

1985
Annual Meeting

OCTOBER 10, 11 & 12, 1985
HYATT DES MOINES
DES MOINES, IOWA

THURSDAY, OCTOBER 10, 1985

7:00 a.m.
BOARD MEETING-CAPTAIN'S ROOM

8:00 a.m.
REGISTRATION

8:30-9:00 a.m.
**PRESIDENT'S REPORT
ANNUAL BUSINESS MEETING**

9:00-10:00 a.m.
DEFENSE OF FRAUDULENT INSURANCE CLAIMS
JAMES A. PUGH,
Morain, Burlingame, Pugh & Juhl
West Des Moines, Iowa

10:00-10:15 a.m.
COFFEE BREAK

10:15-11:00 a.m.
RULES OF EVIDENCE - IOWA FEDERAL UPDATE
JOHN B. GRIER
Cartwright, Druker & Ryden
Marshalltown, Iowa

11:15-12:00 Noon
**WORKERS COMPENSATION AGENCY RULES -
RECENT DECISIONS**
ROBERT C. LANDESS
Iowa Industrial Commissioner
Des Moines, Iowa

12:00-1:30 p.m.
LUNCHEON
Speaker: THE HON. WILLIAM C. STUART, Chief Judge
United States District Court
Des Moines, Iowa

1:30-2:00 p.m.
REPORT - U.S. COURT OF APPEALS - 8th CIRCUIT
THE HON. GEORGE G. FAGG, Judge
United States District Court
Des Moines, Iowa

2:00-3:00 p.m.
COMPARATIVE FAULT - ONE YEAR
MARK S. BROWNLEE
Kersten, Ophelm & Carlson
Fort Dodge, Iowa

3:00-3:15 p.m.
COFFEE BREAK

3:15-3:45 p.m.
ESTIMATING SETTLEMENT VALUES
GREGORY G. BARNITSEN
Smith, Peterson, Beekman & Willison
Council Bluffs, Iowa

3:45-5:00 p.m.

HOW TO IMPROVE THE LAWYER'S PUBLIC IMAGE
Panel:
WILLIAM H. KOTLOWSKI, Jr., (Leader)
News Editor
Defense Research Institute

PATRICIA ROSENZWEIG
Professional Services Marketing
Chicago, Illinois

DAVID WITKE
Des Moines Register
Des Moines, Iowa

THURSDAY EVENING
Ingersoll Dinner Theater - Bus Leaves @ 6:15

FRIDAY, OCTOBER 11, 1985

9:00-10:00 a.m.
CONFLICTS OF INTEREST - A MUSHROOMING PROBLEM
E. J. CONNOR
Cedar Rapids, Iowa

10:00-10:15 a.m.
COFFEE BREAK

10:15-11:15 a.m.
**BANKS AND F.D.I.C. -
HOW TO DEAL WITH FEDERAL REGULATORS**
MARY E. CURTIN
Lindquist & Vennus
Minneapolis, Minnesota

11:15-12:00 Noon
**LEGAL MALPRACTICE - IOWA GRIEVANCE COMMISSION -
FEDERAL COURT RULES**
JAMES PICKENS
Pickens, Barnes & Abernathy
Cedar Rapids, Iowa

12:00-1:30 p.m.
LUNCHEON

Speaker: THE HON. W. WARD REYNOLDS, Judge
Supreme Court
Des Moines, Iowa

1:30-2:30 p.m.
VOIR DIRE - OPENING AND CLOSING
Panel:
DAVID J. DUTTON
Mosier, Thomas, Beatty, Dutton, Braun & Staack
Waterloo, Iowa

H. RICHARD SMITH
Ahlers, Cooney, Dorweiler, Haynie, Smith & Allbee
Des Moines, Iowa

2:30-3:15 p.m.
COURTROOM PSYCHOLOGY FOR LAWYERS
THOMAS SANNITO, Ph.D.,
Dubuque, Iowa

3:15-3:30 p.m.
COFFEE BREAK

3:30-4:15 p.m.
PRODUCT WARNING & LABELING
Panel:
A. ROGER WITKE
Whitfield, Musgrave, Selvy, Kelly & Eddy
Des Moines, Iowa

ROBERT L. FANTER
Whitfield, Musgrave, Selvy, Kelly & Eddy
Des Moines, Iowa

4:15-5:00 p.m.
COMPUTERS FOR TRIAL LAWYERS
LARRY SHEPLER
Betty, Neuman, McMahon, Hellstrom & Bittner
Davenport, Iowa

6:30 p.m.
COCKTAIL RECEPTION

7:30 p.m.
BANQUET
Speaker: PETER J. LAUGEN
Cedar Rapids, Iowa

SATURDAY, OCTOBER 12, 1985

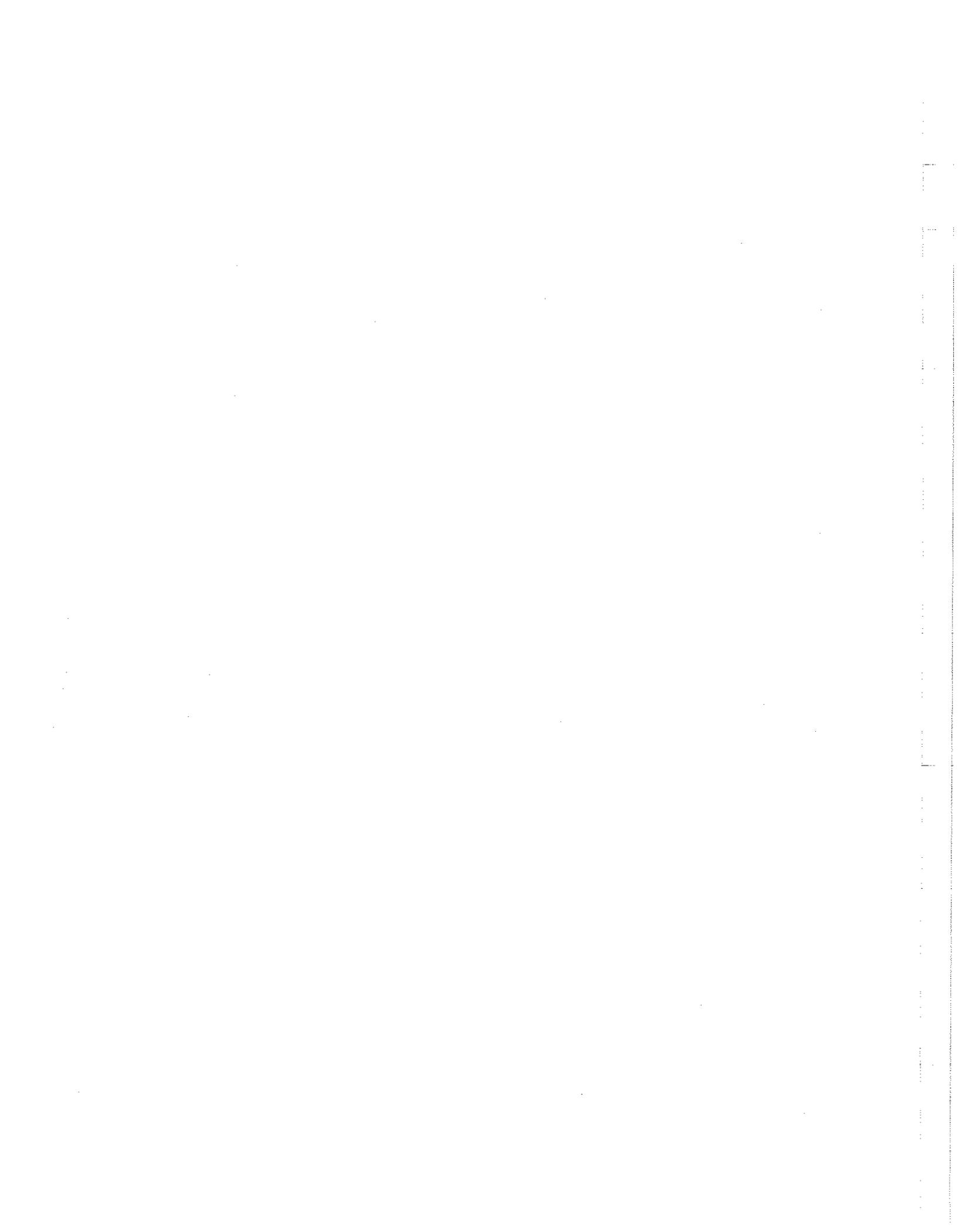
9:00-9:45 a.m.
LEGISLATIVE UPDATE
E. KEVIN KELLY
Des Moines, Iowa

9:45-10:15 a.m.
COLLATERAL SOURCE RULE - IS IT STILL REASONABLE?
RONALD W. RANKIN
Patterson, Lorentzen, Duffield, Timmons, Irish,
Becker & Ordway
Des Moines, Iowa

10:15-11:15 a.m.
ANNUAL APPELLATE DECISIONS REVIEW
MARK L. ZAIGER
Shuttleworth & Ingersoll, P.C.,
Cedar Rapids, Iowa

11:15 a.m.
RECESSED ANNUAL BUSINESS MEETING
Election of Officers

12:00 Noon
BOARD MEETING





OFFICERS AND DIRECTORS 1984-1985

PRESIDENT

Raymond R. Stefani
807 American Building
Cedar Rapids, Iowa 52401

PRESIDENT - ELECT

Claire F. Carlson
7th Floor - Snell Bldg.
Ft. Dodge, Iowa 50501

SECRETARY

David L. Phipps
1300 United Central Bank Bldg.
Des Moines, Iowa 50309

TREASURER

Eugene Marlett
5400 University Avenue
West Des Moines, Iowa 50265

BOARD OF DIRECTORS (Date is Term Expiration Date)

District I

David L. Hammer - 1987
200 Dubuque Building
Dubuque, Iowa 52001

District III

Alan E. Fredregill - 1987
200 Home Federal Building
Sioux City, Iowa 51102

District V

Paul D. Wilson - 1987
518 Midland Financial Bldg.
Des Moines, Iowa 50309

District VII

Larry L. Shepler - 1987
600 Union Arcade Building
Davenport, Iowa 52801

District II

M. Gene Blackburn - 1985
142 N. 9th Street
Ft. Dodge, Iowa 50501

District IV

Robert J. Laubenthal - 1987
307 Midlands Mall
Council Bluffs, Iowa 51501

District VI

Patrick M. Roby - 1985
500 Merchants Nat'l. Bank Bldg.
Cedar Rapids, Iowa 52406

District VIII

Craig D. Warner - 1986
Mississippi Valley Savings Bldg.
Burlington, Iowa 52601

AT LARGE

John B. Grier - 1987
P.O. Box 496
Marshalltown, Iowa 50158

Warren DeVries - 1985
30 Fourth St. N.W.
Mason City, Iowa 50401

Thomas D. Hanson - 1986
1300 Des Moines Bldg.
Des Moines, Iowa 50309

PAST PRESIDENTS & DIRECTORS

Edward F. Seitzinger, 1964-1965
1223 Cummins Parkway
Des Moines, Iowa 50311

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

Robert V.P. Waterman, 1975-1976
700 Davenport Bank Bldg.
Davenport, Iowa 52801

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

* Frank W. Davis, 1965-1966

Kenneth L. Keith, 1971-1972
Union Bank & Trust Building
P.O. Box 218
Ottumwa, Iowa 52501

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

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

D. J. Goode, 1966-1967
10th Floor Hubbell Bldg.
Des Moines, Iowa 50309

Robert G. Allbee, 1972-1973
300 Liberty Building
Des Moines, Iowa 50309

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

Alanson K. Elgar, 1982-1983
207 East Washington
Mt. Pleasant, Iowa 52641

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

Craig H. Mosier, 1973-1974
3151 Brockway Road
Waterloo, Iowa 50705

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

* Albert D. Vasey (Hon) 1983

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

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

Marvin F. Heidman, 1979-1980
200 Home Federal Building
Sioux City, Iowa 51101

Harold R. Grigg
1521 Elm Avenue
Primghar, Iowa 51245

IOWA DEFENSE COUNSEL FOUNDERS AND OFFICERS

Edward F. Seitzinger
President

D.J. Fairgrave
Vice-President

* Frank W. Davis
Secretary

Edward J. Kelly

Mike McCrary
Treasurer

William J. Hancock

Paul D. Wilson

ANNUAL MEETING CHAIRPERSONS

Edward F. Seitzinger
General Program Chairperson

Claire F. Carlson
Program Chairperson



1985 Annual Meeting

INDEX

	SECTION	PAGES
DEFENSE OF FRAUDULENT PROPERTY INSURANCE CLAIMS By James A. Pugh	A	1-19
RULES OF EVIDENCE - FEDERAL AND IOWA UPDATE By John B. Grier	B	1-50
WORKERS' COMPENSATION UPDATE By Robert C. Landess	C	1-56
NOTES — REPORT - U.S. COURT OF APPEALS - 8th CIRCUIT By Hon. George G. Fagg, Judge	D	3
COMPARATIVE NEGLIGENCE AND COMPARATIVE FAULT: REVIEW AND UPDATE By Mark S. Brownlee	E	1-32
ESTIMATING SETTLEMENT VALUES By Gregory G. Barntsen	F	1-34
CLOSING THE COMMUNICATIONS GAPS (Panel Discussion)	G	1-5
"CONFLICTS OF INTEREST - THE MUSHROOMING PROBLEM" By E. J. Connor	H	1-22
IOWA DEFENSE COUNSEL ASSOCIATION DUE PROCESS AND THE FEDERAL BANKING SYSTEM By Mary E. Curtin	I	1-6
LAWYER MALPRACTICE - IOWA GRIEVANCE COMMISSION By James F. Pickens	J	1-15
"VOIR DIRE - OPENING AND CLOSING ARGUMENTS" By David J. Dutton	K	1-5
PSYCHOLOGICAL STRATEGIES IN THE COURTROOM By Thomas Sannito, Ph.D.	L	1-9
PRODUCT WARNINGS AND LABELING By A. Roger Witke	M	1-45
LEGISLATIVE UPDATE By E. Kevin Kelly	N	1-30
COLLATERAL SOURCE RULE - IS IT STILL REASONABLE? By Ronald W. Rankin	O	1-10
ANNUAL APPELLATE DECISIONS REVIEW By Mark L. Zaiger	P	1-92

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q

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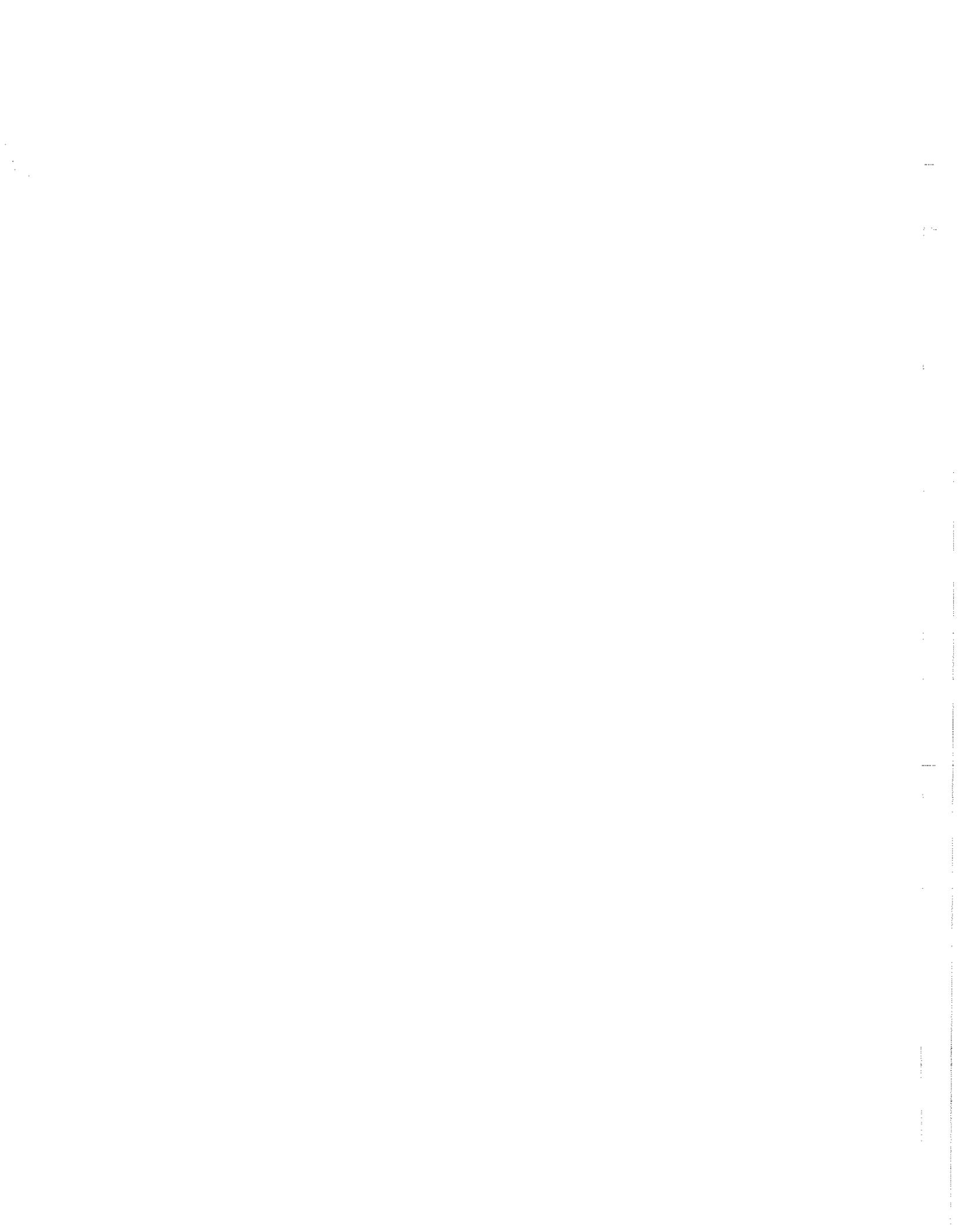
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**DEFENSE OF FRAUDULENT PROPERTY
INSURANCE CLAIMS**

James A. Pugh
Morain, Burlingame, Pugh & Juhl
West Des Moines, Iowa

SENIOR COUNSEL TO
FARM BUREAU MUTUAL INSURANCE COMPANY



DEFENSE OF FRAUDULENT PROPERTY
INSURANCE CLAIMS

Section 515.138 of the Iowa Code mandates that every policy of property insurance issued within the State of Iowa shall contain the standard provisions set out therein. This statutory policy contains, in substance, the same provisions as the 1943 New York Standard Fire Policy. Kintzel v. Wheatland Mut. Ins. Ass'n, 203 N.W.2d 799, 808 (Iowa 1973). The use of the Standard Fire Insurance Policy is discretionary if not mandatory in each of the fifty states and the District of Columbia. Committee on Property Insurance Law, A.B.A., Property Insurance Annotations -- Fire and Extended Coverages, 3-4 (1977). Within the insurance industry, this policy is referred to as the "165 lines" due to its length (see Appendix).

The statutory nature of this policy, coupled with its widespread use across the country, gives use to many unique legal arguments when defending a claim brought thereunder:

1. Since the policy language is prescribed by statute, it is not a policy of adhesion, and thus not subject to the rule that it be construed against the carrier. Kisting v. Westchester Fire Ins. Co., 290 F. Supp. 141, 147 (W.D. Wis. 1968), aff'd, 416 F.2d 967 (7th Cir. 1969); Winters v. National Indemnity Co., 120 Mich. App. 156, _____, 327 N.W.2d 423, 426 (1982); Laidlaw v. Commercial Ins. Co., 255 N.W.2d 807, 811 (Minn. 1977); Rosenthal v. Insurance Co. of North America, 158 Wis. 550, _____, 149 N.W. 155, 156 (1914).



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2. As a statutory policy, interpretation of the phrases contained therein should be subject to statutory, as opposed to contractual construction. Cf., Fraternal Order of Eagles v. Illinois Casualty Co., 364 N.W.2d 218, 221 (Iowa 1985) (statutory construction of dram shop coverage); American States Ins. Co. v. Tollari, 362 N.W.2d 519, 521 (Iowa 1985) (statutory construction of uninsured motorist coverage). The Iowa Supreme Court has twice used the rules of statutory construction to interpret phrases in the standard fire policy. Kintzel v. Wheatland Mut. Ins. Ass'n., 203 N.W.2d 799, 807-11 (Iowa 1973) ("direct loss"); Olson Enterprises, Inc. v. Citizens Ins. Co., 255 Iowa 141, _____, 121 N.W.2d 510, 511-12 (1963) ("inception of the loss").

3. Since the "165 lines" comes directly from statutory language, it can be argued that the insured is presumed to know and understand the contents thereof. Cf., Millwright v. Romer, 322 N.W.2d 30, 33 (Iowa 1982); Presbytery of Southeast Iowa v. Harris, 226 N.W.2d 232, 242 (Iowa 1975); Tuecke v. Tuecke, 257 Iowa 199, _____, 131 N.W.2d 794, 797 (1964); Woodruff & Son v. Rhoton, 251 Iowa 550, _____, 101 N.W.2d 720, 722-23 (1960).

4. Since the obligations of the insured and conditions precedent to recovery contained within the policy were drafted by the legislature, the insured should arguably be

held to a standard of strict compliance therewith, as opposed to the lesser standard of substantial compliance, Cf., Terrell v. State Farm Ins. Co., 346 N.W.2d 149, 151 (Minn. 1984); Loram Maintenance of Way, Inc. v. Consolidated Rail Corp., 354 N.W.2d 111, 114 (Minn. App. 1984).

5. One Court has ruled that the Standard Fire Policy is exempt from a bad faith cause of action, even though such a cause is recognized for non-statutory policies. Bitgood v. Allstate Ins. Co., 481 A.2d 1001, 1008 (R.I. 1984); Bibeault v. Hanover Ins. Co., 417 A.2d 313 (R.I. 1980); A.A.A. Pool Service & Supply Inc. v. Aetna Casualty & Surety Co., 395 A.2d 724 (R.I. 1978).

6. Due to the uniform and widespread use of the Standard Fire Policy, the Iowa Supreme Court will look to other jurisdictions in determining the effect of said policy in this State. Kintzel v. Wheatland Mut. Ins. Ass'n, 203 N.W.2d 799, 808 (Iowa 1973); Olson Enterprises, Inc. v. Citizens Ins. Co., 255 Iowa 141, _____, 121 N.W.2d 510, 512 (1963).

Before undertaking the defense of a fraudulent property insurance claim, it is therefore imperative that counsel have a complete understanding of the "165 lines". If the defense of such a case is made based on ordinary insurance principles, many unique opportunities for a defense verdict will be lost.

THE INSURED'S BURDEN

A In the typical property insurance claim, the insured has three seemingly easy burdens to establish: (1) that a policy was in existence, (2) that he suffered an insured loss (and the amount thereof), and (3) that he complied with his duties and obligations under the policy. While a defense to the first two elements is rather routine, the defense attorney often has unique opportunities to question the insured's proof with respect to the latter.

Lines 90 - 122 of the standard policy set forth certain requirements of the insured that have been construed as conditions precedent to his recovery. Do-Re Knit, Inc. v. National Union Fire Ins. Co., 491 F. Supp. 1334, 1338 (E.D.N.Y. 1980); Bergeron v. Employers Fire Ins. Co., 2 Pa. 2d 453, 455 (Cal. 1931); Fireman's Fund Ins. Co. v. Sims, 115 Ga. 939, _____, 42 S.E. 269, 271 (1902); Dyno-Bite, Inc. v. Traveler's Co., 439 N.Y.S.2d 558, 560 (App. Div. 1981); Gross v. United States Fire Ins. Co., 337 N.Y.S.2d 221, 222 (Sup. Ct. 1972). Collectively, the insured's duties outlined in the policy are often referred to as the cooperation clause, and are contained therein to permit the carrier an avenue to investigate possibly fraudulent claims. Clafin v. Commonwealth Ins. Co., 110 U.S. 81, 94-96 (1884). The insurer has four procedural mechanisms available to it for this purpose: (1) Proof of loss and inventory (lines 97 - 113), (2) Examination of damaged property (lines 113 - 115), (3) Examination under oath (lines 116 - 117), and (4) Production of books and records (lines 117 - 122).



The only limitation on the cooperation clause is that the requests for information must be material and relevant to the loss. Mulkey v. United States Fidelity & Guar. Co., 132 S.E.2d 278, 283 (S.C. 1963). The Mulkey court went on to state that, "the examination should be liberal in scope, and everything fairly relevant and pertinent to the insurance and the loss and the circumstances and amount thereof may be inquired into." See Kisting v. Westchester Fire Ins. Co., 290 F. Supp. 141, 148 (W.D. Wis. 1968) (information about claim of loss that was filed and income tax history was material); Southern Guar. Ins. Co. v. Dean, 172 So.2d 553, 556 (Miss. 1965) (information pertaining to insured's checking account, income tax returns, bank accounts, and mortgages were all material because they were pertinent to the insured's financial condition); Mulkey v. United States Fidelity & Guar. Co., 132 S.E.2d 278, 283-84 (S.C. 1963) (where insured stopped for a can of beer was material because it would establish his whereabouts during a possible arson fire).

The insured's failure to comply with all reasonable requests of the carrier, is a material breach of the contract, and a complete defense to a suit on the policy. Dyno-Bite, Inc. v. Traveler's Cos., 439 N.Y.S.2d at 560; Lentini Bros. Moving & Storage Co. v. New York Prop. Ins. Underwriters Ass'n, 428 N.Y.S.2d 684, 687 (App. Div. 1980), aff'd, 440 N.Y.S.2d 174 (1981) (insured obligated to fulfill its statutory and contractual duties and failure to do so entitled insurer to summary judgment); Do-Re Knit v. National Union Fire Ins. Co., 491 F. Supp. at 1339 (failure to comply with requests was material

A breach of contract); Kisting v. Westchester Fire Ins. Co., 416 F.2d at 967 (refusal to answer questions at examination was breach of a policy provision and barred recovery); Catalogue Serv. of Westchester, Inc. v. Insurance Co. of N. Am., 425 N.Y.S.2d 635, 637 (Sup. Ct. 1980) (failure to submit to an examination under oath is material breach and will preclude an action to recover); Southern Guar. Ins. Co. v. Dean, 172 So. 2d at 558 (refusal to submit to examination resulted in forfeiture of the right to recovery); Gipps Brewing Corp. v. Central Mfrs. Mut. Ins. Co., 147 F.2d 6, 13 (7th Cir. 1945) (noncompliance precluded recovery unless failure to comply was waived by insurer).

The Illinois Appellate Court has recently decided a case which shows the application of this defense. Horton v. Allstate Ins. Co., 125 Ill. App. 3d 1034, 467 N.E.2d 284 (1984). Following an incendiary fire, the plaintiff in Horton refused to comply with the insurer's request for documents and "took no action to either excuse or dispute his noncompliance." The Plaintiff chose to commence an action against the insurer rather than provide the documentation. The trial court granted the insurer's motion for summary judgment based on Horton's non-compliance. The appellate court affirmed, holding that as "a condition precedent for bringing suit against the insurer the policy requires the insured to have first fully complied with all of the terms of the policy." The Illinois court recognized that "the production of an insured's books and records, when requested, is a reasonable condition precedent to recovery."

(Citing Niagara Fire Ins. Co. v. Forehand, 169 Ill. 626, 48 N.E. 830 (1897)). Additionally, it should be noted that the court required full compliance (submission of proof of loss statements does not meet requirements of producing requested documents).

In addition to compliance with the cooperation clause, the standard policy requires that the insured bring any action on the policy within twelve months after the date of loss (lines 157 - 161). Absent waiver on the company's part, the Iowa Supreme Court has upheld this clause as a valid limitation provision. Olson Enterprises v. Citizens Ins. Co. 255 Iowa 141, 121 N.W.2d 510 (1963).

THE ARSON and FRAUD DEFENSE

Once the insured has established his case, the burden shifts to the carrier with respect to the affirmative defenses of arson and fraud (lines 1 - 6, 21 - 24, 31 - 32). With respect to the arson defense, the carrier must meet its burden by the normal "preponderance of the evidence" standard. Don Burton, Inc. v. Aetna Life & Casualty Co., 575 F.2d 702 (9th Cir. 1978); Honeycutt v. Aetna Ins. Co., 510 F.2d 340 (7th Cir. 1975); Mele v. All-Star Ins. Corp., 453 F. Supp. 1338 (E.D. Pa. 1978); Dean v. INA, 453 N.E.2d 1187 (Ind. Ct. App. 1983); Great American Ins. Co. v. K & W Log, Inc., 591 P.2d 457 (Wash. App. 1979). With respect to the fraud defense, the standard of proof is not so easily ascertainable. Generally, the Iowa courts require that fraud be proven by "clear and convincing" evidence. Beeck v. Aquaslide 'N' Dive Corp., 350 N.W.2d 149, 155 (1984). However, in the context of the standard fire policy, a number of

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states allow the carrier to prove fraud solely by a preponderance of the evidence. Esquire Restaurant, Inc. v. Commonwealth Ins. Co., 393 F.2d 111 (7th Cir. 1968); Hammann v. Hartford Accident & Indemnity Co., 620 F.2d 588 (6th Cir. 1980); Summer v. Stark City Patrons' Mutual Ins. Co., 63 Ohio App. 369, 26 N.E.2d 1021 (1940). These rulings are premised on the fact that property insurance claims are fundamentally different than common law actions. Since the policy itself contains a fraud exclusion, the carrier is merely attempting to demonstrate a violation of an express contract clause.

The authorities are unanimous in holding that the insurer can predicate its defenses on evidence which is entirely circumstantial in nature. Gregory's Continental Coiffures & Boutique, Inc. v. St. Paul Fire & Marine Ins. Co., 536 F.2d 1187 (7th Cir. 1976); Elgi Holding, Inc. v. INA, 511 F.2d 957 (2d Cir. 1975); Mele v. All-Star Ins. Corp., 453 F. Supp. 1338 (E.D. Pa. 1978); Manis v. Hartford Fire Ins. Co., 681 P.2d 760 (Okla. 1984); Quast v. Prudential Property & Casualty Co., 267 N.W.2d 493 (Minn. 1978). The rationale is easy to discern. Arson is "one of those crimes which is peculiarly of secret preparation and commission"; "[i]ncendiary fires are planned and executed covertly and seldom lend themselves to proof by direct evidence." Great American Ins. Co. v. K & W Log, Inc., 591 P.2d 457 (Wash. App. 1979). See also Haynes v. Farm Bureau Mutual Ins. Co., 11 Ark. App. 289, 669 S.W.2d 511 (1984).

Furthermore, authorities provide that a very liberal standard of relevancy must be used in determining the

admissibility of circumstantial evidence in cases of this type. Raphtis v. St. Paul Fire & Marine Ins. Co., 198 N.W.2d 505 (S.D. 1972); McIntosh v. Eagle Fire Ins. Co., 325 F.2d 99 (8th Cir. 1963).

The nature of the carrier's circumstantial evidence will generally fall into three areas known as the "arson triangle": (1) Incendiary fire, (2) Motive, and (3) Opportunity.

Proof of incendiarism will come primarily from the examination of a qualified cause and origin expert who will look for the following items:

- (1) Multiple and unconnected points of origin.
- (2) Whether all accidental causes can be ruled out.
- (3) Whether there is direct evidence of arson, including trailers, ignition or timing devices, and/or accelerants or chemicals at the point of origin.
- (4) Temperature gradients inconsistent with an accidental fire.
- (5) Eyewitness reports covering the nature and progress of the fire.

Motive evidence is generally obtained by the insurance company through its innovation of the cooperation clause and can fall into several categories:

- 1) Financial condition - evidence that insured is in poor financial condition is extremely relevant.
- (2) Condition of property - unsuccessful efforts to sell, foreclosure action, zoning changes, etc.

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- (3) Nature of insurance coverage - courts have consistently allowed the carrier to demonstrate that the property was substantially over-insured.

Proof of opportunity evolves from evidence tending to show that the insured (or someone acting in his behalf) had an opportunity to set the fire and that there was no one else with opportunity or motive to destroy the insured's property.

Opportunity evidence falls into the following categories:

- (1) Insured's whereabouts at time of fire.
- (2) How did insured learn of fire - his emotional reactions.
- (3) Insured's activities upon learning of fire.
- (4) How was access gained to premises.
- (5) Were important records or property removed from premises.
- (6) Activities of insured to increase hazard.

Satisfactory proof of the "arson triangle" will generate a jury question on arson and will support the affirmance of a defense verdict. Mele v. All-Star Ins. Corp., 453 F. Supp. 1338 (E.D. Pa. 1978); George v. Travelers Indemnity Co., 81 Mich. App. 106, 265 N.W.2d 59 (1978).

In addition to the arson defense, the insurer has a separate affirmative defense for fraud and false swearing. An insured who makes willfully false statements pertaining to any material portion of the claim, with the intent of deceiving his carrier, has thereby voided the policy and barred his own right

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to recover thereunder. See Breeland v. Security Ins. Co. 421 F.2d 918 (5th Cir. 1959); Perovich v. Glenn Falls Ins. Co., 401 F.2d 145 (9th Cir. 1968); Trice v. Commercial Union Assurance Co., 397 F.2d 889 (5th Cir. 1968); Esquire Restaurant, Inc. v. Commonwealth Ins. Co., 393 F.2d 111 (7th Cir. 1968); Transportation Ins. Co. v. Hamilton, 316 F.2d 294 (10th Cir. 1963).

The misrepresentation must relate to a material fact, but the term is broadly defined. Any misrepresentation is material if it might affect the insurer's decision with respect to settlement and/or adjustment of the claim. Perry v. State Farm Fire & Casualty Co., 734 F.2d 1441 (11th Cir. 1984); Fine v. Bellefonte Underwriters Ins. Co., 725 F.2d 179 (2d Cir. 1984).

False swearing concerning the extent of the loss will furnish the carrier with a fraud defense. A "substantial" or "gross overvaluation" of the claim, Gregory's Continental Coiffures & Boutique, Inc. v. St. Paul Fire & Marine Ins. Co., 536 F.2d 1187 (7th Cir. 1976), or a deliberate exaggeration of the amount of damage sustained will render the policy void. Tenore v. American & Foreign Ins. Co., 256 F.2d 791 (7th Cir. 1958). See also American Diver's Supply & Mfg. Co. v. Boltz, 482 F.2d 795 (10th Cir. 1973); 44 Am. Jur. 2d, "Insurance" §§ 1371-72 (1982); 5A Appleman, Insurance Law & Practice, § 3539 (1970).

Finally, fraud or false swearing is a species of contractual fraud, and there is no need for the carrier to show

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detrimental reliance. American Diver's Supply & Mfg. Co. v. Boltz, 482 F.2d 785 (10th Cir. 1973); Perry v. State Farm Fire & Casualty Co., 734 F.2d 1441 (11th Cir. 1984). As the Supreme Court explained in Clafin v. Commonwealth Ins. Co., 110 U.S. 81, 28 L. Ed. 76 (1884):

A false answer as to any matter of fact, material to the inquiry, knowingly and willfully made, with intent to deceive the insurer, would be fraudulent. If it accomplished its result, it would be a fraud effected. If it failed, it would be a fraud attempted.

PRACTICAL CONSIDERATIONS

I. The insurance company's arsenal of defenses should be used in concert to throw a cloud over the whole claim, rather than relying specifically on the defenses of fraud and/or arson. Juries will be reluctant to find the plaintiff guilty of arson, but they will not be reluctant to take away the fruits of that crime, or diminish the verdict, when given a chance to do so without arriving at a quasi-criminal verdict.

II. Defense counsel should take advantage of special interrogatories to the jury. R.C.P. 205-206. Each separate defense should be addressed in a separate interrogatory. When presented with 5 - 10 pages of questions, to which a single "yes" answer means a defense verdict, the chance of success is greatly magnified.

III. The company's position as mortgage subrogee can be used to advantage in settlement negotiations. Although the carrier is bound to pay a named mortgagee irrespective of the acts of the insured, such action results in a subrogation

interest on the carrier's part. Wholesale Sports Warehouse Co. v. Pekin Ins. Co., 587 F. Supp. 916, 920-21 (S.D. Iowa 1984). The insured's claim is therefore not an all or nothing proposition, since a loss will leave the carrier holding the note and mortgage to the insured's premises.

IV. The fact that no criminal charges have been brought against the insured is not admissible. United States v. Burch, 394 F.2d 1 (5th Cir. 1961); Miller & Dobrin Furniture Co. v. Camden Fire Ins. Co., 55 N.J. Super. 205, 150 A.2d 76 (1959); Greenberg v. Aetna Ins. Co., 427 Pa. 511, 235 A.2d 576 (1967). Evidence of an acquittal in a related criminal proceeding is equally inadmissible. Galbraith v. Hartford Fire Ins. Co., 464 F.2d 225 (3rd Cir. 1972).

V. Where the only issues in the case are arson, fraud by the insured and other related defenses, the insurer should consider stipulating to all elements of the plaintiff's case, which is to say the loss, the existence of the policy at the time of the fire and damages. This puts the carrier in a position to argue for the right to last argument, as the insurer is then the party which bears the burden of proof. See, e.g., Martin v. Cheseborough-Pond's, Inc., 614 F.2d 498 (5th Cir. 1980); Silver v. New York Life Ins. Co., 116 F.2d 159 (7th Cir. 1940); Liptak v. Security Benefit Ass'n, 183 N.E. 564 (Ill. 1932).

VI. Use the examination under oath to limit extra-contractual exposure. The examination under oath is usually

A
taken at a time where the insured is still attempting to be cooperative and has not had a chance to formulate his extra-contractual claim. When questioned about the carrier's activities, the insured will most often agree that the company has not done anything improper.

CONCLUSION

The defense of first party property insurance claims is one of the few areas where an insurance carrier can enter a courtroom on an equal footing with its insured. However, this status can be lost by the defense counsel if he fails to recognize the unique nature of the standard fire insurance policy and the defenses available thereunder.

APPENDIX



STANDARD PROVISIONS—IOWA ONLY

1 **Concealment,** This entire policy shall be void if whether
2 **fraud** before or after a loss, the insured has wil-
3 fully concealed or misrepresented any ma-
4 terial fact or circumstance concerning this insurance or the
5 subject thereof or the interest of the insured therein or in case
6 of any fraud or false swearing by the insured relating thereto
7 **Uninsurable** This policy shall not cover accounts, bills,
8 **and** currency, deeds, evidences of debt, money or
9 **excepted property.** securities; nor, unless specifically named
10 hereon in writing, bullion or manuscripts.
11 **Perils not** This Company shall not be liable for loss by
12 **included.** fire or other perils insured against in this
13 policy caused, directly or indirectly, by: (a)
14 enemy attack by armed forces, including action taken by mili-
15 tary, naval or air forces in resisting an actual or an immediately
16 impending enemy attack; (b) invasion; (c) insurrection; (d)
17 rebellion; (e) revolution; (f) civil war; (g) usurped power; (h)
18 order of any civil authority except acts of destruction at the time
19 of and for the purpose of preventing the spread of fire, provided
20 that such fire did not originate from any of the perils excluded
21 by this policy; (i) neglect of the insured to use all reasonable
22 means to save and preserve the property at and after a loss, or
23 when the property is endangered by fire in neighboring prem-
24 ises; (j) nor shall this Company be liable for loss by theft.
25 **Other Insurance.** Other insurance may be prohibited or the
26 amount of insurance may be limited by en-
27 dorsement attached hereto
28 **Conditions suspending or restricting insurance. Unless other-**
29 **wise provided in writing added hereto this Company shall not**
30 **be liable for loss occurring**
31 (a) while the hazard is increased by any means within the con-
32 trol or knowledge of the insured; or
33 (b) while a described building whether intended for occupancy
34 by owner or tenant, is vacant or unoccupied beyond a period of
35 sixty consecutive days; or
36 (c) as a result of explosion or riot, unless fire ensue and in
37 that event for loss by fire only.
38 **Other perils** Any other peril to be insured against or sub-
39 **or subjects.** ject of insurance to be covered in this policy
40 shall be by endorsement in writing hereon or
41 added hereto.
42 **Added provisions.** The extent of the application of insurance
43 under this policy and of the contribution to
44 be made by this Company in case of loss, and any other pro-
45 vision or agreement not inconsistent with the provisions of this
46 policy, may be provided for in writing added hereto, but no pro-
47 vision, may be waived except such as by the terms of this policy
48 is subject to change
49 **Waiver** No permission affecting this insurance shall
50 **provisions.** exist, or waiver of any provision be valid,
51 unless granted herein or expressed in writing
52 added hereto. No provision, stipulation or forfeiture shall be
53 held to be waived by any requirement or proceeding on the part
54 of this Company relating to appraisal or to any examination
55 provided for herein.
56 **Cancellation** This policy shall be cancelled at any time
57 **of policy.** at the request of the insured, in which case
58 this Company shall, upon demand and sur-
59 render of this policy, refund the excess of paid premium above

STANDARD PROVISIONS—IOWA ONLY
(Continued)

60 the customary short rates for the expired time. This pol-
 61 icy may be cancelled at any time by this Company by giving
 62 to the insured a five days' written notice of cancellation with
 63 or without tender of the excess of paid premium above the pro-
 64 rata premium for the expired time which excess, if not ten-
 65 dered, shall be refunded on demand. Notice of cancellation shall
 66 state that said excess premium (if not tendered) will be re-
 67 funded on demand.

68 **Mortgagee** If loss hereunder is made payable, in whole
 69 **interests and** or in part, to a designated mortgagee not
 70 **obligations.** named herein as the insured, such interest in
 71 this policy may be cancelled by giving to such
 72 mortgagee a ten days' written notice of can-
 73 cellation.

74 If the insured fails to render proof of loss such mortgagee, upon
 75 notice shall render proof of loss in the form herein specified
 76 within sixty (60) days thereafter and shall be subject to the pro-
 77 visions hereof relating to appraisal and time of payment and of
 78 bringing suit. If this Company shall claim that no liability ex-
 79 isted as to the mortgagor or owner, it shall, to the extent of pay-
 80 ment of loss to the mortgagee, be subrogated to all the mort-
 81 gagee's rights of recovery, but without impairing mortgagee's
 82 right to sue; or it may pay off the mortgage debt and require
 83 an assignment thereof and of the mortgage. Other provisions
 84 relating to the interests and obligations of such mortgagee may
 85 be added hereto by agreement in writing.

86 **Pro rata liability.** This Company shall not be liable for a great-
 87 er proportion of any loss than the amount
 88 hereby insured shall bear to the whole insurance covering the
 89 property against the peril involved, whether collectible or not.

90 **Requirements in** The insured shall give immediate written
 91 **case loss occurs.** notice to this Company of any loss, protect
 92 the property from further damage, forthwith
 93 separate the damaged and undamaged personal property, put
 94 it in the best possible order, furnish a complete inventory of
 95 the destroyed, damaged and undamaged property, showing in
 96 detail quantities, costs, actual cash value and amount of loss
 97 claimed; and within sixty days after the loss, unless such time
 98 is extended in writing by this Company, the insured shall render
 99 to this Company a proof of loss, signed and sworn to by the
 100 insured, stating the knowledge and belief of the insured as to
 101 the following: the time and origin of the loss, the interest of the
 102 insured and of all others in the property, the actual cash value of
 103 each item thereof and the amount of loss thereto, all encum-
 104 brances thereon, all other contracts of insurance, whether valid
 105 or not, covering any of said property, any changes in the title
 106 use, occupation, location, possession or exposures of said prop-
 107 erty since the issuing of this policy, by whom and for what
 108 purpose any building herein described and the several parts
 109 thereof were occupied at the time of loss and whether or not it
 110 then stood on leased ground and shall furnish a copy of all the
 111 descriptions and schedules in all policies and, if required, verified
 112 plans and specifications of any building, fixtures or machinery
 113 destroyed or damaged. The insured, as often as may be reason-
 114 ably required, shall exhibit to any person designated by this
 115 Company all that remains of any property herein described, and
 116 submit to examinations under oath by any person named by this
 117 Company, and subscribe the same; and, as often as may be
 118 reasonably required, shall produce for examination all books of
 119 account, bills, invoices and other vouchers, or certified copies
 120 thereof if originals be lost, at such reasonable time and place as
 121 may be designated by this Company or its representative and
 122 shall permit extracts and copies thereof to be made.



STANDARD PROVISIONS—IOWA ONLY
(Continued)

123 **Appraisal.** In case the insured and this Company shall
124 fail to agree as to the actual cash value or
125 the amount of loss, then on the written demand of either, each
126 shall select a competent and disinterested appraiser and notify
127 the other of the appraiser selected within twenty days of such
128 demand. The appraisers shall first select a competent and dis-
129 interested umpire; and failing for fifteen days to agree upon
130 such umpire, then on request of the insured or this Company,
131 such umpire shall be selected by a judge of a court of record in
132 the state in which the property covered is located. The ap-
133 praisers shall then appraise the loss, stating separately actual
134 cash value and loss to each item; and, failing to agree, shall
135 submit their differences, only, to the umpire. An award in writ-
136 ing, so itemized of any two when filed with this Company shall
137 determine the amount of actual cash value and loss. Each
138 appraiser shall be paid by the party selecting him and the ex-
139 penses of appraisal and umpire shall be paid by the parties
140 equally.

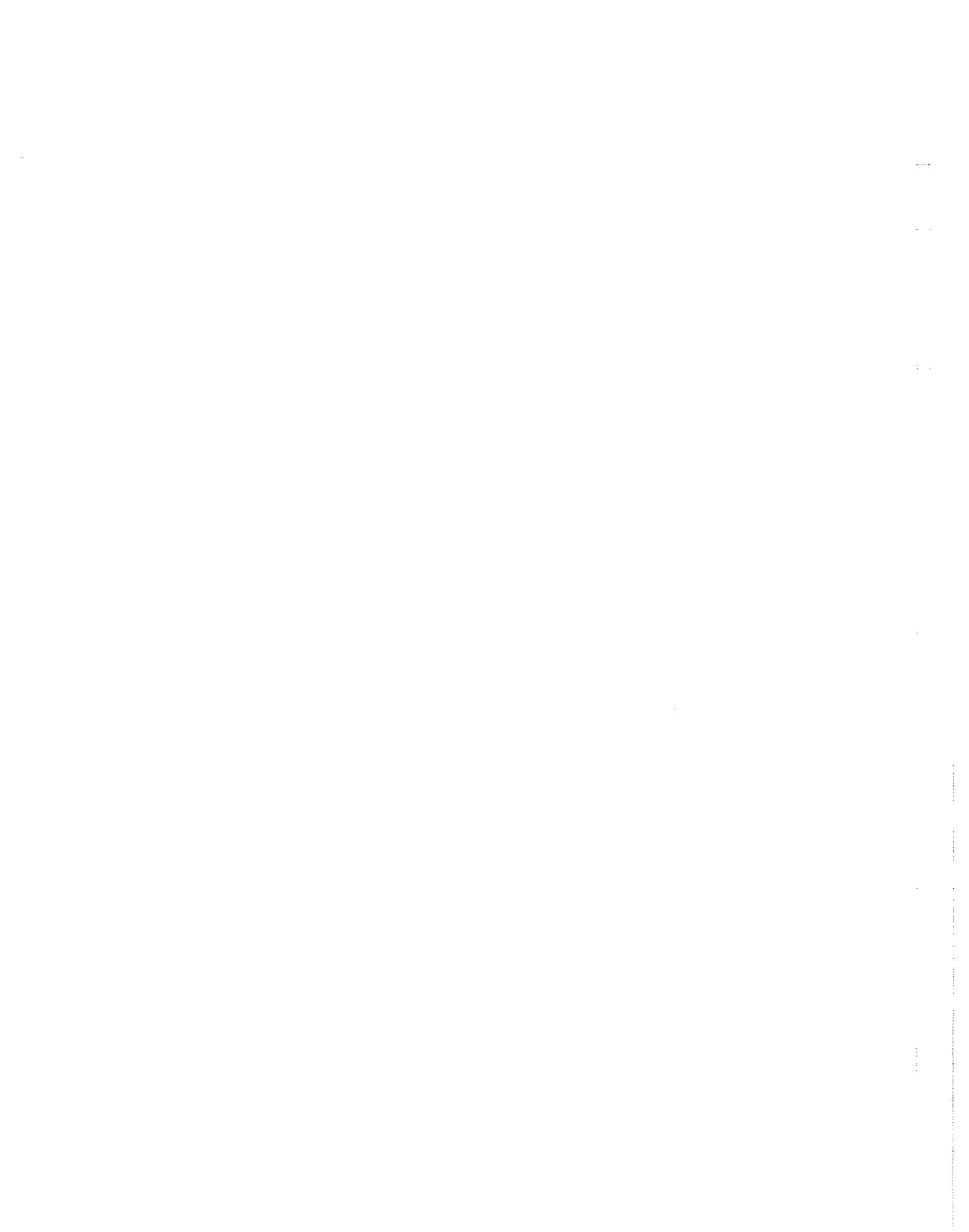
141 **Company's** It shall be optional with this Company to
142 **options.** take all, or any part, of the property at the
143 agreed or appraised value and also to re-
144 pair, rebuild or replace the property destroyed or damaged with
145 other of like kind and quality within a reasonable time, on giv-
146 ing notice of its intention so to do within thirty days after the
147 receipt of the proof of loss herein required.

148 **Abandonment.** There can be no abandonment to this Com-
149 pany of any property.

150 **When loss** The amount of loss for which this Company
151 **payable.** may be liable shall be payable sixty days
152 after proof of loss, as herein provided, is
153 received by this Company and ascertainment of the loss is made
154 either by agreement between the insured and this Company ex-
155 pressed in writing or by the filing with this Company of an
156 award as herein provided.

157 **Suit.** No suit or action on this policy for the recov-
158 ery of any claim shall be sustainable in any
159 court of law or equity unless all the requirements of this policy
160 shall have been complied with, and unless commenced within
161 twelve months next after inception of the loss.

162 **Subrogation.** This Company may require from the insured
163 an assignment of all right of recovery against
164 any party for loss to the extent that payment therefor is made
165 by this Company.



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RULES OF EVIDENCE - FEDERAL AND IOWA UPDATE



John B. Grier

The Advisory Committee, formed to study the Federal Rules of Evidence, was appointed by the Iowa Supreme Court on December 14, 1981. The Committee was directed to undertake a study of the Federal Rules of Evidence for the purpose of recommending which rules, if any, should be adopted for use in the Iowa state court system. The Iowa Rules of Evidence became effective on July 1, 1983. This outline presents an update as to case law interpretation of the Iowa Rules of Evidence from its date of adoption through the most recent Reporter received at the time of drafting, including Iowa and Federal case law interpretation. This update is effective through 368 N.W.2d 68, 766 F.2d 1536, and through 611 F.Supp. 989.

I N D E X

I. GENERAL PROVISIONS	
A. Rule 101. Scope	5
B. Rule 102. Purpose and Construction	5
C. Rule 103. Rulings on Evidence	5
D. Rule 104. Preliminary Questions	6
E. Rule 105. Limited Admissibility	7
F. Rule 106. Remainder of Related Acts, Declarations, Conversations, Writings, or Recorded Statements	7
II. JUDICIAL NOTICE	
A. Rule 201. Judicial Notice of Adjudicative Facts	7
III. PRESUMPTIONS IN CIVIL ACTIONS	
A. Rule 301. Presumption in General in Civil Actions and Proceedings	9
IV. RELEVANCY AND ITS LIMITS	
A. Rule 401. Definition of "Relevant Evidence". . .	9
B. Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible. .	11
C. Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time	14
D. Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes	17
E. Rule 405. Methods of Proving Character	19
F. Rule 406. Habit; Routine Practice.	20
G. Rule 407. Subsequent Remedial Measures	20
H. Rule 408. Compromise and Offers to Compromise	20
I. Rule 409. Payment of Expenses	21
J. Rule 410. Inadmissibility of Pleas, Plea Discussion, and Related Statements	22
K. Rule 411. Liability Insurance	23
L. Rule 412. Sexual Abuse Cases; Relevance of Victim's Past Behavior	23



V. PRIVILEGES

A. Rule 501. General Rule 24

VI. WITNESSES

A. Rule 601. General Rule of Competency 24
B. Rule 602. Lack of Personal Knowledge 25
C. Rule 603. Oath or Affirmation 26
D. Rule 604. Interpreters 26
E. Rule 605. Competency of Judge as Witness 26
F. Rule 606. Competency of Juror as Witness 26
G. Rule 607. Who May Impeach 26
H. Rule 608. Evidence of Character and Conduct of Witness 27
I. Rule 609. Impeachment by Evidence of Conviction of Crime 28
J. Rule 610. Religious Beliefs or Opinions 28
K. Rule 611. Mode and Order of Interrogation and Presentation 28
L. Rule 612. Writing Used to Refresh Memory 29
M. Rule 613. Prior Statements of Witness 29
N. Rule 614. Calling and Interrogation of Witness by Court 30
O. Rule 615. Exclusion of Witnesses 31

VII. OPINIONS AND EXPERT TESTIMONY

A. Rule 701. Opinion Testimony by Lay Witnesses 31
B. Rule 702. Testimony by Experts 31
C. Rule 703. Basis of Opinion Testimony by Experts 33
D. Rule 704. Opinion on Ultimate Issue 34
E. Rule 705. Disclosure of Facts or Data Underlying Expert Opinion 35
F. Rule 706. Court-Appointed Experts 36

VIII. HEARSAY

A. Rule 801. Definitions 36
B. Rule 802. Hearsay Rule 42
C. Rule 803. Hearsay Objections; Availability of Declarant Immaterial 44
D. Rule 804. Hearsay Exceptions; Declarant Unavailable 47
E. Rule 805. Hearsay Within Hearsay 48
F. Rule 806. Attacking and Supporting Credibility of Declarant 48

IX. AUTHENTICATION AND IDENTIFICATION

A.	Rule 901. Requirement of Authentication and Identification	48
B.	Rule 902. Self-Authentication	49
C.	Rule 903. Subscribing Witness' Testimony Unnecessary.	49

X. CONTENTS OF WRITINGS, RECORDINGS AND
PHOTOGRAPHS

A.	Rule 1001. Definitions	49
B.	Rule 1002. Requirement of Original	49
C.	Rule 1003. Admissibility of Duplicates	49
D.	Rule 1004. Admissibility of Other Evidence of Contents	50
E.	Rule 1005. Public Records	50
F.	Rule 1006. Summaries	50
G.	Rule 1007. Testimony or Written Admission of Party.	50
H.	Rule 1008. Functions of Court and Jury	50

IOWA AND FEDERAL RULES OF EVIDENCE UPDATE

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I. GENERAL PROVISIONS

A. Rule 101. Scope

1. No comment.
2. No case law interpretation.

B. Rule 102. Purpose and Construction

1. No comment.
2. No case law interpretation.

C. Rule 103. Rulings on Evidence

1. This rule is identical to Iowa law in force prior to the enactment of the Iowa Rules of Evidence.

2. Federal Rule 103(d) (Plain Error) was not adopted because it is contrary to the Iowa Rule 103 requirement for a timely and proper objection to evidence affecting a substantial right of a party, and for offers of proof where appropriate.

3. Case law:

- a. Civil Cases - Objection

Carter v. Wiese Corp., 360 N.W.2d 122

(Iowa App. 1984). Truck driver and his wife brought negligence action against corporation. Defendant objected to opinion testimony that it was "without a proper foundation." The trial court allowed the testimony into evidence. On appeal, the court stated that

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when a party seeks to exclude evidence, the specific grounds of objection need to be indicated to the trial court so as to alert the judge to the question raised and further enable opposing counsel to take remedial steps to cure the alleged defect. An objection stating only that there is "no proper foundation", but which does not state in what respects the foundation is lacking, is insufficient to preserve error for appeal.

b. Criminal Cases

State v. Washington, 356 N.W.2d 192 (Iowa 1984). Defendant was convicted of second degree theft. Regarding an objection by defendant to the introduction of certain photographs and officer's testimony concerning photographs, the Iowa Supreme Court held that no error was preserved. The state conceded that certain exhibits depicted items of property not listed in the minutes of evidence. However, there was no error in admission where defendant's objection was not made at the earliest time after which grounds for objection became apparent, and where defendant's motion contained no application to have his objection precede officer's answer nor any excuse for tardiness.

D. Rule 104. Preliminary Questions

1. Under Rule 104(a) preliminary matters concerning both exclusion and admission of evidence can be addressed by the court. Iowa has long used a motion in limine to exclude an anticipated evidentiary offer and now under this rule an

advance determination with regard to the admission of evidence can be made.

2. Rule 104(b)-(e) makes no changes in Iowa practice regarding conditional relevancy.

3. No case law interpretation.

E. Rule 105. Limited Admissibility

1. This is consistent with previous Iowa practice and Federal Rule 105 in that evidence which is admissible as to one party for one purpose, but not admissible as to another party for another purpose, should be admitted.

2. No case law interpretation.

F. Rule 106. Remainder of Related Acts, Declarations, Conversations, Writings, or Recorded Statements

1. No comment

2. No case law interpretation

II. JUDICIAL NOTICE

A. Rule 201. Judicial Notice of Adjudicative Facts

1. No comment

2. Case law interpretation:

a. Purchasing Power - In Re Marriage of Mentel, 359 N.W.2d 505 (Iowa App. 1984). Wife filed a petition seeking dissolution of marriage. After stating that the Iowa Supreme Court has taken judicial notice, in retrospect, of the reduced purchasing power of the dollar when considering child support payments, the court stated it should not take



judicial notice of future inflation.

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b. Medical Records - State v. Henze, 356 N.W.2d 538 (Iowa 1984). In determining whether medical records relied on by doctor in giving opinion testimony were within hearsay exception, court could take judicial notice of fact that doctors customarily rely on medical records prepared by other doctors in forming opinions about their patients' conditions.

c. Insurance Policy - McAndrews v. Farm Bureau Mutual Insurance Co., 349 N.W.2d 117 (Iowa 1984). Insured brought action against liability insurer alleging breach of contractual duty to defend after insured lost action brought by third party for assault and battery in which insurer had refused to defend insured. The insured, in his petition, did not allege facts sufficient to bring his claim within the liability covered by the policy. The court, holding that the insured was not covered by the policy due to the exclusion clause eliminating from coverage intentional acts of bodily injury or property damage, stated that in determining policy coverage, it may take judicial notice of the facts bearing on the policy coverage.

d. Decisions in Other Courts - Cunha v. City of Algona, 334 N.W.2d 591 (Iowa 1983). This action results from the 1980 unappealed, unpublished Federal district court judgment granting habeas corpus relief to plaintiff. Plaintiff then sued the county and defendant for damages. In defendant

county's motion to dismiss, asserted on the ground that the county would not have been required in 1970 to anticipate a change in a rule (which was the basis of habeas corpus relief), the court noted that the 1980 decision was not placed before it by pleading, proof, or stipulation. Therefore, as an Iowa district court cannot in one case take judicial notice of other cases, let alone a case in another trial court, the motion must be overruled.

III. PRESUMPTIONS IN CIVIL ACTIONS

A. Rule 301. Presumption in General in Civil Actions and Proceedings

1. Common law rule of presumptions is not affected by adoption of this rule. Presumptions are evidence and "clear, satisfactory and convincing evidence" is needed to rebut a presumption. Estate of Givens, 119 N.W.2d 191 (Iowa 1963).

2. Federal Rule 301 - all rebuttable presumptions would be treated as a procedural device that only shifts the burden of going forward to the opposing party.

3. No case law interpretation.

IV. RELEVANCY AND ITS LIMITS

A. Rule 401. Definition of "Relevant Evidence"

1. The Iowa common law definition of "relevant evidence" is the same as Federal Rule 401. Carson v. Mulnix, 263 N.W.2d 701, 706 (Iowa 1978).

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2. The concept of materiality has been included within the definition of relevancy and is described as that which "ordinarily relates to the pertinency of offered evidence to the issues in dispute or to the issue of credibility." State v. Clay, 213 N.W.2d 473, 477 (Iowa 1973).

3. Case law interpretation:

a. In General - Carter v. MacMillan Oil Co., Inc., 355 N.W.2d 52 (Iowa 1984). Gasoline customer brought action against oil company for abuse of process, malicious prosecution, and negligence in instigation of prosecution. Plaintiff was threatened by defendant that if it commenced this action, defendant would sue for abuse of process. Trial court excluded this testimony. Iowa Supreme Court, affirming in part and reversing in part the trial court's decision, stated that relevancy and materiality are matters of trial court discretion and that relevant evidence will be excluded when its probative value is substantially outweighed by confusion of issues or considerations of waste of time. Here, if the threat made to plaintiff with respect to the bringing of this action was improper, it should have been made the subject of an additional claim. It was not a matter embraced within the issues of the present case.

b. Receipt of Mail - Liberty Mutual Insurance Co. v. Caterpillar Tractor Co., 353 N.W.2d 854 (Iowa 1984). Plaintiff's suit was dismissed pursuant to Iowa Rule of Civil

Procedure 215.1. Court reversed dismissal after showing by plaintiff of proof that it did not receive a piece of mail giving notice of dismissal from clerk. This was competent and relevant evidence that it was not mailed.

c. Bad Checks - State v. Storrs, 351 N.W.2d 520 (Iowa 1984). The court in a prosecution for second-degree theft based on a bad check did not abuse its discretion in admitting evidence concerning prior overdrafts, since evidence was admissible to show knowledge, intent and absence of mistake.

d. Subsequent Fall - Madison v. Colby, 348 N.W.2d 202 (Iowa 1984). The trial court, in a negligence action, did not abuse its discretion in excluding evidence of a fall by another person on parking lot where plaintiff was injured, where the person's fall was subsequent to injured plaintiff's first fall and in a different winter season than plaintiff's second fall. Evidence of former accidents at a place is admissible to show its dangerous character and knowledge thereof if conditions are substantially similar or comparable and are not too remote. This determination is at the discretion of the trial court.

B. Rule 402. Relevant Evidence Generally Admissible;
Irrelevant Evidence Inadmissible

1. No comment
2. Case law interpretation:

a. Worker's Compensation - Carter v. Wiese Corp., supra at I-C-3-a, p. 1 above. Truck driver and wife brought negligence action against corporation, seeking damages

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for personal injuries and loss of consortium as a result of driver's accident which occurred in corporation's place of business when a ladder fell on him. Defendant argued the trial court erred when it prohibited further discussion of workers' compensation aspects of case, after mention had been made that benefits were received, but that the insurance carrier for the benefits was subrogated. The court held the workers' compensation statements were not relevant to the issue of "malingering" and that there was no abuse of discretion.

b. Termination of Officer - Johnson v. Civil Service Comm'n of City of Clinton, 352 N.W.2d 252 (Iowa 1984).

In an action against city challenging the police department's termination of a police officer for use of excessive force, evidence of discipline imposed on another officer for using excessive force was irrelevant.

c. Fraud - Kunkle Water & Electric v. City of Prescott, 347 N.W.2d 648 (Iowa 1984). Water company brought action against city to collect a delinquent account for labor and equipment furnished in repairing city's water system, and city defended on ground of fraud and violation of the competitive bidding statute. As to plaintiff's relevancy objection to admission of evidence that in 32 other instances over a five-year period they had estimated below the statutory limitation on projects that later overran the \$10,000 trigger for competitive bidding, and had in a number of those instances divided its

billing to disguise that fact, there was no abuse of discretion by the trial court in admitting the evidence. The evidence tended to establish an overall pattern lending support to the city's contention of fraud and deliberate evasion of the statute.

d. Photographs - Briner v. Hyslop, 337 N.W.2d 857 (Iowa 1983). A wrongful death action arising out of an automobile-truck accident was instituted against a corporate employer and its truck driver. Defendant argued the trial court erred in admitting into evidence photographs of the scene of the accident and the condition of the vehicles subsequent to the accident, as they were irrelevant. Defendant also argues that testimony of a passenger of plaintiff's vehicle was irrelevant. The court holds these were relevant to the issue of outrageous conduct of defendant and punitive damages. The evidence tended to show the nature, extent, and enormity of the wrong. There was no abuse of discretion by the trial court in allowing this evidence in.

e. Racial Discrimination - Richardson v. Quick Trip Corp., 591 F.Supp. 1151 (D.C. Iowa 1984). Plaintiff filed suit under Title VII alleging that his discharge for violation of his employer's no-beard policy constituted racial discrimination because the policy had a disparate impact on black males.

Regarding an opinion survey, the court stated:

1. For opinion survey to be independently admissible as evidence, proponent must in some manner validate sampling technique used and explain how reliability was assured.



2. Burden on proponent of opinion survey evidence to show reliability is greater if survey purports to represent subjective data, such as attitudes or beliefs, because of inherent difficulty of accurately measuring such data.

3. Although opinion survey data was not shown to be reliable and, thus, to be independently admissible to show how average convenience store customer would react to convenience store personnel with beards, data was admissible in employment discrimination action arising out of firing of plaintiff for violating employer's no-beard policy for limited purpose of supporting decision of management not to rescind no-beard policy.

C. Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

1. Iowa common law with regard to exclusion of relevant evidence on policy grounds is the same as Rule 403. State v. Hall, 297 N.W.2d 80, 87 (Iowa 1980).

2. Case law interpretations:

a. In General - Carter v. Wiese Corporation, supra at I-C-3-a, at page 1 above. A trial judge can and should exclude evidence when convinced it would create a danger of prejudice outweighing its probative value.

b. Photographs - State v. Munz, 355 N.W.2d 576 (Iowa 1984). Defendant was convicted of two counts of third-degree sexual abuse. On appeal, the court held there was no error in admitting pictures showing defendant and victim engaged in various sex acts which were on dates other than those charged. The determination of relevancy verses prejudicial

effect is one for the trial court and will only be reversed upon a showing of abuse of discretion.

c. Wrongful Death - Sechler v. State, 340

N.W.2d 759 (Iowa 1983). Administrator of estate of motorcyclist brought wrongful death action against state and two of its employees based on alleged negligence in barricading a closed highway. Regarding a blood test taken from the deceased, the court stated:

1. Inability of mortician who withdrew blood sample from motorcyclist killed when his motorcycle ran into barricade to positively state that syringe and bottle cap were sterile was not fatal to foundation of blood sample evidence, where factory-wrapped syringe and needle were intact when received, capped vacuum tube from regular alcohol collection kit was used, tube was closed by rubber stopper and was not subject to leakage except when needle was withdrawn, and mortician used substantial care in withdrawing sample.

2. Although mortician did not seal blood sample vial and vial remained in unlocked cooler for more than one week, labeling and storage of sample met foundation standards for introduction of blood sample evidence in wrongful death action brought against State, where mortician properly labeled sample and presented kit to patrolman unsealed, kit was sealed and mailed to laboratory, was received in good shape with no evidence of tampering or spillage of blood, and samples were placed in cooler that was accessible only to employees of laboratory.

d. Comparative Sales Data - Taylor v. City of Des Moines, 337 N.W.2d 881 (Iowa App. 1983). Action for condemnation. The city appeals claiming the trial court erred in admitting as a comparative sale evidence of a negotiated sale of land between seller who knew that a public body had determined to acquire the land for a public purpose. The court, noting



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that for a sale of land to be comparable in determining a condemnation award must be between a willing buyer and willing seller, held that no reversible error was committed and the evidence was not prejudicial. The jury would give little if any weight to the "comparable sale" in determining the value of plaintiff's land.

e. Photographs - Dabney v. Montgomery Ward & Co., Inc., 761 F.2d 494 (C.A. 8th 1985). Action was brought seeking damages for injuries sustained in a fire allegedly caused by a furnace manufactured by defendant. Defendant argues on appeal that the trial court erred in admitting photographs which depicted the nature and extent of burns to plaintiff's body. The court held there was no abuse of discretion by the trial court and the pictures were not overly prejudicial.

f. Epidemiological Studies - Kehm v. Proctor & Gamble Mfg. Co., 724 F.2d 613 (8th Cir., 1983). In products liability action brought against manufacturer of tampons, reports of epidemiological studies conducted by Center for Disease Control and various state health departments and analyzing the statistical relationship between tampon use and the incidents of toxic shock syndrome were admissible under the investigative public reports exception to the hearsay rule, in absence of showing that the reports were not trustworthy, and trial court did not abuse its discretion in refusing to exclude the reports as prejudicial, in light of manufacturer's opportunity to challenge the methodology

and findings of the studies through presentation of its own evidence.

D. Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

1. No comment
2. Case law interpretations:

a. [404(a)] Self-Defense - State v. Miller, 359 N.W.2d 508 (Iowa App. 1984). Defendant was convicted of second-degree murder. On appeal, the Court of Appeals reversed the trial court's decision based on the trial court's sustaining the state's objection to defense counsel's mentioning previous violent incidents involving the victim during opening statements. Generally, when a murder defendant denies a crime or contends that it was unintentional, evidence of a deceased's character trait is not admissible. However, an exception to this rule applies where the accused asserts that he acted in self-defense and the slightest supporting evidence is introduced. Further, evidence of deceased's character trait is specifically admissible to show the state of mind of defendant. Therefore, the reversible error here was that the trial court denied defense counsel the right to refer, during opening statement, to victim's previous acts of violence. The defendant fully intended to introduce such evidence at his murder trial to show his state of mind at the time the crime was committed. The evidence was extremely relevant to the claim of self-defense.

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b. [404(b)] Knowledge of Crime - State v. Mendiola, 360 N.W.2d 780 (Iowa 1985). Defendant was convicted of possessing a controlled substance with intent to deliver. As to defendant's prior conviction for similar offense in Texas, the court held this was admissible where defendant denied knowledge that scales could be used to weigh marijuana. In affirming, the Supreme Court stated that exceptions to rule that evidence of other crimes is generally inadmissible are built around situations where the prior crime is relevant, not because prior acts tend to prove defendant is a bad person who has capacity to commit bad acts, but because prior act tends to establish element in pending prosecution. This evidence is admissible so long as its probative value outweighs its prejudicial effect.

c. [404(b)] Motive - State v. Williams, 360 N.W.2d 782 (Iowa 1985). Defendant was convicted of first-degree murder. In affirming the conviction, the court stated that evidence that defendant was connected to prior killing of fellow inmate was relevant to defendant's alleged involvement in the murder of another inmate who had stated that he was going to give evidence against defendant implicating him in earlier murder. This went to issue of motive of defendant.

d. [404(b)] Violent Tendencies - State v. Miller, 359 N.W.2d 508 (Iowa App. 1984). Defendant was convicted of second-degree murder. In affirming the conviction

the court stated that the trial court acted properly in excluding evidence consisting of a divorce decree referring to the murder victim's violent tendencies. The divorce decree was neither reputation evidence nor evidence of specified acts of violence, but merely established victim's violent tendencies in a particular domestic situation.

E. Rule 405. Methods of Proving Character

1. As to (a), the rule is consistent with Iowa case law concerning admissibility of reputation and opinion testimony to prove a character trait. State v. Scalf, 254 Iowa 669, 119 N.W.2d 868 (1963). Cross-examination as to specific instances of conduct is also consistent with Iowa case law. State v. Keul, 233 Iowa 852, 5 N.W.2d 849 (1942).

2. As to (b), for an example of the application of this rule, see State v. Jacoby, 260 N.W.2d 828 (Iowa 1977).

3. Case law interpretation:

a. Personality of Defendant - State v. Hood, 346 N.W.2d 481 (Iowa 1984). Defendant and co-defendant were convicted of first-degree murder. Court held regarding expert testimony of defendant's character that an evaluation of defendant as being a "passive-dependent" personality was admissible as bearing on her inherent inability to form specific intent necessary for first-degree murder and, therefore, on the probability of her committing the first-degree murder charged.

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F. Rule 406. Habit; Routine Practice

1. Iowa common law with respect to the admissibility of evidence of habit is similar to Federal Rule 406. Such evidence, when offered to show that on a particular occasion the thing was done as usual "is naturally a thing of probative value" and "is constantly admitted in evidence." State v. Shelton, 176 N.W.2d 159, 162 (Iowa 1970).

2. No case law interpretation.

G. Rule 407. Subsequent Remedial Measures

1. Iowa's rule is similar to Federal Rule 407, however, it specifically does not apply to actions based upon strict liability or breach of warranty.

2. No case law interpretation.

H. Rule 408. Compromise and Offers to Compromise

1. Iowa common law is in accord with Federal Rule 408 to the extent that offers to compromise a controversy are generally inadmissible as an admission of liability; and that offers to compromise are admissible for purposes other than proof of liability, such as to prove waiver or good faith in asserting a claim, or mitigation in a punitive damage claim. See Pogge v. Fullerton Lumber Co., 277 N.W.2d 916, 921 (Iowa 1979).

2. Case law interpretation:

a. "Buying Peace" - Miller v. Component Homes, Inc., 356 N.W.2d 213 (Iowa 1984). Employee brought



action for commissions due from his employer. Three letters written by the employee demanding commissions and which tended to show that the employer had intentionally rather than inadvertently failed to pay him were admitted into evidence over defendant's objection that these letters were an offer of compromise. The court, in holding that the letters were properly admitted, stated that:

1. Proof of offer to compromise controversy involved in litigation, or of fact that offer to compromise was made, is inadmissible, apart from its possible admissibility as independently relevant evidence.

2. Offer of settlement or compromise exclusionary rule is designed to exclude such evidence only when it is tendered as admission of weakness of other party's claim or defense, not when it is tendered to prove fact other than liability.

3. Evidence of offer of settlement or compromise is excluded because it implies merely desire for peace, not concession of wrong done.

4. Since law favors settlement of controversies out of court, a person is entitled to endeavor to "buy his peace" without danger of being prejudiced in case his effort should fail; hence, public policy favors regarding any communications made toward that end as privileged.

5. In employee's action for commissions due from his employer, three letters written by employee offering to settle his differences could not be objectionable as attempt to establish admission of liability by employer since they were not written by adversary attempting to "buy his peace."

I. Rule 409. Payment of Expenses

1. Iowa common law excludes evidence of advance payment of property damages and promises to pay medical bills

on public policy grounds. Lewis v. Kennison, 278 N.W.2d 12 (Iowa 1979).

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2. Rule 409 only excludes any and all expenses occasioned by an injury, in contrast with the Federal rule which excludes only evidence concerning "medical, hospital or similar expenses."

3. Rule 409 only excludes evidence when it is offered to prove liability and is limited only to evidence of "furnishing or offering or promising to pay" expenses.

4. No case law interpretation.

J. Rule 410. Inadmissibility of Pleas, Plea Discussion, and Related Statements

1. This adopted Federal Rule 410. The stated benefits of the new rule are:

a. It excludes use of evidence regarding pleas only to criminal or civil proceedings directly involving the defendant himself;

b. It limits excluded evidence only to withdrawn pleas, nolo contendere pleas, and plea discussions with a prosecuting attorney;

c. It allows otherwise unusable evidence to be admitted in a later criminal proceeding for perjury or false statement if the defendant later lies under oath in contradiction to earlier statements under oath.

2. No case law interpretation.

K. Rule 411. Liability Insurance

1. Iowa common law is in accord with Rule 411.
2. Case law interpretation:

- a. Carter v. Wiese Corp., supra at I-C-3-a, at page 1 above. Absent a showing of prejudice, introduction of insurance coverage into a negligence suit will not warrant reversal. At trial, Defendant contended plaintiff inquired into matters concerning defendant's liability insurance coverage. The defendant objected and immediately motioned for mistrial. The Court of Appeals in affirming the trial judge's decision overruling defendant's motion for new trial stated that the reference to insurance made by plaintiff's expert witness had no relevance to the issue of liability insurance coverage. The references were not blatant such that it would have informed the jury of defendant's insurance coverage of any liability found.

L. Rule 412. Sexual Abuse Cases; Relevance of Victim's Past Behavior

1. This rule will be read in the same manner as Iowa Rule 20(5). State v. Ogilvie, 310 N.W.2d 192, 195 (Iowa 1981).

2. Case law interpretation:

- a. In General - State v. Clarke, 343 N.W.2d 158 (Iowa 1984). Defendant was charged with third-degree sexual abuse. Trial court entered an order permitting defendant to introduce evidence of complaining witness' past sexual conduct. In reversing that order, the Iowa Supreme Court stated that

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the probative value of defendant's proposed inquiry concerning whether victim of alleged sexual abuse had ever had oral intercourse with anyone within one year prior to crime did not outweigh prejudicial effect and public policy favoring exclusions of such evidence. The defendant did not make a showing supporting his theory of relevancy, one theory being that if complainant had previously experienced oral sex with another person she would be more likely to later fantasize the event and second theory being that the only way complainant, whom defendant alleged had fantasized the crime, would be able to describe fantasized act of oral sex plausibly would be because of similar experience.

V. PRIVILEGES

A. Rule 501. General Rule

1. This rule, like its Federal counterpart, leaves the matters of privileges essentially undisturbed. Statutory and case law pronouncements respecting privilege continue in force by operation of the rule.

2. No case law interpretation.

VI. WITNESSES

A. Rule 601. General Rule of Competency

1. No comment.

2. Case law interpretation:

a. In General - State v. Halstead, 362 N.W.2d 504 (Iowa 1985). Admissibility of opinion evidence as to mental capacity of witness is left to the discretion of the trial court under the circumstances of a given case, guided by the question of whether expert's opinion will be helpful to the jury in performing its function. In this prosecution for child sexual abuse, the trial court did not abuse its discretion in not admitting testimony of defense psychiatrist as to victim's ability to testify. The testimony would add nothing that was not or could not have been brought about by examination of child or was beyond the common understanding of the jury. The child was competent to testify.

b. Retarded Adult - State v. Miller, 359 N.W.2d 508 (Iowa App. 1984). Trial court acted within its discretion in determining that a retarded adult, who had been adjudicated incompetent in another state, was competent to testify during a murder trial. The court examined the witness extensively about her recollection of the event in question and her understanding of telling the truth. The witness' responses demonstrated that it was reasonable to conclude she was competent to testify.

B. Rule 602. Lack of Personal Knowledge

1. This rule is in accord with the longstanding Iowa requirement that a witness must testify from first-hand knowledge.

2. Case law interpretation:

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a. In General - Carter v. Wiese Corp., supra at I-C-3-a, at page 1. Witness was going to testify as to what she heard her daughter-in-law tell her concerning the plaintiff. However, as the witness did not have personal knowledge of the information concerning the plaintiff, the testimony was properly excluded as hearsay.

C. Rule 603. Oath or Affirmation

1. This requires both the administration and understanding of an oath as a predicate to competency.

2. No case law interpretation.

D. Rule 604. Interpreters

1. No comment

2. No case law interpretation.

E. Rule 605. Competency of Judge as Witness

1. This is consistent with previous Iowa law.

2. No case law interpretation.

F. Rule 606. Competency of Juror as Witness

1. This rule is consistent with Iowa practice regarding the testimony of jurors both during the trial and post trial.

2. Rule 606(b), like Iowa common law, protects the sanctity of the jury room regarding matters that inured in the verdict, while allowing disclosure of extraneous misconduct.

3. No case law interpretation.

G. Rule 607. Who May Impeach

1. This rule is in accord with pre-existing Iowa practice.

2. Case law interpretation:

a. In General - State v. Halstead, supra at VI-A-2-a, at page 21. Parties are entitled to try to impeach a witness' credibility as it is reflected in his ability to observe, remember, or recount. The Court has held that evidence of mental capacity is admissible as bearing on the issue of credibility when the witness was judicially adjudged insane prior to the act which gave rise to the case. However, as this witness was not judicially adjudged insane, the trial court did not abuse its discretion in not admitting into evidence the doctor's testimony as to the witness' competency.

H. Rule 608. Evidence of Character and Conduct of Witness

1. Iowa law previous to Rule 608(a) permitted an attack on credibility based on witness' reputation for "general moral character" or untruthfulness. State v. Alberts, 43 N.W.2d 703 (Iowa 1950); State v. Teager, 222 Iowa 391, 269 N.W. 348 (Iowa 1937). Rule 608(a) expands the admissible impeachment testimony to reputation and opinion, consistent with Federal Rule 405 and past Iowa practice on nonimpeaching character traits and requires that the attack be directed to the trait of untruthfulness.

2. Case law interpretation:

a. In General - State v. Munz, supra at IV-c-2-c, at page 10. Testimony of victim that defendant charged with sexual abuse had beat her subsequent to charged abuse was not

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admissible to support victim's credibility by explaining reason for her delay in reporting assaults, since victim's credibility had not been called into question at time of such testimony.

I. Rule 609. Impeachment by Evidence of Conviction of Crime

1. No comment
2. Case law interpretation:

a. In General - State v. Willard, 351 N.W.2d 516 (Iowa 1984). Defendant was convicted of theft in the second degree. On appeal defendant challenged the trial court's allowance of questions asked by the State on cross-examination to impeach defense witness concerning the witness' prior felony conviction. The court, in affirming defendant's conviction stated that it was permissible, for impeachment purposes, to inquire into the specific nature of a witness' prior felony conviction that is otherwise allowable, provided that the probative value of the inquiry is not outweighed by its prejudicial impact to the defendant. Here, the witness had been convicted of theft, a felony, and the crime involved "dishonesty or false statement."

J. Rule 610. Religious Beliefs or Opinions

1. No comment
2. No case law interpretation.

K. Rule 611. Mode and Order of Interrogation and Presentation

1. No comment
2. No case law interpretation.

L. Rule 612. Writing used to Refresh Memory

1. No comment
2. No case law interpretation.

M. Rule 613. Prior Statements of Witness

1. This rule embodies prior existing Iowa law and establishes the procedure to be used to impeach a witness by prior inconsistent statements.

2. Case law interpretation:

a. Prior Inconsistent Statement - State v. Oshinbanjo, 361 N.W.2d 318 (Iowa App. 1984). Defendant was convicted of third-degree sexual abuse. At trial, the victim testified that she had not engaged in sexual intercourse for a week prior to her attack. Defense counsel attempted to have the nurse who examined the victim testify that the victim stated she had engaged in sexual intercourse earlier that day. The State objected to admission of the nurse's testimony and the court sustained the objection. In affirming the decision, the Iowa Supreme Court stated:

1. First test in determining whether statement is admissible as prior inconsistent statement is whether proper foundation has been laid for its admission, alerting the witness to the occasion of the prior statement and giving witness opportunity to admit or deny making the statement; if witness admits making the statement, then it is not admissible, but if witness denies making the prior statement or cannot remember making it, then the statement may be admitted for purposes of impeachment.

2. During defendant's cross-examination of rape victim, there was no foundation laid for later admission of prior statement inconsistent with her trial

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testimony as to her prior sexual conduct, in that she was not alerted to nature of the prior statement or time and place of its making, nor was she given an opportunity to admit or deny making the statement; therefore, trial court properly excluded testimony concerning the prior inconsistent statement.

3. If examining nurse's testimony about rape victim's statements concerning her prior sexual conduct was offered to impeach victim's credibility, it constituted extrinsic evidence of prior inconsistent statement of a witness and, as such, was inadmissible, because victim was not afforded an opportunity to explain or deny the prior statement.

b. Impeachment Evidence - State v. Ware, 338 N.W.2d 707 (Iowa 1983). Defendant was convicted of first-degree murder. Defendant appeals contending the trial court erred in allowing a statement to be admitted into evidence and read to the jury, the purpose of the statement being to impeach the defendant's testimony. The court held that the extrinsic evidence of a prior inconsistent statement by a witness is admissible, even when the witness admits making the statement, if the witness is afforded an opportunity to explain or deny the statement and the opposing party is afforded an opportunity to interrogate the witness.

N. Rule 614. Calling and Interrogation of Witnesses by Court

1. By this rule Iowa recognizes the right, but not the duty, of the court to call and interrogate its own witnesses. Iowa had previously recognized this right in Scroggs Feed and Grain Co. v. Vos, 254 Iowa 620, 118 N.W.2d 543 (1962).



2. No case law interpretation.

O. Rule 615. Exclusion of Witnesses

1. No comment

2. No case law interpretation.

VII. OPINIONS AND EXPERT TESTIMONY

A. Rule 701. Opinion Testimony by Lay Witnesses

1. Adoption of this rule will not affect Iowa practice as to lay witnesses.

2. No case law interpretation.

B. Rule 702. Testimony by Experts

1. No comment

2. Case law interpretation:

a. Due Care & Proper Conduct - Bandstra

v. International Harvester, 367 N.W.2d 282 (Iowa App. 1985).

Proper foundation was laid for the admission of testimony of expert witness of plaintiff who brought action against manufacturer of forage blower for injuries sustained when he fell into a hopper opening of a forage blower. The expert had worked in the area of industrial safety for several years and taught safety administration at a university. He was hired as a safety consultant by the Federal Bureau of Labor to write and design a training program to be used in the field of major disasters and accident prevention. He also examined the forage blower and had reviewed several materials in preparing for the case. There was no

prejudice in admitting this testimony as expert testimony.

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b. Opinion Evidence, Weight - State v. Nunn, 356 N.W.2d 601 (Iowa App. 1984). Defendant appeals from her conviction for second-degree murder. She contends that the state failed to present sufficient evidence that the killing was not justified in light of defense expert witness' testimony on the "battered woman syndrome." In affirming her conviction, the court stated that the "trier of fact is not obliged to accept opinion evidence, even from experts, as conclusive. It may be accepted in whole, in part or not at all."

c. Fire Chief - Kellar v. Peoples Natural Gas Co., a Div. of InterNorth, Inc., 352 N.W.2d 688 (Iowa App. 1984). In action against gas company for damages for loss of plaintiff's truck, the trial court did not abuse its discretion in determining that city fire chief was competent to testify regarding whether the riser to the gas line posed a fire hazard.

d. Officer - Miller v. Bonar, 337 N.W.2d 523 (Iowa 1983). Defendant appeals from action for damages involving two trucks. Defendant objects that a police officer was allowed to testify as to opinions formed regarding the accident. The court, in holding the receipt of opinion evidence from the officer was within the officer's discretion noted that the policeman had 25 years experience as a trooper and had investigated 800-1000 accidents. Taking into consideration the policeman's experience,

his opinion, based on his investigation of the yaw marks and skid marks on the pavement, the damage done to the two trucks and the point at which they came to rest, was admissible as expert testimony.

e. Officer's Testimony - State v. Taylor, 336 N.W.2d 721 (Iowa 1983). Defendant was convicted of two counts of first-degree murder. Regarding expert testimony, the Iowa Supreme Court held that the trial court did not abuse its discretion in finding officer qualified to give testimony concerning effects of certain quantity and quality of heroin on a person, where officer had been member of police department for over 15 years, had had extensive experience working on drug cases and with people involved in drug cases, both informants and drug users, and he had accumulated knowledge about quality of heroin available in the area, both through continued education and courses in police investigative work.

C. Rule 703. Basis of opinion Testimony by Experts

1. This rule represents a departure from Iowa common law. It is no longer necessary that the witness be interrogated by means of a hypothetical question. The underlying factual basis for the opinion need not be previously admitted or even admissible independently of the opinion, if it is of such nature and type reasonably relied upon by experts in the particular field.

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2. Case law interpretation:

a. Charts and Reports - Carter v. Wiese Corp., supra at I-C-3-a, at page 1. Allowing into evidence charts and reports that plaintiff's expert testified from was not improper, since expert gave his opinion based on that information and he specifically testified that it was not unusual to rely on that type of information.

b. Medical Records - State v. Henze, supra at II-A-2-b, at page 4. Defendant was convicted of operating a motor vehicle while intoxicated. Defendant, contending he was not intoxicated, attempted to offer the expert testimony of the doctor who examined him on the night of his arrest and who later reviewed defendant's medical records. The state objected to the doctors use of defendant's medical records as a basis for his testimony. The trial court sustained the objection and allowed the doctor to testify only as to his observations of defendant the night of his arrest. In reversing the decision, the court stated the medical records, prepared by other doctors at the medical clinic where the witness practiced, were facts or data of the type reasonably relied on by doctors in forming opinions.

D. Rule 704. Opinion on Ultimate Issue

1. This rule is consistent with previous Iowa law.
2. No case law interpretation.

E. Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

1. This rule significantly changes previous Iowa law in that it is no longer necessary that opinion testimony be offered by hypothetical questions. It should be noted, however, that the rule gives the trial court the discretion to require that hypothetical questions be used. Or, if such a procedure is deemed advantageous, a trial court may permit an adverse party, upon request and outside the presence of the jury, to conduct a preliminary voir dire examination of the expert to uncover the facts or data on which his opinion is to be based. If a prima facie case is made that the expert does not have sufficient basis for his opinion, then the trial court can preclude such opinion testimony unless the party offering the testimony first establishes the underlying facts or data.

2. Case law interpretation:

a. Present Value of Damages - Beeck v. Aquaslide 'N' Dive Corp., 350 N.W.2d 149 (Iowa 1984). Husband, injured on a waterslide allegedly manufactured by corporate defendant. Witness testified as to the present value of the damages incurred to plaintiff. Defendant claims on appeal that expert witness' testimony as to inflation and present value and the setoff against each other was not supported by the expert witness' assumptions. The court held that defendant's objection went to the sufficiency of the data upon which the expert rested his opinion, as

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distinguished from facts which qualified him to state an opinion at all. Thus, these objections went to the weight and not the sufficiency of the expert's testimony.

F. Rule 706. Court-Appointed Experts

1. No comment
2. No case law interpretation.

VIII. HEARSAY

A. Rule 801. Definitions

1. This rule is identical to the definition of hearsay set forth in Federal Rule 801(c). The definitional language of what constitutes a "statement" and who is a "declarant" set forth in Federal Rule 801(a) and 801(b) has been quoted with approval in State v. Miller, 204 N.W.2d 834, 840 (Iowa 1973), and State v. Galvan, 297 N.W.2d 344, 346 (Iowa 1980).

2. Case law interpretation:

a. In General - State v. Mueller, 344 N.W.2d 262 (Iowa App. 1983). Defendant appeals his conviction of second-degree sexual abuse arguing that the testimony of a child psychologist should have been excluded as prejudicial hearsay evidence. The court holds that the testimony of the child psychologist regarding the child's oral assertions and nonverbal conduct were hearsay and were not admissible under the exception for statements made for the purpose of medical diagnosis. (Rule 803(4)). The child's statements were not

made while seeking medical aid and benefit, but were responses to the questions of the psychologist posed to determine if the child had been abused. Admission of the hearsay testimony constituted prejudicial error and necessitated that a new trial be given to defendant.

b. Information Acted on or Responsive Conduct,
Statements not Offered to Prove the Truth of the Assertion

1. State v. Williams, 360 N.W.2d 782 (Iowa 1985). Defendant appeals his first-degree murder conviction arguing that a fellow gang member's testimony that the gang was afraid the victim would inform authorities of what he knew of an earlier killing was hearsay. However, the court held that since the statements were not admitted for their truth, they were not hearsay. These statements were offered only to explain responsive conduct.

2. State v. Doughty, 359 N.W.2d 439 (Iowa 1984). Defendant appeals his conviction of first-degree kidnapping arguing that the testimony of a police officer, reiterating statements made to him by the five-year-old victim, should have been limited to explaining why the officer went to the defendant's apartment. The trial court ruled that statements by the victim describing his sexual abuse were admissible hearsay under the excited utterance exception. On appeal, the state abandoned the argument that the statements were an excited utterance as the child was not in a state of

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excitement. The state now argues the officer's statements were not hearsay because they were not offered to prove the truth of the assertions, but that they were offered only to explain the officer's actions which culminated in defendant's arrest. The court holds that the testimony was inadmissible, under the state's new theory, because it went beyond the point of merely explaining why certain responsive actions were taken by the officers. As the officer would become more specific by repeating complaints of a particular crime by the accused, it is more likely that the jury would misuse the evidence. The conviction was reversed.

3. State v. Maniccia, 355 N.W.2d 256 (Iowa App. 1984). Defendant was convicted of delivery of a controlled substance. On appeal he argues that the trial court erred in admitting the testimony of the officer who accompanied an informant to the sale of cocaine. The state argues that the statements by the officer as to discussions between defendant and informant were nonhearsay because they were introduced to explain subsequent conduct, or in the alternative, that they were admissible as part of the facts and circumstances surrounding the crime. The court held that the statements at issue were not necessary to explain the officer's subsequent conduct, that this could easily have been done without resort to the statements in question. The court further held that the statements were admitted for their truth and thus constituted inadmissible hearsay. The conviction was reversed.

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c. Identity--Oral Statement as Hearsay - State v. Maniccia, supra at VIII-A-2-b-3, at page 34. Testimony of agent regarding statements of defendant that agent heard over radio receiver was not barred by hearsay rule, since testimony concerned an admission of defendant and was circumstantially corroborated by officer's statements regarding persons present as well as defendant's action during transaction; therefore, trial court did not abuse its discretion in overruling defendant's objection.

d. Letters, Writings as Hearsay

1. State v. Henze, supra at II-A-2-b, at page 4. Defendant's medical records, containing statements about his physical and mental condition, were hearsay, where they were not made by the physician who testified at trial and were offered to show that such physical and mental conditions actually existed and may have affected defendant's actions on occasion when he was arrested for operating a motor vehicle while intoxicated.

2. Kehm v. Proctor & Gamble Mfg. Co., supra at IV-C-2-f, at page 12. The trial court did not abuse its discretion in excluding, on hearsay grounds, a letter from the Center for Disease Control to manufacturers' association of which defendant was a member. Where the trade association did not receive the letter or forward a copy to defendant until eighteen months after the commencement of the lawsuit, the

likelihood the letter was untrustworthy was increased. The trustworthiness of a business record justification for excepting these from the hearsay rule was not satisfied.

3. Madison v. Colby, 348 N.W.2d 202

(Iowa 1984). Woman injured when she fell on icy parking lot brought negligence action against those responsible for maintenance of lot. Plaintiff's first treating physician's record was entered into evidence through another doctor. Defendant argues admission of the record, for the truth of the matters contained in it was proper under the business records statute. The Court, in holding the record was inadmissible hearsay, stated:

a) Offering the record under the business records exemption to hearsay mandated exclusion because the record was "hearsay within hearsay", or double hearsay; and

b) The foundational prerequisites for the record were not established to invoke the business records statute because defendants failed to show the record was made in the ordinary course of business at or about the time of the events recorded or that the sources of information and method of preparation were such as to indicate trustworthiness.

4. Poyzer v. McGraw, 360 N.W.2d 748

(Iowa 1985). Personal injury suit brought by employee of farm partnership for injuries received from a gas explosion and fire. Defendant filed a pleading admitting she owned, operated and maintained the property in question. She later withdrew the pleading. The withdrawal of the pleading did not erase the pleading. It remained for the defendant to explain the admission

after the admission was offered, and it was for the jury to sort through the admission, its withdrawal, and the defendant's explanation to determine the weight to be given to the admission.

e. Rebuttal - State v. Jespersen, 360 N.W.2d 804 (Iowa 1985). Defendant was convicted of first-degree murder. He appeals contending that witness's testimony that she heard defendant say "if he had to kill Jeff to win this fight, he would" was inadmissible hearsay. The court held that the statement was admissible under Rule 801(a)(1)(B) because the declarant was subject to cross-examination concerning the statement, and that the statement is consistent with the declarant's testimony and is offered to rebut an express or implied charge of recent fabrication on the declarant's part.

f. Admissions--In General

1. Conner v. State, 362 N.W.2d 449 (Iowa 1985). This case holds that admissions against penal interest are admissible against declarant.

