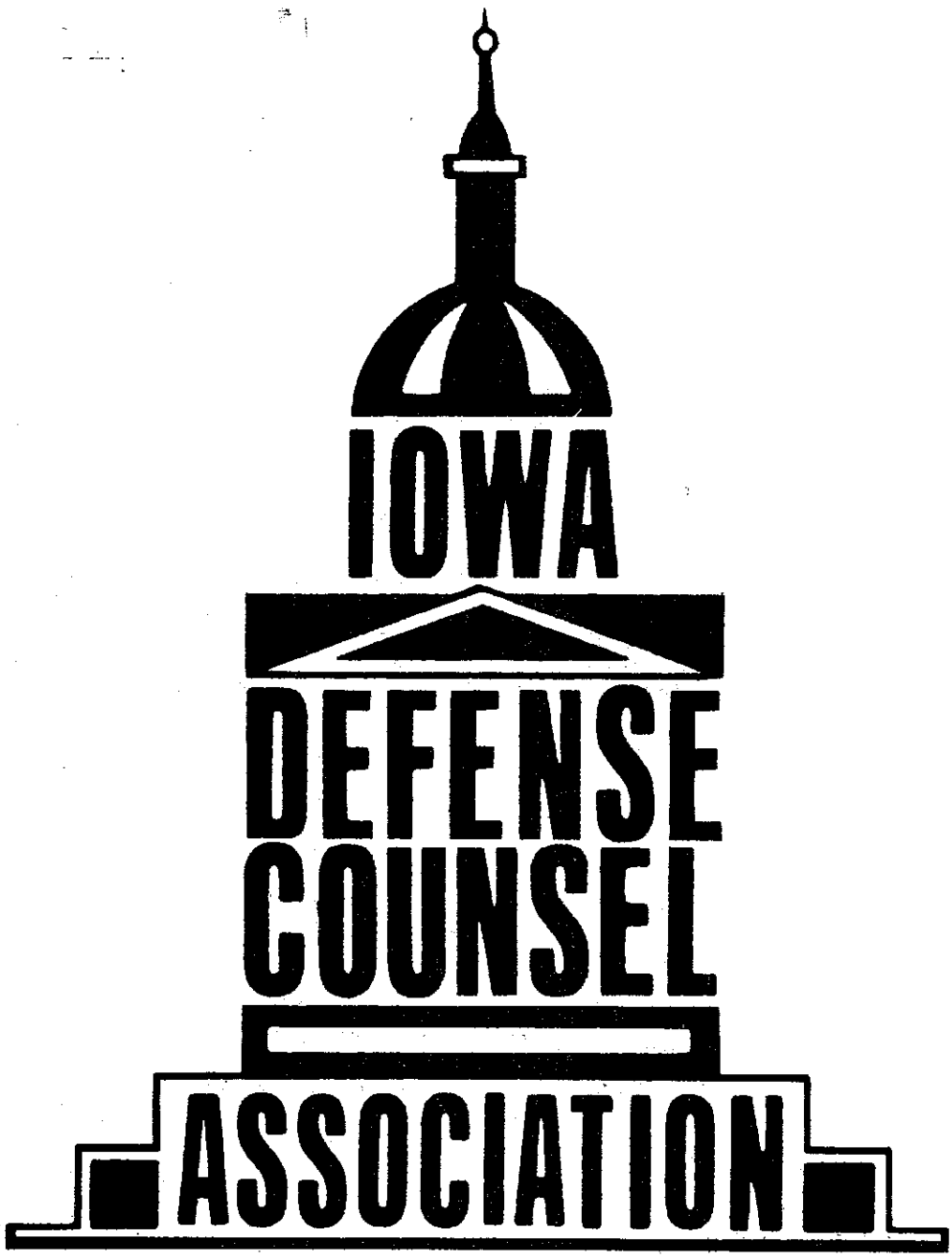

1993
ANNUAL MEETING

OCTOBER 6, 7 & 8
EMBASSY SUITES HOTEL
ON THE RIVER
101 EAST LOCUST STREET
DES MOINES, IOWA 50309

1993 IOWA DEFENSE COUNSEL ANNUAL MEETING

WEDNESDAY, OCTOBER 6

9:00 a.m **Registration, Desk Opens**

11:00 a m **Board of Directors Meeting**

1:00 p m **Introduction and Report of the Association**

1:15-2:00 p m **Recent Developments Under Comparative Fault**
Tom Shields - Lane & Waterman, Davenport, IA.

2:00-2:45 p m **Environmental Liability: Defense Issues and Insurance Coverage**
Charles Becker - Belin, Harris, Lamson, McCormick, A P.C , Des Moines. IA

2:45-3:00 p.m **Break**

3:00-3:45 p.m **Insurance Coverage Issues in Sex Discrimination and Abuse Cases**
Connie Alt - Shuttleworth & Ingersoll Cedar Rapids, IA

3:45-4:15 p m. **Americans with Disabilities Act - its Applicability to the State Courts and Impact On Trial Practice**
Hon Ross A Walters, District Judge, Fifth Judicial District, Des Moines, IA

4:15-5:15 p m. **Important Ethical Issues for Trial Lawyers**
James Gritzner - Nyemaster, Goode, McLaughlin, Voigts, West, Hansell, O'Brien, A.P.C., Des Moines, IA

5:30-7:00 p.m **Cocktails**
"On - your- own" Night in Des Moines

THURSDAY, OCTOBER 7

8:30-9:30 a m. **Ethics Problems From the Perspective of the Defense Attorney**
John D. Lloyd - Reynoldson, VanWarden, Kimes, Reynoldson & Lloyd, Osceola, IA

9:30-10:15 a m. **Recent Developments in Iowa Insurance Law**
John F Lorentzen - Nyemaster, Goode, McLaughlin, Voigts, West, Hansell & O'Brien, A P.C , Des Moines, IA

10:00-10:30 a m **Break**

10:30-11:15 a m **Judicial View of Proposed Amendments to the Federal Rules of Civil Procedure**
Magistrate Judge Mark W Bennett
U S District Court, Southern District of Iowa

11:15-12:00 p.m **Defense Attorney Perspective of Proposed Amendments to the federal Rules of Civil Procedure**
David H. Luginbill - Ahlers, Cooney, Dorweiler, Haynie, Smith, & Allbee, P.C , Des Moines, IA

12:00-12:45 p.m **Lunch**

12:45-1:15 p.m. **Supreme Court Report**
The Honorable Louis A Lavorato
Justice, Iowa Supreme Court

1:15-2:00 p m **Wrongful Discharge Claims : Issues Affecting Defense of the Employer**
Frank Harty - Nyemaster, Goode, McLaughlin, Voigts, West, Hansell & O'Brien, A P C., Des Moines, IA

2:00-2:45 p.m. **Workers' Compensation Update**
Debra Dubik - Betty, Neuman & McMahan, Davenport, IA

2:45-3:00 p.m. **Break**

3:00-3:45 p.m. **Appellate Procedure: New Rules and Practice Pointers**
Diane H. Stahle - Davis, Hockenberg, Wine, Brown, Koehn,& Shors, P C., Des Moines, IA

3:45-4:45 p m **Retention and Working With Outside Counsel,**
View of Corporate and Insurance In-House Counsel,
Wendy N. Munyon - Assistant General Counsel Grinnel Mutual Reinsurance Co., Grinnell, IA
Edward H. Graham, General Counsel, Maytag Corp

6:30 p m. **Reception** - Des Moines Club

7:30 p m. **Annual Banquet** - Des Moines Club

FRIDAY, OCTOBER 8

9:00-9:45 p m **Handling Expert Witnesses in the Defense of Product Liability Cases**
Kevin M. Reynolds - Whitfield & Eddy, Des Moines, IA

9:45-10:30 p m **Defense of Employment Discrimination and Sex Harassment Claims**
Iris Muchmore - Simmons, Perrine, Albright & Ellwood Cedar Rapids, IA

10:30-10:45 a m **Break**

10:45-11:30 a.m. **First and Third - Party Bad Faith**
Barbara A. Hering - Bradshaw, Fowler, Proctor & Fairgrave, P.C , Des Moines, IA

11:30-12:00 p.m **Legislative Report - 1993**
Robert M. Kreamer - Whitfield & Eddie, Des Moines, IA

12:00-12:45 p m **Lunch**

12:45-1:15 p m. **Developments in the Federal Court**
Hon. Ronald E. Longstaff
U.S District Court Judge, Southern District of Iowa

1:15-2:00 p.m. **Jury Instructions Update**
David L. Brown - Hanson, McClintock & Riley Des Moines, IA

2:00-3:15 p.m. **Annual Appellate Update**
Gregory M. Lederer - Simmons, Perrine, Albright & Ellwood, Cedar Rapids, IA

3:15-3:30 p.m **Election of Officers and Directors and Annual Meeting of The Iowa Defense Counsel Association**

3:45 p.m **Board of Directors Meeting**

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1993 ANNUAL MEETING

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THE BEAT GOES ON: CHAPTER 668 IN FLUX

By Thomas J. Shields
Davenport, Iowa

In the January 1993 edition of *Defense Update*, the Iowa Defense Counsel Association newsletter, I wrote, "When Chapter 668, Code of Iowa, was adopted in 1984, bringing the modified comparative fault doctrine to Iowa, few lawyers felt that the act was either perfect or static." That article then went on to discuss several interesting cases that "fine-tuned" certain sections of Chapter 668, Code of Iowa.

While I am certain that each of you have slavishly read each and every issue of *Defense Update*, and committed to memory every recent Supreme Court of Iowa decision, let me offer this sequel to that earlier article so that your minds may be at ease as to whether you have missed important advancements in the law.

Rest assured you have missed some of those developments; you will in the future. Hopefully, the efforts promoted by this Association will help us remain current.

While there have been some additional cases that have arisen since that article appeared in *Defense Update*, one of the cases which keynoted that article has been subjected to a final review by the Supreme Court of Iowa. In Waterloo Savings Bank v. Austin, 494 N.W.2d 715 (Iowa 1993), the Supreme Court of Iowa upon application for further review vacated the Court of Appeals' decision, reversed the district court judgment, and remanded with directions.

Waterloo Savings Bank, on its face, presents simple issues. A wrongful death action was filed on behalf of two decedents, and after the defendant admitted liability a jury returned verdicts of

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$40,000 for each estate. Of that amount, $35,000 of each award was for future damages. The issue arose as to when interest should begin running, and at what amount on the award for future damages. The district court had entered judgment at 10% interest from the date the petition was filed; defendants moved to modify seeking interest to begin running on the day of the judgment and at the floating interest rate provided for in Section 668.13.

The district court refused to modify the judgment, and on appeal the Iowa Court of Appeals reversed and remanded the case for entry of judgment in accordance with Section 668.13(4), noting, however, that the defendants had failed to preserve error on their claim that the rate of interest was improperly calculated. The Supreme Court accepted the petition for further review.

In the court's opinion, Justice Linda Neuman noted, "The fighting issue is whether Iowa Code Chapter 668, and its interest provisions, have any application to this case at all." Waterloo Savings Bank, 494 N.W.2d at 716. When a defendant admits liability, is there any fault to be compared pursuant to Chapter 668? The plaintiff responded in the negative. The defendants argued that because plaintiff's petition initially alleged negligence, comparative fault applies.

The Supreme Court sided with the defendants. The court, Id. 494 N.W.2d at 717, that

> By its terms, the purpose of the comparative fault act is to establish "comparative fault as the basis for liability in relation to claims for damages arising from injury to or death of a person or harm to property...." 1984 Iowa Acts Ch. 1293. This broad prescription applies

> where the fault which is placed in issue, or may be placed in issue, is that defined by Section 668.1. "Fault" is therein defined as "one or more acts...in any measure negligent or reckless toward the person or property of the actor or others...." Iowa Code §668.1 (emphasis added). See Cowan v. Flanery, 461 N.W.2d 155, 157 (Iowa 1990) (negligence claim for damages resulting from injury to person "now brought under the provisions of Chapter 668 of the Iowa Code; liability in tort--comparative fault").
>
> Because plaintiff's claim was for damages arising from the death of its decedents, the applicable provisions of Chapter 668 were implicated. Among those appliable provisions is Section 668.13 relating to the payment of interest on future damages. Section 668.13(4) permits such interest to accrue only from the date of judgment....

The Supreme Court has settled this issue. Even though liability is admitted by a defendant, as long as fault was properly placed in issue in the initial pleadings pursuant to Chapter 668, interest on awards of future damages runs only from the date of judgment at the floating rate provided for in Section 668.13.

While some observers might believe that the Supreme Court in Waterloo Savings Bank, supra, delved into what constitutes only a technical clarification of Chapter 668, the same cannot be said of the decision of the court in Coker v. Abell-Howe Company, et al, 491 N.W.2d 143 (Iowa 1992). This case involved personal injuries sustained by Bobbie G. Coker, a truck driver, who had delivered a large steel component to a construction site in Cedar Rapids where Abell-Howe was one of the contractors. In unhooking the load to prepare it for removal from the trailer that Coker brought on site, one of Abell-Howe's superintendents employed a cheater bar brought to the site by Coker to release chain binders. Coker told the

Abell-Howe superintendent that, "if he were to get hit by that cheater bar, it could buy him a new lunch or more ways than one hurt him." 491 N.W.2d at 146. He ignored the warning. Shortly thereafter, the Abell-Howe employee lost control of the cheater bar and it swung over his head and backward behind him, striking Coker in the head. Coker was not wearing a helmet, and it was alleged that he gave no warning that he was near the Abell-Howe employee prior to the incident.

The trial court instructed the jury on comparative fault, including instructions on contributory negligence, unreasonable failure to take action to avoid an injury, assumption of the risk, and proper lookout. The jury found Coker 65% at fault and Abell-Howe and its employee 35% at fault. Coker appealed, claiming error over the instructions that were given.

The Supreme Court of Iowa, Justice Bruce Snell writing for the court, dissected Chapter 668 as it pertains to the issues of assumption of risk and failure to take action to avoid an injury.

The court rejected Abell-Howe's contention that the adoption of Chapter 668 reinstated assumption of risk in a negligence case. The court distinguished the two primary meanings of assumption of the risk, noting, Id. 491 N.W.2d at 146, that

> ... In its primary meaning, assumption of risk is an expression for the proposition that the defendant was not negligent, either because the defendant owed no duty or did not breach a duty. When used in its secondary meaning, assumption of risk is an affirmative defense to an established breach of duty; the defendant contending that the plaintiff acted unreasonably in encountering a known risk. Rosenau, 199 N.W.2d 125, 131 ...

> Before our decision in Rosenau, the affirmative defense of assumption of risk in negligence cases resulted in confusion and repetition in our tort law. When both contributory negligence and assumption of risk were pleaded, a jury could find that the plaintiff acted with the care of a reasonably prudent person under all of the circumstances, yet could deny recovery because the plaintiff "assumed the risk." ...

Because Abell-Howe noted to the court that Section 668.1 specifically includes assumption of the risk in the definition of fault, it argued further that assumption of risk applies to all fault cases. The court rejected this analysis citing extensively from the Uniform Comparative Fault Act and committee comments thereto. The court, Id. 491 N.W.2d at 148, held, "The inclusion of assumption of risk in our comparative fault statute does not mandate that the defense be restored in negligence cases, returning tort law to the confusion and repetition that prompted Rosenau."

Assumption of the risk cannot be pleaded or instructed upon as a separate defense in cases in which contributory negligence is an available defense under the Iowa comparative fault act, and Rosenau remains intact. Coker, Id. 491 N.W.2d at 148. The court also held that the giving of that assumption of the risk instruction constituted prejudicial error.

The court next turned to the issue of the instruction on unavoidable injury. Construing it with the language of Section 668.1 and referring to the official comment to Section 1 of the Uniform Comparative Fault Act, the court found that the phrase "unreasonable failure to avoid an injury or mitigate damages,"

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states "the doctrine of avoidable consequences is expressly included in the coverage [of the definition of fault]."

Noting that contributory negligence and avoidable consequences involve a review of the reasonableness of the plaintiff's conduct as a defense in a negligence action, the court held that nonetheless, contributory negligence and avoidable consequences are distinct. The court added, Id. 491 N.W.2d at 149, that

> ... The difference between the two theories is time related. A plaintiff is contributorily negligent when unreasonable behavior before or simultaneous with that of the defendant is a contributing cause of his injuries. Avoidable consequences, on the other hand, occur after the defendant's negligence, but before an injury results. The avoidable consequences doctrine is akin to mitigation of damages when the plaintiff must attempt to reduce damages after the injury has occurred. See R.E.T. Corp. v. Frank Paxton Co., 329 N.W.2d 416, 419-22 (Iowa 1983).

Holding that the Iowa legislature adopted the avoidable consequences doctrine as an element of Section 668.1, the court felt a separate instruction on "an unreasonable failure to avoid an injury" may be warranted in those cases in which the plaintiff could have acted to avoid injury after the defendant's alleged negligence occurred. Id. 491 N.W.2d at 150.

The key to whether the avoidable consequences doctrine is triggered and can be instructed upon is whether the plaintiff's alleged fault occurs in time after the act of fault alleged against the defendant. "In cases in which the plaintiff's failure to avoid injury occurs prior to or simultaneous with the defendant's negligent acts or omissions, the allegation is nothing more than contributory negligence, and a negligence instruction is all that

is required." Coker, 491 N.W.2d at 150. The Supreme Court found prejudicial error in the giving of the avoidable consequences instruction in this case.

The holding in Coker as it pertains to Chapter 668 is manifestly apparent. First, the court has reiterated the incompatibility of contributory fault and assumption of the risk as separate defenses in the same case. Second, the court has further defined and amplified the temporal application of the avoidable consequences doctrine. The giving of that instruction, along with a comparative fault instruction, will constitute prejudicial error unless the defendant can show that the plaintiff's complained-of action occurred after the act of fault alleged against the defendant.

The discussion of the issues in Cincinnati Insurance Co. v. Evans, 493 N.W.2d 798 (Iowa 1992), shows that even when an attorney believes all the issues are properly focused and framed under Chapter 668, disaster nonetheless can come knocking at the door.

This case resulted from a fire that did heavy damage to a number of stores in Ames. The owner of one of the stores, Evans, had used a floor conditioner manufactured by Permagrain. When first applied, this conditioner is highly flammable, and under some circumstances, may cause spontaneous combustion. When Evans had finished mopping on the floor conditioner, he put the mop in a soap concentration manufactured by GoJo. As luck would have it, GoJo soap contains some of the same flammable ingredients that were found in the Permagrain floor conditioner. After Evans washed the

mop head which contained the floor conditioner in the GoJo soap for approximately 30 minutes, he hung the mop to dry. Later a fire was reported and the investigation revealed that it started in the mop head, which was not disputed by any of the parties.

Adjacent store owners sued Evans, who then sued Permagrain. Cross-claims were filed, and eventually Permagrain filed a third-party petition against GoJo. Permagrain then settled all of the other pending claims, with the exception of its action against GoJo, and pursuant to Sections 668.5 and 668.6, released GoJo's liability to the other parties. This allowed Permagrain to pursue GoJo free of any statutory defects, or so it thought.

Despite stipulating the damages and providing that the jury could affix the percentage of fault for Evans, as well as Permagrain and GoJo, the district court directed a verdict in favor of GoJo. The basis of the district court's decision was that notwithstanding obtaining the release of all other negligent parties, Permagrain had failed to establish the common liability prerequisite for contribution because it had failed to "actually show" its own liability.

The Supreme Court reversed. Its discussion centered upon Sections 668.5 and 668.6(2).

Noting that despite the enactment of the comprehensive fault provisions of Chapter 668, the contribution law in Iowa remains unchanged insofar as it requires a showing of common liability, and quoting from Allied Mutual Insurance Co. v. State, 473 N.W.2d 24, 26, the court stated

> [w]e decline to eliminate or modify the common liability criterion for contribution claims. That requirement originally prescribed as a rule of common law has now attained statutory recognition. It is provided in Iowa Code §668.5(1) (1989) that "[a] right of contribution exists between or among two or more persons who are liable upon he same indivisible claim for the same injury, death, or harm." It is not necessary, however, that the common liability rest on the same legal theory.
>
> It is not our role to alter this legislative determination of the grounds for a contribution claim. We declined to do so in Rees v. Dallas County, 372 N.W.2d 503, 505 (Iowa 1985), and Speck v. Unit Handling Division of Litton Systems, Inc., 366 N.W.2d 543, 547-48 (Iowa 1985), both decided after the enactment of Section 668.5(1). We maintain a similar posture in the present litigation.

Cincinnati Ins. Co., 493 N.W.2d at 801.

After reiterating the common liability standard, the court noted that Permagrain had sufficiently proven and alleged its own fault to avert a directed verdict. The court found specifically that Permagrain knew that its product could spontaneously combust; that it could have used a different, less dangerous type of oil; and its instructions did not specify what type of detergent or soap should be used to remove the conditioner.

Because the court found there was substantial evidence in the record from which a jury could find Permagrain was at fault, the court noted, "It is not clear what more could be required under the 'actual liability' standard established by the court." Cincinnati Insurance Co., 493 N.W.2d at 801.

Taking exception with the trial court's directed verdict, the court, Id., stated

> "Actual liability" is itself not a readily quantifiable concept, one that has not been defined by our contribution cases. We agree with Permagrain that producing evidence of its own fault was sufficient because a reasonable fact-finder could conclude it amounted to "fault" under Chapter 668.

The Supreme Court has, in this case, removed a large hurdle to contribution actions by specifically defining the common liability prerequisite and by rejecting an unreasonable standard.

In Hantsbarger v. Coffin, 501 N.W.2d 501 (Iowa 1993), the plaintiffs dodged a bullet. This case involves the never-ending disputes that arise in professional malpractice cases involving designation of expert witnesses.

The twist in this case is not that the plaintiffs necessarily designated their expert witnesses late, but whether they adequately designated those witnesses.

Section 668.11 requires in part that a plaintiff designate expert witnesses within 180 days of the filing of the defendant's answer. The defendant then has 90 days from that date to make a designation, unless extensions or modifications are allowed.

The Hantsbargers timely designated their expert witnesses, but only gave the name of the witness and each name was preceded by the designation "Dr.". Thereafter, defendant moved to disqualify and preclude the experts from testifying on the grounds that their qualifications and their purposes for being called as experts were not certified. Thereafter, plaintiffs attempted to amend their designation, which was not allowed by the court, and which was again denied on a motion to reconsider. Thereafter, the district

court granted summary judgment for the defendant because there was no proper designation of expert witnesses and the witnesses were precluded from testifying. Plaintiffs appealed.

The Supreme Court, Justice Louis Schultz, set up a two-prong evaluation for situations such as this. The appellate standard of review is to first look for substantial compliance with Section 668.11, and if substantial compliance is not found, then the inquiry focuses on whether good cause exists to permit a late designation of the expert witnesses.

The court, Id. 501 N.W.2d at 504, stated

> Our first inquiry is whether Section 668.11 must be followed literally or whether it requires substantial compliance. With its prohibition of testimony, this section is properly classified as procedural or remedial rather than substantive. See State ex.rel. Buechler v. Vinsand, 318 N.W.2d 208, 210 (Iowa 1982). A procedural or remedial statute is liberally interpreted to accomplish its purpose. State v. Green, 470 N.W.2d 15, 18 (Iowa 1991). We conclude Section 668.11 requires substantial compliance. Substantial compliance is compliance in respect to essential matters necessary to assure the reasonable objectives of the statute. Superior/Ideal, Inc. v. Board of Review of the City of Oskaloosa, 419 N.W.2d 405, 407 (Iowa 1988). (Emphasis supplied).

Having defined the nature of its evaluation of the plaintiffs' designation of expert witness, the court in a careful and swift review concluded that the plaintiffs had not substantially complied with Section 668.11. The reasons for that finding can b summarized as follows: (1) designation of a witness as "Dr." does not substantially comply with the requirements of listing qualifications of a witness because it requires defendant to expend further time and effort to obtain the information and prepare for

trial; (2) designations which require further inquiry and discovery prolong trial, add to expenses of the defendants, and are at odds with the purposes of Section 668.11. Id. 501 N.W.2d at 504.

The court also noted, however, that generally it was unwilling to dispose of cases for failure to abide by the rules of discovery, seeking to dispose of cases on their merits. Consistent with that philosophy, the court then turned to the review of plaintiffs' actions to determine whether good cause would allow them relief.

The court distinguished this case from Donovan v. State, 445 N.W.2d 763, 766 (Iowa 1989), where it affirmed dismissal of the plaintiff's medical malpractice action and the denial of the plaintiff's request for an extension of time in which to designate experts. Unlike Donovan, plaintiffs in the instant case complied with discovery, had their experts in hand and named them before the statutory deadline, and while not fully complying with Section 668.11 by the deadline, their complete designation was delinquent for about one week. Id. 501 N.W.2d at 505.

Focusing on what perhaps is the most crucial consideration in a good cause defense, the court also noted that no prejudice could really be shown to the defendant under the facts as presented to the court.

CONCLUSION

I have selected the cases above because I thought they were of relative importance and touched on important areas within Chapter 668. Certainly there are other cases which have a great impact on Chapter 668 itself, as opposed to specific sections, but

I have chosen not to discuss those because they properly fall within the annual case review and complicate a focused and specific discussion. One such case that comes to mind is Reed v. Chrysler Corporation, 494 N.W.2d 224 (Iowa 1992), and dealing with the issue of enhanced injuries and comparative fault.

In addition, even though many sections of 668 remain to be challenged, fully construed, or even fully applied, the Supreme Court's attention is necessarily drawn to other cases of great importance and which fall, unfortunately, outside the ambit of Chapter 668.

Hopefully, the discussion of the specific cases above, and their selective impact on individual sections within Chapter 668, will be both informative and helpful.

B

DEFENSE ISSUES FOR ENVIRONMENTAL DAMAGE TO REAL ESTATE

Prepared By

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B

DEFENSE ISSUES FOR ENVIRONMENTAL DAMAGE TO REAL ESTATE

By Charles F. Becker

INTRODUCTION

Asserting and defending claims for environmental damage to property is an emerging area of law in Iowa. There are very few Iowa cases which have addressed these claims. Indeed, even the theories available for recovery are in question because of the unique facts created by environmental damage.

However, there is no question that environmental claims are on the rise. After many years of false starts and redrafting, the Iowa Department of Natural Resources is now aggressively requiring cleanup of contaminated property. This means individuals are finding themselves paying out money -- lots of money. As this happens more and more frequently, there will be more and more lawsuits attempting to recover those funds.

The purpose of this presentation is to look at the issue of environmental damage from a defense perspective. What gives rise to environmental claims? What cause of action should you expect? What defenses are possible? Is insurance available to cover your client? What defenses are there to the insurance claim?

Before looking at the insurance availability, we need to look at the situations which cause environmental damage and the claims which are likely to be asserted. The fact is that contamination of property can occur anywhere and at any time. The contaminants can be airborne or they can migrate laterally on the groundwater table; they may have been released from a tanker that took too sharp of a corner and flipped over last week or they could have been the result of a production process at a plant that closed its doors twenty years ago. Further, unlike most other claims, the damages caused by contamination often cannot be smelled, touched or even seen -- many times the damages do not manifest themselves until the property is tested and the pollution is identified in the lab results. The alert defense lawyer will keep these facts in mind when he/she is investigating a theory of defense.

I. COMMON LAW CAUSES OF ACTION

There are four instances that could cause a business or individual to bring an action for cleanup of property. Undoubtedly there are other fact situations which will arise, but those cases should fit under one of the following categories. A business could:

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a) receive migration of others' waste;
b) rent land to someone who pollutes;
c) buy the problem property; or
d) ship waste to a polluted site.

A. The Landowner Who Receives Pollution Migration

Perhaps the most common plaintiff is the one best described as the truly "innocent" landowner -- the person or business who owns land which becomes contaminated through no acts of the current owner. A good (and common) example of this would be if an underground storage tank (UST) leaks petroleum which travels "downstream" and contaminates the adjoining parcel of land. The adjoining landowner finds the contamination (or the Iowa Department of Natural Resources finds it) and the landowner wants it cleaned up and to receive money for any possible damages. What claims might the landowner assert against your client -- the upstream, polluting neighbor?

1. Nuisance

a. Elements

The most prevalent claim asserted in this type of situation is one for nuisance. Nuisance is an actionable interference with a person's interest in the private use and enjoyment of their land. The existence of a nuisance is not affected by the intention of its creator not to injure anyone. Further, the fact that a particular activity is allowed by zoning ordinances or regulations does not prevent a nuisance claim.

In Mel Foster Co. Properties, Inc. v. The American Oil Company, 427 N.W.2d 171 (Iowa 1988), the Iowa Supreme Court determined that a leaking underground petroleum storage tank constituted a nuisance. The Court held that the fact that the leaking tanks had been fixed was not relevant -- the nuisance was not abated until use and enjoyment of the property was no longer interfered with. The Court found that this would occur when the property was cleaned.

b. Damages

The Court went on to determine the proper measure of damages and held that in a contamination situation, the proper measure was to view the damage as a permanent nuisance. As such, the measure of damages to the property was the diminution in the market value of the property -- the market value immediately before the contamination minus the market value after the contamination.

c. Defenses

As one would expect, the plaintiff must be the owner or legal occupier of the land. Therefore, if the plaintiff is the past owner of the property or if the plaintiff is not on the property with the permission of the owner, nuisance should not be available.

It has been held that the absence of intent is not a defense to nuisance. Kriener v. Turkey Valley Community School District, 212 N.W.2d 526 (Iowa 1973); Mel Foster, id. Nevertheless, it is a requirement that the defendant be the bad actor. What if the contamination is not coming from defendant's property, but, rather, is coming from further "upstream?" What if the plaintiff has the wrong person? Do not jump to conclusions -- get your expert and dig for the facts.

Perhaps most importantly, the defendant must have interfered with the private use and enjoyment of the property. This is a very fact specific inquiry. If the migration is onto commercial property that continues to profitably operate unaffected by the pollution, has there been an actionable interference?

Next, you need to determine exactly what damage has actually occurred to the plaintiff. The result of Mel Foster seems to be contrary to damage analysis in other areas of the law. Look for an opportunity to argue that the experts agree that instead of having damage for an "unspecified period of time," the cleanup will be done in three, or five or ten years and that therefore the measure of damage should be loss of rental value (if that is less than the fair market values of the property).

Further, as mentioned above, if the damage is to commercial property that continues to operate unaffected by the contamination, an argument could be made that there are no damages. This will likely depend on how the court chooses to value the diminution in "market value."

In a related vein, if the damaged property is being leased to a business that is ongoing and continues unaffected by the contamination (and continues to pay rent to the landlord), there is arguably no damage to the landlord. If the property is vacant and the landlord claims that he/she is unable to rent it because of the contamination, you must be prepared to put the landlord to his/her proof. What has been done to try to rent it? Who has the landlord spoken to? What reasons have been given by the prospective tenants for not renting? Are they scared of the pollution or is it just a bad location or too much rent? Where has the landlord advertised? Has the landlord made serious efforts to lease the property or does he/she simply "assume" that no one would want to rent contaminated property so he/she has made no attempt to mitigate?

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It is also necessary to identify, at an early stage, the damages being alleged by the plaintiff. The common claims will be for the cost of cleaning the property and the diminution in the value of the land. However, in some cases, creative plaintiff's counsel may seek recovery for emotional distress, loss of ability to use the property as a mortgagable asset, natural resources damage or future medical expenses. Litigation is new enough in this area that there are no Iowa cases which allow or disallow such "unusual" claims. The most likely defenses to these claims would be foreseeability and causation-type arguments.

Also, it is likely that claims for punitive damages will be made. Although it is conceivable that punitive damage claims could be supported, it is likely that such awards will be few and far between. In the migration of contamination situation, it is usually the case that the polluter does not even know of contamination until identified by the affected neighbor. It would seem unlikely that these facts would support a claim for punitive damages

On the other hand, a neighbor who deliberately dumps hazardous waste on their property (or in a stream), at a time that such dumping was prohibited, which migrates to the neighbor and causes contamination could be accused of wanton and reckless disregard for someone likely to be affected by the misdeeds. Also, it is possible that concealing the knowledge that contamination might adversely affect a neighbor (particularly if it results in personal injury) could present a possible claim for punitive damages. Discovery of the underlying basis for plaintiff's punitive damage claim at an early time is necessary to determine if the claim is warranted and, if not, to support a motion for summary judgment.

Finally, the lateral migration situation may present a serious dilemma to a plaintiff's lawyer. As we all know, Rule 80 of the Iowa Rules of Civil Procedure provides that counsel's signature on a pleading is a certification that "counsel has read the ... pleading; that to the best of counsel's knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact ...." Although it is expensive, it is not particularly difficult to determine, before filing suit, if the contamination found on a piece of property could reasonably have been expected to have come from the adjoining parcel. Of course, other possibilities exist. The contamination could have been caused by the plaintiff's predecessors in interest. Or it could have been dumped on plaintiff's land without plaintiff's knowledge. Or it could have traveled from further upstream than the next adjoining parcel, passed through the adjoining property (without that owner's knowledge or consent) and was discovered on plaintiff's property. Before signing the petition, it is at least arguable that plaintiff's counsel must make a reasonable investigation to substantiate the serious claim that the source of the contamination came from the immediately adjoining property. Although I know of no existing case law, I

question whether plaintiff can simply allege the contamination came from next door (without more of a basis than gravity) without risking the possibility of Rule 80 sanctions.

By the same token, defense counsel who desire to pass the liability to another party should do so only after establishing a scientific basis for the allegation. Without such support, defense counsel could be equally susceptible to a Rule 80 claim.

It is certainly in no one's best interest to see Rule 80 claims becoming everyday occurrences in environmental litigation. However, such claims are likely to be more common in the environmental area because of the staggering cost of environmental litigation (especially given the number of experts needed and the cost of testing) and the stigma which attaches to one accused of being a "polluter." If a plaintiff chooses to bring such an action (or a defendant chooses to third-party in another suspected contributor), it is not unreasonable to expect plaintiff to have at least some preliminary scientific support for the accusation.

2. Trespass

a. Elements

The next most common claim in the lateral migration situation is one for trespass. See Sterling v. Velsical Chemical Corp., 855 F.2d 1188 (6th Cir. 1988). Trespass is the unlawful entry onto the property of another without the express or implied consent of the owner or occupier. Iowa State Highway Commission v. Hipp, 147 N.W.2d 195, 199 (Iowa 1966). Although trespass is an intentional act, and does not include negligent acts, the intention is only that the trespasser intended to commit the physical act of entry upon land of another. The intent to injure as a result of the trespass does not need to be shown by the claimant.

b. Damages

Property damage for trespass would be the amount necessary to restore the property to the condition it existed in prior to the trespass or, if this cannot be done, damages would be the value of the property before trespass diminished by its value after the trespass. White v. Citizens National Bank of Boone, 262 N.W.2d 812, 817 (Iowa 1978). Although it has not been litigated, the Iowa Supreme Court may find that if the property can be restored but that such restoration will be completed only in the indefinite future, then the measure of damages is the value of the property before and after the trespass. This would bring it in line with the holding of Mel Foster and would prevent repetitious trespass actions while the cleanup is taking place.

Punitive damages are also available for trespass if the trespasser acted willfully, wantonly or with reckless disregard for the rights of another. Hagenson v. United Telephone Company of Iowa, 209 N.W.2d 76, 82 (Iowa 1973). In the case of trespass, this would most

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likely be raised for actions taken after the trespass was identified unless an actual intent to injure by the trespass itself can be proven.

c. Defenses

First, trespass is actionable only by the owner and/or person in actual possession of the property. Discovery of the plaintiff's interest in the property should be done to determine if the plaintiff is the appropriate party plaintiff. For example, it could be argued that a tenant who plans to build on a piece of leased (and contaminated) property, but is unable to do so due to lateral pollution, is not the proper plaintiff for a trespass action because he/she is not in actual possession.

Next, although the intentional act is only that the trespasser intended to enter upon the land, at least this showing must be satisfied. Frequently the upstream owner has no knowledge that there has been a release of contaminants. Once he/she is put on notice of the fact, failure to stop and remediate the contamination likely constitutes a continuing trespass from that point forward. But, what if the contamination is just "passing through" the defendant's property from further upstream. In this case, defense counsel should raise proximate cause issues and argue that the plaintiff has the wrong party.

3. Negligence

a. Elements

Another possible theory of recovery for the situation involving migration of contamination would be negligence. Negligence is considered any conduct that falls below the standard which the law establishes for the protection of others against unreasonable risk of harm. Seeman v. Liberty Mutual Ins. Co., 322 N.W.2d 35 (Iowa 1982). The claimant must show a duty by the defenant to the plaintiff, a breach of that duty, causation and harm.

The acts of negligence could include any number of activities. For example, dumping waste at a site without investigation of the underlying soils would be sufficient. See Sterling, 647 F. Supp. at 316. Likewise, operating a gas station without periodically checking for loss of product could also satisfy the standard.

b. Damages

Compensatory damages are recoverable to the degree necessary to put the plaintiff back in the position he/she was in prior to the wrongful conduct of the defendant. Although there are few Iowa cases based upon environmental negligence, other cases have held damages for negligence include lost income, medical bills, pain and suffering and loss of consortium. See Kosmacek v. Farm Service Coop, 584 N.W.2d 99 (Iowa Ct. App. 1992).

c. Defenses

The underground petroleum storage tank raises several interesting issues with regard to the elements necessary for a claim of negligence in an environmental case. First, to whom is the duty owed? The Iowa courts have generally responded that the duty is owed to anyone who could suffer reasonably foreseeable injuries. Barnhill v. Davis, 300 N.W.2d 104 (Iowa 1981). Would this include the neighbor to the gas station? Possibly. Suppose the gas station stopped usage of the tanks in 1968 (prior to regulation) and the migrated contamination was discovered in 1993. Arguably, the operator could not have reasonably foreseen the damage because he/she could not have reasonably foreseen the change in the law which caused the damage to the adjoining landowner.

This example also raises the question of what duty is owed. Is there a duty not to contaminate real property when the law making such action illegal did not come into effect until after cessation of the polluting activity? There is no Iowa resolution of this question.

Next, what must be shown to establish a breach of the duty, assuming that a duty exists? The adjoining landowner must show that the gas station owner acted unreasonably in light of the potential risks. If all reasonable precautions were taken and the injury still occurs, the station owner is not liable. But what is "reasonable?" In the environmental field, this term is particularly troublesome.

For example, in 1976, it might very well have been reasonable for a gas station owner to have relied on tank "sticking" to determine if his/her underground tanks were tight. If "sticking" was routinely done with no hint of a problem, but later testing showed contamination, the claim may not survive summary disposition. But the same claim in 1993 may be successful because today there are electronic detectors available and routinely used for identifying leaks in tanks. In this day and age, is it "reasonable" to rely on the old method of sticking the tank? Possibly not. But many of the current cases arise under releases that occurred long ago. In those cases, defense counsel should determine at an early stage exactly what activities the client took to avoid releases to the client's own property.

Proximate cause also presents serious problems in the leaking underground tank case. When did the migration move next door? Was it because of the current station owner's activities or someone earlier in the chain of title? Is it possible that plaintiff's property was contaminated from some source other than lateral migration? If so, plaintiff's land was already damaged and defendant's contribution may have little or no additional damaging effect.

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Itemization of damages should be required at any early stage. The most common claim is for diminution in the value of the property. But if the defendant agrees to clean the property, how should the diminution be measured? If it is rental property, perhaps the lost rental value from the time the plaintiff is unable to rent the property to the time of completion of the cleanup or rental is a proper measure (though under Mel Foster this may not be the proper measure).

The cost of cleanup would also be actionable. But what type of cleanup is recoverable? There can be large differences in the cost of cleanup depending on the technology used. And does the cleanup damage need to consider a remedial technique that will return the property to background levels of contamination or is it enough that the defendant pay to clean the property only to the satisfaction of the Iowa Department of Natural Resources (which may allow some of the contamination to remain)?

As with any new area of tort law, creative plaintiff's counsel will seek to attribute as much fault and damage to the defendant as possible. But plaintiff has the duty to show that the damages he/she suffered were caused by the wrongful acts of the defendant. It is important to force plaintiff to itemize damages early. Then look to see how the plaintiff ties the actions of your defendant to those specific damages. The nexus may be so tenuous that a court will agree that the evidence should not even be presented to the jury.

4. Strict Liability

a. Elements

Strict liability is a tort theory most often associated with product liability but may be well suited to activities affecting the environment. This theory does not require a showing of fault by the defendant. Rather, the defendant is held liable because he/she has engaged in an abnormally dangerous activity. Since the person chose to engage in this activity, he/she can be held liable for their actions even if reasonable care was exercised.

For example, a person who makes his/her living using dynamite recognizes that this activity might hurt someone despite all attempts to be careful. The law says that if the person chooses this profession to earn a living, then that person should be required to pay for damages resulting from the activity. See David v. L & W Construction Company, 176 N.W.2d 223, 225 (Iowa 1970); Watson v. Mississippi River Power Co., 174 Iowa 23, 156 N.W. 188 (1916).

b. Damages

If the underlying claim can be established, it is likely that the damages available would be the same as those previously discussed.

c. Defenses

The first line of defense should be to challenge whether the activity giving rise to the claim is abnormally dangerous. Needless to say, not every activity is deemed abnormally dangerous. Whether a particular activity is so considered is determined by the following criteria:

a. The existence of a high degree of risk of harm;

b. The likelihood that the resulting harm will be great;

c. The inability to eliminate the risk by the exercise of reasonable care;

d. The extent to which the activity is not in common usage;

e. The inappropriateness of the activity to the place where it is carried on; and

f. The extent to which the activity's value to community is outweighed by its dangerous attributes.

National Steel Service Center v. Gibbons, 319 N.W.2d 269 (Iowa 1982). See also Restatement (Second) of Torts, 520; CERCLA Vicarious Liability After ACETO: More Than a Common Law Duty?, 76 Iowa L. Rev. 641, 653-54 (1991).

In the area of environmental regulation, what activities could fit these criteria? Handling hazardous waste would appear to be a likely candidate. Sterling v. Velsicol Chemical Corp., 647 F. Supp. 303 (W.D. Tenn. 1986); T&E Industries, Inc. v. Safety Light Corporation, 227 N.J. Super 228, 546 A.2d 570 (1988); see Werlein v. U.S., 746 F. Supp. 887 (D. Minn. 1990). Also, in Total Petroleum, Inc. v. U.S., 12 Cl. Ct. 178 (U.S. Cl. Ct. 1987), the Court held that operating a petroleum pipeline during a flood was "abnormally dangerous." And in National Steel Service Center v. Gibbons, 319 N.W.2d 269 (Iowa 1982) strict liability was applied to a common carrier, transporting gasoline or propane, when a tank car exploded and derailed.

On the other hand, there has been no Iowa determination relating to the more common types of environmental problems. For example, is the operation of a gas station an abnormally dangerous activity? Or a landfill which accepts household hazardous waste? Until more case law develops, it would appear that the determination of what environmental activities are abnormally dangerous will have to be made on a case-by-case basis.

B. The Landlord/Tenant Situation

A second common situation in which environmental claims are made is when the tenant contaminates property. The action is usually precipitated by the tenant's notice that it is abandoning or not renewing the lease. The landlord may then test the property and find contamination. What claims should the tenant's counsel expect to see?

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1. The Four Theories

a. Negligence and Strict Liability

Of the four common law claims previously discussed, negligence and strict liability are probably the best suited to the landlord/tenant situation. For example, the tenant's negligent use of the gas tanks which resulted in a release, and damage to the property, would be actionable. Assuming that the activity in question was an ultrahazardous activity, strict liability could also be asserted.

b. Nuisance and Trespass

Nuisance and trespass are less well suited to the landlord/ tenant situation. The difficulty is that nuisance and trespass contemplate some activity to or against the plaintiff that is actionable at the time the nuisance or trespass occurs. For example, if the tenant is a gas station and it is determined that the tenant caused petroleum releases during the tenancy, was there an unlawful entry onto the property without the owner's consent? Some may argue that the tenancy creates the necessary consent to defeat a trespass claim. A contrary argument would be that the claim of trespass arises after the tenancy expires. Since the contamination remains on the property, the contamination (until removed) is a continuing trespass by the prior tenant which is not with the consent of the landlord. Likewise, with regard to nuisance, although the contamination may not interfere with the landlord's use of the property so long as the tenant is paying rent, the nuisance claim would be actionable when the tenant vacates as a continuing nuisance.

c. Defenses

In the typical landlord/tenant situation, there will usually only be two areas of defense. First, did the tenant really cause the release? Second, has the landlord been damaged?

The first issue is one of proof. In many gas station situations, the landlord has rented the property as a gas station for many years to several different parties. If it is possible or likely that a prior tenant was the one that caused the release, the defendant has a strong position. This is where the experts, who can opine on the age of the contamination, become crucial to the case.

Second, if the landlord continues to rent the property unaffected by the contamination, defense counsel should raise the issue of whether the plaintiff has suffered any damages. This issue has not yet been litigated but it will undoubtedly be one of the first issues resolved when these cases start being appealed.

Another theory of defense that I have heard raised is that the landlord has not been damaged by a leaking UST at a gas station site because the landlord should have reasonably

anticipated, when he/she rented the property to a gas station, that there would be some releases in the normal business operation. I know of no known case which has successfully asserted this theory as a defense. Each counsel needs to decide whether it has merit, but I would caution that the theory runs the risk of alienating the fact finder to the defendant's position because the theory essentially is saying that the defendant had the right to pollute and to force plaintiff to pay for it -- a theory that most fact finders would not find persuasive.

2. Waste

In the area of landlord/tenant, another theory is available for environmental contamination -- waste. From a defense perspective, this is perhaps the most difficult claim to defend.

a. Elements

Waste is the destruction, misuse, alteration, or neglect by one lawfully in possession of the property to the prejudice of the estate or interest therein of another. Waste, 78 Am. Jur. 2d 395. The activity giving rise to the waste can be negligent, intentional or unreasonable. Kelly v. Burns, 36 Iowa 507 (1873); Rudnitski v. Seely, 452 N.W.2d 644 (Minn. 1990); Pleasure Time, Inc. v. Kuss, 254 N.W.2d 463 (Wis 1977). This theory is appropriate because it covers the activity of the tenant during the lease term, which is when the actual pollution activities would have occurred.

b. Damages

The proper measure of damages for waste was set out by the Iowa Supreme Court in Duckett v. Whorton, 312 N.W.2d 561, 562 (Iowa 1982):

> We believe the proper measure of damages for waste, when it occurs where the owner is aware of the injury, is the same as the ordinary measure for injuries to realty. If the property can be repaired or restored, it is the reasonable cost of repair or restoration, not exceeding the fair market or actual value of the improvement immediately prior to the damage. . . . Where the property cannot be repaired or restored, the measure of damages is the difference between its fair and reasonable market value immediately before and immediately after the injury. . . .

It is possible that the Supreme Court will modify this measure of damages in the environmental case to, in effect, allow recovery of both measures of damages That is, the cost to remediate the property will be recoverable as will the diminution in the fair market value caused by the pollution. This would bring the damage element in line with the Mel Foster case. Alternatively, a court might find that the proper measure of damages is the cost to remediate

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together with the fair rental value of the property until cleanup is completed up to, but not beyond, the fair market value of the property. This measure, however, does not seem to be consistent with the holding of Mel Foster.

Waste is also a statutory violation. Chapter 658 Iowa Code allows damages against a "guardian, tenant for life or years, joint tenant, or tenant in common of real property that commits waste thereon." The difficulty for defense counsel is that a finding of waste which satisfies the terms of the statute (and many gas station leases would) results in treble damages.

c. Defenses

Defenses to this claim are difficult. The primary line of defense is challenging the origin of the contamination. If the landlord's property was contaminated not by the defendant tenant but by a prior tenant, a midnight dumper or lateral migration, waste against the present tenant should not be recoverable. This tends to be an expensive defense because it requires extensive testing, age-dating of the pollutant and expert testimony.

The second line of defense is to argue damages. If the landlord is able to lease the property despite the contamination, a court might find only limited damages. There are no environmental cases to give us guidance on this theory, though many of the pending cases include a waste claim.

3. Settling

At the present, most cases involving landlord/tenant claims result in a settlement of the case by the defendant purchasing the property from the plaintiff for its uncontaminated fair market value. The reason for this result is the uncertainty caused by the damage calculation of Mel Foster.

Under Mel Foster, the Iowa Supreme Court awarded permanent damages. This was awarded in addition to the cleanup which was being voluntarily done by the defendant. In most cases, the defendant acknowledges that he/she must do the cleanup. The litigation then focuses on whether there is any residual diminution in the value of the property. The problem is that if the defendant chooses to litigate the issue, he/she runs the risk of: 1) paying for the cleanup and 2) paying for the difference between the market value of the property before and after the contamination (or triple this amount if waste is alleged). A fact finder could easily determine that the value is $0 after the contamination. This measure would therefore be 100% of the fair market value of the property. The result is that the defendant pays for the cleanup and 100% of the land -- but does not get the deed to the property. At least if the case is settled by the defendant buying the property, the defendant will be able to resell the property after it is cleaned to recover part of his/her loss.

C. The Landowner Who Purchases the Problem

Oddly enough, the most difficult environmental claim to bring is probably that by buyer against seller. This is where the common sense concepts of the common law conflict with the policy driven directives of the environmental law.

1. The Four Theories

a. Nuisance, Negligence, Trespass and Strict Liability

The person who buys contaminated property (assuming no discussion of environmental issues in the sales documents) has a significantly different situation from the adjoining landowner or the landlord/tenant claims. For example, can the buyer sue the seller for nuisance? Certainly the pollution interferes with the buyer's private use and enjoyment of the land, but the buyer literally bought the nuisance -- the nuisance did not come to the buyer. The same is true for trespass Of course, one could argue that polluted land is a continuing trespass or nuisance so long as the pollution remains, so the buyer may be able to sue the seller for the continuing tort.

Negligence does not fare much better. Did the seller owe a duty to the buyer even when the seller had no plans to sell? Could a seller ever be considered negligent if all releases occurred prior to regulation?

Strict liability has some outward appeal, but it would require expansion of the concept as it is presently understood. For example, even if operating a gas station is deemed to be an abnormally dangerous activity, why should the buyer not take the property "as is?" An analogy would be if a child is hurt in a backyard swimming pool, the child sues the present owner and the present owner brings in the former owner (who built the pool). It could be argued that a buyer takes on the risk of the ultrahazardous activity, particularly if he/she continues the activity after purchase. The counter argument might be that even if this is true, the buyer does not assume the liability for any ultrahazardous activity which took place prior to the sale (such as pre-existing contamination).

b. Defenses

In the buy/sell situation, the best defense to the four common theories of recovery is probably to argue that these theories are inapplicable for two reasons. First, the elements of these torts simply do not fit the buy/sell fact situation and to stretch them to fit could open a Pandora's box of problems.

Second, these four common law theories of recovery run counter to an underlying policy of environmental law -- make as many people look for contamination as possible. The

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concept of buyer beware applies to land sales and forces a buyer to open his/her eyes and do some environmental investigation. For example, in Upp v. Darner, 130 N.W. 409 (1911), the Iowa court said that if a dangerous condition is known by the buyer of if the condition should have been known to the buyer based on the kind of inspection a buyer might be expected to make before taking possession, then the seller is not liable for the condition. If the common law theories of recovery were allowed to prevail, a buyer would be less inclined to investigate knowing that he/she could easily sue the seller at a later date.

2. Fraudulent and Negligent Misrepresentation

This same policy of investigation, however, does give rise to another common law theory of recovery which is better suited to the purchase and sale of real estate -- fraudulent and negligent misrepresentation.

a. Elements

Misrepresentation requires reasonable reliance by the buyer upon material misrepresentations by the seller made in negotiations which result in damages to the buyer. Fraudulent misrepresentation requires a showing that the seller intended to deceive; negligent misrepresentation requires only a showing of carelessness.

b. Defenses

In the area of misrepresentation, disclosure is usually the key fact at issue. Suppose the seller knows of contamination but does not volunteer the information to buyer and buyer does not ask about it. Is there liability to seller when buyer later discovers the contamination?

The general rule is that nondisclosure is not actionable unless the party having the information is under a specific duty to disclose. A duty to disclose arises when one party is in a fiduciary relationship (such as attorney-client or trustee-beneficiary) or when a special relationship (such as employer-employee exists. Also, active concealment of a defect can be actionable as well as attempts to divert or misdirect an investigation conducted by a buyer. See Restatement (Second) of Torts 550. It would appear to be a very close question as to whether knowledge of contamination which is not asked about would support a claim for fraud. (It should be noted that such failure to disclose by seller is dangerous because there is another party who is entitled to be immediately notified of known contamination -- the Iowa Department of Natural Resources. (Iowa Code 455B.386)

3. Beach of Implied Warranty of Habitability

Another possible common law cause of action in the buy/sell area may be for breach of the implied warranty of habitability. This is a developing area of the law and it may find favor in the environmental contamination situation.

In McDonald v. Mianechi, 398 A.2d 1283 (N.J. 1978), the Court held that a builder of a new home was liable to a buyer for diminution in the value of the property when it turned out that the water supply to the home was not potable. This conclusion was based on a finding that the builder had breached the implied warranty of habitability.

In Blagg v. Fred Hunt Company, Inc., 612 S.W.2d 321 (Ark. 1981), the plaintiff was the third owner of a home who sued the original builder-vendor when it was discovered that the carpet was giving off strong formaldehyde fumes. The claim was based on a theory of implied warranty of habitability. The Court held that such a claim is actionable, despite the lack of privity between the plaintiff and the builder, and held that the liability of the builder was strict.

Although the McDonald and Bragg cases deal with residential property, the discussions in those cases provide for the possibility that the implied warranty of habitability could be equally applicable to the commercial setting. If so, this claim would be well suited to the sale of contaminated property. Not surprisingly, there are no Iowa cases to date applying this theory to an environmental contamination case.

D. Shipping Waste to a Problem Site

More and more frequently we are seeing situations where businesses have shipped their empty barrels, their used car batteries or their used oil to a center for recycling. The recycling center mismanages the materials and causes releases. EPA then goes through invoices, determines who sent the materials to the site for the past year -- or twenty years -- and orders those parties to do the cleanup. This scenario presents a difficult situation for the defense counsel.

1. Defending the Claim by EPA

The basis for the claim by EPA will be that the sender "arranged for" the disposal of hazardous waste. This type of argument was accepted in U.S. v. Aceto Agricultural Chemicals Corp., 872 F.2d 1375 (8th Cir. 1989).

In Aceto, several chemical companies supplied technical grade pesticides to Aidex for refining, formulating and packaging into a commercial grade product. Throughout the formulating process, the chemical companies retained ownership of the chemicals. After formulation, the finished product was returned to the chemical companies for sale. The contract between Aidex did not address waste management and did not set out any rights or duties which the chemical companies had with regard to Aidex's operations. It was determined that during the formulation process, Aidex mismanaged the waste disposal and caused releases. EPA sued the chemical suppliers as "arrangers" because Aidex was

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judgment-proof. Under 42 U.S.C. §9607(a)(3), a person who arranges for disposal or treatment of hazardous substances owned or possessed by that person is liable for a release of that hazardous waste.

On appeal, the Eighth Circuit agreed with EPA. The Court said that the chemical suppliers knew that the production process would result in some waste and the suppliers retained ownership of the product throughout this process. The waste being disposed of was really that of the suppliers, and therefore the suppliers were arranging for the disposal of waste.

2. Defenses

The first area to investigate is whether the EPA has named the correct party. Did your client actually send batteries to the site? What proof does EPA have? What records does your client have showing that he/she did/did not send the batteries there? Was it a predecessor company who did the delivery?

Second, is there any basis to argue that the batteries sent did not contribute to the problem. For example, Company A accepted batteries at its recycling center from 1960-1962. During this time, the testimony will be that Company A carefully managed the batteries, did not break them up, did not have any release, and simply sent them whole to another recycler out of state. From 1963-1973, Company A decided to send only the lead plates so it broke the batteries on site, causing extensive releases. Your company only sent batteries to Company A in 1961. EPA does not carry a heavy burden in showing that your batteries added to the contamination at the site -- but it does carry some burden. Arguably, under these facts, EPA cannot show the minimal nexus between your batteries and the necessary cleanup.

Third, defense counsel needs to focus on the nature of the item sent to the site. For example, your company may have sent empty barrels to a drum recycler which mismanaged the rinsate from the drum causing contamination. But if your company sent only plastic drums to the site which contained residue from food products only, an argument can be made that the minimal nexus between your company and the hazardous waste cleanup that must be shown by EPA is not met.

Finally, do not hesitate to look for legal arguments. Is a spent battery a hazardous substance under §9607(a)(3)? In Catellus Development Corp. v. U.S., No. C-91-2531 (N.D. Cal. 8/3/97), the court said no. In that case, Company A sold useless car batteries to a lead reclamation firm. That firm then broke up the batteries and shipped the broken casings to a dump site. The dump site became contaminated and EPA pursued both Company A and the lead reclamation firm.

The Court held that although the batteries were no longer useful for their original purpose, Company A did not arrange for disposal because the batteries still had a productive use when sold and because Company A had no control over the eventual disposal of the batteries. Whether this reasoning would prevail in light of the Eighth Circuit's decision in Aceto is questionable. The point is that in this emerging area, all factual and legal defenses should be considered.

3. Suits Against Others

In many instances, defense counsel will recognize that a defense to the EPA action will be expensive and probably unsuccessful. In these cases, the defense lawyer will become a plaintiff's lawyer.

In most recycling types of cases, EPA will pick out one or two or twenty of the large suppliers to sue. EPA will avoid suing the other 200 or 2000 suppliers to the site because, under joint and several liability, EPA can accomplish its cleanup goal by just suing the "big players." Those players who are targeted for prosecution, however, have the right to pursue others who contributed to the site. Frequently, the pursuit of other PRPs will become the best, and only, defense to what would otherwise be staggering liability.

CONCLUSION

Surprisingly, there have been relatively few reported Iowa cases addressing claims for environmental contamination. There are probably several reasons for this including the relative recent nature of the statutes requiring cleanup and the delays in incurring cleanup costs caused by regulatory changes. Those delays now seem to be behind us and it is likely that we will be seeing more claims in the future. As we do, many of the unanswered questions set out above will be answered. Until then, it is up to creative trial lawyers to fashion remedies and defenses in this developing area of law.

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II. Insurance Coverage Issues

At a defense seminar, it would be natural to consider the defenses available to the insurance companies for a claim of environmental damage asserted by an insured. The realty is that in most instances, defense counsel will find themselves asserting a claim against the carrier after they realize that the claim being asserted against the client by EPA, DNR or a third-party might be a covered occurrence. For example, to date I have heard of only one case where an insurance company agreed to provide coverage at a Superfund site despite the fact that the policy contained the "absolute pollution clause." And the claim was made by counsel who usually defends insurance companies.

Nevertheless, it is appropriate to look at the defenses available to insurance companies when a claim for coverage is made. Attached hereto is an article on the various defenses which have been asserted in Iowa and elsewhere to attempt to defeat coverage. I will not repeat all of the cases here, but I will summarize what seems to be the trend in Iowa and then discuss the two hot issues in insurance defense coverage -- the pollution exclusion clause and the trigger-of-coverage issue.

A. The Trend in Iowa

We now have a trilogy of environmental insurance coverage cases in Iowa. The first case was Weber v. IMT Insurance Company, 462 N.W.2d 283 (Iowa 1990) The second was A.Y. McDonald Industries, Inc. v. Insurance Company of North America, 475 N.W.2d 607 (Iowa 1991). These cases are discussed in the attached article.

The third case is West Bend Mutual Ins. Co. v. Iowa Iron Works, Inc., No. 245/92-826 (7/21/93 Iowa). In this case, the district court denied the insurance company's motion for summary judgment regarding the duty to defend. The Court held that the pollution exclusion clause did not preclude coverage. On appeal, the Supreme Court agreed saying that the DNR claim was for both solid waste and hazardous waste violations The Court found that the pollution exclusion clause did not cover solid waste violations so the company did have a duty to defend.

The insurance company next argued that there was no "occurrence" under the policy because that term requires an "accident" which "results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." The company pointed out that, for years, the insured hauled contaminated sand to the disposal site. The Court held that although the depositing of the sand was intentional, the insured did not intend any injury. Therefore, there was an occurrence.

This trilogy of Iowa cases seems to indicate that the Iowa Supreme Court is not going to be persuaded by linguistic gymnastics. The Court has said that if the insurance company is going to try to define away coverage by saying that the claim is not "damages" or it does not result in "property damages" or it is not a "legal" duty or it does not constitute an "occurrence," or an "accident," these defenses will not be tolerated. Most environmental claims do present damages to an insured that the insured never intended, that do real harm to the insured and that the insured could reasonably expect to be covered. In other words, the Court seems to be saying that this is one of those unforeseen contingencies that an insurance policy could be expected to cover -- at least to a point.

B. The Pollution Exclusion Clause

The one area which the Court has reserved for consideration is the definition of "sudden and accidental" in the standard pollution exclusion clause. The issue is discussed in the attached article. The Iowa Court has not yet been confronted with the specific question of whether the pollution exclusion clause will successfully defeat coverage of the typical environmental claim. The day of reckoning is likely near, however. There are several pending cases raising the issue. The one which has progressed the farthest is Fireman's Fund Ins. Co. v. ACC Chemical Co., et al., In the Iowa District Court for Clinton County, Nos. CL 14219 and CL 16034.

In that case, the insured moved for partial summary judgment seeking to declare that the terms "sudden" and "accidental" were ambiguous as a matter of law. The Court did not agree. The Judge held that the term "sudden" means "happening, coming, made, or done quickly or abruptly without warning," and that "accidental" means "unintended and unexpected." The Court granted the insurer's motion for partial summary judgment on the ambiguity issue.

C. The Trigger of Coverage

The second major issue yet to be considered by the Iowa Court is the question of what event triggers coverage under the policy. The answer could make all of the other questions moot.

To be entitled to recover for an environmental claim under the typical comprehensive general liability policy, it is necessary to show that the damage was caused by an occurrence that took place during the policy period. If the loss occurred during the policy period (typically one year long), it is said that the policy is "triggered."

Most CGL policies do not have a time limit on when a claim can be brought for injuries that can be shown to have occurred during the policy period. Of course, the insured

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has the duty to make a claim as soon as "practicable" after the insured becomes aware of the problem. However, in the environmental area, this may be decades after the original release of contaminants. In the meantime, the insured may have had ten or fifteen different insurance carriers. If the contaminants stayed in the ground all of that time, which policy is "triggered" for coverage? Over the past ten years, the Courts have established four distinct trigger theories. A brief review of each theory is in order.

1. The Exposure Theory

Under the exposure theory, the policy in force at the time the person or property was exposed to the harm is the one that provides coverage. It is unclear, under Iowa law, whether any policies issued after cessation of the release would also be on the risk. The problem is that Blue Chip indicates that a new release occurs with each rise and fall of the groundwater. Therefore, is there a new exposure at each rise and fall?

Cases: Fireman's Fund Ins. C. v. Ex-Cell-O-Corp., 662 F. Supp. 71 (E.D. Mich 1987); INA v. Forty-Eight Insulating, Inc., 633 F. 2d 1212 (6th Cir. 1980); Continental Ins. Co. v. Nepacco, 843 F.2d 977 (8th Cir. 1988); TBG, Inc. v. Commercial Union Ins., 806 F. Supp. 1444 (N.D. Cal. 1990).

2. Manifestation or Discovery Theory

This theory provides that the policy in force when the harm is first "manifest" as first discovered, is responsible for coverage. All policies which pre-date the discovery of the condition will avoid liability under this theory. This is the insurer's theory of choice.

Cases: Mraz v. Canadian Universal Ins. Co., 804 F.2d 1325 (4th Cir. 1986); Eagle-Picher Indus., Inc. v. Liberty Mutual Ins. Co., 682 F.2d 12 (1st Cir. 1982); Home Ins. Co. v. Landmark Co., 205 Cal. App. 3d 1388, 253 Cal. Rptr. 277 (1988).

3. Triple Trigger or Continuous Trigger Theory

Under this trigger, all of the policies in force at the time of initial exposure or release, during the period of continued exposure or release, and at the time that damage is manifested or discovered would be required to respond. The continuous trigger says that all policies from initial exposure to the date of death or cleanup would be on the risk. This is the insured's theory of choice.

Cases: Keene Corp. v. INA, 667 F.2d 1034 (D.C. Cir. 1981); New Castle County v. Continental Casualty Co., 725 F. Supp. 800 (D. Del. 1989), aff'd 933 F. 2d 1162 (ed Cir. 1991). See also the discussion in Continental Ins. Co. v. NEPACCO, 842 F.2d 977 (8th Cir. 1988).

4. Injury-In-Fact Theory

This theory provides that the policy in effect at the time the claimant suffers actual injury is the only one that must provide coverage. Under this theory, a real but undiscovered injury that can be shown to have been in existence at the relevant time would result in coverage regardless of when the injury was diagnosed or discovered. This theory is probably the most difficult to apply, as a legal matter. For example, if a release occurred on time in 1960, the law requiring cleanup was promulgated in 1980 and the contaminated site was identified in 1990, it could be argued that the property damage did not occur until 1980.

Cases: American Home Products Corp. v. Liberty Mutual Ins. Co., 565 F. Supp. 1485 (S.D. N.Y. 1983), aff'd as modified, 748 F. 2d 760 (2d Cir. 1984); Industrial Steel Container Co. v. Fireman's Fund Ins. Co., 399 N.W 2d 156 (Minn. Ct. App. 1987); Triangle Publications v. Liberty Mutual Ins. Co., 703 F. Supp. 367 (E.D. Pa. 1989).

To date, the Iowa Supreme Court has not been confronted with the trigger issue. This seems unusual because it has the potential of making moot the other issues. Insurers will advance the discovery theory saying that the insured is not harmed until the damage is discovered so only that policy is on the risk. If the insurer prevails, it means that most of the policies that then will be considered for coverage will have the "absolute pollution clause." In many cases this clause will defeat coverage.

The insured, on the other hand, will argue that the continuous trigger theory must be applied. They will argue that they were, indeed, damaged from the moment the contaminant was first released to the time it was discovered -- they just did not realize they were damaged. Since most contamination dates back many years, the insured will likely only have to argue the standard pollution exclusion clause or, if the release was pre-1972, there may be no pollution exclusion clause to address.

CONCLUSION

As in the area of civil claims for environmental problems, the area of insurance coverage for those problems is relatively new in Iowa. The trilogy of cases shows a trend, but these cases give little guidance on the major question still to be decided by the Court. And with the changing personalities on the Iowa Supreme Court, it would be difficult to predict what line of cases the Court is likely to follow.

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Enviromental Liability and the CGL Policy: Why Is There Coverage?

by Charles F. Becker, J.D.

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Environmental Liability and the CGL Policy: Why Is There Coverage?

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ABSTRACT: *Comprehensive general liability insurance policies have been used by industry for decades. Environmental liability, however, has only recently become a major issue for most businesses. Should CGL policies be applied to provide coverage for environmental liability? In this article, the author discusses the cases and the reasoning for coverage of such liability and why the insurance industry can look forward to a change in the future.*

Everyone wants a clean environment. The problem is that cleanup costs can be staggering. Under the present environmental liability scheme, these costs typically are borne by the business that owns the contaminated property. As one would expect, the liable company will look for others who can help pay for the cleanup, and that search frequently results in a call to the company's insurance carrier to see whether an old policy will provide coverage. As will be shown, many courts are finding that there is such coverage.

The purpose of this article is to discuss the current state of the law with respect to environmental liability coverage under a policy that has been used by industry for several decades—the comprehensive general liability (CGL) policy. We will look at recent court decisions and attempt to predict future trends. This will not be an exhaustive analysis of the law in this area—entire books have been written on insurance claims for environmental problems.[1] Rather, some of the more visible issues and problematic insurance clauses will be discussed, and particular emphasis will be placed on an examination of some of the more practical aspects of environmental conditions that make such claims different from other insurance claims.

As with most areas of the law, there is good news and bad news for insurance carriers. The bad news is that CGL policies prior to 1985 will probably provide coverage for environmental liability. The good news, for the insurance industry, is that this liability probably presents only a short-term problem.

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THE ENVIRONMENTAL LIABILITY SCHEME

Before looking at the various policy provisions that might apply, it is necessary to understand the nature of environmental liability. It is critically important to recognize that environmental law in the United States imposes millions of dollars in liability on persons and businesses that are "innocent" of any wrongdoing! Under federal and state laws, it is possible for an individual to be liable for hundreds of thousands of dollars in cleanup costs though he or she has not caused the problem, contributed to the problem, allowed the problem or even known of the problem. Under such laws, a person who buys a contaminated piece of property may also be buying environmental liability. Mere ownership, without more, can impose liability even though the owner did not cause or contribute to any of the problem. This is commonly referred to as ownership liability.[2]

Another serious problem in the environmental liability scheme is that the law has no regard for time. It does not matter whether the contamination that has recently been identified was released last week or thirty years ago. Regardless of when the release occurred, it must now be cleaned up.

This is significant because the Comprehensive Environmental Response, Compensation and Liability Act (known as CERCLA or Superfund) was not passed until 1980. It is CERCLA that is generally recognized as the law that made it illegal to dispose of hazardous wastes into the environment and that required the cleanup of such wastes

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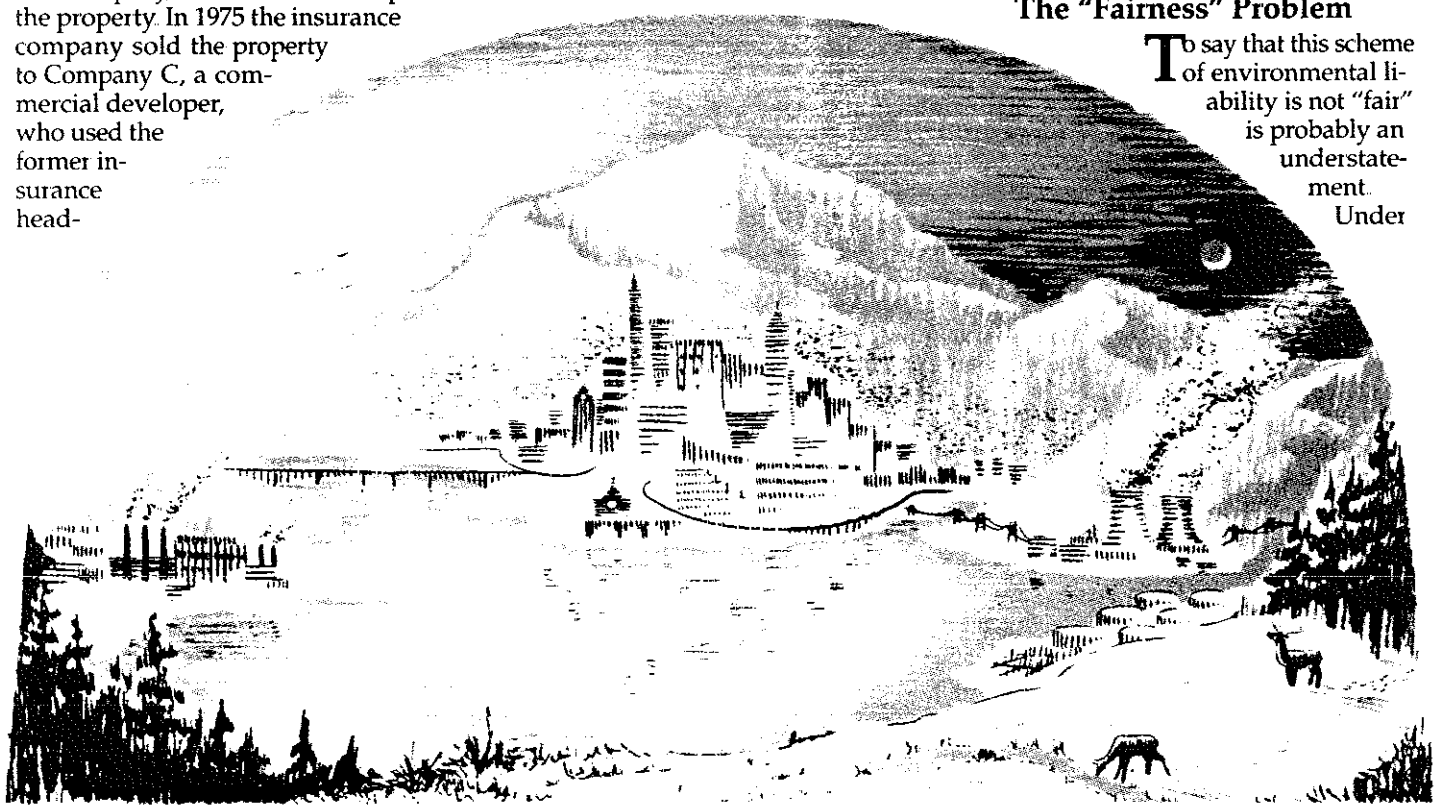
> *...environmental law in the United States imposes millions of dollars in liability on persons and businesses that are innocent of any wrongdoing...*

once identified. But CERCLA does not require cleanup of just those wastes that were improperly released after 1980. It requires cleanup for releases that occurred in 1970, or 1960 or, for that matter, 1860. Therefore, a company that stopped dumping its industrial sludge in a holding pond or in the local landfill as soon as it was told it was going to be illegal is not saved from hundreds of thousands (or millions) of dollars in cleanup costs resulting from its past, albeit legal, activities. This point is best illustrated through an example.

Imagine that Company A owned ten acres on the outskirts of a town from 1950 to 1960. During these years, it collected and drained car batteries and then reconditioned them for resale. The battery acid was poured on the ground, where it collected and severely contaminated the drinking water supply.

In 1960 the property was sold to Company B, an insurance company, which built its headquarters on the property. In 1975 the insurance company sold the property to Company C, a commercial developer, who used the former insurance headquarters as an office building. In 1990, the developer sold the building to Company D, a computer sales company, which used it as a regional sales office. In 1991 the property was tested and it was found to contain sufficient contaminants to list it as a CERCLA site. The estimated cost to remediate the property is $20 million.

Under the current laws, Company A is liable for the entire cleanup, even though its actions were not illegal at the time. Also, Company D is liable for the entire cleanup because it is the current owner of the property. A recent case even attempts to hold Companies B and C liable for the entire cleanup because these companies owned the land while the contaminant was continuing to pollute the drinking water, though those companies did not add to the problem in any way.[3]



The "Fairness" Problem

To say that this scheme of environmental liability is not "fair" is probably an understatement. Under

> *...The failure of the insurance industry to recognize the nature of the environmental beast is a major contributor to the problems the industry is now facing...*

the American justice system, it is "fair" to hold someone liable for doing something wrong after telling him or her that it was wrong. But Company A was never told that what it was doing was wrong. Indeed, its actions were entirely legal at the time and at all times that it owned the property. Yet the law now requires Company A to clean the property.

As a general matter, the law also says that it is "fair" to impose liability on someone just for owning something that is dangerous. For example, if a child falls into a backyard pool and is injured, the owner is liable because he or she should have foreseen this possibility and taken precautions to prevent it. If the owner wants the pool, he or she must suffer the consequences. But in the above example, the subsequent owners did not even know the contamination was present; yet they may have to pay for the entire cleanup.

As can be seen, one of the most difficult aspects of environmental law is that it is basically unfair as that term is generally understood. What is generally not understood, however, is that fairness is not the primary goal of the environmental laws—expediency is. The federal and state legislatures have decided that it is more important that hazardous material be removed from the environment quickly than it is to find someone who intentionally polluted or who otherwise acted wrongfully.

Under this environmental liability scheme, it is an easy process to find someone to clean up contaminated property. It is not difficult to find the current owner of a piece of contaminated property. It is simply a matter of going to the local courthouse and obtaining ownership records. Likewise, it is often easy to identify the person who allowed a hazardous release but stopped such releasing prior to 1980. It may not be "fair" to tell these "innocent" people to clean the property, but, by doing so, the property will get cleaned in a relatively short period of time. If the environment gets cleaned, even if innocent people suffer, the environmental laws (at least in the eyes of the regulators) have done their job.

This inherent unfairness in the regulatory scheme is something that the insurance industry has not really acknowledged. Most CGL carriers will challenge coverage for environmental problems when a claim is made under a pre-1985 policy. Why should the policy cover when environmental issues were never considered by the parties at the time of executing the policy? Why shouldn't the pollution exclusion clause preclude coverage? Why should such a claim be considered as damages as defined by the policy? One answer to these questions is that there is coverage because what is unfair to the insured will eventually flow down to be unfair to the insurer. In a roundabout manner, the cases finding coverage say that if the insurer does not want to pay just because it is inherently unfair, that argument is inadequate to deny coverage.

There is another aspect of environmental problems that must be examined to understand why many courts are finding coverage under CGL policies, that is, the nature of pollution releases.

The Physical Problem

Before passage of the environmental laws, there were virtually no types of liability-causing events that were comparable to those of environmental liability, because the vast majority of environmental problems are either unknown or unintended.

For example, many hazardous substances are stored underground, such as in underground petroleum storage tanks at gasoline stations. When an underground gasoline storage tank rusts out and begins to leak, it does so contrary to the wishes of the tank owner. Each gallon that leaks out costs the owner a sale. The owner would certainly stop the leak if he or she knew about it, but because the leak is underground and inventory records are not very accurate, it is not unusual (particularly for periods prior to 1985) for hundreds of gallons to leak each month for several years before the leak is identified and stopped.

In this case, the owner simply has no knowledge that a release is occurring, and he or she may not know for many years. This is unusual in the insurance context. Certainly there are instances in which a pipe breaks and leaks water for hours, or sometimes even days, before it is discovered. But it would be extremely unusual for that pipe to leak for years without being identified.

Also, unlike the water pipe, what leaks out of a petroleum tank is not harmless. One gallon of petroleum can contaminate thousands of gallons of drinking water. There are few other such events that cause such extensive liability simply because of the toxicity of the product.

Further, there are a number of instances in which the insured actually intends to dispose of the hazardous mate-

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rial by dumping it in, say, a lagoon behind the plant. This is cheaper than taking it to a landfill or processing it. To the extent that such disposal was done after passage of the laws prohibiting it, such activities would not be covered by a CGL policy. But most of the disputes today deal with disposals that stopped prior to 1980. Nevertheless, the contaminant remains in the ground and continues to be a threat. In short, the insured never intended to do something inappropriate. Indeed, the disposal was not prohibited at the time it was done.

Insurance carriers simply did not have a great deal of experience in addressing unwanted problems that could exist for years or decades without identification, that caused such far-reaching liability for such a small item and that were legal one day and illegal the next. The failure of the insurance industry to recognize the nature of the environmental beast is a major contributor to the problems the industry is now facing because, as we will see, it affected how the industry drafted the clauses now being relied upon to deny coverage.

THE HISTORY OF ENVIRONMENTAL CLAUSES

The first standard form CGL-type policy was created by the insurance industry in 1940. Since that time, a number of revisions to the standard provisions have been made. Specifically, these changes were made in 1943, 1947, 1955, 1966, 1973, and most recently in 1985.

In most instances, courts have found that a pre-1970 CGL policy is sufficiently broad to cover environmental liability. The primary reason for this is that, until this time, few people seriously considered environmental liability, so the policies were silent on the topic. However, in the late 1960s, significant environmental claims started to be made against insurers. Also, in 1969, Congress passed the National Environmental Policy Act, which signaled a national commitment to environmental protection. As a result of these developments, insurers began to understand the implications of environmental damage on CGL policies. Before 1970, however, there was little reason to be concerned, so the policies did not address the topic.[4]

Most courts that have faced the issue of environmental coverage under pre-1970 policies simply rely on the reasonable expectations of the insured. CGL policies are all-risk policies by nature. Therefore, a reasonable insured would expect coverage unless the event were explicitly excluded. Since no one contemplated liability, there is no exclusion. The result is that the insurers must pay.[5]

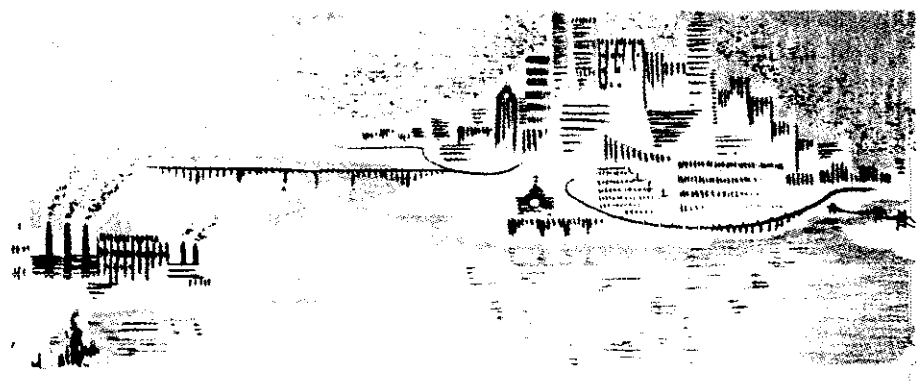
With regard to post-1970 policies, insurers have taken two approaches to denying coverage for environmental liability. First, they have taken the position that environmental claims do not come within the explicit terms of the CGL policy. Second, even if the terms should cover pollution events, the post-1970 exclusions preclude coverage. These are two distinct arguments, but both rely on contract terms and interpretation. We will look at these arguments separately.

Coverage Term

Viewing the contention that the CGL policy does not provide coverage in the first instance, the critical terms that have been reviewed by the Courts are the coverage term and the "occurrence" definition. The typical coverage term, as it existed from approximately 1970 to 1985 provided:

> The company will pay on behalf of the insured all sums which the insured shall become *legally obligated to pay* as *damages* because of bodily injury or *property damage* to which this insurance applies, caused by an *occurrence*....

The italic portions of the clause represent the areas that have seen extensive litigation. Each of these words has been reviewed by many courts across the country with widely differing results. Although it is difficult to predict, the trend appears to be to find that most environmental claims do fall within the language of the coverage term.



Legal Obligation. The first argument made by the insurer is that environmental damage is not something the insured is "legally obligated to pay." The typical environmental claim arises in one of two ways. The most common is that

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the insured is ordered by a governmental agency to clean up the property. The alternative is that the insured is sued to repay either the governmental agency or a third party for a cleanup that has already been done. In the typical situation of an ordered cleanup, the insurer argues that a cleanup order is an equitable claim rather than a legal claim. That is, if a governmental agency requires a company to clean up, the agency is requiring an act rather than a payment. Such a requirement is equitable, not legal, in nature and would therefore not impose a "legal" obligation. Some courts have accepted this distinction.[6]

The majority of courts, however, reject this argument.[7] The court to most recently decide this issue was the Iowa Supreme Court in the case of *A.Y. McDonald Industries, Inc. v. Insurance Company of North America, et al.*[8] To understand the Court's ruling, it is important to understand the facts of the case.

In this case, A.Y. McDonald was ordered by EPA to do an expensive cleanup at a site it owned in Dubuque, Iowa. The contamination was identified in 1984. However, the facts showed that the contamination was a result of the practice of the company of dumping waste sand, used in the foundry production process, on the plant site. Mixed with the sand was a residue of brass, which also contained lead. The practices occurred continually between 1949 and 1983.

A.Y. McDonald brought a declaratory action seeking the cleanup costs from its insurers. As it turned out, the company had a total of thirteen insurers, either CGL or primary and excess, between 1972 and 1986. One company provided CGL coverage between 1948 and 1968. The Court did not draw any distinction between any of the companies for purposes of liability.

One of the arguments made by the insurance companies was that an ordered cleanup was more like an injunction, which is an equitable remedy, than like an order of payment of money, which is a legal remedy. The Court disposed of this argument by saying that it was "not impressed by the hypertechnical distinction between 'legal and equitable' forms of relief."

The Iowa Court pointed out that the EPA could have cleaned up the site and sued A.Y. McDonald for its response costs. According to the Court, under those circumstances there would have been a clear duty under the CGL policies to pay the insured. Therefore, it would be nonsensical to allow payment in one situation but not in the other.

Other courts have expanded on this reasoning by saying that in the ordinary case, the governmental agency will, in fact, do the cleanup if the owner refuses to comply with an order. The agency then sues the owner for its response costs. These courts point out that it would be bad public policy to force an insured to refuse to comply with an order just to be sure that the equitable damages are converted into legal damages.[9]

Under these cases, the outcome is clear. Regardless of what form it takes, an environmental claim that requires the insured to clean property is a legal obligation that is covered by the insurance policy.

"Damages" Definition. The next battleground for coverage was the argument that cleanup costs are not truly "damages" as that term is used in the CGL policy. Again, *A.Y. McDonald* is instructive on this issue.

In *A.Y. McDonald*, the Court said that the term "damages" is ambiguous, so the term must be given the meaning that is understandable to the ordinary reasonable person. According to the Court, the reasonable person would look up "damages" in Webster's Third New International Dictionary (1961) and find that the term means "compensation . . . imposed by law for a wrong . . . caused by a violation of a legal right." The Court then went on to say that

> a reasonable person purchasing a CGL policy like the one here would expect government mandated response costs under CERCLA to be covered. These are costs A.Y. McDonald has become legally obligated to pay as compensation imposed by law for a wrong

It should be noted that it is usually the case that when a court starts discussing the understanding of the "reasonable person," it means the insurer is about to lose. And in the area of insurance policy interpretation, the "reasonable person" is discussed a great deal.

"Property Damages" Definition. The next argument raised by the insurers to attempt to deny coverage for environmental claims is that cleanup costs are not "damages because of property damage." Most CGL policies define

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> *...It should be noted that usually when a court starts discussing the understanding of the 'reasonable person', it means the insurer is about to lose...*

"property damage" as being "injury to, loss of use of or destruction of tangible property." The argument that has been made is that contamination of an aquifer, soil, or surface water, with the resulting requirement that there be a cleanup, is not a property damage but is, rather, an economic loss only.[10]

Most courts that have addressed this argument have rejected it.[11] For example, in *A Y McDonald* the Court simply made the conclusory statements that

> any injury to the environment resulting from contamination of hazardous waste constitutes "property damage" within the meaning of the CGL policies We further hold that any injury to the environment resulting from contamination is incurred "because of property damage" and represents the measure of damages to the property

The *A Y McDonald* Court was careful, however, to limit its holding to property damage occurring after the polluting event. In many instances, the regulatory body orders a party to take action to prevent a possible release. The Court said that the costs of such preventive measures are not incurred "because of property damage" unless such costs are incurred after the pollution has taken place.

For example, if an underground tank is routinely tested and a condition is found that might result in a leak (but has not yet), the costs of repairing the tank would not be covered under a CGL policy. However, if the tank were not tested and then leaked, the cleanup would be covered.

This court-imposed exclusion—the preventive-measure exclusion—is extremely important. Insurance companies have frequently argued that CGL policies should not cover environmental damages for the same reasons that the policies do not cover other costs associated with doing business and are not covered under a CGL policy.[12] The insurers argue that compliance costs for OSHA, for example, are simply the economic cost of doing business. Compliance with environmental laws, according to this argument, should also be viewed as a noncovered cost of doing business.

This argument fails to address the *A Y McDonald's* distinction between preventive measures and actual pollution events. Just as the cost of safety goggles for machine operators is not paid under insurance, repairing an underground storage tank that has not yet leaked would not be covered. But just like the worker who receives workers compensation when his or her goggles fail to stop a chip, insurance should cover an actual release of a contaminant.

Although there is a split in the courts, the majority have held that the coverage term of the standard 1970-1985 policy would not prevent coverage of environmental claims. But insurers had another argument for why CGL policies could not be used in these instances—the definition of "occurrence."

"Occurrence" Clause

Under the standard CGL policy, the definition of "occurrence" is as follows:

> "Occurrence" means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

Insurers have argued that a release of a pollutant is not an occurrence. Although many cases have addressed this argument, one of the most complete discussions can be found in another recent Iowa case, *Weber v. IMT Insurance Company*.[13] In that case, the Newmans sued the Webers, alleging that the activity of the Webers in transporting hog manure from their stalls to the Webers' fields constituted a nuisance. The Newmans contended that the odor from the manure damaged their sweet corn crop and made it unmarketable. The Webers sought coverage from their carrier, which was denied. The Webers then brought a declaratory judgment action to establish their rights under their CGL and umbrella policies.

Among other issues presented to the Court was whether there had been an "occurrence" under the umbrella policy. This policy used the standard form definition. The Court therefore needed to define the terms "intended" and "expected."

With regard to "intended," the Court said that the Webers knew they were spilling manure but did not do so intentionally. Moreover, the Webers did not intentionally cause the property damage. Therefore, the damage was not intended by the Webers.

It is important to note that the Court, following the language of the definition, focused on the intent to do damage rather than the intent to do the act. It did not matter that the Webers intended to move the manure or that they knew that this would result in some unintended spillage. What mattered to the Court was that the Webers did not intend to

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> *"...if groundwater is affected, (virtually always the case), the owned property exclusion does not preclude coverage because the damage is caused to property owned by the state, not by the insured..."*

cause damage to the sweet corn by allowing this spillage.

The Court next looked at the term "expected." The Court said:

> Expected denotes that the actor knew or should have known that there was a substantial probability that certain consequences will result from his action. Substantial probability [means] the indications must be strong enough to alert a reasonably prudent man not only to the possibility of the results occurring but the indications also must be sufficient to forewarn him that the results are highly likely to occur.

Applying this definition to the facts, the Court found that the Webers did not expect damage to occur. Apparently the Newmans had not complained to the Webers, and the Webers did not know, nor have any reason to know, that the sweet corn crop was being damaged.

Based on these findings, together with the fact that there was no pollution exclusion clause in the umbrella policy, the Court found coverage under the umbrella policy even though no coverage was found under the CGL policy.

These, then, constitute the four primary arguments advanced by the insurer to argue that the policy does not cover the liability. If these arguments fail, as they frequently have, the insurer next argues that although the contamination might be a covered event under the broad language of the policy, it is taken out of coverage by one or more exclusions. The most often cited exclusions used by the insurers are the pollution exclusion and the owned-property clause. We will first look at the pollution exclusion clause.

The Pollution Exclusion Clause

In 1970, the insurance industry drafted the pollution exclusion clause, which was added to the CGL policies as a mandatory endorsement. This clause became a part of the standard CGL policy in the 1973 revision. The standard exclusion stated:

> It is agreed that this insurance does not apply to bodily injury or property damage arising out of the discharge, disposal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials, or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden or accidental.

This clause is seeing extensive litigation throughout the United States, and it is easy to see why. It begins by saying that there will be no coverage for environmental problems. If this was all it said, there would be little room for argument. The problem is that the clause goes on to explicitly provide pollution coverage if the release is sudden and accidental.

As it turns out, the exception eats up the exclusion because of the vagueness of those terms as they would be applied to a pollution-causing event. For example, attempt to apply the exclusion to an underground storage tank leak. Is such a release "sudden and accidental?" That, of course, depends on how the terms are defined. Unfortunately, the insurance industry decided to leave the definitions up to the courts—not a good idea when dealing with contract interpretation.

What does "suddenly" mean in this context? First, it could have a temporal meaning such as quickly or abruptly. Courts that adopt this definition generally find that a long-term underground release is not "sudden."[14] But is this really the case? At some point in its life, the tank presumably held the gasoline without leaking. Then, over time, a rust spot formed on the wall of the tank and a leak began. Or perhaps a truck drove over a pipe and a pipe cracked open. In both instances, there was a moment in time in which the environment was clean and the next moment, it was contaminated. This release certainly seems to be abrupt or sudden.

Admittedly, the leak and resulting damage might go on for years before discovery, but does that make the initial release any less sudden?[15] And remember that the leak is allowed to continue only because it is not detected. Is the insured to be penalized because he or she cannot see underground?

Moreover, many courts are now finding that "sudden" does not mean abruptly or hastily but, rather, means 'unexpected."[16] The courts which have found "sudden" to mean 'unexpected" have relied on two grounds. First, the genesis of the term in the insurance industry went back to boiler and machinery policies. Judicial interpretation of the phrase "sudden and accidental" under those policies equated it with "unexpected and unintended." Arguably,

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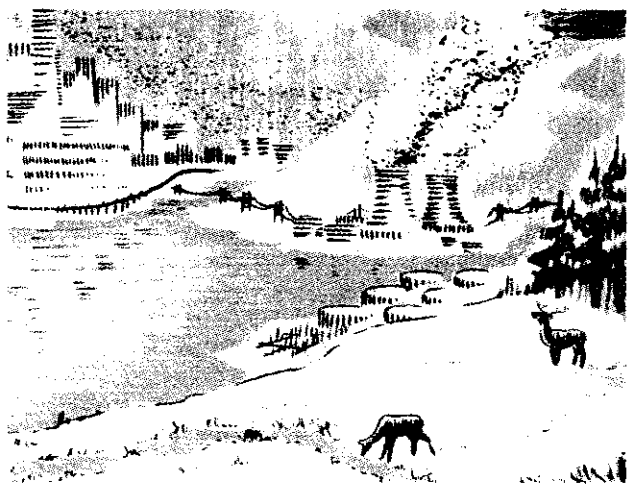
the insurance industry was aware of these cases when it used the phrase "sudden and accidental" in the pollution exclusion.[17]

Second, the primary dictionary definition of "sudden" is a happening without previous notice, or as something coming or occurring unexpectedly, as unprepared for or unforeseen. It does not primarily mean instantaneous.[18]

The courts agreeing with this interpretation find that the term "sudden" is ambiguous and that this ambiguity must be resolved in favor of the insured. The Court then looks at the pollution event to see if it was unexpected. As one can guess, the event is usually found to be unexpected.

Turning to the term "accidental" in the pollution exclusion clause, there has been similar extensive litigation. All of the same cases that define "sudden" as unexpected go on to define "accidental" as unintended. In all of those cases, the courts found that the insured did not intend the release to occur.



Iowa finds itself in a rather unique position on the interpretation of the phrase "sudden and accidental"—it has defined accidental, but not sudden. The Court's reasoning may prove instructive not only in Iowa, but elsewhere.

In *Weber*, the Court stated that "accidental" means an unexpected and unintended event. The Court then chose to define "unexpected and unintended."

The Court defined "unexpected" in exactly the same manner that it defined the term under the definition of "occurrence" previously discussed (actor knew or should have known that there was a substantial probability that certain consequences would result from his actions). This time, however, the Court found that the Webers did "expect." The Court said that the Webers knew or should have known that the spills were going to occur and that therefore the spills were expected. Since the spills were expected, they were not accidental, and the pollution exclusion clause precluded coverage. Since it had already found no coverage, the Court did not attempt to define "sudden."

It should be noted that, under the exclusion, the Court is focusing on the *act* rather than the *damage*. The Webers knew that their act could result in spillage of manure. It did not matter to the Court that the Webers did not intend or even know that the spillage could cause damage. This approach is exactly the opposite of the Court's application of the term "accidental" under the "occurrence" definition. The difference, however, is justifiable given the other language of the clauses—the exclusion refers to accidental *discharges* and "occurrence" refers to accidental *injury or damage*.

Applying this definition of occurrence to a more typical environmental problem, such as a leaking underground storage tank, will probably result in a different outcome than in *Weber*. As previously discussed, the owner of a tank seldom knows of a leak occurring. Although the Webers could "expect" a spill because they could see it happening, a tank owner cannot see it and therefore should fit under the Court's definition of "accidental."

Of course, expectations are a relative thing. Should an operator whose tanks are two years old reasonably expect a leak? Probably not. What if the tanks are ten years old? Or twenty? As the time lengthens, the expectations of the owner become more and more suspect. This type of distinction has not yet been the basis of any reported decisions, but one can anticipate that the argument will be made.

The pollution exclusion clause, as it existed between 1970 and 1985 has not been very successful at supporting a denial of coverage for environmental claims. The insureds have therefore resorted to another exclusion—the owned-property exclusion—to deny coverage.

The Owned-Property Exclusion

Most CGL policies contain the following language:

> This policy shall not apply to property damage to property owned by the insured.

In many instances, the leak or release has occurred on property owned by the insured. Does this provision then exclude coverage? Generally not.

As previously mentioned, *A.Y. McDonald* held that preventive measures employed after pollution has taken place are incurred "because of property damage" and are therefore covered. In most areas of the country, the groundwater table will move the contaminant off site, causing damage

to adjoining property, which would be a covered event " Therefore, according to the *A.Y McDonald* court, the preventive measure of remediating the insured's own property is a covered event

Another argument successfully advanced by insureds as to why the owned-property exclusion does not preclude coverage is that only the state owns the groundwater located beneath property Therefore, if the groundwater is affected or threatened (which is virtually always the case), the owned property exclusion does not preclude coverage because the damage caused is not to property owned by the insured but rather to property owned by the state

> *"...the inherent unfairness of the statutory liability scheme makes matters worse..."*

WHAT THE FUTURE HOLDS

This article began by saying there was good news and bad news Having devoted the bulk of the discussion to the bad news (for insurers), it is appropriate to focus on the good news—the problems of coverage for environmental claims being short term This is the case for two reasons

First, since 1985, the insurance industry has adopted what is loftily referred to as the "absolute pollution exclusion " Though not perfect, it provides much less room for debate There have been virtually no cases decided that have found coverage under this new version of the pollution exclusion clause

Second, it is inevitable that the reasonable expectations of the insureds will be successfully challenged Remember that most states consider the insureds' reasonable expectation to be the polestar of insurance coverage But it is not enough that the insured says he or she reasonably expected that there was coverage for the environmental claim—it must be believable This will become more and more difficult as time passes

Environmental issues are at the forefront of national debate Seldom does a day pass without an environmental article being printed in every major newspaper In this climate, it is becoming increasingly difficult for anyone to claim that he or she did not know that his or her paint booth was an environmental problem or that his or her underground storage tank would leak

Also, technology marches ever onward In Iowa and many other states, all underground petroleum storage tanks will require sophisticated monitoring devices to detect leaks The incidence of releases from these sources is likely to drop drastically in the next few years

Perhaps most importantly, insurance agents are beginning to warn insureds about the absolute pollution exclusion and the need to take additional steps if pollution is an event for which the insured desires coverage This kind of testimony by an insurance agent would make it difficult for an insured to prevail on a claim of reasonable expectations

CONCLUSION

Environmental claims are proving to be a disaster for everyone—the insured, the insurer, and society Cleanup costs can range from $200,000 for the average underground storage tank to $35 million for the average Superfund remediation No one planned for this type of liability, and the inherent unfairness of the statutory liability scheme makes matters worse Under these circumstances it is not surprising to see why so many courts have been asked to pass on these complex issues There will undoubtedly be much more litigation before it is all said and done One can only hope that the resources that are being expended in the battle are worth the resources claimed to have been lost ■

Endnotes

1 *Environmental Liability Insurance Law*, Kenneth S Abraham (1992); *Insurance Coverage for Environmental Claims* Mitchell L Lathrop (1992); *Insurance Coverage for Environmental Damages* Lynne M Miller (1989); *Underground Tank Leak Insurance Maximizing Your Coverage* Richard Levy and Leslie Foster (1988)

2 The Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA or Superfund) lists four groups as "potentially responsible parties" who are liable for an environmental problem Those four groups are (1) the owner and operator of a vessel (2) any person who at the time of disposal of any hazardous substance own

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or operated any facility at which such hazardous substances were disposed of. (3) any person who by contract, agreement or otherwise arranged for disposal or treatment, or arranged with a transporter for disposal or treatment, of hazardous substances owned or possessed by such person, and (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person 42 U.S.C §9607.

3. *Nurad. Inc. v. William E. Hooper & Sons Co.*, No. 91-1775 (4th Cir. 5/29/92).

4. *New Castle County v. Hartford Co.* 33 ERC 1169, 1198 (3rd Cir. 1991).

5. As noted in *AIU Ins. Co. v. Santa Clara County Superior Court*, 32 ERC 1257 at n. 8 (Cali. S.Ct. 1990):

> Because [CGL] policies are "comprehensive," it was within the insured's reasonable expectation that new types of statutory liability would be covered, as long as they were within the ambit of the language used in the coverage provision.

6. *Continental Ins. v. NEPACCO*, 842 F.2d 977 (8th Cir. 1988); *Cincinnati Ins. Co. v. Milliken & Co.*, 857 F.2d 979 (4th Cir.1988); *Maryland Cas. Co. v. Armco. Inc.*, 822 F.2d 1348 (4th Cir.1987).

7. See, for example, *Independent Petrochemical Corp. v. Aetna Cas. & Surety Corp.*, 944 F.2d 940 (D.C. Cir. 1991); *Aetna Casualty and Surety Co. v. Pintlar*, 34 ERC 1604, 1608 (9th Cir. 1991); *AIU Ins. Co. v. Santa Clara County Superior Court*, 32 ERC 1257, 51 Cal. 3d 807 (Cali. S.Ct. 1990); *U.S. Fidelity and Guaranty Co. v. Specialty Coatings Co.*, 535 N.E.2d 1071, 1080 (Ill. App. Dist. 1989); *Intel Corp. v. Hartford Accident & Indemnity Co.*, 692 F.Supp. 1171 (N.D. Cal. 1988); *U.S. Aviex v. Travelers Ins. Co.*, 336 N.W.2d 838 (Mich. 1983).

8. 475 N.W.2d 607 (Iowa 1991).

9. *AIU Ins. Co.*, 32 ERC at 1274; *Intel Corp.* 692 F.Supp. at 1189; *Broadwell Realty v. Fidelity & Casualty Co.*, 528 A.2d 76 (N.J. 1987); *Aviex Co.* 336 N.W.2d at 843.

10. *Mraz v. Canadian Universal Ins. Co.* 804 F.2d 1325 (4th Cir. 1986).

11. *Pintlar*, 34 ERC at 1609; *AIU Ins. Co.*, 32 ERC 1257; *Aerojet-General Corp. v. Superior Court*, 257 Cal. Rptr. 621, 634 (Cal. App. 1 Dist. 1988); *Port of Portland v. Water Quality Ins. Syndicate*, 796 F.2d 1188 (9th Cir. 1986).

12. See *AIU Ins.*, 32 ERC at 1268.

13. 462 N.W.2d 283 (Iowa 1990).

14. *Ogden Corp. v. Travelers Indemn. Co.* 32 ERC 1637 (2d Cir. 1991); *F.L. Aerospace v. Aetna Casualty & Surety Co.*, 897 F.2d 214, 219 (6th Cir. 1990).

15. It should be noted that most courts that define "sudden" as abrupt also add that "sudden" means for a short period of time. Therefore, according to these courts, a long-term underground tank release could not be sudden even if the initial release was abrupt. This argument strikes the author as desperate—at best. The reason for this was best stated by the Georgia Supreme Court in *Claussen v. Aetna Casualty and Surety Co.* 380 S.E.2d 686, 688 (1989):

> But, even on reflection one realizes that even in its popular usage "sudden" does not usually describe the duration of an event, but rather its unexpectedness: a sudden storm, a sudden turn in the road, sudden death.

16. *CPC Int'l. Inc. v. Northbrook Excess & Surplus Ins. Co.*, ____F.2d____ (1st Cir. 3/24/92); *Hecla Mining Co. v. New Hampshire Ins. Co.*, 33 ERC 1340, 1347 (Colo. 1991); *New Castle County v. Hartford Accident and Indem. Co.*, 33 ERC 1169, 1199 (3d Cir. 1991); *Just v. Land Reclamation, Ltd.*, 456 N.W.2d 570, 578 (Wis. 1990); *Claussen v. Aetna Casualty & Surety Co.*, 888 F.2d 747, 750 (11th Cir. 1989).

17. See 10A Couch, *Cyclopedia of Insurance Law*, 2D ¶42.396 (1982); *Claussen*, 888 F.2d at 750.

18. Anderson, *Liability Insurance Coverage for Pollution Claims*, 12 Univ. of Hawaii L. Rev. 83, 95-101 (1990); *New Castle County v. Hartford Co.* 37 ERC 1169, 1198 (3d Cir. 1991).

19. *Gerrish Corp. v. Universal Underwriters Ins. Co.*, 947 F.2d 1023, 1030 (2d Cir. 1991).

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INSURANCE COVERAGE ISSUES

* SEXUAL ABUSE
* FAILURE TO SUPERVISE OR PREVENT
* SEX DISCRIMINATION
* SEXUALLY TRANSMITTED DISEASES

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I. SEXUAL MOLESTATION OR ABUSE - IS THERE COVERAGE?

The number of claims based on sexual misconduct - sexual molestation, sexual misconduct by Professionals[1], sexual harassment, discrimination or transmission of sexually transmitted diseases is on the increase. The flood of new cases may be explained in part by publicity, therapists' focus toward confrontation, and Iowa Code §614.8A, which extends the limitations period for sexual abuse claims to four years after the injury and the causal relationship are discovered.

A. Is There An Occurrence?

Most policies provide coverage only for bodily injury caused by an occurrence. The typical Policy defines "occurrence" as:

> Occurrence means an accident, including continuous or repeated exposure to substantially similar conditions.

Iowa follows the general rule that the determination of whether an injury is accidental must be made from the point of view of the insured and what he intended or should reasonably have expected. Comfort v. Continental Casualty Co., 239 Iowa 1206, 34 N.W.2d 588 (1948); Lickleider v. Iowa State Traveling Mens' Assn., 184 Iowa 423, 166 N.W. 363, (1918); Estate of Wade v. Continental Ins. Co., 514 F.2d 304, 307 (8th Cir. 1975). In Smithway Motor Xpress Inc. v. Liberty Mutual Ins. Co., 484 N.W.2d 192, 195 (Iowa 1992), the Iowa Supreme Court held that a wrongful

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[1] This outline does not attempt to cover the specialized provisions in professional liability policies. A number of cases have addressed the coverage issues that arise from sexual acts with patients in the medical malpractice context. See e.g. St. Paul Fire & Marine Ins. Co. v. Mori, 486 N.W.2d 803, 808-09, (Minn. App. 1992) (insurer has no duty to indemnify gynecologist from claims of improper sexual contacts on theory the contacts arose from mishandling of transference phenomenon, absent showing doctor had consciously attempted to induce transference to further therapy.)

termination of employment was not an "occurrence" and expressly agreed with the California and New York courts which focused on the intentions of the insured employer in determining if the event was an accident covered under the policy of insurance. The Court also noted that the definition of "accident" halts any argument that the act was intended but the resulting harm was not intended. Id. at 195.

The Iowa Supreme Court has recently summarized the requirements of an "occurrence" in West Bend Mutual Insurance Co. v. Iowa Iron Works, Inc., 1993 Iowa Sup. LEXIS 175, *9 (July 21, 1993). The typical policy defines an occurrence as an accident. An "accident" is defined as an unusual or unexpected event, (citing Weber v. IMT Ins. Co., 462 N.W.2d 283, 287 (Iowa 1990)), The term 'expected' as used in insurance policies requires that "the actor knew or should have known there was a substantial probability that certain consequences will result from his [or her] actions", (citing AMCO Ins. Co. v. Haht, 490 N.W.2d 843, 845 (Iowa 1992)). The Court in First Newton Nat'l Bank v. General Casualty Co., 426 N.W.2d 618 (Iowa 1988) "explicitly added a requirement to the policy definition of an occurrence": an event "is an unexpected and unintended occurrence so long as the insured does not expect or intend both it and some injury". Id. at *9. Thus an act or event, while intentional, is an occurrence under the policy unless the actor intended "some injury." Id. at *9.

It is difficult to imagine that sexual molestation could be an accident. Indeed, the court in Altena held that sexual molestation is an intentional act of aggression, not an accident. Altena v. United Fire and Casualty Co., 422 N.W.2d 485, 490 (Iowa 1988). See Allstate Insurance Co. v. McRanie, 716 F. Supp. at 1440, 1444 (S.D. Fla. 1989), aff'd. 904 F2d 713 (11th Cir. Fla. 1990). ("It would be difficult to call the fondling of genitals and oral sex an accident. The actions of Richard McRanie were, to some degree within his control, and not fortuitous. . .").

In Vermont Mutual Ins. Co. v. Malcolm, 128 N.H. 521, 517 A.2d 800 (1986), the Court addressed the issue of whether an occurrence occurred in the context of a sexual molestation claim. The Court held that the general rule for determining whether an act is an "accident" or "occurrence" is to be determined from the standpoint of the insured and insureds' intentional act is not an "accidental" cause of injury when it is so inherently injurious that it cannot be performed without causing the resulting injury. The New Hampshire Court aptly explained why this must be the focus:

> Although this definition [of accident] is not remarkable, its application poses the further question, whether the fortuity should be determined by reference to the insured or to the victim. The answer must be, by reference to the insured. Because an injury is always fortuitous to a non-consenting victim, if its accidental character were to be judged in relation to such a victim, virtually all instances of compensable injury would also be instances of accident, and nothing would be accomplished by determining coverage in relation to occurrence rather than injury alone. Thus the general rule for applying "accident" or "occurrence" causation coverage looks to the insured defendant to determine whether the causal event was fortuitous or not.

Id. at 801. The New Hampshire Court concluded that it was inconceivable that sexual molestation could be an accident. Id. at 802. See also, R. Keeton, Basic Text of Insurance law at 291-93. See also Merced Mutual Insurance Co. v. Mendez, 261 Cal.Rptr. 273, 213 Cal. App. 3rd 41, (1989) (Sexual activity not an accident and thus not an occurrence within the meaning of the policy provision).

The argument that the sexual molestation complained of is not an occurrence under the policy, and therefore no coverage exists, should definitely be raised in all cases. As discussed below, the intentional acts exclusions vary, and the Court has interpreted them differently. The inclusion of an argument that the act was not an occurrence for which the policy applies may be a valuable alternative argument.

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B. Intentional Acts Exclusion

The Iowa Supreme Court has held there is no coverage for sexual molestation under a homeowner's policy because the act falls within the "intentional act" exclusion. Altena v. United Fire and Casualty Co., 422 N.W.2d at 490-91. The Court held that an insured's intent to injure a victim by the commission of sexual acts would be inferred as a matter of law. The Court stated, "Our conclusion, of course, means [the defendant] has no coverage for his sexual misconduct . . . . . As we have shown, coverage is precluded because the injuries caused by [the defendant's] conduct were intentional rather than fortuitous." 422 N.W.2d at 490.[2]

While it might appear that the Altena decision would apply to all cases of sexual molestation, regardless of the insurance policy language, this now must be questioned in light of the Court's opinion in AMCO Insurance Co. v. Haht, 490 N.W.2d 843 (Iowa 1992), discussed below. AMCO is proof positive for the axiom that bad facts make bad law. In AMCO, in addition to holding that a youth of 11 years may not have the same capacity to formulate an intent to injure as a more mature youth or adult, the Court distinguished the Altena policy language from the AMCO policy stating:

> Chris and his parents can also rely on a direct defense on the basis of the wording of the policy, which differs from that in Altena. the exclusion in Altena was addressed to "any act committed by ... the insured with intent to cause personal injury". Altena, 422 N.W.2d at 486. The exclusion involved here is not addressed to the insured's act. Rather, AMCO's exclusion is addressed to "bodily injury ... intended by the insured." The target of this language is the injury specifically intended by the insured.

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[2] Cf. Alber v. Farm Bureau Mutual Insurance Co., 187 Mich. App. 557, 468 N.W.2d 282 (1991), where the victim was a mildly mentally retarded adult and the insured claimed sex was consensual. The Court held that intent to injure would not be inferred, and distinguished the case from the general rule on the basis that the alleged victim was not a minor, and the sexual contact was not therefore obviously illegal.

> We in no way retreat from our holding in Altena; we merely hold it does not apply on this policy in these special circumstances.[3]

Given the AMCO holding, perhaps the most important language in the Altena decision is the statement that coverage under the circumstances is against public policy:

> our own sense of propriety dictates that coverage for these types of criminal acts should be **against the public policy of this state**. Such a holding is in accord with the general rule that insurance to indemnify an insured against his or her own violation of the criminal statutes is against public policy and is therefore void.

422 N.W.2d at 489

One would hope that the Court has not opened up the question of coverage for sexual molestation, and arguably, given the public policy holding, the door remains shut. However, one may need to rely on the lack of an occurrence under the policy language if the policy language in issue contains the exclusion for "bodily injury ... intended" rather than "act committed ... with intent to cause personal injury". See Smithway Motor Xpress, Inc. v. Liberty Mutual Ins. Co., 484 N.W.2d 192, 195 (Iowa 1992)(the definition of "accident" halts any argument that the act was intended but the resulting harm was not intended.)

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[3] While the AMCO decision refers to the Altena policy as excluding "any act committed by ...the insured with the intent to cause personal injury", there were actually two policies discussed in Altena. The homeowner's policy excluded from coverage "bodily injury 'which is expected or intended by the insured'", while the umbrella policy excluded from its coverage "any act committed by ... the insured with intent to cause personal injury." Id. at 486. It appears that the homeowner's policy language was the same in Altena as in AMCO. The Court in Altena rested its decision on both policy exclusions stating that "because of the intentional injury exclusions in both policies, the result of the court's ruling precluded coverage of Senard's sex acts..." Id. at 491. It is difficult to square this with the alternative holding in AMCO.

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C. Arguments to Avoid Exclusions.

Creative arguments will be made to distinguish any given case from the facts in Altena. A variety of theories have been argued. None of these have made it to the Iowa Supreme Court in the context of sexual molestation, so authorities from other jurisdictions are discussed where available:

1. The Petition Claims Negligence, Therefore a Fact Issue Exists.

With an eye toward the deep pocket, the Plaintiff's counsel will invariably allege claims sounding in negligence. However, allegations in the pleading are not the decisive factor in determining whether there exists a duty on the part of the insurer to defend. New Hampshire Insurance Company v. Christy, 200 N.W.2d 834 (Iowa 1972). The mere fact that Plaintiffs in an underlying action claim that the molestation is "negligence" does not make it so. The Court must look beyond the pleading to the relevant undisputed facts in the record to make a determination as to whether the claim is covered by the insurance policy in light of the exclusions contained therein. Central Bearings Co. v. Wolverine Insurance Co., 179 N.W.2d 443 (Iowa 1970). As the Court stated in Allstate Ins. Co. v. Bailey, 723 F.Supp. 665 (M.D. Fla. 1989), a sexual molestation case where the victim claimed the abuser acted "negligently and carelessly . . . such that his actions caused his sexual organs to come into contact with and penetrate [the victim's] mouth":

> Despite the depiction of the incident [in the Complaint] as negligence, this court can conceive of no way that [the abuser's] alleged conduct could be anything but intentional. The intention of a child molester to inflict injury can be inferred as a matter of law from the act of child molestation.
>
> * * * *
>
> Moreover, the alleged molestation of [the victim] could not have arisen from an accidental loss as the policy requires. Intentional child molestation is no accident.

Id. at 669. Regardless of the pleading, the court should look to the true nature of the main action, and where it is such that there is no coverage under the policy for any resulting liability, the insurer has no duty to defend or indemnify as a matter of law. State Farm Fire & Casualty Co. v. Williams, 355 N.W.2d 421, 424-25 (Minn. 1984).

2. Youth

In AMCO Insurance Co. v. Haht, 490 N.W.2d 843 (Iowa 1992), an 11 year old boy "who happened to have the [base]ball" threw it in the direction of a boy who announced he was quitting the game because he was not allowed to pitch. The ball struck the boy in the temple and he died as a result of the injuries received. The district court found that Haht intended to hurt his playmate but not to cause him bodily injury. The Court affirmed its holding in Altena that the intent to cause the injury, in the liability context "may be either actual or inferred. Intent may be inferred from the nature of the act and the accompanying reasonable foreseeability of harm. In addition, once intent to cause injury is found it is immaterial that the actual injury cause is of a different character or magnitude of that intended." Id. at 845. However, the Court found that the intent to "hurt" the other boy "did not rise to the level of intent to bodily injure him as contemplated in Altena." Iowa Supreme Court held that a boy 11 years of age lacks the same capacity to formulate intent to injure as possessed by an adult, or a youth of more maturity. The insurance company argued that under Altena the specific intent to injure should be inferred. The court rejected this argument and found:

> To apply Altena here would grossly overemphasize the vague, uncertain meanderings in the mind of an 11 year old child involved in a playground spat.

Id. at 846. The Court also rested its holding on the policy language as discussed above.

If a child is involved in what would otherwise be characterized as an intentional act, there is no certainty that coverage will be excluded given this holding. The Court gave us no bright lines for purposes of determining when a minor may be too young to have the capacity to formulate intent. The Court distinguished without comment, two cases cited by AMCO. The first, Pachucki v. Republic Ins. Co., 89 Wis.2d 703, 278 N.W.2d 898 (1979), involved a youth "old enough to be employed at a print shop", while the second, Iowa Kemper Ins. Co. v. Stone, 269 N.W.2d 885 (Minn. 1978) involved a sixteen year old youth.

In American Family v. Wubbena, 496 N.W.2d 783 (Iowa App. 1992) the Court of Appeals held that "there can be little, if any, question" that a 15-year-old boy with a bb gun in hand, who shot twice at the victim, intended the act which he committed. Id. at 785. The court distinguished AMCO based on the use of a bb gun rather than a ball. Id. The line apparently is somewhere between the age of 11 and 15, unless the child is old enough to work sooner, and depending upon the weapon.

The impact of the AMCO decision may be even more widespread. The Iowa Supreme Court has not discussed may of the other theories of lack of capacity to form intent. However, given this holding, the Court has indicated a willingness to consider special facts which may defeat the inference of intent.

In the context of child molestation, the Minnesota Court of Appeals rejected the argument that the aggressor's age and immaturity prevented him from forming intent. Illinois Farmers Ins. Co. v. Judith G., 379 N.W.2d 638 (Minn. Ct. App. 1986). In Judith G., the insured's son was alleged to have committed various sex acts upon three young girls while the boy was between the ages of 13 and 16. The insured's argued that an intent to injure could not be inferred in this case because the boy's age and immaturity prevented him from forming the requisite intent to

injure or to appreciate the consequences of his conduct. The court reviewed its decisions in prior sexual molestation cases where the court held that the intent to injure was inferred from the fact that the act involved non-consensual sexual conduct without looking to the surrounding circumstances. The court refused to base its holding on the presence or absence of subjective intent to injure The court held that there was no coverage stating that neither the insured nor the insurer contemplated coverage against claims arising out of non-consensual sexual assaults. Id. at 642.

The court in Altena also noted that the average insured would not contemplate coverage for non-consensual sexual abuse. The court should distinguish sexual abuse from other intentional acts and infer an intent to injure in all cases, regardless of the age of the actor.

3. Intoxication

Can the fact that the molester was intoxicated or a chronic substance abuser defeat the intentional act exclusion? A number of jurisdictions have held that incapacity due to intoxication may render harm caused by the insured "unintentional" and have held that the question of whether intoxication renders an insured incapable of forming an intent within the meaning of an "intentional acts" exclusion is a question for the jury. See, e.g., Morris v. Farmers Insurance Exchange, 771 P.2d 1206 (Wyo. 1989); State Farm Fire & Casualty Co. v. Morgan, 185 Ga. App. 377, 364 S.E.2d 62 (Ga. Ct. App. 1987); aff'd, 258 Ga. 276, 368 S.E.2d 509 (1988); Long v. Coates, 60 Wash. App. 710, 806 P.2d 1256 (1990); Parkinson v. Farmers Ins. Co., 122 Ariz. 343, 594 P.2d 1039 (Ct. App. 1979).

While the Iowa court in AMCO has arguably opened the question of the insured's capacity in the context of the intentional acts exclusion, rejection of the intoxication defense would not be

inconsistent with the AMCO holding. The Michigan Court has specifically determined that while tender age may be considered in determining intent, Connecticut Indemnity Co. v. Nestor, 4 Mich App. 578, 145 N.W.2d 399 (1966), intoxication cannot be considered in the same fashion. Allstate Insurance co. v. Hampton, 173 Mich. App. 65, 433 N.W.2d 334, 336 (1988). In Hampton the Michigan Court of Appeals summarily rejected the claim that the insured lacked the intent to commit the alleged sexual molestation because the insured was intoxicated:

> Where an insured voluntarily ingests alcohol, he may not, as a defense to an exclusionary clause in an insurance policy such as the one at bar, assert that he lacked the capacity to form the intent to act or harm.

Id. at 336.

Michigan joins Minnesota and Missouri in holding voluntary intoxication may never be used as a defense to the application of the intentional harm exclusion, regardless of the act committed. In American Family Mut. Ins. Co. v. Peterson, 405 N.W.2d 418 (Minn. 1987), the insured was a confirmed alcoholic and had a history of alcoholic blackouts. The underlying case involved a claim that Peterson hit his landlady in the head with a hammer. In the declaratory judgment action by the insurer to establish that there was no coverage due to the intentional injury exclusion, Peterson claimed he was intoxicated at the time and was incapable of forming any kind of intent - to commit the act or to cause injury to the victim. Peterson presented expert testimony that given his intoxication, Peterson did not intend to hurt the landlady.

The Court in Peterson rejected the insured's argument that his intoxication created a fact issue regarding his intent to commit the act or intent to cause injury. The Court stated:

> To describe the workings of the human mind in converting thought to action is an elusive task. Our task here is not so ambitious. We need only construe the contract language . . . In doing so, we keep in mind that policy language is to be construed in accordance with the reasonable expectations of the insured . . .

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> The policyholder's expectations are to be considered in light of the purpose of the intentional act exclusion. This purpose, it is frequently said, is to deny the insured license to commit wanton and malicious acts. . . Peterson's contention, really, is that whatever his specific intention might have been while drunk, if indeed he had any at all, it is not the specific intent he would have had if he had chosen not to drink. Absent an understandably provocative situation which induces an instinctive reflex or an impulsive defensive reaction, **we do not think an insured reasonably expects his assault committed while voluntarily intoxicated to be within his policy coverage any more than an assault committed while sober. Nor do we think that other kinds of assaults, such as rape, if committed in an alcoholic blackout, are within an insured's reasonable expectations of insurance coverage., Finally, we are not inclined to create a situation where the more drunk an insured can prove himself to be, the more likely he will have insurance coverage.**
>
> **We hold therefore, that voluntary intoxication may not be used to deny an intent to injure one's victim where the circumstances of the assault otherwise compel an inference of intent to injure.** (emphasis added)

405 N.W.2d at 422.

In Hannover Insurance Co. v. Newcomer, 585 S.W.2d 285 (Mo. Ct. App. 1979), where the Missouri court rejected the argument of the insured that he intended no harm in striking his girlfriend with a machete while under the influence of alcohol and marijuana. The Court stated:

> That the evidence established he was under the influence of intoxicants and marijuana is of no consequence, for the law must not permit the use of such stimuli to become a defense for one's actions.

Id. at 289. See also, Travelers Ins. Co. v. Cole, 631 S.W.2d 661,664 (Mo. Ct. App. 1982).

Other courts have held that while intoxication may negate intent in some situations, in the context of sexual molestation, voluntary intoxication cannot be considered, because intent is inferred from the sexual act. See Western Nat. Assur. Co. v. Hecker, 43 Wash. App. 816, 719 P.2d 954 (1986) (insureds asserted inability to form intent based on drinking and smoking marijuana did not preclude inference of intent to harm); N.N. v. Moraine Mut. Ins. Co., 153 Wis. 2d 84, 450 N.W.2d 445 (1990) (diminished capacity due to intoxication inapplicable to prevent

inference). In Wiley v. State Farm Fire & Cas. Co., 995 F.2d 457 (3d Cir. 1993) the court, applying Pennsylvania law, rejected the defense of intoxication in a child molestation case stating:

> In exceptional cases such as sexual abuse, where the insured's conduct is both intentional and of such a nature and character that harms inheres in it, that conduct affords a sufficiently clear demonstration of intent to harm subsuming any need for a separate inquiry into capacity.

Id. at 457.

The Iowa Supreme Court has not had occasion to determine this precise issue. Given the Court's strong language in Altena, it seems unlikely the court would carve out an exception for the intoxicated sexual offender.

4. Mental Illness

The insured's mental condition may be argued to preclude him/her from forming the necessary mental intent to invoke the intentional act exclusion. Several jurisdictions have recognized mental disease as a defense to the intentional act exclusion. See e.g., Ruvolo v. American Cas. Co., 39 N.J. 490, 498, 189 A.2d 204, 208-09 (1963) (insured suffering from derangement acted on irrational impulse when he committed murder, and his acts could not be considered 'intentional' under policy); AETNA Casualty & Surety Co. v. Dichtl, 78 Ill.App. 3d 970, 398 N.E.2d 582, 584 (1979) (Insurer not entitled to summary judgment against insured - wife previously acquitted of murdering husband by reason of insanity; what is expected and intended from the stand point of the insured creates a fact issue concerning the insured's mental capacity at the time of the killing); Rosa v. Liberty Mut. Ins. Co., 243 F. Supp. 407, 409 (D. Conn. 1965) (Schizophrenic incapable of controlling behavior incapable of committing intentional act);

Johnson v. Insurance Co. of North America, 232 Va. 340, 350 S.E.2d 616 (1986)(exclusion applied to shooting committed by schizophrenic); See generally Annot, 33 A.L.R.4th 983 (1984)("Liability Insurance: Intoxication or other mental incapacity avoiding application of clause in liability policy specifically exempting coverage of injury or damage caused intentionally by or at direction of insured"); Nationwide Mut. Fire Ins. Co. v. May, 860 F.2d 219 (6th Cir. 1988), (Affirmed jury's finding that the insured's 22 yr. old son diagnosed as a psychotic with delusional thinking, suicidal tendencies and depression did not have the mental capacity to understand the physical consequences of his acts in setting the fire and thus the intentional act exclusion in the homeowner's policy was inapplicable.)

Yet in the context of cases alleging sexual abuse/molestation, the Courts have been unwilling to find that mental incapacity negates intent in a wide variety of cases. In Allstate Ins. Co. v. Troelstrup, 789 P.2d 415 (Colo. 1990), Defendant sought homeowners coverage for claims against him alleging homosexual molestation of a neighbor boy. Defendant claimed he had no subjective intent to injure and offered psychological testimony the he "consciously and overtly saw himself as a paternal surrogate and sincerely felt he was encouraging growth and development of male children." The Court there stated:

> The majority analysis regarding the inherently harmful nature of child molestation is persuasive and accordingly we hold that in cases involving such molestation, the subjective intent of the insured is not relevant to the determination of whether coverage is precluded pursuant to an intentional injury exclusion. We conclude that the intent to injure may be inferred as a matter of law where child molestation is involved.

Id. at 419

In Fire Insurance Exchange v. Abbott, 204 Cal. App. 3d 1012, 251 Cal. Rptr, 620 (1988), the court held that in light of the inference that must be drawn from criminal sexual misconduct,

psychological evidence of a pedophile's lack of subjective intent to injure because of mental incapacity is not relevant to the coverage issue. Id. at 630. See also, Shaw v. Bourn, 615 So.2d 466 (La. App. 1993) (sexual molestation presents the rare circumstance where no fact question exists on intent. These acts cannot result from careless conduct. Fact that insured is a pedophile of no consequence); Public Employees Mut. Ins. Co. v. Rash, 48 Wash. App. 701, 740 P.2d 370 (1987) (Fact that insured is sexual psychopath does not mean he lacks capacity to intend the act, nor is it a finding of insanity. Despite mental illness no coverage exists as act was intentional); Auto-Owners Insurance Co. v. Gardipey, 173 Mich App. 711, 434 N.W.2d 220, 222 (1988), (the insured was mildly mentally retarded, and had Fanconi DNA syndrome which affected both his mental capacity and his character. He pled guilty, however, to assault with intent to commit sexual misconduct. The Court rejected the psychological evidence on the insured's lack of intent to harm and held that his intent to harm could be inferred as a matter of law from the alleged sex acts.) See also, State Farm Fire and Casualty Co. v. Reuter, 299 Ore. 155, 700 P.2d 236 (1985) (Conviction of rape collaterally estopped insured and victim from asserting defense of lack of mental capacity.)

These cases all deal with mental conditions or illnesses alleged to show the insured lacked the intent to harm, rather than the intent to do the act itself. While evidence of lack of mental capacity will not be heard to negate intent to harm, these courts may consider evidence showing the insured lacked the intent to commit the act. See, Fire Exchange v. Abbott, 251 Cal. Rptr. at 630. Under Iowa law, for the intentional act exclusion to apply the insured must have intended both the act and to cause some kind of bodily injury. Altena, 422 N.W.2d at 488 (Iowa 1988); McAndrews v. Farm Bureau Mutual Insurance Company, 349 N.W.2d 117 (Iowa 1984). However the Court in Altena held that the intent to do the act and to cause the injury may be

inferred by the nature of the act and the accompanying reasonable foreseeability of harm. Altena, 422 N.W.2d at 488. Thus Altena should be dispositive on the issue when the defense of lack of intent to injure due to lack of mental capacity is raised and may even indicate the court's unwillingness to consider evidence showing that the insured's mental condition was so severe that he/she could not form the requisite intent to commit the act.

5. The Reasonable Expectations Argument

Of course every insured will claim reasonable expectations when all else looks bad for them. Where a policy of insurance is not ambiguous the Court must not re-write the contract of insurance between the parties nor strain the words and language of the policy to impose liability that was neither intended nor purchased. West Trucking Line Inc. v. Northland Insurance Co., 459 N.W.2d 262 (Ia 1990). The mere fact that the parties may disagree regarding the meaning of certain terms in a policy does not establish the existence of a "ambiguity". A.Y. McDonald Industries, Inc. v. Insurance Company of North America, 475 N.W.2d 607 (Iowa 1991).

The doctrine of reasonable expectations applies an objective standard of the reasonable expectations of the average member of the public. State Farm Auto Insurance Co. v. Malcolm, 259 N.W.2d 833 (Iowa 1977). When ordinary laypersons would not misunderstand the policy's coverage, the reasonable expectations doctrine is inapplicable. Aid Mut. Ins. v. Steffen, 423 N.W.2d 189 (Iowa 1988). The Iowa Supreme Court in Altena, 422 N.W.2d at 490, quoted Rodriguez v. Williams, 42 Wash App. 633, 713 P.2d 135, 137 (1986) aff'd. 107 Wash. 2d 381, 729 P.2d 627 (1986) with approval:

> the average person purchasing homeowner's insurance would cringe at the very suggestion that [the person] was paying for such coverage. And certainly [the

person] would not want to share that type of risk with other homeowner's policy holders.

Id.

This appears to be the single situation where we can say with some certainty, that the Court will not be persuaded or even tempted by the reasonable expectations argument.

II. IS THERE COVERAGE FOR CLAIMS ALLEGING THE INSURED FAILED TO SUPERVISE OR FAILED TO PREVENT SEXUAL MOLESTATION.

Where Plaintiff claims one party has sexually molested, an intentional act, frequently Plaintiff also claims a spouse or parent failed to supervise or otherwise enabled the molester. The claim usually is that the inaction allowed the damage suffered at the hands of molester.

In the Iowa Defense Counsel Association Newsletter, Defense Update, Mark L. Greiner from West Des Moines explored the duties the Iowa Code imposes on parents in the criminal context, in an article entitled "Non-Reporting of Child Sexual Abuse/The Next Attempt at Insurability" (July 1993). The article points out that §232.68(2) and §726.6 of the Iowa Code are directed not only to the deliberate acts of sexual abuse, but to "omissions of the person responsible for the care of the child" as well. §726.6 specifically prohibits a parent from "knowingly permitting the continued physical or sexual abuse of a child." Greiner notes, however, that the sections are silent as to what level of knowledge must be present before a parent will be deemed to have omitted to act to prevent or stop the abuse.

In terms of insurance coverage for the party who fails to act when faced with objective evidence of child sexual abuse, Greiner posits that the same public policy reasons exist as noted by the Court in Altena for denying coverage. Further, the party is subjected to the same criminal sanctions as the abuser. The criminal nature of the act was significant to the Court in Altena.

Altena 422 N.W.2d at 490 (The criminal character of the acts is a further recognition of the injury inherent in the commission of them). See Atlantic Employers Ins. Inc. v. Tots & Toddlers Pre-School Day Care Center, 239 N.J. Super 276, 571 A.2d 300 (1990), certif. denied, 122 N.J. 147, 584 A.2d 218 (1990) (noting that coverage might be denied under the policy exclusion relating to violations of penal statutes if the employees participated in, condoned or had knowledge of the illegal activity).

However, the claim against the inactive insured (whether parent, grandparent, childcare center, babysitter, or school) will not likely allege merely a knowing and intentional failure to act when faced with unambiguous evidence of sexual abuse. To the contrary, the majority of claims allege negligent failure to supervise, either alone or in addition to intentional claims. See e.g., D.W.H. v. Steele 494 N.W.2d 513 (Minn. Ct. App. 1993), review granted, 1993 Minn. LEXIS 212 (Minn. Mar. 16, 1993), (where claims of intentional failure to report known maltreatment and negligent supervision were alleged against a foster parent, the insurer defended the negligence claim, and brought a declaratory judgment action to determine coverage on the intentional claims under a policy which specifically excluded coverage for injury arising out of sexual molestation, criminal acts, or willful violation of penal statues, arguing the policy conflicted with the Minnesota statute requiring certain coverages for foster homes.); Atlantic Employers Ins. Inc., 571 A.2d at 303, (If [insureds] were negligent in not reasonably conducting the day care center so as to prevent causing injury to the children, coverage might well be afforded under the policy.)

