

defense UPDATE

The Iowa Defense Counsel Association Newsletter

Spring 2004 Vol. XVIII, No. 2

Out of Time: Dispositive Motions Based on Time in Products Liability Defense – a Refresher Course

By: Robert L. Fanter and Gretchen Kraemer, Des Moines, IA

I. Introduction

At first blush, statutes of limitation or repose defenses seem rather straight-forward. But a close examination reveals a complex cascade of case situations where the ultimate remedy of dismissal may result based on tardiness of the claim prosecution. Missed opportunities in asserting these defenses may be not only embarrassing, but costly to one's malpractice carrier. Similarly, Plaintiffs in product liability cases may think they won the race by a nose only to be edged out by a defense lawyer's careful analysis of the photo finish.

Below are listed some practice situations (by no means all inclusive) which give examples of the operation of the timeliness defenses in situations sometimes overlooked in the Product Defense environment.

II. Statutes of Limitation

Limitation periods established by the legislature are set forth in Iowa Code section 614.1. In products liability defense work, two commonly applicable limitation provisions are section 614.1(2) relating to injuries to persons and section 614.1(4) relating to injuries to property. Claims for breach of express written warranty may appear to be covered by 614.1(5) (providing a ten-year limitations period for suit on written contracts), however, most warranty provisions have time limits drafted into the content of the warranty, thus section 614.1(5) rarely applies in a products liability context.

Section 614.1 provides "Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared:"

(2)*Injuries to person or reputation – relative rights – statute penalty.* Those founded on injuries to the person or reputation, including injuries to relative rights, whether based on contract or tort, or for a statute penalty, within two years.

See Iowa Code. § 614.1(2) (2003). The rule is straight-forward: in lawsuits where the Plaintiff seeks recovery for personal injury, the Plaintiff must file the lawsuit within two years of the date of the injury.

Subsection (4) provides:

(4)*Unwritten contracts -- injuries to property -- fraud -- other actions.* Those founded on unwritten contracts, those brought for injuries to property, or for relief on the ground of fraud . . . , and all other actions not otherwise provided for in this respect, within five years, except as provided by subsections 8 and 10.

See Iowa Code § 614.1(4) (2003). Thus, Plaintiffs seeking recovery for injuries to property alone have five years from the date of injury in which to file a lawsuit. For example, if an unattended coffee pot malfunctions and causes a house fire, the date of injury, and the date the clock starts running, is the date of the fire. Although claims for breach of implied warranties may appear to fall under subsection (4) as unwritten contracts, the limitations provision based on the nature of the injury applies; if the action is for personal injury, the two-year limitation period governs. "No Iowa statute provides a special longer limitation period for plaintiffs' claims of personal injury resulting from alleged breaches of implied warranty." *Franzen v. Deere & Co.*, 334 N.W.2d 730, 733 (Iowa 1983). Statutes of limitation provide a bright line rule against which timeliness can be measured. Statutes of limitation "are by definition arbitrary, and their operation does not discriminate between the just and the

continued on page 6

Inside This Issue

Out of Time: Dispositive Motions Based on Time in Products Liability Defense – a Refresher Course Robert L. Fanter and Gretchen Kraemer	Page 1
Message From The President	Page 2
Standing Issues in Derivative Actions Jason M. Steffens	Page 3
Federal Court Pretrial Orders: Read Them For Your Own Good. Kevin M. Reynolds	Page 4
Waiter! There's A Patent In My Treademark! Distinguishing Intellectual Property Law for the Defense Lawyer B. MacPaul Stanfield	Page 5
Schedule of Events	Page 19
Editorial	Page 20

MESSAGE FROM THE PRESIDENT



Richard G. Santi

Dear IDCA Member:

The newly revised IDCA website will be up and running by June 15. Check it out at www.iowadefensecounsel.org. Only IDCA members will have access to the jury verdict reports and the listserv features. To access these "members only" sections, the password will be your first initial and last name, e.g., rsanti. Please report all jury verdicts (good or bad) to the IDCA so a case and verdict summary can be posted on the website. It would also be helpful to know if a reported verdict is later reduced or set aside.

With respect to the new "listserv" feature of the IDCA website, an IDCA member may use this electronic forum to seek assistance on behalf of a defendant concerning civil litigation matters. The revised IDCA website will also have links to various resources and other venues including the Iowa Code, the Federal District Courts for the Northern and Southern Districts of Iowa, the Iowa Supreme Court, the Iowa Court of Appeals, and the Eighth Circuit Court of Appeals. We believe the IDCA website will be equal to, if not superior, to any other defense counsel organization's website in the United States. So take advantage of your IDCA membership and use the IDCA website.

The 2004 legislative session has ended. Tort reform and other matters impacting on civil litigation were once against "hot button" issues. Our IDCA lobbyist Bob Kreamer and our IDCA Legislative Committee, chaired by Mike Thrall, spent many hours in making sure that the

legislature received input from the defense bar. Probably the most publicized attempt at tort reform was the bill to cap non-economic damages in medical malpractice actions at \$250,000. Like most of you, I have close friends or family who are medical doctors. Iowa doctors have seen high increases in their medical malpractice premiums in recent years. The doctors I have spoken to are aware that placing a \$250,000 cap on noneconomic damages will do little, if anything, to reduce their premiums. However, regardless of one's view on caps as a perceived solution to high premiums, all of us share a common interest in having access to competent and affordable health care and attracting and keeping skilled medical doctors in Iowa. Thus, we need to explore ways to lower the cost of medical malpractice premiums for Iowa doctors while at the same time preserving the right to fair and adequate compensation to those unfortunate few whose lives are impacted by negligent medical care. Just because institution of caps may not be an effective tool to lower premiums does not mean that we shouldn't be working cooperatively with the medical profession and the legislature to address a problem which is all too real to our colleagues in the medical profession.

Attendance exceeded expectations for the IDCA mini-seminar on workers' compensation for the defense practitioner held at the Des Moines Golf and Country Club on April 16. The credit for the success of this year's mini-seminar goes to Sharon Greer, Pete Sand, and the workers' compensation practitioners who spoke at the seminar.

Lastly, please make sure you have the dates of September 22-24, 2004, reserved on your calendar for the IDCA Annual Meeting and Seminar to be held at the Des Moines Marriott Hotel. In the meantime, I hope each of you will take time out of your busy schedules by indulging in your favorite summer outdoor activity as well as spending quality time with family members.

Richard G. Santi
President

STANDING ISSUES IN DERIVATIVE ACTIONS

By: Jason M. Steffens, Cedar Rapids, Iowa

“I sink in deep mire, where there is no standing; I am come into deep waters, where the floods overflow me.”¹

In defending any action, one of the first things defense counsel must ascertain is whether the client even needs to answer the complaint. A key avenue to challenging a petition could be the plaintiff’s lack of standing to bring the particular claim or claims. While defense counsel may not give plaintiff’s standing even an initial thought in most tort or breach of contract cases, standing issues may play a large role in derivative litigation. King David’s lament in the second verse of the sixty-ninth Psalm could quickly turn into a plaintiff’s lament if the plaintiff fails to follow certain procedures before suing in the right of a corporation, or mistakes an individual action for a derivative one.

This article is intended as a primer on standing issues in derivative litigation. Specifically, this article will address the difference between individual and derivative claims, focusing on the 2001 Iowa Supreme Court decision in *Rieff v. Evans* (*Rieff I*)²; the requirements plaintiffs must meet before suing in the right of a company; the changes the Iowa General Assembly made to those requirements in 2002; and how those requirements differ

between corporations and limited liability companies.

AUTHORITY TO ASSERT DERIVATIVE CLAIMS

The right of shareholders to sue on behalf of corporations is “unequivocally recognized” by Iowa Code section 490.740 *et seq.*³ Section 490A.1001 similarly unequivocally provides for a right of a member of a limited liability company to bring an action in the right of the LLC.⁴ Limited partners have standing to bring derivative actions on behalf of limited partnerships pursuant to Iowa Code section 487.1001.⁵ Finally, Iowa case law grants policyholders of a mutual company the right to bring derivative suits.⁶ Consequently, Iowa law answers the basic standing question—derivative suits are allowed.

Nevertheless, other considerations may “sink in deep mire” a plaintiff’s standing to bring a derivative claim. Before evaluating standing issues in derivative claims, though, it is important to understand exactly what a derivative claim is, and how it differs from an individual claim. Iowa Code section 490.740 provides that a “derivative proceeding” is “a civil suit in the right of a domestic corporation or, to the extent provided in section 490.747, in the right of a foreign

corporation.”⁷ As stated by the Iowa Supreme Court, “A derivative lawsuit is unique in that the shareholders allege the company’s directors have directly harmed it by their acts and omissions such that the company has suffered a loss. The shareholders indirectly assert their rights through the rights of the company.”⁸ A derivative proceeding is analogous to a “next friend” suit on behalf of an individual.⁹

Most derivative claims are brought against officers or directors of the corporation. This is so because it is unlikely that those responsible for bringing an action on behalf of the corporation will institute a corporate action against *themselves*.¹⁰ The law *could* address that problem by allowing shareholders to sue in their own right for harms inflicted on the corporation by its officers and directors.¹¹ Generally, however, “shareholders have no claim for injuries to their corporations by third parties unless within the context of a derivative action.”¹² This limitation on standing to bring individual shareholder actions is important for a number of reasons. Most significantly, and stated generally, limits on individual shareholder actions help avoid corporate and judicial waste. As noted by the Second Circuit Court of Appeals, “the stake of each shareholder

continued on page 10

¹ *Psalm* 69:2 (KJV).

² 630 N.W.2d 278 (Iowa 2001) (*Rieff I*).

³ *Id.* at 283.

⁴ See IOWA CODE § 490A.1001 (2003) (“A member may bring an action in the right of the limited liability company to recover a judgment in its favor if all of the following conditions are met . . .”).

⁵ See *Id.* § 487.1001. This article only specifically addresses shareholder, policyholder, and member derivative actions. However, many of the same principles discussed will also apply to suits in the right of limited partnerships

⁶ *Rieff I*, 630 N.W.2d at 287.

⁷ IOWA CODE § 490.740(1).

⁸ *Weltzin v. Nail*, 618 N.W.2d 293, 295 (Iowa 2000).