2. Vinson v. Linn-Mar Community School District, 360 N.W.2d 108 (Iowa 1984). Former school bus driver brought action against school district and former supervisor for breach of contract, defamation, and intentional infliction of emotional distress. The Court held that statements by supervisor of "I'll fire anyone around here who won't keep their damn mouth

shut" and "push [the children] out the door and hope the door didn't hit them in the ass" were not hearsay because they were admissions.

3. State v. Maniccia, supra at VIII-A-2-b-3, at page 34.

g. Diary - Kehm v. Proctor & Gamble Mfg. Co., supra at IV-C-2-f, at page 12. At trial, the court permitted plaintiffs to read two excerpts from deceased's diary. The entries concerned normal domestic affairs and contained professions of Mrs. Kehm's love for her family. Defendant argues this should have been excluded, both as hearsay and as unduly prejudicial. The Court correctly held these admissible for the purpose of negating the inference that Mrs. Kehm was portrayed in the best light possible and stating that as the trial judge admitted the evidence after examining the diaries outside the jury's presence and limiting the admission to only two entries, there was no abuse of discretion in the entries' admission.

B. Rule 802. Hearsay Rule

1. Iowa law is consistent with Federal Rule 802.

2. Case law interpretation:

a. In General - State v. Nims, 357 N.W.2d 608 (Iowa 1984). Defendant was convicted of first-degree kidnapping. On appeal, he argues that trial court erred in allowing a police officer to detail a statement made by the eight-year-old female victim in her home an hour and a half

after the abduction. The State argues that the statement was not hearsay, or in the alternative that if it is hearsay, the statement falls within the excited utterance exception and that, in any event, admission of the statement was harmless error. The court, without addressing the first two arguments put forth by the state, held that in light of the overwhelming evidence against the defendant, any error was harmless. The facts were such that the presumption in favor of prejudicial error for the admission of hearsay evidence over a proper objection was overcome.

b. Limited Admissibility

1) State v. Maniccia, supra at VIII-A-2-b-3, at page 34.

2) Madison v. Colby, supra at VIII-A-2-d-3, at page 36. Trial court in negligence action did not err in admitting letter from plaintiff's employer to defendant's manager about incidents and danger in parking lot which was written prior to first fall by plaintiff, after it was excised to exclude hearsay.

c. Erroneous Admission - Madison v. Colby, supra at VIII-A-2-d-3, at page 36. Presumption of prejudice which accompanied erroneous admission of hearsay evidence consisting of office records of injured plaintiff's first treating physician was not overcome in negligence action.

d. Harmless Error

1) State v. Farris, 359 N.W.2d 190 (Iowa 1984). Failure of the trial court to overrule defendant's hearsay objection to questions asked of state's witness concerning victim's statements regarding her fear of defendant was not prejudicial error in light of substantial other evidence of the hearsay matters (harmless error).

2) State v. Nims, supra at VIII-B-2-a, at page 38.

C. Rule 803. Hearsay Objections; Availability of Declarant Immaterial

1. Rule 803(b) replaced Iowa Code Section 622.28, the business records exception. The threshold determination by the court as to whether the "business record" should be admitted into evidence as an exception to the hearsay rule is one of trustworthiness. There are minor differences between the Iowa and Federal Rule. They are:

a. The Iowa statute included within the definition of business records the language--"electronic means and interpretations thereof." The federal rule eliminates this language, but contains the words--"data compilation in any form," which appears to be sufficient to encompass the former statutory language.

b. The additional words "opinion, or diagnoses" appear in the federal rule definition as types of entries in business records that are admissible.

c. The definition of what constitutes a business is expanded by the federal rule with the additional words "institution" and "association." It also states that the exception applies to business regardless of whether or not for profit.

These differences are not considered to be of great variance from pre-existing Iowa case law interpreting the statutory language.

2. Iowa Rule 803(11) is more restrictive than Federal Rule 803(11) on the certification aspect.

3. Rule 803(21) provides a more liberal rule of admission than pre-existing Iowa case law, which required that a general reputation in the entire community be established to create a hearsay exception. The Federal Rule requires only that a person's reputation among his associates need be shown, dropping the necessity that a "community wide" reputation be proven.

4. Rule 803(22) was new to Iowa law. Prior to this Iowa law did not permit the admission of a felony criminal conviction to prove the underlying essential facts.

5. Case law interpretation:

a. Excited Utterance

1) Hamilton v. O'Donnell, 367 N.W.2d 293 (Iowa App. 1985). Plaintiff farmer brought action against defendant farmer for personal injuries sustained while working on defendant's farm. Plaintiff argues on appeal that sheriff should have been allowed to testify that, at the scene of the accident, he heard someone say plaintiff stepped on a loose board. Court held that these statements could not be allowed in under the spontaneous declaration exception to the hearsay rule. The admissibility of declarations as part of the res gestae

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turns on whether the statements were made before there was time to contrive and misrepresent. This was not the case under these facts. The sheriff was not even able to identify the declarant.

2) State v. Brown, 341 N.W.2d 10 (Iowa 1983). Five-year-old boy's identification of defendant as person who sexually assaulted him was not admissible under excited utterance exception to hearsay rule, since officer who showed child a photographic array testified that child was not crying or hysterical, but was calm.

b. Calendars - Miller v. Bonar, supra at VII-B-2-d, at page 29. Action for damages resulting from accident involving two trucks. Plaintiff, at trial, testified that each time he had had a headache in the last four years, either he or his wife had made a notation on a calendar. At trial, however, he testified he had no present recollection of when he had the headaches.

At time of trial, common law rule was that if a witness can testify that at or about the time a memorandum or entry was made he knew its contents, and knew it to be true, his testimony and the memorandum are both competent evidence. Held, this was not an abuse of discretion to admit the calendars under the common law rule.

Note that under the Iowa Rules, memoranda which record past recollections "may be read into evidence but may not (themselves) be received as an exhibit unless offered by an adverse party. Iowa R. Evid. 803(5).



c. Public Records and Reports - Zimmer v. Miller Trucking Co., Inc., 743 F.2d 601 (8th Cir. 1984). Administratrix of estate of truck passenger, killed in collision between his vehicle and vehicle parked on shoulder of interstate brought wrongful death action. Appellant argues that officer's report of accident was admissible under Federal Rule 803(3)(c), the public records and reports exception to the hearsay rule. The trial court judge excluded the reports under Federal Rule 702 (expert testimony) and 704 (opinion on ultimate issue). The court, in deciding the reports were properly excluded under these rules, stated that the officer's report (the excluded portions thereof) where he wrote that defendant contributed to accident by illegal or improper parking, was specialized knowledge, and was not necessary to determine whether defendant was negligent in parking his tractor-trailer rig on the shoulder of an interstate highway while he slept. The jury was competent to make this decision without superfluous expert opinion evidence. Specialized knowledge was not necessary in this case.

D. Rule 804. Hearsay Exceptions; Declarant Unavailable

1. Rule 804(b)(2). Adoption of the Federal Rule would expand the so-called dying declaration exception beyond its traditional limitation in Iowa to homicide cases. Unavailability is also not limited to the death of the declarant. Because the Committee believes that this exception should apply in any case

where cause of death is an issue, the introductory clause of the Federal Rule was stricken.

2. No case law interpretation.

E. Rule 805. Hearsay Within Hearsay

1. No comment

2. Case law interpretation:

a. Madison v. Colby, supra at VIII-A-2-d-3, at page 36. Hearsay evidence consisting of office records of injured plaintiff's first treating physician was not admissible in negligence action under business records exception, in that, if offered as a business record of chiropractor who obtained records to assist him in treating plaintiff to prove assertions of first treating physician, exclusion would be required under double hearsay rule, and foundational requisites for admissibility of records were not established.

F. Rule 806. Attacking and Supporting Credibility of Declarant

1. No comment

2. No case law interpretation.

IX. AUTHENTICATION AND IDENTIFICATION

A. Rule 901. Requirement of Authentication and Identification

1. Rule 901(b)(8) requires that a document or data compilation have been in existence for 30 years, rather than the 20 years required by the Federal Rules.



2. Case law interpretation:

a. Photographs - State v. Hickman, 337 N.W.2d 512 (Iowa 1983). In first-degree murder prosecution, basic test for admission of pictures of the crime scene, of victim's body, and of details of the autopsy was their relevancy.

B. Rule 902. Self-Authentication

1. No comment
2. No case law interpretation.

C. Rule 903. Subscribing Witness' Testimony Unnecessary

1. No comment
2. No case law interpretation.

X. CONTENTS OF WRITINGS, RECORDINGS AND PHOTOGRAPHS

A. Rule 1001. Definitions

1. No comment
2. No case law interpretation.

B. Rule 1002. Requirement of Original

1. No comment
2. No case law interpretation.

C. Rule 1003. Admissibility of Duplicates

1. The court's primary concern should be that the contents of any such item be presented to the court in accurate form.

2. Case law interpretation:

- a. State v. Hershey, 348 N.W.2d 1 (Iowa 1984).

Carbon copies are not subject to the best evidence rule but, rather, are admissible as primary evidence.

- D. Rule 1004. Admissibility of other Evidence of Contents
1. No comment
 2. No case law interpretation.
- E. Rule 1005. Public Records
1. No comment
 2. No case law interpretation.
- F. Rule 1006. Summaries
1. No comment
 2. No case law interpretation.
- G. Rule 1007. Testimony or Written Admission of Party
1. No comment
 2. No case law interpretation.
- H. Rule 1008. Functions of Court and Jury
1. No comment
 2. No case law interpretation.

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WORKERS' COMPENSATION UPDATE

Robert C. Landess
Iowa Industrial Commissioner

PUBLISHED SUPREME COURT AND COURT OF APPEALS
DECISIONS ON JUDICIAL REVIEW OF
INDUSTRIAL COMMISSIONER DECISIONS

PROCEDURE--EXHAUSTION OF ADMINISTRATIVE REMEDIES

CONTINENTAL TELEPHONE COMPANY v. COLTON, 348 N.W.2d 623 (Iowa 1984)

Defendants appealed from a district court order in a workers' compensation proceeding remanding the proceeding to the industrial commissioner for a redetermination of his disability.

Defendants, in the present case, sought judicial review from a decision of a deputy industrial commissioner. No attempt was made to first seek review of the deputy's decision by the industrial commissioner.

Claimant urged in the district court that it was without jurisdiction under Iowa Code section 17A.19(1), to review a decision of a deputy industrial commissioner. The district court rejected claimant's contentions relying in part on the recent decision of Leaseamerica Corp. v. Iowa Department of Revenue, 333 N.W.2d 847 (Iowa 1983).

The supreme court held that except in those circumstances delineated in Iowa Code section 86.3, a petition for judicial review will not be from a decision of a deputy industrial commissioner, even where that decision has become final by reason of passage of time. Consistent with the general policy outlined in Iowa Code section 17A.19(1), sections 86.3 and 86.26,



considered in pari materia, contemplate that an intra-agency review by the industrial commissioner is necessary in order to establish exhaustion of administrative remedies for purposes of seeking judicial review.

The supreme court reversed the district court and remanded with directions to dismiss the petition for judicial review for lack of jurisdiction.

AGGRAVATION OF PREEXISTING HEART ATTACK

VARIED ENTERPRISES, INC. v. SUMNER, 353 N.W.2d 407 (Iowa 1984)

Defendants appealed from a district court decision upholding the industrial commissioner's award of workers' compensation benefits for disability attributable to acute myocardial infarction.

Claimant, while driving a truck for his employer, began to experience chest pains. He believed it was only indigestion and continued driving for two and one-half hours before pulling off the traveled portion of the roadway at a truck stop.

After stopping, claimant drank a bicarbonate of soda, whereupon the pain became much worse. He then asked for emergency assistance and was diagnosed as having incurred an acute myocardial infarction. A permanent and total disability resulted.

Conflicting expert testimony was presented concerning whether claimant's continued driving after the onset of the infarction materially aggravated the impact of the heart attack in terms of resulting industrial disability. The industrial commissioner accepted the views of claimant's expert that the continued driving did materially aggravate the impact of the

infarction and increased the resulting disability. This finding was upheld by the district court on judicial review.

The primary issue on appeal was whether the commissioner erred in not apportioning claimant's disability between that which was produced by the onset of the myocardial infarction and that produced by continued driving. Stated somewhat differently, it was defendants' position that the commissioner and the court were required to carve out some portion of the total disability as attributable to the original onset of the infarction which all parties agree was a noncompensable event.

The defendants' claim for apportionment was not based upon claimant's prior atherosclerotic condition which precipitated the infarction. The industrial commissioner found that there was no evidence from which it could be found that this diseased condition of claimant's arteries independently produced an industrial disability. That finding, which was not challenged, precludes apportionment based on the evidence of previously diseased arteries. The employer argued, however, that the initial infarction produced by the diseased arteries, which the parties agreed was not a compensable event, would have independently provided some portion of claimant's ultimate industrial disability even in the absence of the aggravating activities upon which his claim has been allowed.

While the court believed that the legal premises upon which the employer's arguments were based state a claim for apportionment, they were convinced that the commissioner declined to

apportion the disability because of his view of the facts rather than any misapplication of legal theory. The commissioner spoke directly to this point, stating:

Since the medical opinions could not differentiate between the amount of damage caused by the continued exertions, this agency cannot interject or speculate on the apportionment of damage between the onset of the infarction and the aggravation caused by continued exertion.

The court believed that this is a negative finding of fact by the commissioner which undercuts the legal premise upon which any claim of apportionment must rest. The appellants presented no basis for overturning the decision of the commissioner or the district court.

OCCUPATIONAL DISEASE--LAST INJURIOUS EXPOSURE

DOERFER DIV. OF CCA v. NICOL, 359 N.W.2d 428 (Iowa 1984)

Defendants appealed from a district court decision reversing the agency. The Iowa Supreme Court affirmed in part, reversed in part, and remanded.

This case required the court to interpret several statutes in chapter 85A, to determine which of two successive employers should be held liable for claimant's occupational disease. There is no dispute that claimant's machine shop work for three employers exposed him to coolant, used in the metal cutting process, chrome and nickel, and that he ultimately was afflicted by an allergic contact dermatitis.

Claimant successively worked for Schulty Manufacturing (June 1976 to February 3, 1978), Wayne Engineering (February 9, 1978

through June 9, 1978), and Doerfer Division of CCA (June 10, 1978 through July 31, 1978). In all of this employment he was exposed to coolant, but it was during his work at Wayne Engineering that his exposure was heavy and the symptoms of his disease were first manifested.

In late March or early April 1978, claimant noticed a rash on his arms which was diagnosed as contact dermatitis. When the medicines ran out his rash reappeared. His physician prescribed further medication and kept him off work for ten days. Claimant then resumed work at Wayne, but at a different job. His condition improved, but he sought and found a better paying job at Doerfer, where his exposure to coolant would not be so extensive.

Before Nicol left Wayne, he trained a replacement and his symptoms again became apparent, a matter he explained to the shop supervisor at Doerfer. At Doerfer, Nicol wore gloves and had contact with coolant less frequently. His symptoms improved, but then became serious. He quit his job at Doerfer on July 31, 1978. He has neither sought nor held employment since that time.

A deputy industrial commissioner held that claimant acquired the occupational disease dermatitis through contact with coolant and metals while working for Wayne and Doerfer. Because Doerfer was the last employment in which claimant was exposed to these substances, Doerfer was liable to pay claimant's compensation under Iowa Code section 85A.10. The deputy rejected Doerfer's defense that it had not received statutory notice from Nicol, reasoning Doerfer had actual notice of its employee's physical

problem. The commissioner, on appeal, affirmed the deputy's decision in all respects, except that he raised claimant's industrial disability from ten to twenty percent.

On judicial review, the district court accepted almost all of the commissioner's factual findings and conclusions. It determined, however, that because claimant's disease was known to exist at the time he began working for Doerfer, the conditions at Doerfer could not have caused it; therefore, Iowa Code section 85A.10 was inapplicable. The court thus held Wayne liable for payment of claimant's compensation. Although the court reversed the agency by holding Wayne liable to pay claimant's benefits, it based its award on the compensation claimant had earned while working for Doerfer.

The fighting issue between Wayne and Doerfer is the proper interpretation and application of Iowa Code section 85A.10. The court has previously examined this statute in McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980). There the court accepted the view that the last injurious exposure rule does not require a claimant to prove causation by any particular employer, or that the last injurious exposure, in fact, be the cause of the disease. Rather, it is sufficient that claimant prove certain hazardous conditions induced his disease and that these conditions existed at the last place he was employed in a concentration sufficient to cause the disease.

In the instant case, the court held that there was adequate evidence to support the agency's finding that claimant's contact

with irritants at Doerfer caused further exacerbation of his dermatitis which led to his ultimate disability.

Doerfer argued the physical problems claimant had at Doerfer were simply a reoccurrence of the disease contracted at Wayne. It is true that occupational disease "recurrence of disability" rules have been recognized in several jurisdictions. The court stated that under the record in this case, the agency arguably might have found adequate evidence to support that doctrine. On the other hand, there was sufficient evidence to support the agency's finding that the disease itself was contracted while working for both Wayne and Doerfer. To recover under section 85A.10, claimant was not required to show that conditions at Doerfer in any way caused his dermatitis. He was required only to show an injurious exposure. Though he was not required to do so, claimant produced substantial evidence that his condition deteriorated during his Doerfer employment. That evidence justified the commissioner's finding that claimant was last injuriously exposed at Doerfer. The court went on to say that in the long view, there is merit in not consigning a diseased employee's claim to the sidelines while two employers stage a lengthy fight over apportionment or responsibility, or inject the problems of out-of-state employers and statutes of limitations. The court stated that although the result sometimes may seem harsh on the employer charged with the liability under this interpretation; there will be a spreading of the risk when the total picture of such litigation is considered and this rule is

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applied on a nationwide basis. The court held, therefore, that the district court was in error in reversing the agency's determination imposing the liability on Doerfer. Reversal on this issue moots the issue of whether a readjustment should have been made to reflect claimant's lower wage level with the previous employer upon whom liability was erroneously imposed.

The second issue before the court was whether Doerfer had actual knowledge of claimant's illness. The court found that the record revealed substantial evidence that claimant's dermatitis was apparent when he commenced working for Doerfer. He explained his allergy to a supervisor. There is further evidence that his supervisors knew his condition worsened while employed by Doerfer and, more significantly, they suspected a claim for benefits might be filed against Doerfer. From claimant's severe and rapid decline while working in the Doerfer environment, the commissioner properly determined that Doerfer had actual knowledge that claimant's illness was work connected.

A third issue is whether the district court erred in determining the commissioner's finding of twenty percent disability was supported by substantial evidence.

The deputy commissioner, who fixed claimant's disability at ten percent, took into consideration claimant's functional impairment (two percent of the body as a whole), age, education, past employment, and his complete lack of motivation. The commissioner's appeal decision pointed out that Nicol was precluded from many areas of employment and increased his

industrial disability to twenty percent which the district court affirmed. The evidence revealed that claimant, who is receiving social security disability checks, has been relatively free of dermatitis since January 1979, but has failed to make employment applications even though he has not been medically advised to quit work. He has above average intelligence with previous experience in postal work, as a truck driver, and has supervisory skills. At the time of hearing, he had not contacted the rehabilitation center for about nine months. The court held there was substantial evidence to support the commissioner's finding that claimant was lacking in motivation, and that he sustained an industrial disability of twenty percent.

ARISING OUT OF--HEART ATTACK

BRIAR CLIFF COLLEGE v. CAMPOLO, 360 N.W.2d 91 (Iowa 1984)

Defendants appealed the district court affirmance of the industrial commissioner's decision awarding death benefits.

Decedent, a college professor, died of cardiac failure shortly after his participation in an intramural basketball game on the college campus as a member of the faculty team. The decedent's spouse and dependent children were awarded death benefits by the agency and the award was affirmed by the district court.

The defendants' first issue on appeal was whether decedent's participation in the basketball game occurred in the course of his employment. The court upheld the agency's finding that the intramural basketball program gave students an opportunity to

have personal contact with faculty members which made a contribution to student retention and thus, determined that there was substantial evidence that the employer derived a substantial direct benefit from faculty participation in the basketball program.

Defendants' second issue on appeal was whether decedent's death arose out of his employment. It was undisputed that the 40 year old decedent had a preexisting heart condition. The basketball game consisted of running time, no time outs, two 20-minute halves and a 5-minute halftime. Decedent played both the first and second halves of the game. Within the last two minutes of the game, decedent was stricken and collapsed. Three cardiologists concluded that the strenuous physical activity gave rise to cardiac arrhythmia, cardiac failure and death. The court held that there was substantial evidence in the record to verify the commissioner's findings that playing basketball was an unusually strenuous exertion within the meaning of Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974), and that decedent's preexisting heart condition was aggravated or accelerated by his participation in the game.

The defendants also challenged via certiorari the trial court's refusal to permit posting of a supersedeas bond during pendency of the appeal. The employer urged that the district court lacked discretion to refuse to permit the posting of a supersedeas bond under Iowa Rules of Appellate Procedure 7 and 8. In response, claimant, who cited a court case involving child

custody appeals, asserted that public policy requires recognition of an exception to the applicability of rules 7 and 8 in workers' compensation cases and that the amount tendered as bond was inadequate. The court held that unlike a child custody award, a workers' compensation award is nothing more than a property award. While payment of a forfeited bond could never restore to a parent and child the time lost pending appeal, it could compensate the recipient of a workers' compensation award for monies not received while the appeal was pending. The court held that the trial court was in error when it refused to follow the mandatory terms of Iowa Appellate Procedure 8.

COMMUTATIONS--FULL

SIDLES DISTRIBUTING CO. AND AETNA CASUALTY AND SURETY v. HEATH,
366 N.W.2d 1 (Iowa 1985)

The defendants appealed from a district court decision upholding a decision of the industrial commissioner commuting weekly benefits to a lump sum. The supreme court affirmed in part, reversed in part, and remanded.

Claimant was found by the agency to be permanently and totally disabled. In a later decision, he was found to be entitled to a full commutation which was affirmed by the district court.

Claimant, in seeking commutation, established that he was 47 years of age, had in the past used sound judgment in money management, and would rise the lump sum to enhance his family's financial security. The commissioner found sufficient benefit

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to claimant to award the full commutation. The commutation was ordered based upon 1482 weeks of disability payments, which was the period of claimant's remaining life expectancy. In actuarially discounting the weekly payments to present worth, a ten percent simple interest factor was employed by the industrial commissioner.

Defendants' first issue on appeal was whether claimant's period of disability should be considered to be his life expectancy or his work-life expectancy. The court found no basis to disturb the commutation ordered by the commissioner on the ground that he did not properly determine the period during which compensation is payable. The court held that the commissioner properly considered the period of the employee's disability to be his physical life expectancy rather than his work-life expectancy. To the extent that defendants separately argued that the period during which compensation is payable is not capable of being definitely determined so as to render commutation inappropriate as a result of Iowa Code section 85.45(1), that argument also failed because the court found that the use of mortality tables is mandated by statute.

The second issue on appeal involved the defendants' challenge to the use by the commissioner of a simple interest discount rate in reducing the sum of the periodic payments to present worth. The court held that a compound interest factor more nearly accords with a sound annuity basis than a factor which involves only simple interest. The court held that the commissioner applied an improper legal standard in equating the discount

factor with interest recoverable upon judgments, and held that a compound interest factor more nearly accords with the legislative intent which produced the applicable statutory provisions. The court reversed the judgment in this issue and remanded the proceeding to the industrial commissioner.



EVIDENCE--EXPERT TESTIMONY

ROCKWELL GRAPHICS SYSTEMS v. PRINCE, 366 N.W.2d 187 (Iowa 1985)

The employer appealed from the district court's affirmance on judicial review of the industrial commissioner's finding of permanent partial disability. The supreme court affirmed.

The agency found that claimant sustained an injury arising out of and in the course of her employment and awarded benefits. The district court affirmed the agency in all respects. Defendant appealed contending the district court erred in requiring the employer to prove that claimant's injuries were not work related rather than requiring claimant to establish her burden of proof that she sustained an injury arising out of and in the course of her employment. The court held that the district court erred in placing the burden of proof on the employer, but that error did not require reversal when the agency correctly placed the burden of proof on claimant.

Quoting extensively from the deputy commissioner's decision, the court further found there was substantial evidence to support the agency's finding that the injury was work related and its finding concerning the extent of disability. The court further stated that it would be unwise to adopt a rule of law

C that a treating physician's testimony should be given greater weight than that of a later physician who examines the patient in anticipation of litigation. The court held that the employer should and does have the right to develop the facts as to a latter physician's employment in connection with litigation, his examination at a later date and not when the injuries were fresh, his arrangement as to compensation, the extent and nature of his examination, his education, experience, training, and practice, and all other factors which bear upon weight and value of his testimony. The claimant may similarly develop such information as to the treating physician. Both parties may press all of this information to the attention of the fact finder, as either supporting or weakening the physician's testimony and opinion. All these factors, however, go to the value of the physician's testimony as a matter of fact, not as a matter of law.

NOTICE OF INJURY

DILLINGER v. CITY OF SIOUX CITY, 368 N.W.2d 176 (Iowa 1985)

Appeal by the employer from the district court's reversal of the industrial commissioner's decision denying an employee workers' compensation benefits.

On October 8, 1975, claimant gave his employer a first report of injury stating that his lower back was injured on that date when he fell while he was in the course of his employment. He had a preexisting back condition. The claimant testified his back hurt for two or three days after the 1975 fall. The pain

then subsided. Although he filed the first report of injury, he continued to work and did not seek treatment. Claimant testified that his back pains persisted, but he continued to work until the pain forced him to terminate his employment in April 1977. On December 7, 1977, a laminectomy was performed. The physician opined that the 1975 fall aggravated the preexisting condition.

After his surgery, claimant sought the aid of an attorney. The attorney contacted the employer in the latter part of March 1978 and filed a petition with the industrial commissioner on April 3, 1978. The agency denied benefits based on claimant's failure to commence proceedings within two years of his accident in 1975. The supreme court reversed the district court's affirmance of the agency's denial and remanded to the agency for an evidentiary hearing and decision in light of the court's ruling in Orr v. Lewis Central School District, 298 N.W.2d 256 (Iowa 1980), which involved the applicability of the discovery rule to the limitation period in section 85.26.

On remand the commissioner determined the proceeding was filed in a timely manner because the employee did not discover his injury until 1977. The commissioner denied benefits, however, because the employee did not give the employer a notice of injury within 90 days from the discovery of his injury. The commissioner concluded that the time period of discovery under sections 85.23 and 85.26 must coincide. He reasoned that the employer, like the employee, should not be charged with knowledge of a potential claim on October 8, 1975 especially in view of

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the fact that claimant continued to work for 18 months. On judicial review the district court concluded the commissioner erroneously interpreted section 85.23 by requiring a second notice be given an employer when the employer had actual knowledge of the occurrence of the injury.

The supreme court stated that while the discovery rule aids the employee by preventing the limitation period from commencing until the claimant knows of his injury and its probable compensable nature, the notice requirement of section 85.23 protects the employer by insuring he is alerted to the possibility of a claim so that an investigation can be made while the information is fresh. Because the discovery rule is based upon entirely different purposes and reasoning than the notice requirement, the same set of facts may provide for a different result under sections 85.23 and 85.26. At a time when the employee did not know the probable compensable nature of his injury, allowing him to later utilize the discovery rule to delay the commencement of the section 85.26 limitation period, the employer may have actual knowledge under section 85.23 of the reasonable possibility of a claim.

In the instant case, claimant filed a first report of injury with the city's compensation adjuster. Claimant described how the injury occurred, the time of the injury and described the injury as follows: "Lower back was injured, extreme lower back caused pain remainder of the day." The employer knew about the employee's back injury and was given sufficient information to

be alerted to the possibility of a claim so that an investigation of the facts could be made while the information was fresh. Thus, the purpose of section 85.23 was satisfied. The decision of the district court was affirmed. Accordingly, the case is remanded to the commissioner for a determination of benefits.

ARISING OUT OF -- EMOTIONAL AND PSYCHOLOGICAL

SCHRECKENGAST v. HAMMERMILLS, INC. 369 N.W.2d 809 (Iowa 1985)

Appellant claimant had been employed by the appellee employer for 31 years prior to becoming permanently and totally disabled from a mental illness diagnosed as unipolar affective disorder, depressed type. Claimant contended that his condition was caused by or exacerbated by job stress. His duties included considerable travel to meet with prospective customers, designing machines to meet the particular business needs of customers, working up sales quotations in order to market such machines and working with production personnel in order to assure that manufactured items met with the specifications mandated by the individual customers. These work activities required considerable evening and weekend time. Work pressures were intensified because of rather strict project deadlines.

Three psychiatrists testified that there was no work-related cause of claimant's depression. One of these psychiatrists also testified that, in his opinion, there was no work-related aggravation of claimant's depressive condition. The other psychiatrists were equivocal as to the possibility that claimant's depression was aggravated by job stress. A clinical psychologist

testified for the claimant that in his opinion, both the original cause of the depressive disorder and a subsequent exacerbation thereof were caused by the stressful conditions of claimant's work environment.

C The court's review was limited to a determination of whether the commissioner's finding was supported by substantial evidence in the record made before the agency when that record is viewed as a whole. Iowa Code section 17A.19(8)(f). Because the commissioner's finding that claimant's evidence failed to establish causation in fact was supported by substantial evidence, no basis existed for reversing the decision on the ground that an improper standard of legal causation was applied. The court declined to consider whether Swiss Colony, Inc. v. Department of Industry, Labor & Human Relations, 72 Wis.2d 46, 240 N.W.2d 128 (1976) represents the standard of legal causation which is applicable under Iowa law.

ARISING OUT OF -- EMOTIONAL & PSYCHOLOGICAL

NEWMAN v. JOHN DEERE OTTUMWA WORKS, ___ N.W.2d ___ (Iowa 1985)

The Iowa Supreme Court affirmed a ruling of the district court which overturned the allowance of a workers' compensation claim.

The claimant, Newman, went to work for Deere as a welder in November 1978. Claimant stated on a preemployment medical questionnaire he never had received treatment for any mental disorder or allergies. However, claimant had an extensive medical history of both. Claimant had been diagnosed as manic

depressive and had displayed signs of hypochondriasis. One doctor believed that claimant suffered from a hyperventilation syndrome caused by stress or tension. These problems were diagnosed as early as 1972 and claimant periodically received treatment for them all. The claimant developed a single-minded preoccupation with fresh air and an aversion to smells.

As the court stated, "The case is difficult because on two critical points vital facts are elusive. The claimed accident is something of a phantom and Newman's injuries are without objective physical symptoms."

Claimant was seen by internal medicine specialists: an eye, ear, nose, and throat specialist; a psychiatrist; and a psychologist. None found any tangible physical abnormality, in fact all believed Newman enjoyed good physical health. They agreed however, that because of what the psychiatrist described as Newman's "unshakeable belief his problem is physical," Newman should stay away from fumes.

Prior to working at Deere, claimant had, to state subtly, a preoccupation with air purity. In 1973 Newman was hospitalized for ulcers.

The commissioner found that claimant's preexisting psychological condition was materially aggravated by a March 1, 1979 inhalation of fumes while doing piece work welding and suffered a 60 percent permanent partial impairment disability.

The court considered three groups of cases as described by Larson, Law of Workmen's Compensation, §42.20 at 7-784: mental

stimulus causing physical injury; physical trauma causing nervous injury; and mental stimulus causing nervous injury. While neither accepting nor rejecting any of Larson's three groups, the court stated, "We need not decide whether any such claimant is allowable under the Iowa statute because we find no record support for allowing Newman's claim under any of the three groups of cases last mentioned by Professor Larson." The court rejected any notion that imaginary trauma can be the proximate cause of a compensable injury.

District court's reversal of industrial commissioner affirmed.

APPEALS--TIMELINESS OF FILING

MILLER v. CIVIL CONSTRUCTORS, ___ N.W.2d ___ (Iowa 1985)

On July 15, 1983 a deputy industrial commissioner filed a review-reopening decision which awarded disability benefits to petitioner Miller. Through his attorney, Miller intended to perfect an intra-agency appeal to the commissioner pursuant to Iowa Code section 86.24(1).

Pursuant to that statute, the industrial commissioner has promulgated rule 500-4.27, Iowa Administrative Code, which provides in part: "[A]n appeal to the commissioner...shall be commenced within twenty days of the filing of the decision...by filing a notice of appeal with the industrial commissioner."

The petitioner's notice of appeal was received in the mail by the commissioner and file stamped on Friday, August 5. The twenty day period expired August 4. An affidavit by petitioner's attorney's secretary stated she mailed the notice of appeal on

August 3, 1985.

The same affidavit stated that a copy of the notice was mailed to respondents' attorney on July 29. Respondents denied ever receiving the notice from petitioner. Rule 500-4.13, IAC, provides in part: "Service upon the attorney or party shall be made by delivery of a copy to or mailing a copy to the last known address of the attorney or party....Service by mail under this rule is complete upon mailing."

The commissioner sustained respondents' motion to dismiss due to the untimely filing of the notice of appeal. The district court on judicial appeal ruled the appeal was perfected timely, thereby reversing the commissioner. Respondents appealed to the Iowa Supreme Court.

The controlling issue before the court was whether an appeal is "filed" within the meaning of 500-4.27 IAC, when it is mailed or when it is received by the industrial commissioner. The court stated:

This court has ordinarily given a "reasonable range of informed discretion" to an administrative agency in interpreting its own administrative rules. The decision of the agency should be given controlling weight unless it is inconsistent with those rules, Sommers v. Iowa Civil Rights Commission, 337 N.W.2d 470, 475 (Iowa 1983), or is plainly erroneous. Dameron v. Neumann Bros., Inc., 339 N.W.2d 160, 162 (Iowa 1983).

The court concluded that the commissioner's interpretation, that an appeal is not "filed" within the meaning of Iowa Code section 86.24(1) and rule 500-4.27, IAC, until the commissioner has actually received it, was reasonable. The district court



was reversed.

ODD LOT DOCTRINE

GUYTON v. IRVING JENSEN COMPANY, ___ N.W.2d ___ (Iowa 1985)

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Petitioner Frank Guyton, Jr., hurt his back while working for respondent when he was struck in the left hip by a cement truck. The petitioner was approximately 40 years old but was not sure of his age. He grew up in Mississippi where he had about one month of formal education. He cannot read, write or make change. Psychological tests indicated that Guyton was mildly retarded.

Guyton's employment history prior to his injury included: farm hand, fertilizer bagger, bottling plant laborer, garbage man, and janitor. When injured, Guyton was working as a laborer on highway construction.

Guyton's physician testified that he would have good days and bad days but could not do any job on a regular basis that involved bending, prolonged sitting, or even lifting as little as ten or fifteen pounds. He did not believe Guyton could perform the work in the kind of job he previously had.

A vocational counselor said that before his injury Guyton could expect to obtain elemental employment in the bottom ten percent of the job market. After his injury she did not believe he could even obtain jobs of that type. She concluded that Guyton had "little, if any, possibility of job placement in substantial gainful activity." As a result, she said she considered him to be 100 percent vocationally disabled. There

was no evidence that jobs were available to persons with his combination of impairments.

Partly based upon photographic evidence presented by a private detective, the commissioner found:

Although claimant has a permanent partial impairment to the body as a whole of 15 to 20 percent, he is able to perform such activities as loading light to moderately heavy items onto a pickup and is at times able to load an item as heavy as a roto tiller onto a pickup and is able to drive a pickup.

....

Claimant is disabled to the extent of 20 percent of the body as a whole because of the injury of [May 5, 1978].

In accordance with these findings, the commissioner awarded Guyton benefits based on a twenty percent industrial disability.

In this case the court formally adopted the "odd-lot doctrine." Under that doctrine a worker becomes an odd-lot employee when an injury makes the worker incapable of obtaining employment in any well known branch of the labor market. An odd-lot worker is thus totally disabled if the only services the worker can perform are "so limited in quality dependability, or quantity that a reasonably stable market for them does not exist.

Regarding the burden of proof, the court followed Larson and held:

[T]hat when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to produce evidence of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of fact finds the worker does fall in the odd-lot category, the worker is entitled to a finding of total disability.

The case was remanded to the industrial commissioner.



PUBLISHED SUPREME COURT DECISIONS
ON RELATED MATTERS

EVIDENCE--ADMISSIBILITY OF PAYMENT OF WORKERS' COMPENSATION
BENEFITS IN JURY TRIAL

CARTER v. WIESE CORP., 360 N.W.2d 122 (Iowa App. 1984)

Defendant, Wiese Corporation, appealed from an adverse jury verdict entered in a case involving the plaintiff, Thomas E. Carter. Plaintiffs, Carter and his wife, brought this action seeking damages for personal injury and loss of consortium as a result of an incident which occurred at defendant Wiese Corporation's place of business. Plaintiff had previously received workers' compensation benefits from his employer for this same incident.

At the time of trial, defendant's attorney sought to receive evidence that the plaintiff was eligible for and in fact received workers' compensation medical benefits. The defendants sought this evidence in an attempt to prove that fees the family physician charged for treating plaintiff were not fair and reasonable. While taking the physician's deposition, defendant was able to determine that the physician charged for treatments to plaintiff's neck and back, while rendering some gratuitous services to the plaintiff's children. The court found there was no evidence introduced to suggest that the physician charged the plaintiff anything other than his standard fee for treatments to the plaintiff's neck and back. The court further found that the physician's omission to charge for medical treatment to plaintiff's children was motivated by affection or philanthropy and did not

have an adverse bearing on the issue of whether the physician's charges for plaintiff's back and neck treatments were fair and reasonable. Likewise, the fact that the physician was aware that benefit payments from workers' compensation coverage would cover the medical bills did not in and of itself prove that the sums charged were not fair and reasonable. The court stated that there were other methods that the defendant could have used to prove his claim on this issue such as what the physician charged other patients for similar treatment or evidence as to the normal fee charged in the community for this type of treatment. When faced with equally or more effective alternative methods of proving his contention, the court held defendant was not entitled to present evidence as to payment of workers' compensation medical benefits.

Defendant further alleged the trial court erred in not allowing into evidence the fact that plaintiff received workers' compensation as it relates to the issue of malingering. Iowa has adopted the "collateral source rule" so that a tortfeasor's obligation to make restitution for the injury it caused is undiminished by any compensation received by the injured party from a collateral source. Defendant asserted that the collateral source rule does not apply where there is alleged malingering being practiced by the plaintiff. The court stated that the possible prejudice to the plaintiff which attends informing the jury that he has already received workers' compensation benefits for the injuries complained of in a subsequent negligence action

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against the defendant tortfeasor is reason that the trial court should be wary to admit this evidence. Evidence of request for and receipt of benefits is admissible only in limited circumstances. This evidence is incompetent for the purpose of directly reducing properly recoverable damages. On the other hand, the court stated that it is competent evidence as to the issue of possible malingering by the plaintiff. The court further stated that where the danger of the jury's misuse of the evidence for the incompetent purpose is great, and its value for proving malingering is slight or if malingering can be proved by other evidence or means, the court will recognize the trial judge's power to exclude it altogether. The court found, in this case, that there were other ways with which the defendant could have attempted to prove up his claim of malingering. The court did not find the evidence of request and receipt of certain sums of workers' compensation benefits particularly relevant to the issue of malingering and found that the trial court did not act improperly in keeping the defendant from entering this evidence into the record.

CONTRACTS--SPECIFIC PERFORMANCE OF ORAL CONTRACT

DILLON v. CITY OF DAVENPORT, IOWA, 366 N.W.2d 918 (Iowa 1985)

Defendant city appealed from the district court judgment ordering specific performance of the oral agreement to settle plaintiff's workers' compensation claim. Plaintiff Dillon cross-appealed asserting that interest should have been awarded on the judgment. The supreme court affirmed.

The court held that a city's offer to enter into a compromise settlement, when accepted, constituted a resolution binding the city notwithstanding failure to formally adopt the settlement in open session. The settlement, with the exception of a later addition that the trial court ordered deleted, was within the scope of actual authority given to the city's attorney during the closed council session. Once the enforceable agreement was made the city council lacked authority to reconsider or rescind it. The court further held that the industrial commissioner's approval of a written settlement under Iowa Code section 85.35 is not a condition precedent to enforcement of this oral agreement.

Concerning the issue raised in plaintiff's cross-appeal, the court held that even under a liberal construction of Iowa Code section 535.3, the judgment ordering specific performance is not a money judgment entitling plaintiff to statutory interest.

EMPLOYER-EMPLOYEE RELATIONSHIP

ROUSE v. STATE OF IOWA, 369 N.W.2d 811 (Iowa 1985)

Judgment was entered against the State in this wrongful death action brought pursuant to the Iowa Tort Claims Act by administrator of the estate of John Douglas Rouse. On appeal the State contends the trial court erred in rejecting its defense that the decedent was an employee of the state and thus limited to a workers' compensation recovery. The State argues that if the correct factors were considered the court would have been obliged as a matter of law to find Rouse was a state employee.

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Rouse was killed while working as a participant in a program under the Federal Comprehensive Employment Training Act (CETA). The program is administered by state or local government bodies. The government sponsor enters contracts with entities who need labor performed. Eligible candidates are then referred by the sponsor to the contractor which screens and hires those who fit its needs.

In the present case the program sponsor was the Governor of Iowa who designated the Office of Planning and Programming to act for him. The contractor was defendant Chariton Valley R C & D, a nonprofit organization concerned with human and natural resources development. Chariton Valley contracted with Office of Planning & Programming to employ twenty persons on public service jobs. Among the jobs was a position called "conservation aide." A person in that position was to be "outstationed," which in this case involved assignment of the person by Chariton Valley to perform work for the state conservation commission.

Chariton Valley was to maintain all payroll records, pay participants' wages, withhold for tax purposes, and purchase workers' compensation insurance and health insurance. Office of Planning and Programming, using federal funds, was to reimburse Chariton Valley for these expenses pursuant to the contract.

From November 13, 1979 until his death on January 14, 1980, Rouse and another CETA participant worked with conservation commission employees headquartered at Lake Rathbun except for one day when Rouse did some work for the Lucas County Historical

Society. While outstationed with the conservation commission he took orders from conservation commission employees and was supervised by them. He was killed on January 14, 1980 while helping them take down a silo which collapsed on him.

In deciding the case the trial court found that Rouse was an employee of Chariton Valley at the time of his death and not an employee of the state. The State argued that the trial court erred in stating that Iowa adheres to the "contract test" in determining who the employer is for workers' compensation purposes. The court held however that our statute and cases, however, support the trial court's view. For employment to be found, there must be a "contract on the part of the employer to hire and on the part of the employee to perform service."

Henderson v. Jennie Edmundson Hospital, 178 N.W.2d 429, 431 (Iowa 1970).

The trial court emphasized the necessity of an employment contract in rejecting the State's argument that Rouse was employed by the conservation commission at the time of his death. The trial court compared the situation to the facts in a "loaned employee" case, Muscatine City Water Works v. Duge, 232 Iowa 1076, 7 N.W.2d 203 (1942).

The State complained that the court did not apply the five-factor employment test enunciated in Henderson, 178 N.W.2d at 431. Those factors include (1) the right of selection, or to employ at will, (2) responsibility for payment of wages by the employer, (3) the right to discharge or terminate the relationship,



C (4) the right to control the work, and (5) identity of the employer as the authority in charge of the work or for whose benefit it is being performed. The factors are an aid to analysis. The intent of the parties is the overriding element in determining whether an employment contract existed. Id. Moreover, the fourth and fifth factors are subject to the Duge holding in loaned employee workers' compensation cases.

Although the trial court did not delineate these factors, we believe the court applied them in determining that Rouse was employed by Chariton Valley. Affirmed.

UNPUBLISHED DECISIONS

(NON-PRECEDENTIAL)

AGGRAVATION--PREEXISTING BACK CONDITION

MAROVEC v. HAWK BILT COMPANY, (Iowa Court of Appeals 1984)

Claimant appealed from a district court decision affirming the agency's denial of workers' compensation benefits.

Claimant sustained a job-related injury to his back in 1969 or 1970 and eventually underwent back surgery in 1972. The surgery was not completely successful and further back surgery was performed in 1973. Claimant developed spinal stenosis and in 1976 underwent spinal fusion at the L4-S1 level.

Claimant sought healing period benefits for the time following the 1976 surgery and for permanent partial disability benefits. The agency, on appeal, ruled that claimant's back problems were a result of the 1972 and 1973 surgeries and were not caused by any employment-related activity in 1976. The district court affirmed the agency decision.

The court of appeals found that the fusion surgery was due to both scar formation from the prior surgery and the heavy stresses of claimant's job. The treating physician stated that the work stress played a significant role in making the fusion necessary. The court held that all of claimant's back problems from the first injury in 1970 through the 1976 fusion were work-related. The decision of the district court was reversed and the case was remanded to the agency for further proceedings.



ARISING OUT OF--HEAT EXHAUSTION

DOTSON v. MORTON BUILDINGS, INC., (Iowa Court of Appeals 1985)

Claimant appealed the district court affirmance of the industrial commissioner's decision denying recovery of compensation benefits. The court of appeals affirmed.

Decedent, while constructing a metal machine shed for his employer on a day when the temperature reached 87 degrees and the humidity was approximately 55 percent, collapsed and died. An autopsy was performed and the findings concluded the cause of death to be cardiorespiratory failure. Decedent's wife filed a claim for death benefits asserting the death arose out of and in the course of decedent's employment. Benefits were denied by the agency and affirmed by the district court.

Claimant's experts testified decedent collapsed from the heat, his airway was obstructed, and improper resuscitation was performed resulting in decedent's death. Defendants' experts testified decedent died almost immediately from cardiorespiratory failure of unknown cause which did not arise out of his employment. The agency gave greater weight to defendants' witnesses' testimony and denied benefits. The court of appeals, holding that the evidence supported the findings of the agency, affirmed the denial of benefits.

HEALING PERIOD--TERMINATION OF

FARMERS COOPERATIVE ELEVATOR CO. v. MAYNE, (Iowa Supreme Court 1985)

Defendants appealed from a district court decision. The

supreme court in a per curiam decision reversed and remanded.

The industrial commissioner, on appeal, noted that there was no evidence before the deputy commissioner upon which to make a finding as to the date of termination of the healing period. The district court, on judicial review, concluded that healing period ceased on a date which was thirty days after notice by the insurance carrier to the employee that permanent partial disability payments would be terminated as of certain date. The supreme court found that the date used by the district court was an arbitrary one and not acceptable. The court held that in the absence of a record upon which to base a finding of the termination date of the healing period, the case was remanded to the industrial commissioner for the reception of additional evidence on the issue.

INTEREST--ENTITLEMENT IN SUBROGATION

FARRIS v. GENERAL GROWTH DEVELOPMENT CORPORATION, (Iowa Court of Appeals 1984)

Defendant appealed from judgment upon verdicts for the plaintiffs in a tort case arising from a construction accident. The defendant's numerous issues revolve around its contention that it, as an employer of the independent contractor, owed only a limited duty of care to the employee of an independent contractor.

The general rule is that an employer of an independent contractor is not vicariously liable for injuries arising out of the contractor's negligence. The explanation most commonly given for that rule is that since the employer has no power to

control over the manner in which the work is to be done by the contractor, it is to be regarded as the contractor's own enterprise. There are exceptions to the rule.

C Restatement (Second) of Torts section 422 provides that normally an owner of property is liable for injuries caused to others by the unsafe condition of the property as long as he has possession of the land. Here, the defendant had a supervisor on the site and exercised control over the premises. Therefore, the court held that the trial court did not err by instructing the jury that defendant owed plaintiff a duty to provide a reasonably safe place to work.

Defendant further contended that if General Growth is responsible for plaintiff's injury, it should be entitled to the benefits of the exclusive remedy provisions of the workers' compensation law. The court held the argument was without merit since section 85.20, The Code, provides that the rights and remedies provided under the workers' compensation law are to be the exclusive rights and remedies against the injured employee's employer. In the present case, there was no employer-employee relationship between plaintiff and General Growth.

Plaintiff cross-appealed from the judgment, challenging the trial court's refusal to award statutory interest on that part of the award to which a workers' compensation insurer possessed a right of subrogation. The court held the argument to be without merit.

At the time of trial the employer's insurance carrier had a

workers' compensation lien against any recovery which plaintiff might receive. Neither the lien nor its amount was ever challenged by the plaintiff. When judgment was entered for plaintiff, the insurance carrier was entitled to the amount of its lein. Plaintiff, pursuant to section 535.3, was entitled to interest on the excess over the amount of the lien, but it is the insurance carrier who is entitled to the interest on the workers' compensation amount. To permit statutory interest on the amount of the compensation lein to insure the plaintiff's benefit would permit him to recover interest twice on the same sums. The court held that they would not sanction such a result.

STATUTE OF LIMITATIONS

CARTER v. CONTINENTAL TELEPHONE COMPANY, (Iowa Court of Appeals (1985))

Claimant has been employed by defendant for 25 years. His duties included cleaning and oiling switches, handling wires, relays and batteries. The claimant developed contact dermatitis on his hands, face, and feet. He suffered from several episodes of skin irritation. The first occurred prior to his employment with Continental Telephone Company. Of four following incidents of skin irritation, two were related to work. One occurred in 1965 and the other in 1973. A severe incident occurred in 1977 while claimant was on vacation. The last took place in 1978.

The company doctor told claimant he should not return to the job he had held. Defendant placed claimant in another job where claimant would not come into contact with materials causing

claimant's problem. Claimant was transferred to the service center on March 12, 1979.

Carter asserted that he was unaware of any potential workers' compensation claim until August 9, 1980 when a friend informed him he might have a claim. A hearing before the deputy industrial commissioner resulted in the determination that the claim was barred since the notice and petition was filed more than two years from the occurrence of the injury, as required by section 85.26(1) of the Code. Intraagency appeal resulted in the same result. The district court affirmed on judicial review.

Claimant argued that his claim was not barred by the statute of limitations, and in the alternative the defendant was estopped from using the statute of limitations or has waived the claim.

A statute of limitations defense can be waived. Beeck v. Kapalis, 302 N.W.2d 90, 93 (Iowa 1981). Claimant referred to a letter from Travelers of January 28, 1981 which stated that they felt the claim would be barred by the two-year limitations period. The author of the letter, a claims representative, went on to state, "I do not, however, want to make a decision to pay or not to pay the claimant based on any statutes."

Although a statute of limitations defense may be waived, the defendant must have the intent to do so. In the Matter of Guardianship of Collins, 327 N.W.2d 230, 234 (Iowa 1982). In addition to intent to give up the right, the plaintiff must show the existence of that right and actual or constructive knowledge that it exists. Id.

The evidence presented at trial showed that Travelers indicated in their letter that a statute of limitations defense existed, but that they preferred to deny the claim based on the merits of the case.

The court reached the same conclusion regarding the estoppel issue. No evidence was presented of a fraudulent intent.

Paveglio v. Firestone Tire & Rubber Co., 167 N.W.2d 636, 638 (Iowa 1969).

The discovery rule enunciated in Orr v. Lewis Central School District, 298 N.W.2d 256, 261 (Iowa 1980) was not of use to claimant. Carter was given several letters about his condition by the company doctor, the last dated December 29, 1978. In that letter the doctor specifically indicated the dermatitis was caused by a substance he came into contact with while on the job. As the commissioner indicated, the letter was clear about the relationship between the skin condition and claimant's job.



SELECTED
INDUSTRIAL COMMISSIONER
APPEAL DECISIONS

AGGRAVATION--PREEXISTING ALLERGY

Miller v. University of Osteopathic Medicine (March 20, 1985)

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Claimant received a memo which directed that all persons working with animals have preexposure rabies vaccination in a series of shots. The claimant received a first shot of duck serum. After receiving a second shot, the series was discontinued because the claimant was pregnant. After discovering the possibility a rabid animal in the lab the claimant requested a second series of shots.

In June 1982 claimant received an injection of human serum. Shortly thereafter she suffered a laryngeal spasm. The claimant was taken to the hospital and was treated with drugs. Her symptoms gradually lessened. The claimant attempted to return to work but due to spasms had to return home. Claimant testified that she was told not to return to work because she couldn't handle the anti-rabies shot. Claimant's old job was immediately filled. The claimant testified that she applied for a maintenance position with the employer but was turned down. The record indicated that the claimant numerous preexisting allergies.

The hearing deputy awarded permanent partial disability and the defendants appealed stating that an individual who sustains no more than a temporary aggravation of a prior existing condition is not entitled to any benefits for permanent partial disability. The final agency decision held that the claimant's underlying condition was not caused by her employment. Nor did her reaction

result in increased sensitivity to the vaccine. The claimant was found to have no functional impairment as a result of the allergic reaction which occurred on June 24, 1982. (Appealed to District Court; Pending)

ATTORNEYS' FEES

Romani v. Ebasco Services (November 2, 1985)

On March 27, 1980 the claimant entered into an employment agreement with the law firm of Gleysteen, Harper, Eidsmoe, Heidman and Redmond. Clause 3 stated: "After recovery, either by settlement or after trial in the lower court and after second party has been reimbursed for his reasonable expenses, the amount remaining shall be divided on the basis of 66 2/3% to the first party, less the court costs, and 33 1/3% to the second party."

The parties sought approval of the original fee agreement as well as a supplemental agreement which stated in part:

1. The attorney fees of Wiley Mayne, which fees now constitute a lien in Case #87384 Law, Ebasco Services, Inc., and United States Fidelity & Guaranty Company, Plaintiffs/Petitioners, vs. Frederick Romani, Defendant/Claimant, and Iowa Industrial Commissioner, Defendant-Respondent in the amount of \$435.38 shall be paid by Fred Romani in conformance with the letter of D. M. Harper attached hereto and made a part hereof and marked Exhibit "A".

2. The attorney fees on the check for \$17,784.00 and heretofore distributed shall be \$7,113.60.

3. Contingent upon approval of Iowa Industrial Commissioner, future checks for disability benefits shall be divided on the basis of 70% to Frederick Romani and 30% to Gleysteen, Harper, Eidsmoe, Heidman & Redmond.



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Both agreements were approved by the industrial commissioner's office. In applying Iowa Code section 86.39 the commissioner ruled that the percentage called for in the employment agreement was in line with changes made by local attorneys. It was also found that claimant's counsel was experienced in workers' compensation proceedings and had been actively representing claimant's interests for 28 months. (No Appeal)

DEATH BENEFITS--LUMP SUM PAYMENT

Stromley v. Iowa Packaging Corp., (Declaratory Ruling May 2, 1985)

Defendants filed a petition for declaratory ruling to determine whether the surviving spouse is entitled to a two year lump sum payment as of the date of her remarriage and whether any benefits are payable to a stepson or daughter in the event they enroll full time in an accredited educational institution before reaching age twenty-five and within two years from the date of remarriage of the widow or widower.

At the time of death in 1980, the decedent in this case had a surviving spouse and a stepson and a daughter, both of whom were under the age of eighteen. The surviving spouse remarried on December 1, 1984. As of that date, both children were over age 18 but under age 25 and neither was currently enrolled as a full time student in any accredited institution, although the daughter had attended business college for a period of time. Neither child has received any weekly indemnity payments since April 30, 1984.

The Iowa law concerning payment of death benefits is different

than that of most states with similar provisions in that it was written in such a manner as to specifically negate the possibility that double payments would be based upon the same claim. If, upon remarriage of the spouse, dependent children qualify for the benefits they will take to the exclusion of the spouse. If there are no children qualifying for benefits, the surviving spouse will be allowed a two year dower. They will not both receive benefits, however, during a commensurate period of time.

In most all provisions of the workers' compensation statutes the right to benefits is dependent upon circumstances which existed at the time of the injury or death. When the surviving spouse remarries she receives a two year lump sum payment of benefits if there are no children entitled to benefits. This means that the children must have qualified as dependent at the time of death and remain entitled to benefits as de jure or de facto dependent. That is, a child under the age of 18 is no longer entitled to benefits upon reaching age 18 unless he or she was mentally or physically incapacitated from earning at the time of the death or can show, in fact, dependency. Dependency is established as of the time and under the conditions present at the time of the triggering event - the injury producing death. In order for a person to receive benefits for being dependent they must be able to show that condition of dependency present at the time of the injury and continue in an unbroken chain. A full time student under age 25 is aided by a rebuttable presumption of actual dependency.

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In this case the entitlement to benefits of the children at the time of the remarriage of the spouse is contingent upon their having remained dependent upon the decedent continuously from the date of the injury. A child under age 18 is aided by the conclusive presumption of whole dependency and a child under age 25 is aided by a rebuttable presumption of actual dependency. In this case neither presumption applies. Both children are over age 18 and neither is enrolled in school.

In order to continue to be entitled to benefits either child must show a continuation of actual dependency from the date of the injury. One cannot flow in and out of dependency as the duration of benefits terminates when actual dependency terminates. Once concluded for the purpose of these statutes it cannot be reinstated.

If the children, after attaining age 18, ceased for a period of time being actually dependent upon the decedent then they are not "children entitled to benefits" and the surviving spouse is to be paid a two year lump sum of benefits. (No Appeal)

EQUITABLE ESTOPPEL

Veach v. Wolff Transportation Co. (August 15, 1984)

Claimant was paid compensation for permanent disability based upon a five percent functional impairment resulting from a work injury. The last date of benefit payment was in May of 1979 and claimant filed a petition in review-reopening in June of 1982, more than the three years statutory period.

On February 10, 1982 defendants sent a letter to claimant

stating that his file had been requested and that an adjuster would be calling him. The record discloses that claimant's file was not requested from the home office until May 4, 1982 at which time it was virtually impossible for claimant to meet the limitations time period.

On appeal it was held that the February 10, 1982 letter contained a false statement that an adjuster would be in contact with the claimant, that the statement was material, and claimant reasonably relied upon it to his prejudice. Claimant established by clear and convincing evidence the elements of equitable estoppel. Defendants are therefore estopped from asserting the statute of limitations. (No Appeal)

HEALING PERIOD--DURATION

Stevens v. Ideal Ready Mix Co. (April 30, 1985)

The claimant was injured while working on a lawn mower. On appeal the defendants raised the issue as to healing period duration. The proposed decision awarded healing period benefits until February 23, 1983. In support of their claim the defendants introduced a medical report dated November 29, 1982 in which it is stated that the claimant's symptoms have been consistent over the past year. At the same time, the doctor gave the claimant a five percent impairment to the body as a whole.

This report put two recent decisions; Thomas v. Knudson, 349 N.W.2d 124 (Iowa App. 1984); and Derochie v. City of Sioux City, II Iowa Industrial Commissioner Report 112 (1982), on a collision course. Derochie held that medical treatment which is maintenance

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in nature often continues beyond that point when maximum medical recuperation has been accomplished. Id. at 114. Thomas held that it is only at the point at which a disability can be determined that the disability award can be made. Thomas, 349 N.W.2d 124, 126.

The commissioner found that the doctor's general statements that claimant's pain had been consistent over the last year and that it had neither increased nor decreased in intensity, taken by themselves, could not be construed to mean that the claimant achieved maximum recuperation nor that the doctor sometime in the previous year did not anticipate further improvement. On November 29, 1982 the doctor rated the claimant as having a five percent total body impairment. The doctor's statements taken together with the impairment rating would seem to indicate that claimant had reached his maximum level of recuperation on November 29, 1982 and that any treatment beyond that point could be inferred to be merely maintenance. Therefore the claimant's healing period ended on November 29, 1982 and the proposed decision was modified accordingly. (No Appeal)

INDEPENDENT CONTRACTOR

Tuttle v. The Mickow Corporation (July 31, 1985)

This case involved the death of claimant's husband from injuries sustained in an accident while the deceased was traveling from Des Moines to Norfolk, Nebraska. Defendants claimed that deceased was not an employee, but an independent contractor. Defendants further argued that even if claimant was an employee

his death did not arise out of nor in the course of his employment. The deputy found against the defendants on both counts and awarded benefits to claimant.

An involved case from a factual standpoint, the defendants' same issues were raised on appeal. Applying the following authorities to the facts: Arne v. Western Silo Co., 214 Iowa 511 (1932); Mallinger v. Webster City Oil Co., 211 Iowa 847 (1929); Swain v. Monona County, 163 N.W.2d 918 (Iowa 1969); and Larson, The Law of Workmen's Compensation, it was found that the decedent was indeed an employee of Mickow.

An executed "independent contractor" agreement provided that the decedent had to identify Mickow on the truck either by painting the truck or a large sticker or printing of some type on tractor doors. The "contractor" was required to keep the vehicle in good working order at his own expense.

Control is often very indicitive of an employer-employee arrangement. The uncontradicted testimony of Michow's own president indicated that if a person did not wish to drive for them everyday then they would get rid of them. Defendants argued the merits of unforced dispatch. However requiring a driver to drive on, at the very least, a more than regular basis or else face termination, is de facto, a forced dispatch. The power of termination is the ultimate form of control. Further, in an arrangement with an intermediary such as Jay Mar Co., if Jay Mar had a driver that Mickow did not like, they could effectively fire him or her through Jay Mar.

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The defendants' view towards trip leasing was also inconsistent with the idea of an independent contractor. If the trucker took on a load that was not Mickow's when Mickow had a load available, Mickow's president testified quite unequivocally that the trucker would in all likelihood be terminated.

There was also testimony indicating that Mickow had higher standards than the DOT. Mickow also had stringent requirements as to passengers in driver's trucks. Again hardly indicative of an independent contractor. In short, drivers were to work on a steady, regular basis for Mickow, with outside work being, at the bare minimum, discouraged, with Mickow exercising substantial control over the means by which a driver operated his or her truck.

Where the driver is expected to drive continuously for a company, with the company exercising various controls over the driver, including power of termination if the driver hauls for someone else, the driver is an employee for purposes of workers' compensation coverage. The method of payment is a slight consideration; for the fact remains that the driver was hauling goods for the company for pay. No amount of "smoke" will conceal the fact that decedent was an employee of Mickow. The instrument, taken together with various supporting testimony, indicates that Charles Tuttle was an employee of Mickow.

The second issue addressed the issue as to whether the decedent died as a result of injuries sustained in the course of his employment.

The evidence presented supported the following sequence of events. The decedent, in service, delivered a load from Norfolk, Nebraska to Willmar, Minnesota. At Willmar the decedent called Mickow's terminal in Norfolk and asked to be put out of service. At that time decedent proceeded, as to his own records indicate, out of service to Des Moines to take care of personal business. While in Des Moines the personal business was attended to. Claimant stopped at Mickow's Des Moines terminal to sign up trailer and discuss bounce miles. The claimant proposed that while the decedent was at the terminal signing up the trailer, he received either a communication or talked directly to the Norfolk dispatcher where the decedent agreed to take a load. Claimant cannot remember for sure if her husband talked to Zimmerman directly or not. Zimmerman says he did not and the documentary evidence supports this. The records indicate that the decedent went out of service in Willmar and never came back in. Ignoring the out of service, if the decedent's name was scratched out because he was given a load, then his name would be under a driver list. But it is not.

Claimant failed to establish that the decedent did in fact have a load waiting for him at Norfolk or that a load even existed at that time. Evidence that decedent talked to or communicated in some manner to Zimmerman is thin and not a preponderance. The defendants' evidence tends to demonstrate that; first, there is every good chance that the Bixby load did not exist (not on load list of June 9 or June 10); second, even

if the Bixby load did exist the decedent would not have been assigned to it as he was out of service. (Appealed to District Court; Pending)

INDEPENDENT MEDICAL EXAMINATION

Dana v. Sargent Electric Company (November 20, 1984)

The claimant sustained an injury on November 28, 1981 which resulted in a fractured right wrist, tibia and fibula, and an injury to claimant's right knee. Claimant filed an application for examination August 24, 1984 pursuant to Iowa Code section 85.39. Claimant was seeking an evaluation at the Medical Occupational Evaluation Center of Mercy Hospital. Defendants filed a resistance to the motion stating that under the circumstances, such application is redundant based upon the previous evaluations and care provided by claimant's own physicians.

The claimant argued that the medical evidence shows a need to include other factors of psychic and psychological injury and functional and occupational disability. On appeal it was held that the medical evidence was not suggestive of a need for evaluation of other than those injured areas. (No Appeal)

LIMITATIONS--ALCOHOLISM

Hans v. Roadway Express, Inc. (April 25, 1985)

On April 30 1984 the claimant filed a petition in arbitration alleging that sometime in January of 1983 claimant suffered from the disease of alcoholism as a result of his work requirements. In their answer, the defendants affirmatively pled the statute

of limitations under section 85.26, and lack of notice to employer under section 85.23 of the Code. The defendants filed a motion for summary judgment alleging that there were no genuine issues of material fact concerning its affirmative defenses.

A memorandum of material facts not in dispute revealed the following: 1) The claimant was consuming alcohol on a daily basis since about 1976-1977, and 2) The claimant was hospitalized for hepatitis resulting from excessive consumption of alcohol on August 28, 1978. In August 1978 the claimant was drinking approximately 12 to 18 cans of beer per day. The memorandum further disclosed that the claimant and his wife discussed the job relatedness of his alcohol abuse in early 1979. In August of 1978 the claimant believed that his excessive alcohol consumption was job related.

Applying Orr v. Lewis Central School District, 298 N.W.2d 256 (Iowa 1980), the commissioner stated that the claimant knew or should have known of an alcohol problem in August of 1978. As the claimant's petition was beyond the two year filing limit, the defendant employer met its burden of proving no genuine issue of material fact existed. (No Appeal)

MEDICAL TREATMENT--AUTHORIZATION

Richards v. Department of General Services (March 28, 1985)

Claimant sustained a work-related injury and initially received medical treatment from an orthopedist at the direction of her employer. The orthopedist released claimant to return to

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work. Claimant, who continued to have disabling symptoms and felt unable to return to work, visited another physician without authorization from the employer. After treatment with her chosen physician, claimant was then able to return to work.

On appeal, defendants contended that claimant was awarded unauthorized medical expenses. The crux of their argument was that they stood ready, willing and able to provide claimant with alternate medical care so long as the treating physician was a specialist.

Larson states in 2 Workmen's Compensation Law, §61.12(a) and §61.12(e):

Under the commonest type of medical benefits clause, the employer is required to furnish medical and hospital services in the first instance....

....

[I]t is generally held that the employee should ordinarily not incur medical expense without first giving the employer a reasonable opportunity to furnish such services, and if he does so, the employee will be liable for that expense himself....

...If the employer has sufficient knowledge of the injury to be aware that medical treatment is necessary, he has the affirmative and continuing duty to supply medical treatment that is prompt, in compliance with the statutory prescription on choice of doctors, and adequate; if the employer fails to do so, the claimant may make suitable independent arrangements at the employer's expense.

It is usually held that, when the employee has furnished the employer with the facts of his injury, it is up to the employer to instruct the employee on what to do to obtain medical attention, and to inform him regarding the medical and surgical aid to be furnished....

The employer need not actually have refused medical services; it is enough that he has neglected

to provide them....

[T]he furnishing of medical services by the employer must be prompt; if there is undue delay, the employer may become liable for services engaged by the employee in the meantime....

Moreover, if the employee has once justifiably engaged a doctor on his own initiative, a belated attempt by the employer to offer a doctor chosen by the employer will not cut off the right of the employee to continue with the employee's doctor....

....

Finally, the services offered by the employer must be adequate.

In this connection, difficult questions can arise when there is a difference of opinion on diagnosis or appropriate treatment, as when the employer's doctor recommends conservative measures while the claimant thinks he should have surgery. One way to settle this kind of controversy is to let the result turn on whose diagnosis proved to be right.

This is a case where, under the principles from Larson discussed above, the results should be analyzed to determine which diagnosis was right. The difference is essentially one of degree. The employer retained orthopedist thought claimant had a minor muscle injury when he examined and released her. Claimant's physician, on the same day, found marked tenderness and spasm in the muscles. Claimant was discharged from care while the disabling symptoms persisted. Claimant's seeking alternate care was not unreasonable and belated attempts to provide other care will not negate the reasonableness and necessity of the care claimant chose. (No Appeal)



PROCEDURE--POPER PARTY TO AN ACTION

Poindexter v. Grant's Carpet Service (August 10, 1984)

In response to an application for determination of reasonableness of medical fees filed by the employer and insurance carrier, Plastic Surgery Institute, P.C. (P.S.I.) filed an appearance and initiated discovery proceedings. The employer and insurance carrier resisted and moved to quash notice of the taking of a deposition by P.S.I. On appeal it was held that the injured worker, who has the burden of proving his medical costs, had filed no claim for medical payment, and the question of reasonableness of fees was not therefore, properly before this agency. Furthermore, it was found that a treating physician has no authority under compensation law to proceed directly against the employer. Further, the action commenced by the employer and insurer was dismissed. (No Appeal)

RATE OF COMPENSATION

Lang v. Humboldt Community School (June 21, 1984)

Claimant sustained a work-related injury while driving a school bus for defendant employer. Claimant contended that his earnings as a school bus driver were part-time wages, and his total earnings for purposes of computing the applicable rate of compensation should include income from his other job.

Implied in claimant's argument is the supposition that his wages as a school bus driver are less than the regular full time earnings for that line of industry. In fact, the line of industry in question is school bus driving. The earnings of school bus drivers for their regularly scheduled hours do not

represent part-time employment within a category of full time bus driving, but are full time wages for that particular line of industry. Since the record indicates that claimant's employment contract with defendant employer provides for claimant to receive wages based on the regularly scheduled 39 weeks of school bus driving, the provisions of section 85.36(10) are not applicable, and other income may not be included in total earnings.

The first report of injury indicates claimant's pay period basis to be monthly. Since claimant is paid on a monthly basis, his rate of compensation is computed under the provisions of section 85.36(4), The Code. (Appealed to District Court; Pending)

RATE OF COMPENSATION

Moore v. Posters 'N Things, Ltd. (June 21, 1984)

Claimant, who was a sales manager for defendant employer, had an employment contract which provided for a salary of \$57,500 per year. Claimant was to receive \$50,000 in wages and the remaining \$7,500 was to be paid into a SEP IRA on his behalf. By agreement with the defendant employer, claimant drew a varied weekly salary dependent on cash flow. He was to receive any balance due on the contract at the end of the year. Following his work-related injury, claimant did not return to work and did not receive the remainder of his contract salary.

Claimant's employment contract entitled him to a yearly salary of of \$57,000. Had he received set equal payments of



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that salary on a weekly or monthly basis, other provisions of section 85.36 would govern, depending upon the pay period to which his contract adhered. But in a situation where an employee receives a portion of his contractual salary in a form other than wages, as the IRA, and then draws against the base salary a variable weekly wage that is at least partially influenced by the employer's cash flow, annual earnings as the basis of computation under section 85.36(5), The Code, is the correct method of obtaining a representative of the employee's contracted remuneration for his services. (No Appeal)

RATE OF COMPENSATION--GROSS EARNINGS EXPENSES EXCLUDED

Norton v. Stylecraft, Inc. (April 30, 1985)

The claimant was employed as a truck driver. In 1973 the claimant began receiving a weekly wage and a reimbursement for road expenses. The claimant received two checks each week in 1978. One was for claimant's salary, the other check covered the claimant's road expenses. In 1980 the claimant started receiving one check each week amounting to \$401.93. The claimant said the reason for this was to build up social security. The claimant was injured on July 31, 1981. His rate of compensation based on weekly earnings of \$401.93 was \$237.31. The claimant's rate of compensation was reduced in 1982. The reduction, according to the defendants, reflected an adjustment of the claimant's determined gross earnings based on the exclusion of the expenses.

Strict reading of Iowa Code section 86.61(12) precluded

inclusion of reimbursement for expenses in calculation of gross earnings. Therefore the claimant's rate of compensation was \$175.90. (No Appeal)

SEXUAL IMPAIRMENT

Veeder v. Commercial Contracting Company, (July 18, 1985)

Claimant sustained traumatic injuries arising out of and in the course of his employment with defendant. Claimant's right leg was severely injured and subsequently amputated above the knee. Claimant suffered other injuries as well: a burst bladder, severed urethra, multiple fractures in his lower spine, and multiple breaks in his pelvis. Sexual impotency was a further result of claimant's injuries. At the review-reopening level it was concluded that the claimant did not establish entitlement to additional permanent partial disability.

One of the issues asserted that claimant had three categories of treatment (orthopedic, urological, and sexual) and that claimant should have an increased industrial disability because of the sexual impairment. On appeal, the review-reopening decision was upheld. Relying upon Diedrich v. Tri-City Railway Co., 219 Iowa 587, 258 N.W. 899 (1935) and Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985), the appeal decision held that claimant's physio-sexual problems should not be considered in determining industrial disability. It is the loss of earning capacity and the factors bearing upon earning capacity which are included in the consideration of industrial disability. This claimant's sexual dysfunction was



not a proper element for consideration in determining his industrial disability because it did not effect his earning capacity. (No Appeal)

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VOCATIONAL REHABILITATION

Alexander v. Barnes Builders Supply (March 28, 1985)

Defendants appealed from a ruling denying their motion to compel claimant to participate in vocational rehabilitation. Defendants sought the vocational evaluation to determine claimant's ability to carry on gainful employment.

As indicated in the deputy's ruling, it is not within the authority of this agency to order a claimant to participate in vocational rehabilitation or to impose a direct sanction for refusal to accept offered rehabilitation services. It could well affect the claimant's credibility and reflect on his motivation to obtain employment in a later determination of industrial disability, however. (No Appeal)

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— NOTES —
REPORT - U.S. COURT OF APPEALS - 8th CIRCUIT

The Hon. George G. Fagg, Judge
United States District Court



— NOTES —
REPORT - U.S. COURT OF APPEALS - 8th CIRCUIT

The Hon. George G. Fagg, Judge
United States District Court

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— NOTES —
REPORT - U.S. COURT OF APPEALS - 8th CIRCUIT

The Hon. George G. Fagg, Judge
United States District Court

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— NOTES —
REPORT - U.S. COURT OF APPEALS - 8th CIRCUIT

The Hon. George G. Fagg, Judge
United States District Court

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— NOTES —
REPORT - U.S. COURT OF APPEALS - 8th CIRCUIT

The Hon. George G. Fagg, Judge
United States District Court



— NOTES —
REPORT - U.S. COURT OF APPEALS - 8th CIRCUIT

The Hon. George G. Fagg, Judge
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COMPARATIVE NEGLIGENCE AND COMPARATIVE FAULT: REVIEW AND UPDATE

Mark S. Brownlee

I. INTRODUCTION

In Fuller v. Buhrow, 292 NW2d 672 (Iowa 1980), the Iowa Supreme Court invited the Iowa Legislature to abrogate the doctrine of contributory negligence as a bar to recovery and adopt the doctrine of comparative negligence. The legislature did not respond. On December 22, 1982, the Court reconsidered its deference to the legislature and adopted comparative negligence in Goetzman v. Wichern, 327 NW2d 742 (Iowa 1982).

In 1984, the legislature finally responded to the Court's invitation by rejecting the "pure" form of comparative negligence adopted in Goetzman in favor of a modified comparative fault system of tort liability. Chapter 668, The Code (1985). The Comparative Fault Act (Act) broadens the application of the comparative concept from only negligent behavior to a defined class of acts and omissions which constitute "fault". In addition, the Act addresses several areas of tort law placed somewhat in question by Goetzman (or the trial bar's active imagination) such as joint and several liability, credit for settlement and contribution.



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Because the Act is applicable to all cases filed on or after July 1, 1984 (except §668.4 regarding joint and several liability applies to all cases tried on or after July 1, 1984), many pending cases are controlled by Goetzman and subsequent decisions regarding comparative negligence. Therefore, an understanding of the "old" comparative negligence law as well as the Act is essential. The short time period between Goetzman and the Act places the Iowa Supreme Court in the unusual position of making new law which has already been supplanted by statute, but however short-lived the comparative negligence decisions are, they affect much of the pending tort litigation.

This outline is intended as a sort of refresher course and update regarding comparative negligence and comparative fault. It is assumed that the reader has at least a basic understanding of Goetzman and the Act. Goetzman and decisions regarding comparative negligence will be discussed as well as the changes effected by the Act. In addition, observations will be made regarding the practical effect of Goetzman and the Act.

II. BRIEF REVIEW OF COMPARATIVE NEGLIGENCE (GOETZMAN)

- A. Goetzman v. Wichern, 327 NW2d 742 (Iowa 1982)
abolished the doctrine of contributory negligence as a complete bar to recovery in favor of the

so-called "pure" form of comparative negligence, under which a claimant's award is reduced by the proportion his or her contributory negligence bears to the total negligence that proximately caused the damages.

B. Effective date.

Comparative negligence (Goetzman) applies to all cases tried after December 22, 1982 (and filed before July 1, 1984, the effective date of the Comparative Fault Act).

C. Scope.

Comparative negligence (Goetzman) only applies to actions in which contributory negligence was formerly available as a complete defense, so non-negligence actions such as strict liability actions, dram shop actions and intentional tort actions are not controlled by Goetzman.

1. Because contributory negligence is not a defense to a gross negligence action, Larson v. Massey-Ferguson, Inc., 328 NW2d 343 (Iowa 1982), comparative negligence would appear to

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be inapplicable to such actions. However, see Sechler v. State, 340 NW2d 759 (Iowa 1983), where the Iowa Supreme Court held that the plaintiff's contributory negligence barred recovery in an action against the state for gross negligence. It was not a comparative negligence case and the decision is apparently limited to gross negligence in that specific statutory context, §306.41.

2. It is generally believed that Rule 8 actions and Stewart v. Pilgrim actions are not affected by Goetzman, meaning no imputation of comparative negligence in those contexts.

D. Whose negligence is compared?

1. Although Goetzman does not specifically state whose negligence is to be compared (unnamed persons? settled persons?), the practice seems to be comparison of named parties and settled parties. Moreover, read literally, Goetzman does not require apportionment of negligence among individual defendants. It can be argued that Goetzman only requires apportionment of negligence between the plaintiff and the defendants as a whole to effect a proportionate reduction in the plaintiff's award.

2. The change to pro rata or comparative contribution in comparative negligence cases, Frank v. Junke, 366 NW2d 536 (Iowa 1985) (see later discussion), creates the need for complete individual apportionment where there is a contribution claim.
3. The new joint and several liability statute, §668.4, also requires individual apportionment in a comparative negligence case. (See later discussion.) In light of the different strategies available depending on how negligence is apportioned, it is surprising that the group versus individual apportionment issue has not been decided on appeal.

III. SIGNIFICANT DECISIONS REGARDING COMPARATIVE NEGLIGENCE

A. Did the adoption of comparative negligence affect joint and several liability?

1. One of the many questions raised after Goetzman was whether or not the long-established principle of joint and several liability was affected by the adoption of comparative negligence. It was argued by some defense

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counsel that the concept of joint and several liability is inconsistent with the concept of apportioning negligence among the parties. The same fairness considerations were urged as in Goetzman. A basic conflict seemed to exist between the long-standing policy of full compensation to a claimant and the new concept of negligence apportionment. The practical issue was whether claimants or solvent defendants should bear the risk and burden of insolvent defendants.

2. In Rozevink v. Faris, 342 NW2d 845 (Iowa 1983), the Iowa Supreme Court held that the adoption of comparative negligence did not affect the traditional joint and several liability doctrine. The Court spoke of the indivisibility of an injury with or without comparative negligence and reasoned as follows at 342 NW2d at 850:

"Were we to modify or eliminate joint and several liability as Farises here advocate, the burden of the insolvent defendant would fall entirely on the plaintiff, and the plaintiff's damages would be reduced beyond the percentage

of negligence attributable to that plaintiff. Comparative negligence does not mandate this further reduction."

B. Joint and several liability under the Act.

1. Section 668.4 of the Act adopted a sort of modified joint and several liability doctrine:

"In actions brought under this chapter, the rule of joint and several liability shall not apply to defendants who are found to bear less than fifty percent of the total fault assigned to all parties.

In other words, a party is only jointly and severally liable if he or she is 50% or more at fault. Section 668.4 applies to all cases tried on or after July 1, 1984, so it presumably supersedes Rozevink regarding the retention of joint and several liability in comparative negligence cases. However, in non-comparative negligence cases filed before July 1, 1984, and therefore not subject to the Act, (i.e. strict liability and dram shop), the "old" rule of joint and several liability would still apply inasmuch as there would be no apportionment of negligence to which the 50% rule prescribed by §668.4 could be applied. Similarly, if there were multiple defendants and no apportionment of negligence among them



individually (see previous discussion), the statutory rule could not be applied.

2. The practical effect of §668.4 and some problems created by its language are discussed in the next section of this outline. Drafting flaws may unwittingly restrict its application to cases filed on or after July 1, 1984.

C. Credit for settlements (pro tanto v. pro rata).

1. In Glidden v. German, 360 NW2d 716 (Iowa 1984), the Iowa Supreme Court was asked to abrogate the pro tanto credit rule and adopt the pro rata credit rule for settlements. In a comparative negligence context under the pro tanto rule, a credit is applied against the verdict (after reduction for the claimant's negligence) in the dollar amount received in settlement. Judgment is then entered in the net amount. Under the pro rata rule in a comparative negligence context, a credit is applied against the verdict (before reduction for the claimant's negligence) in the amount of the settling party's proportionate or pro rata share of the verdict. The difference in the

results obtained under the two rules is clearly illustrated by the charts in Glidden, 360 NW2d at 718. Under the pro rata rule, partial settlement may produce a windfall or shortfall for a claimant depending on whether or not the settlement amount represents more or less than the settling party's proportionate share of the verdict as determined by the apportionment of negligence.

2. Despite arguments that it is inconsistent with the concept of comparative negligence, the Court in Glidden retained the pro tanto credit rule for settlements in comparative negligence cases, stressing the principle that a claimant is entitled to full compensation but no double recovery. In short, the Court was disturbed by the potential windfall under the pro rata rule, quoting Wadle v. Jones, 312 NW2d 510, 513 (Iowa 1981) at 360 NW2d at 719:

"Adoption of the pro rata credit rule would allow a claimant who has made settlement that exceeds the settling tortfeasor's pro rata share of the verdict to recover more than full compensation for personal injuries."

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D. Credit for settlement under the Act.

1. The pro tanto rule retained in Glidden is only applicable to actions filed before July 1, 1984. Section 668.7 of the Act essentially adopts the pro rata rule and is discussed in the next section of this outline.

E. Contribution (per capita v. pro rata).

1. Until recently, contribution has always been on a per capita basis. As the Iowa Supreme Court stated in Schnebly v. Baker, 217 NW2d 708, 731 (Iowa 1974), "Ordinarily the total amount of the judgment is divided equally among those liable to the injured person."
2. In Franke v. Junko, 366 NW2d 536, (Iowa 1985), the Iowa Supreme Court adopted comparative or pro rata contribution:

"On the basis of our holding in Goetzman, we abolish our prior rule of equal contribution among joint tortfeasors and adopt the rule that contribution shall be exacted on the basis of comparable causal negligence." Id. at 540.

Franke essentially incorporates the contribution principles of § 668.6 of the Act into the common law for comparative negligence cases. Although the Court stated its decision

was "wholly uninfluenced" by the Act, the basic framework of §668.6 was adopted. The Court characterized the change to pro rata contribution as "merely a refinement of the equitable principle." Franke, 366 NW2d at 540, quoting Bieloski v. Schultz, 114 NW2d 105, 109 (Wisc. 1962).

3. Franke does not mean that per capita or equal contribution is now eliminated from the common law. The pro rata rule adopted in Franke clearly contemplates only cases where negligence is allocated among the individual tortfeasors. In non-negligence cases filed before July 1, 1984, i.e. strict liability and dram shop, the "old" rule of equal contribution would be applicable.
4. Contribution under the Act is more fully discussed in the next section of this outline.

F. Contribution from a claimant's employer.

1. In Thompson v. Stearns Chemical Corp. 345 NW2d 131 (Iowa 1984) and Speck v. Unit Handling Division, 366 NW2d 534 (Iowa 1985), the Iowa Supreme Court declined to modify the rule established in Iowa Power and Light Co.v. Abild

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Construction Co., 144, NW2d 303 (Iowa 1966) to the effect that a party liable to another's employee may not obtain contribution from the employer liable for worker's compensation. The Supreme Court concluded in Thompson and Speck that the adoption of comparative negligence did not justify the rejection or modification of the requirement of common liability to a claimant in order to obtain contribution in either negligence or strict liability cases. The Court stated as follows in Speck, 366 NW2d at 548:

"The right of contribution in Iowa is conditioned on the existence of common liability, and the employer may not be held liable for contribution because the statutory liability under our worker's compensation law is unlike the defendant tortfeasors' liability based on negligence or strict liability theories."

2. The Act does not appear to alter the Thompson and Speck decisions. See later discussion.
- G. Negligence in the ordinary sense as a defense to strict liability.
1. In Speck v. Unit Handling Division, 366 NW2d

543 (Iowa 1985), the Iowa Supreme Court was urged to adopt a common law rule whereby contributory negligence would serve to reduce a claimant's recovery from strict liability in cases involving allegedly defective products. The Court declined to modify the established common law principle that negligence in the ordinary sense is not a defense to a strict liability action.

2. Of course, the above holding only applies to cases filed before July 1, 1984. The Act includes both negligence and strict liability within the defined scope of "fault", so negligence on the part of a claimant does serve to reduce recovery for strict liability in cases filed on or after July 1, 1984.

H. Punitive damages.

1. In Campbell v. Van Rockel, 347 NW2d 406 (Iowa 1984), the Iowa Supreme Court held that neither negligence nor assumption of risk on the part of a plaintiff constitutes a complete or partial defense to a claim for punitive damages. Thus, awards for punitive damages are not subject to reduction for a claimant's negligence in cases filed before July 1, 1984.



2. A strong argument exists that punitive damages are subject to reduction under the Act. That issue is discussed in the next section of this outline.

IV. REVIEW OF CHAPTER 668, THE COMPARATIVE FAULT ACT.

A. Modified comparative fault.

1. Chapter 668 integrates the proportionate reduction concept of comparative negligence, the concept of contributory negligence as a bar to recovery and the concept of fault, hence its description as a "modified comparative fault concept".

B. Effective date of the Act.

1. The Act applies to all cases filed on or after July 1, 1984 (except §668.4 regarding joint and several liability applies to cases tried on or after July 1, 1984).

C. Basic effect of the Act.

1. Section 668.3(1) provides, in part, as follows:

"Contributory fault shall not bar recovery in any action by a claimant to recover damages for fault resulting in death or in injury to persons or property unless the claimant bears a greater percentage of fault than the combined percentage of fault attributed to the defendants, third-party

defendants and persons who have been released pursuant to §668.7, but any damages allowed shall be diminished in proportion to the amount of fault attributable to the claimant."

In other words, a claimant who is more than 50% at fault may not recover from any party.

D. Scope of the Act.

1. "Fault" is defined in §668.1(1) as follows:

"As used in this chapter, 'fault' means one or more acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages."

2. More simply stated, the Act expressly includes the following as species of fault:

- a. Negligence;
- b. Recklessness;
- c. Strict liability;
- d. Breach of warranty;
- e. Unreasonable assumption of risk;
- f. Misuse of a product;
- g. Unreasonable failure to avoid injury;
- h. Unreasonable failure to mitigate damages.



The act does not appear to include the following actions:

- a. Intentional torts;
- b. Breach of contract;
- c. Assumption of risk based upon an enforceable express consent (i.e. express contract).

3. Dram shop actions.

1. A strict interpretation of §668.1 would appear to exclude dram shop actions from the Act. However, it is possible that the Iowa Supreme Court would construe §668.1 as less than all-inclusive and judicially place dram shop actions within the Act. The Court will probably be confronted with the issue on appeal in the near future, as dram shop insurance carriers will not quietly sit back and pay full damages to claimants while others pay only proportionate amounts.

4. Gross negligence actions.

1. It is not clear whether or not gross negligence is covered by the Act. While the Act does not expressly mention gross negligence, the Iowa Supreme Court has stated that gross negligence

is only a "greater degree" of negligence and not a "different kind" of negligence. Sechler v. State, 340 NW2d 759, 763 (Iowa 1983). The phrase "... in any measure negligent" in §668.1 would seem to contemplate and justify the inclusion of gross negligence actions within the Act.

The Commissioners' Comment to the Uniform Comparative Fault Act (§668.1 is substantively identical to §1(c) of the Uniform Act) suggests the inclusion of gross negligence, stating that, "'in any measure' is intended to cover all degrees and kinds of negligent conduct without the need of listing them specifically." Therefore, it seems that although gross negligence is probably not affected by comparative negligence, it is within the purview of the Comparative Fault Act.

5. The Commissioners' Comment to the Uniform Act points out that with respect to intentional torts (and presumably other unincorporated actions), "[A] court determining that the general principle should apply at common law to a case before it of an intentional tort is not precluded from that holding by the Act."

6. Misuse.

The Commissioners' Comment states that "misuse" of a product means:

"[A] misuse giving rise to a danger that could have been reasonably anticipated and guarded against. The Act does not apply to a misuse giving rise to a danger that would not reasonably have been anticipated and guarded against by the manufacturer so that the product was therefore not defective or unreasonably dangerous."

That concept of product misuse is consistent with Iowa products liability law. See, Henkel v. R. and S. Bottling Co., 323 NW2d 185 (Iowa 1982); Hughes v. Magic Chef, Inc., 288 NW2d 542 (Iowa 1980).

7. It may often prove difficult to distinguish between negligence and the unreasonable failure to avoid injury. However, both constitute fault under the Act, so the problem is essentially academic.
8. There is a conceptual problem with characterizing the unreasonable failure to mitigate damages as fault. Mitigation of damages is a post-injury, not injury-producing, act or omission. Stated differently, mitigation is more of a damages concept than a

causation concept. Under the Act, damages which reasonably could have been mitigated presumably reduce a claimant's recovery by the amount thereof, but it is likely that defendants will effectively be required to pay proportionately for such damages. When the issue is essentially "Who caused the accident?", it will be difficult for jurors to integrate the concept of mitigation into the concept of causation, particularly when separate instructions are submitted regarding those concepts. It would seem to make more sense to first reduce a claimant's award to the extent the claimant could have reasonably mitigated his or her damages and then reduce the remaining amount proportionately to the claimant's fault.

E. Allocation of fault.

1. Under §668.3, fault is allocated among (1) claimants, (2) defendants, (3) third-party defendants and (4) persons released pursuant to §668.7. (Fault is not allocated to persons released for claims based on theories not covered by the Act.)



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2. The Court may determine that two or more persons are to be treated as a single party for purposes of fault allocation, i.e. vicarious liability. Section 668.3(2)(b). In determining the percentages of fault, consideration is given to both (1) the nature of the conduct of each party, and (2) the extent of the causal relation between the conduct and the damages claimed. Section 668.3(3). (This seems to contemplate unreasonable failure to mitigate but constitutes a difficult conceptual distinction.)
 3. In a jury case, "evidence and argument" is permitted with respect to the effect of the jury's answers to special interrogatories. Section 668.3(5). "Evidence" would arguably include exhibits such as charts which illustrate the end results of various fault allocations and damage assessments. If not, such figures could probably be graphically demonstrated during "argument", but the jury would not have the benefit of an exhibit during its deliberations. It is doubtful that one

would be permitted to argue the effect of the jury's answers to special interrogatories in terms of joint and several liability as prescribed by §668.4. To do so would promote speculation by the jury regarding the solvency and/or insurance coverage of the defendants.

F. Joint and several liability /drafting flaws/
constitutionality.

1. See previous discussion of §668.4.
2. Section 668.4 purports to be applicable to all cases tried on or after July 1, 1984. However, the phrase "In actions brought under this chapter..." suggests that §668.4 only applies to cases brought pursuant to Chapter 668. Because cases filed before July 1, 1984 are by definition not brought pursuant to chapter 668, it is arguable that §668.4 therefore cannot apply to those actions notwithstanding the statutory indication to the contrary.
3. Section 668.4 clearly does not apply to cases filed after July 1, 1984 which are not covered by the Act.



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4. Section 668.4 speaks in terms of "total fault assigned to all parties," but the cases filed before and tried after July 1, 1984 to which it purportedly applies are comparative negligence cases. With "fault" defined in §668.1 as including acts and omissions clearly outside the common law comparative negligence doctrine adopted in Goetzman (i.e. strict liability), how can §668.4 properly be applied to those pre-July 1, 1984 cases in which only negligence is compared?
 5. Notwithstanding the conceptual problems inherent in the use of the term "fault," §668.4 assumes that fault will be apportioned among all parties individually. Otherwise, there would be no way to apply the 50% rule prescribed by §668.3(1). As discussed earlier, Goetzman does not necessarily require individual apportionment in comparative negligence cases; it only requires comparison of a claimant's negligence to the total negligence with proximately caused the damages. Without apportionment of fault (negligence) to individual defendants, §668.4 is ineffectual.

6. The use of the term "parties" at the end of §668.4 is somewhat confusing. Released persons are regarded as parties under the Act and their fault is compared. The Iowa Supreme Court has still not definitively stated whose negligence is to be compared in comparative negligence cases, although there are indications that released persons are generally being included (see earlier discussion). If and when the Court decides such issue, an inconsistency could result between the statutory definition of "party" and the Court's determination of whose negligence is compared in Goetzman cases, i.e. the inclusion of unnamed parties.
7. It is likely the Iowa Supreme Court will decide future Goetzman cases in a manner which facilitates the application of §668.4 to comparative negligence cases. Eventually, of course, there will be no Goetzman comparative negligence cases and the drafting flaws discussed above will be moot.
8. It has been suggested that §668.4 perhaps arbitrarily creates two classes of claimants -- those required to accept the risk of insolvent

E

defendants and those not required to do so.
See, "Some Constitutional Questions raised by
the Enactment of Chapter 668," by David Wiggins
and Donna Medoza-Mitchel, The Iowa Trial
Lawyer, p. 2, 1984.

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G. Contribution.

1. A release, covenant not to sue or similar agreement discharges the released person from all liability for contribution. §668.7.
2. The right of contribution, §668.5.
 - a. The basis for contribution is each person's equitable share of the fault, as determined under §668.3.
 - b. Contribution may be sought in the original action or a separate action.
 - c. No judgment against any party is required for a right of contribution to exist.
 - d. A settling party may bring a contribution action only if the liability of the person against whom contribution is sought has been extinguished and only to the extent the settlement was reasonable. Query: If a settling party's equitable share of the

obligation to a claimant is determined in the original action to be less than the settlement amount, would that be evidence of unreasonableness?

3. The enforcement of contribution, §668.6.

- a. If the percentages of fault of each of the parties to a contribution claim have been determined per §668.3, a party paying more than his or her percentage share of the damages may recovery contribution upon motion (if contribution is sought in original action) or in a separate action. §668.6(1). For example, persons found jointly and severally liable in actions with insolvent defendants.
- b. If the percentages of fault of each of the parties to a contribution claim have not been established, a separate action for contribution may be brought whether or not judgment has been rendered against the persons seeking contribution or the party from whom contribution is sought. §668.6(2).



c. If a judgment has been rendered, an action for contribution must be commenced within one year after the judgment becomes final.

