defense UPDATE

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BITUMINOUS CASUALTY CORP. V. SAND LIVESTOCK SYSTEMS – THE ABSOLUTE POLLUTION EXCLUSION AND THE REASONABLE EXPECTATIONS DOCTRINE

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I. INTRODUCTION

The term "pollution" evokes images of belching smokestacks and pipes discharging foul liquids, or rusting barrels at a dumpsite. Indeed, most environmental litigation addresses contamination of the air, soil, groundwater or surface waterways–our external environment. Liability insurers have long sought to avoid or limit their risk through so-called pollution exclusions. Do such exclusions bar coverage for injuries from indoor exposures? Courts nationwide are divided on this question. In *Bituminous Cas. Corp. v. Sand Livestock Systems,* the Iowa Supreme Court held the absolute pollution exclusion in a general liability insurance policy bars coverage for damages resulting from an *indoor* carbon monoxide leak. 728 N.W.2d 216, 222 (Iowa 2007). This was the first time the Court addressed whether a pollution exclusion applied to indoor or "nontraditional" pollution claims. *Sand Livestock* effectively ends the debate in Iowa as to whether the absolute pollution exclusion applies to liability claims arising from exposure to indoor contaminants such as toxic mold, lead paint, asbestos, and airborne chemicals in "sick building" cases. Nevertheless, the analysis of whether insurance coverage exists for an indoor exposure claim does not necessarily end. The *Sand Livestock* Court expressly declined to answer whether the insured in that case could avoid the exclusion under the "reasonable expectations doctrine." *Id.* at 222.

This article discusses pollution exclusions and the *Sand Livestock* decision, then picks up where that case left off by analyzing whether the reasonable expectations doctrine could be used to avoid the exclusion.

II. POLLUTION EXCLUSIONS

Insurance companies have used pollution exclusions for decades to limit liability coverage for the enormous costs of remediating environmental pollution. The standard language from early clauses was "qualified," in that it excluded coverage for liability resulting from pollution unless the release of pollutants was "sudden and accidental." *See, e.g.*, *Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Farmland Mut. Ins. Co.*, 568 N.W.2d 815, 817 (Iowa 1997). Courts in other jurisdictions are divided on whether the term "sudden" has a temporal definition limited to abrupt rather than gradual releases. *See id.* at 818 (citing *Newcastle County v. Hartford Acc. & Indem. Co.,* 933 F.2d 1162, 1195) (3d Cir. 1991) (surveying cases). The *Farmland Mutual* Court rejected the insured's argument that "sudden" is ambiguous, and affirmed summary judgment for the insurer barring coverage for pollution occurring over a period of years. 568 N.W.2d at 819.

Insurers sought to further reduce coverage for pollution liabilities by removing the "sudden and accidental" exception, and by broadening the definition of the "pollutant" in the "absolute" pollution exclusion. Even with the revised "absolute" language, courts struggled in applying the exclusion. A split in authorities developed as to whether an absolute exclusion bars coverage for nontraditional or indoor pollution, such as lead paint, toxic mold, asbestos and carbon monoxide. *See generally,* Claudia G. Catalano, Annotation, *What Constitutes "Pollutant," "Contaminant," "Irritant," or "Waste" Within Meaning of Absolute or Total Pollution Exclusion In Liability Insurance Policy*, 98 A.L.R.5th 193 (2002).

Insureds argue that the exclusion should only be applied to traditional environmental pollution claims, such as commercial waste dispersed into the environment, because the application of the exclusion to nontraditional or indoor pollution was not anticipated by the parties when the policies were purchased. Insureds contend the exclusion is ambiguous and that any ambiguity should be resolved against the drafter. In addition, insureds argue the doctrine of reasonable expectations avoids the exclusion. Conversely, insurers argue that the language of the policy exclusion is unambiguous and that courts should apply the exclusion as written, to bar coverage for indoor pollution claims.

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MESSAGE FROM THE PRESIDENT

Megan Antenucci

The 2008 IDCA Annual Meeting and Seminar provided me with a burst of energy and enthusiasm, so I am making the most of that opportunity and taking "pen to hand," as we used to say, for my first Message from the President. What a fantastic group of lawyers we have under the umbrella of the Iowa Defense Counsel Association. I am re-energized by the collective talents just shared to lead this group into the coming year.

Additionally the DRI Annual Meeting also just concluded in New Orleans, with our own J. Michael Weston as Annual Meeting Chair. Several lessons learned from the meeting:

First, the meeting was an all around success, as one might anticipate with Mr. Weston's hand at the tiller. Blockbuster speakers including former Speaker of the House Newt Gingrich; Juan Williams, National Public Radio and Fox News Sunday commentator; and many leading lawyers in the defense practice shared their expertise and insight on a host of current issues, both legal and political.

Secondly, The State and Local Defense Organization leadership was treated to a presentation by Chris Rose, writer for the *New Orleans Times-Picayune.* Rose returned to New Orleans as soon as possible after hurricane Katrina, and won the Pulitzer Prize for his post-storm columns in that paper. The theme of his presentation was that no one has any sense of direction in New Orleans today, from its tourists to its current leadership, including the Mayor. He said that many have stated that New Orleans should not be rebuilt, but that it is home to so many, that it lives in their hearts, and that there was never any question that true New Orleans residents would rebuild.

Thirdly, the IDCA continues to be at the forefront of state defense organizations in its seminars, membership drives, and sense of direction. Chris Rose, if he visited our organization and state, would not find any lack of direction or sense of where the group is headed. IDCA is a home to many defense lawyers, and the plan is to continue to build on a great tradition, as is New Orleans.

To further that plan and in an effort to improve the group's service to its members, the executive committee is currently working on a survey to be sent to the membership. It will come via e-mail through the service of "Survey Monkey." The goal is to take the monkey off members' backs in terms of an onerous set of questions, and make this an easy and quick way to convey thoughts, ideas, and concerns to the board. Please take a moment or two to communicate with the board through the survey when it arrives in your in box. The members' answers will serve to help set the direction for years to come, so members don't find the group in the fix of New Orleans, without a set course to sail. The direction is to continue to build on the successes and strong reputation of the IDCA now so firmly established.

Finally, the DRI mid-region meeting will be held in Des Moines June 12–13, 2009. This meeting will give the IDCA a chance to showcase this organization, and host leadership from SLDOs (State and Local Defense Organizations)throughout the region in Iowa. I look forward to an invigorating and active year.

As a post script, we bid a fond farewell to long-time IDCA member and leader John McClintock, who passed away at age 77 on October 23 in Des Moines. John was a strong and steady voice for the defense bar over his distinguished career. He was a mentor to many lawyers during his 50 years of law practice. Perhaps it was his years as an official for Big 8 football that influenced him, but John was always one to call them as he saw them. He will be missed. ◆

Megan Antenucci

THE INTOXICATED DRIVER: A POSSIBLE DEFENSE APPROACH

By: Ted Wallace, American Family Insurance, Davenport, Iowa

A new file comes into the office. You begin to review the claim and start an analysis of liability. It appears that the accident was at an uncontrolled intersection and that there are some comparative fault defenses. In fact, at first blush, it appears that the Defendant may not even be the majority at fault for the accident. Things are looking up. Then you notice on the police report that your new client blew a .13 on the breathalyzer and was charged with OWI.

If you have even done insurance defense work for any length of time, you have likely encountered the above situation. Your defense position just went out the window. Or did it? Contrary to how most laymen (and numerous attorneys) understand the law, driving a vehicle while intoxicated is not a negligent act. It is illegal, certainly, but standing alone it does not create negligence. It is this crucial distinction which makes possible an approach in defending an intoxicated driver which removes any and all evidence of intoxication from the trial until it becomes relevant, if it ever does.