Thus, except as discussed below, it is likely that a claim of negligent supervision or negligent failure to discover sexual abuse/molestation will trigger a duty to defend, and if the

plaintiff in the underlying claim recovers on the negligence claim, as opposed to an intentional/knowing failure to prevent claim, the insurer will have a duty to indemnify.[4]

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A. The Co-Insured Exclusion

Frequently the "enabler" is a co-insured of the alleged molester. In this situation, the claims against the co-insured may be excluded from coverage under the intentional acts exclusion. Homeowner's policies exclude coverage for all damage caused intentionally by:

(1) any insured;

(2) an insured; or

(3) the insured.

In the property loss coverage context, the Iowa Supreme Court examined the question of whether an insured may recover under a homeowner's insurance policy when a loss results from the intentional acts of another insured person under the policy in Vance v. Pekin Insurance Co., 457 N.W.2d 589 (Iowa 1990). In Vance the insured, Susan Vance, sought to collect under her policy after her husband, Donald, was convicted of arson in June, 1987 for setting their home on fire. Id. at 590. Susan Vance was never implicated in the fire. Id.

The Vance policy excluded coverage for damages caused by the intentional acts of "an insured." In determining whether the intentional act exclusion applied to the claims of Mrs. Vance, the Court applied the "best reasoned rule" - that "recovery depends on contract analysis of insurance policy provisions". Id. at 592. The Court in Vance focused upon the specific words

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[4] Many policies are now being written with a specific exclusion for injuries resulting from sexual abuse or molestation. These exclusions appear clear and would avoid coverage.

of the policy, distinguishing "the insured" from "an insured". Id. The Court held the policy did not provide coverage for Mrs. Vance because the phrase "an insured" was not ambiguous, and the intentional act of Mr. Vance ("an insured") triggered the exclusion, and Mrs. Vance, also "an insured", could not recover under the policy. Thus, the exclusion operated to bar the claims of the innocent co-insured since the intentional act exclusion was invoked by the act of "an insured", the arsonist. Id. at 592-593.

Although the Iowa Supreme court has yet to rule on the applicability of the exclusionary language "an insured" or "any insured" in a case against a co-insured for negligence in failing to protect the victim from continuing abuse, nearly all other Courts which have interpreted similar policy language and have addressed this issue, have held the insurance carrier does not have a duty to defend or indemnify under these circumstances. The Courts generally have interpreted the policy language in the same way that the Iowa Supreme Court did in Vance, and have reached the same conclusion as the Vance Court.

In Allstate Ins. Co. v. Foster, 693 F. Supp. 886 (D. Nev. 1988), the court held that an insured did not have a duty to defend or indemnify the wife of a convicted child molester sued for her failure "to warn, disclose or otherwise protect" a child from abuse where the policy in issue excluded "bodily injury . . . which may reasonably be expected to result from the intentional or criminal acts of an insured person". Id. at 888. The Allstate Court stated:

> the insurance policy expressly excludes coverage to any other insureds, such as Roberta Foster, for liability arising from the harm which is directly attributable to the intentional or criminal act . . . Accordingly, the court finds Allstate has no legal obligation to defend or indemnify Steven Foster and Roberta Foster for liability . . . for any bodily harm and emotional harm . . . which was caused by the criminal acts of lewdness by Steven Foster.

Id. at 889. (Emphasis supplied).

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The Court's rationale in Foster is substantially the same as the Iowa Supreme Court's reasoning in Vance, supra. The issue is one of contract interpretation. See also, Allstate Ins. Co. v. McCranie, 716 F. Supp. 1440, 1449 (S.D. Fla. 1989)(In a case involving a child care center operator, sued for failing to "supervise and care for [the child] while he was a guest in her house" the court ruled that the insurer had no duty to defend or indemnify the operator whose brother-in-law resided at her home and sexually molested a child at the residence.); Allstate Ins. Co. v. Roelfs, 698 F. Supp. 815, 822 (D. Alaska 1987)(in negligence suit against the parents of a teenager who sexually molested minor girls, where policy excluded coverage for "bodily injury . . . intentionally caused by an insured", the court held that the exclusion applied to all claims which arise from the intentional acts of any one insured, even though claims are stated against another insured party in a somewhat different form.); Farmers Ins. Co. v. Hembree, 54 Wash. App. 195, 773 P.2d 105, 108 (Wash. App. 1989) (Acts of the minor children of an insured who sexually molested a child in the parents custody in their home and any claims arising from these are acts not covered under their insurance policy. The policy provides no coverage if the intentional acts of an insured gave rise to the injury or damage.) In All American Ins. Co. v. Burns, 971 F.2d 438 (10th Cir. 1992) the court applied the contract interpretation rule and found that where a church liability policy contains an exclusion for a violation of a penal statute by "any insured" the exclusion applied to negligence claims against the church for failure to supervise and negligent entrustment where the employee of the church allegedly sexually abused young girls in violation of the penal statute. The policy defined the term "insured" to include both the church and the individual employees. The court reasoned that the violation of the penal statute by the employee could not be separated from the claims against the church stating:

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> We are convinced that here the Oklahoma Court would likewise view the damage suit petitions as a whole, including the element of the molestations and resulting injuries, which bring into play the penal act exception. The charges of molestation are an essential element of the plaintiff's claims in the state court here . . . in these circumstances, we are persuaded that the district court properly determined Oklahoma law in applying the clear and unambiguous exclusion.

Id. at 444-45.

If the policy does not provide the exclusion for intentional acts of "an" insured or "any" insured, but instead excludes intentional acts of "the" insured, the unanimous view appears to be that such language is ambiguous because it is susceptible to more than one reasonable interpretation: "the insured" could refer only to the insured seeking recovery, or it could refer to all insureds under the policy. Since the language is ambiguous, courts applying the contract interpretation doctrine that Iowa has adopted in Vance, construe the provision in favor of the innocent co-insured. Ponder v. Allstate Ins. Co., 729 F.Supp. 60, 61-62 (E.D. Mich. 1990); McCauley Enterprises, Inc. v. New Hampshire Ins. Co., 716 F.Supp. 718, 720 (D. Conn. 1989); Hogs Unlimited v. Farm Bureau Mut. Ins. Co., 401 N.W.2d. 381, 384-86 (Minn. 1987) (Applying a fraud clause to a business partnership and noting the paucity of case law on innocent Partners").

In the sexual molestation context, the Courts have reached the same conclusion; the exclusion does not bar coverage for the innocent co-insured if the operative language is "the insured." See Armstrong v. Security Insurance Group, 292 Ala. 27, 288 So.2d 134 (Ala. 1973); Hedtcke v. Sentry Ins. Co., 109 Wis. 2d 461, 326 N.W.2d 727 (1982); Lewis v. Homeowners Ins. Co., 172 Mich. App. 443, 432 N.W.2d 334 (Mich. 1988); Madsen v. Threshermen's Mut. Ins. Co., 149 Wis. 2d 594, 439 N.W.2d 607 (Ct App. 1989).

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B. Effect of Severability Clause to Co-Insured Exclusion

Despite the clear and unambiguous language of the exclusion for liability "resulting from bodily injury . . . caused intentionally by . . . any insured" (or "an insured") it has been argued with some success that the exclusion is not applicable where the policy contains a "severability clause." The typical severability clause provides:

> Separate Insurance. This insurance applies separately to each insured. This condition does not increase our limit of liability for any one occurrence.

The history of the severability clause is important. At one time, judicial uncertainty existed as tho whether additional, omnibus, and other insureds had the same rights and obligations under an insurance policy as did the named insureds. To resolve such uncertainties, insurance companies began to insert the severability of interests clause to indicate that the policy applied separately to each insured. See Ryder Truck Rental, Inc. v. St. Paul Fire & Marine Ins. Co., 540 F. Supp. 66, 71 (N.D. Ga. 1982).

The inclusion of such a provision has led some courts to allow an innocent co-insured to recover even though the language of the relevant exclusion or condition indicates unambiguously that wrongdoing by one insured precludes recovery by all insureds. The argument is that the term "any insured" or "an insured" means only the insured seeking coverage under the policy, because of the policy definition providing that each person is a separate insured under the policy. The "separate insured" definition requires that the insurance policy be interpreted as two separate insurance policies. Under this construction, the "intentional acts" exclusion would not apply to the co-insured, since she would be the only "insured" under such a separate policy.

In Worcester Mut. Ins. Co. v. Marnell, 398 Mass. 240, 496 N.E.2d 158 (Mass. 1986), the insurer denied coverage under a homeowner's policy which contained an exclusion for coverage which arose out of the use of motor vehicle owned by "any insured". The defendants were named insureds and their son was an unnamed insured under the policy. The complaint alleged that the son became intoxicated and, while negligently operating his vehicle, killed the plaintiff's decedent. The parents, as named insureds, were sued for negligent failure to supervise the party at which their son had become intoxicated.

The parents' policy contained a severability clause. The Court agreed that, without this "severability" clause, there was no coverage. However, the Court noted that since the policy "applies separately to each insured", the term "insured" as used in the exclusion "refers only to the person claiming coverage under the policy". The Court stressed that:

> While our interpretation of the policy makes the word 'any' in the motor vehicle exclusion superfluous, the construction urged by [the insurer] would render the [separate insureds] clause meaningless.[5]

See also, Catholic Diocese of Dodge City v. Raymer, 16 Kan. App. 2d 488, 825 P.2d 1144 (1992), aff'd., 251 Kan. 689, 840 P.2d 456 (1992), (The court recognized a number of cases which held that an exclusion for damages intentionally caused by "an insured" or "any insured" barred coverage for all insureds, but held that, even if the exclusion was unambiguous and otherwise applied to all insureds, the exclusion was made ambiguous by the "separate insureds" clause, and reversed a summary judgment in favor of the insurer); Northwestern Nat. Ins. Co. v. Nemetz,

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[5] If this argument is accepted, the Court must construe all references to "insured" as referring only to the specific insured asserting a claim, regardless of whether the term "insured" is modified by the word "any" in all cases. One way to attack this argument is to apply the interpretation to other provisions of the policy. Alternatively, again by application of the terms throughout the policy, one can show that the severability clause is not rendered meaningless if "any insured" is given its clear meaning.

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135 Wis. 2d 245, 400 N.W.2d 33 (Ct. App. 1986), (Where husband intentionally started a fire, policy excluded coverage for damage "expected or intended by an insured person, coverage was nonetheless available for the insured wife's alleged liability, which was based upon negligence, because the policy contained a clause which provided that the policy "applies separately to each insured person".) c.f. Taryn E.F. v. Joshua, 1993 Wisc. App. LEXIS 979 (August 3, 1993) (court distinguished Nemetz on the basis that in Nemetz the policy referred to "an insured" while in Taryn E.F. the policy referred to "any insured". The court held "any" is a clear term, and where the exclusion applies to intentional acts on the part of "any insured", the severability clause does not make the policy ambiguous)

These cases misconstrue the purpose of the severability of interests clause. The fact that the policy applies separately to each insured does not mean that there are no joint obligations among all the insureds.

A severability clause merely clarifies that where the policy refers to "insured" or "the insured" it applies to each insured. McCauley Enterprises Inc. v. New Hampshire Ins. Co., 716 F. Supp. 718, 720 (D. Conn. 1989). The clause clarifies that each person is provided certain rights and obligations in the policy as "insured" or "the insured". Where, however, the policy makes clear by adding the pronoun "any" or "an" to "insured" that the reference is to one, some, or all insureds indiscriminately, the policy must be interpreted to give full effect to this language. Id. at 21.

The Court in McCauley, applying the contract approach adopted by our Court in Vance, explained the effect of a severability clause. The McCauley Court held that an exclusion for acts of "the insured" did not clearly define the obligation to refrain from conduct as joint or severable, but the severability clause clarified this term:

> The definition of an "insured" evidences intention that the obligations be several rather than joint. Specifically, the policy definition of "insured" provides that [the] insurance afforded applies separately to each insured . . .

716 F. Supp. at 720. With respect to another exclusion, however, the policy in issue in McCauley provided a fraudulent act committed by "any insured" barred coverage. The McCauley Court held:

> The language "any insured" has been consistently interpreted as expressing contractual intent to create joint obligations and to prohibit recovery by an innocent co-insured . . . Accordingly both [insureds] would be barred, as a matter of law, from recovery of the policy proceeds . . . based on [one insured's] conduct . . . "

Id. at 721.

Thus the McCauley Court recognized the purpose of the severability clause is only to clarify that the term "insured" or "the insured" standing alone in the policy evidences the intent that obligations are several and discrete. Where the pronoun "any" is added, however, the intent is to create joint obligations.

The Court in Chacon v. American Family Mut. Ins. Co., 788 P.2d 748 (Colo 1990) also rejected the Massachusetts' Court's reasoning in Worcester. In Chacon the Chacon's son vandalized an elementary school. The school district's insurer sued the boy's parents. American Family, the Chacon's home owners insurance carrier denied coverage under the "intentional act" exclusion. Chacons sought declaratory relief. Under the American Family policy, the Chacons and their son were insureds under the policy. The policy in Chacon also contained a severability provision stating that "this insurance applies separately to each insured."

The Court in Chacon stated:

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> We find the reasoning of the majority of courts more persuasive than that of Worcester, because it considers and gives effect to all the policy provisions and recognizes that an insurance policy is a contract between the parties which should be enforced in a manner consistent with the intentions expressed therein. The inquiry is an objective one, focusing on what a reasonable person would have understood that contract to mean. Here, the policy provides that liability coverage does not apply to property damage "which is expected or intended by any insured." This provision clearly and unambiguously expresses an intention to deny coverage to all insureds when damage is intended or expected as a result of the actions of any insured.

Id. at 752. The court noted that "the inclusion of the severability clause within the contract is not inconsistent with the creation of a blanket exclusion for intentional acts. Instead, the inquiry is whether the contract indicates that the parties intended such a result." Id. at 752, fn.6. In a concurring opinion Justice Erickson stated:

> I intend to emphasize that, despite the severability clause, the exclusion expresses a clear intent to preclude coverage for liability on the part of an insured for the intentional acts of the other individual insureds. (citations omitted). **The language of the intentional act exclusion unambiguously expresses the intent to render the severability clause inapplicable to liability of one insured under the policy for the intentional acts of another insured.** (emphasis added)

Id. at 752.

Thus, the Chacon Court found the policy was not ambiguous and the clear intent of the policy language precluded coverage where the exclusion applied to intentional injury by "any insured"; See also, Great Central Ins. Co. v. Roemmich, 291 N.W.2d 772 (S.D. 1980) where the court found similar policy language clear and unambiguous; Allstate Ins. Co. v. Freeman, 432 Mich. 656, 443 N.W.2d 734, 750, (1989) (Insurer had a separate and distinct duty to cover each insured under the policy, but any duty to defend the husband was solely derivative of the duty to defend the wife under the policy. Looking to the underlying cause of the injury to determine coverage, the court found that intentional act exclusion for bodily injury caused intentionally by "an insured" applied to the husband as well as the wife who committed the intentional tort.);

Farmers Ins. Co. v. Hembree, 54 Wash. App. 195, 773 P.2d 105 (1989) (The policy language was not ambiguous. The court held the policy, when read as a whole, was not capable of two reasonable and fair interpretations and afforded no coverage to the parents

C. The Reasonable Expectations Argument

Again every insured will claim reasonable expectations when all else looks bad for them. The Court's decision in Vance that the clear policy language excludes the "innocent" co-insured from coverage should be persuasive.

The Court in Spezialetti v. Pacific Employees Ins. Co., 1759 F.2d 1139,1142 (3rd Cir. 1985), rejected the Plaintiff's reasonable expectations argument in a coinsured case stating sh e was attempting to "avoid a clear application of the clause here by conjuring up ambiguities". Id. at 1142. The Spezialetti Court stated that "a court should read policy provisions to avoid ambiguities if possible and should not torture the language to create them." Id. The Court w ent on to state:

> we have no difficulty in determining that in this case "any insured" means one covered by the policy issued on the [premises]. . . . Where as here the contract language is 'clearly worded and conspicuously displayed, the insured may not avoid the consequences of that limitation by proof that he failed to read that limitation or that he did not understand it'".

Id.

But see U.S.F. & G. Ins. Co. v. Brannan, 22 Wash. App. 341, 589 P.2d 817, 823 (Wash. Ct. A pp. 1979), where the policy defined occurrence in part as "an accident". A husband and wife were named insureds. The husband was alleged to have intentionally shot two business associates. At the trial on the declaratory judgment petition, the jury determined that the

husband had acted intentionally. On appeal, the Court noted in part that, while the jury's finding of an intentional act indicated that the shootings were not an "occurrence" from the viewpoint of the husband, "nevertheless, it would seem that the event would be an 'occurrence' with respect to [the wife]" and that "the event could not, from (the wife's] point of view, have been 'expected or intended from the standpoint of the insured'." See also Armstrong v. Security Insurance Group, 292 Ala. 27, 288 So. 2d 134 (1973).

Interestingly, the plaintiff in the underlying action may be claiming that the statute of limitations period for claims against the abuser and the co-insured alleged to have negligently supervised is extended by application of Iowa Code §614.8A which provides in pertinent part:

> An action for damages for injury suffered as a result of sexual abuse which occurred when the injured person was a child, but not discovered until after the injured person is of the age of majority, shall be brought within four years from the time of discovery by the injured party of both the injury and the causal relationship between the injury and the sexual abuse.

Thus the plaintiff is asserting that the claim against the co-insured is "an action for damages f or injuries suffered as a result of sexual abuse" under §614.8A. Yet the same plaintiff may attempt to argue that their claim will not result in "liability . . . resulting from bodily injury caused intentionally by an insured". This provision can be argued to defeat the reasonable expectations argument - either the claim is barred by the statute of limitations - or there is no coverage under the policy.

III. SEXUAL DISCRIMINATION - IS THERE COVERAGE?

As stated previously, the Iowa Supreme Court in Smithway Motor Xpress held there is no insurance coverage for a claim of wrongful termination. In Smithway the employee claimed he was retaliated against based on his application and receipt of workers compensation benefits. The court reasoned that the employee's discharge was not an "occurrence" under the policy, and any resulting damages claimed are intended and expected. 484 N.W.2d 192, 195.

In Clark-Peterson Co. v. Independent Ins. Assoc. Ltd., 492 N.W.2d 675 (Iowa 1992) the court held that under a policy of insurance providing discrimination coverage, the insurer must defend and indemnify the insured employer for an act of intentional employment discrimination. In Clark-Peterson, the plaintiff in the underlying case obtained a substantial judgment against his employer on the theory of improper employment termination due to discrimination based on a disability - alcoholism. In the subsequent declaratory judgment action, the court affirmed the district court's finding that the discrimination against the employee was intended and therefore, under the precise terms of the policy, there was no coverage. Id. at 676. This was based both on the intentional acts exclusion and the definition of "occurrence" in the policy. Id. at 677. After making this finding, however, the court considered the insured's reasonable expectation argument based on the conflicting provisions in the policy. The policy purported to provide protection for discrimination yet excluded acts of intentional discrimination (desperate treatment) and disparate impact claims. In analyzing the reasonable expectations under the circumstances the court noted that the insured was seeking coverage for a "unusual and controversial liability, liability which no doubt came as a shock to it". Id. at 678. The court explained the application of the reasonable expectations stating:

> Coverage does not necessarily follow from the finding that an ordinary layperson could expect coverage. It cannot be awarded unless we agree with the district court on at least one of its three findings that denial of coverage: (1) is bizarre or oppressive; (2) eviscerates terms explicitly agreed to; or (3) eliminates the dominant purpose of the transaction.

Id. at 678. The court held that under the circumstances, this policy eviscerated terms explicitly agreed to - the discrimination coverage. The court held that "evisceration can occur on something less than total obliteration of all possibilities of coverage" and "it is enough if an exclusion deprives coverage in a vital and substantial way. Disembowelling is the taking of a vital organ, not the taking of all of them". Id.

Most recently, in Ottumwa Housing Authority v. State Farm Fire & Casualty Co., 495 N.W.2d 723 (Iowa 1993), the court again analyzed the policy exclusions in light of a claim of intentional employment discrimination. Plaintiffs in the underlying action were employees of the Ottumwa Housing Authority (OHA) claiming its executive director had sexually harassed them. State Farm denied coverage under its general liability policy and its workers compensation policy. While the underlying claims were pending, OHA filed this suit seeking declaratory judgment that the policies afforded coverage and imposed a duty on State Farm to defend. Eventually OHA reached a settlement with the plaintiffs in the underlying suit.

In this declaratory judgment action, OHA claimed the allegations fell within the meaning of the policy's definition of "occurrence" and the damages alleged "bodily injuries" under the policy. The Iowa Supreme Court did not analyze either of these arguments but instead found that the employee exclusion of the general liability policy applied to deny coverage The employee exclusion provided:

> Under Coverage L [Business Liability], this policy does not apply:

> to bodily injury to any employee of the insured arising out of and in the course of their employment by the insured . . .

The court held that this exclusion applied regardless of whether the employee had liability under the workers compensation law to the employee.

> All that is required is that the bodily injury arise out of and in the course of employment . . . according to the pleadings, all five theories [alleged by plaintiffs in the underlying suits] are based on conduct allegedly (1) occurring at the workplace, (2) occurring during the employment . . , and (3) resulting in the injuries and damages both claimed.

Id. at 727. The court also rejected OHA's claim that coverage is afforded under the personal injury provisions of the policy. This provision affords coverage for injuries arising out of:

> the publication or utterance of a liable or slander or of other defamatory or disparaging material, or a publication or utterance in violation of an individual's right of privacy.

Finding the underlying claims do not seek damages for injury to reputation, the court rejected the argument that claims based on verbal abuse, sexually suggestive conversations, insults, innuendos, and other sexually harassing comments were sufficient to state a claim for damage to reputation. The court rejected OHA's argument that such comments constitute "sexually harassing disparagement" stating that "we find nothing in the record presented to suggest coverage under the personal injury clause for 'sexually harassing disparagement', an alleged cause of action with which we are unfamiliar". Id. at 728 See also, Nichols v. American Employers Ins. Co., 140 Wis.2d 743, 412 N W 2d 547, 551 (Ct. App. 1987) (Because the nature of the claim was not a defamatory action, the simple fact that a defamatory statement is part of a proceeding does not bring the case within the insurance coverage.); Hamlin v. Western Nat. Mut. Ins. Co., 461 N.W.2d 395, 398 (Minn. App. 1990) (Sexual harassment claim did not fall within the endorsement for "personal injury" claims even if the sexual harassment complaint had related

some defamatory matter.); Streamline Bar Inc. v. GRE America, 1993 Minn. App. LEXIS 790 (August 3, 1993) (where employee's complaint stated thirteen causes of action, primarily relating to sexual harassment, but also claiming defamation, insurer had a duty to defend under the personal injury policy endorsement due to the defamation and false imprisonment claims); But see, Dixon Distributing Co. v. Hannover Insurance Co., 244 Il. App. 3d 837, 612 N.E.2d 846 (1993) (retaliatory discharge covered under expanded policy covering personal injury.).

The court in Ottumwa Housing Authority also addressed the issue of coverage under the workers compensation policy. One of the plaintiffs in the underlying action had originally filed a workers compensation suit but dismissed it after filing civil suits in State and Federal Court. These suits were based on the same acts of sexual discrimination that she had alleged in her workers compensation proceeding. Id. at 729. The court held that the plaintiffs did not have a basis for a workers compensation claim because they had a right of action against OHA, their employer, for sexual discrimination under both State and Federal law. Under these circumstances, the court reasoned that:

> The quid pro quo for OHA's giving up its normal defenses is gone. Therefore the basis for a workers compensation claim grounded on these same discrimination claims is likewise gone

Id. at 729.

The Court in Greenman v. Michigan Mut. Ins. Co., 173 Mich. App. 88, 433 N.W.2d 346 (Mich 1988), addressing the question of coverage for sexual harassment claims under a homeowner's policy, ruled in favor of the insurer on several policy exclusions. The insured in Greenman was sued by a co-worker for sexual harassment and discrimination and brought a claim against his homeowner's policy that refused to provide coverage on the claims. The court affirmed summary judgment in favor of the insurer on the basis that (1) no bodily injury occurred

as defined under the policy; (2) the acts alleged were not a "occurrence" under the policy definition requiring an accident; (3) the alleged injuries were "expected or intended" from the standpoint of the insured; and (4) the policy "business pursuits exception applied to defeat coverage".

Other jurisdictions have also held that there is no coverage for discrimination because the conduct does not equate to an occurrence as required by the policy. See e.g. Continental Insurance Co. v. McDaniel, 160 Ariz. 183, 772 P.2d 6 (Ct. App. 1988) (Under a general liability policy there is a no coverage for a sexual harassment claim because the alleged acts were not an "occurrence" as defined in the policy.). Others have held no the no bodily injury exists to trigger coverage. See e.g. Steve Spicer Motors Inc. v. Federated Mutual Ins. Co., 758 S.W.2d 191 (Mis. Ct. App. 1988) (age discrimination claim does not constitute bodily injury or personal injury which would trigger coverage under the policy).

In E-Z Loader Boat Trailers Inc. v. The Travelers Indemnity Co., 106 Wash. 2d 901, 726 P.2d 439 (1986), the court distinguished sexual discrimination claims based on desperate treatment versus disparate impact:

> To prove "desperate treatment" a plaintiff must show that an employer treated an individual employee or group of employees differently because of sex, race, age, religion, or some other improper differentiation to prove a "disparate impact" from discrimination upon a person or group of persons, a plaintiff must show that an employment practice, which was facially neutral, resulted in discrimination against persons because of their age, sex or other improper distinction.

Id. at 444. The court held that where plaintiffs are direct targets of their employer because of their status, they were discriminated against because of the employers direct and purposeful act against them as individuals rather than some improper policy or goal of the employer. Thus the intentional act exclusion of the policy applies. The court stated, however, "A duty to defend might

arise under some policies when disparate impact has been caused by the negligence of an employer." Id.

At least two courts have found that providing coverage for wrongful termination or intentional discrimination violates public policy. See Ranger Insurance Co. v. Bal Harbour Club, Inc., 549 So.2d 1005 (Fla. 1989); John's Cocktail Lounge Inc. v. The North River Insurance Co., 235 N.J. Super. 536, 563 A.2d 473 (1989).

IV. TRANSMISSION OF SEXUALLY TRANSMITTED DISEASES - IS THERE COVERAGE?

The question of whether coverage exists under the standard homeowner's policy for transmission of a sexually transmitted disease has been resolved differently depending on the facts. Generally the courts have held that the issue must be submitted to the jury on the issue of intent unless there is undisputed evidence of some intent to injure. Intent to injure has been inferred in cases of transmission of disease during sexual abuse, rather than consensual sex, and in the case of AIDS.

In Milbank Ins. Co. v. B.P.L.G., 484 N.W.2d 52 (Ct. App. Minn. 1992), the insured was diagnosed with genital herpes prior to beginning a sexual relationship. He did not tell his sex partner of his diagnosis and she contracted the disease. His sex partner sued claiming he was negligent in failing to warn her when he had reason to believe that he was infected by herpes. The court awarded damages in the underlying claim. Subsequently the insurer brought a declaratory judgment action to determine if coverage under its homeowner's policy applied to the liability of the insured. The insurer claimed that because of the finding in the underlying lawsuit that the insured knew he had herpes, as a matter of law that the insured "expected and intended" to infect his sex partner.

The Milbank court noted that under Minnesota law, a party has a legal duty to use reasonable care to avoid infecting others with a sexually transmitted disease even without "medical confirmation" that the person has the disease. The existence of a legal duty exists if the potential injury was reasonably foreseeable. Id. at 57. In the summary judgment posture of the declaratory judgment action, however, the court declined to infer intent absent a showing that the insured engaged in sexual contact "knowing it was highly certain that he would infect her". The court also rejected the insurer's argument that the transmission of herpes could not be an "occurrence" under the policy because of the intentional conduct of participating in the sexual acts. The court adopted the view that "the term [accident] includes all negligently caused injury, provided such injury was not intentional". Id. at 58. Finally, the court rejected the insurer's arguments that coverage for liability for sexually transmitted diseases is contrary to public policy. Id. at 58. The case was then remanded for trial on the issue of the extent and certainty of the insured's knowledge and whether he expected that he would infect his sex partner with herpes through sexual contact. Id. at 59.

In Loveridge v. Chartier, 161 Wis. 2d 150, 468 N.W.2d 146 (1991), the Wisconsin Supreme Court reached a similar result. The insured, a 44 year old supervisor at a shoe store entered into a sexual relationship with a 16 year old employee of the store despite his prior diagnosis of genital herpes. He did not inform the employee of the diagnosis nor did he take any specific precautions to prevent transmission of the disease. The record showed that the insured transmitted the disease when he had open cold sores on his mouth.

The court in Loveridge refused to infer as a matter of law the intent to injure, and rejected the argument that intent could be inferred because the sexual acts with a minor violated a Wisconsin criminal statute. The court noted that the insured was never criminally charged, and

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the conduct constituted only a misdemeanor offense. The court agreed that if the insured intended to injure Loveridge, there would be no insurance coverage for the transmission of herpes even if the insured did not intend to give Loveridge herpes. Id. at 155. However, the court found that the evidence was insufficient to raise the inference that the insured subjectively intended to harm Loveridge. Id. The court found consensual sexual contact between an adult and a 16 year old did not create a "substantial risk of injury or death". Finally the court rejected the public policy argument finding:

> the existence of insurance coverage for negligent transmission of the herpes simplex virus will not encourage people infected with the disease to act in an irresponsible manner.

Id. at 157. See also, State Farm Fire & Cas. Co. v. Eddy, 218 Cal. App 3d 958, 267 Cal. Rptr. 379 (1990) (insurer had a duty to defend insured sued for intentional and negligent infliction of emotional distress in transmission of herpes where the sex act was consensual); State Farm Fire & Cas. Co. v. S.S., 1993 TEX. LEXIS 104 (June 30, 1993) (reversed summary judgment for insurer where fact question on issue of whether insured under mistaken impression he could not transmit herpes absent symptoms.)

In Mid-Century Ins. Co. v. L.D.G., 835 S.W.2d 436 (Mo. Ct. App. 1992), the court held that the intentional act exclusion of the policy applied and barred coverage of a claim that the insured transmitted a venereal disease. In this case, however, the victim was a 2 year old girl. The court found the evidence did not support a finding that the insured intended to transmit the disease, but found this was not dispositive since intent to harm could be inferred in a sexual molestation case. Id. at 437. The court stated:

> The transmission of a venereal disease, as a matter of law, is a reasonably foreseeable consequence of rape.

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Id. at 438. See also, Aetna Casualty & Surety Co. v. Sheft, 756 F.Supp. 449 aff'd. 989 F2d 1105 (9th Cir. 1993) (C.D. Cal. 1990), where Marc Christian claimed that Rock Hudson engaged in consensual sexual relations with the knowledge that he carried the diagnosis of AIDS. In the underlying claim Christian alleged Hudson misrepresented his condition to him. The jury rendered a verdict against the estate of Hudson in the amount of 14.5 million dollars for intentional misrepresentation, concealment, and intentional infliction of emotional distress. In Aetna's declaratory judgment action based on the intentional acts exclusion in Hudson's homeowner's policy, the court held the exclusion was applicable and precluded coverage. The court held that "assuming the facts to be true, a reasonable person in Hudson's position must have "expected" that Christian would suffer either bodily injury or emotional distress as a result of Hudson's action. Therefore the policy exclusion for injury 'expected or intended by an insured' precludes coverage." Id. at 451-52. The court granted summary judgment for the insurer on the intentional act exclusion.

IMPORTANT ETHICAL ISSUES FOR TRIAL LAWYERS

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I. Any discussion of ethical considerations must begin with the underlying principles which control both the promulgation and application of ethical standards.

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> EC 1-1: A basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence. Maintaining the integrity and improving the competence of the bar to meet the highest standards is the ethical responsibility of every lawyer.
>
> EC 9-6: Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and the judges thereof; to observe the Code of Professional Responsibility; to act as a member of a learned profession, one dedicated to public service; to co-operate with his brother lawyers in supporting the organized bar through devoting of his time, efforts, and financial support as his professional standing and ability reasonably permit; to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.

A. There exists an interesting irony in our profession.

1. Polling reveals general lack of public trust of and regard for lawyers.

2. Every day individuals do entrust their resources and futures to lawyers.

3. Both the general lack of trust and the specific fact of trust lies beneath promulgation and enforcement of ethical standards.

B. The court has delineated several purposes of the inquiry:

1. To determine the fitness of an officer of the court to continue in that capacity;

2. To insulate courts and the public from those persons unfit to practice law;

3. To protect the integrity of the system of justice;

4. To preserve public confidence in the system of justice; and

5. To deter others from engaging in similar conduct.

C. Attorney disciplinary proceedings are not designed to punish offenders. See Committee on Professional Ethics v. Ulstad, 376 N.W.2d 612 (Iowa 1985); Committee on Professional Ethics v. Rogers, 313 N.W.2d 535 (Iowa 1981); Committee on Professional Ethics v. Kraschel, 260 Iowa 187, 148 N.W.2d 621 (1967).

D. "While we recognize that a license suspension imposes a hardship on [the respondent attorney's] clients, this hardship is substantially outweighed by our general duty to ensure to the public that attorneys who do represent them possess integrity." Committee on Professional Ethics v. Ulstad, 376 N.W.2d 612, 615 (Iowa 1985).

II. Trial lawyers must follow the ethical command to be zealous advocates, but with a controlled zeal.

A. Canon 7 of the Iowa Code of Professional Responsibility for Lawyers is devoted to issues in the trial practice. Read it if you read no other.

B. YOU MUST:

1. Zealously seek the lawful objectives of your client. DR 7-101(A)(1).

2. Disclose to the court authority known to be directly adverse to the position of the client when not disclosed by opposing counsel. DR 7-106(B)(1).

3. Disclose any fraud upon a person or tribunal or, if prohibited by privilege, withdraw from the representation. DR 7-102(B). See Section IV of the outline.

C. YOU MUST NOT:

1. Prejudice or damage a client during the relationship. DR 7-101(A)(3). See In The Matter of an Accusation Against Bishop, 320 N.W.2d 47 (Iowa 1982). See Section VII of the outline.

2. Present a claim or defense or take a legal action when you know or when it is obvious such action would merely harass or maliciously injure another. DR 7-102(A)(1).

3. Advance a claim or defense that is unwarranted under existing law. DR 7-102(A)(2). See Committee on Professional Ethics v. Clauss, 468 N.W.2d 213 (Iowa 1991).

   a. The Iowa Code of Professional Responsibility for Lawyers provides no basis for a private cause of action by a medical doctor for negligence against attorneys who brought a malpractice action against the doctor. Brody v. Ruby, 267 N.W.2d 902 (Iowa 1978).

b. A discussion of a similar matter involving a claim of malicious prosecution is found in Wilson v. Hayes, 464 N.W.2d 250 (Iowa 1990).

4. Conceal or knowingly fail to disclose what you are required by law to reveal. DR 7-102(A)(3). See Committee on Professional Ethics v. Zimmerman, 354 N.W.2d 235 (Iowa 1984).

5. Knowingly use false evidence. DR 7-102(A)(4). See Committee on Professional Ethics v. Crary, 245 N.W.2d 298 (Iowa 1976).

6. Knowingly make a false statement of law or fact. DR 7-102(A)(5). Laguna v. Prouty, 300 N.W.2d 98 (Iowa 1981).

7. Participate in the creation or preservation of false evidence when the lawyer knows or it is obvious it is false. DR 7-102(A)(6).

8. Assist a client in conduct the lawyer knows to be illegal or fraudulent. DR 7-102(A)(7). See Committee on Professional Ethics v. Van Etten, 490 N.W.2d 545 (Iowa 1992).

9. Knowingly engage in other illegal conduct or conduct contrary to a disciplinary rule. DR 7-102(A)(8). See Committee on Professional Ethics v. Roberts, 312 N.W.2d 556 (Iowa 1981).

10. Communicate directly or indirectly with a person of adverse interest who is represented by counsel without the prior consent of the lawyer

representing that person. DR 7-104(A)(1). See Committee on Professional Ethics v. Michaelson, 345 N.W.2d 112 (Iowa 1984). See also Meat Price Investigators Assoc. v. Spencer Foods, Inc., 572 F.2d 163 (8th Cir. 1978) (discussion of this area on a motion to disqualify counsel who had made such contacts).

11. Threaten criminal prosecution. DR 7-105. See Section X of the outline.

12. Disregard or advise a client to disregard a standing rule or order. DR 7-106(A). See Committee on Professional Ethics v. McCullough, 465 N.W.2d 878 (Iowa 1991).

13. Allude to any matter the lawyer has no reasonable basis to believe is relevant to the case or will not be supported by admissible evidence. DR 7-106(C)(1).

14. Ask a question with no reasonable basis to believe it is relevant and that is intended to degrade a witness or other person. DR 7-106(C)(2). State v. Crawford, 202 N.W.2d 99 (Iowa 1972).

15. Assert personal knowledge of the facts except when testifying. DR 7-106(C)(3). See Section V of the outline.

16. Assert personal opinion of the justness of the cause or credibility of a witness. DR 7-106(C)(4). See State v. Williams, 334 N.W.2d 742 (Iowa 1983).

17. Fail to comply with local customs and practice without timely notice of intent not to comply. DR 7-106(C)(5).

18. Engage in undignified or discourteous conduct which is degrading to a tribunal. DR 7-106(C)(6). See Committee on Professional Ethics v. Rauch, 486 N.W.2d 39 (Iowa 1992).

19. Intentionally or habitually violate any established rule of procedure or of evidence. DR 7-106(C)(7).

20. Make extrajudicial statements, other than quotation from or reference to public records, regarding the following:

> (1) Evidence regarding the occurrence or transaction involved. (2) The character, credibility, or criminal record of a party, witness, or prospective witness. (3) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such. (4) An opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule. (5) Any other matter reasonably likely to interfere with a fair trial of the action.

DR 7-107(G).

21. Communicate with a juror until after the pending action, and then without comments intending to harass or embarrass. DR 7-108. See Omaha Bank Four Co-operative v. Siouxland Cattle Co-operative, 305 N.W.2d 458 (Iowa 1981).

22. Advise or cause a person to hide or leave the jurisdiction to become unavailable as a witness. DR 7-109(B).

23. Pay or offer to pay compensation to a witness contingent upon the content of the testimony or the outcome of the case--including experts. DR 7-109(C). See Committee on Professional Ethics v. Halleck, 325 N.W.2d 11 (Iowa 1982).

24. Have ex parte communications with a judge. DR 7-110(B).

III. Multiple representation in litigation presents difficult and sometimes insurmountable issues.

A. There is no absolute prohibition against representation of multiple parties in litigation. 51:303 ABA/BNA Lawyers' Manual on Professional Conduct.

B. However, EC 5-15 provides the following cautionary language:

> A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which a lawyer would be justified in representing in litigation multiple clients with potentially differing interests. If a lawyer accepted such employment and the interests did become actually differing, the lawyer would have to withdraw from employment with likelihood of resulting hardship on the clients; and for this reason it is preferable that the employment be refused initially.

C. The lawyer may represent multiple parties in litigation only with the consent of the parties after full disclosure of the implications of the common representation. EC 5-16; EC 5-17; DR 5-105.

1. The consent is not required to be written (unless you want to later prove that it was given).

2. The real issue is the definition of "full disclosure" which will necessarily be applied where a former client is arguing they have been misled and ill-informed.

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3. Counsel may be required to disclose any potential conflicts of interest. See Woodruff v. Tomlin, 616 F.2d 924 (6th Cir. 1980).

4. In the related area of conflicts presented by the attorney's own interests, the Iowa Supreme Court has held an attorney has the burden of demonstrating good faith in the attorney's actions and of showing that the client was advised of all the potential problems in the relationship. See Committee on Professional Ethics v. Postma, 430 N.W.2d 387 (Iowa 1988); Committee on Professional Ethics v. Mershon, 316 N.W.2d 895 (Iowa 1982).

D. A collateral area of concern is the situation in which an attorney is retained by an insurance company to defend an insured.

1. This is collateral because the attorney should not in fact have multiple loyalty, even though for some purposes it may be concluded there are multiple clients.

2. The lawyer employed in this situation has an undivided loyalty to the insured. ABA Formal Opinion 282 (May 27, 1950).

3. In the event of a conflict between the insurance company and the insured, the lawyer may not represent both absent consent after full disclosure. ABA Informal Opinion 1476 (August 11, 1981).

   a. The varying need for disclosure between the sophisticated insurance company and the insured may make this an impossible situation.

   b. Often this will require withdrawal from both representations.

4. The Iowa Supreme Court has noted that when a damaged plaintiff offers to settle a valid personal injury liability claim within the defendant's insurance policy limits and the insured is not represented by counsel other than counsel for the insurer, that insurance company lawyer walks a "narrow and dangerous path". Koppie v. Allied Mutual Insurance Company, 210 N.W.2d 844 (Iowa 1973).

5. A growing trend throughout the country has been for insurance companies to defend insureds with in-house attorneys.

   a. Initially the practice was prohibited by ethics opinion in Iowa finding the situation to involve insurmountable conflicts. ISBA Ethics Opinion 87-16.

   b. Upon reconsideration, the Iowa Committee on Professional Ethics and Conduct modified the

position to allow the practice if the insurance company agreed in writing to the following:

(1) Present no coverage dispute;

(2) Raise no policy defenses;

(3) Pay the full amount of any settlement or judgment including any excess;

(4) Prosecute all additional claims of the insured; and

(5) Make all files available to the insured upon request.

ISBA Ethics Opinion 88-14. Thus making the practice possible but unattractive to the insurance company.

c. One court found this practice to constitute the prohibited practice of law by a corporation, Gardner v. North Carolina State Bar, 341 S.E.2d 517 (NC 1986); but the weight of authority is to the contrary. See In re Allstate Insurance Co., 722 N.W.2d 947 (Mo. 1987).

IV. It is the nightmare of most trial lawyers to be confronted with client perjury in deposition, affidavit, or trial.

A. These considerations must begin from the assumption that the lawyer knows the client has made an arguably intentional misstatement of fact.

1. The lawyer must be concerned with his actual knowledge and what he should have known under the circumstances.

2. The quality of the lawyer's conduct in realizing the misstatement by the client will be tested in hindsight colored by the seriousness and impact of the misstatement.

B. The procedure to be followed by a lawyer whose client has committed perjury is set out in DR 7-102(B).

1. Ask the client to correct the problem.

2. If the client refuses, and you are not barred by attorney-client privilege, you disclose to the tribunal.

3. If privilege is a problem, you seek to withdraw.

4. If the court requires you to explain the reason for withdrawal, you ask to be ordered to do so in open court.

C. Another set of problems is presented by the situation in which the client intends to, but has not yet, made the misstatement.

1. The lawyer must seek to discourage the client from the planned conduct.

2. If the client refuses, DR 7-102(A)(4) says you cannot knowingly use false evidence.

3. You cannot continue to represent the person and must withdraw.

4. You must seek a court order for any necessary disclosure.

D. It is a rare case where the lawyer will know that a client intends to commit perjury. Whiteside v. Scurr, 744 F.2d 1323 (8th Cir. 1984), reh'g denied 750 F.2d 713 (1984), rev'd on other grounds Nix v. Whiteside, 106 S.Ct. 988 (1986).

E. There is no constitutional right to commit perjury, so your refusal to allow that conduct by a client is not ineffective assistance of counsel. See Nix v. Whiteside, 106 S.Ct. 988 (1986).

F. A lawyer must also observe the obligations under Canon 2 to withdraw in a fashion that does not unduly prejudice the client's interests.

G. While the focus is on a client's perjury because that is the more difficult question, the same rules apply with regard to the testimony of a non-client witness.

V. Generally a lawyer must avoid being both advocate and fact witness in the same proceeding.

A. Sometimes unavoidably, and increasingly as a litigation tactic, lawyers find themselves in the position of being both the trial counsel and a potential witness--must such a lawyer withdraw?

B. The Canons note some distinction based upon whether the attorney is knowingly a witness before taking on the representation, or learns of that need after having taken on the work.

1. An attorney is cautioned against taking on the representation if it is obvious that a member of the attorney's firm ought to be called as a witness.

2. Once involved in the matter it is required that the lawyer withdraw if the lawyer ought to be called as a witness on behalf of the client.

   a. The lawyer may continue the representation if not called on behalf of the client.

   b. The lawyer must consider if continued representation under the circumstances will prejudice the client.

   c. The point is that the Canons are focused upon public perception which is impacted more significantly when an advocate in a case also takes the stand as a witness sworn to tell the truth on behalf of a client.

3. In either instance, a lawyer should consider possible adverse impact on the client by whatever decision is made.

C. Pursuant to DR 5-101(C), a lawyer or member of the lawyer's firm may continue as counsel if the testimony to be obtained fits certain categories.

1. Relating solely to an uncontested matter;

2. Relating solely to a matter of formality without reason to believe substantial evidence will be offered to the contrary;

3. Relating solely to the nature of legal services rendered in the case by the lawyer; or

4. Any matter if refusal would work a substantial hardship on the client.

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a. Familiarity with the case is not substantial hardship unless the lawyer has some distinct value as trial counsel and there will be unusual expense caused by necessary delay in the proceeding. MacArthur v. Bank of New York, 524 F.Supp. 1205 (S.D. N.Y. 1981).

b. Being the best local trial lawyer doesn't seem to create the substantial hardship. In re Conduct of Lathen, 294 Or. 157, 654 P.2d 1110 (1982).

D. The apparent standard for recognizing the potential requirement for a lawyer's testimony is whether the lawyer knows, or it is obvious, the lawyer will have to testify. Henninger and Henninger v. Davenport Bank and Trust, 341 N.W.2d 43 (Iowa 1983).

VI. Misrepresentation of fact or law, an obvious misstep, can have serious consequences.

A. Several cases have arisen due to false representations made by attorneys. In order to protect the integrity of the judicial process and the general image of attorneys, the court has been firm in its handling of such cases.

B. Misrepresentation to clients regarding the status of their cases. Committee on Professional Ethics v.

Shepherd, 431 N.W.2d 342 (Iowa 1988) (revocation); Committee on Professional Ethics v. Piazza, 405 N.W.2d 820 (Iowa 1987) (revocation); Committee on Professional Ethics v. Silver, 395 N.W.2d 877 (Iowa 1986) (revocation); Committee on Professional Ethics v. Jackson, 391 N.W.2d 699 (Iowa 1986) (revocation); Committee on Professional Ethics v. Steensland, 376 N.W.2d 615 (Iowa 1985)(6-month suspension); Committee on Professional Ethics v. Kelly, 357 N.W.2d 315 (Iowa 1984) (revocation).

C. Misrepresentation to the Court regarding facts or law. Committee on Professional Ethics v. Postma, 430 N.W.2d 387 (Iowa 1988) (6-month suspension); Committee on Professional Ethics v. Davidson, 398 N.W.2d 856 (Iowa 1987) (24-month suspension); Committee on Professional Ethics v. Zimmerman, 354 N.W.2d 235 (Iowa 1984) (failure to advise the court of critical facts within the knowledge of the lawyer) (3-month suspension); Committee on Professional Ethics v. Hurd, 325 N.W.2d 386 (Iowa 1982) (alteration of order after signed by Magistrate) (2-month suspension); Committee on Professional Ethics v. Pappas, 313 N.W.2d 532 (Iowa 1981) (misrepresentations to the court regarding status of conservatorship assets) (revocation); Committee on Professional Ethics v. Roberts, 312 N.W.2d 556 (Iowa 1981) (obtaining false signature on financial statement and affidavit in dissolution) (reprimand); Committee on Professional Ethics v. Wilson, 270 N.W.2d 613 (Iowa 1978) (false

statements to panel of judges investigating misconduct) (revocation).

D. Misrepresentation to opposing counsel. Committee on Professional Ethics v. VanEtten, 490 N.W.2d 545 (Iowa 1992); Committee on Professional Ethics v. Hurd, 375 N.W.2d 239 (Iowa 1985) (revocation).

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E. Misrepresentation to a person not a client, but for the benefit of the lawyer. Committee on Professional Ethics v. Mollman, 488 N.W.2d 168 (Iowa 1992) (In an effort to reduce drug charges against himself, the Respondent cooperated with law enforcement to wear a concealed microphone during a conversation with a friend about drug investigations. While the Court found there was no attorney/client relationship between the Respondent and the friend, the Court found the Respondent had deceived the friend for the Respondent's own purposes. SANCTION: 30-day suspension.).

VII. Neglect of client matters raises dual issues.

A. Neglect of client matters, as well as raising the potential for malpractice claims, has often formed the bases of ethics violations. DR 6-101. Committee on Professional Ethics v. Conzett, 476 N.W.2d 43 (Iowa 1991); Committee on Professional Ethics v. Nadler, 445 N.W.2d 358 (Iowa 1989) ("Property or funds delivered for a special purpose by a client to his attorney cannot constitute the subject matter of a retaining lien in favor of such attorney." By failing to deliver the funds

as intended, the lawyer failed to seek the lawful objectives of his client.) (1-year suspension); Committee on Professional Ethics v. Havercamp, 442 N.W.2d 67 (Iowa 1989) (6-month suspension); Committee on Professional Ethics v. Haney, 435 N.W.2d 742 (Iowa 1989) (3-month suspension); Committee on Professional Ethics v. Shepherd, 431 N.W.2d 342 (Iowa 1988) (general neglect of client legal matters) (revocation); Committee on Professional Ethics v. Oleson, 422 N.W.2d 176 (Iowa 1988) (general neglect of client legal matters) (6-month suspension); Committee on Professional Ethics v. Rauch, 417 N.W.2d 459 (Iowa 1988) (neglect of personal injury lawsuit) (reprimand); Committee on Professional Ethics v. Winkel, 415 N.W.2d 601 (Iowa 1987) (reprimand); Committee on Professional Ethics v. Gardalen, 414 N.W.2d 124 (Iowa 1987) (general neglect of litigated matters) (6-month suspension); Committee on Professional Ethics v. Sytsma, 405 N.W.2d 844 (Iowa 1987) (self-destructive behavior does not justify conduct "...because of our overriding obligation to the public which suffers the same when an attorney's immobility stems from a regrettable affliction as when it stems from indolence.") (12-month suspension); Committee on Professional Ethics v. Megan, 402 N.W.2d 432 (Iowa 1987) (missed statute of limitations and neglected estate) (6-month suspension); Committee on Professional Ethics v. Stienstra, 395 N.W.2d 638 (Iowa 1986) (missed statute; neglected estate) (3-month suspension);

Committee on Professional Ethics v. Jackson, 391 N.W.2d 699 (Iowa 1986) (neglect of appeal; neglect of personal injury case allowing involuntary dismissal) (revocation); Committee on Professional Ethics v. Glenn, 390 N.W.2d 131 (Iowa 1986) (mishandling of appeal) (revocation); Committee on Professional Ethics v. Blomker, 379 N.W.2d 19 (Iowa 1985) (neglect of several cases) (6-month suspension); Committee on Professional Ethics v. Freed, 341 N.W.2d 757 (Iowa 1983) (neglect of appeal) (6-month suspension); Committee on Professional Ethics v. Thompson, 328 N.W.2d 520 (Iowa 1983) (neglect of criminal appeal) (revocation).

B. These cases involve more than a mistake of judgment in a single instance.

1. Single instances of professional negligence have been left to civil proceedings.

2. When a pattern of behavior suggests a more general concern for the lawyer's competence and need for client protection, the Committee on Professional Ethics and Conduct has intervened.

C. Attempts to cure problems created by the lawyer's inattention do not mitigate against the ethical violations. Committee on Professional Ethics v. Conzett, 476 N.W.2d 43 (Iowa 1991); Committee on Professional Ethics v. Gardalen, 414 N.W.2d 124 (Iowa 1987).

D. Attempts to pay damages to the client do not mitigate against the ethical violations. Committee on

Professional Ethics v. Havercamp, 442 N.W.2d 67 (Iowa 1989); Committee on Professional Ethics v. Gardalen, 414 N.W.2d 124 (Iowa 1987).

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Caveat: Attempts to settle the issue with the client may violate DR 6-102(A).

E. Emotional or physical impairment which has led to the neglect will explain, but not mitigate, the violation. Committee on Professional Ethics v. Sytsma, 405 N.W.2d 844 (Iowa 1987) (self-destructive behavior does not justify conduct "...because of our overriding obligation to the public which suffers the same when an attorney's immobility stems from a regrettable affliction as when it stems from indolence.").

F. Committee on Professional Ethics v. Nadler, 467 N.W.2d 250 (Iowa 1991), provides no significant developments in ethics law; but the case contains an interesting series of events when Nadler was defending himself in a malpractice action:

> The court also found Nadler displayed the same lack of professional care and competence in defending the legal malpractice case as he did in representing the Greers. He failed to respond to requests for admissions. He responded untimely and improperly to the plaintiff's motion for partial summary judgment. He filed an untimely request to designate additional expert witnesses. He was late for the beginning of the trial, and he was late in returning from several recesses during the trial. After the completion of the plaintiffs' case, Nadler's request for a recess was granted. However, Nadler failed to return to court following recess, and the trial was completed in Nadler's absence...

G. In Committee on Professional Ethics v. Foudre, 477 N.W.2d 384 (Iowa 1991), Respondent failed to learn of a new trial date, although the record suggests the client knew of the date. Respondent argued that the client was at fault for not telling him about the new trial date. The Court held:

> The relationship between a lawyer and client is not a partnership whereby each is responsible for the other's acts and lawyer negligence may be slipped off to the client "partner". Foudre's job was to protect his client by doing the lawyer work his license to practice gave him the right to do.

H. A violation of the Canons may exist for neglect even though the client suffered no financial loss. Committee on Professional Ethics v. Gill, 479 N.W.2d 303 (Iowa 1991).

VIII. Because of the combative and intense nature of litigation, it is an arena in which lawyers frequently are confronted with ethical misconduct of others, which they may be required to report to appropriate disciplinary authorities.

A. Sources of the obligation.

1. For Iowa attorneys, the rules are primarily embodied in Canon 1 of the Iowa Code of Professional Responsibility for Lawyers.

> EC 1-1 A basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence. Maintaining the integrity and improving the competence of the bar to meet the highest standards is the ethical responsibility of every lawyer.

EC 1-4 The integrity of the profession can be maintained only if conduct of lawyers in violation of the disciplinary rules is brought to the attention of proper officials. A lawyer should reveal voluntarily to those officials all unprivileged knowledge of conduct of lawyers which he believes clearly to be in violation of the disciplinary rules. A lawyer should, upon request, serve on and assist committees and boards having responsibility for the administration of the disciplinary rules.

DR 1-103 Disclosure of Information to Authorities.
(A) A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.
(B) A lawyer possessing unprivileged knowledge or evidence concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges.
(C) A lawyer possessing unprivileged knowledge or evidence that another lawyer or judge is suffering from such mental or emotional instability as renders him unfit or unable to furnish competent legal services shall report such knowledge to a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges.

2. The duty to report misconduct has not been further explained or interpreted by case law or ethics opinion in Iowa.

3. The use of the term "shall" creates a mandatory rule in Iowa and many other jurisdictions which have patterned their rules after the Model Code drafted by the American Bar Association in 1969.

   a. Some jurisdictions specifically deleted the duty to report misconduct of other attorneys (i.e., California, Massachusetts, District of Columbia).

b. Washington uses the term "should" to provide a voluntary system.

c. Some jurisdictions only require the report if the conduct involved amounts to "significant" violations or raises a substantial question regarding the lawyer's honesty or fitness (i.e., Louisiana, Michigan).

4. One court has held that the lawyer's duty to report misconduct will not be relieved by the filing of a complaint by another. In re Himmel, 125 Ill.2d 531, 533 N.E.2d 790 (1988).

5. The duty is also not relieved because a lawyer is directed by his client to withhold the information. Id.

B. Nature and scope of the duty.

1. The legal duty to report misconduct does not arise unless you have "knowledge of a violation".

a. The level of knowledge has been described as something more than a mere suspicion. Alabama Ethics Op. 85-95; New York City Ethics Op. 80-42.

b. A lawyer does have more than a mere suspicion, however, if personally satisfied there is a basis for a charge of misconduct. Id.

c. One court has suggested the knowledge must be of a "clear violation" of the canons. Williams v. Council of the North Carolina

State Bar, 46 N.C.App. 824, 266 S.E.2d 391 (1980).

2. The knowledge must be "unprivileged".

a. If the knowledge is of the attorney's own conduct, the privilege may be found in the 5th Amendment to the U.S. Constitution.

(1) The attorney may assert the privilege to avoid creating a record that might later be used for purposes of criminal prosecution.

(2) There is an argument the exercise of the right could be used against the respondent attorney in the disciplinary proceeding.

(a) The assertion of the 5th Amendment right may be used against a party in a civil proceeding. E.g., State v. Bartz, 224 N.W.2d 632, 634 (Iowa 1974); Bauer v. Stern Finance Company, 169 N.W.2d 850, 854 (Iowa 1969).

(b) Ethics cases are not criminal proceedings. E.g., Iowa State Bar Association v. Kraschel, 260 Iowa 187, 193, 148 N.W.2d 621, 625 (Iowa 1967).

(c) The inquiry is into the fitness of the person to practice law, and is in the nature of a special civil action. E.g., Committee on Professional Ethics v. Ulstad, 376 N.W.2d 612 (Iowa 1985).

(d) Does the exercise of the privilege in response to questions of serious conduct adversely impact on the person's fitness to practice law?

b. An attorney/client relationship will have to exist in order to claim privilege for information regarding the conduct of others.

c. The court will likely be looking for traditional means to avoid the privilege by finding the communication was not within the attorney/client relationship, was not really a communication in the pertinent legal sense, or was made in the presence of third parties. See In re Himmel, 125 Ill.2d 531, 533 N.E.2d 790 (1988).

d. The partnership relationship in a law firm, without more, will not establish a privileged relationship. See Attorney Grievance Commission v. Kahn, 290 Md. 654, 431 A.2d 1336 (1981) (failing to report actions of other members of the firm).

3. The knowledge must be "of a violation of DR 1-102".

a. Pursuant to this specific section of the Code, a lawyer shall not:

(1) Violate a disciplinary rule.

(2) Circumvent a disciplinary rule through the actions of another.

(3) Engage in illegal conduct involving moral turpitude.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

b. Because of the terms in subsections a and f above, this one section would appear to incorporate all of the provisions of the Code of Professional Responsibility.

c. This provision does leave room to be critical of an attorney's conduct while not convinced the conduct amounts to a violation of a specific provision of the Code. Consider the distinction between having probable cause and being convinced of an ultimate fact.

C. Sanctions for failure to comply with the duty to report.

1. No Iowa attorney has yet been sanctioned for failing to report the misconduct of another Iowa attorney.

2. The Iowa Supreme Court has indicated it will react sternly to conduct that amounts to a cover-up of unethical conduct. See Committee on Professional Ethics v. McCullough, 468 N.W.2d 458 (Iowa 1991); Committee on Professional Ethics v. LaPointe, 415 N.W.2d 617 (Iowa 1987); Committee on Professional Ethics v. Klein, 394 N.W.2d 358 (Iowa 1986); Committee on Professional Ethics v. Shifley, 390 N.W.2d 133 (Iowa 1986).

3. A persuasive argument can be made that the attorney who fails to report misconduct of another is aiding and abetting the misconduct and ought to be sanctioned at an equal or near equal level with the attorney responsible for the underlying conduct.

4. The Iowa Supreme Court has addressed one case in which the actions of the lawyer were viewed as an attempt to dissuade the other attorney from his obligation to report misconduct. Committee on Professional Ethics v. McCullough, 468 N.W.2d 458 (Iowa 1991).

5. Disciplinary cases on this basis are rare, but there are some illustrative examples from other jurisdictions.

a. In re Himmel, 125 Ill.2d 531, 533 N.E.2d 790 (1988) (one-year suspension).

b. Attorney Grievance Commission v. Kahn, 290 Md. 654, 431 A.2d 1336 (1981) (disbarment).

c. Carter v. Falcorelli, 121 RI 667, 402 A.2d 1175 (1979) (public censure).

D. To whom to report.

1. The Code requires that the report of misconduct be made to "a tribunal or other authority empowered to investigate or act upon such violation".

2. The term "tribunal" has been interpreted to require the lawyer to make a report to the court in which the misconduct has occurred. Schneyer, The Model Rules and Problems of Code Interpretation and Enforcement, 1980 Am. B. Found. Research J. 939, 951-52.

3. Under Iowa procedure, the "other" authorities would include some alternatives.

a. The Iowa Supreme Court;

b. The Committee on Professional Ethics and Conduct of The Iowa State Bar Association;

c. The Ethics and Grievance Committees of the various county bar association groups;

d. The Client Security and Attorney Disciplinary Commission of the Iowa Supreme Court (for matters within their jurisdiction);

e. The Prosecuting Attorneys Council in the Office of the Attorney General (for matters involving public prosecutors); and

f. The Commission on Judicial Qualifications (for matters involving judges).

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IX. Lack of civility can result in unprofessional attacks on the court or opposing counsel.

A. While a lawyer is expected to zealously pursue the interests of the client, that zeal is not intended to justify lack of courtesy, respect and accommodation which have the laudable effect of diminishing the collateral controversies and associated costs in litigation.

B. A lawyer does not fail to properly seek the interests of the client "by acceding to reasonable requests of opposing counsel which do not prejudice the rights of a client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy all persons involved in the legal process". DR. 7-101(A)(1).

C. The Canons encourage civility and professionalism in the relationship between opposing lawyers.

1. EC 7-37 recognizes that ill feelings may exist between litigants, but provides as follows:

> ...such ill feeling should not influence a lawyer's conduct, attitude, and demeanor towards opposing lawyers. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly

administration of justice and have no proper place in out legal system.

2. EC 7-38 instructs a lawyer to follow local customs of courtesy or practice unless timely notice is provided to the opponent that a different rule will prevail in a particular case.

D. These provisions are not simply to make life more pleasant for lawyers, or to diminish the public criticism of lawyers, but to increase the efficiency and decrease the cost of the system of justice.

E. The court will sanction lawyers for conduct which exceeds the level of normal zealous advocacy. Committee on Professional Ethics v. Hoffman, 402 N.W.2d 449 (Iowa 1987) (reprimand); Committee on Professional Ethics v. Horak, 292 N.W.2d 129 (Iowa 1980) (reprimand).

X. Lawyers must be wary of threatening criminal prosecution to gain civil advantage.

A. DR 7-105 prohibits threatening to take criminal action in an effort to obtain advantage in a civil matter.

B. An excellent example involves demanding that someone make good on a bad check or the matter will be turned over to the county attorney. Committee on Professional Ethics v. Michaelson, 345 N.W.2d 112 (Iowa 1984).

C. As citizens and officers of the court, we are obligated to report criminal activity without regard to any civil advantage.

D. Lawyers writing threatening letters ought to also give heed to the extortion statutes.

XI. Be sensitive to the obligation to supervise legal assistants.

A. With the continued growth in the use of legal assistants, it is wise to be sensitive to the limitations on the work which may be performed by non-lawyers.

B. EC 3-6 along with DR 3-104 provides important parameters in which legal assistants must function.

1. Factual investigation;

2. Client consultation solely for the purpose of obtaining factual information; and

3. Preparation or selection of legal instruments, so long as those legal instruments are ultimately completed as the act of the lawyer.

C. The lawyer is specifically prohibited from allowing the legal assistant to perform some functions.

1. Counsel clients about legal matters;

2. Appear in court or in other judicial proceedings (except as an aid to the lawyer who is present); or

3. Otherwise engage in unauthorized practice of law.

D. The lawyer is obligated to ensure that the legal assistants conduct themselves in a manner consistent with the Code of Professional Responsibility.

E. The lawyer may be disciplined for the misconduct of the legal assistant. Committee on Professional Ethics v. Lawler, 342 N.W.2d 486 (Iowa 1984) (36-month suspension).

ETHICS PROBLEMS FROM THE PERSPECTIVE OF THE DEFENSE ATTORNEY

John D. Lloyd
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I. INTRODUCTION

This presentation is intended to provide some thoughts about the representation of a lawyer facing disciplinary action based on my experiences. It is not intended to be an exhaustive presentation of substantive law in the area nor a primer on techniques or strategies for use in such proceedings. At bottom, the skills you use in the handling of any litigation, with only slight modifications, must be brought to bear on the representation of the lawyer involved in the disciplinary process.

II. INDEPENDENT PROFESSIONAL JUDGMENT

A. Canon 5 provides that "a lawyer should exercise independent professional judgment on behalf of a client."

B. EC 5-1 states: "The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties. Neither personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute a lawyer's loyalty to a client."

C. Personal interests

1. EC 5-2 states: "A lawyer should not accept proffered employment if the lawyer's personal interests or desires will, or there is reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client. After accepting employment, a lawyer carefully should refrain from acquiring a

property right or assuming a position that would tend to make the lawyer's judgment less protective of the interests of the client."

2. Personal and professional relationships with the client/attorney before the need for services arose prevent representation without consent. Restatement (Third) The Law Governing Lawyers §206 (Tent. Draft #4, April 10, 1991): "Unless the affected client consents . . ., a lawyer may not undertake or continue to represent a client if a substantial risk exists that a financial or other personal interest of the lawyer will materially and adversely affect the lawyer's representation of the client." Comment c to that section states: "Lawyers are obliged not to seek to advance their personal interests at the expense of their clients. Such client interests include not only interests that the client has expressed to the lawyer but all other interests that a reasonable lawyer, unaffected by a possibly conflicting interest, would protect or advance."

3. Relationships with affected members of the client/attorney's firm during and after the representation.

4. Personal concerns about the integrity of the profession if the client continues to practice law.

D. Desires of third persons

1. EC 5-21 states: "The obligation of a lawyer to exercise professional judgment solely on behalf of a client requires that the lawyer disregard the desires of others that might impair free judgment. The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political, or social pressures upon the lawyer. These influences are often subtle,

and a lawyer must be alert to their existence. A lawyer subjected to outside pressures should make full disclosure of them to the client; and if the lawyer or client believes that the effectiveness of the lawyer's representation has been or will be impaired thereby, the lawyer should take proper steps to withdraw from representation of the client."

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2. Expectations of other members of the local bar who have a desire for information and perhaps for a particular result.

3. Expectations of members of the judiciary before whom the client/attorney practices.

a. Full disclosure with client consent.

b. Subpoena -- Canon 2 B: "A judge should not testify voluntarily as a character witness."

4. Expectations of members of the firm of the client/attorney or of other attorneys with whom the attorney is associated or sharing offices.

a. Possible malpractice or intentional tort exposures.

b. Negotiation for termination of a practice.

III. MAINTAINING THE INTEGRITY OF THE PROFESSION

A. Canon 1 provides that "a lawyer should assist in maintaining the integrity and competence of the legal profession."

B. EC 1-1 states: "A basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence. Maintaining the integrity and improving the competence of the bar to meet the highest standards is the ethical responsibility of every lawyer."

C. EC 1-4 states: "The integrity of the profession can be maintained only if conduct of lawyers in violation of the disciplinary rules is brought to the attention of the proper officials. A lawyer should reveal voluntarily to those officials all unprivileged knowledge of conduct of lawyers believed clearly to be in violation of the disciplinary rules. . . ."

D. EC 8-7 states: "Since lawyers are a vital part of the legal system, they should be persons of integrity, of professional skill, and of dedication to the improvement of the system. Thus a lawyer should aid in establishing, as well as enforcing, standards of conduct adequate to protect the public by insuring that those who practice law are qualified to do so."

E. A lawyer generally has a duty to report unprivileged information concerning breaches of ethical rules and illegal, immoral or deceitful conduct. See DR 1-103.

F. Query: May a lawyer defend another lawyer accused of unethical conduct without violating these guidelines, once the lawyer becomes aware of evidence indicating that an ethical violation was in fact committed?

1. Ethics Opinion 88-25 involved a similar question. The attorney requesting the opinion indicated that a client wanted representation in connection with charges of unauthorized practice of law being pursued by both the Attorney General and the ISBA Committee on Unauthorized Practice. The attorney wished to know if the representation could be undertaken in light of Canon 3, which provides that a lawyer should assist in preventing the unauthorized practice of law.

2. The Committee's conclusion was as follows: ". . . (A)s long as you believe in good faith that the proposed client has valid legal

rights which should be protected and that the defense of those rights could not constitute 'frivolous' litigation . . . , your responsibility to represent the client takes precedence over the provisions of Canon 3, because, until there has been a court determination that there is, indeed, unauthorized practice of the law, Canon 3 is not involved."

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3. DR 7-102 (A) states: "In the representation of a client a lawyer shall not . . . (k)nowingly advance a claim or defense that is unwarranted under existing law, except that a lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law."

4. EC 7-3 states in part: "While serving as an advocate, a lawyer should resolve in favor of the client doubts as to the bounds of the law." EC 7-4 states in part: "The advocate may urge any permissible construction of the law favorable to a client, without regard to the lawyer's professional opinion as to the likelihood that the construction will ultimately prevail. . . . However, a lawyer is not justified in asserting a position in litigation that is frivolous."

5. ABA Committee on Ethics Formal Opinion 85-352 states the obligation this way: "A lawyer can have a good faith belief in this context even if the lawyer believes the client's position probably will not prevail. However, good faith requires that there be some realistic possibility of success if the matter is litigated." (emphasis added, notes omitted)

IV. Confidentiality

A. Canon 4 provides that "a lawyer should preserve the confidences and secrets of a client." DR 4-101(A) defines "confidence" as "information protected by the attorney-client privilege under applicable law" while "secret" is "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."

B. ABA Committee on Ethics Informal Opinion 89-1530 notes that "the client's aberrational behavior constitutes a 'secret' within the meaning of DR 4-101(A) . . . which ordinarily cannot be disclosed without the client's consent after full disclosure."

C. EC 4-2 states in part: "A lawyer must always be sensitive to the rights and wishes of a client and act scrupulously in the making of decisions which may involve the disclosure of information obtained in a professional relationship."

D. EC 4-4 states in part: "The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of a client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge."

E. Judges as character witnesses: candor toward the potential witness may require a disclosure of confidential information. Conflict between the client's interests and the interests of the lawyer who will be practicing before that judge in the future.

F. Other attorneys who will be character witnesses: same problem, second verse.

V. CANDOR TOWARD THE TRIBUNAL

A. The nature of the tribunal in ethical matters gives a special meaning to the duty of candor toward the tribunal.

B. Norman Bastemeyer, in presentation before the ISBA Annual Meeting in June, 1993, noted the critical need to be completely candid toward a grievance commission panel.

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C. EC 7-26 states: "The law and disciplinary rules prohibit the use of fraudulent, false, or perjured testimony or evidence. A lawyer who knowingly participates in introduction of such testimony or evidence is subject to discipline. A lawyer should, however, present any admissible evidence a client desires to have presented unless the lawyer knows, or from facts within the lawyer's knowledge should know, that such testimony or evidence is false, fraudulent, or perjured." (emphasis added)

D. DR 7-102 (B) states: "A lawyer who receives information clearly establishing that: (1) A client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected person or tribunal in all circumstances except when barred from doing so by Iowa Code section 622.10. If barred from doing so by section 622.10, the lawyer shall immediately withdraw from representation of the client unless the client fully discloses the fraud to the person or tribunal . . . ."

E. The Iowa Supreme Court has addressed clearly the duty of the lawyer with respect to perjured testimony in the criminal context in State v. Whiteside, 272 N.W.2d 468 (Iowa 1978).

1. In that case, defense counsel was faced with the revelation of his client just prior to trial that he intended to testify falsely. Counsel attempted to dissuade the client from testifying falsely and when this failed he threatened the client with disclosure of the perjury and an attempt to withdraw as his attorney if the client persisted. The client ultimately testified truthfully at trial, then raised ineffective assistance of counsel and due process arguments in his post-trial motions and on appeal. The Supreme Court's language is strong: "A lawyer not only has an obligation to his client; he must also recognize his duty as an officer of the court. His oath as a member of the bar requires him to employ 'such means only as are consistent with truth.' By that oath he undertakes not to 'mislead the judges by any artifice or false statement of fact or law.'" 272 N.W.2d at 470.

2. The court notes several provisions of the Iowa Code of Professional Responsibility which "vindicate" the approach of trial counsel in this case, including DR 4-101(C)(3) which states as an exception to the confidentiality requirements "the intention of the client to commit a crime and the information necessary to prevent the crime" and Canon 7 which provides that a lawyer must represent the client "zealously within the bounds of the law." 272 N.W.2d at 471 (emphasis added by the Court)

F. The Court could have added DR 7-102 (A)(4) which states that a lawyer may not "knowingly use perjured testimony or false evidence" and DR 7-102 (A)(7) which bars a lawyer from "counsel(ing) or assist(ing) a client in conduct that the lawyer knows to be illegal or fraudulent." Both of these provisions were cited by the United States Supreme Court which upheld the

conviction of the defendant against a 6th Amendment ineffective assistance of counsel claim. Nix v. Whiteside, 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986).

G. The obligations with respect to the use of false testimony set out above, and the duty to disclose controlling, adverse authority [DR 7-106(B)(1)] establish an overall obligation of candor toward the court or tribunal before which the lawyer is appearing.

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RECENT DEVELOPMENTS IN IOWA INSURANCE LAW

IOWA DEFENSE COUNSEL ASSOCIATION
October 7, 1993

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I. LIABILITY INSURANCE: ACCIDENTS AND EXPECTED OR INTENDED INJURIES.

A. General Rules:

1. Liability insurance policies that provide occurrence coverage usually insure against accidents or expressly exclude injuries expected or intended by the insured. Regardless of how the coverage is described, these two types of provisions ordinarily result in the same coverage.

   a. Unless otherwise defined by the policy, an accident is an event which is both unexpected and unintended.

   b. If an injury was either expected or intended from the standpoint of the insured, there should ordinarily be no coverage. *Weber v. IMT Ins. Co.*, 462 N.W.2d 287 (Iowa 1990).

2. "Expected" means the actor knew or should have known there was a substantial probability that certain consequences would result from the action taken. *Id.*

   a. "Substantial probability" means the circumstances would forewarn the actor that the results are highly likely to occur. *Id.*

   b. An insured must be forewarned of the character and magnitude of the injury actually resulting in order for only an expectation of injury to cause an exclusion of coverage. *Id.*

3. "Intended" means the insured must have intended to act *and* to cause some kind of injury. *Altena v. United Fire & Cas. Co.*, 422 N.W.2d 485, 488 (Iowa 1988).

   a. The intent to injure may be inferred as a matter of law from the nature of the act. *Id.* (*Example*: sexual abuse.) The intent to injure may also be inferred as a matter of law even if the action and injury were justified by some reason, such as self-defense. *McAndrews v. Farm Bur. Mut. Ins. Co.*, 349 N.W.2d 117, 120 (Iowa 1984).

   b. Once intent to act and intent to injure are found, it is immaterial that the actual injury caused is of a different character or magnitude than that intended. Coverage may still be excluded. *Altena v. United Fire & Cas. Co.*, 422 N.W.2d at 488.

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B. Recent Developments: Expected or Intended Injury.

1. Eleven-year old boy, angered in a playground argument, throws a ball at a friend resulting in the friend's death. *Amco Ins. Co. v. Haht*, 490 N.W.2d 843 (Iowa 1992) (en banc).

   a. The injury was not expected because there was no evidence the boy knew or should have known his friend's *death* would result from the thrown ball. *Id.* at 845. An expectation of only some injury was insufficient to exclude coverage.

   b. Although the boy intended to injure his friend, mere playground bickering does not rise to the level of intent to inflict bodily injury as contemplated by the exclusion. Animated in this way, the boy lacked the capacity to formulate the intent contemplated by the policy which is necessary to exclude coverage. *Id.* at 845-46 (with three justices dissenting).

   c. In addition, the majority distinguished the language of the policy before it, which excluded "bodily injury . . . intended by the insured", from the policy language in *Altena*, which excluded "any act committed by . . . the insured with intent to cause personal injury." The court held the language before it required that the injury actually resulting be specifically intended by the insured. *Id.* at 845-46 (with three justices dissenting).

2. Fifteen-year old boy with a bb gun shot twice at his friend causing severe injury to his friend's eye. *American Family Mut. Ins. Co. v. Wubbena*, 496 N.W.2d 783 (Iowa App. 1992).

   a. The court concluded there could be little, if any, question that the fifteen-year old insured intended to do the act which he committed. *Id.* at 785. The finding by the district court that the insured intended to fire the bb gun at his friend was affirmed.

   b. However, the court held it "can be inferred as a matter of law that when a person shoots a bb gun at another, there is the intent to cause bodily injury." *Id.*

      (1) The factual finding by the district court that the insured did not intend to injure his friend was error and as a result coverage was excluded.

      (2) It was immaterial that the insured did not intend to cause the specific injury which actually resulted.

II. LIABILITY INSURANCE: GENERALLY.

A. Duty to Defend.

1. Underlying suit against insured was based broadly on a violation of the statutory prohibition against depositing solid waste in an unlicensed place. *West Bend Mut. Ins. Co. v. Iowa Ironworks, Inc.*, _____ N.W.2d _____ (Iowa 1993).

   a. Although the act of depositing the solid waste, which in this case was sand, may be intentional, the underlying suit still alleged an occurrence because it did not allege that the insured also intended some injury.

   b. The word "waste" appeared in both the statute upon which the underlying suit was being prosecuted and in the insurance policy's pollution exclusion.

      (1) The statutory meaning of waste is quite broad and includes materials that irritate and contaminate and also materials that do not; the term "waste" as it appears in the policy's definition of pollutants is narrow and limited only to irritants and contaminants.

      (2) Because the violations alleged in the underlying suit against the insured "are not necessarily based on contaminant or irritant materials" within the meaning of the exclusion, the insurer had a duty to defend the insured.

   c. When the duty to indemnify is not readily apparent before resolution of the underlying suit, the indemnity question should not be addressed until after trial of the underlying suit.

      (1) The duty to defend is separate from the duty to indemnify.

      (2) The duty to defend is also broader than the duty to indemnify and arises whenever there is a potential or possible liability to indemnify based upon the facts appearing at the outset of the case.

2. Bar room scuffle led to a civil action against the insured in which theories of both intentional tort and negligence were alleged. *Boles v. State Farm Fire & Cas. Co.*, 494 N.W.2d 656 (Iowa 1992).

   a. In the declaratory judgment action brought to resolve the coverage dispute, the insured testified that the contact between his right hand, which held a beer glass, and another person's head was a "reflex"; his only intent at the time was to separate himself from the other person.

   b. The insured's testimony was held to be sufficient to generate a factual issue precluding summary judgment on the coverage questions, which were:

      (1) Whether the injury in the underlying case was expected or intended by the insured, and

(2) Whether the injury was the result of willful and malicious acts of the insured.

3. Underlying suit sought damages from the insured for claimed tortious interference with contract and tortious interference with a prospective advantage. *Employers Reinsurance Corp. v. Beaty*, _____ N.W.2d _____ (Iowa 1993).

a. The policy upon which the declaratory judgment action is based is called an "insurance agents and brokers professional liability insurance policy." It is a type commonly referred to as an "errors and omissions" policy, or a "professional liability" policy.

b. The policy's coverage provision provides in part to pay for losses "by reason of liability imposed by law for damages caused by any negligent act, error or omission of the insured . . . in rendering services" as an insurance agent or broker.

c. This errors and omissions coverage did not give rise to any duty to defend or indemnify the insured against allegations of intentional torts.

(1) There is no claim in the underlying suit that the insured did any negligent act. However, "the word 'negligent' modifies only the word 'act' and does not modify the word 'error' or the word 'omission'. Thus, any claim of coverage must be derived from the independent words 'error' or 'omission'."

(2) "The word 'error' means 'an act or condition of often ignorant or improvident deviation from a code of behavior'. It is "synonymous with 'mistake, blunder, slip [or] lapse'. The word 'omission' means 'apathy toward or neglect of duty, . . . neglected or left undone'."

(a) The acts alleged cannot be contemplated within the meaning of error and omission.

(b) Other than making these points, the Supreme Court did not expand on the differences between negligence, on one hand, and an error or an omission, on the other.

B. Recent Developments: Family Liability Exclusion.

1. A family liability exclusion in a homeowners policy does not violate the public policy of this state. *Principal Cas. Ins. Co. v. Blair*, 500 N.W.2d 67, 69 (Iowa 1993).

2. Neither does the family exclusion clause violate the right to equal protection guaranteed by the Iowa constitution or the United States constitution; the writing of the insurance policy is not an action of the state. *Id.* at 70.

C. Recent Developments: Additional Insureds and Consent Drivers.

1. When ownership of a vehicle is admitted, a rebuttable presumption is created that the vehicle is operated with the consent of the owner. *State Farm v. Employers Mut. Cas. Co.*, 500 N.W.2d 80, 82 (Iowa App. 1993).

2. As applied to a second permittee, this inference may be overcome by the owner's showing that the first permittee was not given express or implied authority to delegate permission for the vehicle's use. *Id.*

a. Under certain circumstances, when it would be entirely unanticipated or unexpected that anyone else might use the vehicle, an express limitation or condition on who could drive the vehicle is unnecessary. *Id.*

b. However, if use of the vehicle by another can be anticipated or expected, it is necessary for the owner of the vehicle to give the first permittee an express limitation on the use of the vehicle by others in order to rebut the inference of consent. *Id.* at 82-83.

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D. Recent Developments: Property Damage.

1. When the term property damage is not defined in the policy, coverage requires physical injury to or destruction of tangible property or its equivalent. *Felder v. State Farm Mut. Auto. Ins. Co.*, 494 N.W. 2d 704, 705 (Iowa 1993).

2. Loss of consortium does not constitute property damage for purposes of a liability policy. *Id.*

III. THE CONCURRENT PROXIMATE CAUSE DOCTRINE.

A. General Rules:

1. When two independent acts of negligence are alleged, one covered and one excluded, coverage is still provided unless the excluded act is the sole proximate cause of the injury. *Kalell v. Mutual Fire & Auto. Ins. Co.*, 471 N.W.2d 865, 866-67 (Iowa 1991).

2. For example, a policy covering liability "arising out of . . . the use of a motor vehicle" and another policy excluding coverage for liability "arising out of . . . the use of a motor vehicle" both can provide coverage unless the negligence associated with the use of a motor vehicle was the sole proximate cause of the injuries.

B. Recent Developments:

1. A child suffered injuries in attempting to exit a school bus negligently set in motion by one of her classmates; no one was supervising the students at the time of the accident. *Grinnell Mut. Reins. Co. v. Employers Mut. Cas. Co.*, 494 N.W.2d 690, 691-92 (1993).

2. The negligent supervision of the students was not vehicle-related and could have been a proximate cause of the injuries; because those injuries were not caused solely by vehicle-related negligence, the general liability policy provided coverage notwithstanding its exclusion for vehicle-related bodily injury. *Id.* at 693-94.

IV. POLICY CONDITIONS.

A. Misrepresentation by an Insured.

1. **General Rules:**

a. By the terms of many insurance policies, coverage is forfeited or the policy is void if an insured has intentionally concealed or misrepresented any material fact relating to the insurance.

b. Minor discrepancies in a proof of loss committed honestly without an intent to defraud the insurer would not be grounds to void an insurance policy.

(1) For example, the mere mistaken recollections of household goods owned is not a misrepresentation amounting to fraud.

(2) Misstatements on a proof of loss which either concern more memorable or valuable items or which are committed consistently on a larger scale could constitute misrepresentation which would void the policy if made with intent to defraud. *Webb v. American Family Mut. Ins. Co.*, 493 N.W.2d 808, 811 (Iowa 1992).

2. **Recent Developments: Materiality of Misrepresentation.**

a. Misstatements concerning losses above policy limits are material. *Id.* at 811-12.

b. Even though such a fraud does not prejudice the insurer, since the insurer bears no risk of additional loss, dishonesty by insureds cannot be ignored.

(1) The insured should be penalized for the wilfulness of the conduct regardless of the fact that the insurer would not have been required to pay any greater amount had the falsity not been demonstrated. *Id.*

(2) Once it is established that the insured intentionally misrepresented the extent of items covered by the insurance, the misrepresentation will be material. *Id.*

B. **Innocent Coinsured Doctrine.**

1. **General Rules:**

a. Whether or not an innocent coinsured is barred from recovery when another insured acts in a manner which voids the insurance policy is determined by contract analysis of the insurance policy provisions. *Vance v. Pekin Ins. Co.*, 457 N.W.2d 589 (Iowa 1990).

b. If the policy is voided by prohibited acts committed by any insured, then the decision whether to deny coverage does not depend upon how the insured property is held or upon whether the coinsureds are married. *Id.*

2. **Recent Developments:** This rule governing recovery by innocent coinsureds was reaffirmed in *Webb v. American Family Mut. Ins. Co.*, 493 N.W.2d 808, 812-13 (Iowa 1992).

C. **Other Insurance: Coordination of Benefits.**

1. **General Rules:**

a. When two or more insurers provide insurance coverage for the same insured and the same loss, their respective obligations will initially be determined by construing the language used in each policy. *Truck Ins. Exchange v. Maryland Cas. Co.*, 167 N.W. 2d 163, 164 (Iowa 1969).

b. If the "other insurance" provisions:

(1) cannot be enforced so as to implement the intention of the parties, or

(2) if enforcement of the other insurance clauses deny coverage altogether, they are "mutually repugnant" and there will be proration among the insurers. *Aid Ins. Co. (Mut.) v. United Fire & Cas. Co.*, 445 N.W. 2d 767, 771 (Iowa 1989).

c. When two policies both provide that they are "excess" over any other collectible insurance, the clauses are mutually repugnant and they will be prorated. *Id.* at 770-71.

2. Recent Developments:

a. When two policies have "excess" clauses, and one of the policies is marketed and sold as a primary insurance policy, while the other is marketed and sold as umbrella insurance:

(1) The primary insurer cannot hide behind an excess insurance clause in its "other insurance" provisions to require an umbrella insurer to cover liability for its insured.

(2) The umbrella insurance is true excess coverage and the primary insurance policy must be exhausted before the umbrella policy may be reached for payment of any damages. *Le Mars Mut. Ins. Co. v. Farm & City Ins. Co.*, 494 N.W.2d 216, 218-19 (Iowa 1992).

b. Rather than limiting the inquiry to the language of the policies, the court considered the circumstances surrounding the issuance of the policies in coordinating benefits provided by primary and umbrella policies.

V. REASONABLE EXPECTATIONS.

A. General Rules:

1. There are three steps which must be taken in applying the reasonable expectations doctrine. *Clark-Peterson Co. v. Independent Ins. Assoc., Ltd.*, 492 N.W.2d 675 (Iowa 1992).

a. The policy as written must exclude coverage. *See e.g., Id.* at 676-77. The doctrine has no application if the policy provides coverage.

b. Before application of the doctrine can be considered any further, one of two preliminary criteria must be satisfied. Either:

(1) The policy must be such that an ordinary lay person would misunderstand coverage; or

(2) There must be circumstances attributable to the insurer which would foster coverage expectations. *Id.* at 677.

c. Once one of these criteria is met, the doctrine results in coverage only if there is also a finding that denial of coverage:

(1) Is bizarre or oppressive;

(2) Eviscerates terms specifically agreed to; or

(3) Eliminates the dominant purpose of the transaction. *Id.* at 678.

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B. Recent Developments: Definition of "Eviscerate":

1. An insurance policy which expressly covers liability for discrimination in employment is subject to the reasonable expectations doctrine when that policy also excludes discrimination committed at the insured's direction. *Id.* at 678-79.

a. The policy was sold to the insured with express statements that it provided discrimination liability coverage, fostering coverage expectations.

b. The exclusion, if enforced, would eviscerate terms expressly agreed to in violation of the doctrine.

(1) Evisceration does not have to be complete to trigger application of the doctrine.

(2) It is enough if the exclusion deprives coverage in a substantial way. *Id.*

VI. UNINSURED MOTORIST COVERAGE: RECENT DEVELOPMENTS.

A. General Rules: Coordination of Benefits with Similar Coverage.

1. In 1991, the legislature amended Iowa Code Ch. 516A expressly abrogating the Supreme Court's decision in *Hernandez v. Farmer's Ins. Co.*, 460 N.W.2d 842 (1990).

2. Iowa Code section 516A.2 now states in part:

> It is the intent of the General Assembly that when more than one motor vehicle insurance policy is purchased by or on behalf of an injured insured and which provides uninsured, underinsured, or hit-and-run motor vehicle coverage to an injured insured in an accident, the injured insured is entitled to recover up to an amount equal to the *highest single limit for uninsured, underinsured, or hit-and-run motor vehicle coverage under any one of the above-described motor vehicle insurance policies* insuring the injured person which amount should be paid by the insurers according to any priority of coverage provisions contained in the policies insuring the injured person.

Iowa Code section 516A.2 (1983) (emphasis added).

B. Recent Developments:

1. The insured was a co-owner of two cars, the first insured by one carrier and the second insured by another. The insured was injured in an accident with an uninsured motorist when occupying the first car. The carrier issuing the policy covering first car paid its limits, which were in excess of the minimum limits required by Iowa law. Claim was then made against the insurer of the second vehicle, to recover its uninsured motorist benefits which had limits of $100,000. *Rodish v. State Farm Mut. Auto. Ins. Co.*, 501 N.W.2d 514 (Iowa 1993).

2. Second insurer's policy contained provisions which under the circumstances denied coverage for damages in excess of the amount of the minimum limits of liability required by Iowa law and which declared that its coverage was excess above any other similar insurance.

   a. The court held that these "other insurance" provisions are valid limitations on the liability for uninsured motorist benefits. *Id.* at 516.

   b. Although the policy was issued, and the injuries occurred, before the amendment to Iowa Code section 516A.2, the court held that: "Even if we give the 1991 amendment retroactive application *on the basis it merely clarifies pre-existing law . . . . this amendment still does not require payment of additional uninsured benefits in this case.*" *Id.* at 515-16 (emphasis added).

VII. UNDERINSURED MOTORIST COVERAGE: RECENT DEVELOPMENTS.

A. Insurer's Right of Reimbursement.

1. Many underinsured motorist policies contain provisions which give the insurer the right to be reimbursed, to the extent of its payment, if the insured recovers damages from another. These reimbursement provisions are authorized by Iowa Code section 516A.4.

2. The right of reimbursement cannot be exercised until the insured's total recoveries, including underinsured motorist coverage, settlements, and judgments, exceed the amount of the insured's total damages. *Continental Western Ins. Co. v. Krebill*, 492 N.W.2d 405, 406-07 (Iowa 1992).

   a. This holding followed from the previously announced goal of underinsured motorist coverage, which is full compensation for the insured. *Id.* at 407.

   b. A different result might follow if the insurer seeks reimbursement of its payments for uninsured motorist coverage; the goal of this type of coverage is simply to guarantee the minimum amount of coverage required by statute.

3. The result reached in *Krebill* was reached independently by the Court of Appeals in *Elliot v. Farm Bur. Mut. Ins. Co.*, 494 N.W. 2d 731 (Iowa App. 1992).

B. **Insured's Right to Coverage.**

1. "Section 516A.1 requires underinsured coverage only for those who are otherwise insured under the policy." *Kats v. American Family Mut. Ins. Co.*, 490 N.W.2d 60, 62 (Iowa 1992).

2. The issue of who is insured under the policy will be governed by contract law and not by any statutory requirement. *Id.*

C. **"Bodily Injury": Emotional Distress.**

1. The injury underlying a bystander claim for emotional distress is a bodily injury for purposes of underinsured motorist coverage. *Pekins Co. v. Hugh*, 501 N.W.2d 508, 511-12 (Iowa 1993) (en banc) (with three justices dissenting).

2. Bystander claims for emotional distress are subject to their own "per person" limitation when the underinsured motorist coverage contains split limits. *Id.* at 512 (with three justices dissenting).

D. **"Owned But Not Insured" Exclusion.**

1. "Owned but not insured" exclusions are enforceable in the context of underinsured motorist coverage. *Dessel v. Farm & City Ins. Co.*, 494 N.W.2d 662, 664 (Iowa 1993).

2. There are two reasons for this result:

   a. The insured would at least have recovered on the policy limits of the tort-feasor's insurance.

   b. The insured has control over the insurance coverage chosen to insure risks associated with owned vehicles. *Id.*

E. **Liability Coverage Exclusion.**

1. Automobile policy provided both liability coverage and underinsured motorist coverage. Following an accident in which a passenger in the covered automobile was injured, insurer tendered its liability limits. Action against insurer sought additional amounts for underinsured motorist coverage. However, policy excluded from the definition of underinsured motor vehicle any vehicle owned by or available for the regular use of the named insured or any member of the named insured's family. *Jones v. American Star Ins. Co.*, 501 N.W.2d 536, 367 (1993).

2. Because the policy provided liability coverage up to its limits for the accident, the exclusion of the covered auto from the definition of underinsured motor vehicle was appropriate and prevented duplication of coverage. Avoiding duplication of coverage is a purpose authorized by statute and does not violate public policy. *Id.* at 538.

   a. To collect underinsured motorist coverage, after having received liability benefits under the same policy would be to convert the underinsured motorist coverage into liability insurance.

   b. Even though the injured person, who admittedly was a covered person under the policy, had no control over the limits of coverage selected by

the named insured, the court refused to extend additional protection to additional insureds for the named insured's failure to purchase sufficient liability insurance. *Id.*

VIII. FIRST PARTY BAD FAITH.

A. General Rules:

1. In a first party action, the issue is whether or not the insurer acted in bad faith when denying the insured's own claim for policy benefits. *North Iowa State Bank v. Allied Mut. Ins. Co.*, 471 N.W.2d 824, 828 (Iowa 1991).

2. Good faith in a first party action means the insurer is obligated to pay the insured's claim unless there is a reasonable basis to debate the claim; in order to impose tort liability there must be *no* reasonable basis for the insurer to deny the claim. *Id.* at 828-29.

B. Recent Developments:

1. An insurer which denies a claim based upon an erroneous conclusion, when the error is evident from the facts appearing in the insurer's file, and then refuses to consider information offered by the insured, does not act with an "honest and informed judgment". *Nassen v. National States Ins. Co.*, 494 N.W.2d 231, 236 (Iowa 1992). Bad faith in this case is for the jury to decide. *Id.*

2. The potential liability of a workers' compensation insurer for first party bad faith in failing to pay benefits due an injured employee also extends to self-insured employers. *Reedy v. White Consolidated Ind.*, _____ N.W.2d _____ (Iowa 1993).

   a. Material issues of benefit entitlement should be decided in the first instance by the Industrial Commissioner through a discretionary abstention policy that operates to delay the consideration of those issues by a court in a first party bad faith action. *Id.* at _____.

   b. Decisions made through this administration process that are relevant to the issues in the bad faith action will, in many instances, carry preclusive effect. *Id.*

IX. CANCELLATION OF GROUP INSURANCE CONTRACTS.

A. General Rules:

1. Absent a special statute governing cancellation of the particular type of insurance at issue, Iowa Code section 515.80 requires an insurer to give notice to each individual member covered under a group insurance policy. *Freeman v. Bonnes Trucking, Inc.*, 337 N.W.2d 871, 877 (Iowa 1983).

2. Cancellation clauses in the policy which provide for notice only to a group representative, such as an employer, conflict with the general code provisions governing cancellation procedures and are, therefore, unenforceable. *Id.*

B. **Recent Developments:**

1. HMO must give 30-day notice to enrollees, which includes individual members covered under a group policy, for policy cancellation to be effective. Iowa Code section 514B.17; 191 IAC 40.10(3); *Lifeline Ambulance, Inc. v. Iowa Ins. Div.*, _____ N.W.2d _____ (Iowa 1993).

2. The provisions of Iowa Code section 509B.5(2), which require an employer or a group policyholder to notify employees or members of cancellation, does not relieve an HMO of its duty to provide notice of cancellation to the group enrollees; the notice provisions of Iowa Code section 509B.5(2) are not applicable until the employees' or members' benefits have first been terminated. *Id.*

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X. **SUBROGATION: ATTORNEYS FEES.**

A. **General Rule:**

1. An insurer which employs its own attorney and actively participates in the action against the tort-feasor cannot be compelled to contribute to the insured's attorney fees. *Bales v. Warren County, Iowa*, 478 N.W.2d 398, 401-02 (Iowa 1991).

2. An insurer which benefited from the work done by the insured's attorney must pay a pro rata share of the costs incurred in bringing an action against the tort-feasor, including a pro rata share of attorney fees. *Principal Cas. Ins. Co. v. Norwood*, 463 N.W.2d 66, 68-69 (Iowa 1990); *see also*, Iowa Code § 668.5(3), (4) (1993).

B. **Recent Developments:**

1. When the insurer's subrogation interest is at risk and the insurer fails to take adequate action to protect its subrogation rights, the insurer must pay a pro rata share of costs and attorney fees incurred by its insured. *Kroes v. American Family Ins.*, 499 N.W.2d 309, 311 (Iowa App. 1993). That interest is at risk when:

   a. Tort-feasor's insurance carrier only agreed to pay the subrogation claim "to the extent [its] insured was considered liable";

   b. The tort-feasor did not admit liability; and

   c. The tort-feasor, in its answer to the petition, denied the allegations of liability and raised comparative fault as a defense.

2. The Court of Appeal's decision in *Kroes* illustrates some of the circumstances which reflect that the insurer's subrogation interest is at risk; absent actual participation by the insurer in prosecuting the claim the insurer must contribute to the insured's costs and attorney fees in that case.

CHANGES TO THE

FEDERAL RULES OF CIVIL PROCEDURE

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IOWA DEFENSE COUNSEL ASSOCIATION

1993 Annual Meeting

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1993 FALL TRAVELING SEMINAR

CHANGES IN THE FEDERAL RULE OF CIVIL PROCEDURES

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Fed. R. Civ. P. 5(d)	Filing; Certificate of Service -- change requires that papers required to be served must be filed together with a certificate of service
Fed. R. Civ. P. 5(e)	Filing with the Court Defined -- change allows filing by facsimile if permitted by rules of district court so long as those rules are consistent with standards established by Judicial Conference
Fed. R. Civ. P. 15(c)	Relation Back to Amendments -- change clarifies the rule as to misnamed parties; notes say it was intended to prevent defendants from taking unjust advantage of inconsequential pleading errors (c)(1) is new and states that relation back is allowed when permitted by law providing limitations period (e.g., state law). (c)(3) sets out rules as to misnamed parties so long as they received notice of the action within the 120 days provided in Rule 4(j) and "knew or should have known that but for a mistake" about identity they would have been named. Intended to overrule Schiavone v. Fortune, 106 S. Ct. 2379 (1986)
Fed. R. Civ. P. 24(c)	Procedure for Intervention -- adds provision requiring court to notify Attorney General of state when constitutionality of state statute affecting public interest is called into question, as required by 28 U.S.C. § 2403 (the prior rule had the same language for challenges to statutes of the United States, but § 2403 applies to both state and federal statute, so this just added language to make rule conform to statute)
Fed. R. Civ. P. 34(c)	Document requests to Persons Not Parties -- provides that non-parties can be compelled to produce documents or allow inspections under Rule 45
Fed. R. Civ. P. 35	Physical and Mental Examinations of Persons -- changes rule from just allowing exams by physicians and psychologists to allow exams by "suitably licensed or certified examiner"; notes indicate that work "suitably" means court should assess the credentials of the examiner
Fed. R. Civ. P. 41(b)	Involuntary Dismissal: Effect Thereof -- change deletes the language regarding dismissal by court in bench trials after plaintiff has completed evidence, as this is now covered by new rule 52(c)

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Fed. R. Civ. P. 44(a)	Proof of official record - Authentication - change to sub (1) makes it applicable to any (generic) territories (I suppose it is in case we gain more or give any more back); change to sub (2) makes authentication of foreign documents easier for Hague Convention countries
Fed. R. Civ. P. 45	Subpoena -- rule is significantly revamped: (a) form: attorneys authorized to practice in court where case pending may sign and issue; subpoenas can be issued to non-parties to produce documents without need for deposition; subpoenas issue from court where testimony is to be heard, where deposition is to be had, or where documents are to be produced, whichever is applicable; (b) service: any nonparty over 18 can serve; witness fees to be tendered if testimony required (but not if is just for documents); must serve parties with prior notice for pretrial document subpoenas; geographic limits are essentially same as were before; (c) protection of persons subject to subpoenas: court can quash or modify or set conditions including compensation; (d) duties in responding: must produce documents as kept in regular course or categorized according to demand (same as Rule 34), if withhold on claim of privilege or work product must provide description sufficient to enable demanding party to contest claim; (e) contempt: specifies that adequate excuse for failure to appear is nonparty's being outside the subpoena power
Fed. R. Civ. P. 47	Jurors -- Alternate jurors abolished (see 48 below); court shall allow 3 preemptory challenges; court may excuse juror for good cause during trial or deliberation
Fed. R. Civ. P. 48	Number of jurors -- no less than 6, no more than 12, all participate in verdict; unless parties stipulate verdict must be unanimous and cannot be returned by jury with fewer than six members
Fed. R. Civ. P. 50	Judgment as Matter of Law in Actions Tried by Jury; Alternative Motion for New Trial; Conditional Rulings -- no more "motions for directed verdict"; changes explicitly state the legal standard and clarify that the rule only applies to jury trials and that the motion may be made at any time after party has been fully heard with respect to an issue and before submitted to jury; motion shall "specify the judgment sought and the law and facts on which the

moving party is entitled to the judgment"

Fed. R. Civ. P. 52	Findings by the Court -- new subsection (c) Judgment on partial findings: (equivalent of Rule 50 for bench trials) when party has been fully heard on an issue and court finds against party on that issue, court may enter judgment as a matter of law on any claim, counterclaim, etc. that depends on that issue, or court may decline to render judgment until all evidence has been heard; any judgment on partial findings must be supported by findings and conclusions
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Fed. R. Civ. P. 63	Inability of a Judge to Proceed -- substantially changed: now applies if judge can't proceed for any reason and at any time; successor just must certify familiarity with the record and must determine that proceeding can be completed without prejudice to the parties; successor judge in bench trials shall, if requested, recall available witnesses as to material and disputed issues, and may recall any other witness
Fed. R. Civ. P. 72	Magistrates, Pretrial Matters (a) - Nondispositive Matters - specifies that objections to orders on nondispositive motions not made within ten days are waived
Fed. R. Civ. P. 77	Notice of Orders -- technical change intended to ease strict sanctions where appellants miss time for notice of appeal because court didn't serve them promptly; notes indicate this should increase the burden on prevailing party to provide its own notice

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II. PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

The Advisory Committee on Civil Rules made extensive proposals for changes in the summer of 1991. After hearings and comments the proposals were revised several times, the Standing Committee on Rules of Practice has now approved a version, which was sent to the Judicial Conference for consideration in September, 1992. From the Judicial Conference, the proposed amendments to the Federal Rules of Civil Procedure went to the United States Supreme Court. On April 22, 1993, the Chief Justice of the United States Supreme Court sent correspondence to the Speaker

of the House of Representatives, The Honorable Thomas S. Foley, indicating that the Court adopted the proposed amendments for submitting the proposed amendments to Congress for review. Justice White issued a separate statement (see Appendix "A"), Justice Scalia issued a dissenting statement, which Justice Thomas joined and Justice Suiter joined in part (see Appendix "B").

Fed. R. Civ. P. 1 Scope and Purpose of Rules -- change adds the words " and administered" -- notes say the purpose of this change is to remind court and attorneys of affirmative duty to resolve litigation not only fairly but also without undue costs and delay

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Fed. R. Civ. P. 11 Signing of Pleadings, Motions and Other Papers; Representations to the Court; Sanctions -- These are substantial changes, but keep the initial concept, despite many arguments made for broader changes. Rule 11 will not apply to discovery or discovery motions, which are covered by Rule 37. Sanctions are discretionary: even if a judge finds a violation sanctions are not mandatory. A new "safe harbor" provision requires the motion for sanctions to be served on the other party but not filed for 21 days, to give the responding party time to withdraw the allegedly offending paper. The "certification" is different: after "inquiry reasonable under the circumstances" attorney is certifying that (1) no improper purpose, (2) warranted by existing law or by a "nonfrivolous argument" for extension or change in the law, (3) "the allegations or other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery," (4) "the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief." The sanctions should be limited to what is sufficient "to deter repetition of such conduct or comparable conduct by others similarly situated." Sanctions may be imposed on the attorneys, parties or law firms responsible for the violation, but monetary awards may not be awarded against a represented party unless the party is determined to be responsible for the violation. Absent exceptional circumstances a law firm shall be held jointly responsible for violations committed by its partners, associates and employees. The Court must specify the conduct that violated the rule and state the reasons for imposing sanctions

Fed. R. Civ. P. 16 Pretrial Conferences; Scheduling; Management -- several "technical" changes, many to conform with changes to Rule 26; others of significance include that the scheduling order must issue within sixty days of appearance by defendant; additional areas to be considered at pretrial conferences; possible limitations on expert testimony, appropriateness of summary adjudication under Rule 56, control and scheduling of discovery, any need for separate trials on any issues, order that party must present evidence early in case on "manageable issue" that might be subject to judgment as matter of law, limits on time for presentation of evidence

Fed. R. Civ. P. 26 General Provisions Governing Discovery; Duty of Disclosure -- Rule 26 is significantly changed to include several types of required disclosures. The rule generally allows the court to modify the times established, and, on a case by case basis, to modify the limits on discovery set out here and in Rules 30 and 33. Attorneys must meet and propose discovery plan; the meeting must be at least 14 days before Rule 16 conference, if no conference is held then within seventy-five days of defendant's appearance. No party can seek discovery until after this meeting. (1) **Initial Disclosures:** within 10 days after the meeting each side must disclose: (a) identities of persons likely to have discoverable information "relevant to disputed facts alleged with particularity in a pleading"; (b) description of all relevant documents; (c) damage computations and documents they are based on; (d) insurance agreements. (2) **Expert testimony:** Parties provide written reports of expert stating all opinions to be given, basis for same, information relied on, exhibits to be used, qualifications, list of publications for last ten years, compensation to be paid for study and testimony, list of other cases witness has testified in at trial or deposition in past 4 years. These disclosures to be made at times and in sequence directed by the Court; in absence of other others ninety days before trial, rebuttal experts disclosure 30 days after disclosure of testimony to be rebutted. Expert depositions are allowed but can't be taken until after report is provided. (3) **Pretrial Disclosures:** witnesses, documents, etc. 30 days before trial (4) **Limits on discovery:** no discovery may be taken until disclosures have been made; see specific rules for limits; court may impose different limits. (5) **Privilege assertions:** party asserting privilege must list and describe withheld materials in a manner sufficient "to enable the other party to assess the applicability of the privilege claimed." (6) **Protective Orders:** must provide a certificate of attempt to resolve

Fed. R. Civ. P. 29 Stipulations regarding discovery -- would allow parties to stipulate to different procedures, including changing time for responding to discovery requests so long as didn't interfere with time set for trial, hearing, or close of discovery

Fed. R. Civ. P. 30 Depositions -- only 10 depositions per party, unless parties stipulate otherwise or obtain leave of court; the Judicial Conference deleted the recommendation in the proposed rules that each deposition be limited to 6 hours; party noticing shall state means of recording, which may be sound, sound and visual, or stenographic; costs to be at noticing party's expense

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Fed. R. Civ. P. 31 Depositions on written questions -- these count toward the 25 total, and generally have the same limitations

Fed. R. Civ. P. 32 Use of depositions -- allows use of expert depositions; depositions can't be used if party deposed had so little notice no time to get an attorney; depositions can't be used if party got less than 11 days notice and promptly sought a protective order but didn't get it ruled on in time; if use nonstenographic recording have to give the court a transcript

Fed. R. Civ. P. 33 Interrogatories -- limited to 25 in number, including "all discreet subparts"; parties may stipulate in writing to extend the time for responding

Fed. R. Civ. P. 34 Document Requests -- may extend the time for responding by written agreement; if object to a category or part of a request must specify what the objection is to and produce the remainder

Fed. R. Civ. P. 36 Requests for Admissions -- parties may stipulate in writing to extensions of time

Fed. R. Civ. P. 37 Failure to make disclosure or cooperate in discovery; Sanctions -- Essentially makes the Rule 37 procedures and sanctions available for failure to provide the mandatory disclosure as well as for failure to cooperate in discovery

Fed. R Civ. P. 43 Taking of Testimony -- allows for presentation of testimony by affidavit or statement in nonjury cases, subject to the right of cross-examination

Fed. R. Civ. P. 54 Judgments; costs -- changes specify that costs normally don't include attorneys fees; rule sets up procedure for determining motions for attorneys fees

Fed. R. Civ. P. 56 Summary Judgment -- The new rule is not intended to change the legal standard, but to clarify the way it should be used. Summary judgment may be entered when "summary adjudication . . . is warranted as a matter of law because of material facts not genuinely in dispute." The rule also sets out the procedure for the motion and response (response time extended to 30 days; more precision and less argument in both motion and response)

Fed. R. Civ. P. 58 Entry of Judgment -- change sets out that motions for attorneys fees will not delay entry of judgment or time for appeals unless court orders the same

Fed. R. Civ. P. 83 Rules by District Courts; Orders -- the change allows district courts, with Judicial Conference approval, to adopt experimental (5 years in duration) local rules that are inconsistent with FRCP; new sub (d) provides that local rules shouldn't be enforced in a way that would cause parties to forfeit substantial rights as a result of negligent failures to comply

III. TEXT OF RULES.

Fed. R. Civ. P. 11 **Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions**

(a) Signature. Every pleading, written motion, and other paper ~~of a party represented by an attorney~~ shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. ~~whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address.~~ Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. ~~The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party~~

~~constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other~~ An unsigned paper ~~is not signed, it~~ shall be stricken unless ~~it is signed promptly after the~~ omission of the signature is corrected promptly after being called to the attention of the ~~pleader or movant~~ attorney or party.

(b) Representations to Court. ~~If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.~~ By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, --

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

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(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the

reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to Discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

Fed. R. Civ. P. 16 **Pretrial Conferences; Scheduling; Management**

* * * *

(b) Scheduling and Planning. Except in categories actions exempted by district court rule as inappropriate, district judge, or a magistrate judge when authorized district court rule, shall, after receiving the report from parties under Rule 26(f) or after consulting with attorneys for the parties and any unrepresented parties a scheduling conference, telephone, mail, or other suit means, enter a scheduling order that limits the time

(1) to join other parties and to amend the plead

(2) to file ~~and hear~~ motions; and

(3) to complete discovery.

The scheduling order may also include

(4) modifications of the times for disclosures under Rule 26(a) and 26(e)(1) and of the extent of discovery to be permitted;

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

(56) any other matters appropriate in the circumstances of the case.

The order shall issue as soon as practicable but in ~~no~~ any event ~~more than 120~~ within 90 days after ~~filing of the complaint~~ the appearance of a defendant and within 120 days after the complaint has been served on a defendant. A schedule shall not be modified except upon a showing of good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge ~~when authorized by district court rule upon a showing of good cause~~.

(c) Subjects ~~to be Discussed~~ for Consideration at Pretrial Conferences. ~~The participants a~~At any conference under this rule ~~may consider and take action~~ consideration may be given, and the court may take appropriate action, with respect to

(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

(2) the necessity or desirability of amendments to the pleadings;

(3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;

(4) the avoidance of unnecessary proof and of cumulative evidence, and limitations or restrictions on the use of testimony under Rule 702 of the Federal Rules of Evidence;

(5) the appropriateness and timing of summary

adjudication under Rule 56;

(6) the control and scheduling of discovery, including orders affecting disclosures and discovery pursuant to Rule 26 and Rules 29 through 37;

(~~5~~7) 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~~8) the advisability of referring matters to a magistrate judge or master;

(~~7~~9) ~~the possibility of~~ settlement ~~or~~ and the use of ~~extrajudicial~~ special procedures to ~~resolve~~ assist in resolving the dispute when authorized by statute or local rule;

(~~8~~10) the form and substance of the pretrial order;

(~~9~~11) the disposition of pending motions;

(1~~0~~2) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(13) an order for a separate trial pursuant to Rule 42(b) with respect to a claim, counterclaim, cross-claim, or third-party claim, or with respect to any particular issue in the case;

(14) an order directing a party or parties to present evidence early in the trial with respect to a manageable issue that could, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c);

(15) an order establishing a reasonable limit on the time allowed for presenting evidence; and

(1~~1~~6) such other matters as may ~~aid in~~ facilitate the just, speedy, and inexpensive 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. If appropriate, the court may require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute.

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Fed. R. Civ. P. 26 **General Provisions Governing Discovery; Duty of Disclosure**

(a) Required Disclosures; ~~Discovery~~ Methods to Discover Additional Matter.

(1) Initial Disclosures. Except to the extent otherwise stipulated or directed by order or local rule, a party shall, without awaiting a discovery response, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Unless otherwise stipulated or directed by the court, these disclosures shall be made at or within 10 days after the meeting of the parties under subdivision (f). A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).

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(3) Pretrial Disclosures. In addition to the disclosures required in the preceding paragraphs, a party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment purposes:

(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

(B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise directed by the court, these disclosures shall be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B) and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections

under Rules 402 and 403 of the Federal Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

(4) Form of Disclosure; Filing. Unless otherwise directed by order or local rule, all disclosures under paragraphs (1) through (3) shall be made in writing, signed, served, and promptly filed with the court.

(5) Methods to Discover Additional Matter. 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 under Rule 34 or 45(a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. ~~It is not a ground for objection that t~~The information sought need not be ~~will be in~~admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) Limitations. By order or by local rule, the court may alter the limits in these rules on the number of depositions and interrogatories and may also limit the length of depositions under Rule 30 and the number of requests under Rule 36. The frequency or extent of use of the discovery methods ~~set forth in subdivision (a)~~ otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery

sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenience, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) ~~the discovery is unduly burdensome or expensive~~ the burden or expense of the proposed discovery outweighs its likely benefit, 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, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

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~~(2) Insurance Agreements. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.~~

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(4) Trial Preparation: Experts. ~~Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:~~

(A)~~(i)~~ A party may ~~through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and 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. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions,~~

~~pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.~~ depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subdivision (a)(2)(B), the deposition shall not be conducted until after the report is provided.

(B) A party may, through interrogatories or by deposition, discover facts known or 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 Rule 35(b) 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) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision~~s (b)(4)(A)(ii) and (b)(4)(B) of this rule~~; and (ii) with respect to discovery obtained under ~~subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under~~ subdivision (b)(4)(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.

(5) Claims of Privilege or Protection of Trial Preparation Materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

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(1) that the disclosure or discovery not be had;

(2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition, after being sealed, be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be ~~disclosed~~ revealed or be ~~disclosed~~ revealed only in a designated way; and

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) ~~Sequence and~~ Timing and Sequence of Discovery. Except when authorized under these rules or by local rule, order, or agreement of the parties, a party may not seek discovery from any source before the parties have met and conferred as required by subdivision (f). Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of Disclosures and Responses. A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a disclosure or response ~~that was complete when made~~ is under ~~no~~ a duty to supplement or correct the disclosure or response to include information thereafter acquired~~, except as follows~~ if ordered by the court or in the following circumstances:

(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 an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the person's testimony.~~ at appropriate intervals its disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be

disclosed by the time the party's disclosures under Rule 26(a)(3) are due.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns ~~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~~ is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

~~(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.~~

(f) Meeting of Parties; Planning for 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~~ Except in actions exempted by local rule or when otherwise ordered, the parties shall, as soon as practicable and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by subdivision (a)(1), and to develop a proposed discovery plan. The plan shall indicate the parties' views and proposals concerning:

(1) ~~A statement of the issues as they then appear;~~ what changes should be made in the timing, form, or requirement for disclosures under subdivision (a) or local rule, including a statement as to when disclosures under subdivision (a)(1) were made or will be made;

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(2) ~~A proposed plan and schedule of discovery,~~ the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) ~~Any limitations proposed to be placed on discovery;~~ what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(4) Aany other ~~proposed~~ orders ~~with respect to discovery~~ that should be entered by the court under subdivision (c) or under Rule 16(b) and (c).~~, and~~

~~(5) 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 each 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 10 days after service of the motion.~~

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging and being present or represented at the meeting, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 10 days after the meeting a written report outlining the plan. ~~Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule 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 pretrial conference authorized by Rule 16.~~

(g) Signing of Disclosures, Discovery Requests, Responses, and Objections.

(1) Every disclosure made pursuant to subdivision (a)(1) or subdivision (a)(3) shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(2) Every discovery request, ~~for discovery or~~ response, or objection ~~thereto~~ made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party ~~who is not represented by an attorney~~ shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification ~~that the signer has read the request, response, or objection, and~~ that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, ~~it~~ the request, response, or objection is:

(~~1~~A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(~~2~~B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(~~3~~C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issue at stake in the litigation.

G

If the request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

(3) If without substantial justification a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the disclosure, request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

Fed. R. Civ. P. 29

Stipulations Regarding Discovery Procedure

Unless ~~the court orders~~ otherwise directed by the court, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify ~~the procedures provided by these rules for other methods of~~ other procedures governing or limitations placed upon discovery, except that stipulations extending the time provided in Rules 33, 34, and 36 for responses to discovery may, if they would interfere with any time set for completion of discovery, for hearing of a motion, or for trial, be made only with the approval of the court.

SUPREME COURT OF THE UNITED STATES

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

[April 22, 1993]

Statement of JUSTICE WHITE. 28 U. S. C. § 2072 empowers the Supreme Court to prescribe general rules of practice and procedure and rules of evidence for cases in the federal courts, including proceedings before magistrates and courts of appeals.[1] But the Court does not itself draft and initially propose these rules. Section 2073 directs the Judicial Conference to prescribe the procedures for proposing the rules mentioned in § 2072. The Conference is authorized to appoint committees to propose such rules. These rules advisory committees are to be made up of members of the professional bar and trial and appellate judges. The Conference is also to appoint a standing committee on rules of practice and evidence to review the recommendations of the advisory committees and to recommend to the Conference such rules and amendments to those rules "as may be necessary to maintain consistency and otherwise promote the interest of justice." § 2073(b). Any rules approved by the Conference are transmitted to the Supreme Court, which in turn transmits any rules "prescribed" pursuant to § 2072 to the Congress. Except as provided in § 2074(b), such rules become effective at a specified time unless Congress otherwise provides.

The members of the advisory and standing committees are carefully named by THE CHIEF JUSTICE, and I am

[1] Section 2075 vests a similar power in the Court with respect to rules for the bankruptcy courts.

quite sure that these experienced judges and lawyers take their work very seriously. It is also quite evident that neither the standing committee nor the Judicial Conference merely rubber stamps the proposals recommended to it. It is not at all rare that advisory committee proposals are returned to the originating committee for further study.

During my 31 years on the Court, the number of advisory committees has grown as necessitated by statutory changes. During that time, by my count at least, on some 64 occasions we have "prescribed" and transmitted to Congress a new set of rules or amendments to certain rules. Some of the transmissions have been minor, but many of them have been extensive. Over this time, Justices Black and Douglas, either together or separately, dissented 13 times on the ground that it was inappropriate for the Court to pass on the merits of the rules before it.[2] Aside from those two Justices, Justices Powell, Stewart and then-Justice REHNQUIST dissented on one occasion and JUSTICE O'CONNOR on another as to the substance of proposed rules. 446 U. S. 995, 997 (1980) (Powell, J., dissenting); 461 U. S. 1117, 1119 (1983) (O'CONNOR, J., dissenting). Only once in my memory did the Court refuse to transmit some of the rule changes proposed by the Judicial Conference. 500 U. S. ___ (1991).

That the Justices have hardly ever refused to transmit the rules submitted by the Judicial Conference and the

[2] 421 U. S. 1019, 1022 (1975) (Douglas, J., dissenting); 416 U. S. 1001, 1003 (1974) (Douglas, J., dissenting); 411 U. S. 989, 992 (1973) (Douglas, J., dissenting); 409 U. S. 1132 (1972) (Douglas, J., dissenting); 406 U. S. 979, 981 (1972) (Douglas, J., dissenting); 401 U. S. 1017, 1019 (1971) (Black and Douglas, JJ., dissenting); 400 U. S. 1029, 1031 (1971) (Black, J., with whom Douglas, J., joins, dissenting); 398 U. S. 977, 979 (1970) (Black and Douglas, JJ., dissenting); 395 U. S. 989, 990 (1969) (Black, J., not voting); 383 U. S. 1087, 1089 (1966) (Black, J., dissenting); *ibid.* (Douglas, J., dissenting); 383 U. S. 1029, 1032 (1966) (Black, J., dissenting); 374 U. S. 861, 865 (1963) (Black and Douglas, JJ., dissenting).

fact that, aside from Justices Black and Douglas, it has been quite rare for any Justice to dissent from transmitting any such rule, suggest that a sizable majority of the 21 Justices who sat during this period concluded that Congress intended them to have a rather limited role in the rulemaking process. The vast majority (including myself) obviously have not explicitly subscribed to the Black-Douglas view that many of the rules proposed dealt with substantive matters that the Constitution reserved to Congress and that in any event were prohibited by § 2072's injunction against abridging, enlarging or modifying substantive rights.

Some of us, however, have silently shared Justice Black's and Justice Douglas' suggestion that the enabling statutes be amended

> "to place the responsibility upon the Judicial Conference rather than upon this Court. Since the statute was first enacted in 1934, 48 Stat. 1064, the Judicial Conference has been enlarged and improved and is now very active in its surveillance of the work of the federal courts and in recommending appropriate legislation to Congress. The present rules produced under 28 U. S. C. § 2072 are not prepared by us but by Committees of the Judicial Conference designated by THE CHIEF JUSTICE, and before coming to us they are approved by the Judicial Conference pursuant to 28 U. S. C. § 331. The Committees and the Conference are composed of able and distinguished members and they render a high public service. It is they, however, who do the work, not we, and the rules have only our imprimatur. The only contribution that we actually make is an occasional exercise of a veto power. If the rule-making for Federal District Courts is to continue under the present plan, we believe that the Supreme Court should not have any part in the task; rather, the statute should be amended to substitute the Judicial Conference. The Judicial Conference can participate more actively in fashioning the rules and affirmatively contribute to their content and design better than we can. Transfer of the function to the Judicial Conference would relieve us of the embarrassment of having to sit in judgment on the constitutionality of rules which we have approved and which as applied in given situations might have to be declared invalid." 374 U. S. 865, 869–870 (1963) (footnote omitted).

Despite the repeated protestations of both or one of those Justices, Congress did not eliminate our participation in the rulemaking process. Indeed, our statutory role was continued as the coverage of § 2072 was extended to the rules of evidence and to proceedings before magistrates. Congress clearly continued to direct us to "prescribe" specified rules. But most of us concluded that for at least two reasons Congress could not have intended us to provide another layer of review equivalent to that of the standing committee and the Judicial Conference. First, to perform such a function would take an inordinate amount of time, the expenditure of which would be inconsistent with the demands of a growing caseload. Second, some us, and I remain of this view, were quite sure that the Judicial Conference and its committees, "being in large part judges of the lower courts and attorneys who are using the Rules day in and day out, are in a far better position to make a practical judgment upon their utility or inutility than we." 383 U. S. 1089, 1090 (1966) (Douglas, J., dissenting).

I did my share of litigating when in practice and once served on the Advisory Committee for the Civil Rules, but the trial practice is a dynamic profession, and the longer one is away from it the less likely it is that he or she should presume to second-guess the careful work of the active professionals manning the rulemaking committees, work that the Judicial Conference has approved. At the very least, we should not perform a *de novo* review and should defer to the Judicial Conference and its committees

as long as they have some rational basis for their proposed amendments.

Hence, as I have seen the Court's role over the years, it is to transmit the Judicial Conference's recommendations without change and without careful study, as long as there is no suggestion that the committee system has not operated with integrity. If it has not, such a fact, or even such a claim, about a body so open to public inspection would inevitably surface. This has been my practice, even though on several occasions, based perhaps on out-of-date conceptions, I had serious questions about the wisdom of particular proposals to amend certain rules.

In connection with the proposed rule changes now before us, there is no suggestion that the rulemaking process has failed to function properly. No doubt the proposed changes do not please everyone, as letters I have received indicate. But I assume that such opposing views have been before the committees and have been rejected on the merits. That is enough for me.

Justice Douglas thought that the Court should be taken out of the rulemaking process entirely, but as long as Congress insisted on our "prescribing" rules, he refused to be a mere conduit and would dissent to forwarding rule changes with which he disagreed. I note that JUSTICE SCALIA seems to follow that example. But I also note that as time went on, Justice Douglas confessed to insufficient familiarity with the context in which new rules would operate to pass judgment on their merits.[3]

[3]In dissenting from the order transmitting the Chapter XIII Bankruptcy Rules, Justice Douglas, among other things said: "Forty years ago I had perhaps some expertise in the field; and I know enough about history, our Constitution, and our decisions to oppose the adoption of Rule 920. But for most of these Rules I do not have sufficient insight and experience to know whether the are desirable or undesirable. I must, therefore, disassociate myself from them." 411 U. S. 992, 994 (1973).

With respect to Amendments to the Rules of Criminal Procedure forwarded by the Court a year later, the following statement was appended to the Court's order, 416 U. S. 1003 (1974): "MR. JUSTICE DOUGLAS is opposed to the Court's being a mere conduit of Rules to Congress since the Court has had no hand in drafting them and has no competence to design them in keeping with the titles and spirit of the Constitution."

In conclusion, I suggest that it would be a mistake for the bench, the bar, or the Congress to assume that we are duplicating the function performed by the standing committee or the Judicial Conference with respect to changes in the various rules which come to us for transmittal. As I have said, over the years our role has been a much more limited one.

SUPREME COURT OF THE UNITED STATES

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

[April 22, 1993]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, and with whom JUSTICE SOUTER joins as to Part II, filed a dissenting statement.

I dissent from the Court's adoption of the amendments to Federal Rules of Civil Procedure 11 (relating to sanctions for frivolous litigation), and 26, 30, 31, 33, and 37 (relating to discovery). In my view, the sanctions proposal will eliminate a significant and necessary deterrent to frivolous litigation; and the discovery proposal will increase litigation costs, burden the district courts, and, perhaps worst of all, introduce into the trial process an element that is contrary to the nature of our adversary system.

I

Rule 11

It is undeniably important to the Rules' goal of "the just, speedy, and inexpensive determination of every action," Fed. Rule Civ. Proc. 1, that frivolous pleadings and motions be deterred. The current Rule 11 achieves that objective by requiring sanctions when its standards are violated (though leaving the court broad discretion as to the manner of sanction), and by allowing compensation for the moving party's expenses and attorney's fees. The proposed revision would render the Rule toothless, by allowing judges to dispense with sanction, by disfavoring compensation for litigation expenses, and by providing a 21–day "safe harbor" within which, if the party accused

of a frivolous filing withdraws the filing, he is entitled to escape with no sanction at all.

To take the last first: In my view, those who file frivolous suits and pleadings should have no "safe harbor." The Rules should be solicitous of the abused (the courts and the opposing party), and not of the abuser. Under the revised Rule, parties will be able to file thoughtless, reckless, and harassing pleadings, secure in the knowledge that they have nothing to lose: If objection is raised, they can retreat without penalty. The proposed revision contradicts what this Court said only three years ago: "Baseless filing puts the machinery of justice in motion, burdening courts and individuals alike with needless expense and delay. Even if the careless litigant quickly dismisses the action, the harm triggering Rule 11's concerns has already occurred. Therefore, a litigant who violates Rule 11 merits sanctions even after a dismissal." *Cooter & Gell* v. *Hartmarx Corp.*, 496 U. S. 384, 398 (1990). The advisory committee itself was formerly of the same view. *Ibid.* (quoting Letter from Chairman, Advisory Committee on Civil Rules).

The proposed Rule also decreases both the likelihood and the severity of punishment for those foolish enough not to seek refuge in the safe harbor after an objection is raised. Proposed subsection (c) makes the issuance of any sanction discretionary, whereas currently it is *required*. Judges, like other human beings, do not like imposing punishment when their duty does not require it, especially upon their own acquaintances and members of their own profession. They do not immediately see, moreover, the system-wide benefits of serious Rule 11 sanctions, though they are intensely aware of the amount of their own time it would take to consider and apply sanctions in the case before them. For these reasons, I think it important to the effectiveness of the scheme that the sanctions remain mandatory.

Finally, the likelihood that frivolousness will even be *challenged* is diminished by the proposed Rule, which restricts the award of compensation to "unusual circum-

stances," with monetary sanctions "ordinarily" to be payable to the court. Advisory Committee Notes to Proposed Rule 11, pp. 53–54. Under Proposed Rule 11(c)(2), a court may order payment for "some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation" only when that is "warranted for effective deterrence." Since the deterrent effect of a fine is rarely increased by altering the identity of the payee, it takes imagination to conceive of instances in which this provision will ever apply. And the commentary makes it clear that even when compensation is granted it should be granted stingily—only for costs "directly and unavoidably caused by the violation." *Id.*, at 54. As seen from the viewpoint of the victim of an abusive litigator, these revisions convert Rule 11 from a means of obtaining compensation to an invitation to throw good money after bad. The net effect is to decrease the incentive on the part of the person best situated to alert the court to perversion of our civil justice system.

I would not have registered this dissent if there were convincing indication that the current Rule 11 regime is ineffective, or encourages excessive satellite litigation. But there appears to be general agreement, reflected in a recent report of the advisory committee itself, that Rule 11, as written, basically works. According to that report, a Federal Judicial Center survey showed that 80% of district judges believe Rule 11 has had an overall positive effect and should be retained in its present form, 95% believed the Rule had not impeded development of the law, and about 75% said the benefits justify the expenditure of judicial time. See Interim Report on Rule 11, Advisory Committee on Civil Rules, reprinted in G. Vairo, Rule 11 Sanctions: Case Law Perspectives and Preventive Measures, App. I-8–I-10 (2d ed. 1991). True, many lawyers do not like Rule 11. It may cause them financial liability, it may damage their professional reputation in front of important clients, and the cost-of-litigation savings it produces are savings not to lawyers but to litigants. But the overwhelming approval of the Rule by the federal

district judges who daily grapple with the problem of litigation abuse is enough to persuade me that it should not be gutted as the proposed revision suggests.[1]

II

Discovery Rules

The proposed radical reforms to the discovery process are potentially disastrous and certainly premature—particularly the imposition on litigants of a continuing duty to disclose to opposing counsel, without awaiting any request, various information "relevant to disputed facts alleged with particularity." See Proposed Rule 26(a)(1)(A), (a)(1)(B), (e)(1). This proposal is promoted as a means of reducing the unnecessary expense and delay that occur in the present discovery regime. But the duty-to-disclose regime does not replace the current, much-criticized discovery process; rather, it *adds a further layer of discovery.* It will likely *increase* the discovery burdens on district judges, as parties litigate about what is "relevant" to "disputed facts," whether those facts have been alleged with sufficient particularity, whether the opposing side has adequately disclosed the required information, and whether it has fulfilled its continuing obligation to supplement the initial disclosure. Documents will be produced that turn out to be irrelevant to the litigation, because of the early inception of the duty to disclose and the severe penalties on a party who fails to disgorge in a manner consistent with the duty. See Proposed Rule 37(c) (prohib-

[1] I do not disagree with the proposal to make law firms liable for an attorney's misconduct under the Rule, see Proposed Rule 11(c), or with the proposal that Rule 11 sanctions be applied when claims in pleadings that at one time were not in violation of the rule are pursued after it is evident that they lack support, see Proposed Rule 11(b); Advisory Committee Notes to Proposed Rule 11, p. 51.

It is curious that the proposed rule regarding sanctions for discovery abuses *requires* sanctions, and specifically recommends financial sanctions and compensation to the moving party. See Proposed Rule 37(a)(4)(A), (c)(1). No explanation for the inconsistency is given.

iting, in some circumstances, use of witnesses or information not voluntarily disclosed pursuant to the disclosure duty, and authorizing divulgement to the jury of the failure to disclose).