§668.6(3).

d. If a judgment has not been rendered, a party seeking contribution may:

i. Discharge the liability of the person from whom contribution is sought by payment to the claimant within the statute of limitations period applicable to the claimant's action and commence a contribution action within one year of that payment; or

ii. Agree while the claimant's action is pending to discharge the liability of the persons from whom contribution is sought and both actually discharge that liability and commence a contribution action within one year of the agreement.

§668.6(3).

- e. No percentage of fault is to be allocated to the state or a municipality for contribution unless the party seeking contribution has given notice of the claim under §25A.13 or §613A.5. §668.10(3).
4. It should be noted that for cases filed after July 1, 1984 which are not covered by the Act, the old rule of per capita or equal contribution would still apply.
5. Because contribution under the Act is based upon two or more persons being liable upon the same individual claim, §668.5(1), the common liability rule reaffirmed in Thompson and Speck would appear to be incorporated into the Act. Therefore, it would appear that a good argument can be made that there can be no contribution from a claimant's employer under the Act.

H. Indemnity.

1. Indemnity claims are not affected by Chapter 668, so it appears that a party released per §668.7 and therefore discharged from liability

E

for contribution may be brought back into a case by an indemnity claim.

2. A settling defendant should require appropriate language in the settlement agreement to the effect that the claimant will hold that defendant harmless from indemnity claims.

I. Effect of releases, §668.7.

1. A release, covenant not to sue, or similar agreement discharges the person from all liability for contribution.
2. No other persons are discharged upon the same claim unless the agreement so provides. (This modifies the common law principle that the release of one tortfeasor releases all unless a contrary intent is shown.)
3. The claim of a releasing person is reduced by the released person's equitable share of the claimant's damages. (This constitutes adoption of a pro rata rule credit rule for settlements in contrast to the common law pro tanto rule retained in comparative negligence cases. The pro tanto rule would still apply in all cases not covered by the Act no matter when filed or tried.

J. Governmental Exemptions, §668.10.

1. No assignment of fault to the state or a municipality for the failure to install traffic control devices. However, fault may be assigned for the failure to maintain the devices once installed. §668.10(1).
2. No assignment of fault to the state or a municipality for the failure to remove natural or unnatural accumulations of snow or ice, or to place sand, salt or other abrasive material on a roadway if the state or municipality complied with its policy for such services. §668.10(2).
3. No assignment of fault to the state or a municipality for contribution unless notice was given thereto under §25A.13 or §613A.5. §668.10(3).
4. The above governmental exemptions from the assignment of fault apply to "any action brought pursuant to this Chapter." It would therefore appear that the state or a municipality could be assigned a percentage of negligence for the stated omissions in cases filed before July 1, 1984.

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K. Tolling of statute, §668.8.

1. The filing of a petition under Chapter 668 tolls the statute of limitations with respect to actions against other parties at fault under that chapter.
2. Forever? What if judgment has been entered and a potentially liable party was never brought into the case? May such party still be sued after judgment is entered four years after the tort was committed?
3. Does the potentially extended statute of limitations period for actions filed under Chapter 668 create an unconstitutional distinction between persons sued under the Act and those sued outside of the Act?

V. CONCLUSION

Iowa tort law has long been in a near constant state of evolution, but the Goetzman decision and enactment of the Comparative Fault Act have served to accelerate that evolutionary process, perhaps to a rate neither anticipated nor even desired by the Goetzman majority. Appellate decisions regarding comparative negligence and comparative fault will eventually

provide answers to presently unanswered questions, but the wait is proving quite anxious and often frustrating. In the meantime, one must always remember to make a proper record to preserve one's opportunity to raise those unanswered questions on appeal and hopefully influence the answers provided by the Iowa Supreme Court. Remember -- no one presently "knows" the law of comparative negligence and comparative fault (except Phil Wilson), so one should not be reluctant to urge any sensible argument to benefit one's case.

E



NOTES

NOTES

NOTES

NOTES

ESTIMATING SETTLEMENT VALUES

Gregory G. Barntsen
Council Bluffs, Iowa

TABLE OF CONTENTS

- I. Forms to Use in Estimating Settlement Value
 - A. Estimated Verdicts for Injuries to an Adult in Iowa
 - B. Estimated Verdicts for Death of an Adult in Iowa
 - C. Estimated Verdicts for Injuries to a Minor in Iowa
 - D. Estimated Verdicts for Death of a Minor in Iowa

- II. Uniform Jury Instructions on Damanges
 - A. No. 3.7 Medical - Hospital
 - B. No. 3.8 Loss of Time - Earnings
 - C. No. 3.8A Loss of Future Earning Capacity
 - D. No. 3.9 Pain and Suffering - Past - Future - Future Disability
 - E. No. 3.10 Death of Spouse and Parent - Damages Recoverable by Personal Representative
 - F. No. 3.10A Present Worth of the Value of the Estate
 - G. No. 3.10B Funeral Expenses
 - H. No. 3.10C Support
 - I. No. 3.10D Services
 - J. No. 3.10E Services and Support - Time Limitations
 - K. No. 3.10F Death of Parents - Loss of Spousal Consortium to the Surviving Spouse - Loss of Parental Consortium to a Minor - Allocation of Damage - Damages Recoverable by Personal Representative
 - L. No. 3.11 Death of a Minor - Damages Recoverable by Personal Representative



- M. No. 3.11A Death of a Minor - Damages to Parent
- N. No. 3.12 Injured Parent's Claim for Deprived Child's Loss of Parental Consortium
- O. No. 3.17 Spousal Consortium - Spouse - Damages
- P. No. 3.18 Allocation of Damage for Loss Under Instruction 3.12
- Q. No. 3.22 Aggravation of Pre-Existing Condition

III. Parental Consortium Claims in Iowa

F

ESTIMATED VERDICTS FOR INJURIES TO AN ADULT IN IOWA

Name: _____ Age: _____ Life Expectancy: _____

UNIFORM JURY
INSTRUCTION

1. Claims of injured person.

- | | | | |
|----|--|------|----------|
| A. | Medical and hospital bills. | 3.7 | \$ _____ |
| B. | Loss of earnings to date. | 3.8 | \$ _____ |
| C. | Loss of future earning capacity. | 3.8A | |
| D. | Pain and suffering-past. | 3.9 | |
| E. | Present worth (3.30) of: | 3.9 | |
| | future medicals | | |
| | future pain and suffering, | | |
| | future disability. | 3.9 | |
| F. | Aggravation of pre-existing condition. | 3.22 | |

Estimated verdict range \$ _____

Estimated reduction for comparative fault _____ %

Interest on verdict from filing of action on _____.

ESTIMATED NET TOTAL \$ _____

Estimated Settlement Value \$ _____

2. Children of injured person have a claim for loss of parental consortium. Claim can be made by parent for the child. If made by parent, the jury is directed to answer a special interrogatory indicating the amount awarded for each child.*

<u>NAME</u>	<u>AGE</u>
_____	_____
_____	_____
_____	_____
_____	_____

* Nelson v. Ludovissy 368 N.W.2d 141 (Iowa 1985)

Estimated verdicts for children's claims. \$ _____
(Not reduced by comparative fault.)

Interest from date of filing. \$ _____

TOTAL \$ _____

Settlement estimate for all children. \$ _____

3. Claims of spouse of injured person*

A. Loss of consortium to date. 3.17

B. Present worth of future loss of consortium.

Estimated Verdict Range \$ _____
(Not reduced by comparative fault.)

Interest from date of filing on _____ \$ _____

TOTAL \$ _____

Estimated settlement value for spouse. \$ _____

No separate recovery for loss of enjoyment of life. Poyzer v. McGraw
360 N.W.2d 748 (Iowa 1985)

* Consortium claims must be joined when feasible. Madison v. Colby, 348 N.W.2d 202, 209 (Iowa 1984)

ESTIMATED VERDICTS FOR DEATH OF AN ADULT IN IOWA
(§§611.20, 613.15)

Name: _____ Age: _____ Life Expectancy: _____

Uniform Jury
Instruction

1. Decedent's estate may claim the following:

- A. The present worth (3.30) of the following: 3.10
- (1) Estate that would have been accumulated if decedent had lived normal expectancy. 3.10A
- (2) Value of support which decedent would have contributed to spouse during lesser of their expectancies and to children during their minority (or beyond if disabled). 3.10C 3.10E
- B. Interest on reasonable burial expenses not exceeding amount of bills. 3.10B \$ _____
- C. Pain and suffering from accident until dead or unconscious. Lang v. City of Des Moines, 294 N.W.2d 557, 562 (Iowa 1980).
- D. Medical and hospital bills 3.7 \$ _____
- Estimated verdict range for estate \$ _____
- E. Value of services (spousal consortium) decedent would have performed for spouse (Not reduced by comparative fault.) 3.10D 3.10E
- (a) The jury is directed to answer interrogatories indicating amounts included in the award for spouse. 3.10F \$ _____



Interest from date of filing on _____ \$ _____

ESTIMATED NET TOTAL \$ _____

Estimated settlement value for estate \$ _____

- 2. Surviving spouse may claim loss of consortium for period prior to death.** 3.10D
Madison v. Colby 348 N.W.2d 202, 209
 (Iowa 1984) (Not reduced by comparative fault.)

Estimated verdict range (Not reduced by comparative fault.) \$ _____

Interest from filing on _____ \$ _____

TOTAL \$ _____

Estimated settlement value for spouse \$ _____

- 3. Children of decedent have a claim for loss of parental consortium. Claim can be made by parent for the child. If made by parent's estate, the jury is directed to answer a special interrogatory indicating the amount awarded for each child. (Need instruction defining) (Not reduced by comparative fault.)***

<u>NAME</u>	<u>AGE</u>
_____	_____
_____	_____
_____	_____
_____	_____

Estimated verdicts for children's claims. \$ _____

Interest from date of filing on _____ \$ _____

TOTAL \$ _____

Settlement estimate for all children. \$ _____

** Consortium claims must be joined when feasible. Madison v. Colby, 348 N.W.2d 202, 209 (Iowa 1984)

*** Nelson v. Ludovissy 368 N.W.2d 141 (Iowa 1985)

F

ESTIMATED VERDICTS FOR DEATH OF A MINOR IN IOWA

Name: _____ Age: _____ Expectancy After Majority: _____

UNIFORM JURY
INSTRUCTION

1. Decedent's estate may claim the following: 3.11

A. The present worth of the following:

(1) Estate that would have been accumulated after majority if lived normal expectancy. 3.11

B. Pain and suffering from accident until dead or unconscious. 3.9

Estimated verdict range for estate \$ _____

Estimated reduction for comparative fault. _____ %

Interest from filing action on _____ \$ _____

ESTIMATED NET TOTAL \$ _____

Estimated settlement value for estate \$ _____

2. Decedent's parents may recover: *

A. For period from date of accident to present: loss of earnings (or economic or monetary value thereof if not employed) and value of loss of services, companionship and society, reduced by probable cost of child's support and maintenance. 3.11A

B. For future loss of services: present worth of future loss of earnings (or economic or monetary value where not employed) and value of loss of services, companionship and society (children's consortium) from present until majority, 3.11A



reduced by probable cost of child's support and maintenance during the same period of time.

C. No damages allowed for grief, mental anguish or suffering. Haafke v. Mitchell, 347 N.W.2d 381, 389.

D. Interest on burial expenses, not exceeding amount of bills. 3.10B \$ _____
Wardlow v. City of Keokuk, 190 N.W.2d at 442.

E. Medical expenses. Gookin v. Norris, 261 N.W.2d 692. 3.7 \$ _____

Estimated verdict for parents (Not reduced by comparative fault.) \$ _____

Interest from filing on _____ \$ _____

TOTAL \$ _____

Estimated settlement value for parents. \$ _____

* Consortium claims must be joined when feasible. Madison v. Colby, 348 N.W. 2d 202, 209 (Iowa 1984)

ESTIMATED VERDICTS FOR INJURIES TO A MINOR IN IOWA

Name: _____ Age: _____ Expectancy After Majority: _____

UNIFORM JURY
INSTRUCTION

1. Minor may recover present worth (3.30) of following damages for period after majority:

- A. Loss of future earning capacity. 3.8A
- B. Future medicals. 3.9
- C. Future pain and suffering. 3.9
- D. Future disability. 3.9

Estimated verdict range. \$ _____

Estimated reduction for comparative fault _____ %

Interest on verdict from date of filing petition on _____ \$ _____

ESTIMATED NET TOTAL \$ _____

Estimated settlement value for minor \$ _____

2. Parents may assert independent claims for:

A. Parents (not minor) may recover medical expenses incurred before majority. Gookin v. Norris, 261 N.W.2d 692 (Iowa 1978). 3.7 \$ _____

B. For period from time of accident to present, lost earnings (or economic or monetary value thereof if not employed), reduced by probable cost of child's support and maintenance. 3.11A

C. Present value loss of earnings from present to majority reduced by cost of support.

D. Loss of child's services, companionship and society during 3.11A



lifetimes of parents. Audubon-Exira,
335 N.W.2d 148 (Iowa 1983);
Madison v. Colby, 348 N.W.2d 202
(Iowa 1984)

Estimated verdict range. \$ _____
(Not reduced by comparative fault.)

Interest from date of filing action \$ _____
on _____.

TOTAL \$ _____

Estimated settlement value for parents \$ _____

F

No. 3.7 MEDICAL - HOSPITAL

The measure of damages for (medical attendance) (and) (hospital service) incurred to date is the fair and reasonable value of such service (s), but not exceeding for each item the amount (claimed therefor) (expended therefore) (shown by the evidence).

Elzig v. Bales, 135 Iowa 208, 112 N.W. 540 (1907).

Scurlock v. City, 142 Iowa 684, 121 N.W. 369 (1909).

NOTE: The form should be adapted to include any and all related items for which claim is made, and as shown by the evidence.



No. 3.8 LOSS OF TIME - EARNINGS

The measure of damages for loss of earnings, (time), if any you find, will be the fair and reasonable value of the time lost because of the injuries; but not exceeding \$ _____ being the amount (claimed therefor) (shown by the evidence).

In connection with this claim for loss of time, evidence has been received tending to show the extent of plaintiff's business, (farming) operations, the amount of his business income and earnings both before and after the injury, the amount and character of his investment and the type of duties which he has performed. This evidence should not be regarded as establishing a measure or rule for ascertaining the damages that may be awarded, but is submitted as tending to show the decrease, if any, of his capacity to work and continue the business (farming) operations. You are instructed that there can be no recovery for profits but such evidence may be considered in determining the fair and reasonable value of any loss of time which plaintiff has sustained.

Amelsburg v. Lunning, 234 Iowa 852, 15 N.W. 2d. 680 (1944).

Miller v. McCoy Truck Lines, 243 Iowa 483, 52 N.W. 2d. 62 (1952).

NOTE: The first sentence should be adapted to the evidence.

No. 3.8A LOSS OF FUTURE EARNING CAPACITY

The measure of damages for loss of future earning capacity will be such amount as will fairly and reasonably compensate therefor. The damages, if any you find, for loss of future earning capacity cannot be fixed within any prescribed field of certainty and must be left to the sound discretion of the jury.

Impairment of earning capacity involves impairment of ability to work and earn money generally, rather than in a particular vocation or business. Damage for such impairment is the present value of the difference between the value of a person's services, if working, as he would have been but for the injury, and the value of the services of that injured person, if working, in the future.

NOTE: The following should be given only if the evidence shows a loss of business profits:

Future loss of earning capacity is not measured by future loss of profits as such. The loss of earning capacity for which compensation may be made is measured by the value of a person's own labor. Profits, for which no compensation can be given, represent the gain from an investment in capital or business and the labor of others, after the payment of all expenses. You will give no consideration to evidence of loss of profits, except to the extent that such evidence shows the value of plaintiff's services to his business, as distinct from profits of the business.

Truscheff v. Abell-Howe Co., 239 NW 2d 116, 121-123 (Iowa 1976)

Ehlinger v. State, 237 NW 2d 784, 792 (Iowa 1976)

Anthes v. Anthes, 258 Iowa 260, 270-271, 139 NW 2d 201, 207-210 (1965)
12 Drake L. Rev. 59 (1962)

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No. 3.9 PAIN AND SUFFERING - PAST - FUTURE - FUTURE
DISABILITY

The measure of damages for injuries to his person, pain and suffering, and (future disability), if any you find, will be such amount as will fairly and reasonably compensate therefor. If you find that injuries are permanent or will to some extent disable him in the future, (or require further medical or hospital expense), or hereafter cause pain and suffering, you should determine and allow such further sum as paid now in advance will fairly and reasonably compensate for any such items as the evidence shows, with reasonable certainty, will result in the future from such injuries.

The damages, if any you find, for injuries to the person, for pain and suffering in the past and future, and future disability, cannot be measured by any exact or mathematical standard but the amount must rest in the sound discretion of the jury. Such discretion must not be exercised arbitrarily, or out of passion or sympathy or prejudice for or against the parties, but based upon a fair, intelligent, dispassionate and impartial consideration of the evidence.

In no event can the allowance for these items exceed \$ _____ being the amount claimed therefor.

Tissue v. Durin, 216 Iowa 709, 246 N.W. 806 (1933).

Winter v. Davis, 217 Iowa 424, 251 N.W. 770 (1933).

Pestotnik v. Balliet, 233 Iowa 1047, 10 N.W. 2d. 99 (1943).

Smith v. Pine, 234 Iowa 256, 12 N.W. 2d. 236 (1943).

Jackson v. C.M.St.P., 238 Iowa 1253, 30 N.W. 2d. 97 (1947).

Tucker v. Tolerton, 249 Iowa 405, 86 N.W. 2d. 822 (1957).

NOTE: If death case involved, see Fitzgerald v. Hale, 247 Iowa 1194, 78 N.W. 2d. 509 (1956).

NO. 3.10 DEATH OF SPOUSE AND PARENT - DAMAGES RECOVERABLE BY PERSONAL REPRESENTATIVE

The measure of damages for decedent's death includes each of the following items, so far as shown by the evidence.

1. The present worth of the value of the estate which decedent, (name), would reasonably be expected to have saved and accumulated as a result of his own efforts from the date of his death if he had lived out the term of his natural life.
2. An award of interest on the reasonable funeral expenses of decedent, (name) for such time as they were prematurely incurred.
3. The present worth of the value of the support which decedent, (name), would have contributed to his wife and children but for his death.
4. The present worth of the value of the services which decedent, (name) would have performed for his wife (loss of spousal consortium) and children (loss of parental consortium) or both but for his death.

You should add together the amounts, if any, you find plaintiff entitled to recovery on each of the items claimed, and such total will be the amount of your verdict.

AUTHORITY

Adams v. Deur, 173 N.W.2d 100 (Iowa 1969).
Audubon-Exira Ready Mix, Inc. v. Illinois Central Gulf Railroad Co., 335 N.W.2d 148 (Iowa 1983).
Madison v. Colby, 348 N.W.2d 202 (1984).

November, 1984

NO. 3.10A PRESENT WORTH OF THE VALUE OF THE ESTATE

With respect to item number 1 of Instruction No. (3.10), you may consider the evidence of the expectancy of life of _____; his health and physical condition; his age and occupation at the time of his death; his ability to earn money; the amount of money out of decedent's income which would be used for the support of his wife and family; the amount of taxes, both federal and state, which would be payable out of his earning; his habits as to industry, thrift and economy; the contingencies of life such as ill health, unemployment, increase or diminution of earning capacity as age advances, and all other facts and circumstances in the evidence tending to show the amount, if any, his estate might have accumulated if he had not met death in the accident involved herein.

November, 1984

NO. 3.10B FUNERAL EXPENSES

With respect to item number 2 of Instruction No. (3.10), there can be no recovery for the amount actually expended for funeral expenses, but only the interest thereon for the length of time that the estate was compelled to pay such expenses in advance of the normal date of death. Thus you will first determine the reasonable cost and value of the materials and services rendered in connection with the funeral, which amount cannot exceed what is reasonable and proper for a person of the decedent's social and financial standing. Then the measure of damages, if any, will be the reasonable interest on such amount for the period between the date of death of decedent and the end of his natural life; but such allowance, if any you make, cannot exceed either the reasonable cost of the funeral, or \$ _____, the amount claimed therefor.

AUTHORITY

Van Wie v. U.S., 77 F. Supp. 22 (1948).

Davidson v. Vast, 233 Iowa 534, 10 N.W.2d 12 (1942).

Hamdorf v. Corrie, 251 Iowa 896, 101 N.W.2d 836 (1960).

November, 1984

NO. 3.10C SUPPORT

With respect to item number 3 of Instruction No. (3.10), you may consider the evidence of the age of the decedent at the time of his death; his health, strength, character, skills and training; his life expectancy and that of his wife; his previous employment and earnings; his expectancy for earnings in the future; the ages of his wife and children; their dependency upon him for support and their present and future need for support; the amount of money out of decedent's income which would have been available for the support of his wife and children after payment of federal and state taxes; the time that will elapse before each of the present minor children will attain their majority, together with any disability on the part of any of the children which would require the support of the father beyond the age of eighteen years, and all other facts and circumstances bearing on such issue. You will allow such an amount, if any, as shown by the evidence to be fair and reasonable under the circumstances.

November, 1984

NO. 3.10D SERVICES

With respect to item number 4 of Instruction No. (3.10), "spousal consortium" is the fellowship of a husband and wife and the right of each to the intangible benefits of company, cooperation, affection, and aid of the other in every marital relationship and also the tangible benefits of general usefulness, industry and attention within the home and family. It does not include loss of pecuniary support from the injured spouse.

In determining the value of the services of a parent or spouse you may consider the circumstances of the decedent's life; his age at the time of his death; his health, strength, character, life expectancy and that of his wife; his capacities, abilities and efficiencies in the discharge of his duties as a husband and parent; his skills and abilities in providing instruction, guidance, advice and assistance to his wife and children; their respective needs and all other facts and circumstances bearing on this issue. You will allow such an amount, if any, as shown by the evidence to be fair and reasonable under the circumstances.



NO. 3.10E SERVICES AND SUPPORT - TIME LIMITATIONS

Damages for services and support which decedent would have contributed to his wife is limited in time to the lesser of their normal life expectancies.

Damages for services which decedent would have contributed to (child) (children) is limited in time to the lesser of their normal life expectancies.

Damages for support which decedent would have contributed to his children are limited to a child's minority unless you find that plaintiff has proved by a preponderance of the evidence that the (child) (children) will have a need for support beyond the period of minority.

F

November, 1984

NO. 3.10F DEATH OF PARENIS - LOSS OF SPOUSAL CONSORTIUM TO THE SURVIVING SPOUSE - LOSS OF PARENTAL CONSORTIUM TO A MINOR - ALLOCATION OF DAMAGE - DAMAGES RECOVERABLE BY PERSONAL REPRESENTATIVE

If you find plaintiff is entitled to recover and the award of damages includes an amount for (loss of spousal consortium) [loss of parental consortium to the surviving (child) (children)], it will be necessary for you to allocate that portion of the award which represents damage for loss of consortium.

You will do this by answering the following special interrogatory submitted with the forms of verdict:

- 1. Does the damage award include an amount for loss of spousal consortium to the surviving spouse?

ANSWER "yes" or "no".

ANSWER: _____

(Answer the following question only if your answer above is "yes".)

- 2. What amount of the total damage award is for loss of spousal consortium to the surviving spouse?

\$ _____

- 3. Does the damage award include an amount for loss of parental consortium to the surviving (child) (children)?

ANSWER "yes" or "no".

ANSWER: _____

(Answer the following question only if your answer above is "yes".)

- 4. What amount of the total damage award is for loss of parental consortium for (the surviving child) (each surviving child)?

(Continued)



DEATH OF PARENTS - LOSS OF SPOUSAL CONSORTIUM TO THE SURVIVING
SPOUSE - LOSS OF PARENTAL CONSORTIUM TO A MINOR - ALLOCATION
OF DAMAGE - DAMAGES RECOVERABLE BY PERSONAL REPRESENTATIVE

Page 2

<u>Name of Child</u>	<u>Amount of Damage for Loss of Parental Consortium</u>
A. (Insert Name)	\$ _____
B. (Insert Name)	\$ _____
C. (Insert Name)	\$ _____

F

November, 1984

CAPTION

CASE NO.
SPECIAL INTERROGATORY

SPECIAL INTERROGATORY FOR NO. 3.10F

SPECIAL INTERROGATORY NO. 1

1. Does the damage award include an amount for loss of spousal consortium to the surviving spouse?

ANSWER "yes" or "no".

ANSWER: _____

(Answer the following question only if your answer above is "yes".)

2. What amount of the total damage award is for loss of spousal consortium to the surviving spouse?

\$ _____

3. Does the damage award include an amount for loss of parental consortium to the surviving (child) (children)?

ANSWER "yes" or "no".

ANSWER: _____

(Answer the following question only if your answer above is "yes".)

4. What amount of the total damage award is for loss of parental consortium for (the surviving child) (each surviving child)?

<u>Name of Child</u>	<u>Amount of Damage for Loss of Parental Consortium</u>
A. (Insert Name)	\$ _____
B. (Insert Name)	\$ _____
C. (Insert Name)	\$ _____

Dated: _____

(Continued)



SPECIAL INTERROGATORY FOR NO. 3.10F

Foreman*

*To be signed only if verdict is unanimous.

Juror**

**To be signed by the jurors agreeing thereto after six hours or more of deliberation.

November, 1984

NO. 3.11 DEATH OF A MINOR - DAMAGES RECOVERABLE BY PERSONAL REPRESENTATIVE

The measure of damages for the death of _____ is the present worth of the value of the estate which he would reasonably be expected to have saved and accumulated as a result of his own efforts from the date of his death, if he had lived out the term of his natural life. In determining the amount you shall exclude the sum which he would have accumulated from the date of his death to the date of attaining his majority.

In arriving at such damages, if any, you may consider the evidence on the expectancy of life of _____; his health, physical and mental condition; his morals, his habits as to industry, thrift and economy; his interest in school; his grades and attendance; the occupation of his parents; the contingencies of life such as ill health, unemployment, increase or diminution of earning capacity as age advances; and all other facts and circumstances in the evidence tending to show the amount, if any, that his estate might have accumulated from the date of his death. In no event can such recovery exceed \$ _____, being the amount claimed therefor.

AUTHORITY

Lenth v. Schug, 226 Iowa 1, 281 N.W. 510 (1939).

Pagel v. Notbohm, 188 N.W.2d 314 (Iowa 1971).

November, 1984

NO. 3.11A DEATH OF A MINOR - DAMAGES TO PARENT
(Rule 8 Claim)

If you find the plaintiff, _____ (father-mother) is entitled to recovery for damages sustained by _____ (him-her) as the result of the death of _____, you shall consider:

1. The value of the past loss of services, companionship, and society of said child from the date of death to the present time, less the probable cost of the child's support and maintenance during that period of time.

2. The present value of the future loss of services, companionship, and society of said child from the present time until the child would have reached majority less the present value of the probable cost of the child's support and maintenance during that same period of time.

These items of damage include the (loss of earnings of a child) (the economic or monetary value of the child's labor where he is not employed) as well as the parent's right to the intangible benefits of companionship, cooperation, and affection of the children.

If you find plaintiff, _____ (father-mother) is entitled to recover, you should add together the amounts, if any you find, plaintiff is entitled to recover on each item claimed. The total will be the amount of your verdict, but in no event can it exceed \$ _____, the amount claimed in the Petition.

AUTHORITY

R.C.P. 8

Wardlow v. City of Keokuk, 190 N.W.2d 439 (Iowa 1971).

Pagitt v. City of Keokuk, 206 N.W.2d 700 (Iowa 1973).

Audubon-Exira Ready Mix, Inc. v. Illinois Central Gulf Railroad Co., 335 N.W.2d 148 (Iowa 1983).

Madison v. Colby, 348 N.W.2d 202 (Iowa 1984).

November, 1984

NO. 3.12 INJURED PARENT'S CLAIM FOR DEPRIVED CHILD'S LOSS OF PARENTAL CONSORTIUM

The plaintiff asserts a claim for the loss of parental consortium. "Parental consortium" is the relationship between parent and child and the right of the child to the intangible benefits of companionship, comfort, guidance, affection, and aid of the parent in every parental relation. It also includes the tangible benefits of general usefulness, industry and attention within the home and family. It does not include the value of tangible contributions or loss of monetary support from the injured parent.

The plaintiff is not entitled to recover for loss of parental consortium unless the injury to the parent has caused a significant disruption or diminution of the parent-child relationship.

The measure of damages for the loss of parental consortium to date, if any you find, will be such amount as will fairly and reasonably compensate for such loss.

If you find that such loss will continue in the future, you should determine the present worth of the value of such loss.

Damages are limited in time to the lesser of their normal life expectancies.

In no event can the allowance for the loss of parental consortium exceed \$ _____ being the amount claimed therefor.

AUTHORITY

Acuff v. Schmit, 248 Iowa 272, 78 N.W.2d 480 (1956).

Fuller v. Buhrow, 292 N.W.2d 672 (Iowa 1980).

Audubon-Exira Ready Mix, Inc. v. Illinois Central Gulf Railroad Co., 335 N.W.2d 148 (Iowa 1983).

Madison v. Colby, 348 N.W.2d 202 (Iowa 1984).

November, 1984

NO. 3.17 SPOUSAL CONSORTIUM - SPOUSE - DAMAGES

The plaintiff asserts a claim for the loss of spousal consortium. "Spousal consortium" is the fellowship of husband and wife and the right of each to the intangible benefits of company, cooperation, affection and aid of the other in every marital relationship and also the tangible benefits of general usefulness, industry and attention within the home and family. It does not include loss of monetary support from the injured spouse.

The measure of damages for the loss of spousal consortium to date, if any you find, will be such amount as will fairly and reasonably compensate for such loss.

If you find that such loss will continue in the future, you should determine and allow any further sum, as paid now in advance, will fairly and reasonably compensate for such loss as the evidence shows, with reasonable certainty, will result in the future. Damage for future spousal consortium is limited in time to the lesser of the normal life expectancy of the (decedent) (injured spouse) and the (plaintiff).

In no event can the allowance for the loss of spousal consortium exceed \$ _____, being the amount claimed therefor.

AUTHORITY

Acuff v. Schmit, 248 Iowa 272, 78 N.W.2d 480 (1957).

Fuller v. Buhrow, 292 N.W.2d 672 (Iowa 1980).

Audubon-Exira Ready Mix, Inc. v. Illinois Central Gulf Railroad Co., 335 N.W.2d 148 (Iowa 1983).

Madison v. Colby, 348 N.W.2d 202 (1984).

November, 1984

NO. 3.18 ALLOCATION OF DAMAGE FOR LOSS UNDER INSTRUCTION 3.12

If you find plaintiff is entitled to recover and an award of damages includes an amount for loss of parental consortium to the deprived (child) (children), it will be necessary for you to allocate that portion of the award which represents damage for loss of parental consortium to the deprived (child) (children).

You will do this by answering the following special interrogatory submitted with the forms of verdict:

SPECIAL INTERROGATORY NO. 1

- 1. Does the damage award include an amount for loss of parental consortium to the surviving (child) (children)?

Answer "yes" or "no".

ANSWER: _____.

(Answer the following question only if your answer above is "yes".)

- 2. What portion of the total damage award is allocable to loss of parental consortium for (the surviving child) (each surviving child)?

Name of Child	Amount of Damage for loss of Parental Consortium.
A. _____	\$ _____
B. _____	\$ _____
C. _____	\$ _____

Dated: _____.



CAPTION

CASE NO.
SPECIAL INTERROGATORY

SPECIAL INTERROGATORY FOR
INSTRUCTION NO. 3.18

SPECIAL INTERROGATORY NO. 1

1. Does the damage award include an amount for loss of parental consortium to the surviving (child) (children)?

Answer "yes" or "no".

ANSWER: _____.

(Answer the following question only if your answer above is "yes".)

2. What portion of the total damage award is allocable to loss of parental consortium for (the surviving child) (each surviving child)?

Name of Child	Amount of Damage for loss of Parental Consortium.
A. _____	\$ _____
B. _____	\$ _____
C. _____	\$ _____

Dated: _____.

Foreman*

*To be signed only if verdict is unanimous.

Juror**

Juror**

(Continued)

SPECIAL INTERROGATORY FOR INSTRUCTION NO. 3.18
Page 2

Juror**

Juror**

Juror**

Juror**

Juror**

**To be signed by the jurors agreeing thereto after six hours or more of deliberation.



November, 1984

NO. 3.22 AGGRAVATION OF PRE-EXISTING CONDITION

If you find from the evidence that before this accident the plaintiff had a dormant (arthritic) (heart) (other -- specify) condition, and further find that because of the accident this condition was aggravated and made active, so as to cause suffering and disability, then plaintiff is entitled to recover because of disability or pain proximately due to such aggravation, but is not entitled to recover for any physical ailment or disability which may have existed prior to the accident or for any from which plaintiff may now be suffering which were not caused or contributed to by reason of the accident.

I. CURRENT STATUS OF PARENTAL CONSORTIUM CLAIMS IN IOWA

- A. Adult children may not pursue consortium and loss of support claims under §613.15 of the Iowa Code in their own names as a matter of right. Nelson v. Ludovissy, 368 N.W.2d 141 (Iowa 1985).
- B. In order for a minor or adult child to be entitled to bring a loss of parental consortium claim in their own name they must first establish to the court's satisfaction that it is impossible, impracticable, or not in the child's best interest for the parent to maintain the action. Nelson v. Ludovissy, 368 N.W.2d 141 (Iowa 1985).
- C. A showing that it is possible, impractical or not in the child's best interest for the parent to maintain the child's loss of parental consortium claim may be inferred on the circumstances, such as the parents failure to bring such claim. Nelson v. Ludovissy, 368 N.W.2d 141 (Iowa 1985).
- D. Where it is feasible parental consortium claims should be joined with the action for injury or death of the injured person to avoid multiplicity of litigation and to assure against double recovery. Madison v. Colby, 348 N.W.2d 202 (Iowa 1984); Weitl v. Moes, 311 N.W.2d 259, 270 (Iowa 1981).
- E. Damages in an action for loss of parental consortium are not limited to the period of a child minority. Audubon - Exira Ready Mix, Inc. v. Ill. Cent. Gulf R. Co., 335 N.W.2d 148 (Iowa 1983).
- F. The word "services" as used in I.C.A. §613.15 includes parental consortium damages without regard to whether the parent is killed or merely injured. Audubon - Exira Ready Mix, Inc. v. Ill. Cent. Gulf R. Co., 335 N.W.2d 148 (Iowa 1983).

II. PROBLEMS ASSOCIATED WITH PARENTAL CONSORTIUM CLAIMS

- A. How do you get a complete release?
- B. Can you force the parent to join the minor children?

- C. When do you raise a question about the consortium claims of children when they are not brought by the parent?
- D. What cases are probably the types that have the most exposure for consortium claims by children?

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CLOSING THE COMMUNICATIONS GAPS

&

Defense Trial Lawyer
Image Enhancement

A panel of communications experts from the areas of public relations, the news, and marketing, who have worked either for or with lawyers, will offer their observations about lawyer communications.

They will perk your interest with their independent observations, new data, practical communications tips, and discuss techniques now in use by lawyers for reaching both broad and specialty audiences.

Competitive "exposure" opportunities will also be discussed.

- I. An overview of lawyer activity in "P.R." and communications planning and techniques for defense trial lawyers.
 - William "Bill" Kotlowski, D.R.I. Public Relations Director, and News Editor-
For The Defense, Chicago
- II. News needs and your needs: will they, can they, do they meet? And, what about alleged bias in the news and the opportunity for rebuttal.
 - David Witke, Deputy Editor, The Des Moines Register, Des Moines
- III. New data about how companies choose counsel, and ways to find and hold clients through enhanced communications and marketing techniques.
 - Pat Rosenzweig, President of Professional Services Marketing, Chicago
- IV. Surveying and serving lawyer needs.



An overview of lawyer activity in "P.R."
Image - Perceptions - Categories of Communications
- Definitions - Applications - Planning
by William "Bill" Kotlowski, D.R.I.

- I. "First...a word from my sponsor."
- II. The role of image in the communication process.
- Lawyer image and its relationship to professional and educational lawyer associations
 - Lawyer image and its relationship to the news
 - Lawyer image and its relationship to the lawyer/firm
- III. Perceptions about lawyer self-promotion before, and after, Bates.
- IV. Categories of mass communications and descriptive definitions with applications for defense trial lawyers, or, techniques, tools, and the media.
- | | | |
|-------------------|-------------------------|------------------------------------|
| -Marketing | -News Releases | -Electronic (r.,tv., catv) |
| -Advertising | -Firm Brochures | -Print-general (wkly daily, slick) |
| -Public Relations | -Newsletters | -Print-specialty (prof. & trade) |
| -Publicity | -S.T. (special tactics) | -Print-firm |
| -Promotion | -Giveaways | |
| | -Direct mail | |
| | -Advertisements | |
- V. Determining the need for a communications program, and the role of planning, research, evaluation, and assessment in a communication program
- the conscious v. the "unconscious" program
- VI. The bottom-line: techniques other lawyers have used, why, and what kind of success has been experienced.
- VII. Market opportunities created by the communications efforts of the insurance and manufacturing industries, the organized plaintiffs trial bar, and independent counsel/firms.
- VIII. The role of communications professionals in your communications plans.

ROSENZWEIG

Professional Services Marketing 1121D South Plymouth Court Chicago, Illinois 312-987-9541

HELPING COMPANIES CHOOSE YOUR FIRM AS COUNSEL

I. A working definition of marketing

All the activities necessary to reach people who are in a position to:

Retain your services for the first time;
Allow you to continue to serve them.

At least 1/2, and often 3/4, of your billings are from existing clients. Don't understate your need to recognize these people as a target market.

Then there is the other half, the new clients. How do you reach them? What are your tools?

II. Know your market.

For what categories of organizations or individuals are the services you provide needed most? What ownership structure? What size? What location?

III. How do the companies in your market use outside counsel and what do they look for in the selection process?

A. For what services do companies without inside counsel retain outside counsel?

1. CEOs of such businesses express a need for a wide range of specialized legal services.

2. The services sought by most successful businesses are tax, employee benefits, and litigation.

B. What are their selection criteria?

1. The most important and decisive criteria are compatible personality, proven experience in a particular issue, and evidence of giving clients proper attention.

2. The least important are a trustworthy referral, location, and having other clients from the same industry.

IV. Presentation of your firm to your market.

Now you can develop ideas and materials for firm and individual resumes, newsletters, seminars and public



relations efforts that are both appropriate for your market and consistent with your practice. You can present your firm in a manner that will interest the prospective or continuing client.

A. Newsletters serve to inform your existing and future clients of your firm's recent accomplishments, highlight the services or counsel you can provide, and make them aware that you can anticipate their needs.

1. Target your material to the members of your audience and use their language.

2. Be clear about each subject. Readers should be able to scan headlines to pick up the important subject matters.

3. Don't just state a case or law; use more text space for discussing implications.

B. The press is a powerful tool. It provides name recognition and creates the impression with prospective and existing clients that you are an authority.

1. Identify the specific press your market reads for information.

2. Again, target your audience. This consists of BOTH the respective editors AND the publication's readers.

3. To arrive at appropriate topics, ask yourself, "What are the readers' (not just my) interests? What can the readers do to avoid a problem?"

C. Brochures provide the opportunity to formally introduce your firm to a prospective client or to other departments within an existing client. It is no more than "an extended business card." It creates or reinforces an impression. It saves time and maintains quality control. It does NOT sell.

1. Target, always target.

2. Be sure to present your specialties; clients are not likely to retain you initially as general counsel.

3. Consider naming your clients in the brochure text. At least describe them in terms of size, form of ownership, general business type, and perhaps location.

HELPING COMPANIES CHOOSE YOUR FIRM AS COUNSEL Page Three

D. Interviews are your chance to determine the client's needs and how you can serve them best.

1. Listen closely.

2. Focus your presentation of your firm on service, on building relationships, and on understanding priorities.

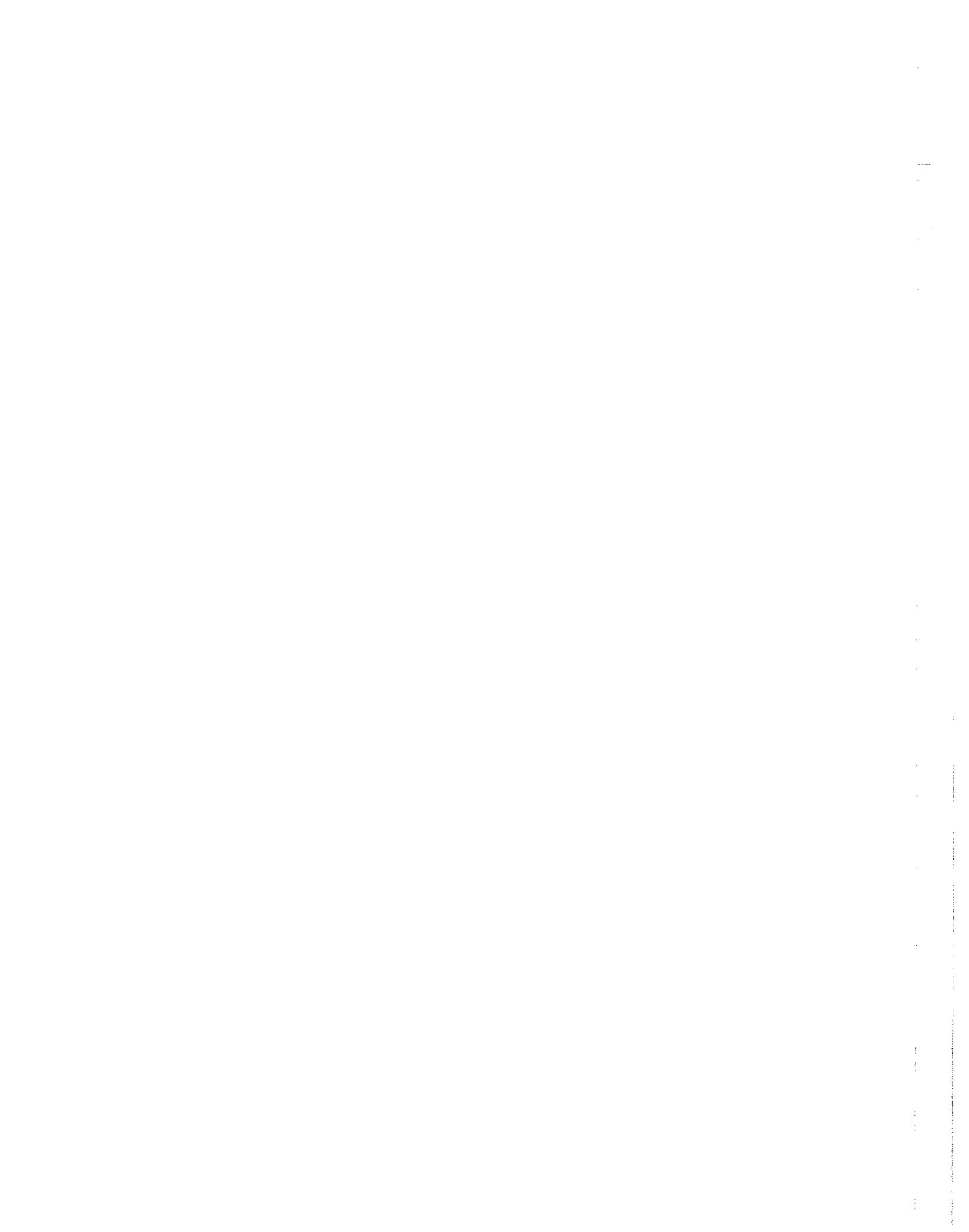
E. Speeches and seminars provide the best opportunity to meet people who are actively interested in your subject.

1. Understand your role in the program and match its objectives to you interests.

2. Understand your audience's sophistication in your subject.

3. Present them something to think about or to do that is useful, that most of them would not have thought of themselves, and for which you may be able to assist them in implementing.

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"CONFLICTS OF INTEREST - THE MUSHROOMING PROBLEM"

By
E. J. Connor

CONFLICT OF INTERESTS - THE DUTY TO DEFEND, DISCLAIMERS AND RESERVATIONS OF RIGHTS

- I. INTRODUCTION: TURNING A BREACH OF CONTRACT INTO A TORT...OR "TURNING A SOW'S EAR INTO A SILK PURSE"
- A. Don't let our adversaries turn a breach of contract into a tort! Is your action "anticipatory breach of contract?"
 - B. Don't let your adversaries out leverage you!
 - C. Acquisition of technical litigation skills is your only defense! Nike, Inc v Atlantic Mutual, 578 F.Supp. 948 (1983).
 - D. Do you have a "siege mentality"? Paranoia?
 - E. Shot gun reservation of rights shackle a defense attorney.
 - 1. "Liability insurance carriers do not operate in a vacuum. They are presumed

*Director, Vice President and General Counsel, Iowa National Insurance Group, Member Iowa State Bar Association, Nebraska State Bar Association, Linn County Bar Association, Iowa Defense Counsel Association, Vice President, International Association of Insurance Counsel, Special Panel of Arbitrators for Excess and Reinsurance Disputes, Mediator, AAA, Panel of Arbitrators, AAA, Defense Research Institute, Chicago, Illinois, Member Legislative Committee of the Iowa Insurance Institute, Cost of Litigation Committee, Iowa State Bar Association, Chartered Property and Casualty Underwriter.

to have knowledge of well-established principles of law in the field of insurance." Fidelity & Cas. Co v Maryland Cas. Co., 51 Misc2d 116, 281 NYS2d 452, rev'd on other grds, 28 AD2d 815 (1967).

F. Does the defense attorney "argue" the coverage question properly?

1. "Certainly the Appellate Division was not obliged to consider or to rely on an argument NOT PRESENTED TO IT. See Royal Indem Co v Blakely, 372 Mass. 86, 88, 360 N.E.2d 864 (1977). It did so, however, as it had a right to do in the circumstances, and it reached the correct result. We should sustain a lower court that on its own reaches a proper result on stated facts, even when the successful party did not argue to that court the ground on which the decision was based and even when the prevailing party is an insurance company that initially failed to present a proper view of its own policy." Bond Bros., Inc v Robinson, et al, 471 N.E.2d 1332 (Mass. Sup. Jud. Ct. 1984 filed 1985).
2. For "incomplete briefing" see Foremost Insurance Co v Eanes, 184 Cal. Rptr. 635 (1982)

II. THE DUTY TO DEFEND - WHAT IS IT? CONTRACTUAL, FIDUCIARY, OR BOTH?

A. This duty to defend is the insurer's duty, not the attorney's duty. Pirkl v Northwestern Insurance Association, 348 N.W.2d 633 (Iowa 1984); McAndrews v Farm Bureau, 349 N.W.2d 117 (Iowa, 1984); Gross v Lloyd's of London Insurance Co, 358 N.W.2d 266 (Wis. 1984); Teigen, infra; also see Loy v Bunderson, 320 N.W.2d 175 (Wis. 1982); Wolfrich v United Services Automobile Association, 197 Cal.Rptr. 446 (Cal. App. 1984); Gould v Mutual Insurance Company of New York, 683 P.2d 207 (Wash. App. 1984); Coleman v Gulf Insurance Group, 200 Cal.Rptr. 619 (Cal. App. 1984); Spruill v Universal Underwriters, 512 P.2d 403 (Kan. 1973); Trimble, infra.

1. "Our law considers...that where an insurer reposes upon the insured the power as of an attorney to negotiate the claim of

liability brought against the insured -- an inherent fiduciary relationship arises which the insurer must discharge with the utmost good faith." Varnal v Weathers, 619 S.W.2d 825 (Mo. App. 1981).

2. "...the process is one of envisaging what kinds of losses may be proved as lying within the range of the allegations of the complaint, and then seeing whether any such loss fits the expectation of protective insurance reasonably generated by the terms of the policy." See Rhodes v Chicago Insurance Company, 719 F.2d 116 (CA 5 Tex. 1983).
- B. Your selection of a defense attorney may impose on him/her the duty to find coverage. "The lawyer is forced to walk an ethical tightrope, and not communicate relevant information which is beneficial to one or the other of his clients." Purdy v Pacific Auto Insurance, 157 Cal.App.3d 59, 76 (1984). Courts are not uniform as to scope of this duty. Hawkeye-Security, infra.
 - C. The duty arises from the insurer's "right to control the settlement or litigation...". Kranzush v Badger State Casualty Co, 307 N.W.2d 256 (Wis. 1981).
 - D. There first must be a covered loss before there is a duty to defend. Servidone v Security Insurance, 477 N.E.2d 441 (N.Y. 1985).
 - E. Is it a quasi-fiduciary duty? Trimble v Farmers Insurance Company, et al, 691 P.2d 1138 (Colo. 1984).
 - F. The duty to pay and the duty to defend are PARALLEL duties (like two parallel railroad tracks running to the same city). Stanback v Westchester Fire Insurance, 314 S.E.2d 775 (N.C. 1984).
 1. The "Umbrella" defense duty is broader than the primary duty and "drops down" when the duty to pay is broader. See Stanback, supra, re the definition of "personal injury".
 2. The duty is personal to each insurer - Pirk1 at p. 635; Teigen v Jelco of Wisconsin, Inc, 367 N.W.2d 806 (Wis. 1985) at p. 811.



3. Regarding the excess and/or primary insurer's duties, see Loy v Bunderson, 320 N.W.2d 175 (Wis. 1982).
- G. WHEN does it begin? At the time of the first report! Samson v Transamerica Insurance Company, 636 P.2d 32 (Cal. 1981) -- or at the time of filing the complaint? See Stanback, supra.
1. A lawsuit is not necessary to trigger a duty to defend.
 2. The duty CONTINUES until the "court finds...the insurer is relieved...under a non-coverage provision of the policy". Hawkeye-Security, infra.
- H. WHAT does it mean? The duty is fiduciary, "...inherent in the nature of the contract and arising out of a special relationship of trust". "It is an independent duty separate and distinct from the contract obligation." Sadler v Rexaire, Incorporated, ___ F.2d ___ (9th Cir. 1985).
1. Relying on your attorney to fulfill YOUR fiduciary duty to defend may be evidence of bad faith (because there is a conflict of interest) 90 ALR 3d 1199 et. seq. (1979).
 2. The duty is "personal in nature" and the co-insurer's duties are irrelevant. Nordby v Atlantic Mutual, 329 N.W.2d 820 (Minn. 1983); see Teigen, supra.
 3. The duty varies in first party actions. Pirkl v Northwest Mutual, 348 N.W.2d 633 (Iowa, 1984). No fiduciary duty arises.
- I. WHY is it broader than the duty to pay?
1. It is separate and distinct -- a fiduciary duty; it is extracontractual, "no higher duty exists". Swiatlowski v State Farm, 585 F.Supp. 965 (W.D. Va. 1984).
- J. ISO is proposing a cap (a dollar limit) on defense costs under the new 1986 CGL. Can this quasi-fiduciary duty be subject to a dollar contract limit?
- K. Burden of showing no duty to defend is on insurer. Hawkeye-Security Insurance Company v Clifford, 366 N.W.2d 489 (S.D. 1985).

1. Notice pleading and shot gun complaints place heavy burden on insurers. Seaboard Surety v Gillette Co, 476 N.E.2d 272 (N.Y. 1984).

L. The DUTY OF DISCOVERY. Is it an affirmative duty? From the time of the first report? To what extent? Is discovery adequate from the insured's standpoint?

1. Do you have a duty to increase litigation costs, engage in "discovery abuse", seek every defense possible for your insured and every cause of action possible for your insured? Why? See Michigan Mutual, infra.

What is negligent investigation?
Farm Bureau v Crabtree, 467
N.E.2d 1220 (Ind. App. 1984).
Betts v Allstate Insurance Co,
201 Cal.Rptr. 528 (1984).

M. Do you have an affirmative duty to sue other parties and establish other causes of action on behalf of the insured in discovery? YES!

Michigan Mutual v Hartford Insurance. 463 N.E.2d 608 (N.Y. 1984) -- failure to file a WC 1B action against another insured breaches the duty to defend.

1. Tendering of defense or the duty to defend to another carrier or another potential defendant. The defense duty extends to additional insureds, the duty to procure insurance for another, etc. Ervin v Sears, et al, 469 N.E.2d 243 (Ill. App. 1984).

2. For conflicts where two parties are represented by the same insurer, see Murphy v Urso, 88 Ill.2d 444 (1981).

N. What are the coverage "triggers" as to the duty to defend?

1. ALLEGATIONS of the complaint.

a. Is there potentially or arguably coverage based upon the complaint?



"...we caution that while a liability insurance carrier may initially rely on the allegations of the underlying complaint to determine whether it must provide its insured with a defense, it may not rely on that determination, without investigating the facts, once the insured has come forward and made some factual showing that the suit is actually one for damages resulting from events which do fall into policy terms. If any part of the cause of action against its insured is arguably within the scope of coverage, the insurer must provide a defense." Johnson v AID Insurance Company of Des Moines, 287 N.W.2d 663 (Minn., 1980) (emphasis mine).

- b. IOWA RULE: "The scope of inquiry, however, must sometimes be expanded beyond the petition, especially under 'notice pleading' petitions which often give few facts upon which to assess an insurer's duty to defend. In Central Bearings Co v Wolverine Insurance Co, 179 N.W.2d 443 (Iowa 1970), we recognized the need to supplement the facts in the pleadings saying that the insurer has no duty to defend 'if after construing both the policy in question, the pleadings of the injured party and any other admissible and relevant facts in the record, it appears the claim made is not covered by the indemnity insurance contract....' Id. at 445. (Emphasis added). A court may also take judicial notice of facts bearing on policy coverage. Appleman, supra, Sec. 4684.01, at 90.

An insurer cannot, of course, await the outcome of the trial to furnish the defense if potential liability appears at an earlier stage. Appleman, supra Sec. 4684, at 83, 85.

On the other hand, an insurer is not required to provide a defense when no facts presently available to it indicate coverage of the claim merely because such facts might later be added by amendment or introduced as evidence at the trial. If the totality of facts fail to disclose potential coverage, an insurer might proceed in two ways: it could initiate a declaratory judgment action against its insured, see e.g. Farm Bureau Mutual Insurance Co v Sandbulte, 302 N.W.2d 104 (Iowa 1981), or it might elect to do nothing, running the risk, of course, that its insured will seek indemnity if coverage is established at trial. See Grenga v National Surety Corp, 113 R.I. 45, 49, 317 A.2d 433, 436 (1974); Appleman, supra Secs. 4683, 4685.01, at 53, 133.

In the present case, we look to the pleadings and all other 'admissible and relevant facts', Central Bearings, 179 N.W.2d at 445, to resolve the question of Farm Bureau's duty to defend. If it appears from those facts that there was potential for coverage under the policy, McAndrews must prevail."

McAndrews v Farm Bureau Mutual Insurance Co, 349 N.W.2d 117 (Iowa 1984).

See also Hagen Supply v Iowa National Insurance Company, 331 F.2d 199, 203 (CA 8 1964); Stover v State Farm, 189 N.W.2d 588 (Iowa 1971).



- c. Is there part coverage and part not coverage? If so, the duty is to defend the entire complaint. Waste Management v Peerless Insurance Company, 323 S.E.2d 726 (N.C. App. 1984); North Star Insurance Co v Johnson, 352 N.W.2d 791 (Minn. App. 1984).
- d. To declare no defense duty, "all parts of the causes of action must be outside scope of coverage." Western World Insurance v Hall, 353 N.W.2d 221 (Minn. App. 1984).
2. Before and/or after a complaint is filed, is there knowledge outside of the complaint that there is potentially or arguably a duty to pay or a duty to indemnify? See 44 Am.Jur.2d, Insurance, Sec. 1410, Conflict Between Allegation and Known or Ascertainable Facts.
3. If there is no knowledge before or after the filing of the complaint of coverage and/or there is definitely knowledge that there is no coverage, there still is the duty to defend if there is potentially or arguably coverage alleged in the complaint (the reverse does not relieve the insurer) e.g. AHP v Liberty Mutual, 565 F.Supp. 1485 (S.D. N.Y. 1983). See also Buckeye Union Insurance Co v Liberty Solvents, et al, 477 N.E.2d 1227 (Ohio App. 1984).
- a. The duty arises "irrespective of the true facts"! Baron Oil Co, supra, at p. 814; 7C Appleman Insurance Law and Practice, Sec. 4683, p. 52 and Sec. 4683.01, p. 65.
4. Is there a duty to INVESTIGATE if there is no allegation in the complaint alleging coverage and no actual or constructive knowledge outside the complaint of the possibility or potential of coverage? Bond Brothers, Incorporated v Robinson, 471 N.E.2d 1333 (Mass. 1985); Associated Indemnity v INA, 386 N.E.2d 529 (Ill. App. 1979).

- a. Some courts hold there is a duty to investigate all complaints notwithstanding coverage or a duty to pay. City of Willoughby Hills v Cincinnati Insurance Company, 459 N.E.2d 555 (Ohio, 1984), Betts v Allstate, 201 Cal.Rptr. 528 (1985).
5. What if the complaint is amended? See Baron Oil Co v Nationwide Mutual Insurance Co, 470 S.2d 810 (Fla. App. 1985).
- a. Can you require notice as a condition of coverage or did you waive it by denial?
- b. Do amendments supersede prior pleadings? Yes, see Rhodes, supra.
6. Are you estopped to deny coverage if the insured fails to report the subsequent amendment to the complaint?
7. What about a separate agreement with the policyholder to avoid a conflict of interest? Does it protect insurer?
8. Does the adoption of "notice pleading" or liberal amendments to pleading change the duty? Terrio v McDonough, 453 N.E.2d 1231 (Mass. 1984), 31 ALR 4th 947; Buckeye Union, supra; also McAndrews, supra.
- O. Reservations: An insurer may be estopped if it "undertakes" a defense when that "undertaking" without a proper reservation results in some prejudice to the insured. Western Casualty v Brochu, 475 N.E.2d 872 (Ill. 1985).
- P. Disclaimers:
1. As to the duty to pay: You deny at your peril.
2. As to the duty to defend: You face an estoppel peril.

Sterlite Corporation v Continental Casualty, 458 N.E.2d 338 (Mass. App. 1984).

3. Maximizing protection -- what is the peril or consequence of being wrong?

a. What are the consequential damages? Trovillon v USF&G, 474 N.E.2d 953 (Ill. App. 1985).

4. May plaintiff and insured agree to preclude recovery against insured and sue the company? YES!

Steil v Florida Physician's Recip, 448 S.2d 589 (Fla. App. 1984); See Loy v Bunderson, 320 N.W.2d (Wis. 1982) as to settlement with primary insurer and preservation of rights versus excess carrier. See also Teigen, infra.

5. If there is a proper coverage BASIS for denial, the duty to defend is never triggered! Murphy v Peterson, et al, 473 N.E.2d 480 (Ill. App. 1984). A FACTUAL BASIS for denial of coverage, does NOT trigger a duty to defend. Hartford Accident and Indemnity v Aetna, et al, 1985 CCH Fire and Casualty Cases, 1284 (N.J. Sup. Ct. 1985).

6. As to attorney fees in D/J actions, see Allstate v Robins, 597 P.2d 1052 (Colo. App. 1979).

Q. Your defense is only as good as your weakest link! Defense duties are determined by the statutes and the courts -- NOT the Claims Manager, NOT by Company policy, NOT the Company President, and NOT your supervisors! Company policy does not supersede judicial fiat.

1. Company policy may be a jury issue as to bad faith. Loudon v State Farm, 360 N.W.2d 575 (Iowa, 1985).

2. We may challenge claims "which are fairly debatable". Our liability exposure is denial "WITHOUT A REASONABLE BASIS". Anderson v Continental, 271 N.W.2d 368 (Wis. 1978); Alt v American Family Insurance Co, 237 N.W.2d 706 (Wis. 1976).

3. "When a claim is 'fairly debatable', the insurer is entitled to debate it, whether the debate concerns a matter of fact or law". Higgins v Blue Cross, 319 N.W.2d 232 (Iowa 1982).

R. Estoppel:

If you disclaim and fail to defend, are you ESTOPPED to argue a good coverage defense later? YES, in Illinois and most states. Mancikis v St Paul Insurance, 655 F.2d 818 (7th Cir. Ill. 1981). NO, in Idaho, Hirst v St Paul Insurance, 683 P.2d 440 (Idaho 1984) and Missouri, Missouri Terrazzo v Iowa National; infra Ervin v Sears, supra; Servidone v Security Insurance, 477 N.E.2d 441 (N.Y. 1985).

1. Estoppel cannot create coverage where none exists. Western Insurance Co v Cimarron Pipe Line Construction, Inc, 1985 CCH Fire and Casualty Cases, 1290 (CA 10 Okla. 1984).

S. WITHDRAWAL FROM THE DEFENSE

1. If no duty to pay or defend is established, withdraw and disclaim. Your basis for that decision must be supported by evidence. United Fire and Casualty Company v Maloof Realty, 435 N.E.2d 496 (Ill. App. 1982). Also Transamerica Insurance v Meere, 694 P.2d 181 (Ariz. 1984).

T. What is the MEASURE of DAMAGES for failure to defend?

1. Trovillon v USF&G, 474 N.E.2d 953 (Ill. App. 1985).

U. If the duty to defend is clearly not triggered by the "evidence", disclaim coverage!

1. Murphy v Peterson, et al, 473 N.E.2d 480 (Ill. App. 1984).

V. Does the "expectations doctrine" [Kremers-Urban Co. v American Employers Insurance Co, 351 N.W.2d 156 (Wis. 1984)] apply to the duty to defend? Yes, in Wisconsin and California.

W. Does duty to defend extend to post trial motions? Appeal? See Cathy Pac., Inc v United Pac. Insurance, 582 F.Supp. 650 (N.D. Cal. 1984).



- X. Counterclaims - Duty to Defend. Cooper v Commonwealth Land Title Insurance Co, 699 P.2d 1128 (Or. App. 1985).
- Y. As to applicability of Supplemental Payments provisions see Hedgecock v Stewart Title, et al, 676 P.2d 1208 (Colo. App. 1984).

III. DEFENSE COSTS AND BAD FAITH:

- A. What is the cost-benefit ratio to the INSURER? Is cost cutting a "cheap" defense?
- B. Can restricting the defense be bad faith? How?
e.g. offering the policy limits without offering a structured settlement? Is there an affirmative duty to seek a SS? YES, Maine Bonding and Casualty Co v Continental Insurance Co, 693 P.2d 1296 (Or. 1985).
- C. Can Claims Representatives be directly liable for representations they make in settlement negotiations? YES, Richardson v Economy Fire and Casualty, 467 N.E.2d 317 (Ill. App. 1984).
- D. Can a method for looking for witnesses amount to bad faith? YES, Green v State Farm Fire and Casualty Company, 667 F.2d 22 (9th Cir. 1982).
- E. When do defense costs outweigh the cost-benefit ratio to the insured?
- F. Basis of a decision to "deny" a claim is the crux of any bad faith claim. Also the basis for denial of "damages" is the test. Town and Country Mutual v Hunter, 472 N.E.2d 1265 (Ind. App. 1985); See Alt, supra.

IV. CONFLICT OF INTEREST WITH THE POLICYHOLDER -- WHAT IS IT?

1. Why create a conflict of interest? What is your cost-benefit ratio of creating a conflict with the insured? Is it Company procedure to create conflicts notwithstanding benefits? Is it worth it?
2. RESERVATION OF RIGHTS, a direct conflict of interest. ANTICIPATORY BREACH?

- a. Why take one? Why bring it up? Is it realistic? Is it a procedural or a claims manual rule? Why create one? What is the scope of inquiry? See Central Bearings v Wolverine Insurance Company, 179 N.W.2d 443 (Iowa 1970) and McAndrews at p. 119.
- b. What reservation of rights are you talking about? The duty to "pay" conflict? The duty to "defend" conflict? Is the distinction clear in your reservations of rights because if you have no coverage, you still may have a duty to defend? Does the insured understand it? Do you communicate the "pay" duty and/or the "defend" duty separately?
- c. Will you estop the Company? If you don't defend (Illinois), you may waive your coverage defense even if it is a good one. Is it worth it? Why? See Mancikis v St Paul Insurance, supra. Tuell v State Farm Fire and Casualty Co, 477 N.E.2d 70 (Ill. App. 1985); Western Casualty & Surety v Brochu, 475 N.E.2d 872 (Ill. 1985).
3. What are the INSURER'S RIGHTS? We have a contractual right to control the complete defense as long as there is no conflict of interest.
4. What is the INSURED'S RIGHTS? The insured barter control of the litigation to the insurer if there is no conflict of interest. The moment you establish a conflict of interest through a reservation of rights, do you breach (anticipatory) your contract performance and now you no longer have a right to control the litigation or the defense?
- a. What are the insured's rights as to the indemnity duty to pay?
- b. What are the insured's rights as to the defense duties?
- c. Does a "special agreement" supersede a reservation of rights? Why?



- d. Do you need the "express" consent of the insured when you raise a conflict reservation? YES. Will implied consent work? Sometimes? INFORMED consent is valid. Tatum v Mitchell, 423 N.E.2d 978 (Ill. App. 1982).
5. When there is a reservation and a conflict, does the insured have a right to "select his own attorney" and force us to pay him? Yes. San Diego Naval Credit Union v Cumis Society, 162 Cal.App.3d 358 (4th Dist., Case No. 493483, 1985). See N.Y. State Urban Development Corporation v VSL Corporation, infra, for a case with "nonstandard" contract language.
6. A unilateral reservation of rights does not alone waive the insured's rights. San Diego v Cumis, supra; Mid Century Insurance v McKelvey, 666 S.W.2d 457 (Mo. App. 1984).
7. Consent judgments, confessions of judgment, the Vagnozzi rule. Farmers Insurance Group v Vagnozzi, 675 P.2d 703 (Ariz. 1983); Sandbulte v Farm Bureau, 343 N.W.2d 457 (Iowa, 1984); Miller v Shugart*, 316 N.W.2d 729 (Minn. 1982). St Paul Insurance v Rahn, 641 S.W.2d 276 (Tex. App. 1982).
- a. Can the insured agree to a Shugart* settlement without forfeiting coverage for breach of the cooperation clause? Sargent v Johnson, 551 F.2d 221, 224 (CA 8 1977).
8. Collateral estoppel by judgment in the original action? We still have a right to intervene. McGough v INA, 691 P.2d 738 (Ariz. App. 1984); See Steil, supra. We can waive a right by not asserting it. Shook v Tinney, 461 N.E.2d 642 (Ill. App. 1984).
9. Can the insured Pierringer out by consent judgment? Pierringer v Hoyer, 124 N.W.2d 126 (Wisc. 1963); Frey v Snelgrove, 269 N.W.2d 918 (Minn. 1978); Hosley v Armstrong N.W.2d ____ (Minn. App. Aug. 1985).
10. What does a Declaratory Judgment do? Maybe nothing? Metropolitan Insurance v Kirkwood, 729 F.2d 61 (1 Cir. 1984).

- a. Can a D/J action be stubbornly litigious? Can it be bad faith if it attempts to run up costs to the insured? Can it be malicious? Christy v New Hampshire Insurance Co, 200 N.W.2d 834 (Iowa 1972).
- b. Does it stay the original action? See USF&G v Roser, infra.
- c. Is it res judicata in the original action? Maybe.
"...only as to facts determined by D/J judgment." USF&G v Roser, 585 F.2d 932 (8 Cir. Minn. 1978).
- d. Even if you win the D/J action, if an appeal is still pending, do you still have a duty to defend the original action? YES! State Farm v Moore, 430 N.E.2d 641 (Ill. App. 1981).
11. There is no absolute right to intervene. Restor-A-Dent v Certified Alloy, 725 F.2d. 871 (CA 2 1984). See McGough, supra.
12. Attorney fees as damages: Do you owe the insured's fees in the D/J action? (In Minnesota if you lose, you owe the fees and you also owe them in many other states). Do you owe the fees in the original action? Do you also owe the fees for monitoring the original action? Do you owe four sets of fees for each insured? See Cumis v San Diego Credit Union, supra; Hedgecock v Stewart, 676 P.2d 1208 (Colo. App. 1984).
13. What are the umbrella or the "super excess" insurer's rights in view of a D/J action, a reservation of rights, or a failure to defend? See McGough, supra.
- a. An umbrella policy's defense duties vary. There is no standard defense clause! Do carriers share pro rata? Nabisco, Inc v Transport Indemnity Co, 192 Cal.Rptr. 207 (1983).
- b. Does an umbrella insurer have the same duty to the insured that a primary carrier does? NO.



Reservations of rights, disclaimers, duties to defend do not parallel or track the primary's duties. See McGough, supra.

...BUT IN WISCONSIN, SEE TEIGEN V JELCO OF WISCONSIN, INC, ET AL, 367 N.W.2d 806 (Wis. 1985).

- c. Who is the primary defender? Associated Indemnity v INA, 386 N.E.2d 529 (Ill. App. 1979).

V. IF THERE IS A CONFLICT OF INTEREST (RESERVATION OF RIGHTS), IS THE INSURED PERMITTED TO PARTICIPATE IN SELECTION OF COUNSEL? WHO PAYS THE ATTORNEY FEES?

- A. In NEW YORK, in N.Y. State Urban Development Corp v VSL Corp, 563 F.Supp. 187; 738 F.2d 61 (2 Cir. 1984) the court recognized the insurer's contractual right to participate in the selection of defense counsel only as long as the insurer makes a good faith selection and the attorney is truly independent. In concluding that the insurer had discharged its obligation in good faith, the court pointed out that the insurer selected a firm only after giving insured the opportunity to submit a list of acceptable law firms from which a firm would be selected. The court further noted that the insurer selected a firm that was experienced in construction litigation and instructed the firm not to become involved in the coverage dispute. Moreover, the court observed that the insurer might legitimately fear that given its prior adversarial relationship with insured's firm, that firm might seek to have insured found liable on grounds covered under the policy. Thus, the court concluded that "independent" counsel means independent of both insurer and insured.

This case is a rare example of a court permitting an insurer to participate in the selection of defense counsel where a conflict of interest exists between the insurer and the insured and the insured insists on the unilateral right to select defense counsel. As the court acknowledged, prior New York decisions seemed to indicate that insured has an absolute right to choose counsel where a conflict exists. Klein v Salama, 545 F.Supp. 175, 179 (E.D.N.Y. 1982)(New York law); Public Service Mutual Insurance Co v Goldfarb, 53 N.Y.2d at 401, 442 N.Y.S.2d 422,

425 N.E.2d 810; Prashker v United States Guarantee Co, 1 N.Y.2d at 593, 154 N.Y.S.2d 910, 136 N.E.2d 871. The policies at issue in those cases, however, provided that the insurer "shall have the right and duty to defend any suit" and that the insurer shall pay "all expenses incurred by the company...on any suit defended by the Company." The policies did not expressly reserve the insurer's right to retain a voice in the selection of counsel. By contrast, the policy at issue here only obligated the insurer to pay "claims expenses," and defined such expenses as either fees charged by any attorney designated by the insurance company, or fees charged by any attorney designated by the insured with the written consent of the insurance company. This distinction was critical to the court's decision!

- B. In CALIFORNIA, San Diego Navy Federal Credit Union v Cumis Insurance Society, Inc, 208 Cal.Rptr 494 (Cal. App. 1984) held that a conflict of interest exists between insured and his liability insurer whenever the insurer reserves its right to assert noncoverage at a later date. The court, therefore, held that the insurer was required to pay for insured's independent counsel.

Claimant sought general and punitive damages from insured based on alleged wrongful discharge, breach of the covenant of good faith and fair dealing, breach of contract and intentional infliction of emotional distress. Under the terms of the policy, insurer retained a law firm to defend insured but reserved the right to disclaim coverage at a later date. The insurer also informed insured that punitive damages were not covered under the policy. Anticipating a conflict, insured hired independent counsel to serve as co-counsel with insurer's attorneys and billed insurer for attorneys fees and costs. Insurer initially paid for the services, but later stopped, claiming no conflict existed which would give rise to the need for independent counsel. In an action for attorneys fees and costs filed by the insured, the trial court held that insurer was required to pay for independent counsel since the insurer and insured had divergent interests in the litigation which could be prejudicial to the insured. Insurer appealed. The appellate court affirmed. Although acknowledging that issues of coverage are not actually litigated in the third-party suit, the court emphasized the impact of the development of facts in the third-party suit on the coverage dispute and the



appointed counsel's role in developing those facts. The court reasoned that because the attorney appointed by insurer is dependent upon the insurer for future business, that attorney may be tempted to shape insured's defense so as to place the risk of loss entirely on insured. Thus, the court ruled that the Canons of Ethics require counsel appointed by the insurer to explain to the insured the full implications of joint representation whenever the insurer reserves its right to deny coverage at a later date. Absent consent [see Tatum v Mitchell, 423 N.E.2d 978 (Ill. App. 1982)] by insured to the continued representation, the court concluded, the insurer must pay the reasonable cost of independent counsel hired by insured.

The court relied on Tomerlin v Canadian Indemnity Co, 61 Cal.2d 638 (1964). In Tomerlin, the California Supreme Court had held that in cases involving multiple claims against the insured, some of which fall within policy coverage and some of which do not, a conflict of interest exists between the insurer and insured and the insurer may not compel the insured to surrender control of the litigation. Although Tomerlin did not expressly state that the insurer had to pay for the insured's independent counsel, the court found this proposition implicit in the decision. As the court concluded, "if the insurer must pay for the cost of defense and, when a conflict exists, the insured may have control of the defense if he wished, it follows the insurer must pay for such defense conducted by independent counsel."

- C. In ILLINOIS, Nandorf v CNA, et al, 479 N.E.2d 988 (Ill. App. 1985), the First Appellate District in Illinois held that if a reservation of rights letter is sent to an insured and a conflict is created, the insured's private attorney's fees must be paid by the insurer. The real holding is arguably narrower, but the trend is evident.

"Our finding that a conflict of interest existed in the instant case is not meant to imply that an insured is entitled to independent counsel whenever punitive damages are sought in the underlying action. Under the peculiar facts and circumstances of this litigation, punitive damages formed a substantial portion of the potential liability in the Scott action and CNA's disclaimer of liability

for punitive damages left Nandorf with the greater interest and risk in the litigation."

- D. What is the basis for payment of insured's attorney fees in a conflict situation? Employer's Fire Insurance Company v Beals, 240 A.2d 397, 404 (R.I. 1968). In Beals, the court said:

"One novel solution to the problem posed, has been proposed by the New York Court of Appeals. In Prashker v United States Guarantee Co, 1 N.Y.2d 584, 154, N.Y.S.2d 910, 136 N.E.2d 871, it was suggested that where a conflict of interests has arisen between an insurer and its insured, the attorney to defend the insured in the tort suit should be selected by the insured and the reasonable value of the professional services rendered should be assumed by the insurer. While this suggestion seemingly would afford full protection to the insured's interests, we note that insurers may well be reluctant to endorse it since they feel that their right to rely on a policy's exclusionary clause may be jeopardized.

Another possible solution to the problem under consideration would be to have the insured and the insurer represented by two different attorneys, each of whom is pledged to promote and protect the prime interests of the client he represents. In this way it appears that the deleterious conflict of interests imposed on an attorney who attempts the difficult task of representing both parties is also averted.

'Because the insurer has a legitimate interest in seeing that any recovery based on finding of negligence on the part of its insured is kept within reasonable bounds, and since the total expense of this defense is to be assumed by the insurer under its promise to defend, we believe that in each of the above two suggestions the engagement of an independent counsel to represent the insured should be approved by the insurer. Such



approval, however, should not be unreasonable withheld.'

While an insurer may be dismayed in its having to pay the cost of two attorneys for one civil suit, we are cognizant that the necessity for this action stems from its failure to provide within any degree of clarity for this contingency when it placed the exclusionary clause in its insured's contract. The insurer, being the draftsman, should have set forth its provisions in such clear and distinct language as would have avoided any doubt relative to the extent of its duty to defend. Under a well-established principle, the words of an insurance contract are construed against the insurer. 4 Williston, Contracts (3d ed. Jaeger), Sec. 621, pp. 764-65. Accordingly, the insurance company is bound by the terms of its own contract.

We wish to make it plainly understood that the above two suggested procedures for avoiding the conflict of interests in cases similar to the one now before us, are not to be taken as the only avenues by which an attorney can act with due propriety in these cases. The decision as to which of these alternatives or as to any others which may be proposed in the future is of course to be made conjunctively by the insured, the insurer and the attorneys involved."

- E. The first obvious impact of Cumis, supra, is economic. Exacerbating the issue is Bogard v Employer's Casualty Company, 210 Cal.Rptr 578 (Ct. App. 1985) holding an excess limits letter creates a conflict of interest. Is a refusal to pay fees for an insured's personal attorney -- bad faith? Is a reservation of rights to "investigate" only -- an exception? What are the alternatives?
1. How do you handle this in view of "cost control"?
 2. Do insurers now have to pay personal attorney fees every time there is excess exposure? See Bogard, supra.

- F. What if the insured rejects the "reservation offer" and exercises his right to select his own counsel and make you pay the expense? What do you do? Pekin Insurance Co v Home Insurance Co, 479 N.E.2d 1078 (Ill. App. 1985); See Nandorf, supra.

VI. THE RIGHTS AND DUTIES OF PRIMARY AND EXCESS CARRIER AS TO THE DUTY TO DEFEND.

- A. The "equitable subrogation" theory. Continental Casualty Co v USF&G, 516 F.Supp. 384 (N.D. Cal. 1981); Valentine v Liberty Mutual, 620 F.2d 583 (6 Cir. 1980); U.S. Fire Insurance Co v Royal Insurance Co, 759 F.2d 306 (CA 3 1985).
- B. The direct duty theory. Lisi v Nepola, 443 N.Y.S.2d 270 (1981); contra, U.S. Fire, supra.
- C. No "equitable apportionment" of fees between primary and umbrella insurer. Bituminous Casualty Corporation v Iowa National Mutual Insurance Company, 477 N.E.2d 694 (Ill. App. June 4, 1985).
- D. Wisconsin Rule:
1. Loy v Bunderson, 320 N.W.2d 175 (Wis. 1982).
 2. Teigen v Jelco of Wisconsin, Inc, et al, 367 N.W.2d 806 (Wis. 1985).
 3. Wisconsin Insurance Law, Duty of Primary Company to Excess Insurance Company, Sec. 5.4, 84-87 (re: the implication of Loy v Bunderson), Arnold P Anderson, Professional Education Systems, Inc, 1982.

VII. Who controls defense litigation? The attorney? The insurer? The insured? Who selects which attorney to do what? What is control?

- A. The peril of defense counsel's relinquishment of control to the insurer? A conflict? Rogers v Robson, et al, 392 N.E.2d 1365 (Ill. App. 1980); Moritz v Medical Protective, 428 F. Supp. 865 (1977).
- B. "Specifically, the attorney must take care to apprise the insured of any limitation imposed by the insurer on the scope of the attorney's employment..." 30 Kan. L.R. 385, 396; See also Nandorf, supra.

- C. Can the defense lawyer alter his defense practice due to cost constraints? Bevevino v Saydjari, 76 FRD 88, 93 (1977).
- D. A lawyer can also be exposed to liability if he conspires with an insurance company to violate the unfair practice provisions of an insurance code by cooperating with an insurer's dilatory tactics. Wolfrich v United Services Automobile Association, 197 Cal. Rptr. 446 (Cal. App. 1984).
- E. What if the lawyer recommends against or the carrier turns down a favorable settlement offer within the policy limits based upon inadequate investigation and pretrial preparation? Togstad v Vesely, Otto, Miller & Keefe, 291 N.E.2d 686 (Minn. 1980). Kooyman v Farm Bureau Mutual Insurance Co, 315 N.W. 30, 35 (Iowa 1982).
- F. The insurer's duty of "good faith" is not limited to its duty to pay claims that may create an indemnity excess exposure. The carrier has the SAME DUTY IN DEFENDING the insured. Kooyman v Farm Bureau Mutual Insurance Co, 315 N.W. 30, 35 (Iowa 1982).
- G. The insured's right to choose or select his own defense counsel. Purdy v Pacific Auto Insurance, 703 Cal. Rptr. 524 (1984); San Diego Credit Union v Cumis Insurance, 208 Cal. Rptr. 494 (1984). Is a conflict of interest the sole basis for the right to select defense counsel?
- H. Does Cumis, supra, control the ability to assert a legitimate coverage defense? Will Iowa follow Cumis?
- I. Does VSL and Nandorf, supra, modify the ability to assert a coverage defense?

VIII. A GAME OF SKILL -- THE UNSKILLED WILL NO LONGER COMPETE*

A. CAVEAT:

"We should be careful to get out of an experience only the wisdom that is in it -- and stop there; lest we be like the cat that sits down on a hot stove-lid. She will never sit down on a hot stove-lid again -- that is well; but also she will never sit down on a cold one anymore."

Mark Twain

*Keller Construction Company v Drew Agency, Inc, 361 N.W.2d 79 (Minn. App. 1985) - a case involving joint ventures and coverage provisions applicable.

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IOWA DEFENSE COUNSEL ASSOCIATION DUE PROCESS AND THE FEDERAL BANKING SYSTEM

Mary E. Curtin

GENERAL STRUCTURE AND AUTHORITY OF THE FEDERAL BANK REGULATORY AGENCIES.

I. Structure

A. Federal Deposit Insurance Corporation

1. Insures the deposits of all federally insured banks.
2. Is the primary regular for banks have a state charter who are not members of the Federal Reserve System.
3. Because of its insurance capacity, it is the receiver and liquidator of all failed banks regardless of their charter.

B. Office of the Comptroller of the Currency - is the primary regulator of all banks having a national (as opposed to state) charter.

C. Board of Governors of the Federal Reserve System.

1. Regulates all bank holding companies regardless of the charter of their subsidiary banks.
2. Is the primary regulator of all state chartered banks who are also members of the Federal Reserve System (these are comparatively few; of the approximate 14,000 banks in this country I would guess the Fed regulates less than 500).

II. Regulatory and Enforcement Structure

A. Examination Process

1. All of the federal agencies examine the banks for which they are the primary regulator on a recurring basis that ranges from every eight months to every five years, depending upon the bank's condition.
2. The primary function of a bank examiner is to review the loan portfolio and classify assets in accordance with the "risk" of those loans and to monitor compliance with laws, rules and regulations.

B. When the condition of a bank is found to be deteriorating, all of the agencies have the authority to issue various types of enforcement actions against banks as a result of a bank's condition or violations of laws, rules and/or regulations. These enforcement actions include:

1. Cease and desist orders;
2. Civil money penalties against officers and directors;
3. The revocation of a bank's charter;
4. The removal of individual officers or directors;
5. In the case of the FDIC, the termination of a bank's insurance, which effectively closes the institution;
6. In the case of a national bank, the Comptroller can declare the bank insolvent and turn its assets over to a receiver for liquidation. In the case of the state chartered bank, the state issuing the charter must make the final determination of solvency.

III. The Agency "Administrative Investigation"

- A. In the opinion of one private practitioner, it is the closest thing currently available to the historical "Star Chamber."
- B. The FDIC Section 10(c) investigation, paralleled by other agencies, can be initiated by the FDIC's Board of Directors, General Counsel, or Director of Bank Supervision. Your client has no statutory or procedural right to:

1. Be present;
2. Be notified of subpoenas issued by the agency to collect documentary evidence;
3. To a transcript of the testimony against him or to copies of documents produced pursuant to subpoena;
4. To have his counsel present;
5. To cross-examine witnesses whose testimony is taken, or even to be notified that witnesses are testifying; and
6. Notwithstanding all of the foregoing "if the record developed in the course of the proceeding contains allegations of wrongdoing by any person with respect to the affairs or ownership of any bank, such person shall be advised of the alleged wrongdoing and shall be afforded a reasonable opportunity, consistent with administrative efficiency, to produce rebuttal evidence in documentary form (including depositions and statements under oath) or in the form of testimony given before the presiding officer. The evidence shall be on the record. [12 U.S.C. §308.51(d)] This opportunity is relatively meaningless when the agency position has been that the potential "defendant" or "respondent" has no right to cross-examine witnesses, have transcripts of their testimony, be provided with documents requested pursuant to any agency subpoena, or to have counsel present at the proceeding.
7. It is also not unusual for such an investigation to be conducted, if not primarily at least tangentially, to develop documentary and testimonial evidence to be used at an ensuing administrative proceeding and without the inconvenience of providing discovery rights to the defendant party.

IV. Capital Adequacy, Termination of Insurance and Receivership

- A. The capital structure of a bank supposedly functions to absorb loan losses and a bank's lending limit (the amount of money it can extend to one customer) is in turn determined by the amount of capital the bank has. Until recently, the banking agencies, as well

as attorneys, consultants, accountants and the industry as a whole, have agreed that determinations of "capital adequacy" were highly subjective, varies from one institution to the other according to size, condition, management, etc., and were to be determined on a case by case basis.

1. In 1983, the Office of the Comptroller of the Currency brought an administrative action entitled "In the Matter of the First National Bank of Bellaire, Bellaire, Texas." The Comptroller had attempted to convince the bank to sign a cease and desist order agreeing to increase its capital to a level of 8% of the bank's total assets. The bank was unable or unwilling to accomplish this and, in accordance with "due process" an administrative hearing was convened before a federal administrative law judge to determine the amount of capital the Bellaire Bank should have in order to not be operating in an "unsound or unsound condition."
2. After listening to the Comptroller's bank examiners as well as the testimony of a number of expert witnesses, the administrative law judge concluded, not surprising, that determinations of capital adequacy were extremely subjective and that the Bellaire Bank appeared to have sufficient capital to meet the unsafe or unsound test. The agency reversed the administrative law judge, the case went to the Fifth Circuit Court of Appeals and the Court of Appeals supported the administrative law judge.
3. In response to what all of the agencies saw as an attack on their previous authority to determine capital levels by fiat, they successfully convinced Congress to pass a law legislating capital adequacy.
4. As a result of the International Lending Supervision Act of 1983 (12 U.S.C. §301 et sec.), the agencies were given the authority to determine by regulation adequate capital levels for banks and to enforce their determinations through the issuance of orders.
5. As a result of this legislation, and regulations adopted by all the agencies, acceptable capital in a "well managed bank" has now been defined as 5.5% of total assets.

6. In banks that are not "well managed" (as determined by the regulatory agency) the agencies gave themselves the authority to issue "capital directives" to banks instructing them to increase capital to any level determined by the agency and authorizing the agencies to fine officers and directors of the bank up to \$1,000 per day for failure to increase capital.
7. There is no provision in the regulations for any administrative hearing or administrative or judicial review of any of these procedures until the agency attempts to collect the fine.
8. There is no provision for administrative or judicial review, at any time, of the agency's directive to increase the capital of the bank or of the adequacy of the bank's preexisting capital.

B. Termination of Insurance and Receivership.

1. When an agency classifies loans in a bank "loss", those loans must be immediately deducted from the bank's loan loss reserve and capital.
2. Loan classifications are extremely subjective and a bank examiner has virtually unbridled discretion to classify assets.
3. If this classification-deduction process results in what the agency believes to be a capital deficiency, the procedures enumerated in A. above are utilized.
4. If the agency determines that the bank's capital has dropped below 3% of assets, the agency is authorized, again pursuant to 12 U.S.C. §3901, to terminate insurance on the bank's deposits. The bank must publish a public notice that its deposit insurance has been revoked, and this generally results in a run on the bank if the chartering authority does not close it prior to this time.
5. If the assets classification-deduction process results in a capital impairment, i.e., loan losses exceed capital, the agency is authorized to apply to a federal district court for the appointment of a receiver and the liquidation of the bank. This process is ex parte and the bank is not notified of the requested order for the appointment of a receiver and the dissolution of the institution.

6. The only judicial review of the receivership-dissolution process occurs after the agency has taken possession of the bank's assets and publicly announced their intention to dissolve the institution as a result of insolvency.
7. At this point, even if the bank is successful in overturning the order of receivership, the ongoing viability of the bank has generally been destroyed.

V. General Comparisons Between the Regulation of Savings and Loans and Banks with Respect to the Foregoing Factors

- A. Discrepancies in accounting treatment.
- B. Discrepancies with respect to capital adequacy.
- C. The disclosure of enforcement actions, civil money penalties and removal orders.

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LAWYER MALPRACTICE - IOWA GRIEVANCE COMMISSION

James F. Pickens - Chairman
Grievance Commission of Iowa Supreme Court
1010 American Building, P.O. Box 4091
Cedar Rapids, Iowa 52407

- I. Procedure for Handling Grievances
 - A. Function of Professional Ethics and Conduct Committee; makeup of committee; handling of complaints; investigation
 - B. Function of Grievance Commission; makeup of Commission; venue of hearing; public or confidential hearing
 - C. Hearing and Decision - Recommendation to Iowa Supreme Court
 - (1) Dismissal - not a public document;
 - (2) Reprimand recommended (If PE & C committee makes reprimand, this may be end of proceedings;
 - (3) Suspension license (for specific or indefinite period of time.) Tax cases seem to result in automatic suspensions between three months and three years;
 - (4) Recommendation of disbarment or revocation of license;
 - (5) All recommendations are automatically reviewed by Supreme Court except dismissals which the PE & C Committee do not attempt to appeal;
 - (6) A recommendation is strictly a recommendation; frequently the Iowa Supreme Court does not go along;
- II. Review of Decisions in Past Year



- III. Distinction Between Malpractice Claims Against a Lawyer and Grievance Complaints
- IV. If You Are Involved, Either as a Respondent Charged by the PE & C Committee or as an Attorney, What Should You Do?
- A. Read court rule 118 and all subparagraphs;
 - B. Talk with some attorney who has defended a claim;
 - C. Feel free to contact the counsel for the PE & C Committee who is now James Gritzner of Des Moines. Lee Gaudineer, Frank Comito, George Capps, and Pat O'Bryan all did capable jobs in the past.
- V. Mechanics of Hearing
- A. The burden of proof in a hearing is by a preponderance of clear and convincing evidence (whatever that is). It is more than what is required in an ordinary civil case and yet less than a criminal case.
 - B. Hearings on complaints. Five members of the Commission hear the complaints like a petit jury, usually four lawyers and one lay person.
 - C. If respondent objects to any members of Commission, they will generally be replaced unless the objection is made at the last minute.
 - D. Attitude of lay members: Lawyers are generally tougher on other lawyers than lay people except for delays which lay people have difficulty in accepting.
 - E. Similar to a criminal procedure in which the PE & C Committee acts as a grand jury and the Grievance Commission as a petit jury.
 - F. A majority of the members sitting on a grievance commission must agree; others can concur or dissent.
 - G. Supreme Court wants to keep these matters current.

- (1) No longer will these proceedings necessarily wait until the conclusion of a malpractice case.
- (2) Discovery proceeds as in regular lawsuits and the Supreme Court wants these matters processed quickly before the Grievance Commission and attempts to expedite appeals to the Iowa Supreme Court. If an attorney is innocent of the charges, the Supreme Court wants him (or her) promptly vindicated, and if they are found guilty, the Supreme Court wants a decision made promptly. It is difficult to predict (except for tax cases, outright deceit, and embezzlement cases) what the Supreme Court will do.
- (3) A Des Moines dentist was an alcoholic. The Grievance Commission recommended reprimand due to his steps taken to cure his problem. Supreme Court suspended.
- (4) A woman lawyer had a sexual encounter with a five-time felon at Fort Madison. Grievance Commission recommended suspension, Supreme Court only a reprimand.
- (5) A lawyer, who claimed to practice in the probate and real estate area, took a default ex parte in a lawsuit against another party who was represented by another lawyer. We recommended (3-1) a reprimand and Supreme Court suspended. Lawyer was judged by the area of the law he entered into, and was not allowed to shield his activities by claimed ignorance. Supreme Court agreed with the only lay member of the Grievance Commission.
- (6) Procedure seems to work effectively. The Iowa Supreme Court in recent years has disbarred a former president of the American Bar Association in Iowa and suspended the license of a former congressman in a tax case.

VI. Miscellaneous

- A. Suggestions or recommendations are welcomed. Just because we've been doing something for a long time does not mean we have been doing it right.

- B. If you think you have a problem concerning ethics, write the Ethics Administrator in care of the bar association headquarters and you can get an opinion in all likelihood. The present administrator is Hedo Zacherle and his successor may well be chosen by the time of this meeting. Thomas Finley in Des Moines is the present chairman of the Professional Ethics and Conduct Committee at the preparation of this outline.

J

9. DISBARMENT AND DISCIPLINE: Any member of the bar of this court may, for good cause shown, and after an opportunity has been given him/her to be heard, be disbarred, suspended from practice for a definite time, reprimanded, or subjected to such other discipline as the court may deem proper.

Whenever it is made to appear to the court that any member of its bar has been disbarred or suspended from practice or convicted of a felony in any other court, he/she shall be suspended or disbarred from practice before this court unless upon notice mailed to him/her at his/her last known place of residence, he/she shows good cause to the contrary within ten days, why similar punishment should not be imposed.

Any person who, before his/her admission to the bar of this court, or during his/her disbarment or suspension, exercises in this state, or in any action or proceeding pending in this court, any of the privileges of a member of the bar, or pretends to be entitled to do so, is guilty of contempt of court and subjects himself/herself to appropriate punishment therefor.

J

Court Rule 118.9 Decision. At the conclusion of a hearing upon any complaint against an attorney the grievance commission shall dismiss the complaint, or reprimand the attorney, or recommend to this court that the license to practice law of the accused attorney be suspended or revoked. If the grievance commission reprimands the attorney or recommends suspension or revocation of the attorney's license, it shall report to this court, in writing, its findings of fact, conclusions of law, and recommendations. The commission may permit a reasonable time for the parties to file post hearing briefs and arguments. The disposition or report of the commission shall be made or filed with this court within thirty days of the date set for the filing of the last responsive brief and argument. If the commission cannot reasonably make its determination or file its report within such time limit, it shall report that fact and the reasons therefor to the parties and the clerk of this court. Any determination or report of the commission need only be concurred in by a majority of the commissioners sitting. Any commissioner has the right to file with this court his or her dissent from the majority determination or report. Such matter shall then stand for final disposition in this court. If the grievance commission dismisses the complaint, no report shall be made to this court, except as provided in rule 118.20. Any report of reprimand or recommendations for license suspension or revocation shall be a public document upon the filing thereof with the clerk of this court.

Referred to in Ct R 118.11

Court Rule 118.10. Disposition by the supreme court. Any report filed by the grievance commission with this court shall be served upon the attorney concerned as provided by the rules of the grievance commission. Such report shall be entitled in the name of the complainant versus the accused attorney as the respondent. Within fourteen days after a report is filed with the clerk of this court, the secretary of the grievance commission shall transmit to the clerk of this court the entire record made before the commission. If no appeal is taken or application for permission to appeal is filed within ten days as provided in court rule 118.11, the court shall proceed to review de novo the record made before the commission and determine the matter without oral argument or further notice to the parties.

This court may revoke or suspend the license of an attorney admitted to practice in Iowa upon any of the following grounds: Conviction of a felony, conviction of a misdemeanor involving moral turpitude, violation of any provision of the Iowa Code of Professional Responsibility for Lawyers, or any cause now or hereafter provided by statute or these rules.

