also argued that the decree was not in force and in effect during the period of time that plaintiff allegedly violated its provisions because it had not yet been entered of record in the clerk's office.

In two separate opinions, a total of five justices found that the procedure, while unusual, did not result in a judgment that was void as against public policy. All justices criticized the court's role in interpreting and/or determining the results of the Maharishi's answers to the four questions. All justices also were critical of the withholding of the decree from the public record, but only four justices would have invalidated the decree for that reason.

Brenton State Bank v. Tiffany, 400 N.W.2d 576 (Iowa 87)

Bank obtained a judgment of foreclosure against mortgaged property and then sought possession of secured property in an action for replevin. In response to defendants' claim of merger, bank obtained an order vacating the judgment of foreclosure as void for mistake of law. Bank did not follow procedures of either Rule 179(b) or Rule 252. HELD: District court cannot undue a final judgment absent compliance with Rule 179(b) or Rule 252.

Q

Duggan v. Hallmark Pool Manufacturing Co., 398 N.W.2d 175 (Iowa 86)

Interest

Diving accident in pool at Highlander Inn resulted in suit against pool designer manufacturer (Hallmark), its contractor, pool consultant, and the Highlander. All defendants except Hallmark settled with plaintiffs by a payment of $1,050,000.00. At trial, jury awarded Michael Duggan $1,250,000.00 and Ann Duggan $250,000.00. Jury placed 20% of fault on Michael Duggan, 50% on Hallmark, and the remainder on the settling defendants. Case was filed before July 1, 1984, but tried thereafter.

The district court entered judgment in favor of Mike for $700,000.00 plus pre-judgment interest on the entire 1.5 million dollar judgment.

HELD: The district court erred in awarding pre-judgment interest on the entire verdict. Because § 535.3 allows interest on "judgments," not verdicts, interest is awarded only on the net judgment.

South Ottumwa Savings Bank v Sedore, 394 N.W.2d 349 (Iowa 1986)

Execution

The defendants moved to set aside execution sale after sale and issuance of sheriff's deed and service of writ of possession. Notice of sale served on defendants inadvertently omitted the legal description of a portion of the real estate to be sold. HELD: Where defendants knew what property was intended to be sold, where public notices accurately described property to be sold, and where defendants waited until after sale to complain, sale should not be set aside.

Q

JURISDICTION

Bascom v. Joseph Schlitz Brewing Co., 395 N.W.2d 879 (Iowa 86)

Minimum Contacts

Plaintiffs sued two breweries for injuries suffered while loading kegs of beer. Breweries specially appeared. District court sustained the special appearances and found insufficient minimum contacts with Iowa to assert jurisdiction over either brewery. Instead of appealing that decision, plaintiffs filed a second suit against the breweries, with identical allegations plus additional allegations that the breweries are nation-wide manufacturers of beer and have numerous contacts within Iowa through shipment of their products and advertising of same, and that the empty kegs that fell on plaintiff were "emptied" in Iowa. HELD: Although plaintiffs assert additional factual allegations or even evidence, the issue of sufficient minimum contacts has been litigated. The second suit's effort to relitigate jurisdiction is barred by the doctrine of issue preclusion.

Cross v. Lightolier, Inc., 395 N.W.2d 844 (Iowa 86)

§ 617.3

An Iowa resident sued a New York corporation for breach of a contract for employment by Lightolier of plaintiff as Lightolier's sales representative in Missouri. Facts established that as a result of contract, plaintiff terminated his employment in Iowa, sold his Iowa home, purchased an automobile, made preliminary contacts with other Lightolier employees, and placed phone calls to the Missouri office. Lightolier did other business in Iowa, had a full-time employee in Iowa, and sold $500,000.00 of products within the state of Iowa a year. Plaintiff used § 617.3 to accomplish service.

HELD: Substantial evidence supported district court's findings that plaintiff showed only his unilateral actions and not the acts of defendant. Plaintiff did not establish the existence of a contract "to be performed in whole or in part by either party in Iowa." Facts relating to Lightolier's presence in Iowa relate to whether or not the exercise of jurisdiction over Lightolier comports with due process, an issue to be reached only after plaintiff complies with the terms of § 617.3.

In re Marriage of Bolson, 394 N.W.2d 361 (Iowa 1986)

Dissolution of Marriage

Grandparents petitioned for modification and visitation filed in a dissolution proceeding two months after issuance of decree and one month after mother and children moved to California was within Court's jurisdiction under Chapter 598 and the Uniform Child Custody Jurisdiction Act, Chapter 598A.

Jew v. University of Iowa, 398 N.W.2d 861 (Iowa 87)

Administrative Agency

District court had original jurisdiction of professor's civil damage action against the university for sexual harassment. Chapter 17A does not provide an exclusive remedy for challenging agency action when it relates to rule-making, or more accurately, application of a rule.

LABOR

Anthon-Oto Community School District v. PERB, 404 N.W.2d 140 (Iowa 87)

PERB

PERB decision that there was sufficient community of interest among professional and non-professional employees in small school district to establish a single bargaining unit was supported by substantial evidence.

Northeast Community School District v. PERB, 408 N.W.2d 46 (Iowa 1987)

PERB

Proposal by teachers' association with respect to teacher evaluation which provided a process by which to grieve

inappropriate or erroneous evaluations was a mandatory subject of bargaining.

Vander Zyl v. Professional Teaching Practices Commission, 397 N.W.2d 751 (Iowa 86)

Teacher Termination

School district terminated contract of teacher after criminal conviction on his guilty plea to a charge of indecent exposure. On appeal, the adjudicator reversed and ordered the teacher's reinstatement. The district complied, without appealing, but then filed a complaint with the commission, requesting that the teacher's certificate be revoked or suspended. The district and teacher filed a proposed stipulation in which the record of the private termination hearing would be sealed to preserve its confidentiality, but the commission refused. HELD: The confidential nature of a teacher-termination proceeding under Chapter 279 is not changed or waived by an appeal to an adjudicator. Nor are the confidentiality provisions affected by the fact that the commission's proceedings with respect to suspension or revocation of the teaching certificate are public. Board of Directors v. Quad City Times, 382 N.W.2d 80 (Iowa 86), is distinguished because it involved the termination of an administrator under Chapter 279. Chapter 279 distinguishes between administrators and teachers, and only the former proceeding is governed by Chapter 17A, which mandates a public hearing.

Aplington Community School District v. PERB, 392 N.W.2d 495 (Iowa 86)

Mandatory Subjects

Substantive criteria for evaluation of teachers, and teachers' right to file a grievance on evaluations, are mandatory subjects for collective bargaining.

Clinton Police Department Bargaining Unit v. PERB, 397 N.W.2d 764 (Iowa 86)

Q

Mandatory Subject Bargaining

Union sought to include in contract a clause in which the city "acknowledges and recognizes its responsibility" to

promote and provide for safety of police personnel by reviewing various employment policies, analyzing various professional studies, examining criminal history of community members, and reviewing statistical information available from law enforcement agencies. HELD: Proposal was not a mandatory subject of bargaining.

Hurtado v. Job Service, 393 N.W.2d 309 (Iowa 1986)

Unemployment

Administrative agency hearing officer found that employee was guilty of deliberate sleeping on the job in violation of company work rules and disqualified the terminated employee for unemployment compensation. On the employee's petition for judicial review, the district court reversed, and the Court of Appeals affirmed the district court's decision. The Supreme Court reversed, holding that the district court and Court of Appeals should have examined only whether the hearing officer's findings of fact were adequately supported by the evidence.

Carpenter v Department of Job Services, 401 N.W.2d 242 (Iowa App. 1986)

Unemployment Benefits

Repeated use of vulgarity and abusive language toward supervisors may (and did in this case) constitute misconduct that disqualifies discharged employee from unemployment benefits. The two incidents in this case were related and were separated by 30 minutes.

Iowa Association of School Boards v. PERB, 400 N.W.2d 571 (Iowa 87)

Temporary Employees

Q

Substitute teacher must be employed more than 4 consecutive months to be covered by Chapter 20, but there is no minimum amount of service required in any particular month.

Cerro Gordo County v. PERB, 395 N.W.2d 672 (Iowa App. 86)

Retaliatory Discharge

Union established prima facie case that affected conduct was a substantial or motivating factor in the discharge of the chief union steward, and the county did not establish by a preponderance of evidence that the discharge would have occurred in any event and was a lawful discharge for valid reasons.

LIMITATIONS OF ACTION

Sparks v. Metalcraft, Inc., 408 N.W.2d 347 (Iowa 1987)

Plaintiffs filed their lawsuit against the state and several University of Iowa employees on November 23, 1981. Plaintiffs alleged that University required plaintiff-employee to use toxic adhesives and solvents and that as a result of long exposure to these materials, he suffered injury. During discovery, plaintiffs found a document in University files from defendant Metalcraft on the subject of the solvents. Plaintiffs filed this lawsuit against Metalcraft on January 31, 1985. A district court sustained Metalcraft's motion for summary judgment on the authority of the two-year statute of limitations. Other facts establish that plaintiff began asking doctors as early as 1973 whether the solvents were related to the symptoms, and that he received fairly positive responses. In November 1980 a doctor told plaintiff that his symptoms "may all be related to a 16-year exposure to the chemicals in the solvents manufactured by Metalcraft." HELD: Plaintiffs' claims for negligence and strict liability began to run when they commenced suit against the University, if not before. Fact that they discovered a document during discovery in that case in which Metalcraft represented that the solvents were nontoxic and that side effects were temporary is irrelevant. The purposes of the discovery rule "would be thwarted if we allowed claimants to ignore the statute of limitations when it becomes obvious they have a basis for an actionable claim based on one or more theories of action, and then later permit them to sue when additional facts are uncovered supporting additional theories. . . . [O]nce claimants have knowledge of facts supporting an actionable claim they have no more than the

applicable period of limitations to discover all theories of action they may wish to pursue in support of that claim."

Cameron v. Hardisty, 407 N.W.2d 595 (Iowa 1987)

Minnesota citizen sued Iowa resident in federal district court for injuries suffered in motor vehicle accident that occurred in Nebraska. On certification of question, court held that statutes of limitations are viewed as procedural, and that Iowa would continue to apply the "law of the forum" rule with respect to statute of limitations. Iowa's two-year limitations period, rather than Nebraska's four-year statute, would apply to this case. Court also proceeds to include that Iowa, not Nebraska, has the most significant contact with this litigation.

Burgess v. Great Plains Bag Corp., 409 N.W.2d 676 (Iowa 87)

Plaintiff timely commenced proceedings for an allegedly work-related injury with the Iowa Industrial Commissioner. His attorney filed an application to withdraw because of non-cooperation. The application and the Industrial Commissioner's orders in response to same were sent to plaintiff by certified mail. Plaintiff made no objection to the application, and counsel was permitted to withdraw. The commissioner sent a status report form by certified mail to plaintiff, but it was returned as unclaimed. A series of motions and orders resulted in which plaintiff was notified that unless he responded to the status report and request for attention to his claim, the matter would be dismissed. He did not respond and the case was in fact dismissed. More than two years after the dismissal, the plaintiff filed an application for reinstatement. HELD: Industrial Commissioner did not act in an arbitrary manner in denying the application for reinstatement. Chapter 85 provides no exception for tolling the two-year period of limitations when an action has been dismissed without prejudice. The extenuating circumstances offered by plaintiff (illiteracy) form no basis for relief.