The proposed new regime does not fit comfortably within the American judicial system, which relies on adversarial litigation to develop the facts before a neutral decisionmaker. By placing upon lawyers the obligation to disclose information damaging to their clients—on their own initiative, and in a context where the lines between what must be disclosed and what need not be disclosed are not clear but require the exercise of considerable judgment—the new Rule would place intolerable strain upon lawyers' ethical duty to represent their clients and not to assist the opposing side. Requiring a lawyer to make a judgment as to what information is "relevant to disputed facts" plainly requires him to use his professional skills in the service of the adversary. See Advisory Committee Notes to Proposed Rule 26, p. 96.

It seems to me most imprudent to embrace such a radical alteration that has not, as the advisory committee notes, see *id.*, at 94, been subjected to any significant testing on a local level. Two early proponents of the duty-to-disclose regime (both of whom had substantial roles in the development of the proposed rule—one as Director of the Federal Judicial Center and one as a member of the advisory committee) at one time noted the need for such study prior to adoption of a national rule. Schwarzer, The Federal Rules, the Adversary Process, and Discovery Reform, 50 U. Pitt. L. Rev. 703, 723 (1989); Brazil, The Adversary Character of Civil Discovery: A Critique and Proposals for Change, 31 Vand. L. Rev. 1295, 1361 (1978). More importantly, Congress itself reached the same conclusion that local experiments to reduce discovery costs and abuse are essential *before* major revision, and in the Civil Justice Reform Act of 1990, Pub. L. 101–650, §§ 104, 105, 104 Stat. 5097–5098, mandated an extensive pilot program for district courts. See also 28 U. S. C. §§ 471, 473(a)(2)(C). Under that legislation, short-term experiments relating to discovery and case management are to last at least three years, and the Judicial Conference is to report the results of these experiments to Congress, along with recommendations, by the end of 1995. Pub. L. 101–650, § 105, 104 Stat. 5097–5098. Apparently, the advisory committee considered this timetable schedule too prolonged, see Advisory Committee Notes to Proposed Rule 26, p. 95, preferring instead to subject the entire federal judicial system at once to an extreme, costly, and essentially untested revision of a major component of civil litigation. That seems to me unwise. Any major reform of the discovery rules should await completion of the pilot programs authorized by Congress, especially since courts already have substantial discretion to control discovery.[2] See Fed. Rule Civ. Proc. 26.

I am also concerned that this revision has been recommended in the face of nearly universal criticism from every conceivable sector of our judicial system, including judges, practitioners, litigants, academics, public interest groups, and national, state and local bar and professional associations. See generally Bell, Varner, & Gottschalk, Automatic Disclosure in Discovery—The Rush to Reform, 27 Ga. L. Rev. 1, 28–32, and nn. 107–121 (1992). Indeed, after the proposed rule in essentially its present form was published to comply with the notice-and-comment requirement of 28 U. S. C. § 2071(b), public criticism was so severe that the advisory committee announced abandonment of its duty-to-disclose regime (in favor of limited pilot experiments), but then, without further public comment or explanation, decided six weeks later to recommend the rule. 27 Ga. L. Rev., at 35.

* * *

Constant reform of the federal rules to correct emerging

[2] For the same reason, the proposed presumptive limits on depositions and interrogatories, see Proposed Rules 30, 31, and 33, should not be implemented.

problems is essential. JUSTICE WHITE observes that Justice Douglas, who in earlier years on the Court had been wont to note his disagreements with proposed changes, generally abstained from doing so later on, acknowledging that his expertise had grown stale. *Ante*, at 5. Never having specialized in trial practice, I began at the level of expertise (and of acquiescence in others' proposals) with which Justice Douglas ended. Both categories of revision on which I remark today, however, seem to me not matters of expert detail, but rise to the level of principle and purpose that even Justice Douglas in his later years continued to address. It takes no expert to know that a measure which eliminates rather than strengthens a deterrent to frivolous litigation is not what the times demand; and that a breathtakingly novel revision of discovery practice should not be adopted nationwide without a trial run.

In the respects described, I dissent from the Court's order.

RULES 16 AND 26 TIMELINE

Complaint filed	Rule 26(f) meeting of parties Contents: 1) nature & basis for claims & defenses 2) prompt settlement 3) 26(a)(1) disclosures 4) discovery plan (contents of discovery plan 26(f)(1)-(4))	Initial disclosures pursuant to 26(a)(1)(A)-(D)	Submit written report to court outlining plan pursuant to 26(f)(1)-(4)	Rule 16(b) Sch Order	26(a)(2) expert disclosures: trial witnesses, deposition/trial, trial exhibits	26(a)(3) pretrial disclosures	Objections to Rule (26(a)(3) pretrial disclosures
_/	_____/	_____/	_____/	_____/	_____/	_____/	_____/
	14 days prior to scheduling conference or scheduling order due (except actions exempt by local rule or by order of court)	At meeting of of parties or within 10 days after meeting of parties	10 days after Rule 26(f) meeting of parties	90 days after appearance of Deft & within 120 days of service of complaint on Deft	90 days before trial or date ready for trial (in absence of court order) or 30 days after disclosure by other party if used as rebuttal	30 days prior to trial	14 days after disclosure of 26(a)(3) disclosure (in absence of court order)

APPENDIX "C"

DEFENSE ATTORNEY PERSPECTIVE OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

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I. Introduction

On April 22, 1993, the U.S. Supreme Court announced changes to the Federal Rules of Civil Procedure (the "Rules") which, if approved, will dramatically affect the way discovery is conducted in civil cases and revise the way sanctions for filing frivolous lawsuits are administered. Unless Congress acts to forestall them, the amendments will take effect on December 1, 1993. The amendments will govern all proceedings in civil cases thereafter commenced and, *"insofar as just and practicable, all proceedings in civil cases then pending."*

The proposed amendments regarding mandatory disclosure and sanctions have been subject to widespread criticism. The Court transmitted, virtually unchanged, the Rules as promulgated by the Judicial Conference of the United States at its September, 1992 meeting. In a statement accompanying the amendments, Justice White characterized the role of the Supreme Court in the rule making process as one of *"transmit[ting] the Judicial Conference's recommendations without change and without careful study, as long as there is no suggestion that the committee system has not operated without integrity,"* even when an individual justice questions the *"wisdom of particular proposals to amend certain rules."* Justices Scalia and Thomas joined in a statement dissenting from the Court's adoption of the amendments to the Rules on sanctions and discovery. In the dissent, Justice Scalia commented that *"... the sanctions proposal will eliminate a significant and necessary deterrent to frivolous litigation; and the discovery proposal will increase litigation costs, burden the district courts, and, perhaps worst of all, introduce into the trial process an element that is contrary to the nature of our adversary system."* Justice Souter joined in the dissent on the discovery issue only.

This outline discusses the proposed changes to the Rules from the defense attorney's perspective in the order a litigant would encounter them in a typical case. The proposed amendments, in their entirety, include proposed changes to Civil Rules 1, 4, 5, 11, 12, 15, 16, 26, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 50, 52, 53, 54, 58, 71A, 72, 73, 74, 75, and 76; new Rule 4.1; abrogation of Form 18A; amendments to Forms 2, 33, 34, and 34A; and new Forms 1A, 1B, and 35. The complete text of the Rules and of the Justices' accompanying statements can be found at 61 U.S.L.W. 4365-4420 (April 27, 1993).

II. Commencement of Litigation

Rule 4. The proposed revisions to Rule 4 contain a number of technical changes on issuance of a summons by the clerk of court and service of the summons and complaint. From the defense attorney's perspective, the most significant changes to Rule 4 are the modifications which establish a more formal procedure for service by mail. The Rule provides that the defendant *"has a duty to avoid unnecessary costs of serving the summons"* and contains incentives and penalties to encourage defendants to do so. The changes are consistent with the intent of the drafters to make litigation in Federal Court more time and cost efficient. This Rule should encourage defendants to waive formal service of process.

Rule 4(d): Waiver of service. The revised rule establishes a more formal method of service by mail. It imposes a duty upon defendants to avoid unnecessary costs of serving the summons and contains penalties and incentives to encourage defendants to waive service.

Mechanics: The mechanics of "waiver of service" are set forth in Rule 4(d). Plaintiffs may ask that a defendant waive service by sending defendant a Notice of Lawsuit and Request for Waiver of Service of Summons. See new Form 1A. (Appendix).

- The notice and request must be in writing; directed to the defendant, if an individual, or to an officer or managing agent if a corporation; sent by first class mail or "other reliable means" and must include a copy of the complaint. The plaintiff must provide the defendant with a pre-paid means of complying with the request.

- Defendant has 30 days from the date the request is sent to return a Waiver of Service of Summons (60 days if defendant is outside of the United States). See new Form 1B. (Appendix). Under the current service by mail Rule, the defendant has only 20 days to respond to mail service.

- If formal service is waived, the case proceeds as if summons had been served at the time of filing of the waiver. Rule 4(d)(4).

- A defendant who waives service retains all defenses and objections (except relating to the summons or service of the summons) and may later object to personal jurisdiction or venue. Rule 4(d)(1).

Incentives: If defendant waives service, the proposed Rule gives the defendant more time to file an answer than allowed if formal service had been used. If service is waived, the defendant has 60 days from the date the request for waiver of service was sent to file an answer (90 days if the defendant is outside of the United States). Under Rule 12, defendant has only 20 days to file an answer when formally served. The effect of the new Rule is to give the defendant an extra 40 days to file an answer (and an extra 70 days if outside of the United States) if service is waived. See Rule 4(d)(3).

Penalties: If a defendant unreasonably refuses to waive service, the defendant must pay costs which shall include the costs subsequently incurred in effecting service together with the costs, including a reasonable attorney's fee, of any motion required to collect the cost of service. Rule 4(d)(5).

- It is not good cause for a failure to waive service that a party believes that the complaint is unfounded, or that the action has been brought in an improper place or in a Court that lacks jurisdiction over the subject matter of the action or over its person.

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Rule 4(e): Service upon Individuals. Expands method of service. Service may be effected in accordance with the law of the state in which the district court sits or the law of the state where service is effected. The current Rule only provides for service in accordance with the law of the forum state.

Rule 4(f): Service on Foreign defendants. In addition to the waiver of service provisions noted above, additional changes were made which clarify the methods for serving foreign defendants. Defendants may be served by any internationally agreed means - e.g. specifically noted in the text of the proposed Rule is the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents. If there is no applicable treaty, service may be effected by any means "reasonably calculated to give notice."

Rule 4(i): Service upon the United States. The revised Rule has been amended to facilitate service upon the United States. The provisions for waiver of service do not apply to service on the United States.

Rule 4(k): Territorial limits of effective service. The revised Rule 4(k) expands jurisdiction by allowing Federal Courts to exercise territorial jurisdiction over any defendant against whom a claim is made arising under Federal law, even if that person is not subject to personal jurisdiction in any state, if the exercise of jurisdiction is consistent with the Constitution and laws of the United States.

III. Sanctions

Rule 11. The proposed amendments to Rule 11 have generated much discussion. From a defense attorney's perspective, the Rule appears to restrict a defendant's ability to obtain sanctions and attorney fees, and implicitly imposes an enhanced duty on lawyers to assure the integrity of their pleadings. The proposed amendment contains a "safe harbor" provision, requiring motions for Rule 11 sanctions to be served initially only on the opposing party. The motion could not be filed with the Court unless the opposing party failed to withdraw or correct the challenged pleading within 21 days. Rule 11 sanctions would no longer be mandatory once the district court found a party or lawyer had violated the Rule. Instead, the revised Rule would give the Court discretion whether to impose sanctions. Finally, the Rule provides that a law firm will be held responsible when one of its partners, associates, or employees violates the Rule.

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Justice Scalia, in his dissenting statement, said the proposed revision of Rule 11 *"would render the Rule toothless, by allowing judges to dispense with sanctions, by disfavoring compensation for litigation expenses, and by providing a 21 day 'safe harbor' within which, if the party accused of a frivolous filing withdraws the filing, he is entitled to escape with no sanction at all.* He further stated that in his view, *"parties will be able to file thoughtless, reckless and harassing pleadings, secure in the knowledge that they have nothing to lose. If objection is raised, they can retreat without penalty."*

Rule 11(a): Signature. The requirement that all pleadings, motions or other papers be signed is retained. In addition, the revised Rule requires that papers also state the signer's telephone number. Unlike the current version of Rule 11, which ties a lawyer's responsibility to "signing" a filed paper, the amendment would extend the Rule's reach to those who are "presenting" ("signing, filing, submitting, or later advocating") the paper.

Rule 11(b): Representations to Court. The standards are revised under the Rule. From a defense attorney's perspective, the new Rule attempts to establish an objective standard and thereby eliminate some of the inconsistencies and uncertainties which exist under the current Rule. By presenting a pleading to the Court, the attorney is certifying to the best of the person's knowledge, information or belief, formed after a reasonable inquiry, that:

(1) the paper or motion is not being presented or maintained with the intent to harass, cause unnecessary delay, or increase the cost of litigation;

(2) the claims or defenses are warranted by existing law, or a non-frivolous argument for the extension, modification or reversal of existing law, or the establishment of new law;

- When determining whether this standard has been violated, the Advisory Committee notes suggested a Court take into consideration whether there is support for the party's theory in minority Court opinions or law review articles.

(3) the allegations have evidentiary support, or if specifically identified, are likely to have evidentiary support after a reasonable opportunity for investigation or discovery;

- Both plaintiff and defendant may plead facts on information and belief without running the risk of a sanction. However, a litigant has a duty not to persist in a contention if evidentiary support is not obtained after the litigant has had a reasonable opportunity for investigation or discovery.

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(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. The revised Rule continues to permit denials based on lack of information and belief.

From a defense attorney's perspective, claims and defenses grounded on factual assertions that cannot be supported by evidence at the time of filing, but, "are likely to be supported by the evidence" after discovery would have to be identified as such in any pleading. Coupled with the proposed automatic disclosure requirements in Rule 26(a), this would allow plaintiffs to plead facts without evidentiary support in the hope that the defendant will be forced to automatically disclose the evidence to support the claim.

Rule 11(c): Who May Be Sanctioned. *"Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees."*

Rule 11(c): How Initiated: By a Party. The proposed amendment contains a "safe harbor" provision which allows the alleged offending party to withdraw or correct the challenged pleading within 21 days.

Mechanics: The mechanics of a motion for sanctions are set forth in Rule 11(c)(1).

- Motions are initially served on opposing party but not filed with the Court. Motions must be filed separately, and not be part of another motion, and must describe the specific conduct alleged to

violate the Rule. The Rule requires that any Motion for Sanctions not be filed or presented to the Court until 21 days after it is served. During this time, the party being served has the opportunity to correct the violation. If the party corrects the violation within this time period, presumably the motion must be withdrawn.

Rule 11(c): How Initiated: By the Court. Under the revised Rule, the Court retains the power to initiate sanctions sua sponte. However, a Court must do so on an order to show cause, thereby giving the party an opportunity to respond and to be heard. The Court could not levy a monetary sanction on anyone on its own initiative after the action has been voluntarily dismissed or settled. 11(c)(2)(B).

Rule 11(c)(2): Nature of Sanctions. The revised Rule would give the Court discretion whether to impose sanctions, which may be monetary or non-monetary.

Monetary Sanctions: Monetary sanctions may include an award to a party of reasonable expenses and attorney's fees expended as a direct result of the violation if "warranted for effective deterrence." Monetary sanctions may not be awarded against a represented party for non-frivolous attempts to make new law. 11(c)(2)(A). Monetary sanctions can also take the form of payment of a penalty into the Court.

Non-Monetary Sanctions: The revised Rule does not enumerate the types of non-monetary sanctions which may be imposed. The Advisory Committee notes suggest, by way of example, striking the offending pleading, issuing an admonition, reprimand, or censure, requiring participation in seminars or other educational programs, or referring the matter to disciplinary authorities.

Rule 11(d). The provisions of Rule 11 are not applicable to discovery disputes. This subsection makes it clear that sanctions for discovery practice are covered by the provisions of Rules 26 and 37.

IV. Pre-trial: Litigation Planning; Scheduling Order.

Rule 26(f): Meeting of the parties; Planning for Discovery. Rule 26(f) requires the parties to meet "as soon as practicable" to discuss the nature and basis of their claims and defenses, the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Rule 26(a)(1), and to develop a proposed discovery plan.

From a defense attorney's perspective, the new Rule will increase initial costs of litigation by requiring counsel to evaluate the case, meet with opposing counsel, and

formulate a discovery plan at an early date. Although improved planning should improve the quality of service rendered to the client, it is questionable whether the revised Rules will reduce costs down the road (by presumably reducing formal discovery as a result of mandatory disclosures). This requirement may, nonetheless, force parties to focus on the real issues in the case early on and at least make some initial discovery decisions.

Mechanics: This Rule makes mandatory the existing, but rarely used, option for such meetings under current Rule 26(f). From a litigation management perspective, the Rule encourages litigants to conduct discovery with a minimal amount of Court supervision. Rules 26(f) and 16 have been integrated to require the parties to meet to develop a discovery plan in accordance with Rule 26(f) and to submit the plan to the Court in accordance Rule 16.

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Timing: "As soon as practicable" and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b).

Discovery Plan: The discovery plan shall indicate the parties' views and proposals concerning:

(1) any changes in the timing or form of mandatory disclosure under Rule 26(a)(1) and a statement as to when such mandatory disclosure were made or will be made;

(2) the subjects on which discovery will be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues; and

(3) whether any changes should be made in the limitations imposed on discovery under these Rules or by local Rule, and what other limitations should be imposed.

Good Faith Requirement: Counsel are jointly responsible for arranging and being present or represented at the meeting and for attempting in good faith to agree on the proposed discovery plan. The Committee notes recognize that agreement may not always be possible and contemplate situations where more than one plan may be submitted to the Court. From a defense attorney perspective, in complex multi-party litigation, it may be difficult for litigants to agree upon and formulate a meaningful discovery schedule that all parties can agree to.

Report: To be submitted to the Court within 10 days after the meeting. New form 35 (Report of Parties' Planning Meeting) reflects the parties' proposed report to the Court. See Appendix.

Rule 16. Rule 16 governs scheduling orders and pre-trial conferences. The new Rule would extend the time within which the scheduling order is to be issued. The new Rule also expands the subjects which may be considered at the final pre-trial conference. Finally, if the proposed amendments to Rule 26 are adopted, Rule 16 would be integrated into the discovery process under Rule 26.

Rule 16(b): Scheduling orders. The Rule contemplates that the scheduling order will set deadlines to join additional parties, amend the pleadings, file motions, and complete discovery. This is consistent with current practice. Under the amendments, the scheduling order is integrated with Rule 26(f). The Rule contemplates that by the time the scheduling conference is held, the Court will have received the parties' discovery report under Rule 26(f). Under the proposed Rule, the scheduling order may include modifications of the times for the mandatory disclosures under Rules 26(a) and 26(e)(1). Presumably, the Court could also simply adopt the Rule 26(f) discovery plan established by the parties.

- The scheduling order may also include a schedule for any further pre-trial conferences before trial, a final pre-trial conference, and trial, and any other matters appropriate in the circumstances of the case.

- The scheduling order shall not be modified except upon a showing of good cause and by leave of the district judge or, when authorized by local Rule, by a magistrate judge.

Timing of Order: The time within which the scheduling order is issued has been extended. Under the current Rule, the scheduling order issues no more than 120 days after filing of the complaint. Under the proposed Rule, the scheduling order is to be issued no more than 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant. This may help to assure that all party defendants will have appeared and participated in the process.

V. Pre-trial: Automatic Disclosures.

Rule 26. The most controversial aspect of the proposed changes to the Rules relates to the requirement for mandatory pre-discovery disclosure under Rule 26. Under the Rule, certain matters will have to disclosed by a party automatically without waiting for a discovery request. This initial automatic disclosure would include basic information regarding potential witnesses, relevant documents, damages, and insurance coverage. The

revised Rule also expands the disclosure required of expert witnesses, and establishes automatic pre-trial disclosure of evidence which will be offered at trial. Traditional formal discovery, although retained, is restricted.

Justice Scalia, in his dissenting statement, called the proposed changes to Rule 26 *"radical reforms to the discovery process....potentially disastrous and certainly premature - particularly the imposition on litigants of a continuing duty to disclose to opposing counsel, without any requests, various information 'relevant to disputed facts alleged with particularity.'"* He further stated that, in his view, the proposed discovery changes *"will increase litigation costs, burden the district courts, and, perhaps worst of all, introduce in the trial process an element that is contrary to the nature of our adversary system."*

According to the revisors, the purpose of the proposed changes is to reduce the costs and time associated with discovery by accelerating the exchange of basic information and eliminating paperwork. From a defense attorney's perspective, some of the items that must be automatically disclosed are routinely asked for by plaintiff's attorneys. Besides saving a few more trees, the only real effect is to eliminate the advantage obtained by the defense lawyer when a plaintiff's lawyer does not ask for these matters. The real change will come in automatic disclosures of *"individuals likely to have discoverable information"* and documents relevant to *"disputed facts alleged with particularity."*

Rule 26(a)(1): Mandatory initial disclosures. The amendments would require that litigants automatically disclose, without request, certain basic information that would otherwise be subject to a formal discovery request. This proposal has generated the most discussion and criticism of the proposed amendments. Under the Rule, the litigants must automatically disclose, without request, the following information:

A. Witnesses. The name and, if known, the address and telephone number of each individual *"likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings;"*

B. Documents. A copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are *"relevant to disputed facts alleged with particularity in the pleadings;"*

C. Damages. Any party claiming damages must disclose its damages computations and make available for inspection and copying the information upon which the claim is based;

D. Insurance agreements. Any insurance agreement under which an insurer may be liable to satisfy any or all of a judgment entered in the action must be made available for inspection and copying.

Timing: The Rule provides that unless otherwise stipulated or directed by the Court, these disclosures shall be made at or within ten days after the meeting of the parties as required by Rule 26(f). Under that Rule, the 26(f) planning meeting is triggered to occur at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b). This timing means that mandatory disclosures should have occurred at least four days before the scheduling conference.

- Litigants are not excused from initial disclosure on the basis that they have not had time to complete an adequate investigation. Parties must make their initial disclosures based upon the information then reasonably available.

- Each litigant must make its initial disclosures regardless of whether another party has made its disclosures. Nor is a litigant excused from the initial disclosure because it challenges the sufficiency of another party's disclosure.

- These initial disclosure requirements can be altered by stipulation, court order, or local rule. See Rule 26(a)(1), new Form 35, and Rule 29.

- Litigants have a continuing duty to supplement initial disclosures *"at appropriate intervals"* if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. Rule 26(e).

Form of disclosure: Filing. Unless otherwise directed by order or local rule, the initial disclosure shall be made in writing, signed, served, and promptly filed with the Court. Rule 26(a)(4).

Methods to discover additional matter. Traditional methods of discovery are retained. Rule 26(a)(5). A party may not seek discovery from any source before the Rule 26(f) planning meeting. Rule 26(d).

From a defense attorney's perspective, the mandatory disclosure revisions would dramatically impact on the defense attorney's role and would disadvantage defendants.

First, the standard for disclosure is vague and ambiguous. The duty to automatically disclose is only triggered when the opposing party has pled facts "with particularity,"

and then only as to information "relevant" to those facts that is "reasonably available" to the defendant. Attorneys may interpret these terms in various ways, which may produce a new round of motion practice as parties dispute the meaning of these terms and the bounds of required disclosure.

Second, the revisions unfairly disadvantage defendants and appear to shift the burden of discovery from plaintiffs to defendants. The plaintiffs may use the complaint as a broad discovery tool. This may encourage plaintiffs to overplead on a fishing expedition to discover evidence.

Third, how can a defendant make a meaningful response when the complaint may be the first notice of loss? Yet, the defendant will be precluded from later offering evidence which it has failed to disclose. Mandatory disclosure will impose a particularly unfair burden on larger corporations which would be required to review all of their records, company wide, to try to determine what information must be disclosed. In comparison, the plaintiff will have had ample time to investigate the case before filing a complaint.

Finally, as Justice Scalia noted, the revisions would place intolerable strain upon the lawyers' ethical duty to represent their clients and not to assist the opposing side. A client may perceive that it is being disadvantaged by the disclosures which may need to be made by defense counsel who through years of regular representation is knowledgeable about the client's affairs, or who has represented the client in prior lawsuits concerning the same or similar facts at issue. Other commentators have suggested that clients will be hesitant to divulge all relevant information for fear that their attorneys will be required to disclose it pursuant to the disclosure duties. In order to overcome these potential problems, defense attorneys should attempt to make every available use of stipulations and to seek relief from the Court as needed.

VI. Pre-trial: Experts.

Rule 26(a)(2): Discovery of experts. In addition to the disclosures required by Rule 26(a)(1), the parties must disclose the identity of any person who may be used to present evidence at trial under FRE 702, 703 or 705. Rule 26(a)(2)(A). From a defense attorney's perspective, the proposed changes appear to expand the disclosure required of expert witnesses. The Rule would require that both outside and inhouse experts who are expected to testify at trial prepare and sign a comprehensive written report. Rule 26(a)(2)(B).

Timing of Disclosure. The Rule requires that the disclosures be made at the times and in the sequence directed by the Court, which is consistent with current practice. If there is no Court directive or stipulation by the parties, the disclosure must be made at least 90 days before trial. If the expert

evidence is intended solely to rebut evidence of another party's expert, disclosure must be made within 30 days of the other party's disclosure.

Expert Reports. The Rule would require both retained experts and inhouse witnesses "... whose duties as an employee of the party regularly involve giving expert testimony" to prepare and sign a written report. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding 10 years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding 4 years.

The revisors note that the mandatory disclosure and the filing of the expert report may diminish the need for some expert depositions. From a defense attorney perspective, the requirement of a mandatory report will increase the cost to the litigants. In addition, many plaintiffs simply do not ask for all of the information required in the expert report. This Rule is another example of a situation which may serve to eliminate the advantage obtained by a defense lawyer when a plaintiff's lawyer does not ask for these matters.

Depositions of experts. Rule 26(b)(4) clarifies that discovery of an expert can be taken either by interrogatories or by deposition which is consistent with current practice in most courts. A party may not depose an expert before an expert report has been provided under Rule 26(a)(2)(B). In addition, like other discovery, an expert deposition may not be taken until the parties have held the Rule 26(f) planning meeting.

VII. Pre-trial: Written Discovery.

Rule 33: Interrogatories. The proposed Rule limits the number of interrogatories to 25 per party - including subparts. The rationale behind this revision is that much of the data usually sought in interrogatories is of the type designed to be automatically disclosed under revised Rule 26(a).

Timing: Rule 33(a). Interrogatories may not be served prior to the initial planning meeting of the parties without written stipulation or leave of Court.

Stipulations: Rule 33(a) and Rule 29. Parties can stipulate or obtain leave of Court to file more than 25 interrogatories.

Objections: Rule 33(b)(1). The revisions clarify the duty of the responding party to provide answers to interrogatories which may be objectionable, in part. The Rule is modified to make clear that if an interrogatory is objectionable only in part, an answer should be made to the unobjectionable portions. Therefore, even when an objection is stated, the responding party must answer the interrogatory to the extent it is not objectionable. An objection not stated with specificity is waived. Rule 33(b)(4). Note also the provisions of revised Rule 26(b)(5) concerning objections based under a claim of privilege or as to trial preparation materials.

Sanctions: Rule 26(g) and Rule 37. In combination, these provisions authorize the Court to impose sanctions on a party and attorney making an unfounded objection to an interrogatory.

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Removal: When a case with outstanding interrogatories is removed to Federal Court, the Committee notes state that the interrogating party must seek leave to allow the additional interrogatories, specify which 25 are to be answered, or resubmit a new set in compliance with the Rule. Under 26(d), the time for response would be measured from the date of the parties' planning meeting. See Rule 81(c) providing that these Rules govern procedures after removal.

Rule 24: Production of Documents. Technical changes are made to conform to Rule 26(d). A party cannot seek formal discovery prior to the Rule 26(f) planning meeting. In addition, the Rule is modified to make it clear that, if a request for production is objectionable only in part, production should be made with respect to the unobjectionable portions.

Removal: When a case with outstanding request for production is removed to Federal Court, the time for response would be measured from the date of the parties' planning meeting. See Rule 81(c) providing that these Rules govern procedures after removal.

Rule 26: Request for Admissions. Technical changes made to make the Rule consistent with Rule 26(d). A party may not serve request for admission prior to the Rule 26(f) planning meeting.

VIII. Pre-trial: Depositions.

Rules 28, 30, 31 and 32: Depositions. The proposed revisions restrict the number of depositions which may be taken, add provisions designed to deter improper conduct by attorneys, and facilitate the use of video depositions at trial and the taking of depositions in foreign countries.

Number: Rule 30(a)(2)(A). This new provision limits the number of depositions the parties may take, absent leave of Court or stipulation. Under the Rule, no more than ten depositions could be taken by the plaintiffs, no more than ten by the defendants, and no more than ten by the third-party defendants.

- Both plaintiff and defense bar have expressed concern with this limitation in multi-party litigation. However, any difficulty should be able to be resolved by stipulation. Consideration should ordinarily be given at the Rule 26(f) planning meeting to enlarge or reduce the number of depositions.

- Leave of Court would also be required to examine a deponent who has already been deposed. Rule 30(a)(2)(B).

Timing: Rule 30(a)(2)(C). Without leave of Court, depositions cannot be taken prior to the time the parties have had their Rule 26(f) planning meeting unless the person to be deposed is about to leave the United States and will be unavailable for examination unless deposed before that time.

Method of deposition: Rule 30(b). The revisions provide that parties may take depositions by non-stenographic means without first having to obtain permission of the Court or agreement from other counsel. Unless otherwise ordered by the Court, depositions may be taken by stenographic, audio or video means.

- If the deposition is ultimately to be offered at trial or in summary judgment motion, a transcript must be provided of depositions recorded by non-stenographic means. Rules 26(a)(3)(B) and 32(C).

Mechanics: Rule 30(b)(2). The choice of method is conferred on the party taking the deposition and the method by which the deposition is to be recorded must be stated in the deposition notice. Under 30(b)(3), any party may designate another method to record the deposition in addition to the method specified in the notice by providing prior notice to the deponent and other parties.

Telephonic: Rule 30(b)(7). The revisions authorize the taking of a deposition not only by telephone but also by other remote electronic means, such as satellite television, when agreed to by the parties or authorized by the Court. The Rule continues to provide that the deposition is deemed to be taken in the district and at the place where the deponent is to answer questions.

Rule 30(c). Technical revisions, the effect of which is that other witnesses will not be automatically excluded from a deposition simply by a party's request. Exclusion could be ordered under Rule 26(c)(5).

Rule 30(b): Conduct of examination. The Rule states that objections are to be made "concisely and in a non-argumentative and non-suggestive" manner. In addition, the Rule limits when an attorney may instruct a witness not to answer to three situatons: to preserve a privilege, to enforce an evidentiary limitation directed by a Court, or to present a motion that the deposition is being conducted in bad faith, or to annoy, embarass or oppress the deponent or party.

The revisors note that objections ordinarily should be limited to the form of a question or the responsiveness of an answer. Under Rule 32(b), other objections can be raised for the first time at trial even without a standard stipulation preserving objections.

From a defense attorney perspective, these provisions should strengthen counsel's arsenal to deal with obstreperous plaintiff's attorneys.

Time limit: Rule 30(d)(2). The proposed six hour time limit was rejected in the final draft. However, this provision anticipates that limits on the length of depositions could be prescribed by local Rules.

Sanctions: Rule 30(d)(3). In addition to the provisions of (d)(2), subsection (d)(3) authorizes and sets out the method for obtaining appropriate sanctions not only when a deposition is unreasonably prolonged, but also when an attorney engages in other practices that improperly frustrate the fair examination of the deponent, such as an examination being conducted in bad faith or in such manner as unreasonably to annoy, embarass, or oppress the deponent or party.

- When taking a deposition, the proponent of the question may complete or adjourn the examination before applying for an order.

Review and signing by deponent: Rule 30(e). Review and signing of transcript by deponent is no longer required. Under the revision, pre-filing review by the deponent is required only if requested before the deposition is completed. If review is requested, the deponent will be allowed 30 days to review the transcript or recording and to indicate any changes in form or substance. Signature of the deponent will be required only if review is requested and changes are made.

Rule 31: Depositions upon written questions. These changes parallel the changes to Rule 30. The revisions clarify that depositions upon written questions are to be counted toward the Rule 30 10-deposition limit. It also reduces the total time for developing cross-examination, redirect, and re-cross testimony from 50 to 28 days.

Rule 32: Use of depositions. The Rule has been revised to add a provision to deal with the situation when a party receives inadequate notice of a proposed deposition and is unable to obtain relief from the Court. If the party receives less than eleven days notice of a deposition and timely files a motion for a protective order requesting that the deposition not be held or be held at a different time, or place, a deposition taken at the time originally noticed cannot be used against the objecting party in Court. This revision does away with the risk of non-attendance at a deposition when a party has received less than 11 days advance notice.

- The Committee notes indicate that inclusion of this provision is not intended to signify that 11 days notice is the minimum advance notice for all depositions or that greater than 10 days should necessarily be deemed sufficient in all situations.

Rule 28: Foreign depositions. The revisions indicate that a deposition may be taken in a foreign country pursuant to any applicable treaty or convention. The Committee notes reflect that this revision is intended to make effective use of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, and of any similar treaties that the United States may enter into the future.

IX. Pre-trial: Miscellaneous Discovery Rules.

Rule 26(b)(5): Scope of discovery; privilege. This is a new provision. A party must notify other parties if it is withholding materials otherwise subject to automatic disclosure or pursuant to a discovery request because it is asserting a claim of privilege or work product protection. In addition, the party withholding the information must describe the nature of the evidence not disclosed in a manner that, without violating the privilege or protection, will enable the other party to assess the validity of the asserted privilege or protection.

- The Committee notes reflect that a party can seek relief through a protective order under subdivision (c) if compliance with the requirements for providing this information would be an unreasonable burden.

- The Committee notes further reflect that the obligation to provide pertinent information concerning withheld privilege materials applies only to items "otherwise discoverable." If a broad discovery request is

made - for example, for all documents of a particular type during a 20 year period - and the responding party believes in good faith that production of documents for more than the past three years would be unduly burdensome, it should make its objection to the breadth of the request and, with respect to the documents generated in that three year period, produce the unprivileged documents and describe those withheld under the claim of privilege.

Rule 26(c): Protective Orders. The revision requires that before filing a motion for a protective order, a party must confer with the other effected parties in a good faith effort to resolve the discovery dispute without the need for Court intervention. The revisions contemplate that the motion be accompanied by a "certification" of compliance with these requirements.

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Rule 26(e): Duty to supplement. This subdivision is revised to clarify that the duty to supplement extends to mandatory disclosures as well as traditional discovery requests; the revisions also clarify the time when supplementation should be made and the scope of the duty to supplement.

Standard: A party is under a duty to supplement if the party learns that in some material respect its past disclosure or discovery response was incorrect or incomplete and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

- The duty to supplyment extends to all disclosures required by subsections 26(a)(1)-(3), including initial disclosures, change in opinons epressed by experts, and mandatory pre-trial disclosures.

- The Rule requires parties to supplement at "appropriate intervals". The Committee notes reflect that it may be useful for the scheduling order to specify the time or times when supplementation should be made.

- With respect to testimony of an expert, a duty to supplement extends both to the written report under subdivision (a)(2)(B) and changes in the opinions expressed at deposition of the expert.

- There is no obligation to provide supplemental or corrected information that has been otherwise made known to the parties in writing or during the discovery process, such as when a witness not previously disclosed is identified during the taking of a deposition or when an expert during a deposition corrects information contained in an earlier report. See Committee notes.

Rule 29: Stipulations. The Rule has been revised to permit the parties to stipulate in writing to modify the procedures governing and limitations placed upon discovery. According to the Committee notes, the revisions are intended to encourage the parties to avoid Court involvement by agreeing to written stipulations.

- From a defense perspective, the Rule is broadly worded and would allow the parties to alter the disclosure and discovery requirements both in the initial schedule and throughout the discovery period. For example, this would allow the parties to stipulate to more depositions or interrogatories than allowed under the rules without Court approval.

- Stipulations to extend the 30-day period for responding to interrogatories, request for productions, and request for admissions would require Court approval only if the delay would interfere with the deadlines set by the Court for completing discovery, for hearing of a motion, or for trial.

Rule 37: Discovery sanctions. There are two major changes. Rule 37 has been revised to integrate with the disclosure provisions of Rule 26(a). Although the Rule does not have the "safe harbor" provision contained in Rule 11, the Rule incorporates a good faith provision, requiring the parties to confer before filing any motion.

Good faith requirement: Under Rule 37(a)(2)(A) and (B) the party making the motion must make a good faith attempt to confer with the other party in an effort to resolve the matter without Court intervention before making any motion to compel or motion for sanctions. This provision applies both to motions for failure to comply with any automatic disclosure requirements and to traditional discovery requests, and depositions. From a defense attorney's perspective, while the proposed Rule does not have the "safe harbor" provisions contained in proposed Rule 11, the "good faith" conference requirement may serve this purpose. This good faith requirement is consistent with local Rule 14(e).

Motion to compel: Rule 37(a). The Rule allows a party to move to compel disclosures and to seek sanctions when any other party has failed to make disclosures, or has made an inadequate disclosure as required by Rule 26(a). Under revised paragraph 37(a)(3) evasive or incomplete disclosures and discovery responses are treated as failures to disclose or respond.

Rule 26(g). The Rule requires that all disclosures pursuant to Rule 26(a)(1) and (3) (initial and pre-trial disclosures) be signed. By signing, the attorney or unrepresented party certifies *"that to the best of the signor's knowledge,*

information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made." Under Rule 37(c), sanctions, including attorney fees, can be awarded against a party who *"without substantial justification"* certifies in violation of the Rule.

Rule 37(c): Sanctions for nondisclosure. A party who "without substantial justification" fails to disclose the information required by Rule 26(a) or Rule 26(e)(1) (mandatory disclosures and supplemental disclosures) would be precluded from offering the evidence at trial, or in any motion or hearing. The Committee notes reflect that this provision provides a self-executing sanction for failure to make a disclosure required by Rule 26(a) without need for a motion. From a defense perspective, this automatic sanction provides a strong inducement for disclosure of material that the disclosing party would expect to use as evidence, whether at a trial, at a hearing, or on a motion. However, precluding the use of damaging evidence that the disclosing party would not want to offer at trial may not be an effective incentive to compel disclosure of damaging information that might advantageously be concealed.

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In addition to or in lieu of this sanction, the Court on motion and after affording an opportunity to be heard may impose other appropriate sanctions which may include an award of reasonable expenses, including attorney's fees, caused by the failure or omission, declaring specified facts to be established, restricting contradictary evidence, or allowing the jury to be informed of the fact of non-disclosure. From a defense perspective, the plaintiff's failure to disclose a fact, witness or a document in a disclosure statement would be admissible under the Federal Rules of Evidence under the same principles that allow a party's interrogatory answers to be offered against it.

Expenses: Reasonable expenses incurred in making or opposing the motion, including attorney's fees, may be awarded to the successful litigant as specified in this provision.

If a party who has failed to provide information comes forth with the information after a motion to compel is filed, but before the motion is heard, the Court may still award reasonable expenses and attorney's fees, unless the movant did not first attempt to confer in good faith to obtain the disclosure.

X. Trial

Rule 16(c): Pre-trial Conference. The proposed Rule makes several additions to the subjects for consideration at the pre-trial conference. These include:

- limitations or restrictions on the use of testimony under FRE 702 (Rule 16(c)(4));

- timing and appropriateness of summary judgment motions (Rule 16(2)(5));

- orders for separate trials with respect to a claim, counter-claim, cross-claim, or third-party claim, or with respect to any particular issue in the case (Rule 16(c)(13));

- an order requiring parties to present evidence early with respect to a "manageable issue" that could be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c) (Rule 16(c)(14));

- an order establishing a reasonable limit on the time for presenting evidence at trial (Rule 16(c)(15)).

Rule 26(a)(3): Pre-trial disclosures. Under the new Rule, parties must automatically disclose, without request, the evidence they intend to produce at trial at least 30 days before trial. These disclosures are to be made in accordance with schedules adopted by the Court under Rule 16(b) or by local rules. If no such schedule is directed by the Court, the disclosures are to be made at least 30 days before commencement of the trial. From a defense attorney perspective, this change is consistent with local rules in many judicial districts. The automatic disclosures would include the following:

A. The name, address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises.

B. The designation of those witnesses whose testimony is expected to be presented by means of a deposition, and a transcript of the relevant portion of the deposition if it is taken by other than stenographic means; and

   - By order or local Rule, the Court may require that parties designate the particular portions of depositions to be used at trial.

C. An appropriate identification of each document or other exhibit the party expects to offer as well as those which the party may offer if the need arises.

Objections. 26(a)(3). Upon receipt of these final pre-trial disclosures, the opposing parties have 14 days (unless a different time is specified by the Court) to disclose any objections they wish to preserve to the admissibility of the deposition testimony or to the admissibility of the documentary evidence (other than objections under Rules 402 and 403 of the F.R.E.). Objections not disclosed, other than objections under Rules 402 and 403 of the Federal Rules of Evidence, would be deemed waived unless excused by the Court for good cause shown.

Form of Disclosure: Filing. Unless otherwise directed by order of local Rule, all disclosures would be made in writing, signed, served, and promptly filed with the Court.

Impeachment Evidence. By its terms, Rule 26(a)(3) does not require disclosure of evidence to be used solely for impeachment purposes.

Sanctions. Under revised Rule 37(c)(1), a party who, without substantial justification, fails to disclose information would be precluded from presenting the evidence at trial.

According to the Committee notes under Rule 26(a)(3), this restriction would not bar an unlisted witness or theu se of unlisted documents if the need for such evidence is based upon developments during trial that could not reasonably have been anticipated, i.e., a change of testimony. The Committee notes further reflect that listing a witness does not obligate the party to secure the attendance of the person at trial, but should preclude a party from objecting if the person is called to testify by another party who did not list the person as a witness.

Rule 32. Use and presentation of depositions at trial.

Restrictions on use: A deposition may not be used at trial against a party who was unable, through the exercise of diligence, to obtain counsel at the deposition. As previuosly noted, a deposition may also not be used at trial against a party who receives less than 11 days notice of the deposition, provided that the party promptly moved for an order of protection requesting that the deposition not be held, or that it be held at a different time and place. Rule 32(a).

Form of presentation. Rule 32(c). The revisions parallell the changes to Rule 30 which allow for non-stenographic means of recording depositions. Under this Rule a party may offer deposition testimony in any of the forms authorized under Rule 30(b) such as by audio or video tape, without leave of the Court or permission of the other parties.

- If the deposition is offered in non-stenographic form, the party shall provide the Court with a transcript of the portions so offered.

- In a jury trial, any party can request that any deposition testimony offered other than for impeachment purposes be presented in non-stenographic form if available. This provision, coupled with the provisions concerning the permissible methods of recording depositions, would assure that every deposition could be presented to the jury by video if desired by any party.

Rule 38: Right to jury trial. Technical cross-reference to Rule 5(d) requiring that jury demands be filed with the Court as well as with other parties.

Rule 50(a): Directed verdicts. Technical amendment to clarify that judgments as a matter of law in jury trials may be entered against both plaintiffs and defendants and with respect to issues or defenses that may not be wholly dispositive of a claim or defense.

Rule 52(c): Judgment on partial findings. This amendment makes clear that judgments as a matter of law in non-jury trials may be entered against both plaintiffs and defendants and with respect to issues or defenses they may not be wholly dispositive of a claim or defense.

XI. Post-Trial

Rule 54(d): Attorney's fees. This revision would establish a procedure for presenting claims for attorneys' fees, whether or not denominated as "costs," and would provide a time limit within which a motion for fees must be filed.

It applies also to requests for reimbursement of expenses, not taxable at costs, when recoverable under governing law incident to the award of fees. The revisions do not apply to fees recoverable as an element of damages, as when sought under the terms of a contract, nor to an award of fees as sanctions. 54(d)(2)(E).

> **Mechanics:** 54(d)(2)(A) provides that the claim shall be made by motion. Rule 54(d)(2)(B) provides that unless otherwise provided by statute or order of the Court, motions for attorney fees must be made within 14 days after the entry of judgment. The motion must state the basis for the award of fees and must provide a fair estimate of the fees sought. Evidentiary support need not accompany the motion. Any part can file an adversary submission with respect to the motion.

Rule 54(d)(2)(D). The Rule explicitly authorizes the adoption of local rules to establish procedures facilitating the efficient and fair resolution of fee claims. According to the committee notes, local rules might include a schedule of standard hourly rates. This revision also permits a judge to refer issues regarding the amount of the fee award to a special master under Rule 53 or to a magistrate judge.

Rule 58: Entry of Judgment. The proposed revision would permit, but does not require, the Court to delay the entry of final judgment until resolution of attorney fee disputes. The purpose of this revision would be to allow appeal of an attorney fee award to be considered at the same time as appeal on the merits. Under the current Rule, the post-judgment filing of a motion for attorneys' fees does not affect the time for appeal from the underlying judgment. It may be more efficient to decide the fee issue in advance so that an appeal related to that issue can be heard at the same time as the appeal on the merits.

H

XII. Other changes.

In addition to the changes discussed above, the following technical changes have been made.

Rule 1. Purpose of Rules. Technical change makes clear that the Rules are to be both construed "and adminstered" to secure the just, speedy, and inexpensive determination of every action.

Rule 4.1: Service of other process. This is a new Rule containing provisions from old Rule 4 that do not pertain to service of a summons.

Rule 5: Service and filing of pleadings. Technical amendment which allows the Court, by local rule, to permit filing of papers by fascimile or other electronic means.

Rule 12: Answers. Technical cross-reference to Rule 4.

Rule 15: Amended pleadings. Technical cross-reference to Rule 4.

Rules 53, 71(A), 72-76. Technical amendments to conform with the judicial improvement act. "Magistrate" is changed to "Magistrate Judge".

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APPENDIX OF FORMS

Form 1A. Notice of Lawsuit and Request for Waiver of Service of Summons

TO: _____(A)_____
[as _____(B)_____ of _____(C)_____
]

A lawsuit has been commenced against you (or the entity on whose behalf you are addressed). A copy of the complaint is attached to this notice. It has been filed in the United States District Court for the __ _____(D)_____ and has been assigned docket number _____(E)_____.

This is not a formal summons or notification from the court, but rather my request that you sign and return the enclosed waiver of service in order to save the cost of serving you with a judicial summons and an additional copy of the complaint. The cost of service will be avoided if I receive a signed copy of the waiver within _(F)_ days after the date designated below as the date on which this Notice and Request is sent. I enclose a stamped and addressed envelope (or other means of cost-free return) for your use. An extra copy of the waiver is also attached for your records.

If you comply with this request and return the signed waiver, it will be filed with the court and no summons will be served on you. The action will then proceed as if you had been served on the date the waiver is filed, except that you will not be obligated to answer the complaint before 60 days from the date designated below as the date on which this notice is sent (or before 90 days from that date if your address is not in any judicial district of the United States).

If you do not return the signed waiver within the time indicated, I will take appropriate steps to effect formal service in a manner authorized by the Federal Rules of Civil Procedure and will then, to the extent authorized by those Rules, ask the court to require you (or the party on whose behalf you are addressed) to pay the full costs of such service. In that connection, please read the statement concerning the duty of parties to waive the service of the summons, which is set forth on the reverse side (or at the foot) of the waiver form.

I affirm that this request is being sent to you on behalf of the plaintiff, this __ day of _____, ___.

_____
Signature of Plaintiff's Attorney or Unrepresented Plaintiff

Notes:
A--Name of individual defendant (or name of officer or agent of corporate defendant)
B--Title, or other relationship of individual to corporate defendant
C--Name of corporate defendant, if any
D--District
E--Docket number of action
F--Addressee must be given at least 30 days (60 days if located in foreign country) in which to return waiver

Form 1B. Waiver of Service of Summons

TO: _____(name of plaintiff's attorney or unrepresented plaintiff)_____

I acknowledge receipt of your request that I waive service of a summons in the action of _____(caption of action)_____, which is case number _____(docket number)_____ in the United States District Court for the _____(district)_____. I have also received a copy of the complaint in the action, two copies of this instrument, and a means by which I can return the signed waiver to you without cost to me.

I agree to save the cost of service of a summons and an additional copy of the complaint in this lawsuit by not requiring that I (or the entity on whose behalf I am acting) be served with judicial process in the manner provided by Rule 4.

I (or the entity on whose behalf I am acting) will retain all defenses or objections to the lawsuit or to the jurisdiction or venue of the court except for objections based on a defect in the summons or in the service of the summons.

I understand that a judgment may be entered against me (or the party on whose behalf I am acting) if an answer or motion under Rule 12 is not served upon you within 60 days after _____(date request was sent)_____, or within 90 days after that date if the request was sent outside the United States.

_____ _____

Date Signature

Printed/typed name: _____

[as _____]

[of _____]

To be printed on reverse side of the waiver form or set forth at the foot of the form:

Duty to Avoid Unnecessary Costs of Service of Summons

Rule 4 of the Federal Rules of Civil Procedure requires certain parties to cooperate in saving unnecessary costs of service of the summons and complaint. A defendant located in the United States who, after being notified of an action and asked by a plaintiff located in the United States to waive service of a summons, fails to do so will be required to bear the cost of such service unless good cause be shown for its failure to sign and return the waiver.

It is not good cause for a failure to waive service that a party believes that the complaint is unfounded, or that the action has been brought in an improper place or in a court that lacks jurisdiction over the subject matter of the action or over its person or property. A party who waives service of the summons retains all defenses and objections (except any relating to the summons or to the service of the summons), and may later object to the jurisdiction of the court or to the place where the action has been brought.

A defendant who waives service must within the time specified on the waiver form serve on the plaintiff's attorney (or unrepresented plaintiff) a response to the complaint and must also file a signed copy of the response with the court. If the answer or motion is not served within this time, a default judgment may be taken against that defendant. By waiving service, a defendant is allowed more time to answer than if the summons had been actually served when the request for waiver of service was received.

Form 35. Report of Parties' Planning Meeting

[Caption and Names of Parties]

1. Pursuant to Fed. R. Civ. P. 26(f), a meeting was held on ___(date)___ at ___(place)___ and was attended by:
___(name)___ for plaintiff(s)
___(name)___ for defendant(s) ___(party name)___
___(name)___ for defendant(s) ___(party name)___

2. **Pre-Discovery Disclosures.** The parties [have exchanged] [will exchange by ___(date)___] the information required by [Fed. R. Civ. P. 26(a)(1)] [local rule ___].

3. **Discovery Plan.** The parties jointly propose to the court the following discovery plan: [Use separate paragraphs or subparagraphs as necessary if parties disagree.]

Discovery will be needed on the following subjects: ___(brief description of subjects on which discovery will be needed)___
All discovery commenced in time to be completed by ___(date)___. [Discovery on ___(issue for early discovery)___ to be completed by ___(date)___.]
Maximum of ___ interrogatories by each party to any other party. [Responses due ___ days after service.]
Maximum of ___ requests for admission by each party to any other party. [Responses due ___ days after service.]
Maximum of ___ depositions by plaintiff(s) and ___ by defendant(s).
Each deposition [other than of _____] limited to maximum of ___ hours unless extended by agreement of parties.
Reports from retained experts under Rule 26(a)(2) due:
from plaintiff(s) by ___(date)___
from defendant(s) by ___(date)___
Supplementations under Rule 26(e) due ___(time(s) or interval(s))___.

4. **Other Items.** [Use separate paragraphs or subparagraphs as necessary if parties disagree.]

The parties [request] [do not request] a conference with the court before entry of the scheduling order.
The parties request a pretrial conference in ___(month and year)___.
Plaintiff(s) should be allowed until ___(date)___ to join additional parties and until ___(date)___ to amend the pleadings.
Defendant(s) should be allowed until ___(date)___ to join additional parties and until ___(date)___ to amend the pleadings.
All potentially dispositive motions should be filed by ___(date)___.
Settlement [is likely] [is unlikely] [cannot be evaluated prior to ___(date)___] [may be enhanced by use of the following alternative dispute resolution procedure: [_____].
Final lists of witnesses and exhibits under Rule 26(a)(3) should be due
from plaintiff(s) by ___(date)___
from defendant(s) by ___(date)___
Parties should have ___ days after service of final lists of witnesses and exhibits to list objections under Rule 26(a)(3).
The case should be ready for trial by ___(date)___ [and at this time is expected to take approximately ___(length of time)___].
[Other matters.]

Date: _____

THE DEVELOPING LAW OF WRONGFUL DISCHARGE IN IOWA

IOWA DEFENSE COUNSEL ANNUAL MEETING

October 7, 1993

by

Frank Harty
Nyemaster, Goode, McLaughlin,
Voigts, West, Hansell & O'Brien, P.C.
1900 Hub Tower, 699 Walnut Street
Des Moines, Iowa 50309

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I. Introduction.

A. The Changing Employment Environment.

1. Over a half century ago, Professor John R. Commons spoke of "a new equity that will protect the job just as the older equity protected the business." J.R. Commons, Legal Foundations of Capitalism 307 (Macmillan 1924). In recent years, elements of the American judiciary have embraced this concept. Indeed, some courts appear to have adopted the statutory mission of the United States Labor Department "to foster, promote and develop the welfare of wage earners. . .." Public Law 426, 62nd Congress.

2. Enforcing standards of equity in employment has traditionally been the affair of organized labor. Since 1953, however, organized labor has experienced a steady decline in membership with the result being that less than eighteen percent of today's workforce is unionized. The decline of unionism has produced a concomitant increase in attempts by the courts and legislatures to protect the worker and his perceived interests.

3. Today's worker not only expects benefits from employment, but is also more willing to resort to litigation in order to obtain the treatment to which he feels entitled. More than 25,000 wrongful discharge lawsuits are pending in the nation's courts. A Rand study released last year surveyed 120 wrongful discharge cases that went to trial in California between 1980 and 1986. The average salary of fired employees was $36,254. Plaintiffs won 67.5% of their cases and were awarded an average of $646,855. About 40% of the awards were for punitive damages. See, Wall St. J., Sept. 7, 1989, at 131, col. 3.

B. The Decline of Employment-At-Will in Iowa.

1. Traditionally, the doctrine of employment-at-will permitted an employer to discharge an employee for "good cause, for no cause, or even for cause morally wrong. . .." See Payne v. Western & A.R.R. Co., 81 Tenn. 507, 519-20 (1884), overruled on other grounds, Hutton v. Watters, 132 Tenn. 527 (1915). See also C. Labatt, Master and Servant § 183 (2d ed. 1904). Iowa has long adhered to the traditional doctrine. See Harrod v. Wineman, 146 Iowa 718, 720, 125 N.W. 812, 813 (1910).

2. At the peak of its acceptance, the employment-at-will doctrine was even given the backing of the federal constitution. See Adair v. United States, 208 U.S. 161 (1908) ("the employer and employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract"). See also Coppage v. Kansas, 236 U.S. 1 (1915).

3. On a national basis, only a few jurisdictions continue to strictly adhere to the employment-at-will doctrine. See Morast v. Lance, 631 F. Supp. 474 (N.D. Ga. 1986); Neighbors v. Kirksville College of Osteopathic Medicine, 694 S.W.2d 822 (Mo. Ct. App. 1985); Kelly v. Mississippi Valley Gas Co., 397 So.2d 874 (Miss. 1981).

4. Most jurisdictions recognize one or more of three significant exceptions to the at-will doctrine. They include: (a) an exception based on public policy considerations; (b) an exception based on contract theories; and (c) an exception based on the covenant of good faith and fair dealing.

5. In Abrisz v. Pulley Freight Lines, Inc., 270 N.W.2d 454 (Iowa 1978), the Iowa Supreme Court first hinted it would deviate from the traditional doctrine. In Abrisz the court stated: "We do not decide if an employee under an at-will contract is without remedy under any circumstances. . .. We hold only that under the facts of this case there is no showing that plaintiff's discharge was violative of public policy." Id. at 456-57.

6. The Iowa Supreme Court has since adopted the two more generally recognized exceptions to the doctrine. See Cannon v. National By-Products, Inc., 422 N.W.2d 638 (Iowa 1988) (handbook exception to employment-at-will doctrine); Springer v. Weeks & Leo Co., Inc., 423 N.W.2d 560, 561 (Iowa 1988) (public policy exception adopted). Despite the acceptance of these exceptions, the presumption of at-will employment remains the starting point for analyses of wrongful discharge claims in Iowa. See McBride v. City of Sioux City, 444 N.W.2d 85 (Iowa 1989).

II. Statutory Exceptions to the Employment-At-Will Doctrine.

A. General Statutory Restrictions.

There are a number of general statutory restrictions on an employer's ability to terminate employees.

1. National Labor Relations Act, 29 U.S.C. § 158(a)(3): prohibits discharge for union activity.

2. Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-21(a): forbids discriminatory discharges.

3. Iowa Code § 601A.6: prohibits discharge because of race, sex, religion, age or disability.

B. Whistleblower Legislation.

Other enactments specifically protect an employee's right to assert various rights.

1. Age Discrimination in Employment Act, 29 U.S.C. § 623(d): forbids discrimination or retaliation for an employee's use of enforcement procedures.

2. National Labor Relations Act, 29 U.S.C. § 158(a)(4): outlaws discrimination for filing charges or giving testimony under NLRA.

3. Employee Retirement Income Security Act, 29 U.S.C. § 1140: prohibits retaliation and interference with attainment of ERISA rights.

4. Fair Labor Standards Act, 29 U.S.C. § 215(a)(3): prohibits retaliation for participating in FLSA enforcement proceedings.

5. Occupational Safety and Health Act, 29 U.S.C. § 660(c)(1): forbids discrimination based on reporting or testifying regarding OSHA violations.

6. Equal Employment Opportunity Act, 42 U.S.C. § 2000e-3(a): bans discrimination based on opposition to unlawful employment practice.

C. Iowa "Whistleblower" Provisions.

1. Iowa Code § 19A.19: outlaws reprisal for disclosure of violations of state merit system.

2. Iowa Code § 20.10(2)(d): prohibits discrimination against public employee for filing affidavit,

petition or complaint under Public Employment Relations Act.

3. Iowa Code § 88.9(3): prohibits discharge or discrimination against employee instituting IOSHA proceedings.

4. Iowa Code § 730.1: imposes liability for actual damages to discharged employee prevented from obtaining other employment where employer fails to furnish "in writing on request a truthful statement as to the cause of the person's discharge."

D. Iowa's Drug Testing Statute.

1. An employee cannot be disciplined or discharged for the first drug test indicating the presence of alcohol or drugs if the employee successfully completes drug abuse evaluation and treatment. See Iowa Code § 730.5(8)(1989). Failure to complete evaluation and treatment may result in discipline and discharge. Likewise, any employee who "successfully" completes evaluation and treatment but nevertheless subsequently tests positive for drug or alcohol impairment may presumably be disciplined or terminated.

2. To ensure compliance with Iowa's drug testing law, the legislature has given aggrieved employees the right to sue for reinstatement, backpay and "other equitable relief" including attorneys' fees and court costs.

III. Exceptions to the At-Will Doctrine Based Upon Contract Theories.

A. Introduction.

1. On a national basis, there are four generally recognized exceptions to the employment-at-will doctrine based upon contract theories: (a) exceptions based upon judicial enforcement of written personnel policies or manuals (the "handbook" theory); (b) exceptions based upon implied promises of job security; (c) exceptions based upon the judicially-implied covenant of good faith and fair dealing; and (d) the traditional permanent employment agreement exception.

2. In addition, there are decisions that appear to inject elements of promissory estoppel as well as

hybrids of tort and contract law. Some courts combine the various theories.

B. The Contract for "Permanent Employment".

1. General Rule.

Under Iowa law, a contract for permanent or lifetime employment is construed as terminable at the will of either party, absent consideration beyond the employee's mere promise to perform services. Wolfe v. Graether, 389 N.W.2d 643, 654-55 (Iowa 1986); Albert v. Davenport Osteopathic Hospital, 385 N.W.2d 237 (Iowa 1986). Where an employee furnishes consideration in addition to his promise to perform services, the permanent or lifetime contract is enforceable and continues in effect for as long as the employer has work available for the employee and the employee performs that work competently. Albert, 385 N.W.2d at 238; Stauter v. Walnut Grove Products, 188 N.W.2d 305, 311 (Iowa 1971).

a. What constitutes sufficient "additional" consideration to support a contract of lifetime or permanent employment is determined on a case-by-case basis. Albert, 385 N.W.2d at 238; Laird v. Eagle Iron Works, 249 N.W.2d 646, 647 (Iowa 1977).

b. The general rule requiring additional consideration is not a "rule of consideration in the traditional sense", but rather, an "adjunct rule of interpretation" which applies only to "questions involving the duration of employment where the subject has not been specifically fixed in the agreement." Cannon v. National By-Products, Inc., 422 N.W.2d 638, 641 (Iowa 1988). The rule of interpretation does not apply to questions concerning "the legal effect of a specific written guarantee that discharge may only take place 'for cause'." Id. at 641.

(1) The general rule expressed in Wolfe and Albert was distinguished, but not altered by the court, in Cannon. The court explained that the general rule continued to apply to cases where the duration of an employment agreement was in question. In Cannon, the court was required to interpret a "just cause" provision in an employment handbook. A promise of

lifetime or permanent employment was not involved.

(2) The court in Cannon held that written personnel policies distributed by an employer could create a binding contractual obligation if the employee reasonably understood the policies as binding and the employer "had reason to suppose the [employee] understood it in that light." Cannon, 422 N.W.2d at 640. See also Young v. Cedar County Work Activity Center, 418 N.W.2d 844, 847-48 (Iowa 1987). Additional consideration was not necessary to make the policies enforceable.

2. What Constitutes Sufficient "Additional Consideration"? The Case-by-Case Approach.

What constitutes additional consideration necessary to interpret an employment contract as a contract of lifetime or permanent duration is determined on an ad-hoc basis.

a. Wolfe v. Graether, 389 N.W.2d 643, 654-55 (Iowa 1986). The court held the plaintiff furnished sufficient consideration to support a contract for lifetime employment where the plaintiff forfeited his partnership interest in the company when it changed from a partnership to a professional corporation. The court noted that as a partner, the plaintiff "had a right to vote on any proposal to alter his status as a partner and participate in discussions held at any meeting where such a vote was taken." Id. at 653. The plaintiff did not enjoy similar rights as the employee of a professional corporation. Id. The evidence established the plaintiff gave up his partnership interest in exchange for the promise of lifetime employment.

b. Albert v. Davenport Osteopathic Hospital, 385 N.W.2d 237 (Iowa 1986). The court found the plaintiff's forfeiting the security of a bargaining unit position was not sufficient to interpret his employment contract as a contract of lifetime duration. Distinguishing its decision in Collins v. Parsons College, 203 N.W.2d 594 (Iowa 1973), the court noted the trial court failed to find the plaintiff would not have accepted the new position had he known

he was giving up the security of his bargaining unit position. Albert, 385 N.W.2d at 239.

c. Laird v. Eagle Iron Works, 249 N.W.2d 646 (Iowa 1977). The court held plaintiff did not provide "independent consideration" to secure contract of lifetime employment where the employee gave up his full-time position as sales manager in favor of a part-time sales consultant position. The court reasoned that the plaintiff's forfeiture of his position as defendant's sales manager was not a sufficient consideration because the sales manager position was not permanent. The court noted that when plaintiff "stopped working as sales manager, he gave up nothing that [the] defendant could not have taken away anyway." Id. at 647.

d. Collins v. Parsons College, 203 N.W.2d 594 (Iowa 1973). The court held the plaintiff, a college professor, furnished sufficient consideration for a lifetime employment contract where he surrendered a tenured position at another college to accept employment and the defendant knew of the professor's sacrifice. The court stated:

> ... we think the better rule to be that an employee who gives up other employment to accept an offer of a permanent job provides independent consideration -- at least, when as here the employment surrendered was itself permanent and the new employer is aware of the facts.... Id. 203 N.W.2d at 599 (citations omitted).

e. Stauter v. Walnut Grove Products, 188 N.W.2d 305, 311 (Iowa 1971). The court found the plaintiff furnished necessary additional consideration to support a promise to employ him for as long as he performed his job in a competent manner, where the promise was given as part of plaintiff's sale of his entire business. The court characterized the transaction in the following manner:

> In the matter before us, plaintiff gave up a competitive business to defendant, and as part of the agreement to sell the business and

its equipment, an oral agreement to employ plaintiff under the terms indicated in Division I was entered into. Thus the permanent contract had additional consideration to make it valid and enforceable, and not terminable at will. Id. at 312.

f. Hanson v. Central Show Printing Co., 256 Iowa 1221, 1224, 130 N.W.2d 654, 656 (1964). The court determined the plaintiff's leaving his prior "at will" employment to take a job with the defendant did not constitute adequate additional consideration to support a promise of lifetime employment. Citing numerous cases from other jurisdictions, the court explained that forfeiting other employment was only an "incident" necessary for the employee to place himself in a position to perform, and was not a "price" or "consideration" for the contract of employment. Id. at 1224, 130 N.W.2d 656.

C. The "Handbook" Exception.

1. Numerous courts have held terms embodied in personnel manuals, employee handbooks and other such documents may give rise to a cause of action by employees.

2. A majority of jurisdictions has found that personnel policies and rules may form a binding contract of employment. See Mers v. Dispatch Printing Co., 483 N.W.2d 150 (Ohio 1985); Woolley v. Hoffman-La Roche, Inc., 491 A.2d 1257 (N.J. 1985); Mobile Cola Producing Inc. v. Parks, 704 P.2d 702 (Wyo. 1985); Gorrill v. Icelandair/Flugleidir, 761 F.2d 847 (2d Cir. 1985); Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025 (Ariz. 1985); Rasch v. City of East Jordan, 367 N.W.2d 856 (Mich. Ct. App. 1985); Wing v. J.M.B. Property Management Corp., 714 P.2d 916 (Colo. Ct. App. 1985); Perlizza v. Readers Digest Sales and Services, 624 F. Supp. 806 (N.D. Ill. 1985); Thompson v. St. Regis Paper Co., 685 P.2d 1081 (Wash. 1984); Fleming v. Kids and Kin Head Start, 693 P.2d 1363 (Or. Ct. App. 1985); Staggs v. Blue Cross of Maryland, Inc., 486 A.2d 798 (Md. 1985); Enyeart v. Shelter Mut. Ins. Co., 693 S.W.2d 120 (Mo. Ct. App. 1985); see also Sherman v. Rutland Hosp., Inc., 500 A.2d 230 (Vt. 1985) (even where the employment manual itself does not create a binding contract, preemployment mention of the manual by the employer may result in

the incorporation of the manual into the employee's employment agreement).

3. Recent cases exemplify the sort of language necessary to give rise to "contractual" rights. See Aiello v. United Air Lines, Inc., 818 F.2d 1196 (5th Cir.) rehearing denied 826 F.2d 12 (5th Cir. July 22, 1987) (employee manuals containing specific disciplinary procedures and an obligation to discharge only for cause can constitute express written contract); Duldulao v. Saint Mary of Nazareth Hospital, 505 N.E.2d 314 (Ill. 1987) (employee handbook or other policy statement can create enforceable contract rights); Hoffman-La Roche, Inc. v. Campbell, 512 So.2d 725 (Ala. 1987) (handbook language was sufficiently specific to give rise to contract rights).

4. One of the first "handbook" cases was Toussant v. Blue Cross and Blue Shield of Michigan, 408 Mich. 579, 292 N.W.2d 880 (1980). In Toussant, the Michigan Supreme Court held that employers may have an implied contractual obligation not to discharge employees without just cause, based on expressed terms of an employment agreement, on an employee's "legitimate expectations" derived from the employer's policy statement, or on oral promises of job security made during a hiring interview.

5. The language, which gives rise to contractual rights, does not need to appear in a formal rulebook or employee manual. Other employer-produced documents have supported contract claims. See Rafferty v. Committee of Public Welfare, 20 Mass. App. Ct. 718 (1985) (memorandum); Rulon-Miller v. International Bus. Mach. Corp., 162 Cal. App. 3d 241, 208 Cal. Rptr. 524, modified, 162 Cal. App. 3d 1181b (1984) (memorandum that highlighted employees' right of privacy); Myers v. Coradian Corp., 459 N.Y.S.2d 929 (App. Div. 1983) (hiring letter); Shapiro v. Wells Fargo Realty Advisors, 152 Cal. App. 3d 467, 199 Cal. Rptr. 613 (1984) (employee stock option plan).

6. In Cannon v. National By-Products, Inc., 422 N.W.2d 638 (Iowa 1988), the Iowa Supreme Court held that a specific provision in an employee handbook guaranteeing the plaintiff would be discharged only for "just cause" was part of the plaintiff's contract of employment. The court held in that instance that an employee could not be terminated absent a showing of just cause. Id. at 640. The Cannon

court did not adopt a general exception to the employment-at-will doctrine. Rather, the court held that an employment agreement may be found to include provisions contained in an employee handbook.

The court in Cannon held that written personnel policies may be considered part of an employment agreement where each of several elements is present. The plaintiff in Cannon claimed that a promise in an employee handbook that no employee would be suspended or dismissed without "just and sufficient cause" had been integrated into the plaintiff's contract of employment. See also Young v. Cedar County Work Activity Center, 418 N.W.2d 844, 847-48 (Iowa 1987).

7. In McBride v. City of Sioux City, 444 N.W.2d 85 (Iowa 1989), the court refined its Cannon decision and held an employment handbook must "be sufficiently definite in its terms to create an offer." Id. at 91. In McBride, the court set forth the elements of the "handbook" cause of action: "(1) [T]he handbook must be sufficiently definite in its terms to create an offer; ;(2) [T]he handbook must be communicated to and accepted by the employee so as to create acceptance; and, (3) [T]he employee must continue working, so as to provide consideration." Id. at 91. In McBride, the court approved the 1986 Minnesota Supreme Court decision of Hunt v. IBM Mid America Employees Federal Credit Union, 384 N.W.2d 853 (Minn. 1986). In Hunt, the Minnesota Supreme Court affirmed a trial court's summary judgment in favor of the employer. The plaintiff in Hunt was forced to resign as a result of his involvement in an intra-office romance. He sued alleging the employer violated the terms of its "reference manual." The manual contained positive reinforcement language as well as references to discharge and discipline. The manual stated:

> YOU ARE THE KEY TO OUR SUCCESS:
> * * * *
> You can be assured that you will have every opportunity to develop your skills and learning power to the fullest extent with our Credit Union. In terms of hiring and promotion, our aim is to attract the best people and to encourage their peak development by promoting within according to performance.
> * * * *

> DISCIPLINARY ACTION
> If an employee of the Credit Union is reprimanded or asked to make certain corrections in theif(sic) job performance they will be placed on probation and it will be documented and placed in their personnel file. Improvement must be shown or the employee may be terminated.
> * * * *
> DISCHARGE
> In the event of a serious offense, an employee will be terminated immediately.

Id. at 856. The handbook did not give examples of "serious offense" or outline termination procedures. Id. The court held the handbook did not contain sufficient terms that could give rise to a unilateral contract.

8. There are generally two theories upon which handbook claims are based: unilateral contract and implied contract. The McBride opinion indicated the Iowa Supreme Court would evaluate handbook claims using a unilateral contract analysis. In Cannon and Young, however, the court appeared to be basing its decisions, at least in part, on promissory estoppel principles.

9. The court dispelled any doubt as to how it would analyze handbook claims. In Fogel v. Trustees of Iowa College, 446 N.W.2d 451 (Iowa 1989), the court used a unilateral contract analysis in rejecting the plaintiff's handbook claim. The plaintiff in Fogel was a food service employee at Grinnell College. After his discharge, Fogel sued the college for discrimination, retaliatory discharge, and breach of contract. Fogel premised his contract claim upon the Grinnell College Food Service Employee Handbook. The plaintiff appealed from a partial summary judgment and jury verdict in favor of the college.

10. The court in Fogel noted that the Cannon decision created only a "narrow" exception to the employment-at-will doctrine. Fogel v. Trustees of Iowa College, 446 N.W.2d at 455. Based upon the Fogel opinion, it appears the following elements must be present in any handbook claim:

    a. The employer's handbook or policy manual must guarantee an employee that discharge will

occur only for cause or under certain conditions;

b. The handbook or manual was communicated to the employee;

c. The employee expected the policy or manual to be part of his or her contract of employment;

d. The employee's expectation was reasonable;

e. The employer knew or reasonably should have known of the employee's expectation;

f. The employer failed to adhere to the provision contained in the handbook or policy manual and the employee was damaged.

11. Hunter v. Board of Trustees, 481 N.W.2d 510, 515 (Iowa 1992). A former department director of a hospital sued the hospital's board of trustees for wrongful termination in violation of his employment contract, the employee manual of personnel policies set forth seven types of separation from employment, and procedures that governed staff reductions. The court found the language used to describe employee separation procedures was "sufficiently definite to manifest the parties' assent to an employment contract that is properly terminable only for one or more of the seven enumerated reasons."

In French v. Foods, Inc., 495 N.W.2d 768 (Iowa 1993), a grocery store employee was fired form his job for alleged misconduct. The employee sued, claiming his termination violated an express contract of employment, and an implied in fact contract. The court distinguished the handbook at issue in this case from the one involved in Hunter. The handbook in Hunter was "amendable to an interpretation that discharge would be permitted only on one of the seven grounds set out in the handbook." In French, the handbook repeatedly reiterated that the employer reserved the right to terminate the employee at any time for any reason or no reason. The plaintiff-employee had signed an statement that he had read the handbook and understood that either he or his employer could terminate the relationship at any time for any reason. the court found no unilateral contact for continued employment was established.

D. Implied Promises of Job Security.

1. In other jurisdictions, oral assurances of job security and other acts by employers have been held to imply job security. Hodge v. Evans Financial Corp., 823 F.2d 559 (D.C. Cir. 1987) (evidence of oral promises of permanent employment until retirement and additional consideration in exchange for the promise was sufficient to defeat motion for judgment n.o.v. on issue of whether parties entered into a permanent employment contract); Green v. Oliver Realty, Inc., 526 A.2d 1192 (Pa. Super. 1987) (whether assurances of employment "for life" in exchange for agreeing to work at a pay rate below union scale rebutted the at-will presumption was a question for the jury); Terrio v. Millinocket Comm. Hosp., 379 A.2d 135 (Me. 1977); Rabago-Alvarez v. Dart Industrial, Inc., 55 Cal. App. 3d 91, 127 Cal. Rptr. 222 (1976) (personnel manager's statement that employees were only terminated for cause implied an enforceable promise that the employee would not be fired absent just cause); Wiskotoni v. Mich. Nat'l Bank-West, 716 F.2d 378 (6th Cir. 1983) (written statement in employee manual that probationary employees could be fired for any reason, implied that non-probationary employees could be fired only for cause); Ohanian v. Avis Rent-A-Car System, Inc., 779 F.2d 101 (2d Cir. 1985) (pledge of lifetime employment is binding if employee relies on the promise to his detriment). See also Johnson v. Ford Motor Co., 690 S.W.2d 90 (Tex. Ct. App 1985); Easles v. Tanana Valley Medical-Surgical Group, Inc., 663 P.2d 958 (Alaska 1983).

2. Other courts have refused to find contractually binding agreements arising from oral assurances of job security. See, e.g., Pranzo v. ITEC, Inc., 521 So.2d 983 (Ala. 1988) (oral agreement that employee would never be terminated was merged into subsequent written employment contract containing employment at will clause); Aberman v. Malden Mills Industries, Inc., 414 N.W.2d 769 (Minn. App. 1987) (employer's representations that "I will always take care of you," "we are offering you security" and "[you will be a] lifetime sales representative" were not definite enough to create a lifetime employment contract); Rancourt v. Waterville Osteopathic Hosp., 526 A.2d 1385 (Me. 1987) (statement that the employee "would be able to keep her job for as long as she wanted it created nothing more than a contract of employment for an

indefinite period of time that was terminable at will by either party"); Brunner v. Abex Corp., 661 F. Supp. 1351 (D.N.J. 1986) (an employee may not rely on oral assurances of job security to support an allegation of implied contract). See also Monsanto v. Electronic Data Systems Corporation, 529 N.Y.S.2d 512 (1988); Johnson v. Int'l Minerals & Chem. Corp., 122 LRRM 2652 (D.S.D. 1986) (verbal agreements do not give rise to the level of contract); Titchener v. Avery Coonley School, 350 N.E.2d 502 (Ill. App. Ct. 1976).

3. Some courts hold that actions for breach of an implied contract based on oral promises are barred by the applicable statute of frauds. Harris v. Arkansas Book Co., 700 S.W.2d 41 (Ark. 1985); Newfield v. Insurance Co. of the West, 156 Cal. App. 3d 440, 203 Cal. Rptr. 9 (1984) (alleged oral contract for "permanent employment."). But see Hodge v. Evans Financial Corp., 823 F.2d 559 (D.C. Cir. 1987) (oral contract for permanent employment was not enforceable under the statute of frauds even where employee expected to retire at indefinite time in the future and the employer agreed to pay a bonus more than one year after contract was entered into); Eisenberg v. Insurance Co. of North America, 815 F.2d 1285 (9th Cir. 1987) (claim for breach of contract arising out of employee's discharge was not barred by the statute of frauds where agreement was capable of being performed within one year); Finley v. Aetna Life and Cas. Co., 520 A.2d 208 (Conn. 1987) (employment contract of indefinite duration is not subject to one-year provision of statute of frauds); Country Corner Food & Drug, Inc. v. Reiss, 737 S.W.2d 672 (Ark. App. 1987) (statute of frauds did not apply to oral employment contract that was terminable at will because contract could be performed within one year).

4. As noted above, Iowa has traditionally required additional consideration to support oral promises of continued employment. See Albert v. Davenport Osteopathic Hosp., 385 N.W.2d 237 (Iowa 1986). Other jurisdictions follow this rule. See e.g., Ladesic v. Servomation Corp., 488 N.E.2d 1355 (Ill. App. Ct. 1986); Hamblen v. Danners, Inc., 478 N.E.2d 926 (Ind. Ct. App. 1985); Adams v. Budd Co., 583 F. Supp. 711 (E.D. Pa. 1984). It remains to be seen what, if any, impact the Cannon decision will have on this line of cases.

5. A note on taking a different approach in an oral contract case. In Dallenbach v. Mapco Gas Products, Inc., 459 N.W.2d 483 (Iowa 1989) the plaintiff recovered damages under Iowa's Wage Payment Collection Act, Chapter 91A, for the alleged breach of an oral employment contract.

E. Promissory Estoppel.

1. Some courts, even in at-will states, enforce employer promises upon which an employee has detrimentally relied. Scott v. Lane, 409 So.2d 791 (Ala. 1982); Glover v. Sager, 667 P.2d 1198 (Alaska 1983); Grouse v. Group Health Plan, Inc., 306 N.W.2d 114 (Minn. 1981); Nilsson v. Cherokee Candy & Tobacco Co., 639 S.W.2d 226 (Mo. 1982); Mers v. Dispatch Printing Co., 483 N.E.2d 150 (Ohio 1985); Ackman v. Ohio Knife Co., 589 F. Supp 768 (S.D. Ohio 1984); Scholtes v. Signal Delivery Service, Inc., 548 F. Supp. 487 (W.D. Ark. 1982); Thompson v. St. Regis Paper Co., 102 Wash.2d 219, 685 P.2d 1081 (Wash. 1984).

2. Other promissory estoppel claims have failed. Bates v. Jim Walters Resources, Inc., 418 So.2d 903 (Ala. 1982); Dumas v. Kessler & Maguire Funeral Home, Inc., 380 N.W.2d 544 (Minn. 1986); Walker v. Modern Realty of Missouri, Inc., 675 F.2d 1002 (8th Cir. 1982); Salazar v. Furr's, Inc., 629 F. Supp. 1403 (D.N.M. 1986) (New Mexico does not recognize equitable estoppel in the context of employee discharge); Hawkins v. Peoples Federal Sav. & Loan Association, 155 Mich. App. 237, 399 N.W.2d 484 (1987) (where employee made no claim that enforcement of the promise was necessary to avoid injustice, his claim of promissory estoppel failed); Rose v. Allied Development Co., 719 P.2d 83 (Utah 1986) (employer's promise did not give rise to promissory estoppel because the employer received no benefit from the promise); LaRose v. Agway, Inc., 508 A.2d 1364 (Vt. 1986).

F. The Implied Covenant of Good Faith and Fair Dealing.

1. Iowa currently recognizes no implied covenant of good faith and fair dealing in an employer-employee relationship. The Iowa Supreme Court in Fogel v. Trustees of Iowa College, 446 N.W.2d 451 (Iowa 1989), refused to overturn the trial court's dismissal of the plaintiff's implied covenant claim. Although the Fogel opinion indicated a degree of hostility to the claim, it did not reject

the cause of action as a matter of law. The BNA Individual Employment Rights Manual incorrectly lists Iowa as a state applying the covenant of good faith and fair dealing, citing High v. Sperry Corp., 581 F. Supp. 1246 (D.C. Iowa 1984). In High, Judge Vietor merely refused to hold in the context of a motion to dismiss that, as a matter of law, Iowa courts would not apply the covenant. Id. at 1248.

2. The evolution of this exception to the at-will employment doctrine began in 1974 with Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974). Massachusetts followed New Hampshire in applying the "good faith and fair dealing" covenant in employee discharge cases. See Fortune v. National Cash Register Co., 364 N.E.2d 1251 (Mass. 1977).

The plaintiff in Fortune, a 24-year employee, alleged he had been discharged in bad faith because his employer wished to avoid paying him commissions. Considering "whether this bad faith termination constituted a breach of employment-at-will contract," the court found it did:

> [The plaintiff] argues that, in spite of the literal wording of the contract, he is entitled to a jury determination on NCR's motives in terminating his services under the contract and in finally discharging him. We agree. We hold that NCR's written contract contains an implied covenant of good faith and fair dealing, and a termination not made in good faith constitutes a breach of the contract....

364 N.E.2d at 1255-56.

3. The California courts expanded the application of the covenant of good faith and fair dealing. See Tameny v. Atlantic Richfield Co., 27 Cal.3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980). Montana has also recognized the covenant. See Gates v. Life of Montana Ins. Co., 638 P.2d 1063 (Mont. 1982).

4. Examples of decisions in which the implied covenant has been applied.

Long tenure and allegations of bad faith are routine features of cases finding an implied-in-fact

covenant of good faith and fair dealing. See Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 329, 171 Cal. Rptr. 917, 927 (1981) (Grodin, J.) ("employer's implied promise that it would not act arbitrarily" based in part on plaintiff's 32 years' seniority; factors included "the duration of [the plaintiff's] employment, the commendations and promotions he received, the apparent lack of any direct criticism of his work, the assurances he was given, and the employer's acknowledged policies, 'all reflecting the totality of the parties' relationship'." 116 Cal. App. 3d at 329, 171 Cal. Rptr. at 927); Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980) (implied covenant inferred in alternate holding, in part from 18 year employment as well as from existence of elaborate grievance procedure); Hijmadi v. AMFAC, Inc., 202 Cal. App. 3d 525, 249 Cal. Rptr. 4 (1988) (oral promises and assurances in policy manuals of job security, regular promotions and raises, eight year tenure); Flanigan v. Prudential Fed. Savings & Loan Ass'n., 720 P.2d 257 (Mont. 1986) (where employer violated its own policies in terminating a long-time employee with reasons for the termination that were contradictory, employer breached the covenant of good faith and fair dealing).

5. A majority of jurisdictions have rejected the covenant of good faith and fair dealing as an exception to the at-will employment doctrine. Minihan v. American Pharmaceutical Ass'n, 812 F.2d 726 (D.C. Cir. 1987); Morris v. Coleman Co., 738 P.2d 841 (Kan. 1987); Sadler v. Basin Electric Power Co-op, 409 N.W.2d 87 (N.D. 1987); Cockels v. Intern. Business Expositions, 406 N.W.2d 465 (Mich. App. 1986); Citizens State Bank of New Jersey v. Libertelli, 215 N.J. Super. 190 (N.J. Super 1987); Hostettler v. Pioneer Hi-Bred Intern., Inc., 624 F. Supp. 169 (S.D. Ind. 1986); Johnson v. Int. Min. & Chem. Corp., 122 LRRM 2652 (D.S.D. 1986) (applying Wyoming law); Salazar v. Furr's, Inc., 629 F. Supp. 1403 (D.N.M. 1986); Hunt v. I.B.M. Mid Amer. Employees Fed. Credit Union, 384 N.W.2d 853 (Minn. 1986); Mobil Coal Producing, Inc. v. Parks, 704 P.2d 702 (Wyo. 1985); Neighbors v. Kirksville College, 694 S.W.2d 822 (Mo. Ct. App. 1985); Eggert v. Reed, 497 N.Y.S.2d 810 (N.Y. Sup. Ct. 1985); Satterfield v. Lockheed Missiles & Space Co., 617 F. Supp. 1359 (D.S.C. 1985); Wyant v. SCM Corp., 692 S.W.2d 814 (Ky. Ct. App. 1985); Armstrong v. Richland Clinic, Inc., 709 P.2d 1237 (Wash. Ct.

App. 1985); Matson v. Cargill, Inc., 618 F. Supp. 278 (D. Minn. 1985); Magnan v. Anaconda Indus., Inc., 479 A.2d 781 (Conn. 1984); Larrabee v. Penobscot Frozen Foods, Inc., 486 A.2d 97 (Me. 1984); Walker v. Modern Realty of Missouri, 675 F.2d 1002 (8th Cir. 1982) (applying Missouri law); Muller v. Stromberg Carlson Corp., 427 So.2d 266 (Fla. Dist. Ct. App. 1983); Lumpkin v. H & C Communications, Inc., 3 I.E.R. Cases 1019 (Texas Ct. App. 1988).

6. Even those jurisdictions that have adopted the covenant have narrowed its application. See Howard v. Door Woolen Co., 414 A.2d 1273 (N.H. 1980). The California Supreme Court has recently announced that plaintiffs are limited to contractual, rather than tort, damages in wrongful discharge actions. See Foley v. Interactive Data Corp., 47 Cal.3d 654, 254 Cal.Rptr. 211, 765 P.2d 373, 3 I.E.R. Cases 1729 (Cal. 1988). The Montana legislature has enacted a statute which limits remedies in wrongful discharge suits. See Mont. Code Ann. § 39-2-901 et seq. (1988).

IV. The "Public Policy" Exception to the At-Will Doctrine.

A. Adoption in Iowa.

1. In Abrisz v. Pulley Freight Lines, Inc., 270 N.W.2d 454, 455 (Iowa 1978), the Iowa Supreme Court declared that under proper circumstances it would recognize a common law claim for wrongful discharge in contradiction of public policy. See Niblo v. Parr Mfg., Inc., 445 N.W.2d 351 (Iowa 1989).

2. More recently, the court adopted the public policy exception and applied it in a case where the discharge was allegedly the result of a worker's compensation claim. Springer v. Weeks & Leo Co., 429 N.W.2d 558, 560-61 (Iowa 1988).

3. Springer Decision.

a. In Springer, the court held that an at-will employee allegedly terminated for pursuing the statutory right to workers' compensation could assert an action for wrongful discharge. See Springer v. Weeks & Leo Co., Inc., 429 N.W.2d 558, 560-61 (Iowa 1988). Springer involved a claim of retaliatory discharge. The plaintiff worked for the defendant cosmetic manufacturer in its labelling department. She developed

bilateral carpal tunnel syndrome and missed approximately ten weeks of work as a result of the surgery performed to correct the problem. The plaintiff received workers' compensation benefits during this absence from work. The plaintiff testified at trial that her employer refused to allow her to return to work until she signed a document stating that her carpal tunnel syndrome problems were not work related. The plaintiff refused and was ultimately discharged.

b. The trial court directed a verdict in favor of the defendant on the ground that the plaintiff was an at-will employee and could be discharged for any reason. The Supreme Court reversed the decision below, holding that an action would sound in tort where an employee is discharged for filing a workers' compensation claim. Id.

c. The court emphasized that its decision in Springer involved a discharge that was alleged to be in violation of a "clear expression" of a public policy of this state. The court stated: "We believe a cause of action should exist for tortious interference with the contract of hire when the discharge serves to frustrate a well-recognized and defined public policy of the state." Id. at 560 (emphasis added).

4. In Springer, the court cited examples of courts from other jurisdictions granting remedies for the discharge of at-will employees for reasons deemed to be contrary to public policy. Each of the decisions cited in Springer involved alleged violations of clearly expressed public policies. See Petermann v. International Bhd. of Teamsters, 174 Cal. App.2d 184, 188-89, 344 P.2d 25, 27 (1959) (discharge for refusal of employee to commit perjury at employer's behest); Parnar v. Americana Hotels, 65 Haw. 370, 379-80, 652 P.2d 625, 631 (1982) (discharge of employee for cooperation with grand jury investigating employer's anticompetitive business practices); Palmateer v. International Harvester Co., 85 Ill.2d 124, 130, 421 N.E.2d 876, 879-80 (1981) (discharge of employee for supplying law enforcement authorities with information concerning criminal acts of co-employee); Monge v. Beebe Rubber co., 114 N.H. 130, 133, 316 A.2d 549, 551 (1974) (discharge of employee for refusal to

submit to supervisor's sexual advances); Nees v. Hocks, 272 Or. 210, 218-19, 536 P.2d 512, 514-15 (1975) (discharge of employee for serving on a jury).

5. In Niblo v. Parr Mfg., Inc., 445 N.W.2d 351 (Iowa 1989), the Iowa Supreme Court extended the Springer doctrine to cases in which the plaintiff-employer is discharged for threatening to file a workers' compensation claim. The court in Niblo also allowed the recovery of damages for emotional distress without a showing that the distress was "severe." Thus, the courts will apply a relaxed standard of proof of emotional distress in wrongful discharge cases: the defendant's conduct in such cases is, in essence, "deemed" to be outrageous.

6. The Supreme Court has given no indication that it will recognize a common law tort action for retaliatory discharge except where the employer's conduct offends a clearly articulated public policy of the state. See Conaway v. Webster City Products Co., 431 N.W.2d 795 (Iowa 1988).

B. Proof Standard.

1. In Smith v. Smithway Motor Xpress, Inc., 464 N.W.2d 682 (Iowa 1990), the Iowa Supreme Court held that a plaintiff in a public policy wrongful discharge action need not prove that his claim for workers' compensation benefits was the "predominant and improper" reason for his discharge.

2. The plaintiff in a Springer case need only prove his filing of a workers' compensation claim was a "determining factor" in the employer's decision to discharge him. Id. The court explained that a "determining factor": "need not be the main reason behind the decision. It need only be the reason which tips the scales decisively one way or the other," Smith, 464 N.W.2d at 686.

C. The "Public Policy" Exception in Other Jurisdictions.

1. The public policy exception is the most widely accepted exception to the at-will rule.

2. Like Iowa, most jurisdictions require a clear showing of a mandate of public policy. See Marsh v. Boyle, 530 A.2d 491 (Pa. Super. Ct. 1987) (allegation of public policy that "every person has a right to earn a living in a job that he chooses and

that an employer cannot act in an arbitrary, capricious and abusive manner" was insufficient to show a "clear mandate of public policy"); Martinez v. Admiral Maintenance Service, 510 N.E.2d 1122 (Ill. App. 1987) (termination for excessive tardiness is not in violation of a clearly mandated public policy); Perry v. Sears, Roebuck & Co., 508 So.2d 1086 (Miss. 1987) (employee terminated for personality conflict with his supervisor could not maintain an action because he suffered a private and not a public wrong); Alexander v. Kay Finlay Jewelers, Inc., 506 A.2d 379 (N.J. Super. A.D. 1986), cert. denied 104 N.J. 466 (N.J. 1986) (no clear mandate of public policy violated when the employee was discharged after demanding that his employer repay him money owed); Turner v. Letterkenney Fed. Credit Union, 505 A.2d 259 (Pa. Super. Ct. 1986) (the employee could not show a violation of clear mandate of public policy sufficient to overcome the employer's superior interest in running a business).

3. Most courts do not, however, require the public policy to be embodied in a statute. See Dabbs v. Cardiopulmonary Mgt. Services, 188 Cal. App. 3d 1437, 234 Cal. Rptr. 129 (1987).

D. Examples of Public Policy Exceptions.

1. Workers' compensation. See e.g., Guye v. International Paper Co., 488 So.2d 1108 (La. Ct. App. 1986); Novosel v. Nationwide Ins. Co., 721 F.2d 894 (3d Cir. 1983); Wolcowicz v. Intercraft Indus. Corp., 478 N.E.2d 1039 (Ill. App. Ct. 1985); Clanton v. Cain-Sloan Co., 677 S.W.2d 441 (Tenn. 1984); Firestone Textile Co. v. Meadows, 666 S.W.2d 730 (Ky. 1983); Lally v. Copygraphics, 428 A.2d 1317 (N.J. 1981).

2. Refusal to take polygraph. See Moniodis v. Cook, 494 A.2d 212 (Md. 1985); Condle v. General Hugh Mencin Co., No. CC937 (W. Va., July 13, 1984). But see Walden v. General Mills Restaurant Group, 508 N.E.2d 168 (Ohio App. 1986).

3. Refusal to commit a crime or further employer's unlawful scheme. See Laws v. Aetna Finance Co., 667 F. Supp. 342 (N.D. Miss. 1987) (refusal to violate federal truth-in-lending law); Freidrichs v. Western Nat. Mut. Ins. Co., 410 N.W.2d 62 (Minn. App. 1987) (employee terminated for reporting violation of engineering standards required by

statute); Winther v. D.E.C. Int'l., Inc., 625 F. Supp. 100 (D. Colo. 1985) (employee terminated for refusing to engage in illegal price-fixing); Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (refusing to violate Antitrust laws).

4. Termination for serving on jury or obeying subpoena. See Ludwick v. This Minute of Carolina, Inc., 337 S.E.2d 213 (S.C. 1985); Sides v. Duke Univ., 328 S.E.2d 818 (N.C. App. 1985); In re Webb, 586 F. Supp. 1480 (N.D. Ohio 1984); Wiskotoni v. Michigan National Bank-West, 716 F.2d 378 (6th Cir. 1983); Palmateer v. International Harvester Co., 421 N.E.2d 876 (Ill. 1981); Reuther v. Fowler & Williams, Inc., 386 A.2d 119 (Pa. 1978); Nees v. Hocks, 536 P.2d 512 (Or. 1975).

E. Limits on the Public Policy Exception. Many actions alleging discharge in violation of a "public policy" have been rejected. McCartney v. Meadowview Manor, Inc., 508 A.2d 1254 (Pa. Super. Ct. 1986) (it is not a violation of public policy to discharge an employee who is actively seeking employment with competitors). Newman v. Legal Services Corp., 628 F. Supp. 535 (D.D.C. 1986) (violation of an employee's First Amendment rights creates a constitutional claim, not a wrongful discharge claim).

V. Practice and Procedure.

A. Demise of the "Contract for Life."

1. Under Iowa law, additional consideration is required to support a lifetime employment contract claim. See Wolfe v. Graether, 389 N.W.2d 643 (Iowa 1986); Albert v. Davenport Osteopathic Hosp., 385 N.W.2d 237 (Iowa 1986).

2. An oral employment contract may, however, be sued upon. See Dallenbach v. Mapco Gas Products, Inc., 459 N.W.2d 483 (Iowa 1989)

3. Query whether claims of life employment should be couched in terms of oral agreement to terminate only for "just cause."

B. Damages.

1. A wrongfully discharged employee can recover lost past and future wages. See Smith v. Smithway Motor Xpress, Inc., 464 N.W.2d 682 (Iowa 1990). Thus, if

a plaintiff's new job pays less, he or she may recover the wage differential based upon the likely duration of the terminated employment.

2. Punitive damages are recoverable in public policy wrongful discharge action. Springer v. Weeks and Leo Co., 429 N.W.2d 550 (Iowa 1988).

3. Emotional distress damages may be recovered without a showing of "severe" distress. Niblo v. Parr Mfg. Inc., 445 N.W.2d 351 (Iowa 1989).

C. Jury Instructions.

1. For defendants in handbook case, Fogel v. Trustees of Iowa College, 446 N.W.2d 451 (Iowa 1989) spelled out in detail the elements a plaintiff in a handbook case must prove.

2. For plaintiffs in a workers' compensation wrongful discharge case, Smith v. Smithway Motor Xpress, Inc., 464 N.W.2d 682 (Iowa 1990), defined "determining cause" in favorable language.

VI. Emerging Alternate Theories of Recovery.

A. Introduction.

Traditional tort causes of action are now frequently asserted in addition to or instead of wrongful discharge theories. Thus, an employee may recover even when a discharge is "lawful." The new types of employment suits permeate the entire human resource decision-making process: from hiring and applicant screening to discharge and post-employment references. These new employment causes of action include: (a) invasion of privacy; (b) negligent evaluation; (c) misrepresentation; (d) interference with contractual relations; (e) defamation; and (f) intentional infliction of emotional distress.

B. Negligent Hiring.

Numerous plaintiffs have successfully sued employers for negligently hiring or retaining workers who engaged in criminal, violent or other wrongful acts. See Pruitt v. Pavelin, 141 Ariz. 195, 685 P.2d 1347 (1984); Giles v. Shell Oil Corp., 487 A.2d 610 (D.C. 1985); Abbot v. Payne, 457 So.2d 1156 (Fla. Dist. Ct. App. 1984); Henley v. Prince George's County, 305 Md. 320, 503 A.2d 1333 (1986); Gaines v. Monsanto Co., 655 S.W.2d 568, 569 (Mo. Ct. App. 1983); Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 340 S.E.2d 116

(1986). Employers have even been held accountable for employee wrongs that took place after normal working hours. See Abbot v. Payne, 457 So.2d 1156 (Fla. Dist. Ct. App. 1984) (pest control company may be found liable for assault of plaintiff in her home under theory of negligent retention or hiring); Gaines v. Monsanto Co., 655 S.W.2d 568 (Mo. Ct. App. 1983) (employer who knew or should have known of employee's violent tendencies may be liable for assault on co-worker in her home). The increase in negligent hiring cases requires employers to consider the potential for such actions when recruiting and investigating personnel. At the same time, developments in anti-discrimination, privacy and defamation law have made it more difficult for employers to obtain information from job applicants.

1. Statutory and common law protection of privacy rights may expressly prohibit or otherwise deter an employer from administering polygraph, blood and urine tests to gauge an employee's truthfulness or reveal drug or alcohol use. Iowa Code Section 730.5(2)(1989) makes it illegal for an employer to "request, require or conduct random or blanket testing of its employees." In spite of these constraints, employers must make responsible investigation into pertinent employment-related background of prospective employees. To do otherwise exposes the employer to liability to customers, clients and other employees injured by dangerous, violent or criminally predisposed employees.

2. The elements of negligent hiring.

   a. The law of negligent hiring is based in part on the philosophy of spreading risk to those better able to afford it. It is based as well on traditional elements of fault. The tort of negligent hiring arises out of the common-law obligation of an employer to hire persons who will not endanger their fellow employees and customers or clients. Respondeat superior make the employer liable only for employee actions committed in the scope of the employee's authority and in furtherance of the employer's business. Negligent hiring, on the other hand, holds the employer responsible for the foreseeable acts of even the reckless employee who exceeds the scope of authorized duties. Actionable conduct may appear to be anything but "foreseeable" at the time of the negligent hiring. For instance, landlord employers have repeatedly been held liable for

the "foreseeable" sexual assaults of their employees who have been issued building passkey and have used those keys to gain entrance to the victim's dwelling. See Welsh Mfg. Div. of Textron v. Pinkerton's Inc., 474 A.2d 436 (R.I. 1984); William v. Feather Sound, Inc., 386 So.2d 1238 (Fla. Dist. Ct. App. 1980); Easley v. Apollo Detective Agency, Inc., 69 Ill. App. 3d 920, 387 N.E.2d 1241 (1979).

b. Twenty-eight states have reported cases recognizing negligent hiring as a valid action. Most jurisdictions have relied upon the Restatement (Second) of Agency Section 213 and the Restatement (Second) of Torts Section 307 in developing negligent hiring theory. The Restatement (Second) of Agency delineates the dangerous qualities of an agent which would make him or her "incompetent" and imposes liability upon a principal who negligently employed such as person. The Restatement (Second) of Agency defines an incompetent agent as unskillful, inexperienced, reckless or vicious. Section 307 of the Restatement (Second) of Torts similarly imposes liability upon a person who negligently employs someone whom the employer knew, or should have know, was "so incompetent, inappropriate, or defective" as to create an unreasonable risk to others.

c. In order to prevail on a theory of negligent hiring, the plaintiff in most jurisdictions must prove:

(1) the existence of an employment relationship;

(2) the incompetency of the employee;

(3) that the employer knew or should have known of the employee's incompetence;

(4) that the employee negligently or intentionally caused the plaintiff's injury; and

(5) that the defendant-employer's negligence in hiring or retaining the employee was the proximate cause of the plaintiff's injury.

Duty and causation are especially important in the negligent hiring or retention case.

3. Duty to the plaintiff.

a. The first of several legal standards which must be satisfied in a negligent hiring case is the establishment that the defendant-employer owed some sort of duty to the plaintiff-victim. This is a fairly easy showing when some sort of special relationship exists between the employer and the plaintiff exists. See D.R.R. v. English Enters, CATV, Div. of Gator Transp., 356 N.W.2d 580 (Iowa App. 1984).

b. Such a relationship existed in Kendall v. Gore Properties, 236 F.2d 673 (D.C. Cir. 1956), an action by a tenant against a landlord-employer. In the 1956 case, the court noted the landlord had a special relationship with his tenants and owed a duty to "not . . . create an unsafe condition in the premises either permanent or temporary by an affirmative action on his part." Similarly, public carriers such as bus, train, and airline operators have readily been found liable for hiring incompetent or criminally predisposed persons. See Nesbit v. Chicago, R.I. & Pac. R.R., 163 Iowa 39, 143 N.W. 1114 (1913); see also Fagg v. Minneapolis & St. Louis R.R., 175 Iowa 459, 462, 157 N.W. 148, 148-149 (1916) (passenger assaulted by brakeman); Garvik v. Burlington, Cedar Rapids & Northern, R.R., 131 Iowa 415, 418-419, 108 N.W. 327, 328 (1906) (passenger raped by brakeman). Likewise, innkeepers, police and fire departments, and schools have clear special duties to the public. These employers would undoubtedly be liable for hiring an employee with a violent history who subsequently harmed a customer, citizen or student.

c. Most jurisdictions that recognize a cause of action for negligent hiring have stated that an employer's duty to select competent employees extends to any member of the general public who comes into contact with the employment situation. Courts have found liability in cases when employers invite the general public onto the business premises (see, e.g., Priest v. F.W. Woolworth Five & Ten Cent

Store, 228 Mo.App. 23, 26, 62 S.W.2d 926, 927 (1933) (assistant manager of store assaulted customer)); or require employees to visit residences (see, e.g. Coath v. Jones, 277 Pa. Super. 479, 481, 419 A.2d 1249, 1250 (1980) (business employee with access to customer's home raped occupant)), or business establishment (see, e.g. Stone v. Hurst Lumber Co., 15 Utah 2d 49, 386 P.2d 910 (1963) (employee delivering lumber attacked construction worker).

d. The two common factors in cases finding the employer owed a duty to third parties have been that: (1) the plaintiff must have met the employee as s direct result of the employment relationship; and (2) the employer must have derived some benefit, albeit indirect, from the meeting of the employee and plaintiff. See D.R.R. v. English Enters, CATV. Div. of Gator Transp., 356 N.W.2d 580 (Iowa App. 1984). See also Cramer v. Housing Opportunities Comm'n, 304 Md. 705, 501 A.2d 35 (1985); Burch v. A & G Assocs., Inc., 122 Mich. App. 798, 333 N.W.2d 140 (1983); Gaines v. Monsanto Co., 655 S.W.2d 568 (Mo. App. 1983).

4. Causation.

a. The employer's negligent hiring must be shown to be the cause of the plaintiff's injury. Thus, the employee's tortious conduct must be shown to have been facilitated by the employer's negligent hiring decision. Causation is particularly difficult to show when the employee has engaged in some sort of criminal act such as rape. See D.R.R. v. English Enters, CATV. Div. of Gator Transp., 356 N.W.2d 580 (Iowa App. 1984). The question is one of reasonable foreseeability. A plaintiff may generally establish causation by showing that an adequate pre-hire investigation would have revealed evidence of an employee's criminal disposition and thereby made the subsequent criminal act foreseeable. Gaines v. Monsanto Co., 655 S.W.2d 568 (Mo. App. 1983).

b. The issue of foreseeability also weighs heavily in the determination of what constitutes reasonable employer hiring practices.

The adequacy of an employer's pre-hire investigation undoubtedly figures heavily into any determination of causation. The nature of the employment bears upon the scope and depth of the required inquiry into an applicant's past. As the court stated in Ponticas v. K.M.S. Investments, 331 N.W.2d 907, 913 (Minn. 1983), an action by a rape victim against her attacker's employer:

> Although only slight care might suffice in the hiring of a yardman, a worker on the production line, or other types of employment where the employee would not constitute a high risk of injury to third persons, a very different series of steps are justified if an employee is to be sent, after hours, to work for protracted periods in the apartment of a young woman tenant.

5. Advantages of Negligent Hiring Cause of Action.

   a. An action for negligent hiring has several advantages over the traditional tort claim of respondeat superior. Not only is the scope of actionable conduct broader, as was mentioned. The focus of liability is also shifted. Under respondeat superior, an employer is only vicariously or derivitively liable, whereas negligent hiring is a doctrine of primary liability. Because the employer is primarily liable, punitive damages may be awarded for gross negligence.

   b. Evidence of prior specific acts of the employee, as well as evidence of the employee's reputation, are admissible for a negligent hiring action. Under respondeat superior, evidence of an employee's prior negligent acts and reputation is inadmissible to show negligence at the time of the accident. A plaintiff may also recover in cases when the employer was negligent in hiring an employee, but the employee was not negligent in causing an injury, such as when the employee is clearly incompetent.

   c. Perhaps the greatest advantage of the negligent hiring cause is that it is available in cases involving intentional assaults.

6. The Law of Negligent Hiring in Iowa

a. In D.R.R. v. English Enterprises, CATV. Division of Gator Transportation, 356 N.W.2d 580 (Iowa App. 1984), a rape victim alleged the defendants were negligent in hiring her attacker, a cable television installer. The plaintiff was a young female who lived in Council Bluffs, Iowa. The named defendants were cable television companies engaged in installing cable television systems in the homes of Council Bluffs' residents. Kenneth Logston was hired by the defendants as a cable television installer. The plaintiff sought damages from the defendants for the violent rape she suffered at the hands of Logston. The trial court granted the defendants' motion for summary judgment reasoning the defendants could not, as a matter of law, be directly or vicariously liable for the rape.

b. The Iowa Court of Appeals reversed and in so doing expressly approved the tort of negligent hiring in Iowa. The court quoted section 213 of the Restatement (Second) of Agency as the basis for the tort. The Restatement provides that an employer who knew or should have known of an employee's dangerous propensities may be liable for tortious harm inflicted upon a third party by the employee. the court also noted decisions from other jurisdictions and early Iowa cases and determined that Iowa would follow the general trends in the area of negligent hiring.

c. Iowa has long recognized that an employer may be liable for even the malicious or criminal acts of its employees where the employer owes a special duty to the plaintiff. The court in English Enterprises quoted an earlier Iowa Supreme Court opinion:

> The modern doctrine is that, if the master owes an affirmative duty of protecting a party from injury, as a passenger upon a railway train, an occupant of a sleeping car, a guest of an inn, or any other person to whom the master owes an affirmative duty of protection, he is responsible for the wrongful, malicious or tortious acts of its

servants, although not done in the course of their employment.

The reason for these exceptions or apparent exceptions to the rule of non-liability, where the acts of the servant is not within the scope of his employment, actual or apparent, is that the master owed the person injured some special duty.

Nesbit v. Chicago, R.I. & Pac. R.R., 163 Iowa 39, 143 N.W. 1114, 1119-1120 (1913). Thus, the court recognized that in special duty situations, Iowa has long adhered to the rule making an employer liable for negligent hiring.

c. The court in English Enterprises was careful to liken its opinion to earlier decisions involving public carriers and innkeepers. The court went so far as to note that the defendant-employer, like a public carrier, operated pursuant to a franchise, and like an innkeeper, had access to the plaintiff's living quarters. The court was careful to place Iowa with the more conservative jurisdictions which require the existence of a traditional duty of some sort in negligent hiring actions.

d. Some jurisdictions require less. Some courts state that the employer's conduct "run[s] from the employer to those members of the public whom the employer might reasonably anticipate would be placed in a position of risk of injury as a result of the hiring." See Ponticas v. K.M.S. Investments, 331 N.W.2d 907, 913 (Minn. 1983).

e. Because of the procedural context of the English Enters case, the court did not address the standards that might be used to judge the adequacy of the pre-hire investigation conducted by the defendant-employer. The court noted only that an issue of material fact existed as to whether the defendants were negligent by hiring the assailant without checking his criminal record. Generally it can be said that more exhaustive inquiry is required for jobs placing the employer in a greater position of care and trust.

Hospitals, innkeepers, and common carriers, for example, are usually required to conduct thorough examinations. See e.g. Vannah v. Hart Private Hospital, 228 Mass. 132, 136-37, 117 N.E. 328, 329-30 (1917); McLeod v. New York, Chic & St. L.R.R., 72 A.D. 116, 120-21, 76 N.Y.S. 347, 350 (1902).

f. The court in English Enters did discuss the question of causation in the negligent hiring context. The question of causation was a matter of fact to be determined by a jury. An intervening cause cannot be a "normal consequence" of a defendant's negligence or "reasonable foreseeable" by the defendant. The question was "whether the policy of the law will extend the responsibility for the conduct to the consequences which have in fact occurred.

C. Negligent Evaluation.

1. The Performance Appraisal.

a. Nearly all employers conduct some form of periodic evaluation of the job performance of their employees. A systematic performance appraisal system will increase the likelihood that uniform standards will be used to evaluate employees on a company-wide basis. In addition, effective performance appraisals should condition worker expectations and prepare the marginal employee for eventual dismissal.

b. The record created by performance evaluations can be powerful evidence in a wrongful discharge or other employment tort action. The appraisal record can, however, act as a two-edged sword. If the evaluations are consistent with the articulated grounds for dismissal, they will provide an effective shield in defending against almost any theory of wrongful discharge. On the other hand, evaluations that are inconsistent with the stated reason for discharge may prove to be potent weapons to an aggrieved employee. See Pugh v. See's Candies, Inc., 116 Cal. App.3d 311, 171 Cal. Rptr. 917 (1981). Inconsistent appraisals may support claims of discrimination as well as allegations of the breach of an implied duty of good faith and fair

dealing. See Hatton v. Ford Motor Co., 508 F. Supp. 620 (E.D. Mich. 1981). See also J. Posner, Creative Approaches in Employment-Termination Cases (Rutter Group 1985).

c. The conduct of performance appraisals may be accompanied by another risk. Totally independent of the content of the appraisal records, an employee may claim that the employer has performed the appraisal itself in a negligent manner.

2. Negligent Undertaking of Performance Appraisals.

a. The negligent performance of an employee appraisal may give rise to an action in tort. See e.g., Chamberlain v. Bissell, Inc., 547 F. Supp. 1067 (W.D. Mich. 1982); Schipani v. Ford Motor Co., 302 N.W.2d 307 (Mich. App. 1981), limited on other grounds, 409 N.W.2d 213 (Mich. App. 1987). A handful of courts have recognized a cause of action for negligent employee evaluation. See Chamberlain v. Bissell, Inc., 547 F. Supp. 1067 (W.D. Mich. 1982); Schipani v. Ford Motor Co., 302 N.W.2d 307 (Mich. App. 1981) limited on other grounds, 409 N.W.2d 213 (Mich. App. 1987). See also Haslam v. Pepsi-Cola Co., No. 83-1025, slip op. (E.D. Mich. May 23, 1984). These courts have held that a contractual obligation to conduct appraisals based on an agreement that an employee may be terminated only for just cause may be the basis of an action in tort when the employer negligently performs the appraisal.

b. The Michigan Court of Appeals, in Schipani v. Ford Motor Company, 102 Mich. App. 606, 302 N.W.2d 307 (1981), was the first court to hold that a cause of action would lie for the negligent performance of an employee appraisal. The plaintiff in Schipani sought recovery for negligent evaluation on the ground that Ford annually reviewed the plaintiff's performance and breached a duty to do so in "an objective manner." The aggrieved employee in Schipani claimed that Ford, by not reviewing his performance in an objective manner, denied him placement upon a promotion list. The appellate court held that a plaintiff may have an action in tort for negligent performance of a promise to evaluate

independent of any claim for breach of contract. The court noted that "[a] duty to exercise reasonable care may arise out of a contract" and "[a]ccompanying every contract is a common law duty to perform with ordinary care the thing agreed to be done, and . . . negligent performance constitutes a tort as well as breach of contract." Id. at 624, 302 N.W.2d at 315.

c. In Chamberlain v. Bissell, Inc., 547 F. Supp. 1067 (W.D. Mich. 1982), a federal court applying Michigan law took a slightly different approach but nevertheless also concluded an employer may be liable for the negligent conduct of employee performance appraisals.

(1) The plaintiff in Chamberlain worked for the defendant-employer for over twenty years before his termination in 1979. He received good to excellent performance reviews during most of his career and enjoyed regular promotions. After successive failures to receive a promotion he desired, the plaintiff became uncooperative and bitter.

(2) In a performance appraisal interview conducted two months prior to his termination, the plaintiff was told that his performance was not entirely satisfactory. However, it was Chamberlain's contention that he was never informed that his termination was being contemplated. The plaintiff was eventually fired and the court concluded that he was never informed that his superiors were considering discharging him. The plaintiff sued, claiming an age discrimination violation as well as wrongful discharge and negligent evaluation.

(3) The court concluded that Chamberlain asserted a viable cause of action for negligent evaluation. Id. at 1081. The Chamberlain court explained that "while a complete failure to perform a contractual obligation may be actionable only as a breach of contract, the negligent performance of the obligation is actionable as a tort." Id.

(4) The Chamberlain court held that the employer had a contractual obligation to perform annual reviews of the plaintiff's job performance. The employer did not breach this obligation; appraisals were conducted. The court stated, however, that the employer had a duty, separate and distinct from the contractual obligation, to exercise reasonable care in the performance of the contractual obligation. It was this duty the employer was said to have breached. The court recognized an action against the defendant for negligent evaluation concluding that the employer had breached its duty to exercise reasonable care in the performance of its contractual obligation.

d. The court in Chamberlain set forth the elements of the claim of negligent evaluation: (1) the existence of a legal duty to conduct performance appraisals; (2) the breach of such duty; (3) a proximate causal relationship between the breach of the duty and some harm to the plaintiff; and (4) damage. The court concluded that the defendant-employer had a legal duty to conduct performance appraisals because an employee handbook providing for such periodic evaluations was deemed part of the employment contract.

3. Iowa and the Negligent Evaluation Claim.

a. The Iowa courts have not dealt with a negligent evaluation claim in a reported decision. However, the Iowa Supreme Court has stated:

> It appears to be well settled in Iowa that where a contract imposes a duty upon a person, the neglect of that duty is a tort, and an action ex delicto will lie. " 'A tort may be dependent upon, or independent of, contract. If a contract imposes a legal duty upon a person the neglect of that duty is a tort founded on contract; so that an action ex contractu for the breach of the contract, or an action ex delicto for the breach of the duty, may be brought at the option of the plaintiff.' "

Giarratano v. Weitz Co., Inc., 147 N.W.2d 824, 832 (Iowa 1967) (quoting Matthys v. Donelson, 179 Iowa 1111, 1116, 160 N.W. 944, 946; Kunzman v. Cherokee Silo Co., 253 Iowa 885, 891, 114 N.W.2d 534, 537).

b. The cases decided subsequent to Schipani and Chamberlain make it clear that a claim for negligent evaluation will not be sustained in the absence of an enforceable employment agreement. See Ellis v. Kentucky Fried Chicken Nat'l Mgmt. Co., No. 683-1363, slip op. (W.D. Mich. 1985).

c. Some courts have required only that the plaintiff prove an enforceable contract of some nature in order to prevail on the tort theory. See Id. See also Chamberlain v. Bissell, Inc., 547 F. Supp. 1067 (W.D. Mich. 1982); Haslam v. Pepsi-Cola Co., No. 83-1025, slip op. (E.D. Mich. May 1984). However, other courts have refused to allow a claim for negligent evaluation even when it accompanies a claimed breach of employment contract. See Shaver v. F. W. Woolworth Co., 669 F. Supp. 243 (E.D. Wis. 1986); Carver v. Sheller-Globe Corp., 636 F. Supp. 368 (W.D. Mich. 1986).

d. It appears the Iowa Supreme Court would not adopt such a cause of action in the absence of a Cannon-like handbook "agreement."

D. Misrepresentation and Fraud.

1. Introduction.

In recent years, employees have brought actions based upon fraud and misrepresentation against employers in Iowa and other jurisdictions. See e.g., Hagarty v. Dysart Genesio Comm. School District, 282 N.W.2d 92 (Iowa 1979). See also Ohanian v. Avis Rent-A-Car System, Inc., 779 F.2d 101 (2d Cir. 1985) (employer liable for misrepresentation and wrongful discharge where it promised job security to induce employee to relocate); Mueller v. Union Pac. R.R., 371 N.W.2d 732 (Neb. 1985) (valid cause of action for fraud stated where terminated employees were promised they would not lose jobs if they disclosed information regarding misappropriation of funds); Spoljaric v. Percival Tours, Inc., 708 S.W.2d 432 (Tex. 1986) (employee promised large

credits), and other tangible incidents of employment. See Palmer v. Beverly Enterprises, 823 F.2d 1105 (7th Cir. 1987) (employee alleged that employer misrepresented it would purchase his home after he commenced working for employer if the home failed to sell within ninety days after his employment); Albrant v. Sterling Furniture Co., 736 P.2d 201 (Or. App. 1987) rev. den. 304 Or. 55 (Or. Aug. 24, 1987) (employee alleged misrepresentation based on a change in her hours and commissions).

3. Elements of the Cause of Action.

a. Most courts have looked to the Second Restatement of Torts in developing the law of misrepresentation in the employment context. The Restatement imposes liability for fraudulent, Restatement (Second) Torts § 525, negligent, Id. § 552 and, in some instances, innocent misrepresentations. Id. § 552C. Although most courts have imposed liability upon employers only for fraudulent or negligent misrepresentations, at least one court has stated that a cause of action will lie for an innocent misrepresentation that was reasonably relied upon by an employee.

b. The elements of a cause of action based upon fraudulent or negligent misrepresentation are essentially the same. The main distinction between the two causes of action is the scope of liability imposed upon the wrongdoer. Compare Restatement (Second) of Torts §§ 531 and 552. As stated in comment a to Section 552 of the restatement: "When there is no intent to deceive but only good faith coupled with negligence, the fault of the maker of the misrepresentation is sufficiently less to justify a narrower responsibility for its consequences." Restatement (Second) of Torts § 552, comment (a). Thus, one found guilty of making a fraudulent misrepresentation is subject to liability to all those whom he intends or has reason to expect to act upon a misrepresentation. By comparison, the maker of a negligent misrepresentation is ordinarily liable only to persons who are actually foreseen as using and relying upon the information. However, this distinction should have little import in the employment context because most cases involve alleged

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strike was settled on November 12 and strike replacements were laid off at the end of their shift on November 13.

(3) The strike replacements filed an action seeking compensatory and punitive damages for fraud and breach of contract against the employer. The case was tried to a jury that returned a verdict awarding compensatory and punitive damages to each of the plaintiffs. On appeal, the jury verdict was upheld. The appellate court stated that the jury could have reasonably concluded that the employer fraudulently misrepresented to the plaintiffs that they would have permanent positions, intending all along to use them only as strike replacements and to terminate their positions when the strike was settled. Id. It should be noted that actions of this sort may not be preempted by the National Labor Relations Act. In Belknap, Inc. v. Hale, 463 U.S. 491 (1983), strike replacements brought a similar action against their employer, claiming that a promise of permanent employment was false when made. The trial court held that the replacements' claims were preempted by the National Labor Relations Act (NLRA), but an appellate court reversed.

(4) The case proceeded to the U.S. Supreme Court, which held that the strike replacements' claims were not preempted by the NLRA. The court stated that although the labor laws permit an employer to hire permanent replacements, those same laws may not be invoked to nullify an employer's valid promise of permanent employment. The court suggested that employers protect themselves from such lawsuits by making all offers of employment to strike replacements subject to both a strike settlement agreement and a National Labor Relations Board order that the strikers (if they are adjudged by the Board to be unfair labor practice strikers) be reinstated. Id.

g. Negligent Misrepresentation.

company's net operating loss in the prior year. The bonus would be paid when a profit was realized. The company president instructed the employee to formalize their bonus arrangement in writing. The employee did so and then gave it to the company president. The plan was modified by the company attorney but never returned to the employee. When the employee made further inquiry, the company president stated that he had no intention of honoring the bonus plan.

(2) The executive brought an action for fraudulent misrepresentation and breach of an oral contract. The jury found that the company president had made a false promise that he never intended to keep and that the employee relied on it to his detriment. The jury awarded the executive $30,000 in damages as the amount of the promised bonus and $750,000 in punitive damages for fraudulent misrepresentation. The trial court reduced the amount of the award. On appeal, the Supreme Court of Texas affirmed the judgment, but remanded the case to an intermediate appeals court to determine whether the trial court erroneously reduced the award of punitive damages.

f. Similarly, in Verway v. Blincoe Packing Company, 108 Idaho 315, 698 P.2d 377 (1985), a jury award of compensatory and punitive damages was upheld by the Idaho Supreme Court.

(1) Verway involved an action by strike replacements against their former employer, a meat-packing company.

(2) At midnight on November 1, 1981, union employees of the defendant-employer went on strike and set up pickets outside the plant entrance. Management determined that to remain in operation during the strike it would have to hire new employees and utilize supervisory personnel on the kill floor. Several strike replacements were hired between November 4 and 6. Each of the replacements was promised that he would not be fired in the event the strike was settled. The

strike was settled on November 12 and strike replacements were laid off at the end of their shift on November 13.

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g. Negligent Misrepresentation.

(1) Even if a plaintiff-employee does not have proof that a misrepresentation was known by the employer to be false when it was made, the employee may proceed on a negligent misrepresentation theory. For instance, in D'lisse-Cupo v. Board of Directors of Notre Dame High School, 202 Conn. 206, 520 A.2d 217 (1987), the plaintiff high school language teacher brought an action against her employer for negligent misrepresentation. The plaintiff taught foreign languages to ninth and tenth grade students at Notre Dame High School in West Haven, Connecticut. She was employed pursuant to two successive one-year contracts. Toward the end of the second year of her employment, the plaintiff's principal told her that there would be "no problem with her teaching certain courses in levels the following year, that everything looked fine for rehire for the next year, and that she should continue her planning for the exchange program" which the plaintiff had organized for the high school. Shortly thereafter, the plaintiff's principal posted a written notice on the bulletin board stating: "All present faculty members will be offered contracts for next year." Id. However, in May of her second year, near the end of her contract of employment, the plaintiff was told by school officials that her teaching contract would not be renewed due to staff cutbacks resulting from a drop in enrollment.

(2) The trial court granted the defendant's motion to strike the complaint on the ground that it failed to state a claim upon which relief could be granted. The Connecticut Supreme Court determined that the plaintiff's allegation of negligent misrepresentation was sufficient to withstand a motion to strike. The Supreme Court noted that the complaint alleged a cause of action in negligent misrepresentation pursuant to Section 552 of the Second Restatement of Torts. The Supreme Court overruled the trial court and remanded the action.

E. Interference with Contract or Prospective Business Relations.

1. Introduction. Litigation regarding the improper interference with the employment relationship has traditionally involved two broad areas of law: (1) the enforcement of an employment agreement or restrictive covenant and (2) the enforcement of statutory or common law rights concerning tortious interference with a contractual or business relationship and the protection of customer lists, trade secrets and other proprietary confidential information. Thus, traditional actions for interference with contractual and prospective relations generally involve litigation between competing employers. Recently, however, employees are bringing this type of lawsuit against their employers.

2. There are three different employment contexts from which the claim of improper interference generally arises: (1) where an employer seeks to enforce a non-compete provision in an employee's contract of employment; (2) where a supervisor interferes with an employee's job performance or causes the employee's termination from employment; and (3) where a former employer provides an unfavorable post-employment job reference that results in the rejection of an employee by a prospective employer.

a. Enforcement of Restrictive Covenants and Statutory or Common Law Rights.

(1) There has been a great deal of litigation involving attempts by employers to enforce non-compete provisions in employment agreements. These actions generally involve claims by a former-employer against its former employee and his or her new employer.

(2) An employer pursuing such actions runs the risk that the employee will assert a counterclaim for interference with existing or prospective contractual relations.

b. Interference by Supervisor.

(1) In some cases, employees have alleged that supervisors or managers of a company have wrongfully interfered with the

plaintiff-employee's contract of employment with the company. See e.g., Bradley v. Consolidated Edison Co. of New York, 657 F. Supp. 197 (S.D.N.Y. 1987); Evans v. Six Flags, 613 F. Supp. 219 (E.D. Mo. 1985). Because of the triangular nature of this tort, a supervisor acting within the scope of his authority cannot usually be held liable for tortious interference with the employment relationship. See e.g., Bradley v. Consolidated Edison Co. of New York, 657 F. Supp. 197 (S.D.N.Y. 1987); Hickman v. Winston County Hospital, 508 So.2d 237 (Ala. 1987); Appley v. Locke, 487 N.E.2d ____ (Mass. App. Ct. 1986); Charles v. Faust, 487 So.2d 612 (La. Ct. App. 1986); Evans v. Six Flags, 613 F. Supp. 219 (E.D. Mo. 1985); Fletcher v. Wesley Medical Center, 585 F. Supp. 1260 (D. Kan. 1984); Muller v. Stromberg Carlson Corp., 427 So.2d 266 (Fla. Dist. Ct. App. 1983); Mackie v. La Salle Industries, 460 N.Y.S.2d 313 (A.D. 1983), appeal dismissed in part by 59 N.Y.S.2d 750 (N.Y. May 10, 1983); Fincke v. Phoenix Mut. Ins. Co., 448 F. Supp. 187 (W.D. Pa. 1978); Salaymeh v. Interqual, Inc., 508 N.E.2d 1155 (Ill. App. Ct. 1987). The tort of interference with contract generally presupposes the existence of a third party who has interfered with the contractual relations between two other persons or entities, such as employer and employee. The general rule of law is that neither of the parties to a contract can themselves be liable for "interference" with that contract. See Klooster v. North Iowa State Bank, 404 N.W.2d 564, 570 (Iowa 1987). Thus, most jurisdictions hold that an employer or its agents, acting within the scope of their authority, cannot be held liable for tortious interference with the employment relationship to which the employer is a party. The Iowa employer should, however, bear in mind two possible exceptions to this general rule.

(2) Employees sometimes allege that supervisors or managers were in fact third parties who could interfere with the

employment relationship when they were acting outside the scope of their employment. The courts have struggled with this concept of alleging that a supervisor or manager of a company can be a third party to the relationship between the company and one of its employees. Most decisions appear to turn upon the nature of the manager's conduct. See Hickman v. Winston County Hosp., 508 So.2d 237 (Ala. 1987). If the manager appears to be acting within the scope of his general authority with the company, then the manager cannot be held liable for tortious interference with the employment relationship. If, however, the behavior of the manager appears to be beyond or outside of the scope of his or her authority, the employee may be allowed to sue the manager personally for tortious interference.

(3) Iowa practitioners should be aware of another possible exception to the rule that an employer cannot improperly interfere with its own contract of employment. The Iowa Supreme Court may recently have made inroads into this general rule. In Springer v. Weeks & Leo Co., 429 N.W.2d 558 (Iowa 1988), the Iowa Supreme Court held that an employee in Iowa could assert a cause of action for wrongful discharge when she was allegedly terminated for pursuing workers compensation benefits. While the result of the decision was somewhat predictable and justifiable, the court's reasoning was rather strained and convoluted. Although it didn't have to, the court likened the Springer wrongful discharge cause of action to an action for interference with a business relationship. Springer v. Weeks & Leo Co., 429 N.W.2d 558 (Iowa 1988). In a footnote explaining its analogy, the court, while conceding that tortious interference claims have "ordinarily involved an improper interference with an existing contract or future expectancy between the plaintiff and a third person," continued by stating that "ordinarily, if the defendant is a party to the contract, other adequate

remedies are available. We do not find this to be true in the employment-at-will relationship, however, and agree with those courts which, in that situation, permit recovery for tortious interference with a contract to which the defendant is a party." Id. at 561. Although its discussion in Springer is clearly dicta, it may portend a willingness on the part of the Iowa Supreme Court to allow an employee to proceed against his or her employer for tortious interference with the employment relationship.

(4) For a detailed discussion of the tort, see Toney v. Casey's General Stores, Inc., 460 N.W.2d 849 (Iowa 1990). The Iowa Supreme Court has held that an employment contract terminable-at-will may nevertheless be interfered with. Id.

c. Post-Employment References.

The last employment related context in which a tortious interference claim may arise involves allegations by an ex-employee that the employer wrongfully interfered with a prospective employment relationship. Such a claim may arise where a former employer provides an unfavorable post-employment job reference that results in the rejection of an employee for a new job. See Geyer v. Steinbronn, 351 Pa. Super. 536, 506 A.2d 901 (1986). Although an employer is generally justified in providing truthful post-employment references, Restatement (Second) of Torts § 772. the employer should be extremely cautious in this regard.

F. Invasion of Privacy.

1. Introduction.

The Iowa Supreme Court has repeatedly recognized an individual's "right of privacy." Stessman v. American Blackhawk Broadcasting Co., 416 N.W.2d 685 (Iowa 1987); Anderson v. Low Rent Housing Commission of Muscatine; 304 N.W.2d 239 (Iowa), cert. denied 454 U.S. 1086 (1981); Howard v. Des Moines Register & Tribune Co., 283 N.W.2d 289 (Iowa 1979),

cert denied, 445 U.S. 904 (1980); Winegard v. Larsen, 260 N.W.2d 816, 822 (Iowa 1977); Bremer v. Journal-Tribune Publishing Co., 247 Iowa 817, 76 N.W.2d 762 (1956). The right, as recognized by the court, is defined as "the right of the individual to be left alone, to live a life of seclusion, to be free from unwarranted publicity." Bremer v. Journal-Tribune Publishing Co., 247 Iowa at 821, 76 N.W.2d at 764. Unlike a defamation claim which is based on injury to an individual's reputation, an action for invasion of privacy attempts to compensate the plaintiff for any emotional harm caused by the improper and unauthorized intrusion into his private affairs. Restatement (Second) Torts § 652A(1).

2. The Iowa court has adopted and applied the principles stated in the Restatement (Second) Torts with respect to invasion of privacy claims. Stessman v. American Blackhawk Broadcasting Co., 416 N.W.2d at 686. The Restatement identifies four separate "forms" of invasion, each of which is actionable under Iowa law: (1) unreasonable intrusion upon the seclusion of another; (2) the appropriation of the other's name or likeness; (3) unreasonable publicity given to another's private life; and (4) publicity that unreasonably places another in false light before the public.

a. Intrusion Upon Seclusion.

(1) Elements. The Restatement defines the invasion of privacy action covering a defendant's intrusion into the seclusion of another in the following manner:

> One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

Restatement (Second) Torts § 652B.

(2) An employer has a legitimate interest in gathering information about its employees where that information is directly related to the employee's ability to

perform his job. The nature and responsibility of the employee's job or potential job is significant to this inquiry. As was noted by the Massachusetts Supreme Court in Cort v. Bristol-Meyers Company, 431 N.E.2d 908, "the information that a high level or confidential employee should reasonably be expected to disclose is broader in scope and more personal in nature than that which should be expected from an employee who mows grass or empties waste baskets." Id. at 913.

(3) Some courts consider the motivation of the employer's intrusion.

(a) In Love v. Southern Bell Telephone and Telegraph Co., 263 So.2d 460 (La. Ct. App. 1972), writ denied 262 La. 1117 (La. Sept. 2, 1972), the plaintiff was terminated when, after he failed to report to work, two supervisory employees had a locksmith open the door of the employee's trailer and found him ill, surrounded by empty whiskey and wine bottles and empty beer cans. Although the supervisors claimed concern for the employee's health, they returned later with another employee as a witness and took notes on their observation that one partially empty whiskey bottle was less full upon the second visit. The court viewed these facts as establishing that the supervisors' acts were motivated by the employer's interest and designed to prove plaintiff's unworthiness as a supervisory employee. As such, the intrusion was an invasion of privacy.