See Amendment at back

Referred to in Ct R 118.11

Court Rule 118.11. Appeal. The respondent may appeal from the report filed by the grievance commission pursuant to rule 118.9 to this court. Respondent's notice of appeal must be filed with the secretary of the grievance commission within ten days after the report is filed with the clerk of this court. The respondent shall serve a copy of the notice of appeal on the complainant or its counsel pursuant to rule 30 of the Iowa rules of appellate procedure. Promptly after filing notice of appeal with the secretary of the grievance commission respondent shall mail or deliver a copy of the notice of appeal to the clerk of the supreme court.

The complainant, within ten days after filing of final disposition of a case by the grievance commission, may apply to this court for permission to appeal from a ruling, report, or recommendation of the grievance commission. This court may grant such appeal in a manner similar to the granting of interlocutory appeals in civil cases under the Iowa rules of appellate procedure. The filing fee and the docket fee shall be waived upon complainant's written requests. If such appeal is from the grievance commission's dismissal of a complaint or of any charge contained therein, such appeal shall remain confidential. In event, however, this court reverses or modifies the report of the grievance commission, such court order of reversal or modification shall become a public record.

After the filing of a notice of appeal or the granting of permission to appeal, the appeal shall proceed pursuant to the Iowa rules of appellate procedure to the full extent those rules are not inconsistent with this rule. Appellant shall cause the appeal to be docketed within ten days after the filing of notice of appeal or the granting of permission to appeal. The matter shall be docketed under the title given to the action before the grievance commission with the appellant identified as such pursuant to rule 12(a) of the Iowa rules of appellate procedure. The abbreviated time limits specified in rule 17, rules of appellate procedure, shall apply. Enlargements of time are not favored and shall not be granted except upon a verified showing of the most unusual and compelling circumstances. Review shall be de novo. If a respondent's appeal is dismissed for lack of prosecution pursuant to rule 19 of the rules of appellate procedure or for any other reason, this court shall proceed to review and decide the matter pursuant to court rule 118.10 as if no appeal had been taken.

Referred to in Ct R 118.10

Court Rule 118.12. Suspension. In event an order of this court provides for the suspension of the license of an attorney to practice law, such suspension shall continue for the minimum time specified in such order and until this court has approved the attorney's written application for reinstatement.

Any attorney suspended shall refrain, during such suspension, from all facets of the ordinary law practice including but not limited to the examination of abstracts, consummation of real estate transactions, preparation of legal briefs, deeds, buy and sell agreements, contracts, wills and tax returns.



Court Rule 118.13. Application for reinstatement. An application for reinstatement from any suspension shall be filed with the clerk of this court not more than sixty days prior to expiration of such suspension or time fixed for making application therefor in accordance with the provisions of court rule 117. In addition thereto the applicant shall state, in said application, that he or she has complied in all respects with the orders and judgments of this court relating to the suspension. The applicant shall also submit to this court satisfactory proof that he or she, at time of the application, is of good moral character and in all respects worthy of the right to practice law.

Court Rule 118.14. Conviction of a crime. Upon receipt by this court of satisfactory evidence that an attorney had pled guilty to, or nolo contendere to or has been convicted of a crime which would be grounds for license suspension or revocation, such attorney may be temporarily suspended from the practice of law by this court regardless of the pendency of an appeal. Not less than twenty days prior to the effective date of such suspension, the attorney concerned shall be notified, in writing directed by restricted certified mail to his last address as shown by the records accessible to this court, that he has a right to appear before one or more justices of this court at a specified time, at a designated place and show cause why such suspension should not take place. Any hearing so held shall be informal and the strict rules of evidence shall not apply. The decision rendered may simply state the conclusion and decision of the participating justice or justices and may be orally delivered to the attorney at the close of the hearing or sent to him in written form at a later time.

Any attorney suspended pursuant to this rule shall refrain, during such suspension from all facets of the ordinary law practice including but not limited to the examination of abstracts, consummation of real estate transactions, preparation of legal briefs, deeds, buy and sell agreements, contracts, wills and tax returns.

For good cause shown, this court may set aside an order temporarily suspending an attorney from the practice of law as hereinabove provided, upon application by such attorney and hearing thereon in accordance with court rule 117, but such reinstatement shall neither terminate a disciplinary proceeding then pending nor stand as a bar to any such proceeding thereafter instituted against such attorney.

An attorney temporarily suspended under the aforesaid provisions of this rule shall be promptly reinstated upon the filing of a good and sufficient certificate disclosing the underlying conviction of a crime has been finally reversed or set aside, but such reinstatement shall neither terminate a disciplinary proceeding then pending nor stand as a bar to any such proceeding thereafter instituted against such attorney.

The clerk of any court in this state in which an attorney has pled guilty or nolo contendere to, or been convicted of a crime as aforesaid shall, within ten days thereafter transmit a certificate thereof to the clerk of this court.

Court Rule 118.15. Disbarment on consent. An attorney subject to investigation or a pending proceeding involving allegations of misconduct subject to disciplinary action may acquiesce in his or her disbarment but only by delivering to the grievance commission an affidavit stating he or she consents to disbarment and that

(1) The consent is freely and voluntarily given absent any coercion or duress, with full recognition of all implication attendant upon such consent;

(2) He or she is aware of a presently pending investigation into or proceeding involving allegations that there exist grounds for discipline the nature of which shall be specifically set forth;

(3) He or she acknowledges the material facts so alleged are true; and

(4) In event proceedings were instituted upon the matters under investigation, or if existent proceedings were pursued he or she could not successfully defend against same.

Upon receipt of such affidavit the grievance commission shall cause same to be filed with the clerk of this court whereupon this court shall enter an order disbarring such attorney on consent

Any order disbarring an attorney on consent shall be a matter of public record. However, the affidavit required as aforesaid shall not be publicly disclosed or made available for use in any other proceeding except upon order of this court.

Court Rule 118.16. Disability suspension. In event an attorney shall at any time in any jurisdiction be duly adjudicated a mentally incapacitated person, or an alcoholic or a drug addict, or shall be committed to an institution or hospital for treatment thereof, the clerk of any court in Iowa in which any such adjudication or commitment is entered shall, within ten days thereafter certify same to the clerk of this court

Upon the filing of any such certificate or a like certificate from another jurisdiction or upon determination by this court pursuant to a sworn application on behalf of a county bar association or the Committee on Professional Ethics and Conduct of the Iowa State Bar Association, that such lawyer is unable to discharge his or her responsibilities due to disability, incapacity or disappearance, this court may enter an order suspending the license of such attorney to practice law in this state until further order of this court. Not less than twenty days prior to the effective date of such suspension, the attorney concerned or his or her guardian and the director of the institution or hospital to which such attorney has been committed, if any, shall be notified, in writing directed by restricted certified mail to his or her last address as shown by the records accessible to this court, that the attorney has a right to appear before one or more justices of this court at a specified time, at a designated place and show cause why such suspension should not take place. Any hearing so held shall be informal and the strict rules of evidence shall not apply. The decision rendered may simply state the conclusion and decision of the participating justice or justices and may be orally delivered to the attorney at the close of the hearing or sent to the attorney in written form at a later time. A copy of such suspension order shall be given the suspended attorney or to his or her guardian and the director of the institution or hospital to which such suspended attorney has been committed, if any, by restricted mail or personal service as this court may direct.

Any attorney suspended pursuant to this rule shall refrain, during such suspension, from all facets of the ordinary law practice including but not limited to the examination of abstracts, consummation of real estate transactions, preparation of legal briefs, deeds, buy and sell agreements, contracts, wills and tax returns

No attorney suspended due to disability under the aforesaid provisions of this rule may engage in the practice of law in this state until reinstated by order of this court.

Upon being notified of the suspension of the attorney, the chief judge in the judicial district in which the attorney practiced shall appoint a lawyer or lawyers to serve as trustee to inventory the files, sequester client funds, and take any other appropriate action to protect the interests of the clients and other affected persons. Such appointment shall be subject to confirmation by the supreme court. The appointed lawyer shall serve as a special member of the Committee on Professional Ethics and

Conduct of the Iowa State Bar Association and as a commissioner of the supreme court for the purposes of the appointment. The trustee may seek reasonable fees and reimbursement of costs of the trust from the suspended attorney. If reasonable efforts to collect such fees and costs are unsuccessful, the trustee may submit a claim for payment from the Clients' Security Trust Fund of the Bar of Iowa. The Client Security and Attorney Disciplinary Commission, in the exercise of its sole discretion, shall determine the merits of the claim and the amount of any payment from the fund. When the suspended attorney is reinstated to practice law in this state, or all pending representation of clients has been completed or the purposes of the trust have been accomplished, the trustee may apply to the appointing chief judge for an order terminating the trust.

Any attorney so suspended shall be entitled to apply for reinstatement to active status once each year or at such shorter intervals as this court may, in the suspension order, provide or specify. An attorney suspended due to any aforesaid disability may be reinstated by this court upon a showing, by clear and convincing evidence, that the attorney's disability has been removed and he or she is fully qualified to resume the practice of law. Upon the filing of an application for reinstatement this court may take or direct any action deemed necessary or proper to determine whether such suspended attorney's disability has been removed including a direction for an examination of the applicant by such qualified medical experts as this court shall designate. In its discretion this court may direct that the expenses of such an examination be paid by the petitioning attorney.

The filing of an application for reinstatement to active status by an attorney suspended due to disability shall constitute a waiver of any doctor-patient privilege with regard to any treatment of the petitioning attorney during the period of his or her disability. Such attorney shall also set forth in his or her application for reinstatement the name of every psychiatrist, psychologist, physician and hospital or any other institution by whom or in which the petitioning attorney has been examined or treated since his or her suspension due to disability, and shall also furnish to this court written consent that any such psychiatrist, psychologist, physician and hospital or other institution by whom or in which the petitioner has been examined or treated as aforesaid may divulge any and all information and records requested by this court or any court-appointed medical experts.

Where an attorney has been suspended due to any aforesaid disability and thereafter, in proceedings duly had, he or she shall be judicially held to be competent or cured, this court may dispense with further evidence regarding removal of his or her disability and may order his or her reinstatement to active status upon such terms as are deemed reasonably proper and advisable.

Court Rule 118.16A. Death or suspension of practicing attorney. Upon a sworn application on behalf of a county bar association or the Committee on Professional Ethics and Conduct of the Iowa State Bar Association showing that a practicing attorney has died or been suspended or disbarred from the practice of law, and a reasonable necessity exists, the chief judge in the judicial district in which the attorney practiced shall appoint a lawyer or lawyers to serve as trustee to inventory the files, sequester client funds, and take any other appropriate action to protect the interests of the clients and other affected persons. Such appointment shall be subject to confirmation by the supreme court. The appointed lawyer shall serve as a special member of the Committee on Professional Ethics and Conduct of the Iowa State Bar Association as a commissioner of the supreme court for the purposes of the appointment. The trustee may seek reasonable fees and reimbursement of costs of the trust from the deceased attorney's estate or the attorney whose license to practice law has been suspended or revoked. If reasonable efforts to collect such fees and costs are

unsuccessful the trustee may submit a claim for payment from the Clients' Security Trust Fund of the Bar of Iowa. The Client Security and Attorney Disciplinary Commission, in the exercise of its sole discretion, shall determine the merits of the claim and the amount of any payment from the fund. When all pending representation of clients has been completed or the purposes of the trust have been accomplished, the trustee may apply to the appointing chief judge for an order terminating the trust.

Court Rule 118.17 Reciprocal discipline. Any attorney admitted to practice in this state upon being subjected to professional disciplinary action in another jurisdiction or in any federal court, shall promptly advise the grievance commission, in writing, of such action. Upon being informed that an attorney admitted to practice in this state has been subjected to discipline in another jurisdiction or any federal court, the grievance commission shall obtain a certified copy of such disciplinary order and cause same to be filed in the office of the clerk of this court.

Upon receipt of a certified copy of an order disclosing an attorney admitted to practice in this state has been disciplined in another jurisdiction or any federal court, this court shall promptly give notice thereof by restricted certified mail or personal service directed to such attorney containing: (1) A copy of said disciplinary order from the other jurisdiction or federal court, and (2) an order directing that such disciplined attorney inform this court, within thirty days after receipt of said notice, of any claim by such attorney that imposition of identical discipline in this state would be too severe, too lenient or otherwise unwarranted, giving the specific reasons therefor. A like notice shall be mailed to the committee on professional ethics and conduct of the Iowa State Bar Association. If either party so informs this court, the matter shall be set for hearing before five or more justices of this court and the parties notified thereof by restricted certified mail at least ten days prior to the date set. At such hearing a certified copy of the testimony, transcripts, exhibits, affidavits and other matters introduced into evidence in such jurisdiction or federal court shall be admitted into evidence as well as any findings of fact, conclusions of law, decision and orders decided or issued. Any such findings of fact shall be conclusive and not subject to readjudication. Thereafter, the court shall enter such findings, conclusions and orders that it deems appropriate. If neither party so informs this court within thirty days from service of notice issued pursuant to the foregoing provisions hereof, this court may impose the identical discipline, unless this court finds that on the face of the record upon which the discipline is predicated it clearly appears: (1) The disciplinary procedure was so lacking in notice and opportunity to be heard as to constitute a deprivation of due process; or (2) there was such infirmity of proof establishing misconduct as to give rise to the clear conviction that this court could not, conscientiously, accept as final the conclusion on that subject; or (3) the misconduct established warrants substantially different discipline in this state.

Where this court determines that any of the aforesaid factors exist, such order as is deemed appropriate may be entered by this court. Rule 117 shall apply to any subsequent reinstatement or reduction or stay of discipline.

Court Rule 118.18. Notification of clients and counsel. In every case in which a respondent is ordered to be disbarred or suspended, the respondent shall:

(a) Within fifteen days in the absence of co-counsel, notify his or her clients in all pending matters to seek legal advice elsewhere, calling attention to any urgency in seeking the substitution of another lawyer;

(b) Within fifteen days deliver to all clients being represented in pending matters any papers or other property to which they are entitled or notify them and any co-counsel of a suitable time and place where the papers and other property may be obtained, calling attention to any urgency for obtaining the papers or other property;

(c) Within thirty days refund any part of any fees paid in advance that have not been earned;

(d) Within fifteen days notify opposing counsel in pending litigation or, in the absence of such counsel, the adverse parties, of the respondent's disbarment or suspension and consequent disqualification to act as a lawyer after the effective date of such discipline or transfer to disability inactive status;

(e) Within fifteen days file with the court, agency, or tribunal before which the litigation is pending a copy of the notice to opposing counsel or adverse parties;

(f) Keep and maintain records of the steps taken to accomplish the foregoing; and

(g) Within thirty days file proof with this court and with the committee on professional ethics and conduct of complete performance of the foregoing, and this shall be a condition for application for readmission to practice.

Court Rule 118.19. Immunity. Complaints submitted to the grievance commission or testimony with respect thereto shall be privileged and no lawsuit predicated thereon may be instituted.

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

A true copy of any complaint against a member of the grievance commission or the committee on professional ethics and conduct involving alleged violations of the attorney's oath of office or of the Iowa Code of Professional Responsibility for Lawyers and laws of the United States or state of Iowa shall be promptly forwarded to the chief justice of this court

Court Rule 118.20. Reports The chairman of the grievance commission and the chairman of the committee on professional ethics and conduct shall, on July 1 of each year, submit to this court a report of the number of complaints received and processed during the prior period, a synopsis of each such complaint, and the disposition thereof. In event such disposition was by way of dismissal of the complaint, the name of the attorney charged shall be omitted, but a synopsis of the charges made and by whom and a report of disposition shall be included.

Referred to in Ct. R. 118.9; R. Prob P. 5 d

Court Rule 118.21. Effective dates. These rules shall have prospective and retrospective application to all alleged violations, complaints, hearings, and dispositions thereof on which a hearing has not actually been commenced before the grievance commission prior to the effective date of these rules.

[Court Order June 10, 1964; October 8, 1970; November 8, 1974; 118.10 January 15, 1975; 118.12, 118.14 and 118.16 November 21, 1977; 118.18 January 15, 1979; 118.1, 118.2 and 118.7 July 30, 1981; 118.16 and 118.16A March 30, 1982; 118.16A May 19, 1982; August 27, 1982 (amendment to rule 118.7 to clarify, not change the meaning); 118.2 October 20, 1982; February 9, 1983; 118.6 March 15, 1983; 118.3 June 15, 1983; 118.1 June 24, 1983; 118.10 and 118.11 July 18, 1983]

AMENDMENT

Court Rule 118.10. Disposition by the supreme court. Any report filed by the grievance commission with this court shall be served upon the attorney concerned as provided by the rules of the grievance commission. Such report shall be entitled in the name of the complainant versus the accused attorney as the respondent. Within fourteen days after a report is filed with the clerk of this court, the secretary of the grievance commission shall transmit to the clerk of this court the entire record made before the commission. If no appeal is taken or application for permission to appeal is filed within ten days as provided in court rule 118.11, the court shall proceed to review de novo the record made before the commission and determine the matter without oral argument or further notice to the parties. Upon such review de novo the court may impose a lesser or greater sanction than the discipline recommended by the grievance commission.

This court may revoke or suspend the license of an attorney admitted to practice in Iowa upon any of the following grounds: Conviction of a felony, conviction of a misdemeanor involving moral turpitude, violation of any provision of the Iowa Code of Professional Responsibility for Lawyers, or any cause now or hereafter provided by statute or these rules.

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“VOIR DIRE - OPENING AND CLOSING ARGUMENTS”

An Audience Participation Demonstration
by
David J. Dutton and H. Richard Smith

Summary of Case

(To be provided by Dave)

Demonstration

Using selected members of the audience as jurors, and the issues in the above case, Dave and Dick will demonstrate things to consider in examining and selecting the jury, in presenting the opening statement, and in closing arguments. The demonstration will focus on the following:

Voir Dire

1. Collective or individual questioning.
2. Concentration on first two or three jurors or thorough examination of all.
3. Narrow or open ended questions.
4. Style of addressing jurors and phrasing questions.
5. Extent to which theory of case should be revealed.
6. Inquiries concerning applicable law.
7. Dealing with biases, prejudices and sympathies of jurors.

Opening Statement

1. Length of statement.
2. Use of visuals.
3. General statement of case or detailed review of evidence.



4. Style of delivery - formal/casual, emotional/matter of fact, talk up or down to jury, etc.
5. Over or understate case?
6. Disclosure of weaknesses?
7. How do you end?

Closing Arguments

1. Length of statement.
2. Use of visuals.
3. Style.
4. Appeal to jurors' general reaction to evidence or focus on specific issues?
5. Concede anything?
6. Other side's evidence.
7. Other side's trial tactics.
8. Review the instructions?
9. Impeachment evidence and conflicts in evidence.
10. Review expert testimony?
11. How to close.

K

The plaintiffs are John and Mary. John was 28 on the date of the accident; Mary was 26. John was 5'11" tall and weighed 170 pounds and was a high school graduate. John claimed to be an above-average swimmer and was experienced both diving from the side of pools and gravel pits as well as diving boards in motel and municipal swim pools. At the time of the accident, John had been on layoff from a factory job. He had been living with Mary for approximately a year without the benefit of marriage. They had decided to get married and on May 22, a Thursday, they were married in their hometown in a nearby state.

The day before the wedding, John had received word that he had been called back to his job in the factory. They decided to drive to Iowa City and spend the weekend at the Camelot Motel, a member of the Most Western Motel chain. The Camelot did considerable advertising concerning its "fun-filled weekends" and boasted about its indoor pool, jacuzzi, sauna and health club. It made particular mention of the food and fun which could be enjoyed at the bar and restaurant located in the motel known as the Knight's Lounge. Although the Knight's Lounge was located in the lower level of the motel, it was owned and operated by a corporation which was separate from the motel.

The motel was originally constructed with an outdoor pool. Several years before the incident, rooms were built around the pool forming a courtyard which was then covered with a roof. In addition to the pool, the enclosed area had a jacuzzi and a large area for games and gaiety. The bar of the Knight's Lounge was located at the deep end of the pool with a window which afforded the patrons of the bar an underwater view of the pool itself. A side door and a stairway connected the lounge to the pool area. Customers of the motel either had access to the pool area from their poolside rooms or through common entryways from rooms remotely located.

The pool was the shape of a lazy L. It was three feet deep at the shallow end, four feet deep in the middle and nine feet deep at the deep end. There was no diving board. A crest had been painted on the bottom of the pool which continued the theme of Camelot. Depth markers were painted on the deck in both feet and meters. There was a sign located on one wall of the motel which advised swimmers that they were swimming at their own risk. There were no signs which prohibited diving or warned of the danger of diving into shallow water. No depth markers were located on the sidewalls of the pool. There was no lifeguard on duty. Signs indicated that the pool was open from 8:00 a.m. to 11:00 p.m. and parents were admonished to supervise their children.

John and Mary arrived at the Camelot Motel on Friday noon. After they settled into their room, which was not located at poolside, John and Mary came to the pool for an afternoon swim. During the afternoon, John dove into the pool on several occasions at the area near the rope dividing the shallow from the deep end. The depth marker at that location indicated four feet of water. He also stood in the shallow end at various locations and acknowledged his awareness that one had to be careful diving



into shallow water because of the possibility of striking one's head. He had heard of people being injured from diving into the shallow end, but did not realize how serious the injuries could be.

On Saturday, John and Mary had lunch in downtown Iowa City and each drank a bottle of beer. During the afternoon, they had several more beers and several mixed drinks at the Airliner. They then came back to the motel where they had additional drinks at the Knight's Lounge. Employees of the lounge directed the couple to a Chinese restaurant for supper. They had one drink before dinner and returned to the Knight's Lounge at approximately 10:30 p.m.

When John and Mary returned to the lounge on that evening, there were two employees who worked at the lounge. One of the employees, whose nickname was "Caption Librium", worked behind the bar. Another university student worked the tables serving meals and drinks. Also at the bar, were two salesmen who were known to the motel as VIPs. They had special privileges because they were such frequent customers of the Camelot. Two desk clerks, Kathryn and Louise, had just completed their shift at the motel desk and as was their custom, were in the lounge hustling the VIPs for drinks.

After several beers, John became very loud and friendly and before long, everyone was celebrating with the honeymooners.

Shortly before the lounge closed, the bartenders and motel clerks decided to go swimming in the motel pool. They invited the two salesmen and John and Mary to join them. John questioned the invitation since the pool was supposedly closed. He was told by the employees that they had permission to use the pool after hours. Captain Librium stated that relaxing in the pool and sauna after hours was a "great way to get laid". He spoke of the wild parties that they had at the pool after hours. He assured John that it was alright.

The two desk clerks had to improvise for swim suits. Louise ended up with a T-shirt over her underwear while Kathryn managed to fit into a swim suit that she found in her car. The desk clerks and John and Mary entered the pool area through the poolside room of one of the salesmen. The two employees of the lounge had keys that allowed them access to the pool area and after closing the lounge, they came up the stairs and into the pool area to join the festivities. As John and Mary were coming through the salesmen's room, one of the desk clerks had a small amount of hashish which they attempted to inhale by lighting the same and placing it between two ashtrays. John also brought with him two bottles of champagne that he had in his room. During the next hour and one-half, the employees, salesmen and honeymooners used the pool and jacuzzi and drank champagne. There is a difference in recollections as to what transpired before the accident at 3:00 a.m. John claims that he was not feeling any effects of alcohol. He also claimed that he did not enter the pool until the accident happened. He said that he drank champagne and sat in the jacuzzi, talking with Mary and the other members of the party. John claims that the underwater lights were not on in the pool and that the room was very dimly lit.

John said that he approached the pool and could not see the bottom. He saw Mary and Louise standing in the water on the opposite side of the pool near the rope. They were facing away from him. He intended to dive into the pool and over to the area where they were standing. He does not recall what happened or how it happened, but when he next had a recollection, he could no longer use his arms or his legs and was struggling to keep his head out of water.

Other witnesses including his wife gave a somewhat different view of the accident. Witnesses will say that the underwater lights were on and that the overhead lights were also illuminating the pool area. Whereas John claims he could not see the bottom of the pool, other witnesses will say that the crest on the bottom of the pool was in plain view and that John had been in and out of the pool on several occasions that evening. John's wife indicated that John had been "aroused" during the whole weekend and that as he approached the pool, he became embarrassed by his condition, placed his hands over his crotch and dove headfirst into the pool. John's blood alcohol, which was drawn at the hospital after the accident, was .187 mg/dl. The doctors testified that there was a bump and abrasion on the very top of John's head and that his spine was fractured with C6 being displaced on C7. He has limited use of his hands and arms and appears at the time of trial to be permanently unemployable.

John claims that the motel was negligent in failing to post proper signs to prohibit diving and to warn of the dangers of diving into shallow water. He complains about the lack of lighting, the absence of a lifeguard and allowing persons to use a pool after hours. He claims that the motel chain has failed to properly inspect this pool to see that all of the signs and lighting as required by the regulations of the Iowa Department of Health were in place. He contends that the Knight's Lounge and its employees were negligent in inviting him and his bride to the pool on the evening in question because the pool was closed and because of his intoxicated condition.



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PSYCHOLOGICAL STRATEGIES IN THE COURTROOM

Thomas Sannito, Ph.D.

I. INTRODUCTION

A. A trial Is a Psychologist's Dream: It has deviancy, hypochondria, role playing, manipulation, conflict, group dynamics, and it involves memory and recall of witnesses and information-processing of jurors in an atmosphere of authority, dignity, and ritual.

B. Darrow the Master Strategist:

C. Definition Of a Courtroom Strategy: A carefully calculated plan to enhance the effectiveness of your case by using the laws of human nature to your fullest advantage.

D. Example

II. SEQUENCING AND TIMING OF EVIDENCE

A. Serial Position Effect: Generally speaking, your best witnesses should go on first and last, since the first and last things in a series are learned the best.

B. The Primacy-Recency Law in Court:

1. Put emotional evidence first to get a long-lasting primacy effect. Because it is the first impression, it will have the greatest impact. Because it is emotional material, it will last over time.

2. Put factual evidence on last to the gain the recency effect of memory. Since memory of technical data fades more rapidly than emotional experiences, make it as recent as possible. If jurors receive the information just before deliberation, it will still be fresh in their minds.

3. Unless it is novel, try never to put important evidence on in the middle of your case, since it will be forgotten first.

4. Taking each day as a separate segment of the trial, put your best evidence for that day on first for an enhanced primacy effect. The attention span of jurors is greatest in the morning when they're fresh and alert, in contrast to a narrowed interest later in the day when fatigue and boredom set in.

C. The Von Restorff Effect:

1. Events that stand out or are unique are virtually unforgettable.
2. Save some exciting evidence for the dead part of the trial to make it stand out even more.
3. Have novelty in your theme or theory of the case, one they haven't heard before.
4. Talk in a low tone for a while, then accent your point by raising your voice.
5. To intensify the testimony of a good expert, position him after a series of dull, but necessary, filler witnesses.
6. Make use of visual aids. Most of what goes on in a trial is verbal, so any good visualization will captivate the interest of the jury. Pictorial representations will be remembered best and recalled the easiest during deliberations.

D. Opening or Closing Remarks:

1. Always state favorable conclusions first, because research has shown that if negative conclusions are stated first, people stop listening to the remaining conclusions, even if they are favorable.
2. Begin with a positive, favorable conclusion first. Research has determined that when desirable conclusions are stated first, the jurors are more attentive to all of your conclusions that follow.
3. Draw conclusions that help them simplify and reconcile all of the inconsistencies of the evidence.

III. IMPRESSION FORMATIONS

A. Attorney Image -- in forming their impressions about you jurors ask themselves four questions.

1. Do I like him (her)? It can be increased by
 - a. similarity in background, past experiences, attitudes, beliefs, and so on.
 - b. use of jurors' names
 - c. friendliness

IOWA TAXPAYERS ASSOCIATION 15th ANNUAL GOLF OUTING

Wednesday, September 17, 2008
 Bos Landen Golf Resort, 2411 Bos Landen Dr., Pella, Iowa 50219
 8:00 A.M.–9:00 A.M. Legislative Roundtable
 10:00 A.M. Tee-off Time with reception immediately following golf

Join your colleagues for a day of friendship and fun at one of Iowa's finest golf courses. ITA members, spouses, and business associates are encouraged to participate. Invite a friend from a potential ITA member company to the event.

Registration is \$95 per person. The registration includes the Legislative Roundtable, continental breakfast, green fee, 1/2 cart rental, range balls, box lunch, refreshments and prizes. More information will follow for all registrants. To register, complete the registration form below.

Payment must be received along with the registration by September 8th.

A block of rooms is reserved at the Royal Amsterdam Hotel, 705 E. 1st St., Pella, Iowa for the evening of September 16th. Call (877) 954-8400 or (641) 620-8400 and refer to the Iowa Taxpayers Association when making a reservation. Room rates are \$69 per night.

For assistance or for other information, contact Lynn Harkin at (515) 243-0300 or staff@iowataxpayers.org

Thank you to our primary sponsors of this year's Annual Golf Outing.

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SILVER

Iowa Credit Union League
 Iowa Gaming Association
 Mediacom
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*Add:
 Ernst & Young, LLP*

ITA 15th Annual Golf Outing Registration Form

I will be attending the Legislative Roundtable only (No Charge)

My registration fee of \$ _____ (\$95 each) for _____ individual(s) is enclosed

Name _____ Company _____

If possible, I would like to be included in a foursome with:

Name _____ Company _____

Name _____ Company _____

Name _____ Company _____

Payment Method: Check MasterCard Visa

Card #: _____ Exp Date: _____

CVV Code: _____ Billing Zip Code: _____

Name on Card: _____ Signature: _____

Mail by September 8th to: Iowa Taxpayers Association
 100 East Grand Ave., Suite 330, Des Moines, IA 50309
 (515) 243-2049 fax • (515) 243-0300 phone

IOWA TAXPAYERS ASSOCIATION 15th ANNUAL GOLF OUTING

Wednesday, September 17, 2008

Bos Landen Golf Resort
2411 Bos Landen Dr.
Pella, Iowa 50219

DIRECTIONS

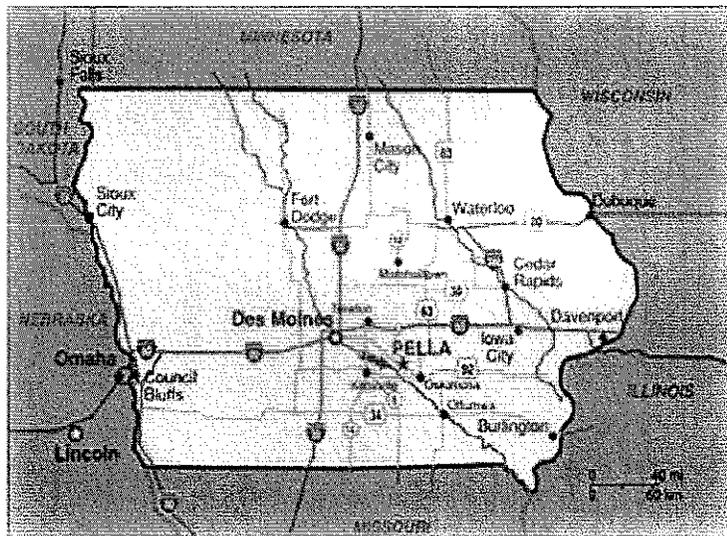
From north of Des Moines on I-35, exit onto I-80 East, then take exit 141 (Hwy 65S), and then take exit 79 (Hwy 163 East). Follow Hwy 163 until you reach Pella. Take the first Pella exit, #40, and follow the signs to Bos Landen Golf Resort.

From I-80 East, take exit 173 and follow the signs to Pella. Continuing south on Main Street, turn right at the stoplight at the intersection of Main and University. Follow University south and west, and you will see the course after approximately 2 miles. Turn right onto Bos Landen Weg and proceed to first right turn, which is Bos Landen Drive. Continue on Bos Landen Drive approximately one mile until you see the clubhouse on your left.

From south (Chariton & Knoxville) Go to Hwy 34 and IA Hwy 14. Follow Highway 14 north to Knoxville. At the junction of Hwy 14 and IA Hwy 5/County Road T-15, turn right and continue east and north on County T-15. Continue north after crossing the dam on Lake Red Rock approximately one mile until you see the golf course on your right. Turn right onto Bos Landen Drive and follow the signs to the Holiday Inn Express on your left and the Clubhouse on your right.

From the south (I-35 and Kansas City) - take I-35 north to Highway 5/65 East - just south of Des Moines. Head east and remain on the Bypass until you reach Highway 163 East near Pleasant Hill. Follow Hwy 163 until you reach Pella. Take the first Pella exit, #40, and follow the signs to Bos Landen Golf Resort.

From the southeast (Burlington/Ottumwa/Oskaloosa) - follow Hwy 34 to Ottumwa - turn right (north) onto Hwy 63 - continue to Oskaloosa where Hwy 63 & Hwy 163 merge - continue north on Hwy 163 to Exit 40. At off ramp follow signs heading west and south to Bos Landen.



2. Can I trust him to tell me the truth? Sincerity is the most important personality trait.

3. Is he efficient and competent?

4. Is he confident about his case?

B. Corporation Image -- neutralizing the "underdog advantage."

1. Humanize the company

2. Give the company an identity/personality

3. Identify the company with All American winners

4. Establish equality with the plaintiff

IV. THE ART OF PERSUASION

A. Powerful Speech Patterns

1. Descriptions rather than superlatives

2. Powerless style includes hedges, intensifiers, and rising pitch

B. Avoid "reactance" or the "boomerang effect."

1. Low-pressure messages in one study brought about 70% compliance compared with 40% conformity from high-pressure messages.

2. When a person's behavioral freedom is reduced or threatened, he will rebel against the mandate or order by doing the opposite to preserve or re-establish his freedom.

3. Avoid the dominant, aggressive style of overselling that jurors may interpret as a restriction of their freedom.

4. Let them know that you are leaving the decision in their hands.



Thomas Sannito is Chairman of the Psychology Department at Loras College, and principal of Forensic Psychologists in Dubuque, Iowa. Throughout many sections of the country he is serving as lecturer and consultant to trial attorneys on the applications of psychology to the courtroom. Dr Sannito is Associate Director of Trial Diplomacy Journal's Jury Study

Psychological courtroom strategies

L THOMAS SANNITO, PhD

No one can listen to two people at the same time. So, in the interest of fairness, trial advocates take turns presenting their evidence so that each has a chance to command the jury's undivided attention. Except by raising objections, counsel is powerless to prevent jurors from hearing the opposition's arguments or evidence.

So it was in an earlier era, when Clarence Darrow could do little else but smoke his cigar as the prosecution developed its case. Watching him in his mummified state, one could only judge the passage of time by the length of his cigar ash. It grew longer and longer, as

many eyes in the packed courtroom watched it. Jurors and spectators alike seemed to be anxiously waiting for the dangling ash to drop from its stub, but it wouldn't. Now, with curiosity piqued, no one dared to turn away until the tension broke with the ash's descent. The tantalizing ash wouldn't fall because Darrow had put a wire through the center of the cigar.

Regardless of the veracity of this folklore vignette, it was not beyond Darrow's inventiveness to use such a psychological tool to dull prosecution testimony. He, like many of the legendary courtroom craftsmen, relied on psychological instincts rather than on a

formal understanding of the psychological principles involved. This sly old fox may not have fully understood the gestalt principle of *figure and ground* in perception, or the *Von Restorff* effect of novelty on attention and memory; but he knew the human mind could only concentrate on one thing at a time.

A psychological strategy, in contrast to the intuitive stratagems of Darrow, is a carefully calculated plan to enhance the effectiveness of your case by using the laws of human nature to your fullest advantage. Would you plan various aspects of your case differently if you knew the following psychological principles?

A Sequencing and Timing of Evidence

- We are better visual than auditory learners.
- The first and last things in a series are learned better than those in the middle
- The attention span narrows under stress, fatigue, and boredom.
- Unique events are "burned" into our memories
- Metaphors, similes, and stories are forgotten last.

B. Impression Formation

- Sympathy appeals leave us cold
- Certain people appear better than they really are when we experience them after someone unlikable.
- Sincerity is the trait of greatest appeal.
- First impression counts the most.
- If a person is described as "warm," a whole cluster of positive traits will be ascribed to him

C. Persuasion

- Bright people are insulted by a "one-sided" message, but ignorant people are influenced by it
- Superlatives weaken your speech, while descriptive words make it more powerful
- Crisp answers and long narratives increase credibility.
- People resist changing their story unless you first join them and then "walk them away"
- When our freedom seems threatened by high pressure messages, we rebel with the opposite decisions.

D. Theory or Theme

- Jurors have a need to resolve conflict, and it gets greater as the trial wears on.
- We remember a general theme, theory or principle better than individual details
- Jurors look for the explanation that reconciles the greatest number of discrepancies.

From these laws of human nature, strategies can be fashioned to (a) give your evidence greater impact, (b) help you create favorable impressions for you and your client, (c) make you a more persuasive communicator, and (d) make your case more meaningful to jurors

Timing and sequencing of evidence

In music, two different melodies can be created from the same set of notes: one a harmonious masterpiece that caresses our eardrums, and another one a melodious disaster that makes us grimace with displeasure. The difference between a work of noise and a work of art is the *order* in which the notes occur and the *timing* of certain sounds. The genius comes in knowing how to create the overall effect by the right combination.

So it is with the presentation of evidence at trial; the proper timing and sequencing of the various segments can produce a courtroom *chef-d'oeuvre*

Serial Position Effect Once you have determined the evidence you intend to introduce, the question becomes: "How can I arrange the segments of my case to achieve the greatest impact on the jurors?" Unlike music, in which each note is theoretically equal in value to every other note, certain pieces of evidence are more important than others. The quandary, then, is where in the trial order should you present those parts of evidence that will make or break your case

Our memory of items presented in a sequence is not equal at each point in the series. Anyone who has ever ridden a train through a big city knows that you learn the stations in the beginning and end better than those in the middle. This phenomenon, in which the first and last things in a series are learned more quickly than those in the middle, is called the *serial position effect*. Generally speaking, then, your best witnesses should go on first and last, since jurors will forget much of what occurs in between.

The Primacy-Recency Law. The next question that arises is, "Should I position the evidence that I want to give the greatest significance to first or last? One of the beginning efforts to determine the comparative power of the two positions is attributed to Lund, who in 1925 formulated his Law of Primacy in Persuasion¹ He found that the argument of a controversy presented first would have the greatest impact on the audience. Other studies have supported the "primacy effect" Asch asked one group of subjects to consider a person who was INTELLIGENT, INDUSTRIOUS, IMPULSIVE, CRITICAL, STUBBORN and ENVIOUS. To a second group he

described a person as ENVIOUS, STUBBORN, CRITICAL, IMPULSIVE, INDUSTRIOUS and INTELLIGENT² Note that the two lists with the same words are in reversed order; so that the first one opens with positive traits and finishes with negative traits, while the other list is negative to positive. The impressions formed from the two lists were quite different. The person depicted from the first list was seen as "an able person who possesses certain shortcomings which are not serious enough to overshadow his merits." The person portrayed after exposure to the second list, by a different group of subjects, was "a problem person whose abilities are hampered by serious difficulties."

Similarly, Luchins found a strong primacy effect using a two-paragraph description of a person named "Jim," in which the first paragraph described Jim as an extrovert while the second paragraph described Jim as an introvert.³ The group that heard this description (extrovert-introvert) perceived Jim as extroverted. When the order of the paragraphs was reversed (intro-extro) and read to a different group, the second group perceived Jim as introverted.

In all of these studies, what came first determined the impression. Thus the correct strategy for establishing a lasting impression of your client or the opposition's client is to advance your description early. Prosecutors and plaintiff's attorneys have a decided advantage built right into the system. Since they go first, they can create the strongest impression. First impressions do count most, and once formed they resist change, even in the face of evidence to the contrary. The first impression becomes the reference point, and all subsequent information must be reconciled with it. Information that is different will seem to be "discrepant" and less reliable. As time goes on, the discrepant information will be distorted to make it consistent with the initial impression.

Fortunately for defense attorneys, there are exceptions to the primacy over recency rule. The primacy effect is weakened as the length of time between contrary messages increases.⁴ The longer the trial, the more the memory of first impression fades, making the last impression the strongest one. In a one-day to two-day trial, attorneys for the people and plaintiff will have a "primacy" advantage, but in

trials of three days or more, counsels for the defense will savor a 'recency effect' Two tactics for neutralizing the primacy power of adverse first impressions are: (a) lengthen the trial, so that memory of the first impression is stale and weak, while recall of the last impression is fresh and strong, and (b) have a parade of character witnesses that by their sheer numbers will cause a breakdown of the first impression.

Another reversal of the primacy-recency law happens when you're dealing with objective information of experts rather than emotional impressions from lay witnesses or opposing competition. What gives first impression descriptions the r lasting effect is the strong emotional tone of the describer. Feelings are remembered more easily than facts. With the lack of emotion in the testimony of experts, it takes more mental energy of jurors to remember it. The more factual the communication, the more quickly it withers over time. Therefore, put your strongest experts on last so the fact-finders can deliberate on things they just heard.

From this discussion of primacy and recency effects, several strategies for sequencing evidence emerge:

- A Put emotional evidence first to get the primacy effect of first impressions. Once an emotional decision has been made, we construct a logic to justify it.
- B Put factual evidence on last to gain the recency effect of memory.
- C. If a damagingly negative first impression is created by the opposition, lengthen the trial to allow the impression to fade, and add more witnesses with opposite portrayals.
- D Put your best evidence first on each separate day of the trial for a souped-up primacy effect. The attention span of jurors is greatest in the morning, when they're fresh and alert in contrast to a narrowed interest later in the day, when fatigue and boredom set in.

The Von Restorff Effect. The *Von Restorff* principle in learning states that unique or novel events that stand out are virtually unforgettable. How many parties can you remember? After a while, they all seem alike, but you can't forget the one in which the jealous lady "accidentally" shoved the plate of spaghetti in the coquette's lap. Research by Sears and Friedman reveals that if subjects are merely told that a particu-

lar message they are about to hear is novel, they are substantially more influenced by that message than the same message without the belief of novelty.⁵ Legendary attorneys who electrify courtrooms always have this effect going for them. However, every attorney can make use of the *Von Restorff Effect* during the course of a trial. First, have a novel theory or theme in your case, one they haven't heard before. Second, save "hair raising" evidence for the boring part of a trial to ensure that it will be remembered during deliberations. In this way, you can make the middle part of the trial, which is usually dull, work for you. Also, create your own *Von Restorff Effect* anytime you wish by talking in a low voice and a slow tempo for a while and then suddenly accent your point in a loud, quick voice.

Finally, if you are a judge, be conservative with the order to "strike it from the record" and the admonition to the jury to forget what they heard. By making it stand out, you are burning it into their memories.

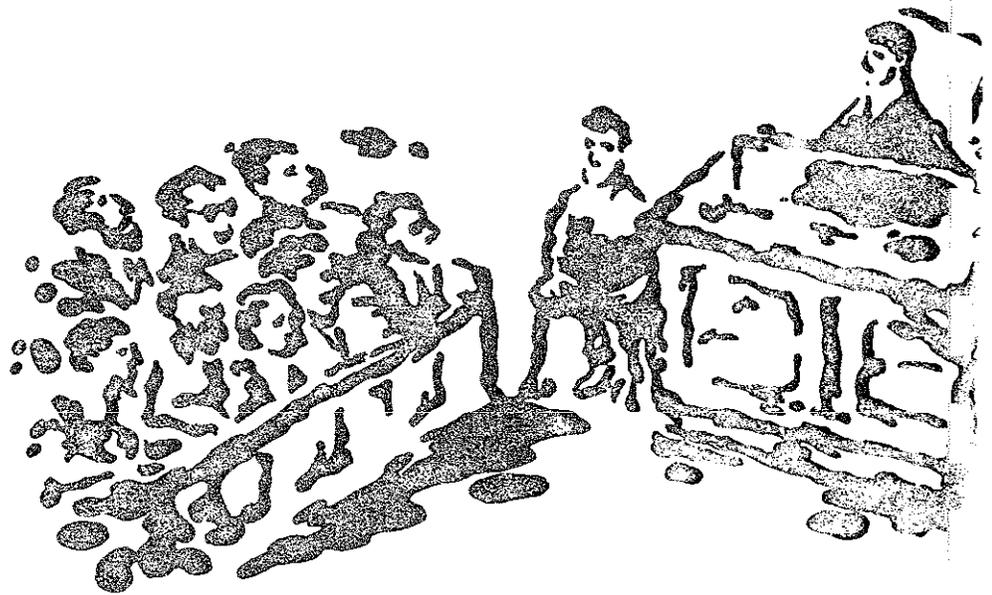
Forming impressions

An irresistible human tendency is to form impressions of others, even when very limited information is available. There is no way to prevent jurors from forming impressions about the plaintiff, defendant, attorneys, and judge, because it is human nature. What is even more disconcerting is that their "emo-

tional impressions' in about 20% of personal injury and criminal cases may be affecting their verdicts.⁶ Humans are not necessarily "rational" creatures as the philosophers tell us. Just to satisfy your curiosity on this point, the next time you go to your banker for a loan, ask him where he hides the batteries to light up his pants. Now, being a completely objective, rational person, he will explain that money is "tight" right now. We make emotional decisions about others, then seek rational evidence to justify them. When confronted with contrary information, we are even willing to delete, distort, or rearrange it or demean its source to make it consistent with our impression. Once formed, the enduring whole impression jurors have of you and your client will affect their interpretation of the event in question.

Attorney Image. In forming their impressions of you as an attorney, jurors will want to know four things about you. First, they will ask themselves "Do I like him?" *Liking* is the first decision we make about another person, and it has a subtle, but powerful, influence on our thinking. If they like you, they unconsciously want you to win and will find it difficult to vote against you.

Second, jurors watch you and wonder, "Can I trust him to tell me the truth?" Avoid casting the image of a "slick" who is sly and cunning. Jurors are impressed with an honest and sin-



cere lawyer. Psychological research has shown that sincerity and honesty are two of the most admired traits in others.⁷ If they judge you to be sincere and straightforward in your approach and not trying to trick them, you satisfy their intellectual quest for the truth.

Third are you *efficient and competent*, or are you a stammering, bumbling lawyer in their eyes who robbed his client of effective representation? It is hard to go against efficiency and quality.

Four, your own *confidence* will color their judgment in the case. If you appear shaky and tentative, they conclude the case for your client is worth very little. On the other hand, if you seem confident and certain of your case, your arguments are more believable. The image that has universal appeal to most jurors is an attorney who is likeable, sincere, efficient, and confident.

You may wish to adjust your courtroom image slightly as you change from a predominantly male to a largely female jury. According to Lind and O Barr,⁸ men believe the job of the attorney is to win; whereas, women expect him to be sensitive and considerate. Hence your ideal image for a male jury would be *CONFIDENT, EFFICIENT, SINCERE, and LIKEABLE*; and for women it would be altered to *LIKEABLE, SINCERE, EFFICIENT, and CONFIDENT*. The two images differ only by the trait of greatest importance, with men favoring the competi-

tive spirit and women underscoring warmth. A more aggressive approach can be taken in front of a male-majority jury, since they will key on the "confidence-efficiency" part of the image, and the female accent on "likeable-sincere" will dictate a softer tone. Men will expect you to be a little rougher on cross-examination, while women will give you points for finesse.

There are many things you can do to improve your attorney image in the courtroom. Concerning liking, it is true that zealous efforts to get jurors to like you will be interpreted as shallow "ingratiation" or begging for a verdict, but actions which naturally promote liking may be quite successful. For one thing, try to bring out similarities between you and the jurors during *voir dire*. For example, if the juror served in Viet Nam and you did too, ask him about a few of the places and events with which you are familiar, to establish a common bond. We feel best in the company of those who are similar to us in their past experiences, attitudes, values, and interests, and we are uneasy about aliens who are dissimilar. There is hardly a better feeling than discovering someone went to the same school, got knocked around by the same teachers, belongs to the same church, or likes activities that we like. That's why people are driven to attend class reunions in which they can reminisce on common experiences. Remember, "birds of a feather flock together," so

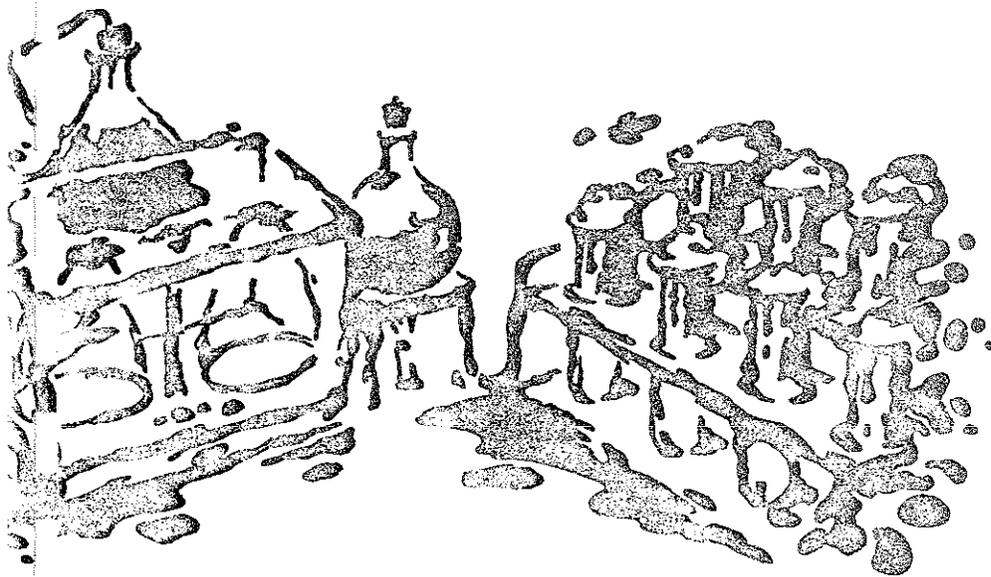
tease out those similarities whenever possible. Also speaking to them in their language instead of lawyer jingo will tell them that you came from their ranks. A feeling of comradery naturally accrues when the vernacular is spoken (if you feel comfortable with it).

For the efficiency part of your image, prepare your case thoroughly so that you manifest an economy of words and actions. And avoid shuffling frantically through papers in the courtroom, which spells disorganization to jurors by being well organized. Lastly, be yourself as much as possible to convey authenticity.

Defendant Image. In criminal cases, the defendant image becomes a particular concern, because as a group they have a dubious reputation. Most jurors have an initially bad impression of anyone who has to defend himself in court. They wonder, "What's he doing here in a fix like this, the police don't go out and pick up innocent people." According to the research of Schulman, *et al.*, about 80% of prospective jurors begin with a belief that there is something to a case when someone is on trial.⁹ In the impression formation of a defendant, he may well be "Guilty" until proven "Innocent."

The only way the attorney can control the image of his client is to keep him off the stand. In most criminal matters, there is no choice but to swear him in, since he may be the *only* evidence in his own defense. When a defendant tells his story to the jury, the "defendant impression" will be formed mostly from the emotional reactions jurors have to him. They will trust their own instincts in sizing him up, in spite of your efforts to present a "clean" character. In forming their impressions, they will use the cues most often relied upon in short-term person perception, "social attractiveness" and "demeanor while speaking."

Since time won't allow you to send your client to acting school to learn desirable affectations, concentrate on his dress and grooming with the idea that beautiful is good and ugly is bad. Our emotions tell us that attractive people don't have to resort to crime to get what they want, while homely people may go bad out of desperation. Psychological research is replete with studies showing that "unattractive" people are judged guilty more often and receive harsher sentences than "attractive" per-



sons^{10, 11} If your client looks like he crawled out of a swamp or fell off a flat car, it won't matter much what he says. Who knows, maybe in their tendencies to want to acquit those who are attractive and convict those who are unappealing, they may be reasoning "She's too good looking to be behind bars" or "He's too ugly to be out on the street." You can bleach the tainted image of the defendant by making him more esthetic in appearance. Keep in mind, though, that juries will detect phoniness. Don't dress a factory worker like a banker, and don't try to make a prostitute seem like a Girl Scout.

In insanity or diminished capacity defenses, in which a special image is required, the best strategy is to leave the defendant off the stand. In trying to prove "He was temporarily insane" or "He didn't mean to do it," he can only hurt his own defense by taking the stand. If he appears lucid and clear-headed, they can't visualize him going berserk; and if he acts crazy enough to convince them, they may want the mad dog securely in prison rather than in a mental hospital where some do-gooder may let him go. If he never takes the stand, the attorney and a good expert can project an image of a normally rational person who "cracked" while under unusual strain or while in a rare mental and emotional state. With the defendant on the sidelines, all eyes will be on the defense attorney to reassure them that he's safe. If the manner in which he defends his client conveys security, confidence, and calm, their fears will abate. If, on the other hand, he acts uneasy about defending his client, jurors may get an uncertain feeling about the defendant. With this strategy, the defense counsel becomes an extension of his client's personality, presenting a rational, calm figure.

At the same time the attorney soothes them emotionally by representing the now-rational side of his client, the expert witness gives the defendant an identity and explains his ephemeral insanity. Keeping the defendant mute while the attorney and expert characterize him allows defense counsel to control the impression the jury forms of his client.

Plaintiff Image. Probably the best image a plaintiff can have in a personal injury case is *understated*. Jurors know you're there to ask for money, but they want to see if you're going to beg or

not. The evidence may determine which way the verdict goes, but their impression of the plaintiff will influence the amount. Don't let your injured client whine on the stand; it will turn jurors off. Sympathy appeals usually backfire and result in lower verdicts. We feel most compassionate toward those who are trying to cope with their miseries. Which paper boy would you tip the most when you inquire how cold they are, the one who says "Boy it's cold out here" or the one who replies "No, I'm ok" as he shivers uncontrollably? The effect works best when the injury is visible, experts give strong testimony about the abjection of the plaintiff, and there is no doubt of the victim's suffering. Playing down a big injury is seen as courage, which should always be rewarded, while begging is to be discouraged. The impression jurors have of the plaintiff as a "resolute soul" making the best of it, or a "beggar" exaggerating his ills, may determine whether they will be generous or chintzy in their award.

To add to the impression of understatement in a personal injury case, bring the plaintiff in sparingly. Understatement will work only if the jurors are emotionally moved by the injury; overexposure will attenuate their emotional reaction. The longer the victim is in court, the greater chance there is the jury will get used to the injury and become "desensitized" to the misery it has caused. Then the plaintiff's understatement may lead to the jury's undervaluation of the case. The best way to heighten the effect of plaintiff understatement is to build the suspense by withholding the plaintiff; then, near the end, expose the jury to the plaintiff's condition at the same time she or he takes the stand.¹² In this way, the understatement will come at a time when the jury's emotional reaction to the injury will be the greatest, and the whole effect will remain fresh for jury deliberations.

A final word of caution about plaintiff impressions. Dressing down is generally consistent with understatement, but it is particularly important for a female plaintiff with a female jury. One of the strongest female emotions is jealousy, and very few women jurors are going to want to give money to a seductive, sensuous female. Women would resent the effect an overly attractive female would have on men, and this feeling will curb their generosity.

The art of persuasion

Powerful Speech. All of us have been captivated at one time or another by an accomplished orator like John F. Kennedy, Hubert Humphrey, or the great Clarence Darrow, any of whom could hold audiences spellbound for long periods of time. Besides the unique charm of each individual, all three had "powerful" speech patterns. What makes speech in the courtroom powerful and persuasive? Recently, sociolinguists have identified several variables of courtroom speech that differentiate a "powerful" style from a "powerless" style.¹³

First, persuasive lawyers avoid the use of intensifiers (e.g. "very, very much"), hedges (e.g. "kinda," or "sort of") and questioning intonation (i.e. finishing an answer with a rising pitch, as if asking a question). We are much more convinced by detailed descriptions than by these meaningless expressions of speech. When we hear Harry described as "super great," we are left with a hollow ring to the words, but if he is depicted as "warm, friendly, kind, and soft-hearted," we form a vivid picture of his greatness.

Second, on the handling of witnesses, the most "powerful" style was judged to be when attorneys encouraged their witnesses to speak in a narrative form rather than the shorter staccato style controlled by the attorney. With the long narratives, the attorney is signaling the jury that he is giving up his control and prompting, which makes the whole examination more credible.

Third, attorneys who get into verbal clashes with their witnesses, in which both speak at the same time, are perceived to be "powerless." Jurors watching this simultaneous speech saw the attorney as losing control and being less fair. It is much more skillful if the attorney acquiesces.

Fourth, increase your courtroom power by teaching your witnesses to answer in a crisp tone instead of a tentative manner. I have seen many witnesses of dubious reputation look believable by a firmness in their answers. Over the long haul, altering your speech patterns to fit these findings can give you stature as a powerful, compelling persuader.

The Boomerang Effect. The "boomerang effect" is the rebellion jurors feel for high-pressure attorneys, which results in their reduced compliance. It

was first described by Brehm in 1966 who contended that if a person's freedom is restricted or threatened with restriction, he will rebel against the mandate or order by doing the opposite to insure his freedom¹⁴ In one of Brehm's studies he reported 70% compliance from subjects subjected to low-pressure messages and only 40% compliance from those who received high-pressure tactics. This same desire to act contrary to the force that is constricting one is called the "paradoxical effect" by psychotherapists. Therapists have observed that ministers who preach at their kids often have hellions. The courtroom moral to the story is avoid overselling your cases with a dominant, aggressive style; use the soft sell to reassure jurors that you are not making the decision for them.

Refrain from using expressions like "... you will be compelled to find the defendant," or "... you must then turn in a big award." Also, never sum up by saying "Ladies and gentlemen of the jury, you must come in with an acquittal," because you may thereby make it difficult for them to find him innocent. If you do anything, tell them, "My opponent will tell you that you have no choice ...". Also, if you stand in about the middle of the courtroom, you take the pressure off them; and if they feel less pressure from you they are more malleable. If you stand too close, they feel pressured, and you are risking the 'boomerang effect'. Notwithstanding the success of two or three prominent attorneys who use dynamic force, the best results will be achieved by a smooth, low-key effort.

Developing a theme

A theme or theory is an explanation of how and why things occurred. Some attorneys present fragments of evidence and others develop themes. A theme is the common meaning running through all of the evidence in a case. Each piece of evidence should say the same thing in a different way. Adding "filler" witnesses detracts from the theory and weakens its effect. The theory is stronger when it is tight and tidy, with no distractions. When every segment of evidence adds to the theory, the explanation becomes compelling. Jurors will forget most of the details unless they are bound together by a common thread. A good theory or theme is one that is (a) simple, (b) unique, and (c) tidy, making it easier for them to remember. Jurors will buy the theory that

makes sense out of the greatest number of facts and reconciles most of the inconsistencies. Therefore try to work the other side's evidence into your theory, and delete any evidence that doesn't fit in with your theory.

Conclusion

There is an intangible quality that accomplished veterans of the courtroom possess; it is psychological moxie about human nature. Oh, they don't have formal training in psychology, as a rule, but the great ones are masterful in practicing psychology in court. They instinctively know how to sharpen human memory, create compelling impressions, and hold jurors spellbound as they weave their theories with the smooth flow of a *raconteur*. These courtroom craftsmen are psychological strategists, and psychology is now in a position to explain what they've been doing. Who knows, maybe Clarence Darrow is smiling now.

Footnotes

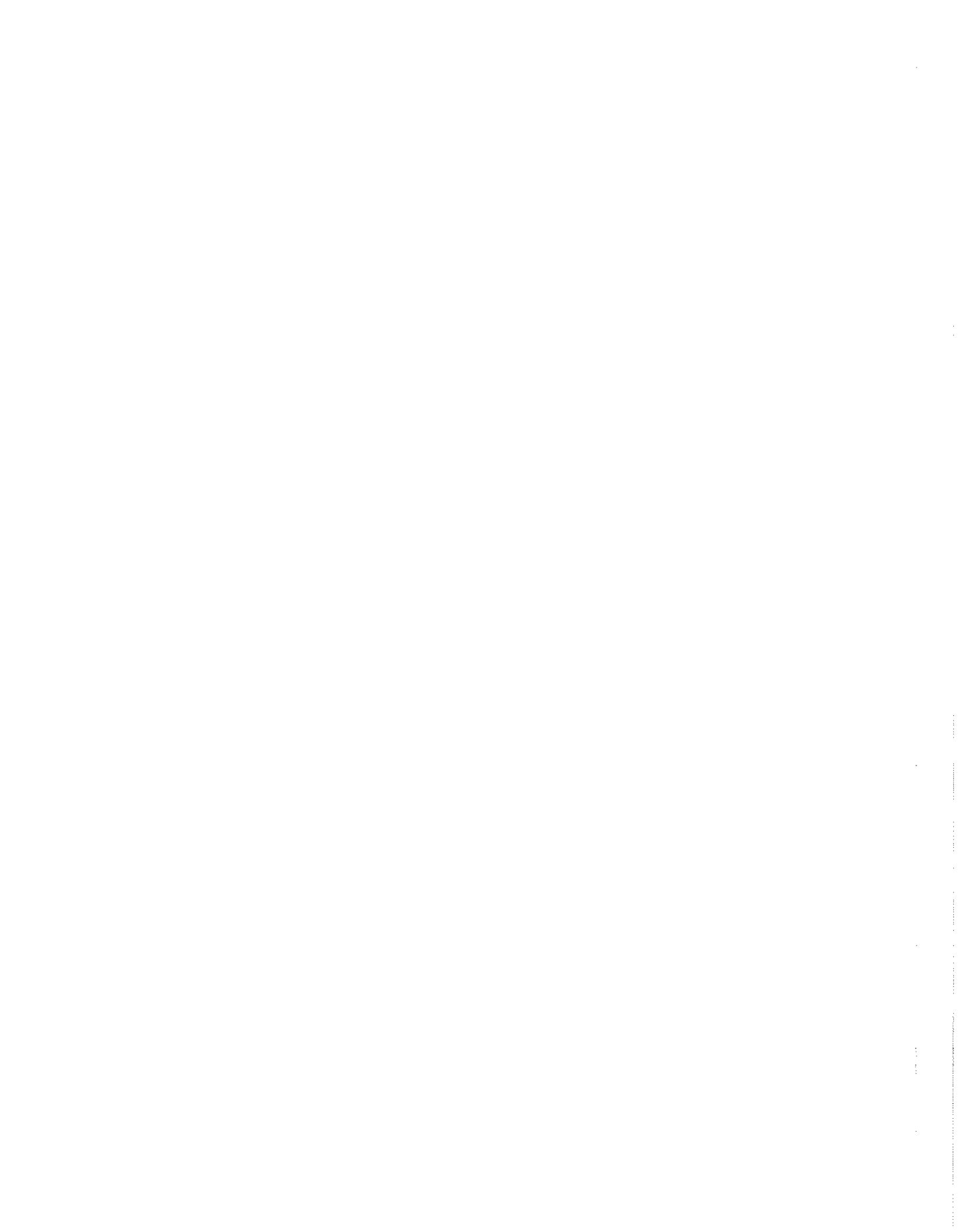
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I trust, counselor, that all this is adding up to something."



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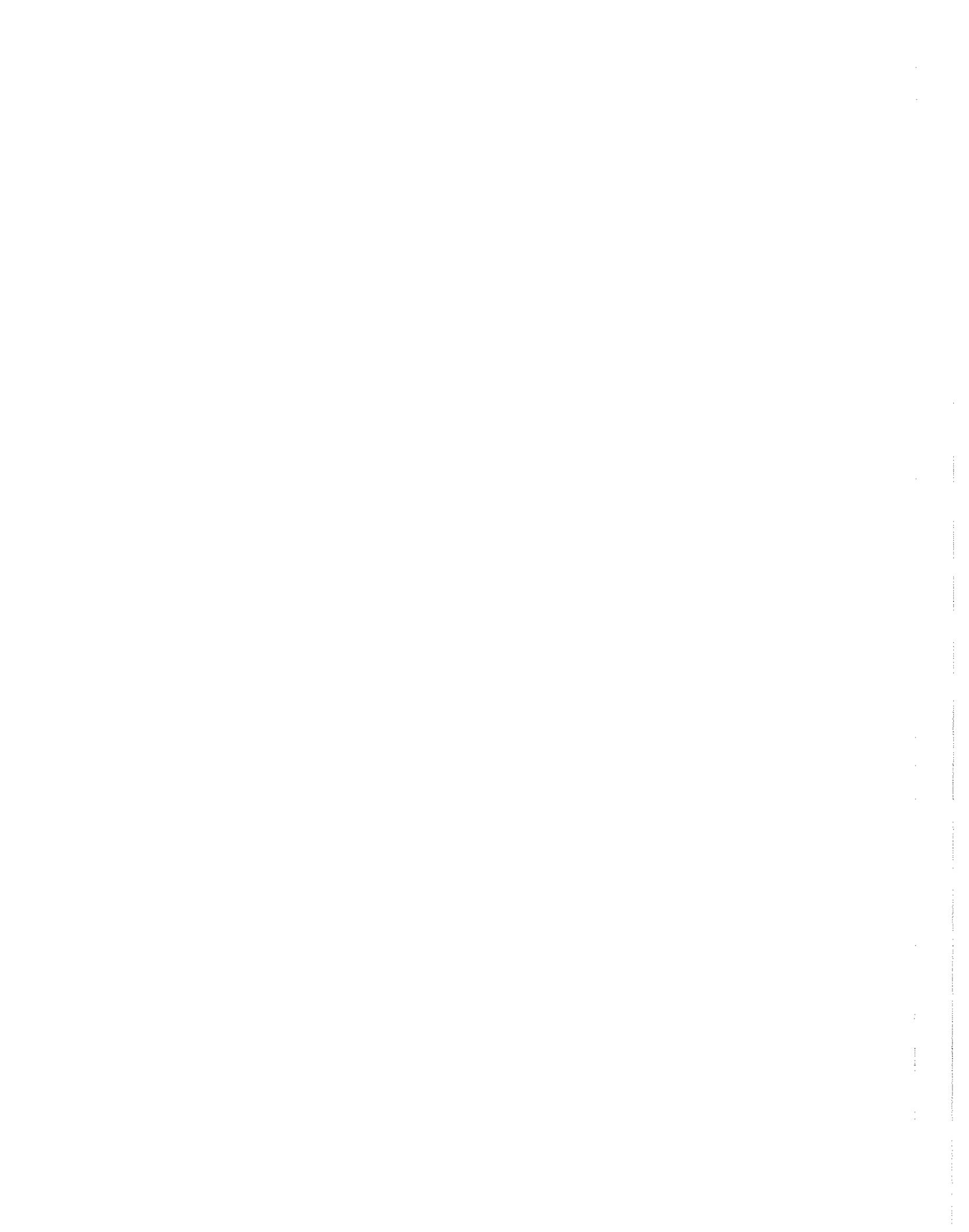
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PRODUCT WARNINGS AND LABELING

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FAILURE TO WARN/LABELING -- AN OVERVIEW

I. History

Throughout the nation, an increase in consumer awareness, adoption of consumer protection legislation and standards, and the emergence of strict liability in tort have shifted the burden of product safety squarely onto the shoulders of the manufacturers.

A. Weinstein, "The Design of Safe Products: Guidelines from the Law," Product Liability of Manufacturers, Prevention and Defense 1979 (Practicing Law Institute, Litigation and Administrative Practice Series Number 145).

P. Sherman, Product Liability for the General Practitioner §§ 6-7 (1981).

RESTATEMENT OF TORTS (SECOND) Section 402A (1965).

- A. Consumer awareness is placing a greater burden on the product designer, manufacturer, and seller.
A. Weinstein, "The Design of Safe Products: Guidelines from the Law," at 19.
- B. Consumer protection legislation has been passed on both the state and federal levels. These statutes, which set standards for products such as flammable fabrics, insecticides, foods, drugs, cosmetics, and a wide variety of others, can be the basis for charges of negligence per se regarding injuries incurred through the use of a "regulated product" that does not meet the statutory standards for safety.
The Flammable Fabrics Act.
The Federal Hazardous Substances Act
The Federal Insecticide, Fungicide and Rodenticide Act
The Food, Drug and Cosmetic Act
See generally, P. Sherman Product Liability for the General Practitioner § 6:01-6:09.
Gaston v. Aquaslide 'n' Dive Corp. 487 F. Supp. 16 (E. D. Tenn 1950) (evidence showing safety standards promulgated by the Consumer Products Safety Commission for swimming pools was admissible).
- C. Strict liability in tort for manufacturers is a codification of the policy that manufacturers are in a better position to bear the costs of injuries related to the

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use of their products than the injured consumer. The manufacturer is then able to spread the costs of such injuries through the marketing chain in the form of increased product price. A second impetus behind strict products liability is the theory that its imposition on the manufacturer will motivate manufacturers to be more safety conscious in their design, manufacture, and marketing of products.

J. Sales, The Marketing Defect - Inadequate Warnings & Instructions for Use, Presentation at the Third Annual S.M.U. Product Symposium, March 31 - April 2, 1982.

1. Strict liability in tort may have had its roots in the early common law decisions that held those selling food products to a high degree of responsibility for the integrity of those foods. As far back as 1266, there were criminal statutes on the books that imposed penalties on food producers and handlers who supplied "corrupt" foods. Many decisions in the early part of the 20th century held sellers of impure foods liable to third persons in the absence of negligence or privity of contract through a variety of inventive theories based on agency, assignment of the seller's warranty to the intermediate dealer, third party beneficiary contracts, and others. Later decisions focused on a warranty running with the goods, borrowing a concept from covenants and real property, or warranty directly to the buyer.
2. Decisions since 1950 extended strict liability beyond food for human consumption. The first step beyond food was to products for personal use, such as cosmetics. From that first step, decisions have brought strict liability to its current position: "Strict liability ... [covers] the sale of any product which, if it should prove to be defective, may be expected to cause physical harm to the consumer or his property."
RESTATEMENT (SECOND) OF TORTS § 402A, comment b (1977).
3. Since the formal adoption of strict tort liability through the decisions like Grunman v. Yuba Power Products, Inc., 59 Cal 2d 57, 377 P.2d 897, 27 Cal Rptr 697 (1962) and Section 402A of the RESTATEMENT

(SECOND) OF TORTS, this doctrine has essentially replaced negligence, implied warranty, and contract as the main cause of action used by plaintiffs injured by manufactured products.

J. Sales, The Marketing Defect-Inadequate Warnings & Instructions for Use.

- a. Neither negligence nor privity of contract need be shown.
RESTATEMENT (SECOND) OF TORTS § 402A(2) (A), (B) (1977).

II. The "Defective" Product

RESTATEMENT (SECOND) OF TORTS § 402A, comment g (1977).

- A. In a strict liability action, the focus is on the product and its condition, not on the conduct of the manufacturer.

Bly v. Otis Elevator Co., 713 F.2d 1040 (4th Cir. 1983) (New trial ordered because of improper jury instructions confusing theories of negligence and strict liability).

Foster v. Ford Motor Co., 621 F.2d 715, 718, 720 (5th Cir. 1980) (Plaintiff alleged faulty truck suspension caused injuries. The focus was on whether the suspension was unreasonably dangerous. There was no issue regarding Ford's conduct, so no negligence jury instruction was given).

2 L. Frumer & M. Friedman, Products Liability § 16A(4)(f)(vi) at 3B-146 (1984).

1. A seller who has exercised all possible care in the manufacture and sale of the product may still be held liable for injuries caused by that product's use if the product is found to be defective and therefore unreasonably dangerous to the user.

RESTATEMENT (SECOND) OF TORTS §§ 402A(1), 402A(2)(a) (1977).

- B. Three types of defects will support a strict liability cause of action:

1. A design defect.

(Brochu v. Ortho Pharmaceutical Corp.), 642 F.2d 652, 654-57 (1st Cir. 1981) (High estrogen content

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of oral contraceptive as a design defect).
Schell v. AMF, Inc., 567 F.2d 1259, 1259-63 (3rd Cir. 1977) (Plaintiff argued machine which injured his arm was defective because design was inadequate for normal use).

2. A manufacturing defect.

Wagner v. Coronet Hotel, 458 P.2d 390 (Ariz. App. 1969) (Hotel guest slipped in bath tub, mat was missing suction cups, recovery allowed against manufacturer of mat based on manufacturing defect); and

3. A marketing defect (such as the absence of warnings or directions for use).

(Jackson v. Johns-Manville Sales Corp., 727 F.2d 506 (5th Cir. 1984) (Asbestos marketed without warnings).

Paulides v. Galveston Yacht Basin, Inc., 727 F.2d 330 (5th Cir. 1984) (Boat sold without instruction on what to do if bilge plug slipped out of place. The boat sank and a fatality resulted).

Rhodes v. Interstate Battery System of America, Inc., 722 F.2d 1517 (11th Cir. 1984) (Plaintiff questioned the adequacy of a warning on a car battery that exploded).

- a. The duty to warn is imposed when the danger of a product exceeds "that contemplated by the ordinary consumer."
RESTATEMENT (SECOND) OF TORTS § 402A, comment i (1977).

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C. In light of defective products, the question must be raised as to whether the product should be marketed at all. Warnings and instructions may make the difference.

1. Certain products are unavoidably unsafe even when used as intended by the manufacturer.

- a. e.g. chemicals, heavy industrial machinery, drugs, blood for transfusions.

2. A manufacturer must employ a risk-benefit analysis - as will the courts - to determine if marketing

the product is reasonable. If the benefits from the product significantly outweigh the risks attending its use, the product can justifiably be marketed with adequate warnings.

Jackson v. Johns-Manville Sales Corp., 727 F.2d 506 (5th Cir. 1984) (Even if benefits of product outweigh risks, it is unreasonably dangerous if distributed without adequate warnings and the manufacturer is strictly liable to those who are foreseeably endangered).

Burks v. Firestone Tire & Rubber Co., 633 F.2d 1152, 54 (5th Cir. 1981) (Utility of design of tire rim that exploded was to be balanced by the jury against the risk of harm even though a nonexplosive design was feasible at the time the rim was designed).

See R. Phelan & K. Ross, Product Warnings, Instructions, and Recalls, (Practicing Law Institute, Litigation and Administrative Practice Series Number 227).

- a. Elements for risk-benefit analysis include:
1. The usefulness and desirability of the product.
 2. The availability of other and safer products to meet the same need.
 3. Likelihood of injury and its probable seriousness.
 4. Obviousness of the danger.
 5. Common knowledge and normal public expectation of the danger (for established products).
 6. The avoidability of injury by care in use of the product (including the effect of instructions and warnings).
 7. The ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive.

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K. Ross & M. Foley, Product Liability of Manufacturers: Prevention and Defense 1979 (Practicing Law Institute, Litigation and Administrative Practice Series No. 145) (citing Wade, Strict Liability for Manufacturers, 19 SW. L.J. 5 (1965)).

III. Failure to Warn and/or Instruct as a "Marketing Defect."

- A. A fundamental principle of product liability law is the requirement that manufacturers instruct consumers as to the safe use of their products and to warn consumers of dangers associated with their products of which the seller either knows or should have known at the time the products were sold.

Pavrides v. Galveston Yacht Basin, Inc., 727 F.2d 330 (5th Cir. 1984) (In this fatal boating accident, a plug accidentally slipped out of place in bilge pump compartment. The subsequent flooding of the compartment caused the pump itself to short out and fail, resulting in the boat sinking.

1. The lack of adequate warnings renders a product defective and unreasonably dangerous, even if there is no manufacturing or design defect in the product.

Pavrides v. Galveston Yacht Basin, Inc., 727 F.2d 330 (5th Cir. 1984).

a. This is the marketing defect.

2. In the case of an unavoidably unsafe product, the inclusion of a warning is a main element that prevents that product from being classified as unreasonably dangerous and imposing liability on the manufacturer. Even if the product has passed the risk-benefit test, an adequate warning is required to accompany the distribution of the product.

Jackson v. Johns-Manville Sales Corp., 727 F.2d 506 (5th Cir. 1984) (Asbestos case).

- B. There are four essential elements that must be met to have an actionable claim based on a marketing defect for failure to warn.

1. The product supplier must know of or reasonably foresee the risk of harm inherent in the intended or reasonably anticipated use of the product.
Vanskike v. AFC Industries, Inc., 665 F.2d 188, cert. denied, 455 U.S. 1000 (8th Cir. 1982) (Use of trailer hitch without retaining rings was a foreseeable misuse, so liability imposed on manufacturer).
 - a. A manufacturer is held to the status of an expert.
Pavlidis v. Galveston Yacht Basin, Inc., 727 F.2d 330 (5th Cir. 1984) (Fatal boating accident case).
2. There must be a marketing defect associated with the product. Either a failure to provide any warning, a failure to provide an adequate warning, and/or a failure to provide adequate instructions for safe use of the product.
Whitehead v. St. Joe Lead Co., Inc., 729 F.2d 238 (3rd Cir. 1984) (Employees of lead processing company were not warned of dangers of inhaling lead particles).
3. The absence of a warning and/or instruction must render the product unreasonably dangerous to the consumer.
Ferebee v. Chevron Chemicals Co., 552 F. Supp. 1293 (D. D.C. 1982) (Failure to warn that dermal exposure to paraquat herbicide could cause serious lung disease and death. Liability imposed on manufacturer).
4. The failure to warn or instruct must be a proximate cause of the injury or harm.
RESTATEMENT (SECOND) OF TORTS § 402A (1977).
Giddens v. Denman Rubber Mfg. Co., 440 S.2d 1320 (Fla. App. 1983) (Tire blew off rim during mounting. Allegation was failure to warn of dangers of attempting to mount tire on incompatibly sized rim. Causation was questioned since plaintiff thought he was using the proper sizes).
McClain v. NMR Corp., 558 F.Supp. 1297 (N.D. Ill. 1983) (The court held that any failure to warn could not have been the proximate cause

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of a plastic worker's injuries because the employer was aware of the dangers from heat override and had instructed workers to protect against those dangers.

- a. Some jurisdictions require the failure to warn to be the "producing" rather than proximate cause of the injury. "Producing" cause means an efficient, exciting or contributing cause which causes the injury through a continuous and unbroken sequence. Rourke v. Garza, 530 S.W.2d 794 (Tex. 1975).

IV Circumstances not Requiring a Warning

The theory behind requiring warnings on products is to make the user aware of harm that may result from the use of a product and give that user the information necessary so that he or she can make an informed decision on how and if to use the product. The consumer must be given the opportunity to avoid the hazard.

Kehm v. Proctor & Gamble Manufacturing Co., 724 F.2d 613 (8th Cir. 1983). (The court noted that had a proper warning been given regarding the dangers of TSS associated with the use of Rely tampons, the decedent might have recognized her symptoms and discontinued use of the product).

A. Open and obvious dangers.

Corbin v. Coleco Industries, Inc., No. 83-1578 (7th Cir. 1984) (Court held that dangers of diving into four (4) foot deep swimming pool were not open and obvious).

1. Common knowledge and experience of the user. Garrison v. Heublein, Inc., 673 F.2d 189-191 (7th Cir. 1982) (Hazards of alcohol use are common knowledge. No duty to warn and no cause of action allowed). Cipollone v. Liggett Group, Inc., 593 F. Supp. 1146 (D. N.J. 1984) (Action allowed against cigarette manufacturer in spite of warning on packs).

B. Danger known to the expert or professional in the trade.

Campbell v. Nordco Products, 629 F.2d 1258, 1262 (7th Cir. 1950) (Airplane mechanic supervisor killed when lift tipped over from raising it without extending stabilizers. Supervisor trained others not to do this).

Barger v. Charles Machine Works, Inc., 658 F.2d 582 (8th Cir. 1981) (Underground telephone cable installer injured).

C. Unforeseeable misuse.

Page v. Barlco Hydraulics, 673 F.2d 134 (5th Cir. 1982) (Worker killed when tree limb loader burst into flames. The defendant manufacturer argued that improper repairs to the machine were an unforeseeable misuse of the product and, therefore, it had no duty to warn of dangers of improper repairs).

1. Distinguished from reasonably anticipated although unintended use.

McGowne v. Challenge-Cook Bros., Inc., 672 F.2d 652 (8th Cir. 1982) (Mechanic decapitated while working on a cement mixer. The court held it was for the jury to decide if the method used by the decedent could have been reasonably anticipated by the manufacturer, or if it was unforeseeable so as to preclude liability).

D. Modified product.

1. Defect must exist at the time the product leaves the hands of the manufacturer, and the product must reach the user in a substantially unaltered condition for strict liability to apply.

RESTATEMENT (SECOND) OF TORTS § 402A(1)(b), comment p. (1977).

A user who modifies a product so as to render it unreasonably dangerous may not bring a claim based on strict liability for injuries attributable to the modification of the product. If, however, the modification was reasonably foreseeable by the manufacturer, then the defense of substantial modification will not be applicable.

Merriweather v. E. W. Bliss Co., 636 F.2d 42 (3rd Cir. 1980).

Hill v. General Motors Corp., 637 S.W.2d 382 (E.D.



Mo. 1952) (This is a negligence case which also discusses strict liability elements. Plaintiff modified a Chevrolet Blazer by making major changes in the suspension system. Plaintiff argued that General Motors had a duty to warn of the danger of the Blazer tipping over if so modified. The case was dismissed for failure to state a claim upon which relief could be granted).

2. Regular deterioration.

Hamilton v. Motor Coach Ind., Inc., 569 S.W.2d 571 (Tex. Civ. App. 1978).

V. Necessity of Warning and Criteria for Adequacy: "A closer look at the marketing defect."

A. Failure to provide any warning.

1. Whether a warning is required is to be determined by standards of reasonable care. This is a jury question in most situations.
Bly v. Otis Elevator Co., 713 F.2d 1040 (4th Cir. 1983).

2. This provides for the overlap between claims for negligent failure to warn and strict liability based on a marketing defect for no warning in some jurisdictions.

a. For recovery under either theory, the plaintiff must show that a reasonable manufacturer in the same circumstances would have provided a warning.

P. Sherman, Product Liability for the General Practitioner § 7:13 at 210-11.
Henkel v. R&S Bottling Co., 323 N.W.2d 185, 188 (Iowa 1982) (citing Cooley v. Quick Supply Co., 221 N.W.2d 763, 771 (Iowa 1974)).

b. Other jurisdictions draw a more distinct line between the two theories, and look only to whether the product marketed without a warning was unreasonably dangerous.

Jackson v. Coast Paint and Lacquer Co., 498 F.2d 809 (9th Cir. 1974).
See generally 2 L. Frumer & M. Friedman,

Products Liability § 16A[4][f][vi] at 3B-146 to 152.

3. The general rule is that a manufacturer or supplier has a duty to warn users of the dangers of a product, or provide instructions for the safe use of a product when: (1) the product is dangerous, (2) the manufacturer knows or should have known of the dangers at the time the product was sold, and (3) the user is unaware of the dangers. Osborn v. Massey Ferguson, Inc., 290 N.W.2d 893 (Iowa 1980).

a. If the product is dangerous to an extent beyond that which would be contemplated by the ordinary consumer, then a warning is required. RESTATEMENT (SECOND) OF TORTS § 402A comment j (1977).

B. Inadequate warnings.

1. Sufficiency or adequacy - a jury question.

a. Must attract attention of reasonably prudent person.

b. Must be clear and understandable.

c. Must convey the nature and extent of the danger.

Rhodes v. Interstate Battery System of America, Inc., 722 F.2d 1517 (11th Cir. 1984).

2. Elements to determine sufficiency or adequacy.

a. Prominence

i. Guarantee attention.

b. Location of warning.

i. Determined by seriousness of the risk. If very serious, the warning must be permanently affixed to the product.

c. Clarity v. vagueness.

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- d. Specific risk of harm and severity of degree of danger must be communicated.
Rhodes v. Interstate Battery System of America, Inc., 722 F.2d 1517 (11th Cir. 1984).
- e. Adequacy of warning may be weakened by representations of safety.
Gracyalny v. Westinghouse Electric Corp., 723 F.2d 1311 (7th Cir. 1983).
- f. Timeliness.
- g. Symbols.
 - i. Poison - Skull and Crossbones
Ziglar v. E. I. DuPont DeNemours & Co., 280 S.E.2d 510 (N.C. App. 1981) (Words "DANGER-POISON" and two red skull and crossbones on a clear container holding a liquid poison that looked like water was held not adequate as a matter of law. The court noted that the liquid should have been colored to distinguish it from water).
- h. Product design.
- i. Statutory provisions may be evidence of adequacy.
Bryant v. Technical Research Co., 654 F.2d 1337 (9th Cir. 1981).

VI. Lack of instructions.

- A. Distinguished from failure to warn of inherent dangers of a product.
 - 1. In failure to instruct cases, it is the absence of instructions on proper use that render the product unreasonably dangerous and therefore defective.
Jones v. Meat Packers Equipment Company, 723 F.2d 370 (4th Cir. 1983) (1,000 pound capacity meat mixer activated, although the stop button was pushed, cutting off part of the plaintiff's right hand while she was cleaning the mixer. There were no instructions with the machine on proper cleaning

procedures or the necessity of disconnecting the power source to avoid unintentional activation of the machine).

Pavlides v. Galveston Yacht Basin, Inc., 727 F.2d 330 (5th Cir. 1984)

VII. Who must be warned or instructed on use.

A. Buyer and those who may come in contact with the product.

1. The manufacturer has a duty to warn the ultimate consumer when it makes tangible items that can be labeled or sent into the stream of commerce with instructions for use. When the product is sold in bulk and packaged and labeled by a third party, the manufacturer's duty to warn only extends to the packager.

Groll v. Shell Oil Co., 148 Cal. App. 3d 444, 196 Cal. Rptr. 54 (1983).

Frazier v. Kysor Industrial Corp., 607 P.2d 1296 (Colo. App. 1976) (Manufacturer placing a product into the stream of commerce, which was made unreasonably dangerous through lack of warning, is liable to those who foreseeably may be injured along the path of delivery. Plaintiff, a moving man, was held to be a "consumer" for 402A purposes).

Pegg v. General Motors Corp., 391 A.2d 1074 (Pa. Super. 1978) (Held that plaintiff's status as a thief of the product was not by itself reason to deny recovery against the manufacturer. The concern of the court was that products be free from defects, regardless of whose hands they fall into).

Wentworth v. Kawasaki, Inc., 508 F. Supp. 1114 (D. N.H. 1981) (Friends and family members of purchaser of snowmobile are foreseeable users and therefore consumers under 402A).

2. Purchasers, including remote purchasers.
3. Employees of purchasers.
4. Users.
5. Bystanders (including recovery in some states for emotional distress from witnessing injury).

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Walker v. Clark Equipment Co., 320 N.W.2d 561 (Iowa 1982)).

6. Passengers.

B. Is warning the intermediary sufficient?

1. Reliability

2 Ease of transmission

C. Continuing duty to warn

1. The manufacturer is held to a duty to warn of latent dangers of which he becomes aware after the manufacture or sale of the product.
Cover v. Cohen, 61 N.Y.2d 261, 473 N.Y.2d 378 (Ct. App. 1984).

VII. Jury Instructions in Failure to Warn or Instruct Cases.

A. Specifics on which the court will instruct the jury.

(See Handout for examples)

1. Knowledge and experience of the injured party.

B. Achilles' Heel warning instructions.

(See Handout for examples)

VIII. Contribution and Indemnity.

- A. Three main types of allocation of loss among several defendants which may arise from either express contract or implication of law.

Phillips, Contribution and Indemnity in Products Liability, 42 Tenn. L. Rev. 85-95 (1974).

1. Pro rata division of liability.

- a. The amount of the judgment is divided by the number of tortfeasors - a type of contribution.

2. Allocation of liability on the basis of comparative fault.

a. The fact finder attributes the proportion of fault among the defendants - a type of contribution.

3. A complete shifting of liability for the judgment from one defendant to another.

a. Complete indemnity

B. Contribution.

1. A right to contribution arises when tortfeasors have common liability to a plaintiff and one pays more than his or her pro rata or proportional share.

Venters v. Michigan Gas Utilities Co., 493 F. Supp. 345 (W.D. Mich. 1980).

a. "When contribution is an issue, a percentage of the judgment must be allocated among all those liable" notwithstanding that liability for some was based on negligence and for others on strict liability.
Ladwig v. Ermanco, Inc., 504 F.Supp. 1229, 1237 (E.D. Wis. 1981) (The manufacturer of a conveyor system was sued by a purchaser's employee who suffered severe injuries when her hair was caught in the drive shaft of the conveyor. The manufacturer brought a third-party action for contribution against the installer and distributor. The manufacturer was held to be 55 percent at fault for design defects and failure to warn or properly instruct. The purchaser was held 35 percent at fault for dangerous work policies requiring employees to reach under the conveyor. The installer was found to be 7 percent at fault for violating statutory safety standards for guards around moving machinery. Finally, the distributor was found to be 3 percent at fault since it had reason to know that the conveyor would be dangerous for its intended use and failed to warn the purchaser.)



The employer was immune from liability under the Wisconsin Workers' Compensation Act, and the manufacturer had settled with the plaintiff. The court ordered that the employer's liability was to be considered a "common burden" for the defendants. Therefore, the settlement amount was divided among the three remaining defendants according to their relative share of fault: Manufacturer, 55/65ths; Installer, 7/65ths; and Distributor, 3/65ths. The court rejected the arguments of the installer and distributor that they merely be required to contribute 7 percent and 3 percent respectively, since that would have forced the manufacturer to bear the full burden of the employer's liability.

C. Indemnity.

This complete shifting of the loss appears to be the most equitable when the entire actual fault lies with the indemnitor, and the indemnitee is free from actual fault and is held liable "only because of some duty strictly imposed by statute or case law."

Phillips, Contribution and Indemnity in Products Liability, 42 Tenn. L. Rev. 85 (1974).

1. An example would be a wholesaler who merely passes on a product which should have included a warning from the manufacturer to the retailer.
2. Kicklighter v. Nails by Jannee, Inc., 616 F.2d 734 (5th Cir. 1980) (Reversed on other grounds). A buyer brought an action against the seller of fingernail restoration kits for serious health problems that allegedly resulted from use of the seller's product. The seller purchased the polymer in bulk from the manufacturer, the manufacturer did not provide any warnings of potential health hazards from use of the product to the seller or ultimate user. The seller brought a third party action against the manufacturer to indemnify it for any liability it was found to have to the plaintiff. This portion of the judgment was affirmed.

PRODUCT WARNINGS - NECESSARY? (PROBABLY) ADEQUATE?

(The Lawyers, Experts, Courts and Juries Speak)

- I. PRODUCT WARNINGS ARE NOT LEGALLY NECESSARY WITH RESPECT TO ALL PRODUCTS AND ALL CIRCUMSTANCES. IN A RELATIVELY FEW CASES COURTS HAVE HELD THE COMPLETE LACK OF WARNING TO BE LEGALLY DEFENSIBLE, ENABLING DISMISSAL FOR FAILURE TO STATE A CLAIM, SUMMARY JUDGMENT, OR OTHER APPROPRIATE SUMMARY REMEDY FOR DEFENDANT AS A MATTER OF LAW. OPENNESS AND OBVIOUSNESS OF THE DANGER IS SOMETIMES A CIRCUMSTANCE WHICH SUPPORTS THE LACK OF LEGAL NECESSITY FOR A WARNING.

Illustrative case decision: Garrison v. Heublein, Inc., 673 F.2d 189 (7th Cir. 1983).

Facts: Suit against manufacturer-distributor of Smirnoff vodka. Plaintiff alleged physical and mental injuries as a result of consuming defendant's product over twenty-year period. Suit included product (strict) liability based upon failure to warn of certain alleged propensities of the vodka, i.e. causing physical damage, impairment to physical and motor skills and mental capacity for a period of time following consumption, to be addictive, to affect the human personality, and to create dangers in the operation of a motor vehicle.

Holding: District court's dismissal of the complaint for failure to state a claim affirmed. No duty to warn in Illinois of the common propensities of alcohol, in view of common knowledge of dangers involved in use of alcoholic beverages. The 7th Circuit recognized Illinois case law, following Section 402A of the Restatement, was that a product faultlessly made could be deemed defective if the product were not safe for intended use and no warning given. However, it held that the Restatement's assertion that there is no duty to warn where the product is an alcoholic



beverage which has dangerous characteristics of common knowledge to consumers was also Illinois law.

Comparative case decision: Corbin v. Coleco Industries Inc., 748 F.2d 411 (7th Cir. 1984).

Facts: In the spring of 1978, plaintiff Joe Corbin, six feet tall, age 27, acquired an above-ground swimming pool manufactured by defendant Coleco. Corbin assembled the pool in his backyard and filled it to a depth of 4 feet. (Reported opinion does not indicate height of pool above the water level). The pool was equipped with a flat rim approximately 6 inches wide that circled the top of the pool. In the early evening of June 3, 1978, Corbin dove from the rim into the pool. He hit his head on the bottom of the pool, suffered a spinal cord injury, and became a quadriplegic as a result. Corbin had not previously used this particular above-ground pool or any other. Plaintiff's complaint included strict liability claim based on theory of defective product due to failure to warn against diving into the pool. No such warning appeared anywhere on the pool.

Holding: Applying Indiana law, the 7th Circuit reversed District Court's granting of Coleco's Motion for Summary Judgment.

In reaching its decision that the trial court erred in holding there was no duty to warn against diving into four feet of water because of the open and obvious danger of doing so, the Circuit Court relied heavily on the testimony of plaintiff's expert witness that although people are generally aware of the danger of diving into shallow water, they nevertheless believe there is a safe way to dive into shallow water; that is, by executing a flat, shallow dive with the arms outstretched in front of the person's head. (The reported decision does not discuss

the expert's qualifications or the merit of admitting his testimony). Plaintiff testified he intended to execute a "belly flopper" dive, but that "for some unknown reason--nobody knows why, I don't know why--when I got in the air, I bent in the middle and went straight in the pool instead of on my stomach."

The Circuit Court held that the testimony by the expert and Corbin created genuine issues of material fact as to whether the danger of executing a flat, shallow dive into four feet of water was open and obvious and, thus, as to whether Coleco negligently failed to warn Corbin of that danger. The Circuit Court downplayed testimony by Corbin that he was generally aware of the danger both before and after the accident. The Circuit Court said in a footnote that, with respect to Corbin's admitted general knowledge of the danger, the important question was: What did he know at the time of the accident? The Circuit Court also distinguished a case in which the 3rd Circuit Court of Appeals had reversed a jury verdict for a plaintiff on almost identical facts, Colosimo v. May Department Store Co., 466 F.2d 1234 (3rd Cir. 1972), by noting that the water in Colosimo was three feet deep rather than four, and the the plaintiff in Colosimo was a more experienced swimmer than Corbin.

Comments on Garrison, supra, and Corbin, supra:

(1) What qualifications must one possess to give expert opinions on what "people" "generally know" or "perceive" about

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the dangers of diving into shallow water?

(2) In Garrison, plaintiff was given no opportunity to present expert evidence on what "people" "generally know" about the dangers of consuming vodka.

(3) Did plaintiff's conduct in Garrison or in Corbin more clearly fly in the face of open and obvious danger?

(4) Does public policy suggest warning is more important with respect to shallow swimming pools than to alcoholic beverages?

