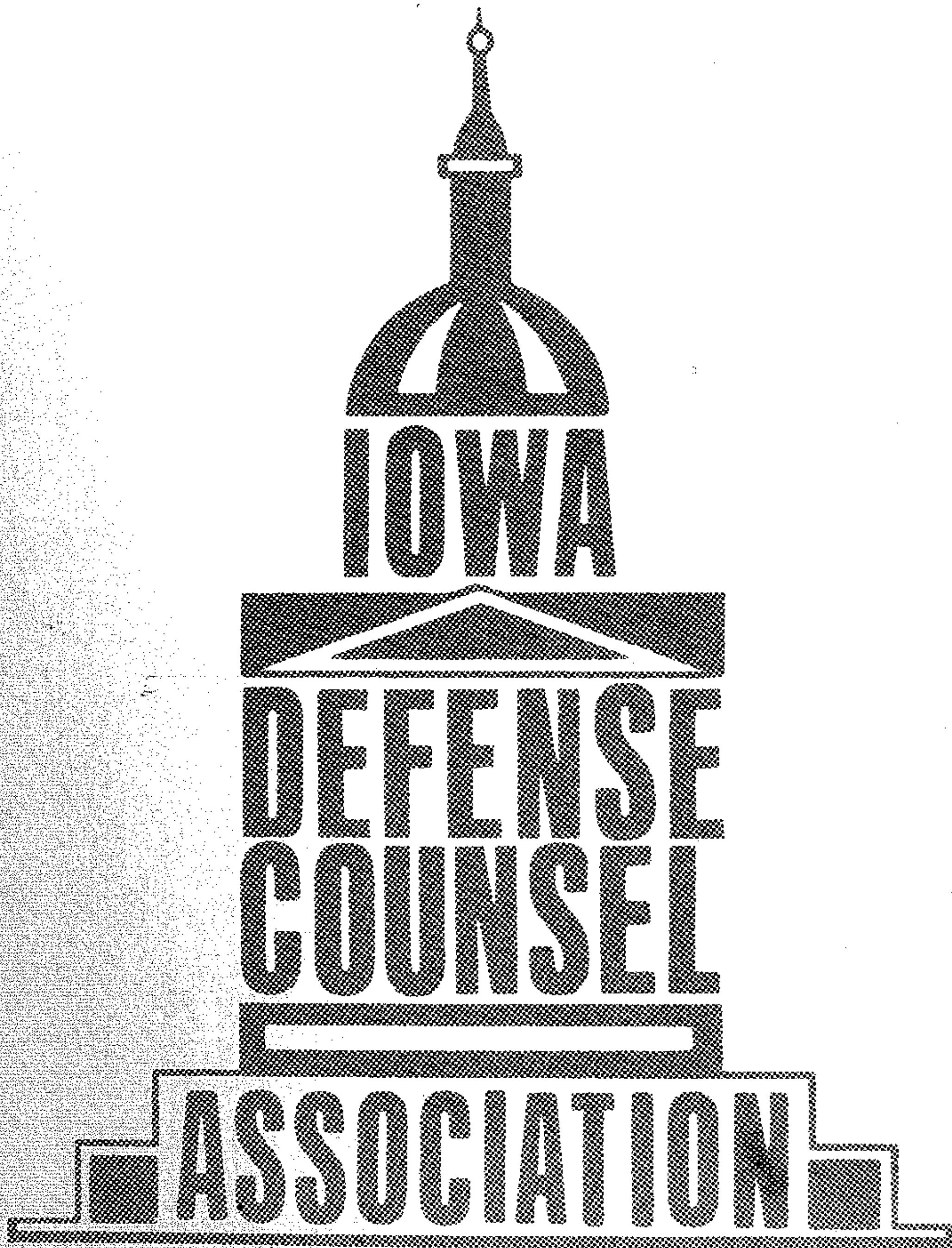
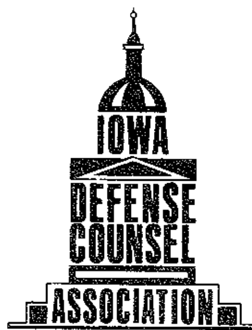


ANNUAL MEETING

September 23, 24 & 25, 1982
HYATT DES MOINES
Des Moines, Iowa



1981 - 1982
OFFICERS AND DIRECTORS

PRESIDENT

L.R. Voigts
10th Floor, Hubbell Building
Des Moines, Iowa 50309
515-283-3100

PRESIDENT-ELECT

Alanson K. Elgar
207 East Washington Street
Mt. Pleasant, Iowa 52641
319-385-3157

SECRETARY

Harold R Grigg
1521 Elm Avenue
Primghar, Iowa 51245
712-757-4645

TREASURER

Albert D Vasey
P O. Box 1336
Des Moines, Iowa 50305
515-274-3531

BOARD OF DIRECTORS
(Date is Term Expiration Date)

District I

David L Hammer - 1984
200 Dubuque Building
Dubuque, Iowa 52001
319-582-3601

District II

G. Arthur Minnich - 1984
721 N. Main Street
Carroll, Iowa 51401
712-792-3508

District III

Alan E Fredregill - 1984
200 Home Federal Building
Sioux City, Iowa 51102
712-255-8838

District IV

Robert J Laubenthal - 1984
307 Midlands Mall
Council Bluffs, Iowa 51501
712-328-1833

District V

David L. Phipps - 1984
1400 United Central Bank Building
Des Moines, Iowa 50309
515-288-6041

District VI

Raymond R Stefani - 1982
807 American Building
Cedar Rapids, Iowa 52401
319-364-1535

District VII

Larry L. Shepler - 1984
600 Union Arcade Building
Davenport, Iowa 52801
319-326-4491

District VIII

Craig D. Warner - 1983
Mississippi Valley Savings Building
Burlington, Iowa 52601
319-754-6587

PAST PRESIDENTS & DIRECTORS

Edward Seitzinger, 1964-1965
5400 University Avenue
West Des Moines, Iowa 50265
515-225-5410

*Frank W Davis, 1965-1966
2600 Ruan Center
Des Moines, Iowa 50309
515-243-6251

D. J Goode 1966-1967
10th Floor Hubbell Building
Des Moines, Iowa 50309
515-283-3100

Harry Druker, 1967-1968
112 West Church Street
Marshalltown, Iowa 50158
515-752-5467

Philip H Cless, 1968-1969
942 Insurance Exchange Bldg
Des Moines, Iowa 50309
515-244-0177

Philip J. Willson 1969-1970
307 Midlands Mall
Council Bluffs, Iowa 51501
712-328-1833

Dudley Weible, 1970-1971
134½ N. Clark Street
Forest City, Iowa 50436
515-582-2530

Kenneth L Keith 1971-1972
Union Bank & Trust Bldg
P O Box 218
Ottumwa, Iowa 52501
515-682-5447

Robert G Allbee, 1972-1973
920 Liberty Building
Des Moines, Iowa 50309
515-243-7611

Craig H Mosier, 1973-1974
3151 Brockway Road
Waterloo, Iowa 50705
319-234-4471

Ralph W Gearhart 1974-1975
500 Merchants Nat'l Bank Bldg
Cedar Rapids, Iowa 52406
319-365-9461

Robert V P Waterman, 1975-1976
717 Davenport Bank Building
Davenport, Iowa 52801
319-324-3246

Stewart H M. Lund, 1976-1977
623 Second Street
Webster City, Iowa 50595
515-832-2626

Edward J Kelly, 1977-1978
1400 United Central Bank Bldg
Des Moines, Iowa 50309
515-288-6041

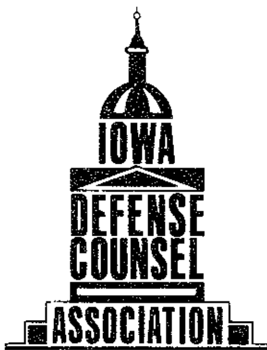
Don N Kersten, 1978-1979
Seventh Floor - Snell Bldg
Fort Dodge, Iowa 50501
515-576-4127

Marvin F Heidman, 1979-1980
200 Home Federal Building
Sioux City, Iowa 51101
712-255-8838

Herbert S. Selby, 1980-1981
P O Box 845
Newton, Iowa 50208
515-792-4141

L. R Voigts, 1981-1982
10th Floor Hubbell Bldg
Des Moines, Iowa 50309
515-283-3100

*Deceased



1982 Annual Meeting

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CHECKLIST FOR AFFIRMATIVE DEFENSES

PHIL WILLSON
SMITH, PETERSON BECKMAN & WILLSON
COUNCIL BLUFFS, IOWA

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1. Jurisdiction of Subject Matter A. Workers compensation as exclusive remedy	6.22				1
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4. Unconstitutionality of Statute relied on by Plaintiff	6.19				4
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9. Payment by Defendant or one Jointly Liable	6.69-6.73, 15.2, 15.4	8(c)		900	9
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17. Release		8(c)			
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25. Misjoinder of actions*	7.58		27(b)		20
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40. Legislative Immunity

41. Prosecutional (quasi-judicial) Immunity

42. Executive (good faith) Immunity

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45. Immunity from Punitive Damages					31
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FOOTNOTES

1. Freeman v. Chevron Oil Co. (CA 5th 1975) 517 F.2d; Wright & Miller, Fed. Practice §1271 m. 30, 32.

2. Attacks on jurisdiction of the person or the form of the original notice or its service must be made by special appearance.

3. Northbrook Residents Ass'n. v. Iowa State Dept. (Iowa, 1980) 298 N.W.2d 330, 331, 332; In re: Estate of Pearson (Iowa, 1982) _______ N.W.2d ___________.

4. Wright & Miller, Fed. Prac. & Proc. §1271 p. 307, m. 29.

5. Federal Procedural Forms 1 §1.503.

6. A denial is not sufficient. Facts relied on must be stated. Iowa Rule 98.

7. Bolinger v. Kiburz, 270 N.W.2d 603 (Iowa, 1978); Gourley v. Ronald Nielson 318, N.W.2d 160 (Iowa, 1982); Restatement Contracts 2nd §§378, 379.

8. Possible governmental, judicial, prosecutorial or parent immunity.

9. Federal Procedural Forms, 1:516.

10. Pleading 63, Federal Procedural Forms 1:514 and Federal Procedural Forms 1:520

11. Federal Procedural Forms 1:521; Restatement Second Contracts §84(b).

12. Federal Procedural Forms 1:509.

13. Restatement, Second, Judgments §§47, 61 (Tent. Draft).

14. Restatement, Second, Judgments §§48, 61 (Tent. Draft).

15. Restatement, Second, Judgments §56.1 (Tent. Draft).

16. Restatement, Second, Judgments §68 (Tent. Draft).

17. Colo v. Taylor (Iowa, 1981) 301 N.W.2d 766; Best v. Yerkes (Iowa, 1956) 247 Iowa 800, 77 N.W.2d 23, 28; Funderman v. Mickelson (Iowa, 1981), 304 N.W.2d 790.

18. Wright and Miller, Federal Pleading and Practice §1273; §§619.7, 619.8, The Code; Loth §§6.77, 37.5; Iowa Uniform Jury Instruction 3.22. Restatement of Contracts 2d §336.

19. Federal Procedural Forms 1:507, 11 USCS §§523, 524, 727.

20. The only remedy is by motion. Iowa Rule 27(b).

21. The grounds may include: prior action pending, assignment of cause of action before suit, corporation judicially dissolved, or premature action.

22. A denial is not sufficient. Facts relied on must be stated.

23. Pleading and Practice Forms-Auto 1331-1361; Federal Procedural Forms §1:506.

24. Pleading and Practice Form 1403.

25. Pleading and Practice Forms--Auto 1401-1403, Federal Procedural Form 1:505, Pleading and Practice Forms--Federal Procedure 253. Bessman v. Harding, 176 N.W.2d 129, 133, 134 (Iowa, 1970); Meade v. Roller 212 N.W.2d 426 (Iowa, 1973).

26. Turner v. Turner (Iowa, 1981) 304 N.W.2d 786, 788, 789. Abolishes parental immunity but reserves "the question whether there are areas of parental authority and discretion where immunity should exist."

27. Prosser, Torts 4th Ed. pp. 528-534.

28. 1979 Iowa Defense Counsel pp. 17-34.

29. 1980 Iowa Defense Counsel pp. 61-71; 1981 Bridge the Gap Institute pp. 412-415.

30. Chambers v. Omaha Public School District, 536 F.2d 222, 225 (8th Cir., 1976). Luken v. Nelson 341 F. Supp. 111 (1972) holds that there is no need to comply with notice of claim requirements.

31. Newport v. Facts Concerts, Inc. (1981) ____________ v. ______________, 69 L. Ed.2d 616, 1015 Ct. ____________.

32. Jones v. Marshall, 528 F.2d 132 (2nd Cir., 1975); T & M Homes, Inc. v. Mansfield, 162 N.J. Super 497, 393A.2d 613 (1978).

33. 27 Dr.L.R. 195, 212.

34. Uniform Jury Instruction 24.9

35. Winter v. Honeggers & Co., Inc., 215 N.W.2d 316 (Iowa, 1974). Notice is a condition precedent; therefore, a mere denial without pleading facts is insufficient §554.2607, The Code.

36. Hawkeye Security Insurance Co. v. Ford Motor Co., (Iowa, 1972), 199 N.W.2d 373, 382.

38. Comment 5 to §554.2715, The Code, and Comment 8 to §554.2316. See also §2314 and comment; anno: 4 ALR3d 501. 63 Am. Jur.2d Products Liability §32, 33. Romus v. A. O. South Corp. (1958, DC. Ia.) 158 F. Supp. 70, prior to adoption of U.C.C. is contra.

39. Questionable as a defense except as to economic damages. 63 Am Jur.2d Products Liability §30; §§554.1102(3), 554.2316, 554.2317, The Code.

40. Bonowski v. Revlon, Inc. 251 Iowa 141, 100 N.W.2d 5 (1959); 63 Am Jur.2d Products Liability §§200-205.

41. §622.32, The Code, is a rule of evidence. §§554.1206, .2201, .2209, .3416, .3416, .3419, and .9203 provide that where the UCC applies oral contracts are not enforceable.

42. Federal Procedural Forms 1:508.

43. Merrifield v. Troutner, 269 N.W.2d 136, 137 (Iowa, 1978) Compares equitable and promissory estoppel; Warden and Lee Elevator, Inc. v. Britten, 274 N.W.2d 339, 342, 343 (Iowa, 1979); Derking v. Bellas Hess Superstore, 258 N.W.2d 312 (Iowa, 1977).

44. Pleading and Practice Forms--Fraud 151-157, Federal Procedural Forms 1:511.

45. C. & J. Fertilizer, Inc. v. Allied Mutual Ins. Co., 227 N.W.2d 169 (Iowa, 1975).

*Not affirmative defenses. Listed as a reminder.

WORKER'S COMPENSATION--ORIGINAL PROCEEDINGS
ELEMENTS OF PROOF OF CLAIMANT'S CASE

1. A personal Injury. §85.3(1); 85.61(5)
2. Employer--Employee Relationship at the time of injury. §85.61(2, 3, 4)
3. Amount of Earnings.
4. Number of dependents (dependency in death cases).
5. Arising out of the Employment.
6. Arising in the course of the Employment.
7. Causal Connection for bills and injury.
8. Fair and reasonable amount of claimed professional and hospital bills.
9. Time disabled from work.
10. Nature and extent of any disability claimed.

Freeman v. Luppes Transportation Company, Inc., 227 N.W.2d 143 (Iowa, 1975); Nelson v. Cities Service Oil Company 259 Iowa 1209, 146 N.W.2d 261 (1967); Musselman v. Central Telephone Company 261 Iowa 532, 154 N.W.2d 128 (1967).

AFFIRMATIVE DEFENSES

		Code	Other
1.	Lack of Jurisdiction A. Subject Matter B. Person	85.71	1
2.	Coverage Excluded	85.1	
3.	Election of Remedies		2
4.	Statute of Limitations	85.26	3
5.	Failure to Give Notice	85.23	4
6.	Willful Intent to Injure Self or Another	85.16	
7.	Intoxication as a Proximate Cause	85.16	5

		Code	Other
8.	Willful Act of Third Party for Personal Reasons	85.16	
9.	Unauthorized Professional or Hospital Expenses	85.27	
10.	Failure to Submit to Medical Care	85.39	
11.	Independent Contractor		6
12.	Occupational Disease Defenses	85A.7	
13.	Other		7

FOOTNOTES

1. Iowa Beef Processors, Inc. v. Miller, 312 N.W.2d 530 (Iowa, 1981).

2. Bonlinger v. Kiburz, 270 N.W.2d 603 (Iowa, 1978); Larson §67.22.

3. Whitmer v. International Payer Co., Etc., 314 N.W.2d 411 (Iowa, 1982).

4. Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa, 1980); DeLong v. Iowa State Highway Commission, 229 Iowa 700, 295 N.W.2d 91 (1941).

5. Intoxication need only be a proximate cause. Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 171 (Iowa, 1979).

6. Daggett v. Nebraska-Eastern Express, Inc., 252 Iowa 341, 107 N.W.2d 102, (1961).

7. It is assumed that matters relating to cause (such as preexisting disability, subsequent injury or independent intervening cause) are admissible under a general denial. See Adam v. T.I.P. Rural Elec. Co-op, 271 N.W.2d 896, 902 (Iowa, 1978); State v. Marti, 290 N.W.2d 570, 584, 585 (Iowa, 1980); Schnebly v. Baker, 217 N.W.2d 708, 728-730 (Iowa, 1974). It is assumed that misconduct or violation of a work rule is admissible under a denial of "in the course of". See Enfield v. Certain-Teed Products Co., 211 Iowa 1004, 233 N.W.2d 141 (1930); Pohler v. T.W. Snow Constr. Co., 293 Iowa 1018, 33 N.W.2d 416 (1948); Buehner v. Hamptly, 161 N.W.2d 170 (Iowa, 1968). It is assumed that a claim that

the risk was not a risk reasonably related to employment would be admissible under a denial that the injury "arose out of".

AVOIDING INSURERS' EXCESS LIABILITY

DUTY TO DEFEND; AND CONFLICT OF INTEREST PROBLEMS

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DISCLAIMER

This paper will briefly address three problem areas frequently dealt with by insurance defense counsel. It is not meant to be an exhaustive treatment of any of the three subjects. It will attempt to list a few principles in each area with references to some Iowa cases on each subject, if found, with reference to some other authorities. Rely on it at your peril.

I. AVOIDING INSURERS' EXCESS LIABILITY

A. FAILURE TO SETTLE THIRD-PARTY CLAIMS WITHIN LIABILITY POLICY LIMITS:

(AUTHORITIES)

Hayes Bros. Inc. v. Economy Fire & Casualty Company, 634 F. 2d 1119 (1980);

Kooyman v. Farm Bureau Mutual Insurance Company, 267 NW 2d 403 (Iowa 1978);

Trask v. Iowa Kemper Mutual Insurance Company, 248 NW 2d 97 (Iowa 1976);

Petersen v. Farmers Casualty Company, 226 NW 2d 226 (Iowa 1975);

Koppie v. Allied Mutual Insurance Company, 210 NW 2d 844 (Iowa 1973);

Kohlstedt v. Farm Bureau Mutual Insurance Company, 258 Iowa 337, 139 NW 2d 184 (Iowa 1965);

Ferris v. Employers Mutual Casualty Company, 255 Iowa 511, 122 NW 2d 263 (Iowa 1963);

Henke v. Iowa Home Mutual Casualty Company, 250 Iowa 1123, 97 NW 2d 168 (Iowa 1959);

(AUTHORITIES)
Continued

INSURER'S LIABILITY TO INSURED FOR JUDGMENTS EXCEEDING POLICY LIMITS, 7 Drake Law Review 23;

MONOGRAPH, Insurance Law - Excess Liability, DRI, Volume 1973, Number 3, and extensive Annotated Bibliography contained therein, Pages 81 thru 84;

ANNOTATION, INSURED'S PAYMENT OF EXCESS JUDGMENT, OR A PORTION THEREOF, AS PREREQUISITE OF RECOVERY AGAINST LIABILITY INSURER FOR WRONGFUL FAILURE TO SETTLE CLAIM AGAINST INSURED, 63 ALR 3d 627;

ANNOTATION, RIGHT OF INJURED PERSON RECOVERING EXCESS JUDGMENT AGAINST INSURED TO MAINTAIN ACTION AGAINST LIABILITY INSURER FOR WRONGFUL FAILURE TO SETTLE CLAIM, 63 ALR 3d 677;

ANNOTATION, RELIANCE ON, OR REJECTION OF, ADVICE OF COUNSEL AS FACTOR AFFECTING LIABILITY IN ACTION AGAINST LIABILITY INSURER FOR WRONGFUL REFUSAL TO SETTLE CLAIM, 63 ALR 3d 725;

ANNOTATION, LIABILITY INSURER'S NEGLIGENCE OR BAD FAITH IN CONDUCTING DEFENSE AS GROUND OF LIABILITY TO INSURED, 34 ALR 3d 533;

ANNOTATION, DUTY OF LIABILITY INSURER TO SETTLE OR COMPROMISE, 40 ALR 2d 168;

GENERAL PRINCIPLES

1. An insurer in Iowa may be liable in excess of the limits of the policy where it was established the insurer acted in bad faith. (See Kooyman.)

2. Honest mistake of judgment or inadvertance after good faith dealings is not sufficient to show bad faith. (See Henke.)

3. The burden is on the insured to show bad faith. (See Ferris.)

4. The insurer is not required to compensate for the insured's failure to carry adequate insurance.

5. To show bad faith it must appear not only the settlement offer was reasonable but the insurer had no reasonable basis for its judgment the offer was not reasonable. The question is was the judgment of the insurer reasonable at the time, not was it correct in the light of subsequent events. (See Kohlstedt.)

6. Bad faith must be shown by a preponderance of the evidence. (See Koppie.)

7. Bad faith is a state of mind (See Ferris), and requires the introduction of substantial evidence, as a scintilla of evidence is insufficient. (see Trask.)

8. Although the test is one of bad faith, some negligences may be material to the issue of bad faith. However, not every negligence of the insurer should be held evidence of bad faith. It is only acts of negligence that show or permit an inference of indifference to or disregard of the interest of the insured, that are material. (See Kooyman. But see, Petersen.)

9. Failure to accept an offer to settle within policy limits by a specific date will expose the carrier to excess liability even though it later offers policy limits, which is rejected. (See Hayes.)

10. An insurer cannot be held liable for refusal to settle within the policy limits where the proposal of a claimant was merely conditional. The settlement offer must be definite and specific. (See Henke, and Hayes.)

11. An award of punitive damages for failure to settle within policy limits and thereby exposing the insured to an excess judgment will be allowed only on a clear showing that the insurer's conduct was in willful or reckless disregard of the insured's rights and with complete indifference to the insured's interest. (See Hayes and discussion of various Iowa cases on punitive damages at Page 1124 thereof.)

CONDUCT EVIDENCING BAD FAITH

1. The rejection of reasonable settlement proposals within the policy limits.

2. When the insurer advises the insured to transfer property to avoid payment of possible excess liability.

3. When the insurer disregards the recommendations urged by their field adjuster as well as their local and trial counsel.

4. If the insurer rejects the advice of its own attorneys.

5. Failure on the part of the insurer and counsel to inform the insured of its possible excess liability or to disclose to him the status of settlement negotiations and offers of settlement.

6. If the evidence as to liability and damages was strongly against the insured.

7. If the insurer recognized the advisability of settlement, but attempted to induce the insured to contribute thereto.

8. If the insurer failed to properly investigate the claim so as to be able to intelligently assess the probabilities.

9. If the insurer fails to accept a compromise offer to settle within policy limits after an excess judgment has been rendered against the insured.

10. The failure in some circumstances to inform a fiduciary or client of the policy limits.

11. The failure to appeal if there is a showing that such appeal had a hope of success.

TO AVOID BAD FAITH

1. The insurer should view settlement negotiations objectively, as if there were no policy limitations.

2. It must be shown that any refusal of settlement offers were of offers in excess of the policy limits.

3. The insurer must conduct good faith investigations of all aspects of the case, including the exercise of the upmost care and diligence in the interviewing of witnesses, visiting the scene, and ascertaining all facts and circumstances. This probably requires complete use of discovery.

4. The insurer must consider a proposed settlement in good faith based on such investigation and the apparent state of the law within the policy limits.

5. All of the insurer's employees and agents must also act in good faith.

6. The insurer must not refuse to make a settlement if it knows it has no more than equal, or less than a 50-50 chance of winning the case, when the judgment could exceed the policy limits.

7. The insurer and counsel must inform the insured of its possible excess liability.

8. The insurer and counsel must disclose to insured the status of settlement negotiations and offers of settlement.

B. EXCESS LIABILITY - FIRST-PARTY INSURANCE:

(AUTHORITIES)

Dublinske v. Pacific Fidelity Life Ins. Co., 230 NW 2d 924 (Iowa 1975);

Amsden v. Grinnell Mutual Reinsurance Co., 203 NW 2d 252 (Iowa 1972);

See, Beeck v. Kapalis, 302 NW 2d 90. (This is a somewhat related case and the court at Page 96 mentions a possible breach of the insurer's duty to conduct a proper defense and cites various Iowa and other authorities.);

MONOGRAPH, Insurance Law - Excess Liability-First Party Insurance, DRI, Volume 1977, Number 1, and extensive Annotated Bibliography contained therein, Pages 44 thru 47, citing numerous Law Review articles on related subjects;

ANNOTATION, INSURER'S LIABILITY FOR CONSEQUENTIAL OR PUNITIVE DAMAGES FOR WRONGFUL DELAY OR REFUSAL TO MAKE PAYMENTS DUE UNDER CONTRACTS, 47 ALR 3d 314.

GENERAL COMMENT ON SUBJECT

Excess Liability of insurers in First-Party Contract situations is a fairly recent development in insurance law. It seemingly involves a new tort which may be characterized as a breech of duty of good faith and fair dealing. The law has developed primarily in the State of California, but there are cases in many other jurisdictions, including some in Iowa, two of which are cited above, namely Dublinske and Amsden. In the Dublinske case a second beneficiary of credit-life insurance sued for benefits and claimed punitive damages which was denied. The court held the beneficiary was not entitled to punitive damages where the amount found to be due the beneficiary was substantially the same as the amount contended by the insurer.

In Amsden the insured brought an action for intentional infliction of emotional distress against the insurer under a fire policy. The insured alleged the insurer was guilty of bad faith in failing and refusing to pay the fire loss claim when its duty to do so was clear. The court indicated there was not outrageous conduct shown but rather the company had a right to wait a reasonable time for an arson investigation to be completed and to determine the exact amount due.

The Beeck case is not truely a First-Party excess case but is somewhat related. In that case an action was brought to recover against a corporation, its insurer and insurer's employees on theory that fradulent, negligent or innocent misrepresenation that a slide was manufactured by such corporation, when in fact it was not, caused them to lose their cause of action against the real manufacturer because the statute of limitations had run in the meantime. At Page 96 thereof the court makes some interesting references to excess liability law in Iowa after making this statement:

"We caution that we are only considering Beecks' claim against Aquaslide for representations, primarily by Meyer in the answer to the interrogatory, that the slide was an Aquaslide. We are aware that Aquaslide, which was in Texas, might claim that it was basing the misrepresentation to Beecks on its insurer's investigation and statements from the lawyers hired to defend it. Since we are not presented with any cross-claim by Aquaslide against its insurer for any alleged breach of its duty to conduct a proper defense, particularly in the investigation, we express no opinion on the subject."

The author of the Annotation in 47 ALR 3d, 314, at Page 318, indicates as a general statement that the annotated cases recognize that an insurer may be liable for collateral damages arising out of his delay or refusal to make payments owing under an insurance policy, where such delay or refusal is wrongful, and proper bases for compensation for consequential losses are shown.

It appears to this writer that this general field of the law - Excess Liability - First Party contracts, may be a rapidly expanding one and involve practically all types of insurance policies, such as life, disability, accident and health, fire and extended coverage, automobile first party, and uninsured motorist, etc. While it may have no standing as precedent, a recent Wisconsin case, Schwittay v. Aetna Casualty & Surety Co., Wisconsin-Milwaukee County Circuit Court No. 464-751, decided April 30, 1981 resulted in a jury verdict of $10,000.00 compensatory damages and $100,000.00 punitive damages against an insurer for its bad faith failure to advise its insured of her right to submit a claim for pain, suffering and disability under her uninsured motorist policy. The company had settled with the insured who was unrepresented, for the amount of $1,012.00 without advising her of her right to submit a claim for pain, suffering and disability. The jury found the carrier acted with outrageous disregard for the rights of its insured in making the award. This may be a sign of things to come.

C. DUTY OF PRIMARY CARRIER TO EXCESS CARRIER:

(AUTHORITIES)

Lysick v. Walcom, 65 Cal Rptr 406 (Cal App 1968);

Knepper, Relationship Between Primary and Excess Carriers in Cases Where Judgment or Settlement Value Will Exhaust Primary Coverage, 20 Ins Counsel J 207, 210 (July 1953);

Bloom, Recovery Against Primary Insurer by Excess Carrier for Bad Faith or Negligent Failure to Settle, 36 Ins Counsel J, 235, 238 (Apr 1969);

MONOGRAPH, Insurance Law - Excess Liability, DRI, Volume 1973, Number 3;

See, Westhoff v. American Interinsurance Exchange, 250 NW 2d 404 (Iowa 1977); and Union Insurance Co. (Mutual) v. Iowa Hardware Mutual Insurance Co., 175 NW 2d 413 (Iowa 1970);

The Westhoff and Union Insurance Company cases do not involve the duty of the primary to the excess carrier but deal with the troublesome problems of "other insurance" provisions and questions of which policy is primary or excess in automobile liability policies.

GENERAL STATEMENT

There is little definitive law on this subject in Iowa that the writer has been able to find. In the excess liability Monograph prepared by DRI, as cited above, the author discusses the problem at some length at Pages 23, 24 and 25. He refers to one California case and two articles. He concludes that generally the primary insurer's duties and obligations to exercise good faith apply both to its insured and to an excess insurer. He further surmises that in those situations where a court would find that a primary insurer evidenced bad faith by refusing a proper settlement within its policy limits, unless an insured contributed to settlement, the courts would likewise find bad faith where a similar demand was made upon an excess insurer. It seems that generally the same principles apply as between a primary and an excess insurer as apply between the insurer and its insured.

II. DUTY TO DEFEND

(AUTHORITIES)

State Farm Auto Insurance Company v. Malcolm, 259 NW 2d 833 (Iowa 1977);

New Hampshire Insurance Company v. Christy, 200 NW 2d 834 (Iowa 1972);

Stover v. State Farm Mutual Insurance Company, 189 NW 2d 588 (Iowa 1971);

Central Bearings Company v. Wolverine Insurance Company, 179 NW 2d 443 (Iowa 1970);

INSURER'S DUTY TO DEFEND, DRI, Volume 17, No. 4 and authorities cited therein;

ANNOTATION, INSURED'S RIGHT TO RECOVER ATTORNEYS' FEES INCURRED IN DECLARATORY JUDGMENT ACTION TO DETERMINE EXISTENCE OF COVERAGE UNDER LIABILITY POLICY, 87 ALR 3d, Page 429;

(Annotation on the Christy Case, Supra)

GENERAL PRINCIPLES

1. An insurer has no duty to defend nor indemnify if it appears the claim made is not covered by the indemnity insurance contract issued. However, the insurer must first construe both the policy in question, the pleadings of the injured party, and any other admissible and relevant facts in the record before making such decision.

2. An insurer does have a duty to defend if there are extraneous facts which are known either to the insurer or the insured which, if proved, make out a case against the insured which is covered by the policy.

3. Any doubts as to the coverage of a policy should be resolved in favor of the insured. (See Wolverine.)

4. An insurer is not required to defend if it would not be bound to indemnify the insured, even though the claim against the insured should prevail in that action. (See Stover.)

5. An insurer who refuses to defend third-party actions against its insured, contrary to its contractual obligation, is liable for the insured's attorney's fees incurred by the insured in defense of the claim. (See Christy.)

6. An insurer's duty to defend is contractual, and is therefore ultimately based on the policy provisions.

7. The words and phrases of a policy should not be strained to impose liability on an insurer that was not intended and not purchased. And in the same vein, if there is no ambiguity in a contract there is no right or duty on the part of the court to write a new contract of insurance between the parties. (See Malcolm.)

III. CONFLICTS OF INTEREST

(AUTHORITIES)

Henke v. Iowa Home Mutual Casualty Company, 249 Iowa 614, 87 NW 2d 920 (Iowa 1958);

Rogers v. Robson, Masters, Ryan, Brumund & Belom, 81 Illinois 2d 201, 407 NE 2d 47;

Gonsoulin, OBSERVATIONS ON ATTORNEYS' CONFLICT OF INTERESTS, 19 FTD (July, 1978) Defense Memo of DRI;

MONOGRAPH, Insurance Law - Conflicts of Interest in Insurance Practice, DRI, Volume 1971, Number 5, and extensive Bibliography contained therein, Page 54;

ANNOTATION, MALPRACTICE: LIABILITY OF ATTORNEY REPRESENTING CONFLICTING INTERESTS, 28 ALR 3d 389;

ANNOTATION, LIABILITY INSURER'S RIGHTS AND DUTIES AS TO DEFENSE AND SETTLEMENT AS AFFECTED BY ITS HAVING ISSUED POLICIES COVERING PARTIES WHO HAVE CONFLICTING INTERESTS, 18 ALR 3d 482;

ANNOTATION, PROPRIETY AND EFFECT OF ATTORNEY REPRESENTING INTEREST ADVERSE TO THAT OF FORMER CLIENT, 52 ALR 2d 1243;

ANNOTATION, PRIVILEGE OF COMMUNICATIONS OR REPORTS BETWEEN LIABILITY OR INDEMNITY INSURER AND INSURED, 22 ALR 2d 659;

CODE OF PROFESSIONAL RESPONSIBILITY, Cannon 5, Ethical Considerations, EC 5-1, EC 5-14, EC 5-15, EC 5-16, EC 5-17, EC 5-19; Disciplinary Rules DR 5-105 (A), (B), (C), & (D), DR 5-107 (A)(1) & (2) and (B), and Notes 23.

GENERAL DISCUSSION

The conflicts of interest problem is a particularly difficult one for an attorney employed by an insurance company to represent an insured. In a real sense he is attempting to serve two masters. It would tax the wisdom of Solomon to make the correct decision in all situations that may arise. The writer has attempted to set forth an important, if not the leading Iowa case on the subject, and other authorities most important of which is the Code of Professional Responsibility. Your attention is directed to the cases and authorities and discussions under the first topic of this paper dealing with the problems of the insurer's excess liability. In practically all of those situations the attorney is faced with a conflict of interest and they are the type that must be dealt with. This writer believes that the factors set forth therein, dealing with the issue of bad faith, are basically the proper guidelines for the attorney's conduct to avoid the problems of conflict of interest if it can in fact be avoided.