Q

Neylan v. Moser, 400 N.W.2d 538 (Iowa 87)

Attorney filed equity action to recover on fee agreement. Seven months after answering, clients moved for leave to assert a counterclaim for legal malpractice. HELD: 5-year statute did not begin to run (cause of action for legal malpractice did not accrue) until disposition of appeals emanating from

proceedings that client alleges were conducted in a negligent manner by the attorney. Split of authority exists on this issue, but court adopts the approach that permits the client to rely upon the attorney's continued representation during the appellate process. COMMENT: Court expressly notes that applicability of 2-year statute limitations to legal malpractice claim was not raised.

NEGLIGENCE

Kopsas v. Iowa Great Lakes Sanitary District, 407 N.W.2d 339 (Iowa 87)

Ch. 668

Minor plaintiff injured in motor vehicle accident and her parents sued two construction companies and the county sanitation district. Before trial, minor plaintiff received $3,000.00 in settlement from construction company Barbarossa. After trial, the jury fixed minor plaintiff's damages at $50,000.00 and assessed the following percentages of negligence:

Minor	10%
Parents	40%
Barbarossa	40%
Johnson Construction	10%
Sanitation District	0%

The verdict awarded the parents no damages. This case was filed before July 1, 1984, but tried after that date.

The district court reduced the verdict by the minor's 10%, and then determined Johnson's liability by computing 10% of the net verdict. The court then made a pro tanto reduction of the Barbarossa settlement, which resulted in a judgment against Johnson of $1,500.00. This procedure was consistent with Glidden v. German, 360 N.W.2d 716 (Iowa 84), which is a case that was filed and tried before July 1, 1984.

The court held that ch. 668, and not Glidden, governed these issues in cases tried after July 1, 1984. Because ch. 668's provisions on joint and several liability apply to the

benefit of Johnson, Johnson "should be responsible for paying its own percentage share of the damages and ought not receive credit for amounts others have paid in settlement."

The court also held that Johnson's 10% of the verdict must be calculated from the gross verdict, unaffected by the percentages applied to the minor or parents.

Automobile Underwriters Corp. v. Harrelson, 409 N.W.2d 688 (Iowa 87)

Ch. 668

Plaintiff settled with injured party and sued defendant for contribution and indemnity. At trial, district court directed a verdict on plaintiff's indemnity count based on active/passive negligent theory. The jury returned a verdict on plaintiff's claim of contribution by finding that defendant was not negligent. On appeal, plaintiff asserts that the directed verdict was error, because plaintiff's negligence was passive and defendant's negligence was active.

The court held that the finding of no negligence on the contribution claim forces the conclusion that defendant would not have been negligent for purposes of the indemnification claim either. The court takes the opportunity, however, to suggest, with the benefit of voluminous citations, "that the active/passive negligence theory of indemnification does not survive in a comparative fault tort system."

Duggan v. Hallmark Pool Manufacturing Co., 398 N.W.2d 175 (Iowa 86)

Ch. 668

Diving accident in pool at Highlander Inn resulted in suit against pool designer manufacturer (Hallmark), its contractor, pool consultant, and the Highlander. All defendants except Hallmark settled with plaintiffs by a payment of $1,050,000.00. At trial, jury awarded Michael Duggan $1,250,000.00 and Ann Duggan $250,000.00. Jury placed 20% of fault on Michael Duggan, 50% on Hallmark, and the remainder on the settling defendants. Case was filed before July 1, 1984, but tried thereafter.

District court accepted plaintiffs' counsel's ad hoc allocation of settlement among Michael and Ann Duggan and their

children, which placed Mike's share of the settlement $700,000.00 below the amount awarded to him by the jury, and gave Ann and the children more than the jury awarded them (the children received nothing from the jury). The court entered judgment in favor of Mike for $700,000.00 plus pre-judgment interest on the entire 1.5 million dollar judgment. As a result, plaintiffs received $1.750 million, which was more than the total damages fixed by the jury.

HELD: Following Glidden v. German, 360 N.W.2d 716 (Iowa 84), the district court should have credited the entire amount received in any settlement against the verdict on a dollar-for-dollar basis. Because the jury found Hallmark to be 50% at fault, statutory provisions in Ch. 668 for pro rata application of settlements for purposes of determining joint and several liability are inapplicable. District court should have ignored the ad hoc allocation by plaintiffs' counsel of the settlement and made the pro tanto reductions on the basis of the jury verdict. Multiple plaintiffs are entitled to recover only in the same ratio that their verdict bore to the sum of the plaintiffs' total recovery.

As a result, because Michael Duggan's share of the verdict was .8333, that percentage of the settlement is subtracted from his portion of the verdict, for a net recovery from Hallmark of $375,000.00. Ann Duggan's share of the verdict, .1666, results in a net recovery from Hallmark of $75,000.00. See chart below:

	Verdict	Settlement	Hallmark
Mike	1.250	.875	.375
Ann	.250	.175	.075
	1.500	1.050	.450

The district court also erred in awarding pre-judgment interest on the entire verdict. Because § 535.3 allows interest on "judgments," not verdicts, interest is awarded only on the net judgment of $450,000.00.

Johnson v. Junkmann, 395 N.W.2d 862 (Iowa 86)

Q

Ch. 668

Defendant driver was in her lane but with wheels turned and vehicle angled toward the left, preparatory to making a left-hand turn into a driveway. Defendant was struck from behind by

Fine, which sent defendant's car across the center line into the oncoming lanes of traffic, where she collided with plaintiff. Plaintiff's claim against Fine was settled prior to suit. At trial, jury found defendant 3% at fault and Fine 97% at fault. HELD: Even though jury did not find plaintiff at fault, Ch. 668 is still applicable to case. If a claim involves the fault of more than one party, including a person (such as Fine) who has been released from liability by the claimant, the Act applies.

McIntosh v. Barr, 397 N.W.2d 516 (Iowa 86)

Ch. 668

Mr. and Mrs. Barr sued McIntosh as a result of a two-car accident. Jury awarded $200,000.00 to Richard Barr and $25,000.00 to Joan Barr, and attributed 65% of the negligence to McIntosh and 35% to Richard Barr. McIntosh paid the resulting judgments and sued Richard for contribution, alleging that he should pay 35% of Joan's judgment. HELD: Without regard to whether or not Richard is immune from suit by Joan, Richard has breached no actionable duty owed to Joan. Accordingly, she has no cause of action, and without common liability, there is no right of contribution. One spouse has no duty to provide services to the other. COMMENT: McIntosh's suit against Richard was filed after July 1, 1984.

Telegraph Herald, Inc. v. McDowell, 397 N.W.2d 518 (Iowa 86)

Ch. 668

Robert McDowell was operating a vehicle owned by his father, James, when he was involved in a one-vehicle accident. Robert and James sued plaintiff for personal injuries and property damage, respectively. The jury found Robert to be 75% negligent and the plaintiff 25% negligent. Plaintiff paid the resulting judgments and sued Robert for contribution toward the judgment in favor of his father for damage to the vehicle. The district court held that plaintiff's claim was a compulsory counterclaim that should have been raised in the original proceeding. After disagreeing with this ruling, the Supreme Court proceeded to determine whether or not plaintiff was entitled to summary judgment on its claim for contribution. "Robert has asserted facts which, if proved, could conceivably bring the case under some remaining vestige of parent-child immunity." The abrogation

of parent-child immunity in Turner v. Turner, 304 N.W.2d 786 (Iowa 81), was not complete.

COMMENT: Assuming that a parent can sue a child for causing property damage, what result would occur if father James had sued plaintiff for Rule 8 and consortium damages?

Schuller v. Hy-Vee Food Stores, Inc., 407 N.W.2d 347 (Iowa App. 87)

Instructions

In slip-and-fall case, district court instructed the jury that the occurrence of an accident is insufficient to show that either party was negligent, that the jury could consider whether or not plaintiff's attention was distracted by merchandise displays, that the store owner cannot complain if such a person looks at displayed goods instead of the floor, that the customer is not bound to use the same care to avoid an obstacle in the store as would a pedestrian on the street, that the customer has a right to assume the floor is free of obstructions and pitfalls, but that a customer may not ignore a hazard that is apparent, foreseeable, and as known to the customer as to the storekeeper. The district court also instructed that if the jury found that the ashtray canister that allegedly caused plaintiff's fall "was in fact located in plain sight . . . and that the ordinarily reasonable and prudent person would have avoided falling over [it]," then plaintiff was negligent.

HELD: Instructions were proper.

Fratzke v. Meyer, 398 N.W.2d 200 (Iowa App. 86)

Instructions

Decedent, on gravel road with stop sign, attempted to cross state highway on bicycle, when he was struck and killed by motorist. District court refused to give UJI 5.15, which provides that motorist who sees or should see child in plain view on a road "cannot assume that such child will not move from a position of safety . . . and into a place of danger . . . but . . . must realize that such child may act without any care or may suddenly and unexpectedly leave a place of safety and move into a place of danger . . . . The degree of care . . . is commensurate with the danger which may be presented by the disposition of

children suddenly to run out in response to impulse and without the exercise of judgment or caution."

HELD: Elimination of presumptions regarding freedom from contributory negligence for children, Petersen v. Taylor, 316 N.W.2d 869 (Iowa 82), does not change the purposes of 5.15. Giving this instruction does not diminish the duties imposed upon a bicyclist, minor or otherwise.

Lake v. Schaffnit, 406 N.W.2d 437 (Iowa 1987)

Headlights

Minor plaintiff was struck by vehicle at 11:00 p.m. Child's dog had been struck by another vehicle, and child was kneeling by pet, with her brothers standing in the lane of traffic and acting as guards. Defendant, who was traveling the speed limit with his lights on low beam, did not reduce his speed or attempt to avoid the minor plaintiff, and she was struck.

At trial, the court instructed on adequacy of headlights. HELD: Although a minor plaintiff and her brothers all saw the headlights of a vehicle and the defendant and investigating officer testified that the headlights were working properly, there was sufficient evidence as to adequacy of headlights that the court properly instructed on the statutory requirements. The court notes that defendant's deposition and trial testimony as to his distance from plaintiff when he first saw her varied by up to 90 feet.

Lake v. Schaffnit, 406 N.W.2d 437 (Iowa 1987)

Pedestrian Duty

Minor plaintiff was struck by vehicle at 11:00 p.m. Child's dog had been struck by another vehicle, and child was kneeling by pet, with her brothers standing in the lane of traffic and acting as guards. Defendant, who was traveling the speed limit with his lights on low beam, did not reduce his speed or attempt to avoid the minor plaintiff, and she was struck.