Before an Iowa driver can be held accountable for an accident, there must have been negligence on his part in the operation of a motor vehicle. While it is certainly not advisable to operate a vehicle while under the influence of alcohol, it is been held to be irrelevant to the question of fault. For example, in *Yost v. Miner*,[1] the following was stated in regard to intoxication and negligence:

> In ruling on the motion for judgment notwithstanding, trial court stated:
> '... the record, without dispute, shows that the defendant was intoxicated at the time of the accident.' It is not clear what, if any, bearing this statement had on the ruling, but the plaintiff argues such intoxication bars defendant from recovering on his counterclaim.
> For purpose of this opinion, we accept trial court's conclusion that the undisputed evidence shows defendant was intoxicated. However, it does not follow his right of recovery is barred as a matter of law.[2]

The *Yost* decision went on to state unequivocally that intoxication alone was insufficient to show contributory negligence. It noted that "[i]ntoxication in and of itself is not . . . conclusive evidence of contributory negligence."[3] Further, in regard to the driving of an automobile while intoxicated, the *Yost* Court noted that the act of driving a vehicle while intoxicated was a violation of Iowa Code § 321.281.[4] It went on to state that such violation was not negligence per se.[5] In *Sylvester v. Incorporated Town of Casey*,[6] the Court specifically disapproved a jury instruction which stated that contributory negligence could be inferred from intoxication alone. Instead, the Court approved an instruction utilized in a Wisconsin case which provided that "[d]runkeness is not negligence per se, nor [is it negligence] unless it contributes to the accident or injury. If it did not, then it is a matter of no concern to the defendant."[7]

In a more recent Iowa case, a trial court instructed the jury in an automobile case that in order to recover a Plaintiff had to prove *both* the issue of intoxication and failure to maintain control of her vehicle.[8] Following the caselaw noted above, the trial judge in *Easton* agreed with the Defendant in that case that intoxication alone was insufficient for liability. It was noted that the marshalling instruction utilized in that case was not objected to by the Plaintiff.

While the *Easton* case demonstrated one' courts willingness to require more than intoxication evidence on the issue of fault, perhaps the Court should have gone further and prevented the introduction of any evidence of intoxication. The remainder of this article will outline a possible strategy on eliminating evidence of alcohol or intoxication from a trial until such time as it is relevant—after a fault determination has been made.

Unquestionably, the evidence of alcohol use or intoxication by the driver of an automobile involved in an accident will be problematic for a defendant to overcome. Once a jury hears such evidence the trial and outcome will forever be tainted by its introduction. There cannot be a serious doubt that such evidence is extremely prejudicial. In *Pexa v. Auto Owners Ins. Co.*,[9] a lawsuit for underinsured motorist benefits, the Plaintiff alleged that evidence of the underlying tortfeasor's intoxication was relevant to the damages claim.[10] The Supreme Court noted:

> Contrary to Pexa's argument on appeal, the tortfeasor's intoxication is not probative of the nature and extent of Pexa's injuries. The tortfeasor'sintoxication was only marginally relevant at best to the Plaintiff's claim that he feared involvement in another accident. On the other hand, this type of evidence would tend to influence a jury to increase its award of compensatory damages out of sympathy for the victim of such irresponsible conduct or to punish the drunk driver.[11]

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1 163 N.W.2d 557 (Iowa 1969).
2 163 N.W.2d at 561.
3 163 N.W.2d at 561. Additional Iowa cases on this issue include Nicholson v. City of Des Moines, 246 Iowa 318, 324, 67 N.W.2d 533, 536 (1954) (same) and Cramer v. City of Burlington, 42 Iowa 315, 320 (1875) (intoxication does not defeat a plaintiffs recovery if it does not contribute to the injury).
4 163 N.W.2d at 561.
5 Id. See also Chandler v. Harger, 253 Iowa 565, 570-2, 113 N.W.2d 250, 253-4 (1962).
6 110 Iowa 256, 260, 81 N.W.2 455, 457
7 Chandler, 113 N.W.2d at 254 (quoting Ward v. Chicago, St. P., M. & O. Ry. Co., 85 Wis. 601, 605, 55 N.W. 771, 772 (1893) (overruled on other grounds)).
8 Easton v. American Family Mut. Ins. Co., No. 50/06-0936 (Filed June 20, 2008).
9 686 N.W.2d 150 (Iowa 2004)
10 686 N.W.2d at 159.
11 Id. The Pexa decision also made reference to Weinstein's Federal Evidence § 403.04[1][c], at 403-43, 403-46 (stating examples of unfairly prejudicial evidence include evidence that "appeals to the jury's sympathies" or "provokes a jury's instincts to punish.").

COMPUTER FRAUD AND ABUSE ACT: A NEW TOOL FOR EMPLOYERS

By: Frank Harty, Nyemaster, Goode, West, Hansell & O'Brien, P.C., Des Moines, IA

In the information age, employers must be more vigilant than ever in protecting confidential information. Even with comprehensive policies and procedures safeguarding intellectual property, an employer can fall victim to unscrupulous workers. Employers now have another weapon to combat employee theft of intellectual property: the Computer Fraud and Abuse Act (CFAA).

INTRODUCTION

The CFAA, while originally enacted as a criminal statute, is increasingly being used in civil actions. Although a majority of cases brought under the CFAA have dealt with outside hackers, a growing number are based on former employees using their former employer's customer or business information that was obtained through unauthorized use of a company computer. See *Mintel Int'l Group, Ltd. v. Neergheen*, 2008 WL 2782818 at *2-3 (N.D. Ill. July 16, 2008); *Pac. Aerospace & Electronics, Inc. v. Taylor*, 295 F. Supp. 2d 1188, 1197 (E.D. Wash. 2003). There is a growing trend towards using the CFAA in employer/employee disputes. *Pac. Aerospace & Electronics*, 295 F. Supp. 2d at 1197.

HISTORY OF THE CFAA

The first version of the CFAA was enacted in 1984 as the Counterfeit Access Device and Computer Fraud and Abuse Act. *Id.* at 1194. That version of the CFAA was meant to apply to electronic trespassers known as computer hackers. *Shamrock Foods Co. v. Gast*, 535 F.Supp. 2d 962, 965 (D. Ariz. 2008). Since its enactment, the CFAA has been revised many times. An important revision occurred in 1994, when Section 1030(g) added a civil cause of action for violation of the statute. *Pac. Aerospace & Electronics*, 295 F. Supp. 2d at 1195. The 1994 amendment was intended "to expand the statute's scope to include civil claims challenging the unauthorized removal of information or programs from a company's computer database." *Id.* at 1196 (citing *Shurgard Storage Ctrs., Inc. v. Safeguard Self Storage, Inc.*, 119 F. Supp. 2d 1121 (W.D. Wash. 2000)).

The revisions of the CFAA have broadened its scope. In fact, the CFAA can be considered to be as ubiquitous as the internet itself. "The CFAA was intended to control interstate computer crime, and since the advent of the Internet, almost all computer use has become interstate in nature." *Shurgard*, 119 F. Supp. 2d at 1127.

The CFAA is filled with precise terminology that courts have struggled to interpret. This has resulted in differences among the district and circuit courts in the interpretation of the provisions of the CFAA.

CATEGORIES OF ACCESS

Various sections of the CFAA refer to "exceed[ing] authorized access" and accessing a computer "without authorization." E.g., 18 U.S.C. § 1030(a)(1); § 1030(a)(5)(A)(i). There is some question as to whether these terms are interchangeable. While some district courts view the terms as virtually the same, others have given them different applications and meanings. The Seventh Circuit has said there is a "paper thin" difference between the two terms. *Int'l Airport Ctrs., L.L.C. v. Citrin*, 440 F.3d 418, 420 (7th Cir. 2006). The "legislative history . . . demonstrates the broad meaning and intended scope of the terms 'protected computer' and 'without authorization.'" *Shurgard*, 119 F. Supp. 2d at 1129.