⁹ *Rieff I*, 630 N.W.2d at 288 (citing *Koster v. (American) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 522-23 (1947)).

¹⁰ William A. Klein et al, *Agency, Partnerships, and Limited Liability Entities* 334 (2001).

¹¹ Charles R.T. O’Kelley & Robert B. Thompson, *Corporations and other Business Associations* 395 (3d ed. 1999).

¹² *Engstrand v. West Des Moines State Bank*, 516 N.W.2d 797, 799 (Iowa 1994).

FEDERAL COURT PRETRIAL ORDERS: READ THEM FOR YOUR OWN GOOD

By: Kevin M. Reynolds, Des Moines, IA

Imagine yourself in a federal courtroom in Iowa, defending a product liability case in front of a jury. Assume that the case involves a house fire that allegedly started because of a defect in a battery-powered toy car, that was parked in a garage and plugged into the recharger at the time of the fire. The case is a subrogation matter by the fire carrier for the homeowner, and is for property damage only in the approximate sum of \$200,000. And oh, by the way, plaintiff has added a claim for punitive damages for “good measure.” Assume that the trial has proceeded for three or four days, and you are just about done. You are putting on your primary defense expert witness. This expert is very experienced at fire cause and origin investigations. The expert has carefully inspected and photographed the fire scene. Burn patterns show a significant flash-over effect, with the garage fully involved. The scene investigation does not clearly indicate where the fire started. There were many fuel loads in the garage, and each left a distinct burn pattern. Areas of the garage away from the toy are burned more severely than areas directly adjacent to where the toy was. The expert, trained as an electrical engineer, also has examined the remnants of the product. This “blob” of molten plastic, which use to be a shiny toy car large enough for small kids to ride in, has been x-rayed. A crucial point of your expert’s opinion is that in

examining the x-ray, it can be shown that the recharger for the toy was *not plugged in to the toy’s battery* at the time of the fire. Thus, the toy, and any alleged “defect” in it, could not have been a proximate cause of the fire. You have just finished your direct examination of the expert. You sincerely feel that the expert has done a very thorough job of explaining his opinions, and feel confident that a defense verdict is in the offing.

Plaintiff’s counsel rises to start his cross-examination. You can’t imagine what counsel is going to do in order to try to undercut your expert. He is well-qualified and has given a compelling opinion; the jury has been listening to him on the edge of their seats. He first asks “when” the expert “had changed his mind” about certain electrical wires depicted in the x-ray of the burned remnant of the rechargeable toy car. The expert notes that he reviewed the case with counsel on the preceding evening, at the hotel after arriving late at about 10:30PM, and was told by counsel that one of plaintiff’s experts had noted this possible error. At that point, Plaintiff’s counsel dramatically asks that the jury be excused, moves for an immediate directed verdict in favor of plaintiff, and asks that the defense expert’s testimony be completely stricken from the record. The look on defense counsel’s faces had to be one of “shock and awe,” to say the least!

What was the basis for Plaintiff’s

counsel’s anger? What had the expert done wrong? What had defense counsel done wrong? In short, the defense had violated the terms of the court’s final pretrial order which included a unique variation on the rule regarding the sequestration of witnesses. The rule set forth in the order did not allow defense counsel to tell its expert anything about what the Plaintiff’s expert had testified to in the trial! This situation actually happened and the issues are discussed (among others¹) in the ruling on Defendant’s post-trial motions. *Zeigler v. Fisher-Price, Inc.*, 302 F. Supp.2d 999 (N. D. Iowa 2004).

What was the court’s ruling? In the trial court record the court found that defense counsel’s violation of its order regarding witnesses was “inadvertent.” However the court found that a violation had occurred, that it was sanctionable, and as a sanction, the court struck from the record all of the defense expert’s testimony regarding his examination of the product which was alleged to have been defective and caused the fire. The jury was told that defense counsel and the expert had violated a court order.² The court went even further, and drew the jury’s attention to the jury instruction regarding “prior inconsistent statements.” This was so even though Defendant claimed that the expert had never made any prior inconsistent statements about the specific subject matter involved in his error. The jury

continued on page 15

¹ The court also granted a sua sponte dismissal under Rule 50 of Plaintiff’s design defect claim, but it should be noted that this ruling may have been in error. The court found that design defect was not submissible because Plaintiff’s property damage claim was one for “economic loss” only, and such claims are governed exclusively by warranty theories. *Id.* at 1008-1009. However, the claim here was not for damage to the toy itself, but for structural damage caused by a fire that allegedly originated in the toy, which spread to the garage, house, a motor vehicle parked in the garage, and personal property. Also, a fire occurred which is a “sudden, calamitous event” of the type that could have caused personal injury. Under the facts, this was a claim for property damage only based on strict liability in tort, which is permissible under Iowa law. *See American Fire & Cas. Co. v. Ford Motor Co.*, 588 N.W.2d 437 (Iowa 1999).

² However, the jury was not told the violation was “inadvertent,” and the reported opinion ruling on Defendant’s post-trial motions makes no reference to this finding.

WAITER! THERE'S A PATENT IN MY TRADEMARK!

Distinguishing Intellectual Property Law for the Defense Lawyer

By: B. MacPaul Stanfield, Des Moines, IA

Intellectual property ("IP") is no longer an area of law reserved to boutique operations in the nation's major cities. Public awareness of intellectual property is on the rise and small business operators are more cognizant of IP assets and risks. Increased awareness creates a need for legal services and Iowa defense lawyers should not shy away from opportunities to serve clients or act as local counsel in this area of the law.

You do not have to be a licensed patent lawyer to litigate an IP dispute. Non-patent attorneys may not prosecute a patent but may provide counsel on matters such as trademark prosecution, copyright registration, IP licensing, and IP litigation. For interested attorneys not familiar with IP law, the first step is to learn the basic differences between patents, copyrights, and trademarks. This article provides a very basic breakdown of the IP family.

Trademarks

Trademarks are words, symbols, phrases, logos, shapes, colors, and other indicators of the source of a good or service. The holder of a trademark may prevent others from using a confusingly similar mark on goods or services of the same type (i.e., infringing uses). The Lanham Act codified in Title 15 of the United States Code governs federal trademark law. 15 U.S.C. §§1051-1127. The circle "R" (®) designation indicates that the mark is registered with the United States Patent and Trademark Office ("PTO") and provides constructive notice of the registrant's ownership claim in the mark. Federal trademark registration entails filing an application, review by the PTO, and an opportunity for others to object to the application. Maintenance of a federal registration requires follow-up

declarations, fee payments, and decennial renewals. Federal trademark registration confers upon the registrant important benefits, such as access to the federal court system and the right to seek enhanced damages. A "TM" beside a mark means the user claims the mark as a trademark, but has not registered the mark with the PTO. Unregistered marks are still protected under the common law and state and federal unfair competition laws. The cornerstone of all trademark rights is actual use of the mark.

Iowa Code Chapter 548 governs the registration and protection of trademarks at the state level. State registration does not provide the registrant with rights beyond the State of Iowa. An important note for all attorneys is that registering a business name with the Office of the Secretary of State does not give rise to trademark rights.

Trademark litigation usually involves a question of infringement. Basic trademark infringement occurs when a confusingly similar mark is used to identify similar goods or services. Federal law also provides a claim for dilution of a famous trademark. Dilution provides the trademark holder with an action against the user of an identical or similar mark on *dissimilar* goods or services.

Trade Dress

Trade dress is at issue when the product itself or its packaging serves the function of a trademark (e.g., the shape of a bottle or decor of a restaurant). Trade dress disputes often underlie claims for unfair competition. In some instances the trade dress of a product is, in fact, registered as a trademark. To have proprietary trademark rights in trade dress, the trade dress must be both

distinctive and non-functional. If the trade dress is functional, or has utility, then it has crossed over into the realm of patent law.

Copyrights

A copyright is a proprietary right in an original expression that is fixed in a tangible form. The rights under copyright arise in the author of the work. Copyrights are typically associated with creative works of authorship such as music, motion pictures, and literary works. Copyright law, however, also protects computer software (a literary work) and has become a critical area of law in the Internet and information technology industries. Currently, the term of a copyright is the life of the author plus 70 years. For corporations and the like, the term is 95 years from first publication, or 120 years from creation, whichever is first.

The Copyright Act, codified in Title 17 of the United States Code, governs the law of copyrights. Under the current law, a work is copyrighted the moment it is fixed in a tangible form. Neither federal registration nor notice (e.g., the circle "c" (©)) is required to secure ownership of the copyright. Both, however, are strongly recommended. Registration of a copyrighted work with the United States Copyright Office gives the copyright holder access to federal courts and statutory damages. Copyright notice is still necessary in some foreign countries. Attorneys, however, should be aware that Congress has amended the Copyright Act multiple times. The date of first publication may determine which version of the law is applicable. In the past, notice and registration were sometimes required.

OUT OF TIME: DISPOSITIVE MOTIONS BASED ON TIME IN PRODUCTS LIABILITY DEFENSE – A REFRESHER COURSE . . . continued from page 1

unjust claim, or the avoidable and unavoidable delay.” *Schulte v. Wageman*, 465 N.W.2d 285, 287 (Iowa 1991). Application, however, becomes complicated if the Plaintiff claims difficulty identifying the injury or the product manufacturer within the two year limitation period. It is in negotiating these turns that a defense lawyer’s careful assessment can close the gap, leaving the Plaintiff out of the race.

III. Statutes of Repose

Like statutes of limitation, statutes of repose set a bright finish line that litigants must reach within the applicable period or lose the privilege to litigate. Statutes of repose impose an absolute limit on claims, running not from the date of the accrual of the claim (generally the date of injury), but instead running from the date of the act or omission that caused the injury to a date fifteen years thereafter. *Albrecht v. Gen. Motors Corp.*, 648 N.W.2d 87, 92 (Iowa 2002). With respect to products, the clock begins to run either when the product is first purchased or installed for use, *see id.* at 91, or when the product is first manufactured, *see Henningsen v. E. Iowa Propane*, 652 N.W.2d 462, 464 (Iowa 2002). Statutes of repose are different from statutes of limitation. *Albrecht*, 648 N.W.2d at 91. Where statutes of limitation affect only the remedy, statutes of repose extinguish the right itself. *Id.* Under a statute of repose, “the mere passage of time can prevent a legal right from ever arising.” *See Koppes v. Pearson*, 384 N.W.2d 381, 395 (Iowa 1986). Statutes of repose are designed to prevent the trial of stale claims, where due to the passage of time, memories fade and evidence becomes more difficult to gather. *Fisher v. McCrary-Rost Clinic, P.C.*, 580 N.W.2d 723, 725 (Iowa 1998).