Keep in mind that there may be situations wherein an attorney simply cannot represent both parties and must withdraw from representation of one or both.

The Henke case cited above, which is the first Henke opinion, involves the issue as to whether correspondence, reports and communications are confidential and privileged between an insurer and the attorney employed by it to defend an insured in litigation resulting from an automobile accident insofar as it pertains to that litigation. The court held that the papers were not confidential and that the claim of privilege was invalid. The case is set out here, however, because the court in that case clearly enunciated the role and duty of an attorney employed by an insurance company to represent an insured. The quotation of the court on this subject from Pages 617 and 618 of 249 Iowa is set out in full.

"I. Defendant denies there is any attorney-client relationship between a lawyer, hired by an insurer and who defends the insured under the terms of the insurance policy, and the insured. The contention is without merit. The fact that another selects and pays an attorney does not control the relationship of attorney-client. It may be a factor to be considered in proving that such relationship exists, but there are many other more important factors, such as the undertaking by the attorney, and the acceptance of his services by the other. When with due knowledge one assents to the appearance in court of an attorney in his behalf, an attorney-client relationship must be presumed. It is no answer that under the contract the insured agrees to co-operate and aid the insurer's attorney. Nothing in the policy compels the insured or his representative to accept the attorney selected by the insurer. He may reject such attorney and thus relieve the insurer from the obligation. On the other hand, if he consults and communicates with the furnished attorney, as contemplated by all parties, on the matter involved, and permits that attorney to enter his appearance in court for him, these actions tend to establish a clear personal relationship between himself and the attorney which is entitled to the usual confidences of client and attorney. There is no question here but what such a relationship did exist, and we hold that the district court was correct in its finding that the attorney hired by the insurer who tried the two cases did legally represent both parties in those transactions."

Attention is specifically directed to the 1980 Illinois case of _Rogers v. Robson_ cited above. This was an action by an insured doctor against the attorneys employed by his insurance carrier who had settled the case without his permission. While the attorney felt he was acting properly and in the doctor's best interest he did not obtain his specific consent to the settlement and therefore exposed himself to liability. The case is of extreme importance to insurance counsel and should be read by all. If there is a lesson to be learned it probably is this. _The insured is your client and you must keep his rights paramount in your sights._

Because of the importance of this subject and the apparent lack of familiarity with the pertinent portions of the Code of Professional Responsibility governing counsel in this matter, those portions of Cannon 5, cited above herein, are set forth for easy reference by counsel. Attention is directed to the fact that there are three portions of the Code of Professional Responsibility governing conduct herein, namely Ethical Considerations, Disciplinary Rules and Notes.

CANON 5

A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client

ETHICAL CONSIDERATIONS

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

EC 5-14 Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client.[17] This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.[18]

EC 5-15 If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests;[19] and there are few situations in which he would be justified in repre-

senting in litigation multiple clients with potentially differing interests. If a lawyer accepted such employment and the interests did become actually differing, he would have to withdraw from employment with likelihood of resulting hardship on the clients; and for this reason it is preferable that he refuse the employment initially. On the other hand, there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation. If the interests vary only slightly, it is generally likely that the lawyer will not be subjected to an adverse influence and that he can retain his independent judgment on behalf of each client; and if the interests become differing, withdrawal is less likely to have a disruptive effect upon the causes of his clients.

EC 5-16 In those instances in which a lawyer is justified in representing two or more clients having differing interests, it is nevertheless essential that each client be given the opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires.[20] Thus before a lawyer may represent multiple clients, he should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent.[21] If there are present other circumstances that might cause any of the multiple clients to question the undivided loyalty of the lawyer, he should also advise all of the clients of those circumstances.[22]

EC 5-17 Typically recurring situations involving potentially differing interests are those in which a lawyer is asked to represent co-defendants in a criminal case, co-plaintiffs in a personal injury case, an insured and his insurer,[23] and beneficiaries of the estate of a decedent. Whether a lawyer can fairly and adequately protect the interests of multiple clients in these and similar situations depends upon an analysis of each case. In certain circumstances, there may exist little change of the judgment of the lawyer being adversely affected by the slight possibility that the interests will become actually differing; in other circumstances, the chance of adverse effect upon his judgment is not unlikely.

EC 5-19 A lawyer may represent several clients whose interests are not actually or potentially differing. Nevertheless, he should explain any circumstances that might cause a client to question his undivided loyalty.[24] Regardless of the belief of a lawyer that he may properly represent multiple clients, he must defer to a client who holds the contrary belief and withdraw from representation of that client.

DISCIPLINARY RULES

DR 5-105 Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment,[35] except to the extent permitted under DR 5-105(C).[36]

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C).[37]

(C) In the situations covered by DR 5-105 (A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

(D) If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment.

DR 5-107 Avoiding Influence by Others Than the Client.

(A) Except with the consent of his client after full disclosure, a lawyer shall not:

(1) Accept compensation for his legal services from one other than his client.

(2) Accept from one other than his client any thing of value related to his representation of or his employment by his client.[39]

(B) A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.[40]

NOTES

23. *Cf. ABA Opinion* 282 (1950).

"When counsel, although paid by the casualty company, undertakes to represent the policyholder and files his notice of appearance, he owes to his client, the assured, an undeviating and single allegiance. His fealty embraces the requirement to produce in court all witnesses, fact and expert, who are available and necessary for the proper protection of the rights of his client. . . .

". . . The Canons of Professional Ethics make it pellucid that there are not two standards, one applying to counsel privately retained by a client and the other to counsel paid by an insurance carrier." American Employers Ins. Co. v. Goble Aircraft Specialties, 205 Misc. 1066, 1075, 131 N.Y.S.2d 393, 401 (1954), *motion to withdraw appeal granted*, 1 App. Div. 2d 1008, 154 N.Y.S.2d 835 (1956).

"[C]ounsel selected by State Farm to defend Dorothy Waller's suit for $50,000 damages was apprised by Waller that his earlier version of the accident was untrue and that actually the accident occurred because he lost control of his car in passing a Cadillac just ahead. At that point, Waller's counsel should have refused to participate further in view of the conflict of interest between Waller and State

Farm. . . . Instead he participated in the ensuing deposition of the Walkers, even took an *ex parte* sworn statement from Mr. Walker in order to advise State Farm what action it should take, and later used the statement against Walker in the District Court. This action appears to contravene an Indiana attorney's duty 'at every peril to himself, to preserve the secrets of his client' . . . .'" State Farm Mut. Auto Ins. Co. v. Walker, 382 F.2d 548, 552 (1967), *cert. denied*, 389 U.S. 1045, 19 L. Ed.2d 837, 88 S. Ct. 789 (1968).

SUGGESTIONS TO AVOID CONFLICTS

THE COMPANY:

1. Should not ask or expect the attorney to obtain information from the insured, or others, for use against the insured.

2. Must not expect or require the attorney to respond on behalf of the company to questions posed by the insured.

3. Must not request or expect the attorney to send a reservation of rights letter to the insured or obtain a reservation of rights agreement from the insured.

4. Must not request or expect the attorney to render an opinion relative to a conflict that would require the attorney to withdraw from the defense of the insured. Instead the company should obtain the opinion of a completely independent attorney relative to any suspected conflict question, and particularly relative to the necessity of the retained attorney withdrawing from his representation.

5. Must never attempt to limit the attorney in fully preparing for and providing a complete defense to the case, regardless of the chances of settlement.

6. Should not request nor direct the attorney to refrain from reporting all facts to the insured, but keep in mind that the attorney has a duty to keep the insured advised of the progress of the case at all stages, including all settlement offers that affect him so he may take any and all steps to protect his own interests.

THE ATTORNEY EMPLOYED BY THE INSURANCE COMPANY:

1. Must always keep in mind that the insured is his client and deal with him at all times as he would any other client.

2. Keep the insured advised of the progress of the case generally, and particularly of settlement negotiations and settlement opportunities. In those cases where by the terms of the policy, or otherwise, the insured's consent must be obtained for settlement, obtain specific written approval to any proposed settlement prior to consumating the settlement. It is probably wise to obtain the insured's approval to every settlement even though it may not technically be required.

3. Advise the client both formally, in writing, and informally by personal conversation of his rights to employ his personal attorney in the event of any excess or conflict situation; and make it clear that you <u>welcome</u> any comments, suggestions or advice the insured's personal attorney may have at any and all stages up to and including settlement negotiations and trial, if the case is not settled. If independent counsel is obtained prior to trial you should determine if he desires to be counsel of record and appear on the pleadings and invite his participation in all court appearances, pre-trial conferences, discovery, settlement negotiations and trial. In the event of settlement obtain his written approval.

4. Be willing to withdraw in the event it appears you cannot properly represent the interests of the insured and the insurance company at any stage. In the event of a withdrawal, however, be certain that it is done at such time and under such circumstances that both the insured and the insurance company have adequate time to obtain other counsel and make certain that other competent counsel are obtained and have undertaken the defense before completing your withdrawal. Also, always make application to and obtain written court authority to withdraw before doing so.

THE PERSONAL ATTORNEY EMPLOYED BY THE INSURED:

1. Represent the interests of the insured fully and fairly even though it may be contrary to the wishes of the company and the retained attorney.

2. Advise the retained attorney and the insurance carrier directly of the insured's desire to settle the case within policy limits, setting out in detail the reasons and justifications for such a settlement and the dangers of failure to do so, including the consequences of such failure.

3. Make clear to a client at all stages that he is representing the client only and that the client and not the insurance company will pay his bill. For this reason the client should be consulted as to the extent of participation of the attorney in the actual handling of the case, including appearance on pleadings, participation in discovery, pre-trial and trial.

4. Determine whether the best interests of the client will be served by simply keeping advised generally as to the status of the matter, and making an appropriate demand rather than participating in the actual conduct and handling of the case. In the event of a bad result and an excess judgment, the personal attorney of the insured, and the insured as his client, may be in a better position to proceed on the excess if the personal attorney has not been a party to the proceedings.

THE PLAINTIFF'S ATTORNEY:

1. Should know as much about conflict of interest problems, including excess problems, as the attorney retained by the insurance carrier and by the personal attorney.

2. He should very early determine the details of coverage and the attitude of both the retained attorney and the personal attorney, if any.

3. Thoroughtly and adequately investigate and prepare his case so that he can properly evaluate it for settlement purposes and then make an appropriate settlement demand at the earliest possible stage, with all necessary supporting facts and citations of the law to support his position.

4. Make certain that any offer of settlement is clear, definite and unequivocal. If there are subrogation interests, or interests of other parties that in any way affect the settlement, it must be clear factually and in the offer that all interested persons and parties have consented to the settlement and it takes their interests into account. Remember that a conditional offer is no offer at all and will not create an excess situation.

WORKERS' COMPENSATION UPDATE

REPORTED CASES

ARMSTRONG TIRE & RUBBER CO. V. KUBLI, Iowa App., 312 N.W.2d 60 (1981)

Appeal from a district court decision affirming an award of workers' compensation to claimant. The court of appeals, in a *per curiam* decision, affirmed in part and reversed and remanded in part. In an arbitration decision the deputy commissioner found that claimant's back disease was aggravated by injuries occurring over a span of several years and that his injury arose out of and in the course of his employment. The deputy awarded claimant a running award of healing period benefits until the terms and conditions of section 85.34(1), The Code, had been met. The commissioner affirmed. The primary issues are whether there is sufficient evidence to support a finding that claimant's disability was caused by an injury arising out of his employment and whether claimant was entitled to healing period benefits.

The court held that there was substantial evidence in the record to support the conclusion that claimant's employment activity was a substantial factor in causing claimant's disability. Medical experts for both parties testified that the repetitive bending, lifting, and twisting required by claimant's employment aggravated his degenerative back disease. The court held that the employment activity was a proximate contributing cause of claimant's disability, citing the authority of Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980) that the activity "needs to be one cause; it does not have to be the only cause." *Id.*

Section 85.34(1), The Code provides that healing period is to be paid until claimant returns to work or competent medical evidence indicates that recuperation from the injury has been accomplished. The court held "that 'recuperation' as used in this statute refers to that condition in which healing is complete and the extent of the disability can be determined." Healing period is to be characterized as the period during which there is a reasonable expectation of improvement and ends when maximum medical improvement is reached. Here, the medical testimony was that claimant's injury from the beginning was one that would not improve but would be aggravated by further physical exertion. The court reversed the award of healing period benefits concluding that claimant was not entitled to healing period due to the fact that from the start no further improvement of claimant's condition was anticipated. The court remanded the case to the commissioner for determination of percent of claimant's permanent partial disability.

THOMPSON V. BOHLKEN, 312 N.W.2d 501 (Iowa 1981)

Appeal from a district court ruling dismissing a tort action against co-employee Bohlken but overruling motions for a directed verdict against plant manager Long and Travelers Insurance Company. The supreme court reversed on Long's appeal and reversed and remanded on Travelers' appeal.

An employee who lost fingers of his left hand while operating a press for his employer brought suit against two co-employees

asserting gross negligence in failing to provide him with a safe machine, and against employer's workers' compensation insurance carrier, alleging negligence in its "gratuitous" safety inspection preceding the accident.

The court stated that there are three elements necessary to establish gross negligence amounting to such lack of care as to amount to wanton neglect under section 85.20, The Code, for injuries sustained in a work related accident: (1) knowledge of the peril to be apprehended; (2) knowledge that injury is a probable, as opposed to a possible, result of the danger; (3) a conscious failure to avoid the peril. The court concluded the conduct of the plant manager did not constitute gross negligence, that the most the evidence established under the circumstances was want of ordinary care and there was no evidence under the facts known or which should have been known that the employee's injury was probable.

The court further stated that "we have clearly recognized a cause of action against an insurer based upon negligence in conducting 'gratuitous' inspections." Application of section 324A of the Restatement (Second) of Torts (1965) which the court adopted for imposing liability on the defendant insurance carrier for inspecting the plant, depends on whether there was substantial evidence that the inspection was one which the carrier should have recognized as necessary for the protection of third persons and, if so, that (1) such inspection increased the risk of harm or (2) harm was suffered by the employee

because of reliance upon it by him or by his employer on the inspection. The court found that there was no evidence of any changes brought about by the insurance carrier in the machine or the employer's operating procedure which could be said to have increased the risk; thus, there was insufficient evidence of liability under Restatement section 324A(a), and the trial court erred in submitting that issue to the jury. On the issue of liability based on reliance, there was evidence from which the jury could find the employer relied upon these inspections and the employee was injured as a result of such reliance, the court properly submitted the issue of liability under subsection 324A(c). The court remanded for a new trial.

ROSS V. ROSS, 308 N.W.2d 50 (Iowa 1981)

Appeal from district court decision affirming denial of workers' compensation benefits. The supreme court affirmed the district court. Claimant's decedent was a farmer whose farming operation was conducted in a close family association with his father and brother. There was extensive exchange labor among the three farms. On the day of his death, decedent spent the morning working on his father's farm. He then drove to the farm his brother operated to see if he could be of some assistance. After speaking to the brother, decedent decided to return to his father's farm and on his way, was involved in the fatal collision.

One issue in this case is whether claimant's decedent was an employee of his parents. The court held that the industrial commissioner clearly found that no employer-employee relationship

existed and further observed that, even had such employment existed, decedent would have been excluded as a child under section 85.1(3), The Code. The court further found that there is a rational basis for treating farm employees different than other employees: Section 85.1(3), The Code, does not deny equal protection by excluding both groups from compulsory workers' compensation coverage; it was not a denial of equal protection to grant an employer the right to elect coverage without granting a similar right to the employee.

COWELL V. ALL-AMERICAN, INC., 308 N.W.2d 92 (Iowa 1981)

Appeal from district court decision modifying an award of workers' compensation. The supreme court reversed the district court. The court held that mailing the petition for judicial review to the attorney's address rather than the employer's address was not fatal to jurisdiction. The court citing Delman v. Commissioner, 384 F.2d 929 (3d Cir.), cert. denied, 390 U.S. 952, 88 S. Ct. 1044, 19 L. Ed. 2d 1144 (1967) found that the petitioner could reasonably conclude that the employer wished all communications in the proceeding to be sent to its attorney's address. At the time of mailing the copy of the petition for judicial review, the petitioner's selection of the attorney's address was not unreasonable. The court further found that there was no basis for the district court finding that the commissioner's decision on the claimant's industrial disability was unsupported by substantial evidence, arbitrary and capricious, or induced by an error of law.

IOWA BEEF PROCESSORS, INC. v. MILLER, 312 N.W.2d 530 (Iowa 1981)

Appeal from a district court judgment affirming the decision of the industrial commissioner allowing benefits. The supreme court reversed. Claimant was domiciled in Iowa but was injured at her place of employment in Nebraska. The court held that under section 85.71(1), The Code, domicile in Iowa alone is not sufficient to entitle an employee who has sustained an injury outside the state to benefits provided by the Iowa Workers' Compensation Act. The court stated that there must be some meaningful relationship before an Iowa domiciliary becomes entitled to Iowa benefits for an injury occurring outside Iowa. The response by Miller to an employment advertisement in an Iowa newspaper was found to be an insufficient relationship, however, the question of how substantial the connection between domicile and the employment relationship must be to entitle an employee injured in another state to benefits under the Iowa Workers' Compensation Act was not addressed in this appeal.

CATERPILLAR TRACTOR CO. v. SHOOK, 313 N.W.2d 503 (Iowa 1981)

Appeal from a district court judgment reversing the industrial commissioner's finding that an employment relationship existed between claimant and defendant employer at the time of the injury. The supreme court reversed the district court and affirmed the commissioner. Claimant was a machine operator for defendant employer. He was elected by his fellow employees to three union positions to which he devoted full time. He was considered by the employer to be on a leave of absence but was

paid by the employer for his duties as chairman of the grievance committee. Claimant was injured in a motorcycle accident while en route to collective bargaining negotiations. The court discussed the factors considered in determining whether an employer-employee relationship exists and concluded that the commissioner was correct in finding that an employment relationship existed between Shook and Caterpillar at the time he was injured. An employee may have more than one employer. In that situation the worker may be an employee of one employer for the purpose of certain activities but the employee of another employer while doing other work. The court found that Caterpillar benefited from the relationship because a properly operating grievance procedure contributes to industrial peace.

The court further held that the commissioner did not err in concluding claimant was in the course of his employment when injured. Claimant was on his way from the union hall to the negotiating session when he was injured and was paid by Caterpillar until the negotiations began. His travel was incidental to his duties and therefore the time, place and activity were work-connected.

WHITMER V. INTERNATIONAL PAPER CO., ETC., 314 N.W.2d 411 (Iowa 1982)

Appeal from district court's judgment dismissing claimant's review-reopening claim. The supreme court affirmed. Claimant was injured in the course of her employment when a bank of lights fell and struck her on the side of the head and face on October 12, 1972. She was awarded five percent permanent

partial disability. The last payment of compensation was made on February 27, 1974. On May 23, 1979 claimant filed a petition in review-reopening alleging that the injuries to her brain, neck, and back had produced an epileptic condition which could not be and was not discovered until April 1979. The court held that under the plain language of section 86.34, The Code 1971, (now section 85.26, The Code), the "discovery rule" does not apply to review-reopening cases. Therefore, such proceedings must be commenced within three years of the last payment of compensation made under the original award, regardless of when the additional injury or disability is discovered or discoverable.

WILSON FOOD CORPORATION V. CHERRY, 315 N.W.2d 756 (Iowa 1982)

Appeal from a district court judgment affirming a determination that an employer is entitled to a credit for overpayment of healing period benefits against permanent partial disability benefits. The supreme court affirmed. The employer, through administrative error, continued paying the claimant $91 weekly for healing period benefits until February 9, 1979, whereas they should have been reduced to $84 weekly beginning December 9, 1975, when claimant reached maximum recuperation. Temporary disability benefits under Iowa Code section 85.33 are deducted from any amount of healing period benefits under section 85.34. A similar credit is granted under section 85.34(3) for permanent partial disability payments from benefits for permanent total disability. Iowa Code section 85.34, however, does not provide for such a credit against permanent partial disability benefits

for healing period payments already made. The court held that the fact that the legislature chose not to address such a credit does not mean that the legislature intended to exclude such a credit. Benefits for permanent partial disability under section 85.34(2) do not begin until the termination of the healing period pursuant to section 85.34(1). The question of a credit was therefore not needed in the legislative scheme to proscribe simultaneous collection of two benefits. While such a credit would result in inconvenience by an earlier cutoff of permanent partial disability benefits, the claimant still receives the full value of the award to which he is legally entitled. Moreover, the public interest is served by allowing such a credit in that employers are encouraged to freely pay benefits to injured employees without fear of later penalty for having done so.

DORMAN V. CARROLL COUNTY, Iowa App., 316 N.W.2d 423 (1982)

Appeal from a district court ruling reversing the industrial commissioner's denial of benefits. The court of appeals affirmed. Two deputy sheriffs had been on auxiliary duty by working at community celebrations. They met afterwards at a local farm to discuss problems encountered during the evening and how to avoid such problems in the future. They decided to eat breakfast at a Country Kitchen which was on a direct route from the farm to one of the deputies' homes. On the way to the Country Kitchen, the accident occurred and both deputies were killed. The facts that the deputies had been drinking and were speeding at the time of

the accident did not remove them from coverage since Iowa no longer follows the "unusual and rash act" doctrine. The court held that the deputies were within the scope of their employment while they performed the special police work on the night of their deaths. Although the county could not afford to pay for off-duty deputies to be at the celebrations, the county received the benefit of law enforcement services rendered by the deputies. The celebrations were potentially explosive situations, and therefore the sheriff needed someone to be there to control the crowds. The county was responsible for law enforcement within its boundaries. Both deputies assisted in making arrests and in bringing the arrested persons to the Carroll County Courthouse. While not on "active" duty and not specifically required to perform the special police duties, the sheriff considered the men to be on "auxiliary" duty and the claimant felt he had to perform the services to keep his job. When the deputies left the courthouse and went to the Hulsing farm, they did not abandon their employment. The purpose of the meeting was to discuss law enforcement problems encountered during the evening and attempt to find ways to avoid such problems at future celebrations. The fact that the deputies were on their way to eat breakfast does not remove them from coverage. The deputies were covered under the dual purpose and personal comfort doctrines.

GOURLEY V. RONALD NIELSON, 318 N.W.2d 160 (Iowa 1982)

Appeal from district court's granting of defendant's motion for summary judgment. The supreme court reversed and remanded.

Plaintiff was injured in the course of his employment and received benefits under the workers' compensation act. He then brought action in district court under section 85.22, The Code, against co-employee Nielson alleging Nielson's gross negligence had been the proximate cause of his injury. The issue is whether the trial court was right in ruling plaintiff had made an election of remedies by accepting workers' compensation benefits following his injury.

Election of remedies is an equitable doctrine which prohibits a party from pursuing inconsistent remedies as redress for the same wrong. In Bolinger v. Keburg, 270 N.W.2d 603 (Iowa 1978), the court stated that three elements must be established by a party relying on the doctrine: (1) existence of two or more remedies, (2) inconsistency between them, and (3) a choice of one of them. The court in Bolinger further stated that election of remedies presupposes the knowledge of alternatives with an opportunity for choice and the choice must be intelligent and intentional.

Viewing the entire record in the light most favorable to plaintiff, the court believes there is a genuine issue of material fact which must be decided by trial, not by a summary judgment motion. If plaintiff acted without full knowledge of the facts or because he did not understand the correct principles of law, there was no election of remedies.

The court reserved for determination when properly preserved and presented on appeal whether the doctrine of election of

remedies is applicable to sections 85.20 and 85.22, The Code. The court further stated the doctrine is not regarded favorably in workers' compensation cases. See, 2A Larson, The Law of Workers' Compensation, section 73.30 (1976).

HUNTZINGER V. MOORE BUSINESS FORMS, INC., 320 N.W.2d 545 (Iowa 1982)

Appeal from a district court decision awarding both medical and disability benefits. The court affirmed in part and reversed in part. The issue on appeal was whether an employee who received his last disability and medical workers' compensation benefits in 1971 is barred by the three-year statute of limitations period in section 85.26(2), The Code, from seeking additional benefits in a review-reopening proceeding commenced in 1979. The industrial commissioner held that the employee was entitled to medical benefits only, but the district court held the employee was entitled, because of the discovery rule, to disability benefits as well. The court held that the discovery rule does not apply under the language of section 85.26(2) and the claim for disability benefits was thus barred by the three year statute of limitations.

Since 1973, employees have been entitled to unlimited medical benefits for compensable injuries pursuant to section 85.26(2). The main issue before the court was whether the three-year statute of limitations on review-reopening is applicable to claims for benefits based on injuries that occurred before the effective date of the 1973 amendment. The respondents contended that because the claimant's medical expenses did not exceed $7500, (as referred to in section 85.27, The Code, 1971)

he was barred from claiming medical benefits by the statute of limitations. The court found that the periods of limitations for original and review-reopening proceedings in the 1971 Code applied only to actions for "compensation." Although the statute referred to disability and death benefits as compensation, it did not use that term in referring to medical benefits. The court held that the 1973 amendment to section 85.27 clarified rather than changed the statute and concluded that claimant's claim for medical benefits was not subject to the statute of limitations.

The court further held that a ruling by a deputy industrial commissioner sustaining defendants' motion for summary judgment did not deprive the deputy of jurisdiction to enter a subsequent decision on the merits of the case, because the deputy characterized his first ruling as "preliminary" and did not enter it as a "proposed decision," and that the deputy modified the ruling while he still had jurisdiction within the 20-day period for appeal.

LEFFLER V. WILSON AND CO., Iowa App., 320 N.W.2d 634 (1982)

Appeal from district court decision remanding the case to the industrial commissioner for a redetermination of disability using the correct principles of law. The court of appeals, in a *per curiam* decision, affirmed. Claimant sustained physical injuries to his finger and back during a fight with his foreman. The claimant also alleged that he was permanently and totally disabled due to psychiatric problems resulting from the fight. The deputy commissioner stated that a number of factors detracted from the finding that the claimant was totally disabled by the fight. The court held that the deputy improperly minimized the

weight to be given the psychiatrist's testimony and imposed a higher burden of proof on the claimant than is required by law. The court held that Langford v. Kellar Excavating & Grading, Inc., 191 N.W.2d 667 (Iowa 1971) is controlling. The court stated that here, as in Langford, taking into account the medical testimony and giving it full effect, the conclusion is inescapable as a matter of law that the claimant's disability is directly traceable to the injury, without which it would not now exist. The court further concluded that this is all claimant need prove.

In a dissenting opinion, Carter, J., held that the majority of the court misapplied the Langford decision. In Langford, the issue on appeal was whether the commissioner had applied an improper standard of proximate cause in ruling that the claimant's disability was not legally connected to a work-related injury. Carter stated that in the present case the issue is not whether there is any causal relationship between claimant's injury and his present disability, but rather the extent of his present disability and what part of that disability is traceable to a prior injury. In this regard, the majority decision injects a false issue in the case by suggesting that the commissioner failed to heed the rule that "the employer takes the employee as he finds him." Carter wrote that this rule cannot properly be applied without also applying the rule that if a worker has some disability which is increased by a compensable injury, the worker is entitled to compensation only to the extent of the increased disability.

SEEMAN V. LIBERTY MUTUAL INSURANCE CO., ___ N.W.2d ___ (Iowa 1982)

Certification of two questions of law from United States District Court Southern District of Iowa, W.C. Stuart, Chief Judge. The first question is whether section 507B.4(9)(f), The Code, creates a cause of action for damages in the individual entitled to the insurance proceeds when the insurance carrier has violated that section. The court stated that their interpretation of chapter 507B indicates that the legislature intended administrative sanctions to be the exclusive enforcement mechanism for section 507B.4(9)(f). The answer to the first certified question renders the second question moot.

UNPUBLISHED CASES

ALDERMAN V. WILSON & CO. (Iowa Court of Appeals 1981)

Appeal from a district court ruling reversing the industrial commissioner in denying running healing period benefits. The court of appeals affirmed. The court held that the evidence in the record indicates that while it is true that the healing period for that portion of petitioner's functional disability attributable to his physical disability may have been over, the healing period for his psychological problems had not ended. Since recuperation from the psychological component of his injury was not complete, the court found that it was error for the industrial commissioner to deny petitioner running healing period benefits. Because the industrial commissioner's decision was held in error as a matter of law, the court did not address respondant's allegation that the industrial commissioner's award was supported by substantial evidence in the record as a whole. This decision appears to be based on the claimant's employability or ability to return to work without any consideration for maximum medical recovery. Two judges dissented, asserting that the claimant's psychological problem in the present case is capable of being viewed as a nonexpected reaction by a disabled worker to the fact that he is disabled. Such conditions will frequently be manifested when, as in the present case, the physical injury has stablized so as to convey to the worker an awareness of the full extent of his or her residual disability. In applying the applicable rules of law relating to the healing period and running awards of disability, the facts of the

present case permitted the industrial commissioner to find that a disability award based upon a percentage of the body as a whole was the proper statutory remedy.

DILLINGER V. CITY OF SIOUX CITY (Supreme court filed September 23, 1981)

The district court affirmed the industrial commissioner's decision denying benefits because claimant's petition was filed more than two years after the injury. After the industrial commissioner and the district court decided this case, the supreme court decided Orr v. Lewis Central School District, 298 N.W.2d 256 (Iowa 1980), which interpreted section 85.26, The Code 1977, as amended by 1977 Sess., 67 G.A., ch. 51, §2. The case was reversed and remended for an evidentiary hearing and decision in light of Orr.

LEWIS V. MICH COAL COMPANY (Iowa Court of Appeals 1982)

Appeal from a district court ruling affirming the industrial commissioner's decision that claimant's second injury was responsible for his present disability and, therefore, the defendants rather than the second injury fund should compensate claimant. Reversed and remanded. The determination of the liability of the fund requires that a finding be made in the present case as to the extent of permanent disability which would flow from the second injury had the first injury and its consequences never occurred. The industrial commissioner focused on the extent to which the second injury reduced the claimant's ability to work beyond the degree of disability which existed following the healing of the first injury. As a result of this approach, the industrial commissioner concluded that

because there would have been no permanent industrial disability but for the second injury, the entire disability falls on the employer. This is an improper standard for determining the liability of the second injury fund.

The court stated that in view of the evidence in the record that without the consequences of the first injury, the extent of claimant's industrial disability for which claim is now being made would have been substantially less, they must assume that the improper legal standard applied by the commissioner may have induced an improper decision on the ultimate issue.

MASSEY-FERGUSON, INC. V. ALI (Iowa Court of Appeals 1981)

Appeal from a district court's dismissal of a petition for judicial review of an agency decision. The court of appeals affirmed. Claimant filed a claim for compensation for injuries which she sustained in 1977. After hearing before a deputy industrial commissioner, claimant moved to reopen the record in order to amend the date of injury in her petition to conform to the proof, to which motion petitioners resisted. The deputy granted the motion. Petitioners moved for rehearing by the deputy. The deputy affirmed his ruling granting the motion to amend. Petitioners filed an appeal to the industrial commissioner of the rehearing order. No decision had been filed by the deputy on the merits of Ali's claim. The industrial commissioner filed an order dismissing petitioner's appeal on the grounds the order appealed from was interlocutory and that no appeal is proper until a final judgment is determined. Petitioners

sought judicial review of the industrial commissioner's order pursuant to sections 86.26 and 17A.19, The Code 1979. The district court dismissed the petition on the grounds that no final action by the agency had occurred and administrative remedies had not been exhausted. Petitioners appealed that dismissal and sought remand to the industrial commissioner to hear and determine the appeal concerning the deputy's ruling. The court held that judicial review at the district court level under the provisions of chapter 17A, The Code 1979, is predicated on the fact the agency action is a final determination. The petitioners postulate the supreme court's order on September 29, 1980 is determinative of the finality of the agency action. This assertion is erroneous. The district court's dismissal is a final judgment, but is not conclusive of the finality of the agency actions. The agency's action is not final; that is, disposing of the entire matter. Intermediate agency actions may be judicially reviewed if all administrative remedies have been exhausted and review of the final agency action would not provide an adequate remedy. Section 17A.19(1). Petitioners, however, had not shown any harm or prejudice by not reviewing this issue prior to final determination of the entire matter.

UNIFIED CONCERN FOR CHILDREN V. CAPUTO (Iowa Court of Appeals 1982)

Appeal from a district court decision reversing the industrial commissioner's refusal to credit an overpayment of healing period benefits toward due and owing permanent partial disability benefits. The court of appeals affirmed. The court held that

while it is true that there is no express provision in the statute allowing credit for overpayment of healing period benefits, it would be unreasonable to deny employers and insurance carriers such a credit when overpayments were made in a good faith effort to give an injured worker prompt payment and thereby promote a major policy of the act, i.e., "to provide prompt payment to a covered employee in the event of injury arising out of and in the course of employment" See Blizik v. Eagle Signal Company, 164 N.W.2d 84, 85 (Iowa 1969). If credit was not allowed for overpayments, it would in effect penalize the employer and its insurance carrier for promptly complying with the policy which underlies the statute. This would only serve to unjustly enrich the claimant without furthering any specific policy of the statute and is consistent with the recent decision of Wilson Food Corp. v. Cherry, 315 N.W.2d 756 (Iowa 1982).

SELECTED
INDUSTRIAL COMMISSIONER
APPEAL DECISIONS

The decedent's spouse filed for a full commutation of death benefits for the purpose of investing it to make more money. There were no dependent children. The issue was whether or not the Iowa Code permits commutation of scheduled periodic benefits solely on the basis that the income produced by the commuted lump sum would accumulate at a rate greater than the five percent statutory discount rate.

The supreme court in <u>Diamond v. The Parsons Co.</u>, 256 Iowa 915, 129 N.W.2d 608 (1964), stated that commutation may be ordered when it is shown to the satisfaction of the court or judge that the commutation will be for the best interest of the person or persons entitled to compensation or that periodical payments as compared to lump-sum payment will entail undue expense, etc., on the employer. In <u>Diamond</u> the court looked to the circumstances of the case, claimant's financial plans, and claimant's condition and life expectancy in awarding the commutation. The court stated that it "should not act as an unyielding conservator of claimant's property and disregard his desires and reasonable plans just because success in the future is not assured." <u>Id.</u> at 929, 129 N.W.2d at ____. To say a commutation which would produce considerably more money than the claimant is currently receiving would not be in her best interests would be incredible. Although lump-sum awards could have a deleterious effect on workers' compensation insurance premiums this is not one of the options this agency has the authority to consider. It must be noted, however, that this impact does not deter

insurance carriers from using the same vehicle when they want to settle a case and avoid all further potential liability on a claim. (Appealed to District Court; Affirmed)

CREDIT -- FOR PRIOR PAYMENTS

Hoxsey v. Frank Foundries Corp. (April 30, 1982)

The issue on appeal was whether defendants were entitled to credit for payments previously paid to claimant when no notice of voluntary payment or memorandum of agreement was filed with the industrial commissioner's office. A first report of injury was filed by the defendants as well as a final report indicating they had made payments. Further dilatory filing by the defendants was indicated by a resumption of payments shortly thereafter with no subsequent filings with the industrial commissioner until the petition was filed. After the initiation of the contested case proceedings, defendants did file a subsequent memorandum of agreement.