Iowa: No duty to warn (at all) absent "substantial evidence" that defendant knew or had reason to know that product was a danger or that there was a likelihood of danger. Henkel v. R and S Bottling Company, 323 NW2d 185 (Iowa - 1982). Held: insufficient evidence to make jury issue on duty to warn with respect to danger of injury from breaking (by contact with another object) of a beverage bottle. See especially 323 NW2d at 189.

Duty to warn exists (at least jury issue does) with respect to: tendency of 1975 Ford pickup truck to get into reverse position from (or near) park position (gear shifting lever), LaCoste v. Ford Motor Co., 322 NW2d 898 (Iowa App - 1982); potential dangers in use of safety fuse to detonate dynamite, Cooley v. Quick Supply Company, 221 NW2d 763 (Iowa - 1974); danger of falling into auger of International Harvester forage blower, 367 NW2d 282 (Iowa App - 1985); dangers in use of wire slings if

loaded beyond rated capacities, West v. Broderick and Bascom Rope Co., 197 NW2d 202 (Iowa - 1972).

II. HOW CAN A LEGALLY IMPOSED DUTY TO WARN BE ADEQUATELY MET? THE PRODUCT RISK OR DANGER INVOLVED IN MOST CASES IS NOT SO OPEN AND OBVIOUS AS TO ESCAPE THE NEED FOR WARNINGS. WHAT MAKES A WARNING ADEQUATE OR SUFFICIENT TO ESCAPE LIABILITY?

A. Prominence and Location of the Warning.

The two factors of prominence and location are critical. If the warning is sufficient in content, its location and prominence may be appropriate enough to support judgment for defendant as a matter of law.

Illustrative case: Scott v. Black and Decker, Inc., 717

F.2d (5th Cir. 1983).

Facts: Plaintiff Scott was a pipe-fitter employed at a power plant. His foreman instructed him to cut through a temporary welding gas pipeline with a portable electric bandsaw manufactured by defendant, Black and Decker, rather than with a hand-operated pipe cutter, in order that Scott could cut through and remove the pipeline more quickly. Scott obtained the bandsaw from the tool room. A label on the bandsaw warned the user to read the bandsaw's owner's manual before using it. No other warnings were affixed to the bandsaw itself. Scott was not given the owner's manual which contained instructions and the actual warnings regarding use of the bandsaw.

The welding gas had been turned off in the temporary pipeline, and the pipeline itself had been opened to the atmosphere. However, the pipeline had not been flushed with air. Scott climbed up to the pipeline which was located near the ceiling. After he had cut about one-third of the way through the pipeline, an explosion occurred, knocking Scott 8 feet to the ground and causing him burns and back injuries. Scott sued Black and Decker under a Louisiana codification of strict product liability which recognized failure to warn as a

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potential product defect. He alleged that placing the warning in the owner's manual was not a reasonable location. He was not warned because the owner's manual was not given to him.

Holding: The District Court granted Black and Decker's motion for directed verdict at the close of all the evidence. The Fifth Circuit Court of Appeals affirmed, stating that Black and Decker complied with Louisiana law by taking reasonable steps to warn Scott of the danger of using the bandsaw in an explosive atmosphere, since the label affixed to the bandsaw instructed the user to read the owner's manual before using the bandsaw, and since the first page of the owner's manual specifically warned against using the bandsaw in an explosive atmosphere. The Fifth Circuit further noted that the first page of the owner's manual contained a total of 20 warnings and instructions regarding use of the bandsaw, and said that it would have been unreasonable for Black and Decker to have affixed a label to the bandsaw itself that would have carried all 20 warnings and instructions.

Comparative case decision: Dalton v. Toyota Motor Sales, Inc., 526 F.Supp. 575 (E.D.La. 1981) Rev'd 703 F.2d 137 (5th Cir. 1983).

Facts: Plaintiff Dalton purchased a 1978 Toyota Corolla early in 1978. On Christmas Eve, 1978, he left an office Christmas party and drove west on an interstate highway toward home. He became sleepy, parked his car heading east on the grass median of the interstate, left the engine idling, lit a cigarette, and fell asleep. Sometime later a passing motorist saw that Dalton's car was on fire and, on the third attempt, pulled Dalton from the burning car. The motorist testified there were no flames although there was smoke inside the car during

his first two attempts to rescue Dalton. Dalton suffered second and third degree burns on his head, face, hands and arms as the result of the fire.

Dalton sued Toyota under a strict liability theory of failure to warn of the allegedly dangerous tendency of the car's catalytic converter to overheat and cause fire.

The District Court granted Toyota judgment notwithstanding the jury's verdict for Dalton. The Fifth Circuit Court of Appeals reversed and remanded with instructions to reinstate the jury's verdict.

Plaintiff's evidence included testimony by an engineering and fire expert regarding the catalytic converter's tendency to overheat when the car was left idling. In the expert's opinion, the fire started underneath the car as the result of heat radiating from the catalytic converter, which caused the grass beneath the car to burn. He also gave the opinion that the fire did not start inside the passenger compartment of the car. He testified that earlier Toyota models (1975 through 1977) provided a dashboard warning light to advise an occupant of the car of actual overheating of the catalytic converter, and also to serve as a reminder to an occupant of the possibility of the catalytic converter overheating.

Toyota presented evidence that 1978 models, such as Dalton's, incorporated a device that would automatically shut off the car's engine in the event that the catalytic converter overheated. Toyota also presented evidence that Dalton's owner's



manual included a warning that the catalytic converter might overheat and cause a fire when the car's engine had been run at a fast idle for more than 10 minutes, at a normal idle for 20 minutes, or when the car had been parked over dry grass or "anything that might burn easily." Dalton himself testified that he had not read the owner's manual prior to the fire.

The Fifth Circuit held that reasonable persons could disagree as to whether Toyota had taken reasonable steps to warn Dalton of the possibility that the catalytic converter might overheat and cause a fire. Specifically, the Court noted that the jury could reasonably have found that the warning contained in Dalton's owner's manual was inadequate because of its location, noting that it is well known that owner's manuals are often not read. It said that Toyota acted unreasonably in eliminating dashboard warning lights from 1978 model Toyotas such as Dalton's. Since reasonable persons could have come to different conclusions regarding appropriateness of the warning the Court felt its reversal of the District Court's judgment NOV for Toyota was justified.

Comments: Compare Dalton with Scott supra, on the issue of prominence and location of warnings. In Scott, the warning was adequate as a matter of law when placed on the first page of the owner's manual. In Dalton, the jury was allowed to determine whether the warning was adequate when placed in the owner's

manual. The Fifth Circuit Court of Appeals decided both the Scott and Dalton cases.

The fact that Toyota eliminated the dashboard warning light in Dalton's car may serve to explain the court's seemingly conflicting opinions. Toyota argued that the dashboard warning light was made unnecessary by the automatic shut-off devices incorporated into Dalton's 1978 model Toyota. Compare the feasibility of retaining "unnecessary" dashboard warning lights in Dalton with Scott, where it was not feasible for Black and Decker to include on the label affixed to the bandsaw some 20 warnings and instructions. Would the Court in Scott have reached the same holding:

- (1) If the bandsaw had been a larger object and therefore, could have accommodated a larger label?
- (2) If Black and Decker had put some warnings on the saw, but not the specific warning at issue in this case?
- (3) Would expert testimony have helped Scott make a case against Black and Decker?

Iowa: Reasonable care by defendant is key in determining whether the location and prominence of the warning is sufficient to avoid jury issue. See Cooley v. Quick, supra; West v. Bascom Rope Company, supra (see especially language at 197 NW2d at 211, 212). See also Bandstra v. International Harvester, supra, (discussed later herein).

B. Communication of risk.

Even though prominent and effectively located, a warning

without the content necessary to communicate the nature and seriousness of the danger or risk will fall short of the legally imposed duty to warn. In addition to prominence and appropriate location warnings will probably have to:

1. Identify the nature and severity of the hazard. (TO AVOID DEATH V. DANGER; USE CAUTION V. FOLLOW THESE INSTRUCTIONS TO PREVENT INJURY).
2. Tell the potential user what to do in order to avoid the hazard.
3. Be clear, specific and to the point.
4. Possess a sufficient degree of permanence.
5. In some instances advise as to what to do in the event the hazard is not avoided.

In Bandstra v. International Harvester, et al, 367 NW2d 282 (Iowa App. 1985), the forage blower manufactured by International Harvester had two warning labels. One provided:

1. Keep all shields in place.
2. Stop machine to adjust and oil.
3. When mechanism becomes clogged, shut-off engine before cleaning.
4. Keep hands, feet, clothing away from all moving parts.
5. Keep off implements unless seat or platform is provided for riding purposes. Keep others off.

The other label provided: "Keep hands and feet out of the hopper when machine is connected to a power source."

Plaintiff fell from a silo ladder into the hopper (which contained the auger) of the forage blower.

Did the foregoing warning labels adequately communicate the

risk or danger of climbing a ladder over the auger so as to avoid a jury issue? "No," said the trial court and court of appeals.

[Note: the owners manual for the forage blower did contain a warning regarding climbing a ladder over the auger. Apparently the court felt a jury issue was made as to the reasonableness of the location of such warning, i.e. owner's manual warning not sufficient in this case to avoid jury issue].

Comments - Questions: Does the label contain adequate warning? As a matter of law? Does it communicate the danger or risk? Why or why not? How would you defend and argue to the jury with respect to the warning? Would an expert witness be a good idea for the defense? What would you hope (think) he (she) would say? How could the label be improved? What would you do on voir dire? Opening statements? Closing argument?

III. EVIDENCE ON THE ISSUE OF ADEQUACY OF WARNING IS LIKELY TO INCLUDE EXPERT TESTIMONY. LIKELY SOURCES OF EXPERT TESTIMONY INCLUDE:

1. The human factors experts;
2. Communications-language experts;
3. Technical and engineering professionals;
4. Industry and academic experts familiar with the particular product involved.

The use of human factors experts appears to be a relatively recent development that is burgeoning.

- A. See December 1984 For The Defense article "Uses of Human Factors Experts by Wallace and Key. This is an



excellent article detailing the history of the interdisciplinary field of human factors, the trend toward use of such experts, potential contribution of these experts to defense of products cases (including duty to warn cases) and basis for admissibility of the human factors opinions.

- B. See Vol 1 Products Liability, Frumer and Friedman, Sec. 5A.06 (1) and (2) for a review of decided cases in which human factors expert testimony was admitted.

Illustrative case: Tennis v. General Motors, 625 S.W.2d 218 (Mo. App. 1981). Trial court's discretion in admitting opinion on adequacy of automobile jack warning upheld. Qualifications approved.

Comparative case: Garwood v. International Paper Co., 666 F.2d 217 (5th Cir. 1982). Trial court's discretion in excluding opinion of human factors expert on issue of plaintiff's contributory negligence upheld in dive into swimming pool case. Qualifications sufficient, but opinion held not helpful to jury and directed to issue (contributory negligence) which was not beyond common understanding of the average person.

Comments: Human factors experts, if well qualified by education and experience, will undoubtedly be permitted to express opinions on appropriate issues. Each case must be carefully studied as to the qualifications of the witness, the issue being addressed by

the opinion, and the factual foundation for the opinion, in order to determine admissibility under the jurisdiction's applicable rules of evidence. See Federal Rules of Evidence 702-705. Is the offered opinion truly enlightening and helpful and is it based on sufficient factual foundation, so that a well qualified expert's opinion should be admitted? Or is the opinion "propaganda" or "window dressing" in that it does not truly add to the evidence as a whole, so that it should be excluded?

IV. EXHIBITS. A SELECTION OF EXHIBITS ILLUSTRATING VARIOUS LABELS, WARNINGS, AND INSTRUCTIONS COMPOSES A SUPPLEMENT TO THIS OUTLINE.

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SUPPLEMENT TO
DUTY TO WARN AND LABELING



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Jackson v. Coast Paint and Lacquer Company, 499 F.2d 809 (9th Cir. 1974). This was a case brought in strict liability for failure to warn. The cause of action was based on an explosion when fumes from an epoxy paint used on the inside of a tank caught fire. The label on the paint can was introduced into evidence. The warning first refers to the toxicity of the paint if injected, and then states:

"Keep away from heat, sparks, and open flame.
USE WITH ADEQUATE VENTILATION. Avoid prolonged
contact with skin and breathing of spray mist.
Close container after each use. KEEP OUT OF
REACH OF CHILDREN."

The District Court's instructions to the jury included the following:

"[B] Defendant had a duty to supply plaintiff or his employer with proper and adequate directions for the use of the paint and proper and adequate warnings concerning the dangers inherent in the paint....If the defendant had reason to believe that plaintiff or his employer knew or would discover the hazards inherent in the paint, then defendant had no duty to warn plaintiff or his employer of these dangers."

The 9th Circuit held this instruction to be erroneous in three respects:

(1) It suggested that liability is based on negligence rather than strict liability. "In strict liability it is of no moment that defendant 'had reason to believe.' Liability arises from 'sell[ing] any product in a defective condition unreasonably dangerous to the user or consumer.' It is the unreasonableness of the condition of the product, not of the conduct of the defendant, that creates liability. (Emphasis added.)

(2) The instruction presented the wrong issue. "It is not the knowledge actually possessed by the plaintiff, individually, that determines whether the absence of warning renders a product unreasonably dangerous....On the issue of duty to warn, however, the question to be put to the jury is whether 'the danger, or potentiality of danger, is generally known and recognized'; whether the product as sold was 'dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.'"

(3) The instruction was erroneous in its statement that knowledge of the hazard on the part of the plaintiff's employer would relieve any duty to warn the plaintiff. "Besides improperly focusing on the knowledge of an individual rather than general

or common knowledge, this (instruction) erroneously concedes the 'community' whose common knowledge the jury is to ascertain. The seller's duty under §402A is to 'the ultimate user or consumer.' ...the adequacy of warnings must be measured according to whatever knowledge and understanding may be common to painters who will actually...use the paints; ...superior knowledge and understanding of paint contractors is irrelevant."



Hamilton v. Hardy, 549 P.2d 1099 (Colo. App. 1976).

This case involved the product Ovulen, an oral contraceptive which plaintiff took on the advice of her physician. The plaintiff ultimately suffered a stroke, and, as a result, sued the manufacturer on three theories: negligence, breach of warranty, and strict tort liability for failure to warn.

The trial court instructed the jury as follows:

"[In strict liability as in negligence] reasonable care is 'that degree of care which a reasonably prudent drug manufacturer would use under the same or similar circumstances,' and that negligence means 'a failure to do an act which a reasonably prudent drug manufacturer would do, or the doing of an act which a reasonably prudent drug manufacturer would not do under the same or similar circumstances.'"

The jury was then instructed that for the plaintiff to prevail, they must find that "the defendant was negligent in marketing of Ovulen by failing to use reasonable care to warn the medical profession on the question of whether Ovulen causes thrombosis." (See 2 L. Frumer & M. Friedman, Products Liability §16A (4)(f) (vi) at 3B-151 to 152.)

The trial judge in this case refused to give an instruction on the theory of strict liability because it perceived no difference between a negligence claim for failure to warn and a strict liability claim for failure to warn. On appeal, the court held that, even though the evidence which proves a failure to warn is the same under both theories, the theories are not identical.

"Thus the question to be posed to the jury with regard to the strict liability issue is whether the manufacturer's failure to adequately warn rendered the product unreasonably dangerous without regard to the reasonableness of the failure to warn judged by negligence standards. On remand, the jury should be so instructed."

Plaintiff Smith was seriously burned in an accident in his work place, and he brought an action based on both strict liability in tort and negligence for failure to warn. The District Court returned a verdict for the defendant, and the plaintiff appealed. The plaintiff alleged, inter alia, that the trial court instruction on the failure to warn claims was erroneous and prejudicial.

1. The plaintiff asserted that the trial court erred in defining "unreasonably dangerous" in the instructions. On appeal, the 5th Circuit held that it was true that a portion of the instructions could be interpreted by an attorney as "applicable if a design defect were at issue, which is not the case here. Nevertheless, the portion of the charge quoted in the margin is a tolerably accurate, albeit incomplete, statement of the law in a failure to warn case." (There was an additional, particularized charge on failure to warn given to the jury.) The questioned instruction provided as follows:

"A DEFECTIVE CONDITION is a condition not known or contemplated by the user which is unreasonably dangerous to him. For a product to be UNREASONABLY DANGEROUS it must be more dangerous than would be contemplated by the ordinary user with the ordinary knowledge common to the community of foreseeable users as to its characteristics or use.

Further, to be UNREASONABLY DANGEROUS a product must create an unreasonable risk of harm to the ordinary user when the product is used in a manner which can be reasonably foreseen and anticipated by the manufacturer of the product.

Further, the degree of danger in the ordinary use of a product must be so great that an ordinarily prudent manufacturer having knowledge of such risk or danger would not undertake to manufacture such product.

The Court further will instruct you that a product may be defective because of the failure of a manufacturer to give timely and adequate warnings about the use of the product if said product was unreasonably dangerous."

2. The plaintiff also asserted that the court's use of the term "unreasonably dangerous" in the portion of the charge dealing with the negligence issues fatally misled the jury. During the trial, however, at the insistence of the plaintiff, the judge called the jury back after it had begun deliberation and gave a clarifying charge in which he told the jury that the term "unreasonably dangerous" applied solely to the strict liability claims. The court of appeals held that, in light of the above clarification and the closing arguments during the



trial, the jury instructions gave sufficient guidance and were not misleading.

3. Plaintiff also alleged error concerning the court's instruction on Borg-Warner's duty to warn. The trial court instructed the jury that it could take into account the experience of the personnel handling the material which caused the accident. Plaintiff contended that the language in the instruction required the jury to find that the personnel were experts in compounding plastics. The court of appeals, however, held that the instruction did no more than tell the jury that they might consider the uncontroverted evidence that the personnel involved had some experience in handling chemicals of this kind. That instruction stated:

"You are instructed that, in considering whether any warning was required and, if so, whether any warning that may have been given was adequate, you may take into account that A. Schulman and its personnel at Orange were accustomed to compounding powder, including ABS, and had expertise in the characteristics of such powders and the precautions required in compounding and handling them.

Therefore, you are instructed that, if, by virtue of the experience, training, and expertise of A. Schulman and Donald Smith, you should find from a preponderance of the evidence that there was no requirement to give them a warning concerning the handling and compounding of ABS, or, if you should find from a preponderance of the evidence that such warning as you may conclude was given was adequate or if you should find that no warning was given but that facts would not have changed the manner in which A. Schulman compounded ABS and would not have prevented Donald Lee Smith's injury, then you will find for the defendant and against the plaintiff's contention on the question of warning under the product liability."

Bridges v. Chemrex Specialty Coatings, Incorporated, 704 F.2d 175 (5th Cir. 1983).

Plaintiff, an injured construction worker, brought a products liability action against the manufacturer of a concrete curing chemical. An empty drum of this chemical caught fire and exploded causing plaintiff's injuries.

The Supreme Court of Louisiana has held that strict liability and negligence concepts are substantially the same in Louisiana, except for the element of the defendant's knowledge of the risk involved. Kent v. Gulf States Utilities Company, 418 So. 2d 493 (La. 1982).

Plaintiff Bridges challenged a portion of the jury instructions which read:

"A product is not unreasonably dangerous or defective merely because it is possible to be injured while using it. In the case of Kem-Cure and its container, the law does not impose a duty to produce a product which is absolutely safe for the user under any and all conditions but merely requires that the product not be hazardous to normal use."

Bridges contended that the instruction was proper only for a negligence claim, and was insufficient as to the strict liability claim for failure to warn. The 5th Circuit held that, since the full instruction on strict liability did not restrict plaintiff's right to recover by requiring knowledge of the risk on the part of the manufacturer, there was no reversible error as to the strict liability claim because the instruction was an adequate statement of the law.

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Plaintiff filed a product liability action based on strict liability for failure to warn users of potential dangers in the use of an elevator cable. The challenged instruction was found to be in error because it distorted the duty of the manufacturer to warn in a case sounding in strict liability. The instructions stated:

"The manufacturer has a duty to warn users of the dangerous character of its products insofar as it is known to the manufacturer if, but only if, the manufacturer has no reason to expect that those for whose use the product as supplied will discover its condition and realize the danger involved."

While the court found that this instruction was in error, it held that it was not prejudicial and therefore not a ground upon which to grant a new trial. The Montana court noted that under strict liability the duty to warn is measured by an objective standard: the care which would be exercised by a reasonable seller or expected by the ordinary consumer. This standard focuses on the condition of the product and the degree of danger which would be tolerated by the reasonable manufacturer, apprised of the danger, would not sell the product without a warning. The negligence standards, according to the Montana court, are measured by subjective criteria. The negligence theory focuses on the degree of care used by the particular defendant manufacturer. The subjective standard of care is measured by the knowledge and reasonable expectations of the purchaser and of the manufacturer. The plaintiff in this case had failed to prove causation, and therefore the court did not reverse on the basis of the erroneous instructions.



(Label on band saw)

CAUTION: For safe operation see instruction manual.

(Key warning from band saw owner's manual)

20. DO NOT OPERATE portable electric tools in gaseous or electric atmospheres. Motors in these tools normally spark, and the sparks might ignite fumes.



SAFETY RULES FOR POWER TOOLS

- KNOW YOUR POWER TOOL**—Read owner's manual carefully. Learn its applications and limitations as well as the specific potential hazards peculiar to this tool.
- GROUND ALL TOOLS — UNLESS DOUBLE-INSULATED.** If tool is equipped with three-prong plug, it should be plugged into a three-hole electrical receptacle. If adapter is used to accommodate two prong receptacle, the adapter wire must be attached to a known ground. Never remove third prong.
- KEEP GUARDS IN PLACE** and in working order.
- KEEP WORK AREA CLEAN.** Cluttered areas and benches invite accidents.
- AVOID DANGEROUS ENVIRONMENT.** Don't expose power tools to rain. Don't use power tool in damp or wet locations. And keep work area well lit.
- KEEP CHILDREN AWAY.** All visitors should be kept safe distance from work area.
- STORE IDLE TOOLS.** When not in use, tools should be stored in dry, high or locked-up place — out of reach of children.
- DON'T FORCE TOOL.** It will do the job better and safer at the rate for which it was designed.
- USE RIGHT TOOL.** Don't force small tool or attachment to do the job of a heavy duty tool.
- WEAR PROPER APPAREL.** No loose clothing or jewelry to get caught in moving parts. Rubber gloves and footwear are recommended when working outdoors.
- USE SAFETY GLASSES** with most tools. Also face or dust mask if cutting operation is dusty.
- DON'T ABUSE CORD.** Never carry tool by cord or yank it to disconnect from receptacle. Keep cord from heat, oil and sharp edges.
- SECURE WORK.** Use clamps or a vise to hold work. It's safer than using your hand and it frees both hands to operate tool.
- DON'T OVERREACH.** Keep proper footing and balance at all times.
- MAINTAIN TOOLS WITH CARE.** Keep tools sharp at all times, and clean for best and safest performance. Follow instructions for lubricating and changing accessories.
- DISCONNECT TOOLS.** When not in use, before servicing; when changing accessories such as blades, bits, cutters, etc.
- REMOVE ADJUSTING KEYS AND WRENCHES.** Form habit of checking to see that keys and adjusting wrenches are removed from tool before turning it on.
- AVOID ACCIDENTAL STARTING.** Don't carry plugged-in tool with finger on switch. Be sure switch is off when plugging in.
- OUTDOOR USE EXTENSION CORDS**—When tool is used outdoors, use only extension cords suitable for use outdoors and so marked.
- DO NOT OPERATE** portable electric tools in gaseous or explosive atmospheres. Motors in these tools normally spark, and the sparks might ignite fumes.

ADDITIONAL SAFETY RULES—SAWS

- DISCONNECT PLUG** from power supply before changing blades, inspecting, cleaning or when saw is not being used.
- KEEP HANDS AWAY** from cutting area.
- WHEN SAWING** never reach underneath the material for any reason.
- KEEP BLADE SHARP.** Dull blades may cause the saw to swerve or stall under pressure.
- IF YOU DROP THE SAW,** unplug it first; then check all external parts including blade and blade guard. Repair or replace damaged parts before using saw.
- KEEP REAR BLADE GUARD** in place and in working order.

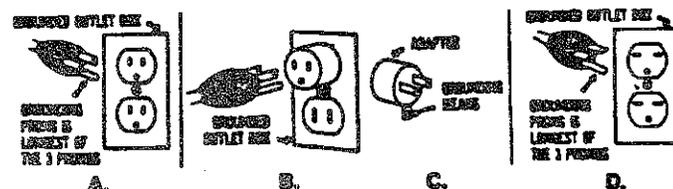
GROUNDING INSTRUCTIONS

This tool should be grounded while in use to protect the operator from electric shock. The tool is equipped with an approved three-conductor cord and three-prong grounding type plug to fit the proper grounding type receptacle. The green (or green and yellow) conductor in the cord is the grounding wire. Never connect the green (or green and yellow) wire to a live terminal.

If your unit is for use on less than 150 volts, it has a plug like that shown in Figure A.

If it is for use on 150 to 250 volts, it has a plug like that shown in Figure D.

An adapter, Figures B and C, is available for connecting Figure A plugs to two-prong receptacles. The green-colored rigid ear, lug, etc., must be connected to a permanent ground such as a properly grounded outlet box. No adapter is available for a plug as shown in Figure D. Adapter shown in Figure B & C is Not for Use in Canada.



We recommend that you **NEVER** disassemble the tool or try to do any rewiring in the electrical system. Any repairs should be performed only by B&D Service Centers or other qualified service organizations. Should you be determined to make a repair yourself, remember that the green colored wire is the "grounding" wire. Never connect this green wire to a "live" terminal. If you replace the plug on the power cord, be sure to connect the green wire only to the grounding (longest) prong on a 3-prong plug.

MOTOR

Your Black & Decker tool is powered by a B&D-built motor. Be sure your power supply agrees with voltage marked on nameplate. Volts 50/60 Hz means Alternating Current only. Volts DC-60 Hz means it will also operate on Direct Current. Voltage variation of more than 10% will cause loss of power and over-heating.

MOTOR BRUSHES

Inspect carbon brushes frequently (first unplug tool) by removing the brush inspection caps (Figure 1, next page) and withdrawing the brush and spring assembly. Replace when brushes are worn down to the identifying letter or groove or when spring exerts insufficient pressure to hold brush against commutator. Keep brushes clean and sliding freely in guides.

EXTENSION CORD

When using the tool at a distance from power source, a 3-wire, grounding-type extension cord of adequate size must be used for safety and to prevent loss of power and over-heating. Use the table below to determine the minimum wire size required in an extension cord.

Use only three-wire extension cords which have three-prong grounding-type plugs and three-pole receptacles which accept the tool's plug. Replace or repair damaged cords.

Ampere rating (on nameplate)	0 to 2.0	2.10 to 3.4	3.5 to 5.0	5.10 to 7.0	7.10 to 12.0	12.1 to 16.0
Ext. Cable length	Wire Size (A.W.G.)					
25 ft.	18	18	18	18	16	14
50 ft.	18	18	18	16	14	12
75 ft.	18	18	16	14	12	10
100 ft.	18	18	14	12	10	—
150 ft.	16	14	12	12	—	—
200 ft.	16	14	12	10	—	—

BLADES

The Portable Band Saw uses only blades that are .020" thick, 1/2" wide and 44 7/8" long. CAUTION: The use of any other blade or accessory might be hazardous. DO NOT use any other type of accessory (other than the correct size blade) with your Band Saw. Blades used on stationary band saws are

of different thickness. Do not attempt to use them on your portable unit.

Blades recommended for cutting different materials with your saw are listed in the table below.

MATERIAL THICKNESS OR WALL THICKNESS	USE HIGH SPEED ON 2 SPEED SAW OR USE SINGLE SPEED SAW		USE LOW SPEED ON 2 SPEED SAW ONLY	
	TO CUT	COPPER BRASS, ALUMINUM & PLASTIC OR ANGLE IRON PIPE, MILD STEEL CAST IRON	TO CUT	TOUGHER STEELS, CABLE OR STAINLESS STEEL, CHROME & TUNGSTEN STEEL, OTHER PROBLEM MATERIALS
3/16" to 7/8" AND LARGER	10 TOOTH HIGH		SPEED STEEL	Cat. No. 31212
	10 TOOTH ALLOY		STEEL	Cat. No. 31206
	10 TOOTH CARBON STEEL			
5/32" to 3/4"	14 TOOTH HIGH		SPEED STEEL	Cat. No. 31213
	14 TOOTH ALLOY		STEEL	Cat. No. 31207
	14 TOOTH CARBON STEEL			
1/8" to 1/2"	18 TOOTH HIGH		SPEED STEEL	Cat. No. 31214
	18 TOOTH ALLOY		STEEL	Cat. No. 31209
	18 TOOTH CARBON STEEL			
3/32" to 1/8"	24 TOOTH HIGH		SPEED STEEL	Cat. No. 31215
	24 TOOTH ALLOY		STEEL	Cat. No. 31209
	24 TOOTH CARBON STEEL			

High-Speed Steel & Alloy Steel Blades

These blades are used for cutting harder metals (use 2 Speed Saw at low speed), and will outlast carbon steel blades when cutting softer metals. Both types will cut tool steel, high-speed steel, drill rod and similar materials (see table above).

Some experimentation will determine which type of blade has the longest life on your cutting applications. Factors that may favor one type of blade over the other are operator technique, twisting, binding and the material being cut.

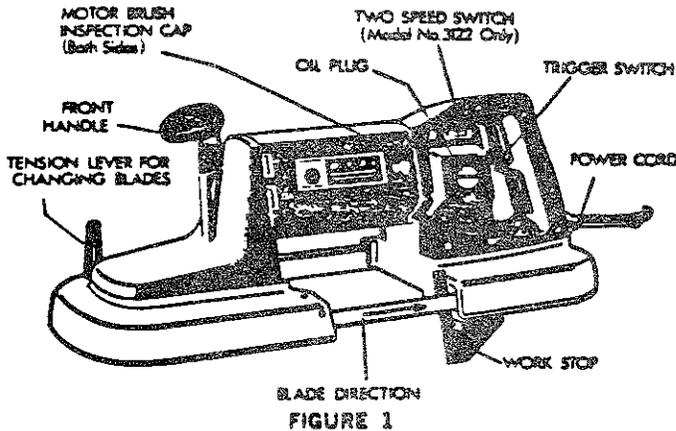


FIGURE 1

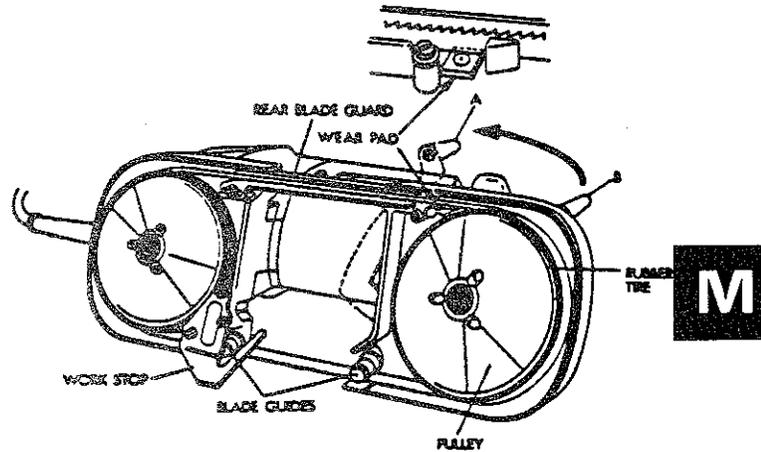


FIGURE 2

CHANGING BLADES

1. FIRST, UNPLUG THE BAND SAW.
2. Turn the Saw upside down with power cord to left (Figure 2).
3. Pull the Tension Lever toward the center of the tool into position "A" (Figure 2). Remove the blade from the pulleys first, and from the blade guides last.
4. Inspect the blade guides and remove any large chips which may have lodged in them. These chips can prevent the guide from turning, and extended use with a lodged blade guide can wear a flat on the roller.
5. Wipe any metal particles off of the rubber pulley tires. This

will prevent the blade from slipping and will extend the life of the tires.

6. Install the new blade with the teeth facing toward the power cord (Figure 1). Put the blade under the work stop first, then onto pulleys and finally, twist the blade slightly to fit it into the two blade guides.
7. Push tension lever into locked position, "B" (Figure 2), making sure that it is completely forward.
8. Start and stop the saw to be sure that blade is seated properly and is riding on top of wear pad as shown in Figure 2.

OPERATION

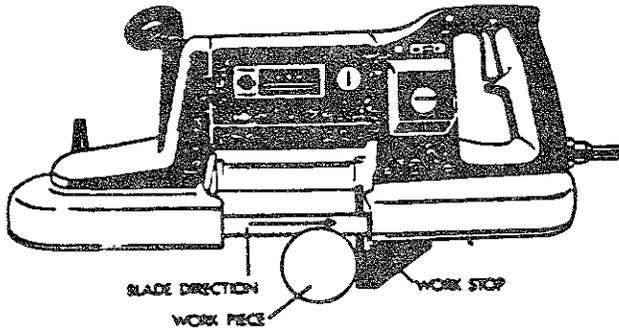


FIGURE 3

- 1 Mount the material to be cut solidly in a vise or other clamping device.
- 2 For No. 3122 2-Speed Band Saw only: Select speed. See top of Blade Selection Chart for recommendations. Speed can also be changed when tool is running.
- 3 Turn the Saw "ON" before lowering blade onto work. This will help prevent tooth breakage. Always start cutting with the work piece back against the work stop (Figure 3). Normally, blade direction and cutting force will keep the work against the work stop where it belongs.
- 4 Watch the blade while cutting so that you can guide the Saw to cut straight. Any twisting or cocking of the blade in the cut increases the risk of blade breakage.
- 5 The tool's own weight provides the most efficient downward cutting pressure. Added operator pressure slows the blade and reduces blade life.
- 6 End pieces which would be heavy enough to cause injury when they drop after cut off, should be supported. Safety shoes are strongly recommended for cut off work.
- 7 Hold the Saw firmly so that it does not fall against clamped or supported material when the cut is completed.
- 8 Recommended positions for cutting various material shapes are shown below.

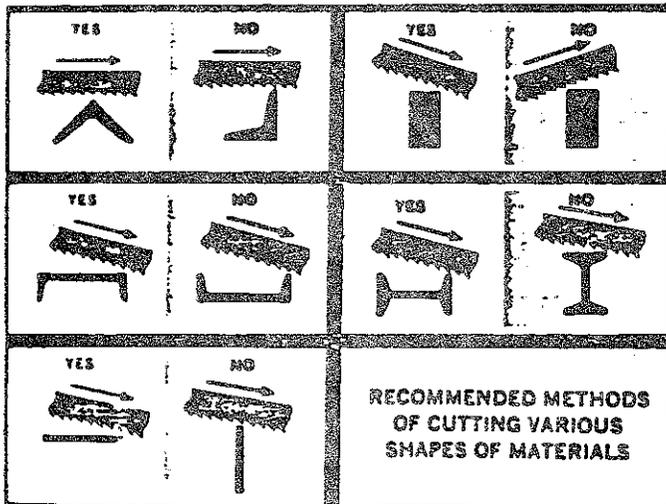


FIGURE 4

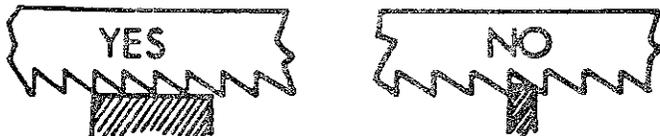


FIGURE 5

TIPS FOR BETTER CUTTING

The following recommendations should be used only as a guide. Results may vary with the operator and the particular material being cut.

1. At least two teeth of the selected blade should always be engaged in the material (Figure 5). Otherwise, the moving teeth will tend to grab the material causing tooth breakage and possible blade failure. Thin materials will require fine pitch blades (more teeth per inch).
2. Softer materials require coarser pitch blades (fewer teeth per inch) because the softer materials tend to fill the smaller gullets (Fig. 6) of fine pitch blades causing blade overheating and possible failure.
3. Harder materials require finer pitch blades (more teeth per inch). Because there are more teeth in the blade, each tooth does less work and will stay sharp longer.
4. The finish of the cut on any material will improve by using finer pitch blades (more teeth per inch).
5. The saw will cut faster if a coarser pitch blade (less teeth per inch) is used. However, at least two teeth should be engaged or tooth breakage and blade failure may result.
6. When cutting Brass or Aluminum, particularly thick sections or solid bars, stick wax such as #140 Johnson's Stick Wax is recommended. The stick wax should be applied by light pressure of the wax against the moving blade teeth. The wax should be reapplied intermittently for most efficient cutting. NOTE: Do not use wax excessively as it may adhere to pulley tires and cause blade slippage. Make sure pulley tires and blade are wiped clean of wax after aluminum cutting is complete or between cuts if problems occur.

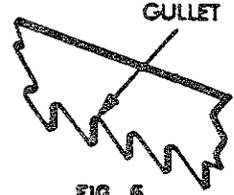


FIG. 6

LUBRICATION

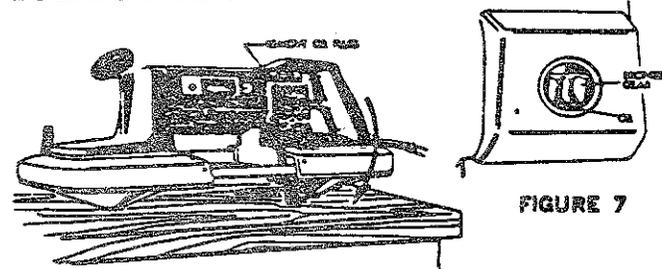


FIGURE 7

Your Band Saw was filled with oil to the proper level at the factory and should not "use" oil under normal circumstances. Check the oil level every 4 to 6 months unless leakage occurs. Then check more frequently.

To check the oil level

1. Rest the saw on a flat surface, tilting the oil plug toward you until the work stop touches the surface. Prop the saw in this position (Figure 7).
2. Remove the oil plug and observe the oil. The oil level must be visible on the gear, but must not run out (Figure 7).
3. If it is not visible at the bottom of the gear as shown in Figure 7, then oil should be added. Add oil little by little allowing it to settle. Fill to level shown without allowing oil to run out.

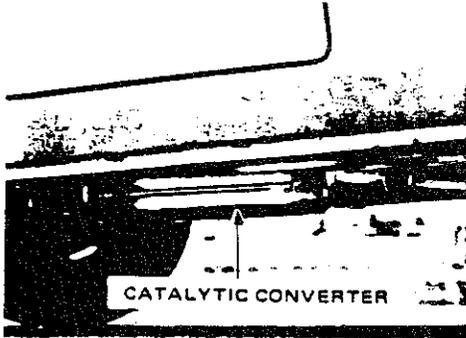
It is very important that the proper oil level be maintained in your saw as insufficient oil will cause excessive gear wear. Never fill the gear chamber completely. Overfilling will cause the pumping action of the gears to build up pressure and force oil through the seals and into the motor chamber. This could cause motor failure.

Always use Black & Decker Worm Drive Gear Oil Catalog No. 60086, 5 oz. tube. Use of regular motor oil may cause excessive gear wear.

CLEANING

1. Clean the outside of the Band Saw only with a rag. Do not use any solvents or abrasive cleaners.

An important warning
about the catalytic converters



The catalytic converter is an emission control device installed in the exhaust system. It is installed only on Corollas sold in the U.S.A.

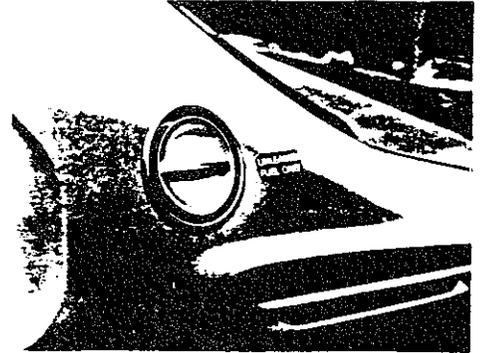
The catalytic converter looks somewhat like a muffler, but it performs an important job in maintaining cleaner air.

If a large amount of unburned gasoline flows into the converter, it may overheat and create a fire hazard. To prevent this, observe the following precautions:

- Do not drive with an extremely low fuel level. This may cause engine misfire which creates an extra load for the converter

information for the new owner—section 1

Gasoline recommendation



For cars sold in the U.S.A., you must use only UNLEADED fuel: Anti-knock index 87 (91 research octane no.) or higher.

To help prevent gas station mixups, all Corollas sold in the U.S.A. have a new smaller gas tank opening. The special nozzle on pumps with unleaded gas will fit it, but the larger standard nozzle on pumps with leaded gas will not fit.

- Do not allow the engine to run at fast idle speed for more than 10 minutes or at normal idle speed for more than 20 minutes.
- Do not park the car over dry grass or anything else that might burn easily
- Do not turn off the ignition while the car is moving.



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LEGISLATIVE UPDATE

By
E. Kevin Kelly
1400 Dean Avenue
Des Moines, Iowa 50316

I. Bills of Specific Interest to Defense Lawyers

SF 70 - SF 329 - SF 423 - HF 150

II. Bills of General Interest to Attorneys

SF 24 - SF 25 - SF 244 - SF 289 - SF 377 - SF 378
SF 561 - SF 570 - SF 577 - HF 29 - HF 128 - HF 421
HF 484 - HF 495 - HF 550 - HF 696 - HF 761 - SJR 3

III. Bills of General Interest to Society

SF 395 - HF 451 - HF 225 - HF 570 - HF 381



Senate Files Passed

SJR 3

Effective date: Requires voter ratification

A joint resolution proposing an amendment to the constitution of the state of Iowa to allow the general assembly to specify by law when acts of the general assembly take effect.

SF 9

Effective date: 7/1/85

A bill for an act relating to the operation of all-terrain vehicles subject to penalties provided by law.

SF 13

Effective date: 5/31/85

A bill for an act to allow certain nonprofit corporations owning property in this state an extension of time to appeal to the local board of review its property assessment values for designated assessment years and to allow refunds of taxes paid for designated tax years.

SF 15

Effective date: 7/1/85

A bill for an act relating to the designation of the Grand river.

SF 24

Effective date: Retroactive to 1/1/84 and 1/1/85

A bill for an act to impose a state alternative minimum tax to replace the state minimum tax under the individual income tax and making the act retroactive.

SF 25

Effective date: 7/1/85

A bill for an act relating to life-sustaining procedures by providing a procedure for declarations by certain competent adults that life-sustaining procedures may be withheld or withdrawn; providing for revocations; providing a procedure in absence of a declaration; providing for transfers; providing immunity from liability; prohibiting destruction, concealment or forging of declarations or revocations; providing penalties; and providing other matters properly relating thereto

SF 27

Effective date: 7/1/85

A bill for an act relating to the investment policies for funds available to certain state agencies.

SF 32

Effective date: Vetoed

A bill for an act to establish a minimum price for certain agricultural commodities sold within the state, providing for supply management and orderly marketing, and providing a penalty.

SF 55

Effective date: 3/20/85

A bill for an act relating to fur harvester and hunting licenses and providing an effective date by publication.

SF 63

Effective date: 7/1/85

A bill for an act relating to the approval of attorney fees by the department of job service.

SF 70

Effective date: 7/1/85

A bill for an act relating to the rights and duties of a person riding a bicycle on the highway, including a penalty.

SF 77

Effective date: 7/1/86

A bill for an act requiring that the first day of school not be sooner than the first day of September except under certain conditions and providing an effective date.

SF 78

Effective date: 7/1/85

A bill for an act requiring the state board of public instruction to adopt a five-year plan regarding education.

SF 79

Effective date: 5/3/85

A bill for an act to establish an Iowa advance funding authority, providing for the authority to issue revenue bonds, defining its powers and duties, and providing for the issuance of tax and revenue anticipation notes for certain purposes and providing an effective date

N

SF 81

Effective date: 7/1/85

A bill for an act permitting a qualified organization to conduct a raffle at a fair if the organization has the permission of the sponsor of the fair and obtains a license to conduct the raffle

SF 85

Effective date: 7/1/85

A bill for an act relating to the application for and issuance of search warrants.

SF 90

Effective date: 7/1/85

A bill for an act to prohibit adverse personnel actions against state employees based upon the employees declining to participate in contributions or donations to charitable or community organizations

SF 103

Effective date: Upon publication

A bill for an act authorizing the board of supervisors to sell or lease a county hospital for use as a private hospital with voter approval.

SF 110

Effective date: 7/1/85

A bill for an act prohibiting the treasurer of state from purchasing a security issued by or depositing money in a financial institution participating in loans to the Republic of South Africa, prohibiting funds of the Iowa public employees' retirement system or institutions controlled by the state board of regents from being invested or deposited in financial institutions or companies which invest in or do business in or with the Republic of South Africa, providing for divestiture of the investments, and providing for civil penalties.

N SF 113

Effective date: 7/1/85

A bill for an act relating to the health data commission by delaying the termination of the commission requiring certain members of the commission to implement common medical reimbursement reporting forms, and permitting the commission to initiate a review of collection of information relating to long term care and home health care

SF 117

Effective date: 3/28/85

A bill for an act relating to the Iowa family farm development authority by revising definitions amending requirements relating to the board and imposing conditions on loans made by the authority to a beginning farmer

SF 121

Effective date: 7/1/85

A bill for an act relating to nonsubstantive code corrections.

SF 128

Effective date: 7/1/85

A bill for an act relating to the use of certain funds for the elimination of asbestos from school buildings.

SF 149

Effective date: 7/1/85

A bill for an act relating to the acceptance of the federal rehabilitation acts

SF 150

Effective date: 7/1/85

A bill for an act relating to the appointment date for a secretary of a school board.

SF 154

Effective date: 7/1/85

A bill for an act relating to the duties of the secretary for the state board of engineering examiners

SF 156

Effective date: 7/1/85

A bill for an act relating to programs administered by the Iowa college aid commission, to establish an Iowa college work-study program, and to change the method of administering the state scholarship program

SF 157

Effective date: 5/28/85

A bill for an act permitting a savings and loan association to obtain deposit insurance from an insurance plan approved by the supervisor of savings and loans or permitting a savings and loan association to voluntarily liquidate in lieu of obtaining and maintaining the insurance

SF 163

Effective date: 7/1/85

A bill for an act relating to the authority of the department of water, air and waste management to regulate water use and embodying a general plan of water allocation priorities for this state

SF 168

Effective date: 7/1/85

A bill for an act relating to the time period when volunteer fire fighters are acting in the course of employment for purposes of workers compensation benefits.

SF 172

Effective date: 7/1/85

A bill for an act increasing the maximum amount of credit life insurance that may be written to insure the life of a debtor.

SF 183

Effective date: 7/1/85

A bill for an act to provide resale rights to a holder of a motorcycle or motorcycle parts franchise upon termination of the franchise.

SF 194

Effective date: 7/1/85

A bill for an act striking the semiannual reporting requirement by mobile homepark licensees, and providing a civil penalty

SF 200

Effective date: 5/4/85 and 7/1/85

A bill for an act relating to the office of the appellate defender

SF 213

Effective date: 7/1/85

A bill for an act relating to the imposition of mandatory minimum sentences

SF 215

Effective date: 7/1/85

A bill for an act requiring a free and appropriate public education for children requiring special education

SF 218

Effective date: 7/1/85

A bill for an act relating to the return of juveniles alleged to be delinquent from another state under the interstate compact on juveniles.

SF 224

Effective date: 7/1/85

A bill for an act relating to discrimination on the basis of gender and marital status.

SF 230

Effective date: 7/1/85

A bill for an act relating to qualifications of sureties.

SF 241

Effective date: 7/1/85

A bill for an act relating to membership on the interagency coordinating council on radiation safety.

SF 244

Effective date: 7/1/85

A bill for an act for the collection of support obligations relating to the posting of security, the ordering of assignments of income by the clerk of the district court or the child support recovery unit, the attachment of liens, and the modification of certain limitations on paternity actions

SF 250

Effective date: 7/1/85

A bill for an act relating to the provision of statewide library services by the reorganization of the state library of Iowa and the regional library system.

SF 254

Effective date: 7/1/85

A bill for an act relating to the administrative endorsements and certificates issued by the board of educational examiners

SF 261

Effective date: 7/1/85

A bill for an act relating to the residence of township officers.

SF 264

Effective date: 7/1/85

A bill for an act to eliminate the net worth eligibility requirement for loans from the conservation practices revolving loan fund.

SF 266

Effective date: 7/1/85

A bill for an act relating to veteran preference in public employment and providing an effective date

N

SF 269

Effective date: 7/1/85

A bill for an act relating to and making appropriations to various state regulatory and licensing departments, boards, and commissions.

SF 271

Effective date: 7/1/85

A bill for an act relating to refund of tuition policies of certain postsecondary institutions and to prescribe a penalty.

SF 286

Effective date: 3/22/85

A bill for an act relating to the operation of a bank or bank office located outside a municipal corporation when the bank is merged into or acquired by another state bank and providing for an effective date.

SF 289

Effective date: 7/1/85

A bill for an act relating to the filing of an affidavit prior to the taxing of attorney's fees for the recovery on a contract containing an agreement to pay an attorney's fee.

SF 290

Effective date: 7/1/85

A bill for an act relating to the sale of antique motor vehicles.

SF 291

Effective date: 7/1/85

A bill for an act relating to the authority of the department of water, air and waste management over used oil.

SF 295

Effective date: 7/1/85

A bill for an act relating to the violation of laws concerning alcoholic liquor and beer by establishing the penalty for transporting an open container of alcoholic liquor or beer in a motor vehicle as a simple misdemeanor, and by removing the duty of a liquor control licensee to break empty liquor bottles.

SF 296

Effective date: 7/1/85

A bill for an act relating to the deposit and investment of public funds.

SF 303

Effective date: 5/7/85

A bill for an act relating to the lease by state agencies of real and personal properties and facilities for use as or in connection with any energy conservation measure.

SF 306

Effective date: 7/1/85

A bill for an act relating to certain requirements for the filling of prescriptions for controlled substances and poisons.

SF 307

Effective date: 7/1/85

A bill for an act relating to the operation of fire vehicles.

SF 309

Effective date: 7/1/85

A bill for an act relating to dishonored checks, drafts, or orders for payment and providing penalties.

SF 317

Effective date: 7/1/85

A bill for an act relating to qualifying for office.

SF 318

Effective date: 5/4/85

A bill for an act relating to the authority of the court to issue administrative search warrants to government agencies having the statutory authority to conduct inspections.

SF 328

Effective date: 7/1/85

A bill for an act relating to the eligibility of graduates of colleges of pharmacy located outside the United States to take the licensure exam in Iowa.

SF 329

Effective date: 7/1/85

A bill for an act relating to code corrections which adjust language to reflect current necessary practices, correct earlier omissions, delete redundancies, inaccuracies, and temporary and discriminatory language, remove inconsistencies, update ongoing provisions, remove ambiguities, improve syntax, correct references, and update provisions relating to court reorganization.

SF 342

Effective date: 7/1/85

A bill for an act relating to bees by making certain acts unlawful, and providing penalties.

SF 349

Effective date: 7/1/85

A bill for an act relating to the type of federal tax-exempt persons or organizations eligible to become licensees to conduct games of skill, games of chance, and raffles

SF 355

Effective date: 7/1/85

A bill for an act relating to the publication of notice of a hearing on an amendment to an urban revitalization plan

SF 359

Effective date: 1/1/86

A bill for an act relating to the declaration of value for real estate transfers, and providing an effective date.

SF 364

Effective date: Vetoed

A bill for an act relating to the scope of negotiation in public employment contract negotiations, membership in a bargaining unit, and the remedial powers of the public employment relations board.

SF 374

Effective date: 7/1/85

A bill for an act relating to the giving of false information on a blood plasma sale application to blood taking personnel and providing a penalty.

SF 375

Effective date: 7/1/85

A bill for an act providing for forms of certain acknowledgments of conveyances of real estate

SF 376

Effective date: 7/1/85

A bill for an act reclassifying and adding certain controlled substances to the schedules in chapter 204.

SF 377

Effective date: 7/1/85

A bill for an act relating to the jurisdiction of the probate court with respect to trusts administered by banks and trust companies.

SF 378

Effective date: 7/1/85

A bill for an act relating to the share of the surviving spouse in intestate succession.

SF 383

Effective date: 7/1/85

A bill for an act relating to the establishment of a special unemployment compensation contribution rate for certain expanding employers.

SF 385

Effective date: Vetoed

A bill for an act to provide for payment of prevailing wage rates on public construction projects and to provide enforcement through the labor commissioner and providing penalties.

SF 387

Effective date: 7/1/85

A bill for an act allowing a person to whom ownership of a vehicle has been transferred by a spouse, parent or child of the person, or by operation of law upon inheritance, devise or bequest, from the person's spouse, parent or child, or by a former spouse pursuant to a decree of dissolution of marriage, a credit to be applied to the registration fee of the transferred vehicle, requiring rules to be adopted to provide for the assignment of registration plates to the person, requiring certain counties to send a statement relating to due registration fees to owners of motor vehicles and allowing a refund of unexpired registration fees for certain vehicles.

SF 391

Effective date: 7/1/85

A bill for an act exempting fire trucks and other fire apparatus from meeting air quality standards.

SF 392

Effective date: 7/1/85

A bill for an act requiring insurance for certain motor vehicle service contracts and providing a remedy.

SF 393

Effective date: 7/1/85

A bill for an act relating to the fee for transferring real estate by the county auditor.



SF 395

Effective date: 7/1/85

A bill for an act relating to state and local revenues by providing for the private sale of wine containing more than five percent but not more than seventeen percent alcohol by weight, imposing a tax on wine to be sold, allowing cities and counties to impose certain local option taxes, exempting and providing refunds until the exemption begins of the sale or lease of certain farm machinery and equipment including certain replacement parts, and certain industrial machinery, equipment and computers, including certain replacement parts from the state sales, services and use tax, providing for setting aside of revenues to pay such refunds and not including certain increases in revenues in computing the state percent of growth for purposes of chapter 442, amending the state sales, service and use tax to impose the tax on the rendering or furnishing of additional services, and on sales of certain tangible personal property, to alter certain definitions, and to provide exemptions and limit others, increasing the tax on tobacco products and on cigarettes and little cigars, imposing an inventory tax on cigarettes and little cigars, unused tax stamps and metered imprints and granting one-time credit purchase on cigarette tax stamps, providing for the phase out and repeal of all property taxes on personal property, and providing penalties, appropriations and effective dates, making permanent exemptions from property taxation of certain pollution control property, providing for the special valuation of machinery, equipment and computers acquired after a certain date and limiting the applicability of the present special valuation to that property acquired before a certain date, amending the lottery law to provide for fifty percent of the projected annual revenue from the sales of lottery tickets and shares be used for payment of prizes, and imposing the state sales, service and use tax on the sales of lottery tickets and shares, eliminating the prohibition on the manufacture of electronic and computerized gambling devices, providing a new jobs tax credit for computing the individual and corporate tax liabilities of certain businesses that create new jobs within the state, providing that for purposes of property taxation the term "computer" does not include point of sales equipment and providing penalties and appropriations

SF 398

Effective date: 7/1/85

A bill for an act relating to school reorganization.

SF 401

Effective date: 7/1/85

A bill for an act relating to the harboring or enticing away of children and providing penalties.

SF 406

Effective date: 7/1/85

A bill for an act relating to the destruction of noxious weeds and providing a penalty

SF 407

Effective date: 7/1/86

A bill for an act relating to the licensing of real estate brokers and real estate salespersons and providing for an effective date.

SF 409

Effective date: 5/11/85

A bill for an act relating to legislative agencies under the direction and control of the legislative council by creating a computer support bureau, by providing budgeting procedures for statutory legislative agencies, making standing appropriations and making the act effective upon publication.

SF 413

Effective date: 7/1/85

A bill for an act relating to farm-to-market road fund allocations.

SF 414

Effective date: 7/1/85

A bill for an act relating to rights of a person possessing a teaching certificate with a coaching endorsement and not issued a teaching contract who is employed by a school district.

SF 423

Effective date: 7/1/85

A bill for an act relating to claims in estates for which there is insurance coverage

SF 424

Effective date: 1/1/86

A bill for an act relating to the ownership and operation of, and employment by child care centers, group day care homes, and family day care homes, and providing a penalty

SF 433

Effective date: 7/1/85

A bill for an act relating to the certification and regulation of respiratory care practitioners and providing a penalty and an effective date.

SF 434

Effective date: 7/1/85

A bill for an act relating to and making appropriations to various executive and legislative departments, bureaus, and agencies.

SF 435

Effective date: 7/1/85

A bill for an act relating to the distribution of monthly employment and unemployment statistics by the department of job service

SF 438

Effective date: 7/1/85

A bill for an act allowing licensed optometrists to administer and prescribe certain pharmaceutical agents

SF 445

Effective date: 7/1/85

A bill for an act exempting the director, deputy director and two administrative heads of the Iowa beer and liquor control department from the state merit system.

SF 449

Effective date: Upon publication

A bill for an act relating to bonding by amending the definition of small business for purposes of the Iowa housing finance authority's program for which bonds may be issued, by removing the limits on the amount of bonds and notes of the Iowa housing finance authority that may be outstanding or used for certain programs, and by providing for allocation of the state ceiling on private activity bonds for tax exempt purposes and making the provisions effective upon publication

SF 450

Effective date: 7/1/85

A bill for an act to create an Iowa commerce commission pilot program for energy conservation improvements.

SF 452

Effective date: 7/1/85

A bill for an act authorizing conversion of certain real property to a mobile home

SF 455

Effective date: 7/1/85

A bill for an act relating to the seizure and forfeiture of property which is obtained in violation of the law, unlawful to possess, used or possessed with criminal intent, relevant to a criminal prosecution, or which is the proceeds of criminal activity

SF 456

Effective date: 5/9/85

A bill for an act relating to the licensure of private investigative and security agencies and providing an effective date.

SF 459

Effective date: Upon publication

A bill for an act relating to real property which is subject to foreclosure.

SF 463

Effective date: 7/1/85 and 1/1/86

A bill for an act relating to the disposal of hazardous wastes, providing for a civil penalty, and providing for an effective date

SF 465

Effective date: 7/1/85

A bill for an act relating to agricultural limestone.

SF 466

Effective date: 7/1/85

A bill for an act relating to the bonding requirements for a holder of a permit to sell seed.

SF 467

Effective date: 7/1/85

A bill for an act relating to the predisposition investigation and report in a juvenile delinquency proceeding

SF 473

Effective date: 7/1/85 and 7/1/87

A bill for an act relating to the rights of a person having mental retardation, a developmental disability or chronic mental illness and providing an effective date and an appropriation.

SF 480

Effective date: 5/16/85

A bill for an act relating to time lines and requirements for a certificated school employee to accept an extracurricular contract and providing that the act takes effect upon its publication



SF 490

Effective date: 5/9/85

A bill for an act to legalize and validate the proceedings and declaring each and all of the acts taken by the city of Forest City, city of Osage, city of Lake Mills, all in Iowa, in entering into, ratifying and confirming an agreement with Western Wisconsin Municipal Power Group dated and a certain transmission agreement between Western Wisconsin Municipal Power Group and Dairyland Power Cooperative to have been legally taken.

SF 497

Effective date: 7/1/85

A bill for an act prohibiting political subdivisions or agencies of this state from requiring their employed peace officers to issue a certain number of citations or memorandums.

SF 502

Effective date: 7/1/85

A bill for an act relating to the financial security and reporting requirements of insurance companies and providing for administrative penalties.

SF 503

Effective date: 7/1/85 and 1/1/86

A bill for an act relating to self-insurance plans.

SF 507

Effective date: 7/1/85

A bill for an act to legalize the proceedings of the city council of the city of Stanwood relating to the boundaries of the city.

SF 509

Effective date: 5/16/85, retroactive to 1/1/85

A bill for an act relating to the inspection of fruit-tree or forest reservations and making the act retroactive.

SF 511

Effective date: 7/1/85

A bill for an act to extend the time for the completion of the flood plain mapping plan

SF 514

Effective date: 7/1/85

A bill for an act relating to garnished accounts of supervised financial organizations.

SF 515

Effective date: 7/1/85

A bill for an act relating to the election to become a senior judge

SF 521

Effective date: 7/1/85

A bill for an act relating to insurance trade practices and providing penalties.

SF 524

Effective date: 7/1/85

A bill for an act creating a residential care licensing classification for the mentally ill

SF 525

Effective date: 7/1/85

A bill for an act authorizing the director of general services to assign unmarked motor vehicles to the department of justice

SF 526

Effective date: 7/1/85

A bill for an act requiring successful completion of a course relating to education of the handicapped and gifted and talented before issuance of any certificate, endorsement, or approval by the department of public instruction.

SF 531

Effective date: 7/1/85

A bill for an act relating to guardianships and conservatorships.

SF 538

Effective date: 7/1/85

A bill for an act relating to an agricultural supply dealer's lien.

SF 539

Effective date: 5/16/85

A bill for an act relating to motor vehicle fuel.

SF 547

Effective date: 7/1/85

A bill for an act providing for collective bargaining on a statewide basis with certified employee organizations representing employees of the judicial department.

SF 552

Effective date: 7/1/85, item vetoed

A bill for an act making appropriations to and relating to the financing of departments and agencies whose responsibilities relate to corrections, public safety, and the justice system.

SF 560

Effective date: 7/1/85

A bill for an act relating to the establishment of and improvements within a secondary road assessment district.

SF 561

Effective date: Retroactive to 1/1/84, 7/1/84, and 1/1/85 upon publication

A bill for an act relating to taxation by updating references to the internal revenue code; providing for a refund of individual income tax for the 1979 tax year resulting from the inclusion of unemployment benefits; making technical corrections to the individual and corporate income tax concerning the credit for increasing research activities in the state; eliminating the requirement that the election campaign fund and fish and game protection fund checkoffs be on the face of the return immediately above the signature line; providing a due date of corporate income tax and franchise tax returns under certain conditions; allowing for the destruction of all useless records and reports and other papers filed by taxpayers after certain periods of time after the filing of these reports with the department of revenue; providing for a refund of individual income tax where the taxpayer died after November 17, 1978 as a result of wounds or injury incurred due to military or terroristic action outside the United States; making technical corrections to the inheritance tax concerning the taxation of gifts made within three years of death; and providing effective dates.

SF 562

Effective date: 7/1/85

A bill for act relating to and making appropriations to various state commissions, departments, and agencies relating to business, trade, and transportation

SF 564

Effective date: 7/1/85

A bill for an act relating to the exemption of certain nonprofit corporations providing services to disabled persons and adult day care services from the sales, services and use tax, prohibiting the collection for certain sales, services and use tax not paid by those corporations

SF 565

Effective date: 7/1/85

A bill for an act relating to taxation for the use of motor vehicles, water vessels and mobile homes in the state by increasing the rate of tax on motor fuel and special fuel, by crediting moneys from the road use tax fund to the RISE fund, for use in road or street projects which promote economic development in the state, by crediting moneys from the road use tax fund to the public transit assistance fund, by providing an exemption from the use tax for certain vehicles registered under chapter 326, by exempting from the state use tax the portion of the purchase price of a mobile home which is not attributable to the cost of the materials used in manufacturing the mobile home, exempting from the state use tax the gross receipts from the subsequent sale of a mobile home if the use tax had been paid in a previous sale, by exempting from the sales, services and use tax the sale of special fuel for diesel engines for certain ships, barges and waterborne vessels, by allowing certain truck tractors to be registered as special trucks, and making penalties applicable

SF 568

Effective date: 7/1/85

A bill for an act relating to drainage improvements by counties and providing for assessing the benefits of the improvements, issuing bonds, and imposing rates for its use, benefit, and connection.

SF 570

Effective date: 7/1/85, 7/1/86, and retroactive to 7/1/83, item vetoed

A bill for an act making corrections and other changes relating to court reorganization court fees, court-imposed fines and costs and the suspension of motor vehicle licenses and the setoff of income tax refunds and rebates, administrative closures under chapter 601A, the ability to pay a criminal fine, the judicial retirement system and other court procedures and making certain procedures retroactive.

N

SF 574

Effective date: 7/1/85

A bill for an act relating to when electricity steam, and other taxable services used to produce marketable food products for human consumption are sold for processing for purposes of the processing exemption under the state sales, services and use tax

SF 575

Effective date: 7/1/85 and upon publication
A bill for an act relating to and making appropriations to state agencies for capital projects and providing that the act takes effect upon publication.

SF 576

Effective date: 7/1/85

A bill for an act relating to the granting of a partial real property tax credit for new construction of research-service facilities

SF 577

Effective date: 7/1/85 and 3/1/86

A bill for an act relating to the economy of the state of Iowa, by amending the definition of small business for purposes of the Iowa housing finance authority's program for which bonds may be issued, by changing the name of the Iowa housing finance authority, by requiring that real estate brokers' trust accounts be deposited in interest-bearing accounts and the interest transferred quarterly to the treasurer of state and deposited in the title guaranty fund, by providing that the Iowa housing finance authority initiate a self-sustaining title guarantee program for title of real property, creating a commitment cost fund, creating a title guaranty fund, by modifying the limitations on bank offices upon merger or acquisition, by providing for an alternative nonjudicial voluntary foreclosure procedure including providing for redemption periods of lienholders under the procedure, permitting the charging of fees incurred under the title guaranty program, requiring the disclosure of the availability of the title guaranty program and making penalties applicable, by creating an Iowa economic protective and investment authority, providing for the authority's powers and duties, providing for incentives for lending institutions to participate in the operating assistance program, providing for a five-year write off of interest bought down under the authority's operating assistance program, permitting life

insurance companies and associations to invest in bonds of the African Development Bank, providing for the valuation of real property held by or used to secure loans held by lending institutions, providing for the disposal of real property held by a state bank, by modifying the investment powers of state chartered savings and loan associations and savings banks, revising the requirement of amendments to a uniform commercial code financing statement, providing for stipulation of redemption periods, providing for an alternative nonjudicial voluntary foreclosure procedure including providing for redemption periods for lienholders, providing for execution of foreclosure judgments, providing for the creation of the Iowa export trading company, providing for interim study committees, and providing an effective date.

SF 578

Effective date: 7/1/85

A bill for an act relating to the compensation and benefits for public officials and employees by specifying salary rates and ranges, providing adjustments for salary, health insurance, and per diem, making coordinating amendments to the code.

SF 580

Effective date: 7/1/85, retroactive to 7/1/84

A bill for an act exempting from the state sales, services, and use tax the gross receipts from the rental of motion picture films, video and audio tapes and discs, records, photos, copy, scripts or other media used for the purpose of transmitting that which can be seen, heard or read under certain conditions.

SF 581

Effective date: 7/1/85

A bill for an act providing for the promotion of the pork industry in this state by creating an Iowa pork producers council, authorizing an assessment on the sale of porcine animals, and imposing penalties.

SF 583

Effective date: 7/1/85

A bill for an act relating to the imposition of certain taxes by imposing the barrel tax and the gallonage tax to beer and wine manufactured in Iowa and correcting references to an additional real property tax under the local option provisions of senate file 395.

SF 584

Effective date: 5/25/85

A bill for an act to provide for the time required for action on gubernatorial appointments which require confirmation by the senate and are submitted to the senate during the last thirty days prior to adjournment sine die and providing an effective date by publication.

SF 585

Effective date: 7/1/85

A bill for an act appropriating federal funds made available from federal block grants, allocating portions of federal block grants, and providing procedures if federal funds are more or less than anticipated or if federal block grants are more or less than anticipated or if categorical grants are consolidated into new or existing block grants.

SF 586

Effective date: 5/24/85

A bill for an act appropriating moneys from the general fund of the state to the legislative council for the use of the Iowa world trade center selection advisory committee effective upon publication.

SF 587

Effective date: 7/1/85

A bill for an act relating to and appropriating petroleum overcharge funds.

SF 588

Effective date: 7/1/85

A bill for an act amending statutory provisions relating to the medical assistance program by requiring the department of human services to deposit certain payments in the medical assistance fund and to grant certain children automatic eligibility for medical assistance.

SF 589

Effective date: 7/1/85

A bill for an act related to the licensure of dietitians.

House Files Passed

HF 29

Effective date: 7/1/85

A bill for an act relating to qualification of nonprofit corporations as guardians

HF 38

Effective date: 7/1/85

A bill for an act providing that appraised value determines when a school board has the power to sell, lease or dispose of school property.

HF 41

Effective date: 4/12/85

A bill for an act relating to farm implement franchises and providing an effective date by publication.

HF 66

Effective date: 7/1/85

A bill for an act requiring state agencies to enter into agreements with soil conservation districts for the control of soil erosion on state land in cultivation under the agencies' control.

HF 70

Effective date: 7/1/85

A bill for an act relating to the conducting of going-out-of-business sales and providing for penalties.

HF 87

Effective date: 3/22/85

A bill for an act relating to the procedure for adding moneys in a school district's budget for moneys collected under section 302.3, Code 1981, and removing those moneys from the one hundred two percent budget guarantee for school districts for the school year beginning July 1, 1985 and succeeding school years.

HF 100

Effective date: 3/14/85

A bill for an act relating to the determination of special education balances of school districts by the state comptroller and providing that the act is retroactive to June 30, 1984.



HF 124

Effective date: 7/1/85

A bill for an act permitting the sentencing of juveniles at least twelve years old to community service work programs

HF 128

Effective date: 7/1/85

A bill for an act creating a program for the establishment and support of dispute resolution centers to provide informal procedures for the resolution of minor disputes authorizing the imposition of an additional fee upon the filing of civil actions in counties served by such centers, and making an appropriation

HF 130

Effective date: 7/1/85

A bill for an act relating to community service by providing that the state assumes liability for injuries to persons performing unpaid community service.

HF 139

Effective date: 7/1/85

A bill for an act relating to the crime of lascivious acts with a child and providing a penalty.

HF 150

Effective date: 7/1/85

A bill for an act relating to fees collected by the sheriff

HF 160

Effective date: 7/1/85

A bill for an act removing the exception which allows licensed practical nurses to staff an authorized ambulance or rescue squad service.

HF 164

Effective date: 7/1/85

A bill for an act relating to the payment of commissions to commission salespersons and providing a penalty

HF 173

Effective date: 7/1/85

A bill for an act to protect public employees from personnel actions as reprisals for providing information to legislators or public officials or disclosing waste, mismanagement or violations of law.

HF 181

Effective date: 7/1/85

A bill for an act to legalize proceedings taken by the city council of the city of Buffalo, Iowa relating to the compensation of the mayor.

HF 183

Effective date: 1/1/86

A bill for an act relating to user fees for certain state lands under the jurisdiction of the state conservation commission, writing fees, making an appropriation, and providing a penalty.

HF 186

Effective date: 7/1/85

A bill for an act amending the code chapters relating to the Iowa department of corrections by reorganizing the statutes, making changes to sexually discriminatory statutes dealing with both minor and adult offenders, and modifying statutes relating to allowances paid to inmates for work, absconding from work release, temporary confinement of work release violators, departmental employees as chauffeurs, and to district court reports of criminal convictions

HF 196

Effective date: 7/1/85

A bill for an act relating to powers, organization, reserve requirements and other requirements of credit unions including a corporate central credit union.

HF 204

Effective date: 7/1/85

A bill for an act relating to the waiver of the juvenile court's jurisdiction for the alleged commission of public offenses.

HF 210

Effective date: 7/1/86

A bill for an Act relating to the weighting per pupil for shared programs of school districts.

HF 225

Effective date: 5/3/85 item vetoed

A bill for an act relating to economic development by creating a five-year state lottery, providing penalties, and providing revenues from the state lottery to be used for certain economic development programs and activities; providing for set-asides in state procurement contracts for small minority businesses; providing for the reorganization of state economic

development programs and activities with the Iowa development commission acting as the interim coordinating agency for economic development until the new department of economic development is created; creating an Iowa partnership for economic progress advisory committee to advise the Iowa development commission and the general assembly on economic development matters and the uses to be made of the revenues from the state lottery, creating an Iowa world trade center selection advisory committee to accept proposals from private groups on the construction of the Iowa world trade center, to select from those proposals one proposal under which the state will purchase space in the Iowa world trade center, and to become part of the nonprofit corporation formed to operate, manage and lease this state-owned space; establishing a primary research and marketing center for business and international trade and satellite centers; creating a forgivable loan program for loans to students who remain residents of Iowa and are employed as a teacher under certain circumstances; making appropriations for economic development programs and activities; and providing an effective date.

HF 231

Effective date: 7/1/85

A bill for an act relating to the establishment and maintenance of pumping stations in drainage districts

HF 255

Effective date: 7/1/85

A bill for an act relating to the election of hospital trustees.

HF 265

Effective date: 7/1/85

A bill for an act authorizing a city or a county to impose additional conditions on property owners a condition to zoning changes.

HF 266

Effective date: 7/1/85

A bill for an act relating to financial incentive payments for the protection of forests and forest soils from damage by grazing.

HF 308

Effective date: 7/1/85

A bill for an act relating to clinical privileges of certain licensed practitioners

HF 311

Effective date: 7/1/85

A bill for an act to provide that demolition contracts are public improvements

HF 315

Effective date: Vetoed

A bill for an act relating to drug product selection.

HF 319

Effective date: 7/1/85

A bill for an act relating to accrued interest from certain gifts received by the commission for the blind

HF 338

Effective date: 5/1/87

A bill for an act relating to the term of office of the labor commissioner

HF 341

Effective date: 7/1/85

A bill for an act requiring the state building code commissioner to adopt a minimum energy efficiency standard for new single-family or two-family residential construction.

HF 359

Effective date: 7/1/85

A bill for an act relating to fees for boiler inspections.

HF 366

Effective date: 7/1/85

A bill for an act relating to the giving of notice under chapter 321 or any other law regulating the operation of vehicles

HF 378

Effective date: 7/1/85

A bill for an act exempting road workers from the forty miles per hour minimum speed limit

HF 381

Effective date: Vetoed

A bill for an act relating to workers' compensation benefits for injuries or death to volunteer fire fighters involving intoxication.

HF 395

Effective date: 7/1/85

A bill for an act permitting the articles of incorporation of a trust company existing and operating on January 1, 1970 and which is authorized to act only as a trust company to be renewed in perpetuity

N

HF 398

Effective date: 7/1/85

A bill for an act relating to the confidentiality of the name of a complainant regarding a person in a long-term care facility.

HF 413

Effective date: 7/1/85

A bill for an act to include domestic violence as compensable from the victims reparations fund provided the offender and victim were not residing together at the time of the act.

HF 415

Effective date: 7/1/85

A bill for an act relating to the designation of persons to accept bond money and securities

HF 418

Effective date: 7/1/85

A bill for an act requiring the state department of transportation to accept payment by check of proportional registration fees.

HF 419

Effective date: 7/1/85

A bill for an act relating to the payment of court costs and providing a penalty.

HF 421

Effective date: 7/1/85

A bill for an act relating to the custody of children by an abandoned spouse.

HF 428

Effective date: 7/1/85

A bill for an act relating to the use of gizzard shad as bait.

HF 438

Effective date: 7/1/85

A bill for an act relating to evidence of intent in cases alleging theft of library equipment.

HF 451

Effective date: 7/1/85

A bill for an act relating to child protection and providing penalties.

HF 453

Effective date: 7/1/85

A bill for an act relating to the hunter safety course requirements in applying for a hunting license.

HF 454

Effective date: 7/1/85

A bill for an act requiring monthly notification to the county treasurer of outstanding arrest warrants for certain offenses.

HF 460

Effective date: 7/1/85

A bill for an act relating to the investment of the pension funds of public safety police officers, Iowa public employees, and police officers and fire fighters, and the assets of insurance companies, state banks, state savings banks, state savings and loan associations and credit unions in venture capital firms making investments in small businesses in the state and in small businesses operating in this state

HF 462

Effective date: 7/1/85

A bill for an act relating to the protection of victims and witnesses in judicial proceedings, and providing penalties.

HF 469

Effective date: 7/1/85

A bill for an act to require a sufficient number of wells at each sanitary disposal project to adequately monitor ground water quality.

HF 476

Effective date: 7/1/85

A bill for an act relating to and making appropriations to various departments, boards, agencies, and commissions of the state relating to agricultural affairs, energy and natural resources management.

HF 484

Effective date: 7/1/85

A bill for an act to regulate the sale of time-sharing estates and uses, establish time-share and project instruments, mandate the disclosure of certain information to a purchaser by a developer, provide for the release of liens and declaring certain acts unlawful, and providing for enforcement by the attorney general.

HF 494

Effective date: 5/12/85

A bill for an act authorizing economic development as a purpose for approval of an urban renewal plan and an urban renewal project

HF 495

Effective date: 7/1/85

A bill for an act for the collection of support obligations relating to identifying information in petitions for dissolution of marriage and support orders, the payment and distribution of support payments to and by the clerk of the district court, the modification of support orders, and the recording of income tax refund or rebate payments by the clerk.

HF 498

Effective date: 7/1/85

A bill for an act relating to the qualifications of a weed commissioner or a deputy weed commissioner.

HF 501

Effective date: 7/1/85

A bill for an act relating to the inspection of of boilers and unfired steam pressure vessels.

HF 505

Effective date: 7/1/85

A bill for an act relating to an annual review of local human service programs by the county board of social welfare

HF 514

Effective date: 4/1/86

A bill for an act to require highway authorities to submit annual road construction programs to county soil conservation district commissioners for review and recommendations relating to soil erosion controls and drainage controls.

HF 523

Effective date: 5/31/85

A bill for an act related to the right of cities to lease or lease-purchase real and personal property.

HF 526

Effective date: 7/1/85

A bill for an act relating to interpreters for certain hearing impaired persons.

HF 531

Effective date: 7/1/85

A bill for an act prohibiting certain practices by a financial institution which makes or offers to make a real estate mortgage loan, requiring certain disclosures, and providing penalties

HF 537

Effective date: 7/1/85

A bill for an act relating to special elections to fill vacancies in city councils.

HF 539

Effective date: 7/1/85

A bill for an act relating to the jurisdiction and control of the great river road

HF 540

Effective date: 7/1/85

A bill for an act relating to the mining of ores and minerals other than coal and authorizing a penalty

HF 541

Effective date: 7/1/85

A bill for an act to provide for the establishment of the Iowa higher education facilities program.

HF 549

Effective date: 7/1/85

A bill for an act relating to domestic abuse counseling; to coordination of certain domestic abuse programs by the department of human services; to compilation and dissemination of domestic abuse information by the department of public safety; to warrantless arrests of persons committing domestic abuse, and providing penalties; and to the establishment of a court fee for the entering of a final decree of dissolution of marriage.

HF 550

Effective date: 7/1/85

A bill for an act making appellate procedure in discretionary reviews, criminal appeals, post-conviction relief appeals and civil appeals more uniform and consistent.

HF 552

Effective date: 7/1/85

A bill for an act relating to area education agencies, including the charging of user fees, budget publication, contracting for services and filing of candidacy papers

HF 553

Effective date: 5/11/85

A bill for an act relating to federal disaster assistance to state and local governments and providing an effective date.



HF 554

Effective date: 7/1/85

A bill for an act relating to the security interest in farm products purchased by a buyer in the ordinary course of business from a person engaged in farming operations and providing penalties.

HF 555

Effective date: 7/1/85

A bill for an act to establish the Iowa community cultural grants program within the office for planning and programming

HF 556

Effective date: 7/1/85

A bill for an act relating to chattel loans by providing a short title to chapter 536, increasing the maximum amount of a regulated loan from two thousand to twenty-five thousand dollars, permitting a licensee to sell property insurance to borrowers on property owned by the borrowers, modifying the penalty if a licensee charges excessive interest or other charges, and repealing a requirement that an applicant for a loan shall report other installment loans that the applicant may have.

HF 558

Effective date: 7/1/85

A bill for an act relating to the liabilities of mental health advocates.

HF 569

Effective date: 7/1/85

A bill for an act relating to the administration of special land use districts

HF 570

Effective date: 7/1/85

A bill for an act relating to the premium tax on insurance companies and associations and mutual service corporations operating under chapter 514 domiciled or doing business in the state.

HF 571

Effective date: 7/1/85

A bill for an act relating to the funding of state agencies for designated service programs including health programs, civil rights, citizens' aide, women veterans' services, vocational rehabilitation, substances abuse, and programs for minority, elderly, and disadvantaged persons for the fiscal year beginning July 1, 1985 and ending June 30, 1986

HF 575

Effective date: 7/1/85

A bill for an act to legalize proceedings taken by the board of directors of the Van Buren community school district relating to the sale of certain land

HF 584

Effective date: 7/1/85

A bill for an act relating to information contained on interstate probation and parole compact transfer requests

HF 587

Effective date: 7/1/85

A bill for an act relating to the authorization of contempt powers for juvenile court referees and providing penalties.

HF 589

Effective date: 7/1/85

A bill for an act relating to fees collected by county officers.

HF 625

Effective date: 7/1/85

A bill for an act to require the display of a bill of sale receipt, or other proof of ownership for the registration of a vessel and to repeal the requirement for the issuance of a certificate of origin on the sale of a vessel.

HF 626

Effective date: 7/1/85

A bill for an act to revise the procedures for the assessment of penalties under the laws regulating coal mining

HF 631

Effective date: 7/1/85

A bill for an act relating to the operation and funding of community, supervised apartment living arrangements

HF 639

Effective date: 7/1/85

A bill for an act relating to the presence and removal of asbestos in public school buildings

HF 640

Effective date: 7/1/85

A bill for an act relating to the computation of interest penalties on delinquent property taxes.

HF 641

Effective date: 7/1/85

A bill for an act relating to the violation of a custodial order and providing penalties

HF 642

Effective date: 5/8/85

A bill for an act relating to and making appropriations to the department of banking, state comptroller, department of general services, the Iowa lottery agency, the Iowa development commission, and office of disaster services and providing an effective date.

HF 643

Effective date: 7/1/85

A bill for an act relating to the authority of the department of water, air and waste management over underground tanks for storage of regulated substances and petroleum products, and subjecting violators to civil and criminal penalties.

HF 648

Effective date: 7/1/85

A bill for an act relating to the schools subject to the provisions of chapter 601A on sex discrimination in education.

HF 649

Effective date: 7/1/85

A bill for an act relating to water wells by providing for regulation of water wells and the registration of water well contractors.

HF 652

Effective date: 7/1/85

A bill for an act authorizing the creation of self supported improvement districts within residential areas which are designated as historic districts.

HF 664

Effective date: 7/1/85

A bill for an act relating to procedures for determining ownership and disposition of certain seized or abandoned vehicles, component parts and personal property in the custody of a peace officer or police authority

HF 670

Effective date: 7/1/85

A bill for an act relating to the termination of a county library district.

HF 677

Effective date: 7/1/85

A bill for an act creating an Iowa sheep and wool promotion board, and providing a penalty.

HF 678

Effective date: 7/1/85

A bill for an act relating to drainage and drainage districts.

HF 682

Effective date: Upon publication, retroactive to 3/1/85

A bill for an act relating to the calculation of enrollment for increasing enrollment school districts and providing that the act takes effect upon its publication.

HF 686

Effective date: 7/1/85

A bill for an act relating to plans and programs for educational development in Iowa.

HF 688

Effective date: 7/1/85

A bill for an act relating to the use of juvenile records in the sentencing of a person for an offense other than a simple or serious misdemeanor

HF 691

Effective date: 7/1/85

A bill for an act relating to the psychological testing of law enforcement officers and candidates

HF 692

Effective date: 7/1/85

A bill for an act relating to the Iowa dairy industry commission

HF 696

Effective date: 7/1/85

A bill for an act relating to abandoned property, by providing for a civil action, providing for the issuance of injunctions and other orders, and providing for appointing a receiver with certain powers, duties, and liability

HF 700

Effective date: 7/1/85

A bill for an act relating to the endangering of certain persons and providing penalties

N

HF 701

Effective date: Vetoed

A bill for an act amending the juvenile justice code relating to the content of delinquency petitions, notices of delinquency proceedings, recordings of delinquency hearings, wavers of the right to remain silent, and civil commitment procedures for allegedly delinquent juveniles, and relating to notices of child-in-need-of-assistance hearings, evidence required to remove alleged sexual offenders from the home, contents of petitions, the receipt of social investigation reports, and transferring guardianships, and relating to the provision of services to correct abusive situations in termination-of-parental-rights cases.

HF 702

Effective date: 7/1/85

A bill for an act including in the definition of theft certain acts relating to public utilities and cable television services and making penalties applicable.

HF 703

Effective date: 7/1/85

A bill for an act creating a procedure for a domestic mutual life insurance company to become a domestic stock life insurance company

HF 709

Effective date: 7/1/85

A bill for an act relating to the hazardous chemicals interagency coordinating council.

HF 711

Effective date: 7/1/85

A bill for an act relating to the application for registration and titling of vehicles and providing penalties.

HF 713

Effective date: 7/1/85

A bill for an act relating to educational leave and educational assistance for state employees.

HF 726

Effective date: 7/1/85

A bill for an act relating to joint exercise of powers to finance hydroelectric power facilities.

HF 728

Effective date: 7/1/85

A bill for an act requiring the department of water, air and waste management to initiate and conduct a pilot program to collect and dispose of small amounts of hazardous wastes that are being stored in residences, schools and small businesses.

HF 729

Effective date: 7/1/85

A bill for an act relating to certain tax levies of political subdivisions and area schools

HF 730

Effective date: 7/1/85

A bill for an act relating to the licensure of dietitians and nutritionists.

HF 740

Effective date: 7/1/85

A bill for an act relating to the abandonment of funds or a deposit in a banking or financial organization.

HF 741

Effective date: 5/18/85

A bill for an act relating to custom livestock feeders.

HF 742

Effective date: 7/1/85

A bill for an act relating to the prospective repeal of chapter 225C and the enforcement of certain service standards for the mentally ill and mentally retarded.

HF 746

Effective date: 7/1/85

A bill for an act relating to merged area hospitals.

HF 747

Effective date: 7/1/85. item vetoed

A bill for an act relating to and making appropriations to agencies, institutions, commissions, departments, and boards responsible for education, artistic, and historical programs of this state.

HF 748

Effective date: 7/1/85

A bill for an act relating to the financial requirements of grain dealers

HF 750

Effective date: 4/1/86

A bill for an act imposing a tonnage fee on solid waste deposited in sanitary landfills to establish a groundwater fund for administering a groundwater monitoring program, the development of groundwater quality standards, alternative means of waste disposal, emergency landfill cleanup programs, and subjecting violators to a penalty.

HF 751

Effective date: 7/1/85

A bill for an act relating to restitution by a child for attorneys' fees.

HF 753

Effective date: Upon publication

A bill for an act relating to the implementation of comparable worth pay adjustments, amending 1984 Iowa Acts, chapter 1314, and providing for an effective date

HF 761

Effective date: 7/1/85 and 1/1/88

A bill for an act relating to the state inheritance and fiduciary income tax by providing for an Iowa qualified terminable interest property election, for a six-month audit period after receipt of a federal audit, for the taxation of the possession of a general power of appointment, and for notice to the department of revenue prior to the discharge of the personal representative of an estate or trust and providing effective date provisions.

HF 762

Effective date: 7/1/85

A bill for an act to legalize the proceedings for the organization, establishment, boundaries and election and tenure of office of the board of trustees of the Sun Valley sanitary district in the township of Union county of Ringgold and declaring the district a duly and legally organized corporate body as provided by law and further declaring all trustees duly and legally elected and holding office as provided by law

HF 763

Effective date: 5/29/85

A bill for an act to transfer funds credited to the Iowa economic emergency fund to the general fund of the state, effective upon publication

HF 766

Effective date: 7/1/85

A bill for an act to establish an Iowa small business new jobs training program and making an appropriation.

HF 768

Effective date: 7/1/85

A bill for an act relating to townships providing fire protection and ambulance service, establishing emergency warning systems and levying taxes for those purposes

HF 771

Effective date: 7/1/85

A bill for an act relating to the administration and financing of services and programs under the jurisdiction of the department of human services, the state department of health, the foster care review board, and the commission on children, youth, and families for the fiscal year beginning July 1, 1985, and ending June 30, 1986.

HF 773

Effective date: 7/1/85

A bill for an act to establish an education research foundation, to prescribe its functions, and to make an appropriation.

HF 777

Effective date: 7/1/85

A bill for an act relating to certain state funds by making a supplemental appropriation to the Iowa beer and liquor control department and allowing interest from the investment of certain employee insurance funds to be deposited to those funds.

HF 780

Effective date: 7/1/85

A bill for an act appropriating funds relating to the compensation and benefits for public officials and employees

N

Sections Repealed or Amended 1st Session, 71st General Assembly

2 12	SF 409	P.C.	19A 3(24)	SF 445	7-1-85	83A 2(5)	HF 540	7-1-85
2 15 unnn 2	SF 121	7-1-85	19A 9	HF 686	7-1-85	83A 2(7)	HF 540	7-1-85
2 32(3) unnn 1	SF 584	P.C.	20A 1	HF 173	7-1-85	83A 2(8)	HF 540	7-1-85
2 42(14)	SF 409	P.C.	22 7	HF 128	7-1-85	83A 3 unnn 1	HF 540	7-1-85
2 42(16)	SF 570	7-1-85	22 7(2)	HF 549	7-1-85	83A 6	HF 540	7-1-85
2 42(17)	SF 409	P.C.	22 7(19)	HF 691	7-1-85	83A 8	HF 540	7-1-85
2 42(18)	SF 409	P.C.	23 1 unnn 2	SF 329	7-1-85	83A 9	HF 540	7-1-85
2 52 unnn 1	SF 121	7-1-85	23 21 unnn 1	SF 121	7-1-85	83A 13	HF 540	7-1-85
2 55(4)	SF 409	P.C.	24 35	SF 121	7-1-85	83A 13(1)	HF 540	7-1-85
2 100	SF 409	P.C.	24 36	SF 121	7-1-85	83A 13(2)	HF 540	7-1-85
2 101	SF 409	P.C.	25A 19	SF 121	7-1-85	83A 14	HF 540	7-1-85
2 102	SF 409	P.C.	28 7	HF 225	P.C.	83A 17	HF 540	7-1-85
2 103	SF 409	P.C.	28 89	SF 562	7-1-85	83A 18	HF 540	7-1-85
2 104	SF 409	P.C.	28 90	SF 562	7-1-85	83A 19	HF 540	7-1-85
7A 51	HF 555	7-1-85	28 91(1)	SF 562	7-1-85	83A 20	HF 540	7-1-85
7A 52	HF 555	7-1-85	28 101	HF 225	P.C.	83A 23	HF 540	7-1-85
7A 53	HF 555	7-1-85	28 101	SF 577	7-1-85	83A 24	HF 540	7-1-85
7A 54	HF 555	7-1-85	28 102	SF 577	7-1-85	83A 28	HF 540	7-1-85
7B 4(8)	SF 395	7-1-85	28 103	SF 577	7-1-85	83A 29	HF 540	7-1-85
7C 1	SF 449	P.C.	28F 1 unnn 2	HF 726	7-1-85	85 59 unnn 2	SF 121	7-1-85
7C 2	SF 449	P.C.	28F 14	HF 726	7-1-85	85 59 unnn 2	HF 130	7-1-85
7C 3	SF 449	P.C.	29B 115	SF 121	7-1-85	85 59 unnn 3	HF 130	7-1-85
7C 4	SF 449	P.C.	29C 6(17)	HF 553	P.C.	85 59 unnn 4	HF 130	7-1-85
7C 5	SF 449	P.C.	29C 20	HF 553	P.C.	85 61(1)	SF 329	7-1-85
7C 6	SF 449	P.C.	29C 20(1)	SF 329	7-1-85	85 61(6)	SF 168	7-1-85
7C 7	SF 449	P.C.	31 4	SF 224	7-1-85	85 61(8)	SF 329	7-1-85
7C 8	SF 449	P.C.	39 22	SF 261	7-1-85	87 4	SF 503	7-1-85
7C 9	SF 449	P.C.	53 22(1) b	SF 121	7-1-85	89 3(6)	HF 501	7-1-85
7C 10	SF 449	P.C.	56 18(1)	SF 561	P.C.	89 3(7)	HF 501	7-1-85
7C 11	SF 449	P.C.	63 1	SF 317	7-1-85	89 7(1)	HF 359	7-1-85
7C 12	SF 449	P.C.	64 6	HF 686	7-1-85	89 7(3)	HF 359	7-1-85
8 6	HF 686	7-1-85	70 1	SF 266	7-1-85	89 8	HF 359	7-1-85
8C 1 Art VI. a'	SF 121	7-1-85	76 2	HF 729	7-1-85	91 2	HF 338	5-1-87
11 20	SF 121	7-1-85	76 2 unnn 3	SF 329	7-1-85	91 17	SF 329	7-1-85
12 8 unnn 1	SF 110	7-1-85	79 1 unnn 8	HF 713	7-1-85	91 18	SF 329	7-1-85
12 25	SF 79	P.C.	79 25	HF 713	7-1-85	91A 2(3) unnn 1	HF 164	7-1-85
12 26	SF 79	P.C.	79 28	SF 90	7-1-85	92 17(6)	HF 124	7-1-85
12A 1	SF 110	7-1-85	80 39(1)	SF 455	7-1-85	92 21	HF 686	7-1-85
12A 2	SF 110	7-1-85	80A 4(2)	SF 456	P.C.	96 5(1) f'	SF 224	7-1-85
12A 3	SF 110	7-1-85	80A 7 unnn 3	SF 456	P.C.	96 7A	SF 383	7-1-85
12A 4	SF 110	7-1-85	80A 10	SF 456	P.C.	96 11(3)	SF 435	7-1-85
12A 6	SF 110	7-1-85	80A 10A	SF 456	P.C.	96 15(2)	SF 63	7-1-85
13B 4	SF 200	7-1-85	80A 12(7)	SF 456	P.C.	97B 7(2) b"	SF 27	7-1-85
14 13	SF 329	7-1-85	80A 12(7)	SF 121	7-1-85	97B 7(2) b' unnn 1	SF 110	7-1-85
14 14	SF 329	7-1-85	80A 13(1)	SF 456	P.C.	97B 8 unnn 1	SF 27	7-1-85
14 21 unnn 2	SF 570	7-1-85	80A 13(2)	SF 456	P.C.	97B 49(8) a" unnn 4	SF 329	7-1-85
17 3	HF 686	7-1-85	80A 17	SF 456	P.C.	97B 57	SF 27	7-1-85
17 16	SF 329	7-1-85	80B 11(5)	HF 691	7-1-85	98 6(2)	SF 395	7-1-85
17 30 unnn 1	SF 329	7-1-85	80B 13(8) unnn 2	SF 121	7-1-85	98 43(1)	SF 395	7-1-85
18 97(19)	SF 250	7-1-85	80C 2 unnn 1	SF 329	7-1-85	98 43(2)	SF 395	7-1-85
18 115(7)	SF 525	7-1-85	80C 2 unnn 2	SF 329	7-1-85	99A 10	SF 395	7-1-85
18 136	HF 686	7-1-85	80C 2 (1)	SF 329	7-1-85	99B 5(1) a'	SF 81	7-1-85
18 170	HF 225	P.C.	80C 2 (2)	SF 329	7-1-85	99B 5(1) b'	SF 81	7-1-85
18 171	HF 225	P.C.	80C 2 (3)	SF 329	7-1-85	99B 7(1) m'	SF 349	7-1-85
18 172	HF 225	P.C.	83 10(6)	HF 626	7-1-85	99B 7(1) o'	SF 349	7-1-85
18 173	HF 225	P.C.	83 14(4)	HF 626	7-1-85	99B 7(6) a'	SF 349	7-1-85
18 174	HF 225	P.C.	83 14(8)	HF 626	7-1-85	99D 22(2) b' (3)	SF 121	7-1-85
18 175	HF 225	P.C.	83 14(9)	HF 626	7-1-86	99E 1	HF 225	P.C.
18 Ch	HF 225	P.C.	83 15(1)	HF 626	7-1-86	99E 2	HF 225	P.C.
18C 1	HF 225	P.C.	83 15(2)	HF 626	7-1-86	99E 3	HF 225	P.C.
18C 2	HF 225	P.C.	83 15(3)	HF 626	7-1-86	99E 4	HF 225	P.C.
18C 3	HF 225	P.C.	83 15(4)	HF 626	7-1-86	99E 5	HF 225	P.C.
18C 4	HF 225	P.C.	83A 1	HF 540	7-1-85	99E 6	HF 225	P.C.
19 34	SF 303	P.C.	83A 2	HF 540	7-1-85	99E 7	HF 225	P.C.
19A 3	HF 686	7-1-85	83A 2(4)	HF 540	7-1-85	99E 8	HF 225	P.C.