The Iowa legislature enacted a statute of repose specific to

products, providing:

2A. *With respect to products.*
 a. Those founded on the death of a person or injuries to the person or property brought against the manufacturer, assembler, designer, supplier of specifications, seller, lessor, or distributor of a product based upon an alleged defect in the design, inspection, testing, manufacturing, formulation, marketing, packaging, warning, labeling of the product, or any other alleged defect or failure of whatever nature or kind, based on the theories of strict liability in tort, negligence, or breach of an implied warranty shall not be commenced more than fifteen years after the product was first purchased, leased, bailed, or installed for use or consumption unless expressly warranted for a longer period of time by the manufacturer, assembler, designer, supplier of specifications, seller, lessor, or distributor of the product. This subsection shall not affect the time during which a person found liable may seek and obtain contribution or indemnity from another person whose actual fault caused a product to be defective. This subsection shall not apply if the manufacturer, assembler, designer, supplier of specifications, seller, lessor, or distributor of the product intentionally misrepresents facts about the product or fraudulently conceals information about the product and that conduct was a substantial cause of the claimant's harm.

See Iowa Code § 614.1(2A) (2003). A statute of repose defense extinguishes all claims against typical defendants in a product liability case if the claim is not brought within fifteen years of the date the product is sold to the public, except

if the defendant has intentionally or fraudulently concealed information about the product. Subsection b preserves claims for latent disease cause by exposure to harmful material, permitting the claim to survive the statute of repose and defining the time for accrual of the cause of action as that time when the disease *and* the disease’s cause have been made known or the person should have known of the disease and cause.

Likewise, the legislature has also enacted a fifteen-year statute of repose for improvements to real property. *Buttz v. Owens-Corning Fiberglas Corp.*, 557 N.W.2d 90, 91 (Iowa 1996).

11. Improvements to real property.

In addition to limitations contained elsewhere in this section, an action arising out of the unsafe or defective condition of an improvement to real property based on tort and implied warranty and for contribution and indemnity, and founded on injury to property, real or personal, or injury to the person or wrongful death, shall not be brought more than fifteen years after the date on which occurred the act or omission of the defendant alleged in the action to have been the cause of the injury or death. However, this subsection does not bar an action against a person solely in the person's capacity as an owner, occupant, or operator of an improvement to real property.

See Iowa Code § 614.1 (11) (2003).

These statutes of repose may serve as a bar to a lawsuit even if the Plaintiff claims the discovery rule, disability, or some other reason would excuse the tardiness under a statute of limitation. Under the plain language of the repose provisions, the statute begins to run at the occurrence of the act or omission

OUT OF TIME: DISPOSITIVE MOTIONS BASED ON TIME IN PRODUCTS LIABILITY DEFENSE – A REFRESHER COURSE . . . continued from page 6

that causes the injury. Thus, it is not subject to the later “discovery” of an injury or claim. See *McKiness Excavating & Grading v. Morton Bldgs.*, 507 N.W.2d 405, 408 (Iowa 1993). Other than the statutorily created exception for latent diseases caused by harmful materials described above, statutes of repose are not subject to the excuses that may prevail to save a claim untimely under the statute of limitation. Tolling for minority or disability will not save a claim from a statute of repose. See *Albrecht*, 648 N.W.2d at 95.

IV. Misnomers, Adding Defendants, and the Relation Back Rule.

Given the complex nature with which businesses structure their operations and the difficulty identifying the precise entity responsible for manufacturing or selling a product that has been involved in injury to persons or property, Plaintiffs may bring suit against the wrong parties. Attempts to correctly identify a misidentified defendant or omitted defendant may run afoul of a limitations period as well.

Problems may occur if the Plaintiff misnames the Defendant or seeks to add defendants after the initial petition is filed. Even if the initial petition was filed within the applicable limitation period, added claims against new, or newly renamed, parties may be untimely. The critical issue is whether the amended petition bringing claims against new defendants relates back to the original filing. In Iowa, the relation back rule is governed by Iowa Rule of Civil Procedure 1.402(5).

According to Iowa Rule of Civil Procedure 1.402(5):

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment

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

Defendants must have notice that the race has begun, for the relation back doctrine to apply. And the rule that the Defendant must have had **legally sufficient notice** applies regardless of whether the Plaintiff is correcting a misnomer, or adding a new party. *Grant v. Cedar Falls Oil Co.*, 480 N.W.2d 863, 866 (Iowa 1992). Further, the Plaintiff bears the burden of pleading and proving that the amended petition would relate back to the original petition. *Porter v. Good Eavespouting*, 505 N.W.2d 178, 181 (Iowa 1993); *Brown v. Ellison*, 304 N.W.2d 197, 200 (Iowa 1981).

Under Iowa law, the “notice” required under the relation back rule is service of a petition within the applicable limitation period. “A petition is the document that serves to notify the defendant of the claim for the purposes of the statute of limitations.” *Estate of Kuhns v. Marco*, 620 N.W.2d 488, 492 (Iowa 2000); see also *Butler v. Woodbury County*, 547 N.W.2d 17 (Iowa Ct. App. 1996). Generally, mere letters of negotiation between parties do not constitute legally sufficient notice for the relation back rule to apply. For

example, Pauline Plaintiff may contact Defendant Department Store about an injury she received from an errant clothing security tag. If Pauline files suit two years and three days after the injury, the suit will be untimely because the limitations period on personal injury expires two years from the injury. Although she has notified Department Store of an alleged injury before the Petition was filed (and assuming the Department Store has not fraudulently strung her along permitting the statute to run), this notice is insufficient to state a timely claim against the store. Department Store is entitled to legally sufficient notice, including not only the facts, but notice of the relevant causes of action Pauline asserts against Department Store. Likewise, if Pauline sued Department Store in time, but moved to amend, adding a cause of action against Defendant Security Tag Manufacturer three months after the limitation period expired, this claim would not relate back. Because the relation back doctrine can clash with the protections provided by the statute of limitations, when the relation back doctrine is applied to amendments that add defendants (rather than merely correct misnomers), the rule is strictly construed to protect defendants from defending stale and untimely lawsuits. *Estate of Kuhns*, 620 N.W.2d at 491, 492.

The relation back requirement of notice by service with a petition presents a distinct opportunity for defendants to challenge the timeliness of a claim not present in filing an initial action. Typically, a Plaintiff has up to ninety days to serve a Defendant with a Petition after filing the lawsuit. See Iowa R. Civ. P. 1.302(5). Thus, a Plaintiff who files two days before the expiration of the limitations period need not ensure the petition is served within that two day

continued on page 8

OUT OF TIME: DISPOSITIVE MOTIONS BASED ON TIME IN PRODUCTS LIABILITY DEFENSE – A REFRESHER COURSE . . . continued from page 7

window, so long as service is effected ninety days thereafter. For a claim to relate back, however, that claim must be filed *and served* within the applicable limitation period. Picking on Pauline, our tardy Plaintiff, if Pauline sues Department Store two days before the limitations period expires, she will have ninety days in which to serve Department Store. However, if Pauline mistakenly sues Department Market (a different store than Department Store) two days before the limitations period expires, under Iowa law Pauline has only two days to correct the misnomer, file suit against Department Store, *and serve* Department Store. If Pauline fails to correctly name *and serve* Department Store within the limitations period, her suit will not relate back and will be time barred.

This requirement is also distinct from the relation back doctrine under federal law, even though the Iowa relation back rule is modeled after Federal Rule of Civil Procedure 15(c). *See Eischeid v. Dover Construction, Inc.*, No. C00-4100, 2001 U.S. Dist. Lexis 24633, *7 n.3 (N.D. Iowa Sept. 6, 2001) (unpublished). Under the Iowa relation back rule, parties must receive notice within the period provided for commencement of an action. *See* Iowa R. Civ. P. 1.402(5). Federal law allows parties an additional 120 days time for service of the summons and complaint. *See* Fed. R. Civ. P. 15(c). The second distinction is in the type of notice required: Iowa law requires actual notice through service with a petition; federal law allows constructive and imputed notice. *Estate of Kuhns*, 620 N.W.2d at 492; *Eischeid*, 2003 U.S. Dist. Lexis 24633, *7; *Schrader v. Royal Caribbean Cruise Line, Inc.*, 952 F.2d 1008, 1012 (8th Cir. 1991). Under federal law, Pauline would be permitted to show that Security Tag Manufacturer, although added after the limitations period

expired, had knowledge of the lawsuit, perhaps because an officer participated in a deposition within the limitations period, or because Security Tag Manufacturer was represented by the same attorney as timely served Department Store. With constructive or imputed notice permitted, Defendants must more carefully and thoroughly document a lack of notice to prevail on timeliness challenges.

V. Excuses for Tardiness

Although limitations provisions provide a bright line against which timeliness can be measured, there are several exceptions through which Plaintiffs can attempt to save tardy filings. The statutes of limitation can be tolled for disability, tolled by certification of inability to identify the appropriate defendant or extended through the discovery rule or proof of fraudulent concealment. Although Plaintiffs have tried to raise equitable tolling as a defense to statutes of limitation, such claims have been unsuccessful, providing yet another available reply to the savvy defense attorney.

A. Disability

Iowa Code section 614.8 tolls statutes of limitation for minors and for persons with mental illnesses. In each case, persons have one year from the termination of the disability within which to bring an action: minors have one year after they turn 18, and persons with mental illness have one year after they have been restored to competency. These provisions operate as “specially declared” exceptions to statutes of limitation. *Albrecht*, 648 N.W.2d at 93 (discussing minority exception to statutes of limitation); *Langer v. Simpson*, 533 N.W.2d 511, 523 (Iowa 1995) (holding mental illness must rise to level of legal disability to be subject to tolling). As already discussed, however, disability does not affect statutes of

repose. Thus, even though a Plaintiff may remain a minor, or suffer from legally incapacitating mental illness and as such never realize the legal ability to bring a cause of action, the right to sue will be extinguished with the running of the statute of repose.