Recently the Iowa Supreme Court in Wilson Food Corporation v. Cherry, 315 N.W.2d 756, stated that employers may generally recover payments made by mistake in workers' compensation matters and that public interest will be better served by encouraging employers to freely pay injured employees without adversary strictness.

Although the defendants have not followed the letter of the law, it does not appear to have inconvenienced nor deceived the claimant. The rehearing decision was reversed. (No Appeal)

DEFAULT

Wagner v. Des Moines Americana Healthcare Corp. (February 26, 1982)

Claimant filed an original notice and petition with the industrial commissioner. An affidavit of mailing and return receipts indicated that copies of the petition were mailed to the registered agent and insurance administrator for the employer. No notice was sent to the insurance carrier. An order for default was entered against defendants for failure to file an appearance. The issue on appeal was whether the failure of the claimant to serve the insurance carrier as a named party is a denial of that party's constitutional right to notice and hearing.

Most insurance agreements are not intended to directly benefit third parties. Normally, an insurance agreement is a contractual arrangement between the insurer and the party to be benefited, the insured, which specifically provides for notice of a claim against the insured. In these cases, the insured knows who to contact in the event such notice is required. The party bringing suit against the insured is not required to notify the insurer.

Similarly, in workers' compensation cases the insured possesses the necessary information as to notification of its insurer, information the employee is not necessarily aware of. See In re Disinternment of Tow, 243 Iowa 695, 699, 53 N.W.2d 283 (1952). The employee is not a party to the insurance agreement between the carrier and the employer. In the majority of cases, the insured will notify the insurer but in the event such

notification is withheld, the employee is still protected under the provisions of section 87.10, The Code, which clearly contemplates that notice of a claim need only be given to the employer. (No Appeal)

HEALING PERIOD

Derochie v. City of Sioux City (March 23, 1982)

That a person continues to receive medical care does not indicate that the healing period continues. Medical treatment which is maintenance in nature often continues beyond the point when maximum medical recuperation has been accomplished. Medical treatment that anticipates improvement does not necessarily extend healing period particularly when the treatment does not in fact improve the condition. (Appealed to District Court; Settled)

HEALING PERIOD

Lopez v. Carter Construction Co., (July 24, 1981)

Claimant, while still in a leg cast, returned to high school. Defendants argue that claimant removed himself from the labor force by returning to high school and therefore terminated his healing period.

Industrial Commissioner Rule 500-8.3 states, in part, that healing period is to be terminated when the employee is capable of returning to employment substantially similar to that in which the employee was engaged at the time of the injury.

To say that one who enrolls in an activity designed to improve their job marketability while they have still not

reached maximum recuperation intentionally removes themselves from the job market is to work against the intent and rationale behind Iowa Workers' Compensation Law. Such a statement would serve to reward the malingerer and penalize the ambitious. Moreover, by not financially penalizing those who seek to increase their job marketability, it eases the burden upon employers and insurance carriers by reducing the degree of permanency of an industrial disability.

The mere fact that a claimant enrolls in or returns to an education program does not in and of itself constitute a voluntary removal from the labor market such as to terminate healing period benefits. (No Appeal)

INDUSTRIAL DISABILITY

Birmingham v. Firestone Tire & Rubber Company, (July 10, 1981)

There is a common misconception that a finding of industrial disability to the body as a whole must necessarily be in excess of a rating of permanent impairment found by a medical evaluator. Such is not the case as impairment and disability are not identical terms. Disability can in fact be less than the degree of impairment because in the first instance we are referring to loss of earning capacity and the latter reference is to anatomical or functional abnormality or loss. Although loss of function is to be considered and disability can rarely be found without it, is is not so that a loss of function per se will result in an industrial disability.

Factors considered in determining industrial disability

include the employee's medical condition prior to the injury, after the injury and present condition; the situs of the injury, its severity and the length of healing period; the work experience of the employee prior to the injury, after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; and age, education, motivation, and functional impairment as a result of the injury and inability because of the injury to engage in employment for which the employee is fitted. Loss of earnings caused by a job transfer for reasons related to the injury is also relevant. These are matters which the finder of fact considers collectively in arriving at the determination of the degree of industrial disability.

There are no weighting guidelines that are indicated for each of the factors to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of total, education a value of fifteen percent of total, motivation - five percent; work experience - thirty percent, etc. neither is a rating of functional impairment entitled to whatever the degree of impairment that is found to be conclusive that it directly correlates to that degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience,

general and specialized knowledge to make the finding with regard to degree of industrial disability. (No Appeal)

INDUSTRIAL DISABILITY

Dirks v. Libbey Owens Ford Company (February 22, 1982)

As a result of an industrial injury, claimant suffered a functional impairment of 15 percent of the body as a whole. Upon claimant's return to work, defendant employer promoted her to a higher paying job which met physical restrictions set out by claimant's physician. Claimant was unable to perform the job tasks and later underwent substantial new treatment. All medical opinions were that claimant was unable to return to work and that the limited release was in error. Claimant later resigned from her employment to accompany her family in a move necessitated by her husband's business promotion. It was held on appeal that it was claimant's earning capacity and not her actual earnings after the injury that determines industrial disability. While defendant employer offered her a greater salary, she was still less able to engage in acts of gainful employment given her physical restrictions and limited employment experience. (Appealed to District Court: Pending)

INDUSTRIAL DISABILITY

Webb v. Lovejoy Construction Co. (October 20, 1981)

Claimant's brief on appeal gave considerable weight to the fact that the "depressed" economic conditions in his area greatly reduced his ability to find employment. In response to this contention, it was found that the amount of functional

disability suffered, age, education, and past job experience all serve to determine potential for future earning capacity. If one has a serious disability, his earning capacity is much lower in relation to the work force as a whole. If one has a poor education, his earning potential is also lower than the mainstream. But if the local economic situation is temporarily depressed, the earning capacity of the entire work force is decreased. The earning capacity of an industrially disabled worker because of an economic down turn has then been decreased regardless of the fact that he has been injured. It stands to reason, therefore, that a claimant should not be entitled to additional compensation benefits because the employment opportunities are temporarily restricted for one reason or another.

The claimant also contended that his earning capacity had been decreased because of prior felony convictions. However, he testified that his felon status did not affect employability in the past because employers did not inquire as to his record nor did he volunteer such information. Based upon the testimony of a foreman for the defendant employer and a job service manager, it was found that there was little basis for concluding that claimant's status as an ex-felon will now impede his ability to find gainful employment.

In determining the extent of this employee's industrial disability, significant weight was given to the vocational consultant's report on the employment future of this employee. While it is the statutory duty of this agency to determine the

degree of industrial disability based upon all the credible evidence contained in the record, the assessments of vocational rehabilitation experts are valuable tools in the agency's ultimate determination of industrial disability. (Appealed to District Court; Affirmed; Appealed to Supreme Court; Dismissed by Appellant)

INDUSTRIAL DISABILITY -- EMPLOYER'S REFUSAL TO OFFER WORK

Hurtt v. National Carriers, Inc. (October 9, 1981)

Defendants appealed a review-reopening decision awarding claimant 30 percent industrial disability. Much of this rating was based upon a finding that the employer refused to provide the employee with substitute work. In the decision the deputy stated that the claimant would be prevented from resuming his previous occupation in that he is precluded by regulation of the U.S. Department of Transportation (Federal Motor Carrier Safety Regulations) from certification as a driver in interstate commerce pursuant to the provisions of section 391.41. The claimant testified that he had not attempted to under go a D.O.T. physical in order to regain certification as a truck driver. On appeal it was found that this tribunal does not have authority to determine whether or not claimant would be denied certification as a driver in interstate commerce. As no attempt has been made to acquire certification and the medical evidence would not appear to preclude it, this cannot support a finding by this agency that claimant is prevented from returning to driving in interstate commerce.

It was further found that the record was without evidence of

any refusal by the employer to employ claimant as before the injury. Therefore, there can be no finding of industrial disability based upon McSpadden v. Big Ben Coal Co. or Blacksmith v. All-American, Inc. rationale. (Appealed to District Court; Pending)

INDUSTRIAL DISABILITY -- EMPLOYER'S REFUSAL TO OFFER WORK

Chewning v. Morse Chain Rubber Division (January 27, 1982)

Defendants terminated claimant after he had been off work for one year following his injury. Defendants asserted that claimant was not refused a job because of his injury, instead his discharge was required by an existing labor contract which called for termination of any employee who failed to work, for any reason, for a period of one year.

If indeed the terms of the union contract are the reason for claimant's termination, it is also because of the injury and the limitations imposed upon claimant and the lack of timely job modifications on the part of defendant employer to meet those limitations that claimant was terminated. Defendants' argument that claimant's termination was because of the union contract overlooks the fact that it was the injury which put the terms of the contract into operation. Therefore, claimant was ultimately terminated because of his injury and defendant employer's inability to find alternative work for claimant within his limitations.

The obligations imposed under workers' compensation law does not require defendants to waive provisions of a labor agreement

for anyone. But if the physical limitations of the claimant because of the injury cause the claimant to be unemployable with his present employer the degree of industrial disability can be affected. Such an effect is contemplated by the court in light of Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980) and McSpadden v. Big Ben Coal Company, 288 N.W.2d 181 (Iowa 1980). (No Appeal)

ISSUE PRECLUSION

Schofield v. Iowa Beef Processors, Inc. (August 28, 1981)

In the companion case of Leonard Burmeister v. Iowa Beef Processors, Inc., claimant was given an award. In the instant case, the deputy decided that claimant's assertion of the doctrine of issue preclusion established the fact that claimant Schofield was exposed to sodium hydroxide at his work place during October 1976. The most important factors in determining the availability of the doctrine of issue preclusion (collateral estoppel) notwithstanding a lack of mutuality or privity are whether the doctrine is used offensively or defensively, and whether the party adversely affected by issue preclusion had a full and fair opportunity to litigate the relevant issue effectively in the prior action to bar litigation on a specific issue. Four requirements must be established: (1) the issue concluded must be identical; (2) the issue must have been raised and litigated in the prior action; (3) the issue must have been material and relevant to the disposition of the prior action; and (4) the determination made of the issue in the prior action

must have been necessary and essential to the resulting judgment. Indentity of parties is not necessary to give validity to a claim of issue preclusion. Hunter v. City of Des Moines, 300 N.W.2d 121 (Iowa 1981) adopts the position of the Restatement (second) of Judgments, section 88. The defensive or offensive use of issue preclusion is permissable where nonmutual parties are present if there has been a full opportunity to litigate the issues sought to be precluded. Where parties could have easily affected joinder, such opportunity is said to have existed. Because joinder was an open option which was not exercised in the prior action and the evidence in the first action was found to have been thoroughly presented, that evidence should suffice to preclude the issue from being presented again. (Appeal to District Court: Dismissed)

MEDICAL EVIDENCE

Lee v. Vernon Starling d/b/a American Roofing (October 23, 1981)

In the original decision, the employee was awarded temporary total disability benefits and medical expenses as a result of a June 7, 1979 injury. The defendants appealed, asserting that because claimant failed to introduce medical evidence, the causal relationship between the incident and claimant's disability was not proved. At the hearing, there was uncontroverted testimony that the claimant was splashed by hot tar; that his mother took him to Dr. Beattie for treatment; that he was hospitalized; and that he was released for work on a specific date. The record contains nothing that would place the testimony

of the claimant in doubt. Moreover, photographs of the injury leave no doubt that the claimant had sustained an injury.

Therefore, it was found that the claimant had met his burden of proof in establishing that he suffered an injury arising out of his employment and that the injury proximately caused severe burns across his chest and arm pit area, and that because of the injury he was unable to engage in acts of gainful employment. It was noted that the fact that claimant did not introduce medical testimony to point out the obvious is of no consequence. Claimant's exhibits 1 and 2 plainly established his injuries. Were claimant complaining of injuries which could not be externally viewed by a layman, expert testimony would be necessary. Such is not the case here. (No Appeal)

MEDICAL EXAMINATION -- OUT OF STATE

Hoegh v. Embassy Club (June 12, 1981)

Defendants appealed an order authorizing claimant to obtain a medical examination out of state and for defendants to pay the reasonable cost of said examination under the provisions of section 85.39, The Code.

Defendants assert that the language of section 85.39 in the first unnumbered paragraph which restricts examinations by employers geographically but not in frequency should be carried over to the second unnumbered paragraph of section 85.39 which allows the employee one examination by a self-chosen physician without any mention of geographical restraint.

This issue has been previously discussed in Shannon v.

Department of Job Service, 33rd Biennial Report of the Industrial Commissioner, p. 98.

> Iowa Code §85.39 expressly reveals the legislature's intent to distinguish between the obligation to submit to examination imposed upon employees and those imposed upon employers when it is the employee who is requesting the evaluation. The statute clearly limits the employer-requested employee exam to 'some reasonable time and place within the state' and 'to a physician or physicians authorized to practice under the laws of this state.'This restriction has been seen as a protective shield for the employees who are submitting to an examination by physicians who are not chosen by them. When the employee is choosing the physician, as in the case in an employee-requested evaluation, the safeguard provided by requiring an examination within the state by an Iowa doctor is unnecessary. It is to be noted that the element of reasonableness pervades the employee-requested examination section and operates as a protective device for the employer. . . .

The statute is not interpreted as directing all costs to be paid by the employer for an examination requested to be conducted at some remote and exotic place merely on whim. Nevertheless, it is concluded that section 85.39 does not restrict evaluations to be made by a physician of the employer's choice, when the prerequisite conditions have been met, to a physician authorized to practice under the laws of this state and located in this state. (No Appeal)

MEDICAL EXPENSES -- REIMBURSEMENT

Majewski v. D & M Grain Farms, Inc. (October 28, 1981)

Claimant filed an application for reimbursement of an independent medical examination pursuant to section 85.39, The Code. At the time of the application, no memorandum of agreement was on file. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181

(Iowa 1980) holds that reimbursement cannot be ordered under section 85.39 until liability for an injury has been established by the filing of a memorandum of agreement or by adjudication. The commissioner found that based solely upon the record in this case which demonstrates that claimant lost no work time due to the injury, that defendants did not deny liability in the notices of injury, and did not object to the independent medical examination itself, claimant's application for reimbursement will be allowed. This case must not be interpreted to eliminate the requirement that defendants' liability must be established prior to entitlement to reimbursement. In virtually all cases this showing must be made. (No Appeal)

MEDICAL TREATMENT -- GASTRIC BYPASS

Shilling v. Martin K. Eby Construction (October 27, 1981)

A review-reopening decision awarded temporary total disability benefits and further ordered defendants to provide and pay reasonable surgical and hospital expenses for a gastric bypass operation which was to be performed prior to the laminectomy recommended by the treating physicians.

Claimant was injured in a truck accident in the course of his employment. All of his physicians recommended he lose weight before surgical intervention for a ruptured disc would even be considered. Claimant was unsuccessful in following any diet and was finally referred to a surgeon who performs gastric bypass operations because the treating physician felt that, unless his weight was reduced, the positive benefits from the

back surgery would be considerably lessened. It was found that any treatment of claimant's back problems required prior treatment of his obesity.

The commissioner urged claimant, in a cooperative effort with his physicians, to exhaust all conventional means of weight loss before any drastic measures are undertaken to effect this weight reduction. Only as a last resort should surgical intervention be utilized as a means of alleviating claimant's obesity. However, should surgery become necessary in order for claimant to reduce so that his injury-related back problems can be resolved, such a remedy will be considered reasonable and necessary medical treatment in the course of remedying claimant's back problems.

This agency, however, does not want to go on record as ordering a specific surgical weight loss procedure. In light of continual advancements in modern medical science, some previously acceptable surgical procedures become less attractive as alternatives then they once were. As a result, if it becomes absolutely necessary to surgically intervene in order to facilitate claimant's weight loss, the procedure utilized must be chosen by claimant's physician in light of the then current medical knowledge. (No Appeal)

MOTION FOR SUMMARY JUDGMENT

Inghram v. Winegard Company (November 24, 1981)

Claimant appealed from a deputy's ruling which granted defendants' motion for summary judgment upon finding no genuine

issue of material fact existed as to whether claimant's injury arose out of and in the course of her employment.

The deputy's ruling was based in part on the claimant's answers to defendants' interrogatories. Claimant admitted she left a company sponsored Christmas party to accompany a fellow employee who was driving the employer's van to his brother's house. During the ride, the van struck a pole resulting in claimant receiving a fractured right leg. Claimant stated in the answers to interrogatories that attendance at the party was not required by her employer even though she was paid for the time she was at the party. Claimant, by her own admission, performed no function at the party.

On appeal it was found that nowhere in the pleadings, resistance to the summary judgment motion, or at the hearing, did the claimant allege the ride was business-related or intended to benefit her employer. As a result, there was no genuine issue as to a material fact regarding whether claimant was in the course of her employment and summary judgment was proper. (No Appeal)

NOTICE -- TERMINATION OF BENEFITS

Armstrong v. Buildings & Grounds (July 15, 1981)

Claimant returned to work for one or two days and then stopped working, he testified, because of the injury. Auxier v. Woodward State Hospital-School, 266 N.W.2d 139 (Iowa 1978) states that a claimant is entitled to a notice prior to termination of workers' compensation except when he has demonstrated

recovery by returning to work. There appears to be no question that claimant would not be entitled to an Auxier notice under the circumstances. Claimant returned to work, and the employer took him back in apparent good faith. The Auxier case does not go so far as to state that notice is due under such circumstance. (Appeal to District Court: Pending)

NOTICE -- TERMINATION OF BENEFITS

(February 9, 1982)

Kniesly v. Brazos Transport, Inc. (February 9, 1982)

Defendants contended that the Auxier v. Woodward State Hospital, 266 N.W.2d 139 (Iowa 1978) requirements for notice of termination of benefits are inapplicable to them since they are not a state entity. The Iowa Supreme Court in Auxier, however, made no such distinction between private and state employers when it held that due process demands proper notice of benefit termination. Iowa Workers' Compensation Law is designed to benefit the employee regardless of whether he is employed by the state government or by a private company. To make such a distinction when the issue of benefit termination arises would be patently unfair. If such a distinction were made, an employee would be penalized by denial of Auxier protection simply because he or she was employed by a private entity. A state employee, on the other hand, would be afforded greater protection against unjust termination of benefits simply due to the fact that his state employer was required to comply with the Auxier standards. It is the opinion of this agency, that the Iowa Supreme Court

did not intend to create such a distinction when Auxier was decided. (Appealed to District Court; Pending)

NOTICE OF INJURY

Rosine v. Webster City Products (August 21, 1981)

Claimant informed defendant employer of his intent to seek compensation benefits nearly 15 months after the alleged injury. Although claimant asserted that his physician did not inform him of the link between his alleged shoulder injury and his employment until then, it was admitted that claimant did not seek counsel until witnessing a workers' compensation hearing nearly a year after his own injury. Defendants met burden of affirmative defense through testimony of company employees to the effect that claimant did not mention any alleged incident until the receipt of claimant's original petition. (No Appeal)

SCHEDULED MEMBER -- WRIST

Elam v. Midland Manufacturing (December 28, 1981)

Claimant received a traumatic amputation of his left hand through the wrist. Surgery completed the amputation at the distal radius and ulna. The issue on appeal was whether the wrist (carpus) is properly a part of the hand or the arm for the purposes of section 85.34(2)(l) and (m).

Prior rulings from this office and pronouncements in publications have implied or indicated that the wrist would be considered a part of the arm. The defendants' brief contained extensive research into the medical definitions and legal precedents supporting the proposition that the prior implications and

indications are in error and should no longer be followed.

It was found that the lay, medical and legal dictionaries are in almost universal agreement that the word "hand" or "manus" includes the parts of the upper limb distal to the forearm composed of the wrist or carpus, palm or metacarpus and fingers and thumb or phalanges. It was further found that there was no injury to the arm above the wrist; therefore it was ordered that the defendants pay the employee 190 weeks of permanent partial disability benefits based on the loss of the hand.

It should be noted that this case does not answer the question of whether the ankle is part of the foot or leg nor does it indicate that any injury involving the wrist would be considered an injury to the hand rather than the arm. Answers to questions of this nature would depend entirely on the medical testimony in the individual case. (No Appeal)

SECOND INJURY FUND

Johnson v. The Second Injury Fund (February 17, 1982)

Claimant received an injury to her left arm in 1972 and an injury to her right arm in 1974. Both injuries arose out of and in the course of claimant's employment. The medical evidence established that claimant sustained a fifteen percent permanent partial disability to both the left and right arms, or a total of seventy-five weeks of compensation. Claimant was found to be ten percent industrially disabled.

In a second injury fund case, when the industrial commissioner

finds as to the claimant's present condition an industrial disability to the body as a whole, he must also make a factual determination as to degree to the body as a whole caused by the second injury. Second Injury Fund v. Mich Coal Co., 274 N.W.2d 300 (Iowa 1979)

Pursuant to Iowa Code section 85.64 an employee is paid compensation from the second injury fund for the degree of permanent disability involved only after the compensable value of the industrial disability involved is greater than the sum of the compensable values of the prior and subsequent disabilities. The compensable value of claimant's left arm injury is 37.5 weeks and the compensable value of claimant's right arm injury is 37.5 weeks. The compensable value of ten percent industrial disability is 50 weeks. Therefore, the scheduled values of 75 weeks is greater than the value of claimant's industrial disability and the second injury fund incurs no liability. (Appealed to District Court; Pending)

SPECIAL APPEARANCE

Fry v. Hy-Vee Food Stores (April 26, 1982)

Defendants filed a special appearance asserting a lack of subject matter jurisdiction due to the expiration of the two year limitation period found in section 85.26(1), The Code. On January 21, 1982 claimant filed his petition in arbitration stating he received an employment-related injury in October 1978. Claimant then sought to amend his petition to include he was "materially prejudiced" in failing to file within the applicable

period because after his injury he relied upon the employer's "false representations and assurances of employment" to the extent he did not file a workers' compensation claim.

The legislature, through enactment of the workers' compensation act, removed the jurisdiction of an employee's right to a cause of action and remedy against an employer for injuries arising out of and in the course of employment from the general original jurisdiction of the district courts and placed it exclusively with the industrial commissioner. Jansen v. Harmon, 164 N.W.2d 323, 326 (Iowa 1969); Groves v. Donohue, 254 Iowa 412, 419, 118 N.W.2d 65, 69 (1962). In connection with this jurisdiction, the legislature affixed conditions under which the right to a cause of action is to be enforced.

One condition for enforcement of the right of action is section 85.26(1) which requires original proceedings to be commenced within a prescribed period of two years. Section 85.26(1) is not a limitation on the jurisdiction of the industrial commissioner. Mousel v. Bituminous Material & Supply Co., 169 N.W.2d 763, 768 (Iowa 1969); Secrest v. Galloway Co., 239 Iowa 168, 173, 30 N.W.2d 793 (1948).

Section 1386 of the Iowa Code of 1936 (currently §85.26) was described by the Iowa Supreme Court as a "special statutory limitation" in a claimant's right to a cause of action and not a general statute of limitations which bars enforcement of a claim beyond a specified period of time. Secrest v. Galloway Co., 239 Iowa at 173, 30 N.W.2d at 796. Ct.: Arnold v. Lang, 259 N.W.2d

749 (Iowa 1977) (citing Secrest v. Galloway for distinction of a special statutory limitation from a pure statute of limitations in a case involving the Dram Shop Act).

When a claim is filed beyond the prescribed time limit, the claimant has most generally lost the right to receive compensation benefits. However, since the subject matter of the industrial commissioner is not defeated by an untimely filed claim, it is the statutory duty of the commissioner to determine whether there is any factual evidence providing a reason to excuse the lateness of the filed claim. If a claimant is unable to bring forth a justifiable reason for lateness, the special limitation condition will be activated to deny his right to receive compensation under the workers' compensation laws. The special appearance is overruled. (No Appeal)

Kausalik v. Arrow Drug, (July 28, 1982)

Defendant employer asked claimant, a passer-by, to help unload wood burning stoves from a truck. By stipulation, no employment or compensation agreements existed, nor did claimant expect compensation. On appeal, it was held that claimant was not entitled to benefits. While it is unfortunate that claimant received an injury in return for his neighborly assistance, the legislature did not intend that the Iowa Workers' Compensation Law provide a remedy in such circumstances. Iowa Code section 85.61(2) clearly intends that a contract of employment be present. No such contract, express or implied, existed. Claimant was a mere passer-by who offered his assistance.

Claimant asserted that the inclusion of Iowa Code section

85.36(10) is evidence that the lack of compensation agreement is not determinative as to whether claimant was an employee of Arrow Drug. While this may be so there is still the necessity of a contract of service, express or implied, before section 85.36 may be applied.

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Louis B. Potter, Executive Director

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LITIGATION IN BANKRUPTCY COURT

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I. SUBJECT MATTER JURISDICTION

A. Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 9 B.C.D. 67 (1982). In a badly split decision issued on June 28, 1982, the United States Supreme Court in Northern Pipeline Const. Co. v. Marathon Pipe Line Co. held that the jurisdiction conferred on the bankruptcy courts by the Bankruptcy Reform Act of 1978 cannot be constitutionally exercised by those courts. The Court stayed its judgment until October 4, 1982.

The following Supreme Court Bulletin contained in 20 B.R. 2, pp. 3 and 4 (July 13, 1982), summarizes the decision in its material respects:

> "Northern Pipeline Const. Co. v. Marathon Pipe Line Co. . . . arose out of proceedings initiated in the United States Bankruptcy Court for the District of Minnesota after appellant Northern Pipeline Construction Company (Northern) filed a petition for reorganization in January of 1980. In March of 1980, Northern, pursuant to the Bankruptcy Reform Act of 1978, filed in that Court a suit against appellee Marathon Pipe Line Co. (Marathon). Northern sought damages for alleged breaches of contract and warranty, as well as for alleged misrepresentation, coercion, and duress. Dismissal of the suit was sought by Marathon on the ground that the Act unconstitutionally conferred Article III judicial power upon judges who lack life tenure and protection against salary diminution. The United States intervened to defend the statute's validity.
>
> "The Bankruptcy Court, 6 B.R. 928, denied Marathon's motion to dismiss, but on appeal the District Court, Miles W. Lord, J., 12 B.R. 946, entered an order granting the motion on the ground that the delegation of authority in 28 U.S.C.A. § 1471 to the bankruptcy judges to try cases otherwise relegated under the Constitution to Article III judges was unconstitutional. Both the United States and Northern filed notices of appeal.

"Justice Brennan announced the Supreme Court's judgment and delivered a plurality opinion in which Justice Marshall, Justice Balckmun, and Justice Stevens joined. He wrote that Section 1471's broad grant of jurisdiction to bankruptcy judges violates Article III. The Court held that the United States' judicial power must be exercised by judges who have the attributes of life tenure and protection against salary diminution specified by Article III. These attributes were incorporated in the Constitution to ensure the independence of the Judiciary from the control of the Executive and Legislative Branches. The Court held that there is no doubt that bankruptcy judges created by the Act are not Article III judges.

"Further, Article III bars Congress from establishing under its Article I power legislative courts to exercise jurisdiction over all matters arising under the bankruptcy laws. The establishment of such courts does not fall within any of the historically recognized situations in which the principle of independent adjudication commanded by Article III does not apply. No persuasive reason exists in logic, history, or the Constitution as to why bankruptcy courts should lie beyond the reach of Article III.

"Section 1471, it was stated, impermissibly removed most, if not all, of the essential attributes of the judicial power from the Article III district court and vested those attributes in a non-Article III adjunct. Congress, the Court said, does not have the same power to create adjuncts to adjudicate constitutionally recognized rights and state-created rights as it does to adjudicate rights that it creates. The grant of jurisdiction to bankruptcy courts cannot be sustained as an exercise of Congress' power to create adjuncts to Article III courts.

"Lastly, the Court ruled that its holding of unconstitutionality would have only prospective application. Retroactive application would not further the operation of the holding but would visit substantial injustice and hardship upon those litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts. The Court also stayed its judgment until October 4, 1982 in order to afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws.

> "Justice Rehnquist, joined by Justice O'Connor, concurred in the judgment. They concluded that because Marathon had simply been named a defendant in Northern's suit on a contract claim arising under state law, the constitutionality of the bankruptcy court's exercise of jurisdiction over that kind of suit was all that had to be decided in the case, and that resolution of any objections Marathon might make to the exercise of authority conferred on bankruptcy courts by the Act, on the ground that the suit had to be decided by an Article III court, should await the exercise of such authority. They agreed that so much of the Act as enabled a bankruptcy court to entertain and decide Northern's lawsuit over Marathon's objection was violative of Article III, and they further agreed that the court's judgment should not be applied retroactively.
>
> "Justice White, with whom Chief Justice Burger and Justice Powell joined, filed a dissenting opinion. He said that the new courts are constitutional because their judgments can, in every instance, be applied to at least one Article III court--the District Court and/or the Court of Appeals. He further claimed that no one could seriously argue that the Bankruptcy Reform Act represented an attempt by the political branches of government to aggrandize themselves at the expense of the third branch or an attempt to undermine the authority of constitutional courts in general. Indeed, he said, the congressional perception of a lack of judicial interest in bankruptcy matters was one of the factors that led to the establishment of the bankruptcy courts; that is, Congress feared that this lack of interest would lead to a failure by federal district courts to deal with bankruptcy matters in an expeditious manner."

B. The options available to Congress to remedy the non-constitutional delegation of jurisdiction are:

1. Elevate bankruptcy judges to Article III status; or
2. Bifurcate jurisdiction over Title 11 cases between Article III and non-Article III judicial officers; or
3. Do nothing

C. Pending the October 4, 1982, deadline, the bankruptcy courts, apparently, although not clearly, continue to function as usual. Bills have been introduced in Congress to remedy the situation and hearings have been held, but there is no reason to believe that the October 4 deadline will be met. Perhaps the only solution is for the United States Supreme Court to extend its stay past the October 4, 1982, deadline. At least one decision, In re O.P.M. Leasing Services, Inc., 9 B.C.D. 335 (S.D.N.Y. 1982), has held that until October 4 it is business as usual.

D. The jurisdictional provisions under which bankruptcy courts are now operating and under which they would continue to operate if bankruptcy judges were elevated to Article III status are contained in 28 U.S.C. § 1471, which provides as follows:

> "28 U.S.C. § 1471. Jurisdiction.
>
> (a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.
>
> (c) The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts.
>
> (d) Subsection (b) or (c) of this section does not prevent a district court or a bankruptcy court, in

the interest of justice, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11. Such abstention, or a decision not to abstain, is not reviewable by appeal or otherwise.

(e) The bankruptcy court in which a case under title 11 is commenced shall have exclusive jurisdiction of all of the property, wherever located, of the debtor, as of the commencement of such case."

E. The expansive jurisdictional grant in 28 U.S.C. § 1471 reaches not only cases under Title 11 under § 1471(a) but also all civil proceedings under Title 11 or arising in or related to cases under Title 11. As was explained In re Auburn Medical Realty, Bkrtcy App., 19 B.R. 113 (1st Cir. 1982):

> "The jursidictional grant of section 1471, which substantially enlarged the jurisdiction of the bankruptcy courts, was carefully considered by the Congress. The legislative history of this section reveals the congressional intent:
>
> > Subsection (b) is a significant change from current law. It grants the bankruptcy court original (trial), but not exclusive, jurisdiction of all civil proceedings arising under title 11 or arising under or related to cases under title 11. This is the broadest grant of jurisdiction to dispose of proceedings that arise in bankruptcy cases or under the bankruptcy code. Actions that formerly had to be tried in State court or in Federal district court, at great cost and delay to the estate, may now be tried in the bankruptcy courts. The idea of possession or consent as the sole basis for jurisdiction is eliminated. The bankruptcy court is given in personam jurisdiction as well as in rem jurisdiction to handle everything that arises in a bankruptcy case.
>
> H.R.Rep. No. 595, 95th Cong., 1st Sess. 445-46 (1977); see S.Rep. No. 989, 95th Cong., 2d Sess. 153 (1978), U.S.Code Cong. & Admin. News 1978, pp. 5787, 6400; see also 1 Collier on Bankruptcy ¶ 3.01 (15th ed. 1980), at 3-39--3-47. 'The plain

meaning of subsections (b) and (c) of § 1472 is that bankruptcy courts can now try virtually any civil case.' Bank of Delaware v. Houghton (In re Straughn), 10 B.R. 28, 7 B.C.D. (CRR) 564, 4 C.B.C.2d 123 (Bkrtcy.D.Del. 1980); . . . ."

F. Thus, § 1471 has been interpreted to confer jurisdiction on, among other things:

--Foreclosure actions, In re Strangher, 10 B.R. 28 (D.Del. 1980)

--Truth-in-lending actions, In re Hill, 2 C.B.C.2d 84 (M.D. Fla. 1980); In re Claypool, 2 C.B.C.2d 64 (M.D. Fla. 1980)

--Commercial dispute with Indian tribe, In re Sandman Corp., 8 B.C.D. 1327 (D. N.M. 1981)

--Civil rights claims, In re Trina Dee Inc., 18 B.R. 330 (E.D. Pa. 1982)

--Anti-trust actions, In re Repair & Maintenance Parts Corp., 19 B.R. 575 (E.D. Ill. 1982)

--Suits by factor to collect against debtors obligors, In re Lewis Carpet Mills Inc., 15 B.R. 173 (N.D. Ga. 1981)

--And, of course, suits to recover preferences, fraudulent transfers, etc., In re American Aluminium Window Corp., 15 B.R. 803 (D. Mass. 1981)

G. A related statutory provision is contained in 28 U.S.C. § 1481:

"28 U.S.C. § 1481. Powers of bankruptcy court. A bankruptcy court shall have the power of a court of equity, law, and admiralty, but may not enjoin another court or punish a criminal contempt not committed in the presence of the judge of the court or warranting a punishment of imprisonment."

H. An additional related statutory provision is found in 11 U.S.C. § 105(a):

> "Power of court.
>
> (a) The bankruptcy court may issue any order, process, or judgment that is necesssary or appropriate to carry out the provisions of this title."

II. PERSONAL JURISDICTION

A. Bankruptcy court has nationwide personal jurisdiction under current rules. Rules of Bankruptcy Procedure 704(f) and 914.