Because Congress used both terms ("unauthorized access" and "exceeds authorized access") in the statute, some argue Congress expressed its intention to exclude culpability or liability for "exceeding authorized access" in the sections of the statute where it did not use that term. *In re Am. Online, Inc.*, 168 F. Supp. 2d 1359, 1370 (S.D. Fla. 2001). Specifically, one question that arises is whether an employer can bring a suit under the CFAA against an employee for emailing proprietary information to a competitor when the employee was generally authorized to access and use that information. Some argue that allowing claims against ex-employees for sending unauthorized information to new employers will inappropriately federalize what should properly be a state law claim. "[A] case of this kind sounds in state statutory and common law and is heard in state court." *Chas. S. Winner, Inc., v. Polistina*, 2007 WL 1652292 at *2, (D. N.J. June 4, 2007).

UNAUTHORIZED ACCESS

As discussed below, it appears that the better reasoned decisions hold that a private cause of action does exist under the CFAA when an employee exceeds authorization.

"Without authorization" is not defined by the statute. The term covers direct and obvious forms of unauthorized access, including the mimicking of IP addresses to obtain access to protected computer systems. *Four Seasons Hotels & Resorts B.V. v. Consorcio Barr, S.A.*, 267 F. Supp. 2d 1268, 1323 (S.D. Fla. 2003). Some courts have held the term covers other forms of access as well, such as when an agent-employee has breached his duty of loyalty. See, e.g., *Citrin*, 440 F.3d at 420; *ViChip Corp. v. Lee,* 438 F. Supp. 2d 1087, 1100 (N.D. Cal.2006); *Shurgard*, 119 F. Supp. 2d at 1125. The rationale supporting this approach is fairly straightforward: once a trusted employee stops acting on his employer's behalf, he is no longer an "authorized" system user.

Breach of a duty of loyalty terminates an agency relationship, and termination of that relationship can make the accessing of computer files that had previously been authorized change into unauthorized access under the CFAA. *Citrin*, 440 F.3d at 420-21. "The authority of the agent terminates if, without knowledge of the principal, he acquires adverse interests or if he is otherwise guilty of a serious breach of loyalty to the principal." *Id.* at 421 (quoting *State v. DiGiulio*, 835 P.2d 488, 492 (Ariz. Ct. App. 1992)).

In *ViChip*, the defendant claimed his

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III. *BITUMINOUS CASUALTY V. SAND LIVESTOCK SYSTEMS*

Furnas County Farms hired Sand Livestock Systems to construct a hog confinement facility on its property. 728 N.W.2d at 218. Sand Livestock installed a propane power washer in a washroom at the facility. *Id*. There was no outside ventilation to eliminate the exhaust fumes generated by the power washer. *Id*. Raymond Gossage, an employee of Furnas, was in the washroom when he was overcome by carbon monoxide exhaust fumes and died of asphyxiation. *Id.* Gossage's widow filed a wrongful death action against Sand Livestock. *Id*. at 219.

Bituminous filed a declaratory judgment action in the U.S. District Court for the Northern District of Iowa, seeking a declaration that it had no duty to defend or indemnify the underlying action under two insurance policies it had issued to Sand Livestock, because coverage was precluded by the pollution exclusions. *Id*. The Commercial Lines Policy contained an endorsement entitled "Total Pollution Exclusion with a Hostile Fire Exception," which stated:

> This insurance does not apply to:
> f. Pollution
> (1) "Bodily injury" or "property damage" which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.
> *Id*.

The policy defines "Pollutants" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." *Id*. The Commercial Umbrella Policy contained a similar endorsement entitled "Pollution Exclusion," which stated:

> It is agreed that this policy does not apply:
> A. to any liability for "bodily injury," "property damage" or "personal and advertising injury" arising out of the actual, alleged or threatened discharge, dispersal, release or escape of "pollutants at any time."
>
> * * * *
>
> C. to any obligation of the "insured" to indemnify or contribute to any party because of "bodily injury," "property damage" or "personal and advertising injury" arising out of the actual, alleged or threatened discharge, dispersal, release or escape of "pollutants."
>
> D. to any obligation to defend any "suit" or "claim" against any "insured" alleging "bodily injury," "property damage" or "personal and advertising injury" and seeking damages for "bodily injury," "property damage" or "personal and advertising injury" arising out of the actual, alleged or threatened discharge, dispersal, release or escape of "pollutants."
>
> * * * *
>
> "Pollutants" means any solid, liquid, gaseous, or thermal irritants or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste....
> *Id*.

Mrs. Gossage argued that because it was unclear whether the pollution exclusions extended beyond traditional environmental pollution, the exclusions were ambiguous and the court should interpret them in favor of the insured. *Id*. Sand Livestock argued the exclusions were inapplicable because under the doctrine of reasonable expectations, "a reasonable policyholder would expect the exclusions to prevent coverage for 'traditional hog confinement problems associated with pollution wastes and smells, and not wrongful death claims based on an alleged negligent design of a hog confinement facility which allowed carbon monoxide to accumulate.'" *Id*. Bituminous argued that the exclusions unambiguously excluded coverage for indoor carbon monoxide poisoning. *Id*.

Magistrate Judge Paul Zoss concluded that because both parties' positions were supported by case law from other jurisdictions and no Iowa case had decided the issue, the proper course of action was to certify the following question to the Iowa Supreme Court:

> Do the total pollution exclusions in the policies issued by Bituminous to Sand Livestock relieve Bituminous from any obligation to defend or indemnify Sand Livestock, or to pay damages to Mrs. Gossage, for claims arising out of the death of Raymond Gossage?
> *Id*. at 220.

Justice Streit, writing for a unanimous Iowa Supreme Court, began the analysis with the "cardinal principle" for interpreting and construing insurance policies: the intent of the parties at the time the policy was sold controls. *Id.* The parties' intent is determined by the language of the policy. *Id.* If, however, there is a genuine uncertainty as to which one of two or more meanings is the proper one, the ambiguity is resolved in favor of the insured due to the adhesive nature of insurance policy contracts. *Id.* In addition, exclusions are construed strictly against the insurer. *Id.*

With these rules serving as guideposts, the Court held carbon monoxide was a "pollutant" under the language of the pollution exclusions. *Id.* at 221. The Court declined to find the pollution exclusions ambiguous. *Id.* The Court specifically rejected the argument that pollution exclusion should be limited to "traditional environmental pollution." *Id.* Justice Streit quoted a commentator suggesting the absolute pollution exclusion "was designed to serve the twin purposes of eliminating coverage for gradual environmental degradation and government-mandated clean up work such as Superfund response cost reimbursement." *Id.* (quoted authority omitted). The Iowa Supreme Court concluded, however, that "the plain language of the exclusions at issue here make no distinction between 'traditional environmental pollution' and injuries arising from normal business operations." *Id.*

Significantly, the Iowa Supreme Court expressly declined to follow the approach of the Supreme Court of Illinois that relied on extrinsic evidence to find ambiguity. *See id.* at 221-22 (citing *Am. States Ins. Co. v Koloms,* 687 N.E.2d 72, 79 (Ill. 1997)). The Iowa Supreme Court conclud-

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ed that "[t]he plain language in the exclusions encompasses the injury at issue here because carbon monoxide is a gaseous irritant or contaminant, which was released from the propane washer." *Id*. The *Sand Livestock* Court concluded "it is inappropriate and unwise" to look "beyond the bare language of the exclusion" to find ambiguity. 728 N.W.2d at 222. The *Sand Livestock* Court held that "[a]n ambiguity exists only if the language of the exclusion is susceptible to two interpretations," and that it "may not refer to extrinsic evidence in order to create ambiguity." *Id*. *Sand Livestock* is good authority in Iowa to limit the discoverability and admissibility of extrinsic evidence for the construction and interpretation of insurance contract language. This precedent supports confining the analysis to the four corners of the policy as applied to the underlying claim or suit. *See also*, Iowa R. App. P. 6.14(6)(n) ("In the construction of written contracts, the cardinal principle is that the intent of the parties must control; and except in cases of ambiguity, this is determined by what the contract itself says."). However, extrinsic evidence may come into play if the insured raises the reasonable expectations doctrine, as discussed below. *See generally*, *Grinnell Mut. Reins. Co. v. Voeltz*, 431 N.W.2d 783, 786-87 (Iowa 1988) (affirming declaration of coverage based in part on extrinsic evidence used to find homeowners' business pursuits exclusion ambiguous and discussions with agent supporting reasonable expectations of coverage for babysitting).