At trial, the court refused to instruct on U.J.I. 4.50, which requires that pedestrians walk on the left side of a highway at all times "when walking on or along a highway". HELD: Especially where trial court instructed on the minor child's

failure to keep a proper lookout and failure to yield the right of way when not in a crosswalk, it was not error to instruct as requested by defendant. Even if the child could be properly characterized as pedestrian ("although she may well not have been"), the record lacks substantial evidence that her back was to defendant's car as it approached.

COMMENT: Apparently facing in the correct direction is just as good as being on the "left side" of the roadway.

Lake v. Schaffnit, 406 N.W.2d 437 (Iowa 1987)

Goetzman

Minor plaintiff was struck by vehicle at 11:00 p.m. Child's dog had been struck by another vehicle, and child was kneeling by pet, with her brothers standing in the lane of traffic and acting as guards. Defendant, who was traveling the speed limit with his lights on low beam, did not reduce his speed or attempt to avoid the minor plaintiff, and she was struck.

At trial, minor child was found 49% negligent. Defendant alleged that parent's claim should be reduced by that percentage as well. HELD: The rule adopted in Handeland v. Brown, 216 N.W.2d 574 (Iowa 1974), that a child's contributory negligence is not a defense to a parental claim is not affected by the adoption of Goetzman. The fundamental Goetzman concept does not change the independent character of the parent's claim.

Kanzmeier v. McCoppin, 398 N.W.2d 826 (Iowa 87)

Misrepresentation

Order buyer contacted defendant to see if defendant wanted to sell his cattle. After discussing prices of sale at local sale barn earlier that day, defendant said he would be willing to sell at $60.00 per hundred weight. Order buyer called plaintiff, who agreed to buy the cattle and pay the order buyer's commission. Order buyer called defendant and accepted his offer, and reached a delivery date with him. The next day, defendant learned that some cattle had been sold at the sale barn for $62.00 per hundred weight, and eventually refused to perform his agreement. He sold his cattle to another party for $62.00.

HELD: Absent proof of fraudulent intent or materiality, negligent misrepresentation is insufficient to make a contract voidable.

Johnson v. Junkmann, 395 N.W.2d 862 (Iowa 86)

Sudden Emergency

Defendant driver was in her lane but with wheels turned and vehicle angled toward the left, preparatory to making a left-hand turn into a driveway. Defendant was struck from behind by Fine, which sent defendant's car across the center line into the oncoming lanes of traffic, where she collided with plaintiff. Plaintiff's claim against Fine was settled prior to suit. At trial, jury found defendant 3% at fault and Fine 97% at fault. District court granted defendant's motion for judgment n.o.v., in part because of a finding that defendant was confronted with a sudden emergency as a matter of law. HELD: Because sudden emergency requires, among other things, proof that the emergency was not created by the defendant, and because there was substantial evidentiary support for the jury's finding that defendant was 3% at fault, it cannot be said that defendant established the defense as a matter of law. Evidence that defendant had turned its wheels to the left and had angled its vehicle toward the center line was sufficient to support a 3% finding of fault, even though her signal was on, a left-hand turn from that position was legal, and her entire vehicle was within her own lane. The court refers to evidence that defendant knew that under the circumstances a failure to keep her vehicle parallel with the center line would increase significantly the likelihood her car would travel across the center line and into oncoming traffic, if struck from behind.

Moore's Builder & Contractor, Inc. v. Hoffman, 409 N.W.2d 191 (Iowa App. 87)

Warranties of Fitness and Habitability

Plaintiff sued defendant to foreclose on its mechanic's lien arising out of plaintiff's construction of a house for defendant. Defendant counterclaimed for damages arising out of breach of implied warranty of fitness and/or express warranty. District court instructed the jury that if plaintiff substantially performed contract and justifiably abandoned the performance of the remainder of the contract (defendant had refused to pay amount then due because of alleged defects), then defendant could not recover on counterclaims. HELD: Substantial performance, relevant only to the action to foreclose on the mechanic's lien, is not a defense to the homeowner's claims for breach of warranty.

Whitehorn v. Lovik, 398 N.W.2d 851 (Iowa 87)

Lease

Section 562A.12(4)'s 30-day requirement of the landlord to provide written statement for withholding rental deposit does not constitute a statute of limitations for landlord's claims for damages.

Overhead Door Co. v. Sharkey, 395 N.W.2d 186 (Iowa App. 86)

Mechanic's Lien

Sharkey leased commercial property to Consolidated Freightways for 10 years. Upon termination, Consolidated hired Dewco to repair doors that Consolidated had damaged. Dewco ordered replacement doors from Overhead. Dewco went into bankruptcy after being paid by Consolidated, but before paying Overhead. Overhead filed a mechanic's lien against Sharkey. HELD: Overhead failed to prove a contract between Sharkey and Consolidated for the improvement by Consolidated of Sharkey's property. By repairing the damaged doors, Consolidated was performing its obligations under the lease to leave the premises in as good a condition as before. Sharkey's knowledge of Overhead's involvement in making repairs does not deprive Sharkey of

the right to expect Consolidated to perform its obligations to repair.

Peoples Bank & Trust Co. v. Lala, 392 N.W.2d 179 (Iowa App. 86)

Mortgage

Bank executed a release of a mortgage because it discovered the land was not owned by the mortgagors. Release language provided that the debt secured by the mortgage was "paid off, satisfied, and discharged." HELD: Bank met its burden that a "latent ambiguity existed," because the evidence was that the debt had not in fact been paid. Evidence established that bank's intent was to release the collateral, not the underlying debt.

Hancock v. City Council, 392 N.W.2d 472 (Iowa 86)

Nuisance

Municipal resolution declaring building to be a nuisance and ordering its demolition were set aside because municipality failed to adhere to its building code and nuisance ordinance with respect to procedures, and because it failed to provide adequate notice to all equitable ownership interests.

TORTS

Tomash v. John Deere Industrial Equipment Co., 399 N.W.2d 387 (Iowa 87)

Abuse of Process

Q

Purchaser of tractor (Tomash) brought action for abuse of process against seller (PEC) and holder of security interest (Deere). Deere made extensive efforts to work with Tomash when his financial difficulties placed him in default on installment purchase agreement. Deere learned that Tomash had sold the tractor to Rice, and had put the proceeds of that sale to his own use. When collection efforts appeared futile, Deere reassigned

its interest back to PEC with an agreement for the sharing of the loss. PEC then signed a complaint with the police department, which resulted in an independent police investigation and formal charges by the county attorney, which resulted in a warrant issued by the court. Charges on Tomash eventually were dismissed, because Rice died. Tomash went into bankruptcy. The bankruptcy court determined that Tomash "had willfully and malicious converted the tractor or the proceeds . . . to his own benefit," and entered judgment against Tomash for the value of the tractor as a non-dischargeable debt.

At trial, district court directed a verdict in favor of PEC and Deere. HELD: Plaintiff produced no evidence that Deere was even involved in the filing of charges. Deere was only aware that PEC was considering such action, and did not discover charges had been filed until two and one-half years later. PEC's act in signing a complaint, which resulted in the filing of charges after an independent police investigation and the prosecutor's decision to charge, is not coupled with any evidence of an "act or threat directed to an immediate objective not legitimate in the use of the process." Regardless of PEC's motive, plaintiff must show that PEC "took some specific action in connection with [its] use of process which can be characterized as unlawful or irregular." Plaintiff produced no evidence of any contact between PEC and him for any purpose after the sale to Rice.

COMMENT: Citing recent legislation on victim restitution, §§ 910.1-.15, the court notes that the admitted intent to seek collection of an uninsured civil debt might be viewed as an appropriate purpose for initiating criminal proceedings.

Tomash v. John Deere Industrial Equipment Co., 399 N.W.2d 387 (Iowa 87)

Emotional Distress

Purchaser of tractor (Tomash) brought action for intentional infliction of emotional distress against seller (PEC) and holder of security interest (Deere). Deere made extensive efforts to work with Tomash when his financial difficulties placed him in default on installment purchase agreement. Deere learned that Tomash had sold the tractor to Rice, and had put the proceeds of that sale to his own use. When collection efforts appeared futile, Deere reassigned its interest back to PEC with

an agreement for the sharing of the loss. PEC then signed a complaint with the police department, which resulted in an independent police investigation and formal charges by the county attorney, which resulted in a warrant issued by the court. Charges on Tomash eventually were dismissed, because Rice died. Tomash went into bankruptcy. The bankruptcy court determined that Tomash "had willfully malicious converted the tractor for the proceeds to his own benefit," and entered judgment against Tomash for the value of the tractor as a non-dischargeable debt.

At trial, district court directed a verdict in favor of PEC and Deere. HELD: Plaintiffs have failed to show outrageous conduct. Deere was not involved in the decision to file charges, and PEC's only conduct was the signing of a criminal complaint, the contents of which were true.

COMMENT: Opinion contains citations to all emotional distress cases from Vinson forward.

Peterson v. First National Bank of Iowa, 392 N.W.2d 158 (Iowa App. 86)

Emotional Distress

In suit for intentional interference with existing contractual relations and prospective contractual relations and for breach of contract, jury awarded damages for emotional distress. Court of appeals refused to review this verdict in accordance with recent cases on intentional infliction of emotional distress and instead simply held that the tort theories submitted in this case permit recovery for emotional distress as an element of damages. Court cited a personal injury case in which recovery for, among other things, mental anguish in an automobile accident was upheld.

Oberreuter v. Orion Industries, Inc., 398 N.W.2d 206 (Iowa App. 86)

Q

Products Liability

In products liability case, district court directed a verdict at close of all evidence for Mid-State, which plaintiffs alleged was a wholesaler of the 15-foot aluminum antenna. Plaintiffs had adduced evidence that only two distributors supplied

this manufacturer's antennas to the retailer from whom the plaintiff purchased the antenna, and that Mid-State supplied 90% of those antennas. Plaintiffs also adduced evidence that the other distributor's records gave no indication that it had supplied the antenna. The court affirmed, and held that while circumstantial evidence is sufficient to engender a jury question, plaintiffs' case against Mid-State was based strictly on negative inferences, which "do not necessarily satisfy the burden of positive proof." (emphasis supplied) Court also noted that on cross-examination, the retailer's owner at the time of the purchase negated the inferences by saying he did not recall how many distributors he dealt with then, that he usually dealt with more than two distributors for antennas, and that he was not certain as to the percentages.

Duggan v. Hallmark Pool Manufacturing Co., 398 N.W.2d 175 (Iowa 86)

Products Liability

Diving accident in pool at Highlander Inn resulted in suit against pool designer manufacturer (Hallmark), its contractor, pool consultant, and the Highlander. Evidence established that Hallmark designed, manufactured, and distributed prefabricated fiberglass pools, and that it markets its product as a "completely equipped pool." Hallmark does not supply concrete or an installation crew, but does supply sidewalls, steps, filters, pumps, ladders, diving boards, and designs. Although the Highlander's contractor made a number of design changes, plaintiffs established that Hallmark designed and produced the pool with no diving board, a three foot ledge at the deep end (which apparently would give the impression that children standing on the ledge were in the shallow end of the pool), loose depth markers, and an uncharacteristic deep end. Hallmark contends that as a "components part manufacturer," it cannot be held strictly liable for the fully constructed swimming pool. Hallmark also contends that the pool "substantially changed in condition" after it left Hallmark's hands. Hallmark lastly asks the court to overrule Speck v. Unit Handling Division, 366 N.W.2d 543 (Iowa 85) (comparative negligence under Goetzman inapplicable to strict liability claims).