In calculating the limitation period, then, the Defense attorney must not only consider the limitation period provided by rule, but also any periods of disability that may be relevant. Calculating alternative periods of limitation based on possible findings related to relevant disability, and showing how each was expired before the Plaintiff file suit, can close any possible windows of opportunity for the tardy plaintiff to save the claim.

B. Certification of Unidentified Manufacturer

The Iowa Code provides a mechanism for the careful Plaintiff to preserve as timely claims against unknown defendants while conducting discovery into the precise identity of the responsible defendant. Section 613.18(3) provides:

An action brought pursuant to this section, where the claimant certifies that the manufacturer of the product is not yet identifiable, tolls the statute of limitations against such manufacturer until such time as discovery in the case has identified the manufacturer.

The Plaintiff must file the certification with the court *before* the limitations period expires to toll the statute under section 613.18(3). “[T]he two-year clock of Iowa Code section 614.1(2) stops ticking on the plaintiffs’ section 613.18(3) certificate; when the manufacturer is identified, the clock begins to tick again.” *Harrington v. Toshiba Machine Co., Ltd.*, 562 N.W.2d 190, 191 (Iowa 1997). Thus, filing a certificate with the Court within the

OUT OF TIME: DISPOSITIVE MOTIONS BASED ON TIME IN PRODUCTS LIABILITY DEFENSE – A REFRESHER COURSE . . . continued from page 8

limitations period is a necessary predicate to availing oneself of the benefits of the statute. Merely naming a “John Doe” defendant in the caption without filing the necessary certification will not suffice to toll the statute.

Careful defense attorneys will not accept a Plaintiff’s claimed inability to discover the identity of the manufacturer as an excuse to preserve a claim from the operation of the statute of limitations. Absent timely certification under section 613.18(3), Plaintiffs must identify the manufacturer within the applicable limitations period.

C. The Discovery Rule

The Supreme Court has applied the discovery rule in several types of cases including medical malpractice, product liability, and warranty. See *McKiness Excavating*, 507 N.W.2d at 408; *Franzen*, 334 N.W.2d at 732 (products liability); *Brown*, 304 N.W.2d at 201 (express and implied warranties); *Chrischilles v. Griswold*, 260 Iowa 453, 150 N.W.2d 94, 100 (Iowa 1967) (negligence). Recently, the Supreme Court abrogated the discovery rule in the medical malpractice context, noting the legislature expressly provided that lawsuits against medical professionals must be brought within the applicable limitations period set forth in 614.1(9). *Schlote v. Dawson*, 02-1143, 2004 Iowa Lexis 39 (Iowa Jan. 22, 2004). Section 614.1(2A)(b) expressly preserves the discovery rule for diseases caused by harmful products, thus in all likelihood, in the products liability context, the discovery rule remains alive and well.

Under the discovery doctrine, the limitations period begins to run once an injury is discovered, or should have been discovered. *Ranney v. Parawax Co., Inc.*, 582 N.W.2d 154, 154-55 (Iowa 1998). A claim is considered discovered when the Plaintiff has actual knowledge of the injury, or, through the exercise of reasonable diligence, should discover

the nature, seriousness, and compensable character of the injury. *Ranney*, 582 N.W.2d at 154; (citing *Orr v. Lewis Cent. Sch. Dist.*, 298 N.W.2d 256, 261 (Iowa 1980)); *Franzen*, 377 N.W.2d at 662 (applying discovery rule, holding plaintiff must have actual or imputed knowledge of all the elements of the claim). Thus, the fighting issue often becomes when the Plaintiff had sufficient knowledge the Plaintiff was on inquiry notice of the compensable nature of the injury. Inquiry notice is “[k]nowledge [] imputed to a claimant when he gains information sufficient to alert a reasonable person of the need to investigate.” *Ranney*, 582 N.W.2d at 155 (citing *Estate of Montag*, 509 N.W.2d at 470; *Franzen*, 377 N.W.2d at 662). Clearly, “inquiry notice” does not require a Plaintiff to know the exact nature of the problem that caused the injury. *Id.* at 662. “It is sufficient that the person be aware that a problem existed.” *Id.* Defendants can defeat discovery rule claims through careful factual discovery, showing when a reasonable plaintiff should have known of the existence of a compensable injury, and filed suit.

Pauline Plaintiff’s efforts at timeliness continue to fail. Pauline adopted a New Year’s Resolution to become more fit, and accordingly, purchased a home gym known as the Bend-It resistance training system. Pauline used the trainer faithfully for a full year, then developed joint problems. Pauline sought treatment. After the joint problems failed to resolve, Pauline had surgery to correct the injury. Three years after her surgery and four years after her last use of the Bend-It, receives a Bend-It recall notice in the mail. Pauline sues the Bend-It manufacturer, claiming a defective design led to her injury. Pauline may claim she only recently discovered her cause of action, however, the careful defendant will argue she had

sufficient information to put her on notice when she began to have joint problems and abandoned her Bend-It routine.

E. Fraudulent Concealment.

A plaintiff may also assert as an excuse for tardiness that a defendant fraudulently concealed information about a cause of action. *Beeck v. Aquaslide ‘N’ Dive Corp.*, 350 N.W.2d 149, 157 (Iowa 1984). To prove fraudulent concealment, a plaintiff must show an affirmative act of concealment on the part of the defendant and plaintiff exercised diligence to discover the cause of action. *Schlote v. Dawson*, No. 02-1143, 2004 Iowa Lexis 39 (Iowa Jan. 22, 2004); *Koppes*, 384 N.W.2d at 387-88. Like the discovery doctrine, fraudulent concealment runs from the time a plaintiff knew or should have known of facts placing the person on inquiry notice a cause of action exists. *Gruener v. City of Cedar Falls*, 189 N.W.2d 577, 580 (Iowa 1971). Again, where the defense attorney can show a Plaintiff should have known of a cause of action, or if Plaintiff failed to exercise diligence to discover the cause of action, the excuse will not save an untimely filing. For example, if Bend-It were sued within the limitations period, and actively failed to disclose to Plaintiff the resistance trainer was made by Bulk-It within the applicable period, such an affirmative act could be considered fraudulent concealment. However, for fraudulent concealment to apply, Pauline must have exercised diligence to discover the identity of the manufacturer. In this hypothetical, Pauline must at least ask the right question and Bend-In must actively avoid the answer or lie for fraudulent concealment to apply.

D. Equitable Tolling.

Although an available excuse, equitable tolling has not been recognized

STANDING ISSUES IN DERIVATIVE ACTIONS . . . continued from page 3

in the likely return is usually too small to justify bringing a lawsuit,” and a large number of such suits results in a waste of resources.¹³ Thus, in light of 1) the need to hold officers and directors accountable, and 2) to limit individual shareholder actions, equity courts developed the shareholder derivative action.¹⁴

THE DIFFERENCE BETWEEN INDIVIDUAL AND DERIVATIVE CLAIMS

Despite the general rule that shareholders may only seek injuries to their corporations in the context of derivative proceedings, there is an exception: “[A] shareholder has an individual cause of action if the harm to the corporation also damaged the shareholder in his capacity as an individual rather than as a shareholder.”¹⁵ At first glance, the distinction appears nebulous. In most instances, the shareholder only has an injury *because she is a shareholder*. Digging deeper, though, the exception requires the shareholder “to show that the third-party owed him a special duty *or* that he suffered an injury separate and distinct from that suffered by the other shareholders.”¹⁶ (Of course, where there is a special duty, there will often be a special injury.¹⁷)

An examination of the 2001 Iowa

Supreme Court decision in *Rieff v. Evans (Rieff I)* aids an understanding of the demarcation between derivative and individual claims in Iowa law. In *Rieff I*, the plaintiffs—policyholders of a mutual company—asserted five derivative claims and three class action claims against two insurance companies and numerous individuals who served as directors of the mutual company.¹⁸ According to the policyholders’ allegations, the mutual company—Allied Mutual—incorporated Allied Group, with Mutual having 100% control of Group.¹⁹ The companies shared many of the same directors.²⁰ A series of transactions from 1985 to 1993, however, resulted in a role reversal, with Group ending up in control of Mutual.²¹ The policyholders alleged the transactions resulted in Mutual exchanging assets worth more than \$900 million for consideration of just \$126 million.²² The result was a *de facto* demutualization, which requires “follow[ing] strict [statutory] guidelines ensuring fairness to [the] policyholders.”²³

The five derivative claims asserted by the plaintiffs were: breach of fiduciary duty, waste of corporate assets, improper transfer of control, intentional interference with business advantage and contracts, and equitable relief.²⁴ The three direct class action

claims were: *de facto* conversion, breach of fiduciary duty, and intentional interference with advantageous business and contractual relationships.²⁵

As is evident, the derivative and individual claims overlapped in some respects, underscoring the hazy nature of the distinction between derivative and individual shareholder/policyholder claims. The defendants in *Rieff I*, in fact, “suggested that the class claims were really derivative claims in sheep’s clothing.”²⁶ The Iowa Supreme Court agreed with that assessment regarding the policyholders’ intentional interference class claim, which the policyholders also asserted as a derivative claim. With respect to that claim, the Court stated:

If the directors of a mutual corporation interfere with its ability to conduct business and enter into contracts, this injures the corporation directly, and only indirectly, the policyholders. This is akin to a corporate waste claim, which is a classic derivative injury. Under such a scenario, there is no special, individual injury distinct from the corporation’s. Moreover, this claim was correctly brought derivatively . . .²⁷

continued on page 11

¹³ *Joy v. North*, 692 F.2d 880, 886-87 (2d Cir. 1982).

¹⁴ O’KELLEY, *supra* note 11, at 395.

¹⁵ *Engstrand*, 516 N.W.2d at 799.

¹⁶ *Rieff I*, 630 N.W.2d at 293-94 (emphasis added).

¹⁷ *See id.* at 294 (“We have recognized that when a special duty is present, the shareholders suffer a harm not suffered by the corporation itself . . .”).

¹⁸ *Id.* at 281-83.