(b) In Leggett v. First Interstate Bank of Oregon, 739 P.2d 1083 (Or. App. 1987), the court held that whether an employer wrongfully invaded an employee's privacy by consulting with the employee's psychologist was a question for the jury. The employer's legitimate interest in determining the employee's condition

to the extent it related to the work had to be balanced against the nature and extent of the invasion into the employee's privacy.

(4) Sexual harassment may form the basis of the intrusion. For example, in Phillips v. Smalley Maintenance Service, Inc., 711 F.2d 1524 (11th Cir. 1983), in response to certified questions from the Eleventh Circuit, the Alabama Supreme Court stated that Alabama law does not require physical invasion where the intrusion is of a highly personal nature. Based on this, the Eleventh Circuit held that a supervisor's coercive sexual demands were an intrusion into plaintiff's privacy.

(5) An employer's surveillance of an employee, depending on how it is conducted, may constitute intrusion upon the employee's solitude. Pemberton v. Bethlehem Steel Corporation, 502 A.2d 1101 (Md. App. Jan. 14, 1986), cert. denied, 479 U.S. 984 (U.S. Md. Dec. 1, 1986).

b. Public Disclosure.

(1) Public disclosure of true, private facts about an employee, such as dissemination of the reasons for an employee's discharge, the contents of a performance evaluation, or the employee's medical condition may form the basis of a claim for invasion of privacy. See Restatement (Second) Torts § 652D.

(2) For the disclosure to be actionable, the information disclosed must be private. Cummings v. Walsh Construction Co., 561 F. Supp. 872 (S.D. Ga. 1983) (employee's allegations that her supervisor disclosed to others that she had engaged in sexual relations with him were insufficient to state a privacy claim because she had already disclosed these events in complaints of sexual harassment); Williams v. Coffee County Bank, 308 S.E.2d 430 (Ga. Ct. App. 1983) (bank's disclosure of certificates of title on which an employee appeared as co-owner of trucks

was insufficient to state privacy claim because certificates were public records); Pemberton v. Bethlehem Steel Corporation, 502 A.2d 1101 (Md. App. Jan. 14, 1986) cert. denied, 479 U.S. 984 (U.S. Md. Dec. 1, 1986) (the employer's communication of plaintiff's past criminal record was not actionable because such information was public).

(3) For the disclosure to be actionable, the disclosure must be "public." Pemberton v. Bethlehem Steel, supra, (the employer's communication of intimate facts regarding the plaintiff to one person or to a small group not sufficient publicizing).

c. False Light in the Public Eye.

(1) Placing the employee in a false light in the public eye by disclosing inaccurate information may form the basis of an invasion of privacy claim even where the information is not derogatory.

(2) In Patton v. Royal Industries, Inc., 263 Cal. App. 2d 760, 70 Cal. Rptr. 44 (1968), the court held that the tort of false light invasion of privacy requires public disclosure of information an employee wishes to keep secret. The employer had sent a memorandum to customers that implied plaintiffs had been discharged when in fact they had resigned to go into business for themselves. As the plaintiffs' goal of an independent business established that they did not want to keep secret the information that they had left the employ of defendant, the former employer's inaccurate disclosure could not form the basis of a claim.

(3) In Dzierwa v. Michigan Oil Co., 393 N.W.2d 610 (Mich. App. 1986), the court held that an employee failed to plead sufficient facts to establish false light invasion of privacy because the employer's statements were only made in the presence of other employees and at most a handful of office visitors. The

employee failed to allege facts that the communication was broadcast to the public in general or to a large number of people.

G. Intentional Infliction of Emotional Distress.

1. The tort of intentional infliction of emotional distress arises when an individual engages in extreme or outrageous conduct with the intent of causing another emotional distress. Restatement (Second) Torts § 46.

2. To establish the independent tort of intentional infliction of emotion distress, an employee must prove each of the following elements:

a. outrageous conduct by the employer;
b. the employer's intentional causing or reckless disregard of, the probability of causing emotional distress;
c. the employee's suffering severe or extreme emotional distress; and
d. actual and proximate causation of the substantial distress by the employer's outrageous conduct. Northrup v. Farmland Industries, Inc., 372 N.W.2d 193 (Iowa 1985); Vinson v. Linn-Mar Community School District, 360 N.W.2d 108, 118 (Iowa 1985); Restatement (Second) Torts § 46.

The purpose of the tort is two-fold: (1) to compensate victims of outrageous conduct, and, (2) to delineate the boundaries of permissible activity. The tort is not, however, intended to rectify distress caused by mere trivialities or bad manners. The law continues to recognize that society, while hopefully civilized, is not utopic. The Iowa courts, quoting from the Restatement, have observed that society has its "rough edges" and "plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language and to occasional acts that are definitely inconsiderate and unkind." Restatement (Second) Torts § 46, comment d. Employer conduct that is merely insulting or inappropriate is not covered by the tort.

3. Outrageous Conduct.

a. An individual's actions are "outrageous" if they are "so extreme in degree as to go beyond

all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Harsha v. State Savings Bank, 346 N.W.2d 791, 801 (Iowa 1984); Restatement (Second) of Torts, § 46, comment d. The definition of outrageous conduct is narrow. Few actions by employers, including discharges, fall within the definition absent aggravating circumstances which make the decision in question unusually harsh or extreme.

b. The Iowa Supreme Court's decision in Vinson v. Linn-Mar Community School District, 360 N.W.2d 108 (Iowa 1985), demonstrated the restrictive nature of the definition quoted above. In Vinson, the plaintiff introduced evidence that her employer engaged in what the court referred to as a "campaign of harassment" which included, among other things, wrongfully accusing the plaintiff of falsifying her time records, discharging the plaintiff for dishonesty and, lastly, telling prospective employers about the incident in a way which imputed improper conduct to the plaintiff. Id. The Supreme Court held the trial court erred in not granting the defendant's motion for directed verdict at the close of the plaintiff's case. While noting that a jury could find the defendant "engaged in a deliberate campaign to badger and harass [the] plaintiff", the court concluded that the defendant's conduct did not, as a matter of law, rise "to the level of extremity essential to support a finding of outrageousness." Id.

c. In Haldeman v. Total Petroleum, Inc., 376 N.W.2d 98 (Iowa 1985), the court held, like it did in Vinson, that the employer's conduct did not constitute outrageous conduct as a matter of law. The court noted that the defendant's conduct of discharging the plaintiff for working a shift during which cash shortages occurred, and then later telling prospective employers that plaintiff was discharged pursuant to such a policy, without also explaining that the plaintiff was not directly involved in the shortages, did not constitute outrageous conduct. Id.

d. The court reached a similar result in Northrup v. Farmland Industries, Inc., 372 N.W.2d 193

(Iowa 1985). In Northrup, the plaintiff alleged his employer discharged him because he was an alcoholic. Id. at 198. He also alleged his supervisor yelled at him, told him he would not tolerate his behavior any longer and accused him of lying and falsifying documents. The trial court granted the defendant's motion for summary judgment and dismissed the plaintiff's claim. Id. at 195, 198-99. The Supreme Court affirmed the trial court and observed that the plaintiff's allegations, even if taken as true, did not reach the level of egregious behavior necessary to establish outrageous conduct. Id. at 195, 198-99.

4. Emotional Distress as an Element of Damages.

a. The intentional infliction of emotional distress, as an independent tort, must be distinguished from claims of emotional damages as a result of a distinct employment tort. The Iowa Supreme Court recently discussed the assessment of damages for emotional distress as part of the recovery for the tort of wrongful discharge. In Niblo v. Parr Manufacturing, Inc., 445 N.W.2d 351 (Iowa 1989), the court discussed at length the recoverability of damages for emotional distress.

b. Rose Marie Niblo worked for three years at Parr Manufacturing, Inc. She worked with poastisol, a chemical used in the manufacture of fuel filters. Niblo was discharged after she developed a skin problem diagnosed by her dermatologist as work-related. Niblo brought suit claiming retaliatory discharge in violation of public policy. She alleged she was fired because she threatened to file a workmen's compensation claim. Niblo claimed when she informed the defendant's president of her skin problem and asked for protective clothing and reimbursement for medical expenses, he became irate, told her he didn't intend to pay workmen's compensation and fired Niblo. The jury awarded Niblo damages, including recovery for emotional distress. The defendant appealed, claiming insufficient evidence to support the award and arguing the trial court failed to instruct the jury that emotional distress must be "severe before it is compensable."

c. In support of its claim the trial court erred in instructing the jury, the defendant relied upon earlier Iowa decisions dealing with the independent tort of intentional infliction of emotional distress. Id. The Supreme Court distinguished those cases and held a plaintiff need not demonstrate that emotional distress is "severe" when claiming such damage results from a retaliatory discharge in violation of public policy. Id. at 357. The Niblo court cited with approval the Iowa Court of Appeals decision in Peterson v. First National Bank of Iowa, 392 N.W.2d 158 (Iowa App. 1986), dealing with emotional distress damages in an action based upon interference with contractual relations. The Niblo court adopted the Court of Appeals' reasoning that with intentional torts, damages for emotional distress "should be allowed with proof of severe emotional distress if the harm was reasonably to be expected from the interference." Id. (citing Restatement (Second) of Torts § 774A(1)(c) (1977). This same logic would probably apply to any intentional employment-related tort.

d. Thus, an employee with an independent cause of action such as retaliatory discharge, defamation or interference with contract would be well-advised to include any emotional distress claim as an element of damages rather than an independent tort.

H. Defamation.

1. Introduction.

Defamation is the publication of information about an individual which is false and injurious to his/her reputation. Terminated employees often invoke a tort theory of defamation. Defamation has two basic components: there must be a publication of information; and, that information must be defamatory.

2. Defamation Per Se.

a. Defamatory communications that are written, printed or of similar nature, are libelous. The Iowa Supreme Court defined libel as "a malicious publication, expressed either in

printing or writing, or by signs and pictures, tending to injure the reputation of another or expose him to public hatred, contempt, or ridicule or to injure him in the maintenance of his business." Vinson v. Linn-Mar Community School District, 360 N.W.2d 108, 115 (Iowa 1985); Vojak v. Jansen, 161 N.W.2d 100, 104 (Iowa 1968). Slander is defamation which does not constitute libel and typically involves verbal communications.

b. The Iowa court recognizes both libel per se and slander per se if the communication is defamatory on its face.

c. Under Iowa law, a communication is per se defamatory if it "is of such a nature, whether true or not, that the court can presume, as a matter of law, that [the statement's] publication will have a libelous effect." Vinson, 360 N.W.2d at 116. If a communication is clear and unambiguous, the court determines whether the statement had a libelous effect as a matter of law. The jury makes that determination if the effect of the communication is ambiguous. If either the court or the jury finds a communication is per se defamatory, the statements are then presumed to be malicious and false and are actionable without further proof. Vojak, 161 N.W.2d at 104. The plaintiff can recover without proving special damages. Common examples:

(1) a criminal offense, Restatement (Second) Torts § 571;
(2) a loathsome disease, Restatement (Second) Torts § 572;
(3) a matter incompatible with his business, trade, profession or office, Restatement (Second) Torts § 573; or
(4) serious sexual misconduct, Restatement (Second) Torts § 574.

3. The Iowa court has also recognized as defamatory per se communications that injure the integrity and moral character of a party. Shaw Cleaners & Dyers, Inc. v. Des Moines Press Club, 215 Iowa 1130, 245 N.W.231,234 (1932); McCuddin v. Dickinson, 226 Iowa 304, 283 N.W.886 (1939); Prewit v. Wilson, 128 Iowa 198, 203, 103 N.W. 365, 367 (1905). In Vinson v. Linn-Mar Community School District, the court concluded that an employer's statements accusing an

employee of falsifying her time cards were defamatory per se. Vinson, 360 N.W.2d at 116. The court failed to find a "meaningful distinction between accusing a person of being a liar and accusing a person of falsifying information." Id.

4. An employer's derogatory statements regarding an employee's ability to perform his job, or imputations of dishonesty or unethical practices made by the employer against the employee are defamatory per se. See Pappas v. Air France, 652 F. Supp 198 (E.D.N.Y. 1986) (statements made in corridor in presence of other employees accusing plaintiff of stealing was actionable defamation); Battista v. United Illuminating Company, 523 A.2d 1356 (Conn. App. 1987) cert. denied, 204 Conn. 802 and 803 (1987) (letter that employee tampered with his electric meter to pay lower electric charge was actionable defamation); Geyer v. Steinbronn, 506 A.2d 901 (Pa. Super. Ct. 1986) (employee who was not hired because his former employer told a prospective employer that he had been discharged for forging checks when in fact this was not true, stated actionable defamation); Loughry v. Lincoln First Bank, N.A., 502 N.Y.S.2d 965 (N.Y. Ct. App. 1986) (statements made in a meeting by the employee's manager accusing the employee of theft and drug use, were actionable for defamation). See also Anson v. Erlanger Min. & Met. Inc., 702 P.2d 393 (Okla. Ct. App. 1985); Supan v. Michelfeld, 468 N.Y.S.2d 384 (A.D. 1983); Kelly v. General Telephone Co., 136 Cal. App.3d 278, 186 Cal. Rptr. 184 (1982); Patton v. Royal Indus. Inc., 263 Cal. App.2d 760, 70 Cal. Rptr. 44 (1968).

5. The Elements of a Defamation Action.

   a. A communication is defamatory if the communication is (1) a "statement of fact" concerning another (2) published to a third person and (3) results in injury to that person's reputation or good name. A plaintiff need not prove the statement injured his reputation if the communication is per se defamatory.

   b. Statement of Fact. A communication is defamatory if it is a statement. Mere opinion, however, is usually not actionable. Underwood v. Digital Equip. Corp., Inc., 576 F. Supp. 213 (D. Mass. 1983) (blocks checked on a standardized form which indicated the employee was unsatisfactory and should not be rehired

constituted opinion and was not actionable. See also Hostettler v. Pioneer Hi-Bred Intern. Inc., 624 F. Supp. 169 (S.D. Ind. 1985) (exit interview form statements were innocuous and, therefore, not actionable).

c. Where, however, an employer tells a third person an employee is, in the employer's opinion, a thief, the employer has uttered a potentially defamatory statement even though the statement is technically an opinion. This is because the statement implies the employer is aware of specific instances, not known to the third person, when the employee took property the employee did not own. Such undisclosed facts, if false, are defamatory. The same analysis applies to employer statements concerning an employee's ability to perform a specific job. If an employer tells a third person a former employee is a poor worker, the employer has again uttered a potentially defamatory statement since the statement implies the employer is aware of instances when the employee's performance was less than satisfactory.

6. Publication to a Third Party.

A defamatory statement must be published to a third person. Restatement (Second) Torts § 558. Courts have held that intra-company communications constitute sufficient publication to be actionable as defamation. See e.g., Luttrell v. United Telephone System, Inc., 695 P.2d 1279 (Kan. 1985); Frankson v. Design Space Intern., 380 N.W.2d 560 (Minn. 1986), cert. granted, 380 N.W.2d 560 decision reversed in part on other grounds 394 N.W.2d 140 (Minn. Oct. 10, 1986) (statement dictated to secretary who typed a memo for the file and distributed memo to two company officers was "publication"); But see Wyant v. SCM Corp., 692 S.W.2d 814 (Ky. Ct. App. 1985) (internal report made by credit manager criticizing the employee's management of his department did not constitute "publication" because there was no evidence it was published to a third party); Thibodeaux v. Southwest La. Hosp. Ass'n., 488 So.2d 743 (La. Ct. App. 1986) (employer's investigation of theft by the employee which resulted in other employees becoming aware of the accusations, was not actionable defamation).

7. Self-Compelled Publication.

a. In recent years, the courts have begun to recognize an exception to this general publication rule in cases where the defamed individual is compelled to disclose a defamatory matter to a third person. This exception, referred to as the doctrine of compelled self-publication, is recognized by a growing number of jurisdictions, including Iowa. The doctrine of compelled self-publication arises within the employment context when an employer terminates an employee for a defamatory reason and the defamed employee later discloses that reason to a potential employer. Courts generally consider such self-publication compelled and, therefore, actionable.

b. Such a situation existed in Lewis v. Equitable Life Assurance Society, 389 N.W.2d 876 (Minn. 1986). In Lewis, four employees sued their former employer, Equitable Life Assurance, for defamation and for breach of contract. Equitable employed all four employees as "dental approvers" in its St. Paul office. The employees were terminated for "gross insubordination" because they refused to revise expense reports they prepared after returning from a business trip. Id. at 881. The company told the employees they were terminated for gross insubordination, but did not repeat this allegation to any other person. Equitable's policy was to give only the dates of employment and final job titles of former employees to prospective employers. Consistent with that policy, the company did not disclose to any third party the reason why it terminated each employee. Id. at 882.

c. Disclosure to third persons did, however, occur. During subsequent employment interviews, employers routinely asked plaintiffs why they left Equitable. The evidence established the employees answered the employers' inquiries truthfully and disclosed Equitable's stated reasons for their terminations. The employees also denied the validity of those reasons and attempted, to the best of their ability, to explain the situation. Each employee experienced difficulty in obtaining other employment because of the disclosure. Id. The court noted that "only one plaintiff

found employment while being completely forthright with a prospective employer about her termination." Id. Another plaintiff obtained employment even though she disclosed the reason for her prior termination during an employment interview. The plaintiff "misrepresented" the reason she left Equitable on her initial employment application, however. Id. The third plaintiff found employment after she failed to answer, on her application, a question regarding the reason why she left her last employment. The final plaintiff was unable to secure full-time employment. Id.

d. Recognizing what it termed a "narrow exception to the general rule that communication of a defamatory statement to a third person by the person defamed is not actionable", Id. at 886, the Lewis court held publication existed even though the employees, and not Equitable, communicated the alleged defamatory statements to prospective employers. Id. According to the court, each employee was "compelled to repeat the allegedly defamatory statement to prospective employers" and Equitable knew the employees "would be so compelled." While recognizing that its acceptance of the compelled self-publication doctrine expanded the scope of traditional defamation claims, the court noted that "cautious application" of the doctrine would eliminate many of the risks faced by employers.

e. The Iowa Supreme Court has not yet applied the doctrine of self-publication to an employment case. The court, however, adopted and applied the doctrine in Belcher v. Little, 315 N.W.2d 734, a slander of title to real estate case. The plaintiff in Belcher claimed the defendant, her former husband, maliciously and in bad faith, claimed an interest in property they owned prior to their divorce. Id. at 736. It was, however, undisputed that the defendant communicated his claim only to the plaintiff and her attorney and did not assert the claim in front of a third person. The defamatory title claim might have been published to a third party when plaintiffs sought financing from their local bank and were compelled to disclose the defendant's claim. Id. Adopting the same standard applied in Lewis, the court held publication existed if the

trier of fact determined the plaintiffs were "under a strong compulsion" to disclose the defendant's defamatory title claim and defendant "should have reasonably anticipated such disclosure would be made."

8. Privilege.

a. Courts recognize an absolute privilege for statements made in the course of official proceedings. See Watkins v. Laser/Print-Atlanta, Inc., 358 S.E.2d 477 (Ga. App. 1987) (warrant sworn out by employer against employee who was arrested on charges of terroristic threats and theft was absolutely privileged). This privilege has been applied to an employer's response to inquiries from the Equal Employment Opportunity Commission, Paros v. Hoemako Hospital, 681 P.2d 918 (Ariz. App. 1984). It also has been applied to inquiries from an unemployment insurance agency. Gordon v. Tenneco Retail Service Co., 666 F. Supp. 908 (N.D. Miss. 1987); Pappas v. Air France, 652 F. Supp. 198 (E.D.N.Y. 1986). Haldeman v. Total Petroleum, Inc., 376 N.W.2d 98 (Iowa 1985). But see Williams v. Taylor, 129 Cal. App.3d 745, 181 Cal. Rptr. 423 (1982) (only a qualified privilege was extended to statements made to the Maryland Employment Security Administration).

b. The Iowa Supreme Court held in Haldeman v. Total Petroleum, Inc. that a statement made by the defendant in a termination form filed with Iowa Job Service was absolutely privileged because Iowa's unemployment compensation statute expressly immunized such statements from libel and slander actions. While the court did not address the issue of whether such statements were entitled to an absolute privilege under general common law principles, other jurisdictions have, however, applied an absolute privilege to statements absent express statutory immunity.

c. Qualified Privilege.

(1) A defamatory statement is conditionally privileged if the statement is communication among persons with a mutual interest in the statement's subject matter or if the person making the statement has a

duty or obligation to disclose the statement to a third party. The Iowa Supreme Court has listed the following elements of a conditionally privileged statement: (a) good faith; (b) an interest to be upheld; (c) a statement limited in its scope to serving that trust; (d) a proper occasion; and (e) a publication in a proper manner and to proper persons. The privilege is not, however, as limited as it might appear. The court has recognized that the qualified privilege "arises from the necessity of full and unrestricted communication concerning a matter in which the parties have an interest or duty, and is not restricted within narrow limits."

(2) If a defendant proves a defamatory statement is conditionally privileged, then the plaintiff must prove the statement was made with actual malice. Whether actual malice is present depends upon the motive for, or intention of, the statement. Statements to management officials, supervisors and foremen concerning an employee's work performance are usually conditionally privileged because the employer and those receiving the information have a shared interest in knowing how employees are performing.

(3) In contrast, employer communications concerning an employee's work performance might not receive the same privileged status if the statements are published to non-management employees or to the general public.

(4) The Iowa Supreme Court held no qualified privilege existed in Brown v. First National Bank of Mason City, 193 N.W.2d 547 (Iowa 1972). In that case, the plaintiff, a former employee, sued the defendant bank alleging that two stories which appeared in the local newspaper defamed her. The articles reported the bank experienced a series of cash shortages and that the bank was undergoing an investigation to "clear all innocent employe[e]s (sic) of any blame or involvement". Id. at 550. In the latter

of the two articles, the bank's president was quoted as saying some employees were not working because "the bonding company withdrew their bonds." Id. at 550. The plaintiff, an employee whose bond was withdrawn, claimed the articles, while not identifying her by name, were defamatory because they accused her "of embezzlement and falsely imputed to her improper conduct in her trade or business." Id. at 551.

(5) The bank maintained the statements were conditionally privileged but the trial court refused to submit the issue of qualified privilege to the jury. The Iowa Supreme Court affirmed and held that the president's statements to the newspaper were not privileged because there was not a "valid interest on the part of the general public which necessitated or justified the making of the statements by the defendant for publication." Id. at 552. The court observed that nothing in the final record indicated any depositors were so concerned about the cash shortage that a disclosure to the general public was warranted.

(6) References. Employer communications to non-employee third parties can be conditionally privileged provided the employer has an interest in disclosing the information to the third party and the third party has an interest in knowing the information. Within the employment context, employer communications to third parties typically concern employment references. A prospective employer calls a former employer and requests information about a job applicant. Courts generally hold disclosure of defamatory information by an employer concerning a former employee's work performance is privileged and not actionable absent proof of actual malice. The Iowa Supreme Court reached such a conclusion in Haldeman v. Total Petroleum, Inc., 376 N.W.2d 98 (Iowa 1985). The court held, with little discussion, that a statement by the defendant that the plaintiff was discharged "due to the company's policy

of discharging all employees on a shift when a shortage occurs" was qualifiedly privileged because it was a statement about a former employee made to "one having a legitimate interest in the information". Id. at 103.

(7) An employer can, however, abuse a qualified privilege and lose its protection if it says more than is necessary to protect the interests involved or if the employer publishes the statement to third persons beyond the ambit of the privilege. Where both parties and the subject matter of the statement are covered by the privilege, "excessive statement" is only relevant to the issue of actual malice.

VII. Preemption of Wrongful Discharge Claims and Related Torts.

A. ERISA.

1. Wrongful discharge and related actions may be preempted by ERISA. See Coontz v. Gordon Jewelry Corp., 439 N.W.2d 223 (Iowa App. 1989).

2. ERISA, § 514(a), 9 U.S.C. § 1144(a) provides:

> Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in Section 4(a) and not exempt under Section 4(b).

3. The Supreme Court has given a broad reading to the preemption provision. See Shaw v. Delta Airlines, Inc., 463 U.S. 85, 907 (1983) (preemption not limited to state laws directed at benefit plans; law "relates to" benefit plan if it "has a connection or reference to such a plan."); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985) ("[t]he preemption provision was intended to displace all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements.")

4. Severance Plans. Without regard to degree of formality, severance pay practices and programs are covered by ERISA. ERISA §§ 1002(1), 186(c); 29 C.F.R. § 2510.3-2(b); Donovan v. Dillingham, 688

F.2d 1367, 1370-73 (11th Cir. 1982) (en banc) (ERISA covers informal severance plan); Scott v. Gulf Oil Corp., 754 F.2d 1499, 1503-4 (9th Cir. 1985) (plan was "established" although not in writing).

5. Consequences of ERISA Coverage.

a. Exhaustion. An employer properly providing appeal provisions within a severance plan conforming to ERISA may assert that administrative remedies must be exhausted before pursuit of civil actions. Wolf v. National Shopmen Pension Fund, 728 F.2d 182, 185-191 (3d Cir. 1984); Amato v. Bernard, 618 F.2d 559, 566-69 (9th Cir. 1980). The plaintiff may avoid the exhaustion requirement only on a demonstration of irreparable harm, futility of resorting to administrative remedies, or denial of meaningful access to the plan's appeal procedures. See Tomczyscyn v. Teamsters, Local 15 Health and Welfare Fund, 590 F. Supp. 211, 213 (E.D. Pa. 1984).

b. Standard of Review. An "arbitrary and capricious" standard was traditionally used in reviewing trustee's actions. The Supreme Court recently engaged in de novo review. Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989).

B. Preemption of Employment Claims under the National Labor Relations Act.

1. Preemption by the National Labor Relations Act.

a. Where the conduct alleged as the basis of a state tort claim might form the basis of an unfair labor practice charge under Section 8 of the National Labor Relations Act, the federal act generally preempts the state tort claim. See Local 926, Operating Engineers v. Jones, 460 U.S. 669, 103 S. Ct. 1453 (1983); San Diego Building Trades Council v. Garmon, 359 U.S. 236, 79 S. Ct. 773 (1959).

b. Similarly, where a state tort suit is based on facts closely connected with a collective bargaining agreement or grievance procedure, the suit is preempted because of the congressional policy favoring arbitration of disputes

under collective bargaining agreements. Bell v. Union Carbide Corp., 582 F. Supp. 824 (E.D. Tenn. 1984); Magnuson v. Burlington Northern, Inc., 576 F.2d 1367 (9th Cir. 1978), cert. denied, 439 U.S. 930, 99 S. Ct. 318 (1978).

2. Preemption by § 301 of the Taft-Hartley Act.

   a. Claims of an employee covered by a collective bargaining agreement may be preempted by § 301 of the Labor Management Relations Act. In such a case the grievance procedure of the collective agreement is the employee's exclusive remedy. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985) (§ 301 preempts state tort claim alleging breach of a duty that arose out of contractual relationship); Scott v. Machinists Automotive Trades D. Lodge 190, 827 F.2d 589 (9th Cir. 1987).

   b. Consequences of preemption: (1) internal grievance procedures must be exhausted, Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 563 (1976); (2) the six month limitation period may apply, Del Costello v. Int'l Brotherhood of Teamsters, 462 U.S. 151 (1983); (3) arbitration awards will be accorded binding effect, W.R. Grace & Co. v. Local 759, 461 U.S. 757 (1983); and (4) no punitive damages are allowed. Vaca v. Sipes, 386 U.S. 171 (1967).

3. Claims affected.

   a. Defamation. Defamation claims arising out of collective bargaining agreements may be preempted by the National Labor Relations Act. Tucker v. Cincinnati Bell Telephone Company, 506 N.E.2d 944 (Ohio App. 1986) (defamation claim arising out of employer's marking of employee's employment record "discharged because of inadequate performance" was preempted by the National Labor Relations Act). But see Tellez v. Pacific Gas and Electric co., 817 F.2d 536 (9th Cir. 1987) cert. denied, 484 U.S. 908 (1987) (defamation claim relating to suspension letter charging employee with purchasing drugs on the job was not preempted by the NLRA); Krasinski v. United Parcel Service, Inc., 508 N.E.2d 1105 (Ill. App. 1987) appeal allowed, 116 Ill. 2d 559 (1987) (defamation claim alleging

employer's statements that employee feloniously stole chain saw was not preempted by the NLRA). See also Linn v. United Plant Guard Workers, 383 U.S. 53 (1966) (defamation claim against union during organizational campaign not preempted).

b. Wrongful Discharge. See Costello v. UPS, 617 F. Supp. 123, 124 (E.D. Pa. 1984), aff'd without op., 774 F.2d 1150 (3d Cir. 1985); Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367 (9th Cir. 1984), cert. denied, 471 U.S. 1099 (1985).

c. Retaliatory Discharge. Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399 (1988). Claim for retaliatory discharge, on grounds prohibited by workers' compensation statute, not preempted under § 301 because not dependent "on the meaning of any provision of a collective bargaining agreement"; there may be state law-based rights and remedies that "although non-negotiable, nonetheless [turn] on the interpretation of the collective bargaining agreement" and these would be preempted under § 301. In Conaway v. Webster City Products Co., 431 N.W.2d 795 (Iowa 1988), the court held retaliatory discharge claim was not preempted, relying on Lingle.

d. Infliction of Emotional Distress. Magnuson v. Burlington Northern, Inc., 576 F.2d 1367 (9th Cir.), cert. denied, 439 U.S. 930 (1978).

C. Preemption by Iowa's Worker Compensation Statute.

1. Courts from other jurisdictions have held employment related claims preempted by workers' compensation statutes. See e.g., Cole v. Fair Oaks Fire Protection Dist., 43 Cal.3d 148, 233 Cal.Rptr. 308 (1987) (intentional infliction of emotional distress claim barred by exclusivity of workers' compensation law when claim is based upon conduct "normally occurring in the workplace"); Flynn v. New England Telephone Co., 615 F.Supp. 1205 (N.D. Mass. 1985) (claim by former employee for intentional infliction of emotional distress barred by Massachusetts workers' compensation act).

2. Some courts have determined that workers' compensation provisions preempt only emotional distress claims that result in "disabilities" that are

covered by workers' compensation, but does not preempt emotional distress that does not result in such disability. See Jones v. Los Angeles Community College, 198 Cal. App.3d 794, 244 Cal.Rptr. 37 (1988); Spulak v. K-Mart Corp., 664 F.Supp. 1395 (D. Colo. 1985).

3. Other courts reject this preemption defense. See Ford v. Revlon, Inc., 734 P.2d 580 (Ariz. 1987); Wolber v. Service Corp. Int'l, 612 F. Supp. 235 (D. Nev. 1985).

4. There are not any reported decisions dealing with Iowa Code Chapter 85.

D. Iowa Preemption Decisions.

1. In Northrup v. Farmland Industries, Inc., 372 N.W.2d 193 (Iowa 1985), the court affirmed summary judgment for the employer on wrongful discharge and tortious infliction of emotional distress claims. The plaintiff alleged he was terminated for alcoholism. The court, noting that Consolidated Freightways, Inc. v. Cedar Rapids Civil Rights Commission, 366 N.W.2d 522 (Iowa 1985) held that alcoholism was a "disability" under the Iowa Civil Rights Act, ruled that the Act's procedures were exclusive.

2. Woodruff v. Associated Grocers of Iowa, 364 N.W.2d 215 (Iowa 1985) held that an arbitration award upholding termination barred plaintiff's wrongful discharge claim.

3. In Coontz v. Gordon Jewelry Corp., 439 N.W.2d 223 (Iowa App. 1989), the court held that a former employee's wrongful discharge action was preempted to the extent it involved claims referring to the employer's benefit plan.

4. Conaway v. Webster City Products Co., 431 N.W.2d 795 (Iowa 1989): retaliatory discharge action was not preempted by § 301 of LMRA because it doesn't involve interpretation of collective bargaining agreement.

5. Brown v. Garman, 364 N.W.2d 566 (Iowa 1985) contains a good discussion of preemption principles. In Brown, a black union member brought suit against union officials for interference with contract and intentional infliction of emotional distress. The court held the interference with contract claim was

preempted by the NLRA but the emotional distress claim was not. The court further held that Section 301 of LMRA was not applicable to the common law claims alleged by Brown.

6. Walles v. Int'l Brotherhood of Electrical Workers, 252 N.W.2d 701 (Iowa 1977) (preemption found proper).

7. Langrehr v. United Brotherhood of Carpenters, 236 N.W.2d 339 (Iowa 1975) (preemption found proper).

8. Hollander v. Peck, 261 N.W.2d 507, 510 (Iowa 1978) (request for damages found to state arguable unfair labor practice under NLRA and was therefore pre-empted).

9. In Hamilton v. First Baptist Elderly Housing, 436 N.W.2d 336, 337, 339 (Iowa 1989), an apartment building janitor alleged she was discharged because of sex discrimination. she and her husband had been hired together as a team. When he was fired for misconduct, the plaintiff was let go because the team concept of their employment had broken down. The court found this was a legitimate, non-discriminatory reason for the plaintiff's discharge, and the plaintiff lost on her claim of sex discrimination, even though she had established a prima facie case. As an alternative theory of recovery, the plaintiff alleged that her discharge violated public policy. The court found that this claim was based on the same facts the plaintiff advanced in support of her discrimination claim. Because Iowa Code Chapter 601A pre-empts independent common law actions also premised on discrimination, the plaintiff lost on this count as well.

10. In Greenfield v. Fairtron Corp., 500 N.W.2d 36, 37 (Iowa 1993), an employee brought actions against her employer for sexual harassment, emotional distress and assault and battery. In her petition, the plaintiff alleged that a managerial employee subjected her to crude and demeaning language that included graphic descriptions of fantasized sexual conduct and the circulation of false rumors regarding a meretricious relationship. the plaintiff also alleged that the manager touched her inappropriate on six occasions. The issue in the case was the extent to which Iowa Code Chapter 601A, under which the plaintiff brought her sexual harassment claim, pre-empted her other claims.

a. Citing Grahek, 473 N.W.2d at 34, and Vaughn, 459 N.W.2d at 639, the court stated the pre-emption occurs unless the claims are separate and independent, and therefore incidental causes of action. If the other non-chapter 601A claims require proof of discrimination, they are not separate and independent. The test is whether, in light of the pleadings, discrimination is made an element of the alternative claims.

b. Because discrimination through sexual harassment was the "outrageous conduct" the plaintiff alleged in her claim for emotional distress, this claim was pre-empted by Chapter 601A. If the plaintiff were to fail to prove her claim of discrimination, she would necessarily fail her claim for intentional infliction of emotional distress. Under the same test, the plaintiff's claims for assault and battery were not pre-empted. "The assault and battery claims . . . [were] complete without any reference to discrimination.

VIII. Recommendations for Employers.

A. Introduction. Employers can reduce the risk of wrongful discharge and tort exposure through proper training and planning. Some preventative measures are outlined below.

B. Handbook Disclaimers. Simple disclaimer language in a handbook or manual may avoid contractual liability.

1. Judicially "approved" disclaimers:

a. Castiglione v. Johns Hopkins Hosp., 1 I.E.R. 1374, 1375 (Md. Ct. App. 1986):

> Finally, this handbook does not constitute an express or implied contract. The employee may separate from his/her employment at any time; the Hospital reserves the right to do the same.

b. Courtney v. Canyon TV Rental, 3 I.E.R. 619 (D.C. Haw. 1988):

> LEGAL STATUS OF THIS HANDBOOK
> This employee handbook does not represent contractual terms of

employment. It is, rather, an explanation of employment policy subject to change by Canyon. No change in employment policy will be effective unless it is executed in writing by an authorized Canyon representative. Employment at Canyon is at will. That is, either you or Canyon may terminate the employment relationship at any time, with or without cause. The at will relationship remains in full force and effect notwithstanding any statements to the contrary made by company personnel or set forth in any documents.

c. Bailey v. Perkins Restaurants, Inc., 398 N.W.2d 120, 123 (N.D. 1986):

> DISCLAIMER
> This employee handbook has been drafted as a guideline for our employees. It shall not be construed to form a contract between the Company and its employees. Rather, it describes the Company's general philosophy concerning policies and procedures.

d. Perry v. Sears, Roebuck & Co., 508 So.2d 1086 (Miss. 1987):

> EMPLOYMENT RIGHTS NOT IMPLIED. Participation in the plan does not give you the right to be retained in the employ of Sears, nor does it interfere in any way with the right of the company to discharge or terminate you at any time without regard to the effect such discharge or termination may have on your rights under the plan.

2. Disclaimers in applications may be adequate. See Forbes v. Hotel Inter-Continental Maui, 2 I.E.R. 833 (D. Haw. 1987).

3. Disclaimers should be "prominent" or "conspicuous." Otherwise, employers may be at the mercy of judicial interpretations of "promises" of employment. See e.g., Fitzgerald v. Norwest Corp., 382

N.W.2d 290 (Minn. 1986) review denied by 4/24/88 (language in employment manual which strongly encouraged employees to accept employment because the employer was an "equal opportunity employer," raised a jury question of whether this constituted an offer of job security).

C. Other Steps to Prevent Handbook Claims.

1. Review all writings.

2. Employee Handbooks should be examined:

a. Should a handbook be used and if so, must terminations be dealt with at all?

b. Who should be given the handbook?

c. Draft termination provisions carefully and include disclaimers.

d. Avoid "probationary periods." Some courts have construed the traditional probationary period in which the employer reserves the right to fire during the first thirty to ninety days of employment with or without cause as implying that the employer can only fire for cause thereafter.

e. Consider using a removable disclaimer to be signed by each employee:

> I hereby acknowledge receipt of the Company's Employee Handbook. I agree, as specified in the Employee Handbook, that my employment with the Company may be terminated at any time, with or without cause, by the Company or by me. I understand that no one at the Company has authority to make any arrangement with me contrary to the foregoing.

3. "Undoing" a Cannon-like Handbook.

Some courts hold an employer may "modify" handbooks that have created "expectations" if the employees receive reasonable notice. See In re Certified Question Bankey v. Storer Broadcasting Co., 443 N.W.2d 112 (Mich. 1989) (employer may alter personnel policies). Even Cannon held modifications

without additional consideration were possible. 422 N.W.2d 638 at 641.

D. Fraud and Misrepresentation.

1. Many employees have brought causes of action claiming that they were fraudulently induced into employment with promises of job security, wages or other benefits of employment.

2. The best way to avoid liability for fraudulent misrepresentation is to train recruiters and interviewers. They should be briefed on the potential that their representations may later bind the employer to a contract. They should be admonished not to overemphasize job security or other benefits.

3. The employer should keep the elements of the misrepresentation cause of action in mind during the hiring process; the gist of the tort is that a promise is made with the knowledge that the employer did not intend to honor it. The tort commonly arises when recruits or applicants are promised job security, salary increases or other benefits or incidents of employment. Employers should adopt a uniform standardized outline of procedures for interviewers to ensure that the facets of employment are covered while at the same time discouraging interviewers from making promises regarding career opportunities, future compensation, or expected job benefits or duties.

4. Employers may wish to allocate interview responsibility between personnel professionals and other managers, allowing only personnel officials to discuss company personnel management policies. An employer should consider ending each interview by having a personnel professional ask the applicant if any promises were made during the interview process. The applicant's response should be documented and any promises that were made should be tactfully disclaimed.

5. Finally, employers should consider using a specific disclaimer of job security as part of the application process. Courts have found that disclaimer language contained in job applications may prevent an employee from claiming a contractual right to job security. In Novosel v. Sears Roebuck & Co., 495 F. Supp. 344 (E.D. Mich. 1980), the court found that the following language on the application form

prevented a terminated employee from claiming a contractual right to job security:

> "In consideration of my employment, I agree to conform to the rules and regulations of Sears Roebuck & Co., and my employment and compensation can be terminated, with or without cause, and with or without notice, at any time, at the option of either the Company or myself. I understand that no store manager or representative of Sears Roebuck & Co., other than the President or Vice-President of the Company, has any authority to enter into any agreement for employment for any specified period of time, or to make any agreement contrary to the foregoing."

6. Similarly, an employer may wish to use a hiring letter which would disclaim any promises made during the recruitment process as well as delineate the terms of the employment-at-will relationship.

E. Performance Evaluation and Employment File Maintenance.

1. Employee performance appraisals are vital personnel management tools. In addition, an effective performance appraisal system, together with a thorough documentation of employee performance, may be a potent weapon in defending wrongful termination, discrimination, and other employment tort claims. A well-managed appraisal system may provide a defendant-employer with convincing evidence that it acted deliberately and fairly in a particular instance. However, as noted above, the negligent implementation of an employee performance appraisal may give rise to tort liability.

2. Thus, the employer should be advised that if it undertakes to conduct employee performance appraisals, it should resolve to dedicate the time and energy necessary to do them right. In many cases, employees have complained that terminations were unfair when based on performance deficiencies which could have been, but were not, recognized and properly communicated to the employee.

3. The employer should consider using multiple managers to rate employees. Many of the tort cases brought by employees claiming intentional infliction of emotional distress have centered on the

allegedly uncontrolled acts of a particular manager. Involvement of a second manager in the appraisal process reduces the employer's vulnerability to a charge that the entire process was tainted and unfair.

F. Discipline and Terminations.

1. Progressive discipline should be considered. But reserve management's right to terminate for first offense misconduct if the serious nature of the offense justifies it.

2. Give specific criticisms, notice and opportunity to improve.

3. Employee shortcomings should be discussed only on a "need to know" basis.

4. Termination decisions should be reviewed by multiple managers.

G. Separation Agreement.

Consider using a separation agreement in appropriate cases.

1. It must be knowing and voluntary.

2. Additional consideration is required.

H. Job Inquiries and References.

Job inquiries and references: Employers should abide by the "name, rank and serial number" rule. Generally, they should disclose only: (1) the fact of employment; (2) the dates of employment; and (3) the positions held. Providing more information unnecessarily risks defamation, invasion of privacy, or other litigation.

The limited information or "name, rank and serial number" rule should be explained as a matter of "company policy" to preclude any unfavorable inferences.

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WORKERS' COMPENSATION UPDATE

and

STRESS AND PSYCHOLOGICAL CLAIMS

AFTER MORTIMER v. FREUHAUF

J

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PART I. WORKERS' COMPENSATION UPDATE.

A. SUPREME COURT.

1. ***Sourbier v. State,*** 498 N.W. 2d 720 (Iowa 1993).

The claimant sustained an injury arising out of and in the course of his employment and received weekly and medical benefits totaling $21,920.92. He filed a third party action and received an award for past and future medical expenses, past and future loss of earnings, past and future loss of function of the body and past and future pain and suffering. The claimant was found to be 20% at fault and judgment was entered in the amount of $17,780.80. The issues in the case were: whether the employer's right to indemnification extended to the award for pain and suffering and medical expenses not awarded by the jury and whether there ought to be a reduction in the employer's indemnification right for the claimant's comparative fault.

The court held that since the employer had a subrogation right equal to that of the injured worker under Iowa Code Section 85.22, the indemnification provision of that section of the law imposes a lien on the amount recovered by the employee for pain and suffering. The court also concluded that there was a lien on medical expenses actually paid by the employer. However, the lien was not reduced by the comparative fault of the injured worker.

2. ***Arrow-Acme Corporation and National Union Fire Ins. Co. v. Bellamy,*** 500 N.W. 2d 92 (Ia. App. 1993).

The claimant sustained two work related injuries at two separate times but returned to work for the same employer in between and after the injuries. The claimant was found to have a

5% permanent partial disability as a result of the two injuries.

The Court rejected the employer's contention that the claimant's continuous employment with the employer bars an entitlement to industrial disability benefits. The court discussed the operative phrase "loss of earning capacity" and stated that an injured worker may earn a higher wage after the injury than before and still be entitled to permanent partial disability benefits.

3. ***Walsh v. Schneider National Carriers,*** 497 N.W. 2d 895 (Iowa 1993).

The Court upheld the Industrial Commissioner's right to dismiss a petition for benefits when the party failed to comply with orders issued by the commissioner. The Court did not comment on the Industrial Commissioner's sanction power (i.e. cutting off evidence and activity).

4. ***Venenga v. John Deere,*** 498 N.W. 2d 422 (Ia. App. 1993).

The industrial commissioner found claimant sustained a work-related injury to his low back on October 27, 1986. On that date claimant, as a reasonable person, had within his knowledge sufficient facts to recognize that his back condition was serious and work-related. The court of appeals reversed the decision of the agency. It found that when claimant was hospitalized in October 1986 he had no compensable workers' compensation claim.

The Court found more was required than knowledge of an injury or receipt of medical care. The employee must realize his or her injury will have an impact on employment. The Court also found

that the 90-day notice requirement is adequately served by requiring the employee to notify the employer within ninety days of the day the employee becomes aware that the injury impacts his or her employment. (Summary by the Industrial Commissioner.)

5. ***Kostelac v. Feldman's Inc.,*** *497 N.W. 2d 853 (Iowa 1993).*

The claimant's decedent committed suicide and alleged to the industrial commissioner that work stressors caused decedent's demise. The commissioner issued his decision denying benefits on the basis of *Schofield v. White,* 250 Iowa 571, 95 N.W. 2d 40 (1959) and Iowa Code Section 85.16(1).

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In considering under what circumstance, if any, suicide will trigger compensation benefits, the court rejected its prior holding in *Schofield* in favor of the test of chain of causation, used in the majority of jurisdiction. That test allows recovery upon proof of a chain of causation directly linking an employment injury to a worker's loss of normal judgment and domination by a disturbance of mind, causing the suicide.

The court declined to rule on whether a mental injury, standing alone (mental-mental) is sufficient to give rise to a claim for compensation benefits.

The court upheld the industrial commissioner's denial of benefits, notwithstanding the change in the law, on a substantial evidence test.

6. *Ottumwa Housing Authority v. State Farm Fire,* 495 N.W. 2d 723 (Iowa 1993).

A contract covering workers' compensation did not insure against claims of sex discrimination.

B. IOWA INDUSTRIAL COMMISSIONER DECISIONS.

1. *Sioson v. Manpower Temporary Services,* File No. 998928 (Alt. Med. Care Decn. Jan. 15, 1993).

In an action under an Application for Alternate Medical Care, insurer was order to pay for the total cost of purchasing, repairing, insuring and maintaining a specially equipped van for quadriplegic confined to an electric wheelchair. The deputy held that the use of a specially equipped ban was a medical necessity to ensure safe transportation and just as necessary as the wheelchair. The van was awarded because, in part, the claimant had not previously required the use of a vehicle.

2. *Carsner v. Rochwell Goss,* File No. 940690 (Mar. 29, 1993).

The claimant obtained permission to leave work early. When he approached the gate, the guard was not at his station. When an attempt to open the gate failed, the claimant scaled the fence and injured his knee. It was held that the knee injury arose out of and in the course of claimant's employment.

3. *Webb v. Lovejoy Construction Co.,* File No. 474988 (Nov. 19, 1992).

Claimant's first attorney secured for claimant an award of 25% industrial disability benefits after numerous appeals. Claimant

later retained another attorney and settled his claim on a full commutation equal to an industrial disability of 95%. Claimant first attorney was awarded 33% of the 70% increase in benefits (25 to 95%) on the basis that this attorney's efforts on claimant's behalf established an injury arising out of employment and that this constituted 80% of the later commutation settlement.

4. ***Peek v. Super Valu,*** File No. 910511 (Mar. 10, 1993).

Defendants overpaid the claimant approximately $44,000 on an injury. When the claimant sustained a second injury, defendants refused to pay any benefits, claiming credit for the previous payments. Claimant, in addition to seeking weekly benefits, sought penalty benefits.

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The commissioner denied defendants credit as there is no provision for such credit. However, penalty benefits were denied as the defendants' refusal to pay was reasonable as the claim was fairly debatable.

5. ***Debose v. Process Mechanical, Inc.,*** File No. 889569 (Feb. 22, 1993).

An ability to support oneself is not a factor in determining industrial disability. A worker may not be earning sufficient wages to support him or herself prior to suffering an injury, and thus assessing whether the injury has resulted in a inability to support oneself after the injury is not a proper part of the evaluation. Earnings before and after the injury are relevant, and the worker's ability to compete in the job market before and after the injury is a part of industrial disability. But whether the

wages a worker is capable of earning are of a level to support the worker, at some unknown level of lifestyle, is not an appropriate factor of industrial disability per se. (Summary by the commissioner.)

6. ***Elliot v. Firestone Tire & Rubber Co.,*** File No. 912957 (Feb. 26, 1993).

Termination from employment after an injury based on falsification of the employment application was not used as a factor in determining industrial disability so long as the policy is uniformly applied to all individuals who falsify their employment applications.

J

7. ***Hoch v. Bridgestone/Firestone,*** File Nos. 956038, 976617 (Jan. 29, 1993).

No first report of injury was filed with the industrial commissioner prior to the hearing commencing as ordered by the hearing assignment order. Defendants' evidence and activity was cut off.

PART II. PSYCHOLOGICAL INJURIES.

A. COMMON DISABILITY LITIGATION CATEGORIES.

It is recognized by most, if not all professionals, that there are four basic types of disability claims. Herbert Lasky in *Psychiatric Claims in Workers' Compensation and Civil Litigation* discusses them as:

1. Purely psychological or mental-mental claims. An example

of this type of claim is where the employee feels mistreated by a supervisor and suffers emotionally as a result. See, e.g. *Kuhl v. Iowa Medical Classification Center,* Arb. Decision filed July 18,1991. This type of claim will ordinarily involve one of the anxiety disorders or possibly an adjustment disorder with depressed mood.

2. Pure Emotional stress claims which cause physical problems such as heart attacks or ulcers. The *Diagnostic and Statistical Manual of Mental Disorders* (DSM-III) calls such disorders "Psychological Factors Affecting Physical Condition."

3. Physical injury which leads to a psychological claim commonly referred to as "functional overlay." The DSM-III uses the general category "Codes for Conditions Not Attributable to a Mental Disorder that Are a Focus of Attention or Treatment."

4. Lasky's fourth category is one in which there is a substantiated traumatic physical disability with additional but allegedly related psychological effects such as a person who sustains a back injury and in addition appears to exhibit a major affective disorder such as major depressive episode.

The disorders that parties generally will see in litigation are:

1. Major Depression.

2. Post-Traumatic Stress Disorder.

3. Generalized Anxiety Disorder.

4. Somatoform Pain Disorder.

5. Personality Disorders.
- **A. Paranoid**
- **B. Schizoid**
- **C. Schizotypal**

D. Histrionic
E. Narcissistic
F. Antisocial
G. Borderline
H. Avoidant
I. Dependent
J. Obsessive-Compulsive
K. Passive-Aggressive

The first 4 disorders mentioned are referred to as Axis I diagnoses which can be caused by an injury. The 5 personality disorders are Axis II diagnoses which can be aggravated by an injury. A personality disorder is defined by the DSM as a maladaptive syndrome that causes distress or disability and is a lifelong condition generally recognizable by adolescence or earlier.

J

B. IOWA LAW IN WORKERS' COMPENSATION.

1. INJURY.

An injury under Iowa's workers' compensation statute is very broadly defined in *Almquist v. Shenandoah Nurseries, Inc.*, 218 Iowa 724, 254 N.W. 2d 35 (1934) as:

> An injury to the body, the impairment of health, or a disease, not excluded by the act, which comes about, not through the natural building up and tearing down of the human body, but because of a traumatic or other hurt or damage to the health or body of an employee. [citations omitted.] The injury to the human body here contemplated must be something, whether an accident or not, that acts extraneously to the natural processes of nature, and thereby impairs the health, overcomes, injures, interrupts, or destroys some function of the body, or otherwise damages or injures a part of all of the body.

No accident or unusual occurrence must occur for there to be a

compensable injury. This, therefore, leaves the door wide open for a claim for psychological injury. In addition, once an injury has occurred and is found to be compensable, the employer and insurance carrier are responsible for all consequences that naturally and proximately flow from the accident. Psychological problems may be such a natural consequence.

2. PSYCHOLOGICAL PROBLEMS AS A RESULT OF PHYSICAL TRAUMA.

It is well recognized that a traumatically induced psychological injury is compensable in Iowa as well as in most other jurisdictions. *Leffler v. Wilson & Co.*, 320 N.W. 2d 634 (Iowa App. 1982); *Dever v. Armstrong Rubber Co.*, 170 N.W. 2d 455 (Iowa 1969). Also, see, generally, IB *Larson's Workmen's Compensation Law*, Section 42.20. However, the manner in which they are compensable may be changing.

J

The Industrial Commissioner has long held that an employee who sustains an injury to the body as a whole, with or without a psychological component, will be compensated industrially. Needless to say, the psychological component, if causally connected to the injury, can and often does have a significant impact on the final award of industrial disability and will also affect the settlement value of the case.

However, the Commissioner has also held that a worker who sustains a scheduled injury, with or without a psychological component, will be compensated according to the schedule. That is, the schedule <u>includes</u> any loss as a result of psychological

problems stemming from the injury and does not take the injury out of the schedule. Although the employee is entitled to medical treatment for the psychological problems, psychological injuries related to a scheduled loss are compensated solely by the schedule.

The Iowa Supreme Court changed all this with its decision in *Mortimer v. Freuhauf,* 502 N.W. 2d 12 (Iowa 1993). This case could eliminate the schedule all together as the Court considered the issue of whether claimant's depressive disorder (which probably keeps the claimant from engaging in gainful employment) makes his scheduled injury to the foot an injury to the body as a whole entitling claimant to permanent partial disability benefits based on an industrial disability.

J

Throughout a series of decisions, the Court consistently recognized the unfairness in the compensation of scheduled injuries but has refused to legislate any changes. *See, e.g., Graves v. Eagle Iron Works,* 331 N.W. 2d 116 (Iowa 1983) *and Moses v. National Union Mining Co.,* 194 Iowa 819, 184 N.W. 746 (1921). In *Mortimer* the court held that a psychological condition caused or aggravated by a scheduled injury is to be compensated as an unscheduled injury.

3. PHYSICAL PROBLEMS AS A RESULT OF STRESS OR MENTAL STIMULUS.

Physical problems as a result of stress generally manifest themselves in the form of heart attacks or end in suicide.

a. Heart Attacks.

1. Pre-existing heart conditions.

The legal standard for compensability of a heart attack where

the heart is previously weakened or diseased has long been established. *Sondag v. Ferris Hardware*, 220 N.W. 2d 903 (Iowa 1974). Compensability is allowed when medical testimony shows an instance of unusually strenuous employment exertion or when the employment contribution takes the form of an exertion greater than that of nonemployment life. The comparison is not with the particular employee's usual exertion in his employment, but with the exertions of normal nonemployment life of the employee or any other person. Exertion, within the meaning contemplated by the *Sondag* test, applies to mental stress as well as physical stress.

There is an interesting discussion of work related stress as a cause of a claimant's heart attack in *Tatzer v. Cooper Tire & Rubber Co.*, (Arb. Decision filed Jan. 4, 1990). The decision was appealed and later settled. The deputy stated:

> The standard for comparison is not particularly definite. There are those individuals who, in their nonemployment life, run in marathons, rebuild their homes, mow lawns, shovel snow, play tennis and engage in a number of forms of quite substantial exertion. On the other hand, there are those who live in apartments or condominiums and do nothing more strenuous than walk on what is essentially level ground between the front door of their home and their vehicle, never carrying more than a few pounds of weight at any time. With regard to emotional stress, there are some individuals who live a very complacent life off the job. They get along well with their spouse and even get along well with their in-laws. Other individuals live in a state of constant turmoil with ongoing altercation with the neighbors, harassment from bill collectors, and a great deal of domestic discord....
>
> Sales is certainly a stressful occupation. A successful salesman is usually quite highly motivated and competitive. Claimant seems to fit that description quite well....Salesmen do not generally seem to be adversely affected by the stress when they are successful. It is when things are not going well that stress seems to take its toll....

J

> The physicians all seemed to agree...that stress can produce a myocardial infarction. Those who work in occupation which present a high risk of physical injury are not denied compensation for those injuries due to the fact that 'it goes with the territory.' There is likewise no reason to deny workers' compensation for stress-induced injuries where the individual has worked in an occupation which is inherently stressful.

2. No pre-existing condition.

In situations where these is no personal risk element whatsoever, the actual risk doctrine or even positional risk doctrine should be applied. Any employment contribution, even merely putting the employee in a place where the injury from a neutral force occurred, is enough to satisfy legal causation.

J

Rare is the case, however, where there will not be evidence of a pre-existing condition, even if the condition was asymptomatic prior to the work incident.

b. Suicide.

In *Schofield v. White*, 250 Iowa 571, 95 N.W. 2d 40 (1959) the Court held:

> Claimant having pleaded and proved suicide must get around the statutory provision that compensation shall not be allowed for an injury caused by the employee's willful intent to injure himself. To do this she must prove the mental condition of her decedent at the time of the suicidal act was such that he was motivated by an uncontrollable impulse or in a delirium of frenzy, without conscious volition to produce death.

The Court recently rejected this standard and joined the majority of jurisdiction who permit recovery of workers' compensation benefits upon proof of a chain of causation directly linking an employment injury to a worker's loss of normal judgment and domination by a disturbance of the mind, causing the suicide.

Kostelac v. Feldman's, Inc., filed March 24, 1993. Under the chain of causation rule adopted, the suicide must be traced directly to some injury arising out of and in the course of employment. The Court stated:

> We are persuaded that this shift in emphasis from proof that an employee acted in an impulsive, frenzied state to proof that but for an employment-related mental injury--however expressed--the employee would not have committed suicide, is a more sound way of dealing with the 'willful injury' issue of section 86.13(1).

As in any case where causation is in question, the parties resort to "dueling doctors" as the cases will boil down to the opinions of medical experts providing opinions on the causal connection between the work injury and the subsequent suicide.

J

4. PURELY PSYCHOLOGICAL CLAIMS.

As the Court pointed out in *Kostelac*, it has not yet had occasion to rule whether mental injury, standing alone, will give rise to a claim for workers' compensation. I would submit that it is only a matter of time before such recognition occurs and a purely mental cases becomes compensable.

While the Supreme Court has not yet dealt with the issue, the Industrial Commissioner has. In *Ohnemus v. John Deere Davenport Works* (Appeal Decision filed February 26, 1990), the Commissioner wrote:

> In order to prevail claimant must prove that he suffered a non-traumatically caused mental injury that arose out of and in the course of his employment. This matter deals with what is referred to as a mental-mental injury and does not deal with a mental condition caused by physical trauma or a physical condition caused by mental stimulus. The supreme court in *Schreckengast v. Hammer Mills, Inc.*, 369 N.W. 2d 809 (Iowa 1985),

recognized that issued of causation can involve either causation in fact or legal causation. As stated in footnote 3 at 369 N.W. 2d 810:

> We have recognized that in both civil and criminal actions causation in fact involves whether a particular even in fact caused certain consequences to occur. Legal causation presents a question of whether the policy of the law will extend responsibility to those consequences which have in fact been produced by that event... Causation in fact presents an issue of fact while legal causation presents an issue of law.

That language was the basis of the language in *Desgranges v. Dept. of Human Services,* (Appeal Decision filed August 19, 1988) which discussed that there must be both medical and legal causation for a nontraumatic mental injury to arise out of and in the course of employment. While *Desgranges* used the term medical causation the concept involved was factual causation. Therefore, in this matter, it is necessary for two issued to be resolved before finding an injury arising out of and in the course of employment--factual and legal causation. Proving the factual existence of an injury may be accomplished by either expert testimony or nonexpert testimony.

The proof of the causal connection between an injury and an alleged disability is dependent upon medical opinion. That medical opinion cannot only be the opinion of a psychologist. *Saunders v. Cherry Burrell Corp.,* II Iowa Industrial Commissioner Report 333 (Appeal Decision 1982). A psychologist is not a physician. See Iowa Code section 135.1(5).

The Industrial Commissioner has adopted the rule found in *Swiss Colony v. Department of ICAR,* 240 N.W. 2d 128 (Wisconsin 1976). Known as the "Wisconsin Rule" it has been cited with approval by the Iowa Supreme Court and states that out of the ordinary work stresses must be shown in order for the claimant too recover.

To prove entitlement to compensation benefits for a mental-

mental injury, the claimant is left with almost the same standard of proof as in a heart attack case: medical causation (or causation in fact that the work medically caused the condition) and legal causation (that the mental condition resulted from a condition of greater dimension than day-to-day mental stresses and tensions which all employees must experience).

J

Appellate Procedure
New Rules and Some Often Asked Questions

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I. SOME NEW (AND NOT SO NEW) CHANGES TO THE IOWA RULES OF APPELLATE PROCEDURE.

Scope of Review/Preservation of Error - Rule 14(a)(5) and (b)

> Each division of the argument shall begin with a discussion, citing relevant authority, concerning the scope or standard of appellate review (e.g., "on error," "abuse of discretion," "de novo") and shall state how the issue was preserved for review, with references to the places in the record where the issue was raised and decided.

K

This requirement was added in 1990. You must now include in your Brief a statement setting forth the scope or standard of appellate review and how error was preserved for each division of your argument. The court prefers that you set this out in a separate section. This applies to both the Appellants and Appellees Brief. The Clerk's office will require you to refile your Brief if this is not included. Note: if the Appellant is required to refile its Brief due to this omission, it does not automatically extend the due date for Appellee's Brief.

Appendix and Briefs - Rules 13, 14 and 15 (attached)

Appendix

Significant changes took effect on July 1, 1993 regarding the Appendix and the due dates for Briefs. All appendices are now deferred. Thus, you no longer need to file an Agreement as to Contents of Appendix or a Notice to Defer Appendix. The court has amended Rule 15a to specifically state that trial briefs should not be included in the Appendix.

Briefs

The initial Briefs of the Appellant and Appellee are filed as Proof Briefs. Two copies are filed with the court with one copy served on each opposing counsel. (Rule 13e). When you file your Proof Brief, you must also file a designation of parts of the district court record you want included in the Appendix. As

the Appellee, you need only designate the additional items you want included in the Appendix. (Rule 15b).

The Appellant is responsible for compiling and filing the Appendix within 21 days after the service or expiration of time for service of Appellee's Proof Brief. (Rule 15a). Eighteen copies of the Appendix are filed, with two copies served on counsel for each party separately represented. (Rule 15a).

Each party has 14 days following service of the Appendix to file their Briefs in final form. You are only allowed to correct typographical errors in your Final Brief. Eighteen copies are filed and two are served. (Rule 15a, e).

If the Appellant files a Reply Brief, you now have 21 days (rather than 14) to file your Brief. It is due at the same time as the Appendix, so the Reply Brief is filed as a Final Brief rather than as a Proof Brief. (Rule 13a).

If there is a cross-appeal, the sequence of events is as follows: Appellant's Proof Brief (50 days after docketing); Appellee's (Cross-Appellant) Proof Brief (30 days after service of Appellant's Proof Brief); Appellant (Cross-Appellee) files Appendix and responsive Brief (or statement waiving any further Brief) (21 days after service of Appellee's Proof Brief); both parties file Final Briefs and Appellee (Cross-Appellant) may file a responsive Reply Brief (14 days after service of Appellant's responsive Brief). (Rule 13a, b, 15a).

K

Transmission of Record - Rule 11

The Appellant is required to request the Clerk of the Trial Court to transmit the record within seven days after all Final Briefs have been served or the time to serve has expired.

Number of Copies of Motions and Other Papers - Rule 16b

You now file four copies (it used to be three) of motions or other papers.

Taxing of Costs - Rule 16c

The only costs which will be taxed are those associated with printing the Brief in final form.

II. SOME OFTEN ASKED QUESTIONS ABOUT THE APPELLATE PROCESS.

Q: My client just lost at the trial court level. They are considering an appeal. How long does the whole process take?

A: For civil appeals, it generally takes 12-14 months (barring a number of extensions of time) from the time the Notice of Appeal is filed until the decision is filed. After all of the briefing is completed, it takes 5-6 months for oral argument to be set. The decision is generally filed within the two months following oral argument.

Q: Where do I file my Notice of Appeal?

A: In the District Court. (Rule 6(a)). Serve a courtesy copy on the Iowa Supreme Court Clerk.

Q: Does the Notice of Appeal actually have to be filed on the day it is due?

A: No - it must be served on that day. See I. R. Civ. Proc. 82(d): "Whenever these rules or the rules of appellate procedure require a filing with the district court or its clerk within a certain time, the time requirement shall be tolled when service is made, provided the actual filing is done within a reasonable time thereafter."

K

Q: What is this Combined Certificate all about?

A: The Combined Certificate must be filed within four days after the Notice of Appeal is filed. (Rule 10(b)). The form to be used is found at the end of the Rules of Appellate Procedure. The Combined Certificate does several things. It is the process by which you order the transcript so it must be served on the court reporter. It also notifies the Court if the case falls within any of the categories which trigger expedited docketing and/or briefing. The parties, their attorneys and their designations in the district court must be clearly identified. Finally, the attorney singing the Combined Certificate must certify that the appeal meets jurisdictional limits and that no arrangements have been made or suggested to delay preparation of the transcript.

Q: Trial is starting next week. The Court just ruled on something crucial to the case and I want to appeal but the trial will start before I get a ruling. What do I do?

A: The Court can be called upon to rule on interlocutory matters in an emergency situation. You will need to call the Clerk's office and let them know you will be filing an Application For Interlocutory Review and that you would like to have a Justice hear it in a matter of days. You can also file papers directly with a Justice outside of the Des Moines area (Supreme Court Rule 14(c)18). The Clerk's office will most likely ask you to immediately notify opposing counsel so they will have as much advance notice as possible. Since the time for a Resistance or Reply will be only a matter of days, if not hours, papers can be filed and served by fax. (See Rule 30(a) regarding fax filings).

Q: The other side has designated a lot of things to be included in the Appendix which I feel are unnecessary. Can I do something about this?

A: Rule 15(b) states that you are to advise the Appellee that you consider part of the record designated to be unnecessary and that Appellee, upon such notice, "shall advance the costs of including such parts."

K

Beware - the Court can, and does, assess costs against a party who over designates. These costs can be significant. See Ezzone v. Hansen, 474 N.W.2d 548 (Iowa 1991); Tratchel v. Essex Group, Inc., 452 N.W.2d 171 (1990); In re Marriage of Hernt, 476 N.W.2d 99 (Iowa App. 1991); In re Marriage of Lacaeyse, 461 N.W.2d 475 (Iowa Ct. App. 1990); Bethesda Foundation v. Board of Review, 453 N.W.2d 224 (Iowa App. 1990).

Q: Can I assume that everything I need to know about appeals can be found in the Iowa Rules of Appellate Procedure?

A: No. There are additional matters of importance located in the Supreme Court Rules (found in the Iowa Court Rules). Also, many rules relating to the Iowa Court of Appeals are found at Iowa Code § 602.5101 et seq.

Q: What categories of cases have expedited deadlines?

A: The docketing deadline is shortened in the following cases:

Termination of Parent-Child Relationship (30 days)
Guilty Plea or Sentence Only (20 days)
Certiorari (20 days)
Certified Question (10 days)
Lawyer Discipline (10 days)
No Transcript (10 days)
Administrative Action (10 days)

(Rule 12(b)).

The time for briefing is shortened by one-half if the case involves:

Child Custody
Adoption
Termination of Parent-Child Relationship
Juvenile Proceedings
Lawyer Discipline

(Rule 17).

Q: Does is really matter if I'm a few days late in filing my Brief?

A: Yes. The Clerk's office issues a Notice of Default and an assessment of a $50 penalty when a deadline is missed. Rule 19(a) and (b). You have 15 days to correct the default by either filing the matter at issue or requesting an extension of time. You still must pay the $50, even if you made the late filing before you received the Notice of Default. If the Notice was received in error, you can respond by a letter to the Clerk or by Motion to the Court.

If you don't correct the default and you are the Appellant, your case may be dismissed. (Rule 19a). If you are the Appellee, you will not be allowed to present oral argument absent special permission by the Court. (Rule 13f). This is true even if you eventually file the Brief and pay the fine.

Q: My Brief is two pages too long. Can I just extend the margins to get it within the 50 page limit?

A: No. The Clerk's office does check margins and if they are not in compliance with the Rules, you will be required to refile the Brief. If you file an overlength Brief without permission, you will also be required to refile it. Requests to file overlength Briefs are rarely granted.

Q: Should I ask for oral argument?

A: Yes. If you want to be heard orally, you must request oral argument. It is not a matter of right. Sup. Ct. Rule 7(b). If one side requests oral argument and the other does not, the Court will grant oral argument only to the party requesting it.

Oral argument can and does make a difference, so you should always request it.

As a general rule, you can expect 15 minutes of oral argument time (plus 5 minutes of rebuttal) before the Supreme Court and 10 minutes of oral argument time (plus 5 minutes of rebuttal) before the Court of Appeals.

Q: I just got the Notice of Oral Argument. Can I find out who is hearing the case?

A: Yes, you can call the Clerk's office to ascertain who is on the panel as well as the order of cases scheduled to be heard that day. The Court of Appeals, however, does not identify panel members until the day of the argument.

Q: How should I prepare for oral argument?

A:

1. Review all Briefs, the transcript, relevant exhibits, key cases.
2. Decide which issue (or issues) you will devote your time to. (But be prepared to discuss any issue).
3. Develop a theme or a recurring point to make during your argument.
4. Think about the weaknesses of your argument and try to anticipate potential questions.
5. Put your argument (in some format) in writing -- say it out loud several times and make changes to improve it.
6. Put your argument on each issue on a separate page.
7. Practice your argument; practice your responses to questions.
8. Consider implications of your arguments beyond your case or a specific set of facts.
9. Argue policies and general principles to convince the court <u>why</u> they should decide your way. Don't simply cite to what the cases say.
10. Know the standard of review.
11. Consider use of demonstrative aids.

Q: When can I expect a decision after oral argument?

A: The Supreme Court hears oral arguments during the second week of the month and the Court of Appeals hears argument during the first week.

Opinions come out at a designated time each month. For the rest of the year, it is as follows:

> Supreme Court - October 21, November 25, December 23;
> Court of Appeals - October 27, November 30, December 29
> (These dates do change sometimes).

You can get a written list of the opinions expected to be filed a day in advance. If you know your case is coming down, you can then pick up a copy at the Clerk's office when they open.

Generally, an opinion will be filed in the next month or two following oral argument.

Q: The Court just ruled and I lost. Now what?

A: If your case was heard by the Court of Appeals, you have two further options: A Request for Rehearing which must be filed within 7 days, or a Request for Further Review which must be filed within 20 days. If you request rehearing, it does not toll your time to Request Further Review. (Rule 402; Sup. Ct. Rule 3.5).

A party resisting a Request for Further Review has 10 days to do so. (Rule 402(d)). There is no answer allowed to a Request for Rehearing unless the Court of Appeals requests it. (Rule 3.5(b)).

If your case was heard by the Supreme Court, you have 14 days to file a Request for Rehearing. No response it allowed, unless the Court requests it. (Rule 27(a)).

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FILED
JAN 27 1993

IN THE SUPREME COURT OF IOWA

O R D E R

IN THE MATTER OF THE DEFERRED APPENDIX METHOD

By action of this court en banc, the deferred appendix method is to be used in all cases appealed to the Supreme Court of Iowa and the Iowa Court of Appeals. The following rules of appellate procedure are hereby amended to accomplish this result as shown in the following exhibits:

Exhibit "A"	Rule 11
Exhibit "B"	Rule 13
Exhibit "C"	Rule 14
Exhibit "D"	Rule 15
Exhibit "E"	Rule 16
Exhibit "F"	Rule 17
Exhibit "G"	Rule 102
Exhibit "H"	Rule 454
Exhibit "I"	Rule 455

Existing appellate timetables No. 2 and 4 are hereby stricken. Appellate timetable No. 3 is hereby amended and renumbered. These changes are effective July 1, 1993.

Dated this 27th day of January, 1993.

THE SUPREME COURT OF IOWA

By Arthur A. McGiverin
Arthur A. McGiverin, Chief Justice

EXHIBIT "A"

Rule 11. Transmission of record

* * * *

b. Transmission of remaining record. Within seven days after all final required briefs and the appendix have been served or the times for serving them have expired, or at such earlier time as the parties may agree or the supreme court may order, appellant shall request the clerk of the trial court to transmit immediately to the clerk of the supreme court the remaining record not already transmitted, including the original papers and exhibits filed in the trial court and any reporter's transcript of proceedings. Appellant shall take all action necessary to enable the clerk of the trial court to assemble and timely transmit the remaining record. If more than one appeal is taken, each appellant shall comply with the provisions of Iowa rule 10:b,: Rules of Appellate Procedure, 10(b) and this subdivision.

When request is made by either party for transmission to the supreme court of portions of the record in addition to the certified copy of the docket and calendar entries, the clerk of the trial court shall number the documents comprising the remaining record and shall transmit the same to the clerk of the supreme court. The clerk of the trial court shall transmit with the remaining record a list of the documents correspondingly numbered and identified with reasonable definiteness. Documents of unusual bulk or weight and physical exhibits other than documents shall not be transmitted by the clerk unless he is so directed to do so by a party or by the clerk of the supreme court. A party must make advance arrangements with the clerks for the transportation and receipt of exhibits of unusual bulk or weight.

Transmission of the record is effected when the clerk of the trial court mails or otherwise forwards the record to the clerk of the supreme court. The clerk of the trial court shall indicate, by endorsement on the face of the record or otherwise, the date upon which the record is transmitted to the supreme court.

* * * *

EXHIBIT "B"

Rule 13. Filing and service of briefs and amendments

a. Time for serving and filing proof briefs except in those cases expedited under Iowa Rule of Appellate Procedure 17 or 105. Appellant shall serve and file a proof copy of appellant's brief within fifty days after the date on which the appeal is docketed. Appellee (cross-appellant in the event of a cross-appeal) shall serve and file a proof copy of appellee's (cross-appellant's) brief within thirty days after service of appellant's proof brief. Where a cross-appeal has not been filed, an appellant may serve and file a proof copy of a reply brief within fourteen twenty-one days after service of appellee's proof brief. In the event of a cross appeal, appellant (cross-appellee) shall respond within twenty-one days after service of appellee's (cross-appellant's) proof brief in one of two ways: by filing either (1) a proof copy of a responsive reply brief; or (2) a statement waiving any further proof brief. If appellant (cross-appellee) serves and files a responsive reply brief, appellee (cross-appellant) may serve and file a final reply brief under Iowa Rule of Appellate Procedure 14(c) within fourteen days after service of appellant's (cross-appellee's) reply brief. The supreme court may shorten these periods for serving and filing briefs, either by rule for all cases or for classes of cases or by order in specific cases.

b Cross-appeals. In the event of a cross-appeal, except in those cases expedited under Iowa rule of appellate procedure 17 or 105, appellant shall serve and file a brief within fifty days after the date on which the appeal is docketed. Appellee (cross-appellant) shall serve and file a brief within thirty days after service of appellant's brief. Within thirty days after service of appellee's brief, appellant (cross-appellee) shall serve and file either a responsive reply brief or a statement indicating that a reply brief will not be filed because the issues on cross-appeal have already been addressed in appellant's brief. Appellee (cross-appellant) may serve and file a reply brief under Iowa rule of appellate procedure 14(c) within fourteen days after service of appellant's reply brief. Time for serving and filing briefs in final form. Within fourteen days after the appendix is served pursuant to Iowa Rule of Appellate Procedure 15(a), each party shall serve and file the party's brief or briefs in the final form prescribed by Iowa Rule of Appellate Procedure 16(a). No other changes may be made in the proof briefs as initially served and filed, except that typographical errors may be corrected. The supreme court may shorten the periods for serving and filing proof and final briefs.

c Multiple adverse parties. If the time for doing any act prescribed by these rules is measured from the date of service of a paper by an adverse party, then in the case of multiple adverse parties the time for doing such act shall be measured from the date of service of the last timely served paper by an adverse party or the date of expiration of time within which the adverse parties had to serve the paper.

d Amendments. An appellant may amend a required brief once within fifteen days after serving the brief, provided no brief has been served in response to it. The time for serving and filing of appellee's brief shall be measured from the date of service of the amendment to appellant's brief. An appellee's brief may be amended once within ten days after service, provided no brief has been served in reply to it. The time for serving and filing appellant's reply brief shall be measured from the date of service of the amendment to appellee's brief. A reply brief may be amended at any time prior to seven days before submission of the appeal to the appellate court. Any other or further amendments to the briefs may be made only with leave of the appropriate appellate court. An amendment may be conditionally filed with a motion for leave.

e Number of copies to be filed and served. Two copies of proof briefs and eighteen copies of each brief in final form or amendment thereto shall be filed with the clerk of the supreme court, unless the court by order in a particular case shall direct a different number, and one proof brief and two copies of briefs in final form shall be served on counsel for each party separately represented.

f Consequence of failure to file briefs. If appellant fails to file the appellant's brief within the time provided by this rule, or within the time as extended, appellee may move for dismissal of the appeal. If appellee fails to file a timely brief, appellee will not be heard at oral argument except by special permission of the appropriate appellate court. In the event of a cross-appeal, the appellee shall file a timely brief in support of it; a failure to do so shall render the

EXHIBIT "C"

Rule 14 Briefs

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g References in briefs to the record. Proof briefs shall contain appropriate references to the pages of the parts of the record involved, e.g., Petition p. 6, Judgment p. 5, Transcript p. 298. References in the briefs to parts of the record reproduced in the appendix filed with the brief of appellant (see rule 15, rules of appellate procedure) shall be to the pages of the appendix at which those parts appear. If the appendix is deferred, References in the final briefs to portions of the record to be reproduced in the appendix shall be made in the manner stated in rule 15(e), Iowa rules of appellate procedure 15(e) to the pages of the appendix at which those parts appear. If references are made in the briefs to parts of the record not reproduced in the appendix, the references shall be to the pages of the parts of the record involved, e.g., Answer p. 7, Motion for Judgment p. 2, Transcript p. 231. Intelligible abbreviations may be used. If reference is made to evidence, the admissibility of which is in controversy, reference shall be made to the pages of the appendix or of the transcript at which the evidence was identified, offered and received or rejected.

* * * *

EXHIBIT "D"

Rule 15 Appendix to briefs

a Duty of appellant; content; time; number. Appellant shall prepare and file an appendix to the briefs which shall contain: (1) the relevant docket entries in the trial court proceeding; (2) any relevant portions of the pleadings, transcript, instructions, findings, conclusions, and opinion; (3) the judgment, order or decision in question; (4) the notice of appeal; and (5) any other parts of the record to which the parties wish to direct the particular attention of the court. Portions of the record shall be set out verbatim in the appendix. Summaries, abstracts or narratives shall not be used unless the parties prepare an agreed statement of the case pursuant to subdivision (f) of this rule. Trial briefs shall not be included in the appendix. The fact that parts of the record are not included in the appendix shall not prevent the parties or the courts from relying on such parts.

Unless filing is to be deferred pursuant to the provisions of subdivision (e) of this rule, appellant shall serve and file the appendix with his brief. Appellant shall serve and file the appendix within twenty-one days after service or expiration of the time for service of appellee's (cross-appellant's) proof brief. Eighteen copies of the appendix, and of any amendments thereto, shall be filed with the clerk of the supreme court and two copies shall be

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served on counsel for each party separately represented unless the court shall by rule or order direct the filing of a different number The appendix may be amended by agreement of all the parties at any time prior to assignment of the appeal for submission to an appellate court The written consent of all the parties must be filed with the amendment In absence of agreement or after assignment, the appendix may be amended only with leave of the appropriate appellate court An amendment to the appendix may be conditionally filed with a motion for leave

b Determination of contents; cost of producing. Designation of contents. The parties are encouraged to agree as to the contents of the appendix except as provided in Iowa rule of appellate procedure 102 If the parties do agree on such contents, they shall file a short memorandum of that agreement with the clerk of the supreme court within fourteen days after the date on which the appeal is docketed. If the parties do not so agree, appellant shall, not later than fourteen days after the date on which the appeal is docketed, serve on appellee and file with the clerk of the supreme court a designation of the parts of the record which appellant intends to include in the appendix and a statement of the issues which appellant intends to present for review. If appellee desires to direct the particular attention of the court to parts of the record not designated by appellant, appellee shall, within ten days after service of the designation, file with the clerk of the supreme court and serve upon appellant a designation of those parts. Designations of parts of the district court record to be included in the appendix shall be served and filed by each party at the time the proof copy of required briefs, other than appellant's (cross-appellee's) reply brief, are served and filed, except that an appellee need not designate additional parts if appellee is satisfied with appellant's designation. Appellant shall include in the appendix the parts thus designated by appellee In designating parts of the record for inclusion in the appendix the parties shall consider the fact that the entire record is available to the appellate courts for examination and shall not engage in unnecessary designation.

c Cost of Producing. Unless the parties otherwise agree the cost of producing the appendix shall initially be paid by appellant but if appellant considers that parts of the record designated by appellee for inclusion are unnecessary for the determination of the issues presented appellant may so advise appellee and appellee shall advance the cost of including such parts The cost of producing the appendix shall be taxed as costs in the case, but if either party shall cause matters to be unnecessarily included in the appendix the appropriate appellate court may impose the cost of producing such parts on that party.

e. Alternative Method of designating contents. Preparation of the appendix may be, and under Iowa rule of appellate procedure 102 must be, deferred by appellant until after typewritten or page proof copies of all the briefs have been filed. If the preparing and filing of the appendix is thus deferred, the provisions of subdivision b of this rule shall apply, except that the designations referred to therein shall be made by each party at the time the required brief is initially served and filed, and a statement of the issues presented shall be unnecessary. Except in criminal cases, appellant shall, not later than ten days after the date on which the appeal is docketed, file with the clerk of the supreme court and serve on appellee a notification of the election to defer the appendix.

If a deferred appendix authorized by this subdivision and required under Iowa rule of appellate procedure 102 is employed, each party shall serve and file typewritten or page proof copies of the brief or briefs within the time required by Iowa rule of appellate procedure 13(a). One typewritten carbon copy or page proof copy of each brief shall be served on opposing counsel and two copies shall be filed with the clerk of the supreme court. The initial copies of the briefs shall contain appropriate references to the pages of the parts of the record involved, e.g., Petition p. 6; Judgment p. 5; Transcript p. 298. Within twenty-one days after service or expiration of the time for service of the initial copy of appellee's brief, appellant shall file and serve the appendix. Within fourteen days after the appendix is served, each party shall serve and file copies of the party's brief or briefs in the form prescribed by Iowa Rule of Appellate Procedure 16(a) containing references to the pages of the appendix in place of or in addition to the initial references to the pages of the parts of the record involved. No other changes may be made in the briefs as initially served and filed, except that typographical errors may be corrected

d Arrangement of the appendix At the beginning of The appendix shall be inserted a list of the parts of the record which it contains, in the order in which the parts are set out therein, begin with a table of contents with references to the pages of the appendix at which each part begins The pages of the appendix shall be consecutively numbered. When the appendix contains portions of the reporter s transcript, the name of each witness whose testimony is included in the appendix shall be indicated in the list of contents with a reference to the page of the appendix at which the witness testimony begins The relevant docket entries shall be set out following the list of contents Thereafter, other parts of the record shall be set out in chronological order Portions of the reporter s transcript of proceedings shall be inserted in chronological order based on the date the transcribed proceedings took place rather than on the date the completed transcript was filed When matter contained in the transcript is set out in the appendix the original pagination of that matter shall be indicated in the appendix by placing in brackets

th number of each page of the transcript at the place in the appendix where that transcript page begins, and the name of each witness whose testimony is included in the appendix shall be indicated at the place in the appendix where the witness testimony begins. Omissions in the text of papers, of exhibits or of the transcript, regardless of size, must be indicated by a set of three asterisks. Immaterial formal matter, such as captions, subscriptions and acknowledgments, shall be omitted. A question and its answer may be contained in a single paragraph.

e. Reproduction of exhibits. Exhibits or relevant portions thereof designated for inclusion in the appendix may be contained in a separate volume or volumes, suitably indexed. Eighteen copies thereof shall be filed with the appendix and two copies shall be served on counsel for each party separately represented. Relevant portions of the transcript of a proceeding before an administrative agency, board, commission or officer, used in an action in the trial court, may be regarded as an exhibit for the purpose of this subdivision.

f. Agreed statement of the case filed as the appendix. In lieu of an appendix with contents as specified in subdivision (a) and arranged as specified in subdivision (d), the parties may prepare an agreed statement of the case which shall not incorporate by reference any part of the record. The statement shall be in narrative form, shall show how the issues presented by the appeal arose and how they were decided and shall set forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. The original agreed statement shall be signed by all parties to the appeal or their counsel, and one copy thereof shall be filed with the clerk of the supreme court within fourteen days after the appeal is docketed. ~~At the appendix, appellant shall file and serve with his brief printed or duplicated copies of the agreed statement in the form required by rule 16, rules of appellate procedure.~~ The agreed statement shall be filed in lieu of an appendix.

EXHIBIT "E"

Rule 16. Form of briefs, appendix, and other papers.

a. Form of briefs and appendix. Briefs and the appendix may be produced by standard typographic printing or by any duplicating or copying process which produces a clear black image on white paper. The appendix and briefs shall be printed or duplicated on both sides of the sheet. All printed or duplicated matter must appear in no smaller than pica type (averaging no more than ten characters per inch) on opaque, unglazed paper, and be legible. ~~When utilizing a process which duplicates or copies a typewritten original,~~ Lines of typewritten text shall be double-spaced. Briefs and the appendix shall be bound on the left in volumes having pages 8 1/2 by 11 inches and type matter 6 by not less than 8 1/8 inches nor more than 9 1/4 inches. Each line shall contain on average no more than 60 characters. Spaces between words shall be included in the computation of characters. Margins on the bound side of the sheets shall be not less than 1 1/8 inches suitable for permanent binding procedures. Copies of legal-sized pleadings and other papers may be reduced or enlarged to 8 1/2 by 11 inches by standard photocopying methods and inserted in the appendix. All such copies must be legible. Copies of the reporter's transcript of proceedings and other papers reproduced in a uniform permanent binding. Such papers may be informally renumbered and asterisks may be added informally if necessary.

The cover of the brief of appellant should be blue; that of appellee, red; that of an intervenor or amicus curiae who is not an appellant or appellee, green; that of a reply brief, gray. The cover of the appendix should be white. The cover of an amendment should be the same color as the document which it amends. The front covers of the briefs, appendix, and amendments thereto, shall contain: (1) the name of the court and the appellate number of the case; (2) the title of the case (see Iowa Rule of Appellate Procedure 12(a)); (3) the nature of the proceeding in court (e.g., Appeal, Certiorari) and the name of the court (and judge), agency, or board whose decision is under review; (4) the title of the document (e.g., Brief for Appellant, Appendix); and (5) the name, address, and telephone number of counsel representing the party on whose behalf the document is filed.

b. Form of other papers. Motions and other papers may be produced in the manner prescribed by subdivision (a), or they may be typewritten upon opaque, unglazed paper 8 1/2 by 11 inches in size. Lines of typewritten text shall be double-spaced. Consecutive sheets shall be attached at the left margin.

A motion or other paper addressed to an appellate court shall contain a caption setting forth the name of the court, the title of the case, the file number, and a brief descriptive title indicating the purpose of the paper. ~~Three~~ Four copies of motions and other papers addressed to the appropriate appellate court shall be filed with the clerk of the supreme court and one copy shall be served on each party separately represented unless the appropriate appellate court by order directs otherwise.

c. Printing taxed as costs. The amount actually paid for printing or otherwise producing necessary copies of briefs in final form, appendix, or copies of records authorized by these rules, exclusive of stenographic expense, shall be certified by the attorney, and to the extent reasonable, shall be taxed in the appellate court as costs. Reasonable printing or duplicating costs shall not exceed four dollars per page unless otherwise ordered by the appropriate appellate court.

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EXHIBIT "F"

Rule 17. Cases involving expedited times for filings. The times prescribed in Iowa Rules of Appellate Procedure 13 and 15 for serving and filing the briefs, other than reply briefs and the appendix, the times prescribed in Iowa Rule of Appellate Procedure 15(b) for determining the contents of the appendix, ~~the time prescribed in Iowa rule of appellate procedure 15:e: for filing an election to defer the appendix~~ and the times prescribed in Iowa Rule of Appellate Procedure 15(f) for filing an agreed statement of the case shall be reduced by one-half in appeals involving the following: (1) a contest as to custody of children; (2) adoption; (3) termination of the parent-child relationship; (4) juvenile proceedings affecting child placement; or (5) lawyer disciplinary matters. ~~If filing of the appendix is deferred in the foregoing types of cases pursuant to Iowa rule of appellate procedure 15:e:~~ The appendix and reply briefs, except an appellee's (cross-appellant's) reply brief, shall be served and filed not more than fifteen days after service or expiration of the time for service of appellee's ~~initial~~ proof brief, and printed or duplicated copies of all the briefs in final form shall be served and filed within seven days after service of the appendix. An appellee's (cross-appellant's) reply brief, if filed, shall be served and filed not more then seven days after service of appellant's (cross-appellee's) reply brief. Court reporters shall give priority to transcription of proceedings in these cases over other civil transcripts. These appeals shall be accorded submission precedence over other civil cases.

EXHIBIT "G"

Rule 102. Procedure. All procedure after the perfection of an appeal in a criminal case shall be governed by the Iowa Rules of Appellate Procedure. Within four days after filing notice of appeal, appellant shall file with the clerk of the supreme court and serve on appellee a statement of whether the appeal is from a conviction and sentence upon a plea of guilty or from sentence only to which Iowa Rule of Appellate Procedure 105 applies. In addition to complying with Iowa Rule of Appellate Procedure 11(a), the clerk of the court in which the judgment or order was entered shall simultaneously transmit a certified copy of the same entries to the attorney general. Upon request, the clerk of district court shall transmit to the attorney general a copy of the record as defined in Iowa Rule of Appellate Procedure 10(a). ~~The deferred appendix method under Iowa rule of appellate procedure 15:e: shall apply in all criminal cases, all actions arising from the disposition of seizable and forfeitable property under Iowa Code Chapter 809, and all postconviction relief actions, unless the parties file a written stipulation that Iowa rule of appellate procedure 15:k: applies.~~ Papers required to be served on the state shall be served upon the attorney general.

EXHIBIT "H"

Rule 454. Briefs. ~~The movant or party who is to file his a brief first~~ The parties shall file and serve the ~~initial~~ all briefs within the expedited times for filings prescribed by Iowa Rule of Appellate Procedure 17 ~~twenty days after the matter is entered upon the docket~~ in the manner outlined by Iowa Rule of Appellate Procedure 13(a). ~~The responding party shall file and serve a responsive brief within the twenty days after service of the initial brief. A reply brief may be filed and served within ten days after service of the responsive brief.~~ Iowa Rules of Appellate Procedure 13(e), 14, and 16(a), ~~rules of appellate procedure, shall apply to briefs with those portions applicable to appellant's briefs applying to briefs of the movant or the party who is to file a brief first and those portions applicable to appellee's brief applying to the brief of the responding party.~~

EXHIBIT "I"

Rule 455. Appendix. The movant or party who is to file ~~his a~~ brief first shall file and serve with ~~his initial brief~~ an appendix to the briefs and appendix in the manner of an appellant. The appendix shall contain the certification order and such portions of the record relevant to the question as the parties by agreement or the certifying court by order may determine. Iowa Rules of Appellate Procedure, 15(a), 15(c), 15(d), 15(e), and 16(a) ~~rules of appellate procedure, shall apply to the appendix to the greatest extent possible.~~

APPELLATE PROCEDURE TIMETABLE No. 32

POST-DOCKETING PROCEDURE

WHERE APPENDIX IS PREPARED BUT CROSS-APPEAL IS NOT FILED

Due Dates		
	1	Docketing date See rule 12"a"
50 days	2	Appellant's proof brief and designation Appellant files 2 proof copies and serves 1 proof copy of brief and designation of parts of record to be included in appendix. See rules 13"a", 15"e", 17, and 105.
30 days	3	Appellee's proof brief and designation Appellee files 2 proof copies and serves 1 proof copy of brief and designation of any additional parts of record to be included in appendix. See rules 13"a", 15"e", 17, and 105.
21 days	4	Appendix and appellant's proof reply brief. If appellee has served proof brief, or if time for serving has expired, appellant files 10 copies and serves 2 copies of appendix. See rules 15"a", 15"e", 17, and 105. Appellant files a proof reply brief which is mandatory only if cross-appeal is involved. See rules 13"a" and 13"b".
14 days	5	Final briefs and appellee's responsive reply brief. All parties file 10 copies and serve 2 copies of all briefs in final form. Appellee may file a responsive brief to appellant's reply brief if cross-appeal is involved. See rules 13"b", 13"e", 15"e", 17, and 105
7 days	6	Transmission of record Appellant requests transmission and ensures that district court clerk transmits remaining record to supreme court clerk. See rule 11"b" and note (C) below

NOTES

(A) The Iowa Rules of Appellate Procedure govern procedure in all appeals. These timetables are merely illustrative and may not cover every procedural situation.

(B) If rule 17 (priority cases) or 105 (guilty pleas or sentence only cases) applies, the times for filing the above are reduced by one-half, except step 6 4, which is reduced to 15 days, and step 8 6 which remains 7 days.

(C) Suggestion: Document the request for transmission of the remaining record by sending a letter to the district court clerk with a copy to the supreme court clerk.

RETAINING AND WORKING WITH OUTSIDE COUNSEL

Wendy N. Munyon
Assistant General Counsel
Grinnell Mutual Reinsurance Co.
Grinnell, IA

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Vice President and General Counsel
Maytag Corporation
Newton, IA

RETAINING AND WORKING WITH OUTSIDE COUNSEL

I. Selection and Evaluation

A. Sources

- industry directories
- defense organization rosters
- other insurance companies

B. Philosophy

- lawyer, not firm
- goal is long-term retention
- trend toward "regional counsel"

C. Evaluation

- results
- cost
- effective development of strategy and evaluation of case

II. Staffing

III. Case Evaluation and Strategy

A. Develop a plan together early regarding

- theories of liability or coverage
- motions
- experts
- depositions

B. Decide whether to try or settle as soon as possible
C. Explore feasibility of alternative dispute resolution

IV. Importance of Dialogue--No Surprises Rule

V. Fees - Friction or Friendly?

A. Where does it say "hourly rates?"
B. Alternatives to the hourly rate -

- blended hourly rates
- flate rate/fixed fee
- retainers
- contingent fees
- success fees
- bidding - the "beauty contest"
- shared counsel
- "rent-a-lawyer"
- "loan-a-lawyer"
- mix and match

C. Reimbursement of costs and expenses

- legitimate items
- not a profit center

D. The challenge: How do you deliver responsive, responsible and cost-effective legal service at a price your clients are willing to pay?

E. Budgets - They are required and they must be real.

"HANDLING EXPERT WITNESSES IN THE DEFENSE OF PRODUCT LIABILITY CASES"

The Foundational Requirements for the Admissibility of Expert Testimony in Iowa

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Iowa is committed to the liberal admission of expert opinion testimony. Hunter v. Board of Trustees, 481 N.W.2d 510, 519 (Iowa 1992); Ort v. Klinger, 496 N.W.2d 265 (Iowa Ct. App. 1992); Bloomquist v. Wapello County, 500 N.W.2d 1 (Iowa 1993) (a "long standing policy" of liberal admission of expert testimony). Determining the admissibility of expert testimony and permitting its introduction is primarily committed to the sound discretion of the trial court. Id. A trial court's determination as to the admissibility of expert testimony will only be disturbed if the court abused its discretion and that decision prejudiced the complaining party. However, an appellate court only finds an abuse of discretion when the trial court's discretion is exercised on grounds or for reasons which are clearly untenable or unreasonable. Hunter, 481 N.W.2d at 519. As long as the record contains some support for the trial court's decision, an appellate court will not reverse. Id. Consequently, a trial court's ruling is rarely disturbed; an abuse of discretion is rarely found. See Sullivan v. Chicago & Northwestern Transportation Co., 326 N.W.2d 320, 324 (Iowa 1982).

Iowa Rules of Evidence governing the admissibility of expert opinion testimony mirror the Federal Rules of Evidence. Accordingly, cases regarding the admissibility of expert testimony which interpret Federal Rules of Evidence may be of substantial benefit when faced with a question regarding the admissibility of expert testimony in Iowa. Brunner v. Brown, 480 N.W.2d 33, 35 (Iowa 1992).

DISCLOSURE OF OPINIONS, UNDERLYING DATA AND INFORMATION TOUCHING UPON QUALIFICATIONS AND BIAS

The Court Is Required To Compel Timely Disclosure Of The Identity Of Experts, The Opinions Of Those Experts, And The Underlying Bases Which Support Expert Opinions

Timely Disclosure Is Required. Iowa Rule of Civil Procedure 125(c) requires parties to disclose the identity of experts and information regarding their testimony upon receiving an appropriate interrogatory. When necessary, the disclosing party must supplement its responses "as soon as practicable," but more than thirty days prior to trial, unless leave is granted by the court. When a party fails to comply with this rule, the court may in its discretion

exclude or limit such expert testimony or make other appropriate orders regarding the nondisclosure. Security Mutual Insurance Co. v. Board of Review, 467 N.W.2d 301, 306 (Iowa Ct. App. 1991).

In addition to disclosing an expert's name, proponents must provide the expert's qualifications, subject matter of the intended testimony, the expert's mental impressions and opinions, and the underlying facts forming the basis of the opinion. If this information is not disclosed in the original answers to interrogatories, the proffering party must supplement its responses. Mills v. Iowa Department of Transportation, 462 N.W.2d 300, 302 (Iowa Ct. App. 1990).

Iowa Code, § 668.11 (1993), requires expedient identification of experts in cases involving licensed professionals. Experts not identified pursuant to the strictures of § 668.11 are prohibited from testifying, unless leave is granted by the court for good cause shown. Good cause under § 668.11 requires more than a mere excuse, plea or justification for the failure. Cox v. Jones, 470 N.W.2d 23, 25 (Iowa 1991). Although a defendant may presume the complainant's treating physician will testify, the treating physician may not testify as to reasonable standards of care or causation, unless designated as an expert.

When experts have not been properly identified, a party may seek a court order excluding the testimony, Krugman v. Palmer College, 422 N.W.2d 470, 472 (Iowa), cert. denied, 488 U.S. 944 (1988), utilize a "motion to strike and prohibit testimony," Carter v. Wiese Corp., 360 N.W.2d 122, 136 (Iowa Ct. App. 1984), or employ a motion in limine. Kilker by and through Kilker v. Mulry, 437 N.W.2d 1, 4 (Iowa Ct. App. 1988). Counsel may also move to exclude just prior to the expert's testimony. Amco Insurance Co. v. Stammer, 411 N.W.2d 709, 717-18 (Iowa Ct. App. 1987).

Expert Testimony Must Be Prohibited If Timely Disclosure Is Not Made. A sanction less severe than complete exclusion may be appropriate, especially if the opposing party was not surprised by the testimony. Security Mutual Insurance Co. v. Board of Review, 467 N.W.2d 301, 306 (Iowa Ct. App. 1991). When dismissal will result from the exclusion of expert testimony, the court should exercise its discretion carefully. Farley v. Ginther, 450 N.W.2d 853, 856 (Iowa 1990).

When the facts known, mental impressions and opinions held by an expert are developed during discovery, Iowa R. Civ. P. 125(d) precludes the expert from proffering inconsistent testimony or testimony exceeding the reasonable scope disclosed. Mercy Hospital v. Hansen, Lind & Meyer, 456 N.W.2d 666, 670 (Iowa 1990).

Even when a party violates a discovery rule or order, the court may in its discretion permit the expert to testify. However, the expert's ability to testify will likely be subject to measures enabling opposing counsel to obtain any necessary information regarding the proposed testimony. Preferred Marketing Associates Co. v. Hawkeye National Life Insurance Co., 452 N.W.2d 389, 393 (Iowa 1990).

Expert testimony may be limited to information disclosed in interrogatory responses, excluding topics which were not disclosed within original responses or appropriate supplements. Bratton v. Bond, 408 N.W.2d 39, 41-42 (Iowa 1987). An expert was not permitted to testify that damages exceeded $25,000 when the proponent's interrogatory responses indicated that the damage sustained was $4,900 and that answer was never supplemented. White v. Citizens National Bank of Boone, 262 N.W.2d 812, 815 (Iowa 1978).

Expert testimony may be excluded if the proponent's responses to interrogatories regarding identification and the proposed topics of expert testimony are not timely filed. Kilker by and through Kilker v. Mulry, 437 N.W.2d 1, 4 (Iowa Ct. App. 1988). The proponent need not violate a discovery order, violation of discovery rules is sufficient grounds to exclude expert testimony. Id. Exclusion is appropriate even if the violation of discovery rules or orders is not willful. Id. at 6. An expert, who was not sufficiently available for deposition, may be precluded from testifying. Carter v. Wiese Corp., 360 N.W.2d 122, 136 (Iowa Ct. App. 1984).

The Court Should Require Disclosure Of Any Information Touching Upon Qualifications Or Bias Of Witness

An expert's qualifications must be examined by the court before testimony is admissible. Dougherty v. Boyken, 155 N.W.2d 488, 495 (Iowa 1968); Bornn v. Madagan, 414 N.W.2d 646, 647 (Iowa Ct. App. 1987). Before providing an opinion, an expert must disclose sufficient experience, knowledge, skill, education or training indicating the opinion will assist the factfinder. State v. Nowlin, 244 N.W.2d 591, 595 (Iowa 1976). Although it has broad discretion, the trial court should not admit testimony from an unqualified expert. State v. Peterson, 219 N.W.2d 665, 673 (Iowa 1974).

Pursuant to Iowa R. of Evid. 411, a party cannot delve into the liability insurance coverage possessed by a defendant, but may offer evidence regarding insurance to demonstrate bias or prejudice of a witness. Pursuant to this rule, the Eighth Circuit Court of Appeals permitted evidence that an expert, who attacked the veracity of the plaintiff's expert and held an attorney-client relationship in other cases with the insurer of the defendant, was biased and had connections with the defendant's insurer. Charter v. Chleborad, 551 F.2d 246, 248-49 (8th Cir.), cert. denied, 434 U.S. 856 (1977). However, the Iowa Supreme Court qualified this rule and indicated each situation must be independently analyzed. Strain v. Heinssen, 434 N.W.2d 640, 642-43 (Iowa 1989). In Strain, the plaintiff was not permitted to cross-examine expert witnesses, retained by the defendant physician's malpractice insurer, regarding their retention by the malpractice insurer because there was no indication that the experts were biased, they did not attack the veracity of plaintiff's expert nor was there a distinct relationship between the experts and the insurer. Id. The plaintiff was permitted to inquire into whether the experts were paid to testify,

the frequency of their trial testimony and their propensity for testifying on behalf of defendant physicians. Id. at 643.

Scope of permissible cross-examination of expert regarding potential bias is committed to discretion of trial court and will only be overturned for abuse of discretion. Strain v. Heinssen, 434 N.W.2d 640, 641-42 (Iowa 1989).

The test of whether an expert may be disqualified because of bias is "whether the witness will either gain or lose by the direct legal operation and effect of the judgment, or that the [record will be] legal evidence for or against him in some other action." Security Mutual Insurance Association v. Board of Review, 467 N.W.2d 301, 307 (Iowa Ct. App. 1991).

Appraiser who had evaluated property value for plaintiff's successor was disinterested because he had no further interest in sale or litigation. Security Mutual Insurance Association v. Board of Review, 467, N.W.2d 301, 307 (Iowa Ct. App. 1991).

QUALIFICATIONS OF EXPERT

The Court Is Obligated To Determine Sufficiency Of Qualifications Of Expert Before Permitting Opinion

The court must determine if a proffered expert has sufficient credentials to qualify as an expert and render an opinion, Osborn v. Massey-Ferguson, Inc., 290 N.W.2d 893, 899 (Iowa 1980), or sufficient qualifications or expertise to render an expert opinion. State v. Nowlin, 244 N.W.2d 591, 596 (Iowa 1976).

Before providing an opinion, an expert must demonstrate sufficient knowledge, experience, or skill in the particular field at issue so that the opinion will likely aid the factfinder. State v. Nowlin, 244 N.W.2d 591, 595 (Iowa 1976). Although a court has considerable discretion to permit expert testimony, it cannot admit an expert opinion unless the expert is qualified to render an opinion upon the subject for which testimony is sought. State v. Peterson, 219 N.W.2d 665, 673 (Iowa 1974). A court's vast discretion to permit or exclude expert testimony is not limitless, but must be legally based on sound judicial reasoning. Ganrud v. Smith, 206 N.W.2d 311, 314 (Iowa 1973).

Expert testimony should be excluded when an adequate foundation substantiating the expert's qualifications has not been established. Shinrone, Inc. v. Tasco, Inc., 283 N.W.2d 280, 289 (Iowa 1979). Proponents are given broad latitude when attempting to qualify a witness as an expert. Id.

Specific reasons must be provided when objecting to a proposed expert's qualifications. On appeal, an objection is only effective for the grounds specified. State v. Mark, 286 N.W.2d 396, 408 (Iowa 1979).

After a lack-of-qualification objection, the proponent must substantiate the expert's credentials. Thereafter, the court determines whether the expert possesses sufficient qualifications to render an opinion on the matter in question. Gail v. Clark, 410

N.W.2d 662, 673 (Iowa 1987). Upon demonstrating sufficient knowledge of the subject matter, any questions regarding the degree of the expert's knowledge affects the weight of that testimony, rather than its admissibility. Id.

Prior to rendering an opinion, an expert's qualifications may be tested with a voir dire examination. Bornn v. Madagan, 414 N.W.2d 646, 647 (Iowa Ct. App. 1987).

Guidelines To Determine Qualifications

The testimony must be within the expert's area of expertise. The capacity to testify as an expert is relative to the topic at issue. A witness must have sufficient expertise or experience in the particular field to qualify as an expert. State ex rel. Leas in Interest of O'Neal, 303 N.W.2d 414, 421 (Iowa 1981). The trial court is granted considerable latitude in determining the expert qualifications of a witness preparatory to rendering of opinions. Wheeler v. Dental East, P.C., 494 N.W.2d 248 (Iowa Ct. App. 1992). An expert must be qualified to answer each question propounded. Wick v. Henderson, 485 N.W.2d 645 (Iowa 1992) (expert must not only be generally qualified in the field of expertise, but must also be qualified to answer particular questions propounded). Accordingly, qualifications must render the expert qualified on each particular point. Karr v. Samuelson, Inc., 176 N.W.2d 204, 210 (Iowa 1970). See also Ort v. Klinger, 496 N.W.2d 265 (Iowa Ct. App. 1992) (trial court did not abuse its discretion where it prevented a doctor's testimony on the effect of chiropractic treatments since doctor did not know what type of treatment was received).

Experts may only testify to the extent of their expertise. Experts may not give opinions on matters outside the scope of their knowledge simply because they have been designated as an expert. Oldham v. Shenandoah Community School District, 461 N.W.2d 207, 208 (Iowa Ct. App. 1990).

An expert attempting to proffer evidence or results obtained from an experiment must have been qualified to conduct the experiment and interpret its results. Hubby v. State, 331 N.W.2d 690, 698 (Iowa 1983).

The court must restrict the expert to his/her area of particular expertise. Although proffered testimony must be within the expert's area of expertise, the expert is not required to be a specialist in the particular area if testimony falls within the witness's general area of expertise. Hunter v. Board of Trustees, 481 N.W.2d 510, 520 (Iowa 1992).

The court excluded portions of an expert's testimony regarding standards of care that a school district was responsible for when maintaining and supervising its playground areas, even though the witness held a Ph.D. in Recreation and Park Administration; such testimony was beyond the expert's area of expertise. Oldham v. Shenandoah Community School District, 461 N.W.2d 207, 208 (Iowa Ct. App. 1990).

A physician who served as a medical examiner was qualified, after observing the crime scene and the victim's body, to determine the likelihood that death occurred where the body was found. State v. Nowlin, 244 N.W.2d 591, 601 (Iowa 1976).

An engineer and a county engineer were not qualified to render opinions regarding the interpretation governmental agencies would give to rules under specific circumstances. Hoyt v. Chicago, Rock Island & Pacific Railroad Co., 206 N.W.2d 115, 120 (Iowa 1973).

General education or expertise of an expert witness is insufficient qualification where specialized expertise is required. Although general knowledge, experience, education or expertise often qualify an expert to render an opinion, the court will not permit an expert, who possesses only general expertise or education, to testify regarding specialized matters which exceed the scope of the expert's general qualifications. See Tappe v. Iowa Methodist Medical Center, 477 N.W.2d 396, 402 (Iowa 1991); Bornn v. Madagan, 414 N.W.2d 646, 650 (Iowa Ct. App. 1987).

The trial court properly excluded a law enforcement officer's testimony regarding a driver's ability to avoid an accident; extensive accident investigation experience was insufficient when there was no indication the officer possessed any accident reconstruction experience. Bornn v. Madagan, 414 N.W.2d 646, 650 (Iowa Ct. App. 1987).

A police officer's expert testimony regarding the speed a vehicle was traveling based upon the skid marks was inadmissible when the officer had not considered all the necessary factors regarding road surface, vehicle and tire characteristics, and the grade of the roadway and could not demonstrate sufficient experience justifying his failure to consider all of the necessary factors while still reaching an accurate speed assessment. Bernal v. Bernhardt, 180 N.W.2d 437, 441 (Iowa 1970).

Iowa Code, § 147.139 (1993), restricts the ability to render an expert medical opinion regarding the appropriate standard of care to persons who possess medical qualifications relating directly to the medical problem and type of treatment involved. Tappe v. Iowa Methodist Medical Center, 477 N.W.2d 396, 402 (Iowa 1991). This section does not apply to opinions relative to the standard of care of a hospital and a nurse anesthetist; it only applies, according to its terms, to licensed physicians, surgeons, and dentists. Wick v. Henderson, 485 N.W.2d 645 (Iowa 1992) (neurologist qualified to give opinion on standard of care of nurse anesthetist).

A physician is not unqualified to render an expert opinion merely because he or she is not a specialist; however, a lack of educational experience in a particular medical branch or specialty affects the weight given an expert's testimony. State v. Peterson, 219 N.W.2d 665, 673 (Iowa 1974). Status as a general practitioner and completion of core medical school courses generally qualify physicians to render expert opinions regarding physical maladies, even though the physician is not a specialist in a particular field of medicine. State v. Backus, 147 N.W.2d 9, 10-11 (1966). A

general practitioner is qualified to provide an expert opinion regarding the mental condition of a patient under the physician's care. In re Springer's Estate, 110 N.W.2d 380, 386 (Iowa 1961). The general practitioner has had sufficient opportunity to professionally observe and examine the patient. Id. Chiropractic is a restricted area of medical practice. A chiropractor is qualified to interpret x-rays and express opinions within the realm of that limited field. Becker v. D & E Distributing Co., 247 N.W.2d 727, 733 (Iowa 1976).

A hog farmer was not qualified to render an expert opinion regarding the proper vaccination of gilts and sows. Although the farmer fed between 500 and 600 hogs annually, no information was disclosed indicating the length of time the farmer had been raising hogs, his knowledge regarding the illness suffered by the hogs at issue, or that he was versed in proper vaccination methods. Ruden v. Hansen, 206 N.W.2d 713, 717 (Iowa 1973).

Before permitting expert testimony, the court must find a witness qualified by reason of: Iowa R. Evid. 702 requires that an expert be qualified by reason of "knowledge, skill, experience, training or education." Hunter v. Board of Trustees, 481 N.W.2d 510, 520 (Iowa 1992).

Qualification as an expert enables a witness to render an opinion upon specific facts in issue by virtue of the person's study, training, experience, and special knowledge. Osborn v. Massey-Ferguson, Inc., 290 N.W.2d 893, 900 (Iowa 1980).

(1) **Knowledge:** To qualify an expert to state an opinion regarding value, it is appropriate to show that the witness is familiar with market values. Shinrone, Inc. v. Tasco, Inc., 283 N.W.2d 280, 289 (Iowa 1979).

An expert, qualified by reason of knowledge or experience, may testify as to the custom or usage in a particular trade or business. McCrady v. Sino, 118 N.W.2d 592, 595 (Iowa 1962).

Iowa courts recognize that devoting substantial time and effort to the study of a particular subject may qualify a person as an expert. Van Wyk v. Norden Lab., Inc., 345 N.W.2d 81, 86 (Iowa 1984). Although others may have more extensive backgrounds, if the proffered expert has an adequate background and will be able to assist the jury, the testimony should be accepted. See id.

Although not a licensed physician, a witness who had completed several physiology courses, worked as a research physiologist, and studied neurological problems concomitant with head injuries was qualified to render an opinion regarding the probable loss of memory attendant to a head injury followed by extended unconsciousness. Ganrud v. Smith, 206 N.W.2d 311, 315 (Iowa 1973).

(2) **Skill:** An expert's skill in a particular area may sufficiently qualify the expert to render an opinion. Hunter v. Board of Trustees, 481 N.W.2d 510, 520 (Iowa 1992); Iowa Rules of Evidence, 702.

Although Iowa case law does not contain a great deal of discussion regarding the skill necessary to qualify an expert to

render an opinion, decisions discussing knowledge and experience may be sufficiently analogous to provide guidance.

(3) **Experience:** Trial courts have broad discretion when determining if a witness has adequate personal experience to provide an expert opinion. State v. Taylor, 336 N.W.2d 721, 726 (Iowa 1982). A proffered expert need not be the most or best qualified person, but must be adequately qualified on the basis of his or her experience. CHR Equipment Financing, Inc. v. C & K Transport, 448 N.W.2d 693, 695 (Iowa Ct. App. 1989).

Police officers are generally qualified to calculate minimum speed based on skid marks when there is no issue regarding impact. The calculations require little formal training and are beyond the average juror's comprehension. Bernal v. Bernhardt, 180 N.W.2d 437, 440 (Iowa 1970). However, when an impact or collision is involved, a great deal of scientific and mathematical knowledge is necessary, therefore a stronger factual foundation showing the expert's qualifications is required. Id.

A doctor may testify as an expert in regard to the type and character of an injury's cause, based upon the doctor's treatment of that injury and general experience. State v. Paulsen, 265 N.W.2d 581, 589 (Iowa 1978).

An expert who placed traffic control devices for governmental entities with experience in accident reconstruction may testify regarding the noticeability or proper placement of road signs. Cook v. State, 431 N.W.2d 800, 804 (Iowa 1988).

Body shop foreman with extensive truck repair experience was qualified to testify regarding the customary methods utilized to lock truck doors. McCrady v. Sino, 118 N.W.2d 592, 595 (Iowa 1962).

(4) **Training:** Training as a perfusionist is an insufficient qualification to render a medical opinion as to what caused a patient's brain damage during surgery, perfusionists do not possess the general medical knowledge and diagnosis skills necessary to render a qualified opinion. Tappe v. Iowa Methodist Medical Center, 477 N.W.2d 396, 402 (Iowa 1992).

When testifying as to the speed at which a vehicle was most likely traveling, if a law enforcement officer did not know or consider the specific variables which must be considered when making an exact mathematical calculation of speed, the witness must disclose the details of his/her training and experience which justified disregarding any of the required factors. State v. Dvorsky, 322 N.W.2d 62, 65 (Iowa 1982).

Occupational training generally qualifies a police officer to estimate vehicle speed based upon skid marks, if the vehicle skids to a stop without experiencing substantial impact. However, the officer must consider the road surface, the automobile and its tires, and the grade of the roadway. If all of the necessary factors are not considered, the officer must indicate specific elements of the training, experience, or experimentation which permitted excluding any required factors. Bernal v. Bernhardt, 180 N.W.2d 437, 441 (Iowa 1970).

Investigating officers are generally qualified to provide an opinion regarding the point of impact. Dougherty v. Boyken, 155 N.W.2d 488, 492 (Iowa 1968). This opinion is generally admissible even when the officer's qualifications are minimal; questions regarding the officer's qualifications go to the weight, rather than the admissibility, of the opinion. Id.

A police officer trained in alcohol-related law enforcement, with experience administering the horizontal gaze nystagmus test, is qualified to perform the HGN test and interpret its results. State v. Murphy, 451 N.W.2d 154, 157-58 (Iowa 1990).

Training and drug counseling experience with drug users qualified an expert to give an opinion regarding drug counseling; nevertheless, the expert was not qualified to render an opinion regarding the effect of drugs or drug use on the human mind and body. State v. Martin, 217 N.W.2d 536, 546 (Iowa 1974).

An expert need not have a degree in engineering to testify regarding the adequacy of traffic signals, devoting substantial time and effort to the study of traffic safety and regulation qualify an expert to offer an opinion on such matters. Schmitt v. Clayton County, 284 N.W.2d 186, 188 (Iowa 1979).

(5) **Education:** Experience and education in accident reconstruction may qualify an expert to opine whether a party had the time or ability to avoid an accident. Bornn v. Madagan, 414 N.W.2d 646, 649 (Iowa Ct. App. 1987).

FACTUAL PREDICATES TO ADMISSIBILITY OF OPINIONS

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The Court, Upon Proper Motion Or Objection, Is Required To Determine The Sufficiency Of The Factual Bases For Opinions Before Permitting Same

The admissibility of an expert opinion necessarily depends upon the validity of its factual foundations. An opinion lacking a proper foundation is inadmissible. Lessenhop v. Norton, 153 N.W.2d 107, 114 (Iowa 1967); Ort v. Klinger, 496 N.W.2d 265 (Iowa Ct. App. 1992). If sufficient data or facts do not undergird an expert's opinion, that opinion is incompetent. Mermigis v. Servicemaster Industries, Inc., 437 N.W.2d 242, 247 (Iowa 1989); Des Moines Chrysler-Plymouth, Inc. v. City of Urbandale, 488 N.W.2d 711 (Iowa Ct. App. 1992) (property owners failed to meet burden that street paving assessment was excessive; expert witness admitted he knew nothing about formula city used in assessments, he did not perform an appraisal, nor did he opine as to a fair assessment).

The court must determine if sufficient factual predicates and an adequate foundation support an expert's opinion and conclusions, removing the opinion from the status of mere conjecture or speculation. Osborn v. Massey-Ferguson, Inc., 290 N.W.2d 893, 899 (Iowa 1980). Admission of an expert opinion which is not supported by an adequate factual foundation is reversible error. Shinrone, Inc. v. Tasco, Inc., 283 N.W.2d 280, 288 (Iowa 1979).

Iowa R. Evid. 703 and 705 provide two safeguards against using insufficient evidence to support an expert's testimony. First, the information supporting an opinion must be of a type reasonably relied upon by other experts in the field. Second, cross-examination may be utilized to test the expert's basis. Brunner v. Brown, 480 N.W.2d 33, 35 (Iowa 1992).

An expert may state opinions or inferences without disclosing their underlying basis, unless the court requires predisclosure. However, the underlying facts or data which support the opinion may be explored on cross-examination. Brunner v. Brown, 480 N.W.2d 33, 34-35 (Iowa 1992) (citing Iowa R. Evid. 705).

A jury cannot evaluate an expert opinion unless it has information disclosing the opinion's basis. This requirement may be fulfilled by having the witness state the facts upon which he relies and the source of those facts or by utilizing the facts assumed to be true in hypothetical question. If the facts or basis supporting an expert's opinion is insufficiently disclosed, that opinion is inadmissible. Harsha v. State Sav. Bank, 346 N.W.2d 791, 798 (Iowa 1984).

When an expert discloses the information upon which an opinion is based, the jury may consider that underlying evidence as substantive evidence, unless a limiting instruction is requested. Brunner v. Brown, 480 N.W.2d 33, 37 (Iowa 1992).

To preserve error for appellate review, a motion to exclude expert testimony or strike erroneously admitted expert testimony must specifically indicate the grounds or reasons for the objection. An objection must contain the requisite specificity to inform the trial judge, so that alleged insufficiencies may be considered and ruled upon, and to notify opposing counsel of deficiencies, so that he or she will have an opportunity to correct or eliminate any defects. An appellate court will only consider those grounds specifically raised. Fischer, Inc. v. Standard Brands, Inc., 204 N.W.2d 579, 583 (Iowa 1973). See also State v. Mark, 286 N.W.2d 396, 408 (Iowa 1979); State v. Horton, 231 N.W.2d 36, 38 (Iowa 1975).

Upon proper objection, a court must evaluate the foundational basis for an expert's testimony. The court may permit the testimony subject to its discretion to later strike that testimony if its underlying foundation is insufficient. Sallis v. LaMansky, 420 N.W.2d 795, 797 (Iowa 1988). An objection claiming there is "no proper foundation" for expert testimony but which fails to explain in what respect the foundation is lacking, does not provide a sufficient basis for review on appeal. Carter v. Wiese Corp., 360 N.W.2d 122, 132 (Iowa Ct. App. 1984).

A timely and specific objection to the propriety of expert testimony on a particular subject requires the proponent to establish that the testimony is admissible. State v. Myers, 382 N.W.2d 91, 93 (Iowa 1986). An objection that an opinion is not a proper subject for expert testimony adequately preserves the issue for review. State v. Johnson, 224 N.W.2d 617, 622 (Iowa 1974), aff'd, 237 N.W.2d 819 (Iowa 1976).

An objection questioning the sufficiency of the data or facts supporting an expert's opinion, as opposed to the facts qualifying an expert to render an opinion, is directed at the weight, not the admissibility, of the testimony. DeBolt v. Daggett, 416 N.W.2d 102, 106 (Iowa Ct. App. 1987).

A hypothetical question may not assume facts which have no support in the record or are not inferable from the facts in the record. Hubby v. State, 331 N.W.2d 690, 696 (Iowa 1983).

A voir dire examination may be used to test the factual bases supporting an expert's opinion, State v. Chancy, 391 N.W.2d 231, 234 (Iowa 1986), or the expert's knowledge of the underlying facts. Bernal v. Bernhardt, 180 N.W.2d 437, 439 (Iowa 1970).

Guidelines To Assist In Determining Sufficiency Of Factual Bases

An expert may base testimony on one of three sources: (1) firsthand observation; (2) information obtained during trial through hypothetical questions or other witnesses' testimony; or (3) data presented to the expert outside of court and other than by the expert's perception. Brunner v. Brown, 480 N.W.2d 33 (Iowa 1992).

The expert must consider all facts actually in evidence in reaching opinions. Although an expert need not consider all the facts in evidence when presenting an opinion, the facts supporting an opinion must be sufficient to make that opinion stronger than conjecture. Van Wyk v. Norden Lab., Inc., 345 N.W.2d 81, 86 (Iowa 1984). Although a hypothetical question need not encompass all facts within the record, it must contain the important, relevant facts. Schmitt v. Clayton County, 284 N.W.2d 186, 189 (Iowa 1979); Speed v. State, 240 N.W.2d 901, 911 (Iowa 1976).

The expert cannot rely upon facts unless of the type reasonably relied upon by experts in the field. Iowa R. Evid. 703 allows an expert to utilize or rely upon information, even though not admissible in evidence, if of a type reasonably relied upon by other experts in the same field when forming opinions. Brunner v. Brown, 480 N.W.2d 33, 34 (Iowa 1992). Experts need to disclose the underlying evidence. Absent disclosure, jurors would be faced with a "meaningless conclusion" and have no basis upon which to evaluate the opinion. Id. at 36.

Whether the underlying evidence supporting an expert's opinion is of the type reasonably relied upon by similarly situated experts must be determined by the trial court. The court will consider the expert's own testimony regarding the reasonableness of that reliance. However, if the underlying evidence was furnished by a biased witness, it will most likely be excluded. Brunner v. Brown, 480 N.W.2d 33, 35 (Iowa 1992).

An expert may not merely state that colleagues agree with or do not contradict the expert's analysis. State v. Barrett, 445 N.W.2d 749, 751 (Iowa 1989). The expert must provide foundational testimony indicating that a colleague's opinion is a type of "fact or data" upon which others in the expert's field reasonably rely when reaching conclusions. Id. Facts or data of the type relied upon by other

experts in the field generally consist of lab or test results, texts, and charts, among other things. Id. Consequently, it was erroneous to admit an expert's statement that his colleagues generally concurred with his conclusion without evidence indicating forensic pathologists generally rely upon the conclusions of colleagues. Id.

The ability to base testimony on facts of the same type reasonably relied upon by experts in the same field and the lack of a requirement that those bases be admissible at trial, coupled with the fact that experts need not disclose the bases for an opinion prior to giving testimony, places the burden of testing and exploring the facts and assumptions supporting an expert opinion upon the opposing side through cross-examination. Mercy Hospital v. Hansen, Lind & Meyer, 456 N.W.2d 666, 671 (Iowa 1990).

Iowa's Supreme Court has taken judicial notice that doctors customarily rely on other physicians' medical records when forming opinions about a patient's physical condition. State v. Henze, 356 N.W.2d 538, 540 (Iowa 1984).

Psychological expert testimony based on responses from a subject's friends and neighbors to the psychologist's inquiries regarding the subject, should be excluded if there is no evidence indicating psychologists ordinarily or reasonably rely upon this type of information. State v. Vincik, 398 N.W.2d 788, 795-96 (Iowa 1987), aff'd, 436 N.W.2d 350 (Iowa 1989).

The opinions must be based upon the facts and the opinions cannot create or establish the facts. An expert may disclose hearsay which formed the basis for an opinion, but that information cannot be utilized as proof of the underlying matter's truth. Brunner v. Brown, 480 N.W.2d 33, 35 (1991).

Inserting the words "leukemia" and "multiple sclerosis" on charts presented with an expert's testimony was improper when those health effects had not been sufficiently linked with the presence of an electromagnetic field. Iowa Power & Light Co. v. Stortenbecker, 334 N.W.2d 326, 331 (Iowa Ct. App. 1983).

Facts assumed in a hypothetical question must be supported by the record. However, those facts need not be established by direct testimony, but may be inferred from circumstantial evidence. Hubby v. State, 331 N.W.2d 690, 696 (Iowa 1983).

A hypothetical question asking an expert about the stopping time for a five-axle truck, weighing in excess of 27,000 lbs. and traveling approximately 50 mph on a level, paved highway and the expert's response were improper when the case involved stopping a five-axle truck which weighed in excess of 50,000 lbs., and the question did not consider various factors particular to the truck, the road surface conditions, and the slope of the highway. The expert could not base his conclusion on facts which differed so drastically from the record. Albrecht v. Rausch, 193 N.W.2d 492, 495 (Iowa 1972).

The opinions of the expert cannot be based upon criteria that are contrary to the law.

The opinion must be based upon the requisite certainty as opposed to possibility. An expert opinion may be stated in terms which depict the expert's true state of mind, regardless of whether that opinion is of a possibility, probability, or actuality. State v. Knudtson, 195 N.W.2d 698, 701 (Iowa 1972). The opinion need not be stated in definite, unequivocal terms; terms such as "I believe," "I think," or "It appears to me" are permissible if such language accurately expresses the expert's professional opinion. Dickinson v. Mailliard, 175 N.W.2d 588, 593 (Iowa 1970).

In a negligence case, the probability standard may be met by expert testimony indicating causation is probable or by expert testimony that causation is possible in conjunction with testimony indicating the conditions at issue did not exist prior to the alleged causative facts. Bushman v. Cuckler Building Systems, 421 N.W.2d 145, 148 (Iowa Ct. App. 1988). Shinrone, Inc. v. Tasco, Inc., 283 N.W.2d 280, 284 (Iowa 1979).

A doctor's opinion that an electromagnetic field created by an electric transmission line could possibly result in adverse health effects should have been excluded. Adverse health effects had not been sufficiently demonstrated and the doctor could not testify regarding the likelihood of those effects beyond a mere possibility. Iowa Power & Light Co. v. Stortenbecker, 334 N.W.2d 326, 331 (Iowa Ct. App. 1983).

A physician cannot opine upon the future consequences or effects of an existing injury or condition, unless those effects or consequences are reasonably certain or medically probable to occur. Consequences or effects which are merely possible are inadmissible. Bostian v. Jewell, 121 N.W.2d 141, 146 (Iowa 1963).

Although experts, who compared the defendant's shoe prints with those found at the murder scene, were unwilling to conclusively identify the defendant as the maker of the prints at the murder scene; their testimony was admissible because it made the defendant's identity as the murderer more probable than it would have been without the proffered testimony. State v. Mark, 286 N.W.2d 396, 411 (Iowa 1979).

The criteria applied by the expert must comport with legal standard and cannot impose a duty greater than the legal standard. Although no reported Iowa decision specifically addresses this issue, expert testimony which deviates from the legal standard would likely violate a cardinal rule governing the admissibility of expert testimony, that expert opinions are only admissible if they will assist the jury. Hunter v. Board of Trustees, 481 N.W.2d 510, 519 (Iowa 1992).

In a criminal prosecution, medical experts testifying as to the cause of a decedent's death permissibly based their opinion upon a "reasonable medical certainty," rather than "beyond a reasonable doubt." Medical and legal causation are distinct standards. The jury must determine legal causation, the medical experts need only

establish medical causation for the decedent's death. State v. Webb, 309 N.W.2d 404, 413 (Iowa 1981).

The Court Is Required To Determine Whether The Factual Bases And Information Relied Upon By The Expert Are Reasonably Reliable And To Preserve, Upon The Record, The Bases For The Ruling

The court must determine whether the methods used by the expert and the information supporting the expert's opinion are reasonable under the circumstances of the case and the purpose for which the information or opinion is utilized. Mills v. Iowa Dept. of Transp., 462 N.W.2d 300, 303 (Iowa Ct. App. 1990).

Experimental evidence is admissible if it will aid the jury in reaching a decision. The court must weigh the probative value of experimental evidence against the danger it will mislead the jury. Generally, the conditions under which an experiment was conducted must be sufficiently similar to the issue at hand to be of assistance. Hubby v. State, 331 N.W.2d 690, 698 (Iowa 1983).

The court properly excluded psychological testimony regarding a computer analysis performed upon the plaintiff. Although the computer analysis could serve as the basis for the psychologist's opinion, the court excluded all testimony regarding the independent results of the computer analysis because the reliability of those results had not been established. Sallis v. LaMansky, 420 N.W.2d 795, 797 (Iowa 1988).

Although expert shoe print analysis was subject to possible error, that possibility of error, which was fully explained to the jury, merely affected the weight of the evidence, not its admissibility. State v. Mark, 286 N.W.2d 396, 413 (Iowa 1979).

Expert opinions must be exluded if they contradict the rules of logic or when some other explanation is equally probable. Expert conclusions which are insufficiently supported by the underlying factual circumstances are inadmissible. See Hardwick v. Bublitz, 119 N.W.2d 886, 888 (Iowa 1963); Iowa Power & Light v. Stortenbecker, 334 N.W.2d 326, 331 (Iowa Ct. App. 1983). Unreliable opinions do not assist the factfinder and are inadmissible. State v. Brown, 470 N.W.2d 30, 32-33 (Iowa 1991).

Expert testimony regarding the adverse health effects of an electromagnetic field should have been excluded. The factual bases utilized and relied upon by the expert did not adequately establish that adverse health effects arise from the presence of an electromagnetic field. Iowa Power & Light v. Stortenbecker, 334 N.W.2d 326, 331 (Iowa Ct. App. 1983).

An expert opinion regarding a vehicle's speed when it left the road is inadmissible when the basis for the expert's opinion, facts observed at the scene of the accident, are insufficient to apply scientific or expert knowledge and reach an accurate determination. Hardwick v. Bublitz, 119 N.W.2d 886, 888 (Iowa 1963).

Expert opinions which are based upon "facts" which are contrary to science or medicine must be excluded. No Iowa cases specifically discuss the subject of this subheading. However, the Iowa Court of

Appeals excluded expert testimony regarding the connection between electromagnetic fields and leukemia because of insufficient proof of a cause/effect relationship. Iowa Power & Light v. Stortenbecker, 334 N.W.2d 326, 331 (Iowa Ct. App. 1983).

Expert opinions must be excluded when they are contrary to science or medicine. Although no reported Iowa cases specifically discuss the exclusion of expert testimony under this standard, the supreme court has established the general rule governing the admissibility of scientific evidence. If the reliability of a scientific process or scientific evidence cannot be established, the court must exclude that evidence because it will not assist the trier of fact. State v. Klindt, 389 N.W.2d 670, 672 (Iowa 1986). See also Iowa Power & Light v. Stortenbecker, 334 N.W.2d 326, 331 (Iowa Ct. App. 1983) (ruling that expert testimony regarding adverse health effects of electromagnetic fields was not adequately supported and should have been excluded).

The Court Is Required To Determine Whether The Data, Tests, Authorities Or Things Relied Upon By The Expert Are The Type Upon Which The Expert Can Reasonably Rely In His/Her Field

The data, tests, authorities or things relied upon must be reliable and trustworthy from a logical basis before the opinions are admissible, even though experts in the field generally rely upon that type of information. No Iowa cases specifically discuss the subject of this subsection.