9	HF 225	PC	123 21(10)	SF 395	7-1-85	123 173	SF 395	7-1-85
E 10	HF 225	PC	123 21(12)	SF 395	7-1-85	123 174	SF 395	7-1-85
E 10(1) unnn 1	HF 642	PC	123 22 unnn 1	SF 395	7-1-85	123 175	SF 395	7-1-85
E 10(1) unnn 1	SF 395	7-1-85	123 23	SF 395	7-1-85	123 176	SF 395	7-1-85
E 10(1)	SF 395	7-1-85	123 27(2)	SF 395	7-1-85	123 177	SF 395	7-1-85
JE 11	HF 225	PC	123 28 unnn 2	SF 295	7-1-85	123 178	SF 395	7-1-85
JE 12	HF 225	PC	123 29(4) 'c'	SF 395	7-1-85	123 179	SF 395	7-1-85
9E 13	HF 225	PC	123 30(3) 'a'	SF 395	7-1-85	123 180	SF 395	7-1-85
9E 14	HF 225	PC	123 30(3) 'b'	SF 395	7-1-85	123 181	SF 395	7-1-85
9E 15	HF 225	PC	123 30(3) 'c'	SF 395	7-1-85	123 182	SF 395	7-1-85
9E 16	HF 225	PC	123 30(3) 'd'	SF 395	7-1-85	123 183	SF 395	7-1-85
9E 17	HF 225	PC	123 32(1)	SF 395	7-1-85	123 183	SF 583	7-1-85
99E 8	HF 225	PC	123 32(2)	SF 395	7-1-85	123 184	SF 395	7-1-85
99E 19	HF 225	PC	123 32(4)	SF 395	7-1-85	123 185	SF 395	7-1-85
99E 20	HF 225	PC	123 33	SF 295	7-1-85	123 186	SF 395	7-1-85
99E 21	HF 225	PC	123 34	SF 395	7-1-85	123 Ch	SF 395	7-1-85
103A 8(7)	HF 341	7-1-85	123 35 unnn 1	SF 395	7-1-85	127 20	SF 329	7-1-85
103A 25	HF 341	7-1-85	123 36(2)	SF 395	7-1-85	135.93	SF 121	7-1-85
106 5(1) unnn 2	HF 625	7-1-85	123 36(5) 'c'	SF 395	7-1-85	135B 7	HF 308	7-1-85
106 33	SF 121	7-1-85	123 36(6)	SF 395	7-1-85	135C 2(3)	SF 524	7-1-85
106 56	HF 625	7-1-85	123 36(7) unnn 1	SF 395	7-1-85	135C 6(1)	HF 631	7-1-85
107 16 unnn 3	SF 561	PC	123 37	SF 395	7-1-85	135C 37	HF 398	7-1-85
108A 7	SF 121	7-1-85	123.38 unnn 1	SF 395	7-1-85	135D 24(3)	SF 194	7-1-85
109 56(1)	SF 55	PC	123 38 unnn 2	SF 395	7-1-85	135D 26(1) 'b'	SF 452	7-1-85
109 80 unnn 2	HF 428	7-1-85	123 39	SF 395	7-1-85	135D 27	SF 452	7-1-85
109 82	HF 428	7-1-85	123 40	SF 395	7-1-85	135D 27	SF 194	7-1-85
110 5	SF 55	PC	123 44	SF 395	7-1-85	135F 1	SF 433	7-1-85
110 24 unnn 1	SF 121	7-1-85	123 45	SF 395	7-1-85	135F 2	SF 433	7-1-85
110 24 unnn 9	SF 55	PC	123 46	SF 395	7-1-85	135F 3	SF 433	7-1-85
110 27(1)	HF 453	7-1-85	123 47	SF 395	7-1-85	135F 4	SF 433	7-1-85
110 27(2)	HF 453	7-1-85	123 49(1)	SF 395	7-1-85	135F 5	SF 433	7-1-85
111 57	HF 183	7-1-86	123 49(2) unnn 1	SF 395	7-1-85	135F 6	SF 433	7-1-85
111 Ch	HF 183	7-1-86	123 49(2) 'c'	SF 395	7-1-85	135F 7	SF 433	7-1-85
113 18(5)	SF 329	7-1-85	123 49(2) 'd'	SF 395	7-1-85	135F 8	SF 33	7-1-85
113 20(3)	SF 329	7-1-85	123 42(2) 'e'	SF 395	7-1-85	135F 9	SF 433	7-1-85
114 11	SF 154	7-1-85	123 42(2) 'f'	SF 395	7-1-85	135F 10	SF 433	7-1-85
114 21(1)	SF 329	7-1-85	123 42(2) 'g'	SF 395	7-1-85	135F 11	SF 433	7-1-85
114 21(5)	SF 329	7-1-85	123 42(2) 'h'	SF 395	7-1-85	135F 12	SF 433	7-1-85
117 7(7)	HF 484	7-1-85	123 42(2) 'i'	SF 395	7-1-85	135F 13	SF 433	7-1-85
117 15 unnn 3	SF 407	7-1-86	123 49(2) 'k'	SF 395	7-1-85	136B 2	SF 241	7-1-85
117 15 unnn 4	SF 407	7-1-86	123 49(3)	SF 395	7-1-85	136C 14	SF 329	7-1-85
117 46(1)	SF 577	7-1-85	123 49(4)	SF 395	7-1-85	139 9	HF 686	7-1-85
117A 1(1)	HF 484	7-1-85	123 50(2)	SF 395	7-1-85	139 33	SF 374	7-1-85
118A 15(1)	SF 329	7-1-85	123 50(3)	SF 395	7-1-85	144 13A	HF 451	7-1-85
118A 15(5)	SF 329	7-1-85	123 51(3)	SF 395	7-1-85	144 36(1)	SF 329	7-1-85
123 1	SF 395	7-1-85	123 53(2)	SF 395	7-1-85	144 37 unnn 2	SF 329	7-1-85
123 2	SF 395	7-1-85	123 53(3)	SF 395	7-1-85	144A 1	SF 25	7-1-85
123 3	SF 395	7-1-85	123 53(7)	SF 395	7-1-85	144A 2	SF 25	7-1-85
123 3(4)	SF 395	7-1-85	123 53(8)	SF 395	7-1-85	144A 3	SF 25	7-1-85
123 3(7)	SF 395	7-1-85	123 55(8)	SF 395	7-1-85	144A 4	SF 25	7-1-85
123 3(8)	SF 395	7-1-85	123 55(9)	SF 395	7-1-85	144A 5	SF 25	7-1-85
123 3(10)	SF 395	7-1-85	123 56	SF 395	7-1-85	144A 6	SF 25	7-1-85
123 3(11) 'c'	SF 395	7-1-85	123 56(1)	SF 583	7-1-85	144A 7	SF 25	7-1-85
123 3(13)	SF 395	7-1-85	123 59	SF 395	7-1-85	144A 8	SF 25	7-1-85
123 3(17)	SF 395	7-1-85	123 59	SF 121	7-1-85	144A 9	SF 25	7-1-85
123 3(19)	SF 395	7-1-85	123 60	SF 395	7-1-85	144A 10	SF 25	7-1-85
123 3(20)	SF 395	7-1-85	123 71	SF 395	7-1-85	144A 11	SF 25	7-1-85
123 3(25)	SF 395	7-1-85	123 72	SF 395	7-1-85	145 3(3) 'h'	SF 113	7-1-85
123 3(26)	SF 395	7-1-85	123 81	SF 395	7-1-85	145 3(3) 'i'	SF 113	7-1-85
123 3(27)	SF 395	7-1-85	123 84	SF 395	7-1-85	145 3(4) 'e'	SF 113	7-1-85
123 3(31)	SF 395	7-1-85	123 91	SF 395	7-1-85	145 6	SF 113	7-1-85
123 4	SF 395	7-1-85	123 92 unnn 1	SF 395	7-1-85	145A 2 unnn 1	HF 746	7-1-85
123 6	SF 395	7-1-85	123 95 unnn 1	SF 395	7-1-85	145A 2(3)	HF 746	7-1-85
123 14(1)	SF 395	7-1-85	123 96(1)	SF 395	7-1-85	145A 3	HF 746	7-1-85
123 14(3)	SF 395	7-1-85	123 96(2)	SF 395	7-1-85	145A 5	HF 746	7-1-85
123 15	SF 395	7-1-85	123 121 unnn 1	SF 395	7-1-85	145A 12	HF 746	7-1-85
123 16(2) 'b'	SF 395	7-1-85	123 143(3)	SF 583	7-1-85	145A 13	HF 746	7-1-85
123 18	SF 395	7-1-85	123 146	SF 583	7-1-85	145A 14	HF 746	7-1-85
123 19(1)	SF 395	7-1-85	123 150 unnn 1	SF 329	7-1-85	145A 17	HF 746	7-1-85
123 20(5)	SF 445	7-1-85	123 171	SF 395	7-1-85	145A 18	HF 746	7-1-85
123 21(6)	SF 395	7-1-85	123 172	SF 395	7-1-85	145A 20	HF 746	7-1-85

N

145A 21	HF 746	7-1-85	179 2 unnn 2	HF 692	7-1-85	204 212(3)	SF 376	7-1-85
145A 22	HF 746	7-1-85	179 2 unnn 3	HF 692	7-1-85	205 3	SF 306	7-1-85
147 1(2)	HF 730	7-1-85	179 2 unnn 4	HF 692	7-1-85	214A 1(5)	SF 539	PC
147.1(3)	HF 730	7-1-85	179 2 unnn 5	HF 692	7-1-85	214A 1(6)	SF 539	PC
147 2	HF 730	7-1-85	179 2 unnn 6	HF 692	7-1-85	214A 2(1)	SF 539	PC
147 3	HF 730	7-1-85	179 2 unnn 7	HF 692	7-1-85	214A 2(2) unnn 2	SF 539	PC
147 13	HF 730	7-1-85	179 2(6)	HF 692	7-1-85	214A 2(2) unnn 3	SF 539	PC
147 14(11)	HF 730	7-1-85	179 2(7)	HF 692	7-1-85	214A 2(2) unnn 4	SF 539	PC
147 25 unnn 4	HF 730	7-1-85	179 3(8)	HF 692	7-1-85	214A 2(2) unnn 5	SF 539	PC
147 80(21)	HF 730	7-1-85	179 4	HF 692	7-1-85	214A 2(2) unnn 6	SF 539	PC
147A 12	HF 160	7-1-85	179 5	HF 692	7-1-85	214A 2(2) unnn 7	SF 539	PC
148C 5	SF 121	7-1-85	179 6	HF 692	7-1-85	214A 2(2) unnn 8	SF 329	PC
154 1	SF 438	7-1-85	179 7	HF 692	7-1-85	214A 2(2) unnn 8	SF 539	PC
154 3(7)	SF 438	7-1-85	179 8	HF 692	7-1-85	214A 2(4)	SF 539	PC
154 3(8)	SF 438	7-1-85	179 10	HF 692	7-1-85	214A 16	SF 539	PC
154 3(9)	SF 438	7-1-85	179 13	HF 692	7-1-85	214A 17	SF 539	PC
154 3(10)	SF 438	7-1-85	182 1	HF 677	7-1-85	214A 18	SF 539	PC
154 10	SF 438	7-1-85	182 1	SF 581	7-1-85	216 1 unnn 1	HF 186	7-1-85
155 1(2)	SF 438	7-1-85	182 2	HF 677	7-1-85	216 1(1) unnn 1	HF 186	7-1-85
155 3(11)	SF 438	7-1-85	182 2	SF 581	7-1-85	216 1(2) unnn 1	HF 186	7-1-85
155 9 unnn 1	SF 328	7-1-85	182 3	HF 677	7-1-85	216 2(2)	HF 186	7-1-85
155 9	SF 328	7-1-85	182 3	SF 581	7-1-85	216 3(1) 'a' (1)	HF 186	7-1-85
155.22	SF 438	7-1-85	182 4	HF 677	7-1-85	216 5(3)	HF 186	7-1-85
155 26 unnn 1	SF 438	7-1-85	182 4	SF 581	7-1-85	216 5(4)	HF 186	7-1-85
155 26 unnn 2	SF 438	7-1-85	182 5	HF 677	7-1-85	216 5(5)	HF 186	7-1-85
158A 1	HF 730	7-1-85	182 5	SF 581	7-1-85	216 5(7) unnn 1	HF 186	7-1-85
158A 2	HF 730	7-1-85	182 6	HF 677	7-1-85	216 5(7) 'd' (2)	HF 186	7-1-85
158A 3	HF 730	7-1-85	182 6	SF 581	7-1-85	216 5(7) 'e'	HF 186	7-1-85
160 14	SF 342	7-1-85	182 7	HF 677	7-1-85	216 8(3)	HF 186	7-1-85
161 12 unnn 2	SF 509	PC	182 7	SF 581	7-1-85	216 9(2) 'b'	HF 186	7-1-85
174 13	SF 121	7-1-85	182 8	HF 677	7-1-85	216 10(2) 'a'	HF 186	7-1-85
175 2(5)	SF 117	PC	182 8	SF 581	7-1-85	216 10(3)	HF 186	7-1-85
175 2(8)	SF 117	PC	182 9	HF 677	7-1-85	216 12(1)	HF 186	7-1-85
175 2(9)	SF 117	PC	182 9	SF 581	7-1-85	216 12(2)	HF 186	7-1-85
175 2(13)	SF 117	PC	182 10	HF 677	7-1-85	216 13	HF 186	7-1-85
175 3(1)	SF 117	PC	182 10	SF 581	7-1-85	217 23(2)	SF 578	7-1-85
175 3(3)	SF 117	PC	182 11	HF 677	7-1-85	217A 2(5)	HF 186	7-1-85
175 12(3) 'a'	SF 117	PC	182 11	SF 581	7-1-85	217A 2(6)	HF 186	7-1-85
175 12(3) 'c'	SF 117	PC	182 12	HF 677	7-1-85	217A 5(6)	HF 186	7-1-85
175 12(3) 'd'	SF 117	PC	182 12	SF 581	7-1-85	217A 8(6)	HF 186	7-1-85
175 12(3) 'f'	SF 117	PC	182 13	HF 677	7-1-85	217A 23	HF 186	7-1-85
175 12(3) 'g'	SF 117	PC	182 13	SF 581	7-1-85	217A 31(1) unnn 1	HF 186	7-1-85
175A 1	SF 577	7-1-85	182 14	HF 677	7-1-85	217A 31(2)	HF 186	7-1-85
175A 2	SF 577	7-1-85	182 14	SF 581	7-1-85	217A 31(4)	HF 186	7-1-85
175A 3	SF 577	7-1-85	182 15	HF 677	7-1-85	217A 32	HF 186	7-1-85
175A 4	SF 577	7-1-85	182 16	HF 677	7-1-85	217A 33	HF 186	7-1-85
175A 5	SF 577	7-1-85	182 17	HF 677	7-1-85	217A 39	HF 186	7-1-85
175A 6	SF 577	7-1-85	182 18	HF 677	7-1-85	217A 46	HF 186	7-1-85
175A 7	SF 577	7-1-85	182 19	HF 677	7-1-85	217A 47	HF 186	7-1-85
175A 8	SF 577	7-1-85	182 20	HF 677	7-1-85	217A 47	SF 329	7-1-85
175A 9	SF 577	7-1-85	182 21	HF 677	7-1-85	217A 66	HF 186	7-1-85
175A 10	SF 577	7-1-85	182 22	HF 677	7-1-85	217A 78	HF 186	7-1-85
175A 11	SF 577	7-1-85	182 23	HF 677	7-1-85	217A 79	HF 186	7-1-85
175A 12	SF 577	7-1-85	183 Ch	SF 581	7-1-85	217A 80	HF 186	7-1-85
175A 13	SF 577	7-1-85	189 2(1)	SF 121	7-1-85	217A 85	HF 186	7-1-85
175A 14	SF 577	7-1-85	196 1(7)	SF 329	7-1-85	217A 86	HF 186	7-1-85
175A 15	SF 577	7-1-85	196 2	SF 329	7-1-85	217A 87	HF 186	7-1-85
175A 16	SF 577	7-1-85	196 9	SF 329	7-1-85	217A 88	HF 186	7-1-85
175A 17	SF 577	7-1-85	199 10(2) 'a'	SF 121	7-1-85	217A 89	HF 186	7-1-85
175A 18	SF 577	3-1-86	199 10(3) unnn 1	SF 121	7-1-85	218 75	SF 588	7-1-85
175A 19	SF 577	7-1-85	199 10(3) 'a'	SF 121	7-1-85	218.78(1)	SF 588	7-1-85
175A 20	SF 577	7-1-85	199 10(3) 'c'	SF 121	7-1-85	218B 2, Art III.(2)	HF 186	7-1-85
175A 21	SF 577	7-1-85	199 16	SF 436	7-1-85	220 1(28) unnn 1	SF 577	7-1-85
175A 22	SF 577	7-1-85	200 8(3)	SF 465	7-1-85	220 1(28) unnn 1	SF 449	PC
179 1(3)	HF 692	7-1-85	201 3	SF 465	7-1-85	220 1(34)	SF 577	7-1-85
179.1(4)	HF 692	7-1-85	201 13	SF 465	7-1-85	220 1(35)	SF 577	7-1-85
179 1(5)	HF 692	7-1-85	204 204(2) 'ar'	SF 376	7-1-85	220 2(1)	SF 577	7-1-85
179 1(6)	HF 692	7-1-85	204 204(5) 'b'	SF 376	7-1-85	220 3(14)	SF 577	7-1-85
179 1(7)	HF 692	7-1-85	204 206(3) 'w'	SF 376	7-1-85	220 5(16)	SF 577	7-1-85
179 1(8)	HF 692	7-1-85	204 206(5) 'b'	SF 376	7-1-85	220 26(1)	SF 449	PC
179 2 unnn 1	HF 692	7-1-85	204 210(3) 'a' - 'x'	SF 376	7-1-85	220 26(3)	SF 449	PC

220 40	SF 577	7-1-85	238 33 Art III "a"	HF 451	7-1-85	257A 4	HF 773	7-1-85
220 91	SF 577	7-1-85	238 33 Art VIII "a"	HF 451	7-1-85	257A 5	HF 773	7-1-85
222 31(3)	SF 121	7-1-85	238 44	SF 224	7-1-85	257A 6	HF 773	7-1-85
222 38	SF 224	7-1-85	242 4	HF 186	7-1-85	257A 7	HF 773	7-1-85
222 93	SF 588	7-1-85	242 16	HF 186	7-1-85	258 3	HF 686	7-1-85
223 Ch	HF 186	7-1-85	242 16	HF 451	7-1-85	258 13	HF 686	7-1-85
225 18	SF 224	7-1-85	244 3(1)	HF 186	7-1-85	258 7	HF 686	7-1-85
225C 4(1) "s"	HF 742	7-1-85	244 15	HF 451	7-1-85	258 7(15)	SF 329	7-1-85
225C 19	HF 742	7-1-85	245 Ch	HF 186	7-1-85	258 7(17)	SF 224	7-1-85
225C 19	HF 631	7-1-85	246 12	SF 121	7-1-85	259 1	SF 149	7-1-85
225C 25	SF 473	7-1-85	246 32	SF 121	7-1-85	259A 4	HF 686	7-1-85
225C 26	SF 473	7-1-85	246 Ch	HF 186	7-1-85	259A 5	HF 686	7-1-85
225C 27	SF 473	7-1-85	246A Ch	HF 186	7-1-85	260 3	HF 686	7-1-85
225C 28	SF 473	7-1-87	247 29	HF 186	7-1-85	260 8	SF 254	7-1-85
225C 29	SF 473	7-1-85	247 29	SF 570	7-1-85	260 15	HF 686	7-1-85
227 4	HF 742	7-1-85	247 30	HF 186	7-1-85	260 28	HF 686	7-1-85
229 1(8) "c"	HF 186	7-1-85	247 30	SF 570	7-1-85	261 1	HF 686	7-1-85
229 19 unnn 3	HF 558	7-1-85	247 31	HF 186	7-1-85	261 1(6) unnn 2	SF 121	7-1-85
229 21(3)	SF 329	7-1-85	247 31	SF 570	7-1-85	261 1(6) unnn 3	SF 121	7-1-85
229 26	HF 186	7-1-85	247 32	HF 186	7-1-85	261 12(1) "b"	HF 747	7-1-85
232 13	HF 130	7-1-85	247 41	HF 584	7-1-85	261 25(1)	HF 747	7-1-85
232 37(4)	SF 329	7-1-85	247A 1	HF 186	7-1-85	261 45 unnn 3	HF 747	7-1-85
232 45(1)	HF 204	7-1-85	247A 10(1)	HF 186	7-1-85	261 45(6)	HF 747	7-1-85
232 45(4)	HF 204	7-1-85	249A 3(1) "d"	SF 588	7-1-86	261 51	HF 747	7-1-85
232 45(6)	HF 204	7-1-85	249A 11	SF 588	7-1-86	261 52 unnn 1	HF 747	7-1-85
232 45(8)	HF 204	7-1-85	249A 14	SF 329	7-1-85	261 53	HF 747	7-1-85
232 45(10)	HF 204	7-1-85	249B 31	HF 398	7-1-85	261 54 unnn 1	HF 747	7-1-85
232 45(11)	HF 204	7-1-85	249B 32 unnn 1	HF 398	7-1-85	261 61 unnn 1	HF 747	7-1-85
232 48	SF 467	7-1-85	249B 32(1)	HF 398	7-1-85	261 63	HF 747	7-1-85
232 52(2) "a"	HF 751	7-1-85	249B 36	HF 398	7-1-85	261 64	HF 225	P C
232 55(2)	HF 688	7-1-85	250 3	SF 121	7-1-85	261 65	HF 225	P C
232 68(6) "c"	HF 451	7-1-85	250 13	SF 121	7-1-85	261 66	HF 225	P C
232 69(1) "a"	HF 451	7-1-85	250 14 unnn 1	SF 121	7-1-85	261 67	SF 156	7-1-85
232 69(1) "b"	HF 451	7-1-85	250 16	SF 121	7-1-85	261 68	SF 156	7-1-85
232 69(3)	HF 451	7-1-85	250 17	SF 121	7-1-85	261 69	SF 156	7-1-85
232 71(2) "e"	HF 451	7-1-85	252A 6(11)	SF 244	7-1-85	261 70	SF 156	7-1-85
232 71(3)	HF 451	7-1-85	252C 7	HF 495	7-1-85	261A 32	HF 541	7-1-85
232 71(4)	HF 451	7-1-85	252C 9	SF 329	7-1-85	261A 33	HF 541	7-1-85
232 71(6)	HF 451	7-1-85	252C 11	SF 244	7-1-85	261A 34	HF 541	7-1-85
232 78(1) "a"	HF 451	7-1-85	252D 1	HF 495	7-1-85	261A 35	HF 541	7-1-85
232 78(4)	HF 451	7-1-85	252D 1(2)	SF 244	7-1-85	261A 36	HF 541	7-1-85
232 98(1) unnn 1	HF 451	7-1-85	252D 1(3)	SF 244	7-1-85	261A 37	HF 541	7-1-85
232 102(2)	HF 451	7-1-85	252D 3	SF 244	7-1-85	261A 38	HF 541	7-1-85
232 139	SF 218	7-1-85	252D 4(1)	HF 495	7-1-85	261A 39	HF 541	7-1-85
232 141(2)	HF 451	7-1-85	252D 4(3)	SF 244	7-1-85	261A 40	HF 541	7-1-85
232 149(5)	HF 451	7-1-85	252D 5	SF 244	7-1-85	261A 41	HF 541	7-1-85
234 9	SF 224	7-1-85	252D 6	HF 495	7-1-85	261A 42	HF 541	7-1-85
234 11	HF 505	7-1-85	257 10	HF 686	7-1-85	261A 43	HF 541	7-1-85
235A 15	HF 451	7-1-85	257 10(16)	SF 78	7-1-85	261A 44	HF 541	7-1-85
235A 15(2) 1'	HF 462	7-1-85	257 10(16)	HF 552	7-1-85	261A 45	HF 541	7-1-85
235A 18(2)	HF 451	7-1-85	257 11	HF 686	7-1-85	261A 46	HF 541	7-1-85
235A 19(2)	HF 451	7-1-85	257 12	HF 686	7-1-85	261A 47	HF 541	7-1-85
235A 19(3)	HF 451	7-1-85	257 13	HF 686	7-1-85	261A 48	HF 541	7-1-85
235B 1(2) "a"	HF 700	7-1-85	257 14	HF 686	7-1-85	261A 49	HF 541	7-1-85
236 2(3)	HF 549	7-1-85	257 15	HF 686	7-1-85	261A 50	HF 541	7-1-85
236 2(4)	HF 549	7-1-85	257 18	HF 686	7-1-85	262 14 unnn 1	SF 110	7-1-85
236 2(5)	HF 549	7-1-85	257 19	HF 686	7-1-85	262 14(3)	SF 27	7-1-85
236 2(6)	HF 549	7-1-85	257 20	HF 686	7-1-85	273 2 unnn 2	SF 329	7-1-85
236 3 unnn 2	HF 549	7-1-85	257 21	HF 686	7-1-85	273 3	HF 686	7-1-85
236 9	HF 549	7-1-85	257 22	HF 686	7-1-85	273 3(6)	HF 552	7-1-85
236 12(2) "d"	HF 549	7-1-85	257 23	HF 686	7-1-85	273 3(13)	HF 552	7-1-85
236 13	HF 549	7-1-85	257 24	HF 686	7-1-85	273 3(20)	HF 552	7-1-85
236 14	HF 549	7-1-85	257 25	HF 686	7-1-85	273 8(2) unnn 5	HF 552	7-1-85
236 15	HF 549	7-1-85	257 25(2)	HF 686	7-1-85	273 11	HF 686	7-1-85
236 16	HF 549	7-1-85	257 31	SF 526	7-1-85	274 42	HF 686	7-1-85
236 17	HF 549	7-1-85	257 42	HF 747	7-1-85	274 43	HF 686	7-1-85
237A 4	HF 451	7-1-85	257 44	HF 747	7-1-85	274 44	HF 686	7-1-85
237A 5	SF 424	1-1-86	257 45	HF 686	7-1-85	274 45	HF 686	7-1-85
237A 12 unnn 3	HF 451	7-1-85	257A 1	HF 773	7-1-85	275 1 unnn 1	HF 686	7-1-85
237A 19 unnn 2	SF 424	1-1-86	257A 2	HF 773	7-1-85	275 3	HF 686	7-1-85
238 33 Art II "d"	HF 451	7-1-85	257A 3	HF 773	7-1-85	275 4	HF 686	7-1-85

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275 14	SF 398	7-1-85	291 15	HF 686	7-1-85	317 18	SF 406	7-1-85
275 15	SF 398	7-1-85	294 5	HF 686	7-1-85	317.19 unnn 1	SF 406	7-1-85
275 16	HF 686	7-1-85	294 15 unnn 1	SF 121	7-1-85	317 21 unnn 1	SF 406	7-1-85
275 16 unnn 1	SF 398	7-1-85	296 3	SF 121	7-1-85	321 1	SF 9	7-1-85
275 18	SF 398	7-1-85	297 22 unnn 1	HF 38	7-1-85	321.1(3) c	SF 70	7-1-85
275 25(6)	SF 398	7-1-85	297 32	HF 686	7-1-85	321 1(16) d	SF 9	7-1-85
275 29	SF 398	7-1-85	299 1 unnn 1	SF 77	7-1-86	321 1(26)	SF 307	7-1-85
275 31	SF 398	7-1-85	299 24	HF 686	7-1-85	321.1(43)	HF 186	7-1-85
275 33	SF 398	7-1-85	302 13	HF 686	7-1-85	321 16 unnn 1	HF 366	7-1-85
275 41(9)	SF 398	7-1-85	303 49(2)	HF 569	7-1-85	321 19(1)	SF 121	7-1-85
276 4	HF 686	7-1-85	303 52(1)	HF 569	7-1-85	321.19(1)	SF 525	7-1-85
279 3 unnn 1	SF 150	7-1-85	303 52(2)	HF 569	7-1-85	321 22(3)	SF 329	7-1-85
279 10(1)	SF 77	7-1-86	303 52(4)	HF 569	7-1-85	321 30(11)	SF 452	7-1-85
279 10(4)	SF 77	7-1-86	303 52A	HF 569	7-1-85	321 34(1)	SF 387	7-1-85
279 19A(1)	SF 480	PC	303 55	HF 569	7-1-85	321 34(8)	SF 121	7-1-85
279 19A(2)	SF 480	PC	303 57	HF 569	7-1-85	321 38	SF 329	7-1-85
279 19A(4) c	SF 480	PC	303 59	HF 569	7-1-85	321 40	SF 387	7-1-85
279 19A(5) unnn 1	SF 480	PC	303A 1	SF 250	7-1-85	321 40	SF 395	7-1-85
279 19B unnn 2	SF 414	7-1-85	303A 2	SF 250	7-1-85	321 40 unnn 3	HF 454	7-1-85
279 43(1)	SF 128	7-1-85	303A 3	SF 250	7-1-85	321 42 unnn 2	HF 711	7-1-85
279 43(2)	HF 639	7-1-85	303A 4	SF 250	7-1-85	321 46(6)	SF 387	7-1-85
279 43(3) c	HF 639	7-1-85	303A 5	SF 250	7-1-85	321 49(1)	HF 711	7-1-85
279 43(3) d	HF 639	7-1-85	303A 6	SF 250	7-1-85	321 52(3)	SF 121	7-1-85
279 49	HF 451	7-1-85	303A 7	SF 250	7-1-85	321 52(3)	HF 711	7-1-85
280 3	HF 686	7-1-85	303A 21	SF 250	7-1-85	321 85	HF 664	7-1-85
280 12	HF 686	7-1-85	303A 22	SF 250	7-1-85	321 89(3) a	HF 664	7-1-85
280 13	HF 686	7-1-85	303A 23	SF 250	7-1-85	321 104(3)	SF 329	7-1-85
280 15	HF 686	7-1-85	303A 24	SF 250	7-1-85	321 115	SF 290	7-1-85
280 16	HF 451	7-1-85	303B 1	SF 250	7-1-85	321 126 unnn 1	SF 387	7-1-85
280 16	HF 686	7-1-85	303B 4	SF 250	7-1-85	321 126	SF 387	7-1-85
280A 1(5A)	HF 686	7-1-85	303B 6	SF 250	7-1-85	321 127	SF 387	7-1-85
280A 2	HF 686	7-1-85	303B 7	SF 250	7-1-85	321 130	SF 395	7-1-85
280A 25(9)	HF 686	7-1-85	303B 8	SF 250	7-1-85	321 135	HF 711	7-1-85
280A 33	HF 686	7-1-85	303B 8A	SF 250	7-1-85	321 177(1)	SF 329	7-1-85
280B 2(10)	HF 729	7-1-85	306 50	HF 514	4-1-86	321 196 unnn 1	SF 329	7-1-85
280C 1	HF 766	7-1-85	306 51	HF 514	4-1-86	321 210A	SF 570	7-1-85
280C 2	HF 766	7-1-85	306 52	HF 514	4-1-86	321 212(1) a	SF 570	7-1-85
280C 3	HF 766	7-1-85	306 53	HF 514	4-1-86	321 218 unnn 2	SF 329	7-1-85
280C 4	HF 766	7-1-85	306 54	HF 514	4-1-86	321 233 unnn 1	HF 378	7-1-85
280C 5	HF 766	7-1-85	307B 23	SF 562	7-1-85	321 234	SF 70	7-1-85
280C 6	HF 766	7-1-85	308 4(3)	HF 539	7-1-85	321 234A	SF 9	7-1-85
280C 7	HF 766	7-1-85	308 5	HF 539	7-1-85	321 236(10)	SF 70	7-1-85
280C 8	HF 766	7-1-85	310 27 unnn 2	SF 413	7-1-85	321 281(10)	SF 329	7-1-85
281 1	HF 686	7-1-85	311 1	SF 560	7-1-85	321 283(6) unnn 1	SF 121	7-1-85
281 2 unnn 1	SF 215	7-1-85	311 3	SF 560	7-1-85	321 288	HF 378	7-1-85
281 9	HF 686	7-1-85	311 4	SF 560	7-1-85	321 358(1)	SF 70	7-1-85
281 12	HF 686	7-1-85	311 5	SF 560	7-1-85	321 388	SF 329	7-1-85
282 7(1)	HF 686	7-1-85	311 6	SF 560	7-1-85	321 423(1) a	SF 307	7-1-85
282 19	HF 686	7-1-85	311 7	SF 560	7-1-85	321 451	SF 307	7-1-85
282 24	HF 686	7-1-85	311.8(1)	SF 560	7-1-85	321 492A	SF 497	7-1-85
282 27	HF 686	7-1-85	311.8(3)	SF 560	7-1-85	321A 17(5)	SF 570	7-1-85
283A 3	HF 686	7-1-85	311.8(4)	SF 560	7-1-85	321B 30	HF 451	7-1-85
283A 4	HF 686	7-1-85	311.11 unnn 1	SF 560	7-1-85	321E.1	SF 562	7-1-85
283A 5	HF 686	7-1-85	311.29	SF 560	7-1-85	321I.1	SF 392	7-1-85
284 2	HF 686	7-1-85	312.2(16)	SF 565	7-1-85	321I.2	SF 392	7-1-85
285 1	HF 686	7-1-85	312 2(17)	SF 565	7-1-85	321I.3	SF 392	7-1-85
285 4	HF 686	7-1-85	315 1	SF 565	7-1-85	321I.4	SF 392	7-1-85
285 5	HF 686	7-1-85	315 2	SF 565	7-1-85	321I.5	SF 392	7-1-85
285 6	HF 686	7-1-85	315 3	SF 565	7-1-85	321I.6	SF 392	7-1-85
285 8	HF 686	7-1-85	315 4	SF 565	7-1-85	321I.7	SF 392	7-1-85
285 12	HF 686	7-1-85	315 5	SI	7-1-85	321I.8	SF 392	7-1-85
285 13	HF 686	7-1-85	315 6	SF 565	7-1-85	322.9(4)	SF 121	7-1-85
286A 6	HF 686	7-1-85	315 7	SF 565	7-1-85	322D 1(1)	SF 183	7-1-85
286A 10	HF 686	7-1-85	315 8	SF 565	7-1-85	322D.1(3) b	SF 183	7-1-85
286A 11	HF 686	7-1-85	315 9	SF 565	7-1-85	322D 1(3) e	SF 183	7-1-85
286A 12	HF 686	7-1-85	315 10	SF 565	7-1-85	322D 1(4)	SF 183	7-1-85
286A Ch	HF 747	7-1-85	317 1(2)	SF 406	7-1-85	322D 1(5)	SF 183	7-1-85
290 5	HF 686	7-1-85	317.3 unnn 1	HF 498	7-1-85	322D 1(5A)	SF 183	7-1-85
291 9	HF 686	7-1-85	317 8(4)	SF 406	7-1-85	322D 2(1) unnn 1	SF 183	7-1-85
291 10	HF 686	7-1-85	317 13	SF 406	7-1-85	322D 2(1) a	SF 183	7-1-85
291 11	HF 686	7-1-85	317 16	SF 406	7-1-85	322D 2(2)	SF 183	7-1-85

322D 2(3)	SF 183	7-1-85	386 3(1)"a"	HF 652	7-1-85	422B 10	SF 395	7-1-85
322D 2(4)	HF 41	PC	386 8	HF 652	7-1-85	422B 11	SF 395	7-1-85
322D 2(4)	SF 183	7-1-85	386.9	HF 652	7-1-85	422B 11	SF 583	7-1-85
322D 3(5)	SF 121	7-1-85	386 10	HF 652	7-1-85	423 1(1) unnn. 2	SF 395	7-1-85
322D 3(7)	SF 183	7-1-85	400.10 unnn. 1	SF 266	7-1-85	423 1(14)	SF 565	7-1-85
322D 3(9)	SF 183	7-1-85	403 2(3)	HF 494	PC	423 4(10)	SF 565	7-1-85
322D 4	SF 183	7-1-85	403 4(1)	HF 494	PC	423 4(11)	SF 565	7-1-85
322D 7	HF 41	PC	403 4(2)	HF 494	PC	423 4(12)	SF 565	7-1-85
324 2(7)	SF 565	7-1-85	403 5(1)	HF 494	PC	425 26(9)	SF 121	7-1-85
324 3 unnn. 1	SF 565	7-1-85	403 7	HF 494	PC	427 1(32) unnn. 1	SF 395	7-1-85
324 3 unnn. 3	SF 565	7-1-85	403 17(9)	HF 494	PC	427 1(32) unnn. 2	SF 395	7-1-85
324 34 unnn. 1	SF 565	7-1-85	403 17(10) unnn. 1	HF 494	PC	427A 1(1) j"(1)	SF 395	7-1-85
324 34 unnn. 8	SF 565	7-1-85	403 17(10)"a"	HF 494	PC	427A 9 unnn. 2	SF 395	7-1-85
324 36(1)	SF 121	7-1-85	403 17(11)	HF 494	PC	427A 9 unnn. 3	SF 395	7-1-85
324A 2(4)	SF 562	7-1-85	403 17(12) "b"	HF 494	PC	427A 10	SF 395	7-1-85
326.10A	HF 418	7-1-85	403 17(20)	HF 494	PC	427A 12(6)	SF 395	7-1-85
327G 32 unnn. 3	SF 329	7-1-85	403.19(1)	HF 729	7-1-85	427A.13	SF 395	7-1-85
331.301(10)	HF 523	PC	403 19(5)	HF 729	7-1-85	427B 1 unnn. 1	SF 576	7-1-85
331.361(5)"c"	SF 103	PC	403.19(6)	HF 729	7-1-85	427B 10 unnn. 1	SF 395	7-1-85
331 427(1) unnn. 1	SF 455	7-1-85	404 2(7)	SF 355	7-1-85	427B Ch.	SF 395	7-1-85
331 427(1)"b"	SF 329	7-1-85	414 5	HF 265	7-1-85	428A 1 unnn. 2	SF 359	1-1-86
331 430(2)"c"	HF 523	PC	421 17(25)	SF 570	7-1-86	432 2	HF 570	7-1-85
331 485	SF 568	7-1-85	421 17(25)	SF 570	7-1-86	442 4(3)"a"	HF 682	PC
331 486	SF 568	7-1-85	422 3(5)	SF 561	PC	442 7	HF 686	7-1-85
331 487	SF 568	7-1-85	422.5 unnn. 10	SF 24	1-1-85	442 7(1)"a"	SF 395	7-1-85
331 488	SF 568	7-1-85	422 5(15)	SF 24	1-1-85	442 7(7)"i"	HF 87	PC
331 489	SF 568	7-1-85	422 7(20)	SF 561	PC	442 9(1)"a"	SF 121	7-1-85
331 490	SF 568	7-1-85	422 8(4)	SF 24	1-1-84	442 9(1)"b"	HF 87	PC
331 491	SF 568	7-1-85	422 10 unnn. 1	SF 561	PC	442 12	HF 686	7-1-85
331 508(2)"b"	SF 570	7-1-85	422.11A	SF 395	7-1-85	442 13	HF 686	7-1-85
331 507(2)"a"	SF 393	7-1-85	422.13(14) unnn. 1	HF 100	PC	442 21	HF 87	PC
331 507(2)"b"	HF 589	7-1-85	422 21 unnn. 1	SF 561	PC	442 23	HF 686	7-1-85
331 510(2)	SF 570	7-1-85	422 27(1)	HF 761	7-1-85	442 28 unnn. 1	HF 682	PC
331 510(2)	HF 186	7-1-85	422 33(5) unnn. 1	SF 561	PC	442 28 unnn. 2	HF 682	PC
331 602(29A)	SF 329	7-1-85	422 33(7)	SF 395	7-1-85	442 39(2)	HF 210	7-1-85
331 605(5)	HF 589	7-1-85	422 42(3)	SF 395	7-1-85	442 44 unnn. 1	HF 747	7-1-85
331 605(6)	HF 589	7-1-85	422 42(3) unnn. 1	SF 574	7-1-85	442 44 unnn. 4	HF 747	7-1-85
331 605(7)	HF 589	7-1-85	422 42(12)	SF 395	7-1-85	442A 1	SF 79	PC
331 653(22)	SF 121	7-1-85	422 43(2)	SF 395	7-1-85	442A 2	SF 79	PC
331 655(1)"a"	HF 150	7-1-85	422 43(3)	SF 329	7-1-85	442A 3	SF 79	PC
331 655(1)"b"	HF 150	7-1-85	422 43(11)	SF 329	7-1-85	442A 4	SF 79	PC
331 655(1)"c"	HF 150	7-1-85	422 43(11)	SF 395	7-1-85	442A 5	SF 79	PC
331 655(1)"e"	HF 150	7-1-85	422 45	HF 225	PC	442A 6	SF 79	PC
331 655(1)"f"	HF 150	7-1-85	422 45	SF 395	7-1-85	442A 6A	SF 79	PC
331 655(1)"g"	HF 150	7-1-85	422 45	SF 564	7-1-85	442A 7	SF 79	PC
331 655(1)"h"	HF 150	7-1-85	422 45	SF 580	7-1-85	442A 8	SF 79	PC
331 655(1)"i"	HF 150	7-1-85	422 45	SF 329	7-1-85	442A 9	SF 79	PC
331 655(1)"k"	HF 150	7-1-85	422 45(2)	SF 395	7-1-85	442A 10	SF 79	PC
331 655(1)"l"	HF 150	7-1-85	422 45(12)	SF 395	7-1-85	442A 11	SF 79	PC
331 655(1)"o"	HF 150	7-1-85	422 45(20)	SF 395	7-1-85	442A 12	SF 79	PC
331 756(70)	SF 329	7-1-85	422 45(22)	HF 225	PC	442A 13	SF 79	PC
331 904(1)	SF 329	7-1-85	422 45(22)	SF 565	7-1-85	442A 14	SF 79	PC
347 7	SF 103	PC	422 45(22)	SF 395	7-1-85	442A 15	SF 79	PC
347 13(10)	SF 103	PC	422 47A	SF 395	7-1-85	442A 16	SF 79	PC
347 14(14)	SF 103	PC	422 47B	SF 395	7-1-85	445 39	HF 640	7-1-85
347 25 unnn. 1	HF 255	7-1-85	422 61(2)	SF 561	PC	448 12	HF 186	7-1-85
347A.3	HF 746	7-1-85	422 62	SF 561	PC	450 3(2)	SF 561	PC
356 4	HF 186	7-1-85	422 68(3)	SF 561	PC	450 3(4)	HF 761	7-1-85
357A.2 unnn. 2	SF 121	7-1-85	422 69(3)	SF 395	7-1-85	450 3(7)	HF 761	7-1-85
358 2 unnn. 3	SF 121	7-1-85	422 73	SF 561	PC	450 58	HF 761	7-1-85
358 9 unnn. 1	HF 255	7-1-85	422B 1	SF 395	7-1-85	450 94(5)	HF 761	7-1-85
358A 7	HF 265	7-1-85	422B 1(1)	SF 583	7-1-85	452 10	SF 296	7-1-85
358B 16 unnn. 4	HF 670	7-1-85	422B 1(9)	SF 583	7-1-85	453 1	SF 296	7-1-85
359 42	HF 768	7-1-85	422B 2	SF 395	7-1-85	453 16(1)"b"	SF 296	7-1-85
359 43(1)	HF 768	7-1-85	422B 3	SF 395	7-1-85	453 17(1)"c"	SF 296	7-1-85
364 3(2)	SF 329	7-1-85	422B 4	SF 395	7-1-85	453 20	SF 296	7-1-85
364 4(4)	HF 523	PC	422B 5	SF 395	7-1-85	453 22	SF 296	7-1-85
372 13(2)"b"	HF 537	7-1-85	422B 6	SF 395	7-1-85	453 23	SF 296	7-1-85
384 4(3)	HF 523	PC	422B 7	SF 395	7-1-85	453 24	SF 296	7-1-85
384 6 unnn. 1	SF 329	7-1-85	422B 8	SF 395	7-1-85	453 25	SF 296	7-1-85
384 12(19)"c"	SF 329	7-1-85	422B 9	SF 395	7-1-85	455 33	HF 678	7-1-85

N

455 50 unnn 3	SF 575	7-1-85	467D 20	SF 121	7-1-85	534 213(1)"i"	HF 460	7-1-85
455 50 unnn 4	SF 575	7-1-85	476 61	SF 450	7-1-85	534 213(1)"i"	SF 577	7-1-85
455.64(2)	HF 678	7-1-85	502.102(12)	HF 484	7-1-85	534 213(1)"m"	HF 460	7-1-85
455 111	HF 678	7-1-85	507B 4(1)"i"	SF 521	7-1-85	534.213(1)"m"	SF 577	7-1-85
455 127A	HF 678	7-1-85	507C 21(1)"a"	SF 121	7-1-85	534 213(3)	SF 577	7-1-85
455 128	HF 678	7-1-85	507C 21(1)"d"	SF 121	7-1-85	534 308	SF 296	7-1-85
455 129	HF 678	7-1-85	507C 21(1)"j"	SF 121	7-1-85	534 406	SF 329	7-1-85
455 130	HF 678	7-1-85	507C 21(1)"k"	SF 121	7-1-85	534 516	SF 296	7-1-85
455 135(1)"c"	HF 678	7-1-85	507C 21(2)	SF 121	7-1-85	534 516	SF 157	P.C.
455 135(8)	HF 678	7-1-85	507C 50(1) unnn. 1	SF 121	7-1-85	535 8(2)"b"(10)	SF 577	7-1-85
455.147	HF 678	7-1-85	508 6	SF 502	7-1-85	535A.1(3)	HF 531	7-1-85
455B 131(2)	SF 391	7-1-85	508.19	SF 502	7-1-85	535A.6	HF 531	7-1-85
455B 171(24)	HF 649	7-1-85	508.29	HF 570	7-1-85	535A.7	HF 531	7-1-85
455B 171(25)	HF 649	7-1-85	508B 1	HF 703	7-1-85	535A.9	HF 531	7-1-85
455B 171(26)	HF 649	7-1-85	508B 2	HF 703	7-1-85	535A.9	SF 577	7-1-85
455B 171(27)	HF 649	7-1-85	508B 3	HF 703	7-1-85	536 1	HF 556	7-1-85
455B 171(28)	HF 649	7-1-85	508B.4	HF 703	7-1-85	536 10 unnn 3	HF 556	7-1-85
455B 172(3)	HF 649	7-1-85	508B 5	HF 703	7-1-85	536 13	HF 556	7-1-85
455B 172(4)	HF 649	7-1-85	508B 6	HF 703	7-1-85	536 15	HF 556	7-1-85
455B 172(5)	HF 649	7-1-85	508B.7	HF 703	7-1-85	536 25	HF 556	7-1-85
455B 173(9)	HF 649	7-1-85	508B 8	HF 703	7-1-85	536 26 unnn 1	HF 556	7-1-85
455B 186A	HF 649	7-1-85	508B 9	HF 703	7-1-85	536.28(3)	HF 556	7-1-85
455B 186B	HF 649	7-1-85	508B 10	HF 703	7-1-85	536.28(4)	HF 556	7-1-85
455B 261(8)	SF 163	7-1-85	508B 11	HF 703	7-1-85	536.28(5)	HF 556	7-1-85
455B 262(1)	SF 511	7-1-85	508B 12	HF 703	7-1-85	536 30	HF 556	7-1-85
455B 262(2)	SF 163	7-1-85	508B 13	HF 703	7-1-85	536A.5	HF 556	7-1-85
455B 262(3)	SF 163	7-1-85	508B 14	HF 703	7-1-85	537A.4 unnn 2	HF 225	P.C.
455B 263(1)	SF 163	7-1-85	508B 15	HF 703	7-1-85	542 1(3)	HF 741	P.C.
455B 264(2)	SF 163	7-1-85	509 1(3)"d"	SF 172	7-1-85	542 1(6)	HF 741	P.C.
455B 265	SF 163	7-1-85	509A.5 unnn 2	HF 777	7-1-85	542 3(4)"c"	HF 748	7-1-85
455B 266	SF 163	7-1-85	509A.14	SF 503	1-1-86	542 3(5)"c"	HF 748	7-1-85
455B 267(4)	SF 163	7-1-85	510 11	SF 502	7-1-85	542 15(7)	HF 748	7-1-85
455B 268(1)	SF 163	7-1-85	511 3	SF 502	7-1-85	542.21	HF 741	P.C.
455B 271(2)"d"	SF 163	7-1-85	511 8(4)	SF 577	7-1-85	547 3	HF 589	7-1-85
455B 271(3)	SF 163	7-1-85	511 8(16) unnn. 2	SF 502	7-1-85	551 8(20)	HF 460	7-1-85
455B 281	SF 163	7-1-85	512.42 unnn 1	SF 502	7-1-85	554 3806	SF 309	7-1-85
455B 301(4)	HF 750	4-1-86	514.15	HF 570	7-1-85	554 9307(1)	HF 554	7-1-85
455B 301	HF 750	4-1-86	514 23	HF 570	7-1-85	554 9307(4)	HF 554	7-1-85
455B 304 unnn 1	HF 469	7-1-85	515 13	HF 570	7-1-85	554 9402(4)	SF 577	7-1-85
455B 309	HF 750	4-1-86	515 35(4)"m"	HF 460	7-1-85	554 9404(1)	HF 554	7-1-85
455B 310	HF 750	4-1-86	515 48(5)"a"	HF 570	7-1-85	554 9405(2) unnn 2	HF 589	7-1-85
455B 412(5)"d"	SF 291	7-1-85	515 65	SF 502	7-1-85	556 2(1)"e"	HF 740	7-1-85
455B 422	SF 463	7-1-85	515 68	SF 502	7-1-85	556 2(2)"e"	HF 740	7-1-85
455B 461	HF 643	7-1-85	518A 18	SF 502	7-1-85	556 2(6)	HF 740	7-1-85
455B 461	SF 463	7-1-85	523A 2(1)"d"	HF 589	7-1-85	556 5(1)"b"	SF 329	7-1-85
455B 462	HF 643	7-1-85	523A 2(1)"e"	HF 589	7-1-85	556.25(1)	SF 329	7-1-85
455B 462	SF 463	7-1-85	524 103(27)	SF 577	7-1-85	557 24	HF 589	7-1-85
455B 463	HF 643	7-1-85	524 109	SF 577	7-1-85	557 26	HF 589	7-1-85
455B 463	SF 463	7-1-85	524 312(1)	SF 286	P.C.	557A.1	HF 484	7-1-85
455B 464	SF 463	7-1-85	524 901(3)"g"	HF 460	7-1-85	557A.2	HF 484	7-1-85
455B 464	HF 643	7-1-85	524 901(3)"h"	HF 460	7-1-85	557A.3	HF 484	7-1-85
455B 465	SF 463	7-1-85	524 901(5)	SF 577	7-1-85	557A.4	HF 484	7-1-85
455B 465	HF 643	7-1-85	524 910(2)	SF 577	7-1-85	557A.5	HF 484	7-1-85
455B 466	SF 463	7-1-85	524 1005	HF 395	7-1-85	557A.6	HF 484	7-1-85
455B 466	HF 643	7-1-85	524 1202(3)	SF 577	7-1-85	557A.7	HF 484	7-1-85
455B 467	SF 463	7-1-86	524 1312(2)	SF 296	7-1-85	557A.8	HF 484	7-1-85
455B 467	HF 643	7-1-85	525 1	HF 570	7-1-85	557A.9	HF 484	7-1-85
455B 468	SF 463	7-1-85	533 4(23)	HF 196	7-1-85	557A.10	HF 484	7-1-85
455B 468	HF 643	7-1-85	533.4(26)	HF 196	7-1-85	557A.11	HF 484	7-1-85
455C 1(1)	SF 395	7-1-85	533 12	HF 196	7-1-85	557A.12	HF 484	7-1-85
455C 4(3)	SF 395	7-1-85	533.14(1)	HF 196	7-1-85	557A.13	HF 484	7-1-85
455C 5(1)	SF 395	7-1-85	533 16(1)	HF 196	7-1-85	557A.14	HF 484	7-1-85
455D 16(1)	HF 709	7-1-85	533 17(1)	HF 196	7-1-85	557A.15	HF 484	7-1-85
461 2	HF 231	7-1-85	533 22(1)"b"	SF 296	7-1-85	557A.16	HF 484	7-1-85
462.18	HF 678	7-1-85	533.30(1)	HF 196	7-1-85	557A.17	HF 484	7-1-85
462 22	HF 678	7-1-85	533 30(2)	HF 196	7-1-85	557A.18	HF 484	7-1-85
467A 4(4)	HF 678	7-1-85	533 38	HF 196	7-1-85	557A.19	HF 484	7-1-85
467A 54	HF 66	7-1-85	533 47	HF 460	7-1-85	557A.20	HF 484	7-1-85
467A 71(1)	SF 264	7-1-85	533 64 unnn 1	HF 196	7-1-85	558 39(4)	SF 375	7-1-85
467A 71(4)	SF 121	7-1-85	533A 2(1)"b"	HF 556	7-1-85	558 39(5)	SF 375	7-1-85
467A 73	HF 266	7-1-85	534 102(12)	SF 157	P.C.	558 39(6)	SF 375	7-1-85

558.39(7)	SF 375	7-1-85	602.8105(1)"b"	SF 329	7-1-85	642.23	HF 495	7-1-85
558.39(8)	SF 375	7-1-85	602.8105(1)"j"	SF 570	7-1-85	654.1	SF 577	7-1-85
558.39(9)	SF 375	7-1-85	602.8105(1)"l"	HF 549	7-1-85	654.15	SF 459	P.C.
558.39(10)	SF 375	7-1-85	602.8105(1)"p"	SF 570	7-1-85	654.15(2)	SF 459	P.C.
558.39(11)	SF 375	7-1-85	602.8105(1)"q"	SF 570	7-1-85	654.16	SF 577	7-1-85
558.57 unn. 2	HF 589	7-1-85	602.8105(1)"r"	SF 570	7-1-85	654.16	SF 577	7-1-85
558.66	HF 589	7-1-85	602.8106	SF 329	7-1-85	655.5	HF 589	7-1-85
562A.28	SF 121	7-1-85	602.8106(1)	SF 570	7-1-85	657A.1	HF 696	7-1-85
562B.18(5)	SF 121	7-1-85	602.8106(3)	SF 329	7-1-85	657A.2	HF 696	7-1-85
570A.1(11)	SF 538	7-1-85	602.8106(4)	SF 570	7-1-85	657A.3	HF 696	7-1-85
570A.2(1)	SF 538	7-1-85	602.9103	SF 121	7-1-85	657A.4	HF 696	7-1-85
570A.3(1)	SF 538	7-1-85	602.9103	SF 570	7-1-85	657A.5	HF 696	7-1-85
570A.4(1)	SF 538	7-1-85	602.9104(1)	SF 570	7-1-85	657A.6	HF 696	7-1-85
570A.4(5)	SF 538	7-1-85	602.9109	SF 570	7-1-85	657A.7	HF 696	7-1-85
573.1(3)	HF 311	7-1-85	602.9203(1)	SF 515	7-1-85	657A.8	HF 696	7-1-85
587.1	SF 121	7-1-85	602.9203(2)"e"	SF 515	7-1-85	657A.9	HF 696	7-1-85
595.2(2)"b"	SF 121	7-1-85	602.11101(4)	SF 570	7-1-85	657A.10	HF 696	7-1-85
595.4 unn. 2	SF 121	7-1-85	602.11101(5)	SF 570	7-1-85	657A.11	HF 696	7-1-85
595.4 unn. 3	SF 121	7-1-85	602.11101(7)	SF 570	7-1-85	659.4	SF 224	7-1-85
595.6	SF 121	7-1-85	602.11102	SF 570	7-1-85	663A.9	HF 550	7-1-85
595.19 unn. 1	SF 224	7-1-85	602.11102(2)"d"	SF 329	7-1-85	665.4(3)	HF 587	7-1-85
595.19(1)	SF 224	7-1-85	602.11103	SF 570	7-1-85	666.6	SF 570	7-1-85
595.19(2)	SF 224	7-1-85	602.11108	SF 570	7-1-85	674.6 unn. 1	SF 224	7-1-85
597.15	HF 421	7-1-85	602.11109	SF 329	7-1-85	674.14	HF 589	7-1-85
598.5(1)	HF 495	7-1-85	602.11110	SF 570	7-1-85	675.3	SF 244	7-1-85
598.5(3)	HF 495	7-1-85	611.21	SF 570	7-1-85	675.25	SF 244	7-1-85
598.11 unn. 2	HF 495	7-1-85	615.4	SF 577	7-1-85	675.26	SF 244	7-1-85
598.14 unn. 1	SF 224	7-1-85	622B.1(1)"a"	HF 526	7-1-85	675.33	SF 244	7-1-85
598.14 unn. 1	SF 329	7-1-85	624.23(1)	SF 244	7-1-85	675.42	SF 244	7-1-85
598.21(7)	HF 495	7-1-85	624.24	SF 244	7-1-85	679.1	HF 128	7-1-85
598.21(8) unn. 1	HF 495	7-1-85	625.24	SF 289	7-1-85	679.2	HF 128	7-1-85
598.21(8) unn. 2	HF 589	7-1-85	627.11	HF 495	7-1-85	679.3	HF 128	7-1-85
598.22 unn. 1	HF 495	7-1-85	627.12	HF 495	7-1-85	679.4	HF 128	7-1-85
598.22 unn. 2	HF 495	7-1-85	628.26A	SF 577	7-1-85	679.5	HF 128	7-1-85
598.22 unn. 3	HF 495	7-1-85	628.28	SF 329	7-1-85	679.6	HF 128	7-1-85
598.22	SF 244	7-1-85	628.29	SF 577	7-1-85	679.7	HF 128	7-1-85
598.23(2)	SF 121	7-1-85	631.6	SF 329	7-1-85	679.8	HF 128	7-1-85
598.23(2)"a"	HF 495	7-1-85	631.6(1)	SF 570	7-1-85	679.9	HF 128	7-1-85
598.41(1)	SF 121	7-1-85	631.6 unn. 2	SF 570	7-1-85	679.10	HF 128	7-1-85
598.41(3) unn. 1	SF 121	7-1-85	631.16(4)	HF 550	7-1-85	679.11	HF 128	7-1-85
598.41(5)	SF 121	7-1-85	631.16(5)	HF 550	7-1-85	679.12	HF 128	7-1-85
598.41(6)	SF 121	7-1-85	631.16(6)	HF 550	7-1-85	679.13	HF 128	7-1-85
601A.9 unn. 2	HF 648	7-1-85	631.16(7)	HF 550	7-1-85	679.14	HF 128	7-1-85
601A.16(6)	SF 570	7-1-85	631.16(8)	HF 550	7-1-85	682.4	SF 230	7-1-85
601B.8	HF 319	7-1-85	631.16(9)	HF 550	7-1-85	682.60	SF 377	7-1-85
601F.2	SF 224	7-1-85	633.10(4)	SF 377	7-1-85	691.9	SF 455	7-1-85
601F.3	HF 686	7-1-85	633.63(3)	HF 29	7-1-85	692.2(1)"e"	HF 225	P.C.
602.1211(4)	HF 415	7-1-85	633.123(1)	SF 27	7-1-85	694.10	HF 451	7-1-85
602.1214(4)	SF 121	7-1-85	633.211	SF 378	7-1-85	702.11	HF 700	7-1-85
602.1301(2)	SF 552	7-1-85	633.212	SF 378	7-1-85	702.22	HF 438	7-1-85
602.1302(4)	SF 570	7-1-85	633.410	SF 423	7-1-85	709.8(2)	HF 139	7-1-85
602.1303(7)	SF 570	7-1-85	633.436 unn. 1	SF 378	7-1-85	709.12(4)	HF 139	7-1-85
602.1303(8)	SF 570	7-1-85	633.552(2)"a"	SF 531	7-1-85	710.6	HF 641	7-1-85
602.1401(3)	SF 547	7-1-85	633.554	SF 531	7-1-85	710.8	SF 401	7-1-85
602.4104(3)	SF 570	7-1-85	633.554	HF 761	7-1-85	710.9	SF 401	7-1-85
602.4202	SF 570	7-1-85	633.561	SF 531	7-1-85	710.10	SF 401	7-1-85
602.6603(4)	SF 570	7-1-85	633.561(1)	HF 761	7-1-85	714.1(7)	HF 702	7-1-85
602.6603(8)	SF 570	7-1-85	633.566(2)"a"	SF 531	7-1-85	714.3 unn. 2	SF 329	7-1-85
602.8102	HF 495	7-1-85	633.568	SF 531	7-1-85	714.5	HF 438	7-1-85
602.8102(29)	SF 407	7-1-85	633.568	HF 761	7-1-85	714.8(3)	SF 329	7-1-85
602.8102(40)	SF 329	7-1-85	633.575	SF 531	7-1-85	714.16(2)"c"	HF 70	7-1-85
602.8102(44)	HF 186	7-1-85	633.575(3)	HF 761	7-1-85	714.16(2)"g"	HF 70	7-1-85
602.8102(45)	HF 186	7-1-85	633.575(4)	HF 761	7-1-85	714.18	HF 686	7-1-85
602.8102(45)	SF 570	7-1-85	633.575(5)	HF 761	7-1-85	714.22	HF 686	7-1-85
602.8102(47)	HF 495	7-1-85	633.635(2)"b"	SF 531	7-1-85	714.23	SF 271	7-1-85
602.8102(50A)	SF 570	7-1-85	633.642	SF 531	7-1-85	721.8	SF 525	7-1-85
602.8102(58A)	SF 570	7-1-85	633.668	SF 531	7-1-85	725.9(5)	SF 395	7-1-85
602.8102(129)	SF 455	7-1-85	633.669	SF 531	7-1-85	725.12 unn. 1	HF 225	P.C.
602.8104(2)"i"	SF 121	7-1-85	633.670	SF 531	7-1-85	725.15	HF 225	P.C.
602.8105(1)"a"	SF 570	7-1-85	642.21(1)	HF 495	7-1-85	726.6	HF 700	7-1-85
602.8105(1)"b"	SF 570	7-1-85	642.22	SF 514	7-1-85	728.13	SF 455	7-1-85



802 2	HF 462	7-1-85	1985 SESSION		
802 3	HF 462	7-1-85			
804 7(5)	HF 549	7-1-85			
804 31	HF 526	7-1-85	HF 225-106	HF 642	P C
805 6(1) a	SF 570	7-1-85	HF 225-301 d	HF 642	P C
805 6(1) c (1)	SF 570	7-1-85	HF 225-303	HF 642	P C
805 6(1) c (2)	SF 570	7-1-85	HF 225-602(2)	HF 642	P C
805 6(1) c (3)	SF 570	7-1-85	SF 260-2	SF 434	7-1-85
805 8(2) i	SF 329	7-1-85	SF 269-1	SF 434	7-1-85
805 8(2) j	SF 70	7-1-85	SF 269-2	SF 434	7-1-85
805 8(2) k	SF 329	7-1-85	SF 395-88(3)	SF 434	7-1-85
805 8(2) l	SF 329	7-1-85	SF 434-14	HF 780	7-1-85
805 9	SF 570	7-1-85	HF 730-7	SF 589	7-1-85
805 9(6)	SF 329	7-1-85			
805 11 unnn. 2	SF 329	7-1-85			
808 3	SF 85	7-1-85			
808 14	SF 318	P C.			
809 1	SF 455	7-1-85	1984 IOWA ACTS		
809 2	SF 455	7-1-85			
809 3	SF 455	7-1-85			
809 4	SF 455	7-1-85	1067-8	SF 329	7-1-85
809 5	SF 455	7-1-85	1303-10	SF 329	7-1-85
809 6	SF 455	7-1-85	1230-28	SF 296	7-1-85
809 7	SF 455	7-1-85	1306-2(2) unnn. 3	SF 552	7-1-85
809 8	SF 455	7-1-85	1311-1(1)	SF 585	7-1-85
809 9	SF 455	7-1-85	1311-1(2)	SF 585	7-1-85
809 10	SF 455	7-1-85	1311-1(3)	SF 585	7-1-85
809 11	SF 455	7-1-85	1311-10(1)	SF 585	7-1-85
809 12	SF 455	7-1-85	1311-10(5)	SF 585	7-1-85
809 13	SF 455	7-1-85	1311-12(1)	SF 585	7-1-85
809 14	SF 455	7-1-85	1311-13(2)	SF 585	7-1-85
809 15	SF 455	7-1-85	1311-13(4)	SF 585	7-1-85
809 16	SF 455	7-1-85	1311-13(5)	SF 585	7-1-85
811.2(1) c	HF 415	7-1-85	1311-13(6)	SF 585	7-1-85
812 5	HF 186	7-1-85	1314-5	HF 753	P C.
814 4	HF 550	7-1-85	1314-8	HF 753	P C
814 7	HF 550	7-1-85			
814 15	HF 550	7-1-85			
814 16	HF 550	7-1-85			
814 18	HF 550	7-1-85	1983 IOWA ACTS		
814 20	HF 550	7-1-85			
814 21	HF 550	7-1-85			
814 24	HF 550	7-1-85	194-16(2)	SF 585	7-1-85
814 25	HF 550	7-1-85	194-16(5)	SF 585	7-1-85
815 8	HF 186	7-1-85	207-5(1)"c"	SF 587	7-1-85
815 11	SF 329	7-1-85	207-5(1)"e"	SF 587	7-1-85
815 13	SF 570	7-1-85			
901 7	HF 186	7-1-85			
901 10	SF 213	7-1-85			
904 6	HF 186	7-1-85			
905 7(4)	HF 186	7-1-85			
906 5 unnn 1	HF 186	7-1-85	1982 IOWA ACTS		
907 4	SF 570	7-1-85			
909 5	HF 419	7-1-85			
909 7	SF 570	7-1-85	1117(2)	HF 742	7-1-85
910 2	SF 329	7-1-85			
910A.1	HF 462	7-1-85			
910A.2	HF 462	7-1-85			
910A.3	HF 462	7-1-85	1981 IOWA ACTS		
910A.4	HF 462	7-1-85			
910A.5	HF 462	7-1-85			
912 4(1)	HF 462	7-1-85	23-8	SF 200	P C.
912 4(3)	HF 462	7-1-85	78-20	HF 742	7-1-85
912 4(4)	HF 462	7-1-85			
912 4(5)	HF 462	7-1-85			
912 6(2)	HF 413	7-1-85			
912 6(3)	HF 413	7-1-85	1976 IOWA ACTS		
912 7(3)	HF 413	7-1-85			
912 13	HF 462	7-1-85			
			1204-4	SF 121	7-1-85

1985 Bill Summary

RECAPITULATION

71st Iowa General Assembly
1985 Session

Session Dates: Monday, January 14, 1985 to Saturday, May 4, 1985
Calendar Days: 111
Session Days: 75

Bills and Resolutions Introduced

Senate Files: 593
Senate Joint Resolutions: 9
Senate Concurrent Resolutions: 54
Senate Resolutions: 14
 Subtotal: 670
House Files: 781
House Joint Resolutions: 5
House Concurrent Resolutions: 45
House Resolutions: 12
 Subtotal: 843
TOTAL: 1,513

Bills and Resolutions Passed

Senate Files: 143
Senate Joint Resolutions: 1
Senate Concurrent Resolutions: 12
Senate Resolutions: 12
 Subtotal: 168
House Files: 131
House Joint Resolutions: 0
House Concurrent Resolutions: 13
House Resolutions: 10
 Subtotal: 154
TOTAL: 322

Vetoes: 7
Item Vetoes: 4

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COLLATERAL SOURCE RULE - IS IT STILL REASONABLE?

Ronald W. Rankin
Patterson, Lorentzen, Duffield, Timmons, Irish,
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Des Moines, Iowa

I. The Collateral Source Rule--Is It Still Viable?

A. Introduction

1. Broadly stated, the Collateral Source Rule provides:

"The tort-feasor is not entitled to mitigate or reduce his damages by showing that the accident victim's economic losses were, in fact, lessened by continued salary payments, pension and welfare benefits, by proceeds of Plaintiff's own hospitalization and accident insurance by gratuitous medical or nursing care, by tax advantages from the substitution of tax-exempt funds for his taxable salary, by savings from Plaintiff's reduced living costs during hospital sojourn and shrinking of normal and business related expenses during care and convalescence, by the widowed Plaintiff's remarriage (possibly a more affluent one) following fatal injury to her prior husband, or by showing other miscellaneous payments and benefits to Plaintiff from 'collateral sources,' that is, sources unrelated to the Defendant.

Lambert, A Case for the Collateral Source Rule, Ins. L. J. 531, 532 (Sept. 1966).

B. History of the Collateral Source Rule

1. The Collateral Source Rule has now been in existence for over 130 years.

a. The rule first appeared in the case of The Propeller Monticello v. Mollison, 58 U.S. 152 (1854).

b. The term "Collateral Source" was first used in the case of Hardin v. Town of Townsend, 43 Vt. 536, 538 (1871).

c. The first Iowa case applying the rule was Beringer v. Dubuque St. Ry. Co., ___ , Iowa ___ , 91 N.W. 931, 933 (1902). In Beringer, the Plaintiff was allowed to recover from the Defendant for the value of nursing services gratuitously rendered by a family member.

2. Other Iowa cases illustrate the breadth of the Collateral Source Rule.
 - a. Clark v. Berry Seed Company, ___, Iowa, 280 N.W. 505, 510 (1938) (recovery of medical expenses paid by Plaintiff's employer);
 - b. Stanley v. State, 197 N.W. 2d 599, 607 (Iowa, 1972) (Plaintiff allowed to recover the future cost of prosthetic devices, though the state agreed to supply the same when needed);
 - c. Rigby v. Eastman, 217 N.W. 2d 604, 609 (Iowa, 1974) (workmen's compensation benefits received by a widow);
 - d. Conley v. Warne, 236 N.W. 2d 682, 688 (Iowa, 1975) (Plaintiff allowed to recover for the value of labor and materials supplied her by her spouse);
 - e. Groesbeck v. Napier, 275 N.W. 2d 388, 391-92 (Iowa, 1979) (evidence of Plaintiff's remarriage in a wrongful death action not admissible);
 - f. Stewart v. Madison, 278 N.W. 2d 284, 293-94 (Iowa, 1979) (Plaintiff allowed to recover for items previously paid under a comprehensive auto policy);
 - g. Rudolph v. Iowa Methodist Medical Center, 293 N.W. 2d, 550, 558 (Iowa, 1980) (upheld the constitutionality of Section 147.136 of the Iowa Code, which partially abrogates the Collateral Source Rule in medical malpractice cases);
 - h. See Also United States v. Klein, 153 F2d 55, 60-61 (8th Cir. 1946) (Plaintiff allowed to recover the value of gratuitously paid medical expenses and wages under Iowa Law).

C. Impact of the Collateral Source Rule

1. The importance of the historical perspective and various applications of the Collateral Source Rule presented above is clear. This rule has its origin in a period when few Plaintiffs had sources collateral to the litigation from which they could recoup their losses. Thus, the Rule had little or no impact upon the economics of the times with respect to adjustment of losses. Today, however,

Plaintiff's routinely have a wide range of collateral sources available which help to insulate and prevent depletion of their personal and business assets. Hence, the Collateral Source Rule now has a major impact upon the cost of litigation and the orderly resolution of disputes, especially with respect to the cost of insurance, because the Collateral Source Rule allows Plaintiffs, in many cases, to recover twice for the same injury.

2. A number of statistics are available which show the availability of collateral sources, and according to one study:

"Collateral sources account for almost half of the compensation received by injury victims: only 55 percent of the aggregate compensation is derived from tort liability settlements, while 21 percent came from automobile insurance, 12 percent from medical and 5 percent from life insurance; the remaining 7 percent derived from social security of one kind or another, including workmen's compensation for traffic accidents on the way to and from work. The share reportedly borne by non-tort sources of compensation is, it will be noted, the more impressive, because it does not, for all practical purposes, include the largest of these sources, workmen's compensation. Moreover, while it is true that 38 percent of the accident bill was footed by the victim's own private insurance and only 7 percent from 'Social Security' plans, the latter have been and still are increasing their benefits at a much faster rate than other regimes and must, therefore, be credited with a correspondingly greater impact in the future.

More revealing yet for purposes of the present discussion is that about half of the serious injury victims are reimbursed less than 1/2 of their monetary losses, whereas a substantial percentage in the lower and especially in the lowest range of injury are overcompensated at rates up to five times their economic loss.

In appreciable measures, this discrepancy is attributable to the Collateral Source Rule whose impact is most noticeable in the lower ranges because most collateral benefits are flat rated and fairly modest in amount."

Fleming, The Collateral Source Rule and Loss Allocation in Tort Law, 54 Cal. L. Rev. 1478, 1481-82 (emphasis in original) (citing Conrad, Morgan, Pratt, Voltz, Bombaugh automobile accident costs and payments (1964)).

3. It should be noted that a steering committee has been set up under the auspices of the Defense Research Institute to be known as "The National Coalition for Litigation Cost Containment." This coalition has been set up to address the problems of costly litigation and the impending unavailability of insurance, to work with organizations (particularly defense organizations) at the state level and to propose legislation for reform in the areas that are causing the problems. One such area is the Collateral Source Rule.
4. In the past, efforts have been made to ameliorate the harsh effects of the Collateral Source Rule, but with limited success. In Iowa, this limited success resulted in the enactment of Section 147.136 of the Iowa Code, which partially abrogates the Collateral Source Rule in medical malpractice cases. That section provides:

"In an action for damages for personal injury against a physician and surgeon, osteopath, osteopathic physician and surgeon, dentist, podiatrist, optometrist, pharmacist, chiropractor, or nurse licensed to practice that profession in this state, or against a hospital licensed for operation in this state, based on the alleged negligence of the practitioner in the practice of the profession or occupation, or upon the alleged negligence of the hospital in patient care, in which liability is admitted or established, the damages awarded shall not include actual economic losses incurred or to be incurred in the future by the claimant by reason of the personal injury, including but not limited to, the cost of reasonable and necessary medical care, rehabilitation services, and custodial care, and the loss of services and loss of earned income, to the extent that those losses are replaced or indemnified by insurance, or by governmental, employment, or service benefit programs or from any other source except the assets of the claimant or of the members of the claimant's immediate family.

5. Iowa Code ^S 147.136 (1985).
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- a. Many other states have similar enactments.
See: Rudolph v. Iowa Methodist Medical Center, 293 N.W. 2d 550, 558 (Iowa, 1980) (and authorities cited therein).

D. The "Functional Approach" to Collateral Source Problems.

1. There have been numerous scholarly works produced with respect to the pros and cons of the Collateral Source Rule. These various arguments have been analyzed, and it would appear that they cancel each other out. See: Lorentzen and Rankin, The Collateral Source Issue: Forging a Middle Ground, 35 F. I. C. Q. 3 (Fall, 1984). Even the Iowa Supreme Court has recognized "that the merits of the rule are fairly debatable." Rudolph v. Iowa Methodist Medical Center, 293 N.W. 2d at 558.
2. In Sedler, The Collateral Source Rule and Personal Injury Damages: The Irrelevant Principle and the Functional Approach, 58 Ken. L. J. 36 (1969), an alternative is suggested for the proper resolution of collateral source problems. Professor Sedler does not see the Collateral Source Rule as an "all-or-nothing" proposition. Without going into great detail as to how the "functional approach" works, it is sufficient to note that Professor Sedler would allow recovery in most cases only for the amounts expended by the Plaintiff to secure the collateral source benefits. For example, a Plaintiff who has been compensated by insurance benefits for injuries sustained would not be allowed to recover again for the reasonable value of medical services rendered, but, rather, would be limited in his or her recovery to the amount of premiums paid over the life of the policy (if less than the reasonable value of the services). Thus, the Plaintiff would be compensated for his out-of-pocket expense, but would not be allowed a "double recovery" for the injuries sustained. The Defendant would be forced to pay only the amounts actually expended by the Plaintiff, and this system would bring the law of damages back to the compensatory ideal.
3. With Professor Sedler's approach in mind, an article was prepared for the Federation of Insurance Counsel with an eye toward developing a proposed position on the collateral source issue. This article drew heavily from Professor Sedler's thesis, and it is

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entitled "The Collateral Source Issue: Forging a Middle Ground." The proposed position resulting from that work is as follows:

a. The award of damages in civil litigation for injuries, for which the Plaintiff has been compensated by sources collateral to the litigation, is inconsistent with the principle that damages should be compensatory, directly related to the actual loss sustained, and fair and reasonable to all parties. An injured party once made whole by an award of money which reasonably and fairly compensates him for his actual loss has no legitimate claim to any further sum. Issues of punishment and deterrence are matters outside the scope of modern civil litigation and should be restricted to the criminal justice system. The maxim that the Defendant should take the Plaintiff as he finds him should apply equally to cases in which the Plaintiff has available collateral sources in which to mitigate his losses, such that the Plaintiff should not be unjustly enriched by recovering over again for losses met by collateral sources. The focus should be not on what the Defendant should pay, but rather, upon what the Plaintiff has actually lost.

1. The appropriate formula for computing damages recoverable from the Defendant should take into account the economic loss actually sustained by the Plaintiff, plus the cost of any collateral sources inuring to the benefit of the Plaintiff, less the benefits accruing to Plaintiff as a result of the injury. This formula would bring tort recovery back in line with the compensatory ideal.
2. In cases where the Plaintiff is compensated through medical and accident insurance, the Defendant should be liable for the reasonable and actual costs of medical care or the premiums paid over the life of the policy by Plaintiff, whichever is smaller.
3. In the case of gratuitous medical services provided Plaintiff as a

result of injury, the Plaintiff should not be able to recover the reasonable value, as he has not paid or lost anything as a result thereof.

4. In cases where the Plaintiff is required to recompense the collateral source, as in the case of subrogation, the Collateral Source Rule may still be applied.
5. In the case of collateral source benefits accruing from Medicare or other similar social assistance programs, the Plaintiff should not be allowed to recover their reasonable value, since he has neither paid nor lost anything as a result thereof.
6. In cases involving social insurance, all government financed and all government controlled programs of protection against loss, the Plaintiff should be allowed to recover only the cost of such protection, if any, and not the reasonable value of services provided thereunder.
7. In cases where the Plaintiff has received gratuitous nursing services by family members, the reasonable value of such services are recoverable only to the extent that such services would be compensable where necessarily rendered by private nurses. Those gratuitous nursing services rendered in the normal course of the family relationship should not be compensable as such, but are more properly taken into account when computing damages for pain and suffering or loss of consortium.

E. Conclusion

1. The Collateral Source Rule has been in operation for over 130 years in this country. It has become most pervasive throughout the tort scheme and has been applied to many varied types of collateral benefits which a Plaintiff may use to recover his losses. A number of advocates, primarily from the Plaintiff's bar, have offered rationale in support of



the rule. Opponents to the Collateral Source Rule have countered with numerous arguments attempting to show why the Collateral Source Rule is illogical or based upon poor foundation. In addition, it has been pointed out that the Collateral Source Rule does not comport with the basic principle of our tort system, that the Plaintiff is entitled to recover or to be compensated for his losses, but is entitled to nothing more.

2. In addition to the theoretical objections to the Collateral Source Rule, there is some empirical evidence to show that the application of the rule results in a serious economic impact to both the classes of persons paying damage awards, which is generally the insurance industry, and to the premium paying public.
3. A number of alternatives have been offered by the commentators ranging from total abolition of the Collateral Source Rule to a more selective approach. While the total abolition of the rule might at first seem appealing, a closer examination of the effects of the rule on particular benefits indicates that it would not be fair to reject the rule in all cases. It has been suggested that subrogation or indemnity would alleviate the potential for over-compensation and double recovery. However, there are a number of problems associated with subrogation as a remedy. Moreover, such remedies do not go to the root of the problem.
4. Another solution has been offered and labeled the "Functional Approach." Under this approach, the court would look to the nature and source of the benefit to determine whether the Plaintiff has actually lost anything or paid anything to receive and extinguish the benefit. If the Plaintiff has in fact paid something for the use of the benefit, it would be unfair not to credit him something for this cost. This would appear to be fair both to the Plaintiff and to the Defendant and would eliminate problems of over-compensation and wind-fall. This is but one example of the ways in which a more "functional approach" could be used to affect the Plaintiff's recovery.
5. All members of the defense bar should exert themselves to persuade legislatures and courts, as appropriate to enact statutes or establish judicial doctrine declaring that damages once compensated through collateral sources are not recoverable

again from the Defendant in civil litigation. When that preferred goal is not immediately obtainable, members of the defense bar should seek to discourage application of the Collateral Source Rule through reform legislation or judicial action in accord with the recommended statement of position on the Collateral Source Rule outlined above. If successful, such efforts will help to preserve the continuing availability of insurance coverage, as well as dramatically impact the escalating costs of civil litigation.

By Ronald M. Rankin

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ANNUAL APPELLATE DECISIONS REVIEW

October 1984 - October 1985
353 N.W.2d through 371 N.W.2d no. 2

By
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Shuttleworth & Ingersoll, P.C.
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TABLE OF CONTENTS

	Page
Administrative Law	2
Administrative Procedure	4
Agency	4
Appellate Procedure	5
Attorney and Client	6
Civil Procedure	8
Civil Rights	12
Claim Preclusion/Issue Preclusion	14
Consortium	19
Contracts	20
Contribution/Indemnification	26
Courts	27
Corporations	31
Damages	36
Discovery	38
Dramshop	41
Education Law	44
Evidence	45
Execution/Garnishment	48
Family Law	49
Indemnity	49
Insurance	49
Interest	53
Labor and Employment	54
Limitation of Actions	60
Municipal Corporations	62
Negligence	63
Pleading	69
Products Liability	70
Sales	70
Torts	71
Trial	84
Trusts and Estates	86
Witnesses	86
Workers Compensation	87



ADMINISTRATIVE LAW

Black v. University of Iowa, 362 N.W.2d 459 (Iowa 1985).

Administrative Law.

Civil action seeking judicial review of tenure decision by the University of Iowa. Petitioner availed himself a faculty dispute procedure which recommended he be promoted with tenure. President of the University found petitioner had failed to satisfy his burden to prove by clear and convincing evidence that the determination to deny him tenure had been unreasonable but did hold tenure decision was tainted with procedural error and that unfair "impediments" had precluded petitioner from obtaining adequate academic record to achieve tenure. He directed the academic department to again consider the request for tenure but he let stand the earlier departmental decision. President further stated that if the request were again denied petitioner's appointment as a faculty member should be extended for two more years to enable him to qualify for tenure free of unfair "impediments". The Board of Regents reviewed and accepted the President's ruling. Petitioner continued to pursue the intra-university procedures set forth in the President's ruling. However, he also filed in the district court a several-count petition seeking in one count judicial review from agency action pursuant to section 17A.2(9) and, in other counts, multiple claims for damages and other affirmative relief.

Joinder of claims Supreme Court held rules of civil procedure neither "expressly nor by implication" allow bringing together in one lawsuit a judicial review proceeding and an original law or equity action. Judicial review proceedings are "fundamentally different" from original actions commenced in district court. Accordingly, single proceedings can not mix judicial review and original actions.

Exhaustion of remedies. Respondents claim that decision was not yet final for purposes of judicial review because President's decision left open additional administrative proceedings through which petitioner could obtain tenure. Respondents rely on section 17A.19(1). However, the agency action consisted of severable parts. The action challenged in court was final for purposes of judicial review when University officials and the Board of Regents concluded that petitioner was not immediately to be granted tenure.

City of Des Moines v. Des Moines Police Bargaining Unit Association, 360 N.W.2d 729 (en banc) (Iowa 1985).

Administrative Law — Exhaustion of Remedies.

Courts — Jurisdiction.

Case started as an action for declaratory judgment concerning validity of a provision in a collective bargaining agreement. Supreme Court on its own motion rules on jurisdictional issues and determines the District Court lacked jurisdiction. See also Molitor v. City of Cedar Rapids, 360 N.W.2d 568 (1985). Since administrative remedy through PER Board declaratory ruling exists and exhaustion of remedies is implied, parties must exhaust administrative remedies and cannot proceed directly in court via declaratory judgment action.

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Ross v. Iowa City, 353 N.W.2d 887 (Iowa App. 1984).

Administrative Law --Exhaustion of Remedies.

Equitable action brought by owners of commercial and industrial property seeking declaratory judgment that tax assessments regarding such property are invalid due to unlawfully delegated statutory duties. Defendants specially appeared and urged the district court lacked subject matter jurisdiction because of plaintiffs' failure to exhaust administrative remedies. Court denied special appearance. Supreme Court granted interlocutory appeal.

The only exception to the rule requiring exhaustion of administrative remedies prior to seeking judicial relief in district court regarding tax levy or collection is where the tax is illegal because levied without statutory authority or levied upon property not subject to taxation or by some officer or having no authority to levy or as in some other respect illegal. Griswald Landon Credit v. Calhoun County, 201 N.W. 11 (1924). Otherwise, taxpayers must proceed through complaint to the Board of Review and, thereafter, an appeal to the District Court. Claimed failure of taxing authorities to comply with statutory requirements constitutes irregularity but not illegality. Accordingly, plaintiffs are not excepted from the requirement of exhaustion of administrative remedies. District court Order therefore reversed.

Gospel Assembly Church v. Department of Revenue, 368 N.W.2d 158 (Iowa 1985).

Administrative Law — Ripeness.

Plaintiff appeals district court's dismissal for lack of jurisdiction of petition in equity seeking declaratory and injunctive relief against Department of Revenue. District Court sustained defendant's motion to dismiss for failure to exhaust administrative remedies and lack of ripeness. Dispute arose from Department's indication that it intended to subpoena books, records and other documents beyond those necessary to determine plaintiff's liability for sales or use tax. Plaintiff contended Department intended to examine such things as church membership lists, records of spiritual counseling, minutes of church meetings, etc. Petition alleged the request for documents violated a number of constitutional provisions and sought declaratory and injunctive relief under 48 U.S.C. §1988. Supreme Court holds controversy is not "ripe" for review. Nature and existence of the issue presented by plaintiff hinges on the precise scope of the request for documents. The scope cannot be determined from the record at present. Moreover, defendant has taken no formalized, legally enforceable action that would define precisely the scope of its request. Such definition of precise issues is necessary to avoid danger that constitutional adjudication will be mooted by subsequent favorable agency action. In light of ruling of ripeness, court avoids determination under exhaustion of remedies doctrine.

Administrative Law — Timely Review.

See Doerfer Division of CCA v. Nicol, 359 N.W.2d 428 (Iowa 1984).--P. 90



ADMINISTRATIVE PROCEDURE

Midwest Carbide Corp. v. Occupational Safety and Health Review Commission, 353 N.W.2d 399 (Iowa 1984).

Administrative Procedure.

Judicial review proceeding of IOSHA Review Commission decision that employer had committed a serious violation of the general duty clause of Iowa Code §88.4. That statute requires all employers to furnish employees a place of employment "free from recognized hazards." Case arose from an explosion of an electric submerged arc furnace. Employer was charged with willful violation of the general duty clause but hearing officer held commission failed to prove willful violation. Employer urged that the charge of willful violation, in light of the ultimate determination of serious violation, failed to meet the requirements of notice as set forth in Code §17A.12(2)(c) in that willful and serious violations are separate violations with different penalties. Court held notice sufficient pursuant to the statute since the notice properly identified the duty — the general duty clause — at issue. Notice held to meet the standard of reasonable notice required in light of statutory provision giving to the commission the authority to assess "all civil penalties provided"

Substantial Evidence. Under Administrative Procedure Act, the substantial evidence on the record as a whole standard applied to review of the agency determination. Under federal case law, cases hold a hazard to be "recognized" even where cause of accident was never discovered and situation had not occurred earlier. In instant action, explosion of the type present had "never occurred in the industry." Fact of "eruptions" in proximity to the explosion held to make explosion foreseeable and, accordingly, under §88.4, a recognized hazard. Burden on commissioner of labor to show "demonstrably feasible measures" that would materially reduce the likelihood of such injury. Fact of previous eruptions and the possibility for shutting down the furnace held to satisfy commissioner's burden.

Dissent by Justice McCormick distinguishes eruptions from explosions. Eruptions may have been foreseeable. However, the violation and charge was based upon the recognized hazard of an explosion. Lacking evidence in the record that eruptions make explosions foreseeable.

AGENCY

Agency.

See Bossuyt v. Osage Farmers' Nat'l Bank, 360 N.W.2d 769 (Iowa 1985).--P. 20.

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APPELLATE PROCEDURE

H & S, Ltd. v. Andreola, 363 N.W.2d 592 (Iowa App. 1984).

Appellate Procedure — Jurisdiction.

Very strange case. Plaintiffs commenced action against defendant. Defendant counterclaimed. Defendant violated subpoena duces tecum and notices of deposition just before case set for trial. District Court order held defendant in default for bad faith failure to comply with subpoena and willful refusal to supply documents. Counterclaim dismissed. Following hearing on damages, judgment entered for plaintiffs. Defendant filed notice of appeal but the appeal was dismissed for failure to prosecute. Defendant then filed a petition to vacate pursuant to Rule 252 which was denied.

Question presented is whether appellate court has jurisdiction on appeal given the earlier appeal dismissed for want of prosecution. Court first holds that appeal dismissed for lack of prosecution acts as an affirmance of the judgment. However, the questions presented by a motion to vacate a judgment are not included in an affirmance of the judgment. While dismissal of the first appeal bars subsequent appeals, it cannot bar an appeal from the separate decision dismissing a motion to vacate the original judgment. However, court affirms district court dismissal of motion to vacate on merits. Defendant claims there is no proof of service of the subpoena duces tecum. However, defendant admitted he had received the subpoena and further admitted his attorney had agreed to the deposition. Defendant claims he did not receive a motion to compel prior to the finding of default. Failure to attempt to compel discovery through court order prior to imposition of sanctions was not an irregularity sufficient to vacate the judgment.

Appellate Procedure — Jurisdiction.

See Knauss v. City of Des Moines, 357 N.W.2d 573 (Iowa 1984).--P. 35.

River Excursions, Inc. v. City of Davenport, 359 N.W.2d 475 (Iowa 1984).

Appellate Procedure — Jurisdiction.

Defendant appeals partial summary judgment order settling certain, but not all, issues of equitable action for specific performance. Parties failed to raise the issue of appellate jurisdiction. Court on its own motion considers the issue. Only final judgments may be appealed as a matter of right. Summary judgments that are not dispositive of the entire case are not final judgments as required for purposes of appeal. Trial court here specifically indicated its intention to act further on the case before finally adjudicating all issues. This case is not one of those exceptional cases in which there can be more than one final order. Accordingly, there is no appeal as of right.

Court also declines to exercise its jurisdiction to grant interlocutory appeal. The provisions of Rule 1(e), R. App. Pro., should be "rarely invoked". And interlocutory appeals are permitted only sparingly. Heavy burden is on the appellant to demonstrate likely benefit from early appeal outweighs likely detriment and satisfies the interest of justice. Appellant fails to do so here.

Rowen v. LeMars Mutual Ins. Co., 357 N.W.2d 579 (Iowa 1984).

Appellate Procedure — Jurisdiction.

Fourth appeal in shareholders' derivative action brought by policy holders of LeMars Mutual regarding takeover of LeMars by Iowa Mutual. Present appeal by plaintiff policy holders from district court's decision of remaining issue in the case, order establishing plan of election for new board of directors for LeMars. Defendant argues court lacks appellate jurisdiction because the order appealed from is not final.

Rule 1(c), R. App. Pro., was adopted to permit interlocutory review under limited circumstances when parties improvidently attempt appeal as of right from an order that is not final. However, the standard applicable is that ordinarily involved for determining when interlocutory appeal should be granted. In present case, court order resolved final issues in the case but court retained jurisdiction during implementation of the plan for election of new directors in order to permit parties to raise additional issues during course of implementation of the plan. If plaintiffs are prohibited from challenging the plan now, their objections become moot because the plan will have been fully implemented before they are given a right to appeal. Although appeals as of right are available only from final orders, court holds appeal as of right available in the present case and that the adjudication appealed from is final because this case has more than one final order for purposes of appeal. Judgment settled relative rights of the parties as well as the particulars of the equitable relief and, accordingly, order is final, leaving only issues that may later arise during implementation.

ATTORNEY AND CLIENT

Attorney and Client — Attorneys Fees.

See Bethards v. Shivvers, Inc., 355 N.W.2d 39 (Iowa 1984) (en banc). --P. 71

Coonrad v. Van Metre, 362 N.W.2d 197 (Iowa 1985).

Attorney and Client — Attorney Fees.

Certiorari action to review fee allowances made by District Court for court-appointed attorneys in criminal cases. The rule of the First Judicial District sets as a guideline the sum of \$40.00 per hour as the "average, ordinary and customary charges for like services" in the judicial district. Supreme Court reviews the awards under standards referred in Hulse v. Wifvat, 306 N.W.2d 707 (Iowa 1981). Supreme Court holds \$40.00 per hour "absent special circumstances" to be a reasonable fee within the meaning of Section 815.7. One justice specially concurs, three justices dissent.

P

Lunde v. Ruigh, 356 N.W.2d 566 (Iowa 1984).

Attorney and Client — Attorney's Fees.

Original certiorari action to challenge award of attorneys fees to a court-appointed attorney in a contempt proceeding. Although decision limited to attorneys fees in particular action, impliedly the decision would also apply to cases under statutes allowing civil actions and including an award for attorneys fees as part of a remedy created.

District Court, in awarding fees, noted novelty of some of legal issues raised, but held the amount of time submitted to have been more than necessary and, accordingly, cut approximately in half the award requested. If correct legal standard is applied by the court, review is limited to determination of whether trial court abused its discretion. Since legal standard is not challenged, court finds no abuse of trial court's discretion.