¹⁹ *Id.* at 282.

²⁰ *Id.*

²¹ *Rieff I*, 630 N.W.2d at 282.

²² *Id.* at 283.

²³ *Id.* “Demutualization occurs when a private mutual company converts to a publicly held stock company.” *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Rieff I*, 630 N.W.2d at 292.

²⁷ *Id.* at 295 (citing *Whalen v. Connelly*, 545 N.W.2d 284, 292 (Iowa 1996); *Economy Roofing & Insulating Co. v. Zumaris*, 538 N.W.2d 641, 652 (Iowa 1995)) (citations omitted from text).

STANDING ISSUES IN DERIVATIVE ACTIONS . . . continued from page 10

The Court allowed the other two direct claims to go forward, however. The Court allowed the de facto conversion claim because Iowa Code chapter 515G requires certain steps for a mutual company to demutualize, including notice and a vote on that decision.²⁸ If the approved demutualization takes place, the policyholders are due a payout, such as stock offers or dividends.²⁹ The payout the policyholders alleged they were due “was never something the corporation was entitled to.”³⁰ Consequently, the mutual company suffered no injury, and the policyholders were the only injured parties, as the result of the de facto demutualization.³¹

The direct breach of fiduciary claim, which was also brought as a derivative claim, was a closer call than the direct conversion claim. The plaintiffs argued the applicability of the special injury exception, stating that the transfer of the surplus of Mutual to Group deprived them of the benefit of the surplus through “reduced premiums or a declared dividend.”³² It is difficult to distinguish that injury from a loss of corporate assets due to director malfeasance, which may reduce a

shareholder’s dividend but is really a direct injury to the corporation and only an incidental injury to the shareholder.³³ Nevertheless, the *Rieff I* Court held there was “enough separateness” between the class action and derivative breach of fiduciary claims to get past the motion to dismiss stage.³⁴ This was due to the “unusual circumstances of the fact pattern alleged.”³⁵ The lesson to take, though, is that under *normal* circumstances a breach of fiduciary duty claim will be derivative rather than individual.³⁶ Significantly, as the Iowa Supreme Court held in *Rieff II*, there is a right to trial by jury on *direct* claims for breach of fiduciary duty but not for derivative claims.³⁷

Despite the example provided by *Rieff I*, distinguishing between derivative and individual claims remains difficult. One resource recommends asking two essential questions, a restatement of the special injury and special duty exceptions: “The basic tests are: (1) Who suffered the most immediate and direct injury? If the corporation, the suit is derivative. (2) To whom did the defendant’s duty run? If the corporation, the suit is derivative.”³⁸

RESTRICTIONS ON STANDING TO BRING DERIVATIVE SUITS

While Iowa law may unequivocally recognize the right to bring a suit in the right of a corporation or LLC, the right is not unconditional. Litigation is costly and is obviously not always the best use of company resources.³⁹ Companies, through their officers and directors (or members or managers, or general partners), must have significant control over the decision whether to institute a legal action. Consequently, even though derivative litigation addresses a need to hold officers and directors accountable,⁴⁰ restrictions on standing to sue in the right of a company are important. As stated by the Second Circuit Court of Appeals:

Since any judgment runs to the corporation, shareholder plaintiffs at best realize an appreciation in the value of their shares. The real incentive to bring derivative actions is usually not the hope of return to the corporation but the hope of handsome fees to be recovered by plaintiffs’ counsel. . .

continued on page 12

²⁸ *Id.* at 294 (citing IOWA CODE § 515G.4, .6).

²⁹ *Id.* (citing IOWA CODE § 515G.3).

³⁰ *Id.*

³¹ *Rieff I*, 630 N.W.2d at 294.

³² *Id.*

³³ *See PacLink Comm. Int’l, Inc. v. Superior Ct. of Los Angeles County*, 90 Cal. App. 4th 958, 965 (2001) (“The injury was essentially a diminution in the value of their membership interest in the LLC occasioned by the loss of the company’s assets. Consequently, any injury to plaintiffs was incidental to the injury suffered by PacLink-1.” (quoting *Rankin v. Frebank Co.*, 47 Cal. App. 3d 75, 95 (1975))).

³⁴ *Rieff I*, 630 N.W.2d at 295.

³⁵ *Id.*

³⁶ *See id.* (“We . . . recognize that a breach of fiduciary duty is generally recognized as a derivative claim.” (citing *Weltzin v. Nail*, 618 N.W.2d 293, 299 (Iowa 2000); *Cunningham v. Kartridg Pak Co.*, 332 N.W.2d 881, 883 (Iowa 1983))).

³⁷ *Rieff v. Evans*, 672 N.W.2d 728, 732-33 (Iowa 2003) (“*Rieff II*”); *Weltzin v. Nail*, 618 N.W.2d 293 (Iowa 2000) (holding that derivative claims are equitable with no right to trial by jury). Defense counsel should consider moving to strike plaintiff’s jury demand as to claims properly characterized as derivative.

³⁸ *See Klein*, *supra* note 10, at 334. A further example of a “special duty” is a contractual duty. *See Dawson v. Atlanta Design Assoc.*, 144 N.C. App. 716, 720 (2001) (“Even assuming Boykin-Dawson, L.L.C. suffered injuries as a result of the wrongs alleged in Plaintiff’s complaint, Plaintiff’s individual contract with Defendants creates a ‘special duty’ running from Defendants to Plaintiff.”).

³⁹ O’Kelley, *supra* note 11, at 395.

⁴⁰ *See supra* note 10 and accompanying text.

STANDING ISSUES IN DERIVATIVE ACTIONS . . . continued from page 11

However, there is a danger in authorizing lawyers to bring actions on behalf of unconsulted groups. Derivative suits may be brought for their nuisance value, the threat of protracted discovery and litigation forcing settlement and payment of fees even where the underlying suit has modest merit. Such suits may be harmful to shareholders because the costs offset the recovery.⁴¹

Addressing derivative actions on behalf of corporations first—shareholders must meet certain statutorily imposed obligations before bringing an action on behalf of a corporation. First, they must have been a “shareholder of the corporation at the time of the act or omission complained of.”⁴² Second, they must be “[f]airly and adequately represent[ing] the interests of the corporation in enforcing the right of the corporation.”⁴³ Third, they must have made “[a] written demand . . . upon the corporation to take suitable action.”⁴⁴ Finally, the corporation must have notified the shareholder that the corporation has rejected the demand, “[n]inety days have expired from the date the demand was made,” or “irreparable injury to the corporation would result by waiting for the expiration of the ninety-day

period.”⁴⁵ If a shareholder fails to follow these steps, a derivative complaint is subject to attack in a motion to dismiss.

All of these obligations were essentially also part of the Code prior to the 2002 amendments.⁴⁶ One difference is the addition of the ninety-day period corporations have to respond absent a showing of irreparable injury. The previous Code provision merely stated the shareholder could sue if the demand was “ignored.”⁴⁷ Additionally, the previous Code provision allowed a complainant to state the reasons why if a complainant chose not to make a demand.⁴⁸ The new Code provision thus provides greater specificity—refusal, ninety days, or irreparable injury—and expressly disallows the ability of a shareholder to sue without making a demand, even if the demand would be obviously futile.

These specific requirements do not need to be met if the action is brought in the right of a foreign corporation.⁴⁹ Instead, the laws of the jurisdiction of incorporation are applicable,⁵⁰ though many jurisdictions impose similar requirements.

Even if a shareholder has met the requirements to institute a derivative proceeding, the court may stay the proceeding for whatever time period the court deems appropriate “[i]f the corporation commences an inquiry into

the allegations made in the demand or complaint.”⁵¹ Moreover, court approval is required for a discontinuance or settlement of a derivative suit.⁵² These statutory requirements were additionally part of the Code prior to the 2002 amendments.⁵³

Significantly, though a shareholder may have met all of the requirements of bringing a derivative suit, the Iowa Code provides a further protection to officers and directors (and, nominally, the corporation) from having to defend against such suits. The added protection was part of the 2002 amendments, effective January 1, 2003. New Iowa Code section 490.744 provides that if a statutorily specified group “has determined in good faith after conducting a reasonable inquiry upon which its conclusions are based that the maintenance of the derivative proceeding is not in the best interests of the corporation,” then the court *must* dismiss the suit.⁵⁴ That group may be any one of the following:

- “A majority . . . of independent directors present at a meeting of the board of directors if the independent directors constitute a quorum.”⁵⁵
- “A majority . . . of a committee consisting of two or more independent directors appointed by

continued on page 13

⁴¹ *Joy v. North*, 692 F.2d 880, 886-87 (2d Cir. 1982).

⁴² IOWA CODE § 490.741(1) (2003).

⁴³ *Id.* § 490.741(2).

⁴⁴ *Id.* § 490.742(1).

⁴⁵ *Id.* § 490.742(2).

⁴⁶ *See* IOWA CODE § 490.740 (2001).

⁴⁷ *Id.* § 490.740(2).

⁴⁸ *Id.*

⁴⁹ IOWA CODE § 490.747 (2003).

⁵⁰ *Id.*

⁵¹ *Id.* § 490.743.

⁵² *Id.* § 490.745.

⁵³ *See* IOWA CODE § 490.740(2)-(3) (2001).

⁵⁴ IOWA CODE § 490.744(1) (2003). Section 490.744(1) opens: “A derivative proceeding *shall* be dismissed by the court on motion by the corporation if” *Id.* (emphasis added).

⁵⁵ *Id.* § 490.744(2)(a).

STANDING ISSUES IN DERIVATIVE ACTIONS . . . continued from page 12

majority vote of independent directors present at a meeting of the board of directors, whether or not such independent directors constitute a quorum.”⁵⁶

- A court-appointed panel of one or more independent persons, appointed on motion by the corporation.⁵⁷

The corporation has the burden of proving the requirements—determination in good faith, reasonable inquiry—for dismissal on this basis have been met where the majority of directors are not independent.⁵⁸ The plaintiff has the burden of proving the requirements have not been met where a majority of the directors are independent, or in the case of a court-appointed panel.⁵⁹ Significantly, that the petition names a director as a defendant in the proceeding does not “by itself” mean that the director is not independent.⁶⁰ Additionally, that a director has been nominated by defendant directors or that a director approved of the act the petition challenges likewise do not by themselves make a director not independent.⁶¹ Consequently, section 490.744 significantly aids a corporation’s ability to avoid a costly and time-consuming derivative suit not likely to be in the interests of the corporation.