B. The personal jurisdiction does not depend on and is not limited by any concept of minimum contacts. In re American Aluminium Window Corp., 15 B.R. 803 (D. Mass. 1981); In re Nixon Machinery, 5 C.B.C.2d 709 (E.D. Tenn. 1981).

III. VENUE

A. The venue of cases under Title 11 is dealt with in 28 U.S.C. § 1472:

> "Venue of cases under title 11. Except as provided in section 1474 of this title, a case under title 11 may be commenced in the bankruptcy court for a district--
>
> (1) in which the domicile, residence, principal place of business, in the United States, or principal assets, in the United States, of the person or entity that is the subject of such case have been located for the 180 days immediately preceding such commencement, or for a longer portion of such 180-day period than the domicile, residence, principal place of business, in the United States, or principle assets, in the United States, of such person were located in any other district; or

(2) in which there is pending a case under title 11 concerning such person's affiliate, general partner, or partnership."

B. The time to object to venue of a case under Title 11 apparently, but not clearly, ends as of the date of the meeting of creditors held under 11 U.S.C. § 341. See Rule of Bankruptcy Procedure 116(b)(1).

C. In re Lakeside Utilities, 18 B.R. 115 (D. Neb. 1982), deals with venue for corporate debtor in Title 11 case.

D. Venue of proceedings arising under or related to cases under Title 11 is dealt with in 28 U.S.C. § 1472:

"Venue of proceedings arising under or related to cases under title 11.

(a) Except as provided in subsections (b) and (d) of this section, a proceeding arising in or related to a case under title 11 may be commenced in the bankruptcy court in which such case is pending.

(b) Except as provided in subsection (d) of this section, a trustee in a case under title 11 may commence a proceeding arising in or related to such case to recover a money judgment of or property worth less than $1,000 or a consumer debt of less than $5,000 only in the bankruptcy court for the district in which a defendant resides.

(c) Except as provided in section (b) of this section, a trustee in a case under title 11 may commence a proceeding arising in or related to such case as statutory successor to the debtor or creditors under section 541 or 544(b) of title 11 in the bankruptcy court for the district where the State or Federal court sits in which, under applicable nonbankruptcy venue provisions, the debtor or creditors, as the case may be, may have commenced an action on which such proceeding is based if the case under title 11 had not been commenced.

(d) A trustee may commence a proceeding arising under title 11 or arising in or related to a case under title 11 based on a claim arising after the commencement of such case from the operation of the business of the debtor only in the bankruptcy court for the district where a State or Federal court

sits in which, under applicable nonbankruptcy venue provisions, an action on such claim may have been brought.

(e) A proceeding arising in or related to a case under title 11, based on a claim arising after the commencement of such case for the operation of the business of the debtor, may be commenced against the representative of the estate in such case in the bankruptcy court for the district where the State or Federal court sits in which the party commencing such proceeding may, under applicable nonbankruptcy venue provisions, have brought an action on such claim, or in the bankruptcy court in which such case is pending."

E. Change of venue is dealt with in 28 U.S.C. § 1475:

"28 U.S.C. § 1475. Change of venue. A bankruptcy court may transfer a case under title 11 or a proceeding arising under or related to such a case to a bankruptcy court for another district, in the interest of justice and for the convenience of the parties."

F. Under 28 U.S.C. § 1477, even if venue is proper, the court may transfer the case in the interests of justice and for the convenience of the parties:

"Cure or waiver of defects.

(a) The bankruptcy court of a district in which is filed a case or proceeding laying venue in the wrong division or district may, in the interest of justice and for the convenience of the parties, retain such case or proceeding, or may transfer, under section 1475 of this title, such case or proceeding to any other district or division.

(b) Nothing in this chapter shall impair the jurisdiction of a bankruptcy court of any matter involving a party who does not interpose timely and sufficient objection to the venue.

See also In re Landmark Capital Co., 20 B.R. 220 (S.D.N.Y. 1982)

G. The venue provisions set out above may not prevail over all conflicting provisions such as those of the National Bank Act, 12 U.S.C. § 94. Radzanower v. Touche Ross &

Co., 426 U.S. 148 (1976); In re Malone, 5 B.R. 658 (S.D. Cal. 1980); In re Dick & Co., 8 B.R. 358 (N.D. Ind. 1980); In re Artic Enterprises, 7 B.C.D. 648 (D. Minn. 1981).

IV. REMOVAL

A. 28 U.S.C. § 1478 provides for removal of cases from non-bankruptcy courts to bankruptcy courts:

"Removal to the bankruptcy courts.

(a) A party may remove any claim or cause of action in a civil action, other than a proceeding before the United States Tax Court or a civil action by a Government unit to enforce such governmental unit's police or regulatory power, to the bankruptcy court for the district where such civil action is pending, if the bankruptcy courts have jurisdiction over such claim or cause of action.

(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order under this subsection remanding a claim or cause of action, or a decision not so remanding, is not reviewable by appeal or otherwise."

B. 28 U.S.C. § 1479 provides for the continuation of provisional remedies after removal:

"Provisional remedies; security.

(a) Whenever any action is removed to a bankruptcy court under section 1478 of this title, any attachment or sequestration of the goods or estate of the defendant in such action shall hold the goods or estate to answer the final judgment or decree in the same manner as they would have been held to answer final judgment or decree had it been rendered by the court from which the action was removed, unless the attachment or sequestration is invalidated under applicable law.

(b) Any bond, undertaking, or security given by either party in an action prior to removal under section 1478 of this title shall remain valid and effectual notwithstanding such removal, unless such

bond, undertaking, or other security is invalidated under applicable law.

(c) All injunctions, orders, or other proceedings in an action prior to removal of such action under section 1478 of this title shall remain in full force and effect until dissolved or modified by the bankruptcy court."

C. The procedure and time within which removal must be accomplished is regulated by Interim Rule 7004, providing as follows:

"Removal

(a) Application.

(1) Form and Content. A party desiring to remove any civil action or proceeding from a federal or a state court shall file in the bankruptcy court for the district and division within which such action is pending a verified application containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process and pleadings.

(2) Time for Filing by Defendant. The application for removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

(3) Time for Filing by Any Party. If the civil action or proceeding stated by the initial pleading is not within the jurisdiction of the bankruptcy court when initiated, an application for removal may be filed by a party within 30 days after the order for relief in the case under the Bankruptcy Code.

(b) Bond. Except where a trustee or debtor in possession in a case under the Bankruptcy Code or the United States is an applicant, each application for removal of a civil action or proceeding shall be accompanied by a bond with good and sufficient surety conditioned that the party will pay all

costs and disbursements incurred by reason of the removal proceedings should it be determined that the civil action or proceeding was not removable or was improperly removed.

(c) Notice. Promptly after the filing of the application and bond, when required, the party filing the removal application shall give written notice thereof to all adverse parties and shall file a copy of the application with the clerk of the court from which the civil action or proceeding was removed which shall effect the removal and the parties shall proceed no further in that court unless and until the case is remanded.

(d) Procedure After Removal.

(1) In all civil actions or proceedings removed to a bankruptcy court the bankruptcy court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the court from which the case was removed or otherwise.

(2) The bankruptcy court may require the applicant to file with its clerk copies of all records and proceedings in the court from which the case was removed.

(e) Process After Removal. In all civil actions or proceedings removed to a bankruptcy court in which any one or more of the defendants has not been served with process or in which the service has not been perfected prior to removal, or in which process served proves to be defective, such process or service may be completed or new process issued in the same manner as in cases originally filed in the bankruptcy court. This subdivision shall not deprive any defendant on whom process is served after removal of his right to move to remand the case.

(f) Applicability of Part VII of the Rules of Bankruptcy Procedure. The rules of Part VII of the Bankruptcy Rules apply to a civil action or proceeding removed to a bankruptcy court from a federal or state court and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removal action in which the defendant has not answered, he shall answer or present the other defenses or objections available to him under the rules of Part VII of the Rules of Bankruptcy Procedure within 20 days after the receipt through service or otherwise of a copy of

the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the application for removal, whichever period is longer.

(g) Time for Filing a Demand for Jury Trial. If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury shall be accorded it, if his demand therefor is served within 10 days after the application for removal is filed if he is the applicant, or if he is not the applicant, within 10 days after service on him of the notice of filing the application. A party who, prior to removal, has made an express demand for trial by jury in accordance with federal or state law, need not make a demand after removal. If state law applicable in the court from which the case is removed does not require the parties to make express demands in order to claim trial by jury, they need not make demands after removal unless the bankruptcy court directs that they do so within a specified time if they desire to claim trial by jury. The bankrupty court may make this direction on its own motion and shall do so as a matter of course at the request of any party. The failure of a party to make demand as directed constitutes a waiver by him of trial by jury.

(h) Record Supplied. Where a party is entitled to copies of the records and proceedings in any civil action or proceeding in a federal or a state court, to be used in a bankruptcy court, and the clerk of such court, on demand, and the payment or tender of the legal fees, fails to deliver certified copies the bankruptcy court may, on affidavit reciting such facts, direct such record to be supplied by affidavit or otherwise. Thereupon such proceedings, trial and judgment may be had in such bankruptcy court, and all such process awarded, as if certified copies had been filed in the bankruptcy court.

(i) Attachment or Sequestration; Securities. Whenever any civil action or proceeding is removed to a bankruptcy court, any attachment or sequestration of the goods or estate of the defendant in such action in the court from which the action was removed shall hold the goods or estate to answer the final judgment or decree in the same manner as they would have been held to answer final judgment or decree had it been rendered by the court from which the civil action or proceeding was removed.

All bonds, undertakings, or security given by either party in a civil action or proceeding prior to its removal shall remain valid and effectual notwithstanding such removal. All injunctions, orders, and other proceedings had in civil action or proceeding prior to its removal shall remain in full force and effect until dissolved or modified by the bankruptcy court.

(j) Remand. If at any time before final judgment it appears that the civil action or proceeding was removed improvidently or without jurisdiction, the bankruptcy court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the court from which the civil action or proceeding was removed and that court may thereupon proceed with the case.

(k) Definitions. For the purpose of this rule the word "state" includes the District of Columbia and the words "state court" include the Superior Court of the District of Columbia."

D. Authority exists that the 30-day provision of Interim Rule 7004(a)(2) is mandatory, see e.g., In re Gurney, 20 B.R. 91 (W.D. Mo. 1982); but authority also exists that it is not mandatory and can be extended by the bankruptcy court, see e.g., American Fidelity Investments v. Gagel, 20 B.R. 122 (S.D. Ohio 1982).

E. Griffith v. Realty Executives, Inc., 6 B.R. 753 (D. N.M. 1980), holds that where there is a removal of a civil proceeding "related to" the debtor's case under Chapter 11, the bankruptcy court has ancillary jurisdiction of cross-claims for contribution or indemnity.

V. ABSTENTION

A. It is provided in 11 U.S.C. § 305 that the bankruptcy court may abstain from hearing a case under Title 11,

and the order is not reviewable by appeal or otherwise:

"§ 305. Abstention.

(a) The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if--

(1) the interests of creditors and the debtor would be better served by such dismissal or suspension; or

(2)(A) there is pending a foreign proceeding; and

(B) the factors specified in section 304(c) of this title warrant such dismissal or suspension.

(b) A foreign representative may seek dismissal or suspension under subsection (a)(2) of this section.

(c) An order under subsection (a) of this section dismissing a case or suspending all proceedings in a case, or a decision not so to dismiss or suspend, is not reviewable by appeal or otherwise."

B. It is further provided in subdivision (d) of 28 U.S.C. § 1471, set out in full above, that the court has comparable powers of abstention with respect to any "proceeding arising under Title 11 or arising in or related to a case under Title 11," and that the order of abstention likewise is not subject to review.

C. In re Med General, Inc., 672 F.2d 716 (8th Cir. 1982), says that the statutory language that an order of abstention is not reviewable on appeal means what it says.

VI. FORMAT OF THE LITIGATION: ADVERSARY PROCEEDINGS AND CONTESTED MATTERS

A. In bankruptcy court litigation takes the form either of adversary proceedings or of contested matters. The format of an adversary proceedings conforms closely to litigation in the United States District Court. Adversary proceedings are governed by Part VII of the Rules of Bankruptcy Procedure. They incorporate many of the Federal Rules of Civil Procedure by reference, although there are significant omissions and notable variations. The format of contested matters does not necessarily conform to litigation in the United States District Court. Certain contested matters are subject to specific Bankruptcy Rules governing only them. For example, Bankruptcy Rule 920 sets out the procedure with respect to contempt proceedings. Most contested matters, however, will be governed by Rule 914 which deals with procedures in contested matters not otherwise provided for.

B. Bankruptcy Rule 701 itemizes those matters which must be litigated in the format of an adversary proceeding, providing:

> "Rule 701. SCOPE OF RULES OF PART VII
>
> The rules of this Part VII govern any proceeding instituted by a party before a bankruptcy judge to (1) recover money or property, other than a proceeding under Rule 220 or Rule 604, (2) determine the validity, priority, or extent of a lien or other interest in property, (3) sell property free of a lien or other interest for which the holder

> can be compelled to take a money satisfaction, (4) object to or revoke a discharge, (5) obtain an injunction, (6) obtain relief from a stay as provided in Rule 401 or 601, or (7) determine the dischargeability of a debt. Such a proceeding shall be known as an adversary proceeding."

C. Adversary proceedings are instituted by the filing of a complaint, Rule 703, with a caption showing both the name of the Title 11 case and the plaintiff and defendant, Interim Forms No. 24 and 25. The pleading requirements are the same as for complaints in United States District Courts, Rules 708, 709, and 710. The filing fee is $60, the same as for litigation in the United States District Court. A cover sheet similar to that required by United States District Courts is also required.

The summons may be served personally, by publication, or by United States mail, first class, and must be served within 10 days after the issuance of the summons, Rule 704. The territorial limits are nationwide for the service of summons, Rule 704. The answer or other responsive pleadings must be served within 30 days after issuance (not service) of the summons unless the court prescribes a different time, Rule 712. Provisions identical or somewhat similar to the Federal Rules of Civil Procedure exist with respect to counterclaims and cross-claims, Rule 713, third-party practice, Rule 714, amended and supplemental pleadings, Rule 715, parties plaintiff and defendant, Rule 717, joinder, Rules 718, 719, 720, 721, class proceedings, Rule 723, derivative

proceedings, Rule 723.1, interpleader, Rule 722, intervention, Rule 724, substitution of parties, Rule 725, as well as with respect to a few other matters. A pre-trial conference may be held, Rule 716, and discovery is available including depositions, Rule 730, interrogatories, Rule 733, production of documents, Rule 734, and request for admissions, Rule 736. Failure to comply with the discovery results in the customary sanctions, Rule 737. Summary judgment can be obtained, Rule 756. Subpoenas are available for deposition and at trial, Rule 716. At the trial the Federal Rules of Evidence apply, Federal Rules of Evidence 1101. The court makes findings of facts and conclusions of law, Rule 752.

D. In contested matters not otherwise provided for, Rule 914 governs, providing as follows:

> "<u>PROCEDURE IN CONTESTED MATTERS NOT OTHERWISE PROVIDED FOR</u>
>
> In a contested matter in a bankruptcy case not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No responsive pleading is required under this rule unless the court orders an answer to a motion. The motion shall be served in the manner provided for service of a summons, complaint, and notice by Rule 704. In all such matters, unless the court otherwise directs, the following rules shall apply: 721, 725, 726, 728-737, 741, 742, 752, 754-756, 762, 764, 769, and 771. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. A person who desires to perpetuate his own testimony or that of

> another person regarding any matter that may be cognizable and relevant in a contested matter in a pending bankruptcy case may proceed in the same manner as provided in Rule 727 for the taking of a deposition before an adversary proceeding. For the purposes of this rule a reference in the rules in Part VII to adversary proceedings shall be read as a reference to contested matters. Notice of an order or direction under this rule shall be given when necessary or appropriate to assure to the parties affected a reasonable opportunity to comply with the procedures made applicable by the order.

E. Thus, in such contested matters the proceeding is instituted not by the filing of a complaint, but by motion. No responsive pleading is required unless the court so orders. The motion must be served in the manner for the service of summons in an adversary proceeding. However, specific Bankruptcy Rules relating to adversary proceedings are applicable, including Rule 721 relating to misjoinder or nonjoinder of parties, 725 relating to substitution of parties, 726 containing general provisions relating to discovery, 728 relating to persons before whom depositions may be taken, 729 relating to stipulations regarding discovery proceeding, 730 relating to depositions upon oral examination, 731 relating to deposition upon written questions, 732 relating to use of depositions, 733 relating to interrogatories, 734 relating to production of documents and things and entry upon land for inspection and other purpose, 735 relating to physical and mental examination of persons, 736 relating to requests for admissions, 737 relating to sanctions, 741 relating to dismissals, 742 relating to consolidation of proceedings, 752 relating

to findings by the court, 754 relating to judgments, 755 relating to defaults, 756 relating to summary judgment, 762 relating to stays of proceedings to enforce judgment, 764 relating to seizure of personal property, 769 relating to execution, and 771 relating to certain process in behalf of and against parties, and the court may direct that other rules applicable to adversary proceedings apply.

F. In litigating in bankruptcy court, the Bankruptcy Rules, as distinct from the Federal Rules, must always be consulted. This is because there are annoying variations between the two. Illustrative of these variations between the Federal Rules of Civil Procedure and the Bankruptcy Rules of Procedure, are the following--

--In an adversary proceeding, the answer date is calculated from the issuance of the summons, whereas under the Federal Rules of Civil Procedure it is calculated from the service of the summons;

--In calculating time under the Federal Rules, Rule 6(e) provides for an additional three days when service has been by mail. The Bankruptcy Rules do not so provide. Thus in responding to interrogatories, requests for admission, etc., the due date is three days earlier when, as is usually the case, the document has been served upon you by mail;

--Although the Federal Rules require that documents be served upon a party and then be filed with the court in a reasonable time thereafter, Rule 5(d), the Bankruptcy Rules require they be served and be filed with the court within two days thereafter, Rule 705(b);

G. A knotty problem may arise where such service of process in an adversary proceeding or a contested matter is by ordinary mail. If proof of service becomes material, as in a default situation, evidence of such due mailing raises a presumption of such due receipt. However, the presumption probably is of the bubble bursting variety. If the defendant comes into court and denies receipt, the presumption of receipt has no evidentiary effect. The burden then remains on the plaintiff to prove actual receipt. If service has been by ordinary mail, there may be insufficient evidence. See, 1 Weinstein's Evidence § 300[01].

H. It should be noted that jury trials are available under some circumstances in bankruptcy court although to the author's knowledge, none has occurred. It is provided in 28 U.S.C. § 1480 as follows:

> "§ 1480. Jury trials.
>
> (a) Except as provided in subsection (b) of this section, this chapter and title 11 do not affect any right to trial by jury, in a case under title 11 or in a proceeding arising under title 11 or arising in or related to a case under title 11, that is provided by any statute in effect on September 30, 1979.

(b) The bankruptcy court may order the issues arising under section 303 of title 11 to be tried without a jury."

I. The procedure with respect to jury trials is contained in Interim Rule 9001, which states as follows:

"Jury Trial

(a) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the case or proceeding and not later than 10 days after the service of the last pleading directed to such issue. The demand may be indorsed on a pleading of the party.

(b) Specification of Issues. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(c) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 509 constitutes a waiver by him of trial by jury, a demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

(d) Applicability of Certain of the Federal Rules of Civil Procedure. Rules 47-51 of the Federal Rules of Civil Procedure apply when a jury trial is conducted."

VII. APPEALS FROM BANKRUPTCY COURT TO DISTRICT COURT

A. In some circuits, appeal from bankruptcy courts is to an appellate panel of bankruptcy judges appointed pursuant to 28 U.S.C. § 160. This requires the circuit council to order application of 28 U.S.C. § 160 and Chief Judge of Circuit to appoint panel. If appointed, such

appellate panels have jurisdiction over appeals from bankruptcy courts. In the Eighth Circuit 28 U.S.C. § 160 has not been invoked and there is no appellate panel of bankruptcy judges.

B. Since there is no such appellate panel in the Eighth Circuit, jurisdiction over appeals from bankruptcy courts is vested in the United States District Courts under 28 U.S.C. § 1334. Such jurisdiction under subsection (a) is to hear appeals from final judgments, orders, and decrees of bankruptcy court, and by leave of the district court, under subsection (b), to hear appeals of interlocutory orders and decrees:

> "§1334. Bankruptcy appeals
>
> (a) The district courts for districts for which panels have not been ordered appointed under section 160 of this title shall have jurisdiction of appeals from all final judgments, orders, and decrees of bankruptcy courts.
>
> (b) The district court for such districts shall have jurisdiction of appeals from interlocutory orders and decrees of bankruptcy courts, but only by leave of the district court to which the appeal is taken.
>
> (c) A district court may not refer to appeal under that section to a magistrate or to a special master.'
>
> (b) The table of sections of chapter 85 of title 28 of the United States Code is amended by striking out the item relating to section 1334 and inserting in lieu thereof the following: . . . ."

C. The appeal under 28 U.S.C. § 1334 must, of course, be brought in the district in which the bankruptcy court is located:

"'§ 1408. Bankruptcy appeals

'An appeal under section 1334 of this title from a judgment, order, or decree of a bankruptcy court may be brought only in the judicial district in which such bankruptcy court is located.'"

D. It is possible to bypass the district court and appeal directly to the Court of Appeals where the appeal is from a final judgment, order, or decree of the bankruptcy court, and all parties agree. It is provided in 28 U.S.C. § 1293(b) that:

"(b) Notwithstanding section 1482 of this title, a court of appeals shall have jurisdiction of an appeal from a final judgment, order, or decree of an appellate panel created under section 160 or a District court of the United States or from a final judgment, order, or decree of a bankruptcy court of the United States if the parties to such appeal agree to a direct appeal to the court of appeals."

E. Where leave is sought to appeal an interlocutory order of bankruptcy court to district court, the test as to whether the order is interlocutory is said variously to be that there must be showing of some "exceptional circumstances," In re National Shoes, Inc., Bkrtcy App., 20 B.R. 672 (1st Cir. 1982), or that the bankruptcy judge's decision involves "a controlling question of law as to which there is substantial ground for difference of opinion" and that "an immediate appeal from the order may materially advance the ultimate termination of the litigation," In re Den-Col Cartage & Distribution, Inc., 20 B.R. 645 (D. Colo. 1982). Doubtless, the collateral order doctrine of Cohen v. Beneficial Industrial Loan

Corp., 337 U.S. 541 (1949), also impacts on the right to appeal.

F. The filing of a notice of appeal transfers jurisdiction from the bankruptcy court to the district court, and the same result follows from the filing of an application for leave to appeal an interlocutory order even before the application is ruled on. Thereafter, the bankruptcy court may not change the order appealed from. See O'Neill Production Credit Association v. Theodore V. Olson and Sandra Ann Olson, unreported opinion dated July 23, 1982 (D. Neb.), a copy of which is attached.

G. Part VIII of the Rules of Bankruptcy Procedure, Rules 801 et seq., together with Part VIII of the Interim Rules, specify the procedures on appeal from bankruptcy court. The following are notable provisions in those Rules:

--To appeal to district court, notice of appeal must be filed within ten days after "the date of the entry of the judgment or order appealed from. This ten-day period may be extended for an additional 20 days. The request for extension must be made within the ten-day period except in cases of "excusable neglect." Specified motions can terminate the running of the time for filing a notice of appeal. Rule 802. The notice of appeal is jurisdictional.

--To appeal directly to the Court of Appeals by agreement, the notice need only be filed within 30 days. In re Andrews, 7 B.C.D. 202 (8th Cir. 1980).

--Unless a notice of appeal is timely filed, the order becomes final. Rule 812; Interim Rule 8006.

--The failure to file a notice of appeal within the time provided in Rule 802 deprives the district court of jurisdiction to review a final order appealed from. In re Martin, 573 F.2d 958 (6th Cir. 1978). The time for filing an application for leave to appeal an interlocutory order under Interim Rule 8004 is limited to ten days.

--Interim Rule 8004 protects Appellant where a notice of appeal is filed, the order is interlocutory, and an application for leave to appeal should have been filed instead of the notice of appeal:

> "(d) Appeal Improperly Taken Regarded as an Application for Leave to Appeal. If a timely notice of appeal is filed where the proper mode of proceeding is by an application for leave to appeal under this rule, the notice of appeal shall be deemed a timely and proper application for leave to appeal. The appellate court may enter an order either granting or denying leave to appeal or directing that an application for leave to appeal be filed. Unless the appellate court fixes another time in its order directing that an application for leave to appeal be filed, the application shall be filed within 10 days of entry of the appellate court's order."

--Rule 805 governs stays pending appeal. It provides order stayed only on motion which must be presented first to bankruptcy judge and he may make any appropriate order during pendency of appeal including stay

without bond. Relief from his order may be granted by district court. In re Parr, 5 B.C.D. 1143, 1144 (E.D.N.Y. 1979), holds that in deciding whether to grant a stay the factors to be considered are: (1) the likelihood of success on the merits on appeal; (2) whether there will be irreparable injury to the moving party absent a stay; (3) whether granting the stay will harm other persons; and (4) the public interest. See also, In re Chanticleer Associates, 4 B.C.D. 509 (S.D.N.Y. 1978).

FILED
DISTRICT OF NEBRASKA
JUL 1982
William L. Olson, Clerk
By Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF: THEODORE V. OLSON and SANDRA ANN OLSON, Debtors.	)	BK 82-0-0379
O'NEILL PRODUCTION CREDIT ASSOCIATION, Plaintiff-Appellant, vs. THEODORE V. OLSON and SANDRA ANN OLSON, Defendants-Appellees.	)	CV 82-0-334 MEMORANDUM AND ORDER

APPEARANCES:

For Plaintiff-Appellant -- Jerrold L. Strasheim, Timothy V. Haight, Omaha, Nebraska

For Defendants-Appellees -- William L. Needler, Chicago, Illinois

BEAM, District Judge.

This matter comes before the Court on the application for leave to appeal[1] from the Bankruptcy Court.[2] The plaintiff-appellant, O'Neill Production Credit Association (PCA), has moved this Court pursuant to Rule 805 of the Rules of Bankruptcy Procedure for an order staying the Bankruptcy Court's order of July 13, 1982.

The relevant chronology of events is uncontroverted and as follows:

1. March 1, 1982: The defendants-appellees, Theodore V. Olson and Sandra Ann Olson (Ted Olson), file a voluntary petition under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 1101 to 1146. The filing of the Chapter 11 petition triggers the automatic stay provisions of § 362(a) of the Code. This precludes PCA from foreclosing its prior security interest in some 530,000 bushels of 1981 grown corn owned by Ted Olson.

2. May 1, 1982: The Bankruptcy Court conducts a hearing on PCA's request for relief from the automatic stay, pursuant to § 362(d) of the Code.

3. May 4, 1982: The Bankruptcy Court files a memorandum opinion and enters an order which, in pertinent part, modifies the automatic stay so as to permit PCA to foreclose its security interest in the 1981 corn. This deprives Ted Olson the use of the cash proceeds to operate his business within the Chapter 11 proceedings.

4. May 4, 1982: Ted Olson immediately requests the Bankruptcy Court to reconsider its decision.

5. May 11, 1982: A formal order is entered denying the above-referenced motion for reconsideration.

6. May 13, 1982: Ted Olson files a "Notice of Appeal to District Court" with the Clerk of the Bankruptcy Court relative to the Bankruptcy Court's orders of May 4, 1982, and May 11, 1982.

7. May 19, 1982: The Bankruptcy Court signs an order for stay pending appeal of its order of May 4, 1982, but allows the parties, as part of the order for stay, to proceed to sell the 1981 corn and place the proceeds in an escrow account pursuant to written stipulation.

8. June 9, 1982: Ted Olson files a "Designation of Record on Appeal" with the Clerk of the Bankruptcy Court. This designation includes a section entitled "Issues Presented for Review" relative to the Bankruptcy Court's orders of May 4, 1982, and May 11, 1982.

9. June 25, 1982: The Bankruptcy Court signs an order approving an executed agreement between PCA and Ted Olson whereby the 1981 corn is to be sold and the proceeds escrowed, as contemplated by the original stay order of May 19, 1982. (This sale and escrow apparently has been or is in the process of being completed.)

10. July 9, 1982, and July 12, 1982: The Bankruptcy Court, by way of conference calls managed from Davenport, Iowa, confers with interested parties relative to Ted Olson's

"Emergency Petition" to make various expenditures and to grant certain liens and, as pertinent to the instant appeal, to invade the 1981 corn proceeds escrow fund for current expenditures totalling $10,000.00 for production of Ted Olson's 1982 corn crop.

11. July 13, 1982: An order is entered by the Bankruptcy Court granting the emergency relief requested. In regard to invasion of the escrow account, $5,000.00 of the funds to be withdrawn is chargeable to PCA (the other $5,000.00 is chargeable to Ted Olson Enterprises, Inc.). The Bankruptcy Court notes but does not discuss in its order PCA's contentions that, due to the previous appeals brought by Ted Olson, the Bankruptcy Court lacks subject matter jurisdiction, and even assuming that the Court has jurisdiction, that the telephone conference procedure is improper.

12. July 13, 1982: Ted Olson's appeal of the Bankruptcy Court's two May, 1982, orders is docketed with the Clerk of the District Court (see CV 82-0-330). (Leave of the U.S. District Court to docket this appeal has not yet been granted.)

13. July 14, 1982: PCA files the instant appeal (CV 82-0-334) with the Bankruptcy Court and files a motion for stay with the Clerk of the District Court and oral argument is conducted immediately thereafter. (Leave of the U.S. District Court to docket this appeal has not yet been granted.)

PCA has articulated three major arguments in support of its motion for a stay of the Bankruptcy Court's order of July 13, 1982, pending further appeal. First, PCA points out that Ted Olson's appeal of the Bankruptcy Court's two May, 1982, orders covers all issues relating to Ted Olson's use of the cash collateral represented by the escrow fund. PCA argues that, upon filing of said notice of appeal, the Bankruptcy Court lost its subject matter jurisdiction over those issues and thus lacked jurisdiction when it purported to modify its previous orders on July 13, 1982. Second, PCA maintains that, even assuming that the Bankruptcy Court still had jurisdiction on July 13, 1982, the telephone conference procedure used to modify the previous stay orders was deficient under the Code's

provisions for "notice and a hearing" (11 U.S.C. § 102), as well as from a broader standpoint of procedural due process. Third, in the event that the jurisdictional and procedural arguments fail, PCA also urges that the use of the $5,000.00 in which it has an interest somehow offends notions of substantive due process. For the reasons explained in more detail below, the Court respectfully concludes that the Bankruptcy Court lacked jurisdiction over the pertinent issues decided on July 13, 1982, and that, thus, its order modifying the previous stay conditions must be vacated, in part. This conclusion obviates the need to address PCA's other contentions.

The jurisdictional question in this case is not a simple one. The Court therefore fully sympathizes with the plight of the Bankruptcy Court which, as a practical matter, was forced to resolve Ted Olson's "Emergency Petition" on short notice. The Court is also mindful of the fact that the Bankruptcy Judge is sitting in this District by special designation in addition to his regular duties in the Southern District of Iowa, and that his assignment to this District was precipitated in no small measure by this Court's ruling on a recusal matter on April 20, 1982 (see CV 82-0-178). Nonetheless, this Court is bound to fully and independently review the critical legal question involved and, having done so, concludes that the Bankruptcy Court lacked jurisdiction over the relevant issues on July 13, 1982.

A threshold question in this case is whether the Bankruptcy Court's orders of May 4, 1982, and May 11, 1982, are interlocutory or final. By definition, all orders which modify injunctions are considered interlocutory in nature. See 28 U.S.C. § 1292(a)(1); 9 J. Moore, B. Ward & J. Lucas, Moore's Federal Practice ¶¶ 110.17 & 110.19 (2d ed. 1982) [hereinafter cited as Moore's Federal Practice]. In the specific context of bankruptcy, most (but certainly not all) courts and commentators contend that appeals from trial court orders relative to a § 362 stay are interlocutory and that, accordingly, leave to appeal must be obtained from the appellate court. E.g., Roslyn Savings Bank v. Vaniman International, Inc., 8 B.R. 751, 752 (E.D. N.Y. 1981). See 1 L. King, Collier on Bankruptcy ¶ 3.03[7][e], at 3-312

(15th ed. 1982). Under the former Bankruptcy Act such appeals were likened to appeals of right under 28 U.S.C. § 1292(a)(1) (which provides as a matter of right appellate review of trial court orders granting, modifying, or dissolving a preliminary injunction) and accordingly, the appellate court seldom, if ever, refused to hear such appeals. Roslyn Savings Bank v. Vaniman International, Inc., supra, 8 B.R. at 752. To date, this approach has evidently remained the same under the new Bankruptcy Code. Id.

Assuming that the Bankruptcy Court's orders of May 4, 1982, and May 11, 1982, impacting the automatic stay, are interlocutory, the next issue involves the jurisdictional effect, if any, upon the Bankruptcy Court as a result of Ted Olson's filing of a notice of appeal on May 13, 1982. In the context of conventional civil litigation involving appeal of an interlocutory order appealable as a matter of statutory right (e.g., an order granting, modifying, or dissolving a preliminary injunction), it is well-established that a properly filed notice of appeal immediately acts to transfer jurisdiction from the District Court to the Circuit Court of Appeals with regard to those matters specifically involved in the appeal. Thus, the District Court is divested of jurisdiction to proceed with such matters. See Janousek v. Doyle, 313 F.2d 916, 920 (8th Cir. 1963). However, the question of the effect of a notice of appeal filed from an interlocutory order not appealable as a matter of statutory right remains uncertain. 9 Moore's Federal Practice, supra, ¶ 203.11, at 3-51 (2d ed. 1982). Under the language of 28 U.S.C. § 1334(b), an argument can be made that, in a situation involving appeal of an 11 U.S.C. § 362 order, jurisdiction is transferred to the appellate court only at such time as that court grants leave to bring the appeal. Nonetheless, the rule expressed in the Janousek case (which case, it will be recalled, at least suggests that jurisdiction is transferred upon the mere filing of an application for leave to appeal) appears to apply in bankruptcy appeals involving the automatic stay provisions of § 362 of the Code. See In re Bialac, 15 B.R. 901, 903 (Bankr. 9th Cir. 1981); In re J. M. Fields, Inc., 8 B.R. 638, 641 (Bankr. S. D. N.Y. 1981).

To be more specific, under the bankruptcy law, the appeal of an interlocutory order is not an appeal of right. Accordingly, leave of the district court or appellate panel is required. See 28 U.S.C. §§ 1334(b) & 1482(b), respectively. Therefore, even though labeled as a "notice of appeal," the Ted Olson filing of May 13, 1982, must actually be considered an application for leave to appeal assuming, as we have, that the order in question is interlocutory in nature. See Rule 8004(d) of the Suggested Interim Bankruptcy Rules.[3] Quite simply, we are faced with the need to determine which court has jurisdiction pending a ruling by the appellate court on the application for leave to appeal. As earlier indicated, an argument can be made that the appellate court does not obtain jurisdiction until it permits the appeal to be docketed per Rule 8004(c). The pertinent statute, 28 U.S.C. § 1334(b), states:

> The district courts . . . shall have jurisdiction . . ., but only by leave of the district court to which the appeal is taken.