Attorney and Client — Attorney Fees.

See Miller v. Component Homes, Inc., 356 N.W.2d 213 (Iowa 1984). --p. 54.

Dillon v. City of Davenport, 366 N.W.2d 918 (Iowa 1985).

Attorney and Client — Authority of Attorney.

Discovery — Closed Governmental Meetings.

Contracts — Settlement.

Equitable action for specific performance of work comp settlement agreement. District court ordered specific performance. Facts arose out of workers compensation case in which city employee suffered a heart attack. Attorney for employee and attorney specially retained by City prepared a joint application for submission of settlement agreement to the Industrial Commissioner. When the joint application was presented to the City Council for final approval, the terms of the settlement were rejected. Present action resulted.

Discovery. City challenges pre-trial ruling granting request for production of transcript of closed session of City Council meeting attended by attorney for City for purposes of discussing litigation. Section 28A.5(4) sets forth that records of closed sessions are not public records and "shall be sealed". Court holds right of discovery pursuant to R.C.P. 122(a) takes precedence under the present circumstances. Closed session law allows discussion of litigation strategy with counsel, including settlement strategy. Need for secrecy no longer exists, however, when settlement discussions and negotiations cease. Need to determine the events at closed sessions becomes paramount when settlement negotiations end with a settlement that is rejected and litigation ensues in the form of a suit to enforce the settlement.

City contends it had no authority to bind itself through actions taken during closed session. Specifically, vote taken regarding city attorney's settlement authority held not to be binding because no authority to pass resolutions had such closed sessions. However, since

closed session law authorizes counsel to meet to discuss litigation strategy and since the only practical method of providing authority to an attorney for the City to negotiate is in closed session, vote by city council is a binding resolution passed in closed session.

Attorney's Authority. Attorney-client relationship is one of agent and principal. An attorney cannot settle or compromise a case without authority but a settlement made with authority is binding on the client. Whatever the attorney does within the scope of his actual authority is binding. Transcript of closed session revealed that counsel voted and granted "authority" to settle the case. Transcript further indicated counsel was well aware that it would be "bound" by the settlement if one was reached. Attorney acted within his authority. Settlement is binding, notwithstanding oral agreement was reached. The oral agreement is as enforceable as the contract would be if executed. Moreover, fact that Code §85.35 requires approval by Industrial Commissioner does not constitute a condition precedent to binding agreement.

Interest. Plaintiff claims interest on the award. Section 535.3 provides for interest on money judgments in equity actions as well as those at law. However, money owed pursuant to settlement agreement does not constitute within meaning of the statute "money due on judgment and decree". Instant judgment is not the equivalent of a money judgment because it must yet be approved by the Industrial Commissioner pursuant to §85.35.

CIVIL PROCEDURE

Civil Procedure — Amendment of Pleadings and Reopening of Case.
See Peterson v. Petersen, 355 N.W.2d 26 (Iowa 1984).--p. 24.

Baty v. Binns, 354 N.W.2d 777 (Iowa 1984).

Negligence — Comparative.

Civil Procedure — Applicability of Goetzman.

Defendants appeal judgment for plaintiffs in automobile negligence action. Issue on appeal is whether pure comparative negligence, Goetzman, must be applied to a case tried to the court before the Goetzman decision but decided after Goetzman was filed. Trial was completed before Goetzman decision. Trial court findings of fact and conclusions of law filed after Goetzman decision. Trial court findings and conclusions held plaintiff's conduct to be negligent and a proximate cause awarded in favor of plaintiffs, reducing award by percentage of plaintiff's causal negligence.

Language from Goetzman regarding effective date does not specifically cover present action. This case was not tried after date of filing of Goetzman opinion. Defendants assert that although the action was pending at the time of filing of the Goetzman decision, the issue of comparative negligence was not raised prior to the trial court's decision after Goetzman was decided. Since contributory negligence of plaintiff had been raised prior to trial court adjudication, the issue is deemed to have been raised prior to the final ruling. Accordingly, Goetzman applies to the present case.

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Vigneroli v. Blue Cross of Iowa, 360 N.W.2d 741 (Iowa 1985).

Civil Procedure — Class Actions.

Appeal from trial court order certifying litigation as class action. Underlying law suit regards claims of former employees of Blue Cross/Blue Shield claiming right to severance pay on their dismissal from Blue Cross/Blue Shield and that they should be compensated for diminution of employment benefits as a result of forced transition to employment with new company. Upon request of plaintiffs, class action was certified by the court pursuant to R.C.P. 42.2(a). Standard for review of order certifying law suit as class action is for abuse of discretion. Burden of establishing prerequisites for class action is on plaintiffs. Requirements are that common question of law or fact applies to class of persons so numerous that joinder of all such persons is impracticable. R.C.P. 42.1. However, representatives of class must fairly and adequately protect interest of the class. Two broad considerations come into play: achieving judicial economy while preserving rights of litigants.

Court holds that the present case common questions of the law and fact predominate. Gist of plaintiffs' claim is that defendants' employment manual sets out a specific severance pay schedule defendants failed to meet. Defendants claim nature of proof for damages is individual in nature. However, although calculation for each plaintiff may be required, such calculation will not be difficult factoring in only the variations in length of employment and rate of pay.

Class representatives will adequately and fairly protect the interests of the class. Internal conflicts among the members of the class are not sufficient to preclude adequate and fair representation. Nor are some of named plaintiffs are so over zealous as to have little in common with other members of the class. Individuals do not have to be identically situated in every aspect of opinion and belief for them to be adequate representatives of a class. Rule 42.3 requires adequate financial resources to prosecute class action. Although it may be a strain here, potential lack of adequate financing is not sufficient to deny class certification.

Easton v. Crystal River Resources, Inc., 360 N.W.2d 138 (Iowa App. 1984).

Civil Procedure — Default Judgment.

Default judgment in the amount of \$750,000 entered against defendant. Trial court overruled motion to set aside. Personal service was effectuated on defendant's registered agent. However, he was not aware he had been designated as the agent until he was served with process. He attempted to contact the corporation by telephoning a number given to him by one of defendant's customers. He was told the corporation was no longer at that address but had moved to the Livestock Exchange Building in Kansas City. He then called a tenant in the building but was informed that the defendant was not there. Thereafter, he sent the original notice by certified mail to the last address known to him, which certified mail was returned unclaimed with a notation on the envelope turning out to be the corporation's new address, the Livestock Exchange Building.

Defendant argues mistake under Rule 236 lies with the United States Postal Service for not forwarding mail and/or with the individual who told the agent that the offices were not in the Livestock Exchange Building. There is nothing in the record to support the claim that a forwarding address was left with anyone. Defendant had a duty to, at all times, keep its registered agent for service of process apprised of its address and phone number. Defendant had no one to blame but itself.

Sher v. Burche, 353 N.W.2d 859 (Iowa App. 1984).

Civil Procedure — Default Judgment.

Trial was set in small claim action and defendant apparently had notice of such trial but failed to appear for trial whereupon the court telephoned defendant. His wife told the judge defendant was working about 40 miles away and it would take approximately one and one-half hours for him to arrive at the courthouse because of bad weather. The judge responded that he would wait only one-half hour. Court entered default judgment. Defendant's Motion to Reconsider was deemed to constitute a motion pursuant to Rule 236 to set aside default judgment. Defendant's conduct throughout the action in appearing and denying the allegations of the petition, including asserting a counterclaim for punitive damages, constituted substantial evidence that defendant diligently defended the lawsuit sufficient to vacate the default.

Allied Gas and Chemical Co. v. Federated Mutual Ins. Co., 365 N.W.2d 26 (Iowa 1985).

Civil Procedure — Rule 215.1.

Discovery — Admissions.

Case was subject to Rule 215.1 and was continued into 1982 for trial. Just prior to trial, court issued interlocutory order from which defendant sought appellate review. Supreme Court granted review and decision issued in 1983. At trial in 1983, court on its own motion raised question of validity of action under Rule 215.1 and dismissed the action. Rule 215.1(a) excepts those situations in which a case is pending on appeal provided a finding that the case is pending on appeal is entered of record. There is no finding of record in the present situation but case obviously was on appeal. Fact of a "finding" should not be deemed to be a condition precedent to operation of the exception for cases pending on appeal when record clearly reflects case is pending on appeal. Requirement of a "finding" was substantially supplied by district court record. Moreover, despite language in Koss v. City of Cedar Rapids, 300 N.W.2d 153 (Iowa 1981), even those appeals that are limited in scope nonetheless are appeals under the exception provided by Rule 215.1(a). Appellate rule 2(b) provides that for interlocutory appeals, the order granting such appeal "shall stay further proceedings below."

P

Liberty Mutual Insurance Co. v. Caterpillar Tractor Co., 353 N.W.2d 854 (Iowa 1984).

Civil Procedure — Rule 215.1.

Civil action dismissed under Rule 215.1. District court clerk mailed to defendants notice that the case was subject to dismissal under the Rule. Clerk's docket sheet shows that notice was mailed on a date certain. The action was dismissed pursuant to rule. More than six months later, plaintiff filed a motion to reinstate the case on the ground that plaintiff's attorneys had never received the notice as required by the rule. Defendants resisted on the ground that more than six months had elapsed and attached the notice received by defendants and the clerk's docket sheet indicating mailing. The notice received by defendants specifically reflected service upon plaintiff's law firm. Defendants presented affidavits regarding practices and procedures of the clerk which indicated mailing to plaintiff's attorneys. A second affidavit from the mail department supported mailing to plaintiff's lawyers.

Plaintiff submitted two affidavits. One by an associate in plaintiff's attorney's firm that, having reviewed the file and finding no notice and, based on his personal familiarity with the file, he was "absolutely certain" the firm never received the notice from the clerk of court. A second affidavit by attorney's secretary reflected that she keeps a log of 215.1 notices for all actions within the office. Nothing in the log reflects receipt of 215.1 notice.

Rule 215.1 states that notice must be served in accordance with Rule 82 and Rule 82 authorizes service by mail so service is accomplished and complete upon mailing. Accordingly, whether or not received, if Rule 215.1 notice is mailed, service is complete. Normally, proof of practice in the clerk's office and with the mail room would raise a presumption that the envelope was put in the mail. In this case, presumption is corroborated by the fact that two defense law firms received copies of the notice. However, the "positive sworn statement" of the attorney that he found no Rule 215.1 notice in his file weighs against the presumption in favor of mailing. Also, the secretary's index to 215.1 cases and a system of monitoring 215.1 notices "about as fool-proof as could be devised" weigh against mailing. Proof that an addressee did not receive mail is competent evidence that it was not mailed. The presumption of regularity of the mail service is available for the supposed receiver of the letter as well as for the sender. Presumption of mailing was rebutted and case reinstated.

Severson v. Peterson, 364 N.W.2d 212 (Iowa 1985).

Civil Procedure — Small Claims.

Discretionary review of small claims determination. Following default judgment in small claims action, party filed petition to vacate pursuant to Rules 252 and 253. Magistrate held it had no authority to entertain petition to vacate. Barnes Beauty College v. McCoy, 279 N.W.2d 258 (Iowa 1979). Case appealed to district court and opposing party cross-appealed on one issue.

Supreme Court earlier held no provision for granting of new trial under R.C.P. 244 for small claim actions. Similar considerations apply with respect to petitions to vacate. Nothing in the rules suggest such procedure is available in small claim actions. However, cross-appeals are permitted. Rule 5(a), Rules of Appellate Procedure, suggest nothing indicating that procedure is less applicable in appeals granted by discretionary order than in those taken as a

matter of right. Moreover, appellate rule 203 states that if discretionary rule is granted, further proceedings shall be had according to the appellate rules.

Schroeder v. Fuller, 354 N.W.2d 780 (Iowa 1984).

Civil Procedure — Summary Judgment.

Case of first impression in Iowa. Rule 237(c) sets forth that an adverse party to a motion for summary judgment may file opposing affidavits "prior to the date of hearing". Defendants filed motion for summary judgment. Approximately one-half hour before the time of hearing plaintiff filed her resistance for summary judgment accompanied by her affidavit. The trial court relied on plaintiff's affidavit in denying the motion. The time constraints in Rule 237(c) must be read in conjunction with Rule 83(a) regarding enlargement of time. Rule 83(a) permits time to be enlarged after expiration where the failure to act was a result of excusable neglect. Therefore, trial court had discretion to permit late filing upon a showing by plaintiff of excusable neglect. This rule is consistent with federal court interpretation of the Federal Rules of Civil Procedure. There is no record of the summary judgment hearing. Accordingly, there is no way to determine whether the trial court abused its discretion. Although it is the burden of plaintiff to demonstrate excusable neglect, it is the burden of the party seeking reversal to provide a record demonstrating error. They have not done so.

CIVIL RIGHTS

Christenson v. Ramaeker, 366 N.W.2d 905 (Iowa 1985).

Civil Rights.

Civil rights action pursuant to 42 U.S.C. §1983 in which plaintiff contends that defendant, a criminal investigator for the state, violated his constitutional rights by causing him to be arrested for a crime he did not commit. Allegations of negligent investigation and improper motivation in seeking issuance of arrest warrant. Supreme Court affirms grant of summary judgment.

A victim of burglary specifically identified plaintiff as having committed the crime. Defendant then undertook investigation and submitted a complaint and affidavit to the court upon which the court held probable cause for arrest to have been established. Ultimately, the victim recanted with respect to plaintiff and the charges against plaintiff were dismissed. Plaintiff's §1983 action does not allege that the arrest warrant was invalid on its face or that the complaint and affidavit which lead to its issuance were insufficient in form or content. To prevail, plaintiff must show defendant deprived him of a constitutional right and that defendant acted under color of state law. Defendant here did act under color of state law in his official capacity for the state. Court holds, however, plaintiff's constitutional rights were not breached.

Plaintiff was not denied due process. Plaintiff's innocence is irrelevant to issue of whether he was denied due process. Baker v. McCollan, 443 U.S. 137 (1979). Neither were plaintiff's Fourth Amendment rights violated since probable cause determination was appropriately made by judicial officer. Since plaintiff has not challenged facial validity of the arrest warrant, he can only succeed if there are sufficient facts of record to pierce the arrest



warrant. Affidavits supporting arrest warrant is entitled to presumption of validity. Franks v. Delaware, 438 U.S. 154 (1974). Under Franks, there must be allegations of deliberate falsehood or reckless disregard of the truth and those allegations must be accompanied by an offer of proof with specific reference to the portions of the warrant affidavit claimed to be false and supporting reasons.

Civil Rights.

See Kraft v. City of Bettendorf, 359 N.W.2d 466 (Iowa 1984).--p. 72.

Rhiner v. City of Clive, _____ N.W.2d _____, No. 84-502 (Iowa, August 21, 1985).

Civil Rights.

Plaintiff appeals from judgments under 42 U.S.C. §1983. Case discusses substantive elements of §1983 claims and holds trial court did not err by instructing jury defendants could not be held liable under the statutory provision if they were merely negligent. Testimony concerning prior incidents of violence involving plaintiff was admissible under Evidence Rule 404(a)(2)(B). Case also discusses foundational requirements regarding demonstrative evidence.

Good v. Iowa Civil Rights Commission, 368 N.W.2d 151 (Iowa 1985) (en banc).

Civil Rights -- Public Accommodation.

Action appealing from adverse ruling on petition for judicial review of an Iowa Civil Rights Commission ruling dismissing complaint of sex discrimination under Chapter 601A. Civil Rights Commission determined it lacked jurisdiction, in part, because program to which petitioner applied was not a "public accommodation" as defined in §601A.2(10). Affirmed.

Petitioner claims she was denied selection into a Rotary exchange program because of her sex. 601A.7 applies only to public accommodations. Accordingly, Commission had jurisdiction only if the Rotary program was a public accommodation within the meaning of the statute. Section makes clear that a private club or organization such as Rotary is prohibited from discriminating only if it offers goods or services to the "general public". The question then becomes whether Rotary offered the group exchange program to the general public.

In determining whether the program was a public accommodation, judgment of the agency charged with special duty of administering the statute is entitled to appropriate weight. Civil Rights Commission ruled the charge of discrimination was not covered by the act and that determination is entitled to deference. The list of criteria applied by Rotary to each candidate reflects that the class of persons sought for the program ought not be considered the general public. [Note: Language construed by the Supreme Court was removed from statute in amendment effective July 1, 1984.]

CLAIM PRECLUSION/ISSUE PRECLUSION

Banks v. City of Ames, 369 N.W.2d 451 (Iowa 1985).

Claim Preclusion/Issue Preclusion.

Action arises out of City's actions to take the power of eminent domain certain property for use as a sewage treatment plant. Plaintiffs initially brought injunction action in which they were unsuccessful. Later, after a condemnation Commission was convened for the purpose of taking the land plaintiffs commenced a certiorari action in district court. Plaintiffs appeal from adverse judgments on the injunction action and the certiorari action. With respect to certiorari action, trial court held plaintiffs barred by earlier judgment in injunction proceeding. Even though injunction action was terminated summarily and issues therein raised were not tried, Rule 217, R.C.P., mandates that the judgment operates as an adjudication on the merits. Accordingly, claim preclusion would bar second action. However, injunction judgment has been reversed and, accordingly, certiorari judgment is vacated.

Brown v. Monticello State Bank, 360 N.W.2d 281 (Iowa 1984).

Claim Preclusion/Issue Preclusion.

Torts — Malicious Prosecution.

Tort action against defendant bank in its individual and not representative capacities for maladministration of a probate estate and malicious prosecution with respect to probate of the estate. Earlier probate proceedings appealed to the Supreme Court concerned the bank's final reports regarding the estate as well as alleged improper performance of certain duties in its fiduciary capacity. Trial court held doctrine of issue preclusion barred litigation in a tort action regarding the bank's conduct with respect to matters previously litigated in probate proceedings. Damages are different but the claim of misconduct in second proceeding is the same. Situation meets the four prerequisites to the application of issue preclusion set forth in Hunter v. Des Moines, 300 N.W.2d 121 (Iowa 1981): (1) the issue concluded is identical; (2) the issue was raised and litigated in the prior action; (3) the issue was material and relevant to the disposition of the prior action; and (4) the determination of the issue was necessary and essential to the result in the prior action. Accordingly, maladministration claims are barred. Doctrine of issue preclusion also applies to portion of malicious prosecution claim concerning the bank's intervention in a probate proceeding in Wisconsin regarding the estate. The Iowa Supreme Court already determined that the bank was entitled to compensation for its services in intervention in Wisconsin. Such determination, pursuant to Iowa statute, requires a showing that the action was prosecuted "in good faith and with just cause". Finding of just cause for the allowance of fees negates finding of inferred malice from lack of probable cause. If malice cannot be inferred, actual hostility, ill will and spite must be shown, requiring proof the act or acted in bad faith and wilfully. Supreme Court's holding in earlier case precluded also this showing.

Malicious Prosecution. Plaintiffs' malicious prosecution claims concern two proceedings, an Iowa declaratory judgment action and intervention in a Wisconsin proceeding. With respect to the Iowa action, defendant obtained summary judgment because as defendant in the earlier action, plaintiffs did not prevail absolutely across the board. An element of malicious



prosecution is the termination of prior litigation in favor of the plaintiff. Supreme Court holds that malicious prosecution will lie where plaintiff was defendant in a prior action containing more than one separate and distinct cause of action and plaintiff was successful in such prior action on the cause of action serving as the basis for the malicious prosecution action. However, plaintiff's damages are limited to the loss caused by the suit or the cause of action in which he was successful. "A person who holds a good cause of action against a party should not be allowed to join an additional malicious suit without penalty."

Bryan v. Hall, 367 N.W.2d 251 (Iowa App. 1985).

Claim Preclusion/Issue Preclusion.

Personal injury action. Defendant and plaintiff's mother were involved in an automobile accident. Plaintiff's mother suffered physical injuries and in trial of her lawsuit against defendant, the jury responded that defendant was not negligent. Following conclusion of mother's suit, her son filed a lawsuit against defendant seeking damages for loss of parental consortium. Defendant moved for summary judgment relying on ground of issue preclusion. Court overruled motion for summary judgment. Reversed. Under ruling of Audubon-Exira Ready Mix, proper party ordinarily to bring parental consortium claim is the injured parent. Since injured parent is proper party and since injured parent lost her claim against defendant in earlier litigation, court holds issue preclusion bars second suit by child claiming parental consortium. Plaintiff here is so connected in interest with parent in earlier action as to have had full and fair opportunity to litigate the relevant claim. Accordingly, all elements of issue preclusion are present here. Hunter v. City of Des Moines, 300 N.W.2d 121 (Iowa 1981).

City of Ankeny v. Armstrong Co., Inc., 353 N.W.2d 864 (Iowa App. 1984).

Claim Preclusion/Issue Preclusion.

Litigation arose out of dispute between the City and defendant regarding construction of a municipal golf course. Under the contract between the City and the defendant, disputes were to be resolved through an arbitration proceeding. Defendant requested arbitration and parties proceeded through the process despite the City's objection regarding the arbitrator's power to determine matters at issue. Objections to the arbitration by the City regarded claims of untimely request for compensation and untimely request for arbitration as set forth in the contract. Despite the City's objections, the arbitration board awarded money to defendant.

City then brought declaratory judgment action in district court asserting that the arbitration award was improper and unenforceable because of timeliness problems. Defendant moved to dismiss the declaratory judgment action, claiming the arbitration award was enforceable, binding and not reviewable and, further, that the City was estopped from challenging arbitrability because of its participation in the process.

The district court denied the Motion to Dismiss, holding that the City made timely objection to the arbitrability of the dispute and, therefore, was not estopped from asserting that issue in court and, further, concluding as a matter of law that the claim was not subject to arbitration and that the board lacked arbitral jurisdiction and that the award is "neither binding nor enforceable" against the City.

Following denial of defendant's Motion to Dismiss, defendant answered and counterclaimed for the amount of the arbitration award. The case was then transferred from the equity to the law docket and the City claimed the doctrine of res judicata precluded the counterclaim because the prior order was a final judgment on the merits. The City also filed a Motion for Summary Judgment based on the earlier Order of the court. The district court sustained the City's Motion for Summary Judgment and held that, the issue of arbitrability had been decided adversely to defendant in the declaratory judgment action and, accordingly, ruled in favor of the City, granting it summary judgment. The Court of Appeals reversed. The court held the doctrine of res judicata inapplicable to the present circumstances. Because the earlier ruling was in the same litigation as the ruling on the Motion for Summary Judgment, the court determined that the doctrine of res judicata did not properly apply.

Rather, the appropriate issue for determination on appeal is whether or not the ruling on the Motion to Dismiss constitutes the "law of the case". The ruling was not objected or accepted to, nor appealed from. However, a ruling does not become the law of the case until it is finalized. Avoca State Bank v. Merchants Mutual Bonding Co., 251 N.W.2d 553, 559 (Iowa 1977). Even with a change in judges, a court may correct its own errors prior to final judgment. Reversed.

Metallo v. Musengo, 353 N.W.2d 872 (Iowa App. 1984).

Family Law.

Claim Preclusion/Issue Preclusion.

Mother and current husband appeal district court ruling adjudging former husband as legal father and awarding him visitation rights. Betty and Frank were married in 1966, which marriage was dissolved in 1972. In that same year, Betty then married Todd. At various times during her marriage to Todd, Betty left without warning and without leaving a forwarding address. In September 1974, a baby was born while Betty and Todd were married and living together, and Todd was listed as the father on the baby's birth certificate. Betty then left in 1975, taking the baby with her, and obtained a default divorce decree in Colorado. The Colorado court was not informed of the baby's existence. In 1976, Betty remarried Frank, but periodically she would leave Frank, taking baby with her, to return to Todd and live with him as a family. This occurred at least four separate times after Betty and Todd's marriage was dissolved. It apparently has not occurred since 1981, however. In 1982, Frank and Betty had the baby's birth certificate changed in California to show Frank is the father.

The Court of Appeals held that the Colorado dissolution proceeding holding that no children were born as a result of the marriage was not preclusive in Todd's action to be adjudged legal father and to obtain visitation rights. Betty's Petition in Colorado stated that no children were born as a result of the marriage. Betty cannot use the Colorado decree as a shield when that decree was based on her own misrepresentations. Also, it was not error for the court to grant visitation without finding change in circumstances, because, again, Colorado court was not even apprised of the child's existence. The main issue is whether Todd is the baby's father. The law presumes the legitimacy of a child born in wedlock. But that presumption may be rebutted by clear, strong and satisfactory evidence. Marriage of Schneckloth, 320 N.W.2d 535, 536 (Iowa 1982). Betty's testimony not sufficient to overcome presumption. Todd is dad.



Tigges v. City of Ames, 356 N.W.2d 503 (Iowa 1984).

Indemnity/Contribution.

Claim Preclusion/Issue Preclusion.

Workers Compensation — Exclusive Remedy.

Negligence — Comparative Negligence.

Wrongful death action regarding death of contractor's employee on construction site. Action brought against the owner of the project (City of Ames) alleging negligence and decedent's supervisor (Wayne) alleging gross negligence. Wayne asserted that he was a partner of decedent's employer and, pursuant to Section 85.20, claims of gross negligence against Wayne were outside the subject matter jurisdiction of the trial court. The City claimed the benefit of its written contract with the contractor and filed third-party petitions against the contractor, first in contract then in tort, claiming indemnification.

Trial commenced one month after Goetzman decision. Jury apportioned 7% negligence to decedent, 8% negligence to the City, 28% negligence to the contractor, and 57% gross negligence to Wayne. Trial court denied both of City's third-party claims for indemnification and held Wayne to be a partner in decedent's employer and, therefore, immune from suit under §85.20. Accordingly, pursuant to the judgment of the trial court, City became responsible for 93% of causal negligence leading to decedent's death, its 8% negligence and 85% attributable to contractor and its employees. Supreme Court affirmed.

Indemnity — Contribution.

A. First third-party petition. During pre-trial stage of proceedings, City filed third-party action seeking indemnity from contractor based on the terms of the construction contract. The District Court dismissed the third-party action because plaintiff's petition sought recovery from City on the grounds of the City's negligence and the agreement for indemnity did not explicitly include right to indemnity for City's own conduct. On appeal, the City requests indemnification in the amount measured by the contractor's negligence — 85% — under Goetzman. The contractor argues that partial indemnity cannot be raised for the first time on appeal since the trial court was not presented with a claim or theory of recovery for partial indemnity. Supreme Court agrees with contractor.

The Supreme Court held that the City had identified its theory (full indemnity) to the trial court below. Accordingly, the City cannot now raise a partial indemnity theory based upon comparative fault of the contractor since it had not been presented to the District Court below. Despite claims of City, error was not preserved in City's motion for new trial pursuant to R.C.P. 244(f), (h), in which it sought indemnity for the 85 percent of the fault attributable to the contractor. Although the City has a right to appeal from the District Court's decision on its first third-party petition, when the City failed to plead further within seven days as permitted by R.C.P. 86, the order of the court became a final adjudication. [The anomaly of this situation is that the motion to dismiss the third-party petition was ruled upon approximately nine months before the court's ruling in Goetzman. Strong dissent is based upon this point.]

B. Second third-party petition.

Claim preclusion. The City's second third-party petition was filed and served approximately 60 days after ruling on the first third-party petition. The City had not sought additional time to further plead pursuant to R.C.P. 86. The second third-party petition claimed indemnification under a tort theory. The contractor alleged that when the adjudication on the first motion became final and binding, the City was thereafter precluded from raising the issue again, even though the theories were different. Trial court overruled the contractor's motion for summary judgment regarding the second third-party petition on the basis that the theories raised were different and that, accordingly, the second third-party petition was not barred. The Supreme Court holds that the trial judge erred and should have sustained the contractor's motion for summary judgment on claim preclusion grounds.

Although the City's second third-party petition asserted a different theory of recovery from its first third-party petition, the claims asserted in both arose out of the same transaction or occurrence. The City's failure further to plead under Rule 86 resulted in the court's order on the contractor's motion to dismiss becoming a final adjudication. Since the issues of indemnity were determined finally by the court's ruling on the initial motion to dismiss, claim preclusion barred the second suit.

Workers Compensation -- Exclusive Remedy. From the outset, Wayne had challenged the court's jurisdiction over claims asserted against him on the grounds that he was a partner in the entity employing the decedent. Accordingly, pursuant to the ruling of Carlson v. Carlson, 346 N.W.2d 525 (Iowa 1984), exclusive jurisdiction for any claims against Wayne arising out of an injury during the course of decedent's employment was granted to the industrial commission. The factual issue regarding Wayne's status determines the extent of the District Court's subject matter jurisdiction. The Supreme Court noted that the issue is "knotty" but criticized the District Court and the various judges involved in dealing with this issue below for failing to resolve the issue well in advance of trial through an efficient procedure.

The Supreme Court stated that the District Court ought to have taken certain steps to resolve the issue of Wayne's status, conducting a separate hearing on the question of subject matter jurisdiction after a bifurcated trial with a separate hearing had been requested. The evidence was before the court and the "parties were entitled to know their status." The problem was further compounded when the court incorrectly ruled that Wayne's Rule 179(b) motion to enlarge was inapplicable to its ruling on the motion to dismiss. See Dull v. Dull, 303 N.W.2d at 406. The District Court did not resolve the issue of Wayne's status until following trial. At trial, the court submitted a special verdict to the jury regarding Wayne's status. The instruction to the jury, however, indicated that the court would make the ultimate determination regarding subject matter jurisdiction. The jury responded that Wayne was not a partner and the court rejected the jury's finding. Resolution of the factual issue regarding Wayne's status is for the court, "the court must determine its own authority to hear a case." Since the court has inherent power to determine whether it has jurisdiction, a hearing on subject matter is a special proceeding triable to the court. Review of the subject matter jurisdiction ruling is at law, not de novo. Since substantial evidence supports the trial court's determination that Wayne was a partner, it will not be disturbed.

Dissent. Since the ruling on the motion to dismiss regarding the City's first claim for indemnity pre-dated the adoption of comparative negligence and since contributory negligence has been supplanted by comparative negligence, the City as negligent indemnitee should not be



denied recovery altogether merely because the contract does not expressly allow indemnification notwithstanding the City's negligence. Rather, recovery should be reduced by the amount of the City's negligence — 7%. The dissent would follow the United States Supreme Court decision in U.S. v. Seckinger, 397 U.S. 207, 215-16 (1970).

CONSORTIUM

Beeck v. S. R. Smith Co., 359 N.W.2d 482 (Iowa 1984).

Consortium.

Limitation of Actions.

Supreme Court determination of certified questions from the federal district court. Action for loss of parental consortium. Incident occurred in 1972, nearly ten years before Iowa Supreme Court in Weitl v. Moes, 311 N.W.2d 259 (Iowa 1981) held that minor has an independent cause of action for loss of consortium of an injured parent. Court holds that Weitl is retroactive, holding as a general rule that judicial decisions are both retroactive and prospective. Accordingly, cause of action proper even though incident arose ten years before substantive right created.

Limitations Period. Second certified question concerns whether or not the limitations period for bringing an action for parental consortium is tolled during the minority of the children pursuant to Code §614.8. Following Weitl, Supreme Court in Audubon-Exira Ready Mix, Inc., 335 N.W.2d 148 (Iowa 1983) and Madison v. Colby, 348 N.W.2d 202 (Iowa 1984), held that the proper party to assert claims for loss of parental consortium is the injured parent on behalf of the child. Since, here, the parent's claim is long since barred by the statute of limitations, defendant claims action for parental consortium also is barred. However, under Audubon-Exira and Madison v. Colby, amounts recovered by the parent on behalf of the child "are the child's property." Although the court had held that consortium actions be joined with the underlying action for the injury or death "whenever feasible", court assumes joinder in present case was not feasible because injury predated by nearly ten years the Weitl decision. Although the parent is the proper party to bring the claim, the claim is the property of the child. Accordingly, as with other actions in which the injured party is the child, the limitations period is tolled during the period of minority. Section 614.8 applies to parental consortium claims.

Nelson v. Ludovissy, 368 N.W.2d 141 (Iowa 1985).

Consortium — Proper Party.

Action by adult plaintiffs for damages for loss of father's services and support. Cases were filed independently of father's action for damages sustained in accident. Trial court granted defendant's motion to dismiss claiming plaintiff's lack of capacity to sue on claims. Audubon-Exira Ready Mix states that a child's claim for loss of services and support of a parent is properly brought by the injured parent. It recognizes no distinction between claims of adult and minor children. Neither does Madison v. Colby. Beeck v. S. R. Smith Co., 359 N.W.2d 482 (Iowa 1984) deals with the situation in which joinder of the parent's claims and those of the child

is not "feasible" but provides limited recognition for adult children's suits in their own name for loss of parental society and companionship.

When child's independent claim under Weitl v. Moes, was abrogated in Audubon-Exira Ready Mix, child-parent consortium claims once again came under §613.15. Supreme Court rejects plaintiff's claim that adult children may always pursue consortium claims under §613.15 in their own names. Statute expressly provides that recovery may not be had by the "children, as such". In order for either a minor or adult child to avoid statutory proscription, child must first establish to the court's satisfaction that it is impossible, impracticable or not in the child's best interest for the parent to maintain the action. Required showing may be inferred from the present circumstances. Where parent has commenced action omitting claims of a child, plaintiff may be inferred to have elected against representing child's interests. Similarly, disagreement between adult child and parent over who shall control the course of litigation would, of itself, permit adult child to maintain claim under §613.15 in his or her own name.

CONTRACTS

Kirk v. Ridgway, _____ N.W.2d _____, No. 84-1503 (Iowa, August 21, 1985).

Contracts.

Builder-vendor appeals from judgment for plaintiff in action for breach of implied warranty of workmanship in the sale of a home. The doctrine of implied warranty of workmanship is applicable to the sale of a home by a builder-vendor. Plaintiff showed entitlement to protection of the warranty and warranty was not "merged" in the deed.

Recruiter, Inc. v. Brenco Automation Center, Inc., 354 N.W.2d 245 (Iowa App. 1984) (6/26/84) (No. 43).

Contracts.

Suit by Employment Agency for payment of services performed for defendant pursuant to contract between the parties. Defendant contracted with plaintiff to find a person to work as a systems analyst. Following interviews, the hiring personnel with defendant informed the individual referred that he had not been selected for the job that was available. The individual then considered the matter closed and accepted a position with another employer. The following year defendant underwent certain reorganization, bringing in a new managers. The decision was made to purchase new computer systems. Because the new programming manager had worked for three or four years with the individual who had earlier been referred to defendant and knew of his skills, he recommended that individual to the new personnel manager. Neither the new program manager nor the new assistant manager who were responsible for hiring for the second position were aware that the individual had previously been interviewed the year before. The individual was hired for a new position that was not the same position for which he had earlier interviewed.

The Court of Appeals held that given the fact that the individual had been hired to a different position more than one year later, by individuals not involved in the earlier hiring process who were not even aware of his earlier application for employment, there was no

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substantial evidence to support the trial court's finding that the agency had performed services under its contract entitling it to a fee.

Contracts.

See Sauer v. Moffitt, 363 N.W.2d 269 (Iowa App. 1984).--p. 31.

Bossuyt v. Osage Farmers' Nat'l Bank, 360 N.W.2d 769 (Iowa 1985).

Contracts -- Cashier's Check.

Contracts -- Elements of Damage.

Damages -- Remittitur.

Agency.

Torts -- Fraud.

Civil action arising out of bank's dishonor of cashier's check. Facts are complex. A wrote check to B for B to obtain cattle for A. B negotiated for purchase of cattle from C (plaintiff). C called B's bank (defendant) to determine whether he could accept check from B. Bank officer informed C that B's check would be good. When A received cattle they did not conform. C did not know of the requirements A had imposed on B. A stopped his check to B. B called C and informed him her check would not be good since A had stopped payment on his check to B. C went to bank to cash B's check. Bank officer, representing that cashier's check was as good as cash, issued cashier's check to C. B then instructed Bank to stop payment on her personal check, which had already been cashed. Bank stopped payment on cashier's check.

In action brought by C against Bank, C recovered amount of check, consequential damages and an award for mental anguish. Bank prevailed on its claim against B for the amount of the cashier's check.

Defense to cashier's check. Bank asserts fraud of C as defense to C's claim on the cashier's check. Fraud is a defense. Bank claims C's failure to disclose to the Bank his awareness B's check was not good constitutes a fraudulent misrepresentation by silence. Court refused to instruct jury that silence by a party to a transaction who has superior knowledge can result in material misrepresentation. Court adopts Restatement (Second) of Contracts §161(b) regarding nondisclosure. However, since jury was instructed that in presenting B's check to Bank C "impliedly represented he was good faith in seeking payment and that no defense of any party of any party to the check is good against him", there was no error. However, better instruction would have followed Restatement rule. Bank also asserts absence of consideration as defense to its cashier's check. Court does not decide whether absence of consideration is a valid defense but holds that when C delivered check to Bank, C provided consideration. Bank knew that collection on A's check was necessary to cover B's check and that it had not yet collected A's check. Accordingly, Bank chose to accept risk of collectibility of A's check.

Remittitur. Jury awarded C \$30,000.00 for consequential damages. C agreed to accept remittitur to \$8,000.00. Appeal resulted. Pursuant to R.C.P. 50, entire judgment deemed reinstated, notwithstanding remittitur. Supreme Court agrees with trial court's determination that consequential damage award was excessive. Issue is whether C gets a second chance to consent to reduction or have a new trial or whether Supreme Court reinstates reduced judgment on remittitur that was set aside by appeal. Supreme Court follows federal rule and concludes that remitted judgment ought properly be reinstated.

Mental Anguish. Jury awarded damages for mental anguish. Facts do not meet elements for tort of intentional infliction of emotional distress. Damages for mental anguish sometimes awarded for certain kinds of tortious conduct involving an intentional tort for certain types of personal injury. Restatement (Second) of Torts §905, Comment c. Mental anguish damages incident to breach of contract, however, are not normally recoverable except in very limited circumstances. Present action is a commercial dispute. Facts do not fall within "narrow ambit" of Restatement provision.

Agent's Individual Liability. C claims that Bank employee involved in transaction who was also an officer of the Bank induced Bank to breach its contract with C and that Bank officer ought properly be individually responsible. Bank officer did act for personal gain but rather only in the course and scope of his agency for the bank. Court refuses to adopt a rule of personal liability of an individual who, while acting for the corporation, has made decisions resulting in the corporation's promise being broken.

Punelli v. Punelli, 364 N.W.2d 259 (Iowa App. 1984).

Contracts -- Confidential Relationship.

Action to void the effects of two deeds on the ground that they were obtained by fraud. Husband and wife (plaintiff) purchased certain property. Later, husband (now deceased) called plaintiff and requested she execute certain documents releasing her interest in the land following property's buyer filing bankruptcy. Plaintiff claimed the existence of a confidential relationship which would shift the burden of proving the fairness of the transaction to the decedent, her husband. The effect of existence of a confidential relationship raises a presumption of fraud and undue influence and shifts the burden to the party seeking to uphold the transaction to establish by clear and convincing evidence the transaction was entered into voluntarily. In Re Estate of Samek, 213 N.W.2d 690 (Iowa 1973). However, plaintiff has burden to show by "clear proof" the existence of a confidential relationship in which she was the subserviant and decedent the dominant person. Plaintiff claims confidential relationship arose solely from the fact that she and decedent were married at the time of the transaction. Court rejects the argument. Confidential relationship may exist between husband and wife but every transaction between spouses is not to be presumed to be tainted by fraud or undue influence. Section 597.4 places commercial dealings between spouses on the same footing as those between other parties. In Re Estate of Tollefsrud, 275 N.W.2d 412 (Iowa 1979). Plaintiff failed to meet her burden of demonstrating the existence of the relationship. Plaintiff herself was experienced in business.

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Courts — Appellate Jurisdiction.

Contract — Partnership.

Supreme Court review of trial court judgment affirmed by operation of law by the Court of Appeals on a tie vote. Farm owner entered a crop-share and stock-share agreement with tenant under which owner was to receive one-half of the receipts of farm products sold and tenant was to have full management control over the farming operation, including what to sell, when to sell, what, where, and how much to buy. In fraudulent violation of the terms of their agreement, the tenant made arrangements for stock on the property that were owned by others or by tenant himself. Owner never received an interest in such stock but did, under the terms of the agreements, pay one-half of the expenses associated with such stock. Supplier of feed to tenant, following tenant's bankruptcy, filed action against the owner on partnership, agency and quantum meruit theories. Trial court held partnership existed between owner and tenant and that owner, accordingly, was responsible for debts of tenant in purchase of feed for their joint enterprise.

Supreme Court Jurisdiction. Trial court ruling was affirmed by operation of law, §602.5106, by an evenly divided Court of Appeals. Plaintiff feed supplier argues §602.4102(2) provides that Supreme Court jurisdiction over an appeal ceases when the case is transferred and is not regained except upon a grant of further review under §602.4102(4). That statute permits parties to an appeal "decided" by the Court of Appeals to file an application for further review. Issue is whether Court of Appeals "decided" the case when it affirmed by operation of law. Supreme Court holds case was decided.

Existence of Partnership. Primary question of law in the case is whether or not trial court erred in concluding that the facts established the legal relationship between owner and tenant as one of partnership. Supreme Court holds trial court did err. Crop-share and stock-share agreements in Iowa traditionally have been viewed as creating a landlord-tenant relationship, not a partnership. E.g. Florence v. Fox, 188 N.W. 966 (Iowa 1922). Absent stipulation or evidence clearly manifesting a contrary purpose, it is not presumed that parties to such an agreement intended to assume the responsibilities of partnership. Policy reasons behind such a rule is that construing such arrangements to be partnerships exposes the parties to "unwarranted and unexpected liability" for conduct he or she ordinarily is powerless to control or direct.

Court looks to written agreement between the parties which demonstrates the ordinary elements of common landlord-tenant relationship. In order to find partnership, there must be an intent by the parties to associate as partners; a business; earning of profits; and co-ownership of profits, property and control. The "crucial test" of partnership is the intention of the parties to create a partnership. The agreement does not contain words such as "partner", "partnership", "firm" or any other term usually deemed to show intent to form a partnership. Rather, it is entitled Farm Lease and the words "landlord" and "tenant" are used to describe the parties, who are identified in no other way. Profits, property and control under the lease are not co-owned. Landlord is to receive one-half of the receipts and shares certain expenses. Others, however, are not shared. Agreement does not provide for sharing of losses. The owner and tenant jointly owned certain livestock and feeding equipment. That, alone, is not sufficient.

Co-ownership of control, or a community of interest in the administration of the business is a key element. This is lacking here. Agreement specifically placed tenant in complete "management" control. Moreover, the conduct of the parties is consistent with the language of the agreement. Partnership is a contract that can be formed only upon mutual consent of the parties. One party cannot create the relation alone. Fact that owner in one conversation may have referred to himself as a partner entitled to little weight. Nor did the parties conduct themselves for ownership of profits. Distinction between sharing of receipts and sharing of profits is commonly found and recognized as valid. No substantial evidence of joint exercise of control.

Agency. Burden of proof of agency is on the person asserting its existence. Agency requires manifestation of consent and control. Lack of control by owner and operation tenant independent of any control by owner negate agency. Tenant's agreement to become obligated for purchase of feed does not bind the owner. An agreement between owner and tenant to share cost of feed expense is personal to the landlord and tenant and does not give rise to a cause of action by a supplier against a landlord.

Four justices dissent. Dissent argues majority grants appellant what amounts to de novo review of action tried at law.

Maynes Real Estate, Inc. v. McPherron, 353 N.W.2d 425 (Iowa 1984).

Contracts — Quantum Meruit.

Real estate broker sued to collect real estate commission under oral listing of agreement for sale of farm land. Under Milholin v. Vorhies, 320 N.W.2d 552 (Iowa 1982), failure to comply with real estate commission regulation requiring all listing agreements be in writing deprives plaintiffs of suit on contract. Similarly, to permit recovery on quantum meruit basis would frustrate the purpose of the real estate commission regulation and encourage violation of the regulation.

Dain Bosworth, Inc. v. Brandhorst, 356 N.W.2d 590 (Iowa App. 1984).

Contracts — Restrictive Covenants.

Defendant appeals from District Court injunction prohibiting violation of the terms of a noncompetition agreement. Defendant was employed as a securities dealer under a contract of employment in which his employer agreed to train him to be a stockbroker and, in return, defendant agreed not to compete. The agreement prohibited competition for 90 days following termination of employment with any other securities dealers within 30 miles of any of plaintiff's offices in which defendant worked. The agreement also prohibited defendant for a period of 90 days from soliciting customers with whom he had dealt while employed with plaintiff. In connection with his employment, plaintiff provided defendant with four months of training at a cost of more than \$20,000. After working only 16 months after completing training, defendant voluntarily terminated his employment. At the time he quit, defendant already had an employment agreement with a competitor of plaintiff. Under that employment agreement, defendant would work more than 30 miles from his former office for 90 days and then move back to Waterloo, the seat of his earlier employment. During the 90 day period, defendant and



members of the competitor's Waterloo office, drafted a solicitation letter sent to customers with whom defendant had dealt while an employee of plaintiff. Injunctive action resulted.

District Court enjoined defendant's conduct for 90 days following the termination of his employment. Defendant appealed. Plaintiff moved to dismiss the appeal on grounds of mootness, since the 90 day period had expired. However, defendant asserts a claim for damages resulting from the injunction which, pursuant to the contract, he must bring in an arbitration proceeding. Defendant cannot raise his damage claim in court because of the arbitration clause. Accordingly, he could not assert damages as a counterclaim in the injunction action.

Courts will enforce a noncompete provision if the covenant is "reasonably necessary" for the protection of the employer's business and not "unreasonably restrictive" of the employee's rights nor prejudicial to the public interest. Trial court correctly held plaintiff has met its initial burden of proving the noncompetition agreement was reasonably necessary for its business through the showing of the "special training or peculiar knowledge" given to defendant. Moreover, in terms of the limited time and area restrictions, trial court correctly determined restrictions were reasonable, not unduly oppressive and not injurious to the public interest.

Peterson v. Petersen, 355 N.W.2d 26 (Iowa 1984).

Civil Procedure — Amendment of Pleadings and Reopening of Case.

Contracts — Statute of Frauds.

Action for partition of proceeds of sale of tract of land planned for development in shopping center. Plaintiff claimed defendant had orally agreed to convey one-third interest in the land in exchange for plaintiff's services in development of the project. Plaintiff seeks to avoid Iowa statute of frauds prohibiting evidence of contract creating an interest in land. Action initially brought on contract. After plaintiff had rested his case, defendant appeared in the courtroom for the first time. Plaintiff immediately moved to reopen plaintiff's case which was allowed by the court. Plaintiff then called defendant as adverse witness. At the close of the additional testimony, plaintiff moved to amend his pleadings to include a claim of promissory estoppel. That motion was granted.

Amendment and Reopening of Case. Granting leave to reopen plaintiff's case and allowing the amendment to assert promissory estoppel are discretionary with the trial court. It is evident defendant intentionally avoided the courtroom until time for him to appear in his own defense. This is a "questionable" trial tactic which would have the effect of causing piecemeal litigation and should not be condoned. Trial court did not abuse its discretion in allowing reopening or amendment of pleading, especially since promissory estoppel is closely related to plaintiff's contractual theory.

Statute of Frauds. Oral agreement to transfer an interest in land must be established by clear and convincing evidence. Although part performance, pursuant to §622.33 and promissory estoppel can bar a defendant from asserting the statute of frauds as a bar to the action, plaintiff must meet the quantum of proof. An examination of the record reveals there was not

a preponderance of clear and convincing evidence. Testimony regarding agreement between the parties were not sufficient to demonstrate the terms of the alleged agreement with the required specificity.

Contracts -- Settlement.

See Dillon v. City of Davenport, 366 N.W.2d 918 (Iowa 1985). --p. 6.

Contracts -- Third-Party Beneficiary.

See Bain v. Gillispie, 357 N.W.2d 47 (Iowa App. 1984). --p. 64.

Contracts -- Third-Party Beneficiary.

See D.R.R. v. English Enterprises, 356 N.W.2d 580 (Iowa App. 1984). --p. 79.

Contracts -- Written or Oral.

See Matherly v. Hanson, 355 N.W.2d 450 (Iowa 1984) (en banc). --p. 59

CONTRIBUTION/INDEMNIFICATION

Contribution/Indemnification -- Common Liability.

See Speck v. Unit Handling Division, 366 N.W.2d 543 (Iowa 1985). --p. 69.

Franke v. Junko, 366 N.W.2d 536 (Iowa 1985) (en banc).

Contribution/Indemnification -- Comparative Contribution.

Negligence -- Comparative.

Pre-stature comparative negligence case. Plaintiff passenger in vehicle driven by her husband sued defendant driver of other vehicle who cross-petitioned against husband for contribution. Trial court dismissed cross-petition for contribution but reduced plaintiff's recovery by 25%, apparently the negligence attributed to plaintiff's husband driver.

Supreme Court abandons equal contribution rule prevailing prior to Goetzman decision. In its stead, court adopts rule of comparative contribution, the rule set forth in comparative fault statute because it is as the better common law approach, not because it was adopted by the legislature. Court reverses dismissal of cross-petition for contribution against husband but holds contribution to be proper in the amount of 25% of plaintiff's recovery. Plaintiff is entitled to her entire judgment. Defendant is entitled to a 25% contribution against plaintiff's husband.

Four justices dissent and argue retention of the equal contribution among joint tort feasons rule.



COURTS

I.G.L. Racquet Club v. Midstates Builders, Inc., 367 N.W.2d 267 (Iowa App. 1985).

Courts.

Following trial, court entered judgment for defendant on counterclaim for foreclosure of mechanic's lien. Judgment for money damages plus interest and court costs. Court costs did not include attorneys fees. Plaintiff appealed but appeal was dismissed for lack of prosecution. Subsequently, Code §572.32 became effective. Provision allows attorney fees for successful plaintiff in mechanic's lien enforcement actions. Defendant moved the district court to retax costs. Court held it lacked jurisdiction to retax costs. Court of Appeals affirms. Only method to correct error, if any, in judgment was through appeal. Dismissal of appeal ended further inquiry. Motion to retax costs could not lie because the attorney fee issue inhered in the judgment.

Courts -- Appellate Jurisdiction.

See Chariton Feed & Grain, Inc. v. Harder, 369 N.W.2d 777 (Iowa 1985) (en banc). --p. 22.

Robco Transportation, Inc. v. Ritter, 356 N.W.2d 497 (Iowa 1984).

Courts -- Appellate Jurisdiction/Timely Appeal.

Review of ruling on special appearance challenging personal jurisdiction over defendant on basis of lack of minimum contacts. Court characterizes circumstances as those from "an imaginative law school examination" but refuses to reach the merits because appeal not timely filed. Defendant personally served March 1 and, on March 21, filed a special appearance on basis of lack of personal jurisdiction. Although special appearance sought dismissal of the action, appropriate relief is now a motion to quash, not to dismiss.

Defendant's special appearance was sustained by court ruling of April 8. On April 11, plaintiff's attorney received a copy of the ruling and immediately telephoned the judge ruling on defendant's motion. Counsel informed the court that plaintiff had not resisted plaintiff's special appearance because plaintiff was unaware of the special appearance and had never received notice that plaintiff had filed a special appearance. The District Court told counsel he would allow plaintiff to resist the special appearance and counsel then telephoned defendant's attorney to obtain a copy of the special appearance which he received April 13. Plaintiff filed a resistance to special appearance April 20 but took no appeal from the ruling of April 8 nor did it file a motion to enlarge under Rule 179(b) or petition to vacate the judgment under Rule 252 or 253. On April 25, the court entered an order stating that "the court's ruling on special appearance . . . will be reconsidered . . ." On June 21, the court ruled a second time, sustaining defendant's special appearance. Plaintiff's notice of appeal was within 30 days of the second ruling but more than 30 days after the first ruling. Held: appeal untimely.

Timely appeal is jurisdictional and cannot be inferred by consent, much less silence. The court's April 8 ruling sustaining the special appearance is a final order from which appeal of right may be taken. Similarly, motion to vacate is appropriate and a Rule 179(b) motion to enlarge is permitted. However, final judgment puts it beyond the power of the trial court to

return the parties to their "original positions" and trial court may not undue its final judgment absent motion to enlarge or petition to vacate. Plaintiff filed no timely motion challenging the April 8 ruling. Consequently, court's second "ruling" was "without authority and a nullity". Accordingly, Supreme Court has no jurisdiction over the appeal. April 11 telephone call to the court judge deciding defendant's motion was not the equivalent of a Rule 179(b) motion. The rule, however, refers to the "filing" of the motion and, further, Rule 82 requires service of such motions. Accordingly, Rule 179(b) motions, apparently, must be in writing. To rule otherwise and to allow counsel to make oral, ex parte, post-trial motions would "degrade the importance and purpose of the Rules of Civil Procedure."

The court's April 25 order setting hearing for reconsideration of the earlier ruling was not an order nunc pro tunc, nullifying the earlier order. Nunc pro tunc is not for the purpose of correcting judicial thinking, a judicial conclusion or mistake of law, Headley v. Headley, 172 N.W.2d 104, 108 (Iowa 1969), and is inapplicable here. Moreover, court lacked inherent power to nullify its earlier judgment on the basis of a phone call, even if that were the court's intent.

Dissent argues form over substance. April 8 order was obtained without opportunity for plaintiff to be heard on this issue upon which the case was decided. Accordingly, plaintiff has clearly shown a right to avoid the effect of the April 8 order on due process grounds. Any fair interpretation of the circumstances "compels" the conclusion that the April 8 order was nullified by the District Court and the matter was hear anew and the June 21 order became the final judgment in the case. Contrary to majority's opinion, District Court has inherent power to set aside its earlier order based only upon the telephone call from plaintiff's counsel. The affidavit of plaintiff's counsel showing that no copy or notice of defendant's special appearance had been given to plaintiff and confirming the telephone arrangement counsel had discussed with the court is sufficient upon which to base an order to rehear the special appearance. The April 25 order for reconsideration may fairly be interpreted as vacating the April 8 order and is susceptible of a correction by entry nunc pro tunc.

Courts — Jurisdiction.

See City of Des Moines v. Des Moines Police Bargaining Unit Association, 360 N.W.2d 729 (en banc) (Iowa 1985). --p. 1.

Fisher v. Sedgwick, 364 N.W.2d 183 (Iowa 1985).

Courts — Jurisdiction.

Certiorari action challenges authority of district court to issue an administrative search warrant to be conducted under city housing code. Case presents very nearly same questions dealt with in Meier v. Sulhoff, 360 N.W.2d 722 (Iowa 1985) and Molitor v. City of Cedar Rapids, 360 N.W.2d 568 (Iowa 1985). No Iowa statutory authority grants to the district court or any other court the right to issue administrative search warrants for housing violations. Statute granting to municipalities the right to adopt housing codes with programs of inspection does not establish any warrant procedure nor does any other statute. Absent statutory authority, the City lacks authority to establish such warrant procedure in the district courts by ordinance. Molitor v. City of Cedar Rapids.



Court points out in the present case that if warrant had been issued by a district court judge rather than associate judge, order might have been upheld. "Nothing contained in our Sulhoff opinion denying warrant authority to the district court in the absence of statutory authorization would deny that court the authority under its general equity jurisdiction to issue an order for compulsory process (whatever label might be given to such process) upon notice and hearing to the affected parties." What does that mean?

Meier v. Sulhoff, 360 N.W.2d 722 (Iowa 1985) (en banc).

Labor and Employment -- OSHA Warrants.

Courts -- Jurisdiction.

Certiorari action brought by Iowa Commissioner of Labor to challenge legality of an order entered by defendant judge denying an application for an administrative inspection warrant. Commissioner's application sought administrative inspection warrant under Iowa IOSHA allowing agents of labor department to make general and health inspection premises of employer. Application set forth identification of the employer as an inspection site pursuant to a general administrative plan and that the employer had been cited for six "non-serious" IOSHA violations previously. Defendant judge denied the application for an inspection warrant. District judge was correct to deny the warrant but right for the wrong reasons. Probable cause in the criminal sense is not required for OSHA warrants. However in the absence of the specific legislative authorization, Iowa courts lack authority to issue administrative search warrants. Cases under federal OSHA not applicable. There is no counterpart in Iowa to Federal Rule of Criminal Procedure 41(h). Iowa Code Section 808.2 does not apply. In other statutes the legislature has is specifically authorized administrative bodies to seek inspection warrants, §100.51-.54, 204.502, 467A.51 (fire, controlled substances and soil conservation). However there is no common law right to issue a search warrant under the Iowa Occupational Safety and Health Act.

Four justices dissent.

Molitor v. City of Cedar Rapids, 360 N.W.2d 568 (Iowa 1985).

Courts -- Jurisdiction.

City housing ordinance provided that those persons adversely affected by decisions of the Housing Board of Appeals could appeal to the Iowa district court. District court on its own motion raised jurisdictional issue. Jurisdiction is given to a court solely by law. Iowa district court is a state court. However, §602.2, granting district court jurisdiction in all appeals "from all tribunals, boards or officers, under any provisions of the laws of this state" refers to state law, not city ordinances. Jurisdiction of state courts is a state matter, not a municipal matter. If municipal corporations had the power to confer jurisdiction on the district court, jurisdiction of the court potentially could be fragmented into as many components as there are municipalities. Home rule as a source of authority for the municipalities to grant jurisdiction in the state courts also is rejected.

Hewitt v. Ryan, Judge, 356 N.W.2d 230 (Iowa 1984).

Courts -- Mandamus.

Supreme Court review of Court of Appeals decision conditionally sustaining a petition for writ of mandamus. Action arose out of a dissolution proceeding. On review of the award in dissolution, and specifically relative to 45 shares of stock owned by the husband in a closely held corporation, the Court of Appeals had held it "unnecessary" to determine the value of the husband's stock interest because, whatever its value, the wife is entitled to one-half of it. The court went on to hold that the wife held one-half interest. Since the corporation is closely held, the stock has no readily available market. However, the stock is subject to an obligation of the corporation to repurchase upon the husband's termination of employment or death and an option to repurchase if the husband should seek to transfer or encumber the stock.

Approximately two years later, the wife filed an application alleging she had not received her one-half interest in the stock and that she was entitled to be paid by her husband one-half of the value of the stock. She requested the District Court to determine the stock's value. The husband alleged that the wife had received one-half interest in the stock through the Court of Appeals determination and that her application attempted to modify the decision of the Court of Appeals. The wife claimed that the court could not have intended she receive only an interest in the stock without a right to have the stock valued and to be paid. The District Court indicated he would value the stock. Husband thereafter immediately filed a petition for writ of mandamus to require the District Court to vacate the order and to preclude him from further attempting to interfere with the Court of Appeals decision. The Court of Appeals granted the writ of mandamus, indicating that it did not intend to require the husband to purchase the wife's one-half interest in the stock and that upon sale of the stock to the corporation, the wife was to receive one-half of the value at that time. The District Court appealed to the Supreme Court.

Authority for the Court of Appeals to issue writs of mandamus arises from Iowa Code §661.4 where necessary for the Court of Appeals to "exercise its legitimate power", in other words, where necessary to protect or preserve its "appellate authority". Decision to issue a writ of mandamus involves exercise of discretion and, absent error of law or abusive discretion on de novo review, will not be set aside. The prior Court of Appeals decision was a mandate to the District Court in that it authoritatively and finally adjudicated the rights of the parties and the procedendo notified the District Court of the terms of the decree to be put into effect. However, since District Judge undertook a further proceeding on an issue determined by the Court of Appeals and since the appellate decision did not authorize such further proceedings, the affected party is entitled to an order of mandamus prohibiting such further proceedings. Right to appeal District Court actions was not equally beneficial, convenient and effective. Mandamus proceeding allowed aggrieved party to avoid time expense and expense of the proceeding and of the appeal. He could not have done so had he awaited entry of the final order. Even interlocutory appeal would have been inadequate as an alternative to mandamus. The purpose of an appeal establishes legal rights; the purpose of mandamus is to enforce legal rights already established. So long as plaintiff is correct that earlier Court of Appeals decision adjudicated the issue to now be determined by the District Court, mandamus was the appropriate remedy. Had he been incorrect, mandamus would not lie.

P

Courts -- Parties -- Claims Against Estate.

See Baldwin v. City of Waterloo, _____ N.W.2d _____ (No. 84-1470) (Iowa, July 31, 1985) (en banc). --p. 62.

Tung v. American University of the Caribbean, 353 N.W.2d 869 (Iowa App. 1984).

Courts -- Personal Jurisdiction.

Appeal from grant of special appearance of defendant. Action involves claimed breach of employment contract. The trial court held defendants had insufficient contacts with the forum under Iowa Rule of Civil Procedure 56.2 and the constitutional standard of due process. Affirmed.

Jurisdiction pursuant to Rule 56.2 is coextensive with the limits of constitutional due process.

In the present action, defendant searched for employees and sent a letter to plaintiff in Iowa explaining employment possibilities. Three telephone conversations occurred between plaintiff and defendant. Thereafter, a meeting was held in Florida for the purpose of negotiating the terms of the contract. Defendant then mailed an employment contract from the Caribbean to plaintiff. Defendant is licensed to do business in no state, including Iowa, has never had any agents, employees, officers or facilities in the state of Iowa, owns no property in the state of Iowa, has made no purchases in Iowa, held no seminars in Iowa, and transacts no business in the state of Iowa. Further, at no time during the discussions with plaintiff did defendant send any representatives into the state of Iowa for purposes of negotiating the contract. However, defendant did mail plaintiff's termination check into Iowa. Three telephone calls into Iowa, two letters sent into Iowa, and the initial letter explaining employment positions sent to Iowa, as well as the check do not constitute sufficient minimum contacts under International Shoe, nor does the fact of mailing of the termination check into the forum. The initial contacts resulted from plaintiff's listing in a national registry his availability for teaching physicians, not from defendant's solicitation. Neither does the plaintiff's execution of the contract in the state of Iowa provide requisite contacts between the defendant and the forum state.

CORPORATIONS

Swanson v. Shockley, 364 N.W.2d 252 (Iowa 1985).

Corporations.

Plaintiff, minority shareholder in closely held corporation, brought suit challenging defendant's transfer and sale of majority of stock without affording plaintiff right of first refusal. Plaintiff asserts contractual rights arising under a bylaw of the corporation restricting sales of the corporation stock to outsiders unless corporation was first given right of first refusal to buy the stock at a formula price. Bylaw was in effect at the time plaintiff acquired his stock and for eighteen years thereafter but was repealed eight months prior to the

challenged transaction in accordance with the procedure established in the bylaws for amendment. Repeal was accomplished by vote of all shareholders except plaintiff who abstained.

Berger v. Amana Society, 95 N.W.2d 909 (1959), recognized contractual rights can arise from articles of incorporation. Logical extension of Berger also permits contractual rights to arise from organization bylaws. General rule is that there are two types of bylaws, those that are merely regulatory of the conduct of the affairs of the corporation and those in the nature of contract designed to vest property rights among stockholders. The first type can be changed at the will of a majority, the second type cannot be repealed or changed without consent of parties whose rights are affected. In order for the subsequently repealed bylaw to vest contractual rights in plaintiff, it must be one that plaintiff (1) has relied on by change of position or circumstances or payment of consideration; and (2) enforcement of the right must not work an unreasonable hardship upon the other shareholders. Plaintiff has satisfied neither test. Plaintiff did not change his position and there is no evidence he relied upon the repealed bylaw in purchasing his shares. Moreover, such a contractual right would not preserve the status quo but constitute a windfall to plaintiff, allowing him to purchase stock at a formula price which, 25 years after establishment of the formula, amounts to approximately 8% of its fair market value. Such a result would place an unreasonable hardship upon the corporation and the other shareholders.

Sauer v. Moffitt, 363 N.W.2d 269 (Iowa App. 1984).

Contracts.

Corporations — Corporate Opportunity.

Shareholder derivative suit brought by minority shareholders based upon oral contract. Family dispute regarding closely held farming corporation. Father purchased a farm which he gifted to two daughters (plaintiffs). Thereafter corporation was formed. Transferred two other farms to the corporation and plaintiffs executed a deed conveying the third farm to the corporation. Plaintiffs claim father induced them to make transfer by promising to put all of his assets in the corporation and to divide the stock of the corporation equally among the four children upon retirement. Action filed by plaintiffs in their individual capacities for illegal or fraudulent acts of the defendants under Iowa Code §496A.94(1)(c) seeking actual and punitive damages and actual damages for breach of fiduciary duty and breach of contract. Trial court held oral contract to convey equal number of shares to all children. Court of Appeals affirmed, holding clear and convincing evidence of enforceable oral contract.

Corporate Opportunity. Plaintiffs contended that during course of corporation's existence, father acquired personally three farms which were not made assets of the corporation. Plaintiffs claim these purchases were corporate opportunities and that defendants breached duty of loyalty to the corporation by acquiring the farms. Rule governing corporate opportunity and constructive trust is from Ontjes v. MacNider, 5 N.W.2d 860 (Iowa 1942). If the nature of the enterprise is not essential to the corporation and one in which the corporation has no interest or expectancy, corporate officer may treat the opportunity as his own. Court of Appeals holds purchase of farms was not a corporate opportunity. No showing of any corporate

expectancy in acquiring the farms or that the farms were essential to the business. Court fails to consider question of promise by father to put all his assets in the corporation and equally divide stock therein as discussed above.

Trial court order partial liquidation of the corporation. Evidence of failure to maintain proper and accurate books and records; commingling of father's crops with those of the corporation; diversion of assets of corporation to defendants' livestock operation and failure to provide plaintiffs with proper notice of board of directors meetings held sufficient for equitable relief. Court order requiring partial liquidation and redemption of plaintiffs' shares was affirmed. Further, trial court awarded punitive damages on the basis of conduct that was not merely negligent but rose to the level of intentional acts of fraud. Presumably, acts of fraud were the co-mingling of assets of the individuals and the corporation. Court held punitive damage award justified.

Adam v. Mt. Pleasant Bank & Trust Co., 355 N.W.2d 868 (Iowa 1984).

Corporations — Corporate Veil.

Corporations — Gap in Corporate Charter.

Pleading — Notice Pleading.

Further review of the decision of the Court of Appeals. Action arose out of financial collapse of Prairie Green Co. of which defendant Phelps was an officer. Plaintiffs are farmers who stored their grain at the elevator and were not able to obtain its return. Phelps filed a motion for summary judgment on the basis that he was not individually liable as an owner or partner in Prairie Green but that rather his involvement with the firm was exclusively in its capacity as corporation properly organized and legally authorized. In resistance, plaintiffs claim that the individual defendants were co-owners of the business and therefore liable as partners unless the business was properly incorporated. Plaintiffs claimed the company was not a legal corporation because of variance from requirements of the Iowa corporation statute and because the corporation's existence expired prior to the relevant events.

Court granted motion for summary judgment, holding that corporate status can not be challenged in proceeding at law. Court also held that corporate status was properly revived by filing in 1980 of reinstated articles of incorporation, therefore there was no gap in limited liability afforded by the corporate form.

Notice Pleading — Preservation of Error. On appeal plaintiffs urge Phelps can be found liable personally by piercing the corporate veil of Prairie Grain. However, no such theory is apparent from the pleadings. Petition alleges Phelps was one of the owners and operators of Prairie Grain and further alleges that Prairie Grain was a partnership owned and operated in part by Phelps and, finally, that Phelps is liable for the debts of the partnership. Under notice pleading, petition is sufficient if it apprises opposing party of the incident from which the claim arose and the general nature of the action. Assertion of the wrong theory is not necessarily fatal. Rather, the litigation process is designed to narrow the issues.

The issues in the present action were begun to be narrowed when, pursuant to pretrial conference under R.C.P. 136, an order was entered compelling parties to file, in turn, pretrial

briefs stating facts and legal theories relied upon. Plaintiffs were to file first, then defendants, and then plaintiff to reply. The order then stated that any claims for relief or defenses, factual or legal contentions not set forth in detail in this procedure "shall be deemed abandoned or withdrawn" Plaintiffs filed initial brief which did not disclose theory of recovery based upon piercing corporate veil. Defendant replied Plaintiffs then breached the terms of the pretrial order and did not file a reply brief. Accordingly, the court failed to enter an order pursuant to RCP 138 "reciting any action taking at conference which will control the subsequent course of the action" Because of plaintiffs' failure to abide by the terms of court order, the pretrial order was not issued and, accordingly, to the benefit of plaintiffs, "dimensions of plaintiffs' claim were not limited by a final pretrial order." Because plaintiffs' petition is not fatally inconsistent with the position urged on appeal, despite failure to urge this position in resistance to motion for summary judgment, issue is preserved on appeal.

Piercing the veil. Quo warranto is the appropriate remedy to test the legality of corporate existence of the corporation only when "public interest" are involved. It is not the exclusive remedy, however, when the challenge to corporate legality is merely a casual issue in a case involving enforcement solely of private rights not related to questions of public interest. Accordingly, corporate veil could be challenged here since only private rights are involved.

Viewing of the facts and circumstances in light most favorable to plaintiffs under Rule 237, Supreme Court held genuine issue of material fact generated regarding whether or not veil could be pierced. Corporate veil may be pierced if corporation is merely an alter ego of controlling owner serving no legitimate business purpose. Standards for determining alter ego set forth in Lakota Girl Scout Council, Inc. v. Havey Fund-Raising Mgmt., Inc., 519 F.2d 634 (Cir. 1975). Plaintiffs claim violations of Iowa corporation law regarding failure of stockholders to hold annual meetings, failure of board of directors to meet since 1966, and failure to have corporate books audited. Plaintiffs further claim Phelps cooperated personally in controlling the business and misusing corporate funds. Allegations sufficient to raise a fact question about whether corporate veil ought properly be pierced and whether Phelps may be found personally liable.

Gap in Corporate Charter. Relevant circumstances underlying Plaintiffs' claim arose during gap in corporate charter. Later, corporate status reestablished. Question is whether reestablishment of corporate charter retroactively limited liability during gap in corporate existence. Iowa corporation law §4968.102 allows the corporation to amend articles of incorporation at any time within five years after expiration of corporation's period of duration "so as to extend its period of duration." Iowa statute, contrary to those of some other states, is silent on subject of whether limited liability also applies during gap in corporate existence. Following holding in Moore v. O.S.H. Review Comm'n, 591 F.2d 991 (4th Cir. 1979), absent statutory direction, limited liability is suspended and personal liability imposed for occurrences arising during the suspension of a corporate charter, notwithstanding later reinstatement of the charter. Accordingly, limited liability did not exist for matters that occurred during the suspension of corporate charter.

P

Corporations — Fiduciary Duty.

Equity proceeding brought by corporation claiming breach of fiduciary duty owed by director to the corporation and its shareholders. Defendant was a director and chairman of investment committee of corporation interested in new avenue of investment. Defendant persuaded corporate board of directors to invest in a new venture that was to be managed by Defendant and operated by his son and two others. The shareholders at the meeting at which the venture was proposed expressed clear reservations regarding a corporate commitment absent the promoters of the new business backing it with their own funds. Testimony at trial by shareholders indicated that but for a commitment of the promoters to purchase stock, approval would not have been granted.

Defendant was present at all meetings at which stock purchase commitments were discussed but made no attempt to change or correct incorrect statements about his commitment to purchase stock. At trial, Defendant did not deny that corporate director explained that Defendant was committed to purchase stock but denied being bound by any such statements by corporate director. He admitted taking no action to correct any misinformation regarding his involvement in the venture. The corporation went forward with the venture which, expectedly, failed. Neither Defendant nor any of the other promoters of the new venture ultimately made any purchases of stock as had been represented during the shareholders' meeting.

Fiduciary Duty. Corporate director's duty to the corporation is fiduciary, one of complete loyalty, honesty and good faith. The court holds that in persuading corporate officers to invest corporate funds in a new business, especially where corporation was unwilling to make any investment without Defendant's own investment, Defendant's conduct of the negotiations with directors and shareholders was in connection with the general well being of the corporation and within the role of Defendant as fiduciary to the corporation.

Fiduciary duty encompasses duty to disclose information to the shareholders. Defendant's silence upon hearing unequivocal statements of his involvement in purchase of stock constitute his knowingly permitting shareholders to be led to believe statements he knew were untrue in order to obtain corporate approval for the investment.

Damages. Compensatory damages equal to the amount of loss of corporation in investment affirmed. Measure of damage is the loss of the investment less any value accruing to the investor, whether the theory of liability is fraud or breach of fiduciary duty. Shareholders were aware the venture was risky and it would have failed even without conduct of Defendant. Nonetheless, evidence demonstrates shareholders willing to undertake the risk only if Defendant involved with risk, too, a risk Defendant claims he had never assumed while concealing that information from the shareholders at the time of the investment.

Award of punitive damages also is affirmed. A fiduciary's knowing and purposeful concealment of information of a material nature can constitute legal malice — wrongful conduct committed with willful disregard of another's rights.

Pre-commencement Interest. Pre-commencement interest at the rate of five percent was held by the court to be authorized pursuant to §535.2(1)(b) in circumstances involving investments made in reliance upon false representations. In such circumstances, entire damage

for which recovery is demanded was complete prior to commencement of action. Post-commencement interest on compensatory damages runs at statutory rate. No interest on punitive damage award prior to entrance of judgment.

DAMAGES

Damages.

See Countryman v. Mt. Pleasant Bank & Trust Co., 357 N.W.2d 599 (Iowa 1984). --p. 82.

Damages.

See Poyzer v. McGrawz, 360 N.W.2d 748 (Iowa 1985). --p. 83.

Damages.

See Yoch v. Cedar Rapids, 353 N.W.2d 95 (Iowa App. 1984). --p. 78.

Barnum v. Nebergall, 367 N.W.2d 317 (Iowa App. 1985).

Damages — Mitigation.

Action for wrongful termination of farm lease. Plaintiff appeals from award of nominal damages in which trial court determined plaintiff's net profits from the farm and mitigated plaintiff's damages by the amount of his interim earnings. Plaintiff was awarded five dollars. Affirmed. Measure of appropriate damages is lost profits and is not in dispute. Doctrine of avoidable consequences applied from employment cases. Although farm lease is not an "employment contract per se, this situation is analogous since plaintiff expected to earn a living from farming" Plaintiff claimed his other employment was not made possible by breach of the farm lease. However, the lease provided that he would not engage in any other business occupation or sideline.

Knauss v. City of Des Moines, 357 N.W.2d 573 (Iowa 1984).

Negligence — Comparative.

Appellate Procedure — Jurisdiction.

Damages — Mitigation — Pro Tanto Credit.

Personal injury action arising out of bizarre circumstances. Plaintiff was a passenger in automobile operated by companion which was involved in an accident. Plaintiff was able to remove himself from the car but the companion was not. When the police arrived, the companion was extricated the car and taken by ambulance to the hospital. Plaintiff was not. Instead, the police escorted him to a convenience store so that he could pay for the beer the two had been drinking at the time of the accident. Then plaintiff was arrested for public intoxication, he was placed in a paddy wagon and delivered to a police station where he was jailed for the night. The next morning plaintiff pleaded guilty and was released. His wife



immediately drove him to the hospital where he underwent surgical and medical treatment for multiple fractured ribs, internal bleeding, partial shock, contusions and abrasions. Action initially was brought against both the City and the companion, alleging that the companion had negligently operated the vehicle and that the City had negligently jailed plaintiff without providing him adequate medical care. Before trial, plaintiff settled with the companion for \$10,000 and proceeded to trial against the City, obtaining a verdict for \$12,000.

Appellate Jurisdiction. Court holds it has jurisdiction notwithstanding trial court never entered final judgment. Entry of final judgment is a prerequisite to right to appeal but court may exercise jurisdiction to permit appeal even though no party has filed a formal request for interlocutory appeal. Failure to enter final judgment appears only to be oversight, and court permits appeal since trial court ruled on all post-trial motions.

Mitigation of Damages. City pleaded as a defense plaintiff's failure to mitigate his damages because he did not exercise reasonable diligence to obtain necessary medical attention, asserting that plaintiff had denied he was injured and had not sought medical treatment while he was in jail. Instruction given fairly embodies the requirement that plaintiff take reasonable steps to effect a speedy and complete cure of injuries as could reasonably be accomplished under all the circumstances.

Pro Tanto Credit. At trial against on the City, plaintiff sought damages only for physical pain and suffering relating to the delay and receipt of treatment because of his jailing. He did not seek recovery for loss of earnings, disability or even medical or hospital bills. The parties and the court consciously narrowed and restricted plaintiff's proof on the issue of damages so that he would not be allowed any recovery for injuries caused solely by his companion and not the City. Jury verdict on damages submitted was \$12,000. City seeks credit of \$10,000 against the verdict representing the amounts received by plaintiff from companion in settlement. Although pro tanto rule is for the purpose of preventing unjust enrichment and double recovery, burden of proof was on the City to establish right to the credit. City amended its answer to raise issue of credit but failed to establish on the record total amount of recovery plaintiff would have been entitled to including factors other than those submitted to the jury. Since City did not establish total recovery that would have been appropriate, and because although plaintiff suffered one injury the elements of damage sought from the City and his companion differed, pro tanto credit rule does not apply under the facts of the circumstances. Court was "unwilling to assume" that \$22,000 was more than a jury would have awarded plaintiff for all of his injuries.

Glidden v. German, 360 N.W.2d 716 (Iowa (1984)).

Damages — Pro Tanto Credit.

Negligence — Comparative.

Multiparty action in which two defendants settled prior to trial. During trial at defendant's request, the jury rendered special verdicts regarding the negligence of all parties in the action as well as the settling defendants. Defendant requested settlement amounts be credited pro tanto toward the verdicts. Trial court refused, applying a pro rata rule. Under pro rata allocation credit against verdict was made in an amount equal to the percentage of the verdict representing the settling party's fault as determined by the jury. Plaintiffs contend that

pro tanto rule is not compatible with comparative fault because it does not fairly apportion plaintiff's damages among several tort feasons. Plaintiffs urge the court to follow the lead of the comparative fault statute enacted by the legislative.

Supreme Court reverses. Rule of pro tanto credit is based upon policy that no party should receive double recovery. No conflict between adoption of pure comparative negligence in Goetzman and the basic policy against excessive recovery of damages for single injury that underlies pro tanto concept. Doctrine of comparative negligence displaced contributory negligence, a single doctrine. It did not require a new and different division of plaintiff's damage recovery among defendants. Although Iowa Comparative Fault Act (Ch. 668) alters the rule, none of its provisions apply to the present action and court declines to adopt one portion of the new statute to control cases decided under pure comparative negligence.

Damages -- Pro tanto Credit.

See Jones v. City of Des Moines, 355 N.W.2d 49 (Iowa 1984). --p. 66.

Damages -- Punitive Damages.

See Midwest Management Corp. v. Stephens, 353 N.W.2d 76 (Iowa 1984) (en banc). --p. 34.

Damages -- Remittitur.

See Bossuyt v. Osage Farmers' Nat'l Bank, 360 N.W.2d 769 (Iowa 1985). --p.20.

DISCOVERY

Discovery -- Admissions.

See Allied Gas and Chemical Co. v. Federated Mutual Ins. Co., 365 N.W.2d 26 (Iowa 1985). --p. 9.

Discovery -- Closed Governmental Meetings.

See Dillon v. City of Davenport, 366 N.W.2d 918 (Iowa 1985). --p. 6.

Discovery -- Damages Claimed.

See Gordon v. Noel, 356 N.W.2d 559 (Iowa 1984). --p. 76.

Discovery -- Exclusion of Witness.

See Carter v. Weise Corp., 360 N.W.2d 122 (Iowa App. 1984).--p. 44.

Lambert v. Sisters of Mercy Health Corp., 369 N.W.2d 417 (Iowa 1985).

Discovery -- Exclusion of Witness.

Medical malpractice action against doctors and hospital. With consent of plaintiff, defendant doctors were directed out at the close of plaintiff's case. Plaintiff then proceeded



against hospital on theory that hospital personnel failed to notify doctors in time to perform caesarean section delivery prior to infant's suffering irreversible brain damage. Court holds jury issue on proximate cause, "although not strong," was raised.

Defendant doctors had identified an expert witness properly through the discovery procedures. Defendant hospital had not identified the same expert witness. After defendant doctors were dismissed from the case, hospital sought to supplement its discovery responses pursuant to Rule 125 to identify expert. Such expert was key to vital element of case against the hospital. Trial court excluded the witness on grounds that defendant hospital had failed to comply with the Rules of Civil Procedure on identification of experts and supplementation of discovery responses. Abuse of discretion standard governs. However, there was no surprise to plaintiffs since other party had previously identified expert and outlined the area of testimony. Moreover, there was evidence that decision to permit doctors to be dismissed from suit was done in order to avoid expected testimony of their expert witness. Supreme Court disapproves of such use of Rule 125. It was an abuse of discretion after doctors left the case to prohibit hospital from calling expert witness previously identified. Error requires new trial.

AgriVest Partnership v. Central Iowa Production Credit Association, _____ N.W.2d _____, No. 84-1020 (Iowa, August 21, 1985).

Discovery — Privilege.

Appeal from interlocutory order in which defendant PCA challenges district court's ruling requiring it to comply with plaintiff's request for production of board minutes and supporting documents. Defendant PCA has no statutory or regulatory privilege insulating it from compliance with the trial court's discovery order. Under a balancing test defendant has not carried its burden to establish a common law privilege shielding the information sought from discovery.

State Ex Real. Shanahan v. Iowa District Court, 356 N.W.2d 523 (Iowa 1984).

Discovery — Qualified Privilege.

Original certiorari proceeding brought by the State for review of a District Court decision requiring the State to produce the contents of a criminal investigation file for inspection by civil litigants. Action arose out of murder in a motel room which the State had investigated but which had not resulted in criminal charges. Civil wrongful death action thereafter brought against motel. The parties in the civil action sought discovery of the State's files concerning ongoing homicide investigation. The State and the civil parties agreed to an arrangement to furnish certain information from the criminal file. Thereafter, the court issued a second subpoena for an agent to produce all investigatory materials pertaining to the murder. The State's Motion was sustained in part and denied in part.

Basis for State's statutory claim of privilege is Iowa Code §622.11. Statute is very much similar to statutes from other states, however, its interpretation is one of first impression. In analyzing the breadth of the statute, it is the public interest, not that of the individual government officers, at stake. The protection accorded by §622.11 extends only to public officers being examined and prohibits disclosure of protected information. The protection is

limited to communications made to such officer in official confidence and is not an absolute bar but rather a qualified privilege, applicable only when the public interest would suffer from disclosure. The qualified privilege under Section 622.11 applies at any stage of the proceedings, unlike physician-patient privilege under Section 622.10 applicable only when the physician is "giving testimony". Although the section refers to examination of the officer, it emphasizes protection against disclosure. The files sought here come within the qualified protection so long as the third showing - that public interest would suffer by disclosure - is made. Court holds the showing has been made through "sensitive" balancing process, weighing possible adverse effect on investigations in general, not just the possible effect on this investigation, as well as the importance of information to these particular civil litigants and the public interest in allowing civil litigants generally to discover every person's evidence, including that of state agents, in judicial proceedings. One purpose of the privilege and confidentiality is to encourage persons to come forward. Another purpose allows fellow officers to privately discuss their findings and theories about each case under investigation. Here the crime is very serious and investigation continues. The State need not conclusively prove disclosure to the litigants of some specific portion of the file might jeopardize the overall investigation.

The scope of discovery under Rule 122(a) specifically excludes discovery of evidence which is privileged. Information is not critical to the litigants in light of the other avenues for obtaining information, much of it based on State's willingness to produce some of the information from its files. Among other things, depositions of those persons interviewed by the DCI and inspection of the premises and retention of experts are available to civil litigants. The fundamental principle that a private litigant is entitled to discovery and use every person's evidence is not absolute but must be balanced against other public interests. District Court abused its discretion in denying the State's motion for protective order to the extent litigants sought access to file materials not already voluntarily disclosed.

Barks v. White, 365 N.W.2d 640 (Iowa App. 1985).

Discovery — Sanctions.

Pleading — Verification.

Defendant claims plaintiff violated discovery rules and should have been prohibited from introducing certain exhibits into evidence. Defendant filed request to produce to which no objection was filed and plaintiff stated "all documents" were produced. At trial plaintiff sought to introduce 26 additional exhibits which had not been produced. Exhibits admitted over objection. Plaintiff claims exhibits properly introduced because they were documents that had come from the files of defendant and his attorneys. Discovery is proper regarding information within the discoverer's own knowledge. Sole fact that defendant had knowledge of material in question does not relieve plaintiff from obligation to provide in response to proper request. While failure to supply requested material may have been sufficient grounds for imposing sanctions, no finding of abuse of trial court discretion in failing to exclude the evidence.

Defendant also claims that plaintiff's petition to quiet title should be dismissed because it was not verified as required by §649.2. However, plaintiff supported allegations of petition by sworn testimony at trial and no objection was made to such testimony. Since testimony supported allegations of unverified petition, trial court correct in overruling motion to dismiss.



Schaffer v. Rogers, 362 N.W.2d 552 (Iowa 1985).

Discovery — Work Product Privilege.

Defendant police officers in a civil rights action alleging assault and battery and violation of constitutional and statutory rights, appealed from an interlocutory order directing the production for discovery purposes of documents prepared by the Des Moines Police Department Internal Affairs Unit (IAU). Defendants contend materials plaintiffs seek to discover are within the qualified work product privilege of Rule 122(c), R.C.P. Supreme Court agrees and reverses.

Plaintiffs' interrogatories requested identification of statements. Defendants responded that the IAU had conducted an investigation and was in possession of statements taken from plaintiffs, defendants and a civilian witness. In response to request for production, defendants made statements of plaintiffs available but declined production of the other statements or the IAU investigation report on the grounds of qualified work product privilege. Defendants maintained the statements were prepared in anticipation of litigation and plaintiffs had not shown substantial need for materials as required by Rule 122(c).

Trial court has broad discretion regarding discoverability of certain information. An incorrect interpretation of the rule, however, can constitute an abuse of discretion. Trial court based its decision upon finding that the IAU investigation was conducted in the ordinary course of police department business and, accordingly, was not prepared in anticipation of litigation. However, relying on Ashmead v. Harris, 336 N.W.2d 197 (Iowa 1983), dealing with routine insurance investigation, the fact that IAU investigation was conducted as a matter of routine business does not compel the conclusion that the documents are not privileged under Rule 122(c). The fact that an investigative body regularly conducts investigations for a variety of purposes, such as the IAU investigation, does not require holding that primary purpose of any particular investigation was not to prepare for litigation. Here, record supported finding that "primary motivating purpose" of this investigation was in anticipation of litigation.

Plaintiffs have failed to make sufficient showing of need under Rule 122(c) to justify turning over materials notwithstanding qualified privilege. Court adopts federal rule requiring independent and, but not futile, attempts to obtain similar such materials. Plaintiffs have failed to show any effort on their part to obtain the substantial equivalent of the materials they seek to discover.

DRAMSHOP

Connolly v. Conlan, _____ N.W.2d _____, No. 84-853 (Iowa, July 31, 1985).

Dramshop.

Interlocutory appeal from dismissal of two counts of petition stating common-law claim against liquor licensee for furnishing liquor to minors. Affirmed. Dramshop act preempts the tort field for expressly covered licensees and permittees. Dissent would hold dramshop act preempts only those common-law actions arising from claim that licensee negligently sold or gave intoxicants to intoxicated person.

Golden v. O'Neill, 366 N.W.2d 178 (Iowa 1985).

Dramshop.

Sole issue on appeal is whether dramshop act, §123.92, preempts actions against licensees grounded on negligent failure to provide safe premises for patrons or on assault and battery by an employee under the theory of respondeat superior. Supreme Court holds no such preemption. Claims asserted here, assault, battery and negligent failure to keep premises safe for business invitees are not necessarily within the scheme of the dramshop statute. Additionally, causes of action exist at common law and are remedies for wrongs other than that addressed by dramshop act. Dramshop act does not immunize licensees from liability for intentional torts and negligence not based upon the sale or gift of liquor to an intoxicated person. However, to the extent that claims for employee's assault and battery and negligent failure to keep premises safe are founded upon intoxication of employee in violation of dramshop act, those portions of the negligence claims would be preempted. There are facts conceivable under which plaintiff might demonstrate right to relief. For example, plaintiff could prove employee did not obtain alcoholic beverages from the licensee.

Rees v. Dallas County, _____ N.W.2d _____ (No. 84-1277) (Iowa, July 31, 1985).

Dramshop.

Interlocutory appeal by dramshop operators from denial of their motion to dismiss a third-party petition for contribution. Court holds defendant in a negligence action may not maintain an action for contribution or indemnity from a dramshop operator alleged to have served plaintiff liquor or beer to the point of intoxication. Court holds that there is no common liability as required to support claims for contribution or indemnification. Because dramshop operator was immune to suit by plaintiff (presumably because of untimely notice) dramshop operator and defendant did not share common liability as required.

Clark v. Mincks, 364 N.W.2d 226 (Iowa 1985) (en banc).

Dramshop — Social Host Liability.

Negligence — Duty of Care.

Action for wrongful death against owner and estate of driver of a van involved in an accident and the host of a "goat roast" the deceased driver had attended, as well as a third action against a passenger in the van. Interlocutory appeal following ruling on motions to dismiss. Plaintiff claims social host gave intoxicants to driver who was then involved in an accident in which plaintiff's decedent was killed. Plaintiff claims also that adult passenger in vehicle at time had duty of care to prevent the harm. Supreme Court holds pleading alleging social host liability states a claim upon which relief can be granted but that there is no evidence generating a question of fact that adult passenger had duty to prevent plaintiff's decedent from harm.



Social Host Liability. Evidence would support finding that driver of the van (Nancy) began drinking about noon, then went out to the cookout and drank again in the evening until late that night, drinking over 10 twelve ounce cups of beer while at the cookout, that she had difficulty standing and spilled beer on one of the hosts. Section 123.49(1) prohibits any person from selling, dispensing or giving alcoholic liquor or beer to any intoxicated person. Statute is not limited to a commercial context. However, \$123.92, the statute involving liability for providing liquor to another does not create liability in the present context but is limited to licensees or permittees. Previously, the Supreme Court had held that furnisher of liquor was not liable because the consumption of the liquor and not the furnishing of the liquor was the proximate cause of injury. Cowman v. Hansen, 92 N.W.2d 682 (Iowa 1958). However, in Lewis v. State, 256 N.W.2d 181 (Iowa 1977), the court held question of causation to be for the trier of fact.

Common law rights of action respecting the furnishing of intoxicants had been recognized in Lewis as well as Haafke v. Mitchel, 347 N.W.2d 381 (Iowa 1984). Each case involved commercial sales of liquor to minors in situations not covered by the dramshop act. Rationale of both decisions did not depend upon the commercial setting, however, but rather was based upon the violation of statute, in those cases, the statute prohibiting sales to minors. Despite fact that "nearly all courts" considering the assertion of liability against social hosts have rejected such liability, Supreme Court holds cause of action is Iowa against social hosts under certain circumstances, based upon statutory prohibition of providing to any intoxicated person liquor or beer. Section 123.49(1). The statute provides no exception for social hosts. Accordingly, cause of action will lie when plaintiff can introduce substantial evidence that: (1) guest was intoxicated; (2) host was personally aware of intoxication; (3) host then made intoxicants available to the guest; (4) guest drank intoxicants; (5) while intoxicated, guest then operated a motor vehicle; and (6) by reason of intoxication, guest operated vehicle in a manner which caused injury to plaintiff. Petition in present case held sufficiently raised such issues under notice pleading.

Passenger's Duty of Care. Trial court denied adult passenger's motion for summary judgment in which he asserted lack of duty of care under the circumstances which could prove as the basis for liability. Plaintiffs argue passenger had an affirmative duty to plaintiff's minor decedent to protect her from danger of an intoxicated driver and that the passenger "assumed custody" of the minor decedent. General rule in such situations is stated in Restatement (Second) of Torts §314: "The fact that an actor realizes or should realize that action on his part is necessary for another's aid or protection does not itself impose liability upon him a duty to take such action." Despite the passenger's knowledge of the driver's intoxication and that the minor decedent's parents (plaintiffs) did not want the driver to drive and did not want their child in the van at the time, general rule would not impose a duty upon the passenger. Exceptions exist where one is required by law or voluntarily takes custody of another under certain circumstances. However, the law imposed no duty upon a passenger in the present circumstances. Accordingly, plaintiffs must contend that passenger voluntarily assumed custody over a minor decedent. Court reviews "lengthy depositions" taken of witnesses to the facts and "scrutinized" the depositions as well as pleadings and discovery responses. Court holds no question of fact on voluntary assumption of custody by passenger, reversing denial of motion for summary judgment.

Four justices dissent on social host issue.

EDUCATION LAW

Slockett v. Iowa Valley Community School Dist., 359 N.W.2d 446 (Iowa 1984).

Education Law.

Question is whether procedure protections provided for termination of teacher contracts apply to discontinuance of teacher as a coach without otherwise affecting status of employment—whether a coaching contract created a tenured teaching position. Trial court determined that the head coaching position to which plaintiff claimed contractual entitlement was merely an extra-duty assignment and did not qualify as a tenured teaching position. Following the trial court's ruling, the legislature amended the statute. Under new provisions, termination of extra-curricular contract is pursuant to teacher termination statute. Extensive statutory amendment is an indication that the law was altered. Under law prior to statutory amendment it is the teaching position, not the intertwined coaching position to which tenure attached and which, if terminated, would have called for Chapter 279 procedural protection. In present case, coaching position was not intertwined but, by contract, was merely an additional assignment made by the administration as necessary and within the power of the administration to appoint. Because the coaching position in the present case was separate from the teaching position, tenure did not attach to the coaching position.

Harvey v. Palmer College of Chiropractic, 363 N.W.2d 443 (Iowa App. 1984).

Education Law.

Civil action brought by former student at defendant institution for wrongful expulsion. Less than six months prior to graduation plaintiff distributed on campus copies of a newspaper containing a cartoon criticizing relationship between two professional chiropractic associations. Cartoon "implied an act of oral sex". Plaintiff did not prepare the cartoon or participate in printing the paper but admitted looking through the paper before distributing it and agreeing with the cartoon's message. He was charged with violating student standards and, ultimately, expelled. Plaintiff brought suit, alleging breach of contract, fraud and intentional infliction of emotional distress. At the close of plaintiff's case, trial court directed a verdict for defendant. Plaintiff appeals.

The due process clause of the Fourteenth Amendment applies only to state action, but the requirements imposed by the common law in private universities parallel those imposed by due process on public universities. Abbriao v. Hamline University School of Law, 258 N.W.2d 108 (Minn. 1977). Private institution may not expel a student arbitrarily, unreasonably or in bad faith. Although courts are reluctant to intervene in cases involving academic dismissal, dismissals for disciplinary reasons are more closely examined. There here was a material factual dispute over whether plaintiff was accorded the procedural protections to which he was entitled under school regulations. Procedures to be followed are in the student handbook and there was evidence presented that, in a number of respects, those procedures were not adhered to. Student at private school should be able to rely upon the school to follow its own procedures. Directed verdict reversed.

EVIDENCE

Carter v. Weise Corp., 360 N.W.2d 122 (Iowa App. 1984).