There are a couple of other things worth noting outside of the standing

context regarding derivative actions. First, derivative actions are suits in equity.⁶² As a result, there is no right to a jury trial in derivative proceedings.⁶³ Second, Iowa Code section 490.746 allows a court to award attorney fees to the plaintiff if the court “finds that the proceeding has resulted in a substantial benefit to the corporation,” and to the defendants if the court “finds that the proceeding was commenced or maintained without reasonable cause or for an improper purpose.”⁶⁴

DERIVATIVE CLAIMS UNDER THE LIMITED LIABILITY COMPANY CHAPTER

Limited liability company members may also bring a derivative action on behalf of their LLC. As noted above,⁶⁵ Iowa Code section 490A.1001 expressly grants them that right.

Even absent section 490A.1001, it is likely members of LLCs would have standing to bring derivative actions. One of the main issues the *Rieff I* Court addressed was whether enactment of section 490.740 abrogated the common law right of policyholders to bring derivative suits, with section 490.740 exclusively providing that right in all corporate contexts.⁶⁶ Because section 490.740 only acknowledges *shareholder* derivative suits, the defendants in *Rieff I*

argued policyholders of mutual companies lacked standing to sue in the right of their company.⁶⁷ The Court rejected that argument. The Court noted that chapter 490, under section 490.1701(2), does not apply to “a corporation organized on the *mutual plan* under chapter 491.”⁶⁹ Consequently, section 490.740 could not have abrogated policyholder derivative suits because section 490.740 has no application to mutual companies and does not otherwise “purport to be the exclusive provider of derivative remedy for every corporate context.”⁷⁰ Additionally, the United States Supreme Court and many state courts have expressly provided for or assumed policyholder derivative standing and “no court . . . has expressly said this right is unavailable to policyholders absent controlling statutory direction.”⁷¹

The *Rieff I* Court also, quoting prior case law, stated policy reasons for allowing derivative suits:

“[W]e have long recognized the right and obligation of the courts to vindicate wrongs done to corporations by others, whether they be officers, directors or strangers. . . . We have also permitted derivative actions. The derivative action is a unique

continued on page 14

⁵⁶ *Id.* § 490.744(2)(b).

⁵⁷ *Id.* § 490.744(6).

⁵⁸ *Id.* § 490.744(5).

⁵⁹ IOWA CODE § 490.744(5)-(6) (2003).

⁶⁰ *Id.* § 490.744(2).

⁶¹ *Id.* § 490.744(1), (3).

⁶² *Rieff v. Evans*, No. 136/02-0727 (Iowa Dec. 17, 2003) (*Rieff II*) (citing *Weltzin v. Nail*, 618 N.W.2d 293, 297 (Iowa 2000)).

⁶³ *Id.*

⁶⁴ IOWA CODE § 490.746 (2003).

⁶⁵ See *supra* note 4 and accompanying text.

⁶⁶ *Rieff I*, 630 N.W.2d at 286.

⁶⁷ *Id.*

⁶⁸ *Id.* at 287. The main earlier cases recognizing a policyholder’s right to sue derivatively were *Rowen v. LeMars Mut. Ins. Co.*, 230 N.W.2d 905 (Iowa 1975) (*Rowen I*) and *Rowen v. LeMars Mut. Ins. Co.*, 282 N.W.2d 639 (Iowa 1979) (*Rowen II*). See *Rieff I*, 630 N.W.2d at 287 (“We feel our past cases, especially our *Rowen* jurisprudence, provide [the necessary] authority.”).

⁶⁹ *Id.* at 286-87 (citing Iowa Code § 490.1702(2) (2003)) (emphasis in original).

⁷⁰ *Id.* at 287.

⁷¹ *Rieff I*, 630 N.W.2d at 287-88.

STANDING ISSUES IN DERIVATIVE ACTIONS . . . continued from page 13

judicial device by which those who hold the public franchise may seek redress in behalf of the corporation for wrongs done to it. Although the right to seek derivative relief is subject to abuse, *it is essential as a means to permit correction of intracorporate wrongs.*⁷²

Moreover, “[u]sually the wrongdoing officers . . . possess the control which enables them to suppress any effort by the corporate entity to remedy such wrongs.”⁷³ Equity thus supports derivative proceedings.⁷⁴ It is hard to imagine the Court would not consider that policy rationale applicable in the context of LLCs as well.

The basic requirements a member must meet before instituting a claim in the right of an LLC are substantially the same as the requirements the law imposes on shareholders of a corporation. The plaintiff must have been a member at the time the act complained of occurred, must be fairly and adequately representing the members’ interests, must have made a demand on the LLC to sue in its own right, and the LLC must have refused to bring the action or failed to respond to the demand after “adequate time.”⁷⁵ Additionally, the LLC must be manager-managed or must be member-managed but the plaintiff member lacks the “authority to cause the [LLC] to sue in its own right under the provisions of the articles of organization or an operating agreement.”⁷⁶

There are a few distinctions, though, between section 490A.1001—the LLC derivative actions statute and section 490.740—the corporate derivative actions statute. There is nothing in section

490A.1001 providing an irreparable injury exception to the necessary waiting period after the plaintiff has made a demand. However, in a practical sense, that may be inconsequential. “Adequate time” is certainly more flexible than “ninety days,” and is more analogous to the previous allowance of a shareholder derivative suit if the demand was “ignored.”⁷⁷ “Adequate time” may be much shorter than ninety days, especially where the plaintiff can show irreparable injury if there is further delay. In that sense, the “adequate time” requirement impliedly provides for an “irreparable injury” showing, allowing the plaintiff to institute the action sooner than normally allowed.

Additionally, there is nothing in section 490A.1001 about staying proceedings while the company investigates whether to bring the claim. There is finally nothing in section 490A.1001 corresponding to section 490.744 requiring dismissal upon motion if a statutorily specified group or a court appointed panel determines the suit is not in the best interests of the LLC.⁷⁸ Consequently, as the Code currently stands, corporations have important devices for avoiding costly and time-consuming litigation that LLCs lack.

The exact extent these distinctions have practical significance is, however, at this point, speculative. There are no Iowa appellate cases interpreting section 490A.1001.

BASIC QUESTIONS PRACTITIONERS SHOULD ASK

In summary, the following are some basic questions defense counsel should

ask when defending a derivative suit to ensure the plaintiff has standing:

- Was the plaintiff a shareholder or member at the time the act complained of occurred?
- Can the plaintiff be said to be representing the interests of the shareholders or members?
- Did the plaintiff make a demand on the company to bring a suit on its own behalf?
- If so, did the company refuse to do so, or
 - o if the company is a corporation, has at least ninety days past since the shareholder or member made the demand or has the shareholder made a sufficient allegation of irreparable harm in waiting the ninety days?
 - o if the company is a LLC, has “adequate time” elapsed since the member made the demand?
- If the company is a corporation, have one of the groups specified in Iowa Code section 490.744 determined that prosecution of the derivative proceeding is not in the best interests of the corporation?
- Does the plaintiff assert individual claims that are in fact derivative in nature?

If the answer to any one of those questions is unfavorable to the plaintiff, then the plaintiff’s petition is subject to attack for lack of standing, and defense counsel should proceed with a motion to dismiss. If, on the other hand, the plaintiff has surpassed these hurdles to suing in the right of the corporation or LLC, the plaintiff will have avoided “sink[ing] in deep mire, where there is no standing.”

⁷² *Id.* at 286 (quoting *Rowen v. LeMars Mut. Ins. Co.*, 230 N.W.2d 905, 916 (Iowa 1975)) (alteration and ellipsis in original; emphasis added).

⁷³ *Id.* at 288.

⁷⁴ *Id.*

⁷⁵ IOWA CODE § 490A.1001 (2003).

⁷⁶ *Id.*

⁷⁷ See *supra* note 47 and accompanying text.

⁷⁸ See *supra* notes 54-61 and accompanying text (discussing section 490.744).

FEDERAL COURT PRETRIAL ORDERS: READ THEM FOR YOUR OWN GOOD . . . continued from page 4

was specifically told that with regard to the defense expert, they could choose to believe none of his testimony.

Regarding the “rule on witnesses,” the final pretrial order in *Zeigler*, 302 F. Supp.2d at 1011-1012, provided in pertinent part as follows:

IV. RESTRICTIONS ON WITNESSES: A witness who may testify at the trial shall not be permitted to hear the testimony of any other witnesses before testifying, and is excluded from the courtroom during the trial until after the witness has completed his or her testimony, unless exclusion of the witness is not authorized by Federal Rule of Evidence 615 or the court orders otherwise. A witness who is excluded from the courtroom pursuant to this paragraph also is prohibited from reviewing a verbatim record of the testimony of other witnesses at the trial until after the witness has completed his or her testimony, unless the court orders otherwise. Unless the court orders otherwise, after the commencement of trial and until its conclusion, a witness who may testify at the trial [sic] is prohibited from communicating with anyone about what has occurred in the courtroom during the trial. If the witness does testify at the trial, after the witness is tendered for cross-examination and until the conclusion of the witness’s testimony, the witness is prohibited from communicating with anyone about the subject matter of the witness’s testimony. A witness may, however, communicate with his or her attorney about matters of privilege, and may communicate with anyone if the right to do so is guaranteed by the United States Constitution.

These prohibitions do not apply to the parties. An attorney who may call a witness to testify at trial must, before the trial, advise the witness of these restrictions.

(emphasis added)

In this order, the “rule on witnesses” is markedly different than Federal Rule of Evidence 615. Rule 615 does not apply to prohibit or restrict a party unless a party “invokes” the rule. The Rule only applies “at the request of a party.” See Fed. R. Evid. 615. In *Zeigler*, on the other hand, and as is the general practice in that particular court, see 302 F. Supp.2d 999, at 1012 (“This language is identical to the language in the suggested Final Pretrial Order “format” attached to the trial scheduling order”), the rule on witnesses is automatically “invoked” by the terms of the final pretrial order. If a party desires an “exception” to the rule, then application must be made to the court for an exception. This presents a potential trap for the unwary, as defense counsel accustomed to practicing under Rule 615 will need to study the terms of the court’s final pretrial order on these issues, and adjust accordingly. This is true of any case which involves expert witnesses, and not just product liability cases, which are often heavy-laden with expert witnesses.