Id. (emphasis added). This Court concludes that the more appropriate rule, and one reasonably contemplated by the statute, is a rule which vests jurisdiction in the appellate court at the time an application for leave to appeal an interlocutory bankruptcy court order is filed, provided that such filing is accomplished in a timely manner. See generally Janousek v. Doyle, supra, 313 F.2d at 920.

Unfortunately, it appears that there are no published opinions on point. The most likely source for precedent would seem to be decisions, if any, dealing with 28 U.S.C. § 1292(b) wherein a Circuit Court of Appeals must grant permission to take an interlocutory appeal. However, the occurrence of interim actions by the trial court after the filing of an application for leave to appeal has apparently not created litigation. This is not surprising since the trial court must, as a condition precedent, certify in writing that such an appeal may materially advance the ultimate termination of the litigation. Thus, it is not likely that a trial court will proceed to modify a specific interlocutory order which it has already certified for appeal.

Commentators on jurisdiction are in agreement that "[t]he question of the effect of a notice of appeal filed from an

interlocutory order not appealable by statute . . . is clouded." See 9 Moore's Federal Practice, supra, ¶ 203.11, at 3-51. However, Professor Moore points out that even when an appeal is obviously improper, the trial court may not strike it or quash it because the issue of jurisdiction is decided by the appellate court. Id. In order to prevent the disruption of a trial proceeding by an improvident appeal, most courts have held that the trial court may simply ignore a notice of appeal naming an obviously non-appealable order. Id. (citing Arthur Andersen & Co. v. Finesilver, 546 F.2d 338, 340-41 (10th Cir. 1976), cert. denied, 429 U.S. 1096 (1977)). However, in this matter, we are not dealing with an obviously non-appealable order. We have, instead, an order very likely to be deemed appealable by the appellate court. Upon the filing of the application, the appellate court has the issue of appeal or no appeal before it for consideration. Jurisdiction, then, at least for that limited purpose, is in the appellate court. To find that the trial court retains jurisdiction of the issues raised in the application for leave to appeal during such period of consideration could, in this Court's view, create a chaotic situation.

A rule that jurisdiction transfers immediately upon the filing of the application for leave to appeal is supported in this case by two further considerations. First, Rule 8004(a) & (c) of the Suggested Interim Bankruptcy Rules indicates that an application for leave to appeal also serves as a notice of appeal if leave is ultimatley granted by the appellate court. In effect, the filing of an application is also a "notice of appeal" subject only to an order permitting the appeal to be formally docketed by the Clerk of the appellate court. See Rule 8004(d). Second, the matter before this Court is in the nature of injunction or modification of injunction and more nearly fits the type of case contemplated by 28 U.S.C. § 1292(a)(1). As earlier indicated, a notice of appeal from an order modifying an injunction would automatically shift the jurisdiction to the appellate court. There appears to be no good reason to apply a different test to an order modifying the automatic stay engendered by § 362(a) of the Bankruptcy Code. As also earlier pointed out, past practice under the old bankruptcy law dictates such a result.

Even if an analogy of 28 U.S.C. § 1334 to 28 U.S.C. § 1292(b), rather than § 1292(a)(1), is more appropriate, the commentators apparently have construed the language in § 1292(b) to the effect "that application for an appeal . . . shall not stay proceedings in the district court . . ." as retaining jurisdiction in the trial court of only those matters not specifically within the subject matter of the interlocutory appeal. See 9 Moore's Federal Practice, supra, ¶ 203.11, at 3-55.

Returning to the facts of the case at bar, it is noteworthy that Ted Olson's counsel has at no time disputed that the Bankruptcy Court's order of July 13, 1982, amounts to a substantial modification of the previous order entered on May 4, 1982. That is, as of May 4, 1982, PCA was given the right to foreclose its security interest in 530,000 bushels of 1981 corn belonging to Ted Olson. This right to proceed to foreclose was, however, stayed by the Bankruptcy Court pending the appeal of Ted Olson, pursuant to Rule 805 of the Rules of Bankruptcy Procedure. While the corn was later sold and the proceeds escrowed, pursuant to the terms and conditions of the Rule 805 order of stay, PCA was essentially fully protected as to such funds pending only the possible success of Ted Olson's appeal in this Court. In contrast, as of July 13, 1982, $5,000.00 of the escrowed money in which PCA asserts an interest was exposed to being invested in Ted Olson's 1982 corn crop and thus obviously very must at risk.[4] Thus, the Bankruptcy Court's order of July 13, 1982, clearly goes beyond a mere clarification of its May 4, 1982, order which clarification, it appears, would be permissible. See Excavation Construction, Inc. v. Mack Financial Corp., 8 B.R. 752, 760 (D. Md. 1981).

The foregoing establishes that the Bankruptcy Court lacked subject matter jurisdiction on July 13, 1982, when it substantially modified its interlocutory order of May 4, 1982, for the reason that jurisdiction was transferred to this Court by virtue of the filing of Ted Olson's notice of appeal on May 13, 1982.[5] Lacking jurisdiction, the Bankruptcy Court's order of July 13, 1982, must be vacated.[6] Not until this Court decides Ted Olson's prior appeal (CV 82-0-330) may the Bankruptcy Court modify its order dealing with the automatic stay, at least

to the extent of modifying provisions of the order involving the 1981 corn crop. Because of the obvious exigencies present in this matter, the Court will make every reasonable effort to work with counsel toward expeditious conclusion of that appeal.[7]

The Court's jurisdictional ruling here should not be construed generally as inhibiting the Bankruptcy Court's broad remedial powers under Chapter 11 to facilitate continued cultivation of Ted Olson's 1982 corn crop. Nor should this ruling be specifically interpreted as foreclosing the Bankruptcy Court from continuing its efforts to re-open Ted Olson's line of supply of propane fuel or other products or services necessary to grow and harvest the 1982 corn crop. How these tasks may be best accomplished is, of course, a matter within the Bankruptcy Court's particular expertise. It appears to this Court, though, that with regard to the propane supply problem, certain planning alternatives remain open.

As implied in the Bankruptcy Court's order of July 13, 1982, (at page 3, paragraph 6), Ted Olson's principal propane supplier, Thermogas, Inc. of Des Moines, Iowa, will re-establish supply if "certain guarantees" are made. Ted Olson apparently is prepared to grant Thermogas a security interest in his 1982 growing crops. As opposed to invasion of the 1981 corn escrow fund, there appears to be no reason why Thermogas or any other supplier could not obtain the necessary guarantees by and through a lien on the growing crop on a relatively expedited basis. With the permission of the Bankruptcy Court, and upon the mere unilateral filing of appropriate notices, the propane supplier would appear to be entitled to a "pretrolem products lien" in the 1982 crops under Neb. Rev. Stat. §§ 52-901 to 52-904 (Reissue 1978). Such a lien would appear to be superior to virtually all prior security interests in the 1982 crops. See Neb. Rev. Stat. (U.C.C.) § 9-310 (Reissue 1980). Alternatively, it appears that Ted Olson could, with the permission of the Bankruptcy Court, execute a written security agreement in favor of the propane or other similar supplier covering the 1982 crops. See Neb. Rev. Stat. (U.C.C.) § 9-203 (Reissue 1980). This security

interest would appear to have priority over most, if not all, earlier security interests involved in this proceeding. See Neb. Rev. Stat. (U.C.C.) § 9-312(2) (Reissue 1980). See generally J. White & R. Summers, Uniform Commercial Code § 25-6 (1972). If implemented on an expedited basis either of these approaches should give Ted Olson the required propane supply and thus accommodate the important rehabilitative provisions of Chapter 11, while at the same time protecting PCA from unwarranted risk, a concern which was discussed at length in the Bankruptcy Court's memorandum decision of May 4, 1982.

Given the somewhat convoluted procedural posture of this case, the Court deems it appropriate to summarize how things currently stand. The practical effect of the Court's ruling, in vacating the Bankruptcy Court's order of July 13, 1982, is to re-establish, with regard to the 1981 corn crop, the case status as of June 25, 1982. Thus, the automatic stay stands lifted or modified so as to allow PCA to foreclose its security interest in Ted Olson's 1981 corn crop, the sale proceeds of which have now been or are being escrowed pending appeal. This modification, in turn, has been and remains stayed by the Bankruptcy Court order of May 19, 1982, and the matter of the 1981 corn crop will be held in status quo until this Court resolves Ted Olson's appeal (CV 82-0-330) of the Bankruptcy Court's two May, 1982, orders. That appeal will be resolved as soon as reasonably possible. Finally, in vacating the July 13, 1982, order and remanding this case, the Court in no way intends to restrict the prerogatives of the Bankruptcy Court with regard to the ongoing administration of the Ted Olson Chapter 11 proceedings except, of course, to the extent of preventing substantial modification of the relief granted to PCA on May 4, 1982, insofar as the 1981 corn crop is concerned.

In consideration of the foregoing,

IT IS HEREBY ORDERED:

1. That, in accordance with Rule 8004 of the Suggested Interim Bankruptcy Rules, O'Neill Production Credit Association is granted leave to bring the instant appeal;

2. That page five (5), paragraph three (3) of the Bankruptcy Court's order of July 13, 1982, is reversed and vacated;

and

3. That this matter is remanded to the Bankruptcy Court with instructions to proceed in accordance with the above Memorandum decision.

DATED this 23rd day of July, 1982.

BY THE COURT:

C. ARLEN BEAM
UNITED STATES DISTRICT JUDGE

FOOTNOTES

[1]This matter is before the Court pursuant to § 405(c)(1)(C) of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2685 (uncodified), reprinted in [1978] U.S. Code Cong. & Ad. News 2685. Also pertinent is 28 U.S.C. § 1334(b), which specifically provides for District Court jurisdiction to review interlocutory Bankruptcy Court orders and decrees. While technically not effective until April 1, 1984, § 405(c)(2) of the Bankruptcy Reform Act of 1978, supra, provides that, during the "transition period" (October 1, 1979, through March 31, 1984), appeals to the District Courts of interlocutory orders entered by the Bankruptcy Courts shall be governed by the future 28 U.S.C. § 1334(b).

[2]The Honorable Richard Stageman, United States Bankruptcy Judge for the Southern District of Iowa, presiding by special assignment in the United States Bankruptcy Court for the District of Nebraska.

[3]These suggested rules, promulgated by the Advisory Committee on Bankruptcy Rules of the United States Judicial Conference, have been adopted in the District of Nebraska. Local Bankruptcy Rule B-1.

[4]Ted Olson claims that he has secured PCA's interest by offering PCA fifty percent of the profits from the 1982 corn crop. PCA contends, on the other hand, that production costs will exceed the value of the 1982 harvest and that there will be no profit in which to share.

[5]During oral argument on this appeal, there was some discussion regarding the possible ramifications of a ruling that jurisdiction was transferred from the Bankruptcy Court to the District Court on May 13, 1982. It will be recalled that the Bankruptcy Court entered an order on May 19, 1982, staying its orders of May 4 and 11, 1982, pending Ted Olson's appeal. In granting the stay, though, the Bankruptcy Court allowed the parties, pending conclusion of the appeal, to proceed to sell the 1981 corn and place the proceeds in escrow pursuant to stipulation. On June 25, 1982, the Bankruptcy Court entered an order approving an actual agreement between PCA and Ted Olson as to the sale of the corn and escrow of the proceeds.

Ted Olson's counsel has asserted that, if the Bankruptcy Court's order of July 13, 1982, is jurisdictionally deficient, then perhaps its orders of May 19, 1982, and June 25, 1982, are deficient too. This Court disagrees. That is, notwithstanding the notice of appeal filed by Ted Olson on May 13, 1982, the Bankruptcy Court had the authority on May 19, 1982, to make provisions for a stay pending appeal under Rule 805 of the Rules of Bankruptcy Procedure. It further appears that the Bankruptcy Court had authority on June 25, 1982, when it did no more than approve a natural outgrowth or extension of its original stay. Neither of the orders relative to the stay pending appeal amounted to a modification of the substantive provisions of the § 362(d) order entered on May 4, 1982.

Of course, the validity of the stay orders is not before the Court in the instant appeal. If the issue were raised, though, this Court would be hard pressed to conclude that the stay orders are jurisdictionally deficient.

[6]This Court hastens to add that paragraphs 1, 2, 4, and 5 of the Bankruptcy Court's July 13, 1982, order are not involved in the instant appeal and, therefore, should not be considered affected by this appellate decision.

[7] By separate order executed contemporaneously herewith, the Court shall grant Ted Olson leave to bring the appeal of the Bankruptcy Court's two May, 1982, orders docketed at CV 82-0-330.

Improving Your Economic Outlook

by Ralph O. Williams III

Whether you are a managing partner or solo practitioner, if you are in charge of a law firm's finances, you inevitably face two critical questions: what is the optimum fee for the firm's services and what ought to be done with fees once they are collected?

A fee schedule is a tightrope act Charge too much, or not enough, and you're out of business The best answer is a balance. Money received, however, is not handled so delicately. You want to earn the highest possible yield from your firm's revenues, without imprudent risk These are obvious maxims, but it has been this writer's experience that some of our colleagues have overlooked the obvious.

Defense Fees Inadequate

Generally the defense bar is bringing in less distributable revenue than it rightfully should Fees have not kept pace with rising overhead, the salary expectations of mid-level trial lawyers (those with five to ten years experience), or the substantial skill of defense practitioners. In inflationary times, reasonable fee increases (and sound fiscal management) do not increase profit margins. Rather, an increase is a preservation mechanism by which a firm maintains the quality of its services, and perhaps even maintains its existence

The Consumer Price Index is a pretty good indicator of why a static fee schedule can weaken even a robust law firm Compare 1967 with the present Because 1967 is the base year for the Consumer Price Index, the 1967 dollar is presumed to have its face value In comparison, the 1982 dollar has only about 35 cents in purchasing power. Certainly, a firm's fee schedule has to respond to a 65% loss in the value of compensation.

According to national surveys by Price Waterhouse, Altman & Weil and others and surveys taken by the Los Angeles County Bar Association, the Beverly Hills Bar Association and the Association of Southern California Defense Counsel, defense and general litigation firms in 1967 were typically pricing their services at $50 per hour. The prevailing defense rate today is $75 per hour Even with this 50% increase, the defense bar is losing substantial ground to inflation Meanwhile mid-level trial lawyers in general litigation firms are currently commanding $125 to $150 per hour. In some instances, they even command $175 to $200 per hour

While the value of the dollar received is diminishing, the cost of doing business, for all lawyers, is growing apace. In 1967, a legal secretary typically received $600 to $900 per month Today, monthly secretarial salaries range from $1,200 to $1,500 in the Los Angeles area The cost of pro-

[5] Part 65 sets forth the requirements and guidelines for certification of aviation mechanics One can be certified as either a power plant or airframe mechanic, or both (A&P). However being certified as a power plant mechanic does not without the additional airframe certification permit work on an airframe Mechanics certified as IA's (Inspection Authorization) are compelled to comply with more stringent recency requirements than are A&P's

Performing major repairs on propellers and repairs on aircraft instruments requires additional certification. These types of repairs and overhauls are performed by certified repair shops in their specialized area

[6] For a consumer's approach to the problem, see *The Aviation Consumer* April 1 1978 Vol VII No 7 page 6 setting forth the problems of an owner The extent to which Cessna afforded product support as well as replacement cost is addressed in Vol VIII No 8 April 15, 1978

[7] In 1951 the FAA appointed certain airframe company employees as DMCRs (Designated Manufacturer Certification Representatives) to do most of the certification work in the name of the FAA. In 1968 the FAA modified the DMCR — which applied only to individual people within the companies — to the Delegation Option Authority (DOA), which empowers the company as a whole to certify its airplanes The company in turn appoints individual employees as DOA representatives to actually sign the type certificates In addition there is another category of delegated authority: the Designated Engineering Representative (DER) who is appointed by the FAA and is often a free-lance certifying agent not necessarily a full-time employee of one company as is the DOA person

[8] Copies of this article have been made available to the DRI

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proximately 150 billion dollars in the aggregate pool of all the money market mutual funds. This money is used to acquire Treasury bills, commercial paper, bankers' repurchase agreements and other forms of short term debt securities (not equity securities) These "loans" from the money market fund earn substantial interest, which swells the size of the fund

An investor may buy shares in these money market funds at a level price — a price that remains constant at $1.00 a share. The funds are "no load," meaning that no commission is charged to the investor who transfers money in or out of the fund. Many funds issue checks or drafts that can be used to liquidate some or all of one's shares

Complete liquidity combined with daily interest are the most attractive characteristics of these money market funds. Money invested today can be withdrawn tomorrow, and it will have earned a day's interest Interest is paid to the investor in the form of additional, fully liquid shares As of mid-February 1982, the average yield of all money market funds was about 13%.

Money market funds require a minimum initial investment (from $1,000 to $10,000), set a minimum on withdrawals (usually $500), and require a minimum "balance" ($500 to $1,000) While additional investments above the minimum are not mandatory, there is generally a requirement that additional investments be at or above a certain minimum amount. Obviously, an investor should consult a current prospectus for particulars before choosing a fund.

A money market fund takes your money well beyond the limited yield of the traditional savings account and it certainly makes better use of your money than your checking account Bank account services remain vital, of course, but there is no reason for a bank to hold more of your money than it absolutely must

Should you have any doubt about the dysfunctional nature of your checking account, take a look at your daily balance over, say a three-month period Your minimum balance is just sitting there, not earning its keep If you still are not convinced, ask for an account analysis from your bank This computer printout will show you the interest being earned *by the bank* with your money

Once you have carefully analyzed your firm's cash flow patterns, you can prudently shift substantial funds to your money market fund with virtually no risk Even if your firm has neither a general nor a cash flow budget, your day-to-day firm manager has a general awareness of the firm's cash flow patterns. For example rent, telephone, and equipment charges all come due at the same time each month and the amounts are relatively predictable, as are the billing and collection patterns of the firm, especially the insurance defense firm Your quarterly profit and loss statements will be helpful in showing you what is coming in and going out

It's a very simple next step to write these figures down. Also write down your critical payroll data: how often and how much per month You have just made a rudimentary cash flow budget, in that you have identified income and outflow and put them in a time frame.

Now you know when during the month money is going to have to be paid out Since you can withdraw funds from a money market mutual fund with checks or drafts, all bills above $500 (e g rent, telephone, photocopying) can be paid from the fund Meanwhile, your money is earning maximum interest.

There is an additional advantage to your money market fund. These funds have transfer accounts in banks in Chicago, New

CASH MANAGEMENT SYSTEM

SAVINGS ACCOUNTS

a) Deposit all cash receipts here.
b) Each week, transfer excess cash (everything above one payroll, plus replenishment for your checking account) to your money market fund.
c) On the day before payday, tele-transfer your payroll to your checking account
d) Via telephone, replenish your checking account.

CHECKING ACCOUNT

a) Maintain a minimum balance of 2% -4% of your monthly cash flow
b) Pay costs advanced and other bills under $500 from this account
c) Replenish weekly.

MONEY MARKET FUND

All your excess cash goes here to earn maximum daily interest. Pay bills over $500 with fund drafts

viding employee benefits has risen as well.

As with other professionals, the price of protection has also soared. In 1967, a one-million/three-million dollar claims made, errors and omissions insurance policy could be had for less than $200 per lawyer annually. You will pay almost $2,000 per lawyer for that same policy today.

Rental costs also reflect the trend. Ten-year leases for $.50 to $.60 per square foot per month were available in the late 1960's. In Los Angeles today, city-wide office space will cost $1.50 to $2.00 per square foot per month. The current prediction is that Los Angeles rentals will catch up with the New York market rate of $3.00 to $3.50 per square foot per month in three years.

In combination, these factors — higher overhead, devalued compensation and inadequate fee increases — have created a shortfall. There are simply fewer dollars available for distribution to a defense firm's lawyers.

In particular, it is the mid-level trial lawyer who is feeling the economic squeeze. Recent and relatively recent law graduates must still be offered a competitive market wage or they will go elsewhere within the profession. A firm's senior attorneys have life-style preferences and responsibilities that demand financial maintenance. Given these facts of economic life, it is no surprise that middle level defense attorneys are primarily bearing the burden of inadequate, devalued defense firm revenue. This is an inequity that was not expected and one that remains, for the most part, unacknowledged.

As a result, mid-level lawyers in Los Angeles are jumping ship. New defense firms are proliferating in Southern California, founded by disgruntled mid-levelers trying to escape financial stagnation. They will not succeed, however, unless they charge more for their services than their former offices. They will only reinvent the wheel.

Fair Rate

What, then, is a fair rate of compensation for insurance defense work? First, there is no justification for a basic fee lower than that charged by our professional counterparts. Our pre-trial skills are certainly commensurate with theirs, and our trial skills are likely to be superior.

The basic hourly rate for defense lawyers should be equivalent with those of our peers. The Los Angeles and national surveys show that general litigation associates with less than five years experience are having their time billed at $75.00 to $90.00 per hour. Partners are billing at $125.00 to $175.00 per hour.

Nevertheless, we cannot and should not ask $150.00 per hour from our insurance company clients. There are important reasons for offering significantly reduced, but still adequate, rates to insurers. Once a relationship with an insurance company has been established, a defense firm has a continuing source of new business. The cost of acquiring more business from that company disappears. More accurately, further business is acquired by delivering high-quality service, rather than by extraneous acquisition costs.

There is also a sublime absence of accounts receivable problems from insurance company clients (providing the carrier doesn't sink from sight altogether). Billing statements go out and money comes in, usually by return mail. Collection expenses are significantly diminished. The minimal acquisition costs and insignificant collection problems provide the key rationale for discounting rates for insurance clients.

A fair discount would be one-third off the prevailing general litigation rate in a given metropolitan area. In Los Angeles, that would mean a rate of $60 to $70 per hour for younger lawyers and $85 to $100 per hour for partners. Reevaluate this fee schedule annually, after reviewing local surveys and comparing your own firm's income and income distribution patterns with those of similar firms.

Annual reviews and rate increases are inevitable and are consistent with our professional role. It does no honor to our profession to dilute the quality of our services, deny adequate compensation to our mid-level lawyers, or bill extra hours to cover a shortfall. We should meet rising costs head-on, with reasonable increases that preserve our ability to serve our clients.

Cash Flow Management

At the same time, we can also better utilize the money we receive. Through improved cash flow management, we relieve some of the upward pressure on our fee schedule and keep our services competitively priced. The key is to bring checking and savings accounts and money market mutal funds into a single cash management system. Used in combination, these mechanisms can increase your revenue without significant cost or effort and without billing a single extra hour.

Briefly, a money market mutual fund is a pool of money collected and managed by a brokerage house, such as Merrill Lynch or Shearson, or by any of several financial or consulting firms. Currently, there are ap-

York, and Minneapolis It takes eight days — and occasionally up to fifteen days — for a draft to clear through these banks and debit your money market account. Your money continues earning interest during that time.

Money Transfers

If you have now been converted, buy into a money market fund with one-half of the average daily balance of your checking account. For the reasons already discussed, your risk is negligible. You can meet any emergency by drawing upon your fully-liquid money market fund. If you want a larger cushion, pad your savings account, where you will at least earn minimal interest.

Your savings account, by the way, should be held by the same bank that handles your checking. Deposit all of the firm's receipts in your savings account and telephone transfer funds to your checking account, as needed, to maintain your predetermined minimum, the amount needed to cover bills less than $500 and routine costs advanced for clients. Your checking account should be about 2% - 4% of monthly cash flow.

Your payroll money should remain in your savings account, earning interest. Shortly before your payroll is due, direct the bank by telephone to transfer to your checking account enough funds to meet your payroll. You can also arrange for the bank to prepare and issue the payroll checks and employer tax returns for you, at minimal cost.

Twice per month (after the system becomes familiar to you, make it once a week), transfer your excess cash from your savings account to your money market fund for additional yield. *Anything above the amount of one payroll, plus the amount needed to replenish your checking account, is excess.*

It will take twenty to thirty hours to set up your cash management system combining checking, savings, and money market mutual funds. Administering the system will take more time. It's worth it. Properly managed, the cash flow management system should increase annual revenue by 2%, perhaps as high as 4%.

A lawyer should be able to manage the system in two hours or less per week. With careful training, a skillful paralegal or office manager can administer the system for you. In that case, for your peace of mind, make sure that the financial manager understands that the minimum in your checking and savings accounts must never be undercut without your approval.

Consider one important caveat before deflating your checking account. Your bank may predicate its willingness to loan you money, and the amount and cost of credit, upon your account balance. When you shift the bulk of your cash to a money market fund, the bank loses some of the revenue it was making on your accounts. The bank may then become less responsive to your credit needs. Discuss this with your banker if you are in a continual borrowing position.

By bringing our fees in line with current economic reality, and by intelligently managing the money earned, the defense bar will remain viable and competitive in an inflationary economy.

The author is the managing partner of King & Williams, Los Angeles, California. He co-authored the book HOW TO MANAGE A SMALL LAW OFFICE, published by the State Bar of California. Mr. Williams speaks frequently on law office management, and this article is an updated adaptation of his presentation to the Nineteenth Annual Seminar of the Association of Southern California Defense Counsel in 1980. Δ

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Use Of Request For Admission in The No Liability Case

by Ted A. Schmidt

The Request for Admissions, authorized under Rule 36 of the Federal Rules of Civil Procedure, is perhaps one of the most neglected defense tools available, particularly in the nonliability case

We see an increasing number of cases filed each year in which the plaintiff names in his complaint a multitude of defendants, many of whom the facts soon show have no liability whatsoever For example, consider the slip and fall case where the plaintiff sues not only the owner of the premises but the architect who designed the premises and the contractor and subcontractors who were involved in constructing them Although the architect seldom has any liability in this situation, it is usually not until substantial costs and attorneys' fees have been incurred in discovery, court appearances, and legal research that a dismissal, summary judgment, or verdict can be obtained

The same problem is true, of course, for the rear end collision case involving several vehicles The fact scenario is frequently as follows: The plaintiff is stopped for a traffic light, with a line of three or four other stopped automobiles behind him Thereafter, a vehicle fails to stop and collides with the rear of the last vehicle in line at the stop light This collision ultimately results in contact with the rear of the plaintiff's vehicle, in front, and he thereafter sues each of the drivers of the automobiles stopped behind him

In this case, each of the defendant drivers who were already stopped behind the plaintiff is usually entitled to judgment or a verdict because they have no liability for the plaintiff's injuries Again, however, this result is not obtainable without first incurring what may frequently amount to substantial costs and attorneys' fees

Despite the fact that defendants in these types of situations almost invariably prevail, plaintiff's attorneys are not reluctant to name them in the lawsuit. For generally, the plaintiff will be under no obligation to pay the prevailing defendant any of his attorneys' fees in the defense of

awkward about the question. Whether they will truthfully respond is another matter. However, they will accept the question when asked by the judge but will resent it to the grief of any lawyer who asks it.

Next, ask the jurors if any of them or their close relatives or friends are employed by retail stores. Retail personnel know the shoplifting problem and you don't have to educate them further.

Additional inquiry should be made as to whether the jurors presently shop or have ever shopped at the store in question. If the defendant is a chain drug or discount store, usually about two thirds of the jurors are customers. Acknowledging that unavoidably there will be occasional unpleasant experiences with any store, ask the jurors whether any of them have had any experience in any of the stores which would influence them in such a way that they could not render a fair verdict. Of course, be prepared for plaintiff's counsel to exercise preemptory challenges against as many of the store's steady customers as possible.

Opening Statement

Most of the studies of jury trials have indicated that the opening statement has a profound influence on jurors. A good plaintiff's lawyer will usually emphasize in the opening statement the horror and humiliation suffered by the plaintiff.

It is extremely important for the defendant to make his opening statement in order to neutralize the effects of the plaintiff's opening statement. This is one type of case in which the defense opening statement should not be reserved to the start of the defense case. Meet the issue head on and tell the jury immediately that while some portions of the opening statement are slightly exaggerated, it is true that the plaintiff was subjected to quite an ordeal and that you sympathize with what he has been through. However, defense counsel should point out that when all the facts are developed, the jury will most likely find that the plaintiff's own conduct brought it about. Stress that the jury should keep an open mind until the defense has had an opportunity to present its side of the case, which naturally cannot be done until the plaintiff has presented his.

Finally, a mature store representative should be seated with defense counsel throughout the trial. This may, but need not, necessarily, be the security person who effect the arrest and/or who has been individually sued.

Presentation of Evidence

In the presentation of the evidence itself, when the defendant's security officer or employee is testifying, emphasis should be placed on the experience and training such person has had in shoplifting matters. It will dispel the motion of an immature and arrest-happy employee.

Sometimes it will develop that the plaintiff has had prior arrests for shoplifting. To the extent permitted under the law of the jurisdiction in which the case is being tried, this evidence is extremely effective for the defense. For example, a prior arrest for shoplifting can be relevant to the question of damages if the plaintiff claims permanent injury to his professional reputation, great humiliation, embarrassment, and loss of income and earning capacity as a result of the arrest now contested. It would be hard to believe that a prior similar incident did not have a similar effect.

Evidence of reasonable cause should be presented in detail as previously outlined. In the defense's closing argument it is critical to stress the reasonable cause defense and circumstances giving rise to a belief on the part of the store personnel that the plaintiff had been guilty of shoplifting.

The plaintiff will also typically seek punitive damages. In this regard the law of most states permits the plaintiff to introduce evidence of the wealth of the defendant. The defense should stress that punitive damages should be permitted only where the conduct of the defendant was wanton, willful, and spiteful. *Sellinger v. Freeway Mobile Home Sales, Inc.*, 521 P2d 1119 (Ariz 1974). Furthermore, although in a false arrest suit the defendant may be a substantial, publicly-held corporation, it should be pointed out to the jury that much of its stock is owned by people of modest means who rely on the dividends for their livelihood.

The insurance industry, the defense bar, and the business community share a common objective: to pay all just claims but to resist by all lawful means groundless or exaggerated claims. By careful and thorough investigation, and recognition and application of appropriate legal principles, unjustified false arrest claims can be successfully defended. ∆

For a guide to the shoplifting and false arrest problem, see SHOPLIFTING: *What You Need to Know About the Law*, by Stanley L. Skalar (1982 Fairchild Publications, 7 East 12th Street, New York, 225 pages, $14.50). The author, an Acting Justice of the New York Supreme Court, discusses prevention, dentention, prosecution, punitive damages, and insurance coverage. Also included are case citations, law review references and a statutory appendix.

the matter In the interim, the plaintiff's attorney hopes for a larger settlement, with contributions from each defendant

The Request for Admissions is a valuable tool that may be used effectively to remedy this inequitable result Rule 36 of the Federal Rules of Civil Procedure provides that either party may request that any other party to the litigation admit "the truth of any matters within the scope of Rule 26(b) . that relate to statements or opinions of fact or the application of law to fact." The party to whom the request is directed must respond within 30 days or the matter is deemed admitted.

Rule 37(c) of the Federal Rules of Civil Procedure further provides that if a party denies a Request for Admission and the party making the Request subsequently proves the matter's truthfulness, the requesting party *may* obtain reasonable expenses and reasonable attorneys' fees incurred in proving the matter It is therefore suggested that in the case where it is doubtful your client has any liability, a Request for Admission be served upon the plaintiff as early in the litigation as possible

This Request should simply ask the plaintiff to admit that there is no factual basis to support a claim of liability against your client Rule 36 precludes the plaintiff's attorney from objecting to such a Request because it constitutes a "genuine issue for trial" and, given the broad parameters of Rule 26(b), which defines the scope of a Request for Admission under Rule 36, such a request is proper

Once this Request for Admission has been made, the plaintiff's attorney has three options: (1) he may admit the Request, which would entitle your client to an immediate dismissal; (2) he can ignore the Request and not answer it, which will result in the Request being deemed admitted with the same effect as (1) above; or (3) he can deny the Request.

The plaintiff's attorney cannot claim that he lacks information or knowledge sufficient to respond to the Request. This is not only prohibited under Rule 36 but is in further contradiction to the common law mandate that a plaintiff have sufficient evidence to form the basis of a prima facie case before filing his case against a defendant *See, e g., Dobson v Grand Int'l Bhd. of Locomotive Eng'rs*, 421 P2d 520 (Ariz 1966); *Stevens v Anderson*, 256 P2d 712 (Ariz 1953).

If the plaintiff's attorney admits your Request or fails to deny it, you will usually be able to obtain a dismissal for your client with a minimal amount of additional costs and attorneys' fees, and certainly without any additional discovery. On the other hand, if the plaintiff's attorney denies the Request, you should be allowed to collect the reasonable expenses, costs and attorneys' fees incurred in proving the lack of any facts in support of liability on behalf of your client under Rule 37

Obtaining Attorney's Fees

The award of attorneys' fees under Rule 37(c) is discretionary with the court In essence, the Rule states that the court must award reasonable expenses and reasonable attorneys' fees unless the request was objectionable under Rule 36(a); the request was "of no substantial importance;" "the party failing to admit had reasonable grounds to believe that he might prevail on that issue;" or there "was other good reason for the failure to admit" Because of this discretionary language, courts are frequently reluctant to give the Request for Admission the teeth it was intended to have by actually awarding attorneys' fees when the requesting party ultimately proves the truth of the matter he requested be admitted The refusal to award attorneys' fees in this situation is usually based upon the court's concern that all parties be given a reasonable opportunity to present their grievances to the court on the merits and to avoid harsh results

Defense counsel however, can present the Request for Admission in such a manner as to appease these concerns of the trial court. This may be accomplished by demonstrating that the plaintiff's attorney was given a reasonable opportunity to avoid the necessity of paying attorneys' fees, but elected nonetheless to take a risk and pursue the litigation against your client. This is best accomplished by way of correspondence accompanying the Request for Admission.

In the transmittal letter, explain to plaintiff's counsel that your review of the facts gathered to date in the case demonstrates that there is absolutely no basis for a claim of liability against your client Go on to explain that despite the lack of any culpability on behalf of your client, he is being faced with increasing costs and attorneys' fees in the defense of the plaintiff's claim. Explain that although it appears extremely likely that your client would be successful in a motion for summary judgment or directed verdict, it is unfair that he should have to incur the burdensome costs and attorneys' fees necessarily involved in preparing, filing, and arguing such motions, as well as in obtaining the necessary discovery in support thereof The plaintiff's attorney

should then be told that you are now going to offer him an opportunity to dismiss your client from the lawsuit without the necessity of his client paying for any of your attorneys' fees or costs in the case if it can be done in an expeditious manner. Inform the plaintiff's attorney that if the plaintiff refuses to agree to such a dismissal and the Request for Admission is denied, you intend to immediately obtain all necessary discovery in order to present a motion for summary judgment Further explain that it is your intent to seek an award of reasonable expenses and reasonable attorneys' fees in this endeavor if the plaintiff's attorney forces you to go to this additional time and expense in obtaining judgment for your client.