Discovery -- Exclusion of Witness.

Evidence.

Negligence action against third-party for injuries received during course of employment. On opening argument, plaintiff's attorney made reference to plaintiff's receipt of workers compensation benefits but stated that the work comp carrier was subrogated and that all compensation benefits would have to be paid back out of any recovery. Defendants sought to introduce amount of such benefits because the issue of plaintiff's malingering was appropriately in the case. Trial court prohibited defendant from doing so. Evidence of the amount of compensation benefit awards ordinarily should not be disclosed. Price v. King, 122 N.W.2d 318 (Iowa 1963). Although such evidence is relevant to the issue of malingering, in light of the strong policy against introduction of such evidence and its slight probative value on the question of malingering, trial court did not err.

Defendant claims that following plaintiff's counsel's reference to subrogation in opening argument, defendant ought to have been allowed to introduce evidence of negotiations between plaintiff and the workers compensation carrier that benefits would not necessarily have to be repaid in full. However, there was no information that any settlement had been finalized between the comp carrier and plaintiff. Further, no error in court's instruction that benefits must be repaid to carrier.

During course of trial, two occasions plaintiff's attorney elicited information regarding insurance coverage. Timely motion for mistrial was made. Although it is generally improper for the subject of liability insurance to be raised before the jury in any way, court holds it was not a blatant reference and that absent a showing of prejudice (by proving jury improperly relied upon the evidence), the introduction of insurance coverage into the negligence suit will not be critical.

Discovery. Defendant failed to identify except in response to interrogatories. The expert expected to testify at trial more than one full working day prior to commencement of trial. Court excluded expert as a witness as a sanction for not making the expert available for deposition. Expert had been contacted well in advance of trial and defendant knew the expected testimony of plaintiff's expert, whose testimony defendant's expert was expected to rebut. It was not an abuse of discretion for the court to exclude the witness.

Evidence.

See Bethards v. Shivers, Inc., 355 N.W.2d 39 (Iowa 1984) (en banc). --p. 71.

State v. Halstead, 362 N.W.2d 504 (Iowa 1985).

Evidence.

Appeal of criminal conviction for sexual abuse of a child. Issue presented to the court for determination whether trial court erred in prohibiting impeachment of victim child's claims by psychiatric testimony primarily directed to the issue of victim's subnormal intelligence. General rule on admission of opinion evidence is liberality. However, decision on admissibility of such testimony is in the trial court's discretion. Court has held that evidence of mental capacity is admissible as bearing on the issue of credibility when the witness had been judicially adjudged insane. Such facts are not present here. Courts of other jurisdictions are divided. Held: case did not require trial court to admit testimony of psychiatrists. Testimony would have added nothing that could not have been brought out by cross-examination of the child as a witness nor were any of the issues beyond common understanding of the jury requiring expert testimony. It was within court's discretion to hold such testimony would have been superflous.

State v. Latham, 366 N.W.2d 181 (Iowa 1985).

Evidence.

Criminal appeal. Defendant questioned regarding prior crimes for purposes of impeachment. Issue now controlled by Evidence Rule 609. Armed robbery, the basis of the earlier conviction, encompasses stealing in an elemental sense and concerns dishonesty within meaning of evidentiary rules.

State v. Thompson, 357 N.W.2d 591 (Iowa 1984).

Evidence.

Appeal from conviction for operating a motor vehicle while under the influence of intoxicants. Issue in court is admissibility of preliminary breath screening test results. Code §321B.3 prohibits results of preliminary screening test "in any court action". Exception in the provision permits use to prove chemical test properly requested pursuant to statute. State contends test results were properly admitted to show foundational facts necessary for admission of the results of chemical tests. However, chemical test results had not been challenged by defendant by motion to suppress. Evidence was already admitted prior to the time evidence of preliminary screening test was received. Even if it were not, the limited exception to the prohibition against use of preliminary screening test results regards the foundational showing made to the court to justify admissibility of a chemical test. Such matters are not for the jury's consideration.

[Provision's bar would appear clearly to apply to any judicial proceedings, not just criminal actions.]



State v. Chambers, 370 N.W.2d 600 (Iowa App. 1985).

Evidence — Character Impeachment.

Criminal appeal. Defendant convicted of robbery. Defendant and accomplice robbed victim while accomplice held victim. Defendant and accomplice tried separately. Defendant's theory was that there was no robbery but rather a fight between the two women that defendant tried to break up. Two women knew each other previously and had been involved in other altercations. On cross-examination as an attempt to attack her credibility, defendant sought to elicit evidence that victim had within past year filed two or three charges of theft or robbery. Trial court refused to permit such questioning. Evidence Rule 608(b) permits inquiry on cross-examination of specific instances of conduct concerning character for truthfulness or untruthfulness. Here, credibility of witness was vital and her testimony was uncorroborated. Prior charges filed would be probative of credibility of witness and are not remote in time. Moreover, type of charges related to charge on which defendant stood trial. Trial court abused its discretion. Reversed and remanded for new trial.

State v. Mary, 368 N.W.2d 166 (Iowa 1985).

Evidence — Habit.

Criminal case in which State seeks discretionary review to determine whether trial court erred in suppressing evidence of blood-alcohol test. Trial court held State had not satisfied foundational requirements for use of test. Central to the determination was trial court's rejection of habit evidence. State offered testimony of Meyers, a registered nurse who worked with Nurse Kilborn, who had drew the blood sample from defendant. Meyers testified to the habit of Kilborn in drawing blood samples. State offered such evidence by Meyers regarding the habit of Kilborn. Evidence Rule 406 governs evidence of habit and is applicable in the present case. Such habit evidence is admissible to show that a person is likely to have acted on a particular occasion in conformity with that habit. Fact that testimony was of habit of another does not automatically disqualify it.

State v. Henze, 356 N.W.2d 538 (Iowa 1984).

Evidence — Hearsay.

Appeal from conviction for OWI. At trial defendant sought to introduce testimony of physician who had examined defendant's medical records and who was prepared to testify that defendant's condition on the night of his arrest was consistent with depression and the use of valium. Medical records containing entries by other physicians are hearsay under Evidence Rule 801(c). However, pursuant to Rule 703, an expert may base his opinion upon facts or data not admissible in evidence if such facts or data are the type reasonably relied upon by experts in the particular field. Supreme Court takes judicial notice that doctors rely on medical records prepared by other doctors. Accordingly, conviction is reversed. Rule 703 permits doctor to testify based upon medical records prepared by others. Fact of error allows presumption of prejudice unless contrary is established. Accordingly, conviction reversed.

Evidence — Offer to Compromise.

See Miller v. Component Homes, Inc., 356 N.W.2d 213 (Iowa 1984). --p. 54.

Bandstra v. International Harvester Co., 367 N.W.2d 282 (Iowa App. 1985).

Evidence — Subsequent Remedial Measures.

Defendant manufacturer in negligence action appeals judgment rendered in favor of plaintiff who suffered personal injuries. Manufacturer raises factual issues regarding duty to guard the forage blower. Such issues are for determination by the jury. Evidence sufficient to submit to jury also on question of adequate warning. In 1977, defendant redesigned auger control lever to disengage auger when lever was moved downward. Evidence of change was allowed at trial in connection with strict liability claim. However, products liability claim was dismissed at close of evidence and defendant requested evidence be stricken from jury's consideration. Court instructed jury it could consider subsequent change only on issue of feasibility of change. Court holds instruction was proper despite claim of defendant that feasibility was not controverted. There was no indication that defendant stipulated to feasibility of such a change. Moreover, there was no prejudice because court's instructions specifically informed jury evidence should not be used to establish negligence.

Defendant challenges plaintiff's expert's qualifications to testify. However, in view of liberal policy concerning admissibility of opinion testimony and credentials of expert, all be it not in a field recognized for license by Iowa, expert's knowledge and expertise was sufficient to aid the jury.

EXECUTION/GARNISHMENT

Van Maanen v. Van Maanen, 360 N.W.2d 758 (Iowa 1985).

Execution/Garnishment.

Husband and wife, A and B, sold business and property to husband and wife, C and D, on contract. Contract further prohibited competition of vendors against vendees. A and B were divorced and wife B obtained all rights to collect money under the contract. Payments were made to be by C and D to B. Later, A went into competition and C and D filed suit, obtaining a judgment for money damages by default. In order to collect their judgment against A, C and D garnished themselves — their payments to B. B filed a motion to quash the garnishment which was sustained. Trial court held that on the contract C and D were now indebted only to B, not A. Since C and D owed nothing to A there was nothing for them to garnish. Affirmed. C and D are permitted to assert their judgment against A as a setoff to a suit by B which will afford B an opportunity for full and fair hearing to contest C and D's claim against A while reserving to C and D claim against B for setoff. Self-garnishment impermissibly presents B with a fait accompli in the form a judgment against A. Court notes substantial due process implication in forcing B to pay a judgment arrived at without notice to her in a proceeding to which she was not a party and in which A did not participate.

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FAMILY LAW

Family Law.

See Metallo v. Musengo, 353 N.W.2d 872 (Iowa App. 1984), --p. 15.

INDEMNITY

Farmers Cooperative Co. v. Stockdales' Corp., 366 N.W.2d 184 (Iowa 1985) (en banc).

Indemnity -- Contribution.

Plaintiff executed contract whereby defendant would construct certain facilities. \$60,000 down payment was advanced by plaintiff. Plaintiff agreed to obtain building permit from the municipality. Building permit was obtained and construction commenced. However, since construction violated zoning regulations, further construction was prohibited. Plaintiff brought equity action to recover from defendant the down payment it had advanced and alleged legal excuse (impossibility) of proceeding as justification for breach of contract. Trial court held plaintiff breached its contract and awarded damages to defendant. It also found in favor of the plaintiff on its cross-petition for indemnity against the City and its official for issuance of the building permit in violation of its own zoning ordinance. City argues that common law indemnity is not appropriate when the subject claim is based on contract rather than tort.

Supreme Court disagrees. Iowa law recognizes several theories for indemnification including breach of an independent duty between indemnitor and indemnitee. Hysell v. Iowa Public Service Co., 534 F.2d 775 (8th Cir. 1976). In allowing indemnity for breach of an independent duty, court has never made any distinction based on the nature of the liability (contract or tort) of the indemnitee. Absence of express written contract is not determinative.

Indemnity -- Contribution.

See Tigges v. City of Ames, 356 N.W.2d 503 (Iowa 1984). --p. 16.

INSURANCE

Bankers Life Co. v. Aetna Casualty & Surety Co., 366 N.W.2d 166 (Iowa 1985) (en banc).

Insurance.

Action based upon blanket surety bond purchased by Bankers Life from Aetna which provided coverage for securities losses of the type Bankers Life later sustained. While the bond was in force, Bankers Life lost more than five million dollars on five separate promissory notes which were part of a massive securities fraud. Bankers Life brought action to recover the five million dollars contending that the bond obligated Aetna to pay a million dollars on each of the five notes. Aetna claimed that a rider attached to the bond limited total liability to one million dollars. Trial court held in favor of Bankers Life. Case was tried on stipulated facts. Affirmed.

Bond terms required indemnification in an amount not exceeding five million dollars. However, total liability pursuant to rider was one million dollars subject to the non-reduction of liability section. Under the non-reduction of liability provision, total liability for other than specified losses "caused by acts or omissions of any person . . . is limited to the sum above stated [5 million dollars] irrespective of the total amount of such loss . . ." Court construed bond language and language of the rider to permit total recovery of up to five million dollars for losses of type sustained here. Language "opening paragraph of bond" in rider refers to five million dollar figure, not one million dollars referred to in securities loss provision.

Three justices dissent on the "four million dollar question."

Fraternal Order of Eagles v. Illinois Casualty Co., 364 N.W.2d 218 (Iowa 1985).

Insurance.

Declaratory judgment action against dramshop insurance carrier seeking to increase defendant's liability to plaintiff for judgment previously entered against plaintiff in dramshop action. Patron of plaintiff's place of business involved in an automobile accident in which a minor child was killed. In the underlying action, jury awarded estate of minor child \$87,000 and also returned a verdict in favor of mother individually in the amount of \$100,000. Defendant paid \$50,000 to the clerk of court to apply on the judgments. Trial court in dramshop action directed clerk to apply the money to the mother in her individual capacity. Plaintiff's dramshop policy set limitation of liability at \$50,000 for bodily injury to one person, \$100,000 for bodily injuries regarding one occurrence, and \$50,000 injury to means of support. Plaintiff brought declaratory judgment action contending defendant was still liable to plaintiff for additional money.

Plaintiff's theory in declaratory judgment action is that payment of \$50,000 to mother in individual capacity represented policy limit with respect to each person "injured in person." Plaintiff further argued that the estate also had been "injured in person" and that an additional payment of \$50,000 would be authorized to the estate.

Trial court granted defendant's motion for summary judgment, ruling that the phrase "injured in person" as used in the insurance policy referred only to bodily injury. Supreme Court affirms. "Injured in person" language is not ambiguous and reasonably can be interpreted only to refer to bodily injury. Under the policy relational claims, other than means of support, are not covered. Fact that trial court ordered \$50,000 payment to mother in her individual capacity does not alter result. Payment was allocated to mother in individual capacity pursuant to court order and, accordingly, was not a voluntary determination of insurer regarding allocation.

Global Aviation Ins. v. Lees, 368 N.W.2d 209 (Iowa App. 1985).

Insurance.

Declaratory judgment action by insurer that policy of insurance does not provide coverage for damage to airplane. Defendant, owner of plane, contacted his insurance agent to obtain renewal of insurance coverage for plane. Coverage was bound. Defendant was not informed failure to obtain valid medical certificate would deny him coverage under the policy.



He did not obtain medical certificate and had an accident in which the plane was destroyed. Insurance policy provided for no coverage unless pilot held valid and effective pilot and medical certificates. Cause of the accident, however, had nothing to do with medical certificates.

Code §515.101 states that "conditions or stipulations" making the policy void before the loss occurs, shall not prevent recovery if failure to observe the provision did not contribute to the loss. Court holds statute applies. Violation of policy did not contribute to the loss. Cases from other jurisdictions support holding.

Sable v. Horace Mann Life Ins. Co., 362 N.W.2d 495 (Iowa 1985).

Insurance.

Action based on long-term disability insurance policy issued by defendant. Plaintiff contracted multiple sclerosis for which she received benefits until July 1976 when the disease went into remission. The multiple sclerosis recurred in 1978. In 1975 defendant's contract with plaintiff's former employer expired. Plaintiff filed a new proof of loss seeking restoration of benefits which was denied on the basis of the expiration of the underlying group insurance policy. Four years later plaintiff brought suit. Supreme Court avoids ruling on whether contractual limitation is unconscionable. Court holds substantial fact question regarding whether plaintiff, in fact complied with insurance contract requirements. Accordingly, summary judgment in defendant's favor reversed.

Mutual Service Casualty Ins. Co. v. Iowa District Court, _____ N.W.2d _____, No. 84-1235 (Iowa, July 31, 1985) (en banc).

Insurance — Arbitration.

Plaintiff insurer petitions for review of order by District Court directing plaintiff to proceed to arbitration with insured pursuant to arbitration provision in insurance policy. At the time parties entered into the insurance policy the dispute now at issue was a "future controversy" within the meaning of §679A.1(2). Trial court erred in ruling plaintiffs' claim was "existing" within the meaning of subsection (2). As a contract of adhesion, therefore, arbitration clause was not enforceable. Court's alternative rationale is not persuasive. The fact that insured is the party seeking arbitration does not constitute an exception to the clear language of the statute. Dissent urges that purpose for the exception set forth in §679A.1(2)(a) is for the victims of adhesion contracts. Accordingly, insured ought be able to demand and obtain arbitration with insurer.

Loudon v. State Farm Mutual, 360 N.W.2d 575 (Iowa App. 1984).

Insurance — Bad Faith.

Bad faith action against insurance carrier arising from excess judgment. Plaintiff was injured while a passenger. Suit against driver and driver pleaded the guest statute as a bar to recovery. Although plaintiff demanded \$200,000 in damages, he offered to settle the lawsuit from the beginning for \$50,000, later, his demand was reduced to \$35,000. State Farm offered

\$10,000 to settle the case only to "buy piece of mind." Court then granted defendant's motion for judgment N.O.V. on the issue of the guest statute. Supreme Court later held guest statute did not apply and reinstated verdict for \$200,000. State Farm paid the \$50,000 policy limits and driver then assigned any claim he had against State Farm to plaintiff in satisfaction of the judgment.

Evidence of bad faith is evidence of negligence showing an "indifference to or disregard of the interest of the insured." Kooyman v. Farm Bureau Mutual, 315 N.W.2d 30 (Iowa 1982). Insurer has a duty to advise and inform the insured of settlement possibilities and of the "expected consequences" of a failure to settle. Here, evidence sufficient to support finding that insurer failed to advise driver in detail of the consequences of not settling and the possibility of a deficiency judgment. No determination was made whether a deficiency judgment could arise and attorney testified he did not consider who would pay any such potential judgment even though the facts of the case form an excellent basis for finding of negligence and an award exceeding policy limits if the guest statute did not apply. Attorney also failed to inform driver in detail of his options if an excess judgment was returned. Options were mentioned in first meeting between attorney and Hill. However, any such discussion was brief. Attorney told Hill litigation against insurer would have little success and recommendation to file for bankruptcy did not include information about negative effects of declaring bankruptcy. Further, insurer never seriously considered settling the litigation for more than a "small fraction of the policy limit." No committee of the insurer ever considered plaintiff's offer to settle the case for \$35,000. State Farm refused even to submit the \$35,000 settlement offer to a committee, even though plaintiff's medical expenses were more than \$20,000 and he suffered severe permanent injuries. Evidence sufficient that State Farm was indifferent to or disregarded Hill's interest in the settlement negotiations.

State Farm urges that it evaluated the case reasonably and that its reliance upon the applicability of the guest statute was reasonable. However, State Farm represented two parties with potentially adverse interest. This required adequate consideration of the interests of both the insurer and the insured.

State Farm claims its actions were not the proximate cause of the excess judgment because in communicating the offer to settle for \$10,000 plaintiff's lawyer angrily terminated all settlement discussions. However, where there is a factual dispute on superseding cause, the question should be decided by the fact finder.

State Farm Mutual Automobile Insurance Co. v. Townsend, 361 N.W.2d 332 (Iowa App. 1984).

Insurance — Non-owned Vehicle.

Appeal from ruling in declaratory judgment action brought by the insurer. Insured agreed to keep car for friend during friend's thirty-day incarceration. During the period of time, insured had access to use of car and intended to use it as second car for errands infrequently. He used it twice before getting into an accident. Insurer denied coverage on the grounds that it was not a "non-owned car" within the meaning of the policy providing insurance coverage. Insurer claimed that the car was "furnished or available for the regular or frequent use of" the insured and, accordingly, was not a non-owned vehicle within the meaning of the policy language. Trial court ruled in favor of insured. Court of Appeals affirms.



American States Ins. Co. v. Tollari Estate, 362 N.W.2d 519 (Iowa 1985) (en banc).

Insurance -- Underinsured Motorist Coverage.

Issue presented is meaning of "underinsured" in Iowa underinsured motorists' provision, Section 516A.1. Motor vehicle accident in which plaintiff sustained damages far in excess of ability of tortfeasor's insurance to satisfy. Plaintiff's insurance policy contained underinsured motorist coverage to limit of \$50,000.00. Policy defined underinsured motorist as one who had lower liability insurance limits than the injured party's underinsured motorist coverage limits. Since tortfeasor's liability limits were greater than underinsured motorist coverage limits of plaintiff, district court ruled in favor of insurer.

Court holds that meaning of the term "underinsured" in Iowa Code Section 516A.1 is any tortfeasor whose liability insurance coverage is insufficient to satisfy damages to a particular victim. Overall policy limits of the tortfeasor are not determinative except as they relate to the availability of insurance proceeds to any particular individual. Second, if tortfeasor's liability insurance is insufficient to cover damages, underinsurance provision of Iowa Code applies to fill the gap between actual damages and amount received, regardless how much has been received from tortfeasor's insurer.

Court reaches this conclusion despite standard underinsured motorist provision approved by Iowa Insurance Commissioner and almost universal case law from other jurisdictions. Court fails to even discuss the contractual issues despite clear contractual language of the insurance policy. Neither does court hold contractual provisions conflict with public policy. Rather, court restricts itself to interpretation of statutory language, an interpretation not based upon construction of similar language or insurance policies reached by other jurisdictions.

INTEREST

Interest -- Pre-Commencement.

See Midwest Management Corp. v. Stephens, 353 N.W.2d 76 (Iowa 1984) (en banc). --p. 34.

Ballster v. State, 360 N.W.2d 788 (Iowa 1985).

Interest -- Prejudgment Interest.

Tort claims action against the State. Plaintiffs appeal from order denying prejudgment interest. Section 258.4 exempts the State from liability for prejudgment interest. That provision controls over general rule set forth in section 535.3.

LABOR AND EMPLOYMENT

Roberts v. Department of Job Service, 356 N.W.2d 218 (Iowa 1984).

Labor and Employment — Employment Compensation.

Judicial review of administrative determination that disqualified claimant from unemployment compensation benefit holding that her discharge had been "misconduct". That issue is breach of employer rule requiring reporting absence each day. Claimant called first day of absence and indicated she might not be at work for several days. She failed to report for work either of the following two days but did not call again. She was suspended and told that a supervisor would contact her the following week. Thereafter, she was twice admitted to the hospital for emotional problems but her employer was unaware of this circumstance or her illness. Court holds acts of claimant cannot be deliberate and to constitute misconduct where physician reported she was "seriously mentally impaired" and unable to protect her own interests.

Consolidated Freightways, Inc. v. Cedar Rapids Civil Rights Comm'n., 366 N.W.2d 522 (Iowa 1985) (en banc).

Labor and Employment — Employment Discrimination.

Judicial review of administrative determination by Civil Rights Commission of Cedar Rapids that employer unlawfully discriminated against employee in discharging him because of his alcoholism. District Court reversed the Commission. Supreme Court reverses.

Employment discrimination claim is based on theory of disparate treatment—discharge because of alcoholism. Employee claimed his alcoholism did not prevent successful performance of employment but that, nonetheless, he was discharged. Employee claims alcoholism is a disability within protection of ordinance. [Chapter 601A, Iowa Code, also provides protection for disability discrimination]

Relying on Foods, Inc. v. Iowa Civil Rights Commission, 318 N.W.2d 162 (1982), court holds disability is protected when it does not prevent the individual from performing any reasonably competent and satisfactory manner. Disability may have some effect on an individual's job performance and nonetheless be protected. Employer is required to make reasonable accommodation for the condition. Meaning of "disability" is a question of law and, accordingly, whether alcoholism can constitute a disability under the ordinance is a legal question. Under the ordinance, alcoholism can also constitute a "substantial handicap". However, it is not protected unless it does not prevent proper job performance. Where current alcohol problems prevent the individual from performing duties of the job, that individual is not protected from adverse employment decisions.

Discrimination.

Employee burden of proof to demonstrate he suffered from a disability that did not prevent him from performing his job in a reasonably satisfactory manner and that the disability was a factor in the employer's decision to terminate him. Court holds substantial evidence in record to support administrative determination that employee sustained burden of proof.



Hearing officer necessarily made credibility findings regarding employer's contention that employee was terminated for poor performance. Substantial evidence supports administrative findings.

Four justices dissent and would hold that substantial evidence is lacking.

Miller v. Component Homes, Inc., 356 N.W.2d 213 (Iowa 1984).

Labor and Employment — Employee Status.

Evidence — Offer to Compromise.

Attorney and Client — Attorney Fees.

Civil action by commission salesmen or commissions under Iowa Wage Payment Collection Law, Chapter 91A. Defendant claims plaintiff was an independent contractor and, accordingly, beyond protection of the statute. Plaintiff contends he was an employee.

Offer to Compromise. Defendant claims three letters written by Plaintiff offering to settle his differences with Defendant were improperly admitted into evidence contrary to Evidence Rule 408. However, evidentiary rule applies only when evidence is tendered as an "admission of weakness" of the other party's claim or defense, not when it is tendered to prove a fact other than liability. Here, three letters were written not by the adversary but rather by the party proffering the evidence. Moreover they have probative value aside from any consideration of admission in that they tended to show the refusal to pay Plaintiff was deliberate.

Employee status. The Iowa Wage Payment Statute protects only employees — not independent contractors. Defendant offered evidence plaintiff was an independent contractor. Specifically, plaintiff's contract with defendant set forth his status as independent contractor. Defendant also introduced evidence by plaintiff's tax preparer who testified plaintiff considered himself an independent contractor for tax purposes. Test for determining employment status is who has "right of control". Substantial evidence supports finding plaintiff was an employee. He received training, sales materials, contract forms and business cards, all supplied by defendant as were customer leads in selling tips. Each week he attended sales meetings and was required to report sales progress daily. Further, the job application form required plaintiff to abide by all company rules and regulations in that compliance with such terms constitutes a "condition of employment".

Defendant challenges instruction given regarding employees/independent contractor status the requested instruction the court refused to give sets forth that the "overriding element" is the intention of the parties as to their relationship. However, right of control not the intention of the parties is the primary consideration.

Attorneys Fees. Statute under which suit was brought allows attorneys fees to recovering plaintiff. Defendant urges that because plaintiff had a contingent fee arrangement, attorneys fees are included in the judgment in that defendant is a third-party beneficiary to the fee agreement. However, law imposes burden to pay attorneys fees on defendant. Defendant's argument which shifted burden back to plaintiff would obtain an award "less than the full

statutory amount due him" a contingent fee arrangement does not change the obligation of the employer to allow defendant's position would be to grant to the wrongdoer a windfall.

Brown v. Garman, 364 N.W.2d 566 (Iowa 1985).

Labor and Employment — Federal Preemption.

Plaintiff union member brought civil action against union officials claiming violation of federal civil rights, intentional interference with contractual relationship with the union and prospective employment opportunities, and intentional infliction of emotional distress. Tort claims were dismissed by district court. Question is whether federal labor law preempts jurisdiction of Iowa courts over claims for intentional infliction of emotional stress and interference with contractual relationships and prospective employment opportunities. Court holds contract based theories (intentional interference with contractual relationship and prospective economic advantage) are preempted by the federal labor laws. State causes of action are presumptively preempted if they concern conduct actually or arguably prohibited or protected by the National Labor Relations Act. Plaintiff claims common law causes of action dismissed by the district court fall squarely within the local-interest exception to preemption rule where activity is merely "peripheral concern" of federal labor law or where regulated conduct regards interest deeply rooted in particular localities. San Diego Building Trades Counsel v. Garmon, 359 U.S. 236 (1959). Court holds that intentional infliction of emotional distress is within local-interest exception to preemption presumption and only of peripheral federal concern. Farmer v. Carpenters, 430 U.S. 290 (1977). Although trial court erred in dismissing as preempted emotional distress count, Supreme Court highlights recent Iowa case law showing difficulty of recovery under such claims. Moreover, if evidence later adduced and centers primarily on employment discrimination itself, that will not be sufficient to support award for emotional distress. Farmer, 430 U.S. at 306.

Defendant urges claims against individual union officials are prohibited. Assertion is that the claims are similar to those brought under Section 301 of the Labor Management Relations Act for breach of collective bargaining agreements. Section 301 prohibits suits against individual union members. However, causes of action asserted here are common-law in nature and in no way dependent upon the federal statute.

Labor and Employment — OSHA Warrants.

See Meier v. Sulhoff, 360 N.W.2d 722 (Iowa 1985) (en banc). --p. 28.

Taylor v. Iowa Department of Job Service, 362 N.W.2d 534 (Iowa 1985).

Labor and Employment — Unemployment Compensation.

Claimant on unemployment compensation found unskilled work that, due to his prior employment, the Iowa unemployment compensation law would not require that he accept. At the time he accepted the job, new employer informed him that work might be too strenuous. After a week he quit, alleging illness caused by the work, unsafe working conditions, and a substantial change in the contract for hire. The administrative agency denied job benefits. He urges on appeal that, because the law would not require he accept the position in the first place,



his benefits ought properly resume because the trial period was unsatisfactory. Court recognizes that other states allow such an exception. Court declines to carve out the proposed exception. If claimant quit his work without good cause attributable to the employer, even if he gave up unemployment benefits for unsuitable employment before quitting that employment, he is not entitled to resumption of unemployment benefits. If public policy demands such change, the legislature will have to enact it.

An employee cannot qualify for unemployment compensation if he or she quits unemployment due to illness without consulting a physician. Job Service regulations create "presumption" quit in such circumstances is without good cause. Claimant also urges a change in employment agreement as a basis for receipt of benefits. Shortly after he was employed, hours were reduced from 50 per week to 40. He had provided notice to Job Service that one of the reasons he quit was because of the reduction in hours. Reasons for quitting were not necessarily mutually exclusive. Accordingly, on remand, agency should make findings of fact whether there was in fact a substantial change in employment contract and, if so, that was the reason he quit and constitutes good cause attributable to the employer for quit, therefore entitling him to employment benefits. On remand, burden of proof is on employer to establish he quit without good cause attributable to the employer. Recent amendment to §96.6(2) places burden on claimant to show basic eligibility conditions under §96.4. Employer then has burden of proof claimant is disqualified for benefits under provisions of §96.5. Amendment applied to instant case since action was pending at time amendment took effect.

Salter v. Freight Sales Co., 357 N.W.2d 28 (Iowa App. 1984).

Labor and Employment — Wage Collection.

Wage payment collection action brought by manager of one of defendant's stores. Plaintiff was paid on commission basis (9%) on sales he made and 3% commission on sales made by his subordinates. Following a store burglary in which the night bank deposit monies were stolen, plaintiff's commissions were reduced by 1%. Eight or nine months later commission rate was restored. Plaintiff lost compensation of approximately \$5,000.00, almost the exact value of money stolen in the burglary. He filed action under the Iowa Wage Payment Collection Act was awarded lost wages, an equal amount in liquidated damages and attorney fees.

Defendant challenges applicability of Wage Payment Collection Act. Under statute, wages are defined as "compensation owed by an employer." Defendant urges plaintiff was an employee at will whose employment contract could be modified at any time and that the reduction in the commission rate was a valid modification of the contract. Although an employment contract terminable at will is subject to modification by either party and employee's decision to continue work knowing new terms results in acceptance of the modification, here there was no good faith modification. Rather, alleged "modification" in reducing commission rate and later "modification" restoring commission rate clearly was an attempt to circumvent plain language of the statute. Defendants argue reduction in commission rate was not prompted by burglary but rather reflected reduction in plaintiff's responsibilities and duties. Substantial evidence, however, supports trial court's conclusion that actions were taken to punish plaintiff for the burglary. Employers and employees can modify the terms of their employment contracts but when alleged modification is "so obviously an attempt to do what is prohibited by statute," the court will look to the substance and not the form of the transaction. Statute prohibits deduction for amount lost in burglary.

Plaintiff did not waive legal rights by agreeing to the deduction by continuing his employment. Court finds no requirement in Chapter 91A requiring that an employee sacrifice his employment or forfeit remedy provided by statute.

Attorneys Fees. Wage Payment Collection Action Statute authorizes attorneys fees. Plaintiff requests additional award to recover fees incurred on appeal. Case remanded for determination of necessary fees on appeal.

McClure v. International Livestock Improvement Services Corp., 369 N.W.2d 801 (Iowa 1985).

Labor and Employment -- Wage Payment Collection.

Action arises under wage payment collection statute. Parties had an employment agreement setting forth that it could be terminated on 30 days advance written notice to the other party. Plaintiff was terminated and filed wage payment action claiming one month's pay and liquidated damages in an equal amount. Trial court awarded 30 days pay, an equal amount in liquidated damages and attorney fees pursuant to Chapter 91A. Under Chapter 91A, the "general tenor" is the regulation of the payment of wages which have been earned. See §91A.3(1), .4, .6. Statute does not cover wages to be earned in the future. Rather, "wages" means "compensation owed for services rendered" Accordingly, claim for 30 day pay is not for services "rendered" pursuant to the wage payment act but for damages. Nor is it "severance" pay as referred to in statute. Plaintiff is entitled to damages in the amount of one month's pay but not liquidated damages and not attorneys fees.

Northrup v. Farmland Indus., Inc., _____ N.W.2d _____ (No. 84-906) (Iowa, July 31, 1985) (en banc).

Labor and Employment -- Wrongful Discharge.

Torts -- Emotional Distress.

Plaintiff filed action for wrongful discharge and tortious infliction of emotional distress. Summary judgment was entered for employer. Facts of action are remarkably similar to those presented in Consolidated Freightways, Inc. v. Cedar Rapids Civil Rights Commission, 366 N.W.2d 522 (Iowa 1985). Plaintiff had emotional problems connected with alcohol usage and marital difficulties. Several months after his return to work following treatment he was discharged. Plaintiff contends termination was a result of alcoholism and the participation in alcohol treatment program. Employer maintains discharge was because of poor job performance.

Plaintiff filed complaints with the appropriate civil rights agencies claiming termination as a result of alcohol disability. He received an administrative right-to-sue letter advising him that he had a right to commence action within 90 days of issuance of the letter. He filed his lawsuit 91 days later. Discrimination issue not urged on appeal.

Supreme Court cites general rule that an at-will employee may be terminated at any time for any reason. Plaintiff urges an exception to the at-will rule because discharge for alcoholism is against public policy. Iowa court has never recognized public-policy exception but



has noted its increasing acceptance in other jurisdictions. Court in Abrisz v. Pulley Freight Lines, Inc., 270 N.W.2d 454 (Iowa 1978), hinted public-policy exception might apply in Iowa but held that "courts should not declare conduct violative of public policy unless it is clearly so." Court implies statutes and not court decisions would serve to set forth public policy if public-policy exception to at-will rule were adopted.

Court holds §601A.6 to constitute express policy prohibiting discharge for "disabilities" which the court had held can include alcoholism. However, civil rights act establishes exclusive procedure for vindication of statutory rights therein established. Any remedies to which plaintiff would be entitled as a result of discharge for alcoholism lie exclusively within the statutory scheme of Chapter 601A.

Emotional Distress. Plaintiff also claims as a grounds for recovery tortious infliction of emotional harm. Court holds plaintiff's pleading provides fair notice that claim asserted is one for infliction of emotional distress. Reading various counts together, it can be held to have asserted bad faith, reckless disregard for plaintiff's rights and emotional harm. Omitted as any mention of "outrageous conduct" but court believes petition is sufficient when read as a whole to give fair notice of the nature of the claim and is, therefore, sufficient under Rule 69(a).

Plaintiff's claims, however, are fatally deficient with respect to "outrageousness" of the conduct asserted against defendant. Following Vinson v. Linn-Mar Community School Dist., 360 N.W.2d 108 (Iowa 1984) and Harsha v. State Savings Bank, 346 N.W.2d 791 (Iowa 1984), court holds that conduct asserted cannot be deemed to be outrageous. Determination whether conduct may reasonably be regarded to be outrageous is for the court. He asserts only that his supervisor "yelled" at him and accused him of lying. That is not outrageous. "The general criticism of [plaintiff] by the supervisor does not appear to be anything unusual in an employer-employee relationship." Court concludes that if there was not sufficient evidence of outrageousness in Vinson, a situation involving an "employer-employee relationship with considerably 'rougher edges' " than that involved here, as a matter of law outrageousness is not present in the present case.

Woodruff v. Associated Grocers of Iowa, 364 N.W.2d 215 (Iowa 1985).

Labor and Employment — Wrongful Discharge — Arbitration.

Plaintiff was discharged from position for dishonesty. He filed grievance through the procedures set forth in the collective bargaining agreement, which proceeded through arbitration. Arbitrator ruled just cause existed for discharge. Plaintiff then filed civil action in district court seeking damages for wrongful discharge, alleging he had been fired for "informing" about criminal conduct in the company. Defendant moved for summary judgment which was denied. Supreme Court granted discretionary review of interlocutory order.

Court holds arbitration decision drew its essence from the collective bargaining agreement and that, as a favored form of dispute resolution, must be given force and effect. Court fails to discuss judicial avenues for challenge to arbitration awards in employment cases. However, plaintiff's lawsuit untimely under both federal (NLRA) and Iowa arbitration laws. Plaintiff claims that the "whistle-blowing" alleged in the civil action was not raised at

the time of the arbitration. However, it would undermine the policy favoring arbitration to permit a party to challenge the result because of some evidence the party did not bring before the arbitrator. Reversed.

LIMITATION OF ACTIONS

Limitation of Actions.

See Beeck v. S. R. Smith Co., 359 N.W.2d 482 (Iowa 1984). --p. 18.

Emmetsburg Ready Mix Co. v. Norris, 362 N.W.2d 498 (Iowa 1985) (en banc).

Limitation of Actions.

Question whether mechanic's lien timely filed. Statute allows thirty days for a mechanic's lien-holder to bring action to enforce the lien. Thirtieth day fell on Friday, December 24 and courthouse was locked in observance of holiday. Statute provides official holidays allow extension of period. However, December 24 was not declared a holiday. Court holds that legislature never intended the 30 day filing period to be shortened where access to court house is denied on the thirtieth day.

Matherly v. Hanson, 355 N.W.2d 450 (Iowa 1984) (en banc).

Contracts -- Written or Oral.

Limitation of Actions.

Written or Oral Contract. District Court granted summary judgment to defendant on basis of statute of limitations, holding the action to be based on unwritten contract which, pursuant to §614.1(4), must be brought within five years of accrual of the cause of action. Plaintiff asserts action is founded upon written contract and that he is entitled to the ten-year statute of limitations. Plaintiff claims defendant owes him money for services rendered and that the parties agreed to a unique method of payment. The writings at issue the court characterizes as "cryptic and fragmentary". Although supportive of plaintiff's theory, in order to be an action founded on written contracts, the writings do not set forth "the essential facts establishing the liability of the defendant." Lamb v. Withrow, 31 Iowa 164 (1871). Unless liability itself can be shown by the writing, as a matter of law an action on such liability is founded on an unwritten rather than written contract. Iowa court does not reach the issue of whether all material terms of the agreement, not merely the obligation of the party must be in the writing. Since there is nothing in any writings in the present case that shows any obligation or liability of defendant to plaintiff, action is on unwritten contract. Since resort must be had to parol evidence if any obligation of defendant is to be established, this precludes plaintiff's reliance on the ten-year statute of limitations.

Plaintiff claims defendant ought to be estopped from claiming no written contract exists because defendant wrote the first writing. However, the writing does not show an obligation by defendant to perform and defendant is not estopped from denying written contract. Similarly, defendant is not estopped to raise the statute of limitations as a defense. Lacking is any

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habitual offender. Department official testified that "computer problems" and other inefficiencies prevented the department from identifying all drivers whose licenses could have been suspended pursuant to statute.

Supreme Court upholds factual finding by trial court that plaintiff did not prove proximate cause. Specifically, tortfeasor's driving record showed intentional driving violations following license suspension under other circumstances. Moreover, opinion evidence was offered at trial that intentional violators do not quit driving after suspension. Department failed to meet its obligations under habitual offender statute. Statute was enacted for the purpose of protecting the motoring public. State v. Thomas, 275 N.W.2d 422 (Iowa 1979). Nonetheless, as a matter of law, the "failure to suspend the license of an habitual offender cannot be the proximate cause of injury since it is not reasonably foreseeable the driver will cease operating the motor vehicle because of suspension or revocation of the license." Section 321.556 does not imply or create a new cause of action for violation of the provision by the State Department of Transportation.

Jones v. City of Des Moines, 355 N.W.2d 49 (Iowa 1984).

Negligence — Proximate Cause.

Damages — Pro tanto Credit.

Negligence action arising out of an automobile accident. Police officer erroneously stopped plaintiff, seeking to apprehend a criminal suspect. Suspect later approached area and collided with plaintiff. Plaintiff settled before trial with suspect and tavern owner under dramshop action.

Proximate Cause. Trial court instructed following Uniform Jury Instruction 2.6, setting forth the "but for" definition of proximate cause only. Defendant City objected to the instruction as failing to explain the "substantial factor" aspect of proximate cause as set forth in Restatement (Second) of Torts §430, Comment A. The substantial factor aspect of the definition of proximate cause is firmly established in Iowa decisions. The court agrees the instruction "could have been improved". However, submission not reversible error.

Pro Tanto Credit. Plaintiffs (injured husband and his wife) collected \$26,000 in settlement prior to trial. Husband was awarded \$60,000 by jury and wife was awarded \$3,000 at trial. Trial court credited full settlement to jury verdict and allocated settlement against verdict for each plaintiff in the same ratio verdict bore to the total amount awarded, i.e. 60/63 of \$26,000 was set off against husband award and 3/63 of the \$26,000 was set off against wife's award. Plaintiffs argue \$26,000 should have been equally divided between them, reducing husband's award by \$13,000 to \$47,000 and wife's award from \$3,000 to 0. Supreme Court affirms pro tanto credit rule. Otherwise it would result in windfall to plaintiffs.

Negligence — Proximate Cause.

See D.R.R. v. English Enterprises, 356 N.W.2d 580 (Iowa App. 1984).--p. 79.

Mangold v. Riverside Chamber of Commerce, Inc., 353 N.W.2d 880 (Iowa App. 1984).

Negligence — Standard of Care.

Suit arising from injuries sustained by a spectator at demolition derby sponsored by defendant. Jury returned verdict in favor of defendant. Following verdict for defendant, trial court granted new trial. The basis for the ruling was the standard of care owed by possessor of real estate to invitees. The instructions given correctly set forth the general standard of care applicable to possessors of real estate and as embodied in Uniform Jury Instruction 22.3. However, district court had held that the instructions given did not adequately set forth the higher standard of care owed by proprietors of public places of amusement.

In Parsons v. National Dairy Cattle Congress, 277 N.W.2d 620 (Iowa 1979), the court held that proprietors of public entertainment are held to "stricter account" for injuries to patrons than owners of private premises generally. Court therefore further stated, however, that the legal standard, one of reasonable care, does not change with respect to such situations. The Court of Appeals held the only difference between proprietors of public amusement and other possessors of real estate relates to "greater factual dangers" relative to such public places. Since the legal standard of care does not differ, the instructions at issue correctly embodied this legal standard of care and left for the determination of the jury whether defendant actually had satisfied the legal requirement.

Menzel v. Morse, 362 N.W.2d 465 (Iowa 1985) (en banc.).

Negligence — Standard of Care (Realtors).

Action by purchasers of new home against real estate agent. Allegations are that defendant failed to protect plaintiff's interests and insist on strict performance by contractor building the home before closing; failed to insist on adequate escrow for defects prior to closing; discouraged plaintiffs from seeking legal counsel when their interests so required; gave improper legal advice as to the effect of failure to close the transaction; failed to advise plaintiffs of building code requirements with respect to the house; failed to advise plaintiffs that the house had not passed official building inspection and to insist that this be done before closing. Claims alleged in count alleging breach of confidential and fiduciary relationship and in count alleging negligence. At trial, the court admitted National Association of Realtors' Code of Ethics. Defendant testified the Code was widely recognized and uniformly accepted by persons in the real estate world in general and that it was required study for, and included in, the real estate examination given by the Iowa Real Estate Commission. Also, evidence that the Code of Ethics was recognized as setting standards in the profession. Plaintiffs offered evidence regarding several areas defendants had failed to comply with in the Code of Ethics. Trial court held in favor of defendants stating that defendant was required to make no further inspection the premises than was plaintiff.

Supreme Court determines it is not required to determine whether breach of fiduciary duty is a cognizable cause of action in Iowa. Court holds trial court erred in determining the standard of skill and knowledge to be applied to the activities of defendant real estate agent. Standard to be applied to malpractice claims is that set forth in Restatement (Second) of Torts

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§299A. "One who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of the profession in good standing [under like circumstances]."

In determining whether defendant's conduct met standards required, courts look to standards of conduct and practices or bench marks in the industry which may be evidenced by expert testimony, licensing and accreditation standards, accreditation requirements of professional associations, and published ethical standards and practices, including those for real estate agents. Defendants' admissions established that the Code of Ethics sets forth established and accepted standards in the profession and was required study for, and included in, the written examination leading to licensing in Iowa. Defendants' admissions and evidence of the Code of Ethics clearly set forth, further, a number of respects in which defendants' conduct failed to meet the standards applicable. Violation of standards or bench marks in the profession is only evidence of negligence and not negligence per se. However, court's rejection of the standards in favor of rules of conducts, skill and knowledge neither supported in cases nor in the evidence is reversible error.

PLEADING

Pleading — Notice Pleading.

See Adam v. Mt. Pleasant Bank & Trust Co., 355 N.W.2d 868 (Iowa 1984). --p. 32.

Atlas, Ltd. v. Kingman Warehouse Co., 357 N.W.2d 584 (Iowa 1984).

Pleading — Scope of Third-Party Claims.

Interlocutory appeal to delimit proper scope of cross-petitions under R.C.P. 334(a). Third-party cross-petition filed against law partnership by defendant in underlying action seeking indemnification pursuant to Rule 34(a). Additionally, cross-petition sought compensatory damages, punitive damages, attorney fees and general equitable relief against the law firm. Third-party plaintiff also cross-claimed against another defendant, a partner in the law firm, for the same relief sought in the third-party action. Upon motion by the law firm, district court ruled that only claims for indemnification and contribution are proper under Rule 34(a) and struck cross-petitioner's claims for other damages.

Rule 33 permits as cross-claims against co-parties any claims arising out of the same transaction or occurrence. In contrast, Rule 34(a) allows a defendant, as third-party plaintiff, to file a cross-petition against persons not parties to the action who are or may be liable for all or part of the plaintiff's claim against the defendant. The distinction between Rules 33 and 34(a) served as the basis for the district court's ruling since the indemnity language of Rule 34(a) is narrower than the "same transaction or occurrence" language of Rule 33.

Supreme Court does not view Rule 34(a) so restrictively. Rule held to limit the type of party who may be the subject of a cross-petition but not to limit the scope of remedies that may be asserted against such party. Rulings regarding the scope of a cross-petition are addressed to the court's discretion. However, question here as to how much weight should be accorded to the court's discretion since court appears to have struck the cross-petition claims on the basis of its interpretation of rule 34(a), an erroneous legal interpretation. Even if abuse

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of discretion standard applied, order could not stand. Since the cross-claim against co-defendant asserts all the remedies sought in the cross-petition, the substance of all issues raised in the cross-petition would remain in the lawsuit. Similarly, all parties would remain in the lawsuit. Rule 34(a) in part serves to help avoid multiplicity of actions. To restrict scope of cross-petition would not serve that purpose.

Pleading -- Verification.

See Barks v. White, 365 N.W.2d 640 (Iowa App. 1985).--p. 39.

PRODUCTS LIABILITY

Speck v. Unit Handling Division, 366 N.W.2d 543 (Iowa 1985).

Products Liability.

Negligence -- Comparative.

Contribution/Indemnification -- Common Liability.

Interlocutory appeal in products liability action filed prior to the effective date of comparative fault statute. Trial court struck affirmative defenses alleging negligence of the plaintiff and her employer and denied defendants' attempt to obtain contribution from plaintiff's employer. Supreme Court affirms. Goetzman did not change the law governing contributory negligence as a defense to strict liability in cases involving defective products. Although many other jurisdictions permit comparative negligence defense in products liability cases and although comparative fault statute permits such defense, court holds comparative negligence is not a defense in strict liability actions.

Contribution from Employer. Following Thompson v. Stearns Chemical Corp., 345 N.W.2d 131 (Iowa 1984), contribution from negligent employer is not available post Goetzman to defendant in products liability action. Right of contribution is conditioned on existence of common liability and there is no common liability between negligent employer and manufacturer of defective product. The employer's negligence is not a basis on which the seller may escape or reduce its liability to the injured party.

SALES

Bauer v. Curran, 360 N.W.2d 88 (Iowa 1984).

Sales.

Tort action alleging conversion. Plaintiffs leased certain cattle to Davidson, a farmer, with no ownership interest. Davidson later sold the cattle and plaintiff sued the purchaser. Under U.C.C. §2-403(2), a "merchant" has power to transfer ownership to a purchaser in the ordinary course of business. Defendants claimed as a matter of law that Davidson, as a farmer, was a merchant and, accordingly, they owned the cattle. Court ruled the question of Davidson's status was one of fact and not one of law. Jury found Davidson was not a merchant. Supreme



Blong v. Snyder, 361 N.W.2d 312 (Iowa Ap. 1984).

Torts — Emotional Distress.

Appeal from judgment N.O.V. entered in emotional distress case. Former employee brought suit against supervisory personnel. In 1977 he was accused of falsification of time cards and discharged. Subsequent to negotiated settlement, he was reinstated. He claims "unmerciful" harassment following his reinstatement requiring to him to resign less than four months later upon doctors' orders. Case decided one month prior to Supreme Court's Vinson decision. Court says that the Iowa Supreme Court is not defined "outrageous conduct" in situations in which claim arises from an employer-employee relationship. Over dissent of two judges, court holds facts to be sufficiently outrageous to meet the elements of the tort of intentional infliction of emotional distress. Interestingly, facts are apparently much less serious than those present in Vinson, especially as described by Justice McCormick in the Vinson.

Torts — Emotional Distress.

See Northrup v. Farmland Indus., Inc., _____ N.W.2d _____ (No. 84-906) (Iowa, July 31, 1985) (en banc). --p. 57.

TORTS -- FALSE ARREST

Kraft v. City of Bettendorf, 359 N.W.2f 466 (Iowa 1984).

Torts — False Arrest.

Civil Rights.

Defendant appeals from judgment entered on jury verdict awarding plaintiffs damages for false arrest by two Bettendorf police officers following a bar fight. Defendant challenges sufficiency of the evidence. The fight involved an off-duty Bettendorf police officer and the plaintiffs.

Probable Cause. Probable cause for arrest in circumstances in which a crime was committed outside the presence of a police officer requires good faith and reasonable belief that the person arrested committed the crime. Children v. Burton, 331 N.W.2d 673 (Iowa 1983). Defendant claims that since arresting officers relied on information provided by a witness — the off-duty officer — to make the arrest, that constitutes probable cause. However, when a police officer makes a warrantless arrest for a crime not committed in his presence on the strength of one witness' uncorroborated statements and there exists circumstances known to the officer causing a reasonable person to doubt the reliability of those statements, then the credibility of the statements is a pertinent fact on the question of the existence of probable cause. It is for the jury to determine whether the accusation by a single witness would lead to a reasonable belief that the person accused committed the crime. On the present facts, a number of circumstances question the veracity of the off-duty officer's accusation and whether arresting officer's belief that plaintiff committed the crime was reasonable. These circumstances include long-standing hostility (of which arresting officer was aware) and circumstances suggestive of provocation. Police also failed to question any other witnesses at scene.

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Damages. Jury award included damages for humiliation, mental pain and anguish. Defendant claims that since there was no physical manifestation of any sort of mental suffering, such elements were not appropriately awarded to plaintiffs. Physical manifestation of mental suffering has never been a condition for recovery of damages for mental injury caused by false arrest.

Civil Rights. Count II of plaintiff's petition alleges violation of federal civil rights statute, 42 U.S.C. §1983. Trial court dismissed the claim. Section 1983 will not support a claim based upon respondeat superior. Since there was no allegation or facts supporting a claim of execution of governmental policy or custom causing the injury asserted, this was not a 1983 case.

TORTS — FRAUD

Torts — Fraud.

See Bossuyt v. Osage Farmers' Nat'l Bank, 360 N.W.2d 769 (Iowa 1985).--p. 20.

Torts — Fraud.

See Countryman v. Mt. Pleasant Bank & Trust Co., 357 N.W.2d 599 (Iowa 1984). --p. 82.

TORTS — INTENTIONAL INFERENCE

Torts — Intentional Interference.

See Gordon v. Noel, 356 N.W.2d 559 (Iowa 1984). --p. 76.

TORTS — INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Vinson v. Linn-Mar Community School Dist., 360 N.W.2d 108 (Iowa 1984).

Municipal Corporations — Punitive Damages.

Torts — Defamation.

Torts — Intentional Infliction of Emotional Distress.

Action arose from dispute at work. Dispute escalated with plaintiff receiving memoranda from her supervisor indicating that she was "falsifying information" on her time cards. Later in a telephone call after his discharge, her former supervisor told a prospective employer that she had been terminated for recording "incorrect time on time cards".

Defamation. Elements of libel in Iowa are a malicious publication tending to injure the reputation of another person or to expose that person to public hatred, contempt or ridicule. Certain statements are libelous per se without proof of malice, falsity or damage. An attack on the integrity and moral character of an individual is libelous per se. This includes a published account accusing a person of being a liar. There is no meaningful distinction between being accused a liar and being accused of falsifying information. Instruction that memorandum



accusing plaintiff of falsifying information was libelous per se was correct. Slander per se instruction was not given with respect to supervisor's statement to prospective employer. Rather, the court left it to the jury to determine whether the statement would be understood as slanderous per se. When language of the publication is unambiguous, the issue of whether the publication is defamatory per se is for the court. If the language is capable of two meanings, it is for the jury to determine if it was defamatory per se. Because the supervisor's comment that plaintiff had been terminated for recording incorrect time could be viewed as the equivalent of a statement that she falsified records, the court did not err in allowing the jury to determine whether the defamatory meaning was the one conveyed.

Defendant pleads qualified privilege, an issue ordinarily to be determined by the court rather than the jury. Privilege protects only statements made without actual malice and applies to statements — whether or not defamatory per se — when made on an appropriate occasion in good faith on a subject in which the communicator and the addressee have a shared interest, right or duty. Defendants claim all alleged defamatory statements were made in the present case only to persons to whom they had a right or duty to communicate and that the persons had an interest in the subject. Even if applicable, however, the doctrine would not be grounds for dismissal but rather would require plaintiff to prove actual malice as opposed from legal malice. In the present case, the jury found plaintiff did prove actual malice. Effect is only to shift the burden to the plaintiff to prove actual malice. She met that burden clearly in obtaining entitlement to punitive damages. Accordingly, any error did not prejudice defendants' substantial rights.

Emotional Distress. Elements of tort are (1) outrageous conduct; (2) defendant's intentional causing or reckless disregard of the probability of causing emotional stress; (3) severe or extreme emotional distress; and (4) causation. Requirement of outrageousness mandates that the conduct be "so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Quoting Harsha v. State Savings Bank, 346 N.W.2d 791 (Iowa 1984). It is for the court to determine whether the conduct may reasonably be regarded as outrageous and, in making the determination, the court should consider the relationship between the parties. Outrageous character of the conduct may arise from abuse of a position of authority or superiority over the other. It is not enough that defendant acted with intent which is tortious or even criminal or that he intended to inflict emotional distress or even that it be sufficiently aggravated to entitle plaintiff to punitive damages for another tort.

Supreme Court engages in an extraordinary "bad light" characterization of defendants' conduct stating, among other things, that jury could find a continuing campaign of harassment of plaintiff ending with her discharge and continued allegations of dishonesty, when defendants knew that she was not dishonest. "Even though we believe a jury could find defendants engaged in a deliberate campaign to badger and harass plaintiff, we do not believe their conduct rises to the level of extremity essential to support a finding of outrageousness. A trier of fact could not reasonably conclude that the conduct "went beyond all possible bounds of decency and must be regarded as atrocious and utterly intolerable in a civilized community."

Punitive Damages. Amendment to §613A.4 exempts public bodies such as defendant from punitive damage awards. Amendment was enacted after the conduct upon which plaintiff sues. Court holds amendment is substantive and not remedial. Accordingly, it is prospective only and not applicable to plaintiff's action.

TORTS -- INTERFERENCE WITH CONTRACT

Toney v. Casey's General Stores, Inc., _____ N.W.2d _____, No. 84-734 (Iowa, July 31, 1985).

Torts -- Interference With Contract.

Plaintiff appeals ruling granting directed verdict in suit for tortious interference with employment contract. Iowa previously has recognized the tort of interference with contractual relations. No reason exists to bar recovery where the injured contractual relationship is at-will employment. Accordingly, cause of action lies for intentional interference with at-will employment contract.

TORTS -- LIBEL

Hovey v. Iowa State Daily Publication Board, Inc., _____ N.W.2d _____, No. 84-754 (Iowa, July 31, 1985).

Torts -- Libel.

Defendant newspaper appeals judgment for plaintiff in libel action. Iowa case law has long held that truth is a complete defense to defamation action. However, question of whether substantial truth also is a defense has never been addressed. Court adopts Restatement (Second) of Torts §518A, comment f. If an alleged defamatory statement is substantially true, it provides an absolute defense to an action for defamation. Here, newspaper article was substantially truthful regarding plaintiff when it reported that she had been raped when, in fact, she was the victim of sexual abuse. Defendant established its defense of truth as a matter of law and court erred in denying directed verdict.

TORTS -- MALICIOUS PROSECUTION

Torts -- Malicious Prosecution.

See Brown v. Monticello State Bank, 360 N.W.2d 281 (Iowa 1984).--p. 13.

Carter v. MacMillan Oil Co., 355 N.W.2d 52 (Iowa 1984).

Torts -- Malicious Prosecution.

Plaintiff appeals judgment N.O.V. following jury verdict for actual and punitive damages in malicious prosecution action. Plaintiff was accused by defendant's employees of taking gasoline without paying. He was arrested and charged with theft but later acquitted. He brought action for abuse of process, malicious prosecution and negligence in the instigation of prosecution. Defendant did not deny it had instigated the unsuccessful criminal prosecution. In response to a special interrogatory, the jury indicated it had permitted recovery on a theory of negligence in the instigation of prosecution.



Trial court granted judgment N.O.V. holding that to permit recovery on theory of simple negligence in the instigation of prosecution would be an unwarranted expansion of tort law. Plaintiff does not challenge underlying viability of tort claim but argued that jury's verdict on negligence theory coupled with award of punitive damages confirms jury finding that elements of malicious prosecution claim had been established. Supreme Court disagrees. Assuming evidence supports claim for malicious prosecution, the jury did not return a verdict on that theory. Theories of recovery upon which jury returned no finding or theories that were not submitted may not be utilized by the court in post-trial motions to resurrect a verdict based on improper grounds. However, judgment N.O.V. was error. Response to special interrogatory that one theory of recovery was rejected does not ineluctably establish that jury held recovery was not proper under other two theories submitted. Accordingly, proper remedy is new trial. [Carefully crafted jury interrogatories or special verdicts would appear to avoid this problem].

Malice and Probable Cause. Trial court's instruction required jury to find "actual malice" rather than "legal malice" in action against private individuals. This was error. If defendants are private individuals, as opposed to police or other public officials, there is no burden on plaintiff to show actual ill-will, hatred or actual express malice. Rather, malice may be inferred from lack of probable cause. Vander Linden v. Crews, 231 N.W.2d 904 (Iowa 1975). On probable cause, the court instructed the jury on the basis of Uniform Instruction No. 18.6 that a favorable termination of the prosecution constitutes evidence supporting lack of probable cause. Any presumption from acquittal of lack of probable cause is expressly disapproved. The tremendous difference in burdens of proof between civil and criminal actions "negates any logical basis for continuing to adhere to the substantive content of Uniform Instruction No. 18.6."

Gordon v. Noel, 356 N.W.2d 559 (Iowa 1984).

Discovery — Damages Claimed.

Torts — Malicious Prosecution.

Torts — Intentional Interference.

Trial — General/Special Verdict.

Review by Supreme Court of decision of the Court of Appeals. Action arose from an incident that occurred in a bar operated by plaintiff. Individual defendants are police officers who entered the tavern to determine whether it was being operated after statutory closing time. Plaintiff pointed a gun at the officers until they identified themselves and a scuffle occurred. Officers arrested plaintiff for being open after hours. Plaintiff was acquitted of criminal charge after jury trial. Plaintiff's liquor license later was suspended for 30 days. Defendants had provided City Counsel and a hearing board of the State Liquor Control Department with evidence concerning the incident. The suspension decision was affirmed first by a hearing board and, later, by a District Court on judicial review. Plaintiff brought civil action against the officers and the City seeking damages for malicious prosecution, false arrest, assault and battery and intentional interference with prospective business advantage. The jury returned a general verdict for plaintiff. The jury also answered an interrogatory showing no damages were awarded to plaintiff under one element of the general damage instruction relating to the intentional interference claim.

Malicious Prosecution. Trial court used the language from Uniform Jury Instruction 18.6 informing the jury that plaintiff's acquittal on the criminal charge constituted evidence that would support a finding by the jury that the criminal prosecution was without probable cause. The Supreme Court disapproved of such instruction in Carter v. MacMillan Oil Co., 355 N.W.2d 52 (Iowa 1984). The court adheres to that view in the present action, holding that acquittal is not evidence that criminal prosecution was instituted without probable cause. Trial court erred in instructing the jury on the basis of Uniform Instruction 18.6. Defendants also challenge trial court's failure to give requested instructions on the issue of actual malice. Malice cannot simply be inferred from lack of probable cause. Rather, if officers' purpose in initiating the prosecution was otherwise proper, indignation or resentment toward plaintiff, if any, would not subject them to liability.

Intentional Interference. Basis of claim by plaintiff was that the police officers gave false evidence in the liquor license renewal proceeding. Defendants moved for directed verdict on the basis that alleged false testimony by officers in license proceeding is not actionable in a civil case and on the grounds of insufficiency of the evidence. Motion was overruled. Plaintiff contends the issue is moot because jury responded to interrogatory on the portion of damage attributable to the intentional interference claim "if you find" plaintiff entitled to recover on that claim. Jury responded by placing a zero in the blank. Supreme Court holds issue is not moot because interrogatory called for response only if a finding on the intentional interference count in favor of plaintiff.

On the merits of the intentional interference claim, court holds it was error for trial court to deny motion for directed verdict. The information given by officers/defendants in the license renewal proceeding was at the request of the public entity as part of the administrative process and the bodies were informed in each instance that plaintiff was acquitted of criminal charges. Exercise of independent judgment by the licensing authorities breaks the chain of causation between the officers' allegedly false statements and plaintiff's loss of business expectancies. Accordingly, defendants' conduct could not have caused plaintiff's damage.

Discovery and Damages. In plaintiff's deposition, defendants asked him to specify the amount of damages he sought for each element of his damages claimed, including an amount for pain and suffering. Trial court ordered plaintiff to specify amount of business loss claims but refused to require specification of amount claimed for pain and suffering. Plaintiff contends pain and suffering determination is always in the sole discretion of the trier of fact. Although a pleader cannot be required to itemize unliquidated damages in pleadings, R.C.P. 95, such claims are subject to discovery. A party defending a claim clearly is entitled upon appropriate pre-trial request to be informed of the amount of the claim. The trial court abused its discretion in refusing to compel plaintiff to state the amount of his claim for pain and suffering.

General Verdict. Error in submission of intentional interference claim requires reversal and remand for new trial. Court follows rule that when trial court errs in submitting even one of several theories of recovery to the jury and jury returns only a general verdict for plaintiff, verdict cannot stand and new trial is warranted. Despite plaintiffs' argument that plaintiffs ought not have the burden to request special verdicts for interrogatories, when multiple theories of recovery are submitted, there is no reason that party should be unwilling to seek the protection of special verdicts or interrogatories. Even without a request, it is "desirable" for a trial court to use special verdicts or interrogatories in a case of multiple theories of recovery.



Sisler v. City of Centerville, _____ N.W.2d _____, No. 83-1545 (Iowa, July 31, 1985).

Torts — Malicious Prosecution.

Court holds plaintiffs failed to present sufficient evidence to generate jury question on element of absence of probable cause for the prosecution. Directed verdict affirmed.

Yoch v. Cedar Rapids, 353 N.W.2d 95 (Iowa App. 1984).

Torts — Malicious Prosecution.

Malicious prosecution/false arrest action. During trial jury held for Defendants on false arrest claim and for Plaintiff on malicious prosecution claim, awarding as damages the exact amount of attorneys' fees incurred in defense of the criminal action. Plaintiff's Motion for new trial on grounds of inadequate damage award denied by court. HELD: abuse of trial court discretion in refusing to grant new trial for inadequate award of damages. In light of uncontroverted testimony by Plaintiff regarding her "emotional distress, personal humiliation and embarrassment due to the prosecution." In so holding, court relied on decisions that jury awards in amounts exactly equal to special damages are grossly inadequate. Allbee v. Berry, 119 N.W.2d 230 (Iowa 1963). Plaintiff entitled to compensation for mental anguish and suffering resulting from the wrongful charge and arrest. Court acknowledged jury's discretion to accept or reject uncontradicted testimony of a witness it finds unreliable. However, Plaintiff's testimony regarding emotional distress was not "contrary to natural laws, etc."

Despite finding of jury in favor of Defendants on false arrest claims, case reversed and remanded for new trial on all issues.

Regarding malicious prosecution claims, the court also approved Uniform Jury Instruction No. 18.6 that acquittal of the Plaintiff by jury trial in prior criminal charge is evidence that would support finding that criminal prosecution was without probable cause. Court refused to hold acquittal in trial by jury constitutes prima facie showing of want of probable cause, holding only that it is sufficient to support a jury finding to that effect. Court disapproves of portion of Uniform Jury Instruction No. 18.6 that acquittal of Plaintiff by jury trial creates a presumption of lack of probable cause. In malicious prosecution actions, showing to establish required malice depends upon the status of the defendants. If defendant is not a public official, lack of probable cause may be the basis for an inference of malice. For public officials, however, lack of probable cause will not alone support inference of malice. Rather, malice must be subject to an affirmative showing that Defendant's instigation of criminal proceedings was primarily inspired by ill-will, hatred or other wrongful motives.

TORTS — MEDICAL MALPRACTICE

Sammons v. Smith, 353 N.W.2d 380 (Iowa 1984).

Torts — Medical Malpractice.

Plaintiff sued for medical malpractice in connection with knee operation. Plaintiff was advised by physician of risks attendant with procedure but did not suggest the possibility of post-operative nerve damage because of its remote likelihood. Apparently, automatic, air-inflated tourniquet applied above surgery site during the operation resulted in nerve damage from the shutting off of the blood supply to the nerve during surgery. Plaintiff suffered "somewhat of a pegged-like leg deformity." Evidence was not in dispute regarding the tourniquet as the cause of the nerve damage. Neither was evidence conflicting that Plaintiff had no physical characteristics outwardly suggesting unusual susceptibility to the problem. Case was submitted to jury against doctors only on res ipsa loquitur theory.

Court held that modified version of Uniform Instruction 13.9 by its reference to the requirement of deviance from "customary practice" was reversible error for the reason that it "effectively denied Plaintiff the benefit of the res ipsa inference of negligence by requiring her to establish a specific error in treatment" New trial as to the doctors was ordered. However, since res ipsa instruction applied only to doctors, no basis for reversing jury verdict in favor of medical center.

Court held that in order to maintain theory of res ipsa loquitur and submit such theory to the jury, the two "foundational elements" — exclusive control and an injury that ordinarily would not have occurred — need not be established as a matter of law. The fact of other possibilities explaining the cause of injury was held not sufficient to take away from Plaintiff the benefit of the res ipsa doctrine. The fact that miscalibration of the medical instrument (suggestive of negligence on the part of the Defendant medical center) was the most likely explanation for the problem would not deprive Plaintiff of submission of the res ipsa theory.

TORTS — NEGLIGENT HIRING

D.R.R. v. English Enterprises, 356 N.W.2d 580 (Iowa App. 1984).

Negligence — Proximate Cause.

Contracts — Third-Party Beneficiary.

Torts — Negligent Hiring.

Plaintiff brought civil action arising from her rape. She sued employer of the rapist, who hired rapist for installation of cable TV. She also sued the franchisee who had contracted with the rapist's employer. Trial court granted summary judgment in favor of employer and franchisee.

Agency. District Court granted summary judgment on the basis of lack of any evidence that rapist was employee or agent of franchisee. Court of Appeals holds ample evidence in the record to support finding that rapist was an agent and under the control and clothed with the



authority of both the direct employer and the franchisee. Whether he is an employee of either or both defendants is a factual question to be decided by the trier of fact. Plaintiff's first contact with rapist was when rapist connected her television set to the cable system and installed necessary equipment. Rapist presented a contract between franchisee and plaintiff for her signature and requested and received payment for his installation service on behalf of franchisee from plaintiff. His work was in furtherance of service performed by franchisee and employer. Additionally, both franchisee and direct employer had power to terminate rapist's authorization to install cable services. There was sufficient evidence that rapist was employee or agent of both defendants, even though franchisee claims contractor-subcontractor relationship with employer and employer claims rapist was an independent contractor. Rapist could be both an agent and an independent contractor.

Negligent Hiring. Plaintiff urges adoption of cause of action based upon Restatement (Second) of Agency §213 and the decisions of other states. Section 213 imposes liability based upon the acts of servants or agents for harm resulting from defendant's negligence in employing improper persons in work involving risk of harm to others.

No Iowa cases definitively approve a cause of action for negligent hiring. Court of Appeals, however, holds that negligent hiring cause of action does exist under Iowa law when the employer owes a special duty to the injured party.

In the present case, there was circumstantial evidence that rapist obtained a master key to plaintiff's apartment through his employment and used that key to enter plaintiff's apartment to attack plaintiff. Such evidence, if true, is sufficient to create a special duty to plaintiff. The relationship between a tenant of an apartment and a company using master keys to install services in such apartments pursuant to public franchise is sufficiently similar to railroad cases in order to create a special duty. In such respect, the company is analogous to a common carrier. Thus, employer has a special duty to plaintiff and there exists a factual question whether the hiring of the rapist without checking criminal record was a breach of that special duty. With respect to the franchisee, if the franchisee has a duty to the public, the franchisee cannot escape responsibility for performance of that duty by delegating it to an independent contractor.

Proximate Cause. Trial court ruled that rapist's act was intentional, criminal act constituting superseding cause as a matter of law. Court of Appeals disagrees and holds that as a matter of public policy Iowa allows extension of the responsibility of employers for criminal acts of their servants when the employer owes a special duty to the victim. Further, other cases are distinguishable because in present circumstances, employment relationship was instrumental to the employee's act of entering plaintiff's apartment and raping her. Because of evidence of master keys in possession of rapist, which possession arose from employment relationship, factual dispute for submission to jury. Similarly, factual issue of "but for" causation of injuries of plaintiff.

Third-Party Beneficiary. Plaintiff contends also she is a third-party beneficiary of the franchise agreement between the City and the franchisee and the contract between the franchisee and the employee. The trial court ruled she was not. However, because the citizens of the city voted to approve the franchise, that fact, in conjunction with the language of some of the provisions, when viewed in the light most favorable to plaintiff, create a genuine issue of

material fact where the plaintiff was an intended beneficiary of the franchise. Plaintiff also claims breach of implied warranty arising from her contract with the franchisee. Court concludes Iowa law does not imply a contractual duty to insure good character of workmen.

TORTS — NEGLIGENT MISREPRESENTATION

Cedar Falls Building Center, Inc. v. Vietor, 365 N.W.2d 635 (Iowa App. 1985).

Torts — Negligent Misrepresentation.

District court verdict in favor of home owner on cross-claim against lending institution for negligent misrepresentation. Builder of new home did not pay some of its subcontractors and suppliers. Home owners contacted their loan officer who allegedly assured them that all suppliers and subcontractors had filed "lien waivers". Home owners then paid full contract price to builder, alleging they relied upon assurances of loan officer. Mechanic's liens were filed against the property and home owners cross-claimed against the bank. Cross-claim tried to the jury which awarded home owners \$34,000. Bank appeals.

Ample evidence that plaintiffs home owners relied upon comment allegedly made by bank in context of their expressed concerns over whether or not subcontractors had been paid.

Amendment of Defense. Bank did not plead contributory negligence (which controls present case) as an affirmative defense. Rather, it sought to add the defense at the close of all evidence. Defense would have been a complete bar to recovery. And permission to amend was denied by trial court. This was within trial court's discretion. Amendments are allowed at close of evidence only where they do not substantially change a claim or defense.

TORTS — NUISANCE

Sisco v. Iowa-Illinois Gas & Electric Co., 368 N.W.2d 853 (Iowa App. 1985).

Torts — Nuisance.

Action for personal injuries when plaintiff riding motorcycle drove off the normally traveled portion of the road and struck a guy wire attached to utility pole. Action sought recovery on theories of negligence and nuisance. Plaintiff withdrew causes of action for negligence. Pursuant to motion to adjudicate law points, trial court held nuisance theory was not available since plaintiff had left the roadway at the time of the accident. Public nuisance is found when defendant's conduct is unlawful or antisocial and unduly and unreasonably interferes with a substantial number of people in the lawful exercise of a public right. Section 657.2(5) defines nuisance as obstructing public roads, ways, streets, alleys, etc. Court holds obstruction may be a nuisance even though not located in or upon the street, but near the street so as to endanger those foreseeably deviating from the street. Accordingly, nuisance ruling of trial court reversed.



TORTS — PRIVATE CAUSE OF ACTION

Countryman v. Mt. Pleasant Bank & Trust Co., 357 N.W.2d 599 (Iowa 1984).

Torts — Fraud.

Torts — Private Cause of Action.

Damages.

Appeal from civil action claiming conspiracy to defraud farmers. Plaintiffs assert that defendant bank conspired with Prairie Grain Co. to defraud farmers of grain stored at Prairie Grain. Basis of the claim is that Prairie Grain defrauded its customers and that the bank, with knowledge of the precarious financial condition of Prairie Grain, knew of Prairie Grain's fraud and, by its banking operations, made it possible for Prairie Grain to continue in operation and continuance of that fraud. Based on the dealings of the bank with Prairie Grain, plaintiffs' theory is that the bank owners sought to keep the bank and Prairie Grain operating despite Prairie Grain's condition until they could dispose of bank stock.

Private Action. Focus of the appeal is on certain provisions of the state banking law and their effect upon the action. Evidence was submitted that in respect to its dealing with Prairie Grain and the owner of Prairie Grain, the bank violated provisions of state bank law. Trial court instructed the jury that if it were to find such provisions of law violated, they would constitute fraud per se. Court holds that proof of such violation would not permit a private cause of action for fraud. Applying the four part test of Cort v. Ash, 422 U.S. 66 (1975), plaintiffs, as customers of the customer of the bank were not in the class for whose benefit the banking regulations were enacted. Plaintiffs are not suing for failure of the bank and do not claim to be depositors, shareholders or creditors. Accordingly, there is no private cause of action. Since the court's instruction was that violation of the statute constitutes fraud per se, case must be reversed.

However, violations of banking statutes, if substantial evidence is proffered of such violations, would be relevant to the issues of knowledge and intent. Since focus of plaintiffs' claims is the interrelationship between the bank and allegedly "shady" practices of the bank with respect to Prairie Grain, in light of the broad liberality in allowing proof of circumstances bearing on the question of conspiracy (the bank and Prairie Grain) and regarding the issues of knowledge and intent, such evidence would be admissible on retrial.

Damages. Problems arose at trial regarding proof of damage. With respect to some plaintiffs, the plaintiff named in each of some claims as one person or corporation but proof relates to a different name. Absent an assignment or grounds for disregarding a corporate entity, recovery is not authorized when the plaintiff for whose benefit the claim is made does not match the plaintiff for which evidence of damage has been submitted.

TRIAL

Feldhahn v. R.K.B. Quality Corp., 358 N.W.2d 226, (Iowa 1984).

Trial.

Plaintiffs are homeowners who sued plastering corporation claiming defective workmanship. Plaintiffs challenge trial court ruling withdrawing negligence count from jury consideration. Plaintiffs alleged as theories of recovery contract, express warranty, implied warranty, and negligence. Defendant moved to dismiss negligence claim after plaintiffs rested. The trial court overruled the motion, noting that the claim was "perfectly proper" and supported by the evidence. However, trial court said it would not submit the negligence issue since it alleges nothing different than allegations concerning breach of contract. Defendant then moved to withdraw the negligence count from consideration of the jury, which the trial court agreed to do. In discussing the matter with the parties, the judge allowed plaintiffs to elect to pursue the negligence claim alone or to drop it in favor of the other theories.

Court of Appeals held plaintiffs had not preserved error on the negligence issue. There were no exceptions to the instructions of the Court and, to the Court of Appeals, that was fatal. However, Supreme Court holds a ruling withdrawing an issue from jury consideration is, in substance, the granting a motion to dismiss and does not require that the issue again be raised at the time of taking exceptions to jury instructions. Court holds error preserved. Court further holds error to require plaintiffs to choose whether to submit negligence claim or, in lieu thereof, other theories of recovery. Rule 22, R.C.P. permits joinder of as many cases of action as a plaintiff may have against a single defendant. Moreover, doctrine of election of remedies is inapplicable as a largely obsolete theory, narrowly applied only when there are two or more remedies, inconsistent in nature, and a party chooses one of them. First, there is no inconsistency here between negligence and contractual based theories. Secondly, it was inappropriate to impose such a choice upon plaintiffs.

Trial — General/Special Verdict.

See Gordon v. Noel, 356 N.W.2d 559 (Iowa 1984). --p. 76.

Poyzer v. McGrawz, 360 N.W.2d 748 (Iowa 1985).

Workers' Compensation — Exclusive Remedy.

Trial — Special Verdicts.

Damages.

Personal injury suit by employee of farm partnership. Case was submitted to the jury on the theory that employing partnership was a separate entity from the individual partners and that such partners could be sued as third parties. However, reverse as to individual partners on the basis of the holding in Carlson v. Carlson, 346 N.W.2d 525 (Iowa 1984) that section 85.20 precludes an injured employee from suing a partner in an independent tort action for injuries received in the course of his employment with the partnership.

Trial — Special Verdicts. Because judgment against partners was reversed, court evaluated status of third defendant, wife of one partner. She had earlier filed a pleading admitting plaintiff's allegation that she owned, operated and maintained the property on which plaintiff was injured. Although the pleading was withdrawn, "her withdrawal of the admission did not erase it." It remained for her to explain and it was for the jury to sort through the admission, its withdrawal and her explanation to determine the weight to be given it.

Defendants argue plaintiff's counsel should not have been allowed to detail to the jury how various findings on the special verdicts would impact on plaintiff's right of recovery. Where submission to the jury is by general verdict, counsel has clear right to make such an argument. However, special verdicts allow simplification of submission of cases involving complicated legal principles. Special verdicts also compel a jury more accurately to focus on what it properly should. In a special verdict submission, it is "wholly unnecessary" and improper for the jury to be concerned with the effect of its special findings. Accordingly, it is inappropriate in special verdicts submission for counsel to direct the jury's attention to the impact of any specific finding. Here, because submission was a combination of special and general verdicts, court declines to review the assigned error. (Court does not decide the effect of Code section 668.3 since new provision does not apply to this case.)

Damages. Trial court submitted separate and independent element of damages constituting diminished capacity for enjoyment of life. Iowa policy is strongly against duplicative damages. Loss of enjoyment of life is a factor to be considered as part of future pain and suffering. Mabrier v. A.M. Servicing Corp., 161 N.W.2d 180 (Iowa 1968). To the extent recovery for loss of enjoyment of life is allowed it is clearly already recognized as a factor and other elements of damages. A separate award would be plainly duplicate.

McConnell v. Alcoa, 367 N.W.2d 245 (Iowa 1985).

Trial — Special Verdict — Communication with Jury.

Products liability action in which judgment entered for defendant. Plaintiff appeals from denial of motion for new trial. Special verdicts were submitted to the jury. First four special verdicts sought affirmative or negative response to questions regarding defendant's strict liability; proximate cause of defect; negligence; and proximate cause of negligence. Instruction of court set forth procedure in answering special verdicts and conditions under which jury would not be required to answer any inquiries after the initial four. Jury sent question to court on how to proceed after answering initial four questions. Court submitted written question to the jury whether all four of first questions had been answered. Jury responded in the affirmative. Jury then responded with its answers to the questions indicating that defendant was not strictly liable but was negligent. Such negligence, however, was indicated by the jury not to be a proximate cause of the injuries. Court entered judgment for defendant.

Plaintiff contends jury had not completed its deliberations when trial court elicited answers to the special verdicts and that the court's actions had the effect of directing a verdict for defendant. However, jury indicated it had answered all four of the first special verdicts. Accordingly, it had reached its determination and the court did not prematurely cut off deliberations. Similarly, court-jury communications were entirely appropriate pursuant to R.C.P. 197. Court exercised sound discretion in determining whether the jury had reached a conclusion regarding the special verdicts. Attorney for plaintiffs urged prejudice in that the

court did not explain to jurors the effect of special verdict answers. However, in special verdict submissions, jury need be only instructed in so far as is necessary for it to make required factual findings. Design of special verdict is to "exhibit all the ultimate facts, and leave the legal conclusions entirely to the court." Trial court did not abuse its discretion and did not urge verdict but merely determined that verdict had been reached.

TRUSTS AND ESTATES

Cox v. Cox, 357 N.W.2d 304 (Iowa 1984).

Trusts and Estates.

Interlocutory appeal from trial court order granting summary judgment to plaintiff. Action arose from a trust established in 1944. Plaintiff, a contingent remainderman a declaration of his right to entitlement of sums from the trust, among other things, and an accounting. Trial court granted summary judgment for defendants for most of relief sought by plaintiff and refused other relief for plaintiff but held plaintiff, as contingent beneficiary was entitled to an accounting, even absent showing of mismanagement or waste.

Majority rule apparently grants to contingent remainderman a right to accounting only upon a showing of waste of mismanagement. Plaintiff urges he is entitled to an accounting in order to prevent waste and mismanagement, a rule was substantial support among commentators. Policy considers considerations justify the rule urged by plaintiff and is supported by Restatement (Second) of Trusts §172, Comment c.

WITNESSES

Girdler v. State, 357 N.W.2d 595 (Iowa 1984).

Witnesses — Immunity to Compel Testimony.

Appeal from order of district court granting application of the attorney general to grant immunity to Girdler in order to compel him to give testimony in a civil anti-trust action. Girdler contends authority to grant immunity in order to compel testimony pursuant to Rule of Criminal Procedure 19(3) applies only to criminal prosecutions. Present action is civil in nature. Moreover, because civil case involves claimed violations of Iowa Competition Law, criminal prosecutions are precluded under the election of remedy provision of §553.15. Although included in the Rules of Criminal Procedure, the rule provides for making the immunity determination on the basis that "justice in the public interest require the testimony" Justice in public interest are not limited to criminal prosecutions. Also, Rule 19(3) is worded to embrace "any judicial proceeding." Girdler also contends scope of immunity not sufficiently broad to displace constitutional immunity under the Fifth Amendment to the U.S. Constitution. However, in fact Girdler's immunity exceeds constitutional privilege it displaces.



WORKERS COMPENSATION

Guyton v. Irving Jensen Co., _____ N.W.2d _____, No. 84-514 (Iowa, August 21, 1985) (en banc).

Workers Compensation.

Grant of further review of Court of Appeals decision in workers compensation case. Court holds that implicit industrial disability standard enunciated in the case law is the "odd-lot doctrine", referring to "odd-lot" employees who cannot find employment in any well known branch of the labor market. Court formally adopts the doctrine. Accordingly, court holds that when a worker makes a prima facie case of total disability by producing substantial evidence that he or she is not employable in the competitive labor market, the burden to produce evidence of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of fact finds the worker does not fall in the odd-lot category unemployable under any circumstances, the worker is entitled to a finding of total disability. In the present case, petitioner clearly made a prima facie showing of total disability but the evidence was not sufficient to compel that holding as a matter of law. In view of shifting of burdens rule announced in the present case, case is remanded to give the parties an opportunity to offer such additional evidence as they wish on the question of availability of suitable employment.

Newman v. John Deere, _____ N.W.2d _____, No. 84-967 (Iowa, July 31, 1985).

Workers Compensation.

Employee appeals from adverse ruling by court on judicial review of workers compensation award. Claim is based on psychological condition alleged to have been aggravated by inhalation of fumes. However, Industrial Commissioner did not expressly find alleged inhalation of fumes ever actually occurred. Evidence is insufficient to support recovery under recognized theories relating to nervous conditions.

Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187 (Iowa 1985).

Workers Compensation.

Judicial review of work comp review-reopening proceeding. Employer complains District Court erred in requiring it to prove injuries were not work related. Complainant always maintains burden of proof. However, record as a whole in this hotly contested case contains substantial evidence supporting deputy commissioner's findings that claimant established her burden of proof. There is substantial evidence in the record that injury arose out of and in the course of employment, despite factual dispute.

Employer also raises question regarding whether substantial evidence supported agency finding of disability. Treating physician (orthopedic specialist) testified no permanent disability. Physician consulted only later and for litigation purposes testified to permanent disability of 25%. Commissioner held 20% permanent partial disability. Employer urges treating physician's opinion must be accorded more weight than a subsequent specialist.

Sidles Distr. Co. v. Heath, 366 N.W.2d 1 (Iowa 1985).

Workers Compensation.

Employer and insurance carrier appeal from district court decision upholding determination by the Industrial Commissioner commuting workers compensation benefits previously established. Industrial Commissioner held claimant was permanently and totally disabled. Upon claimant's application, the commutation of weekly benefits to a lump sum was made by the Industrial Commissioner. The issues raised are whether claimant's period of disability should be considered to be his entire life expectancy or rather only his work-life expectancy and whether in commuting benefits to lump sum, based upon reduction to present worth, the industrial commissioner should have employed a compound interest factor rather than simple interest factor.

Appellants urge limitation in lump sum award to work-life expectancy consistent with policy of workers compensation laws that compensation is awarded for industrial disability. No Iowa cases, however, have ever suggested that the period for receipt of benefits is to be determined by work-life expectancy. Nothing in §85.34(3) suggests limitation on the duration for benefits as urged by appellants. Determining work-life expectancy is a complex matter while reliance on actual arial life expectancy tables is merely a matter of calculation. Hold: life expectancy governs.

Commissioner used simple interest in commutation. However, since goal of \$85.45 is to commute to a present worth lump sum the total of the probable future payments, compound interest ought properly to have been considered. Compound interest factor more nearly accords with sound annuity basis than a factor that involves only simple interest.

Varied Enterprises, Inc. v. Sumner, 353 N.W.2d 407 (Iowa 1984).

Workers Compensation.

Aggravation. Employee while working suffered onset of heart attack. He continued to work and the problem worsened. At hearing before the industrial commissioner, conflicting expert testimony was presented concerning the question of whether claimant's continued work after the onset of the heart attack materially aggravated the impact of the condition in terms of industrial disability. The commissioner accepted the testimony that continued work had materially aggravated the impact of the heart attack and had increased resulting disability. Held substantial evidence to support the finding of material aggravation from continued work. Further, substantial evidence to relieve the employee of the burden of mitigating his injury because he felt "impelled" to continue his duties when he otherwise would have sought immediate medical assistance.

Causation and Apportionment. Expert witness testimony conflicted regarding causation. There was no evidence that employment caused the initial myocardial infarction. However, claimant's expert testified that physical and emotional stress of continued working after onset or significant factors in worsening the overall heart damage. This evidence was sufficient. Since initial infarction was not compensable but aggravating circumstance due to continued work constituted a compensable event, the issue of apportionment of the ultimate

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industrial disability arose. However, the court held that apportionment is appropriate only where there is an "ascertainable portion" of the disability that exists following the compensable event. Here, portion was not "ascertainable".

Briar Cliff College v. Campolo, 360 N.W.2d 91 (Iowa 1984).

Workers Compensation — Course of Employment.

Assistant professor died of cardiac failure shortly after participating in intramural basketball game as member of the faculty team. Widow filed petition for death benefits with the Industrial Commissioner. Benefits were awarded. Employer claims that participation of the basketball game was not in the course of his employment and that his death did not arise out of his employment. Considering the degree of employer benefit from faculty-student intramural games and the special nature of a teacher's job, evidence supports determination of Industrial Commissioner. Since a contrary result is not demanded as a matter of law, the Commissioner's findings are binding.

Employer also challenges the causal connection between the employee's heart failure and the employment activity. Employer urges pre-existing, latent heart disease and that claimant made no showing that employment materially aggravated or accelerated the disease. It is undisputed the decedent had a heart condition prior to the basketball game. However, Commissioner finding that basketball is an unusually strenuous exertion as referred to in Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974), is sufficiently supported by the evidence. Substantial evidence supported finding that basketball is unusually strenuous exertion and that the heart disease was aggravated or accelerated by participation in the game.

Pending appeal, employer sought to post a supersedeas bond pursuant to Iowa Rules of Appellate Procedure 7 and 8. District Court denied the opportunity. Court lacked discretion to deny posting of supersedeas bond in workers compensation case. Workers compensation awards are property and, therefore, clearly distinguishable from the rule applicable to child custody appeals.

Rouse v. State, 369 N.W.2d 811 (Iowa 1985).

Workers Compensation — Employment Status.

Tort claims action for wrongful death against the state and a contractor. Trial court awarded damages against the state. Plaintiff's decedent participated in the federal CETA program was killed in the course of his work. Both defendants claimed decedent was their employee and, accordingly, \$85.20 barred recovery. Trial court held decedent was not an employee of the state.

Determination of the relationship of employer and employee is ordinarily a question of fact. Decedent was being supervised by state employees at the time of his death. However, he was on the payroll of the contractor and was interviewed and hired by the contractor. In determining whether an individual is an "employee" under §85.61(2), Iowa employs a contract test contrary to most other jurisdictions. The contract test distinguishes determination of the issue in Iowa from common law master-servant relationship determinations made in other

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jurisdictions. Accordingly, the "control test" was inapplicable. The state's day to day control over decedent's work activities is not determinative. Rather, decedent's status is more of that of a "loaned employee". Muscatine City Waterworks v. Duge, 7 N.W.2d 203 (Iowa 1942). Court applied appropriate legal standard.

Workers' Compensation — Exclusive Remedy.

See Poyzer v. McGrawz, 360 N.W.2d 748 (Iowa 1985). --p. 83.

Workers Compensation — Exclusive Remedy.

See Tigges v. City of Ames, 356 N.W.2d 503 (Iowa 1984). --p. 16.

Schreckengast v. Hammermills, Inc., 369 N.W.2d 809 (Iowa 1985).

Workers Compensation — Mental Illness.

Judicial review of denial of workers compensation benefits claimed for total and permanent disability due to mental illness manifested by severe depression. Conflicting medical evidence was received regarding whether or not the circumstances of claimant's employment caused his depression or exacerbated a previously existing depressive disorder. Three psychiatrists testified there was no work-related cause of the depression. One psychiatrist testified there was no work-related aggravation of the depressive condition. One clinical psychologist testified that the stressful conditions of claimant's work were the original cause the depressive disorder and a subsequent exacerbation thereof.

Agency found claimant failed to establish employment caused the onset of or exacerbated an existing depressive disorder, citing with approval Wisconsin decision Swiss Colony v. Dilhr, 240 N.W.2d 128 (Wis. 1976). Swiss Colony case deals with legal causation in mental illness cases, requiring the stress at work to exceed that which would result from ordinary every day life or normal employment. Test is similar to the heart condition test prevailing in Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). Swiss Colony decision deals with legal causation, not factual causation. Since record supports finding of no factual causation, Supreme Court declines to determine whether, if work had been the factual cause of the condition, it would as a matter of law not be compensable.

Miller v. Civil Constructors, _____ N.W.2d _____, No. 84-1263 (Iowa, August 21, 1985).

Workers Compensation — Perfection of Appeal.

Petition in workers compensation case attempted to appeal to the Industrial Commissioner from a decision of the deputy Industrial Commissioner. Commissioner ruled that petitioner had not properly perfected appeal and the deputy's ruling became the final decision of the agency. Commissioner relied upon agency rule that an appeal is not "filed" within the meaning of §86.24(1) and agency rule 4.27 until the Commissioner has actual receipt. Commissioner's ruling is not inconsistent with the rules of the agency and was not plainly erroneous. Commissioner correctly ruled that the deputy's decision became a final ruling of the agency when no timely intra-agency appeal was filed.



Workers Compensation -- Time of Disability.

Administrative Law -- Timely Review.

Judicial review of workers compensation award. Nicol was exposed to certain chemicals and metals during his work for three successive employers. During his work for one employer, he developed a hypersensitive skin reaction to these substances. He changed jobs and began work for another employer where he believed contact with the materials would be less substantial. At first, symptoms improved and then became quite serious. Nicol sought workers compensation benefits from the first employer and the first employer then brought the second employer into the proceeding. First employer filed cross-petition against second employer alleging that second employer was "the employer in whose employment the employee was last injuriously exposed to the hazards of such disease" under §85A.10. Claimant then filed cross-claim against second employer. Industrial Commissioner held second employer liable to pay compensation. District court on judicial review held that because claimant's disease was known by second employer to exist at the time he began employment there, the conditions at second employer could not have caused it and, therefore, §85A.10 did not apply. Court held first employer liable for payment of compensation.

Under the last injurious exposure rule codified in §85A.10, courts frequently look to the "time of disability test". Applying the test, there was substantial evidence, including expert testimony, to support agency's finding that claimant contact with substances at second employer caused exacerbation of the skin problem, leading to his ultimate disability. Time disability was incurred, and not previous manifestations of aspects of the skin problem is determinative. Industrial Commissioner appropriately imposed liability on second employer.

Commissioner held that second employer had actual knowledge of claimant's injury within 90 days as set forth in §§85A.18 and 85.23. Record contains substantial evidence sufficient to support finding of actual notice.

Cross-Petition for Review. At the district court level, claimant filed an answer to petition for judicial review, counterclaim and cross-petition. Employer sought dismissal of such claims because they were not raised within 30 days after the Commissioner's final decision as required by Iowa Code §17A.19(3). To accept employer's position would require "all parties adversely affected by final agency action in a contested case to file a petition . . . within 30 days." By waiting until the 30th day before filing, one party can effectively strip all other parties who may be dissatisfied with one aspect of the case but nonetheless willing to let the decision stand, of opportunity for affirmative relief. Such a position is not supported by law or policy. Claimant timely appeared judicial review proceedings pursuant to §17A.19(2). Further, claimant filed a timely answer. Applying Iowa Rules of Civil Procedure pursuant to R.C.P. 331, the answer might appropriately contain a counterclaim or a crossclaim. Accordingly, district court possessed jurisdiction over claims raised in cross-petition.

Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985).

Workers Compensation — 90 Day Notice.

Employee was hurt at work in 1975. Commissioner, in light of ruling in Orr v. Lewis Central School Dist., 298 N.W.2d 256 (Iowa 1980), held proceedings timely commenced pursuant to §85.26 because employee did not discover injury until more than two years after it had occurred. Issue is whether or not employer was timely provided notice within 90 days of discovery of injury as required by §85.23. District court held employer had actual notice of the occurrence within 90 days which was sufficient to satisfy §85.23. Supreme Court affirms.

On date of injury in 1975, claimant filed report of injury with employer but did not seek medical treatment and continued to work until pain forced him to terminate his employment in 1977. Industrial Commissioner held proceedings timely commenced within two years of discovery of injury under §85.26 but that employee failed to give 90 day notice to employer as required by §85.23. Section 85.23 excepts situations where employer has actual notice of the injury. Court holds report of injury on day of accident sufficient to constitute actual notice under the statute notwithstanding holding that employee did not discover injury until two years later. "An employee may provide information to an employer which would satisfy the actual knowledge notice requirement without at the same time nullifying his right to the benefits of the discovery rule."

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