IV. APPLICATION OF THE REASONABLE EXPECTATIONS DOCTRINE

The *Sand Livestock* Court declined to reach the question whether the "reasonable expectations doctrine" could trump the absolute pollution exclusion, stating:

> Because this case comes to us as a certified question from the federal district Court, this issue is not properly before us. Iowa Code section 684A.1(2003) gives this court the power to answer certified "questions of law." The applicability of the doctrine of reasonable expectations is a question of fact that is not within the scope of chapter 684A. *Wright v. Brooke Group Ltd*,. 652 N.W.2d 159, 170 n. 1 (Iowa 2002). Sand Livestock and Mrs. Gossage are free to argue the doctrine of reasonable expectations to the federal district court.

728 N.W.2d at 223.

As applied by Iowa courts, the doctrine of reasonable expectations works "to avoid the frustration of an insured's expectations notwithstanding policy language that appears to negate coverage." *Vos v. Farm Bureau Life Ins. Co.*, 667 N.W.2d 36, 50 (Iowa 2003) (citation omitted). To invoke the doctrine, "the insured must show circumstances attributable to the insurer that fostered coverage expectations or that the policy is such that an ordinary layperson would misunderstand its coverage." *Sand Livestock*, 728 N.W.2d at 222. Once that showing is made, the doctrine will avoid an exclusion that "(1) is bizarre or oppressive, (2) eviscerates a term to which the parties have explicitly agreed, or (3) eliminates the dominant purpose of the policy." *Id*. (citing *Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Federated Mut. Ins. Co*., 596 N.W.2d 546, 551 (Iowa 1999)).

The Iowa Supreme Court recognized the reasonable expectations doctrine in *Rodman v. State Farm Mut. Auto. Ins. Co.*, 208 N.W.2d 903, 906 (Iowa 1973) (McCormick, J). Subsequently, Iowa appellate courts have allowed recovery by insureds under that doctrine in only five decisions,[1] and held for the insurer in the vast majority of cases, usually by affirming

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[1] Shelter Mut. Ins. Co. v. Davis, 2008 WL 2200082, *6 (Iowa Ct. App. May 29, 2008) (reversing district court judgment for insurer and holding for insured as a matter of law); Clark-Peterson Co., Inc. v. Indep. Ins. Assocs., Ltd., 492 N.W.2d 675, 679 (Iowa 1992) (affirming district court judgment for insured); Grinnell Mut. Reinsurance Co. v. Voeltz, 431 N.W.2d 783, 786-89 (Iowa 1988) (same); Global Aviation Ins. Managers v. Lees, 368 N.W.2d 209, 212 (Iowa Ct. App. 1985) (affirming, without analysis, district court's finding of coverage under reasonable expectations doctrine after affirming ruling that coverage existed based on statute eliminating insurer's technical defense); C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169, 177 (Iowa 1975) (reversing district court judgment for insurer).

[2] See, e.g., Ewing v. Am. Nat'l Prop. & Cas. Co, 2008 WL 375201, *2 (Iowa Ct. App. Feb. 13, 2008) (affirming summary judgment for insurer); AMCO Ins. Co. v. Estate of Wehde, 2006 WL 650234, *5 (Iowa Ct. App. Mar. 15, 2006) (same); Am. Family Mut. Ins. Co. v. Corrigan, 697 N.W.2d 108, 118 (Iowa 2005) (reversing summary judgment for insured); Grinnell Select Ins. Co. v. Continental Western Ins. Co., 639 N.W.2d 31, 37 (Iowa 2003) (disagreeing with district court's application of doctrine, but affirming judgment for insurer on other grounds); Rickerd v. Iowa Mut. Ins. Co., 2003 WL 21076798, **2-3 (Iowa Ct. App. 2003) (affirming summary judgment for insurer); Westfield Ins. Cos. v. Economy Fire & Cas. Co., 623 N.W.2d 871, 881-82 (Iowa 2001) (reversing summary judgment for insured); Monroe County v. Int'l Ins. Co., 609 N.W.2d 522, 526 (Iowa 2000) (affirming summary judgment for insurer); Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Federated Mut. Ins. Co., 596 N.W.2d 546, 551 (Iowa 1999) (same); Shelter General Ins. Co. v. Lincoln, 590 N.W.2d 726, 729 (Iowa 1999) (same); Krause v. Krause, 589 N.W.2d 721, 727-28 (Iowa 1999) (same); Lemars Mut. Ins. Co. v. Joffer, 574 N.W.2d 303, 311 (Iowa 1998) (same); Hickman v. IASD Health Servs. Corp., 572 N.W.2d 165,167 (Iowa Ct. App. 1997) (same); Zaragoza v. West Bend Mut. Ins. Co., 549 N.W.2d 510, 515-16 (Iowa 1996) (affirming district court judgment for insurer); Ide v. Farm Bureau Mut. Ins. Co., 545 N.W.2d 853, 859-60 (Iowa 1996) (reversing district court judgment for insured); Benavides v. J.C. Penny Life Ins. Co., 539 N.W.2d 352, 356-57 (Iowa 1995) (affirming summary judgment for insurer); Johnson v. Farm Bureau Mut. Ins. Co., 533 N.W.2d 203,206 (Iowa 1995) (same); Cincinnati Ins. Co. v. Hopkins Sporting Goods, Inc., 522 N.W.2d 837, 840 (Iowa 1994) (affirming district court judgment for insurer); Essex Ins. Co. v. Fieldhouse, Inc., 506 N.W.2d 772, 777 (Iowa 1993) (same); Smithway Motor Xpress, Inc. v. Liberty Mut. Ins. Co., 484 N.W.2d 192, 196-97 (Iowa 1992) (affirming summary judgment for insurer); Thorco Leasing, Inc. v. Lumbermens Mut. Cas. Co., 489 N.W.2d 31, 33-34 (Iowa Ct. App. 1992) (affirming district court judgment for insurer); Werner's Inc. v. Grinnell Mut. Reinsurance Co., 477 N.W.2d 868, 871-72 (Iowa Ct. App. 1991) (affirming summary judgment for insurer); Baker v. Grinnell Mut. Reinsurance Co., 475 N.W.2d 672, 674-75 (Iowa Ct. App. 1991) (same); Weber v. IMT Ins. Co., 462 N.W.2d 283, 288 (Iowa 1990) (affirming district court judgment for insurer on reasonable expectations claim, but reversing on other grounds); West Trucking Line, Inc. v. Northland Ins. Co., 459 N.W.2d 262, 264-65 (Iowa 1990) (vacating court of appeals decision and affirming district court judgment for insurer); Moritz v. Farm Bureau Mut. Ins. Co., 434 N.W.2d 624, 626 (Iowa 1989) (affirming summary judgment for insurer); Northwestern Nat'l Ins. Co. v. Kinney, 444 N.W.2d 107, 109-10 (Iowa Ct. App. 1989) (affirming district court judgment for insurer); Thomas v. United Fire & Cas. Co., 426 N.W.2d 396, 399 (Iowa 1988) (affirming summary judgment for insurer); Aid (Mut.) Ins. v. Steffen, 423 N.W.2d 189, 192 (Iowa 1988) (same); Lepic v. Iowa Mut. Ins. Co., 402 N.W.2d 758, 7861 (Iowa 1987) (affirming summary judgment for insurer and reversing summary judgment for insured in two consolidated cases); Cairns v. Grinnell Mut. Reinsurance Co., 398 N.W.2d 821, 825-26 (Iowa 1987) (reversing district court judgment for insured); New Hampshire Ins. Co. v. Nat'l Recreation Equip. Co., 322 N.W.2d 890, 892 (Iowa Ct. App. 1982) (affirming district court judgment for insurer); Farm Bureau Mut. Ins. Co. v. Sandbulte, 302 N.W.2d 104, 112-114 (Iowa 1981) (reversing judgment on jury verdict for insured); Chipokas v. Travelers Indem. Co., 267 N.W.2d 393, 396 (Iowa 1978) (affirming district court judgment for insurer).