The data, tests, authorities or things relied upon or methodology being employed must be generally recognized as scientifically or medically reliable by the scientific or medical community of which the witness is a member and the court, upon proper motion, must make such a determination and preserve, on the record, the basis upon which the court rules. "General scientific acceptance" is not a prerequisite for the admission of evidence if its reliability may be otherwise established. Such a requirement is impermissible because: it imposes a standard not required for other areas of expert testimony, it is inconsistent with modern rules of evidence which liberally admit expert opinions if they will assist the factfinder, it is inconsistent with Iowa's committment to liberally admit opinion testimony, distinguishing scientific evidence from other areas of expert testimony is often extremely difficult, acceptance in the scientific community is an amorphous concept, and courts cannot surrender their responsibility to determine the reliability of evidence to scientists or other experts. State v. Hall, 297 N.W.2d 80, 84-85 (Iowa 1980), cert. denied, 450 U.S. 927 (1981). In each case, the court must make an ad hoc determination regarding the reliability of the proponent's evidence. It is impossible to establish rules which are binding in every case. Id. The foundational requirement necessary to demonstrate the reliability of evidence will necessarily be influenced by the subject matter's complexity. Id. Furthermore, the court must consider the likely effect of the evidence on the factfinding process. Id.

When proposed evidence is complex and highly dependent upon the expert's subjective analysis, the court will require a much stronger showing of reliability. Id. at 86.

Iowa does not adhere to the Frye standard of "general scientific acceptance" for the admissibility of scientific evidence, instead requiring that the evidence be established as reliable and meet the general test for admissibility of expert testimony. State v. Hall, 297 N.W.2d 80 (Iowa 1980); State v. Brown, 470 N.W.2d 30, 32 (Iowa 1991). See also Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).

Recently, the United States Supreme Court rejected application of the Frye standard in federal courts, stating that Frye was supplanted by the Federal Rules of Evidence. Daubert v. Merrell Dow Pharmaceuticals, Inc., 61 U.S.L.W. 4805 (U.S. March 30, 1993).

Testimony that the evidence or process is reliable or relied upon by other experts or utilized in other jurisdictions tends to establish the reliability of the proffered evidence or process. State v. Klindt, 389 N.W.2d 670, 672 (Iowa 1986). Nevertheless, an initial showing of reliability is required, unreliable evidence will not assist the factfinder. Id. Reliability may be established through the expert's qualifications and experience and based upon the factual basis supporting the expert's opinion. Van Wyk v. Norden Laboratories, Inc., 345 N.W.2d 81, 87 (Iowa 1984). The scrutiny a court must utilize to examine scientific evidence for reliability depends upon the complexity of the information and its probable impact on the fact-finding process. State v. Murphy, 451 N.W.2d 154, 156-57 (Iowa 1990). The issue is not whether the particular test utilized or discussed by the expert is the best or most foolproof means available, but whether the expert's testimony will aid the factfinder. A trial court need not await the scientific community's approval, if it finds evidence reliable. State v. Nelson, 480 N.W.2d 900, 903 (Iowa Ct. App. 1991).

To preserve error for appellate review, a motion to exclude or strike erroneous expert opinions must specifically identify the grounds or rationale supporting the objection. The objection must be sufficiently specific to enable the trial judge to consider and rule upon the purported inadequacies and notify opposing counsel of the deficiencies so that any defects may be corrected or eliminated. An appellate court will only consider those grounds specifically raised in the objection. Fischer, Inc. v. Standard Brands, Inc., 204 N.W.2d 579, 583 (Iowa 1973). See also State v. Mark, 286 N.W.2d 396, 408 (Iowa 1979); State v. Horton, 231 N.W.2d 36, 38 (Iowa 1975).

AREAS OF ADMISSIBLE EXPERT TESTIMONY

Expert Testimony Is Inadmissible Unless It Will Assist The Trier of Fact

Necessity is not required for the admissibility of expert testimony. Iowa R. Evid. 702 merely requires a showing that

specialized knowledge will assist the jury in understanding evidence or determining a fact in issue. The court must perform a "commonsense inquiry" to determine whether an untrained layman would be able to intelligently and to the best possible degree determine the particular issue in question without enlightenment from an expert with specialized understanding. Hunter v. Board of Trustees, 481 N.W.2d 510, 519 (Iowa 1992). It is unimportant that a jury might be able to arrive at the same conclusion, based upon the facts, as reached by the expert; the important query is whether the expert's opinion will assist the factfinder. However, the reliability of the evidence must be demonstrated, unreliable evidence does not assist the factfinder. State v. Brown, 470 N.W.2d 30, 32-33 (Iowa 1991).

Erroneously admitted opinion testimony does not prejudice an opponent if it is unlikely that any juror's understanding or views were altered or affected by the opinion. State v. Brotherton, 384 N.W.2d 375, 380 (Iowa 1986).

Expert testimony indicating children generally have difficulty with the concepts of reality versus fantasy and truth versus falsehood was properly excluded. The issue was not beyond the jury's understanding and would be within the factfinder's common knowledge obtained from experiences with children or from hearing the child in question testify. State v. Halstead, 362 N.W.2d 504, 508 (Iowa 1985).

A police officer's expert opinion estimating the speed of a vehicle based upon skid marks was inadmissible because it would not assist the jury, the officer had not considered all of the variables necessary to reach an accurate speed determination. Bernal v. Bernhardt, 180 N.W.2d 437, 442 (Iowa 1970).

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The Subject Matter of Expert Testimony Must Be Beyond The Range of Recognition, Comprehension, Perception, Understanding Or Knowledge Of The Average Juror

An expert opinion is admissible when it will assist the jury and encompasses matters outside the realm of common knowledge and experience. State v. Fox, 480 N.W.2d 897, 899 (Iowa Ct. App. 1991).

A trained police investigator with sufficient physical evidence indicating the speed of a vehicle is more qualified to draw a proper conclusion from the available information than untrained jurors. State v. Dvorsky, 322 N.W.2d 62, 65 (Iowa 1982).

Portions of an expert's testimony may be excluded when the issues are relatively simple and not beyond the comprehension of the jury. The court excluded portions of an expert's testimony regarding a school district's responsibility for the maintenance and supervision of a playground area in a case where a student slipped and fell while playing on the ice. Oldham v. Shenandoah Community School District, 461 N.W.2d 207, 209 (Iowa Ct. App. 1990).

Expert testimony that a bank made false representations regarding the effect of a judgment was correctly excluded. The matter was best handled by instructing the jury as to controlling legal principles and allowing the jury to determine whether a

misrepresentation had actually occurred. United Central Bank of Des Moines v. Kruse, 439 N.W.2d 849, 852 (Iowa 1989).

Standards governing attorney conduct may be an appropriate subject for expert testimony. In re Dankbar, 430 N.W.2d 124, 129 (Iowa 1988). The court must determine whether the ethical considerations and disciplinary rules at issue are sufficiently understandable to the jury without the assistance of expert testimony. Id.

Expert testimony regarding potential inaccuracies and inadequacies of eyewitness identification is impermissible; such testimony and subject matter is not beyond the average juror's understanding or experience. State v. Galloway, 275 N.W.2d 736, 740-41 (Iowa 1979) (Reynoldson, Chief Justice, and six other justices, concurring specially).

Opinions Concerning Ultimate Issues Invade The Province Of The Jury And Are Inadmissible Unless They Will Assist The Jury In Deciding The Ultimate Issue

An expert opinion is not inadmissible merely because it discusses or embraces an ultimate issue to be decided by the factfinder. State v. Fox, 480 N.W.2d 897, 899 (Iowa Ct. App. 1991) (citing Iowa Rules of Evidence, 704).

Although an expert opinion may embrace ultimate issues, an expert may not state an opinion regarding legal standards. Cook v. State, 431 N.W.2d 800, 804 (Iowa 1988). Nor may an expert testify as to the fault of respective parties, specifically indicating that a party was at fault or which party was at fault. Bushman v. Cuckler Building Systems, 421 N.W.2d 145, 149 (Iowa Ct. App. 1988); Terrell v. Reinecker, 482 N.W.2d 428 (Iowa 1992) (investigating officer's testimony that in his opinion, motorist had failed to yield right-of-way to truck was inadmissible, since testimony stated a conclusion of law that motorist had violated statutory duty).

A standing objection, prior to expert testimony, that an opinion will encompass ultimate conclusions which invade the province of the jury is ineffectual. Counsel may only object if and when objectionable questions are advanced. Bornn v. Madagan, 414 N.W.2d 646, 648 (Iowa Ct. App. 1987). Furthermore, an objection that expert testimony "invades the province of the jury" is of no effect and does not preserve error. Id; Schlichte v. Franklin Troy Trucks, 265 N.W.2d 725, 730 (Iowa 1978). An objection that an expert's opinion is not an appropriate subject for expert testimony sufficiently preserves that matter for review. Terrell v. Reinecker, 482 N.W.2d 428 (Iowa 1992); State v. Maurer, 409 N.W.2d 196, 197 (Iowa Ct. App. 1987); State v. Nimmo, 247 N.W.2d 228, 231 (Iowa 1976).

The court properly excluded the testimony of a deputy and state trooper regarding the cause of an automobile collision. The excluded testimony essentially indicated who was at fault or caused the accident, as oppposed to the admissible testimony of an accident reconstructionist who merely detailed how the accident occurred and

the chronological events preceding the accident. Bornn v. Madagan, 414 N.W.2d 646, 649 (Iowa Ct. App. 1987).

An expert cannot render an opinion as to an accused's guilt or innocence. Accordingly, a state trooper's testimony that a defendant met both elements of an offense beyond a reasonable doubt was inadmissible. This testimony encompassed the standard of proof, a determination inherently within the factfinder's realm. State v. Maurer, 409 N.W.2d 196, 198 (Iowa Ct. App. 1987).

Expert opinions on ultimate issues are admissible only where the average juror is incapable of formulating an opinion on the issue. Although ultimately reserved for the factfinder's judgment, expert testimony may encompass ultimate issues. State v. Nimmo, 247 N.W.2d 228, 230 (Iowa 1976); State v. Fox, 480 N.W.2d 897, 899 (Iowa Ct. App. 1991); Iowa R. Evid. 704. If the jury, however, is equally capable to render a decision on the issue or will not be assisted by the opinion, the testimony should not be admitted. State v. Brown, 470 N.W.2d 30, 32 (Iowa 1991); Olson v. Katz, 201 N.W.2d 478, 482 (Iowa 1972).

Experts may not opine on the credibility or truthfulness of a witness or a defendant's guilt or innocence. State v. Tonn, 441 N.W 2d 403, 405 (Iowa Ct. App. 1989). However, an expert may explain relevant mental and physical symptoms found in abuse victims. Id.

The point of impact for a collision is a permissible topic of expert testimony. Dougherty v. Boyken, 155 N.W.2d 488, 492 (Iowa 1968). A trained police officer is more able to draw proper conclusions from data and information surrounding a collision than untrained jurors.

Expert opinions on ultimate issues are inadmissible if the jury is capable of forming an opinion on the issue. Although an expert opinion may embrace an ultimate issue, some subjects are never appropriate for expert testimony. An expert may not give an opinion on a mixed question of law and fact, such as: the guilt or innocence of a defendant, the criminal responsibility or irresponsibility of a person, whether or not a person or a person's actions were negligent, or whether a person had the capacity to execute a will, deed, or like instrument. When a standard, measure or capacity has been fixed by law, no expert, regardless of the expert's qualifications, is allowed to express an opinion as to whether or not a person's conduct measured up to that standard. On those issues, the court must properly instruct the jury as to the appropriate law and the jury must draw its own conclusions based upon the evidence. Nevertheless, an expert may opine whether a person's course of conduct was appropriate. State v. Nimmo, 247 N.W.2d 228, 230 (Iowa 1976).

A court will not receive an expert opinion on the ultimate issue if the jury is equally qualified to render a decision on the issue. Olson v. Katz, 201 N.W.2d 478, 482 (Iowa 1972); Brower v. Quick, 88 N.W.2d 120, 126 (Iowa 1958).

Although an expert may not give an opinion on a question of domestic law, exceptions accompany this rule. That rule only limits opinions on law which go to the ultimate issue in a case. Hariri v.

Morse Rubber Prod. Co., 465 N.W.2d 546, 549 (Iowa Ct. App. 1990). Moreover, the rule prohibiting legal opinions regarding domestic law does not apply to instances in which the legal issue is an operative fact to be proven within the case, rather than a rule to decide the case. Id.

Although an expert may not state an opinion regarding domestic law, the opponent's question to a law enforcement officer inquiring if tickets had been issued to any accident participants opened the door, enabling the proponent to ask the expert if he believed that either of the participants was at fault or had broken any laws. Miller v. Bonar, 337 N.W.2d 523, 529 (Iowa 1983).

An expert cannot opine that a product was unreasonably dangerous. Unreasonably dangerous is a legal standard. Experts may not express an opinion as to whether or not the conduct or product measured up to that standard. Aller v. Rogers Machinery Manufacturing Co., Inc., 268 N.W.2d 830, 840 (Iowa 1978).

An expert opinion that a party acted in bad faith was inadmissible, bad faith was the standard by which the opponent's liability was to be measured. Kooyman v. Farm Bureau Mutual Insurance Co., 315 N.W.2d 30, 37 (Iowa 1982). In addition, the court excluded portions of an expert opinion stating that a sufficient investigation was not performed. In effect, that opinion was also an attempt to state whether the requisite standard of care was met, and therefore inadmissible. Id.

The court improperly allowed a psychiatric social worker to opine on the truthfulness of the complaining witness rather than merely explaining relevant mental and psychological symptoms exhibited by an abuse victim. State v. Brotherton, 384 N.W.2d 375, 379 (Iowa 1986).

Expert testimony indicating that children generally do not lie about incidents of abuse was improperly admitted. This testimony crossed the line between an opinion which assists the jury and that which conveys a conclusion regarding a defendant's guilt. State v. Myers, 382 N.W.2d 91 (1986).

An expert may not testify as to whether drugs are held for personal use or distribution. State v. Ogg, 243 N.W.2d 620, 621 (Iowa 1976).

Police officers should not have been permitted to testify that they believed the defendant was waiting outside a tavern to arrange drug sales with patrons. The jury was equally capable of reaching this conclusion and the proffered expert testimony did not assist the jury. State v. Hines, 223 N.W.2d 190, 193 (Iowa 1974).

RECENT DEVELOPMENTS AND EMERGING ISSUES IN THE AREA OF EMPLOYMENT DISCRIMINATION LAW

Presented to:

The Iowa Defense Counsel Association
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FEDERAL EMPLOYMENT DISCRIMINATION LAWS

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 - AN OVERVIEW

A. Coverage of the Act (42 U.S.C. § 2000e, et seq.)

1. Employers with 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.
2. Labor organizations operating hiring halls or which have 15 or more members.
3. Employment agencies.

NOTE: The courts have held that "partners" in a business are not to be counted as "employees" for purposes of determining whether the business meets the jurisdictional requirements of Title VII. Burke v. Friedman, 556 F.2d 867 (7th Cir. 1977); Wheeler v. Hurdman, 825 F.2d 257 (10th Cir. 1987). In a recent case, the Ninth Circuit Court of Appeals also held that although Title VII applies to an employer's "agents", co-workers or supervisors could not be held individually liable under Title VII. Miller v. Maxwell's International, 991 F.2d 583 (9th Cir. 1993).

B. Title VII prohibits employment discrimination on the basis of race, color, sex, religion, or national origin with respect to both employees and job applicants, and applies to hiring, discharge, compensation, promotion, classification, training, apprenticeship, referrals for employment, union membership and all other terms, conditions or privileges of employment.

C. Types of Title VII Cases

1. Disparate Treatment

a. An individual plaintiff contends that he or she has been treated less favorably than a similarly situated person on the basis of race, color, sex, religion, or national origin.

b. The individual plaintiff alleging a claim of disparate treatment under Title VII must initially establish, by a preponderance of the evidence, a prima facie case. To establish a prima facie case, the plaintiff must prove that: (1) he/she is a member of a protected class under Title VII; (2) he/she was qualified for the position held, or the position applied for; (3) the employer took some type of adverse action against the plaintiff; and (4) the plaintiff's position (or the position plaintiff applied for) remained open after the adverse employment action was taken by the employer. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). A prima facie case raises the inference of unlawful discrimination. The burden of production shifts at that point to the employer to articulate a legitimate non-discriminatory reason for its employment decision. Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978). The plaintiff then has the burden of showing that the defendant-employer's stated reasons are nothing more than a pretext for unlawful discrimination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). However, the ultimate burden of persuasion that the defendant-employer intentionally discriminated against the plaintiff remains at all times with the plaintiff. St.

Mary's Honor Center v. Hicks, _____ U.S. _____, 125 L. Ed.2d 407, 113 S. Ct. 2742 (1993).

2. Disparate Impact

   a. Any employment practice which has the effect of screening out the members of a protected group at a disproportionately higher rate than persons not belonging to the group may be discriminatory. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

   b. A disparate impact may be found by comparing, on a percentage basis, the number of the protected class employed relative to the representation of that class in the relevant labor market.

   c. "Neutral" policies which continue past discrimination may also be found to be unlawful.

   d. The use of subjective factors, such as subjective evaluations in the determination of employee or job applicant qualifications, may open the door for possible discrimination claims. Watson v. Fort Worth Bank and Trust, 487 U.S. 977 (1988).

D. Remedies

1. The courts and the Equal Employment Opportunity Commission ("EEOC") are empowered to fashion remedies so as to make the aggrieved individual(s) whole under Title VII.

2. Prior to 1991, the remedies available under Title VII included reinstatement, frontpay, backpay, injunctive relief, and attorney's fees. Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981). Title VII did not, however, provide plaintiffs with a right

to a jury trial or allow for the recovery of punitive damages. Craft v. Metromedia, Inc., 766 F.2d 1205 (8th Cir. 1985); Shah v. Mt. Zion Hospital & Medical Center, 642 F.2d 268 (9th Cir. 1981).

3. In 1991, Congress enacted the Civil Rights Act of 1991, 42 U.S.C. § 1981a, which amended Title VII (and other federal employment discrimination statutes) to allow for jury trials and for the recovery of the following damages:

   a. Compensatory damages -- emotional pain and suffering, etc.

   b. Punitive damages

      (1) May be recovered against any party -- "other than a government, government agency, or political subdivision."

      (2) Plaintiff must show that the employer acted "with malice or with reckless indifference to the federally protected rights of an aggrieved individual."

   c. Limits on compensatory and punitive damage awards are based on the size of the employer:

      (1) 15-100 employees -- $ 50,000
      (2) 101-200 employees -- $100,000
      (3) 201-500 employees -- $200,000
      (4) 501 or more employees -- $300,000

4. One significant development in determining the extent of the employer's liability in discrimination cases involves the use of "after-acquired" evidence by employers to justify employment decisions. In Kristufek v. Hussman Foodservice Co., 985 F.2d 364 (7th Cir. 1993), for example, the federal district court set aside a jury's award because the plaintiff had falsified his employment application. Plaintiff had told his employer during an initial interview that he

had a bachelor of science degree in business administration from Drake University and that he had taken additional business courses at Northwestern University. The defendant-employer did not, however, discover that plaintiff had falsified his job qualifications until after he had been discharged. The Seventh Circuit Court of Appeals reversed the lower court because the plaintiff's "fraud" was not a stated reason for the defendant's action to terminate his employment. Further, the defendant's employment application form indicated that "any misstatement or omissions of material fact . . . may be cause for dismissal." However, the court did hold that the defendant's backpay liability ended as of the date on which the plaintiff's "fraud" was first discovered by the defendant. See also Summers v. State Farm Mutual Auto. Insurance Co., 864 F.2d 700 (10th Cir. 1988); Wallace v. Dunn Construction Co., 968 F.2d 1174 (11th Cir. 1992); Washington v. Lake County, Ill., 969 F.2d 250 (7th Cir. 1992); Milligan-Jensen v. Michigan Technological University, 975 F.2d 302 (6th Cir. 1992).

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II. DEVELOPMENTS UNDER TITLE VII

A. Sexual Harassment

1. The EEOC's Guidelines define "sexual harassment" to include the following conduct:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the

basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. 29 C.F.R. § 1604.11(a).

2. There are two (2) theories of recovery which have been established under Title VII for claims of sexual harassment: (1) quid pro quo harassment; and (2) hostile environment harassment. Quid pro quo harassment occurs when certain employee benefits, such as a job promotion, are conditioned upon granting sexual favors. Hostile environment harassment occurs when such conduct becomes so pervasive in the workplace that it creates a hostile or abusive work environment. Hostile environment cases may, for example, be based upon lewd jokes or comments, or the display of explicit or sexually suggestive materials in the workplace.

Employers are held strictly liable to an employee who is subject to quid pro quo harassment, if the harasser had the actual authority to alter the employee's working conditions and/or the terms of the employee's employment. In that regard, "strict liability" means that the employer will be liable for such harassment, even if the employer had no actual knowledge of the harassment.

With respect to hostile work environment claims, employers are liable only if they knew or should have known of the sexual harassment which occurred and failed to take reasonable steps to remedy the problem. Liability in such cases will be determined in accordance with general agency principles such as respondeat superior.

The EEOC Guidelines suggest that an employer can act to avoid liability in hostile environment cases by establishing a policy which prohibits sexual harassment. The employer's policy must, however, provide for a complaint resolution procedure which does not require that the individual first raise his or her complaint with the offending supervisor.

3. Determining whether sexual conduct is "unwelcome"

   a. Sexual harassment is specifically defined to include "unwelcome . . . verbal or physical conduct of a sexual nature." 29 C.F.R. § 1604.11(a).

   b. Definition of "unwelcome" conduct

      (1) Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982) -- Challenged conduct must be unwelcomed "in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive."

      (2) The Supreme Court held in Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) that voluntary submission to sex-related conduct does not demonstrate "welcomeness". According to the Court, the primary question in such cases is whether the employee indicated by his or her conduct that the sexual advances were unwelcome.

      (3) A victim of harassment need not always directly confront the harasser so long as the victim's conduct demonstrates that the alleged harassment is unwel-

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come. Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988).

c. The EEOC has stated in its Guidelines that it will evaluate each situation on a case-by-case basis.

d. Courts do look to whether the complainant has welcomed the sexual conduct by acting in a sexually aggressive manner, using sexually-oriented language or by actually soliciting the sexual conduct.

(1) Gan v. Kepro Circuit System, 27 EPD Para. 32, 379 (E.D. Mo. 1982) -- The plaintiff regularly used vulgar language, initiated sexually-oriented conversations with her co-workers, asked male employees about their sex lives, and discussed her own sexual encounters.

(2) Meritor Savings Bank v. Vinson -- The Supreme Court held that evidence of the plaintiff's publicly-expressed sexual fantasies and her provocative dress were not per se inadmissible.

(3) Reed v. Shephard, 939 F.2d 484 (7th Cir. 1991) -- Court rejected the plaintiff's claim of hostile environment sexual harassment because she regularly told sexually explicit jokes and frequently volunteered comments about her own sex life.

(4) Kouri v. Liberian Services, Inc., 55 FEP Cases 125 (D.C. Va. 1991) -- District Court held that plaintiff failed to show that alleged harassment was "unwelcome" because she never made it clear to her supervisor that his "attention" was

unwelcome and, at best, sent "mixed signals" to the supervisor.

e. Occasional use of sexually explicit language does not negate a charge of sexual harassment. Some sexual comments may not be unwelcome, but, more extreme, abusive and persistent comments or physical assaults will not be excused or allowed.

f. An employee who once welcomed sexual conduct has the burden of clearly notifying the alleged harasser that the conduct is no longer welcome. Coffin-Boggs v. City of Meridian, 633 F. Supp. 1323 (S.D. Miss. 1986).

However, the employee's refusal to submit to further conduct can never be the basis for employment decisions; that would be "quid pro quo" harassment.

g. Often times defendants attempt to offer proof of the charging party's past sexual conduct to show welcomeness. Generally, courts do not allow this evidence unless it directly relates to the alleged harasser.

(1) The proper inquiry is whether the charging party welcomed the particular conduct in question. Swentek v. USAir, Inc., 830 F.2d 552 (4th Cir. 1987).

(2) The court in Priest v. Rotary, 98 FRD 755 (N.D. Cal. 1983), denied the defendant's request to question the plaintiff in regard to her prior sexual history. The court noted that allowing such discovery would discourage victims from seeking protection under the statute.

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4. Hostile work environment claims

a. Elements of the employee's prima facie case. To establish a prima facie hostile environment case against the defendant, the plaintiff must prove that:

(1) He or she was subjected to unwelcome sexual conduct;

(2) The unwelcome sexual conduct was based upon the employee's gender;

(3) The unwelcome sexual conduct was sufficiently pervasive or severe to alter the terms of the employee's employment and created a hostile or abusive work environment; and

(4) The employer knew or should have known of the harassment, but failed to take prompt and reasonable action to correct it. Staton v. Maries County, 868 F.2d 996, 998 (8th Cir. 1989); Hall v. Gus Construction Co., 842 F.2d 1010, 1013 (8th Cir. 1988).

b. Determining whether a work environment is "hostile"

(1) The Supreme Court stated in Vinson that for sexual harassment to violate Title VII, it must be sufficiently severe or pervasive to alter the conditions of the individual's employment and create an abusive working environment.

(A) Factors affecting the determination include:

(i) whether the conduct was verbal or physical, or both;

(ii) how frequently it was repeated;

(iii) whether the conduct was hostile and patently offensive;

(iv) whether the alleged harasser was a co-worker or supervisor;

(v) whether others joined in the harassment; and

(vi) whether the harassment was directed at more than one individual.

(B) The primary inquiry is whether the conduct unreasonably interferes with an individual's work performance or creates an intimidating, hostile, or offensive working environment.

NOTE: The issue of whether a plaintiff alleging a "hostile environment" claim of sexual harassment must show that she suffered a serious "psychological injury" as a result of the harassment is currently before the Supreme Court. Harris v. Forklift Systems, Inc., No. 92-1168 (1993). The Sixth Circuit Court of Appeals in Harris dismissed the plaintiff's claim of sexual harassment because plaintiff failed to show that her employer's conduct seriously affected her psychological well-being.

5. The "reasonable woman" standard

a. Since the Supreme Court accepted the "hostile work environment" theory in Vinson, most courts have viewed the alleged harassment under a "reasonable person" standard.

b. There is, however, a trend emerging among the federal courts to adopt a "reasonable woman" standard in hostile environment cases.

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(1) Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991) -- Court of Appeals held that "reasonable person" standard did not properly account for the different view of sexual harassment that men have compared to women. The court also rejected the claim that victims of hostile environment harassment must show that their psychological well-being suffered seriously as a result of the harassment.

(2) Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991) -- District Court held that female shipyard workers' hostile environment claim must be reviewed under a "reasonable woman" standard. In that case, the employer allowed its male employees to post pictures of nude women in the workplace. Additionally, female employees were verbally harassed by their male coworkers. The court dismissed the employer's argument that the female employees were aware of the fact that the shipyards were male-dominated and "rough and tumble" before they started working for the employer, and, accordingly, that the female employees had voluntarily and knowingly subjected themselves to such conduct.

(3) Burns v. McGregor Electronic Industries, 989 F.2d 959 (8th Cir. 1993) -- Eighth Circuit Court of Appeals adopted "reasonable woman" standard in a hostile environment case and held that sexual harassment must be viewed "from the

victim's perspective." The court also held that nude photographs of the plaintiff taken for a nationally-distributed motorcycle magazine were "not material to the issue of whether [the plaintiff] found her employer's work-related conduct offensive."

6. Quid pro quo harassment

   a. Elements of the employee's discrimination claim.

      (1) employee belongs to a protected class.

      (2) he or she was subjected to unwelcome sexual harassment.

      (3) the harassment was based on the employee's sex.

      (4) submission to the harassment was an express or implied condition of the employee's employment.

   b. Isolated instances of harassment.

      (1) A "hostile environment" claim usually requires a showing of a pattern of offensive conduct. A "quid pro quo" case, however, requires only a single sexual advance if it is linked to the granting or denial of a tangible job benefit. Neville v. Taft Broadcasting, 421 FEP Cases 1314 (W.D. N.Y. 1987).

      (2) A single, severe incident of harassment may be enough to constitute a Title VII violation; the more severe the harassment, especially physical harassment, the less need there is to show repetition.

   c. Both men and women can file charges of quid pro quo sexual harassment. Showalter v.

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Allison Reed Group, 56 FEP Cases 989 (D.C. R.I. 1991) -- Male employees who were forced by their supervisor, under threat of discharge, to engage in sexual relations with the supervisor's secretary, prevailed under a theory of quid pro quo sexual harassment.

7. Employer liability for harassment by supervisors, co-workers, and non-employees

a. Supervisors.

(1) The Vinson Court held that liability should be determined using standard agency principles. The Court made it clear that employers are not always liable for the acts of supervisors and nevertheless, that absence of notice to the employer does not necessarily insulate the employer from liability.

(2) "Quid pro quo" -- An employer is always liable for a supervisor's act of "quid pro quo" harassment. Schroeder v. Schock, 42 FEP Cases 1112 (D. Kan. 1986).

(3) "Hostile environment" -- The initial inquiry should be whether the employer knew of should have known of the alleged sexual harassment. If the employer knows or has constructive knowledge of the sexual harassment and fails to take corrective action, the employer will be liable for the harassment.

(A) The victim can put the employer on notice by filing a grievance or complaint under a sexual harassment policy.

(B) Employers may be held to constructive notice where the sexual harassment is openly practiced in the workplace.

(C) The employer's remedial action must be more than occasional meetings at which rules against sexual harassment are recited. Zabkowicz v. West Bend Co., 589 F. Supp. 780 (E.D. Wis. 1984).

(D) Some courts have held that the employer is liable for sexual harassment by supervisors even if the employer had no knowledge. Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987).

b. Co-workers.

(1) The employer is generally held liable for harassment by co-workers where the employer (or its agents and supervisors) knew or should have known of the conduct, unless the employer can prove that it took immediate and appropriate corrective action.

(A) Actual knowledge is not required; it may be imputed if the sexual harassment is so severe or pervasive that a reasonable employer would discover it. Hall v. Gus Construction Co., 842 F.2d 1010 (8th Cir. 1988).

(B) Prompt and reasonable steps to discipline the offender may absolve the employer of liability. Barrett v. Omaha National Bank, 584 F.

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Supp. 22 (D. Neb. 1983), aff'd, 726 F.2d 424 (8th Cir. 1984).

(C) Employers will also be liable for the sexual harassment of a manager by his/her subordinates.

c. Non-employees.

(1) Employers may also be held liable for the sexual harassment of its employees by non-employees. Again, if the employer knows or should have known of the harassment, it will be liable unless it takes immediate and corrective action. Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307 (5th Cir. 1982).

B. Pregnancy Discrimination Act (42 U.S.C. § 2000e(k))

1. Adopted by Congress in 1978 as an amendment to Title VII. Emphasizes that the prohibition in Title VII against discrimination "because of sex" or "on the basis of sex" includes discrimination on the basis of pregnancy, child birth, or related medical conditions.

2. The Act covers hiring, promotion, discharge, and employment leave policies.

3. It requires that employers extend the same benefits to pregnant employees as are extended to other employees on short term leaves of absence.

4. Generally, employers are not required to create light duty work for pregnant employees unless light duty work is available.

5. Leave for child care must be granted on the same basis as other non-medical leaves and on a sex neutral basis. Pregnant employees who are temporarily unable to perform their assigned job duties

because of their pregnancy must be treated the same as other disabled workers.

6. Groundrules for employers to follow in developing pregnancy work policies:
   a. Key factor -- treat pregnant employees the same as other employees with temporary disabilities. Any policy that is applied to pregnant employees, such as requiring doctor's statements, must be applied to other employees with temporary disabilities. (For a discussion of the additional protections afforded pregnant employees under Iowa law, see pp. 38-39 of this outline.)
   b. Employers cannot mandate length of time for pregnancy leave.
   c. Employers must hold open the pregnant woman's job for her when she goes on pregnancy leave on the same basis that jobs are held open for employees who are on sick or disability leave.
   d. Child care leave granted to an employee who is medically able to return to work following pregnancy leave should be granted on the same basis as leave granted to other employees for other non-medical reasons.
   e. An employer may discharge a pregnant employee as long as the employer has a legitimate, non-discriminatory reason for the action.

NOTE: The Federal Family and Medical Leave Act of 1993 went into effect on August 5, 1993. (Public Law 103-3) The Act provides that eligible employees make take up to 12 weeks of unpaid leave during a 12-month period for any of the following reasons: (1) for the birth or placement of a child for adoption or foster care;

(2) to care for a spouse, child or parent who has a "serious health condition"; or (3) in the event the employee is unable to perform the essential functions of his/her job due to a "serious health condition". Absences from work due to pregnancy, childbirth, related medical conditions or prenatal care will generally be covered by the Act.

C. Religious Discrimination

1. Reasonable accommodation -- Title VII's ban on religious discrimination covers all conduct motivated by religion. Basic factors considered by the courts in determining whether an employer has made reasonable efforts to accommodate their employees' religious practices include the following:

   a. The size of the employer's establishment. Large companies may be required to explain why they could not transfer an employee to a different operation.

   b. The effects of transferring an employee to a different job. Substantial reductions in pay for the employee may need to be explained by the employer.

   c. The employee's efforts in reaching accommodation. An employee's failure to inform an employer of his/her religious needs or a refusal by an employee to cooperate with the employer in trying to reach an accommodation may cause the employee to forego his or her right to reasonable accommodation. An employee's demand for a "guarantee" to never be required to work on a Saturday sabbath is unreasonable. Cross v. Bailer, 477 F.Supp. 748 (D.C. Ore. 1979)

2. Undue hardship -- Among the effects of accommodation, which employers have asserted constitute undue hardship, are:
   a. The lowering of employee morale. (inadequate reason)
   b. The violation of an agreement with the union.
   c. Scheduling problems.
   d. Expense.

   See Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977); Ansonia Board of Education v. Philbrook, 479 U.S. 60 (1986).
3. Religion as a Bona Fide Occupational Qualification ("BFOQ").
   a. When a school, college, or other institution is in whole or in substantial part, owned, supported, controlled, or managed by a particular religion's society or corporation. 42 U.S.C. § 2000e-2(e)(1).
   b. If the curriculum of such an educational institution is directed toward the propagation of a certain religion. 42 U.S.C. § 2000e-2(e)(2).
4. Employee's burden in establishing religious discrimination -- The employee must first establish that his or her beliefs are religious within the meaning of Title VII. The EEOC takes the position that an employee's beliefs are protected as religious if they are "deeply and sincerely held as more conventional religious convictions".

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III. AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967 (ADEA)

A. Jurisdiction (29 U.S.C. § 621 et. seq.)

1. Employers with 20 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.
2. Private employment agencies.
3. Labor organizations having 25 or more members, or which operate a hiring hall.

B. Statutory Prohibition

The ADEA prohibits employment discrimination based upon age. Specifically, the federal statute protects employees and job applicants who are at least 40 years of age.

C. Exceptions

1. Bona Fide Occupational Qualifications (BFOQ)
   a. The age limit is reasonably necessary to the essence of the employer's business.
   b. The employer has reasonable cause (e.g., a factual basis) for believing that all or substantially all persons excluded because of the BFOQ would be unable to safely and efficiently perform the requisite job duties.
   c. It would be impossible or impractical to deal with persons over the age limitation on an individualized basis.

NOTE: In EEOC v. Commonwealth of Massachusetts, 987 F.2d 64 (1st Cir. 1993), the Court of appeals held that a Massachusetts state law, which required certain state employees over the age of 70 to pass an annual physical examination as a condition of their continued employment, violated the ADEA.

2. Bona fide seniority system

D. Plaintiff's *Prima Facie* Case

1. Plaintiff is a member of the protected age group;
2. Plaintiff was qualified for the job he/she held, or applied for; and
3. Plaintiff was adversely affected (e.g., discharged) by an employment decision.

Cava v. Coca-Cola Bottling Company, 574 F.2d 958, 959-60 (8th Cir. 1978).

E. Liquidated Damages and the "Willfulness" Standard

1. An employer will be subject to liquidated damages for a willful violation of the ADEA. The "willfulness" standard was initially established by the Supreme Court in TransWorld Airlines v. Thurston, 469 U.S. 111 (1985), to mean that the employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA."
2. In Hazen Paper Co. v. Biggins, _____ U.S. _____, 123 L.Ed. 2d 338, 113 S.Ct. 1701 (1993), the Supreme Court reaffirmed the "willfulness" standard established in Thurston, and further held that evidence of an employer's decision to terminate an employee based on factors which are empirically correlated with age -- pension, high salary levels, or seniority -- will not, standing alone, automatically establish a violation of the ADEA.

NOTE: The ADEA does not prohibit the compulsory/mandatory retirement of a "bona fide executive" who: (1) has reached age 65; (2) for the prior two years immediately before retirement was employed in a "bona fide executive" or "high policy making position" with the employer; and (3) upon retirement, is entitled to a

"nonforfeitable annual retirement benefit" of at least $44,000. 29 U.S.C. § 631(c)(1).

IV. REHABILITATION ACT OF 1973 (29 U.S.C. § 701 et. seq.)

A. The Rehabilitation Act of 1973 prohibits discrimination on the basis of disability/handicap by federal government contractors and subcontractors, and by organizations which receive federal funding. In addition, the Act requires that all contracts in excess of $2,500 include an affirmative action provision, and that any government contractor with a contract of $50,000 or more and having 50 or more employees must develop a written affirmative action plan.

B. Definition -- The Term "Handicapped Individual" Means Any Person Who:

1. has a physical or mental impairment which substantially limits one or more of his/her major life activities;
2. has a record of such an impairment; or
3. is regarded as having such impairment.

29 U.S.C. § 706(7)(b).

C. Exclusion from the Definition of "Handicapped Individual"

Current user of alcohol or drugs which prevent such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or safety of others. 29 U.S.C. § 706(7)(b).

D. Reasonable Accommodations and Undue Hardship Considerations

1. Overall size of recipient's program.
2. Type of recipient's operations.
3. The accommodation requirement is not in the law itself, but was developed by the agency that administered the law. It has also been developed in case law.
4. Nature and cost of the accommodation needed.

See School Board of Nassau County v. Arline, 480 U.S. 272 (1987).

V. THE AMERICANS WITH DISABILITIES ACT ("ADA") (42 U.S.C. § 12101 et. seq.)

A. Key Definitions

1. Disability:
   a. A physical or mental impairment that substantially limits one or more major life activities of such individual;
      (1) The Interpretive Guidelines to the ADA, issued by the EEOC (29 C.F.R. §§ 16301.1-16301.16), state that the existence of an impairment is to be determined without mitigating measures such as medicines or prosthetic devices.
      (2) The Interpretive Guidelines make it clear that the definition of the term "impairment" does not include physical characteristics that are within "normal" range and which are not the result of a physiological disorder (e.g., pregnancy, eye color, hair color, left-handedness, height, weight, or muscle tone).

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Neither does the term include "characteristic predisposition to illness or disease."

(3) Examples: orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, diagnosed stress disorders, tuberculosis, AIDS, diabetes, alcoholism, and heart disease.

b. A record of such an impairment; or

c. Being regarded as having such an impairment, including those whose disability exists largely or wholly in the negative attitudes and misperceptions of others.

NOTE: The ADA gives legal protection to individual employees or job applicants who are perceived or treated as being disabled. Employers cannot, therefore, base their personnel-related decisions on unsubstantiated concerns about increased insurance liability, attendance problems, cost of accommodation, higher workers' compensation costs, or acceptance of the individual by co-workers and/or customers.

d. Characteristics <u>not</u> protected as disabilities under the ADA:

(1) Transvestite.

(2) Homosexuality/bisexuality

(3) Pedophilia, exhibitionism, and voyeurism.

(4) Compulsive gambling, kleptomania, pyromania.

(5) Illegal drug use, or the illegal use of prescription drugs.

2. Major life activities:

   Include functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. However, this list is not exhaustive. For example, other major life activities may include, but are not limited to, sitting, standing, bending, lifting, and reaching.

3. Auxiliary aids and services:

   a. Qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

   b. Qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

   c. Acquisition or modification of equipment or devices; and

   d. Other similar services and actions.

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B. Prohibition Against Discrimination

Title I of the ADA prohibits all covered employers, employment agencies and labor organizations from discriminating against qualified job applicants and employees who are disabled. The general prohibition against employment discrimination established by Title I covers all aspects of the employment relationship, including the following:

1. Recruitment.
2. Hiring, promotion, transfers, demotions, and layoffs.
3. Discipline and discharge.
4. Employee seniority rights.
5. All fringe benefit programs.

6. Job assignments and classification.
7. Leaves of absence (paid or unpaid).
8. Training.

NOTE: The ADA does not require that employers establish affirmative action programs. Employers still have the discretion to hire the most qualified applicant and to make employment-related decisions on the basis of reasons which are unrelated to the existence of a covered disability.

Title I further prohibits an employer from entering into a contractual arrangement with a labor union, employment agency, or consulting firm which has the effect of discriminating against qualified job applicants and employees on the basis of their disabilities. In those situations, the employer will ultimately be liable for any discrimination which occurs.

Discriminating against an individual because of his/her relationship or association with a disabled person is also prohibited by Title I. For example, an employee cannot be terminated because he/she is living with someone who has AIDS. However, there is no legal requirement that the employer "reasonably accommodate" the non-disabled job applicant or employee in that situation.

C. Qualified Individual With a Disability

One who has a disability and who can perform the "essential functions" of the job, either with or without "reasonable accommodation." That determination must be made as of the time of the employment action in question and cannot be based on speculation as to the individual's ability to perform in the future.

1. Consideration shall be given to the employer's judgment as to what functions of the job are essential, and written job descriptions will be considered evidence of the essential functions of the job. The Interpretive Guidelines stress that the inquiry into essential functions "is not intended to second guess an employer's business judgment with regard to production standards, whether qualitative or quantitative, nor to require employers to lower such standards." However, an employer will have to offer a legitimate non-discriminatory reason for the selection of a certain standard if challenged.

   a. The Interpretive Guidelines define essential functions as "fundamental job duties" and as excluding "marginal job functions." Individualized inquiry will be required on a job-by-job basis.

   b. This inquiry "initially focuses on whether the employer actually requires employees in the position to perform the functions that the employer asserts are essential." For example, typing would not be an "essential job function" for the position of administrative secretary, if the current employee in that position has seldom, if ever, been required to do any typing on the job.

   c. The next question is "whether removing the function would fundamentally alter the position." For example:

      (1) Is the reason the position exists to perform that function?

      (2) How many other employees are available to perform that job function? Can cer-

tain job duties be distributed to other employees?

(3) What is the degree or expertise of skill required to perform the function?

d. Relevant evidence in making this determination may include:

(1) The employer's judgment as to what is "essential";

(2) The content of written job descriptions or job postings;

(3) The work experience of past employees in the job or of current employees in similar jobs;

(4) The amount of time spent performing the function;

(5) The terms of a collective bargaining agreement; and

(6) Any consequences of failing to require the employee to perform the function.

2. Does not include any employee or applicant who is currently using illegal drugs.

(a) Under the Regulations, illegal use of drugs refers both to the use of unlawful drugs and to the unlawful use of prescription drugs.

(b) The individual is excluded from protection regardless of whether the illegal drug use has any adverse impact on job performance.

(c) Rehabilitated drug users are protected. The Interpretive Guidelines provide that employers are entitled to seek reasonable assurances that no illegal use of drugs is occurring or has occurred recently enough "so that continuing use is a real and ongoing problem." Employers thus may ask for evidence of participation in a rehabilitation

program and/or drug test results and/or any other pertinent evidence. It is the employer's burden, under the Regulations, to request this information.

(d) Applicant drug testing is permitted under the ADA at any point in the application process.

(e) The Interpretive Guidelines indicate that the EEOC intends to treat alcoholism as a covered disability since it substantially limits major life activities.

NOTE: The first decision under the ADA was recently issued in the Federal District Court for the Northern District of Illinois in EEOC v. AIC Security Investigations Ltd., 823 F. Supp. 571 (N.D. Ill. 1993). In that case, the employer discharged the plaintiff after he was diagnosed as having terminal brain cancer even though he could still perform the essential functions of his job. Following a jury trial, the plaintiff was awarded $572,000 in back pay and damages. The award was subsequently reduced because the jury's award of punitive damages exceeded the damages cap established by the Civil Rights Act of 1991.

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D. Reasonable Accommodations

The duty of reasonable accommodation includes a broad array of actions which the employer must take before an individual with a disability can be found not to be qualified for employment. Employers must make reasonable accommodations to the known limitations of an otherwise qualified job applicant or employee. Individualized determinations will be critical.

1. Includes making facilities readily accessible, providing transportation services in some cases, job restructuring, job reassignment to a vacant

position, modified work schedules, granting unpaid leave, acquisition or modification of equipment, providing auxiliary aids or services, providing qualified readers or interpreters, adjustment or modification of exams, training materials, or policies, etc. The duty of "reasonable accommodation" does not, however, mean providing the best accommodation.

a. Workplace accessibility -- The employer must make sure that the job site and all work-related facilities are accessible to qualified disabled applicants and employees. This includes building entrances and exists, parking spaces, restrooms, office furniture, break areas, drinking fountains, etc.

b. Job restructuring -- The Interpretive Guidelines state that employers may be required to reallocate or redistribute "non-essential, marginal" job functions, but not essential functions.

c. Job reassignment -- The Interpretive Guidelines provide that reassignment is to be limited to situations where the person can be reassigned to a vacant position since bumping is not required. Reassignment to another job is not available to job applicants.

d. Modified work schedules -- A reasonable accommodation may include changing daily or weekly work hours, offering flex time and altering break schedules to take medications.

2. Unreasonable accommodations -- Those that pose an "undue hardship" requiring "significant difficulty or expense" in light of the nature and expense of the needed accommodation, the overall financial resources of the facility involved, the number of

persons employed there, the effect (including financial effect) of the accommodation, the overall financial resources of the covered entity and the size of its business, and the type of operation and structure of the covered entity. The ADA requires employers to incur more than just de minimis costs in order to accommodate the disabled.

a. The EEOC has specifically rejected cost measurements based on comparing the cost of accommodation to the value (salary level) of a given position. The more relevant comparison is between the cost of accommodation and the employer's overall budget.

b. The employer must pay for the portion of the accommodation that would not cause an undue financial hardship.

c. The EEOC will not consider it a sufficient defense for an employer to claim that a particular disability is not covered by the employer's current insurance plan or would cause the employer's insurance premium or workers' compensation costs to increase.

3. Applicant or employee may provide or contribute to cost -- Where the otherwise qualified job applicant or employee would be unable to perform the essential functions of a job without an accommodation which would cause an undue hardship to the employer, the employer must still allow the individual to provide the accommodation or to share the cost of the accommodation so as to bring the employer's share below the level of an undue hardship. Employers are not required to provide employees or job applicants with equipment or

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devices, such as hearing aids, glasses, or wheelchairs, which are generally considered to be "personal items."

4. Light duty -- The ADA does not require that employers establish "light duty" programs. However, if the employer does provide a light duty program for injured employees, the employer's duty of reasonable accommodation under the ADA may include reassigning a qualified disabled employee to a vacant light duty position.

E. Employment Testing

1. Screening tests can only be used if job-related for the position in question and consistent with business necessity.

   a. Standards and selection criteria should relate to essential job functions to be consistent with business necessity. However, employers must still determine whether an individual with a disability could meet the standard with reasonable accommodation.

   b. Employment tests must be administered to eligible applicants or employees with disabilities who have impaired sensory, manual, or speaking skills in different formats which do not require the use of the impaired skills, unless the employment tests themselves are intended to measure those particular skills.

      There may be situations where it is not possible to test in an alternative format. In that case, the EEOC has taken the position that the employer may have to try to evaluate the skill to be tested in another manner,

e.g., through interviews, work experience, or licensing requirements.

2. Certain medical information about a person's possible disability cannot be collected or used until after individual is considered and given conditional job offer.

F. The "Significant Risk of Substantial Harm" Standard

An employer can require that employee not pose a significant risk of substantial harm to his/her own safety or health, or to the health or safety of others in the workplace which cannot be eliminated by reasonable accommodation. Note that this is a qualification standard for the position.

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IOWA EMPLOYMENT DISCRIMINATION LAWS

I. THE IOWA CIVIL RIGHTS ACT OF 1965 - IOWA CODE CHAPTER 216

A. Coverage of the Act

1. Employers who "regularly employ" at least four employees.
2. Labor organizations.
3. Employment agencies.

B. Statutory Prohibitions

Iowa Code § 216.6(1) provides, in relevant part:

> 1. It shall be an unfair or discriminatory practice for any:
>
> a. Person 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, unless based upon the nature of the occupation. If a disabled person is qualified to perform a particular occupation, by reason of training or experience, the nature of that occupation shall not be the basis for exception to the unfair or discriminating practices prohibited by this subsection.

C. Procedural Requirements

1. An individual must file his/her complaint of discrimination under the Iowa Civil Rights Act ("ICRA") with the Iowa Civil Rights Commission ("ICRC") within 180 days after the alleged discrimination occurred. The ICRA allows recovery under both "disparate treatment" and "disparate impact" theories of discrimination. Dubuque City

Assessor's Office v. Dubuque Human Rights Commission, 484 N.W.2d 200 (Iowa App. 1992).

2. The complaint will be investigated by the ICRC, which will send initial information questionnaires to the parties. Responses to the questionnaires are due 30 days from the mailing date of the questionnaires. An administrative law judge ("ALJ") will be assigned to the case. The ALJ will issue a finding of either "probable cause" or "no probable cause". A "no probable cause" determination will result in dismissal of the complaint. If a "probable cause" determination is issued, the case will be assigned for conciliation. If conciliation is not successful, the merits of the case may be tried by the parties before another ALJ from the ICRC. The ICRC will be represented at the hearing by counsel from the Attorney General's Office.

3. The individual complainant has the option to withdraw the administrative complaint and file a lawsuit in state district court only if:
   a. the complainant's initial complaint was timely filed with the ICRC;
   b. the complaint has been on file with the ICRC for at least 60 days;
   c. the ICRC has not yet issued a finding of "no probable cause" in the matter;
   d. the ICRC has issued a "right to sue letter" to the complainant, and
   e. the complainant has filed suit within 90 days of the date on which the right to sue letter was mailed to complainant.

NOTE: Individual complainants must follow the administrative procedures established by the Act; they cannot

bypass the ICRC and go straight to court. See Northrup v. Farmland Industries, 372 N.W.2d 193 (Iowa 1985).

D. Discrimination Based on Disability

1. Section 216.2(5) defines the term "disability" as follows:

> 5. "Disability" means the physical or mental condition of a person which constitutes a substantial handicap, and the condition of a person with a positive human immunodeficiency virus test result, a diagnosis of acquired immune deficiency syndrome, a diagnosis of acquired immune deficiency syndrome-related complex, or any other condition related to acquired immune deficiency syndrome. The inclusion of a condition related to a positive human immunodeficiency virus test result in the meaning of "disability" under the provisions of this chapter does not preclude the application of the provisions of this chapter to conditions resulting from other contagious or infectious diseases.

2. The ICRC's regulations define the phrase "substantially handicapped person" to mean any individual "who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment." 161 Iowa Admin. Code § 8.26(1). Other regulations define "physical or mental impairment" and "major life activities". See 161 Iowa Admin. Code § 8.26(2) and (3).

3. Covered employees are legally obligated under the ICRA to "reasonably accommodate" the known disabilities of job applicants and current employees. Foods, Inc. v. Iowa Civil Rights Commission, 318 N.W.2d 163 (Iowa 1982); Fogel v. Trustees of Iowa College, 446 N.W.2d 451 (Iowa 1989). Employers are not, however, required to make accommodations

which would cause an "undue hardship". 161 Iowa Admin. Code § 8.27(6). In determining whether a proposed accommodation would cause an undue hardship, factors such as the size of the employer's operations, number of employees, the nature of the employer's business, and the cost of the proposed accommodation are to be taken into consideration. See 161 Iowa Admin. Code § 8.27(b). The duty of reasonable accommodation does not require an employer "to change the essential nature of the job in order to accommodate an employee; the employer is only obligated to reasonably accommodate the employee's impairment based on the essential requirements of the job." Henkel Corp. v. Iowa Civil Rights Commission, 471 N.W.2d 806, 811 (Iowa 1991).

NOTE: The Iowa Supreme Court recently held in Miller v. Sioux Gateway Fire Department, 497 N.W.2d 838 (Iowa 1993), that the Sioux Gateway Fire Department did not violate the ICRA when it discharged an airport firefighter who had uncontrolled diabetes. The Supreme Court held that the plaintiff was not "qualified" for his position as a firefighter because his diabetes was uncontrolled and the plaintiff had suffered an insulin reaction while at work. According to the court, the plaintiff's condition could not be accommodated by the defendant due to the inherently dangerous nature of the work of an airport firefighter, and the defendant's legitimate interest in the safety of its employees.

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4. Alcoholism is recognized as a disability under the ICRA. Consolidated Freightways, Inc. v. Cedar Rapids Civil Rights Comm'n, 366 N.W.2d 522, 528 (Iowa 1985).

5. The BFOQ defense is available to employers "where mental or physical ability is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 161 Iowa Admin. Code § 8.32(1).

E. Pregnancy Discrimination

1. The ICRA prohibits covered employers from terminating "the employment of a person disabled by pregnancy because of the employee's pregnancy." Iowa Code § 216.6(2)(b).

2. Disabilities resulting from "pregnancy, miscarriage, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and shall be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment." Iowa Code § 216.6(2)(c).

3. Iowa Code § 216.6(2)(e) further provides:

> e. Where a leave is not available or a sufficient leave is not available under any health or temporary disability insurance or sick leave plan available in connection with employment, the employer of the pregnant employee shall not refuse to grant to the employee who is disabled by the pregnancy a leave of absence if the leave of absence is for the period that the employee is disabled because of the employee's pregnancy, childbirth, or related medical conditions, or for eight weeks, whichever is less. However, the employee must provide timely notice of the period of leave requested and the employer must approve any change in the period requested before the change is effective. Before granting the leave of absence, the employer may require that the employee's disability resulting from pregnancy be verified by medical certification stating that the employee is not able to reasonably perform the duties of employment.

4. The employer's health insurance plan must include coverage for pregnancy-related conditions, but the plan "may exclude coverage of abortion, except where the life of the mother would be endangered if the fetus were carried to term or where medical complications have arisen from an abortion." 161 Iowa Admin. Code § 8.54(3).

F. Discrimination Based on Age

1. The ICRA covers job applicants and employees who are age 18 and older. Claims of age discrimination arising under the ICRA are not preempted by the ADEA. Hulme v. Barrett, 449 N.W.2d 629 (Iowa 1989).
2. "Help wanted" notices may not indicate "a preference, limitation, or specification based upon age . . . [unless] the age requirement for an applicant is a bona fide occupational qualification." 161 Iowa Admin. Code § 8.15(3). Notices of job advertisements may not include phrases such as "young", "recent college graduate", "boy", "girl", "retired person" or "college student". 161 Iowa Admin. Code § 8.1594).
3. Employers may ask job applicants whether they are at "least 18 years of age" without violating the ICRA. 161 Iowa Admin. Code § 8.15(6).
4. Age as a BFOQ.
   a. The age of an applicant or employee may be a BFOQ where "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 161 Iowa Admin. Code § 8.15(8)(a).
   b. The employer has the burden to prove the existence of the BFOQ defense; employer

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preference or convenience is not sufficient evidence to warrant a BFOQ.

G. Sex Discrimination

1. The BFOQ defense based upon an individual's sex is available to employers under limited conditions. See 161 Iowa Admin. Code § 8.47.

2. The prohibition against sex discrimination includes "[a]ny distinction between married and unmarried persons of one sex that is not made between married and unmarried persons of the opposite sex . . ." 161 Iowa Admin. Code § 8.15(4).

3. Claims of sexual harassment, both quid pro quo and hostile environment, are actionable under the ICRA. Lynch v. City of Des Moines, 454 N.W.2d 827 (Iowa 1990).

H. AIDS Testing Iowa Code § 216.6(1)(d) specifically prohibits employers from requiring employees to take a test for the presence of AIDS:

1. It shall be an unfair or discriminatory practice for any:

* * *

d. Person to solicit or require as a condition of employment of any employee or prospective employee a test for the presence of the antibody to the human immunodeficiency virus or to affect the terms, conditions, or privileges of employment or terminate the employment of any employee solely as a result of the employee obtaining a test for the presence of the antibody to the human immunodeficiency virus. An agreement between an employer, employment agency, labor organization, or their employees, agents, or members and an employee or prospective employee concerning employment, pay, or benefits to an employee or prospective employee in return for taking a test for the presence of the antibody to the human immunodeficiency virus, is prohibited. The prohibitions of this paragraph do not apply if the state epidemiologist deter-

mines and the director of public health declares through the utilization of guidelines established by the center for disease control of the United States department of health and human services, that a person with a condition related to acquired immune deficiency syndrome poses a significant risk of transmission of the human immunodeficiency virus to other persons in a specific occupation.

II. IOWA CODE § 730.5 -- DRUG TESTING OF JOB APPLICANTS AND EMPLOYEES

A. "Drug test" is defined to include any "blood, urine, saliva, chemical, or skin tissue test conducted for the purpose of detecting the presence of a chemical substance in an individual." Iowa Code § 730.5(1).

B. As a general rule, employers are prohibited from requiring that job applicants or employees take a mandatory "drug test" as a condition of their employment. Employers are further prohibited from conducting random or "blanket" drug tests of employees. Iowa Code § 730.5(2).

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NOTE: In Reigelsberger v. Employment Appeal Board, 500 N.W.2d 64 (Iowa 1993), the Iowa Supreme Court held that the employee's refusal to participate in a treatment program for alcoholism, which included random urinalysis, constituted "misconduct" which disqualified the employee (a truck driver) from receiving unemployment compensation benefits.

C. The general prohibition against mandatory drug testing does not apply to:

1. Preemployment drug tests required for "peace officers or correctional officers" of the State;
2. Drug tests required by federal statutes or federal regulations adopted as of July 1, 1990;
3. Drug testing "conducted pursuant to a nuclear regulatory commission policy statement";
4. "Probable cause" drug testing conducted by an employer under Iowa Code § 730.5(3); or
5. Drug tests conducted in accordance with Iowa Code § 85.16(2) to determine whether an employee is eligible for workers' compensation benefits.

NOTE: Iowa Code § 85.16 states in relevant part:

85.16 Willful injury - intoxication

No compensation under this chapter shall be allowed for an injury caused:

* * *

2. By the employee's intoxication, which did not arise out of and in the course of employment but which was due to the effects to the effects of alcohol or another narcotic, depressant, stimulant, hallucinogenic, or hypnotic drug not prescribed by an authorized medical practitioner, if the intoxication was a substantial factor in causing the injury.

D. Under limited conditions, employers may conduct drug testing of "a specific employee" on a "probable cause" basis, if all of the following conditions established by Iowa Code § 730.5(3) are met:

a. The employer has probable cause to believe that an employee's faculties are impaired on the job.

b. The employee is in a position where such impairment presents a danger to the safety of the employee, another employee, a member of the public, or the 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.

c. The test sample withdrawn from the employee is analyzed by a laboratory or testing facility that has been approved under rules adopted by the department of public health.

d. If a test is conducted and the results indicate that the employee is under the influence of alcohol or a controlled substance or indicate the presence of alcohol or a controlled substance, a second test using an alternative method of analysis shall be conducted. When possible and practical, the second test shall use a portion of the same test sample withdrawn from the employee for use in the first test.

e. An employee shall be accorded a reasonable opportunity to rebut or explain the results of a drug test.

f. The employer shall provide substance abuse evaluation, and treatment if recommended by the evaluation, with costs apportioned as provided under the employee benefit plan or at employer expense, if there is no employee benefit plan, the first time an employee's drug test indicates the presence of alcohol or a controlled substance. 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 if treatment is recommended by the evaluation. However, if an employee fails to undergo substance abuse evaluation when required under the results of a drug test, or fails to successfully complete substance abuse treatment when recommended by an evaluation, the employee may be disciplined up to and including discharge. The substance abuse evaluation and treatment provided by the employer shall take place under a program approved by the department of public health or accredited

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by the joint commission on accreditation of hospitals.

NOTE: An employee may be disciplined, and even discharged, under Iowa Code § 730.5(3)(f) for failing to successfully complete a required substance abuse treatment program. Failure to complete a required substance abuse treatment may also constitute "misconduct" which disqualifies an employee from receiving unemployment compensation benefits. Anderson v. Warren Distribution Co., 469 N.W.2d 687 (Iowa 1991).

E. Iowa Code § 730.5 does not prevent employers from:

(1) establishing work rules which "prohibit the use of alcohol or controlled substances during work hours"; or

(2) disciplining "employees for being under the influence of alcohol or controlled substances during work hours."

Iowa Code § 730.5(5).

F. Employers may conduct drug testing as part of a preemployment physical examination or during a regularly scheduled physical examination. Job applicants must be given notice that a drug test will be required as part of a preemployment physical in the job posting, job advertisement, and during the initial interview. Where drug testing is conducted in connection with a regularly scheduled physical examination, the employer must give employees "notice that a drug test will be part of the physical at least thirty days prior to the date the physical is scheduled." Iowa Code § 730.5(7)(b).

NOTE: Employers conducting preemployment drug tests and/or drug tests as part of regularly scheduled physi-

cal examinations for employees are required to follow the drug testing procedures established under Iowa Code § 730.5(3) for "probable cause" drug testing. Iowa Code § 730.5(7)(b).

G. The results of an employee's drug test must be kept confidential by the employer. Further, any positive test result must be expunged from an employee's personnel file at the time the employee's employment ends, if the employee has undergone a substance abuse evaluation, and successfully completed any required substance abuse treatment program.

H. Job applicants and employees may enforce their rights under Iowa Code § 730.5 by filing a civil action against the employer. Remedies available under Iowa Code § 730.5 include injunctive relief, reinstatement, hiring, backpay, attorney fees, and costs. Iowa Code § 730.5(9)(a).

N

FIRST-PARTY AND THIRD-PARTY BAD FAITH THEORY AND ISSUES

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I. First-Party Bad Faith.

A. Formulation of Tort.

1. Adoption of Tort.

a. The Iowa Supreme Court first recognized the tort of bad faith in a first-party situation in Dolan v. AID Insurance Co., 431 N.W.2d 790 (1988). The Supreme Court had two reasons for adoption of the tort. First of all, the court believed it was necessary to recognize a tort of first-party bad faith in order to provide the insured an adequate remedy for an insurer's wrongful conduct. Dolan, 431 N.W.2d at 794. Secondly, recognition of the tort would redress the inequality in the contractual relationship and bargaining power of the insurer and insured. Id.

b. In recognizing the tort, however, the Iowa Supreme Court specifically stated that the relationship between the insurer and insured in the first-party situation does not involve the same fiduciary duties as in third-party situations. Id. Accord North Iowa State Bank v. Allied Mut. Ins. Co., 471 N.W.2d 824, 829 (Iowa 1991).

B. Elements of Tort.

1. Dolan/Anderson Test: In the Dolan case, the court adopted the test for first-party bad faith enunciated in Anderson v. Continental Insurance Co., 271 N.W.2d 368, 376 (Wis. 1978):

> To show a claim for bad faith, a plaintiff must show the absence of a reasonable basis for denying benefits of the policy and defendant's knowledge or disregard of the lack of a reasonable basis for denying the claim.

Dolan, 431 N.W.2d at 794.

2. Intentional Tort? The Court noted in the Dolan case that the test for first-party bad faith "makes clear the intentional nature of the tort". Dolan, 431 N.W.2d at 794. Accord Boylan v. American Motorists Ins. Co., 489 N.W.2d 742 (Iowa 1992) ("willful or reckless acts . . . are required to establish a cause of action under Dolan"); Reuter v. State Farm Mut. Auto. Ins. Co., 469 N.W.2d 250, 253 (Iowa 1991) ("an insurance company . . . will be found liable only where it has intentionally denied or failed to process or pay a claim without a reasonable basis").

3. Modification of Test. In Kiner v. Reliance Insurance Co., 463 N.W.2d 9 (Iowa 1990), the court held that reckless disregard was not a necessary element in a bad faith claim. Kiner, 463 N.W.2d at 13. Rather, it is sufficient to show that "the insurer denied the claim knowing or having reason to know that its denial is without basis".

4. Iowa Jury Instruction. The elements for first-party bad faith set forth in Iowa Civil Jury Instruction 1410.1 are as follows:

    1. The defendant denied plaintiff's claim;

    2. There was no reasonable basis for denying the claim;

    3. The defendant knew or had reason to know that there was no reasonable basis for denying the claim;

    4. The denial was a proximate cause of damage to the plaintiff; and

    5. The amount of damage.

C. Objective Element: Absence of a Reasonable Basis. The lack of a reasonable basis upon which to deny the insured's claim is an objective element of the tort of first-party bad faith. Reuter v. State Farm Mut. Auto. Ins. Co., 469 N.W.2d 250, 253 (Iowa 1991).

1. A reasonable basis to deny a claim exists when the claim is "fairly debatable". Reuter, 469 N.W.2d at 253; Dirks v. Farm Bureau Mut. Ins. Co., 465 N.W.2d 857, 861 (Iowa 1979); Kiner, 463 N.W.2d at 12; Dolan, 431 N.W.2d at 794. Compare with Deese v. State Farm Mut. Auto. Ins. Co., 838 P.2d 1265 (Ariz. 1992) (en banc) (holding that insurer may be

v. National Union Fire Ins. Co., 13 Cal. Rptr. 2d 295 (Ct. App. 1992), petition for cert. filed, 61 U.S.L.W. 3854 (June 11, 1993) (holding that insurer was in bad faith for canceling policy). The failure of the insurance company to prevail in its coverage defense does not in itself make the insurer's denial of the insured's claim unreasonable or in bad faith. Central Life Ins. Co. v. Aetna Casualty & Sur. Co., 466 N.W.2d 257, 263 (Iowa 1991). Accord Mills v. Regent Ins. Co., 449 N.W.2d 294 (Wis. Ct. App. 1989), review denied, 451 N.W.2d 297 (Wis. 1990). See New Hampshire Ins. Co. v. Christy, 200 N.W.2d 834 (Iowa 1972) (an erroneous refusal to defend is merely a breach of contract).

2. A reasonable dispute with respect to the validity of a claim may be either legal or factual. Kiner, 463 N.W.2d at 12; Dolan, 431 N.W.2d at 794. When the dispute concerns the amount of the insured's damages, there may be an obligation to tender any amounts indisputably owed to the insured. See Benoit v. State Farm Auto. Ins. Co., 602 So. 2d 53 (La. Ct. App. 1992).

3. The Iowa Court of Appeals has specifically held in a bad faith case involving a property policy that when an issue has not yet been decided in Iowa, an insurer is entitled to debate it as a matter of law. AMCO Ins. Co. v. Stammer, 411 N.W.2d 709, 713 (Iowa Ct. App. 1987). Accord International Indem. Co. v. Collins, 367 S.E.2d 786, 788 (Ga. 1988); Squire v. Exchange Ins. Co., 775 P.2d 143, 145 (Idaho Ct. App. 1989). However, the insurer should be aware that not all coverage defenses will necessarily be viewed as "reasonably" debatable even though legal arguments can be made in support of the defense. Compare Opsal v. United Serv. Auto. Ass'n, 283 Cal. Rptr. 212 (Ct. App. 1991) with Gourley v. State Farm Mut. Auto. Ins. Co., 265 Cal. Rptr. 634 (Ct. App. 1990), rev'd on other grounds, 806 P.2d 1342 (1991).

4. An insurer is not in bad faith simply because it relies on a minority position to deny coverage. Klemco Indus. v. Commercial Union Ins. Co., 665 F. Supp. 816, 830 (N.D. Cal. 1987), aff'd, 848 F.2d 1242 (9th Cir. 1988).

5. The mere fact that an insurer applies the policy so as to exclude coverage and therefore the duty to

defend is not conclusive evidence of bad faith unless the insurer's interpretation is inherently unreasonable. Congleton v. National Union Fire Ins. Co., 189 Cal. App. 3d 51, 234 Cal. Rptr. 218, 222 (Ct. App. 1987); Transcontinental Ins. Co. v. Washington Pub. Util. Districts' Util. Sys., 760 P.2d 337 (Wash. 1988).

6. An insured's claim becomes fairly debatable, thus precluding a claim for first-party bad faith, when there is conflicting evidence on the validity of the claim. Dirks, 465 N.W.2d at 861-62; Stammer, 411 N.W.2d at 712-13; Hoekstra v. Farm Bureau Mut. Ins. Co., 382 N.W.2d 100, 110-11 (Iowa 1986).

7. Whether a reasonable basis to deny the claim existed is judged as of the time the decision to deny is made. Central Life Ins. Co., 466 N.W.2d at 263; Dirks, 465 N.W.2d at 861-62. Accord State Farm Fire & Casualty Co. v. Balmer, 891 F.2d 874, 876 (11th Cir.) (applying Alabama law), cert. denied, 498 U.S. 902 (1990).

8. The quality of the insurance company's investigation of the insured's claim is not relevant to whether an objectively reasonable basis for the denial exists. Reuter, 469 N.W.2d at 254-55.

9. A mere delay in the payment of a claim while the insurer conducts an investigation is not a bad faith denial. Hoekstra, 382 N.W.2d at 111.

D. Determination of Proof of Objective Element.

1. Whether a claim is fairly debatable in any given situation is appropriately decided by the court as a matter of law, and in particular, in a ruling on a motion for summary judgment. See Dolan, 431 N.W.2d at 794-95; Stammer, 411 N.W.2d at 712-13.

2. It appears under Iowa law that when the coverage question cannot be resolved as a matter of law, but rather is a submissible jury question, there is no bad faith:

> In this litigation [the insurer's] defense and supporting evidence clearly made [the insured's] claim "fairly debatable", as the trial court must have determined when it submitted the issue to the jury. This being so, there was no bad faith issue in the case and,

there was no bad faith issue in the case and, as a matter of law, that claim should not have been submitted to the jury.

M-Z Enter., Inc. v. Hawkeye-Sec. Ins. Co., 318 N.W.2d 408, 415 (Iowa 1982). However, the Supreme Court has not gone so far as to recognize that the mere denial of an insured's motion for a directed verdict on the coverage issue automatically establishes that the issue is fairly debatable. Reuter, 469 N.W.2d 254. In Reuter, the Supreme Court cautioned the trial court to "carefully review the facts and the particular circumstances" in deciding whether the issues found debatable with respect to coverage are the precise issues providing the reasonable basis for denial of the claim. Id.

It is difficult to envision a situation in which the coverage issues are not the same for the contract claim and the bad faith claim. Certainly, when the issues are the same, if a summary judgment or directed verdict cannot be entered for the insured because reasonable minds could disagree about the insured's right to recover under the policy, then the insurance company should be entitled to a directed verdict or summary judgment on the insured's bad faith claim.

On the other hand, a summary judgment or directed verdict in favor of the insured on the insured's contract claim does not necessarily preclude summary judgment or a directed verdict for the insurer on the bad faith claim. See, e.g., Scott v. United of Omaha Life Ins. Co., 749 F. Supp. 1089 (M.D. Ala. 1990), aff'd, 934 F.2d 1265 (11th Cir. 1991) (court granted insured's motion for summary judgment as to coverage and granted the insurance company's motion for summary judgment as to bad faith). It is certainly possible for the insured to obtain a directed verdict on the contract claim and yet not be successful on the bad faith claim when the basis for the denial of the insured's claim under the policy is a debate over the applicable law. In that situation, the trial court must determine the applicable law for purposes of the contract claim and may likely do so on the insured's motion for summary judgment or motion for directed verdict. The fact that the resolution of this legal dispute with respect to coverage is made in the context of a motion does not change the fact that a valid dispute with respect to the applicable law existed and therefore made the claim

fairly debatable for purposes of the bad faith tort.

E. Subjective Element: Knowledge of Lack of Reasonable Basis. Whether the insurer knew or should have known of the absence of a reasonable basis to deny the claim is the subjective element of first-party bad faith. Reuter, 469 N.W.2d at 253.

1. Duty to investigate.

a. The failure of the insurer to properly investigate and evaluate a claim is evidence of the subjective element of bad faith. Reuter, 469 N.W.2d at 254-55. But an improper investigation alone will not sustain a finding of the tort of bad faith. Id. Accord Pace v. Insurance Co. of N. Am., 838 F.2d 572, 584 (1st Cir. 1988) (applying Rhode Island law); Aetna Casualty & Sur. Co. v. Superior Ct., 778 P.2d 1333 (Ariz. Ct. App. 1989). For an example of a situation in which the court found bad faith because the insurer should have known it had no reasonable basis to deny the insured's claim had it conducted an adequate investigation, see State Farm County Mut. Ins. Co. v. Moran, 809 S.W.2d 613 (Tex. Ct. App. 1991).

b. If a deficient investigation is evidence of subjective bad faith, then the insurer in essence has a duty to investigate or risk exposure to bad faith. However, this conclusion is not consistent with statements made by the Iowa Supreme Court with respect to the carrier's duty to investigate in the first-party situation. In North Iowa State Bank v. Allied Mutual Insurance Co., 471 N.W.2d 824, 828 (Iowa 1991), the Iowa Supreme Court stated:

> In a first-party action, the "insurer has no clearly defined duty of investigation [as in a third-party claim] and may require the insured to present adequate proof of loss before paying the claim".

Id., quoting Pirkl v. Northwestern Mut. Ins. Ass'n, 348 N.W.2d 633, 635 (Iowa 1984).

c. In California, the courts have imposed a duty on the insurance company to "thoroughly investigat[e] the foundation for its denial" in

order to deny benefits in good faith. Egan v. Mutual of Omaha Ins. Co., 169 Cal. Rptr. 691, 696, 598 P.2d 452 (1979), cert. denied, 445 U.S. 912 (1980).

2. Effect of facts learned after denial. Although an insurer may have a reasonable basis to deny a claim initially, the carrier may be in bad faith if it fails to later pay the claim after it becomes aware of additional information that establishes the validity of the insured's claim. See Dirks v. Farm Bureau Mut. Ins. Co., 465 N.W.2d 857, 861 (Iowa 1991). Compare with Woodard v. Champion Ins. Co., 548 So. 2d 1026 (Ala. 1989) (holding insurer had a debatable reason to deny claim and no obligation to conduct a further investigation of the claim).

F. Scope of Tort.

1. Denial of Benefits--First Party Insurance. The most common factual situation giving rise to the tort of first-party bad faith is the insurance company's determination of the benefits due the insured under the policy.

a. Property Insurance.

(1). Central Life Ins. Co. v. Aetna Casualty & Sur. Co., 466 N.W.2d 257 (Iowa 1991).

(2). Hoekstra v. Farm Bureau Mut. Ins. Co., 382 N.W.2d 100 (Iowa 1986).

(3). M-Z Enter. v. Hawkeye-Sec. Ins. Co., 318 N.W.2d 408 (Iowa 1982).

O

b. Health/Disability/Life Insurance.

(1). Higgins v. Blue Cross of W. Iowa & S. Dakota, 319 N.W.2d 232 (Iowa 1982).

c. Uninsured/Underinsured Motorist Coverage.

(1). Dirks v. Farm Bureau Mut. Ins. Co., 465 N.W.2d 857 (Iowa 1991).

(2). Kirk v. Farm & City Ins. Co., 457 N.W.2d 906 (Iowa 1990).

(3). Dolan v. AID Ins. Co., 431 N.W.2d 790 (Iowa 1988).

d. Medical Payments Coverage.

(1). Reuter v. State Farm Mut. Auto. Ins. Co., 469 N.W.2d 250 (Iowa 1991).

2. Denial of coverage under liability policy. In North Iowa State Bank v. Allied Mutual Insurance Co., 471 N.W.2d 824 (Iowa 1991), the Iowa Supreme Court held that the fairly debatable standard applied in determining whether the insurer's decision in limiting its coverage and defense to only one of the six theories of recovery alleged against the insured bank was in bad faith. The test for determining whether the applicable legal standard is the one for third-party or for first-party bad faith claims depends upon the type of claim presented and the conduct required of the insurer. Id. at 828. The standard does not depend upon the type of policy involved, i.e., liability rather than casualty. Id. at 829. In determining coverage for a liability claim, the insurance company is not in a fiduciary relationship with the insured, but rather "occupies the same arms-length position in relation to an insured that it occupies when the insurer challenges an insured's coverage of casualty losses". Id. Therefore, the insurance company's conduct is judged by the standard for first-party bad faith.

3. Workers compensation.

a. Insurer liability. Denial of a workers compensation claim can also give rise to first-party bad faith. Boylan v. American Motorist Ins. Co., 489 N.W.2d 742 (Iowa 1992). Although the employee is not the insured of the workers compensation carrier, the Iowa court did not find this fact an obstacle to recognition of the tort of first-party bad faith in this context. Distinguishing Long v. McAllister, 319 N.W.2d 256 (Iowa 1982), the Court noted that the Iowa workers compensation statute imposed affirmative obligations upon the carrier with respect to paying benefits and providing medical and hospital supplies. The Court concluded that as a result of these obligations the workers compensation situation was more similar to Dolan than to Long and therefore appropriate for imposition of a duty of good faith upon the workers compensation carrier in its dealings with the employee.

See also Kiner v. Reliance Ins. Co., 463 N.W.2d 9 (Iowa 1990).

b. Self-insurer liability. In the case of Reedy v. White Consolidated Industries, Inc., 1993 WL 267560 (Iowa July 21, 1993), the Iowa Supreme Court extended its holding in Boylan to employers who have qualified as self-insured under Iowa's workers compensation statute. However, as of the date of this outline, this opinion had not been released for publication.

G. Procedural Matters.

1. Severance of bad faith claim. The Iowa Supreme Court has held that it is not an abuse of discretion for the trial court to sever a claim for bad faith failure to pay underinsured motorist benefits from the insured's contract claim against the insurer for payment of those benefits. Handley v. Farm Bureau Mut. Ins. Co., 467 N.W.2d 247 (Iowa 1991). In a similar case, the Iowa Court of Appeals has recently held that the trial court did not abuse its discretion in severing a bad faith claim against an underinsured motorist carrier from the insured's claim against the tortfeasor. Johnson v. State Farm Auto. Ins. Co., 1993 WL 286857 (Iowa Ct. App. May 25, 1993).

2. Discovery of insurer's file. The principal defenses available to protect the claim file from discovery are the attorney-client privilege and work product immunity.

a. Attorney-client privilege. Iowa Rule of Civil Procedure 122(a) provides that a party "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action". The Iowa Supreme Court has held that a party may prevent discovery by establishing that the material sought is privileged. AgriVest Partnership v. Central Iowa Prod. Credit Ass'n, 373 N.W.2d 479, 482 (Iowa 1985). In the context of discovery, a valid claim of attorney-client privilege exists when there is an attorney-client relationship and the communication was made in confidence. Recker v. Gustafson, 279 N.W.2d 744, 746-47 n.1 (Iowa 1979).

b. Work product immunity. The work product doctrine is embodied in Federal Rule of Civil Procedure 26(b)(3) and Iowa Rule of Civil Procedure 122(c). Courts have held that an insurer's claim file predating the insurer's denial of the insured's claim is not prepared in anticipation of litigation within the meaning of the rules of civil procedure. APL Corp. v. Aetna Casualty & Sur. Co., 91 F.R.D. 10, 21 (D. Md. 1980); Atlanta Coca-Cola Bottling Co. v. Trans-Am. Ins. Co., 61 F.R.D. 115, 117-18 (N.D. Ga. 1972); Brown v. Superior Ct., 670 P.2d 725, 733-34 (Ariz. 1983).

Even if the court concludes that the claim file or a portion of it was prepared in anticipation of litigation, documents and information are still discoverable if the insured can demonstrate substantial need of the materials and the inability without undue hardship to obtain the substantial equivalent by other means. Reavis v. Metropolitan Prop. & Liab. Ins. Co., 117 F.R.D. 160, 164 (S.D. Cal. 1987) (the insured's ability to depose the insurance adjusters and other claims representatives who handled the claim is not the substantial equivalent of the documentation contained in the insurer's files); Silva v. Fire Ins. Exch., 112 F.R.D. 699, 700 (D. Mont. 1986) ("The general rule in cases of this nature [bad faith] should be that the [insured] is absolutely entitled to discovery of the claims file."); Central Nat'l Ins. Co. v. Medical Protective Co., 107 F.R.D. 393, 395 (E.D. Mo. 1985) (plaintiff in bad faith failure to settle case was entitled to insurer's file, including attorney's mental impressions); Bourget v. Government Employees Ins. Co., 48 F.R.D. 29, 33 (D.Conn. 1969) (files of insurer and its lawyers ordered produced in a bad faith failure to settle case); Miller v. Continental Ins. Co., 392 N.W.2d 500, 506 (Iowa 1986) (items contained in adjuster's file relevant to bad faith failure to settle claim against insurer were discoverable); Amsden v. Grinnell Mut. Reins. Co., 203 N.W.2d 252, 256 (Iowa 1972).

c. Timing of discovery. Compare Handley, 467 N.W.2d at 250 (insured entitled to discover insurer's files without making a prima facie showing of bad faith) with Johnson, 1993 WL

286857 (Iowa Ct. App. May 25, 1993) (insurer's file not discoverable, at least until insured's claim for underinsured motorists benefits was determined, even though bad faith claim is stated because trial court properly determined after an in camera inspection that the file was prepared in anticipation of litigation).

3. Abstention. In a case involving the insurer's alleged bad faith failure to pay workers compensation benefits, the Iowa Supreme Court held that because the issue of entitlement to benefits may have a direct bearing on the bad faith claim and because the Industrial Commissioner was charged with the responsibility for determining such entitlement, courts should permit any bad faith case that is filed to remain on the docket but to voluntarily abstain from considering the bad faith claim until the workers compensation case is determined. Reedy v. White Consolidated Indus., Inc., 1993 WL 267560 (Iowa July 21, 1993).

II. Third-Party Bad Faith.

A. Standard for Bad Faith.

1. Perhaps the best illustration of the elusiveness of the standard for third-party bad faith is the uniform instructions which have been suggested by the Iowa Jury Instructions Committee. Originally, the definition of bad faith contained in the uniform instructions was the following:

> An insurance company must act in good faith in making decisions about claims made against its insured. This requires the company to use the same degree of skill, judgment and consideration for their insured that a skilled, professional defender of lawsuits, with the responsibility for the investigation, settlement or trial of the lawsuit, would use. They must show a faithfulness to the purpose of the insurance policy that is consistent with the justified expectations of the insured.

Iowa Civil Jury Instruction No. 1400.2 (prior to December 1992 revision).

In December 1992, the uniform instruction was revised to give the following definition of third-party bad faith:

> An insurance company must act in good faith in making decisions about claims made against its insured. The company must give equal consideration to its own interests and the interests of the insured.
>
> The insurance company must view the situation as if there were no policy limits applicable to the claim. Bad faith arises when the insurance company, by its misconduct, serves its own interest and irresponsibly exposes the insured to an unreasonable risk of liability.

Iowa Civil Jury Instruction No. 1400.2 (rev. December 1992).

2. The original uniform instruction defined bad faith in terms of failure to use reasonable care, a negligence standard. Compare Iowa Civil Jury Instruction No. 1400.2 (prior to December 1992 revision) with Iowa Civil Jury Instructions Nos. 1500.3 and 1600.2. However, negligence does not equal bad faith, and not every negligent act is even evidence of bad faith. Ferris v. Employers Mut. Casualty Co., 255 Iowa 511, 516, 122 N.W.2d 263, 266 (1963).

> It is only acts of negligence that show or permit an inference of indifference to or disregard of the interest of the insured that can fairly be said to support a charge of bad faith.

Id.; Accord Kohlstedt v. Farm Bureau Mut. Ins. Co, 139 N.W.2d 184, 190 (Iowa 1965). Thus, errors and mistakes made in the course of representing an insured do not, in the absence of bad faith, give rise to liability beyond the policy coverages and limits. See Henke v. Iowa Home Mut. Casualty Co., 250 Iowa 1123, 1130, 97 N.W.2d 168, 173 (1959).

3. Bad faith is something less than conduct which would support an award of punitive damages:

> However, good faith or bad faith in this context does not connote the absence or presence or positive misconduct of a malicious, illegal, or immoral nature such as would be re-

quired for punitive damages; rather, it refers to a breach of the implied covenant of good faith.

Kooyman v. Farm Bureau Mut. Ins. Co, 315 N.W.2d 30, 34 (Iowa 1982).

B. Bad-Faith Failure to Settle.

1. Duty to Settle. There is no express contractual undertaking by a liability insurer to settle a claim against its insured. However, the Iowa Supreme Court has recognized that the duty of good faith imposed on an insurance company by virtue of the contractual relationship includes a duty to act responsibly in settlement negotiations with respect to the insured's risk for that part of the claim in excess of the liability limits. Wierck v. Grinnell Mut. Reins. Co., 456 N.W.2d 191, 195 (Iowa 1990); Kooyman v. Farm Bureau Mut. Ins. Co., 315 N.W.2d 30, 33 (Iowa 1982).

2. Elements of Tort. In order to recover for the insurer's bad faith failure to settle a claim made against its insured, the insured must prove the following:

a. A specific demand for settlement was made by the claimant.

b. The insurer rejected the proposed settlement in bad faith.

c. The insurer's bad faith was a proximate cause of the insured's damages.

d. The insured's damages.

Iowa Civil Jury Instruction No. 1400.1, citing Wierck v. Grinnell Mut. Reins. Co., 456 N.W.2d 191 (Iowa 1990).

3. Application of Bad Faith Standard.

a. An insurer representing its insured with respect to settlement must ignore the policy limits. "If, but for the policy limits, the insurer would settle for an offered amount, it is obliged to do so (and pay towards settlement up to the policy limits). But the insurer is free to reject the offer if it would have rejected the same offer under policy li-

mits covering the whole claim." Wierck, 456 N.W.2d at 195.

b. An insurer is not required to pay every offer of settlement within the policy limits, only those offers which are reasonable based on the situation at the time the settlement offer is made. Kohlstedt v. Farm Bureau Mut. Ins. Co., 258 Iowa 337, 345-46, 139 N.W.2d 184, 186 (1965); Ferris v. Employers Mut. Casualty Co., 255 Iowa 511, 522-23, 122 N.W.2d 263, 270 (1963).

c. An insurer must fully and fairly consider any settlement proposal, and any decision to reject a settlement demand must be based on an honest belief that the case could be successfully defended or that any judgment could be held within policy limits. Henke v. Iowa Home Mut. Casualty Co., 250 Iowa 1123, 97 N.W.2d 168, 173 (1959). The mere fact that a judgment, if obtained, would probably be in excess of policy limits, does not alone show bad faith if the insurer in good faith believed it could successfully defend the case against its insured. Ferris, 255 Iowa at 518, 122 N.W.2d at 267.

d. Policies generally give the insurer the exclusive right to settle or compromise the claim and to prohibit settlement by the insured except at the insured's expense. See, e.g., Jones v. National Emblem Ins. Co., 436 F. Supp. 1119 (E.D. Mich. 1977); Tannefors v. American Fidelity Fire Ins. Co., 397 F. Supp. 141 (D.N.J. 1975), aff'd mem., 535 F.2d 1247 (3d Cir. 1976); Farmers Ins. Exch. v. Henderson, 313 P.2d 404 (Ariz. 1957); Farmers Ins. Exch. v. Schropp, 567 P.2d 1359 (Kan. 1977); Hadenfeldt v. State Farm Mut. Auto. Ins. Co., 239 N.W.2d 499 (Neb. 1976).

C. Bad Faith Investigation of Third-Party Claim.

1. Duty to Investigate.

a. In one of the earliest Iowa cases of bad faith, Henke v. Iowa Home Mutual Casualty Co., 250 Iowa 1123, 97 N.W.2d 168 (1959), the Court stated the following with respect to the duty to investigate:

> The insurer must exercise the utmost care and diligence in investigating the case, including the interviewing of witnesses and ascertaining all facts and circumstances, including visiting the scene of the accident. Failure to do so will be held negligence and will have an influence on the issue of bad faith. [citations omitted].
>
> . . .
>
> An insurer must necessarily develop sufficient information to arrive at an intelligent evaluation of the claim. Attempting to arrive at such a conclusion without adequate investigation, both factual and medico-legal, may be influential on the bad faith issue.

Id. at 1131, 97 N.W.2d at 174.

b. In a later case, the Iowa Supreme Court stated the following with respect to the duty to investigate:

> The duty cast on the insurer is to conduct good faith investigation of all aspects of the case and to consider and propose settlement in good faith based on its investigation and the apparent state of the law within policy limits.

Kohlstedt v. Farm Bureau Mut. Ins. Co., 258 Iowa 337, 340, 139 N.W.2d 184, 185 (1965).

2. Effect of Inadequate Investigation on Existence of Bad Faith.

a. The case of Kooyman v. Farm Bureau Mutual Insurance Co., 315 N.W.2d 30 (Iowa 1982), contains a good factual discussion of an insurer's bad faith in investigating a claim made against its insured. After discussing the facts in that case, the Court held that "indifference of an insurer evidenced by a failure to adequately investigate a case will support a finding of bad faith". Id. at 35. Accord Oliver B. Cannon & Son, Inc. v. Fidelity & Casualty Co., 484 F. Supp. 1375, 1379 (D. Del. 1980); Betts v. Allstate Ins. Co., 154 Cal. App. 3d 688, 201 Cal. Rptr. 528 (Ct.

App. 1984). The Court further noted that "[u]nder some circumstances an insurer's failure to investigate properly may alone establish bad faith". Kooyman, 315 N.W.2d at 35.

b. There is authority that a failure to investigate must be a proximate cause of the insurer's rejection of a reasonable settlement offer, i.e., had it known the facts, it would have accepted the settlement offer. Kohlstedt v. Farm Bureau Mut. Ins. Co., 258 Iowa 337, 347-48, 139 N.W.2d 184, 190 (1965); Ferris v. Employers Mut. Casualty Co., 255 Iowa 511, 519-20, 122 N.W.2d 263, 268 (1963). Accord Van Dyke v. St. Paul Fire & Marine Ins. Co., 448 N.E.2d 357, 362 (Mass. 1983).

D. Failure to Keep the Insured Informed.

1. Duty to Advise and Inform. Although a liability insurer does not expressly agree to advise its insured of the status of the case and other matters, the Iowa Supreme Court has focused on the insurer's conduct in this regard as part of the Court's analysis of the insurer's good faith in rejecting settlement opportunities.

a. The insurance company must keep the insured advised of the status of settlement negotiations. Kooyman, 315 N.W.2d at 36.

b. Not only must the insured be advised of settlement offers, he must be informed of the consequences to him personally of a failure to settle. Kooyman, 315 N.W.2d at 36; Loudon v. State Farm Mut. Auto Ins. Co., 360 N.W.2d 575, 578-80 (Iowa Ct. App. 1984).

c. The insured must be informed of the potential conflict between the interests of the insurance company and the insured with respect to settlement. Loudon, 360 N.W.2d at 579, quoting Lange v. Fidelity & Casualty Co., 185 N.W.2d 881, 885-86 (Minn. 1971).

2. Effect of failure to keep the insured informed.

a. The insurance company's failure to inform the insured of settlement negotiations and the fact that a settlement could be reached within policy limits is not, standing alone, suffi-

cient to generate a jury issue on the question of bad faith. Koppie v. Allied Mut. Ins. Co., 210 N.W.2d 844, 848 (Iowa 1973). Although finding no bad faith, the Court did note in the Koppie case that a lawyer who fails to inform the insured of settlement opportunities when the insured is otherwise unrepresented may violate his or her ethical duties to the insured/client. Id. at 849.

b. On the other hand, the insurer's failure to advise its insured of the status of settlement negotiations and the probable effects of an excess verdict resulting from a failure to settle "is indicative" of bad faith. Loudon v. State Farm Mut. Auto Ins. Co., 360 N.W.2d 575, 579-80 (Iowa Ct. App. 1984).

III. Defenses to Claims of Bad Faith.

A. Comparative Bad Faith.

1. Although no Iowa appellate decision has been reported which considers whether the insured's own bad faith or negligence can be a defense to a claim of bad faith against an insurer, the Federal District Court for the Southern District of Iowa has held:

> [The insured's] contributory fault is not a defense to the bad faith cause of action. A plaintiff's breach of obligations under the insurance contract does not excuse the insurer from its duty of good faith and fair dealing.

Kelly v. State Farm Mut. Auto. Ins. Co., 764 F. Supp. 1337, 1340-41 (S.D. Iowa 1991). The federal court concluded that Iowa's comparative fault statute did not apply to first-party bad faith actions. Id. at 1341.

2. The Iowa Supreme Court has noted that the covenant of good faith and fair dealing requires "that neither party will do anything to injure the rights of the other in receiving the benefits of the agreement". Kooyman v. Farm Bureau Mut. Ins. Co., 315 N.W.2d 30, 33 (Iowa 1982).

3. Contributory or comparative bad faith has been recognized as a defense by some California courts. See California Casualty Gen. Ins. Co. v. Superior Ct., 173 Cal. App. 3d 274, 218 Cal. Rptr. 817 (Ct.

App.1985); Fleming v. Safeco Ins. Co. of Am., 160 Cal. App. 3d 31, 206 Cal. Rptr. 313 (Ct. App. 1984). Cf. Los Angeles Memorial Coliseum Comm'n v. National Football League, 791 F.2d 1356, 1361 (9th Cir. 1986), cert. denied, 484 U.S. 826 (1987) (holding in a non-insurance bad faith case that the plaintiff's own breach of the duty of good faith and fair dealing was a complete defense to the bad faith claim).

B. ERISA Preemption.

1. ERISA applies to "any employee benefit plan if it is established or maintained . . . by any employer engaged in commerce or in any industry or activity affecting commerce." 29 U.S.C. § 1003(a)(1). An "employee welfare benefit plan" can include programs maintained by the employer through the purchase of insurance to provide employees with benefits for medical care, accidents and disability. Id. at § 1002(1).

2. When ERISA governs an employee benefit plan, ERISA preempts all state law causes of action that relate to the plan and that are not saved from preemption by the ERISA "savings clause." 29 U.S.C. § 1144(a) & (b)(2)(A). Thus, when an insurance policy provides benefits under an employee benefit plan, the federal statutory scheme preempts state common law causes of action for breach of contract to obtain benefits under the plan and tort claims for bad faith. Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 60-61, 65 (1987); Pilot Life Ins. Co., 481 U.S. 41, 47-51 (1987). See also, e.g., Schroeder v. Phillips Petroleum Co., 970 F.2d 419, 420 (8th Cir. 1992) (per curiam); Davis v. Ottumwa Young Men's Christian Ass'n, 438 N.W.2d 10, 12-13 (Iowa 1989).

C. Advice of Counsel.

1. Iowa law. Although there are no reported Iowa appellate decisions which have discussed whether the advice of counsel can be a defense to a claim of first-party bad faith, the effect of the insurer's reliance on the advice of its attorney was considered in the context of a third-party bad faith claim in Ferris v. Employers Mut. Cas. Co., 255 Iowa 511, 518, 122 N.W.2d 263, 267 (1963). In Ferris, the Iowa Supreme Court held that it was reasonable for the insurer to rely on the advice and judgment of its defense counsel that the case

against its insured could be successfully defended. Id.

2. Law from other jurisdictions. Most courts which have considered the effect of advice of counsel in bad faith cases have held that reliance on counsel's advice is merely one factor the jury may consider when deciding whether the insurer acted in bad faith. Bohemia, Inc. v. Home Ins. Co., 725 F.2d 506, 513 (9th Cir. 1984); Dumas v. Hartford Accident & Indem. Co., 56 A.2d 57, 61-62 (N.H. 1947); Crabb v. National Indem. Co., 205 N.W.2d 633, 636 (S.D. 1973). Cf. Worden v. Tri-State Ins. Co., 347 F.2d 336, 340 (10th Cir. 1965) (applying Kansas law in negligent failure-to-settle case). On the other hand, at times it appears that advice of counsel is virtually a complete defense. See, e.g., Boston Symphony Orchestra, Inc. v. Commercial Union Ins. Co., 545 N.E.2d 1156, 1160 (Mass. 1989) (statutory bad faith claim).

D. Statute of Limitations.

1. The five-year statute of limitations for actions founded on "unwritten contracts" provided in Iowa Code section 614.1(4) applies to an action based on an insurer's breach of the good faith duty to defend an insured against third-party claimants. Sandbulte v. Farm Bureau Mut. Ins. Co., 343 N.W.2d 457, 462 (Iowa 1984). This statute of limitations applies regardless of the elements of damages sought by the insured. Id.

2. A claim for breach of the good faith duty to defend accrues when the insured becomes obligated to pay, i.e., upon final disposition of the suit against the insured. Sandbulte, 343 N.W.2d at 462.

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E. Acquiescence. The Iowa Supreme Court has made statements in two cases that indicate an insured's failure to object is relevant to a determination of bad faith. In Kohlstedt v. Farm Bureau Mutual Ins. Co., 258 Iowa 337, 139 N.W.2d 184, 186 (1965), the Court held that the insured could not claim that the insurance company's actions were unreasonable or in bad faith when the insured's personal attorney acquiesced in or agreed with those actions. See also Ferris v. Employers Mut. Casualty Co., 255 Iowa 511, 518, 122 N.W.2d 263, 268 (Iowa 1963). But in Loudon v. State Farm Mutual Automobile Insurance Co., 360 N.W.2d 575, 583 (Iowa Ct. App. 1984), the Iowa Court of Appeals held that the insured did not acquiesce in the insurer's

defense decisions when he did not fully understand the total situation.

IV. Damages.

A. Attorneys Fees. The insured may recover attorneys fees incurred in an action to establish insurance coverage. New Hampshire Ins. Co. v. Christy, 200 N.W.2d 834, 845 (Iowa (1972). An insured may not recover attorney fees incurred in a bad faith action. E.g., Farmers Group, Inc. v. Trimble, 658 P.2d 1370 (Colo. Ct. App. 1982), aff'd, 691 P.2d 1138 (Colo. 1984); Bibeault v. Hanover Ins. Co., 417 A.2d 313 (R.I. 1980); Grove v. Myers, 382 S.E.2d 536 (W. Va. 1959).

B. Excess Judgment.

1. An insured may recover the amount of any excess judgment when the insurer is in bad faith for failing to settle within policy limits. Henke v. Iowa Home Mut. Casualty Co., 250 Iowa 1123, 1130, 97 N.W.2d 168, 180-81 (1959). There is no requirement that the insured pay the excess judgment or even be able to pay in order to recover the excess amount of the judgment. Id.

2. An insured may not recover the amount of an excess judgment where the insurer is in bad faith only for refusing to defend unless the insured proves that the failure to defend was a proximate cause of the injury to the insured, i.e., the judgment in excess of policy limits. Employers Nat'l Ins. Corp. v. Zurich Am. Ins. Co., 792 F.2d 517, 520 (5th Cir. 1986) (applying Texas law).

C. Consequential Damages.

1. Emotional distress damages have been recovered in a first-party bad faith case. Nassen v. National States Ins. Co, 494 N.W.2d 231, 238 (Iowa 1992).

2. Economic losses have been allowed as an element of damage in a first-party bad faith case. Nassen, 494 N.W.2d at 238.

D. Punitive Damages.

1. The mere fact that an insurer may have acted in bad faith does not necessarily entitle the insured to punitive damages. Hayes Bros., Inc. v. Economy Fire & Casualty Co., 634 F.2d 1119, 1124 (8th Cir. 1980) (applying Iowa law); Rodgers v. Pennsylvania

Life Ins. Co., 539 F. Supp. 879, 884 (S.D. 1982). Accord Travelers Ins. Co. v. Lesher, 187 Cal. App. 3d 169, 231 Cal. Rptr. 791, 807 (Ct. App. 1986). However, in Nassen v. National States Insurance Co., 494 N.W.2d 231, 238 (Iowa 1992), the Iowa Supreme Court held that a finding of bad faith based on the insurer's acts in "engaging in a general scheme to induce elderly persons to purchase insurance that was not intended by the company to provide the benefits expected" confirmed the elements required for an award of punitive damages.

2. The standard for punitive damages is set out in Iowa Code section 668A.1 (1993). Under that statute, punitive damages may be awarded only upon a showing by a preponderance of clear, convincing and satisfactory evidence that "the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights or safety or another".

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1993
LEGISLATIVE REPORT

by Robert M. Kreamer

The 1993 Legislative Session was a unique session in that there was split control in the Iowa Legislature for the first time since 1967 with the Democrats controlling the Iowa Senate by a margin of 27 to 23, and the Republicans controlling the Iowa House of Representatives by a 51-49 margin. Furthermore, because of reapportionment and the large number of legislators not seeking reelection, there were 48 legislators sworn in to new seats in the legislature. Because of the many new legislators who lacked familiarity with the legislative process and the divided partisan control, the session moved at a slower pace than prior years and tended to devote most of its time to the appropriations and budgeting process.

Also, there appeared to develop the additional factor of philosophical gridlock. This gridlock transcended partisan politics and caused stalemates on such issues as gambling and employment drug testing where debate was attempted. While there was no debate on issues of consequence to the defense bar, there was nevertheless gridlock because of a recognition that bills supported in committee would not be favored on the floor, or bills supported in one chamber would not be supported in the other. This is clearly demonstrated by the fact that neither our legislative program nor the initiatives from the plaintiff's bar enjoyed appreciable legislative success.

The Iowa Defense Counsel Association supported the following legislation in the 1993 Legislative Session:

1. Seat belt legislation. This bill would allow the admissibility of the non-use of safety belts or safety harnesses as evidence of comparative fault. See HSB 27 and SF 98.

2. Interest on Judgments. Interest on judgments shall run only from date of judgment. See HF 156 and SF 129.

3. Ex Parte Communications. This legislation would require the execution of a mandatory patient waiver by plaintiff upon the filing of a lawsuit. See HSB 226.

4. Consortium. This legislation would overrule Schwennen v. Abell, 430 N.W.2d 98 (1988) which held that a spouse's recovery for consortium is not reduced by the comparative fault of the injured spouse. See HSB 40 and SF 255.

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5. Offers to Confess Judgment. This legislation would expand the costs that can be recovered in the event that the plaintiff does not recover at least the amount contained in the offer. See SSB 201.

The Iowa Defense Counsel Association was successful in opposing the following legislation:

1. Products Liability Legislation. This legislation would overrule the interpretation of Chapter 613.18 by the Iowa Supreme Court in Bingham v. Marshall and Huschart Machinery Co., 485 N.W.2d 78 (1992). See HSB 55 and SSB 82.

2. Loss of Services and Support. This legislation would expand the right of a parent to recover for injuries to an adult child. We were successful in amending this legislation to preclude recovery for noneconomic damages in the Senate, but continue to oppose this legislation in the House. See SF 119.

3. Unfair Competition by Insurer. This legislation would create a cause of action against an insurer for unfair competition or deceptive acts under Iowa Code Chapter 507B. Additionally, this legislation contained other plaintiff provisions such as elimination of 180-day rule for designating experts in a malpractice action. See HF 45.

4. Jury Instructions. This legislation allows a jury in a case involving the State or one of its subdivisions to make findings of fact regarding the law as well as the facts. See HF 149.

Because this was my first year of lobbying for the Iowa Defense Counsel Association, it was necessary to not only meet the freshmen legislators, but to also meet with the veteran legislators and inform them of this new relationship. I believe that I was well received by not only legislators, but also other lobbyists and interest groups sharing our legislative perspectives.

I would like to thank the members of the Iowa Defense Counsel Association for the opportunity to have represented them this past year. A special thank you to the Legislative Committee and its chairman, Herb Selby, for the support and assistance given to me at every request. I look forward to working with you in the days ahead. Thank you!

Gronetto, Chair
McKean
Vilsack

FILED FEB 9 1993

SENATE FILE 98
BY McKEAN, LLOYD-JONES,
and SLIFE

Passed Senate, Date _____ Passed House, Date _____
Vote: Ayes _____ Nays _____ Vote: Ayes _____ Nays _____
Approved _____

A BILL FOR

An Act relating to evidentiary restrictions regarding the nonuse of safety belts, safety harnesses, and child restraint devices in civil proceedings.

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

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TLSB 1658SS 75
js/jw/5

Section 1. Section 321.445, subsection 4, Code 1993, is amended by striking the subsection.

Sec. 2. Section 321.446, subsection 6, Code 1993, is amended to read as follows:

6. Failure to use a child restraint system, safety belts, or safety harnesses as required by this section does not constitute negligence ~~nor is the failure admissible as evidence in a civil action~~.

EXPLANATION

This bill will allow the admissibility of the nonuse of safety belts or safety harnesses as evidence of comparative fault.

Current law prohibits the admissibility of the nonuse of safety belts and safety harnesses as evidence in a civil action for damages arising prior to July 1, 1986. For a cause of action arising on or after July 1, 1986, current law prohibits the nonuse of safety belts or safety harnesses as evidence of comparative fault. However, the nonuse may be admitted to determine damages if the parties introduce substantial evidence that the failure to wear a safety belt or safety harness contributed to the injuries of the plaintiff. If the trier of fact finds that the evidence supports a finding that the failure to wear a safety belt or safety harness contributed to the plaintiff's injuries, damages awarded to a plaintiff after reduction for comparative fault can be reduced by 5 percent or less. This bill strikes these provisions.

In addition, provisions prohibiting the admissibility of the nonuse of a child restraint system under section 321.446 in a civil action are stricken.

Dinkla, Chair
McLaren
Neuhauser

FEB 9 1993

Judiciary & Law Enforcement

HOUSE FILE 156
BY HALVORSON of Clayton

Passed House, Date _____ Passed Senate, Date _____
Vote: Ayes _____ Nays _____ Vote: Ayes _____ Nays _____
Approved _____

A BILL FOR

An Act relating to interest on judgments and decrees of courts and providing effective and applicability dates.

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

P

TLSB 1660HH 75

S.F. _____ H.F. 156

Section 1. Section 535.3, Code 1993, is amended to read as follows:

535.3 INTEREST ON JUDGMENTS AND DECREES.

Interest shall be allowed on all money due on judgments and decrees of courts ~~at the rate of ten percent per year~~ as provided in section 668.13, subsection 3, unless a different rate is fixed by the contract on which the judgment or decree is rendered, in which case the judgment or decree shall draw interest at the rate expressed in the contract, not exceeding the maximum applicable rate permitted by the provisions of section 535.2, which rate must be expressed in the judgment or decree. ~~The interest shall accrue from the date of the commencement of the action.~~ However, for liquidated damages, interest shall accrue from the date of loss.

This section does not apply to the award of interest for judgments and decrees subject to section 668.13.

Sec. 2. Section 668.13, subsection 1, Code 1993, is amended to read as follows:

1. Interest, ~~except interest awarded for future damages,~~ shall accrue from the date of the ~~commencement of the action~~ judgment or decree.

Sec. 3. Section 668.13, subsection 4, Code 1993, is amended by striking the subsection.

Sec. 4. This Act takes effect on January 1, 1994, and applies only to judgments and decrees entered on or after that date.

EXPLANATION

This bill provides that interest on judgments and decrees is set according to the formula in section 668.13, subsection 3, tied to United States treasury bills. The bill also provides that interest on liquidated damages applies from the date of the loss and that all other interest accrues from the date of judgment. In addition, the bill makes a conforming change that strikes the provision that interest on future damages accrues starting on the date of judgment.

The Act takes effect on January 1, 1994, and applies only to judgments and decrees entered on or after that date.

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Rafferty, Chair
Dinkla
Neuhauser

NSB 226

Judiciary & Law Enforcemen

HOUSE FILE _____
BY (PROPOSED COMMITTEE ON JUDICIARY AND LAW ENFORCEMENT BILL BY CHAIRPERSON McNEAL)

Passed House, Date _____ Passed Senate, Date _____
Vote: Ayes _____ Nays _____ Vote: Ayes _____ Nays _____
Approved _____

A BILL FOR

An Act relating to release of privileged information.
BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

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TLSB 2252HC 75
mk/jw/5

S.F. _____ H.F. _____

Section 1. Section 622.10, unnumbered paragraphs 1 and 2, Code 1993, are amended to read as follows:

A practicing attorney, counselor, physician, surgeon, ~~physician's~~ physician assistant, mental health professional, or the ~~stenographer~~ secretary or confidential clerk of any such person, who obtains information by reason of the person's employment, or a member of the clergy shall not be allowed~~,~~ ~~in giving testimony,~~ to disclose any confidential communication properly entrusted to the person in the person's professional capacity, and necessary and proper to enable the person to discharge the functions of the person's office according to the usual course of practice or discipline. The prohibition does not apply to cases where the person in whose favor the prohibition is made waives the rights conferred; nor does the prohibition apply to physicians or surgeons, ~~physician's~~ physician assistants, mental health professionals, or to the ~~stenographer~~ secretary or confidential clerk of any physicians or surgeons, ~~physician's~~ physician assistants, or mental health professionals, in connection with a civil action in which the condition of the person in whose favor the prohibition is made is an element or factor of the claim or defense of the person or of any party claiming through or under the person. In an action where the rights conferred are waived, written notice of the waiver of the prohibition shall be provided to the other party upon that party's request, by the person in whose favor the prohibition is made. Any institution or person releasing information to a person or the person's representative after the waiver has been made is not liable criminally or for civil damages by reason of the release of information. The evidence is admissible upon trial of the action only as it relates to the condition alleged.

If an adverse party, in connection with the action, desires the oral deposition, either discovery or evidentiary, of a physician or surgeon, ~~physician's~~ physician assistant, or mental health professional, ~~to which the prohibition would~~

P

~~otherwise apply~~ or the ~~stenographer~~ secretary or confidential clerk of a physician or surgeon, ~~physician's~~ physician assistant, or mental health professional, or desires to call a physician or surgeon, ~~physician's~~ physician assistant, or mental health professional, ~~to which the prohibition would otherwise apply~~ or the ~~stenographer~~ secretary or confidential clerk of a physician or surgeon, ~~physician's~~ physician assistant, or mental health professional as a witness at the trial of the action, the adverse party shall file an application with the court for permission to do so. The court upon hearing, which shall not be ex parte, shall grant permission unless the court finds that the evidence sought does not relate to the condition alleged and shall fix a reasonable fee to be paid to the physician or surgeon, ~~physician's~~ physician assistant, or mental health professional by the party taking the deposition or calling the witness.

EXPLANATION

This bill provides that confidential communications may be disclosed in connection with a civil action upon the waiver of the person in whose favor the prohibition against disclosure operates. Written notice of the waiver shall be provided upon request and shall immunize the person releasing the information from criminal or civil liability. The bill also changes a reference from stenographer to secretary.

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LSB 2252HC 75

(HSB 40

Judiciary & Law Enforcement

Rafferty, chair
Millage
Peterson

HOUSE FILE _____
BY (PROPOSED COMMITTEE ON JUDICIARY AND LAW ENFORCEMENT BILL BY CHAIRPERSON McNEAL)

Passed House, Date _____ Passed Senate, Date _____
Vote: Ayes _____ Nays _____ Vote: Ayes _____ Nays _____
Approved _____

A BILL FOR

An Act relating to consortium claims under comparative fault.
BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

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TLSB 1659HC 75

S.F. _____ H.F. _____

Section 1. Section 668.3, subsection 1, Code 1993, is amended by adding the following new unnumbered paragraph:

NEW UNNUMBERED PARAGRAPH. Contributory fault shall not bar recovery in an action by a claimant to recover damages for loss of services, companionship, society, or consortium, unless the fault attributable to the person whose injury or death provided the basis for the damages is greater in percentage than the combined percentage of fault attributable to the defendants, third-party defendants, and persons who have been released pursuant to section 668.7, but any damages allowed shall be diminished in proportion to the amount of fault attributable to the person whose injury or death provided the basis for the damages.

Sec. 2. Section 668.3, subsection 2, paragraph b, Code 1993, is amended to read as follows:

b. The percentage of the total fault allocated to each claimant, defendant, third-party defendant, ~~and~~ person who has been released from liability under section 668.7, and injured or deceased person whose injury or death provides a basis for a claim to recover damages for loss of consortium, services, companionship, or society. For this purpose the court may determine that two or more persons are to be treated as a single party.

EXPLANATION

This bill provides that the percentage of fault assigned to the person whose death or injury gave rise to a consortium claim shall apply to reduce or bar a judgment for loss of consortium. The bill overrules Schwennen v. Abell, 430 N.W.2d 98 (Iowa 1988).

LSB 1659HC 75

SSB 2201
JUDICIARY

VILSACK, GR.
ROSENBERG
FULHRMAN

SENATE FILE _____
BY (PROPOSED COMMITTEE ON JUDICIARY BILL BY CHAIRPERSON STURGEON)

Passed Senate, Date _____ Passed House, Date _____
Vote: Ayes _____ Nays _____ Vote: Ayes _____ Nays _____
Approved _____

A BILL FOR

An Act relating to offers to confess judgment.
BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

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TLSB 1657SC 75

S.F. _____ H.F. _____

Section 1. NEW SECTION. 677.15 COSTS.

Costs to which a defendant is entitled pursuant to this chapter shall include those items normally taxed as costs in a civil action and shall include expenses incurred by the defendant from the time of the offer for the following:

1. Any depositions, whether or not for testimony offered and admitted at the trial.

2. Witness and service fees actually incurred.

3. Expert witness fees allowed by the court.

Sec. 2. NEW SECTION. 677.16 INTEREST.

If a defendant is entitled to costs pursuant to this chapter, interest on the costs awarded shall accrue from the date of the judgment awarding the costs.

EXPLANATION

This bill provides that a defendant who offers to confess judgment is entitled to the costs normally taxed as costs in a civil action, including deposition costs, witness and service fees, and expert witness fees, when the plaintiff does not recover more than the amount offered to be confessed. The bill also provides that interest on the costs accrues from the date of the judgment awarding the costs.

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LSB 1657SC 75

Vilsack, GH.
Connolly
McKean

SSB 52
Judiciary

SENATE FILE _____
BY (PROPOSED COMMITTEE ON JUDICIARY BILL BY CHAIRPERSON STURGEON)

Passed Senate, Date _____ Passed House, Date _____
Vote: Ayes _____ Nays _____ Vote: Ayes _____ Nays _____
Approved _____

A BILL FOR

An Act relating to the liability of certain persons based on strict liability in tort or breach of implied warranties.

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

P

TLSB 1652SC 75

S.F. _____ H.F. _____

Section 1. Section 613.18, subsection 1, Code 1993, is amended to read as follows:

1. A person who is not the assembler, designer, or manufacturer, and who wholesales, retails, distributes, or otherwise sells a product is:

~~a.--Immune from any suit based upon strict liability in tort or breach of implied warranty of merchantability which arises solely from an alleged defect in the original design or manufacture of the product.~~

b.--~~Not~~ not liable for damages based upon strict liability in tort or breach of implied warranty of merchantability ~~for~~ which arise solely from a default in the original design or manufacture of the product upon proof that the manufacturer is subject to the jurisdiction of the courts of this state and has not been judicially declared insolvent.

EXPLANATION

This bill provides that a person who does not assemble, design, or manufacture a product but who wholesales, retails, or distributes a product is not liable for damages based on strict liability in tort or breach of implied warranties of merchantability for a defect in the design or manufacture of a product only if the manufacturer is subject to the jurisdiction of Iowa courts and has not been judicially declared insolvent.

The bill legislatively overrules the interpretation of section 613.18 by the Iowa supreme court in Bingham v. Marshall & Huschart Machinery Co., 485 N.W.2d 78 (Iowa 1992), which provides that the current language of subsection 1 of section 613.18 confers absolute immunity for damages based upon strict liability or breach of implied warranty of merchantability to persons who do not assemble, deliver, or manufacture a product.

LSB 1652SC 75

Hovel { Dinkla, Chair
Kurley
McKinney

SENATE FILE 119
BY COMMITTEE ON JUDICIARY

(SUCCESSOR TO SSB 15)

(AS AMENDED AND PASSED BY THE SENATE MARCH 1, 1993)

New Language by the Senate

Passed Senate, Date _____ Passed House, Date _____
Vote: Ayes _____ Nays _____ Vote: Ayes _____ Nays _____
Approved _____

A BILL FOR

An Act relating to a parent's right of action for the injury or death of a child.

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

S.F. 119 P

SF 119

Section 1. Section 613.15, Code 1993, is amended by striking the section and inserting in lieu thereof the following:

613.15 INJURY OR DEATH OF A SPOUSE, PARENT, OR CHILD -- RIGHT OF ACTION.

1. An action for damages due to the wrongful or negligent injury or death of a woman may be brought to the same extent as an action for damages due to the injury or death of a man. A woman, or the administrator of a woman's estate, may recover for physician's services and nursing and hospital expenses.

2. A person, or the person's administrator, may bring an action to recover the value of services and support of the person's spouse, parent, or child lost due to the injury or death of the spouse, parent, or child. However, the spouse, parent, or child of a person who, or whose administrator, is entitled to recover for loss of services and support shall not also recover for these elements of damage.

3. As used in this section, "services and support" does not include noneconomic damages such as companionship or society.

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Roger Halvorson, Chair
Doderer
Metcalf

JAN 22 1993
Commerce

HOUSE FILE 45
BY DODERER

Passed House, Date _____ Passed Senate, Date _____
Vote: Ayes _____ Nays _____ Vote: Ayes _____ Nays _____
Approved _____

A BILL FOR

An Act relating to certain causes of action relating to insurance companies and their insureds, and extending the time period for certification of expert witnesses in a professional liability case.

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

HF 45

P

TLSB 1572HH 75
mj/mc/6

S.F. _____ H.F. 45

Section 1. Section 507B.3, unnumbered paragraph 1, Code 1993, is amended to read as follows:

~~No~~ A person shall not engage in this state in any trade practice which is defined in this chapter as, or determined pursuant to section 507B.6 ~~of this chapter~~ to be, an unfair method of competition, or an unfair or deceptive act or practice in the business of insurance. A person aggrieved has a claim for appropriate relief against a person, and the person's employer, who engages in a trade practice which is prohibited pursuant to this chapter.

Sec. 2. Section 668.11, subsection 1, Code 1993, is amended to read as follows:

1. A party in a professional liability case brought against a licensed professional pursuant to this chapter who intends to call an expert witness of their own selection, shall certify to the court and all other parties the expert's name, qualifications and the purpose for calling the expert within the following time period:

a. The plaintiff within ~~one hundred eighty days of~~ such time after the defendant's answer ~~unless the court for good cause not ex parte extends the time of disclosure~~ as is reasonably necessary which reasonable period in any case shall not be less than one hundred eighty days of such answer.

b. The defendant within ninety days of plaintiff's certification.

Sec. 3. Section 135.42, Code 1993, is repealed.

EXPLANATION

This bill provides that a cause of action accrues against an insurer as a result of that insurer engaging in an unfair method of competition or an unfair or deceptive act or practice. The bill extends the time within which a plaintiff in an action involving professional liability against a licensed professional must certify the plaintiff's expert witnesses from 180 days of the defendant's answer to a reasonable time after the defendant's answer, but in no case

less than 180 days.

The bill also repeals section 135.42, which prohibits certain information, interviews, reports, statements, memoranda, or other data furnished in connection with the mortality and morbidity study under section 135.40, from being received in evidence in any legal proceeding.

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Hurley, Chair
Klinker
Peterson

FEB 8 1993

Judiciary & Law Enforcement

HOUSE FILE 149
BY HURLEY, BODDICKER, WELTER, BAKER, MILLAGE, and KLEMME

Passed House, Date _____ Passed Senate, Date _____
Vote: Ayes _____ Nays _____ Vote: Ayes _____ Nays _____
Approved _____

A BILL FOR

An Act relating to jury instructions.
BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

HF 149

TLSB 1869HH 75
mk/sc/14

S.F. _____ H.F. 1419

Section 1. Rule of civil procedure 196, Iowa court rules, third edition, is amended by adding the following new unnumbered paragraph:

NEW UNNUMBERED PARAGRAPH. If the state or a political subdivision of the state is a party in a trial by jury, the court shall inform the jurors that, in addition to their responsibility to judge the facts of the case, the jurors also, as justice requires, have an inherent right to judge the merits of the law and the wisdom of applying the law to the parties to the case.

EXPLANATION

This bill provides that juries in cases in which the state or one of its political subdivisions is a party may make a finding regarding the law applicable in the case as well as the facts.

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LSB 1869HH 75

IOWA JURY INSTRUCTIONS - AN UPDATE
October 8, 1993

DAVID L. BROWN
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8th Floor Fleming Building
218 Sixth Avenue
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I. INTRODUCTION

A. Make-up of Iowa Jury Instruction Committee - members of District Court Bench and trial practitioners throughout the State.

B. Long-standing role of providing assistance to the Bench and Bar in the trial of jury cases.

C. Concept of Plain English drafting:

1. In 1987 the Committee completed the plain english redrafting of the Iowa Civil Jury Instructions.

2. In 1988 the Committee completed the plain english redrafting of the Iowa Criminal Jury Instructions.

D. A recognized need by both the Bench and Bar for easily accessible instructional materials which can be physically taken to Court and utilized as a resource tool in the presentation and trial of lawsuits.

II. OPERATION OF IOWA JURY INSTRUCTIONS COMMITTEE

A. Assignment of particular areas of law for review and possible redrafting.

B. Preliminary drafting, redrafting and submission to the entire committee for approval.

C. Submission to the Iowa State Bar Association Board of Governors for final approval and insertion in the instructional books.

III. RECENT REVISED UNIFORM JURY INSTRUCTIONS - SPECIFIC SUBJECT AREAS

A. The Committee on an ongoing basis has attempted to comport all existing instructions with current Iowa appellate decisions. As the Court has developed, new areas of common law, these are reflected in instructions for use by the Bench and Bar.

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B. Illustrative recently revised instructions which are attached as appendices to this outline:

1. Iowa Civil Jury Instruction 500.1 - Liability of Person Engaging Services of Independent Contractor - Essentials for Recovery. Revised.

2. Iowa Civil Jury Instruction 500.5 - Liability of Person Engaging Services of Independent Contractor - Negligence in Exercising Control Kept by Such Person. Title revised and authority added.

3. Iowa Civil Jury Instruction 500.7 - Liability of Person Engaging Services of Independent Contractor - Work Likely To Cause Nuisance or Trespass - Essentials for Recovery. Revised.

4. Iowa Civil Jury Instruction 500.8 - Liability of Person Engaging Services of Independent Contractor - Work Involving Illegal Act - Essentials for Recovery. Revised.

5. Iowa Civil Jury Instruction 600.67 - Coasting Prohibited. Substituted authority.

6. Iowa Civil Jury Instruction 600.97 - Duty to Sound Horn. Revised.

7. Iowa Civil Jury Instruction 600.100 - Seat Belt Defense - Essentials. Authority substituted.

8. Iowa Civil Jury Instruction 730.1 - Liability of Employer. Revised.

9. Iowa Civil Jury Instruction 730.3 - Definition of Independent Contractor. Revised.

10. Iowa Civil Jury Instruction 1400.1 - Third-Party Bad Faith - Essentials for Recovery. Revised

11. Iowa Civil Jury Instruction 1400.2 - Definition of Third-Party and Bad Faith. Revised.

12. Iowa Civil Jury Instruction 1410.1 - First-Party Bad Faith - Essentials for Recovery. Revised.

13. Iowa Civil Jury Instruction 2400.4 - Consideration. Authority deleted.

14. Iowa Civil Jury Instruction 2400.9 - Impossibility of Performance. Revised.

15. Iowa Civil Jury Instruction 2400.14 - Definition - Implied Contract as to Compensation. Authority substituted.

16. Iowa Civil Jury Instruction 2600.1 - Essentials for Recovery - Implied Contract as to Compensation. Revised

17. Iowa Civil Jury Instruction 2600.6 - Special Defense of Gratuity. Revised.

18. Iowa Civil Jury Instruction 2600.7 - Defense - Payment During Lifetime. Revised.

19. Iowa Criminal Jury Instruction 1500.3 - Uttering A Forged Instrument - 715A.2(1)(c) and 715A.2(1)(a). Revised.

20. Iowa Criminal Jury Instruction 1500.4 - Uttering A Forged Instrument - 715A.2(1)(c) and 715A.2(1)(b). Revised.

21. Iowa Criminal Jury Instruction 1500.8 - Uttering A Forged Instrument - Definition of Utter. Revised.

22. Iowa Civil Jury Instruction 210.4 - Definition of Willful and Wanton. New Instruction.

23. Iowa Civil Jury Instruction 400.8 - Unreasonable Failure to Avoid an Injury - Defined. Revised and authority added.

24. Iowa Civil Jury Instruction 400.9 - Unreasonable Assumption of Risk - Defined. Note and authority added.

25. Iowa Civil Jury Instruction 600.72 - Lookout. Noted added.

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26. Iowa Civil Jury Instruction 700.10 - Proper Lookout. New Instruction.

27. Iowa Civil Jury Instruction 1000.10 - Affirmative Defense - State of the Art. Revised.

28. Iowa Civil Jury Instruction 1430.1 - Uninsured Motorist Coverage - Essentials for Recovery. New Instruction.

29. Iowa Civil Jury Instruction 1440.1 - Underinsured Motorist Coverage - Essentials for Recovery. New Instruction.

30. Iowa Civil Jury Instruction 1600.16 - Result of Treatment. Deleted.

31. Iowa Civil Jury Instruction 1700.4 - Railroad crossings - Speed. Note added.

31. Iowa Civil Jury Instruction 1700.6 - Railroad Crossings - Headlights. Instruction deleted and Note substituted.

32. Iowa Civil Jury Instruction 2000.1 - Emotional Distress - Intentional Infliction - Essentials for Recovery. Revised.

33. Iowa Civil Jury Instruction 2000.3 - Intentional Or Reckless - Definition. Revised.

34. Iowa Criminal Jury Instruction 700.7 - Murder - Definition of Malice Aforethought. Revised.

35. Iowa Criminal Jury Instructions 1300.1 through 1300.9 - Burglary. New Instructions and revisions.

IV. SUBSEQUENT USES OF INSTRUCTIONS AS A WORKING TOOL FOR THE BENCH AND BAR

A. Utilized in drafting pleadings.

B. Resource for motions and legal authority.

C. Reference point for instructions in most commonly tried cases.

V. SOURCE MATERIALS

A. Iowa Civil Jury Instructions - Introductory Remarks to Uniform Instructions (A copy is attached).

B. A. Elwork, B.D. Sales & J.J. Alfini, Making Jury Instructions Understandable (1982)

C. Elwork, Alfini & Sales, Toward Understandable Jury Instructions, 65 Judicature 432 (1982)

D. Devitt, Blackman, Wolff and O'Malley, Federal Jury Practice and Instructions (1992)

VI. CAVEAT

A. While the Iowa Civil and Criminal Jury Instructions are not pre-approved by the Iowa Supreme Court nor are recognized as binding authority such as statutes, rules and reported decisions, they are given respectful consideration by the Supreme Court. See Justice Louis Lavorato's 1989 Iowa State Bar Association Annual Meeting Outline (45 out of 50 Uniform Instructions were approved when challenged on appeal to the Iowa Supreme Court). State v. Jeffries, 313 N.W.2d 508, 509 (Iowa 1981), "We disapprove the Uniform Instruction reluctantly." My review of cases from Shepard's citation for civil cases is out of 179 cases reviewed, 50 involved mere citations to the model instructions. Out of the remaining 129, only 7 model instructions were rejected. This is a 94.6% ratio in favor of upholding model instructions.

B. As a consequence, the members of the Committee take very seriously their responsibility to assure the Bench and Bar that instructions are balanced and accurately reflect the current state of Iowa law.

C. The Committee historically has always welcomed communications from active practitioners to assist in continually updating, revising and improving the instructions regularly utilized in our Courts in order that they accurately and objectively reflect the present state of the law.

D. Current members of the Committee:

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THE
IOWA STATE BAR ASSOCIATION

IOWA JURY INSTRUCTIONS COMMITTEE
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December 4, 1992

Board of Governors of the
Iowa State Bar Association
521 East Locust Street
Des Moines, Iowa 50309

Re: Iowa Jury Instructions Committee

Dear Members of the Board:

We submit the following for approval.

1. Exhibit 1 - **Iowa Civil Jury Instruction 500.1 - Liability Of Person Engaging Services Of Independent Contractor - Essentials For Recovery.** Revised.

2. Exhibit 2 - **Iowa Civil Jury Instruciton 500.5 - Liability Of Person Engaging Services Of Independent Contractor - Negligence In Exercising Control Kept By Such Person.** Title revised and authority added.

3. Exhibit 3 - **Iowa Civil Jury Instruction 500.7 - Liability Of Person Engaging Services Of Independent Contractor - Work Likely To Cause Nuisance Or Trespass - Essentials For Recovery.** Revised.

4. Exhibit 4 - **Iowa Civil Jury Instruction 500.8 - Liability Of Person engaging Services Of Independent Contractor - Work Involving Illegal Act - Essentials For Recovery.** Revised.

5. Exhibit 5 - **Iowa Civil Jury Instruction 600.67 - Coasting Prohibited.** Substituted authority.

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6. Exhibit 6 - **Iowa Civil Jury Instruction 600.97 - Duty To Sound Horn.** Revised.

7. Exhibit 7 - **Iowa Civil Jury Instruction 600.100 - Seat Belt Defense - Essentials.** Authority substituted.

8. Exhibit 8 - **Iowa Civil Jury Instruction 730.1 - Liability Of Employer.** Revised.

9. Exhibit 9 - **Iowa Civil Jury Instruction 730.3 - Definition of Independent Contractor.** Revised.

10. Exhibit 10 - **Iowa Civil Jury Instruction 1400.1 - Third-Party Bad Faith - Essentials For Recovery.** Revised.

11. Exhibit 11 - **Iowa Civil Jury Instruction 1400.2 - Definition of Third-Party Bad Faith.** Revised.

12. Exhibit 12 - **Iowa Civil Jury Instruction 1410.1 - First-Party Bad Faith - Essentials For Recovery.** Revised.

13. Exhibit 13 - **Iowa Civil Jury Instruction 2400.4 - Consideration.** Authority deleted.

14. Exhibit 14 - **Iowa Civil Jury Instruction 2400.9 - Impossibility Of Performance.** Revised.

15. Exhibit 15 - **Iowa Civil Jury Instruction 2400.14 - Definition - Implied Contract As To Compensation.** Authority substituted.

16. Exhibit 16 - **Iowa Civil Jury Instruction 2600.1 - Essentials For Recovery - Implied Contract As To Compensation.** Revised.

17. Exhibit 17 - **Iowa Civil Jury Instruction 2600.6 - Special Defense Of Gratuity.** Revised.

18. Exhibit 18 - **Iowa Civil Jury Instruction 2600.7 - Defense - Payment During Lifetime.** Revised.

19. Exhibit 19 - **Iowa Criminal Jury Instruction 1500.3 - Uttering A Forged Instrument - 715A.2(1)(c) and 715A.2(1)(a).** Revised.

20. Exhibit 20 - **Iowa Criminal Jury Instruction 1500.4 - Uttering A Forged Instrument - 715A.2(1)(c) and 715A.2(1)(b).** Revised.

21. Exhibit 21 - **Iowa Criminal Jury Instruction - 1500.8 - Uttering A Forged Instrument - Definition of Utter.** Revised.

The Committee appreciates your support and consideration of these Instruction changes. If these Instructions are approved, the Table of Context and Index will be changed to conform. The Committee is continuing its effort to update and and revise Instructions as necessary and to add Instructions as the law develops.

Very truly yours,

Mark McCormick, Chair

MM/lj
Enclosures

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500.1 Liability Of Person Engaging Services Of Independent Contractor - Essentials For Recovery. In order to establish liability on the part of one who hires an independent contractor for acts or omissions of that independent contractor, the plaintiff must prove all of the following propositions:

1. The defendant was negligent in one or more of the following ways:

   a. Defendant failed to keep the premises in a reasonably safe condition for an employee of an independent contractor.

   b. The work was likely to create a peculiar risk in the absence of special precautions and defendant failed to take the precautions.

   c. The danger was normal to the work and defendant failed to take precaution against the danger.

   d. Defendant kept control over a particular part of the work and failed to use ordinary care in controlling that work.

   e. Defendant was under a legal or contractual duty to provide a specified safeguard against danger and failed to do so.

2. The negligence of the defendant was a proximate cause of the plaintiff's damage.

3. The nature and extent of damage.

If the plaintiff has failed to prove any of these propositions, the plaintiff is not entitled to damages. If plaintiff has proved all of these propositions, the plaintiff is entitled to damages in some amount. [If an affirmative defense is submitted, delete the second sentence and insert the following: If the plaintiff has proved all of these propositions, you will consider the defense of _____ as explained in Instruction No. _____.]