This broadly-worded, “special” rule on witnesses in the final pretrial order in *Zeigler* is further troublesome when it is applied to product liability cases. First, many courts have ruled that Rule 615's sequestration provisions do not normally apply to “experts.” See, e.g. Wright and Gold, *Federal Practice and Procedure*, §6245, “Exceptions to Required Exclusion,” p. 82 (1997)(“The inclusion of experts in this category is consistent with Rule 703, which permits expert witnesses to base opinion on the testimony of other witnesses.

Accordingly, the cases commonly approve the designation of experts as essential under Rule 615(3);” see also *Malek v. Federal Ins. Co.*, 994 F.2d 49, 54 (2nd Cir. 1993)(court abused its discretion in refusing to allow plaintiffs expert to listen to defense expert’s testimony in court); *Polythane Systems v. Marina Ventures International*, 993 F.2d 1201, 1209 (5th Cir. 1993)(“expert witnesses clearly fall within rule 615(3)’s exception”); *U. S. v. Connors*, 894 F.2d 987, 991 (8th Cir. 1990)(no abuse of discretion in permitting prosecution expert to remain in court under Rule 615(3) where witness was bank examiner). The Rule explicitly provides an exception for “a person whose presence is shown by a party to be essential to the presentation of the party’s cause.” The Advisory Committee Notes to the 1972 Proposed Rules note that this category “contemplates such persons as an agent who handled the transaction being litigated or an expert needed to advise counsel in the management of the litigation.” See 6 Wigmore §1841, n. 4.” (emphasis added). In fact, in many products cases the author has defended, in both federal and state court, the defense expert has actually been physically present in the courtroom when the plaintiff’s expert testifies to the jury. This has always been done with the court’s explicit permission; but in every case it has been requested, it was approved, even over plaintiff’s counsel’s objection. “An expert who is not expected to testify to facts, but only assumes facts for purposes of rendering opinions, might just as well hear all of the trial testimony so as to be able to base his opinion on more accurate factual assumptions.” *Opus 3 Ltd. v. Heritage Park, Inc.*, 91 F.3d 625, 629 (4th Cir. 1996). Wright and Gold, *Federal Practice and Procedure*, §6243,

continued on page 16

FEDERAL COURT PRETRIAL ORDERS: READ THEM FOR YOUR OWN GOOD . . . continued from page 15

p.8 (pocket part 2003) notes that “[D]uring the course of a trial, an attorney customarily consults out-of-court with his client and other witnesses.” Notably, Rule 615 only authorizes exclusion of witnesses from the courtroom, and does not prevent counsel from consulting witnesses outside of the courtroom. See *U.S. v. Rhynes*, 218 F.3d 310, 316-318 (4th Cir. 2000)(trial court erred in excluding witness testimony on ground attorney had discussed case with witness, since invocation of Rule 615 does not prevent a lawyer from telling a witness about another witness’s testimony). As a practical matter, it is difficult to divine what policy is served by forcing defense counsel in a products case to put their defense experts on the witness stand, and essentially “keep them in the dark” about what the facts of the case, as proven at trial, are. Defense experts in products cases are retained, in large part, to rebut specific defect claims lodged by plaintiff’s experts. How can this be done efficiently, if the court’s pretrial order does not allow the defense expert to be told what the plaintiff’s expert testified to with this particular jury? Obviously the defense expert knows what the plaintiff’s expert said in deposition or in his Rule 26 disclosure.³ What conceivable policy is served by forcing the defense expert to respond to the opinions of the other side in the report or deposition, some of which may have never been presented to the

jury at trial? Can’t this provision of the pretrial order simply be circumvented by presenting a hypothetical question to the expert, under Rule 703 and established practice, which historically has always been allowed? What purpose is served by allowing this to be done generally, instead of specifically tied to the testimony in the case? Rule 615’s “non-application” to experts in general is because experts give opinion testimony based on facts, and don’t change the facts based on what some other expert or witness has said. The public policy basis which undergirds Rule 615 is to discourage fabrication, inaccuracy and especially collusion. These concerns are not present regarding experts providing opinions based on facts shown at trial. Rule 615 was designed to apply primarily to fact witnesses, who are subject to collusion, and not to experts who merely give opinions based on the facts made known to them.

A second worrisome aspect of this rule is that it contradicts Federal Rule of Evidence 703. The first sentence of Rule 703 states:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing.

(emphasis added)

This portion of Rule 703 cannot be squared with a literal application of the

final pretrial order’s rule on witnesses as applied to experts in *Zeigler*.⁴ The court’s final pretrial order on witnesses also is contrary to the time-honored tradition and established practice of eliciting expert witness testimony by posing a hypothetical question. The Advisory Committee Notes to the 1972 Proposed Rules makes this clear:

The second source, presentation at the trial, also reflects existing practice. The technique may be the familiar hypothetical question or having the expert attend the trial and hear the testimony establishing the facts.

(emphasis added)

Iowa’s “rule on witnesses” is worded nearly identical to the federal rule. See Iowa Rule of Evidence 5.615; *Frazier v. State Central Sav. Bank*, 217 N.W.2d 238 (Iowa 1974). Most of the Iowa cases on this issue are quite old and involve the sequestration of witnesses during criminal prosecutions. See, e.g., *State v. Don*, 318 N.W.2d 801 (Iowa 1982). Like the federal rule, in Iowa, in order for the rule to be effective, it has to be: 1) invoked by a party; and 2) it operates only to prohibit witnesses from hearing the testimony of other witnesses in court. Thus, the provision in the federal court final pretrial order discussed in this article is contrary to established practice in Iowa state court as well.

What was the outcome in *Zeigler*?

continued on page 19

³ Strange as it may seem, the Defendant in *Zeigler* did not have any Rule 26 disclosure for Plaintiff’s expert. Because of this, the court ruled that the expert could not express any opinions. Yet, in an *offer of proof*, Plaintiff’s expert was called “out of order” (since he could not attend the trial later as a so-called “rebuttal” expert). In that offer, presented outside the presence of the jury, Plaintiff’s expert opened that the defense expert had mis-identified some of the wires shown in the x-ray of the remnant. (The mis-identification was actually in *Defendant’s* favor, as the “new” identification revealed that only vehicle harness wires and recharger wires were in the remnant, and not any battery wires. Based on the design, the recharger could not be plugged into the vehicle harness, but only to the battery. This made it impossible for the toy to be plugged in and recharging at the time of the fire.) This was the claim that the defense expert attempted to counter in his direct examination, in order to “reduce the sting” of possible “rebuttal” testimony by Plaintiff’s expert, who had never filed any Rule 26 disclosure in the first place. If the opinions of Plaintiff’s expert had been properly divulged as required by Rule 26, there would have been no problem with violating the special rule on witnesses in the pretrial order, because this information would have been known (as it should have been known) *well in advance of trial*.

⁴The court in *Zeigler* found that this argument was “absurd,” since Plaintiff’s expert was a “rebuttal” witness who had to testify out of order. *Id.* at 1019. Yet, the final pretrial order’s restriction on witnesses clearly contradicts Rule 703, and could be applied to prohibit telling a defense expert what a plaintiff’s expert has testified to in the case in chief.

WAITER! THERE'S A PATENT IN MY TRADEMARK! . . . *continued from page 5*

Perhaps the most important principle of copyright law that attorneys need to understand is that copyright law does not protect ideas. Copyright law protects only the expression of an idea. One cannot copyright the idea of a tale about two lovers born into feuding families, but one can copyright the expression of that idea in the form of a book, play, musical, or other tangible means of expression. Put simply, a stolen idea is not grounds for copyright infringement.

Attorneys should also understand that a copyright confers upon the holder more than just the exclusive right to make a copy of the protected work. The copyright holder has the exclusive rights to reproduce, distribute, and make derivatives of the work, and for some forms of expression the exclusive right to perform or display the work. Further, these rights are divisible. The copyright holder may license the right to reproduce the work to party A and the distribution right to party B. If that were not enough, there could be layers of copyrights attached to what appears to be a single work. For example, a photograph of a painting would involve the copyright in the photograph and the copyright in the painting.

Attorneys should be alert to works-made-for-hire and the question of authorship (i.e., ownership of the copyright). If an employee or commissioned contractor creates a copyrightable work, the Copyright Act provides that the commissioning party or the employer is the author if certain statutory requirements are met.

Patents

A patent is a government issued, "limited monopoly" on the economic benefits in an invention. The patent holder, or patentee, can *exclude* others from making, using, offering for sale,

selling, or importing the claimed invention within the jurisdiction of the United States. The patentee might also license or assign rights under the patent in exchange for royalties, fees, or other consideration. As with copyright law, the rights under a patent are divisible.

There are three types of patents: the utility patent, the design patent, and the plant patent.

An inventor may obtain a utility patent for an invention or discovery of a new and useful process, machine, article of manufacture, or composition of matter or any new and useful improvement thereof. The term of a utility patent filed on or after June 8, 1995 is twenty years. The previous term of a utility patent was seventeen years. A design patent may be available for a new, original, and ornamental design for an article of manufacture. The term of a design patent is fourteen years. The plant patent is available to anyone "who invents or discovers and asexually reproduces any distinct and new variety of plant" with some limitations. The term of a plant patent is twenty years.

The process of obtaining a patent is known as patent prosecution, which is the exclusive realm of patent attorneys. A patent application must include a "specification", an illustration (if applicable), an oath, and a fee. The specification includes a disclosure and the patent claims, which eventually become incorporated into the patent. Through the disclosure, the public learns how to use the invention. The disclosure must be in writing and describe the invention and "the manner and process of making and using" the invention; it must employ full, clear, concise, and exact terms; and it must "set forth the best mode contemplated by the inventor" in carrying out the invention. The "best mode"

requirement prevents the patent applicant from holding back information, such as a trade secret, that might give him or her an advantage over others in practicing or using the invention at the end of the patent term. The claims define the scope of the patent much as the metes and bounds of a deed define a parcel of land and are the central issue in an infringement action.