BITUMINOUS CASUALTY CORP. V. SAND LIVESTOCK SYSTEMS – THE ABSOLUTE POLLUTION EXCLUSION AND THE REASONABLE EXPECTATIONS DOCTRINE . . . *continued from page 6*

summary judgment.[2]

The threshold requirement to invoke the reasonable expectations doctrine is that either an ordinary layperson would misunderstand the policy coverage, or other circumstances attributable to the insurer led the insured to expect a specific coverage. The "misunderstanding" theory should fail as a matter of law when the policy exclusion is found unambiguous on its face. The *Sand Livestock* Court held that the absolute pollution exclusion unambiguously excluded coverage for indoor pollution such as carbon monoxide. Presumably, if the Court had thought that an ordinary layperson would misunderstand the exclusion, it would have held it ambiguous and construed it in favor of the insured. A finding that the pollution exclusion would be misunderstood by an ordinary layperson is inconsistent with the *Sand Livestock* Court's holding that the exclusion is unambiguous. Accordingly, insurers should be able to obtain summary judgment dismissing reasonable expectations claims that are based solely on the theory an ordinary layperson would misunderstand the absolute pollution exclusion.

The best authority in Iowa for refuting the "misunderstanding" theory is the very case the *Sand Livestock* Court cited for the elements of the reasonable expectations doctrine--*Iowa Comprehensive Petroleum Underground Storage Tank Fund v. Federated Mutual Ins. Co.* There, the owner of a convenience store that sold gasoline from an underground storage tank purchased pollution liability coverage for an additional $13,120 premium that insured against claims for "cleanup costs" because of "environmental damage." 596 N.W.2d at 548. The policy, however, only applied to claims caused by "a pollution incident that commence[d] on or after…March 5, 1990 [and] excluded coverage for any 'environmental damage' caused or contributed to by any 'pollution incident' that commenced prior to [March 5, 1990]." *Id*. at 548-49. Coverage was sought for cleanup costs. The insurer denied coverage based on the exclusion, and the district court granted the insurer's motion for summary judgment. *Id.* at 549. The Iowa Supreme Court affirmed, stating that the pollution exclusion "is not ambiguous" and barred coverage for preexisting pollution. *Id.* at 551. The Court rejected the insured's alternative argument for coverage under the reasonable expectations doctrine, stating:

> We find the Board has failed to establish one of the prerequisites necessary for the applicability of this doctrine. First, there are no circumstances attributable to Federated that fostered coverage expectations. The Board does not assert, and we find no record of, any representations by Federated that would have led CML to believe coverage would be available under the scenario presented in the case at bar. The Board maintains that its payment of the $13,120 premium is indicative of CML's reasonable belief that the environmental damage at issue would be covered. We do not believe, however, that the simple act of paying the premium requested by an insurance company is sufficient to establish "circumstances attributable to the insurer that fostered coverage expectations." Second, the language of the exclusion is not "such that an ordinary layperson would misunderstand its coverage." The exclusion is succinct and clearly written and simple enough for a layperson to comprehend.

596 N.W.2d at 551 (quoted citations omitted).

The Iowa Supreme Court previously had enforced a "sudden and accidental" (qualified) pollution exclusion and rejected a reasonable expectations claim in *Weber v. IMT Ins. Co.*, 462 N.W.2d 283 (Iowa 1990). In that case, the insured hog farmer repeatedly spilled manure on a public road and a neighbor claimed the resulting odor contaminated his sweet corn crop. *Id.* at 284. The neighbor sued, alleging nuisance, and Weber's liability insurer denied coverage based on the pollution exclusion. *Id*. at 284-85. The district court ruled for the insurer in a declaratory judgment action, and the Iowa Supreme Court affirmed. *Id.* at 287-88. The *Weber* Court held that "the term waste material as used in the pollution exclusion is not ambiguous with regard to hog manure spilled on the road." *Id.* at 286. The *Weber* Court went on to conclude:

> We agree with the district court that the pollution exclusion is not bizarre or oppressive, and does not eviscerate terms explicitly agreed to or eliminate the dominant purpose of the transaction. The dominant purpose of the liability policy was to insure Webers against a wide range of farm accidents which can cause serious personal injury or property damage. The pollution exclusion does not eliminate this purpose. It only denies coverage when specific materials are discharged by Webers, and, the discharge is not sudden or accidental. The insureds' reasonable expectations were not frustrated and, therefore, the doctrine of reasonable expectations is not applicable to this case.
>
> *Id*. at 288.

These decisions leave insurers in a strong position to obtain summary judgment dismissing reasonable expectations claims based solely on the policy language. It is unlikely that a jury question could be generated on a reasonable expectations claim without evidence of separate representations by the insurer or its agent that coverage exists for indoor pollutants. *Compare Shelter Mut. Ins. Co. v. Davis,* 2008 WL 2200082 (Iowa Ct. Ap. May 29, 2008) (holding coverage existed as a matter of law under reasonable expectations doctrine for off-site ATV accident despite policy language limiting coverage to insureds' premises, because agent promised "full coverage" when new ATVs were acquired), *with LeMars Mut. Ins. Co. v. Joffer,* 574 N.W.2d 303, 311 (Iowa 1998) (affirming summary judgment enforcing "owned-but-not-insured" exclusion under business auto policy and rejecting reasonable expectations claim despite agent's promise that insureds were "fully covered"). *Shelter Mutual* is an unpublished decision of the Court of Appeals in a case that settled without an application for further review by the Iowa Supreme Court.

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BITUMINOUS CASUALTY CORP. V. SAND LIVESTOCK SYSTEMS – THE ABSOLUTE POLLUTION EXCLUSION AND THE REASONABLE EXPECTATIONS DOCTRINE

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Insurers should argue that the controlling precedent as to "general statements regarding coverage" is the Iowa Supreme Court's published decision in *Joffer*. The *Joffer* Court stated:

> The Joffers argue that their insurance agent's statements to the effect that they were "fully covered" constitute "circumstances that fostered coverage expectations." [quoted citation omitted] We disagree. The agent's general statements regarding coverage are insufficient to foster coverage expectations such as the Joffers allege. Furthermore, the record does not support a finding that the parties specifically discussed the owned-but-not-insured exclusion which could have created any misunderstanding as to coverage by the Joffers. Nor do we think the ordinary layperson would misunderstand the meaning of the owned-but-not-insured exclusion, even when read in light of the temporary substitute clause. The exclusion is clear and unambiguous as is the temporary substitute clause. Because we find that the prerequisite for application of the reasonable expectation doctrine has not been met, the doctrine cannot be used to invalidate the owned-but-not-insured exclusion.
>
> 574 N.W.2d at 311.