Authority

Downs v. A. & H. Constr., Ltd., 481 N.W.2d 520 (Iowa 1992)

Clausen v. R. W. Gilbert Const. Co., Inc., 309 N.W.2d 462 (Iowa 1981)

Lunde v. Winnebago Industries, Inc., 299 N.W.2d 473 (Iowa 1980)

Exhibit 1

Giarratano v. Weitz Company, 259 Iowa 1292, 147 N.W.2d 824 (1967)

Restatement (Second) of Torts, Sections 409-427b

Comment

Submit only those acts that have evidentiary support. If special precautions are claimed, set forth in b. and c. the special precautions claimed.

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500.5 Liability Of Person Engaging Services Of Independent Contractor - Negligence In Exercising Control Kept By Such Person. Persons who hire an independent contractor, but who keep control of a particular part of the work, have the duty to use ordinary care in exercising such control.

"Keeping control" means keeping some degree of control over the way the work is done. This includes the right of supervision so that the independent contractor is not entirely free to control the way the work is done. It is not enough to have only a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations or changes.

A violation of this duty is negligence.

Authority

Downs v. A. & H. Constr., Ltd., 481 N.W.2d 520 (Iowa 1992)

Giarratano v. Weitz Co., 259 Iowa 1292, 147 N.W.2d 824 (1967)

Restatement (Second) of Torts, Section 414

Printed /

500.7 - Liability Of Person Engaging Services Of Independent Contractor - Work Likely To Cause Nuisance Or Trespass - Essentials For Recovery. In order to establish liability of (name of party) for acts of (independent contractor) resulting in [the creation of a [public] [private] [nuisance] [trespass upon the property of another], the plaintiff must prove all of the following propositions:

1. (The independent contractor) [created a nuisance] [trespassed upon the land of (plaintiff)] in one or more of the following ways:

   (a) (conduct alleged to constitute nuisance or trespass);

2. The defendant [knew or should have known a [nuisance] [trespass] would result] [if done in an ordinary manner] [unless special precautions were taken]] [received notice during the progress of the work a nuisance existed] [trespass was occurring].

3. The [nuisance] [trespass] was a proximate cause of damage to the plaintiff.

4. The nature and extent of the plaintiff's damage.

If the plaintiff has failed to prove any of these propositions, the plaintiff is not entitled to damages. If the plaintiff has proved all of these propositions, the plaintiff is entitled to damages in some amount.

[If an affirmative defense is submitted, delete the second sentence and insert the following: If the plaintiff has proved all of those propositions, you will consider the defense of _____ as explained in Instruction No. _____.]

Authority

Shannon v. Missouri Valley Limestone Company, 255 Iowa 528, 122 N.W.2d 278 (1963)

Restatement (Second) of Torts, Section 427 B

Comments

Note: This section must be amplified by instructing on nuisances. This same instruction can also be used for work likely to cause a trespass.

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500.8 Liability Of Person Engaging Services Of Independent Contractor - Work Involving Illegal Act - Essentials For Recovery. In order to establish the liability of (name of party) for the fault of (independent contractor) during the performance of an illegal act, the plaintiff must prove all of the following propositions:

1. (The independent contractor) was acting illegally in one or more of the following ways:

   a. (conduct alleged to be illegal)

2. (Name of party) knew or should have known (the independent contractor) would be acting illegally in carrying out the work.

3. (The independent contractor) was at fault in one or more of the following ways:

   a. (conduct alleged to constitute fault)

4. The fault of (the independent contractor) was a proximate cause of plaintiff's damage.

5. The nature and extent of the damage.

If the plaintiff has failed to prove any of these propositions, the plaintiff is not entitled to damages. If the plaintiff has proved all of these propositions, the plaintiff is entitled to damages in some amount.

[If an affirmative defense is submitted, delete the second sentence and insert the following: If the plaintiff has proved all of those propositions, you will consider the defense of _____ as explained in Instruction No. ____.]

Authority

Hough v. Central States Freight Service, Inc., 222 Iowa 548, 269 N.W.1 (Iowa 1936)

Exhibit 4

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600.67 {Delete present authority and substitute}

Coasting Prohibited. The driver of a motor vehicle shall not drive with the source of motive power disengaged from the driving wheels except when disengagement is necessary to stop or to shift gears.

A violation of this law is negligence.

Authority

Iowa Code section 321.365.

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Exhibit 5

Printed /

600.97 Duty To Sound Horn. A driver shall sound [his] [her] horn when reasonably necessary to ensure the safe operation of the vehicle.

A violation of this duty is negligence.

Authority

France v. Benter, 256 Iowa 534, 128 N.W.2d 268 (1964)

Comment

Instruction 600.16 refers to the duty of a driver who is being passed if the passing vehicle's horn is sounded.

Exhibit 6

PRINTED /93

600.100 {Delete Reference to Authority and also Authority listed on second page}.

Seat Belt Defense - Essentials. The defendant claims _____'s injuries were increased because (he) (she) (they) failed to wear a safety [belt] [harness] as required by law. Defendant must prove both of the following propositions:

1. _____ failed to wear a properly adjusted and fastened safety [belt] [harness].

2. The failure contributed to plaintiff's injuries.

If defendant has proved both of these propositions, _____'s recovery may be reduced by an amount not more than five percent of the damages awarded after any other reductions for comparative fault. If you allocate a percentage, I will apply this percentage after any other reduction for comparative fault to reduce _____'s total recovery.

Authority

Iowa Code sections 321.445, 321.446

Comment

Note: 1. If a child is involved, see Iowa Code section 321.446(6).

Note: 2. This instruction is to be used if a seat belt issue has been raised by a defendant and the foundation evidence of cause has been shown as required by Iowa Code section 321.445(4)(b)(1) and (2).

Note: 3. The instruction will need to be tailored if there are fact questions as to whether the vehicle is a model and type required to have a seat belt, whether plaintiff comes within an exception, or whether the seat belt was properly fastened or adjusted.

NOte: 4. If this seat belt defense is submitted, two interrogatories must be submitted to the jury (as the last questions to the jury) in the following forms:

(If you answered Question No. _____ you will also answer the following question.)

Question No. _____

Do you find failure to wear a safety [belt] [harness] contributed to _____'s injuries?

Answer "yes" or "no."

ANSWER: _____

(If you have answered "yes" to Question No. _____ you will also answer the following question.)

Question No. _____

What percent, if any, (not more than 5%) do you find the recovery of plaintiff _____ should be reduced?

ANSWER: _____

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Exhibit 7 (cont.)

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730.1 Liability Of Employer. An [employer] [corporation] is liable for the [negligent] [wrongful] acts of an [employee] [officer, agent or employee] if the acts are done in the scope of the employment.

Authority

Bethards v. Shivvers, Inc., 355 N.W.2d 39 (Iowa 1984)

Graham v. Worthington, 259 Iowa 845, 146 N.W.2d 626 (1966)

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730.3 {As the present one except for adding new no. 11; move no. 11 to no. 12 as on draft. Authorities listed on the draft should be shown.

Add **Note: Instruct only on the factors supported by the evidence.**

Definition Of Independent Contractor. The right to control the manner and method of performing the work is the primary test for determining whether a person is an independent contractor or an employee. If the person doing the work answers to another only as to the result of the work but selects the manner and method of doing the work they must be regarded as an independent contractor. In determining who has the right to control the manner and method of doing the work you should consider the following matters as shown by the evidence.

1. The existence of a contract or the performance of a certain piece of work or kind of work at a fixed price.

2. Whether the business of the person doing the work is independent from that of the person who hires the work done.

3. Whether the person doing the work has the right to employ assistants and has the right to supervise their activities.

4. Whether the person doing the work must furnish necessary tools, supplies and material.

5. Whether the work in that locaility is usually done under the supervision or by a specialist without supervision.

6. The skill required in doing the work.

7. The time limit for performing the services.

8. The method of payment.

9. Whether the work is part of the regular work of the person who hires the work done.

10. Whether the parties believe they are creating a relationship of employer-employee or independent contractor.

11. Whether there is any withholding from payment to the person providing the service for federal income tax or social security.

Exhibit 9

12. Any other matters shown by the evidence bearing on this question.

Authority

D & C Express, Inc. v. Sperry, 450 N.W.2d 842 (Iowa 1990)

Peterson v. Pittman, 391 N.W.2d 235 (Iowa 1986)

Burr v. Apex Concrete Company, 242 N.W.2d 272 (Iowa 1976)

Greenwell v. Meredith Corporation, 189 N.W.2d 901 (Iowa 1971)

Note: Instruct only on the factors supported by the evidence.

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Exhibit 9 (cont.)

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1400.1 Third-Party Bad Faith - Essentials For Recovery. The plaintiff must prove all of the following propositions:

1. A specific demand for settlement was made by (name of claimant).

2. The defendant rejected the proposed settlement in bad faith.

3. The bad faith was a proximate cause of plaintiff's damages.

4. The nature and extent of the damage.

If the plaintiff has failed to prove any of these propositions, the plaintiff is not entitled to damages. If the plaintiff has proved all of these propositions, the plaintiff is entitled to damages in some amount.

Authority

Wierck v. Grinnell Mut. Reins. Co., 456 N.W.2d 191 (Iowa 1990)

Comment

Note: If the insurer's bad faith is based on conduct other than a failure to settle, omit the first two elements and replace with the following:

1. The defendant acted in bad faith in one or more of the following ways:

   a. _____

   b. _____

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Exhibit 10

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1400.2 Definition Of Third-Party Bad Faith. An insurance company must act in good faith in making decisions about claims made against its insured. The company must give equal consideration to its own interests and to the interests of the insured.

The insurance company must view the situation as if there were no policy limits applicable to the claim. Bad faith arises when the insurance company, by its misconduct, serves its own interest and irresponsibly exposes the insured to an unreasonable risk of liability.

Authority

Wierck v. Grinnell Mut. Reins. Co., 456 N.W.2d 191 (Iowa 1990)

Comment

Note: If the bad faith alleged is other than a failure to settle, omit the second paragraph or modify it to fit the circumstances.

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1410.1 First-Party Bad Faith - Essentials For Recovery. The plaintiff must prove all of the following proportions:

1. The defendant [denied plaintiff's claim] [refused to defend the plaintiff].

2. There was no reasonable basis for [denying the claim] [refusing to defend].

3. The defendant knew or had reason to know that there was no reasonable basis for [denying the claim] [refusing to defend].

4. The [denial] [refusal to defend] was a proximate cause of damage to the plaintiff.

5. The nature and extent of damage.

If the plaintiff has failed to prove any of these propositions, the plaintiff is not entitled to these damages. If the plaintiff has proved all of these propositions, the plaintiff is entitled to damages in some amount.

Authority

Boylan v. American Motors, Inc., ____ N.W.2d _____, Iowa (1992)

North Iowa State Bank v. Allied Mut. Ins. Co., 471 N.W.2d 824, 829 (Iowa 1991)

Kiner v. Reliance Ins. Co., 463 N.W.2d 9 (Iowa 1990)

Dolan v. Aid Ins. Co., 431 N.W.2d 790 (Iowa 1988)

Comment

Note: Element 2, the lack of a reasonable basis for denying the claim, is an objective element. This element will usually be determined by the court as a matter of law. Reuter v. State Farm Mut. Auto. Ins. Co., 469 N.W.2d 250, 255 (Iowa 1991).

Exhibit 12

2400.4 {Delete Reference to Code section 554.3408.}

CONSIDERATION. "Consideration" is either a benefit given or to be given to the person who makes the promise [or some other person] or a detriment experienced or to be experienced by the person to whom the promise is made [or some other person]. Where the contract provides for mutual promises, each promise is a consideration for the other promise.

Authority

Matter of Guaradianship of Collins, 327 N.W.2d 230 (Iowa 1982)

Powell v. McBlain, 222 Iowa 199, 269 N.W. 883 (1937)

Wilson v. Airline Coal Co., 215 Iowa 855, 246 N.W. 753 (1933)

Iowa Code section 537A.2

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2400.9 {Add semicolon to end of point no. 2 and add the word "and". In Authorities correct spelling of Brandau. Eliminate reference to two Iowa Code sections. Add in the Comment the following statement: If the contract is within the scope of Article 2 of the Uniform Commercial Code, the Instruction should be modified to conform with Iowa Code Sections 554.2101 and 554.2615(a).

Impossibility Of Performance. Impossibility of performance means extraordinary circumstances which:

1. Prevent a person from carrying out the terms of the contract.

2. Could not reasonably have been anticipated; and

3. Are not the fault of that party.

Performance is not excused if the party who promised to perform created the circumstances which made performance impossible, or just because performance became economically burdensome or unattractive.

Authority

Yager v. Farmers' Mut. Telephone Co., 323 N.W.2d 245 (Iowa 1982)

Associated Grocers of Iowa Co-op, Inc. v. West, 297 N.W.2d 103 (Iowa 1980)

Nora Springs Co-op Co. v. Brandau, 247 N.W.2d 774 (Iowa 1976)

Comment

Note: This instruction may be used where a plaintiff claims this ground as an excuse for nonperformance or where defendant raises this affirmative defense as a discharge of a duty. If the contract is within the scope of Article 2 of the Uniform Commercial Code, the Instruction should be modified to conform with Iowa Code Sections 554.2101 and 554.2615(a).

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Exhibit 14

PRINTED /92

2400.14 {Substitute new cases for present Authority.}

Definition - Implied Contract As To Compensation. When a person employs someone to provide servides [and materials] without agreeing on the amount of pay, an agreement is implied to pay the reasonable value of those services [and materials].

Authority

Olberding Constr. Co. v. Ruden, 243 N.W.2d 872 (Iowa 1976)

Heninger & Heninger v. Davenport Bank & Trust Co., 341 N.W.2d 43 (Iowa 1983)

McDonald v. Welch, 176 N.W.2d 846 (Iowa 1970)

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Exhibit 15

PRINTED 7/92

2600.1 {Add 4th element. Last paragraph changed.}

Essentials For Recovery - Implied Contract As To Compensation. (Name of claimant) must prove all of the following propositions:

1. (Name of deceased) employed [name of claimant] to provide services [and materials].

2. (Name of claimant) provided those services [and materials].

3. (Name of claimant) and (name of deceased) had no agreement as to the amount of pay for the services [and materials].

4. The reasonable value of those services.

If (name of claimant) has failed to prove any of these propositions, your verdict will be for the Estate. If (name of claimant) has proved all of these propositions, your verdict will be for (him) (her) in an amount equal to the reasonable value of those services [unless the Estate has proved the defense explained in Instruction No. ____].

/93

Exhibit 16

PRINTED /92

2600.6 {As is except between second numbered paragraphs 1 and 2 instead of a period use the word "or."}

Special Defense Of Gratuity. As a defense, the Estate claims the following:

a. (Name of claimant) and (name of deceased) were members of the same family.

b. (Name of claimant)'s services [and materials] were the type usually exchanged between family members.

A "family" is a group of people [living in the same household under one management] [of common ancestry]. If the Estate has proved both of the above propositions, [name of claimant] cannot recover pay for services [and materials] [unless (he) (she) has proved all of the propositions set forth in Instruction No. _____] and at least on the following propositions:

1. Both (name of claimant) and (name of deceased) expected (name of claimant) to be paid for the services [and materials]; or

2. (Name of claimant)'s services [and materials] provided for (name of deceased) were greater in amount than those ordinarily exchanged between persons in a like family relationship under similar circumstances.

Authority

Patterson v. Patterson, 189 N.W.2d 601, 604 (Iowa 1971)

/93

Q

Exhibit 17

PRINTED 7/92

2600.7 {Same heading but use new wording.}

Defense - Payment During Lifetime. As a defense the Estate alleges (name of deceased) paid for (name of claimant)'s services [and materials] before (name of deceased) died. The Estate must prove this defense. In considering this defense, you may take into account the amount of time which passed between (name of claimant)'s services and the (name of deceased)'s death, as well as the actions, statements and conduct of the (name of claimant) and (name of deceased) and other circumstances in the evidence which would support a finding that payment was or was not made by (name of deceased) during (his) (her) lifetime.

Authority

Finley v. Thorne, 209 Iowa 343, 226 N.W. 103 (1929)

Comment

Note: Other relevant circumstances may be the decedent's ability to pay during his or her lifetime; the decedent's business practices; the parties' geographical proximity; the lifetime opportunities for payment; and the collectibility of the amount claimed. Finley v. Thorne, 209 Iowa 3431, 226 N.W. 103 (1929); Baker v. Davis, 212 Iowa 1249, 235 N.W. 749 (1931).

6/92

Exhibit 18

Printed /

1500.3 Uttering A Forged Instrument - 715A.2(1)(c) and 715A.2(1)(a). The State must prove both of the following elements of Forgery:

1. On or about the _____ day of _____, 19___, the defendant uttered a (type of "writing") that the defendant knew had been altered without the permission of (name).

2. a. The defendant specifically intended to defraud or injure (name of person injured or defrauded).

   b. The defendant knew [he] [she] was helping to accomplish a fraud or injury.

If the State has proved both of the elements, the defendant is guilty of Forgery. If the State has failed to prove either of these elements, the defendant is not guilty.

Authority

Iowa Code section 715A.2(1)(c)

Iowa Code section 715A.2(1)(a)

Comment

Note: Use 2a or 2b depending upon the charge.

Q

Exhibit 19

Printed /

1500.4 Uttering A Forged Instrument - 715A.2(1)(c) and 715A.2(1)(b). The State must prove all of the following elements:

1. On or about the ____ day of _____, 19___, the defendant uttered a (type of "writing") that the defendant knew had been (statutory term)* by another.

2. a. The defendant knew the (type of writing) had been (statutory term)* so it would appear to be the act of one who did not authorize the act.

   b. The defendant knew the (type of writing) had been (statutory term)* so it would appear to have been done [at a time] [at a place] [in a numbered sequence] other than it really was.

   c. The defendant knew the (type of writing) had been (statutory term)* so it would appear to be a copy of an original when no original existed.

3. a. The defendant specifically intended to defraud or injure (name of person injured or defrauded).

   b. The defendant knew [he] [she] was helping to accomplish a fraud or injury.

If the State has proved all of these elements, the defendant is guilty of Forgery. If the State has failed to prove any of these elements, the defendant is not guilty.

Authority

Iowa Code section 715A.2(1)(c)

Iowa Code section 715A.2(1)(b)

Comment

Note: *From 715A.2(1)(b)

Use only those portions of elements 2 or 3 required by the charge.

Exhibit 20

Printed /

1500.8 Uttering A Forged Instrument - Definition of Utter. A person utters a writing when [he] [she] offers it to another and represents it is genuine.

Authority

State v. Weaver, 149 Iowa 403, 128 N.W. 559 (1910)

Q

Exhibit 21

THE
IOWA STATE BAR ASSOCIATION

IOWA JURY INSTRUCTIONS
COMMITTEE
Mark McCormick, Chair
2000 Financial Center
Des Moines, Iowa 50309
Telephone 515-243-7100
Fax 515-282-7615

May 27, 1993

Board of Governors of the
Iowa State Bar Association
521 East Locust Street
Des Moines, Iowa 50309

Attention: John Shors, President

Re: Iowa Jury Instructions Committee

Dear Members of the Board:

We submit the following for approval.

1. Exhibit 1 - **Iowa Civil Jury Instruction 210.4 - Definition of Willful and Wanton.** New Instruction.

2. Exhibit 2 - **Iowa Civil Jury Instruction 400.8 - Unreasonable Failure To Avoid An Injury - Defined.** Revised and Authority added.

3. Exhibit 3 - **Iowa Civil Jury Instruction 400.9 - Unreasonable Assumption Of Risk - Defined.** Note and Authority added.

4. Exhibit 4 - **Iowa Civil Jury Instruction 600.72 - Lookout.** Note added.

5. Exhibit 5 - **Iowa Civil Jury Instruction 700.10 - Proper Lookout.** New Instruction.

6. Exhibit 6 - **Iowa Civil Jury Instruction 1000.10 - Affirmative Defense - State Of The Art.** Revised.

7. Exhibit 7 - **Iowa Civil Jury Instruction 1430.1 - Uninsured Motorist Coverage - Essentials For Recovery.** New Instruction.

8. Exhibit 8 - **Iowa Civil Jury Instruction 1440.1 - Underinsured Motorist Coverage - Essentials For Recovery.** New Instruction.

9. Exhibit 9 - **Iowa Civil Jury Instruction 1600.16 - Result Of Treatment.** Deleted.

10. Exhibit 10 - **Iowa Civil Jury Instruction 1700.4 - Railroad Crossings - Speed.** Note added.

11. Exhibit 11 - **Iowa Civil Jury Instruction 1700.6 - Railroad Crossings - Headlights.** Instruction deleted and Note substituted.

12. Exhibit 12 - **Iowa Civil Jury Instruction 2000.1 - Emotional Distress - Intentional Infliction - Essentials For Recovery.** Revised.

13. Exhibit 13 - **Iowa Civil Jury Instruction 2000.3 - Intentional Or Reckless - Definition.** Revised.

14. Exhibit 14 - **Iowa Criminal Jury Instruction 700.7 - Murder - Definition Of Malice Aforethought.** Revised.

15. Exhibit 15 - **Iowa Criminal Jury Instructions 1300.1 through 1300.9 - Burglary.** New Instructions and revisions.

The Committee appreciates your support and consideration of these Instruction changes. If these Instructions are approved, the necessary table of contents, index and additional editorial changes will also be made. The Committee is continuing its effort to update and revise Instructions as necessary and to add Instructions as the law develops.

Q

Very truly yours,

Mark McCormick, Chair

MM/lj
Enclosures

210.4 Willful and Wanton - Defined. Conduct is willful and wanton when a person intentionally does an act of an unreasonable character in disregard of a known or obvious risk that is so great as to make it highly probable that harm will follow.

Authority

Fell v. Kewanee Farm Equipment Co., 457 N.W.2d 911 (Iowa 1990)

Kosmacek v. Farm Service Co-op of Persia, 485 N.W.2d 99 (Iowa App. 1992)

Printed /

400.8 Unreasonable Failure To Avoid An Injury - Defined. A party is required to exercise reasonable care for their own safety. This means that if, in the exercise of ordinary care under the circumstances, a party could have taken some particular action after an act of fault of another party, in order to avoid an injury, then they are under a duty to take such action.

In this case defendant claims that plaintiff unreasonably failed to take action to avoid an injury because:

(Set out the specifications.)

Authority

Iowa Code section 668.1

Coker v. Abell-Howe Co., 491 N.W.2d 143 (Iowa 1992)

Rinkleff v. Knox, 375 N.W.2d 262 (Iowa 1985)

Comment

Note: Use this instruction only where the failure to avoid injury occurred after the alleged fault of the party for whom this Instruction is given.

Q

Printed /

400.9 - Unreasonable Assumption Of Risk - Defined. The defendant claims that plaintiff unreasonably assumed the risk by:

(Set out the particulars.)

To prove this defense, the defendant must prove all of the following propositions:

1. The plaintiff knew the risk was present.

2. The plaintiff understood the nature of the risk to [himself] [herself].

3. Nevertheless, the plaintiff unreasonably, freely and voluntarily took the risk.

4. The plaintiff's assumption of the risk was a proximate cause of plaintiff's damage.

If the defendant has failed to prove any of these propositions, the defendant has not prove this defense. If the defendant has proved all of these propositions, then you will assign a percentage of fault against the plaintiff and include it in the total percentage of fault, if any, found by you in your answers to the special verdicts.

Authority

Iowa Code section 668.1

Martin v. Heddinger, 373 N.W.2d 486 (Iowa 1985)

Hughes v. Magic Chef, Inc., 288 N.W.2d 542, 548 (Iowa 1980)

Rosenau v. City of Esterville, 199 N.W.2d 125 (Iowa 1972)

Restatement (Second) of Torts, Section 496A, et. seq. Section 496G

Comment

Note: This instruction should not be used, and assumption of risk is not available as a separate defense, in cases where contributory negligence is available under Chapter 668 of the Code. In strict liability cases, assumption of risk is an available defense. Coker v. Abell-Howe Co., 491 N.W.2d 143 (Iowa 1992).

Printed /

600.72 Lookout. "Proper lookout" is the lookout a reasonable person would keep in the same or similar situation. It means more than looking and seeing. It includes being aware of the operation of the driver's vehicle in relation to what the driver saw or should have seen. [A driver need not keep a lookout to the rear all the time, but must be aware of the presence of others when the driver's actions may be dangerous to others.]

A violation of this duty is negligence.

Authority

Matuska v. Bryant, 260 Iowa 726, 150 N.W.2d 716 (1967)

Comment

Note: Duty to maintain a proper lookout includes the duty to stop if a driver has lost visibility entirely. Coulthard v. Keenan, 256 Iowa 890, 129 N.W.2d 597 (1964). For a duty of lookout to the rear, see McCoy v. Miller, 257 Iowa 1151, 136 N.W.2d 332 (1965).

Note: For a definition of proper lookout in non motor vehicle cases, see Iowa Civil Jury Instruction 700.10.

Printed /

700.10 Proper Lookout. "Proper lookout" is the lookout a reasonable person would keep in the same or similar situation. It means more than looking and seeing. It includes being aware of one's movements in relation to things seen or that could have been seen in the exercise of ordinary care.

Authority

Coker v. Abell-Howe Co., 491 N.W.2d 143 (Iowa 1992)

Printed /

1000.10 Affirmative Defense - State Of The Art. Even if the plaintiff has established (specific claimed defect), you must still consider whether the product conformed to the state of the art. Defendant claims it complied with the state of the art.

"State of the art" is what feasibly could have been done. It means what technologically and practically could have been done at the time, based on the latest scientific knowledge and discoveries in the field, to [design] [manufacture] (product) that would have prevented plaintiff's injuries while meeting the user's needs. Custom in the industry is not necessarily state of the art, nor is every [alternate design] [safety device] for which technology exists necessarily feasible.

To establish this defense, the defendant must prove its product conformed to the state of the art in existence at the time the product was [designed] [tested] [manufactured] [formulated] [packaged] [provided with a warning] [labeled] with respect to the specific claims that plaintiff has made.

[Even if a product initially complies with the state of the art, a defendant has a continuing duty to warn users concerning product defects of which a defendant acquires knowledge after the product is [manufactured] [sold]. If a defendant later learned its product is defective and unreasonably dangerous, then the defendant has a duty to warn those it knows or should know will be affected by its use.]

If a defendant proves its product conformed to the state of the art with respect to plaintiff's specific claims, then your answer to the appropriate interrogatory will be "yes."*

If the defendant fails to prove its product conformed to the state of the art, you will consider whether the plaintiff is entitled to recover under the other instructions.

Authority

Hillrichs v. AVCO Corp., 478 N.W.2d 70, 76 (Iowa 1991)

Fell v. Kewanee Farm Equipment Co., 457 N.W.2d 911, 921-22 (Iowa 1990)

Chown v. USM Corp., 297 N.W.2d 218, 221-22 (Iowa 1980)

Iowa Code section 668.12

Comment

Note: The paragraph on subsequently acquired knowledge should be omitted if that is not an issue. If subsequently acquired knowledge is an issue, an additional instruction explaining the scope of the duty to warn should be given.

*Submit by interrogatory in the verdict form as to whether a defendant has proved state of the art. Hillrichs v. AVCO Corp., 478 N.W.2d 70, 76 (Iowa 1991).

Printed /

1430.1 Uninsured Motorist Coverage -- Essentials For Recovery.

Plaintiff must prove all of the following propositions:

1. At the time of the accident, plaintiff was insured by the defendant for bodily injuries caused by the fault of an owner or operator of an uninsured motor vehicle.

2. (Name of uninsured motorist) was the owner or operator of an uninsured motor vehicle.

3. (Name of uninsured motorist) is legally liable for the plaintiff's bodily injuries as determined in accordance with instructions ____ through ____.

4. The nature and extent of plaintiff's damage.

If the plaintiff has failed to prove any of these propositions, the plaintiff is not entitled to damages. If the plaintiff has proved all of these propositions, the plaintiff is entitled to recover the amount of plaintiff's damages, subject to the limits of the defendant's policy.

Authority

Iowa Code section 516A.1 (1991)

Hinners v. Pekin Ins. Co., 431 N.W.2d 345 (Iowa 1988)

Lemrich v. Grinnell Mut. Reins. Co., 263 N.W.2d 714 (Iowa 1978)

Comment

Note: If there is a dispute with respect to whether the premiums were paid, add the following additional element:

2. The premiums on the policy were paid when due.

Note: If there is no factual dispute with respect to the existence of every element of the plaintiff's case except element no. 3, the uninsured motorist's legal liability, then it may not be necessary to use this instruction. The parties and court may prefer to simply use the appropriate fault instructions.

Printed /

1440.1 Underinsured Motor Coverage -- Essentials For Recovery.

Plaintiff must prove all of the following propositions:

1. At the time of the accident, the plaintiff was insured by the defendant for bodily injuries caused by the fault of an owner or operator of an underinsured motor vehicle.

2. (Name of underinsured motorist) was the owner of operator of an underinsured motor vehicle.

3. (Name of underinsured motorist) is legally liable for the plaintiff's bodily injuries as determined in accordance with instructions ____ through ____.

4. The nature and extent of the plaintiff's damage.

5. The plaintiff's damages exceeded the policy limits of (name of underinsured motorist) bodily injury liability policy.

If the plaintiff has failed to prove any of these propositions, the plaintiff is not entitled to damages. If the plaintiff has proved all of these propositions, the plaintiff is entitled to recover the amount by which the plaintiff's damages exceed the policy limits of (name of underinsured motorist) bodily injury liability policy, subject to the limits of the defendant's policy.

Authority

Iowa Code section 516A.1 (1991)

Leuchtenmacher v. Farm Bureau Mut. Ins. Co., 461 N.W.2d 291 (Iowa 1990)

American States Ins. Co. v. Estate of Tollari, 362 N.W.2d 519 (Iowa 1985)

Comment

Note: If there is a dispute with respect to whether the premiums were paid, add the following additional element:

2. The premiums on the policy were paid when due.

Note: If the plaintiff has recovered less than the full limits of the underinsured motorist's liability

policy due to settlements made by the underinsured motorist with other injured parties, then element no. 5 should state:

> 5. Plaintiff's damages exceeded the amount of plaintiff's recovery from (name of underinsured motorist).

Compare American States Ins. Co. v. Estate of Tollari, 362 N.W.2d 519, 522 (Iowa 1985) with Rucker v. National Gen. Ins. Co., 442 N.W.2d 113, 117 (Iowa 1989).

Note: If there is no factual dispute with respect to the existence of every element of the plaintiff's case except element no. 3, the underinsured motorist's legal liability, then it may not be necessary to use this instruction. The parties and court may prefer to simply use the appropriate fault instructions.

Printed /

1600.16 Result Of Treatment. Instruction deleted.

Printed /

1700.4 Railroad Crossings - Speed. Railroads are required to use ordinary care as to the speed of their trains at road crossings.

A violation of this duty is negligence.

Authority

Daly v. Illinois Central Railroad Co., 250 Iowa 110, 93 N.W.2d 68 (1957)

Jensvold v. Chicago & Great Western Ry. Co., 236 Iowa 708, 18 N.W.2d 616 (1945)

Comment

Note: A violation of a duly executed city ordinance or regulation as to speed is negligence per se.

Note: Federal law may have preempted state law and regulations governing train speed. See CSX Transp., Inc. v. Easterwood, 113 S.Ct. 1732 (1993).

Q

Printed /

1700.6 Railroad Crossings - Headlights. Instruction deleted.

Comment

Note: Iowa law regulating headlights on locomotives has been preempted by federal law. Brown v. Chicago R.I. & P.R. Co., 108 F. Supp. 164 (N.D. Iowa 1952); Wiedenfeld v. Chicago N.W. Transp. Co., 252 N.W.2d 691 (Iowa 1977). If the locomotive is not engaged in interstate commerce see Iowa Code section 327F.14 (1991).

Printed /

2000.1 Emotional Distress - Intentional Infliction - Essentials For Recovery. [To entitle the plaintiff to recover on the claim for the tortious infliction of severe emotional distress] the plaintiff must prove all of the following propositions:

1. Outrageous conduct by the defendant.

2. The defendant intentionally caused emotional distress or acted with reckless disregard of the probability of causing emotional distress.

3. The plaintiff suffered severe or extreme emotional distress.

4. The defendant's outrageous conduct was a proximate cause of the emotional distress.

5. The nature and extent of plaintiff's damage.

If the plaintiff has failed to prove any of these propositions, the plaintiff is not entitled to damages. If the plaintiff has proved all of these propositions, the plaintiff is entitled to damages in some amount. [If an affirmative defense is submitted, delete the second sentence and insert the following: If the plaintiff has proved all of these propositions, then you will consider the defense of _____ as explained in Instruction No. _____.]

Authority

Vaughn v. Ag Processing, Inc., 459 N.W.2d 627 (Iowa 1990) (en banc)

Tomash v. John Deere Indus. Equipment Co., 399 N.W.2d 387 (Iowa 1987)

Northrup v. Farmland Industries, Inc., 372 N.W.2d 193 (Iowa 1985)

Q

Printed /

2000.3 Intentional Or Reckless - Definition. A person intends to inflict emotional distress when they want to cause distress, or know such distress is substantially certain to result from their conduct.

A person's conduct is reckless if they know or have reason to know their conduct creates a high degree of probability that emotional distress will result and they act with deliberate disregard of that probability.

Authority

M.H. By and Through Callahan v. State, 385 N.W.2d 533 (Iowa 1986)

Meyer v. Nottger, 241 N.W.2d 911 (Iowa 1976)

Restatement (Second) of Torts, Section 46, comment i

700.7 Murder - Definition Of Malice Aforethought. "Malice" is a state of mind which leads one to intentionally do a wrongful act [to the injury of another] [in disregard of the rights of another] out of actual hatred, or with an evil or unlawful purpose. It may be established by evidence of actual hatred, or by proof of a deliberate or fixed intent to do injury. It may be found from the acts and conduct of the defendant, and the means used in doing the wrongful and injurious act. Malice requires only such deliberation that would make a person appreciate and understand the nature of the act and its consequences, as distinguished from an act done in the heat of passion.

"Malice aforethought" is a fixed purpose or design to do some physical harm to another which exists before the act is committed. It does not have to exist for any particular length of time.

Authority

State v. Lee, 494 N.W.2d 706 (Iowa 1993)

State v. Nunn, 356 N.W.2d 601, 603 (Iowa App. 1984)

State v. Love, 302 N.W.2d 115 (Iowa 1981)

Printed /

1300.1 Burglary in the First Degree - Elements - Breaks Structure. The State must prove all of the following elements of Burglary In The First Degree:

1. On or about the _____ day of _____, 19__, the defendant broke into (describe place).

2. The (describe place) was an occupied structure as defined in Instruction No. _____.

3. Persons were present in the occupied structure.

4. The defendant did not have permission or authority to break into (describe place).

5. The defendant did so with the specific intent to commit a [felony of (describe felony)] [theft] [assault].

6. a. During the incident the defendant possessed [an explosive or incendiary device or material] [a dangerous weapon].

   b. During the burglary, [he] [she] [intentionally] [recklessly] inflicted bodily injury on (name of victim).

(Use element 6a or b as may be charged and supported by the evidence.)

If the State has proved all of the elements the defendant is guilty of Burglary In The First Degree. If the State has failed to prove any one of the elements, the defendant is not guilty of Burglary In the First Degree (and you will then consider the charge of _____ explained in Instruction No. _____).

Authority

Iowa Code section 713.1

Iowa Code section 713.3

State v. Olsen, 482 N.W.2d 452 (Iowa App. 1992)

Printed /

1300.1 Burglary in the Second Degree - Elements - Breaks Structure. The State must prove all of the following elements of Burglary In The Second Degree:

1. On or about the ____ day of _____, 19___, the defendant broke into (describe place).

2. The (describe place) was an occupied structure as defined in Instruction No. _____.

3. The defendant did not have permission or authority to break into (describe place).

4. The defendant did so with the specific intent to commit a [felony of (describe felony)] [theft] [assault].

5. a. During the incident [the defendant had possession of an explosive or incendiary device or material] [the defendant had possession of a dangerous weapon] [a bodily injury results to any person].

   b. person were present in or upon the occupied structure.

If the State has proved all of the elements, the defendant is guilty of Burglary In The Second Degree. If the State has failed to prove any one of the elements, the defendant is not guilty of Burglary In The Second Degree (and you will then consider the charge of _____ explained in Instruction No. _____).

Authority

Iowa Code section 713.1

Iowa Code section 713.3

Iowa Code section 713.5

State v. Olsen, 482 N.W. 2d 452 (Iowa App. 1992)

Comment

Note: Second Degree Burglary, which includes bodily injury to "any person", would apply to situations where a person is injured during the burglary but not in or upon the occupied structure. Otherwise, it would be First Degree Burglary. Another possible scenario would be if the "person" injured in the occupied structure was a defendant.

Printed /

1300.3 Burglary in the Third Degree - Elements - Breaks Structure. The State must prove all of the following elements of Burglary In The Third Degree:

1. On or about the _____ day of _____, 19___, the defendant broke into (describe place).

2. The (describe place) was an occupied structure as defined in Instruction No. _____.

3. The defendant did not have permission or authority to break into (describe place).

4. The defendant did so with the specific intent to commit a [felony of (describe felony)] [theft] [assault].

If the State has proved all of the elements, the defendant is guilty of Burglary In The Third Degree. If the State has failed to prove any one of the elements, the defendant is not guilty of Burglary In The Third Degree (and you will then consider the charge of _____ explained in Instruction No. _____).

Authority

Iowa Code section 713.1

Iowa Code section 713.3

Iowa Code section 713.5

Iowa Code section 713.6A

Printed /

1300.4 Burglary In The First Degree - Elements - Enters Structure. The State must prove all of the following elements of Burglary In The First Degree:

1. On or about the _____ day of _____, 19___, the defendant entered (describe place).

2. The (describe place) was an occupied structure as defined in Instruction No. _____.

3. Persons were present in the occupied structure.

4. The defendant did not have permission or authority to enter (describe place).

5. The defendant did so with the specific intent to commit a [felony of (describe felony)] [theft] [assault].

6. a. During the incident the defendant possessed [an explosive or incendiary device or material] [a dangerous weapon].

   b. During the burglary, [he] [she] [intentionally] [recklessly] inflicted bodily injury on (name of victim).

(Use element 6a or b as may be charged and supported by the evidence.)

If the State has proved all of the elements, the defendant is guilty of Burglary In The First Degree. If the State has failed to prove any one of the elements, the defendant is not guilty of Burglary In The First Degree (and you will then consider the charge of _____ explained in Instruction No. _____).

Q

Authority

Iowa Code section 713.1

Iowa Code section 713.3

Iowa Code section 713.5

State v. Franklin, 368 N.W. 2d 716 (Iowa 1985)

State v. Olsen, 482 N.W. 2d 452 (Iowa App. 1992)

Printed /

1300.5 Burglary in the Second Degree - Elements - Enters Structure. "The State must prove all of the following elements of Burglary In The Second Degree:

1. On or about the _____ day of _____, 19___, the defendant entered into (describe place).

2. The (describe place) was an occupied structure as defined in Instruction No. _____.

3. The defendant did not have permission or authority to enter (describe place).

4. The defendant did so with the specific intent to commit a [felony of (describe felony)] [theft] [assault].

5. a. During the incident [the defendant had possession of an explosive or incendiary device or material] [the defendant had possession of a dangerous weapon] [a bodily injury results to any person].

   b. persons were present in or upon the occupied structure.

If the State has proved all of the elements, the defendant is guilty of Burglary In The Second Degree. If the State has failed to prove any one of the elements, the defendant is not guilty of Burglary In The Second Degree (and you will then consider the charge of _____ explained in Instruction No _____).

Authority

Iowa Code section 713.1

Iowa Code section 713.3

Iowa Code section 713.5

Comment

Note: Second Degree Burglary, which includes bodily injury to "any person," would apply to situations where a person is injured during the burglary but not in or upon the occupied structure. Otherwise, it would be First Degree Burglary. Another possible scenario would be if the "person" injured in the occupied structure was a defendant.

Printed /

1300.6 Burglary in the Third Degree - Elements - Enters Structure. The State must prove all of the following elements of Burglary In The Third Degree:

1. On or about the _____ day of _____, 19___, the defendant entered (describe place).

2. The (describe place) was an occupied structure as defined in Instruction No. _____.

3. The defendant did not have permission or authority to enter (describe place).

4. The (describe place) was not open to the public.

5. The defendant did so with the specific intent to commit [felony of (describe felony)] [theft] [assault].

If the State has proved all of the elements, the defendant is guilty of Burglary In The Third Degree. If the State has failed to prove any one of the elements, the defendant is not guilty of Burglary In The Third Degree (and you will then consider the charge of _____ explained in Instruction No. _____).

Authority

Iowa Code section 713.1

Iowa Code section 713.3

Iowa Code section 713.5

Iowa Code section 713.6A

Q

1300.7 Burglary In The First Degree - Elements - Remains In Structure. The State must prove all of the following elements of Burglary In The First Degree:

1. On or about the _____ day of _____, 19___, the defendant remained in (describe place).

2. The (describe place) was an occupied structure as defined in Instruction No. _____.

3. a. The defendant did not have permission or authority to remain in (describe place).

   b. The defendant's permission or authority to remain in (describe place) had expired.

   (Use element 3a or b as may be charged and supported by the evidence.)

4. The defendant did so with the specific intent to commit a [felony of (describe felony)] [theft] [assault].

5. a. During the incident the defendant possessed [an explosive or incendiary device or material] [a dangerous weapon].

   b. After the defendant remained [he] [she] [intentionally] [recklessly] inflicted bodily injury on (name of victim).

(Use element 5a or b as may be charged and supported by the evidence.)

If the State has proved all of the elements, the defendant is guilty of Burglary In The First Degree. If the State has failed to prove any one of the elements, the defendant is not guilty of Burglary In The First Degree (and you will then consider the charge of _____ explained in Instruction No. _____).

Authority

Iowa Code section 713.1

Iowa Code section 713.3

Iowa Code section 713.5

State v. Franklin, 368 N.W. 2d 716 (Iowa 1985)

State v. Olsen, 482 N.W. 2d 452 (Iowa App. 1992)

Printed /

1300.8 Burglary In The Second Degree - Elements - Remains In Structure. The State must prove all of the following elements of Burglary In The Second Degree:

1. On or about the _____ day of _____, 19___, the defendant remained in (describe place).

2. The (describe place) was an occupied structure as defined in Instruction No. _____.

3. The defendant did not have permission or authority to remain in (describe place).

4. The defendant did so with the specific intent to commit a [felony of (describe felony)] [theft] [assault].

5. a. During the incident [the defendant had possession of an explosive or incendiary device or material] [the defendant had possession of a dangerous weapon] [a bodily injury results to any person].

   b. persons were present in or upon the occupied structure.

If the State has proved all of the elements, the defendant is guilty of Burglary In The Second Degree. If the State has failed to prove any one of the elements, the defendant is not guilty of Burglary In The Second Degree (and you will then consider the charge of _____ explained in Instruction No. _____).

Authority

Iowa Code section 713.1

Iowa Code section 713.3

Iowa Code section 713.5

Comment

Note: Second Degree Burglary, which includes bodily injury to "any person," would apply to situations where a person is injured during the burglary but not in or upon the occupied structure. Otherwise, it would be First Degree Burglary. Another possible scenario would be if the "person" injured in the occupied structure was a defendant.

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1300.9 Burglary in the Third Degree - Elements - Remains In Structure. The State must prove all of the following elements of Burglary In The Third Degree:

1. On or about the _____ day of _____, 19___, the defendant remained in (describe place).

2. The (describe place) was an occupied structure as defined in Instruction No. _____.

3. The defendant did not have permission or authority to remain in (describe place).

4. The (describe place) was not open to the public.

5. The defendant did so with the specific intent to commit a [felony of (describe felony)] [theft] [assault].

If the State has proved all of the elements, the defendant is guilty of Burglary In The Third Degree. If the State has failed to prove any one of the elements, the defendant is not guilty of Burglary In The Third Degree (and you will then consider the charge of _____ explained in Instruction No. _____).

Authority

Iowa Code section 713.1

Iowa Code section 713.3

Iowa Code section 713.5

Q

INTRODUCTION

The purpose of jury instructions is to give the law to the jury in language they can understand. The committee believes the best way to do this is to write jury instructions in plain English. With this in mind, the committee asked the Board of Governors of the Iowa State Bar Association to approve redrafting the Iowa Civil and Criminal Uniform Jury Instructions in plain English. The Board approved this request. It also approved our request to employ a communications specialist to help us translate "legalese" into "plain English" and we did this.

While the Iowa Supreme Court cannot give prior approval to the instructions, the Court has unanimously approved, in principle, the plain English redraft of the Iowa Civil and Criminal Jury Instructions. The Court also adopted a resolution commending the Civil Instructions for consideration by the Trial Bench. A copy of the resolution follows this Introduction.

Before drafting was done the committee:

1. Reviewed some of the literature relating to plain English jury instructions.
2. Examined other State and Federal Instructions.
3. Adopted general guidelines for drafting jury instructions.
4. Adopted specific guidelines for drafting plain English jury instructions.

In an address delivered at the Tenth Circuit Judicial Conference on July 9, 1965, Judge Edward J. Devitt, Chief Judge, United States District Court, District of Minnesota, gave ten practical suggestions about Federal jury instructions, including the following:

> "Instructions should be phrased in clear, concise language applicable to the case. Sometimes counsel will quote verbatim from an appellate court decision dwelling on a point involved in the trial and urge it as a proposed instruction. Appellate court opinions are written for a purpose different from that for which jury instructions are designed.

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> The point of law may be controlling, but not the language. It is the legal principle, not the words expressing it, which is pertinent and which will be helpful to the jury. Legal points from decided cases should be couched in language appropriate to the facts and to the parties in the lawsuit.
>
> "The use of legal terminology in instructions should be avoided as much as possible. In preparing instructions we should remember that the task is to shed light and not to add to the darkness. The use of some legal terms such as 'proximate cause' and 'reasonable doubt' cannot be avoided. But to the extent possible, we should use that which Chief Judge Alfred Murrah calls 'the common speech of man'."

We adopted the general approach suggested by Judge Devitt in drafting these instructions.

The general guidelines for drafting jury instructions adopted by the committee are that each jury instruction shall be:

1. An accurate statement of the law.
2. As brief and concise as practible.
3. Understandable to the average juror.
4. Neutral, unslanted and free of argument.

The specific guidelines for drafting plain English jury instructions adopted by the Committee are:

1. Use plain English, simple, short and concrete words.
2. Make it look and sound like talk.
3. Use short sentences.
4. Use short paragraphs.
5. Omit unnecessary words.
6. Use active voice rather than passive.
7. Avoid negative forms, and especially double negatives.
8. Use personal pronouns, "I" for the Judge and "you" for the jury.
9. Whenever possible, leave out the words: "as to", "determine", "facilitate", "herein", "hereof", "however", "if any", "therefrom", "theretofore", "thereof", "otherwise", "require", "that", "the", "whether", and "which".

10. Replace "locate" with "find"; "prior to" with "before"; "sufficient" with "enough"; "in the event that" with "if".

11. Put prepositions at the end whenever it sounds right to do so.

12. Use sex neutral language: eliminate the pronoun; repeat the noun; use a synonym for the noun; change the pronoun to "the", "a", "this" and the like; use "one"; use "it"; use the imperative; reword; and use the passive (the last resort).

13. Where appropriate for clarity and ease of understanding, use lay language in place of exact case or statutory language so long as an accurate statement of the law is maintained.

INSTRUCTIONS MUST ALWAYS BE TAILORED TO FIT THE FACTS OF THE CASE. These instructions are not intended to provide jury instructions which are applicable without change in all cases. Instead, they will provide judges and lawyers with models of clear, concise, accurate and impartial instructions which are understandable to the average juror. They can be adapted for use in particular cases and used as a guide for tailoring instructions.

The instructions will be referred to as Iowa Civil Jury Instructions. There is a cross reference table of the Iowa Civil Jury Instructions to the Iowa Uniform Civil Jury Instructions. Included in it is a table showing additional Iowa Uniform Civil Jury Instructions not included in the Iowa Civil Jury Instructions. The chapter designations will be 100, 200, etc. to avoid any problem with Shepards Citator. However, we recommend you keep your old set for reference.

We have included some suggestions for instructing juries and a model set of jury instructions. We hope these instructions and material will assist trial judges and lawyers in giving the law to the jury in language they can understand.

If you have any suggestions concerning these instructions, we will appreciate having them.

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IOWA CIVIL JURY INSTRUCTIONS

Donald C. Wilson, Chairman
Judge James H. Andreasen
Judge Arthur E. Gamble
Donald H. Gloe
Judge Albert L. Habhab
Judge David B. Hendrickson
Mark McCormick
Charles E. Miller
Judge Roger F. Peterson
Ronald A. Riley
Judge L. Vern Robinson
John P. Roehrick
Judge Dale E. Ruigh
Raymond R. Stefani
Catherine H. Thune
David S. Wiggins
Philip J. Willson

IOWA JURY INSTRUCTIONS COMMITTEE

DRAFTING POLICY, DRAFTING PROCEDURES, GUIDELINES AND FORMATS FOR IOWA CIVIL AND CRIMINAL JURY INSTRUCTIONS, AND MONITORING

I. DRAFTING POLICY

1. The policy of the committee is to draft an Iowa Civil or Criminal Instruction only if there is Iowa authority for the instruction. The instructions shall be impartial statements of the Iowa law.

II. DRAFTING PROCEDURES

1. **ASSIGNMENTS.** Drafting assignments will be made by the chair. One of the drafters will be appointed as lead drafter.

2. **INITIAL DRAFT.** The lead drafter will do the initial draft or be responsible for other drafters doing it.

3. **CIRCULATION TO ALL DRAFTERS.** The initial draft will be circulated to all drafters for input.

4. **SUBMISSION TO COMMUNICATIONS SPECIALIST.** The final initial draft will be submitted to the communications specialist for suggestions as soon as approved by the drafters.

5. **TENTATIVE FINAL DRAFT.** After receipt of the communications specialist's suggestions, the drafters will incorporate the suggestions they deem appropriate in the tentative final draft.

6. **AUTHORITY.** Photocopies of all authority will be attached to the tentative final draft.

7. **CIRCULATION TO THE COMMITTEE.** The tentative final draft, <u>with photocopies of supporting authority</u>, will be forwarded to the Bar Association for circulation to the committee.

8. **DEADLINE FOR SUBMISSION TO BAR ASSOCIATION.** The tentative final draft, <u>with photocopies of supporting authority</u>, will be submitted to the Bar Association at least seven days before the meeting date at which the instructions will be submitted for discussion.

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III. IOWA CIVIL JURY INSTRUCTIONS DRAFTING GUIDELINES

1. Use plain English, simple, short and concrete words.

2. Make it look and sound like talk.

3. Use short sentences.

4. Use short paragraphs.

5. Omit unnecessary words.

6. Use active voice rather than passive.

7. Avoid negative forms, and especially double negatives.

8. Use personal pronouns, "I" for the Judge and "you" for the jury.

9. Whenever possible, leave out the words: "as to", "determine", "facilitate", "herein", "hereof", "however", "if any", "therefrom", "theretofore", "thereof", "otherwise", "require", "that", "the", "whether", and "which".

10. Replace: "locate" with "find"; "prior to" with "before"; "sufficient" with "enough"; "in the event that" with "if".

11. Put propositions at the end whenever it sounds right to do so.

12. Use sex neutral language: eliminate the pronoun; repeat the noun; use a synonym for the noun; change the pronoun to "the", "a", "this" and the like; use "one"; use "it"; use the imperative; reword; and use the passive (the last resort).

13. Where appropriate for clarity and ease of understanding, use lay language in place of exact case or statutory language so long as an accurate statement of the law is maintained.

IV. IOWA CRIMINAL JURY INSTRUCTIONS DRAFTING GUIDELINES

1. The guidelines for drafting Iowa Civil Jury Instructions will apply, except as provided below.

2. Definitional "instructions" for particular crimes will be eliminated.

3. "Crime" will be substituted for "public offense."

4. No effort will be made to note the lesser included offenses for any particular crime.

5. When a lesser included offense applies add the following:"(and you will then consider the charge of _____ explained in Instruction No. ____)."

6. Use "[he] [she]" whenever the use of a pronoun is required.

7. Use "(name)" instead of "victim".

V. FORMAT - IOWA CIVIL JURY INSTRUCTIONS

1. **[MARSHALLING INSTRUCTION] - (CAPTION DESIGNATING SUBJECT OF INSTRUCTION) - ESSENTIALS FOR RECOVERY.** The plaintiff must prove all of the following propositions:

1. _____

a. _____

b. _____

c. _____

2. _____

3. _____

If the plaintiff has failed to prove any of these propositions, the plaintiff is not entitled to damages. If the plaintiff has proved all of these propositions, the plaintiff is entitled to damages in some amount. (If an affirmative defense is submitted, delete the second sentence and insert the following: If the plaintiff has proved all of these propositions, you will consider the defense of _____ as explained in Instruction No. _____.)

Q

Authority

Comment

Note:

Caveat:

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2. **SUBPARAGRAPHS.** Subparagraphing will be in small letters: a., b., c., etc.

3. **ALTERNATIVE PROPOSITIONS.** Alternative propositions will be designated 1a., 1b., etc.

4. **AUTHORITY.** Cite statutes first. After statutes, cite latest Iowa Supreme Court decision and other decisions from the latest case to the oldest. A uniform system of citation shall be used.

5. **COMMENT.** All notes and caveats will appear under **Comment.**

6. **NOTE.** Notes will appear first. Explanatory material will be included in the notes.

7. **CAVEAT.** Caveats will follow the notes. Cautions or warnings will be included in the caveat.

8. **DEFINITIONS.** Definitions will follow the "Essentials for Recovery." in the chronological order of the propositions to which they relate.

9. **DAMAGE PROPOSITION.** When personal injury is involved, replace "The amount of damage." with "The nature and extent of the damage."

10. **EXAMPLES.** Examples of the marshalling and non-marshalling formats for Iowa Civil Jury Instructions are attached as Exhibits 1, 2 and 3.

VI. FORMAT - IOWA CRIMINAL JURY INSTRUCTIONS

1. **[MARSHALLING INSTRUCTION] - (CAPTION DESIGNATING SUBJECT OF INSTRUCTION) - ELEMENTS.** The State must prove all of the following elements of (name of crime):

   1. _____

   2. _____

   3. _____

   If the State has proved all of the elements, the defendant is guilty of (name of crime). If the State has failed to prove any one of the elements, the defendant is not guilty of (name of crime) (and you will then consider the charge or _____ explained in Instruction No. _____).

Authority

Comment

Note:

Caveat:

2. **SAME FORMAT AS IOWA CIVIL JURY INSTRUCTIONS.** The same or similar format for (Elements, Subparagraphs, Alternative Elements, Authority, Comment, Note and Caveat will be used as for Iowa Civil Jury Instructions).

3. **EXAMPLES.** Examples of the marshalling and non-marshalling formats for Iowa Criminal Jury Instructions are attached as Exhibits 4, 5 and 6.

VII. MONITORING

1. **ASSIGNMENTS.** The chair will assign committee members to monitor the case and statutory law relating to particular chapters of the Iowa Civil and Criminal Jury Instructions.

2. **BRINGING TO COMMITTEE.** Any committee member who has a suggested change, correction, new instruction or additional authorities will bring them to the committee for consideration.

3. **UPDATED AUTHORITY.** If there is new authority for an instruction but no change in the instruction, it will be published and printed under the Updated Authority section in either the Iowa Civil and Criminal Jury Instructions.

Q

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700.1 ESSENTIALS FOR RECOVERY. The plaintiff must prove all of the following propositions:

1. The defendant was negligent in one or more of the following ways:

   a. _____
   b. _____
   c. _____

2. The negligence was a proximate cause of the plaintiff's damage.

3. The nature and extent of the damage.

If the plaintiff has failed to prove any of these propositions, the plaintiff is not entitled to damages. If the plaintiff has proved all of these propositions, the plaintiff is entitled to damages in some amount. [If an affirmative defense is submitted, delete the second sentence and insert the following: If the plaintiff has proved all of these propositions, you will consider the defense of _____ as explained in Instruction No. _____.]

Authority

Rinkleff v. Knox, 375 N.W. 21 262 (Iowa 1985)

Bauman v. City of Waverly, 164 N.W.2d 840 (Iowa 1969)

700.2 ORDINARY CARE - COMMON LAW NEGLIGENCE - DEFINED.
"Negligence" means failure to use ordinary care. Ordinary care is the care which a reasonably careful person would use under similar circumstances. "Negligence" is doing something a reasonably careful person would not do under similar circumstances, or failing to do something a reasonably careful person would do under similar circumstances.

Authority

Schalk v. Smith, 224 Iowa 904, 277 N.W. 303 (1938)

Comment

Note: If a party is intoxicated, add: "An intoxicated person is held to the standard of care of a sober person."

Note: If a party is a child, add: "At the time of the injury, _____ was a child. Ordinary care of a child is the care which a reasonable child of like age, intelligence and experience would do under similar circumstances."

Note: If evidence of custom or safety code violations have been received, add: "You have received evidence of [substance of particular custom involved] [applicable safety code provisions]. Conformity with [a custom] [the provisions of the safety code] is evidence of ordinary care and [non-conformity] [violations of its provisions] is evidence of negligence. Such evidence is relevant and you should consider it, but it is not conclusive proof of ordinary care."

Note: Intoxication - Yost v. Miner, 163 N.W.2d 557 (Iowa 1968)

Child - Peterson v. Taylor, 316 N.W.2d 869 (Iowa 1982)

Custom - Langner v. Caveness, 238 Iowa 774, 28 N.W.2d 421 (1947)

Safety Code - Porter v. Iowa Power & Light Company, 217 N.W.2d 221 (Iowa 1974)

Exhibit 2

Caveat: Where knowledge of the custom is material the instruction should be amplified. Normally custom evidence cannot excuse or modify statutory requirements.

Statutory safety code violations may be negligence per se and the jury should be instructed the violation of any of the provisions of the safety code constitutes negligence. (See Wagner v. Northeast Farm Service Company, 177 N.W.2d 1 (Iowa 1970).

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Exhibit 2 - continued

800.1 NEGLIGENT MISREPRESENTATION - WHERE NO PUBLIC DUTY TO GIVE INFORMATION EXISTS - ESSENTIALS FOR RECOVERY. The plaintiff must prove the following propositions:

1. The defendant on or about the _____ day of _____, 19___, negligently supplied [set forth in detail the information supplied] to [plaintiff] [plaintiff as one of the limited group of persons] which was false.

2. The defendant had a financial interest in supplying the information.

3. The defendant intended to supply the information for the benefit and guidance of [plaintiff] [plaintiff as one of the limited group of persons]; or

3a. The defendant knew the person who received the information intended to supply the information for the benefit and guidance of [plaintiff] [plaintiff as one of the limited group of persons].

4. The defendant intended the information to influence [the transaction for which the information was supplied] [a transaction substantially similar to the transaction for which the information was supplied]; or

4a. The defendant knew that the person who received the information intended the information to influence [the transaction for which the information was supplied] [a transaction substantially similar to the transaction for which the information was supplied].

5. The plaintiff acted in reliance on the truth of the information supplied and was justified in relying on the information.

6. The negligently supplied information was a proximate cause of the plaintiff's damage.

7. The amount of damage.

Q

Exhibit 3

If the plaintiff has failed to prove any of these propositions, the plaintiff cannot recover damages. If the plaintiff has proved all of these propositions, the plaintiff is entitled to recover damages in some amount. [If an affirmative defense is submitted, delete the second sentence and insert the following: If the plaintiff has proved all of these propositions, you will consider the defense of _____, as explained in Instruction No. _____.]

Authority

Restatement of Torts (Second), Section 552 (1977)

Beeck v. Kapalis, 302 N.W.2d 90 (Iowa 1981)

Larsen v. United Federal Savings & Loan Association, 300 N.W.2d 281 (Iowa 1981)

Ryan v. Kanne, 170 N.W.2d 395 (Iowa 1969)

Comment

Note: Use 3. or 3a., 4. or 4a. depending on the evidence.

Caveat: The elements of the marshalling instruction are taken from Restatement Section 552, including "justifiable reliance" in paragraph 5 of the Section. There are no Iowa cases concerning whether or not "justification" is an element of the plaintiff's cause of action or an affirmative defense for the defendant. Therefore the Committee cannot take a definitive position and this Instruction and Instruction 800.9 should be used with this admonition in mind.

12/86

Exhibit 3 - Continued

2000.2 PERJURY - CONTRADICTORY STATEMENTS - ELEMENT. The State must prove all of the following elements of Perjury:

1. On or about the ____ day of _____, 19___, the defendant was under [oath] [affirmation].

2. The [oath] [affirmation] was made in (describe proceeding or matter in which statements under oath/affirmation are required or authorized by law).

3. a. The defendant made a statement of fact: (statement(s)).

   b. The defendant denied knowledge of certain material facts: (denial(s)).

4. [At another time] [During the same proceeding] while under [oath] [affirmation], the defendant made a contradictory statement of material fact: (statement).

5. a. One of the statements was false.

   b. The denial was false.

6. The defendant knew such [statement] [denial] was false.

If the State has proved all of the elements, the defendant is guilty of Perjury. If the State has failed to prove any one of the elements, the defendant is not guilty.

Authority

Iowa Code section 720.2

State v. Fisher, 282 N.W.2d 684 (Iowa 1979)

State v. Deets, 195 N.W.2d 118 (Iowa 1972)

Comment

Note: See Iowa Criminal Jury Instructions 200.3 and 200.2.

Q

Exhibit 4

Note: The questions of "material matter", whether "the defendant was required to be under oath or affirmation" are questions of law for the determination of the Court. Also, elements 3a and 5a or 3b and 5b should be selected and used as supported by the charge and the evidence. When the Court submits more than one statement alleged to be false, an interrogatory should be submitted for the jury to find which statements, if any, were false.

Caveat: Whether the defense of retraction is a question of fact for the jury or a question of law for the court is an open question.

6/88

Exhibit 4 - Continued

2610.6 CHILD ENDANGERMENT - PERMITTING ABUSE. The State must prove the following elements of Child Endangerment:

1. On or about the ____ day of _____, 19___, the defendant was the [parent] [guardian] [person having custody or control] of (name).

2. (Name) was [under the age of fourteen] [a mentally or physically handicapped minor under the age of eighteen].

3. The defendant knowingly permitted the continuing [physical] [sexual] abuse of (name).

4. Defendant's act resulted in serious injury to (name).*

5. The defendant's fear that any action to stop the continuing abuse would result in substantial bodily harm to [himself] [herself] or (name) was unreasonable.**

If the State has proved all of the elements, the defendant is guilty of Child Endangerment. If the State has failed to prove any one of the elements, the defendant is not guilty of Child Endangerment (and you will then consider the crime of _____ explained in Instruction No. _____).

Authority

Iowa Code section 726.6(1)(e)

Comment

Note: * Delete if felony endangerment is not charged and supported by the evidence.

Note: ** Use only when statutory affirmative defense is raised by the defendant and supported by the evidence.

Caveat: There are no Iowa appellate court decisions deciding whether Iowa Code section 726.6(1) (e) is (a) an affirmative defense provable by the defendant or (b) an issue to be raised by the defendant and disproved by the State.

7/88

Q

Exhibit 5

200.35 COMPULSION. The defendant claims that at the time and place in question, [he] [she] was acting under compulsion.

When a person is compelled to act by another's threat of serious injury, and reasonably believes the injury is about to take place and can be avoided only by doing the act, then no crime has been committed. This defense does not apply if a person intentionally or recklessly causes physical injury to another. (Omit last sentence if not supported by evidence.)

Authority

Iowa Code section 704.10

Iowa Code section 702.18

Comment

Note: Necessity was an affirmative defense prior to the 1978 Iowa Criminal Code Revision. Once the defense has been properly raised by the defendant, the State has the burden to disprove the defense beyond a reasonable doubt. State v. Reese, 272 N.W.2d 863 (Iowa 1978). See State v. LeCompte, 327 N.W.2d 221 (Iowa 1982), regarding defense under the revised code.

Caveat: If the defense of compulsion is raised, it should be included in the marshalling instruction.

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Exhibit 6

ANNUAL APPELLATE DECISIONS REVIEW

June 1992 - September 1993
487 N.W.2d through 503 N.W.2d 586

By

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I thank Carolyn M. Hinz, Jeffrey T. Ramsey, Mark A. Roberts, and Chad M. VonKampen for their assistance with this year's review.

APPELLATE PROCEDURE

Davis v. United Fire & Casualty Co., 500 N.W.2d 725 (Iowa App. 1993)

Amount in Controversy

Davis sued homeowner's insurance company for $3,100 in coverage for damage caused by hail storm and for bad faith. Court entered judgment for approximately $2,000 and dismissed bad faith claim. HELD: Amount in controversy is determined by amount for which district court could have entered judgment, not amount of judgment actually entered.

Des Moines Asphalt & Paving Co. v. Colcon Industries Corp., 500 N.W.2d 70 (Iowa 1993)

Finality

An order denying a motion to compel arbitration is a final adjudication that is appealable as a matter of right.

Pundzak, Inc. v. Cook, 500 N.W.2d 424 (Iowa 1993)

Finality

In action involving breach of contract claims and a request for declaratory judgment of ownership rights of a trademark, district court bifurcated trial so that parties tried contract issues to jury and, after return of verdict, tried declaratory judgment issues to court. Losing party appealed within 30 days of district court's rendition of declaratory judgment, but later than 30 days after judgment entered on jury verdict. HELD: Judgment is not final until rights of parties are finally determined. Notice of appeal was timely filed.

R

Davis v. United Fire & Casualty Co., 500 N.W.2d 725 (Iowa App. 1993)

Finality

Davis' home suffered storm damage. Davis and insurer could not agree on amount that insurer should pay for roof. Davis sued insurer for coverage and for bad faith. Umpire determined figure for roof damage. Insurer moved for summary judgment and asked court to enter judgment in favor of Davis and against itself for

agreed upon amounts of other damage and for amount of roof damage as determined by umpire. Davis resisted motion, but only to argue that policy provided coverage for cost of repairing roof rather than actual cash value of damage to roof. Davis filed countering motion for summary judgment, contending that Davis was entitled to judgment in the amount of agreed upon damages and the cost of repair, and contending that insurer had committed bad faith as a matter of law, leaving only bad faith damages to be adjudicated at trial. Insurer resisted in part by asserting that there were issues of fact with respect to bad faith.

District court sustained insurer's motion and overruled Davis' motion and apparently believed that those ruling disposed of the case completely (and was reasonable in its belief, since district court's rulings essentially concluded that insurer's pre-suit position with respect to coverage was correct). Davis appealed without seeking permission to do so.

HELD: Summary judgment on coverage amounts was correct. Validity of bad faith claim, however, was not before district court. Case must be remanded for adjudication of Davis' bad faith claim.

COMMENT: If something remained to be adjudicated, the rulings on countering motions for summary judgment were not final for purposes of appeal. In any event, how can Davis possibly prevail on a bad faith claim when the insurer offered before suit was filed to pay the amount for which judgment subsequently was entered?

Sterner v. Fischer, _____ N.W.2d _____ (Iowa, August 25, 1993)

Finality

Pursuant to local rule, district court imposed sanctions on plaintiff's counsel for counsel's failure to secure plaintiff's attendance at settlement conference. One year later, after jury returned verdict for plaintiff, she appealed to challenge the validity of the sanction ruling. HELD: Like an appellate challenge to the imposition of sanctions under rule 80(a), the remedy is certiorari, not appeal. A petition for certiorari must be filed within 30 days of the challenged judicial action. Plaintiff's challenge is untimely and must be dismissed.

Johnston Equipment Corp. v. Industrial Indemnity, 489 N.W.2d 13 (Iowa 1992)

Preservation

Manufacturer sued liability insurer for product liability coverage. Policy did not contain standard "product hazard

exclusion" endorsement, and overwhelming evidence established that this omission was an error and that manufacturer had not sought or even paid for product liability coverage. Nevertheless, district court found that the policy did not provide coverage, and did not adjudicate insurer's alternative request that the policy be reformed to exclude coverage. Manufacturer appealed, but insurer did not cross-appeal.

HELD: "[A] successful party need not cross-appeal to preserve error on a ground urged but ignored or rejected in trial court. ... [W]e think the preservation requirement ordinarily should apply only to an unsuccessful party. Holdings to the contrary in Becker v. Central States Health and Life Co., 431 N.W.2d 354 (Iowa 1988), and Fjelland v. Wemhoff, 249 N.W.2d 634 (Iowa 1977), are overruled.

COMMENT: Court's language suggests that a successful party likewise need not file a rule 179(b) motion to preserve error.

Vachon v. Broadlawns Medical Foundation, 490 N.W.2d 820 (Iowa 1992)

Preservation

In medical malpractice case that resulted in defense verdict, plaintiff argued that defense counsel made improper reference to settlement negotiations during closing argument. HELD: Plaintiff's failure to object at trial so that a proper record of what transpired in closing argument can be made leaves nothing for appellate review.

Gavlock v. Coleman, 493 N.W.2d 94 (Iowa App. 1992)

Preservation

In dramshop action in which intoxicated driver also was a defendant, only the driver objected to certain expert testimony adduced by plaintiff. Dramshop appealed from jury verdict for plaintiff, and argued that evidence objected to by driver was inadmissible. HELD: Dramshop's failure to join in driver's objection prevents dramshop from arguing issue on appeal.

R

Plaintiff filed a motion in limine with respect to certain testimony by one of her physicians about her insurance coverage. District court sustained her motion and ordered that those portions of the videotape be deleted and not played to the jury. Defendant argued on appeal that the ruling was error.

HELD: Because defendant made no offer of proof and otherwise failed to identify in the record the specific testimony that was deleted, error was not preserved.

Waterloo Savings Bank v. Austin, 494 N.W.2d 715 (Iowa 1993)

Preservation

In wrongful death action, district court entered judgment for plaintiff with interest at the rate of 10% from the date the petition was filed. Defendants moved to modify the judgment in accordance with section 668.13(4) (interest on future damages runs from date of judgment). In their supporting brief, defendants also argued that the court should apply an interest rate as determined by section 668.13(3), not 10%.

HELD: Specific request in brief to change the formula for calculating interest was sufficient to alert district court to the error and preserves it for appellate review. Reference to rate in motion itself was not necessary.

Ort v. Klinger, 496 N.W.2d 265 (Iowa App. 1992)

Preservation

In personal injury action, district court sustained objections to certain portions of defense medical expert's opinions about plaintiff's chiropractic treatments. "Defendants made no offer of proof, but offered Dr. Neiman's full deposition at trial and in later motions." HELD: "[W]e are not convinced the defendants preserved error."

Martin v. Raytheon Co., 497 N.W.2d 818 (Iowa 1993)

Preservation

In products liability action, plaintiff sought certification of a nation-wide class. District court denied the request on the grounds of rule 42.6(a)(1), which purports to require that Iowa have jurisdiction over each person if he or she had been sued in Iowa. In her rule 179(b) motion, plaintiff argued that rule 42.6 was invalid "to the extent that it requires minimum contacts of class action plaintiffs." On appeal, plaintiff argued that rule 42.6 as interpreted by district court was unconstitutional.

HELD: Plaintiff did not preserve her constitutional argument with the 179(b) motion. Bald reference to minimum contacts did not alert district court to constitutional arguments made on appeal.

Kalell v. Petersen, 498 N.W.2d 413 (Iowa App. 1993)

Preservation

Jury assessed fault against plaintiff and defendant equally and fixed damages at $60,000. Plaintiff challenged adequacy of award in post-verdict motion, which district court overruled. On appeal, plaintiff supplemented his argument by disclosing for the first time in oral argument that he had received pre-suit payments from nonparties (who were subrogated) of $100,000, apparently for the purpose of supporting his argument that the verdict was inadequate. Defendant mentioned the same number in his brief.

HELD: "This argument is specious and improper. We will not consider any fact that is not in the trial record in deciding this case."

Pundzak, Inc. v. Cook, 500 N.W.2d 424 (Iowa 1993)

Preservation

Cook and Webster worked in the advertising business as performers. Pundzak was an advertising agent who worked with Cook and Webster from time to time. Pundzak heard Cook and Webster informally playing the parts of two "old timers" named Willard and Rafert, and suggested that he could obtain advertising work for them as those characters. The parties subsequently entered into an exclusive agency agreement in which Pundzak, Inc., was to be the exclusive agent for Cook and Webster as "Willard and Rafert." Pundzak was to use its "best efforts" to promote the characters.

After several years of success, Cook and Webster became dissatisfied with Pundzak's efforts, largely because of an alleged conflict of interest. Cook and Webster terminated the agreement. Pundzak sued Cook and Webster for breach of contract, and Cook and Webster filed a separate lawsuit against Pundzak. Cook and Webster's action sought damages for breach of contract and abuse of process, and also sought declaratory judgment as to the ownership rights of "Willard and Rafert." The court consolidated the actions for trial, bifurcated the declaratory judgment action for a subsequent trial to the court, and submitted the breach of contract and abuse of process claims to a jury.

Joseph Pundzak moved for a directed verdict on the contract claim against him personally, and Cook and Webster did not resist. District court sustained the motion and submitted the contract claim only against Pundzak, Inc. After the jury's return of verdict, Cook and Webster sought entry of judgment against Joseph Pundzak.

HELD: Cook and Webster failed to preserve their claim against Joseph Pundzak and failed to preserve any error district court

allegedly made in sustaining Joseph Pundzak's motion for directed verdict.

Kissner v. Brown, 487 N.W.2d 97 (Iowa App. 1992)

Waiver

Plaintiff's appeal was moot when plaintiff's attorney accepted and negotiated, without reservation or protest, the check tendered by the clerk paying the judgment in full. The attorney's actions constituted an accord and satisfaction of plaintiff's claim against all defendants.

ATTORNEYS

Stone v. Pirelli Armstrong Tire Corp., 497 N.W.2d 843 (Iowa 1993)

Class Action

Female employee claimed sexual harassment from a hostile work environment and a sex-based failure of the union to represent her interest in the grievance process. She filed a class action against her employer and the local for violations of chapter 601A. She defined the class as "all women who are now, or were at any time from 2-1-89 to the present, employed by Pirelli ... in a position covered by the collective bargaining agreement." She also defined the class to include women who may be employed by Pirelli in Des Moines in the future. District court refused to certify the class after finding that plaintiff would not "fairly and adequately protect the interests of the class," a requirement of rule 42.2(b).

HELD: District court did not abuse its discretion in refusing to certify class. Plaintiff was a poor candidate for representing the interest of the class. She is not financially stable.

COMMENT: Plaintiff had incurred several thousand dollars by the time of the hearing on her request for certification, but she had paid only the filing fee. She had no assets, liquid or otherwise, and had no explanation for how she intended to reimburse her attorneys' advancement of expenses. A number of factors supported district court's refusal to certify the class, but the court observed that her financial condition was probably sufficient support for the decision:

> This prospect raises the specter that Stone's attorneys may - as a practical matter - end up

> acquiring a financial interest in the litigation. This, of course, would be contrary to our Iowa Code of professional responsibilities for lawyers. Our ethical rules under this Code allow an attorney to advance litigation expenses provided that the client remains ultimately liable for these expenses. The purpose of the rule is to prevent an attorney from acquiring a financial interest in the litigation that might interfere with the attorney's exercise of independent judgment. This is especially true when it comes to deciding whether to settle the case. As one court amply put it, "[i]f the client is not financially responsible, the attorneys have free reign over the prosecution of the action. This is tantamount to the unacceptable situation of the attorney being a member of the class ... ." In re Mid-Atlantic Toyota Anti Trust Litigation, 93 F.R.D. 485, 490 (D.Md. 1982).

In re Conservatorship of Rininger, 500 N.W.2d 47 (Iowa 1993)

Conservatorship

Attorney White set up a voluntary conservatorship for Darrel Rininger and served as conservator until White's death. White's partner Prichard succeeded as conservator. Darrel moved from a veteran's home back to his home town for the last seven years of his life. His twin sister Darlene undertook responsibility for his general care, since his two adult children lived out of state. Darlene needed money. Darrel wanted to help her. Darrel purchased certificates of deposit in joint tenancy with Darlene from his own funds and with Prichard's knowledge. Prichard later transferred principal from a trust in which Darrel was the income beneficiary and purchased a certificate of deposit, again for Darrel and Darlene as joint tenants. When Darrel died, Prichard delivered all six certificates of deposit to Darlene. Darrel's children objected to Prichard's final report and accounting as conservator, and the district court ordered Prichard to reimburse Darrel's estate for the value of the certificates of deposit.

R

HELD: Once Darrel became a ward, he lacked the power to convey his property in any manner, other than by will, and regardless of his actual competence. Prichard's failure to prevent the ward's unauthorized transfer of his own funds constitutes a breach of fiduciary obligation. The probate court's annual approval of accountings does not insulate the conservator from liability, because the accounting merely reported the expenditure of funds for Darrel's care and maintenance. "The transactions the court was approving were not in fact the transactions that had taken place."

Committee v. Sturgeon, 487 N.W.2d 338 (Iowa 1992)

Discipline

Sturgeon, intoxicated and despondent over his broken marriage, planned and attempted to carry out the murders of five people. Under a plea agreement he entered an Alford plea and received a deferred judgment contingent on successful completion of substance abuse programs and a five-year probation. HELD: License revoked.

Committee v. Qualley, 487 N.W.2d 327 (Iowa 1992)

Discipline

Qualley represented Glass. He suggested and prepared documents pursuant to which Glass agreed to purchase from Norwest Bank of Gregory, S.D., for $2.4 million, its loans, mortgages, and security interests to and with Kaup Hereford Farms and certain members of the Kaup family. Glass also entered into a second agreement with Kaup Farms and certain Kaup family members to purchase most of their assets to be held in escrow for use in paying off the Norwest debt and other encumbrances on those assets. During the negotiations for and consummation of these transactions, Glass and Qualley functioned as joint ventures on a 50-50 basis, pursuant to a written agreement.

A few months later, Qualley's negotiations on Glass' behalf with an Omaha bank which Glass owed more than $1 million on defaulted loans were not proceeding to Glass' satisfaction. Qualley recommended that Glass file a Chapter 11 bankruptcy. The Omaha transaction had a South Dakota nexus. Qualley arranged for a South Dakota attorney, a former member of Qualley's law firm, to handle Glass' bankruptcy. Glass provided Qualley with a check to the South Dakota attorney for $10,600. Appellant delivered the check to the bankruptcy counsel, who deposited it in a Sioux City bank account maintained jointly by the South Dakota attorney and Qualley. From that account Qualley advanced $600 for the bankruptcy and later withdrew the balance to pay debts the South Dakota attorney owed to Qualley. The South Dakota attorney subsequently withdrew as bankruptcy counsel and the bankruptcy court ordered that he and Qualley return the $10,000 retainer to Glass' bankruptcy estate.

HELD: The fact that Qualley and his client contracted for an equal division of the profits of the joint venture does not establish that they did not have conflicting interests at some stage of the transaction. Qualley made no showing that he met the high standard of disclosure required by DR 5-104(A). Qualley violated DR 5-104(A), DR 7-101(A)(3), and DR 9-102(A) in entering into a business transaction with Glass without full disclosure and consent.

A private letter of discipline issued to Qualley by the South Dakota Disciplinary Board did not affect or limit disciplinary proceedings in Iowa. First, the South Dakota proceeding involved only violations of the bankruptcy rules and did not consider the disciplinary rules at issue in the Iowa proceeding. Second, the transactions involving the retainer funds originated in Sioux City, Iowa, creating a sufficient nexus to allow the disciplinary complaint based on Qualley's handling of those funds.

An Iowa attorney who receives client funds intended for the client's lawyer in another state does not violate DR 9-102(A) by turning those funds over to the other attorney. However, Qualley's treatment of the retainer intentionally prejudiced or damaged his client in violation of DR 7-101(A)(3).

Committee v. Mollman, 488 N.W.2d 168 (Iowa 1992)

Discipline

HELD: Even in the absence of an attorney-client relationship, an attorney who at the request of federal agents "wore a wire" to obtain incriminating statements from a former client and friend breached professional ethics by engaging in dishonesty, fraud, or misrepresentation to a former client by conducting himself in a manner that discredited the legal profession, and by creating the appearance of impropriety.

The prosecutorial exception to the prohibition on surreptitious recording by attorneys did not apply to private attorney whose motives were "far from altruistic."

Committee v. Van Etten, 490 N.W.2d 545 (Iowa 1992)

Discipline

Van Etten undertook to defend Barbee in a delinquent student loan action. He filed a motion to dismiss on grounds that the 10-year statute of limitations had run. District court set his motion for hearing. Counsel for plaintiff called Van Etten and explained that Barbee had made a payment within the statutory period, which temporarily tolled the statute. Van Etten agreed and assured counsel he would withdraw his motion, making it unnecessary for counsel to travel 2-1/2 hours to attend the hearing. Van Etten failed to perform, and district court sustained his motion and dismissed the action. Van Etten told counsel that there had been a misunderstanding and that he would correct the matter. He did not do so. Van Etten also was delinquent in his representation of an executor, to the point that the court required the executor to obtain other counsel. Van Etten did not respond to the committee's complaints on either matter.

HELD: Six month suspension.

Committee v. Morris, 490 N.W.2d 806 (Iowa 1992)

Discipline

Canadian citizen who needed representation on an immigration matter retained Morris on the basis of his yellow pages advertising, which listed immigration law as one of nine areas of specialization. DR 2-105(A)(2) permits a listing of only three such areas. Morris had not satisfied the CLE requirements necessary for listing immigration law as a specialty. Morris failed to complete and file her application for alien employment certification with Job Service. Client was arrested and became subject to deportation proceedings. She settled by agreeing to leave the country voluntarily.

HELD: Six month suspension.

Committee v. Jackson, 492 N.W.2d 430 (Iowa 1992)

Discipline

In two separate instances, Jackson prepared wills for new clients. In each will, the client gave substantial property to long-time friend Gualtier. The second new client was referred to Jackson by Gualtier. At the same time that Jackson was preparing these wills, he also prepared wills for Mr. and Mrs. Gualtier. He did not disclose to the two other new clients that he also was representing Gualtier. The will for the second client was challenged on the basis of undue influence after the client's death.

HELD: Reprimand is appropriate sanction for Jackson's failure to disclose the conflict of interest created by his representation of Gualtier, who contemporaneously became a beneficiary of wills drafted by Jackson for persons not related to Gualtier.

Committee v. Hunzelman, 492 N.W.2d 670 (Iowa 1992)

Discipline

Hunzelman failed to file state tax returns for three years and federal tax returns for the last two of those years, and falsely stated on client security and attorney disciplinary commission forms that he had filed such returns. HELD: Three month suspension.

Committee v. Baker, 492 N.W.2d 695 (Iowa 1992)

Discipline

Baker participated as drafter of documents in living trust program conducted by other entities and persons. HELD: Reprimand for aiding in the unauthorized practice of law and for permitting non-lawyer to direct or regulate his professional judgment in rendering legal services.

Committee v. Chipokas, 493 N.W.2d 414 (Iowa 1992)

Discipline

Vest rejected a $24,000 offer from his employer's compensation insurer and retained Chipokas to prosecute his claim. Vest and Chipokas agreed in writing that Chipokas would receive a contingent fee of 1/3 of any recovery over $24,000, by settlement or trial. When it appeared that case would not settle, Chipokas then required Vest to sign a new agreement that gave Chipokas a flat 1/3 fee, with no reduction for the previously rejected offer. Chipokas did not advise Vest that the original contingent fee agreement required Chipokas to proceed to trial, and he did not advise Vest to consult independent counsel before signing the new agreement. Instead, Chipokas threatened to withdraw if Vest did not sign. Chipokas subsequently notified the insurer and Vest that Vest had agreed to accept the insurer's more recent offer of $45,000, when in fact Vest had not given Chipokas authority to settle.

Kula obtained Chipokas to prosecute his claim for damages suffered in an automobile accident. Their contingent fee agreement provided that Chipokas was to receive a 1/3 contingent fee, calculated from the net recovery (amount of settlement minus expenses). Chipokas also agreed with Kula's insurer to represent its subrogation interest on a 1/3 fee basis. Kula settled, and Chipokas paid himself a fee calculated based on 1/3 of the gross recovery, which cost Kula approximately $10,000. Kula specifically asked Chipokas if he was calculating the fee on the basis of gross or net, and Chipokas answered, "Trust me. I'm the lawyer." Kula asked Chipokas for an accounting for the next several years, and Chipokas never complied.

R

HELD: 1 year suspension.

Committee v. Thomas, 495 N.W.2d 684 (Iowa 1993)

Discipline

Thomas filed personal injury claim that was a "dog." He failed to respond timely to a motion for summary judgment and

failed to respond timely to discovery requests. When Thomas failed to comply with an order compelling discovery, district court dismissed the action with prejudice. Thomas filed a notice of appeal but, with his client's agreement and consent, ignored appellate deadlines with the expectation that the supreme court would dismiss the appeal. It did, of course, and apparently turned the matter over to the Committee. Thomas failed to respond to Committee's notices. Committee recommended a reprimand and 18 months of supervision.

HELD: Reprimand is sufficient sanction. Given client's lack of complaint, Thomas' record as an attorney and citizen, intentional nature of Thomas' unethical action (as opposed to conduct that brings his competence into question), and the lack of "effective machinery," supervision is not an appropriate or a necessary sanction.

Committee v. Barrer, 495 N.W.2d 757 (Iowa 1993)

Discipline

Lawyer whose excellent academic career gradually gave way to an alcohol problem continued to struggle after law school. Two years after admission to the bar, he was convicted of making obscene telephone calls to high school boys. Commission voted to impose a 1-year suspension, suspend the suspension, and place lawyer on probation.

HELD: Two year suspension. Lawyer's alcoholism and his current willingness to face up to it are irrelevant to the court's obligation to hold lawyers to a higher standard of conduct. Probation is not feasible. Neither bar nor court has a mechanism for administering it.

Committee v. Minette, 499 N.W.2d 303 (Iowa 1993)

Discipline

Minette was business advisor, attorney, attorney in fact, and co-trustee of $40,000,000 trust established for Hanson's benefit. The trust's funds had been dissipated during Minette's tenure as trustee. Minette, who was well aware of Hanson's lavish spending, alcoholism, and inattention to personal business, attended to all of Hanson's business and many personal matters. Although Minette had previously assisted Hanson in tax matters, he failed to file tax returns for 1978-1982, during which time Minette knew or should have known no returns were filed. Without disclosing his interest to Hanson, Minette arranged for Hanson to purchase rental property from a company in which Minette was a director, investor and officer. Minette arranged a loan of $2000 from Hanson to Minette's

friend Parks without Hanson's informed consent. Without Hanson's informed consent, Minette wrote a check for $9000 on Hanson's account to pay a professional negligence claim against Minette. Without Hanson's consent, Minette raised his retainer - which he was paying himself from Hanson's account - from $350 to $2500.

In his representation of Johnson for injuries she sustained in an automobile accident, Minette sued the other driver's insurer, but not the owner or driver of the other vehicle. The statute of limitations ran and the action was dismissed.

HELD: License revoked. Even if Hanson had actually indicated assent to any of the transactions, Minette knew or should have known that Hanson's condition required Minette to make greater efforts to secure Hanson's informed consent. Minette's failure to accept, let alone respond to, the Committee's certified letters of inquiry, aggravated his unethical conduct.

Committee v. Hutcheson, _____ N.W.2d _____ (Iowa, August 25, 1993)

Discipline

Hutcheson, who already was serving a one-year suspension received an additional one-year suspension for falsely certifying as a notary that documents were subscribed and sworn to in his presence, for obtaining ex parte orders determining fees in excess of those permitted by Iowa law, for failing to provide for two of three minor children surviving a decedent whose estate was represented by Hutcheson, and for distributing tort settlement funds directly to family members rather than to a conservatorship.

Committee v. Morris, _____ N.W.2d _____ (Iowa, August 25, 1993)

Discipline

Morris became a trustee and established checking and savings accounts for the trust under his own social security number. IRS seized money from those accounts to satisfy Morris' personal income tax obligation. Embarrassed, Morris began to neglect the trust. A beneficiary complained to district court, and Morris attempted to bring trust accountings up to date, but subsequent checks to beneficiaries bounced. The client security and disciplinary commission performed a routine audit, which disclosed inadequate record keeping.

R

HELD: Because of Morris' poor health, limited practice, and cooperation with commission, and because investigation showed no commingling of funds or other misconduct, a public reprimand was appropriate sanction.

Committee v. Pracht, _____ N.W.2d _____ (Iowa, August 25, 1993)

Discipline

Attorney who limited his practice to real estate law became involved as counsel for the executors in four separate estates, and then failed to complete them. Pracht testified that he took the estates for no fee for the purpose of learning how to do probate work. His lack of experience and the lack of compensation resulted in an inability to find time to complete the legal tasks. Pracht also failed to respond to the ethics committee's initial inquiries.

HELD: Public reprimand is appropriate discipline, given the limited circumstances of Pracht's entry into probate practice and the lack of damage to any of his clients. Pracht must hire competent counsel at his own expense to close the estates, and may not handle probate matters in the future absent associating with a competent attorney or establishing his proficiency in probate law.

Committee v. Iverson, _____ N.W.2d _____ (Iowa, September 22, 1993)

Discipline

Feldman obtained Iverson to represent her on her claim for wrongful discharge from employment. She paid $2,000 and signed a fee agreement that provided the $2,000 "was not to be repaid to the client in any event." Other than consulting with the client and writing one letter to the employer, Iverson did nothing. He closed his office and left Iowa without notice to Feldman. He transferred her case to another lawyer without her knowledge or consent.

Kalen retained Iverson to represent him on a child support matter. Kalen spent three hours with Iverson and paid him $1,000. Iverson assured Kalen that he would file a motion to quash a support order the next morning. Iverson did not do so and left town. By the time another attorney could resolve Kalen's problems, money was withheld from five paychecks and his income tax refund was attached.

Iverson did not respond to the Committee's notices. At hearing, he denied wrongdoing, claimed that Feldman was not harmed because she abandoned her claim after consulting with another lawyer, and claimed he did work for Kalen for the $1,000. Iverson stated that it was "common knowledge" that he intended to leave. Feldman and Kalen said they knew nothing of Iverson's plans.

HELD: One-year suspension. Iverson cannot keep Feldman's $2,000 pursuant to contract if he incurs no expenses and performs no services.

Kroes v. American Family Ins., 499 N.W.2d 309 (Iowa App. 1993)

Fees

Following auto accident, insureds retained counsel to protect their interests against other driver and his insurer, IMT. After commencing an action against the other driver, insureds' attorney obtained a settlement in which IMT paid $16,000 to the insureds and $3,680.90 in subrogation monies to defendant. When American Family refused to pay insured's attorney a fee and a proportionate share of the expenses for the recovery of its subrogation claim, insureds sued. American Family argued that it had made its own arrangements to secure its subrogation interests and that it would be unjust to require the insurer to incur expenses for the recovery of money for the benefit of the insureds' own interests.

HELD: Substantial evidence supported district court's finding that American Family's subrogation interest was at risk. Other driver denied liability in answer and asserted that insureds were at fault. American Family took no action to protect its rights, despite knowing of its insureds' commencement of an action. American Family's pre-suit efforts to collect from IMT were irrelevant, absent some action after suit was commenced to protect its own interests.

Grant v. Iowa District Court, 492 N.W.2d 683 (Iowa 1992)

Guardian Ad Litem

In Garcia v. Wibholm, 461 N.W.2d 166 (Iowa 1990), court held that a guardian ad litem did not necessarily discharge his or her duties simply by filing an answer and might have to provide a defense through trial. Before issuance of Garcia, district court appointed Levad to act as a guardian ad litem for an incarcerated civil defendant. District court had asked Levad prior to making the appointment, and Levad had agreed to serve as guardian ad litem on the assumption that his duties would be limited to filing an answer to prevent a default. He so advised plaintiffs' counsel as well. District court's appointment provided that Levad would be compensated for his services by imposing those as part of the costs of the action. After Garcia was issued, Levad moved for leave to withdraw, citing the limitations of his agreement to serve and the statements in Garcia to the effect that attorneys could not be compelled to accept the appointment. District court declined to release Levad. Plaintiffs noticed defendant's deposition. On motion by Levad, district court ordered plaintiffs to pay Levad's expenses and fees for attending the deposition. As trial approached, Levad asked for an order requiring plaintiffs to advance his fees and costs for defense, including trial. District court granted this motion over plaintiffs' objection. Plaintiffs petitioned for writ of certiorari. Supreme court granted writ.

R

HELD: No statute authorizes district court to require plaintiff to pay guardian ad litem fees and expenses in advance of a judgment in favor of the incarcerated civil defendant. Until the legislature provides a funding mechanism, district courts will have to find attorney willing to serve with no guarantee of compensation.

In Re Marriage of Johnson, 499 N.W.2d 326 (Iowa App. 1993)

Ineffective Assistance of Counsel

Petitioner asserted that district court erred in denying a motion for a new trial of her dissolution of marriage proceeding, based on her claim of ineffective assistance of counsel. HELD: District court properly denied motion. Civil litigant is charged with the neglect of his or her attorney.

Sterner v. Fischer, _____ N.W.2d _____ (Iowa, August 25, 1993)

Sanctions

Pursuant to local rule, district court imposed sanctions on plaintiff's counsel for counsel's failure to secure plaintiff's attendance at settlement conference. One year later, after jury returned verdict for plaintiff, she appealed to challenge the validity of the sanction ruling. HELD: Like an appellate challenge to the imposition of sanctions under rule 80(a), the remedy is certiorari, not appeal. A petition for certiorari must be filed within 30 days of the challenged judicial action. Plaintiff's challenge is untimely and must be dismissed.

CIVIL PROCEDURE

Porter v. Good Eavespouting, _____ N.W.2d _____ (Iowa, August 25, 1993)

Amendments

Porter was injured in a construction accident. With his statute of limitations less than 2 months away, an insurance adjuster purporting to represent Good Eavespouting and Good Construction Company offered to settle by sending a draft with a release. One year and 364 days after his accident, Porter sued Good Eavespouting d/b/a Good Construction Company. Several months

later, defendant answered by, among other things, claiming that defendant was not a legal entity. Defendant moved for summary judgment on the same ground and submitted an affidavit from Larry Good. Good stated that he conducts businesses known as Good's Construction Co., Good's Eavespouting, Co., Good's L-S Storage Rental. Good stated that there is no corporation known as Good Construction Company and that he has never done business as Good Eavespouting or Good Construction Company. Porter resisted the motion with his own affidavit about the insurer's conduct, and moved for leave to amend to add Larry Good and Sandra Good as individual defendants. District court denied Porter's motion and granted defendant's motion for summary judgment.

HELD: Porter cannot satisfy rule 89's relation-back requirements, which apply to misnomers as well as actual changes in parties. Good did not receive notice within the prescribed limitations. District court should not have sustained defendant's motion for summary judgment, however. Defendant did not raise the limitations defense in its answer. "Because the limitations defense was not raised, the defendant waived it." Moreover, the names used by Porter in his petition to identify the defendant are so similar to the names actually used by Good in his business "as to create no confusion as to the identity of the defendant. As such, the business or trade name is a legal entity ...."

Martin v. Raytheon Co., 497 N.W.2d 818 (Iowa 1993)

Class Action

In products liability action, plaintiff sought certification of a nation-wide class. District court denied the request on the grounds of rule 42.6(a)(1), which purports to require that Iowa have jurisdiction over each person if he or she had been sued in Iowa. In her rule 179(b) motion, plaintiff argued that rule 42.6 was invalid "to the extent that it requires minimum contacts of class action plaintiffs." On appeal, plaintiff argued that rule 42.6 as interpreted by district court was unconstitutional. Also on appeal, plaintiff argued that district court at least should have certified a subclass of North Dakota residence, since rule 42.6 also permits certification as to residents of a state that extends reciprocal jurisdiction (North Dakota does).

R

District court did certify a state-wide class, expanded the types of products involved, and added "users" to the class that previously had been defined to be "purchasers and owners." Both sides appealed.

HELD: Plaintiff did not preserve her constitutional argument with the rule 179(b) motion. Out of state plaintiffs do not satisfy traditional minimum contact jurisdictional requirements. District court did not abuse its discretion in refusing to certify a nation-wide class. Plaintiff likewise failed to specifically

request a subclass of North Dakota residents either before or with the rule 179(b) motion. On defendants' cross-appeal, district court acted well within its discretion in expanding the products, expanding the class of plaintiffs to a state-wide basis, and expanding the definition of class members.

Stone v. Pirelli Armstrong Tire Corp., 497 N.W.2d 843 (Iowa 1993)

Class Action

Female employee claimed sexual harassment from a hostile work environment and a sex-based failure of the union to represent her interest in the grievance process. She filed a class action against her employer and the local for violations of chapter 601A. She defined the class as "all women who are now, or were at any time from 2-1-89 to the present, employed by Pirelli ... in a position covered by the collective bargaining agreement." She also defined the class to include women who may be employed by Pirelli in Des Moines in the future. District court refused to certify the class after finding that plaintiff would not "fairly and adequately protect the interests of the class," a requirement of rule 42.2(b).

HELD: District court did not abuse its discretion in refusing to certify class. District court did not have to make findings on each and every factor listed in rule 42.3(a). A failure to comply with any one of the prerequisites is fatal to plaintiff's request for certification. Plaintiff was a poor candidate for representing the interest of the class. A number of current female employees testified against the lawsuit and against plaintiff, contradicting her version of the work environment. She is not financially stable. She has no interest in and no standing to litigate her claim for an injunction, since she has moved out of state. Her conceded destruction of medical records to prevent their use in a dissolution of marriage proceeding and her surreptitious manner of destroying them not only renders her a poor candidate for fairly representing the interest of the class but creates the possibility of diverting the trier of fact from the real issues in which other class members are interested.

R

COMMENT: Plaintiff had incurred several thousand dollars by the time of the hearing on her request for certification, but she had paid only the filing fee. She had no assets, liquid or otherwise, and had no explanation for how she intended to reimburse her attorneys' advancement of expenses. The court held that her financial condition was probably sufficient to support district court's refusal to certify the class:

> This prospect raises the specter that Stone's attorneys may - as a practical matter - end up acquiring a financial interest in the litigation. This, of course, would be contrary to our Iowa Code of professional responsibilities for lawyers. Our

ethical rules under this Code allow an attorney to advance litigation expenses provided that the client remains ultimately liable for these expenses. The purpose of the rule is to prevent an attorney from acquiring a financial interest in the litigation that might interfere with the attorney's exercise of independent judgment. This is especially true when it comes to deciding whether to settle the case. As one court amply put it, "[i]f the client is not financially responsible, the attorneys have free reign over the prosecution of the action. This is tantamount to the unacceptable situation of the attorney being a member of the class ... ." In re Mid-Atlantic Toyota Anti Trust Litigation, 93 F.R.D. 485, 490 (D.Md. 1982).

Johnson v. Mitchell, 489 N.W.2d 411 (Iowa App. 1992)

Default

Johnson sued Mitchells, residents of Minnesota, for breach of contract when their check to Johnson for rental of his resort in Canada (situated next to a resort owned and operated by Mitchells) bounced. Mitchells defended pro se. After Mitchells failed to appear twice for their depositions, district court sustained Johnson's motion for entry of default. Mitchells did not file any attack on the default judgment until almost two years after they first received notice of it.

HELD: Mitchells did not comply with time requirements of either rule 236 or 252, and can set aside this judgment only if it is void, as opposed to simply voidable. Notwithstanding Mitchells' lack of notice of hearing on motion for entry of default, entry of default did not violate due process. Mitchells should have been in attendance on the day of the hearing, because it had been the previously scheduled first day of trial, notice of which had been timely served by the court. Mitchells did not adduce substantial evidence of extrinsic fraud.

R

Wright v. Waterloo Water Works, 493 N.W.2d 889 (Iowa App. 1992)

Default

Wright, an employee of the City-owned utility, sued the City and two managerial employees of the utility for discrimination in violation of chapter 601A. Defendants moved to dismiss. At hearing, district court advised that it was inclined to grant the motion as to the city because the petition did not establish an employment relationship between Wright and the City. Wright's

counsel represented that he could amend the petition to include sufficient facts to keep the City in litigation. District court's ruling stated: "[T]he court grants the city['s] ... motion to dismiss, and said party is dismissed from this lawsuit on the pleadings as they now stand, subject to plaintiff's timely amendment." Remaining defendants did not file an answer, apparently because they were waiting for Wright to amend her petition. Instead of amending, Wright filed a motion for default.

HELD: District court did not abuse its discretion in overruling Wright's motion for default judgment.

State v. Dickey, 497 N.W.2d 876 (Iowa 1993)

Default

State filed a paternity action. Dickey failed to appear, move, or answer timely. District court entered a default judgment, which order was dated June 6 but not filed until June 29, the same date on which State's motion for order of default on amount of support was filed. Seventeen months later, Dickey filed a motion to set aside the default. District court set aside the default, because State's motion was not on file 10 days before district court's ruling, a violation of rule 117.

HELD: Rule 117 did not apply, because State's motion was not a motion that turned on "issues of fact." State's motion for default did not turn on issues of fact because Dickey was in default and was in no position to dispute the allegations in the motion.

Madsen v. Litton Industries, Inc., 498 N.W.2d 715 (Iowa 1993)

Default

Before suit, plaintiff's counsel communicated and corresponded with defendants' in-house counsel, who was out of state. Defense counsel opened a claim file, but clerical personnel mistakenly assigned a "litigation" number, which signified that it was already in litigation. Accordingly, no one reacted to the original notice in accordance with the procedures applicable to "claim" files. The original notice was simply put in the file and not brought to the attention of any attorney. Plaintiff obtained a default, and district court overruled defendant's motion to set it aside.

HELD: Defendant did not establish good cause for setting aside default.

COMMENT: 7-2.

Gavlock v. Coleman, 493 N.W.2d 94 (Iowa App. 1992)

Depositions

In dramshop action, plaintiff took depositions of two treating physicians by using a stenographer and by videotaping the depositions. Plaintiff presented the videotapes at trial, over defendant's objections. Plaintiff did not notify defendant in advance of depositions that they would be recorded by videotape in addition to stenographer. HELD: District court did not abuse its discretion in permitting plaintiff to play the videotapes. Defendant did not show prejudice from lack of notice before the depositions.

Shook v. City of Davenport, 497 N.W.2d 883 (Iowa 1993)

Discovery

Police officer Lynch pulled vehicle over on a traffic stop. As Lynch approached vehicle it drove away quickly. Lynch shot at vehicle. Driver sued City and Lynch for violations of his civil rights under 42 U.S.C. § 1983. In discovery, driver requested internal investigation unit files on Lynch, five other officers, and a communications clerk. Driver also requested the shooting board of review files for all police officers during an 8-year time period, up to and including the date of the Lynch shooting. City objected on grounds of work product, relevancy, and over breadth. Notwithstanding those objections, City voluntarily produced all reports relating to the Lynch incident. Lynch objected that he was not in possession of the materials, and he asserted work product, "police investigative report" privilege, and "policy intelligence information" privilege. Driver moved to compel, and district court sustained the motion. City and Lynch appealed with permission.

HELD: City adduced uncontroverted evidence that established as a matter of law that primary purpose of conducting the investigation that resulted in the documents sought by driver was to prepare for possible civil litigation. Fact that possibility of litigation no longer exists for some files due to their age does not eviscerate the privilege. Driver did not satisfy "substantial need" requirement of rule 122(c), because he did not make any independent effort to discover the same information by interviewing the witnesses or deposing them. If on remand driver makes requisite showing of "substantial need," district court should conduct in camera inspection so as to protect mental impressions, conclusions, opinions, or legal theories and to disclose only factual material.

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In re Estate of Snapp, 502 N.W.2d 29 (Iowa Ap. 1993)

Discovery

Attorney Snapp drafted his father's will and trust agreement and served as both executor and attorney for his father's estate. Father was principal owner of one-car leasing business and a 40% owner of another at the time of his death. Snapp took over operations of the businesses and paid himself compensation from the businesses in the amount of $475,000 over approximately 8 years. Another beneficiary objected to Snapp's first and final report. Before trial, district court overruled beneficiary's motion to compel Snapp's personal tax returns.

HELD: Because Snapp argues that compensation for running father's business must replace what he lost from his law practice, district court should have permitted objector to discover Snapp's income tax returns.

Moyer v. City of Des Moines, _____ N.W.2d _____ (Iowa, August 25, 1993)

Dismissal

Moyer held an option to develop condominiums on properly zoned property. Des Moines refused to permit the development for failure to satisfy density requirements and for failure to comply with a setback requirement. Moyer commenced an action to seek a writ of mandamus and to recover damages. District court sustained defendant's motion to dismiss Moyer's claim for damages, on grounds that the municipality's failure to perform a discretionary function rendered defendant immune from suit under section 613A.4(3). District court sustained defendant's motion for summary judgment against the mandamus request on the same grounds.

HELD: Moyer's petition, taken as true, states a claim for damages on which relief may be granted. Defendant's motion to dismiss should have been overruled. Immunity relates not to subject matter jurisdiction but to the substantive issue of liability. Defendant's motion to dismiss must be tested by rule 104(b) instead of (a), and defendant cannot challenge the truth or accuracy of the petition being assailed by a rule 104(b) motion.

COMMENT: Before 1987, defendant could raise subject matter jurisdiction in advance of an answer by special appearance, which then could be supported with affidavits and other evidentiary showings. Court amended rules in 1987 to extinguish special appearances and to regulate pre-answer jurisdictional challenges with rule 104(a). Court also notes in dicta that a 104(a) motion to dismiss can be supported with affidavits and other evidentiary showings, just as with the special appearance.

Wright v. Waterloo Water Works, 493 N.W.2d 889 (Iowa App. 1992)

Experts

In civil rights action, defendants asked Wright to identify her treating physicians. She identified five physicians but failed to identify 15 other physicians, including the physician treating her at the time that the request was made. Defendants' theory of case was that plaintiff suffered from emotional and mental disability, which caused her to perceive discrimination and harassment where there was none. Because they could not discover information about the undisclosed physicians, they moved for imposition of sanctions. District court posed financial sanctions and dismissed Wright's claim for pain and suffering and emotional distress.

HELD: District court did not abuse its discretion in imposing economic sanction. Whether district court abused its discretion in striking a portion of Wright's damage claim was moot, given district court's findings, affirmed on appeal, that no defendant was liable to Wright.

Beeman v. Manville Corp., 496 N.W.2d 247 (Iowa 1993)

Experts

Beeman sued Johns-Manville (JM) and Keene for injuries caused by exposure throughout his life-long employment as a plumber and pipe fitter to asbestos products manufactured by JM and Keene. Beeman sued on theories of strict liability, negligence, fraud, conspiracy, and breach of warranty. He sought to recover compensatory damages for past and future medical expense, past and future pain and suffering (including fear of cancer), and lost opportunity to live out his natural life expectancy. He also sought punitive damages.

Beeman adduced evidence that he had been exposed to asbestos products throughout his adult life by virtue of his employment. He adduced evidence that he suffers from pleural plaques (a thickening of the lining of the lung) and asbestosis (scarring of the lung), both of which are caused by exposure to airborne asbestos fibers. He also adduced evidence that asbestosis increases the risk of lung cancer and mesothelioma (asbestos-related lung cancer).

From commencement of his action through a portion of the trial, Beeman's medical condition was believed by all concerned to involve only pleural plaques, and not asbestosis. At 11:00 p.m., the night before plaintiff's medical expert Dr. Schwartz was to testify at trial, he discovered a more recent x-ray that he had not viewed before his deposition. Schwartz concluded from this x-ray that Beeman had asbestosis, a more serious condition. Beeman's counsel immediately notified defense counsel. Defendants objected

to the new opinion under rule 125(d). District court permitted Dr. Schwartz to change his opinion, but delayed his testimony until defendants could redepose him.

HELD: District court did not abuse its discretion in permitting Dr. Schwartz to change his opinion in light of his 11th-hour discovery of a more recent x-ray. Although the exclusion of such changed testimony under rule 125 has been affirmed in the past, the point is that the appellate court has affirmed the district court's decision in such cases, because of its broad discretion.

COMMENT: Two justices dissented from the majority's affirmance of the judgment against Keene. After recounting the tenuous connection between the Keene product and Beeman, the minimal evidence relating to his fear, and the minimal impact his condition has had on his ability to work, the dissenters concluded that Keene did not receive a fair trial.

> How did this spectacular verdict occur? The answer is that the lawsuit was tried as a "dread specter of cancer" case. Evidence of asbestos being linked to cancer and [JM's] knowledge of its hazard to health was poured into the case by plaintiff. Although not relevant to prove Keene had any knowledge of asbestos dangers so as to trigger a duty to warn plaintiff at the time of plaintiff's exposure, Keene was blanketed by this snowstorm of evidence. Guilt by association became the prevailing wind.
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> ...
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> Fair trial was clouded ... by plaintiff's counsel announcing ... before plaintiff's expert witness [testified] that plaintiff was more injured than he thought. ... . The case had been on file since October 1988. Even if this late-night switch was unintended and fortuitous, the resulting trial by ambush is no longer favored in law and prejudiced defendants.
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> ...
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> The trial court and majority have tried to salvage a fair result from the contagion prevailing in this case. For Keene Corporation it cannot be done.

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Vachon v. Broadlawns Medical Foundation, 490 N.W.2d 820 (Iowa 1992)

Experts

Expert's interrogatory answer and medical malpractice case stated he would testify about "orthopedic standard of care and causation," but attached letter from expert contained no specific statement about causation. After expert testified on direct and was cross-examined by plaintiff, another defendant asked questions that elicited, over plaintiff's objections, causation opinions.

HELD: District court did not abuse its discretion in concluding that expert's opinions stayed within the fair scope of his answer to interrogatory in violation of rule 125(d). Record reveals that plaintiff expected expert to testify on causation. Moreover, other witnesses testified on causation to the same extent without objection.

Hantsbarger v. Coffin, 501 N.W.2d 501 (Iowa 1993)

Experts

In medical malpractice case, plaintiff designated expert witnesses 11 days before 180-day deadline imposed by section 668.11 simply by listing 11 physicians and by adding:

> Only Drs. Brown, Berg, and Moalem have been employed for the sole purpose of expressing opinions regarding the issues raised in the petition filed herein; the balance of those experts herein identified provided care and treatment for Sally Hantsbarger.

14 days later (and 3 days after certification deadline), physician moved to prohibit expert testimony because plaintiff did not disclose qualifications and purposes for calling the experts, as required by section 668.11. Plaintiffs amended their previous designation to remedy those defects 5 days later. District court sustained physician's motion and prohibited plaintiffs from adducing expert testimony (except as to treatment) from any of the 11 experts.

HELD: Plaintiffs did not substantially comply with section 668.11. Identifying each expert as a "Dr." is an insufficient disclosure of each expert's qualifications. Reference to "the issues raised in the petition" is an insufficient disclosure of the purpose for calling the expert.

> "Designations which require further inquiry and discovery prolong the trial, add to the expenses of the professional accused of malpractice, and are at odds with the purposes of section 668.11(1)."

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District court abused its discretion, however, in refusing to excuse plaintiffs from timely compliance with section 668.11. The physician was not prejudiced, because plaintiffs substantially complied within a week of the deadline. Plaintiffs had retained and disclosed their experts before the deadline, "and had a good record of complying with discovery." Also, defense counsel did not complain until after the deadline passed.

Weiss v. Bal, 501 N.W.2d 478 (Iowa 1993)

Experts

Plaintiff deposed defense expert and then failed to pay agreed upon fees. After entry of judgment on defense verdict, district court declined to assess costs against plaintiff in amount of unpaid expert fee. HELD: "Recoverable court costs would not include reimbursement for the breach of a private agreement reached by the parties prior to trial." COMMENT: Court declines to decide whether defendant would have been entitled to a protective order under rule 125(f) to require advancement of expense in excess of the amount permitted by section 622.72 ($150/day plus mileage).

Peoples Natural Gas Co. v. City of Hartley, 497 N.W.2d 874 (Iowa 1993)

Jury Demand

In condemnation proceeding, neither the Utility nor the City filed a jury demand. One year later, the court administrator inadvertently issued a pre-trial conference memorandum that indicated the matter was to be tried to a jury. The City noticed the error and contacted the administrator, who acknowledged the error to both parties. The Utility then filed a jury demand and, three months later and only 7 days before trial, filed a motion for trial by jury. The Utility's motion claimed that the absence of a demand stemmed from confusion over a companion piece of condemnation litigation. District court denied Utility's motion.

HELD: District court did not abuse its discretion in refusing to grant Utility's request for jury trial, belated by 15 months. Inadvertence and oversight of counsel is not good cause. Utility does not have an unwaiveable constitutional right to a jury trial.

Mays v. C. Mac Chambers Co., 490 N.W.2d 800 (Iowa 1992)

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New Trial

Jury returned verdict for defendant insurance agency in action by insured for agency's failure to purchase the amount of uninsured motor vehicle coverage that insured had requested. Insured moved for a new trial pursuant to rules 244 and 252 on the grounds of newly discovered evidence. District court overruled motion because insured knew of all three witnesses before time of original trial.

HELD: Although one witness testified at hearing on motion for new trial that she had lied to insured and his lawyer during their pretrial interview of her when she denied knowing anything about handwritten notes that she actually authored, insured did not

establish her testimony "could not with reasonable diligence have been discovered" before or during trial. Her notes concerned two telephone conversations that she had in the presence of insured and his lawyer, and she gave insured a copy of the notes before he left. A second witness, who merely would have impeached testimony of an agency employee, was known to insured before trial and was never contacted.

Wolf v. DaCom, Inc., 499 N.W.2d 728 (Iowa App. 1993)

Petition

Wolf sued DaCom for past due commissions and wages, reimbursement for personal merchandise sold, and vacation pay. Jury awarded damages and attorney fees under section 91A.8 to Wolf. On appeal, DaCom argued that Wolf's petition did not provide fair notice of Wolf's claim for reimbursement of merchandise.

HELD: Wolf's allegation that he had not been reimbursed for "a number of items that were put into DaCom's inventory" was sufficient under rule 69 to inform DaCom of the nature of Wolf's claim.

Wilson Close, Ltd. v. Crane, 499 N.W.2d 732 (Iowa App. 1993)

Rule 179(a)

District court need not include separate headings of "findings of fact" and "conclusions of law" in its rulings on matters tried to the court, so long as it makes specific factual findings and reaches "a clear, ultimate legal conclusion."

Johnston Equipment Corp. v. Industrial Indemnity, 489 N.W.2d 13 (Iowa 1992)

Rule 179(b)

Manufacturer sued liability insurer for product liability coverage. Policy did not contain standard "product hazard exclusion" endorsement, and overwhelming evidence established that this omission was an error and that manufacturer had not sought or even paid for product liability coverage. Nevertheless, district court found that the policy did not provide coverage, and did not adjudicate insurer's alternative request that the policy be reformed to exclude coverage. Manufacturer appealed, but insurer did not cross-appeal.

HELD: "[A] successful party need not cross-appeal to preserve error on a ground urged but ignored or rejected in trial court. ... [W]e think the preservation requirement ordinarily should apply only to an unsuccessful party. Holdings to the contrary in Becker v. Central States Health and Life Co., 431 N.W.2d 354 (Iowa 1988), and Fjelland v. Wemhoff, 249 N.W.2d 634 (Iowa 1977), are overruled.

COMMENT: Court's language suggests that a successful party likewise need not file a rule 179(b) motion to preserve error.

Humphreys v. Joe Johnston Law Firm, P.C., 491 N.W.2d 513 (Iowa 1992)

Rule 179(b)

Arbitrator has no obligation to rule on a motion ostensibly presented under the authority of rule 179(b).

Farm Credit Bank of Omaha v. Faught, 492 N.W.2d 422 (Iowa 1992)

Rule 179(b)

Bank filed petition to foreclose three real estate mortgages. The petition sought personal judgment against Faughts and in rem judgment against the land. The district court entered summary judgment for Bank. Faughts moved for reconsideration under rule 179(b). Five days later the Iowa Supreme Court held in a separate foreclosure action on identical property between the same parties that the Bank was prevented from levying general execution on Faughts' personal property (Faught I). Thereafter district court sustained Faughts' motion, reversing its earlier position and entering summary judgment in Faughts' favor.

Bank then sought, and was granted, leave to extend the time for filing its own rule 179(b) motion while the Iowa Supreme Court considered its petition for rehearing in Faught I. Once the Iowa Supreme Court denied the petition for rehearing in Faught I, Bank's rule 179(b) motion in the present case was heard and denied by the district court. Bank then filed a notice of appeal within 30 days. Faughts argued that the rules of civil procedure do not permit "the filing of a rule 179(b) motion on a previous 179(b) motion," and that such an improper motion is ineffective to extend the deadlines for filing appeal.

HELD: The facts of this case do not resemble those which appeared in Doland v. Boone County, 376 N.W.2d 870 (Iowa 1985). Bank's rule 179(b) motion, filed in response to the court's amended judgment, was neither successive nor repetitive of any earlier

motion. The motion was timely filed and appeal promptly taken upon its denial.

In re Marriage of Fountain, 492 N.W.2d 707 (Iowa App. 1992)

Rule 179(b)

Party to dissolution proceeding filed rule 179(b) motion within 10 days after district court filed the decree of dissolution, but more than 10 days after district court announced its decision and directed other party to draft a decree in accordance with district court's oral ruling. HELD: Rule 179(b) motion's 10-day deadline begins to run with the filing of the district court's findings of fact and conclusions of law.

In re Trust of Killian, 494 N.W.2d 672 (Iowa 1993)

Rule 252

Killian created separate trust for her spouse, daughter, and son. Daughter sued trustees for breach of fiduciary duty and fraud. Parties reached a settlement, contingent upon court approval of the trustees' past actions regarding all three trusts. Trustees filed a petition seeking acceptance by district court of jurisdiction over the trust, approval of all past acts of the trustees, and acceptance of one trustee's resignation. Son signed acknowledgement of receipt of notice, entry of appearance, and consent to entry of orders. District court entered an order accepting jurisdiction, approving prior acts of trustees, and accepting the resignation of one trustee.

Son timely filed an action under rule 252(b) to vacate the district court's order. Son alleged that trustees failed to inform him, formally or informally, that the reason for the trustees' petition was to further the settlement of his sister's action against the trustees for fraud and breach of fiduciary duty. District court denied and dismissed son's petition after trial.

HELD: Trustees disclosed in petition that sister's lawsuit was premised on "mismanagement on the part of the trustees and misconduct on the part of the trustees." Son did not establish any fraud or irregularity that would authorize district court to vacate its previous order pursuant to rule 252.

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Schwarz v. Meyer, 500 N.W.2d 87 (Iowa App. 1993)

Sanctions

Meyer served interrogatories and a request for production with his answer to Schwarz's civil damage action on August 28, 1991. Meyer's counsel sent three written requests for responses, the last request being sent on December 9. Schwarz's counsel sent unsigned answers to interrogatories on December 20. Meyer filed a motion to compel on January 23, 1992. On January 31, Schwarz filed a document without appropriate cover sheet but with answers to some of the interrogatories, objections to the others, and a response to the request for production. On February 3 and without hearing, district court ordered Schwarz to serve and file signed answers and to produce requested documents on or before February 18. On February 25, Meyer filed a motion for sanctions, including a request for dismissal, due to Schwarz's failure to comply with the February 3 order. Meyer contended that he never received a set of signed answers. The document Schwarz had filed did not contain a certificate of service. Schwarz resisted the motion for sanctions and advised the court that signed answers had been filed and served. On March 10, without hearing, district court found that Schwarz had failed to comply with the previous order and dismissed Schwarz's action. Schwarz filed a certificate of service on April 3 and appealed.

HELD: District court abused its discretion in dismissing Schwarz's action, absent proof and a finding of wilfulness, fault, or bad faith. A bona fide dispute existed between Meyer and Schwarz as to whether or not Schwarz had served sworn answers. Schwarz was entitled to a hearing before imposition of discovery sanctions, especially in light of Schwarz's contention that he had complied with the original order.

Davis v. United Fire & Casualty Co., 500 N.W.2d 725 (Iowa App. 1993)

Summary Judgment

Davis' home suffered storm damage. Davis and insurer could not agree on amount that insurer should pay for roof. Davis sued insurer for coverage and for bad faith. Umpire determined figure for roof damage. Insurer moved for summary judgment and asked court to enter judgment in favor of Davis and against itself for agreed upon amounts of other damage and for amount of roof damage as determined by umpire. Davis resisted motion, but only to argue that policy provided coverage for cost of repairing roof rather than actual cash value of damage to roof. Davis filed countering motion for summary judgment, contending that Davis was entitled to judgment in the amount of agreed upon damages and the cost of repair, and contending that insurer had committed bad faith as a matter of law, leaving only bad faith damages to be adjudicated at

trial. Insurer resisted in part by asserting that there were issues of fact with respect to bad faith.

District court sustained insurer's motion and overruled Davis' motion and apparently believed that those ruling disposed of the case completely (and was reasonable in its belief, since district court's rulings essentially concluded that insurer's pre-suit position with respect to coverage was correct). Davis appealed without seeking permission to do so.

HELD: Summary judgment on coverage amounts was correct. Validity of bad faith claim, however, was not before district court. Case must be remanded to district court for adjudication of Davis' bad faith claim.

COMMENT: If something remained to be adjudicated, the rulings on countering motions for summary judgment were not final for purposes of appeal. In any event, how can Davis possibly prevail on a bad faith claim when the insurer offered before suit was filed to pay the amount for which judgment subsequently was entered?

Peters v. Vander Kooi, 494 N.W.2d 708 (Iowa 1993)

Venue

Plaintiff sued physician and Buena Vista County Hospital in Buena Visa County. Plaintiff then moved for change of venue, based on the hospital's status as a party. District court granted the motion and transferred case to Cherokee County. Plaintiff later dismissed hospital. District court returned case to Buena Vista County and overruled plaintiff's motion for change of venue pursuant to rule 167(c).

HELD: Basis for changing venue no longer existed, so district court acted properly in returning plaintiff's case to the county of its origin.

COMMENT: District court reversed this defense verdict for other reasons and urged district court to "again consider" plaintiff's motion based on the inability of plaintiff to obtain a fair trial in Buena Vista County.

> "It appears that 20 out of 29 juror examined had some health care connection with [defendants], either personally or through members of their family. If there is reason to believe that such relationships will exist for a similar portion of the jury summoned for a second trial in Buena Vista County, a change of venue should be ordered ... ."

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COMMERCIAL LAW

Seibert v. Noble, 499 N.W.2d 3 (Iowa 1993)

Agency

Note and security agreement covering farm implements was assigned to bank by implement dealer. Debtor sued bank for participating in dealer's allegedly unauthorized repossession of his collateral. Debtor alleged the dealer acted as the bank's agent in repossessing the implements because the bank had conversed with the dealer, knew the origin of the proceeds, and applied the proceeds to Seibert's debt.

HELD: Summary judgment for bank was appropriate. Bank did not instruct, consent, offer, permit or otherwise authorize the repossession. The mere fact that the dealer deposited the proceeds in his own account and paid a like amount to the bank does not permit an inference of either an express or implied agency.

Farmers National Bank v. Manke, 500 N.W.2d 19 (Iowa 1993)

Attachment

Bank obtained a writ of attachment on the business real estate of Manke. Manke filed a motion to discharge the attachment, supported by affidavit, and the bank filed counter affidavits. An evidentiary hearing was held before the district court. Manke testified that he did propose to sell his business real estate but that he intended to use the proceeds to pay off other creditors. The district court found that the intended disposition of the proceeds of the pending sale was as Manke had testified and entered an order discharging the attachment.

HELD: The factual basis of the grounds alleged in support of an attachment may not be traversed on a motion to discharge attachment under sections 639.63 of the Iowa Code. Section 639.63 may only be used to test the legal sufficiency of the stated grounds of the attachment. For example, if an excessive amount of property is attached or if exempt property is attached, a motion to discharge the attachment may be made under section 639.63. The proper method for Manke to have traversed the factual allegations in support of the attachment was by an action on the bond under section 639.14 or a counterclaim on the bond under 639.15.

COMMENT: The court indicated in dicta that a motion to discharge an attachment should be considered as a motion for summary judgment and overruled if the facts are in any manner in dispute.

Comdata Network, Inc. v. First Interstate Bank, 497 N.W.2d 807 (Iowa 1993)

Breach of Letter of Credit

Bank defended action by beneficiary of letter of credit for advances made prior to cancellation of beneficiary's relationship with Bank's customer on the ground that its customer had defrauded it in the underlying transaction by continuing to incur charges to the beneficiary after it ceased its business operations.

HELD: The duty created in the letter of credit is wholly independent of the underlying contract between the issuer's customer and the beneficiary. There is a rule of "strict compliance" to terms stipulated in letters of credit. As a result, where the letter of credit calls for presentation of documents, determination of the issuer's duty of performance depends upon the presentation of conforming documents and not upon the factual performance or nonperformance by the parties to the underlying transaction. The claim of a beneficiary of a letter of credit is not subject to defenses normally applicable to third party contracts. The issuing bank must honor its drafts even if the issuer's customer has defrauded the issuer. Because the letter of credit is an independent instrument, Bank was obligated to reimburse the beneficiary of the letter for advances, notwithstanding misconduct by the Bank's customer in the underlying transactions.

Knierim v. First State Bank, 488 N.W.2d 454 (Iowa App. 1992)

Deficiency Judgment

A creditor's initial failure to give a debtor proper notice of sale of collateral does not necessarily preclude the creditor from obtaining a deficiency judgment provided that the creditor takes remedial action to give the debtor sufficient notice and opportunity to guard against a low sale price. The court applied the exception to the absolute bar rule set out in Barnhouse v. Hawkeye State Bank, 406 N.W.2d 181, 185-86 (Iowa 1987).

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Presidential Realty Corp. v. Bridgewood Realty Investors, 498 N.W.2d 694 (Iowa 1993)

Foreclosure

Norwest Bank foreclosed on a mortgage for a large apartment complex. Norwest had previously bargained for and received an assignment of rents in a separately recorded assignment. Thus, while a debtor is ordinarily entitled to possession of real property during the redemption period following the foreclosure and

is normally entitled to the rents generated from the property during the redemption period, this was not the case where Norwest had a separate assignment of rents. Thus, while Norwest gave up its rights to a deficiency judgment, it did not waive its rights to rents. Norwest was entitled to exercise its rights against surplus rents based on the absolute assignment of rents from the debtor.

Lacina v. Maxwell, 501 N.W.2d 531 (Iowa 1993)

Foreclosure

Section 615.1's two-year statute of limitations against enforcement of a judgment entered in an action for foreclosure of a real estate mortgage or a deed of trust does not apply to judgment entered in an action for the foreclosure of a real estate contract.

First State Bank v. Kalkwarf, 495 N.W.2d 708 (Iowa 1993)

Fraudulent Conveyances

On June 24, 1986, Klooster obtained a judgment against Kalkwarf in Hancock County. First State Bank, a prior creditor of the Kalkwarfs, became aware of the judgment. The Bank reviewed Kalkwarf's file and concluded that as a result of the Klooster judgment, Kalkwarf's debts exceeded current assets. The Bank therefore determined that it needed additional security from Kalkwarf. On July 31, 1986, Kalkwarf executed a promissory note to Bank, secured by a mortgage on Kalkwarf's interest in certain Wright County farm land. On September 3, 1986, Klooster judgment was certified to Wright County, thus becoming a judgment lien on all property owned by Kalkwarfs in Wright County as of that date. Kalkwarf was bitter about the Klooster judgment and stated to Bank that he would do anything he could to defeat a recovery on it. He recognized that a mortgage to the Bank would diminish the opportunity for the judgment creditor to recover by levying on the Wright County property. Loren's thoughts were expressed to the Bank on several occasions. Bank brought a foreclosure action after Kalkwarf refused to pay the interest due on their indebtedness to Bank. Klooster claimed priority of his judgment lien on the ground that the mortgage was fraudulent as to him.

HELD: District court correctly rejected Klooster's claim of fraud. A debtor may lawfully prefer one creditor over another by way of sale, mortgage, or the giving of security to others, even if the debtor's intentions toward the nonpreferred creditor are spiteful and will delay or prevent them from obtaining payment. A preferred creditor's knowledge that the debtor's purpose was fraudulent will not defeat his claim, so long as he acts in good faith for his own protection. Fraud on the part of the debtor will

affect the rights of only those preferred creditors who in some way participate in it. A valid preexisting debt is ordinarily sufficient consideration for any conveyance or giving of security, so long as the amount of the antecedent debt is not materially less than the value of the property conveyed or encumbered. Here, the Bank was acting for its own protection and the preexisting debt was not materially less than the value of the farm land on which it took a mortgage. This was the case even though the Bank may have known there was a potential creditor that would be disadvantaged. Klooster did not overcome the burden of showing the Bank's intentional participation in a fraudulent preferential transfer by clear and satisfactory evidence.

Farm Credit Bank of Omaha v. Faught, 492 N.W.2d 422 (Iowa 1992)

Merger

Bank instituted foreclosure proceedings against the Faught family in 1985. The foreclosure actions sought personal judgment against Faughts and in rem judgment against the land. The Faughts responded by filing chapter 11 proceedings in bankruptcy. Some time later Bank obtained an order from the bankruptcy court granting it limited relief from the automatic stay. Permitted to pursue in rem relief against the Faught real estate, Bank filed an amended foreclosure petition, deleting its prayer for personal judgment and seeking in rem judgment only. Thereafter the district court foreclosed the mortgages and entered judgment in rem against the real estate for the full amount of principal and interest then owing on the notes. It also ordered special execution for sale of the farms. Bank purchased the property at sheriff's sale. Thereafter Faughts redeemed two out of the three tracts of land involved.

Faughts then dismissed their bankruptcy petition. Bank responded by seeking a general execution to recover the deficiency that remained after the sheriff's sale. In a prior appellate decision involving the same land and the same parties, the Iowa Supreme Court held that once Bank withdrew its claim for personal judgment and proceeded in rem against the real estate for the full amount of the indebtedness, the legal effect was to "resolve the dispute then existing between the parties." Federal Land Bank of Omaha v. Faught Bros. Inc., 468 N.W.2d 793, 795 (Iowa 1991) (Faught I). As a result, no deficiency existed upon which Bank could justify general execution upon Faughts' personal property. Anticipating the outcome in Faught I, Bank commenced this separate action seeking personal judgment on Faughts' unpaid promissory obligations. District court entered summary judgment in favor of Faughts.

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HELD: Bank's action was barred by the doctrine of merger. A mortgagee may not seek foreclosure of a mortgage in one action, and in the later one ask for personal judgment against the mortgagor.

Both remedies could have been recovered in the first action. Allowing the second suit would amount to splitting these causes of action. Exceptions to the doctrine of merger which exist where the court which had originally rendered the in rem judgments lacked personal jurisdiction over the mortgagors, are not applicable. In those situations, the mortgagees had been unable to recover their full remedies and, accordingly, the notes did not merge with the in rem judgments.

Bank argued that the bankruptcy stay similarly prevented it from securing personal judgment against the Faughts. Here, however, Bank had no legal duty to dismiss its in personam claim in the first instance. In doing so, the Bank unmistakably signaled an intent to proceed against the real estate and not against the Faughts personally, thereby encouraging them to dismiss the bankruptcy action all together. Faughts could have discharged their indebtedness in bankruptcy had the Bank proceeded under its original petition, thereby leaving the Bank in the same position in which it now finds itself.

Finally, equitable concerns could not be used to limit the doctrine of merger under these facts. Under the court's ruling, Faughts would not be receiving an outrageous "windfall" because their position is precisely the "fresh start" to which they would have been entitled had they not dismissed their bankruptcy petition on the strength of the Bank's conduct. In addition, Bank's allegation of lack of multiplicity of suits as justification for the present action misconstrues the whole motion of merger because the Bank had its day in court. It shows the expedient route of taking the real estate in satisfaction of its indebtedness. Moreover, to hold Bank to its chosen remedy neither exalts form over substance nor offends the "no waiver provisions of the promissory notes." Such provisions were designed to protect a bank which delays exercising its privileges under the notes and are inapplicable here because Bank did not delay to exercise its rights under the contract.