This piece of correspondence then becomes Exhibit "A" to your motion for an award of reasonable expenses and attorneys' fees.

Your motion for attorneys' fees is more likely to be granted where the record demonstrates that the plaintiff's attorney did not have evidence to substantiate a prima facie case against your client and was given the opportunity to dismiss your client without having to pay attorneys' fees or even costs, but nonetheless voluntarily decided to assume the risk of having to pay such fees by pursuing the litigation in the face of your Request for Admissions

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COPING WITH MULTIPLE DEFENDANTS AND PRODUCTS LIABILITY CASES

By Richard A. Bowman[1]

I. THE APPLICATION OF COMPARATIVE NEGLIGENCE TO STRICT LIABILITY CASES

A. A majority of jurisdictions have already adopted the principles of Restatement of Torts § 402A so that most products cases being tried today are tried under principles of strict liability. At the same time, an ever-growing majority of jurisdictions have adopted, either judicially or by statute, some form of comparative negligence. What now? Will comparative negligence principles be applied to strict liability cases? Aren't statutes which refer to negligence actions inapplicable on their face to strict liability cases? Will courts receive through the back door, by applying comparative negligence, defenses based on plaintiff's conduct which were previously unavailable under strict liability?

B. The contribution rights of co-defendants in product liability cases today are governed by three general sets of rules: (1) rules of common law contribution; (2) rules providing for indemnity under circumstances of disproportionate responsibility, vicarious liability, active versus passive wrongdoing, conduct at the direction of another, etc.; and (3) comparative negligence. This paper will deal principally with the contribution rights of co-defendants under comparative negligence.

C. Two jurisdictions have refused to apply comparative negligence to strict liability -- Oklahoma and Colorado. See _e.g._ _Kinnard v. Coats Co._, 553 P.2d 835 (Colo. Ct. App. 1976); _Kirkland v. General Motors Corp._, 521 P.2d 1353 (Okla. 1974). See also _Melia v. Ford_, 534 F.2d 795 (8th Cir. 1976) (predicting Nebraska law).

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D. All other jurisdictions to consider the question have applied some form of comparative negligence to strict liability;

Cases applying comparative negligence to strict liability:

1. Murray v. Beloit Power Systems, Inc., 610 F.2d 149 (3rd Cir. 1979) (predicting Virgin Islands law);

2. Collins v. Ridge Tool Co., 520 F.2d 591 (7th Cir. 1975);

3. Edwards v. Sears, Roebuck & Co., 512 F.2d 276 (5th Cir. 1975);

4. Rodriques v. Ripley Industries, Inc., 507 F.2d 782 (1st Cir. 1974);

5. Kohr v. Alleghany Airlines, Inc., 504 F.2d 400 (7th Cir. 1974);

6. Cyr v. B. Offen & Co., Inc., 501 F.2d 1145 (1st Cir. 1974);

7. Stueve v. American Honda Motors Co., Inc., 457 F. Supp. 740 (D. Kan. 1978);

8. Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., 411 F. Supp. 598 (D. Ida. 1976);

9. Hagenbuch v. Snap-On Tools Corp., 339 F. Supp. 676 (D. N.H. 1972);

10. Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42 (Alaska 1976);

11. Daly v. General Motors Corporation, 144 Cal. Rptr. 380 (Cal. Sup. Ct. 1978);

12. West v. Caterpillar Tractor Co., 336 So.2d 80 (Fla. 1976);

13. Kenney v. City of Sawyer, 608 P.2d 1379 (Kan. App. 1980);

14. Busch v. Busch Construction, Inc., 262 N.W.2d 377 (Minn. 1977);

15. Thibault v. Sears, Roebuck & Co., 395 A.2d 843 (N.H. 1978);

16. Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 406 A.2d 140 (1979);

17. Dole v. Dow Chemical Co., 30 N.Y.2d 143, 282 N.E.2d 288 (1972);

18. Baccelleri v. Hyster Co., 287 Or. 3, 597 P.2d 351 (1979);

19. General Motors Corporation v. Hopkins, 548 S.W.2d 344 (Tex. Sup. Ct. 1977);

20. Mulherin v. Ingersoll-Rand Co., 628 P.2d 1301 (Utah 1981).

E. The legal commentators are in substantial agreement that some form of comparative negligence should apply to strict liability cases. See, e.g., Schwartz, Contributory and Comparative Negligence: A Reappraisal, 87 Yale L.J. 697 (1978); Wade, Products Liability and Plaintiff's Fault, 29 Mercer L.Rev. 373 (1968); Feinberg, The Application of a Comparative Negligence Defense in a Strict Liability Suit Based on Section 402A of the Restatement of Torts 2d, 42 Ins. Counsel J. 39 (Jan. 1975); Schwartz, Strict Liability and Comparative Negligence, 42 Tenn. L. Rev. 1971 (1974); Levine, Buyer's Conduct As Affecting the Extent of a Manufacturer's Liability in Warranty, 52 Minn. L. Rev. 627 (1968).

F. Dippel v. Sciano, 37 Wis.2d 443, 155 N.W.2d 55 (1967) is the benchmark decision first applying comparative negligence principles to Section 402A. Likening strict liability to negligence per se, the court ruled:

> [A] defective product can constitute or create an unreasonable risk of harm to others. If this unreasonable danger is a cause, a substantial factor, in producing the injury complained of, it can be compared with the causal contributory negligence of the plaintiff.

Id. at 462, 155 N.W.2d at 64-65.

G. Typical arguments against application of comparative negligence to strict liability:

1. The "strict" liability of defendant manufacturer cannot be compared with the "negligence" of the plaintiff -- apples and oranges -- oil and water.

2. Contributory negligence is only a defense to negligence and therefore comparative negligence cannot be a defense to strict liability.

3. Jury confusion.

4. Applying comparative negligence to strict liability cases is a "dark day" and a "hasty retreat" and reduces to "shambles" the "pure concept" of products liability, all of this through injecting a "foreign object" -- the "tort of negligence" into strict liability. By reducing plaintiff's recovery for negligent conduct attributable to the plaintiff, this transfers the liability of the manufacturer back to the plaintiff. Dissent, Mosk, J., Daly v. General Motors Corporation, 144 Cal. Rptr. 380 (Cal. Sup. Ct. 1978).

H. Typical rationale for applying comparative negligence to strict liability cases:

1. Avoids anomaly in which the specifically negligent (and therefore more culpable) manufacturer may assert the plaintiff's negligence as a defense while his strictly liable brethren may not. The negligent tortfeasor should not be treated better than the manufacturer who is liable without fault.

2. The theoretical difficulty of comparing the plaintiff's conduct in using the product with the defendant's conduct in manufacturing it is more apparent than real. Such comparisons have been occurring for years in admiralty cases and in states which have been comparing negligence per se with ordinary negligence.

3. The policies underlying strict liability are consistent with the application of comparative negligence because the manufacturer is still liable for all harm caused by his defective product. He simply is no longer liable for harm caused by plaintiff's negligent behavior.

4. Defining the contribution rights of co-defendants according to their percents of causal responsibility is more fair than the 50/50 contribution rules which obtain between joint tortfeasors, and is more fair than the total loss shifting which is occasioned by the principles of indemnity. Just as the courts were reluctant to apply the all-or-nothing rules which denied plaintiff all recovery for any negligence under the principles of contributory negligence, so also, courts are reluctant to make manufacturers bear the risk for all damage, or to make one defendant bear the risk for an entire judgment, where another defendant, or the plaintiff, has been found to be causally responsible for some share.

5. The application of comparative negligence principles permits one set of rules to govern virtually all personal injury cases and avoids situations involving one set of rules for non-products cases and another set of rules for products cases.

I. Practical considerations favoring the application of comparative negligence to strict liability cases.

1. The development of strict liability case law brought with it the abolition of defenses based on plaintiff's negligent conduct. Under the all-or-nothing rules of strict liability, which developed partially in rebellion against the all-or-nothing rules of contributory negligence, many types of plaintiff's misconduct with respect to the product became inadmissible. The application of comparative negligence provides a desirable vehicle for focusing on the plaintiff's conduct and the contribution of the plaintiff's conduct to his own accident and injuries. More varieties of plaintiff's conduct should be found to be admissible under the focus of comparative negligence.

2. Defendants should find products liability verdicts against them reduced by some share of negligence attributable to the plaintiff.

3. Comparative negligence will permit the fair allocation of losses among co-defendants by dint of the invitation to the jury to allocate percentages of fault where fault can be found. In large damage cases, the transfer of as little as ten percent of

the responsibility onto other culpable shoulders can be highly advantageous.

J. Practical considerations against the application of comparative negligence to strict liability.

1. Experience indicates that, where comparative fault principles are introduced, there are fewer complete defense verdicts for manufacturers. The invitation to the jury to allocate responsibility, even in some small percentage, is usually accepted.

2. In states where joint and several liability exists, manufacturers found to be responsible for only tiny shares of causal fault may find themselves paying plaintiff's full judgment in the event that co-defendants are judgment-proof, immune or cannot be located. Thus, extreme unfairness obtains in holding a nearly faultless manufacturer responsible to pay all of the fault attributable to non-joined or judgment-proof co-defendants.

3. The opportunity to allocate fairly causal fault among co-defendants encourages the joinder of numerous co-defendants, any one of which may be nicked for some responsibility. With an increased stable of co-defendants, the quantity of warfare is increased, and so are the verdicts.

II. EFFECT OF SETTLEMENT ON LIABILITY OF CO-DEFENDANTS

A. The Problem.

Where plaintiff reaches a settlement with defendant C and proceeds to trial against co-defendants A and B, will the verdict be reduced by the dollars paid by C or by the proportion of negligence attributed to C? What kind of settlement document can be created to insulate the settling defendant against crossclaims of co-defendants? How does settlement affect the liability of non-joined parties? Will the negligence of non-joined parties be compared?

B. Wisconsin, which pioneered the application of comparative negligence to strict liability, has developed a device permitting plaintiff to settle with one co-defendant and proceed to trial against the non-settling parties. The so-called "Pierringer" release, named after the

case of Pierringer v. Hoger, 124 N.W.2d 106 (Wis. 1963) provides that when plaintiff reaches a settlement with co-defendant C, he releases only that proportion of the responsibility that is later found in a jury trial to be attributable to C, and he does not release any of the responsibility that is ultimately placed on any parties other than C. The Pierringer release also provides that plaintiff will indemnify defendant C in the event that C is called upon to pay contribution to A or B. The effect of the Pierringer is to immunize settling defendant C from paying any more than the amount, agreed upon between plaintiff and C. That amount by definition, settled all of, but no more than, the plaintiff's claim against C. Therefore, plaintiff may recover from A and B only the responsibility found attributable to them, and said defendants will, by definition, have no claim for contribution against C because they will not have been asked to pay anything other than their own share of the causal fault.

1. The Pierringer release requires that the negligence of settling defendant C be compared with A and B in the subsequent trial. Obviously, neither C nor his counsel need be present. C doesn't care how much causal responsibility is heaped on his absent shoulders. At the trial co-defendants A and B will have every incentive to pile blame on C. Plaintiff, conversely, will have every incentive to fasten fault on A and B because plaintiff will already have liquidated his total rights against C by dint of the cash settlement already achieved.

2. Plaintiff's dilemma under the Pierringer release stems from the risk of settling with defendant C for an inadequate sum. In a cord injury case, if plaintiff accepts $10,000 in settlement from C, and at trial, co-defendants A and B are successful in lumping 90 percent of the blame on C, plaintiff will have settled 90 percent of his rights for the sum of $10,000 and will have rights against A and B for only 10 percent of his verdict. Conversely, if plaintiff can achieve a substantial settlement from C and successfully defend C against more than nominal responsibility at trial, he stands to achieve a substantial sum of money from C for a nominal share of responsibility, while preserving his rights against A and B for their full responsibility. Wisconsin law governs the foregoing results.

C. The Kansas rule abrogating joint and several liability among tortfeasors.

1. The Kansas Supreme Court, in the case of Brown v. Keill, 224 Kan. 195, 580 P.2d 867 (1978), held that the common law principles of joint liability no longer exist and do not survive the enactment by Kansas of its comparative negligence statute. The concept of joint and several liability between joint tortfeasors which previously existed no longer applies in comparative negligence actions.

2. The abrogation of joint and several liability in Brown, supra, produces a set of rules for settlement which initially resemble the Wisconsin Pierringer rule. The verdict for plaintiff is reduced by the percentage of negligence ultimately attributed to the settling defendant. The negligence of the settling defendant is compared even though he does not participate at trial. See Stueve v. American Honda Motors Co., Inc., 457 F. Supp. 740 (D. Kan. 1978) which rejected the dollar-for-dollar credit rule (which would give non-settling defendants a credit equal only to the dollars already received by plaintiff) and announced the rule that non-settling defendants should receive a "pro rata" credit calculated with reference to the percentage of fault attributable to the settling defendant.

3. In Kansas, under Brown, defendants cannot be compelled to pay more than their "fair share of the loss." Thus there is no joint liability in Kansas under which a plaintiff can recover his entire judgment from a defendant found 10 percent at fault and require that defendant to secure contribution from a co-defendant found 90 percent to blame. Where joint liability is the rule, the 10 percent defendant may bear the entire verdict if the 90 percent defendant is judgment-proof. Under the Kansas rule, plaintiff can only recover his 10 percent from the 10 percent defendant and must bear the risk that the 90 percent defendant is judgment-proof. Plaintiff must also bear the risk that 90 percent of the causal fault does not reside in a non-joined party.

4. According to Stueve, supra, a Kansas plaintiff can no longer select between arguably negligent defendants and control the allocation of loss among or

between them. The negligence or fault of non-joined entities will be compared and plaintiff will only be able to recover from joined entities the specific share of fault fastened upon them. Thus, plaintiff fails to join parties at his own peril.

D. The California dollar-for-dollar set-off rule -- still viable?

1. The California rule was initiated by dictum in the case of American Motorcycle Association v. Superior Court of Los Angeles County, 578 P.2d 899 (Cal. 1978), where the court announced that a plaintiff's recovery from non-settling defendants should be diminished only by the dollars actually recovered by plaintiff in settlement and that such recovery should not be reduced by an amount measured by the settling co-defendant's proportionate fault.

2. The settling defendant is fully discharged by the settlement with plaintiff and the subsequent trial between non-settling defendants A and B and plaintiff does not submit for comparison the fault of the settling defendant. All the fault will be allocated between the plaintiff and non-settling co-defendants.

3. The dissent in American Motorcycle Association v. Superior Court sets forth a variety of horrors to result from this rule. Must reading. See, e.g. the dilemma of the peripherally involved co-defendant who faces the possibility of being held responsible for nearly 100 percent of the fault in the event that plaintiff reaches settlement with the principal co-defendants for some fraction of their true responsibility.

4. The American Motorcycle dissent also roundly chastises the majority for deciding that plaintiff's recovery should be reduced only pro tanto (dollar-for-dollar) instead of proportionately or pro rata:

> [O]ne of the most important matters determined by today's decision, the issue of pro rata reduction or dollar amount reduction was barely mentioned and the relative merits of the two systems were

> not briefed or argued by the parties or by any of the numerous amici. The overwhelming weight of authority--contrary to the majority--is for pro rata reduction rather than settlement amount reduction. [Citing statutory authority from Arkansas, Hawaii, New Jersey, New York, Rhode Island, South Dakota, Texas, Utah and Wyoming, as well as case authority.] Although I believe it is improper for the court to reach such an important issue without the aid of counsel, I am compelled to discuss the problem because the majority has determined it.

578 P.2d at 919, n. 1.

5. Defense counsel attacking a pro tanto, dollar-for-dollar set off rule, will find Justice Clark's dissent to be one of the best constructed analytical arguments in favor of a proportionate or pro rata set-off. Justice Clark advocates the Wisconsin Pierringer rule granting the non-settling defendant a set-off equal to whatever percentage of fault is ultimately assessed against the settling defendant.

6. Note the dilemma of the settling plaintiff who receives a substantial settlement, then proceeds to trial against the non-settling defendant, only to receive a verdict which does not exceed the settlement already achieved. In that case, the dollar-for-dollar settlement leaves plaintiff with zero recovery against the non-settling defendant even though the non-settling defendant was found responsible for two-thirds of the fault. Jaramillo v. State, 146 Cal. Rptr. 823 (Cal. App. 1978).

7. See also McGee v. Cessna Aircraft Co., 147 Cal. Rptr. 694, 82 Cal. App. 3d 1065 (1978), in which another California appellate court held, like the appellate court deciding Jaramillo, that American Motorcycle required that the plaintiff's verdict be reduced by the dollars received in settlement

rather than by an amount corresponding to the settling defendant's proportionate responsibility.

8. The mechanics of the settlement procedure were the subject of another California appellate decision, Lemos v. Eichel, 147 Cal. Rptr. 603, 83 Cal. App. 3d 110 (1978). In Lemos, the court analyzed whether plaintiff's percentage of fault should be computed and deducted before or after the settlement amount was deducted from the verdict. The court observed that if the settlement amount is deducted first, and the plaintiff's fault is computed as a percentage of the remainder, the deduction for the plaintiff's fault would be smaller than his actual percentage of responsibility for the total injuries, and plaintiff's recovery would be larger. The court held that plaintiff's fault should be deducted first and the amount of the recovery from the settling tortfeasor second.

9. California law with respect to a dollar-for-dollar settlement seemed well-established until the recent case of Baget v. Shepard, 180 Cal. Rptr. 396, 128 Cal. App. 3d 431 (1982) (hearing denied by California Supreme Court together with order that appellate court opinion not be officially published). In Baget, the Court of Appeals for the Fourth District, Division 2, ruled in a lengthy, well-reasoned opinion that the dollar-for-dollar, pro tanto settlement rule announced in American Motorcycle was purely dictum, that the Court of Appeals was free to fashion a rule different from American Motorcycle, and that for all cases after the date of the Baget decision, the law of California would apply a proportionate or equitable set-off according to the percentage of fault assessed against the non-settling tortfeasor. At trial, the 20% non-settling defendant was assessed by the trial judge for 79% of the plaintiff's damages. The trial judge applied the dollar-for-dollar rule in deducting the result of a settlement reached by plaintiff with a co-defendant ultimately found by the jury to be 80% at fault. Because the dollar amount of the settlement with the 80% defendant represented only 21% of the damages found by the jury, the 20% defendant was required to pay the remaining 79% of the jury verdict. The Court of Appeals ruled that that result shocked its sense of fairness and justice, was contrary to the

weight of authority in other jurisdictions, encouraged collusive settlements to the prejudice of low-fault defendants, encouraged litigation challenging the "good faith" of such settlements, and unfairly disadvantaged non-settling defendants by a transaction to which they are not a party and in which they have no voice. Citing Gomes v. Broadhurst, 394 F.2d 465 (3d Cir. 1967), Pierringer v. Hoger, supra, Dole v. Dow Chemical Co., 30 N.Y.2d 143, 331 N.Y.S.2d 382 (1972) and Section 6 of the Uniform Comparative Fault Act of 1977, the court ruled that a new proportionate set-off rule, which it called "equitable indemnity," was henceforth the law of California. Although joint and several liability was preserved, the court ruled that where plaintiff changes the relationships of the parties by a pretrial settlement with less than all of the tortfeasors, in effect, joint liability was being abrogated and remaining co-defendants would be liable only for whatever proportionate share of responsibility was fastened upon them by jury verdict.

Although the California Supreme Court denied a hearing, its ruling that that opinion not be officially published leaves the law in California in considerable doubt. Nevertheless, the rationale articulated by the California Court of Appeals should be mandatory reading for any defense lawyer arguing that contribution should be determined by percents of fault and that non-settling defendants should be entitled to a set-off equal to the percentage of fault ultimately assessed against the settling defendants. Note also that Baget reached its result, notwithstanding a California statute, Section 877, which provided that the effect of a release shall reduce the claims against non-settling defendants by the "amount" stipulated in the release. The Court of Appeals construed the word "amount" to be broad enough to include proportionate share of fault and not necessarily to mean "dollar amount".

10. See also Scalf v. Payne, 583 S.W.2d 51 (Ark. 1979) holding that under a statute which provides that the "amount" of consideration paid for a release shall reduce the claim against non-settling defendants, no reduction would accrue to non-settling co-defendants where the settling defendant was ultimately found not negligent.

11. Baget was willing to allow a plaintiff to be "unjustly enriched" in the event that plaintiff received substantially more in settlement from a co-defendant than the co-defendant's proportionate fault was ultimately determined to be (for example, 50% of the ultimate jury verdict from a co-defendant found to be only 10% at fault). The Iowa Supreme Court, on the other hand, in Wadle v. Jones, 312 N.W.2d 510 (1981), favored the dollar-for-dollar pro tanto set-off rule because of its fear that a proportionate set-off would lead to a double recovery for a plaintiff who is able to achieve a settlement for an amount greater than the settling defendant's proportionate share of the fault.

12. Bartels v. City of Williston, 276 N.W.2d 113 (N.D. 1979) adopted a proportionate set-off rule. The pro rata or proportionate set-off rule has been adopted by statute in Arkansas, Hawaii, New York, Rhode Island, South Dakota, Texas, Utah and Wyoming.

13. See also the case of Conkright v. Ballantyne, 496 F. Supp. 147 (W.D. Mich. 1980) in which the Federal District Court for the Western District of Michigan, predicting under Erie the law of the State of Michigan, held that Michigan would apply comparative contribution among tortfeasors, and would allocate contribution among tortfeasors according to percents of fault, notwithstanding the existence of a statute prohibiting consideration of relative degrees of fault in Michigan. Conkright also held that non-settling defendants would be entitled to a reduction of plaintiff's verdict by the proportionate share of fault ultimately assessed against settling co-defendants, specifically rejecting a dollar-for-dollar set-off rule. The Michigan court held that the Pierringer procedure was the appropriate basis for apportioning fault among co-defendants and that the release documents approved in the case of Pierringer v. Hoger were appropriate release documents for use in Michigan to achieve the results desired in settlement. Thus, at trial, the comparative fault of the settling defendant would be determined, even in the absence of the settling defendant, and that percent of fault would reduce plaintiff's verdict against non-settling defendants. The reasoning of the Conkright decision is as compelling as the reasoning found in Baget. Conkright should be a

part of defense counsels' file on settlements under comparative fault.

E. The insidious use of Mary Carter agreements, Gallagher covenants and other similar secret settlements led to the appointment in 1976 of a committee by the Federation of Insurance Counsel to develop a proposal for the resolution of disputes between insurance carriers involved in casualty litigation. That committee submitted a final report to the Federation of Insurance Counsel Board of Directors which was unanimously adopted, leading to the submission to the International Association of Insurance Counsel and the Association of Insurance Attorneys. As a result of meetings between these groups, a document entitled "Guiding Principles for Cooperation in the Defense of Multi-Party Litigation" was developed, and appears in the July 1982 issue of For the Defense at pp. 16-23. In addition to denouncing the use of secret agreements under certain circumstances, the "Guiding Principles" set forth the framework for cooperation among defense counsel in the handling of litigation, including the use of agreements among defense counsel allocating fault in advance of trial, joint defenses, and the use of arbitration in advance of trial to resolve disputes involving the relative responsibility of co-defendants. The "Guiding Principles" is must reading for defense counsel.

F. Do not overlook the presence of overlapping statutory causes of action which permit damage recoveries which partially overlap, and the effect of a settlement of one on the rights of co-defendants in the other.

III. THIRD-PARTY CLAIMS BY MANUFACTURERS AGAINST EMPLOYERS FOR WORK-RELATED INJURIES TO EMPLOYEES

A. The advent of comparative negligence now affords a vehicle for effectuating a limited right of contribution by manufacturers against employers. Whereas the typical workers' compensation law provides that the exclusive liability of the employer shall be to pay workers' compensation, as a result of which most courts have historically denied contribution and indemnity claims by manufacturers against such employers for work-related injuries, a few jurisdictions have begun to reconsider this prohibition under comparative negligence principles. Now, instead of a 20 percent responsible manufacturer being held to pay all of an employee/plaintiff's claim

(even though the employer is 80 percent at fault for having modified or failed to maintain the subject product), states which have adopted comparative negligence have begun to consider the unfairness of imposing upon such manufacturers liability without contribution for the full amount of plaintiff's claim.

B. Lambertson v. Cincinnati Corp., 257 N.W.2d 679 (Minn. 1977) was one of the first cases to articulate a limited right of contribution by a 25 percent responsible manufacturer against a 60 percent responsible employer in a case brought by a 15 percent negligent plaintiff employee. Under the Minnesota Comparative Negligence Act, which retains joint and several liability, this manufacturer, prior to Lambertson, would have had to pay the full amount of plaintiff's compensable damages even though the employer was 60 percent at fault.

1. Lambertson ordered a limited right of contribution for the manufacturer, permitting contribution against the employer in an amount proportional to the employer's percentage of negligence, but not to exceed the employer's total workers' compensation liability to plaintiff. Thus, Lambertson held that the maximum amount of contribution available was the amount of workers' compensation benefits paid or to be paid by the employer to the plaintiff. The mechanics for determining the ceiling have yet to be announced but are under consideration in a pending case before the Minnesota Supreme Court.

2. The effect of this limited right of contribution against the employer is to deny the workers' compensation carrier for a negligent employer his subrogation interest. Under Minnesota law and under the law of a number of other states, when a plaintiff-employee seeks recovery against third parties for a work-related injury, a portion of the sums collected from the third party must be reimbursed to the workers' compensation carrier according to statutory formulas which vary from state to state. A round robin effect occurs where there is a right to contribution against the employer. In step one, plaintiff collects the full judgment from the manufacturer and remits a portion of that judgment to the employer/compensation carrier to reimburse for previous comp paid. In step two, the manufacturer seeks contribution from the employer in an amount not exceeding the comp

benefits paid or to be paid. Thus, the sums collected by the employer by way of subrogation from the plaintiff are merely paid over to the manufacturer by way of contribution.

3. The benefits of seeking contribution against a third party employer can be substantial where serious injuries are involved which place a potentially high ceiling on the level of contribution which can be obtained. Even in smaller cases, the contribution claim may have the effect of making the plaintiff more reasonable in settlement negotiations. Plaintiff's counsel typically represents the subrogation interests and typically seeks to recover on behalf of the comp carrier for the comp benefits paid to date. Where a contribution claim exists against the employer which appears to have merit, plaintiff, and the comp carrier, may realize that hopes for a subrogation recovery are slim and settlement of the case may become more feasible.

C. See also the Pennsylvania rule permitting contribution from employers up to the amount of workers' compensation benefits. See e.g., Maio v. Fahs, 339 Pa. 180, 14 A.2d 105 (1940); Brown v. Dickey, 397 Pa. 454, 155 A.2d 836 (1959).

D. For a discussion of the contribution rights against employers for work-related accidents, see Larson, Workmen's Compensation: Third Party's Action Over Against Employer, 65 Northwestern U. L.Rev. 351.

IV. THIRD-PARTY CLAIMS BY MANUFACTURERS AGAINST OFFICERS OF EMPLOYERS INVOLVING WORK-RELATED INJURIES

A. The problem and the opportunity:

Even under Lambertson's partial contribution rules, a manufacturer with nominal responsibility in a state with joint and several liability may find itself with wholly inadequate contribution rights against the employer by reason of the exclusive liability provisions of most workers' compensation laws. Manufacturers must explore the possibility that a third party defendant other than

the employer can be located whose liability is not limited by the workers' compensation exclusive remedy rule. An often-overlooked source of such potential defendants is officers of the employer who are senior enough to be named insureds under the liability insurance policies held by the employer, but junior enough to have direct individual responsibility and day-to-day activity with respect to the issues involving plaintiff-employee's injuries.

B. Under the law of many jurisdictions whose workers' compensation laws allow suit against parties other than the employer, a co-employee of the injured employee, including corporate officers and supervisors, is liable for his own negligence, but only where his act or failure to act results in a breach of duty owed personally to the injured party. See e.g., Canter v. Koehring Co., 283 So.2d 716 (La. 1973); Dawley v. Thisius, 231 N.W.2d 555 (Minn. 1975); Wilson v. Hasvold, 194 N.W.2d 251 (S.D. 1972); Steele v. Eaton, 285 A.2d 749 (Vt. 1971). See also, Craven v. Oggero, 213 N.W.2d 678 (Ia. 1973).

C. Restatement of Torts 2d, Section 324A, entitled "Liability to Third Person for Negligent Performance of Undertaking," also provides direct authority for such a suit;

> One who undertakes, gratuitiously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other third person, or

(c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

D. Comment b to Section 324A explains:

> This Section applies to any undertaking to render services to another, where the actor's negligent conduct in the manner of performance of his undertaking or his failure to exercise reasonable care and complete it, or to protect the third person when he discontinues it, results in physical harm to third person or his things. It applies to undertakings both for consideration and to those which are gratuitious.

E. The kinds of behavior that are actionable have been defined.

1. Tortious acts in which the officer participated or which he specifically directed others to do. See Steele v. Eaton, supra, where the court found the corporate president's conduct not sufficient to be actionable where the president did not direct the operation of the machine without the safety device, and had no involvement with respect to plaintiff's injury except for his knowledge that the machine was operated without the safety device. Eaton's failure to insist upon use of the safety device was inadequate to predicate a breach of an immediate duty to plaintiff because between plaintiff and the corporate president were layers of supervisory personnel with direct responsibility for these matters. These intermediate responsible employees had the effect of insulating the corporate president from participatory liability.

2. Personal liability will not be imposed upon a corporate officer because of his general administrative responsibility for some function. More is required. The officer must be responsible for personal fault as opposed to vicarious fault and he must have a personal duty towards the injured plaintiff, breach of which caused the plaintiff's damage. See e.g. Canter v. Koehring Co., supra,

where the court announced four considerations concerning the imposition of personal liability: (a) a duty must be owed to the plaintiff, breach of which caused the injury; (b) the duty must be delegated by the employer to the individual officer defendant; (c) the officer agent or employee must have breached the duty through personal instead of vicarious fault, through failing to discharge the obligations with the degree of care required by ordinary prudence; (d) if the defendant officer's responsibilities have been delegated with due care to responsible subordinates, and the officer is not personally at fault, there can be no liability unless he should know personally of the non-performance of the duty, but has nevertheless failed to cure the harm. (But see Steele, supra).

F. The Wisconsin Supreme Court has taken a more restrictive approach to the liability of corporate officers as co-employees. Wisconsin requires that the alleged negligence be an affirmative act which increases the risk of injury to the employee. See e.g., Kruse v. Schieve, 61 Wis. 2d 421, 213 N.W.2d 64 (1973); Garchek v. Norton Co., 67 Wis. 2d 125, 226 N.W.2d 432 (1975). In Garchek, the Wisconsin Supreme Court held that summary judgment dismissing the corporate officers was appropriate where there was no claim that the officers committed an affirmative act of negligence going beyond the ordinary scope of duty of the employer. The only negligence claimed was the failure to supervise and instruct employees and the failure to institute and maintain allegedly proper safety programs.

G. Consider coverage questions regarding corporate officers or supervisory employees both with respect to general liability policies and worker's compensation policies.

V. APPORTIONMENT OF DAMAGES VERSUS COMPARISON OF FAULT

A. In a crashworthiness case, according to the doctrine of Larsen v. General Motors, 391 F.2d 495 (8th Cir. 1968), and cases such as Huddell v. Levin, 537 F.2d 726 (3rd Cir. 1976), plaintiff has the burden of proving what specific injury enhancement or aggravation occurred and defendant is liable only for the specific level of enhanced injuries which plaintiff can prove. Thus, in the second collision cases, plaintiff's burden of proof requires the apportioning of injuries and damages,

separating out the ordinary and usual injuries and damages which would have flowed but for the claimed defect from those enhanced or aggravated injuries which resulted. The seat belt defense imposes a similar burden on defendant.

1. In such a case, will all of the fault which caused the accident to occur be compared first and all of the fault which caused injury enhancement second? Or, will the jury be asked to perform some variety of rough equity by considering all kinds of fault, whether injury producing or accident producing, in one comparison, instead of a two-level comparison which seeks to apportion specific damages and injuries to the conduct of specific parties. See Theisen v. Milwaukee Auto. Mut. Ins. Co., 18 Wis.2d 91 118 N.W.2d 140 (1963). But see Arbet v. Gussarson, 66 Wis.2d 551 225 N.W.2d 431 (1975), suggesting that second collision injuries are severable and requiring plaintiff to prove them as part of a second collision case. See also Spier v. Barker, 35 N.Y.2d 444, 323 N.E.2d 164 (1974) apportioning damages under the doctrine of avoidable consequences in the context of a seat belt case, as a result of which, if the aggravated injuries are proven to be due to the plaintiff's failure to buckle up, his recovery becomes almost nominal.

B. See Chrysler Corp. v. Todorovich, 580 P.2d 1123 (Wyo. 1978) announcing crashworthiness liability as applicable in Wyoming but finding the injury in that case to be indivisible and not subject to specific apportionment, and ruling that common law contribution must obtain between co-defendants.

C. In the recent case of Mitchell v. Volkswagenwerk, A.G., 669 F. 2d 1199 (8th Cir. 1982), the Eighth Circuit Court of Appeals, purporting to apply Minnesota law, held that where plaintiff sustains a single indivisible injury, the injury is not susceptible of being apportioned and, accordingly, if the design of the product is found to be a "substantial factor" in producing the single indivisible injury, the manufacturer is fully liable for the entire injury. The opinion of the Eighth Circuit Court of Appeals raises more questions than it answers and reaches results highly subject to question. Whether the Minnesota Supreme Court would actually announce for itself the somewhat astonishing Erie prediction of the Eighth Circuit is still another question.

D. The potential apportionment/comparison problems are legion. Little authority exists which provides an answer to any of them:

1. On a special verdict, should one apportionment question deal only with accident-causing negligence, apportioning all 100 percent of it among the parties?

2. Should another apportionment question address just injury-producing fault, apportioning all 100 percent of that between the parties? or

3. Should a single apportionment question be propounded which includes <u>all</u> of the negligent conduct of all of the parties, whether accident-producing or injury-producing?

4. Instead of considering all of the injury-causing negligence to total 100 percent, should a single special verdict question addressed to such negligence seek percentage answers which don't total 100 percent?

5. Once the percentages are derived does one factor out the passive, injury-causing negligence in comparing the negligence of co-defendants, as between them there is only active, accident-causing negligence? How will the factoring be done?