HELD: Plaintiffs adduced evidence from which jury could find that Hallmark was the designer and manufacturer of the pool. Strict liability can result simply from design. Also, a

manufacturer of component parts can be strictly liable. Plaintiff also produced evidence from which jury could find that pool was defective at the time it left Hallmark's hands. Speck will not be changed.

Grimes v. Axtell Ford Lincoln-Mercury, 403 N.W.2d 781 (Iowa 87)

Product Liability

Plaintiff sued Ford dealership (Axtell), which had installed a used rear axle assembly in plaintiffs' vehicle. Axtell filed a third-party complaint against a salvage dealer (Gralnek) which had sold the assembly to Axtell. The axle shaft had failed because it had been exposed to heat, which had weakened it. The exposure to heat had occurred before the axle came into the possession of Gralnek. The defect was latent and could be discovered only by a skilled metalurgist. Gralnek had not disassembled or inspected the axle. Axtell had noticed grease leaking from the assembly and had replaced the grease seal. In returning a verdict (on special interrogatories) for plaintiff against Axtell, the jury found that Axtell did not have a right to expect that the assembly as sold by Gralnek was free of defect. Axtell appealed, and the 8th Circuit certified several questions to the Iowa Supreme Court.

The Iowa Supreme Court declined to answer the general question of whether strict liability can be applied to sellers of used goods. Instead, the court declined under these facts to extend the doctrine of strict liability to a dealer of used goods for latent defects, not arising from design or manufacture, which were caused while the goods were in the possession of a previous owner (previous to Gralnek). The court declined to adopt the federal trial judge's observation that product representations made by car dealerships generally heighten consumer expectations sufficiently to justify implied representation of safety. The goal of deterring sale of defective goods, which underlies strict liability doctrine, would not be significantly furthered by applying the doctrine under these facts. Gralnek had not discovered the defect by any reasonable or customary inspection.

The court added this caveat: "We do not foreclose the possibility of our applying the doctrine of strict liability to sellers of used goods under other circumstances."

Sparks v. Metalcraft, Inc., 408 N.W.2d 347 (Iowa 1987)

Products Liability

Plaintiff sued manufacturer of solvents and adhesives that plaintiff used in his job with University of Iowa. HELD: Federal Hazardous Substances Act (FHSA) does not impliedly or expressly create a private right of action for plaintiff.

Fuhrman v. Total Petroleum, Inc., 398 N.W.2d 807 (Iowa 87)

Dramshop

Juvenile purchased beer from store and drove to a park and consumed the beer. She resummed driving and was involved in an accident, in which plaintiffs were injured. Plaintiffs sued store. Their case falls outside the dramshop law, because there was no claim that while on the premises, the juvenile was or become intoxicated.

By a 5-4 decision, the court re-affirmed Connolly v. Conlan, 371 N.W.2d 832 (Iowa 85). Most recent legislation since Connolly does not indicate the legislature wishes to "surrender to judicial proclivities to innovate in the area of dramshop liability." Legislature overruled the social-host liability holding of Clark v. Meinks, 364 N.W.2d 226 (Iowa 85). COMMENT: Descent contains a long and comprehensive discussion of Iowa dramshop law.

Gremmel v. Junnie's Lounge, 397 N.W.2d 717 (Iowa 86)

Dramshop

Plaintiff was drinking in Junnie's with friends, when he got into a fight with Daniel Demaio and Mark and Gary Cone. Gremmel had been involved in a previous confrontation with Mark Cone, when Gremmel was an employee of another bar and Cone drove a motorcycle into that bar after hours. Gremmel had knocked Cone off the motorcycle and held him until police arrived. There was evidence that Demaio and the Cones were served alcohol in Junnie's and that they were intoxicated. Plaintiff and Mark Cone began to argue. An employee of Junnie's told them to "take it outside," and all concerned left the bar. Gremmel told his friends that it appeared there was going to be a fight, and he took off his shirt. In the resulting fight, Demaio struck

Gremmel from behind and, while Gremmel wrestled with Demaio, the Cones kicked Gremmel in the head and face repeatedly.

Gremmel sued Junnie's and his assailants, but trial involved only Junnie's. Jury returned a verdict for Junnie's.

HELD: Assumption of risk, although it is not available to the combatants in a case of mutual assault, is available to a dramshop defendant. A plaintiff who mutually consents to combat with persons who then injure him is not an innocent person entitled to protection of the statute. "We should discourage tavern fights by imposing upon dramshop plaintiffs the responsibility for assuming the risk of their own injuries when they voluntarily choose to [fight] persons who, they believe, are intoxicated."

The question of proximate cause was for the jury, and there was sufficient evidence to support a finding that the ill feeling between Mark Cone and Gremmel, and the propensity of the Cones and Demaio to fight, even when sober, were the causes of the assault rather than the intoxication.

The martialling instruction's use of the word "the" instead of "a" when requiring plaintiff to prove proximate cause in connection with intoxication and plaintiff's injuries "was harmless because other instructions made it clear that the beer or liquor furnished need not be the sole proximate cause of the intoxication."

District court correctly refused to instruct on plaintiff's theory of joint liability. Plaintiff had to prove that his injuries were caused by an assailant who was actually served by Junnie's and that such assailant was intoxicated or was served to the point of intoxication.

Smith v. Shaffer, 395 N.W.2d 853 (Iowa 86)

Duty

Q

Two juveniles were intoxicated and had stolen the vehicle they were operating when they collided with another vehicle containing the plaintiffs' decedents. Plaintiffs sued two taverns in which the juveniles had been during the evening. Stipulated facts establish that neither tavern had supplied alcohol to the juveniles, but that both had permitted them to remain on the premises. A municipal ordinance made it unlawful

for the tavern to permit a minor on the premises, and another ordinance established a 10:00 p.m. curfew for minors, which was violated when the minors were in the taverns. Plaintiffs also sued the owner of the stolen vehicle, alleging that the owner left the keys in an unlocked car. Plaintiffs also sued the juveniles' parents, alleging a failure to "properly rear, supervise, instruct and give guidance," and a violation of the curfew ordinance. The district court dismissed plaintiffs' claims after ruling against the plaintiffs in a motion to adjudicate law claims.

As to the tavern, the court declined to extend Lewis v. State, to impose liability under these facts. "The obligations [plaintiffs] propose were not imposed by the legislature. At most a bar owner is required to order minors to leave the premises. It scarcely needs pointing out that the accident in question did not occur by reason of youths being illegally in the taverns. The difficulties arose after they left." The court noted there was no legislative mandate to notify authorities of an intoxicated minor's illegal presence in the tavern. To impose such a requirement without legislation "would be tantamount to making informants out of bar owners."

The bare fact that the car stolen by the juveniles had been parked outside a tavern is insufficient to invoke the exception invisioned in Roadway Express v. Piekenbrock, 306 N.W.2d 784 (Iowa 1981), in which the court held that the mere leaving of keys in an automobile's ignition was not a proximate cause of injuries resulting from a thief's negligent operation. The court noted in Piekenbrock that liability may exist when the vehicle is left in an area or under circumstances where theft is likely.

As to the parents, the court noted that the common law does not hold parents liable for damages caused by their children unless the damages "can be attributed to some action or inaction of parent." Parent can be held liable only in two situations: (1) where the child is acting as an agent for the parent, or (2) where the parent's own negligence is the proximate cause of the child's conduct. In this case, "[n]o parental failure was a substantial factor in bringing about the collision. It was not the parents' failure to supervise but rather their childrens' independent decision to become intoxicated, steal a car, and recklessly operate it which caused the accident."

COMMENT: Isn't it a question of fact as to whether a particular tavern "is in a high-crime or hard-drinking area," so

as to trigger an exception from Piekenbrock? And isn't the question of proximate cause almost always a question of fact?

Fritz v. Parkison, 397 N.W.2d 714 (Iowa 86)

Duty

Limbs on old trees situated on land abutting the curve on a county roadway overhang the right-of-way line, but not the travelled portion of curve. The terrain is fairly level. Accordingly, the vegetation impedes only on sight distances as the motorist rounds the curve. A motor vehicle accident on this roadway resulted in a suit by Dallas County against the land owner for contribution or indemnity, alleging that the land owner has an actionable obligation to remove or trim vegetation that interferes in sight distances.

HELD: A land owner has no duty to remove or alter vegetation that does not actually intrude upon the travelled portion of the road. While roadways must be kept free of obstructions and hazards, there also exists a public policy that encourages growth in cultivation of trees and discourages unnecessary destruction. The county and motorists are in a much better position to take precautions to minimize danger caused by reduced sight distances, and the land owner is not in a position to determine how much removal or trimming is necessary for safety. The cost of tree removal and trimming also is not necessarily justified, given the infrequency with which such accidents attributable to the reduced sight distance occur. The fact that this location is rural and deals with natural vegetation, as opposed to urban and artificially induced improvements, is also significant.

Martinko v. H-N-W Associates, 393 N.W.2d 320 (Iowa 1986)

Duty

Q

Estate of shopping mall customer sued mall for inadequate security, after victim was apparently killed in her car at mall parking lot. Defendant's motion for summary judgment sustained.

HELD: Plaintiff did not generate a genuine issue that defendant knew or should have known that an assault was occurring or was about to occur. Restatement (2d) of Torts §344 provides

that the mall's duty to customers arises when it knows or should know that the acts of the third person are occurring or are about to occur. It also provides that "if the place or character of [its] business, or [its] past experience, is such that [it] should reasonably anticipate . . . criminal conduct on the part of third persons . . . [it] may be under a duty to take precautions."

Plaintiff produced evidence that in the four years before this incident, 126 crimes had been reported at 26 other malls around the country, in which defendants owned interest. The court did not find this evidence probative, and noted that this mall, which had been open for only two months, had experienced no crimes. The court also discarded evidence that the mall had hired a security force for non-business hours, because this "obviously" was for protection of mall property, not patrons who had no business on the property after hours. COMMENT: Decision was 5-3.

Kristerin Development Co v. Granson Investment, 394 N.W.2d 325 (Iowa 1986)

Fraudulent Misrepresentation

In addition to suing seller for breach of real estate contract, buyer sued seller (3-man partnership) for fraudulent misrepresentation. Two of the three partners executed contract, and plaintiff adduced evidence that third partner gave verbal assent, when he actually was attempting to negotiate a sale on terms for favorable with other potential buyers.

Court reversed entry of directed verdict on contract claim and remanded for trial, but refused to remand from the claim for fraudulent misrepresentation. The Court held that if the jury found that a third partner in fact gave oral consent to the contract, plaintiff would recover on breach of contract, making the fraud claim unnecessary, while a finding against plaintiff on the partner's assent would be fatal to both claims. DISSENT: Why can't plaintiff sue for breach of contract and for fraudulent misrepresentation?