Claims based on the agent's representations of coverage are fact-specific and the alleged representations must be closely scrutinized in context to determine whether the reasonable expectations doctrine may avoid an exclusion. The more specific the discussion of coverage, the more likely a jury question may be raised under the doctrine because such discussions may "foster coverage expectations" and support a finding that the pollution exclusion "eviscerates a term to which the parties have explicitly agreed."[3]

CONCLUSION

Sand Livestock has answered the question whether the absolute pollution exclusion applies to indoor exposure claims under Iowa law. This holding will defeat coverage in a variety of cases arising from exposure to indoor contaminants, including not only carbon monoxide and other harmful fumes, but also friable asbestos, toxic mold spores and lead paint particles. The *Sand Livestock* holding that the absolute pollution exclusion is unambiguous as applied to indoor contaminants should defeat as a matter of law claims under the reasonable expectations doctrine based on allegations that an ordinary layperson would "misunderstand" the exclusion. In particular cases, however, the insured's discussions with the insurance agent who places coverage may generate a jury question as to whether "circumstances attributable to the insurer" fostered coverage expectations. Insureds who can credibly assert specific discussions led them to believe coverage existed may be able to recover from the insurer under the reasonable expectations doctrine.◆

[3] Potential claims against insurance brokers or agents are beyond the scope of this article.

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IDCA SCHEDULE of EVENTS

DECEMBER 11, 2008
IDCA Board Meeting
The Suites at 800 Locust, Des Moines, IA
10:00 a.m. Executive Committee
11:00 a.m. Board Meeting/Luncheon

FEBRUARY 4, 2009
IDCA Board Meeting
Iowa Hospital Association, Des Moines, IA
3:00 p.m. Executive Committee
4:00 p.m. Board Meeting/Appetizers

FEBRUARY 5–6, 2009
IDCA Trial Academy
Drake University Law School, Des Moines, IA
9:00 a.m. -5:00 p.m.

APRIL 3, 2009
IDCA Spring CLE Seminar
Marriott Coralville Hotel & Conference Center
8:30 a.m. – 4:30 p.m.
Topic: TBD

APRIL 3, 2008
IDCA Board Meeting
Marriott Coralville Hotel & Conference Center
11:30 a.m. Full Board Meeting/Luncheon

JUNE 12-13, 2009
DRI Mid-Region Meeting
Embassy Suites on the River, Des Moines, IA
Hosted by Iowa

JUNE 12, 2009
IDCA Board Meeting
Embassy Suites on the River, Des Moines, IA
8:30 a.m. Executive Committee
9:30 a.m. Full Board Meeting/Luncheon

SEPTEMBER 16, 2009
IDCA Board Meeting & Dinner
West Des Moines Marriott, West Des Moines, IA
4:00 p.m. – 6:00 p.m.

SEPTEMBER 17–18, 2009
44th Annual Meeting & Seminar
West Des Moines Marriott, West Des Moines, IA
8:00 a.m. – 5:00 p.m. both days

OCTOBER 7–11, 2009
DRI Annual Meeting
Chicago, IL

THE INTOXICATED DRIVER: A POSSIBLE DEFENSE APPROACH . . . *continued from page 3*

The *Pexa* Court ruled that the trial judge correctly exercised his discretion in prohibiting evidence of the intoxication of the tortfeasor. The trial court, in making the determination of admissibility of evidence, needs to exclude even relevant evidence when its probative value is substantially outweighed by the danger of unfair prejudice.[12]

That is not to say that evidence of intoxication is never relevant and/or admissible at trial. It is unquestioned under Iowa law that exemplary damages can be recovered against a motorist who causes injury by operating a motor vehicle while intoxicated.[13] What then, can be done, to allow evidence of intoxication to be utilized where it should be and kept out of where it should not be?

The short and simple answer is this: a trial involving an intoxicated driver should be bifurcated into two proceedings. The first proceeding should be a determination of liability and damages without the taint of alcohol evidence affecting the jury determination. The second proceeding, if needed, could then be held to determine whether or not punitive damages were warranted under the circumstances which would permit the intoxication evidence to be utilized.

The idea of bifurcation is not a new one. The Rules of Civil Procedure expressly provide that a court may, for convenience *or to avoid prejudice*, order a separate trial of any claim or separate issue.[14] The decision to grant a bifurcated trial is a matter of court discretion.[15] Refusal to separate issues for trial is reviewed under an abuse of discretion standard.[16]

An example of when a refusal to bifurcate trial issues was found to be an abuse of discretion is *Handley v. Farm Bureau Mut. Ins. Co.*[17] In *Handley*, a plaintiff brought claims against an allegedly negligent driver as well as his own insurer for underinsured motorist benefits. The insurer moved to sever the claims and have then tried separately under then Rule 186. The district court overruled the motion. On appeal, the Supreme Court reversed this ruling. As part of its reasoning, the Court noted that introduction of insurance into the trial of the accident would likely "cause the jury to return a larger verdict" against the motorist "then it would have if it were unaware that insurance existed and the amounts thereof."[18] It concluded that the potential prejudice could be avoided by severing the claims. In that way, the underlying trial could be determined against the tortfeasor without the prejudice of insurance being presented to the jury.

Likewise, in the matter of *Johnson v. State Farm Auto. Ins. Co.*,[19] the trial court granted an insurer's motion to separate for trial claims for underinsured motorist coverage and claims for bad faith. Although it does not expressly state, presumably the decision was granted to avoid the potential prejudice to the insurer on the underinsured motorist claims that might arise from introduction of evidence on the bad faith claims.

What *Handley* and *Johnson* demonstrate is that a trial court is well within its discretion in separating for trial two issues where different elements of proof are necessary as well as different evidence issues.

In the case of an intoxicated driver, as noted, the intoxication is relevant to a claim of punitive damages. However, it is well established that the purposes of compensatory and punitive damages are distinct.[20] Compensatory damages in a negligence action are awarded to cover loss caused by the negligence of another and are intended to make the injured party whole.[21] Punitive damages, on the other hand, are awarded to punish the wrongdoer and deter similar acts or conduct.[22]

What then, based upon all of this, can be done? The first thing is to file a motion in limine early in the case asking the Court to exclude all evidence of alcohol and intoxication. Particularly in cases where the Plaintiff has failed to file a claim for punitive damages, it is terribly prejudicial and not terribly relevant. As noted in the first part of this article, intoxication alone cannot form the basis of liability. It must be "translated into outward conduct which is negligent and bears a causal relationship to the injury."[23]

In those cases where a Plaintiff has filed the punitive damages claim, then there should be a motion to exclude the evidence of intoxication filed in conjunction with a motion to bifurcate the trial into two phases. The first phase would be a "normal" trial with a liability and damages determination. The second would be a trial on punitive damages in which evidence of alcohol or intoxication would be relevant. These trials could utilize the same jury and occur one after the other so as to assist in judicial economy. This is completely consistent with the idea that a bifurcated trial is to avoid prejudicial issues and still allows the Plaintiff to introduce intoxication evidence in relation to the only issue where it should be heard.

Cases involving issues of alcohol and intoxication are always problematic for the Defendant. I think, in some respects, they should be. However, the evidence should be used only where it is relevant. Under the scenario outlined in this article, a jury, as in a case of this nature. ◆

12 See e.g. Graber v. City of Ankeny, 616 N.W.2d 633 (Iowa 2000). Other examples when potentially prejudicial evidence similar to alcohol were excluded include Estate of Long ex rel. Smith v. Broadlawns Medical Center, 656 N.W.2d 71 (Iowa 2002) (exclusion of evidence that decedent had traces of amphetamine and methamphetamine at time of death properly excluded); Ward v. Loomis Bros., Inc., 532 N.W.2d 807 (Iowa App. 1995) (evidence of marijuana use by decedent properly excluded); Shawhan v. Polk County, 420 N.W.2d 808 (Iowa 1988) (evidence of 18-year olds past drug use should have been excluded).
13 See Sebastian v. Wood, 246 Iowa 94, 106, 66 N.W.2d 841, 848 (1954); Nichols v. Hocke, 297 N.W.2d 205 (Iowa 1980).
14 Iowa Rule of Civil Procedure 1.914.
15 Briner v. Hyslop, 337 N.W.2d 858, 870 (Iowa 1983).
16 Barnard v. Cedar Rapids City Cab Co., 133 N.W.2d 884, 896 (Iowa 1965).
17 467 N.W.2d 247 (Iowa 1991).
18 Id. at 250.
19 504 N.W.2d 135 (Iowa 1993)
20 Katko v. Briney, 183 N.W.2d 657, 662 (Iowa 1971).
21 Wilson v. IBP, Inc.
22 Id.
23 Yost, 163 N.W.2d at 561.