First State Bank, Belmond v. Kalkwarf, 495 N.W.2d 708 (Iowa 1993)

Priority

First State Bank obtained a mortgage on Kalkwarf's Wright County farm land on July 31, 1986. The mortgage was recorded on August 8, 1986. On September 3, 1986, Klooster certified a judgment he had obtained against Kalkwarf to Wright County. On January 28, 1987, Kalkwarf showed Bank a notice of sheriff's sale and direction to the sheriff which had been issued pursuant to a general execution upon the Klooster judgment. On January 30, 1987, two days after receiving notice of the legal action to enforce Klooster's judgment lien, Bank advanced $40,000 to the Kalkwarfs pursuant to a new $40,000 promissory note, secured by the July 1986 real estate mortgage. Bank disbursed an additional $11,500

pursuant to a separate promissory note, also indicated to have been "advanced under" the July 31, 1986, real estate mortgage. After Kalkwarf defaulted on the January 30, 1987, note, Bank brought this foreclosure action. Klooster claimed that section 654.12A granted him priority over the January 30, 1987, advancements.

Section 654.12A generally provides loans and advances made under a prior recorded mortgage will have priority over subsequently recorded or filed liens. This general rule, is limited in that the priority of grants "does not apply to loans or advances made after receipt of notice of foreclosure or action to enforce a ... subsequently recorded or filed lien." The court framed the issue as being whether the January 30, 1987, promissory note, along with its subsequent extensions, constitute (1) a continuation of the July 31, 1986, loan or (2) a new loan or advance under the mortgage.

HELD: Bank received actual notice that legal action was being pursued to enforce the Klooster judgment lien against the subject real estate when Kalkwarf showed Bank the notice of sheriff's sale and direction to the sheriff, which mentioned a levy. Actual notice was sufficient notice under 654.12A's limitation on its general rule of priority.

The purpose of the limiting language in section 654.12A is "to prevent a mortgagee from manipulating its loans and advancements so as to shield mortgage property from other lienholders who are pursuing collection efforts against the property." Here Bank engaged in such manipulations pointed to new short term obligations in January of 1987, rather than to a continuing old obligation. The January 30, 1987, note purported to become due on January 30, 1988. Bank explained at trial it had used one year notes for what it claimed to be a long-term obligation because it wanted to be able to review the changing situation of the debtor. The court found that this was not a "hallmark of long-term debt." The January 30, 1987 advances, therefore, were indicative of new loans or advances under the mortgage and not mere continuations of the July 31, 1986 loan. Because Bank had actual notice of Klooster's action to enforce its subsequently filed lien, Bank's advances in January of 1987 were secondary to Klooster's judgment lien.

R

Federal Land Bank v. Dunkelburger, 499 N.W. 305 (Iowa App. 1993)

Receiver

FLB's loan to defendant was secured by defendant's farm, including rents and profits from the real estate. FLB commenced foreclosure proceedings in 1985, and a receiver was appointed in 1987. Defendant filed a bankruptcy petition and leased the farm to Swecker in 1987. District court ordered defendant and Swecker to make rent payments to the receiver. PCA held a junior lien on the farm. It commenced proceedings in federal court to foreclose in

1989. Federal court appointed the same receiver. Swecker made a $9,000 rent payment to receiver. District court entered judgment and decree of foreclosure on FLB's mortgage in 1989. After a sheriff's sale of certain property, PCA obtained an order in federal court to include the surplus in its receivership (district court had dismissed the receiver).

When defendant objected to FLB's attempt to execute on the judgment for rent, district court overruled the objection. Defendant appealed and, in Federal Land Bank v. Dunkelburger, 471 N.W. 82 (Iowa App. 1990), the court reversed, and held that the judgments for rent had merged with the judgment for foreclosure. Swecker, who had not joined in the appeal, then moved to discharge the judgment for rent against him as well, and to seek recovery from FLB of rent monies transferred by the receiver to FLB. FLB contended that Swecker was not entitled to the $9,000 rental payment because the order was merely a nunc pro tunc order clarifying the extent of the receivership. District court discharged the judgment and ordered FLB to return the rent to Swecker with interest.

HELD: The federal court order was not a nunc pro tunc, i.e., an order curing an obvious error. Therefore, there was no relation back to the time of the commencement of the PCA proceedings, and Swecker was entitled to return of the rent.

Pundzak, Inc. v. Cook, 500 N.W.2d 424 (Iowa 1993)

Trademark

Cook and Webster worked in the advertising business as performers. Pundzak was an advertising agent who worked with Cook and Webster from time to time. Pundzak heard Cook and Webster informally playing the parts of two "old timers" named Willard and Rafert, and suggested that he could obtain advertising work for them as those characters. The parties subsequently entered into an exclusive agency agreement in which Pundzak, Inc., was to be the exclusive agent for Cook and Webster as "Willard and Rafert." Pundzak was to use its "best efforts" to promote the characters.

After several years of success, Cook and Webster became dissatisfied with Pundzak's efforts, largely because of an alleged conflict of interest. Cook and Webster terminated the agreement. Pundzak sued Cook and Webster for breach of contract, and Cook and Webster filed a separate lawsuit against Pundzak. Cook and Webster's action sought damages for breach of contract and abuse of process, and also sought declaratory judgment as to the ownership rights of "Willard and Rafert." The court consolidated the actions for trial, bifurcated the declaratory judgment action for a subsequent trial to the court, and submitted the breach of contract and abuse of process claims to a jury.

After trial of the declaratory judgment issue, the district court declared that "Willard and Rafert" was owned 25% by Pundzak and 75% by Cook and Webster.

HELD: District court erred as a matter of law in finding that Pundzak had any ownership interest in Willard and Rafert. Pundzak's use of the trademark was only in conjunction with his performance of the agreement. Cook and Webster created the "persona" and Pundzak offered only suggestions on its use.

Power Engineering & Manufacturing v. Krug International, 501 N.W.2d 490 (Iowa 1993)

UCC Article II

Krug contracted to build an aeromedical equipment laboratory for Tripod Laing, for delivery by Laing to Iraqi airways. Krug contracted with Power Engineering to build a gear box to be used by Krug as part of the centrifuge in the laboratory. Krug did not advise Power Engineering of the identity of the ultimate consumer. Although Power Engineering's form documents provide that Krug could not cancel its order, Power agreed that Krug could cancel an order if it paid for work done prior to cancellation.

A portion of Krug's order documentation is consistent with Power Engineering's agreement. Krug's documents also contain a "force majeure" clause, that gave Krug the right to terminate without cost in the event of causes beyond the control of Krug that "would make it unreasonable in [Krug's] judgment to accept delivery. Power first received such documentation, however, after it had begun the manufacturing process. After Power Engineering completed its work but before it shipped the gear box, the Gulf Ware commenced and the United Nations implemented an embargo that covered Laing's shipment to Iraqi airways. Krug notified Power Engineering of its termination of the contract in accordance with the force majeure clause.

HELD: Section 554.2207, Code of Iowa, controls. Power Engineering's quotation document, which includes a "no alteration or modification" clause, prohibits Krug from utilizing its force majeure clause in a document, sent subsequently, as a proposed additional term unless Power Engineering accepts it.

R

Section 554.2615 (codification of common law theories of impossibility and commercial impracticability) is not applicable, because Krug's performance is not commercially impracticable. Although the embargo may prevent Laing from shipping and may even prevent Krug from fulfilling its contract with Laing, the embargo has no impact on Krug's ability to purchase product from Power Engineering, at least under the circumstances where Power Engineering had no knowledge of its product's ultimate destination.

Seibert v. Noble, 499 N.W.2d 3 (Iowa 1993)

UCC Article IX

Debtor Seibert sued Noble, a farm implement dealer, and Brenton Bank for the wrongful sale of Seibert's equipment. Seibert alleged conversion, fraud, and violation of Article 9. Seibert had executed a note with Noble in 1984 that was later assigned to Brenton Bank. When Seibert was in danger of defaulting on this note in 1989, Noble and Seibert agreed that if Brenton Bank could not be persuaded to take a new note in payment of the old note, Noble would arrange the sale of the equipment and apply the proceeds to the debt to Brenton Bank. Seibert and Noble disputed whether Noble was required to consult Seibert about the sales price for each implement. Noble applied the proceeds of each sale to pay off the remainder of the debt, and retained the expenses he incurred. District court instructed jury on conversion and failure to consent to the sale. Jury found a wrongful taking but no breach of any agreement, and awarded no damages.

Seibert objected to the instruction on damages which allowed Noble an offset for the actual sales price. Seibert objected to the district court's refusal to instruct the jury on Noble's failure to comply with the consent and notice provisions of Article 9.

HELD: Noble was entitled to offset the sales price against Seibert's damages because the proceeds from the sales were applied to a specific debt that the proceeds were intended to discharge. Because Noble had not acted in willful disregard of Seibert's rights, he also was entitled to an offset to the extent of his expenses. Because the 1989 note was conditioned on Brenton Bank's acceptance of it, which did not occur, district court correctly concluded there was a lack of substantial evidence that the sales were accomplished pursuant to a security agreement.

COMPARATIVE FAULT

Pratt v. Piper, 500 N.W.2d 716 (Iowa App. 1993)

Allocation

Pratt and Piper were travelling in the same direction toward a controlled intersection, with Pratt ahead of Piper. Pratt testified that when the light turned yellow she made a gradual stop 4 or 5 car lengths from the intersection and was rear-ended by Piper. Piper testified that he slowed as Pratt slowed and then began to accelerate when Pratt also began to accelerate, so that he

could follow her through the intersection. When Pratt suddenly resumed her stop, Piper rear-ended her. Jury found Pratt to be 65% at fault, and she filed a motion for new trial. District court sustained her motion on the ground that Piper was more at fault than Pratt as a matter of law.

HELD: District court did not abuse its discretion in concluding as a matter of law that defendant was more at fault than plaintiff.

Waterloo Savings Bank v. Austin, 494 N.W.2d 715 (Iowa 1993)

Applicability

Estates of two passengers killed in one-vehicle accident sued driver and obtained verdicts, the substantial portion of which represented present value of money that would have been accumulated for those estates in the future, had the passengers lived their normal life expectancy. District court entered judgment on verdicts with interest at the rate of 10% from the date the petition was filed. Defendants moved to modify the judgment in accordance with section 668.13. Estates argued that chapter 668 was not applicable, because the fault of only one person, the driver, had been placed in issue.

HELD: Because the estates alleged negligence as the basis for their actions against the driver, chapter 668 applied and the interest provisions of section 668.13 applied to the portion of the verdicts that relate to future damages. That the driver did not contend either passenger was negligent is irrelevant.

COMMENT: This opinion inters dicta suggesting an opposite result in Johnson v. Junkmann, 395 N.W.2d 862, 867 (Iowa 1986), and Vasquez v. LeMars Mutual Insurance Co., 477 N.W.2d 404, 410 (Iowa 1991).

Coker v. Abell-Howe Co., 491 N.W.2d 143 (Iowa 1992)

R

Assumption of Risk

In Rosenau v. City of Esterville, 199 N.W.2d 125 (Iowa 1972), Court abolished assumption of risk in its secondary meaning (plaintiff acted unreasonably in assuming a known risk of harm) as a separate defense in all cases where contributory negligence was available as a defense. After the judicial adoption of comparative negligence in Goetzman v. Wichern, 327 N.W.2d 742 (Iowa 1982), Court held that abandonment of the all-or-nothing result for contributory negligence in favor of a proportionate reduction in recovery did not revive "secondary" risk assumption as a defense in negligence cases. Campbell v. Van Roekel, 347 N.W.2d 406 (Iowa

1984). When legislature enacted chapter 668, it defined "fault" to include "unreasonable assumption of risk not constituting an enforceable express consent."

In negligence case filed after effective date of chapter 668, Abell-Howe asserted "secondary" risk assumption as an affirmative defense, relied on the statutory definition of fault quoted above, and argued that the legislature had revived "secondary" risk assumption.

HELD: Legislature's definition of fault included "secondary" risk assumption only because it also included strict liability. Rosenau is still valid; assumption of risk is not an affirmative defense available in a case in which contributory negligence is likewise available.

Pappas v. Clark, 494 N.W.2d 245 (Iowa App. 1992)

Consent

Wife sued doctors and pharmacies for failing to prevent husband from killing himself. Husband had worked for doctors as a billing consultant and obtained prescription drugs fraudulently. He became addicted to prescription medication, to cocaine (purchased from sources other than defendants), and eventually died from a self-injected lethal dose of cocaine.

HELD: Husband's illegal act bars surviving spouse's and child's negligence actions as a matter of public policy.

COMMENT: Court of appeals distinguishes Katko v. Briney, 183 N.W.2d 657 (Iowa 1971), in which supreme court upheld a jury verdict in favor of plaintiff who had pled guilty to breaking and entering defendant's abandoned home but who was injured by defendant's spring gun.

> In Katko, the main thrust of the defendant's defense in the trial court and on appeal was that Iowa law permitted the use of a spring gun in protecting one's dwelling. The issue of whether the plaintiff's cause of action would be precluded for public policy reasons was never even addressed in the supreme court's opinion.

Huber v. Hovey, 501 N.W.2d 53 (Iowa 1993)

Consent

Dale Huber paid to enter race track as spectator and signed release in consideration for being permitted to enter pit area.

Dale suffered injuries when wheel detached from race car and tore through fence in pit area. Dale and spouse Karen sued a number of racing persons and entities. District court sustained defendants' motion for summary judgment as to both plaintiffs and as to all defendants.

HELD: Release is valid contract and enforceable by all released parties against Dale Huber. Release is not ambiguous as to persons releasing, persons released, and types of liability covered. Dale's failure to read contract is irrelevant. Dale failed to show that risk of injury was unusual or exceptional (which showing could arguably raise fact question as to whether he was aware of risk of injury).

Dale's release, however, does not bar Karen's independent consortium right. The release does not erase the underlying tort, which injured her property right as well as Dale's person.

Fulmer v. Tague, 500 N.W.2d 432 (Iowa 1993)

Consortium

Jim Tague, not of legal age, hosted a "pour your own" beer party. Fulmer and McLaughlin left the party with McLaughlin drunk and driving. Fulmer was killed in a one-vehicle accident.

Fulmer's estate sued Tague and McLaughlin. Fulmer's father sued the same parties for loss of parental consortium. At trial, jury assessed percentages of fault as follows:

Fulmer	25%
Tague	10%
McLaughlin	65%

In submitting the consortium claim of Fulmer's father, district court instructed the jury that it needed to compare the fault of Tague, McLaughlin, and Fulmer's father. The verdict form on the consortium claim did not list Tague or McLaughlin and asked only for the percentage of fault, if any, of Fulmer's father. The jury answered "0" and fixed the consortium damages at $35,000. District court then entered judgment on the consortium claim against Tague for 10/75 of the $35,000 and against McLaughlin for 65/75 of the $35,000.

HELD: District court properly utilized the jury's findings of fault in the estate's claim for purposes of entering judgment on the consortium claim. Court did not substitute its fact-findings for the jury's. In any event, rule 205 authorizes the court to remedy any omission in fact-findings with its own findings if the error is determined after the jury retires.

Cincinnati Insurance Co. v. Evans, 493 N.W.2d 798 (Iowa 1992)

Contribution

Permagrain sold a wood conditioner that Evans used on the floor of his retail store. Evans used GoJo soap in water that he used to clean the mop he was using to spread the conditioner. The soap prevented an active ingredient in the floor conditioner from dispersing and evaporating. It generated enough heat to cause spontaneous combustion. Building owner sued Evans, who sued Permagrain, who sued GoJo. Permagrain settled, obtained a release that included GoJo, and then sought contribution from GoJo pursuant to chapter 668. At the end of Permagrain's case in chief, GoJo moved for directed verdict on grounds that Permagrain had failed to establish its own fault, which GoJo argued was an element in Permagrain's action for indemnity. District court sustained GoJo's motion.

HELD: Permagrain need only adduce substantial evidence from which a jury could find Permagrain at fault. Permagrain offered evidence that it knew its product could result in spontaneous combustion, that alternative chemicals were available, and that its instructions did not warn against the application of detergents to the conditioner. This evidence could have supported a jury's finding that Permagrain was a fault.

Thompson v. Allen, 503 N.W.2d 400 (Iowa 1993)

Damages

In personal injury case, jury assessed fault as follows:

Plaintiff	49%
Defendant	51%

Jury awarded past medicals and past lost wages but no damages for past loss of function or for past pain and suffering. In totalling the damages awarded, jury also made $10,000 error, in favor of plaintiff. The court discharged jury before error was discovered.

Plaintiff moved for a new trial. Defendants resisted and moved for entry of judgment with an additur of $5,000 for past pain and suffering and $5,000 for past lost function (the amounts requested by plaintiff's counsel in final argument), both figures then to be subjected to reduction for plaintiff's comparative fault.

HELD: District court properly rejected defendant's request for additur, as this would have turned court into a fact finder. District court properly granted new trial, but should have limited trial to damages only. The record does not disclose any basis for

concluding that errors made by jury in awarding damages affected the jury's findings as to fault.

Guzman v. Des Moines Hotel Partners, 489 N.W.2d 7 (Iowa 1992)

Interest

In personal injury case governed by chapter 668, district court submitted verdict forms that did not differentiate between past and future damages. HELD: Because jury did not determine which of Mrs. Guzman's "damages were past and which were future," district court shall assume they were all future and assess interest only from the date of judgment, pursuant to section 668.13(3).

Mossman v. Amana Society, 494 N.W.2d 676 (Iowa 1993)

Interest

Legislature amended section 535.3 and enacted section 668.13 in 1987 to provide, among other things, that interest on future damages accrues with the entry of judgment. The enactment applied to all actions accruing on or after July 1, 1987, and all claims accruing earlier but filed on or after September 15, 1987.

Mossman sued Amana for personal injuries allegedly caused by Amana's negligence in October 1986. Amana filed a third-party petition against CRANDIC in March 1987. Mossman amended her petition to assert a direct claim against CRANDIC in October 1988. Jury verdict in favor of Mossman and against CRANDIC included future damages.

HELD: Cause of action against CRANDIC accrued before July 1, 1987, and was "filed" (by virtue of Amana's third-party petition against CRANDIC) before September 15, so the new law does not apply and interest shall accrue from the date of filing, which is the date Amana added CRANDIC, not the date that Mossman asserted the direct claim against CRANDIC.

R

Reed v. Chrysler Corp., 494 N.W.2d 224 (Iowa 1992)

Intervening Cause

Reed was injured while a passenger in a jeep CJ-7, which was involved in a one-vehicle accident. The driver tested at .185 and Reed tested at .168. None of the four passengers were wearing seat belts. The accident occurred when the driver lost control in a curve. The jeep hit a concrete bridge abutment, rolled over, and

slid upside down for 300 feet. The jeep's fiberglass top disintegrated, and Reed's arm became pinched between the highway surface and the roll bar.

Reed sued Chrysler on a theory of crash worthiness as set forth in Wernimont v. International Harvestor Corp., 309 N.W.2d 137 (Iowa App. 1991). At close of Reed's case in chief, district court sustained Chrysler's motion for directed verdict. Supreme court decided Hillrichs v. Avco Corp., 478 N.W.2d 70 (Iowa 1991), after Reed's trial.

HELD: Reed adduced substantial evidence on all three elements of crash worthiness claim. District court should not have sustained Chrysler's motion for directed verdict. On retrial, several issues are likely to recur.

District court should exclude evidence of Reed's or driver's intoxication, absent some showing that intoxication was a proximate cause of the enhanced injury, a showing that appears from this record to be unlikely. The holding in Hillrichs to the contrary is overruled.

> [Crash worthiness doctrine], which presupposes the occurrence of accidents precipitated for myriad reasons, focuses alone on the enhancement of resulting injuries. The rule does not pretend that the design defect had anything to do with causing the accident. ... So any participation by the plaintiff in bringing the accident about is quite beside the point.

COMMENT: Court sat en banc and decision was unanimous, except as to this decision to overrule the contributory negligence aspect of Hillrichs, a decision only thirteen months old. Four justices dissented. The conduct forming the basis for the crash worthiness claim is not in the nature of an intervening cause that

> varies the risk in kind rather than degree. The situation presented in enhanced injury claims does not differ substantially from other situations in which the defendant's fault is premised on a failure to protect other persons from the consequences of their own negligent acts. Consequently, there is no logical reason to use different rules for fault comparison and enhanced injury claims than would be used in claims involving negligent failure to warn or negligent failure to install safety devices.

Coker v. Abell-Howe Co., 491 N.W.2d 143 (Iowa 1992)

Mitigation

Legislature defined fault in chapter 668 to include "unreasonable failure to avoid an injury or to mitigate damages."

HELD: "Unreasonable failure to avoid an injury" is a codification of the avoidable consequences doctrine. "[I]t applies only to the plaintiff's alleged fault occurring in time after the act of fault alleged against the defendant."

Ort v. Klinger, 496 N.W.2d 265 (Iowa App. 1992)

Mitigation

In personal injury action, defendants objected to mitigation instruction that required plaintiff to "use ordinary care in following the orders of her treating chiropractors and physicians," because the instruction did not permit jury to consider the recommendations of independent medical examiners in evaluating whether or not plaintiff took all reasonable steps to "effect a speedy cure." HELD: Iowa law does not require plaintiff to do what independent medical examiners recommend in order to satisfy her duty of mitigation.

Guzman v. Des Moines Hotel Partners, 489 N.W.2d 7 (Iowa 1992)

Nuisance

Defendant hotel's sprinkler system on its lawn malfunctioned, causing water to be sprayed out into street. Mr. and Mrs. Guzman rear-ended another vehicle. Guzmans sued hotel, claiming that water from sprinkler obscured his vision. District court submitted claims of negligence and nuisance. Jury assessed 55% of fault to hotel and 45% to John Guzman. Because of the nuisance count, however, district court entered judgment for both Guzmans for the full amount of their damages, without reduction for John Guzman's fault.

R

HELD: District court erred in submitting nuisance claim as well as negligence. While the result of hotel's conduct may be categorized as nuisance, negligence was the alleged cause. No plaintiff should be permitted to circumvent the operation of chapter 668 simply by focusing on the result of alleged negligence, calling it nuisance, and recovering damages without reduction for his or her own fault.

Guzman v. Des Moines Hotel Partners, 489 N.W.2d 7 (Iowa 1992)

Release

Defendant hotel's sprinkler system on its lawn malfunctioned, causing water to be sprayed out into street. Mr. and Mrs. Guzman rear-ended another vehicle. Guzmans sued hotel, claiming that water from sprinkler obscured his vision. Guzman dismissed another defendant before trial, but without prejudice. District court submitted claims of negligence and nuisance. Jury assessed 55% of fault to hotel and 45% to John Guzman.

HELD: District court properly excluded evidence that Guzmans had dismissed without prejudice another defendant, because the dismissal document did not meet the definition of release under section 668.7.

IBP, Inc. v. DCS Sanitation Management Services, Inc., 498 N.W.2d 425 (Iowa App. 1993)

Workers' Compensation

IBP and DCS contracted for DCS to provide certain cleaning and sanitation services for IBP. DCS agreed to indemnify IBP against all claims arising out of damages caused by DCS. The indemnity obligation did not extend to claims arising out of damages caused by IBP. DCS employee Grimm was injured while cleaning machinery at IBP. Grimm filed a workers' compensation claim against DCS and sued IBP. Grimm obtained a judgment, which IBP paid. IBP then sued DCS and its liability insurer for indemnity, breach of contract, and bad faith. District court sustained DCS' motion for summary judgment, holding that the jury's assessment against IBP of 70% (Grimm 30%) of the fault precluded indemnity under the IBP - DCS contract.

HELD: Because of section 85.20, there has not yet been an adjudication of the relative responsibilities of IBP and DCS. IBP has adduced substantial evidence that would support a finding that DCS was negligent.

> DCS argued such a holding would run a foul to the spirit of the workers' compensation legislation. There is merit to this position.
>
> ... However, not allowing IBP the opportunity to litigate the negligence could well result in DCS being made whole for workers' compensation paid on an injury caused by its negligence.
>
> ... Which, in essence, is allowing DCS to be indemnified on its claim against IBP when the issue of the respective negligence of the two has not been litigated.
>
> If there is incompatibility between section 85.20 and section 85.22 (creating DCS's right of subrogation),

the incompatibility is better resolved by not allowing an employer to escape any financial responsibility for negligently injuring an employee.

COMMENT: The result makes complete sense and should be no surprise, given DCS' indemnity obligation to IBP. The language used by the court of appeals, constitutes the first recognition by an appellate court in Iowa of the inequity of permitting negligent employers and/or their insurers to recover from third party tort-feasors all or part of comp benefits paid for injuries that were caused by the employer's negligent conduct.

Sourbier v. State, 498 N.W.2d 720 (Iowa 1993)

Workers' Compensation

Sourbier was injured in the course of his employment as a highway patrol officer. The State paid his workers' compensation benefits. Sourbier brought an action against the third-party tort-feasors for the personal injuries he suffered. The State filed a lien for workers' compensation benefits paid and to be paid. Sourbier filed a petition for declaratory judgment to determine what lien rights the State had in his third party award.

HELD: An employer's lien should not be reduced by the amount of an employee's comparative fault.

CONSTITUTIONAL LAW

Johnson v. Mitchell, 489 N.W.2d 411 (Iowa App. 1992)

Due Process/Equal Protection

Johnson sued Mitchells, residents of Minnesota, for breach of contract when their check to Johnson for rental of his resort in Canada (situated to a resort owned and operated by Mitchells) bounced. Mitchells defended pro se. After Mitchells failed to appear twice for their depositions, district court sustained Johnson's motion for entry of default. Mitchells did not file any attack on the default judgment until almost two years after they first received notice of it.

HELD: Mitchells did not comply with time requirements of either rule 236 or 252, and can set aside this judgment only if it is void, as opposed to simply voidable. Notwithstanding Mitchells' lack of notice of hearing on motion for entry of default, entry of

default did not violate due process. Mitchells should have been in attendance on the day of the hearing, because it had been the previously scheduled first day of trial, notice of which had been timely served by the court.

Kennis v. Mercy Hospital Medical Center, 491 N.W.2d 161 (Iowa 1992)

Due Process/Equal Protection

Pro se plaintiff in medical malpractice action argued on appeal from summary judgment for defendants that section 668.11 (certification deadlines for experts in professional liability actions) violated due process and equal protection clauses of the constitutions because it discriminates against impoverished litigants who cannot afford experts or who cannot afford attorneys (on the rationale that experts will not work with pro se litigants).

HELD: Statute does not abridge right of access to courts but simply establishes certain procedural requirements. Statute does not require plaintiff in professional liability case to obtain an expert. Whether or not plaintiff can prevail without an expert is a matter of proving one's claim.

Clark v. Miller, 503 N.W.2d 422 (Iowa 1993)

Due Process/Equal Protection

Clark sued governmental subdivision within two years after giving sufficient and timely notice of claim pursuant to section 613A.5, but not within two years of the date of injury. HELD: Decision that section 613.A.5's six-month statute of limitations was unconstitutional did not also invalidate the notice provision that permitted a claimant to commence his action within two years after an adequate 60-day notice to the governmental subdivision. Clark's action was timely filed

R

Principal Casualty Insurance Co. v. Blair, 500 N.W.2d 67 (Iowa 1993)

Due Process/Equal Protection

Mr. and Mrs. Blair's minor son suffered injuries when his bicycle wheel detached. Mrs. Blair, as an individual and as next friend, sued Mr. Blair for his negligent assembly of the bicycle. Principal commenced an action for declaratory judgment that its homeowner's policy issued to the Blairs did not provide coverage because of family exclusion clauses.

Principal's policy excludes liability coverage for bodily injury to "your relatives residing in your household." The med pay clause excludes coverage for injury to an "insured person," who is defined to include "your relatives residing in your household."

HELD: Principal's family exclusion clauses are not void for public policy. The Blairs' contention that the family exclusion clauses violate equal protection fail because there is not a sufficiently close nexus between the state and the challenged action of a regulated entity so as to render Principal's exclusions state action.

Peoples Natural Gas Co. v. City of Hartley, 497 N.W.2d 874 (Iowa 1993)

Jury

In condemnation proceeding, neither the Utility nor the City filed a jury demand. One year later, the court administrator inadvertently issued a pre-trial conference memorandum that indicated the matter was to be tried to a jury. The City noticed the error and contacted the administrator, who acknowledged the error to both parties. The Utility then filed a jury demand and, three months later and only 7 days before trial, filed a motion for trial by jury. The Utility's motion claimed that the absence of a demand stemmed from confusion over a companion piece of condemnation litigation. District court denied Utility's motion.

HELD: District court did not abuse its discretion in refusing to grant Utility's request for jury trial, belated by 15 months. Utility does not have an unwaiveable constitutional right to a jury trial.

CONTRACTS

R

Frontier Properties Corp. v. Swanberg, 488 N.W.2d 146 (Iowa 1992)

Breach

Frontier contracted with the Swanbergs to construct a basic "shell" of a house. A written and signed proposal defined the work to be done and established a price of $166,802 for work and material. The proposal also included Frontier's "rough estimate" of $61,400 to finish the construction.

As Frontier began to build the house the Swanbergs began requesting substantial additions to the house. Frontier and Swanberg disagreed as to whether these additions were included in Frontier's general interior finish estimate of $61,400. Seven months into the project the Swanbergs began paying some subcontractors directly and disputing some of their bills. The following month the Swanbergs quit making any payments on the contract.

Frontier sued Swanberg to foreclose mechanic's liens and for breach of express and implied contracts. Frontier dismissed the foreclosure count before trial. The trial court found that the additional work requested by the Swanbergs was not included in $61,400 general finish estimate and awarded Frontier $69,210.86 on its theories of express and implied contracts. Swanberg maintained that Frontier's exclusive remedy was the mechanic's lien, Iowa Code chapter 572.

HELD: Iowa's statutory mechanic's lien is cumulative, not exclusive, and does not preempt any common-law actions available to a contractor. In fact, Frontier had failed to meet the notice requirements in Iowa Code section 572.13(2) and had no lien to enforce.

Frontier was entitled to recover damages for breach of express and implied contracts because "the express contract covered the exterior and interior work originally contemplated in the written proposal, and the implied contract covered the additions not included in the $61,400 estimate."

Jackson v. State Bank, 488 N.W.2d 151 (Iowa 1992)

Breach

In 1977 a family farm partnership (Jackson) became a customer of the State Bank of Wapello (bank), and annually borrowed money from the bank for operating expenses. In 1980 Jackson gave Connecticut General Life Insurance Company a note secured by a mortgage on the Jackson farm. In 1982 Jackson had no farm income because of flooding. The bank consolidated Jackson's outstanding note balances of $100,912 and took additional security. In February of 1985 Jackson made the interest payment due on the consolidated note and borrowed $105,000 from the bank for operating expenses. Under the terms of the new note the bank agreed to advance funds on a monthly basis. The note also provided that the bank could refuse to advance funds if the bank deemed that it was not secure.

Jackson lost many of its crops through flooding in spring and early summer in 1986. Based on Jackson's cash flow projections, it would be unable to make its payments to the bank. When Jackson requested an advance of funds to replant beans, the bank refused.

Jackson ultimately lost the farm to Connecticut General through foreclosure. Jackson sued the bank for breach of contract to lend operating funds and tortious interference with the contractual agreement between Jackson and Connecticut General. A jury awarded Jackson $31,729 on the contract claim and $81,020 on the interference claim.

HELD: As a matter of law, the bank had not breached its contract to lend. The contract provided that the bank could refuse to advance money if it believed in good faith that it was insecure. Jackson had the heavy burden of proving lack of good faith. It failed.

The alleged interference was no more than the bank's good faith exercise of its contractual right to refuse to perform if insecure. The bank's refusal could not be improper, as a matter of law, and could not support an interference claim.

Iowa-Illinois Gas & Electric Co. v. Black & Veatch, 497 N.W.2d 821 (Iowa 1993)

Breach

B & V contracted with I-Ill to construct a new electric generating unit at a field station. B & V was to provide all engineering and project management services as well as plans and specifications for all structural, mechanical, and electrical work. B & V "agreed to perform the services in accordance with the highest standards in the engineering profession." B & V designed the substation to include a motor-operated disconnect switch (MOD) that could be operated electronically from the control room and manually at the substation. B & V provided circuit breakers that had to be open when the MOD was closed, in order to prevent "back-energization" into the main plant. B & V provided I-Ill with operating instructions, which required that manual control of MOD be used "only for maintenance use with adjacent breakers open." B & V's instructions for manual closure of the MOD also provided: "Be sure that the adjacent breakers are open before closing [the MOD]."

An I-Ill shift supervisor went to the substation to close the MOD switch manually after completion of certain repairs. He assumed that the circuit breakers were open, and directed an apprentice to close the MOD. Back-energization occurred and caused $3 million worth of damage to the generator. I-Ill and its property insurer sued B & V for breach of contract. B & V contended that the cause of the accident was employee error, caused by I-Ill's inadequate training of employees. Jury returned verdict for B & V.

HELD: Substantial evidence supported B & V's contention that damage resulted from I-Ill's inadequate training of employees.

Whether or not B & V's design and instructions complied with the appropriate engineering standards, and whether or not the accident resulted from B & V's work or from I-Ill employee conduct was for the jury to decide.

District court's instructions on B & V's affirmative defenses that I-Ill had breached an implied duty in the contract to train its employees and that the sole proximate cause of the accident was I-Ill's failure to train its employees were not prejudicial to plaintiffs, since jury answered special interrogatory that B & V had not breach the contract.

Pundzak, Inc. v. Cook, 500 N.W.2d 424 (Iowa 1993)

Breach

Cook and Webster worked in the advertising business as performers. Pundzak was an advertising agent who worked with Cook and Webster from time to time. Pundzak heard Cook and Webster informally playing the parts of two "old timers" named Willard and Rafert, and suggested that he could obtain advertising work for them as those characters. The parties subsequently entered into an exclusive agency agreement in which Pundzak, Inc., was to be the exclusive agent for Cook and Webster as "Willard and Rafert." Pundzak was to use its "best efforts" to promote the characters. The agreement was terminable at will by any party on a 60 days' notice. The agreement could be modified only by a subsequent writing. The agreement contained no term about compensation, but the parties agreed orally on a 75% (Cook and Webster) - 25% basis.

After several years of success, Cook and Webster became dissatisfied with Pundzak's efforts, largely because of an alleged conflict of interest. Cook and Webster terminated the agreement. Pundzak sued Cook and Webster for breach of contract, and Cook and Webster filed a separate lawsuit against Pundzak. Cook and Webster's action sought damages for breach of contract and abuse of process. The court consolidated the actions for trial.

The jury found that Pundzak breached his "best efforts" obligation during several years of the life of the agreement, and found that Cook and Webster would have realized an additional $15,000 a year during the last four years of the agreement, if Pundzak had performed as promised. The jury also found that Pundzak breached the agreement by paying Cook and Webster only 60% of the proceeds from one particular customer, resulting in an additional item of damage in the amount of $37,000. The jury also found that Pundzak and Allied had used Willard and Rafert's material without Cook and Webster's consent and awarded them $7,050, the amount they would have received if Allied had paid for such use.

HELD: Substantial evidence supported jury's finding that Pundzak breached his obligation of "best efforts." Cook and Webster's right to terminate the agreement is not their sole remedy and does not bar them from suing for damages caused by poor performance. District court instructed jury on estoppel, so jury obviously rejected Pundzak's argument that Cook and Webster had accepted as satisfactory performance the amounts generated in earlier years by Pundzak's efforts. Cook and Webster adduced substantial evidence that they had complained about Pundzak's efforts over an extended period of time before terminating him. Substantial evidence supported jury's finding that Pundzak's failure to his best efforts was a proximate cause of the damages found.

The award of $37,000 for the Allied work paid at only 60% was duplicative of the damages awarded for Pundzak's breach of his obligation of best efforts. Although the amounts were recovered under different theories "the $60,000 verdict" still included a second recovery for the same loss. Cook and Webster can only recover the $60,000 verdict.

The $7,000 award for misappropriation of Willard and Rafert material by Allied and Pundzak was duplicative of Allied's settlement with Cook and Webster for the same amount. The traditional pro tanto credit rule from common-law tort doctrine is applicable to this aspect of Cook and Webster's breach-of-contract claim against Pundzak.

Crowe-Thomas Consulting Group, Inc. v. Fresh Pak Candy Co., 494 N.W.2d 442 (Iowa App. 1992)

Offer and Acceptance

On March 23, 1988, Fresh Pak entered into an agreement with Crowe-Thomas. According to the agreement, Crowe-Thomas was to perform certain services in connection with the sale of Fresh Pak. The agreement specifically provided for fees to be paid to Crowe-Thomas of $45,000 "payable at closing." On September 26, 1988, the parties executed an "addendum" to the agreement. The addendum provided that the fees for the assistance of Crowe-Thomas in the sale of Fresh Pak would be "due and payable upon the acceptance of any offers by both the buyer and seller." On November 9, 1988, negotiations with a potential buyer culminated in a letter of intent which stated that it was "subject to the negotiation and execution of a definitive agreement" and that Fresh Pak invited "the parties to sign copies of (the) letter and turn (the) matter over to (their) respective attorneys for purposes of forming a definite contract." The sale was never culminated. Crowe-Thomas instituted a lawsuit claiming it was entitled to compensation from Fresh Pak under the consulting agreement based on the letter of intent.

HELD: Agreement to agree to enter into contract is of no effect unless all of the terms and conditions of the contract are agreed on and nothing is left to future negotiations. The letter was nothing more than an invitation to attempt to reach an agreement of sale. It was not an offer within the meaning of the brokerage agreement.

Phone Connection, Inc. v. Harbst, 494 N.W.2d 445 (Iowa App. 1992)

Offer and Acceptance

Willrett, Jones, and Harbst signed articles of incorporation to their new business named "The Phone Connection" on April 14, 1989. The three were to be equal co-owners of the business, which sold, serviced, and installed residential and commercial telephones and related equipment. Willrett, Jones, and Harbst met in their attorney's office on May 16, 1989. The attorney had prepared an employment agreement between the corporation and its three shareholders, who were also the three principal employees of the corporation. In reviewing the agreement, Harbst objected to one particular section which required each employee to devote "all" of his normal business time to the corporate business. The three agreed that the agreement would be redrafted to require each employee to devote "substantially all" of normal business time to the corporation's affairs. The employment agreement also contained a covenant not to compete clause. Harbst did not object to the restrictive covenant at this meeting. After the agreement was redrafted, Willrett and Jones signed their copies but Harbst never signed his.

HELD: In order to be bound to a contract, the contracting parties must manifest mutual assent to the terms of the contract. Such assent need not be indicated by signing a written agreement. The parties to an unsigned agreement are obligated to abide by the agreement, when the acceptance appears from the acts of the parties. Whether such assent by conduct has been given is to be determined "objectively." Harbst's assent to the covenant not to compete in the employment contract was objectively established by evidence that he benefited from the employment in numerous ways, including steady employment, his salary, and the benefit of his co-workers unique experience in particular areas. Harbst's co-workers had every right to assume that he had signed the employment agreement because he agreed to become bound by the provisions of the employment agreement at the meeting on May 16, 1989. Moreover, the fact that Harbst successfully negotiated a change in the employment contract shows that he was acting both in his individual capacity as well as his corporate capacity at that meeting. Because there was substantial evidence to objectively establish Harbst's assent, the district court did not err in finding Harbst agreed, through his conduct, to be bound to the employment agreement.

Power Engineering & Manufacturing v. Krug International, 501 N.W.2d 490 (Iowa 1993)

Offer and Acceptance

Krug contracted to build an aeromedical equipment laboratory for Tripod Laing, for delivery by Laing to Iraqi airways. Krug contracted with Power Engineering to build a gear box to be used by Krug as part of the centrifuge in the laboratory. Krug did not advise Power Engineering of the identity of the ultimate consumer. Although Power Engineering's form documents provide that Krug could not cancel its order, Power agreed that Krug could cancel an order if it paid for work done prior to cancellation.

A portion of Krug's order documentation is consistent with Power Engineering's agreement. Krug's documents also contain a "force majeure" clause, that gave Krug the right to terminate without cost in the event of causes beyond the control of Krug that "would make it unreasonable in [Krug's] judgment to accept delivery. Power first received such documentation, however, after it had begun the manufacturing process. After Power Engineering completed its work but before it shipped the gear box, the Gulf Ware commenced and the United Nations implemented an embargo that covered Laing's shipment to Iraqi airways. Krug notified Power Engineering of its termination of the contract in accordance with the force majeure clause.

HELD: Section 554.2207, Code of Iowa, controls. Power Engineering's quotation document, which includes a "no alteration or modification" clause, prohibits Krug from utilizing its force majeure clause in a document, sent subsequently, as a proposed additional term unless Power Engineering accepts it.

Section 554.2615 (codification of common law theories of impossibility and commercial impracticability) is not applicable, because Krug's performance is not commercially impracticable. Although the embargo may prevent Laing from shipping and may even prevent Krug from fulfilling its contract with Laing, the embargo has no impact on Krug's ability to purchase product from Power Engineering, at least under the circumstances where Power Engineering had no knowledge of its product's ultimate destination.

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Hawkeye Land Co. v. Iowa Power & Light Co., 497 N.W.2d 480 (Iowa 1993)

Parol Evidence

Railroad in bankruptcy negotiated with Utility to transform wire line license agreements into permanent easements. After Utility marked its lines on Railroad maps, Railroad prepared 18 specific easement agreements. Utility believed that it had agreement with Railroad to acquire permanent easement for all of

its facilities on the Railroad right-of-way for $95,000 and issued a check dated November 6, 1985, with this annotation: "Acquisitions of permanent easement for all facilities on Chicago Rock Island Right-of-Way." Railroad cashed check in December. On November 12, however, Railroad faxed to Utility a memo of intent with respect to the 18 specific agreements. The inconsistency was never resolved and never was even raised by Railroad with Utility.

Earlier, on July 1, Railroad quit claimed certain real estate to Hawkeye. The Railroad-Hawkeye agreement reserved to Railroad the right to convert wire line license agreements to permanent easements for another 120 days. Hawkeye did not discover the inconsistency between Iowa Power's position and Railroad's position with respect to the scope of Iowa Power's purchase of easements until three years later. Hawkeye sued Iowa Power for unpaid rent.

HELD: Railroad's November 12 memo of intent was inadmissible by virtue of statute of frauds. Section 622.33 (an exception to statute of frauds "where the purchase money ... has been received by the vendor") does not apply, because the money was received before Railroad issued the memo of intent. Because Railroad's testimony and the memo were being offered to contradict the agreement, district court properly excluded it as extrinsic evidence designed to "vary, add to, or subtract from a written agreement."

Uhl v. City of Sioux City, 490 N.W.2d 69 (Iowa App. 1992)

Promissory Estoppel

City and state reached agreement relating to interstate by-pass that included promise by city to construct a certain street that would have provided access to Uhl, who owned property that was partially condemned for by-pass project. At conclusion of project, city had not yet constructed the street. Uhl resolved its condemnation suit by settlement before it became apparent that city did not intend to construct street. Uhl sued city for breach of its promise to state to construct street.

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HELD: Uhl adduced no evidence that city "could have foreseen that [Uhl] would rely on its agreement with the state when [Uhl] resolved [the] condemnation dispute." City was not involved as a party or otherwise in condemnation proceeding or in settlement negotiations.

Fees v. Mutual Fire & Automobile Insurance Co., 490 N.W.2d 55 (Iowa 1992)

Release

Mr. and Mrs. Fees purchased their home on contract for $12,000. They voluntarily petitioned for bankruptcy two years later. They valued their interest in the home at $12,000, their personal property at $1,500, and their wearing apparel at $1,000. They purchased home owner's insurance after filing for bankruptcy. The policy provided limits of $35,000 on the house, $25,000 for personal property, and $7,000 for loss of use. Fees suffered a fire loss almost one year later, while they were out of town. An investigator for the insurer concluded that the fire was not an accident.

Nevertheless, insurer offered Fees $45,000 in return for a release. Fees accepted, executed the release, and received their money. Nineteen months later, Fees sued for breach of contract, bad faith, misrepresentation, slander, and intentional infliction of emotional distress. Insurer argued that all of Fees' claims had been released. Insurer moved for summary judgment, which Fees resisted on grounds of economic duress.

HELD: Fees did not generate factual dispute on first element of economic duress doctrine as a defense to the release:

(1) involuntary acceptance of terms,
(2) circumstances permitted no alternative, and
(3) circumstances were created by coercive acts of other party.

Fees was intelligent, educated, and experienced with legal documents (he sold health and life insurance). The release was not unusual. Fees consulted with an attorney before executing the release. Fees received substantial consideration, an amount that was close to his own demand, and time passed between communication of insurer's offer and Fees' acceptance of it.

COMMENT: Fees' failure to generate a factual issue on any one of the elements was fatal to his claim. Nevertheless, court proceeded to "find" that Fees had generated a factual issue on element 2.

> Fees was marginally employed, had recently been through bankruptcy, and had no liquid assets nor any other source of funds with which to replace his home, furniture, or personal belongings. [He and his family] lived in a tent for more than three months ... . [L]itigation over the claim could take years. ...
> ...
> ... The second element ... is a practical one under which we take in the exigencies of the

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> victim, and the mere availability of a legal remedy is not controlling if it will not afford effective relief to one in the victim's circumstances.

Court also proceeded to determine that Fees had not generated a factual issue with respect to the third element. Insurer provided money under its loss of use coverage before settlement. Taking more than two months to complete its investigation was reasonable. Insurer had the right to insist upon a satisfactory proof of claim.

Phone Connection, Inc. v. Harbst, 494 N.W.2d 445 (Iowa App. 1992)

Restrictive Covenants

Willrett, Jones, and Harbst signed articles of incorporation to their new business named "The Phone Connection" on April 14, 1989. The three were to be equal co-owners of the business, which sold, serviced, and installed residential and commercial telephones and related equipment. They reached an employment agreement between the corporation and its three shareholders, who were also the three principal employees of the corporation. The employment agreement contained a covenant not to compete clause.

The duration of the covenant was to be five years commencing on the day of termination of employment and was to be effective with respect to Minnesota and Iowa. When Harbst left the business, the business sued to enforce the covenant. Harbst defended on the ground that the restrictive covenant was not supported by consideration and that it was unreasonable in scope. District court modified the covenant to apply only to the Iowa and Minnesota counties in which Phone Connection had established its trade area, and to reduce the time period from five to two years.

HELD: The protective covenant was not prejudicial to the public interest because consumers in The Phone Connection's trade area could be served by several other telephone interconnect companies already in existence. The restrictive covenant, as modified by the district court, was not unreasonably restrictive of Harbst's rights. Harbst's livelihood was tied to the telephone business and he has a large family which he does not want to move. Finally, the restrictive covenant was reasonably necessary for the protection of Phone Connection's business. Harbst was one of only three principal employees. He worked closely with the other two partners, Willrett and Jones. Before their association, the three had been competitors in the same market. Once the company was formed, Harbst had total access to the company books and records and also had direct personal exposure to the company's customers and supplies.

Uhl v. City of Sioux City, 490 N.W.2d 69 (Iowa App. 1992)

Third-Party Beneficiary

City and state reached agreement relating to interstate by-pass that included promise by city to construct a certain street that would have provided access to Uhl, who owned property that was partially condemned for by-pass project. At conclusion of project, city had not yet constructed the street. Uhl sued city for breach of its promise to state to construct street. District court found that state did not intend to benefit Uhl by obtaining promise from city to build street.

HELD: Uhl did not establish that agreement was made for Uhl's express benefit. Agreement was intended to benefit general public. At most, Uhl is incidental beneficiary.

COURTS

Humphreys v. Joe Johnston Law Firm, P.C., 491 N.W.2d 513 (Iowa 1992)

Arbitration

Arbitrator has no obligation to rule on a motion ostensibly presented under the authority of rule 179(b).

Des Moines Asphalt & Paving Co. v. Colcon Industries Corp., 500 N.W.2d 70 (Iowa 1993)

Arbitration

Developer Kroenke contracted with Colcon to construct a building that Kroenke intended to lease to Wal-Mart. Colcon subcontracted paving of the parking lot task to Des Moines Asphalt & Paving (DMAP). The Kroenke-Colcon and Colcon-DMAP contracts provided that all claims and disputes would be subject to arbitration, and that the demand for arbitration shall be made within a reasonable time after the claim, dispute, or other matter in question arose.

Colcon and DMAP completed the building and parking lot in September 1991. Kroenke refused to make full payment because it believed parking lot was unsatisfactory. DMAP filed a mechanic's lien and then filed a petition to foreclose on it. Colcon filed a mechanic's lien, answered DMAP's petition, and cross-claimed against Kroenke. Seventy-five days after Kroenke was served with

notice of the foreclosure action, Kroenke moved to compel arbitration. Colcon and DMAP resisted on grounds that Kroenke's demand for arbitration, coming some seven months after the dispute arose, was untimely.

HELD: Kroenke acted timely in demanding arbitration pursuant to section 679A.2, Code of Iowa, by filing a motion to compel arbitration within 75 days of service of original notice of the petition to foreclose a mechanic's lien. "The issue of whether Kroenke demanded arbitration within a reasonable time under the terms of the contracts is for the arbitrator to decide."

Eley v. Pizza Hut of America, Inc., 500 N.W.2d 61 (Iowa 1993)

Certification

Mr. and Mrs. Eley live across the street from a Pizza Hut restaurant. High school students congregate on and around the Pizza Hut premises and parking lot after Friday night football games. Criminal activity, including fights and violence to person and property have occurred in the past. Pizza Hut used an on-premises security guard to some degree of success in the past. The Eley's adult son confronted a crowd one night. Someone threw a rock in the direction of the Eleys and it injured Mr. Eley. No one can identify the rock thrower or state with certainty the thrower's location relative to Pizza Hut property.

Eleys sued Pizza Hut in federal court. In response to Pizza Hut's motion for summary judgment, federal court certified questions relating to the existence of and scope of Pizza Hut's duty to Mr. Eley, who was not on Pizza Hut property and who was injured by the criminal act of someone who may or may not have been on Pizza Hut property (that night or ever) but who was part of a group of students that congregate on or near Pizza Hut property on a regular basis.

The Iowa Supreme Court declined to answer certified questions.

> "[W]e do not know who threw the rock, the location from which the rock was thrown, or the involvement of Pizza Hut, particularly with respect to providing beer on the night in question. In addition, we do not know what inferences may be made from Pizza Hut's cancellation of the prior security services or what the record might establish as to Pizza Hut's alleged status as an 'attractive nuisance.'"

Grant v. Iowa District Court, 492 N.W.2d 683 (Iowa 1992)

Guardian Ad Litem

In Garcia v. Wibholm, 461 N.W.2d 166 (Iowa 1990), court held that a guardian ad litem did not necessarily discharge his or her duties simply by filing an answer and might have to provide a defense through trial. Before issuance of Garcia, district court appointed Levad to act as a guardian ad litem for an incarcerated civil defendant. District court had asked Levad prior to making the appointment, and Levad had agreed to serve as guardian ad litem on the assumption that his duties would be limited to filing an answer to prevent a default. He so advised plaintiffs' counsel as well. District court's appointment provided that Levad would be compensated for his services by imposing those as part of the costs of the action. After Garcia was issued, Levad moved for leave to withdraw, citing the limitations of his agreement to serve and the statements in Garcia to the effect that attorneys could not be compelled to accept the appointment. District court declined to release Levad. Plaintiffs noticed defendant's deposition. On motion by Levad, district court ordered plaintiffs to pay Levad's expenses and fees for attending the deposition. As trial approached, Levad asked for an order requiring plaintiffs to advance his fees and costs for defense, including trial. District court granted this motion over plaintiffs' objection. Plaintiffs petitioned for writ of certiorari. Supreme court granted writ.

HELD: No statute authorizes district court to require plaintiff to pay guardian ad litem fees and expenses in advance of a judgment in favor of the incarcerated civil defendant. Until the legislature provides a funding mechanism, district courts will have to find attorney willing to serve with no guarantee of compensation.

Reed v. Chrysler Corp., 494 N.W.2d 224 (Iowa 1992)

Misconduct

Reed was injured while a passenger in a jeep CJ-7, which was involved in a one-vehicle accident. The driver tested at .185 and Reed tested at .168. None of the four passengers were wearing seat belts. The accident occurred when the driver lost control in a curve. The jeep hit a concrete bridge abutment, rolled over, and slid upside down for 300 feet. The jeep's fiberglass top disintegrated, and Reed's arm became pinched between the highway surface and the roll bar.

Reed sued Chrysler on a theory of crash worthiness as set forth in Wernimont v. International Harvestor Corp., 309 N.W.2d 137 (Iowa App. 1991). At close of Reed's case in chief, district court sustained Chrysler's motion for directed verdict.

HELD: Reed adduced substantial evidence on all three elements of crash worthiness claim.

COMMENT: Court noted Reed's contention that District Court Judge Jenkins' decision to sustain Chrysler's motion for directed verdict arose out of judge's hostility to the Wernimont decision, which the judge communicated with "disparaging personal references to the [author of] the Wernimont decision." Court condemned those remarks as unjudicial and unnecessary.

In re Jenkins, 503 N.W.2d 425 (Iowa 1993)

Misconduct

Iowa Supreme Court adopted recommendation of judicial qualifications commission and reprimanded district court judge for 10 separate instances of judicial misconduct, most of which involved intemperate remarks orally or in writing about witnesses or parties. Court held that Judge Jenkins' remarks went far beyond what was necessary to assist appellate court in reviewing his determination of the credibility of witnesses.

> The people who come to court, litigants, witnesses, jurors, even lawyers, cannot select the judge who is to preside over them. Although circumstances may on occasion demand sternness, a judge should strive to be kind. The authority exercised by a judge is so great as to easily break ordinary people who are rendered comparatively helpless in their relationship with a court. Such authority should not be entrusted to those who, either deliberately or through thoughtlessness, offend the ordinary sensibilities of citizens. This is true with regard to a judge's conduct throughout a trial, whether in the court room or in chambers. Nowhere is it more true than in the words chosen by a judge in a decision or decree that becomes a permanent public record. Flamboyance in decorum and attempts at clever ridicule are not admired characteristics in a jurist.

In re Property Seized, 501 N.W.2d 482 (Iowa 1993)

Stipulation

State seized gaming machines and personal and real property allegedly acquired through the proceeds of gaming machines, and then applied for forfeiture of the property. At hearing, owner's counsel entered into stipulation that owner "will consent to a forfeiture of all of the property ... except certain items." Six days later, at the resumption of the hearing, owner attempted to repudiate the stipulation. HELD: Party may stipulate to an issue

as well as to a fact, even if stipulating to an issue is tantamount to consenting to a particular decree. To the extent that Van Donselaar v. Van Donselaar, 249 Iowa 504, 87 N.W.2d 311 (1958), suggests that consent to a judgment may be withdrawn as a matter of right at any time before entry of judgment, it is overruled.

Hunter v. Union State Bank, _____ N.W.2d _____ (Iowa, August 25, 1993)

Successor Judge

After trial to court but before judge could issue decision, he died. Successor judge decided case by relying on law clerk's report of deceased judge's intentions. Iowa supreme court reversed and remanded for purposes of complying with rule 367(b). See Hunter v. Union State Bank, 468 N.W.2d 456 (Iowa 1991).

On remand, a new successor judge reviewed transcript and briefs and received oral argument, and then rendered decision without recalling witnesses or receiving new evidence. Losing party appealed on grounds that successor judge should have either ordered a new trial or at least recalled some witnesses, due to the passage of time and the importance of witness credibility in deciding the litigated issues.

HELD: District court did not abuse its discretion in refusing to order a new trial and in refusing to recall witnesses. Passage of time works both ways; on recall, witnesses' memories may have eroded as well. After reviewing the record, district court believed that decision rested not on witness credibility but on application of law to relatively undisputed facts.

DAMAGES

Kalell v. Petersen, 498 N.W.2d 413 (Iowa App. 1993)

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Adequacy

Petersen was removing a limb from a tree in his back yard. He tied a rope onto the limb and fastened the other end of the rope to his truck. While Petersen pulled on the limb, Kalell entered the back yard unannounced and grabbed the rope. A portion of the limb broke loose from the tree and struck Kalell in the head. Kalell suffered a blood clot and brain surgery. He sued Petersen. The jury assessed 50% of the fault to each party, and fixed damages at

$60,000. Kalell challenged the adequacy of damages by post-verdict motion.

HELD: District court did not abuse its discretion in overruling Kalell's motion. Jury awarded more than $22,000 in excess of specials. Assertions on appeal that Kalell received $100,000 from non-parties (who were subrogated) before trial was outside record and cannot be considered on the issue of the adequacy of the damage award.

Thompson v. Allen, 503 N.W.2d 400 (Iowa 1993)

Adequacy

In personal injury case, jury assessed fault as follows:

Plaintiff	49%
Defendant	51%

Jury awarded past medicals and past lost wages but no damages for past loss of function or for past pain and suffering. In totalling the damages awarded, jury also made $10,000 error, in favor of plaintiff. The court discharged jury before error was discovered.

Plaintiff moved for a new trial. Defendants resisted and moved for entry of judgment with an additur of $5,000 for past pain and suffering and $5,000 for past lost function (the amounts requested by plaintiff's counsel in final argument), both figures then to be subjected to reduction for plaintiff's comparative fault.

HELD: District court properly rejected defendant's request for additur, as this would have turned court into a fact finder. District court properly granted new trial, but should have limited trial to damages only. The record does not disclose any basis for concluding that errors made by jury in awarding damages affected the jury's findings as to fault.

Nassen v. National States Insurance Co., 494 N.W.2d 231 (Iowa 1992)

Bad Faith

Elderly single woman sued insurer who sold her a "nursing home" policy for breach of contract, bad faith, and fraud. She adduced substantial evidence that insurer engaged in "cash flow" underwriting and "post-claim underwriting," in which it charged an unreasonably low premium, conducted no significant underwriting, and then attempted to rescind the policies after receiving claims. Because insurer delayed responding to her claim and then eventually attempted to rescind her policy for defects in her application, she

had to pay her own nursing home expenses and had to liquidate assets to do so.

Jury found for plaintiff on all three counts and awarded damages of $43,800 for breach of contract, $40,000 for bad faith, $40,000 for fraud, and $500,000 for punitives. The jury decided that National Sales' conduct was not directed to specifically at Nassen, so Nassen received only 1/4 of the punitive damage award. District court also ordered a remittitur of the $40,000 fraud verdict, which plaintiff accepted. National States appealed and Nassen cross-appealed.

HELD: Jury's award of $40,000 for bad faith was not excessive. In addition to breach of contract damages, jury could award damages under bad faith for economic loss resulting from premature disposition of Nassen's assets and for emotional distress. District court was correct in concluding, however, that fraud verdict and bad faith verdict and the identical damage awards were duplicative. Although jury could award certain economic damages under either theory that were not available under breach of contract, the identity between the acts constituting bad faith and the acts constituting fraud rendered those verdicts completely duplicative. Rather than using remittitur, however, district court simply should have granted judgment n.o.v. on one of the two counts.

Nassen adduced substantial evidence to support jury's finding of malicious conduct for purposes of awarding punitive damages. "[O]nce the jury found that a bad-faith tort had been committed under the instructions that were given ..., the elements required for an award of punitive damages had been confirmed."

Peters v. Vander Kooi, 494 N.W.2d 708 (Iowa 1993)

Collateral Source

After reversing defense verdict in medical malpractice action due to instruction errors, court offered guidance for retrial on issue of collateral source benefits. Defendants offered evidence of various programs, services, facilities, and financial benefits that were available to plaintiff, who had given birth to brain-damaged baby. Defendants also offered evidence that Peters' employer provided medical insurance, with a maximum benefit of $150,000. Coverage was conditioned upon continued employment or assumption of premium responsibility after termination. Peters objected to this evidence. Court noted that district court should instruct "as to the contingencies involved" in the insurance and should require jury "to make specific findings concerning what collateral source amounts were in fact available to plaintiffs. The burden of proof ... should [be] on defendants."

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Pundzak, Inc. v. Cook, 500 N.W.2d 424 (Iowa 1993)

Contract

Cook and Webster worked in the advertising business as performers. Pundzak was an advertising agent who worked with Cook and Webster from time to time. Pundzak heard Cook and Webster informally playing the parts of two "old timers" named Willard and Rafert, and suggested that he could obtain advertising work for them as those characters. The parties subsequently entered into an exclusive agency agreement in which Pundzak, Inc., was to be the exclusive agent for Cook and Webster as "Willard and Rafert." Pundzak was to use its "best efforts" to promote the characters. The agreement was terminable at will by any party on a 60 days' notice. The agreement could be modified only by a subsequent writing. The agreement contained no term about compensation, but the parties agreed orally on a 75% (Cook and Webster) - 25% basis.

After several years of success, Cook and Webster became dissatisfied with Pundzak's efforts, largely because of an alleged conflict of interest. Cook and Webster terminated the agreement. Pundzak sued Cook and Webster for breach of contract, and Cook and Webster filed a separate lawsuit against Pundzak. Cook and Webster's action sought damages for breach of contract and abuse of process. The court consolidated the actions for trial.

The jury found that Pundzak breached his "best efforts" obligation during several years of the life of the agreement, and found that Cook and Webster would have realized an additional $15,000 a year during the last four years of the agreement, if Pundzak had performed as promised. The jury also found that Pundzak breached the agreement by paying Cook and Webster only 60% of the proceeds from one particular customer, resulting in an additional item of damage in the amount of $37,000. The jury also found that Pundzak and Allied had used Willard and Rafert's material without Cook and Webster's consent and awarded them $7,050, the amount they would have received if Allied had paid for such use.

HELD: The award of $37,000 for the Allied work paid at only 60% was duplicative of the damages awarded for Pundzak's breach of his obligation of best efforts. Although the amounts were recovered under different theories "the $60,000 verdict" still included a second recovery for the same loss. Cook and Webster can only recover the $60,000 verdict.

The $7,000 award for misappropriation of Willard and Rafert material by Allied and Pundzak was duplicative of Allied's settlement with Cook and Webster for the same amount. The traditional pro tanto credit rule from common-law tort doctrine is applicable to this aspect of Cook and Webster's breach-of-contract claim against Pundzak.

Frontier Properties Corp. v. Swanberg, 488 N.W.2d 146 (Iowa 1992)

Contract

Frontier contracted with the Swanbergs to construct a basic "shell" of a house. A written and signed proposal defined the work to be done and established a price of $166,802 for work and material. The proposal also included Frontier's "rough estimate" of $61,400 to finish the construction.

As Frontier began to build the house the Swanbergs began requesting substantial additions to the house. Frontier and Swanberg disagreed as to whether these additions were included in Frontier's general interior finish estimate of $61,400. Seven months into the project the Swanbergs began paying some subcontractors directly and disputing some of their bills. The following month the Swanbergs quit making any payments on the contract.

Frontier sued Swanberg for breach of express and implied contracts. The trial court found that the additional work requested by the Swanbergs was not included in $61,400 general finish estimate and awarded Frontier $69,210.86 on its theories of express and implied contracts.

HELD: Frontier was entitled to recover damages for breach of express and implied contracts because "the express contract covered the exterior and interior work originally contemplated in the written proposal, and the implied contract covered the additions not included in the $61,400 estimate."

Pundzak, Inc. v. Cook, 500 N.W.2d 424 (Iowa 1993)

Credit

Cook and Webster worked in the advertising business as performers. Pundzak was an advertising agent who worked with Cook and Webster from time to time. Pundzak heard Cook and Webster informally playing the parts of two "old timers" named Willard and Rafert, and suggested that he could obtain advertising work for them as those characters. The parties subsequently entered into an exclusive agency agreement in which Pundzak, Inc., was to be the exclusive agent for Cook and Webster as "Willard and Rafert." Pundzak was to use its "best efforts" to promote the characters.

After several years of success, Cook and Webster became dissatisfied with Pundzak's efforts, largely because of an alleged conflict of interest. Cook and Webster terminated the agreement. Pundzak sued Cook and Webster for breach of contract, and Cook and Webster filed a separate lawsuit against Pundzak. Cook and Webster's action sought damages for breach of contract and abuse of process. The court consolidated the actions for trial.

The jury found that Pundzak and Allied had used Willard and Rafert's material without Cook and Webster's consent and awarded them $7,050, the amount they would have received if Allied had paid for such use.

HELD: The $7,000 award for misappropriation of Willard and Rafert material by Allied and Pundzak was duplicative of Allied's settlement with Cook and Webster for the same amount. The traditional pro tanto rule from common-law tort doctrine is applicable to this aspect of Cook and Webster's breach-of-contract claim against Pundzak.

Nassen v. National States Insurance Co., 494 N.W.2d 231 (Iowa 1992)

Emotional Distress

Elderly single woman sued insurer who sold her a "nursing home" policy for breach of contract, bad faith, and fraud. She adduced substantial evidence that insurer engaged in "cash flow" underwriting and "post-claim underwriting," in which it charged an unreasonably low premium, conducted no significant underwriting, and then attempted to rescind the policies after receiving claims. Because insurer delayed responding to her claim and then eventually attempted to rescind her policy for defects in her application, she had to pay her own nursing home expenses and had to liquidate assets to do so.

Jury found for plaintiff on all three counts and awarded damages of $43,800 for breach of contract, $40,000 for bad faith, $40,000 for fraud, and $500,000 for punitives.

HELD: Jury's award of $40,000 for bad faith was not excessive. In addition to breach of contract damages, jury could award damages under bad faith for economic loss resulting from premature disposition of Nassen's assets and for emotional distress.

> It is, of course, difficult to arrive at a sum of money that fairly compensates for the trauma visited upon elderly persons by having their worldly possessions dissipated by extended care costs that they believe should be covered by insurance. We are convinced, however, that this is a situation capable of producing severe mental suffering.

Mossman v. Amana Society, 494 N.W.2d 676 (Iowa 1993)

Evidentiary Support

In personal injury action, Mossman claimed that her injury caused a life-long disability. Defendants' independent medical

examiner opined that physical therapy and surgery, all costing $3,000, would resolve her problem. Jury awarded $8,500 for future medical expense. HELD: There was substantial evidence, albeit largely from defendants, to support jury's finding that plaintiff would incur medical expense in the future.

Bloomquist v. Wapello County, 500 N.W.2d (Iowa 1993)

Evidentiary Support

Four state employees and one county employee moved into a 100-year-old building purchased and remodeled by the County. The employees encountered fleas, noxious odors, and poor ventilation. The State hired a pest control company, who repeatedly sprayed Dursban throughout the building. Inspectors discovered sewer problems in the building and either malfunctioning or disconnected ventilation equipment. The employees' physicians testified that the employees suffered from a variety of health problems, all caused by the conditions present in the building. Physicians also testified that health problems were permanent and that the employees would not be able to care for themselves in their daily living in the future.

HELD: Substantial evidence supported verdicts that included damages for future nursing expenses.

Cockerton v. Mercy Hospital Medical Center, 490 N.W.2d 856 (Iowa App. 1992)

Excessiveness

Surgical patient injured nose after apparently falling during x-ray procedure. Jury awarded damages of $370 for lost wages (even though she received paid medical leave), $3,000 for future pain (because she continued to have difficulty breathing and suffered occasional pain), $10,000 for future loss of body function, $15,000 for past pain and suffering, and $20,000 for past loss of function. Injury required two additional and separate surgical procedures.

HELD: Damages were not excessive.

Gavlock v. Coleman, 493 N.W.2d 94 (Iowa App. 1992)

Excessiveness

20-year-old married woman suffered closed-head injury, fracture to her right foot and nose, and facial and knee scars as a result of a collision with an intoxicated driver. She adduced

evidence that she suffered from arthritis as a result of her injuries, and that she continued to experience pain. She adduced evidence that she would have to undergo surgery in the future. She adduced evidence that her personality had changed, and that her future earning capacity had been impaired. Jury awarded her just under $600,000, including $150,000 for present value of future loss of function of her mind and $350,000 for present value of future physical and mental pain and suffering. HELD: Damages are not excessive.

Ort v. Klinger, 496 N.W.2d 265 (Iowa App. 1992)

Excessiveness

In pure liability case, jury awarded $175,000. Treating chiropractors rated plaintiff at 30% and 40% whole body. A neurologist hired by defendants to conduct an independent medical examination rated plaintiff at 15%. HELD: Damages were not excessive. Defendants were not entitled to either to a new trial or a remittitur.

Guzman v. Des Moines Hotel Partners, 489 N.W.2d 7 (Iowa 1992)

Interest

District court did err in instructing that jury could award lost earnings and interest on those earnings. Such an award does not permit interest on interest.

Beeman v. Manville Corp., 496 N.W.2d 247 (Iowa 1993)

Lost Life Expectancy

Beeman sued Johns-Manville (JM) and Keene for injuries caused by exposure throughout his life-long employment as a plumber and pipe fitter to asbestos products manufactured by JM and Keene. Beeman sued on theories of strict liability, negligence, fraud, conspiracy, and breach of warranty. He sought to recover compensatory damages for past and future medical expense, past and future pain and suffering (including fear of cancer), and lost opportunity to live out his natural life expectancy. He also sought punitive damages.

Beeman adduced evidence that he had been exposed to asbestos products throughout his adult life by virtue of his employment. He adduced evidence that he suffers from pleural plaques (a thickening of the lining of the lung) and asbestosis (scarring of the lung), both of which are caused by exposure to airborne asbestos fibers.

He also adduced evidence that asbestosis increases the risk of lung cancer and mesothelioma (asbestos-related lung cancer). Beeman did not have cancer and did not adduce evidence that he would probably contract cancer in the future. The only work he had ever missed was to attend portions of his own trial to testify. He did not testify that he fears contracting cancer or that he had even been advised by a physician of the risks of cancer. He adduced evidence only that, more likely than not, asbestos-related disease would shorten his life by some indeterminable amount.

Jury found JM 90% at fault and Keene 10% at fault. Jury determined Beeman's damages to be $1.17 million. Jury awarded punitive damages against Keene of $5 million. On defendants' post-trial motions, district court sustained Keene's motion for judgment n.o.v. on punitive damages, reduced Beeman's compensatory damages by a portion of the future medical expenses, and eliminated the award attributable to Beeman's claim for lost opportunity to live out his full life expectancy. JM and Keene appealed and Beeman cross-appealed from the resulting judgments in favor of Beeman against Manville for $455,220 and against Keene for $50,580.

HELD: Beeman cannot recover for lost opportunity to live out his full life expectancy. This so-called "English rule" is recognized only in South Carolina. The majority approach in the U.S. is to compute future loss of income without reducing life expectancy due to the injury or condition. Contrary to the majority position, Iowa calculates loss of earning capacity for the reduced life expectancy. Iowa does not permit recovery, however, for the lost opportunity to live out one's full life expectancy. Beeman did not seek recovery for diminished future earning capacity. The lost chance of survival cases are inapposite, because they compensate not for the shortening of one's life but for reduction in the opportunity to survive a pre-existing injury or disease.

Ort v. Klinger, 496 N.W.2d 265 (Iowa App. 1992)

Mitigation

In personal injury action, defendants objected to mitigation instruction that required plaintiff to "use ordinary care in following the orders of her treating chiropractors and physicians," because the instruction did not permit jury to consider the recommendations of independent medical examiners in evaluating whether or not plaintiff took all reasonable steps to "effect a speedy cure." HELD: Iowa law does not require plaintiff to do what independent medical examiners recommend in order to satisfy her duty of mitigation.

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Reed v. Chrysler Corp., 494 N.W.2d 224 (Iowa 1992)

Punitives

Reed was injured while a passenger in a jeep CJ-7, which was involved in a one-vehicle accident. The driver tested at .185 and Reed tested at .168. None of the four passengers were wearing seat belts. The accident occurred when the driver lost control in a curve. The jeep hit a concrete bridge abutment, rolled over, and slid upside down for 300 feet. The jeep's fiberglass top disintegrated, and Reed's arm became pinched between the highway surface and the roll bar.

Reed sued Chrysler on a theory of crash worthiness as set forth in Wernimont v. International Harvestor Corp., 309 N.W.2d 137 (Iowa App. 1991). At close of Reed's case in chief, district court sustained Chrysler's motion for directed verdict. Supreme court decided Hillrichs v. Avco Corp., 478 N.W.2d 70 (Iowa 1991), after Reed's trial.

HELD: Reed adduced substantial evidence on all three elements of crash worthiness claim.

Chrysler did not argue that there was insufficient evidence on the threshold issue of design defect. Reed also adduced evidence that CJ-7 was the only vehicle in America with a removable fiberglass top, that over jeep models came with removal steel tops, and that the industry and general public regarded steel to be safer than plastic for use as the roof of a vehicle. Such evidence made expert testimony on the first element of the Wernimont test unnecessary.

District court should not have sustained Chrysler's motion for directed verdict. On retrial, several issues are likely to recur.

Absent additional evidence, district court should not submit Reed's claim for punitive damages. "Chrysler's conduct was not shown to be willful or wanton."

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Nassen v. National States Insurance Co., 494 N.W.2d 231 (Iowa 1992)

Punitives

Elderly single woman sued insurer who sold her a "nursing home" policy for breach of contract, bad faith, and fraud. She adduced substantial evidence that insurer engaged in "cash flow" underwriting and "post-claim underwriting," in which it charged an unreasonably low premium, conducted no significant underwriting, and then attempted to rescind the policies after receiving claims. Because insurer delayed responding to her claim and then eventually attempted to rescind her policy for defects in her application, she

had to pay her own nursing home expenses and had to liquidate assets to do so.

Jury found for plaintiff on all three counts and awarded damages of $43,800 for breach of contract, $40,000 for bad faith, $40,000 for fraud, and $500,000 for punitives. The jury decided that National Sales' conduct was not directed to specifically at Nassen, so Nassen received only 1/4 of the punitive damage award.

HELD: Nassen adduced substantial evidence to support jury's finding of malicious conduct for purposes of awarding punitive damages. "[O]nce the jury found that a bad-faith tort had been committed under the instructions that were given ..., the elements required for an award of punitive damages had been confirmed." Punitive verdict was not excessive, even though it represented 45% of National States' annual net operating income. Nassen adduced evidence that National States had engaged in "cash flow underwriting" and "post-claim underwriting" for a substantial period of time, and had paid out $5 million in dividends to company principals.

Consistent with Midwest Management Corp. v. Stephens, 353 N.W.2d 76 (Iowa 1984), interest on punitive damages runs from the date of judgment, not from the date the petition was filed.

Beeman v. Manville Corp., 496 N.W.2d 247 (Iowa 1993)

Punitives

Beeman sued Johns-Manville (JM) and Keene for injuries caused by exposure throughout his life-long employment as a plumber and pipe fitter to asbestos products manufactured by JM and Keene. Beeman sued on theories of strict liability, negligence, fraud, conspiracy, and breach of warranty. He sought to recover compensatory damages for past and future medical expense, past and future pain and suffering (including fear of cancer), and lost opportunity to live out his natural life expectancy. He also sought punitive damages.

Beeman adduced evidence that he had been exposed to asbestos products throughout his adult life by virtue of his employment. He adduced evidence that he suffers from pleural plaques (a thickening of the lining of the lung) and asbestosis (scarring of the lung), both of which are caused by exposure to airborne asbestos fibers. He also adduced evidence that asbestosis increases the risk of lung cancer and mesothelioma (asbestos-related lung cancer). Beeman did not have cancer and did not adduce evidence that he would probably contract cancer in the future. The only work he had ever missed was to attend portions of his own trial to testify. He did not testify that he fears contracting cancer or that he had even been advised by a physician of the risks of cancer. He adduced evidence

only that, more likely than not, asbestos-related disease would shorten his life by some indeterminable amount.

The only product manufactured by Keene that contained asbestos was a substance called Monoblock, which contained only 2% or less asbestos and was of a composition that was inconsistent with significant dust emissions. He was exposed to Monoblock for only two weeks in the late 50's and only one week in the early 60's. Beeman adduced evidence, however, that each exposure to a product that releases asbestos fibers has an accumulative effect on the body and increases both the possibility of disease and its severity.

Beeman adduced evidence that JM knew of asbestos hazards long before the Landmark Selikoff Study published in 1965, and acted to conceal its knowledge from the public. Beeman also adduced evidence about cancer and the increased risk of cancer from exposure to asbestos. Because the evidence about JM's knowledge could not be tied to Keene, Keene moved for bifurcation of trial. District court refused to bifurcate, but instructed jury that evidence relating to JM's knowledge prior to 1965 was admissible only as to Beeman's claims against JM and only on his claims against JM for conspiracy and fraud. After the close of all evidence, Beeman withdrew his claims against JM for conspiracy and fraud. Defendants objected to the cancer evidence, because Beeman did not have cancer and could not show that he probably would contract cancer. District court submitted the evidence about cancer with a limiting instruction that it was relevant only for purposes of establishing defendants' duty to warn and the reasonableness of Beeman's fear.

After Beeman dropped his claims of fraud and conspiracy against JM, district court submitted the case on strict liability and negligence. District court submitted Beeman's punitive damages claim against Keene only, and instructed the jury that a bankruptcy court order prevented Beeman from recovering punitive damages against JM. District court had earlier rejected Keene's request that punitive damages be bifurcated and reserved for a second trial, if necessary.

Jury found JM 90% at fault and Keene 10% at fault. Jury determined Beeman's damages to be $1.17 million. Jury awarded punitive damages against Keene of $5 million. On defendants' post-trial motions, district court sustained Keene's motion for judgment n.o.v. on punitive damages, reduced Beeman's compensatory damages by a portion of the future medical expenses, and eliminated the award attributable to Beeman's claim for lost opportunity to live out his full life expectancy. JM and Keene appealed and Beeman cross-appealed from the resulting judgments in favor of Beeman against Manville for $455,220 and against Keene for $50,580.

HELD: District court did not abuse its discretion in refusing Keene's requests to bifurcate the trial so as to exclude the early JM evidence and the punitive damage evidence from the jury's

consideration of Keene's liability. District court likewise did not abuse its discretion in permitting Beeman to withdraw his claims of conspiracy and fraud at the close of the evidence.

District court did not abuse its discretion in admitting evidence of cancer and the increased risk of cancer from exposure to asbestos, because this evidence tended to establish defendants' duty to warn and the reasonableness of Beeman's fear of cancer. Notwithstanding massive amount of such evidence, district court's use of limiting instructions on the purpose of such evidence eliminates the possibility of unfair prejudice. "[W]e believe juries understand limiting instructions. To believe otherwise would be asking appellate courts to speculate that a jury disregarded evidence and clear admonitions."

Beeman did not adduce substantial evidence to support the assessment of punitive damages against Keene. Although evidence supported a finding that sufficient information was available to impose a duty to warn before 1965, there was no basis for concluding that Beeman acted before 1965 with a willful and wanton disregard for the safety of Beeman or persons in a similar position. Beeman's contract with Keene products was pre-1965.

COMMENT: Two justices dissented from the majority's affirmance of the judgment against Keene. After recounting the tenuous connection between the Keene product and Beeman, the minimal evidence relating to his fear, and the minimal impact his condition has had on his ability to work, the dissenters concluded that Keene did not receive a fair trial.

> How did this spectacular verdict occur? The answer is that the lawsuit was tried as a "dread specter of cancer" case. Evidence of asbestos being linked to cancer and [JM's] knowledge of its hazard to health was poured into the case by plaintiff. Although not relevant to prove Keene had any knowledge of asbestos dangers so as to trigger a duty to warn plaintiff at the time of plaintiff's exposure, Keene was blanketed by this snowstorm of evidence. Guilt by association became the prevailing wind.
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> Anticipating this, Keene ... moved for a separate trial and a motion in limine regarding punitive damages. The trial court in an effort to achieve judicial economy denied the motions. What transpired thereafter showed the jury's inability to separate the evidence directed at each defendant and to fairly try the case.
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> A week and a half of prejudicial cancer evidence was inserted by plaintiff using claims of conspiracy and fraud by JM as a vehicle. Plaintiff then withdrew those claims, leaving it to the court to instruct that all of this evidence was to be considered only against JM and solely on the issue of failure to warn. ... The jury's response was a $5 million punitive award against Keene,

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having been instructed that a bankruptcy court order prevented it from awarding punitive damages against JM.

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The trial court and majority have tried to salvage a fair result from the contagion prevailing in this case. For Keene Corporation it cannot be done.

Seibert v. Noble, 499 N.W.2d 3 (Iowa 1993)

Punitive Damages

Debtor Seibert sued Noble, a farm implement dealer, and Brenton Bank for the wrongful sale of Seibert's equipment. Seibert alleged conversion, fraud, and violation of Article 9, and sought compensatory and punitive damages. Seibert had executed a note with Noble in 1984 that was later assigned to Brenton Bank. When Seibert was in danger of defaulting on this note in 1989, Noble and Seibert agreed that if Brenton Bank could not be persuaded to take a new note in payment of the old note, Noble would arrange the sale of the equipment and apply the proceeds to the debt to Brenton Bank. Seibert and Noble disputed whether Noble was required to consult Seibert about the sales price for each implement. Noble applied the proceeds of each sale to pay off the remainder of the debt, and retained the expenses he incurred.

District court instructed jury on conversion and failure to consent to the sale. District court did not submit punitive damages, because plaintiff testified "that he did not believe Noble was motivated by ill-will or lied to him." Jury found a wrongful taking but no breach of any agreement, and awarded no damages. HELD: Plaintiff did not adduce substantial evidence of conduct entitling him to punitive damages.

Brown v. Nevins, 499 N.W.2d 736 (Iowa App. 1993)

Punitive Damages

Purchaser defaulted on real estate contract by failing to pay taxes. On December 6, 1991, vendor served notice of forfeiture, requiring purchaser to cure default and pay reasonable cost of service within thirty days of service. Purchaser paid taxes within allotted time, but not cost of service. Purchaser tendered and vendor accepted the next monthly contract payment on January 3, 1992. On January 6, Vendor demanded $40 cost of service be paid within ten days. On January 22, vendor filed an affidavit in support of forfeiture stating purchaser had failed to pay $40. Purchaser paid the $40 on January 31. Purchaser sued to set aside forfeiture and to recover damages for slander of title. District court found the forfeiture had been timely cured because vendor had not notified purchaser of the amount of the service until January

6. District court found that vendor had slandered purchaser's title, and awarded purchaser $1,200 in actual damages and $600 in punitive damages.

HELD: For slander of title, plaintiff must prove actual or legal malice or want of good faith and probable cause. Plaintiff must meet even higher standard of culpability for award of punitive damages; i.e, wrongful conduct accompanied by willful or reckless disregard of rights of another. Vendor's conduct did not meet this higher standard. Punitive damages were inappropriate.

COMMENT: Court also reversed the slander of title verdict for lack of special damages. This holding presumably made the punitive verdict moot.

Hill v. State, 493 N.W.2d 803 (Iowa 1992)

Subrogation

In State v. Brooks, 412 N.W.2d 613 (Iowa 1987), court held that section 249A.6 did not render State subrogated to claims made by recipient of medical assistance benefits, except to the extent that the claim seeks to recover damages for which the claimant received benefits. In Brooks, the parents sued only for the minor's injury and not for their own medical expenses. The court held that the State could not cover by way of subrogation from the resulting jury verdict, because it did not represent an attempt by the parents, who had received medical assistance benefits, to recover those expenses.

Legislature amended 249A.6 to provide that State is subrogated "to all monetary claims which the recipient may have against third parties." HELD: Amendment overrules the limitations on State's subrogation rights as announced in Brooks. State is subrogated to recipient's claim, regardless of what damage items recipient seeks.

EVIDENCE

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State v. Roby, 495 N.W.2d 773 (Iowa App. 1992)

Character

Prosecution for attempted murder, district court permitted State to admit evidence of defendant's 13-year-old perjury conviction. HELD: District court did not abuse its discretion in concluding that the probative value of a conviction older than 10

years substantially outweighed its prejudicial effect. Perjury conviction was highly probative because defendant relied primarily on his own testimony that he did not intend to kill. Because the previous conviction was for a crime unrelated to murder, the prejudicial effect was low.

Wheeler v. Dental East, P.C., 494 N.W.2d 248 (Iowa 1992)

Hearsay

In dental malpractice case, plaintiff's expert testified that he discussed his opinions with several other professionals. He did not disclose their responses or opinions. HELD: Expert's testimony did not contain hearsay. District court did not abuse its discretion in allowing expert to testify about his consultation.

COMMENT: Why is it relevant?

Fulmer v. Tague, 500 N.W.2d 432 (Iowa 1993)

Hearsay

Jim Tague, not of legal age, posted a "pour your own" beer party in a ravine behind a house vacated by his parents after a mortgage foreclosure. Jim's parents knew nothing about the party in advance. Jim's mother gave him a check payable to a local gas station, which Jim used to pay for beer and a keg deposit. Fulmer and McLaughlin left the party with McLaughlin drunk and driving. Fulmer was killed in a one-vehicle accident.

Fulmer's estate sued Tague, Tague's mother, and McLaughlin. District court sustained Tague's mother's motion for summary judgment.

HELD: Plaintiffs adduced no substantial evidence that Tague's mother had any knowledge of party or of underage drinking. Gas station attendant's testimony that Tague said his parents planned to chaperon the party was relevant only to impeach Tague's denial of the statement. As evidence tending to prove Tague's mother's knowledge of the party, it was hearsay. District court was correct in sustaining her motion for summary judgment.

Shannon v. Hearity, 487 N.W.2d 690 (Iowa App. 1992)

Opinion

Dairy farmers sued Hearity for failing to file a Plan c Reorganization in their Chapter 11 bankruptcy during the time that

as debtors, they had the exclusive right to do so. Plaintiffs contended that as a result, their bankruptcy was converted to a Chapter 7 and they lost their opportunity to reorganize. District court granted Hearity's motion for directed verdict because there was no evidence that plaintiffs were damaged by the alleged negligence.

HELD: Directed verdict was proper. Plaintiffs failed to show the difference between the result they would have realized under a successful Chapter 11 proceeding and the result under the Chapter 7 conversion. In addition, plaintiffs did not present substantial evidence of a lost opportunity. The financial analysis provided by plaintiffs' expert was unreliable, speculative, and did not constitute substantial evidence. Plaintiffs did not provide a proper foundation for the figures and assumptions the expert used, and the expert did not know and/or consider critical information.

Nassen v. National States Insurance Co., 494 N.W.2d 231 (Iowa 1992)

Opinion

85-year-old single woman purchased a nursing home insurance policy from National States through an independent agent who filled out the application form for her. She told the agent that she had been hospitalized for three days with a bowel obstruction about six months earlier. National States issued the policy. Nassen's hospital records contained an admitting physician's note about the possibility of confusion and hypothyroidism. Her regular physician did not confirm those diagnoses, but did find "a low thyroid value" and prescribed small dosage of medication. National States did not seek out these medical records.

Two months after National States issued its policy to Nassen, she was hospitalized with uncontrolled diabetes, mild hypothyroidism, and mild dementia. She transferred from the hospital to a nursing home. Her friend and attorney-in-fact submitted a claim form on July 6. She called National States on several occasions in August and September, and received no response. On October 3, National States sent her a request for another claim form. She returned the form with a letter on October 10. On October 21, National States sent another letter, again requesting another signed claim form. Meanwhile, Nassen's friend was liquidating Nassen's assets to pay for her nursing home bills. On November 5, her friend sent a third signed claim form. Three days later, National States requested yet another claim form. Her friend refused and asked if she were being given "the run around." In January, in response to the friend's telephone call, National States said it was waiting for a doctor's report. National States received the doctor's report on February 7. Nassen's friend then contacted counsel, who wrote to National States in March. On March 15, National States said it was still waiting for the physician's report, which they in fact had received on February 7. On April 4,

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National States finally reported to counsel that Nassen's application "was inaccurate and incomplete." She had failed to disclose "chronic confusion and hypothyroidism." Counsel wrote to National States to advise that the physician had already reported to National States that Nassen did not have chronic confusion or hypothyroidism before her application. National States responded by returning Nassen's premium and by rescinding the policy, retroactive to the date of issue.

At trial, Nassen adduced testimony from expert witness Marshall Revas, who had a Ph.D. in insurance risk management, had worked in underwriting for 17 years, and had taught insurance and performed research on fraudulent underwriting practices since then. Revas opined that National States engaged in "cash flow underwriting" and "post-claim underwriting," in which it charged an unreasonably low premium, conducted no significant underwriting, and then attempted to rescind policies after receiving claims.

HELD: Revas was qualified. His opinions did not run afoul of rule of evidence 406, relating to habit or routine practice. "That rule relates to evidence of routine practice for purposes of permitting a fact-finder to conclude that conduct in a particular instance was in conformity with that practice." Nassen offered evidence of how National States conducted underwriting in order to establish motive and intent. Fact that companies whose premiums Revas used for comparison purposes offered larger benefits went to the weight of his testimony, not its admissibility.

Wheeler v. Dental East, P.C., 494 N.W.2d 248 (Iowa 1992)

Opinion

Patient sued dentist for malpractice arising out of tooth extractions. Patient adduced expert testimony from Dr. Huber, who had been a practicing dentist and was a facility member at the dental school. HELD: Although Dr. Huber is not an oral surgeon or a periodontist, district court was well within its discretion in concluding that he was qualified to testify as an expert on extractions.

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Ort v. Klinger, 496 N.W.2d 265 (Iowa App. 1992)

Opinion

In soft tissue case, defendants offered opinion testimony by neurologist to the effect that chiropractic adjustments can aggravate chronic cervical or lumbosacral strain. Because neurologist did not know the type of chiropractic treatment the plaintiff received, and because he opined that the effect of such treatments depended on the type of treatment given, district court

did not permit him to opine as to the effects of plaintiff's chiropractic treatments. HELD: No abuse of discretion in excluding specific opinion of the effect of actual treatments given to plaintiff by chiropractor.

Iowa-Illinois Gas & Electric Co. v. Black & Veatch, 497 N.W.2d 821 (Iowa 1993)

Opinion

B & V contracted with I-Ill to construct a new electric generating unit at a field station. B & V was to provide all engineering and project management services as well as plans and specifications for all structural, mechanical, and electrical work. B & V "agreed to perform the services in accordance with the highest standards in the engineering profession." B & V designed the substation to include a motor-operated disconnect switch (MOD) that could be operated electronically from the control room and manually at the substation. B & V provided circuit breakers that had to be open when the MOD was closed, in order to prevent "back-energization" into the main plant. B & V provided I-Ill with operating instructions, which required that manual control of MOD be used "only for maintenance use with adjacent breakers open." B & V's instructions for manual closure of the MOD also provided: "Be sure that the adjacent breakers are open before closing [the MOD]."

An I-Ill shift supervisor went to the substation to close the MOD switch manually after completion of certain repairs. He assumed that the circuit breakers were open, and directed an apprentice to close the MOD. Back-energization occurred and caused $3 million worth of damage to the generator. I-Ill and its property insurer sued B & V for breach of contract. B & V contended that the cause of the accident was employee error, caused by I-Ill's inadequate training of employees. Jury returned verdict for B & V.

HELD: B & V's expert witness was qualified to opine about engineering standards for designing protection against back-energization problems. Expert Harbour was an officer and managerial employee of a large electrical utility in Illinois, had over 30 years of experience in utility work, had been a maintenance supervisor, a system planning engineer, and an engineering supervisor with responsibility for construction and design of substations and power plants. He had been involved in designing back-energization protection systems at other plants.

R

Stumpf v. Reiss, 502 N.W.2d 620 (Iowa App. 1993)

Opinion

Police officer concluded after listing his qualifications with respect to accident investigation that "he did not consider himself an expert." HELD: District court did not abuse its discretion in permitting officer to offer expert opinions. Officer was not qualified to conclude whether or not he was an expert.

Lund v. McEnerney, 495 N.W.2d 730 (Iowa 1993)

Relevance

Physician injured patient's ureter during an abdominal hysterectomy. Patient sued. Physician testified that he had performed about 700 surgical procedures in and around the ureter and the bladder, 400 of which were abdominal hysterectomies, and he had never injured a ureter either before or after plaintiff's surgery. Patient sought to prove that on two subsequent occasions, physician had injured bladders during vaginal hysterectomies. HELD: District court did not abuse its discretion in excluding the evidence for lack of similarity and for lack of relevance, given the incidents' occurrence after patient's surgery.

Beeman v. Manville Corp., 496 N.W.2d 247 (Iowa 1993)

Relevance

Beeman sued Johns-Manville (JM) and Keene for injuries caused by exposure throughout his life-long employment as a plumber and pipe fitter to asbestos products manufactured by JM and Keene. Beeman sued on theories of strict liability, negligence, fraud, conspiracy, and breach of warranty. He sought to recover compensatory damages for past and future medical expense, past and future pain and suffering (including fear of cancer), and lost opportunity to live out his natural life expectancy. He also sought punitive damages.

Beeman adduced evidence that he had been exposed to asbestos products throughout his adult life by virtue of his employment. He adduced evidence that he suffers from pleural plaques (a thickening of the lining of the lung) and asbestosis (scarring of the lung), both of which are caused by exposure to airborne asbestos fibers. He also adduced evidence that asbestosis increases the risk of lung cancer and mesothelioma (asbestos-related lung cancer). Beeman did not have cancer and did not adduce evidence that he would probably contract cancer in the future. He did not testify that he fears contracting cancer or that he had even been advised by a physician of the risks of cancer.

Beeman adduced evidence about cancer and the increased risk of cancer from exposure to asbestos. After the close of all evidence, Beeman withdrew his claims against JM for conspiracy and fraud. Defendants objected to the cancer evidence, because Beeman did not have cancer and could not show that he probably would contract cancer. District court submitted the evidence about cancer with a limiting instruction that it was relevant only for purposes of establishing defendants' duty to warn and the reasonableness of Beeman's fear.

HELD: District court did not abuse its discretion in admitting evidence of cancer and the increased risk of cancer from exposure to asbestos, because this evidence tended to establish defendants' duty to warn and the reasonableness of Beeman's fear of cancer. Notwithstanding massive amount of such evidence, district court's use of limiting instructions on the purpose of such evidence eliminates the possibility of unfair prejudice. "[W]e believe juries understand limiting instructions. To believe otherwise would be asking appellate courts to speculate that a jury disregarded evidence and clear admonitions."

COMMENT: Two justices dissented from the majority's affirmance of the judgment against Keene. After recounting the tenuous connection between the Keene product and Beeman, the minimal evidence relating to his fear, and the minimal impact his condition has had on his ability to work, the dissenters concluded that Keene did not receive a fair trial.

> How did this spectacular verdict occur? The answer is that the lawsuit was tried as a "dread specter of cancer" case. Evidence of asbestos being linked to cancer and [JM's] knowledge of its hazard to health was poured into the case by plaintiff. Although not relevant to prove Keene had any knowledge of asbestos dangers so as to trigger a duty to warn plaintiff at the time of plaintiff's exposure, Keene was blanketed by this snowstorm of evidence. Guilt by association became the prevailing wind.
>
> ...
>
> A week and a half of prejudicial cancer evidence was inserted by plaintiff using claims of conspiracy and fraud by JM as a vehicle. Plaintiff then withdrew those claims, leaving it to the court to instruct that all of this evidence was to be considered only against JM and solely on the issue of failure to warn. ... The jury's response was a $5 million punitive award against Keene, having been instructed that a bankruptcy court order prevented it from awarding punitive damages against JM.
>
> ...
>
> The trial court and majority have tried to salvage a fair result from the contagion prevailing in this case. For Keene Corporation it cannot be done.

R

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HELD: Substantial evidence supported B & V's contention that damage resulted from I-Ill's inadequate training of employees. Whether or not B & V's design and instructions complied with the appropriate engineering standards, and whether or not the accident resulted from B & V's work or from I-Ill employee conduct was for the jury to decide. Evidence relating to the supervisor's failure to comply with B & V's instructions was relevant. I-Ill's report to commerce commission, which attributes accident to supervisor's negligence and does not implicate B & V, was an admission. B & V was entitled to impeach I-Ill field station superintendent with employee petition protesting termination of the shift supervisor, when the station superintendent testified that I-Ill had a strong training program and that no one had ever told him that it was inadequate. B & V also was entitled to adduce evidence of conversations between insurer and I-Ill in connection with I-Ill's response to commerce commission's inquiry.

Kalell v. Petersen, 498 N.W.2d 413 (Iowa App. 1993)

Relevance

In personal injury action, district court did not abuse its discretion in permitting defendant to adduce evidence of the plaintiff's tax returns, the plaintiff's tardiness in filing returns, and plaintiff's expenditures post-accident on items other than medical bills. The plaintiff sought to recover lost income and claimed he was unable to participate in social events or enjoy life after the accident.

Reed v. Chrysler Corp., 494 N.W.2d 224 (Iowa 1992)

Seat Belt

Reed was injured while a passenger in a jeep CJ-7, which was involved in a one-vehicle accident. The driver tested at .185 and Reed tested at .168. None of the four passengers were wearing seat belts. The accident occurred when the driver lost control in a curve. The jeep hit a concrete bridge abutment, rolled over, and slid upside down for 300 feet. The jeep's fiberglass top disintegrated, and Reed's arm became pinched between the highway surface and the roll bar.

Reed sued Chrysler on a theory of crash worthiness as set forth in Wernimont v. International Harvestor Corp., 309 N.W.2d 137 (Iowa App. 1991).

At close of Reed's case in chief, district court sustained Chrysler's motion for directed verdict. Supreme court decided Hillrichs v. Avco Corp., 478 N.W.2d 70 (Iowa 1991), after Reed's trial.

HELD: Reed adduced substantial evidence on all three elements of crash worthiness claim. District court should not have sustained Chrysler's motion for directed verdict. On retrial, several issues are likely to recur.

District court should have sustained Reed's motion in limine, by which he sought to exclude evidence of his failure to wear a seat belt. Because accident occurred before July 1, 1986, section 321.445(4)(a) renders non-use of a seat belt inadmissible.

R

COMMENT: Court did not discuss whether or not section 321.445(4)(a) was intended to apply to all kinds of civil damage actions, including particularly but not exclusively, crash worthiness cases. In adjudicating the elements of a crash worthiness claim (at least one with facts like these), how can the trier-of-fact ignore the seat belt factor? One of the reasons automobile manufacturers decided to put seat belts in vehicles was to protect the occupants from the vehicle itself.

In re Property Seized, 501 N.W.2d 482 (Iowa 1993)

Stipulation

State seized gaming machines and personal and real property allegedly acquired through the proceeds of gaming machines, and then applied for forfeiture of the property. At hearing, owner's counsel entered into stipulation that owner "will consent to a forfeiture of all of the property ... except certain items." Six days later, at the resumption of the hearing, owner attempted to repudiate the stipulation. HELD: Party may stipulate to an issue as well as to a fact, even if stipulating to an issue is tantamount to consenting to a particular decree. To the extent that Van Donselaar v. Van Donselaar, 249 Iowa 504, 87 N.W.2d 311 (1958), suggests that consent to a judgment may be withdrawn as a matter of right at any time before entry of judgment, it is overruled.

GOVERNMENT

Clark v. Miller, 503 N.W.2d 422 (Iowa 1993)

Ch. 613A

Clark sued governmental subdivision within two years after giving sufficient and timely notice of claim pursuant to section 613A.5, but not within two years of the date of injury. HELD: Decision that section 613.A.5's six-month statute of limitations was unconstitutional did not also invalidate the notice provision that permitted a claimant to commence his action within two years after an adequate 60-day notice to the governmental subdivision. Clark's action was timely filed.

Hawkeye Bank & Trust Co. v. Spencer, 487 N.W.2d 94 (Iowa App. 1992)

R

Immunity

A former boyfriend of an Urbandale woman threatened to kill her. The following day an Urbandale police officer interviewed the woman at her home and concluded that the boyfriend would carry out his threat. The officer advised the woman that the police would put a "special" watch on her and her home, would attempt to contact her former boyfriend, and would watch for his presence or his vehicles in her neighborhood. An officer attempted unsuccessfully to find the former boyfriend and decided to take no further action until after the weekend. On Sunday the former boyfriend entered the woman's home and killed her and her male friend. The estates

of the murder victims sued the City of Urbandale and its police department for negligence.

HELD: The promise to do more than was routinely required in investigating did not warrant an exception to the immunity from liability for negligence in the course of investigating criminal activity, which immunity was reaffirmed in Hildebrand v. Cox, 369 N.W.2d 411, 415 (Iowa 1985). The fact that the police department promised to provide a "special" watch did not create a special relationship which would form the basis for an exception to this immunity. Likewise, a citizen's justifiable reliance on the promise of a special watch would not create an exception to the immunity.

Moyer v. City of Des Moines, _____ N.W.2d _____ (Iowa, August 25, 1993)

Immunity

Moyer held an option to develop condominiums on properly zoned property. Des Moines refused to permit the development for failure to satisfy density requirements and for failure to comply with a setback requirement. Moyer commenced an action to seek a writ of mandamus and to recover damages. District court sustained defendant's motion to dismiss Moyer's claim for damages, on grounds that the municipality's failure to perform a discretionary function rendered defendant immune from suit under section 613A.4(3). District court sustained defendant's motion for summary judgment against the mandamus request on the same grounds.

HELD: Moyer's petition, taken as true, states a claim for damages on which relief may be granted. Defendant's motion to dismiss should have been overruled. Immunity relates not to subject matter jurisdiction but to the substantive issue of liability. Defendant's motion to dismiss must be tested by rule 104(b) instead of (a), and defendant cannot challenge the truth or accuracy of the petition being assailed by a rule 104(b) motion.

Hill v. State, 493 N.W.2d 803 (Iowa 1992)

R

Subrogation

In State v. Brooks, 412 N.W.2d 613 (Iowa 1987), court held that section 249A.6 did not render State subrogated to claims made by recipient of medical assistance benefits, except to the extent that the claim seeks to recover damages for which the claimant received benefits. In Brooks, the parents sued only for the minor's injury and not for their own medical expenses. The court held that the State could not cover by way of subrogation from the resulting jury verdict, because it did not represent an attempt by

the parents, who had received medical assistance benefits, to recover those expenses.

Elsewhere in chapter 249A, the legislature also provided a procedure for satisfying State's subrogation interest when it does apply:

(1) Payment of attorney fees and expenses,
(2) Payment of 1/3 of remainder to recipient,
(3) Payment of State's claim, and
(4) Payment of any balance to recipient.

Legislature amended 249A.6 to provide that State is subrogated "to all monetary claims which the recipient may have against third parties." HELD: Amendment overrules the limitations on State's subrogation rights as announced in Brooks. Amendment has no impact, however, on statutory procedure for payment of attorney fees from recovery before satisfying State's subrogation interest.

INDEMNITY

Britt-Tech Corporation v. American Magnetics Corp., 487 N.W.2d 671 (Iowa 1992)

Britt-Tech, a power washer manufacturer, sued American Magnetics Corp., a component parts manufacturer, and River City, former owner and seller of the power washer, for contribution and indemnity. Britt-Tech alleged that River City had misused and altered the power washer. The Iowa Supreme Court previously affirmed defendants' motion for summary judgment on the manufacturer's contribution claims. Britt-Tech Corp. v. American Magnetics Corp., 463 N.W.2d 26 (Iowa 1990). River City then sought and obtained summary judgment on the indemnity claim as well. District court denied Britt-Tech's motion to amend to add a fraudulent concealment claim filed on the day of the hearing on River City's summary judgment motion.

HELD: A manufacturer held strictly liable may not recover indemnity from its purchaser or user for misuse or alteration. In addition, district court had not erred in denying Britt-Tech's motion to amend. Britt-Tech did not show why the motion was not timely filed.

Herter v. Ringland-Johnson-Crowley Co., 492 N.W.2d 672 (Iowa 1992)

Herter, an employee of Mid-Iowa Electric, was injured at a construction site when he fell from an extension ladder owned by general contractor RJC. Mid-Iowa Electric was the electrical subcontractor. The ladder had been moved by employees of Waldinger, who was a subcontractor of Wolin, who in turn was a subcontractor of RJC. RJC's contracts with Wolin and Mid-Iowa Electric required Wolin and Mid-Iowa Electric to indemnify RJC for all claims arising out of the work subcontracted to the particular subcontractor.

Herter sued RJC and Waldinger. RJC filed a third-party petition against Mid-Iowa for indemnity. Mid-Iowa filed a cross-claim against Waldinger for contribution and filed a third-party petition against Wolin. Waldinger took over Wolin's defense and agreed to indemnify Wolin. RJC obtained an adjudication that Mid-Iowa Electric was obligated to indemnify RJC. Mid-Iowa and Waldinger then paid Herter $110,000 and $40,000, respectively, to settle all of Herter's claims.

Mid-Iowa moved for summary judgment on its contribution claim against Wolin. District court sustained the motion and ruled that Wolin's and Mid-Iowa's identical obligations of indemnity to RJC required an equitable division of the monies advanced by Mid-Iowa on RJC's behalf in settlement of Herter's suit. District court entered judgment against Wolin and Waldinger (who had agreed to indemnify Wolin) for $55,000.

HELD: Wolin's indemnity obligation runs to work it subcontracted to Waldinger. Wolin had agreed to perform that work and discharged its obligation by hiring Waldinger to perform it. The identical promises by Mid-Iowa and Wolin of indemnity, coupled with Mid-Iowa's payment in performance of its indemnity obligation to RJC, creates in Mid-Iowa the right to require Wolin (and, therefore, Waldinger) to contribute so as to apportion their identical indemnity obligations. When Waldinger paid $40,000, it was only paying for a release of its negligence.

IBP, Inc. v. DCS Sanitation Management Services, Inc., 498 N.W.2d 425 (Iowa App. 1993)

R

IBP and DCS contracted for DCS to provide certain cleaning and sanitation services for IBP. DCS agreed to indemnify IBP against all claims arising out of damages caused by DCS. The indemnity obligation did not extend to claims arising out of damages caused by IBP. DCS employee Grimm was injured while cleaning machinery at IBP. Grimm filed a workers' compensation claim against DCS and sued IBP. Grimm obtained a judgment, which IBP paid. IBP then sued DCS and its liability insurer for indemnity, breach of contract, and bad faith. District court sustained DCS' motion for summary judgment, holding that the jury's assessment against IBP of

70% (Grimm 30%) of the fault precluded indemnity under the IBP - DCS contract.

HELD: Because of section 85.20, there has not yet been an adjudication of the relative responsibilities of IBP and DCS. IBP has adduced substantial evidence that would support a finding that DCS was negligent.

> DCS argued such a holding would run a foul to the spirit of the workers' compensation legislation. There is merit to this position.
>
> ... However, not allowing IBP the opportunity to litigate the negligence could well result in DCS being made whole for workers' compensation paid on an injury caused by its negligence.
>
> ... Which, in essence, is allowing DCS to be indemnified on its claim against IBP when the issue of the respective negligence of the two has not been litigated.
>
> If there is incompatibility between section 85.20 and section 85.22 (creating DCS's right of subrogation), the incompatibility is better resolved by not allowing an employer to escape any financial responsibility for negligently injuring an employee.

COMMENT: The result makes complete sense and should be no surprise, given DCS' indemnity obligation to IBP. The language used by the court of appeals, constitutes the first recognition by an appellate court in Iowa of the inequity of permitting negligent employers and/or their insurers to recover from third party tort-feasors all or part of comp benefits paid for injuries that were caused by the employer's negligent conduct.

Daniels v. Hi-Way Truck Equipment, Inc., _____ N.W.2d _____ (Iowa, August 25, 1993)

Second Injury Fund

Section 85.65 provides that the employer or its insurer shall pay into the second injury fund in the event of a compensable death either $4,000 (if the employee died with dependents) or $15,000 (no dependents). HELD: Neither employer nor its insurer is entitled to recover second injury fund payments from proceeds of wrongful death action against third party, either under a theory of subrogation under chapter 85 or under a theory of indemnity.

INSURANCE

Amco Insurance Co. v. Haht, 490 N.W.2d 843 (Iowa 1992)

Coverage

During backyard baseball game an argument developed over who would pitch. Matt announced he was quitting because he had not been permitted to pitch, and threw his golf to the ground. Chris, 11 years old, threw the ball at Matt. It hit him in the temple and killed him. Matt's parents sued. Amco had issued a homeowner's policy to Chris' parents. The policy defines coverage by excluding bodily injury "which is expected or intended by the insured." Insurer petitioned for declaratory judgment on issue of coverage. District court found coverage.

HELD: Chris did not intend "to cause some kind of bodily injury," the second of two prongs of the test in Altena v. United Fire & Casualty Co., 422 N.W.2d 485 (Iowa 1988).

> An 11-year-old boy, animated by an obscure playground snit, lacks the same capacity to formulate an intent to injure that is possessed by an adult, or even a youth of more maturity.

COMMENT: 6-3.

American Family Mutual Insurance Co. v. Wubbena, 496 N.W.2d 783 (Iowa App. 1992)

Coverage

Several boys were playing with a BB gun. A scuffle developed and Mark Wubbena said to Daniel Crisp, "I'm going to get you." Mark took the BB gun from another boy, and Daniel ran behind a tree 90 feet away. Mark shot the BB gun toward Daniel. His second shot struck Daniel in the eye and caused a serious injury. Daniel's parents sued Mark and his parents. Wubbenas tendered defense to their homeowners' insurer, who commenced a declaratory judgment action. Insurer's policy excludes coverage for bodily injury "which is expected or intended by any insured." District court found that Mark intended to cause Daniel only to be afraid, to run, or to undergo the short-term pain or sting of being hit by a BB, and held that policy afforded coverage.

HELD: Mark, a 15-year-old boy, clearly intended to fire the BB gun at Daniel. As a matter of law, shooting a BB gun at another person is an act committed with intent to cause bodily injury. Haht is distinguished, because of the age of the boys involved and the differences between a baseball and a BB gun.

Employers Reinsurance Corp. v. Mutual Medical Plans, Inc., _____ N.W.2d _____ (Iowa, August 25, 1993)

Coverage

Beaty and Kelly are insurance agents in Burlington. Burlington and Des Moines County created a self-funded health care plan with Beaty's and Kelly's assistance. The city and county retained Mutual Medical to be the third-party administrator (TPA). Beaty and Kelly later formed Employee Benefits Systems (EBS) to also serve as a TPA. When complaints from employees about the timeliness and adequacy of Mutual Medical's performance of its obligations as TPA arose, Beaty and Kelly met with Mutual Medical. Beaty and Kelly later recommended to the city and county that it not renew Mutual Medical's contract. Beaty and Kelly also offered EBS as a substitute. City and county terminated Mutual Medical and contracted with EBS. Mutual Medial sued Beaty and Kelly for tortious interference with contract, and alleged that they "wrongfully induced the board to terminate and breach the contractual relationship between Mutual Medical and the group, and to shift this business to EBS."

Employers Reinsurance insured Beaty with a "insurance agents and brokers professional liability insurance policy." The policy promises to pay on behalf of Beaty "such loss ... sustained by the insured by reason of liability imposed by law for damages caused by any negligent, act or omission of the insured." Employers Reinsurance commenced a declaratory judgment action in which it contested coverage and its duty to defend.

HELD: Employers Reinsurance has no coverage and, therefore, no duty to defend. Mutual Medical has not alleged that Beaty committed a negligent act, an error, or an omission. Mutual Medical alleges deliberate acts, which are not covered.

Boles v. State Farm Fire & Casualty Co., 494 N.W.2d 656 (Iowa 1992)

Coverage

R

Boles and Martin were involved in a bar dispute, in which Martin was the instigator. "Just what happened thereafter is disputed, although it appears without dispute that eventually [Boles's] hand, in which he held a beer glass, made contact with Martin's head." Martin sued Boles, and Boles brought a declaratory judgment action against his insurer for coverage and defense. Boles testified in deposition that he intended to push Martin away with his left hand and that as a consequence, Martin's head came into contact with the beer glass in his right hand. District court granted State Farm's motion for summary judgment.

HELD: "However strongly the aggregate evidence ... favored the insurer's position, plaintiff's testimony is sufficient to

generate a factual issue." District court erred in granting summary judgment.

Clark-Peterson Co. v. Independent Insurance Associates, 492 N.W.2d 675 (Iowa 1992)

Coverage

Cincinnati Insurance issued a "contractor's umbrella liability policy" to Clark-Peterson, who was sued by an employee for termination due to alcoholism. After employee obtained a substantial judgment, Clark-Peterson brought a declaratory judgment action against Cincinnati to determine coverage. District court decided that policy did not cover the employee's claim because the discrimination was intentional. District court decided, however, that Cincinnati had coverage under the doctrine of reasonable expectations.

Policy promised to pay "loss for occurrences," and defined "occurrence" to mean "an accident, or a happening or event, ... which unexpectedly or unintentionally results in personal injury."

HELD: Clark-Peterson's intentional termination because of employee's alcoholism was not an "occurrence." By its express terms, policy does not afford coverage.

The doctrine of reasonable expectations imposes coverage, however, because the exclusionary result of Cincinnati's "occurrence" definition eviscerates coverage created elsewhere in the policy. Cincinnati defines "personal injury," as that word is used in the definition of "occurrence," to include "discrimination." In other words, Cincinnati defined occurrence to include personal injuries that were caused unintentionally, and defined personal injury to include discrimination. Cincinnati cannot provide coverage for discrimination by defining personal injury to include it and then "eviscerate" that coverage by defining occurrence to exclude all personal injuries that are caused intentionally. The fact that some forms of discrimination (e.g. disparate impact cases) can be posited on less than intentional conduct is irrelevant. "[T]his is not a disparate impact case. ... [E]visceration can occur on something less than total obliteration of all possibilities of coverage."

R

Grinnell Mutual Reinsurance Co. v. Employers Mutual Casualty Co., 494 N.W.2d 690 (Iowa 1993)

Coverage

Rhodes and Gray were classmates riding in a school bus on their way to a field trip. Supervisor left bus in gear, unlocked,

and unattended with the keys in the ignition. Gray put the bus in motion, and Rhodes was injured when she jumped from the bus. No supervisor was present. Rhodes' parents sued the school, claiming vehicle-related and non-vehicle-related negligence. School tendered defense to Grinnell, who had issued an automobile liability policy, and Employers, who had issued a business protection policy. Employers denied coverage and refused to participate in the school's defense. Grinnell undertook defense, settled with Rhodes' parents, and brought an action for declaratory judgment against Employers, with a request for money judgment in the amount of 50% of settlement and defense cost.

Employers' business protection policy excludes coverage for liability "arising out of the ownership, maintenance, operation, use, loading or unloading of any automobile ... owned ... by ... any insured." District court found that school's acts of failing to supervise students and failing to promulgate and enforce safety rules regarding loading procedures were not related to vehicles sufficiently to trigger Employers' exclusion.

HELD: Substantial evidence supported district court's finding that school's negligent supervision was not vehicle related. Grinnell was entitled to contribution from Employers.

Felder v. State Farm Mutual Automobile Insurance Co., 494 N.W.2d 704 (Iowa 1993)

Coverage

Standard automobile liability policy's coverage clause for property damage does not apply to claims for loss of consortium or for diminution of assets resulting from payment of expenses. Such claims seek damages due to bodily injury to person, which triggers only the bodily injury coverage.

Ottumwa Housing Authority v. State Farm Fire & Casualty Co., 495 N.W.2d 723 (Iowa 1993)

Coverage

Female employees of OHA filed workers' compensation claims and civil damage actions against OHA, all of which stemmed from employees' allegations that OHA executive director Simpson had sexually harassed them. OHA tendered defense of all claims to State Farm, who had issued a general liability policy and a workers' compensation and employer's liability policy. State Farm ultimately declined coverage and refused to defend any of the claims. OHA settled with the employees. OHA sought declaratory judgment on coverage.

HELD: Neither the general liability policy nor the workers' compensation and employer's liability policy provided coverage.

Even if State Farm's definition of bodily injury as used in its description of coverage is sufficiently broad to catch the employees' allegations of "physical illness" that they suffered as a result of the sexual harassment, the policy excludes coverage for "bodily injury to any employee of the insured arising out of and in the course of their employment by the insured." As a matter of law, employees' claims all relate to conduct occurring during their employment and at the work place. State Farm's coverage for "personal injury" does not apply, because the only relevant portion of the definition of "personal injury" is injury that flows from publication of "defamatory or disparaging material." The word "disparaging" can mean only the destruction or impairment of one's reputation. Employees did not seek damages for injury to reputation.

The workers' compensation portion of the second liability policy does not provide coverage, because it is limited to coverage for OHA's liability under the workers' compensation law. Employees' remedy for sexual discrimination and harassment is chapter 601A. Because the employer is liable under chapter 601A for sexual discrimination and harassment, it is not liable to its employees for the same conduct under the workers' compensation law. Therefore, there is no coverage under the workers' compensation portion of the policy.

State Farm affords no coverage to OHA under the employer's liability portion of the policy, because there is a specific exclusion relating to discrimination by the insured against its own employees.

State Farm Mutual Automobile Insurance Co. v. Employers Mutual Casualty Co., 500 N.W.2d 80 (Iowa App. 1993)

Coverage

Louzek, the chief executive officer for the Amana Society, borrowed a Society-owned vehicle for use in moving his residence. Louzek's girlfriend Morton was driving the vehicle at his direction and on a trip relating to Louzek's move, when she collided with another truck. Her son was injured and Louzek's son was killed. Her son and the estate sued Morton. Amana Society's insurer and Morton's insurer disagreed over which insurer had coverage. Coverage for Morton's liability depended upon whether or not Morton was operating the Amana Society's vehicle with its consent.

HELD: Substantial evidence supported district court's finding that Morton operated the vehicle with Amana Society's consent. Louzek's authority for personal use of the vehicle was broad enough to permit Morton to operate the vehicle also. Amana Society had no

formal employee policy communicated by a handbook. Any informal restrictions that existed with respect to personal use of Amana Society vehicles was not communicated to Louzek. Personal use of Amana Society vehicles and other personal property was commonplace. Louzek's job description literally authorized him to give himself permission to use the vehicle. Morton's trip was related to Louzek's purpose in using the vehicle himself.

Davis v. United Fire & Casualty Co., 500 N.W.2d 725 (Iowa App. 1993)

Coverage

Davis sought coverage under homeowner's policy for damage to roof from hail storm. Policy provided that insurer would pay only for the actual cash value of the damage unless the repair or replacement was complete. Insurer moved for summary judgment, claiming that it owed only the agreed upon cash value of the storm damage of $234, minus the policy's $100 deductible. Davis complained that insurer had not established that repair or replacement was not completed. HELD: Davis had burden to adduce evidence, most accessible to him, that repairs or replacement had been completed. Davis' failure to adduce evidence that he fit within exception to coverage, especially when such evidence is most accessible to him, made summary judgment in favor of insurer appropriate.

Thorco Leasing, Inc. v. Lumbermens Mutual Casualty Co., 489 N.W.2d 31 (Iowa App. 1992)

Coverage

Thorco purchased cargo insurance from Lumbermens Mutual. Policy excluded coverage for spoilage or freezing losses "caused by or resulting from negligence by you, your employees or sub-hauler." Thorco truck driver abandoned his truck and refrigerator unit. By the time Thorco arrived, refrigeration unit had run out of fuel and most of the meat had spoiled.

HELD: Substantial evidence supported district court's finding that exclusion applied.

West Bend Mutual Insurance Co. v. Iowa Iron Works, Inc., _____ N.W.2d ____ (Iowa, July 21, 1993)

Duty to Defend

Iowa Iron Works' operation of a steel foundry requires it to replace the sand it uses in the manufacturing process with new sand

from time to time. A quarry owner asked Iowa Iron to deliver its used sand to his property for use in filling and landscaping an old quarry. Iowa Iron Works did so. DNR sued the quarry owner and Iowa Iron Works for depositing a solid waste at a place other than an approved sanitary disposal project. Iowa Iron Works tendered defense to West Bend, who had issued a liability insurance policy to Iowa Iron Works. West Bend commenced a declaratory judgment action on the issues of duty to defend and coverage. District court declined to decide the coverage question until the DNR litigation concluded. District court determined, however, that West Bend had a duty to defend. West Bend obtained permission to appeal this interlocutory ruling.

West Bend excludes coverage for claims resulting from "discharge, disbursal, release or escape of pollutants." The policy defines "pollutants" as

> (a) any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

DNR posited its action on a violation of section 455B.307, Code of Iowa, which proscribes the depositing of a solid waste at any place other than a sanitary disposal project. Section 455B.301(15) defines solid waste as follows:

> Garbage, refuse, rubbish, and other similar discarded solid or semi-solid materials, including but not limited to such materials resulting from industrial, commercial, agricultural, and domestic activities. ... However, this division does not prohibit the use of dirt, stone, brick, or similar inorganic material for fill, landscaping, excavation or grading at places other than a sanitary disposal. Solid waste does not include hazardous waste as defined in section 455B.411. ...

(emphasis added) The Iowa Code defines hazardous waste in section 455B.411(4)(1) as follows:

> waste .... that, because of its quantity, concentration, biological degradation, leeching from precipitation, or physical, chemical, or infectious characteristics, has either of the following effects:
> (1) Causes, or significantly contributes to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness.
> (2) Poses a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or

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> disposed of, or otherwise managed. "Hazardous waste" may include but is not limited to wastes that are toxic, corrosive or flammable or irritants, strong sensitizers or explosives.

HELD: West Bend has a duty to defend. DNR is proceeding against Iowa Iron Works for its handling of solid waste, not hazardous waste. Given the statutory definitions of solid waste and hazardous waste and the policy's definition of pollutants, it is at least possible that the liability asserted by DNR against Iowa Iron Works does not fit entirely within the exclusion.

West Bend also argued that Iowa Iron Works acted intentionally in transferring its used sand to the quarry. Iowa Iron Works' "depositing of the sand, although intentional, is an occurrence ... unless Iowa Iron intended 'some injury.'" West Bend offered no evidence that Iowa Iron Works intended to injure anything or anyone by hauling used sand to the quarry.

Pekin Insurance Co. v. Hugh, 501 N.W.2d 508 (Iowa 1993)

Emotional Distress

Pekin issued a policy to Mr. and Mrs. Hugh with 100/300 uninsured/underinsured motor vehicle coverage. Two insureds were killed in an automobile accident caused by the fault of another driver, who subsequently paid his policy limits of $40,000. Pekin paid $100,000 to each of the estates of the two deceased insureds, but refused to pay the remaining $100,000 of its $300,000 aggregate limit to the other insureds who witnessed the accident and claimed emotional distress as bystanders. Pekin commenced a declaratory judgment action to determine its obligation to the bystanders. District court found coverage and sustained Hughes' motion for summary judgment.

HELD: Unlike loss of consortium, a bystander's claim for emotional distress involves a bodily injury to the bystander. Each insured's claim for bystander emotional distress is potentially a claim for bodily injury that triggers availability of the third $100,000 purchased by Mr. and Mrs. Hugh from Pekin.

COMMENT: 6-3.

LeMars Mutual Insurance Co. v. Farm & City Insurance Co., 494 N.W.2d 216 (Iowa 1992)

Excess

Thomas Jaminet caused injury to a third person while operating a vehicle owned by his father Robert. Farm & City insured Thomas for automobile liability with a limit of $20,000 and an "other insurance" clause that provided:

> 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.

Robert carried $300,000 of liability insurance from Allied and an umbrella policy of $1 million from LeMars Mutual. Allied and LeMars Mutual settled the third person's claims for $450,000, with Allied paying its limit of $300,000 and LeMars Mutual paying $150,000. LeMars Mutual then filed a declaratory judgment action to seek a determination as to whether or not Farm & City should have paid its limits of $20,000 before Allied paid the balance of the settlement.

HELD: Notwithstanding the express terms of Farm & City's "other insurance" clause, Farm & City's is clearly a primary insurance policy, and LeMars' is clearly an umbrella policy. "[R]esolution of the question of priority ... must come, as the majority rule indicates, from a common sense look at the basic function each policy was intended to serve." Farm & City may have been excess to Allied, but it was primary as to LeMars Mutual and should have paid its $20,000 toward the settlement before LeMars Mutual paid the balance.

Columbia Casualty Co. v. City of Des Moines, 487 N.W.2d 663 (Iowa 1992)

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Excess

The Des Moines Botanical Center (Center) is owned and operated by the City of Des Moines (City). The Des Moines Botanical Center, Inc. (DMBC), is a non-profit corporation that provides volunteer tour guide services, adult education classes, and a gift shop in the Center. City required DMBC, Inc. to carry a $500,000 liability insurance policy to protect DMBC and City. DMBC purchased such coverage from Maryland Casualty. City had an "excess" policy from Columbia with a retained limit of $500,000.

Fister, a visitor to the Center, fell from an unguarded walkway while using a non-public exit pursuant to the direction of a DMBC volunteer. Fister sued City and DMBC. The City paid $800,000 to Fister in exchange for a release of City and DMBC. At about the same time, Maryland Casualty paid City $400,000. City claimed that its obligation to Fister was $800,000, and demanded that Columbia pay City $300,000. Columbia did so with the reservation of rights, and then sued City, arguing that Maryland Casualty's payment was made on behalf of DMBC, not City. City and DMBC argued that Maryland Casualty's payment occurred strictly to settle a coverage dispute between Maryland Casualty and City. Columbia and City filed contrasting motions for summary judgment. District court sustained City's motion.

HELD: It is beyond dispute that DMBC's insurer paid $400,000 for a release by Fister of DMBC. City's liability to Fister, therefore, was only $400,000, and Columbia was entitled to a return of its $300,000 payment.

Jalas v. State Farm Fire & Casualty Co., _____ N.W.2d _____ (Iowa, September 22, 1993)

Excess

Excess or "umbrella" policies are not required by chapter 516A to carry uninsured or underinsured motor vehicle coverage. Iowa statutory provisions that define or use the terms "automobile liability" or "motor vehicle liability" insurance policies apply, pursuant to section 321A.21(7) to the portions of such policies that provide the minimum financial responsibility limits.

Principal Casualty Insurance Co. v. Blair, 500 N.W.2d 67 (Iowa 1993)

Family Exclusion

Mr. and Mrs. Blair's minor son suffered injuries when his bicycle wheel detached. Mrs. Blair, as an individual and as next friend, sued Mr. Blair for his negligent assembly of the bicycle. Principal commenced an action for declaratory judgment that its homeowner's policy issued to the Blairs did not provide coverage because of family exclusion clauses.

Principal's policy excludes liability coverage for bodily injury to "your relatives residing in your household." The med pay clause excludes coverage for injury to an "insured person," who is defined to include "your relatives residing in your household."

HELD: Principal's family exclusion clauses are not void for public policy. The Blairs' contention that the family exclusion

clauses violate equal protection fail because there is not a sufficiently close nexus between the state and the challenged action of a regulated entity so as to render Principal's exclusions state action.

Webb v. American Family Mutual Insurance Co., 493 N.W.2d 808 (Iowa 1992)

Misrepresentation

American Family issued homeowner's policy to Webbs, who thereafter divorced. While Mr. Webb was living in the family home, it burned to the ground. Fire occurred shortly before Mr. Webb's decretal deadline to pay $50,000 to Mrs. Webb in return for her interest in the home or sell the home and split the net proceeds equally between them. American Family's limit on coverage for personal property was $55,000. The Webbs submitted a detailed proof of loss that itemized and valued personal property, all belonging to Mr. Webb, at $88,000. American Family denied Webbs' claim on grounds that Mr. Webb set the fire and/or that he materially and intentionally misrepresented the extent of personal property lost in the fire. Jury found that Mr. Webb had knowingly misrepresented the extent of personal property lost in the fire. Webbs argued that the misrepresentation was not material, because it involved only a portion of the proof of loss and there was no dispute that Webb had lost an amount in excess of the policy limit. Mrs. Webb separately contended that American Family could not void the policy as to her because of Mr. Webbs' fraudulent acts.

HELD: The fraudulent portion of a proof of loss need not be sufficient large to invade the policy limit in order for the misrepresentation to be material. To hold otherwise would permit insureds to attempt to defraud insurers without recourse for the insurer. American Family adduced substantial evidence to support jury finding that Mr. Webb's misrepresentation was "material."

The policy language provided that "policy is void if ... any insured has ... intentionally ... misrepresented any material fact." Language is not ambiguous. Iowa law permits insurer to invalidate policy as to all insureds for the fraudulent act of any one insured.

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LeMars Mutual Insurance Co. v. Farm & City Insurance Co., 494 N.W.2d 216 (Iowa 1992)

Other Insurance

Thomas Jaminet caused injury to a third person while operating a vehicle owned by his father Robert. Farm & City insured Thomas

for automobile liability with a limit of $20,000 and an "other insurance" clause that provided:

> 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.

Robert carried $300,000 of liability insurance from Allied and an umbrella policy of $1 million from LeMars Mutual. Allied and LeMars Mutual settled the third person's claims for $450,000, with Allied paying its limit of $300,000 and LeMars Mutual paying $150,000. LeMars Mutual then filed a declaratory judgment action to seek a determination as to whether or not Farm & City should have paid its limits of $20,000 before Allied paid the balance of the settlement.

HELD: Notwithstanding the express terms of Farm & City's "other insurance" clause, Farm & City's is clearly a primary insurance policy, and LeMars' is clearly an umbrella policy. "[R]esolution of the question of priority ... must come, as the majority rule indicates, from a common sense look at the basic function each policy was intended to serve." Farm & City may have been excess to Allied, but it was primary as to LeMars Mutual and should have paid its $20,000 toward the settlement before LeMars Mutual paid the balance.

Kroes v. American Family Ins., 499 N.W.2d 309 (Iowa App. 1993)

Subrogation

Following auto accident, insureds retained counsel to protect their interests against other driver and his insurer, IMT. After commencing an action against the other driver, insureds' attorney obtained a settlement in which IMT paid $16,000 to the insureds and $3,680.90 in subrogation monies to defendant. When American Family refused to pay insured's attorney a fee and a proportionate share of the expenses for the recovery of its subrogation claim, insureds sued. American Family argued that it had made its own arrangements to secure its subrogation interests and that it would be unjust to require the insurer to incur expenses for the recovery of money for the benefit of the insureds' own interests.

HELD: Substantial evidence supported district court's finding that American Family's subrogation interest was at risk. Other driver denied liability in answer and asserted that insureds were at fault. American Family took no action to protect its rights, despite knowing of its insureds' commencement of an action. American Family's pre-suit efforts to collect from IMT were

irrelevant, absent some action after suit was commenced to protect its own interests.

Rodish v. State Farm Mutual Automobile Insurance Co., 501 N.W.2d 514 (Iowa 1993)

Uninsured Motor Vehicle

Mr. and Mrs. Rodish owned a Thunderbird insured by Principal with $50,000 of uninsured motorist coverage and a Cadillac insured by State Farm with $100,000 of uninsured motorist coverage. Judy Rodish was injured while occupying the Thunderbird and as a result of being in an accident with an uninsured motorist. Principal paid its $50,000 limit. Rodish sought additional coverage from State Farm. The State Farm policy provided no uninsured motor vehicle coverage "in excess of [20/40]" for bodily injury while occupying a vehicle owned by the insured but not named in the policy. The State Farm policy also provided that under such circumstances, its policy was excess and applied only in an amount that does not exceed the 20/40 minimum limits.

In 1991, the legislature amended section 516A.2 to abrogate Hernandez v. Farmers Insurance Co., 460 N.W.2d 842 (Iowa 1990), and to provide:

> [W]hen more than one motor vehicle insurance policy ... provides uninsured ... motor vehicle coverage ..., the injured insured is entitled to recover up to an amount equal to the highest single limit for uninsured ... motor vehicle coverage under any one of the ... policies.

HELD: Even assuming retroactive application of the amendment, it does not require State Farm to pay any uninsured motor vehicle benefits. The amendment does not invalidate State Farm's "other insurance" limitations on uninsured motorist coverage.

Dessel v. Farm & City Insurance Co., 494 N.W.2d 662 (Iowa 1993)

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Underinsured Motor Vehicle

Dessel owned a motorcycle and another vehicle. He carried no underinsured motor vehicle coverage on the cycle. The underinsured motor vehicle coverage applicable to his other vehicle contained a "owned but not insured" exclusion. Dessel was injured by an underinsured motorist while Dessel was riding his cycle. HELD: "Owned but not insured" exclusion in underinsured motorist coverage is not in conflict with chapter 516A, and will be upheld. Dessel has no coverage.

Jones v. American Star Insurance Co., 501 N.W.2d 536 (Iowa 1993)

Underinsured Motor Vehicle

Larry Jones purchased automobile liability insurance, including uninsured/underinsured coverage, from American Star. His step-daughter, Melissa, was injured while riding in Larry's vehicle while it was being driven by Larry's son. American tendered its liability limits to the injured occupants of another vehicle and to Melissa. Melissa then sought underinsured benefits from American Star. The policy defines "underinsured motor vehicle" to exclude a vehicle "owned by or furnished or available for the regular use of you or any family member."

HELD: Exclusion does not violate public policy or chapter 516A. Because Larry Jones was free to choose the amount of liability coverage, invalidating the exclusion would permit a family member to receive duplicate payments of liability benefits.