6. Is plaintiff's injury-causing negligence added to his accident-causing negligence in order to determine his total causal responsibility? Is defendant's active and passive negligence aggregated in order to determine his responsibility? Which percent figure of plaintiff's causal responsibility will be compared with which of defendant's figures?

7. How is the comparison effectuated between cross-claiming co-defendants where one is exposed to liability for injury-causing negligence and the other is only exposed to liability for accident-causing negligence?

8. If, under second collision liability, the enhanced injuries can be specifically determined and must be proven by the plaintiff, then can there ever be just one level of fault comparison such as there might be where injuries were thought to be indivisible?

E. Commentator Aiken, _Proportioning Comparative Negligence - Problems of Theory and Special Verdict Formulation_, 53 Marq. L. Rev. 293 (1970) supplies a "simple key" to many of these questions:

> Factor the passive negligence into the pre-established ratio of the active negligence, rather than attempting to factor it _out_ of an established mixed ratio.

ELEMENTS OF DAMAGE IN THE WRONGFUL DEATH CASE

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I. Action by personal representative (of decedents' estate)

A. Personal representative takes place of decedent - "survival" statute - §613.15, Code of Iowa

B. Elements of recovery:

1. Pain and suffering (only if conscious after injury). Lang v. City of Des Moines, 294 N.W.2d 557 (Iowa 1980).

2. Medical expenses §613.15, Code of Iowa.

3. Services and support (as parent or spouse) §613.15, Code of Iowa.

a. At present worth Adams v. Deur, 173 N.W.2d 100 (Iowa 1969).

b. Includes only "tangible" losses for personal services. Weitl v. Moes, 311 N.W.2d 259 (Iowa 1981).

c. May not be duplicated by child or spouses' independent claim for intangible "consortium" losses. Adams v. Deur, supra. May not be duplicated in loss of income item. DeWall v. Prentice, 224 N.W.2d 428.

d. Not limited to period of children's minority. Schmitt v. Jenkins Truck Lines, Inc., 170 N.W.2d 632 (Iowa 1969) Iowa-Des Moines National Bank v. Schwerman, 288 N.W.2d.

4. Present worth or value of estate which decedent would reasonably have accumulated between time of actual death and end of natural expected life. Iowa-Des Moines National Bank v. Schwerman, 288 N.W.2d 198 (Iowa 1980).

a. May consider evidence of decedents' age, life expectancy, characteristics, health, habits, education or opportunity for education, general ability, occupational qualifications, industriousness, intelligence, manner of living, sobriety, or intemperance, frugality or lavishness and other personal characteristics of assistance in securing business or earning money. Iowa-Des Moines National Bank v. Schwerman, 288 N.W.2d 201.

b. May be claim for loss of support though decedent not employed at time of death. Schmitt v. Jenkins Truck Lines, Inc., 170 N.W.2d 632, 636 (Iowa 1969).

c. May consider effect of income tax.

d. May not consider effect of estate taxes. Iowa-Des Moines National Bank v. Schwerman, 288 N.W.2d 205 (Iowa 1980).

e. May deduct amount of projected personal consumption. Iowa-Des Moines National Bank v. Schwerman, 288 N.W.2d 204 (Iowa 1980).

5. Interest on reasonable funeral expenses for length of time it was prematurely incurred. Schmitt v. Jenkins, 170 N.W.2d 661 (Iowa 1969).

C. Damages shall be apportioned to estate, children, parents, etc. by court - Matter of Youngs Estate, 273 N.W.2d 388 (Iowa 1978); Matter of Parson's Estate, 272 N.W.2d 16 (Iowa 1978); §633.336, Code of Iowa.

D. Damages for wrongful death not subject to debts of estate. §633.336, Code of Iowa.

E. Plaintiff's remarriage may be mentioned in voir dire but must be disregarded with respect to damages issue. Groesbeck v. Napier, 275 N.W.2d 388 (Iowa 1979).

F. Punitive damage claim survives if decedent had such claim. Koppinger v. Cullen-Schiltz and Associates, 513 F.2d 901 (D.C. Iowa 1975); Berenger v. Frink, 314 N.W.2d 388 (Iowa 1982).

G. Interest allowable from date of death. (Question - effect of new §535.3 Code?) Wetz v. Thorpe, 215 N.W. 350 (Iowa 1974).

II. Action by spouse of decedent.

A. May be brought separately. Acuff v. Schmit, 78 N.W.2d 480 (Iowa 1956).

B. Damages are for intangible elements of "consortium" only - company, cooperation, affection, aid, etc. (not services and support). Fuller v. Buhrow, 292 N.W.2d 672 (Iowa 1980); Weitl v. Moes, 311 N.W.2d 259, 263, et seq. (Iowa 1981).

C. Damages include personal loss such as medical bills paid by spouse. (By implication in Weitl).

III. Actions by parents of deceased minor.

A. Constitutes separate claim Rule 8, Iowa Rules of Civil Procedure. Wardlow v. City of Keokuk, 190 N.W.2d 439 (Iowa 1971); Pagitt v. City of Keokuk, 206 N.W.2d 700 (Iowa 1973).

B. Damages for loss of services of minor include present value of what decedent would have earned during minority minus present value of cost of his upbringing. Loss of companionship and society during minority are elements of services. Haumersen v. Ford Motor Co., 257 N.W.2d 7 (Iowa 1977) and expenses paid by parent. Rule 8, IRCP.

C. Grief, mental anguish, and suffering of parent not included. Wardlow and Pagitt, supra.

D. Loss of consortium claim is limited to damages sustained in the period of time between injury and death. Wilson v. Iowa Power & Light Co., 280 N.W.2d 372 (Iowa 1979). Language of Weitl, Page 270 leaves this in doubt as it limits recovery to the "period of minority" - perhaps should be in reference to "services" element.

IV. Actions by children of decedent.

A. Tangible elements of "services and support" belong to the estate. §613.15, Code of Iowa. Adams v. Deur, 173 N.W.2d 100 (Iowa 1969). Weitl v. Moes, supra, Page 263.

B. Loss of consortium belongs to child individually. Weitl v. Moes, supra, Page 270. Annotation, 69 ALR3d 528.

C. Limited to period of minority. Weitl v. Moes, supra, Page 270.

D. Suggested that award may be divided equally among multiple children. Weitl v. Moes, supra, Page 268. (Says ideally each child's loss evaluated separately.)

E. Application of Weitl v. Moes, supra, prospective v. retroactive?

F. Child's consortium claim must be joined with estate's claim "whenever feasible". (Burden of child to show why joinder not feasible.) Weitl v. Moes, supra, Page 270.

V. Consortium claims of other relatives not recognized.
Weitl v. Moes, supra, Page 266.

VI. Claims for death of unborn fetus not recognized.
McKillup v. Zimmerman, 191 N.W.2d 706 (Iowa 1971).
Weitl v. Moes, supra, Page 273.
Annotation, 84 ALR3d 411.

WHAT IS WORK PRODUCT

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UTILIZATION OF WORK PRODUCT AS A MEANS OF SHIELDING THE ATTORNEY-WITNESS INTERVIEW, AND HOW TO AVOID THE SHIELD

I. THE QUESTION PRESENTED

A. Frequently in connection with the deposition of a witness, (party or non-party), it would be useful to discover whether the deponent has previously discussed the case with opposing counsel. This information may be useful for impeachment or for discovering relevant information which may not be discovered in any other form.

B. On the other hand, as counsel who has consulted with a deponent prior to his deposition, situations arise where there is a desire to protect the existence and substance of conversations. Such protection may be afforded by invoking the attorney-client privilege (A/C) or the attorney work product protection (W/P). A/C may be invoked of course, when the witness is a "client" (this term may encompass a former employee of the client, *see* C. J. Burger's concurring opinion in *Upjohn v. United States*, 449 U.S. 383 (1980)). However, where the witness is not a client, or when A/C has been waived, W/P may still exist to afford a shield from disclosure.

C. While a written document prepared by the attorney concerning the interview may be classic W/P, can the opposition none the less inquire into the existence and substance of the conversation through the witness? The purpose of this presentation is to explore the current state of the law regarding the use of W/P as a shield from such interrogation.

II. W/P as applicable to attorney witness conversations.

A. Statement of the rule.

1. *Hickman v. Taylor*, 329 U.S. 495 (1947).

Supreme Court set forth the work-product doctrine in *Hickman* as a protection of the attorney's mental impressions, legal theories, and trial strategies from discovery by the adversary. The Court applied W/P to protect from discovery

memoranda and statements taken by an attorney from witnesses at the scene of an accident. The Court's rationale for denying discovery was to allow a zone of privacy within which a lawyer may prepare his case, free from unnecessary intrusion by opposing parties and their counsel.

2. FRCP Rule 26(b)(3)

The rule of Hickman v. Taylor was codifed in Rule 26(b)(3) of the Federal Rules of Civil Procedure. Since Rule 26(b)(3) refers to discovery of "documents and tangible things", the law is unsettled as to the application of W/P to intangible things such as the existence or substance of conversations between a witness and counsel.

a. Some courts take the view that since Rule 26 (b)(3) expressly extends W/P protection to "documents and tangible things," oral conversations are not entitled to W/P protection and are, therefore, freely discoverable during the course of a deposition.

United States v. I.B.M., 79 F.R.D. 378 (S.D.N.Y 1978).

1.) Further support is derived from opinions which restrict Rule 26(b)(3) to only "documents and tangible things," though not expressly considering the application of the rule to conversations:

Augenti v. Cappellini, 84 F.R.D. 73 (M.D. Pa. 1979).

Feldman v. Pioneer Petroleum, Inc., 87 F.R.D. 86 (N.D. Okla. 1980).

b. A majority of courts, however, take the opposite view, holding that W/P extends further than Rule 26(b)(3) states and applies to intangible things. Under this view the substance and possibly

the existence of conversations between a witness and counsel are capable of being shielded from disclosure through interrogation of the witness.

Ford v. Philips Electronics Co., 82 F.R.D. 359 (E.D. Pa. 1979).

Bercow v. Kidder, Peabody & Co., 39 F.R.D. 357 (S.D.N.Y. 1965).

Ceco Steel Products, Inc. v. H.K. Porter Co., 31 F.R.D. 142 (N.D. Ill. 1962).

Transmirra Products Corp. v. Monsanto Chemical Co., 26 F.R.D. 572 (S.D.N.Y. 1960)

In re Grand Jury Subpoena Dated November 8, 1979, 622 F.2d 933 (6th Cir. 1980)

In re Anthracite Coal Antitrust Litigation, 81 F.R.D. 516 (N.D. Pa. 1979).

III. Situations involving clients where A/C not available - can W/P be invoked?

A. There are situations which present exceptions to the usual A/C privilege. Absent A/C privilege, W/P may still be claimed.

1. Garner-type exceptions.

In Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970), cert. denied, 401 U.S. 974 (1971), the court held that where the adversaries in an action are in a fiduciary relationship to each other, e.g. in a shareholder derivative action against the directors and officers of a corporation, A/C will not attach to conversations between the officers and an attorney.

In Donovan v. Fitzsimmons, 90 F.R.D. 583 (N.D. Ill. 1981), the court held that the Garner exception did not apply to W/P.

2. Ongoing fraud, or improper purpose doctrine.

   a. Where the purpose of an attorney-client conversation is to obtain advice on the commission of a crime, there is no A/C. International Telephone & Telegraph Corp. v. United Telephone Co. of Florida, 60 F.R.D. 177 (M.D. Fla. 1973).

   b. The application of the crime/fraud exception to W/P was considered, but the issue was not decided in Duplan Corp. v. Deering Milliken, Inc., 540 F.2d 1215 (4th Cir. 1976).

   c. However, in In re Grand Jury Proceeding, FMC Corp., 604 F.2d 798 (3rd Cir. 1979), the court held that the crime/fraud exception applies to both W/P and A/C. But an attorney might still successfully invoke W/P even if the client is subject to the fraud exception to A/C, if the attorney was unknowing and uninvolved in the ongoing fraud.

3. Where client has put conversations with his attorney at issue in the litigation, A/C is not afforded.

   a. Where "advice of counsel" defense used, then no privilege afforded to conversations.

      Panter v. Marshall Field & Co., 80 F.R.D. 718 (N.D. Ill. 1978).

      Handgards, Inc. v. Johnson & Johnson, 413 F.Supp. 926 (N.D. Cal. 1976).

   b. From both Panter and Handgards it is unclear what protection, if any, is afforded under W/P theory when A/C does not apply because of the use of an "advice of counsel" defense. Both cases recognize that waiver of A/C by the client is not a waiver of W/P. However both cases found the existence

of a compelling need for the documents sufficient to overcome W/P.

c. Other limitations, such as those involved in A/C, may also become involved in W/P.

4. Several courts have considered the question of whether a waiver by the client of A/C acts as a waiver of W/P for the same material. Courts considering the question have held that W/P is an independent source of immunity. Therefore, the client's waiver of A/C does not necessarily waive the attorney's W/P.

Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 926 (N.D. Cal. 1976).

Hercules, Inc. v. Exxon Corp., 434 F. Supp. 136 (D. Del 1977).

Panter v. Marshall Field & Co., 80 F.R.D. 718 (N.D. Ill. 1978)

Transmirra Products Corp. v. Monsanto Chemical Co., 26 F.R.D. 572 (S.D. N.Y. 1960).

Ceco Steal Products, Inc. v. H.K. Porter Co., 31 F.R.D. 142 (N.D. Ill. 1962).

B. One court has held, however, that W/P does not apply to an attorney-client conversation, so that if A/C is wavied, no other protection could be invoked. (Daniels v. Hadley Memorial Hospital, 68 F.R.D. 583 (D.D.C. 1975)).

IV. Scope of W/P where applicable to the attorney-witness interview.

A. The existence of conversations between a witness and attorney, may be discoverable (see, e.g.: United States v. Lipshy, 492 F. Supp. 35 (N.D. Tex. 1979)). Although in at least one case, (In re Grand Jury Subpoena Dated November 8, 1979, 622 F.2d 933 (6th Cir. 1980)), even threshhold inquiries such as who was interviewed were not permitted.

B. The conversation must have occurred in anticipation of litigation, e.g. where a witness is interviewed in preparation for litigation.

C. Although A/C protects a conversation regardless of whether it occurred in connection with the litigation in question, the courts are divided on the issue of whether W/P terminates along with the termination of the litigation in which it originally arose.

Compare: Midland Investment Co. v. Van Alstyne, Noel & Co., 59 F.R.D. 134 (S.D.N.Y. 1973) (no protection unless cases are closely related); with: In re Murphy, 560 F.2d 326 (8th Cir. 1977), and Duplan, v. Moulinage et Retordie de Chavanoz, 509 F.2d 730 (4th Cir. 1973), cert. denied, 420 U.S. 997 (1975).

D. Since only mental impressions and opinions are truly W/P can the witness testify as to facts he related as long as he does not disclose opinions voiced by the attorney? In fact, can the problem be avoided by asking the witness questions like, "Have you ever told anybody this?"

V. PROBLEMS OF WAIVER

A. Assuming W/P applies, the conversation can be protected as long as the witness does not volunteer what was said in the attorney-witness interview. What, however, happens if the witness is recalcitrant in deposition, or too friendly when opposing counsel seeks an off the record interview? Has a waiver occurred?.

B. Who may invoke W/P?

1. The W/P doctrine has its origins in the interest of protecting the attorney rather than the client. While A/C "belongs" to the client, W/P "belongs" to the attorney. Therefore, courts have uniformly held that the attorney may invoke W/P.

Hercules, Inc. v. Exxon Corp., 434 F.Supp 136 (D. Del. 1977).

Ohio-Sealy Mattress Manufacturing Co. v. Sealy Inc., 90 F.R.D. 45 (N.D. Ill. 1981)

In re Special September 1978 Grand Jury, 640 F.2d 49 (7th Cir. 1980)

In re Grand Jury Proceedings, FMC COrp., 604 F.2d 798 (3rd Cir. 1979).

Panter v. Marshall Field & Co., 80 F.R.D. 718 (N.D. Ill. 1978).

2. This allows the attorney to seek enforcement of W/P in the first instance.

C. Who may waive W/P or A/C, and what constitutes waiver?

1. Differences exist between the W/P and A/C theories with respect to the waiver issue. Only the client may waive the A/C whereas generally only the attorney may waive W/P.

   Panter v. Marshall Field & Co., 80 F.R.D. 718 (N.D. Ill. 1978).

2. In Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613 (S.D.N.Y. 1977), the court held that while for purposes of A/C any disclosure to a third party acts as a waiver, that is not the case for W/P (an expert witness had been shown four notebooks prepared by the attorney as a synthesis of facts in the case to orient the expert to the case, and this was held insufficient to waive W/P - the Court did add a cautionary note that where such disclosure exceeds the decent limits of preparation it may be deemed a waiver of W/P).

3. In GAF Corp. v. Eastman Kodak Corp., 85 F.R.D. 46 (S.D.N.Y. 1979), the voluntary disclosure of documents in compliance with a governmental Civil Investigative Demand was held insufficient to be deemed a waiver of W/P. The court established the standard that disclosure to a third party is not a waiver unless the disclosure is inconsistent with the maintenance of secrecy from the disclosing party's adversary.

4. Other situations where disclosure has been held not to constitute a waiver of W/P:

a. Disclosure to another attorney on a matter of joint interest: Burlington Industries v. Exxon Corp., 65 F.R.D. 26 (D. Md. 1974); Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 90 F.R.D. 45 (N.D. Ill. 1978).

b. Disclosure to opposing counsel by a third party who wrongfully obtained the documents: American Standard, Inc. v. Bendix Corp., 71 F.R.D. 443 (W.D. Mo. 1976).

5. Situations where disclosure has been held to waive W/P protection:

a. Where documents were used during a deposition to refresh the witness' memory, W/P was waived. Bailey v. Meister Brau, Inc., 57 F.R.D. 11 (N.D. Ill. 1972).

b. Where defendant's counsel sought to impeach plaintiff's witness by using prior statements made by the witness to defendant's investigator, the privilege of W/P was waived by calling the investigator to testify at trial and the statements were ordered to be produced to plaintiff for use in cross-examination. United States v. Nobles, 422 U.S. 225 (1975).

D. In sum, the witness' disclosure of an attorney's opinions, etc. may not be a waiver of W/P. However, does it really matter if there is a waiver, if the other side has heard from the witness in any event?

E. Possible solution: obtain a protective order applicable to witness interviews before conducting the interview; then, properly advise the witness of the meaning and effect of same.

VI. The Question of Need

A. W/P does not afford an absolute immunity from disclosure as A/C does. It is a qualified immunity and can be overcome by a showing of substantial need for the information, and undue

hardship in trying to get the same information from other sources.

1. There has been a divergence set up by the courts between "ordinary" W/P, and "opinion" W/P. "Opinion" W/P materials are those which reflect the legal opinions and mental impressions of the attorney. Since the theory behind W/P protection for conversations between a witness and an attorney is that it reflects the attorney's legal thoughts and strategies, these conversations would be included in "opinion" W/P. United States v. Bonnell, 483 F. Supp. 1070 (D. Minn. 1979), modified, 483 F. Supp. 1091, held that notes and memoranda prepared by an attorney during conversations with certain potential witnesses were "opinion" work product.

2. What type of showing is needed to overcome "opinion" W/P was recently discussed by the Supreme Court in Upjohn Co. v. United States, 449 U.S. 383 (1980). There had been a controversy in the lower courts over whether or not "opinion" W/P enjoyed an absolute immunity from discovery. In Uphohn, the Supreme Court did not decide the issue, but did assert that opinion W/P did not have absolute protection, but a simple showing of substantial need was not enough. The showing required to overcome the immunity was something greater than the showing required to overcome "ordinary" W/P.

3. In discussing the issue of substantial need, the lower courts have made the following observations:

    a. The possibility of finding inconsistent statements useful for impeaching a witness is an insufficient showing of need. United States v. Chatham City Corp., 72 F.R.D. 640 (S.D. Ga. 1976).

    b. Cost and inconvenience in obtaining the information elsewhere is an

insufficient showing of need. *United States v. Chatham City Corp.*, 72 F.R.D. 640 (S.D. Ga. 1976).

VII. Conclusions

THE HEARSAY OBJECTION

HEARSAY UNDER THE FEDERAL RULES

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The Federal Rules of Evidence represent a departure from state evidentiary practice in many areas. Under our traditional common law approach, evidence is not normally admitted at trial unless certain conditions are met. Under the Federal Rules of Evidence, the philosophy seems to be that all evidence is admissible unless shown not to be admissible.

Under the common law approach, the factors to be considered in evaluating the testimony of any witness are perception, memory and narration. Our common law tradition has evolved three conditions which any witness must meet in order to testify. A witness must (1) be under oath, (2) be in the personal presence of the trier of fact and (3) be subject to cross-examination. Obviously, we have and will under the Federal Rules of Evidence receive evidence when there is less than full compliance with the three stated conditions. Common law has evolved a general rule excluding hearsay which Rule is subject to numerous exceptions under circumstances felt to furnish a reasonable guarantee of trustworthiness. The Federal Rules of Evidence attempt to further this ideal. They adopt a Federal Rule excluding hearsay with exceptions under which evidence is not required to be excluded even though hearsay.

The following Rules must be considered when evaluating

the Federal Rules of Evidence approach to hearsay.

FEDERAL RULE OF EVIDENCE 402

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

FEDERAL RULE OF EVIDENCE 801

Definitions. The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if--

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive or (C) one of identification of a person made after perceiving him; or

(2) Admission by party-opponent. The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a

statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

FEDERAL RULE OF EVIDENCE 802

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

FEDERAL RULE OF EVIDENCE 803

Hearsay Exceptions: Availability of Declarant Immaterial. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded recollection. A memorandum or record

concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted activity. A memorandum, report, record, or date compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances or preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of

information or other circumstances indicate lack of trustworthiness.

(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts or tombstones, or the like.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established.

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned Treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history. Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.

(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community and reputation as to events of general history important to the community or State or nation in which located.

(21) Reputation as to character. Reputation of a person's character among his associates or in the community.

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere) adjuding a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to personal, family, or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries essential to the judgment, if the same would be provable by evidence of reputation.

(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

FEDERAL RULE OF EVIDENCE 804

Hearsay Exceptions: Declarant Unavailable.

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant--

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) persists in refusing to testify concerning

the subject matter of his statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of his statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b) (2), (3), or (4), his attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant

to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

FEDERAL RULE OF EVIDENCE 703

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

CASE LAW

Olson v. Green, 668 F.2d 421 (8th Cir. 1982)

Battle v. Lubrizol Corp., 673 F.2d 984 (8th Cir. 1982)

United States v. Piatt, 679 F.2d 1228 (8th Cir. 1982)

United States v. Magnuson, 680 F.2d 56 (8th Cir. 1982)

United States v. Handy, 668 F.2d 407 (8th Cir. 1982)

Auto-Owners Insurance Company v. Jensen, 667 F.2d 714 (8th Cir. 1981)

Garman v. Griffin, 666 F.2d 1156 (8th Cir. 1981)

Pillsbury Co. v. Cleaver-Brooks Division, 646 F.2d 1216 (8th Cir. 1981)

United States v. Earley, 657 F.2d 195 (8th Cir. 1981)

Ford Motor Co. v. Auto Supply Co., Inc., 661 F.2d 1171 (8th Cir. 1981)

United States v. Riley, 657 F.2d 1377 (8th Cir. 1981)

United States v. Fay, 668 F.2d 375 (8th Cir. 1981)

United States v. Lanier, 578 F.2d 1246 (8th Cir.), cert. denied, 439 U.S. 856 (1978)

United States v. Scholle, 553 F.2d 1109 (8th Cir. 1977)

United States v. Carlson, 547 F.2d 1346 (8th Cir. 1976), cert. denied, 431 U.S. 914 (1977)

Stolte v. Larkin, 110 F. 2d 226 (8th Cir. 1940)

CONCLUSION

Based upon a reading of the Federal Rules of Evidence and Federal cases interpreting the Rules, it would seem fair to say that the Rules as they relate to hearsay are based upon the

common law and are calculated to encourage growth and development while conserving the values and experience of the common law.

LEGISLATIVE UPDATE

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I. Bills oy interest to defense attorneys

A. Products Liability

B. Comparative Negligence

C. Court Reorganization

D. S.F. 276 -- Judicial nominating commission and 5C district (vetoed).

E. S.F. 2270(chapter 1130) -- Amending the proposed changes in Rules of Civil Procedure.

F. S.F. 539(chapter 1161) -- Changes in Workers' Compensation Law.

G. H.F. 2355(chapter 1221) -- Additional changes in Workers' Compensation Law.

H. S.F. 474(chapter 1018) -- Modifications of the Tort Liability Law of Cities.

II. Bills of interest to attorneys in general

A. S.F. 2286(chapter 1220) -- Revision in requirements relating to soil conservation practices.

B. H.F. 777(chapter 1235) -- Rights of individuals after assignment of instrument.

C. H.F. 823(chapter 1025) -- Consumer credit code changes.

D. H.F. 2407(chapter 1103) -- New Limited Partnership Act.

E. H.F. 2347(chapter 1030) -- Deduction of child support from unemployment compensation.

F. H.F. 2442(chapter 1250) -- Changes in the custody sections of dissolution of marriage law.

G. S.F. 397(chapter 1054) -- Notice to auditor and recorder of property changes in dissolution decree.

H. S.F. 511(chapter 1002) -- Rights of owner of homestead against judgment lien.

I. S.F. 518(chapter 1004) -- Procedure for registration and enforcement of support orders issued by foreign jurisdiction.

J. H.F. 2359(chapter 1134) -- Rights of abstracter to examine court records relative to child support.

K. H.F. 2365(chapter 1106) -- Changes in law relating to privileged communications between husband and wife.

L. S.F. 217(chapter 1027) -- Exemption from transfer tax in real estate transfers.

III. Bills of general interest

A. S.F. 490(chapter 1055) -- Allows tort claim action against state to be tried by a jury.

B. S.F. 367(chapter 1155) -- Son of Sam Law

C. H.F. 2345(chapter 1052) -- Allows minor to receive up to $4000 by bequest directly.

D. H.F. 2460(chapter 1209) -- Revisions in Juvenile Code

E. S.F. 2218(chapter 1245) -- Land use.

F. S.F. 396(chapter 1158) -- Relates to resurvey of record plats

G. H.F. 808(chapter 1062) -- Staggered registration.

H. S.F. 2264(chapter 1122) -- Chauffeurs license exemption.

I. S.F. 537 and H.F. 2393 -- Bills relating to marriage

J. H.F. 2369(chapter 1167) -- O.M.V.U.I.

ANNUAL APPELLATE DECISIONS REVIEW

October, 1981 -- September, 1982

By Kenneth W. Biermacher
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ADMINISTRATIVE LAW

The respondent, Iowa Department of Job Service, appealed from a decision of the district court on judicial review allowing the petitioner to recover unemployment benefits. Prior to seeking judicial review, the claimant did not make application for rehearing pursuant to §96.6(8), The Code.

Holding: Application for rehearing pursuant to §96.6(8), The Code, is not a condition precedent to judicial review of contested cases under Chapter 96.

Kehde vs. Iowa Department of Job Service, 318 N.W.2d 202 (Iowa 1982).

ADMINISTRATIVE LAW

Petitioner appealed from the district court decision on a judicial review determination that subject matter jurisdiction was lost at the administrative level for the reason that petitioner failed to give notice of appeal in a statutory manner.

Holding: Mailing requirements of §17A.16(2), The Code, are mandatory where an application for a rehearing before the agency is made.

Cunningham vs. Iowa Department of Job Service, 319 N.W.2d 202 (Iowa 1982).

ADMINISTRATIVE LAW -- UNEMPLOYMENT COMPENSATION

The district court affirmed the action of the Iowa Department of Job Service that denied the petitioner's benefits

on the basis of excessive absenteeism and tardiness. Although the record reflected that petitioner was absent, it failed to establish whether the absenses were excused or unexcused.

Holding: The Court disapproved of the agency administrative rule relating to "excessive absenteeism" since it failed to distinguish between excused and unexcused absences. The Court reasoned that excessive absences are not misconduct unless they are unexcused.

Cosper v. Iowa Department of Job Service, No. 66953 (Iowa, June 16, 1982).

APPELLATE PROCEDURE

Defendant appealed his conviction of the crime of sexual abuse.

Holding: The Court disapproved of defendant's attorney's practice of citing cases in his brief without refering to the particular page quoted or relied on and as required by Iowa Rule of Appellate Procedure 14(e).

State vs. Coburn, 315 N.W.2d 742 (Iowa 1982).

APPELLATE PROCEDURE

Plaintiff sued for collection of the rent of a billboard. Judgment in the amount of $2,280 plus $940.50 interest was granted. The Court also awarded defendant, on its counterclaim, the sum of $602.55. With the setoff, the total damage award was $2,617.95. Defendant filed an appeal pursuant to Iowa R.App.P. 3 and plaintiff moved to dismiss the appeal on the basis of lack of

jurisdiction due to amount in controversy less than $3,000.

<u>Holding</u>: Interest recoverable on the damage involved at the time the action is commenced may be included in computing the amount in controversy, with respect to an appeal before the Court. A counterclaim does not reduce the amount in controversy for purposes of the appellate rule.

<u>Electra Add Sign Co. vs. Cedar Rapids Truck Center Co., Inc.</u>, 316 N.W.2d 876 (Iowa 1982).

APPELLATE PROCEDURE

A construction firm sued the City of Ossian, its mayor, and the city councilmen for recovery for part of the cost of constructing a sanitary sewer system. The individual defendants moved the Court to dismiss the action on the basis that plaintiff's action was founded upon a contact with the city and relief could only be granted against the city. The motion was sustained. The Court raised the issue of its appellate jurisdiction.

<u>Holding</u>: The trial judge's order sustaining the motions to dismiss became a "final adjudication in the trial court" pursuant to Iowa Rule of Civil Procedure 86 when the plaintiff failed to plead over within the time permitted by the Rule (within seven days after such mailing or delivery of notice of the Court's order). The test for whether an adjudication by way of Rule 86 is appealable of right under Iowa Rule of Appellate Procedure 1 is not whether it is "final" but whether it involves the merits or materially affects the final decision. The trial court's

dismissal order did not meet the test because it did not deprive the plaintiff of any right which could not have been protected by an appeal from final judgment. The claims against the city and the individual defendants are not "separable". The trial court's order was not appealable as a matter of right or by way of interlocutory relief.

Lerdall Construction Co. vs. City of Ossian, 318 N.W.2d 172 (Iowa 1982).

APPELLATE PROCEDURE

Plaintiff sought relief against the Wright County Board of Supervisors, the trial court dismissing the action. Plaintiff pursued appeal by mailing notice of the appeal to opposing counsel, the Clerk of the Supreme Court, and the Clerk of the District Court. There was a 63 day delay from service of the notice on the parties to the actual filing required by Iowa Rule of Civil of Procedure 82(d).

Holding: Under the Rule, the mandatory filings with the district court are timely if service is timely and "actual" filing is completed within a reasonable time thereafter. The 63 day delay did not meet the "reasonable time" test. Although defendants suffered no loss from the delay, the Court did not consider that factor in the definition as extending what would otherwise be a reasonable time.

Gordon v. Wright County Board of Supervisors, 320 N.W.2d 565 (Iowa 1982).

CIVIL PROCEDURE

An action whereby plaintiff sought partition of real estate. The Court granted the plaintiff's motion for summary judgment and directed that the property be appraised and sold. However, after the hearing on plaintiff's motion, but before the decree was entered, defendants filed a further resistance, raising for the first time, a new issue.

Holding: The trial court did not abuse its discretion in sustaining plaintiff's motion for summary judgment without considering defendant's resistance filed after the hearing. Neoco, Inc. vs. Christenson, 312 N.W.2d 559 (Iowa 1981)

CIVIL PROCEDURE

Defendants appealed from an adverse judgment in a declaratory judgment action brought by plaintiff seeking to have a written contract interpreted, and for injunctive relief. The declaratory judgment action was consolidated with a small claims appeal.

Holding: The trial court correctly ruled that the first small claims adjudication did not preclude plaintiff from relitigating the contract interpretation issue in a district court action. The affirmation of the small claims judgment on appeal to district court and the adjudication of the issue of such judgment did not preclude litigation of that issue on appeal. Village Supply Co. vs. Iowa Fund Inc., 312 N.W.2d 551 (Iowa 1981).

CIVIL PROCEDURE

The trial court sustained the defendant's special appearance on the basis of an automatic dismissal pursuant to Iowa Rule of Civil Procedure 215.1, failure to prosecute.

Holding: A stipulation for a continuance does not constitute an application for reinstatement required by the Rule. Plaintiff's argument that the defendant is estopped from attacking the court's jurisdiction by agreeing to a continuance is without merit.

Ellis vs. Tasco, Inc., 311 N.W.2d 820 (Table)(Iowa 1981).

CIVIL PROCEDURE

Plaintiff appealed from the entry of a summary judgment for defendants whereby the Court found that there was a res judicata effect following dismissal pursuant to Iowa Rule of Civil Procedure 175(b), dismissal for improper venue.

Holding: Rule 175(b) provides for dismissal without prejudice and is not res judicata.

Uttecht vs. Ahrens, 312 N.W.2d 571 (Iowa 1981).

CIVIL PROCEDURE -- CONTRACTS

Trial court sustained the special appearance of defendant, Coors, a Colorado corporation which sold beer throughout the State of Iowa. Plaintiff's claim was based upon the sale of machinery parts used at the Colorado brewery.

Holding: A foreign corporation is present in a state when it "does business" there, and in so doing it becomes amenable to the laws and the courts of the state. This was the law before

the enactment of the single act statutes and it is the present law. If a corporation's activity within a foreign state is so "continuous and systematic" that the corporation may, in fact, already be present within the state, it may also be served in causes of action unrelated to its foreign activities.

Holding: Contract clauses purporting to deprive the Iowa courts jurisidiction they would otherwise have are not legally binding in the State of Iowa. However, under a motion to dismiss an Iowa action without prejudice on the basis of forum nonconveniens, the clause, if it is otherwise fair, will be given consideration along with other factors presented to the trial court. Davenport Machine and Foundary Co. vs. Adolph Coors, Co., 314 N.W.2d 432 (Iowa 1982).

CIVIL PROCEDURE -- CONTRACTS

The plaintiff independent insurance agent sought recovery of renewal commissions pursuant to a contract with the insurance carrier. Trial court granted the defendant's motion for summary judgment and motion to dismiss on the basis of violation of the statute of frauds and due to a bar by way of the statute of limitations.

Holding: The statute of frauds does not bar evidence of a contract which has been fully performed by one of the parties. If the plaintiff has evidence that he has fully performed his part of the contract, his belief then becomes a genuine issue of material fact and the applicability of the exception to the statute of frauds exists.