Q

Cornell v. Wunschel, 408 N.W.2d 369 (Iowa 1987)

Fraudulent Misrepresentation

Plaintiff entered into a lease-purchase agreement covering a motel with a lawyer's wife. Lawyer represented his wife throughout the negotiations and drafted all of the documents. Plaintiffs encountered financial difficulties shortly after taking over operation of the motel, and sued defendants for fraudulent misrepresentation. Defendant lawyer and his wife appeal from verdict for compensatory and punitive damages.

Facts established by evidence viewed in light most favorable to plaintiffs establish that lawyer showed plaintiff's financial information but withheld information as to lawyer's cash contributions to the motel business, its negative cash flow in two recent years, and the net operating loss in a recent year. Lawyer had possession of all financial documents relating to the motel, was a director of the motel corporation, and was counsel for it and his wife. When plaintiffs got cold feet during negotiations and suggested a desire to seek the assistance of counsel, defendant lawyer discouraged them from doing so, saying he was trying to create an agreement that was fair to all and that he could save plaintiffs money if another attorney were not hired.

HELD: Under these circumstances, jury could find that the failure to produce the additional information about the financial health of the motel constituted a misrepresentation, "if [lawyer] was under a duty to disclose more than the expense statements in response to [plaintiffs'] inquiries as to the motel's profitability." District court properly instructed that defendant lawyer could be found to have made a representation with scienter if he had superior knowledge, or if a special situation, such as a relationship of confidence, existed between the parties. District court correctly instructed the jury that if they found an attorney-client relationship between plaintiffs and defendant lawyer, he had a duty to disclose all material facts and to disclose all conflicts of interest.

Q

COMMENT: Court quoted Canon 5 extensively with respect to the obligations of a lawyer who has a professional relationship involved in a business dealing and said: "We agree that the Code of Professional Responsibility sets the standard for an attorney's conduct in any transaction in which his professional judgment may be exercised. . . . [T]he trial court did not err

in instructing the jury on the ethical standard clearly announced in Canon 5 of our Code of Professional Responsibility."

Kunau v. Pillers, Pillers & Pillers, P.C., 404 N.W.2d 573 (Iowa App. 87)

Legal Malpractice

Plaintiff hired defendant to commence an action against wife's dentist for alienation of affections. Immediately after suit was filed, the court issued its opinion in Fundermann v. Mickelson, 304 N.W.2d 790 (Iowa 1981), and the district court dismissed. Defendant filed a second lawsuit for intentional infliction of emotional distress, interference with contract, and interference with prospective economic advantage, and the court dismissed the second suit on grounds of preclusion. Defendant filed 179(b) motions in both cases, and then appealed from the orders overruling the 179(b) motions. The Iowa Supreme Court dismissed the appeals as untimely because 179(b) motions were not appropriate in challenging orders on motions to dismiss. See Kunau v. Miller, 328 N.W.2d 529 (Iowa 1983).

Plaintiff sued defendant for legal malpractice, and added claims for intentional infliction of emotional distress and negligent infliction of emotional distress.

Although the court of appeals found that under these factual circumstances, there was no basis for a finding of intentional or reckless behavior by the attorney as opposed to negligent conduct, the court observed in dicta: "[T]here is some logic in not excluding the applicability of the tort of intentional or reckless infliction of emotional distress to the attorney-client relationship. . . . We believe that when a lawyer's outrageous conduct causes severe emotional distress, the client may have a cause of action against the lawyer even if the underlying case could not have been won. . . . We believe that lawyers may not be exempt from the tort of the intentional infliction of severe emotional distress. If a lawyer desires to inflict severe emotional distress and where the lawyer knows such distress is certain, or substantially certain to result from his conduct or where a lawyer acts recklessly in deliberate disregard of a high degree of probability that emotional distress will follow, then the lawyer might be held liable for his acts regardless of whether the client would have prevailed in the underlying lawsuit." COMMENT: The court cites no authority directly on point for these observations.

The court declined to recognize a claim for negligent infliction of emotional distress in concert with a claim for legal malpractice.

Van Iperen v. Van Bramer, 392 N.W.2d 480 (Iowa 86)

Medical Malpractice

Patient with long-term difficulty elected against a third surgical procedure in favor of drug therapy. He sued for damages caused by suffering a known side effect. Court found substantial evidence in support of verdict for defendants on claim of informed consent, despite the fact that patient received no information as to side effects until after electing against surgery. Evidence had been introduced that surgeon referred patient to specialist, who then advised plaintiff as to risks and side effects before commencing drug therapy.

Court also found no evidence of causation sufficient to submit particulars of negligence with respect to monitoring drug therapy for symptoms of side effects. Record contained no evidence that early discovery would have lessened the damage, or that monitoring would have disclosed occurrence of side effects.

Court held that accreditation standards were not sufficiently clear in scope and application to be self-authenticating with respect to the required standard of care for purposes of a claim against the hospital for failing to provide monitoring services for drug therapy.

DeBurkarte v. Louvar, 393 N.W.2d 131 (Iowa 1986)

Medical Malpractice

Patient visited defendant doctor in August, 1981 after she detected a lump in her breast. She consulted doctor seven times over the next nine months. Each time the doctor assured her it was only a cyst, and not cancerous. Patient had a family history and was at an age that placed her at risk, and the lump was in the area where most cancerous tumors are found. In April 1982 patient discovered a second lump. She returned to defendant, who asked her to return again after her menstrual period. Patient skipped an appointment but on her next visit, defendant referred her to a surgeon. Patient has since then had a

mastectomy, has had her ovaries removed, and has had radiation therapy.

At trial, plaintiff adduced evidence that patient's chances of surviving ten years would have been at least 50% if the lump had been removed in September 1981. At time of trial, chances of surviving another ten years were 0. HELD: Although plaintiff did not adduce substantial evidence that the cancer had spread after September 1981, the jury could find from the evidence that the failure to diagnose in August 1981 and treat cancer caused a substantial reduction in patient's chances of survival. Patient may recover for lost chance survival but not for the cancer itself.

Perkins v. Walker, 406 N.W.2d 189 (Iowa 1987)

Medical Malpractice

Plaintiff sued surgeon for post-surgical stroke that she claimed was caused by an adrenal crisis, in turn caused by prior use of topical steroid skin cream for treatment of psoriasis. Plaintiff contended that defendant either should have delayed the elective surgery and tested for adrenal suppression or should have followed a procedure to "cover" her with cortisone injections to compensate for the suppression. Over plaintiff's objection, the court instructed the jury that the surgeon could not be found negligent "merely because he makes a mistake in the diagnosis and treatment of a patient. Any error in diagnosis and treatment does not in and of itself constitute negligence." Plaintiff appealed judgment entered on verdict for surgeon.

The court refused to reverse for use of the instruction in a case that does not involve res ipsa loquitur. The court noted that the instruction was an adaptation from U.J.I. 13.9, which does not appear in the revised (1984) Chapter 13. Nevertheless, when a physician is confronted with a judgment call, as here, "giving this type of instruction does not constitute error."

COMMENT: "For the benefit of bench and bar we address the advisability of giving this instruction in future cases. Plaintiff's counsel is quite critical of the instruction, contending that it is given 'willy-nilly' in any malpractice case and suggesting that the instruction should be placed 'on the scrap heap'. . . . [T]he bar committee . . . omitted this instruction. It has been suggested that such an instruction

might well be rejected by trial judges on the grounds that it is slanted in defendants' favor and superfluous . . . . We share this concern. . . . We caution trial courts to exercise restraint in giving this instruction . . . .

Bebensee v. Ives, 409 N.W.2d 710 (Iowa App. 87)

Medical Malpractice

Plaintiff consulted doctor, complaining of back pain. When pain continued, plaintiff was referred to orthopedic surgeon, who confirmed a herniated disk after a lumbar myelogram test. Doctors performed a laminectomy. After surgery, a neurologist diagnosed the patient's post-surgical difficulties as cauda equina syndrome. A CT scan revealed that plaintiff had spinal stenosis, which is a narrowing or a constriction of space within the spinal column. Plaintiff sued, claiming that the syndrome was caused by surgical negligence, including manipulation of the nerve tissues, in turn due to excessive retraction or scar tissue. Trial to the court resulted in a judgment for defendants.

HELD: On appeal from a trial to the court, plaintiff must show that it carried its burden as a matter of law. Substantial evidence was adduced by defendants that surgeon did not stretch or compress the nerve roots during surgery and did not deviate from the appropriate standard of care. Defendants also adduced evidence of other possible causes, unrelated to professional malpractice. Plaintiff's evidence was not so strong or overwhelming as to compel a finding of negligence as a matter of law.

Bratton v. Bond, 408 N.W.2d 39 (Iowa 1987)

Medical Malpractice

In medical malpractice action against doctor for negligence in failing properly to diagnose and treat heart condition, doctor defended by stating he did diagnose the heart condition and treated it with medication in lieu of surgical procedures that the patient elected not to undergo. At trial, defendant successfully objected to questions posed to plaintiff's expert with respect to whether plaintiff's life expectancy and quality of life would have improved had the doctor utilized surgical

procedures. Identification of expert in answers to interrogatories referred only to the defendant's failure to utilize enumerated test. During expert's deposition, expert said he would be willing to respond to any question posed regarding his expert opinions. Expert also testified that surgery "could have changed the course of events. I say could have. I don't know." When asked in deposition if it was true that he could not testify to a reasonable degree of certainty that had something else been done differently that the outcome would have been different for this patient, expert testified, "I can't testify to that, but I can testify that in my opinion the thinking process that was followed left something to be desired." HELD: Plaintiffs did not alert defendant to expert's opinion with respect to life expectancy and quality of life. District court did not abuse its discretion in refusing to permit expert's testimony on these issues. Court notes that two other experts presented opinions on the same matters.

Bratton v. Bond, 408 N.W.2d 39 (Iowa 1987)

Medical Malpractice

In medical malpractice action, district court instructed over plaintiff's objections that a physician, in accepting employment for the purpose of making a diagnosis and treatment, does not make any implied guarantee of results. HELD: Trial court aptly stated the status of the prior common law in its instructions; however, the court might have avoided this issue by using only the Iowa Uniform Jury Instruction language. The revised UJI Chapter 13 does not contain this language. The bar committee had the same concern that plaintiff and the court shares: This instruction might mislead or confuse the jury by the injection of a contract term in a negligence action. "In the future . . . trial courts should not give guaranty language in a medical negligence case instruction."

Pauscher v. Iowa Methodist Medical Center, 408 N.W.2d 355 (Iowa 1987)

Q

Medical Malpractice

Estate of patient sued doctors and hospital for death caused by diagnostic procedure to which she had not given informed consent. Facts established that physician feared that patient had developed a potentially life-threatening obstruction

in her urinary tract shortly after delivering her first child. Doctor ordered an intravenous pyelogram (IVP), which is a diagnostic and invasive procedure. It carries a risk of death in 1 person out of 100,000 to 150,000. No one told patient of this risk or obtained her consent to the procedure. During the procedure, patient developed anaphylactic shock as a result of the procedure and died.