COMPUTER FRAUD AND ABUSE ACT: A NEW TOOL FOR EMPLOYERS . . . continued from page 4

deletion of company-owned files from a company computer was authorized because he was an officer and director of the company at that time. *ViChip*, 438 F. Supp. 2d at 1100. However, the court held that as an employee and officer, the defendant had a duty of loyalty to ViChip and, along with that duty, an agency relationship. *Id.* The defendant breached that duty because he deleted the company's information after he found out he was being asked to resign. *Id*. When the defendant breached his duty of loyalty, "he also terminated his authorization to access the files." *Id*. Similarly, another court has held that former employees lost their authorized access to the company's computers when they became agents of a competing company. *Shurgard*, 119 F. Supp. 2d at 1125.

The Iowa Supreme Court has not expressly recognized a cause of action for a breach of the duty of loyalty. *Midwest Motorsports P'shp v. Hardcore Racing Engines*, 735 N.W.2d 202, 2007 WL 1201746 at *1 (Iowa Ct. App. April 25, 2007). Iowa does, however, recognize a fiduciary duty of loyalty owed by corporate officers and directors. *Midwest Janitorial Supply Corp. v. Greenwood*, 629 N.W.2d 371, 375 (Iowa 2001). "A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." *Cagin v. McFarland Clinic, P.C.*, 317 F. Supp. 2d 964, 968 (S.D. Iowa 2004) (citing *Kurth v. Van Horn*, 380 N.W.2d 693, 695 (Iowa 1986)).

NARROW VIEW

There is a second line of cases that interpret the meaning of "without authorization" in a different way than the cases concerned with a breach of a duty of loyalty. *See, e.g., Shamrock*, 535 F. Supp. 2d 962, 964-95. The second line of cases holds that "without authorization" only applies to outsiders; persons whom have never had authorization to access the computer. *Id.* That line of cases holds that "the CFAA was intended to prohibit electronic trespassing, not the subsequent use or misuse of information." *Id*. at 966. The courts espousing this narrow interpretation reason "the statute was not meant to cover the disloyal employee who walks off with confidential information. Rather, the statutory purpose is to punish trespassers and hackers." *Am. Family Mut. Ins. Co. v. Rickman*, 554 F. Supp. 2d 766, 771 (N.D. Ohio 2008).

As one example, in *Brett Senior & Associates, P.C. v. Fitzgerald*, the employer claimed the employee had violated Section 1030(a)(4) under the "exceeds authorized access" provision, but the court found that the employee "did not obtain any information that he was not entitled to obtain or alter any information that he was not entitled to alter." 2007 WL 2043377 at *3 (E.D. Pa. July 13, 2007). The employer was actually objecting to the *use* of the proprietary information that the court held was not covered by the CFAA. *Id.* at *3-4. Similarly, other courts have rejected the argument that a breach of the duty of loyalty terminates "authorized" access. *Chas. A. Winner*, 2007 WL 1652292 at *3-4 (focusing on the statutory language of "exceeds authorized access" as opposed to "exceeds authorized use.")

According to the CFAA, "exceeds authorized access" is "to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter." 18 U.S.C. § 1030(e)(6). "Exceed[ing] authorized access" includes the creation of a computer program that gathers information from a public website when the effectiveness of the program depended on the former employee's knowledge of confidential information belonging to his ex-employer. *Pac. Aerospace& Electronics*, 295 F. Supp. 2d at 1196-97 (citing *EF Cultural Travel BV v. Explorica, Inc*., 274 F.3d 577 (1st Cir. 2001)). If information was covered by a confidentiality agreement that the ex-employee had signed, the use of the computer program constituted "unauthorized access." *Id.* In *Explorica*, manual collection of the same data as the computer program was "theoretically" possible, but use of the computer program went beyond any reasonable or expected authorized use of the website. *Explorica*, 274 F.3d at 583.

Other courts have declined to enter in the debate over the meaning of "unauthorized" and "exceeds authorized access" by dismissing claims under other parts of the statute. See, e.g. *Rickman*, 554 F. Supp. 2d at 772 (holding that the employer had not adequately shown a "loss" under the statute); *Cohen v. Gulfstream Training Acad.*, 2008 WL 961472 at*4 (S.D. Fla. April 9, 2008) (holding employer did not show damage or loss resulting from the interruption of service.)

LOSS AND DAMAGE

It is imperative to show the requisite damages under the CFAA. To successfully state a claim under the CFAA, the party must have suffered a loss of more than $5000 within a one year period (18 U.S.C. § 1030(a)(5)(B)(i), or must fall under 18 U.S.C. § 1030(a)(5)(B)(ii-v)). The statutory definition of "loss" was narrowed in 2001, so cases decided before that year do not reflect the current definition. *Cohen,* 2008 WL 961472 at *4.

As defined in the CFAA, "loss" means "any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service." 18 U.S.C. § 1030(e)(11). It is particularly significant that recoverable damages include the costs of responding to the transgression, such as the cost of performing a computer system damage assessment. See *Explorica*, 274 F.3d. at 584-85. Allowable damages also include the cost of making the database more difficult for hackers to access. *Id.* at 585. "Customer information has previously been held to constitute a property interest sufficient to satisfy the damage requirement of the CFAA." *Four Seasons Hotels & Resorts B.V.,* 267 F. Supp. 2d 1268, 1324 (citing *In re Am. Online, Inc*., 168 F. Supp. 2d 1359, 1380).

One district court has held that loss includes "a loss of business, goodwill, and the cost of diagnostic measures."

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Explorica, 274 F.3d at 584. "Loss" is "a cost of investigating or remedying damage to a computer, or a cost incurred because the computer's service was interrupted." *Nexans Wires S.A. v. Sark-USA, Inc*., 319 F. Supp. 2d 468, 477-78 (S.D.N.Y. 2004). Another court has held that loss of business due to the improper use of confidential or proprietary information is not covered under the CFAA, because § 1030(e)(11) limits its scope to "damages incurred because of interruption of service." *Nexans*, 319 F. Supp. 2d at 477-78. "[R]evenue lost because the information was used by the defendant to unfairly compete after extraction from a computer does not appear to be the type of 'loss' contemplated by the statute." *Id.* at 478.

As defined by the CFAA, "'damage' means any impairment to the integrity or availability of data, a program, a system, or information." 18 U.S.C. § 1030(e)(8). "Damage" includes the loss of information. *Shurgard*, 119 F. Supp. 2d at 1127. The term is defined in a way to focus on the harm the CFAA seeks to prevent, and does not define specific acts which would constitute "damage." *Id.* at 1126.

CFAA damages in the typical rogue employee case may also include incidental costs caused by the transgression. For example, if an employee emails confidential client information from a company system to an unsecure address such as a home e-mail address, an employer may be required to notify customers of the security breach. Numerous state laws require notification. See, e.g. 815 ILCS 5301et seq.; Michigan Code 445.72, § 12; Minnesota Code § 325E.61.

FRAUD

The CFAA requires the presence of a modified form of fraudulent intent. This term is important under Section 1030(a)(4), which provides that whoever "knowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value . . ." will be punished according to another provision of the CFAA. 18 U.S.C. § 1030(a)(4). It is much easier to prove fraud under the CFAA than Iowa common law. As one court has explained, fraud, in this context, means only "wrongdoing" and not proof of the common law elements of fraud. *Shurgard*, 119 F. Supp. 2d at 1126.