A patentable invention must have utility, novelty, and be non-obvious. Utility is fairly straight forward, the invention must be useful. "Obviousness" entails a determination of whether the invention would have been obvious to a "person having ordinary skill in the art" of the invention. An obvious invention is not patentable. Novelty requires that the invention be different from anything known before. In the lexicon of patents, novelty requires the invention be different from the "prior art". Generally speaking, prior art is knowledge of the invention available to the public before the date of invention. Any attorney litigating a patent dispute will need to know the ins and outs of patent prosecution, because the issues will likely be the same.

Patent litigation is usually about infringement. The Patent Act provides relief for both direct and indirect infringement. Direct infringement occurs whenever someone makes, uses, offers to sell, or sells any patented invention. One may be liable for indirect infringement either by inducing or contributing to direct infringement. *See* 35 U.S.C. §271. Attorneys should also become familiar with the Doctrine of Equivalents, which provides that even if a product or process does not include each of the elements of a patent

WAITER! THERE'S A PATENT IN MY TRADEMARK! . . . continued from page 17

claim it may nonetheless be infringing if it includes at least an equivalent of an element that is literally absent.

A unique procedural feature of patent litigation is the Markman Hearing. In 1996, the United States Supreme Court held that district court judges have the exclusive responsibility for analyzing and determining the meaning and scope of the claims in a patent. This analysis is called “claim construction.” See *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996) *aff'g*, *Markman v. Westview Instruments, Inc.*, 52 F.3d 967 (Fed. Cir. 1995) (*in banc*). This procedural step of “claim construction” has become known as a “Markman Hearing”. In both patent infringement and validity matters, claim construction is often the central issue and the Markman Hearing is of critical importance. As of this time, there is no set procedure for Markman Hearings in Iowa.

Trade Secrets

Trade secret is yet another area of intellectual property law. The governing law is primarily state and common law, although the Section 43(a) of the Lanham Act may provide some protections. Through trade secret law, one can protect an idea or something otherwise patentable. The burden,

however, is on the possessor of the trade secret to maintain its secrecy. Thus, you wouldn't want to apply for the patent, which requires disclosure.

IP Defenses

Infringement is probably the most commonly litigated issue in IP. Infringement arises when another party trespasses upon one or more of the exclusive rights of the IP holder. The elements of the infringement claim vary among the areas of IP law, but the basic premise is the same. Likewise, are the defenses which can be broadly categorized as: (1) no, I did not infringe; (2) yes, I used it but you let me; or (3) yes, I used it and the law says you can't stop me. Infringement is a question of fact, but sometimes is dealt with on summary judgment.

Of course there is much more to learn before stepping into an IP dispute. For additional research, a few excellent IP resources are: Donald S. Chisum, [Chisum on Patents](#) (Matthew Bender); J. Thomas McCarthy, [McCarthy on Trademarks and Unfair Competition](#), (West); Melville B. Nimmer, [Nimmer on Copyrights](#) (Matthew Bender); or visit the United States Patent and Trademark Office web site at www.uspto.gov and United States Copyright Office web site at www.copyright.gov.

OUT OF TIME: DISPOSITIVE MOTIONS BASED ON TIME IN PRODUCTS LIABILITY DEFENSE – A REFRESHER COURSE . . . continued from page 9

as an effective excuse for expired limitation periods in Iowa. Equitable tolling is grounded in fairness, and in limited circumstances, can save an untimely filing based on fairness to the parties. In *Harrington*, the Iowa Supreme Court addressed the argument that “equitable tolling” suspends the running of a statute of limitations. *Harrington*, 562 N.W.2d at 192. The Court rejected Plaintiffs argument their cause of action against the manufacturer of a computer boring machine was tolled, recognizing “[T]he tolling of a statute of limitations is purely statutory, and [the courts] are not free to expand the concept to avoid hardships.” *Harrington*, 562 N.W.2d at 192 (citing *Boyle v. Boyle*, 126 Iowa 167,168, 101 N.W. 748, 748 (1904) (To engraft exceptions not found in statutes of limitation would defeat the purpose of speeding the settlement of disputes). Because the Court held that even applying tolling principles, the filing would remain untimely, *Harrington* may not conclusively preclude equitable tolling as an effective excuse. However, it is likely that equitable tolling will fail to save the untimely filing from the expiration of a statute of limitations in Iowa.

VIII. Conclusion

Attention to the timeliness of a cause of action results in effective defense of product liability claims and provides positive results to clients who need not spend time and resources defending stale claims. For ease of reference, the following checklist may assist the practitioner in ensuring tardy claims don't slip under the finish line.

- A. Was the claim filed within the applicable statute of limitations: two years for personal injury, five years for injuries to property?
- B. Was the product first sold to the retail public more than fifteen years before the injury date?
- C. Was the Defendant properly named and served within the applicable limitations period?
- D. Was the statute tolled for any reason: disability, certification of unidentifiable defendant, delayed discovery, or fraudulent concealment?
- E. Does the Plaintiff allege an excuse for tardiness in the Petition? Admitting handicaps is worth checking out. And you're off to the races.

IDCA CALENDAR OF EVENTS

July 23, 2004

**Iowa Defense Council
Association Board Meeting**

Tournament Club of Iowa
1000 Tradition Drive
Polk City, IA
10:00 a.m.

September 22, 2004

**Iowa Defense Council
Association Board Meeting**

Marriott Des Moines
Downtown
Des Moines, IA

September 23, 2004

**Iowa Defense Council
Association Board Meeting**

Marriott Des Moines
Downtown
Des Moines, IA

September 22-24, 2004

**Iowa Defense Council
Association Annual Meeting &
Seminar**

Marriott Des Moines
Downtown
Des Moines, IA

FEDERAL COURT PRETRIAL ORDERS: READ THEM FOR YOUR OWN GOOD . . . *continued from page 16*

The effect of Plaintiff's objection and the court's ruling on the jury's verdict, occurring at the end of trial and shortly before deliberations, cannot be overestimated. After the proceedings were so dramatically interrupted, the jury returned a verdict for Plaintiff in the amount of \$1,195,217.95. \$1 million of this verdict was for punitive damages. Ultimately, the trial court granted the post-trial, renewed motion for judgment as a matter of law under Rule 50. The court dismissed the punitive damage award, and a judgment was entered for Plaintiff in the sum of \$195,217.95, the amount of the property damage sued for. A few weeks later the case was settled confidentially and an appeal to the Eighth Circuit was averted.

What is the "moral" to this story? In any case, especially those in federal court, counsel should be advised to read and closely study the final pretrial order. This is not only true of the order's rule on witnesses, but any and all other aspects of the order, and any other court order for that matter. There is clearly no excuse for a counsel's failure to read closely and abide by any court order. But to be fair, defense counsel's actions in *Zeigler* are mitigated by the fact that Rule 615, the rule defense counsel was familiar with in both state and federal court, operates 180 degrees differently than the local rule in this particular court. This problem is compounded by the fact that *Zeigler* was a products case with somewhat complex technical issues involving the origin and cause of a fire, x-ray analysis and interpretation, and product design. Experts are especially useful in products cases, and it is respectfully submitted that a product manufacturer will be significantly hampered in defending against an allegation of defect if the defense expert cannot be told or know what precise opinions have been given to the jury at trial by plaintiff's expert. The

facts in *Zeigler* were further muddled in that: a so-called "rebuttal expert" of Plaintiff had to be called out-of-order, due to his unavailability to testify at a later date; since the expert's opinions had not been previously disclosed, as required by amended Rule 26, the testimony was not allowed before the jury, but was taken by the court in an offer of proof; and the substance of the offer informed the defense expert of an error that needed to be corrected in his direct testimony. In *Zeigler*, an inadvertent violation of a court order resulted in a significant aspect of the Defendant's defense being compromised. The result was an adverse jury verdict in seven figures in a case that was otherwise believed to be defensible. If you take the time to carefully read and study the federal court's final pretrial order, and all court orders for that matter, then you can avoid the problems that defense counsel unfortunately encountered in *Zeigler*.

WELCOME NEW MEMBERS

Brian J. Fagan, Cedar Rapids, IA
Andrew C. Johnson, Des Moines, IA
Tonya A. Oetken, Sioux City, IA
Diane M. Reinsch, Rock Island, IL
Benjamin P. Roach, West Des Moines, IA
Kathleen C. Roe, Sioux City, IA
Diana L. Rolands, Des Moines, IA
Carrie N. Roseberry, Davenport, IA
Mikkie R. Schiltz, Davenport, IA
Mark A. Schultheis, Des Moines, IA
Andrew T. Tice, Des Moines, IA
Patrick B. White, Des Moines, IA

FROM THE EDITORS . . .

As you know, a panel of editors is responsible for the content of each issue of Defense Update. Individual editors frequently author articles, but a majority of articles is obtained from IDCA members, usually at the request of an editor. We strive to maintain the quality and usefulness of this publication, but beyond our efforts, we remain largely dependent upon the excellent contributions of our fellow members.

We recognize how inconvenient, even stressful, it can be to take the time necessary to prepare an article in the middle of a busy practice and are gratified by the

graciousness and generosity of our members when approached about authoring an article. We hope and expect this will continue to be the case. We further hope that our members will take the initiative to contact an editor (listed below) about submitting an article when they have encountered or researched an issue likely to be of interest or benefit to our membership, as articles emanating from work already performed are usually easier to prepare and often relate to timely issues or topics.

Please let us hear from you so that our fellow members may benefit from your efforts and expertise.



The Editors: Kermit B. Anderson, Des Moines, IA; Mark S. Brownlee, Fort Dodge, IA; Noel McKibbin, West Des Moines, IA; Bruce L. Walker, Iowa City, IA; Thomas D. Waterman, Davenport, IA; Patrick L. Woodward, Davenport, IA; Michael Ellwanger, Sioux City, IA

Iowa Defense Counsel Association

431 East Locust Street, Suite, 300
Des Moines, IA 50309
Phone: (515) 244-2847
Fax: (515) 243-2049
E-mail: staff@iowadefensecounsel.org
Website: www.iowadefensecounsel.org

Presorted Standard US Postage Paid Des Moines IA Permit No. 3885
--