At trial, the court granted defendant's motion for directed verdict. On appeal, the court applies the "patient rule" as opposed to the "professional rule" to a nonelective diagnostic procedure. In affirming the directed verdict for the doctors, however, the court said that there was no factual basis for a finding that the disclosed risk would have been material to the patient's decision, due to the rare occurrence of the risk and the potentially life-threatening situation facing the patient.

As to the hospital, the court rejected the argument that the hospital "had a duty either to disseminate the necessary information and secure the patient's response or to adopt policies and procedures which allow physicians practicing in the hospital to perform medical procedures only with the patient's informed consent."

COMMENT: Court also noted that district court did not err in refusing to admit a creditation manual that "contains a number of salutary principles and goals relating to the relationship of the patient both to the hospital and to the practitioner." The manual would not affect the holdings in this case.

Peterson v. First National Bank of Iowa, 392 N.W.2d 158 (Iowa App. 86)

Intentional Interference

Farm lease was breached by plaintiffs on November 1 when plaintiffs failed to pay rent. On December 6, the bank refused to extend plaintiffs' sufficient additional financing to cover a rent check tendered to the landlord. On appeal from verdict in favor of plaintiffs, bank contended that it proved the defense of justification as a matter of law. HELD: Jury could have found from the evidence that bank employed improper means.

Peterson v. First National Bank of Iowa, 392 N.W.2d 158 (Iowa App. 86)

Intentional Interference

Farm lease was breached by plaintiffs on November 1 when plaintiffs failed to pay rent. On December 6, the bank refused to extend plaintiffs' sufficient additional financing to cover a rent check tendered to the landlord. The landlord subsequently terminated the lease, and plaintiffs sued the bank for intentional interference with existing contract. Bank claims that a contract was not in existence at the time of the alleged interference because of the prior default. HELD: Although breached, the contract remained in existence until it was terminated.

Klooster v. North Iowa State Bank, 404 N.W.2d 564 (Iowa 1987)

Intentional Interference

Bank loaned money to plaintiffs and held promissory notes secured by farmers' swineherd. Farmers were in default in notes, and bank learned that farmers were selling some of their hogs. Bank was successful in recovering proceeds from some of the sales, but farmers were successful in prevailing upon some buyers not to include the bank as a joint payee. Bank then brought an action against the farmers on the notes, and obtained an ex parte order for attachment. A surety bond for an amount two and one-half times the value of the logs attached was posted.

Farmers' suit against bank included a claim for intentional interference with business relationship. HELD: Because the asserted acts of liability relate to a contractual relationship between the farmers and the bank, an action for intentional interference by the bank with the business relationship between the bank and the farmers does not lie. Under these facts at least, a party to a contract and/or business relationship cannot be liable for intentionally interfering with it.

Q

Neylan v. Moser, 400 N.W.2d 538 (Iowa 87)

Limitation of Actions

Attorney filed equity action to recover on fee agreement. Seven months after answering, clients moved for leave to

assert a counterclaim for legal malpractice. HELD: 5-year statute did not begin to run (cause of action for legal malpractice did not accrue) until disposition of appeals emanating from proceedings that client alleges were conducted in a negligent manner by the attorney. Split of authority exists on this issue, but court adopts the approach that permits the client to rely upon the attorney's continued representation during the appellate process. COMMENT: Court expressly notes that applicability of 2-year statute limitations to legal malpractice claim was not raised.

North v. State, 400 N.W.2d 566 (Iowa 87)

Tortious Interference

Medical student who was granted a 1-year leave sued when she was not accepted unconditionally at the end of the leave. HELD: State is immune from suit for tortious interference with business opportunity, because Section 25A.14(4)'s exclusions from liability include claims "arising out of . . . interference with contract rights."

Peoples Bank & Trust Co. v. Lala, 392 N.W.2d 179 (Iowa App. 86)

Fiduciary Relationship

In mortgage foreclosure action, debtors claimed undue influence, in violation of confidential relationship between the bank and debtors in the bank's conduct in obtaining new mortgages that covered, among other things, the debtors' homestead. HELD: Bank should have disclosed to Mrs. Lala her homestead exemption rights, given the 20-year relationship between debtors and the bank.

Brichacek v Hiskey, 401 N.W.2d 44 (Iowa 1987)

Landlord Liability

Tenant injured by criminal act of third party may sue landlord for failing to discharge duty, imposed by ordinance, to provide door lock. Criminal act of third party is not, as a matter of law, a superceding cause.

Ellwood v. Mid States Commodities, Inc., 404 N.W.2d 174 (Iowa 87)

Broker-Ratification

A knowledgeable investor opened a non-discretionary account with defendant. The documents confirming trades notified customer that trades on his account would be binding if not objected to within five days of receipt of confirmation, and gave the telephone number of the commodities trader who was a member of the Chicago Board of Trade (not a defendant). The employee of the local broker (defendant) made a series of unauthorized trades. Although the customer and the employee spoke repeatedly on the telephone about these trades, the customer never called defendant or the commodities trader and never sent any formal objection. Customer claimed he did nothing further because he received assurances from the employee that the trades were errors and that they would be corrected. Meanwhile margin calls on the unauthorized trades were slowly eating away at customer's account balance and even eventually creating a substantial deficit. Defendant broker learned of the employee's unauthorized trades through another customer (who was getting the same treatment), and he was fired.

On appeal by customer from a verdict for defendant, the court held that there was substantial evidence to support the district court's findings that customer had impliedly ratified the unauthorized trades. As a knowledgeable investor, plaintiff clearly knew that the unauthorized trades were illegal and that a simple phone call to a superior would have halted this activity. The court noted that ratification is a complete defense.

Klooster v. North Iowa State Bank, 404 N.W.2d 564 (Iowa 1987)

Wrongful Attachment

Bank loaned money to plaintiffs and held promissory notes secured by farmers' swineherd. Farmers were in default in notes, and bank learned that farmers were selling some of their hogs. Bank was successful in recovering proceeds from some of the sales, but farmers were successful in prevailing upon some buyers not to include the bank as a joint payee. Bank then brought an action against the farmers on the notes, and obtained an ex parte order for attachment. A surety bond for an amount two and one-half times the value of the logs attached was posted.

Plaintiffs sued the bank for wrongful conversion and received a substantial verdict for compensatory and punitive damages. Court reversed. The bank had a lien on the swineherd. At the time of the attachment, the farmers were in default of the obligation secured by the lien. The bank had reasonable cause to believe that the farmers were putting assets beyond the bank's reach. The bank was entitled to possession either by self-help pursuant to Section 554.9503 or by appropriate legal process as authorized by Section 554.9501(1).

Klooster v. North Iowa State Bank, 404 N.W.2d 564 (Iowa 1987)

Wrongful Conversion

Bank loaned money to plaintiffs and held promissory notes secured by farmers' swineherd. Farmers were in default in notes, and bank learned that farmers were selling some of their hogs. Bank was successful in recovering proceeds from some of the sales, but farmers were successful in prevailing upon some buyers not to include the bank as a joint payee. Bank then brought an action against the farmers on the notes, and obtained an ex parte order for attachment. A surety bond for an amount two and one-half times the value of the logs attached was posted. Although the order authorizing attachment provided, based on the bank's affidavit, that the hogs should be sold immediately because they were perishable, farmers had no notice that the hogs were to be sold. The sheriff obtained private bids and sold the hogs.

The farmers sued for wrongful conversion, among other things, and obtained a verdict for substantial compensatory and punitive damages.

On appeal, the court noted that the bank's resort to the statutory procedure of attachment supercedes the bank's remedies pursuant to the notes and as outlined by the Uniform Commercial Code, but finds that the bank did not follow the statutory procedures for sale. The farmers adduced evidence that had the statutory procedure (requiring three qualified persons to examine the hogs and determine whether an immediate sale was necessary) occurred, the experts would not have supported the bank. Further, the farmers adduced evidence that the amount received from the private sale was substantially less than that which would have been received had the sale been conducted with proper notice.

The court also notes that although plaintiffs' damages on this claim can be measured by reference to the Uniform Commercial Code, Section 554.9507(2) affords the bank no defense. The bank chose to utilize the provisions of Chapter 639 for the attachment, and their liability for the sale is determined by that chapter.

Klooster v. North Iowa State Bank, 404 N.W.2d 564 (Iowa 1987)

1983 claim

Bank loaned money to plaintiffs and held promissory notes secured by farmers swineherd. Farmers were in default in notes, and bank learned that farmers were selling some of their hogs. Bank was successful in recovering proceeds from some of the sales, but farmers were successful in prevailing upon some buyers not to include the bank as a joint payee. Bank then brought an action against the farmers on the notes, and obtained an ex parte order for attachment. A surety bond for an amount two and one-half times the value of the logs attached was posted.

Farmers' suit against the bank included a claim under 42 U.S.C. §1983. The court held that because the statutory procedure has been held constitutional, and the farmers' claim is that the bank failed to follow the procedure provided by the statute, their claim lies outside the coverage of §1983. See Lugar v. Edmondson Oil Co., 457 U.S. 922, 102 S.Ct. 2724, 73 L.Ed. 2d 482 (1982) (private citizen liability under §1983 for "abuse" of legal process is limited to situations where the state's statutory procedure is unconstitutional).

Kunau v. Pillers, Pillers & Pillers, P.C., 404 N.W.2d 573 (Iowa App. 87)

Alienation of Affection

Plaintiff hired defendant to commence an action against wife's dentist for alienation of affections. Immediately after suit was filed, the court issued its opinion in Fundermann v. Mickelson, 304 N.W.2d 790 (Iowa 1981), and the district court dismissed. Defendant filed a second lawsuit for intentional infliction of emotional distress, interference with contract, and interference with prospective economic advantage, and the court dismissed the second suit on grounds of preclusion. Defendant filed 179(b) motions in both cases, and then appealed from the

orders overruling the 179(b) motions. The Iowa Supreme Court dismissed the appeals as untimely because 179(b) motions were not appropriate in challenging orders on motions to dismiss. See Kunau v. Miller, 328 N.W.2d 529 (Iowa 1983). Plaintiff then sued defendant for legal malpractice.

HELD: Assuming without deciding that defendant was negligent in failing to appeal either dismissal in a timely fashion, the underlying suit would not have been successful as a matter of law, and the district court's order sustaining defendant's motion for summary judgment is affirmed. The facts alleged do not rise to the level of outrageous conduct required by Vinson v. Lin-Mar Community School District, 360 N.W.2d 108 (Iowa 1984). Claims for interference with contract or prospective economic advantage will not lie in facts otherwise suited for an action in alienation of affections in the marital relationship.

TRIAL

Wohlenhaus v. Pottawattamie Mutual Insurance Association, 407 N.W.2d 572 (Iowa 1987)

Jury

Plaintiff purchased wind-damage coverage for a particular prefabricated building that he was erecting on his farm. After erection, tornado destroyed building. Building was still under warranty and was replaced free of charge by manufacturer. Insurer denied plaintiff's claim for loss and relied on policy provision that made insurance excess as to warranty recovery.