MISCELLANEOUS ISSUES ARISING UNDER THE CFAA: RELIEF

"Any person who suffers damage or loss by reason of a violation of this section may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief . . . [d]amages for a violation involving only conduct described in subsection (a)(5)(B)(i) are limited to economic damages." 18 U.S.C. § 1030(g). Damages may be limited to those that result from the interruption of service. *Cenveo Corp. v. CelumSolutions Software*, 504 F. Supp. 2d 574, 581 (D. Minn. 2007). This reading of the statute indicates that lost revenues due to stolen clients are not recoverable. *Cohen*, 2008 WL 961472 at *4. "Indirect damages are recoverable, but there must be an underlying intrusion into the computer system or computer data and that 'loss' was intended to 'target remedial expenses borne by victims that could not properly be considered direct damage cause by a computer hacker." *Rickman*, 554 F. Supp. 2d at 772 (citing *In re DoubleClick Inc. Privacy Litig*., 154 F. Supp. 2d 497, 521 (S.D.N.Y. 2001)).

ADDITIONAL ISSUES: PROTECTED COMPUTER

The CFAA does not apply to all computers, but rather only to "protected" computers. However, the definition of "protected" is very broad. A protected computer is a computer that is: 1) exclusively used by a financial institution or the government, or 2) a computer used in interstate or foreign commerce. 18 U.S.C. § 1030(e)(2).

PROCEDURAL ISSUES: CIVIL ACTIONS

Although the CFAA primarily provides criminal penalties, civil remedies are also available.

Any person who suffers damage or loss by reason of a violation of this section may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief. A civil action for a violation of this section may be brought only if the conduct involves 1 of the factors set forth in clause (i), (ii), (iii), (iv), or (v) of subsection (a)(5)(B). Damages for a violation involving only conduct described in subsection (a)(5)(B)(i) are limited to economic damages. No action may be brought under this subsection unless such action is begun within 2 years of the date of the act complained of or the date of the discovery of the damage. No action may be brought under this subsection for the negligent design or manufacture of computer hardware, computer software, or firmware."

18 U.S.C. § 1030(g).

To bring a civil action, the action "must involve one of the five factors in (a)(5)(B), [but] it need not be one of the three offenses in (a)(5)(A)." *Shamrock*, 535 F. Supp. 2d at 964 (quoting *Theofel v. Farey-Jones*, 359 F.3d 1066, 1078 (9th Cir. 2004)). Therefore, civil actions can be brought for other violations of the CFAA, including 18 U.S.C. § 1030(a)(4).

CONCLUSION

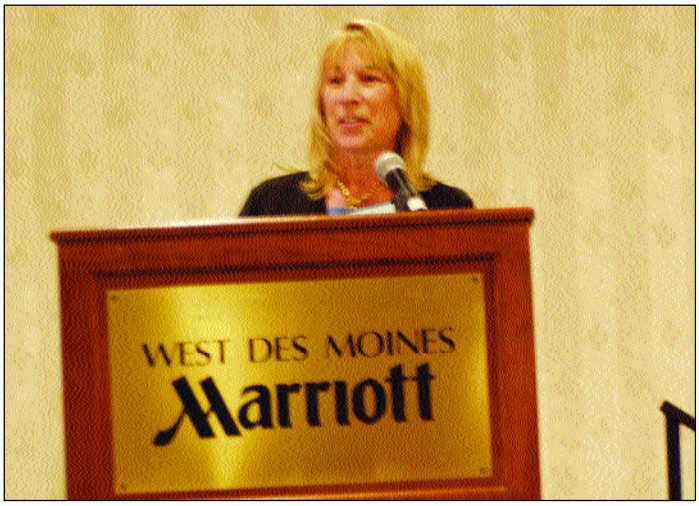
The CFAA, once a rather obscure federal criminal statute, is now a powerful weapon to combat industrial espionage. Counsel representing employers would be well advised to become familiar with the CFAA.◆

IOWA DEFENSE COUNSEL ASSOCIATION ANNUAL MEETING & SEMINAR

The Annual Meeting & Seminar for the Iowa Defense Counsel Association was held on September 18 and 19, 2008 in West Des Moines, Iowa. The two day seminar was headlined by Len Matheo and Lisa DeCaro of Courtroom Performance, Inc. with their presentation "The Art & Science of Jury Selection" and "The Art & Science of Witness Preparation." Chief Justice Marsha K. Ternus of the Iowa Supreme Court and the Honorable Robert W. Pratt, Chief Judge, U.S. District Court for the Southern District of Iowa provided updates on their respective courts. The program provided a case law update as well as programs on Employment law, Medicare and Future Medical Expenses in Personal Injury Litigation, Practical Tips for Using Mock Jury Trials and Construction Defect Coverage Issues. Orrin K. (Skip) Ames, III of Hand Arendall LLC, Mobile, Alabama rounded out the program with an Ethics presentation.◆

Len Matheo and Lisa DeCaro discuss the Art and Science of Jury Selection.

Megan Antenucci recognizes outgoing president Martha Shaff.



The Honorable Justice Ternus speaks to the IDCA group.

Tom Long with Packer Engineering, Inc. talks about accident reconstruction.

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JOHN McCLINTOCK

By: David L. Brown

Bruce Walker asked me to say a few words about our beloved, late partner, John A. McClintock. While words scarcely can do justice to John as a lawyer and the contributions he made to our profession, I will do my best.

John practiced law for 50 years in Des Moines. During that time period he represented both Plaintiffs and Defendants, individuals and corporations, in litigation of every type of lawsuit with consummate skill, attention and advocacy. He was a passionate advocate for is clients and a true believer that every citizen is entitled to his law firm which he joined in 1958 and which he built and led over the years.

John was a mentor to countless lawyers throughout this state. Many of us were fortunate to become his partner and work with him daily. But many countless others trained at the firm as law clerks and later became outstanding lawyers and ascended to the bench on both state and federal levels.

His skills as an advocate were recognized by his invitation to Fellowship in the Iowa Academy of Trial lawyers, an organization for which he was a Past President as well as the long-time acting Secretary-Treasurer, a position he continued to hold at the time of his death. John was also honored as a Fellow in the American College of Trial Lawyers. Additionally, he served as President of the Iowa State Bar Association in 1982–1983 and forever after remained active in Bar affairs.

John's enthusiasm for the profession over his life time was unequaled. He expanded countless hours meeting with legislators working with the courts and lawyers to improve our system of justice. It is fair to say that no significant legal developments in the court system in recent years were unaffected by his considerable influence and intense interest in the process.

John was a lawyer's lawyer and a giant in our profession. Even more than that, he was a friend of each and every lawyer he worked with, whatever side of the table, and the judges before whom he appeared. He made this noble profession even more special by the way he practiced law and lived his life.

SEITZINGER AWARD PRESENTED TO NOEL MCKIBBIN

Edward Seitzinger's daughter, Pam Nelson and IDCA President Martha Shaff present the award to Noel McKibbin.

In 1988, IDCA president Patrick Roby proposed to the board, in Edward F. Seitzinger's absence, that the IDCA honor Ed as a founder and its first president and for his continuous and complete dedication to the IDCA for its first 25 years by authorizing the Edward F. Seitzinger Award, which was dubbed "The Eddie Award."

Edward Seitzinger was an attorney with Farm Bureau and besides his family and work, IDCA was his life. This award is presented annually to the board member who contributed most to the IDCA during the year. It is considered IDCA's most prestigious award.

The very deserving recipient of the Eddie Award for 2008 was Noel McKibbin. Noel serves as the treasurer of IDCA. He brings to IDCA fiscal responsibility as well as ideas for growth both in a monetary sense but also for the organization. Noel provides the board with ideas and follows through to get things done. He makes numerous contributions to the board. He is a much deserving recipient of this prestigious award.

Congratulations Noel!◆

IDCA
WELCOMES NEW MEMBERS

Catherine M. Drexler
FBL Financial Group Inc.,
West Des Moines, IA

Ross W. Johnson
Faegre and Bensen LLP
Des Moines, IA

Jordan A. Kaplan
Betty, Neuman & McMahon, P.L.C.
Davenport, IA