Holding: The action was not barred by the five (5) year statute of limitations. Believing the plaintiff's allegation that the defendant stated its intention to breach the contract in 1973 and did not actually breach the contract until 1978 is not proper grounds for invoking the five year statute of limitations from the earlier date. Since the plaintiff chose to disregard the alleged 1973 anticipatory breach and decided not to sue until the breach in fact, the statute of limitations did not begin to run until the date of breach.

Glass vs. Minnesota Protective Life Insurance Company, 314 N.W.2d 393 (Iowa 1982)

CIVIL PROCEDURE

After being noticed of their own depositions by defendant, plaintiffs failed to appear. Pursuant to Iowa Rule of Civil Procedure 134(b), the defendant moved to dismiss plaintiff's petition as sanctioned for the failure. The motion was sustained.

Holding: Failure of the plaintiffs to attend their own depositions after receiving proper notice did not authorize the trial court to exercise its discretion by imposing the sanction of dismissal, even if the plaintiffs' conduct was willful. The reason was that there was no court order to be disobeyed as the trial court had not entered a discovery order previous to the failure of the plaintiffs.

Suckow vs. Boone State Bank and Trust Co., 314 N.W.2d 421 (Iowa 1982).

CIVIL PROCEDURE -- DAMAGES

Plaintiff administrator sued the defendants for malpractice when the decedent died after checking himself out of the defendant hospital. Defendant brought a motion for partial summary judgment seeking relief from the punitive damages claim sought on behalf of the deceased party.

Holding: The trial court erred in ruling that a motion for summary judgment was an inappropriate procedural device to seek the application of the rule that punitive damages cannot be recovered in an action brought after the death of the injured party.

Holding: The Court's previous position with respect to to recovery of punitive damages for the estate of a deceased individual was not followed on the basis that it was inequitable. The new rule is that in order to carry out the purposes of the punitive damages concept, it is logical to allow punitive damage claims to survive where an action was brought seeking such relief prior to the decedent's death.

Berenger vs. Frink, 314 N.W.2d 388 (Iowa 1982).

CIVIL PROCEDURE

Pursuant to Iowa Rule of Civil Procedure 215.1, the clerk of court provided notice which, however, was defective in that it was served one day late. In addition to a possible automatic dismissal under the Rule, the trial court, upon defendant's motion to dismiss pursuant to the Rule, entered a formal order of dismissal. A motion to reinstate was filed 11 months after the

dismissal, more than the six months allowable for reinstatement under the Rule but within one year allowed for setting aside judgments under Iowa Rule of Civil Procedure 252. The trial court reinstated the case.

Holding: The case of Schmidt vs. Abbott, 261 Iowa 886, 890, 156 N.W.2d 649, 651 (1968), is not to be cited for enlarging the time allowed for reinstatement under Rule 215.1 from six months to one year. However, where service of the notice under the Rule is untimely as it is given on August 15 rather than before, no automatic dismissal pursuant to 215.1 takes effect. Therefore, the 215.1 argument is disregarded. The judgment of dismissal was, however, subject to being vacated pursuant to Iowa Rule of Civil Procedure 252 within the one year period specified in Rule 253.

Greene vs. Tri-County Community School District, 315 N.W.2d 779 (Iowa 1982).

CIVIL PROCEDURE

In a medical malpractice action, defendants moved to take the discovery deposition of plaintiff's medical expert located in Minnesota. Defendants further requested that the plaintiff be prevented from offering any portion of the deposition into evidence at trial and that the defendants have sufficient time to study the deposition and confer with their own attorneys and experts before being required to cross examine the plaintiff's expert on deposition or at trial. The trial court sustained the motion in its entirety. On Writ of Certiorari, plaintiff

asserted that the trial court drew a distinction between "discovery" and "evidentiary" depositions by granting a protective order prohibiting plaintiff's use of the deposition at trial. Plaintiff further asserted that action violated Iowa Rule of Civil Procedure 144(c) and the Court's earlier holding in Osborn vs. Massey Ferguson, Inc., 290 N.W.2d 893, 897 (Iowa 1980).

Holding: Trial court erred in granting defendant's motion to prevent plaintiff from offering into evidence at trial a portion of the defendants' discovery deposition. Iowa Rules of Civil Procedure 140-158 do not draw a distinction between discovery depositions and depositions to be used at trial. (The Court was not concerned with depositions to perpetuate testimony pursuant to Iowa Rules of Civil Procedure 156-159.)
Farley vs. Sciser, 316 N.W.2d 857 (Iowa 1982).

CIVIL PROCEDURE

The United States Court of Appeals, Eighth Circuit, certified a question of law to the Iowa Supreme Court seeking construction of Section 614.10, limitations of actions statute which provides as follows: "If, after the commencement of an action, the plaintiff, for any cause except negligence in its prosecution, fails therein, and a new one is brought within six months thereafter, the second shall, for the purposes herein contemplated, be held a continuation of the first."

Holding: In general, the section only applies if the parties to the two actions are the same. The requirement of identity of parties is met if the change in parties is merely nominal

or if the interests represented in the second action are identical with the interests represented in the first action. The ultimate responsibility of a liability insuror and its insured in Iowa are sufficiently alike that the section applies when the first action was filed against an insuror and the second action against the insureds themselves. So long as these requirements are met, the second action need not be filed within the normal period of limitations so long as it is filed within six months of the failure of the first action.
Beilke vs. Droz, 316 N.W.2d 912 (Iowa 1982).

CIVIL PROCEDURE

The defendant, a foreign corporation, filed a special appearance in an action seeking damages for breach of express warranty and deceit in connection with the sale of equipment. Prior to the hearing on special appearance, the defendant filed interrogatories and a motion to quash discovery of plaintiff. Trial court ruled that based upon the activity of the defendant, the special appearance was waived.

Holding: Since discovery pursuant to the Iowa Rules of Civil Procedure is available on contested special appearance issues, defendant's use of discovery for that purpose did not waive a special appearance. Further, defendant did not waive its special appearance on the basis of the motion to quash, since it did not manifest any purpose to invoke the Court's authority on any issue other than the special appearance proceedings. Because the defendants' participation was limited to the challenge of the

Court's jurisdiction, the trial court erred in overruling the special appearance on waiver grounds.

E & M Machine Tool Corp. vs. Continental Machine Products, Inc., 316 N.W.2d 900 (Iowa 1982).

CIVIL PROCEDURE -- CONTRACTS

Plaintiff insured sued its insurance carrier for the loss resulting to plaintiff's crane. Relief was sought on the insurance contract and for the tort of bad faith for failing to pay benefits pursuant to the contract. After the statute of limitations had run, plaintiff amended the petition to substitute plaintiffs. The court allowed the amendment to relate back so as to avoid the statute of limitations problem.

Holding: The trial court did not abuse its discretion in allowing the amendment to relate back to the date of filing of the petition. Even though Iowa Rule of Civil Procedure 2 (Real Party in Interest) does not explicitly authorize amendments to substitute as party plaintiff the real party in interest, such amendments are condoned in Iowa.

Holding: Section 622.22, The Code, relating to a party's understanding of a contract, applies only if the terms of the contract are ambiguous.

Holding: Iowa Rule of Civil Procedure 125(e)(2) requires a party to seasonably supplement discovery of responses with the identity, subject matter, and substance of the testimony of an expert he expects to call as a witness. Sanctions for violating the duty are implicit in the rule and are not grounded in Rule

134 unless its provisions are violated. The trial court did not abuse its discretion in excluding the expert's testimony under the circumstances.

Holding: Plaintiff failed to present evidence to the jury to show that it owned the crane. The trial court should have granted defendant's motion for a directed verdict, however, due to the unique circumstances of the case, the Court applied Iowa Rule of Appellate Procedure 26 and remanded the case for trial on the single issue of ownership of the crane.

Holding: The fact finder may resort to extrinsic evidence to determine the situation, circumstances, and objects of the parties in order to determine the meaning of the words of the contract.

M - Z Enterprises, Inc. vs. Hawkeye-Security Insurance Co., 318 N.W.2d 408 (Iowa 1982).

CIVIL PROCEDURE -- INSURANCE LAW

The plaintiff insurance carrier, as subrogee, sued a tort feasor of the insured and the trial court determined that the carrier was not the real party in interest. Trial court entered judgment denying relief solely on that basis.

Holding: The insurance carrier who has subrogated to the rights of an insured after it has paid an insured's loss and then sues the tort feasor for damages is the real party in interest only if the inusrance payment covers the entire amount of the loss. This protects the tort feasor against the possibility of separate lawsuit by the insured. Where the insurance payment only covers a portion of the loss, the right of action remains

with the insured for the entire loss.

Holding: In the present case, there is no realistic possibility of further suit on the claim, therefore, the "real party in interest" rule does not bar the present action by the insuror. Wayne County Mutual Insurance Co. vs. Rove, 318 N.W.2d 192 (Iowa 1982). (Compare United Security Insurance Co. vs. Johnson, 278 N.W.2d 29, 30-32 (Iowa 1979).

CIVIL PROCEDURE -- CONTRACTS

Claimant, a discharged police officer, appealed from the district court order sustaining a special appearance filed on behalf of a civil servant's commission. The commission took the position that attempted service by way of mail, rather than personal delivery, did not vest the court with jurisdiction.

Holding: Attempted service of notice of appeal by mail, as opposed to personal delivery, did not comply with Section 400.27, The Code, and therefore, the district court was not vested with jurisdiction.

Holding: Iowa Rule of Civil Procedure 179(b) is not the appropriate appropriate vehicle for reopening the record for additional evidence to correct omissions made in the findings of fact by the court pursuant to a trial issue.
In Re Appeal of Elliott, 319 N.W.2d 244 (Iowa 1982).

CIVIL PROCEDURE

Plaintiff insurance carrier sought declaratory relief from the court to adjudicate whether or not liability arose under a policy of insurance from the insured's murder of his former girl

friend. In the criminal proceeding, the defendant entered a guilty plea.

Holding: The entry of a guilty plea in a proceeding in which the Court ascertains that a factual basis exists for the plea and accepts the plea, satisfies the requirement of the general principle of issue preclusion, that the issue must have been raised and litigated in a prior action. The Court overruled prior inconsistent authority as to guilty pleas to which the new holding applies. The insured had full opportunity to defend against the state's criminal accusation and the conditions necessary to invoke the principle of issue preclusion had been established.

Holding: The term "criminal act" as used in the exclusionary clause was not an ambiguous term and therefore it was not in need of construction. The term means a violation of those laws which are enacted to protect the public and which render the act punishable pursuant to a criminal code.

Ideal Mutual Insurance Co. vs. Winker, 319 N.W.2d 289 (Iowa 1982).

CIVIL PROCEDURE

Upon the trial of defendant tenant's willful holdover on farm land pursuant to a lease agreement between plaintiff and defendant, the jury was unable to agree on two special verdict forms relating to the willfullness issue. Trial court denied plaintiff's motion for a retrial under Iowa Rule of Civil Procedure 200.

Holding: The trial court should have directed retrial on the issues on the special verdicts involving the tenants wilfully holding over where the jury was unable to agree on the special verdicts.

Wederath vs. Brant, 319 N.W.2d 306 (Iowa 1982).

CIVIL PROCEDURE

A farm tenant appealed from a judgment that the landlord improperly terminated the farm tenancy. Tenant claimed that notice was not properly mailed when sent by way of "certified" mailing.

Holding: Pursuant to provisions of §§562.6 and 562.7, The Code (service of notice of termination of farm tenancy), service of the notice must be sent by "restricted certified mail" and not by "certified mail".

Buss v. Gruis, 320 N.W. 2d 549 (Iowa 1982)

CIVIL PROCEDURE

Plaintiff brought an action against the defendant commission seeking enforcement of the open meetings law (Chapter 28A, The Code) and the public records law (Chapter 68A, The Code). The district court dismissed her action.

Holding: The district court improperly relied on determination of what it perceived to be plaintiff's purpose or motive for bringing the lawsuit, rather than on whether the pleading stated a claim on which relief could be granted. Motive in filing the suit is not determinative when ruling on a motion to dismiss. The sole inquiry is whether plaintiff has stated a

cause of action.

Grove v. Iowa Commission for the Blind, No. 66838 (Iowa, June 16, 1982).

CONFLICT OF LAWS

Plaintiff obtained a default judgment in New York for the balance due under a lease agreement. An action was brought in Iowa pursuant to the full faith and credit clause of the United States Constitution whereby plaintiff sought to enforce the New York judgment. Defendant counterclaimed for breach of contract and setoff for the return of leased equipment.

Holding: Full faith and credit clause requires the courts of each state to give to the judgment of another state the same preclusive effect between the parties as is given such judgment in the state in which it was rendered, even if the judgment is obtained by default. Since New York law holds that a default judgment is to be given collateral estoppel effect, thereby precluding relitigation of all matters necessarily determined by and essential to sustaining the judgment, the defendants are foreclosed by New York judgment from seeking the remedy of breach of contract.

National Equipment Rental, Ltd. vs. Estherville Ford Inc., 313 N.W.2d 538 (Iowa 1981).

CONSUMER CREDIT CODE

Plaintiff bank brought an action on various loans, including some drawn pursuant to the Iowa Consumer Credit Code. On appeal

question was raised with respect to the 20-day notice to cure.

Holding: Creditor bank has the burden to prove that a Notice to Cure, if required by the Code, was given to the debtor. Defendant's failure to plead a matter which the bank has the burden to prove is not a waiver of the requirement. Because the statutory notice as required by §§537.5110 and 537.5111, The Code, were not given, the suits on the notes should have been dismissed without prejudice.

Farmers Trust & Savings Bank v. Manning, 311 N.W.2d 285 (Iowa 1981)

CONTRACTS -- USURY

Plaintiff mortgagee sought judgment for unpaid principal of a consolidated note, together with interest and costs, including attorneys fees and for foreclosure of a mortgage securing the note. The transaction did not make up a consumer credit transaction. The trial court found that the note was usurous and gave the plaintiff judgment but denied the foreclosure.

Holding: The Court overruled precedent and held that security given under a usurous contract is ordinarily enforceable to the same extent as the contract itself. However, the Court may apply the clean hands doctrine and refuse to enforce security given under a usurous contract if unconscienable conduct on the part of the creditor appears under the circumstances presented.

CBS Real Estate of Cedar Rapids, Inc. vs. Harper, 316 N.W.2d 170 (Iowa 1982).

DAMAGES

Pursuant to the plaintiff's filing of a personal injury accident against co-tort feasors, the trial court judge applied the pro tanto credit rule and entered judgment awarding damages.

Holding: The Court refused to abrogate the pro tanto credit rule allowing a dollar for a dollar credit against the plaintiff's recovery for consideration received from other joint tort feasors under a settlement in favor of the pro rata rule sought by the plaintiff.

Holding: An active tort feasor who is also the co-owner of a right of contribution with a passive tort feasor may recover the entire amount of contribution owed to the co-owners by a third party tort feasor without joining the passive co-owner as a party to the action. The recovery by the active tort feasor extinguishes any liability of the third party to the passive tort feasor with respect to the contribution and the passive tort feasor may then proceed against the active tort feasor to recover his rightful share of the contribution award.

Wadle vs. Jones, 312 N.W.2d 510 (Iowa 1981)

DAMAGES -- CIVIL PROCEDURE

Leasors of real estate brought an action against leasee who allegedly damaged the realty. Defendant appealed, asserting that the trial court used the improper measure of damages.

Holding: The proper measure of damages for waste, when the owner is aware of the injury, is the ordinary measure for injury sustained to realty: if the property can be restored or repaired, the measure is the reasonable cost of repair or

restoration not exceeding the fair market or actual value of the improvement immediately prior to damage; otherwise the measure of damages is the difference between its fair and reasonable market value immediately before and after the injury.

Holding: Because the plaintiffs simply offered no evidence under the proper measure of damages, the defendants' measure pursuant to Iowa Rule of Civil Procedure 179(b) should have been sustained.

Duckett vs. Whorton, 312 N.W.2d 561 (Iowa 1981).

DAMAGES -- INSURANCE LAW

Plaintiff automobile owner brought an action against the defendant insured company and its insurance carrier for recovery of damage to the plaintiff's automobile. The automobile was damaged beyond repair; however, plaintiff argued that he was entitled to loss of use of the vehicle in spite of the extent of the damage to the vehicle. Plaintiff further sought recovery against the insuror upon a theory of a a third party action against another's insuror for the insuror's bad faith settlement with the third party.

Holding: The court modified the motor vehicle damage rules previously followed in the State of Iowa to permit full compensation, including loss of use damages as follows: (1) When the motor vehicle is totally destroyed or the reasonable cost of repair exceeds the difference in reasonable market value before and after the damage, the measure of the damage is the lost market value, plus the reasonable value of use of the vehicle for

the time reasonably required to obtain a replacement unit. (2) The rule with respect to a vehicle that can be repaired, the cost of repair not exceeding the difference in market value of the vehicle before and after damage remains the same.

(3) When the motor vehicle cannot, by repair, be placed in as good a condition as it was before the damage, then the measure of damages is the difference between its reasonable market value before and after the damage, together with reasonable value of the use of the vehicle for the time reasonably required to repair or replace the unit.

Holding: The court refused to recognize the new tort that would permit a third party to recover against an insuror where relief is sought for the insuror's alleged bad faith exhibited to the third party in failing to settle a liability claim against the carrier's insured.

Long vs. McAllister, 319 N.W.2d 256 (Iowa 1982).

EVIDENCE -- CONTRACTS

In a lessee's claim of interference with lease rights, the lessee cross-appealed from the damage award upon defendant's appeal from the judgment.

Holding: The parol evidence rule was not violated by the trial court's admission of extrinsic evidence bearing on the lease where the evidence was used by the trial court in an aid to interpret the lease. Such extrinsic evidence did not constitute inadmissible heresay.

Westway Trading Corp. vs. Ripper Terminal Corp., 314 N.W.2d 398 (Iowa 1982)

EXECUTION

A garnishee appealed from a garnishment judgment in which the trial court held that the judgment creditor could garnish the statutory annual amount on wages earned for each judgment held against the debtor by the creditor.

Holding: Section 642.21, The Code, clearly limits the total annual garnishment that can be obtained by any one judgment creditor against a particular debtor's earnings to the sum of $250, regardless of the number of judgments held by the creditor against the debtor.

St. Luke's Medical Center vs. Loara, 319 N.W.2d 254 (Iowa 1982).

FAMILY LAW

The Iowa Supreme Court granted further review from a Court of Appeals decision reversing the trial court's determination to transfer custody of the minor children to their father based upon the mother's secretive removal of the children from the State of Iowa.

Holding: The Court of Appeals decision was affirmed. the secretive removal of the children from the state is insufficient grounds to justify a change of custody.

In Re Marriage of Day, 314 N.W.2d 416 (Iowa 1982)

FAMILY LAW

Pursuant to the entry of a decree of dissolution of marriage in 1967, the custodial parent sought modification of the child support award. The defendant father argued that the majority age is determined based upon the statute in effect at the time of the

modification and not by the statute in effect at the time of the entry of the original decree.

Holding: The majority age, for purposes of determining a district court's jurisdiction to modify an award of child support, is defined by the statute in effect at the time of the original decree and award.
Willcox vs. Bradrick, 319 N.W.2d 216 (Iowa 1982).

FAMILY LAW

Subsequent to the entry of a dissolution of marriage decree, the petitioner wife appealed from the economic provisions of the decree. The court refused to subject respondent's one-third interest in a farm that the parties lived on, which was acquired by an inheritance, to the property division provisions.

Holding: The Court found that a number of factors bear on whether the property should be divided pursuant to §598.21(2), The Code: (1) contributions of the parties toward the property, its care, preservation or improvement; (2) the existence of any independent close relationship between the donor or testator and the spouse of the one to whom the property was given or devised; (3) separate contributions by the parties to their economic welfare to whatever extent those contributions preserve the property for either of the individuals; (4) any special needs of either party; and (5) any other matter which would render it plainly unfair to a spouse or child to have the property set aside for the exclusive enjoyment of the donee or devisee.
In Re Marriage of Thomas, 319 N.W.2d 209 (Iowa 1982).

INSURANCE LAW

The Federal District Court, Southern District of Iowa, certified to the Iowa Supreme Court a question concerning interpretation of Chapter 507B, The Code. Specifically, the Federal Court raised the question of whether or not the Chapter provided a private cause of action for unfair insurance practices.

Holding: Section 507B.4(9)(f), which provides that an insurance company's failure to settle a claim in which liability has become reasonably clear can be an unfair practice, does not create a cause of action for damages in the party entitled to the insurance proceeds. The legislature intended administrative sanctions to be the exclusive enforcement mechanism for the aforesaid section.

Seeman v. Liberty Mutual Insurance Co., No. 66706 (Iowa, June 16, 1982).

INSURANCE LAW

Plaintiff insured appealed from a declaratory judgment that his car was not covered under the "non-owned automobile" provision of his liability insurance policy with the defendant carrier. Plaintiff apparently sold the car that was insured with the defendant; however, a safety inspection certificate was not obtained and the transfer of ownership was not effective. Subsequently the car was involved in an accident and plaintiff was sued in two separate tort actions.

Holding: The plaintiff's vehicle was not a "non-owned" automobile and, as defined in the policy, the plaintiff failed to

show that the car was "not owned by or furnished for the regular use of either the named insured or any relative, other than a temporary substitute automobile."

Francis vs. Farmers Casualty Co. (Mutual), 319 N.W.2d 273 (Iowa 1982).

INSURANCE LAW

Plaintiff was owner of a liability policy which had a fixed period of coverage, although it could be continued for an additional period upon timely payment of premium. The plaintiff insuror brought the declaratory action seeking the court's adjudication that the automobile liability policy had expired at the time of the accident involved.

Holding: Section 515.80, The Code, does not apply to the facts of the case for the reason that the policy involved was for a definite period of time as opposed to a policy continuing indefinitely.

Travelers Indemnity Company vs. Fields, 317 N.W.2d 176 (Iowa 1982).

INSURANCE LAW -- EVIDENCE

Plaintiffs, parents of a minor child who was severely injured after she was struck by an automobile as the child disembarked from a school bus, commenced suit against the driver of the car, the driver of the bus, the owner of the bus, and the school district. Upon the second day of trial, all defendants except the driver of the automobile tendered the sum of $800,000 to settle the case. The settlement offer was accepted and trial

proceeded against the driver of the vehicle, whereupon verdict was returned in the sum of $1,100,000. Thereafter, plaintiffs executed against the driver, the execution being returned unsatisfied. In settlement of the judgment, the driver signed a settlement agreement assigning any potential claim which he might have had against his insurance carrier, defendant in the captioned action, for "alleged improper handling of his defense". Plaintiffs then proceeded against the insurance carrier, whereby the trial court dismissed the case for failure to state a cause of action.

Holding: The general rule is that an insuror will be liable for its acts in representing an insured only if "bad faith" is established (even though some cases have adopted a negligence standard). The general rule that evidence of negligence is admissible on the issue of bad faith has been modified in Iowa so that only evidence of negligence which shows an indifference to or disregard of the interests of the insured may be considered.

Holding: Bad faith is a standard by which the defendant's liability must be measured. It is not a proper subject of expert testimony. An expert's opinion that there was not a "sufficient investigation" is, in effect, an opinion that the attorney's actions did not meet the requisite standard of care, and therefore is inadmissible.

Kooyman vs. Farm Bureau Mutual Insurance Co., 315 N.W.2d 30 (Iowa 1982).

MUNICIPAL CORPORATIONS -- TORT CLAIMS ACT

Plaintiff minor child was struck by a car while walking home from school. The minor child's representatives gave timely notice of the claim to the defendant City of Des Moines, but notice, although given to the school district, was not timely pursuant to the statute. Upon the trial court's denial of the defendant school district's motion for summary judgment based upon a claim of insufficient notice pursuant to §613A.5, The Code, the Supreme Court granted an interlocutory appeal.

Holding: Section 613A.5 does not require multiple municipal tort feasors to be notified simultaneously by the injured party. The fact that the minor's representatives notified one municipal defendant of the claim before the second municipal defendant was notified did not preclude plaintiffs from alleging and attempting to prove incapacitation to meet §613A.5, Notice Requirements. Enochs vs. City of Des Moines, 314 N.W.2d 378 (Iowa 1982).

NEGLIGENCE -- JURY INSTRUCTIONS

Plaintiff, the mother of a minor child, sought relief against her neighbors as a result of burn injuries to the child sustained while playing with matches. The child obtained gasoline from the storage shed owned by the neighbors. Defendants pled and the jury was instructed on contributory negligence. The trial court refused to instruct the jury that by proving the minor child's age, the plaintiff had made out a prima facie case of freedom from contributory negligence.

Holding: The Court reversed its position with respect to presumptions arising from the young age of a child and held that

Iowa now recognizes the majority position, that the question of a particular child's capacity is an issue of fact to be determined on the basis of evidence of the child's age, intelligence and experience. Earlier recognized presumptions are no longer recognized. The holding is applicable to all actions in which final judgment has not been entered on the date of the filing of the opinion and to adjudicate a case in which error was preserved and the time for appeal had not yet expired.

Holding: The trial court did not err in refusing to instruct the jury that by proving the child's age, the plaintiff had made out a prima facie case of freedom from contributory negligence as such language is no longer appropriate, now that the plaintiffs do not have the burden of pleading and proving their freedom from contributory negligence.

Holding: The trial court did not err in refusing to give a separate jury instruction on the theory of liability set forth in §339 of Restatement (Second) of Torts (1965) (Artificial Conditions Highly Dangerous to Trespassing Children) as adopted in Rosenau vs. City of Estherville, 119 N.W.2d 125, 13 (Iowa 1972). An instruction on ordinary negligence adequately sets forth the essential aspects of the restatement section. Peterson vs. Taylor, 316 N.W.2d 869 (Iowa 1982).

NEGLIGENCE

Plaintiff executor in a wrongful death action brought an appeal subsequent to judgment entry for defendant. Plaintiff's decedent was apparently an alcoholic who was arrested for intoxication. While in the city jail plaintiff's decedent apparently

struck her head on a bed or sink and subsequently died from an injury to her brain. Issue was raised as to whether comparative negligence instructions should have been given to the jury.

Holding: The Court did not address the issue whether comparative negligence would be adopted in lieu of contributory negligence as there was no evidence of contributory fault.
Lang vs. City of Des Moines, No. 66388 (Iowa, May 19, 1982).

PROPERTY

Plaintiffs sought to quiet title in real property based on a theory of adverse possesion by way of claim of right. At the time plaintiff took possession of the property in 1952, she knew the property which she sought to quiet title against did not make up part of her parcel, although she continued to use the property for her own purposes. Trial court denied plaintiff's assertion.

Holding: The element of "good faith" is an essential component of a claim of right assertion as opposed to an argument of color of title.
Carpenter vs. Ruperto, 315 N.W.2d 782 (Iowa 1982).

PROPERTY -- MORTGAGES

Defendant savings and loan association appealed from a trial court's conclusion of law which prevented the defendant's enforcement of a due-on sale clause in a real estate financial agreement.

Holding: Subject to the statutory limitations in §535.8(2)(c), The Code, which prohibits the use (with exceptions) on mortgages executed after July 1, 1979, due-on sale clauses are

valid and enforceable in Iowa.

Martin vs. Peoples Mutual Savings and Loan Association, 319 N.W.2d 220 (Iowa 1982).

TORTS -- NEGLIGENCE

Plaintiff sought appellate relief from the trial court's dismissal of two counts of their petition containing claims for a child's loss of parental consortium and for the wrongful death in behalf of a stillborn fetus.

Holding: For the first time, the Iowa Supreme Court held that a minor has an independent cause of action for loss of the society and companionship of a parent who is tortiously injured by a third party so as to cause a significant disruption or dimunition of the parent-child relationship. Section 613.15, The Code, limits recovery for loss of tangible services and support and does not permit recovery for loss of society, companionship, and related intangible elements of consortium. All prior cases inconsistent with the new and current interpretation of §613.15 were overruled.

Holding: In order to reduce the multiplicity of litigation that might otherwise occur when an injured parent has a number of children, the newly recognized tort concept is conditioned upon the requirement that the child's claim be joined with an injured parent's claim whenever feasible. If the child's consortium claim is brought separately, the burden will be on the child-plaintiff to show why joinder was not feasible.

Holding: Iowa's survival statute found at §611.20, The

Code, does not permit a wrongful death action to be maintained on behalf of a fetus which is not born alive. This is true regardless of viability of the fetus at the time of injury.
Weitl vs. Moes, 311 N.W.2d 259 (Iowa 1981).

TORTS -- JURY INSTRUCTIONS

Action was brought against the defendant for negligence arising out of plaintiff's fall on a sidewalk. Defendant requested that the Court instruct that the plaintiff's failure to wear overshoes or other protective footwear could be contributory negligence.

Holding: The trial court's general instruction on contributory negligence adequately covered the subject urged by defendant.
Fartella v. Boston House Apartments, 315 N.W.2d 820 (Table)(Iowa 1981)

TORTS

United States Court of Appeals, Eighth Circuit, certified the following question to the Supreme Court: whether the theory of strict liability for abnormally dangerous activities applies to a common carrier under the circumstances of the case. The basic facts of the case reveal that defendant's train derailed, causing four tank cars to explode, resulting in extensive damage to a warehouse owned by the plaintiff

Holding: The theory of strict liability for abnormally dangerous activity can be applied in Iowa to common carriers. The Court declined to adopt the exception for common carriers

suggested by Restatement (Second) of Torts, §521.

National Steel Service Center, Inc. vs. Gibbons, 319 N.W.2d 269 (Iowa 1982).

TORTS

The United States District Court, Southern District of Iowa, certified legal questions involving tort liability to the Supreme Court.

Holding: A bystander, whose allegations satisfy the elements set out in Barnhill v. Davis, 300 N.W.2d 104, 108 (Iowa 1981), may maintain a claim of strict liability in tort against a product manufacturer for emotional distress caused by witnessing harm to a victim proximately caused by a defect in the design or manufacture of the product.

Holding: A bystander, whose allegations satisfy the elements set forth in Barnhill, may maintain a claim based upon the breach of implied warranties of fitness, merchantability against the manufacturer of a product for emotional distress caused by witnessing harm to a victim proximately caused by defects in the product that rendered it unmerchantable or unfit for its intended purposes.

Walker v. Clark Equipment Co., 320 N.W.2d 561 (Iowa 1982).

WORKERS' COMPENSATION -- INSURANCE LAW

Plaintiff who suffered personal injury while working for his employer sued two (2) co-employees asserting gross negligence in failing to provide him with a safe machine. Plaintiff also sued the workers' compensation insurance carrier alleging that it was

negligent in the safety inspection which proceeded the accident.

Holding: Three elements are necessary to establish "gross nenglígence amounting to such lack of care as to amount to wanton negligence" for a co-employee to be liable to employee pursuant to §85.20, The Code: (1) knowledge of the peril to be apprehended; (2) knowledge that injury is probable, as opposed to a possible, result of the danger; and (3) a conscious failure to avoid the peril.

Holding: The Court has recognized a cause of action against an insuror based upon negligence in conducting "gratuitous" inspections. The court adopted §324A of the Restatement (Second) of Torts (1965) for imposing liability on a defendant insurance carrier. Such liability depends on whether there was substantial evidence that the inspection was one which the carrier should have recognized as necessary for the protection of third persons and, if so, (1) the inspection increased the risk or harm or (2) the harm was suffered by the employee because of his, or his employer's, reliance on the inspection.

Thompson vs. Bohlken, 312 N.W.2d 501 (Iowa 1981).

WORKERS' COMPENSATION

Plaintiff employee was awarded Iowa Workers Compensation benefit for injury sustained during his employment outside of the State of Iowa.

Holding: The Court interpreted §85.71(1), The Code, to provide that domicile in Iowa alone is not sufficient to entitle an employee to benefits provided by the Act, when the injury is sustained outside of the state. There must be some meaningful

connection between the domicile and the employer-employee relationship before an Iowa domiciliary becomes entitled to the Iowa benefits.

Iowa Beef Processors, Inc. vs. Miller, 312 N.W.2d 530 (Iowa 1981).

WORKERS' COMPENSATION

The plaintiff employee sought review of the district court's judgment dismissing her review-reopening claim for additional workers' compensation benefits on the basis that the claim was untimely. Plaintiff took the position that the discovery rule applied to review-reopening proceedings.

Holding: The "discovery rule" does not apply to workers' compensation review-reopening proceedings pursuant to the plain language in §83.34, The Code (1971) (presently §85.26, The Code (1981)). As a result, such proceedings must be commenced within three years of the last payment of compensation made under the original award, regardless of when an additional injury or disability is discovered or is discoverable.

Whitmer vs. International Paper Co., 314 N.W.2d 411 (Iowa 1982).

WORKERS' COMPENSATION

On judicial review, the district court judge overturned a determination of the Industrial Commissioner in a review-reopening proceeding with respect to the employer's mistaken overpayment of healing payment benefits. The claimant suffered a herniated disk that was job related in or about July, 1973. He received disability payments from September, 1973, through

February, 1979. It had been determined by the claimant's physician in 1975 that the claimant had reached his maximum healing. As a result, the claimant's permanent-partial disabilty benefits were to cease. Compensation during the healing period was $91 per week, the compensation for the permanent-partial disability being $84 per week. In spite of the change in the type of benefit, the employer mistakenly continued to pay $91 per week until February, 1979.

Holding: An employer is entitled to credit for its mistaken overpayment of healing payment benefits against its obligation to pay permanent-partial disability benefits pursuant to the Act. Wilson Food Corp. vs. Sherrie, 315 N.W.2d 756 (Iowa 1982).

WORKERS' COMPENSATION

Plaintiff brought suit against a co-employee for personal injuries sustained during employment. Prior to suit, plaintiff had accepted workers' compensation benefits. Defendant's motion for summary judgment was sustained on the basis that the plaintiff had elected his remedy by way of accepting workers' compensation benefits.

Holding: A genuine issue of material fact existed as to whether plaintiff's acceptance of the workers' compensation benefits was an election of remedies barring recovery from the defendant co-employee for his alleged gross negligence. Therefore, the issue should not have been decided by way of summary judgment motion.

Gourley vs. Nielson, 318 N.W.2d 160 (Iowa 1982).

WORKERS' COMPENSATION -- ADMINISTRATIVE LAW

Appeal was taken by the employer and its insuror from an award of workers' compensation benefits.

Holding: The Deputy Industrial Commissioner's preliminary ruling on the employer and insuror's motion for summary judgment was not a final judgment and the employee's appeal from the deputy's subsequent ruling was therefore timely.

Holding: The "discovery rule" does not apply to review reopening proceeding for disability benefits pursuant to §85.26(2), The Code. Therefore, the employee's claim for disability benefits is barred by the three year statute of limitations set out in the code section.

Huntzinger v. Moore Business Forms, Inc., 320 N.W.2d 545 (Iowa 1982).