Plaintiff sued for policy coverage. On its own, district court bifurcated "declaratory judgment portion" of case and, over plaintiff's objections and despite a jury demand, proceeded to adjudicate those issues in a "mini-trial" to the court. The court ruled that interpretation of the policy presented only an issue of law, that plaintiff was not entitled to reformation of policy, and that warranty clause precluded coverage.

On appeal, the court rejects the procedures utilized by the district court. Plaintiff's jury demand was applicable to all claims except the request for reformation of the policy. Plaintiff did not present the case as strictly a matter of interpretation of the meaning of words in a written contract. Plaintiff's grounded his claim in part on the understanding of the parties within the context of the transaction.

State v. Bessenecker, 404 N.W.2d 134 (Iowa 87)

Jury

Prosecuting attorney cannot use criminal history data of prospective jurors during jury selection process, absent showing of reasonable basis for using data on a particular juror. Information must be made available to defendant if used by prosecuting attorney, unless good cause is shown by the prosecutor for withholding such information.

State v. Doughty, 397 N.W.2d 503 (Iowa 86)

Jury

"For some unexplained reason" a juror who had been peremptorily struck took the place of an non-struck juror when the clerk called the roll of the 14 jurors to be sworn for the trial. The mistake was not discovered until the jury was polled as to its verdict. HELD: At least in absence of affirmative proof of prejudice, a party may not complain after the verdict that one of the jurors was peremptorily struck.

Bebensee v. Ives, 409 N.W.2d 710 (Iowa App. 87)

Cross-Examination

In trial to court of medical malpractice action, plaintiff's counsel was cross-examining defendants' expert when district court engaged in colloquy with plaintiff's counsel in which counsel says that line of inquiry is not going to "bother" the judge. "You know perfectly well I come from the community where this man is and I have heard him testify in court. . . . And he isn't going to change his testimony because Bob Waterman is his lawyer, I have to tell you, and your comments aren't going to

influence me. I know what your point of view is in this case pretty well by now. . . . Go ahead."

HELD: Assuming that this exchange was "unnecessary," remarks did not amount to an irregularity or an abuse of discretion which prevented the plaintiff from having a new trial. Plaintiff has made no showing that this interfered with or truncated plaintiff's cross-examination. "In fact, counsel was invited to 'go ahead.'"

Steckelberg v. Randolph, 404 N.W.2d 144 (Iowa 87)

Directed Verdict

In action for fraudulent misrepresentation, district court directed a verdict in favor of defendant at close of evidence. On plaintiffs' post-trial motions, trial court reversed itself and granted a new trial. HELD: Entry of directed verdict neither precludes the granting of a new trial or restricts a trial court's discretion in ruling on a motion for new trial.

Lange v. Des Moines, 404 N.W.2d 585 (Iowa App. 87)

Final Argument

Defendant appealed verdict in favor of prisoner in claim rising out of sexual abuse by another prisoner in the city jail and argues that the verdict should be overturned due to prejudicial remarks in closing argument by plaintiff's counsel. The court notes that the jury was admonished to disregard one of the improper remarks, and finds that the other allegations of misconduct are not such that district court abused its discretion in refusing to grant a new trial. The court notes that counsel promptly withdrew the other allegedly improper remarks. Further, the court declines to consider a "cumulative effect" argument by the defendant for lack of citation to authority. Defendant's argument was that with each successive improper remark the impact on the jury mounts and the prejudice becomes so pronounced that remedies less than new trial are ineffective.

DeBurkarte v. Louvar, 393 N.W.2d 131 (Iowa 1986)

Instructions

Patient sued defendant doctor for failing to diagnose cancer, thus reducing her chances of survival. District court instructed jury on standard definitions of "proximate cause" and "substantial factor" and then instructed the jury that a doctor is responsible to a patient if he "depriv[es] her of the opportunity to receive early treatment and chance of realizing any resulting gain in her life expectancy . . . from his failure to exercise reasonable care . . ., if his failure to exercise such care increases the risk of such harm, and was a proximate cause of increasing such risk."

HELD: No error for district court to refuse doctor's request to instruct that the doctor's negligence was not a substantial factor in bringing about the harm if the harm would have been sustained in any event.

Bratton v. Bond, 408 N.W.2d 39 (Iowa 1987)

Instructions

In medical malpractice action, district court instructed over plaintiff's objections that a physician, in accepting employment for the purpose of making a diagnosis and treatment, does not make any implied guarantee of results. HELD: Trial court aptly stated the status of the prior common law in its instructions; however, the court might have avoided this issue by using only the Iowa Uniform Jury Instruction language. The revised UJI Chapter 13 does not contain this language. The bar committee had the same concern that plaintiff and the court shares: This instruction might mislead or confuse the jury by the injection of a contract term in a negligence action. "In the future . . . trial courts should not give guaranty language in a medical negligence case instruction."

State v. Jackson, 397 N.W.2d 512 (Iowa 86)

Q

Instructions

"For some unexplained reason" instructions did not find their way into jury room when jury was given the case. At the

close of deliberations, the jury returned and the error was discovered. The court sent the jury back for deliberations with the instructions. After the jury returned with a signed verdict (3 minutes later), defendant objected and moved for mistrial. HELD: You can't have it both ways.

Fratzke v. Meyer, 398 N.W.2d 200 (Iowa App. 86)

Insurance

In unreported final argument, defense counsel allegedly suggested that defendant was uninsured and would be personally liable for any judgment rendered in the case. After objection and in chambers, defense counsel expressed a belief that he said, "It would come in the form of a judgment against Teresa Meyer and she is the only person in the world here." District court admonished the jury not to draw any inference from counsel's last remark, but refused to give an instruction on the irrelevance of insurance.

The case was reversed and remanded for new trial on other grounds. On this issue, the court characterized defense counsel's argument as "reasonably taken to imply that the defendant is uninsured," which argument is objectionable under Laguna v. Prouty, 300 N.W.2d 98 (Iowa 81). Court again encourages use of insurance instruction from Price v. King, 255 Iowa 314, 122 N.W.2d 318 (1963).

Blakely v. Bates, 394 N.W.2d 320 (Iowa 1986)

Rebuttal

District Court did not abuse its discretion in permitting character evidence on rebuttal as opposed to case in chief, even though defense strategy of attacking plaintiff's credibility in personal-injury suit started in opening statement and continued through cross-examination of plaintiff. Plaintiff had even listed his character witnesses in a pre-trial witness list. COMMENT: Decision on this issue was 5-4.

WORKERS' COMPENSATION

Justus v. Anderson, 400 N.W.2d 66 (Iowa App. 86)

Co-Employee - Gross Negligence

Plaintiff recovered from supervisory employee who had been in charge of redesigning the storage plan for paper products in floor stacks 4-pallets high. Best evidence for plaintiff was that defendant had seen 4-pallet stacks leaning and tilting, knew that 4-pallet stack was more likely to tilt than a 3-pallet stack, and that serious injury could result to people working underneath a stack that fell. Defendant knew that injury as a result of stacking paper products 4-pallets high was a "possibility." Defendant also knew that another employee had suffered similar injury when he ran into a stack with a forklift. Plaintiff's injury apparently occurred without warning and without any such triggering event.

HELD: Evidence of knowledge that injury was "probable" as opposed to "possible" was insufficient. Other accident was not sufficiently similar to place defendant on notice. DISSENT: Trial court used proper standard and found, with substantial evidentiary support, that defendant knew that injury was probable. Majority improperly emphasizes knowledge of similar prior cases or prior safety inspections, which should be just two of several factors to examine.

Teel v McCord, 394 N.W.2d 405 (Iowa 1986)

Interest on award for permanent partial disability begins to accrue when employee returns to work rather than when award is made, especially when only issue being litigated is extent of disability.

Western International v. Kirkpatrick, 396 N.W.2d 359 (Iowa 86)

Appeal

Statute allowing direct appeal to Iowa Supreme Court of industrial commissioner's decisions was unconstitutional expansion of original and/or appellate jurisdiction of Supreme Court.

Dickenson v. John Deere Products Engineering, 395 N.W.2d 644 (Iowa App. 86)

Interest

Interest on permanent partial disability awards should commence on date when claimant commenced action for review-reopening, not the date of the decision on the review-reopening action.

Lauhoff Grain Co. v. McIntosh, 395 N.W.2d 834 (Iowa 86)

Scheduled Injury

McIntosh fractured his femur at the neck, just below the hip joint. Avascular necrosis developed as a result of the interruption of the blood supply, and two years after the accident McIntosh underwent a surgical procedure for replacement of the hip joint. HELD: The statutory definition of "leg" for purposes of application of scheduled benefits does not include the hip joint. Employer had argued that the AMA guide, which industrial commissioner by rule has adopted as a guide, includes the hip as part of the "lower extremity." The court first responded by saying that the AMA guide is only a guide and is not binding on the industrial commissioner, and then noted that the guide's use of "lower extremity" does not correspond to the statutory terms, which would be controlling in any event.

Pappas v. Hughes, 406 N.W.2d 459 (Iowa App. 1987)

Co-employee Suit

Plaintiff was injured when a hot-grease fryer fell on her. She sued defendant, alleging that he was a co-employee whose gross negligence was the proximate cause of her injuries. Uncontested facts established that defendant was the sole shareholder, director, and officer of the corporation that owned the restaurant in which plaintiff worked. Defendant was also an employee and received W-2 forms. The district court sustained defendant's motion for summary judgment, and the court of appeals affirmed. "The evidence is clear that Hughes is the alter ego of the corporation. The fact that he also was employed by the corporation does not change this conclusion."

COMMENT: The court said that because Hughes' status went to jurisdiction, the issue of whether or not Hughes was the alter ego of the corporation was an issue of fact for the court, not a jury.

Woodruff Construction Co. v. Mains, 406 N.W.2d 787 (Iowa 1987)

Co-employee suit

Defendant's employee was injured on a construction site at which plaintiff was general contractor and defendant was sub-contractor to plaintiff. Plaintiff settled with employee and sued defendant and another of defendant's employees (Mains) for indemnity and/or contribution. At trial, jury found that (Mains) was grossly negligent, and that plaintiff was negligent. The jury assessed 60% of the negligence to plaintiff and 40% to Mains.

Evidence at trial was adduced to the effect that Mains was a "tough, hard-driving foreman. He was often verbally abusive. . . . He threatened them with firing, and even with physical abuse. . . . Mains often singled out a certain employee and 'rode' him for a whole work day." Other evidence was adduced to the effect that accidents were caused by Mains' pressure and the pressured employee's resulting inattention to safety.

In reversing an entry of judgment against Mains for indemnity to the general contractor, the court found insufficient evidence to submit the issue of gross negligence. Regardless of Mains' demeanor, he simply directed the employee to come to him quickly. Although the hole through which the employee fell was in the direct line between Mains and the employee, "there was considerable distance between the soft spot and the edge of the roof, which would readily have permitted West to get to Mains without walking over the soft spot." It cannot be said that the evidence shows a "probability" that the employee would fall through the hole. Absent such probability, the employee's co-employee suit would fail, and this claim for indemnity should fail likewise.