Kats v. American Family Mutual Insurance Co., 490 N.W.2d 60 (Iowa 1992)

Underinsured Motor Vehicle

Mulder died while a passenger in an underinsured motor vehicle involved in a one-car accident. Mulder resided in his step-father's home. Mulder's estate sued step-father's insurer for underinsured motor vehicle coverage. Insurer defined "insured" in the underinsured motor vehicle clause to include relatives such as Mulder, unless the relative owned a car. Mulder owned a car at the time of his death. Policy also contained endorsement that specifically excluded Mulder as an insured "under any of the coverages."

HELD: American Family's use of its definition of "insured" to exclude coverage for persons who own cars is permissible only to avoid stacking. The amendment with the specific exclusion, however, is valid and effective to deprive Mulder of underinsured motor vehicle coverage.

Continental Western Insurance Co. v. Krebill, 492 N.W.2d 405 (Iowa 1992)

Underinsured Motor Vehicle

Insured recovered limits of underinsured motor vehicle coverage of his own policy, then recovered additional monies from tort-feasors. Insurer sought reimbursement by way of subrogation language in policy:

> If we make a payment under this policy and the person to ... payment is made recovers damages from another, that person shall ... reimburse us to the extent of our payment.

Insurer stipulated that insured's total damages exceeded all amounts insured had received from insurer and tort-feasors.

HELD: Insurer who has paid underinsured motor vehicle benefits may not recover via subrogation, except to the extent that insured recovers more than his actual damages.

Elliott v. Farm Bureau Mutual Insurance Co., 494 N.W.2d 731 (Iowa App. 1992)

Underinsured Motor Vehicle

Elliott recovered liability policy limits from negligent driver and also recovered $70,000 in non-exempt assets owned by driver. Elliott made a claim against his own policy for underinsured motorist coverage. Elliott and his insurer stipulated that his damages exceeded the sum of the tort-feasor's limits, the assets recovered by Elliott from the tort-feasor, and Farm Bureau's underinsured motor vehicle policy limits. Farm Bureau refused to pay benefits, claiming that it was entitled to recover by virtue of subrogation any monies it would pay under its underinsured motor vehicle coverage from the non-insurance assets collected from the tort-feasor. HELD: Farm Bureau is not entitled to reimbursement of its payments from personal assets recovered from a settling tort-feasor. To hold otherwise would negate the "broad coverage" definition of "underinsured," which continues to the Iowa law.

Jalas v. State Farm Fire & Casualty Co., _____ N.W.2d _____ (Iowa, September 22, 1993)

Uninsured/Underinsured

Excess or "umbrella" policies are not required by chapter 516A to carry uninsured or underinsured motor vehicle coverage. Iowa statutory provisions that define or use the terms "automobile liability" or "motor vehicle liability" insurance policies apply, pursuant to section 321A.21(7) to the portions of such policies that provide the minimum financial responsibility limits.

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Coker v. Abell-Howe Co., 491 N.W.2d 143 (Iowa 1992)

Costs

Expert deposition fees in excess of $150 are not taxable as costs. Costs of depositions "that have been 'bootstrapped' into the record through testimony or subsequent video depositions used at trial may not be taxed against the losing party." Costs that are recoverable pursuant to an unaccepted offer to confess judgment are the same as taxable costs.

Bruning v. Swipies, 498 N.W.2d 410 (Iowa 1993)

Garnishment

Section 627.13 does not exempt workers' compensation benefits from garnishment, when the funds are levied upon to satisfy child support obligations. It would be unjust to enforce the exemption when the principal reason for it was to protect dependents.

Guzman v. Des Moines Hotel Partners, 489 N.W.2d 7 (Iowa 1992)

Interest

In personal injury case governed by chapter 668, district court submitted verdict forms that did not differentiate between past and future damages. HELD: Because jury did not determine which of Mrs. Guzman's "damages were past and which were future," district court shall assume they were all future and assess interest only from the date of judgment, pursuant to section 668.13(3).

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Brenton National Bank v. Ross, 492 N.W.2d 441 (Iowa App. 1992)

Interest

Mable's Will provided that her son Donald could purchase her real estate for $100,000. Donald bought the property from Mable during her lifetime for $100,000, and then sold oak trees on other property owned by Mable. Two years later, Donald sold the property he purchased from Mable, and a second property for which he also paid $100,000, for a total sum of $565,000. Donald then caused a conservatorship to be opened for Mable. When Brenton Bank became the conservator, it concluded that Donald had taken unfair advantage of Mable and sued Donald for the additional fair market

value of the real estate and for conversion of the trees. Jury awarded conservator $185,000 in damages on the sale of the property, and $6,000 for the conversion of the trees.

HELD: Interest at the rate of 5% from the date Donald sold the trees should have been awarded in addition to the $6,000 judgment for conversion. Because Donald disputed not only his liability for undue influence but the amount of the fair market value of the property at the time he purchased it from Mable, the conservator's claim was not liquidated. Because the verdict form does not permit the court to conclude that the jury found for the conservator and against Donald on the conservator's theory of breach of fiduciary duty, the fiduciary duty exception does not apply. Conservator is not entitled to pre-filing interest.

Nassen v. National States Insurance Co., 494 N.W.2d 231 (Iowa 1992)

Interest

Consistent with Midwest Management Corp. v. Stephens, 353 N.W.2d 76 (Iowa 1984), interest on punitive damages runs from the date of judgment, not from the date the petition was filed.

Mossman v. Amana Society, 494 N.W.2d 676 (Iowa 1993)

Interest

Legislature amended section 535.3 and enacted section 668.13 in 1987 to provide, among other things, that interest on future damages accrues with the entry of judgment. The enactment applied to all actions accruing on or after July 1, 1987, and all claims accruing earlier but filed on or after September 15, 1987.

Mossman sued Amana for personal injuries allegedly caused by Amana's negligence in October 1986. Amana filed a third-party petition against CRANDIC in March 1987. Mossman amended her petition to assert a direct claim against CRANDIC in October 1988. Jury verdict in favor of Mossman and against CRANDIC included future damages.

HELD: Cause of action against CRANDIC accrued before July 1, 1987, and was "filed" (by virtue of Amana's third-party petition against CRANDIC) before September 15, so the new law does not apply and interest shall accrue from the date of filing, which is the date Amana added CRANDIC, not the date that Mossman asserted the direct claim against CRANDIC.

Konicek v. Loomis, 503 N.W.2d 420 (Iowa 1993)

Interest

Workers' compensation carrier sought to recover interest as well as monies paid in comp benefits to injured employee who prevailed against third-party defendant. HELD: Cincinnati was entitled to recover interest at the rate of 5%, pursuant to section 535.2(1), from the date on which Konicek actually received payment from the third-party defendant.

Federal Land Bank v. Dunkelburger, 499 N.W. 305 (Iowa App. 1993)

Nunc Pro Tunc

FLB's loan to defendant was secured by defendant's farm, including rents and profits from the real estate. FLB commenced foreclosure proceedings in 1985, and a receiver was appointed in 1987. Defendant filed a bankruptcy petition and leased the farm to Swecker in 1987. District court ordered defendant and Swecker to make rent payments to the receiver. PCA held a junior lien on the farm. It commenced proceedings in federal court to foreclose in 1989. Federal court appointed the same receiver. Swecker made a $9,000 rent payment to receiver. District court entered judgment and decree of foreclosure on FLB's mortgage in 1989. After a sheriff's sale of certain property, PCA obtained an order in federal court to include the surplus in its receivership (district court had dismissed the receiver).

When defendant objected to FLB's attempt to execute on the judgment for rent, district court overruled the objection. Defendant appealed and, in Federal Land Bank v. Dunkelburger, 471 N.W. 82 (Iowa App. 1990), the court reversed, and held that the judgments for rent had merged with the judgment for foreclosure. Swecker, who had not joined in the appeal, then moved to discharge the judgment for rent against him as well, and to seek recovery from FLB of rent monies transferred by the receiver to FLB. FLB contended that Swecker was not entitled to the $9,000 rental payment because the order was merely a nunc pro tunc order clarifying the extent of the receivership. District court discharged the judgment and ordered FLB to return the rent to Swecker with interest.

HELD: The federal court order was not a nunc pro tunc, i.e., an order curing an obvious error. Therefore, there was no relation back to the time of the commencement of the PCA proceedings, and Swecker was entitled to return of the rent.

Huffey v. Lea, 491 N.W.2d 518 (Iowa 1992)

Preclusion

Huffey had a close relationship of long standing with his aunt and uncle, the Olsons. He lived with them for several years and was a tenant on their farm. After Mr. Olson's death, Mrs. Olson executed a will that devised the farm to Huffey. One month later, she revoked the will and executed a new will that gave Huffey nothing and devised the farm to her brother and his children. When she died one month later, the second will was admitted to probate. Huffey commenced an action contesting the will and eventually prevailed. Then, Huffey sued Mrs. Olson's brother and children for interference with a bequest, a cause of action recognized in Frohwein v. Haesemeyer, 264 N.W.2d 792 (Iowa 1978). On defendants' motion for summary judgment, district court held that Huffey's action for interference with a bequest was precluded by the ultimate judgment (albeit favorable to Huffey) in his action to contest the will.

HELD: Claim preclusion doctrine does not require Huffey to join his action for interference with a bequest with his action to contest the will. They are not the same claims. They depend upon different proof. The recoveries are different.

COMMENT: 7-2. Majority opinion notes: "Our research has produced one case that seems to be relevant and corresponds with our situation." Dissenting justices state:

> Most courts hold that a plaintiff who succeeds in a will contest is thereafter not entitled to pursue a claim for tortious interference with a bequest because plaintiff received in the will contest his or her full expectancy under the will and thus suffered no actual damages.
>
> Additionally, the majority of courts then allow plaintiff to pursue a claim for tortious interference with a bequest only if there are special circumstances making the will contest remedy inadequate.
>
> . . .
>
> Furthermore, the Iowa Court will stand virtually alone in allowing a plaintiff, after a successful will contest, to sue for tortious interference with a bequest when plaintiff has not shown that the will contest remedy was inadequate. Only one other court has allowed a plaintiff to pursue, with no allegation of receiving an inadequate probate remedy, a claim for tortious interference with a bequest after successfully contesting a will in probate court. The majority seems to base its holding on that one case.

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Cruise v. Wendling Quarries, Inc., 498 N.W.2d 916 (Iowa App. 1993)

Preclusion

Cruise was injured during the course of his employment with Mid-State when the company's semi-truck and trailer he was driving struck an overpass. An escort vehicle, with a height pole provided by Mid-State and attached to the vehicle's bumper, travelled under the overpass ahead of the truck without incident. Mid-State commenced an action against Paup, the driver of the escort vehicle, and Wendling, the company for whom plaintiff was hauling. Mid-State's action was limited to property damage. Wendling added Cruise as a third-party defendant. Cruise did not assert any counterclaims or cross-claims for damages, and Wendling moved in limine to prevent evidence of Cruise's damages. District court sustained Wendling's motion. After trial, jury found Mid-State 100% at fault.

Before he was added to the first action as a third-party defendant, Cruise filed an action against Wendling and Paup for the injuries he sustained in the accident. After judgment was entered in the first action, Wendling moved in the second action for summary judgment, arguing that fault already had been determined conclusively in the first action and that the doctrine of issue preclusion barred litigation of it in the second action. District court granted the motion.

HELD: Wendling established the prerequisites for issue preclusion as a matter of law. The issue adjudicated in the prior litigation, the question of fault, was identical to the issue presented here. The issue was raised and litigated in the prior action. It was not necessary for Mid-State to be present in the second action; defensive use of issue preclusion does not require complete mutuality of the parties. Cruise had an opportunity to litigate the issue of fault for the accident in the first action. While Cruise could not present evidence regarding his damages, he could present evidence on the issue of liability. The issues in the two actions as to who was at fault with respect to the accident were identical. The issues were raised and litigated in the first action. The issue of fault was material and relevant to the disposition of the first action. A determination of the issue was necessary and essential to the judgment that was entered in that matter. The judgment precludes Cruise from litigating Wendling's fault further.

Riley v. Maloney, 499 N.W.2d 18 (Iowa 1993)

Preclusion

A class of Polk County ad valorem tax payers in 1986 suit challenged the validity of a County lease-purchase agreement. District court entered summary judgment for the County. Before the

summary judgment was affirmed in Stanfield v. Polk County, 492 N.W.2d 648 (Iowa 1992), Riley, another Polk County ad valorem tax payer, filed an action to enjoin County Treasurer Maloney from making payments under the lease-purchase agreement. District court held that claim preclusion did not bar Riley's action because Riley was not a member of the class at the time of certification and because the certification order was not intended to extend to future purchasers and taxpayers.

HELD: Claim preclusion applies and bars Riley's action. Riley was in privity with the person from whom he purchased his Polk County property, and that person had not elected to be excluded from the class. Furthermore, a judgment relating to the validity of bonds or warrants of a county in an action brought by a taxpayer is binding upon the citizens and taxpayers of the county.

Federal Land Bank v. Dunkelburger, 499 N.W. 305 (Iowa App. 1993)

Preclusion

FLB's loan to defendant was secured by defendant's farm, including rents and profits from the real estate. FLB commenced foreclosure proceedings in 1985, and a receiver was appointed in 1987. Defendant filed a bankruptcy petition and leased the farm to Swecker in 1987. District court ordered defendant and Swecker to make rent payments to the receiver. PCA held a junior lien on the farm. It commenced proceedings in federal court to foreclose in 1989. Federal court appointed the same receiver. Swecker made a $9,000 rent payment to receiver. District court entered judgment and decree of foreclosure on FLB's mortgage in 1989. After a sheriff's sale of certain property, PCA obtained an order in federal court to include the surplus in its receivership (district court had dismissed the receiver).

When defendant objected to FLB's attempt to execute on the judgment for rent, district court overruled the objection. Defendant appealed and, in Federal Land Bank v. Dunkelburger, 471 N.W. 82 (Iowa App. 1990), the court reversed, and held that the judgments for rent had merged with the judgment for foreclosure. Swecker, who had not joined in the appeal, then moved to discharge the judgment for rent against him as well, and to seek recovery from FLB of rent monies transferred by the receiver to FLB.

Swecker made motion to discharge the judgment for rent against him. District court discharged the judgment and ordered FLB to return the rent to Swecker with interest.

HELD: Because the issue concerning the validity of the rent judgments was fully litigated by FLB in the earlier appeal, and because the prior decision did not distinguish between the judgment

against defendant and against Swecker, doctrine of issue preclusion bars FLB from relitigating the issues decided in Dunkelburger.

Palmer v. Tandem Management Services, Inc., _____ N.W.2d _____ (Iowa, September 22, 1993)

Preclusion

Landlord brought forcible entry and detainer action against tenant in small claims court. Tenant counterclaimed for, among other things, retaliatory conduct under section 562B.32. Small claims court found for landlord and against tenant on all claims. District court affirmed. Iowa Supreme Court dismissed tenant's appeal. Tenant commenced separate action against landlord for, among other things abuse of process. Tenant alleged that landlord used FED case "to intimidate him and as retaliation for his complaints and prior small claims actions." Jury awarded damages to tenant.

HELD: "Because the claim of retaliatory eviction was already decided adversely to [tenant], ... he could not base his abuse-of-process action on an allegation of retaliatory eviction as an improper purpose."

Kissner v. Brown, 487 N.W.2d 97 (Iowa App. 1992)

Satisfaction

Plaintiff's appeal was moot when plaintiff's attorney accepted and negotiated, without reservation or protest, the check tendered by the clerk paying the judgment in full. The attorney's actions constituted an accord and satisfaction of plaintiff's claim against all defendants. Defendant was not entitled to monetary sanctions under section 624.37 for plaintiff's failure to file a satisfaction of judgment, because defendant did not bring an action for such relief as required under by the statute.

In re Property Seized, 501 N.W.2d 482 (Iowa 1993)

Stipulation

State seized gaming machines and personal and real property allegedly acquired through the proceeds of gaming machines, and then applied for forfeiture of the property. At hearing, owner's counsel entered into stipulation that owner "will consent to a forfeiture of all of the property ... except certain items." Six days later, at the resumption of the hearing, owner attempted to repudiate the stipulation. HELD: Party may stipulate to an issue

as well as to a fact, even if stipulating to an issue is tantamount to consenting to a particular decree. To the extent that Van Donselaar v. Van Donselaar, 249 Iowa 504, 87 N.W.2d 311 (1958), suggests that consent to a judgment may be withdrawn as a matter of right at any time before entry of judgment, it is overruled.

JURISDICTION

Percival v. Bankers Trust Co., 494 N.W.2d 658 (Iowa 1993)

Wright Percival was living in California when he created a trust and made amendments to it. He had married Lydia, a lifelong California resident who has been to Iowa once for one week. After Wright died, his Iowa children by a previous marriage sued Lydia for tortious interference with their interest in the trust. District court sustained her motion to dismiss for lack of personal jurisdiction.

HELD: Lydia does not have sufficient minimum contacts for Iowa to exercise jurisdiction over her. Assuming the children's allegations to be true, Lydia's tortious action occurred in California. "The fortuitous residence of plaintiffs, alone, is not sufficient to confer personal jurisdiction over a non-resident defendant."

Omnilingua, Inc. v. Great Golf Resorts of World, Inc., 500 N.W.2d 721 (Iowa App. 1993)

Minimum Contacts

Omnilingua provides foreign language translation services and is based in Cedar Rapids. Great Golf produces fabulous magazines touting golf resorts and is based in Pennsylvania. On two previous occasions, Golf sent Omnilingua translated copies of its directories for proofreading. Great Golf also distributes its directory to two private country clubs in Iowa. Omnilingua then traveled to Pennsylvania to solicit the opportunity to do the actual translation of Great Golf's next directory for publication in Japan. Omnilingua sent a formal written proposal, which Golf accepted. Omnilingua completed the project and shipped the translated directory to Golf, which refused to accept it as untimely. Omnilingua sued Golf in Iowa. Golf moved to dismiss for lack of personal jurisdiction.

HELD: Substantial evidence purports district court's finding that Golf did not have sufficient minimum contacts with Iowa. The

fact that Omnilingua performed work in Iowa was Omnilingua's choice. Omnilingua solicited the business. "Golf did not unilaterally inject itself into doing business in Iowa."

LIMITATIONS OF ACTION

Porter v. Good Eavespouting, _____ N.W.2d _____ (Iowa, August 25, 1993)

Amendments

Porter was injured in a construction accident. With his statute of limitations less than 2 months away, an insurance adjuster purporting to represent Good Eavespouting and Good Construction Company offered to settle by sending a draft with a release. One year and 364 days after his accident, Porter sued Good Eavespouting d/b/a Good Construction Company. Several months later, defendant answered by, among other things, claiming that defendant was not a legal entity. Defendant moved for summary judgment on the same ground and submitted an affidavit from Larry Good. Good stated that he conducts businesses known as Good's Construction Co., Good's Eavespouting, Co., Good's L-S Storage Rental. Good stated that there is no corporation known as Good Construction Company and that he has never done business as Good Eavespouting or Good Construction Company. Porter resisted the motion with his own affidavit about the insurer's conduct, and moved for leave to amend to add Larry Good and Sandra Good as individual defendants. District court denied Porter's motion and granted defendant's motion for summary judgment.

HELD: Porter cannot satisfy rule 89's relation back requirements, which apply to misnomers as well as actual changes in parties. Good did not receive notice within the prescribed limitations. District court should not have sustained defendant's motion for summary judgment, however. Defendant did not raise the limitations defense in its answer. "Because the limitations defense was not raised, the defendant waived it." Moreover, the names used by Porter in his petition to identify the defendant are so similar to the names actually used by Good in his business "as to create no confusion as to the identity of the defendant. As such, the business or trade name is a legal entity ...."

Clark v. Miller, 503 N.W.2d 422 (Iowa 1993)

Ch. 613A

Clark sued governmental subdivision within two years after giving sufficient and timely notice of claim pursuant to section 613A.5, but not within two years of the date of injury. HELD: Decision that section 613.A.5's six-month statute of limitations was unconstitutional did not also invalidate the notice provision that permitted a claimant to commence his action within two years after an adequate 60-day notice to the governmental subdivision. Clark's action was timely filed.

Northwest Limestone v. Dept. of Transp., 499 N.W.2d 8 (Iowa 1993)

Estoppel

Contractor's surety and various subcontractors each claimed interest in funds retained by the DOT pursuant to Iowa Code chapter 573 (1991). Iowa law provides:

> [A]ny claimant for labor or material who has filed a claim, or the surety on any bond given for the performance of the contract, may, at any time after the expiration of thirty days, and not later than sixty days, following the completion and final acceptance of said improvement, bring action in equity in the county where the improvement is located to adjudicate all rights to said fund, or to enforce liability on said bond.

§ 573.16 (emphasis added). Plaintiff did not file within 60 days, but asserts that surety was estopped from relying on limitation by its discussions with subcontractors about payment of their claims and its request that subcontractors "diary their file ahead" and call back on a specific date, which was beyond the 60-day deadline.

HELD: Subcontractors did not establish estoppel. Surety did not give any assurance that it would ultimately pay the claims or that it would ignore the statute of limitations.

R

Innk Land and Cattle Co. v. Kenkel, 493 N.W.2d 818 (Iowa 1992)

Fraudulent Conveyances

Based on claims of embezzlement, Innk Land filed an action in federal district court in Colorado and obtained a judgment against the Kenkels. When Innk Land attempted to enforce this judgment in Iowa, the Kenkels immediately filed a voluntary petition for

bankruptcy under chapter 7. Through the bankruptcy proceedings, Innk Land became aware that the assets that they had originally believed to be in the hands of the Kenkels had been transferred to various corporations controlled by them. The bankruptcy trustee abandoned any claim in the disputed assets. Innk Land began its own action to set aside those transfers. The Kenkels were awarded summary judgment on two grounds: (1) the action was barred by section 546 of the Bankruptcy Code because it was not brought by the trustee in the chapter 7 proceeding within two years of his appointment and (2) the action was barred by Iowa Code Section 614.1(4) (1987), a five-year statute of limitations in fraudulent transfer cases.

HELD: Section 548 of the Bankruptcy Code does not require a trustee to bring an action. Furthermore, any right the trustee had in this case to pursue such a cause of action was abandoned by the trustee. Once the bankruptcy trustee abandoned the claim against the defendants, Innk Land was free to pursue its remedies in state court.

Innk Land's claim was not barred by section 614.1(4) just because one of the Kenkels had transferred some of the embezzled proceeds to the payment of a personal debt more than five years before Innk Land commenced the action. Section 614.4 provides for extension of the time for bringing actions based on fraud until the fraud complained of "shall have been discovered by the party aggrieved." The fact that Innk Land knew of a single transfer does not as a matter of law establish that it knew the extent of the transfers. As a result, for summary judgment purposes, there was clearly a fact issue as to when Innk Land "knew" of the fraudulent transfer for purposes of applying section 614.4.

NEGLIGENCE

Mastland, Inc. v. Evans Furniture, Inc., 498 N.W.2d 682 (Iowa 1993)

Landlord sued tenant for damages caused by a fire. The fire was started by the tenant's grandchild, who was playing with a cigarette lighter in his crib. The landlord's two theories for recovery were negligence and breach of lease. District court found for defendants.

HELD: No negligence of the 2-year-old child could be imputed to tenant, because a 2-year-old child cannot be negligent. The question of a particular child's capacity for negligence is to be determined on the basis of evidence of the child's age, intelligence and experience. "We think at least as to three years of age and under, a child is incapable of negligence." Substantial

evidence supported the finding that the mother was not negligent in her supervision of the child. While the mother and tenant both smoked, there was no evidence the child had easy access to or was allowed to play with lighters. There was no explanation of how the child obtained the lighter.

Res ipsa loquitur was not applicable. Children often get into mischief despite a parent's best efforts and care. Thus, fire was not an event that, in the ordinary course of things, would not happen if reasonable care had been used.

Walker v. Mlakar, 489 N.W.2d 401 (Iowa 1992)

Gross Negligence

Employee was cleaning tunnels underneath aluminum rolling mills at the direction of his supervisor. He fell through an unguarded drop-off that could not be seen, due to poor lighting. His estate sued supervisory employees for gross negligence. District court sustained defendant's motion for directed verdict.

HELD: Plaintiff did not adduce substantial evidence that supervisory co-employees were aware of unguarded drop-off. Gross negligence requires proof of actual knowledge of the peril. Constructive knowledge is insufficient.

COMMENT: 6-3. Dissenting justices note that unguarded drop-off had existed for at least eight years. "The defendants cannot avoid the responsibility by intentionally avoiding discovery of the peril." District court should have permitted evidence of an OSHA violation to establish gross negligence. Post-accident investigation identified over 2,000 places in plant where a similar fall could have occurred. This evidence should have been admitted as "proof of the defendants' conscious failure to identify and appreciate the dangerous condition."

Hanson v. Schaumberg, 490 N.W.2d 84 (Iowa App. 1992)

R

Gross Negligence

Defendant employed Hanson to bail hay at defendant's farm. Hanson exhibited symptoms of heat stroke, and defendant directed him to sit down and rest. Defendant left Hanson alone for about one hour, returned, and found him unconscious. Hanson subsequently died. Estate sued defendant, alleging "intentional and outrageous" conduct. District court granted defendant's motion for summary judgment.

HELD: Hanson did not adduce substantial evidence that defendant intentionally caused Hanson's injuries.

COMMENT: The opinion never says the words "gross negligence." Is this a new cause of action (albeit one not supported by the evidence here) for employer liability for work-related injuries over and above worker's compensation and gross negligence?

Coker v. Abell-Howe Co., 491 N.W.2d 143 (Iowa 1992)

Lookout

Coker delivered steel to construction site. Abell-Howe employee Moore supervised Abell-Howe employees in unloading Coker's truck. Moore was unfastening chains that secured the load and noticed he was having difficulty with the "cheater bar." Coker knew of the danger in releasing the cheater bar. He nevertheless turned his back on Moore, who then lost control of the bar, which hit Coker. Coker sued Abell-Howe, who affirmatively alleged that Coker was negligent for, among other things, failing to keep a proper lookout. Court reversed judgment on defense verdict for other grounds and remanded for new trial.

HELD: Abell-Howe submitted substantial evidence to support submission of its lookout particular of contributory negligence.

Kamerick v. Wal-Mart Stores, Inc., 503 N.W.2d 24 (Iowa App. 1993)

Sufficiency of Evidence

Plaintiff in trip-and-fall case adduced evidence that she arrived at Wal-Mart, asked an employee where she could find potting soil, and then followed the employee at his request, until she tripped over an empty pallet. Jury assessed 51% of fault to Wal-Mart and 49% at fault to plaintiff. District court sustained Wal-Mart's motion for judgment n.o.v.

HELD: Plaintiff adduced substantial evidence of negligence and proximate cause.

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HELD: Plaintiff adduced substantial evidence of negligence and proximate cause.

Pundzak, Inc. v. Cook, 500 N.W.2d 424 (Iowa 1993)

Abuse of Process

Cook and Webster worked in the advertising business as performers. Pundzak was an advertising agent who worked with Cook and Webster from time to time. Pundzak heard Cook and Webster informally playing the parts of two "old timers" named Willard and Rafert, and suggested that he could obtain advertising work for them as those characters. The parties subsequently entered into an exclusive agency agreement in which Pundzak, Inc., was to be the exclusive agent for Cook and Webster as "Willard and Rafert." Pundzak was to use its "best efforts" to promote the characters.

After several years of success, Cook and Webster became dissatisfied with Pundzak's efforts, largely because of an alleged conflict of interest. Cook and Webster terminated the agreement. Pundzak sued Cook and Webster for breach of contract, and Cook and Webster filed a separate lawsuit against Pundzak. Cook and Webster's action sought damages for breach of contract and abuse of process. The court consolidated the actions for trial. The jury found that Pundzak breached the "best efforts" clause during several years of the life of the agreement. The jury also found for Cook and Webster on their claim for abuse of process, and awarded $1.

HELD: Substantial evidence supported jury's findings that Pundzak filed his original action against Cook and Webster primarily to accomplish an improper purpose. Cook and Webster produced evidence that Pundzak stated he would "nickel and dime Bob Cook to death" and "bleed Bob Cook." Cook and Webster also produced evidence that Pundzak stood to benefit from media coverage of the litigation, because of the notoriety of Willard and Rafert.

Palmer v. Tandem Management Services, Inc., _____ N.W.2d _____ (Iowa, September 22, 1993)

R

Abuse of Process

Landlord brought forcible entry and detainer action against tenant in small claims court. Tenant counterclaimed for, among other things, retaliatory conduct under section 562B.32. Small claims court found for landlord and against tenant on all claims. District court affirmed. Iowa Supreme Court dismissed tenant's appeal. Tenant commenced separate action against landlord for, among other things abuse of process. Tenant alleged that landlord used FED case "to intimidate him and as retaliation for his

complaints and prior small claims actions." Jury awarded damages to tenant.

HELD: "Because the claim of retaliatory eviction was already decided adversely to [tenant], ... he could not base his abuse-of-process action on an allegation of retaliatory eviction as an improper purpose."

Boylan v. American Motorists Insurance Co., 489 N.W.2d 742 (Iowa 1992)

Bad Faith

Boylan sued his employer's workers' compensation insurer for bad faith in delaying and then terminating his compensation benefits. Insurer moved to dismiss. District court granted the motion, holding that the relationship between Boylan and his employer's insurer is not analogous to the traditional first-party bad faith claim scenario but "is more analogous to the relationship between a tort victim and the tort feasor's liability insurer. District court also concluded that statutory remedy in section 86.13 makes creation of new cause of action unnecessary.

HELD: Boylan stated a claim upon which relief may be granted. Section 86.13, relied upon by insurer and district court, in fact establishes "an affirmative obligation on the part of the employer and insurance carrier to act reasonably in regard to benefit payments in the absence of specific direction by the commissioner." In other words, unlike the situation between tort victim and tort feasor, comp insurer must proceed to pay benefits that are owed or face penalty.

Courts that have refused to recognize this cause of action have based their rejection on the exclusive-remedy provisions of their states' statutes. Iowa's exclusive-remedy provision "is applicable only to claims against the employer and does not extend to the employer's compensation insurer." Legislature did not likely intend section 86.13 "to be the sole remedy for all types of wrongful conduct by carriers with respect to administration of workers' compensation benefits." It applies only to delay in making payments or to termination of payments. "It contemplates negligent conduct rather than the willful or reckless acts that are required to establish [bad faith]." The statute provides no remedy for delay in payment of medical benefits or for failure to pay such benefits.

Reedy v. White Consolidated Industries, Inc., _____ N.W.2d _____ (Iowa, July 21, 1993)

Bad Faith

The claim for bad-faith failure to pay benefits due an injured employee, first recognized as a valid cause of action against a workers' compensation insurer in Boylan v. American Motorist Insurance Co., 489 N.W.2d 742 (Iowa 1992), applies as well to self-insured employers. Also, adjudication of the workers' compensation claim and exhaustion of all appellate remedies is not a prerequisite to the commencement of such a bad-faith action. Although it usually will be helpful for the compensation liability to have been adjudicated conclusively before the trial of a bad-faith action, district courts can accommodate this interest simply by delaying trial of the bad faith claim until the workers' compensation claim has been completed.

Nassen v. National States Insurance Co., 494 N.W.2d 231 (Iowa 1992)

Bad Faith

85-year-old single woman purchased a nursing home insurance policy from National States through an independent agent who filled out the application form for her. She told the agent that she had been hospitalized for three days with a bowel obstruction about six months earlier. National States issued the policy. Nassen's hospital records contained a physician's note about the possibility of confusion and hypothyroidism. Her regular physician did not confirm those diagnoses, but did find "a low thyroid value" and prescribed small dosage of medication. National States did not seek out these medical records.

Two months after National States issued its policy to Nassen, she was hospitalized with uncontrolled diabetes, mild hypothyroidism, and mild dementia. She transferred from the hospital to a nursing home. Her friend and attorney-in-fact submitted a claim form on July 6. She called National States on several occasions in August and September, and received no response. On October 3, National States sent her a request for another claim form. She returned the form with a letter on October 10. On October 21, National States sent another letter, again requesting another signed claim form. Meanwhile, Nassen's friend was liquidating Nassen's assets to pay for her nursing home bills. On November 5, her friend sent a third signed claim form. Three days later, National States requested yet another claim form. Her friend refused and asked if she were being given "the run around." In January, in response to the friend's telephone call, National States said it was waiting for a doctor's report. National States received the doctor's report on February 7. Nassen's friend then contacted counsel, who wrote to National States in March. On March 15, National States said it was still waiting for the physician's

report, which they in fact had received on February 7. On April 4, National States finally reported to counsel that Nassen's application "was inaccurate and incomplete." She had failed to disclose "chronic confusion and hypothyroidism." Counsel wrote to National States to advise that the physician had already reported to National States that Nassen did not have chronic confusion or hypothyroidism before her application. National States responded by returning Nassen's premium and by rescinding the policy, retroactive to the date of issue.

Nassen sued for breach of contract, bad faith, and fraud. Jury found for Nassen on all counts and awarded damages of $43,800 for breach of contract, $40,000 for bad faith, $40,000 for fraud, and $500,000 for punitives. The jury decided that National Sales' conduct was not directed to specifically at Nassen, so Nassen received only 1/4 of the punitive damage award. District court also ordered a remittitur of the $40,000 fraud verdict, which plaintiff accepted. National States appealed and Nassen cross-appealed.

HELD: Nassen adduced substantial evidence to satisfy the Dolan test. National States had no basis for concluding that Nassen had intentionally misrepresented her health. It rested its decision entirely on tentative diagnoses made by an admitting physician, which diagnoses were rejected upon discharge by Nassen's regular physician. Evidence permitted the jury to conclude that National States did not even read the medical information it had before deciding to reject her claim and rescind the policy.

Jury's award of $40,000 for bad faith was not excessive. In addition to breach of contract damages, jury could award damages under bad faith for economic loss resulting from premature disposition of Nassen's assets and for emotional distress.

Nassen adduced substantial evidence to support jury's finding of malicious conduct for purposes of awarding punitive damages. "[O]nce the jury found that a bad-faith tort had been committed under the instructions that were given ..., the elements required for an award of punitive damages had been confirmed." Punitive verdict was not excessive, even though it represented 45% of National States' net operating income. Nassen adduced evidence that National States had engaged in "cash flow underwriting" and "post-claim underwriting" for a substantial period of time, and had paid out $5 million in dividends to company principals.

District court was correct in concluding that fraud and bad faith verdicts and the identical damage awards were duplicative. Although jury could award certain economic damages under either theory that were not available under breach of contract, the identity between the acts constituting bad faith and the acts constituting fraud rendered the verdicts completely duplicative. Rather than using remittitur, district court simply should have granted judgment n.o.v. on one of the two counts.

Ottumwa Housing Authority v. State Farm Fire & Casualty Co., 495 N.W.2d 723 (Iowa 1993)

Bad Faith

Employee filed complaint with civil rights commission as a result of alleged sexual harassment by OHA executive director. OHA tendered defense to State Farm, who had issued a general liability policy and a workers' compensation and employer's liability policy to OHA. State Farm denied coverage under both policies. Employee filed a workers' compensation claim, the basis for which was the sexual harassment. State Farm retained its coverage counsel to defend the workers' compensation claim. Employee then filed civil damage actions against OHA for sexual harassment. Employee subsequently dismissed her workers' compensation proceeding, and coverage counsel then advised State Farm that it had no coverage for the civil damage actions. State Farm denied coverage and refused to defend. OHA settled the employees' claim and sued State Farm for bad faith. District court granted State Farm's motion for summary judgment.

HELD: State Farm did not commit bad faith by the manner that it defended the short-lived workers' compensation claim. OHA's theory was that State Farm could have settled the workers' compensation claim while it was pending, which would have, at the very least, cut OHA's losses when it came time for OHA to settle the civil damage actions. OHA argued that State Farm did not pursue settlement because the counsel it retained to defend was interested in coverage as well. "We offer no opinion on whether such a conflict of interest existed. ... Because there was no basis for [employee's] workers' compensation claim, State Farm - under the duty to defend provision - had every right to defend the claim in the way it did."

In re Conservatorship of Rininger, 500 N.W.2d 47 (Iowa 1993)

Breach of Fiduciary Duty

Attorney White set up a voluntary conservatorship for Darrel Rininger and served as conservator until White's death. White's partner Prichard succeeded as conservator. Darrel moved from a veteran's home back to his home town for the last seven years of his life. His twin sister Darlene undertook responsibility for his general care, since his two adult children lived out of state. Darlene needed money. Darrel wanted to help her. Darrel purchased certificates of deposit in joint tenancy with Darlene from his own funds and with Prichard's knowledge. Prichard later transferred principal from a trust in which Darrel was the income beneficiary and purchased a certificate of deposit, again for Darrel and Darlene as joint tenants. When Darrel died, Prichard delivered all six certificates of deposit to Darlene. Darrel's children objected to Prichard's final report and accounting as conservator, and the

district court ordered Prichard to reimburse Darrel's estate for the value of the certificates of deposit.

HELD: Once Darrel became a ward, he lacked the power to convey his property in any manner, other than by will, and regardless of his actual competence. Prichard's failure to prevent the ward's unauthorized transfer of his own funds constitutes a breach of fiduciary obligation. The probate court's annual approval of accountings does not insulate the conservator from liability, because the accounting merely reported the expenditure of funds for Darrel's care and maintenance. "The transactions the court was approving were not in fact the transactions that had taken place."

Bloomquist v. Wapello County, 500 N.W.2d (Iowa 1993)

Causation

Four state employees and one county employee moved into a 100-year-old building purchased and remodeled by the County. The employees encountered fleas, noxious odors, and poor ventilation. The State hired a pest control company, who repeatedly sprayed Dursban throughout the building. Inspectors discovered sewer problems in the building and either malfunctioning or disconnected ventilation equipment. The employees did not adduce any epidemiological evidence, however. Their physicians testified that the employees suffered from a variety of health problems, all caused by the conditions present in the building. After substantial verdict for the employees, district court granted motion for judgment n.o.v.

HELD: Epidemiological evidence may be helpful, but it is not an absolute requirement in establishing causation in a toxic tort action. Iowa's rejection of the Frye standard of "general scientific acceptance" in 1980 as a prerequisite for introduction of scientific evidence is consistent with permitting a jury verdict to be supported by standard medical opinion testimony as to causation.

R

Stumpf v. Reiss, 502 N.W.2d 620 (Iowa App. 1993)

Causation

In litigation arising out of collision between motorcycle and automobile, district court allowed automobile driver to present evidence, over cyclist's objection, that cyclist did not have cycle license. Jury found that defendant automobile driver was not at fault.

HELD: Cyclist's failure to have license did not bar his recovery and was not the proximate cause of the accident. Evidence should not have been received. Because jury found that defendant automobile driver was not at fault, "we have no way of knowing the amount of weight the jury gave to the inadmissible evidence." Cyclist is entitled to new trial.

Garvis v. Scholten, 492 N.W.2d 402 (Iowa 1992)

Child Abuse Reporting

Section 232.73 immunizes from civil liability a "person participating in good faith in the making of a report ... or aiding and assisting in an investigation of a child abuse report." HELD: Good faith is measured by a subjective standard.

Greenland v. Fairtron Corp., 500 N.W.2d 36 (Iowa 1993)

Civil Rights

Greenland sued her employer for maintenance of a sexually hostile work environment through sexual harassment in violation of chapter 601A, Code of Iowa, intentional infliction of emotional distress, assault, and battery. She sought a jury trial. She alleged a hostile work environment from crude and demeaning language, graphic descriptions of fantasized sexual conduct, and circulation of false rumors about her personal life. She alleged six instances of physical contact.

HELD: 601A preempts the emotional distress claim, but not the assault or battery claims. She is entitled to a jury trial on the assault and battery claims.

Renander v. Inc., 500 N.W.2d 39 (Iowa 1993)

Civil Rights

R

Renander and his party did not receive service at The Sanctuary Restaurant in Iowa City (the best pizza in town), allegedly because of Renander's statements on a previous occasion about homosexuality (Renander was Rush before Rush was) Renander sued The Sanctuary and its employees for violation of Iowa's "hate crimes" statute, section 729.5, Code of Iowa. (Subsection 5 provides a civil remedy to victims suffering harm from a hate crime). District court sustained defendants' motion to dismiss.

HELD: Renander was not "injured" by conduct proscribed by section 729.5. The statute provides:

> A person, who acts ... to injure, oppress, threaten, or intimidate or interfere with any citizen in the free exercise or enjoyment of any right or privilege secured to that person by the constitution or laws of the state of Iowa or ... the United States, ... is ... guilty of a class "D" felony.

Renander does not contend that he was oppressed, threatened, intimated, or interfered with. He cannot be "injured" within the meaning of the statute unless he has sustained a physical injury to person or property. "[O]therwise section 729.5 would turn into a general state tort law."

State Farm Mutual Automobile Insurance Co. v. Employers Mutual Casualty Co., 500 N.W.2d 80 (Iowa App. 1993)

Consent to Operate

Louzek, the chief executive officer for the Amana Society, borrowed a Society-owned vehicle for use in moving his residence. Louzek's girlfriend Morton was driving the vehicle at his direction and on a trip relating to Louzek's move, when she collided with another truck. Her son was injured and Louzek's son was killed. Her son and the estate sued Morton. Coverage for Morton's liability depended upon whether or not Morton was operating the Amana Society's vehicle with its consent.

HELD: Substantial evidence supported district court's finding that Morton operated the vehicle with Amana Society's consent. Louzek's authority for personal use of the vehicle was broad enough to permit Morton to operate the vehicle also. Amana Society had no formal employee policy communicated by a handbook. Any informal restrictions that existed with respect to personal use of Amana Society vehicles was not communicated to Louzek. Personal use of Amana Society vehicles and other personal property was commonplace. Louzek's job description literally authorized him to give himself permission to use the vehicle. Morton's trip was related to Louzek's purpose in using the vehicle himself.

R

McCray v. Carstensen, 492 N.W.2d 444 (Iowa App. 1992)

Conversion

Plaintiffs leased commercial real estate from defendants. Lease term was 5-1-89 to 4-30-90. Lease provided plaintiffs were to receive a 10-day notice prior to cancellation or forfeiture of the lease for any default by plaintiffs. Plaintiffs operated a bar that featured semi-nude female dancers until they lost their dance permit in March of 1990. Plaintiffs closed the bar while they attempted to obtain new permits. Defendants notified plaintiffs in

late March or April that there would be a rent increase upon renewal. Plaintiffs expressly rejected any interest in renewing the lease. Plaintiffs abandoned further efforts to reopen the bar in early April. Defendants took possession of the premises on April 7, changed the locks, and leased the premises to a third party. Plaintiffs asked defendants just once for return of certain personal property. Defendants directed the plaintiffs to contact the new tenant. New tenant asked for a list, because several individuals were claiming rights to property on the premises. Plaintiffs never submitted a list and never contacted defendants again. Plaintiffs sued defendants for conversion. District court found against plaintiffs.

HELD: Plaintiffs did not adduce substantial evidence to support their claim of conversion. Locking plaintiffs out does not interfere with plaintiffs' personal property sufficiently to constitute conversion, because defendants were willing to return the property. Failure to provide notice of default does not determine conversion. Defendants acted in good faith in taking possession of the premises, did not assert any rights inconsistent with plaintiffs' rights over the property, and acted consistent with their obligation to mitigate damages.

Collins v. Kenealy, 492 N.W.2d 679 (Iowa 1992)

Dog Bite

Section 351.28 imposes liability on "[t]he owner of a dog for damages done by dog bite." Section 351.2 defines "owner" to "include any person who keeps or harbors a dog." HELD: Person who has custody and control of dog because he has contracted to provide grooming services does not keep or harbor a dog for purposes of becoming an owner, and thus may sue the legal owner of the dog for damages done when the dog bites the groomer.

Paul v. Ron Moore Oil Co., 487 N.W.2d 337 (Iowa 1992)

Dramshop

The term "service" as used in the dramshop law does not include the assistance that store employees provide to customers incidental to the sale of alcohol which is not consumed on the store premises.

Gavlock v. Coleman, 493 N.W.2d 94 (Iowa App. 1992)

Dramshop

Admission over objection of the results of intoxicated driver's preliminary breath test was, at best for dramshop, harmless error. Other evidence clearly establishing that driver was intoxicated (including her own testimonial admission) was presented to the jury without objection.

Fulmer v. Tague, 500 N.W.2d 432 (Iowa 1993)

Dramshop

Jim Tague, not of legal age, posted a "pour your own" beer party in a ravine behind a house vacated by his parents after a mortgage foreclosure. Jim's parents knew nothing about the party in advance. Jim's mother gave him a check payable to a local gas station, which Jim used to pay for beer and a keg deposit. Fulmer and McLaughlin left the party with McLaughlin drunk and driving. Fulmer was killed in a one-vehicle accident.

Fulmer's estate sued Tague, Tague's mother, and McLaughlin. District court sustained Tague's mother's motion for summary judgment. At trial, jury assessed percentages of fault as follows:

Fulmer	25%
Tague	10%
McLaughlin	65%

HELD: Plaintiffs adduced no substantial evidence that Tague's mother had any knowledge of party or of underage drinking. Gas station attendant's testimony that Tague said his parents planned to chaperon the party was relevant only to impeach Tague's denial of the statement. As evidence tending to prove Tague's mother's knowledge of the party, it was hearsay. District court was correct in sustaining her motion for summary judgment.

District court did not abuse its discretion in refusing to admit evidence of a post-accident beer party held by Jim Tague at the same location (plaintiffs had sought punitive damages).

Substantial evidence supported jury finding that Jim Tague violated section 123.47:

> A person shall not sell, give, or otherwise supply ... beer to any person knowing or having reasonable cause to believe that person to be under legal age ... .

Tague's effort to distinguish the party as a "pour your own" does not protect him from his knowing purchase of beer and providing it

to underage friends. The statute prevents underage persons as well as adults from supplying alcohol to an underage person. Legislature did not need to define "person" to include underage persons in order to supply its proscription to all instances of providing alcohol to underage persons.

Hawkeye Bank & Trust Co. v. Spencer, 487 N.W.2d 94 (Iowa App. 1992)

Duty

A former boyfriend of an Urbandale woman threatened to kill her. The following day an Urbandale police officer interviewed the woman at her home and concluded that the boyfriend would carry out his threat. The officer advised the woman that the police would put a "special" watch on her and her home, would attempt to contact her former boyfriend, and would watch for his presence or his vehicles in her neighborhood. An officer attempted unsuccessfully to find the former boyfriend and decided to take no further action until after the weekend. On Sunday the former boyfriend entered the woman's home and killed her and her male friend. The estates of the murder victims sued the City of Urbandale and its police department for negligence.

HELD: The promise to do more than was routinely required in investigating did not warrant an exception to the immunity from liability for negligence in the course of investigating criminal activity, which immunity was reaffirmed in Hildebrand v. Cox, 369 N.W.2d 411, 415 (Iowa 1985). The fact that the police department promised to provide a "special" watch did not create a special relationship which would form the basis for an exception to this immunity. Likewise, a citizen's justifiable reliance on the promise of a special watch would not create an exception to the immunity.

Conrad American v. Cooperative Grain and Product Co., 488 N.W.2d 450 (Iowa 1992)

Duty

R

Subcontractor has no duty to owner to warn owner of contractor's financial difficulties, so as to prevent owner from having to pay twice for subcontracted work. Chapter 572 provides protection for owners, and imposing a duty on subcontractor would invert the public policy represented by chapter 572.

Guzman v. Des Moines Hotel Partners, 489 N.W.2d 7 (Iowa 1992)

Duty

Defendant hotel's sprinkler system on its lawn malfunctioned, causing water to be sprayed out into street. Mr. and Mrs. Guzman rear-ended another vehicle. Guzmans sued hotel, claiming that water from sprinkler obscured his vision. District court submitted claims of negligence and nuisance. Jury assessed 55% of fault to hotel and 45% to John Guzman. Because of the nuisance count, however, district court entered judgment for both Guzmans for the full amount of their damages, without reduction for John Guzman's fault.

HELD: Hotel as owner of land of adjoining street owes duty to traveling public to keep his premises in such condition as to not create hazards in street. Guzmans adduced substantial evidence that hotel violated this duty.

District court erred in submitting nuisance claim as well as negligence. While the result of hotel's conduct may be categorized as nuisance, negligence was the alleged cause. No plaintiff should be permitted to circumvent the operation of chapter 668 focusing on the result of alleged negligence, calling it nuisance, and recovering damages without reduction for his or her own fault.

Allen v. Anderson, 490 N.W.2d 848 (Iowa App. 1992)

Duty

For a variety of reasons, all of which speak poorly of the police department of the city of Ottumwa, police officers failed to apprehend kidnappers before they murdered their 12-year-old victim. Estate and parents sued city for negligence. District court sustained city's motion for summary judgment.

HELD: Public duty doctrine bars plaintiffs' claim. Police's duty to protect citizenry does not run to specific individuals, absent some special relationship generated by police action that create the hazard or by taking the citizen into police custody or control. Section 719.2 (person who is requested or ordered to assist in making an arrest or to prevent commission of criminal act and who refuses or neglects to do so commits a simple misdemeanor) does not create a civil cause of action or a private duty owed by police officers to members of general public, including those members who become victims of crime.

Leonard v. State, 491 N.W.2d 508 (Iowa 1992)

Duty

Upon his discharge from Mental Health Institute, where he had been treated following involuntary commitment for bipolar affective disorder, manic type, with alcohol dependency and suicidal ideation, Parish almost beat his employee Leonard to death. Leonard sued state and MHI for failing to treat Parish adequately and for discharging him when they knew he posed a threat to members of the general public who came in contact with him. District court overruled defendants' motion for summary judgment.

HELD: Sufficient special relationship exists between physician and patient to impose duty on physician to control patient's conduct, an exception to the general rule under Restatement sections 315 and 319. The duty does not extend to members of the general public, however. Leonard has not shown that he comes within any defined "class of persons more endangered by Parish's release than the public at large."

Knake v. King, 492 N.W.2d 416 (Iowa 1992)

Duty

Knake operated his snowmobile across frozen lake during day. No other vehicles were present on lake. After dark, Knake returned by same route. Only one snowmobile in party had working lights. Meanwhile, King parked his Suburban on lake directly across fresh snowmobile tracks. King was there to fish. His vehicle was unlit. Knake ran into it. Knake sued King. District court sustained King's motion for summary judgment, holding that King owed no legal duty to Knake.

HELD: Knake generated a fact duty as to whether King was negligent.

> We cannot say, as a matter of law, that King breached no standard of care or duty to ... snowmobilers, when he parked his unlighted vehicle on a frozen lake, at night, over visible snowmobile tracks.

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Eley v. Pizza Hut of America, Inc., 500 N.W.2d 61 (Iowa 1993)

Duty

Mr. and Mrs. Eley live across the street from a Pizza Hut restaurant. High school students congregate on and around the Pizza Hut premises and parking lot after Friday night football

games. Criminal activity, including fights and violence to person and property have occurred in the past. Pizza Hut used an on-premises security guard to some degree of success in the past. The Eley's adult son confronted a crowd one night. Someone threw a rock in the direction of the Eleys and it injured Mr. Eley. No one can identify the rock thrower or state with certainty the thrower's location relative to Pizza Hut property.

Eleys sued Pizza Hut in federal court. In response to Pizza Hut's motion for summary judgment, federal court certified questions relating to the existence of and scope of Pizza Hut's duty to Mr. Eley, who was not on Pizza Hut property and who was injured by the criminal act of someone who may or may not have been on Pizza Hut property (that night or ever) but who was part of a group of students that congregate on or near Pizza Hut property on a regular basis.

The Iowa Supreme Court declined to answer certified questions.

> [W]e do not know who threw the rock, the location from which the rock was thrown, or the involvement of Pizza Hut, particularly with respect to providing beer on the night in question. In addition, we do not know what inferences may be made from Pizza Hut's cancellation of the prior security services or what the record might establish as to Pizza Hut's alleged status as an "attractive nuisance."

Huber v. Hovey, 501 N.W.2d 53 (Iowa 1993)

Duty

Dale Huber paid to enter race track as spectator and signed release in consideration for being permitted to enter pit area. Dale suffered injuries when wheel detached from race car and tore through fence in pit area. Dale and spouse Karen sued a number of racing persons and entities. District court sustained defendants' motion for summary judgment as to both plaintiffs and as to all defendants.

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HELD: Release is valid contract and enforceable by all released parties against Dale Huber. Release is not ambiguous as to persons releasing, persons released, and types of liability covered. Dale's failure to read contract is irrelevant. Dale failed to show that risk of injury was unusual or exceptional (which showing could arguably raise fact question as to whether he was aware of risk of injury).

Dale's release, however, does not bar Karen's independent consortium right. The release does not erase the underlying tort, which injured her property right as well as Dale's person.

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Pappas v. Clark, 494 N.W.2d 245 (Iowa App. 1992)

Duty

Wife sued doctors and pharmacies for failing to prevent husband from killing himself. Husband had worked for doctors as a billing consultant and obtained prescription drugs fraudulently. He became addicted to prescription medication, to cocaine (purchased from sources other than defendants), and eventually died from a self-injected lethal dose of cocaine.

HELD: Husband's illegal act bars surviving spouse's and child's negligence actions as a matter of public policy.

COMMENT: Court of appeals distinguishes Katko v. Briney, 183 N.W.2d 657 (Iowa 1971), in which supreme court upheld a jury verdict in favor of plaintiff who had pled guilty to breaking and entering defendant's abandoned home but who was injured by defendant's spring gun.

> In Katko, the main thrust of the defendant's defense in the trial court and on appeal was that Iowa law permitted the use of a spring gun in protecting one's dwelling. The issue of whether the plaintiff's cause of action would be precluded for public policy reasons was never even addressed in the supreme court's opinion.

Davis v. Kwik-Shop, Inc., _____ N.W.2d _____ (Iowa, August 25, 1993)

Duty

Assailants initially gathered at the Hy-Vee and its employee's parking lot and disclosed themselves to Hy-Vee personnel to be dangerous characters in the mood to harm "some guys" they could see at the Kwik-Shop premises. The assailants then walked to the Kwik-Shop premises, engaged in an altercation with Davis and his friends, and seriously injured Davis. Davis sued Kwik-Shop, who filed a third-party action against Hy-Vee. Davis amended his petition to assert a direct claim against Hy-Vee. Hy-Vee filed a motion for summary judgment on grounds that it owed no duty of care to Davis. District court sustained Hy-Vee's motion.

HELD: Hy-Vee had no duty to protect Davis from harm committed by invitees who left Hy-Vee property before assaulting Davis, who had never been on Hy-Vee property. Restatement section 314A provides that the duties owed by a possessor of land no longer apply once the invitee departs.

Kavanaugh v. Medical Associates Clinic, P.C., 491 N.W.2d 194 (Iowa App. 1992)

Employment

Clinic retained Kavanaugh to perform marketing work for its HMO. Employee handbook listed causes for termination and included "organizational changes." Clinic decided to withdraw its marketing operations from Kavanaugh's county, and terminated him.

HELD: Handbook expressly permits employer to terminate Kavanaugh at will, if it changes its organization. Kavanaugh concedes that he was terminated because clinic withdrew its business activities from his county.

Kavanaugh's allegations of oral assurances of long-term employment are insufficient to generate a contract of durational employment, absent additional consideration. Although he left other employment to take the job with defendant, he had no protection against termination in that employment relationship either.

French v. Foods, Inc., 495 N.W.2d 768 (Iowa 1993)

Employment

Grocery store fired overnight stocking employee for eating food without paying for it. Employee contended that he was other than an at-will employee because of the content of the employee handbook that anticipates supplementary or even contradictory employment terms not set forth in the handbook. He also relied on theories of breach of covenant of good faith and fair dealing, discharge in violation of public policy, black-listing in violation of section 730.3, prima facie tort, and malicious discharge. District court sustained grocery store's motion for summary judgment.

HELD: Handbook is not ambiguous. It does not constitute an offer of continued employment. To the contrary, handbook repeatedly states that either employee or employer can terminate the relationship at any time, for any reason. Language in handbook to the effect that corporate officers have the right to modify or change this practice by a writing is irrelevant, because employee relies only on offhand comments by supervisory personnel. The cause of action for breach of implied covenant of good faith and fair dealing is not valid in Iowa. Notwithstanding employee's claim that grocer's investigator engaged in coercive tactics that constitute the suborning of perjury, employee has not adduced any substantial evidence that he was terminated in violation of public policy. The so-called "black listing" prohibition of section 730.3 is not applicable, because grocer did not communicate the circumstances of its termination of employee to any potential

future employers. Hall v. Montgomery Ward, 252 N.W.2d 421 (Iowa 1977) no longer can serve as authority for a civil action arising from extortion in violation of the criminal code. The old statute on extortion, section 720.1, Code of Iowa (1973), defined extortion to include an accusation of crime for the purpose of compelling the person to take action. The current extortion statute, section 711.4, is limited to certain types of conduct coupled with a purpose of obtaining something of value. Employee does not adduce substantial evidence that brings the current extortion statute under play. Iowa does not recognize a cause of action for malicious discharge, as described in Tourville v. Inter-Ocean Insurance Co., 353 Pa. Super. 53, 508 A.2d 1263 (1986).

Porter v. Pioneer Hi-Bred International, Inc., 497 N.W.2d 870 (Iowa 1993)

Employment

Pioneer hired Porter under a contract that reserved to Pioneer "the right to terminate ... by giving 10 days written notice." Porter contended that Pioneer's course of conduct and subsequent interoffice memoranda modified the written agreement. District court entered summary judgment for Pioneer.

HELD: Porter failed to generate a fact issue on his implied-contract theory. He cannot identify any specific act, transaction, or conduct by Pioneer that supported his belief that Pioneer had contracted away its right to terminate him at will. The two interoffice memos that supported his claim were not known to him until after he commenced discovery, so he could not have relied on them. The theory of implied covenant of good faith and fair dealing continues to be inappropriate to employment contract cases.

Anderson v. Boeke, 491 N.W.2d 182 (Iowa App. 1992)

Fiduciary Duty

Mr. and Mrs. Nebergall owned 690 acres of farmland. When Mr. Nebergall died, executor contemplated a sale of the land in order to satisfy the Nebergalls' indebtedness that was secured by the land. Nebergalls' nephew Anderson spoke to Boeke, a loan officer at Federal Land Bank of Cedar Rapids (FLB-CR). Boeke gave Anderson a loan application from Federal Land Bank of Omaha (FLB-O). Lamp met with Boeke and discussed purchasing the Nebergall property. Lamp agreed to sell Boeke 80 acres of the Nebergall property. Lamp made an offer, which was submitted by the executor to the probate court for approval. Anderson again contacted Boeke about purchasing the Nebergall property and expressed an interest in obtaining a loan. Boeke advised Anderson that the Nebergall property "had already been sold subject to court approval."

Anderson filed an objection to the proposed sale, but he and Lamp negotiated their differences such that Anderson withdrew the objection and received five acres of the Nebergall property from Lamp in return for labor to be performed. Boeke proceeded to purchase a portion of the Nebergall property from Lamp, with financing from the executor. Anderson sued Boeke and FLB-O. Anderson contended that Boeke withheld his interest in the Nebergall property from Anderson and steered financing to Lamp instead of Anderson. Anderson claimed that Boeke was FLB-O's agent. District court sustained defendants' separate motions for summary judgment.

HELD: Anderson could not establish a fiduciary relationship between Boeke and Anderson. Anderson never applied for a loan at FLB-CR and never filled out loan forms for FLB-O.

In re Estate of Phoenix, 493 N.W.2d 79 (Iowa App. 1992)

Fiduciary Duty

Executor sold one of two similar duplexes owned by estate to a third party after obtaining an appraisal of it. Executor purchased the second duplex for herself. She did not have it appraised, she did not seek judicial approval, and she apparently did not offer it for sale to the general public. She did, however, pay the same net price as was paid on the first duplex, which was in better condition. Also, the will gave her the power to sell real estate without court approval or notice. She also sought advice from counsel, who opined that the sale was appropriate. One of six beneficiaries sought to remove the executor for self-dealing.

HELD: Executor did not breach her duties sufficiently to merit removal.

In re Trust of Killian, 494 N.W.2d 672 (Iowa 1993)

R

Fiduciary Duty

Killian created separate trust for her spouse, daughter, and son. Daughter sued trustees for breach of fiduciary duty and fraud. Parties reached a settlement, contingent upon court approval of the trustees' past actions regarding all three trusts. Trustees filed a petition seeking acceptance by district court of jurisdiction over the trust, approval of all past acts of the trustees, and acceptance of one trustee's resignation. Son signed acknowledgement of receipt of notice, entry of appearance, and consent to entry of orders. District court entered an order accepting jurisdiction, approving prior acts of trustees and accepting the resignation of one trustee. Son timely filed an

action under rule 252(b) to vacate the district court's order. Son alleged that trustees failed to inform him, formally or informally, that the reason for the trustees' petition was to further the settlement of his sister's action against the trustees for fraud and breach of fiduciary duty. District court denied and dismissed son's petition after trial.

HELD: Trustees disclosed in petition that sister's lawsuit was premised on "mismanagement on the part of the trustees and misconduct on the part of the trustees." Son did not establish any fraud or irregularity that would authorize district court to vacate its previous order pursuant to rule 252.

In re Estate of Snapp, 502 N.W.2d 29 (Iowa Ap. 1993)

Fiduciary Duty

Attorney Snapp drafted his father's will and trust agreement and served as both executor and attorney for his father's estate. Father was principal owner of one-car leasing business and a 40% owner of another at the time of his death. Snapp took over operations of the businesses, paid himself compensation from the businesses in the amount of $475,000 over approximately 8 years, collected executor fees of $25,000, attorney fees of $30,000 and sought compensation for additional extraordinary services of $6,000. A half-sister appeared out of nowhere almost 7 years after her father's death, established her paternity, and then objected to Snapp's first and final report and his application for extraordinary fees.

HELD: Will authorized Snapp to self-deal, but the benefits he receives from such dealing must be reasonable. There is no substantial evidence to support district court's finding that amounts Snapp paid himself to operate father's businesses were reasonable. On remand, district court must "determine the amount of reasonable compensation."

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HELD: Assuming that Boeke misrepresented the facts by failing to disclose his agreement with Lamp to re-purchase a portion of the Nebergall property and by telling Anderson that the Nebergall property was already sold, subject to probate approval, Anderson failed to adduce substantial evidence on reliance and damage. Notwithstanding Boeke's statements, Anderson attempted to stop the sale and then, after negotiating with Lamp, withdrew his objection. The Lamp-Anderson agreement permitted Lamp to do with the balance of the property "as Lamp wished."

Nassen v. National States Insurance Co., 494 N.W.2d 231 (Iowa 1992)

Fraud

85-year-old single woman purchased a nursing home insurance policy from National States through an independent agent who filled out the application form for her. She told the agent that she had been hospitalized for three days with a bowel obstruction about six months earlier. National States issued the policy. Nassen's hospital records contained a physician's note about the possibility of confusion and hypothyroidism. Her regular physician did not confirm those diagnoses, but did find "a low thyroid value" and prescribed small dosage of medication. National States did not seek out these medical records.

Two months after National States issued its policy to Nassen, she was hospitalized with uncontrolled diabetes, mild hypothyroidism, and mild dementia. She transferred from the hospital to a nursing home. Her friend and attorney-in-fact submitted a claim form on July 6. She called National States on several occasions in August and September, and received no response. On October 3, National States sent her a request for another claim form. She returned the form with a letter on October 10. On October 21, National States sent another letter, again requesting another signed claim form. Meanwhile, Nassen's friend was liquidating Nassen's assets to pay for her nursing home bills.

On November 5, her friend sent a third signed claim form. Three days later, National States requested yet another claim form. Her friend refused and asked if she were being given "the run around." In January, in response to the friend's telephone call, National States said it was waiting for a doctor's report. National States received the doctor's report on February 7. Nassen's friend then contacted counsel, who wrote to National States in March. On March 15, National States said it was still waiting for the physician's report, which they in fact had received on February 7. On April 4, National States finally reported to counsel that Nassen's application "was inaccurate and incomplete." She had failed to disclose "chronic confusion and hypothyroidism." Counsel wrote to National States to advise that the physician had already reported to National States that Nassen did not have chronic confusion or hypothyroidism before her application. National States responded by returning Nassen's premium and by rescinding the policy, retroactive to the date of issue.

Nassen sued for breach of contract, bad faith, and fraud. Jury found for Nassen on all counts and awarded damages of $43,800 for breach of contract, $40,000 for bad faith, $40,000 for fraud, and $500,000 for punitives. The jury decided that National Sales' conduct was not directed to specifically at Nassen, so Nassen received only 1/4 of the punitive damage award. District court also ordered a remittitur of the $40,000 fraud verdict, which plaintiff accepted. National States appealed and Nassen cross-appealed.

HELD: Nassen adduced substantial evidence to satisfy the Dolan test. National States had no basis for concluding that Nassen had intentionally misrepresented her health. It rested its decision entirely on tentative diagnoses made by an admitting physician, which diagnoses were rejected upon discharge by Nassen's regular physician. Evidence permitted the jury to conclude that National States did not even read the medical information it had before deciding to reject her claim and rescind the policy.

Jury's award of $40,000 for bad faith was not excessive. In addition to breach of contract damages, jury could award damages under bad faith for economic loss resulting from premature disposition of Nassen's assets and for emotional distress.

Nassen adduced substantial evidence to support jury's finding of malicious conduct for purposes of awarding punitive damages. "[O]nce the jury found that a bad-faith tort had been committed under the instructions that were given ..., the elements required for an award of punitive damages had been confirmed." Punitive verdict was not excessive, even though it represented 45% of National States' net operating income. Nassen adduced evidence that National States had engaged in "cash flow underwriting" and "post-claim underwriting" for a substantial period of time, and had paid out $5 million in dividends to company principals.

R

District court was correct in concluding that fraud and bad faith verdicts and the identical damage awards were duplicative. Although jury could award certain economic damages under either theory that were not available under breach of contract, the identity between the acts constituting bad faith and the acts constituting fraud rendered the verdicts completely duplicative. Rather than using remittitur, district court simply should have granted judgment n.o.v. on one of the two counts.

In re Trust of Killian, 494 N.W.2d 672 (Iowa 1993)

Fraud

Killian created separate trust for her spouse, daughter, and son. Daughter sued trustees for breach of fiduciary duty and fraud. Parties reached a settlement, contingent upon court approval of the trustees' past actions regarding all three trusts. Trustees filed a petition seeking acceptance by district court of jurisdiction over the trust, approval of all past acts of the trustees, and acceptance of one trustee's resignation. Son signed acknowledgement of receipt of notice, entry of appearance, and consent to entry of orders. District court entered an order accepting jurisdiction, approving prior acts of trustees and accepting the resignation of one trustee. Son timely filed an action under rule 252(b) to vacate the district court's order. Son alleged that trustees failed to inform him, formally or informally, that the reason for the trustees' petition was to further the settlement of his sister's action against the trustees for fraud and breach of fiduciary duty. District court denied and dismissed son's petition after trial.

HELD: Trustees disclosed in petition that sister's lawsuit was premised on "mismanagement on the part of the trustees and misconduct on the part of the trustees." Son did not establish any fraud or irregularity that would authorize district court to vacate its previous order pursuant to rule 252.

Seibert v. Noble, 499 N.W.2d 3 (Iowa 1993)

Fraud

Debtor Seibert sued Noble, a farm implement dealer, and Brenton Bank for the wrongful sale and application of proceeds to the debt and cost of sale of equipment owned by Seibert. Seibert alleged conversion, fraud, and violation of Article 9. Seibert had executed a note with Noble in 1984 that was later assigned to Brenton Bank. When Seibert was in danger of defaulting on this note in 1989, Noble and Seibert agreed that if Brenton Bank could not be persuaded to take a new note in payment of the old note, Noble would arrange the sale of the equipment and apply the

proceeds to the debt to Brenton Bank. Seibert alleged that Noble had committed fraud by requiring Seibert to sign in blank the 1989 note. District court refused to instruct jury on fraud.

HELD: Because Noble had never promised that Brenton Bank would accept the 1989 note in replacement of the 1984 note, there was no reliance on Seibert's part. District court correctly concluded there was insufficient evidence to submit issue of fraud.

Morton v. Underwriters Adjusting Co., 501 N.W.2d 72 (Iowa App. 1993)

Fraud

Morton sustained work-related injury to his shoulder. Physician reported to workers' compensation adjuster Kidman, at her request, that Morton had a 32% permanent partial impairment of his left upper extremity. Kidman informed Morton of rating and his entitlement to 80 weeks of permanent partial disability benefits. Without the assistance of counsel, Morton settled his compensation claim with Kidman for a lump sum payment. Represented by counsel, Morton later sued to set aside the commutation on grounds of fraud. Morton specifically alleged that Kidman should have disclosed his entitlement to industrial disability benefits upon proof that his shoulder injury extended to the body as a whole. District court refused to set aside settlement.

HELD: Assuming that Kidman had an obligation to advise Morton and make full disclosure to him (see Harrison v. Keller, 254 Iowa 267, 117 N.W.2d 477 (1962)), substantial evidence supported district court's finding that Kidman did not intend to deceive or act with reckless disregard. Kidman denied telling Morton that the agreed sum was all Iowa law permitted him to recover. Kidman had the right to rely on the physician's impairment rating even though such rating was not binding on the industrial commissioner.

Jackson v. State Bank, 488 N.W.2d 151 (Iowa 1992)

R

Interference

In 1977 a family farm partnership (Jackson) became a customer of the State Bank of Wapello (bank), and annually borrowed money from the bank for operating expenses. In 1980 Jackson gave Connecticut General Life Insurance Company a note secured by a mortgage on the Jackson farm. In 1982 Jackson had no farm income because of flooding. The bank consolidated Jackson's outstanding note balances of $100,912 and took additional security. In February of 1985 Jackson made the interest payment due on the consolidated note and borrowed $105,000 from the bank for operating expenses. Under the terms of the new note the bank agreed to

advance funds on a monthly basis. The note also provided that the bank could refuse to advance funds if the bank deemed that it was not secure.

Jackson lost many of its crops through flooding in spring and early summer in 1986. Based on Jackson's cash flow projections, it would be unable to make its payments to the bank. When Jackson requested an advance of funds to replant beans, the bank refused. Jackson ultimately lost the farm to Connecticut General through foreclosure. Jackson sued the bank for breach of contract to lend operating funds and tortious interference with the contractual agreement between Jackson and Connecticut General. A jury awarded Jackson $31,729 on the contract claim and $81,020 on the interference claim.

HELD: As a matter of law, the bank had not breached its contract to lend. The contract provided that the bank could refuse to advance money if it believed in good faith that it was insecure. Jackson had the heavy burden of proving lack of good faith. It failed.

The alleged interference was no more than the bank's good faith exercise of its contractual right to refuse to perform if insecure. The bank's refusal could not be improper, as a matter of law, and could not support an interference claim.

Water Development Co. v. Board of Water Works Trustees, 488 N.W.2d 158 (Iowa 1992)

Interference

Water Development Company (WDC) sued the Board of Water Works (Board) for interference with contracts and unfair competition. District court sustained Board's motion for summary judgment.

HELD: The contracts between WDC and its customers were month-to-month agreements, terminable at customer's will. For purposes of tortious interference law, WDC's interest in those contracts is treated as a prospective business advantage. Therefore, WDC had to establish that the Board's predominant motive in providing water service to customers in the annexed area was to damage WDC's business. WDC did not adduce substantial evidence that the Board's motive was improper.

Huffey v. Lea, 491 N.W.2d 518 (Iowa 1992)

Interference

Huffey had a close relationship of long standing with his aunt and uncle, the Olsons. He lived with them for several years and

was a tenant on their farm. After Mr. Olson's death, Mrs. Olson executed a will that devised the farm to Huffey. One month later, she revoked the will and executed a new will that gave Huffey nothing and devised the farm to her brother and his children. When she died one month later, the second will was admitted to probate. Huffey commenced an action contesting the will and eventually prevailed. Then, Huffey sued Mrs. Olson's brother and children for interference with a bequest, a cause of action recognized in Frohwein v. Haesemeyer, 264 N.W.2d 792 (Iowa 1978). On defendants' motion for summary judgment, district court held that Huffey's action for interference with a bequest was precluded by the ultimate judgment (albeit favorable to Huffey) in his action to contest the will.

HELD: Claim preclusion doctrine does not require Huffey to join his action for interference with a bequest with his action to contest the will. They are not the same claims. They depend upon different proof. The recoveries are different.

COMMENT: 7-2. Majority opinion notes: "Our research has produced one case that seems to be relevant and corresponds with our situation." Dissenting justices state:

> Most courts hold that a plaintiff who succeeds in a will contest is thereafter not entitled to pursue a claim for tortious interference with a bequest because plaintiff received in the will contest his or her full expectancy under the will and thus suffered no actual damages.
>
> Additionally, the majority of courts then allow plaintiff to pursue a claim for tortious interference with a bequest only if there are special circumstances making the will contest remedy inadequate.
>
> . . .
>
> Furthermore, the Iowa Court will stand virtually alone in allowing a plaintiff, after a successful will contest, to sue for tortious interference with a bequest when plaintiff has not shown that the will contest remedy was inadequate. Only one other court has allowed a plaintiff to pursue, with no allegation of receiving an inadequate probate remedy, a claim for tortious interference with a bequest after successfully contesting a will in probate court. The majority seems to base its holding on that one case.

R

Shannon v. Hearity, 487 N.W.2d 690 (Iowa App. 1992)

Legal Malpractice

Dairy farmers sued Hearity for failing to file a Plan of Reorganization in their Chapter 11 bankruptcy during the time that, as debtors, they had the exclusive right to do so. Plaintiffs

contended that as a result, their bankruptcy was converted to a Chapter 7 and they lost their opportunity to reorganize. District court granted Hearity's motion for directed verdict because there was no evidence that plaintiffs were damaged by the alleged negligence.

HELD: Directed verdict was proper. Plaintiffs failed to show the difference between the result they would have realized under a successful Chapter 11 proceeding and the result under the Chapter 7 conversion. In addition, plaintiffs did not present substantial evidence of a lost opportunity. The financial analysis provided by plaintiffs' expert was unreliable, speculative, and did not constitute substantial evidence. Plaintiffs did not provide a proper foundation for the figures and assumptions the expert used, and the expert did not know and/or consider critical information.

Benton v. Nelsen, 502 N.W.2d 288 (Iowa App. 1993)

Legal Malpractice

Benton sold farm implements and owned farm land. He was in financial difficulty and asked attorney Nelsen for assistance. After meeting with Hawkeye Bank, his principal creditor, Benton delivered to Nelsen a handwritten proposal for restructuring his debt with Hawkeye. Nelsen could not understand the document and wrote to Hawkeye's counsel with a request for a type-written proposal. Nelsen received such proposal from Hawkeye with a letter imposing a 24-hour deadline. Nelsen contends that he delivered the proposal to Benton's business manager, who had a power of attorney from Benton. The business manager did not recall receiving it. Benton was out of state, but he and Nelsen spoke by telephone before the deadline expired. Benton denies that Nelsen alerted him to the proposal or the deadline. Nelsen claims they "discussed the letter but not the contents."

The deadline passed without any agreement. Nelsen ultimately filed a bankruptcy petition for Benton, which was dismissed after Benton made certain payments to creditors. Benton then sued Nelsen for legal malpractice, contending that the proposal from Hawkeye Bank was much more favorable to Benton than the ultimate settlement. Benton offered no expert testimony on the issue of malpractice. District court sustained Nelsen's motion for summary judgment. District court held that expert testimony was necessary to prove Benton's claims, and that Nelsen was not negligent as a matter of law, since he notified the business manager of the proposal.

HELD: Benton generated a factual issue with respect whether Nelsen reported adequately to either Benton or the business manager. If Benton's factual version is correct, Benton does not need an expert to establish that Nelsen failed to act as a reasonable attorney in notifying his client of the major creditor's

settlement proposal. Benton failed, however, to present substantial evidence that Hawkeye would have signed the agreement or that Benton could have performed all of Hawkeye's requirements as a condition to the restructuring of Benton's debt to Hawkeye. Summary judgment, therefore, was proper.

Vachon v. Broadlawns Medical Foundation, 490 N.W.2d 820 (Iowa 1992)

Medical Malpractice

Vachon suffered multiple injuries after being struck by a car. Doctors at Broadlawns decided to transfer him to University Hospitals. When he arrived, a surgeon diagnosed compartment syndrome in Vachon's right leg and attempted to restore circulation. Ultimately, Vachon lost his leg below the knee.

Vachon sued Broadlawns and his treating physicians in Des Moines. Vachon alleged that defendants should have diagnosed the compartment syndrome while he was still in Des Moines, that such a diagnosis would have resulted in a much quicker transfer within Des Moines, and that earlier medical attention to the compartment syndrome in turn would have saved his leg. Defendants offered evidence that the compartment syndrome was not discoverable while Vachon was at Broadlawns and that his other injuries mandated transfer to University Hospitals.

District court instructed on alternative courses of treatment and the physician's right to select from such alternatives in the exercise of his or her best professional judgment. District court also instructed "that a doctor cannot be found negligent merely because he or she makes a mistake in the diagnosis and treatment of a patient." Vachon objected to both instructions. Jury returned defense verdict.

HELD: Defendants adduced substantial evidence to support an instruction on alternative methods of treatment. Jury could have found that either transfer location was a reasonable alternative. The "mistake" instruction should no longer be given, but it was not reversible "[b]ecause we have approved the submission of an instruction relating to mistake in prior cases."

R

Cockerton v. Mercy Hospital Medical Center, 490 N.W.2d 856 (Iowa App. 1992)

Medical Malpractice

Day after surgery for correction of plaintiff's open bite, hospital employees took plaintiff to x-ray department. She suffered a fainting spell or seizure episode. Although attendant denies it, the implication of the evidence is that she fell.

Doctor examined her and determined that she had injured her nose sometime since the surgery. Plaintiff sued hospital for its employees' handling of plaintiff during the x-ray procedure. She did not present expert testimony.

HELD: Expert testimony was not necessary to assist jury in deciding whether or not hospital had breached its standard of care during a routine x-ray procedure. Plaintiff adduced substantial evidence from which a jury could find that her nasal injury occurred during the x-rays procedure and as a result of inadequate care and supervision.

Kennis v. Mercy Hospital Medical Center, 491 N.W.2d 161 (Iowa 1992)

Medical Malpractice

Surgeon performed intestinal by-pass operation on Kennis. Surgeon encountered blockage in Kennis' urethra and inserted the catheter only after using a filiform dilator. Kennis was dissatisfied with results of surgery. Mercy and new physician agreed to reverse the by-pass without charge. Consent form for reversal surgery provided that catheterization would occur during the surgery. New surgeon was unable to insert catheter. Urologist came in to assist, and performed a suprapubic cystostomy, a procedure that involves an incision directly into the bladder for purposes of catheterization. Kennis encountered post-surgery complications and infections from the cystostomy that required two additional surgeries. Kennis sued hospital, second surgeon, and urologist on theories of negligence, lack of informed consent, and battery. Kennis did not certify any expert who could opine in support of his claims. District court sustained defendants' motion for summary judgment.

HELD: Kennis did not adduce substantial evidence in support of his battery claim. He knew that catheterization was a necessary component of the surgical procedure he authorized. He needed to adduce expert testimony to establish that the cystostomy "was a totally different type of treatment."

Each particular of Kennis' negligence claim, itemized below, needed expert testimony:

(1) improper placement of cystostomy tube,
(2) improper care and treatment during and after surgery, and
(3) failure to consult 15-year-old hospital record.

As part of his informed-consent claim, Kennis needed expert testimony to establish the likelihood of a cystostomy becoming necessary and the materiality of the procedure. Moreover, the cystostomy did not cause injury to a part of the body not involved in treatment. Last but not least, Kennis needed expert testimony to establish his claim that second surgeon or urologist should have

stopped the operation upon encountering the complication, wake Kennis, and obtain his consent to proceed with cystostomy.

Whether or not the complications and infections arising out of displacement of the cystostomy tube is an event that, in the ordinary course of things, would not happen but for negligence, is an issue that requires expert testimony.

Peters v. Vander Kooi, 494 N.W.2d 708 (Iowa 1993)

Medical Malpractice

Peters came to the hospital in labor. Twelve hours later, her labor had not progressed. Her physician, Dr. Vander Kooi, prescribed petocin in an effort to induce labor. Vander Kooi was not trained to perform cesarean section surgery. There were only two surgeons in the area who were so qualified, but Vander Kooi made no inquiry as to their availability before administering petocin. When the baby's heart rate dropped to alarming levels, Dr. Vander Kooi attempted to contact the surgeons and learned that they were unavailable. By the time one arrived, Peters' child had been born with substantial brain damage. District court instructed on physician's right to select from two or more alternative but recognized methods of treatment in the course of exercising his professional judgment. Jury returned defense verdict.

HELD: Defendants did not adduce substantial evidence to support the instruction on alternative methods of treatment. Defendants must show:

(1) That, with respect to a particular act or omission upon which the claim of negligence is predicated, there was more than one method of treatment acceptable to a physician exercising the degree of skill, care, and learning ordinarily possessed and experienced by other physicians in similar circumstances; and
(2) that the physician considered these alternatives and exercised his or her best professional judgment in choosing the method of treatment that was utilized.

The issue was not whether or not to prescribe and administer petocin but whether or not Vander Kooi should have prescribed petocin to induce labor without first securing the availability of a surgeon, in the event that a cesarean became necessary.

COMMENT: Court offered guidance for retrial on issue of collateral source benefits. Defendants offered evidence of various programs, services, facilities, and financial benefits that were available to Peters. Defendants also offered evidence that Peters' employer provided medical insurance, with a maximum benefit of $150,000. Coverage was conditioned upon continued employment for

assumption of premium responsibility after termination. Peters objected to this evidence. Court noted that district court should instruct "as to the contingencies involved" in the insurance and should require jury "to make specific findings concerning what collateral source amounts were in fact available to plaintiffs. The burden of proof ... should [be] on defendants."

Huber v. Hovey, 501 N.W.2d 53 (Iowa 1993)

Negligent Inspection

Hubers sued race track's insurance broker for negligent inspection after Dale Huber suffered injuries as a spectator in pit area. Hubers claimed that K & K failed to conduct an additional inspection after race track changed location of pit area.

HELD: Under Thompson v. Bohlken, 312 N.W.2d 501 (Iowa 1981) and Restatement Section 324A, K & K is liable for negligent inspection if it recognized its inspection to be necessary for protection of third persons and either (1) the inspection increased the risk, (2) K & K undertook a duty owed by the race track to third parties, or (3) Huber's harm resulted from the race track's reliance on the inspection. Huber has generated factual questions on each element of the Thompson test by establishing that K & K inspected the track and informed the track that the facility was in compliance with underwriting standards, and that the track changed the location of the pit area.

COMMENT: Court does not indicate that Huber's adduced evidence that K & K knew of the change in location of the pit area, or that substantial time had passed since the last inspection to merit another routine inspection before Huber's accident.

Bird v. Economy Brick Homes, Inc., 498 N.W.2d 408 (Iowa 1993)

Premises Liability

Plaintiff was operating an off-road motorcycle, without permission, on land owned by defendant. He struck a steel cable that defendant had placed across an access road to prevent vehicles from entering the property. There were no markings on the cable to prevent it from visually blending in with the surroundings. Defendant moved for summary judgment, arguing that chapter 111C proscribed liability of landowners for injuries caused by the unauthorized recreational use of their property. Plaintiff argued that section 111C.6 provided an exception when a landowner willfully or maliciously fails to guard or warn against a "dangerous condition, use, structure, or activity."

HELD: Landowner's mere placement of a cable across an access road, without more, did not create an issue of material fact as to whether defendant acted willfully or maliciously.

Bloomquist v. Wapello County, 500 N.W.2d (Iowa 1993)

Premises Liability

Four state employees and one county employee moved into a 100-year-old building purchased and remodeled by the County. The employees encountered fleas, noxious odors, and poor ventilation. The State hired a pest control company, who repeatedly sprayed Dursban throughout the building. Inspectors discovered sewer problems in the building and either malfunctioning or disconnected ventilation equipment. The employees' physicians testified that the employees suffered from a variety of health problems, all caused by the conditions present in the building.

County employees sued State under theories of premises liability. Employee adduced evidence that State operated, controlled, and maintained building. After substantial verdict for the employees, district court granted motion for judgment n.o.v. HELD: State was a possessor of land for purposes of Restatement Section 343's description of duties to invitees.

Hughes v. Massey-Ferguson, Inc., 490 N.W.2d 75 (Iowa App. 1992)

Product Liability

Hughes suffered serious injuries when he fell into the business end of a combine. He was 20, but had operated the combine for five years, had performed much of its maintenance and small repairs, and was familiar with the instructional materials and safety decals. While operating the combine, he had stopped and raised the corn head to permit the gathering mechanisms to clear. He noticed smoke coming from under the engine compartment, and left the cab to investigate without shutting down the combine. He attempted to walk above the exposed moving parts along a three-inch wide rim of the combine structure instead of climbing down to the ground and walking around. He slipped and fell into the moving parts. Hughes sued Massey-Ferguson for strict liability and negligence. Jury found both parties at fault, assessed Massey-Ferguson with 87% of the fault, and fixed damages at $1.7 million.

HELD: Hughes did not adduce substantial evidence that Massey-Ferguson knew or should have known that an operator would raise the corn head, leave the gathering machinery operating, and attempt to walk along the ledge in order to reach the engine compartment. District court should have entered judgment n.o.v. for Massey-Ferguson on the strict liability claim. "Because the special verdict leaves us unable to detect the theory upon which the jury" found for Hughes on his negligence claim, Massey-Ferguson is entitled to a new trial on that theory.

COMMENT: One of three judges would have mandated entry of judgment n.o.v. on the negligence count as well. Neither the

majority nor the dissent, however, recite the multiple "theories" of negligence that Hughes asserted. Nor do they explain why any one or more of those "theories" would have survived the scrutiny applied to the strict liability evidence.

Reed v. Chrysler Corp., 494 N.W.2d 224 (Iowa 1992)

Product Liability

Reed was injured while a passenger in a jeep CJ-7, which was involved in a one-vehicle accident. The driver tested at .185 and Reed tested at .168. None of the four passengers were wearing seat belts. The accident occurred when the driver lost control in a curve. The jeep hit a concrete bridge abutment, rolled over, and slid upside down for 300 feet. The jeep's fiberglass top disintegrated, and Reed's arm became pinched between the highway surface and the roll bar.

Reed sued Chrysler on a theory of crash worthiness as set forth in Wernimont v. International Harvestor Corp., 309 N.W.2d 137 (Iowa App. 1991). Wernimont set forth three elements:

(1) Proof of an alternative safer design, practicable under the circumstances,
(2) What injuries would have resulted had the alternative safer design been used, and
(3) The extent of enhanced injuries attributable to the defective design.

309 N.W.2d at 140-41. At close of Reed's case in chief, district court sustained Chrysler's motion for directed verdict on the first element. Supreme court decided Hillrichs v. Avco Corp., 478 N.W.2d 70 (Iowa 1991), after Reed's trial.

HELD: Reed adduced substantial evidence on all three elements of crash worthiness claim.

Chrysler did not argue that there was insufficient evidence on the threshold issue of design defect. Reed also adduced evidence that CJ-7 was the only vehicle in America with a removable fiberglass top, that other jeep models came with removal steel tops, and that the industry and general public regarded steel to be safer than plastic for use as the roof of a vehicle. Such evidence made expert testimony on the first element of the Wernimont test unnecessary.

Although the presence of a metal top likely would have changed the nature of Reed's injury, and although Reed offered no evidence - by experts or otherwise - as to what injuries he would have incurred with a metal top, Reed did adduce substantial evidence that he "would not have suffered his crushing arm injury." This

evidence satisfied the second as well as the third Wernimont element.

District court should not have sustained Chrysler's motion for directed verdict. On retrial, several issues are likely to recur.

Absent additional evidence, district court should not submit Reed's claim for punitive damages. "Chrysler's conduct was not shown to be willful or wanton."

District court should have sustained Reed's motion in limine, by which he sought to exclude evidence of his failure to wear a seat belt. Because accident occurred before July 1, 1986, section 321.445(4)(a) renders non-use of a seat belt inadmissible.

District court should exclude evidence of Reed's or driver's intoxication, absent some showing that intoxication was a proximate cause of the enhanced injury, a showing that appears from this record to be unlikely. The holding in Hillrichs to the contrary is overruled.

> [Crash worthiness doctrine], which presupposes the occurrence of accidents precipitated for myriad reasons, focuses alone on the enhancement of resulting injuries. The rule does not pretend that the design defect had anything to do with causing the accident. ... So any participation by the plaintiff in bringing the accident about is quite beside the point.

COMMENT I: Court sat en banc and decision was unanimous, except as to the decision to overrule the comparative fault aspect of Hillrichs. Four justices dissented the conduct forming the basis for the crash worthiness claim is not in the nature of an intervening cause that

> varies the risk in kind rather than degree. The situation presented in enhanced injury claims does not differ substantially from other situations in which the defendant's fault is premised on a failure to protect other persons from the consequences of their own negligent acts. Consequently, there is no logical reason to use different rules for fault comparison and enhanced injury claims than would be used in claims involving negligent failure to warn or negligent failure to install safety devices.

R

COMMENT II: Court did not discuss whether or not section 321.445(4)(a) was intended to apply to all kinds of civil damage actions, including particularly but not exclusively, crash worthiness cases. In adjudicating the elements of a crash worthiness claim (at least one with facts like these), how can the trier-of-fact ignore the seat belt factor? One of the reasons

automobile manufacturers decided to put seat belts in vehicles was to protect the occupants from the vehicle itself.

Beeman v. Manville Corp., 496 N.W.2d 247 (Iowa 1993)

Product Liability

Beeman sued Johns-Manville (JM) and Keene for injuries caused by exposure throughout his life-long employment as a plumber and pipe fitter to asbestos products manufactured by JM and Keene. Beeman sued on theories of strict liability, negligence, fraud, conspiracy, and breach of warranty. He sought to recover compensatory damages for past and future medical expense, past and future pain and suffering (including fear of cancer), and lost opportunity to live out his natural life expectancy. He also sought punitive damages.

Beeman adduced evidence that he had been exposed to asbestos products throughout his adult life by virtue of his employment. He adduced evidence that he suffers from pleural plaques (a thickening of the lining of the lung) and asbestosis (scarring of the lung), both of which are caused by exposure to airborne asbestos fibers. He also adduced evidence that asbestosis increases the risk of lung cancer and mesothelioma (asbestos-related lung cancer). Beeman did not have cancer and did not adduce evidence that he would probably contract cancer in the future. The only work he had ever missed was to attend portions of his own trial to testify. He did not testify that he fears contracting cancer or that he had even been advised by a physician of the risks of cancer. He adduced evidence only that, more likely than not, asbestos-related disease would shorten his life by some indeterminable amount.

The only product manufactured by Keene that contained asbestos was a substance called Monoblock, which contained only 2% or less asbestos and was of a composition that was inconsistent with significant dust emissions. He was exposed to Monoblock for only two weeks in the late 50's and only one week in the early 60's. Beeman adduced evidence, however, that each exposure to a product that releases asbestos fibers has an accumulative effect on the body and increases both the possibility of disease and its severity.

Beeman adduced evidence that JM knew of asbestos hazards long before the Landmark Selikoff Study published in 1965, and acted to conceal its knowledge from the public. Beeman also adduced evidence about cancer and the increased risk of cancer from exposure to asbestos. Because the evidence about JM's knowledge could not be tied to Keene, Keene moved for bifurcation of trial. District court refused to bifurcate, but instructed jury that evidence relating to JM's knowledge prior to 1965 was admissible only as to Beeman's claims against JM and only on his claims against JM for conspiracy and fraud. After the close of all

evidence, Beeman withdrew his claims against JM for conspiracy and fraud. Defendants objected to the cancer evidence, because Beeman did not have cancer and could not show that he probably would contract cancer. District court submitted the evidence about cancer with a limiting instruction that it was relevant only for purposes of establishing defendants' duty to warn and the reasonableness of Beeman's fear.

After Beeman dropped his claims of fraud and conspiracy against JM, district court submitted the case on strict liability and negligence. District court submitted Beeman's punitive damages claim against Keene only, and instructed the jury that a bankruptcy court order prevented Beeman from recovering punitive damages against JM. District court had earlier rejected Keene's request that punitive damages be bifurcated and reserved for a second trial, if necessary.

Jury found JM 90% at fault and Keene 10% at fault. Jury determined Beeman's damages to be $1.17 million. Jury awarded punitive damages against Keene of $5 million. On defendants' post-trial motions, district court sustained Keene's motion for judgment n.o.v. on punitive damages, reduced Beeman's compensatory damages by a portion of the future medical expenses, and eliminated the award attributable to Beeman's claim for lost opportunity to live out his full life expectancy. JM and Keene appealed and Beeman cross-appealed from the resulting judgments in favor of Beeman against Manville for $455,220 and against Keene for $50,580.

HELD: District court did not abuse its discretion in refusing Keene's requests to bifurcate the trial so as to exclude the early JM evidence and the punitive damage evidence from the jury's consideration of Keene's liability. District court likewise did not abuse its discretion in permitting Beeman to withdraw his claims of conspiracy and fraud at the close of the evidence.

District court did not abuse its discretion in admitting evidence of cancer and the increased risk of cancer from exposure to asbestos, because this evidence tended to establish defendants' duty to warn and the reasonableness of Beeman's fear of cancer. Notwithstanding massive amount of such evidence, district court's use of limiting instructions on the purpose of such evidence eliminates the possibility of unfair prejudice. "[W]e believe juries understand limiting instructions. To believe otherwise would be asking appellate courts to speculate that a jury disregarded evidence and clear admonitions."

Beeman adduced substantial evidence from which a jury could find that Keene manufactured a product that contributed to Beeman's asbestos-related disease.

Beeman did not adduce substantial evidence to support the assessment of punitive damages against Keene. Although evidence supported a finding that sufficient information was available to impose a duty to warn before 1965, there was no basis for

concluding that Beeman acted before 1965 with a willful and wanton disregard for the safety of Beeman or persons in a similar position. Beeman's contract with Keene products was pre-1965.

Beeman cannot recover for lost opportunity to live out his full life expectancy. This so-called "English rule" is recognized only in South Carolina. The majority approach in the U.S. is to compute future loss of income without reducing life expectancy due to the injury or condition. Contrary to the majority position, Iowa calculates loss of earning capacity for the reduced life expectancy. Iowa does not permit recovery, however, for the lost opportunity to live out one's full life expectancy. Beeman did not seek recovery for diminished future earning capacity. The lost chance of survival cases are inapposite, because they compensate not for the shortening of one's life but for reduction in the opportunity to survive a pre-existing injury or disease.

COMMENT: Two justices dissented from the majority's affirmance of the judgment against Keene. After recounting the tenuous connection between the Keene product and Beeman, the minimal evidence relating to his fear, and the minimal impact his condition has had on his ability to work, the dissenters concluded that Keene did not receive a fair trial.

> How did this spectacular verdict occur? The answer is that the lawsuit was tried as a "dread specter of cancer" case. Evidence of asbestos being linked to cancer and [JM's] knowledge of its hazard to health was poured into the case by plaintiff. Although not relevant to prove Keene had any knowledge of asbestos dangers so as to trigger a duty to warn plaintiff at the time of plaintiff's exposure, Keene was blanketed by this snowstorm of evidence. Guilt by association became the prevailing wind.
>
> Anticipating this, Keene ... moved for a separate trial and a motion in limine regarding punitive damages. The trial court in an effort to achieve judicial economy denied the motions. What transpired thereafter showed the jury's inability to separate the evidence directed at each defendant and to fairly try the case.
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> A week and a half of prejudicial cancer evidence was inserted by plaintiff using claims of conspiracy and fraud by JM as a vehicle. Plaintiff then withdrew those claims, leaving it to the court to instruct that all of this evidence was to be considered only against JM and solely on the issue of failure to warn. ... The jury's response was a $5 million punitive award against Keene, having been instructed that a bankruptcy court order prevented it from awarding punitive damages against JM.
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> ...
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> The trial court and majority have tried to salvage a fair result from the contagion prevailing in this case. For Keene Corporation it cannot be done.

Brown v. Nevins, 499 N.W.2d 736 (Iowa App. 1993)

Slander of Title

Purchaser defaulted on real estate contract by failing to pay taxes. On December 6, 1991, vendor served notice of forfeiture requiring purchaser to cure default and pay reasonable cost of services within thirty days of service. Purchaser paid taxes within allotted time, but not cost of service. Purchaser tendered and vendor accepted the next monthly contract payment on January 3, 1992. On January 6, Vendor demanded $40 cost of service be paid within ten days. On January 22, vendor filed an affidavit in support of forfeiture stating purchaser had failed to pay $40. Purchaser paid the $40 on January 31. Purchaser sued to set aside forfeiture and to recover damages for slander of title. District court found the forfeiture had been timely cured because vendor had not notified purchaser of the amount of the service until January 6. District court found that vendor had slandered purchaser's title, and awarded purchaser $1,200 in actual damages and $600 in punitive damages.

HELD: Purchaser failed to prove special damages, a necessary element of a slander of title action. District court's award of $1200 appeared to be for attorney's fees, which are not recoverable in a slander of title action.

Bloomquist v. Wapello County, 500 N.W.2d (Iowa 1993)

State Tort Claims Act

County employee who worked in building owned by county but operated, controlled and maintained by state timely filed claim for toxic poisoning from age and condition of building and insecticide spraying in building. Claim did not mention her children or loss of consortium claims by them. HELD: District court properly dismissed claims by children for loss of consortium for lack of subject matter jurisdiction, due to failure to comply with claims provisions of state tort claims act.

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Weiss v. Bal, 501 N.W.2d 478 (Iowa 1993)

Sudden Emergency

Bal was operating his father's vehicle in high school parking lot after evening basketball game. He noticed a group of pedestrians in his path, swerved to avoid them, and struck a lagging member of the group not previously seen by Bal. District court instructed on sudden emergency in conformity with Iowa Uniform Jury Instruction 600.75, and jury returned verdict for Bal.

HELD: District court should not have instructed on sudden emergency.

> This is not a case in which a driver was suddenly confronted with oncoming traffic on the wrong side of the road, an unexpected patch of ice, a nonnegligent failure of brakes, or a sudden heart attack. The facts reveal no more than the every day hazard of driving through a school parking lot and the not uncommon appearance of pedestrians crossing the travelled way to reach their parked cars. We are convinced the collision resulted from one or more of the fault concepts alleged ... not from an emergency independent of this conduct. In other words, the conduct created the emergency; the emergency did not create conduct to be excused.

COMMENT: Court refused to dispose of sudden emergency instructions entirely, but noted other courts' abrogation of the doctrine and expressed dissatisfaction with its own uniform instruction, especially when compared to a briefer version taken from Colorado:

> A person who, through no fault of his or her own, is placed in a sudden emergency, is not chargeable with negligence if the person exercises that degree of care which a reasonably careful person would have exercised under the same or similar circumstances.

Hanson v. Schaumberg, 490 N.W.2d 84 (Iowa App. 1992)

Workers' Compensation

Defendant employed Hanson to bail hay at defendant's farm. Hanson exhibited symptoms of heat stroke, and defendant directed him to sit down and rest. Defendant left Hanson alone for about one hour, returned, and found him unconscious. Hanson subsequently died. Estate sued defendant, alleging "intentional and outrageous" conduct. District court granted defendant's motion for summary judgment.

HELD: Hanson did not adduce substantial evidence that defendant intentionally caused Hanson's injuries.

COMMENT: The opinion never says the words "gross negligence." Is this a new cause of action for employer liability for work-related injuries over and above worker's compensation and gross negligence?

Vachon v. Broadlawns Medical Foundation, 490 N.W.2d 820 (Iowa 1992)

Argument

In medical malpractice case that resulted in defense verdict, plaintiff argued that defense counsel made improper reference to settlement negotiations during closing argument. HELD: Plaintiff's failure to object at trial so that a proper record of what transpired in closing argument can be made leaves nothing for appellate review.

Mays v. C. Mac Chambers Co., 490 N.W.2d 800 (Iowa 1992)

Attorney Misconduct

In personal injury action, plaintiffs moved in limine to prohibit any mention of prior claims by plaintiffs against other injuries or damages. District court sustained the motion. Defense counsel violated ruling on several occasions. Plaintiffs moved for new trial after defense verdict. District court overruled motion.

HELD: Although record establishes that defense counsel did breach the ruling on motion in limine on several occasions, defense counsel's conduct was not so improper and prejudicial as to merit a new trial. District court did not abuse its discretion in concluding that a different result was not probable.

Beeman v. Manville Corp., 496 N.W.2d 247 (Iowa 1993)

Bifurcation

Beeman sued Johns-Manville (JM) and Keene for injuries caused by exposure throughout his life-long employment as a plumber and pipe fitter to asbestos products manufactured by JM and Keene. Beeman sued on theories of strict liability, negligence, fraud, conspiracy, and breach of warranty. He sought to recover compensatory damages for past and future medical expense, past and future pain and suffering (including fear of cancer), and lost opportunity to live out his natural life expectancy. He also sought punitive damages.

Beeman adduced evidence that he had been exposed to asbestos products throughout his adult life by virtue of his employment. He adduced evidence that he suffers from pleural plaques (a thickening of the lining of the lung) and asbestosis (scarring of the lung), both of which are caused by exposure to airborne asbestos fibers.

He also adduced evidence that asbestosis increases the risk of lung cancer and mesothelioma (asbestos-related lung cancer). Beeman did not have cancer and did not adduce evidence that he would probably contract cancer in the future. He did not testify that he fears contracting cancer or that he had even been advised by a physician of the risks of cancer.

The only product manufactured by Keene that contained asbestos was a substance called Monoblock, which contained only 2% or less asbestos and was of a composition that was inconsistent with significant dust emissions. He was exposed to Monoblock for only two weeks in the late 50's and only one week in the early 60's. Beeman adduced evidence, however, that each exposure to a product that releases asbestos fibers has an accumulative effect on the body and increases both the possibility of disease and its severity.

Beeman adduced evidence that JM knew of asbestos hazards long before the Landmark Selikoff Study published in 1965, and acted to conceal its knowledge from the public. Beeman also adduced evidence about cancer and the increased risk of cancer from exposure to asbestos. Because the evidence about JM's knowledge could not be tied to Keene, Keene moved for bifurcation of trial. District court refused to bifurcate, but instructed jury that evidence relating to JM's knowledge prior to 1965 was admissible only as to Beeman's claims against JM and only on his claims against JM for conspiracy and fraud. After the close of all evidence, Beeman withdrew his claims against JM for conspiracy and fraud. Defendants objected to the cancer evidence, because Beeman did not have cancer and could not show that he probably would contract cancer. District court submitted the evidence about cancer with a limiting instruction that it was relevant only for purposes of establishing defendants' duty to warn and the reasonableness of Beeman's fear.

After Beeman dropped his claims of fraud and conspiracy against JM, district court submitted the case on strict liability and negligence. District court submitted Beeman's punitive damages claim against Keene only, and instructed the jury that a bankruptcy court order prevented Beeman from recovering punitive damages against JM. District court had earlier rejected Keene's request that punitive damages be bifurcated and reserved for a second trial, if necessary.

Jury found JM 90% at fault and Keene 10% at fault. Jury determined Beeman's damages to be $1.17 million. Jury awarded punitive damages against Keene of $5 million. On defendants' post-trial motions, district court sustained Keene's motion for judgment n.o.v. on punitive damages, reduced Beeman's compensatory damages by a portion of the future medical expenses, and eliminated the award attributable to Beeman's claim for lost opportunity to live out his full life expectancy. JM and Keene appealed and Beeman cross-appealed from the resulting judgments in favor of Beeman against Manville for $455,220 and against Keene for $50,580.

HELD: District court did not abuse its discretion in refusing Keene's requests to bifurcate the trial so as to exclude the early JM evidence and the punitive damage evidence from the jury's consideration of Keene's liability. District court likewise did not abuse its discretion in permitting Beeman to withdraw his claims of conspiracy and fraud at the close of the evidence.

District court did not abuse its discretion in admitting evidence of cancer and the increased risk of cancer from exposure to asbestos, because this evidence tended to establish defendants' duty to warn and the reasonableness of Beeman's fear of cancer. Notwithstanding massive amount of such evidence, district court's use of limiting instructions on the purpose of such evidence eliminates the possibility of unfair prejudice. "[W]e believe juries understand limiting instructions. To believe otherwise would be asking appellate courts to speculate that a jury disregarded evidence and clear admonitions."

COMMENT: Two justices dissented from the majority's affirmance of the judgment against Keene. After recounting the tenuous connection between the Keene product and Beeman, the minimal evidence relating to his fear, and the minimal impact his condition has had on his ability to work, the dissenters concluded that Keene did not receive a fair trial.

> How did this spectacular verdict occur? The answer is that the lawsuit was tried as a "dread specter of cancer" case. Evidence of asbestos being linked to cancer and [JM's] knowledge of its hazard to health was poured into the case by plaintiff. Although not relevant to prove Keene had any knowledge of asbestos dangers so as to trigger a duty to warn plaintiff at the time of plaintiff's exposure, Keene was blanketed by this snowstorm of evidence. Guilt by association became the prevailing wind.
>
> Anticipating this, Keene ... moved for a separate trial and a motion in limine regarding punitive damages. The trial court in an effort to achieve judicial economy denied the motions. What transpired thereafter showed the jury's inability to separate the evidence directed at each defendant and to fairly try the case.
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> A week and a half of prejudicial cancer evidence was inserted by plaintiff using claims of conspiracy and fraud by JM as a vehicle. Plaintiff then withdrew those claims, leaving it to the court to instruct that all of this evidence was to be considered only against JM and solely on the issue of failure to warn. ... The jury's response was a $5 million punitive award against Keene, having been instructed that a bankruptcy court order prevented it from awarding punitive damages against JM.
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> The trial court and majority have tried to salvage a fair result from the contagion prevailing in this case. For Keene Corporation it cannot be done.

Reed v. Chrysler Corp., 494 N.W.2d 224 (Iowa 1992)

Directed Verdict

Reed was injured while a passenger in a jeep CJ-7, which was involved in a one-vehicle accident. The driver tested at .185 and Reed tested at .168. None of the four passengers were wearing seat belts. The accident occurred when the driver lost control in a curve. The jeep hit a concrete bridge abutment, rolled over, and slid upside down for 300 feet. The jeep's fiberglass top disintegrated, and Reed's arm became pinched between the highway surface and the roll bar.

Reed sued Chrysler on a theory of crash worthiness as set forth in Wernimont v. International Harvestor Corp., 309 N.W.2d 137 (Iowa App. 1991).

At close of Reed's case in chief, district court sustained Chrysler's motion for directed verdict. Supreme court decided Hillrichs v. Avco Corp., 478 N.W.2d 70 (Iowa 1991), after Reed's trial.

HELD: Reed adduced substantial evidence on all three elements of crash worthiness claim.

COMMENT: Court also found directed verdict to be an inefficient method of adjudicating this case, and reminded trial judges of "what veteran Iowa judges often refer to as the Uhlenhopp rule." In cases that are "routine" or "at all close," district court should not sustain motion for directed verdict but should permit the case to go to verdict. A defense verdict might avoid an appeal entirely if plaintiff's verdict can be cured by sustaining a motion for judgment notwithstanding the verdict.

Pundzak, Inc. v. Cook, 500 N.W.2d 424 (Iowa 1993)

Directed Verdict

Cook and Webster worked in the advertising business as performers. Pundzak was an advertising agent who worked with Cook and Webster from time to time. Pundzak heard Cook and Webster informally playing the parts of two "old timers" named Willard and Rafert, and suggested that he could obtain advertising work for them as those characters. The parties subsequently entered into an exclusive agency agreement in which Pundzak, Inc., was to be the exclusive agent for Cook and Webster as "Willard and Rafert." Pundzak was to use its "best efforts" to promote the characters.

After several years of success, Cook and Webster became dissatisfied with Pundzak's efforts, largely because of an alleged conflict of interest. Cook and Webster terminated the agreement. Pundzak sued Cook and Webster for breach of contract, and Cook and

Webster filed a separate lawsuit against Pundzak and Pundzak, Inc. Cook and Webster's action sought damages for breach of contract and abuse of process. The court consolidated the actions for trial. Joseph Pundzak moved for a directed verdict on the contract claim against him personally, and Cook and Webster did not resist. District court sustained the motion and submitted the contract claim only against Pundzak, Inc. After the jury's return of verdict for Cook and Webster, they sought entry of judgment against Joseph Pundzak.

HELD: Cook and Webster failed to preserve their claim against Joseph Pundzak and failed to preserve any error district court allegedly made in sustaining Joseph Pundzak's motion for directed verdict.

Baker v. Bower, 487 N.W.2d 86 (Iowa App. 1991)

Instructions

Motorcyclist sued motorist for damages arising out of an automobile-motorcycle accident. At trial there was conflicting evidence from parties, an investigating officer, and a passenger on motorcycle about the cyclist's speed, braking, and skid marks. Although some of the evidence supported a finding that cyclist was exceeding the posted speed limit of 30 mph, the court refused to give motorist's requested instruction that any speed in excess of 30 mph was unlawful and constituted negligence. The jury found motorist 100% at fault.

HELD: The conflicting evidence created a jury question on the issue of cyclist's speed. Motorist was entitled to the requested instruction. Error was not rendered harmless by the fact that district court instructed on assured clear distance ahead and reasonable and proper rate of speed in the vicinity of an intersection or by the fact that cyclist's speed was at most just a few miles over the speed limit.

Lund v. McEnerney, 495 N.W.2d 730 (Iowa 1993)

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Jury

During deliberations after trial of medical malpractice action, jury sent out note indicating that jurors were having difficulty applying "and accepting" certain instructions and that the jury was deadlocked. With the agreement of the parties, the court submitted an additional instruction and suggestions that the jury reread previous instructions. The jury subsequently returned a sealed verdict for defendants, along with a letter assigned by the foreman, expressing the jury's concern about the conduct of the physician, and a request that the matter be reported to

"appropriate medical associations and agencies, that the physician be admonished, and that he should pay plaintiffs $5,000 for their out-of-pocket expenses as a matter of moral obligation arising out of the physician's creed of "first to do no harm." District court returned the letter to the court attendant with instructions to the jury that it was not proper and could not be accepted. District court entered judgment on the verdict form. In post-verdict motions, plaintiffs submitted affidavits suggesting that the jury would not have returned a defense verdict if it had known that the letter would not have been accepted. District court denied the motion for new trial.

HELD: District court properly concluded that the letter was surplusage that forms no part of the verdict. The affidavits relate to the internal workings of a jury, and cannot be utilized to impeach the verdict.

State v. Hardin, 498 N.W.2d 677 (Iowa 1993)

Jury

At trial on criminal charge of disorderly conduct for disrupting a political rally for President Bush during the buildup before the Gulf War, Hardin faced a tough jury panel. The trial was occurring during the war itself. One of the jurors was wearing a "Desert Storm" t-shirt. Another had attached red, white and blue ribbons to her purse. Others were combat veterans or had relatives currently serving in the military. Hardin requested the opportunity to assert his challenges for cause outside the presence of the panel. District court rejected his request. Hardin challenged the juror with the t-shirt. The court asked the juror whether he could be fair and impartial, notwithstanding his support for the troops. The juror answered yes. Hardin could not persuade the juror further.

HELD: District court did not abuse its discretion in refusing Hardin's request for in camera challenges or in refusing Hardin's challenge of the juror with the t-shirt. Hardin did not couple his request with any showing of prejudice that would make in camera challenges necessary. Wearing the t-shirt was not sufficient to establish a challenge for cause.

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Kalell v. Petersen, 498 N.W.2d 413 (Iowa App. 1993)

Motion In Limine

In personal injury action, plaintiff filed motion in limine to prevent defendant from discussing certain facts relating to damages. District court overruled the motion as to certain matters and reserved ruling on others. Plaintiff's counsel then "insisted

on receiving a clear ruling so he would know how to handle voir dire and his opening statement. The trial judge then stated he would make a clear-cut ruling and denied the entire motion." Plaintiff then proceeded to introduce most of the evidence he had sought to exclude, and did not object to the other evidence when defendant introduced it.

HELD: Because district court made an unequivocal ruling on the admissibility of the matters covered in the motor in limine, plaintiff's "introduction of the evidence and failure to object to such evidence was not a waiver."

Gavlock v. Coleman, 493 N.W.2d 94 (Iowa App. 1992)

Motion in Limine

Plaintiff filed a motion in limine with respect to certain testimony by one of her physicians about her insurance coverage. District court sustained her motion and ordered that those portions of the videotape be deleted and not played to the jury. Defendant argued on appeal that the ruling was error. HELD: Because defendant made no offer of proof and otherwise failed to identify in the record the specific testimony that was deleted, the court held that any error had not been preserved.

Gavlock v. Coleman, 493 N.W.2d 94 (Iowa App. 1992)

Videotape

In dramshop action, plaintiff took depositions of two treating physicians by using a stenographer and by videotaping the depositions. Plaintiff presented the videotapes at trial, over defendant's objections. Plaintiff did not notify defendant in advance of depositions that they would be recorded by videotape in addition to stenographer. HELD: District court did not abuse its discretion in permitting plaintiff to play the videotapes. Defendant did not show prejudice from lack of notice before the depositions.

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Gavlock v. Coleman, 493 N.W.2d 94 (Iowa App. 1992)

Witness

District court refused to exclude plaintiff's husband (not a party) prior to his testimony as witness. HELD: No abuse of discretion. Record does not contain any showing that defendant was prejudiced.

Boylan v. American Motorists Insurance Co., 489 N.W.2d 742 (Iowa 1992)

Bad Faith

Boylan sued his employer's workers' compensation insurer for bad faith in delaying and then terminating his compensation benefits. Insurer moved to dismiss. District court granted the motion, holding that the relationship between Boylan and his employer's insurer is not analogous to the traditional first-party bad faith claim scenario but "is more analogous to the relationship between a tort victim and the tort feasor's liability insurer. District court also concluded that statutory remedy in section 86.13 makes creation of new cause of action unnecessary.

HELD: Boylan stated a claim upon which relief may be granted. Section 86.13, relied upon by insurer and district court, in fact establishes "an affirmative obligation on the part of the employer and insurance carrier to act reasonably in regard to benefit payments in the absence of specific direction by the commissioner." In other words, unlike the situation between tort victim and tort feasor, comp insurer must proceed to pay benefits that are owed or face penalty.

Courts that have refused to recognize this cause of action have based their rejection on the exclusive-remedy provisions of their states' statutes. Iowa's exclusive-remedy provision "is applicable only to claims against the employer and does not extend to the employer's compensation insurer." Legislature did not likely intend section 86.13 "to be the sole remedy for all types of wrongful conduct by carriers with respect to administration of workers' compensation benefits." It applies only to delay in making payments or to termination of payments. "It contemplates negligent conduct rather than the willful or reckless acts that are required to establish [bad faith]." The statute provides no remedy for delay in payment of medical benefits or for failure to pay such benefits.

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Reedy v. White Consolidated Industries, Inc., _____ N.W.2d _____ (Iowa, July 21, 1993)

Bad Faith

The claim for bad faith failure to pay benefits due an injured employee, first recognized as a valid cause of action against a workers' compensation insurer in Boylan v. American Motorist Insurance Co., 489 N.W.2d 742 (Iowa 1992), applies as well to self-insured employers. Also, adjudication of the workers' compensation

claim and exhaustion of all appellate remedies is not a prerequisite to the commencement of such a bad-faith action. Although it usually will be helpful for the compensation liability to have been adjudicated conclusively before the trial of a bad-faith action, district courts can accommodate this interest simply by delaying trial of the bad faith claim until the workers' compensation claim has been completed.

Morton v. Underwriters Adjusting Co., 501 N.W.2d 72 (Iowa App. 1993)

Bad Faith

Morton sustained work-related injury to his shoulder. Physician reported to workers' compensation adjuster Kidman, at her request, that Morton had a 32% permanent partial impairment of his left upper extremity. Kidman informed Morton of rating and his entitlement to 80 weeks of permanent partial disability benefits. Without the assistance of counsel, Morton settled his compensation claim with Kidman for a lump sum payment. Represented by counsel, Morton later sued to set aside the commutation on grounds of fraud. Morton specifically alleged that Kidman should have disclosed his entitlement to industrial disability benefits upon proof that his shoulder injury extended to the body as a whole. District court refused to set aside settlement.

HELD: Assuming that Kidman had an obligation to advise Morton and make full disclosure to him (see Harrison v. Keller, 254 Iowa 267, 117 N.W.2d 477 (1962)), substantial evidence supported district court's finding that Kidman did not intend to deceive or act with reckless disregard. Kidman denied telling Morton that the agreed sum was all Iowa law permitted him to recover. Kidman had the right to rely on the physician's impairment rating even though such rating was not binding on the industrial commissioner.

Jones v. Sheller-Globe Corp., 487 N.W.2d 88 (Iowa App. 1992)

Labor Broker

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Plaintiff worked for Manpower, Inc., an employment service which provided temporary employees to various employers. Manpower assigned plaintiff to Sheller-Globe. Plaintiff filed a tort suit against Sheller-Globe for an injury plaintiff suffered in the course of his employment at Sheller-Globe. The court granted Sheller-Globe's motion for summary judgment on the basis that plaintiff's tort action was barred by chapter 85's exclusive remedy provision.

HELD: Both Manpower and Sheller-Globe were employers of plaintiff while he worked for Sheller-Globe pursuant to contract

with Manpower. Sheller-Globe, as an employer of a broker employee, was an employer under section 85.61(2). It was free to reject any employee sent by the broker. It paid the broker directly according to the number of hours worked by the employee. It retained the right to discharge the employee from the work assignment. It maintained full authority to control the work while the employee was at the job site. Its business purpose was directly furthered by the employee's work.

COMMENT: 5-1. Dissenting judge found factual issues. Manpower had the sole discretion to hire and terminate employees, and had responsibility for payment of wages. In addition, Manpower retained the right to control the work in part by limiting a Manpower employee from operating any vehicle or machinery without Manpower's prior written consent. In its answer to interrogatories, Sheller-Globe stated that plaintiff was an employee of Manpower at the time of his injury.

Hanson v. Schaumberg, 490 N.W.2d 84 (Iowa App. 1992)

Sole Remedy

Defendant employed Hanson to bail hay at defendant's farm. Hanson exhibited symptoms of heat stroke, and defendant directed him to sit down and rest. Defendant left Hanson alone for about one hour, returned, and found him unconscious. Hanson subsequently died. Estate sued defendant, alleging "intentional and outrageous" conduct. District court granted defendant's motion for summary judgment.

HELD: Hanson did not adduce substantial evidence that defendant intentionally caused Hanson's injuries.

COMMENT: The opinion never says the words "gross negligence." Is this a new cause of action for employer liability for work-related injuries over and above worker's compensation and gross negligence?

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Sladek v. K Mart Corp., 493 N.W.2d 838 (Iowa 1992)

Subrogation

K Mart employee Sladek was injured on the job. She received workers' compensation benefits and hired an attorney to represent her in a third-party action. Attorney failed to prosecute action diligently, and it was dismissed under 215.1. She made a claim against attorney for legal malpractice and received $100,000. K Mart sought to recover from her legal malpractice proceeds by virtue of the subrogation language in section 85.22.

HELD: Attorney was not a third party that was liable for the injury that imposed the workers' compensation liability on K Mart in the first place. K Mart's subrogation interest does not attach to Sladek's attorney-malpractice recovery.

IBP, Inc. v. DCS Sanitation Management Services, Inc., 498 N.W.2d 425 (Iowa App. 1993)

Subrogation

IBP and DCS contracted for DCS to provide certain cleaning and sanitation services for IBP. DCS agreed to indemnify IBP against all claims arising out of damages caused by DCS. The indemnity obligation did not extend to claims arising out of damages caused by IBP. DCS employee Grimm was injured while cleaning machinery at IBP. Grimm filed a workers' compensation claim against DCS and sued IBP. Grimm obtained a judgment, which IBP paid. IBP then sued DCS and its liability insurer for indemnity, breach of contract, and bad faith. District court sustained DCS' motion for summary judgment, holding that the jury's assessment against IBP of 70% (Grimm 30%) of the fault precluded indemnity under the IBP - DCS contract.

HELD: Because of section 85.20, there has not yet been an adjudication of the relative responsibilities of IBP and DCS. IBP has adduced substantial evidence that would support a finding that DCS was negligent.

> DCS argued such a holding would run a foul to the spirit of the workers' compensation legislation. There is merit to this position.
>
> ... However, not allowing IBP the opportunity to litigate the negligence could well result in DCS being made whole for workers' compensation paid on an injury caused by its negligence.
>
> ... Which, in essence, is allowing DCS to be indemnified on its claim against IBP when the issue of the respective negligence of the two has not been litigated.
>
> If there is incompatibility between section 85.20 and section 85.22 (creating DCS's right of subrogation), the incompatibility is better resolved by not allowing an employer to escape any financial responsibility for negligently injuring an employee.

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COMMENT: The result makes complete sense and should be no surprise, given DCS' indemnity obligation to IBP. The language used by the court of appeals, constitutes the first recognition by an appellate court in Iowa of the inequity of permitting negligent employers and/or their insurers to recover from third party tort-feasors all or part of comp benefits paid for injuries that were caused by the employer's negligent conduct.

Sourbier v. State, 498 N.W.2d 720 (Iowa 1993)

Subrogation

Sourbier was injured in the course of his employment as a highway patrol officer. The State paid his workers' compensation benefits. Sourbier brought an action against the third-party tort-feasors for the personal injuries he suffered. The State filed a lien for workers' compensation benefits paid and to be paid. Sourbier filed a petition for declaratory judgment to determine what lien rights the State had in his third party award.

HELD: Under section 85.22, an employer's right to indemnification out of the third-party recovery should extend to the amount allowed for pain and suffering. Furthermore, the employer has a lien for medical expenses which were actually paid by the employer, even if the employee deliberately did not submit to the jury some of the medical expenses paid by his employer in his third-party action. An employer's lien should not be reduced by the amount of an employee's comparative fault. Finally, it is proper to reduce an employer's lien for the employee's attorney fees and pro rata unreimbursed expenses of litigation.

Daniels v. Hi-Way Truck Equipment, Inc., _____ N.W.2d _____ (Iowa, August 25, 1993)

Subrogation

Section 85.65, Code of Iowa, provides that the employer or its insurer shall pay into the second injury fund in the event of a compensable death either $4,000 (if the employee died with dependents) or $15,000 (no dependents). HELD: Neither employer nor its insurer is entitled to recover second injury fund payments from proceeds of wrongful death action against third party, either under a theory of subrogation under chapter 85 or under a theory of indemnity.

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Konicek v. Loomis, _____ N.W.2d _____ (Iowa, July 21, 1993)

Subrogation

Workers' compensation carrier sought to recover interest as well as monies paid in comp benefits to injured employee who prevailed against third-party defendant. HELD: Cincinnati was entitled to recover interest at the rate of 5% pursuant to section 535.2(1) from the date on which Konicek actually received payment from the third-party defendant.

THE AMERICANS WITH DISABILITIES ACT

APPLICABILITY TO THE STATE COURTS AND IMPACT ON TRIAL PRACTICE

I. The Americans with Disabilities an Act signed into law July 26, 1990.

A. Prohibits discrimination against persons with disabilites in employment, government services, public facilities and telecommunications.

B. Title II makes the Act applicable to all services, programs and activities provided or made available by public entities--includes the state court system.

C. A public entity (i.e. the judicial department) must evaluate its current policies and practices with regard to the requirements of the ADA.

D. Supreme Court Task Force on the Americans with Disabilities Act -- report to state court administrator.

1. Work of the Task Force.

a. Evaluation of court facilities in 5 areas:

i. Accessible entrances

ii. Physical access to services

iii. Restrooms

iv. Telecommunications

v. Program Accessibility--"viewed in their entirety are the services and programs [of the court/ juvenile office] readily accessible to persons with disabilities."

b. ADA Compliance varied widely from courthouse to courthouse.

i. Program accessibility the greatest concern in Courthouses without elevators

ii. Counties are responsible for structural changes --transition plans prepared --and in many instances structural changes planned or started.

c. Telecommunications and employment policies

d. Grievance procedures

e. Public notices of ADA applicability

i. Posted notice

ii. Juror summonses--contact person for accommodation.

iii. Subpoena forms--oral argument notices from Supreme Court.

f. Rules of Civil Procedure regarding juror challenges.

E. Enforcement. ADA adopts Section 505 of the Rehabilitation Act of 1973 (29 U.S.C. Section 794a) which in turn incorporates the remedies in the Civil Rights Act of 1964 codified at 42 U.S.C. Sections 2000d et seq. and 2000e et seq. State sovereign immunity is waived.

II. Impact of the ADA on Trial Practice

A. Mandate: No qualified individual with a disability

shall by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimmination by any such entity. 42 U.S.C. Section 12131 (1991).

B. A "qualified individual" is . . . an individual with a disability who, with or without reasonable modifications to rules, policies or practices, the removal of architectural, communication or transportation barriers or the provision of auxiliary aids and services, meets the essential eligibility requirements for the recipient of services or the participation in programs or activities provided by a public entity." 42 U.S.C. Section 12115.

1. Example: the hearing impaired juror. Statutory minimum qualifications include:

a. "[b]e able to receive and evaluate information such that the person is capable of rendering satisfactory jury service." Section 607A.4(1)(d), Iowa Code.

b. "Minimum qualifications," include "[b]e able to understand the English language in written, spoken or manually signed mode." Section 607 A.4(1)(c), Iowa Code.

c. "A person shall not be excluded from jury service . . . on account of . . . physical

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disability." Section 607 A.2, Iowa Code.

2. Does a hearing impaired person meet the "essential eligibility requirements" for jury service?

3. Is the juror entitled to have a manual sign interpreter?---in the jury room?

4. Challenge for cause.--Rule 187(f)(3) I.R.Civ.P. "Physical or mental defects making [juror] incapable of performing the duties of a juror." What discretion does the trial court retain under the rule in light of the ADA?.

5. Will there have to be "Batson" proceeding if person with a disability is stricken.

C. What is a disability?

1. A person with a physical or mental impairment that substantially limits that person in some major life activity; or

2. A person with a record of such a physical impairment; or

3. A person who is regarded as having such an impairment. 42 U.S.C. Section 12102 (2)

a. Generally, temporary non-permanent impairments of short duration are not disabilities.

b. ADA does not include impairments due to current use of drugs.

D. Key to Title II: Accessibility -- each service program or activity conducted by a public entity must be readily accessible to persons with disabilities

1. Unless:

a. Making the program accessible will result in fundamental alteration of the program or activity.

b. Will cause an undue or administrative burden. This is intended to be a high standard.

2. Test is program accessibility, not whether a particular building or courtroom is accessible. Purpose of Title II is to insure access to courts.

3. Reasonable Accommodation. Examples:

a. Move proceedings from a courtroom not accessible to person in a wheel chair to one which is

b. Install better sound amplification equipment or adjust existing equipment.

c. Use of real time reporting.

d. Designate and construct an "accessible" courtroom in multi -courtroom courthouses or district.

e. Reassign services at alternate accessible sites.

III. Discussion Problems. Discussion group problems prepared by Judge Rick Brown of the Wisconsin Court of Appeals for use in connection with training at the National Judicial College are attached with Judge Brown's consent.

DISCUSSION GROUP PROBLEM

Rumpole county has a courthouse that was built during the depression as part of a public works project. At the time, it was state of the art--with majestic courtrooms of high ceilings, tall benches and marble walls. There are four such courtrooms and they are all pretty much the same.

Due to increasing judicial business, the state legislature added a new judge for the county in 1980. The county, strapped for funds, decided not to build an addition to the courthouse. Instead, they decided to convert one of their county board meeting rooms, in a building across the street from the courthouse, into a small courtroom. No jury box was put into this courtroom. It was intended to handle domestic relations, small claims and probate matters.

Paul Astich is a person with parapalegia. He uses a wheelchair. He was a witness to an automobile accident and the defense has subpoened him to come to trial. The lawyer who subpoened him did not bother to tell the court that Astich used a wheelchair. The trial was to be held in the third floor courtroom. To get to this courtroom requires climbing three stairs from the hallway. Once up the stairs, the doors to the courtroom are extremely narrow. A wheelchair cannot pass through the door unless it is folded up. Inside the courtroom, there is room enough to maneuver when using a wheechair. The witness box requires a climb of two steps. As judge in Rumpole County, this is your courtroom. On the second day of trial, you are informed about Astich and his use of a wheelchair. Astich objects to being carried into the courtroom from the hallway. You know that there is only one courtroom in the courthouse that does not have a similar set up with steps leading from the hallway to the courtroom. That is on the second floor where Judge Bailey sits. But she is hearing a full calandar of misdemeanor arraignments today. Someone suggests that the whole trial be moved across the street because there are no steps to worry about in the county building courtroom. What do you do? How would you prevent this situation from occurring in the future?

Matt Sonnleitner is deaf. He lost his hearing at age 27 and is now 32. He speaks well and has a good command of the English language. He does not know sign language, so he depends upon lip reading. Matt is called for jury duty on the very same case that Astich has been subpoened as a witness. Matt tells the court that he is deaf, but would like to serve on a jury. Prior court policy had been to exclude all deaf and blind people from serving on the jury because of the thought that neither blind nor deaf persons can fully appreciate the testimony being given. You, as the judge, now know that this thinking is contrary to the ADA and you are prepared to allow Matt to sit on the jury if so chosen. However, one of the attorneys objects, saying that it is her clients constitutional right to have competent people on the jury and she does not feel that Matt is qualified. How do you rule? Matt, for his part, wants a real-time reporter so that he can understand what is being said in the courtroom. You don't have a reporter with real-time capability. What do you do? Assuming you can get a reporter, will you let the reporter in the jury room? What if the reporter, under

your questioning, states that the accuracy level of the reporting is 90% and the same counsel who objected to Matt serving now expresses concern that the missing 10% may be vital to the case. What do you do now?

Patricia Zoey is one of the plaintiff's in the case. She was a passenger in the car that was allegedly hit from behind. She has a vision impairment, needing bright lights in order to see. The lighting in the courtroom is not very good and the marble walls tend to darken rather than lighten the room. She complains, after the jury is picked, that she cannnot see the jury and has trouble seeing you. She would like an audio-visual set-up so that she can view the proceedings on a big screen. When you ask why she didn't tell you this beforehand, she says she had no idea that the courtroom would be so dark. What do you do?

The driver of the car that Zoey was in is Randy King. He is a plaintiff in the case and also a defendant who is being sued by Zoey. As a result of the collision, his back was badly injured. His doctor requires that he sit in a special chair to ease the strain on his back. King must also, according to the doctor, stand every 10 minutes, place one knee on the chair and remain like that for five minutes before sitting again. While Zoey's counsel has no objection to this, the other defendant--the one who hit the King vehicle from behind, objects to this procedure as being unfairly prejudicial to his case. How do you rule?

Carol Manley has a mental disability. She is a person who had been diagnosed as having a retardation, but she has done very well in special education classes, can read to a fourth grade level and holds a job as a bus person in a local restaurant. She also has been called to jury duty. She also wants to serve. The same lawyer who is posing an objection to Matt poses one here. Where do you go from here?

The defendant who hit the King car from behind is Kelsey Raynor. Kelsey is a big man. He is about 6'2" and weighs about 390 pounds. The trial is in the summer and there is no air conditioning in the courtroom. Kelsey is sweating profusely. He claims that his physical condition causes this and makes him so uncomfortable that he cannot concentrate on the proceedings. Also, he thinks it will make for a bad appearance in front of the jury. His attorney argues that Kelsey qualifies under the ADA and moves that the court adjourn the proceedings to the fourth floor courtroom which is air conditioned. That courtroom is largely unused right now because a criminal trial set for that courtroom was cut short when the defendant suddenly plead guilty. However, another criminal trial is set to begin there in two days and this civil trial is slated to last at least three and possibly four more days. Although there is no air conditioning in your courtroom you notice that no one else seems uncomfortable with the room temperature and you yourself feel no discomfort. How do you approach this motion?

I N D E X

Iowa Defense Counsel Association

1965 through 1992 Annual Meetings

This Index is supplied as a service to the members of the the Iowa Defense Counsel Association and will be updated annually. Entries in this Index refer to the title of the paper presented followed by the year of presentation.

Outlines for annual meetings of 1970, 1972, 1973, and 1974 were unavailable at the time of this printing and no papers for those years are included in this Index.

Copies of specific presentations may be obtained by contacting:

Iowa Defense Counsel Association
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