Woodruff Construction Co. v. Barrick Roofers, Inc., 406 N.W.2d 783 (Iowa 1987)

Indemnity

Defendant's employee was injured on a construction site at which plaintiff was general contractor and defendant was sub-contractor to plaintiff. Plaintiff settled with employee and sued defendant and another of defendant's employees for indemnity and/or contribution. At trial, jury found that the co-employee was grossly negligent, and that plaintiff was negligent. The jury assessed 60% of the negligence to plaintiff and 40% to co-employee.

The court affirmed the denial of plaintiff's claim against defendant for indemnity. The sub-contract contains no express clause of indemnity, and plaintiff did not adduce evidence that the parties actually intended to provide for indemnity. The question is whether the law, for policy or other reasons, should impose such a duty, regardless of the circumstances, including plaintiff's own negligence. At least "where the proposed indemnity aided in the creation of a hazard, the law should not imply a right to indemnity from the employer." Professor Larson's suggestion "that a duty to indemnify might be implied where a proposed indemnity has merely failed to discover a hazard, as opposed to causing one" is not applicable to these facts. To the extent that Blackford v. Sioux City Dressed Pork, Inc., 254 Iowa 845, 118 N.W.2d 559 (1962), supports an implied agreement to indemnify in all "service contracts," without regard to the fault of the proposed indemnity, it is overruled.

McCollough v. Campbell Mill & Lumber Co., 406 N.W.2d 812 (Iowa App. 1987)

Commutation

Employee suffered work-related accident in 1967. In 1971 employee sought and received commutation of an award based upon a finding of 60% permanent industrial disability. In 1979 employee experienced additional difficulties with his condition, and filed a petition to set aside the commutation order on the basis of fraud and mutual mistake of fact. Evidence was adduced at hearing that employee was advised in 1969 that his condition could worsen over time. HELD: Without deciding whether or not a mutual mistake of fact would ever constitute grounds upon which

to set aside a commutation, "employee has not adduced evidence suggesting that a mutual mistake of fact occurred."

Burgess v. Great Plains Bag Corp., 409 N.W.2d 676 (Iowa 87)

Statute of Limitations

Plaintiff timely commenced proceedings for an allegedly work-related injury with the Iowa Industrial Commissioner. His attorney filed an application to withdraw because of non-cooperation. The application and the Industrial Commissioner's orders in response to same were sent to plaintiff by certified mail. Plaintiff made no objection to the application, and counsel was permitted to withdraw. The commissioner sent a status report form by certified mail to plaintiff, but it was returned as unclaimed. A series of motions and orders resulted in which plaintiff was notified that unless he responded to the status report and request for attention to his claim, the matter would be dismissed. He did not respond and the case was in fact dismissed. More than two years after the dismissal, the plaintiff filed an application for reinstatement. HELD: Industrial Commissioner did not act in an arbitrary manner in denying the application for reinstatement. Chapter 85 provides no exception for tolling the two-year period of limitations when an action has been dismissed without prejudice. The extenuating circumstances offered by plaintiff (illiteracy) form no basis for relief.

Muscatine County v. Morrison, 409 N.W.2d 685 (Iowa 87)

Hearing Loss

Hearing loss resulting from prolonged, work-related exposure to noise levels below the times and intensities specified in section 85B.5, may nevertheless be compensable. Conclusive evidence that noise levels did not rise to the figures proscribed in the statute does not preclude claimant from showing a hearing loss caused by work environment.

ANNUAL APPELLATE DECISIONS REVIEW

October 1986 - October 1987
Addendum

By

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CIVIL PROCEDURE

Graber v. Iowa District Court, 410 N.W.2d 224 (Iowa July 1987)

179(b)

In response to mortgage foreclosure action and action for replevin by PCA, plaintiffs sued PCA for breach of fiduciary duty. Cases were consolidated for trial, and the jury found in favor of plaintiffs in its defenses to the replevin action and for plaintiffs on the merits of their tort action. The district court followed the jury's verdict in the replevin action and entered judgment for plaintiffs in the foreclosure action, but sustained PCA's motion for new trial in the tort action, because of duplicative and/or excessive damages.

PCA filed a 179(b) motion eight days later. The sole relief requested was a determination of the scope of the new trial, with inquiry by PCA as to whether any issues of liability as well as those relating to damages would be tried. Twenty-six days after the order granting new trial, PCA notified the court and opposing counsel orally of a request that the court also determine whether the findings in the foreclosure action prevented PCA from enforcing certain promissory notes. After unreported hearing by telephone, the court advised the parties that it intended to alter the foreclosure judgment with respect to the promissory notes, to the benefit of PCA. Plaintiffs subsequently advised the court that they contested the court's jurisdiction to alter that judgment. PCA filed an amendment to its 179(b) motion to memorialize its request with respect to the promissory notes.

HELD: The oral request and written amendment were both untimely and do not relate back to the original 179(b) motion. The original motion related only to the tort action and sought only clarification of the scope of the new trial ordered in the tort action.

COMMENT: The court also found the ultimate order with respect to modification of the judgment on PCA's foreclosure action did not constitute an order nunc pro tunc.

Federal Land Bank v. Gibbs, _____ N.W.2d ____ (Iowa August 1897)

Summary Judgment

District court abused its discretion in denying land owner's motion for continuance to permit discovery of facts in possession of plaintiff mortgagee in action for foreclosure of mortgage. Hearing on motion for summary judgment had been scheduled for less than two months after the action had been filed. Counsel had been representing land owners for less than one week at the time of the motion for continuance.

COURTS

Wright v. Scott, 410 N.W.2d 247 (Iowa August 1987)

Settlements

Shortly before trial, one of several defendants in an action arising from a multi-car accident filed an offer to confess judgment. On the last day of the offer's duration, and pursuant to the direction of plaintiffs, counsel telephoned defendant's counsel to accept the offer. That evening, plaintiffs discussed the effect of this settlement on their claims against the remaining defendants, and upon being more fully advised as to the effect, changed their mind. Counsel advised defendant's counsel three days later that the settlement was off.

HELD: A party who has accepted a settlement cannot rescind that agreement later, based on its unilateral mistake of law.

DAMAGES

Gail v. Clark, 410 N.W.2d 662 (Iowa July 1987)

Consortium

In a dram shop action by officer injured in high-speed chase of intoxicated driver, officer's spouse and children made claims for loss of consortium. HELD: Spouse's and child's

rights to spousal and parental consortium respectively are claims that they were "injured in . . . property" for purposes of §123.92. COMMENT: Opinion contains a lengthy historical comment on consortium claims.

EVIDENCE

Gail v. Clark, 410 N.W.2d 662 (Iowa July 1987)

Settlement

Officer injured in high-speed chase of intoxicated driver sued driver and dram shop. Intoxicated driver settled with officer before a trial, then testified at trial that his deposition testimony, which was quite favorable to the dram shop, was a lie and that he had in fact consumed beer purchased from the dram shop defendant's convenience store. HELD: No abuse of discretion in refusing to permit defendant to introduce evidence of settlement and amount.

INSURANCE

Tilley v. Home Insurance Co., ____ N.W.2d ____ (Iowa Aug. 1987)

In anticipation of renewal, insurer sent a certificate of insurance to the beer and liquor control department, which issued a liquor license to the insured in reliance upon such certificate. Insured purchased insurance from another company, and insurer-defendant never issued a policy. HELD: No insurance coverage by Home, because neither insured nor department relied upon certificate to its detriment. COMMENT: 5-4, even though it was clear that other insurer issued a policy, sent a certificate of insurance, and was "on the risk" in the underlying suit.

LABOR

Halsey v. Coca-Cola Bottling Co., 410 N.W.2d 250 (Iowa Aug. 1987)

Disability

Vending machine repairman who had to drive to locations to service machines, to pick-up machines for in-house service, and to return repaired machines, lost his drivers' license as a result of an eye disease. HELD: Reasonable accommodation of disability not established by proof that employee could provide driver at his own expense. Employer not required to expose its property to drivers not controlled by employer.

TORTS

Schreiner v. Scoville, 410 N.W.2d 679 (Iowa Aug. 1987)

Legal Malpractice

Lawyer prepared will that contains specific bequest of real estate. Testator subsequently sold real estate. Lawyer helped her with that transaction as well. Beneficiary sued lawyer after testator's death, because proceeds of sale of real estate passed through residuary clause of will. District Court sustained defendant/lawyer's motion to dismiss.

HELD: Lawyer drafting will "owes a duty of care to the direct, intended, and specifically identifiable beneficiaries." Such a cause of action is limited to where the lawyer's malpractice frustrates the testator's intent as expressed in the will and the beneficiary's interest "is either lost, diminished, or unrealized." If the testator's intent is fully implemented, no cause of action will be allowed," unless "the lawyer concedes negligence."

The court noted that on a motion to dismiss, it was taken as true that the lawyer had actively represented the testator in her sale of the real estate but had never told her what effect that sale would have on her testamentary intent. "In most cases separate transactions between lawyer and client will not be linked, nor should they be. No lawyer reasonably can be expected to keep track of the provisions in the wills of his or her clients, nor the effect on those instruments caused by

changes in the clients' affairs. It follows that in most cases, post-will disposition of property will give rise to no cause of action." In this case, however, the sale was sufficiently close in time to the will that the lawyer's involvement in the sale would impose a duty of care.

Gail v. Clark, 410 N.W.2d 662 (Iowa July 1987)

Fireman's Rule

Distinguishing the facts of Pottebaum v. Hinds, 347 N.W.2d 642 (Iowa 1984), in which the court adopted the fireman's rule and applied it to dram shop actions, the court affirmed legal rulings denying the applicability of the fireman's rule to a dram shop action for injuries suffered by an officer involved in a high-speed chase of an intoxicated driver. The officer's presence at the scene of the accident "was one step removed from defendant's dram shop conduct."

Gail v. Clark, 410 N.W.2d 662 (Iowa July 1987)

Dram Shop

Officer injured in high-speed chase of intoxicated driver, as a matter of law, did not assume the risk of injury for purposes of the officer's dram shop action.

TRIALS

Gail v. Clark, 410 N.W.2d 662 (Iowa July 1987)

Instructions

Police officer injured in high-speed chase of intoxicated driver filed dram shop action. At trial, intoxicated driver testified that he had lied in his pre-trial deposition about the amount of beer purchased at defendant dram shop, and then testified in a manner that was extremely prejudicial to defendant's interest. HELD: Because the jury gave stock instructions on the jury's exclusive duty to assess witness credibility, the weight to be accorded testimony of a witness who is impeached by prior and inconsistent statements, and the value

of testimony with regard to verbal statements, it was not error to refuse to instruct on the meaning of perjury and the caution to be exercised in considering the testimony of a witness who commits perjury.

WORKERS' COMPENSATION

John Deere v. Meyers, 410 N.W.2d 255 (Iowa August 1987)

Discovery Rule

Court affirms industrial commissioner's application of discovery rule to statute of limitations for claims arising under occupational hearing loss statute.